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1917] Appeal Cases (Car
Law Reports [1918] A
(Eng.)
Aeton (Eng.)
Adams Reports (N.H.)
Addison (Pa.)
Addams' Ecclesiastical (E
Adolphus & Ellis (Eng.)
American & English Ruc
Law

&C.	Barnewall & Cresswell (Eng.)
&Macn.	Browne & Macnamara (Eng.)
).&O.	Blackham, Dundas & Osborne (Ir.)
atty	Beatty (Ir.)
av.	Beavan (Eng.)
av.&Wal.Ry. Jas.	Beavan & Walford's Railway and Canal Cases (Eng.)
av.R.&C. Cas.	English Railway and Canal Cases
aw.Lex.Mer.	Beawes Lex Mercatoria (Eng.)
e	Bee (U.S.)
ll.	Bellewe (Eng.)
ll App.Cas	Bell's Appeal Cases (Sc.)
ll Cas.	Bell's Cases (Sc.)
ll C.C.	Bell's Crown Cases (Eng.)
ll Comm.	Bell's Commentaries (Eng.)
ll Sc.Cas.	Bell's Scotch Court of Session Cases
n.	Benedict (U.S.)
nl.	Benloe (Eng.)
nl.&D.	Benloe & Dallison (Eng.)
rks Co.	Berks County Law Journal (Pa.)
&H.Cr.Cas.	Bennett & Heard Leading Criminal Cases (Eng.)
bb	Bibb (Ky.)
ng.	Bingham (Eng.)
ng.N.Cas.	Bingham's New Cases (Eng.)
nn.	Binney (Pa.)
ss.	Bissell (U.S.)
itt.W.&P.	Bittleson, Wise & Parnell (Eng.)
lack	Black (U.S.)
lackf.	Blackford (Ind.)
lackstone Comm.	Blackstone Commentaries
la.H.	Henry Blackstone's English Common Pleas (Eng.)
lair Co.	Blair County (Pa.)
land	Bland (Md.)
land's Ch.	Bland Chancery (Md.)
latchf.	Blatchford (U.S.)
latchf &H.	Blatchford & Howland (U.S.)
latchf.PrizeCas.	Blatchford's Prize Cases (U.S.)
ligh	Bligh (Eng.)
ligh N.S.	Bligh New Series (Eng.)
.Mon.	B. Monroe (Ky.)
ond	Bond (U.S.)
ouvier	Bouvier's Law Dictionary
oyce	Boyce (Del.)
.&P.	Bosanquet & Puller (Eng.)
.&P.N.R.	Bosanquet & Puller's New Reports (Eng.)
ract.	Bracton de Legibus et Consuetudinibus Angliæ
radf.Surr.	Bradford's Surrogate (N.Y.)
rayt.	Brayton (Vt.)
.R.C.	British Ruling Cases
rev.	Brevard (S.C.)
rewst.	Brewster (Pa.)
rightly	Brightly (Pa.)
rightly El.Cas.	Brightly's Election Cases (Pa.)
ro.Ch.	Brown's Chancery (Eng.)
rock.	Brockenbrough (U.S.)
rock.Cas.	Brockenbrough's Virginia Cases
rod.&B.	Broderip & Bingham (Eng.)
rod.&Fr.	Broderick & Fremantle's Ecclesiastical Cases
Brodix Am.&E. Pat.Cas.	Brodix's American & English Patent Cases
Bro.Just.	Broun's Justiciary (Sc.)
Brook Abr.	Brook's Abridgments (Eng.)
Brook N.Cas.	Brook's New Cases (Eng.)
Brooke N.C.	Brooke's New Cases
Bro.P.C.	Brown's Parliament Cases (Eng.)
Brown Adm.	Brown's Admiralty (U.S.)
Brown, Ch.	Brown's Chancery Cases (Eng.)
Brown Ecc.	Brown Ecclesiastical (Eng.)
Brown N.P.	Brown's Michigan Nisi Prius
Brown,Parl.Cas.	Brown Parliamentary Cases (Eng.)
Browne	Browne (Pa.)
Brown.&L.	Browning & Lushington (Eng.)
Brownl.&G.	Brownlow & Goldesborough (Eng.)
Bruce	Bruce (Sc.)
Brunn.Coll.Cas.	Brunner's Collective Cases (U.S.)
B.&S.	Best & Smith (Eng.)
B.T.A.	Board of Tax Appeals (U.S.)
Buck	Buck (Eng.)
Buller N.P.	Buller's Nisi Prius (Eng.)
Bulstr.	Bulstrode (Eng.)
Bunb.	Bunbury (Eng.)
Burn.	Burnett (Wis.)
Burr.	Burrows (Eng.)
Burr S.Cas.	Burrows' Settlement Cas. (Eng.)
Busb.	Busbee (N.C.)
Busb.Eq.	Busbee Equity (N.C.)
Bush	Bush (Ky.)
B.W.C.C.	Butterworth's Workmen's Compensation Cases (Eng.)

C

C.A.	Court of Appeals (U.S.)
Cab.&El.	Cababe & Ellis (Eng.)
Cai.	Caines (N.Y.)
Cai.Cas.	Caines' Cases (N.Y.)
Cal.	California
Cal.2d	California Reports, Second Series
Cal.App.	California Appellate Court
Cal.App.2d	California Appellate Reports, Second Series
Cald.	Caldecott (Eng.)
Call	Call (Va.)
Calthr.	Calthrop (Eng.)
Cal.Unrep.Cas.	California Unreported Cases
Cam.Cas.	Cameron's Cases (Can.)
Camph.	Campbell (Eng.)
Canal Zone	Canal Zone Supreme Court
Can.App.Cas.	Canadian Appeal Cases
Can.Cr.Cas.	Canadian Criminal Cases
Can.Exch.	Canadian Exchequer
Can.L.J.	Canada Law Journal
Can.L.J.N.S.	Canada Law Journal New Series
Can.L.T.Occ. Notes	Canadian Law Times Occasional Notes
Can.R.Cas.	Canadian Railway Cases
Can.S.C.	Canada Supreme Court
Cane&L.	Cane & Leigh Crown Cases Reserved (Eng.)
Car.&K.	Carrington & Kirwan (Eng.)
Car.&M.	Carrington & Marshman (Eng.)
Car.&P.	Carrington & Payne (Eng.)
Car.H.&A.	Carrow, Hamerton & Allen (Eng.)
Carp.P.C.	Carpmael Patent Cases (Eng.)
Carter	Carter (Eng.)
Carth.	Carthew (Eng.)
Cartwr.Cas.	Cartwright's Cases (Can.)
Cary	Cary (Eng.)
Cas.	Casey (Pa.)
Cas t.Hardw.	Cases temp. Hardwicke (Eng.)
Cas.t.Holt	Cases temp. Holt (Eng.)
Cas.t.King	Cases temp. King (Eng.)
Cas.t.Talb.	Cases temp. Talbot (Eng.)
C.B.	Common Bench (Manning, Granger & Scott) (Eng.)
C.B.N.S.	Common Bench New Series (Manning, Granger & Scott New Series) (Eng.)
C.C.A.	Circuit Court of Appeals (U.S.)
C.C.P.A.	Court of Customs and Patent Appeals
Centr.L.J.	Central Law Journal
[1891] Ch.	Law Reports [1891] Chancery (Eng.)
Chamb.Rep.	Chamber (Ont.)
Chandl.	Chandler (Wis.)
Charlt.R.M.	R. M. Charlton (Ga.)
Charlt.T.U.P.	T. U. P. Charlton (Ga.)
Chase	Chase (U.S.)
Ch.Cas.	Cases in Chancery (Eng.)
Ch.Chamb.	Chancery Chambers (U.C.)
Ch.Col.Op.	Chalmers' Colonial Opinions
Ch.D.	Law Reports Chancery Division (Eng.)
Chest.Co.	Chester County (Pa.)
Chev.	Cheves (S.C.)
Chit.	Chitty (Eng.)
Choyce Cas.Ch.	Choyce Cases in Chancery (Eng.)
Ch.Rep.	Chancery Reports (Eng.)
Ch.Sent.	Chancery Sentinel (N.Y.)
Cinc.L.Bul.	Weekly Law Bulletin (Oh.)
Cinc.Super.	Cincinnati Superior Court Reporter (Oh.)
City Ct.R.	City Court Reports (N.Y.)
City Hall Rec.	City Hall Recorder (N.Y.)

eporter (N.Y.)
eports New Series (N.Y.)
Probate (Cal.)
Institutes
ng.)
's Cases (N.Y.)
n & Caines' Cases (N.Y.)
s Chancery Cases (Eng.)
l (Tenn.)
(Eng.)

Kames Rem Dec.	Kames' Remarkable Decisions (Sc.)
Kames Sel Dec	Kames' Select Decisions (Sc.)
Kan.	Kansas
Kan.App.	Kansas Appeals
Kay	Kay (Eng.)
Kay&J.	Kay & Johnson (Eng.)
[1917]K.B.	Law Reports [1917] King's Bench (Eng.)
Keane &Gr.	Keane & Grant (Eng.)
Keb.	Keble (Eng.)
Keen	Keen (Eng.)
Keil.	Keilwey (Eng.)
Keilw.	Keilway (Eng.)
Kel C.C.	Kelyng's Crown Cases (Eng.)
Kelly	Kelly (Ga.)
Kelyng, J.	Kelyng's English Crown Cases
Kelynge, W.	Kelynge's Chancery (Eng.)
Keyes	Keyes (N.Y.)
K.&G.	Keane & Grant (Eng.)
Kilk	Kilkerran's Decisions (Sc.)
Kirby	Kirby (Conn.)
Knapp	Knapp (Eng.)
Knapp&O.	Knapp & Ombler (Eng.)
Kn.&Moo.	Knapp & Moore (Eng.)
Knox	Knox (N.S.Wales)
Knox&F.	Knox & Fitzhardinge (N.S.Wales)
Kulp	Kulp (Pa.)
Ky	Kentucky
Ky.Dec.	Kentucky Decisions
Ky.L.	Kentucky Law Reporter
Ky.Op.	Kentucky Opinions

L

La.	Louisiana
La App.	Louisiana Court of Appeals
La A (Orleans)	Court of Appeal, Parish of Orleans
La Ann.	Louisiana Annual
Lab.	Labatt's District Court (Cal.)
Lack.Bar	Lackawanna Bar (Pa.)
Lack.Jur.	Lackawanna Jurist (Pa.)
Lack.Leg.N.	Lackawanna Legal News (Pa.)
Lack.Leg.Rec.	Lackawanna Legal Record (Pa.)
Lalor	Lalor's Supplement to Hill & Denio (N.Y.)
Lanc.Bar	Lancaster Bar (Pa.)
Lanc.L.Rev.	Lancaster Law Review (Pa.)
Land Dec.	Land Decisions (U.S.)
Lane	Lane (Eng.)
Lans.	Lansing (N.Y.)
Lans.Ch.	Lansing Chancery Decisions (N.Y.)
Latch	Latch (Eng.)
Law Rep.N.S.	Law Reports New Series (N.Y.)
L.C.	Lower Canada
L.&C.	Leigh & Cave (Eng.)
L.C.Jur.	Lower Canada Jurist
L.C.L.J.	Lower Canada Law Journal
L.C.Rep.S.Qu.	Lower Canada Reports Seignorial Questions
L.D.	Law Dictionary
Ld.Ken.	Lord Kenyon (Eng.)
Ld.Raym.	Lord Raymond (Eng.)
Lea	Lea (Tenn.)
Leach C.C.	Leach's Crown Cases (Eng.)
L.Ed.	Lawyers' Edition United States Supreme Court
Lee Eccl.	Lee's Ecclesiastical (Eng.)
Lee t.Hardw.	Lee temp. Hardwicke (Eng.)
Lef.Dec.	Lefevre's Parliamentary Decisions (Eng.)
Leg Chron.	Legal Chronicle (Pa.)
Leg.Gaz.	Legal Gazette (Pa.)
Leg.&Ins R.	Legal & Insurance Reporter (Pa.)
Leg.Int.	Legal Intelligencer (Pa.)
Leg.Op.	Legal Opinions (Pa.)
Leg.Rec.	Legal Record (Pa.)
Lehigh Co.L.J.	Lehigh County Law Journal (Pa.)
Lehigh Val.L.R.	Lehigh Valley Law Reporter (Pa.)
Leigh	Leigh (Va.)
Leigh &C.	Leigh & Cave's English Crown Cases
Leon.	Leonard (Eng.)
Lev.	Levinz (Eng.)
Lew.C.C.	Lewin's Crown Cases (Eng.)
Ley	Ley (Eng.)
L.G.	Law Glossary
Liberian L.	Liberian Law
Litt	Littell (Ky.)
Litt.	Littleton (Eng.)
Litt.Sel.Cas.	Littell's Select Cases (Ky.)
L.J.Adm	Law Journal Admiralty New Series (Eng.)
L.J.Bankr.	Law Journal Bankruptcy New Series (Eng.)
L.J.Ch.	Law Journal Chancery New Series (Eng.)
L.J.Ch.O.S.	Law Journal Chancery Old Series (Eng.)
L.J.C.P.	Law Journal Common Pleas New Series (Eng.)
L.J.C.P.O.S.	Law Journal Common Pleas Old Series (Eng.)
L.J.Eccl.	Law Journal Ecclesiastical New Series (Eng.)
L.J.Exch.	Law Journal Exchequer New Series (Eng.)
L.J.Exch.O.S.	Law Journal Exchequer Old Series (Eng.)
L.J.K.B.	Law Journal King's Bench New Series (Eng.)
L.J.K.B.O.S.	Law Journal King's Bench Old Series (Eng.)
L.J.M.C.	Law Journal Magistrate Cases New Series (Eng.)
L.J.M.C.O.S.	Law Journal Magistrate Cases Old Series (Eng.)
L.J.P.C.	Law Journal Privy Council New Series (Eng.)
L.J.P.D.&Adm.	Law Journal Probate Divorce & Admiralty New Series (Eng.)
L.J.P.&M.	Law Journal Probate & Matrimonial New Series (Eng.)
L.J.Q.B.	Law Journal Queen's Bench New Series (Eng.)
L.J.Rep.	Law Journal Reports (Eng.)
Ll.&G.t.Pl.	Lloyd & Goold temp. Plunket (Ir.)
Ll.&G.t.S.	Lloyd & Goold temp. Sugden (Ir.)
Ll.&W.	Lloyd & Welsby (Eng.)
L.&M.	Lowndes & Maxwell (Eng.)
L.M.&P.	Lowndes, Maxwell & Pollock (Eng.)
Loc.Gov.	Local Government (Eng.)
Lofft	Lofft (Eng.)
Longf.&T.	Longfield & Townsend (Ir.)
Low.Can.Seign.	Lower Canada Seignorial Reports
Lowell	Lowell (U.S.)
L.R.	Law Reports (U.S.)
L.R.A.	Lawyers' Reports Annotated
L.R.A.1915A.	Lawyers' Reports Annotated 1915A
L.R.App.Cas.	English Law Reports, Appeal Cases (Eng.)
L.R.A.&E.	Law Reports Admiralty & Ecclesiastical (Eng.)
L.R.A.N.S.	Lawyers' Reports Annotated New Series
L.R.C.C.	Law Reports Crown Cases (Eng.)
L.R.Ch.	Law Reports Chancery Appeal Cases (Eng.)
L.R.C.P.	Law Reports Common Pleas Cases (Eng.)
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L.R.Exch.	Law Reports Exchequer Cases (Eng.)
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L.R.H.L.Sc.	Law Reports House of Lords (Scotch Appeal Cases)
L.R.Indian App.	Law Reports Indian Appeals (Eng.)
L.R.Ir.	Law Reports Irish
L.R.P.C.	Law Reports Privy Council (Eng.)
L.R.P.&D.	Law Reports Probate & Divorce (Eng.)
L.R.Q.B.	Law Reports Queen's Bench Cases (Eng.)
L.T.	Law Times (Pa.)
L.T.N.S.	Law Times New Series (Pa.)
L.T.O.S.	Law Times, Old Series (Eng.)
L.T.O.S.	Law Times, Old Series (Pa.)
L.T.Rep.N.S.	Law Times Reports, New Series (Eng.)
Lush.	Lushington's Admiralty (Eng.)
Lutw.	Lutwyche (Eng.)

Granger & Scott (Eng.)
Law Journal
Ryland (Eng.)

Ryland's Magistrates' C
)
Scott (Eng)
Unreported Cases (La.)
Eng.)

New Rep	New Reports in all Courts (Eng.)
New Sess Cas.	New Session Cases (Eng.)
New Zeal L	New Zealand Law
N.H.	New Hampshire
N J	New Jersey Reports
N.J Eq.	New Jersey Equity
N.J Law	New Jersey Law
N.J.L J.	New Jersey Law Journal
N J Misc.	New Jersey Miscellaneous
N J Super.	New Jersey Superior Court Reports
N.M	New Mexico
N.&M	Nevile & Manning (Eng.)
N &Macn.	Neville & Macnamara (Eng.)
Nolan	Nolan (Eng.)
North	Northington (Eng.)
North.Co.	Northampton County Reporter (Pa.)
Northumb Co.Leg. N.	Northumberland County Legal News (Pa.)
Northumb.Leg.J.	Northumberland Legal Journal (Pa.)
Notes of Cas	Notes of Cases (Eng.)
Nott & McC	Nott & McCord (S.C.)
Noy	Noy (Eng.)
N.&P.	Nevile & Perry (Eng.)
N S.	Nova Scotia
N.S.Dec.	Nova Scotia Decisions
N S.Wales	New South Wales
N.S.Wales L.	New South Wales Law
N.S.Wales L R.Eq.	New South Wales Law Reports Equity
N.W.	North Western Reporter
N.W.2d	North Western Reporter Second Series
N.Y.	New York
N.Y.Ann.Cas.	New York Annotated Cases
N.Y.City Ct.	New York City Court
N.Y City Ct Suppl.	New York City Court Supplement
N.Y.Civ.Proc.	New York Civil Procedure
N.Y.Civ Pr Rep.	New York Civil Procedure Reports
N.Y.Code Reports, N.S.	New York Code Reports, New Series
N.Y.Cr.	New York Criminal
N.Y.Leg Obs.	New York Legal Observer
N.Y.L.Rec.	New York Law Record
N.Y.Month.L.Bul.	New York Monthly Law Bulletin
N.Y.S.	New York Supplement
N.Y.S.2d	New York Supplement Second Series
N.Y.St	New York State Reporter
N.Y.Super.	New York Superior Court
N.Y.Wkly.Dig.	New York Weekly Digest

O

O.Ben.	Old Benloe (Eng.)
O Bridgm.	Orlando Bridgman (Eng.)
Off.Gaz.	Official Gazette
Ohio	Ohio
Ohio App.	Ohio Court of Appeals
Ohio Cir.Ct.	Ohio Circuit Court
Ohio Cir Ct.N.S.	Ohio Circuit Court New Series
Ohio Cir.Dec.	Ohio Circuit Decisions
Ohio Dec. Reprint	Ohio Decisions (Reprint)
Ohio F.Dec.	Ohio Federal Decisions
Ohio L.J.	Ohio Law Journal
Ohio N.P.	Ohio Nisi Prius
Ohio N.P.N.S.	Ohio Nisi Prius New Series
Ohio O.	Ohio Opinions
Ohio Prob.	Ohio Probate
Ohio S.&C.P.	Ohio Superior & Common Pleas Decisions
Ohio St.	Ohio State
Ohio Supp.	Ohio Supplement
Okl	Oklahoma
Okl.Cr.	Oklahoma Criminal
Olcott	Olcott (U.S.)
Oliv.B.&L.	Oliver, Beavan & Lefroy (Eng.)
O'M.&H.	O'Malley & Hardcastle (Ir.)
Ont.	Ontario
Ont.A.	Ontario Appeals
Ont.El.Cas.	Ontario Election Cases
Ont.L.	Ontario Law
Ont.L.J.	Ontario Law Journal
Ont L.J.N.S.	Ontario Law Journal New Series
Ont.Pr.	Ontario Practice
Ont.W.N.	Ontario Weekly Notes
Ont.W.R.	Ontario Weekly Reporter
Op.Atty. Gen.	Opinions of Attorneys General (U.S.)
Op Sol.Dept. Labor	Opinions of the Solicitor for the Department of Labor dealing with Workmen's Compensation
Or.	Oregon
Orleans App.	Orleans Appeals (La.)
Overt.	Overton (Tenn.)
Owen	Owen (Eng.)

P

P.	Pacific Reporter
P.2d	Pacific Reporter Second Series
[1891]P.	Law Reports [1891] Probate (Eng.)
Pa.	Pennsylvania State
Pa.Cas.	Pennsylvania Supreme Court Cases (Sadler)
Pa.Co.	Pennsylvania County Court
Pa Corp.	Pennsylvania Corporation Reporter
Pa.C.Pl.	Common Pleas (Pa.)
Pa.Dist.	Pennsylvania District
Pa.Dist.&Co.	Pennsylvania District and County
Paige	Paige's Chancery (N.Y.)
Paine	Paine (U.S.)
Pa.L.J.	Pennsylvania Law Journal
Pa.L Rec	Pennsylvania Law Record
Pa.L.J.R.	Clark's Pennsylvania Law Journal Reports
Palm.	Palmer (Eng.)
Pa.Rec.	Pennsylvania Record
Park.	Parker (Eng.)
Park Cr.	Parker's Criminal (N.Y.)
Park.Exch.	Parker's Exchequer (Eng.)
Park.Ins.	Parker's Insurance (Eng.)
Pars.Eq.Cas.	Parsons' Equity Cases (Pa.)
Pa Super.	Pennsylvania Superior Court
Paton App.Cas.	Paton's Appeal Cases (Sc.)
Patrick El.Cas.	Patrick's Election Cases (Can.)
Patt.&H.	Patton & Heath (Va.)
P.D.	Law Reports Probate Division (Eng.)
P.&D.	Perry & Davison (Eng.)
Peake N.P.	Peake's Nisi Prius (Eng.)
Pearce C.C.	Pearce's Reports in Dearsly's (Eng.)
Pearson	Pearson (Pa.)
Peck	Peck (Tenn.)
Peck.El.Cas.	Peckwell's Election Cases (Eng.)
Pennew.	Pennewill (Del.)
Pennyp.	Pennypacker (Pa.)
Penr.&W.	Penrose & Watts (Pa.)
Perry & Kn.	Perry & Knapp Election Cases (Eng.)
Pet.	Peters (U.S.)
Pet.Adm.	Peters' Admiralty (U.S.)
Pet.C.C.	Peters' Circuit Court (U.S.)
Phil.	Phillips (Eng.)
Phil.	Phillip (N.C.)
Phila.	Philadelphia (Pa.)
Philippine	Philippine
Phillim.	Phillimore Ecclesiastical (Eng.)
Pick.	Pickering (Mass.)
Pig.&R.	Pigott & Rodwell (Eng.)
Pig.Rec.	Pigott's Recoveries (Eng.)
Pinn.	Pinney (Wis.)
Pittsb.	Pittsburgh (Pa.)
Pittsb.Leg.J.	Pittsburgh Legal Journal (Pa.)
Pittsb.Leg.J.N.S.	Pittsburgh Legal Journal New Series (Pa.)
P.&K.	Perry & Knapp (Eng.)
Plowd.	Plowden (Eng.)
Pollexf.	Pollexfen (Eng.)
Poph.	Popham (Eng.)
Port.	Porter (Ala.)
Posey	Posey's Unreported Cases (Tex.)
Puerto Rico	Puerto Rico
Puerto Rico Fed.	Puerto Rico Federal
Pow.Surr.	Powers' Surrogate (N.Y.)
P.R.&D.El.Cas.	Power, Rodwell & Dew's Election Cases (Eng.)
Prec.Ch.	Precedents in Chancery (Eng.)
Pr.Edw.Isl.	Prince Edward Island
Price	Price (Eng.)
Price Pr.Cas.	Price's Practice Cases (Eng.)
Prid.&C.	Prideaux & Cole (Eng.)
Prob.[1917]	Law Reports, Probate Division (Eng.)
Prob.Rep.	Probate Reports (Eng.)

h (Va.)
's Judiciaries de Quebec (
euro
Pa.)
ase Law
& Canal Cases (Eng.)
& Canal Traffic Cases (E
's Surrogate (N.Y.)
& Bigelow's Leading C

Spinks, P.C.	Spinks' Prize Cases (Eng.)
Spottisw	Spottiswoode (Sc.)
Spottisw.Eq.	Spottiswoode's Equity (Sc.)
Sprague	Sprague (U.S.)
Stair	Stair (Sc.)
Stark.	Starkie Nisi Prius (Eng.)
Stat. at L.	United States Statutes at Large
Stew.	Stewart (Ala.)
Stew.	Stewart's Reports (N.S.)
Stew.&P.	Stewart & Porter (Ala.)
Stockt.Vice-Adm.	Stockton's Vice-Admiralty (N.B.)
Story	Story (U.S.)
Str.	Strange (Eng.)
Strob.	Strobhart (S.C.)
Stuart Vice-Adm	Stuart's Vice-Admiralty (L.C.)
Stu.M.&P.	Stuart, Milne & Peddie (Sc.)
Style	Style (Eng.)
Sumn.	Sumner (U.S.)
Susq.Leg.Chron.	Susquehanna Legal Chronicle (Pa.)
S.W.	South Western Reporter
S.W.2d	South Western Reporter Second Series
Swab.	Swabey's Admiralty (Eng.)
Swab.&Tr.	Swabey & Tristram (Eng.)
Swan	Swan (Tenn.)
Swanst.	Swanston (Eng.)

T

Taml.	Tamlyn (Eng.)
Taney	Taney (U.S.)
Tapp.	Tappan (Oh.)
Taunt.	Taunton (Eng.)
Taylor	Taylor (N.C.)
T.B.Mon.	T. B. Monroe (Ky.)
Tenn.	Tennessee
Tenn App.	Tennessee Appeals
Tenn Cas.	Unreported Tennessee Cases
Tenn.Ch.	Tennessee Chancery
Tenn.Ch.A.	Tennessee Chancery Appeals
Tenn Civ.A.	Tennessee Civil Appeals
Terr.L.	Territories Law (Northwest Territories)
Tex.	Texas
Tex.App.	Texas Court of Appeals
Tex.A.Civ.Cas.	White & Wilson's Civil Cases (Tex.)
Tex.Civ.App.	Texas Civil Appeals
Tex.Cr.	Texas Criminal
Tex.Suppl.	Texas Supplement
Tex.Unrep.Cas.	Posey's Unreported Cases (Tex.)
Thach.Cr.	Thacher's Criminal Cases (Mass.)
Thomps.&C.	Thompson & Cook (N.Y.)
Thomps.Cas.	Thompson's Cases (Tenn.)
Tinw.	Tinwald (Sc.)
T.Jones	Thomas Jones (Eng.)
T.L.R.	Times Law Reports (Eng.)
T.M.R.	Trade Mark Reports
T.&M.	Temple & Mew (Eng.)
Toth.	Tothill (Eng.)
T.R.	Term Reports (Durnford & East) (Eng.)
Transcr.A.	Transcript Appeals (N.Y.)
T.Raym.	Thomas Raymond (Eng.)
Tread.Const.	Treadway Constitutional (S.C.)
Treas.Dec.	Treasury Decisions (U.S.)
Tr.&H.Pr.	Troubat & Haly's Practice (Pa.)
Trin.T.	Trinity Term (Eng.)
Truem.Eq.Cas.	Trueman's Equity Cases (N.B.)
Tuck.Sel.Cas.	Tucker's Select Cases (Newfoundland)
Tuck.Surr.	Tucker's Surrogate (N.Y.)
T.U.P.Charlt.	T. U. P. Charlton (Ga.)
Turn.&R.	Turner & Russell (Eng.)
Tyler	Tyler (Vt.)
Tyrw.	Tyrwhitt (Eng.)
Tyrw.&G.	Tyrwhitt & Granger (Eng.)

U

U.C.	Upper Canada
U.C.Ch.	Upper Canada Chancery
U.C.Cham.	Upper Canada Chamber
U.C.C.P.	Upper Canada Common Pleas
U.C.E.&A.	Upper Canada Error and Appeal
U.C.K.B.	Upper Canada King's Bench Reports
U.C.Q.B.	Upper Canada Queen's Bench
U.C.Q.B.O.S.	Upper Canada Queen's Bench Old Series
U.S.	United States
U.S.App.D.C.	United States Appeal Cases (D.C.)
U.S.Aviation Rep	Aviation Reports (U.S.)
U.S.C.A.	United States Code Annotated
Utah	Utah

V

Va.	Virginia
Va.Cas.	Virginia Cases
Va.Ch.Dec.	Chancery Decisions (Va.)
Va.Dec.	Virginia Decisions
Van Ness Prize Cas.	Van Ness Prize Cases (U.S.)
Vaugh.	Vaughan (Eng.)
Vaux	Vaux's Decisions (Pa.)
Vent.	Ventris (Eng.)
Vern.	Vernon's Cases (Eng.)
Vern.Ch.	Vernon's Chancery (Eng.)
Vern.&S.	Vernon & Scriven (Ir.)
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Ves.&B.	Vesey & Beames (Eng.)
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CORPUS JURIS SECUNDUM

VOLUME SEVENTY-FOUR

QUART. As a measure of capacity both in dry and liquid measure, see the C.J.S. title Weights and Measures § 1, also 51 C.J. p 118 notes 45–49.

QUARTA FALCIDIA. A term of the Roman law having the same meaning as Falcidian Portion, see 35 C.J.S. p 492 note 28.

QUARTER. The fourth part of a thing;[34] as applied to money, twenty-five cents.[35] The term has been held synonymous with "fourth" see 37 C.J.S. p 137 note 64.1.

In English criminal law, to divide a criminal's body into quarters, after execution, as part of the punishment of high treason.[36]

Quartering soldiers is the act of a government in billeting or assigning soldiers to private houses, without the consent of the owners of such houses, and requiring such owners to supply them with board or lodging or both.[37]

QUARTERLY. Quarter-yearly;[38] every three months;[39] once in a quarter of a year.[40]

QUARTO DIE POST. On the fourth day after.[41]

QUARTZ. See Mines and Minerals § 2 b (8).

QUARTZ LODE. See Mines and Minerals § 3 b (4).

QUASH. A term derived from the French "quasser,"[42] and defined as meaning to annul;[43] to overthrow;[44] to abate, annul, overthrow, or make void;[45] to annul, overthrow, or vacate by judicial decision.[46] It has been distinguished from "discharge" see 26 C.J.S. p 1330 note 56, and "dismiss" see Dismissal and Nonsuit § 1.

34. Black L.D.

Phrases

(1) "Quarter day" defined see 25 C.J.S. p 1007 note 79.

(2) "Quarter sessions," courts of, see Courts §§ 11, 448, 490.

(3) "Quarter sessions of the peace," courts of, see Courts § 285.

(4) Other phrases as to which more recent adjudications have not been found see 51 C.J. p 118 notes 60 62.

35. Ga.—Sims v. State, 57 S.E. 1029, 1 Ga.App. 776.

36. Black L.D.

37. Black L.D.

"Quarter" and "quartering" as used in connection with militia defined see Militia § 1.

38. Idaho.—Leonard v. St. Clair, 149 P. 1058, 1060, 27 Idaho 568. 51 C.J. p 118 note 63.

Phrases

(1) "Quarterly courts" see Courts §§ 11, 264.

(2) Other phrases as to which more recent adjudications have not been found see 51 C.J. p 118 notes 67, 68.

39. Or.—Dickenson v. Cox, 244 P. 877, 878, 118 Or. 88.

40. Idaho.—Leonard v. St. Clair, 149 P. 1058, 1060, 27 Idaho 568. 51 C.J. p 118 note 65.

41. Black L.D.

Allowance of dies gratiæ or quarto die post was the practice in the English courts, and was presumably, on the adoption of the common law in this state, introduced as the proper and approved practice thereunder. —Vollmer v. Avondale Marble Co., 10 Pa.Dist. 434, 435.

42. Pa.—Crawford v. Stewart, 38 Pa. 34, 36.

43. Pa.—Crawford v. Stewart, supra.

44. Pa.—Crawford v. Stewart, supra.

45. Fla.—Holland v. Webster, 29 So. 625, 627, 43 Fla. 85.
Neb.—Jones v. Wolfe, 60 N.W. 563, 42 Neb. 272.

46. Va.—Wilson v. Commonwealth, 162 S.E. 1, 2, 157 Va. 776. 51 C.J. p 119 note 79.

"Quashed" has been held synonymous with "set aside" see 6 C.J.S. p 789 note 63.

Motion to quash, dismiss, or set aside indictments generally see Indictments and Informations §§ 195–218 For other particular applications and specific uses of the term consult the Descriptive-Word Index, sub verbo "Quashing."

QUASI. A Latin word[47] frequently used in the civil law,[48] and often prefixed to English words.[49] It is not a very definite word.[50] It marks the resemblance, and supposes a little difference, between two objects,[51] and in legal phraseology the term is used to indicate that one subject resembles another, with which it is compared, in certain characteristics, but that there are also intrinsic and material differences between them.[52] It negatives the idea of identity,[53] but implies a strong superficial analogy,[54] and points out that the conceptions are sufficiently similar for one to be classed as the equal of the other.[55]

"Quasi" is defined as meaning as if;[56] almost;[57] as though; as it were; in a manner; in a certain sense or degree; seeming; seemingly;[58] analogous to;[59] and it may mean resemblance.[60]

The word "quasi" is employed in various places throughout this work, and for particular applications and specific uses of the term see the phrases set out in the following paragraph and consult the indexes to the various titles and the Descriptive Word Index.

Phrases employing the word are set out in the note,[61] and for other phrases as to which more re-

47. Colo.—**Corpus Juris quoted in** People ex rel Rogers v. Letford, 79 P.2d 274, 282, 102 Colo. 284.
Ill.—People v. Bradley, 60 Ill. 390, 402.
Minn.—State v. Jeffrey, 247 N.W. 692, 693, 188 Minn. 476.
Utah.—**Corpus Juris quoted in** Patterick v. Carbon Water Conservancy Dist, 145 P.2d 503, 511, 106 Utah 55—**Corpus Juris quoted in** Lehi City v. Meiling, 48 P.2d 530, 541, 87 Utah 237.

48. Colo.—**Corpus Juris quoted in** People ex rel. Rogers v. Letford, 79 P.2d 274, 282, 102 Colo. 284.
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49. Minn.—State v. Jeffrey, 247 N. W. 692, 693, 188 Minn. 476.
A prefix
W.Va.—Wiseman v. Calvert, 59 S.E. 2d 445, 454.

50. Ala.—Barron v. City of Anniston, 48 So. 58, 59, 157 Ala. 399.

51. Ala.—Barron v. City of Anniston, supra.
Colo.—**Corpus Juris quoted in** People ex rel. Rogers v. Letford, 79 P.2d 274, 282, 102 Colo. 284.
Del.—State, on Complaint of Johnson v. Wright, 3 A.2d 74, 76, 9 W. W.Harr. 552.
Ill.—People v. Bradley, 60 Ill. 390, 402.
Utah.—**Corpus Juris quoted in** Patterick v. Carbon Water Conservancy Dist., 145 P.2d 503, 511, 106 Utah 55—**Corpus Juris quoted in** Lehi City v. Meiling, 48 P.2d 530, 541, 87 Utah 237.

52. Ala.—Marker v. State, 142 So. 105, 106, 23 Ala.App. 91.
Mo.—Baker v. Stucker, 248 S.W. 1003, 1006, 213 Mo.App. 245.
W.Va.—Wiseman v. Calvert, 59 S.E. 2d 445, 454.

53. U.S.—U. S. v. Harbin, D.C.Miss., 27 F.2d 892, 893.
Del.—State, on Complaint of Johnson v. Wright, 3 A.2d 74, 76, 9 W. W.Harr. 552.

54. U.S.—U. S. v. Harbin, D.C.Miss., 27 F.2d 892, 893.
Mere appearance or want of reality is implied by the term.—State v. Jeffrey, 247 N.W. 692, 693, 188 Minn. 476.

55. Del.—State, on Complaint of Johnson, v. Wright, 3 A.2d 74, 76, 9 W.W.Harr. 552.

56. U.S.—U. S. v. Harbin, D.C.Miss., 27 F.2d 892, 893.
Colo.—**Corpus Juris quoted in** People ex rel. Rogers v. Letford, 79 P.2d 274, 282, 102 Colo. 284.
Ill.—People v. Bradley, 60 Ill. 390, 402.
Minn.—State v. Jeffrey, 247 N.W. 692, 693, 188 Minn. 476.
Pa.—Commonwealth v. Gettin, 72 A. 2d 619, 620, 166 Pa.Super. 515.
Utah.—**Corpus Juris quoted in** Patterick v. Carbon Water Conservancy Dist., 145 P.2d 503, 511, 106 Utah 55—**Corpus Juris quoted in** Lehi City v. Meiling, 48 P.2d 530, 541, 87 Utah 237.
Wash.—Cannon v. Miller, 155 P.2d 500, 508, 22 Wash.2d 227, 157 A.L.R. 530—Bicknell v. Garrett, 96 P. 2d 592, 595, 1 Wash.2d 564, 126 A.L.R. 258.
W.Va.—Wiseman v. Calvert, 59 S.E. 2d 445, 454.

57. U.S.—U. S. v. Harbin, D.C.Miss., 27 F.2d 892, 893.
Colo.—**Corpus Juris quoted in** People ex rel. Rogers v. Letford, 79 P.2d 274, 282, 102 Colo. 284.
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58. W.Va.—Wiseman v. Calvert, 59 S.E.2d 445, 454.

59. Ala.—**Marker** v. State, 142 So. 105, 106, 23 Ala.App. 91.

60. Minn.—State v. Jeffrey, 247 N. W. 692, 693, 188 Minn. 476.
Having some resemblance to
W.Va.—Wiseman v. Calvert, 59 S.E. 2d 445, 454.

61. **Phrases**
(1) "Quasi admission" see Evidence § 270.

(2) "Quasi bailee" see Bailments § 15 b.

(3) "Quasi contract" see Contracts §§ 4, 6; Corporations § 1125; and Money Received § 1.

(4) "Quasi conveyance" see 18 C.J.S. p 95 note 32.

(5) "Quasi corporation" see the C.J.S. titles Corporations § 24; Municipal Corporations § 5 b and the title index; Counties § 3 a; Drains § 6 b; Highways § 145; Levees and Flood Control § 14; Schools and School Districts § 35, also 56 C.J. p 195 note 10; and Towns § 4, also 63 C.J. p 100 note 36 Fire department as a quasi corporation see Municipal Corporations § 592.

(6) "Quasi crime" see Criminal Law § 1 b.

(7) "Quasi-criminal contempt" see Contempt §§ 5, 62 b.

(8) "Quasi-criminal proceeding"

cent adjudications have not been found see 51 C.J. p 120 notes 11–26.

QUATUOR PEDIBUS CURRIT. See Currit Quatuor Pedibus 25 C.J.S. p 39 note 30.

QUAY. The word "quay" has several significations; in a strict sense it may be confined to a sloping wall; in another, to the part of a port destined for the reception of merchandise; and in a more enlarged sense it designates the whole space which separates the first row of houses of a city from the sea or river.[62]

QUEBRACHO. A wood extract for tanning.[63]

QUEDAN. As a form of warehouse receipt see the C.J.S. title Warehousemen and Safe Depositaries § 16, also 51 C.J. p 121 note 37.

QUEEN'S BENCH. The English court of king's bench is so called during the reign of a queen.[64] It is abbreviated "Q.B." see 1 C.J.S. p 276 note 5.

QUEEN'S COUNSEL. Barristers appointed as counsel to the crown on the nomination of the lord chancellor, taking precedence over ordinary barristers, and having the privilege of wearing a silk gown as their professional robe.[65] It is abbreviated "Q.C." see 1 C.J.S. p 276 note 5.

QUEM NUPTIÆ DEMONSTRANT. Whom the marriage indicates or points out.[66]

QUEM; QUEMADMODUM; QUEMQUE. As the first words of maxims as to which there have been no recent applications see 51 C.J. p 121 notes 41, 43, 44.

QUER. As an abbreviation of "querens" see 1 C.J.S. p 276 note 5.

QUERELA. An action preferred in any court of justice.[67]

QUERENS. In Latin, a plaintiff; complainant; inquirer.[68]

QUERIDA. Concubine or lover.[69]

QUERULOUS. Apt to find fault; habitually com-

see Actions § 43; Attorney and Client § 28; Bastards § 32 a; and Municipal Corporations § 316.

(9) "Quasi derelict" see the C.J.S. title Salvage § 30, also 56 C.J. p 30 notes 28–32.

(10) "Quasi dwelling house" with respect to the crime of burglary see Burglary § 18.

(11) "Quasi easement" defined see Easements § 1 d, and other references in title index.

(12) "Quasi estoppel" see Estoppel §§ 107–129.

(13) "Quasi ex contractu" see Ex 32 C.J.S. p 1144 note 64.

(14) "Quasi ex delicto" see Ex 32 C.J.S. p 1145 note 67.

(15) "Quasi fee" see Estates § 8 a.

(16) "Quasi feudum" see 36 C.J. S. p 734 note 44.

(17) "Quasi guardian" see Guardian and Ward §§ 3, 146, 161.

(18) "Quasi individual" as a term used to designate a private corporation see Corporations § 1.

(19) "Quasi in rem" see Actions § 1 a (6); Garnishment §§ 2 a (3), 123 b; Judgments §§ 12, 24, 911; Mortgages § 605; and Process § 57.

(20) "Quasi-judicial" and various phrases employing "quasi-judicial" see 50 C.J.S. p 562 note 72—p 565 note 4.

(21) "Quasi-judicial officer" defined generally see Officers § 3 b, and other references in title index; district attorney as quasi-judicial officer see District and Prosecuting Attorneys § 1 a; United States commissioner as quasi-judicial officer see the C.J.S. title United States Commissioners § 1, also 66 C.J. p 2 note 11.

(22) "Quasi-jurisdictional facts" see Fact 35 C.J.S. p 386 note 37.

(23) "Quasi-legislative" see 52 C. J.S. p 1043 note 65.

(24) "Quasi-legislative function" see Function 37 C.J.S. p 1400 note 74.

(25) "Quasi offense" see the C.J.S. title Torts § 1, also 51 C.J. p 120 note 9.

(26) "Quasi office" see Officers § 2 a.

(27) "Quasi parties" see Equity § 140 and Parties § 1.

(28) "Quasi partner" see Partnership § 1 b (2).

(29) "Quasi-private" contrasted with "governmental" see 38 C.J.S. p 969 note 81.

(30) "Quasi-private road" equivalent, under some circumstances, to "byway" see 12 C.J.S. p 873 note 71.

(31) "Quasi-public corporation" see the title index to Corporations.

(32) "Quasi-public employment" see Employment 30 C.J.S. p 235 note 89.

(33) "Quasi-public officer," "quasi-public official" see Officers § 2 b.

(34) "Quasi-public records," admissibility of parol or extrinsic evidence to explain or contradict, see Evidence § 891.

(35) "Quasi-public wharf" see the C.J.S. title Wharves § 1, also 68 C. J. p 208 notes 21, 22.

(36) "Quasi trustee" see the C. J.S. title Trusts § 3, also 65 C.J. p 216 note 65.

62. La.—De Armas v. New Orleans, 5 La. 132, 152.
51 C.J. p 120 note 35.
"Quay" as a wharf at which goods or wares may be landed or shipped see the C.J.S. title Wharves § 1, also 51 C.J. p 120 notes 29–34.

63. U.S.—Hess v. Cousinie, C.C.A.N. Y., 296 F. 358, 360.

64. Black L.D.

65. Bouvier L.D.

66. Trayner Leg. Max.

67. Black L.D.

Querela coram rege e concilio discutienda et terminanda

A writ by which one is called to justify a complaint of a treason made to the king himself, before the king and his council.—Black L.D.

Querela inofficiosi testamenti

Latin, in the civil law, a species of action allowed to a child who had been unjustly disinherited, to set aside the will, founded on the presumption of law, in such cases, that the parent was not in his right mind.—Black L.D.

68. Black L.D.

69. Philippine.—U. S. v. De la Cruz, 22 Philippine 429, 430.

plaining; disposed to murmur; expressing or suggestive of complaint; fretful; whining.[70]

QUESTIO FIT DE LEGIBUS, NON DE PERSONIS. See 51 C.J. p 121 note 52.

QUESTION. A subject or point of investigation, examination, or debate; theme of inquiry; problem; matter to be inquired into; as a delicate or doubtful question;[71] a proposition;[72] something in controversy, or which may be the subject of controversy,[73] including every issue capable of judicial determination.[74]

The term is also defined as meaning doubt; dispute;[75] and it has been said that a question should not, and cannot, arise, except where there is a reasonable doubt.[76]

Questions of law or fact are discussed generally in the C.J.S. titles Criminal Law §§ 1120–1142, and Trial §§ 203–224, also 64 C.J. p 296 note 48–p 371 note 99, p 509 note 43–p 510 note 99; and with reference to particular actions see the specific titles throughout this work. Consult also the Descriptive-Word Index.

Phrases employing the word are set out in the note.[77]

QUESTUS EST NOBIS. Literally "Hath complained to us." Initial words of various old writs in the Register.[78]

QUI. In law French and Latin, who, whom; who; he who.[79] The introductory word of various Latin phrases.[80]

Maxims

Qui facit per alium, facit per se. A maxim meaning "He who acts through another acts himself."[81] It is regarded as the fundamental maxim in the law of agency as stated in Agency § 1 a, and it is frequently applied in the law of imputed negligence as stated in Negligence § 157.

Qui hæret in litera, hæret in cortice. A maxim meaning "He who considers merely the letter of an instrument goes but skin deep into its meaning."[82]

Qui per alium facit per seipsum facere videtur. A maxim meaning "He who does an act through another is deemed in law to do it himself."[83]

70. Neb.—Crounse v. Booth Fisheries Co., 195 N.W. 462, 463, 111 Neb. 6.

71. Vt.—Pitts v. Howe Scale Co., 1 A.2d 695, 697, 110 Vt. 27.

72. N.Y.—Matter of Merow, 99 N.Y.S. 9, 20, 112 App.Div. 562.
51 C.J. p 121 note 56.

73. N.Y.—Matter of Merow, 99 N.Y.S. 9, 20, 112 App.Div. 562.
51 C.J. p 121 note 54.

74. U.S.—King v. McLean Asylum of the Massachusetts General Hospital, Mass., 64 F. 331, 339, 12 C.C.A. 145.
51 C.J. p 121 note 55.

75. N.C.—Harding v. Long, 9 S.E. 445, 446, 103 N.C. 1, 14 Am.S.R. 775.

76. D.C.—American Security & Trust Co. v. Frost, 117 F.2d 283, 286, 73 App.D.C. 75.

77. **Phrases**
(1) "Hypothetical question" see the title indexes to Criminal Law and Evidence. See also Appeal and Error § 1455 a for review of hypothetical questions in civil cases.

(2) "Judicial question" defined generally see 50 C.J.S. p 572 note 88.

(3) "Specific question" is a question specified, that is, distinctly stated.—Cummings v. Taylor, 21 Minn. 366, 369.

(4) Other phrases as to which more recent adjudications have not been found see 51 C.J. p 121 note 57–p 122 note 77.

78. Burrill L.D.

79. Burrill L.D.

80. **Qui cito dat bis dat**
"The Latin proverb, Qui cito dat bis dat—, he who gives quickly gives twice,—has its counterpart in a maxim equally sound—Qui serius solvit, minus solvit,—he who pays too late pays less."—State of Louisiana ex rel. Hubert v. Mayor and Council of the City of New Orleans, La., 20 S.Ct. 40, 44, 215 U.S. 170, 54 L.Ed. 144—State of Louisiana v. City of New Orleans, La., 102 U.S. 203, 207, 26 L.Ed. 132.

Qui improvide
A supersedeas granted where a writ was erroneously sued out or misawarded.—Black L.D.

Qui tam
In Latin, "Who as well ————."—State v. Warner, 94 S.W. 962, 965, 197 Mo. 650. "Qui tam actions" see Actions § 1 a (23) and Penalties § 8 d.

81. Black L.D.
Other form of maxim see "Qui per alium facit seipsum facere videtur" infra note 83.

Discussion of maxim
(1) "Qui facit per alium facit per se" means that which the superior has put the inferior in motion to do must be regarded as done by the superior himself.—Reynolds' Adm'r v. Black Mountain Corporation, 42 S.W.2d 916, 918, 240 Ky. 672.

(2) A maxim of the common law founded on the principle that a duty rests on every man, in the management of his own affairs, whether by himself or by his agents or servants, so to conduct them as not to injure another, and that if he does not do so, and another is thereby injured, he shall answer for the damage.—Poutre v. Saunders, 142 P.2d 554, 556, 19 Wash.2d 561.

Applied in
U.S.—Ocean Accident & Guaranty Corporation v. Schroeder, C.C.A. Ohio, 48 F.2d 727, 729.—Wheat v. White, D.C.La., 38 F.Supp. 791, 792.
Colo.—Dolfin v. Bruesselbach, 143 P.2d 1014, 1015, 111 Colo. 525.
S.C.—Hambright v. Walker, 44 S.E.2d 310, 312, 211 S.C. 201.
51 C.J. p 294 note 8.

82. Black L.D.
51 C.J. p 295 note 12.

Applied in
Pa.—McBride's Appeal, 72 Pa. 480, 482.
51 C.J. p 295 note 12 [a].

83. Neb.—Rhoads v. Columbia Fire Underwriters' Agency, 280 N.W. 174, 176, 128 Neb. 710.
Other form of maxim see "Qui facit per alium, facit per se" supra note 81.

Qui sentit commodum, sentire debet et onus. A maxim meaning "He who feels the advantage, ought also to suffer the burden."[84]

Qui serius solvit, minus solvit. A maxim meaning "He who pays too late pays less."[85]

Qui tacet, consentire videtur. A maxim meaning "He who is silent is supposed to consent."[86]

Other maxims. "Qui" as the first word of maxims as to which there have been no recent applications see 51 C.J. p 122 note 80–p 124 note 44, p 294 note 2–p 300 note 39.

QUIA. A Latin word meaning because; whereas; inasmuch as.[87] It is the introductory word of a maxim,[88] and of various phrases.[89]

QUICK. Swift; rapid; speedy;[90] and, in an archaic and dialectic sense, living, animate.[91]

The term has been held tantamount to "big" see 10 C.J.S. p 358 note 80, and synonymous with "prompt" see 73 C.J.S. p 131 note 53.

QUICKENING. In medical jurisprudence, the first motion of the fœtus in the womb felt by the mother, occurring usually about the middle of the term of pregnancy.[92]

QUICKLY. In a quick, living, lifelike, vigorous, or lively manner; now, usually, promptly; rapidly; speedily.[93] It has been held synonymous with "immediately" see 42 C.J.S. p 393 note 7.1, and an antonym of "slowly."[94]

QUICKSAND. A fine-grained, loose sand, into which a ship sinks by her own weight as soon as the water retreats from her bottom.[95]

QUICQUID; QUICUNQUE; QUIDCUNQUE; QUIDQUID; QUIETA. As the first words of maxims as to which there have been no recent applications see 51 C.J. p 123 notes 20–30, 34, 35, p 124 notes 38, 46, 47, 57.

QUID. A Latin word meaning what, anything, something. It is the neuter singular of "quis," who, anyone,[96] and is the introductory word of various phrases and maxims.[97]

Applied in
Mich.—Shaw v. Bradley, 26 N.W. 331, 59 Mich. 199, 205.
N.Y.—Brown's Accounting, 16 Abb. Pr.,N.S., 457, 465.

84. Black L.D.

Applied in
Pa.—Commonwealth v. Gushinski, 10 Pa.Dist. & Co. 202, 203, 24 Lux.Leg. Reg. 373.
51 C.J. p 298 note 74 [a].

85. N.J.—Munday v. Rahway, 43 N. J.Law 338, 345.

Counterpart of the Latin proverb, "Qui cito dat bis dat."—State of Louisiana ex rel. Hubert v. Mayor and Council of the City of New Orleans, La., 30 S.Ct. 40, 44, 215 U.S. 170, 54 L.Ed. 144—State of Louisiana v. City of New Orleans, La., 102 U. S. 203, 207, 26 L.Ed. 132.

86. Black L.D.

Applied in
Pa.—Moore v. Smith, 14 Serg. & R. 388, 393.
51 C.J. p 299 note 16 [a].

87. Black L.D.

88. **Maxim**
The maxim "Quia non refert aut quis intentionem suam declaret, verbis, aut rebus ipsis vel factis" means that it is immaterial whether the intention be collected from the words used or the acts done.—Tocci v. Nowfall, 18 S.E.2d 225, 228, 220 N.C. 550.

89. **Quia emptores**
Literally "Because of purchasers;" the title of Statute of Westminster III (18 Edward I c 1).—Black L.D.
Statute of Quia Emptores see Estates § 10 and Ground Rents § 2.

Quia hæres representat defunctum in omnibus et per omnia
A Latin phrase expressing the concept that all rights, both real and personal, shall pass to the heir. —Conde v. Abaya, 13 Philippine 249, 260.

Quia improvide emanavit
Literally "Because it issued mistakenly;" a supersedeas to quash and nullify a writ erroneously issued.—Wharton L.Lex.

Quia timet
A Latin phrase meaning because he fears or apprehends.—Black L.D. "Bills quia timet" are actions brought to prevent anticipated mischiefs which could not after their occurrence be adequately redressed as stated in Equity § 40 b. Such bills are also treated in Quieting Title § 2.

90. Webster New Int.D.

Phrases employing the term as to which more recent adjudications have not been found see 51 C.J. p 123 notes 7–9, 11.

91. Webster New Int.D.
"Quick child" or "quickened child;" "quick with child" see 14 C.J.S. p 1110 note 10.1.

92. Black L.D.

Quickening as element in offense of abortion see Abortion § 6 d.

93. Webster New Int.D

94. N.H.—Lebreque v. Childs, 55 A. 2d 473, 475, 94 N.H. 451.

95. U.S.—The Sandringham, D.C. Va., 10 F. 556, 562, 5 Hughes 316.

96. Webster New Int.D.

97. **Quid juris' clamat**
A judicial writ issued out of the record of a fine, which remained with the custos brevium of the common pleas before it was engrossed; it lay for the grantee of a reversion or a remainder, when the particular tenant would not attorn.—Wharton L.Lex.

Quid pro quo
(1) In its common acceptance "quid pro quo" means "something for something; an equivalent in return; a consideration in the contract," and "consideration" in a contract is the quid pro quo that the party to whom the promise is made gives or agrees to give in exchange for such promise.—In re Lueders' Estate, C.C.A.8, 164 F.2d 128, 135.

(2) The term "quid pro quo" means consideration.—Thompson v. Henson, 209 S.W.2d 849, 851, 307 Ky. 61.

Maxims
"Quid" as the first word of maxims as to which there have been no recent applications see 51 C.J. p 124 notes 41, 48–50.

QUIET. Unmolested; tranquil; free from interference or disturbance.[98]

98. La.—New Zion Baptist Church v. Strain, App., 39 So 2d 185, 187.

Phrases

(1) "Quiet enjoyment," covenants or conditions of, see the title indexes to Covenants and Landlord and Tenant Consult also the Descriptive-Word Index.

(2) Other phrases employing the term as to which more recent adjudications have not been found see 51 C.J. p 124 notes 54, 55.

QUIETING TITLE

This Title includes actions for determination of conflicting claims to real property or removal of clouds on title thereto, whether under the jurisdiction of courts of equity or under statutory provisions, statutory actions to determine adverse claims to money or personal property; nature and scope of the remedy in general; grounds of such actions and defenses thereto; by and against whom and as to what property, rights, and claims they may be maintained, procedure therein; incidental relief; judgments or decrees, and enforcement thereof; review of proceedings; and costs in such actions.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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I. RIGHT OF ACTION AND DEFENSES

A. NATURE, SCOPE, GROUNDS, AND SUBJECT MATTER OF ACTION

§ 1. Nature and Scope of Remedy in General

Equity has jurisdiction of a bill to quiet title, to remove an existing cloud thereon, or to prevent a threatened cloud. The purpose of such suits is to clear the title and determine the validity of adverse claims thereto.

Equity has inherent original jurisdiction of bills to quiet title to property,[1] and, on the principal of quia timet, recognized by courts of chancery from the earliest times, has jurisdiction to remove an ex-

1. U.S.—U. S. v. McIntosh, D.C.Va., 57 F.2d 573.
Fla.—Beebe v. Richardson, 23 So.2d 718, 156 Fla. 559—Ben-Jay Inv. Co. v. Stillman, 154 So. 829, 114 Fla. 703.
Iowa.—McKenney & Seabury v. Nelson, 262 N.W. 101, 220 Iowa 504.
Mich.—Farabaugh v. Rhode, 9 N.W. 2d 562, 305 Mich. 234.
Mo.—Rhodus v. Gentley, 147 S.W.2d 631, 347 Mo. 397.
Pa.—Worrell v. Cohen, Com.Pl., 31 Del.Co. 435—Adams v. Rosenfeld, Com.Pl., 30 Del.Co. 396.
51 C.J. p 132 note 1.

Independent jurisdiction

(1) Bills to quiet title constitute an independent branch of equity jurisdiction.—Michalski v. Kruszewski, 198 A. 872, 330 Pa. 62—Parantino v. Meckley, Pa.Com.Pl., 28 North.Co. 370.

(2) If plaintiff has a clear legal title and possession, equity court has jurisdiction, independent of statute, to remove a cloud from title.—Hennett v. Neff, 42 S.E.2d 793, 130 W.Va. 121—Putnam Co. v. Fisher, 26 S.E. 2d 681, 128 W.Va. 383—Dolan v.

isting cloud from title[2] or to prevent a threatened cloud.[3] Actions to quiet title or to remove a cloud thereon are equitable in nature,[4] or, as sometimes said, of equitable cognizance,[5] and are governed by equitable principles and the rules pertaining to suits in equity.[6] A suit to quiet title must be legally predicated and may not arise from caprice or desire only.[7] Independently of statute, equity has no jurisdiction to render a decree merely establishing and confirming an existing title, without reference to any need to quiet it or remove a cloud therefrom.[8]

The purpose of a suit to quiet title or remove a cloud is to determine the existing title to property and the validity of adverse claims thereto.[9] The suit is designed to enable an owner of property whose title is beclouded by instruments or records constituting a semblance of title or a claim of right in another, which are in fact invalid or the enforcement of which would be inequitable, to have his title cleared and quieted by a decree canceling and avoiding the offending instruments or prohibiting the claim of any right under them.[10] Where the

Hardman, 29 S.E.2d 8, 126 W.Va. 480.

(3) Suit to remove cloud from title, which deraigns title and specifically pleads such cloud, may be maintained in equity independently of statute.—Ashur v. McCreery, 300 P. 767, 150 Okl. 111.

Equitable origin

Suits to quiet title have their origin in equity jurisprudence.—Erskine v. Dykes, 150 P.2d 322, 158 Kan. 788.

Louisiana jurisprudence

Suit to remove cloud from title or to quiet title is recognized in jurisprudence of Louisiana.—Parish of Jefferson v. Texas Co., 189 So. 580, 192 La. 934, certiorari denied Texas Co. v. Parish of Jefferson, 60 S.Ct. 138, 308 U.S. 601, 84 L.Ed. 503.

2. U.S.—Holland v. Challen, Neb., 3 S.Ct. 495, 500, 110 U.S. 15, 28 L.Ed. 52—Jump v. Ellis, D.C.Okl., 22 F.Supp. 380, affirmed, C.C.A., 100 F.2d 130, certiorari denied 59 S.Ct. 584, 306 U.S. 645, 83 L.Ed. 1044.
Mo.—Milliken v. Saco & Biddeford Sav. Inst., 53 A.2d 335—Buswell v. Wentworth, 186 A. 802, 134 Me. 383.
Mich.—Dunn v. Peck, 238 N.W. 224, 255 Mich. 391.
Miss.—Ravesies v. Martin, 199 So. 282, 190 Miss. 92—State Mineral Lease Commission v. Lawrence, 157 So. 897, 171 Miss. 442.
Mo.—Madden v. Fitzsimmons, 150 S.W.2d 761, 235 Mo.App. 1074.
N.J.—Carpender v. City of New Brunswick, 39 A.2d 40, 135 N.J.Eq. 397—Estate of Gilbert Smith v. Cohen, 196 A. 361, 123 N.J.Eq. 419.
Okl.—Marshall v. Ward, 28 P.2d 1091, 167 Okl. 183.
Pa.—Swart v. Hafer, Com.Pl., 38 Berks Co.L.J. 39, 59 York Leg.Rec. 155.
Vt.—Scully v. Dermody, 8 A.2d 675, 110 Vt. 422.
51 C.J. p 132 notes 2, 3—21 C.J. p 131 note 89.
Equitable jurisdiction of bills quia timet generally see Equity § 40 b.

3. Mont.—Little Horn State Bank of Wyola v. Gross, 300 P. 277, 89 Mont. 472.
51 C.J. p 133 note 4.
Apprehended or threatened cloud see infra § 15.

"Removal" and "prevention" of cloud compared

The use of the terms "removing cloud" and "preventing a cloud" does not represent a real difference, and those cases in which a cloud is "removed" and those in which it is "prevented" are not merely governed by the same principles, but are indistinguishable as to the form of relief, and also as to the circumstances on which relief is granted.—Bank of America Nat. Trust & Savings Ass'n v. Town of Atherton, 140 P.2d 678, 60 Cal.App.2d 268.

4. Cal.—Bradley Co. v. Ridgeway, 58 P.2d 194, 14 Cal.App.2d 326.
Mont.—Teisinger v. Hardy, 5 P.2d 219, 91 Mont. 9.
N.D.—Axt v. Bank of America, 10 N.W.2d 430, 72 N.D. 600.
Okl.—Keith v. Lawson, 155 P.2d 716, 195 Okl. 157—Smith v. Reneau, 112 P.2d 160, 188 Okl. 629.

5. Ark.—Beloate v. Taylor, 150 S.W.2d 730, 202 Ark. 229.
Mont.—Fuller v. Gibbs, 199 P.2d 851.
Okl.—Nelms v. Newton, 185 P.2d 202, 199 Okl. 241—Lasswell v. McNutt, 159 P.2d 739, 195 Okl. 548—Maynard v. Hustead, 90 P.2d 80, 185 Okl. 20.

6. Cal.—Gavina v. Smith, 154 P.2d 681, 25 Cal.2d 501—Bradley Co. v. Ridgeway, 58 P.2d 194, 14 Cal.App.2d 326.
Kan.—Hultz v. Taylor, 215 P.2d 145, 168 Kan. 684.
Okl.—Nelms v. Newton, 185 P.2d 202, 199 Okl. 241—Lasswell v. McNutt, 159 P.2d 739, 195 Okl. 548—Keith v. Lawson, 155 P.2d 716, 195 Okl. 157—Smith v. Reneau, 112 P.2d 160, 188 Okl. 629.

7. Fla.—Cremin v. Quigley, 139 So. 383, 104 Fla. 133.

8. Ala.—Teal v. Mixon, 169 So. 477, 233 Ala. 23.
Ill.—Harms v. Kranau, 47 N.E. 746, 167 Ill. 421.

9. Mo.—Lortz v. Rose, 145 S.W.2d 385, 346 Mo. 1212—White v. Kentling, 134 S.W.2d 39, 345 Mo. 526.
N.H.—Bottomly v. Parmenter, 159 A. 302, 85 N.H. 322.

Quieting title or removal of cloud held proper remedy

(1) Landowner may test enforceability of covenants or servitudes asserted against his property in suit to quiet title.—Marra v. Ætna Const. Co., 101 P.2d 490, 15 Cal.2d 375.

(2) Action to quiet title was held proper remedy, where plaintiff claimed under parol gift from deceased mother, and defendants claimed as executrixes of grantee of plaintiff's mother.—Williams v. Stillwell, 19 P.2d 773, 217 Cal. 487.

(3) Where title of purchaser at mortgage foreclosure sale was challenged by mortgagor's grantee on whom no notice of foreclosure suit was served, action by purchaser to quiet title wherein grantee asserted ownership of part of realty was proper form of action in which to determine rights of parties.—Equitable Life Ins. Co. of Iowa v. Condon, 10 N.W.2d 78, 233 Iowa 567.

(4) Question whether recorded certified transcript of foreign judgment constitutes lien because of status of defendant as married woman at time of judgment and nature of cause of action as being one ex contractu is one for judicial inquiry in appropriate proceeding to cancel record as cloud on married woman's title.—Protective Holding Corporation v. Cornwall Co., 173 So. 804, 127 Fla. 252.

"Clear the title," "cure the title," "straighten out the title," and "remove cloud from title" have well understood meanings as applied to the law of real estate; they have reference to all such acts, steps, or proceedings as are necessary in order to render the title good and marketable, including the opinion of counsel that this has been done.—Johnston v. Cox, 154 So. 206, 114 Fla. 243.

10. U.S.—Barnes v. Boyd, D.C.W.Va., 8 F.Supp. 664, affirmed, C.C.A., 73 F.2d 910, certiorari denied 55 S.Ct. 550, 294 U.S. 723, 79 L.Ed. 1254, rehearing denied 55 S.Ct. 647, 295 U.S. 768, 79 L.Ed. 1708.

purpose of a suit is to remove an apparent cloud, equity has jurisdiction to entertain the cause, and rule on the sufficiency of the bill, although it does not state facts sufficient to warrant the equitable relief prayed for.[11] An action to quiet title may be a proper method by which to settle the question whether a testator owned property which the decree of distribution of his estate purports to distribute;[12] and title to property can be settled in an action to quiet title independently of a determination of a probate court to determine who are the heirs entitled to succeed to an estate.[13] In a suit to remove a cloud on title, where it is shown that plaintiff has a clear legal title to the land in dispute and that defendant has none, a court of equity is not deprived of its jurisdiction because the determination of a question ordinarily cognizable at law is involved;[14] nor is equity deprived of jurisdiction by the fact that the determination of an action to quiet title requires the construction of a will under which all the parties claim as a common source of title.[15]

Whether a particular action is one to quiet title,[16] or to remove a cloud,[17] or to prevent a threatened cloud[18] depends on the nature of the relief sought, as determined by the pleadings. While an action by a plaintiff out of possession against a defendant in possession of real property, in the form of a suit to quiet title, possesses the essential characteristics of the old legal action of ejectment,[19] nevertheless a suit in chancery to remove a cloud on title is not tantamount to an action in ejectment to try title,[20] and an action in ejectment cannot be maintained under the guise of a suit to quiet title.[21]

§ 2. —— Bills to Quiet Title and to Remove Cloud Distinguished

A bill to quiet title, strictly considered, is a bill of peace to put an end to vexatious litigation, whereas a bill to remove a cloud is designed to procure the cancellation of an instrument or claim which may be used to injure a person in the enjoyment of his title; but this distinction is not always observed.

A suit to quiet title has been distinguished from a suit to remove a cloud.[22] A bill to quiet title, strictly considered, is substantially a bill of peace,[23] the purpose of which is to put an end to vexatious litigation in respect of the property involved.[24] A bill quia timet or to remove a cloud is a bill to procure the cancellation, delivery up, or release of an instrument, encumbrance, or claim constituting a claim on plaintiff's title, and which may be used to injure or vex him in the enjoyment of his title.[25] However, the distinction between bills to quiet title and to remove clouds thereon is not always observed,[26] and bills to remove a cloud are sometimes spoken of as bills to quiet title, and vice versa.[27]

§ 3. Grounds of Jurisdiction in General

The broad grounds on which equity removes a cloud on title are the prevention of litigation and the protection and determination of the true title, and, in cases requiring extrinsic evidence to invalidate an instrument affecting title, the possible future unavailability of the necessary evidence.

11. Mo.—Schwab v. St. Louis, 274 S.W. 1058, 310 Mo. 116.

12. Cal.—Pometti v. Larala, 25 P.2d 857, 134 Cal.App. 545.

13. U.S.—Arizona Lead Mines v. Sullivan Mining Co., D.C.Idaho, 3 F.R.D. 135.

14. W.Va.—Putnam Co. v. Fisher, 36 S.E.2d 681, 128 W.Va. 383.

15. Ark.—Bowen v. Frank, 18 S.W. 2d 1037, 179 Ark. 1004.

16. Mo.—Lortz v. Rose, 145 S.W.2d 385, 346 Mo. 1212.
51 C.J. p 133 note 9.

Bill regarded as one quia timet

Where it was determined that church became owner of property in fee simple under provision in will, there was no need for a decree for sale under statute, but, in view of fact that church could not sell property without a judicial decree establishing title and removing cloud cast on it by adverse claims, an amended bill was regarded as a bill quia timet.—McMahon v. Consistory of St. Paul's Reformed Church at Westminster, Md., 75 A.2d 122.

Actions held not to quiet title

(1) Bill seeking injunction to oust tenant could not be regarded as a bill to quiet title where plaintiffs did not allege that they were in possession of the property.—Redwood Hotel v. Korbien, Md., 73 A.2d 468.

(2) Suit to obtain correction of mistake in deed has been held not one to quiet title.—Scottwood Realty Co. v. Bowman, 158 N.E. 172, 21 Ohio App. 244.

(3) Other actions.—La Fleaur v. Kinard, Tex.Civ.App., 161 S.W.2d 144, error refused—51 C.J. p 133 note 9 [b].

17. U.S.—Schultz v. Highland Gold Mines Co., C.C.Or., 158 F. 337.
51 C.J. p 133 note 10.

Bills to quiet title and to remove clouds distinguished see infra § 2.

18. Wash.—Cable v. Ward, 238 P. 697, 130 Wash. 582.
51 C.J. p 133 note 11.

19. Cal.—Southern Pacific Land Co. v. Dickerson, 204 P. 576, 188 Cal. 113—Norman v. Mortensen, 164 P. 2d 551, 72 Cal.App.2d 413.

20. W.Va.—Pocahontas Coal & Coke Co. v. Bower, 163 S.E. 421, 111 W. Va. 712.

21. Ark.—Patterson v. McKay, 150 S.W.2d 196, 202 Ark. 241—Pick v. Magness, 94 S.W.2d 958, 197 Ark. 231—Jackson v. Frazier, 299 S.W. 738, 175 Ark. 421.

22. W.Va.—Whitehouse v. Jones, 44 S.E. 730, 50 W.Va. 650, 652, 12 L.R.A.,N.S., 49.
51 C.J. p 134 note 13.

23. Cal.—Wolf v. Gall, 168 P. 115, 174 Cal. 140.
51 C.J. p 134 note 14.

24. U.S.—Simon v. Tucker, D.C., 12 S.Ct. 730, 144 U.S. 533, 36 L.Ed 533.
51 C.J. p 134 note 15.

25. Or.—Manning v. Gregoire, 191 P. 687, 102 P. 406, 97 Or. 324.
51 C.J. p 134 note 16.

26. N.J.—Sheppard v. Nixon, 13 A 617, 43 N.J.Eq. 627.

27. La.—Parish of Jefferson v. Texas Co., 189 So. 580, 193 La. 934, certiorari denied Texas Co. v. Parish of Jefferson, 60 S.Ct. 135, 308 U.S. 601, 84 L.Ed. 503.

The broad grounds on which equity interferes to remove a cloud on title are the prevention of litigation and the protection of the true title and possession, and because it is to the real interest of both parties, and promotive of right and justice, that the precise state of the title be known, if all are acting bona fide.[28] The jurisdiction to grant equitable relief against a cloud on title is grounded in the need for the protection of complainant's title against the injury or vexatious embarrassment which may flow from the deed or other instrument or proceeding constituting the cloud.[29] The ground of equitable jurisdiction, where extrinsic evidence is necessary to show the invalidity of the instrument affecting the title, is that such document may be asserted to the detriment, injury, or embarrassment of the holder of the legal title when, by reason of lapse of time or other circumstances, the evidence to demonstrate its invalidity may not be available, or its authority may be impaired.[30] As otherwise stated, equity interposes to remove clouds from title because they embarrass the owner of the property clouded and tend to impede his free sale and disposition of it, and because the evidence of the party on which he relies to show the invalidity of the adverse claim may be lost by lapse of time.[31] Equity has been held to have jurisdiction to quiet title where the case involves fraud,[32] or the setting aside of a mortgage,[33] or the reformation of an instrument.[34]

Prevention of harassment by repeated assertion of defeated title. Equity will entertain a bill to quiet title by one who has successfully vindicated his title at law against another, where the latter continues to harass the former by continued assertion of his defeated title.[35] As a general rule, equity will not interfere to prevent harassment by continued assertion of defeated title unless plaintiff has vindicated his title by repeated judgments in his favor in actions at law,[36] but if the title is satisfactorily established it is not material what number of trials have taken place, whether two or more.[37] In jurisdictions where ejectment is regarded as a real action, one trial and judgment in ejectment is conclusive, and, when a party defeated in ejectment keeps on denying its effect and disquieting his adversary in possession, equity has jurisdiction to quiet the latter's title.[38]

§ 4. —— Lack of Remedy at Law

In general, equity takes jurisdiction to quiet title or remove a cloud where there is no remedy at law.

In general, a court of equity has jurisdiction to quiet title or remove a cloud thereon where no remedy at law exists.[39]

§ 5. —— Prevention of Multiplicity of Suits

As a rule, subject to some exceptions and qualifications, equity will entertain an action to quiet title in order to prevent a multiplicity of suits.

As a general rule, a court of equity, on the sole ground of preventing multiplicity of suits, will entertain an action to quiet title where there are a number of persons interested in it, and a great many actions at law would be necessary to conclude the title.[40] However, this rule is subject to some

28. N.D.—Gardner Hotel Co. v. Hagaman, 182 N.W. 685, 47 N.D. 434.
51 C.J. p 134 note 20

29. Md.—Homewood Realty Corporation v. Safe Deposit & Trust Co. of Baltimore, 154 A. 58, 160 Md. 457, 78 A.L.R. 8.
N.J.—Estate of Gilbert Smith v. Cohen, 196 A. 361, 364, 123 N.J.Eq. 419.

30. N.J.—Estate of Gilbert Smith v. Cohen, supra
"The possibility of a future unconscionable or inequitable use of the instrument, with the consequent clouding of the title, justifies appropriate equitable relief where there is no sufficient legal remedy. Manifestly, the case for equitable intervention on this ground is much the stronger when resort is to be had to parol testimony to establish the invalidity of the instrument casting doubt upon the title."—Estate of Gilbert Smith v. Cohen, supra.

31. N.C.—McArthur v. Griffith, 61 S.E. 519, 147 N.C. 545.
51 C.J. p 135 note 21.

32. Mich.—Hawkins v. Dillman, 256 N.W. 492, 268 Mich. 483.
W.Va.—Putnam Co. v. Fisher, 86 S.E.2d 681, 128 W.Va. 383.
Possession by plaintiff as unnecessary where fraud present see infra § 27.
Obtaining deeds from persons without title
Where evidence indicated that defendants, having heard rumors of defects of plaintiffs' title, secured deeds to property from relatives and neighbors who had no title thereto, and neither defendants nor grantors under such deeds had paid taxes, defendants' claims were so tainted with fraud that equity had jurisdiction on that ground alone and could cancel deeds constituting clouds on plaintiffs' title.—Putnam Co. v. Fisher, 86 S.E.2d 681, 128 W.Va. 383.

33. Mich.—Hawkins v. Dillman, 256 N.W. 492, 268 Mich. 483.

34. Mich.—Hawkins v. Dillman, supra.

35. U.S.—Stark v. Starrs, Or., 6 Wall. 402, 18 L.Ed. 925.
51 C.J. p 136 note 32.
Injunction against vexatious suits see Injunctions § 39.

36. U.S.—Holland v. Challen, Neb., 3 S.Ct. 495, 110 U.S. 15, 28 L.Ed. 52.
51 C.J. p 136 note 33.

37. Ohio.—Marsh v. Reed, 10 Ohio 347.
51 C.J. p 136 note 34.

38. W.Va.—Whitehouse v. Jones, 55 S.E. 730, 60 W.Va. 680.

39. U.S.—Carter Oil Co. v. Owen, D.C.Ill., 27 F.Supp. 74.
Fla.—Ellis v. Dixie Highway Special Road & Bridge Dist., 138 So. 374, 103 Fla. 795.
Md.—Homewood Realty Corporation v. Safe Deposit & Trust Co. of Baltimore, 154 A. 58, 160 Md. 457, 78 A.L.R. 8.
51 C.J. p 135 note 23.
Adequacy of legal remedies see infra § 10.

40. Mich.—Hawkins v. Dillman, 256 N.W. 492, 268 Mich. 483.

exceptions and qualifications,[41] and it will not apply where the exercise of jurisdiction would not in fact avoid a multiplicity of suits.[42] Furthermore there must be a community of interest in the subject matter, or a common title from which all the separate claims and all questions at issue arise.[43] In other words, in order to originate the jurisdiction on this ground, it is essential that there be a single claim of right in all the defendants, arising out of some privity or relationship with plaintiff.[44] Moreover, it has been held that the doctrine does not apply where defendants have nothing in common except their source of color of title, and each defendant has a distinct, different, and separate defense.[45]

§ 6. Statutory Remedies for Determination of Adverse Claims

a. In general
b. Construction, scope, and effect

a. In General

Under the statutes in many jurisdictions, an action may be maintained to determine adverse claims and quiet title independently of the common-law right to remove a cloud on title by a bill in equity. Such statutes ordinarily are constitutional and, depending on the particular provisions, may permit the maintenance of the action either at law or in equity.

In many jurisdictions statutes have been enacted authorizing actions to be maintained for the determination of adverse claims and to quiet title.[46] An action under statute to compel the determination of an adverse claim to realty is in its nature one to quiet plaintiff's title to the property and to remove any cloud thereon.[47] The action may be maintained independently of the common law right to remove a cloud on the title by a bill in equity,[48] and hence the existence of an equitable remedy to quiet title will not preclude an action under a statute conferring jurisdiction of such actions on certain courts of law.[49] The statutory action affords a means by which one in possession under claim of title may force a threatening but otherwise inactive adverse claimant to his proof, to the end that if such adverse claimant fails to show good title in himself he is forever silenced.[50] Specific matters affecting the right of action and defenses, as well as the procedure, under these statutes, are very generally regulated by the provisions thereof, and when the procedure is prescribed by the statute its provisions must be substantially followed.[51]

Such statutes are enabling acts,[52] and the proceeding thereunder is not usually regarded as a special proceeding, but as an action,[53] equitable in its nature[54] and governed by the rules pertaining to suits in equity,[55] or by equitable principles,[56] ex-

N.J.—Fidelity Union Trust Co. v. Cochrane, 172 A. 800, 116 N.J.Eq. 190.
51 C.J. p 135 note 26.
Multiplicity of suits as ground for jurisdiction in equity generally see Equity § 42.

41. Ala.—Sayers v. Tallassee Falls Mfg. Co., 52 So. 892, 167 Ala. 553.
51 C.J. p 135 note 27.

42. U.S.—Buchanan Co. v. Adkins, Va., 175 F. 692, 99 C.C.A. 246.
51 C.J. p 135 note 28.

43. Wis.—Illinois Steel Co. v. Schroeder, 113 N.W. 51, 133 Wis. 561, 14 L.R.A.,N.S., 239.
51 C.J. p 135 note 29.

44. Mich.—Detroit Trust Co. v. Hunrath, 131 N.W. 147, 168 Mich. 180.
51 C.J. p 136 note 30.

45. N.M.—Pankey v. Ortiz, 195 P. 906, 26 N.M. 575, 30 A.L.R. 92.

46. Mo.—Bragg v. Ross, 139 S.W.2d 491.
N.C.—Maynard v. Holder, 5 S.E.2d 535, 216 N.C. 524.
Okl.—Impson v. Kelley, 163 P.2d 984, 195 Okl. 666—Cochran v. Norris, 51 P.2d 786, 175 Okl. 186.
Wyo.—Corpus Juris quoted in Norris v. United Mineral Products Co., 158 P.2d 679, 684, 61 Wyo. 386.
51 C.J. p 136 note 33.

Codification of previous remedies
(1) The statute providing for an action to compel the determination of an adverse claim to realty has codified the remedies obtained through a bill of peace and a bill quia timet to quiet plaintiff's equitable title to property and to remove any cloud thereon. Karp v. Twenty Three Thirty Ryer Corp., 56 N.Y.S.2d 783, 185 Misc. 440.
(2) Statutory quiet title action is the equitable action formally known as "quia timet." Greco v. Fuller Auto. Co., Ohio Com.Pl., 31 N.E.2d 401.

Enforcement of right to possession
One having right to possession of premises may proceed under quiet title statute for purpose of making that right to possession effective. Peisch v. Willman, 185 P.2d 992, 30 Wash.2d 136.

47. N.Y.—Karp v. Twenty Three Thirty Ryer Corp., 56 N.Y.S.2d 783, 185 Misc. 440.

48. N.D.—Wagner v. Stroh, 294 N.W. 195, 70 N.D. 322.

49. Hawaii.—Kahoiwai v. Limaeu, 10 Hawaii 507.

50. N.Y.—George v. People, 47 N.Y.S.2d 681, 267 App.Div. 575.

51. Cal.—Stanley v. Westover, 262 P. 468, 93 Cal.App. 97.

52. Neb. Corpus Juris cited in Maxwell v. Hamel, 293 N.W. 34, 44, 138 Neb. 49.
Wyo. Corpus Juris quoted in Norris v. United Mineral Products Co., 158 P.2d 679, 684, 61 Wyo. 386.
51 C.J. p 136 note 39.

53. Wyo. Corpus Juris quoted in Norris v. United Mineral Products Co., 158 P.2d 679, 684, 61 Wyo. 386.
51 C.J. p 137 note 40

54. N.C. Holden v. Totten, 31 S.E.2d 635, 224 N.C. 544.
N.D. Northwestern Mut. Savings & Loan Ass'n v. Hanson, 16 N.W.2d 599, 72 N.D. 679—Wagner v. Stroh, 294 N.W. 195, 70 N.D. 322.
Okl.—Corpus Juris cited in Maynard v. Hunstead, 90 P.2d 30, 32, 185 Okl. 20.
Wyo. Corpus Juris quoted in Norris v. United Mineral Products Co., 158 P.2d 679, 684, 61 Wyo. 386.
51 C.J. p 137 note 41.

55. Wyo.—Corpus Juris quoted in Norris v. United Mineral Products Co., 158 P.2d 679, 684, 61 Wyo. 386.
51 C.J. p 137 note 41.

56. Cal.—Gonzales v. Hirume, 200 P.2d 793, 33 Cal.2d 313.
Kan.—Erskine v. Dykes, 150 P.2d 382, 158 Kan. 788.

Rules as to quieting tax titles
Statute respecting quieting title does not abrogate, but is subject to

cept where the statute directs otherwise.[57] Under some statutes the action is an action at law,[58] while under others it may be either an equitable action or an action at law, depending on the pleadings, issues, and relief sought;[59] if the issues tendered are equitable the proceeding is one in equity,[60] but where no equitable rights are set up by either party,[61] or where the answer sets up an equitable defense but seeks no equitable relief,[62] the action is one at law governed by the ordinary rules applicable to actions at law.

As possessory action. In some jurisdictions the statutory action is the ordinary method of trying disputed titles; it is a possessory action, even the action of ejectment being practically superseded,[63] but in others it is not a possessory action.[64]

Constitutionality. Statutes enlarging equity jurisdiction in respect of actions to quiet title or remove a cloud thereon are within the powers of the legislature, and are constitutional,[65] unless they violate some particular constitutional provision.[66] If the effect of such a statute is to deprive parties of the right to trial by jury, the statute will not be sustained.[67]

Amendment or repeal. An amendment of a statute of this nature cannot affect judgments recovered prior to such amendment.[68] Where a statute authorizing suits to quiet title is repealed by an act relating to the same matter, the court has no authority to grant relief under the repealed statute.[69]

b. Construction, Scope, and Effect

Statutes providing for actions to determine adverse claims are remedial and should be liberally construed. They are generally held not to oust the antecedent jurisdiction of equity but, rather, to extend the equitable

equitable rules regarding quieting tax titles.—Cremin v. Quigley, 139 So. 383, 104 Fla. 133.

57. Wyo.—**Corpus Juris quoted in** Norris v. United Mineral Products Co., 158 P.2d 679, 684, 61 Wyo. 386.
51 C.J. p 137 note 43.

58. Me.—Hoadley v. Wheelwright, 156 A. 692, 130 Me. 395.
51 C.J. p 137 note 44.

59. Mo.—Rhodus v. Geatley, 147 S.W.2d 631, 347 Mo. 397—Baker v. Lamar, 140 S.W.2d 31—Souders v. Kitchens, 137 S.W.2d 501, 345 Mo. 977—Kimberlin v. Roberts, 107 S.W.2d 24, 341 Mo. 267—Rains v. Moulder, 90 S.W.2d 81, 338 Mo. 275—Fancher v. Frock, 88 S.W.2d 179, 337 Mo. 1119—Stafford v. Shinabargar, 81 S.W.2d 626, 336 Mo. 856—Cuthbert v. Holmes, 14 S.W.2d 444—Jacobs v. Waldron, 298 S.W. 773, 317 Mo. 1133.
51 C.J. p 137 note 45.

Substance, not form, of pleading

Whether statutory proceeding to quiet title is action at law or suit in equity is to be determined by issues raised by substance of pleading rather than by form of pleading.—Wolfersberger v. Hoppenjon, 68 S.W.2d 814, 334 Mo. 817.

Allegations and prayer regarding receivership

Character of cause of action to quiet title is not changed by allegations and prayer regarding receivership, which is purely ancillary.—Ebbs v. Neff, 30 S.W.2d 616, 325 Mo. 1182.

Both law and equity

(1) Under some statutes action to determine interest in realty and quiet title must be either at law or in equity and cannot have attributes of both.—Ebbs v. Neff, supra.

(2) Under other statutes action to determine adverse claims embraces both common-law action of ejectment and equitable action to quiet title.—Udgaard v. Schindler, 31 N.W.2d 776, 75 N.D. 625—Cooper v. Gordon, 164 N.W. 21, 37 N.D. 247, L.R.A. 1918A 52.

60. Mo.—St. Joseph Lead Co. v. Fuhrmeister, 182 S.W.2d 273, 353 Mo. 232—Wolfersberger v. Hoppenjon, 68 S.W.2d 814, 334 Mo. 817—Ebbs v. Neff, 30 S.W.2d 616, 325 Mo. 1182—Williamson v. Frazee, 242 S.W. 958, 294 Mo. 320—Schneider v. Schneider, 224 S.W. 1, 284 Mo. 314.
51 C.J. p 137 note 46.

Actions held in equity

(1) Action to quiet title was in equity where defendants' answer sought determination of estates, rights, titles, and interests of plaintiff and defendants severally, and removal from defendant's title of cloud of allegedly void deed to plaintiff's predecessor.—Rains v. Moulder, 90 S.W.2d 81, 338 Mo. 275.

(2) Suit to remove cloud from title to land and seeking credit for valuable improvements placed on the land is suit in equity.—Hyde v. Copeland, 173 S.W.2d 684, 351 Mo. 580.

61. Mo.—Baker v. Lamar, 140 S.W.2d 31—Stanton v. Leonard, 130 S.W.2d 487, 344 Mo. 998—Mendenhall v. Pearce, 20 S.W.2d 670, 323 Mo. 984—Dowd v. Bond, 199 S.W. 954.
51 C.J. p 137 note 47.

Determination of legal rights only

Action to establish fact of forfeiture of defendant's title to surface rights in land by breach of condition in deed to defendant, reentry by defendant's grantor, subsequent conveyance to plaintiff of defendant's grantor's right, title, interest, and remedies and plaintiff's ownership and right to possession sought only the determination of legal rights.—St. Joseph Lead Co. v. Fuhrmeister, 182 S.W.2d 273, 353 Mo. 232.

62. Mo.—Jacobs v. Waldron, 298 S.W. 773, 317 Mo. 1133—Turner v. Kline, 248 S.W. 933, 207 Mo. 153—Koehler v. Rowland, 205 S.W. 217, 275 Mo. 573, 9 A.L.R. 107.

Prayer for general relief

Prayer in answer for general relief was held insufficient to convert action to determine title into action in equity.—Jacobs v. Waldron, 298 S.W. 773, 317 Mo. 1133.

63. Wash.—Rue v. Oregon, etc., R. Co., 186 P. 1074, 109 Wash. 436.
51 C.J. p 138 note 50.

64. Ark.—Hershy v. Du Val, 14 S.W. 469, 47 Ark. 86.
51 C.J. p 138 note 51.

65. U.S.—Wehrman v. Conklin, Iowa, 15 S.Ct. 129, 155 U.S. 314, 39 L.Ed. 167.
51 C.J. p 138 note 52.

Legislative power not limited by doctrine of adequate remedy

The doctrine that equity has no jurisdiction where there is a complete and adequate remedy at law in no manner limits the power of the legislature to enlarge equity's jurisdiction to authorize the maintenance of suits to quiet title whether or not there is an adequate remedy at law.—Quintana v. Vigil, 135 P.2d 711, 46 N.M. 200.

66. Mo.—McFadin v. Simms, 273 S.W. 1050, 309 Mo. 312.
51 C.J. p 138 note 53.

67. Fla.—Hughes v. Hannah, 22 So. 613, 39 Fla. 365.
51 C.J. p 138 note 54.

68. Mo.—Mayhew v. Todisman, 151 S.W. 426, 246 Mo. 233.

69. Mo.—Phillips v. Broughton, 193 S.W. 538, 270 Mo. 365.

remedy to cases in which the settled rules of equity precluded relief.

Statutes providing for actions to determine adverse claims are remedial[70] and beneficial,[71] not penal, restrictive, or destructive,[72] and, like other remedial statutes, should be liberally construed,[73] and be held to embrace all cases coming fairly within their scope.[74] However, they will not authorize proceedings to determine matters not within the purpose and intent of their provisions, when properly construed,[75] nor, as to the jurisdictional facts specifically stated, can such statutes be extended beyond their terms.[76]

Whether a particular action is a statutory proceeding for the determination of adverse claims is determined by the provisions of the statute and the nature of the relief sought.[77] A statutory proceeding for partition may be converted by the answer into one to quiet title.[78] Where the action, although brought in form under the statute as an equitable action to quiet title, is in reality for the recovery of specific real property, and the issues made are purely legal and such as are cognizable in a court of law, the substance will control the form.[79]

Purpose and effect. The purpose of a statutory action to quiet title has been variously stated to be to determine adverse claims to real property,[80] to secure repose and to settle in one comprehensive action all conflicting claims,[81] to fix the status of

70. Iowa.—Bates v. Bates, 24 N.W. 2d 460, 237 Iowa 1408—Davis v. Niemann, 258 N.W. 761, 219 Iowa 620.
Mo.—White v. Kentling, 134 S.W.2d 39, 345 Mo 526—Rains v. Moulder, 90 S.W.2d 81, 338 Mo. 275—Wm. H. Johnson Timber & Realty Co. v. Belt, 46 S.W 2d 153, 329 Mo. 515.
N.C.—Maynard v. Holder, 5 S.E.2d 535, 216 N C. 524.
S.C.—Tolbert v. Greenwood Cotton Mill, 48 S.E.2d 599, 213 S.C. 43.

71. Mo.—Rains v. Moulder, 90 S.W. 2d 81, 338 Mo. 275—Wm. H. Johnson Timber & Realty Co v. Belt, 46 S.W.2d 153, 329 Mo. 515.

72. Neb.—Maxwell v. Hamel, 292 N. W. 38, 138 Neb. 49.

73. Iowa.—Bates v. Bates, 24 N.W. 2d 460, 237 Iowa 1408—Davis v. Niemann, 258 N.W. 761, 219 Iowa 620.
Mo.—White v. Kentling, 134 S.W.2d 39, 345 Mo. 526—Meyer v. Wise, 133 S.W.2d 321—Rains v. Moulder, 90 S.W.2d 81, 338 Mo. 275—Wm. H. Johnson Timber & Realty Co. v. Belt, 46 S.W.2d 153, 329 Mo. 515.
N.C.—Maynard v. Holder, 5 S.E.2d 535, 216 N C. 524.
S.C.—Tolbert v. Greenwood Cotton Mill, 48 S.E.2d 599, 213 S.C. 43.
51 C.J. p 138 note 57.

74. Colo.—Empire Ranch & Cattle Co. v. Wilson, 131 P. 779, 24 Colo. App. 83.
Iowa.—Davis v. Niemann, 258 N.W. 761, 219 Iowa 620.
N.Y.—Schermerhorn v. Albany Syndicate, 158 N.Y.S. 553, 93 Misc. 597.
S.C.—Corpus Juris cited in Tolbert v. Greenwood Cotton Mill, 48 S.E. 2d 599, 600, 213 S.C. 43.
51 C.J. p 138 note 58.

Actions held within statute

(1) Where both parties assert mere equities in real property, an action may be maintained under the statute to ascertain which party has the superior equity.—Turner v. Deacon, 289 P. 179, 106 Cal.App. 329.

(2) Fact that plaintiff as judgment creditor could have brought supplementary proceedings to determine the existence and extent of debtor's lien upon property, did not preclude plaintiff from proceeding under statute to quiet title in his judgment debtor.—Christie v. Morris, 149 P.2d 250, 116 Mont. 210.

(3) Provisions of real property law for determination of claims to real property were held not affected or superseded by remedy provided by county administrative code and tax law.—Connolly v. Danton, 54 N. Y.S.2d 131, 184 Misc. 761.

(4) Where electric lines were constructed over street railroad right of way with oral permission of owner of right-of-way easement, decree protecting rights of a licensee against and as superior to rights of fee-simple owner of servient estate involved title, estate, or interest in real property within the quiet title statute.—Eureka Real Estate & Inv. Co. v. Southern Real Estate & Financial Co., 200 S.W.2d 328, 355 Mo. 1199.

75. La.—Duffourc v. Constantin, 181 So. 183, 189 La. 826.
Pa.—Kauffman v. Schroeder, Com.Pl., 34 Berks Co.L.J. 191, 56 York Leg. Rec. 53.
51 C.J. p 138 note 59.

Conflicting claims to property in controversy

Scope of action to quiet title is limited to determination of conflicting claims to property in controversy.—Turner v. Bank of America Nat. Trust & Savings Ass'n, 87 P.2d 382, 135 Cal.App. 314.

Statutory conditions

Action under statute prescribing who may maintain action to determine title to realty is purely statutory and will not lie unless conditions prescribed in statute are fulfilled.—Higbee v. Schwartz, 56 N.Y. S.2d 150, 185 Misc. 28.

76. Miss.—Phelps v. Harris, 51 Miss. 789.
51 C.J. p 139 note 60.

77. Cal.—Vanusek v. Pokorney, 238 P. 798, 73 Cal.App. 312.
51 C.J. p 139 note 61.

Action for declaratory judgment challenging constitutionality of act giving commission power to fix equitable rental for diversion of waters from river was action to determine claim to real property under statute.—Niagara Falls Power Co. v. Halpin, 45 N.Y.S.2d 426, 267 App.Div. 238, 853, affirmed 56 N.E.2d 111, 292 N.Y. 705.

78. Mo.—Hancock v. York, 210 S.W. 63.

79. Cal.—Davis v. Judson, 113 P. 147, 159 Cal. 121.

80. N.H.—Bottomly v. Parmenter, 159 A. 302, 85 N.H. 322.

Statute authorizing cancellation distinguished

Proceedings under statute authorizing action to quiet title to realty are not aimed at particular instrument, but at pretensions of individuals claiming adversely, while action under statute authorizing cancellation of instrument is directed to particular instrument dangerous to plaintiff's rights and object of action is to have such instrument canceled and cloud cast thereby removed.—Sanborn v. Lewis and Clark County, 120 P.2d 567, 113 Mont. 1.
51 C.J. p 138 note 38 [e].

81. Ind.—Central Federal Savings & Loan Ass'n v. Cummings, 35 N.E. 2d 638, 216 Ind. 636.

Determination of all legal or equitable rights

Statute providing for suits to determine interest and quiet title was intended to permit determination in one action of any and all rights, whether legal or equitable, of any litigant affecting title to real property involved in suit.—Rains v. Moulder, 90 S.W.2d 81, 338 Mo. 275

the land with respect to ownership,[82] and to re-establish by decree muniments of title to it.[83] The general purpose and effect of statutes of this class are not to restrict the previous jurisdiction of equity,[84] but to enlarge and extend the equitable remedy to cases in which, by the settled rules of equity, no relief could be had.[85] The proceeding authorized by such a statute has been said to be a mere extension of the principle quia timet.[86]

A statute extending the jurisdiction in actions to quiet title or remove clouds where plaintiff is out of possession does not enlarge the jurisdiction where he is in possession.[87] It has been held that statutes assuming to confer on equity jurisdiction to remove clouds from title, which do not give a more extensive remedy than exists by virtue of the customary jurisdiction of the chancery courts, may regulate the mode of proceeding and form of decree, but they are not necessary to the exercise of the jurisdiction.[88] It is not the object of the statute to afford to a defendant in an ejectment action the option to deprive plaintiff of his right to a trial by jury and to permit defendant to elect in which court he will try the question of title.[89]

Ousting jurisdiction of equity. Although there are some cases to the contrary,[90] the general rule, as to the effect of statutes providing a legal remedy, where formerly the remedy was in equity by bill to quiet title, or remove cloud thereon, is that the antecedent jurisdiction of equity is not ousted by such statutes,[91] at least where the language used therein does not limit the remedy to the one therein provided.[92]

Effect of state statutes in federal courts. The right of action given by the state statutes under consideration may be enforced by an appropriate form of action in the federal courts, if the provisions of the federal constitution as to trial by jury, and of the statute forbidding suits in equity in any court of the United States where an adequate remedy at law exists, are not infringed;[93] and in such

—Autenrieth v. Bartley, 176 S.W.2d 546, 238 Mo.App. 55.

82. Ala.—Ex parte Baird, 200 So. 601, 240 Ala. 585.

83. Ala.—Ex parte Baird, supra.

Other statements of purpose

(1) Purpose of statute providing for quieting title to realty in case of loss or destruction of public records was to prevent fraud on those who had title or interest in the property. —Laurel Hill Cemetery Ass'n v. All Persons, etc., 158 P.2d 759, 69 Cal. App.2d 190.

(2) Statute relating to suit to quiet title was enacted because of lack of adequate remedy at law where plaintiff is in possession of land and another claims an interest therein, but brings no suit to test it. —Wood v. Curry, 8 So.2d 822, 243 Ala. 136—51 C.J. p 139 note 65 [a] (2).

(3) Purpose of action to quiet title, under statute, is to determine who is real owner of property and to put at rest all adverse claims.—Akers v. Hintergardt, 203 P.2d 883, 201 Okl. 213—Home Development Co. v. Hankins, 159 P.2d 1013, 195 Okl. 632.

(4) Additional statements.

Ala.—Dake v. Inglis, 194 So. 673, 239 Ala. 241.

La.—Settoon v. Sharp, App., 19 So. 2d 342.

N.C.—Fisher v. Fisher, 6 S.E.2d 812, 217 N.C. 70—Satterwhite v. Gallagher, 92 S.E. 369, 173 N.C. 525.

S.C.—Tolbert v. Greenwood Cotton Mill, 48 S.E.2d 599, 213 S.C. 43.

84. N.J.—Estate of Gilbert Smith v. Cohen, 196 A. 361, 123 N.J.Eq. 419. 51 C.J. p 139 note 64.

85. Neb.—Corpus Juris cited in Maxwell v. Hamel, 292 N.W. 38, 44, 138 Neb. 49.

N.J.—Estate of Gilbert Smith v. Cohen, 196 A. 361, 123 N.J.Eq. 419.

N.M.—Quintana v. Vigil, 125 P.2d 711, 46 N.M. 200.

S.C.—Corpus Juris cited in Tolbert v. Greenwood Cotton Mill, 48 S.E. 2d 599, 600, 213 S.C. 43.

51 C.J. p 139 note 65.

Supplementary to rules in equity

Right to have affirmative adjudication in chancery of title to realty is conferred by statute, supplementary to ancient rules in equity on that subject.—Hudson v. Gulf Refining Co., 30 So.2d 66, 202 Miss. 331, motion overruled 30 So.2d 421, 202 Miss. 331, certiorari denied 68 S.Ct. 84, 332 U.S. 775, 92 L.Ed. 359.

86. N.J.—Estate of Gilbert Smith v. Cohen, 196 A. 361, 123 N.J.Eq. 419.

87. Ill.—Whitney v. Stevens, 97 Ill. 482.

Statutes dispensing with possession in general see infra § 29.

Availability of petitory, possessory, or jactitation suit

Where a party is in possession of realty and a petitory, possessory, or jactitation suit can be brought, no resort may be had to the provisions of the act providing for an action to establish title to realty in cases where two or more persons lay claim to land by recorded title and neither of them is in actual possession of land claimed.—Duffourc v. Constantin, 181 So. 183, 189 La. 826.

88. U.S.—Lamb v. Farrell, C.C.Ark., 21 F. 5.

89. Mich.—City of Grand Rapids v Central Land Co., 292 N.W. 579, 294 Mich. 103—Carpenter v. Dennison, 175 N.W. 419, 208 Mich. 441.

Substitution of chancery jurisdiction for ejectment

The statutory provision was not intended to substitute chancery jurisdiction for the action of ejectment, and, where conflicting claims of title depend on determination of issues of fact, resort must still be had to law side of court.—Treavy v. Lindsey, 19 S.E.2d 613, 124 W.Va. 130.

90. U.S.—Metzgar v. McCoy, C.C. Pa., 105 F. 676.

51 C.J. p 140 note 69.

91. Colo.—Harrison v. City and County of Denver, 76 P.2d 1116, 102 Colo. 98.

Me.—Hoadley v. Wheelwright, 156 A. 692, 130 Me. 395.

N.J.—Estate of Gilbert Smith v. Cohen, 196 A. 361, 123 N.J.Eq. 419.

Pa.—Michalski v. Kruszewski, 198 A. 673, 330 Pa. 62.

51 C.J. p 140 note 70.

Equitable jurisdiction notwithstanding repeal of statute

If statutory provisions governing suit to quiet title were repealed, power would remain in court of chancery to quiet title and to remove clouds on titles.—Patterson v. McKay, 134 S.W.2d 542, 199 Ark 140.

92. Ala.—Normant v. Eureka Co., 13 So. 454, 98 Ala. 181, 39 Am.S.R. 45.

93. U.S.—A. G. Wineman & Sons v.

case the appropriate form of action in the federal courts is a bill in equity.[94] However, a federal court has no equitable jurisdiction of an action under a state statute providing for the determination of adverse claims, where the effect would be to deprive a party of his right to trial by jury,[95] or to give a right to relief where an adequate remedy at law exists,[96] as is ordinarily the case where the statutes authorizes the action to be brought by a party out of possession.[97] A federal court has jurisdiction under such a statute, if the circumstances are such that no adequate remedy at law exists,[98] as where both parties are out of possession, or the land is vacant and unoccupied, and plaintiff holds the legal title.[99] The federal Constitution and statute are held to refer to the right to trial by jury as it existed at common law;[1] and, if a state statute enlarging equitable jurisdiction does not deprive a party of the right to trial by jury as it existed at common law, the statute may be followed by the federal courts;[2] otherwise not.[3]

§ 7. Action in Personam or in Rem

An action to remove a cloud is generally, although not invariably, considered to be an action in personam. Actions under statutes providing for the determination of adverse claims ordinarily are held to be in the nature of proceedings in rem or quasi in rem, or, where personal service can be made, in personam as well as in rem.

The fundamental doctrine of equity, as originally administered, that every action in equity is purely an action in personam ordinarily applies to actions to remove clouds from title unless abrogated by statute.[4] However, it has been said that any suit to quiet title to realty acts on the property,[5] and under some circumstances an action to quiet title may be treated as one in rem[6] such characteristic of the suit being neither nullified nor minimized by the circumstance that the affected res is not formally reduced to the custody or possession of the court.[7]

It is generally held that actions under statutes providing for the determination of adverse claims are in the nature of proceedings in rem[8] or quasi in rem.[9] Some authorities have held that the character of the statutory action is determined by the nature of the process; that is, where personal service can be made the action is in personam as well as in rem, but where service can be obtained only by publication the action is in rem.[10]

§ 8. Subject Matter

The subject matter of an action to quiet title or remove a cloud is generally confined to land; but under, or even apart from, statute an action of this nature is sometimes available with respect to personalty.

The subject matter of equitable jurisdiction to quiet title or remove a cloud is generally held to be confined to land,[11] including the surface of the ground and everything that is on it[12] and under it.[13] More particularly it has been said that the

Reeves, Miss., 245 F. 254, 157 C. C.A. 446.
21 C.J. p 44 note 68—25 C.J. p 804 note 85—51 C.J. p 140 note 74.

94. U.S.—Bigelow v. Chatterton, Minn., 51 F. 614, 2 C.C.A. 402.
21 C.J. p 44 note 68.

95. U.S.—Whitehead v. Shattuck, Iowa, 11 S.Ct. 276, 138 U.S. 146, 34 L.Ed. 873.
51 C.J. p 140 note 79.
Right to trial by jury in action to quiet title generally see Juries § 33.

96. U.S.—Whitehead v. Shattuck, supra.
51 C.J. p 140 note 80—25 C.J. p 804 note 86.
Adequacy of remedy at law generally see infra § 10.

97. U.S.—Barnes v. Boyd, C.C.A.W. Va., 73 F.2d 910, certiorari denied 55 S.Ct. 550, 294 U.S. 723, 79 L.Ed. 1254, rehearing denied 55 S.Ct. 647, 295 U.S. 768, 79 L.Ed. 1708—Twist v. Prairie Oil & Gas Co., C.C.A. Okl., 6 F.2d 347, reversed on other grounds 47 S.Ct. 755, 274 U.S. 684, 71 L.Ed. 1297.
51 C.J. p 140 note 81—21 C.J. p 44 note 69.
Statutes dispensing with necessity of possession by plaintiff see infra §§ 29, 30.

98. U.S.—Wehrman v. Conklin, Iowa, 15 S.Ct. 130, 155 U.S. 314, 39 L.Ed. 167.
51 C.J. p 141 note 82.

99. U.S.—Warren v. Oregon & W. Realty Co., C.C.Wash., 156 F. 203.
51 C.J. p 141 note 82.

1. U.S.—Gordan v. Jackson, C.C. Ark., 72 F. 86—Grand Rapids & I. R. Co. v. Sparrow, C.C.Mich., 36 F. 210, 1 L.R.A. 480.

2. U.S.—Southern Pine Co. v. Hall, Miss., 105 F. 84, 44 C.C.A. 363, certiorari denied 21 S.Ct. 921, 180 U. S. 639, 45 L.Ed. 711—Grand Rapids & I. R. Co. v. Sparrow, C.C. Mich., 36 F. 210, 1 L.R.A. 480.

3. U.S.—Gordan v. Jackson, C.C. Ark., 72 F. 86.

4. U.S.—Hart v. Sansom, Tex., 3 S.Ct. 586, 110 U.S. 151, 28 L.Ed. 101.
Pa.—Talenfeld v. Rothman's Estate, Com.Pl., 97 Pittsb.Leg.J. 39.
51 C.J. p 141 note 92.

5. U.S.—Bain v. Montana Power Co., D.C.Mont., 30 F.Supp. 843.

6. U.S.—Prudential Ins. Co. of America v. Zimmerer, D.C.Neb., 60 F.Supp. 492.
Okl.—Franklin v. Margay Oil Corporation, 158 P.2d 486, 194 Okl. 519.

7. U.S.—Prudential Ins. Co. of America v. Zimmerer, D.C.Neb., 60 F.Supp. 492.

8. U.S.—Morrison v. Marker, C.C. Cal., 92 F. 692.
51 C.J. p 141 note 93.

9. U.S.—Corpus Juris cited in Bain v. Montana Power Co., D.C.Mont., 30 F.Supp. 843, 846.
Cal.—Park v. Powers, 43 P.2d 75, 3 Cal.2d 690.
51 C.J. p 141 note 94.

10. Kan.—Dillon v. Heller, 18 P. 893, 39 Kan. 595.
51 C.J. p 141 note 96.

11. Colo.—Central Nav. Bank, etc., Co. v. Carpenters, etc., Amalgamated Soc., 134 P. 1007, 24 Colo. App. 438.
51 C.J. p 142 note 98.

12. Ariz.—Arizona Mine Supply Co. v. Holman, 140 P. 490, 15 Ariz. 504, 510.
51 C.J. p 142 note 97.

13. Conn.—Harri v. Schwarz Iron Co., 107 A. 3, 93 Conn. 501.
51 C.J. p 142 note 98.
Quieting title to mining property see Mines and Minerals § 146.

subject matter of an action to quiet title is the title, and not the land, and that the interest to be quieted is in the title.[14] A reversionary interest may be protected against an easement by a suit to quiet title under some statutes, especially when the adverse party is claiming a title in fee.[15] The term "real property" has been held to include incorporeal hereditaments,[16] such as water rights[17] and easements in land.[18]

On the other hand, it has been held that an incorporeal hereditament is not a proper subject of equitable jurisdiction to quiet title;[19] and it has also been held that the right to control navigable waters is not determinable in a suit to quiet title because it is not a right of property but of sovereign power vested in the federal government.[20]

Ordinarily the subject matter of the action does not extend to personal property[21] unless the statute expressly so declares;[22] but in some jurisdictions, without any express provision therefor, or at least without any express reference to statutes, the action has been sustained as applied to personalty,[23] and, even in jurisdictions in which the general rule has been followed, it has been held that equity will give relief in respect of personalty in unusual cases,[24] where, owing to exceptional circumstances, there is no adequate remedy at law.[25]

B. MATTERS AFFECTING RIGHT TO REMEDY GENERALLY

§ 9. In General

The exercise of the jurisdiction of the court in actions to quiet title or remove a cloud does not rest on arbitrary rules but depends largely on the discretion of the court and the facts of the particular case.

Jurisdiction in actions to quiet title or remove a cloud does not rest on arbitrary rules; much depends on the facts of the particular case, and in the exercise of the jurisdiction the court is clothed with a large discretion,[26] where there is any doubt whether there is such a cloud that injury may reasonably be apprehended therefrom,[27] and will exercise its jurisdiction with great caution.[28] A court of equity cannot, on pretense of settling or quieting title, review the decision of an inferior court on a matter within its jurisdiction,[29] nor will equity take jurisdiction of a bill merely seeking advice as to the character and extent of plaintiff's title.[30] Where the judgment in an action to remove a cloud cannot conclude or bind a party claiming under the adverse title, the action must fail.[31] A purchaser at a foreclosure sale[32] or at a sale by a guardian or administrator[33] cannot maintain an action to quiet

14. Ariz.—Saxman v. Christmann, 79 P.2d 520, 52 Ariz 149.

15. Ariz.—Boyd v. Atchison, T. & S. F. Ry. Co., 4 P.2d 670, 39 Ariz. 154.

16. Ind.—Davidson v. Nicholson, 59 Ind. 411—Sanxay v. Hunger, 42 Ind. 44.

17. Colo.—New Brantner Extension Ditch Co. v. Kramer, 141 P. 498, 57 Colo. 218, Ann.Cas.1916B 1225.
51 C.J. p 143 note 6.

18. Ariz.—Boyd v. Atchison, T. & S. F. Ry. Co., 4 P.2d 670, 39 Ariz. 154.
Okl.—Buttrill v. Stanfield, 178 P.2d 889, 198 Okl. 374.
51 C.J. p 142 note 7.

19. N.J.—Whitlock v. Groacen, 21 A. 944, 48 N.J.Eq. 359.

20. U.S.—U. S. v. Central Stockholders' Corporation of Vallejo, C.C.A.Cal., 52 F.2d 322, followed in U. S. v. Charles S. Howard Co., 52 F.2d 340.

Attempt to invoke state court decision

Attempt of lower riparian owner to invoke decision of state court concerning its rights as against licensee of federal government owning upper riparian land has been held not to warrant quieting government's title to riparian rights in public domain.—U. S. v. Central Stockholders' Corporation of Vallejo, C.C.A.Cal., 52 F.2d 322, followed in U. S. v. Charles S. Howard Co., 52 F.2d 340.

21. Colo.—Central Sav. Bank, etc., Co. v. Carpenters, etc., Amalgamated Soc., 134 P. 1007, 24 Colo. App. 438.
51 C.J. p 142 note 99.

22. U.S.—In re American Fidelity Corporation, D.C.Cal., 28 F.Supp. 462.
51 C.J. p 142 note 1.

23. U.S.—Chicago Auditorium Ass'n v. Willing, 20 F.2d 837, reversed on other grounds 48 S.Ct. 507, 277 U.S. 274, 72 L.Ed. 880—First Trust Co. of St. Paul v. Board of Education of Whitley County, Ky., D.C. Ky., 5 F.Supp. 49, reversed on other grounds, C.C.A., 78 F.2d 114.
Minn.—Corpus Juris cited in First Trust Co. of St. Paul v. Matheson, 246 N.W. 1, 3, 187 Minn. 468.
Tex.—Dittmar v. Alamo Nat. Co., 118 S.W.2d 298, 132 Tex. 44.
51 C.J. p 142 note 2.

Quieting title to patents see Patents § 241 a.

Same rules as to personalty and realty

Suit to quiet title to personalty was subject to the same rules as those prevailing in similar suits respecting realty.—Wagner v. Worrell, 173 P.2d 751, 76 Cal.App.2d 172.

24. W.Va.—United Thacker Coal Co. v. Newsome, 38 S.E.2d 660, 129 W.Va. 86.

25. Fla.—Ellis v. Dixie Highway Special Road & Bridge Dist., 138 So. 374, 103 Fla. 795.
51 C.J. p 142 note 4.

26. Wash.—Humphrey v. Krutz, 137 P. 806, 77 Wash. 152, 157.
51 C.J. p 143 note 12.

27. Va.—Payne v. Buena Vista Extract Co., 98 S.E. 34, 124 Va. 296.

28. Mo.—Shelton v. Horrell, 134 S.W. 988, 137 S.W. 264, 232 Mo. 358.
51 C.J. p 143 note 14.

29. N.Y.—Hyatt v. Bates, 35 Barb. 308, affirmed 40 N.Y. 164.

30. N.H.—Harvey v. Harvey, 59 A. 621, 72 N.H. 106.

31. N.Y.—Sanders v. Sexton, 75 N. E. 529, 182 N.Y. 477, 108 Am.S.R. 836, 1 L.R.A.,N.S., 727.

32. Okl.—Sawyer v. Ware, 148 P. 278, 36 Okl. 139.

33. Okl.—Cockran v. Barkus, 240 P. 881, 112 Okl. 186—Baldridge v. Smith, 134 P. 152, 76 Okl. 36.

title against infant defendants therein whose right to appeal from the judgment has not expired.

A cloud on title which justifies the intervention of a court of equity is one which complainant has not created and placed himself under personal obligation to remove.[34] A plaintiff seeking to quiet title may be denied relief if his conduct, in the light of his own intelligence and information, was manifestly unreasonable.[35] However, there is no such conclusive presumption of an owner's knowledge of the state of his own title as will necessarily preclude him from having his title quieted as against an interest obtained from him by fraudulent misrepresentations as to the extent of his ownership.[36] Further, a purchaser who has paid the true consideration for the deed may be granted a judgment declaring that there was no lien on the property for nonpayment of any part of the consideration notwithstanding, by the exercise of ordinary diligence, he could have learned of an error in the deed with respect to the recital of consideration.[37]

Mistake in connection with deed or contract. Where, by mistake, a deed conveyed only a part of the land intended to be conveyed, but the grantor received the full value of the entire tract, those claiming under the deed were entitled to have their title quieted as to the part not mentioned in the deed.[38] So it has been held that, where a quitclaim deed by mistake failed to convey the property intended, the grantee, after requesting the execution of another quitclaim deed, may sue under the statute to quiet title to the land intended to be conveyed,[39] although an action to reform the deed might more properly be brought.[40] A material mistake in connection with the execution of a contract for the sale of land, the contract having been recorded, may warrant quieting title to the land as against the contract.[41]

§ 10. Adequacy of Legal Remedies

a. In general
b. Adequacy of particular remedies

a. In General

An action in equity to quiet title or remove a cloud will not lie where there is an adequate remedy at law which is as efficient to the ends of justice as the remedy sought in equity.

The well-established principle of equity jurisprudence that a court of equity will not entertain jurisdiction where there is an adequate remedy at law applies to actions to quiet title or remove a cloud.[42] Thus the bill will not be entertained merely to afford protective relief when plaintiff is under no disability to bring suit to test the question of title.[43] However, in order to deprive equity of jurisdiction to quiet title or remove a cloud, it is not enough that there is a remedy at law; the remedy must be plain and adequate, and, as frequently stated, equity may take jurisdiction where there is no complete and adequate legal remedy.[44] The other

34. Mont.—Epletveit v. Solberg, 169 P.2d 722, 119 Mont. 45.

Contract of sale after execution of lease

Owner of land could not petition a court of equity to remove a cloud on title which he voluntarily placed there by giving a contract for sale of the land whereby he obligated himself to quiet title and thereupon to execute and deliver a deed conveying property to purchaser, after having previously executed a grazing lease.—Epletveit v. Solberg, supra.

35. Cal.—Seeger v. Odell, 115 P.2d 977, 18 Cal.2d 409, 136 A.L.R. 1391. Laches see infra § 49.

Failure to make inquiry

Purchasers being charged with knowledge of the law could not assume that marginal release on record of prior mortgage meant that mortgage had been satisfied to extent that lien thereof was destroyed, but marginal release only served to put them on further inquiry, and not having inquired by searching record further, they were not entitled to equitable aid in their action to quiet title against holder of renewal note and mortgage.—Marialke v. Conservative Life Ins. Co. of America, 12 N.E.2d 983, 105 Ind.App. 554.

36. Cal.—Seeger v. Odell, 115 P.2d 977, 18 Cal.2d 409, 136 A.L.R. 1391.

37. Ky.—McQueen v. Eatridge, 65 S.W.2d 464, 251 Ky. 464.

38. Ky.—Taul v. Brickey, 219 S.W. 430, 187 Ky. 375.

39. Iowa.—Kessler v. Terrell, 185 N.W. 15, 192 Iowa 442.

40. Iowa.—Kessler v. Terrell, supra.

41. Cal.—Foster v. De Venney, 290 P. 462, 107 Cal.App. 600.

42. Ala.—Moss v. Crabtree, 18 So.2d 467, 245 Ala. 610.
Fla.—Ellis v. Dixie Highway Special Road & Bridge Dist., 138 So. 874, 103 Fla. 795.
Mich.—Hawkins v. Dillman, 286 N. W. 492, 288 Mich. 433.
Or.—Anderson v. Guenther, 35 P.2d 146, 144 Or. 446.
51 C.J. p 143 notes 20, 25.

Correction of irregularity by motion

Where apparent irregularity of judgment might be corrected on motion in the cause in which it was rendered or execution might there be recalled, the remedies available were apparently adequate and judgment debtor was not entitled to maintain action to remove cloud on title and have transcript removed from docket.—Holden v. Tatton, 35 S.E.2d 615, 225 N.C. 558.

Vacation of judgment

Where execution plaintiff in law action became purchaser at sheriff's sale, and court had authority to vacate allegedly invalid judgment and enter one for defendant, fact that court allegedly could not set aside sheriff's deed was held not to render legal remedy inadequate so as to authorize defendant to sue in equity to remove cloud on title Anderson v. Guenther, 35 P.2d 146, 144 Or. 446.

43. N.C.—Browning v. Lavender, 10 S.E. 77, 104 N.C. 89.
51 C.J. p 145 note 31.

44. U.S.—People of Porto Rico v. Livingston, C.C.A.Puerto Rico, 47 F.2d 712, certiorari denied 52 S. Ct. 28, 284 U.S. 642, 76 L.Ed. 546.
Ala.—Dunn v. Ponceler, 178 So. 49, 235 Ala. 269.
Colo.—Spaulding v. Porter, 81 P.2d 711, 94 Colo. 496.

remedy, in order to deprive equity of jurisdiction, must be as practicable and efficient to the ends of justice as the remedy in equity.[45]

While jurisdiction to quiet title or remove a cloud should be exercised whether plaintiff is in or out of possession, where he holds the equitable title, as discussed infra § 28, a plaintiff out of possession holding the legal title will be left to his remedy by ejectment under ordinary circumstances, as discussed infra § 27. However, when he is in possession, and thus unable to obtain adequate relief by ejectment or other legal remedy, he may resort to equity for relief.[46] The equitable jurisdiction of a federal court to remove a cloud from title will not be divested because there is a local statute which affords a legal remedy.[47]

Effect of statutes on general rule. Statutes which give a right of action to quiet title only to the party in possession have no effect on the rule that the aid of equity cannot be invoked where an adequate remedy at law exists.[48] Likewise, statutes which extend equitable relief to claimants of unoccupied lands in no wise interfere with the general rule that equity jurisdiction cannot be invoked where an adequate remedy at law exists;[49] but if there is no adequate remedy at law an action under the statute to quiet title will lie.[50] As to statutes permitting an action to quiet title to be maintained by a person not in possession, if such statutes be regarded as giving an absolute right to the equitable remedy where an adequate remedy at law exists, the effect is to deprive the party in possession of the right to trial by jury,[51] and they are therefore unconstitutional.[52] Some of the decisions follow the statute, without raising or discussing the question of its effect on the right of trial by jury, where, under the common law, the remedy would have been at law,[53] while others hold, where the question is squarely presented, that, although equitable in form, the action is not strictly equitable, and that, where there are legal issues, the parties demanding it may have such issues framed for a jury.[54]

Waiver of defense. So far as the parties themselves are concerned, the defense that there is an adequate remedy at law may be waived by failure to object.[55] However, this rule does not apply where the subject matter of the litigation and the character of the relief are foreign to the power of a court of equity.[56]

b. Adequacy of Particular Remedies

(1) Ejectment
(2) Other remedies

(1) Ejectment

A party will be left to his remedy by ejectment where such remedy is plain, adequate, and complete; but he may sue in equity to quiet title where ejectment will not lie because he is in possession and holds the legal title.

The remedy by ejectment is generally regarded as plain, adequate, and complete, and a party ordinarily will be left to that remedy when it exists.[57] Thus, as discussed infra § 27, where the title is purely a legal one, and defendant is in possession, the remedy at law in the nature of an action of ejectment is usually regarded as plain, adequate, and complete. However, if the circumstances are such that the remedy by ejectment is inadequate, equity has jurisdiction.[58] Where plaintiff is in

Fla.—Ellis v. Dixie Highway Special Road & Bridge Dist., 133 So. 374, 103 Fla. 795.
Okl.—Jefferson v. British American Oil Producing Co., 145 P.2d 387, 193 Okl. 599.
51 C.J. p 135 note 24, p 145 note 29.

45. N.J.—Estate of Gilbert Smith v. Cohen, 196 A. 361, 123 N.J.Eq. 419.
51 C.J. p 145 note 29.

46. Ark.—Gingles v. Rogers, 175 S.W.2d 192, 206 Ark. 915.
N.J.—Carpender v. City of New Brunswick, 39 A.2d 40, 135 N.J. Eq. 397.
51 C.J. p 144 note 28—31 C.J. p 65 note 78.

47. U.S.—Brown v. French, C.C. Mont., 80 F. 166.
51 C.J. p 145 note 32.
Effect of state statutes in federal courts see supra § 6 b.

48. U.S.—Northern Pac. R. Co. v. Amacker, Mont., 49 F. 529, 1 C.C.A. 346.
51 C.J. p 145 note 35.
Necessity of possession generally see infra §§ 26–31.

49. Or.—Comegys v. Hendricks, 106 P. 1016, 55 Or. 533.
51 C.J. p 145 note 37.

50. U.S.—North Star Lumber Co. v. Johnson, D.C.Or., 196 F. 56, affirmed 206 F. 624, 125 C.C.A. 119.
51 C.J. p 145 note 38.

51. N.M.—Pankey v. Ortiz, 195 P. 906, 909, 26 N.M. 575, 30 A.L.R. 92.
51 C.J. p 145 note 40.

52. Mich.—Tabor v. Cook, 15 Mich. 322.
N.M.—Pankey v. Ortiz, 195 P. 906, 909, 26 N.M. 575, 30 A.L.R. 92.

53. Miss.—People's Bank v. West, 7 So. 513, 67 Miss. 739, 8 L.R.A. 727.
51 C.J. p 145 note 42.

54. Wash.—Brown v. Baldwin, 89 P. 483, 46 Wash. 106.
51 C.J. p 145 note 43.

55. Neb.—Mollie v. Peters, 44 N.W. 372, 28 Neb. 670.
51 C.J. p 147 note 63.

56. Ill.—Toledo, etc., R. Co. v. St. Louis, etc., R. Co., 70 N.E. 715, 208 Ill. 623.

57. U.S.—Barnes v. Boyd, D.C.W. Va., 8 F.Supp. 584, affirmed, C.C.A., 73 F.2d 910, certiorari denied 55 S. Ct. 550, 294 U.S. 723, 79 L.Ed. 1254, rehearing denied 55 S.Ct. 647, 295 U.S. 768, 79 L.Ed. 1708.
Ill.—McGookey v. Winter, 46 N.E.2d 84, 381 Ill. 516.
51 C.J. p 146 note 45.

58. Mich.—Hawkins v. Dillman, 258 N.W. 492, 268 Mich. 483.
51 C.J. p 146 note 47.

possession and holds the legal title, so that ejectment will not lie, he may sue in equity to quiet title,[59] and even where the statute authorizes a person in possession of real property to maintain ejectment it has been held that one in actual possession under a superior title may sue in equity to remove a cloud from the title.[60]

Ejectment barred by limitations. Where plaintiff is out of possession, and his right to maintain ejectment is barred by the statute of limitations, a court of equity will not grant a decree quieting his title, such relief being without value when plaintiff cannot recover possession under the title.[61]

(2) Other Remedies

Equity will decline to interfere where there is an adequate remedy by way of writ of entry, trespass to try title, unlawful detainer, or an action for damages.

Generally, where plaintiff may resort to the remedy at law by a writ of entry,[62] or by an action of trespass to try title,[63] or unlawful detainer,[64] such remedies are regarded as plain, adequate, and complete, and equity will decline to interfere; and this is also true where relief may be had in an action to recover damages.[65]

On the other hand, a landowner who seeks to quiet title as against a claim of right of way for a public highway cannot be required to resort to the statutory remedy for abandonment or vacation of a lawfully established highway.[66] Where a mortgagee retains a mortgage which has been paid, asserting that a release given by him is invalid, the mortgagor has no adequate remedy by action at law for slander of title.[67]

Defenses available at law. The owner of land in possession may sue to quiet his title, notwithstanding he may have a defense in a court of law[68] unless such defense is as practical and efficient as the remedy in equity.[69] It has been held that a statute authorizing an action for the purpose of determining an adverse claim to money or property on an alleged obligation does not provide a method for litigating a personal cause of action which plaintiff anticipates may be brought against him, since he has an adequate remedy at law by his day in court when sued.[70]

§ 11. Previous Establishment of Title at Law

The plaintiff ordinarily must have established his title in an action at law before equity will entertain a suit to quiet title or remove a cloud; but under some circumstances or statutes the necessity of a prior establishment of title at law is obviated.

The general rule is that equitable jurisdiction to quiet or remove cloud on title will not be exercised where the parties are not numerous unless it clearly appears that plaintiff has fully and fairly established his title in an action at law.[71] However, an exception has been made where the right is founded on undisputed evidence or long-continued possession[72] or where plaintiff has not been dispossessed or his possession interrupted so as to give him an opportunity of trying his right.[73] Moreover, some authorities have made a distinction in this respect between an action to quiet title and one to remove a cloud, and have held that equity has jurisdiction to remove a cloud where plaintiff is in possession under the better title, although he has not vindicated it at law.[74]

Effect of statutes. The general rule as to the necessity of establishing title at law is held to be abrogated by a statute providing that any person in possession of realty may maintain a suit in equity against another who claims an estate or interest therein adverse to him, for the purpose of

59. Pa.—Pasyotis v. Fromm, Com. Pl., 42 Berks Co.L.J. 75.
W.Va.—Putnam Co. v. Fisher, 36 S.E.2d 681, 128 W.Va. 383.
51 C.J. p 146 note 49.
Necessity of possession generally see infra §§ 26–31.

60. W.Va.—Whitehouse v. Jones, 55 S.E. 730, 60 W.Va. 680, 12 L.R.A., N.S., 49.
51 C.J. p 146 note 51.

61. U.S.—Rudland v. Mastic, C.C. Wash., 77 F. 688.
51 C.J. p 146 note 52.

62. Mass.—Preston v. Newton, 100 N.E. 641, 213 Mass. 483.
51 C.J. p 146 note 53.

63. Mich.—Barron v. Robbins, 22 Mich. 35.
51 C.J. p 147 note 54.

64. Ala.—Sayers v. Tallassee Falls Mfg. Co., 52 So. 892, 167 Ala. 553.
51 C.J. p 147 note 55.

65. U.S.—Ennis-Brown Co. v. Central Pac. R. Co., Cal., 235 F. 825, 149 C.C.A. 137, certiorari denied 37 S.Ct. 21, 242 U.S. 637, 61 L.Ed. 540.

66. Mont.—Warren v. Chouteau County, 265 P. 676, 82 Mont. 115.
51 C.J. p 147 note 57.

67. W.Va.—Gardner v. Buckeye Sav. etc., Co., 152 S.E. 520, 108 W.Va. 673.

68. Fla.—Oslus v. Barton, 147 So. 862, 109 Fla. 556, 88 A.L.R. 594.
Me.—Buswell v. Wentworth, 136 A. 803, 134 Me. 383.
51 C.J. p 147 note 60.

69. Ala.—Greene v. Ikua, 47 So. 255, 157 Ala. 68.
51 C.J. p 147 note 61.

70. S.D.—Morrison v. Connery, 279 N.W. 392, 66 S.D. 458.

71. Md.—Carswell v. Swindell, 52 A. 956, 103 Md. 636.
51 C.J. p 148 note 74 91 C.J. p 65 note 77.

72. U.S.—Holland v. Challen, Neb., 8 S.Ct. 495, 110 U.S. 15, 28 L.Ed. 52.
51 C.J. p 148 note 75.

73. Ill.—Smith v. McConnell, 17 Ill. 135, 139, 63 Am.D. 346.
51 C.J. p 148 note 76.

74. W.Va.—Whitehouse v. Jones, 55 S.E. 730, 60 W.Va. 6, 60, 12 L.R.A., N.S., 49.
Bills to quiet title and to remove clouds distinguished see supra § 2.

determining such claim, estate, or interest,[75] and the same effect has been given to statutes authorizing the action to be maintained by a plaintiff out of possession.[76]

C. WHAT CONSTITUTES CLOUD ON TITLE

§ 12. Existing Cloud

In general, a cloud is the semblance of a title or interest which, although in fact unfounded, nevertheless appears to be valid and casts a doubt on the validity of the record title.

A cloud, such as equity will undertake to remove, is the semblance of a title, either legal or equitable, or a claim of an interest in lands appearing in some legal form, but which is in fact unfounded and which it would be inequitable to enforce;[77] an outstanding claim or encumbrance which, if valid, would affect or impair the title of the owner of a particular estate, and which apparently and on its face has that effect, but which can be shown by extrinsic proof to be invalid or inapplicable to the estate in question.[78] It is something which constitutes an apparent encumbrance on the title or an apparent defect in it;[79] some claim which is apparently valid but which is actually invalid;[80] a semblance of title which is, in fact, unfounded and which casts a doubt on the validity of the record title;[81] something which shows prima facie some right of a third person either to the whole or some interest in the title.[82] The fact that an invalid claim is not actively asserted does not preclude the quieting of title as against it.[83]

Verbal claim or assertion of rights. Except where the statute has enlarged the jurisdiction of equity so as to authorize actions to quiet title against persons asserting any adverse claim, as discussed infra § 38, a mere verbal claim or assertion of ownership or rights in realty does not constitute a cloud on title.[84] However, a cloud is created where defendant's position in respect of the written instrument of record under which he claims is manifested by verbal statements.[85]

A valid claim, which may be enforced in law or in equity, does not cast a cloud on title.[86]

§ 13. —— Necessary Attributes

Equity will not interfere to remove as a cloud on title an instrument or claim the invalidity of which appears on its face or is established conclusively by matters of record; but if the claim is such as to cause a reasonable fear that it may be asserted against the owner injuriously equity takes jurisdiction.

It is generally held that a claim, in order to constitute a cloud on title, must be apparently valid,[87]

75. U.S.—People of Porto Rico v. Livingston, C.C.A.Puerto Rico, 47 F.2d 712, certiorari denied 52 S.Ct 23, 284 U.S. 642, 76 L.Ed. 546.
51 C.J. p 148 note 80.

76. U.S.—Wehrman v. Conklin, Iowa, 15 S.Ct. 129, 155 U.S. 314, 39 L.Ed. 167.
51 C.J. p 148 note 81.

77. Ill.—Hogan v. Orr, 173 N.E. 162, 341 Ill. 58—Hill v. 1550 Hinman Avenue Bldg. Corporation, 282 Ill. App. 109, affirmed 6 N.E.2d 128, 365 Ill. 129.
51 C.J. p 149 note 82.

Other definitions

(1) A cloud on title is something, such as a mortgage, deed, or other instrument, which can be pointed out, and which, as a semblance of title, either legal or equitable, has some appearance of casting a valid objection over true owner's title.—Parker v. Vallerand, 8 A.2d 594, 136 Me. 519.

(2) An instrument in the possession of another, which injures a title, depreciates the market value of the property, and is of such mischievous character that a prospective purchaser would hesitate to purchase, is a cloud on the title.—Anderson v. Guenther, 25 P.2d 146, 144 Or. 446.

(3) Additional definitions.—Gary-Wheaton Bank v. Helton, 35 N.E.2d 472, 337 Ill.App. 294—51 C.J. p 149 note 82 [b].

Question of construction

Where both parties are claiming under the same instrument, and the question is purely one of construction, no case is presented for the removal of a cloud on the title.—Ex parte Darby, 154 S.E. 632, 157 S.C. 434—51 C.J. p 149 note 82 [1].

78. Or.—Corpus Juris quoted in Nehalem Timber & Logging Co. v. Columbia County, 189 P. 212, 215, 97 Or. 100.
51 C.J. p 149 note 82 [b] (3)—11 C.J. p 920 note 79.

79. N.C.—McArthur v. Griffith, 61 S.E. 519, 147 N.C. 545.
51 C.J. p 149 note 83.

80. Tex.—Dalton v. Allen, Civ.App., 56 S.W.2d 205.

81. Ill.—Hill v. 1550 Hinman Ave. Bldg. Corporation, 6 N.E.2d 128, 365 Ill. 129.

82. U.S.—Johnston v. Kramer Bros. & Co., D.C.N.C., 203 F. 793.
51 C.J. p 150 note 84.

83. Md.—Homewood Realty Corporation v. Safe Deposit & Trust Co. of Baltimore, 154 A. 58, 160 Md. 457, 78 A.L.R. 8.

84. Ga.—Collier v. Garner, 170 S.E. 353, 177 Ga. 467.
Ill.—Nelson v. Burns, 255 Ill.App. 314.
Mo.—Eureka Real Estate & Inv. Co. v. Southern Real Estate & Financial Co., 200 S.W.2d 328, 355 Mo. 1199.
N.J.—Corpus Juris cited in Landis v. Sea Isle City, 18 A.2d 841, 844, 139 N.J.Eq. 217.
Pa.—Liddick v. Louden, 52 Pa.Dist. & Co. 402.
W.Va.—Amick v. Gauley Coal Land Co., 194 S.E. 268, 119 W.Va. 485.
51 C.J. p 150 note 91.

Right to another term under lease

Landlord cannot maintain bill to restrain tenant from clouding landlord's title by making statements to prospective tenant concerning right to another term under lease.—Nelson v. Burns, 255 Ill.App. 314.

85. U.S.—Chicago Auditorium Assoc. v. Willing, C.C.A.Ill., 29 F.2d 837, reversed on other grounds 48 S.Ct. 507, 277 U.S. 274, 72 L.Ed. 880.
51 C.J. p 150 note 92.

86. Tex.—Dalton v. Allen, Civ.App., 56 S.W.2d 205.
51 C.J. p 150 note 93.

87. W.Va.—Amick v. Gauley Coal

and that equity will not interfere to remove a cloud on title where the invalidity of the instrument or claim complained of appears on its face,[88] or is established conclusively by matters of record,[89] or where extrinsic facts must be proved for the purpose of establishing its validity,[90] or where the party claiming under it must, in order to recover thereon, necessarily offer evidence inevitably showing its invalidity and destroying its effect.[91] As has been said, some color of title in defendant must be shown in order to constitute a cloud.[92] However, equity will grant relief where the instrument or claim of defendant appears to be valid on its face, and plaintiff, in order to show its invalidity, would be compelled to offer extrinsic evidence,[93] especially if such evidence rests in parol, and is liable to be lost through lapse of time or otherwise.[94]

It has been said that the true test in determining whether or not an instrument or claim constitutes a cloud on title is: Would the owner of the property in an action at law brought by the adverse party, founded on the instrument or claim, be required to offer evidence to defeat a recovery? If such proof would be necessary the cloud would exist; if the proof would be unnecessary, no shade would be cast by the presence of the instrument or claim.[95] The doctrine asserted in some cases is that, if the defect or invalidity is not apparent to the ordinary searcher, but is such as to require legal acumen to discover it, whether it appears on the face of the instrument or record or has to be proved aliunde, the jurisdiction of equity may be invoked to remove the cloud.[96] Where the deed or other instrument sought to be set aside is a mere nullity, but, left in an uncanceled state, may be a cloud on title, it is immaterial whether it was originally invalid by reason of extrinsic facts[97] or has become insufficient by reason of subsequent events not impeaching its original validity, but only destroying its future operation.[98]

The justice of the rule that an instrument or claim void on its face does not constitute a cloud on title has been questioned in some cases,[99] and some authorities have held that equity has jurisdiction to cancel a void instrument whether or not its character as such appears on its face.[1]

Substantial character. The magnitude of the apparent defect in the title is immaterial;[2] it is sufficient if the adverse claim has a tendency, even in a slight degree, to cast a doubt on the owner's title.[3] Nevertheless, the alleged cloud must be prima facie substantial[4] and cast such a suspicion on the title

Land Co., 194 S.E. 268, 119 W.Va. 485.
51 C.J. p 150 note 86.

88. U.S.—Marshall v. Desert Properties Co., C.C.A.Cal., 103 F.2d 551, certiorari denied 60 S.Ct. 74, 308 U.S. 563, 84 L.Ed. 473—Appalachian Electric Power Co. v. Smith, C.C.A.Va., 67 F.2d 451, certiorari denied 54 S.Ct. 458, 291 U.S. 674, 78 L.Ed. 1063.
Ala.—King v. Artman, 144 So. 442, 225 Ala. 569
Mont.—Hart v. Barron, 204 P.2d 797.
Or.—Anderson v. Guenther, 25 P.2d 146, 144 Or. 446.
Pa.—Corpus Juris quoted in Liddick v. Louden, 52 Pa.Dist. & Co. 402, 413.
Vt.—Scully v. Dermody, 8 A.2d 675, 110 Vt. 422.
51 C.J. p 150 notes 86, 94.

89. Mo.—Turner v. Hunter, 122 S.W. 1097, 225 Mo. 71.
Or.—Anderson v. Guenther, 25 P.2d 146, 144 Or. 446.
Pa.—Corpus Juris quoted in Liddick v. Louden, 52 Pa.Dist. & Co. 402, 413.
51 C.J. p 151 note 95.

90. Pa.—Corpus Juris quoted in Liddick v. Louden, 52 Pa.Dist. & Co. 402, 413.
51 C.J. p 151 note 96.

91. Pa.—Corpus Juris quoted in Liddick v. Louden, 52 Pa.Dist. & Co. 402, 413.
51 C.J. p 151 note 97.

92. Pa.—Corpus Juris quoted in Liddick v. Louden, 52 Pa.Dist. & Co. 402, 413.
51 C.J. p 150 note 85.

93. Ala.—May v. Granger, 139 So. 569, 224 Ala. 208.
Md.—Homewood Realty Corporation v. Safe Deposit & Trust Co. of Baltimore, 154 A. 58, 160 Md. 457, 78 A.L.R. 8.
Or.—Anderson v. Guenther, 25 P.2d 146, 144 Or. 446.
51 C.J. p 151 note 98.

Claimed right to open shutters across boundary and right to light and air, if invalid, cast cloud on title of adjoining owner, unless so patently infirm as not to impair title.—Homewood Realty Corporation v. Safe Deposit & Trust Co. of Baltimore, 154 A. 58, 160 Md. 457, 78 A.L.R. 8.

94. N.C.—McArthur v. Griffith, 61 S.E. 519, 147 N.C. 545.
51 C.J. p 152 note 99.

95. N.J.—Corpus Juris quoted in Landis v. Sea Isle City, 13 A.2d 841, 843, 129 N.J.Eq. 217.
51 C.J. p 152 note 1.

Sufficiency to convey legal title
The instrument sought to be canceled as a cloud must be on its face sufficient to convey the legal title so that the person holding under the instrument could maintain an action of ejectment unless defendant in such suit introduced evidence to defeat a recovery. Hardsdale v. Jordan, 43 So.2d 406, 253 Ala. 198.

96. Mo. Schwab v. St Louis, 274 S.W. 1058, 310 Mo. 116.
51 C.J. p 152 note 3.

97. Minn. Forniquet v Forestall, 34 Minn. 87.
N.Y. Stoken v. Houghton, 45 N.Y.S. 21, 16 App.Div. 241

98. Kan. Commercial Nat Bank v. Combs, 216 P. 819, 114 Kan. 82.
51 C.J. p 152 note 4.

99. Md. Homewood Realty Corporation v. Safe Deposit & Trust Co. of Baltimore, 154 A. 58, 160 Md. 457, 78 A.L.R. 8.
51 C.J. p 152 note 6.

1. W.Va. Gilbert v. McCreary, 104 S.E. 273, 87 W.Va. 56, 21, 13 A.L.R. 1172.
51 C.J. p 152 note 7.

2. Mich. Emig v. Frank P. Miller Corp., 214 N.W. 144, 238 Mich. 695
51 C.J. p 150 note 87.

3. Mich.—Whitney v. Port Huron, 50 N.W. 316, 88 Mich. 262, 26 Am.S.R. 291.
51 C.J. p 150 note 88.

4. Va.—Patch v. Morrisett, 22 S.E. 173,

or interest to which it is hostile[5] as will injuriously affect the market value of the property[6] or seriously embarrass the owner either in disposing of the property[7] or in maintaining his rights.[8] An idle or groundless suspicion or baseless fear is not sufficient to warrant the cancellation of an instrument as a cloud on title.[9] In other words, if the claim constituting the alleged cloud is such as to cause a reasonable fear that it may at some time be asserted against the owner vexatiously or injuriously, equity has jurisdiction;[10] but, if the instrument or claim complained of is not one which, presently, or in the future, will embarrass plaintiff or endanger his title, equity will refuse to entertain the suit.[11]

§ 14. —— Particular Instruments or Matters

a. In general
b. Contract or option for purchase of land
c. Deeds
d. Execution sale
e. Foreclosure sale
f. Judgments or decrees
g. Mortgages
h. Taxes and assessments
i. Wills and contracts to devise

a. In General

General rules apply in determining whether a particular instrument or matter constitutes a cloud on title.

General rules apply in determining whether particular instruments or matters constitute a cloud on title.[12] So-called caveats filed in the land records, which state that plaintiff had no lawful claim to the property, but which in fact are neither caveats nor lis pendens, have been held to constitute clouds on plaintiff's title.[13]

Administrator's sale. Where a sale of estate lands by an administrator is void and the conveyance discloses its invalidity, it casts no cloud on title of which equity will take cognizance.[14] Likewise, a sale of land by an administrator without an order of the probate court,[15] or under an order which is void for want of jurisdiction,[16] is not such a cloud on title as will justify the interference of a court of equity. However, where an administrator's deed, although fraudulently executed, is by statute made prima facie evidence of the regularity of the proceedings prior to the sale, it creates a cloud on the title of an heir, which he may have removed by proceedings in equity.[17]

Attachment proceedings. Where the parties seek

5. Ky.—Campbell v. Disney, 18 S.W. 1027, 93 Ky. 41.
51 C.J. p 153 note 11.

6. U.S.—Lyon v. Alley, D.C., 9 S.Ct. 480, 130 U.S. 177, 32 L.Ed. 899.
51 C.J. p 153 note 12.

7. Md.—Rosenthal v. Donnelly, 94 A. 1030, 126 Md. 147.
51 C.J. p 153 note 13

8. U.S.—Lamb v. Farrell, C.C.Ark., 21 F. 5.
51 C.J. p 153 note 14.

9. Miss.—Ring v. Watson, 107 So. 6, 143 Miss. 281.
51 C.J. p 150 note 89.

10. Ala.—Corpus Juris cited in Bates v. Bates, 24 So.2d 440, 441, 247 Ala. 337.
51 C.J. p 153 note 15.

Ordinance affecting use, sale, and value of property

Where action to quiet title was brought to determine validity of ordinance containing building restrictions which limited use, obstructed sale, and depreciated value of property, relief sought was both preventive and remedial, so that action could not be dismissed on ground that cause sought to be removed must be an anticipated or apprehended danger to title.—Bank of America Nat. Trust & Savings Ass'n v. Town of Atherton, 140 P.2d 673, 60 Cal.App.2d 268.

11. W.Va.—Amick v. Gauley Coal Land Co., 194 S.E. 268, 119 W.Va. 485.
51 C.J. p 153 note 16.

12. **Matters or claims constituting clouds**

(1) Plat recorded with statement thereon that land is claimed through adverse possession.—Day v. Proprietors of Swan Point Cemetery, 153 A. 312, 51 R.I. 213.

(2) Recorded plats, purporting to subdivide lands for purpose of establishing claim of dedication of streets.—North Bay Shore Land Co. v. Pollard, 128 So. 809, 99 Fla. 1287.

(3) Orders of federal power commission, relating to use and enjoyment of property of power company.—Appalachian Electric Power Co. v. Smith, D.C.Va., 4 F.Supp. 3.

(4) Levy and recording of writ of execution on husband's separate realty for satisfaction of judgment against wife.—Gudger v. Manton, 134 P.2d 217, 21 Cal.2d 537.

(5) Fieri facias issued for costs of prosecution.—Land v. Jolley, 166 S.E. 217, 175 Ga. 788.

(6) Other matters or claims.
Mich.—Mark v. Bradford, 28 N.W. 2d 201, 315 Mich. 50.
W.Va.—Maze v. Bennett, 171 S.E. 249, 114 W.Va. 169.
51 C.J. p 149 note 82 [c].

Matters or claims not constituting clouds

(1) Ordinance offering to railroad land on which it was proposed to construct stadium.—Meyer v. City of Cleveland, 171 N.E. 606, 35 Ohio App. 20.

(2) A self-serving declaration in the form of a writing filed in an orphans' court.—Liddick v. Louden, 52 Pa.Dist. & Co. 402.

(3) Other matters or claims.
U.S.—Port Angeles Western R. Co. v. Clallam County, Wash., C.C.A. Wash., 44 F.2d 28, certiorari denied 51 S.Ct. 495, 283 U.S. 848, 75 L.Ed. 1457.
Mont.—Hart v. Barron, 204 P.2d 797.
N.Y.—People v. Butler, 120 N.Y.S. 302, 135 App.Div. 222.
Tex.—Stradley v. Magnolia Petroleum Co., Civ.App., 155 S.W.2d 642, error refused.
51 C.J. p 149 note 82 [g].

13. Conn.—Laudano v. Laudano, 142 A. 407, 108 Conn. 37.

14. Ala.—Woods v. Legg, 8 So. 342, 91 Ala. 511.
51 C.J. p 162 note 51.

15. Ala.—Florence v. Paschal, 50 Ala. 28.

16. Fla.—Sloan v. Sloan, 5 So. 603, 25 Fla. 53.
51 C.J. p 162 note 53.

17. Wis.—Hoffman v. Wheelock, 22 N.W. 712, 716, 62 Wis. 434.
Personal representative's conveyance of decedent's land as evidence see Executors and Administrators § 653.

to remove all liens and encumbrances, if any, created by proceedings in attachment, and so to quiet their title, equity has jurisdiction[18] However, where attachment proceedings are void on their face, they do not constitute a cloud on the title.[19] An action to remove a cloud on title will not lie in favor of one claiming perfect title to lands against another attaching it as the property of a third person, since it does not constitute a cloud on title.[20] Where a statute provides for cancellation of an instrument when there is a reasonable apprehension that, if left outstanding, it may cause injury to one against whom it is void, but declares that the provision shall not apply to an instrument the invalidity of which is apparent on its face, an attachment against the owner of buildings on land belonging to another is not ground for an action to remove a cloud on the title, if it constitutes no lien because improperly levied.[21]

Dower claims. When the invalidity of a claim of dower in land does not appear on the record, but can only be shown by extrinsic evidence, a bill in equity to remove such claim as a cloud on title will lie;[22] and this applies to an inchoate right of dower,[23] especially under statutes enlarging the jurisdiction of equity.[24]

Easements. An unfounded claim of an easement may cast a cloud on the title of the servient estate;[25] and, where defendant has claimed certain easements with respect to land, the fact that plaintiff might establish that the purported easements do not actually exist does not deprive chancery of its jurisdiction.[26]

Judicial proceedings in general. Where a valid objection appears on the face of proceedings at law through which the adverse party can alone claim title to plaintiff's land,[27] or where the invalidity of the proceedings would be manifest on the proof which a claimant under such proceedings would be compelled to make in support of his claim,[28] there is not in law such a cloud on the title as to give equity jurisdiction to set aside the proceedings; but, where the claim of the adverse party to the land is valid on the face of proceeding sought to be set aside, and extrinsic facts are necessary to show their invalidity, a case is made out for the interference of equity.[29] Title may be quieted as against one claiming title under foreclosure proceedings which purported to, but which did not in fact, divest the owner of title.[30] The filing of a suit to quiet title is not a cloud on defendant's title which will warrant the court in granting him affirmative relief, where the amended answer praying for such relief sets up only matters which could be urged in defense of the pending suit.[31]

Leases and contracts therefor. The general rules as to what constitute clouds on title apply to leases and contracts to lease.[32] Whenever proof of extrinsic facts is necessary to establish that an outstanding lease, regular on its face, was invalid at its inception,[33] or, although originally valid, has, by subsequent events, become functus officio,[34] it constitutes a cloud on title. The same instrument may create both the title and the cloud thereon.[35] Thus

18. Iowa.—Blott v. Blott, 290 N.W. 74, 227 Iowa 1103.
51 C.J. p 166 note 6.

19. Mont.—Newman v. Northern Montana Credit Men's Assoc., 208 P. 914, 63 Mont. 545.
N.Y.—Beardslee v. Ingraham, 76 N. E. 476, 183 N.Y. 411, 3 L.R.A.,N.S., 1073.

20. N.J.—Maisch v. Hoffman, 7 A. 340, 42 N.J.Eq. 116.
51 C.J. p 166 note 8.

21. Mont.—Newman v. Northern Mont. Credit Men's Assoc., 208 P. 914, 63 Mont. 545.

22. Iowa.—Corpus Juris quoted in Donnelly v. Nolan, 15 N.W.2d 924, 927, 235 Iowa 30.
Pa.—In re Horst's Estate, Orph., 50 Lanc.Rev. 263.
51 C.J. p 160 note 14.

23. Iowa.—Corpus Juris quoted in Donnelly v. Nolan, 15 N.W.2d 924, 927, 235 Iowa 30.
51 C.J. p 160 note 15.

24. Iowa.—Corpus Juris quoted in Donnelly v. Nolan, 15 N.W.2d 924, 927, 235 Iowa 30.
N.C.—Southern State Bank v. Sumner, 122 S.E. 848, 187 N.C. 762.
Nature of adverse claim against which relief may be had under statute generally see infra § 38.

25. Md.—Homewood Realty Corporation v. Safe Deposit & Trust Co. of Baltimore, 154 A. 53, 160 Md. 457, 78 A.L.R. 8.

26. Md.—Homewood Realty Corporation v. Safe Deposit & Trust Co. of Baltimore, supra.

27. Ala.—Henderson v. Holman, 69 So. 424, 193 Ala. 262.
51 C.J. p 165 note 1.

28. N.Y.—Beardslee v. Ingraham, 76 N.E. 476, 183 N.Y. 411, 3 L.R.A., N.S., 1073.

29. Cal.—Veale v. Young, 185 P.2d 81, 81 Cal.App.2d 748.
Ga.—Allen v. Pittard, 161 S.E. 260, 173 Ga. 716.
Va.—Watson v. Mone, 182 S.E. 428, 165 Va. 661.
51 C.J. p 165 note 2.

30. Cal.—Bishop v. Hayward Lumber & Investment Co., 65 P.2d 135, 19 Cal.App.2d 224.

31. Tex. Donnelly v. Jeffrey, Civ. App., 283 S.W. 361.

32. Ill. Nelson v. Burns, 225 Ill. App. 314
Iowa.—John Hancock Mut. Life Ins. Co. v. Behr, 295 N.W. 456, 229 Iowa 900
51 C.J. p 168 note 37.
Quieting title to property held under oil or gas lease see Mines and Minerals § 207.

33. Tex.—Osborn v. Texas Pac. Coal, etc., Co., Civ.App., 229 S.W. 349.
51 C.J. p 168 note 38.

34. Cal.—Riedman v. Barkwill, 24 P.2d 744, 139 Cal.App. 544
Ga.—Hardin v. Chamblin, 42 S.E.2d 566, 202 Ga. 247.
Iowa.—Corpus Juris cited in Bates v. Bates, 24 N.W.2d 468, 483, 227 Iowa 1408.
N.Y.—Law Center v. Trust Co. of North America, 84 N.Y.S.2d 577.
51 C.J. p 169 note 39.

35. U.S.—Chicago Auditorium Assoc. v. Willing, C.C.A.Ill., 29 F.2d 837, reversed on other grounds

a provision in a long-term lease which the lessor asserts denies the lessee the right to replace buildings thereon, and which is susceptible of such construction, is a cloud on the lessee's title.[36] However, there is no cloud on title where a lease or contract therefor is void on its face,[37] or where extrinsic facts must be proved in order to establish its validity.[38] A lease or contract therefor which is valid and enforceable is not a cloud on the lessor's title.[39]

Lis pendens. An owner or lessee of real estate is entitled to maintain a suit to set aside a lis pendens as a cloud on his title,[40] unless he purchased pending the suit from the person against whom the decree was rendered.[41]

Mechanics' liens. A mechanic's lien, apparently valid on its face and requiring extrinsic evidence to show its invalidity, constitutes a cloud on title.[42] So equity will remove a cloud on the title caused by the record of a mechanic's lien which has become forfeited by the lien claimant's failure to institute foreclosure proceedings.[43]

Trusts. Where a trust is apparently valid and the facts necessary to show its invalidity must be proved by extrinsic evidence, it constitutes a cloud on title.[44] However, an instrument creating a trust is not a cloud on title where its invalidity appears on its face.[45] So no cloud on title is created by a paper recorded in a registry of deeds, giving notice that certain realty is claimed to be a trust, in favor of the signer and others, and that he will dispute any title which the holder of the present title will attempt to give.[46] On the other hand, it has been held that the existence of an instrument creating a valid trust, once capable of execution, but which has become incapable of execution by reason of the death of the person having the power of appointment, without exercising such power, does not present a proper case for the exercise of equitable jurisdiction because of the necessity of resorting to extrinsic evidence to establish the extinguishment of the power.[47]

Although the court will ordinarily refuse to decree a conveyance from a nominal trustee to one who purchases from the beneficiary, as being a cloud on the purchaser's title, in cases where the legal estate is vested in the beneficiary by force of law,[48] when a nominal trust beclouds the title and embarrasses the rights of alienation, a conveyance will be decreed.[49]

b. Contract or Option for Purchase of Land

A contract or option for the purchase of land, at least if recorded and apparently valid, may constitute a cloud on title; but, if void on its face, it does not constitute a cloud.

A contract for the sale of land may constitute a cloud on title against which the landowner may be entitled to have his title quieted.[50] Thus, where a recorded contract is not void on its face, and its invalidity can be shown only by extrinsic evidence,[51] as where a contract placed in escrow is wrongfully recorded,[52] it is a cloud on title which equity has

48 S.Ct. 507, 277 U.S. 274, 72 L.Ed 880.

36. U.S.—Chicago Auditorium Assoc. v. Willing, supra.
51 C.J. p 159 note 91.

37. Cal.—Glos v. McBride, 191 P. 67, 47 Cal.App. 688.
51 C.J. p 159 note 92.

38. N.Y.—Elkhorn Valley Coal-Land Co. v. Empire Coal, etc., Co., 181 N.Y.S. 132, 191 App.Div. 230.
51 C.J. p 159 note 93.

39. Ill.—Hill v. 1550 Hinman Ave. Bldg. Corporation, 6 N.E.2d 128, 365 Ill. 129—Nelson v. Burns, 255 Ill.App. 314.
51 C.J. p 159 note 94.

Estoppel
Plaintiff was not entitled to relief in suit to remove cloud on title and have lease canceled on ground that lessee was estopped by conduct to assert any rights under lease where, by plaintiff's own proof, lessee was not estopped from asserting all rights under the lease.—Buswell v. Wentworth, 186 A. 808, 134 Me. 383.

40. U.S.—Colquitt v. Roxana Petroleum Corporation, C.C.A.Tex., 49 F. 2d 1025, certiorari denied 52 S.Ct. 43, 284 U.S. 669, 76 L.Ed. 566.
51 C.J. p 166 note 12.

41. Tenn.—Fitzgerald v. Cummings, 1 Lea 282.

42. U.S.—Corpus Juris cited in Suburban Improvement Co. v. Scott Lumber Co., C.C.A.W.Va., 59 F.2d 711, 716, 87 A.L.R. 555, certiorari denied Scott Lumber Co. v. Suburban Imp. Co., 53 S.Ct. 123, 287 U.S. 660, 77 L.Ed. 569.
Mo.—Center Creek Min. Co. v. Coyne, 147 S.W. 148, 164 Mo.App. 492.

43. N.D.—Sheets v. Prosser, 113 N. W. 72, 16 N.D. 180.

44. N.Y.—Colt v. Grey, 25 Hun 444.
51 C.J. p 159 note 97.

45. Miss.—Methodist Episcopal Church South v. Odom, 56 So. 314, 100 Miss. 64.
N.Y.—Hotchkiss v. Elting, 36 Barb. 38.

46. Mass.—Nickerson v. Loud, 115 Mass. 24.
51 C.J. p 159 note 99.

47. N.Y.—Hotchkiss v. Elting, 36 Barb. 38.

48. N.Y.—Ring v. McCoun, 10 N. Y. 268.

49. Mo.—McGuire v. Nugent, 15 S. W. 551, 103 Mo. 161.
51 C.J. p 159 note 3.

50. Cal.—Grimes v. Steele, 133 P.2d 874, 56 Cal.App.2d 786—Fisher v. Chaffee, 121 P.2d 51, 49 Cal.App.2d 97—Hacienda Homes v. Peck, 113 P.2d 487, 45 Cal.App.2d 37.
Neb.—Kear v. Hausmann, 41 N.W. 2d 850, 152 Neb. 513.
N.Y.—In re De Stuers' Estate, 99 N. Y.S.2d 739.
Ohio.—Peck v. Williams, 72 N.E.2d 562, 82 Ohio App. 35.
Wash.—Hopper v. Williams, 179 P. 2d 283, 27 Wash.2d 579.

51. Fla.—Griffing v. Griffing, 163 So. 141, 120 Fla. 913.
Ill.—Hogan v. Orr, 178 N.E. 162, 341 Ill. 58.
Mich.—Fix v. Amiot, 231 N.W. 114, 251 Mich. 134.
Or.—Williams v. Barbee, 106 P.2d 1033, 165 Or. 260.
51 C.J. p 160 note 21.

52. Ill.—Lane v. Lesser, 26 N.E. 522, 135 Ill. 567.
51 C.J. p 160 note 22.

jurisdiction to remove; and this applies to a contract which was originally valid but has become inoperative by abandonment, forfeiture, or other subsequent event.[53] However, if a recorded executory contract for sale of land is void on its face,[54] or its invalidity will necessarily appear in the proceeding by one claiming under it and attempting its enforcement,[55] it does not constitute a cloud on title. Title will not be quieted as against a contract of purchase on the ground of a default of the purchaser under the contract where the vendor had waived the right to declare a forfeiture because of such default.[56]

An option to purchase land, filed for record, is a cloud on the title of the owner where it has not been exercised within the time and in the manner provided therein.[57] An unacknowledged contract of option or sale signed by a married woman concerning her separate property, and the public record thereof, may constitute such a cloud on her title as will entitle her to maintain a bill for its removal, although such instrument was not entitled to be recorded.[58]

An unrecorded contract for the sale or exchange of lands ordinarily is not a cloud on the title.[59] However, a bona fide purchaser of land without knowledge of an outstanding unrecorded contract for the sale of the land has been held entitled to have his title quieted as against any claims under the unrecorded contract.[60]

Forged assignment of a contract to buy land, recorded by the assignee, constitutes a cloud on the title of the person whose signature was forged, entitling him to have his title quieted by a cancellation of the assignment.[61]

c. Deeds

An outstanding deed, apparently valid, but in fact invalid because of fraud, duress, undue influence, forgery, or other reason, generally constitutes a cloud on title justifying the intervention of equity.

Where a deed is apparently valid, and its invalidity can be shown only by the introduction of extrinsic evidence, it is a cloud on title justifying the intervention of equity,[62] notwithstanding such

53. Fla.—Pierce & Stevenson v. Jones, 147 So. 842, 109 Fla. 517, 88 A.L.R. 192.
La.—Succession of Darton, 1 La.A. (Orleans) 144.
Md.—Suburban Garden Farm Homes Corporation v. Adams, 188 A. 808, 171 Md. 212.
Minn.—Corpus Juris cited in Union Central Life Ins. Co. v. Page, 251 N.W. 911, 914, 190 Minn. 360.
Neb.—Johnson v. Norton, 42 N.W.2d 622, 152 Neb. 714—Wilcot v. Pounds, 8 N.W.2d 211, 142 Neb. 882.
Or.—Williams v. Barbee, 106 P.2d 1033, 165 Or. 260.
Pa.—Montgomery v. Mahjoubian, 8 Pa.Dist. & Co. 833.
51 C.J. p 160 note 23.

Failure to cancel on abandonment

A written contract to sell real estate, recorded in the office of the register of deeds and not canceled when the contract is abandoned, casts a cloud on the vendor's title, authorizing a suit by him to quiet title.
Neb.—Rakow v. Tate, 140 N.W. 162, 93 Neb. 198.
N.M.—Corpus Juris quoted in Dunken v. Guess, 56 P.2d 1123, 1125, 40 N.M. 156.

Sale of growing timber

Where contract for sale of growing timber obligated purchaser to log specified quantity of timber and stipulated that, in event of purchaser's default, sellers might terminate agreement by giving notice or bring suit in equity to foreclose contract, trustees, to whom sellers conveyed land and assigned their interest in contract, could maintain suit to quiet title to land after default of assignee of purchaser's interest in contract.—Williams v. Barbee, 106 P.2d 1033, 165 Or. 260.

54. Kan.—Banister v. Fallis, 116 P. 822, 85 Kan. 320.
51 C.J. p 160 note 19.

Unacknowledged contract

The record of an unacknowledged contract for sale of realty would not be a cloud on title of grantor thereunder.—Lassiter v. Curtiss-Bright Co., 177 So. 201, 129 Fla. 728.

55. N.Y.—Washburn v. Burnham, 63 N.Y. 132.

56. Cal.—Gonzalez v. Hirone, 200 P. 2d 793, 33 Cal.2d 218.

57. Ala.—McDonald v. Birmingham Trust & Savings Co., 194 So. 839, 239 Ala. 369.
Fla.—Keene v. Latimer, 136 So. 831, 103 Fla. 841.
51 C.J. p 161 note 24.

Nonperformance by optionors

On question whether optionors who were not in possession could maintain suit to cancel option as a cloud on title, optionee could not base his claim to extension of option on nonperformance by optionors, if his own acts caused nonperformance according to terms of option, and his claim that option was still in force was a waiver of time limit for performance by optionors.—McDonald v. Birmingham Trust & Savings Co., 194 So. 839, 239 Ala. 369.

58. Fla.—Keene v. Latimer, 136 So. 831, 103 Fla. 841.

59. Ill. Forest Preserve Real Estate Improvement Corporation v. Miller, 41 N.E.2d 526, 379 Ill. 376—Howe v. Hutchinson, 105 Ill. 501.

60. Ark.—Delonis v. Smith, 218 S.W.2d 361, 214 Ark. 884.

61. Or. Whitney v. Whitney, 235 P. 393, 114 Or. 103.

62. Ala. Randolph v. Randolph, 18 So.2d 555, 245 Ala. 688.
Ark.—Harris v. Collins, 150 S.W.2d 749, 202 Ark. 146.
Cal.—Vanderlip v. Los Molinos Land Co., 133 P.2d 407, 56 Cal.App.2d 747.
Ill.—Johnson v. Masterson, 72 N.E.2d 401, 397 Ill. 168.
Mich. Pavela v. Balogh, 15 N.W.2d 673, 309 Mich. 264.
Mo.—Frey v. Onstott, 210 S.W.2d 87, 357 Mo. 721.
N.J.—Morewood, Inc., v. Donshaw, 50 A.2d 459, 139 N.J.Eq. 147, application denied 59 A.2d 549, 142 N.J.Eq. 138.
N.Y.—Davis v. Quinn, 156 N.Y.S. 422, 170 App.Div. 489.
Pa.—Swart v. Hafer, Com.Pl., 36 Berks Co. 39, 59 York Leg.Rec. 105—Bereiter v. McGarrity, Com.Pl., 8 Pay.L.J. 221.
Vt.—Scully v. Dormody, 8 A.2d 675, 110 Vt. 422.
W.Va.—Bennett v. Neff, 43 S.E.2d 793, 130 W.Va. 121.
51 C.J. p 154 note 25.

Deed in hands of third person

Equity may declare deed in hands of third person claiming no interest therein void as against grantor, where delivery would only constitute

deed would not support an action in ejectment.[63] A deed valid on its face constitutes a cloud on title if delivered, although it was not recorded;[64] and the record of an apparently valid deed is a cloud on title although it was not delivered.[65] If a deed, apparently valid on its face, is in reality based on an illegal consideration, it constitutes a cloud on title.[66]

A deed executed by an agent under a power not coupled with an interest, after the death of the principal, but antedated, constitutes a cloud on title which a court of equity will remove.[67] A deed which, originally valid, becomes inoperative by subsequent events is a cloud on title.[68] So, where a conveyance has been rescinded by redelivery of the deed to the grantor and unequivocal acts of abandonment on the part of the grantee, the deed constitutes a cloud on the grantor's title which equity will remove.[69] Alteration of a deed by the grantor after its delivery to a third person for the grantee, by the insertion of the name of an additional grantee, creates a cloud on the title of the original grantee;[70] and the same is true where the grantor's agent to whom a deed was delivered for delivery to the grantee on completion of payments erased the latter's name and inserted the name of a new grantee without the knowledge or authority of the grantor.[71]

Although, in some jurisdictions, equity has assumed jurisdiction to cancel deeds void on their face,[72] it is generally held that a conveyance, in order to be a cloud on title, must constitute an apparent title, and that equity will not intervene to cancel or remove as a cloud on title a deed which is void on its face;[73] nor will equity intervene, even though the invalidity does not appear on the face of the deed, if the invalidity necessarily appears in some of the links of title which one claiming under the deed would have to establish in order to give it force and effect.[74] If a deed describes the land so indefinitely as to render it void on its face, it does not constitute a cloud which equity will remove.[75] Equity will not interfere where the purpose of the deed is clear and it cannot operate presently or in the future to the injury of the true owner.[76] A deed executed by a mere stranger to the title does not constitute a cloud thereon,[77] at least under ordinary circumstances;[78] but this rule is not of universal application.[79]

cloud on grantor's title.—Johnson v. Walden, 173 N.E. 790, 342 Ill. 201.

Inoperative reservation

Where deed reserved "the graveyard situated on" the realty, to be used as a burial place by the grantor and his heirs with free ingress and egress, and grantor was not buried on the realty and no graveyard could be found thereon, and there was no evidence that bodies were ever interred there, reservation was inoperative, and cloud on title of the realty as result of the reservation, was removed.—McDonough v. Roland Park Co., 57 A.2d 279, 189 Md. 659.

63. Ala.—Prestwood v. Horn, 70 So. 134, 195 Ala. 450.

64. Ky.—Goodloe v. Black, 54 S.W. 957, 21 Ky.L. 1286.
Wash.—Crowley v. Byrne, 129 P. 113, 71 Wash. 444.

Availability of other remedies

The alleged fact that innocent purchaser for value without notice of prior unrecorded deed could have rescinded the purchase from his grantor and could have been restored to status quo, or could have proceeded against his grantor for breach of warranty, did not preclude him from maintaining an action to quiet title against the grantees of the unrecorded deed.—Freligh v. Billmeyer, 4 N.W.2d 392, 231 Iowa 1207.

65. Tex.—Sgitcovich v. Sgitcovich, Civ.App., 229 S.W.2d 183, error refused, no reversible error.
51 C.J. p 155 note 29.

66. Tenn.—Johnson v. Cooper, 2 Yerg. 524, 24 Am.D. 502.

67. Ala.—Saltmarsh v. Smith, 32 Ala. 404.

68. Ind.—Jancovech v. Christensen, 195 N.E. 287, 100 Ind.App. 299.
Mo.—Dickerson v. Dickerson, 110 S.W. 700, 211 Mo. 483.

Accomplishment of specific purpose

Where all parties agreed that a deed conveyed the bare legal title for specific purpose of enabling grantee to qualify as surety on bond and that purpose for which legal title was conveyed had been accomplished and reason for holding legal title in such manner had ceased to exist since grantee had been discharged as surety, court did not err in canceling deed.—Whitaker v. Whitaker, 167 P.2d 895, 196 Okl. 689.

Failure to record senior deed

A senior unrecorded deed which loses its priority over a junior recorded deed for value from same vendor, taken without knowledge or notice of existence of senior deed, may in a proper case be canceled as cloud on title at instance of grantor in junior recorded deed.—Terry v. Ellis, 7 S.E.2d 282, 189 Ga. 698.

69. Tenn.—Huffman v. Huffman, 1 Lea 491.

70. Md.—Clark v. Creswell, 76 A. 579, 112 Md. 339, 21 Ann.Cas. 333.

71. N.D.—Smith v. Fladeland, 214 N.W. 42, 55 N.D. 433.

72. W.Va.—Whitehouse v. Jones, 55 S.E. 730, 60 W.Va. 680, 12 L.R.A., N.S., 49.
51 C.J. p 154 note 20.

73. Ga.—Domin v. Brush, 161 S.E. 809, 174 Ga. 32.
N.Y.—Nehasane Park Assoc. v. Lloyd, 60 N.E. 741, 167 N.Y. 439.
51 C.J. p 154 note 18.

74. Mo.—Jewett v. Boardman, 81 S.W. 186, 181 Mo. 647
51 C.J. p 154 note 19.

75. Ill.—St. Louis Bridge Co. v. Curtis, 103 Ill. 410.
Pa.—Trustees v. Bell, Com.Pl., 20 Leh.L.J. 199.
51 C.J. p 154 note 22.

76. Mass.—Hardy v. Sanborn, 52 N.E. 517, 172 Mass. 405.
51 C.J. p 157 note 58.

77. Ohio.—Horton v. Matheny, 51 N.E.2d 41, 72 Ohio App. 187.
51 C.J. p 154 note 21.

78. Md.—Homewood Realty Corporation v. Safe Deposit & Trust Co. of Baltimore, 154 A. 58, 160 Md. 457, 78 A.L.R. 8.

79. Md.—Homewood Realty Corporation v. Safe Deposit & Trust Co. of Baltimore, supra.

Creation of doubt in reasonably prudent man

Chancery will remove cloud cast by deed of stranger if pretension under circumstances would create doubt in mind of reasonably prudent man.—Homewood Realty Corporation v. Safe Deposit & Trust Co. of Baltimore, supra.

Fraud, duress, or undue influence. A deed valid on its face, but in fact fraudulent,[80] or procured by undue influence,[81] or duress,[82] is a cloud on the title of the true owner which equity will remove, although the fraud becomes immaterial where defendant relies on a valid sheriff's deed on foreclosure, and not on the fraudulent deed.[83] So a conveyance in fraud of the grantor's creditors is a cloud on the title obtained through appropriate proceedings by the creditors to enforce their debts.[84] On the other hand, it has been held that, where a debtor conveys land with intent to defraud his creditors, and they proceed to have the land sold, treating the conveyance as void, one who purchases at the execution sale is not entitled to come into equity to have the fraudulent deed brought in and canceled as a cloud on his title.[85] A deed, apparently valid, need not have been procured by fraud in order to warrant setting it aside as a cloud on title.[86]

Forgery; false certificate. A forged deed, regular and valid on its face,[87] and which has been recorded,[88] may be canceled in equity as a cloud on the title of the true owner. An action can be maintained to cancel as a cloud on title a forged deed which has been recorded on the strength of a false certificate of acknowledgment made by one duly authorized to take acknowledgments of deeds.[89]

Failure to perform conditions precedent. Generally, a contract imposing a burden on, or vesting a right in, land on performance of a condition precedent under which, because of failure to perform the condition, no right, title, or interest has vested or ever can vest, will be canceled as a cloud on the owner's title.[90] When an instrument in the form of a conveyance on condition precedent has been recorded by the grantee, who is asserting rights thereunder, although no estate ever vested in him because the condition was not performed, these facts resting on extrinsic evidence, equity will decree a cancellation at the instance of the grantor.[91] So, too, where the grantee in a deed containing a condition precedent has failed to comply with the terms of the grant, or has abandoned the estate, and the grantor is in possession, the latter may maintain a bill in equity to cancel the deed as a cloud on title.[92]

Delivery in escrow. A deed made in the course of negotiations for the sale of land, delivered only as an escrow and by some means finding its way on the record,[93] either by accident or mistake,[94] or through fraud,[95] is such a cloud on the grantor's title as will entitle him to have it canceled on the failure of the negotiations.

Including lands by mistake. Equity will quiet title to that part of a tract of land included by a mistake in a conveyance regular on its face,[96] at least, where complainant and his grantors have remained in possession ever since the conveyance was made.[97] On the other hand, it has been held that a mistake in the description of land, insufficient to defeat the grantee's legal title, does not constitute a cloud which will justify a resort to equity.[98]

Building restrictions in a deed may, owing to changed conditions, constitute a cloud on title which

80. Ga.—Greenwood v. Starr, 163 S.E. 500, 174 Ga. 503.
Ind.—Kratli v. Booth, 191 N.E. 180, 99 Ind.App. 178.
51 C.J. p 156 note 39.
Constructive fraud
Iowa.—Lampman v. Lampman, 91 N.W. 1042, 113 Iowa 140.

81. Ala.—Noel v. Noel, 155 So. 362, 229 Ala. 20.
51 C.J. p 156 note 40.

82. Cal.—Regoli v. Fancher, 66 P.2d 214, 19 Cal.App.2d 673.

83. Cal.—Morrissey v. Gray, 124 P. 246, 162 Cal. 638.

84. Mo.—Spear v. Spear, 54 A. 1106, 97 Mo. 493.
51 C.J. p 156 note 42.

85. N.C.—Thigpen v. Pitt, 54 N.C. 49.

86. Ill.—Little v. Eaton, 108 N.E. 727, 267 Ill. 623.

87. Kan.—Corpus Juris cited in Cox v. Watkins, 87 P.2d 242, 247, 149 Kan. 309.
51 C.J. p 156 note 45.
Fraudulent misrepresentation amounting to forgery
Where warranty deed to prior grantee because of mutual mistake contained a wrong description and subsequent quitclaim deed conveying realty intended to be conveyed by warranty deed executed by grantor to different grantee was procured by fraudulent misrepresentation amounting to forgery in second degree, title was quieted against deeds of subsequent purchasers based on quitclaim deed.—Grather v. La Rue, 191 P.2d 214, 200 Okl. 151.

88. Kan.—Corpus Juris cited in Cox v. Watkins, 87 P.2d 242, 247, 149 Kan. 309.
51 C.J. p 156 note 46.

89. N.Y.—Remington Paper Co. v. O'Dougherty, 81 N.Y. 474.
51 C.J. p 156 note 47.

90. W.Va.—Adams v. Guyandotte Valley R. Co., 61 S.E. 341, 64 W.Va. 181.

91. W.Va.—Adams v. Guyandotte Valley R. Co., supra.

92. Miss.—Vicksburg, etc., R. Co. v. Ragsdale, 54 Miss 290.

93. Cal.—Brown v. Wilson, 265 P. 351, 89 Cal.App. 764.
51 C.J. p 157 note 52.
Contract for sale of land placed in escrow see supra subdivision b of this section.

94. Mo.—Bates v. Roberts, 87 S.W. 914, 189 Mo. 49.
51 C.J. p 157 note 53.

95. Okl.—Hallam v. Bailey, 166 P. 874, 65 Okl. 46.
51 C.J. p 157 note 54.

96. Colo.—Hitchens v. Milner Land, etc., Co., 178 P. 575, 68 Colo. 597.
51 C.J. p 157 note 55.

97. Cal.—Smith v. Matthews, 23 P. 469, 81 Cal. 120.
Colo.—Hitchens v. Milner Land, etc., Co., 178 P. 575, 68 Colo. 597.

98. Ala.—Bevans v. Henry, 49 Ala. 123.

equity will remove.[99] So a building restriction which has become unenforceable because of changed conditions in the use of the land for the benefit of which it was established may be removed as a cloud on title.[1] On the other hand, it has been held that a court of equity will not cancel building restrictions merely because the property, by reason of changed conditions, would be more valuable if put to uses prohibited by the restrictions.[2]

d. Execution Sale

An apparently valid execution sale, the invalidity of which can be shown only by extrinsic proof, may constitute a cloud on title which equity will remove.

A bill in equity will lie to remove as a cloud on title a sale of land under execution, where such sale is apparently valid and its invalidity can be shown only by extrinsic proof;[3] and this is so, even though a court of law has subsequently vacated the sale.[4] So, it has been held that a sale on execution against a lessee for years who had assigned his term, when purporting to convey the entire title, is a cloud on title,[5] as is a sale on execution against one who had a contract for the purchase of the land, but had forfeited his rights thereunder at the time of the levy.[6] However, equity will not ordinarily grant relief where the proceedings are void on their face, and, hence, do not affect plaintiff's property or require him to resort to extrinsic evidence to show their invalidity;[7] and it is generally held that a sale of lands on execution against one who never had any title thereto or interest therein will not cast a cloud on the title of the true owner.[8] A sale under a valid judgment does not constitute a cloud on title.[9]

Time of sale. Where a party sells land under execution as the property of his debtor, with either actual or constructive notice of a bona fide sale and conveyance to another before the judgment became a lien,[10] or, where a landowner purchased the land from the execution defendant after the levy and before an invalid sale thereunder,[11] the owner may have the execution sale set aside as a cloud on his title. The redemption of land from an execution sale by a judgment creditor who has no lien or levy thereon is ineffectual as against one who purchased the lands of the judgment debtor after the original levy and prior to the sale thereunder, and the purchaser may maintain a bill to remove the cloud occasioned by the claim of such creditor.[12]

Homestead property. The sale of a homestead under an execution forms a cloud on the title to the homestead which a court of equity will remove.[13] However, a sheriff's deed conveying part of the remainder interest in land does not constitute a cloud on the title of one holding a homestead in a life estate in the land.[14]

Curtesy. Where a husband's estate by curtesy is sold under execution, the wife cannot sue to set aside the sale as a cloud on her title, until the husband's estate has been extinguished by his death or otherwise.[15]

e. Foreclosure Sale

A sale under a foreclosure decree does not constitute a cloud on title where the foreclosure proceedings are void on their face, but it does constitute a cloud where the invalidity of the proceedings can be shown only by a resort to extrinsic evidence.

A sale under a decree in a suit to foreclosure a mortgage[16] or mechanic's lien[17] does not constitute a cloud on title where the foreclosure proceedings are void on their face, as where defendant in proceedings to foreclose a mechanic's lien had

99. Ark.—City of Little Rock v. Joyner, 206 S.W.2d 446, 212 Ark. 508.
N.H.—Nashua Hospital Ass'n v. Gage, 159 A. 137, 85 N.H. 335.
Ohio.—Olberding v. Smith, App., 34 N.E.2d 296.
51 C.J. p 156 note 36.

1. Fla.—Osius v. Barton, 147 So. 862, 109 Fla. 556, 88 A.L.R. 994.
Mass.—McArthur v. Hood Rubber Co., 109 N.E. 182, 221 Mass. 272.

2. Ill.—Cuneo v. Chicago Title, etc., Co., 169 N.E. 760, 337 Ill. 589.
51 C.J. p 156 note 38.

3. Ala.—Cowdy v. Hood, 29 So.2d 121, 248 Ala. 635.
Mo.—Decker v. Evans, 221 S.W.2d 127.
51 C.J. p 161 note 27.
Enjoining levy or sale of lands under execution to prevent cloud on title see Executions § 152 b.

4. Ala.—Lockett v. Hurt, 57 Ala. 198.
51 C.J. p 161 note 28.

5. Ill.—Taylor v. Marshall, 99 N.E. 638, 255 Ill. 545.

6. Ill.—Hayes v. Carey, 210 Ill.App. 497, affirmed 122 N.E. 524, 287 Ill. 274.

7. Ala.—Henderson v. Holman, 69 So. 424, 193 Ala. 262.
51 C.J. p 161 note 31.

8. N.Y.—Lehman v. Roberts, 86 N.Y. 232.
51 C.J. p 161 note 32.

9. Or.—Crim v. Thompson, 193 P. 448, 98 Or. 599.
51 C.J. p 161 note 37.

10. Wis.—Goodell v. Blumer, 41 Wis. 436.
51 C.J. p 161 note 33.

11. Ill.—Conwell v. Watkins, 71 Ill. 488.

12. Tenn.—Kenner v. Loyd, 14 S.W. 804, 89 Tenn. 290.

13. Cal.—Magneson v. Pacific Mfg. Co., 146 P. 69, 26 Cal.App. 52.
51 C.J. p 161 note 38.

14. Ga.—Thornton v. Hardin, 52 S.E.2d 841, 205 Ga. 215.

15. Ill.—Lang v. Hitchcock, 99 Ill. 550.

16. N.D.—Morris v. McKnight, 47 N.W. 975, 1 N.D. 286.
51 C.J. p 162 note 40.
Preventing threatened sale under mortgage see infra § 15.

17. Mo.—Schaaf v. Kirkwood Lumber Co., App., 184 S.W. 494.

no title or interest in the property,[18] or where there is a sale under a mortgage of land not included therein;[19] but the rule is otherwise where the foreclosure proceedings are apparently valid on their face, and their invalidity can be shown only by resort to extrinsic evidence.[20]

An ambiguous description in a foreclosure decree and in a commissioner's deed given thereunder may result in a cloud on the title to land which was not included in the mortgage.[21] Where a party obtains a judgment by scire facias on foreclosure of a mortgage given to secure notes which have been paid by taking new notes and a mortgage, and purchases the mortgaged premises, a portion of which he had previously released from the mortgage lien, equity will set aside the conveyance as a cloud on the title of a subsequent purchaser of the premises.[22] A minor remainderman who joined in a deed of trust which was subsequently foreclosed was held not entitled to have the foreclosure deed removed as a cloud on the ground of the inadequacy of the bid where, in view of the expectancy of the life tenant and the possible defeat of the remainderman's interest by his predeceasing the life tenant, the remainderman's interest was of small market value.[23]

Payment or tender of amount due. Where a mortgage debt had been paid at the time of foreclosure, the mortgagor may have the sale set aside as a cloud on title, provided he is in possession;[24] but, if not in possession, the equitable remedy is not available, since the remedy at law by an action of ejectment is adequate.[25] Where plaintiff, before expiration of the time for redemption, has tendered the amount required to redeem,[26] or has paid the amount due, and the purchaser refuses to execute the necessary certificate,[27] an action may be brought to quiet plaintiff's title and remove the cloud created thereon by the foreclosure sale.

f. Judgments or Decrees

A judgment or decree, the invalidity of which can be shown only by extrinsic evidence, constitutes a cloud on title; but a judgment void on its face ordinarily will not be removed as a cloud.

An action in equity will lie to cancel a judgment or decree which is an apparent cloud on the title to land,[28] as where the invalidity of a judgment or decree is not apparent on its face, but can be shown only by extrinsic evidence;[29] and this applies to a judgment which has been paid or satisfied but not discharged of record.[30] A judgment lien barred by limitations may constitute a cloud on title so as to entitle the owner to have his title quieted.[31]

A judgment or decree void on its face carries its own condemnation with it, and is not a cloud on title,[32] although there is authority to the contrary.[33] A decree which is not a cloud on title when entered cannot become such by mere lapse of time.[34] Equity will not quiet title as against a judgment for irregularity or defect in service of process, in the absence of a showing that plaintiff had a defense on the merits, or that the judgment was not in fact

18. Mo.—Scharff v. Kirkwood Lumber Co., supra.
N.Y.—Lehman v. Roberts, 86 N.Y. 232.

19. Ala.—Preiss v. Campbell, 59 Ala. 635.

20. Mont.—Teisinger v. Hardy, 5 P. 2d 219, 91 Mont. 9.
N.J.—Indiana Inv. Co. v. Evens, 187 A. 158, 121 N.J.Eq. 72.
51 C.J. p 162 note 45.

21. Mich.—Hillock v. Kimball, 275 N.W. 800, 282 Mich. 174.

22. Ill.—Tucker v. Conwell, 67 Ill. 552.

23. Tenn.—Human v. Hartsell, 148 S.W.2d 634, 24 Tenn.App. 678.

24. Ala.—Drum v. Bryan, 60 So. 483, 183 Ala. 395.

25. Ala.—Drum v. Bryan, supra—Drum v. Bryan, 40 So. 131, 145 Ala. 686.
Adequacy of remedy by ejectment generally see supra § 10.
Necessity of possession by plaintiff generally see infra §§ 26–31.

26. Idaho.—Kelley v. Clark, 129 P. 921, 22 Idaho 1, Ann.Cas.1914C 605.

27. Minn.—Donnelly v. Simonton, 7 Minn. 167.
51 C.J. p 162 note 50.

28. Cal.—Graham v. Hunt, 7 P.2d 186, 119 Cal.App. 586.
Fla.—Protective Holding Corporation v. Cornwall Co., 173 So. 804, 127 Fla. 282.
N.Y.—Graber v. Gault, 98 N.Y.S. 76, 103 App.Div. 514.
N.C.—Holden v. Totten, 31 S.E.2d 635, 224 N.C. 547—Ekum v. Carolina R. Co., 32 S.E.2d 424, 223 N. C. 222.
Ohio.—Hoffman v. Pugh, App., 42 N. E.2d 737.
Okl.—State ex rel. Com'rs of Land Office v. Lewis, 170 P.2d 287, 197 Okl. 388.
Wash.—Eckley v. Bonded Adjustment Co., 190 P.2d 718, 30 Wash. 2d 96, 1 A.L.R.2d 717—Seaton v. Smith, 58 P.2d 830, 186 Wash. 447.
51 C.J. p 164 note 53.
Failure to renew judgment
Cloud on title to land caused by record of judgment lien which had become forfeited for failure to renew judgment in statutory manner and time was held removable in equity.—Groth v. Ness, 260 N.W. 700, 65 N.D. 580.

29. N.C.—Downing v. White, 183 S. E. 815, 211 N.C. 10.
51 C.J. p 165 note 55.
Fraud
In suit to determine title, fraud alleged and proved as basis for setting aside judgment must be in very connection of judgment itself.—Wm. H. Johnson Timber & Realty Co. v. Belt, 46 S.W.2d 152, 329 Mo. 515.

30. Cal.—Price v. Oakland Cent. Sav. Bank, 217 P. 800, 63 Cal.App. 583.
51 C.J. p 165 note 56.

31. N.M.—Pugh v. Heating & Plumbing Finance Corp., 161 P.2d 714, 49 N.M. 234.

32. Ala.—Tynon v. Brown, 64 Ala. 244.
51 C.J. p 165 note 57.

33. Okl.—Hennon v. Oklahoma State Bank, 23 P.2d 709, 165 Okl. 1.
51 C.J. p 165 note 58.

34. Ill.—Olen v. People, 193 N.E. 762, 359 Ill. 332, Ann.Cas.1916C 119.
51 C.J. p 165 note 59.

just,[35] especially where limitations have run against the note on which judgment was recovered.[36] A decree affecting land, in a suit between strangers to the true title, does not constitute a cloud on the title of the true owner.[37] So a judgment against one who has made a general assignment for creditors, valid by state laws, and rendered before an assignee in bankruptcy has procured the assignment to be set aside, is not a cloud on the title of the assignee under the general assignment.[38]

Homesteads. Homesteaders may quiet their title to the homestead as against a judgment which is not effective as a lien against the homestead property because of the judgment creditor's failure to comply with statutory provisions;[39] and it is not a prerequisite to an action by the owner of a homestead to remove clouds on his title, consisting of recorded judgments, that the creditors were threatening execution on the homestead.[40] On the other hand, it has been held that the mere filing of an abstract of judgment does not of itself create any cloud on the title to homestead property.[41]

Purchaser of land from trustee in bankruptcy may remove as a cloud on title an invalid judgment lien, without showing that the judgment was unjust, and without paying it.[42]

Rights of sureties of principal judgment debtor. Where a creditor releases the property of the debtor held under levy of execution, the debtor's sureties may compel the creditor to execute a release of the judgment lien, as to their real estate, as a cloud on title.[43]

Determination. In determining whether a supplemental decree in proceedings to foreclose a tax lien is a cloud on title, it must be examined in connection with all the other pleadings in such proceedings, both original and supplemental.[44]

g. Mortgages

A mortgage, the invalidity of which appears on its face or as a matter of record, generally does not constitute a cloud justifying the intervention of equity; but a mortgage constitutes a cloud which equity will remove where its invalidity must be proved by extrinsic circumstances.

Although a contrary rule obtains in some jurisdictions,[45] a mortgage which is invalid on its face,[46] or the invalidity of which is a matter of record,[47] or will appear from the proof which the mortgagee must reasonably make in order to establish it,[48] does not ordinarily constitute a cloud on title justifying the intervention of equity, although the right to have a mortgage canceled as a cloud will not be denied because it is not enforceable without resort to extrinsic evidence, where such evidence is required to supply a mere insufficiency, and does not go to the validity of the mortgage.[49] So a mortgage given by one who has no title whatever is a nullity, and does not constitute a cloud on the title of the true owner under equity rules.[50] However, a mortgage or deed of trust, valid on its face, and requiring proof of extrinsic circumstances to show its invalidity, constitutes a cloud on title which equity will remove;[51] and this is so whether the mortgage was, in its inception, not a valid lien on the property covered by it,[52] or has since ceased to be a valid lien,[53] as where the considera-

35. Cal.—Hickey v. Algie, 197 P. 359, 51 Cal.App. 595.

36. Cal.—Hickey v. Algie, supra.

37. Ark.—Haggart v. Chapman, etc., Land Co., 92 S.W. 792, 77 Ark. 527, 7 Ann.Cas. 333.

38. U.S.—Belden v. Smith, D.C.N.Y., 3 F.Cas.No.1,242.

39. Cal.—Graham v. Hunt, 7 P.2d 186, 119 Cal.App. 586.

40. Neb.—Corey v. Schuster, 62 N.W. 470, 44 Neb 269.

41. U.S.—Westman v. Clow, D.C.Tex., 38 F.2d 124.

42. Ill.—Hooper v. Bank of Two Rivers, 99 N.E. 633, 255 Ill. 549.
51 C.J. p 164 note 88.

43. W.Va.—Williams v. Brown, 74 S.E. 409, 70 W.Va. 472.

44. Ill.—Glos v. People, 102 N.E. 763, 259 Ill. 332, Ann.Cas.1914C 119.

45. Tex.—Degetau v. Mayer, Civ.App., 145 S.W. 1054.

46. Wis.—Cornish v. Frees, 43 N.W. 507, 74 Wis. 490.
51 C.J. p 157 note 64.

47. N.Y.—Bissell v. Kellogg, 60 Barb. 617, affirmed 65 N.Y. 432.
51 C.J. p 157 note 65.

Homestead

Mortgagor, claiming that trust deed is void as covering homestead, has no cause of action against mortgagee to remove it as cloud on mortgagor's title.—Davenport v. San Antonio Machine & Supply Co., Tex.Civ.App., 59 S.W.2d 207, error refused.

48. N.Y.—Dudley v. Third Order of St. Francis Cong., 19 N.Y.S. 605, 65 Hun 21, affirmed 34 N.E. 281, 138 N.Y. 451.

49. N.Y.—Stokes v. Houghton, 45 N.Y.S. 21, 16 App.Div. 381.

50. Wis.—Cornish v. Frees, 43 N.W. 507, 74 Wis. 490.

51. Cal.—White v. Lantz, 14 P.2d 1041, 126 Cal.App. 693.
Ill.—Johnson v. Riedler, 70 N.E.2d 570, 395 Ill. 412.
N.J.—Indiana Inv. Co. v. Elvens, 187 A 158, 121 N.J.Eq. 72.
N.Y.—Greenberg v. Schwartz, 73 N.Y.S.2d 458, affirmed 76 N.Y.S.2d 95, 273 App.Div. 814.
N.C.—Rostan v. Huggins, 5 S.E.2d 162, 216 N.C. 386, 126 A.L.R. 410—Bechtel v. Bohannon, 153 S.E. 316, 198 N.C. 730.
Ohio.—Hoffman v. Pugh, App., 42 N.E.2d 727.
Okl.—Local Federal Sav. & Loan Ass'n of Oklahoma City v. Sickles, 165 P.2d 328, 196 Okl. 395.
Tex.—Temple Trust Co. v. Logan, Civ.App., 82 S.W.2d 1017—Great Southern Life Ins. Co. v. Williams, Civ.App., 77 S.W.2d 900.
51 C.J. p 157 note 70.

52. N.Y.—Swarthout v. Ranier, 38 N.E. 726, 143 N.Y. 499.
51 C.J. p 158 note 71.

53. Ky.—Fitzsimmons v. Flynn, 13 Ky.Op. 950,
51 C.J. p 158 note 72.

tion has failed,[54] or the secured debt has been paid or the mortgage otherwise satisfied.[55] A mortgage which appears by record as a first mortgage, but is in fact subordinate to a lien for unpaid purchase money, constitutes a cloud on the title.[56]

A deed of trust which is binding on the grantor cannot be declared void as a cloud on title at the instance of one whose rights are derived from, and are no stronger than, those of the grantor.[57] Where a vendee, knowing of an adverse claim against his vendor, takes a deed with covenant of title, and gives a mortgage not to be due until the vendor shall procure a quitclaim deed from the adverse claimant, which is not done within the time stipulated, the mortgage is not a cloud on the vendee's title.[58]

Forged mortgage is a cloud on title which equity will remove.[59]

Right of redemption. A purchaser at a mortgage foreclosure sale may maintain an action to quiet title against the mortgagor's statutory right of redemption which has been forfeited by the mortgagor's refusal to deliver possession on demand.[60]

Purchasers acquiring land subject to an existing trust deed are not entitled to have the deed canceled as a cloud on title on the ground that it was without consideration.[61]

Partial invalidity. Where the statute renders an obligation given to secure a usurious note invalid only to the extent of the interest, a mortgage given to secure such a note will not be canceled as a cloud on the mortgagor's title.[62]

Barred by statute of limitations. An action to quiet title against the holder of a mortgage, on the naked ground that the right to foreclose the mortgage is barred by limitations, is not maintainable,[63] unless the right to such an action is given by statute.[64] However, where a debt secured by a deed of trust was conclusively presumed to have been paid because of the failure of the holder of the indebtedness to file the necessary writings or make the necessary entries, within the time limited by statute, the owner of the property was held entitled to have the deed of trust removed as a cloud on title.[65] Further, a person seeking to quiet title to land may interpose the bar of the statute against a mortgagee defendant seeking in such action to foreclose his mortgage lien.[66]

h. Taxes and Assessments

(1) In general
(2) Sale thereunder

(1) In General

A cloud on title is created by a tax or assessment which, although in fact invalid, appears authorized and regular, necessitating extrinsic proof to establish its invalidity; but an assessment which is invalid on its face will not justify the intervention of equity.

Taxes or assessments may create a cloud on title, as where a tax or an assessment is really invalid, but apparently authorized and regular, and extrinsic proof must be made to show its invalidity,[67] par-

54. Ala.—King Lumber Co. v. Spragner, 58 So. 920, 176 Ala. 564. 51 C.J. p 158 note 73.

55. Ala.—Hammock v. Oakley, 154 So. 906, 228 Ala. 588.
Colo.—Jones v. Sturgis, 199 P.2d 645, 118 Colo. 579.
51 C.J. p 158 note 74.

Deed given as security for debt may be canceled as a cloud on title on payment or tender of the amount of the debt.—Ray v. Etheridge, 25 S.E.2d 570, 195 Ga. 787—Hobbs v. Houston, 24 S.E.2d 884, 195 Ga. 571—Simpson v. Ray, 178 S.E. 726, 180 Ga. 395.

Termination of payments on return of children

A husband who executed deed of trust to secure husband's obligation under property settlement agreement to make monthly payments to divorced wife was entitled to have his title quieted unconditionally, notwithstanding husband had not made all the monthly payments provided for in agreement, where husband's obligations to make payments terminated when wife returned children to husband. Biecomini v. Biecomini, 176 P.2d 750, 77 Cal.App.2d 850.

56. N.Y.—Kennedy v. Babcock, 43 N.Y.S. 832, 19 Misc. 87.

57. Tenn.—Hobson v. Hobson, 201 S.W.2d 659, 184 Tenn. 484.

58. N.Y.—Ryerson v. Willis, 8 Daly 462, affirmed 81 N.Y. 277.

59. N.Y.—Rothschild v. Title Guarantee, etc., Co., 97 N.E. 879, 204 N.Y. 458, 41 L.R.A.,N.S., 740.
N.C.—Byerly v. Humphrey, 95 N.C. 151.

60. U.S.—Connecticut Gen. Life Ins. Co. v. Weldon, D.C.Ala., 246 F. 265.

61. Ill.—Schrei v. Van Alyea, 247 Ill.App. 440.

62. N.C.—Briggs v. Richmond Industrial Bank, 147 S.E. 815, 197 N. C. 130.
51 C.J. p 158 note 81.

63. Kan.—Capell v. Dill, 109 P. 286, 82 Kan. 652.
51 C.J. p 158 note 82.

Payment of mortgage debt as condition of relief see infra § 102.

64. Mass.—Mitchell v. Bickford, 78 N.E. 453, 193 Mass. 241.
51 C.J. p 158 note 83.

65. N.C.—Thomas v. Myers, 49 S.E. 2d 478, 229 N.C. 231.

66. Okl.—Holmes v. Heilbach, 231 P. 478, 105 Okl. 71.
51 C.J. p 158 note 84.

67. U.S.—Detroit, G. H. & M. Ry. Co. v. Fuller, 107 Mich., 305 F. 86.
Ala.—Streater v. Town of Town Creek, 173 So. 851, 234 Ala. 132.—Fenton v. Brown Crummer Inv. Co., 131 So. 14, 222 Ala. 155.
Idaho.—Boddy v. State, 139 P.2d 1005, 65 Idaho 127.
N.Y.—Niagara County v. City of North Tonawanda, 46 N.Y.S.2d 8, 267 App.Div. 941.—Board of Education of Union Free School Dist. No. 6 of Town of Greenburgh v. Town of Greenburgh, 295 N.Y.S. 465, 250 App.Div. 691, reversed on other grounds 18 N.E.2d 788, 277 N.Y. 193, reargument denied 19 N.

ticularly if such extrinsic proof affects the jurisdiction of the taxing authorities;[68] and this rule applies where the assessment roll is made presumptive evidence of the regularity of the proceedings.[69] However, where the invalidity of the assessment appears on the face of the proceeding,[70] or where the defect will necessarily appear in any proceedings which the party claiming under the lien of the assessment must produce to establish his title,[71] the assessment does not constitute such a cloud on title as to justify equitable relief. Plaintiff is not bound to rest on one ground of invalidity, and if other grounds, not apparent on the face of the proceedings, are also alleged, relief may be had,[72] and it has been held that equity will grant relief where the invalidity does not appear wholly on the face of the record, but is shown in part by extrinsic evidence.[73] The purchaser at the foreclosure sale of a superior lien has been held entitled to the removal of a cloud on title created by a junior lien for taxes.[74]

Legal acumen theory. It has been held by some authorities that, if the defect in the assessment is such as to require legal acumen to discover it, whether it appears on the face of the proceedings or is to be proved aliunde, equity will set aside the assessment as a cloud on title.[75]

Valid lien for taxes,[76] or one that is valid to any extent,[77] does not constitute a cloud on title.

(2) Sale Thereunder

A sale for taxes or assessments, or a certificate or deed given pursuant thereto, constitutes a cloud on title if it is apparently valid and requires extrinsic evidence to prove its invalidity; but, if the sale, deed, or certificate is void on its face, equity will not intervene.

A sale for taxes and assessments is not such a cloud on title as will authorize equitable intervention to set it aside, where the defects rendering it invalid appear on the face of the proceedings,[78] or would necessarily be exposed by the proof required from one claiming under it in proceedings to establish his claim.[79] However, if the sale is apparently valid, and extrinsic evidence is necessary to show its invalidity, equity will give relief.[80]

Certificate or deed. An invalid tax deed or certificate of sale or delinquency may constitute a cloud on title,[81] as where the certificate or deed is valid

E.2d 105, 278 N.Y. 566—Weiskopf v. City of Saratoga Springs, 279 N.Y.S. 878, 244 App.Div. 417, reversed on other grounds 200 N.E. 33, 269 N.Y. 634.

Pa.—Parastino v. Meckley, Com.Pl., 28 North.Co. 370.

51 C.J. p 162 note 57.

Cloud on title as ground for setting aside drainage assessment see Drains § 75 a.

Taxes credited to wrong property

Where complainant paid taxes on property which it owned and which by mistake was credited to adjoining property, taxes against complainant's property constituted a lien which was a cloud on complainant's title and which equity had jurisdiction to remove.—Lenape Building & Loan Ass'n v. Mayor and Common Council of City of Elizabeth, 25 A.2d 510, 131 N.J.Eq. 391.

68. N.Y.—Monroe County v. Rochester, 49 N.E. 139, 154 N.Y. 570.

Property exempt from taxation

An action will lie to remove lien of assessment as a cloud on title to realty, where assessors were without jurisdiction in making assessment because property was exempt by law from taxation.—Syracuse Center of Jehovah's Witnesses v. City of Syracuse, 297 N.Y.S. 587, 163 Misc. 535—Hunter College Student Social Community & Religious Clubs Ass'n v. City of New York, 63 N.Y.S. 2d 337.

Cloud on title of United States

The placing on the assessment roll of a county of lots, the title to which is in the United States, with a definite amount assessed against a claimed equity of other persons therein, is a cloud on the title of the United States to the lots.—U. S. v. Power County, D.C.Idaho, 21 F.Supp. 684.

Absence of quorum

Property owner could maintain bill to remove assessment as cloud on title where resolution fixing assessment was attacked on ground that council members necessary to quorum were absent.—Penton v. Brown-Crummer Inv. Co., 131 So. 14, 222 Ala. 155.

69. N.Y.—Rumsey v. Buffalo, 97 N. Y. 114—Trumbull v. Palmer, 93 N. Y.S. 349, 104 App.Div. 51.

70. Ala.—Streater v. Town of Town Creek, 173 So. 853, 234 Ala. 132.

Minn.—Scribner v. Allen, 12 Minn. 148.

51 C.J. p 163 note 60.

Unconstitutional law

No cloud could be cast on title by law, unconstitutional on its face, creating statutory lien for tax.—Cook's Estate, Trustees, v. Sheppard, D.C.Tex., 8 F.Supp. 21, affirmed Barwise v. Sheppard, 55 S.Ct. 145, 293 U. S. 527, 79 L.Ed. 637.

71. N.Y.—Bussing v. Mt. Vernon, 91 N.E. 543, 198 N.Y. 196.

51 C.J. p 163 note 61.

72. N.Y.—Boyle v. Brooklyn, 71 N. Y. 1.

73. U.S.—Lyon v. Alley, D.C., 9 S.Ct. 480, 130 U.S. 177, 32 L.Ed. 899.

74. U.S.—Minnesota Mut. Life Ins. Co. v. U. S., D.C.Tex., 47 F.2d 942.

75. Mo.—Verdin v. St. Louis, 33 S. W. 480, 36 S.W. 52, 131 Mo. 26—Perkins v. Baer, 68 S.W. 939, 95 Mo.App. 70.

76. Ala.—Bailey v. Folsom, 93 So. 479, 207 Ala. 329.

51 C.J. p 163 note 66.

77. N.Y.—Heywood v. Buffalo, 14 N. Y. 534.

78. Minn.—Gilman v. Van Brunt, 13 N.W. 125, 29 Minn. 271.

51 C.J. p 163 note 69.

Preventing threatened sale for taxes or assessments see infra § 15.

Actions against tax title claimant to quiet title or remove cloud see the C.J.S. title Taxation § 973, also 61 C.J. p 1401 note 28—p 1408 note 37.

79. N.Y.—Guest v. Brooklyn, 69 N. Y. 506.

80. W.Va.—Collins v. Reger, 57 S.E. 743, 62 W.Va. 195.

51 C.J. p 163 note 71.

81. U.S.—Whitman College v. Berryman, C.C.Wash., 156 F. 112, reversed on other grounds 32 S.Ct. 147, 222 U.S. 324, 56 L.Ed. 225—Massie v. Halstead, C.C.W.Va., 127 F. 176.

Colo.—Munson v. Kalm, 127 P. 1026, 53 Colo. 576.

Mass.—Holt v. Weld, 5 N.E. 506, 140 Mass. 578.

N.Y.—Sanders v. Saxton, 73 N.Y.S.

on its face, and resort to extrinsic evidence is necessary to show its invalidity,[82] or where the statute makes the certificate or deed presumptive or prima facie evidence of the validity and regularity of the previous proceedings.[83] The rule is inapplicable, however, where the certificate or deed is prima facie evidence only of the facts contained therein, and not of the regularity of the preliminary proceedings leading thereto.[84] The record owner of land sold for taxes who has redeemed the land from the sale in the manner provided by statute may maintain an action to quiet title against the holder of the tax certificate in possession.[85]

A certificate of sale or tax deed does not constitute a cloud on title where it is void on its face,[86] or where it is defective for want of preliminary proceedings which the party claiming under it would be bound to show,[87] although in some jurisdictions a tax deed has been held a cloud on title, even though it is void on its face.[88] A record title cut off in tax proceedings is not a cloud on the title acquired through such proceedings, and a bill in equity cannot be maintained for the sole purpose of declaring the validity of a tax deed by quieting the tax title against the former record title on the theory that the mere existence of the latter casts a cloud on the former,[89] at least where there has been no attempt subsequent to the issuance of the tax deed to assert the record title.[90]

Lease given on sale. Where the statute makes a lease given on the sale of land for assessments presumptive evidence of the regularity of the sale and all proceedings prior thereto, such a lease, although in fact invalid for irregularity in the prior proceedings, is an apparent cloud on the title of the land which it purports to lease, and the owner may maintain a suit in equity to set it aside.[91]

i. Wills and Contracts to Devise

An apparently valid will may create a cloud on title; but a will which is void on its face is generally held not to create such cloud. An oral contract to devise land is not a cloud on title.

A cloud on title is not created by a will, or a provision thereof, which is void on its face,[92] although a contrary rule obtains in some jurisdictions.[93] A will not probated is not a cloud on title.[94] On the other hand, a will valid on its face and requiring extrinsic evidence to establish its invalidity is a cloud on title which equity will remove;[95] and, where a will devising land is executed under such

1095, 36 Misc. 574, affirmed 85 N.Y.S. 762, 89 App.Div. 421, reversed on other grounds 75 N.E. 529, 182 N.Y. 477.
Ohio.—Powers v. Henning, 26 Ohio Cir.Ct.,N.S., 237.
W.Va.—Cunningham v. Brown, 20 S.E. 615, 39 W.Va. 588.
Wis.—Hoffman v. Peterson, 102 N.W. 47, 123 Wis. 632.

Enforcement of corporate license taxes

A deed, purporting to convey fee title to property of corporation subject to deed of trust, made by receiver pursuant to decree of sale in suit for enforcement of payment of corporate license taxes wherein trustee under deed of trust was not joined as party, was mere nullity and subject to cancellation as cloud on title of purchaser from trustee under deed of trust.—Andre v. Caldwell, 191 S.E. 556, 118 W.Va. 689.

82. U.S.—Gage v. Kaufman, Ill., 10 S.Ct. 406, 133 U.S. 471, 33 L.Ed. 725—Lyon v. Alley, D.C., 9 S.Ct. 480, 130 U.S. 177, 32 L.Ed. 899—Nevada-California Power Co. v. Hamilton, D.C.Nev., 235 F. 317.
Cal.—Axtell v. Gerlach, 8 P. 34, 67 Cal. 483.
Fla.—Hughey v. Winborne, 33 So. 249, 44 Fla. 601.
Ill.—Hogan v. Mock, 127 N.E. 27, 292 Ill. 403.
Mass.—Davis v. Boston, 129 Mass. 388.
N.Y.—Hazkate Holding Corporation v. People, 224 N.Y.S. 22, 130 Misc. 409.
N.C.—Beck v. Meroney, 47 S.E. 613, 135 N.C. 532.
51 C.J. p 164 note 75.

83. U.S.—Huntington v. Central Pac. R. Co., C.C.Cal., 12 F.Cas.No.6,911—Tilton v. Oregon Cent. Military Road Co., C.C.Or., 23 F.Cas.No.14,055.
Cal.—Hibernia Sav., etc., Soc. v. Ordway, 28 Cal. 679.
D.C.—Luchs v. Christman, 42 App. D.C. 326.
Fla.—Sloan v. Sloan, 5 So. 603, 25 Fla. 53.
51 C.J. p 164 note 77.

84. N.Y.—Quest v. Brooklyn, 69 N.Y. 506—Overing v. Foote, 43 N.Y. 290.

85. Okl.—Honeyman v. Andrew, 253 P. 489, 124 Okl. 18.

86. U.S.—Minturn v. Smith, C.C. Cal., 17 F.Cas.No.9,647, 3 Sawy. 142.
Ark.—Allen v. Ozark Land Co., 18 S.W. 1042, 55 Ark. 549—Crane v. Randolph, 30 Ark. 579.
Wis.—Shepardson v. Milwaukee County Sup'rs, 28 Wis. 593—Truesdell v. Rhodes, 28 Wis. 215.
51 C.J. p 163 note 72.

87. N.Y.—Clark v. Davenport, 95 N.Y. 477.
51 C.J. p 163 note 73.

88. Mo. Voights v. Hart, 226 S.W. 218, 285 Mo. 182—Wilcox v. Phillips, 169 S.W. 55, 260 Mo. 661.
Or. Kirkpatrick v. Dallas, 115 P. 424, 58 Or. 511.
S.D. Stoken v. Allen, 69 N.W. 1023, 10 S.D. 421.

89. Fla. Florida Cent. & P. Ry. v. Bothwell, 123 So. 567, 98 Fla. 117—Stuart v. Stephanus, 114 So. 767, 94 Fla. 1087.
Mich. Triangle Land Co. v. Nessen, 119 N.W. 586, 155 Mich. 463.

90. Fla. Woodman v. Jones, 133 So. 630, 101 Fla. 177—Tangerman v. Sjoblom, 130 So. 603, 100 Fla. 1059—Jordan v. Hausher, 124 So. 33, 96 Fla. 438—Stuart v. Stephanus, 114 So. 767, 94 Fla. 1087.

91. N.Y.—Masterson v. Hoyt, 55 Barb. 539.
51 C.J. p 161 note 81.

92. Ill.—Greenough v. Greenough, 120 N.E. 272, 291 Ill. 416.
51 C.J. p 159 note 4.

93. W.Va.—Gilbert v. McCreary, 104 S.E. 273, 87 W.Va. 56, 12 A.L.R. 1172.

94. Tex.—Milner v. Sims, Civ.App., 171 S.W. 784.

95. Ill.—Bale v. Bale, 90 N.E. 232, 242 Ill. 519.
51 C.J. p 159 note 7.

conditions as to be irrevocable, a subsequent will, inconsistent therewith, may be adjudged void as a cloud on title at the suit of those claiming under the original devise.[96] A devise of specific property which testator had conveyed in his lifetime by valid deed may be a cloud on the title of the grantee.[97] A will not describing any particular property will not be set aside in equity, before probate, as a cloud on title because of an adverse claim asserted to some of the property devised.[98]

Inconsistent descriptions. Where a will dividing lands between two devisees contains two inconsistent and contradictory descriptions of the land, a claim set up under the invalid description is a cloud on the title of that part of the land against which it is asserted.[99]

Devisee in a will may sue to quiet title on the ground that the will is invalid because of testator's minority, and that it is a cloud on the devisee's title as testator's heir, although such devisee was a proponent of the will and the decree admitting it to probate recited that testator was of full age when he executed it.[1]

Contract to devise land is not a cloud on title if it is not in writing.[2]

§ 15. Apprehended or Threatened Cloud

a. In general
b. Sale

a. In General

Equity may give relief against an apprehended or threatened cloud on title where the danger is not merely speculative; but it will not intervene where the threatened act, if completed, would not cast a cloud on title.

A court of equity will restrain a defendant from proceeding in an illegal act which, if completed, will necessarily cast a cloud on plaintiff's title.[3] Otherwise stated, if the facts are such that a court would remove the cloud when cast,[4] and there is a fixed determination to create a cloud, the danger not being merely speculative and potential,[5] the court will give preventive relief. On the other hand, such relief cannot be had where the threatened act, if completed, would not cast a cloud on title.[6] The determination to create a cloud must clearly appear,[7] and it is not sufficient that the danger is merely speculative.[8]

There is a threat to create a cloud which equity may interfere to prevent whenever an instrument or claim exists which the holder may so utilize as to convert it into a cloud on title by his own action, and he refuses to surrender it and thus put an end to this power.[9] It has been held that, as a rule, an injunction will be granted to prevent a cloud when the evidence on which plaintiff's right depends is not of record or shown in the papers through which the right depends.[10]

Levy for taxes. A court of equity has power to enjoin the taxing authorities from making an unlawful levy[11] or from issuing an invalid tax bill against plaintiff's land[12] which will result in casting a cloud on the title; but an injunction does not lie where a levy, if made, would be void on its face.[13]

Execution of lease. Injunction will not lie to prevent one in possession of land under claim of title as against another claimant, who is in no way connected with him in estate, from executing a lease on the ground that it will be a cloud on such other claimant's title.[14] However, if a lease made pursuant to a sale for an unpaid street assessment is by law evidence of the regularity of the sale, the making of such lease will be restrained in case of substantial irregularity.[15]

Proceedings at law. It has been held that a court of equity may restrain proceedings at law which

96. N.Y.—Mutual Life Ins. Co. v. Holloday, 13 Abb.N.Cas. 16.
97. Ill.—Thurston v. Tubbs, 100 N. E. 947, 257 Ill. 465.
98. Ga.—Adams v. Johnson, 59 S.E. 269, 129 Ga. 611.
99. W.Va.—Gilbert v. McCreary, 104 S.E. 273, 87 W.Va. 56, 12 A.L.R. 1172.
1. Okl.—Letts v. Letts, 176 P. 234, 78 Okl. 313.
2. Tex.—Walker v. Haley, Civ.App., 286 S.W. 544.
3. W.Va.—Bradley v. Swope, 87 S.E. 86, 77 W.Va. 113.
51 C.J. p 166 note 16.
Jurisdiction of equity to prevent threatened cloud generally see supra § 1.
4. Mo.—Madden v. Fitzsimmons, 150 S.W.2d 761, 235 Mo.App. 1074.
51 C.J. p 166 note 17.
5. Iowa.—John Hancock Mut. Life Ins. Co. of Boston, Mass., v. Roeder, 268 N.W. 64, 221 Iowa 1375.
51 C.J. p 166 note 18.
6. Ark.—Brizzolara v. Ft. Smith, 112 S.W. 181, 87 Ark. 85.
51 C.J. p 166 note 19.
7. U.S.—Roxana Petroleum Corp. v. Colquitt, D.C.Tex., 34 F.2d 470, affirmed, C.C.A., 49 F.2d 1025, certiorari denied 52 S.Ct. 43, 284 U. S. 669, 76 L.Ed. 566.
51 C.J. p 166 note 20.
8. S.C.—Ex parte Darby, 154 S.E. 632, 157 S.C. 434.
51 C.J. p 166 note 21.
9. W.Va.—Gardner v. Buckeye Sav., etc., Co., 152 S.E. 530, 108 W.Va. 673.
51 C.J. p 167 note 22.
10. Tex.—Weaver v. Emison, Civ. App., 153 S.W. 923.
11. Neb.—Fox v. Kountze, 78 N.W. 713, 58 Neb. 439.
12. Mo.—Skinker v. Heman, 49 S. W. 1026, 148 Mo. 349—Verdin v. St. Louis, 33 S.W. 480, 36 S.W. 52, 131 Mo. 26.
13. N.Y.—Magee v. Cutler, 43 Barb. 239.
14. Me.—Spofford v. Bangor, etc., R. Co., 66 Me. 51.
15. N.Y.—Scott v. Onderdonk, 14 N. Y. 9, 67 Am.D. 106.

would tend to cast a cloud on the title to realty,[16] but should not interfere until there is imminent danger of a cloud being cast by some impending wrongful result of the action.[17] A suit by a commissioner of school lands, instituted for the direct benefit of the state to raise revenue for school purposes by the sale of its lands, will not be restrained at the instance of an adverse claimant to the land who alleges that title may be clouded by the suit.[18]

b. Sale

Equity may prevent a wrongful sale of land, such as a sale to enforce an invalid assessment for taxes, where such sale will result in casting a cloud on the title of the real owner.

It is well settled that equity will interfere by injunction to prevent the wrongful sale of land where such sale will result in casting a cloud on the title of the real owner of the property,[19] although no title would in fact pass to the purchaser at the sale.[20] However, where a sale, if consummated, would not cast a cloud, equity will not give preventive relief.[21] So, it has been held that a sale of land as the property of one from whom the owner in no way derived his title presents no ground for equitable interference,[22] as where a married woman seeks to enjoin a sale, under judicial process against her husband, of lands belonging exclusively to her separate estate.[23] Where a cloud to be cast on title exists only on the supposition of an incorrect legal view being taken of facts which are latent, equity will not enjoin a sale of land on the ground of a threatened cloud on title.[24]

By conveyance under pretense of right. Equity will interfere to prevent the giving of a conveyance of realty, under pretense of right, which will operate as a cloud on title.[25] However, in order to constitute such a cloud on title as would warrant equity in restraining the giving of a deed, it must appear that the owner of the property in an action by the adverse party, founded on the deed, would have to offer evidence to defeat a recovery.[26] Where a deed has never been recorded because of its destruction or loss,[27] or because of defects in the acknowledgment which prevent its being recorded,[28] a sale by the grantor or his legal representative will be restrained at the instance of the grantee in whom title has vested. The recordation of a quitclaim deed of land to which the grantor had no title will be enjoined where it appears that the purpose of the recordation was to cloud plaintiff's title.[29]

On the other hand, an injunction will be refused where complainant is in possession and has a good record title,[30] where his rights depend on the construction of recorded instruments,[31] where the party sought to be enjoined has apparent title to the property on which he resides,[32] or where purchasers buy at their peril.[33] Likewise, where the filing of a lis pendens will protect complainant, no injunction will be granted against a threatened wrongful sale of land on the ground of preventing a cloud on title.[34]

Under invalid assessment. Where a sale to enforce an invalid assessment for taxes would cast a cloud on title, equity will intervene to prevent the sale or the issuance of a deed thereunder;[35] and this rule applies where, by statute, such conveyance is presumptive evidence of title.[36] On the other hand, where the proceedings resulting in the assessment are void, and a deed after sale of the property would on its face be void and cast no cloud on the true title, its execution will not be enjoined as a threatened cloud.[37] It has been held

16. N.Y.—Wood v. Seely, 32 N.Y. 105.
51 C.J. p 168 note 68.

17. Miss.—Hammel v. Clarke, 23 So. 358, 76 Miss. 66.

18. W.Va.—Moore v. McNutt, 24 S.E. 682, 41 W.Va. 695.
51 C.J. p 168 note 70.

19. Ark.—Brizzolara v. Ft. Smith, 112 S.W. 181, 87 Ark. 85.
51 C.J. p 167 note 30.
Enjoining levy or sale under execution to prevent cloud on title see Executions § 153 b.

20. Cal.—Metropolis Trust, etc., Bank v. Barnet, 132 P. 833, 165 Cal. 449.
51 C.J. p 167 note 31.

21. Ark.—Brizzolara v. Ft. Smith, 112 S.W. 181, 87 Ark. 85.
51 C.J. p 167 note 33.

22. Ala.—Rea v. Longstreet, 54 Ala. 291.

23. Ala.—Rea v. Longstreet, supra.

24. Mo.—Hasenmier v. Thomas, 4 Mo.App. 463.

25. Ark.—Hare v. Carnall, 39 Ark. 196.
51 C.J. p 167 note 37.

26. Cal.—Russ v. Crichton, 49 P. 1043, 117 Cal. 695.

27. Mo.—Wynn v. Cory, 48 Mo. 301.
51 C.J. p 167 note 39.

28. Ky.—Frank v. Peyton, 88 Ky. 150.

29. Mo.—Tucker v. Wadlow, 184 S.W. 69.

30. Mo.—Wilcox v. Walker, 7 S.W. 115, 94 Mo. 88.
51 C.J. p 167 note 41.

31. N.Y.—Mariposa Co. v. Garrison, 26 How.Pr. 448.

N.C.—Browning v. Lavender, 10 S.E. 77, 104 N.C. 69.

32. Ga.—Powell v. Quinn, 49 Ga. 533.

33. Ga.—Spence v. Cox, 64 Ga. 543.
51 C.J. p 167 note 44.

34. Wash.—Spokane v. Amsterdam asch Trustees Kantoor, 50 P. 1088, 18 Wash. 81.
51 C.J. p 167 note 45.

35. Cal.—Bolton v. Gilleran, 34 P. 881, 105 Cal. 244, 45 Am.St.R. 33.
51 C.J. p 168 note 55.

36. N.Y.—Litchfield v. Brooklyn, 31 N.Y.S. 151, 10 Misc. 74.
51 C.J. p 168 note 56.

37. Cal.—Byrne v. Drath, 60 P. 433, 127 Cal. 663.
51 C.J. p 168 note 58.

that the fact that an assessment for constructing a sidewalk is made a lien on the adjacent property does not create such a cloud on title as will confer equitable jurisdiction to restrain the collection of an illegal assessment, where it does not appear that property had been levied on, or that a levy had been authorized, or that anything had been done which would cause irreparable injury or lead to a multiplicity of suits.[38] A sale cannot be enjoined merely because of the unauthorized and untrue statement of a city official that it would be without the right of redemption.[39]

Of land purchased at tax sale. An injunction to prevent, as a threatened cloud on title, the sale of land previously purchased at a tax sale, on the ground that the tax sale passed no title, will be refused, since such mischief has already been done by the first sale.[40]

Under mortgage. A sale under a mortgage will be enjoined by a court of equity where it will result in casting a cloud on plaintiff's title.[41] However, a sale under a mortgage of land not included therein cannot cast a cloud on the title of the owner, as discussed supra § 14 e, and will not, therefore, be restrained as a threatened cloud on title.[42] A party who has by fraud obtained possession of land by a deed absolute on its face, but intended only as a mortgage, will be restrained from selling it.[43]

D. TITLE OR INTEREST OF PLAINTIFF

§ 16. Necessity

An action to quiet title or to remove a cloud thereon may be maintained by, and only by, a person having some title to, or interest in, the property in controversy at the time the action is commenced.

An action to quiet title or to remove a cloud thereon may be maintained by, and only by, a person having some title to, or interest in, the property in controversy[44] at the time the action is commenced.[45]

§ 17. Sufficiency

a. In general
b. Paramount title
c. Extent of interest; particular estates or interests in general

a. In General

The holder of the legal title to property, even though he holds merely a naked legal title, without any

38. W.Va.—Wilson v. Philippi, 19 S.E. 553, 39 W.Va. 75.

39. Miss.—Ring v. Watson, 107 So. 6, 142 Miss. 281.

40. Mo.—St. Louis v. Goode, 21 Mo. 216.

41. Tex.—Weaver v. Emison, Civ. App., 153 S.W. 923.

42. Ala.—Preiss v. Campbell, 59 Ala. 635.

43. N.C.—Peeler v. Barringer, 60 N. C. 556.

44. Ariz.—Lee v. New York Life Ins. Co., 145 P.2d 843, 61 Ariz. 177.
Cal.—Reed v. Hayward, 144 P.2d 561, 23 Cal.2d 336—Valle v. Ingram, 117 P.2d 869, 18 Cal.2d 761—Babu v. Petersen, 48 P.2d 689, 4 Cal.2d 276—Lyons v. Emery, 164 P.2d 272, 72 Cal.App.2d 275—Swann v. Carson, 132 P.2d 803, 56 Cal.App.2d 502—Jones v. Walker, 118 P.2d 299, 47 Cal.App.2d 566—Osborne v. Abels, 87 P.2d 404, 30 Cal.App.2d 729—Gibson v. River Farms Co. of California, 83 P.2d 966, 28 Cal.App.2d 757—Von Neindorff v. Schallock, 68 P.2d 278, 21 Cal.App.2d 44—Riedman v. Barkwill, 34 P.2d 744, 139 Cal.App. 564—Penn v. Dyba, 1 P. 2d 461, 115 Cal.App. 67.
Conn.—Speike v. Shaw, 153 A. 809, 114 Conn. 272—Borden v. Town of Westport, 151 A. 512, 112 Conn. 152.
Fla.—Atlantic Beach Improvement Corporation v. Hall, 197 So. 464, 143 Fla. 778
Ill.—Amburann Corp. v. Old Ben Coal Corp., 69 N.E.2d 835, 395 Ill. 154—Ford v. Witwer, 50 N.E.2d 714, 383 Ill. 511—Town of Kaneville v. Meredith, 184 N.E. 883, 351 Ill. 620—Clark Memorial Missionary Baptist Church v. Liberty Nat. Bank of Chicago, 33 N.E.2d 237, 309 Ill.App. 441.
Kan.—Penn Mut. Life Ins. Co. v. Tittel, 111 P.2d 1116, 153 Kan. 530, rehearing denied 114 P.2d 312, 153 Kan. 747.
Ky.—Gabbard v. Lunsford, 215 S.W. 2d 985, 308 Ky. 836—Stearns Coal & Lumber Co. v. Douglas, 185 S. W.2d 385, 299 Ky. 314—Boyd v. Salisbury, 182 S.W.2d 894, 298 Ky. 306—Hopkins v. Slusher, 98 S.W. 2d 932, 266 Ky. 300, 103 A.L.R. 662
Mass.—Daley v. Daley, 14 N.E.2d 113, 300 Mass. 17.
Mich.—Dunn v. Peck, 238 N.W. 224, 255 Mich. 391.
Mo.—Bostwick v. Freeman, 160 S.W. 2d 713, 349 Mo. 1.
N.H.—Bottomly v. Parmenter, 159 A. 803, 85 N.H. 322.
N.Y.—Stickler v. Ryan, 61 N.Y.S.2d 708, 270 App.Div. 962, appeal denied 64 N.Y.S.2d 914, 27 App.Div. 757, appeal dismissed 70 N.E.2d 545, 296 N.Y. 735—Roller v. City of New York, 294 N.Y.S. 185, 250 App.Div. 778—D'Anna v. City of New York, 283 N.Y.S. 939, 246 App. Div. 753—Kark v. Twenty Three Thirty Ryer Corp., 56 N.Y.S.2d 783, 185 Misc. 440.
Pa.—Behling v. Wagner, Com.Pl., 23 Wash.Co. 165.
S.C.—Smith v. Hanna, 56 S.E.2d 339, 215 S.C. 520.
Tenn.—May v. Abernathy, 130 S.W. 2d 135, 23 Tenn.App. 236.
Tex.—La Fleaur v. Kinard, Civ.App., 161 S.W.2d 144, error refused.
Wis.—Hunter v. Neuville, 39 N.W. 2d 468, 255 Wis. 423.
Wyo.—Black v. Beagle, 140 P.2d 594, 59 Wyo. 268.
51 C.J. p 168 note 71.

A claim or interest in title to property in controversy is necessary to maintain an action to quiet title thereto or to remove cloud on title.
Ariz.—Saxman v. Christmann, 79 P. 2d 530, 52 Ariz. 140.
Okl.—Robertson v. Knighten, 139 P. 2d 601, 192 Okl. 678—Davidson v. Whitfield, 99 P.2d 156, 186 Okl. 536—Moore v. Barker, 97 P.2d 776, 186 Okl. 312.
51 C.J. p 168 note 71 [a].

45. Cal.—Reed v. Hayward, 144 P. 2d 561, 23 Cal.2d 336—Lyons v. Emery, 164 P.2d 272, 72 Cal.App.2d 275—Moakley v. Los Angeles Pac. Ry. Co., 34 P.2d 218, 139 Cal.App. 421.
51 C.J. p 169 note 72.

beneficial interest, ordinarily may maintain an action to quiet title thereto or to remove a cloud thereon.

The holder of the legal title to property,[46] even though he holds merely a naked legal title, without any beneficial interest,[47] ordinarily may maintain an action to quiet title thereto or to remove a cloud thereon. Under the original equity jurisdiction and statutes which have not changed the rule, plaintiff may not maintain an action unless he has legal title,[48] or, as held in some jurisdictions, a legal and equitable title, connected with possession.[49]

On the other hand, it has been held that in order to bring such an action plaintiff need not have a legal title provided he has some interest therein,[50] and that a legal title is not necessary where plaintiff has some equitable right not redressable in a court of law, and the removal of a cloud is only incidental to the primary relief sought.[51] Furthermore, under the broad terms of many of the statutes enlarging equitable jurisdiction, as discussed supra § 6, such action may also be brought by one having only an equitable title to the property in controversy,[52] even as against one holding the legal title,[53] although in some jurisdictions the rule has not been relaxed to the extent of permitting the owner of an equitable interest to sue the holder of the legal title.[54] Where defendant is estopped to attack the validity of plaintiff's title shown by a deed from the county, fair on its face, and good against all the world except the former fee owner, plaintiff's title is sufficient to maintain the action.[55]

46. Cal.—Turner v. Deacon, 289 P. 179, 106 Cal.App. 329.
Ky.—Hensley v. Lewis, 128 S.W.2d 917, 278 Ky. 510, 123 A.L.R. 537—Minn v. Blakeman, 71 S.W.2d 961, 254 Ky. 416.
Mich.—Florenski v. Smith, 42 N.W.2d 234, 327 Mich. 502, rehearing denied 42 N.W.2d 898, 327 Mich. 502.
N.Y.—Karp v. Twenty Three Thirty Ryer Corp., 56 N.Y.S.2d 783, 185 Misc. 440.
Okl.—Fidelity & Deposit Co. of Md. v. De Graw, 178 P.2d 885, 198 Okl. 368—Piland v. Craig, 154 P.2d 583, 194 Okl. 666.
51 C.J. p 169 note 73.

47. U.S.—Van Deventer v. Lott, C.C. N.Y., 172 F. 574, affirmed 180 F. 378, 103 C.C.A. 524.
51 C.J. p 169 note 74.
Necessity of possession see infra §§ 26–31.

48. U.S.—U. S. v. McIntosh, D.C.Va., 2 F.Supp. 244, rehearing denied 3 F.Supp. 715, appeal dismissed, C. C.A., McIntosh v. U. S., 70 F.2d 507, certiorari denied 55 S.Ct. 101, 293 U.S. 586, 79 L.Ed. 682.
Ark.—Gingles v. Rogers, 175 S.W.2d 192, 206 Ark. 915—Patterson v. McKay, 150 S.W.2d 196, 202 Ark. 241.
Ky.—Justice v. Staton, 163 S.W.2d 471, 291 Ky. 179.
Mass.—Daley v. Daley, 14 N.E.2d 113, 300 Mass. 17.
51 C.J. p 170 note 76.

What constitutes legal title

Term "legal title" within rule requiring such title for maintenance of suit to remove cloud from title has no absolute or strict legal meaning and may mean full and absolute title or apparent right of ownership with beneficial or equitable title in another and is not necessarily record title.—Barnes v. Boyd, D.C.W.Va., 8 F.Supp. 584, affirmed, C.C.A., 78 F. 2d 910, certiorari denied 55 S.Ct. 550, 294 U.S. 723, 79 L.Ed. 1254, rehearing denied 55 S.Ct. 647, 295 U.S. 768, 79 L.Ed. 1708.

49. Md.—Keys v. Forrest, 45 A. 22, 90 Md. 132.
51 C.J. p 170 note 77.

50. Wyo.—Black v. Beagle, 140 P.2d 594, 59 Wyo. 268.

51. W.Va.—Swick v. Rease, 59 S.E. 510, 62 W.Va. 557.

52. U.S.—Houck v. Jone, D.C.Cal., 72 F.Supp. 6, affirmed, C.A., 171 F.2d 211.
Cal.—Crane v. French, 104 P.2d 53, 39 Cal.App.2d 642—Dement v. Pierce, 9 P.2d 884, 122 Cal.App. 254.
Kan.—Watson v. Woodruff, 114 P.2d 864, 154 Kan. 61.
Minn.—Gostomezik v. Gostomezik, 253 N.W. 370, 191 Minn. 119.
Mont.—**Corpus Juris cited in** Polson Sheep Co. v. Owen, 106 P.2d 181, 183, 110 Mont. 601.
N.M.—**Corpus Juris cited in** Sullivan v. Albuquerque Nat. Trust & Sav. Bank of Albuquerque, 188 P.2d 169, 174, 51 N.M. 456—**Corpus Juris cited in** McDaniel v. McDaniel, 15 P.2d 229, 233, 36 N.M. 335.
N.Y.—Karp v. Twenty Three Thirty Ryer Corp., 56 N.Y.S.2d 783, 185 Misc. 440.
Okl.—Oklahoma City v. Wainwright, 187 P.2d 226, 199 Okl. 470—Keith v. Lawson, 155 P.2d 716, 195 Okl. 157—Smith v. Roneau, 113 P.2d 160, 188 Okl. 629.
Tex.—Neely v. Neely, Civ.App., 52 S.W.2d 927.
51 C.J. p 170 note 80.

Either legal or equitable title must be in plaintiff in order to entitle him to sue in equity to quiet title in property or to remove a cloud from title.—Atlantic Beach Improvement Corporation v. Hall, 197 So. 464, 143 Fla. 778—Peninsular Naval Stores v. Cox, 49 So. 191, 57 Fla. 505.

Legal title or complete equitable title

(1) Unless plaintiff has legal title or complete equitable title, it is immaterial to him what title defendant claims. Bridwell v. Goecke, 193 P.2d 656, 200 Okl. 344.

(2) Complainant must have a legal title or such complete equity that by the force of it he can draw to himself the legal title
Miss.—Adams v. Harris, 47 Miss. 144.
Vt.—Blondin v. Brooks, 76 A. 184, 83 Vt. 473.

53. Mont. **Corpus Juris cited in** Polson Sheep Co. v. Owen, 106 P. 2d 181, 183, 110 Mont. 601.
51 C.J. p 171 note 81.

54. Cal.—C. R. Holcomb Estate Co. v. Burke, 48 P.2d 663, 4 Cal.2d 289—Botchford v. Alt, 102 P.2d 984, 71 Cal.App.2d 240—Crane v. French, 104 P.2d 53, 39 Cal.App. 2d 642—Williams v. Hebbard, 97 P.2d 657, 33 Cal.App.2d 686—Bacon v. Bacon, 69 P.2d 884, 21 Cal. App.2d 546—Booth v. Taylor, 26 P. 2d 846, 135 Cal.App. 318—Dement v. Pierce, 9 P.2d 884, 122 Cal.App. 254—McAlvay v. Consumers' Salt Co., 297 P. 135, 113 Cal.App. 382—Becker v. Highley Constr. Trust, 296 P. 651, 113 Cal.App. 219.
51 C.J. p 171 note 82.

Rule inapplicable

(1) Mortgagee is not legal title holder, whom equitable owner may not sue to quiet title. Turner v. Deacon, 289 P. 179, 106 Cal.App. 329.

(2) Where plaintiff in action to quiet title claims and trial court finds that no trust was created, and that plaintiff is owner of both legal and equitable title, the text rule is inapplicable and plaintiff may maintain action to quiet title against adverse claim.—Bauer v. Bauer, 100 P.2d 1070, 38 Cal.App.2d 309, rehearing denied 101 P.2d 1117, 38 Cal.App. 2d 309.

55. N.D.—Hackney v. Lynn, 147 N. W. 265, 27 N.D. 458.
51 C.J. p 171 note 83.

Where a use-plaintiff sues to quiet title in the name of his grantor, he must rely on the title as of the date of the transfer from the nominal plaintiff to him,[56] and he may not claim to be an innocent purchaser without notice.[57]

b. Paramount Title

As a general rule, one seeking to quiet title or to remove a cloud thereon must succeed on the strength of his own title and not on the weakness of his adversary's title.

As a general rule, one seeking to quiet title or remove a cloud thereon must succeed on the strength of his own title and not on the weakness of his adversary's title,[58] and want of title in plaintiff ordinarily renders it unnecessary to examine that of

56. N.D.—Hanitch v. Beiseker, 130 N.W. 833, 21 N.D. 290

57. N.D.—Hanitch v. Beiseker, supra

58. U.S.—U. S. v. State of Oregon, 55 S.Ct. 610, 295 U.S. 1, 79 L.Ed. 1267—Anderson-Tully Co. v. Murphree, C.C.A.Ark., 153 F.2d 874—Gilcrease Oil Co. v. Cosby, C.C.A. Tex., 132 F.2d 790, certiorari denied 64 S.Ct. 77, 320 U.S. 772, 88 L.Ed. 462, rehearing denied 64 S.Ct. 258, 320 U.S. 814, 88 L.Ed. 492—Jones Creek Min. & Mfg. Co. v. Black Mountain Corporation, C.C.A.Ky., 114 F.2d 814—Baxter v. McGee, C.C.A.Ark., 82 F.2d 695, certiorari denied McGee v. Baxter, 56 S.Ct. 948, 298 U.S. 680, 80 L.Ed. 1407—Moodey v. Dale Consol. Mines, C.C.A.Cal., 81 F.2d 794, certiorari denied 57 S.Ct. 11, 299 U.S. 549, 81 L.Ed. 404—Knoell v. Frisco Lease, C.C.A.Okl., 78 F.2d 286—U. S. v. Prince William County, D.C.Va., 9 F.Supp. 219, affirmed, C.C.A., Prince William County v. U. S., 79 F.2d 1007, certiorari denied 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000.

Ariz.—Price v. Sunfield, 112 P.2d 210, 57 Ariz. 142—Saxman v. Christmann, 79 P.2d 520, 52 Ariz. 149.

Ark.—Sanders v. Baker, 231 S.W.2d 106—Thomason v. Abbott, 229 S.W.2d 660—Rouse v. Teeter, 216 S.W.2d 869, 214 Ark. 488—Chavis v. Taylor & Co., 200 S.W.2d 507, 211 Ark. 252—Crow v. Johnston, 194 S.W.2d 193, 209 Ark. 1063—Rushing v. Thompson, 185 S.W.2d 941, 208 Ark. 248—Gibbs v. Pace, 179 S.W.2d 690, 207 Ark. 199—Chavis v. Henry, 168 S.W.2d 610, 205 Ark. 163.

Cal.—Reed v. Hayward, 144 P.2d 561, 23 Cal.2d 336—Tanner v. Title Insurance & Trust Co., 129 P.2d 383, 20 Cal.2d 814—Valle v. Ingram, 117 P.2d 869, 18 Cal.2d 761—Denman v. Smith, 97 P.2d 451, 14 Cal.2d 752—Coffin v. Odd Fellow Hall Ass'n of Modesto, 71 P.2d 266, 9 Cal.2d 521—Babu v. Petersen, 48 P.2d 689, 4 Cal.2d 276—Paradise Irr. Dist. v. Barry, 32 P.2d 966, 220 Cal. 748—Shimpones v. Stickney, 28 P.2d 673, 219 Cal. 637—Cohn v. Klein, 287 P. 459, 209 Cal. 421—Hendershott v. Shipman, App., 221 P.2d 982—Casaletti v. McGuire, 201 P.2d 889, 89 Cal.App.2d 777—Garrett v. Cook, 200 P.2d 21, 89 Cal.App.2d 98—De Flon v. Van Lue, 188 P.2d 301, 83 Cal.App.2d 288—Alspach v. Landrum, 187 P.2d 130, 82 Cal.App.2d 901—Wagner v. Worrell, 172 P.2d 751, 76 Cal.App.2d 172—Oaks v. Renshaw, 168 P.2d 199, 74 Cal.App.2d 144—Lyons v. Emery, 164 P.2d 272, 72 Cal.App.2d 275—Chaplin v. Sullivan, 155 P.2d 368, 67 Cal.App.2d 728—Blume v. MacGregor, 114 P.2d 375, reheard 148 P.2d 656, 64 Cal.App.2d 244—Swann v. Carson, 132 P.2d 863, 56 Cal.App.2d 502—Oroville-Wyandotte Irr. Dist. v. Ford, 118 P.2d 340, 47 Cal.App.2d 531—Jones v. Walker, 118 P.2d 299, 47 Cal.App.2d 566—Crane v. French, 104 P.2d 53, 39 Cal.App.2d 642—Hess v. Moodey, 95 P.2d 699, 35 Cal.App.2d 401—Spencer v. Cheroske, 88 P.2d 161, 31 Cal.App.2d 384—Osborne v. Abels, 87 P.2d 404, 30 Cal.App.2d 729—Pedersen v. Reynolds, 87 P.2d 51, 31 Cal.App.2d 18—Chapman v. Title Guarantee & Trust Co., 78 P.2d 268, 25 Cal.App.2d 567—Nobel v. You Bet Mining Co., 72 P.2d 205, 22 Cal.App.2d 623—Von Neindorff v. Schallock, 68 P.2d 278, 21 Cal.App.2d 44—Canal Oil Co. v. National Oil Co., 66 P.2d 197, 19 Cal.App.2d 524—Dalton v. Clark, 18 P.2d 752, 129 Cal.App. 136—Beck v. Barnes, 18 P.2d 749, 129 Cal.App. 187—Hurt v. Pico Inv. Co., 15 P.2d 203, 127 Cal.App. 106—Roberts Land & Improvement Co. v. Dallas, 11 P.2d 1103, 124 Cal.App. 86—Widney v. Southern Pac. Co., 7 P.2d 1046, 124 Cal.App. 291—Schwartz v. Mead, 3 P.2d 48, 116 Cal.App. 606—Syme v. Warden, 300 P. 863, 114 Cal.App. 707—McAlvay v. Consumers' Salt Co., 297 P. 135, 112 Cal.App. 383—Scott v. Wardon, 296 P. 95, 111 Cal.App. 587—Woodson v. Torgerson, 291 P. 663, 108 Cal.App. 386—McInerny v. Allebrand, 290 P. 530, 107 Cal.App. 457.

Colo.—Munro v. Eshe, 156 P.2d 700, 113 Colo. 19.

Conn.—Pepe v. Aceto, 175 A. 775, 119 Conn. 283—Borden v. Town of Westport, 151 A. 512, 112 Conn. 152.

Ga.—Bright v. Cudahy Packing Co., 15 S.E.2d 880, 192 Ga. 584.

Idaho.—Reynolds Irr. Dist. v. Sproat, 214 P.2d 880, 70 Idaho 217—Hunt v. McDonald, 149 P.2d 792, 65 Idaho 610—Stickel v. Carter, 117 P.2d 477, 63 Idaho 78—Gerber v. Wheeler, 115 P.2d 100, 62 Idaho 673—Rexburg Lumber Co. v. Purrington, 113 P.2d 511, 62 Idaho 461—Independence Placer Mining Co. v. Hellman, 109 P.2d 1038, 62 Idaho 180—Federal Land Bank of Spokane v. Union Cent. Life Ins. Co., 6 P.2d 486, 51 Idaho 490—Snell v. Stickler, 299 P. 1080, 50 Idaho 648.

Ind.—Kerfoot v. Kessener, 84 N.E.2d 190, 227 Ind. 58—Central Federal Savings & Loan Ass'n v. Cummings, 25 N.E.2d 638, 216 Ind. 636—Kozanjieff v. Petroff, 19 N.E.2d 563, 215 Ind. 286, 122 A.L.R. 479—Cozy Home Realty Co. v. Ralston, 14 N.E.2d 917, 214 Ind. 149—Hester v. Hardy, 76 N.E.2d 590, 118 Ind.App. 256—Sheets v. Stiefel, 74 N.E.2d 921, 117 Ind.App. 584—Bercot v. Velkoff, 41 N.E.2d 686, 111 Ind.App. 323—Willard v. Bringolf, 5 N.E.2d 315, 103 Ind. App. 16.

Iowa.—State v. Nichols, 44 N.W.2d 49—Swim v. Langland, 11 N.W.2d 713, 234 Iowa 46—Ferrell v. Stinson, 11 N.W.2d 701, 233 Iowa 1331—Todd v. Murdock, 300 N.W. 284, 230 Iowa 1121—Flanders v. Inter-Ocean Reinsurance Co., 292 N.W. 795, 228 Iowa 926—Bohle v. Brooks, 282 N.W. 351, 225 Iowa 980—Bittle v. Cain, 278 N.W. 608, 224 Iowa 1332—Lockie v. White, 267 N.W. 671, 221 Iowa 1044—City of Dubuque v. Fischer & Co., 245 N.W. 758, 215 Iowa 433—Blain v. Blain, 244 N.W. 827, 215 Iowa 69—McFerrin v. Wiltse, 231 N.W. 438, 210 Iowa 627.

Kan.—Sinclair Prairie Oil Co. v. Worcester, 183 P.2d 947, 163 Kan. 540.

Ky.—Jones v. Wheeldon, 217 S.W.2d 221, 309 Ky. 184—Gabbard v. Lunsford, 215 S.W.2d 985, 308 Ky. 836—Whitson v. Morris, 201 S.W.2d 193, 304 Ky. 447—Hunt v. Cassity, 181 S.W.2d 248, 297 Ky. 716—Crawford v. Baker, 143 S.W.2d 513, 283 Ky. 800—Whitaker v. Shepherd, 134 S.W.2d 604, 280 Ky. 713—Warfield Natural Gas Co. v. Danks, 112 S.W.2d 674, 271 Ky. 452—Hale v. Horn, 97 S.W.2d 402, 265 Ky. 560—Fugate v. Fugate, 67 S.W.2d 952, 252 Ky. 587—Alcorn v. Superior Oil Corporation, 53 S.W.2d 528, 245 Ky. 343—Ratcliff v. Coleman, 45 S.W.2d 493, 241 Ky. 791.

defendant.[59] On the other hand, since an action to quiet title will not be defeated by a showing that plaintiff's interest, otherwise sufficient to support the action, is subject to possibly superior rights of persons who are not parties to the suit,[60] the rule has been laid down that plaintiff need not show a title good as against the whole world, but only as against defendant.[61] The defendant may not create a superior title in himself through plaintiff's alleged fraud on plaintiff's predecessor in title.[62]

Title or interest in third person. The general rule that one must be the owner of the property in order to maintain an action has no application where a person unlawfully obtains a deed from a trustee as a purchaser from him, holds such deed as a monument of his title, and nevertheless resists the efforts of a cestui que trust to have the illegal deed canceled by attempting to set up an outstanding title in a third person.[63] One seeking to establish title to realty is not entitled to recover on a showing that another than defendant may have an interest in the property in question.[64]

c. Extent of Interest; Particular Estates or Interests in General

The interest of plaintiff which will entitle him to maintain an action to quiet title or to remove a cloud thereon may be an interest less than a fee.

The interest of plaintiff which will entitle him to maintain an action to quiet title or remove a cloud may be an interest less than a fee,[65] such as an interest in reversion in realty[66] or an estate for

La.—Dugas v. Powell, 1 So.2d 677, 197 La. 409.
Miss.—Levy v. Campbell, 28 So.2d 224, 200 Miss. 721—Ables v. Forrester, 181 So. 913, 182 Miss. 551.
Mo.—Gee v. Bullock, 164 S.W.2d 281, 349 Mo. 1154, followed in Gee v. Johnson, 164 S.W.2d 285—Auldridge v. Spraggin, 163 S.W.2d 1042, 349 Mo. 858—Bostwick v. Freeman, 160 S.W.2d 713, 349 Mo. 1—Brown v. Weare, 152 S.W.2d 649, 348 Mo. 135, 136 A.L.R. 286—Cullen v. Johnson, 29 S.W.2d 39, 325 Mo. 253.
Mont.—Corpus Juris quoted in McAlpin v. Smith, 213 P.2d 602, 603—Hilyard v. Engel, 209 P.2d 895—Aronow v. Bishop, 86 P.2d 644, 107 Mont. 317—Smith v. Whitney, 74 P.2d 450, 105 Mont. 523.
N.M.—Eager v. Belmore, 207 P.2d 519, 53 N.M. 399—Lawson v. Serna, 150 P.2d 122, 48 N.M. 299.
N.Y.—Smith v. Dayton, 1 N.Y.S.2d 975, 253 App.Div. 899—Finch Pruyn & Co. v. People, 40 N.Y.S.2d 797, 181 Misc. 122.
N.D.—Shuck v. Shuck, 44 N.W.2d 767—Star v. Noratsky, 30 N.W.2d 718, 75 N.D. 503—Robertson v. Brown, 25 N.W.2d 781, 75 N.D. 109—Pierce Tp. of Barnes County v. Ernie, 19 N.W.2d 755, 74 N.D. 16—Nord v. Nord, 282 N.W. 507, 68 N.D. 560.
Okl.—Dierks v. Walsh, 218 P.2d 920—Kasner v. Routledge, 188 P.2d 227, 199 Okl. 550—Findley v. Lynn, 164 P.2d 989, 196 Okl. 322—Otto v. Jones, 158 P.2d 899, 195 Okl. 446—Robertson v. Knighten, 139 P.2d 601, 192 Okl. 678—Pauline Oil & Gas Co. v. Fischer, 130 P.2d 305, 191 Okl. 346—Gilchrist v. Sutton, 127 P.2d 163, 191 Okl. 117—Moore v. Barker, 97 P.2d 776, 186 Okl. 312—Waken v. Blmstrom, 45 P.2d 97, 172 Okl. 232—Martin v. Rogers, 1 P.2d 696, 151 Okl. 51.
Pa.—Blumner v. Metropolitan Life Ins. Co., 68 A.2d 245, 362 Pa. 7—Ransberry v. Brodhead's Forest & Stream Ass'n, 174 A. 97, 315 Pa. 513.
R.I.—Talbot v. Town of Little Compton, 160 A. 466, 52 R.I. 280.
S.C.—Griggs v. Griggs, 19 S.E.2d 477, 199 S.C. 295.
S.D.—Waldner v. Blachnik, 274 N.W. 837, 65 S.D. 449.
Tex.—Perry v. Venable, Civ.App., 112 S.W.2d 1069, error dismissed.
Utah. Mercur Coalition Min. Co. v. Cannon, 184 P.2d 341, 112 Utah 13—Home Owners' Loan Corporation v. Dudley, 141 P.2d 160, 105 Utah 208—Babcock v. Dangerfield, 94 P.2d 862, 98 Utah 10.
Wash.—City of Centralia v. Miller, 197 P.2d 244, 31 Wash.2d 417—Lewis v. City of Seattle, 34 P.2d 427, 174 Wash. 219, reheard 37 P.2d 1119, 174 Wash. 219—Rohrbach v. Sunstrom, 20 P.2d 28, 172 Wash. 406.
Wis.—Kidder v. Puechner, 247 N.W. 315, 211 Wis. 19.
Wyo.—Hudson v. Erickson, 216 P.2d 379—York v. James, 165 P.2d 109, 62 Wyo. 184, 162 A.L.R. 837—Rue v. Morrill, 297 P. 379, 42 Wyo. 511.
51 C.J. p 171 note 86.
Title derived from common source see infra § 19.

59. Cal.—Pacific States Savings & Loan Co. v. Warden, 117 P.2d 877, 18 Cal.2d 757—Donman v. Smith, 97 P.2d 451, 14 Cal.2d 752—Wagner v. Worrell, 172 P.2d 751, 76 Cal. App.2d 172.
Mont.—Corpus Juris quoted in McAlpin v. Smith, 213 P.2d 602, 603.
Okl.—Pauline Oil & Gas Co. v. Fischer, 90 P.2d 411, 185 Okl. 108, reversed on other grounds Fischer v. Pauline Oil & Gas Co., 60 S.Ct. 535, 309 U.S. 294, 84 L.Ed. 764, rehearing denied 60 S.Ct. 706, 309 U.S. 697, 84 L.Ed. 1037, mandate conformed to 130 P.2d 305, 191 Okl. 346.
Wis.—Kidder v. Puechner, 247 N.W. 315, 211 Wis. 19.
51 C.J. p 172 note 88.

60. U.S.—U. S. v. State of Oregon, 55 S.Ct. 610, 295 U.S. 1, 79 L.Ed. 1267.
N.D.—Pierce Tp. of Barnes County v. Ernie, 19 N.W.2d 755, 74 N.D. 16.
It is enough that the interest of plaintiff in possession of the property in question is superior to that of defendant.—U. S. v. State of Oregon, 55 S.Ct. 610, 295 U.S. 1, 79 L.Ed. 1267.

61. Okl.—Keith v. Lawson, 155 P.2d 716, 195 Okl. 157—Robertson v. Knighten, 139 P.2d 601, 192 Okl. 678—Smith v. Benesu, 113 P.2d 160, 188 Okl. 629—Moore v. Barker, 97 P.2d 776, 186 Okl. 312.
51 C.J. p 172 note 89.

62. Mich.—Bonninghausen v. Hannen, 9 N.W.2d 850, 308 Mich. 595.
Question irrelevant
In suit to quiet title where plaintiff's predecessor in title was not a party to suit, question whether plaintiff obtained deed from his predecessor through fraud was irrelevant.—Bonninghausen v. Hannen, supra.

63. Ga.—Turner v. Barber, 62 S.E. 587, 131 Ga. 444.

64. U.S.—Gilcrease Oil Co. v. Cosby, C.C.A.Tex., 132 F.2d 790, certiorari denied 64 S.Ct. 77, 320 U.S. 772, 88 L.Ed. 462, rehearing denied 64 S. Ct. 258, 320 U.S. 814, 88 L.Ed. 493.

65. Cal.—Schipper v. Penkalski, 118 P.2d 291, 46 Cal.App.2d 38.
Mont.—La Vassaur v. Roullman, 30 P.2d 350, 93 Mont. 552.
Tex.—Dalton v. Davis, Com.App., 1 S.W.2d 571—Lee v. Grupe, Civ. App., 223 S.W.2d 543.
51 C.J. p 178 note 31.

66. Iowa.—Ransom v. Mellor, 297 N.W. 861, 230 Iowa 451.

life.[67] Various persons or entities have been held to have sufficient title or interest in property to maintain an action to quiet title to such property or to remove a cloud thereon,[68] such as assignees in insolvency,[69] and one or more cotenants.[70] On the other hand, various persons have been held to have insufficient title or interest in property to maintain such an action.[71] Thus, it has been held that a life tenant may not have his title quieted as to his right to convey a fee,[72] although, should the life tenant exercise such power, his grantee or the remainderman might sue in a proper case.[73] Furthermore, a land owner, merely because of a right to lateral support of land in its natural state, has been held to have no such interest in the title to adjoining land as will give him a right of action to quiet title.[74]

§ 18. —— Title Founded on Possession

Under many statutes providing for actions for the determination of adverse claims, it has been held that one in possession of, and claiming title to, land may maintain an action to quiet title thereto or to remove a cloud thereon, without other evidence of title.

In the absence of a statute providing otherwise, it is a general rule that mere naked possession, unconnected with a legal or equitable title, is insufficient to confer a right of action to quiet title or remove a cloud thereon;[75] but under many statutes

Rule inapplicable

Where will, which created trust and failed to dispose of the corpus remaining after determination of life estates, directed conversion of testator's realty into money or securities, executrix and sole beneficiary under will of testator's deceased nephew who was beneficiary and heir at law of testator had no such interest in realty as would entitle her to maintain action for determination of her interest in reversion in corpus.—Ransom v. Mellor, supra.

67. W.Va.—Criner v. Geary, 89 S.E. 149, 78 W.Va. 476
51 C.J. p 175 note 32.

68. Ala.—Standard Contractors Supply Co. v. Scotch, 25 So.2d 257, 247 Ala. 517.
Ark.—Sheppard v. Zeppa, 133 S.W.2d 860, 199 Ark. 1.
Cal.—Reed v. Hayward, 144 P.2d 561, 23 Cal.2d 336—Paradise Irr. Dist. v. Barry, 32 P.2d 966, 220 Cal. 748—Schipper v. Penkalski, 115 P.2d 231, 46 Cal.App.2d 28—Syme v. Warden, 300 P. 863, 114 Cal.App. 707.
Colo.—Hagan v. Mahoney, 174 P. 1119, 24 Colo.App. 285.
Fla.—Rabinowitz v. Houk, 129 So. 501, 100 Fla. 44.
Ga.—Franklin v. Womack, 134 S.E. 758, 162 Ga. 715.
Idaho.—Evans v. City of American Falls, 11 P.2d 363, 52 Idaho 7.
Ill.—Glos v. Ptacek, 80 N.E. 727, 226 Ill. 188.
Kan.—Withroder v. Wiederoder, 134 P.2d 381, 156 Kan. 570.
Ky.—Crawley v. Mackey, 143 S.W.2d 171, 283 Ky. 717.
Md.—Homewood Realty Corporation v. Safe Deposit & Trust Co. of Baltimore, 154 A. 58, 160 Md. 457, 78 A.L.R. 8.
51 C.J. p 176 note 51 [a], [b].

Title or interest held sufficient

(1) Interest of city in streets, alleys, and parks dedicated to public use.—Lamoure v. Lasell, 145 N.W. 577, 28 N.D. 638.

(2) Interest of one who takes title to land in his own name, intending to give it to another whom he places in possession.—Strouthers v. Bogenshutz, 157 S.W. 406, 108 Ark. 276.

(3) Interest of stockholders to whom the corporation has conveyed land for sale and division of the proceeds.—Simmons v. Dantzler, 118 So. 829, 152 Miss. 428

(4) Interest of heirs at law in realty belonging to decedent.—Balakjon v. Hillstad, N.D., 35 N.W.2d 637—Blakemore v. Roberts, 96 N.W. 1029, 12 N.D. 394.

69. Mich.—Byles v. Rowe, 31 N.W. 463, 64 Mich. 522.
51 C.J. p 176 note 38.

70. W.Va.—Cherry River Boom, etc., Co. v. Reger, 110 S.E. 709, 90 W.Va. 252.
51 C.J. p 176 note 39.

71. Ariz.—Saxman v. Christmann, 79 P.2d 520, 52 Ariz. 149—City of Phoenix v. Hughes, 286 P. 191, 36 Ariz. 399.
Cal.—Valle v. Ingram, 117 P.2d 869, 18 Cal.2d 761.
D.C.—Donovan v. Mahoney, 45 App. D.C. 480.
Ill.—Ford v. Witwer, 50 N.E.2d 714, 383 Ill. 511.
Kan.—Baker v. Lane, 109 P. 182, 82 Kan. 715, 27 L.R.A.,N.S., 405.
Mich.—McNamara v. Langguth, 165 N.W. 661, 198 Mich. 776.
Mont.—City of Cut Bank v. Clapper Motor Co., 182 P.2d 474, 120 Mont. 274.
Okl.—Oklahoma City v. Wainwright, 187 P.2d 226, 199 Okl. 470.
Pa.—Blumner v. Metropolitan Life Ins. Co., 66 A.2d 245, 362 Pa. 7.
51 C.J. p 176 note 51 [c], [d].

Title or interest held insufficient

(1) Interest of person having an inchoate right of redemption from a tax sale as against one in possession under claim of title.—Sears v. Willard, 130 P. 869, 165 Cal. 12.

(2) Interest of person having only right of redemption from tax sale as against purchaser at such sale.—Dennis v. Robertson, 96 S.E. 802, 123 Va. 456—Matthews v. Glenn, 41 S.E. 735, 100 Va. 352.

(3) Interest of person divested of title by judgments in ejectment who is not in possession of land, and who has no record title or title giving apparent right of ownership and possession.—Barnes v. Boyd, D.C.W.Va., 8 F.Supp. 584, affirmed, C.C.A., 73 F.2d 910, certiorari denied 55 S.Ct. 550, 294 U.S. 723, 79 L.Ed. 1254, rehearing denied 55 S.Ct. 647, 295 U.S. 768, 79 L.Ed. 1708.

72. Ind.—Foudray v. Foudray, 89 N.E. 499, 44 Ind.App. 444.

73. Ind.—Foudray v. Foudray, supra.

74. Cal.—Sargent v. Jaegeling, 256 P. 1116, 83 Cal.App. 485.

75. U.S.—Ripinsky v. Hinchman, Alaska, 181 F. 786, 105 C.C.A. 462, modified on other grounds 186 F. 151, 108 C.C.A. 263.
51 C.J. p 172 note 93.
Necessity of possession see infra §§ 26-31.
Sufficiency of possession see infra §§ 32-36.

Title or actual possession

The action must be based on either title or actual possession.—May v. Abernathy, 130 S.W.2d 135, 23 Tenn. App. 236—51 C.J. p 172 note 93 [c].

In California

(1) Under the present statute, mere possession, unless it reaches the dignity of a prescriptive title, has been held insufficient to support the action.—City of Burlingame v. Norberg, 290 P. 587, 210 Cal. 195—Langstaff v. Mitchell, 6 P.2d 546, 119 Cal.App. 407.

(2) Under an earlier statute, possession under claim of ownership was sufficient to authorize an action against trespasser or one who established no title in himself.—Bond v. Aickley, 141 P. 1138, 168 Cal. 161—51 C.J. p 173 note 96 [e].

providing for actions for the determination of adverse claims, it has been held that one in possession of,[76] and claiming title to,[77] land may maintain the action without other evidence of title.

Adverse possession. Although there is some authority to the contrary,[78] the general rule is that, where title is claimed by plaintiff in good faith, accompanied by actual and adverse possession of the property for the period prescribed by the statute of limitations, no more is required to support the action,[79] even though such action is against the holder of the paper title,[80] who has not used his title to disturb plaintiff.[81] Where neither party has such possession as to perfect title under the statute of limitations, their rights have been held to depend on the question of the better paper title.[82]

§ 19. —— Title Derived from Common Source

In a suit to quiet title to property or to remove a cloud thereon, where both parties to the controversy claim title from a common source, plaintiff should deraign his title from the grantor under whom both parties claim, and he is not required to go back of the common source.

In a suit to quiet title to property or to remove a cloud thereon, where both parties to the controversy claim title from a common source, plaintiff should deraign his title from the grantor under whom both parties claim, and he is not required to go back of the common source,[83] since it is presumed that the

76. Kan.—**Corpus Juris cited in** Withroder v. Wiederoder, 134 P.2d 331, 335, 156 Kan 570.
51 C.J. p 173 note 95.

77. Mo.—**Corpus Juris cited in** Johnson v. McAboy, 169 S.W.2d 932, 935, 350 Mo 1086.
51 C.J. p 173 note 96.

78. D.C.—Contee v. Lyons, 19 D.C. 207.
51 C.J. p 173 note 97

79. U.S.—Moore v. Devonian Oil Co., C.C.A.Tex., 98 F.2d 557.—**Corpus Juris quoted in** United States v. 13,255.53 Acres of Land, Etc., D. C.N.J., 53 F.Supp. 305, 308.
Ala.—Bearden v. Orr, 4 So.2d 138, 241 Ala. 585—Vidmer v. Lloyd, 69 So. 480, 193 Ala. 386, Ann.Cas. 1917A 576.
Cal.—President, etc., of Southern California Conference of Seventh Day Adventists v. Goodwin, 5 P.2d 973, 119 Cal.App. 37.
Del.—**Corpus Juris cited in** Jackson v. Wax, 171 A. 755, 756, 20 Del.Ch. 93.
Ill.—Scales v. Mitchell, 92 N.E.2d 665, 406 Ill. 130—Leonard v. Leonard, 17 N.E.2d 563, 369 Ill. 572.—People v. Hatch, 183 N.E. 610, 350 Ill. 586—Sheaff v. Spindler, 171 N. E. 632, 339 Ill. 540.
Ind.—Terry v. Davenport, 112 N.E. 998, 185 Ind. 561—O'Connor v. Anderson, 8 N.E.2d 422, 104 Ind.App. 628—Blood v. Weller, 132 N.E. 650, 76 Ind.App. 605—Stalcup v. Lingle, 131 N.E. 852, 76 Ind.App. 242.
Ky.—Jones v. Wheeldon, 217 S.W.2d 221, 309 Ky. 184—Boyd v. Salisbury, 182 S.W.2d 894, 298 Ky. 306—Martt v. McBrayer, 166 S.W.2d 823, 292 Ky. 479—Warfield Natural Gas Co. v. Ward, 149 S.W.2d 705, 286 Ky. 73—Crawley v. Mackey, 143 S.W.2d 171, 283 Ky. 717—Strunks Lane & Jellico Mountain Coal & Coke Co. v. Anderson, 124 S.W.2d 779, 276 Ky. 576—Hale v. Horn, 97 S.W.2d 402, 265 Ky. 560—Combs v. Combs, 38 S.W.2d 243, 238 Ky. 362.
Mass.—Daley v. Daley, 14 N.E.2d 113, 300 Mass. 17.
Mich.—Carlson v. Wisconsin Land & Lumber Co., 162 N.W. 960, 186 Mich. 213.
Miss.—Broome v. Jackson, 8 So.2d 245, 193 Miss. 66.
Mo.—Jamison v. Wells, 7 S.W.2d 347.
Nev.—Esmeralda Water Co. v. Mackley, 208 P.2d 821.
N.D. Steinwand v. Brown, 166 N.W. 139, 38 N.D. 602.
Or. Anderson v. Richards, 198 P. 570, 100 Or. 641 Krueger v. Brooks, 184 P. 285, 94 Or. 119 Spath v. Salen, 141 P. 160, 70 Or. 269.
R.I. Tiffany v. Babcock, 154 A. 784, 51 R.I. 350 - Day v. Proprietors of Swan Point Cemetery, 153 A. 312, 51 R.I. 213.
Tex.—Patrick v. Simpson, Civ.App., 168 S.W.2d 315, error refused Town of Refugio v. Heard, Civ. App., 134 S.W.2d 1015, error dismissed, judgment correct.
Wis. Mitchell v. Mitchell, 283 N. W. 448, 230 Wis. 461.
51 C.J. p 173 note 98.

Although lacking record title or color of title, plaintiffs having actual, adverse, continuous, hostile, notorious, peaceable, and exclusive possession of land for statutory period may maintain action to quiet title thereto.—Thompson v. Abbott, Ark., 229 S.W.2d 660.

Under statute requiring adverse possessor to pay taxes, acquisition of tax deed by person in adverse possession of land did not constitute payment of taxes, and, hence, such person could not maintain action to quiet title.—Angelos v. Zella Mining Co., 107 P.2d 170, 99 Utah 417, 132 A. L.R. 213.

80. U.S.—**Corpus Juris quoted in** United States v. 13,255.53 Acres of Land, Etc., D.C.N.J., 53 F.Supp. 305, 308.
Del.—**Corpus Juris cited in** Jackson v. Wax, 171 A. 755, 756, 20 Del.Ch. 93.
Ill.—Scales v. Mitchell, 92 N.E.2d 665, 406 Ill. 130 Leonard v. Leonard, 17 N.E.2d 563, 369 Ill. 572.
51 C.J. p 174 note 99.

81. U.S. **Corpus Juris quoted in** United States v. 13,255.53 Acres of Land, Etc., D.C.N.J., 53 F.Supp. 305, 308.
Tex. Moody v. Holcomb, 76 Tex. 714.

82. N.M. Williams v. Lack, 207 P. 576, 28 N.M. 146.
Tenn. State v. Cooper, Ch.A., 52 S. W. 391.

83. Ala. Sherrod v. King, 147 So. 600, 226 Ala. 522.
Cal. Cohn v. Klein, 287 P. 453, 209 Cal. 421 Shelley v. Hurwitz, 93 P.2d 660, 33 Cal.App.2d 658 - Fleishman v. Davis, 16 P.2d 776, 128 Cal.App. 174 Syme v. Warden, 300 P. 883, 114 Cal.App. 707.
Fla. Laganke v. Sutter, 187 So. 536, 137 Fla. 71 Protective Holding Corporation v. Cornwall Co., 178 So. 804, 127 Fla. 252.
Ind. Rouse v. Patrick, 49 N.E.2d 578, 221 Ind. 517.
Ky. Jones v. Wheeldon, 217 S.W.2d 221, 309 Ky. 184 Martt v. McBrayer, 166 S.W.2d 823, 292 Ky. 479 Crawley v. Mackey, 143 S.W. 2d 171, 283 Ky. 717 Strunks Lane & Jellico Mountain Coal & Coke Co. v. Anderson, 124 S.W.2d 779, 276 Ky. 576 Jones v. O'Connell, 35 S.W.2d 290, 237 Ky. 219
Miss. Dockery v. Zerkowsky, 189 So. 797, 186 Miss. 21.
Mo.—Kirkwood Realty, Insurance & Adjustment Co. v. Henry, 162 S. W.2d 600, 349 Mo. 632.
N.D.—**Corpus Juris cited in** Schuck v. Schuck, 44 N.W.2d 767, 771.
Wyo.—**Corpus Juris cited in** York v. James, 185 P.2d 103, 113, 62 Wyo. 184, 182 A.L.R. 837.
51 C.J. p 174 note 3.

Existence of several quitclaim deeds in chains of title of parties to action to quiet title, where first deed in such chains was a grant, did not

title of the grantor traced back to the government.[84] In fact neither party need go back of the common source,[85] nor may either one question the title of the common grantor.[86] The rule that plaintiff must recover on the strength of his own title, as discussed supra § 17 b, is inapplicable where the parties trace their respective titles to a common source.[87] In such a case, the only question is who has the better title from the common source,[88] and plaintiff need not show a title good as against the whole world, but only as against defendant,[89] and the one who has the superior title or equity must prevail.[90] Where a statute declares that a conveyance shall be void as against a subsequent purchaser in good faith, whose conveyance is first recorded, it has been held that an action to quiet title may not be maintained by one claiming under a quitclaim deed recorded before, but given subsequent to, a deed to defendant from the same grantor, where plaintiff did not purchase in good faith.[91]

What constitutes common source. Whether or not the parties to a controversy claim title from a common source so as to make the common grantor rule applicable depends on the facts and circumstances of the case.[92] The title may be from a common source, although the land involved includes uplands and filled-in or made land adjacent thereto.[93] So, where defendant claims through a tax deed based on sales for taxes levied while plaintiff's grantor was the owner, such grantor is the common source of title.[94] However, title is not shown to be from a common source where plaintiff's deed is from one grantor and defendant's from the same grantor and another.[95]

§ 20. —— Record or Paper Title

The general rule is that, where reliance is placed solely on paper title, the chain thereof must be from the government, or from the original patentee, or from some grantor in possession, but plaintiff may be entitled to maintain an action to quiet title or to remove a cloud thereon although he does not have a perfect record title.

The general rule is that, where reliance is placed solely on paper title, the chain thereof must be, and is sufficient when it is, from the government, or from the original patentee,[96] or from some grantor

render common-grantor rule inapplicable in plaintiff's favor.—Wagnor v. Blume, 161 P.2d 1001, 71 Cal. App.2d 94.

84. N.Y.—Evans v. Lux, 201 N.Y.S 161, 121 Misc. 466.

85. Ky.—Elk Horn Coal Corporation v. Jacks Creek Coal Co., 43 S.W.2d 13, 240 Ky. 769.
51 C.J p 174 note 5.

86. Mont.—**Corpus Juris cited in** Thomson v. Nygaard, 41 P.2d 1, 4, 98 Mont. 539.
51 C.J. p 174 note 6.

87. Cal.—Cohn v. Klein, 287 P. 459, 209 Cal. 421.
Mont.—McAlpin v. Smith, 213 P 2d 602.
S.C.—Griggs v. Griggs, 19 S.E.2d 477, 199 S.C. 295.
Wyo.—**Corpus Juris quoted in** York v. James, 165 P.2d 109, 113, 62 Wyo. 184, 162 A.L.R. 837.
51 C.J. p 174 note 8

88. Mo.—Williams v. Sands, 158 S. W. 47, 251 Mo 147.
Reason for rule
Rule is one of convenience and justice, and is based on principle that one may not dispute title under which he claims.—Shuck v. Shuck, N.D., 44 N.W.2d 767.

89. N.M.—**Corpus Juris quoted in** Dunken v. Guess, 56 P.2d 1123, 1125, 40 N.M. 156.
N.D.—**Corpus Juris quoted in** Schuck v. Schuck, 44 N.W.2d 767, 771.
Wyo.—**Corpus Juris quoted in** York v. James, 165 P.2d 109, 113, 62 Wyo. 184, 162 A.L.R. 837.
51 C.J. p 174 note 9.

90. Ga.—Holliday v. Guill, 27 S.E.2d 398, 196 Ga. 723.
Ky.—Baker v. Brown, 111 S W.2d 1036, 271 Ky. 93
Miss.—Dockery v. Zorkowsky, 189 So. 797, 186 Miss. 31
Mo.—Kirkwood Realty, Insurance & Adjustment Co. v. Henry, 162 S.W. 2d 600, 349 Mo 522.
N.M.—**Corpus Juris quoted in** Dunken v Guess, 56 P.2d 1123, 1125, 40 N.M 156.
N.D.—**Corpus Juris quoted in** Shuck v. Shuck, 44 N.W.2d 767, 771.
S.C.—Griggs v. Griggs, 19 S.E 2d 477, 199 S.C. 295.
Tex.—Hornsby v. Bartz, Civ.App., 230 S.W.2d 360.
Wyo.—**Corpus Juris quoted in** York v. James, 165 P.2d 109, 113, 62 Wyo. 184, 162 A.L.R. 837.
51 C.J. p 174 note 10.

91. Cal.—Chapman v. Ostergard, 238 P. 1081, 73 Cal.App. 539.

92. Cal.—Wagnor v. Blume, 161 P. 2d 1001, 71 Cal.App.2d 94.

93. U S.—Commodores Point Terminal Co. v. Hudnall, D.C.Fla., 283 F. 150.

94. U.S —Ginaca v. Peterson, C.C.A. Cal., 262 F. 904.
Cal.—**Corpus Juris cited in** Denning v. Green, 6 P.2d 317, 119 Cal.App. 102.
Pa.—**Corpus Juris cited in** Godding v. Swanson, 67 A.2d 814, 815, 165 Pa.Super. 193.

95. Mo.—Hunter v. Pemiscot Land, etc., Co., 151 S.W. 714, 246 Mo. 135 —Nall v. Conover, 122 S.W. 1039, 223 Mo. 477.

96. U.S.—Anderson-Tully Co. v. Murphree, C.C.A.Ark., 153 F.2d 874.
Cal.—Coffin v. Odd Fellow Hall Ass'n of Modesto, 71 P.2d 266, 9 Cal.2d 521—**Corpus Juris cited in** San Diego Improvement Co. v. Brodie, 8 P.2d 1027, 1028, 215 Cal. 97—Shelley v. Hurwitz, 92 P.2d 660, 33 Cal.App.2d 658—Syme v. Warden, 300 P. 863, 114 Cal.App. 707.
Ky.—Jones v. Wheeldon, 217 S.W 2d 221, 309 Ky. 184—Martt v. McBrayer, 166 S.W.2d 823, 292 Ky. 479—Strunks Lane & Jellico Mountain Coal & Coke Co. v. Anderson, 124 S.W.2d 779, 276 Ky. 576—Hale v. Horn, 97 S.W.2d 402, 265 Ky. 560.
Tex.—Smith v. Waggoner, Civ.App., 191 S.W.2d 892, refused no reversible error—Town of Refugio v. Heard, Civ.App., 124 S.W.2d 1015, error dismissed, judgment correct.
Wash.—Hansen v. Lindstrom, 11 P. 2d 232, 168 Wash. 130.
Wis.—Hunter v. Neuville, 39 N.W.2d 468, 255 Wis. 423—Kidder v. Pueschner, 247 N.W. 315, 211 Wis. 19.
51 C.J. p 175 note 16.
Where location of property line only question
In equity action between adjoining landowners to quiet title, where there was no contention but that defendant owned realty on one side of line and that plaintiffs owned realty on other side of line, and only contention was true location of line, defendant who filed counterclaim, in order to prevail, was not required to trace title from commonwealth.—

in possession,[97] unless, as discussed supra § 19, both parties claim under a common source. Plaintiff may be entitled to maintain an action to quiet title or to remove a cloud thereon although he does not have a perfect record title,[98] and a technical objection to the chain of title made out by plaintiff may be met by curing the defect.[99] Furthermore it has been held that plaintiff is not bound to show a perfect title from the government or as against the world, but only as against the holder of the alleged cloud,[1] and that it is sufficient for plaintiff to show that he claims through one who procured a judicial decree of ownership and right to possession against the very persons who are defendants in the instant action.[2]

In a suit to quiet title plaintiff ordinarily may claim only under his deed,[3] and a deed which is void for indefiniteness, as far as a record title is concerned, may not support an action to quiet title based on a record title,[4] but unimportant discrepancies in the deeds in the chain of title have been held not to constitute missing links or breaks in the chain.[5]

A defective deed may be sufficient to enable plaintiff to sue where the defect is due to a mistake against which the law would afford relief;[6] and even where the deed does not cover the land in dispute, and plaintiff does not present a case entitling him to reformation of such deed, the infirmity may be cured by conveyance of his grantor's interest to him before commencement of the action.[7] An unrecorded deed, where such facts are shown to have put anyone who was dealing with the estate on notice, is sufficient on which to base an action to quiet title.[8] So it has been held that a tax deed is sufficient evidence of title to sustain such action, even though not witnessed,[9] and a deed which may not be recorded because not acknowledged or witnessed has been held sufficient to sustain an action by the grantee against the grantor's heirs.[10] Under a statute providing that, where two or more persons claim land by recorded title and neither one is in actual possession, either may bring a suit to establish title, where plaintiff in such a suit claims title by inheritance, nothing more in the form of a recorded title may be required of plaintiff than that the title which his ancestor had, and which he inherited, is a recorded title.[11]

Reynolds v. Cobb, 150 S.W.2d 702, 286 Ky. 339.

97. Cal.—Coffin v. Odd Fellow Hall Ass'n of Modesto, 71 P.2d 266, 9 Cal.2d 521—Corpus Juris cited in San Diego Improvement Co. v. Brodie, 8 P.2d 1027, 1028, 215 Cal. 97—Shelley v. Hurwitz, 92 P.2d 660, 33 Cal.App.2d 658—Syme v. Warden, 300 P. 863, 114 Cal.App. 707.

51 C.J. p 175 note 17.

98. Cal.—Crane v. French, 104 P. 2d 53, 39 Cal.App.2d 642.

N.J.—Charette v. Fruchtman, 159 A. 318, 10 N.J.Eq. 256.

99. Mich.—Stewart v. Hunt, 5 N.W. 2d 737, 303 Mich. 161.

Foreign probate

In suit to quiet title, an objection to title to land involved because only certified copy of nonresident's will, probated outside state, was offered for probate in state, can be cured by filing exemplified copy of will and record of foreign probate in probate court for county wherein land is situated before entry of decree for plaintiffs.—Stewart v. Hunt, supra.

1. Ill.—South Chicago Brewing Co. v. Taylor, 68 N.E. 732, 205 Ill. 132.

Okl.—Smith v. Reneau, 112 P.2d 160, 188 Okl. 629.

2. Cal.—San Diego Improvement Co. v. Brodie, 8 P.2d 1027, 215 Cal. 97.

3. Ala.—Van Valkenburg v. Geron, 31 So.2d 767, 249 Ala. 467.

Suit against restrictions

Statute authorizing suit to quiet title against restrictions is not available to one holding land under deed containing questioned restrictions.—Humphreys v. Ibach, 160 A. 531, 110 N.J.Eq. 647, 85 A.L.R. 980.

4. Ark.—Thomason v. Abbott, 229 S. W.2d 660.

Ind.—Edens v. Miller, 46 N.E. 526, 147 Ind. 208—In re Long v. Starkey, App., 92 N.E.2d 238.

Deed held void

Deed conveying the remaining part of southeast quarter of southeast quarter of designated section not formerly sold and owned by named persons was void for indefiniteness in so far as record title was concerned and would not support a recovery by grantee on record title either in ejectment action or suit to quiet title, since record did not show what land was ever sold to or owned by parties named as excluded.—Thomason v. Abbott, Ark., 229 S.W.2d 660.

5. Cal.—Wagner v. Blume, 161 P.2d 1001, 71 Cal.App.2d 94.

Erroneous description of land

Where deed in plaintiff's chain of title contained erroneous description in employment of "southwest" as the designated beginning corner instead of "southeast," the erroneous description did not furnish such break in title as would preclude plaintiff from recovering in suit to recover title and possession from adverse claimant, where evidence showed that the grantor had no other land in the survey involved and that it was the grantor's intention to convey the land claimed by plaintiff.—Smith v. Waggoner, Tex.Civ.App., 191 S.W.2d 892, refused no reversible error.

6. Ark. Corpus Juris quoted in Stephens v. Ledgerwood, 226 S.W. 2d 587, 590, 216 Ark. 401.

51 C.J. p 175 note 20.

7. Ark. Corpus Juris quoted in Stephens v. Ledgerwood, 226 S.W. 2d 587, 590, 216 Ark. 401.

Ind.—Adams v. Betz, 74 N.E. 649, 167 Ind. 161.

8. U.S.—Findlay v. Hinde, Ohio, 1 Pet. 241, 7 L.Ed. 128.

9. Fla.—Heaney v. Sanchez, 66 So. 997, 68 Fla. 167.

10. Tenn.—Bradford v. Bradford, 3 Tenn.Civ.A. 502.

11. La.—Long v. Chaffan, 175 So. 42, 187 La. 507.

Presumption as to community

Where husband after marriage acquired patent to land from government and presumption existed that he and his wife were living together in community and title was recorded in husband's name when community was dissolved by death of wife, property was presumed to have been community property inuring to the benefit of husband and wife, and husband having recorded title wife had recorded title also, with respect to heirs' right to bring suit to estab-

Quitclaim. An action to quiet title or remove a cloud thereon ordinarily may be based on a quitclaim deed.[12] So one who has a quitclaim deed from one in possession may sue to quiet title where, at the time of the giving of the deed, there was an existing statutory provision that such deed should be sufficient to convey all the estate which could lawfully be conveyed by a deed of bargain and sale.[13] One receiving a quitclaim deed to certain property as well as a sheriff's deed thereto may, in a proper case, be entitled to have his title to such property quieted.[14] However, a quitclaim deed from a grantor who had no title[15] or who was not in possession[16] at the time it was executed is insufficient, although the invalidity of a quitclaim deed is immaterial where plaintiff claims by inheritance from the grantor.[17]

§ 21. —— Vendors and Purchasers

a. Vendors
b. Purchasers

a. Vendors

(1) In general
(2) Conveyance under covenant of warranty

(1) In General

A mere contract to convey land will not divest a vendor of his right to maintain an action to quiet title thereto or to remove a cloud thereon where the legal title remains in him, but one who has sold and actually disposed of all his interest in property ordinarily may not maintain an action to quiet title thereto.

A mere contract to convey land will not divest a vendor of his right to maintain an action to quiet title or remove a cloud thereon where the legal title remains in him,[18] and this rule applies where the vendor has received no part of the consideration.[19] Also, one who signs a deed to land owned by him may be entitled to maintain a suit to quiet title to such property where the deed has not been delivered,[20] and a vendor retaining a vendor's lien for unpaid purchase money, in jurisdiction where such fact gives him the superior title, may sue to cancel as clouds on his title deeds from his grantor to defendant.[21] One who conveys land but retains possession of accretions thereto may properly maintain a suit to quiet title to the accretions in himself as against persons who prove no interest in, or title to, the accreted lands, where the purchaser disclaims an interest in such lands.[22]

On the other hand, one who has sold and actually disposed of all his interest in property ordinarily may not maintain an action to quiet title thereto.[23] Thus, although a sale of land by the owner pending a bill by him to quiet title has been held not to defeat the action,[24] as a general rule, one who has sold and actually conveyed land may not, subsequent to such conveyance, maintain a bill to quiet title thereto in himself,[25] according to the authorities on the

lish title under statute.—Smith v. Courtney, 192 So. 528, 193 La. 910.

12. Cal.—Thornton v. Middletown Educational Corporation, 70 P.2d 234, 21 Cal.App.2d 707.
51 C.J. p 175 note 26.

Reason for rule

A quitclaim deed is sufficient to convey interest of grantors to grantees so as to entitle them to maintain action to quiet title, since quitclaim deed is closely related to simple release, but is recognized as distinct form of conveyance and operates like any other deed to extent of transferring whatever title or interest grantor has.—Thornton v. Middletown Educational Corporation, 70 P.2d 234, 21 Cal.App.2d 707.

13. Mass.—Ex parte Connolley, 46 N.E. 613, 168 Mass. 201.

14. Neb.—Webber v. Spencer, 27 N.W.2d 824, 148 Neb. 481.

15. Ohio.—Euclid Ave. Christian Church v. Adams, 159 N.E. 490, 26 Ohio App. 306.

16. Colo.—Olson v. Kelsey, 157 P. 194, 61 Colo. 331.
51 C.J. p 175 note 29.

17. Mo.—Miller v. Corpman, 257 S.W. 428, 301 Mo. 589.

18. Cal.—Kelso v. Ulrich, 155 P.2d 407, 67 Cal.App.2d 698.
Mont.—Corpus Juris quoted in Kern v. Robertson, 12 P.2d 565, 568, 92 Mont. 283.
51 C.J. p 176 note 53.

Abandonment of contract or breach of condition

(1) On abandonment of contract or breach of condition by vendee, the vendor, being still the owner of the legal title, may sue to protect it.—Snodgrass v. Parks, 21 P. 429, 79 Cal. 55—51 C.J. p 176 note 53 [b].

(2) Where vendee may be deemed to have abandoned the contract so as to enable vendor to treat contract as forfeited and terminated in accordance with its terms, the vendor may take proper steps in equity to obtain removal of cloud on his title by cancellation of public record of such contract.—Realty Securities Corporation v. Johnson, 111 So. 532, 93 Fla. 46.

Effect of vendor's deed to third person

Vendor under contract for sale of lot was not precluded from maintaining quiet-title suit against vendee on ground that vendor was not real party in interest because vendor had conveyed lot to third person after execution of contract and before commencement of suit, where vendor and third person executed contemporaneous agreement stipulating that deed was delivered to third person as security for loan, and reconveyance had been made to vendor, and date of reconveyance was not shown.—Hacienda Homes v. Peck, 113 P.2d 487, 45 Cal.App.2d 37.

19. Tex.—Masterson v. Pullen, Civ. App., 207 S.W. 537.

20. Cal.—Nelson v. Thomas, 172 P. 393, 36 Cal.App. 433.

21. U.S.—Smith v. Brown, C.C.A. Tex., 3 F.2d 926.

22. Neb.—Conkey v. Knudsen, 284 N.W. 737, 135 Neb. 390.

23. Cal.—Lyons v. Emery, 164 P.2d 272, 72 Cal.App.2d 275.

24. Okl.—Sarkeys v. Evans, 141 P.2d 301, 193 Okl. 159.
51 C.J. p 177 note 67.

25. U.S.—Iselin v. La Coste, C.C.A. Miss., 139 F.2d 887, certiorari denied 64 S.Ct. 791, 321 U.S. 790, 88 L.Ed. 1080.
Ariz.—Lee v. New York Life Ins. Co., 145 P.2d 843, 61 Ariz. 177.
51 C.J. p 176 note 55.

question, even though he is in possession,[26] and although the grantee, pending suit by the grantor to quiet title against a third person, redelivers the deed to the grantor on condition that the grantee shall own the land on the successful termination of the suit.[27] Where an owner of realty by express trust conveys such property to a trustee so as to vest the whole estate in the trustee, primarily for the purpose of sale, and incidentally for the purpose of security, an action to quiet title or to remove a cloud thereon may not lie in favor of the original owner of the property or one claiming under him.[28]

Deed delivered in escrow. The grantor in a deed delivered in escrow may bring an action to remove a cloud from title before the condition on which delivery to the grantee is to be made has been performed.[29]

(2) Conveyance under Covenant of Warranty

There is authority to the effect that a vendor who, in conveying land, has warranted the title or contracted to perfect it, may be entitled to sue to quiet title, but there is also authority to the effect that a vendor, after conveyance, may not maintain the action, even though he has warranted the title or agreed to procure the discharge of an apparent lien thereon.

There is authority to the effect that a vendor who, in conveying land, has warranted the title or contracted to perfect it,[30] where evidence is about to be lost or the vendee's inertia would result in the perfecting of an adverse title,[31] may sue to quiet title. So it has been held that a vendor who has conveyed by warranty deed, but holds a lien to secure the purchase price, may maintain a bill to quiet title in his vendee as against invalid claims, although his title at the time of the conveyance was merely equitable.[32] On the other hand, there is also authority to the effect that a vendor, after conveyance, may not maintain the action, even though he has warranted the title[33] or agreed to procure the discharge of an apparent lien thereon.[34]

In any event the vendor may not sue where his liability on the covenant of warranty has terminated.[35] So where the warrantor of a title executes at the request of the warrantee an instrument which may injure the title, the warrantor is not thereby made liable on his covenant of warranty, and, hence, may not maintain a bill in equity to clear the title from such instrument, without allegation and proof that the warrantee, on request, refused to move in the matter.[36]

b. Purchasers

(1) In general

(2) At execution or judicial sale generally

(3) At foreclosure sale

(1) In General

In some jurisdictions, a vendee under an executory contract of sale may not maintain a bill to quiet title, but in other jurisdictions a vendee under such a contract may maintain such an action, as may his assignee.

In those jurisdictions where none but a legal title suffices, as discussed supra § 17, a vendee under an executory contract of sale may not maintain a bill to quiet title.[37] So also, where an equitable title is sufficient as against persons claiming equities, but insufficient as against the holder of the legal title, one claiming under an executory contract of sale may not sue the vendor to quiet title.[38] However, where an equitable title is sufficient to bring an action to quiet title, a vendee under such a contract, being considered as having the equitable estate, usually may maintain the action,[39] as may his assignee,[40] although it has been held that the action may not be maintained by a vendee who has not paid the purchase money, so as to entitle him to go at

26. W.Va.—Hawkinberry v. Metz, 114 S.E. 240, 91 W.Va. 637.
51 C.J. p 176 note 56.

27. Ky.—Collins v. Adams, 180 S.W. 374, 167 Ky. 328.

28. Cal.—Ephraim v. Metropolitan Trust Co. of Cal., 172 P.2d 501, 28 Cal.2d 824.

29. N.C.—Graham County Board of Education v. Union Dev. Co., 74 S.E. 1015, 159 N.C. 162.
51 C.J. p 177 note 68.

30. Mich.—Taylor v. Hurd, 282 N.W. 862, 293 Mich. 425.
Okl.—Sarkeys v. Evans, 141 P.2d 801, 193 Okl. 159.
Wis.—Delap v. Parcell, 283 N.W. 305, 230 Wis. 152.
51 C.J. p 177 note 69.

31. W.Va.—Jackson v. Kittle, 12 S.E. 484, 34 W.Va. 307.

32. W.Va.—Dudley v. Brownlow, 90 S.E. 878, 78 W.Va. 331.

33. Ind.—Chapman v. Jones, 47 N.E. 1065, 49 N.E. 347, 149 Ind. 434.
51 C.J. p 177 note 63.

34. N.Y.—Townsend v. Goelet, 11 Abb.Pr. 187.

35. Iowa.—Houchin v. Salyards, 133 N.W. 48, 136 N.W. 1049, 155 Iowa 608.
51 C.J. p 177 note 65.

36. Me.—Cobb v. Baker, 49 A. 425, 95 Me. 89.

37. Ohio.—Thomas v. White, 3 Ohio St. 540.
Va.—Tax Title Co. v. Denoon, 57 S.E. 586, 107 Va. 201.

38. Cal.—Chase v. Cameron, 65 P. 460, 133 Cal. 231.

39. Fla.—Andrew v. Hocker, 183 So. 251, 132 Fla. 739.
Kan.—Corpus Juris cited in Withrocker v. Wiederrader, 134 P.2d 381, 385, 156 Kan. 570.
Mo.—Corpus Juris cited in Hamilton v. Linn, 200 S.W.2d 69, 70, 355 Mo. 1178.
N.Y.—Karp v. Twenty Three Thirty Ryer Corp., 56 N.Y.S.2d 753, 185 Misc. 440.
51 C.J. p 177 note 77.

40. Mich.—Pleasant Lake Hills Corp. v. Eppinger, 209 N.W. 152, 235 Mich. 174.
Wash.—Griffith v. Whittier, 323 P.2d 1063.

once into a court of equity and demand a conveyance.[41]

Where a son of an intestate surrendered his interest in the intestate's land to plaintiff, his brother, on condition that the latter support their mother during her life, and plaintiff takes possession, he may not, until completion of his contract, maintain a suit to remove a cloud on the title against creditors of the brother levying execution on the latter's legal title,[42] although his possession under the contract will be protected until such time as his equitable interest entitles him to specific performance of such contract.[43] Where a purchaser under a contract of sale assigns his interest and the assignee of such interest agrees with another to sell him the property described in the contract, the one agreeing to purchase the land from the assignee has been held to have no title in the land which may be quieted.[44]

Purchaser receiving defective conveyance. A purchaser for value to whom a defective conveyance has been made and who has a right to call for the legal title may maintain a bill to quiet his title as against his grantor,[45] and he may also quiet title as against a subsequent purchaser for value, with notice of the prior equitable right.[46] One who, by reason of a mutual mistake, accepts a deed of less than the full amount of acreage intended to be conveyed, but who goes into possession of the full acreage, has been held entitled to have his title quieted as against one, not an innocent purchaser without notice, who purchased realty which included the acreage omitted from the deed.[47] On the other hand, the grantee in a deed to a homestead in which the husband did not join has been held not entitled to maintain a suit to quiet title against the grantor's creditor who purchased the land under a judgment in his favor.[48]

Deed delivered in escrow. Where land is sold under a valid contract and a deed is executed and placed in escrow, to be delivered on payment of the purchase money, the equitable title passes at once to the grantee, and he may maintain an action to quiet title.[49]

(2) At Execution or Judicial Sale Generally

Ordinarily, a person deducing his title to lands through a judicial or an execution sale may maintain an action to quiet title to such lands, except where the proceedings which were the basis of such sale, and on which complainant's title depends, are shown to be void.

Ordinarily a person deducing his title to lands through a judicial or an execution sale may maintain an action to quiet title to such lands,[50] except where the proceedings which were the basis of such sale, and on which the validity of complainant's title depends, are, for jurisdictional defects[51] or for fraud,[52] shown to be void, or where the sale was on a judgment and it is shown that the debt on which the judgment was obtained had been fully paid before the commencement of the action.[53] Where a sale in partition has not been reported or confirmed, and no deed has been delivered, a purchaser at such sale has been held not entitled to maintain an action to remove a cloud on the title to the lands purchased.[54]

(3) At Foreclosure Sale

Although one in possession, under color of foreclosure, may be able to maintain an action to quiet his title against strangers to the equity of redemption, without proving his title, where a mortgagor has no title to the land, and the purchaser at foreclosure takes with notice, an action by the latter to quiet title must fail.

A person in possession, under color of foreclosure, may maintain an action to quiet his title against strangers to the equity of redemption, without proving his title;[55] but where a mortgagor has no title to the land, and the purchaser at foreclosure sale takes with notice, an action by the latter to quiet title must fail,[56] irrespective of any question whether the rights of the owner's representatives are barred by the statute of limitations by virtue of their having discovered the fraud by which mortgagor

41. Ala.—Bradley v. Bell, 38 So. 759, 142 Ala. 382.
Payment of consideration as condition precedent to relief see infra § 94.

42. Mich.—Schmidt v. Steinbach, 160 N.W. 448, 193 Mich. 640.

43. Mich.—Schmidt v. Steinbach, supra.

44. Colo.—Miller v. Temple, 211 P. 2d 989, 120 Colo. 546.

45. Iowa.—Kessler v. Terrell, 185 N.W. 15, 192 Iowa 442.
51 C.J. p 177 note 70.

46. Ky.—Taul v. Brickey, 219 S.W. 430, 187 Ky. 375.
N.H.—Doe v. Doe, 37 N.H. 268.

47. Okl.—Wise v. Latimer, 198 P.2d 1001, 200 Okl. 526.

48. Miss.—Zukoski v. McIntyre, 47 So. 435, 666, 93 Miss. 806.

49. Okl.—Akers v. Brooks, 229 P. 544, 108 Okl. 98.

50. Ariz.—Copper Belle Min. Co. v. Gleeson, 134 P. 285, 14 Ariz. 548, 48 L.R.A.,N.S., 481.
51 C.J. p 178 note 83.

51. Ala.—Craney v. White, 51 So. 236, 164 Ala. 411.
51 C.J. p 178 note 84.

52. U.S.—Sowles v. Rugg, C.C.Vt., 55 F. 163.
Miss.—Boyd v. Thornton, 21 Miss. 338.

53. U.S.—Burt v. Collins, C.C.Ill., 39 F. 538.

54. Ill.—MacGregor v. Malarkey, 89 Ill.App. 435.

55. N.Y.—Craft v. Merrill, 14 N.Y. 456.
51 C.J. p 178 note 87.

56. Cal.—Randall v. Duff, 19 P. 532, 21 P. 610, 79 Cal. 115, 3 L.R.A. 754.

secured the apparent title;[57] and relief has been denied one who purchased at foreclosure sale for a grossly inadequate price.[58]

Grantee or assignee of purchaser. Where a mortgagee purchases at a foreclosure sale, although the sale is not confirmed, a person to whom his rights are conveyed may bring an action against the holder of a tax deed on the premises under a statute authorizing the holder of a lien to prosecute an action to test the legality of adverse claims.[59] However, the assignee of a purchaser at foreclosure sale, whose representations that the time for redemption would be extended caused the mortgagor to forego his right to redeem, is not entitled to a decree quieting title in a suit by the mortgagor to quiet his title, although such representations were made without consideration.[60]

One who forecloses under a junior mortgage and acquires the legal title may not assert a lien under a prior mortgage in an action to quiet title based on the title acquired by such foreclosure.[61]

§ 22. —— Creditors

An attaching creditor or a judgment creditor may be entitled to maintain an action to quiet title or to remove a cloud thereon.

An attaching creditor has sufficient title in the property attached to sustain a bill to quiet title or remove a cloud thereon.[62] Moreover, one who has recovered judgment at law and levied his execution on the only realty of defendant is entitled to a bill in chancery to quiet title to or remove a cloud from such real estate,[63] although it has also been held that a judgment creditor may not maintain an action to quiet title in the absence of a levy of execution or a decree specifically attaching a lien to particular property.[64]

Estate creditors. A creditor of an estate has no interest such as will enable him to maintain an action to quiet title to the estate lands,[65] except by leave of court, after refusal of the administrator to bring suit.[66] However, equity will intervene to remove a cloud on the title to decedent's realty, his estate having been represented insolvent, in favor of a creditor who has obtained a judgment against the administrator, and to subject the land to payment of his debts.[67]

§ 23. —— Homestead, Dower, or Leasehold Interests

Ordinarily, a homestead, dower, or leasehold interest constitutes a sufficient interest to enable the holder thereof to bring an action to quiet title or to remove a cloud thereon.

Ordinarily, an action may be brought by the holder of a homestead interest to quiet title or to remove a cloud thereon.[68] An inchoate right of dower has been held to be such an interest in land as will enable a wife to bring an action to remove a cloud thereon.[69] Thus where, by statute, a widow's right of dower is a vendable interest, it has been held that she may sue to quiet title[70] without having elected between dower and her statutory rights.[71]

Leasehold interests. While under some statutory provisions, a tenant may not be able to maintain a statutory action to quiet title as against the owner of the fee,[72] ordinarily, one in possession of lands under a lease may maintain a suit to quiet title against another claiming possession under another lease[73] or against an adverse claim by the owner

57. Cal.—Randall v. Duff, supra.

58. Cal.—Dunlap v. Kelsey, 5 Cal. 181.
51 C.J. p 178 note 90.

59. Wis.—Coe v. Rockman, 106 N.W. 290, 126 Wis. 515.

60. Idaho.—Steinour v. Oakley State Bank, 262 P. 1053, 45 Idaho 472.

61. S.D.—Farm, etc., Co. v. Meloy, 75 N.W. 207, 11 S.D. 7.

62. R.I.—Blackstone Hall Co. v. Rhode Island Hospital Trust Co., 97 A. 484, 39 R.I. 69.
51 C.J. p 179 note 95.

63. Cal.—Robben v. Benson, 185 P. 200, 43 Cal.App. 204.
51 C.J. p 179 note 96.

64. Cal.—Stenzel v. Kronick, 283 P. 93, 103 Cal.App. 507.
51 C.J. p 179 note 97.

65. Ill.—Le Moyne v. Quimby, 70 Ill. 399.

66. Mich.—Marshall v. Blanc, 46 N. W. 947, 47 N.W. 516, 82 Mich. 518.

67. Ala.—Saltmarsh v. Smith, 32 Ala. 404.

68. N.D.—Nelson v. Griggs County, 219 N.W. 225, 56 N.D. 729.
51 C.J. p 179 note 2.

Children of owner

(1) Under some statutory provisions, it has been held that children of deceased owner of homestead, who also left a widow, may maintain an action to have their title determined. —Naiman v. Rohlmeyer, 150 N.W. 829, 97 Neb. 551.

(2) However, it has also been held that a daughter is not entitled to cancellation of divorce decree entered in favor of wife against deceased husband during his lifetime as cloud on daughter's title and right to use of homestead occupied by mother and father prior to divorce on ground that court was without jurisdiction to enter divorce decree. Pinkford v. Williams, 70 P.2d 97, 190 Okl. 441.

69. Wis.—Madigan v. Walsh, 22 Wis. 501.
51 C.J. p 179 note 7.

70. Mo.—Brake v. Ross, 178 S.W. 2d 491.—Egan v. Wurfel, 18 S.W. 2d 50, 323 Mo. 27.

71. Mo.—Egan v. Wurfel, 18 S.W. 2d 50, 323 Mo. 27.

72. Ind.—Santa Claus, Inc., v. Santa Claus of Santa Claus, 27 N.E.2d 334, 217 Ind. 251.

Excluding others from use of land

Plaintiff who asserted certain limited rights to use of land as a tenant and asserted right to have others excluded from using the land for specific purposes could not maintain statutory action to quiet title.—Santa Claus, Inc., v. Santa Claus of Santa Claus, supra.

73. W.Va.—Castle Brook Carbon

of the fee[74] Thus, it has been held that a lessee under a lease for a fixed period, renewable forever, who has exercised an election to renew and offered to pay all arrears of rent due, may maintain an action quieting his title to a permanent leasehold.[75]

§ 24. —— Interest as Mortgagor or Mortgagee

a. Interest as mortgagor
b. Interest as mortgagee

a. Interest as Mortgagor

In a jurisdiction where the legal title remains in the mortgagor, a mortgagor in possession has been held entitled to bring an action to quiet title against the mortgagee asserting legal title to the land.

In a jurisdiction where the legal title remains in the mortgagor, a mortgagor in possession may maintain an action to quiet title against the mortgagee asserting legal title to the land.[76] Furthermore, it has been held that a grantor of a trust deed to realty given as security may be entitled to bring an action to quiet title to such property.[77] Also, where title to property is held by a person named by a creditor holding possession under a contract to reconvey when reimbursed for his expenditures, an action to quiet the debtor's title may lie when the creditor has been fully reimbursed.[78] A statute providing that, when an action to enforce a mortgage is barred by the statute of limitations, the owner of the land may maintain an action to quiet title and to have the cloud removed applies where a deed given as security was made directly to the creditor by one who held the title for the debtor.[79]

After foreclosure. As a result of the foreclosure of a mortgage, the mortgagor, or one claiming under him, may be divested of such title or interest in the property covered by the mortgage as would enable him to maintain an action to quiet title thereto.[80] So a mortgagor who has failed to redeem within the statutory period, and does not ask to redeem after the expiration of such period, or allege any facts entitling him to do so, has no title to quiet.[81]

b. Interest as Mortgagee

While in some jurisdictions, a mortgagee or his assignee has been held to have sufficient title or interest in the property involved to maintain a suit to quiet title thereto as against adverse claims, in other jurisdictions, it has been held that such an action ordinarily may not be brought by the mortgagee.

In those jurisdictions where a mortgage is regarded as passing the whole legal title to the property, a mortgagee[82] or his assignee[83] has sufficient title or interest in the property involved to maintain a suit to quiet title thereto as against adverse claims. However, in those jurisdictions where a mortgage is not regarded as passing the legal title to the property, and an equitable title in plaintiff is not sufficient to support an action to quiet title, it has been held that such an action may not ordinarily be maintained by the mortgagee.[84] So also, where a mortgage does not create any estate or interest in real property, a mortgagee may not bring the action,[85] and this is true where, under the statute, a mortgage conveys no title, legal or equitable, to the property described.[86] It has also been held that the

Black Co. v. Ferrell, 85 S.E. 544, 76 W.Va. 300.
51 C.J. p 179 note 3.

74. Cal.—Langstaff v. Mitchell, 6 P.2d 546, 119 Cal.App. 407.
51 C.J. p 179 note 4.

Statute construed and applied
Under statute providing that an action may be brought by any person against another who claims an estate or interest in real property adverse to him to determine such adverse claims, a leasehold interest in real property is sufficient to maintain action.—Langstaff v. Mitchell, 6 P.2d 546, 119 Cal.App. 407—51 C.J p 179 note 4 [a].

75. Ohio.—Foster v. Ellison, 12 Ohio Cir.Ct.,N.S., 399, 31 Ohio Cir.Ct. 513.

76. Ky.—Sheffield v. Day, 90 S.W. 545, 28 Ky.L. 754.

77. Cal.—Bishop v. Morrow, 55 P. 2d 1216, 12 Cal.App.2d 720.

Although legal title vests in trustee, where trust deed is given as security for debt the grantor nevertheless retains sufficient interest to sue under statute providing that an action to quiet title may be maintained by "any person who claims an estate of inheritance," etc., and who is in possession.—Charles A. Warren Co. v. All Persons, etc., 96 P. 807, 153 Cal. 771.

78. Kan.—Doty v. Shepard, 158 P. 1, 98 Kan. 309.

79. Kan.—Jones v. Hammond, 235 P. 857, 118 Kan. 479

80. Ala.—Harper v. Tate, 178 So. 892, 235 Ala. 321.
Iowa.—City of Dubuque v. Fischer & Co., 245 N.W. 758, 215 Iowa 433.

Notwithstanding reservations in subsequent contracts and deeds, where mortgagor mortgaged realty without reservation of strip of land along river, and mortgage was foreclosed, mortgagor was without title to strip so as to enable him to bring action to quiet title thereto.—City of Dubuque v. Fischer & Co., supra.

Where right to redeem from tax sale passed
Where mortgagor's right to redeem from tax sale passed to mortgagees by virtue of foreclosure decree, mortgagor had no right or interest which could pass by deed, so as to permit grantee thereunder to maintain action to quiet title against mortgagees and purchasers at foreclosure sale whose right to redeem from tax sale had not terminated.—Potter v. Entler, 163 P.2d 490, 41 Cal.App.2d 710.

81. Idaho.—Steinour v. Oakley State Bank, 262 P. 1052, 45 Idaho 472.

82. Ark.—Love v. Bryson, 22 S.W. 341, 57 Ark. 589.

83. Md.—Polk v. Reynolds, 31 Md. 106.

84. Utah.—Fields v. Cobbey, 62 P. 1020, 22 Utah 415.

85. N.Y.—Stickler v. Ryan, 61 N.Y. S.2d 708, 270 App.Div. 962, appeal denied 64 N.Y.S.2d 914, 27 App.Div. 757, appeal dismissed 70 N.E.2d 545, 296 N.Y. 735.

86. Fla.—Cook v. Pontious, 128 So. 765, 98 Fla. 378—Peninsular Naval

grantee in a deed, absolute in form but in fact an equitable mortgage, may not maintain a bill to set aside as a cloud on title a subsequent deed from his grantor.[87]

On the other hand, where either a legal or equitable interest is sufficient to authorize the action, an action to quiet title against adverse claims may be brought by a mortgagee, although the mortgage gave him merely a lien on the property,[88] and this is true where the statute authorizes an action by the "holder of any lien or incumbrance on land, although not having legal title or possession."[89] So it has been held that a trustee in a mortgage, who has not the legal title entitling him to possession, may sue to cancel deeds of adverse claimants in possession, where he has no adequate remedy at law.[90]

A mortgagee, under a purchase-money mortgage, may not bring a suit to quiet title to the property involved, on default of the purchaser, under a statute providing that a mortgage of realty shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the property without foreclosure and sale.[91] Also, where a statute declares that there shall be but one action for enforcement of any right secured by mortgage, it has been held that a mortgagee's remedy against the mortgagor is not by action to quiet title, but by suit to foreclose,[92] although it has also been held that one who has the status of a mortgagee-trustee may prosecute an action to quiet title to the mortgaged property, on the failure of the mortgagor-beneficiary to pay sums advanced, and that he is not required to bring an action to foreclose the security.[93] Under some statutory provisions, plaintiff is the beneficial owner of land entitled to maintain an action to quiet title thereto and not relegated to the remedy of foreclosing his mortgage where, with the intent to execute a specific plan to sell the land, he transfers the immediate title to the property to a selling agent who executes a note and mortgage back to plaintiff to facilitate that purpose, and the selling agent retains title thereto in violation of the contract on termination of the agency.[94]

After conveyance, with warranty of title, by mortgagee. A mortgagee, after conveying the mortgaged premises with a warranty of title, may sue to relieve the premises from a cloud affecting his rights under the mortgage, and thereby protect the title conveyed and warranted.[95]

§ 25. —— Easements

Under some statutory provisions the holder of an easement has been held to have the right to bring an action to quiet title, but under other statutory provisions such right has been held not to exist.

The holder of an easement has been held to have the right to bring an action to quiet title under a statute giving a right of action to anyone in peaceable possession of lands and claiming to own them.[96] However, a statute providing for an action to determine the validity of adverse claims by one in possession of a freehold estate has been held not to include a party in the enjoyment of an easement,[97] and the same rule has been held to apply to an action under a statute providing that an action may be brought by one claiming land in fee, or for life, or for a term of years not less than a stated number of years.[98]

Stores Co. v. Cox, 49 So. 191, 57 Fla. 505.

87. U.S.—Greenbank v. Ferguson, C.C.Ill., 58 F. 18.

88. S.D.—Newton v. McGee, 140 N.W. 252, 31 S.D. 216.
51 C.J. p 180 note 25.

89. Wis.—Wilson v. Hooser, 39 N.W. 772, 72 Wis. 420.

90. U.S.—Continental Trust Co. v. Tallassee Falls Mfg. Co., D.C.Ala., 232 F. 694.

91. Colo.—Pope v. Parker, 271 P. 1118, 84 Colo. 535.

92. Cal.—Scott v. Woodworth, 167 P. 543, 34 Cal.App. 400.

93. Cal.—Haime v. DeBeaulieu, 129 P.2d 345, 20 Cal.2d 849—Hughes v. Korntved, 21 P.2d 417, 218 Cal. 3.

94. Wash.—Standring v. Mooney, 127 P.2d 401, 14 Wash.2d 220.

Reason for rule

Where mortgage of property conveyed by plaintiffs to their selling agent was not intended to secure an obligation to pay plaintiffs for the property conveyed but to constructively notify third parties of plaintiffs' interest, fact that plaintiffs held the mortgage was immaterial with respect to plaintiffs' right to maintain action to quiet title against their selling agent, and in such case where plaintiffs' selling agent holding legal title and another possessed no equity in property remaining unsold for which the selling agent had executed mortgage to plaintiffs, selling agent was not entitled to customary mortgagor's period of redemption, so that there was no injustice in permitting plaintiffs to enforce their summary contractual remedy of forfeiture by action to quiet title instead of requiring them to foreclose their mortgage. Standring v. Mooney, supra.

95. Ind. Indianapolis v. United Presby. Church Extension, 62 N.E. 715, 28 Ind.App. 319.

96. Ala.—Oates v. Headland, 45 So. 910, 154 Ala. 503.
51 C.J. p 180 note 24.

97. Mass. Minot v. Cotting, 60 N.E. 610, 179 Mass. 335.
Subject matter of action to quiet title or remove cloud see supra § 3.

98. N.Y.—Consolidated Ice Co. v. New York, 58 N.E. 713, 166 N.Y. 92—Vanderveer Crossings v. Rapalje, 117 N.Y.S. 485, 132 App.Div. 302.

E. POSSESSION OF PLAINTIFF

§ 26. Necessity

The necessity that plaintiff have possession of the property in order to maintain a suit to quiet title or remove a cloud thereon is discussed infra §§ 27–31.

Examine Pocket Parts for later cases.

§ 27. —— When Title or Interest Legal

a. In general
b. Exceptions

a. In General

As a general rule, possession of the land by the plaintiff is prerequisite to his maintenance of a suit to quiet title or remove a cloud on title.

As a general rule, a holder of the legal title to lands must, in order to maintain an action to quiet title or remove cloud, be in possession of the land when the action is instituted,[99] since, where defendant is in possession, the remedy at law by action of ejectment ordinarily affords a plain, adequate, and complete remedy;[1] but in some states which have no separate legal and equitable jurisdictions, and in which the courts may give either legal or equitable relief as the facts demand, an action to quiet title or remove a cloud on title may be brought by a person out of possession.[2] Under some statutes plaintiff must have actual or constructive possession.[3] Want of possession is not excused by

99. U.S.—Wood v. Phillips, C.C.A.N.C., 50 F.2d 714—Browne v. Pool, C.C.A.N.C., 44 F.2d 125, certiorari denied 51 S.Ct. 180, 282 U.S. 893, 73 L.Ed. 787—Denison v. Keck, C.C.A. Neb., 13 F.2d 384—Brock v. Barnsdall Oil Co., D.C.Tex., 22 F.Supp. 786—U. S. v. Standard Oil Co. of California, D.C.Cal., 20 F.Supp. 427—U. S. v. McIntosh, D.C.Va., 2 F. Supp. 244, rehearing denied 3 F. Supp. 715, appeal dismissed, C.C.A., McIntosh v. U. S., 70 F.2d 507, certiorari denied 55 S.Ct. 101, 293 U. S. 586, 79 L.Ed. 682.

Ala.—Freeman v. Lewis, 36 So.2d 309, 251 Ala. 75—Garrett v. Brewton, 25 So.2d 158, 247 Ala. 490—McDonald v. Birmingham Trust & Savings Co., 194 So. 839, 239 Ala. 369—Hobson v. Robertson, 138 So. 548, 224 Ala. 49.

Ark.—Weaver v. Gilbert, 218 S.W.2d 353, 214 Ark. 800—Lowe v. Cox, 194 S.W.2d 892, 210 Ark. 169—Gingles v. Rogers, 175 S.W.2d 192, 206 Ark. 915—Patterson v. McKay, 150 S. W.2d 196, 202 Ark. 241.

Colo.—French v. Golston, 100 P.2d 581, 105 Colo. 578.

Ga.—Greenwood v. Starr, 163 S.E. 500, 174 Ga. 503—Thomas v. Couch, 156 S.E. 206, 171 Ga. 602—Morris v. Mobley, 155 S.E. 8, 171 Ga. 224.

Ill.—McGookey v. Winter, 46 N.E.2d 84, 381 Ill. 516—Nelson v. Burns, 255 Ill.App. 314.

Kan.—Penn Mut. Life Ins. Co. v. Tittel, 111 P.2d 1116, 153 Kan. 530, rehearing denied 114 P.2d 312, 153 Kan. 747.

Ky.—Wood v. Corman, 211 S.W.2d 424, 307 Ky. 580—Justice v. Staton, 163 S.W.2d 471, 291 Ky. 179—Middlesboro Town & Land Co. v. Louisville & N. R. Co., 120 S.W.2d 394, 274 Ky. 756—Combs v. Jones, 51 S.W.2d 672, 244 Ky. 512.

Mass.—Daley v. Daley, 14 N.E.2d 113, 300 Mass. 17.

Mich.—Crawford v. Hamrick, 42 N. W.2d 751, 327 Mich. 591—Featherston v. Pontiac Tp., 16 N.W.2d 689, 310 Mich. 129.

Miss.—White v. Turner, 19 So.2d 825, 197 Miss. 365.

N.J.—Miller v. Reich, 34 A.2d 143, 134 N.J.Eq. 28—Estate of Gilbert Smith v. Cohen, 196 A. 361, 123 N. J.Eq. 419.

Ohio.—Haban v. Suburban Home Mortg. Co., App., 57 N.E.2d 97—Harris v. Paul, 174 N.E. 615, 37 Ohio App. 206.

Okl.—**Corpus Juris cited in** Marshall v. Ward, 28 P.2d 1091, 167 Okl. 183.

Pa.—Buck v. Brunner, 74 A.2d 528, 167 Pa.Super. 142—Liddick v. Louden, Pa.Dist. & Co. 402—Statler v. Babcock Lumber Co., Com.Pl., 10 Monroe L.R. 128, 14 Som.Leg.J. 127—Weger v. Rhoads, Com.Pl., 57 Montg.Co. 354.

R.I.—Barone Lumber Co. v. Sowdon, 153 A. 308, 51 R.I. 166.

Vt.—Scully v. Dermody, 8 A.2d 675, 110 Vt. 422.

Wash.—Dungeness Cemetery Ass'n v. Lotzgesell, 24 P.2d 81, 173 Wash. 581.

W.Va.—Flynn Coal & Lumber Co. v. F. W. White Lumber Corporation, 157 S.E. 588, 110 W.Va. 262.

51 C.J. p. 180 note 42—21 C.J. p. 65 note 77.

Statutes dispensing with necessity of possession see infra §§ 29, 30.

Statutory bill

Bill in equity to establish title to realty which disclosed that respondents were in possession of property could not be maintained as a statutory bill in equity to quiet title.—Freeman v. Lewis, 36 So.2d 309, 251 Ala. 75.

1. U.S.—Harlan v. Sparks, C.C.A.N.M., 125 F.2d 502—Wood v. Phillips, C.C.A.N.C., 50 F.2d 714—Barnes v. Boyd, D.C.W.Va., 8 F.Supp. 584, affirmed, C.C.A., 78 F.2d 910, certiorari denied 55 S.Ct. 550, 294 U.S. 723, 79 L.Ed. 1254, rehearing denied 55 S.Ct. 647, 295 U.S. 768, 79 L.Ed. 1708.

Ala.—Freeman v. Lewis, 36 So.2d 309, 251 Ala. 75—Tyler v. Copham, 16 So.2d 316, 245 Ala. 151—Lampkin v. Strawbridge, 11 So.2d 130, 243 Ala. 558—Wood v. Curry, 8 So. 2d 822, 243 Ala. 136—McDonald v. Birmingham Trust & Savings Co., 194 So. 839, 239 Ala. 369—Price v. Hall, 147 So. 156, 226 Ala. 372.

Ark.—Winkle v. School Dist. No. 81, Independence County, Ark., 221 S. W.2d 884, 215 Ark. 670—Fisk v. Magness, 98 S.W.2d 958, 193 Ark. 231.

Okl.—**Corpus Juris cited in** Bridwell v. Goeske, 192 P.2d 656, 658, 200 Okl. 244.

Wyo.—Huber v. Delong, 91 P.2d 53, 54 Wyo. 240.

51 C.J. p. 182 note 43.

Right to trial by jury

Where the title is purely a legal one and defendant is in possession, the remedy at law is plain, adequate, and complete, and an action of ejectment cannot be maintained under a guise of a bill in equity to quiet title or remove a cloud. In such case the adverse party has a constitutional right to trial by jury.—Winkle v. School Dist. No. 81, Independence County, Ark., 221 S.W.2d 884, 215 Ark. 670—Lowe v. Cox, 194 S.W.2d 892, 210 Ark. 169—Gingles v. Rogers, 175 S.W.2d 192, 206 Ark. 915—Patterson v. McKay, 150 S.W.2d 196, 202 Ark. 241—Fisk v. Magness, 98 S.W. 2d 958, 193 Ark. 231—Pearman v. Pearman, 222 S.W. 1064, 144 Ark. 528—51 C.J. p. 182 note 43 [b].

2. Tex.—Day Land & Cattle Co. v. State, 4 S.W. 865, 68 Tex. 526—Johnson v. Miller, Civ.App., 173 S.W.2d 280, affirmed 177 S.W.2d 249, 142 Tex. 228.

3. Ala.—Ex parte Proctor, 22 So. 2d 896, 247 Ala. 138.

the hardship of taking possession.[4] However, in an equitable proceeding to remove a specific cloud from the title, possession has been held not necessary.[5]

Admission of want of possession. The bringing of ejectment in a federal court is not an admission by plaintiff that he is not in possession of the land, so as to preclude him from maintaining a suit to remove a cloud on title, where the law of the state in which the federal court is located does not require a person to be out of possession in order to maintain ejectment.[6]

b. Exceptions

(1) In general
(2) Existence of other equitable grounds for relief
(3) Holders of future estates

(1) In General

The rule requiring the plaintiff to be in possession of the land in order to maintain a suit to quiet title is subject to exception where special circumstances warrant a departure, as where a plaintiff out of possession is permitted to sue because his legal remedy is inadequate.

The rule requiring plaintiff to be in possession of land before he may bring suit to quiet title thereto or remove a cloud on the title thereof, as discussed supra subdivision a of this section, is subject to certain exceptions where special circumstances warrant a departure from the general rule.[7] Such an action will lie without plaintiff's possession of the land when plaintiff holds the legal title under such circumstances that there is no adequate remedy at law available.[8] A mortgagee not in possession and having merely a lien may maintain an action to remove a cloud from such lien, even though the statute authorizes an action to quiet title or remove a cloud to be brought only by one in possession, there being no remedy at law.[9] For the same reason, where a vendee is in possession of the land under a contract of sale, but refuses to accept title because of an adverse claim by defendant, the vendor may maintain a bill to quiet title.[10] Where neither party has possession, there is no adequate remedy at law, and hence equity has jurisdiction.[11]

(2) Existence of Other Equitable Grounds for Relief

The rule requiring the plaintiff to have possession of property in order to sue to quiet title thereto is inapplicable where there is some other special ground for equitable jurisdiction.

The rule requiring plaintiff to be in possession does not apply where some other special ground for equitable jurisdiction is shown, or the primary relief sought is based on some distinct head of equity jurisdiction and the removal of a cloud and the quieting of title is sought only as an incident to that relief.[12] Hence equity will entertain a bill

4. U.S.—Northern Pac. R. Co. v. Amacker, Mont., 49 F. 529, 1 C.C.A. 345.
51 C.J. p 183 note 46.
5. Colo.—Harrison v. City and County of Denver, 76 P.2d 1110, 102 Colo. 98.
6. U.S.—Accord v. Western Pocahontas Corp., C.C.W.Va., 156 F. 989, affirmed 174 F. 1019, 98 C.C.A. 625, certiorari denied 30 S.Ct. 408, 215 U.S. 607, 54 L.Ed. 346.
7. Ga.—Burton v. Hart, 55 S.E.2d 594, 206 Ga. 87—McDaniel v. Bagby, 51 S.E.2d 805, 204 Ga. 750—Oglesby v. Oglesby, 32 S.E.2d 906, 198 Ga. 864.
R.I.—Barone Lumber Co. v. Sowden, 153 A. 308, 51 R.I. 166.
8. Ala.—Corpus Juris cited in Timms v. Scott, 27 So.2d 487, 489, 248 Ala. 286—Corpus Juris cited in McDonald v. Birmingham Trust & Savings Co., 194 So. 839, 841, 239 Ala. 369—Dunn v. Ponceler, 178 So. 40, 235 Ala. 269.
N.J.—Estate of Gilbert Smith v. Cohen, 196 A. 361, 123 N.J.Eq. 419.
Wyo.—Ohio Oil Co. v. Wyoming Agency, 179 P.2d 773, 63 Wyo. 187.
51 C.J. p 183 note 50.

Possession not of essence

Jurisdiction to grant equitable relief against a cloud on title is grounded in need for protection of complainant's title against injury or vexatious embarrassment that may flow from instrument or proceeding constituting the cloud, and possession is not of the essence of right to that relief.—Estate of Gilbert Smith v. Cohen, 196 A. 361, 123 N.J.Eq. 419.

Optionors who were not in possession could maintain a suit in equity to cancel an option as a cloud on title even if respondent's claim of title under alleged cloud was legal rather than equitable, where respondent was alleged to be a nonresident of the state not subject to suit in personam unless he made a voluntary appearance, since an action in ejectment against his tenant in possession, if any, would not bind him, and optionors had no adequate remedy at law.—McDonald v. Birmingham Trust & Savings Co., 194 So. 839, 239 Ala. 369.

9. Wyo.—Chesney v. Valley Live Stock Co., 244 P. 216, 34 Wyo. 378, 44 A.L.R. 1255.
10. Pa.—Hoppenstall v. Long, 66 A. 991, 217 Pa. 491, 12 L.R.A.,N.S., 652.

Possession of vendee as possession of vendor see infra § 32 d.

11. U.S.—Higgins Oil, etc., Co. v. Delaney, D.C.La., 263 F. 931, affirmed, C.C.A., 271 F. 1021.
12. U.S.—U. S. v. Standard Oil Co of California, D.C.Cal., 20 F.Supp. 427.
Ga.—Oglesby v. Oglesby, 32 S.E.2d 906, 198 Ga. 864—Page v. Brown, 15 S.E.2d 506, 192 Ga. 398—Morris v. Mobley, 155 S.E. 3, 171 Ga. 724—Sweat v. Arline, 127 S.E. 592, 156 Ga. 460.
Ky.—Williams v. Thomas, 149 S.W.2d 525, 285 Ky. 776.
51 C.J. p 184 note 55.

Mental incapacity of grantor

Ga.—Burton v. Hart, 55 S.E.2d 594, 206 Ga. 87—Page v. Brown, 15 S.E.2d 506, 192 Ga. 398.

Fraudulent effort to appropriate title

An action to quiet title may be maintained by one who is owner of realty but not in possession when an effort is made on the part of the defendant to seize and fraudulently appropriate the particular title under which the plaintiff claimed.—Spencer v. Steele, 175 S.W.2d 1005, 296 Ky. 3—Williams v. Thomas, 149 S.W.2d 525, 285 Ky. 776.

Void deeds

Subject matter of bill to adjudge void deeds whereby three devisees

to have canceled as a cloud on title an instrument, the execution of which is shown by proper averments to have been procured by fraud, notwithstanding plaintiff is out of possession.[13] The cancellation of the instrument under which defendant claims must be the main relief sought, and must be based on an equitable ground other than the fact that it covers the land in controversy.[14] However, the alleged necessity for an accounting will not confer jurisdiction of an action to quiet title where plaintiff is not in possession.[15]

(3) Holders of Future Estates

Ordinarily the holder of a future estate, such as a remainderman, may bring suit to quiet his title even though not in possession of the property.

The general rule requiring plaintiff to be in possession at the time the action is commenced is subject to an exception in favor of the holder of a future estate, such as a remainderman or reversioner, who, pending the possession of the life tenant, can maintain an action to quiet his title,[16] unless the holder of the future estate has an adequate remedy at law, in which case he may not sue to quiet title without possession.[17]

On the other hand, it has been held that remaindermen out of possession cannot maintain such an action unless they show some special or exceptional occasion for invoking the aid of equity[18]

§ 28. —— When Title or Interest Equitable

A plaintiff out of possession may sue to quiet title where his title is equitable instead of legal, where such a title is sufficient to support the action.

Where plaintiff's title or interest is an equitable one, possession by him is not necessary to equitable jurisdiction.[19] This rule does not apply, however, where an equitable title is not sufficient to support the action,[20] nor is the rule applicable where an equitable title is sufficient to maintain a statutory action of right in a court of law.[21]

§ 29. —— Statutes Dispensing with Possession in General

Under statutory provisions expressly or impliedly dispensing with the necessity of possession, a plaintiff out of possession may maintain a suit to quiet title or remove a cloud thereon when the facts bring the case within the purview of the statute.

Where statutes expressly or by necessary implication dispense with the necessity of possession by permitting a plaintiff out of possession to bring suit to quiet title or remove a cloud thereon, he may maintain the action in any case falling within the purview of such statutory provisions,[22] but not

conveyed their interests in tract to grantees who were attempting to frustrate a scheme acted on by all devisees to save property was within original general jurisdiction of equity to remove a cloud from title, notwithstanding grantees were in possession of part of tract under lease made by decedent's executors.—Estate of Gilbert Smith v. Cohen, 196 A. 361, 123 N.J.Eq. 419.

13. Ga.—McDaniel v. Bagby, 51 S.E.2d 805, 204 Ga. 750—Sweat v. Arline, 197 S.E. 893, 186 Ga. 460
W.Va.—Putnam Co. v. Fisher, 36 S.E.2d 681, 128 W.Va. 383.
51 C.J. p 185 note 56.

14. Ky.—Cumberland Co. v. Kelly, 160 S.W. 1077, 156 Ky. 397.

15. U.S.—Bearden v. Benner, C.C.Ga., 120 F. 690—Hanley v. Kansas, etc., Coal Co., C.C.Ark., 110 F. 62

16. U.S.—Corpus Juris cited in Howth v. Farrar, C.C.A.Tex., 94 F.2d 654, 659, rehearing denied 95 F.2d 1005, certiorari denied 59 S.Ct. 75, 305 U.S. 599, 83 L.Ed. 380.
Ala.—Teal v. Mixon, 169 So. 477, 233 Ala. 23.
Ky.—Broaddus v. Tevis, 177 S.W.2d 901, 297 Ky. 168—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 242 Ky. 814.
Okl.—Corpus Juris cited in Marshall v. Ward, 28 P.2d 1091, 167 Okl. 183.
51 C.J. p 185 note 59.

17. Ala.—Moseley v. Monteabaro, 17 So.2d 657, 245 Ala. 475.

Fraudulent sale by life tenant

Where life tenant exercised power of sale in fraud of rights of remaindermen, who were not in possession, such fraud was cognizable at law and remaindermen had an adequate remedy at law by action against vendee to recover possession thereby precluding suit by remaindermen against vendee to remove a cloud from title.—Moseley v. Monteabaro, supra.

18. U.S.—Williams v. Provident Life, etc., Co., W.Va., 242 F. 417, 155 C.C.A. 193.

19. Ala.—McDonald v. Birmingham Trust & Savings Co., 194 So. 839, 239 Ala. 369.
Me.—Corpus Juris cited in Hanscom v. Bourne, 177 A. 187, 133, 133 Me. 304.
Minn.—Corpus Juris cited in Union Central Life Ins. Co. v. Page, 251 N.W. 911, 914, 190 Minn. 360.
N.J.—Estate of Gilbert Smith v. Cohen, 196 A. 361, 123 N.J.Eq. 419.
51 C.J. p 185 note 61.

20. Va.—Glenn v. West, 49 S.E. 671, 103 Va. 521.
51 C.J. p 186 note 62.
Sufficiency of title or interest to support action see supra §§ 17–25.

21. Iowa.—Harrington v. Cubbage, 3 Greene 307.
51 C.J. p 186 note 63.

22. Fla.—Griffin v. Bolen, 5 So.2d 690, 692, 149 Fla. 377—Conway v. Wilson, 181 So. 385, 132 Fla. 404.
Mo.—Hamilton v. Linn, 200 S.W.2d 69, 355 Mo. 1176—St. Joseph Lead Co. v. Fuhrmeister, 182 S.W.2d 273, 353 Mo. 232.
Neb.—Morse v. Cochran, 268 N.W. 307, 131 Neb. 424.
N.C.—Vick v. Winslow, 183 S.E. 750, 209 N.C. 540.
W.Va.—Bennett v. Neff, 42 S.E.2d 793, 130 W.Va. 121—Putnam Co. v. Fisher, 36 S.E.2d 681, 128 W.Va. 383—Flynn Coal & Lumber Co. v. F. W. White Lumber Corporation, 157 S.E. 588, 110 W.Va. 262.
Wis.—Doherty v. Rice, 3 N.W.2d 734, 240 Wis. 389.
51 C.J. p 145 note 39 [a], p 186 note 64.

Clear legal title

Under statute, a plaintiff who has clear legal title to real estate but who is out of possession may maintain a suit in equity to remove cloud on title to land.—Bennett v. Neff, 42 S.E.2d 793, 130 W.Va. 121.

Plaintiff in possession

Action may be brought under statute by plaintiff who is in possession.—Ellsworth Corporation v.

where the facts take the case out of the statute,[23] or where such statute has been repealed.[24] It is generally held that plaintiff need not be in possession where the statute, omitting any reference to possession, authorizes the action to be brought by "any person" against another who claims an adverse estate or interest.[25] Where the statute dispenses with the necessity of possession by plaintiff, a landlord may sue to quiet title as against a hostile claim of one who has taken possession from the tenant, without awaiting the termination of the lease.[26] Under a statute conferring jurisdiction on the chancery court to hear and determine suits instituted by any person claiming legal or equitable title to lands, whether or not in possession, against any other person not in possession, plaintiff may not maintain the suit as against a defendant who is in actual possession of the land.[27] Under a statute permitting any person in possession to bring an action against another who claims an estate or interest therein adverse to him, and permitting such action to be joined with an action to recover possession by any person not in possession, a plaintiff must be in possession or must seek possession when he sues to quiet title[28] and it is not necessary that plaintiff first secure possession of the realty before suing to quiet title thereto.[29]

§ 30. —— Vacant or Unoccupied Lands, or Lands Not in Actual Possession of Defendant

Under some statutes a person may maintain a suit to quiet title or remove a cloud thereon although not in possession of the land, where such property is vacant or unoccupied or where the land involved is not in the actual possession of the defendant.

Some statutes dispense with the necessity of possession by plaintiff where the land which forms the subject matter of the action is vacant or unoccupied,[30] while others permit an action by a per

Stratbucker, 278 N.W. 381, 134 Neb. 246.

In Mississippi

(1) Possession by complainant or nonoccupancy of land is not required as a condition precedent to right to maintain suit to remove cloud from title to land.—Broome v. Jackson, 7 So.2d 829, 193 Miss. 66, suggestion of error overruled 8 So.2d 245, 193 Miss. 66.

(2) Either possession in complainant or proof that land is unoccupied is indispensable to confirmation of title in complainant.—Broome v. Jackson, supra—51 C.J. p 187 note 71 [d].

(3) However, it has been broadly stated that the owner of land out of possession may resort to an equity court to remove clouds and confirm title.—Dockery v. Zerkowsky, 189 So. 797, 186 Miss. 31.

23. Ohio.—Lichtenberger v. Milligan, 25 N.E.2d 357, 63 Ohio App. 107—Lake Front-East Fifty-Fifth Street Corp. v. City of Cleveland, 7 Ohio Supp. 17, affirmed 36 N.E.2d 196, appeal dismissed 38 N.E.2d 410, 139 Ohio St. 138.

51 C.J. p 186 note 64.

Remainder or reversion

The statute relating to an action to quiet title gives a right of action to one out of possession who claims an estate or interest in remainder or reversion in real property but it does not give such right to one out of possession who claims the entire estate.—Lake Front-East Fifty-Fifth Street Corp. v. City of Cleveland, supra.

24. Ark.—Lowe v. Cox, 194 S.W.2d 892, 210 Ark. 169.

25. Cal.—Thomson v. Thomson, 62 P.2d 358, 7 Cal.2d 671, 117 A.L.R. 1—Martin v. Pacific Southwest Royalties, 106 P.2d 443, 41 Cal.App.2d 161—Thornton v. Middletown Educational Corporation, 70 P.2d 234, 21 Cal.App.2d 707.

Nev.—Corpus Juris quoted in Aikins v. Nevada Placer, 13 P.2d 1103, 1104, 54 Nev. 281.

N.C.—Ramsey v. Ramsey, 29 S.E.2d 340, 224 N.C. 110—Plotkin v. Merchants' Bank & T. Co., 125 S.E. 541, 188 N.C. 711—Satterwhite v. Gallagher, 92 S.E. 369, 173 N.C. 525.

51 C.J. p 186 note 65.

In New York

Prior to the statutory amendment in 1943, Real Prop.L. § 500, which permits a person who claims an interest in real property to bring an action to determine adverse claims and which omits the requirement of possession, for the maintenance of an action to quiet title or determine adverse claims it was essential that plaintiff be in possession.—Harris v. Noque, 266 N.Y.S. 785, 240 App.Div. 728—Beidleman v. People, 39 N.Y.S.2d 333—51 C.J. p 186 note 42.

26. Iowa.—Equitable Life Ins. Co. v. C. C. Taft Co., 179 N.W. 880, 192 Iowa 934.

51 C.J. p 186 note 66.

27. Mich.—Featherston v. Pontiac Tp., 16 N.W.2d 689, 310 Mich. 129.

Ejectment or trespass

Grantor's heir, not being in possession of land which had been conveyed to railroad to be used solely for construction and maintenance of railroad, could not maintain bill in chancery to establish title to land by virtue of alleged reversion as against defendants in possession of the land under conveyance from grantee's successor after abandonment of the land for railroad purposes, since heir had an adequate remedy at law in ejectment or trespass.—Crawford v. Hamrick, 42 N.W.2d 751, 327 Mich. 591.

28. Okl.—Stone v. Merrell, 154 P.2d 953, 195 Okl. 19—Johnson v. Johnson, 77 P.2d 745, 182 Okl. 393.

29. Okl.—Young v. Campbell, 16 P.2d 65, 160 Okl. 265.

30. Ill.—Webster v. Hall, 58 N.E.2d 875, 388 Ill. 401

Or.—Williams v. Barlow, 106 P.2d 1033, 165 Or. 360.

51 C.J. p 187 note 70.

Sufficiency of possession of vacant land see infra § 33.

Color of title; taxes

(1) The Grove Act extends the relief under suits to quiet title to cases where no one is in actual possession, if complainant or those under whom he claims has held color of title and has paid taxes for ten or more consecutive years preceding suit, and to cases where complainant or he and his privies in claim have paid taxes during the whole of such period, and no other person has paid taxes during any part of such period, regardless of status of actual possession.—Hixson v. Swift, 9 So.2d 891, 243 Ala. 289.

(2) Under such statute the state had sufficient constructive possession of land granted it by federal patent to support its suit to quiet title thereto, where respondents had no claim of title except by adverse possession, which was not sufficiently proved, or effective in law to show title superior to state's claim under patent, and no one was in actual possession of land, or scrambling

son out of possession when the land is not in the actual possession of defendant.[31]

§ 31. —— Waiver of Objection

The objection that plaintiff in a suit to quiet title is not in possession may be waived by defendant, as where he seeks affirmative relief.

The objection that plaintiff in a suit to quiet title is not in possession may be waived.[32] Such waiver results where the objection is not taken by demurrer, plea, or answer,[33] or where, after demurrer on this ground is overruled, defendant answers on the merits.[34] Defendant likewise waives the objection where he stipulates for the trial of the cause before a master.[35]

Asking for affirmative relief. A defendant who by answer or cross bill seeks affirmative relief on matters clearly cognizable in equity thereby supplies any defect in jurisdiction arising from plaintiff's lack of possession and places the whole cause before the court,[36] as where defendant asserts his own title and seeks to have it quieted.[37] However, this rule does not apply where defendant sets up his own title and possession only by way of defense, and does not ask affirmative relief.[38]

§ 32. Sufficiency

a. In general
b. Lawfulness of possession
c. Possession subject to easement
d. Possession of vendee

a. In General

Ordinarily possession must be actual, as opposed to constructive, in order to support an action to quiet title, although the rule may vary under statutes.

Whenever possession is a condition precedent to the maintenance of the action, as discussed supra §§ 26–31, actual possession or possession in fact, as distinguished from constructive possession simply by virtue of legal title, is usually contemplated,[39] unless a statute makes constructive possession sufficient.[40] Hence the general rule is that one having

to retain or secure possession thereof, when suit was brought.—Grissom v State for Use of Alabama College, 48 So.2d 197, 254 Ala. 218

31. Fla.—Sawyer v. Gustason, 118 So. 57, 96 Fla. 6.
51 C.J. p 187 note 71.
Possession by plaintiff or nonoccupancy of land as prerequisite to confirmation of title see supra § 29.

32. Ark.—Weaver v. Gilbert, 218 S W.2d 353, 214 Ark. 800.
Colo.—Rocky Mountain Fuel Co. v. Clayton Coal Co., 134 P.2d 1062, 110 Colo. 334.
Fla.—Jahn v. Purvis, 199 So. 340, 145 Fla. 354.
Ky.—Goins v. Catron, 190 S.W.2d 322, 300 Ky. 583.
Minn.—Union Central Life Ins. Co. v. Page, 251 N.W. 911, 190 Minn. 360.
N.M.—Corpus Juris cited in Quintana v. Vigil, 125 P.2d 711, 714, 46 N. M. 200.
Okl.—Hall v. Pearson, 219 P.2d 617.
Wyo.—Corpus Juris quoted in Bruch v. Benedict, 165 P.2d 561, 564, 62 Wyo. 213.
51 C.J. p 187 note 72.

33. Ga.—Corpus Juris cited in Terry v. Ellis, 7 S.E.2d 282, 284, 189 Ga. 698.
Wyo.—Corpus Juris quoted in Bruch v. Benedict, 165 P.2d 561, 564, 62 Wyo. 213.
51 C.J. p 187 note 73.

Failure to put possession in issue

Court of equity has jurisdiction to quiet title though land is not actually in possession of complainant, where possession is alleged by bill and not put in issue by answer.—Campbell Stores v Mayor and Council of City of Hoboken, 169 A. 681, 115 N J Eq. 159.

34. Wash.—Weatherwax Lumber Co. v. Ray, 80 P 775, 38 Wash. 545.
Wyo.—Corpus Juris quoted in Bruch v. Benedict, 165 P 2d 561, 564, 62 Wyo. 213.

35. U S.—Sanders v. Riverside, Ill., 118 F. 720, 55 C.C.A. 240.
Wyo.—Corpus Juris quoted in Bruch v. Benedict, 165 P.2d 561, 564, 62 Wyo. 213.

36. Ark.—Weaver v. Gilbert, 218 S. W 2d 353, 214 Ark. 800.
Colo.—MacKenzie v. Corley, 29 P.2d 1044, 94 Colo. 263.
Fla.—Jahn v. Purvis, 199 So. 340, 145 Fla. 354.
Ky.—Hunt v Cassity, 181 S.W.2d 248, 297 Ky. 716—Rose v. Rose, 176 S.W.2d 122, 296 Ky. 18—Crawley v. Mackey, 143 S.W.2d 171, 283 Ky. 717—Combs v. Jones, 51 S.W. 2d 672, 244 Ky. 512.
Wyo.—Bruch v. Benedict, 165 P.2d 561, 62 Wyo. 213.

37. Colo.—Rocky Mountain Fuel Co. v. Clayton Coal Co., 134 P.2d 1062, 110 Colo. 334.
Kan.—Walker v. Rooney, 9 P.2d 973, 135 Kan. 153.
Ky.—Waller v. Parsley, 229 S.W 2d 741, 312 Ky. 758—Smith v. Williamson, 208 S.W.2d 503, 306 Ky. 467—Goins v. Catron, 190 S.W.2d 322, 300 Ky. 583—Hunt v. Cassidy, 181 S.W.2d 248, 297 Ky. 716—Spencer v. Steele, 175 S.W.2d 1008, 296 Ky. 3—Davis v. Daniel, 175 S.W. 2d 501, 295 Ky. 717—Hopper v. McBurney, 168 S.W.2d 374, 293 Ky. 31—Crawley v. Mackey, 143 S.W. 2d 171, 283 Ky. 717—Whitaker v. Shepherd, 134 S.W.2d 604, 280 Ky. 713—Strunks Lane & Jellico Mountain Coal & Coke Co. v. Anderson, 124 S.W 2d 779, 276 Ky. 576—Madden v. Bond, 106 S.W.2d 95, 269 Ky. 31—Brown v. Martin, 39 S.W. 2d 243, 239 Ky. 146.
Minn.—Corpus Juris cited in Union Central Life Ins. Co. v. Page, 251 N.W. 911, 913, 190 Minn. 360.
N.M.—Corpus Juris quoted in Quintana v. Vigil, 125 P.2d 711, 714, 46 N.M. 200.
Okl.—Magnolia Petroleum Co. v. Ball, 223 P.2d 136—Hall v. Pearson, 219 P.2d 617—Bridwell v. Gooske, 192 P.2d 656, 200 Okl. 244—Concho Washed Sand Co. v. Sallstrom, 157 P.2d 176, 195 Okl. 302—Terwilleger v. Bridges, 138 P.2d 79, 193 Okl. 642—Newcomer v. Robison, 15 P.2d 129, 159 Okl. 236.
Wyo.—Bruch v. Benedict, 165 P.2d 561, 62 Wyo. 213.
51 C.J. p 188 note 77.

38. N.M.—Corpus Juris quoted in Quintana v. Vigil, 125 P.2d 711, 714, 46 N.M. 200.
51 C.J. p 188 note 78.

39. Ill.—Nelson v. Burns, 255 Ill. App. 314.
Minn.—Union Central Life Ins. Co. v. Page, 251 N.W. 911, 190 Minn. 360.
Vt.—Corpus Juris cited in Scully v. Dermody, 8 A.2d 675, 678, 110 Vt. 422.
51 C.J. p 188 note 80.

40. Ala.—Walthall v. Yohn, 40 So.2d 705, 252 Ala. 262.

the legal title, and in constructive possession only, cannot maintain the action,[41] although constructive possession will support a statutory action to determine adverse claims, where the plain intent of the statute, by merely using the word "possession," is to dispense with actual possession.[42]

What constitutes actual possession is a mixed question of law and fact,[43] depending on the character and location of the land, the situation of the parties, and other circumstances of the particular case.[44] Generally speaking, in order to constitute actual possession it is necessary only to put the land to such use, or exercise such dominion over it, as in its present state it is reasonably adapted to,[45] and it is not necessary that one should actually live on the land.[46] However, it has been held that there must be an open and visible occupancy,[47] and that the possession must be so open, visible, notorious, and exclusive as to be calculated in its very nature to inform persons in the vicinity, and those seeing the property, that some person has appropriated it and is using and occupying it as his own.[48]

Constructive possession sufficient to support an action to quiet title is that possession which the law annexes to the legal title or ownership of property,[49] and one having a legal estate in fee in the property has the constructive possession thereof unless there is actual possession in another.[50]

Cotenants. The possession of a tenant in common claiming adversely to plaintiff, a cotenant whose title is in part only denied, has been held not the possession of plaintiff,[51] but it has also been held that a tenant not in physical possession of land held in cotenancy may sue to quiet title and secure partition as against his cotenant.[52]

Necessity of exclusive possession. Plaintiff's possession and occupancy jointly with defendant is insufficient to enable him to maintain the action under a statute making the remedy available only to one "in possession."[53]

b. Lawfulness of Possession

The possession essential to maintain a suit to quiet title should be such as was acquired in a lawful manner.

The possession which gives jurisdiction in actions to quiet title, whenever possession is a jurisdictional fact, must be such as was acquired in a legal manner,[54] and hence possession wrongfully

Ky.—Rhodes v. Bennett, 211 S.W.2d 693, 307 Ky. 507.

Peaceable possession see infra § 35.

Vacant and unoccupied lands see infra § 33.

In New York

The requirement under a former statute of possession of land for one year before commencement of suit to determine ownership thereof is satisfied by constructive possession, that is, possession in law, which follows in wake of title.—Helferline v. People, 66 N.E.2d 345, 295 N.Y. 245—American Surety Co. of New York v. Brink, 250 N.Y.S. 534, 140 Misc. 851.

41. W.Va.—Payne v. Fitzwater, 136 S.E. 509, 103 W.Va. 12.
51 C.J. p 188 note 82.

42. Okl.—Womble v. Pike, 87 P. 427, 17 Okl. 122.
51 C.J. p 189 note 83.

43. U.S.—New Jersey, etc., Land, etc., Co. v. Gardner-Lacy Lumber Co., N.C., 178 F. 772, 102 C.C.A. 220.

44. Ill.—Le Sourd v. Edwards, 86 N.E. 212, 236 Ill. 169, 127 Am.S.R. 287.
51 C.J. p 189 note 85.

Boundaries described in deed

One claiming ownership of land in his possession under deed with intention to possess it all is in constructive actual possession thereof to extent of boundaries described in deed, except such as may be in another's actual possession.—Calhoun v. Gayhart, 133 S.W.2d 760, 280 Ky. 170.

45. Ala.—Brand v. U. S. Car Co., 39 So. 60, 138 Ala. 579.
51 C.J. p 189 note 86.

46. Cal.—Vanderbilt v. All Persons, etc., 126 P. 158, 163 Cal. 607.
Wash.—Magee v. Morgan, 71 P. 188, 30 Wash. 604.

47. N.Y.—Churchill v. Onderdonk, 59 N.Y. 134—Cleveland v. Crawford, 7 Hun 616.

48. Ill.—Glos v. Archer, 73 N.E. 745, 214 Ill. 74—Dempsey v. Burns, 118 N.E. 193, 281 Ill. 614.

49. U.S.—Corpus Juris cited in Playa de Flor Land & Improvement Co. v. U. S., D.C.Canal Zone, 70 F.Supp. 281, 340, modified, C.C.A., 160 F.2d 131.
Ala.—Walthall v. Yohn, 40 So.2d 705, 252 Ala. 262—Brunson v. Bailey, 16 So.2d 9, 245 Ala. 102.
51 C.J. p 192 note 19 [a] (1).

Constructive possession held shown

(1) Generally.—Montgomery v. Spears, 117 So. 753, 218 Ala. 160.

(2) Owner of legal title who had land partially under fence and had signs thereon, without objection on part of persons claiming title under adverse possession or anyone else, at time bill to quiet title was filed had requisite possession to maintain bill under statute.—Walthall v. Yohn, 40 So.2d 705, 252 Ala. 262.

Constructive possession held not shown

Ala.—Brown v. Powers, 52 So. 647, 167 Ala. 518—Ballworth v. Roberts, 51 So. 758, 166 Ala. 160

50. U.S.—Corpus Juris cited in Playa de Flor Land & Improvement Co. v. U. S., D.C.Canal Zone, 70 F.Supp. 281, 340, modified, C.C.A., 160 F.2d 131.
Ala.—Ex parte Proctor, 22 So.2d 246, 247 Ala. 138—Brunson v. Bailey, 16 So.2d 9, 245 Ala. 102.
51 C.J. p 192 note 19 [a] (2).

51. N.J.—Country Homes Land Co. v. De Gray, 71 A. 340, 71 N.J.Eq. 283.
Possession of agent or tenant generally see infra § 34.

52. Ky.—Howard v. Mitchell, 105 S.W.2d 178, 268 Ky. 179.

53. Pa.—Earhart v. Marshall, 87 A. 462, 233 Pa. 365.

54. Ala.—Nabers v. Wise, 4 So.2d 149, 241 Ala. 618.
Okl.—Corpus Juris cited in Stanolind Petroleum Co. v. Hall, 72 P.2d 136, 141.
51 C.J. p 192 note 23.

Possession held to have been lawfully acquired

(1) Generally.—Gillis v. Snow, 77 N.W. 241, 118 Mich. 611, 51 C.J. p 192 note 23 [a].

(2) Where contract for sale of mining property provided that, as to payment due by purchasers, time was of the essence, and authorized vendor to declare forfeiture in case of purchasers' default, and vendor reentered on purchasers' default, vendor's possession on reentry was

obtained,[55] whether by force[56] or fraud,[57] will not suffice, and this is also true of a possession illegally retained by a grantor after he has conveyed the fee.[58] In some jurisdictions, however, it has been held that, under a statute giving a right of action to a person in possession, a person having such possession may sue, irrespective of the mode by which he acquired it.[59]

Attempt to deprive plaintiff of possession Where plaintiff is in possession of property, claiming either under paper title or adverse possession, one who fences off such property becomes merely a trespasser and does not deprive plaintiff of possession so as to preclude him from maintaining a suit to quiet title.[60]

Possession taken in contemplation of suit. It has been held that possession taken for the purpose of instituting an action to quiet title is sufficient[61] if it was not tortious or in violation of the prior possession of another;[62] but that it is otherwise where possession taken for such purpose was obtained by force, fraud, or other wrongful means.[63] On the other hand, some authorities have held that a possession obtained peaceably, although by a trespass, and for the purpose of bringing suit, is sufficient.[64]

c. Possession Subject to Easement

The fact that the plaintiff's possession is subject to an easement will not preclude him from maintaining a suit to quiet title or to remove a cloud therefrom.

One in possession of land as the owner in fee, subject to the right of the public to use it as a public street or highway, has such possession of the premises as entitles him to maintain an action to remove a cloud from the title.[65] The mere use of a claimed easement by defendant will not oust plaintiff of his actual possession.[66]

d. Possession of Vendee

A vendee's possession is a sufficient possession of the vendor to support the latter's suit to quiet title.

The possession of a vendee, under a contract of sale, is a sufficient possession of the vendor to enable him to maintain a bill to quiet title,[67] at least as against a third person not claiming under the vendor.[68] Under statutes providing that an owner in possession through his tenant may maintain suit to quiet title, as discussed infra § 34, one having a contract for the sale of property, and put into possession thereof by the owner for the purpose of building, occupies a position so analogous to that of a tenant as to enable the owner to maintain an action to quiet title.[69]

§ 33. —— Vacant and Unoccupied Lands

In the case of wild or vacant lands, the possession essential to maintenance of a suit to quiet title may be constructive.

To the rule requiring actual possession to maintain an action to quiet title, discussed supra § 32 a, an exception is recognized in some jurisdictions, where the lands forming the subject matter of the action are vacant and unoccupied, in which case the constructive possession arising from legal ownership is regarded as sufficient to support the action,[70] and it has been said that constructive possession is suffi-

not unlawful and was sufficient to entitle the vendor to maintain action to quiet title to the property.—Lowe v. Sory, 111 P.2d 1054, 107 Colo. 341.

55. Fla.—Jahn v. Purvis, 199 So. 340, 145 Fla. 354.
Okl.—Stone v. Merrell, 154 P.2d 953, 195 Okl. 18.
51 C.J. p 192 note 24.

56. Okl.—Stone v. Merrell, 154 P.2d 953, 195 Okl. 18.
51 C.J. p 192 note 25.

57. W.Va.—Abner v. Young, 99 S.E. 552, 84 W.Va. 336.
51 C.J. p 192 note 26.

58. Colo.—Walker v. Pogue, 29 P. 1017, 2 Colo.App. 149.

59. Cal.—Pilione v. Conarty, 152 P. 2d 452, 66 Cal.App.2d 532.
51 C.J. p 192 note 28.

60. Ky.—Conyers' Adm'x v. McGee, 171 S.W.2d 450, 294 Ky. 382—Calhoun v. Gayhart, 132 S.W.2d 760, 280 Ky. 170.

61. Ky.—Lauderbach v. Lewis, 283 S.W. 973, 214 Ky. 521.
51 C.J. p 192 note 29.

62. W.Va.—Perry v. McDonald, 72 S.E. 745, 69 W.Va. 619.
51 C.J. p 192 note 30.

63. Mich.—Crosby v. Hutchinson, 85 N.W. 255, 126 Mich. 56.
51 C.J. p 193 note 31.

64. Colo.—Sayre v. Sage, 108 P. 160, 47 Colo. 559—Phillippi v. Leet, 35 P. 540, 19 Colo. 246.
Peaceable possession generally see infra § 35.

65. Ill.—Glos v. Holmes, 81 N.E. 1064, 228 Ill. 436.

66. Md.—Corpus Juris cited in Homewood Realty Corporation v. Safe Deposit & Trust Co. of Baltimore, 154 A. 58, 64, 160 Md. 457, 78 A.L.R. 8.
Mich.—Corpus Juris cited in Hasselbring v. Koepe, 248 N.W. 869, 872, 263 Mich. 466.
51 C.J. p 191 note 7.

67. Ohio.—Thomas v. White, 2 Ohio St. 540—Kaufman Realty Co. v. Lucas Unknown Heirs, 155 N.E. 173, 23 Ohio App. 470.

68. Minn.—Union Central Life Ins. Co. v. Page, 251 N.W. 911, 190 Minn. 360.

69. Wash.—Bigelow v. Brewer, 70 P. 129, 29 Wash. 670.

70. Ark.—Commercial Nat. Bank v. Cole Bldg. Co., 138 S.W.2d 794, 200 Ark. 212.
Ga.—Oglesby v. Oglesby, 32 S.E.2d 900, 198 Ga. 864—Page v. Brown, 15 S.E.2d 506, 192 Ga. 393.
Ky.—Calhoun v. Gayhart, 132 S.W. 2d 760, 280 Ky. 170.
51 C.J. p 190 note 94.
Possession as attaching to better title
(1) Where both parties to action to quiet title were in actual possession of their respective adjoining farms and claimed title to disputed unfenced forest land not actually occupied, possession thereof attached to better title.—Calhoun v. Gayhart, supra.

cient where neither party is in actual possession.[71] If the land is not occupied by anyone, some authorities hold that a plaintiff having title may sue to quiet it either because the remedy exists independently of statute[72] or because his title affords him constructive possession sufficient to satisfy statutory provisions to the effect that one having "possession" is entitled to sue.[73] On the other hand, it has been held that where neither party has any actual possession, but each claims constructive possession by virtue of his paper title, equity has no jurisdiction, since the question to be determined is the ownership of the legal title, which must be tried in an action at law.[74]

§ 34. —— Possession of Agent or Tenant

Possession by the plaintiff's agent or tenant ordinarily is sufficient possession to support a suit to quiet title.

In some jurisdictions possession of land by plaintiff's agent is, by statute, sufficiently the possession of plaintiff to sustain an action to quiet title;[75] and, independently of statute, it has been held that possession of a duly authorized agent, having charge of the land and engaged in keeping off trespassers, is sufficient to sustain an action to quiet title in favor of the owner of the legal title who is himself a nonresident.[76] Plaintiff's possession is not interrupted by the presence of a third person on the land as his employee.[77]

Tenant. Possession of real property by a tenant is sufficient to enable the landlord to maintain an action to quiet title,[78] and this is so under statutes in some jurisdictions.[79] The fact that a tenant, without the knowledge or consent of his landlord, may have paid rent to a person claiming adversely does not take the case from the operation of the statute,[80] but such a statutory provision does not permit an action against a tenant claiming an estate adverse to the landlord.[81] On the other hand, it has been held that a director or manager of a corporation cannot acquire a hostile possession of its property so as to prevent it from maintaining an action under a statute authorizing the action to be brought by any person in possession by himself or his tenant.[82] The fact that one spouse occupies land as tenant of a plaintiff suing to quiet title does not prevent the other spouse from asserting a claim to such land.[83]

§ 35. —— Peaceable Possession

Under the provisions of some statutes the possession which will support a suit to quiet title must be peaceable.

Where the possession sufficient to support an action to quiet title is limited by statute to peaceable possession, plaintiff must, in a case falling within the purview of the statute, show that he has a peaceable, as distinguished from a disputed or scrambling, possession,[84] or from a possession acquired by force or threats,[85] although where the case does not fall within the purview of the statute such a showing may be unnecessary.[86] A "peaceable possession," within the contemplation of such statutes, has been variously defined as a possession so clear that no

(2) Where evidence in quiet title suit shows plaintiff and defendant in actual possession of their respective adjoining farms and that each claims title to an uninclosed tract of land of little value and not actually occupied by either, unoccupied land attaches to land showing better title.—Hunt v. Cassidy, 181 S.W.2d 248, 297 Ky. 716.

71. Ohio.—Haban v. Suburban Home Mortg. Co., App., 57 N.E.2d 97.
Holder of inferior title may not claim constructive possession sufficient to maintain action to quiet title.—Harris v. Paul, 174 N.E. 615, 37 Ohio App. 206.

72. Okl.—McGrath v. Eichhoff, 100 P.2d 880, 187 Okl. 64—Levindale Lead & Zinc Mining Co. v. Fluke, 150 P. 481, 48 Okl. 480.
Wyo.—Ohio Oil Co. v. Wyoming Agency, 179 P.2d 773, 63 Wyo. 187.

73. Wyo.—Ohio Oil Co. v. Wyoming Agency, supra.

74. N.J.—Nugent v. Lindsley, 111 A. 324, 92 N.J.Eq. 128.

75. Mo.—Root v. Mead, 58 Mo.App. 477.

76. Fla.—Sloan v. Sloan, 5 So. 603, 25 Fla. 53.

77. Or.—Manning v. Gregoira, 191 P. 657, 102 P. 406, 97 Or. 304.

78. Ky.—Williams v. Thomas, 149 S.W.2d 525, 285 Ky. 776.
Tex.—Watson v. Rockmill, 155 S.W. 2d 783, 137 Tex. 566, 137 A.L.R. 1032.
51 C.J. p 190 note 98.
Possession of tenant in common see supra § 32 a.

79. Kan.—Brown v. Brooks, 51 P. 2d 32, 142 Kan. 556.
51 C.J. p 190 note 99.
Possession of vendee as equivalent to possession of tenant see supra § 32 d.

80. Colo.—Merchants State Bank v. Porter, 37 P. 960, 20 Colo. 216.

81. Wyo.—Baldwin v. McDonald, 156 P. 27, 24 Wyo. 108.
51 C.J. p 190 note 3.

82. Colo.—Consolidated Plaster Co. v. Wild, 94 P. 285, 42 Colo. 202.

83. Ind.—Ault v. Miller, 181 N.E. 35, 203 Ind. 487.

84. Ala.—Walthall v. Yohn, 40 So. 2d 705, 252 Ala. 202—Webb v. Griffin, 10 So.2d 458, 243 Ala. 468—Sisson v. Swift, 9 So.2d 891, 243 Ala. 288—Dawsey v. Walden, 8 So.2d 417, 243 Ala. 93—Price v. Robinson, 7 So.2d 663, 242 Ala. 626—Hinds v. Federal Land Bank of New Orleans, 186 So. 153, 237 Ala. 218.
51 C.J. p 191 note 3—48 C.J. p 775 note 55 [a].
Purpose of statute authorizing person in peaceable possession to sue in equity to quiet title is to give remedy to persons in peaceable possession only.—Ziegler v. Bonner, 128 So. 592, 221 Ala. 307.

85. Ala.—Hinds v. Federal Land Bank of New Orleans, 186 So. 153, 237 Ala. 218—Cooper v. Cooper, 78 So. 285, 201 Ala. 477.
Lawfulness of possession generally see supra § 32 b.

86. Ala.—Garrett v. Cobb, 80 So. 79, 202 Ala. 241.
51 C.J. p 191 note 9 [g].

one denies the fact of the possession, whether actual or constructive;[87] any possession where a person, although setting up a claim of title, has not interfered with possession by any act suable at law by a suit which may or will involve his claim of title,[88] or a possession undisturbed by any act of a person in or upon the locus in quo, for which act such person would be suable in an action by which the title to the property could be determined.[89]

It has been held that plaintiff need only be in peaceable possession of the locus in quo as against defendant, without regard to the claims of third persons.[90] "Peaceable possession" refers to the character of the possession, and the fact that some person is denying plaintiff's right to possession does not create a disputed or scrambling possession;[91] but such person must do something indicating that he claims to be in possession himself.[92] Merely going upon the land, however, while it is in plaintiff's possession, claiming title thereto and warning plaintiff off, is not sufficient to affect plaintiff's peaceable possession,[93] nor will the fact that the adverse claimant is a tenant in common with plaintiff qualify the latter's peaceable possession under claim of title.[94]

The possession of defendant which will make plaintiff's possession a disputed one, and thus defeat his action, need not, however, be technically an adverse possession which would in time ripen into title,[95] and it has been held that defendant's claim of possession through attornment of plaintiff's tenant is sufficient to make plaintiff's possession a disputed one,[96] notwithstanding the general rule that a tenant may not attorn to a stranger.[97] In the final analysis, what constitutes a peaceable possession under the statute must be left for determination on the facts of each case.[98]

In accordance with some statutes, a person claiming ownership of wild, wood, waste, unenclosed, or unimproved lands who has paid taxes thereon which have been assessed to him or to his grantors for five consecutive years immediately preceding commencement of the suit shall be presumed to be in peaceable possession of the lands if no other person is in actual possession.[99] It is unnecessary that the taxes be paid during the year in which they were assessed[1] or that the taxes be assessed by lot and block number instead of in bulk.[2]

Actual or constructive peaceable possession. Under statutes providing that the peaceable possession may be either actual or constructive, it is as indispensable that a constructive possession be peaceable as that actual possession be so.[3] However, constructive possession, if peaceable, has been held sufficient whether or not the land is vacant.[4]

§ 36. —— Possession of Part of Tract

Actual possession of part of the land coupled with constructive possession of the balance may afford possession sufficient to support an action to quiet title.

Actual possession by plaintiff of part of a tract of land, coupled with constructive possession of the balance, where no one is in actual adverse possession of such balance, is a sufficient possession of the whole to sustain an action to quiet title,[5] at least where such balance constitutes but a small portion

87. Ala.—Geo. E. Wood Lumber Co. v. Williams, 47 So. 202, 157 Ala. 73.
88. N.J.—Oeding v. Schweinler, 138 A. 379, 101 N.J.Eq. 455.
18 C.J. p 775 note 59.
89. N.J.—Bradley v. McPherson, Ch., 58 A. 105.
90. N.J.—Allaire v Ketcham, 35 A. 900, 55 N.J.Eq. 108.
91 C.J. p 191 note 11.
91. Ala.—Jordan v. McClure Lumber Co., 54 So. 415, 170 Ala. 289.
91 C.J. p 191 note 12
92. Ala.—Webb v. Griffin, 10 So.2d 458, 243 Ala. 468—Dawsey v. Walden, 8 So.2d 417, 243 Ala. 93.
1 C.J. p 192 note 13.
93. Ala.—Jordan v. McClure Lumber Co., 54 So. 415, 170 Ala. 289.
94. N.J.—Powell v. Mayo, 24 N.J. Eq. 178.
95. Ala.—Price v. Robinson, 7 So.2d 568, 242 Ala. 626.
1 C.J. p 192 note 16.
96. Ala.—Donohoo v. Smith, 92 So. 455, 207 Ala. 296.
97. Ala.—Donohoo v. Smith, supra.
98. Ala.—Webb v. Griffin, 10 So.2d 458, 243 Ala. 468—Dawsey v. Walden, 8 So.2d 417, 243 Ala. 93—Price v. Robinson, 7 So.2d 568, 242 Ala. 626.

Possession held peaceable

Ala.—Hinds v. Federal Land Bank of New Orleans, 186 So. 153, 237 Ala. 218.
N.J.—Girard Trust Co. v. McGeorge, 15 A.2d 206, 128 N.J.Eq. 91.
51 C.J. p 191 note 9 [e].
99. N.J.—Girard Trust Co. v. McGeorge, supra.

Presumptive or constructive possession of another

In order to defeat the presumption of peaceable possession, actual possession of the land by another person, as contrasted with a presumptive or constructive possession of such person, is necessary.—Girard Trust Co. v. McGeorge, supra.

1. N.J.—Girard Trust Co. v. McGeorge, supra.
2. N.J.—Girard Trust Co. v. McGeorge, supra.
3. Ala.—Birmingham Securities Co. v. Southern Univ., 55 So. 240, 173 Ala. 116—Holland v. Coleman, 50 So. 128, 162 Ala. 462.
4. Ala.—Kyle v. Alabama State Land Co., 41 So. 174, 147 Ala. 698.
5. Colo.—Rocky Mountain Fuel Co. v. Clayton Coal Co., 134 P.2d 1062, 110 Colo. 334.
Ind.—Sheets v. Stiefel, 74 N.E.2d 921, 117 Ind.App. 584.
Ky.—Flinn v. Blakeman, 71 S.W.2d 961, 254 Ky. 416.
Ohio.—Lake Front-East Fifty-Fifth Street Corp. v. City of Cleveland, 7 Ohio Supp. 17, affirmed 36 N.E. 2d 196, appeal dismissed 38 N.E. 2d 416, 139 Ohio St. 138.
Va.—Buchanan Coal Co. v. Street, 9 S.E.2d 339, 175 Va. 531.
51 C.J. p 193 note 33.

of the whole.[6] Otherwise stated, plaintiff's actual possession of the particular tract is sufficient possession of adjoining land held under the same title and used in connection therewith.[7] Where one in possession of a tract of land purchases an adjoining tract, he will be presumed to have extended his possession over the part so acquired, and may maintain a bill to quiet title thereto.[8] Where, however, one has a patent to all unappropriated lands within a certain boundary, possession of certain detached parcels of unappropriated land, separated from the land in dispute by land already appropriated, is not such possession as will extend over all lands unappropriated when the patent issued.[9]

F. ADVERSE CLAIM OR INTEREST OF DEFENDANT

§ 37. Necessity

In order to maintain the statutory action to determine adverse claims to realty, there must be a showing that defendant asserts a claim which is adverse to plaintiff's title or possession.

In order to maintain an action to determine adverse claims to realty, there must be a showing that defendant asserts a claim which is adverse to plaintiff's title or possession.[10]

§ 38. What Constitutes

Whenever the statute provides broadly for the determination of adverse claims, it is usually held to embrace any claim or interest asserted adversely to the plaintiff's title or right.

Whenever the statute provides broadly for the determination of adverse claims, it is usually held to embrace any claim or interest asserted adversely to plaintiff's title or right,[11] whether defendant

6. Ky.—Williams v. Lowe, 194 S.W. 342, 175 Ky. 369.
51 C.J. p 193 note 34.

7. U.S.—Elliott v. Atlantic City, 149 F. 849.
N.J.—Yard v. Ocean Beach Assoc., 24 A. 729, 49 N.J.Eq. 306.

8. Ky.—Cates v. Loftus, 4 T.B.Mon. 439.

9. Ky.—Moses v. Gatliff, 13 S.W. 139, 11 Ky.L. 356.

10. Idaho.—Whitney v. Randall, 70 P.2d 384, 58 Idaho 49.
N.Y.—39th-40th Corp. v. Port of New York Authority, 65 N.Y.S.2d 712, 188 Misc. 657.
N.C.—Ramsey v. Ramsey, 29 S.E.2d 340, 224 N.C. 110.
51 C.J. p 193 note 39.
Pleading adverse claim see infra § 62.

Estate, interest, lien or encumbrance
An action to determine adverse claims may be maintained against any person claiming an estate or interest in, or lien or encumbrance on it, for the purpose of determining such adverse estate, interest, lien, or encumbrance.—Udgaard v. Schindler, 31 N.W.2d 776, 75 N.D. 625.

11. Cal.—Thompson v. Moore, 65 P. 2d 800, 8 Cal.2d 367, 109 A.L.R. 1027.
Iowa.—Bates v. Bates, 24 N.W.2d 460, 237 Iowa 1408—Donnelly v. Nolan, 15 N.W.2d 924, 235 Iowa 30.
Miss.—Church of the Living God, C. W. F. F., etc., v. Curry, 34 So.2d 494, 203 Miss. 279.
Wyo.—Ohio Oil Co. v. Wyoming Agency, 179 P.2d 773, 63 Wyo. 187.
51 C.J. p 193 note 41.
What constitutes cloud on title generally see supra §§ 12-15.

Every description of claim
(1) An "action to quiet title" embraces every sort of a claim whereby the plaintiff might be deprived of his property or his title clouded or its value depreciated, or whereby the plaintiff might be incommoded or damnified by assertion of an outstanding title already held or to grow out of the adverse pretension.—Castro v. Barry, 21 P. 946, 79 Cal. 443—Head v. Pordyce, 17 Cal. 149—Bank of America Nat. Trust & Savings Ass'n v. Town of Atherton, 140 P.2d 678, 60 Cal.App.2d 268—Hamilton v. Elvidge, 22 P.2d 239, 132 Cal. App. 21—Hughes v. Beakley, 259 P. 337, 85 Cal.App. 313—Andrews v. Russell, 259 P. 113, 85 Cal.App. 149.

(2) Action to quiet title lies against claimant in respect of land, although claim is based on mere pretension or asserted right therein or thereto, or issues out of, or concerns, or is annexed to or exercisable in connection with such property.
Cal.—Castro v. Barry, 21 P. 946, 79 Cal. 443—Hamilton v. Elvidge, 22 P.2d 239, 132 Cal.App. 21.
Miss.—Church of the Living God, C. W. F. F., etc. v. Curry, 34 So.2d 494, 203 Miss. 279.

Particular matters or claims held adverse
(1) In general.—Idaho Farms Co. v. North Side Canal Co., D.C.Idaho, 34 F.Supp. 189, reversed on other grounds, C.C.A., North Side Canal Co. v. Idaho Farms Co., 107 F.2d 481, rehearing denied 109 F.2d 354.

(2) Where building restrictions imposed by municipal ordinance limited use, obstructed sale, and greatly depreciated value of property, action to quiet title was proper remedy to determine validity of ordinance.—Bank of America Nat. Trust & Savings Ass'n v. Town of Atherton, 140 P.2d 678, 60 Cal.App.2d 268.

(3) The filing of a map embodying state survey of highway evidenced claim on part of state that highway was of width and in location shown on map and was sufficient to give rise to an equitable right of action to determine a claim to real property. Heidheim v. People, 39 N.Y.S. 2d 333.

(4) A landowner was not precluded from maintaining action to quiet title to land on ground that affidavit in which defendant claimed a life interest in land did not constitute a cloud on title because affidavit was not acknowledged, where statutory action to quiet title was not limited to removal of mere clouds on title but embraced any claim of interest in the land adverse to plaintiff and defendant pleaded and undertook to prove a claim of interest in land adverse to plaintiff. Corman v. Cree, C.C.A.N.M., 100 F.2d 486.

Particular matters or claims held not adverse
(1) In general. 39th-40th Corp. v Port of New York Authority, 65 N.Y. S.2d 712, 188 Misc. 657.

(2) Contract to purchase oil was not "adverse claim" affecting real estate.—Bartholomae Oil Corporation v. Delaney, 286 P. 690, 112 Cal App. 314.

(3) Where lessors had reentered into possession of leased premises on lessee's breaches of terms of lease and no one was disputing lessors' right to possession or asserting claims against anything but leasehold estate, lessors were held not entitled to equitable decree removing alleged clouds on their fee-simple title, since title was in state of tranquility.—Hill v. 1550 Hinman

claims under a recorded instrument or merely asserts an unknown but hostile claim,[12] and whether or not it constitutes a technical cloud on title.[13] Under this rule relief may be had against instruments which are void on their face,[14] and which do not, therefore, constitute clouds on title within the principles of equity, as discussed supra § 13. The adverse claim or interest contemplated under some statutes must be in the legal sense the assertion of an adverse claim or interest in the property,[15] but, where the statute has dispensed with the necessity of possession by plaintiff, an action to quiet title will lie by a landlord against his tenant in possession for the purpose of determining the validity of an adverse claim set up by the tenant,[16] even though such claim is no more than the right of possession as tenant.[17]

A grantor, after conveying the legal title, cannot maintain an action with respect thereto under the statute, since the title is in privity and not adverse.[18]

§ 39. —— Present or Future Interest

The assertion of a future or contingent interest or right in the property may constitute an adverse claim.

A claim may be adverse, although defendant is not asserting a present right to recover possession;[19] an assertion of a future or contingent interest is sufficient.[20] Accordingly, a person claiming an estate in fee may maintain an action against one wrongfully claiming an estate in reversion or remainder,[21] and a devisee in whom a contingent remainder is vested may maintain an action against other contingent remaindermen to quiet title, although the life estate is not terminated.[22] However, one claiming only a life estate cannot maintain an action to determine adverse claims to the remainder, because such claims are not adverse to him.[23]

§ 40. —— Lien Claims

Whether an action will be against lien claimants under a statute depends on the phraseology of such statute and the construction given thereto by the courts.

Whether an action will lie against lien claimants under the statute depends upon the phraseology of such statute and the construction given thereto by the courts.[24] Where the statute provides broadly for the determination of adverse claims to land, it has been held applicable to lien claims.[25] Likewise,

Ave. Bldg. Corporation, 6 N.E.2d 128, 365 Ill. 129.

(4) Statements of tenant to prospective lessees concerning right to another term under lease gave landlord no right to maintain suit against him to quiet title.—Nelson v. Burns, 255 Ill.App. 314.

12. Miss.—Gambrell Lumber Co. v. Saratoga Lumber Co., 40 So. 485, 87 Miss. 773—Cook v. Friley, 61 Miss. 1.

13. U.S.—Corman v. Cree, C.C.A.N.M., 100 F.2d 486.
51 C.J. p 194 note 42.

14. Miss.—Silvey v. Upton, 32 So.2d 267, 202 Miss. 485.
Wash.—O'Neal Land Co. v. Judge, 32 P.2d 535, 196 Wash. 224.
51 C.J. p 194 note 43.
Forged deed
Md.—Maskell v. Hill, 55 A.2d 842, 189 Md. 327.

15. Colo.—Smith v. Schlink, 62 P. 1044, 15 Colo.App. 325.
Pa.—Kimmel v. Shaffer, 68 A. 1017, 219 Pa. 375.

16. Cal.—Universal Milk Co. v. Wood, 272 P. 745, 205 Cal. 751—Andrews v. Russell, 259 P. 113, 85 Cal.App. 149.
Statutes dispensing with possession generally see supra § 29.
Contra under earlier statute
Cal.—Van Winkle v. Hinckle, 21 Cal. 342.

Tenant holding over
Iowa.—Bates v. Bates, 24 N.W.2d 460, 237 Iowa 1408.
N.D.—Udgaard v. Schindler, 31 N.W.2d 776, 75 N.D. 625.

17. Iowa.—Bates v. Bates, 24 N.W.2d 460, 237 Iowa 1408—Davis v. Niemann, 258 N.W. 761, 219 Iowa 620.
Termination of lease
(1) A landlord, without awaiting the termination of the lease and then bringing ejectment or forcible entry and detainer, may at once bring suit against the tenant to quiet title.—Bates v. Bates, 24 N.W.2d 460, 237 Iowa 1408.

(2) It has been held that, where an assignee of rents has taken possession from the tenant, claiming the right of possession for the full term, free from the landlord's right to terminate the tenancy on sale of the property, the landlord, without waiting for the date on which the tenancy could be terminated and then bringing ejectment or forcible entry and detainer, may at once bring suit against the assignee to quiet title.—Equitable L. Ins. Co. v. C. C. Taft Co., 179 N.W. 880, 192 Iowa 934.

(3) A lessor may bring an action to quiet title against the lessee who has forfeited the lease, without giving notice of default and demand for possession.—Universal Milk Co. v. Wood, 272 P. 745, 205 Cal. 751—Andrews v. Russell, 259 P. 113, 85 Cal.App. 149.

18. Colo.—Walker v. Pogue, 29 P. 1017, 2 Colo.App. 149, 152.
51 C.J. p 195 note 51.

19. Ohio.—First New Jerusalem Church of Lakewood v. Singer, 34 N.E.2d 1007, 68 Ohio App. 119.
51 C.J. p 195 note 52.

20. Mo.—Audsley v. Hale, 261 S.W. 117, 303 Mo. 451—Ball v. Woolfolk, 75 S.W. 410, 175 Mo. 278.

21. Mo.—White v. Kentling, 134 S.W.2d 39, 345 Mo. 526.
51 C.J. p 195 note 54.

22. Ky.—Boggess v. Crail, 5 S.W.2d 906, 224 Ky. 97.
Necessity of possession in order to maintain suit see supra § 27.

23. Cal.—Akley v. Bassett, 228 P. 1057, 68 Cal.App. 270.
N.Y.—Onderdonk v. Mott, 34 Barb. 106.

24. Conn.—Hagearty v. Ryan, 195 A. 730, 123 Conn. 372.
51 C.J. p 195 note 57.
Taxes regularly fixed and directed to be collected by warrant affixed to tax roll, including assessment roll properly compiled, and delivered to collector, are "lien or incumbrance" on realty assessed within statute authorizing possessor claiming fee to sue for examination of adverse claims.—Hoen v. Suffolk County, 261 N.Y.S. 535, 146 Misc. 439.

25. N.Y.—Kothe v. Wilson, 45 N.Y.S. 649.
51 C.J. p 196 note 60.

it has been held that lien claims are within a statute authorizing an action to be maintained against a person "claiming title," and providing that the petition shall pray that defendant be barred from claiming "any right" adverse to plaintiff.[26] In some jurisdictions it has been held that a lien is not within the purview of a statute providing for the determination of an adverse "estate or interest" in land;[27] but in other jurisdictions the word "interest" has been held broad enough to include liens.[28]

G. DEFENSES

§ 41. General Statement

In an action to quiet title, all defenses, equitable, as well as legal, may be invoked.

In an action to quiet title, all defenses,[29] equitable, as well as legal,[30] may be invoked. Accordingly, a prospective,[31] as well as a present[32] claim in the property, may be asserted as a defense to the action.

Estoppel. The defense by way of equitable estoppel is available in an action to quiet title.[33]

Where a use-plaintiff sues to quiet title, defendant may avail himself of any defense he may have had against the nominal plaintiff at the date of the transfer from the nominal to the use-plaintiff.[34] The nominal plaintiff cannot end the litigation by a deed to defendant after transfer of title to the use-plaintiff,[35] but, where defendant's deed was given prior to the deed to the use-plaintiff, defendant may prove it as a defense against the use-plaintiff.[36]

§ 42. Particular Defenses

a. In general
b. Want of title in plaintiff
c. Title in third person
d. Existing agreement by plaintiff to dispose of interest in lands

a. In General

Various matters have been held to constitute, or not to constitute, a good defense to an action to quiet title.

Equity will not encourage speculation in doubtful and disputed titles, and the fact that plaintiff purchased such a title with knowledge of its doubtful character is a good defense.[37] On the other hand, the fact that a codefendant, joined as a tenant in common, was not a bona fide purchaser, but purchased his interest in collusion with plaintiff and in the latter's interest, is no defense where the rights of the other defendant were not prejudiced.[38] So the fact that defendant, claiming under a sheriff's deed, void because there was no valid publication of notice in the proceedings under which the property was attached and sold, might be allowed to amend the proof of service and have a new valid judgment for the enforcement of the attachment lien, is no ground for denying relief to plaintiff.[39]

Also relief will not be denied the owner of a fee because of the voluntary payment of taxes by another,[40] without claim of title and under a mistaken assessment.[41] In an action by a grantee against

26. Iowa.—French v. Bartel, 146 N. W. 754, 164 Iowa 677.
51 C.J. p 196 note 61.

27. N.D.—Power v. Bowdle, 54 N. W. 404, 3 N.D. 107, 44 Am.S.R. 511, 21 L.R.A. 328.
51 C.J. p 196 note 58.

28. U.S.—Ormsby v. Ottman, Neb., 85 F. 492, 497, 29 C.C.A. 295.
51 C.J. p 196 note 59.

29. Mo.—Wm. H. Johnson Timber & Realty Co. v. Belt, 46 S.W.2d 153, 329 Mo. 515.
R.I.—Talbot v. Town of Little Compton, 160 A. 466, 53 R.I. 280.

30. Iowa.—Equitable Life Ins. Co. of Iowa v. Condon, 10 N.W.2d 73, 233 Iowa 567.
Wash.—McLiesh v. Ball, 109 P. 209, 58 Wash. 690, 137 Am.S.R. 1087.
50 C.J. p 196 note 63.

31. Cal.—Williams v. Rush, 25 P.2d 883, 134 Cal.App. 554.

32. Cal.—Williams v. Rush, supra.

33. S.D.—Kraft v. Corson County, 24 N.W.2d 643, 71 S.D. 382—McDowell v. Jameson, 184 N.W. 251, 44 S.D. 480—Kenny v. McKenzie, 127 N.W. 597, 25 S.D. 485, 49 L.R.A.,N.S., 782—Grigsby v. Larson, 124 N.W. 856, 24 S.D. 628—Parr v. Semmler, 123 N.W. 235, 24 S.D. 290—Shelby v. Bowden, 94 N.W. 416, 16 S.D. 531—Wampol v. Kounts, 85 N.W. 595, 14 S.D. 334, 86 Am.St. Rep. 765.

Estoppel in pais
In proceedings to quiet title, estoppel in pais to assert title is an equitable defense.—Ilsins v. Moulder, 90 S.W.2d 81, 338 Mo. 275.

Facts held not to constitute estoppel
Ark.—Norman v. Sharp, 177 S.W.2d 401, 206 Ark. 744.
Cal.—North Hollywood Mortg. Co. v. Henshey, 14 P.2d 843, 126 Cal. App. 411.
Minn.—Gostomezik v. Gostomezik, 253 N.W. 376, 191 Minn. 119.
N.M.—Mosley v. Magnolia Petroleum Co., 114 P.2d 740, 45 N.M. 330.
N.D.—Nichols v. Schutte, 26 N.W.2d 515, 75 N.D. 207.

34. N.D.—Hanitch v. Beiseker, 130 N.W. 833, 21 N.D. 286.

35. N.D.—Hanitch v. Beiseker, supra.

36. N.D.—Hanitch v. Beiseker, supra.

37. U.S.—Richmond Cedar Works v. Pittsburg Land, etc., Co., D.C.N.C., 238 F. 870.
Cal.—Storrs v. Belmont Gold Min. & Mill. Co., 76 P.2d 197, 24 Cal.App.2d 551.
Mo.—Greenfield v. Petty, 145 S.W.2d 367, 346 Mo. 1186.

38. U.S.—Richmond Cedar Works v. Pinnix, D.C.N.C., 208 F. 785.

39. Iowa.—Empire Real Est., etc., Co. v. Buckley, 114 N.W. 556, 137 Iowa 7, 126 Am.St.R. 248.
51 C.J. p 203 note 60.

40. Mo.—Kellogg v. Moore, 198 S. W. 15, 271 Mo. 189.

41. Cal.—Vanderbilt v. All Persons, etc., 126 P. 158, 163 Cal. 807.
Tenn.—Culwell v. Culwell, 173 S.W. 2d 1009, 23 Tenn.App. 349.

the grantor to quiet title, the grantor may, without reentry, defend on the ground that the grantee has failed to perform a condition subsequent;[42] but such defense is not available to one holding an option to purchase from the grantor.[43] Various other facts pleaded by defendant have been held to constitute[44] or not to constitute[45] a good defense to an action to quiet title.

Partial defenses. Defendant cannot wholly defeat plaintiff's action by showing that plaintiff is estopped as a tenant to dispute title and right of possession to a part only of the realty in controversy, plaintiff being entitled, in such case, to a decree to quiet title to that portion of the property to which the estoppel does not apply.[46]

b. Want of Title in Plaintiff

Where plaintiff is not in possession of the property, a defendant in an action to quiet title may effectually resist a decree against himself by showing simply that the plaintiff is without title. However, where the plaintiff makes a prima facie showing of title, defendant cannot question plaintiff's title where he shows no title or interest in himself.

Where plaintiff is not in possession of the property,[47] a defendant in an action to quiet title may effectually resist a decree against himself by showing simply that the plaintiff is without title,[48] since if the plaintiff has no title he cannot complain that someone else, also without title, asserts an interest in the land.[49] However, where the plaintiff makes a prima facie showing of title,[50] even if that title is by possession only,[51] defendant cannot question plaintiff's title where he shows no title or interest in himself,[52] or where both parties derive their

42. Ind.—Ralston v. Hatfield, 143 N. E. 887, 81 Ind.App. 641.

43. Ind.—Ralston v. Hatfield, supra.

44. Cal.—Blodgett v. Trumbull, 257 P. 199, 83 Cal.App. 566.
Wash.—McLeish v. Ball, 109 P. 209, 58 Wash. 690, 137 Am.S.R. 1037.

45. Cal.—Seeger v. Odell, 115 P.2d 977, 18 Cal.2d 409, 136 A.L.R. 129—Paradise Irr. Dist. v. Barry, 32 P.2d 966, 220 Cal. 748—Faucher v. State, 187 P.2d 918, 82 Cal.App.2d 991—Canal Oil Co. v. National Oil Co., 66 P.2d 197, 19 Cal.App.2d 524—Bartholomae Oil Corporation v. Delaney, 296 P. 690, 112 Cal.App. 314.
Iowa.—Equitable Life Assur. Soc. of U. S. v. Asmus, 300 N.W. 318, 230 Iowa 1062.
Mo.—Curators of Central College v. Shields, 188 S.W.2d 835, 354 Mo. 129.
Ohio.—Lake Front-East Fifty-Fifth Street Corp. v. City of Cleveland, 7 Ohio Supp. 17, affirmed, App., 36 N.E.2d 196, appeal dismissed 38 N. E.2d 410, 139 Ohio St. 138.
Utah.—Zion's Ben. Bldg. Soc. v. Geary, 189 P.2d 964, 112 Utah 548.
51 C.J. p 203 note 66.

Particular matters

(1) Where, after alleged repudiation of oil lease by lessor, the lessee did nothing and failed to pay the rent or do drilling as required by lease, lessee was in no position to take advantage of alleged breach by lessor in lessor's action to quiet title for failure to pay rentals and to do drilling required by lease.—Rehart v. Klossner, 119 P.2d 148, 48 Cal. App.2d 46.

(2) Where suit to quiet title to land taken in satisfaction of trust deed was defended on ground of payment of debt before giving of trust deed for benefit of defendant's brother, action could not be defeated on ground that defendant had been deceived by his brother where plaintiff was not a party to such deception.—Simon Newman Co. v. Tully, 88 P.2d 131, 13 Cal.2d 134.

(3) Defendants, not proving valid assignment to their decedent from purchaser of land, could not urge, in vendor's action to quiet title, vendor's noncompliance with covenants of sale contract.—Los Angeles First Nat. Trust & Savings Bank v. Northrup, 8 P.2d 528, 120 Cal.App. 677.

(4) Plaintiff was not estopped to bring suit to quiet title under deed from his mother, now deceased, because defendant, who was plaintiff's stepfather, had prior to commencement of suit made material improvements to the property, even if such improvements had been made without defendant's knowledge that plaintiff claimed title to premises.—Wilder v. Conlon, 30 N.W.2d 764, 239 Iowa 187.

(5) Where plaintiff, through persuasion of persons plaintiff was entitled to believe would not act inconsistent with plaintiff's welfare, entered into improvident contract, which among other things entitled defendant as tenant to continue in possession of plaintiff's premises for an indefinite period, acceptance of rent from defendant was not a ratification of contract precluding quieting title to premises against claims under contract.—Peck v. Williams, 79 N.E.2d 562, 82 Ohio App. 35.

(6) Defendants in action to quiet title could not complain, as against plaintiff that their common grantor previously conveyed to plaintiff more than contract required.—Pitchios v. Jones, 290 P. 958, 76 Utah 595.

46. Kan.—Brenner v. Bigelow, 8 Kan. 496.

47. Cal.—Williams v. City of San Pedro, 94 P. 234, 153 Cal. 44.
51 C.J. p 197 note 77.

48. Cal.—Pacific States Savings & Loan Co. v. Warden, 117 P.2d 877, 18 Cal.2d 757—Williams v. City of San Pedro, 94 P. 234, 153 Cal. 44—Penn v. Dyba, 1 P.2d 461, 115 Cal. App. 67.
N.J.—Arlington Realty Co. v. Gluck, 130 A. 809, 98 N.J.Eq. 62.
51 C.J. p 197 note 76.

49. Cal.—Pacific States Savings & Loan Co. v. Warden, 117 P.2d 877, 18 Cal.2d 757—Williams v. City of San Pedro, 94 P. 234, 153 Cal. 44—Jones v. Walker, 118 P.2d 299, 47 Cal.App.2d 566—Penn v. Dyba, 1 P.2d 461, 115 Cal.App. 67.

50. Cal.—Pacific States Savings & Loan Co. v. Warden, 117 P.2d 877, 18 Cal.2d 757—McPhail v. Nunes, 192 P. 95, 48 Cal.App. 383.

51. Kan.—Wilson v. Glenn, 254 P. 694, 123 Kan. 16.

Paramount title must be shown

Where it is shown in action to quiet title that plaintiff is in actual possession of realty in controversy, defendant cannot defeat plaintiff's action except by showing a paramount right in himself.—Federal Savings & Loan Ins. Corporation v. Hatton, 135 P.2d 559, 156 Kan. 673.

52. Colo.—Bennett v. Morrison, 242 P. 636, 78 Colo. 464.
51 C.J. p 197 note 78.

Strangers or intruders

In action to quiet title, want of validity of plaintiff's title may not be challenged by strangers and intruders, that is, persons who were neither in possession of the property nor connected in any way with the paramount source of title.—Pacific States Savings & Loan Co. v. Warden, 117 P.2d 877, 18 Cal.2d 757.

title from a common source.[53] Accordingly, where plaintiff establishes a prima facie title in himself under a mortgage foreclosure sale, defendant, who was a stranger to the mortgagor and his title, could not attack the validity of the foreclosure;[54] nor can defendant, in an action to set aside a judgment against plaintiff's grantor and conveyances based thereon, as clouds on title, assert fraud by such grantor in procuring his title from the government.[55]

The fact that plaintiff procured his title by fraud on his grantors cannot avail defendant, a stranger to the transaction, whose conduct was not influenced thereby and who makes no claim under or through the persons defrauded.[56] Likewise, where plaintiff holds the legal title, his right to maintain the action cannot be attacked by defendants, who are without title, on the ground that he holds his title as trustee[57] or that the conveyance to him was champertous.[58] It has also been held that one defendant cannot attack the sufficiency of plaintiff's title as against a codefendant.[59] Other cases where defendant was held to be precluded from attacking plaintiff's title or right of possession are collected in the note.[60]

c. Title in Third Person

Where plaintiff is in the actual possession of the land in controversy, defendant cannot defeat the action by showing an outstanding paramount right or title in a third person.

Where plaintiff is in the actual possession of the land in controversy, defendant cannot defeat the action by showing an outstanding paramount right or title in a third person,[61] at least where such outstanding title is not a valid and subsisting one.[62] Likewise, it has been held that the holder of a naked legal title to land, as against a plaintiff in possession thereof, will not be permitted to set up a countervailing equity in a third person, with whom he is not in privity, and who, being also a party defendant to the action, by his default confesses plaintiff's title.[63] The fact that a third person has obtained title to the land by adverse possession does not militate against the rights of the plaintiff in the absence of a showing of privity between such third person and defendant.[64] However, a defendant in adverse possession may defeat the action by showing a title outstanding in a third person,[65] without connecting himself with that title,[66] although as to this, there appears to be authority to the contrary.[67]

d. Existing Agreement by Plaintiff to Dispose of Interest in Lands

The right of plaintiff cannot be defeated by showing that he has entered into an agreement to dispose of the property, where such agreement in no way affects plaintiff's title.

The right of plaintiff cannot be defeated by showing that he has entered into an agreement to dispose of the property, where such agreement in no way affects plaintiff's title.[68] Accordingly, a contract[69] of sale[70] which is not specifically enforceable cannot be the basis of a defense by one claiming an interest in the property under such contract. Likewise, a vendor's failure to carry out a contract to convey is no defense to an action by him against the purchaser to remove a cloud from title, where the latter subsequently agreed to waive his rights under the contract.[71] However, where plaintiff contracts to sell land to defendant, the contract entitling defendant to possession, and subsequently contracts to sell the land to another person, defend-

53. Mo.—Stone v. Kansas City, etc., R. Co., 169 S.W. 88, 261 Mo. 61.
51 C.J. p 197 note 80.

54. Colo.—Inman v. White, 122 P. 65, 21 Colo.App. 427.
N.Y.—Craft v. Merrill, 14 N.Y. 456.

55. Or.—Temple v. Osburn, 106 P. 16, 55 Or. 506.

56. Ind.—Pence v. Long, 77 N.E. 961, 38 Ind.App. 62.
N.Y.—Obermeyer v. Behn, 109 N.Y.S. 289, 123 App.Div. 440, affirmed 89 N.E. 1106, 195 N.Y. 588.

57. U.S.—Van Deventer v. Lott, C.C.N.Y., 172 F. 574, affirmed 180 F. 378, 103 C.C.A. 524.

58. U.S.—Van Deventer v. Lott, supra.

59. Cal.—Morris v. Judkins, 172 P. 163, 36 Cal.App. 413.
51 C.J. p 197 note 86.

60. Mo.—Heagy v. Miller, 187 S.W. 889.
51 C.J. p 197 note 87.

61. Kan.—Corpus Juris cited in Federal Savings & Loan Ins. Corporation v. Hatton, 135 P.2d 559, 563, 156 Kan. 673.
51 C.J. p 198 note 88.
Want of title in plaintiff *see supra* subdivision b of this section.

62. Miss.—Harney v. Morton, 36 Miss. 411.
51 C.J. p 198 note 89.

63. Ohio.—McKinnie v. Perrill, 15 Ohio St. 152.

64. Ind.—Sheets v. Stiefel, 74 N.E. 2d 921, 117 Ind.App. 554.

65. Cal.—Woodward v. Faris, 41 P. 781, 109 Cal. 13.
51 C.J. p 198 note 91.

66. Cal.—Woodward v. Faris, supra.
51 C.J. p 198 note 92.

67. Miss. Southern Naval Stores Co. v. Price, 32 So.2d 575, 202 Miss. 116.

68. N.D.—State v. Coughran, 103 N.W. 31, 10 N.D. 271.

69. Cal.—Pimentel v. Hall-Baker Co., 80 P.2d 588, 33 Cal.App.2d 691—Sheehan v. Vedder, 292 P. 175, 108 Cal.App. 419.

70. Cal.—Hedden v. Waldeck, 265 P. 244, 89 Cal.App. 494—Archer v. Miller, 239 P. 92, 73 Cal.App. 678—Crane v. Roach, 156 P. 375, 29 Cal.App. 584—Jolliffe v. Steele, 98 P. 544, 9 Cal.App. 213.
Oil and gas leases not specifically enforceable as defense to action to quiet title see Mines and Minerals § 207.

71. Mass.—Flaherty v. Goldinger, 144 N.E. 274, 249 Mass. 564.

ant's contract is, in the absence of the second vendee as a party, a complete defense to an action to quiet title.[72] So a vendor is not entitled to a decree quieting title, where it involves enforcing a forfeiture of the contract of sale under which he has received part payment, as against assignees of the contract who have paid a large advance in price and are able and willing to pay the balance, but have made default in payment of the installment on which forfeiture is claimed, in reliance on representations of plaintiff's agent that plaintiff would later accept payment and execute a deed.[73]

§ 43. —— Title or Interest of Defendant

The right of the plaintiff to recover in an action to quiet title may be defeated by defendant showing a paramount title in himself or any valid interest in the land.

Plaintiff's right to recover may be defeated by defendant showing a paramount title in himself,[74] but not if defendant acquired his title subsequent to the commencement of the action,[75] although it has been held that, where defendant, being unable to show sufficient title because he could not by competent evidence trace his title from the original patentee into one of his earlier grantors, procured a deed from the patentee's heir pending the action, defendant's title, if otherwise valid, will prevail.[76] Likewise, a plaintiff in a suit to quiet title cannot obtain a decree if the defendant has any valid interest in the land.[77] Accordingly, it is a good defense that defendant is a tenant of plaintiff under a valid lease, and that a decree quieting title would cut off the tenant's interest under the lease.[78] However, it has been held that defendant's ownership of stock in a corporation does not give him an interest in the corporation's real property, which he can set up in an action to quiet title.[79]

Title by adverse possession is a good defense where the elements necessary to constitute such adverse possession are established.[80]

Failure to pay taxes. Failure of plaintiff's ancestors to pay taxes on the land for several years is no defense, where there has been no sale to enforce a forfeiture for nonpayment.[81] Likewise, failure of plaintiff, claiming title by adverse possession, to pay taxes on every part of disputed property for some of many years of continuous possession relied on, does not warrant judgment for defendant, claiming under void tax deed.[82]

§ 44. —— Defendant in Possession

Unless the statutes dispense with the necessity of possession by the plaintiff, possession by defendant will defeat an action to quiet title brought by the holder of the legal title.

Unless the statutes dispense with the necessity of possession by plaintiff, possession by defendant will defeat an action to quiet title brought by the holder of the legal title,[83] since, as considered supra § *27*, where the defendant is in possession, the remedy at law by action in ejectment ordinarily affords a plain, adequate, and complete remedy. The fact that defendant obtained possession by force, or violence,[84]

72. Cal.—Birch v. Cooper, 69 P. 420, 136 Cal. 636.

73. U.S.—Liddle v. Cook, Colo., 209 F. 182, 126 C.C.A. 130.

74. Ala.—Throckmorton v. City of Tuscumbia, 23 So.2d 547, 247 Ala. 209.
Cal.—Becker v. Highboy Coaster Trust, 296 P. 651, 112 Cal.App. 219.
N.C.—Dillingham v. Gardner, 13 S.E.2d 478, 219 N.C. 227.
51 C.J. p 196 note 69.

75. Colo.—Floyd v. Sellers, 44 P. 373, 7 Colo.App. 498.

76. Ala.—Rucker v. Jackson, 60 So. 139, 180 Ala. 109, Ann.Cas.1915C 1053.

77. Ind.—Kozanjieff v. Petroff, 19 N.E.2d 563, 215 Ind. 286, 122 A.L.R. 479—Ault v. Miller, 181 N.E. 35, 203 Ind. 487—Bisel v. Tucker, 23 N.E. 81, 121 Ind. 249—Johnson v. Murray, Administrator, 13 N.E. 273, 112 Ind. 154, 2 Am.S.R. 174—Sawyer v. Kleine, 82 N.E.2d 533, 118 Ind.App. 616—Follette v. Andersen, 105 N.E. 793, 56 Ind.App. 524.
Utah.—Columbia Trust Co. v. Nielson, 287 P. 926, 76 Utah 129.

78. Ind.—Ault v. Miller, 181 N.E. 35, 203 Ind. 487.
Me.—Buswell v. Wentworth, 186 A. 803, 134 Me. 383.

79. Cal.—Phelan v. All Persons, etc., 259 P. 725, 202 Cal. 175.

80. Ark.—Marks v. Morgan, 263 S.W. 970, 165 Ark. 613.
Cal.—Woodward v. Faris, 41 P. 781, 109 Cal. 12.
Ind.—Rapp v. Harrold, 154 N.E. 679, 85 Ind.App. 494.
Ky.—Whitaker v. Shepherd, 134 S.W.2d 604, 280 Ky. 713.
N.M.—Manby v. Voorhees, 203 P. 543, 27 N.M. 511.
Okl.—Goslen v. Waddell Inv. Co., 292 P. 362, 145 Okl. 269—McGowan v. Carlton, 288 P. 338, 143 Okl. 106.
Tex.—Haltom v. McKinley, Civ.App., 64 S.W.2d 1060.
51 C.J. p 197 note 73.

Adverse claimant out of possession
An adverse claimant out of possession cannot prevail in an action for determination of a claim to real property merely by showing weakness of plaintiff's title, but he can do so only on strength of his own title as in an action of ejectment brought by him.—Best Renting Co. v. City of New York, 162 N.E. 497, 248 N.Y. 491—George v. People, 47 N.Y.S.2d 681, 267 App.Div. 575—Smith v. Dayton, 1 N.Y.S.2d 975, 253 App.Div. 899.

Adverse possession not shown
Ark.—Norman v. Sharp, 177 S.W.2d 401, 206 Ark. 744.
Cal.—Colver v. W. B. Scarborough Co., 233 P. 1096, 73 Cal.App. 421.
Miss.—Southern Naval Stores Co., Limited, v. Price, 30 So.2d 505, 202 Miss. 116.
51 C.J. p 197 note 73 [b].

81. U.S.—Johnston v. Kramer, D.C. N.C., 203 F. 733.

82. Cal.—Snodgrass v. Bell, 261 P. 497, 86 Cal.App. 664.

83. Or.—Williams v. Barbee, 106 P. 2d 1033, 165 Or. 260.
51 C.J. p 182 note 42.

In action to confirm title to land
Miss.—Broome v. Jackson, 7 So.2d 829, 193 Miss. 66, suggestion of error overruled 8 So.2d 245, 193 Miss. 66.

84. Ill.—Stephens v. Johnson, 99 N.

or committed unlawful acts in taking possession,[85] has been held not to change the rule. On the other hand, it has been held that possession taken from plaintiff by force will not give defendant such possession as will enable him to defeat plaintiff's action,[86] and this has been held true of a possession acquired by collusion with plaintiff's tenant.[87] Moreover, defendant's possession, in order to constitute a defense, must be of such open, visible character as to give notice thereof.[88]

In determining whether defendant's possession is sufficient to constitute a defense, the character and situation of the land must be considered.[89] Where defendant, holding the legal title under a claim of ownership, inclosed land, previously uninclosed by anyone, with his other land, without force or fraud, his possession is sufficient.[90] However, placing signs on vacant land advertising it for sale has been held insufficient.[91] Possession by defendant's tenant is sufficient.[92]

Where plaintiff shows no title in himself, defendant's possession, irrespective of his title, is a good defense.[93] Actual possession of only part of the land described in a deed to defendant gives him constructive possession of the whole, even though the grantor had neither title nor possession.[94]

§ 45. Waiver and Bar of Defenses

A defense to an action to quiet title may be waived or barred by laches or limitations.

A defense to an action to quiet title may be waived[95] or barred[96] by laches[97] or limitations.[98]

II. PROCEEDINGS AND RELIEF

A. MATTERS OF PROCEDURE IN GENERAL

§ 46. In General

Unless otherwise provided, the usual rules of procedure governing civil actions are applicable to actions brought under a statute providing for the determination of adverse claims.

Unless otherwise provided, the usual rules of procedure governing civil actions are applicable to actions brought under a statute providing for the determination of adverse claims.[99] A court of equity must, however, view the case in the broadest aspects of the equitable rights of the parties, rather than on narrow and technical legal grounds.[1]

What law governs. The lex loci controls the procedure.[2]

§ 47. Jurisdiction and Venue

a. Jurisdiction
b. Venue

a. Jurisdiction

An action to quiet title must be brought in the jurisdiction in which the land is situated, although where the court has jurisdiction in personam of the parties, it may decree the removal of a cloud on lands situated in another state.

An action to quiet title must be brought in the jurisdiction in which the land is situated,[3] although

E. 642, 255 Ill. 610—Gould v. Sternburg, 105 Ill. 488.

85. Ill.—Le Sourd v. Edwards, 86 N.E. 212, 236 Ill. 169, 127 Am.S.R. 287.
51 C.J. p 198 note 97.

86. U.S.—Slaughter v. Mallet Land, etc., Co., Tex., 141 F. 282, 72 C.C.A. 430, certiorari denied 26 S.Ct. 761, 201 U.S. 646, 50 L.Ed. 903.

87. Colo.—American Bond, etc., Co. v. Hopkins, 104 P. 1040, 46 Colo. 460.
51 C.J. p 198 note 99.

88. Ill.—Dempsey v. Burns, 118 N. E. 193, 281 Ill. 644.

89. Mich.—Fleming v. Conklin, 211 N.W. 638, 237 Mich. 243.
51 C.J. p 198 note 2.

90. Mich.—Sylvan Tp. School Dist. No. 2 v. Munbach, 142 N.W. 348, 176 Mich. 243.

91. Mich.—Ballona v. Potex, 207 N. W. 836, 234 Mich. 273—Donnely v. Lyons, 139 N.W. 246, 173 Mich. 515.

92. U.S.—Fryer v. Weakley, C.C.A. Mo., 261 F. 503.

93. S.D.—Waldner v. Blachnik, 274 N.W. 837, 65 S.D. 449.
51 C.J. p 198 note 6.

94. Cal.—Horton v. Moore, 177 P. 188, 38 Cal.App. 623.

95. Cal.—Clavey v. Loney, 251 P. 232, 80 Cal.App. 20.
Waiver of defense of:
Adequate legal remedy see supra § 10.
Want of possession by plaintiff see supra § 31.

96. Cal.—Fugl v. Edwards, 215 P.2d 802, 96 Cal.2d 460.

97. Cal.—Clavey v. Loney, 251 P. 232, 80 Cal.App. 20.
S.D.—Harker v. Cowie, 172 N.W. 722, 42 S.D. 159—Wampol v. Kounts, 85 N.W. 595, 14 S.D. 334, 86 Am. S.R. 765.
Laches in bringing suit see supra § 49.

98. Cal.—Clavey v. Loney, 251 P. 232, 80 Cal.App. 20.
Limitation against cause of action see supra § 48.

99. Mo.—Wm. H. Johnson Timber & Realty Co. v. Belt, 46 S.W.2d 153, 329 Mo. 515—Stewart v. Omaha Loan & Trust Co., 232 S.W. 508, 283 Mo. 364, 375.
51 C.J. p 203 note 73.
Same as in ejectment
N.Y.—American Surety Co. of New York v. Brink, 250 N.Y.S. 524, 140 Misc. 851.

1. Iowa.—Eckert v. Sloan, 239 N.W. 714, 209 Iowa 1040.

2. N.D.—Wilson v. Kryger, 149 N. W. 781, 29 N.D. 24, affirmed 37 S. Ct. 34, 242 U.S. 171, 61 L.Ed. 229.
51 C.J. p 203 note 75.

3. Ariz.—Snow v. Kennedy, 286 P. 230, 36 Ariz. 475.
51 C.J. p 203 note 77.

the adverse claimant is a nonresident [4] On the other hand, it has been held that, where the court has jurisdiction in personam of the parties, it may decree the removal of a cloud on lands situated in another state.[5]

Jurisdiction of particular courts. The question as to what particular court has jurisdiction of an action to quiet title must be determined by reference to the constitutions and statutes of the different states.[6] Jurisdiction of courts of equity as to suits to quiet title has been considered in connection with the nature of the remedy discussed supra § 1.

b. Venue

Under constitutional or statutory provisions relating specifically to actions to quiet title or generally to actions affecting real property, an action to quiet title is local in its nature, and the venue is determined by the location of the property, and not the residence of the party.

Under constitutional or statutory provisions relating specifically to actions to quiet title or generally to actions affecting real property, an action to quiet title is local in its nature, and the venue is determined by the location of the property,[7] and not by the residence of the party,[8] and must, therefore, be brought in the county in which the land[9] or a part thereof[10] is situated. If brought in a county other than that in which the land lies, the court has no jurisdiction whatever,[11] even to change the venue;[12] and the objection, being jurisdictional, cannot be waived.[13] The objection may be taken by demurrer for want of jurisdiction[14] or by plea in abatement.[15]

On the other hand, it has been held that a suit to cancel a claim on land as a cloud on the title, where the property is in possession of the complainant and the court is not asked to make any disposition thereof, should not be held to be a proceeding purely in rem in the sense that a court would be wholly without jurisdiction in a county other than where the land is situated.[16]

§ 48. Time to Sue and Limitations

An action to quiet title must not be brought prematurely. Limitations may be invoked as a defense to the action except where plaintiff is in actual possession of the land and claims to be the owner thereof.

An action to quiet title to land must not be brought prematurely.[17] Limitations may be invoked as a defense to the action,[18] except where plaintiff is in the actual possession of the land and claims to be the owner thereof.[19]

4. Tex.—Erwin v. Holliday, 112 S.W.2d 177, 131 Tex. 69.
51 C.J. p 203 note 78.

Act on title or property
The courts in quieting titles cannot act directly on person of nonresident owner or claimant, but only on title or property itself.
Tex.—Erwin v. Holliday, supra.
W.Va.—Tennant v. Fretts, 68 S.E. 387, 67 W.Va. 569, 140 Am.S.R. 979, 29 L.R.A.,N.S., 625.

5. U.S.—Remer v. Mackay, C.C.Ill., 35 F. 86.

6. Cal.—Martin v. Pacific Southwest Royalties, 106 P.2d 443, 41 Cal.App.2d 161.
Idaho.—Whitney v. Randall, 70 P.2d 384, 58 Idaho 49.
Mass.—Daley v. Daley, 14 N.E.2d 113, 300 Mass. 17—O'Connell v. Everett, 175 N.E. 44, 274 Mass. 602—Fuller v. Fuller, 125 N.E. 499, 234 Mass. 187—McArthur v. Hood Rubber Co., 109 N.E. 162, 221 Mass. 372.
Mich.—Mark v. Bradford, 23 N.W.2d 201, 315 Mich. 50.
Ohio.—Kinsinger v. Cummins, 182 N.E. 524, 42 Ohio App. 468.
51 C.J. p 204 note 80.
Courts exercising original jurisdiction generally see Courts §§ 238-310.

7. Ky.—Corpus Juris quoted in Flinn v. Blakeman, 71 S.W.2d 961, 974, 254 Ky. 416.
51 C.J. p 204 note 83.

8. Ky.—Corpus Juris quoted in Flinn v. Blakeman, 71 S.W.2d 961, 974, 254 Ky. 416.
51 C.J. p 204 note 84.

9. Ky.—Corpus Juris quoted in Flinn v. Blakeman, 71 S.W.2d 961, 974, 254 Ky. 416.
51 C.J. p 204 note 83.

10. Ky.—Corpus Juris quoted in Flinn v. Blakeman, 71 S.W.2d 961, 974, 254 Ky. 416.
51 C.J. p 204 note 86.

Where tract of land lies partly in one county and partly in another
(1) The action may be brought in either county.—Flinn v. Blakeman, 71 S.W.2d 961, 974, 254 Ky. 416—51 C.J. p 204 note 86 [a].

(2) The court of the county in which most of the land to which title was sought to be quieted was situated had jurisdiction of the subject matter, although the lands were situated in two counties.—Bowen v. Frank, 18 S.W.2d 1037, 179 Ark. 1004—51 C.J. p 204 note 86 [d].

11. Cal.—Maguire v. Cunningham, 222 P. 838, 64 Cal.App. 536.
51 C.J. p 204 note 87.

12. Cal.—Fritts v. Camp, 29 P. 867, 94 Cal. 393—Maguire v. Cunningham, 222 P. 838, 64 Cal.App. 536.

13. Cal.—Maguire v. Cunningham, supra.
51 C.J. p 89 note 204.

14. Cal.—Pacific Yacht Club v. Sausalito Bay Water Co., 33 P. 322, 98 Cal. 487.

15. Tex.—Russell v. Texas, etc., R. Co., 5 S.W. 636, 68 Tex. 646.

16. Miss.—Ravesies v. Martin, 199 So. 283, 190 Miss. 92.

17. D.C.—Donovan v. Mahoney, 45 App.D.C. 480.
Suit, before termination of lease, against tenant claiming right of possession see supra § 38.

Action held not premature
Kan.—Oklahoma City University v. Baughman, 83 P.2d 681, 148 Kan. 510, 119 A.L.R. 1255.
Mo.—White v. Kentling, 134 S.W.2d 39, 345 Mo. 526.
N.C.—Johnston v. Johnston, 12 S.E. 2d 248, 218 N.C. 706.

18. Mich.—Tiedemann v. Kroll, 107 N.W. 883, 144 Mich. 308.
51 C.J. p 199 note 14.
Accrual of right of action to quiet title or remove cloud on title generally see Limitations of Actions § 124.
Limitations applicable to equitable actions generally see Limitations of Actions §§ 36, 92.
Limitations applicable to relief on the ground of fraud or mistake see Limitations of Actions § 91.

19. Tenn.—Stearns Coal, etc., Lum-

§ 49. Laches

a In general
b What constitutes

a. In General

Laches ordinarily is available as a defense to an action to quiet title, except where the action is a statutory one in which no equitable relief is sought by either party, or where the plaintiff is in possession under claim of title, or where the action is brought by the owner of wild, unoccupied, and unimproved land.

In accordance with the general rules, discussed in Equity §§ 112–132, laches ordinarily is available as a defense to an action to quiet title,[20] except where the action is a statutory one in which no equitable relief is sought by either party.[21] However, where plaintiff is in possession under claim of title, he is entitled to wait until his possession is invaded or his title attacked before taking steps to vindicate his right, and mere lapse of time will not bar an action by him to quiet title.[22] Likewise, laches ordinarily will not bar an action to quiet title based on a forged deed or forged alteration thereof.[23] Where defendant is not in possession, plaintiff's delay in bringing an action to quiet title will not preclude recovery, even though defendant has paid taxes on the land;[24] but it has been held that constructive possession of defendant is sufficient to enable him to invoke the doctrine of laches.[25] It has also been held that laches is no defense where plaintiff is vested with legal title to the land[26] or claims title by adverse possession.[27]

Wild and unoccupied land. The doctrine of laches has been held inapplicable in an action by the owner of wild, unoccupied, and unimproved land.[28] Such lands, as discussed supra § 33, are in the constructive possession of the owner, who need not assert his rights until there have been some affirmative acts invading them.[29] Mere inaction on the part of the owner, and failure to pay taxes for a time short of the statutory period, do not constitute supervening equities calling for the application of the doctrine of laches.[30] Likewise payment of taxes by another,[31] without color of title,[32] however long continued, alone will not constitute such an invasion of the owner's rights as to call for action on his part. Where defendant's predecessor did not establish title by adverse possession, and for many years before suit there was no regular occupancy by defendant or his predecessor, the owner of the land was not bound to commence an action to quiet title against occasional occupants, and his delay did not bar a subsequent suit.[33]

ber Co. v. Patton, 184 S.W. 855, 134 Tenn. 556.
51 C.J. p 199 note 15.
Operation and effect of statute of limitations generally as to claimants of property in or out of possession see Limitations of Actions § 23.

20. U.S.—Arbor v. Blue, C.C.A.Okl., 45 F.2d 746—Barnes v. Boyd, D.C. W.Va., 8 F.Supp. 584, affirmed, C.C.A., 73 F.2d 910, certiorari denied 55 S.Ct. 550, 294 U.S. 723, 79 L.Ed. 1254, rehearing denied 55 S.Ct. 647, 295 U.S. 768, 79 L.Ed. 1708.
Ark.—Dickey v. Stevens, 184 S.W.2d 955, 208 Ark. 111—Marks v. Morgan, 263 S.W. 970, 165 Ark. 613.
51 C.J. p 200 note 27.
Estoppel as a defense see supra § 41.

21. Mo.—Cullen v. Johnson, 29 S.W.2d 39, 325 Mo. 252.
51 C.J. p 200 note 30.

22. Cal.—Williams v. Stillwell, 19 P.2d 773, 217 Cal. 487.
Ga.—Marietta Realty & Development Co. v. Reynolds, 5 S.E.2d 247, 189 Ga. 147—Simpson v. Ray, 178 S.E. 726, 180 Ga. 395.
Iowa.—Fulton v. McCullough, 7 N.W.2d 910, 233 Iowa 1320.
51 C.J. p 200 note 31.
Neither title nor possession
One who has neither a legal or equitable interest in property nor the possession of it cannot avail himself of the bar of laches against the owner.- Mosley v. Magnolia Petroleum Co., 114 P.2d 740, 45 N.M. 230.
Common grantor
The defense of laches was not available against a grantee in possession of land, who was seeking by a suit in equity to quiet title and procure reformation of a deed as against a subsequent grantee of a common grantor.- Klar v. Hooplngarner, 23 N.E.2d 326, 62 Ohio App. 102.

23. Ill.—Anderson v. Village Homebuilders, 31 N.E.2d 430, 401 Ill. 60.
Kan.—Corpus Juris cited in Cox v. Watkins, 87 P.2d 243, 247, 149 Kan. 209.
N.M.—Mosley v. Magnolia Petroleum Co., 114 P.2d 740, 45 N.M. 230.
51 C.J. p 200 note 32.

24. Cal.—Secret Valley Land Co. v. Perry, 203 P. 449, 187 Cal. 420.
51 C.J. p 200 note 33.

25. D.C.—Van Hook v. Frey, 13 App. D.C. 543.

26. W.Va.—Waldron v. Harvey, 46 S.E. 603, 54 W.Va. 603, 102 Am.S.R. 959.

27. Ill.—Sheaff v. Spindler, 171 N.E. 632, 339 Ill. 510.
51 C.J. p 200 note 36.
Permissive possession
Where possession relied on by plaintiff to constitute adverse possession was permissive, title holders were not precluded by laches. Norman v. Sharp, 177 S.W.2d 401, 206 Ark. 744.

28. Tenn. Stearns Coal, etc., Co. v. Patton, 184 S.W. 855, 134 Tenn. 556.
51 C.J. p 201 note 37.
Laches is not available except where plaintiff is out of possession and "out of possession" does not mean a mere failure of the owner to be in actual possession of wild or unoccupied lands. Stearns Coal, etc., Co. v. Patton, 184 S.W. 855, 134 Tenn. 556—Holton College v. Wellborn, 4 Tenn.App. 339.

29. Ark.—Miller v. Henry, 150 S.W. 700, 105 Ark. 261, Ann.Cas.1914D 754.
51 C.J. p 201 note 39.

30. Ark.—Bradley Lumber Co. v. Langford, 160 S.W. 866, 109 Ark. 594.

31. Fla.—Seaborn v. South Florida Naval Stores Co., 75 So. 425, 75 Fla. 145.
51 C.J. p 201 note 41.

32. Ark.—Fletcher v. Malone, 224 S.W. 629, 145 Ark. 211.
51 C.J. p 201 note 42.

33. Cal.—Maginnis v. Huributt, 193 P. 606, 49 Cal.App. 469.

b. What Constitutes

The question whether or not there has been laches depends on the circumstances of the particular case, and mere lapse of time will not bar the action unless the circumstances are such as to render its maintenance inequitable.

The question whether or not there has been laches depends on the circumstances of the particular case,[34] and mere lapse of time will not bar the action unless the circumstances are such as to render its maintenance inequitable.[35] Unexcused delay for an unreasonable period of time, accompanied by other circumstances, may constitute a bar.[36] Hence, in determining the question of laches, the court will consider, in connection with the duration of the delay, its effect to mislead defendant to his injury,[37] as where expenditures have been made by him and risks incurred in reliance on his own right,[38] even though the rents received exceed the expenditures;[39] any change in conditions rendering the enforcement of plaintiff's right inequitable,[40] as where rights

34. Miss.—Laster v. Ard, 42 So.2d 737.
51 C J. p 201 note 44.

Equity follows the analogy of the law, and a plaintiff's right to cancel a cloud on his title will not be denied when he applies within seven years after assertion of void title which is apparently good and when there are no special circumstances demanding an earlier application.—Hanleiter v. Spearman, 36 S.E 2d 780, 200 Ga. 289—Pierce v. Middle Georgia Land, etc., Co., 61 S E. 1114, 131 Ga. 99.

Facts held to show laches
Ark.—Dickey v. Stevens, 184 S.W.2d 955, 208 Ark. 111.
Cal.—Stewart v. Rice, 86 P 2d 136, 30 Cal.App.2d 335.
Ind.—Grantham Realty Corporation v. Bowers, 22 N.E.2d 832, 215 Ind. 672.
Mich.—Gustin v. Alpena Power Co., 11 N.W.2d 873, 307 Mich. 241.
Mont.—Akey v. Great Western Building & Loan Ass'n, 104 P.2d 10, 110 Mont. 528
Neb.—Clayton v. Evans, 290 N.W. 447, 137 Neb. 574.
Tenn.—Human v. Hartsell, 148 S.W. 2d 634, 24 Tenn.App. 678
Va.—Hagan Estates v. New York Min. & Mfg. Co., 37 S.E.2d 75, 184 Va. 1064.

Facts held not to show laches
(1) In general.
U.S.—Kentucky West Virginia Gas Co. v. Woods, C.C.A.Ky., 110 F.2d 94.
Ala.—Blewett v. Stallworth, 27 So. 2d 206, 248 Ala. 242.
Cal.—Sterling Realty Co. v. Relfe, 130 P.2d 410, 21 Cal.2d 164—Truesdail v. Lewis, 115 P.2d 218, 45 Cal. App.2d 718—Smallpage v. Turlock Irr. Dist., 79 P.2d 752, 26 Cal.App. 2d 538—Noble v. Blanchard, 8 P. 2d 523, 120 Cal.App. 664.
Colo.—Barnes v. Spangler, 56 P.2d 31, 98 Colo. 497.
Fla.—Brooks v. Pryor, 139 So. 675, 138 Fla. 498.
Ill.—Anderson v. Village Homebuilders, 81 N.E.2d 430, 401 Ill. 60—McDiarmid v. McDiarmid, 15 N.E. 2d 493, 368 Ill. 638.
Iowa.—York v. York, 29 N.W.2d 408, 236 Iowa 1174—Fulton v. McCullough, 7 N.W.2d 916, 232 Iowa 1230.
Kan.—Moffett v. Moffett, 292 P. 942, 131 Kan 546.
Miss.—Gulf Refining Co. v. Travis, 30 So.2d 398, 201 Miss. 336.
N.M.—Lotspeich v. Dean, 211 P.2d 979, 53 N.M. 488.
N.D.—Loy, for Use and Benefit of Union Securities Co. v. Kessler, 39 N.W.2d 260.
S.D.—McDowell v. Jameson, 184 N. W. 251, 44 S.D. 480.
Wash.—Lavigne v. Hughes, 91 P.2d 560, 199 Wash. 285.
51 C.J. p 201 note 44 [b].

(2) Husband held not barred by laches from maintaining action to quiet title to realty which was conveyed to his wife long before her death, where husband did not know that deed recited that realty was to be wife's separate property, and wife did not claim realty as her separate property until shortly before she died.—Durrell v. Bacon, 32 P.2d 644, 138 Cal.App. 396.

(3) Where mother verbally gave plaintiff land, and he complied with conditions and lived thereon without objection, action to quiet title, commenced forty years after gift, held not barred by laches under evidence.—Williams v. Stillwell, 19 P. 2d 773, 217 Cal. 487.

(4) Complainant was not barred by laches from claiming land purchased from father, as against daughter who purchased land from father with actual notice of complainant's deed, merely because he did not assert claim to land or have deed recorded until after daughter's purchase.—Branstetter v. Poynter, 222 S.W.2d 214, 32 Tenn.App. 189.

(5) That husband permitted divorced wife to use land for fifteen months after receiving deed from wife held not to constitute laches.—Gardner v. Herbert, 5 P.2d 782, 165 Wash. 429.

35. N.M.—Corpus Juris cited in Mosley v. Magnolia Petroleum Co., 114 P.2d 740, 754, 45 N.M. 230.
Wash.—Lavigne v. Hughes, 91 P.2d 560, 199 Wash. 285.
51 C.J. p 201 note 45.

Mere delay, not exceeding time limited by statute, will not preclude relief in action to quiet title, where defendant has not been prejudiced.—Geiss v. Trinity Lutheran Church Congregation, 230 N.W. 658, 119 Neb. 745.

36. Ohio.—Greenberg v. Shamansky, App., 93 N.E.2d 45.
51 C.J. p 201 note 46.

Delay held unreasonable
(1) In general.
U.S.—Barnes v. Boyd, D.C.W.Va., 8 F.Supp. 584, affirmed, C.C.A., 73 F. 2d 910, certiorari denied 55 S.Ct. 550, 294 U.S. 723, 79 L.Ed. 1254, rehearing denied 55 S.Ct. 647, 295 U.S. 768, 79 L.Ed. 1708.
Ark.—Marks v. Morgan, 263 S.W. 970, 165 Ark 613.
51 C.J. p 201 note 46 [b].

(2) In action to quiet title, where during the eighteen years preceding action, several defendants had acquired interest in property for a valuable consideration and had caused property to be improved and operated as a cemetery in reliance on sufficiency of their title, plaintiff was guilty of unreasonable delay and should be barred from asserting title to property.—Fickeisen v. Peebler, 219 P.2d 864, 98 Cal.App.2d 320.

Delay held not unreasonable
Mich.—McArthur v. Dumaw, 42 N. W.2d 924, 328 Mich. 453.
51 C.J. p 201 note 46 [c].

37. Cal.—Fickeisen v. Peebler, 219 P.2d 864, 98 Cal.App.2d 320.
N.D.—Nichols v. Schutte, 26 N.W.2d 515, 75 N.D. 207.
51 C.J. p 201 note 47.

Defendant held not misled or prejudiced
Miss.—Gulf Refining Co. v. Travis, 30 So.2d 398, 201 Miss. 336.
Okl.—Morton v. Van Orsdel, 322 P.2d 520.
51 C.J. p 201 note 47 [b].

38. U.S.—Pooler v. Hyne, Ind., 213 F. 154, 129 C.C.A. 506, certiorari denied 35 S.Ct. 603, 236 U.S. 620, 59 L.Ed. 1493.
51 C.J. p 201 note 48.

39. Cal.—Akley v. Bassett, 228 P. 1057, 68 Cal.App. 270.

40. Fla.—Norton v. Jones, 90 So. 854, 83 Fla. 31.
51 C.J. p 208 note 56.

of third persons have intervened,[41] or the property has become greatly enhanced in value,[42] or evidence relating to the matters in dispute has been lost or become unavailable by death or other cause.[43] It will also consider the sufficiency of the excuse offered to explain the delay,[44] such as personal disability to sue[45] or ignorance of the cause of action and lack of opportunity to act sooner.[46]

B. PROCESS, AND INCIDENTAL RELIEF PENDING PROCEEDINGS

§ 50. Process

a. In general
b. Unknown persons

a. In General

The process or notice and service thereof in actions to quiet title or remove clouds thereon are, in the main, governed by statutes relating specifically to such actions, or statutes regulating process in civil actions generally.

The process or notice and service thereof in actions to quiet title or remove clouds thereon are, in the main, governed by statutes relating specifically to such actions, or statutes regulating process in civil actions generally.[47] The action is not an action in personam in which personal service is necessary;[48] and the jurisdiction of defendant, so far as to enable the court to determine the extent of his title to the land, may be acquired by any reasonable method of imparting notice provided by statute.[49] Thus, service by copy of the bill and notice out of the state is sufficient to confer jurisdiction to render a judgment in rem quieting the title or removing the cloud.[50] Accordingly, it is generally held that service by publication, under the authority of state statutes, is sufficient to confer jurisdiction as against nonresidents or others who cannot be personally served,[51] and the validity of such statutes has been sustained, not only by the courts of the states wherein they were enacted,[52] but also by the federal courts.[53] Likewise, under statutes authorizing service of process by publication, such service has generally been held valid and sufficient in actions to remove cloud on title[54] or to quiet title[55] to personal property, subject to the jurisdiction of the court.

Statutory requirements in relation to the mode of publication of service are mandatory,[56] and must be strictly followed;[57] and service by publication, based on an affidavit which does not comply with the statute, is insufficient to confer jurisdiction.[58]

Serving defendant under fictitious name. Where the statute provides that defendant may be served with summons under a fictitious name when his true name is unknown, a defendant so served cannot have the service set aside on the ground that plaintiff could have ascertained defendant's real name had he exercised reasonable diligence in examining the public records.[59]

Deceased defendant. Where a suit to quiet title is commenced after the death of defendant, and the

41. Ark.—Sanders v. Flenniken, 21 S.W.2d 847, 180 Ark. 303.
Mich.—Hatch v. St. Joseph, 36 N. W. 36, 68 Mich. 220.
42. Ark.—Craig v. Hodges, 119 S.W. 645, 90 Ark. 430.
51 C.J. p 202 note 52.
43. Mich.—Gustin v. Alpena Power Co., 11 N.W.2d 873, 307 Mich. 241.
51 C.J. p 202 note 53.
44. Wis.—Likens v. Likens, 117 N. W. 799, 136 Wis. 331.
51 C.J. p 202 note 54.
45. Neb.—Brooks v. Brooks, 180 N. W. 41, 105 Neb. 235.
51 C.J. p 202 note 55.
46. N.D.—Goss v. Herman, 127 N. W. 78, 20 N.D. 295.
51 C.J. p 202 note 56.
47. Cal.—Alameda County Title Ins. Co. v. U. S. Fidelity & Guaranty Co., 8 P.2d 913, 121 Cal.App. 73.
La.—Uthoff v. Thompson, 146 So. 161, 176 La. 599.
51 C.J. p 204 note 98.
48. U.S.—Morris v. Graham, C.C. Fla., 51 F. 53.
49. U.S.—Arndt v. Griggs, Ill., 10 S.Ct. 557, 134 U.S. 316, 33 L.Ed. 918.
51 C.J. p 205 note 96.
50. Ill.—Cloyd v. Trotter, 9 N.E. 507, 118 Ill. 391.
N.H.—Bancroft v. Conant, 5 A. 836, 64 N.H. 151.
51. U.S.—Sain v. Montana Power Co., D.C.Mont., 20 F.Supp. 843.
Md.—Staley v. Safe Deposit & Trust Co. of Baltimore, 56 A.2d 114, 189 Md. 417.
N.M.—Sullivan v. Albuquerque Nat. Trust & Sav. Bank of Albuquerque, 188 P.2d 169, 51 N.M. 456.
Okl.—Franklin v. Marnay Oil Corporation, 153 P.2d 486, 194 Okl. 519.
Pa.—Adams v. Rosenfeld, 30 Del.Co. 396.
Utah.—Parker v. Ross, 217 P.2d 373.
50 C.J. p 503 notes 83, 84—51 C.J. p 205 note 99.
52. Iowa.—Taylor v. Ormsby, 23 N. W. 223, 66 Iowa 109.
50 C.J. p 503 notes 83, 84—51 C.J. p 205 note 99.
53. U.S.—Ormsby v. Ottman, Neb., 35 F. 492.
51 C.J. p 205 note 2.
54. U.S.—Jellenik v. Huron Copper Min. Co., Mich., 30 S.Ct. 559, 177 U.S. 1, 44 L.Ed. 647.
55. U.S.—Franz v. Buder, C.C.A.Mo., 11 F.2d 854.
50 C.J. p 503 note 86.
Shares of corporate stock
Ga.—Hamil v. Flowers, 65 S.E. 981, 133 Ga. 216.
51 C.J. p 205 note 99 [b].
56. Fla.—Hinely v. Wilson, 109 So. 468, 91 Fla. 815.
51 C.J. p 205 note 3.
57. Ark.—Howell v. McMillan, 330 S.W.2d 884.
51 C.J. p 205 note 4.
58. Kan.—Penner v. Gunn, 87 P. 1132, 74 Kan. 748.
Affidavit held sufficient
Utah.—Parker v. Ross, 217 P.2d 373.
Affidavit held insufficient
Mont.—Aronow v. Anderson, 104 P. 2d 2, 110 Mont. 484.
51 C.J. p 205 note 5 [a].
59. Cal.—Irving v. Carpentier, 11 P. 391, 70 Cal. 23—Blackburn v. Bucksport, etc., R. Co., 85 P. 668, 7 Cal.App. 649.

summons is served by publication against him, the court acquires no jurisdiction.[60]

b. Unknown Persons

Statutes permitting service of process in actions to quiet title by publication against unknown owners, claimants, or heirs must be strictly construed and followed.

In some jurisdictions the statutes permit service of process in actions to quiet title by publication against unknown owners, claimants, or heirs,[61] and whether such persons are residents or nonresidents is immaterial.[62] These statutes have been held invalid in some jurisdictions,[63] but in most jurisdictions their validity has been sustained.[64] However, the statutes must be strictly construed and followed,[65] and service by publication is not authorized where plaintiff has knowledge, or the means of acquiring knowledge, of the names of owners or claimants alleged to be unknown.[66] Where a statute which provides for quieting title by making the land a party defendant is complied with, and service had as required by the general law as to service by publication, it is not necessary to comply with the statute relating to service on unknown heirs.[67]

§ 51. Injunction, Receiver, and Use or Disposition of Property pending Proceedings

In a suit to quiet title, the court may, in its discretion, grant a temporary injunction to maintain the status quo, or appoint a receiver for the preservation of the property pending the action.

Where it is necessary to maintain the status quo pending an action to quiet title, a temporary injunction may be granted,[68] in the absence of an adequate remedy at law.[69] The granting of injunctive relief rests in the sound discretion of the court,[70] and in order to authorize such relief it is not necessary that a case shall be made out that will entitle plaintiff to relief at all events, but it is enough that the court finds, on the pleadings and evidence, a case which makes the transaction a proper subject for investigation in a court of equity.[71] However, where the filing of a bill to remove a cloud or to quiet title operates as a lis pendens, as discussed in Lis Pendens § 16, if no facts are stated tending to show that plaintiff will suffer any injury that might not be fully provided against by the filing of the notice of lis pendens, plaintiff is not entitled to a temporary injunction,[72] and, in such case, a com-

60. Cal.—Jones v. Walker, 118 P.2d 299, 47 Cal.App.2d 566.
61. Ill.—Rush v. Hubbart, 65 N.E. 2d 681, 393 Ill. 228.
Ind.—Grantham Realty Corporation v. Bowers, 22 N.E.2d 832, 215 Ind. App. 672.
Miss.—Dorsey v. Sullivan, 24 So.2d 852, 199 Miss. 602.
Utah.—Parker v. Ross, 217 P.2d 373.
50 C.J. p 503 notes 83, 84—51 C.J. p 205 note 8.
Statute held inapplicable
A statute authorizing service by publication on unknown owners or unknown heirs has no application to actions to quiet title.—Hall v. Melvin, 35 S.W. 1109, 62 Ark. 439, 54 Am.S.R. 301.
62. Mo.—Simms v. Thompson, 236 S.W. 876, 291 Mo. 493.
63. N.D.—Fenton v. Minnesota Title Ins., etc., Co., 109 N.W. 363, 15 N.D. 365, 125 Am.S.R. 599.
51 C.J. p 206 note 10.
64. Mo.—McFadin v. Simms, 273 S. W. 1050, 309 Mo. 312.
50 C.J. p 503 notes 83, 84—51 C.J. p 206 note 11.
65. Ind.—Grantham Realty Corporation v. Bowers, 22 N.E.2d 832, 215 Ind.App. 672.
La.—Uthoff v. Thompson, 146 So. 161, 176 La. 599.
Minn.—Trask v. Bodson, 169 N.W. 489, 141 Minn. 114.
Miss.—Dorsey v. Sullivan, 24 So.2d 852, 199 Miss. 602.
Utah.—Parker v. Ross, 217 P.2d 373. 51 C.J. p 206 note 12.
66. S.D.—Berry v. Howard, 146 N. W. 577, 33 S.D. 447.
51 C.J. p 206 note 13.
Persons in possession
(1) Person in actual possession of land cannot be regarded as an "unknown person" within meaning of statute providing for decree based on published service.
Cal.—Manuel v. Kiser, 210 P.2d 918, 94 Cal.App.2d 540.
N.M.—Christmas v. Cowden, 105 P. 2d 484, 44 N.M. 517.
S.D.—Killian v. Hubbard, 9 N.W.2d 700, 69 S.D. 289, 146 A.L.R. 708.
(2) Also, jurisdiction cannot be acquired by substituted service.—Kirby v. Michigan Cent. R. Co., 210 N.W. 254, 236 Mich. 286.
67. Neb.—Miller v. Ruzicka, 190 N. W. 216, 109 Neb. 152.
68. U.S.—Tyler v. Stanolind Oil & Gas Co., C.C.A.Tex., 77 F.2d 802, certiorari denied Allred v. Stanolind Oil & Gas Co., 56 S.Ct. 149, 296 U.S. 627, 80 L.Ed. 445, rehearing denied 56 S.Ct. 169, 296 U.S. 663, 80 L.Ed. 472.
Ala.—Pierce v. Lee Bros. Foundry Co., 44 So.2d 750, 253 Ala. 320.
Cal.—Leach v. Klein, 183 P. 702, 40 Cal.App. 432.
Mont.—Corpus Juris cited in Tiffany v. Uhde, 216 P.2d 375, 378.
Neb.—American Savings & Loan Ass'n v. Barry, 243 N.W. 628, 122 Neb. 523.
Tex.—Shirey v. Trust Co. of Texas, Civ.App., 69 S.W.2d 835, error refused.
51 C.J. p 214 note 47.
Injunction as part of final relief see infra § 98.
Injunction to protect property rights generally see Injunctions § 52.
Enjoining legal proceedings
Ill.—Holmes v. First Union Trust & Savings Bank, 198 N.E. 671, 362 Ill. 44.
51 C.J. p 214 note 47 [d].
69. N.Y.—Wolff v. Altman, 187 N. Y.S. 902, 196 App.Div. 549.
51 C.J. p 214 note 48.
70. U.S.—Tyler v. Stanolind Oil & Gas Co., C.C.A.Tex., 77 F.2d 802, certiorari denied Allred v. Stanolind Oil & Gas Co., 56 S.Ct. 149, 296 U.S. 627, 80 L.Ed. 445, rehearing denied 56 S.Ct. 169, 296 U.S. 663, 80 L.Ed. 472.
Cal.—Leach v. Klein, 183 P. 702, 40 Cal.App. 432.
Idaho.—Castelbury v. Harte, 98 P. 293, 15 Idaho 399.
Ind.—Risch v. Burch, 95 N.E. 123, 175 Ind. 621.
Mont.—Corpus Juris cited in Tiffany v. Uhde, 216 P.2d 375, 378.
71. Ala.—Pierce v. Lee Bros. Foundry Co., 44 So.2d 750, 253 Ala. 320.—Rice v. Davidson, 89 So. 600, 206 Ala. 226.
Ind.—Risch v. Burch, 95 N.E. 123, 175 Ind. 621.
72. S.D.—Grant County v. Colonial,

plainant is not entitled to an injunction restraining defendant from transferring the land pendente lite.[73] Where an answer is filed setting up paramount title in defendant, an injunction previously issued on the complaint, restraining defendants from selling the property, is properly dissolved, since the validity of defendant's title should be judicially determined before enjoining its assertion.[74] Likewise, where all the equities are fully and inevasively denied by duly verified answer, and neither side is supported by evidence outside the pleadings, a preliminary injunction ought not to stand.[75]

A receiver may be appointed pending the action on a proper showing that such appointment is necessary for the preservation of the property.[76] However, it has been held that, where plaintiff is not in possession, the court is without power to appoint a receiver on his application, and require an adverse claimant, subsequently made a party, to deliver to the receiver all the papers and documents relating to the title.[77] Likewise, a receiver will not be appointed at the instance of a defendant in actual possession of the property to protect it from being interfered with by plaintiff, who is living thereon with defendant's permission.[78]

Impounding rents. Where a bill to remove a cloud on title avers that complainants are owners in fee and are in possession and entitled to the rents, defendants are not injured by an order impounding the rents with the clerk of the court until final disposition of the cause.[79] Such order is not equivalent to the appointment of a receiver, so as to require complainant to give bond.[80]

C. PARTIES

§ 52. General Rules

There must be adverse parties to an action or proceeding prosecuted under a statute to quiet title.

There must be adverse parties to an action or proceeding prosecuted under a statute to quiet title.[81]

§ 53. —— Necessary Parties

a. In general
b. Persons who have parted with interest

a. In General

As a general rule all persons who are materially interested in a suit to quiet title, or in the subject matter, or without whom no effective judgment or decree can be rendered, should be made parties, either as plaintiffs or defendants.

As a general rule all persons who are materially interested in the event of a suit to quiet title, or in the subject matter, or without whom no effective judgment or decree can be rendered, should be made parties, either as plaintiffs or defendants,[82] and the rule is applicable whether the interests of such persons are legal or merely equitable.[83] Conversely, persons without any material, subsisting

etc., Mortg. Co., 53 N.W. 746, 3 S.D. 390.

73. U.S.—Zander v. Phillips, La., 213 F. 29, 129 C.C.A. 615.
51 C.J. p 214 note 53.
Injunction to restrain sale, transfer, or removal of property or funds generally see Injunctions § 56 c.

74. Cal.—Curtis v. Sutter, 15 Cal. 259.

75. S.D.—Grant County v. Colonial, etc., Mortg. Co., 53 N.W. 746, 3 S.D. 390.

76. Cal.—Snidow v. Hill, 191 P.2d 513, 84 Cal.App.2d 702.
51 C.J. p 214 note 56.
Discretion of court
Cal.—Leach v. Klein, 183 P. 702, 40 Cal.App. 432.

77. U.S.—American Title, etc., Co. v. New York, C.C.A.N.Y., 292 F. 860.

78. Cal.—Miller v. Oliver, 163 P. 355, 174 Cal. 407.

79. Ill.—Metz v. Brodfuehrer, 198 Ill.App. 587.

80. Ill.—Metz v. Brodfuehrer, supra.

81. Idaho.—Whitney v. Randall, 70 P.2d 384, 58 Idaho 49.

82. U.S.—Appalachian Electric Power Co. v. Smith, C.C.A.Va., 67 F.2d 451, certiorari denied 54 S.Ct. 458, 291 U.S. 674, 78 L.Ed. 1063.—Young v. Cushing, C.C.Ill., 30 F.Cas.No.18,156, 4 Biss. 456.
Miss.—Corpus Juris cited in Magnolia Textiles v. Gillis, 41 So.2d 6, 8, 206 Miss. 797.—Dorsey v. Sullivan, 24 So.2d 852, 199 Miss. 602.
Mo.—Brake v. Ross, 139 S.W.2d 491.—Wolfersberger v. Hoppenjon, 68 S.W.2d 814, 334 Mo. 817.
N.J.—Haythorn v. Margerem, 7 N.J. Eq. 324.
Okl.—Taylor v. Kirk, 202 P.2d 420, 201 Okl. 111.
Tenn.—Rice v. Hunt, 13 Heisk. 344.
Tex.—Shirey v. Trust Co. of Texas, Civ.App., 69 S.W.2d 835, error refused.—Abernathy v. Adoue, Civ. App., 49 S.W.2d 476.
51 C.J. p 206 note 20.
Parties in actions to quiet title to mining property generally see Mines and Minerals §§ 140, 204.
Infant children
In an action for the construction of a will and to remove a cloud on the title of lands, brought by the grantee of a deceased devisee, wherein defendants alleged that plaintiff claims under a fraudulent conveyance executed by the devisee, the infant children of such deceased devisee are proper parties defendant, since they must succeed to the title or interest of their father in the property conveyed, if the deed should be set aside.—Mellen v. Banning, 18 N.Y.S. 587, 61 Hun 627, 41 N.Y.St. 573.
Unborn children
In an action to quiet title where title was vested in one subject to be divested by the birth of children, it was held that, although the possibility of the party ever having children was remote, the title could not be perfected because there was no one who could be brought into court who represented the class of unborn children.—Barnett v. Daniel, 11 Tenn.App. 443.

83. Okl.—Simon v. Hine, 199 P. 384, 78 Okl. 224.
51 C.J. p 207 note 21.

interest in the controversy, or whose interests will not necessarily be affected by the judgment or decree, are not necessary parties[84] Only the adverse claimants against whose claims it is sought to quiet title need be made parties,[85] and a mortgagee of defendant is not a necessary party where defendant is asserting an unfounded claim to the title.[86] A statute authorizing plaintiff to include as defendants, in addition to such persons as appear of record, all other persons known by him to have some adverse claim, does not require plaintiff to examine the public records and name as defendants all persons having an interest in the land.[87]

Heirs, devisees, and personal representatives. In an action to quiet title against the heirs of a decedent, the administrator is not a necessary party.[88] However, the executors of a defendant who died pending a suit to quiet title are necessary parties, where the will purported to give them a power of sale.[89] Likewise, in a suit to quiet title to homestead land between the devisees of a deceased husband and the heirs of the widow, the widow's administrator is not a necessary party.[90] So, also, it has been held that a foreign executor is not a necessary party plaintiff in an action by devisees to quiet title to local land.[91] Where both parties claim under a will which devised the property to testator's wife "and her heirs," all the children of the devisee should be made parties defendant, and the whole controversy settled in one suit.[92] A grantor's heirs who received advancements which precluded them from participating in a division of the grantor's land are necessary parties to a suit by other heirs to cancel deeds conveying land to certain of the grantor's children.[93] So, too, a statute which provides that, in suits against a decedent's estate involving the title to real estate, the executor or administrator, if any, and the heirs, shall be made parties, makes the heirs necessary parties in a suit against an estate to quiet title.[94]

In a suit by a grantee to remove a cloud on his title cast by the conditions of his deed, the grantor's heirs are necessary parties defendant, in the absence of a personal representative of the deceased grantor.[95]

b. Persons Who Have Parted with Interest

Generally, one who has parted with all his interest in the land in controversy is not a necessary party defendant.

Generally, one who has parted with all his interest in the land in controversy is not a necessary party defendant.[96] On the other hand, it has been held that, while this is true as to grantors in deeds with-

84. Ala.—Duke v. Inglis, 194 So. 673, 239 Ala. 241.
Cal.—Mariposa Commercial & Mining Co. v. Peters, 8 P.2d 849, 215 Cal. 134—Battle v. Niece, 111 P.2d 455, 43 Cal.App.2d 655.
Colo.—Jones v. Sturgis, 199 P.2d 645, 118 Colo. 579.
Fla.—Brooks v. Pryor, 189 So. 675, 138 Fla. 498.
Ill.—Crawford Realty & Development Corporation v. Woodlawn Trust & Savings Bank, 47 N.E.2d 81, 382 Ill. 354.
Miss.—Magnolia Textiles v. Gillis, 41 So.2d 6, 206 Miss. 797.
N.J.—Pamrapau Corporation v. City of Bayonne, 8 A.2d 835, 126 N.J. Eq. 479, motion denied 8 A.2d 908, 126 N.J.Eq. 478, affirmed 12 A.2d 860, 127 N.J.Eq. 340, motions denied 17 A.2d 544, 129 N.J.Eq. 3, affirmed 19 A.2d 877, 129 N.J.Eq. 586, and 21 A.2d 863, 130 N.J.Eq. 240.
Okl.—American Bank & Trust Co. v. Continental Inv. Corp., 213 P.2d 861—Marathon Oil Co. v. Western Oil & Drilling Co., 89 P.2d 939, 185 Okl. 53.
Tex.—Howard v. Davis, 6 Tex. 174—Sgitcovich v. Sgitcovich, Civ.App., 229 S.W.2d 185, error refused, no reversible error.
Wis.—Knutson v. Munson, 248 N.W. 440, 211 Wis. 525.
51 C.J. p 207 note 22.

United States
In suit to remove clouds from title to land which parish had expropriated and by material act had transferred interest therein to the United States, the United States was not a "necessary party," although the suit involved construction of the notarial act for purpose of determining whether it granted a servitude to the United States or transferred full ownership, where defendants did not claim by or through the United States.—Parish of Jefferson v. Texas Co., 189 So. 580, 192 La. 934, certiorari denied Texas Co. v. Parish of Jefferson, 60 S.Ct. 138, 308 U.S. 601, 84 L.Ed. 503.

Remaindermen
In action by two of four remaindermen to cancel as cloud fraudulently procured deed executed by such four, other two remaindermen are not necessary parties.—Greenwood v. Starr, 163 S.E. 500, 174 Ga. 503.

85. Miss.—McLendon v. McGee, 198 So. 725, 189 Miss. 712,
N.Y.—Lally v. New York Cent. & H. R. R. Co., 107 N.Y.S. 868, 123 App.Div. 35.
51 C.J. p 207 note 23.

86. Cal.—Snodgrass v. Parks, 21 P. 429, 79 Cal. 55.
51 C.J. p 207 note 24.

87. Cal.—Blackburn v. Bucksport, etc., R. Co., 95 P. 668, 7 Cal.App. 649.

88. Cal.—Tryon v. Huntoon, 7 P. 741, 67 Cal. 325.
Right of executor or administrator to maintain action to quiet title see Executors and Administrators § 255.

89. N.Y.—Sweetland v. Buell, 35 N.Y.S. 346, 89 Hun 543, affirmed 58 N.E. 663, 164 N.Y. 541, 79 Am.S.R. 676.

90. Ala.—Cogburn v. Callier, 104 So. 330, 213 Ala. 46.
51 C.J. p 208 note 36.

91. S.D.—Koch v. Chicago Nat. Life Ins. Co., 241 N.W. 617, 59 S.D. 596

92. Miss.—Byrd v. Henderson, 104 So. 100, 139 Miss. 140.

93. Tex.—Stewart v. Miller, Civ. App., 271 S.W. 311.

94. Tex.—Russell v. Texas, etc., R. Co., 5 S.W. 686, 68 Tex. 646.

95. Mo.—Weinreich v. Weinreich, 18 Mo.App. 364.

96. U.S.—Chance v. Buxton, C.C.A. Ga., 164 F.2d 341—Ford v. Adkins, D.C.Ill., 39 F.Supp. 473.
Colo.—Jones v. Sturgis, 199 P.2d 645, 118 Colo. 579.
N.D.—Bumann v. Burleigh County, 18 N.W.2d 19, 73 N.D. 655.
Tex.—Corpus Juris quoted in Strib-

out warranty,[97] a grantor who has conveyed by deed containing covenants of general warranty is a necessary party to an action to set aside the deed as a cloud on title,[98] although there is authority to the contrary.[99] It has also been held that, where the cloud sought to be removed consists of an alleged fraudulent conveyance, the persons executing such conveyance, against whom fraud is charged, are necessary and indispensable parties.[1]

Common grantors or their heirs. The grantor under whom both parties to the action claim is not a necessary party defendant.[2] Likewise, the heirs of the common grantor are not necessary parties defendant.[3] Accordingly, in a suit by a vendee under a contract of sale, against a subsequent grantee who had notice of plaintiff's prior equitable claim to have defendant's title divested, such subsequent grantee is the only necessary defendant.[4]

§ 54. —— Proper Parties

a. In general
b. Persons who have parted with interest, and their heirs

a. In General

All persons interested in the controversy are proper parties to a suit to quiet title or remove a cloud thereon, although they may not be necessary or indispensable parties.

All persons interested in the controversy are proper parties to a suit to quiet title or remove a cloud thereon,[5] although they may not be necessary or indispensable parties.[6] If not joined, their interests will not be affected, although the judgment or decree will be good as to the parties before the court.[7] However, persons who have no material subsisting interest in the realty involved, or in the object sought by the suit, are not proper parties.[8] All encumbrancers whose claims arose before the commencement of the suit are proper parties,[9] but purchasers pendente lite cannot be made parties without plaintiff's consent.[10] In some jurisdictions under statutes relating to suits to quiet title, the test as to whether one shall be made a party does not turn on the question whether he "has" asserted any title or interest in the premises, but whether he "might" do so.[11]

Heirs and personal representatives in action against estate. In an action against the estate of a decedent, both the heirs at law[12] and the personal representative, where he is entitled to possession of the realty,[13] are proper parties defendant. However, as discussed in Executors and Administrators § 103, ordinarily the executor or administrator has no interest in the realty, and is not a proper party to the action.[14]

ling v. Polunsky, Civ.App., 195 S.W.2d 554, 555.

Wash.—Corpus Juris cited in Johnston v. Medina Improvement Club, 116 P.2d 272, 273, 10 Wash.2d 44. 51 C.J. p 207 note 27.

Rule applied to cross action by defendant

Cal.—Mings v. Compton City School Dist. of Los Angeles County, 18 P.2d 967, 129 Cal.App. 413.

Tex.—Stribling v. Polunsky, Civ. App., 195 S.W.2d 554.

97. Fla.—West Coast Lumber Co. v. Griffin, 45 So. 514, 54 Fla. 621.

98. Fla.—Fain v. Adams, 121 So. 562, 97 Fla. 517. 51 C.J. p 208 note 29.

99. Puerto Rico.—Teillard v. Green, 6 Puerto Rico Fed. 379.

Where contingent liability is negligible

In suit to cancel, as clouds on plaintiff's title, deed to same property executed by his grantor to third person and deed by such person to defendant, contingent liability of plaintiff's grantor as warrantor of title to third person did not make her an "indispensable party," where her liability was negligible, since consideration of deed was merely love and affection plus one dollar.—Chance v. Buxton, C.C.A.Ga., 163 F.2d 939, rehearing denied 164 F.2d 341.

Where not prejudicially affected

In suit to cancel, as clouds on plaintiff's title, deed to same property executed by plaintiff's grantor to third person and deed executed by such person to defendant, plaintiff's grantor was not an "indispensable party" to suit, since she would not be prejudicially affected by outcome of suit.—Chance v. Buxton, supra.

1. Wash.—Corpus Juris quoted in Johnston v. Medina Improvement Club, 116 P.2d 272, 276, 10 Wash.2d 44. 51 C.J. p 208 note 31.

2. Iowa.—Fremont Tp. Independent School Dist. No. 3 v. Gunn, 61 N.W. 417, 93 Iowa 44.

3. Iowa.—Thomas v. Kennedy, 24 Iowa 397, 95 Am.D. 740.

4. Mo.—McQuitty v. Stockdaub, 190 S.W. 590.

5. U.S.—City of Osceola, Iowa v. Utilities Holding Corporation, C.C.A.Iowa, 55 F.2d 155.

Miss.—State Mineral Lease Commission v. Lawrence, 157 So. 897, 171 Miss. 442.

Mo.—Young v. Pressgrove, 195 S.W.2d 516, 355 Mo. 204—Wolfersberger v. Hoppenjon, 68 S.W.2d 814, 334 Mo. 817. 51 C.J. p 208 note 43.

6. Or.—Guaranty, etc., Co. v. Ruff, 252 P. 536, 120 Or. 615. 51 C.J. p 209 note 44.

7. N.Y.—Phillips v. Home, etc., R. Co., 9 N.Y.S. 795, 34 Abb.N.Cas. 393, affirmed 28 N.E. 350, 128 N.Y. 578. 51 C.J. p 209 note 45.

8. Or.—Flanagan v. Marshfield Trading Co., 130 P. 1133, 65 Or. 311. 51 C.J. p 209 note 46.

State is not a proper party to action between private landowners to quiet title to lands formerly submerged by lake.—Knutson v. Munson, 248 N.W. 440, 211 Wis. 535.

9. R.I.—Sprague v. Stevens, 91 A. 43, 37 R.I. 1.

10. R.I.—Sprague v. Stevens, supra.

11. Mich.—Gillespie v. Lee, 180 N.W. 469, 212 Mich. 212.

12. Cal.—Louvall v. Gridley, 11 P. 777, 70 Cal. 507.

Tex.—Stewart v. Miller, Civ.App., 271 S.W. 311.

13. Cal.—Louvall v. Gridley, 11 P. 777, 70 Cal. 507.

14. Ala.—Bromberg v. Yukers, 19 So. 49, 103 Ala. 577.

Proper parties in actions relating to property of decedent generally see Executors and Administrators § 741.

b. Persons Who Have Parted with Interest, and Their Heirs

Persons who have parted with their interest in the property, and likewise their heirs, are proper parties defendant, especially where such a grantor has conveyed by deed containing covenants of warranty.

Persons who have parted with their interest in the property,[15] and likewise their heirs,[16] are proper parties defendant, especially where such a grantor has conveyed by deed containing covenants of warranty.[17] So, too, a vendor is a proper party in a suit by the vendee to remove a cloud on title where such vendor has an equitable lien for a part of the purchase money unpaid,[18] or has made a contract with defendant constituting the cloud sought to be removed.[19] On the other hand, it has been held that a former owner of the land who claims no interest therein is not a proper party.[20]

§ 55. Plaintiffs

a. In general
b. Joinder

a. In General

An action to quiet title should be prosecuted in the name of the real party in interest.

An action to quiet title not only may,[21] but must,[22] be prosecuted in the name of the real party in interest, and one who has conveyed the land prior to the commencement of the action cannot sue in his own name for the use and benefit of the grantee.[23] On the other hand, it has been held that one who has conveyed away all of the land, warranting title,[24] or has conveyed away a portion of the land, retaining a portion,[25] may maintain an action to quiet title in his own name, without making the grantees coparties. Likewise, it has been held that a grantee may maintain the action either in his own name, or in the name of his grantor for his own use and benefit.[26] The right of a trustee of an express trust under the statutes to maintain an action in his own name without joining the cestui que trust, constituting an exception to the rule that a civil action must be brought in the name of the real party in interest, as discussed in Parties § 11, applies to an action to quiet title.[27] Under a statute providing that on a transfer by plaintiff of his interest the action may be continued in the name of the original party, where the land involved in an action to quiet title is transferred by plaintiff pending the action, such action is properly allowed to be continued in the name of the transferee;[28] and under the chancery practice a suit to quiet title cannot proceed until the person to whom plaintiff's interest passed pending the suit is substituted as plaintiff.[29] Likewise if, pending the action, plaintiff assigns the cause of action, the action is properly allowed to be continued with the assignee as a coplaintiff.[30] Where a statute provides that on the death of a sole plaintiff, if the cause of action survives, the court must allow or compel the action to be continued against his representative or successor in interest, on the death of plaintiff pending an action to determine adverse claims his devisee can be compelled to proceed with the action in his place.[31]

15. Wash.—Johnston v Medina Improvement Club, 116 P.2d 272, 10 Wash 2d 144.
51 C.J. p 209 note 52.

16. Ind.—Caress v. Foster, 62 Ind. 145.

17. Ala.—McDowell v. Herren, 122 So. 336, 219 Ala. 370.
51 C.J. p 209 note 54.

18. R.I.—Blackstone Hall Co. v. Rhode Island Hospital Trust Co., 97 A. 484, 39 R.I. 69.

19. Or.—Guaranty, etc., Co. v. Ruff, 253 P. 536, 120 Or. 613.
Tex.—Stribling v. Polunsky, Civ. App., 195 S.W.2d 554.

20. Cal.—Darter v. Schuyler, 190 P. 827, 47 Cal.App. 457.
51 C.J. p 209 note 57.

Where petition did not seek specific performance but asked for relief against persons, other than plaintiff's vendors, who were interfering with plaintiff's possession, and prayed that, as against them, title to property be adjudged in plaintiff, petition was not defective for want of "proper parties" defendant because no person representing interests of vendors was named as defendant.—Duggar v. Quarterman, 12 S.E.2d 302, 191 Ga. 314.

21. La.—New Orleans Nat. Bank v. Raymond, 29 La.Ann. 355, 29 Am. R. 335.

22. Cal.—Mariposa Commercial & Mining Co. v. Peters, 8 P.2d 849, 215 Cal. 134.
Mont.—Ryan v. Bloom, 186 P.2d 879, 120 Mont. 443, certiorari denied 68 S.Ct. 903, 333 U.S. 874, 92 L.Ed. 1150.
51 C.J. p 209 note 66.

Proper parties plaintiff in actions to quiet title, as far as it is one of substantive right, depending on title and possession, see supra §§ 16–36.

Plaintiff held not real party in interest

County in action to quiet title could not represent people of state generally.—San Luis Obispo County v. Hart, 15 P.2d 873, 127 Cal.App. 365.

23. Ind.—Peck v. Sims, 22 N.E. 313, 120 Ind. 345.

24. Okl.—Gulley v. Christian, 176 P. 2d 812, 198 Okl. 167—McGrath v. Aubrey, 131 P.2d 73, 191 Okl. 570—Kingkade v. Plummer, 339 P. 628, 111 Okl. 197—Cressler v. Brown, 192 P. 417, 79 Okl. 170.

25. Okl.—McGrath v. Aubrey, 131 P. 2d 73, 191 Okl. 570.

26. N.D.—Hanitch v. Beiseker, 130 N.W. 833, 21 N.D. 290.

27. Utah.—Salina Canyon Coal Co. v. Klemm, 290 P. 161, 76 Utah 372.
51 C.J. p 210 note 70.

28. Cal.—Pereira Farms Corp. v. Simas, 230 P. 976, 69 Cal.App. 159.
51 C.J. p 210 note 71.

29. Fla.—Dees v. Cook, 51 So. 138, 58 Fla. 420.

30. Conn.—Hagearty v. Ryan, 195 A. 730, 123 Conn. 372.

31. N.Y.—Higgins v. New York, 18 N.Y.S. 553, affirmed 32 N.E. 772, 136 N.Y. 214, 29 Abb.N.C. 462.

One suing for many. Where the question involved is one of common or general interest to many persons, or where the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of all.[32]

Capacity to sue. An action to quiet title or remove a cloud thereon may be maintained by a private corporation[33] or a municipality.[34] A nonresident of the state may likewise sue,[35] subject to the power of the court to impose terms.[36]

b. Joinder

All persons whose interests are in harmony, and only those, should be joined as parties plaintiff.

All persons whose interests are in harmony, and only those, should be joined as parties plaintiff.[37] Holders in severalty of distinct parcels of land under a common source of title may join as complainants in a bill to quiet title as against an adverse claim equally affecting the lands of all.[38] However, the rule has been held inapplicable where some of the plaintiffs claim under separate and distinct contracts to which all of their coplaintiffs are strangers.[39] In an action by the record owner of realty, failure to join, as plaintiffs, persons having equitable interests, other than ownership, in the property, is not ground for nonsuit, where such persons participate in the action, through plaintiff, the real party in interest, to an extent that the decree will bind them equally with the parties to the action.[40]

Tenants in common and joint tenants. One of several tenants in common to realty may maintain an action to quiet title or remove a cloud thereon without joining his cotenants as coplaintiffs.[41] However, such cotenants may join.[42] Likewise, it has been held that joint tenants may join in an action to quiet their joint title.[43]

Husband and wife. Husband and wife may join as plaintiffs, it has been held, if the land is owned solely by the wife, and evidence of such ownership will not vitiate a finding for plaintiffs jointly;[44] but the rule is otherwise if the legal title to the land is in the husband solely.[45] A husband and wife, claiming to own different tracts of land separately, cannot join as plaintiffs in an action to quiet title of all the tracts.[46] However, it has been held that a wife who joined in signing notes, and a mortgage on her husband's land securing them, although she may have done so only to relinquish her marital rights, may properly be joined as plaintiff in an action by the husband to cancel such instruments as cloud on the title.[47]

Heirs and personal representatives. Where one dies intestate, leaving no debts, and there is no administration on his estate, all the heirs of such decedent may jointly maintain an action to cancel a deed of their ancestor, on the ground that it is illegal and void, and is a cloud on their title.[48] In some jurisdictions the statutes regulate the question of joinder in actions involving title to realty of a decedent.[49]

§ 56. Defendants

In order to obtain a complete adjudication, all persons having or claiming an interest in the land adversely to plaintiff may be joined as defendants.

32. Nev.—Nesbitt v. Delamar's Nevada Gold Min. Co., 52 P. 609, 53 P. 178, 24 Nev. 273, 77 Am.S.R. 807.
51 C.J. p 210 note 74.

33. Mass.—Jeffries Neck Pasture v. Ipswich, 26 N.E. 239, 153 Mass. 42.
51 C.J. p 210 note 75.

34. Cal.—Los Angeles v. Pacific Coast SS. Co., 187 P. 739, 45 Cal. App. 15.
44 C.J. p 1457 note 64—51 C.J. p 210 note 76.

35. Mo.—Root v. Mead, 58 Mo.App. 477.

36. Mo.—Root v. Mead, supra.
51 C.J. p 210 note 78.

37. Iowa.—Bauer v. Bauer, 266 N.W. 531, 221 Iowa 782.
51 C.J. p 210 note 80.

Warrantors and mortgagees could join in suit to remove cloud cast on their title by recording of abstract of judgment alleged to be void.—Shirey v. Trust Co. of Texas, Tex.Civ.App., 69 S.W.2d 835, error refused.

Parties held properly joined

Where appellants and brother each owned an undivided one-third interest in one tract of land and brother owned title to two additional tracts and they joined in complaint praying for decree confirming their title to an undivided one-third interest each in the one tract, and brother also sought decree confirming his title in the other two tracts, appellants were entitled to have their title quieted in them, and dismissal of petition because of misjoinder was error.—Ex parte Ripley, 193 S.W.2d 127, 209 Ark. 701.

38. U.S.—Commodores Point Terminal Co. v. Mudnall, D.C.Fla., 283 F. 150.
51 C.J. p 210 note 81.

39. Wash.—Utterback v. Meeker, 47 P. 428, 16 Wash. 185.

40. N.D.—McKenzie v. Gussner, 124 N.W. 22, 23 N.D. 445, 27 L.R.A.,N.S., 918.

41. U.S.—Franz v. Frank, C.C.A.Mo., 15 F.2d 797.
51 C.J. p 211 note 84.

42. Cal.—McCleary v. Brenaldus, 111 P. 125, 14 Cal.App. 60.
Conn.—Cornwell v. Lee, 14 Conn. 524.

43. Conn.—Cornwell v. Lee, supra.

44. Ind.—Indiana, etc., R. Co. v. Burlington, 98 Ind. 294.
Iowa.—Peterson v. Higgins, 190 N.W. 407, 194 Iowa 759.

45. Ala.—Crider v. American Freehold Land Mortg. Co., 12 So. 775, 99 Ala. 281, 42 Am.S.R. 58.
Ind.—Puritan Oil Co. v. Myers, 80 N.E. 851, 39 Ind.App. 695.

46. Mo.—Gardner v. Robertson, 106 S.W. 645, 208 Mo. 605.

47. Ala.—King Lumber Co. v. Sprague, 58 So. 920, 176 Ala. 564.

48. Ga.—Pierce v. Middle Georgia Land, etc., Co., 61 S.E. 1114, 131 Ga. 99.

49. U.S.—Thorpe v. Sampson, C.C. Cal., 34 F. 62.
51 C.J. p 211 note 92.

In order to obtain a complete adjudication, all persons having or claiming an interest in the land adversely to plaintiff may be joined as defendants,[50] even though there is no privity or connection between them.[51] Accordingly, there is no misjoinder where each defendant claims a separate parcel of the land[52] from a different source or by an independent title,[53] although in some cases stress has been laid on the fact that all the defendants claimed title from a common source.[54] On the other hand, the rule has been laid down that defendants who do not in every instance claim interests adverse to plaintiffs in the same tract of land cannot be joined in an action to quiet title to all of the tracts.[55]

Unknown persons. In some jurisdictions the statutes provide for an action to determine adverse claims to realty in which all unknown persons may be joined.[56]

Capacity to be sued. The right to maintain an action against a municipal corporation to quiet title has been recognized.[57]

Legal and equitable owners. The holder of the legal title, although without any beneficial interest, may be joined as codefendant in an action by the holder of the equitable title.[58]

A person whose interests are identical with those of plaintiff may be joined as a defendant if he refuses to join in the bill.[59]

Where a deed was taken in the name of a husband and wife, and the wife, claiming the entire interest in the land, sued her husband and a person who bought his interest at execution sale, to remove the cloud from her title, there was no misjoinder of parties.[60]

§ 57. Intervention

As a general rule, persons who are interested in the subject matter of a suit to quiet title, or in the success of one of the parties, may intervene therein.

As a general rule, persons who are interested in the subject matter of a suit to quiet title, or in the success of one of the parties, may intervene therein,[61] provided the issues are not changed or broad-

50. Ill.—Rush v. Hubbart, 65 N.E. 2d 681, 393 Ill. 228.
La.—Dugas v. Powell, 1 So.2d 677, 197 La. 409.
Mo.—Bragg v. Ross, 189 S.W.2d 491
Mont.—Sanborn v. Lewis and Clark County, 120 P.2d 567, 113 Mont. 1
N.C.—Corpus Juris cited in Sparks v. Sparks, 55 S.E.2d 477, 478, 230 N.C. 715.
51 C.J. p 211 note 1.
Necessary and proper parties see supra §§ 53, 54.

Bringing in new party

Where it clearly appeared from record that entire interest of defendant had been assigned to an individual and that individual was the real party in interest and should have been made a defendant, and issues could not properly be determined without individual's presence, trial court had authority to make individual a defendant.—Crofton v. Young, 119 P.2d 1003, 48 Cal.App.2d 452.

51. Colo.—Wells v. Brown, 128 P. 869, 28 Colo.App. 190.
51 C.J. p 212 note 2.

52. Okl.—Gulley v. Christian, 176 P.2d 812, 198 Okl. 167.
51 C.J. p 212 note 3.

53. Ky.—Kincaid v. McGowan, 4 S. W. 802, 88 Ky. 91, 9 Ky.L. 987, 13 L.R.A. 289.
51 C.J. p 212 note 4.

54. N.Y.—Fisher v. Hepburn, 48 N. Y. 41.
51 C.J. p 212 note 5.

55. Mo.—Essen v. Adams, 119 S.W. 2d 773, 118 A.L.R. 1393, 342 Mo. 1196
51 C.J. p 212 note 6.

56. Ill.—Rush v. Hubbart, 65 N.E. 2d 681, 393 Ill. 228.
La.—Uthoff v. Thompson, 146 So 161, 176 La. 599.
Miss.—Dorsey v. Sullivan, 24 So.2d 852, 199 Miss. 602.
N.M.—Christmas v. Cowden, 105 P. 2d 484, 44 N.M. 517.
51 C.J. p 211 note 96.

The term "all other persons unknown" etc., within quieting title statute and as used in describing unknown defendants in plaintiff's complaint, includes representatives, unknown heirs, and devisees of any person named as defendant who is not known by plaintiff to be dead.—Parker v. Ross, 217 P.2d 378.

Status of person who appears

In an action to quiet title in which an order is obtained for publication of summons as against unknown persons claiming any interest in the subject matter, one who appears in response to the published summons and claims an interest, regardless of his technical status, becomes a party and has a right to defend without obtaining leave, and it is error to strike his answer and require him to proceed by intervention.—Mulvey v. San Juan Metals Corporation, 75 P.2d 1044, 102 Colo. 1.

In Indiana

(1) The purpose of the statute was to provide a method by which the unknown husband or wife, widower or widow, heirs or devisees, of any and all such persons appearing of record as a former owner or encumbrancer might be made a party defendant and bound by a decree quieting plaintiff's title as to such husband or wife, widower or widow, heir or devisee, whose name was unknown to plaintiff.—Bastin v. Myers, 144 N.E. 425, 82 Ind.App. 325.

(2) In a later case, however, it was held that the purpose of the statute was to provide an additional and more comprehensive remedy for curing defective title against the world and not to provide a method by which unknown husband or wife, widow or widower, heir or devisee, of any and all such persons appearing of record as former owner or encumbrancer might be made party defendant and be bound by decree quieting plaintiff's title.—Grantham Realty Corporation v. Bowers, 22 N. E.2d 832, 215 Ind. 672.

57. Cal.—San Francisco v. Holladay, 17 P. 942, 76 Cal. 13.

58. N.J.—Maisch v. Hoffman, 7 A. 349, 42 N.J.Eq. 116.

59. Ill.—Roby v. South Park Comrs., 97 N.E. 225, 252 Ill. 575, error dismissed 35 S.Ct. 791, 238 U.S. 610, 59 L.Ed. 1488.

60. Mo.—Hudson v. Wright, 103 S. W. 8, 204 Mo. 412.

61. Okl.—Franklin v. Margay Oil Corporation, 153 P.2d 486, 194 Okl. 519—Mount v. Schulte, 143 P.2d 424, 193 Okl. 335.
51 C.J. p 212 note 11.

ened by the intervention.[62] Conversely, persons without such interest are not entitled to intervene.[63] The interest which will entitle a party to intervene must, it has been said, be of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation of the judgment or decree entered.[64] Accordingly, it has been held that the contingency of being held liable on covenants of warranty given to one of the parties is not such an interest,[65] although there is authority to the contrary.[66] Among others who have been permitted to intervene[67] are judgment lien claimants,[68] mortgagees,[69] purchasers before commencement of the suit,[70] and persons claiming to be cotenants of defendant.[71]

On the other hand, it has been held that neither a judgment creditor[72] nor his assignee[73] is entitled to come in and set up the judgment lien as an estate adverse to plaintiff's estate and interest. Likewise, a person may not intervene for the purpose of quieting his title, as against plaintiff, to another tract of land not in dispute between plaintiff and defendant.[74] Persons interested in the subject matter, who are not made parties to the action, but who, without objection, join with the parties in an agreement to arbitrate, are afterward properly regarded as parties to the action.[75]

Purchasers pendente lite. Purchasers who acquire an interest in the property pending the suit have no right to intervene,[76] unless the statute authorizes such intervention.[77] However, it has been held that, where a deed is made pendente lite, or under such circumstances that the grantee cannot defend his title to the property in his own name, he may do so in the name of his grantor, and may intervene for such purpose.[78] Permitting a purchaser pendente lite to become a party defendant is not error, although he is not a necessary party, where no prejudice results from his admission.[79]

Effect of default of named defendants. A person claiming title, adverse to plaintiff and the defendant named, will not be precluded from intervening by the fact that default has been taken against one or all of the named defendants.[80]

Leave to intervene. The right to intervene is not absolute,[81] and one desiring to intervene should apply for, and obtain, leave of court when the right to intervene is in the discretion of the court,[82] but the absence of such application and leave, where issues have been fully joined, does not go to the jurisdiction, but must be treated as an irregularity only.[83]

Time of intervention. The right to intervene should be claimed within a reasonable time,[84] and what constitutes a reasonable time is a matter within the discretion of the court.[85] Although it has

Limitation not applicable to one in possession of land

Statutory provision limiting right to intervene in proceedings in rem to establish title to land was held not applicable as respects right of intervention in proceedings by person in possession to establish title. —Dodd v. Deepwater Coal & Iron Corporation, 171 So. 732, 233 Ala. 392.

62. Ind.—Abeele v. Ruse, 44 N.E.2d 235, 113 Ind.App. 596.
La.—Bonnabel v. Police Jury, Parish of Jefferson, 44 So.2d 873, 216 La. 798.

Issues held not broadened

In action to quiet title to realty and to construe a will and trust, plea of intervention which raised no new issue of law or fact and merely brought into proceedings additional land held by trustees under same trust provisions of will did not so broaden the issues as to preclude the intervention.—Franklin v. Margay Oil Corporation, 153 P.2d 486, 194 Okl. 519.

63. N.C.—Moore v. Massengill, 41 S.E.2d 655, 227 N.C. 244, 170 A.L.R. 147.
51 C.J. p 212 note 12.

64. U.S.—Smith v. Gale, Dak., 12 S.Ct. 674, 144 U.S. 509, 36 L.Ed. 521.
51 C.J. p 213 note 13.

65. U.S.—Smith v. Gale, supra.
51 C.J. p 213 note 14.

66. La.—Bodcaw Lumber Co. v. Pardee Co., 3 La.App. 102.
51 C.J. p 213 note 14 [a].

67. Utah.—Salina Canyon Coal Co. v. Klemm, 290 P. 161, 76 Utah 372.
51 C.J. p 212 note 11.

Beneficiary corporation establishing fiduciary capacity of stockholder in respect of purchase of lands has right to intervene in action to quiet title to such lands.—Salina Canyon Coal Co. v. Klemm, supra.

68. Cal.—Robben v. Benson, 185 P. 200, 43 Cal.App. 204.

69. Iowa.—Switz v. Black, 45 Iowa 597.

70. Ind.—Knotts v. Tuxbury, 117 N. E. 282, 69 Ind.App. 248.

71. S.C.—Bradley v. Meigham, 86 S. E. 378, 102 S.C. 161.

72. N.M.—Security Inv., etc., Co. v. Capital City Bank, 184 P. 829, 22 N.M. 469.

73. N.M.—Security Inv., etc., Co. v. Capital City Bank, supra.

74. Wash.—McNamara v. Crystal Min. Co., 62 P. 81, 23 Wash. 26.

75. Tex.—Shultz v. Lempert, 55 Tex. 273.

76. R.I. Sprague v. Stevens, 21 A. 43, 37 R.I. 1.
W.Va. Taylor v. Taylor, 85 S.E. 652, 76 W.Va. 469.

77. Cal.—Brooks v. Hager, 8 Cal. 281.
Fla.—Nelson Bullock Co. v. South Down Development Co., 181 So. 365, 132 Fla. 495.

78. Ind.—Boegell v. Boegell, 4 N.E. 423, 105 Ind. 77.

79. Ariz. Jordan v. Duke, 53 P. 197, 6 Ariz. 55.

80. Cal. Montgomery v. Hack, 275 P. 1058, 206 Cal. 30.

81. Ind.—Abeele v. Ruse, 44 N.E.2d 235, 113 Ind.App. 596.

82. Wyo. Bamforth v. Ihnsen, 204 P. 345, 205 P. 1004, 28 Wyo. 283.

83. Wyo.—Bamforth v. Ihnsen, supra.
51 C.J. p 212 note 30.

84. Ind.—Abeele v. Ruse, 44 N.E. 2d 235, 113 Ind.App. 596.
51 C.J. p 212 note 31.

85. U.S.—Smith v. Gale, Dak., 12 S.Ct. 674, 144 U.S. 509, 36 L.Ed. 521.
51 C.J. p 213 note 33.

been held that the court, acting on principles of justice, may, in cases not provided for by the code, permit a person to intervene either before or after judgment, for the protection of some right with respect to the subject matter,[86] it has also been held that a person has no right to intervene after the entry of final judgment and the expiration of the term at which the judgment was entered.[87]

Conditions imposed. The court may in its discretion impose conditions on which intervention will be allowed.[88]

Rights of interveners. Interveners in a suit to quiet title may object that the court has no jurisdiction of the subject matter.[89] Interveners have the right to file pleadings of their own, or they may adopt part or all of the pleadings already filed.[90] While the complaint in intervention must state facts sufficient to constitute a cause of action,[91] immaterial matters need not be alleged.[92] Thus, it is unnecessary for intervener to plead the infirmity of the claims of the various defendants;[93] it is sufficient to allege that the defendants each claimed some interest in the property.[94] A warrantor intervening in an action to quiet title, for the purpose of defending the vendee's title, may plead any defense which defendant might have pleaded.[95]

D. PLEADING

§ 58. Bill, Complaint, or Petition

A bill or complaint, in an action to quiet title or remove a cloud, must contain sufficient allegations to show a cause of action in equity, or under the statute if the action is a statutory one.

A bill or complaint in an action to quiet title or remove a cloud must contain sufficient allegations to show a cause of action in equity, or under the statute if the action is a statutory one.[96] A bill or

86. Okl.—Franklin v. Margay Oil Corporation, 153 P.2d 486, 194 Okl. 519
51 C.J. p 213 note 33.

87. Ind.—Abeele v. Ruse, 44 N.E.2d 235, 112 Ind.App. 596.

88. Wis.—Allen v. Coe, 85 N.W. 492, 109 Wis. 635.
51 C.J. p 213 note 34.

89. Cal.—Maguire v. Cunningham, 222 P. 838, 64 Cal.App 536.

90. Wyo.—Bamforth v. Ihmsen, 204 P. 345, 205 P. 1004, 28 Wyo. 282

Cross bill
Person claiming through respondent in bill to quiet title in proceedings by person in possession is entitled to intervene by filing cross bill setting forth his claim or title and asking for affirmative relief.—Dodd v. Deepwater Coal & Iron Corporation, 171 So. 732, 233 Ala. 392.

91. Mont.—Thomson v. Nygaard, 41 P.2d 1, 98 Mont. 529.

Complaint held sufficient
(1) In general.—Thomson v. Nygaard, 41 P.2d 1, 98 Mont. 529.

(2) To support judgment quieting title in intervener.—Dittmar v. Alamo Nat. Co., 91 S.W.2d 781, affirmed 118 S.W.2d 298, 132 Tex. 44.

Complaint held insufficient
In an action under statute dealing with action to establish title when neither claimant is in possession, a petition of intervention setting up title and possession in an intervener, and asking for judgment against plaintiff and defendant, decreeing the intervener to be the owner in possession of property, disclosed no cause of action.—Bonnabel v. Police Jury, Parish of Jefferson, 44 So.2d 872, 216 La. 798—Fortner v. Good Pine Lumber Co., 83 So. 319, 146 La. 11.

Cure or aider
Defect, if any, in intervener's complaint as not sufficiently alleging that intervener's predecessor had interest in property, to which plaintiff and intervener sought to quiet title, was cured by defendants' answer, showing that their rights, if any, came through such predecessor.—Thomson v. Nygaard, 41 P.2d 1, 98 Mont. 529.

92. Mont.—Thomson v. Nygaard, supra.

93. Mont.—Thomson v. Nygaard, supra.

94. Mont.—Thomson v. Nygaard, supra.

95. La.—Pardee Co. v. Bodcaw Lumber Co., 3 La.App. 169.

96. Ala.—Sisson v. Swift, 9 So.2d 891, 243 Ala. 289—First Nat. Bank v. Boles, 105 So. 586, 231 Ala. 473—Watson v. Baker, 154 So. 788, 228 Ala. 652—Hicks v. Stone, 99 So. 115, 210 Ala 685.
Cal.—Compas v. Escondido Mut. Water Co., 194 P.2d 785, 86 Cal.App. 2d 407—Peck v. Martinez, 117 P. 2d 7, 46 Cal.App.2d 855—Bush v. Rogers, 109 P.2d 378, 42 Cal.App. 2d 477—Williams v. City & County of San Francisco, 76 P.2d 182, 24 Cal.App.2d 630.
Ga.—Northwest Atlanta Bank v. Manning, 17 S.E.2d 547, 193 Ga. 186.
Ind.—Bollenbacher v. Miller, 179 N. E. 556, 94 Ind.App. 409.
N.C.—Corpus Juris cited in Sparks v. Sparks, 55 S.E.2d 477, 478, 230 N.C. 715.
51 C.J. p 215 note 62.

Payment of mortgage
(1) Bill to quiet title which disclosed that complainant, by his assumption of mortgage which defendant held on land had become principal debtor under mortgage, was insufficient in absence of allegation of payment of mortgage debt.—Federal Land Bank of New Orleans v. Vinson, 18 So.2d 865, 246 Ala. 95.

(2) In action to quiet title to property covered by mortgage, burden of alleging payment is on person asserting rights by reason of payment.—Korfoot v. Kessner, 84 N.E.2d 190, 227 Ind. 58.

Trespass or damage
Complaint was not required to allege a trespass or damage to state a cause of action under statute authorizing any person in possession of realty, or having or claiming title to vacant or unoccupied realty, to bring an action to determine adverse claims and rights of parties.—Tolbert v. Greenwood Cotton Mill, 48 S.E.2d 599, 213 S.C. 43.

Complaint showing laches
Petition for equitable relief of removal of cloud from title states no cause of action, where petition shows complainant guilty of laches.—City of Corpus Christi ex rel. Harris v. Flato, Tex.Civ.App., 88 S.W.2d 433, error dismissed.

Restrictive covenants
In order to warrant the removal of restrictive covenants from land, the bill must allege such a changed state of circumstances as will frustrate or bring to naught the effect of the covenants, and that such change was not brought about by the fault of those who seek to have restric-

complaint in an action under a statute is sufficient if it follows the language of the statute,[97] or embodies the essential averments required thereby,[98] or substantially sets forth the real essentials necessary for a recovery,[99] although a complaint which pleads the bare language of the statute and does not plead facts has been held insufficient.[1] In stating a cause of action under the statute, the rules of pleading which govern ordinary civil actions are applicable,[2] such as the requirement of certainty,[3] consistency,[4]

tions removed—Dade County v. Thompson, 200 So 212, 146 Fla 66.

Relief

A statutory bill to quiet title may contain averments of fact on which to predicate relief beyond that provided for in the statute—Ex parte Baird, 200 So. 601, 240 Ala. 585.

Pleadings held sufficient

(1) Generally.

U.S.—Miller v. Long, D.C.S.C., 71 F. Supp. 603.

Ala.—City of Bessemer v. Ratliff, 199 So. 838, 240 Ala. 406—May v. Granger, 139 So. 569, 224 Ala. 208.

Ark.—Dodson v. Abercrombie, 234 S. W.2d 30.

Cal.—Independent Iron Works v. American President Lines, 221 P. 2d 939, 35 Cal.2d 858—Santens v. Los Angeles Finance Co., 204 P.2d 619, 91 Cal.App.2d 197—Compas v. Escondido Mut. Water Co., 194 P. 2d 785, 86 Cal.App.2d 407—Tarvin v. Davey, 133 P.2d 844, 56 Cal.App. 2d 846—Johnson v. Warden, 119 P.2d 787, 48 Cal.App.2d 329—Truesdail v. Lewis, 115 P.2d 218, 45 Cal.App.2d 713—North Hollywood Mortg. Co. v. Henshey, 14 P. 2d 842, 126 Cal.App. 411.

Fla.—Ellis v. Dixie Highway Special Road & Bridge Dist., 138 So. 374, 103 Fla. 795.

Ga.—Latham v. Fowler, 16 S.E.2d 591, 193 Ga. 686—Jones v. Reid, 193 S.E. 235, 184 Ga. 764—Simpson v. Ray, 178 S.E. 726, 180 Ga. 395—Ison v. Geiger, 177 S.E. 596, 179 Ga. 798.

Kan.—Cooper v. Cooper, 76 P.2d 867, 147 Kan. 256.

Ky.—Whitaker v. Million, 110 S.W. 2d 653, 270 Ky. 708.

La.—Dugas v. Powell, 1 So.2d 677, 197 La. 409.

Mo.—Hamilton v. Linn, 200 S.W.2d 69, 355 Mo. 1178—Boatmen's Nat. Bank of St. Louis v. Rogers, 179 S.W.2d 102, 352 Mo. 763—Baker v. Lamar, 140 S.W.2d 31—Bragg v. Ross, 139 S.W.2d 491.

Mont.—Tiffany v. Uhde, 216 P.2d 375—Ryan v. Bloom, 186 P.2d 879, 120 Mont. 443, certiorari denied 68 S. Ct. 908, 333 U.S. 874, 92 L.Ed. 1150—Teisinger v. Hardy, 5 P.2d 219, 91 Mont. 9.

Neb.—Wells v. Tietge, 9 N.W.2d 180, 143 Neb. 280—Morse v. Cochran, 268 N.W. 307, 131 Neb. 424.

N.J.—Schmid v. First Camden Nat. Bank & Trust Co., 22 A.2d 246, 130 N.J.Eq. 254.

N.Y.—Chodikee Lake Farm Camp v. Stutz, 62 N.Y.S.2d 195, 270 App. Div. 974—3021 Corporation v. Napoli, 49 N.Y.S.2d 399

N.C.—Cauble v. Trexler, 42 S.E.2d 77, 227 N.C. 307—Johnston v. Johnston, 12 S.E.2d 218, 218 N.C. 706—Efird v. City of Winston-Salem, 153 S.E. 632, 199 N.C. 33.

Okl.—Pigeon v. Hill, 147 P.2d 453, 194 Okl. 74—Wiley v. Lewis, 4 P. 2d 7, 152 Okl. 173—Schuman v. Reynolds, 1 P.2d 656, 151 Okl. 26.

S.C.—Tolbert v. Greenwood Cotton Mill, 48 S.E.2d 599, 213 S.C. 43—Forshur Timber Co. v. Santee River Cypress Lumber Co., 178 S. E. 329, certiorari denied Santee River Cypress Lumber Co. v. Forshur Timber Co., 55 S.Ct. 655, 295 U.S. 743, 79 L.Ed. 1689.

Tex.—Spencer v. Baumgart, Civ. App., 157 S.W.2d 664—Patterson v. Shell Petroleum Corporation, Civ. App., 143 S.W.2d 208, error dismissed, judgment correct—Johnson v. Perkins, Civ.App., 140 S.W. 2d 282, error dismissed, judgment correct—Neely v. Neely, Civ.App., 52 S.W.2d 927.

Wash.—O'Neal Land Co. v. Judge, 82 P.2d 535, 196 Wash. 224.

W.Va.—Nicholas Land Co. v. Crowder, 32 S.E.2d 563, 127 W.Va. 216. 51 C.J. p 215 note 62 [c].

(2) Under statute petition alleging that plaintiff is the owner and in possession of realty in controversy, describing it, and that defendant is claiming some right, title, or interest therein adverse to plaintiff, which claim is a cloud on plaintiff's title, states a cause of action.—Piland v. Craig, 154 P.2d 583, 194 Okl. 666—McGrath v. Majors, 66 P. 2d 915, 179 Okl. 500—Cochran v. Norris, 51 P.2d 736, 175 Okl. 126—McGrath v. Durham, 1 P.2d 718, 151 Okl. 55—Roxoline Petroleum Co. v. Craig, 300 P. 620, 150 Okl. 148—51 C.J. p 215 note 62 [c] (12).

(3) Allegations that one of defendants continued assertion of a title adjudicated invalid in a prior ejectment action by his predecessor were sufficient to give equity jurisdiction to quiet the superior title, although muniments of title held by defendant would not be canceled in absence of an adequate description thereof.—Amick v. Gauley Coal Land Co., 194 S.E. 368, 119 W.Va. 485.

(4) Complaint in action to quiet title against deed alleged to have been obtained by trick, artifice, or deceit, and without negligence of grantor, and which was never delivered, was held not demurrable on ground that complaint failed to show denial of consideration received and also failed to plead return of consideration, since complaint did not affirmatively disclose that consideration was paid to grantor and theory on which action was based negatived presumption of consideration—Hegeman v. Petty, 7 N.E.2d 518, 103 Ind.App. 291.

(5) A suit to establish an interest in real estate wherein plaintiff pleaded all the facts of the various transactions leading to his claim of an interest in the real estate, that the extent thereof was in controversy, that possibly some sum was due to defendant, and that the court should determine it, was within the jurisdiction of equity within the principle that an equity court has power to apply settled rules to unusual conditions and to do equity.—Stephens v. Farwell, 126 P.2d 489, 155 Kan. 491.

Pleadings held insufficient

Ala.—Barksdale v. Jordan, 43 So.2d 406, 253 Ala. 199.

Cal.—Lloyd v. Los Angeles County, 107 P.2d 622, 41 Cal.App.2d 808—Bradley Co. v. Ridgeway, 58 P.2d 194, 14 Cal.App.2d 326.

Fla.—Butler v. De Soto Nat. Bank of Arcadia, 135 So. 897, 102 Fla. 464.

Mont.—Frisbee v. Coburn, 52 P.2d 882, 101 Mont. 58.

51 C.J. p 215 note 62 [f].

97. N.M.—Knabel v. Escudero, 255 P. 623, 32 N.M. 311.

98. Okl.—McGrath v. Majors, 66 P. 2d 915, 179 Okl. 500 Roxoline Petroleum Co. v. Craig, 300 P. 620, 150 Okl. 148.

51 C.J. p 216 note 64.

99. N.Y.—Niagara Falls Power Co. v. White, 55 N.E.2d 742, 292 N.Y. 472.

1. N.Y.—Queensboro Improvement Co. v. Dean, 23 N.Y.S.2d 865, 175 Misc. 655, affirmed 20 N.Y.S.2d 993, 259 App.Div. 911.

2. Conn.—Spencer v. Merwin, 68 A. 270, 80 Conn. 330.

51 C.J. p 216 note 67.

Avoidance of multifariousness

Plaintiffs in action to determine title were required to obey rules of good pleading and avoid multifariousness regardless of whether their cause was in equity or at law.—Ilsen v. Adams, 119 S.W.2d 772, 342 Mo. 1196, 118 A.L.R. 1393.

3. Cal.—Keele v. Clouser, 268 P. 883, 92 Cal.App. 526.

51 C.J. p 216 note 68.

4. U.S.—Collins v. Dye, C.C.A.Ariz.,

or directness and positiveness.[5] However, this does not mean that the ordinary rules of pleading shall be so closely observed as to defeat the main purpose of the action, but only that general civil procedure, adjusted to the peculiar action, be followed.[6] While it has been held that a cause of action to quiet title pleaded in the general form is sufficient, although fraud is one of its constituent elements,[7] where fraud or estoppel is relied on, the facts constituting the fraud[8] or estoppel[9] must ordinarily be stated.

Since, as discussed supra § 6, the jurisdiction of equity to quiet title or remove a cloud ordinarily is not ousted by the existence of a statutory remedy, a bill brought in equity, and not under the statute, is not insufficient for failure to allege the facts necessary to be stated in the statutory action,[10] and the equity of such a bill must be found on settled principles of equity jurisprudence for removing a cloud on title.[11] Thus, in accordance with the principle that equity will not interfere to remove a cloud on title where the invalidity of the instrument or claim complained of appears on its face, as discussed supra § 13, right of complainant to have cloud on title removed without statutory allegations depends on whether the instrument or claim of defendant on its face shows an apparent superior right, and complainant, in order to show its invalidity, would be compelled to offer extrinsic evidence,[12] and, if invalidity of the instrument or claim of defendant appears on its face, complainant must set forth statutory allegations.[13] A statute authorizing confirmation of tax titles, provided petitioner shall have paid taxes on the land for a specified period after expiration of the right of redemption, does not apply to an adversary suit in chancery to litigate conflicting titles, so as to require plaintiff to allege the payment of such taxes.[14]

Surplusage and immaterial allegations. A bill or complaint to quiet title is not rendered insufficient because of surplusage,[15] or the averment of immaterial[16] or cumulative[17] facts, if enough is stated to entitle plaintiff to relief.

Construction. Whether a bill or complaint is one to quiet title is determined by the allegations thereof and the nature of the relief sought,[18] and not necessarily by the designation given to the pleading by the pleader.[19] Furthermore, although a bill is brought primarily to obtain relief from a forfeiture, it may, if no forfeiture has occurred, be treated as a bill to quiet title, provided it contains the requisite averments and a prayer for general relief.[20]

Establishment of title at law and pendency of other suits. Where previous establishment of title at law in plaintiff is essential, as discussed supra § 11, the bill or complaint should allege that plaintiff's title has been established by trial at law.[21] A bill averring that complainant's title has been fully adjudicated in his favor by a court of competent jurisdiction in suits brought against persons in like situation with defendant is, in that respect, sufficient.[22]

Where the statute authorizes a suit to try title only in cases where there is no action pending to test the validity of the title, the bill must aver that no such action is pending.[23]

Waiver and cure of defects. The omission or insufficient allegation of a material fact in the complaint is cured by its admission or averment in the

94 F.2d 799, certiorari denied Collins by Hughes v. Dye, 59 S.Ct. 62, 305 U.S. 601, 83 L.Ed. 381.

5. Cal.—Peck v. Martinez, 117 P.2d 7, 46 Cal.App.2d 355.

6. Mo.—Huff v. Laclede Land, etc., Co., 57 S.W. 715, 157 Mo. 65.

7. Cal.—McKoin v. Rosefelt, 153 P. 2d 55, 66 Cal.App.2d 757.

Complaint held sufficient
Cal.—McKoin v. Rosefelt, supra.

8. Cal.—Campbell v. Genshlea, 180 P. 336, 180 Cal. 313—Lewis v. Marshall, 265 P. 382, 90 Cal.App. 351.

9. Cal.—Sly v. Abbott, 264 P. 507, 89 Cal.App. 209.

10. Ala.—Bank For Savings & Trusts v. Jefferson Development Co., 174 So. 757, 234 Ala. 199.
51 C.J. p 216 note 73.

11. Ala.—Means v. Hollis, 86 So.2d 486, 261 Ala. 122.

12. Ala.—Barksdale v. Jordan, 43 So.2d 406, 253 Ala. 199—Teal v. Mixon, 169 So. 477, 233 Ala. 23—King v. Artman, 144 So. 442, 225 Ala. 569.

13. Ala.—King v. Artman, supra.

14. Ark.—Knauff v. National Cooperage, etc., Co., 113 S.W. 28, 87 Ark. 494.
51 C.J. p 217 note 74.

15. Mich.—Guntzviller v. Gitre, 162 N.W. 290, 195 Mich. 695.
N.Y.—Doscher v. Wyckoff, 116 N.Y.S. 389, 132 App.Div. 139.

16. N.Y.—Parmely v. Showdy, 148 N.Y.S. 1086, 86 Misc. 634—Hamilton v. Hamilton, 139 N.Y.S. 1095, 78 Misc. 557.

17. Ala.—Worthington v. Miller, 82 So. 748, 134 Ala. 420.

18. Mont.—Fratt v. Daniels-Jones Co., 133 P. 760, 47 Mont. 487.
51 C.J. p 217 note 78.

19. U.S.—Power, etc., Co. v. Capay Ditch Co., Cal., 226 F. 634, 141 C.C.A. 390.
51 C.J. p 217 note 79.

20. W.Va.—Castle Brook Carbon Black Co. v. Ferrell, 85 S.E. 544, 76 W.Va. 300.

21. U.S.—Subirana v. Kramer, C.C.A.Puerto Rico, 17 F.2d 725.
51 C.J. p 223 note 43.

22. U.S.—Preteca v. Maxwell Land Grant Co., Colo., 50 F. 674, 1 C.C.A. 607.

23. Ala.—Thompson v. Page, 43 So. 2d 533, 253 Ala. 171—Grayson v. Roberts, 156 So. 552, 229 Ala. 245—Watson v. Baker, 154 So. 735, 228 Ala. 652—Sibley v. Kennedy, 140 So. 552, 224 Ala. 354.
N.J.—Estate of Gilbert Smith v. Cohen, 196 A. 361, 123 N.J.Eq. 419.
51 C.J. p 223 note 46.
Abatement of action to quiet title or to remove cloud by pendency of action at law see Abatement and Revival § 49.

answer,[24] although plaintiff may not rely on a pleading of his adversary where he has specifically denied in his reply the allegations which he later relies on for assistance;[25] and the fact that there is a demurrer to the complaint reserved in the answer does not take the case out of the rule of express waiver.[26] In like manner an omission or insufficient allegation in the complaint may be cured by a reply.[27]

It is too late to object for the first time at the trial or hearing that the bill or complaint omits a material fact, where the objection should have been raised by demurrer or answer.[28] So, objections to the bill or complaint because of multifariousness,[29] or misjoinder of causes of action,[30] are waived by failure to raise such objection by demurrer or answer, and the same rule applies to technical objections to the bill.[31] So, where the answer includes affirmative defenses inconsistent with the defense of misjoinder of defendants and causes of action, the defense of misjoinder is waived.[32] However, where a bill alleges possession in plaintiff, and the answer denies this and alleges that defendant is in possession, defendant does not waive his right to question the jurisdiction of the court because he fails to set up in his answer specifically that plaintiff is not entitled to relief because he has an adequate remedy at law.[33]

The necessity of alleging possession in plaintiff may be waived by failure, either by demurrer or answer, to raise an objection, on that ground, to the jurisdiction of the court.[34] So, where defendant sets up an affirmative defense in the nature of a counterclaim, he waives want of possession in plaintiff, as discussed supra § 31, and, therefore, failure of the bill or complaint to allege such possession.[35]

Failure to allege a material fact is not error after judgment, where the proof establishes the existence of such fact,[36] although there is authority to the effect that defects in the complaint may be remedied by proof but only to the extent of making definite and certain that which has been averred in the complaint,[37] but that it is never of any avail to prove what has not been charged.[38]

§ 59. —— Allegations as to Title or Interest of Plaintiff

Generally, the bill or complaint, by appropriate allegations, must show title in the plaintiff to the property in controversy at the time when the action was commenced.

Except where the action is brought under a statute which expressly or by construction dispenses with the necessity of alleging title,[39] or except where the statute makes mere possession sufficient to support the action,[40] the bill or complaint, by appropriate allegations, must show title,[41] either legal title or complete equitable title,[42] in plaintiff

24. Ky.—Potter v. Quillen, 218 S.W.2d 60, 309 Ky. 500.
Utah.—Worley v. Peterson, 12 P.2d 579, 80 Utah 27.
Wyo.—Bruch v. Benedict, 165 P.2d 561, 62 Wyo. 213.
51 C.J. p 230 note 40.

25. Utah.—Worley v. Peterson, 12 P.2d 579, 80 Utah 27.

26. Ark.—Davis v. Hare, 32 Ark. 386.
Cal.—Cohen v. Knox, 27 P. 215, 90 Cal. 266, 13 L.R.A. 711.

27. Okl.—McGrath v. Eichhoff, 100 P.2d 880, 187 Okl. 64.
Wyo.—Bruch v. Benedict, 165 P.2d 561, 62 Wyo. 213.

28. Mich.—Cleland v. Casgrain, 52 N.W. 460, 92 Mich. 139.
51 C.J. p 230 note 42.

29. Neb.—Snowden v. Tyler, 31 N.W. 661, 21 Neb. 199.

30. Mo.—Downing v. Anders, App., 202 S.W. 297.

31. Cal.—Santa Ana Mortg. & Inv. Co. v. Kinslow, 85 P.2d 899, 30 Cal.App.2d 107.
Ill.—Schoolman v. Hofstadter, 226 Ill.App. 417.

32. Mo.—Lampel Land, etc., Co. v. Spelling, 139 S.W. 345, 236 Mo. 33.

33. Ill.—Delaney v. O'Donnell, 84 N.E. 668, 234 Ill. 109.

34. Wash.—McKinley v. Morgan, 70 P. 45, 26 Wash. 561.
51 C.J. p 230 note 49.

35. Colo.—Haymaker v. Windsor Reservoir, etc., Co., 254 P. 708, 81 Colo. 168.
Kan.—Hewett v. Gott, 294 P. 897, 133 Kan. 168.
Ky.—Hopper v. McBurney, 168 S.W. 2d 374, 293 Ky. 31.
Minn.—Whitney v. Clow, 271 N.W. 589, 199 Minn. 312.

36. Ky.—Potter v. Quillen, 218 S.W. 2d 60, 309 Ky. 500.
Neb.—Tourtellotte v. Pearce, 42 N.W. 915, 27 Neb. 57.

37. Miss.—Woodward v. Moss, 30 So.2d 420, 202 Miss. 33.

38. Miss.—Woodward v. Moss, supra.

39. Ala.—Ellis v. Womack, 28 So. 2d 859, 247 Ala. 354.
51 C.J. p 218 note 89 [e].
Surplusage
Under such a statute allegations as to title will be treated as surplusage.—Campbell v. Rice, 12 So.2d 385, 244 Ala. 144—Denbo v. Sherrill, 2 So.2d 773, 241 Ala. 385—51 C.J. p 219 note 1 a [1].

40. Ohio.—Lamby v. Jones, 1 Ohio S. & C.P. 292, 31 Cinc.L.Bul. 70.
Wash.—Bird v. Winyer, 64 P. 178, 24 Wash. 269.

41. Fla.—Atlantic Beach Improvement Corporation v. Hall, 197 So. 464, 143 Fla. 778.
Ga.—Spence v. Brown, 32 S.E.2d 297, 198 Ga. 566.
Ky.—Davis v. Daniel, 175 S.W.2d 501, 295 Ky. 717—Crawley v. Mackey, 143 S.W.2d 171, 283 Ky. 717—McElhoney v. Newman, 127 S.W.2d 860, 277 Ky. 835—Hale v. Horn, 97 S.W.2d 402, 265 Ky. 560—Hatton v. Williams Ex'r, 82 S.W.2d 774, 259 Ky. 548—Combs v. Jones, 51 S.W.2d 672, 244 Ky. 513—Brown v. Martin, 39 S.W.2d 248, 239 Ky. 146—Southern Oil Co. v. Holman, 244 S.W. 762, 196 Ky. 250.
Miss.—Gilchrist-Fordney Co. v. Keyes, 74 So. 619, 113 Miss. 86.
Okl.—Piland v. Crain, 154 P.2d 583, 194 Okl. 666.
51 C.J. p 217 note 81.

42. Miss.—Jones v. Rodgers, 38 So. 743, 85 Miss. 802—Williamson v. Louisville, etc., R. Co., 6 So. 295.
Okl.—State ex rel. Richardson v. Citizens State Bank of Webbers Falls, 97 P.2d 91, 186 Okl. 270—Going v. Green, 239 P. 521, 103 Okl.

to the property in controversy, and the nature of the title, whether legal or equitable, must appear.[43] Aside from statute, it has been held that plaintiff must either allege title, or aver that he is in possession.[44]

Averments as to title must be made in accordance with the general rules as to certainty, positiveness, and the like,[45] and title must be stated with sufficient certainty to enable the court to see that plaintiff has such a right as warrants its interference.[46] Hence, the complaint must allege clearly and directly, and with certainty to a common intent, title in plaintiff,[47] but, where plaintiff claims under a deed correcting a former deed which contained an erroneous description of the property, allegations in respect of the first deed are unnecessary.[48]

Plaintiff need not deraign his title in the complaint,[49] or set out the chain of title relied on,[50] but an averment of title in general terms,[51] or an averment of the ultimate fact of title to the land,[52] such as an averment that plaintiff is the owner,[53] or the owner in fee simple,[54] or the owner of a complete equitable title,[55] is sufficient, without setting out specifically the character or source of title, unless the statute so requires,[56] as where a deraignment of title must be set forth.[57] However, cases

93—Clewell v. Cottle, 225 P. 946, 99 Okl. 84—Lindeberg v. Mossman, 207 P. 1067, 86 Okl. 288—Clark v. Duncanson, 192 P. 806, 79 Okl. 180, 16 A.L.R. 315.

43. Cal.—Peck v. Martinez, 117 P. 2d 7, 46 Cal.App.2d 855.
Ind.—Sawyer v. Kleine, 82 N.E.2d 533, 118 Ind.App. 616.

Where plaintiff is not entitled to possession, the complaint must show the nature of his title or interest and that it is consistent with the right of possession in another—Pittsburg, etc., R. Co. v. O'Brien, 41 N.E. 528, 142 Ind. 218.

44. Tenn.—Nason v South Memphis Land Co., 195 S.W. 761, 138 Tenn. 21.
Tex.—Mayfield v. Musquez, 1 Tex. Unrep.Cas. 221.

45. Cal.—Peck v. Martinez, 117 P.2d 7, 46 Cal.App.2d 855.

46. Cal.—Peck v Martinez, 117 P.2d 7, 46 Cal.App.2d 855.

47. N.M.—Oliver v. Enriquez, 124 P. 793, 17 N.M. 206.
51 C.J. p 218 note 89.

Allegations held sufficient
Cal.—Lilley v. Leggett, 142 P.2d 57, 61 Cal.App.2d 25—Pacific States Savings & Loan Co. v. Perez, 124 P.2d 184, 51 Cal.App.2d 84.
Ga.—Foster v. Adcock, 60 S.E.2d 334, 207 Ga. 201.
Ky.—Egner v. Livingston County Board of Education, 230 S.W.2d 448, 313 Ky. 168.
Mo.—Bragg v. Ross, 139 S.W.2d 491
N.M.—Campbell v. Doherty, 206 P.2d 1145, 53 N.M. 280.
N.C.—Fisher v. Fisher, 6 S.E.2d 812, 217 N.C. 70.
R.I.—Davis v. Girard, 59 A.2d 366, 74 R.I. 125.
51 C.J. p 218 note 89 [c].

Allegations held insufficient
Cal.—Peck v. Martinez, 117 P.2d 7, 46 Cal.App.2d 855.
51 C.J. p 218 note 89 [d].

48. Or.—Grenz v. Anders, 241 P. 46, 119 Or. 277.

49. Mont.—Polson Sheep Co. v. Owen, 106 P.2d 181, 110 Mont. 601—Nadeau v Texas Co., 69 P.2d 586, 104 Mont. 558—Thomson v. Nygaard, 41 P.2d 1, 98 Mont. 529—Le Vasseur v Roullman, 20 P.2d 250, 93 Mont. 552.
Okl.—Thompson v. General Outdoor Advertising Co., 151 P.2d 379, 194 Okl. 300—Houghton v. Houghton, 62 P.2d 473, 178 Okl. 167.

50. Ark.—Robeson v Kempner, 32 S.W.2d 616, 182 Ark. 746.
Cal.—Penaat v. Guasco, 191 P.2d 564, 84 Cal.App.2d 445.
Idaho.—Woll v Costella, 85 P.2d 679, 59 Idaho 569.

Common grantor
(1) One suing to quiet title to land under common grantor rule need not plead his intent to rely on such rule.—Wagnor v. Blume, 161 P. 2d 1001, 71 Cal.App.2d 94.

(2) A petition to quiet title to part of tract, alleged to have been originally conveyed by person named therein to another named person and come by mesne conveyances to plaintiffs, with reservations of such part for use and benefit of schools and churches as long as used for such purposes, was not demurrable on grounds that plaintiffs must rely on strength of their own title, not weakness of defendants' title, and because no common grantor was shown, plead title back to commonwealth, since plaintiffs derived title and defendants their right of use from original grantor, even though he was not common grantor because dedication was not strictly a grant.—Egner v. Livingston County Board of Education, 230 S.W.2d 448, 313 Ky. 168.

Evidence of title
A copy of the deed or other evidence of title under which plaintiff claims need not be set out.—Lash v. Perry, 19 Ind. 322.

51. Mont.—Tiffany v. Uhde, 216 P. 2d 375.

52. Mont.—Le Vasseur v. Roullman, 20 P.2d 250, 93 Mont. 552.
51 C.J. p 218 note 92.

53. Ariz.—Palmer v. Sunnyside Gold & Development Co., 61 P.2d 444, 48 Ariz. 327.
Ark.—Robeson v. Kempner, 32 S.W. 2d 616, 182 Ark. 746.
Nev.—**Corpus Juris cited in Aikins v Nevada Placer,** 13 P.2d 1103, 1104, 54 Nev. 281.
Okl.—Houghton v. Houghton, 62 P. 2d 473, 178 Okl. 167.
51 C.J. p 218 note 93.

54. Ariz.—Floyd v Hornbeck, 4 P. 2d 908, 39 Ariz. 178.
51 C.J. p 219 note 94.

55. Ind.—Stanley v. Holliday, 30 N. E. 634, 130 Ind. 464.
Mont.—Le Vasseur v. Roullman, 20 P.2d 250, 93 Mont. 552.

56. N.Y.—New York Foundation v People, 181 N.E. 12, 259 N.Y. 54.
51 C.J. p 219 note 96.

57. Miss.—Smith v. Overstreet, 38 So.2d 923, 205 Miss. 488.
51 C.J. p 218 note 92 [c].

Requisites and sufficiency of deraignment
(1) Complainant suing to remove cloud must deraign title from ultimate source, or show title by adverse possession, or from defendant, or must show superior title from common source with defendant.—Rabinowitz v. Houk, 129 So. 501, 100 Fla. 44—51 C.J. p 218 note 89 [a].

(2) "Deraignment of title," within statute requiring complainant to set forth in plain and concise language deraignment of his title, means that complainant must show either title in himself from the government down, or title in himself by adverse possession, or title in himself from defendant, or that parties to the suit claimed under a common source, the complainant having the better title from that source.—Smith v. Overstreet, 38 So.2d 923, 205 Miss. 488—Long v. Staley, 30 So. 823, 79 Miss. 298.

(3) In suit to quiet title where the character of defendant's claim to the land involved is unknown to complainant, complainant must deraign his title from the government

may arise in which it is advisable to set out the facts in detail.[58]

Claim from common source. Where both parties claim under a common grantor, it need not be alleged that such grantor had title,[59] since neither party will be permitted to deny it, as discussed supra § 19, but plaintiff must, by averment, connect his title with that of the common grantor,[60] and show by proper allegation that his title from such common source is the better.[61] If the bill deraigns title from a common source, and affirmatively shows a good title in defendant and no title in plaintiff, it is demurrable.[62] Furthermore, where deraignment of title is required by statute, a bill alleging that the property was derived from a common source who owned the property has been held insufficient and demurrable for failure to show facts of the title of the common source.[63]

Averring facts showing title. If the facts stated in the complaint show title in plaintiff, a direct averment of title is unnecessary,[64] and a complaint is not insufficient merely by reason of the inclusion of unnecessary allegations concerning plaintiff's title,[65] since insufficient or incomplete special allegations of title by plaintiff also pleading title generally may be treated as surplusage.[66] However, special allegations of title, if sufficient in themselves, control general allegations,[67] and, if the complaint avers generally that plaintiff is seized in fee simple, and then proceeds to set forth the facts which constitute his title, it is bad if the facts so stated do not show title in him,[68] unless the specific facts averred are not for the purpose of tracing title, but to show a right to other relief sought.[69] An allegation that plaintiff is the true and equitable owner "by purchase in fee simple from" a named grantor is insufficient, unless it is further averred that such grantor had title.[70] On the other hand, a general allegation of ownership will control with respect to instruments annexed to the complaint by way of description, to define the nature of the rights claimed by plaintiff, although such instruments may not show a sufficient deraignment of title.[71] Where plaintiff unnecessarily sets out his own and defendant's chain of title from a common source, the petition is insufficient unless it shows that plaintiff's deed was prior to that of defendant.[72]

Where an equitable title is claimed, all the facts that go to maintain such title may be alleged in the complaint.[73]

Time of ownership. The bill must allege that plaintiff was the owner of the land at the time when suit was commenced,[74] and a mere averment that plaintiff had title at some previous time is not sufficient.[75] However, a complaint which alleges that plaintiff had title at the time when the action was commenced is not vitiated by other allegations showing that he had conveyed the land to another, where such conveyance was alleged to have been obtained by duress, so that no title passed,[76] or where it is averred that the conveyance was long

down.—Woodard v. Moss, 30 So.2d 420, 202 Miss. 33.

(4) A bill in proceeding requiring deraignment of title does not state a case against defendant thereto unless deraignment is sufficient, since complainant must depend on strength of his own title and not weakness of that of his adversary. —Smith v. Overstreet, supra—Dorsey v. Sullivan, 24 So.2d 852, 199 Miss. 602.

58. U.S.—Goldsmith v. Gilliland, C. C.Or., 22 F. 865, 10 Sawy. 606.
51 C.J. p 219 note 97.

59. Cal.—Fudickar v. East Riverside Irr. Dist., 41 P. 1024, 109 Cal. 29.
51 C.J. p 218 note 83.

60. Kan.—Grove v. Jennings, 26 P. 738, 46 Kan. 366.

61. Miss.—Woodard v. Moss, 30 So. 2d 420, 202 Miss. 33.

Effect of subsequent allegations

If by use of words "the common source of title" complainant intended to allege that named person was the common source from which he and defendant derived their titles, complainant negatived any knowledge thereof, and, therefore, the value of the allegation by thereafter alleging that defendant asserted some character or claim or pretended character or claim to the land of which complainant has no knowledge or had no knowledge at the time he purchased the land.—Woodard v. Moss, supra.

62. Miss.—Longmire v. Mars, 86 So. 753, 124 Miss. 77.

63. Miss.—Dorsey v. Sullivan, 24 So.2d 852, 199 Miss. 602.

64. R.I.—Blackstone Hall Co. v. Rhode Island Hospital Trust Co., 97 A. 484, 39 R.I. 69.
51 C.J. p 219 note 99.

65. N.D.—Birks v. Globe International Protective Bureau, 218 N.W. 864, 56 N.D. 613.
51 C.J. p 219 note 1.

66. Mont.—Nadeau v. Texas Co., 69 P.2d 586, 104 Mont. 558.

67. Mont.—Nadeau v. Texas Co., supra.
51 C.J. p 220 note 2 [a].

68. Ky.—Whitaker v. Million, 110 S.W.2d 653, 270 Ky. 708.
N.Y.—Belsheim v. People, 8 N.Y.S. 2d 841, 255 App.Div. 429.
51 C.J. p 220 note 3.

69. Ind.—O'Connor v. Baum, 100 N. E. 581, 54 Ind.App. 195.

70. Miss.—Harrill v. Robinson, 61 Miss. 153.

71. Cal.—Fudickar v. East Riverside Irr. Dist., 41 P. 1024, 109 Cal. 29.

72. Ky.—Arnett v. Elkhorn Coal Corp., 231 S.W. 219, 191 Ky. 706.
51 C.J. p 220 note 5.

73. Ind.—Sawyer v. Kleine, 82 N.E. 2d 533, 118 Ind.App. 616.
51 C.J. p 220 note 7.

74. Ind.—Baxter v. Baxter, 92 N.E. 831, 1039, 46 Ind.App. 514.
51 C.J. p 220 note 8.

75. Okl.—Clark v. Holmes, 136 P. 642, 31 Okl. 164, Ann.Cas.1913D 385.
51 C.J. p 220 note 9.

76. Ind.—Baxter v. Baxter, 92 N.E. 831, 1039, 46 Ind.App. 514.

enough before suit to have enabled plaintiff to reacquire title.[77]

§ 60. —— Allegations as to Possession of Plaintiff

Where the plaintiff claims a legal estate or interest he must affirmatively allege in his bill or complaint that he is in possession of the lands in controversy, or that such lands are vacant and unoccupied, or wild lands; but the bill need not allege possession where it states facts sufficient to show that the estate or interest is equitable in its nature, or where the primary relief sought is based on some distinct equitable ground and the removal of a cloud is sought only as an incident to such relief.

Except where the action is brought under a statute which expressly or by necessary implication dispenses with the necessity of possession as a condition precedent to the maintenance of the action,[78] or unless defendant asserts his own title and asks for affirmative relief so as to give the court jurisdiction of the whole controversy, as discussed supra § 31, plaintiff, claiming a legal estate or interest, must affirmatively allege in his bill or complaint that he is in possession of the lands in controversy,[79] or that

77. Cal.—Gray v. Walker, 108 P. 278, 157 Cal. 381.
Ind.—Indiana, etc., R. Co. v. Brittingham, 98 Ind. 294.

78. Nev.—Aikins v. Nevada Placer, 13 P.2d 1103, 54 Nev. 281.
51 C.J. p 220 note 13.
Statutes dispensing with necessity of possession by plaintiff see supra §§ 29, 30.

Neither party in possession

Under statute allowing suit to establish title to land where none of the parties is in actual possession, petition must allege that neither of the parties to the proceedings is in actual possession of the land.—Doll v. Dearie, La.App., 41 So.2d 84.

In Arizona

(1) Under statute plaintiff out of possession may maintain action and need not allege possession or right of possession.—Palmer v. Sunnyside Gold & Development Co., 61 P.2d 444, 48 Ariz. 327—Floyd v. Hornbeck, 4 P.2d 908, 39 Ariz. 178—Chuk v. Katich, 281 P. 923, 27 Ariz. 182.

(2) Under prior similar statute, court held that plaintiff out of possession must allege that he has no adequate remedy at law, and must allege grounds for equitable relief.—Ely v. New Mexico & A. R. Co., 19 P. 6, 2 Ariz. 420.

In Florida

(1) Under statute it is no longer necessary to allege possession.—Griffin v. Bolen, 5 So.2d 690, 149 Fla. 377—Conway v. Wilson, 181 So. 385, 132 Fla. 404.

(2) Under prior law, except where a statute allowed a person out of possession to sue to quiet title against any person not in actual possession claiming adverse interest, plaintiff who had legal title had to allege in bill of complaint that he was in possession of land, or that it was vacant and unoccupied.—Zetteriund v. Stratton, 113 So. 562, 93 Fla. 1113—51 C.J. p 220 note 14, p 221 note 15.

In Texas

(1) In suits to remove cloud from title, plaintiff need not aver that he is in possession.—Day Land & Cattle Co. v. State, 4 S.W. 865, 68 Tex. 526—Johnson v. Miller, Civ.App., 173 S.W.2d 280, affirmed 177 S.W.2d 249, 142 Tex. 228.

(2) Formerly it was held that plaintiff must allege possession—Herrington v. Williams, 31 Tex. 448.

In West Virginia

(1) Under statute plaintiff need not allege possession of the land in controversy.—Bennett v. Neff, 42 S.E.2d 793, 130 W.Va. 121—Pocahontas Coal & Coke Co. v. Bower, 163 S.E. 421, 111 W.Va. 712—Flynn Coal & Lumber Co. v. F. W. White Lumber Corporation, 157 S.E. 588, 110 W.Va. 262.

(2) By virtue of statute allegation of possession by plaintiff in suit to remove cloud from title is not jurisdictional, but possession is important element in considering laches—Maze v. Bennett, 171 S.E. 249, 114 W.Va. 169.

(3) Prior to statute plaintiff who had a clear and equitable title had to allege possession, although bill did not have to allege possession in plaintiff if it stated facts sufficient to show that the estate or interest to be protected was equitable in its nature.—Mustard v. Big Creek Dev. Co., 72 S.E. 1021, 69 W.Va. 713—51 C.J. p 220 note 14.

79. U.S.—Gerard v. Mercer, D.C. Mont., 62 F.Supp. 28, reversed on other grounds, C.C.A., Gerard v. U. S., 167 F.2d 951.
Ala.—Federal Land Bank of New Orleans v. Vinson, 18 So.2d 865, 246 Ala. 95—Mathison v. Barnes, 16 So.2d 717, 245 Ala. 289—Tyler v. Copham, 16 So.2d 316, 245 Ala. 15—McDonald v. Birmingham Trust & Savings Co., 194 So. 839, 239 Ala. 369—Hobson v. Robertson, 138 So. 548, 224 Ala. 49.
Colo.—Harrison v. City and County of Denver, 76 P.2d 1110, 102 Colo. 93.
Ga.—Burton v. Hart, 55 S.E.2d 594, 206 Ga. 87—Parnell v. Wooten, 43 S.E.2d 673, 202 Ga. 443—Oglesby v. Oglesby, 32 S.E.2d 906, 198 Ga. 864—Byrd v. Goodman, 26 S.E.2d 34, 195 Ga. 621—Northwest Atlanta Bank v. Manning, 17 S.E.2d 547, 193 Ga. 186—Page v. Brown, 15 S.E.2d 506, 192 Ga. 398—Moore v. Moore, 4 S.E.2d 18, 188 Ga. 303—Sweat v. Arline, 197 S.E. 893, 186 Ga. 460—Moody v. McHan, 193 S.E. 240, 184 Ga. 740—Simpson v. Kelley, 156 S.E. 198, 171 Ga. 523—Morris v. Mobley, 155 S.E. 8, 171 Ga. 224—Miller v. Jennings, 147 S.E. 32, 168 Ga. 101—McMullen v. Cooper, 54 S.E. 97, 125 Ga. 435—Weyman v. Atlanta, 50 S.E. 492, 122 Ga. 539.
Ill.—McCookey v. Winter, 46 N.E. 2d 84, 381 Ill. 516—First Nat. Bank v. Gordon, 21 N.E.2d 288, 371 Ill. 424—Chicago Medical School v. Wilson, 173 N.E. 168, 341 Ill. 170.
Ky.—Rose v. Rose, 176 S.W.2d 122, 296 Ky. 18—Davis v. Daniel, 175 S.W.2d 501, 295 Ky. 717—Hopper v. McBurney, 168 S.W.2d 374, 293 Ky. 31—Crawley v. Mackey, 143 S.W.2d 171, 283 Ky. 717—McGlboney v. Newman, 127 S.W.2d 860, 277 Ky. 835—Madden v. Bond, 106 S.W.2d 95, 269 Ky. 31—Hale v. Horn, 97 S.W.2d 402, 265 Ky. 560—Hatton v. Williams' Ex'r, 82 S.W.2d 774, 259 Ky. 548—Combs v. Jones, 51 S.W.2d 672, 244 Ky. 512—Brown v. Martin, 39 S.W.2d 243, 239 Ky. 146—Southern Oil Co. v. Holman, 244 S.W. 762, 196 Ky. 250.
Minn.—Exsted v. Exsted, 279 N.W. 554, 202 Minn. 521, 117 A.L.R. 554.
N.Y.—Glover v. Egner, 10 N.Y.S.2d 300, 256 App.Div. 981, reargument denied 12 N.Y.S.2d 353, 256 App. Div. 1081.
Okl.—Piland v. Craig, 154 P.2d 583, 194 Okl. 666.
Vt.—Scully v. Dormody, 8 A.2d 675, 110 Vt. 422.
51 C.J. p 220 note 14.

Adequate remedy

(1) The reason for general rule, requiring a plaintiff to allege actual possession in himself in order to be entitled to maintain an equitable petition to remove a cloud on his title, is that, where defendant is in possession, plaintiff has a remedy to test his title at law by bringing an action in ejectment, which is ordinarily deemed an adequate remedy, and in consequence there is no ground for exercise of equitable ju-

such lands are vacant and unoccupied,[80] or wild lands,[81] or the bill must state facts sufficient to show that, although out of possession, plaintiff's remedies at law are inadequate.[82] However, the bill need not allege possession in plaintiff where it states facts sufficient to show that the estate or interest to be protected is equitable in its nature,[83] or where the primary relief sought is based on some distinct equitable ground and the removal of a cloud is sought only as an incident to that relief,[84] or where there is a distinct ground of equity jurisdiction sufficient to support the action.[85] It has been held that failure to allege possession in plaintiff is not a jurisdictional defect.[86]

Right of possession. The right of possession of realty attaches to the legal title,[87] and, where a perfect title is set out in the bill, it is not necessary to allege the right of immediate possession.[88]

Sufficiency. The fact of possession in plaintiff must be clearly stated in the bill, and not left to inference merely,[89] but an averment in the language of the statute is sufficient.[90] It is sufficient to aver possession in general terms,[91] unless in addition thereto other specific facts and circumstances are alleged which show that in fact plaintiff has not a sufficient possession.[92] Possession need not be averred in terms if the facts stated show such possession;[93] but in the absence of such a showing possession should be directly averred.[94] An averment of ownership in fee simple has been held a sufficient allegation of possession,[95] but there is also authority to the contrary.[96] An averment that plaintiff is entitled to immediate possession does not necessarily imply that he is not in possession.[97]

Making more definite and certain. If defendant is in doubt as to plaintiff's possession, he may move to make the complaint more definite and certain.[98]

risdiction.—Northwest Atlanta Bank v. Manning, 17 S.E.2d 547, 193 Ga. 186.

(2) Where the basic reason on which general rule requiring a plaintiff to allege actual possession in himself rests is absent in a particular instance, the rule itself should not be applied.—Northwest Atlanta Bank v. Manning, supra.

Complaint or petition showing defendants in possession of real property does not state a cause of action.
Ala.—Wood v. Curry, 8 So.2d 822, 243 Ala. 136.
Ga.—Oglesby v. Oglesby, 32 S.E.2d 906, 198 Ga. 864—Moore v. Moore, 4 S.E.2d 18, 188 Ga. 303.
S.C.—Guerard v. Jenkins, 61 S.E. 258, 80 S.C. 223.

Time of possession

(1) In order to sustain an action to quiet title, it must be alleged that plaintiff had possession at the time when the suit is begun.—Davis v. Daniel, 175 S.W.2d 501, 295 Ky. 717.

(2) Allegation held sufficient.—Bruch v. Benedict, 165 P.2d 561, 62 Wyo. 213.

(3) Allegation held insufficient.—Davis v. Daniel, 175 S.W.2d 501, 295 Ky. 717.

(4) Other decisions with respect to time of possession see 51 C.J. p 220 note 14 [b].

80. Ill.—McGookey v. Winter, 46 N.E.2d 84, 381 Ill. 516—Chicago Medical School v. Wilson, 173 N.E. 168, 341 Ill. 170.
51 C.J. p 221 note 15.

81. Ga.—Parnell v. Wooten, 43 S.E.2d 673, 202 Ga. 443—Oglesby v. Oglesby, 32 S.E.2d 906, 198 Ga. 864—Page v. Brown, 15 S.E.2d 506, 192 Ga. 398—Moore v. Moore, 4 S.E.2d 18, 188 Ga. 303—Moody v. McHan, 193 S.E. 240, 184 Ga. 740—Simpson v. Kelley, 156 S.E. 198, 171 Ga. 523—Mentone Hotel, etc., Co. v. Taylor, 130 S.E. 527, 161 Ga. 237—McMullen v. Cooper, 54 S.E. 97, 125 Ga. 435—Weyman v. Atlanta, 50 S.E. 492, 122 Ga. 539.

82. Or.—Hodgkin v. Boswell, 110 P. 487, 57 Or. 88.
51 C.J. p 221 note 16.

83. Ala.—Federal Land Bank of New Orleans v. Vinson, 18 So.2d 865, 246 Ala. 95.
51 C.J. p 221 note 17.

84. Ill.—McGookey v. Winter, 46 N.E.2d 84, 381 Ill. 516—Vlahos v. Andrews, 1 N.E.2d 59, 362 Ill. 593—Chicago Medical School v. Wilson, 173 N.E. 168, 341 Ill. 170.
51 C.J. p 221 note 18.

85. Ga.—Foster v. Adcock, 60 S.E.2d 334, 207 Ga. 201—Burton v. Hart, 55 S.E.2d 594, 206 Ga. 87—Parnell v. Wooten, 43 S.E.2d 673, 202 Ga. 443—Oglesby v. Oglesby, 32 S.E.2d 906, 198 Ga. 864—Page v. Brown, 15 S.E.2d 506, 192 Ga. 398—Moore v. Moore, 4 S.E.2d 18, 188 Ga. 303—Sweat v. Arline, 197 S.E. 893, 186 Ga. 460—Moody v. McHan, 193 S.E. 240, 184 Ga. 740—Greenwood v. Starr, 163 S.E. 500, 174 Ga. 503—Simpson v. Kelley, 156 S.E. 198, 171 Ga. 523—Morris v. Mobley, 155 S.E. 8, 171 Ga. 224—Miller v. Jennings, 147 S.E. 32, 168 Ga. 101—Mentone Hotel, etc., Co. v. Taylor, 130 S.E. 527, 161 Ga. 237.

Mental incapacity of the grantor in deed which plaintiff seeks to have canceled constitutes another distinct ground of equity jurisdiction.—Burton v. Hart, 55 S.E.2d 594, 206 Ga. 87—Page v. Brown, 15 S.E.2d 506, 192 Ga. 398—Moody v. McHan, 193 S.E. 240, 184 Ga. 740—Morris v. Mobley, 155 S.E. 8, 171 Ga. 224.

86. Ala.—Gargis v. Fore, 117 So. 679, 218 Ala. 102.

87. Cal.—Root v. Conlin, 223 P. 1023, 65 Cal.App. 341.
51 C.J. p 221 note 20.

88. Fla.—Downing v. Carlton, 80 So. 57, 76 Fla. 490.

89. Wis.—Shaffer v. Whelpley, 37 Wis. 334.
51 C.J. p 222 note 23.

Allegations held sufficient
Okl.—Wolfe v. Graham, 90 P.2d 1067, 185 Okl. 318.
51 C.J. p 222 note 23 [b].

90. Ala.—Joiner v. Glover, 78 So. 55, 201 Ala. 279.
Ohio.—Lusby v. Jones, 1 Ohio S. & C. P. 291, 31 Cinc.L.Bul. 70.

91. N.Y.—Walker v. Peane, 41 N.Y.S. 219, 17 Misc. 415.
Utah.—State v. Rollo, 262 P. 987, 71 Utah 91.

92. U.S.—Northern Pac. R. Co. v. Amacker, Mont., 49 P. 523, 1 C.C.A. 345.
51 C.J. p 222 note 25.

93. Okl.—Womble v. Pike, 87 P. 437, 17 Okl. 122.
51 C.J. p 222 note 26.

94. Ala.—Fowler v. Alabama Iron, etc., Co., 56 So. 672, 182 Ala. 31.

95. U.S.—Gage v. Kaufman, Ill., 10 S.Ct. 406, 133 U.S. 471, 33 L.Ed. 725.
51 C.J. p 222 note 28.

96. Ky.—Smith v. Williamson, 208 S.W.2d 503, 306 Ky. 467.

97. Wash.—McKinley v. Morgan, 79 P. 45, 36 Wash. 561.

98. S.C.—Shute v. Shute, 60 S.E. 961, 79 S.C. 430.

Actual possession. Since the possession required to maintain the action usually means actual, as distinguished from mere constructive, possession, as discussed supra § 32, the bill or complaint must show actual possession in plaintiff,[99] unless the statute makes constructive possession sufficient.[1] An averment in general terms that plaintiff is in possession,[2] or in peaceable possession,[3] is prima facie equivalent to an averment of actual possession. An averment that plaintiff is legally in possession, or an averment equivalent thereto, is insufficient as an averment of actual possession.[4]

Peaceable possession. If the statute requires "peaceable" possession as a condition precedent to the right of action, as distinguished from disputed or scrambling possession, plaintiff must allege that his possession is peaceable,[5] although another section of the statute declares that the bill must allege "possession and ownership."[6] If the action is not strictly under the statute, however, but is brought by the owner in possession to remove a cloud, plaintiff need not aver a peaceable possession.[7]

An averment of possession as to a part of the premises is insufficient where it is sought to remove a cloud from the entire tract.[8]

§ 61. —— Allegations as to Inadequacy of Remedy at Law

Where one in possession of land, claiming the legal title, sues to remove a cloud thereon or to quiet title, he need not allege that he has no adequate remedy at law, but in a suit to prevent the imposition of a cloud the bill must affirmatively show the inadequacy of any remedy at law.

Where one in possession of land, claiming the legal title, sues to remove a cloud thereon or to quiet title, he need not allege that he has no adequate remedy at law;[9] but in a suit to prevent the imposition of a cloud the bill must affirmatively show the inadequacy of any remedy at law.[10] Where plaintiff is out of possession, the bill or complaint in an equitable action must show that his remedies at law are inadequate,[11] and this has been applied to an action under a statute giving a right of action to one out of possession.[12] On the other hand, it has been held that, in an action brought under a statute by one out of possession, plaintiff need not allege that he has no adequate remedy at law, especially in jurisdictions where both legal and equitable issues may be determined in one action.[13]

§ 62. —— Allegations as to Cloud or Adverse Claim

a. Cloud on title
b. Adverse claim

a. Cloud on Title

In a suit to remove a cloud on title, it must be shown in the bill that such a cloud exists, and in such a case, the bill must, in addition to specifying the writing or matter which constitutes the alleged cloud, state the facts which give it apparent validity, as well as those which show its invalidity.

In a suit to remove a cloud on title, it must be shown in the bill that such a cloud exists,[14] and,

99. Ky.—Smith v. Williamson, 208 S.W.2d 503, 306 Ky. 467—Crawley v. Mackey, 143 S.W.2d 171, 283 Ky. 717.
51 C.J. p 222 note 32.

1. Ala.—Moore v. Empire Land Co., 61 So. 940, 181 Ala. 344.
51 C.J. p 222 note 33.

2. Ky.—Weaver v. Bates, 33 S.W. 1118, 17 Ky.L. 1218.
51 C.J. p 222 note 34.

3. Kan.—Douglass v. Huhn, 24 Kan. 766—Cartwright v. McFadden, 24 Kan. 662.

4. Ky.—Smith v. Gatliff, 5 S.W. 558, 9 Ky.L. 553.
51 C.J. p 222 note 36.

5. Ala.—Standard Contractors Supply Co. v. Scotch, 25 So.2d 257, 247 Ala. 517—Hinds v. Federal Land Bank of New Orleans, 186 So. 153, 237 Ala. 218—Brookside-Pratt Mining Co. v. Wright, 173 So. 605, 234 Ala. 70.
51 C.J. p 223 note 38.

Allegation held sufficient
Ala.—Watson v. Baker, 154 So. 788, 228 Ala. 652.
51 C.J. p 223 note 38 [a].

Allegations held insufficient
Ala.—Federal Land Bank of New Orleans v. Vinson, 18 So.2d 865, 246 Ala. 95—Shamblee v. Wilson, 170 So. 769, 233 Ala. 164—Sibley v. Kennedy, 140 So. 552, 224 Ala. 354—51 C.J. p 223 note 38 [b].

6. Ala.—Hicks v. Stone, 99 So. 115, 210 Ala. 635.

7. Ala.—Garrett v. Cobb, 80 So. 79, 202 Ala. 241—Henry Bank v. Elkins, 51 So. 321, 165 Ala. 628.

8. Ill.—Stannard v. Aurora, etc., R. Co., 77 N.E. 254, 220 Ill. 469.
Possession of part of tract as giving right of action see supra § 36.

9. Wyo.—Bamforth v. Ihmson, 204 P. 345, 205 P. 1004, 28 Wyo. 282.
51 C.J. p 223 note 48.
Adequacy of legal remedies see supra § 10.
Lack of legal remedy as ground of jurisdiction see supra § 4.

10. Va.—South, etc., R. Co. v. Virginia, etc., R. Co., 51 S.E. 343, 104 Va. 323.

11. Iowa—Fejervary v. Langer, 9 Iowa 159.
51 C.J. p 223 note 50.
Necessity of alleging possession when estate or interest to be protected is equitable in its nature see § 60.

12. N.M.—Lockhart v. Leeds, 63 P. 48, 10 N.M. 568.

13. Conn.—Gaul v. Baker, 134 A. 250, 105 Conn. 80.

14. Md.—Homewood Realty Corporation v. Safe Deposit & Trust Co. of Baltimore, 154 A. 58, 160 Md. 457, 78 A.L.R. 8.
Mich.—Fletcher v. Morlock, 231 N.W. 59, 251 Mich. 96.
51 C.J. p 223 note 53.

Anticipating defense
Bill to remove cloud on title need not show defense or title by which defendant claims.—Sheaff v. Spindler, 171 N.E. 632, 339 Ill. 540.

Easement
Where plaintiff and assigns had been in continuous possession of premises subject to a recorded driveway easement in common with adjacent property but easement by mutual mistake had not been properly conveyed, an allegation that a cloud was cast on plaintiff's title by such

in such case, the bill must, in addition to specifying the writing or matter which constitutes the alleged cloud,[15] as far as it is within plaintiff's knowledge,[16] state the facts which give it apparent validity,[17] as well as those which show its invalidity,[18] and a mere averment of its invalidity as a conclusion of the pleader is insufficient,[19] although a complaint alleging facts as to the alleged cloud may charge that, as a matter of law, the alleged cloud is void.[20] A bill to remove as a cloud on title, because of failure of consideration, a mortgage and secured notes in the hands of others than the mortgagee need not show wherein the notes are not negotiable;[21] but, if they are negotiable and defendants are bona fide purchasers, this is defensive matter.[22]

Sustaining complaint on different theory. It has been held that a complaint which is clearly framed as one to remove a specified cloud on title, if defective as such, cannot be sustained as a complaint under the statute to determine an adverse claim, although it states facts showing that plaintiff might have maintained such statutory action.[23]

Where it is sought to prevent a cloud on title, it must be averred that the acts which will impose the cloud are threatened or contemplated,[24] and, if this appears only by inference, the complaint is insufficient.[25]

b. Adverse Claim

In a statutory action to quiet title or determine adverse claims the plaintiff must allege or show that the defendant is asserting some claim to the land hostile or adverse to plaintiff's title or interest. The rule prevails in a few jurisdictions that the complaint must state the facts showing the nature of defendant's title or claim, while in others the view obtains that the plaintiff, except in case of fraud, need not particularly state the nature, extent, and circumstances of the defendant's claim.

In a statutory action to quiet title or determine adverse claims plaintiff must allege or show that defendant is asserting some claim to the land[26] hostile or adverse to plaintiff's title or interest.[27]

Nature of claim. The rule prevails in a few ju-

mutual mistake was unnecessary in order for plaintiffs to maintain an action for removal of cloud on their title resulting therefrom.—Howard v. Young, Tex.Civ.App., 210 S.W.2d 241, error refused, no reversible error.

Allegations held sufficient
Mich.—Fletcher v. Morlock, 231 N. W. 59, 251 Mich. 96.
51 C.J. p 224 note 53 [d].

Allegations held insufficient
Ga.—Thornton v. Hardin, 52 S.E.2d 841, 205 Ga. 215.
51 C.J. p 224 note 53 [e].

15. Cal.—Ephraim v. Metropolitan Trust Co. of Cal., 172 P.2d 501, 28 Cal.2d 824.
51 C.J. p 224 note 54.

Mere allegation and claim of cloud on title is not sufficient of itself to give court of equity jurisdiction to try title to land.—York v. McCausland, 154 A. 780, 130 Me. 245.

16. W.Va.—United Thacker Coal Co. v. Newsome, 38 S.E.2d 660, 129 W. Va. 86—Amick v. Gauley Coal Land Co., 194 S.E. 268, 119 W.Va. 485—Hyman v. Swint, 119 S.E. 366, 94 W.Va. 627.

17. Cal.—Ephraim v. Metropolitan Trust Co. of Cal., 172 P.2d 501, 28 Cal.2d 824.
51 C.J. p 224 note 55.

Allegations held sufficient
Ala.—Barksdale v. Jordan, 43 So.2d 406, 253 Ala. 199.
51 C.J. p 224 note 55 [b].

Allegations held insufficient
Ala.—Teal v. Nixon, 169 So. 477, 233 Ala. 28.
51 C.J. p 224 note 55 [c].

18. Cal.—Ephraim v. Metropolitan Trust Co. of Cal., 172 P.2d 501, 28 Cal.2d 824.
51 C.J. p 224 note 56.

Allegations held sufficient
(1) Generally.
Ala.—McDonald v. Birmingham Trust & Savings Co., 194 So. 839, 239 Ala. 360.
W.Va.—Maze v. Bennett, 171 S.E. 249, 114 W.Va. 169.
51 C.J. p 224 note 56 [a].

(2) Removal of land registration certificates as cloud on title.—Chicago Title & Trust Co. v. Darley, 1 N. E.2d 846, 363 Ill. 197—Sheaff v. Spindler, 171 N.E. 632, 339 Ill. 540.

Allegations held insufficient
Ga.—Clark v. Woody, 30 S.E.2d 181, 197 Ga. 683.

19. Or.—O'Hara v. Parker, 39 P. 1004, 27 Or. 156.
51 C.J. p 224 note 57.

20. Idaho.—Maxwell v. Twin Falls Canal Co., 293 P. 232, 49 Idaho 806.

Lien
Complaint to remove alleged equitable lien as cloud on title was held not ambiguous for failure to allege when lien should have been filed.—Maxwell v. Twin Falls Canal Co., supra.

21. Ala.—King Lumber Co. v. Spragner, 58 So. 930, 176 Ala. 564.

22. Ala.—King Lumber Co. v. Spragner, supra.

23. Minn.—Knudson v. Curley, 15 N. W. 873, 30 Minn. 433—Walton v. Perkins, 10 N.W. 424, 28 Minn. 413.

24. Minn.—Maloney v. Finnegan, 35 N.W. 723, 38 Minn. 70.

N.Y.—Sanders v. Yonkers, 63 N.Y. 489.

25. Minn.—Maloney v. Finnegan, 35 N.W. 723, 38 Minn. 70.

26. Ind.—Attica Building & Loan Ass'n of Attica v. Calvert, 23 N. E.2d 483, 216 Ind. 192.
N.C.—Ramsey v. Ramsey, 39 S.E.2d 340, 224 N.C. 110.
51 C.J. p 225 note 63.

27. Ind.—Attica Building & Loan Ass'n of Attica v. Calvert, 23 N.E. 2d 483, 216 Ind. 192.
Ky.—Crawley v. Mackay, 143 S.W. 2d 171, 283 Ky. 717.
Utah.—Worley v. Peterson, 13 P.2d 579, 80 Utah 27.
51 C.J. p 225 note 64.

Allegations held sufficient
Pa.—Rubinoff v. Rubinoff, 61 Pa. Dist. & Co. 694, 96 Pittsb.Leg.J. 168.

Allegations held insufficient
Ind.—Attica Building & Loan Ass'n of Attica v. Calvert, 23 N.E.2d 483, 216 Ind. 192.
51 C.J. p 225 note 64 [b].

Interest in lien
City, claiming to be holder of lien against ten lots in special improvement district for unpaid assessments, could not maintain a quiet title action against owners of the real property on which the lien was claimed under statute authorizing action to quiet title to personal property on ground that lien constituted personal property, in absence of any allegation showing that owners of real property claimed any adverse interest in the lien.—City of Cut Bank v. Clapper Motor Co., 182 P.2d 474, 120 Mont. 274.

risdictions that the complaint must state facts showing the nature of defendant's title or claim,[28] while in others the view obtains that plaintiff, except in case of fraud,[29] need not particularly state the nature, extent, and circumstances of defendant's claim,[30] or deny knowledge thereof,[31] but that the pleading is sufficient if it alleges in general terms, or states facts which show, that defendant is asserting some claim adverse to plaintiff,[32] and that it is wrongful,[33] and calls on defendant to set it forth in his answer so that its validity may be submitted to the judgment of the court.[34] In those jurisdictions where it is not necessary to state the nature of defendant's claims, the complaint may set up the claims of the opposing party,[35] and the insertion of such allegations in the complaint, although improper,[36] does not necessarily render the complaint insufficient,[37] and a complaint which avers that defendant asserts an adverse claim is not insufficient because it goes further and alleges the source of defendant's claim, even though such allegation shows that the claim is so unfounded as to occasion no doubt of plaintiff's title,[38] but such allegations render the complaint insufficient where they disclose an insufficiency of title or interest in plaintiff to maintain the action.[39]

Invalidity of claim. In some jurisdictions the complaint must state facts showing the invalidity of defendant's title or claim,[40] as far as the facts are within plaintiff's knowledge,[41] but in other jurisdictions this is not required,[42] and, if the complaint does contain allegations as to such defects, it is not for that reason demurrable,[43] but such allegations may be disregarded as surplusage.[44]

Where unknown persons are proceeded against as claiming some interest in the land, the petition should state the nature of such interest or claim, as far as known to plaintiff,[45] and set out facts show-

28. Conn.—Orentlicherman v. Matarese, 121 A. 275, 99 Conn. 122.
51 C.J. p 225 note 65.

29. U.S.—Marshall v. Desert Properties Co., C.C.A.Cal., 103 F.2d 551, certiorari denied 60 S.Ct. 74, 308 U.S. 563, 84 L.Ed 473.
Cal.—Thompson v. Moore, 65 P.2d 300, 8 Cal.2d 367, 109 A.L.R. 1027—Carpenter v. Smallpage, 29 P.2d 841, 30 P.2d 995, 220 Cal. 129—Maison v. Puntenney, 293 P. 33, 212 Cal. 134—Burris v. Adams, 31 P. 565, 96 Cal. 664.
N.C.—Ramsey v. Ramsey, 29 S.E.2d 340, 224 N.C. 110.

30. U.S.—Marshall v. Desert Properties Co., C.C.A.Cal., 103 F.2d 551, certiorari denied 60 S.Ct 74, 308 U.S. 563, 84 L.Ed. 473.
Ariz.—Palmer v. Sunnyside Gold & Development Co., 61 P.2d 444, 48 Ariz. 327.
Cal.—Ephraim v. Metropolitan Trust Co. of Cal., 172 P.2d 501, 28 Cal.2d 824—Thompson v. Moore, 65 P.2d 300, 8 Cal.2d 367, 109 A.L.R. 1027—Kroeker v. Hurlbert, 101 P.2d 101, 38 Cal.App.2d 261.
Nev.—Aikins v. Nevada Placer, 13 P.2d 1103, 54 Nev. 281.
N.J.—Hudson Guild v. Morris Canal & Banking Co., Ch., 158 A. 389.
N.C.—Ramsey v. Ramsey, 29 S.E. 2d 340, 224 N.C. 110.
51 C.J. p 225 note 67.

31. U.S.—Goldsmith v. Gilliland, C. C.Or., 22 F. 865, 10 Sawy. 606.

32. Mont.—Tiffany v. Uhde, 218 P. 2d 375.
51 C.J. p 226 note 69.
Allegations held sufficient
Mont.—Teisinger v. Hardy, 5 P.2d 219, 91 Mont. 9.
51 C.J. p 226 note 69 [a].

33. U.S.—Goldsmith v. Gilliland, C. C.Or., 22 F. 865, 10 Sawy 606.
Or.—Manning v. Gregoire, 191 P. 657, 192 P. 406, 97 Or. 394.

34. Ala.—Downing v. City of Russellville, 3 So.2d 34, 241 Ala. 494—Watson v. Baker, 154 So. 788, 228 Ala. 652.
51 C.J. p 226 note 71.

35. Ala.—Nabers v. Wise, 4 So.2d 149, 241 Ala. 612.

36. Cal.—Noble v Blanchard, 8 P. 2d 523, 120 Cal.App. 664.
Determination on demurrer
The code sections pertaining to contents of bills to quiet title do not contemplate course of procedure by which complainant also set forth in bill basis of defendant's rights so as to have controversy determined on demurrer.—Federal Land Bank of New Orleans v. Vinson, 18 So.2d 865, 246 Ala. 95.

37. Cal.—Noble v. Blanchard, 8 P. 2d 523, 120 Cal.App. 664.

38. Ala.—Adler v. Sullivan, 22 So. 87, 115 Ala. 582.
51 C.J. p 227 note 72.

39. Ala.—Federal Land Bank of New Orleans v. Vinson, 18 So.2d 865, 246 Ala. 95.

40. Neb.—McDonald v. Early, 17 N. W. 257, 15 Neb. 68.
51 C.J. p 227 note 73.

41. Miss.—Church of the Living God, C. W. F. F., etc., v. Curry, 34 So.2d 494, 203 Miss. 279.
51 C.J. p 227 note 73 [c].

42. S.D.—Campbell v. Equitable Loan & Trust Co., 85 N.W. 1015, 14 S.D. 483—Frum v. Weaver, 83 N.W. 579, 13 S.D. 457.
51 C.J. p 227 note 74.
In New York
(1) Under present statutory provisions complaint in actions to determine claims to realty stated no cause of action, where it alleged that defendant's claim was based on a recorded deed, and contained no factual allegations rendering such title ineffective.—Higbee v. Schwartz, 56 N.Y.S.2d 149, 184 Misc. 421.
(2) New York decisions under prior statutes see 51 C.J. p 227 note 74 [a].

43. Colo.—Mitchell v Pearson, 82 P. 446, 34 Colo. 278
N.D.—Birks v. Globe International Protective Bureau, 218 N.W. 864, 56 N.D. 613.

44. S.D.—Campbell v. Equitable Loan & Trust Co., 85 N.W. 1015, 14 S.D. 483—Frum v. Weaver, 83 N.W. 579, 13 S.D. 457.

45. Fla.—Welborn v. Pierce, 78 So. 929, 75 Fla. 667.
51 C.J. p 227 note 77.
Service of process on unknown persons see supra § 50.
Nature and existence of cloud unknown
Bill seeking to remove cloud, nature and existence of which are unknown, as against unknown defendants, does not present justiciable matter under statute authorizing suit to quiet title.
U.S.—Greene v. Uniacke, C.C.A.Fla., 46 F.2d 916, certiorari denied 51 S. Ct. 493, 283 U.S. 847, 75 L.Ed. 1455.
Fla.—Key v. All Persons Claiming Any Estate, etc., Upon Real Property Described in Bill of Complaint in Said Cause, 36 So.2d 366, 160 Fla. 723—McDaniel v. McElvy, 108 So. 330, 91 Fla. 770, 51 A.L.R. 731—Welborn v. Pierce, 78 So. 929, 75 Fla. 667.

ing the validity or invalidity of the claim.[46]

§ 63. —— Allegations as to Parties

Where a person sought to be made a party is dead, his death must be alleged if his heirs or devisees are to be proper parties Where the statute so requires, the bill or complaint should name the persons who claim or are claimed or reputed to have the title, lien, or encumbrance.

Where a person sought to be made a party is dead, his death must be alleged if his heirs or devisees are to be proper parties.[47]

Names. Where the statute so requires, the bill or complaint should name the persons who claim or are claimed or reputed to have the title, lien, or encumbrance,[48] or allege that they are unknown.[49] A petition alleging that a named defendant, "or his unknown heirs," are asserting an adverse interest is insufficient.[50]

Residence. It is the better practice, and it is sometimes necessary in order to show jurisdiction, to aver the residence of the parties,[51] if known;[52] but a bill which alleges that the premises in controversy are located in the county in which the suit is brought is sufficient, although the bill does not allege the residence of the parties.[53] Where complainant is a resident of the county in which the suit is brought, and defendant unconditionally appears, failure to aver the residence of the parties is immaterial.[54]

§ 64. —— Location and Description of Land

The petition in a suit to quiet title should show that the property in dispute is situated in the county in which the action is brought, and the plaintiff's pleading must contain a pertinent description of the property in controversy; otherwise it is fatally defective.

The petition in a suit to quiet title should show that the property in dispute is situated in the county in which the action is brought.[55] Plaintiff's pleading must also contain a pertinent description of the property in controversy,[56] and must conform to any statutory requirement in that regard;[57] otherwise it is fatally defective.[58] Such description must be definite and accurate.[59] However, a description as definite as can be in the nature of things,[60] or which is sufficiently definite to identify the property, either in itself,[61] or by the aid of extraneous evidence,[62] suffices.

46. Fla.—Welborn v. Pierce, supra.
51 C.J. p 227 note 78.

47. Ala.—Gill v. More, 76 So. 453, 200 Ala. 511.

48. N.J.—Fittichauer v. Metropolitan Fire Proofing Co., 61 A 740, 70 N.J.Eq. 429.
51 C J. p 227 note 81.

49. Fla.—Tibbetts v. Olson, 108 So. 679, 91 Fla. 824.
51 C.J. p 227 note 82.

50. Ohio.—Lamb v. Boyd, 4 Ohio Cir.Ct. 499, 2 Ohio Cir.Dec. 672.
51 C.J. p 227 note 83.

51. Ala.—City Loan, etc., Co. v. Poole, 43 So. 13, 149 Ala. 164.

52. Fla.—Tibbetts v. Olson, 108 So. 679, 91 Fla. 824.
51 C.J. p 227 note 85.

53. Ala.—City Loan, etc., Co. v. Poole, 43 So. 13, 149 Ala. 164.

54. Ala.—City Loan, etc., Co. v. Poole, supra.

55. La.—State v. Bozeman, 101 So. 4, 156 La. 635.
51 C.J. p 227 note 88.

56. Cal.—Rapaport v. Forer, 66 P. 2d 1242, 20 Cal.App.2d 271.
Mo.—Curd v. Reaban, 232 S.W.2d 389.
51 C.J. p 227 note 89.

57. Ala.—Wise v. Massee, 196 So. 275, 239 Ala. 559.
Pa.—Cheesman v. Yurkanin, Com.Pl., 41 Luz.Leg.Reg. 169.

Under statute requiring bill to describe land with certainty
(1) Bill must describe lands with certainty sufficient to identify them, not only at present time, but always. —Davidson v. Blackwood, 34 So.2d 205, 250 Ala. 363—Wise v. Massee, 196 So. 275, 239 Ala. 559—Ingo v. Demouey, 25 So. 228, 122 Ala. 169.

(2) Descriptions held insufficient. —Wise v. Massee, supra—51 C.J. p 227 note 91 [a] (1).

58. Ga.—Spence v. Brown, 32 S.E.2d 297, 198 Ga. 566.
Mo.—Hartvedt v. Harpst, 173 S.W.2d 65.
51 C.J. p 227 note 90.

59. Cal.—Pereira Farms Corp. v. Siman, 230 P. 976, 69 Cal.App. 159.
51 C.J. p 227 note 91.

Descriptions held insufficient
Cal.—Rapaport v. Forer, 66 P.2d 1242, 20 Cal.App.2d 271.
51 C.J. p 227 note 91 [a] (2).

Equitable title
The rule of law requiring descriptions of realty to be definite in suits to maintain title is not applicable in suit involving purely equitable title. —Sweeney v. Sweeney, 25 N.E.2d 273, 107 Ind.App. 466.

Island
In action to quiet title to realty described in petition as an island, etc., it was not necessary for plaintiff to define the word "island."—Hartvedt v. Harpst, Mo., 173 S.W. 2d 65.

60. U.S.—Goldsmith v. Gilliland, C. C.Or., 22 F. 865, 10 Sawy. 606.

61. Cal.—Wagner v. Blume, 161 P.2d 1001, 71 Cal.App.2d 94.
51 C.J. p 228 note 93.

Location of lines on ground
A petition, sufficiently describing land to permit location of lines thereof on ground, will support judgment quieting petitioner's title thereto.—Baker v. Brown, 111 S.W.2d 1036, 271 Ky. 93.

Greater particularity is required in description of land in complaint, such as complaint in bill to quiet title, than in deeds, so that officer in executing judgment or decree can do so without exercise of discretion, but officer can look to existing things, such as recorded instruments, maps, monuments, and other objects which may be looked to as data furnished by description itself. Puryear v. Smith, 173 So. 17, 233 Ala. 505.

Description held sufficient
Ala.—Puryear v. Smith, supra.
Cal.—Anderson Cottonwood Irr. Dist. v. Zinzer, 135 P.2d 52, 51 Cal.App. 2d 587.
Ky.—Baker v. Brown, 111 S.W.2d 1036, 271 Ky. 93.
Mo.—Bragg v. Ross, 139 S.W.2d 491.
Tex.—Postal Savings & Loan Ass'n v. Powell, Civ.App., 47 S.W.2d 313, error refused.
51 C.J. p 228 note 93 [a].

62. Cal.—Wagner v. Blume, 161 P. 2d 1001, 71 Cal.App.2d 94.
Tex.—Kelly v. Howard, Civ.App., 94 S.W. 379.

§ 65. —— Offering to Do Equity

Although in statutory actions to quiet title the plaintiff in his bill or complaint may not be required to offer to do equity, the general rule in equity that plaintiff in his bill must offer to do equity applies to bills to remove clouds on title.

Although in statutory actions to quiet title plaintiff in his bill or complaint may not be required to offer to do equity,[63] the general rule in equity that plaintiff in his bill must offer to do equity applies to bills to remove clouds on title.[64] Accordingly, when the object of the action is the removal of a cloud on plaintiff's title, which is created by a contract or agreement executed by him, he must expressly offer in his bill to do equity by restoring or repaying whatever he may have received under the contract or agreement sought to be canceled.[65]

Sufficiency of offer. While better pleading demands a direct and unconditional offer to repay such sums as plaintiff must pay as a condition of relief,[66] an offer by plaintiff to pay defendant whatever sum may be due on account of the matters set forth in the bill is a substantial offer to do equity and is sufficient.[67]

§ 66. —— Prayer for Relief

Ordinarily there should be an express prayer that plaintiff's title be quieted, and for an injunction or such other appropriate relief as may be desired.

Ordinarily there should be an express prayer that plaintiff's title be quieted,[68] and for an injunction or such other appropriate relief as may be desired,[69] but a specific prayer to cancel instruments or claims is not necessary,[70] and, where the bill contains a special prayer for relief to which plaintiff is not entitled, such prayer may be disregarded.[71] Subject to the rule of multifariousness a bill for statutory relief may be joined with a prayer for other relief.[72] So it has been held that, when an action to quiet title lies at the instance of one not in possession, a prayer to recover possession may be united with a prayer that the cloud on title be removed,[73] and in a bill under the statute to quiet title a special prayer not in accordance with the statute will not destroy the equity of the bill.[74] However, issues tendered by a complaint cannot be extended beyond their natural import by anything contained in the prayer,[75] since the prayer for relief cannot be more extensive than the facts alleged in the body of the complaint.[76] Where the bill deraigns title in complainant and alleges the existence of a hostile claim in defendants, constituting a cloud on title, and follows such allegations with a prayer for relief which, although general in its terms, specifically prays relief against the clouds or other matters previously alleged, the bill is sufficient, notwithstanding the absence of a specific enumeration in the prayer of the particular clouds against which relief is sought,[77] although the ordinary or conventional prayer for "general relief" which usually forms the conclusion of the prayer to bills in chancery will not alone satisfy this rule.[78]

63. Ala.—Grayson v. Roberts, 156 So. 552, 229 Ala. 245.
51 C.J. p 228 note 98 [a].

64. Ill.—Abramowitz v. Langknecht, 195 Ill.App. 484.
Mont.—Frisbee v. Coburn, 52 P.2d 882, 101 Mont. 58.
51 C.J. p 228 note 98.
Offer in bill to quiet title or remove cloud caused by tax deed, see the C.J.S. title Taxation § 990, also 51 C.J. p 228 notes 99–2, 61 C.J. p 1443 note 44 et seq.

Dower agreement
In suit to have agreement between husband and wife purporting to keep alive wife's inchoate right of dower in husband's realty, notwithstanding subsequent absolute divorce decree, declared void, wherein wife claimed that husband induced wife to change her position to her prejudice, complaint, in view of allegation that wife had refused to release for its present cash value her inchoate right of dower, was not demurrable for failure to offer to do more equity. —Manton v. Manton, 50 A.2d 181, 72 R.I. 241.

Satisfaction of judgment
A complaint, in an action to quiet title, by one claiming under a second execution sale, alleging the invalidity of the first execution sale, was not objectionable because complainant did not offer to accept the amount of her judgment, since it had already been satisfied to the extent of the amount bid by the judgment creditor, and whatever title the debtor had passed by the sheriff's deed.—Worthington v. Miller, 32 So. 748, 134 Ala. 420.

65. Kan.—Corpus Juris cited in Fitch v. United Royalty Co., 55 P.2d 409, 414, 143 Kan. 486.
51 C.J. p 228 note 98.

66. Ala.—New England Mortg. Security Co. v. Powell, 12 So. 55, 97 Ala. 483.

67. Ala.—New England Mortg. Security Co. v. Powell, supra.
51 C.J. p 228 note 4.

68. U.S.—Kennedy v. Elliott, C.C. Wash., 85 F. 832.
51 C.J. p 229 note 6.

69. Ala.—McDonald v. Birmingham Trust & Savings Co., 194 So. 839, 239 Ala. 369.
51 C.J. p 229 note 7.

70. Cal.—Fay v. Norquist, 140 P. 2d 141, 60 Cal.App.2d 218.
Miss.—Norton v. Graham, 187 So. 510, 185 Miss. 164, suggestion of error overruled 188 So. 314, 185 Miss. 164.

71. Ala.—Davis v. Daniels, 85 So. 797, 204 Ala. 374.
51 C.J. p 270 note 37.

72. Ala.—Cooper v. W. P. Brown, etc., Lumber Co., 108 So. 20, 214 Ala. 400.

73. Iowa.—Lees v. Wetmore, 12 N. W. 238, 58 Iowa 170.

74. Ala.—Stacey v. Jones, 60 So. 823, 180 Ala. 231.
51 C.J. p 229 note 11.

75. Idaho.—Carns v. Idaho-Iowa Lateral, etc., Co., 202 P. 1071, 34 Idaho 330.
Ky.—Asher v. G. F. Stearns Land & Lumber Co., 43 S.W.2d 1012, 241 Ky. 292.

76. Ky.—Asher v. G. F. Stearns Land & Lumber Co., supra.

77. Fla.—Hinely v. Wilson, 109 So. 468, 91 Fla. 815.

78. Fla.—Hinely v. Wilson, supra.

Where service constructive. If service on defendant was not personal, but by publication alone, it has been held that the complaint must set out exactly the relief sought.[79]

§ 67. Plea or Answer in General

a. General rules
b. Denials
c. Admissions
d. Particular defenses

a. General Rules

A person against whom a suit to quiet title is brought is entitled to appear and answer; and the plea or answer must state a defense and conform to rules of pleading generally.

A person against whom a suit to quiet title is brought is entitled to appear and answer;[80] and the answer ordinarily must be made by the party required to answer.[81] There must be a compliance with statutory provisions with respect to answers,[82] such as provisions as to what the answer shall contain[83] and within what time it must be made.[84]

In accordance with the rules governing pleas and answers in civil actions generally, discussed in Pleading §§ 99–120, and in equity proceedings generally, discussed in Equity §§ 301–360, the answer must state facts sufficient to constitute a defense,[85] and each defense pleaded must be complete in itself.[86] However, the answer is not required to contain affirmative defenses as to matters not specifically pleaded by plaintiff.[87]

The allegations must be clear and definite,[88] and specific,[89] and, likewise, the allegations

79. Ohio.—Lamb v. Boyd, 4 Ohio Cir.Ct. 499, 2 Ohio Cir.Dec. 672.

80. Colo.—Mulvey v. San Juan Metals Corporation, 75 P.2d 1044, 102 Colo. 1.

Right held not waived

One appearing in response to a published summons addressed to unknown persons in an action to quiet title does not waive his statutory right to appear and answer by an attempted compliance with an erroneous order of the court striking his answer and requiring him to intervene.—Mulvey v. San Juan Metals Corporation, supra.

81. Cal.—Los Angeles First Nat. Trust & Savings Bank v. Northrup, 8 P.2d 528, 120 Cal.App. 677.

Answer held unauthorized

In vendor's action to quiet title, defendants claiming as assignees of purchaser were held not authorized to answer for such purchaser, and such pleading was a nullity.—Los Angeles First Nat. Trust & Savings Bank v. Northrup, supra.

Answer by grantee

Where vendors executed title bonds to three purchasers of land and after purchase price was paid land was conveyed to one purchaser with understanding that he should execute a deed to a part of the tract in favor of copurchaser, and purchaser did not execute deed but copurchaser took possession of part of tract and placed tenant on it and exercised possession of it until he sold it, and, in suit to quiet title by purchaser's heirs, copurchaser failed to answer, copurchaser's grantees were entitled to answer and make such claims to tract in question as copurchaser could have made.—Swaner v. Nash, 156 S.W.2d 852, 288 Ky. 485.

82. Idaho.—Venus Foods v. District Court of Eleventh Judicial Dist. in and for Twin Falls County, 181 P.2d 775, 67 Idaho 390.

83. Ala.—Kinney v. Steiner, 42 So. 25, 149 Ala. 104.

84. Idaho.—Venus Foods v. District Court of Eleventh Judicial Dist. in and for Twin Falls County, 181 P.2d 775, 67 Idaho 390.

Suspension pending disposition of motion

Original time within which defendant was required to answer was suspended until motion to quash service of summons was disposed of, but defendant, if motion were denied, ran hazard of being in default if not then answering within time required and thus becoming subject to the challenged jurisdiction.—Venus Foods v. District Court of Eleventh Judicial Dist. in and for Twin Falls County, supra.

85. Cal.—Neher v. Kauffman, 242 P. 713, 197 Cal. 674.
51 C.J. p 232 note 6.

Answers held sufficient

Ark.—Fink v. Magness, 98 S.W.2d 958, 193 Ark. 221.
Minn.—Tappan v. Joslyn, 221 N.W. 224, 180 Minn. 480.
Okl.—McLennon v. Deaver, 223 P.2d 355.
51 C.J. p 232 note 6 [c].

Answers held insufficient

(1) In general.—Lowe v. Sory, 111 P.2d 1054, 107 Colo. 241—51 C.J. p 232 note 6 [d].

(2) In quiet title action, defendant abandoned interest in land, thereby conceding plaintiff's right to judgment, by claiming damages and alleging that state destroyed value of gas and oil lease by curtailing production.—Martin v. Hall, 36 P.2d 285, 219 Cal. 324.

(3) In quiet title action by husband whose wife and children, after his absence for more than seven years, had conveyed his land, paragraph in purchaser's answer setting forth such facts, alleging that purchaser became the owner by purchase from husband's son for a valuable and adequate consideration in cash, was demurrable.—Kinnett v. Abrell, 121 S.W.2d 699, 275 Ky. 276.

86. Colo.—Weston v. Estey, 45 P. 367, 22 Colo. 334—Dodge v. Millett, 127 P. 247, 23 Colo.App. 64.

87. Cal.—Schroeder v. Wilson, 300 P.2d 173, 89 Cal.App.2d 63.

Instrument not pleaded

In actions to quiet title to real and personal property, where the instrument on which the plaintiff based his claim of title was not pleaded, defendants were not required to allege any affirmative defense thereto.—Schroeder v. Wilson, supra.

88. N.J.—Phillips v. Vermeule, 102 A. 695, 88 N.J.Eq. 500.
51 C.J. p 232 note 8.

Answer held bad

In action to quiet title, defendant's answer was bad for uncertainty, ambiguity, and unintelligibility, where it was impossible to tell what right, title, or interest defendant claimed to have in the realty, or whether he claimed title, a lien, or some other interest, or whether he claimed any such interest in the whole or in some part thereof.—California Trust Co. v. Gustason, 101 P.2d 74, 15 Cal.2d 268.

89. N.Y.—Weiskopf v. City of Saratoga Springs, 279 N.Y.S. 878, 241 App.Div. 417, reversed on other grounds 200 N.E. 32, 269 N.Y. 624.

Answer held insufficient

In action by property owner to vacate a municipal assessment as cloud on title, defense of plaintiff's failure to comply with charter and statute was held insufficient where there was no reference in the answer to par-

must be relevant[90] and material,[91] and should state facts and not conclusions of law.[92] Matters alleged in the petition or complaint need not be set forth in the answer.[93] Ordinarily defendant should specially plead matters in confession and avoidance of the complaint,[94] although, as discussed infra § 75 c, it has been held in some jurisdictions that all defenses may be shown under a general denial.

A plea may be to the whole bill or to some distinct portion thereof.[95] Where the allegations of the plea, being taken as true, do not, as far as it purports to go, make a full and complete defense,[96] or where the necessary facts are to be gathered by inference alone,[97] it will not be sustained. It must be perfect in itself, so that if true, it will make an end of the case[98] or of that part of the case to which it applies.[99] If a plea is directed to a part of the bill it must definitely and exactly express to what part it extends;[1] and if the plea undertakes to answer the whole bill, but extends only to a part thereof, it is bad.[2]

Demurrers to answers are discussed infra § 73 a.

Description of land. A description in the answer by which the land may be identified by a competent surveyor with reasonable certainty, either with or without extrinsic evidence, is sufficient.[3] Where the statute requires that the answer describe the land claimed so that it may be identified, an answer which claims the whole land in controversy is sufficient where the petition contains a particular description.[4] However, if defendant claims only a part of the land in dispute, the answer must so describe such part that it may be identified;[5] but such requirement is mandatory only in the event that defendant is seeking affirmative relief.[6] It has been held that, where defendant claims a portion of the tract to which plaintiff asserts title, an answer accurately describing that portion, which includes a part inclosed by defendant, is sufficient to warrant judgment for the inclosed lands.[7]

Affirmative relief. It has been held that in a proper case an answer may contain a plea for affirmative relief.[8] Where it is an admitted fact that defendant is the record owner in fee of the property in issue, an answer containing general allegations of ownership by defendant is sufficient to authorize the granting of affirmative relief.[9] It has been held that, since the parties are already before the court, defendant is not required to file a lis pendens and obtain a proper summons before he can assert a request for affirmative relief by partition of the property involved.[10]

Partial defenses. An answer which does not deny plaintiff's title, but sets up that defendant has an easement in the land, is good as a partial defense to the action.[11] So an answer which confesses that the fee is in plaintiff may pro tanto defeat the action where, by appropriate and adequate averments, it sets forth that defendant holds a lien;[12] that is to say, it may at least secure a lienhold and provision in the decree, reserving, protecting, or enforcing his lien.[13] However, this rule cannot apply

ticular charter provision or statute. —Weiskopf v. City of Saratoga Springs, supra.

90. Colo.—Lewis v. Weitbrec, 143 P. 1037, 58 Colo. 147.
51 C.J. p 232 note 9.

91. Conn.—Hartford-Connecticut Trust Co. v. Cambell, 111 A. 864, 95 Conn. 399.
51 C.J. p 232 note 10.

92. U.S.—Crocker v. Ingersoll Engineering & Constructing Co., D.C. Mich., 205 F. 99, reversed on other grounds 228 F. 844, 143 C.C.A. 242.
51 C.J. p 232 note 11.

Pleading effect of statute held unnecessary
Conn.—Robinson v. Meyer, 68 A.2d 142, 135 Conn. 691.

93. Iowa.—Chicago, etc., R. Co. v. Sioux City Stockyards Co., 158 N. W. 769, 143 N.W. 560, 176 Iowa 659.

94. Ind.—Bunch v. Bunch, 26 Ind. 400.

95. Ill.—Snow v. Counselman, 26 N. E. 590, 136 Ill. 191.

96. Fla.—Harvey v. Morgan, 51 So. 140, 58 Fla. 427.
Ill.—Gage v. Smith, 31 N.E. 430, 142 Ill. 191.

97. Fla.—Harvey v. Morgan, 51 So. 140, 58 Fla. 427.
Ill.—Gage v. Smith, 31 N.E. 430, 142 Ill. 191.

98. Ill.—Gage v. Smith, supra.

99. Ill.—Gage v. Smith, supra.

1. Ill.—Snow v. Counselman, 26 N. E. 590, 136 Ill. 191.

2. Ill.—Snow v. Counselman, supra.
51 C.J. p 232 note 5.

3. Or.—McMaster v. Ruby, 157 P. 782, 80 Or. 476.

4. Ky.—Kirk v. Cassady, 288 S.W. 1045, 217 Ky. 87—Paducah Cooperage Co. v. Paducah Veneer, etc., Co., 121 S.W. 986, 135 Ky. 53.

5. Ky.—Harmon v. Lowe, 219 S. W.2d 932, 310 Ky. 60.
51 C.J. p 233 note 19.

6. Ky.—Harmon v. Lowe, supra.

7. Ky.—Foster v. Roberts, 201 S.W. 834, 179 Ky. 752.

8. Ky.—Hopkins v. Slusher, 98 S. W.2d 932, 266 Ky. 300, 103 A.L.R. 662.
Necessity of cross complaint for affirmative relief see infra § 70 a.

Answer held sufficient
Prayer in defendant's answer in quiet title suit that he ought to recover land from plaintiff, because he himself was also the owner of it and asking for "all proper relief," was held sufficient to entitle court to adjudge defendant owner of the land involved if evidence justified it. —Hopkins v. Slusher, 98 S.W.2d 932, 266 Ky. 300, 103 A.L.R. 662.

9. Cal.—Hough v. Wright, 16 P.2d 301, 127 Cal.App. 689.

Facts and evidence of ownership need not be pleaded in such case.—Hough v. Wright, supra.

10. Cal.—Munden v. Hayes, 202 P. 2d 112, 89 Cal.App.2d 772.

11. Ind.—Messick v. Midland R. Co., 27 N.E. 419, 128 Ind. 81.

12. Ind.—Manifold v. Jones, 20 N.E. 124, 117 Ind. 213.

13. Ind.—Manifold v. Jones, supra.

where the answer confesses that the fee is in plaintiff, and does no more than show that a stranger to the action holds an outstanding lien.[14]

Joinder and consolidation of defenses; inconsistent defenses. The general rule allowing several defenses to be pleaded, discussed in Pleading §§ 121–129, applies to actions to quiet title.[15] The fact that defendant's right to relief arose after the complaint was filed does not support a claim of misjoinder of defenses, where there is no repugnance or inconsistency in the several grounds of defense, the new matter pleaded affects all the parties and no others, and the transaction out of which defendant's right to relief arose is connected with the subject matter of the action.[16] So allegations of tax title and the facts by which it was acquired, in one defense in an answer, are in no wise inconsistent with a claim of title antecedent to it, and do not qualify the allegation of such antecedent title in a previously stated separate defense.[17] In jurisdictions where inconsistent defenses are allowed, defendant in an action to quiet title to a right of way may set up the defense that plaintiff's use of the way is merely permissive, and also that the right of way is a public highway, although such defenses are inconsistent.[18]

If certain defenses, repeated in separate denials of the answer, are, in substance, specifications of sources of title, the court may properly order them consolidated, and hence commits no error in merely striking the repetition of the denials.[19]

b. Denials

Ordinarily a denial of a material allegation of the bill or complaint is sufficient to raise an issue.

Ordinarily a denial of a material allegation of the bill or complaint is sufficient to raise an issue.[20] Under this rule a denial of plaintiff's title[21] or possession[22] is sufficient, without any affirmative allegation of title in defendant,[23] although an affirmative allegation which necessarily asserts that the allegation of the complaint is untrue is also a sufficient denial to raise an issue.[24] In some jurisdictions, however, it has been held that, in order to constitute a defense, defendant must set up some claim to, or interest in, the property,[25] and that, while a defense asserting an adverse title or claim, but containing no denials, is sufficient,[26] an answer consisting only of denials, or of denials and admissions, is insufficient.[27]

An argumentative denial,[28] or a denial in the form of a negative pregnant,[29] is insufficient, as is a denial of a mere conclusion of law.[30]

Matters not in bill. A defendant who claims protection as a bona fide purchaser without notice must deny such notice, although not distinctly alleged in the complaint;[31] and the pleader must deny fully, in the most precise terms, every circumstance from which notice could be inferred.[32]

c. Admissions

A defendant is bound by facts admitted in his answer or by material allegations of the complaint which he did not deny.

A defendant is bound by facts admitted in his answer.[33] Thus a direct admission that plaintiff is in possession binds defendant;[34] and the binding force of such admission is not avoided by a special averment that plaintiff obtained possession by fraud.[35] However, the admissions of one of several defendants are not binding on the other defendants.[36]

14. Ind.—Manifold v. Jones, supra.
15. Kan.—Flint v. Dulany, 15 P. 208, 37 Kan. 332.
Minn.—Branham v. Bezanson, 21 N. W. 861, 33 Minn. 49.
16. Kan.—Flint v. Dulany, 15 P. 208, 37 Kan. 332.
17. Minn.—Branham v. Bezanson, 21 N.W. 861, 33 Minn. 49.
18. Cal.—Costello v. Sharp, 223 P. 567, 65 Cal.App. 152.
19. Conn.—Dawson v. Orange, 61 A. 101, 78 Conn. 96.
20. Cal.—Butterfield v. Graves, 71 P. 510, 138 Cal. 155.
51 C.J. p 233 note 22.
21. Cal.—Martin v. Hall, 26 P.2d 288, 219 Cal. 334—Coons v. Thompson, 171 P.2d 443, 75 Cal.App.2d 687.
51 C.J. p 233 note 23.
22. Cal.—Martin v. Hall, 26 P.2d 288, 219 Cal. 334.
51 C.J. p 233 note 24.
23. Cal.—Johnson v. Baker, 139 P. 86, 167 Cal. 260.
51 C.J. p 233 note 25.
24. Cal.—Trozera v. McDonell, 21 P.2d 706, 131 Cal.App. 473.
Allegation of ownership in defendant Answer that defendants claimed interest in realty involved, denial that claims were without right, and allegation that defendants were fee-simple owners thereof were held to raise issue and make necessary evidence to support findings for plaintiffs.—Trozera v. McDonell, supra.
25. Colo.—McMillan v. Hayman, 221 P. 893, 74 Colo. 300.
51 C.J. p 233 note 26.
26. Colo.—Empire Ranch, etc., Co. v. Webster, 121 P. 171, 52 Colo. 207.
51 C.J. p 233 note 27.
27. Colo.—McMillan v. Hayman, 221 P. 893, 74 Colo. 300.
51 C.J. p 233 note 28.
28. Ohio.—Watterson v. Ury, 5 Ohio Cir.Ct. 347, 3 Ohio Cir.Dec. 171.
29. Colo.—McLaughlin v. Wilson, 127 P. 242, 23 Colo.App. 59.
30. Ohio.—Baldwin v. Rees, 8 Ohio Dec., Reprint, 869, 8 Am.L.Rec. 556
31. Neb.—Dailey v. Kinsler, 53 N.W. 973, 35 Neb. 825.
32. Neb.—Dailey v. Kinsler, supra.
33. Ariz.—Dunbar v. Moralesha, 178 P. 777, 20 Ariz. 178.
51 C.J. p 233 note 35.
34. Cal.—Reed v. Calderwood, 32 Cal. 109.
35. Cal.—Reed v. Calderwood, supra.
36. Minn.—Union Central Life Ins. Co. v. Page, 251 N.W. 911, 190 Minn. 360.

Material allegations of the complaint,[37] such as plaintiff's title[38] or possession,[39] if not denied when susceptible of a denial, stand admitted. Where defendant files a cross bill praying possession, he thereby admits that possession is in plaintiff.[40] If plaintiff alleges title by devise, and the answer contains only a general denial, the effect of the answer is to admit that plaintiff acquired such interest in the land as the devisor had at the time of his death.[41]

Construction. The statutory rule in some jurisdictions that pleadings shall be liberally construed in determining their effect applies in determining whether or not an admission has been made in the answer.[42]

d. Particular Defenses

Various defenses, including the defense that the defendant has title to the land, must be specially pleaded in the answer.

Various defenses are required to be specially pleaded;[43] and equitable defenses must be specifically pleaded.[44] Thus, where defendant seeks to avail himself of the defense that an adequate remedy at law exists,[45] or that the conveyance which plaintiff pleads as the basis of his title is fraudulent,[46] he must plead such defense in his answer; and, where it does not appear on the face of the complaint that the action is barred by limitations, the question can be presented only by answer.[47] However, in case of gross laches the court will refuse to entertain the suit, although defendant does not plead such defense in his answer.[48]

Title in defendant. Where defendant relies on the defense that title to the land is in him, he must set up such defense by appropriate allegations in his answer.[49] Any language which sets forth facts which show a good title in defendant, and which, by fair and reasonable construction, imports a denial of plaintiff's title and right of possession, is sufficient,[50] and defendant need not recite all the evidence by which his ownership is to be established,[51] or set forth the source of his title,[52] unless the statute so requires, either expressly[53] or by implication.[54] An answer which, without denying plaintiff's title, sets up an easement in the land as a full defense to the cause of action is bad.[55]

Generally, defendant, in order to avail himself of an equitable title as against plaintiff's legal title, should specifically plead it,[56] although in some jurisdictions a contrary rule obtains.[57] An answer setting up an equitable interest under a contract should allege the fairness of the contract and the adequacy of the consideration;[58] and, where the contract is one of sale, an answer which contains no statement of facts showing performance of conditions precedent by defendant, or excuse for nonperformance, fails to state a defense.[59]

37. Ala.—Vandergrift v. Shortridge, 61 So. 897, 181 Ala. 275.
Cal.—Harris v. Harris, 88 P. 384, 7 Cal.A.Unrep.Cas. 319.

38. Miss.—Bennett v. Chaffe, 13 So. 731, 69 Miss. 279.
Or.—Stanley v. Topping, 143 P. 632, 71 Or. 590.

39. Or.—Slater v. Reed, 60 P. 709, 37 Or. 274.
51 C.J. p 233 note 40.

40. U.S.—Collier v. Goessling, Tenn., 160 F. 604, 87 C.C.A. 506, certiorari denied 30 S.Ct. 899, 215 U.S. 596, 54 L.Ed. 342.

41. Ark.—Shirk v. Williamson, 9 S.W. 307, 50 Ark. 562.

42. Mo.—Long v. Lackawanna Coal, etc., Co., 136 S.W. 673, 233 Mo. 713.
51 C.J. p 233 note 44.

43. Wis.—Kimball v. Baker Land, etc., Co., 140 N.W. 47, 152 Wis. 441.

44. Cal.—Davis v. Perry, 8 P.2d 514, 120 Cal.App. 670.
Grantee as grantor's alter ego
Equitable defense that corporate grantee in action to quiet title was grantor's alter ego must be specifically pleaded.—Davis v. Perry, supra.

45. N.Y.—Nickerson v. Canton Marble Co., 54 N.Y.S. 705, 35 App.Div. 111.
Wis.—Kimball v. Baker Land, etc., Co., 140 N.W. 47, 152 Wis. 441.

46. Cal.—Strong v. Strong, 140 P.2d 386, 22 Cal.2d 540—Whitney v. Sherman, 173 P. 931, 178 Cal. 435.

47. Cal.—Brusie v. Gates, 22 P. 284, 80 Cal. 462.

48. D.C.—Mayse v. Gaddis, 2 App. D.C. 20.

49. U.S.—Corpus Juris cited in Playa De Flor Land & Improvement Co. v. U. S., D.C.Canal Zone, 70 F.Supp. 281, 356.
Ala.—Throckmorton v. City of Tuscumbia, 23 So.2d 547, 247 Ala. 209.
51 C.J. p 234 note 45.

50. Colo.—Dodge v. Millett, 127 P. 247, 23 Colo.App. 64.
51 C.J. p 234 note 46.
Denial as to part of property
In action to recover possession of, and quiet title to, realty wherein plaintiff alleged ownership of five lots by virtue of warranty deed, answer containing general denial but admitting plaintiff's ownership and possession of one lot and claiming ownership of others, stating that defendants were in possession and seeking to have title quieted thereto, was sufficient.—Welch v. Ruby, 198 P.2d 432, 200 Okl. 586.

51. Colo.—Clark v. Huff, 112 P. 542, 49 Colo. 197.
51 C.J. p 234 note 47.

52. Cal.—Tilton v. Russek, 154 P. 860, 171 Cal. 731—Peterson v. Plunkett, 88 P. 283, 4 Cal.App. 302.

53. Ala.—Reeder v. Cox, 118 So. 338, 218 Ala. 182.
51 C.J. p 234 note 49.

54. N.Y.—Hooper v. New York, 160 N.Y.S. 14, 96 Misc. 47.

55. Ind.—Messick v. Midland R. Co., 27 N.E. 419, 128 Ind. 81.

56. Cal.—United Land Assoc. v. Pacific Impr. Co., 69 P. 1064, 72 P. 988, 139 Cal. 370, affirmed 23 S.Ct. 569, 203 U.S. 614, 52 L.Ed. 645.
51 C.J. p 234 note 52.

57. Mo.—Noble v. Cates, 130 S.W. 302, 230 Mo. 189.

58. Cal.—Williams v. Rush, 25 P.2d 888, 134 Cal.App. 554—Archer v. Miller, 239 P. 92, 73 Cal.App. 678.

59. N.M.—Corpus Juris quoted in Dunken v. Guess, 56 P.2d 1123, 1125, 40 N.M. 156.
51 C.J. p 234 note 55.

Where the allegations of title in defendant are uncertain and indefinite, the remedy is by motion to make the answer more definite and certain,[60] and not by a request for a bill of particulars[61] or by an objection to the introduction of evidence.[62]

Adverse claim. It has been held that, in statutory proceedings to determine adverse claims, defendant, relying on an adverse claim in himself, must plead the nature of his claim,[63] although the claim need not be set forth at length where this has already been done in the complaint.[64]

On the other hand, it has been held that an answer denying plaintiff's ownership and right of possession and admitting that defendant claims some interest in the property is sufficient, without setting forth the nature of defendant's claim.[65]

Adverse possession. Where defendant pleads title in himself by adverse possession, the facts stated must be sufficient to constitute such defense;[66] and an answer purporting to set up the defense that defendant was in adverse possession of the lands when plaintiff took conveyance is bad for failure to aver that defendant entered, believing in good faith that he had title.[67] If the answer specifically denies plaintiff's ownership, and alleges title in defendant by adverse possession, it need not be accompanied by a plea that the action is barred by the statute of limitations.[68]

§ 68. Disclaimer

a. In general
b. Operation and effect

a. In General

Where the defendant does not claim an adverse interest he should appear and file a disclaimer, which consists of a denial of insistence on any claim or right in the property.

Where defendant, in a proceeding to quiet or remove a cloud from title, does not in fact claim any adverse interest, he should appear and file a disclaimer,[69] the purpose of which ordinarily is to save defendant from liability for costs.[70] A disclaimer consists of a denial of the insistence on any claim or right in the property, and the renunciation of all claim thereto,[71] and has been held so far to resemble a release or conveyance of the land that, in general, no person can disclaim who is not capable of conveying the land.[72]

In order to be effective, the disclaimer must be absolute and unqualified;[73] and a denial "except as hereinafter stated" is not an absolute disclaimer.[74] On the other hand, it has been held that, where the facts necessary to constitute a cause of action under the statute are the actual possession of the land by plaintiff, and some claim on the part of defendant, adverse to him, of an estate or interest in the land, an answer denying any interest thereunder other than a lien on the land amounts to a disclaimer.[75] It has been held that a disclaimer is a good answer when defendant is out of possession,[76] but that the rule is otherwise where he is in possession and, without denying or yielding possession, simply disclaims title.[77]

Whether a disclaimer is subject to demurrer is considered infra § 73 a.

Disclaimer as to part. If defendant does not claim a part of the land, he should specify in his answer the part disclaimed, and if he fails to do so it has been held that he must be treated as claiming the whole;[78] but it has also held that no formal

60. Iowa.—Pillsbury v. Baldwin, 53 N.W. 278, 86 Iowa 744.
N.Y.—Hooper v. New York, 160 N.Y. S. 14, 96 Misc. 47.
61. N.Y.—Hooper v. New York, supra.
62. Iowa.—Pillsbury v. Baldwin, 53 N.W. 278, 86 Iowa 744.
63. Colo.—Lambert v. Murray, 120 P. 415, 52 Colo. 156.
1 C.J. p 934 note 59.
64. Conn.—Hartford-Connecticut Trust Co. v. Cambell, 111 A. 864, 95 Conn. 399.
65. Cal.—Wayne v. Biedebach, 261 P. 1036, 86 Cal.App. 712.
Cal.—Webber v. Clarke, 15 P. 481, 74 Cal. 11.
C.J. p. 234 note 62.
Ind.—Elliott v. Frakes, 90 Ind. 369.
68. Utah.—Huntsman v. Huntsman, 192 P. 368, 56 Utah 609.
69. Cal.—Baar v. Smith, 255 P. 827, 201 Cal. 87.
51 C.J. p 235 note 85.
Disclaimer generally in:
Civil actions see Pleading § 99.
Equity proceedings see Equity § 260.
70. Ind.—McAdams v. Lotton, 20 N. E. 523, 118 Ind. 1.
Okl.—Moore v. Wallace, 82 P. 825, 16 Okl. 114.
Costs on disclaimer see infra § 111.
71. Or.—Moores v. Clackamas County, 67 P. 662, 40 Or. 536.
"Disclaimer" defined generally see 26 C.J.S. p 1351 notes 76–82.
Answer held to constitute disclaimer
Where complaint alleged that defendant claimed interest in property adverse to plaintiff, answer which denied each and every allegation was disclaimer of any interest in property.—Boone v. Grom, 37 P.2d 1059, 2 Cal.App.2d 284.
72. Ky. Kentucky Union Co. v. Cornett, 88 S.W. 728, 112 Ky. 677, 27 Ky.L. 1022.
73. Okl.—Moore v. Wallace, 82 P. 825, 16 Okl. 114.
51 C.J. p 236 note 89.
74. Or.—Moores v. Clackamas County, 67 P. 662, 40 Or. 536.
75. Minn.—Brackett v. Gilmore, 15 Minn. 245.
51 C.J. p 236 note 91.
76. Ind.—Miller v. Curry, 24 N.E. 319, 274, 124 Ind. 48.
77. Ind.—Miller v. Curry, supra.—McAdams v. Lotton, 20 N.E. 523, 118 Ind. 1.
78. Ala.—Friedman v. Shamblin, 22 So. 831, 117 Ala. 464.

disclaimer is necessary as to that part of the property not claimed by defendant.[79]

Answer with disclaimer. Under some circumstances a disclaimer must be accompanied by an answer in order to make it effective.[80]

b. Operation and Effect

A disclaimer usually operates as an estoppel, and bars any other assertion of the right renounced. It generally entitles the plaintiff, as of course, to a judgment quieting title to the property disclaimed.

A disclaimer by a defendant usually operates as an estoppel, and between the parties and their privies is an absolute bar to any other assertion of the right renounced.[81] While the effect of a disclaimer may be to relieve defendant from liability for costs, as discussed infra § 111, a disclaimer of any interest in the property in issue does not avoid a charge in the complaint as to a matter other than title to the property;[82] and a disclaimer by the principal defendant, after the appearance and filing of a cross bill by another defendant, does not affect the jurisdiction of the court.[83]

Where defendant, who had conveyed the land in controversy, disclaims, plaintiff is charged with notice of the grantee's rights.[84]

Judgment on disclaimer. Where defendant files a disclaimer, it is generally held that plaintiff is entitled as of course to a judgment quieting title to the land disclaimed,[85] without any limitation or qualification in defendant's favor,[86] and notwithstanding defects in the complaint.[87] This is so even though the answer puts in issue material allegations of the complaint;[88] but, as considered infra § 111, in such case the costs ordinarily will not be imposed on defendant. On the other hand, it has been held that, where possession is necessary to sustain the action, plaintiff is not entitled to judgment, even as to the property disclaimed, without proof of possession, if that fact is put in issue.[89] A judgment on disclaimer may be set aside and defendant and his grantees allowed to defend where the disclaimer was made through inadvertence and mistake of fact.[90]

Dismissal. It has been held that, if defendant disclaims, and plaintiff fails to prove any pretension of claim before suit brought, no cause of action is made out, and the suit should be dismissed.[91] So, where plaintiff sues to remove, as a cloud on the title to his homestead, the record of a judgment lien not of itself constituting a cloud on such property, and defendant disclaims any purpose to assert a claim thereon, there is no justiciable issue, and the bill will be dismissed.[92] Where defendant disclaims as to part of the land, the court may dismiss the action as to such part instead of giving plaintiff judgment therefor;[93] and, where one of the defendants disclaims, the action may be dismissed as to him.[94] On the other hand, it has been held that, where the court grants a nonsuit in favor of all defendants, one of whom had expressly disclaimed any interest, the nonsuit as to him is error.[95]

§ 69. Cross Bill, Cross Complaint, or Counterclaim, and Plea or Answer Thereto

Cross pleadings in civil actions generally are treated in Pleading §§ 167-176; and cross plead-

79. Ala.—Smith v. Rhodes, 90 So. 349, 206 Ala. 460.

80. U.S.—McDonald v. McDonald, D. C.Or., 203 F. 724.
51 C.J. p 236 note 96.

81. Ind.—New American Oil, etc., Co. v. Troyer, 76 N.E. 253, 166 Ind. 402, rehearing denied 77 N.E. 739, 166 Ind. 402.
51 C.J. p 236 note 99.

82. Ind.—Anderson v. Moise, 63 N.E. 2d 303, 116 Ind.App. 240.

Failure to account for money collected

Defendant, in action to quiet title to realty and for injunction against interference with plaintiff's possession thereof and for an accounting of rents collected, by disclaiming any interest in the involved realty, could not thereby avoid charge in complaint that he had collected money belonging to plaintiff and not properly accounted for it.—Anderson v. Moise, supra.

83. Neb.—Rakow v. Tate, 140 N.W. 162, 93 Neb. 198.

84. Mass.—Weld v. Clarke, 95 N.E. 651, 209 Mass. 9.
51 C.J. p 236 note 2.

85. Mo.—Burgess v. Magers, 24 S. W.2d 1042.
51 C.J. p 236 note 3.

Disclaimer as to part

Where defendant expressly disclaimed any interest in one portion of the realty claimed by plaintiff in action to quiet title, and asserted no interest or claim with respect to another portion of the realty, plaintiff's title should be quieted as against any claim of defendant as to those portions of the realty.—Rushton v. Borden, 199 P.2d 101, 29 Wash.2d 321.

86. Neb.—Wilson v. Neligh, 193 N. W. 704, 110 Neb. 266.

87. Cal.—Fudickar v. East Riverside Irr. Dist., 41 P. 1024, 109 Cal. 29.

88. Minn.—Donohue v. Ladd, 17 N. W. 381, 31 Minn. 244.
51 C.J. p 237 note 6.

89. Cal.—Brooks v. Calderwood, 84 Cal. 563.
Necessity of:
Possession to sustain action see supra §§ 26-31.
Proving possession generally see infra § 75 b (3).

90. Cal.—Underwood v. Underwood, 25 P. 1065, 87 Cal. 523.

91. N.Y.—Davis v. Read, 65 N.Y. 566.
51 C.J. p 237 note 11.

92. U.S.—Westman v. James B. Clow & Sons, D.C.Tex., 38 F.2d 124.
51 C.J. p 237 note 12.

93. Cal.—Packer v. Doray, 24 P. 118, 93 Cal. 315.—Martin v. Stockton, 179 P. 894, 39 Cal.App. 552.

94. Cal.—Jeffords v. Young, 239 P. 1054, 197 Cal. 224.

95. Cal.—Parker v. Swett, 180 P. 251, 40 Cal.App. 68.

ings in equity proceedings generally are discussed in Equity §§ 370–389.

Examine Pocket Parts for later cases.

§ 70. —— Cross Bill or Cross Complaint and Answer Thereto

a. In general
b. Sufficiency of cross pleading
c. Pleadings in reply to cross pleading

a. In General

Where the defendant seeks affirmative relief, as where he seeks to have title quieted in himself, it is generally, although not universally, necessary or proper for him to file a cross pleading; but such cross pleading can generally be sustained only as to matters germane to those of the original bill.

It has been held that, where defendant relies on his own title and the relief demanded by him can be had on the averments of his answer, a cross bill or cross complaint is unnecessary,[96] and, if filed, may be stricken,[97] or may be treated as a mere answer containing affirmative matter.[98] However, where defendant seeks affirmative relief,[99] such as the enforcement of a mortgage or other lien against the property,[1] his right to file a cross complaint is recognized, especially where the relief sought is not obtainable on his answer,[2] and it has been held that only where defendant seeks affirmative relief,[3] outside the scope and purpose of a statutory proceeding to quiet title,[4] is a cross bill necessary or proper. So, where defendant asserts a superior title in himself and seeks to have such title quieted, he must,[5] or, at least, may,[6] file a cross complaint or a counterclaim in the nature thereof; and it has been held that where defendant's pleading asserts title in himself and seeks affirmative relief such pleading is,[7] or will be treated as,[8] a counterclaim, notwithstanding it is designated merely an answer.[9]

The rule that an original bill to quiet title cannot be maintained unless plaintiff is in possession, discussed supra §§ 26–31, does not require posses-

96. Cal.—Larkin v. Shasta County Super. Ct., 154 P. 841, 171 Cal. 719, Ann.Cas.1917D 670.
51 C.J. p 237 note 17.
Propriety and necessity of cross bills in equity proceedings generally see Equity §§ 371–376.

Under statute so providing, petition in nature of cross bill need not be filed, and "defendant may set up in his answer any matter which, under the English practice, should be the subject of a cross bill;" and under such statute, in action by holder of a senior deed to cancel a junior recorded deed as cloud on title on ground that grantee had notice of existence of senior deed, answer of grantee in junior deed, denying averments as to notice or knowledge of senior deed and alleging that holder of senior deed had no title in land, and praying that his deed be canceled, was not purely defensive in nature, but sought affirmative relief against plaintiff as in a cross-action. —Terry v. Ellis, 7 S.E.2d 282, 189 Ga. 698.

Defendant seeking partition
In quiet title action, defendant had right to ask affirmative relief of partition without filing a formal cross complaint.—Munden v. Hayes, 202 P.2d 112, 89 Cal.App.2d 772.

Particular cross complaint held unnecessary
Where a single pleading denominated "answer and cross complaint" was filed by defendant in quiet title suit and portion of pleading under heading "answer" alleged ultimate facts, while the portion called "cross complaint" went more into detail in alleging probative facts, and prayer in pleading asked for nothing which could not be given under answer if it stood alone, cross complaint was unnecessary.—Crofton v. Young, 119 P.2d 1003, 48 Cal.App.2d 452.

97. Cal.—Miller v. Luco, 23 P. 195, 80 Cal. 257—Keller v. McGilliard, 90 P. 483, 5 Cal.App. 395.

98. Cal.—Booth v. Stow, 171 P. 705, 38 Cal.App. 191.
51 C.J. p 237 note 19.

99. Conn.—Hartford-Connecticut Trust Co. v. Cambell, 111 A. 864, 95 Conn. 399.
51 C.J. p 237 note 20.

Rescission
Where grantors to whom grantees had reconveyed land sought to quiet title thereto after grantees filed notice of rescission as to their deed of reconveyance, customary practice would be for defendant grantees to have filed a cross complaint for rescission on which proper issues would have been framed by pleadings.—Davies v. Symmes, 122 P.2d 102, 49 Cal.App.2d 433.

1. Colo.—Tucker v. McCoy, 3 Colo. 284.
51 C.J. p 237 note 21.

2. Ala.—Thompson v. Leyden, 130 So. 780, 222 Ala. 81.
51 C.J. p 237 note 22.

3. Ala.—Dodd v. Deepwater Coal & Iron Corporation, 171 So. 732, 233 Ala. 392—Chestang v. Bower, 140 So. 537, 224 Ala. 469.

Affirmative relief sought
In suit to quiet title, answer by way of cross bill, setting forth matters on which defendants relied for their claim of title to the lands by way of defense to claim of plaintiff, as permitted by statute, could also properly seek the affirmative relief of having the parties adjudged joint owners and tenants in common to lands involved and that they be sold for division of proceeds among them. —Steele v. Freeman, 34 So.2d 139, 250 Ala. 336.

4. Ala.—Hinds v. Federal Land Bank of New Orleans, 179 So. 194, 235 Ala. 360—Dodd v. Deepwater Coal & Iron Corporation, 171 So. 732, 233 Ala. 392—McCaleb v. Worcester, 140 So. 535, 224 Ala. 360—Chestang v. Bower, 140 So. 537, 224 Ala. 469.

Assertion of independent equity
Ala.—Walling v. Oliver Farm Equipment Co., 15 So.2d 497, 244 Ala. 674.

5. Idaho.—Corpus Juris cited in Rexburg Lumber Co. v. Purrington, 113 P.2d 511, 515, 62 Idaho 461.
51 C.J. p 238 note 23.

6. U.S.—Ohio Oil Co. v. Thompson, C.C.A.Mo., 120 F.2d 831, certiorari denied 62 S.Ct. 112, 314 U.S. 658, 86 L.Ed. 528.
Iowa.—Miller v. Mills, 6 N.W.2d 828, 232 Iowa 558.
Okl.—First Nat. Bank & Trust Co. of Oklahoma City v. Hohanon's Heirs, 189 P.2d 612, 199 Okl. 665.
51 C.J. p 238 note 24.

7. N.D.—Jester v. Juster, 37 N.W.2d 879.

8. Ky.—Hunt v. Cassity, 181 S.W.2d 248, 297 Ky. 716.

9. Ky.—Crawley v. Mackey, 143 S.W.2d 171, 283 Ky. 717.

sion by cross complainant;[10] but the rule that a person who has no interest in the title to real estate cannot maintain an action to remove a cloud thereon or quiet title thereto, discussed supra § 16, applies to a defendant who seeks by cross petition to quiet title.[11]

Jurisdiction. Where, in a suit to quiet title, a cross bill is founded on matters clearly cognizable in equity, any defect in jurisdiction is supplied,[12] but equity will not take jurisdiction to vacate a deed because it is void on its face.[13] Where defendant files a cross complaint or a counterclaim in the nature thereof to quiet title in himself, equity will retain jurisdiction and determine the matter in issue even though the complaint did not give such jurisdiction;[14] and, as considered infra § 85, in a proper case a dismissal of plaintiff's bill will not necessarily carry with it defendant's cross bill.

Relation to subject matter of original bill. In general, a cross complaint can be sustained only in respect of matters germane to those of the original bill,[15] and hence generally will not lie to quiet a title distinct from that which plaintiff in his original bill prays to have quieted.[16] However, under a statute to that effect relating to cross complaints generally, while a cross complaint cannot be filed where the relief sought is in no way related to, or dependent on, any transaction on which the action to quiet title was brought or does not affect the property in issue,[17] a cross complaint is proper where it relates to or affects the property in issue,[18] or relates to, or depends on, the transaction involved in plaintiff's original action;[19] and where the same transaction is involved it is unnecessary that cross complainants have an interest in the property involved,[20] and the fact that the relief sought in a cross complaint is distinct from that demanded by plaintiff is immaterial.[21] Accordingly, under such statute, defendant may seek a money judgment, by way of cross complaint in a quiet title suit, where the complaint and the cross com-

10. U.S.—Ohio Oil Co. v. Thompson, C.C.A.Mo., 120 F.2d 831, certiorari denied 62 S.Ct. 112, 314 U.S. 658, 86 L.Ed. 528.
Ala.—Herren v. Beck, 164 So. 904, 231 Ala. 328—Sloss-Sheffield Steel, etc., Co. v. Lollar, 54 So. 272, 170 Ala. 239.

11. Okl.—Robertson v. Knighten, 139 P.2d 601, 192 Okl. 678.

12. Ark.—Lowe v. Cox, 194 S.W.2d 892, 210 Ark. 169.
Jurisdiction of cross bills in equity proceedings generally see Equity § 382.

13. Ala.—Herren v. Beck, 164 So. 904, 231 Ala. 328.

14. S.D.—Reichelt v. Perry, 91 N.W. 459, 15 S.D. 601.

15. Cal.—Anderson Co. v. Regenold, 134 P. 999, 166 Cal. 44.
Neb.—Corpus Juris cited in Dawson County Irrigation Co. v. Stuart, 6 N.W.2d 602, 606, 142 Neb. 428.
51 C.J. p 238 note 28.
Relation of cross bill to subject matter of original bill in equity proceedings generally see Equity § 384.

Matter held germane
In action by grantee in senior deed to secure cancellation of junior recorded deed as cloud on title on ground of notice of existence of senior deed at time of execution of junior deed, cross action by grantee in junior deed, praying that senior deed be canceled, and for general relief, was germane to subject matter of original petition.—Terry v. Ellis, 7 S.E.2d 282, 189 Ga. 698.

Matter held not germane
In action to quiet title to land, a cross petition on promissory note alleged to have been given by plaintiff to defendant and his deceased sister was not germane to action to quiet title.—O'Shea v. O'Shea, 11 N.W.2d 540, 134 Neb. 843.

16. Ky.—Dugan v. Logan, 16 S.W.2d 763, 229 Ky. 5.
51 C.J. p 238 note 29.

17. Cal.—Thomson v. Thomson, 62 P.2d 353, 7 Cal.2d 671, 117 A.L.R. 1.

Cross complaint held improper
Cross complaint to quiet title, alleging that adjoining owners were entitled to mining claims by adverse possession, but failing to state that claims were part of section to which plaintiff in complaint claimed title, or were affected by plaintiff's claim, was demurrable as attempting to state a cause foreign to subject involved in complaint.—Garrett v. Cook, 200 P.2d 21, 89 Cal.App.2d 93.

18. Cal.—Woman's Athletic Club of San Francisco v. Anglo Cal. Nat. Bank of San Francisco, 204 P.2d 411, 90 Cal.App.2d 850.

Cross complaint held proper
In action to quiet title, where complaint alleged declaration of homestead, foreclosure of trust deed and commissioner's sale which was claimed to be void, cross complaint seeking to recover value of trustors' use and occupation of property during redemption period was authorized.—Carpenter v. Hamilton, 147 P.2d 563, 24 Cal.2d 95, 153 A.L.R. 733.

19. Cal.—Martin v. Hall, 26 P.2d 288, 219 Cal. 334.

Same "transaction" involved
(1) In general.—Hanes v. Coffee, 300 P. 963, 212 Cal. 777—Bradbury v. Thomas, 27 P.2d 402, 135 Cal.App. 435.

(2) Cross complaint seeking to quiet title to realty other than that described in complaint and asking reformation of certain documents was proper where both parcels of land were involved in one transaction.—Hanlon v. Western Loan & Bldg. Co., 116 P.2d 465, 46 Cal.App.2d 580.

(3) Where defendants' only connection with property arises from contract, cross complaint asking that contract be reformed, and for damages, is authorized, since relating to "transaction" on which action is brought.—California Trust Co. v. Cohn, 7 P.2d 297, 214 Cal. 619.

(4) Action directed at all claims made by defendant under written instrument cross complaint for damages was held authorized, since relating to "transaction" on which action was brought.—Martin v. Hall, 26 P.2d 288, 219 Cal. 334.

No "transaction" set forth
Fact that complaint alleges only plaintiff's title and right to possession and sets forth no "transaction" is not conclusive of defendant's right to file cross complaint for damages under statute permitting cross complaint relating to "transaction" on which action is brought.—Martin v. Hall, supra.

20. Cal.—California Trust Co. v. Cohn, 7 P.2d 297, 214 Cal. 619.

21. Cal.—Carpenter v. Hamilton, 147 P.2d 563, 24 Cal.2d 95, 153 A.L.R. 733.

plaint both arose out of the same transaction,[22] although a mere money demand unrelated to plaintiff's cause of action is not a proper subject for a cross complaint.[23] Under a statute so providing, a defendant may assert, by cross petition or cross bill, any claim, right, title, or interest concerning the real estate in issue which a plaintiff might assert in his original petition.[24]

Effect of cross bill or complaint. Where a cross bill or complaint is filed, the original bill and the cross bill then become but one cause,[25] the court has possession of, and will determine, the whole case,[26] and any attempt to require a treatment of the cross complaint as a separate case is unavailing.[27]

Cross complaint or petition against a codefendant may be maintained in a proper case.[28]

Premature filing. A cross complaint prematurely filed is properly stricken.[29]

Cross complaint as part of answer. An answer alleging that defendant's interest was "as will more fully hereinafter appear," followed by a cross complaint seeking specific performance of an agreement to lease, makes the cross complaint a part of the answer.[30]

In actions other than to quiet title, but affecting title to land, defendant has been held entitled to file a cross bill or cross complaint to have his title quieted.[31]

Waiver of objections. Where a cross complaint is filed, praying that title be quieted in defendant, a plaintiff who does not attack it by demurrer or motion to strike, but answers it and goes to trial on the merits, waives his right to object that such cross complaint is not a proper method of procedure in an action to quiet title.[32]

b. Sufficiency of Cross Pleading

The sufficiency of a cross pleading in an action to quiet title depends on whether it states a cause of action; and as a general rule a cross pleading to quiet title must set up such facts as are required in an original bill for that purpose.

In accordance with the rules governing the sufficiency of cross pleadings in civil actions generally, discussed in Pleading §§ 167-176, and in equity proceedings generally, discussed in Equity §§ 383-385, the sufficiency of a cross pleading in an action to quiet title is determined by whether or not it states a cause of action;[33] and as a general rule a cross bill or cross complaint to quiet title must set up such facts as are required in an original bill or complaint for the same purpose.[34] However, a cross

22. Cal.—Sawyer v. Sterling Realty Co., 107 P.2d 419, 41 Cal.App.2d 715.

Former contrary rule was changed by the statute discussed in the text.—Sawyer v. Sterling Realty Co., 107 P.2d 419, 41 Cal.App.2d 715.

23. Cal.—Thomson v. Thomson, 62 P.2d 358, 7 Cal.2d 671, 117 A.L.R. 1—Meyer v. Quiggle, 74 P. 40, 140 Cal. 495.

24. Mo.—Horton v. Gentry, 210 S.W.2d 72, 357 Mo. 694—Crawford v. Amusement Syndicate Co., 37 S.W.2d 581.

Cancellation of indenture

In action to quiet title by plaintiffs claiming title to the realty under a trust indenture, court had jurisdiction to permit defendants to file cross bill for cancellation of indenture on ground that one who executed the indenture was of unsound mind, that indenture was prepared without his consent, and that he was induced to sign the indenture by fraud and undue influence.—Young v. Pressgrove, 195 S.W.2d 516, 355 Mo. 204.

25. Ark.—Lowe v. Cox, 194 S.W.2d 892, 210 Ark. 169.

Reason for rule

There is only one case in the action in equity, however many may be the parties or pleadings.—Oswald v. Northrop Aircraft, 145 P.2d 635, 62 Cal.App.2d 824.

26. Ark.—Lowe v. Cox, 194 S.W.2d 892, 210 Ark. 169.

27. Cal.—Oswald v. Northrop Aircraft, 145 P.2d 635, 62 Cal.App.2d 824.

28. Okl.—Lamb v. Alexander, 179 P. 587, 74 Okl. 250.
51 C.J. p 238 note 31.

29. Ind.—Tuesburg Land Co. v. State, 131 N.E. 530, 78 Ind.App. 327.

30. Cal.—Durst v. Jolly, 169 P. 449, 35 Cal.App. 184.

31. Cal.—Lubarsky v. Chavis, 279 P. 305, 99 Cal.App. 610.
51 C.J. p 238 note 34.
Availability of counterclaim or cross complaint to quiet title in actions of ejectment see Ejectment § 69 a.

In Arizona

(1) It was formerly held, under a statute so providing, that in an action to recover possession of property there could be no counterclaim except of like proceedings, and a counterclaim to quiet title would not be maintainable.—Tolmachoff v. Eshbaugh, 18 P.2d 256, 41 Ariz. 318.

(2) That statute has been superseded by a statute relating to counterclaims generally, under which it is held that in an action to quiet title and recover possession of realty, counterclaim to quiet title on the theory of adverse possession is properly made.—Keystone Copper Min. Co. v. Miller, 161 P.2d 803, 63 Ariz. 544.

32. Cal.—Johnson v. Taylor, 88 P. 903, 150 Cal. 201, 10 L.R.A.,N.S., 818.

33. Okl.—Cross v. Hutchins, 71 P. 2d 733, 180 Okl. 486.

Cross pleadings held sufficient

Cal.—Martin v. Hall, 26 P.2d 258, 219 Cal. 334.
Ind.—Boyer v. Lenn, 64 N.E.2d 591, 116 Ind.App. 502.

Cross pleadings held insufficient

Cal.—Martin v. Hall, 26 P.2d 258, 219 Cal. 334.
Okl.—Cross v. Hutchins, 71 P.2d 733, 180 Okl. 486.

34. Tex.—Donnelly v. Jeffrey, Civ. App., 282 S.W. 251.
51 C.J. p 238 note 35.

Pleadings held sufficient

Ala.—Hood v. Holligan, 158 So. 759, 229 Ala. 539.
Cal.—Fay v. Norquist, 140 P.2d 141, 60 Cal.App.2d 218.
Mo.—Baker v. Lamar, 140 S.W.2d 81.
51 C.J. p 238 note 35 [d].

Pleadings held insufficient

Ala.—Floyd v. Andrews, 20 So.2d 331, 246 Ala. 301.
51 C.J. p 238 note 35 [e].

complainant need not allege a demand, since he is not the moving party, but is brought into court by plaintiff, and challenged to litigate the matters in controversy.[35] Where a cross complaint is equitable in nature, the sufficiency of the pleading will be determined in accordance with equitable principles.[36]

While it has been held that a cross complaint must be good within itself without aid from other pleadings in the cause,[37] it has also been held that such pleading may be aided by the allegations of plaintiff's petition.[38] Where defendant's cross pleading is otherwise sufficient to warrant the quieting of title in him, the fact that he incorrectly names the character of relief to which he is entitled will not defeat recovery;[39] and, where defendant's pleading contains all the essential elements of a cross complaint, the fact that it is called a "counterclaim" does not determine its character or affect the rights of the parties.[40]

Multifariousness. A cross bill to quiet title under the statute is not multifarious because it seeks relief beyond that provided by statute[41] or because the various defendants do not have the same measure of interest.[42]

Consistency with answer. A cross bill will not support affirmative relief if it is not consistent with defendant's answer to the original bill.[43]

Defendant's title or interest. The cross complaint should contain adequate averments to show title in defendant.[44] However, ordinarily it need not set forth the evidence by which cross complainant expects to prove his title[45] or the source and character of his asserted right;[46] nor need it set up title to all the property described in the original bill.[47] Nevertheless, although an action to quiet title is essentially equitable in origin and nature, as discussed supra §§ 1–6, a counterclaim to quiet title in defendant should disclose whether the title so claimed is legal or equitable,[48] and, if an equitable title is claimed, all facts which go to maintain it may be shown.[49] If an equitable interest in defendant under a contract of sale is alleged, defendant is not entitled to a judicial declaration of such interest in the absence of an allegation of facts showing the fairness of the contract and the adequacy of consideration,[50] as well as an averment of performance by defendant of conditions precedent.[51]

Possession in defendant need not be alleged,[52] since the court would have, and could properly exercise, jurisdiction of the whole controversy for the purposes of quieting the title[53] and determining the right to possession,[54] especially where there was no demurrer to the cross action for failure of the petitioner therein to allege that he is in possession.[55]

Plaintiff's adverse claim. Although it is not averred in express terms that plaintiff's claim of title is adverse to that of cross complainant, it is sufficient, on demurrer, if facts are alleged showing such to be the case.[56] Moreover, it has been held that a counterclaim to quiet defendant's title is sufficient although it is silent as to plaintiff's claim, since that is shown by plaintiff's bringing suit.[57]

35. Ind.—Decker v. Mahoney, 116 N.E. 57, 64 Ind.App. 500

36. Wash.—John Hancock Mut. Life Ins. Co. v. Gooley, 83 P.2d 221, 196 Wash. 357, 118 A.L.R. 1484.

Tender of amount admittedly due

(1) Allegation in mortgagor's cross complaint that mortgagor stood ready and willing to pay amount of mortgage with interest was sufficient, as against contention that mortgagor must make formal tender of amount of money admittedly due on mortgage since, cross complaint being equitable in nature, mortgagor, if relief should be accorded to him, would be required to do equity.—John Hancock Mut. Life Ins. Co. v. Gooley, supra.

(2) Necessity of tender in equity proceedings generally, under maxim that, he who seeks equity must do equity, see Equity § 91 j.

37. Ind.—Conger v. Miller, 4 N.E. 300, 104 Ind. 592.

38. Tex.—Dittmar v. Alamo Nat. Co., 118 S.W.2d 398, 132 Tex. 44.

39. Tex.—Dittmar v. Alamo Nat. Co., Civ.App., 91 S.W.2d 781, affirmed 118 S.W.2d 398, 132 Tex. 44.

Pleading seeking removal of cloud on title was held sufficient to authorize judgment quieting title.—Dittmar v. Alamo Nat. Co., supra.

40. Ind.—McClanahan v. Williams, 35 N.E. 897, 136 Ind. 30.

41. Ala.—Smith v. Rhodes, 90 So. 349, 206 Ala. 460.

42. Ala.—Smith v. Rhodes, supra.

43. Ala.—Behan v. Friedman, 113 So. 538, 216 Ala. 478.

Consistency of cross bill with answer in equity proceedings generally see Equity § 385.

44. Mo.—Stevens v. Fitzpatrick, 118 S.W. 51, 218 Mo. 708.

51 C.J. p 239 note 41.

Pleadings held sufficient

Ala.—Steele v. Freeman, 34 So.2d 139, 250 Ala. 336.

51 C.J. p 239 note 41 [a].

45. Idaho.—Bacon v. Rice, 93 P. 511, 14 Idaho 107.

46. Ala.—Drennen v. White, 69 So. 41, 191 Ala. 274.

47. Ala.—Smith v. Rhodes, 90 So. 349, 206 Ala. 460.

48. Ind.—Sawyer v. Kleine, 82 N.E. 2d 583, 118 Ind.App. 616.

49. Ind.—Sawyer v. Kleine, supra.

50. Cal.—Archer v. Miller, 230 P. 92, 73 Cal.App. 678.

51. Cal.—Archer v. Miller, supra.

52. Ga.—Terry v. Ellis, 7 S.E.2d 282, 189 Ga. 698.

Kan.—Axe v. Wilson, 96 P.2d 880, 150 Kan. 794.

51 C.J. p 239 note 47.

53. Ga.—Terry v. Ellis, 7 S.E.2d 282, 189 Ga. 698.

54. Kan.—Axe v. Wilson, 96 P.2d 880, 150 Kan. 794.

55. Ga.—Terry v. Ellis, 7 S.E.2d 282, 189 Ga. 698.

Waiver of objection that plaintiff in suit to quiet title is not in possession see supra § 31.

56. Ind.—Kitts v. Willson, 5 N.E. 490, 106 Ind. 147.

57. Wis.—Grignon v. Black, 45 N. W. 132, 968, 78 Wis. 474.

c. Pleadings in Reply to Cross Pleading

Where new issues are raised by a cross pleading, the court may permit the plaintiff to plead defensive matter by reply or answer; and where an answer is required and not filed the cross bill may be taken as confessed.

Where defendant raises new issues by a cross complaint, the court may permit plaintiff to plead defensive matter by way of reply to the cross complaint,[58] or by way of answer,[59] even after submission of the case to the court.[60] Where an answer denied that the petition stated facts sufficient to divest defendant's title to land conveyed to him by a third person, and, after plaintiff had replied by a general denial, defendant filed a cross bill alleging his purchase from such person, and the trial was had as though all the issues were joined, the reply has been held properly treated as answering the cross bill.[61] Where an answer to a cross bill is required, and none is filed, it is proper to enter an order taking the cross bill as confessed,[62] provided cross complainants so request.[63] However, where a cross complaint is unnecessary, in accordance with the rule discussed supra subdivision a of this section, plaintiff's failure to answer a "cross complaint" does not authorize the entry of a default against him.[64]

What may be pleaded. Where defendant files a cross complaint, plaintiff, as cross defendant, has the right to set up any equitable defense which he has as an adverse claim as against cross complainant's suit to quiet title.[65] If a cross complaint against plaintiff and a codefendant tenders new issues, plaintiff may, by answer to the cross complaint, set up the defense that he had, before the filing of the cross complaint, acquired the title of the codefendant;[66] and where defendant seeks to foreclose a mortgage by cross bill, or counterclaim in the nature thereof, plaintiff is entitled to set up in his reply any defensive matter which could have been pleaded had defendant filed a complaint for foreclosure of the mortgage.[67]

Setting up claim for improvements. Where defendant interposes an answer in the nature of a cross action in ejectment for recovery of possession, and plaintiff in reply sets up a claim for improvements in case defendant establishes his title, the matters so set up constitute no part of plaintiff's case in chief under the complaint, but are only defensive to defendant's cross action.[68]

§ 71. —— Counterclaim

It is generally held that matter may be pleaded as a counterclaim in suits to quiet title if it constitutes a cause of action in favor of the defendant against the plaintiff and is germane to, or connected with, the subject of the plaintiff's action.

Counterclaims are proper in actions to quiet title;[69] and the rules and statutes governing counterclaims in civil suits generally, discussed in Pleading §§ 167-176, have been held to apply to suits to quiet title.[70] Accordingly, it is generally held that, in actions to quiet title or remove a cloud, matter may be pleaded as a counterclaim if it constitutes a cause of action in favor of defendant against plaintiff, and is germane to, or connected with, the subject of plaintiff's action;[71] and, even where such

58. Ark.—Roberts v. Burgett, 191 S.W.2d 579, 209 Ark. 536.

59. Cal.—Williams v. Hebbard, 93 P.2d 657, 33 Cal.App.2d 686.

60. Ark.—Roberts v. Burgett, 191 S.W.2d 579, 209 Ark. 536.

61. Mich.—Stevens v. Fitzpatrick, 88 N.W. 209, 129 Mich. 93.

62. Mich.—Messenger v. Peter, 88 N.W. 209, 129 Mich. 93.

63. Mo.—Stevens v. Fitzpatrick, 116 S.W. 51, 218 Mo. 708.

64. Cal.—Crofton v. Young, 119 P. 2d 1003, 48 Cal.App.2d 452.

65. Cal.—Williams v. Hebbard, 93 P.2d 657, 33 Cal.App.2d 686.

6. Cal.—Rowley v. Davis, 167 P. 162, 34 Cal.App. 184.

7. Or.—Hanna v. Hope, 168 P. 618, 86 Or. 362.

8. Minn.—Mueller v. Jackson, 40 N.W. 565, 39 Minn. 431.

9. Mo.—Clark v. Heckerman, 142 S.W.2d 35, 346 Mo. 458—Clark Real Estate Co. v. Old Trails Inv. Co., 76 S.W.2d 388, 335 Mo. 1237.

70. Mo.—Clark Real Estate Co. v. Old Trails Inv. Co., 76 S.W.2d 388, 335 Mo. 1237.

71. N.D.—Farmers' State Bank v. Anton, 199 N.W. 582, 51 N.D. 203. 51 C.J. p 235 note 81.

Counterclaim barred by limitations see supra § 48.

Counterclaims held proper

(1) In general.

Mo.—Clark Real Estate Co. v. Old Trails Inv. Co., 76 S.W.2d 388, 335 Mo. 1237.

N.Y.—Union Ferry Co. of New York & Brooklyn v. Fairchild, 176 N.Y.S. 251, 106 Misc. 334, reversed on other grounds 183 N.Y.S. 125, 191 App.Div. 639.

Wis.—Jarvis v. Peck, 19 Wis. 74.

(2) Where grantee of land from grantor having outstanding against him a void judgment brings bill in equity to cancel judgment as cloud on title to land, grantor may maintain counterclaim to have void judgment set aside.—Protective Holding Corporation v. Cornwall Co., 172 So. 804, 127 Fla. 352.

(3) Where complaint to have a deed executed to defendant by trustee in bankruptcy of a plaintiff cotenant declared void and removed as a cloud on title of plaintiff cotenants, and for partition, did not set forth interests of defendant even in alternative, defendant as a cotenant was entitled to counterclaim for partition. Kent v. Foster, 94 N.E.2d 302, 406 Ill. 565.

(4) Statute permitting recovery for use and occupation of realty in case of a vendor holding over, and requiring allegation stating that such relief is desired and the value of the use and occupation, is not a limitation on statute purporting to set forth scope of defendant's answer and relief he may seek by way of counterclaim, so as to preclude heirs of a decedent from counterclaiming for use and occupation in action to quiet title.—Halakjon v. Hilstad, N.D., 25 N.W.2d 687.

Counterclaims held not proper

(1) Where defendants in quiet title action prayed that title be de-

matter is set up in the answer and may be a complete defense to the cause of action alleged in the complaint, it may also be pleaded as a counterclaim [72] However, matters which do not tend to diminish or defeat plaintiff's recovery are not a proper ground for counterclaim;[73] and it has been held that defendant may not interpose a counterclaim for a mere money demand.[74]

Counterclaims in the nature of cross complaints to quiet title are discussed supra § 70, replies to counterclaims infra § 72, and the effect of the dismissal of the original bill on the counterclaim infra § 85.

§ 72. Replication or Reply and Subsequent Pleadings

Except in so far as the rule is changed by statute, the plaintiff ordinarily must respond by replication or reply to new matter properly pleaded by way of defense or counterclaim.

In accordance with rules as to the necessity of a replication or reply in civil actions generally, discussed in Pleading §§ 185–190, and in equity proceedings generally, considered in Equity § 361, and subject to some exceptions, plaintiff must, unless a reply is waived,[75] respond by replication or reply to new matter properly pleaded by way of defense[76] or counterclaim,[77] and not demurred to; and unless he does so the answer will be taken as true.[78] However, under or without reference to statutes so providing, a reply to affirmative matter in the answer is frequently unnecessary, generally on the theory that such matter is deemed to have been denied without a reply.[79] In any event, matters put in issue by the complaint and the general denial thereof in the answer are not required to be denied by a reply.[80] So an answer alleging affirmatively that defendant is the owner, and setting out the source of his title, merely makes an issue as to title, and does not require a reply,[81] nor need plaintiff reply to a counterclaim unnecessarily pleaded.[82] The failure to reply where a reply is unnecessary does not constitute an admission of an allegation in the answer.[83] Under a statute so providing, where the defense is founded on a written instrument, such as a deed, which is contained in the pleading, the genuineness and due execution of such instrument are deemed admitted unless controverted by a verified denial.[84]

Pleadings in reply to cross pleadings are considered supra § 70 c, and the use of a demurrer to attack a reply infra § 73 a

Rejoinder. Where the code does not provide for a rejoinder to a reply, an allegation of plaintiff's title pleaded for the first time in the reply is deemed to be controverted.[85]

Requisites and sufficiency. The general rules as to the requisites and sufficiency of a replication or reply, discussed in Pleading §§ 193–201, are applicable in actions to quiet title.[86] Thus the reply must not depart from the cause of action stated in

creed in it, plaintiff having dismissed petition could not recover by way of counterclaim alleged unearned premiums on insurance on ground that defendants fraudulently converted them, since such alleged fraudulent conversion did not arise out of transaction set forth in answer and was not connected with subject of action, which is title to property.—Clark Real Estate Co. v. Old Trails Inv. Co., 76 S.W.2d 388, 335 Mo. 1237.

(2) Other counterclaims held not proper see 51 C.J. p 235 note 81 [b].

72. Minn.—Griffin v. Jorgenson, 22 Minn 92.
N.D.—Farmers' State Bank v. Anton, 199 N.W. 582, 51 N.D. 202.

73. Cal.—California Trust Co. v. Gustason, 101 P.2d 74, 15 Cal.2d 268.

74. Cal.—California Trust Co. v. Gustason, supra—Hanes v. Coffee, 300 P. 963, 212 Cal. 777—Hoytt Const. Co. v. White, 163 P.2d 32, 71 Cal.App.2d 526.
51 C.J. p 235 note 83.

75. N.D.—Power v. Bowdle, 54 N. W. 104, 3 N.D. 107, 44 Am.S.R. 511, 21 L.R.A. 328.
51 C.J. p 240 note 60.

76. N.C.—Peacock v. Stott, 10 S.E. 456, 104 N.C. 154.
51 C.J. p 240 note 61.

77. Ky.—Hall v. Mineral Dev. Co., 104 S.W. 341, 31 Ky.L. 904.
51 C.J. p 240 note 62.

An answer seeking affirmative relief requires a reply under statutes so providing.—McIntosh v. Foulke, Mo., 228 S.W.2d 757—51 C.J. p 240 note 62 [a].

78. Ky.—Hall v. Mineral Dev. Co., 104 S.W. 284, 31 Ky.L. 863.
51 C.J. p 240 note 63.

79. Cal.—Crofton v. Young, 119 P. 2d 1003, 48 Cal.App.2d 452.
51 C.J. p 240 note 59.

80. Cal.—Crofton v. Young, supra.
51 C.J. p 240 note 64.

Affirmative allegation in answer was held in fact merely a denial and amounting to the general issue, so that no reply was necessary.—Scales v. Mitchell, 92 N.E.2d 665, 406 Ill. 130.

81. Ky.—Irvine v. Irvine, 89 S.W. 193, 28 Ky.L. 262.

82. Wis.—Sloan v. Rose, 77 N.W. 895, 101 Wis. 523.

83. Ill.—Scales v. Mitchell, 92 N.E. 2d 665, 406 Ill. 130.

84. Cal.—Butler v. Stratton, 212 P. 2d 43, 95 Cal.App.2d 23.

85. Okl.—Pimm v. Waldron, 244 P. 37, 118 Okl. 5.

86. Utah.—Huntsman v. Huntsman, 192 P. 368, 56 Utah 609.
51 C.J. p 240 note 69.

Defendant's assertion of legal title
Where defendant, in action to quiet title, asserts legal title, plaintiff may, by reply, set up facts entitling him to equitable relief.—Teisinger v. Hardy, 5 P.2d 219, 91 Mont. 9.

Pleading estoppel to assert title
Since, in proceedings to quiet title, estoppel in pais to assert title is an equitable defense, it can be properly presented in reply to affirmative allegations of title in answer.—Rains v. Moulder, 90 S.W.2d 81, 338 Mo. 275.

the complaint.[87] Moreover, where in an action to determine adverse claims defendant asserts legal title, plaintiff may in his reply plead facts showing an equitable title which ought to prevail over defendant's title.[88] A reply is not insufficient because it denies on information and belief an answer setting up a recorded deed, where it also alleges facts which render the deed invalid.[89]

Admissions by reply. Rules governing admissions in replies and their construction, scope, and effect, in civil suits generally, discussed in Pleading §§ 202-205, have been applied to replies and replications in suits to quiet title.[90] Thus setting up the statute of limitations by way of reply in an action to quiet title does not admit the validity of the title to the adverse party.[91]

§ 73. Demurrer or Exception

a. In general
b. Grounds for demurrer to bill or complaint
c. Scope and effect
d. Hearing and determination

a. In General

Rules governing demurrers to pleadings in civil actions generally apply in actions to quiet title.

Rules governing demurrers or exceptions to pleadings in civil actions generally, discussed in Pleading § 211-274, and in equity proceedings generally, discussed in Equity §§ 261-300, have been applied in actions to quiet title.[92] Thus the objection that the averments of the complaint are contradictory must be taken by special demurrer rather than by general demurrer.[93] However, advantage may be taken by demurrer of all matters which go to the jurisdiction of the court, whether or not specially pointed out in the demurrer;[94] and it has been held that an objection that the bill showed only a scrambling, and not a peaceable, possession need not be taken by special demurrer, but is sufficiently raised by a general demurrer.[95] It is improper practice, where the bill gives a history of plaintiff's claim, to demur to a part and answer to part thereof; but, as a whole, it either does or does not show title, and, as a whole, should be demurred to or answered.[96]

Waiver of demurrer. Where in a suit defendant tenders a peremptory exception that there is no cause of action because defendant was not in possession, and the exception is referred to the merits without prejudice, it is not waived by an answer in which it is expressly reserved.[97]

Demurrer to answer. Rules governing demurrers generally have been applied to demurrers to answers.[98] Thus a demurrer is not available to attack an answer, where the answer raises material issues of fact requiring a trial of the action,[99] or on the ground that the allegations of the answer showed title in plaintiff and not in defendant.[1]

Demurrer to disclaimer. A disclaimer is not subject to demurrer.[2]

Demurrer to cross bill. Rules governing demurrers generally have been held to apply to demurrers to defendant's cross bill.[3]

Demurrer to reply. It is error to overrule a demurrer to a bad special paragraph of a reply, although proof of the facts therein might be admis-

87. Colo.—Webber v. Wannemaker, 39 P. 780, 39 Colo. 425.
51 C.J. p 240 note 71.

Reply held not departure
Utah.—Utah Lead Co. v. Piute County, 65 P.2d 1190, 92 Utah 1.
51 C.J. p 240 note 71 [c].

88. Minn.—Garvey v. Nelson, 242 N.W. 12, 185 Minn. 487.

Colo.—Scott v. Stutholt, 146 P. 766, 58 Colo. 540.

Ill.—Scales v. Mitchell, 93 N.E. 2d 665, 406 Ill. 130.

Reply held not to contain concession
—Baker v. Lamar, 140 S.W.2d 1.

Iowa.—Tabler v. Callanan, 49 Iowa 362.

Cal.—Heeser v. Miller, 19 P. 75, 77 Cal. 192.

Cal.—Heeser v. Miller, supra.

89. Ill.—Wetherell v. Iberle, 14 N. E. 675, 123 Ill. 666.
51 C.J. p 231 note 80.

95. Ala.—White v. Cotner, 54 So. 114, 170 Ala. 324.

96. Miss.—Catchot v. Ocean Springs, 34 So. 145.

97. La.—Craig v. Lambert, 11 So. 464, 44 La.Ann. 885.

98. Wis.—Neitge v. Severson, 42 N.W.2d 149, 256 Wis. 628.

99. Cal.—Coons v. Thompson, 171 P.2d 443, 75 Cal.App.2d 687.
Wis.—Neitge v. Severson, 42 N.W.2d 149, 256 Wis. 628.

1. Utah.—Duncan v. Hemmelwright, 186 P.2d 965, 113 Utah 262.

Motion for judgment on pleadings is proper method of raising the question.—Duncan v. Hemmelwright, supra.

2. Ind.—McAdams v. Lotton, 30 N. E. 823, 113 Ind. 1.
51 C.J. p 236 note 97.

3. Ala.—Floyd v. Andrews, 20 So.2d 331, 246 Ala. 301.

Matter not apparent on face of bill
In suit to quiet title, where defendants' cross bill, averring a claim contrary to that of plaintiff, did not affirmatively show laches on the part of defendants in asserting their claim, demurrer by plaintiff could not raise that defense.—Steele v. Freeman, 34 So.2d 139, 250 Ala. 336.

Surplusage
Where cross bill contained allegations requisite for statutory bill to quiet title, it would not be demurrable because it went further and stated source of complainant's title, even though additional allegations show no title in complainant.—Floyd v. Andrews, 20 So.2d 331, 246 Ala. 301.

Demurrer for nonjoinder of parties held properly overruled
Cal.—Battle v. Niece, 111 P.2d 455, 43 Cal.App.2d 655.

sible under the general denial pleaded in another paragraph thereof.[4]

b. Grounds for Demurrer to Bill or Complaint

A demurrer lies to determine whether sufficient facts to constitute a cause of action are alleged in a bill or complaint to quiet title or remove a cloud.

In accordance with rules governing the use of demurrers to bills or complaints generally, the question whether the matters alleged in a bill or complaint to quiet title or remove a cloud are sufficient to constitute a cause of action should be presented by a demurrer for that reason.[5] Thus a demurrer lies where a want of necessary parties is disclosed by the bill itself,[6] where the bill fails to allege that there is no suit pending to try title,[7] or where it does not contain an offer to do equity, where such offer is necessary.[8]

On the other hand, a demurrer will not lie as to matters alleged in a complaint which are not required to be alleged, since such allegations are mere surplusage,[9] or as to matters not disclosed on the face of the bill,[10] or as to matters as to which there is some ambiguity or uncertainty;[11] and a demurrer is not available to attack a complaint which is in the language of the statute.[12] Where the bill fails to show clearly when complainant acquired title, a special demurrer on the ground that complainant's equity is barred by the statute of limitations will be overruled.[13] A defendant cannot demur as to matters which do not affect his interests[14]

Multifariousness or misjoinder of causes of action is ground for demurrer.[15] However, plaintiff's pleadings are not demurrable because they show that there are other persons holding outstanding titles, and that making them parties would result in a multifariousness of properties and parties,[16] since it is no concern of defendant that there are other outstanding titles which might constitute a cloud[17]

Defects in form A bill which shows complainant to be entitled to relief is not demurrable because it is imperfectly drawn;[18] nor will a demurrer to the bill for want of sufficient facts reach a defect, if any exist, in the prayer for relief.[19]

Matters relating to plaintiff's title or interest. The failure of plaintiff's pleading to contain matter as to title required by statute to be alleged is a ground for a special demurrer.[20] So also, a complaint in a suit to quiet title which shows on its face that plaintiff is not the owner of the land in issue,[21] or

4. Ind.—Jackson v. Neal, 35 N.E. 1021, 136 Ind. 173—Kernodle v. Caldwell, 46 Ind. 153.

5. Cal.—Ephraim v. Metropolitan Trust Co. of Cal., 172 P.2d 501, 28 Cal.2d 824.
Ill.—Sheaff v. Spindler, 171 N.E. 632, 339 Ill. 540.
51 C.J. p 230 note 54.

Pleading held demurrable
Cal.—Powell v. Lampton, 85 P.2d 495, 30 Cal.App.2d 43.

Pleadings held to state cause of action
Kan.—Stephens v. Farwell, 126 P.2d 489, 155 Kan. 491.
W.Va.—Amick v. Gauley Coal Land Co., 104 S.E. 208, 110 W.Va. 485.

6. Mich.—Howell v. Merrill, 30 Mich. 282.

7. Ala.—Brown v. Feagin, 57 So. 20, 174 Ala. 488.
Necessity of such allegation see supra § 58.

8. Ala.—Sloss-Sheffield Steel, etc., Co. v. Alabama Univ., 30 So. 433, 130 Ala. 402—Grider v. American Freehold Land Mortg. Co., 12 So. 775, 99 Ala. 281, 42 Am.S.R. 58.
Necessity and sufficiency of offer see supra § 65.

9. Ala.—Campbell v. Rice, 12 So.2d 385, 244 Ala. 144.

Validity and sufficiency of muniments of title of a complainant in a suit to quiet title could not be tested by demurrer to the bill filed under the statute to quiet title, even though the bill went further than the statutory averments and undertook to state the sources and muniments of complainant's title.—Venable v. Turner, 183 So. 644, 236 Ala. 483.

10. Ala.—Grayson v. Roberts, 156 So. 552, 229 Ala. 245.

Laches
Where bill to quiet title did not disclose laches, demurrer on such ground was properly overruled, since defense must be made by plea or answer in such case.
Ala.—Grayson v. Roberts, 156 So. 552, 229 Ala. 245.
Tex.—Patterson v. Shell Petroleum Corporation, Civ.App., 143 S.W.2d 208, error dismissed, judgment correct.

11. Cal.—Broome v. Lantz, 294 P. 709, 211 Cal. 142, certiorari denied Lantz v. Broome, 52 S.Ct. 9, 284 U.S. 621, 76 L.Ed. 530.

Boundaries of property
Demurrer on ground that plaintiff was seeking to quiet title to land not within boundaries described in patent under which plaintiff claimed was held properly overruled, where patent was ambiguous.—Broome v. Lantz, 294 P. 709, 211 Cal. 142, certiorari denied Lantz v. Broome, 52 S.Ct. 9, 284 U.S. 621, 76 L.Ed. 530.

12. N.M.—Lamport v. Tidwell, 71 P.2d 69, 42 N.M. 12—Knabel v. Escudero, 255 P. 633, 32 N.M. 311

13. U.S.—Union Pac. R. Co. v. Meier, C.C.Kan., 28 F. 9.

14. Cal.—Blodgett v. Trumbull, 257 P. 199, 83 Cal.App. 566.

Misjoinder of parties
Fact that complaint against vendor and agent to quiet title and to recover damages improperly joined agent was not ground for demurrer by vendor whose interests were unaffected.—Blodgett v. Trumbull, supra.

15. Mo.—Downing v. Anders, 202 S.W. 297.
51 C.J. p 231 note 58.

16. Colo.—Mitchell v. Knott, 95 P. 335, 43 Colo. 135.

17. Colo.—Mitchell v. Knott, supra.

18. Mich.—Damouth v. Klock, 29 Mich. 289.

19. Ind.—Stribling v. Brougher, 79 Ind. 328.

20. Miss.—Smith v. Overstreet, 38 So.2d 923, 205 Miss. 488.

Designment of title
Miss.—Smith v. Overstreet, supra.

21. Cal.—Ephraim v. Metropolitan Trust Co. of Cal., 172 P.2d 501, 28 Cal.2d 824.

has no interest therein whatever,[22] is subject to demurrer; and where, in addition to alleged ownership in fee, the facts which constitute the title are also set out, and such facts do not show title, a demurrer to the bill will lie.[23] Where complainant is seeking affirmative relief, based on a patent to land, defendant may attack the validity of such patent by demurrer, on the ground that it is void on its face, without first showing that he has an interest in the land.[24] A general demurrer is not available to raise the objection that, although title was once in plaintiff, as alleged in the complaint, defendant has since acquired a superior title.[25] It is not a ground for demurrer to a complaint which is essentially one to remove a cloud from title, rather than to try title, that a question of title is incidentally involved.[26]

Want of possession in plaintiff. Where possession is necessary to sustain the action, a bill which fails to allege that plaintiff is in possession of the land in controversy,[27] and that such possession is peaceable, if peaceable possession is required by statute,[28] or fails to show who is in actual possession,[29] or shows that defendant is in possession,[30] is demurrable. However, want of possession is not a good ground of demurrer to a bill by a party out of possession, claiming title to the realty as remainderman, pending possession of the life tenant.[31]

Want of proper averments as to cloud or adverse claim. A bill to remove a cloud on title is demurrable or objectionable for failure to show the existence of the cloud,[32] or to allege the facts which show the apparent validity of the alleged cloud, and also the facts showing its actual invalidity.[33] On the other hand, it has been held that a bill which shows that the grantor in a deed constituting the alleged cloud had no title or interest whatever in the land is not for that reason alone demurrable.[34]

c. Scope and Effect

General rules governing the scope and effect of demurrers to pleadings in civil actions apply in actions to quiet title.

General rules governing the scope and effect of demurrers to pleadings in civil actions, discussed in Pleading §§ 253 262, have been applied in actions to quiet title.[35] Thus, on demurrer to a complaint, the sufficiency of the pleading is to be determined by its allegations, and not by the prayer for relief;[36] and the fact that a bill contains a special prayer for relief to which plaintiff is not entitled will not render the bill demurrable.[37] Matters merely affecting the costs, and not plaintiff's right to judgment, will not be considered.[38] A demurrer to a bill for cancellation of a mortgage and notes secured thereby, because of failure to allege an offer by plaintiff to do equity, does not present the question of failure to show that plaintiff had met payments as agreed on in the contract.[39]

Admissions. A demurrer admits the truth of all facts well pleaded[40] and all inferences which reasonably may be drawn therefrom;[41] and a demurrer to a bill or petition should be overruled if the allegations state a cause of action entitling plaintiff to substantially the relief sought.[42]

nd.—Donaldson v. State, 101 N.E. 485, 182 Ind. 615.

Title in one of two plaintiffs

Where complaint in quiet title action was framed on theory that one or the other of plaintiffs owned property but that plaintiffs were not sure which one owned it, allegations were sufficient to avoid a general demurrer.—Tamalpais Land & Water Co. v. Northwestern Pac. R. Co., 167 P.2d 25, 73 Cal.App.2d 917.

k. Okl.—Bascom v. Maxey, 157 P. 2d 158, 195 Okl. 258.

l. Fla.—Brickell v. Trammel, 82 So. 221, 77 Fla. 544.
51 C.J. p 231 note 66.

m. U.S.—Lockhard v. Asher Lumber Co., C.C.Ky., 123 F. 480, reversed on other grounds 131 F. 689, 65 C.C.A. 517.

n. Utah.—State v. Rollo, 262 P. 987, 71 Utah 91.

o. Vt.—Scully v. Dermody, 8 A. 2d 675, 110 Vt. 422.

27. Md.—Kelly v. Nice, 119 A. 333, 141 Md. 472.
51 C.J. p 231 note 70.
Necessity and sufficiency of allegations as to possession see supra § 60.

In possession or unoccupied

Bill is demurrable if, without showing other grounds for equitable relief, it contains no allegation that complainant is in possession or that property is unoccupied.—Miller v. Akin, 182 N.E. 732, 350 Ill. 186.—Dieter v. Blue, 272 Ill.App. 537.

28. Ala.—White v. Cotner, 54 So. 114, 170 Ala. 324.

29. U.S.—Union Pac. R. Co. v. Meier, C.C.Kan., 28 F. 9.

30. U.S.—Union Pac. R. Co. v. Meier, supra.

31. Ala.—Worthington v. Miller, 32 So. 748, 134 Ala. 420.

32. Cal.—Aalwyn v. Cobe, 142 P. 79, 168 Cal. 165.

Under Equity Rules

Pa.—Liddick v. Louden, 52 Pa.Dist. & Co. 402.

33. Or.—Teal v. Collins, 9 Or. 89.
51 C.J. p 231 note 77.

34. Fla.—Johnson v. Baker, 74 So. 210, 73 Fla. 6.

35. S.D.—Jordan v. Schaefer, 166 N. W. 547, 40 S.D. 140.

36. S.D.—Jordan v. Schaefer, supra.

37. Ala.—Davis v. Daniels, 85 So. 797, 204 Ala. 374.

38. S.D.—Jordan v. Schaefer, 166 N. W. 547, 40 S.D. 140.

39. Ala.—Tri-State Constr. Co. v. Friendship Baptist Church, 102 So. 618, 212 Ala. 333.

40. Kan.—Superior Oil Co. v. Johnson, 171 P.2d 658, 161 Kan. 710.
51 C.J. p 231 note 86.

41. Okl.—Myers v. Harness, 244 P. 1109, 116 Okl. 268.

42. Kan.—Superior Oil Co. v. Johnson, 171 P.2d 658, 161 Kan. 710.
Md.—Homewood Realty Corporation v. Safe Deposit & Trust Co. of Baltimore, 154 A. 52, 160 Md. 457, 73 A.L.R. 8.
51 C.J. p 231 note 84.

Demurrer to pleading good in part. A demurrer to the entire bill should be overruled if the bill shows a right to any relief.[43] Accordingly a bill will not be held bad on a general demurrer, if it is maintainable as to part of the lands described in the complaint.[44]

d. Hearing and Determination

General rules governing the hearing and determination of demurrers apply to demurrers in actions to quiet title.

General rules governing the hearing and determination as to demurrers in civil actions generally, discussed in Pleading §§ 264–268, have been applied to demurrers in actions to quiet title.[45] Thus, where a complaint consists of two counts, one to quiet title, and the other merely incidental thereto, so that only one cause of action is stated, a general demurrer will be sustained if the second count reveals a substantial defect or fails to state a cause of action.[46] Where a bill to quiet title, joined with a prayer for other relief, is held multifarious on demurrer, complainant may elect, by amendment, the aspect on which he will proceed,[47] but if the sole equity of the bill is the statutory proceeding to quiet title, and the bill is insufficient for failure to set up jurisdictional facts, a demurrer to the whole bill for want of equity must be sustained, and the cause cannot be retained for incidental relief equally obtainable at law.[48] It is error to sustain a demurrer and dismiss a bill which is readily correctible by amendment;[49] but, where plaintiff declines to amend after the sustaining of a demurrer which is both general and special, he must stand on his pleading as against both grounds of demurrer.[50]

On demurrer to a bill involving a question of boundaries, or what lands were intended to be conveyed by a certain description, which might be more or less affected by oral evidence or circumstances difficult to set forth in detail in the bill, plaintiff is entitled to the benefit of all such extrinsic evidence as might be introduced in support of his theory on the question under the case made by the bill.[51]

§ 74. Amended or Supplemental Pleadings

a. In general
b. Character of amendments

a. In General

The allowance or refusal of amendments to pleadings in actions to quiet title rests within the sound discretion of the court.

The general rules as to amended and supplementary pleadings in civil actions, discussed in Pleading §§ 275–338, and in equity proceedings, discussed in Equity §§ 390–424, apply to an action to quiet title or to remove a cloud or to determine adverse claims.[52] Pursuant to such rules the court may, in the exercise of a sound discretion, allow or refuse amendments to the pleadings according to the circumstances of the particular case;[53] and it has been held that great liberality should be exercised in permitting amendments.[54] An order sustaining a demurrer to an answer and permitting an amendment has been held to be merely a direction to file an amendment, so that the original answer is not superseded,[55] and a subsequent order striking the

43. Cal.—Campbell v. Genshlea, 180 P. 336, 180 Cal. 213.
51 C.J. p 232 note 89.

44. U.S.—Northern Pac. R. Co. v. Roberts, C.C.Wis., 42 F. 734, affirmed 15 S.Ct. 756, 158 U.S. 1, 39 L.Ed. 873.
51 C.J. p 232 note 90.

45. Cal.—Ephraim v. Metropolitan Trust Co. of Cal., 172 P.2d 501, 28 Cal.2d 824.

46. Cal.—Ephraim v. Metropolitan Trust Co. of Cal., supra.

47. Ala.—Cooper v. W. P. Brown, etc., Lumber Co., 108 So. 20, 214 Ala. 400.

48. Ala.—Cooper v. W. P. Brown, etc., Lumber Co., supra.

49. Ala.—Denbo v. Sherrill, 2 So.2d 773, 241 Ala. 385.

50. Cal.—Aalwyn v. Cobe, 142 P. 79, 168 Cal. 165.

51. Mich.—Howell v. Merrill, 30 Mich. 283.

52. Idaho.—Petty v. Petty, 168 P.2d 818, 66 Idaho 717, 164 A.L.R. 520.
51 C.J. p 241 note 76.

Pleadings held amendable

(1) In a suit to quiet title, a bill which was defective under the statute for failure to allege that the plaintiff was in possession of the property was subject to amendment. —Conway v. Wilson, 181 So. 385, 132 Fla. 404.

(2) A count in a complaint alleging a cause of action to quiet title to alleged interests in oil royalty, although it was defective in alleging plaintiffs' claims and not that they were the owners of their proportionate shares of landowners' royalty in oil and gas produced from defendant's property, was saved from being entirely defective and was amendable, where plaintiffs' titles and sources of titles were set forth in another cause of action the allegations of which were incorporated in the cause of action to quiet title.—Andrews v. W. K. Co., 94 P.2d 605, 35 Cal.App.2d 41.

53. Cal.—Bradley v. Butchart, 20 P. 2d 693, 217 Cal. 731—Davies v. Symmes, 122 P.2d 102, 49 Cal.App. 2d 433.
Ky.—Cox v. Jennings, 217 S.W.2d 305, 309 Ky. 238.
N.C.—Davis v. Morgan, 44 S.E.2d 593, 228 N.C. 78.
Okl.—Ellis v. Boggs, 104 P.2d 244, 187 Okl. 544.
51 C.J. p 241 note 77.

Amendment refused

Cal.—Davies v. Symmes, 122 P.2d 102, 49 Cal.App.2d 433.
Idaho.—Metzker v. Lowther, 204 P. 2d 1025, 69 Idaho 155.

Refusal of amendment held error

Utah.—Harman v. Yeager, 110 P.2d 352, 100 Utah 30.

54. Idaho.—Petty v. Petty, 168 P.2d 818, 66 Idaho 717, 164 A.L.R. 520.

55. Cal.—Boyer v. Crichton, 279 P. 677, 100 Cal.App. 24.

amended answer restores the original pleading.[56] Immaterial allegations in an amended pleading will not detract from the proper allegations of the original pleading.[57]

Waiver of objections. Where the supplemental complaint is objectionable on the ground that the original complaint is wholly defective, the objection must be taken by demurrer or by objection to the filing of the supplemental complaint,[58] and is waived by answer.[59]

Time of amendment. Subject to statutory provisions regulating the amendment of pleadings generally, the stage of the proceedings at which amendments are allowable is ordinarily a matter of discretion.[60] Amendments unobjectionable in their character have been allowed after issue joined,[61] at the trial or hearing,[62] at the close of the evidence,[63] after submission of the cause, but before decision,[64] after the cause has been transferred to another court,[65] after judgment or decree,[66] and even after reversal on appeal.[67] However, where plaintiff could have pleaded certain matter in his original pleading, but waited until judgment went against him before seeking to amend to include such matter, the court may properly refuse to permit such amendment.[68] Similarly, an amendment to an answer may be properly refused where there is excessive delay in moving to amend, and no satisfactory excuse for the delay, and allowance of the amendment would interfere with a prompt trial of the case in a manner fair to all parties.[69]

Ordinarily defendant cannot, after plaintiff has moved to dismiss and his motion has been called to the attention of the court, file an amended answer seeking affirmative relief.[70]

b. Character of Amendments

Necessary and material amendments in furtherance of justice are allowable as long as the subject of the action remains substantially the same and no new and distinct cause of action or claim of defense is set up.

Generally speaking, necessary and material amendments in furtherance of justice are allowable as long as the subject of the action remains substantially the same and no new and distinct cause of action or claim of defense is set up,[71] even though the amendment may change the form of remedy;[72] and it has been held that the court should not be astute to detect a departure.[73] Thus a bill, originally filed as a bill to quiet title strictly under the statute, may be amended by adding averments seeking to remove a cloud on title;[74] and, on the other hand, a bill to remove a cloud may be converted into a bill under the statute to compel the determination of adverse claims and to quiet title.[75] Similarly, in an action to remove a cloud from title, defendant may be permitted to amend his answer so as to set up his title.[76] However, a new and different cause of action may not be substituted for the

3. Cal.—Hoyer v. Crichton, supra.
7. Ala.—Davidson v. Blackwood, 34 So.2d 205, 250 Ala. 263.

Plaintiff's peaceable possession

An amended bill to cancel deed and remove it as cloud on plaintiff's title to land did not detract from general allegation of original bill to quiet title that plaintiff was in peaceable possession of land by averring past acts of defendant and his predecessors in title which indicated possible interference with plaintiff's previous peaceable possession, since the criterion is peaceable possession when suit is instituted.—Davidson v. Blackwood, supra.

Minn.—Lowry v. Harris, 12 Minn. 255.

Minn.—Lowry v. Harris, supra.

Cal.—Davies v. Symmes, 123 P. 2d 102, 49 Cal.App.2d 433.
—Cox v. Jennings, 217 S.W.2d 305, 309 Ky. 238.
—Ellis v. Boggs, 104 P.2d 244, 187 Okl. 544.
51 C.J. p 242 note 98.

Ala.—Freeman v. Brown, 11 So. 49, 96 Ala. 301.

Cal.—Neher v. Kauffman, 243 P. 13, 197 Cal. 674.
51 C.J. p 242 note 1.

63. Okl.—Ellis v. Boggs, 104 P.2d 244, 187 Okl. 544.

64. Cal.—Andrus v. Smith, 65 N.E. 320, 133 Cal. 78.
Miss.—Hart v. Potter, 31 So. 898, 80 Miss. 796.

65. Ind.—Hitt v. Carr, 109 N.E. 156, 62 Ind.App. 80.

66. Idaho.—Petty v. Petty, 168 P.2d 818, 66 Idaho 717, 164 A.L.R. 520.
51 C.J. p 242 note 5.

67. Iowa.—Adams County v. Burlington, etc., R. Co., 44 Iowa 335.
51 C.J. p 242 note 6.

68. Ky.—Cox v. Jennings, 217 S.W. 2d 305, 309 Ky. 238.

69. Cal.—Davies v. Symmes, 123 P. 2d 102, 49 Cal.App.2d 433.
51 C.J. p 242 note 7.

70. Tex.—Dannelly v. Jeffrey, Civ. App., 283 S.W. 351.

71. Okl.—First Nat. Bank & Trust Co. of Oklahoma City v. Rohanon's Heirs, 189 P.2d 613, 199 Okl. 665.—Underhill v. Miller, 174 P.2d 349, 197 Okl. 657.—Ellis v. Boggs, 104 P.2d 244, 187 Okl. 544.
51 C.J. p 241 note 82.

Where pleadings or allegations are indefinite, ordinarily they are amendable.—Pittman v. Pittman, 25 So.2d 26, 247 Ala. 458.—51 C.J. p 241 note 82 [b].

72. Neb.—Homan v. Hollman, 53 N. W. 369, 35 Neb. 414.
51 C.J. p 241 note 83.

73. Okl.—Sanford v. Street, 62 P. 2d 479, 178 Okl. 172.

Claims not set forth in original petition

Okl.—Sanford v. Street, supra.

74. Ala.—Joiner v. Glover, 78 So. 55, 201 Ala. 279.
51 C.J. p 241 note 84.

75. Ala.—Smith v. Gordon, 34 So. 838, 136 Ala. 495.

Bill held not converted by amendment

Where bill as originally filed had for its primary purpose removal of cloud on title by reason of alleged invalid assessment, addition of averment by way of amendment to meet requirement for statutory bill to quiet title did not convert original bill into statutory bill to quiet title.—Commonwealth Life Ins. Co. v. First Nat. Bank, 160 So. 260, 230 Ala. 257.

76. U.S.—Stricker Land & Timber Co. v. Hogue, D.C.La., 61 F.Supp. 825.

original by amendment or be brought in by a new and separate count;[77] nor may a petition be amended so as to include a new count where the relief sought therein is premature.[78] In some instances the court may require the amending of a pleading for the purpose of making it more certain.[79]

Description of property. A mistake in the description of the property may be corrected by amendment;[80] and an amendment enlarging the description of the land may not be objected to as prejudicial to a defendant who disclaims as to all the premises described in the amended complaint.[81] However, an amendment substituting property different from that described in the original pleading is not allowable.[82] Notwithstanding an accurate plat is attached to a pleading, the court may require the pleading to be amended so as to contain a description by metes and bounds.[83]

Facts arising after commencement of the action which, if true, would defeat the action, may be pleaded by supplemental answer, at least under the code procedure which abolishes useless forms.[84] So, if at the commencement of the action plaintiff had the equitable title, a supplemental complaint may be filed setting up that plaintiff has since acquired the legal title;[85] and it has been held that, as against one who for his own benefit comes into a pending action to quiet title, plaintiff may, by supplemental complaint, avail himself of a title by adverse possession which became complete after he brought the action but before the intervention.[86] On the other hand, it has been held that, if plaintiff had no title whatever at the commencement of the action, he will not be permitted to file a supplemental complaint showing an after-acquired title.[87] Similarly, if an original bill to remove a cloud from title is filed when complainant is not in possession, so that the bill is objectionable for failure to allege possession, as discussed supra § 60, the court may refuse leave to file a supplemental bill alleging possession subsequently obtained.[88]

Amendments to conform to proof. In accordance with general rules of pleading, the court may, in a proper case, authorize amendments of the pleadings to conform to the proofs,[89] or treat the pleading as so amended.[90] Evidence admitted without objection will not effect an amendment of a pleading so as to embrace subject matters of causes of action not therein mentioned.[91]

§ 75. Issues, Proof, and Variance

a. In general
b. Matters which must be proved
c. Evidence admissible under pleadings
d. Variance between allegations and proof

a. In General

The issues in an action to quiet title or remove a cloud are issues of law and issues of fact; and the issues of fact which arise are those, and only those, which are properly presented by the pleading.

In accordance with rules governing issues, proof, and variance in civil actions generally, discussed in Pleading §§ 512–546, and in equity proceedings generally, discussed in Equity §§ 438–446, the issues in an action to quiet title or remove a cloud are issues of law,[92] and issues of fact.[93] The issues of fact which arise for determination in a suit to quiet title are those, and only those, which are properly presented by the pleadings.[94] On the other hand, a de-

77. Kan.—Birch v. Solomon Nat. Bank, 263 P. 1044, 125 Kan. 211.
51 C.J. p 241 note 86.

78. Mo.—McMurry v. McMurry, 104 S.W.2d 345, 340 Mo. 1094.

Count for partition

Parties seeking to quiet title based on claim of title in fee were held not entitled to amend petition so as to include a count in partition in which they sought partition as between themselves to exclusion of defendants, since such count was premature.—McMurry v. McMurry, supra.

79. Cal.—Diamond v. Grath, 116 P. 2d 114, 45 Cal.App.2d 443.

Details of trusteeship

Where plaintiff alleged in action to quiet title that he was owner of described land and plaintiff testified that he was the owner and that he was owner by reason of a certain trust agreement, court should have required plaintiff to amend title and body of complaint to show clearly for whom he was trustee so that the litigation could be determined on its merits expeditiously and completely. —Diamond v. Grath, supra.

80. Or.—Krueger v. Brooks, 184 P. 235, 94 Or. 119.
51 C.J. p 242 note 87.

Typographical error

Okl.—Howard v. Stewart, 159 P.2d 527, 195 Okl. 491.

81. Cal.—Bulwer Cons. Min. Co. v. Standard Cons. Min. Co., 23 P. 109, 83 Cal. 613.

82. Ala.—Rice v. Davidson, 101 So. 604, 211 Ala. 693.

83. Mo.—Curd v. Reaban, 232 S.W. 2d 389.

84. Wyo.—Norris v. United Mineral Products Co., 158 P.2d 673, 61 Wyo. 386.
51 C.J. p 242 note 90.

85. Minn.—Lowry v. Harris, 12 Minn. 255.

86. Utah.—Weiner v. Stearns, 120 P. 490, 40 Utah 185, Ann.Cas.1914C 1175.

87. Cal.—Rowley v. Davis, 167 P. 162, 34 Cal.App. 184.

88. Ill.—Miller v. Akin, 182 N.E 722, 350 Ill. 186.

89. Ill.—South Chicago Brewing Co. v. Taylor, 68 N.E. 732, 205 Ill. 132.
51 C.J. p 242 note 95.

90. Wis.—Mitchell v. Lyons, 158 N. W. 70, 163 Wis. 395.
51 C.J. p 242 note 96.

91. Mo.—Clark v. Heckerman, 142 S.W.2d 35, 346 Mo. 453.

92. Mont.—Mitchell v. McCormick, 56 P. 216, 22 Mont. 249.

93. Ky.—Gilreath v. Stephens, 192 S.W.2d 966, 301 Ky. 689.

94. Ala.—Dodd v. Deepwater Coal &

nial that the realty in controversy is plaintiff's homestead, and that the sale thereof made under defendant's judgment, which is a pure money judgment, is void or a cloud on title, raises an issue of law, and not of fact.[95] So also, where the complaint states plaintiff's ownership and defendant's claim, setting out facts showing the nature and extent of the latter's title, and the answer admits the allegations of the complaint, issues of law determinative of the conflicting claims are raised;[96] but no such issue of law arises where the complaint merely alleges that defendant claims some interest, without setting out its nature and extent, and the answer merely admits such allegations.[97]

Title and adverse claim. The rule confining the issues of fact to those presented by the pleadings is applicable to the issue of title to the property involved.[98] A general denial is sufficient to put plaintiff's title in issue in an action to determine adverse claims.[99] So a general denial and special plea asserting title in defendant put the whole title in issue.[1] Where the complaint alleges that defendant claims some estate or interest in the land adverse to plaintiff, but that his claim is without right, and that he has no right, title, or interest therein, and the answer admits the former, and denies the latter, allegation, such answer raises a material issue of fact;[2] and where the petition alleges that defendant was not an innocent purchaser, a general denial puts such allegation in issue.[3] Where defendant denies plaintiff's ownership and alleges title in himself, and also sets up the same title by counterclaim, praying that it be quieted, a voluntary dismissal of the counterclaim does not expunge allegations of defendant's ownership in the answer proper, but leaves the issue of fact intact.[4]

Possession. The rule confining issues of fact to those presented by the pleadings applies to the issue of possession of property.[5] As considered supra § 67 b, a denial of plaintiff's possession raises a material issue; but an issue as to such possession is immaterial where the action is brought under a statute dispensing with possession as a condition precedent to the maintenance of the action.[6]

Fraud and forgery. The rule that the issues must be raised by the pleadings applies to fraud as an issue.[7] If it is alleged that defendant holds a deed to the property which is a fraud and a forgery, and

Iron Corporation, 171 So. 732, 233 Ala. 392.
Cal.—Kays v. Bundy, 207 P.2d 113, 92 Cal.App.2d 497.
Ky.—Harmon v. Lowe, 219 S.W.2d 982, 310 Ky. 60—Corpus Juris cited in Gilreath v. Stephens, 192 S.W.2d 966, 967, 301 Ky. 689.
N.M.—Murray Hotel Co. v. Golding, 216 P.2d 364, 54 N.M. 149.
Pa.—Newman v. Fuller, Com.Pl., 14 Som.Leg.J. 82.
51 C.J. p 242 note 16.

If the bill and answer conform to the statute in a proceeding to quiet title, the issues involve everything necessary to determine which party has the superior title.—Hinds v. Federal Land Bank of New Orleans, 179 So. 194, 235 Ala. 360.

Matters held in issue
Cal.—Williams v. Hebbard, 92 P.2d 657, 33 Cal.App.2d 686.
Mo.—White v. Kentling, 134 S.W.2d 39, 345 Mo. 526.
Tex.—Schrock v. Campbell, Civ.App., 34 S.W.2d 324, modified on other grounds Campbell v. Schrock, Com. App., 50 S.W.2d 788.

Matters held not in issue
Iowa.—Blain v. Blain, 244 N.W. 827, 215 Iowa 69.
Ky.—Flinn v. Blakeman, 71 S.W.2d 961, 254 Ky. 416.
Minn.—Merchants' & Farmers' State Bank of Grove City v. Olson, 250 N.W. 366, 189 Minn. 528, 89 A.L.R. 1289.
Mo.—White v. Kentling, 134 S.W.2d 39, 345 Mo. 526—Curry v. Crull, 116 S.W.2d 125, 342 Mo. 553.
S.C.—Evans v. Anderson, 175 S.E. 527, 173 S.C. 291.

95. Mont.—Mitchell v. McCormick, 56 P. 216, 22 Mont. 249.

96. Conn.—Hartford - Connecticut Trust Co. v. Cambell, 111 A. 864, 95 Conn. 399—Foote v. Brown, 62 A. 667, 78 Conn. 369.

97. Conn.—Orentlicherman v. Matarese, 121 A. 275, 99 Conn. 122.

98. Mo.—Matthews v. Citizens' Bank of Senath, 46 S.W.2d 161, 329 Mo. 556.
51 C.J. p 243 note 18.

Title held in issue
U.S.—People of Porto Rico v. Livingston, C.C.A.Puerto Rico, 47 F.2d 712, certiorari denied 53 S.Ct. 33, 284 U.S. 642, 76 L.Ed. 546.

Pleadings held sufficient to raise issue as to
(1) Title.—Dittmar v. Alamo Nat. Co, Civ.App., 91 S.W.2d 781, affirmed 118 S.W.2d 298, 133 Tex. 44—51 C.J. p 243 note 18 [c].
(2) Title, ownership, and boundaries.—Tiffany v. Uhde, Mont., 216 P.2d 375.
(3) Whether petitioners owned the land described in petition and location of the lands so described.—Simmons v. Lee, 53 S.E.2d 79, 230 N.C. 216.

99. Ala.—Rushton v. McLaughlin, 104 So. 534, 213 Ala. 380.
51 C.J. p 243 note 19.

Mode and manner of acquiring title
Where plaintiff in suit to quiet title alleged ownership and possession generally, denial of such ownership or possession put in issue every mode or manner by which that acquirement was obtained so that plaintiff, in order to establish title in a particular mode or manner, was required to make same character of proof necessary as if such mode had been specifically averred and defendant had in terms denied it.—Hopkins v. Slusher, 98 S.W.2d 932, 266 Ky. 300, 108 A.L.R. 662.

1. Mo.—Mahaffey v. Lebanon Cemetery Assoc., 161 S.W. 701, 253 Mo. 135—Flynn v. Strop, 161 S.W. 700, 253 Mo. 1.

2. Cal.—Tompkins v. Sprout, 55 Cal. 31.

3. Mo. Heffernan v. Hagedale, 97 S.W. 898, 199 Mo. 375.

4. Colo.—McMillen v. Hayman, 221 P. 893, 74 Colo. 300.

5. N.J.—Campbell Stores v. Mayor and Council of City of Hoboken, 169 A. 681, 115 N.J.Eq. 159.

Possession held not put in issue
N.J.—Campbell Stores v. Mayor and Council of City of Hoboken, supra.

6. Cal.—Pearson v. Creed, 20 P. 302, 78 Cal. 144.

7. Cal.—Cox v. Klatte, 84 P.2d 290, 20 Cal.App.2d 150.

Issue held properly raised
Cal.—Cox v. Klatte, supra.

a cloud on plaintiff's title, and, unless canceled, will operate as an irreparable injury to plaintiff, the only issues tendered to be considered on the trial are the questions as to forgery and fraud;[8] but where the answer alleges that a deed made by plaintiff's vendor was without consideration, and to hinder, delay, and defraud a certain creditor of vendor, which allegation is denied, no issue is raised as to whether the deed was made to delay or defraud the creditors of the vendor generally.[9]

b. Matters Which Must Be Proved

(1) In general
(2) Title or interest
(3) Possession of land

(1) In General

All matters which are material or essential to a cause of action or defense in actions to quiet title or remove a cloud must be proved; but nonessential matters are not required to be proved even though alleged.

In actions to quiet title or to remove a cloud all matters which are material or essential to a cause of action or a defense must not only be alleged in the pleadings, as discussed supra §§ 58–74, but must be proved.[10] Nonessential matters are not required to be proved even though they may be alleged in the pleadings,[11] as where plaintiff's reply contains a denial of allegations in the answer which are essentially defensive;[12] but incidental relief dependent on such matters cannot be granted where such matters are not proved.[13]

Defendant's adverse claim. Where defendant pleads an adverse claim he must prove it.[14]

Improvements by defendant. Under the betterment statutes it has been held that defendant must prove his allegations as to improvements on the land even though plaintiff makes no formal denial of such allegations.[15]

Truth of recitals in instrument constituting cloud. Where plaintiff alleges that defendant makes an adverse claim of title under a certain deed which he offers in evidence, he is not bound to show that the recitals in the deed are untrue before he can recover.[16]

(2) Title or Interest

The plaintiff is required to prove legal or equitable title in himself, or some interest superior to that of the defendant, unless such matter is not put in issue; but ordinarily immaterial allegations as to title need not be proved.

It has been held necessary, as a jurisdictional prerequisite, that complainant show himself to be the true owner of the legal title.[17] Where plaintiff's title is put in issue by the answer he must prove the legal or equitable title in himself,[18] or at least that he has some interest in the land in controversy superior to that of defendant.[19] If, however, plaintiff's title is not put in issue he is not required to prove title.[20] Thus, if the chain of title is specifically set forth in the bill, and not specifically denied, evidence thereof need not be produced.[21] So also, where defendant claims title through plaintiff, the latter need not prove his title;[22] and, where both parties claim title from a common source, it is not

Issue held not raised

Mo.—Dreckshage v. Dreckshage, 176 S.W.2d 7, 352 Mo. 78.

8. S.C.—Halk v. Stoddard, 45 S.E. 140, 67 S.C. 147.

9. Cal.—Traverso v. Tate, 22 P. 1082, 82 Cal. 170.

10. Cal.—Williams v. Rush, 25 P.2d 888, 134 Cal.App. 554

Fla.—Dade County v. Thompson, 200 So. 212, 146 Fla. 66.

Plaintiff must prove fraud if relied on to overcome effect of an instrument.—Ramsey v. Ramsey, 29 S.E.2d 340, 224 N.C. 110.

11. Ill.—Simpson v. Adkins, 53 N.E. 2d 979, 386 Ill. 64.

Miss.—Levy v. Campbell, 28 So.2d 224, 200 Miss. 721.

12. Okl.—McGrath v. Eichhoff, 100 P.2d 880, 187 Okl. 64.

Plaintiff as bona fide purchaser

Plaintiff was not required to prove that he was a bona fide purchaser of lot involved, where question of plaintiff's bona fides was injected as affirmative defense by allegations of answer which were denied in plaintiff's reply, and, hence, it was not incumbent on plaintiff to introduce evidence to refute allegations until defendants had introduced some evidence in support of allegations.—McGrath v. Eichhoff, 100 P.2d 880, 187 Okl. 64.

13. Ill.—Simpson v. Adkins, 53 N.E. 2d 979, 386 Ill. 64.

Where plaintiffs did not rely on tax deed as source of their title, but allegations in complaint with respect to tax deed were made as basis for asking court to cancel deed as cloud on plaintiffs' title, only effect of plaintiffs' failure to prove invalidity of tax deed was to prevent them from having deed canceled as a cloud on their title.—Simpson v. Adkins, supra.

14. N.Y.—George v. People, 47 N.Y.S.2d 681, 267 App.Div. 575.

15. Ark.—Sadler v. Campbell, 236 S.W. 588, 150 Ark. 594.

16. Kan.—Douglass v. Huhn, 24 Kan. 766

17. Tenn.—Brier Hill Collieries v. Pile, 4 Tenn.App. 468.

18. Ky.—Davis v. Daniel, 175 S.W. 2d 501, 295 Ky. 717—Crawley v. Mackey, 143 S.W.2d 171, 283 Ky. 717—McGiboney v. Newman, 127 S.W.2d 860, 277 Ky. 835—Hale v. Horn, 97 S.W.2d 402, 265 Ky. 560—Hatton v. Williams' Ex'r, 82 S.W. 2d 774, 259 Ky. 548—Brown v. Martin, 39 S.W.2d 243, 239 Ky. 146.

Miss.—Ables v. Forrester, 181 So. 913, 182 Miss. 551.

Okl.—Piland v. Craig, 154 P.2d 583, 194 Okl. 666—State ex rel. Richardson v. Citizens State Bank of Webbers Falls, 97 P.2d 91, 186 Okl. 270.

51 C.J. p 243 note 28.

19. Neb.—McCauley v. Ohenstein, 62 N.W. 232, 44 Neb. 89.

20. Ala.—Chapman v. Cothran, 17 So.2d 677, 245 Ala. 468.

21. Ill.—Head v. Thurber, 32 N.E. 492, 142 Ill. 486.

51 C.J. p 243 note 30.

22. Cal.—Tannahill v. Greening, 259 P. 1017, 85 Cal.App. 714—Strange v. Strange, 137 P. 1104, 23 Cal.App. 281.

necessary for plaintiff to prove title in the common grantor,[23] but only that the title of such grantor passed to him.[24] Similarly, it is not necessary for defendant to prove title in his grantor where the grantor's former ownership is alleged in the complaint and not denied in the answer.[25] Where defendant alleges title in himself and asks to have it quieted, he waives the question of possession in plaintiff, as considered supra § 31, but plaintiff must still prove his title.[26]

Immaterial allegations in respect of plaintiff's title ordinarily need not be proved.[27] Thus, where the statute under which the action is brought was intended to enable a party to quiet his title by proof of actual peaceable possession with claim of title, the fact that plaintiff's title in fee is alleged in the complaint and denied in the answer does not render it necessary for plaintiff to prove title in himself.[28] On the other hand it has been held that, where plaintiff unnecessarily alleges ownership, he must prove it, if it is denied by the answer.[29]

Admissions. Where the answer admits title in plaintiff, no proof of title is necessary.[30] Under a statute providing that when an action or defense is founded on a written instrument, a copy of which is contained in the pleading, the genuineness and due execution of such instrument are deemed admitted unless an affidavit denying such facts is filed within a prescribed period, in the absence of such controverting affidavit the instrument is not required to be put in evidence.[31] The admissions of an infant defendant, however, may not be taken against him, but plaintiff is required to prove title in himself with the same certainty as would be required of him had an answer been filed denying positively the allegation of title;[32] and a fortiori an admission in the answer of a codefendant that title is in plaintiff cannot bind the infant, although the interest of himself and his codefendant is joint.[33]

(3) Possession of Land

Where possession is necessary to maintenance of the action, the plaintiff must prove his possession of the land, unless an allegation of possession is not denied; and where an allegation that land is vacant and unoccupied is material it must be proved.

If possession is necessary to the maintenance of the action, in accordance with the rules discussed supra §§ 26-31, plaintiff cannot prevail without proof of such possession,[34] where the allegation of possession is denied in the answer,[35] although he need not prove possession of all of the land, since he may succeed as to a part and fail as to the remainder.[36] However, where plaintiff's allegation of possession is not denied[37] or is not essential under the circumstances,[38] proof thereof is unnecessary. So, where plaintiff deraigns a good title, and defendant shows no title, plaintiff need not prove his possession, although his allegation thereof is not denied by defendant.[39] Where possession in plaintiff is not necessary to the maintenance of the action, his al-

23. Cal.—Thiele v. Security Trust, etc., Bank, 262 P. 308, 202 Cal. 758.
51 C.J. p 244 note 34.
24. N.D.—Shuck v. Shuck, 44 N.W. 2d 767.
51 C.J. p 244 note 35.
25. Cal.—Harris v. Harris, 88 P. 384, 7 Cal.Unrep.Cas. 319.
26. Ky.—Moren v. Houston, 2 S.W. 2d 667, 222 Ky. 785—Southern Oil Co. v. Holman, 244 S.W. 762, 196 Ky. 250.
27. Minn.—Wilder v. St. Paul, 12 Minn. 192.
28. Minn.—Wilder v. St. Paul, supra.
29. Ala.—Vaughan v. Palmore, 57 So. 488, 176 Ala. 72.
30. Mo.—Long v. Lackawanna Coal, etc., Co., 136 S.W. 672, 232 Mo. 718.
51 C.J. p 244 note 41.
31. Cal.—Butler v. Stratton, 212 P. 2d 43, 95 Cal.App.2d 33.
32. W.Va.—Holderby v. Hagan, 50 S.E. 437, 57 W.Va. 341, 4 Ann.Cas. 401.
33. W.Va.—Holderby v. Hagan, supra.
34. Ala.—Standard Contractors Supply Co. v. Scotch, 25 So.2d 257, 247 Ala. 517—Hinds v. Federal Land Bank of New Orleans, 186 So. 153, 237 Ala. 218—Brookside-Pratt Mining Co. v. Wright, 173 So. 605, 234 Ala. 70.
Colo.—Harrison v. City and County of Denver, 76 P.2d 1110, 102 Colo. 98.
Ga.—Burton v. Hart, 55 S.E.2d 594, 206 Ga. 87—Oglesby v. Oglesby, 32 S.E.2d 906, 198 Ga. 864—Northwest Atlanta Bank v. Manning, 17 S.E.2d 547, 193 Ga. 186—Moore v. Moore, 4 S.E.2d 18, 188 Ga. 303—Sweat v. Arline, 197 S.E. 893, 186 Ga. 460.
Ill.—McCookey v. Winter, 46 N.E.2d 84, 381 Ill. 516—First Nat. Bank v. Gordon, 21 N.E.2d 288, 371 Ill. 424.
Ky.—Smith v. Williamson, 208 S.W. 2d 503, 306 Ky. 467—Hopper v. McBurney, 168 S.W.2d 374, 293 Ky. 31—McGiboney v. Newman, 127 S.W.2d 860, 277 Ky. 835—Madden v. Bond, 106 S.W.2d 95, 269 Ky. 31—Hatton v. Williams' Ex'r, 53 S.W. 2d 774, 259 Ky. 548.
Okl.—Piland v. Craig, 154 P.2d 583, 194 Okl. 666.
35. Ky.—Davis v. Daniel, 175 S.W. 2d 501, 295 Ky. 717—Crawley v. Mackey, 143 S.W.2d 171, 293 Ky. 717—Hale v. Horn, 97 S.W.2d 402, 265 Ky. 560—Brown v. Martin, 39 S.W.2d 243, 239 Ky. 116.
51 C.J. p 244 note 45.
Right to judgment on disclaimer without proof of possession see supra § 68 b.
36. Minn.—Wellendorf v. Tesch, 80 N.W. 639, 77 Minn. 513.
37. Ala.—Vandegrift v. Shortridge, 61 So. 897, 181 Ala. 275.
Colo.—Lambert v. Murray, 120 P. 415, 52 Colo. 156.
38. Ala.—Ellis v. Womack, 23 So.2d 859, 247 Ala. 254.
Ga.—Northwest Atlanta Bank v. Manning, 17 S.E.2d 547, 193 Ga. 186—Page v. Brown, 15 S.E.2d 506, 193 Ga. 398—Moore v. Moore, 4 S.E.2d 18, 188 Ga. 303—Sweat v. Arline, 197 S.E. 893, 186 Ga. 460.
Ill.—McCookey v. Winter, 46 N.E.2d 84, 381 Ill. 516.
39. Colo.—Church v. Nielsen, 138 P. 880, 28 Colo.App. 211.

legation of possession is superfluous and need not be proved.[40]

Vacant and unoccupied land. In an action by one not in possession to quiet title to lands alleged to be vacant and unoccupied, such allegation, being material, must be proved in order to entitle plaintiff to recover.[41] Where, under the circumstances, such allegation is unnecessary, such matter need not be proved.[42] Thus, if defendant, in the ordinary statutory action to determine adverse claims, alleges title in himself, and demands affirmative relief against plaintiff, it is not necessary for plaintiff to prove the allegation that the land is vacant and unoccupied,[43] or that he is in possession,[44] as the case may be; and, where an allegation in the answer that the land was vacant and unoccupied is not denied by the reply, it stands admitted, and need not be proved.[45]

c. Evidence Admissible under Pleadings

In general, the proof in actions to quiet title or remove clouds must be confined to the issues, and evidence will be admitted when, and only when, it conforms to the pleadings.

In accordance with the general rules governing the admissibility of evidence under the pleadings in civil actions, discussed in Pleading §§ 524–530, and in equity proceedings, discussed in Equity § 444, the proof in actions to quiet title or remove clouds must be confined to the issues, and hence evidence will be admitted when, and only when, it conforms to the matters alleged in the bill or answer.[46] However, it has been held in some jurisdictions, that defendant may, under general denial, give in evidence all defenses, either legal or equitable.[47]

Title. The rule confining the proof to the issues made by the pleadings applies to proof of title to the property in issue.[48] Thus, where the nature or source of plaintiff's title is specifically set out, evidence of a different title or title from another source cannot be proved.[49] However, under a general allegation of title, plaintiff may prove title by adverse possession,[50] or whatever title he has,[51] from whatever source he may have acquired it and by any species of conveyances recognized by law;[52] and an allegation of title by adverse possession has been held not to preclude evidence of record title and possession.[53] Moreover, the fact that plaintiff pleads ownership only, and not possession, does not prevent him from proving possession in order to show ownership.[54]

Under a general allegation in the answer of title in himself, defendant may show any title, legal or equitable,[55] such as title by adverse possession.[56] Defendant cannot rely on a defense inconsistent

40. Ariz.—Chuk v. Katich, 231 P. 923, 27 Ariz. 182.

41. Ill.—McGookey v. Winter, 46 N. E.2d 84, 381 Ill. 516.
51 C.J. p 244 note 50.

42. Ill.—McGookey v. Winter, supra.

43. Alaska.—Pioneer Min. Co v. Pacific Coal Co, 4 Alaska 463.
51 C.J. p 244 note 51.

44. Alaska.—Pioneer Min. Co. v. Pacific Coal Co., supra.
51 C.J. p 244 note 52.

45. Colo.—Vanderpan v. Pelton, 123 P. 960, 22 Colo.App 357.

46. Cal.—Storrs v. Belmont Gold Min. & Mill. Co., 76 P.2d 197, 24 Cal.App 2d 551.
Ill.—Townsend v. Townsend, 199 N. E. 786, 362 Ill. 384.
Ky.—Corpus Juris cited in Gilreath v. Stephens, 192 S.W.2d 966, 967, 301 Ky. 689.
Nev.—Gray v. Coykendall, 6 P.2d 442, 53 Nev. 466.
Wash.—Roesch v. Gerst, 133 P.2d 846, 16 Wash.2d 294.
51 C.J. p 244 note 53.

Evidence held admissible
Cal.—Elliott v. Bertsch, 139 P.2d 302, 59 Cal.App.2d 543.
Mont.—West v. Capital Trust & Savings Bank, 124 P.2d 572, 113 Mont. 130.
Tex.—Perry v. Venable, Civ.App., 112 S.W.2d 1069, error dismissed
51 C.J. p 244 note 58 [d].

Evidence held inadmissible
N.M.—Edmondson v. Ætna Loan & Mortgage Co., NSL, 24 P.2d 730, 37 N.M. 478.
51 C.J. p 244 note 58 [e].

47. Ind.—Ault v. Miller, 181 N.E. 35, 203 Ind. 487—Sawyer v. Kleine, 32 N.E.2d 533, 113 Ind.App. 616
51 C.J. p 245 note 75.

48. Ind.—Kozanjieff v. Petroff, 19 N. E.2d 563, 215 Ind. 286, 122 A.L.R. 479.

Restrictive statute held inapplicable
In suit to enjoin interference with fence on boundary of land to which defendants sought to quiet title by counterclaim, written evidence of their title was not inadmissible because it was not set out in abstract attached to pleading as required by statutes pertaining to action for recovery of real property.—Swim v. Langland, 11 N.W.2d 713, 234 Iowa 46.

49. Ind.—Kozanjieff v. Petroff, 19 N. E.2d 563, 215 Ind. 286, 122 A.L.R. 479—Ault v. Miller, 181 N.E. 35, 203 Ind. 487—Bercot v. Veikos, 41 N.E.2d 686, 111 Ind.App. 323.
Okl.—Bridwell v. Goeske, 192 P.2d 656, 200 Okl. 244.
51 C.J. p 245 note 59.

Rule held not violated
Ind.—Harwood v. Masquelette, 187 N.E. 380, 95 Ind.App. 338.

50. Cal.—Glatts v. Henson, 138 P.2d 745, 31 Cal.2d 368—Anderson Cottonwood Irr. Dist. v. Zinzer, 125 P. 2d 82, 51 Cal.App.2d 587—Widney v. Southern Pac. Co., 7 P.2d 1046, 120 Cal.App. 291.
Ky.—Whinery v. Crawford, 116 S.W. 2d 631, 273 Ky. 325.
Mont.—Le Vasseur v. Roullman, 20 P.2d 250, 93 Mont. 552.
Or.—Cooper v. Blair, 92 P. 1074, 50 Or. 394.

51. Cal.—Anderson Cottonwood Irr. Dist. v. Zinzer, 125 P.2d 82, 51 Cal. App.2d 587—Widney v. Southern Pac. Co., 7 P.2d 1046, 120 Cal.App. 291.
Okl.—Whitehead v. Garrett, 185 P.2d 686, 199 Okl. 278.
51 C.J. p 245 note 61.

52. Mont.—Nadeau v. Texas Co., 69 P.2d 586, 104 Mont. 558—Thomson v. Nygaard, 41 P.2d 1, 98 Mont. 529.

53. Cal.—Walker v. Hansen, 24 P. 2d 764, 218 Cal. 619.

54. Cal.—Davis v. Crump, 123 P. 294, 162 Cal. 513.

55. Mo.—Noble v. Cates, 130 S.W. 362, 230 Mo. 189.

56. Wash.—Metropolitan Bldg. Co.

with a title, which, by his answer, he sets up in himself;[57] and where he pleads a fee simple title in himself, he is restricted to proof of such title,[58] and cannot prove an equitable title or interest.[59] Where the complaint alleges that plaintiff is the owner and that defendant claims an adverse estate, calling on him to set forth the nature of his claim, defendant is not confined to proof of a particular claim, but may set forth any adverse title on which he relies.[60] Where plaintiff alleges defendant's adverse claim of title and defendant admits the claim adverse to plaintiff and asserts ownership in himself, defendant may introduce evidence attacking plaintiff's title;[61] and he may controvert a prima facie showing by plaintiff either by evidence showing that plaintiff does not have title[62] or that defendant himself is the owner.[63] In jurisdictions where no pleadings are allowed beyond a demurrer to the reply, if plaintiff's title is pleaded for the first time in reply, defendant may, without further pleading, introduce evidence attacking the validity of such title.[64]

Void conveyance; fraud. In accordance with the rule confining the evidence to the issues made by the pleadings, evidence attacking the validity of a conveyance,[65] such as evidence of undue influence,[66] or want of consideration,[67] is not admissible unless pleaded. Thus, where plaintiff sets up a conveyance as a basis for title, defendant cannot show that the conveyance was fraudulent,[68] unless he has pleaded fraud;[69] nor can fraud be proved by plaintiff where no fraud was charged in plaintiff's pleadings.[70] Moreover, where defendant alleges fraud he is limited to evidence as to actual fraud or oppression.[71] However, under an exception, which prevails in certain special circumstances,[72] it has been held that defendant is not bound to anticipate the source of plaintiff's title,[73] and may prove, without specifically pleading the fact, that it depends on a void or fraudulent conveyance.[74] Moreover, where defendant sets up a deed or other muniment of title under which he claims, plaintiff may, in jurisdictions where no replication is required or permitted, show that the instrument was procured by fraud, although he did not plead fraud in his complaint,[75] or may present whatever defense he has to the new matter so alleged by defendant;[76] and where plaintiff alleges ownership, and defendant denies the allegation in general terms and introduces a decree on which his claim is based, without pleading such decree, plaintiff may, under the implied replication which the law raises, prove that such decree was invalid for fraud and want of jurisdiction.[77] Where by statute the genuineness and due execution of an instrument, such as a deed, which is set out in a pleading are deemed admitted where not controverted by a verified denial, as discussed supra subdivision b (2) of this section, and while evidence is inadmissible to establish a defense relating to the genuineness and due execution of the instrument,[78] evidence is admissible to show that the deed

v. Fitzgerald, 210 P. 770, 122 Wash. 514.

51 C.J. p 245 note 64.

57. Miss.—Harney v. Morton, 36 Miss. 411.
Pa.—Streaty v. Spoonhour, 141 A. 250, 292 Pa. 378.

58. Mo.—Noble v. Cates, 130 S.W. 302, 230 Mo. 180.

59. Minn.—Stuart v. Lowry, 51 N.W. 662, 49 Minn. 91.

60. Colo.—Colburn v. Dortic, 111 P. 837, 49 Colo. 90.

61. Cal.—Pacific States Savings & Loan Co. v. Warden, 117 P.2d 877, 18 Cal.2d 757.

62. Cal.—Pacific States Savings & Loan Co. v. Warden, supra.

63. Cal.—Pacific States Savings & Loan Co. v. Warden, 117 P.2d 877, 18 Cal.2d 757.

64. Okl.—Pimm v. Waldron, 244 P. 37, 118 Okl. 5.

65. Cal.—Davies v. Symmes, 122 P. 2d 102, 49 Cal.App.2d 433.

66. Cal.—Davies v. Symmes, supra.

67. Cal.—Davies v. Symmes, supra.

68. Cal.—Whitney v. Sherman, 173 P. 931, 178 Cal. 435.

69. Cal.—Davies v. Symmes, 122 P. 2d 102, 49 Cal.App.2d 433.
N.M.—Edmondson v. Ætna Loan & Mortgage Co., N.M., 24 P.2d 730, 37 N.M. 478.
Tex.—Smith v. Montes, 11 Tex. 24.

70. Cal.—Carpenter v. Smallpage, 29 P.2d 841, 220 Cal. 129, modified on other grounds 30 P.2d 995—Maison v. Puntenney, 298 P. 33, 213 Cal. 134—Burris v. Adams, 31 P. 565, 96 Cal. 664—Bornoman v. Salinas Title Guarantee Co., 152 P.2d 649, 66 Cal.App.3d 500.

71. Cal.—Central Nat. Bank of Oakland v. Bell, 54 P.2d 1107, 5 Cal.2d 324.

72. Cal.—Davies v. Symmes, 122 P. 2d 102, 49 Cal.App.2d 433.
Only through necessity and in exceptional cases is such a departure from established procedure tolerated. —Davies v. Symmes, supra.
Exception held inapplicable
The rule applied in certain cases that defendant in action to quiet title is not bound to anticipate source of plaintiff's title and may prove, without pleading fact, that it depends on a void conveyance, was inapplicable, where defendants had purchased land from plaintiffs and had reconveyed it to plaintiffs, but defendants had affirmative duty of proving invalidity of their deed to plaintiffs in order to defeat plaintiffs' title or establish their own, and also of pleading their grounds for rescission.—Davies v. Symmes, supra.

73. Cal.—Davies v. Symmes, supra. —Bird v. Murphy, 236 P. 154, 72 Cal.App. 39.

74. Cal.—Davies v. Symmes, 122 P. 2d 102, 49 Cal.App.2d 433.—Sellers v. Nell, 117 P.2d 390, 47 Cal.App. 2d 128—Bird v. Murphy, 236 P. 154, 72 Cal.App. 39.

75. Cal.—Jose Realty Co. v. Pavlicevich, 130 P. 615, 164 Cal. 613.
51 C.J. p 245 note 71.

76. Cal.—Bertelsen v. Bertelsen, 122 P.2d 130, 49 Cal.App.2d 479.

77. Cal.—Moakley v. Los Angeles Pac. R. Co., 277 P. 883, 98 Cal.App. 74.

78. Cal.—Butler v. Stratton, 213 P. 2d 43, 95 Cal.App.2d 28.

had been stolen or procured by fraud or to establish any other defense against it.[79]

Bona fide purchase. Where the statute only requires complainant to allege peaceable possession and ownership in general terms, such general averments are sufficient to allow proof of every fact necessary to establish in him a legal title superior to that asserted by defendant, including the fact that complainant or those under whom he claims were purchasers without notice.[80] On the other hand, where the statute requires specific avowal in the answer of the extent, character, and source of defendant's title, defendant cannot prove that one through whom he claims was an innocent purchaser without notice, where he did not so plead.[81]

d. Variance between Allegations and Proof

Averments and proofs in actions to quiet title or remove clouds should substantially correspond, and a material variance is fatal.

In accordance with the general rules governing such matters in civil actions, discussed in Pleading §§ 531–546, and in equity proceedings, discussed in Equity §§ 445, 446, the averments and proofs in actions to quiet title or remove a cloud should substantially correspond, and a material variance is fatal.[82] A variance between an allegation and proof which might have been obviated on the trial by other evidence or amendment if it had been expressly objected to on that ground will be deemed waived, and will be disregarded.[83]

As to title. Proof of the nature and source of plaintiff's title must not vary materially from the averments of the bill or complaint.[84] An averment of ownership in fee is not supported by proof of an equitable title,[85] although under some statutes the variance is immaterial.[86] So also, a specific plea of record title is not supported by proof of adverse possession.[87] A defense, consisting merely of a denial of plaintiff's title and an assertion of title in defendant, is not established by proof that, while plaintiff is the owner of the legal title, defendant has an equity entitling him to a conveyance.[88]

As to possession. An averment of possession in plaintiff is sustained by proof of possession in plaintiff's tenant at the time of bringing suit;[89] but proof showing property to be vacant constitutes a fatal variance.[90] An allegation that the land was vacant and unoccupied at the time of the filing of the bill is not sustained by proof that the land was vacant and unoccupied at a given time after the filing of the bill.[91]

79. Cal.—Butler v. Stratton, supra.

80. Ala.—Reeder v. Cox, 118 So. 338, 218 Ala. 182.

81. Ala.—Reeder v. Cox, supra—Adams v. Pollak, 117 So. 299, 217 Ala. 688.

82. Ky.—Gilreath v. Stephens, 192 S.W.2d 966, 301 Ky. 689.
51 C.J. p 246 note 77.

Matter held not to constitute variance

(1) Descriptions of property in issue—District Bond Co. v. Hilliker, 98 P.2d 782, 37 Cal.App.2d 81.

(2) In suit to set aside as a cloud on title a mineral deed and conveyance by alleged grantee to another on the ground that the deed was a forgery, the fact that besides direct evidence to prove alleged forgery there was admitted without objection certain immaterial evidence did not constitute a variance between the bill of complaint and the proof.—Laster v. Ard, Miss., 42 So.2d 737.

(3) Other matters see 51 C.J p 246 note 77 [b].

Variance held not fatal

(1) In suit to quiet title by lessors under oil and gas lease against lessee, wherein purported copy of lease attached to complaint omitted certain immaterial phrase which appeared in lease introduced in evidence, but lease admitted was properly identified and was undoubtedly the lease sued on, there was no "fatal variance."—Rice v. Lee, 113 P. 2d 285, 44 Cal.App.2d 909.

(2) Where plaintiff's petition described land as being in section twenty-five, but copy of patent attached to petition described land as being in section twenty-four as result of typographical error, defendant could not complain of admitting copy of patent in evidence on ground that it was a departure from pleadings, where defendant did not contend that he was misled by the discrepancy in the description or that land was not in fact in section twenty-five.—Howard v. Stewart, 159 P. 2d 527, 195 Okl. 491.

83. Ill.—Smith v. Prall, 24 N.E. 521, 133 Ill. 308.
Minn.—Messerschmidt v. Baker, 22 Minn 81.

84. Ky.—Gilreath v. Stephens, 192 S.W.2d 966, 301 Ky. 689.
51 C.J. p 246 note 79.

85. Ind.—Sawyer v. Kleine, 82 N.E. 2d 533, 118 Ind.App. 616.
51 C.J. p 246 note 80.

86. Mont.—Van Vranken v. Granite County, 90 P. 164, 35 Mont. 427.
51 C.J. p 246 note 81.

87. Ky.—Gilreath v. Stephens, 192 S.W.2d 966, 301 Ky. 689.

88. Cal.—Strong v. Strong, 140 P. 2d 386, 22 Cal.2d 540—Robinson v. Muir, 90 P. 521, 151 Cal. 118.

89. Wis.—Krebs v. Dodge, 9 Wis. 1.

90. Ill.—Glos v. Archer, 73 N.E. 382, 214 Ill. 74.
51 C.J. p 246 note 84.

91. Ill.—Johnson v. Huling, 18 N.E. 786, 127 Ill. 14.

76. Presumptions and Burden of Proof

a. Presumptions
b. Burden of proof in general
c Burden of going forward with evidence

a. Presumptions

The general rules as to presumptions are applicable actions to quiet title, and, accordingly, presumptions ppropriate to the circumstances of the particular case ill be indulged as to title, possession, and other atters.

The general rules as to presumptions have been plied in actions to quiet title.[92] Every presumpon will be made in favor of the holder of the gal title,[93] and proof of title raises a presumption possession or right of possession.[94] It will be esumed that a quitclaim deed given by a mortgagee, sting a cloud on the mortgage, and not intended a release, was an injury to the mortgagee.[95] order to quiet title after a lapse of more than enty years, presumptions will be made against c known facts of the case, and in favor of one possession in good faith.[96]

Continuance of possession or title. Where plaintiff's possession of the premises is shown, its continuance for a requisite time will be inferred in the absence of evidence to the contrary,[97] and a similar rule applies to defendant in possession claiming adversely.[98] So, where plaintiff shows a complete title in himself, that condition is presumed to exist until the contrary is shown.[99]

b. Burden of Proof in General

(1) On plaintiff
(2) On defendant

(1) On Plaintiff

(a) In general
(b) As to title
(c) As to possession
(d) As to adverse claim

(a) In General

In an action to quiet title or remove a cloud thereon, the plaintiff has the burden of proving the facts alleged on which his right to judgment is based.

In an action to quiet title or remove a cloud thereon, plaintiff has the burden of proving the facts alleged on which his right to judgment is based,[1] and, if in such action he seeks an injunction

Cal.—Gerlach v. Copeland, 300 P. 818, 212 Cal. 758—Spath v. Seager, 102 P.2d 350, 39 Cal.App.2d 10—Lowe v. Penn, 287 P. 509, 105 Cal.App. 366.
I.—Talbot v. Town of Little Compton, 160 A. 466, 52 R.I. 280.
C.J. p 250 note 27.

uuineness of recorded instrument
I.—Mercantile Trust Co. of San Francisco v. All Persons Claiming, etc., 191 P. 691, 183 Cal. 369.

ucceable possession
.—Girard Trust Co. v. McGeorge, 5 A.2d 306, 128 N.J.Eq. 91.
Ill.—Le Sourd v. Edwards, 86 N.E. 212, 236 Ill. 169, 127 Am.S.R. 87.
a.—Sherbondy v. Surting, 188 N.W. 881, 194 Iowa 203.
Utah.—Day v. Steele, 184 P.2d 16, 111 Utah 481.
C.J. p 250 note 31.
Wyo.—Chesney v. Valley Live tock Co., 244 P. 216, 34 Wyo. 378, 1 A.L.R. 1255.
S.C.—Riddlehoover v. Kinard, 10 C.Eq. 376.
Cal.—Boye v. Andrews, 102 P. 1, 10 Cal.App. 494.
.J. p 250 note 32.
Cal.—Patchett v. Webber, 245 422, 198 Cal. 440.
Cal.—Parsons v. Weis, 77 P. 1007, 144 Cal. 410—Kitzroth v. Ryan, 26 P. 647, 89 Cal. 135.
Utah.—Babcock v. Dangerfield, 94 P. 2d 862, 98 Utah 10.

Ownership of note
Company's original ownership of note secured by trust deed to land would warrant inference that it continued to own it.—Becht v. Johnson, 62 S.W.2d 847, 333 Mo. 420.

1. Ala.—Burleson v. Clark, 167 So. 363, 233 Ala. 110—King v. Artman, 144 So. 442, 225 Ala. 569.
Ark.—Dover Mercantile Co. v. Myers, 167 S.W.2d 491, 204 Ark. 1087.
Cal.—Spath v. Seager, 102 P.2d 350, 39 Cal.App.2d 10—Willis v. Holback, 91 P.2d 140, 32 Cal.App.2d 145—Corpus Juris cited in Auf-demkamp v. Pierce, 40 P.2d 599, 603, 4 Cal.App.2d 276.
Idaho.—Metsker v. Lowther, 204 P. 2d 1035, 69 Idaho 155—Lingenfelter v. Eby, 190 P.2d 130, 68 Idaho 134.
Ind.—Kerfoot v. Kessener, 84 N.E.2d 190, 227 Ind. 58—Waybright v. Longstreet, 46 N.E.2d 688, 221 Ind. 251—Hester v. Hardy, 76 N.E.2d 590, 118 Ind.App. 256—Bryant v. Barger, 18 N.E.2d 965, 106 Ind. App. 245—Kratli v. Booth, 191 N.E. 180, 99 Ind.App. 178.
Iowa.—Neilan v. Lytle Inv. Co., 274 N.W. 103, 223 Iowa 987—Lockie v. White, 267 N.W. 671, 221 Iowa 1044 - City of Dubuque v. Fischer & Co., 245 N.W. 758, 216 Iowa 433.
Ky.—Alcorn v. Superior Oil Corporation, 53 S.W.2d 528, 245 Ky. 343—Denton v. Duff, 41 S.W.2d 933, 240 Ky. 121.
Mass.—Altobelli v. Montesi, 15 N.E. 2d 463, 300 Mass. 386.
Mo.—Wilcox v. Coons, 220 S.W.2d 15, 359 Mo. 52—Becht v. Johnson, 62 S.W.2d 847, 333 Mo. 420.
Mont.—Cleveland-Arvin v. Cleveland, 215 P.2d 963—McAlpin v. Smith, 213 P.2d 603—Aronow v. Bishop, 86 P.2d 644, 107 Mont. 317—La Vassour v. Houlihan, 20 P.2d 250, 93 Mont. 552.
Ohio.—Sting v. Rothacker, 80 N.E.2d 819, 82 Ohio App. 107.
Okl.—Martin v. Rogers, 1 P.2d 696, 151 Okl. 51.
R.I.—Talbot v. Town of Little Compton, 160 A. 466, 52 R.I. 280.
Tex.—Houtte v. Guarino, Civ.App., 216 S.W.2d 607, refused no reversible error.
Wyo.—Corpus Juris cited in Davis v. Minnesota Baptist Convention of Minneapolis, Minn., 16 P.2d 48, 50, 45 Wyo. 148—Rue v. Merrill, 297 P. 379, 42 Wyo. 511.
51 C.J. p 247 note 1.

Land claimed as accretion
(1) The rule that plaintiff in an action to quiet title has burden of proof is not changed by reason of

restraining defendant from taking possession and interfering with plaintiff's title, the burden is on him to show his right to such relief.[2]

(b) As to Title

The burden is on the plaintiff to establish that he has a perfect legal or equitable title regardless of whether the defendant's title is valid or invalid, and, when properly in issue under the pleadings, the plaintiff has the burden of showing that his title or right is superior to that of the defendant.

Since, as discussed supra § 17, plaintiff must recover on the strength of his own title, and not on the weakness of his adversary's, the burden is on plaintiff to establish that he himself has a perfect legal or equitable title,[3] regardless of whether defendant's title is valid or invalid;[4] and, when properly in issue under the pleadings, plaintiff has the burden of showing that his title or right is superior to that of defendant.[5] Where the complaint alleges

fact that plaintiff is claiming title to an accretion—Lake Front-East Fifty-Fifth Street Corp v. City of Cleveland, 7 Ohio Supp. 17, affirmed, App., 36 N.E.2d 196, appeal dismissed 38 N.E.2d 410, 139 Ohio St. 138.

(2) In an action to determine title to land claimed as accretion, the burden of establishing the elements of accretion is on plaintiff.

Iowa—McFerrin v. Wiltse, 231 N.W. 438, 210 Iowa 627.

N.Y.—Hempstead v. Lawrence, 127 N.Y.S 949, 70 Misc. 52, reversed on other grounds 132 N.Y.S. 615, 147 App.Div. 624, reargument denied 133 N.Y.S. 1146, 149 App.Div. 922

Tax lien

Landowners suing to cancel, as illegal cloud on title, New York City's tax lien on land which, by statute, was transferred outside New York City after assessment, had burden of proving that land was not in New York City when tax was assessed.—Leary v. City of New York, 7 N.E.2d 256, 273 N.Y. 342.

2. Ark.—Jackson v. Lady, 216 S.W. 505, 140 Ark. 512.

3. Ala.—Means v. Hollis, 36 So.2d 486, 251 Ala. 122—Campbell v. Rice, 12 So.2d 385, 244 Ala. 144.

Ark.—Rushing v. Thompson, 185 S.W.2d 941, 208 Ark. 248.

Cal.—Pacific States Savings & Loan Co. v. Warden, 117 P.2d 877, 18 Cal.2d 757—Doll v. Maravillas, 187 P.2d 885, 82 Cal.App.2d 943—Corpus Juris cited in Aufdemkamp v. Pierce, 40 P.2d 599, 602, 4 Cal.App.2d 276—Stahmer v. Stahmer, 13 P.2d 833, 125 Cal.App. 132.

Conn.—Pepe v. Aceto, 175 A. 775, 119 Conn. 282—Borden v. Town of Westport, 151 A. 512, 112 Conn. 152.

Ill.—Town of Kaneville v. Meredith, 184 N.E. 883, 351 Ill. 620.

Ind.—Heeter v. Hardy, 76 N.E.2d 590, 118 Ind.App. 256—Sheets v. Stiefel, 74 N.E.2d 921, 117 Ind.App. 584—Bryant v. Barger, 18 N.E.2d 965, 106 Ind.App. 245.

Iowa.—Swim v. Langland, 11 N.W.2d 713, 234 Iowa 46—Bahle v. Brooks, 282 N.W. 351, 225 Iowa 980.

Ky.—Hunt v. Cassity, 181 S.W.2d 248, 297 Ky. 716—Smith v. Slusher, 165 S.W.2d 33, 291 Ky. 600—McGiboney v. Newman, 127 S.W.2d 860, 277 Ky 835—Warfield Natural Gas Co. v. Danks, 112 S.W.2d 674, 271 Ky 452—Hatton v. Williams' Ex'r, 82 S.W.2d 774, 259 Ky 548—Bentley v. Kentland Coal & Coke Co., 46 S.W.2d 1077, 242 Ky. 511—Jones v O'Connell, 35 S.W.2d 290, 237 Ky. 219.

La.—Kemper v. Atchafalaya Basin Levee Dist., 37 So.2d 844, 214 La 383—Dugas v. Powell, 1 So.2d 677, 197 La. 409.

Mass.—Altobelli v. Montesi, 15 N.E 2d 463, 300 Mass. 396

Miss.—Levy v Campbell, 28 So.2d 224, 200 Miss. 721—Broome v. Jackson, 7 So.2d 829, 193 Miss. 66, suggestion of error overruled 8 So.2d 245, 193 Miss. 66—Nicholson v. Myres, 154 So. 282, 170 Miss. 441

Mo.—Webb v. City of East Prairie, 221 S.W.2d 153, 359 Mo. 247—White v. Kentling, 134 S.W.2d 39, 345 Mo 526.

Mont.—McAlpin v. Smith, 213 P.2d 602.

N.M.—Baltzley v. Lujan, 212 P.2d 417, 53 N.M. 502.

Okl.—Cherry v. Weathers, 164 P.2d 615, 196 Okl. 265—Elliott v. Englebrecht, 72 P.2d 352, 181 Okl. 41.

Or.—Darling v. Christensen, 109 P.2d 585, 166 Or. 17.

Tex.—White v. Jones, Civ.App., 158 S.W.2d 842.

Wash.—Fisher v. Hagstrom, 214 P.2d 654, 35 Wash.2d 633—King v. Northern Pac. R. Co., 177 P.2d 714, 27 Wash.2d 250, 171 A.L.R. 190.

Wyo.—Hudson v. Erickson, 216 P.2d 379—York v. James, 165 P.2d 109, 62 Wyo. 184, 162 A.L.R. 837—Corpus Juris quoted in Davis v. Minnesota Baptist Convention of Minneapolis, Minn., 16 P.2d 48, 50, 45 Wyo. 148.

51 C.J. p 247 note 3.

Unrecorded deed

In suit to quiet title it is on plaintiff claiming under an unrecorded deed to show any matters which avoid the effect of a previously recorded deed.—Kelsey v. Norris, 125 P. 111, 53 Colo. 396.

Although defendant files counterclaim alleging ownership and asking that his title be quieted, plaintiff still has burden of proving his title.—Madden v. Bond, 106 S.W.2d 95, 269 Ky. 31.

Title deducible from commonwealth, common source, or adverse possession

(1) Ordinarily, it is incumbent on a plaintiff in action to quiet title to prove, if denied, a record title back to the commonwealth, or to a source common to both litigants, or a title by adverse possession.—Dotson v. Horn, 147 S.W.2d 400, 285 Ky. 246—Hatton v. Williams' Ex'r, 82 S.W.2d 774, 259 Ky 548.

(2) So, where defendant filed counterclaim to quiet title, plaintiff and defendant having claimed title through different sources, both plaintiff and defendant were required to prove title deducible from commonwealth or by adverse possession.—Madden v. Bond, 106 S.W.2d 95, 269 Ky. 31.

(3) In action to remove cloud from title, where evidence showed that plaintiff owned land described in his petition, and that defendant was claiming land and had committed a trespass by felling trees, it was not necessary for plaintiff to show that he deraigned title from sovereignty of soil or from common source.—Lee v. Grupe, Tex.Civ.App., 223 S.W.2d 548.

Purchaser at judicial sale

One buying land at sale by master commissioner in divorce suit with knowledge of claim of another whose deed had been recorded nearly two years had burden to establish that she had equity anterior to other claimant's.—Brewer v. Lee, 68 S.W. 2d 409, 252 Ky. 798.

No necessity to attack defendant's title

In statutory suit to establish title to realty, it was not necessary for plaintiffs to attack defendants' chain of title or any link therein, and defendants' title would not be at issue until plaintiffs prove an apparently valid title in themselves.—Dugas v. Powell, 1 So.2d 677, 197 La. 409.

4. Wyo.—Corpus Juris quoted in Davis v. Minnesota Baptist Convention of Minneapolis, Minn., 16 P.2d 48, 50, 45 Wyo. 148.

51 C.J. p 248 note 4.

5. Wyo.—York v. James, 165 P.2d 109, 62 Wyo. 184, 162 A.L.R. 837.

ossession of vacant lands, such possession must ecessarily be constructive, and plaintiff must prove itle in himself.[6] On the principle that a status, once stablished, is presumed by law to remain until he contrary appears, however, plaintiff, after proof f title in himself, need not show that he has not arted with it.[7]

Common source of title. Where both parties rely n the same source of title, plaintiff is not required o prove the whole chain of title,[8] and is not required o prove title in his grantor[9] or title beyond the ommon grantor,[10] but he must show that he has equired title or an interest from the common gran-or.[11] Where both parties derive title from a com-ion source, the burden is placed on the party having ie inferior title from the common source, if he elies on title from another independent source, to rove that the title acquired from the independent ource is paramount to the title in the common ource,[12] and he is not relieved of this burden by ie fact that the deed tending to show title from independent source was introduced in evidence r the party having the better title from the common source.[13]

Where one tenant in common unites with another, asking that the common title be quieted, he assumes the burden of proving title in his cotenant,[14] and, hence, cannot recover if the cotenant is not entitled to recover.[15]

(c) As to Possession

The burden rests with the plaintiff to prove possession on his part where possession is necessary to the maintenance of the action.

Where possession is necessary to the maintenance of the action, the burden rests with plaintiff to prove possession on his part,[16] and he is not relieved from the burden of proving it by the fact that the allegation of possession in the complaint is not denied by the answer.[17] Where both parties claim title from a common source, possession of plaintiff or his later predecessors need not be proved, however;[18] and, where defendant files a counterclaim asserting title to the land and asks that his title be quieted, he waives the requirement that possession be proved.[19]

atutory proceeding
Statute authorizing an action to tablish title to realty where nei-er claimant is in actual possession es not require plaintiff to produce oof of a perfect title good against e world in view of provision that dgment shall not be res judicata as persons not parties to suit.—In re . Vincent de Paul Benev. Ass'n of w Orleans, La.App., 175 So. 140.

Colo.—Knox v. Gibson, 128 P. 470, 23 Colo.App. 402.

Cal.—Elizroth v. Ryan, 26 P. 547, 89 Cal. 135.
ah.—Babcock v. Dangerfield, 94 P. 2d 862, 98 Utah 10.
esumption of continuance of title shown to exist in plaintiff see supra subdivision a of this section.

Cal.—Scott v. Warden, 296 P. 95, 11 Cal.App. 587.
.—Stotzenberger v. Perkins, 58 S. W.2d 983, 332 Mo. 391.

me source of title
as regards necessity of proof of in of title, both holder of tax d and claimant relied on same rce of title, where delinquent ass-sment accrued while claimant's ntors held record title.—Scott v. rden, 296 P. 95, 111 Cal.App. 587.

ere defendant's sole claim of title is through deed from plaintiff
1) Plaintiff need not prove title himself prior to the date of such l.
—Strange v. Strange, 137 P. 1104, Cal.App. 281.
—Dotson v. Horn, 147 S.W.2d 400, 5 Ky. 246.

(2) By asking a reformation of the deed, defendant concedes plaintiff's power to execute it, and thereby vests plaintiff with title.—Dotson v. Horn, supra.

9. Cal.—Santa Ana Mortg. & Inv. Co. v. Kinslow, 85 P.2d 899, 30 Cal. App.2d 107—Langstaff v. Mitchell, 6 P.2d 546, 119 Cal.App. 407—Syme v. Warden, 300 P. 863, 114 Cal.App. 707.

10. Cal.—Central Nat. Bank of Oakland v. Bell, 54 P.2d 1107, 5 Cal.2d 324.
Ga.—Foster v. Adcock, 60 S.E.2d 334, 207 Ga. 201.
Ky.—Franklin Fluorspar Co. v. Hosick, 39 S.W.2d 665, 239 Ky. 454—Brown v. Martin, 39 S.W.2d 243, 239 Ky. 146.
Wyo.—York v. James, 165 P.2d 109, 62 Wyo. 184, 162 A.L.R. 837.

11. Ga.—Holliday v. Guill, 27 S.E. 2d 298, 196 Ga. 723.

Lost deeds
Remote grantee tracing title to common source was held not bound to supply lost deeds, where grantors therein had subsequently reconveyed to their grantee, reciting execution of former deeds which were lost.—Franklin Fluorspar Co. v. Hosick, 39 S.W.2d 665, 239 Ky. 454.

12. Cal.—Wagnor v. Blume, 161 P. 2d 1001, 71 Cal.App.2d 94—Blume v. MacGregor, 148 P.2d 656, 64 Cal. App.2d 244.

13. Cal.—Blume v. MacGregor, supra.

14. Ind.—Heaton v. Grant Lodge No. 335 I. O. O. F., 103 N.E. 486, 55 Ind.App. 100.

15. Ind.—Heaton v. Grant Lodge No. 335 I. O. O. F., supra.

16. Ala.—Means v. Hollis, 36 So.2d 486, 251 Ala. 122—Hankler v. Boner, 128 So. 592, 221 Ala. 307.
Ark.—Thomason v. Abbott, 239 S.W. 2d 660.
Ga.—Simpson v. Kelley, 156 S.E. 198, 171 Ga. 523.
Ky.—Hunt v. Cassity, 181 S.W.2d 248, 297 Ky. 716—Smith v. Slusher, 165 S.W.2d 38, 291 Ky. 600—McGibbney v. Newman, 127 S.W.2d 860, 277 Ky. 835—Warfield Natural Gas Co. v. Danks, 113 S.W.2d 674, 271 Ky. 452—Hatton v. Williams' Ex'r, 82 S.W.2d 774, 259 Ky. 548—Jones v. O'Connell, 35 S.W.2d 290, 227 Ky. 319.
Okl.—Bridwell v. Goeske, 193 P.2d 656, 200 Okl. 244.
51 C.J. p 248 note 13.

Proof of possession held not required under statute
W.Va.—Bennett v. Neff, 42 S.E.2d 793, 130 W.Va. 121—Pocahontas Coal & Coke Co. v. Bower, 103 S.E. 421, 111 W.Va. 712—Flynn Coal & Lumber Co. v. F. W. White Lumber Corporation, 157 S.E. 588, 110 W.Va. 362.

17. Ill.—Olds v. Kemp, 61 N.E. 473, 192 Ill. 72.

18. N.Y.—Evans v. Lux, 201 N.Y.S. 161, 121 Misc. 466.

19. Ky.—Combs v. Combs, 155 S.W. 2d 764, 288 Ky. 162—Madden v. Bond, 106 S.W.2d 95, 269 Ky. 31.
Asking for affirmative relief as

Where plaintiff alleges that land is vacant and unoccupied, the burden is on him to prove that fact,[20] and in a suit brought under a statute providing for the establishment of title where none of the parties is in actual possession, plaintiff must prove that neither party is in actual possession.[21]

(d) As to Adverse Claim

The burden is on the plaintiff to show the assertion of an adverse claim by the defendant constituting a cloud on title, and the invalidity of such claim.

Plaintiff must in the first instance show the assertion of an adverse claim by defendant,[22] and prove his allegations that such claim is invalid[23] and a cloud on title.[24]

(2) On Defendant

Where the defendant substantially asserts and relies on a fact as an affirmative issue, the burden is on him to establish it.

Where defendant substantially asserts and relies on a fact as an affirmative issue, he must establish it,[25] unless it is established by the evidence offered by plaintiff.[26] Where defendant admits the fee to be in plaintiff from whom he deraigns his title, but claims that plaintiff's title has since been defeated, the burden is on him in the first instance to establish his title.[27] So the burden of a particular issue may rest with defendant, even if plaintiff is required to prove his whole case.[28] Where plaintiff is in peaceable possession and no suit is pending to test defendant's title, plaintiff is not required to prove title, but the burden of proof is on defendant.[29]

c. Burden of Going Forward with Evidence

Where the plaintiff has made out a prima facie case, the burden of going forward with the evidence, as distinguished from the burden of proof, shifts to the defendant; and, where the defendant has established the due execution of an instrument under which he claims, the burden is again cast on the plaintiff to show facts in avoidance, and, if he does so, the burden of going forward with the evidence returns to the defendant.

When plaintiff has made out a prima facie case, the burden of going forward with the evidence will be shifted to defendant;[30] and it is necessary only for plaintiff to make out a prima facie case in order

waiving requirement of possession generally see supra § 31.

20. Okl.—Bartlett v. James, 282 P. 602, 140 Okl. 218
Or.—Comegys v. Hendricks, 106 P. 1016, 55 Or. 533.

21. La.—Doll v. Dearie, App., 41 So. 2d 84.

22. Me.—Parker v. Vallerand, 8 A. 2d 594, 136 Me. 519.
51 C.J. p 248 note 16.

23. Ohio.—Sting v. Rothacker, 80 N.E.2d 819, 82 Ohio App. 107.
51 C.J. p 248 note 17.

Permissive use

Use of way over land, without owner's permission, by another as incident to his own land with such owner's knowledge, is adverse to owner's title and evidence of claim of right, and servient owner, claiming that use was permissive, has burden of showing it.—Sting v. Rothacker, supra.

24. Me.—Parker v. Vallerand, 8 A. 2d 594, 136 Me. 519.
51 C.J. p 248 note 18.

25. U.S.—Manhattan Land & Fruit Co. v. Burns, D.C.La., 48 F.Supp. 361.
Cal.—Corpus Juris cited in Sinai v. Mull, 181 P.2d 924, 928, 80 Cal. App.2d 277—Corpus Juris cited in Oaks v. Renshaw, 168 P.2d 199, 201, 74 Cal.App.2d 144—Sunset Oil Co. v Marshall Oil Co., 118 P.2d 842, 47 Cal.App.2d 716—Warden v. Bailey, 24 P.2d 192, 133 Cal.App. 383.
Fla.—Day v. Benesh, 139 So. 448, 104 Fla. 53.
Iowa.—Crawford v. Cotter, 257 N.W. 356—Arndt v. Lapel, 243 N.W. 605, 214 Iowa 594.
Mont.—Thomson v. Nygaard, 41 P.2d 1, 98 Mont. 529.
N.J.—Warner v. Smith, 172 A. 49, 115 N.J.Eq. 572—Hudson Guild v Morris Canal & Banking Co., Ch., 158 A. 389.
N.Y.—Smith v. Dayton, 1 N.Y.S.2d 975, 253 App.Div. 899—Finch Pruyn & Co. v. People, 40 N.Y.S.2d 797, 181 Misc. 122—Reformed Protestant Dutch Church of Fordham v. Valentine, 12 N.Y.S.2d 969.
N.D.—Robertson v. Brown, 25 N.W. 2d 781, 75 N.D. 109.
Okl.—Pland v. Craig, 154 P.2d 583, 194 Okl. 666.
Tex.—J. M. Radford Grocery Co. v. Speck, Civ.App., 152 S.W.2d 787, error refused.
Va.—French v. Clinchfield Coal Corporation, 198 S.E. 503, 171 Va. 211.
Wyo.—Corpus Juris quoted in York v. James, 165 P.2d 109, 114, 62 Wyo. 184, 162 A.L.R. 837.
51 C.J. p 249 note 22.

Laches and estoppel

In action by record title owners of mineral rights to quiet title in mineral rights and to cancel recorded deeds which were never delivered and were materially altered, burden of proof was on defendant to establish defenses of laches and estoppel.—Mosley v. Magnolia Petroleum Co., 114 P.2d 740, 45 N.M. 230.

As against prior judgment quieting title

In action to quiet title defendant would be required to show as against prior judgment quieting title in plaintiff's predecessor that there were outstanding interests held by persons who were not made parties in prior action.—Grantham Realty Corporation v. Bowers, 22 N.E.2d 832, 215 Ind. 672.

26. Wash.—Fisher v. Hagstrom, 214 P.2d 654, 35 Wash.2d 632.

27. Or.—Sears v. Murdock, 117 P. 305, 59 Or. 211.

28. Ark.—Magness v. Arnold, 31 Ark. 103.

29. Ala.—Chapman v. Cothran, 17 So.2d 677, 245 Ala. 468—Ward v. Chambless, 189 So. 890, 238 Ala. 165.

30. Cal.—Oswald v. Northrop Aircraft, 145 P.2d 635, 62 Cal.App.2d 824—Sunset Oil Co. v. Marshall Oil Co., 118 P.2d 842, 47 Cal.App. 2d 716—District Bond Co. v. Hilliker, 98 P.2d 782, 37 Cal.App.2d 81—Riedman v. Barkwill, 34 P.2d 744, 139 Cal.App. 564—Sim v. Peterson, 283 P. 376, 102 Cal.App. 417.
Conn.—Borden v. Town of Westport, 151 A. 512, 112 Conn. 152.
Ga.—Bradley v. Thompson, 44 S.E. 2d 898, 202 Ga. 785.
Iowa.—Zimmerman v. Felgar, 197 N. W. 20, 197 Iowa 359.
Ky.—Flinn v. Blakeman, 71 S.W.2d 961, 254 Ky. 416.
Mo.—Wilcox v. Coons, 230 S.W.2d 15, 359 Mo. 52.
Mont.—Cook v. Rigney, 126 P.2d 325, 113 Mont. 198.
N.J.—Toth v. Bigelow, 64 A.2d 62, 1 N.J. 399.
Ohio.—Lake Front-East Fifty-Fifth Street Corp. v. City of Cleveland, 7 Ohio Supp. 17, affirmed, App., 36

put defendant on his proof,[31] but the burden of proof which rests upon plaintiff when the allegations of the petition are denied does not shift.[32] If defendant has established the due execution of an instrument under which he claims, the burden is then cast on plaintiff to show facts in avoidance,[33] and, if he does so, the burden of going forward with the evidence returns to defendant.[34] Where plaintiff has established a transfer from a person before he became a debtor, defendant, a subsequent judgment creditor of the grantor holding a sheriff's deed to the land executed after the first conveyance was recorded, has a much greater burden of proof than he would have had if his claim had been in existence at the time the transfer was made.[35]

§ 77. Admissibility

The general rules as to the admissibility of evidence are applicable in actions to quiet title or remove clouds.

The general rules as to the admissibility of evidence are applicable in actions to quiet title or remove clouds.[36]

§ 78. —— As to Title and Adverse Claim

Relevant, material, and competent extrinsic evidence, including documentary evidence, relating to title is admissible, but irrelevant, immaterial, or incompetent evidence is inadmissible.

In a suit to quiet title or remove a cloud, relevant, material, and competent extrinsic evidence relating to title is admissible,[37] but irrelevant, immaterial,

N.E.2d 196, appeal dismissed 38 N. E.2d 410, 139 Ohio St. 410.
.—Piland v. Craig, 154 P.2d 583, 94 Okl. 666.
—Hillegass v. Bachert, Com.Pl., 3 Leh.L.J. 234
c.—J. M. Radford Grocery Co. v. peck, Civ.App., 152 S.W.2d 787, rror refused.
C.J. p 249 note 21.

Evidence held to establish prima ie case requiring defendant to go ward with proof.
.—Pacific States Savings & Loan o. v. Warden, 117 P.2d 877, 18 al.2d 757.
—Head v. Head, 169 S.W.2d 25, 93 Ky. 371.
h.—Gatrell v. Salt Lake County, 49 P.2d 827, 105 Utah 409, 153 A. .R. 1100.
C.J. p 248 note 20.

Cal.—Syme v. Warden, 300 P. 13, 114 Cal.App. 707.
C.J. p 248 note 20.

Ohio.—Lake Front-East Fifty-ifth Street Corp. v. City of leveland, 7 Ohio Supp. 17, 19, af-rmed, App., 36 N.E.2d 196, appeal smissed 38 N.E.2d 410, 139 Ohio . 410.

"he courts frequently do say when plaintiff in an action to t title has made out a prima e case the burden of proof shifts lefendant. The difficulty arises use the words 'burden of proof' used in two senses; one to indi-the burden which rests upon the ntiff when the allegations of the ion are denied, and the other to ate the duty to meet and rebut evidence introduced by the ad-e party by proof to overbear it e mind of the tribunal. The en of proof in the former case not shift. The duty of going ard with the evidence may shift time to time."—Lake Front-Fifty-Fifth Street Corp. v. City eveland, supra.

al.—Kuensel v. Grottenberg, 199 P.2d 732, 88 Cal.App.2d 656 Riedman v. Barkwill, 34 P.2d 744, 139 Cal.App. 564—Cuddy v. O'Brien, 204 P. 37, 55 Cal.App. 469.
51 C.J. p 248 note 19.

Possession of deed formerly in escrow
Grantee's or successor's possession of acknowledged and recorded deed, which had been in escrow, placed burden on grantor or successor of proving wrongful delivery.—Merchants' & Farmers' State Bank of Grove City v. Olson, 250 N.W. 366, 189 Minn. 528, 89 A.L.R. 1289.

34. Cal.—Wilson v. Nichols, 103 P. 2d 1007, 39 Cal.App.2d 527.

35. Mont.—Cook v. Rigney, 126 P. 2d 325, 113 Mont. 198.

36. Cal.—Newcomb v. City of Newport Beach, 60 P.2d 825, 7 Cal.2d 393—Gerlach v. Copeland, 300 P. 818, 212 Cal. 758—Pacific States Savings & Loan Co. v. Perez, 124 P.2d 184, 51 Cal.App.2d 84.
Idaho.—Brothers v. Arave, 174 P.2d 202, 67 Idaho 171.
Mont.—Polson Sheep Co. v. Owen, 106 P.2d 181, 110 Mont. 601.
Tex.—Bookhout v. McGeorge, Civ. App., 65 S.W.2d 513, error dismissed.
51 C.J. p 250 note 25.

Evidence held admissible
(1) In action to quiet title to automobile on issue whether plaintiff was negligent in failing to secure ownership certificate.—Dennis v. Bank of America Nat. Trust & Savings Ass'n, 94 P.2d 51, 34 Cal.App.2d 613.

(2) Evidence of nonperformance, abandonment, and abrogation of agreement whereby alleged wrongfully delivered deed was placed in escrow.—Merchants' & Farmers' State Bank of Grove City v. Olson, 250 N.W. 366, 189 Minn. 523, 89 A.L.R. 1289.

(3) To show acquiescence in alleged rescission of contract under which defendants claimed. Federal Land Bank of Wichita v. Below, 126 P.2d 294, 46 N.M. 228.

(1) On issue whether purchaser had paid purchase-money notes.—Robinson v. Shearer, 99 So. 179, 211 Ala. 16.

Evidence held inadmissible
(1) To defeat effect of decree in divorce action purporting to award wife's separate property to her. Carr v. Carr Co., 177 P. 866, 39 Cal. App. 53.

(2) To show development of subdivision across street from plaintiffs' property as business settlement. Turner v. Glenn, 18 S.E.2d 197, 220 N.C. 620.

(3) To show a general scheme of development of the subdivision.—Turner v. Glenn, supra.

37. Cal.—Pacific States Savings & Loan Co. v. Warden, 117 P.2d 877, 18 Cal.2d 757—Costa v. Nevos, 82 P.2d 600, 12 Cal.2d 121—Central Nat. Bank of Oakland v. Bell, 64 P.2d 1107, 5 Cal.2d 324—Holzer v. Bend, 13 P.2d 697, 216 Cal. 119—Holman v. Toton, 128 P.2d 808, 54 Cal.App.2d 309—Bolton v. Logan, 116 P.2d 801, 46 Cal.App.2d 729—Krocker v. Hurlbert, 101 P. 2d 101, 38 Cal.App.2d 261—Williams v. City & County of San Francisco, 76 P.2d 183, 24 Cal.App. 2d 630—Syme v. Warden, 300 P. 861, 114 Cal.App. 707—Lummer v. Unruh, 142 P. 914, 25 Cal.App. 97.
Mont.—Polson Sheep Co. v. Owen, 106 P.2d 181, 110 Mont. 601.
Tex.—Mason v. David, Civ.App., 232 S.W.2d 427.
51 C.J. p 250 note 26.

Character of deed and consideration
Evidence is admissible to show that deed was at most a mortgage and was without consideration.—Berte v. Luse, 13 P.2d 910, 216 Cal. 251.

or incompetent extrinsic evidence relating to title is inadmissible.[38] Evidence is admissible on behalf of plaintiff to show that a deed in defendant's chain of title was invalid because of want of capacity or power to make it;[39] and in a purchaser's action to quiet title wherein the purchaser alleged the existence of an uncertainty as to the ability and capacity of the vendor to convey, the class of proof admissible is governed by the legal status of the party whose competency is in question, that is, whether he has ever been committed or declared incompetent, and, if so, whether by a summary proceeding, or by a regular adjudication of insanity.[40] Where plaintiff claims title by prescription, it is proper to show the assessment of the premises, so that the court may determine whether plaintiff has paid the taxes required by statute to obtain title by prescription.[41]

Documentary evidence. Subject to the general rules relating to documentary evidence which are discussed in Evidence §§ 623-775, relevant and material documents and writings,[42] such as grants or deeds,[43] including deeds acquired pendente lite,[44] are admissible on the issue of title, as are mortgages,[45] contracts of sale,[46] wills,[47] and judgments and other records.[48] Assignments to plaintiff of mortgages on the property are not relevant to the issue of ownership.[49] The fact that plaintiff had put in evidence a deed purporting to have been executed by defendant will not preclude the latter from objecting to the introduction of an inadmissible document, merely because it purports to have been made by a grantee of defendant's grantee.[50]

§ 79. —— As to Possession

Relevant and material evidence, such as evidence of the execution of a lease, payment of taxes, or inclosure of the land, is admissible on the issue of possession of the premises.

Evidence on the issue of possession of the premises must be relevant and material.[51]

38. Mont.—Sanders v. McDonald, 111 P.2d 1043, 111 Mont. 604.
Tex.—Magnolia Petroleum Co. v. Railroad Commission, 170 S.W.2d 189, 141 Tex. 96—Wisdom v. Minchen, Civ.App., 154 S.W.2d 330, error refused.
51 C.J. p 251 note 37.

Use of property

In suit to quiet title to oil well derrick and drilling equipment, exclusion of evidence that defendants were in possession of and were using the property was proper, since operation of well did not tend to establish ownership of property.—Fesler v. Rawlins, 111 P.2d 380, 43 Cal. App.2d 541.

Ownership of other property

In suit to quiet title to oil well derrick and drilling equipment, testimony sought to be elicited as to whether witness owned an overriding royalty in production of well was not relevant to prove ownership of property.—Fesler v. Rawlins, supra.

39. N.C.—Ricks v. Brooks, 102 S.E. 207, 179 N.C. 204.

40. Idaho.—Whitney v. Randall, 70 P.2d 384, 58 Idaho 49.

41. Cal.—Spotswood v. Spotswood, 89 P. 362, 4 Cal.App. 711.

42. Cal.—Best v. Wohlford, 78 P. 293, 144 Cal. 783—Syme v. Warden, 300 P. 863, 114 Cal.App. 707.
Ga.—Daniel v. Etheredge, 31 S.E.2d 181, 198 Ga. 191.
Okl.—Miles v. Pressley, 176 P.2d 473, 198 Okl. 124.
51 C.J.S. p 251 note 47.

Ancient documents

Cal.—Mercantile Trust Co. of San Francisco v. All Persons Claiming, Etc., 191 P. 691, 183 Cal. 369.
N.M.—Union Land, etc., Co. v. Arce, 152 P. 1143, 21 N.M. 115.

Abstract of recorded lease held admissible

Cal.—Mercantile Trust Co. of San Francisco v. All Persons Claiming, etc., 191 P. 691, 183 Cal. 369.

Error not cured by subsequent statute

Erroneous admission in evidence of abstracts of title in a suit to quiet title was not cured by subsequent enactment of statute which authorized admission of such evidence.—Vanderbilt v. All Persons Claiming Any Interest in or Lien upon the Real Property Herein Described or Any Part Thereof, 136 P. 158, 168 Cal. 507.

Evidence held inadmissible

To cast reflection on plaintiff's title after it became apparent that interveners had neither title nor color of title to land in question.—Munro v. Eshe, 156 P.2d 700, 113 Colo. 19.

43. Ala.—Ellis v. Womack, 23 So.2d 859, 247 Ala. 254.
Cal.—Burkhead v. Briggs, 196 P.2d 73, 86 Cal.App.2d 808—Wilson v. Nichols, 103 P.2d 1007, 39 Cal.App. 2d 527—Moore v. Hoar, 81 P.2d 226, 27 Cal.App.2d 269.
Conn.—Borden v. Town of Westport, 151 A. 512, 112 Conn. 152.
Ga.—Daniel v. Etheredge, 31 S.E.2d 181, 198 Ga. 191.
Ky.—Baker v. Brown, 111 S.W.2d 1036, 271 Ky. 93.
Mo.—Richards v. Earls, 133 S.W.2d 881, 345 Mo. 260.
51 C.J. p 252 note 48.

Cumulative evidence properly excluded

N.H.—Alukonis v. Kabuluses, 70 A.2d 392, 96 N.H. 107.

44. Mo.—Barr v. Stone, 242 S.W. 661.
N.Y.—Ne-ha-sa-ne Park Assoc. v. Lloyd, 55 N.Y.S. 103, 25 Misc. 207, affirmed 61 N.Y.S. 1143, 45 App. Div. 631, affirmed 60 N.E. 741, 167 N.Y. 431.
51 C.J. p 252 note 49.

45. Ala.—Sheridan v. Schimpf, 24 So. 940, 120 Ala. 475.

46. Minn.—Butterwick v. Fuller, etc., Mfg. Co., 168 N.W. 18, 140 Minn. 327.
51 C.J. p 252 note 51.

47. U.S.—Serralles v. Serralles, C.C.A.Puerto Rico, 16 F.2d 841.
51 C.J. p 252 note 52.

48. Cal.—Swartfager v. Wells, 128 P.2d 128, 53 Cal.App.2d 522.
Mont.—West v. Capital Trust & Savings Bank, 124 P.2d 572, 113 Mont. 130.
51 C.J. p 252 note 53.

Judgment roll in former action held inadmissible

Cal.—Moe v. Gier, 2 P.2d 852, 116 Cal.App. 403.

Judgment obtained during pendency of suit quieting plaintiff's title to property involved against other parties is inadmissible as muniment of plaintiff's title.—Moakley v. Los Angeles Pac. Ry. Co., 84 P.2d 218, 139 Cal.App. 421.

49. S.D.—Harmon v. Goggins, 101 N.W. 1086, 19 S.D. 34.

50. N.M.—Union Land, etc., Co. v. Arce, 152 P. 1143, 21 N.M. 115.

51. Cal.—Dorrian v. San Francisco, 273 P. 1067, 96 Cal.App. 69.
51 C.J. p 253 note 56.

Evidence held admissible

Cal.—President, etc., of Southern California Conference of Seventh

Execution of lease. Possession in plaintiff may be shown by a lease whereby the person occupying the land holds under him.[52]

Payment of taxes. Evidence that taxes on the land in controversy are paid by a person in connection with evidence of actual possession is admissible to show the character[53] and extent[54] of his possession.

Inclosure of land. The inclosing of uncultivated, although not wild, land, on three sides by a wire fence, and on the other side by a stone fence, is evidence of possession.[55] Evidence that defendant attempted to gain possession, after the action was commenced, by inclosing the land with a fence, is evidence that he did not actually have possession.[56]

§ 80. Weight and Sufficiency

The general rules as to the weight and sufficiency of evidence are applicable in determining the sufficiency of the evidence in proceedings to quiet title or remove clouds thereon; and generally, in order for plaintiff to recover, it is incumbent on him to make out his case by the preponderance of the evidence.

The general rules as to the weight and sufficiency of evidence are applicable in determining the sufficiency of the evidence in proceedings to quiet title or remove clouds thereon,[57] and, in order that plain-

Day Adventists v. Goodwin, 5 P.2d 973, 119 Cal.App. 37.
y.—Rosiclaire Lead & Fluorspar Mining Co. v. Stone, 38 S.W.2d 713, 238 Ky. 734.
l C.J. p 253 note 56 [a].
l. La.—Craig v. Lambert, 11 So. 464, 44 La.Ann. 885.
l C J p 253 note 57
l. Ala.—Southern R. Co. v. Hall, 41 So 135, 145 Ala 224.
ass.—Blanchard v. Lowell, 59 N.E. 114, 177 Mass. 501.
l. Ala.—Singley v. Dempsey, 42 So.2d 609, 252 Ala. 677.
l. Mass.—Blanchard v. Lowell, 59 N.E. 114, 177 Mass. 501.
l. Or.—McCully v. Heaverne, 160 P. 1166, 162 P. 863, 82 Or. 650.
l. Cal.—Holzer v. Read, 13 P.2d 697, 216 Cal. 119—Durrell v. Bacon, 5 P.2d 961, 119 Cal.App. 31.
ah.—Reimann v. Baum, 203 P.2d 387.
C.J. p 253 note 62, p 254 note 63.
ridence held sufficient
(1) To sustain judgment for plaintiff.
a.—Walthall v. Yohn, 40 So.2d 705, 252 Ala. 262.
iz.—Mosher v. Conway, 76 P.2d 231, 51 Ariz. 275, certiorari denied 59 S.Ct. 77, 305 U.S. 599, 83 L.Ed. 380.
k.—Mauldin v. Howell, 205 S.W. 2d 446, 212 Ark. 268—Walsh v. Certain Lands, 190 S.W.2d 447, 209 Ark. 320—Schnider v. Eldridge, 152 S.W.2d 565, 202 Ark. 675—Pittman v. Longino, 139 S.W.2d 6, 200 Ark. 1190—Mason v. Lagrone, 120 S.W.2d 21, 196 Ark. 1178.
l.—Hunter v. Hunter, 130 P.2d 04, 21 Cal.2d 228—Hunter v. Hunter, 130 P.2d 704, 21 Cal.2d 28—Girard v. Holback, 21 P.2d 20, 217 Cal. 785—Coomber v. ewett, 200 P.2d 187, 89 Cal.App.2d 54—Wagnor v. Blume, 161 P.2d 001, 71 Cal.App.2d 94—Brakhage . McCaslin, 126 P.2d 878, 52 Cal. pp.2d 382—Anderson-Cottonwood rr. Dist. v. Zinner, 125 P.2d 82, l Cal.App.2d 587—Stephan v. Obersmith, 119 P.2d 388, 48 Cal. App.2d 199—Sunset Oil Co. v. Marshall Oil Co., 118 P.2d 842, 47 Cal App.2d 716—Hacienda Homes v. Peck, 113 P.2d 487, 45 Cal.App.2d 37—Thatch v. Livingston, 56 P.2d 549, 13 Cal.App.2d 202—La Mar v. La Mar, 28 P.2d 63, 135 Cal.App. 693—Syme v. Warden, 300 P. 863, 114 Cal.App. 707.
Ga.—Biggers v. Gladin, 50 S.E.2d 585, 204 Ga. 481—Miller v. Everett, 14 S.E.2d 449, 192 Ga. 26—Smith v. Jones, 194 S.E. 556, 185 Ga. 236.
Idaho.—Metzker v. Lowther, 204 P. 2d 1025, 69 Idaho 155—Hunt v. McDonald, 149 P.2d 792, 65 Idaho 610.
Ill.—Hillison v. Glos, 93 N.E. 763, 248 Ill. 275—Hachadourian v. Bogosian, 69 N.E.2d 522, 329 Ill.App. 514.
Iowa.—Blazek v. Blazek, 284 N.W. 180, 226 Iowa 237.
Kan.—Kiskaddon v. Hawkins, 127 P.2d 423, 155 Kan. 616—Swigart v. Peterson, 103 P.2d 785, 152 Kan. 393—Dyer v. Scott, 41 P.2d 993, 141 Kan. 463, rehearing denied 44 P.2d 902, 141 Kan. 766.
Ky.—Floyd v. Bruce, 214 S.W.2d 402, 308 Ky. 324—Goins v. Catron, 190 S.W.2d 322, 300 Ky. 583—Combs v. Combs, 155 S.W.2d 764, 288 Ky. 162—Dotson v. Horn, 147 S.W.2d 400, 285 Ky. 246—Bell v. Twyford, 145 S.W.2d 55, 284 Ky. 481—Triplett v. Hays, 95 S.W.2d 609, 264 Ky. 746—Brown v. Martin, 39 S. W.2d 243, 239 Ky. 146.
La.—Authement v. Weill, 2 So.2d 31, 197 La. 585.
Mich.—Steffes v. Allen, 295 N.W. 245, 295 Mich. 510.
Miss.—Broom v. Jackson, 13 So.2d 630.
N.J.—Hudson Guild v. Morris Canal & Banking Co., Ch., 158 A. 389.
N.M.—C O S Cattle Co. v. Bragaw's Heirs, 28 P.2d 529, 38 N.M. 105.
N.D.—Passenger v. Coan, 338 N.W. 773, 61 N.D. 569.
Okl.—Bell v. Pretheroe, 188 P.2d 868, 199 Okl. 562, 1 A.L.R.2d 315—Anderson v. Abbott, 138 P.2d 545, 192 Okl. 647—Cordilla v. Taylor, 72 P. 2d 375, 181 Okl. 20—Houghton v. Houghton, 62 P.2d 473, 178 Okl. 167.
R.I.—Cahill v. Slaimen, 185 A. 257, 56 R.I. 265.
S.C.—Coleman v. Gaskins, 163 S.E. 790, 165 S.C. 301.
Tex.—City of Dublin v. Tatum, Civ. App., 232 S.W.2d 740 Temple Trust Co. v. Logan, Civ.App., 82 S. W.2d 1017.
Wash. Crook v. Tudor, 182 P.2d 740, 28 Wash.2d 289.
W.Va.—Honaker v. City of Princeton, 25 S.E.2d 772, 125 W.Va. 672.
51 C.J. p 253 note 62 [a] (1).
(2) To sustain judgment for defendant.
U.S.—Endicott v. Phillips Petroleum Co., C.A.Kan., 172 F.2d 372—Weber v. Alabama-California Gold Mines Co., C.C.A.Cal., 121 F.2d 663.
Ark.—Thomason v. Abbott, 329 S.W. 2d 660—Foster-Grayson Lumber Co. v. Bond, 125 S.W.2d 106, 197 Ark. 1003.
Cal.—Valle v. Ingram, 117 P.2d 869, 18 Cal.2d 761—MacDonnell v. California Lands, 101 P.2d 479, 15 Cal. 2d 344—Boucher v. Krieha, 182 P. 2d 218, 80 Cal.App.2d 437 Smith v. California Portland Cement Co., 25 P.2d 1013, 134 Cal.App. 630.
Ga.—Daniel v. Etheredge, 31 S.E.2d 181, 198 Ga. 191.
Idaho.—Hunt v. McDonald, 149 P.2d 792, 65 Idaho 610.
Ind.—Selph v. Illinois Pipe Line, 190 N.E. 191, 206 Ind. 480—Murrer v. Murrer, 19 N.E.2d 494, 106 Ind. App. 304.
Iowa.—Swim v. Langland, 11 N.W.2d 713, 234 Iowa 46.
Kan.—McMickel v. Miner, 106 P.2d 659, 152 Kan. 562.
Ky.—Yates v. Harvey, 215 S.W.2d 538, 303 Ky. 644—Justice v. Staton, 163 S.W.2d 471, 291 Ky. 179.
N.C.—Lee v. McDonald, 53 S.E.2d 845, 230 N.C. 517.
Okl.—Gulf Petroleum Co. v. Boling, 157 P.2d 738, 195 Okl. 338—Gorman v. Wilson, 93 P.2d 600, 186 Okl. 435.
51 C.J. p 253 note 62 [a] (2).

(3) To sustain judgment for intervener.

Ark.—Holloway v. Bank of Atkins, 169 S.W.2d 868, 205 Ark. 598.

Mo.—Kirkwood Realty Insurance & Adjustment Co. v. Henry, 162 S.W.2d 600, 349 Mo. 522.

S.D.—Smith v. Danforth, 223 N.W. 59, 54 S.D. 350.

Tex.—Dittmar v. Alamo Nat. Co., Civ.App., 91 S.W.2d 781, affirmed 118 S.W.2d 298, 132 Tex. 44.

(4) To justify decree of dismissal or nonsuit.

Ala.—McCaleb v. Worcester, 140 So. 595, 224 Ala. 360.

Ark.—Lillie v. Nunnally, 199 S.W.2d 751, 211 Ark. 202.

Ill.—Curielli v. Curielli, 48 N.E.2d 360, 383 Ill. 102.

Ky.—Spencer v. Steele, 175 S.W.2d 1008, 296 Ky. 3—Martt v. McBrayer, 166 S.W.2d 823, 292 Ky. 479.

Mont.—McAlpin v. Smith, 213 P.2d 602.

N.J.—Joffe v. Gliksman, 51 A.2d 467, 139 N.J.Eq. 369.

N.C.—Franklin v. Elizabeth Realty Co., 162 S.E. 199, 202 N.C. 212.

(5) To sustain finding for plaintiff.

Cal.—O'Banion v. Borba, 195 P.2d 10, 32 Cal.2d 145—Brice v. Evans, 217 P.2d 738, 97 Cal.App.2d 412—Hoytt Const. Co. v. White, 163 P.2d 32, 71 Cal.App.2d 526—Dootsch v. Wagner, 158 P.2d 991, 69 Cal.App.2d 407—Bertelson v. Bertelson, 122 P.2d 130, 49 Cal.App.2d 479—Fisher v. Chaffee, 121 P.2d 51, 49 Cal.App.2d 97—Johnson v. Warden, 119 P.2d 787, 48 Cal.App.2d 329.

Or.—Rayburn v. Blechschmidt, 23 P.2d 550, 143 Or. 640.

Tenn.—Woods v. Richardson, 231 S.W.2d 340, 190 Tenn. 662.

Tex.—Klein v. Hartzell, Civ.App., 43 S.W.2d 131, error refused.

Wis.—Walter W. Oeflein, Inc., v. Voell, 258 N.W. 362, 217 Wis. 131.

(6) To support finding for defendant.

Cal.—Nelson v. Nelson, 12 P.2d 950, 216 Cal. 10—Williams v. Palmer, 210 P.2d 714, 94 Cal.App.2d 348—Anderson v. Anderson, App., 103 P.2d 452—Passantino v. American Trust Co., 72 P.2d 223, 23 Cal.App.2d 202—Penn v. Dyba, 1 P.2d 461, 115 Cal.App. 67—Security Trust & Savings Bank v. Carrier, 290 P. 458, 107 Cal.App. 333.

Colo.—Slack v. Anderson, 154 P. 89, 60 Colo. 466.

Fla.—Port St. Joe Dock & Terminal Ry. Co. v. Maddox, 191 So. 775, 140 Fla. 110.

Idaho—Platts v. Pacific First Federal Savings & Loan Ass'n of Tacoma, 111 P.2d 1093, 62 Idaho 340.

Okl.—Fowler v. Hall, 289 P. 706, 144 Okl. 144.

Wash.—Rushton v. Borden, 190 P.2d 101, 29 Wash.2d 831.

(7) To sustain finding that equities of the parties were equal.—Bell v. Protheroe, 188 P.2d 868, 199 Okl. 562, 1 A.L.R.2d 315.

(8) To show laches on plaintiff's part.—Stewart v. Pelt, 131 S.W.2d 644, 198 Ark. 776—51 C.J. p. 253 note 62 [a] (10).

(9) To show other particular facts.

Ala.—Pierce v. Lee Bros. Foundry Co., 44 So.2d 750, 253 Ala. 320—Elson v. Pridgen, 195 So. 889, 239 Ala. 678—Sherrod v. King, 147 So. 600, 226 Ala. 522.

Ark.—Wheeler v. Wendleton, 191 S.W.2d 952, 209 Ark. 601—Shelby v. Shelby, 32 S.W.2d 1071, 182 Ark. 881—Judd v. Rieff, 295 S.W. 370, 174 Ark. 362.

Cal.—O'Banion v. Borba, 195 P.2d 10, 32 Cal.2d 145—Simon Newman Co. v. Tully, 88 P.2d 131, 13 Cal.2d 134—Newcomb v. City of Newport Beach, 60 P.2d 825, 7 Cal.2d 393—Doxsee Co. v. All Persons Claiming Any Interest in, or Lien Upon Real Property Herein Described or Any Part Thereof, 45 P.2d 192, 3 Cal.2d 609—Nelson v. Nelson, 12 P.2d 950, 216 Cal. 10—Ferris v. Emmons, 6 P.2d 950, 214 Cal. 501—Kerr v. Milatovich, 290 P. 289, 209 Cal. 765—Majors v. Butler, App., 221 P.2d 994—Walton v. Evans, 157 P.2d 68, 68 Cal.App.2d 456—Pacific States Savings & Loan Co. v. Perez, 124 P.2d 184, 51 Cal.App.2d 84—Anderson v. Meuer, 123 P.2d 903, 50 Cal.App.2d 841—Bardeen v. Commander Oil Co., 119 P.2d 907, 48 Cal.App.2d 355—Rehart v. Klossner, 119 P.2d 148, 48 Cal.App.2d 46—Rehart v. Klossner, 119 P.2d 145, 48 Cal.App.2d 40—Hanlon v. Western Loan & Bldg. Co., 116 P.2d 465, 46 Cal.App.2d 580—Hacienda Homes v. Peck, 113 P.2d 487, 45 Cal.App.2d 37—Rice v. Lee, 113 P.2d 235, 44 Cal.App.2d 909—Lynch v. Melby, 19 P.2d 49, 129 Cal.App. 646—Penn v. Dyba, 1 P.2d 461, 115 Cal.App. 67.

Ill.—Robertson v. Bachmann, 185 N.E. 618, 352 Ill. 291—Chicago & N.W. Ry. Co. v. Kennedy, 176 N.E. 269, 344 Ill. 309.

Ind.—Dickason v. Dickason, 40 N.E.2d 965, 219 Ind. 683—Hester v. Hardy, 76 N.E.2d 590, 118 Ind.App. 256—Bryant v. Barger, 42 N.E.2d 429, 112 Ind.App. 17—Sweeney v. Sweeney, 25 N.E.2d 273, 107 Ind.App. 466—Hochstetler v. A. Allen Wilkinson Lumber Co., 24 N.E.2d 432, 107 Ind.App. 336.

Iowa.—Eastman v. De Frees, 17 N.W.2d 104, 235 Iowa 488—Crawford v. Cotter, 257 N.W. 355—Haynie v. May, 252 N.W. 749, 217 Iowa 1283—Harris v. Randolph, 236 N.W. 51, 213 Iowa 772.

Ky.—Newsome v. Hall, 161 S.W.2d 629, 290 Ky. 486, 140 A.L.R. 818—Warfield Natural Gas Co. v. Ward, 149 S.W.2d 705, 286 Ky. 73—Belcher v. Adkins, 132 S.W.2d 52, 279 Ky. 680—Adkins v. Hackworth, 130 S.W.2d 774, 279 Ky. 352—Ratcliff v. Coleman, 45 S.W.2d 493, 241 Ky. 791—Blankenship v. Adkins, 33 S.W.2d 593, 236 Ky. 521.

La.—Tate v. Ludeau, 6 So.2d 737, 199 La. 706—Little v. Barbe, 198 So. 368, 195 La. 1071.

Minn.—Exsted v. Exsted, 279 N.W. 554, 202 Minn. 521, 117 A.L.R. 554—Peterson v. Siebrecht, 247 N.W. 6, 188 Minn. 272.

Mo.—Pickel v. McCawley, 44 S.W.2d 857, 329 Mo. 166—Nichols v. Robinson, 211 S.W. 11, 277 Mo. 483.

Mont.—West v. Capital Trust & Savings Bank, 124 P.2d 572, 113 Mont. 130.

N.Y.—Baker v. Halpern, 88 N.Y.S.2d 332, 275 App.Div. 869.

N.C.—Franklin v. Elizabeth Realty Co., 162 S.E. 199, 202 N.C. 212.

N.D.—Stonehouse v. Mersiovsky, 274 N.W. 313, 67 N.D. 485.

R.I.—Gelineau v. Coutu, 173 A. 76.

S.C.—Coleman v. Gaskins, 163 S.E. 790, 165 S.C. 301.

Tex.—Fry v. Harkey, Civ.App., 141 S.W.2d 662, error dismissed, judgment correct—Abernathy v. Adoue, Civ.App., 49 S.W.2d 476—West Texas Const. Co. v. Liberty Nat. Bank of Oklahoma City, Civ.App., 48 S.W.2d 681.

Va.—Harris v. Scott, 18 S.E.2d 305, 179 Va. 102.

Wash.—Gardner v. Herbert, 5 P.2d 782, 165 Wash. 429.

Wyo.—Rue v. Merrill, 297 P. 379, 42 Wyo. 511.

51 C.J. p. 253 note 62 [a].

Evidence held insufficient

(1) To sustain judgment for plaintiff.

Ala.—Davis v. Ashburn, 141 So. 226, 224 Ala. 572.

Ark.—Chavis v. Henry, 168 S.W.2d 610, 205 Ark. 103.

Cal.—Collin v. Odd Fellow Hall Ass'n of Modesto, 71 P.2d 266, 9 Cal.2d 521—G. R. Holcomb Estate Co. v. Burke, 48 P.2d 669, 4 Cal.2d 289—Roma v. Kibert, Limited, 166 P.2d 294, 73 Cal.App.2d 338—Jordan v. Clausen, 56 P.2d 240, 13 Cal.App.2d 16—California Public Improvement Securities v. Porter, 9 P.2d 877, 121 Cal.App. 670.

Fla.—Butler v. De Soto Nat. Bank of Arcadia, 135 So. 897, 102 Fla. 464.

Ga.—Holliday v. Guill, 27 S.E.2d 398, 196 Ga. 723—Sapp v. Thomas, 181 S.E. 842, 181 Ga. 862.

Iowa.—Lockie v. White, 267 N.W. 671, 221 Iowa 1044.

Kan.—Dyer v. Scott, 41 P.2d 993, 141 Kan. 463, rehearing denied 44 P.2d 902, 141 Kan. 766.

Ky.—Bentley v. Kentland Coal & Coke Co., 46 S.W.2d 1077, 242 Ky. 511.

tiff may recover, it is incumbent on him to make out his case by the preponderance of the evidence.[58] Where fraud is alleged, the evidence must be clear and convincing;[59] but, where defendant relies on a deed which plaintiffs claim was executed in violation of a power of attorney, without consideration and in fraud of the principal, only slight proof is required of plaintiffs who have the negative position.[60] Where subsequent acts are relied on as a waiver of clearly established fraud, the acts evincing a purpose to waive or forgive the fraud must be established by the clearest evidence.[61] A litigant's claim of an oral agreement for the purchase of realty prior to the death of the owner should, in actions to quiet title thereto, be scrutinized with the greatest care,[62] and established only on the most satisfactory evidence.[63]

A prima facie case established by plaintiff and not successfully overcome by defendant entitles the former to judgment.[64]

§ 81. —— As to Title and Adverse Claim

General rules have been applied in determining the sufficiency of the evidence to prove plaintiff's title or to

Mich.—Saide v. Brazy, 274 N.W. 736, 281 Mich. 131.
Mo.—Mattingly v. Washburn, 196 S.W.2d 624, 355 Mo. 471.
Tex.—Pearson v. Black, Civ.App., 120 S.W.2d 1075.
51 C.J. p 254 note 63 [a] (1).

(2) To authorize judgment for defendant.

Cal.—Pansini v. Weber, 137 P.2d 288, 53 Cal.App.2d 1—Nobel v. You Bet Mining Co., 72 P.2d 205, 22 Cal.App.2d 623.
Ky.—Griffith v. Daniel, 200 S.W.2d 743, 304 Ky. 314—Pennington v. Anglin, 155 S.W.2d 860, 288 Ky. 226—Hatton v. Williams' Ex'r, 82 S.W.2d 774, 259 Ky. 548.
Miss.—Ravesies v. Martin, 199 So. 282, 190 Miss. 92.
Mo.—Looper v. Kurth, 163 S.W.2d 1031, 349 Mo. 938—Ilxby v. Backues, 144 S.W.2d 112, 346 Mo. 955.
Mont.—Cook v. Rigney, 126 P.2d 325, 113 Mont. 198.
S.D.—Beuck v. Howe, 23 N.W.2d 744, 71 S.D. 288.
Tex.—Greene v. Smith, Civ.App., 148 S.W.2d 909.
51 C.J. p 254 note 63 [a] (2).

(3) To authorize judgment quieting title.

Ala.—Burleson v. Clark, 167 So. 263, 232 Ala. 119.
Ark.—Mabrey v. Millman, 186 S.W. 2d 28, 208 Ark. 289.
Neb.—Owens v. Reed, 4 N.W.2d 914, 141 Neb. 796.

(4) To support findings.

Cal.—Majors v. Butler, App., 221 P. 2d 994—Swigert v. Stafford, 193 P.2d 106, 85 Cal.App.2d 469.
N.M.—Mosley v. Magnolia Petroleum Co., 114 P.2d 740, 45 N.M. 230.
Utah.—Reimann v. Baum, 203 P.2d 337.

(5) To support plea of laches.—Cullen v. Johnson, 29 S.W.2d 39, 325 Mo. 253.

(6) To show other particular facts.

Cal.—Goodfellow v. Goodfellow, 27 P.2d 893, 219 Cal. 548—Majors v. Butler, App., 221 P.2d 994—Hoffman v. Van Duzee, 65 P.2d 1330, 19 Cal.App.2d 517.
Fla.—Pierson v. Bill, 189 So. 679, 138 Fla. 104.
Ky.—Bell v. Twyford, 145 S.W.2d 55, 284 Ky. 481.
N.J.—Humphreys v. Ibach, 160 A. 531, 110 N.J.Eq. 647, 85 A.L.R. 980.
N.Y.—Michelsen v. Leskowicz, 63 N. Y.S.2d 191, 270 App.Div. 1042—Seneca v. Neidhardt, 72 N.Y.S.2d 387.
N.D.—Twenge v. Stavens, 245 N.W. 464, 63 N.D. 1.
Okl.—Mitchell Drilling Co. v. Robert L. Kinkaid, Inc., 105 P.2d 764, 188 Okl. 25.
Or.—Clanton v. Oregon Kelp Ore Products Co., 296 P. 30, 135 Or. 321.
Tex.—Humphrey v. Jones, Civ.App., 41 S.W.2d 263, error refused.
Va.—French v. Clinchfield Coal Corporation, 198 S.E. 503, 171 Va. 211.
Wash.—Hanson v. Lindstrom, 11 P. 2d 232, 168 Wash. 130.
51 C.J. p 254 note 63 [a].

Corroborative testimony

In suit to establish title to land under alleged oral contract with plaintiffs' deceased father, absence of strong equities in favor of plaintiff did not detract from quality of plaintiff's corroborative testimony.—Blezek v. Blezek, 284 N.W. 180, 226 Iowa 237.

58. Ky.—Deaton v. Duff, 41 S.W.2d 933, 240 Ky. 131.

59. Colo.—Casserleigh v. Spar Cons. Min. Co., 128 P. 863, 23 Colo.App. 239.
Ill.—Dausch v. Barker, 160 N.E. 765, 329 Ill. 410.
51 C.J. p 254 note 64.

Evidence held sufficient

Cal.—Holmes v. O'Brien, 151 P. 1151, 28 Cal.App. 364.
Ill.—Hachadourian v. Bogosian, 69 N.E.2d 522, 329 Ill.App. 514.
Utah.—Gigliotti v. Albergo, 115 P. 2d 791, 100 Utah 392.

Evidence held insufficient

Cal.—Pacific States Savings & Loan Co. v. Perez, 124 P.2d 184, 51 Cal. App.2d 34.
Mich.—Farabaugh v. Rhoda, 9 N.W. 2d 562, 305 Mich. 334.
Mont.—Kelly v. Grainey, 129 P.2d 619, 113 Mont. 520.
S.C.—Griggs v. Griggs, 19 S.E.2d 477, 199 S.C. 295.
Utah—Nichols v. Jones, 290 P. 958, 76 Utah 595.
51 C.J. p 254 note 64 [a].

60. Cal.—Bertelsen v. Bertelsen, 122 P.2d 130, 49 Cal.App.2d 479.

61. Cal.—Brakhage v. McCaulin, 126 P.2d 378, 53 Cal.App.2d 383.

62. Iowa.—Swan v. Jhonson, 296 N. W. 214, 229 Iowa 1141—Williams v. Harrison, 293 N.W. 41, 228 Iowa 715.

63. Iowa.—Williams v. Harrison, supra.

Proof must be:

(1) Clear and satisfactory, unequivocal, definite, direct, positive, express, unambiguous, conclusive, substantial, and convincing.—Swan v. Jhonson, 296 N.W. 214, 229 Iowa 1141—Williams v. Harrison, 293 N. W. 41, 228 Iowa 715.

(2) So cogent, clear, and forcible as to leave no reasonable doubt in chancellor's mind as to the terms and character of the contract.—Swan v. Jhonson, 296 N.W. 214, 229 Iowa 1144.

Evidence held insufficient to support defendants' allegations of oral contract for purchase of property by them from decedent.—Swan v. Jhonson, supra.

64. Wash.—White v. McSorley, 91 P. 243, 47 Wash. 18.
51 C.J. p 254 note 66.
Prima facie evidence of title see infra § 81.
Sufficiency to shift burden of going forward with evidence see supra § 76 a.

Evidence held to establish prima facie case

Cal.—Bertelsen v. Bertelsen, 122 P. 2d 130, 49 Cal.App.2d 479—California Public Improvement Securities v. Porter, 9 P.2d 877, 121 Cal.App. 670.
Ky.—Head v. Head, 169 S.W.2d 25, 293 Ky. 371.
Mont.—Smith v. Whitney, 74 P.2d 450, 105 Mont. 532.
N.H.—Cadorette v. Levesque, 69 A.2d 693, 96 N.H. 42.

establish in defendant the title or interest affirmatively set up by him; and ordinarily to authorize a recovery plaintiff must establish title in himself by a preponderance of the evidence.

General rules have been applied in determining the sufficiency of the evidence to prove plaintiff's title[65] or to establish in defendant the title or interest affirmatively set up by him.[66] In order to authorize a recovery by plaintiff he must establish

65. Ala.—Lenoir v. Burns, 134 So. 485, 223 Ala. 101.
Ky.—Strunks Lane & Jellico Mountain Coal & Coke Co. v. Anderson, 124 S.W.2d 779, 276 Ky. 576.
Mo.—Roberts v. Murray, 232 S.W.2d 540.
N.Y.—St. William's Church, Raquette Lake, v. People, 56 N.Y.S.2d 868, 269 App.Div. 874, reversed on other grounds 72 N.E.2d 604, 296 N.Y. 861, reargument denied 73 N.E.2d 576, 296 N.Y. 1000.
51 C.J. p. 254 note 68.

Evidence held sufficient

(1) To show ownership in general.
Ark.—Brundidge v. O'Neal, 210 S.W.2d 305, 213 Ark. 213.
Colo.—Miller v. Gilleland, 95 P.2d 815, 105 Colo. 189.
Ind.—Hochstetler v. A. Allen Wilkinson Lumber Co., 24 N.E.2d 432, 107 Ind.App. 336.
Mich.—French v. Foster, 11 N.W.2d 920, 307 Mich. 361.
Mo.—Fleming v. Pemiscot Land & Cooperage Co., 211 S.W. 74.

(2) To show title in plaintiff.
Ala.—Ellis v. Womack, 23 So.2d 859, 247 Ala. 254.
Ariz.—Shumway v. Darley, 106 P.2d 194, 56 Ariz. 124.
Cal.—Stromerson v. Averill, 141 P.2d 732, 22 Cal.2d 808—Johnston v. Courtial, 14 P.2d 771, 216 Cal. 506—Berte v. Luse, 13 P.2d 910, 216 Cal. 251—Holzer v. Read, 13 P.2d 697, 216 Cal. 119—Luberco, Limited v. Boswell, 217 P.2d 105, 96 Cal.App.2d 946—Wagnor v. Blume, 161 P.2d 1001, 71 Cal.App.2d 94—Martin v. Pacific Southwest Royalties, 106 P.2d 443, 41 Cal.App.2d 161—Bacon v. Bacon, 69 P.2d 884, 21 Cal.App.2d 540—Broadwell v. Anderson, 6 P.2d 269, 119 Cal.App. 145—Anderson v. Broadwell, 6 P.2d 260, 119 Cal.App. 130.
Conn.—Byard v. Hoelscher, 151 A. 351, 112 Conn. 5.
Ind.—Bryant v. Barger, 42 N.E.2d 429, 112 Ind.App. 17.
Ky.—Strunks Lane & Jellico Mountain Coal & Coke Co. v. Anderson, 180 S.W.2d 385, 297 Ky. 578—Conyers' Adm'x v. McGee, 171 S.W.2d 450—Head v. Head, 169 S.W.2d 25, 293 Ky. 371—Pennington v. Anglin, 155 S.W.2d 860, 288 Ky. 226—Adkins v. Hackworth, 130 S.W.2d 774, 279 Ky. 352—Turner v. McCarty, 124 S.W.2d 753, 276 Ky. 481.
La.—In re St. Vincent de Paul Benev. Ass'n of New Orleans, App., 175 So. 140.
Mich.—Bonninghausen v. Hansen, 9 N.W.2d 856, 305 Mich. 595.
Mo.—Jones v. Himmelberger-Harrison Lumber Co., 223 S.W. 63.
N.Y.—Low v. People, 93 N.Y.S.2d 195, 195 Misc. 947.
N.D.—Passenger v. Coan, 238 N.W. 773, 61 N.D. 569.
Utah.—Day v. Steele, 184 P.2d 216, 111 Utah 481.
Wyo.—Ohio Oil Co. v. Wyoming Agency, 179 P.2d 773, 63 Wyo. 187.
51 C.J. p. 254 note 68 [a] (1).

(3) To show that plaintiff had no title.
Ark.—Staton v. Moore, 196 S.W.2d 573, 210 Ark. 416.
Cal.—Blackwell v. Blackwell, 193 P.2d 75, 85 Cal.App.2d 403.
Ky.—Cox v. Jennings, 217 S.W.2d 305, 309 Ky. 238—Martt v. McBrayer, 166 S.W.2d 823, 292 Ky. 479.
La.—Aaron v. Pitts, 171 So. 713, 186 La. 116.
Mo.—Bostwick v. Freeman, 160 S.W. 713, 349 Mo. 1.
Utah.—Home Owners' Loan Corporation v. Dudley, 141 P.2d 160, 105 Utah 208.
Va.—Roller v. Armentrout, 86 S.E. 906, 118 Va. 173, error dismissed 38 S.Ct. 221, 245 U.S. 642, 62 L.Ed. 527.

(4) To support finding.
U.S.—Smith v. Minor, C.C.A.Tex., 83 F.2d 970.
Cal.—Mildred v. Tsheppe's Estate, 65 P.2d 88, 19 Cal.App.2d 159—Kugler v. Scarborough, 14 P.2d 808, 136 Cal.App. 327.

Evidence held insufficient

(1) To show title in plaintiff.
Cal.—Doll v. Maravillas, 187 P.2d 885, 82 Cal.App.2d 943.
Conn.—Pepe v. Aceto, 175 A. 775, 119 Conn. 282—Mentz v. Town of Greenwich, 171 A. 10, 118 Conn. 137.
Fla.—Butler v. De Soto Nat. Bank of Arcadia, 135 So. 897, 102 Fla. 464.
Ky.—Frasure v. Bull, 212 S.W.2d 280, 307 Ky. 726—Warfield Natural Gas Co. v. Banks, 112 S.W.2d 674, 271 Ky. 452—Bentley v. Kentland Coal & Coke Co., 46 S.W.2d 1077, 242 Ky. 511—Ratcliff v. Coleman, 45 S.W.2d 493, 241 Ky. 791.
Mo.—Elder v. Richards, 34 S.W.2d 23.
N.Y.—St. William's Church, Raquette Lake, v. People, 72 N.E.2d 604, 296 N.Y. 861, reargument denied 73 N.E.2d 576, 296 N.Y. 1000.
N.D.—Reitman v. Whitaker, 23 N.W.2d 393, 74 N.D. 504.
S.C.—Griggs v. Griggs, 19 S.E.2d 477, 199 S.C. 295.
Tex.—Perry v. Venable, Civ.App., 112 S.W.2d 1069, error dismissed—Humphrey v. Jones, Civ.App., 41 S.W.2d 263, error refused.
Wis.—Hunter v. Neuville, 39 N.W.2d 468, 255 Wis. 423.
51 C.J. p. 254 note 68 [b] (1).

(2) To show ownership in another.
Or.—Rayburn v. Blechschmidt, 23 P.2d 550, 143 Or. 640.
Tex.—Masterson v. Adams, Civ.App., 197 S.W.2d 154, refused no reversible error.

(3) To support finding.—Diamond v. Grath, 116 P.2d 114, 46 Cal.App.2d 443—51 C.J. p. 254 note 68 [b].

66. Ala.—Martin v. Culpepper, 44 So.2d 568, 253 Ala. 412.
Kan.—Sallee v. King, 277 P. 49, 128 Kan. 270.
51 C.J. p. 256 note 69.

Evidence held sufficient

(1) To show title in defendant.
Ala.—Bates v. Delony, 2 So.2d 313, 241 Ala. 221—Davis v. Ashburn, 141 So. 226, 224 Ala. 572.
Ark.—Stewart v. Pelt, 131 S.W.2d 644, 198 Ark. 776.
Cal.—Haimo v. De Beaulieu, 129 P.2d 345, 20 Cal.2d 849—Casaletti v. McGuire, 201 P.2d 839, 89 Cal.App.2d 777—Kuenzel v. Grettenberg, 199 P.2d 732, 88 Cal.App.2d 626—Klein v. Caswell, 199 P.2d 689, 88 Cal.App.2d 774—Williams v. Hebbard, 92 P.2d 657, 33 Cal.App.2d 686—Security Trust & Savings Bank v. Carrier, 290 P. 458, 107 Cal.App. 333.
Ind.—Coal Creek Coal Co. v. Chicago, T. H. & S. E. Ry. Co., 53 N.E.2d 179, 114 Ind.App. 627.
Ky.—Hunt v. Cassity, 131 S.W.2d 248, 297 Ky. 716.
Mont.—McAlpin v. Smith, 213 P.2d 602.
N.M.—Tietzel v. Southwestern Const. Co., 154 P.2d 238, 48 N.M. 567.
Ohio.—Sting v. Rothacker, 80 N.E.2d 819, 82 Ohio App. 107.
Okl.—State ex rel. Richardson v. Citizens State Bank of Webbers Falls, 97 P.2d 91, 186 Okl. 270.
Wyo.—See Ben Realty Co. v. Gothberg, 109 P.2d 455, 56 Wyo. 294.
51 C.J. p. 256 note 69 [a] (1).

(2) To show that defendants had no interest in property.
Cal.—Rogers v. Bailey, 152 P.2d 468, 66 Cal.App.2d 468.
Ill.—Lasky v. Smith, 94 N.E.2d 898, 407 Ill. 97.
Ky.—Martt v. McBrayer, 166 S.W.2d 822, 292 Ky. 479.
Mich.—McArthur v. Dumaw, 43 N.W.2d 924, 328 Mich. 453.

title in himself by a preponderance of evidence.[67] Accordingly, satisfactory[68] and affirmative[69] proof of title should be adduced. Proof of title need not, however, be made with the strictness required in actions of ejectment[70] or for reformation of instruments.[71] On the other hand, it has been held that plaintiff must establish his title with clearness, accuracy, and certainty,[72] or conclusively;[73] and this applies particularly where plaintiff seeks to overcome the presumption arising from defendant's possession of the legal title.[74] So where defendants' claim of title is predicated on adverse possession, it has been said to be incumbent on them to show clearly and conclusively that all of the requirements to perfect a title by adverse possession have been met before a decree quieting title on such a ground can be entered.[75] Under some rules of court where plaintiff has proved title to the land and a cloud thereon, defendant must establish by a preponderance of the evidence, as an independent ground of defense, the facts allegedly giving him an equitable title.[76]

Lost instruments. Where plaintiff relies on a lost deed, he must establish its original existence, its loss, and the material parts thereof, by clear and convincing evidence,[77] and where an assault on a record title is made by attempting to establish a title in a third person by secondary evidence of a lost muniment of title, a high degree of proof is required.[78]

An ancient record copy of an ancient original deed, not executed and acknowledged as required by statute, is not sufficient to establish title without some confirming circumstances.[79]

Invalidity of adverse claim and cloud on title. Plaintiff's proofs must clearly show that the claim set up by defendant is invalid,[80] and that it constitutes a cloud on plaintiff's title.[81]

N.M.—Sunmount Co. v. Bynner, 2 P. 2d 311, 35 N.M. 527.

Tex.—West Texas Const. Co. v. Liberty Nat. Bank of Oklahoma City, Civ.App., 48 S.W.2d 681.

Evidence held insufficient

To show title in defendant.

Ky.—Frasure v. Bull, 212 S.W.2d 280, 307 Ky. 726—Strunks Lane & Jellico Mountain Coal & Coke Co. v. Anderson, 180 S.W.2d 385, 297 Ky. 578—Combs v. Jones, 51 S.W.2d 672, 244 Ky. 512.

La.—Authement v. Weill, 2 So.2d 81, 197 La. 585—In re St. Vincent de Paul Benev. Ass'n of New Orleans, App., 175 So. 140.

Mont.—Barcus v. Galbreath, 207 P.2d 559.

Tex.—J. M. Radford Grocery Co. v. Speck, Civ.App., 152 S.W.2d 787, error refused.

51 C.J. p 256 note 69 [b] (1).

Mere paper chain of title does not establish ownership in one seeking to quiet his title unless his possession or that of his predecessors in title is shown, although title satisfactorily established may draw with it possession in absence of evidence to the contrary.—Ments v. Town of Greenwich, 171 A. 10, 118 Conn. 137.

Evidence held not conclusive

In action to quiet title to triangular parcel of realty at dividing line between tracts, testimony of competent engineer, produced by defendant, pursuant to survey made, was held not conclusive.—Merrill v. Hooper, 13 P.2d 786, 125 Cal.App. 80.

Evidence regarded with suspicion

Where the owner of property participates in a series of legal transactions with respect thereto, over a period of years and consistently deals with the property as his own, and the person who claims title to the property after the death of the owner followed a line of conduct during the life of the owner inconsistent with the ownership in himself, the court will accept with caution and regard with suspicion any evidence introduced in support of his claim of ownership, where the validity of the instrument under which he claims title is seriously questioned and was not produced until after the owner's death.—Schueler v. Lynam, 75 N.E. 2d 464, 80 Ohio App. 325.

67. Ky.—Deaton v. Duff, 41 S.W.2d 933, 240 Ky. 121.
51 C.J. p 256 note 70.

68. Cal.—Pedersen v. Reynolds, 87 P.2d 51, 31 Cal.App.2d 18.
Idaho.—Independence Placer Mining Co. v. Hellman, 109 P.2d 1038, 62 Idaho 180.

69. Idaho.—Independence Placer Mining Co. v. Hellman, supra.

70. Ill.—Glos v. Randolph, 27 N.E. 941, 138 Ill. 268.

71. N.C.—Ricks v. Brooks, 102 S.E. 207, 179 N.C. 204.
51 C.J. p 256 note 72.

72. Fla.—McDaniel v. McElvy, 108 So. 820, 91 Fla. 770, 51 A.L.R. 731.
51 C.J. p 256 note 74.

"He who comes into equity to get rid of an apparent legal title as a cloud upon his own must show clearly the validity of his own title and the invalidity of his opponent's. Equity will not act in such cases in the event of a doubtful title."—Atlantic Beach Improvement Corporation v. Hall, 197 So. 464, 466, 142 Fla. 778.

73. La.—Kemper v. Atchafalaya Basin Levee Dist., 37 So.2d 244, 214 La. 383.

74. Iowa.—Thompson v. Thompson, 39 N.W.2d 132, 240 Iowa 1162.
Ohio.—Schueler v. Lynam, 75 N.E.2d 464, 80 Ohio App. 325.
51 C.J. p 256 note 76.

Evidence held insufficient

N.D.—Cox v. McLean, 268 N.W. 686, 66 N.D. 696.

75. Cal.—Nobel v. You Bet Mining Co., 72 P.2d 205, 22 Cal.App.2d 623.

76. Tex.—Johnson v. Miller, 177 S.W.2d 249, 142 Tex. 238.

77. Ark.—Sims v. Fisher, 292 S.W. 92, 172 Ark. 1038.

N.D.—Garland v. Foster County State Bank, 92 N.W. 452, 11 N.D. 374.

78. Minn.—Rogers v. Clark Iron Co., 116 N.W. 739, 104 Minn. 198.

79. N.M.—Union Land, etc., Co. v. Area, 152 P. 1142, 21 N.M. 115.

80. Ariz.—Arizona Mine Supply Co. v. Bolman, 140 P. 490, 15 Ariz. 564.
51 C.J. p 256 note 80.

Evidence held sufficient

(1) To show invalidity of claim.

Ky.—Pennington v. Anglin, 155 S.W. 2d 860, 288 Ky. 226.

Or.—Bolster v. Lambert, 135 P. 325, 67 Or. 134.

(2) To sustain finding.—Walton v. Evans, 157 P.2d 68, 68 Cal.App.2d 456—McKoin v. Rosefelt, 153 P.2d 55, 66 Cal.App.2d 757.

81. Cal.—Hartman v. Reed, 50 Cal. 485.

Or.—Bolster v. Lambert, 135 P. 325, 67 Or. 134.
51 C.J. p 257 note 81.

Evidence held sufficient

Mo.—Lindsay v. City of St. Louis, 139 S.W.2d 906, 345 Mo. 1141, certiorari denied City of St. Louis v. Lindsay, 61 S.Ct. 52, 311 U.S. 681, 85 L.Ed. 439.

Or.—Bolster v. Lambert, 135 P. 325, 67 Or. 134.

Prima facie evidence. It is sufficient prima facie if plaintiff makes out a title apparently good as against defendant,[82] and if defendant fails to sustain the burden of overcoming such proof plaintiff is entitled to judgment,[83] but prima facie evidence is not conclusive evidence.[84] Proof of actual possession under a claim of ownership makes out a prima facie case[85] as against a stranger to the title,[86] and, unless successfully controverted, is sufficient to justify a decree quieting title in plaintiff.[87] Mere occupancy, without other evidence of ownership, however, does not constitute adequate evidence of ownership unless such occupancy shall have ripened into title by prescription;[88] and mere possession is not sufficient as against an admitted prior title in fact.[89] A grantee under a deed from the trustee of a bankrupt corporation cannot assert that the bankrupt's possession was prima facie evidence of title in it.[90]

§ 82. —— As to Possession

The rules as to the weight and sufficiency of evidence in civil actions generally have been applied to evidence of possession of the premises necessary to maintain an action to quiet title or remove a cloud thereon.

The rules as to the weight and sufficiency of evidence in civil actions generally have been applied to evidence of possession of the premises necessary to maintain an action to quiet title or remove a cloud thereon.[91] It has been held that, where the answer

Tex.—Lee v. Grupe, Civ.App., 223 S W.2d 548.

82. Ark.—Walsh v. Certain Lands, 190 S.W 2d 447, 209 Ark. 320.
Cal —Riedman v. Barkwill, 34 P.2d 744, 139 Cal.App 564.
Utah.—Babcock v Dangerfield, 94 P. 2d 862, 98 Utah 10.
51 C.J. p 257 note 82.

In order to establish a prima facie case, in absence of evidence of either possession by plaintiff or his predecessors of realty involved in action to quiet title, or a deed to plaintiff from one under whom defendant claims, duly signed, acknowledged, and recorded, together with proof that plaintiff purchased and paid for realty, or a sheriff's deed under foreclosure of a mortgage, and evidence of possession under deed, plaintiff must introduce evidence of a patent from the government and mesne transfers to himself, or of a certificate of purchase from a governmental authority.—Alspach v. Landrum, 187 P.2d 130, 82 Cal.App.2d 901.

Evidence held to establish prima facie case of ownership
Cal.—Pacific States Savings & Loan Co. v. Warden, 117 P.2d 877, 18 Cal.2d 757—Miller v. McKenzie, 19 P.2d 1, 217 Cal 389—Kuenzel v. Grettenberg, 199 P.2d 732, 88 Cal. App.2d 650—Wilson v. Nichols, 103 P.2d 1007, 39 Cal.App.2d 527—Krocker v. Hurlbert, 101 P.2d 101, 38 Cal.App.2d 261—Canal Oil Co. v. National Oil Co., 66 P.2d 197, 19 Cal.App.2d 524—Scott v. Warden, 296 P. 95, 111 Cal.App. 587.
Ill.—Simpson v. Adkins, 53 N.E.2d 979, 386 Ill. 64—Mutual Ben. Life Ins. Co. v. Lyons, 20 N.E.2d 784, 371 Ill. 341.
Ky.—Flinn v. Blakeman, 71 S.W.2d 961, 254 Ky. 416.
Neb.—Ellsworth Corporation v. Stratbucker, 278 N.W. 381, 134 Neb. 246.
N.Y.—Helterline v. People, 66 N.E.2d 345, 295 N.Y. 245—American Surety Co of New York v. Brink, 250 N.Y.S. 524, 140 Misc. 851.
51 C.J. p 257 note 82.

Evidence held insufficient
Cal.—Alspach v. Landrum, 187 P.2d 130, 82 Cal App.2d 901.
51 C J. p 257 note 82 [b], [c].

Title from common source
Plaintiff makes a prima facie case by evidence connecting defendant with a common source of title and proving in himself a better title from that source.—Wagnor v Blume, 161 P.2d 1001, 71 Cal.App.2d 94—Blume v. MacGregor, 148 P.2d 656, 64 Cal.App.2d 244.
51 C.J. p 257 note 82 [e].

83. Cal —Pacific States Savings & Loan Co. v. Warden, 117 P.2d 877, 18 Cal.2d 757—Canal Oil Co. v. National Oil Co, 66 P.2d 197, 19 Cal.App 2d 524.
Utah.—Babcock v. Dangerfield, 94 P. 2d 862, 98 Utah 10.
51 C.J. p 257 note 84.

Evidence held insufficient
To sustain defendant's burden of proof.—Simpson v. Adkins, 53 N.E. 2d 979, 386 Ill. 64—51 C.J. p 257 note 84 [a].

84. Cal.—Penn v. Dyba, 1 P.2d 461, 115 Cal.App. 67.

Deed from city treasurer, although furnishing prima facie evidence of title, was held not conclusive in action to quiet title.—Penn v. Dyba, supra.

85. Ala.—Ellis v. Womack, 28 So.2d 859, 247 Ala. 254.
Cal.—Anderson Cottonwood Irr. Dist. v. Zinzer, 125 P.2d 82, 51 Cal.App. 2d 587.
Iowa.—**Corpus Juris** cited in Wallis v. Clinkenbeard, 242 N.W. 86, 88, 214 Iowa 343.
Mo.—Hauber v. Gentry, 215 S.W.2d 754.
Ohio.—Board of Education of Putney Township, Belmont County, v. Nichol, 46 N.E.2d 872, 70 Ohio App. 467.
Utah.—Mercur Coalition Min. Co. v. Cannon, 184 P.2d 341, 112 Utah 13.
Wyo —See Ben Realty Co. v. Gothberg, 109 P.2d 455, 56 Wyo. 294.
51 C.J. p 257 note 85.

86. Utah.—Mercur Coalition Min. Co v. Cannon, 184 P.2d 341, 112 Utah 13
51 C.J p 257 note 86.

87. Utah.—Mercur Coalition Min. Co v. Cannon, supra
51 C.J. p 257 notes 85, 86.

88. Cal.—Canal Oil Co. v. National Oil Co., 66 P.2d 197, 19 Cal.App.2d 524.

89. Minn —Perkins v. Morse, 13 N. W. 911, 14 N.W. 879, 30 Minn. 11.

90. Mich —Fisk v. State Sav. Bank, 196 N.W. 342, 225 Mich. 580.

91. Wis.—Northern Land Co. v. Wisconsin Live Stock Assoc., 151 N.W. 256, 160 Wis. 203.
51 C.J. p 257 note 91.

Evidence held insufficient
(1) To show possession of plaintiff.—Hunter v. Neuville, 39 N.W. 2d 468, 255 Wis. 423—51 C.J. p 257 note 91 [a] (1).

(2) To establish peaceable possession in complainant.—Dawsey v. Walden, 8 So.2d 417, 243 Ala. 93—Hagler v. Boner, 128 So. 592, 221 Ala. 307.
51 C.J. p 257 note 91 [a] (2).

(3) To warrant finding that plaintiff was in possession of realty by his tenants.—Exsted v. Exsted, 279 N.W. 554, 202 Minn. 521, 117 A.L.R. 554.

(4) To establish that plaintiff was entitled to possession.—Low v. People, 93 N.Y.S.2d 195, 195 Misc. 947.

(5) To show that respondents' possessory acts were sufficient as a contest of complainants' possession to destroy peaceable character thereof and constitute it a "contested, disputed, or scrambling possession."—Price v. Robinson, 7 So.2d 568, 242 Ala. 626.

relies on an adverse right depending entirely on the location of the description, the proof of possession is not required to be as strong as where there is a defense distinctly set up and relied on.[92] The payment of taxes on land is not of itself evidence of possession,[93] but paying taxes and assessments, selling a portion of the land, and subdividing the residue are sufficient prima facie evidence of possession.[94]

F. DISMISSAL AND NONSUIT BEFORE HEARING

§ 83. Voluntary

In the absence of a demand by the defendant for affirmative relief which might be prejudiced by dismissal, the plaintiff ordinarily has a right to dismiss his action to quiet title or remove a cloud thereon, and may, under some circumstances, dismiss as to one or more of the defendants and proceed against the others

Plaintiff ordinarily has a right to dismiss his action to quiet title or remove a cloud thereon,[95] and may, under some circumstances, dismiss as to one or more of the defendants and proceed against the others to final decree.[96] So, where a petition in intervention is permitted to be filed, plaintiff may dismiss as to a defendant who seeks no affirmative relief,[97] and also as to the intervener who merely asks that plaintiff take nothing;[98] but if plaintiff does not elect to do this he has no right to dismiss as to the intervener and then proceed against defendants without meeting the issues raised by the petition in intervention.[99] Where a motion by trustees of a defunct corporation defendant, which had filed a counterclaim, to be substituted as parties is pending, plaintiffs are not entitled to dismiss as to the corporation and leave intact an erroneous judgment previously entered against the individual defendants.[1]

Demand by defendant for affirmative relief. Where defendant files a cross bill, or otherwise seeks affirmative relief, plaintiff will be precluded from dismissing his action so as to defeat or prejudice defendant's claim;[2] and if, before plaintiff attempts to dismiss his bill, defendant files a cross complaint for affirmative relief and this is answered by plaintiff and issues joined thereon, defendant is entitled to have the issues tried and disposed of.[3]

§ 84. Involuntary

In an action to quiet title or remove a cloud thereon, a judgment of dismissal or nonsuit may be granted against the plaintiff in a proper case, as where the court has no jurisdiction or the action is prematurely brought or is barred by laches, but if the bill contains equity the motion to dismiss should be overruled or denied.

In an action to quiet title or remove a cloud thereon, a judgment of dismissal or nonsuit may be granted against plaintiff in a proper case.[4] Thus the action may be dismissed for want of jurisdic-

(6) To support presumption of continuity of actual possession of land by respondent's predecessor in title.—Sisson v. Swift, 9 So.2d 891, 243 Ala. 289.

(7) To support finding that use by plaintiffs was not permissive and was adverse.—O'Banion v. Borba, 195 P.2d 10, 32 Cal.2d 145.

Evidence held insufficient

(1) To show scrambling possession so as to defeat right of complainant to maintain suit to quiet title.—Ellis v. Womack, 23 So.2d 359, 247 Ala. 254.

(2) To establish that tenant in possession was the tenant of the plaintiff or his grantor so as to give plaintiff such possession as to entitle him to maintain action to quiet title.—Magnolia Petroleum Co. v. Ball, Okl., 223 P.2d 136.

Title as drawing possession with it

While title to particular tract of land, in absence of evidence to contrary, draws possession with it, general possession of tract will not avail with respect to particular piece of land, unless it is satisfactorily shown to have been part of that tract.—Pepe v. Aceto, 175 A. 775, 119 Conn. 282.

92. Mich.—Verplank v. Hall, 27 Mich. 79.

93. Ala.—Singley v. Dempsey, 42 So. 2d 609, 252 Ala. 677.

94. Ohio.—Harvey v. Jones, 1 Disn. 65, 12 Ohio Dec., Reprint, 490.

95. Okl.—Howard v. Stewart, 159 P. 2d 527, 195 Okl. 491.
51 C.J. p 258 note 96.

Counterclaim

In action to quiet title to one hundred forty-five acre tract, defendants should have been permitted to dismiss their counterclaim seeking to quiet title to an eighty acre tract which was entirely separate from the one hundred forty-five acre tract and as to which defendant was in effect a plaintiff.—Crystal Lime & Cement Co. v. Robbins, Utah, 209 P. 2d 739.

96. Okl.—Howard v. Stewart, 159 P. 2d 527, 195 Okl. 491.
51 C.J. p 258 note 97.

97. Cal.—Henry v. Vineland Irr. Dist., 73 P. 1061, 140 Cal. 376.

98. Cal.—Henry v. Vineland Irr. Dist., supra.—Townsend v. Driver, 90 P. 1071, 5 Cal.App. 581.

99. Cal.—Townsend v. Driver, supra.

1. N.D.—Murphy v. Missouri, etc., Land, etc., Co., 149 N.W. 957, 28 N.D. 519.

2. Neb.—Hanson v. Hanson, 111 N. W. 368, 78 Neb. 584.
51 C.J. p 258 note 3.

3. Neb.—Hanson v. Hanson, supra.

4. Ala.—Commonwealth Life Ins. Co. v. First Nat. Bank, 160 So. 260, 230 Ala. 257.
Iowa.—Coulthard v. McFerrin, 190 N. W. 940, 194 Iowa 1133.
Dismissal or nonsuit at trial see infra § 90.
Requisites of judgment on dismissal see infra § 103.

Want of equity

In suit by testator's grandchildren against purchasers of testator's realty who concededly had title but for alleged will, complaint was properly dismissed for want of equity where order of a court of another state admitting alleged will to probate had been procured through fraud.—Dodd

tion,[5] or because such action is prematurely brought,[6] or is barred by laches;[7] and in the latter case it is error to dismiss "without prejudice to further suit."[8] So a cross petition may be dismissed where all the parties necessary to the determination of the question raised thereby are not before the court[9] or where the sole issue of title raised by it has been disposed of by the verdict on other counts in the petition.[10] A counterclaim is properly dismissed where the matters set forth therein go to the equities of the subject matter presented by plaintiff's bill, and a final decree on the bill and an appropriate answer would determine the equities between the parties if all material matters set forth in the cross complaint were properly pleaded in an answer.[11]

If the bill of complaint contains equity, the motion to dismiss should be overruled or denied.[12] Where plaintiff brings an action under the statute to quiet title as against defendant's assertion of a judgment lien on plaintiff's homestead, plaintiff is entitled to have the cause tried on its merits, and a dismissal of the complaint is erroneous.[13] The fact that defendant claims no interest in the property is not ground for dismissal as to him where he does not file a disclaimer, but answers, denying plaintiff's ownership and right of possession,[14] especially where defendant's husband claims a life interest in the land constituting community property in which the wife had a present vested interest equal to that of her husband.[15] Also an action will not be dismissed because a municipality, one of the defendants, has instituted an action against others involving a portion of the land claimed by plaintiff, part of which is used as a public street.[16] So, where a person is made defendant by amendment to the petition, failure to make him an original defendant is no ground for nonsuit.[17] A bill which is defective for failure to allege possession of plaintiff is not dismissible on that ground, the bill being subject to amendment,[18] but a bill which after repeated amendments remains defective for want of an essential averment is properly dismissed.[19] Defendant's claim of title by payment of taxes for the statutory period is an affirmative defense which will preclude him from having the action dismissed.[20] Where a bill based on a contract of sale is dismissed because of the existence of other adequate remedies, but prior to the filing of the action defendant brought suit against plaintiff to recover the purchase money, defendant's counterclaim should also be dismissed, or be discontinued until the issue in the prior suit is determined.[21] The court should not dismiss, without prejudice to either party to further action, a petition to quiet title and a cross petition seeking the same relief where the subject matter of both pleadings was within the jurisdiction of the court when the parties tendered their cause for decision.[22]

v. Holden, 171 S.W.2d 948, 205 Ark. 817.

5. Me.—Milliken v. Saco & Biddeford Sav. Inst., 53 A.2d 335.
N.J.—Claron v. Thommessen, 122 A. 435, 94 N.J.Eq. 530.
Pa.—Statler v. Babcock Lumber Co., Com.Pl., 10 Monroe L.R. 128, 14 Som.Co.Leg.J. 127.
51 C.J. p 258 note 6.

6. Neb.—Gingrich v. Blank, 195 N. W. 946, 111 Neb. 111.
51 C.J. p 258 note 7.

7. U.S.—Jewell v. Trilby Mines Co., Colo., 229 F. 98, 143 C.C.A. 374.
Va.—Kennedy Coal Corp. v. Buckhorn Coal Corp., 124 S.E. 482, 140 Va. 37.

8. Va.—Kennedy Coal Corp. v. Buckhorn Coal Corp., supra.

9. Iowa.—Jackson v. Snyder, 208 N. W. 321, 202 Iowa 262.

10. Mo.—Romine v. Haag, 178 S.W. 147.

11. Fla.—Swarz v. Goolsby, 38 So.2d 312.

12. Fla.—Hillsborough Inv. Co. v. Lawyers Trust Co., 3 So.2d 870, 148 Fla. 224—Vaughn v. Stewart, 191 So. 693, 140 Fla. 88.
N.C.—Maynard v. Holder, 5 S.E.2d 535, 216 N.C. 524.

Granting motion to dismiss held error

In action to quiet title to tract of land and remove as cloud on plaintiffs' title an instrument claimed by plaintiffs to be an unperformed contract to convey one-half interest in mineral rights, granting defendant's motion to dismiss was error, where instrument was on its face inoperative as a conveyance, and complaint alleged that things to be done in order to make instrument effective as a conveyance were never done.—Jones v. Continental Royalty Co., C.C.A.Tex., 115 F.2d 731.

Necessity of adjudicating legal question

(1) A chancery proceeding brought under statute to remove a cloud on title to realty is not to be dismissed for the reason that, in order to pass on the merits, the trial chancellor is required to adjudicate a legal question involving title to the realty affected.—Trevey v. Lindsey, 19 S.E.2d 613, 124 W.Va. 130.

(2) A bill to remove a cloud will not be dismissed merely because the controverted question is the ownership of the legal title, but plaintiff will be given an opportunity to establish his legal title by action at law, and if he does so he may then maintain his bill to remove the cloud from such title.—Nugent v. Lindsley, 111 A. 324, 92 N.J.Eq. 128.

13. Cal.—Hughes v. Beckley, 259 P. 337, 85 Cal.App. 313

14. U.S.—Corman v. Cree, C.C.A.N. M., 100 F.2d 486.
Cal.—Johnston v. Baker, 139 P. 86, 167 Cal. 260.

15. U.S.—Corman v. Cree, C.C.A.N. M., 100 F.2d 486.

16. Cal.—Johnston v. Baker, 139 P 86, 167 Cal. 260.

17. Ga.—Mentone Hotel, etc., Co. v. Taylor, 130 S.E. 527, 161 Ga. 237.

18. Fla.—Conway v. Wilson, 181 So. 385, 132 Fla. 404.
Necessity of alleging possession in plaintiff see supra § 60.

19. Ala.—Commonwealth Life Ins. Co. v. First Nat. Bank, 160 So. 260, 230 Ala. 257.

20. U.S.—Jewell v. Trilby Mines Co., Colo., 229 F. 98, 143 C.C.A. 374.

21. N.J.—Claron v. Thommessen, 122 A. 435, 94 N.J.Eq. 530.

22. Iowa.—Equitable Life Assur Soc. of U. S. v. Asmus, 300 N.W 318, 230 Iowa 1062.

Sale of property pending suit. A dismissal is proper where no relief is asked against one of the defendants, and plaintiff purchased, pendente lite, the interests of the other defendants in the property;[23] and where, after the commencement of the action, both parties convey all their interest in the lands in dispute to a stranger, the bill should be dismissed.[24] Where the proceeds of the sale are deposited in court, however, under a stipulation by which they are to be subject to the adjudication of the question as to who is entitled thereto, the bill should not be dismissed.[25]

Time of dismissal. A motion for dismissal for want of jurisdiction of the subject matter may be made at any time before final judgment or decree.[26]

§ 85. Operation and Effect

A nonsuit by a plaintiff who is not a necessary party to the suit to quiet title or remove a cloud thereon does not affect the right of his coplaintiff to have an adjudication; and on the plaintiff's voluntary nonsuit the defendant's answer passes out of court if it is purely defensive in nature, but a dismissal of the original bill does not necessarily carry with it a cross bill praying for affirmative relief.

A nonsuit by a plaintiff who is not a necessary party to the suit to quiet title or remove a cloud thereon does not affect the right of his coplaintiff to have an adjudication.[27] On plaintiff's voluntary nonsuit, defendant's answer passes out of court where it is purely defensive in nature and does not seek any affirmative collateral relief against plaintiff as in a cross action.[28]

Dismissal as affecting cross bill or counterclaim. A dismissal of the original bill does not necessarily carry with it the cross bill,[29] especially where the cross bill prays for affirmative relief[30] or has some independent equity which can uphold the jurisdiction of the court;[31] and the same rule has been applied where the answer sets forth defendant's ownership in fee, although not in the form of a counterclaim.[32] On a similar principle a dismissal as to plaintiff who has no title does not dismiss the action as to defendants asking affirmative relief by way of counterclaim.[33] So, where the court dismisses the bill as to some of the defendants who filed answers denying plaintiff's possession, it is not improper to entertain the cross bill of one of them who seeks affirmative relief against plaintiff.[34] Where plaintiff dismisses his petition after defendant has prayed that title be decreed in him, defendant becomes plaintiff, and plaintiff becomes defendant; and plaintiff as defendant in the cause of action set up in defendant's affirmative answer may set up a counterclaim.[35] Where plaintiff brings suit against the person from whom he derived title, and makes other persons defendants, requiring them to interplead with his vendors, and they file a cross bill against such vendors, the dismissal of the original bill will not prevent the court from determining the issue raised by the cross bill.[36] Where, however, the matter set up in the cross bill is merely a matter of defense, a dismissal of the original bill carries the cross bill with it.[37] If defendant answers and files a cross complaint, a dismissal of the complaint, whether or not it carries with it the cross complaint, will not authorize judgment quieting title in defendant without proof of his title.[38]

G. TRIAL OR HEARING

§ 86. In General

The general rules relating to the trial of civil actions or to hearings in courts of equity, except as changed by statute, are applicable to actions to quiet title or remove clouds.

The general rules relating to the trial of civil actions or to hearings in courts of equity, except as such rules are changed by statute, are applicable to actions to quiet title or remove clouds.[39] As in other cases, the party who asserts the affirmative of an issue is entitled to open and close the case.[40]

23. Colo.—Sternberger v. Ladd, 88 P. 872, 39 Colo. 75.

24. N.J.—Oberon Land Co. v. Dunn, 47 A. 60, 60 N.J.Eq. 280.

25. Idaho.—Pence v. Sweeney, 28 P. 413, 3 Idaho 181.

26. Ill.—Gage v. Schmidt, 104 Ill. 106.
51 C.J. p 259 note 22.

27. Tex.—Russell v. Texas, etc., R. Co., 5 S.W. 686, 68 Tex. 646.

28. Ga.—Spence v. Dyal, 44 S.E.2d 658, 202 Ga. 739.

29. Ill.—Whipple v. Gibson, 41 N.E. 1017, 158 Ill. 339.
51 C.J. p 259 note 24.

30. U.S.—Jackson v. Simmons, Ill., 98 F. 768, 39 C.C.A. 514.

31. Ala.—Meyer v. Calera Land Co., 31 So. 938, 138 Ala. 554.

32. Colo.—Scott v. Sullivan, 244 P. 466, 79 Colo. 173.

33. N.D.—Company A First Regiment Nat. Guard Training School v. State, 234 N.W. 661, 58 N.D. 66.

34. Ill.—Kinsella v. Stephenson, 106 N.E. 950, 265 Ill. 369.

35. Mo.—Clark Real Estate Co. v. Old Trails Inv. Co., 76 S.W.2d 388, 335 Mo. 1237.

36. Ky.—Harris v. Smith, 2 Dana 10.

37. Mich.—McGuire v. Van Buren County Cir. Judge, 37 N.W. 568, 69 Mich. 593, 595.
51 C.J. p 259 note 31.

38. Idaho.—Rogers v. Rogers, 243 P. 655, 42 Idaho 158.
51 C.J. p 259 note 32.

39. R.I.—Talbot v. Town of Little Compton, 160 A. 466, 53 R.I. 289.

40. Ind.—Stevens v. Overturf, 62 Ind. 331.

Time of trial. Under a statute authorizing suits to quiet title to be brought within two years after the act went into effect, a suit brought within that time may be lawfully tried after the expiration of the two years [41]

Reference. The court may, with or without consent, order a reference,[42] and may set aside the reference and resubmit the case.[43] Where the case is referred to a master in equity, the master may adjourn the hearing to the recorder's office where the deeds in plaintiff's chain of title are on record.[44]

Submission of issues to jury. Where a statutory action to determine adverse claims is an action in equity, the general rule that the submission of questions of fact to a jury is within the discretion of the court has been held to apply.[45]

Declarations of law are inapplicable in a suit in equity to remove a cloud on title.[46]

Survey. Where a survey is ordered after decree, for the purpose of correctly locating the land, and is reported to the court, plaintiff may contest it, and he cannot object that the order was made without notice to him.[47]

§ 87. Scope of Inquiry and Power of Court in General

If properly raised by the pleadings, the question of title between the parties may be fully litigated and determined, but immaterial issues will not be passed on, and the court will not inquire collaterally into the regularity of proceedings of another court acting within its jurisdiction.

If properly raised by the pleadings,[48] the question of title between the parties may be fully litigated and determined,[49] according to the conditions as

41. Tex.—Kennedy v. Jarvis, 1 S W. 191.

42. Iowa.—Poitevin v. Binnall, 125 N.W. 653, 148 Iowa 249.

43. Iowa.—Poitevin v. Binnall, supra.

44. Ill.—Glos v. Woodard, 67 N.E. 3, 202 Ill. 480.

45. Idaho.—Fairview Inv Co. v. Lamberson, 136 P. 606, 25 Idaho 72.

Questions of law and fact see infra § 89.

Complaint held not bill to quiet title

Complaint averring complainant's execution and delivery of mortgage constituting alleged cloud on her title, that mortgage was executed to secure debt of complainant's husband, that complainant was induced to execute mortgage through fraud and undue influence and that she was mentally incapacitated at time she executed mortgage, and praying that foreclosure of mortgage be restrained and that mortgage be canceled as cloud on complainant's title, was not a statutory bill to quiet title but was governed by general principles of equity so that complainant was not entitled to jury trial as a matter of right.—Ex parte Baird, 200 So. 601, 240 Ala. 585.

46. Mo.—Cuthbert v. Holmes, 14 S. W.2d 444—Stone v. Perkins, 117 S. W. 717, 217 Mo. 586.

47. Ala.—Brown v. Powers, 52 So. 647, 167 Ala. 518.

48. Ohio.—Miller v. Village of Brookville, Com.Pl., 83 N.E.2d 919, affirmed 87 N.E.2d 378, affirmed 89 N.E.2d 85, 152 Ohio St. 217, 15 A. L.R.2d 967.

49. U.S.—Stricker Land & Timber Co. v. Hogue, D.C.La., 61 F.Supp. 825.

Ala.—Empire Land Co. v. Sanford, 118 So. 563, 218 Ala. 318—Corpus Juris quoted in Cogburn v Callier, 104 So. 328, 330, 213 Ala. 38

Cal.—Corpus Juris quoted in White v. Lantz, 14 P.2d 1041, 1042, 126 Cal.App. 693—Moe v. Gier, 2 P. 2d 852, 116 Cal.App. 403.

Ky.—Goins v. Catron, 190 S.W 2d 322, 300 Ky. 583—Justice v. Staton, 163 S W.2d 471, 291 Ky. 179—Crawley v. Mackey, 143 S.W.2d 171, 283 Ky. 717—Whittaker v. Shepherd, 134 S.W.2d 604, 280 Ky. 713—Strunks Lane & Jellico Mountain Coal & Coke Co. v. Anderson, 124 S.W.2d 779, 276 Ky. 570—Madden v. Bond, 106 S.W.2d 95, 269 Ky. 31—Combs v. Combs, 38 S.W.2d 243, 238 Ky. 362.

La.—Settoon v. Sharp, App., 19 So.2d 342.

Mo.—Lortz v. Rose, 145 S.W.2d 385, 346 Mo. 1212—White v. Kentling, 134 S.W.2d 39, 345 Mo. 526—Meyer v. Wise, 133 S.W.2d 321—Rutledge & Taylor Coal Co. v. Dent, 274 S. W. 30, 308 Mo. 547.

Mont.—Sanborn v. Lewis and Clark County, 120 P.2d 567, 113 Mont. 1—Teisinger v. Hardy, 5 P.2d 219, 91 Mont. 9.

N.M.—Petrakis v. Krasnow, 213 P.2d 220, 54 N.M. 39.

Okl.—Renegar v. Fleming, 211 P.2d 272—Bridwell v. Goeske, 192 P.2d 656, 200 Okl. 244—Home Development Co. v. Hankins, 159 P.2d 1013, 195 Okl. 632—Newcomer v. Robison, 15 P.2d 129, 159 Okl. 238.

Tenn.—Brier Hill Collieries v. Pile, 4 Tenn.App. 468.

51 C.J. p 260 note 51—84 C.J. p 959 note 27.

Nature and extent of relief awarded see infra §§ 95–102.

Validity of contract

Tender by defendant of order to have contract, sought to be canceled, erased from records, but reserving rights thereunder, did not eliminate issue as to validity of contract from case.—Babb v. Hollingsworth, 129 So. 423, 14 La.App. 273.

Validity and effect of judgment

In suit to quiet title, where effect of a judgment on complainant's title is involved and no proceedings are pending to enforce the judgment, the validity of such judgment as against such title may be determined, and, if valid, its extent ascertained so that complainant may pay and discharge it.—Van Keuren v. U. S., 46 A.2d 815, 138 N.J.Eq. 66.

Existence of lien

Although statute does not contemplate determination of a dispute as to the existence of a lien on the title to real estate, where there is no dispute as to the material facts the court may accept such a question as submitted by the parties.—Petition of Frola, 52 Pa.Dist. & Co. 357.

Legal question

A court of equity having jurisdiction may determine a legal question in a suit to remove cloud on title.—Putnam Co. v. Fisher, 36 S.E.2d 681, 128 W.Va. 383.

Where defendant interposes a counterclaim asserting title in himself and asking for affirmative judgment, the court must determine and adjudicate defendant's claims even though plaintiff's cause of action may fail.—Jester v. Jester, N.D., 37 N.W.2d 879.

Other realty and personality

In action to quiet title by plaintiffs claiming title to the realty under a trust indenture executed by aged man, conveying all his property to plaintiffs as trustees, wherein defendants filed a cross bill seeking to have indenture canceled on ground that grantor was of unsound mind,

they existed at the time the issues were made,[50] and a decree rendered assigning the title to the realty in controversy,[51] or any part of it,[52] to the party entitled thereto, or having the superior title,[53] although the real title may be held by strangers to the record.[54] Immaterial issues, however, will not be passed on,[55] and, as discussed supra § 17, where plaintiff fails to establish his own title, it is unnecessary to inquire into the validity of defendant's title. The court will not examine the validity of alleged clouds on a title where it appears that, even if they were removed, defendant has an undisputed title;[56] nor will it inquire collaterally into the regularity of proceedings of another court acting within its jurisdiction,[57] or, as discussed infra § 95, determine rights of persons not parties to the action.

It cannot compel the recognition of a claim barred by statute.[58] On a bill to quiet title asserting no additional condition of equitable cognizance, and in response to which answer is made propounding defendant's title, interest, or claim, the only province of the court is to ascertain and declare such title, interest, or claim.[59] Where a vendor holding a vendor's lien sues to remove a cloud from the title, the jurisdiction of the court is limited to controversies respecting the title conveyed and the clouds thereon, and it cannot adjudicate defenses based on adverse possession.[60] Where the facts show no fraud, the court may determine the right of defendant, taking under a subsequent deed from the grantor, to reimbursement from plaintiff, holding under the paramount deed, for taxes paid on the land.[61] A party, indifferent as between the real parties in interest, can litigate no question which arises only between such parties.[62]

Although a bill is erroneously presented as one to remove a cloud, it is proper to inquire whether, on the facts alleged and proved, there is any other ground on which the suit may be sustained.[63]

Claims of life tenants and remaindermen. A person who comes into court admitting that he has only a life estate, or who is proved to have only such estate, may not compel the determination of the claims of remaindermen or the conflicting claims of remaindermen as between themselves;[64] but it has been held that, where a suit is brought under a statute, the right to a contingent remainder may be adjudicated and a party in possession or out of it may ask determination of, and the court may determine, all rights, claims, and interests, certain or contingent, of the parties or of any of them.[65]

Construction of written instruments. The court may, as an incident to its jurisdiction, construe a deed,[66] will,[67] or other instrument[68] on which the

that indenture was prepared without his consent and that he was induced to sign it by fraud and undue influence, court summoning grantor may consider question of validity of trust as to other realty and personalty.—Young v. Pressgrove, 195 S.W.2d 516, 355 Mo. 204.

50. Or.—Dunlway v. Cellars-Murton Co., 170 P. 298, 179 P. 561, 93 Or. 113.

51. Neb.—Dolen v. Black, 67 N.W. 760, 48 Neb. 688.

52. Neb.—Dolen v. Black, supra.

53. Mo.—Johnson v. McAboy, 169 S.W.2d 932, 350 Mo. 1086.
Utah.—Fisher v. Davis, 291 P. 493, 77 Utah 81.
51 C.J. p 260 note 55.

54. Mo.—Johnson v. McAboy, 169 S.W.2d 932, 350 Mo. 1086.—Barr v. Stone, 242 S.W. 661.
Utah.—Fisher v. Davis, 291 P. 493, 77 Utah 81.

55. Cal.—Snook & Wells v. Holmes, 103 P.2d 487, 35 Cal.App.2d 660.
Iowa.—Boomer v. Challas, 276 N.W. 60, 224 Iowa 411.
Pa.—Dravosburg Land Co. v. Scott, Com.Pl., 90 Pittsb.Leg.J. 433.
51 C.J. p 260 note 57.

Motive of purchaser of property
In quiet title action by landowner placing part of building on adjoining unplatted tract of land which county had acquired many years before for delinquent taxes against purchaser at county's sale of such tract, purchaser's motive in purchasing unplatted tract would not be considered, where purchase was not fraudulent or unlawful and was made openly at public auction of tax delinquent lands, and was not made surreptitiously.—Consolidated Freight Lines v. Greenen, 117 P.2d 966, 10 Wash.2d 673, 137 A.L.R. 1072.

56. N.Y.—Masterson v. Cranitch, 19 N.Y.Wkly.Dig. 55.

57. Mich.—Woods v. Monroe, 17 Mich. 238.
51 C.J. p 260 note 61.

Rights lodged in probate court
In suit to remove cloud from title of assignees of widow's interest in community realty, rights of husband's creditors who had established claims in the probate court could not be adjudicated.—McDonald v. Galt, Tex.Civ.App., 173 S.W.2d 963, error refused.

58. Cal.—Fontana Land Co. v. Laughlin, 250 P. 668, 199 Cal. 625, 48 A.L.R. 1208.
51 C.J. p 260 note 62.

59. Ala.—East Birmingham Realty Co. v. Birmingham Mach., etc., Co., 49 So. 448, 160 Ala. 461.

60. W.Va.—Dudely v. Browning, 90 S.E. 878, 79 W.Va. 331.

61. Colo.—Miller v. Gilleland, 95 P.2d 815, 105 Colo. 149.

62. Utah.—Mawson v. Gray, 6 P.2d 157, 78 Utah 542.

63. U.S.—Chicago Auditorium Assoc. v. Cramer, D.C.Ill., 8 F.2d 998, reversed on other grounds, C.C.A., 20 F.2d 837, reversed on other grounds 48 S.Ct. 507, 277 U.S. 274, 72 L.Ed. 880.
51 C.J. p 260 note 65.

64. Cal.—Akley v. Bassett, 328 P. 1057, 62 Cal.App. 370.

65. Mo.—White v. Kentling, 131 S.W.2d 39, 345 Mo. 526.

66. Cal.—Washington Bldg. Beach Co. v. City of Los Angeles, 100 P.2d 825, 38 Cal.App.2d 135.
51 C.J. p 261 note 67.

67. Tenn.—Powell v. King, 4 Tenn. App. 123.
51 C.J. p 261 note 68.

Validity
In a suit for specific real property where a will is a link in the chain of title of one of the contesting parties, a chancery court has jurisdiction to pass on the validity of the will, when it was alleged that the will was obtained by fraud.—Powell v. King, supra.

68. Cal.—Washington Bldg. Beach

rights of the parties depend, but the court is without jurisdiction to construe a deed where such construction is not incidental to the relief sought.[69] In a proceeding to determine the validity of an incumbrance, the trial judge is limited to construing an indenture without regard to subsequent events as to prescription.[70]

§ 88. Direction and Framing of Issues

Under some statutes or rules of court provision is made for the direction and framing of issues to determine the rights of the parties.

Under some statutes or rules of court, where a person in possession of land petitions a court for a rule on a person denying the petitioner's title and right of possession to show cause why an issue should not be framed to determine the rights of the parties, the court must, before awarding the issue, determine the preliminary question of the petitioner's possession.[71] If the court finds in favor of the petitioner on the jurisdictional facts, an issue will be awarded,[72] but if it finds against him, an issue will be refused.[73] It is not ground for refusing an issue that the pleadings present no question of fact to be determined, but only a question of law.[74] A formal definite issue should be framed, setting forth the exact questions to be determined by the jury;[75] both parties should be compelled to file abstracts of title,[76] and the proceeding should conform as nearly as possible to an action of ejectment.[77] The only question presented for consideration on such petition is the right of the petitioner to have an issue framed, and the court cannot summarily decide the question of title.[78] On framing the issue it is the better practice to make the person against whom the proceeding is brought plaintiff in the issue, and the petitioner the defendant.[79]

Directing action at law. Under the statutes in some jurisdictions, on the timely application[80] of either party,[81] where a legal title or right is in dispute in a suit to quiet title the court of chancery must frame an issue to be tried by a court of law,[82] although the statute has been held inapplicable to controversies originally cognizable in the court of chancery.[83] If defendant asserts possession, or otherwise denies the jurisdictional requirements, and demands an issue at law, there must be a preliminary hearing in the chancery court to determine the jurisdictional facts before sending the question of title to a court of law.[84]

New trial of issue of law. After determination of the issue of title in a court of law and the return of the case to the court of chancery, the chancery court has power to grant a new trial of the issue,[85] and, where application is made for a new trial of the issue of law, the court should act on the application according to the practice in actions at law on contested titles.[86] The finding of the jury on the issue of law submitted to it should not be disregard-

Co v. City of Los Angeles, 100 P. 2d 828, 38 Cal.App 2d 135.
51 C.J. p 261 note 69.

69. Ill.—Harvard First Cong. Church v. Page, 100 N.E. 975, 257 Ill. 472.
51 C.J. p 261 note 70.

70. Mass.—New England Home for Deaf Mutes v Loader Filling Stations Corporation, 177 N.E. 97, 276 Mass. 153.

71. Pa.—Petition of Bell, 103 A. 337, 259 Pa. 495.
51 C.J. p 261 note 72.

72. Pa.—McCormick v. Berkey, 86 A. 97, 238 Pa. 264.
51 C.J. p 261 note 73.

73. Pa.—Earhart v. Marshall, 82 A. 462, 223 Pa. 365—Putt v. Africa, 81 A. 203, 232 Pa. 182.
51 C.J. p 261 note 74.

74. Pa.—Delaware, etc., Canal Co. v. Genet, 82 A. 559, 169 Pa. 343.
51 C.J. p 261 note 75.

75. Pa.—Pifer v. Berkey, 78 A. 990, 229 Pa. 394.

76. Pa.—Pifer v. Berkey, supra.

77. Pa.—Pifer v. Berkey, supra.

78. Pa.—Titus v. Bindley, 59 A. 594, 210 Pa. 121.

79. Pa.—Kimmel v. Shaffer, 68 A. 1017, 219 Pa. 375—Stamey v. Barkley, 60 A. 991, 211 Pa. 313.

80. N.J.—Campbell Stores v. Mayor and Council of City of Hoboken, 169 A. 681, 115 N.J.Eq. 159.

Application held not timely when made after all evidence had been presented and case came on for argument.—Campbell Stores v. Mayor and Council of City of Hoboken, supra.

81. N.J.—Havens v. Thompson, 23 N.J.Eq. 321.

82. N.J.—Campbell Stores v. Mayor and Council of City of Hoboken, 169 A. 681, 115 N.J.Eq. 159.
51 C.J. p 261 note 82.

83. N.J.—Van Houten v. Van Houten, 59 A. 555, 68 N.J.Eq. 358.

84. N.J.—Toth v. Bigelow, 64 A.2d 62, 1 N.J. 399.
51 C.J. p 261 note 85.

On preliminary hearing on question of chancery's jurisdiction.

(1) Statutory requirement is satisfied, and bill will be retained for disposition on merits, if complainant proves peaceable possession of land, claim of ownership thereof by himself, denial or disputation of his title or any part thereof by any other person claiming to own the land, that no suit is pending to enforce or test validity of such adverse title or claim, and that complainant is unable to obtain adequate remedy at law through action in ejectment.—Toth v. Bigelow, supra.

(2) Where pleadings alleged that complainant was in possession of surface, that there was a severance of minerals by prior owner through whom both complainant and defendant claimed, that both claimant and defendant claimed title to minerals through different chains of title, and that neither had attempted to reduce minerals to possession, bill would not be dismissed on ground that chancery had no jurisdiction because complainant was allegedly not in possession of minerals.—Toth v. Bigelow, supra.

85. N.J.—Rowan v. Yarnall, 84 A. 698, 79 N.J.Eq. 78—Brady v. Carteret Realty Co., 59 A. 639, 68 N.J. Eq. 55, affirmed 64 A. 1078, 70 N. J.Eq. 748, 118 Am.S.R. 778, 8 L.R. A.N.S. 866.
51 C.J. p 261 note 86.

86. N.J.—Brady v. Carteret Realty Co., supra.

ed on motion for new trial unless there was insufficient evidence to sustain it,[87] and where no error of law is shown to have been committed at the trial of the issue, and, on examination of the evidence, no reason appears for setting aside the verdict, a decree should be entered thereon.[88]

A new trial will be ordered, however, when the verdict is not sustained by the evidence[89] or is clearly against the weight of the evidence.[90] So if, on the trial of an issue submitted, defendant claims a title substantially different from that set up in his answer, and objection is made, a new trial will be granted as a matter of course, if the verdict is in his favor.[91] Where the special findings of the jury are supported by the evidence and are conclusive of the issue of law, a new trial will not be granted for want of a general verdict.[92] On hearing of an application for a new trial the chancery court should consider alleged trial errors, as well as the evidence reported to it by the law court, in order to determine whether such issues would destroy the value of the verdict.[93]

§ 89. Questions of Law and Fact

It is the province of the court to determine questions of law, and of the jury or trier of facts to determine disputed questions of fact.

In accordance with the general rules, it is the province of the court to determine questions of law,[94] such as the construction of writings[95] or whether there is substantial evidence in support of plaintiff's case,[96] while questions of fact are for the determination of the jury.[97] Accordingly, where the evidence on a question of fact is conflicting, or more than one inference can reasonably be deduced therefrom, the issue is for the jury.[98] So, where plaintiff has traced his title to a common source, a prima facie case is made, requiring submission to the jury of the issue as to which party has the better title from that source.[99]

Whether the presumption raised by the due execution of a deed has been overcome is a question for the trier of facts,[1] and so is the question whether the land was included in one chain of title or another.[2] Where, however, there is no evidence on the fact in issue, or the evidence is undisputed and of such a nature that but one inference can reasonably be drawn therefrom, the question is one for the determination of the court.[3] It is the duty of the court to determine all issues raised in an equitable count of the petition, including ownership.[4] Where there are both equitable issues and issues of fact, the court should first determine the equitable issue, and then submit the issues of fact to a jury on proper instructions.[5]

Demurrer to evidence. Where plaintiff's evidence is insufficient to prove title, a demurrer to the evidence will be sustained[6] even though defendant fails to prove title in himself;[7] but where, in a suit to cancel a lease as a cloud on title, it appears on the

87. N.J.—McGrath v. Norcross, 79 A. 85, 78 N.J.Eq. 120, affirmed 91 A. 1069, 82 N.J.Eq. 367.

88. N.J.—Wilson v. Wilson, Ch., 9 A. 589.

89. N.J.—Rowan v. Yarnall, 84 A. 633, 79 N.J.Eq. 78.

90. N.J.—Rowan v. Yarnall, supra—Powell v. Mayo, 26 N.J.Eq. 120.

91. N.J.—Powell v. Mayo, supra.

92. N.J.—McGrath v. Norcross, 93 A. 801, 83 N.J.Eq. 355.

93. N.J.—McAndrews, etc., Co. v. Camden, 78 A. 232, 78 N.J.Eq. 244—McGrath v. Norcross, 79 A. 85, 78 N.J.Eq. 120, affirmed 91 A. 1069, 82 N.J.Eq. 367.

94. Ga.—Seaboard, etc., R. Co. v. Holliday, 140 S.E. 507, 165 Ga. 200.
Ind.—Reagan v. Sheets, 29 N.E. 1065, 130 Ind. 185.

95. Ind.—Reagan v. Sheets, supra—Zenor v. Johnson, 7 N.E. 751, 107 Ind. 69.

96. Mont.—Le Vasseur v. Roullman, 20 P.2d 250, 93 Mont. 552.

Weight and credit given testimony

It is within the province of the trial court to determine what weight and credit shall be given to the testimony of any witness.—Cox v. Schnerr, 156 P. 509, 172 Cal. 371.

Resolving conflicts in evidence

Trial court was charged with duty of resolving conflicts in the evidence.—Brothers v. Aravo, 174 P.2d 202, 67 Idaho 171.

97. Colo.—Klipp v. Grusing, 300 P. 2d 917, 119 Colo. 111.
51 C.J. p 262 note 98.

98. Colo.—Klipp v. Grusing, supra.
Mo.—Wilcox v. Coons, 220 S.W.2d 15, 359 Mo. 52—Becht v. Johnson, 62 S.W.2d 847, 333 Mo. 420—Cullen v. Johnson, 29 S.W.2d 39, 325 Mo. 253.
N.C.—Layden v. Layden, 44 S.E.2d 340, 228 N.C. 5—Vick v. Winslow, 183 S.E. 750, 209 N.C. 540.
Pa.—Newman v. Fuller, Com.Pl., 14 Som.Leg.J. 82.
Tex.—Jackson v. Langford, Civ.App., 60 S.W.2d 365—Ragland v. Overton, Civ.App., 44 S.W.2d 768.
Utah.—Babcock v. Dangerfield, 94 P. 2d 862, 98 Utah 10.
51 C.J. p 262 note 99.

Payment

In action to quiet title to property covered by equitable mortgage, payment is a question of fact.—Kerfoot v. Kessener, 84 N.E.2d 190, 227 Ind. 58.

99. S.C.—Benbow v. Harvin, 75 S.E. 414, 93 S.C. 180.

1. Cal.—Fares v. Morrison, 129 P.2d 735, 54 Cal.App.2d 773.

2. Conn.—Byard v. Hoelscher, 151 A. 351, 112 Conn. 5.

3. Ky.—Stearns Coal & Lumber Co. v. Douglas, 185 S.W.2d 385, 299 Ky. 314.
51 C.J. p 262 note 2.

Evidence held insufficient for jury

Ky.—Wynn v. Dover, 105 S.W.2d 636, 268 Ky. 562.
N.C.—Home Real Estate Loan & Insurance Co. v. Town of Carolina Beach, 7 S.E.2d 13, 216 N.C. 778.

4. Mo.—Kimberlin v. Roberts, 107 S. W.2d 24, 341 Mo. 367.

5. Utah.—Park v. Wilkinson, 60 P. 945, 21 Utah 279.

6. Kan.—Cities Service Oil Co. v. Grunder, 86 P.2d 495, 149 Kan. 82.
Ky.—Sandford v. Koch, 176 S.W.2d 695, 296 Ky. 329.

7. Okl.—Lindeberg v. Massman, 207 P. 1067, 86 Okl. 288.

face of the lease that it was never signed by the lessor, defendant's demurrer to plaintiff's evidence is properly overruled.[8] So a demurrer to plaintiff's evidence is properly overruled where plaintiff proves that he is the owner and in possession of the premises,[9] and if defendant, on the demurrer being overruled, elects to stand thereon, the court properly enters judgment for plaintiff quieting his title against defendant.[10]

Direction of verdict. Where there is no evidence on the facts in issue, or the evidence is legally insufficient to establish such fact, or is undisputed and of such a character as to lead to but one conclusion, the court may properly direct a verdict;[11] but a verdict should not be directed where the evidence is conflicting or there is some evidence on which the jury might reasonably find the existence or nonexistence of material facts in issue.[12]

§ 90. —— Dismissal and Nonsuit

Generally it is ground for dismissal or nonsuit that the plaintiff has failed to prove that he has title to the land in controversy, or possession, where possession is necessary.

Although it has been said that technically in an equity case such as an action to quiet title there is no such thing as a nonsuit,[13] generally it is ground for dismissal or nonsuit that plaintiff has failed to prove that he has title to the land in controversy,[14] or possession, where possession is necessary.[15] So where a lien, alleged to constitute a cloud on title, is found to be valid the bill should be dismissed.[16] It is error to sustain a motion to dismiss or for a nonsuit, however, where plaintiff's evidence shows that the title in him is complete and perfect[17] or where plaintiff establishes his possession and defendant offers no evidence of title,[18] and the failure of one plaintiff to show title in himself has been held not to entitle defendant to a nonsuit.[19] Under a statute making it within the discretion of the court to permit a plaintiff to take a nonsuit where a case has been finally submitted to the chancellor for decision, denial of plaintiff's motion for nonsuit made after the suit had been heard and taken under submission for final decree in vacation is not an abuse of discretion.[20]

Where plaintiff makes out a prima facie case as to a part only of the land claimed, a nonsuit will be limited to that part as to which no case has been made.[21]

When both plaintiff and defendant fail to establish title, ordinarily both the petition and the counterclaim should be dismissed.[22]

In the absence of a motion to dismiss it is not error for the court to fail to dismiss a statutory ac-

8. Okl.—Riddle v. Ellis, 281 P. 286, 139 Okl. 68.

9. Okl.—Piland v. Craig, 154 P.2d 583, 194 Okl. 666.

10. Okl.—Piland v. Craig, supra.
Judgment or decree in action to quiet title see infra §§ 103-108.

11. Ga.—Foster v. Adcock, 60 S.E. 2d 334, 207 Ga. 201—Land Development Corporation v. Union Trust Co. of Maryland, 180 S.E 836, 180 Ga. 785.
Ky.—Stearns Coal & Lumber Co. v. Douglas, 185 S.W.2d 385, 299 Ky. 314.
Tex.—Fry v. Harkey, Civ.App., 141 S.W.2d 662, error dismissed, judgment correct.
51 C.J. p 262 note 6.

12. N.C.—Morris v. Tate, 51 S.E.2d 892, 230 N.C. 29.
Tex.—Jackson v. Langford, Civ.App., 60 S.W.2d 265—Ragland v. Overton, Civ.App., 44 S.W.2d 768.
51 C.J. p 262 note 7.

13. Mont.—Le Vasseur v. Roullman, 20 P.2d 250, 93 Mont. 552.

14. Ky.—Spencer v. Steele, 175 S. W.2d 1008, 296 Ky. 3—Crawley v. Mackey, 143 S.W.2d 171, 283 Ky. 717.
Wash.—Eakames v. Rallaes, 299 P. 302, 158 Wash. 385.
51 C.J. p 262 note 9.

Dismissal and nonsuit before hearing see supra §§ 83-85.

15. Ill.—First Nat. Bank v. Gordon, 21 N.E.2d 288, 371 Ill. 424.
Ky.—Spencer v. Steele, 175 S.W.2d 1008, 296 Ky 3—Crawley v. Mackey, 143 S.W.2d 171, 283 Ky. 717—McGilboney v. Newman, 127 S.W.2d 860, 277 Ky. 835.
51 C.J. p 262 note 10.

Possession for requisite statutory period

If adverse claimant does not plead and prove good title in statutory action for determination of claim to real property, adverse claimant may procure dismissal of complaint only if plaintiff fails to establish possession for requisite statutory period under claim of title.—George v. People, 47 N.Y.S.2d 681, 267 App.Div. 575.

16. Puerto Rico.—Oriz de Bertram v. Pou, 6 Puerto Rico Fed. 1.

17. N.C.—Layden v. Layden, 44 S. E.2d 340, 228 N.C. 5—Vick v. Winslow, 183 S.E. 750, 209 N.C. 540.
51 C.J. p 262 note 12.

Defendant's title based on deed from plaintiff while insane

It was error to grant a nonsuit in an action to quiet title where plaintiff's evidence showed that defendant's title was based on a deed from plaintiff while insane, to one in a fiduciary relation, and without consideration.—Henley v. Bursell, 215 P. 114, 61 Cal.App. 511.

Nonpayment of taxes

Where plaintiff in action to quiet title showed complete chain of title from the United States government down to himself, it was error to grant motion for nonsuit on ground that evidence that plaintiff failed to pay taxes showed that title was in the county or some third person, since fact that taxes were not paid was not sufficient to show defect in title.—Babcock v. Dangerfield, 94 P. 2d 862, 98 Utah 10.

18. Mo.—Corpus Juris cited in Hanson v. O'Malley, 204 S.W.2d 281, 283—Dowd v. Bond, 199 S.W. 954.
51 C.J. p 262 note 13.

19. N.C.—Davis v. Morgan, 44 S.E. 2d 593, 228 N.C. 78.

20. Ark.—Raymond v. Young, 201 S.W.2d 583, 211 Ark. 577.

21. Cal.—Davis v. Crump, 123 P. 294, 162 Cal. 513—Bublitz v. Reeves, 180 P. 28, 40 Cal.App. 75.

22. Ky.—Duckwall v. Gregg's Adm'r, 181 S.W.2d 263, 297 Ky. 730—Nicholson v. Shear, 7 S.W.2d 516, 225 Ky. 53.

tion to determine title to property attached and sold separately for landlord's lien and mechanic's lien, on the ground that the question of priority of liens cannot be considered where plaintiff fails to show title or right to possession.[23]

Dismissal without prejudice is improper where the court finds that plaintiff's title is fatally defective.[24]

§ 91. Instructions

Correct instructions should be given on all matters put in issue by the pleadings and evidence.

The general rules as to instructions to the jury in civil actions are applicable in actions to quiet title.[25] The instructions should not be misleading,[26] and should not improperly emphasize any particular fact,[27] or invade the province of the jury.[28] An instruction that, if the jury find plaintiff has no title to the premises, they may determine whether defendant has title to the whole or any portion thereof is proper.[29] So too, where a record is admitted with respect to a claim that the land in dispute is the site of a highway, an allusion, in the instruction, to the record as describing a highway, not taken out of the common, but beginning at and running from it, is not error, such being the legal construction of the record.[30]

An instruction ignoring or excluding issues or evidence,[31] or one which is not applicable to the pleading or evidence,[32] is erroneous, as is the refusal of instructions which correctly state the law and are warranted by the issues and evidence.[33] So, where an issue as to title or possession is raised, it should be submitted to the jury, and refusal to do so, or to charge the jury as to it, is error.[34] However, it is not error to refuse to give instructions which are fully covered by other instructions given,[35] and the court may, if it sees fit, modify requested instructions, and give them to the jury in their modified form.[36]

§ 92. Verdict and Findings

a. Necessity
b. Sufficiency
c. Conclusiveness, construction, and effect

a. Necessity

The court should make findings of fact on material issues, but findings on immaterial matters are not required.

The court should make findings of fact on material issues,[37] but findings on immaterial matters are not required;[38] and it has been held that in an action to cancel a covenant in a lease, as a cloud on plaintiff's title, the proper practice is to enter an order for judgment, without findings of fact.[39] Under the practice in some jurisdictions a special finding is not necessary in the absence of any request therefor.[40] Where the issues are complicated, and defendants claim under different sources of title, it is proper for the court to submit special findings to the jury.[41]

Plaintiff's title and possession. There is no occasion for a finding as to any alleged title of plaintiff not set up in the complaint;[42] nevertheless, although plaintiff claims to be the owner of title in fee, if it develops from the evidence presented that

22. Tex.—Cook v. Yandell Realty Co., Civ.App., 275 S.W. 850.

24. Fla.—Morgan v. Jones, 42 So. 242, 52 Fla. 543.

25. Mo.—Cullen v. Johnson, 29 S.W.2d 39, 325 Mo. 253.
51 C.J. p 263 note 18.

26. Mo.—Lewis v. Barnes, 220 S.W. 437.
51 C.J. p 263 note 19.
Instruction held not misleading
Mo.—Cullen v. Johnson, 29 S.W.2d 39, 325 Mo. 253.

27. Mo.—Lewis v. Barnes, 220 S.W. 437.

28. Ind.—Kemery v. Zeigler, 109 N.E. 774, 184 Ind. 144.

29. N.Y.—Hager v. Hager, 38 Barb. 93.

30. Conn.—Dawson v. Grange, 61 A. 101, 78 Conn. 96.

31. Ga.—Franklin v. Womack, 134 S.E. 758, 162 Ga. 715.

32. Mo.—Cullen v. Johnson, 29 S.W.2d 39, 325 Mo. 253.
51 C.J. p 263 note 25.
Instructions held not unwarranted by pleadings and evidence
Ga.—Fowler v. Latham, 56 S.E.2d 272, 206 Ga. 245—Miller v. Everett, 14 S.E.2d 449, 192 Ga. 26.
Mo.—Cullen v. Johnson, 29 S.W.2d 39, 325 Mo. 253.

33. Nev.—Van Vleet v. Olin, 4 Nev. 95, 97 Am.D. 513.
51 C.J. p 263 note 26.

34. N.C.—Lee v. McDonald, 53 S.E. 2d 845, 230 N.C. 517—Midgett v. Midgett, 39 S.E. 722, 129 N.C. 21.

35. Cal.—Boye v. Andrews, 102 P. 551, 10 Cal.App. 494.

36. Ind.—Baxter v. Baxter, 92 N.E. 881, 46 Ind.App. 514.

37. Cal.—Regoli v. Fancher, 34 P. 2d 477, 1 Cal.2d 276—Bardeen v. Commander Oil Co., 119 P.2d 967, 48 Cal.App.2d 355.
Minn.—Orr v. Sutton, 143 N.W. 1066, 127 Minn. 37, Ann.Cas.1916C 527.
Pa.—Pfeiffer v. Allen, Com.Pl., 39 Pittsb.Leg.J. 553.
51 C.J. p 263 note 31.
Comments on evidence held not to restrict power to make findings
Cal.—Huth v. Katz, 184 P.2d 521, 30 Cal.2d 605.

38. Cal.—Warden v. Harker, 300 P. 965, 212 Cal. 775—Schroeder v. Wilson, 200 P.2d 173, 89 Cal.App. 2d 63—Nobel v. You Bet Mining Co., 72 P.2d 205, 22 Cal.App.2d 633.
Idaho.—Metzker v. Lowther, 204 P. 2d 1025, 69 Idaho 155.
51 C.J. p 263 note 32.

39. N.Y.—DeKalb Holding Co. v. Madison Theatre Co., 151 N.Y.S. 85, 165 App.Div. 202.

40. Mo.—McKennie v. Donnell, 106 S.W. 40, 208 Mo. 46.

41. Ky.—Bush v. Chenault, 194 S.W. 777, 175 Ky. 598.

42. Cal.—United Land Assoc. v. Pacific Impr. Co., 69 P. 1064, 72 P. 988, 139 Cal. 370, affirmed 23 S.Ct. 569, 203 U.S. 614, 52 L.Ed. 345.

he owns some lesser estate, the court may so find.[43] An issue as to plaintiff's possession of the land at the commencement of the action is immaterial, where the action is brought under a statute dispensing with the necessity of possession as a condition precedent to the maintenance of the action, and no finding need be made on such issue.[44] Where the action is to quiet plaintiff's title in the whole of certain realty as against a particular defendant, and the court finds that defendant is an owner of an undivided half-interest in the property, it is not necessary to find whether plaintiff is the owner of the other half-interest.[45]

Defendant's title. A finding on the issues raised by denial of the allegations of the complaint, if adverse to plaintiff, is sufficient, without finding defendant's title.[46] So, where the complaint alleges ownership in plaintiff, and the evidence is insufficient to establish such ownership, and the court finds as a conclusion of law that defendant is entitled to judgment, and that plaintiff is not the owner, an omission to find as to defendant's title is not error[47] If defendant in his answer claims no interest in the lands in controversy, a finding that he has no interest therein is not necessary.[48]

Vacancy of land. In the ordinary statutory action to determine adverse claims, a finding that the land is vacant and unoccupied, as alleged in the complaint, is not necessary to support the judgment, where defendant in his answer sets up his own claim to the land for the determination of the court.[49]

b. Sufficiency

(1) In general
(2) Ultimate or evidentiary facts or conclusions
(3) Inconsistent findings or conclusions

(1) In General

In accordance with general rules, the findings must be sufficient to support the judgment, supported by the evidence, responsive to the issues, and should cover all the material issues.

The general rules as to the sufficiency of findings by the court, and of special verdicts or findings by the jury, are applicable in actions to quiet title.[50] The findings must be sufficient to support the judgment,[51] and, in accordance with general rules, must be supported by the evidence,[52] and should cover all the material issues.[53] A finding on a matter not in issue should be disregarded,[54] and that part of the decree based thereon should be stricken[55] If a special verdict states such facts as sustain the substance of the issues, it is sufficient,[56] although want of a finding on a particular issue is not cause for reversal if the omission is in no wise prejudicial.[57] Unauthorized findings inserted in a special verdict must be disregarded.[58]

Responsiveness to issues. The verdict or find-

43. Cal.—Hurt v. Pico Inv. Co., 15 P.2d 203, 127 Cal.App. 106.

44. Cal.—Pearson v. Creed, 20 P. 302, 78 Cal. 144—Snearly v. Hiestand, 195 P. 272, 50 Cal.App. 393.

45. Cal.—Kuenzel v. Grettenberg, 199 P.2d 732, 88 Cal.App.2d 656.

46. Cal.—United Land Assoc. v. Pacific Impr. Co., 69 P. 1064, 72 P. 988, 139 Cal. 370, affirmed 23 S. Ct. 569, 208 U.S. 614, 52 L.Ed. 645.

47. Cal.—San Jose Land, etc., Co. v. San Jose Ranch Co., 62 P. 269, 129 Cal. 673.

48. Cal.—Batchelder v. Baker, 21 P. 754, 79 Cal. 266.

49. Minn.—Mitchell v. McFarland, 50 N.W. 610, 47 Minn. 535.
51 C.J. p 264 note 41.

50. Cal.—Vaughan v. Roberts, 113 P.2d 884, 45 Cal.App.2d 246.
51 C.J. p 264 note 44.

51. Ind.—Sheets v. Stiefel, 74 N.E. 2d 921, 117 Ind.App. 584.
51 C.J. p 264 note 45.

Findings held sufficient

(1) To entitle plaintiffs as a matter of law to judgment quieting title.—Floyd v. Hornbeck, 4 P.2d 905, 39 Ariz. 178.

(2) To support decree that defendants had valid materialmen's lien prior to plaintiff's claim.—Sun Lumber Co. v. Bradfield, 10 P.2d 183, 122 Cal.App. 391, followed in 10 P. 2d 185, 122 Cal.App. 783.

(3) To support judgment for defendant.—Schroeder v. Wilson, 200 P.2d 173, 89 Cal.App.2d 63—Johnson v. Camuffo, 121 P.2d 58, 49 Cal.App. 2d 168.

(4) To support judgment quieting title.
Cal.—Wagnor v. Blume, 161 P.2d 1001, 71 Cal.App.2d 94—Tarvin v. Davey, 133 P.2d 844, 56 Cal.App. 2d 846—Vaughan v. Roberts, 113 P.2d 884, 45 Cal.App.2d 246—Broadwell v. Anderson, 6 P.2d 269, 119 Cal.App. 145.
Ind.—Dickason v. Dickason, 40 N.E. 2d 965, 219 Ind. 683.
Mo.—Boatmen's Nat. Bank of St. Louis v. Rogers, 179 S.W.2d 102, 352 Mo. 763.
Mont.—Sherburne Mercantile Co. v. Bonds, 145 P.2d 827, 115 Mont. 464.
Tex.—Lee v. Grupe, Civ.App., 223 S. W.2d 543—Leonard v. Young, Civ. App., 186 S.W.2d 81.

Findings held insufficient
Cal.—Rotea v. Rotea, 209 P.2d 983, 93 Cal.App.2d 827—Stoneman v. Fritz, 92 P.2d 1035, 34 Cal.App.2d 26
Ind.—Sheets v. Stiefel, 74 N.E.2d 921, 117 Ind.App. 584—Bryant v. Barger, 18 N.E.2d 965, 106 Ind. App. 245.
51 C.J. p 264 note 45 [b].

52. Cal.—Majors v. Butler, App., 221 P.2d 994.
Ind.—Sawyer v. Kleine, 32 N.E.2d 533, 113 Ind.App. 616.
51 C.J. p 264 note 46.

53. Cal.—Majors v. Butler, App., 221 P.2d 994.
51 C.J. p 264 note 47.

54. Cal.—Redmond v. McLean, 164 P. 15, 32 Cal.App. 729.

55. Cal.—Redmond v. McLean, supra.

56. Ind.—Puterbaugh v. Puterbaugh, 30 N.E. 519, 131 Ind. 283, 15 L.R. A. 341—O'Connor v. Baum, 100 N. E. 581, 54 Ind.App. 195.
51 C.J. p 264 note 50.

57. Cal.—Daly v. Sarocco, 28 P. 211, 90 Cal. 367—Callahan v. James, 71 P. 104, 7 Cal.Unrep.Cas. 82.

58. Ind.—Kitts v. Wilson, 29 N.E. 401, 130 Ind. 492.

ings must be responsive to the issues raised by the pleadings.[59]

(2) Ultimate or Evidentiary Facts or Conclusions

The findings should contain only the ultimate, and not the evidentiary, facts; and a finding that a party was or was not the owner of the land is a sufficient finding of the fact in issue without a finding of the facts respecting such ownership.

Only the ultimate facts should be contained in the findings,[60] and it is improper to insert therein evidentiary facts;[61] and a finding which, instead of stating an ultimate fact, consists merely of an unsupported conclusion of law is defective.[62] A finding that all of plaintiff's claims were barred by the provisions of certain statutes, and that the right of defendant was perfected by limitations, being but a conclusion that defendant had acquired title by adverse possession, is a nullity where no facts are found on which to base it.[63]

As to ownership of property. A finding that plaintiff was[64] or was not,[65] or that defendant was,[66] the owner of the realty in controversy is not a conclusion of law, but a finding of the fact in issue, and is sufficient without a finding of the facts respecting such ownership. A finding that the parties entered into a contract of sale, and that its terms were valid, binding, and enforceable, is sufficient, since the ultimate fact as to defendant's interest in the property necessarily results from the terms of the contract.[67]

(3) Inconsistent Findings or Conclusions

Findings which are irreconcilably contradictory as to material matters will not support a judgment; but in case of a conflict between a specific and a general finding the specific finding will control.

The general rule that findings of the court which are irreconcilably contradictory as to material matters will not support a judgment has been applied in actions to quiet title,[68] but this rule does not apply to findings on an immaterial issue.[69] In case of conflict between a specific and a general finding, the specific finding will control;[70] and, in a case tried by a jury, special findings which are in irreconcilable conflict with the general verdict will control such verdict.[71]

Where case is submitted on agreed statement of facts, such statement has the effect of findings of fact on which judgment is rendered,[72] and a conclusion of law which contradicts such statement is sufficient to vitiate the judgment.[73]

c. Conclusiveness, Construction, and Effect

Generally the verdict of a jury in an action to quiet title or to determine adverse claims is merely advisory unless purely legal rights are involved. In determining the meaning of findings, they should be construed as a whole, and so as to support the judgment.

As a general rule the verdict of a jury in an ac-

59. Okl.—Hishaw v. Chandler, 243 P. 146, 115 Okl. 99.
51 C.J. p 265 note 59.

60. Cal.—Hudson v. Becker, 56 P.2d 249, 12 Cal.App.2d 743.
Ind.—Bryant v. Barger, 18 N.E.2d 965, 106 Ind.App. 245.
51 C.J. p 264 note 53.

Sufficiency of plaintiff's knowledge
In suit to quiet title, the ultimate fact to be ascertained, whether plaintiff's knowledge was sufficient to put her on inquiry concerning defendant's claim, was none the less a finding of fact because drawn as a conclusion from other facts, whether the finding was based on undisputed or conflicting testimony. —Christmas v. Cowden, 105 P.2d 484, 44 N.M. 517.

61. Ind.—Dickason v. Dickason, 40 N.E.2d 965, 219 Ind. 683.
51 C.J. p 264 note 54.

62. Ind.—Kerfoot v. Kessener, 34 N.E.2d 190, 227 Ind. 58.
51 C.J. p 264 note 55.

Conclusions of law held supported by findings of fact
Ind.—Kerfoot v. Kessener, supra—Bryant v. Barger, 42 N.E.2d 429, 113 Ind. App. 17.

Findings held sufficient as findings of ultimate fact
Cal.—Sun Lumber Co. v. Bradfield, 10 P.2d 183, 122 Cal.App. 391, followed in 10 P.2d 185, 122 Cal.App. 783.

Findings held not to warrant holding of existence of ultimate fact
Ind.—Sheets v. Stiefel, 74 N.E.2d 921, 117 Ind.App. 584—Dickason v. Dickason, 18 N.E.2d 479, 107 Ind. App. 515, mandate modified on other grounds and rehearing denied 25 N.E.2d 1014, 107 Ind.App. 515.

63. Utah.—Ives v. Grange, 134 P. 619, 42 Utah 608.

64. Ind.—Dickason v. Dickason, 40 N.E.2d 965, 219 Ind. 683.
51 C.J. p 265 note 57.

65. Cal.—Daly v. Sorocco, 22 P. 211, 80 Cal. 367.
S.D.—Naddy v. Dietze, 86 N.W. 758, 15 S.D. 26.

66. Cal.—Hill v. Hill, 205 P.2d 676, 91 Cal.App.2d 592—Casaletti v. McGuire, 201 P.2d 889, 89 Cal.App. 2d 777—Den v. Spalding, 104 P.2d 81, 39 Cal.App.2d 623—Willis v. Holback, 91 P.2d 140, 33 Cal.App.2d 145—Hudson v. Becker, 56 P.2d 249, 12 Cal.App.2d 743.

67. Cal.—Williams v. Rush, 25 P.2d 888, 134 Cal.App. 554.

68. Cal.—Worthley v. Worthley, 165 P. 714, 33 Cal.App. 473.
51 C.J. p 265 note 61.

Findings held not inconsistent
Cal.—Elliott v. Bertsch, 139 P.2d 332, 59 Cal.App.2d 543—Sun Lumber Co. v. Bradfield, 10 P.2d 183, 122 Cal.App. 391, followed in 10 P.2d 185, 122 Cal.App. 783.
51 C.J. p 265 note 61 [b].

Findings held not irreconcilable
Cal.—Vaughan v. Roberts, 113 P.2d 884, 45 Cal.App.2d 246—Mortgage Guarantee Co. v. Hammond Lumber Co., 57 P.2d 164, 13 Cal.App. 2d 538.

69. Cal.—Snearly v. Hiestand, 195 P. 372, 50 Cal.App. 393.
51 C.J. p 265 note 62.

70. Cal.—South San Francisco Bank v. Pike, 200 P. 752, 53 Cal.App. 524.

71. Ind.—Dickey v. Shirk, 27 N.E. 733, 128 Ind. 278.
51 C.J. p 265 note 64.

72. Mont.—Warren v. Chouteau County, 265 P. 676, 83 Mont. 115.

73. Mont.—Warren v. Chouteau County, supra.

tion to quiet title or to determine adverse claims, such action being purely equitable, is merely advisory, and the court may find contrary thereto.[74] Where purely legal rights are involved, however, the jury do not act in an advisory capacity,[75] and in such case a general verdict is conclusive unless set aside on motion for new trial, and will support a judgment for the party in whose favor it is found.[76]

Construction. In determining the meaning of the findings, they should be construed as a whole,[77] and so as to support the judgment,[78] and the construction of particular terms may be determined from the context.[79] A finding by the court that defendant is entitled to possession is a decision on the issue whether plaintiff is entitled to possession.[80] Where an action is brought to quiet title to an undivided interest in land, a finding that defendant had built a foundation for a house partly upon a portion of premises is not a finding that plaintiff was not in possession when the action was commenced.[81]

H. RELIEF

§ 93. Conditions Precedent

The acts required to be performed as a condition precedent to the granting of relief in an action to quiet title depend on the circumstances of the particular case and the application of equitable principles.

The acts which are required to be performed by parties seeking to quiet title, as a condition precedent to the granting of relief, depend on the circumstances of the particular case and the application of equitable principles.[82] It is not necessary that a vendor, before suing to quiet title against a contract of sale recorded by the vendee, should demand the cancellation of record of the contract, which had never been acknowledged by the vendor as required by statute.[83] It has been held unnecessary to give a notice to quit the premises or a notice of termination of a lease before bringing an action to quiet title against a lessee or person in possession of the premises.[84] A general statute requiring a bond before the rendition of a judgment against a nonresident defendant has been held not to require the giving of a bond in an action for the confirmation of a title brought under a specific statute dealing with the procedure for the confirmation of title and containing no provision for a bond.[85]

Demand for reconveyance. Where a landowner executed a deed conveying the legal title in trust, and in an action by him against the grantees to quiet title after the purposes of the trust had been accomplished and he had retaken possession of the land, the grantee set up an adverse claim, plaintiff is entitled to relief although he had not before suit

74. Mont.—Fuller v. Gibbs, 199 P.2d 851.
51 C.J. p 265 note 68.
Equitable nature of remedy generally see supra §§ 1–6.

75. Cal.—Southern Pac. Land Co v. Dickerson, 204 P. 576, 188 Cal. 133.
51 C.J. p 265 note 69.

76. Cal.—Southern Pac. Land Co. v. Dickerson, 204 P. 576, 188 Cal. 113—Reiner v. Schroeder, 80 P. 517, 146 Cal 411.

77. Cal.—Braun v. Dallin, 228 P. 740, 68 Cal.App. 121.
Ind.—Bryant v. Barger, 18 N.E.2d 965, 106 Ind App. 245.

78. Cal.—Vaughan v. Roberts, 113 P.2d 884, 45 Cal.App.2d 246.
51 C.J. p 265 note 73.

Particular terms treated as surplusage
Ind.—Greenwood Lumber Co. v. Roberts, 44 N.E.2d 1002, 112 Ind.App. 377.

Findings held to warrant inference of delivery and acceptance of deed
Vt.—Rich v. Wry, 6 A.2d 7, 110 Vt. 307.

79. Cal.—Elliott v. Merchants' Bank, etc, Co., 132 P. 280, 21 Cal.App. 536.
51 C.J. p 265 note 74.

"Entitled"
In action to quiet title, general verdict that "plaintiff is the owner and entitled" to lands involved, indicated intention by use of word "entitled," to find that plaintiff was entitled to possession.—Kimberlin v. Roberts, 107 S.W.2d 24, 341 Mo. 267.

80. Cal.—Braun v. Dallin, 228 P. 740, 68 Cal.App. 121.

81. Mont.—Butte Hardware Co. v. Cobban, 34 P. 24, 13 Mont. 351.

82. **Foreclosure of "equitable mortgage"**
Plaintiffs deraigning title through trust deed foreclosure could maintain action to quiet title without foreclosing so-called "equitable mortgage" claimed to have arisen from option to purchase the property.—California Trust Co. v. Kerckhoff-Cuzner Mill & Lumber Co., 55 P.2d 865, 5 Cal.2d 628.

Direct attack on judgment
Plaintiffs who claimed to be sole heirs of decedent who had owned realty could bring statutory suit to establish title to the realty without bringing direct action attacking judgment in an ex parte proceeding which recognized certain parties as heirs of decedent and decreed such parties to be owners of the realty in controversy, on which judgment defendants based their claim of title.—Dugas v. Powell, 1 So.2d 677, 197 La. 409.

83. Ind.—Miller v. Fletcher Sav., etc., Co., 133 N.E. 174, 78 Ind.App. 133.

84. Cal.—Paradise Irr Dist. v. Barry, 32 P.2d 966, 220 Cal. 748—Hanes v. Coffee, 300 P. 963, 212 Cal. 777—Furlott v. Security-First Nat. Bank of Los Angeles, 57 P.2d 952, 14 Cal.App.2d 118—Andrews v. Russell, 259 P. 113, 85 Cal App 149.
Wash.—Potsch v. Willman, 185 P. 2d 992, 29 Wash.2d 136.

Service on trustor held unnecessary
A subtenant against whom title was sought to be quieted, and who had been served with a notice to quit, could not prevent the quieting of title on the ground that such notice had not been served on a trustor, where it was the subtenant, not the trustor, who contested the right to the property, and the failure, if any, to serve notice on the trustor could be regarded as waived by the subtenant.—Mailhes v. Investors' Syndicate, 32 P.2d 610, 220 Cal. 735.

85. Ark.—Champion v. Williams, 264 S.W. 972, 165 Ark. 328.

made a demand for a reconveyance.[86] The grantor in a deed wrongfully and fraudulently obtained need not demand a reconveyance before suing the grantee to quiet title.[87] Failure to demand a reconveyance has been held not to preclude the quieting of title as against a deed given on a condition subsequent, which was broken, where under the circumstances the grantee had no right to expect such a demand and could not have been injured by the omission to make it.[88]

Correction of deed or mortgage. Ordinarily, where a person has, by mistake, conveyed land, he must have the deed corrected before he is entitled to have his title quieted.[89] So a purchaser of land from the record owner, with knowledge that it was claimed by, and in possession of, a third person having no legal title, cannot be divested of his title without reformation of such person's deed so as to include the land in suit.[90] However, where the description in the deed under which plaintiff claims title is sufficient to furnish a means of identification of the land, title may be quieted in him without first reforming the deed.[91] A plaintiff to whom there has been executed and delivered a deed omitting the name of the grantee has been held to have a right to maintain an action to quiet title without having first inserted his name as grantee.[92]

In an action to determine adverse claims, brought by a plaintiff in possession of land and having title in fee thereto, reformation of a mortgage set up as a counterclaim has been held unnecessary where the mortgage is a valid lien on the rest of the premises therein described and the only thing necessary is that the mortgage be adjudged not a lien, claim, or interest on the land owned by plaintiff.[93]

§ 94. —— Necessity of Doing Equity

A party seeking to quiet title to property or remove a cloud thereon will be compelled to do equity, as, for example, by restoring any consideration or benefits received by him.

A party seeking to quiet his title to realty or remove a cloud thereon will, as a condition precedent to the relief, be compelled to do equity.[94] Thus, as a general rule, plaintiff cannot have relief against a person asserting a claim under an instrument executed by plaintiff or his privies, unless he restores or tenders the consideration or benefits received.[95] So a vendee of a judgment debtor who has received a deed from the debtor, but has not paid the pur-

86. Kan.—Lehrling v. Lehrling, 115 P. 556, 84 Kan. 786.

87. Ind.—Baxter v. Baxter, 93 N.E. 881, 1039, 46 Ind.App. 514.

88. Ind.—Jancovech v. Christensen, 195 N.E. 287, 100 Ind.App. 299.

89. Ind.—Brandon v. Bruce, App., 93 N.E.2d 646.
51 C.J. p 266 note 82.
Reformation in action to quiet title, see infra § 97.

90. Mo.—Thomas v. McDonald, 287 S.W. 443, 315 Mo. 1119.

91. Ind.—De Long v. Starkey, App., 93 N.E.2d 228.

92. Iowa.—Fulton v. McCullough, 7 N.W.2d 910, 233 Iowa 1230.

93. Minn.—First Nat. Bank v. Northwestern Trust Co., 231 N.W. 796, 181 Minn. 115.

94. Ala.—Hammock v. Oakley, 154 So. 906, 228 Ala. 588.
Ariz.—Parrell v. West, 114 P.2d 210, 51 Ariz. 480—Security Trust & Savings Bank v. McClure, 241 P. 515, 29 Ariz. 228.
Cal.—Shimpones v. Stickney, 35 P.2d 673, 219 Cal. 637—O'Brien v. O'Brien, 245 P. 864, 197 Cal. 674—Brandenburg v. Cramer, 215 P.2d 908, 96 Cal.App.2d 296—Wilbur v. Donohoe Kelly Banking Co., 91 P.2d 910, 33 Cal.App.2d 396—Pantages County Title Co. v. Constantine, 75 P.2d 235, 25 Cal.App.2d 548—Opinion v. Kazarian, 11 P.2d 15, 123 Cal.App. 196—Warden v. Barnes, 295 P. 569, 111 Cal.App. 287—Chapman v. Hicks, 182 P. 336, 41 Cal.App. 158.
Fla.—Price v. Horton, 83 So. 670, 79 Fla. 97.
Ill.—Nelson v. Burns, 255 Ill.App. 214.
Iowa.—Equitable Life Assur. Soc. of U. S. v. Asmus, 300 N.W. 818, 230 Iowa 1062—McCloud v. Bates, 270 N.W. 378, 222 Iowa 1047.
Minn.—Lindell v. Lindell, 165 N.W. 939, 150 Minn. 295.
Miss.—Peeler v. Peeler, 24 So.2d 338, 199 Miss. 492, certiorari denied 67 S.Ct. 54, 329 U.S. 720, 91 L.Ed. 634, rehearing denied 67 S.Ct. 295, 329 U.S. 829, 91 L.Ed. 703.
Mont.—Corpus Juris cited in Hall v. Lommasson, 124 P.2d 694, 698, 113 Mont. 272.
Neb.—Hadley v. Platte Valley Cattle Co., 10 N.W.2d 349, 142 Neb. 482—Hawkins v. Mullen, 283 N.W. 679, 115 Neb. 139.
N.D.—Wagner v. Stroh, 294 N.W. 195, 70 N.D. 222.
Or.—Western States Finance Co. v. Ruff, 216 P. 1018, 105 Or. 442.
Tex.—Mulholland v. Jolly, Civ.App., 17 S.W.2d 1109, error refused.
51 C.J. p 266 note 82.
Doing equity generally see Equity §§ 99-94.
Offer in bill to do equity see supra § 66.
Fraud in corporate stock.
Where complaint seeking to quiet title to stock in company alleged that defendant obtained a purported relinquishment of plaintiff's interest in stock for a specified sum by means of fraud, plaintiff was not required to tender such sum as a prerequisite to maintenance of the suit, but the court in its final determination might properly pass title to stock in plaintiff subject to his paying defendant the money which he received on the alleged void transaction.—Truesdell v. Lewis, 115 P.2d 218, 45 Cal.App.2d 713.
Failure to tender payment
In action to quiet title by original owner of realty which was sold under street improvement ordinance for default in payment of bonds representing amount of assessments, owner who did not tender or offer to pay amount admittedly due under the bonds was nevertheless entitled to have title quieted on condition that he pay amount due against the parcels, together with penalties and costs of sale.—Sterling Realty Co. v. Reiko, 120 P.2d 410, 21 Cal.2d 164.

95. Cal.—Seeger v. Odell, 115 P.2d 977, 16 Cal.2d 409, 136 A.L.R. 1291.
Colo.—Williams v. Davis, 224 P. 197, 82 Colo. 220.
Mont.—Andrews v. Smithson, 196 P. 2d 831, 114 Mont. 360.
N.J.—Jersey Acres v. City of Paterson, 194 A. 882, 124 N.J.Eq. 435.
51 C.J. p 266 note 81.
Payment of mortgage debt see infra § 102.

chase money, cannot maintain a bill to quiet title as against one who bought the land under a judgment rendered subsequently to the vendee's contract, without first paying the purchase money into court.[96] Likewise, where the statute gives a lot owner the privilege of paying municipal improvement bonds and discharging the land from the lien at any time before commencement of proceedings for sale, such owner must, before suing to cancel the bonds as a cloud on title, offer to pay the amount due.[97]

Equity may require plaintiff to do equity by discharging an obligation which is binding in good conscience, but is not otherwise enforceable either at law or in equity,[98] as in the case of a judgment lien[99] or other obligation[1] against which there was originally no meritorious defense, but which has since become barred by the statute of limitations; but a judgment debtor's right to have title quieted as against the lien of a judgment barred by the statute of limitations is not necessarily conditional on payment of the judgment.[2]

It has been held that the equity which plaintiff may be compelled to do as a condition of relief must be one which defendant could enforce against plaintiff by an independent suit,[3] and which arises out of the transaction forming the subject matter of the suit.[4] A party seeking to quiet title need not restore property which is rightfully his;[5] nor need he return an alleged consideration which he did not in fact receive[6] or offer to restore a sum equivalent to an alleged indebtedness, the existence of which is not sufficiently established.[7] The rule requiring plaintiff to do equity has been held to have no application to a plaintiff seeking the cancellation of a security deed as a cloud on title where it does not appear that defendant is entitled to any equitable right as against plaintiff;[8] and the rule has also been held inapplicable to a debtor who seeks merely to have removed as a cloud on title a void sheriff's deed given pursuant to an execution sale, but who does not attempt to have the judgment set aside or to interfere with its enforcement.[9]

Judgment may be quieted in the owner of a homestead as against an execution creditor without requiring such owner to pay the amount of the judgment.[10] A grantor who, after conveying the property to one person, is thereafter induced by false representations to execute to a third person a quitclaim deed conveying property inadvertently excluded from the prior conveyance, and who brings an action to perfect title in the first grantee, has been held not required to repay a nominal sum received by him as consideration for the quitclaim deed.[11]

Performance by vendor of contract of sale. A vendor who seeks to cancel a contract of sale as a cloud on title must tender performance of the contract as a condition precedent to relief.[12] However, where the vendor is ready and willing to perform, and the vendee refuses to perform on the ground of defects in the title, the vendor need not tender performance where the objections to the title are technical and frivolous and nothing could be accomplished by the making of a tender.[13] Where a vendee is unable to meet small amounts in default, it is not necessary that the vendor tender a deed to him prior to bringing suit to quiet title for breach of contract.[14] On breach by the vendee, where time is made of the essence of the contract, no affirmative

96. Ohio.—Butler v. Brown, 5 Ohio St. 211.

97. Cal.—Coleman v. Spring Constr. Co., 152 P. 478, 41 Cal.App. 201.

98. N.D.—Nelson v. Nelson, 236 N. W. 476, 58 N.D. 134.
51 C.J. p 267 note 93.

99. Ariz.—Casper v. Valley Bank, 227 P. 175, 26 Ariz. 373.
Okl.—Nellis v. Minton, 216 P. 147, 91 Okl. 75.
Kan.—Berkley v. Ickl, 186 P. 923, 91 Kan. 16.
51 C.J. p 267 note 95.

1. N.M.—Pugh v. Keating & Plumbing Finance Corp., 161 P.2d 714, 49 N.M. 234.

2. Ind.—Otis v. Gregory, 13 N.E. 39, 111 Ind. 564, 568.
51 C.J. p 267 note 90.

3. Ala.—Worthington v. Miller, 32 So. 743, 134 Ala. 498.
51 C.J. p 267 note 92.

5. Cal.—Seeger v. Odell, 115 P.2d 977, 18 Cal.2d 409, 136 A.L.R. 1291.

6. Cal.—Hendey v. Bursell, 215 P. 114, 61 Cal.App. 511.

8. Ga.—Fulmore v. Macon Federal Savings & Loan Ass'n, 11 S.E.2d 799, 191 Ga. 151.

9. Ill.—Evans v. Chicago Title & Trust Co., 147 N.E. 411, 312 Ill. 11.
Reason for rule
The judgment will be unaffected by a decree setting aside the deed and expunging the memorial of the certificate of sale and deed, and the creditor may still proceed to collect the judgment in the manner provided by law.—Evans v. Chicago Title & Trust Co., supra.

10. Cal.—Lucci v. United Credit & Collection Co., 31 P.2d 869, 220 Cal. 492—Graham v. Hunt, 7 P.2d 186, 118 Cal.App. 536—Price v. Central Savings Bank, 217 P. 800, 62 Cal.App. 583.

11. Mich.—Taylor v. Hund, 293 N. W. 862, 293 Mich. 425.

12. Cal.—Grimes v. Steele, 133 P.2d 874, 56 Cal.App.2d 794.
Wash.—Kane v. Borthwick, 96 P. 516, 50 Wash. 5, 18 L.R.A.,N.S., 886.

13. Wash.—Kane v. Borthwick, supra.

14. Wash.—Kane v. Borthwick, supra.
Circumstances excusing tender
Where purchasers of realty could not make payments on time, and after total amount became due tendered two payments only, and subsequently sought moratorium relief, and thereafter brought action for

action on the part of the vendor is necessary before bringing suit to quiet title, for the purpose of establishing judicially that the vendee had forfeited his rights.[15] On the other hand, where a contract of sale required the vendors to furnish title papers and the purchaser to ascertain the acreage within a certain time, the mere inaction of the parties will not afford the vendors ground for cancellation of the contract as a cloud on title, in the absence of an offer by them to perform, although time was of the essence of the contract.[16]

Return to vendee of money paid on contract of sale. Where a vendor, seeking to quiet his title as against a contract of sale, is himself at fault, the court may require a proper adjustment of the equities and a repayment of the purchase money as a condition precedent to granting relief;[17] and it has been held that a vendor seeking to quiet title as against the vendee who has forfeited his rights under the contract of sale must, as a condition to relief, repay to the vendee the amount paid on the purchase price,[18] or at least must repay any amount in excess of the damages resulting to the vendor from the vendee's breach.[19] On the other hand, it has been held that, where the vendor seeks to have a contract of sale canceled as a cloud on his title, having asserted his right under an express stipulation therein, to declare it forfeited on breach by the vendee, he need not restore or offer to restore payments made,[20] and that the vendor may quiet his title to the property without refunding any part of the price paid in the absence of a showing that he will realize more than the benefit of his bargain.[21] Further, where a vendee abandoned the contract and made no attempt to carry out its terms and conditions for a great many years, the vendor has been held entitled to have the contract canceled as a cloud on title without returning payments made thereunder.[22]

Where, on the default of the vendee, the vendor sues to quiet title and determine the rights of the parties in the land, the court may, after extending time to the vendee to meet his obligations under the contract, which he fails to do, decree title in the vendor free of equities.[23] If the bill contains an offer to return the purchase money, the decree should require plaintiff to keep the offer good.[24]

§ 95. Nature and Extent in General

The court in an action to quiet title will afford complete relief, within the scope of the pleadings and the issues, and the particular relief awarded will be adapted to the circumstances of the case.

The court, in a suit to quiet title or remove a cloud thereon, may,[25] and it is its duty to,[26] determine all the rights and claims of the parties relating to the subject matter, and make such disposition of the cause as will afford complete relief, within the scope of the pleadings and issues, and will safeguard the interests of all the parties, even though legal rights are involved which otherwise could be enforced only in a court of law.[27] Ordinarily the court should define the title, estate, and interest of the parties,[28] although under some circumstances it

specific performance on untenable ground that they had paid in full, vendors were excused from tendering deed and demanding performance and title was properly quieted in vendors.—Grimes v. Steele, 133 P.2d 374, 56 Cal.App.2d 786.

15. Cal.—Fresno Irrigated Farms Co. v. Canupis, 178 P. 300, 39 Cal. App. 184.

16. Ky.—Golden v. Cornett, 157 S.W. 1076, 154 Ky. 488.

17. S.D.—Pirrung v. Blankenburg, 230 N.W. 219, 57 S.D. 45.
51 C.J. p 267 note 2.

18. Fla.—Taylor v. Rawlins, 97 So. 714, 86 Fla. 279, 35 A.L.R. 371.
Ill.—Firebaugh v. Wittenberg, 237 Ill.App. 77, reversed on other grounds 141 N.E. 879, 309 Ill.App. 586.

19. Fla.—Taylor v. Rawlins, 106 So. 434, 90 Fla. 522.

20. Mont.—Suburban Homes Co. v. North, 166 P. 3, 56 Mont. 198, Ann. Cas.1917C 91.

21. Cal.—Hopkins v. Scott, 203 P.2d 832, 86 Cal.App. 116.

22. Fla.—Rosenthal v. Largo Land Co., 200 So. 233, 146 Fla. 81.

23. Wash.—Zane v. Hinds, 240 P. 6, 136 Wash. 352.

24. Ill.—Wistal v. Herting, 37 Ill. App. 443.

25. Ala.—Elsheimer v. Parker Bank & Trust Co., 185 So. 235, 237 Ala. 24—Chestang v. Bower, 140 So. 537, 224 Ala. 469.
Cal.—Bacon v. Bacon, 69 P.2d 884, 21 Cal.App.2d 540—Demant v. Pierce, 9 P.2d 884, 122 Cal.App. 254—Wilson v. Anderson, 293 P. 627, 109 Cal.App. 467.
Iowa.—Utley v. Boone, 299 N.W. 437, 230 Iowa 979.
Kan.—Everly v. Byrd, 152 P.2d 831, 159 Kan. 187—Creighton v. Dorsey, 35 P.2d 90, 140 Kan. 632—Walker v. Rooney, 9 P.2d 973, 136 Kan. 152.
Md.—McMahon v. Consistory of St. Paul's Reformed Church at Westminster, 75 A.2d 122.
Mo.—Allen v. Wiseman, 224 S.W.2d 1016, 359 Mo. 1036—Johnson v. McAboy, 160 S.W.2d 653, 350 Mo. 1086.
Neb.—Miller v. Knight, 19 N.W.2d 153, 146 Neb. 807.
Okl.—Lasswell v. McNutt, 159 P.2d 739, 195 Okl. 548.
51 C.J. p 268 notes 11, 13, 14.
Scope of inquiry generally see supra § 87.

Recovery against all defendants
In suit to remove cloud from title of assignees of widow's interest in community realty, assignees were entitled to recover, if recovery be had, as against all defendants in order to establish their rights, notwithstanding there was no conflict of interest as between an assignee of the husband's heirs and assignees of widow's interest.—McDonald v. Galt, Tex.Civ.App., 173 S.W.2d 963, error refused.

26. Cal.—Milton H. Giles & Co. v. Bank of America Nat. Trust & Savings Ass'n, 117 P.2d 943, 47 Cal. App.2d 315.
Ky.—Rice v. Roberson, 14 S.W.2d 354, 223 Ky. 171.
51 C.J. p 268 notes 12–14.

27. U.S.—Kellogg v. Schauble, D.C. Miss., 278 F. 1062.
51 C.J. p 268 note 15.

28. Cal.—Milton H. Giles & Co. v.

has been held unnecessary and improper to determine whether a party is the owner of a fee simple title rather than a mere easement.[29]

The decree must be confined to a determination and adjustment of existing rights[30] in the particular property in controversy.[31] If the action is brought under a statute which prescribes the extent to which the judgment or decree may go in adjusting rights, the court is limited thereby.[32] The rights of persons not parties to the action cannot be adjudicated,[33] although the court may, where the suit involves the construction of a trust deed, pass on the rights of unborn children,[34] and a decree setting aside an execution sale and certificate issued to the purchaser, as a cloud on plaintiff's title, is not erroneous because it declares the judgment void as against the judgment debtors who were not made parties to the suit.[35] Affirmative relief may be given to one who was not a party to the original bill but who was a party to a cross bill.[36]

The relief awarded will be adapted to the circumstances of the particular case,[37] and may be granted on such terms and conditions as may be necessary to do justice.[38] In the absence of a breach of duty, the court may grant relief against a forfeiture.[39] If it is shown that complainant owns part of the land and defendant part, the court may ascertain and declare these facts and decree ac-

Bank of America Nat. Trust & Savings Ass'n, 117 P.2d 943, 47 Cal.App.2d 315—Goodfellow v. Barritt, 20 P.2d 740, 130 Cal.App. 548

Mo.—Hansen v. O'Malley, 204 S.W.2d 281, 356 Mo. 908.

Prescriptive rights

Where defendant claimed prescriptive rights, a judgment which did not quiet plaintiffs' title or adjudge any prescriptive right and decreed merely that plaintiffs take nothing by reason of their action and that defendants recover their costs, was defective for failure to adjudicate rights of the respective parties.—Nelson v. Robinson, 166 P.2d 76, 73 Cal.App.2d 268.

29. Ky.—Young v. Chesapeake & O. Ry. Co., 163 S.W.2d 451, 291 Ky. 262.

Conveyance for depot and right of way purposes

In action to quiet title to land which had been conveyed for depot and right of way purposes, decision that railroad owned fee-simple title to all of the tract was error, where a determination as to nature of railroad's interest in property was unnecessary in view of conclusion that railroad had not abandoned the tract for the purpose for which it was acquired.—Young v. Chesapeake & O. Ry. Co., supra.

30. Cal.—Victoria Hospital Assoc. v. All Persons, etc., 147 P. 124, 169 Cal. 455.

51 C.J. p 269 note 21.

31. Kan.—Taylor v. Focks Drilling & Manufacturing Corporation, 62 P.2d 903, 144 Kan. 626.

51 C.J. p 269 note 22.

Furniture and equipment

Where purchaser bought property to operate furnished apartments and some of agreements mentioned furnishings, court, on purchaser's default, properly quieted vendors' title to furniture and equipment as well as to realty.—Eastman v. De Frees, 17 N.W.2d 138, 235 Iowa 488.

Accretions

Fact that some accretions to riparian land were added between time survey was made on which petition to quiet title was based and time decree quieting title was entered was held not to defeat purpose of decree to quiet title to land as far as the riparian boundary.—Harrington v. Foster, 264 N.W. 51, 220 Iowa 1066.

32. Mo.—Powell v. Crow, 102 S.W. 1024, 204 Mo. 481.

51 C.J. p 269 note 23.

33. Ark.—Crowell v. Parks, 193 S.W.2d 483, 209 Ark. 803—Dowell v. Land, 188 S.W.2d 134, 208 Ark. 903.

Cal.—Turner v. Bank of America Nat Trust & Savings Ass'n, 27 P.2d 383, 135 Cal.App. 314.

Colo.—Bray v. Germain Inv. Co., 98 P.2d 993, 105 Colo. 403.

N.D.—Jester v. Jester, 37 N.W.2d 879.

Okl.—Galer Oil Co. v. Pryor, 47 P.2d 97, 107 Okl. 302.

Or.—Darling v. Christensen, 109 P.2d 585, 166 Or. 17.

Utah.—Hammond v. Johnson, 75 P.2d 164, 94 Utah 35.

51 C.J. p 268 note 18.

Service on one of several defendants

The fact that certain defendants were not served with process did not deprive trial court of jurisdiction to quiet plaintiffs' title as against defendant who was served with process and who had no interest in issue between plaintiffs and other defendants.—Taylor v. Hamchett Oil Co., 27 P.2d 99, 37 N.M. 406.

Waiver of right to complain

In suit to quiet title, plaintiff who relied in part on referee's deed could not complain, after deed was held invalid, that court could not pass on validity of the deed because all interested parties were not in court.—Patterson v. May, 29 N.W.2d 547, 239 Iowa 602.

34. Mo.—Young v. Hyde, 164 S.W. 228, 255 Mo. 496

51 C.J. p 269 note 19.

35. Ill.—Hammalle v. Lebensberger, 187 Ill.App. 539, affirmed 108 N.E. 669, 267 Ill. 602

36. Ill.—Bowen v. Kraemer, 260 Ill. App. 454.

37. Cal.—Houser v. Houser, 44 P.2d 316, 3 Cal.2d 371—Bacon v. Bacon, 69 P.2d 884, 21 Cal.App.2d 540—Durrell v. Bacon, 32 P.2d 644, 138 Cal.App. 396—Corpus Juris cited in Darrah v. Long, 6 P.2d 989, 990, 119 Cal.App. 552.

Del.—Skinner v. Redding, Ch., 48 A.2d 809.

Ind.—Sawyer v. Kleine, 82 N.E.2d 583, 118 Ind.App. 616.

Ky.—Hensley v. Lewis, 128 S.W.2d 917, 278 Ky. 510, 123 A.L.R. 537—Givens v. Turner, 113 S.W.2d 1166, 272 Ky. 211.

Miss.—Duncan v. Mars, 44 So.2d 529.

Tex.—Martin v. Cage, Civ.App., 135 S.W.2d 151.

51 C.J. p 268 note 16.

Disclaimer

Where defendant disclaimed any interest in one portion of the realty and asserted no interest or claim with respect to another portion, plaintiff's title should be quieted as against any claim of defendant as to those portions of the realty.—Rushton v. Borden, 190 P.2d 101, 29 Wash.2d 631.

Title in husband

Where title before conveyance to son was in husband alone, on cancellation of deed to son, title should have been quieted in husband subject only to homestead right of wife and not in husband and wife, in absence of showing that husband ever conveyed any interest in the land to his wife.—Whitaker v. Whitaker, 147 P.2d 895, 196 Okl. 664.

38. Minn.—Engel v. Swenson, 254 N.W. 2, 191 Minn. 324.

39. Cal.—Gonzales v. Mirna, 166 P.2d 7[illegible], 28 Cal.2d 212.

cordingly[40] Where it appears that neither party has title to the land, neither is entitled to relief.[41] In proceedings under some statutes, however, the court may determine the better title, as between the parties to the proceeding, although a title superior to the rights of either may be held by a stranger.[42] Moreover, title may be adjudged to be in plaintiff, notwithstanding his failure to establish title of record or by adverse possession, where the persons holding the title have expressly disclaimed in plaintiff's favor.[43]

Trusts. The court, in an action involving adverse claims to real property prosecuted on a complaint seeking to quiet title of plaintiff, may provide for the establishment and enforcement of such trusts in relation to the property involved as the equities of the case justify or demand.[44]

An intervener having the status merely of a general creditor of the estate of plaintiff's grantor, and having no claim against the lands involved in plaintiff's suit to quiet title, has been held to have no independent standing to obtain affirmative relief.[45]

§ 96. Relief to Plaintiff

The relief accorded to a successful plaintiff ordinarily consists of quieting his title to the property or removing a cloud thereon, together with such incidental relief as may be proper or necessary to make the main relief complete.

The relief to plaintiff authorized in a suit to quiet title is equitable, and ordinarily consists in a judgment quieting title in him to, or removing a cloud on, the property in dispute,[46] or quieting title to as much thereof as plaintiff shows himself entitled;[47] and the fact that plaintiff alleges ownership in fee does not preclude the court from awarding him an easement.[48] The court may also award such incidental relief as may be proper or necessary to make the main relief complete,[49] such as foreclosure of a deed which has been declared to be a mortgage,[50] or may, in a proper case, grant certain relief to plaintiff on finding the title to be in defendant.[51] However, the court should not grant relief which is not properly incidental,[52] or which is unjust or inequitable,[53] or in excess of that to which plaintiff is entitled.[54] Where at the time of

40. Ala.—Hinds v. Federal Land Bank of New Orleans, 179 So. 194, 235 Ala. 360—Chestang v. Bower, 140 So. 537, 224 Ala. 469—Friedman & Loveman v. Shamblin, 23 So. 821, 117 Ala. 454.

41. Idaho.—Northern Pac. R. Co. v. Hirzel, 161 P. 854, 29 Idaho 438.
Ky.—Madden v. Bond, 106 S.W.2d 95, 269 Ky. 31.
Mo.—Crawford v. Arends, 176 S.W.2d 1, 351 Mo. 1100.

42. Mo.—Johnson v. McAboy, 169 S.W.2d 932, 350 Mo. 1086.

Party in possession under claim of ownership has a better title than one who has no title or possession, and will prevail in action to quiet title.—Lossing v. Shull, 173 S.W.2d 1, 351 Mo. 342—Johnson v. McAboy, 169 S.W.2d 932, 350 Mo. 1086.

43. Ky.—Duckwall v. Gregg's Adm'r, 181 S.W.2d 263, 297 Ky. 730.

44. Cal.—Wilson v. Anderson, 293 P. 627, 109 Cal.App. 467.

45. Iowa.—Rapp v. Losee, 245 N.W. 317, 215 Iowa 356.

46. Ala.—Adams v. Powell, 142 So. 537, 225 Ala. 300.
Ga.—Bell v. Summerlin, 4 S.E.2d 831, 188 Ga. 648.
Ill.—Leonard v. Leonard, 17 N.E.2d 553, 369 Ill. 572.
Ind.—Sawyer v. Kleine, 32 N.E.2d 533, 118 Ind.App. 616.
Ky.—Poff v. Richardson, 227 S.W.2d 175, 312 Ky. 237.
Mo.—St. Joseph Lead Co. v. Fuhrmeister, 182 S.W.2d 272, 353 Mo. 232—Bussen v. Del Commune, 199 S.W.2d 13, 239 Mo.App. 859.
Mont.—Sanborn v. Lewis and Clark County, 120 P.2d 567, 113 Mont. 1
N.D.—Nichols v. Schutte, 26 N.W.2d 515, 75 N.D. 207.
Ohio.—Grace v. Fuller Auto. Co., Com.Pl., 81 N.E.2d 401—Home Owners' Loan Corp. v. Grant, 3 Ohio Supp. 24.
Okl.—Winkler v. Winkler, 127 P.2d 139, 191 Okl. 115.
Tex.—McDonald v Galt, Civ.App., 173 S.W.2d 962, error refused.
Wash.—University Nat. Co. v. Grays Harbor County, 132 P.2d 501, 12 Wash.2d 549.
51 C.J. p 271 note 45.

Defendants' disclaimer of interest
Where defendants in action to quiet title disclaimed any interest in plaintiff's tract, plaintiff was entitled to a decree confirming him in his ownership thereof as against any claims on defendants' part.—Kingsley v. Jacobs, 149 P.2d 950, 174 Or. 514.

47. Miss.—Colotta v. Middleton, 28 So.2d 847, 201 Miss. 637, motion sustained 30 So.2d 90, 201 Miss. 637.
51 C.J. p 271 note 46.

48. Cal.—Bashore v. Mooney, 87 P. 553, 4 Cal.App. 276.
51 C.J. p 271 note 47.

49. Idaho.—Western Loan & Building Co. v. Bandel, 63 P.2d 159, 57 Idaho 101.
51 C.J. p 271 note 48.

50. Ark.—Estes v. Lucky, 201 S.W. 815, 133 Ark. 97.
Or.—Niehaus v. Shetter, 153 P. 486, 78 Or. 447.

51. Cal.—District Bond Co. v. Pollack, 121 P.2d 7, 19 Cal.2d 304.
Mass.—Fields v. Othon, 46 N.E.2d 546, 313 Mass. 115.
N.M.—Merrifield v. Buckner, 70 P.2d 896, 41 N.M. 442.
51 C.J. p 272 note 50.

Mortgage lien in plaintiff's favor
A defendant adjudged to be fee owner was not entitled to complain of portion of judgment decreeing land to be subject to plaintiff's mortgage lien.—Hurt v. Pico Inv. Co., 15 P.2d 203, 127 Cal.App. 106.

52. Cal.—Wilson v. Anderson, 293 P. 627, 109 Cal.App. 467.
51 C.J. p 272 note 51.

Assignment of insurance policy
In an action to quiet title to an insurance policy, where the judgment declared that plaintiff was the sole and exclusive owner of the policy, it was held unnecessary to require, in addition, an assignment of the policy to plaintiff, since the omission of such requirement caused no injury or prejudice to any rights of defendant.—Boldemann Chocolate Co. v. Price, 53 P.2d 946, 5 Cal.2d 200.

53. Okl.—Ross v. Sanderson, 162 P. 709, 63 Okl. 73.
51 C.J. p 272 note 52.

Insurance premiums
An unsuccessful plaintiff is not entitled to recover insurance premiums where it does not appear that the insurance was of any benefit to the party adjudged to have good title.—Swift & Co. v. First Nat. Bank, 168 A. 827, 114 N.J.Eq. 417.

54. Cal.—Warden v. Ratterree, 9

the judgment there are no claims to particular articles adverse to plaintiff's claim of ownership of them, a provision in the judgment quieting plaintiff's title to them has been held not warranted.[55] The court may adjudge that defendant's claims are unfounded and invalid[56] without expressly determining that plaintiff is the owner of the land or has an interest therein;[57] but it has been held that a decree which merely declares plaintiff to be the owner, without finding or removing any cloud, is erroneous.[58]

The court may, on granting relief to plaintiff, require him to act in an equitable manner.[59] In an action against a grantor by the grantee in a deed given as security for a debt, it has been held proper for the court to give defendant a reasonable and specified time to repay the debt, and on failure of defendant to pay within the time fixed, to enter a decree quieting title in plaintiff.[60] Where title is quieted in a vendor in his suit against the vendee, it is error to render judgment in plaintiff's favor for a balance due on the purchase price;[61] but where defendant sets up his possession under a contract by plaintiff to convey the land, a decree quieting title in defendant should be made subject to the payment of the purchase price by him from the time he took possession,[62] or the decree may require plaintiff to convey to defendant on payment of the amount due within a designated time, and provide that on defendant's default plaintiff's title will be quieted;[63] and it has also been held that, where title is decreed in defendant, the court may render a personal judgment against him for the unpaid purchase price.[64]

Partition. It has been asserted broadly that a chancery court which has acquired jurisdiction of the subject matter for the purpose of removing clouds from title may decree a partition in kind or a sale for division of the proceeds.[65] However, it has also been held that, although a plaintiff who seeks to establish an equitable interest in land may in the same suit have partition,[66] he cannot have such relief where he counts solely on his legal title.[67]

Conveyance or release to plaintiff. It has been held that, in a suit to set aside an instrument as a cloud on title, it is erroneous to decree a conveyance by defendant to plaintiff of the title derived through such instrument,[68] if there is nothing to show a trust relationship or other equitable ground for such relief.[69] On the other hand, it has been held that the judgment or decree for plaintiff may order defendant to execute releases or conveyances where necessary to afford complete relief,[70] as where plaintiff bases his right on an equitable title[71] or where a trust deed exists.[72]

In a suit to quiet title against a nonresident, the court may, on decreeing relief to plaintiff, appoint a special commissioner to convey to him the legal title;[73] but the court cannot decree that defendant procure a conveyance in favor of plaintiff from a nonresident who is not a party to the proceedings.[74]

Relief against a tax title should not be a decree for

P.2d 315, 215 Cal. 215, 86 A.L.R. 1204.
Ill.—Trustees of Schools v. Village of Cahokia, 192 N.E. 565, 357 Ill. 538.
Ind.—Hackett v. Tri-State Loan & Trust Co., 194 N.E. 490, 100 Ind. App. 82.
Ky.—Carpenter v. Carpenter, 106 S.W.2d 620, 269 Ky. 137.
51 C.J. p 272 note 53.

Cancellation of taxes, assessments, or liens

In action to quiet title, trial court could not cancel delinquent taxes and special assessments or liens against realty.—McGrath v. Aubrey, 131 P.2d 73, 191 Okl. 570.

Payment of valid lien

Where the alleged cloud is found to be a valid lien, defendants, who had conveyed the land to plaintiff by a deed reciting that it was free from encumbrances, cannot be adjudged to pay the lien.—Orix de Bertran v. Pou, 6 Puerto Rico Fed. 1.

55. Cal.—Doll v. Maravillas, 187 P.2d 885, 82 Cal.App.2d 943.
56. Cal.—People v. Center, 5 P. 263, 6 P. 481, 66 Cal. 551.
Minn.—Windom v. Wolverton, 42 N.W. 296, 40 Minn. 439.
57. Wis.—Coe v. Rockman, 106 N.W. 290, 126 Wis. 515.
58. Ill.—Harms v. Kransz, 47 N.E. 746, 167 Ill. 421.
59. Cal.—Lyons v. Emery, 164 P.2d 272, 72 Cal.App.2d 275.
Necessity of doing equity see supra § 94.

Removal of improvements

In action to quiet title to improvements, court had jurisdiction on granting relief to plaintiff to require him to remove the improvements from defendant's land within a reasonable time.—Lyons v. Emery, 164 P.2d 272, 72 Cal.App.2d 275.

60. Cal.—Booth v. Taylor, 26 P.2d 846, 135 Cal.App. 348.
61. Cal.—Sausalito Bay Land Co. v. Sausalito Impr. Co., 136 P. 57, 166 Cal. 302.
62. Iowa.—Ida County Sav. Bank v. Johnston, 136 N.W. 225, 156 Iowa 234.
63. Cal.—Schaeffer v. Hofmann, 37 P. 932, 4 Cal.Unrep.Cas. 839.
64. Okl.—Runyan v. Herrod, 162 P. 196, 62 Okl. 87.
65. Tenn.—Vanhooser v. Cunningham, 146 S.W.2d 840, 24 Tenn.App. 480.
51 C.J. p 268 note 11 [d].
66. Mo.—Armor v. Frey, 161 S.W. 829, 253 Mo. 447.
67. Mo.—Armor v. Frey, supra.
68. Ill.—Schultz v. Schultz, 113 N.E. 638, 274 Ill. 341.
51 C.J. p 273 note 79.
69. Ill.—Reed v. Reber, 62 Ill. 240.
70. Kan.—Grove v. Jennings, 26 P. 738, 46 Kan. 366.
51 C.J. p 273 note 81.
71. W.Va.—Blake v. O'Neal, 61 S.E. 410, 63 W.Va. 483, 16 L.R.A.,N.S., 1147.
72. Ill.—McFall v. Kirkpatrick, 86 N.E. 139, 236 Ill. 281.
51 C.J. p 273 note 83.
73. W.Va.—Patton v. Eicher, 102 S.E. 124, 85 W.Va. 465.
74. Okl.—Ex parte Deickman, 127 P. 1077, 33 Okl. 749.

he release of such title or its conveyance to plaintiff,[75] but for a perpetual injunction against its assertion.[76]

Delivery of possession. The rule has been laid down in some cases that delivery of possession of the land cannot be decreed as a mere incident to the bill to quiet title.[77] Other authorities, however, have held, sometimes by virtue of express or implied statutory provisions, that on quieting plaintiff's title, the court, in order to give complete relief and avoid litigation, may order possession to be given to him.[78]

Recovery of rents and profits. As a general rule the court may grant complete relief to plaintiff by taking an account of the mesne rents and profits or awarding judgment for use and occupation,[79] where possession of the land was wrongfully taken and retained,[80] although there is also authority to the contrary.[81] However, this rule does not apply where the claim for an accounting is stale;[82] nor is it error to refuse an accounting if it is not asked for in the pleadings.[83] Moreover, plaintiff is not entitled to recover for the use and occupation of the land, or for rents accruing, before he acquired ownership.[84] Where the complaint in an action by a vendor to cancel a contract of sale as a cloud on title is insufficient to invoke the equitable power of the court to remove a cloud, it may nevertheless be sufficient to state a cause of action at law for the use and occupation of the premises during the time they were in defendant's possession.[85]

Recovery of taxes paid. Where plaintiff has paid taxes on the land in question, and judgment goes against him as having no title, he is entitled to a lien on the land for the amount of taxes so paid,[86] and the decree should provide for a sale by a commissioner for the payment of such lien if defendant does not pay it within a reasonable time.[87] However, plaintiff cannot recover taxes paid under a claim of ownership in the absence of proof of such payment and the amount thereof.[88] Further, where plaintiff's claim is based on an alleged sale of the land for delinquent taxes, and the court decrees merely that plaintiff is not the owner, without rendering any affirmative judgment quieting title in defendant, plaintiff is not entitled to have the judgment conditioned on the repayment to him of the amount paid for the tax title.[89] Where the court finds that defendant is the owner of the land and entitled to a decree quieting his title, it is error to render a judgment vesting title in plaintiff unless defendant, within a specified time, repays the amount expended by plaintiff for taxes,[90] and the proper judgment is that, on defendant's failure to repay such amount, the property should be sold and the proceeds applied to plaintiff's lien, any surplus to be paid to defendant.[91]

Recovery for improvements. Where defendant prevails and title is established in him, plaintiff is entitled to judgment for the value of improvements placed on the land by him in good faith,[92] and to a lien on the land to secure payment of such amount;[93] and it has been held that plaintiff cannot be dispossessed until he has been compensated for the en-

75. Ill.—Reed v. Reber, 62 Ill. 240—Barnett v. Cline, 60 Ill. 205.

76. Ill.—Reed v. Reber, 62 Ill. 240—Barnett v. Cline, 60 Ill. 205.

77. U.S.—Steam Stone-Cutter Co. v. Jones, C.C.Vt., 13 F. 567, 21 Blatchf. 138.
51 C.J. p 274 note 88.

78. Mo.—Matthews v. Citizens' Bank of Senath, 40 S.W.2d 161, 329 Mo. 556.
Wash.—O'Neal Land Co. v. Judge, 82 P.2d 535, 196 Wash. 224.
51 C.J. p 274 note 90.
Writ of possession see infra § 108.

79. Idaho.—Western Loan & Building Co. v. Bandel, 63 P.2d 159, 57 Idaho 101.
51 C.J. p 275 note 2.
Deductions from rental
In suit to quiet title and recover possession of realty as against grantee of invalid deed issued to purchaser of delinquency certificate for amount of invalid improvement assessments, amount paid by grantee for delinquency certificate, deed, recording fee, and taxes on and improvement of property, was required to be deducted from amount due owners by grantee as rental for use and occupancy of premises.—Western Loan & Building Co. v. Bandel, supra.

80. N.D.—Swingle v. Swingle, 167 N.W. 715, 39 N.D. 284.

81. Mich.—Fitzhugh v. Barnard, 12 Mich. 104.

82. Mich.—Green v. Reid, 201 N.W. 468, 229 Mich. 503.

83. Kan.—Robertson v. Bear, 112 P. 101, 83 Kan. 468.
51 C.J. p 275 note 7.

84. Miss.—Scottish - American Mortg. Co. v. Buncklev, 41 So. 502, 88 Miss. 641, 117 Am.S.R. 762.
51 C.J. p 275 note 6.

85. Mont.—Hicks v. Rupp, 140 P. 97, 49 Mont. 40.

86. N.M.—Corpus Juris cited in Merrifield v. Buckner, 70 P.2d 586, 941, 41 N.M. 442.
51 C.J. p 275 note 9

Extent of recovery
Unsuccessful complainant in possession in suit to quiet title is entitled to lien for his payment of taxes accrued and in arrears prior to his entry, but not for taxes occurring during his possession, during which he retained rents and profits.—Swift & Co. v. First Nat. Bank, 168 A. 827, 114 N.J.Eq. 417.

87. Miss.—Bacot v. Halloway, 104 So. 696, 105 So. 739, 140 Miss. 120.

88. Colo.—Scott v. Sullivan, 244 P. 466, 79 Colo. 173—Green v. Halsted, 338 P. 40, 77 Colo. 578.

89. Cal.—Biagni v. Mainero, 213 P. 541, 60 Cal.App. 668.

90. Utah.—Salt Lake Inv. Co. v. Fox, 104 P. 1132, 37 Utah 334.

91. Utah.—Salt Lake Inv. Co. v. Fox, supra.

92. La.—Bartley v. Sellier, 42 So. 657, 118 La. 93.
Wash.—Palmer v. Abrahams, 104 P. 643, 55 Wash. 252.

93. Wash.—Palmer v. Abrahams, supra.
51 C.J. p 276 note 75.

hanced value given to the property by the improvements.[94] Where certain heirs under a common source of title were served by publication only, and did not appear, it has been held that the court, having found that plaintiff was a tenant in common only, properly dismissed the suit without prejudice to his claim for improvements, less the rents and profits.[95]

§ 97. —— Cancellation and Reformation

In a proper case the court may decree the cancellation or reformation of an instrument constituting a cloud on title, unless the nature of the instrument forbids such relief.

The court may decree the cancellation,[96] or, in some cases, the reformation[97] of the instrument constituting a cloud on plaintiff's title, unless the nature of the instrument forbids such relief;[98] and the fact that the instrument is void on its face, and, hence, is not a cloud on title, will not preclude cancellation where necessary to give complete relief.[99] However, cancellation is not the exclusive means of removing a cloud;[1] relief may be had by a mere adjudication of good title in plaintiff,[2] and it is sufficient for the decree merely to recite that plaintiff's title is quieted as to the instrument under which defendant claims[3] or to declare that such instrument is null and void,[4] without expressly ordering it to be canceled or set aside. So, instead of canceling the instrument, the court may limit its effect.[5]

§ 98. —— Injunction

Injunctive relief may be granted to the plaintiff by enjoining the defendant from the further assertion of his claims, or under some circumstances, from the prosecution of a pending action.

The relief to plaintiff may consist in enjoining defendant from the further assertion of his claims.[6] Where there are numerous defendants, each claiming an undivided interest in the land, and all basing their claims on the same right, equity will enjoin the prosecution of pending actions in ejectment for the recovery of the interests claimed by them respectively.[7] However, since the question of title is not usually involved in an action for unlawful detainer, such an action, brought previously to the filing of the bill to remove a cloud from title, will not be enjoined.[8] In an action to quiet title to a homestead, where the adverse claim or cloud consists of a judgment against the owner, the decree should not perpetually enjoin the judgment creditor from asserting his lien on the premises, since he ought not to be deprived of his right to assert such lien at any future time if the property should cease to be impressed with the homestead character.[9]

§ 99. —— Recovery of Damages

Incidental relief granted to the plaintiff in an action to quiet title may consist of an award of damages for injury resulting from the defendant's wrongful acts.

It has been held that damages for wrongfully

94. Kan.—Weber v. Gardner, 268 P. 705, 110 Kan. 295.

95. Miss.—Terry v. Unknown Heirs, 67 So. 209, 108 Miss. 749.

96. U.S.—Manhattan Land & Fruit Co. v. Buras, D.C.La., 43 F.Supp. 361.
Ala.—Standard Contractors Supply Co. v. Scotch, 25 So.2d 257, 247 Ala. 517.
Cal.—Thompson v. Moore, 65 P.2d 800, 8 Cal.2d 367, 109 A.L.R. 1027.
Ky.—Conley v. Coburn, 179 S.W.2d 668, 297 Ky. 292.
Me.—Buswell v. Wentworth, 186 A. 803, 134 Me. 383.
Mo.—Wm. H. Johnson Timber & Realty Co. v. Belt, 46 S.W.2d 153, 329 Mo. 515.
Mont.—Sanborn v. Lewis and Clark County, 126 P.2d 567, 113 Mont. 1.
Pa.—Adams v. Rosenfeld, Com.Pl., 30 Del.Co. 296.
W.Va.—United Thacker Coal Co. v. Newsome, 38 S.E.2d 666, 129 W. Va. 86.
51 C.J. p 272 note 83.
Deed set aside except as to grantee's interest
Purported conveyance by surviving husband of owner of fee-simple title, which conveyed only grantee's interest in realty as surviving husband of deceased owner, should be set aside in all other respects as a cloud on title of deceased owner's grantees.—Mill v. Woods, W.Va., 57 S.E.2d 713.

97. Ala.—Standard Contractors Supply Co. v. Scotch, 25 So.2d 257, 247 Ala. 517.
Pa.—Tomina v. Costello, Com.Pl., 98 Pittsb.Leg.J. 330.
51 C.J. p 272 note 84.

98. S.C.—State Univ. v. Columbia Academy, 67 S.E. 951, 85 S.C. 546.
51 C.J. p 272 note 85.

99. Colo.—Service v. West, 153 P. 446, 60 Colo. 366.
Idaho.—Maxwell v. Twin Falls Canal Co., 292 P. 232, 49 Idaho 806.

1. W.Va.—United Thacker Coal Co. v. Newsome, 38 S.E.2d 666, 129 W. Va. 86.
51 C.J. p 272 note 87.

2. W.Va.—United Thacker Coal Co. v. Newsome, supra.—Gilbert v. McCreary, 104 S.E. 273, 87 W.Va. 56, 12 A.L.R. 1172.

3. Cal.—Kittle v. Bellegarde, 25 P. 55, 86 Cal. 556.
51 C.J. p 272 note 89.

4. Cal.—Gibbons v. Peralta, 21 Cal. 629.
51 C.J. p 273 note 90.

5. Miss.—Fox v. Coon, 1 So. 629, 64 Miss. 465.
51 C.J. p 273 note 91.

6. U.S.—Ohio Oil Co. v. Thompson, C.C.A.Mo., 126 F.2d 331, certiorari denied 62 S.Ct. 112, 314 U.S. 658, 86 L.Ed. 528.—Corpus Juris cited in Appalachian Electric Power Co. v. Smith, D.C.Va., 4 F.Supp. 3, 5.
Cal.—Taylor v. Hawley, 45 P.2d 226, 6 Cal.App.2d 576.
Iowa.—Blott v. Blott, 290 N.W. 74, 227 Iowa 1108.
51 C.J. p 273 note 74.
Mandatory injunction to enforce decree quieting title see infra § 108.
Restraining threatened acts which would constitute cloud see supra § 15.
Temporary injunction against acts with respect to property pending suit see supra § 51.

7. U.S.—Commodores Point Terminal Co. v. Hudnall, D.C.Fla., 288 F. 150.

8. Fla.—Knott v. Smith, 24 So. 959, 79 Fla. 628.

9. Neb.—Coley v. Sullivan, 22 N.W. 470, 44 Neb. 868.
N.D.—Klemmens v. Cosmopolis First Nat. Bank, 138 N.W. 1044, 32 N.D. 594.

withholding possession of the property cannot be awarded to plaintiff as incidental relief in an action to quiet title or remove a cloud thereon,[10] and that it is improper to award plaintiff attorney's fees and traveling expenses incurred by him.[11] On the other hand, it has been held that plaintiff may, as an incident to the action, recover damages[12] for injury to the land,[13] for trespass,[14] and for other injury sustained by him by reason of defendant's wrongful acts,[15] and that, where a cloud has been wrongfully and willfully cast on the property, plaintiff may recover reasonable sums necessarily expended by him in procuring the removal of the cloud,[16] together with punitive damages.[17] Ordinarily, the measure of damages is such as will compensate for the loss or prejudice suffered.[18]

Where it is found that plaintiff has no title, a claim for damages falls with the claim of title.[19] Likewise, there can be no recovery on a claim for waste where there is no proof of any wanton or willful destruction, or negligent use, of the property.[20] It has been held that, where the bill to quiet title prays for no injunctive relief to prevent continuing trespass or waste, the right to an accounting for damages does not arise.[21] In an action by a vendor to cancel a contract to convey as a cloud on title, after defendant had repudiated the contract and plaintiff had resumed possession, the complaint, even though insufficient to warrant the equitable relief demanded, may be sufficient to aver a cause of action at law to recover as damages the value of personal property removed from the land by defendant.[22]

§ 100. Relief to Defendant

The court in an action to quiet title may grant to the defendant such affirmative relief against the plaintiff or a codefendant as the circumstances of the case require.

A defendant who has established his rights with respect to the property may be entitled to a judgment dismissing the complaint.[23] Furthermore, in accordance with the rule that the court is authorized to determine all the rights and claims of the parties and render such judgment or decree as will afford complete relief, as discussed supra § 95, the court may grant to defendant such affirmative relief against plaintiff[24] or a codefendant[25] as the pleadings and proof justify, and in a proper case, where it appears that he has a superior title, he is entitled to a decree quieting such title in him.[26] However, defendant should not be granted relief to which he does not show himself entitled,[27] and the mere

10. U.S.—Steam Stone-Cutter Co. v. Jones, C.C.Vt., 13 F. 567, 21 Blatchf. 138.
N.M.—Rosser v. Rosser, 78 P.2d 1110, 42 N.M. 360.

11. Wyo.—Brown v. Citizens' Nat. Bank, 269 P. 40, 38 Wyo. 469.

12. U.S.—Ohio Oil Co. v. Thompson, C.C.A.Mo., 120 F.2d 831, certiorari denied 62 S.Ct. 112, 314 U.S. 658, 86 L.Ed. 528.

13. U.S.—Duke Power Co. v. Toms, C.C.A.N.C., 118 F.2d 443.
51 C.J. p 274 note 93.

14. U.S.—Ohio Oil Co. v. Thompson, C.C.A.Mo., 120 F.2d 831, certiorari denied 62 S.Ct. 112, 314 U.S. 658, 86 L.Ed. 528.

15. Tenn.—Branstetter v. Poynter, 222 S.W.2d 214, 32 Tenn.App. 189.
51 C.J. p 274 note 94.

16. Okl.—McKown v. Haught, 267 P. 245, 130 Okl. 253.
51 C.J. p 274 note 95.

17. Okl.—Eggers v. Olson, 231 P. 483, 104 Okl. 297.

18. Tex.—McCollum Exploration Co. v. Reaugh, Civ.App., 146 S.W.2d 1109, affirmed Reaugh v. McCollum Exploration Co., 163 S.W.2d 620, 139 Tex. 485, motion dismissed 167 S.W.2d 727, 140 Tex. 322.

Value of use of property

Since the occupancy of one claiming and occupying under a tax deed, constituting color of title, is not in itself willfully wrong or tortious, the damage therefor is not the value of crops raised by the occupant, but the value of the use of the property for the time of the occupancy. Weller v. Platt, 146 N.W. 706, 33 S.D. 509.

19. Iowa.—Kuehl v. Bottendorf, 161 N.W. 28, 179 Iowa 1.

20. Iowa.—Barlow v. Childs, 208 N.W. 207.

21. Ala.—Cooper v. W. P. Brown, etc., Lumber Co., 108 So. 20, 214 Ala. 400.

22. Mont.—Hicks v. Rupp, 140 P. 97, 49 Mont. 40.

23. N.Y.—Kasper v. Moore, 54 N.Y.S.2d 685.
Utah.—Boxlevich v. Slechta, 166 P.2d 239, 109 Utah 373.
Dismissal and nonsuit before hearing see supra §§ 83-85.

24. Cal.—Hough v. Wright, 16 P.2d 301, 127 Cal.App. 689.
51 C.J. p 276 note 20.

25. Mo.—Saxbury v. Coons, 98 S.W.2d 662.
51 C.J. p 276 note 21.

26. U.S.—Ohio Oil Co. v. Thompson, C.C.A.Mo., 120 F.2d 831, certiorari denied 62 S.Ct. 112, 314 U.S. 658, 86 L.Ed. 528.
Cal.—Oswald v. Northrop Aircraft, 145 P.2d 635, 62 Cal.App.2d 824—Milton H. Giles & Co. v. Bank of America Nat. Trust & Savings Ass'n, 117 P.2d 943, 47 Cal.App.2d 316.
Ind.—Kozanjieff v. Petroff, 19 N.E.2d 563, 215 Ind. 386, 122 A.L.R. 479.
Iowa.—Miller v. Ellis, 5 N.W.2d 877, 232 Iowa 558.
Ky.—Wynn v. Glover, 105 S.W.2d 636, 268 Ky. 562.
Mo.—Lepmchenske v. Bedell, 183 S.W.2d 148—Lortz v. Rose, 145 S.W.2d 385, 346 Mo. 1212—Clark v. Heckerman, 142 S.W.2d 35, 346 Mo. 458.
N.D.—Hanson v. Hulett, 72 N.W.2d 209, 74 N.D. 390.
Tex.—McDaniel v. Bamford, Civ.App., 116 S.W.2d 102.
Utah.—Boxlevich v. Slechta, 166 P.2d 239, 109 Utah 373.
51 C.J. p 276 note 22.

Extent of ownership

Decree adjudging defendant to be owner of land in its entirety where plaintiff had been adjudged to have no interest and evidence showed defendant did own at least one half of land was held not erroneous since strangers who may own other half would not be bound by judgment.—Hopkins v. Slusher, 98 S.W.2d 932, 266 Ky. 300, 108 A.L.R. 662.

27. Cal.—Balaam v. Perasso, 298 P. 330, 211 Cal. 275.
Ky.—Martt v. McIlrayer, 166 S.W.2d 823, 293 Ky. 472.
Miss.—Duvall v. Farris, 189 So. 516, 185 Miss. 757.
Mo.—Adams v. Smith, 332 S.W.2d

failure of plaintiff to establish any title or right to the property does not necessarily require that title be quieted in defendant [28] Defendant is not entitled to a decree determining his equitable interest, if any, in the property where it is impossible from the evidence to determine what such equitable interest is [29]

Disputes between defendants, who each assert title to the exclusion of the other, may be adjudicated where plaintiff disclaims after reversal of a judgment in his favor.[30] Where the executor and heirs of a decedent are parties defendant and the findings are in favor of the estate, the judgment should quiet title in the heirs and in the executors for purposes of administration.[31] A judgment for defendant, because of plaintiff's failure to do equity by paying a mortgage held by defendant, should not award defendant possession of the property,[32] but the action should be dismissed, leaving the parties to have their rights determined in an appropriate proceeding brought for that purpose.[33]

Default under contract of purchase. A vendee who has defaulted under a contract for the purchase of property, and who is made a defendant in an action to quiet title, may be afforded an opportunity to comply with the contract before title is quieted as against him.[34] However, where an action is brought to quiet title as against a forfeited contract for the purchase of land, defendant will not be relieved from the forfeiture where it was incurred through his willful neglect to make payments when due.[35]

§ 101. —— Incidental, Additional, or Alt native Relief in General

The court in an action to quiet title will pro equitable rights of a defendant which are connected v the subject matter of the action, and, where the cumstances warrant, may require an accounting.

Since the relief in an action to quiet title is s ject to the maxim that he who seeks equity must equity, as discussed supra § 94, the equitable rig of a defendant growing out of, or connected w the subject matter of the action will be protected the court in its decree,[36] and an accounting may had when necessary.[37] So, since a decree quiet title destroys all liens and claims clouding the t unless they are preserved by the decree, as discus infra § 105, where defendant succeeds in estabi ing a lien, easement, or estate to which plaint title is subject, a decree quieting plaintiff's t should specially except or reserve such lien, e ment, or estate from its operation,[38] and it has b held that the court may decree foreclosure o mortgage held by defendant.[39] A defendant has filed a cross-complaint may obtain relief aff ing additional land when the cause of action forth in the cross-complaint includes such additi land.[40] Where defendant is adjudged to be owner of the land in controversy, the court may incidental relief to defendant, order plaintiff, had only an easement of passage over the lanc

482, 360 Mo. 1082—General Theatrical Enterprises v. Lyris, App., 131 S.W.2d 874

Specific performance

Finding of trial court supported by evidence that lessee had failed to comply with provisions of lease and therefore forfeited all rights thereunder precluded grant of specific performance to lessee in lessor's action to quiet title.—Paradise Irr. Dist. v. Barry, 32 P.2d 966, 220 Cal. 748.

28. Ark.—Thomason v. Abbott, 229 S.W.2d 660.

Renunciation by defendant

Defendant who renounced any claim to land beyond fence was entitled to decree quieting his title only to the fence, even though plaintiffs were unable to establish title to remainder of land either by record title or adverse possession.—Thomason v. Abbott, supra.

29. Ga.—Gibbs v. Gibbs, 42 S.E.2d 374, 202 Ga. 105.

30. Mo.—Bryan v. McCaskill, 225 S.W. 682, 284 Mo. 583.

Disclaimer by plaintiff see supra § 68.

31. N.D.—Smith v. Fladeland, 214 N.W. 42, 55 N.D. 433—Druey v. Baldwin, 172 N.W. 603, 182 N.W. 700, 41 N.D. 473.

32. Mont.—McMillan v. Davenport, 118 P. 756, 44 Mont. 23, Ann.Cas. 1912D 984.

33. Mont.—McMillan v. Davenport, supra.

34. Ark.—Alexander v. Mason, 225 S.W.2d 680, 216 Ark. 367.
Cal.—Majors v. Butler, App., 221 P. 2d 994—Brown v. Butts, 211 P.2d 366, 94 Cal.App.2d 747.
Wash.—Crook v. Tudor, 182 P.2d 740, 28 Wash.2d 289

35. Colo.—American Mortg. Co. v. Logan, 7 P.2d 953, 90 Colo. 157.
Ind.—Shelt v. Baker, 137 N.E. 74, 138 N.E. 93, 79 Ind.App. 606.

36. Ariz.—Mason v. Ellison, 160 P. 2d 326, 63 Ariz. 196—Arizona Trust Co. v. Leggett, 124 P.2d 775, 59 Ariz. 198.
51 C.J. p 277 note 38.

Same incidental relief as plaintiff

Defendant may have the same incidental relief to which he would be entitled as a plaintiff.—Ohio Oil Co. v. Thompson, C.C.A.Mo., 120 F.2d 831, certiorari denied 62 S.Ct. 314 U.S. 658, 86 L.Ed. 528.

Right of redemption

Plaintiff holding deed in lega fect a mortgage was not entitle judgment quieting title which w exclude defendants from righ redemption.—Wilson v. Ande 293 P. 627, 109 Cal. 467.

37. U.S.—Ohio Oil Co. v. Thom C.C.A.Mo., 120 F.2d 831, certi denied 62 S.Ct. 112, 314 U.S. 86 L.Ed. 528
Cal.—Stromerson v. Averill, 13 2d 617, reheard 141 P.2d 73 Cal.2d 803.
Okl.—Winkler v. Winkler, 127 139, 191 Okl. 115.
51 C.J. p 277 note 39.

38. Ky.—Kinnett v. Abrell, 121 2d 699, 275 Ky. 276.
51 C.J. p 277 note 41.

39. U.S.—Dennison Brick, etc. v. Chicago Trust Co., C.C.A. 286 F. 818.
Or.—Hanna v. Hope, 168 P. 61 Or. 303.

40. Cal.—Brown v. Luddy, 9 326, 121 Cal.App. 494.

remove obstructions placed by him thereon.[41]

Reformation of deed. Where defendant establishes his claim under a deed which, by mistake, omitted the land in controversy, and the grantor is made a codefendant, defendant is entitled to a reformation of the deed and a decree establishing his title as against plaintiff.[42] However, where there has been a finding of a mistake in the execution of a deed to defendant, a judgment simply quieting title in defendant to a strip of land mistakenly omitted from the deed has been held sufficient without any adjudication that the deed be reformed.[43]

Conveyance to defendant. A decree for defendant may order plaintiff, for the purpose of clearing defendant's record title, to make proper conveyance of the land to defendant,[44] and in case of his failure to do so may direct such conveyance to be made by the clerk of the court as commissioner.[45]

Delivery of possession. Where it is determined that defendant is entitled to possession of the land, the court has jurisdiction to award him such possession;[46] but, where the petition is dismissed and a decree is entered in favor of defendant for costs only, it is error to award him a writ of possession.[47]

Rents and profits. Where it is determined that defendant had an interest in the land, plaintiff should be charged with rents and profits derived therefrom.[48] So, where plaintiff's title ceased on the death of his grantor, and the interest in the land passed to defendant by way of executory devise, the decree should order plaintiffs to account to defendant for the rents and profits accruing after the death of the grantor.[49] However, rents and profits may be offset by amounts equitably due plaintiff,[50] such as expenditures for improvements.[51]

Damages sustained by a defendant in an action to quiet title cannot be recovered unless they are pleaded in the answer,[52] and unless a proper legal basis is disclosed on which such damages may be assessed.[53]

§ 102. —— Reimbursement for Moneys Expended

a. In general
b. Improvements
c. Taxes and assessments
d. Recovery of mortgage debt

a. In General

The defendant in a suit to quiet title may be entitled to repayment of expenditures properly made by him with respect to the land in controversy, such as payments made to remove a valid lien on the property.

Under the rule requiring plaintiff as a condition precedent to relief to do equity, as discussed supra § 94, defendant is entitled to repayment of expenditures properly made by him with respect to the land in controversy.[54] A defendant who had, by fraudulently concealing his course in making advances, become an involuntary trustee with respect to the land may not complain because the judgment quieting plaintiff's title did not require him to repay such advances.[55] A tender of reimbursement has been held not a prerequisite to the bringing of a suit to recover property alleged to have been illegally sold or mortgaged, since reimbursement in such a case is a matter for defendant to set up as an alternative demand in compensation.[56] Under

41. Conn.—Cole v. Austin, 140 A. 108, 107 Conn. 252.

42. Ind.—Adams v. Betz, 78 N.E. 649, 167 Ind. 161.

43. Cal.—Mings v. Compton City School Dist. of Los Angeles County, 18 P.2d 967, 129 Cal.App. 413.

44. Colo.—Herrick v. Woodrow-Shindler Co., 226 P. 137, 75 Colo. 363.

45. Colo.—Herrick v. Woodrow-Shindler Co., supra.

46. Cal.—Duckett v. Adolph Wexler Building & Finance Corporation, 40 P.2d 506, 2 Cal.2d 263.

51 C.J. p 277 note 47.

Writ of assistance or possession see infra § 108.

47. Iowa.—Lombard v. Atwater, 43 Iowa 599.

48. Iowa.—Irish v. Steeves, 134 N.W. 634, 154 Iowa 286.

Payment over by receiver

Order directing receiver to pay rents collected to defendant was held proper, where ownership was established in defendant.—Ebbs v. Neff, 30 S.W.2d 616, 325 Mo. 1182.

Basis of computation

Where defendant was found to be owner of land, rendering judgment for defendant for amount land earned on a crop-sharing basis, rather than ascertaining reasonable cash value thereof, was not error; but assessment against plaintiff of rents on theory that he did not immediately after judgment was entered deliver possession of land to defendant was improper, where it appeared that actual possession of land was in tenants under rental contracts with plaintiff, and that defendant thereafter ratified such rental contracts and, through such ratification, received full benefit of rental contracts and whatever work had been performed thereunder.—Hoffman v. Hogan, Mo., 153 S.W.2d 1046.

49. Or.—Illyeu v. Crouch, 189 P. 222, 96 Or. 66.

50. Mich.—Atkinson v. St. Matthias Church, 186 N.W. 713, 217 Mich. 204.

51. Mich.—Atkinson v. St. Matthias Church, supra.

Right of plaintiff to recover for improvements see supra § 96.

52. Iowa.—Harrington v. Foley, 79 N.W. 64, 108 Iowa 287.

53. Mich.—Otto v. Phillips, 230 N.W. 940, 250 Mich. 546.

54. Ind.—Shaw v. Meyer-Kiser Bank, 156 N.E. 552, 199 Ind. 687.

Mo.—Decker v. Evans, 231 S.W.2d 127.

Okl.—Winkler v. Winkler, 127 P.2d 139, 191 Okl. 115.

51 C.J. p 277 note 56.

55. Cal.—McArthur v. Goodwin, 160 P. 679, 173 Cal. 499.

56. La.—Long v. Chailan, 175 So. 42, 187 La. 507.

some statutes payment need be made only of those items enumerated therein[57]

Liens generally. Where defendant has paid off a lien on the property, both valid and prior to plaintiff's claim, the latter will be granted relief only on terms of paying to the former the amount of the lien,[58] with interest from the time of payment[59]

Recovery of purchase price paid at judicial sale. It has been held, pursuant to the maxim, Caveat emptor, that the title acquired at a void execution sale may be set aside as a cloud without reimbursing the purchaser at the sale;[60] and it has also been held that a plaintiff who had not received any part of the price paid for land sold under a void order of sale could sue to quiet title without refunding the price[61] However, other authorities have held that a court setting aside a judicial sale under a void execution, as a cloud on title, should decree that the purchase money be refunded.[62] So, the assignee of a mortgagee, who redeemed the land from a foreclosure sale and purchased the land on resale under a writ of venditioni exponas, but failed to obtain legal title because the statute gave him no right to redeem, is entitled to reimbursement.[63]

b. Improvements

A defendant against whom title is quieted, who in good faith has made improvements on the property, is entitled on a proper showing to recover therefor; but recovery will not be permitted if he has not acted in good faith or if it is inequitable under the circumstances.

A defendant who, in good faith, supposing that he had title, made lasting improvements on the lands in controversy, or a defendant who has succeeded to the rights of one who has made such improvements, is entitled, on a proper showing, to recover for the improvements on his title being declared void,[64] or to remove such improvements;[65] and reimbursement will not be denied because an action at law to recover for improvements would be barred by the statute of limitations[66] However, defendant is not entitled to recover for improvements where he did not act in good faith,[67] or made such improvements while a mere trespasser,[68] or where a recovery would be inequitable under the circumstances.[69] Likewise, no recovery may be had by a defendant whose interest in the land and improvements has, before the commencement of the action, been sold or divested,[70] particularly where possession had been surrendered to a grantee.[71]

Reimbursement for improvements cannot be awarded in the absence of a demand for such relief in the pleadings,[72] or in the absence of proof of the value of the improvements.[73] Where the statute prescribes the conditions on which recovery for improvements may be had, defendant must bring himself within the terms of the statute[74]

Improvements made pending action. Recovery cannot be had for improvements made by defendant after the action was instituted,[75] except under special circumstances.[76]

The amount recoverable is the amount the real estate increased in value by reason of the improvements,[77] less the value of the use and occupation of the property, or the value of the rents and profits

57. Ill.—Thomas v. Durchslag, 90 N.E.2d 200, 404 Ill. 581.
Necessity of establishment of claim
Under statute pertaining to payments to be made by owner of realty on restoration or confirmation of an unclouded title to him, reimbursement must be made only after existence of claim is established.—Thomas v. Durchslag, supra.

58. Cal.—Silva v. Dias, 116 P.2d 496, 46 Cal.App.2d 662.
51 C.J. p 278 note 77.

59. Neb.—Dougherty v. White, 200 N.W. 884, 112 Neb. 675, 36 A.L.R. 425.

60. Ill.—Conwell v. Watkins, 71 Ill. 43.

61. Mo.—Scott v. Royston, 123 S.W. 454, 223 Mo. 568.

62. Cal.—Keohane v. Keohane, 176 P. 386, 38 Cal.App. 405.
Tex.—Herndon v. Rice, 21 Tex. 455.

63. Ind.—Jolliffe v. Crawford, 132 N.E. 300, 76 Ind.App. 282.

64. Ark.—Penrose v. Doherty, 67 S.W. 398, 70 Ark. 256.
Iowa—Wilder v. Conlon, 30 N.W.2d 764, 239 Iowa 187.
N.D.—Nichols v. Schutte, 26 N.W.2d 515, 75 N.D. 207.
51 C.J. p 278 note 61.

65. N.D.—Hagerott v. Davis, 17 N.W.2d 15, 73 N.D. 532.
51 C.J. p 278 note 62.

66. Ill.—De Walsh v. Braman, 43 N.E. 597, 160 Ill. 415.
Iowa—Warner v. Tullis, 218 N.W. 575, 206 Iowa 630.

67. Iowa—Lindt v. Uihlein, 79 N.W. 73, 109 Iowa 591.
Mich.—Taylor v. Hurd, 292 N.W. 862, 293 Mich. 425.
Neb.—Ohme v. Thomas, 279 N.W. 480, 134 Neb. 727.
51 C.J. p 278 note 64.

68. Cal.—Martin v. Bartmus, 207 P. 550, 189 Cal. 87.

69. Mo.—St. Joseph Lead Co. v. Fuhrmeister, 132 S.W.2d 273, 353 Mo. 232.
51 C.J. p 278 note 66.

70. Neb.—Hammond v. Harrington, 33 N.W.2d 293, 150 Neb. 1—Moreland v. Berger, 141 N.W. 831, 93 Neb. 724.

71. Neb.—Moreland v. Berger, supra.

72. Cal.—Wood v. Henley, 263 P. 870, 88 Cal.App. 441.
Mo.—Koehler v. Rowland, 205 S.W. 217, 275 Mo. 573.

73. Ariz.—Lee v. New York Life Ins. Co., 145 P.2d 843, 61 Ariz. 177.
Tex.—Hunter v. Clayton, Civ.App., 36 S.W. 326.

74. Okl.—Indian Land, etc., Co. v. Scott, 158 P. 1164, 59 Okl. 240.
51 C.J. p 278 note 70.

75. Ark.—Biffle v. Jackson, 72 S.W. 566, 71 Ark. 226.
Utah.—Reimann v. Baum, 203 P.2d 387.

76. Neb.—Thompson v. Thompson, 73 N.W. 943, 53 Neb. 490.
51 C.J. p 278 note 72.

77. N.D.—Nichols v. Schutte, 26 N.W.2d 515, 75 N.D. 207.
51 C.J. p 278 note 74.

during defendant's occupancy,[78] and not the cost of making the improvements.[79]

c. Taxes and Assessments

As a general rule the court on quieting title in the plaintiff will require him to reimburse the defendant, with interest, for all taxes and assessments properly chargeable on the land and paid by the defendant.

As a condition to granting relief the court will, as a general rule, require plaintiff to reimburse defendant, with interest, for all taxes and assessments properly chargeable on the land and paid by him,[80] and declare a lien on the land to secure such reimbursement.[81] Defendant's failure to account for rents and profits will not estop him to assert his claim for taxes paid, where plaintiff did not in his reply counterclaim for such rents and profits.[82] No reimbursement will be awarded where defendant did not purchase the land in good faith,[83] or where defendant has paid only such taxes as he was under a duty to pay;[84] nor will defendant be entitled to payment or a lien for taxes voluntarily paid by him to protect his own title.[85] Statutes requiring plaintiff, in suits for the recovery or possession of lands, to tender taxes paid by defendant have been held inapplicable in a suit, not for possession, but to quiet title.[86]

Effect of offer to reimburse. It has been held that a plaintiff who has offered to pay all taxes legally due, as a condition precedent to relief, is estopped to deny the right of the court to decree payment by him according to the offer;[87] and that, where plaintiff alleges that he is able and willing to pay all legal taxes due on the land, it is error for the court not to take an account of such taxes and decree their payment as a condition of the relief prayed for.[88]

Pleading and proof. Defendant is not entitled to have taxes or assessments paid by him refunded where he has not made a claim therefor in his pleadings,[89] and proved by competent evidence the amount of taxes or assessments paid.[90]

d. Recovery of Mortgage Debt

A plaintiff seeking to have a mortgage canceled as a cloud on his title ordinarily will be required to do equity by paying or tendering the amount of the mortgage debt; but there are circumstances under which payment of the mortgage will not be required.

A court of equity ordinarily will require a plaintiff, suing to have a mortgage canceled as a cloud on his title, whether he is the mortgagor or a person who has purchased from, or who occupies the position of, the mortgagor, to do equity by paying,[91]

78. N.D.—Nichols v. Schutte, supra. 51 C.J. p 278 note 75.
Right of plaintiff to recover rents and profits see supra § 96.

79. Neb.—Gombert v. Lyon, 100 N. W. 414, 72 Neb. 319.

80. Ark.—Turner v. Grove Land & Timber Co., 188 S.W.2d 121, 208 Ark. 921—Penrose v. Doherty, 67 S.W. 398, 70 Ark. 256.
Cal.—Raisch v. Myers, 167 P.2d 198, 27 Cal.2d 773—Sterling Realty Co. v. Relfe, 130 P.2d 410, 21 Cal.2d 164—Noble v. Blanchard, 8 P.2d 523, 120 Cal.App. 664—Scott v. Warden, 296 P. 95, 111 Cal.App. 587—Warden v. Barnes, 295 P. 569, 111 Cal.App. 287.
Colo.—Cripple Creek Trading & Mining Co. v. Stewart, 67 P.2d 1032, 100 Colo. 271.
Fla.—Hollywood, Inc., v. Clark, 15 So.2d 175, 153 Fla. 501.
Mich.—McQuillan v. Ayer, 155 N.W. 599, 189 Mich. 566.
Mont.—Swingley v. Riechoff, 112 P. 2d 1075, 112 Mont. 59.
Okl.—Hogrefe v. Board of Com'rs of Payne County, 134 P.2d 556, 192 Okl. 200—Gillespie v. Board of Com'rs of Payne County, 134 P.2d 558, 192 Okl. 202.
R.I.—Allen & Reed v. Investments, Inc., 190 A. 447, 57 R.I. 457.
Utah.—Adams v. Lamico, 221 P.2d 1037.
51 C.J. p 279 note 80.

Interest on the amount expended by defendant for taxes may be allowed to him.
Colo.—Langley v. Young, 211 P. 640, 72 Colo. 466.
Utah.—Reimann v. Baum, 203 P.2d 387.

Foreclosure of lien
A holder of an unpaid and unforeclosed assessment bond may obtain affirmative relief as a defendant in an action to quiet title without foreclosing his lien.—Munden v. Hayes, 203 P.2d 113, 89 Cal.App.2d 772.

Set-off against tax-title claimant
Owner suing to quiet title was not entitled to set off money judgment held against tax-title claimant in reduction of amount required to reimburse tax-title claimant's assignee for money paid county in satisfaction of its tax claim.—Reeve v. Blatchley, 147 P.2d 861, 106 Utah 259.

81. Ark.—Moorehead v. Dial, 204 S. W. 424, 134 Ark. 548.
51 C.J. p 279 note 81.

82. Kan.—Robertson v. Bear, 112 P. 101, 83 Kan. 468.
Right of plaintiff to recover for rents and profits see supra § 96.

83. Wis.—Kimball v. Baker Land, etc., Co., 140 N.W. 47, 152 Wis. 441.

84. Ark.—Evans v. Jeffries, 198 S. W.2d 62, 210 Ark. 807.

85. Ariz.—Shumway v. Barley, 106 P.2d 194, 56 Ariz. 124.
Mo.—Podesta v. Union Land Co., 133 S.W. 109, 152 Mo.App. 393.

86. Ark.—Duncan v. Board of Directors of Newport Levee Dist., 178 S.W.2d 660, 206 Ark. 1130.

87. Iowa.—Burke v. Early, 33 N.W. 677, 72 Iowa 273.

88. Ill.—Miller v. Cook, 26 N.E. 756, 135 Ill. 190, 10 L.R.A. 202.

89. Ky.—Kash v. Lewis, 6 S.W.2d 1038, 224 Ky. 679.
51 C.J. p 279 note 87.

90. Ariz.—Lee v. New York Life Ins. Co., 145 P.2d 843, 61 Ariz. 177.
51 C.J. p 279 note 88.

91. Ala.—Hammock v. Oakley, 154 So. 906, 228 Ala. 588.
Cal.—Shimpones v. Stickney, 28 P. 2d 673, 219 Cal. 637—Deal v. First Nat. Bank, 278 P. 233, 207 Cal. 347—Fontana Land Co. v. Laughlin, 250 P. 669, 199 Cal. 625, 46 A.L.R. 1308—Kaya v. Bundy, 207 P. 2d 113, 92 Cal.App.2d 497—Brown v. Los Angeles County, 176 P.2d 753, 77 Cal.App.2d 814—Howell v. Dowling, 136 P.2d 630, 62 Cal.App. 2d 487—Wilbur v. Donohoe Kelly Banking Co., 91 P.2d 910, 33 Cal. App.2d 395—Bradbury v. Thomas, 27 P.2d 402, 135 Cal.App. 435—Bateman v. Kellogg, 211 P. 46, 59 Cal.App. 464—Chapman v. Hicks, 182 P. 336, 41 Cal.App. 168.

or in some cases it has been held by tendering,[92] to defendant the amount of the mortgage debt, although the mortgagee fraudulently endeavored to defeat plaintiff's title,[93] and even though such debt or the lien thereof is barred by the statute of limitations.[94] So, where a valid mortgage has been foreclosed, even though the proceedings were void, a purchaser of the equity of redemption, subject to the mortgage, cannot maintain an action to quiet title against the purchaser at the foreclosure sale unless he pays or tenders the amount of the mortgage debt.[95] Likewise, where the interest of the mortgagor escapes being bound by a decree in foreclosure, through a slip in the proceedings, and he subsequently comes into equity to be relieved of the cloud cast on his interest by reason of such proceedings, he will be required to pay defendant his proportion of the mortgage debt.[96] Defendant, however, cannot have affirmative relief for his outlawed debt,[97] and the proper judgment is that, on failure of plaintiff to pay the amount due within a specified time, his action will be dismissed.[98]

Payment of a mortgage debt is not always required as a condition of quieting title.[99] Where land is encumbered by mortgaged liens of different priorities, the purchaser of the equity of redemption, if he is in possession under such purchase, may maintain an action to quiet his title against the holder of a junior mortgage, without having paid off the senior mortgage.[1] A tender of the mortgage debt is not a condition precedent to a statutory action by the owner in possession to determine an adverse claim against the assignee of a mortgage on the property.[2] An offer before suit to do equity by tendering payment of the mortgage debt is not indispensable in an action by the mortgagor to cancel the mortgage and have the foreclosure sale declared void, where such sale was voidable at his option and he seeks to defeat the whole instrument and the lien thereunder.[3] Where the grantee in a deed, which was in fact a mortgage, conveyed the property to a third person who insisted that he purchased without notice, and there was no intent to assign the debt, the grantors suing to quiet title need not pay or tender the amount of the debt to the third person.[4] It has also been held that, where a mortgage executed by a married woman is void because prohibited by a statute founded on public policy, equity will remove the cloud from her title without requiring payment of the mortgage debt.[5]

The rule as to outlawed mortgages has been held inapplicable to a plaintiff who is not the mortgagor and does not claim under, but adversely to, him,[6] or to one who purchases the land after the mortgage has become barred, as shown by the records.[7] Payment of the mortgage debt before quieting title

Idaho.—Gerken v. Davidson Grocery Co., 296 P. 192, 50 Idaho 315.
Ind.—Kerfoot v. Kessener, 84 N.E. 2d 190, 227 Ind. 58—Shaw v. Meyer-Kiser Bank, 156 N.E. 552, 199 Ind. 687.
Md.—Cunningham v. Davidoff, 53 A. 2d 777, 188 Md. 437.
Mont.—Frisbee v. Coburn, 52 P.2d 882, 101 Mont. 58.
Okl.—Higgs v. Renfrow, 159 P.2d 749, 195 Okl. 545.
Wyo.—Harney v. Montgomery, 213 P. 378, 29 Wyo. 362.
51 C.J. p 279 note 89, p 280 note 93.
Necessity that plaintiff do equity generally see supra § 94.

Omission of wife from foreclosure

Where husband has been made party defendant to foreclosure judgment, wife will not be permitted to recover land without paying debt, notwithstanding she was omitted in the action.—Gerken v. Davidson Grocery Co., 296 P. 192, 50 Idaho 315.

Failure to record notice of advances

Plaintiffs were not entitled to have title quieted without payment of mortgage note executed to county for general indigent aid, hospitalization, and medical relief furnished by the county, because of the fact that county did not record notice of advances in office of county recorder.—Brown v. Los Angeles County, 176 P.2d 753, 77 Cal.App.2d 814.

92. Cal.—Potter v. Entler, 163 P.2d 490, 71 Cal.App.2d 710.
51 C.J. p 280 note 90.
Offer in bill or complaint to do equity by repaying consideration received see supra § 65.

Offer held timely

Mich.—McArthur v. Dumaw, 43 N.W. 2d 924, 328 Mich. 453.

93. U.S.—Stoffela v. Nugent, Ariz., 30 S.Ct. 600, 217 U.S. 499, 54 L.Ed 856.
51 C.J. p 280 note 91.

94. Ariz.—Farrell v. West, 114 P. 2d 910, 57 Ariz. 490.
Cal.—Kays v. Bundy, 207 P.2d 113, 92 Cal.App.2d 497—Brown v. Los Angeles County, 176 P.2d 753, 77 Cal.App.2d 814—Chapman v. Hicks, 182 P. 336, 41 Cal.App. 158.
51 C.J. p 280 note 92.

95. Neb.—Westerfield v. Howell, 129 N.W. 986, 88 Neb. 463.

96. Cal.—Johnston v. San Francisco Sav. Union, 16 P. 753, 75 Cal. 314, 7 Am.S.R. 129.

97. Cal.—Boyce v. Fisk, 42 P. 473, 110 Cal. 107—Marshutz v. Seltzor, 89 P. 877, 5 Cal.App. 140.

98. Cal.—Boyce v. Fisk, 42 P. 473, 110 Cal. 107.

99. **Termination of obligation to pay**

The rule requiring payment of a debt as a condition of having title quieted has no application to a husband seeking to quiet title to property which was subject to a deed of trust to secure his obligation under an agreement to make payments for the support of his children, where his obligation to make such payments terminated because of the return of the children to him.—Riccomini v. Riccomini, 176 P.2d 750, 77 Cal.App.2d 850.

1. Ind.—Holten v. Lake County, 55 Ind. 194.

2. Cal.—Mentry v. Broadway Bank, etc., Co., 129 P. 470, 20 Cal.App. 388.

3. Wyo.—Harney v. Montgomery, 213 P. 378, 29 Wyo. 362.

4. Cal.—Smith v. J. R. Newberry Co., 131 P. 1055, 21 Cal.App. 432.

5. Ala.—Richardson v. Stephens, 25 So. 39, 122 Ala. 301—Lansden v. Bone, 8 So. 65, 90 Ala. 446.

6. Cal.—Klumpke v. Henley, 140 P. 289, 313, 24 Cal.App. 35—Marshutz v. Seltzor, 89 P. 877, 5 Cal.App. 140.

7. Cal.—Fontana Land Co. v. Laugh-

as against the mortgage has been held not required of one who was not a party to the mortgage and who purchased the property for value after the mortgage lien had become extinguished by virtue of the dismissal of a foreclosure suit.[8] Further, since the rule requiring the mortgagor to pay his debt is based on equitable principles, it is inapplicable where the mortgage or deed of trust was fraudulently procured.[9] Moreover, the rule is imposed as a condition of granting relief, and does not apply where relief is denied and the action dismissed.[10] Where the holder of an outlawed mortgage himself asks for affirmative relief on the mortgage, the court may declare such mortgage barred, without requiring the holder of the legal title of the premises to do equity by tendering payment of the amount due on the mortgage.[11]

I. JUDGMENT OR DECREE AND ENFORCEMENT THEREOF

§ 103. Nature, Form, and Requisites

a. In general
b. Form and requisites

a. In General

It has been held that the decree in a suit to remove a cloud from title ordinarily operates in personam, whereas the decree in a suit to quiet title is in rem or at least partakes of the nature of a judgment in rem.

It has been held that the decree in a suit to remove a cloud from title, unless otherwise provided by statute, operates in personam only, by restraining defendant from asserting his claim and directing him to deliver up his deed to be canceled, or to execute a release to plaintiff.[12] On the other hand, it has been held that the decree in a suit to quiet title is in rem,[13] or, if not in rem strictly speaking, settles the title to realty, and to that extent partakes of the nature of a judgment in rem.[14] A judgment in favor of plaintiff is unauthorized where there is no person or entity before the court as a defendant against whom judgment can be entered.[15]

b. Form and Requisites

The judgment or decree in a suit to quiet title should determine all the issues, be in proper form, and comply with statutory requisites; and it should describe the property involved with reasonable certainty.

The judgment or decree must determine all the issues,[16] definitely fix and settle the rights of the parties,[17] follow the findings and decision,[18] and comply with any statutory provisions regulating the form and requisites of judgments in actions to determine adverse claims.[19] Where the bill or complaint is dismissed because plaintiff is not in possession,[20] or because the deed sought to be canceled is void on its face and hence not a cloud,[21] the reason for the dismissal should be stated, or at least the judgment should not be so absolute as to constitute a bar to the maintenance by plaintiff of another form of action to enforce or protect his rights. Where the deed, under which a party claims, conveys the property to him as long as used for a specified purpose, a decree quieting title in him absolutely is improper, since it should provide merely that title be quieted in him as long as the property is used for the specified purpose.[22]

lin, 250 P. 669, 199 Cal. 625, 48 A.L.R. 1308.
51 C.J. p 280 note 6.

8. Cal.—Nelson v. Geiss, 7 P.2d 720, 120 Cal.App. 247.

9. Cal.—Howell v. Dowling, 126 P.2d 630, 52 Cal.App.2d 487.

10. Neb.—Morriam v. Goodlett, 54 N.W 686, 36 Neb. 384.

11. Neb.—Herbage v. McKee, 117 N.W. 706, 82 Neb 354—Peterson v. Ramsey, 110 N.W. 728, 78 Neb. 235.

12. U.S.—Hart v. Sansom, Tex., 3 S.Ct. 586, 110 U.S. 151, 28 L.Ed 101.

13. U.S.—Sain v. Montana Power Co., D.C.Mont., 20 F.Supp. 843.

14. U.S.—Corpus Juris cited in Sain v. Montana Power Co., D.C.Mont., 20 F.Supp. 843, 846.
51 C.J. p 281 note 15—50 C.J. p 503 note 88.
Nature of action generally see supra § 7.

15. Cal.—Tanner v. Best's Estate, 104 P.2d 1084, 40 Cal.App.2d 442.

16. N.M.—Miera v. Sammons, 248 P. 1096, 31 N.M. 599.
51 C.J. p 281 note 16.
Nature and extent of relief in general see supra § 95.

17. Utah.—Duncan v. Hemmelwright, 186 P.2d 965, 112 Utah 262.
51 C.J. p 281 note 17.

Judgments or decrees held sufficient
Ariz.—Mosher v. Wayland, 158 P.2d 654, 62 Ariz. 498, appeal dismissed 66 S.Ct. 58, 326 U.S. 682, 90 L.Ed. 399.
Cal.—San Diego Improvement Co. v. Brodie, 8 P.2d 1027, 215 Cal. 97—Sylvester v. Kirkpatrick, 180 P. 2d 36, 79 Cal.App.2d 443—Pacific States Savings & Loan Co. v. Perez, 124 P.2d 184, 51 Cal.App.2d 84—Tristram v. Marques, 3 P.2d 947, 117 Cal.App. 393.
51 C.J. p 281 note 17 [e].

Decree held ambiguous
Decree quieting title was ambiguous where it stated that defendants were owners during "all the times mentioned herein," since it was not clear whether the reference was to all dates mentioned in the decree or all times mentioned in the pleadings or proceedings in the case.—Duncan v. Hemmelwright, 186 P.2d 965, 112 Utah 262.

18. Cal.—Sparks v. Mendoza, 189 P. 2d 43, 83 Cal.App.2d 511.
51 C.J. p 281 note 21.

19. N.Y.—Doscher v. Wyckoff, 113 N.Y.S. 655, 63 Misc. 414, affirmed 116 N.Y.S. 389, 132 App.Div. 139.
51 C.J. p 281 note 18.

20. Mo.—McRee v. Gardner, 33 S.W. 166, 131 Mo. 599.

21. U.S.—Peirsoll v. Elliott, Ky., 6 Pet. 95, 8 L.Ed. 332.
51 C.J. p 282 note 24.

22. Iowa.—Presbyterian Church of

The use of an incorrect term in a decree quieting title in plaintiff will not vitiate the decree where it is apparent that such term was not used in its strict sense, and the decree was fully warranted by the pleadings and evidence.[23] Where defendant's cross bill is insufficient to warrant recovery, is not supported by the evidence, and its averments are covered by the general findings, failure to mention such cross bill in the final decree is not error.[24]

Imposition of terms. Where plaintiff acquired a good title by virtue of a sale by a trustee in bankruptcy, defendant may not complain of the form of a judgment giving him a specific time in which to pay plaintiff's claim and redeem the property.[25] A judgment in favor of defendant on the issue of title, but providing for the payment by defendant to plaintiff of a specified sum to which plaintiff is equitably entitled, should specify a definite period within which such payment must be made.[26]

Parties. A judgment in an action to quiet title in which the owners of the land were not made parties,[27] or against a person who died before the action was commenced,[28] is void. In a suit by a vendor and his vendee to remove a cloud from the title, it is error to make a decree vesting and confirming title in the vendor instead of the vendee.[29] Where the statute authorizes the court to grant relief to one of several plaintiffs, a decree in favor of the husband alone in a suit by husband and wife to quiet title is valid.[30] Where a part of the tract in controversy has been sold in parcels to different defendants, it is proper to render separate judgments in respect of the rights of the separate defendants[31]

Description of property. A description of the property should appear in the decree,[32] and, where title is quieted, the judgment should describe the land with reasonable certainty and such definiteness as to enable the parties to know from such description the precise limits or the location of the boundary lines thereof,[33] although it has been held that a decree need not describe the land where it specifically refers to the land as described in the bill.[34] Where a deed is the only source of title claimed in a suit to quiet title, a decree quieting title according to a survey which departs from the corners and distances plainly specified in the deed is erroneous.[35] On the other hand, the decree is sufficient if the land can be located from the description therein with reasonable certainty[36] or is capable of identification from such description by resorting to extraneous evidence,[37] and it is not essential that, from a mere inspection of the description, the court should be able to know what lands are intended, but it is enough that the property is described in a manner best known to persons familiar therewith.[38]

§ 104. Judgment or Decree by Default or Pro Confesso

A judgment or decree by default or pro confesso can

Paralta, Linn County, v Johnson, 238 N.W. 456, 213 Iowa 49

23. Mont.—Thomas v. Standard Dev. Co., 224 P. 870, 70 Mont. 156
51 C.J. p 281 note 20.

24. Mo.—Stevens v. Fitzpatrick, 118 S.W. 51, 218 Mo. 708.

25. Wash.—Strong v. Durdle, 162 P. 6, 94 Wash. 157.

26. Cal.—Warden v. Nahas, 300 P. 815, 212 Cal. 740—Faust v. City of San Diego, 1 P.2d 543, 115 Cal.App. 277.

27. Colo.—Inman v. White, 122 P. 65, 21 Colo.App. 427.
Kan.—Taylor v. Focks Drilling & Manufacturing Corporation, 62 P. 2d 903, 144 Kan. 626.

28. Cal.—Garrison v. Blanchard, 16 P.2d 273, 127 Cal.App. 616.
Colo.—Inman v. White, 122 P. 65, 21 Colo.App. 427.

29. Tex.—Andrews v. Palmer, 9 Tex. 491.

30. Ala.—King Lumber Co. v. Spragner, 58 So. 920, 176 Ala. 564.

31. Cal.—Morrissey v. Hammon, 117 P. 442, 160 Cal. 808.

32. Iowa.—Rance v. Gaddis, 284 N.W. 408, 226 Iowa 531.

33. Mo.—Hart v. T. L. Wright Lumber Co., 196 S.W.2d 272, 355 Mo. 397—**Corpus Juris cited in** Tillman v. Hutcherson, 154 S.W.2d 104, 110, 348 Mo. 473.
51 C.J. p 282 note 31.

Availability of description in record
A decree quieting title to land is void unless the description can be ascertained from the record.
Idaho.—Norrie v. Fleming, 112 P.2d 482, 62 Idaho 381.
Ind.—Ratliff v. Stretch, 20 N.E. 438, 117 Ind. 526

Greater particularity than in deed
Greater particularity is required in description of land in judgment and decree than in deeds, so that officer in executing judgment or decree can do so without exercise of discretion; but officer can look to existing things, such as recorded instruments, maps, monuments, and other objects which may be looked to as data furnished by description itself.—Purvear v. Smith, 173 So. 17, 233 Ala. 505.

34. Ala.—Whitmire v. Spears, 103 So. 668, 212 Ala. 583.

35. N.M.—Weeks v. Padilla, 291 P. 922, 35 N.M. 180

36. Ind.—O'Connor v. Baum, 100 N.E. 581, 54 Ind.App. 195.
51 C.J. p 282 note 33.

Descriptions held proper or sufficient
Cal.—Cuthbert Burrell Co. v. Shirley, 148 P.2d 85, 64 Cal.App.2d 52.
Ind.—De Long v. Starkey, App., 92 N.E.2d 228.
Mich.—Wicker v. Trombly, 18 N.W. 2d 817, 311 Mich. 262.

Description held insufficient
Utah.—Duncan v. Hemmelwright, 186 P.2d 965, 112 Utah 262.

37. Idaho.—Touch v. Bates, 110 P. 265, 18 Idaho 374
51 C.J. p 282 note 34.

38. Cal.—Newport v. Hatton, 271 P. 471, reheard 279 P. 134, 207 Cal. 515.

Location by surveyor
Descriptions of land in judgment in suit to quiet title thereto are sufficient, if competent surveyor can locate land on ground from such descriptions, with or without aid of extrinsic evidence.—Wagnor v. Blume, 161 P.2d 1001, 71 Cal.App.2d 94.

be rendered in a suit to quiet title, although in some jurisdictions such a default judgment cannot be entered of course but only after the plaintiff proves his cause of action. The court has power, in a proper case, to set aside, or grant relief from, such a judgment.

A judgment by default in an action to quiet title as against a nonresident is not unauthorized and void, where there was constructive service of the summons on him by publication and defendant did not answer and appear in the action.[39] In some jurisdictions a default judgment cannot be entered of course, but plaintiff is required to prove his cause of action,[40] while in others it has been held that a default admits all the material allegations of the bill or complaint, and that, where such allegations are sufficient, plaintiff is entitled to judgment without further proof.[41] A statute providing that, if the allegations of a bill to quiet title are taken as confessed, and a decree pro confesso rendered, a final decree may be rendered without the taking of further proof or reference thereof to a master has been held valid.[42]

The court may not indulge presumptions, in support of a decree pro confesso or a default judgment quieting title, which have no support in the issues tendered by the complaint on which the judgment was entered.[43] In a suit to quiet title against invalid assessments for local improvements, the default of the municipality in failing to answer is an admission only that defendant has no interest or estate in plaintiff's property, and that the assessment was invalid, but not that there was no basis for a valid assessment.[44]

Setting aside or relief from default. The power of the court to relieve from a default judgment extends to default judgments entered in actions to quiet title.[45] Such a judgment may be set aside for fraud,[46] but the fraud must be in fact, and not mere technical fraud,[47] and must be established by clear, strong, and cogent evidence.[48] It is not indispensable, however, that a petition for the review of a default judgment in a suit to quiet title, rendered on service by publication, allege fraud.[49] It has been held that a default judgment against unknown persons will not be set aside, at the instance of the representative of the estate of the record owner, on the ground that the record owner was dead at the time the action was commenced, in the absence of a claim that plaintiff knew of such death.[50]

The court may set aside a decree pro confesso, entered in a suit to remove a cloud on title, on condition that defendant pay the costs which have accrued.[51] Under some circumstances a petition to set aside a default judgment may be considered a petition for review as well as a petition to set aside the judgment.[52]

§ 105. Construction, Operation, and Effect

The general rules governing the construction, operation, and effect of judgments or decrees in equity apply to judgments and decrees in actions to quiet title.

The ordinary rules governing the construction, operation, and effect of judgments or decrees in equity apply to judgments and decrees in actions to quiet title or remove clouds thereon.[53] As discussed

39. Cal.—Perkins v. Wakeman, 25 P. 51, 86 Cal. 580, 21 Am.S.R. 67.
51 C.J. p 282 note 37.

40. N.D.—Murphy v. Missouri, etc., Land, etc., Co., 149 N.W. 957, 28 N.D. 519.
51 C.J. p 282 note 38.

Effect of failure to support claim
Where evidence in action to quiet title failed to support plaintiff's claim of adverse possession, order that plaintiff take nothing against defaulting defendants and dismissing action was proper.—Le Vasseur v. Roullman, 20 P.2d 250, 93 Mont. 552.

41. Fla.—Barton v. Moline Properties, 164 So. 551, 121 Fla. 683, 103 A.L.R. 725.
51 C.J. p 282 note 39.

42. Fla.—McDaniel v. McElvy, 108 So. 820, 91 Fla. 770, 51 A.L.R. 731.

43. Miss.—Woodard v. Moss, 30 So. 2d 420, 202 Miss. 32.
Mont.—State v. District Court of Eighth Judicial Dist., 284 P. 128, 86 Mont. 387.

44. Or.—Beezley v. Astoria, 269 P. 216, 126 Or. 177, 60 A.L.R. 504.

45. Colo.—Wenig v. Lyons, 252 P. 889, 81 Colo. 6.
51 C.J. p 282 note 44.

46. Mo.—McFadin v. Simms, 273 S. W. 1050, 309 Mo. 312.

47. Mo.—McFadin v. Simms, supra.

48. Mo.—McFadin v. Simms, supra.
51 C.J. p 283 note 47.

49. Mo.—Chilton v. Cady, 250 S.W. 403, 298 Mo. 101.

50. Utah.—Parker v. Ross, 217 P. 2d 373.

51. Miss.—Alexander v. Hyland, 45 So.2d 739, 208 Miss. 890.

52. Mo.—Chilton v. Cady, 250 S.W. 403, 298 Mo. 101.

53. Cal.—Houser v. Houser, 44 P.2d 316, 3 Cal.2d 371.—Kellogg v. Huffman, 30 P.2d 593, 137 Cal.App. 278 —Hurt v. Pico Inv. Co., 29 P.2d 310, 136 Cal.App. 290.
Ind.—Grantham Realty Corporation v. Bowers, 22 N.E.2d 832, 215 Ind. 672.
Iowa.—Lackender v. Morrison, 2 N. W.2d 286, 231 Iowa 899.
Wash.—Garvey v. Garvey, 101 P. 45, 52 Wash. 516.
51 C.J. p 283 note 50.
Operation and effect of judgment by default see supra § 104.

Cancellation of deed
Court's declaration in action to quiet title that deed was null and void was in effect a cancellation of the deed.—Morrifield v. Buckner, 70 P.2d 896, 41 N.M. 442.

Description of property
(1) A decree confirming title of plaintiff's vendor, and showing that land conveyed to plaintiff was part of the land acquired by vendor from his father, cured insufficient description of land in deed to vendor's father.—Hull v. Hull, 205 S.W.2d 211, 212 Ark. 808.

(2) The omission of a section from the description of the land in a judgment removing a cloud from defendant's title does not entitle plaintiff to recover an interest in such section where the judgment also denies plaintiff any recovery on

in Judgments § 738, the judgment or decree in an action to quiet title bars subsequent litigation between the parties or their privies on the same cause of action, and is conclusive, not only as to all issues actually involved and determined, but also as to such matters as might have been litigated. The effect of a confirmation decree rendered under a statute providing for the confirmation of titles must be determined with reference to the act under which it was rendered.[54] A judgment for plaintiff in an action to quiet title to easements acquired by adverse use should be interpreted in the light of the use for which the easements were acquired by plaintiff and the right of defendant to make a reasonable use of the land subject to the easements thus acquired.[55] A judgment by a court of general jurisdiction quieting title implies a finding that all defendants in the action have been duly served with notice of the pendency of the action as required by law.[56] The validity of a judgment quieting title as against a particular defendant may be immaterial where such defendant previously conveyed his interest to another defendant against whom plaintiff obtained a valid judgment.[57]

The decree operates only on land within the territorial jurisdiction of the court, and has no extraterritorial force.[58] A judgment adjudging plaintiff to be the owner in fee, and that defendant has no right, title, or interest in the property, does not invest plaintiff with a new title, but merely determines what title he already has.[59] Where both parties claim sole ownership of the land, the effect of a decree quieting plaintiff's title to an undivided one half thereof as against defendant's claim is to quiet the record title in each of the parties as against the claims of the other.[60] A decree which adjudges that defendant has an estate in fee simple in the land, and that complainant has no interest therein, includes a determination that defendant is entitled to possession.[61] One entitled to possession of accreted lands under a decree of court quieting title against those in possession and those having or claiming any interest therein has a superior right until he is divested of such right by the final judgment of a court having jurisdiction of the subject matter.[62] Where the title to securities is quieted, the debtors thereon, although not parties to the action, may safely act on the adjudication, and make payment to such parties as the court decides are entitled thereto.[63] A judgment quieting title in a widow to land inherited by her from her husband cannot change the operation of the statute of descents, and confers no right on one who, if she survives, will be an heir of plaintiff as to the land in controversy.[64]

Decree as final. In accordance with the general rules as to what constitutes a final decree, particular decrees rendered in suits to quiet title or to remove a cloud have been held not to be final,[65] or to be in effect final as to all issues except an accounting.[66]

his action in trespass to try title.—Kreis v. Kreis, Tex.Civ.App., 75 S.W. 2d 938, error refused.

Liability for payment of monthly sums

Judgment quieting plaintiffs' title and requiring plaintiffs to make certain monthly payments was held intended to make monthly sums payable only from income of property and not to make plaintiffs personally liable, when read in connection with stipulation on which judgment was rendered.—Houser v. Houser, 44 P.2d 816, 3 Cal.2d 371.

Suspension of period of limitation

(1) The period of limitations through which plaintiffs' title by adverse possession might have been ripening was suspended during the years in which action to quiet title was pending, and by judgment in such action adverse to plaintiffs, plaintiffs' claim was denied.—Warfield Natural Gas Co. v. Ward, 149 S.W.2d 705, 286 Ky. 73.

(2) Where decree quieting title in plaintiff had been entered some nine years prior to stipulation of defendant that plaintiff was entitled to a writ of possession, the writ was issued some six years later, and trial court denied defendant's motion to quash writ, the stipulation tolled statute limiting effectiveness of judgments to ten years.—Dodd v. Simon, 129 P.2d 224, 113 Mont. 536.

Order for writ of assistance

Judgment quieting title to land and directing writ of assistance to issue if possession should not be surrendered within certain time thereafter was held not affected, with respect to ownership of unharvested crop, by order entered after lapse of such time that writ should not issue until after specified future date.—Short v. Short, 40 P.2d 752, 180 Wash. 514.

54. Ark.—Abbott v. Butler, 201 S.W.2d 1001, 211 Ark. 681.

55. Cal.—O'Banion v. Borba, 195 P. 2d 10, 32 Cal.2d 145.

56. Ind.—Grantham Realty Corporation v. Bowers, 22 N.E.2d 832, 215 Ind. 672.

57. Okl.—Howell v. Hart, 69 P.2d 1043, 180 Okl. 397.

58. Mo.—Long v. Lackawanna Coal, etc., Co., 136 S.W. 673, 233 Mo. 713. Okl.—Harber v. McKeown, 157 P.2d 758, 195 Okl. 290. Wash.—Miles v. Chinto Mining Co., 153 P.2d 856, 21 Wash.2d 902, opinion adhered to 156 P.2d 235, 21 Wash.2d 902.

59. Mo.—McFadin v. Simms, 273 S.W. 1050, 309 Mo. 312.

60. Wash.—Del Notaro v. Douglas, 104 P. 774, 55 Wash. 493.

61. N.J.—Brady v. Carteret Realty Co., 90 A. 257, 82 N.J.Eq. 620, Ann. Cas.1915B 1093.

62. Neb.—State ex rel. Conkey v. Ryan, 285 N.W. 923, 136 Neb. 334.

63. Wis.—Franke v. H. P. Nelson Co., 147 N.W. 13, 157 Wis. 241. 51 C.J. p 283 note 58.

64. Ind.—Dodd v. Shanton, 90 N.E. 1041, 45 Ind.App. 377

65. **Debt for sale of timber**

Decree adjudging that complainant in quiet title suit was indebted to intervening administrator for timber sold by complainant from lands of estate less such sums as complainant paid as taxes on property and his interest from date of such payments was not a final decree.—Gandy v. Hagler, 16 So.2d 305, 245 Ala. 167.

66. Miss.—Robbins v. Berry, 47 So 2d 846, 209 Miss. 422.

Under some statutes a decree quieting title, where service on unknown heirs has been made by publication, does not become final until the lapse of a specified time after the decree.[67]

Retroactive operation. A judgment quieting plaintiff's title, recovered after an alleged trespass on the land, has no retroactive effect on the right of plaintiff to sue for the trespass.[68]

Muniment of title. Decrees in suits to quiet title are intended to stand for all time as muniments of title.[69]

Transferring defendant's title to plaintiff The ordinary decree does not have the effect of transferring to plaintiff, as against a stranger to the suit, the title theretofore held by defendant;[70] but, where the decree includes an order for defendant to convey to plaintiff whatever interest he may have in the realty involved, it effects a transfer of title as effectually as a voluntary conveyance.[71] It has been held that in a suit by a grantee against a grantor to quiet title, in which defendant denied that he claimed the land, and admitted that he had conveyed it to plaintiff, a judgment quieting plaintiff's title vested in plaintiff all of defendant's title, even as against persons not parties to the action, unless they claim under a deed from defendant prior to the institution of the action.[72] Where a decree quieting plaintiff's title revests the title in him, defendant's rights are not affected by plaintiff's failure to pay to a third person a sum which the decree made a lien on the land.[73]

Failure to record decree. Where the statute authorizes a party obtaining a decree quieting title to have an exemplification of the decree recorded in the office of the register of deeds, and he fails to do so, he cannot claim the benefit of the statute as against one not a party to the action whose instrument of title was first recorded.[74]

Destroying liens. A decree quieting title destroys all liens not protected by proper provisions in the decree, if the lienholders were made parties defendant;[75] but does not affect lienholders who were not made parties.[76]

§ 106. Opening, Vacating, or Setting Aside

The decree may be canceled in a direct proceeding or vacated on motion on a proper showing, but is not subject to attack by a person having no interest in the land.

Where the jurisdiction of the court is wrongfully invoked by false allegations in the bill, the decree may be canceled in a direct proceeding[77] or such decree maybe vacated on motion.[78] The decree is not subject to attack by a person having no interest in the land.[79] The right to have the decree set aside, if application is made within a specified time, sometimes exists by virtue of statute.[80]

§ 107. Amendment and Modification

The decree in a suit to quiet title may be amended or modified at a proper time where the circumstances so require.

A court of equity in a suit to quiet title may modify the decree in matters affecting the details of performance, and make further or supplemental orders, where the circumstances so require, in order that the original decree can be acted on.[81] The court also has inherent power, before its judgment becomes final, to modify or correct it, so that it will conform to the issues[82] and findings.[83] A decree may be amended on the ground of constructive fraud in a proper case.[84]

67. Ill.—Ewing v. Plummer, 140 N. E. 42, 308 Ill. 585.

68. Mo.—Dunavant v. Pemiscot Land, etc., Co., 173 S.W. 747, 188 Mo.App. 83.

69. Ala.—Wise v. Massee, 196 So. 275, 239 Ala. 559.

70. Mo.—Dunavant v. Pemiscot Land, etc., Co., 173 S.W. 747, 188 Mo.App. 83, 90.
51 C.J. p 283 note 67.

71. Cal.—Corpus Juris quoted in Scott v. Warden, 296 P. 95, 98, 111 Cal.App. 587.
51 C.J. p 284 note 70.

72. Ky.—Kentucky Union Co. v. Cornett, 66 S.W. 728, 112 Ky. 677, 23 Ky.L. 1922.

73. Mo.—McKenzie v. Donnell, 106 S.W. 40, 208 Mo. 46.

74. Neb.—McCarthy v. Benedict, 133 N.W. 410, 90 Neb. 386.

75. Fla.—Corpus Juris cited in San Sebastian Development Corporation v. Couch, 138 So. 61, 63, 103 Fla. 892.
51 C.J. p 284 note 73.

76. Cal.—McDonald v. McCoy, 53 P. 421, 121 Cal. 55.
Iowa.—Jasper County v. Sparham, 101 N.W. 134, 125 Iowa 464.

77. Miss.—Brooks-Scanlon Co. v. Stogner, 75 So. 596, 114 Miss. 736.
51 C.J. p 284 note 76.
Relief from default judgment see supra § 104.

78. Fla.—Sawyer v. Gustason, 113 So. 57, 96 Fla. 6.

79. N.D.—Patterson Land Co. v. Lynn, 147 N.W. 256, 27 N.D. 391.
51 C.J. p 284 note 78.

80. Ind.—Taylor v. Phelan, 69 N.E. 2d 145, 117 Ind.App. 40.

Mo.—Dillbeck v. Johnson, 139 S.W. 2d 885, 344 Mo. 845.
51 C.J. p 284 note 79.

81. Cal.—Los Angeles Auto Tractor Co. v. Los Angeles County Super. Ct., 271 P. 363, 94 Cal.App. 433.
51 C.J. p 284 note 81.

82. Cal.—Balsam v. Perazzo, 295 P. 330, 221 Cal. 375.
Wash.—Fisher v. Jackson, 206 P. 929, 120 Wash. 107.

83. Iowa.—Irish v. Steeves, 134 N. W. 634, 154 Iowa 280.

84. Ark.—Chronister v. Robertson, 185 S.W.2d 104, 208 Ark. 11.
Laches not shown
Where, although defendants admitted that title was in plaintiffs, court erroneously quieted title in defendants, and plaintiffs' inaction had not postponed decision and defendants were not injured by alleged delay,

§ 108. Enforcement

The court may direct such process or make such order as may be necessary to carry into execution the decree granted in a suit to quiet title; and to this end a writ of assistance or a writ of possession may issue in a proper case in order to enable the successful party to obtain possession.

When the decree declares the rights of the respective parties, the court may subsequently direct such process, or make such order, as may be necessary to carry the decree into execution,[85] although it has been held that, if the decree orders complainant to pay defendant a certain sum in order to do equity, the decree should award execution therefor.[86] Where title has been quieted by decree against one in possession, a mandatory injunction is a proper remedy to enforce it.[87] Under some circumstances a decree quieting title in one of the parties may be ordered to be held in abeyance for a specified period in order to enable the unsuccessful parties to take steps to recoup losses on the property which they incurred without any fault on their part.[88]

Writ of assistance or possession. A decree which determines that a party is entitled to possession may be enforced by a writ of assistance[89] or a writ of possession.[90] The remedy by writ of possession under a decree quieting title is the same as though issued on a judgment in an action at law for the possession of real property,[91] and the writ may issue even though it is not ordered by the decree.[92] It has been held not a sufficient defense to an application by the successful party for a writ of possession to show that, subsequent to the date of the judgment, the unsuccessful party acquired title to the property,[93] nor is it a defense to the unsuccessful party that he has made improvements on the property.[94]

An order permitting the issuance of the writ which is permitted to lie dormant for an unreasonable length of time loses its effectiveness and must be treated as abandoned,[95] and, even though the right to the writ has not been exhausted, nevertheless, in order to obtain the writ after the lapse of a reasonable time, an application must be made to the court.[96]

J. REVIEW AND COSTS

§ 109. Appeal and Error

Matters relating to the review of actions to quiet title are considered in Appeal and Error.

Examine Pocket Parts for later cases.

§ 110. Costs

The right to costs generally in suits to quiet title is considered infra § 111; and the amount and items allowable are considered infra § 112. The application in suits to quiet title of the general rule that costs are allowed to the prevailing party is considered in Costs § 10 b.

Examine Pocket Parts for later cases.

§ 111. —— Right

a. In general
b. On disclaimer

plaintiffs were not barred by laches from having decree amended on ground of constructive fraud so as to quiet title to such land in them.—Chronister v. Robertson, supra.

85. Tex.—Smith v. Miller, 17 S.W. 399, 66 Tex. 74

86. Ill.—Gage v. Schmidt, 104 Ill. 106.
Necessity of doing equity see supra § 94.

87. Neb.—Whitaker v. McBride, 98 N.W. 877, 5 Neb., Unoff., 411.

88. Wash.—Roy Inv. Co. v. Holmes, 292 P. 403, 159 Wash. 244.

89. N.J.—Brady v. Carteret Realty Co., 90 A. 257, 82 N.J.Eq. 620.
Decree for delivery of possession to:
Defendant see supra § 101.
Plaintiff see supra § 96.

Discretion to deny writ
Where issue of adverse possession was not litigated in original proceedings to quiet title in which title was found to be in defendant and on defendant's application for a writ of assistance to put himself into possession plaintiff established by affidavit a prima facie case of adverse possession, court had discretion to deny the writ.—Griggs v. Griggs, 31 S.E.2d 505, 205 S.C. 272.

90. U.S.—Ohio Oil Co. v. Thompson, C.C.A.Mo., 120 F.2d 331, certiorari denied 62 S.Ct. 112, 314 U.S. 658, 86 L.Ed. 528.
Ala.—Sellers v. Manasco, 25 So.2d 21, 247 Ala. 445.
Cal.—Park v. Powers, 42 P.2d 75, 2 Cal.2d 590—City of Los Angeles v. Forrester, 55 P.2d 277, 12 Cal.App. 2d 146.
Ill.—Oberein v. Wells, 45 N.E. 294, 163 Ill. 101.
Iowa.—Bates v. Bates, 24 N.W.2d 460, 237 Iowa 1408.
Mont.—Fuller v. Gibbs, 199 P.2d 851—Dodd v. Simon, 129 P.2d 224, 113 Mont. 536.

51 C.J. p. 274 note 90 [b]-[c].

91. Mont.—Dodd v. Simon, supra.

92. Mont.—Dodd v. Simon, supra.

93. Cal.—City of Los Angeles v. Forrester, 55 P.2d 277, 12 Cal.App. 2d 146.

94. Cal.—City of Los Angeles v. Forrester, supra.

95. Mont.—Dodd v. Simon, 129 P.2d 224, 113 Mont. 536.

96. Mont.—Dodd v. Simon, supra.

Statutes held applicable
Statutes limiting time of enforcement of legal rights determined by judgment applied to right under decree quieting title of realty to recover possession of realty by execution process notwithstanding decree quieting title and restraining defendant from asserting adverse claim of title was perpetual.—Dodd v. Simon, supra.

a. In General

Under some circumstances the plaintiff may be entitled to costs even though some relief is granted to the defendant; and the court may tax attorneys' fees in addition to ordinary costs under some statutes where the defendant has wrongfully refused before suit to execute a quitclaim deed

It has been held that plaintiff is entitled to costs where he is decreed to own the fee, although an easement is decreed to defendant;[97] but where the only material issue is as to the existence of an easement in favor of defendant, and judgment is for him on such issue, plaintiff is properly denied costs.[98] Where plaintiff has brought suit to remove a cloud on his title, consisting of a certain instrument, and by reason of equities in favor of defendant there is a judgment that the property be sold and that any proceeds above plaintiff's claim be applied to defendant's claim, it has been held that costs should not be awarded to either party.[99]

A mortgagee, made defendant with the owners of the fee and uniting with them in unsuccessfully contesting the action, is equally liable for costs.[1]

Previous demand for quitclaim deed. In order to avoid litigation, and enable a landowner to get rid of clouds on his title by negotiation and agreement rather than by decree of court,[2] some statutes provide that if plaintiff, before suit, makes demand on the holder of an adverse claim for a quitclaim deed, and such demand is refused, the court may, if plaintiff succeeds, tax an attorney's fee in addition to the ordinary costs, notwithstanding the filing of a disclaimer.[3] Such a statute is penal in character[4] and should be strictly applied.[5] It has been held not to authorize the imposition of costs in favor of a defendant in a partition suit, who files a cross complaint to quiet title and makes the statutory demand on plaintiffs.[6] The demand should be made directly to the party who is to execute the deed.[7] It should be for a quitclaim such as the party on whom it is made could properly execute,[8] and such as would help clear the title.[9] A joint demand by tenants in common is sufficient.[10]

b. On Disclaimer

A defendant who disclaims all title or interest in the property ordinarily is not liable for costs; but a simple disclaimer does not necessarily absolve the defendant of liability for costs where he has otherwise put the plaintiff to his proof.

In accordance with the general rule and under the express provisions of some statutes, a defendant who disclaims all title or interest in the land in controversy is not liable for costs.[11] However, a defendant who wishes to avail himself of a statutory provision relating to disclaimers, in order to save himself from costs, should not raise an issue as to possession or other material issues and put plaintiff to his proof.[12] Thus a statute relieving a disclaiming defendant from liability for costs has been held inapplicable where defendant is in possession of the land,[13] and where he refuses to yield possession without a writ, notwithstanding his disclaimer, he may be taxed with all the costs.[14] Likewise, where at the same time that defendant disclaims he also answers, and thereby occasions costs which might have been avoided by a simple disclaimer, it is proper to charge him with the costs.[15] A defendant who sets up title in himself may not claim the benefits of one disclaiming;[16] and if defendant disclaims as to some of the land, but claims title to a part, and is unsuccessful in establishing his

97. Cal.—Petitpierre v. Maguire, 100 P. 690, 155 Cal. 242.

98. Cal.—Muzio v. Erickson, 182 P. 974, 41 Cal.App. 413—Weller v. Brown, 143 P. 251, 25 Cal.App. 216.

99. N.Y.—Jones v. Garrigues, 78 N. Y.S. 400, 75 App.Div. 539.

1. Cal.—Pinheiro v. Bettencourt, 118 P. 941, 17 Cal.App. 111.

2. Iowa.—Collier v. Wetmore, 145 N.W. 944, 164 Iowa 344.

3. Iowa.—Shay v. Callanan, 100 N. W. 55, 124 Iowa 370.
51 C.J. p 287 note 39.

4. Iowa.—Stennett v. Stennett, 156 N.W. 406, 174 Iowa 431—Lawless v. Stamp, 79 N.W. 365, 108 Iowa 601.

5. Iowa.—Stennett v. Stennett, 156 N.W. 406, 174 Iowa 431.

6. Iowa.—Collier v. Wetmore, 145 N.W. 944, 164 Iowa 344.

7. Iowa.—Lawless v. Stamp, 79 N. W. 365, 108 Iowa 601.

8. Iowa.—Stennett v. Stennett, 156 N.W. 406, 174 Iowa 431.
51 C.J. p 287 note 44.

9. Iowa.—Polk v. Johnson, 165 N.W. 185.
51 C.J. p 288 note 45.

10. Iowa.—Stennett v. Stennett, 156 N.W. 406, 174 Iowa 431.

11. Cal.—Chernoff v. McKeon Drilling Co., 300 P. 815, 212 Cal. 748—Kelper v. Dunn, 279 P. 772, 207 Cal. 643—Peake v. Azusa Valley Sav. Bank, 99 P.2d 382, 37 Cal.App. 2d 296—Bradley Co. v. Ridgeway, 61 P.2d 77, 16 Cal.App.2d 632.
Fla.—Moore v. Hunter, 13 So.2d 909, 153 Fla. 158.
51 C.J. p 288 note 50.
Right to costs as affected by disclaimer generally see Costs § 67.
Default or admission
Costs as to defendants who defaulted or who appeared and admitted facts stated in petition and consented to judgment as prayed for by plaintiff should have been assessed against plaintiff and not against defendant who contested plaintiff's rights.—Boatmen's Nat. Bank of St. Louis v. Rogers, 179 S.W.2d 102, 352 Mo. 763.

12. Cal.—McMorris v. Pagano, 146 P.2d 944, 63 Cal.App.2d 446.

13. Ind.—Ragan v. Haynes, 10 Ind. 348—Scobey v. Thompson, 37 N.E. 277, 10 Ind.App. 12.

14. Ind.—McAdams v. Lotton, 20 N. E. 523, 118 Ind. 1.

15. Cal.—McMorris v. Pagano, 146 P.2d 944, 63 Cal.App.2d 446.
51 C.J. p 288 note 53.

16. Utah.—Pacific Bond & Mortgage Co. v. Beaver County, 89 P.2d 476, 97 Utah 62.
51 C.J. p 287 note 33 [b].

claim, he is properly charged with costs.[17] A defendant who filed a disclaimer but was compelled to continue in the case because a codefendant filed a cross complaint against him is entitled to recover costs against the cross complainant.[18]

Time for filing disclaimer. A disclaimer should be filed when the party first appears, in order to entitle him to costs,[19] and, if a disclaimer is subsequently filed, plaintiff is entitled to costs accruing up to the time of filing.[20]

Disclaimer and release. Where a statute provides that, if plaintiff establishes his title, defendant shall be adjudged to release him and pay the costs, unless defendant disclaims all title and gives a release, a disclaimer by defendant, without giving or tendering a release, does not entitle him to costs.[21]

§ 112. —— Amount and Items Allowable

The amount and items of costs depend to some extent on the particular circumstances

A party defendant filing a disclaimer cannot recover costs against plaintiff in a sum exceeding the amount which was necessary to enable him to file such disclaimer.[22] Where a survey is necessary to make any division intelligible, in a suit to quiet title, the fees of a surveyor called in by the court may be allowed as costs.[23] In an action to compel the determination of a claim to realty, it has been held proper to award costs and disbursements only in so far as they related to the parcels in which defendant was interested.[24]

III. STATUTORY PROCEEDINGS TO COMPEL BRINGING OF ACTION TO TRY TITLE

§ 113. Right of Action and Defenses

a. In general
b. Possession by petitioner
c. Adverse claim by respondent

a. In General

Under some statutes a person in possession of land and claiming title thereto may compel another person claiming title or interest to bring an action to test such title or interest or be thereafter barred from asserting it.

In some jurisdictions a statutory proceeding exists, or has existed, whereby a person in possession of land, claiming it as his own, may compel a person out of possession, who also claims title or interest, to bring an action to settle the question of title between them or show cause why he should not do so, and providing that on his default his claim shall be forever barred.[25] Such a statute has been held constitutional,[26] penal in its nature,[27] and subject to strict construction.[28] While the proceeding is at law rather than in equity,[29] nevertheless it is not according to the course of the common law,[30] but is purely statutory, possessing none of the features of a suit in equity to quiet title,[31] and is not intended as a substitute for the action of ejectment.[32] The general rule is that the antecedent jurisdiction of equity is not ousted by such statutes.[33] On the other hand it has been held that the statutory remedy

17. Ala.—Whitmire v. Spears, 103 So. 668, 212 Ala. 583.
Colo.—Relended v. Riggs, 79 P. 328, 30 Colo. App. 423.

18. Cal.—Summerville v. March, 76 P. 388, 142 Cal. 554, 100 Am.S.R. 145.

19. Iowa.—Korf v. Howerton, 218 N.W. 274, 205 Iowa 534.
51 C.J. p. 288 note 56.

20. Ind.—Kitts v. Wilson, 29 N.E. 401, 130 Ind. 492.

21. Wis.—Durbin v. Knox, 112 N.W. 1094, 132 Wis. 608.
51 C.J. p. 288 note 59.

22. Cal.—Summerville v. March, 76 P. 388, 142 Cal. 554, 100 Am.S.R. 145.

23. Mo.—Hart v. T. L. Wright Lumber Co., 196 S.W.2d 272, 355 Mo. 397.
Or.—Morgan v. Cleloha, 145 P. 1063, 74 Or. 468.

24. N.Y.—Nassau County v. Hardie, 53 N.Y.S.2d 40, 268 App.Div. 1067, reargument denied 53 N.Y.S.2d 956, 269 App.Div. 667—Nassau County v. Hardie, 53 N.Y.S.2d 41, 268 App. Div. 1068, appeal denied 53 N.Y.S. 2d 535, 269 App.Div. 671, reargument denied 53 N.Y.S.2d 956, 269 App.Div. 667, affirmed 62 N.E.2d 397, 294 N.Y. 848, motion denied 63 N.E.2d 180, 294 N.Y. 963—Connolly v. Curry, 52 N.Y.S.2d 856, 268 App.Div. 1067, appeal denied 53 N.Y.S.2d 535, 269 App.Div. 671, reargument denied 53 N.Y.S.2d 956, 269 App.Div. 667—Connolly v. Curry, 52 N.Y.S.2d 855, 268 App.Div. 1066, reargument denied 53 N.Y.S.2d 956, 269 App.Div. 671, affirmed 62 N.E. 2d 397, 294 N.Y. 850, motion denied 63 N.E.2d 189, 294 N.Y. 963.

25. Pa.—Dice v. Reese, 21 A.2d 89, 342 Pa. 379—City of Scranton v. O'Malley Mfg. Co., Com.Pl., 40 Lack.Jur. 9—Genuardi v. Powel, Com.Pl., 61 Montg.Co. 7, 58 York Leg.Rec. 197—Easton Trust Co. v. Schneider, Com.Pl., 29 North.Co. 111.
51 C.J. p. 289 note 69.

26. Me.—Webster v. Tuttle, 22 A. 167, 83 Me. 271.

27. U.S.—Hoffman v. New Jersey Federation of Young Men's and Young Women's Hebrew Ass'ns, C.C.A.Pa., 106 F.2d 204.
51 C.J. p. 289 note 73.

28. Pa.—Mountain Spring Ice Co. v. Lewis, 20 Pa.Dist. 89.
51 C.J. p. 289 note 74.

29. U.S.—Hoffman v. New Jersey Federation of Young Men's and Young Women's Hebrew Ass'ns, C.C.A.Pa., 106 F.2d 204.

30. U.S.—Hoffman v. New Jersey Federation of Young Men's and Young Women's Hebrew Ass'ns, supra.
51 C.J. p. 289 note 75.

31. Mo.—Daudt v. Keen, 27 S.W. 361, 124 Mo. 105.

32. Mo.—Dyer v. Baumeister, 87 Mo. 134.
51 C.J. p. 289 note 77.

33. Mass.—McArthur v. Hood Rubber Co., 109 N.E. 162, 221 Mass. 372.
51 C.J. p. 289 note 78.

provides a full, complete, and adequate remedy at law, which will prevent persons in possession from maintaining a bill in equity to remove a cloud from their title.[34]

Persons by whom proceedings may be maintained Under some provisions, any person in possession claiming an estate of freehold or an unexpired term of not less than a specified number of years may maintain the proceeding.[35] It need not be shown that the petitioner is the owner of such estate or term, but only that he claims ownership.[36] It has been held that the word "persons" includes a corporation,[37] and that the proceeding may be brought by a nonresident who holds possession through an agent.[38] Where the statute authorizes the proceeding to be brought by any person in possession claiming title, a married woman is entitled to maintain the proceeding;[39] but where husband and wife, holding an estate by the entireties, are divorced the wife is not entitled to maintain the proceeding.[40]

Persons against whom petition will lie. It has been held that the action lies against a nonresident if he can be properly served;[41] but there is also authority to the contrary.[42]

Defenses. It is a good defense to the proceeding that respondent can bring no action at law or in equity to settle the title,[43] that he has sued the petitioner in ejectment and has since recovered judgment for possession,[44] or that he has already brought suit to try his title in the federal court.[45] However, it is no defense that the practical effect of ordering respondent to prosecute an action to settle his title is to curtail the time allowed by the statute of limitations within which he might bring such an action;[46] nor is it a defense that respondent is a feme covert, and so under disability and incapable of suing alone, and that her husband might refuse to join in the appropriate action to vindicate the rights of his wife.[47]

b. Possession by Petitioner

A petitioner seeking to compel the bringing of an action to try title must be in actual and substantially exclusive possession of the land, and such requirement is jurisdictional.

A petitioner may invoke the statutory remedy to require a claimant to title to bring ejectment if petitioner is in possession and claimant is not.[48] On the other hand, statutes providing for the maintenance of the proceeding by a person in possession are mandatory[49] and make the fact of possession a jurisdictional requirement;[50] and the proceeding fails if the petitioner is out of possession at the time of filing his petition.[51]

The possession of the petitioner must be actual;[52] and therefore constructive possession which follows the legal title, or what is termed the "paper title," will not suffice.[53] However, actual occupancy of a part of a tract, under claim to the whole, is sufficient if no other person has actual or constructive possession of the residue.[54] It is not fatal to the proceeding that the petitioner's possession, shown to be actual, is under one who claims title from respondent.[55]

34. Pa.—Heller v. Fishman, 123 A. 311, 278 Pa. 328.
51 C.J. p 289 note 79.

35. Mass.—Ex parte Connolley, 46 N.E. 618, 168 Mass. 201.
51 C.J. p 289 note 80
Possession by petitioner see infra subdivision b of this section.

36. Mo.—Dyer v. Baumeister, 87 Mo. 134.

37. Mass.—Jeffries Neck Pasture v. Ipswich, 26 N.E. 239, 153 Mass. 42.
51 C.J. p 289 note 82.

38. Mo.—Root v. Mead, 58 Mo.App. 477.
51 C.J. p 289 note 83.

39. Pa.—Smith v. Clearwater, 3 Pa. Com.Pl. 34.

40. Pa.—Allen v. Lyon, 66 A. 81, 216 Pa. 604, 116 Am.S.R. 791, 9 Ann. Cas. 137.

41. Mo.—Deware v. Wyatt, 50 Mo. 236—Grant v. King, 31 Mo. 312.

42. Mass.—Macomber v. Jaffray, 4 Gray 82.
51 C.J. p 290 note 87.

43. Mo.—Webb v. Donaldson, 60 Mo. 394.

44. Mo.—McGrath v. Mitchell, 56 Mo.App. 626

45. Mo.—Deware v. Wyatt, 50 Mo. 236.

46. Mo.—Benoist v. Murrin, 47 Mo. 537.

47. Mo.—Benoist v. Murrin, supra.

48. Pa.—Brewer v. Curtis, 197 A. 780, 130 Pa.Super. 270—Petition of Keith, 11 Pa.Dist. & Co. 630, 21 North.Co. 286—Union Sunday School of Caketown v. Stoner, Com. Pl., 19 Northumb.Leg.J. 6—School Dist. of Chartiers Tp. v. McClane, Com.Pl., 22 Wash.Co. 172.

49. Pa.—Wilkinson v. Strohecker, 17 Northumb.Leg.J. 200.
51 C.J. p 290 note 90.

50. Pa.—Girard Trust Co. v. Dixon, 6 A.2d 813, 335 Pa. 253—Hemphill v. Ralston, 128 A. 459, 278 Pa. 432—First Nat. Bank of Ebensburg v. Cambria County, 51 Pa.Dist. & Co. 561—Union Sunday School of Caketown v. Stoner, Com.Pl., 19 Northumb.Leg.J. 6—Wilkinson v. Strohecker, Com.Pl., 17 Northumb.Leg. J. 200—Wilkinson v. Strohecker, Com.Pl., 16 Northumb.Leg.J. 308.

51. Pa.—Girard Trust Co. v. Dixon, 6 A.2d 813, 335 Pa. 253—Brewer v. Curtis, 197 A. 780, 130 Pa.Super. 270—First Nat. Bank of Ebensburg v. Cambria County, 51 Pa. Dist. & Co. 561—Canton Trust Co. v. Schneider, Com.Pl., 28 North.Co. 302—Wilkinson v. Strohecker, Com. Pl., 16 Northumb.Leg.J. 308.
51 C.J. p 290 note 90.

52. Pa.—Paslawski v. Borys, 11 A. 2d 199, 138 Pa.Super. 288—First Nat. Bank of Ebensburg v. Cambria County, 51 Pa.Dist. & Co. 561—Pytle v. Zyvith, Com.Pl., 26 West.Co.Leg.J. 111.
51 C.J. p 290 note 92.

53. Pa.—First Nat. Bank of Ebensburg v. Cambria County, 51 Pa. Dist. & Co. 561.
51 C.J. p 290 note 93.

54. Mo.—Marshall v. Walker, 45 A. 497, 93 Mo. 532.

55. Pa.—Welsh v. Clough, 65 A. 677, 216 Pa. 276.

As between himself and respondent, the possession of the petitioner must be substantially and practically exclusive.[56] It is not sufficient that the petitioner has mere formal or nominal possession which he could without disadvantage abandon and then bring an action himself against the claimant,[57] especially if obtained by an act of trespass, for the sole purpose of instituting the proceeding, so as to shift the burden of establishing title on respondent.[58] Likewise, it is not sufficient that the petitioner may be treated as a disseizor at the election of a respondent.[59] However, the owner of vacant property may take possession thereof for the purpose of instituting suit, if in so doing he does not act tortiously or disturb the possession of another claimant.[60] A disputed or scrambling possession is insufficient,[61] and a mere intruder or squatter upon land, without color or claim of title, is not entitled to the benefit of the statute.[62] Nevertheless, a mere denial by respondent of petitioner's possession of the land in dispute, and an averment of possession in respondent, does not deprive the court of jurisdiction of the proceeding and require a discharge of the rule.[63]

c. Adverse Claim by Respondent

In order to authorize the proceeding, the respondent must be making a claim, legal or equitable, which is adverse to the petitioner's title or interest and which can be tested by an appropriate remedy.

In order to authorize the proceeding, it must appear that respondent[64] at the time of the filing of the petition[65] is making a claim to the premises adverse to the title or interest of the petitioner; and it has been held that the proceeding cannot be maintained when it appears that respondent, after the filing of the petition, conveyed his interest in the real estate.[66]

It is immaterial whether the interest claimed by respondent is legal or equitable;[67] but it must be one which can be presently asserted,[68] and which is capable of being tested by an appropriate remedy,[69] either at law[70] or in equity.[71] However, when defendant asserts an immediate and adverse interest in the property, capable of being tested at once by appropriate proceedings in the courts, the form of action in which such adverse interest is to be asserted is immaterial.[72] The fact that a claim is invalid on the face of the record does not prevent it from being such an adverse claim as authorizes the proceeding.[73]

Although an unassigned dower interest is neither a title nor an estate, it is an adverse claim within the purview of the statute.[74] On the other hand, a petition by one in possession of realty, claiming the fee, will not be sustained when respondent's claim is merely under a mortgage of the premises,[75] and a petition will not lie on behalf of the assignee of an insolvent debtor to compel a prior mortgagee of the same debtor to bring an action to test the validity of the mortgage.[76] Some authorities hold that where the adverse claim is merely of a remainder or reversion and does not conflict with the petitioner's possession or right of possession, the case is not within the purview of the statute;[77] but

56. Mass.—Orthodox Cong. Soc. v. Greenwich, 13 N.E. 880, 145 Mass. 112.
51 C.J. p 290 note 97.

57. Mass.—India Wharf v. Central Wharf, etc., Co., 117 Mass. 504.

58. Mo.—Daudt v. Keen, 27 S.W. 361, 124 Mo. 105.
51 C.J. p 290 note 99.

59. Mass.—India Wharf v. Central Wharf, etc., Co., 117 Mass. 504.
51 C.J. p 290 note 1.

60. Mo.—Apperson v. Allen, 42 Mo. App. 537.

61. Pa.—Brewer v. Curtis, 197 A. 780, 130 Pa.Super. 270—First Nat. Bank of Ebensburg v. Cambria County, 51 Pa.Dist. & Co. 561.
51 C.J. p 290 note 3.

Mere laying of sewer or drain under surface of ground by respondent is not possession of land precluding relief to petitioner under statute since such use, while consistent with ownership and possession, constitutes rather an easement in land.—Brewer v. Curtis, 197 A. 780, 130 Pa. Super. 270.

62. Pa.—Spangler v Trogler, 77 A. 495, 228 Pa 217—Petition of Welsh, 13 Pa.Dist. 498, 29 Pa.Co. 161.

63. Pa.—Brewer v. Curtis, 197 A. 780, 130 Pa.Super. 270.

Answer unsupported by testimony

Where testimony taken in support of answer failed to show any substance in the claim of defendant to have been in possession of the disputed tract at the filing of the petition, court must find whether petitioner was in possession and, if so, make the rule absolute.—Brewer v. Curtis, supra.

64. Mo.—Benoist v. Murrin, 47 Mo. 537.

65. Pa.—Huntzinger v. Helfenstein, 10 Pa.Co. 576.

66. Me.—Allen v. Foss, 66 A. 879, 102 Me. 163.

67. Mo.—Colline Real Estate, etc., Assoc. v. Johnson, 25 S.W. 190, 120 Mo. 299.
51 C.J. p 291 note 10.

68. Mo.—Northcutt v. Eager, 33 S. W. 1125, 132 Mo. 265.
51 C.J. p 291 note 11.

69. Me.—Smith v. Libby, 64 A. 612, 101 Me. 338.
51 C.J. p 291 note 12.

70. Mass.—Tisdale v. Brabrook, 102 Mass. 374.
51 C.J. p 291 note 13.

71. Mo.—Burt v. Warren, 30 Mo. App. 332—Bredell v. Alexander, 8 Mo.App. 110.

72. Mo.—Colline Real Estate, etc., Assoc. v. Johnson, 25 S.W. 190, 120 Mo. 299.
51 C.J. p 291 note 15.

73. Mo.—Colline Real Estate, etc., Assoc. v. Johnson, supra.

74. Mo.—Benoist v. Murrin, 47 Mo 537, approving Burt v. Warren, 30 Mo.App. 332.

75. Me.—Poor v. Lord, 24 A. 583, 84 Me. 98.

76. Mass.—Dewey v. Bulkley, 1 Gray 416—Hill v. Andrews, 12 Cush. 185.

77. Mo.—Meriwether v. Love, 67 S. W. 250, 167 Mo. 514.
51 C.J. p 291 note 22.

there is other authority which adheres to a contrary rule.[78]

§ 114. Proceedings and Relief

a. In general
b. Pleadings
c. Judgment or decree and compliance therewith

a. In General

There must be strict compliance with the statutory provisions in proceedings to compel the bringing of an action to try title, and the court should limit itself to a determination of the appropriate issues.

Inasmuch as statutes providing for proceedings to compel the bringing of an action to try title are in derogation of the common law and penal in nature, as discussed supra § 113, strict compliance with the provisions thereof is required.[79]

Process. Actual notice is required to give jurisdiction; notice by publication to a nonresident is not sufficient.[80] If the notice is sufficient to apprise respondent of the nature and purpose of the proceedings, it is sufficient, although not in strict conformity with the statute.[81] Noncompliance with a provision that the rule to show cause must be served in the same manner as a summons,[82] and that it shall be made returnable to a regular term or return day,[83] is ground for discharge of the rule. If service on respondent is not proved in the manner required, the court obtains no jurisdiction.[84]

Parties Tenants in common may be joined as respondents in a petition to compel them to try their titles to the land, although their alleged titles are several.[85]

Hearing and determination; evidence. The statutory proceedings under consideration are not for the purpose of settling the title to the premises in the first instance, but are merely preliminary to an action which respondent may be ordered to bring for that purpose,[86] and, hence, all evidence tending to prove ownership in either party should be excluded.[87] The court should confine its inquiries to the questions whether petitioner is in possession of the property, claiming the estate or interest specified in the statute,[88] and whether respondent is making some claim to the premises adverse to that of the petitioner.[89] The petitioner must establish to the satisfaction of the court that he is claiming title to the realty involved;[90] and a rule on respondent to bring an action of ejectment will not be made absolute where there is nothing to show that petitioner is in possession of the property but the averments of the petition, denied by the answer.[91] Where respondent denies that plaintiff is in possession, he is entitled to have that issue tried before an order is made requiring him to institute a suit to try title.[92]

Review. A writ of error will not lie to review a judgment making the rule to show cause absolute, in the absence of any statute authorizing such writ.[93] However, such judgment is a final judgment from which an appeal will lie.[94] Where the parties desire to have the legal theory on which the trial court acted reviewed by the appellate court, instructions or declarations of law should be asked.[95] The findings of the trial court are conclusive on appeal as far as they involve questions of fact.[96] On review by certiorari, the appellate court is not confined to a mere inspection of the record, but may consider the opinion of the trial court to ascertain the basis on which it acted.[97]

Costs. If one of the respondents files a disclaimer founded on a partition of the land between respondents subsequently to the filing of the petition, he will take costs only from the date of the an-

78. Pa.—Clark v. Clark, 100 A. 457, 255 Pa. 574.
51 C.J. p 291 note 23.

79. U.S.—Hoffman v. New Jersey Federation of Young Men's and Young Women's Hebrew Ass'ns, C.C.A.Pa., 106 F.2d 204.

80. Mo.—Deware v. Wyatt, 50 Mo. 236.
51 C.J. p 291 note 32.

81. Mo.—Rees v. McDaniel, 21 S.W. 913, 115 Mo. 145.

82. Pa.—Summa v. Rettag, 4 Pa. Dist. 549, 16 Pa.Co. 511.

83. U.S.—Hoffman v. New Jersey Federation of Young Men's and Young Women's Hebrew Ass'ns, C.C.A.Pa., 106 F.2d 204.
Pa.—Summa v. Rettag, 4 Pa.Dist. 549, 16 Pa.Co. 511.

84. Mo.—Higgins v. Bockwith, 14 S.W. 931, 102 Mo. 456.
51 C.J. p 291 note 36.

85. Mass.—Gurney v. Waldron, 137 Mass. 376.

86. Pa.—McGuire v. Gilbert, 156 A. 735, 102 Pa.Super. 25—First Nat. Bank of Ebensburg v. Cambria County, 51 Pa.Dist. & Co. 561.
51 C.J. p 293 note 61.

87. Mo.—Northcutt v. Eager, 33 S.W. 1125, 132 Mo. 265.
51 C.J. p 292 note 59.

88. Mo.—Daudt v. Keen, 27 S.W. 361, 124 Mo. 105.
51 C.J. p 292 note 62.

89. Mo.—Colline Real Estate, etc., Assoc. v. Johnson, 25 S.W. 190, 120 Mo. 299.

90. Pa.—Huntzinger v. Helfenstein, 10 Pa.Co. 576.

91. Pa.—Utley v. Cobb, 19 Pa.Dist. 1106—Huntzinger v. Helfenstein, 10 Pa.Co. 576.

92. Mo.—Babe v. Phelps, 65 Mo. 27.

93. Pa.—Davenport v. Jones, 17 A. 611, 126 Pa. 271.

94. Pa.—Petition of Notley, 106 A. 716, 263 Pa. 377.
51 C.J. p 293 note 90.

95. Mo.—Daudt v. Keen, 27 S.W. 361, 124 Mo. 105—Campbell v. Allen, 61 Mo. 581.

96. Mo.—Glinn v. Ulmer, 74 A. 635, 105 Mo. 256.
51 C.J. p 294 note 93.

97. Pa.—Petition of Notley, 106 A. 716, 263 Pa. 377.

swer.[98] Where respondent's answer that he had already brought suit in a federal court is stricken as insufficient, and the judgment is reversed for such error, the costs accruing after the filing of the answer are properly taxed against the petitioner, but those accruing before the answer was filed are chargeable to respondent.[99] If the original answer contains no disclaimer, but respondent is erroneously permitted to disclaim by supplemental answer, he is chargeable with all the costs including the costs on appeal.[1]

b. Pleadings

It is necessary and sufficient that the pleadings in statutory proceedings to compel the bringing of an action to try title set forth facts justifying the relief sought.

The one actually in possession must make the petition, and not his agent or attorney.[2] If the facts which the statute requires to be alleged are sufficiently stated, the petition is sufficient, without averring other facts not expressly required, even though it is necessary that they be shown in order to maintain the proceeding.[3] Petitioner's ownership of the land need not be alleged, but only that he is in possession and claims the estate or interest specified in the statute.[4] As to an adverse claim, it is sufficient to use the language of the statute.[5]

Since the statutory proceeding follows the analogies of equity rather than law,[6] the petition need not describe the land with the particularity and definiteness required in a writ of entry or other action to try title,[7] but is sufficient if it is definite enough to apprise respondent of the land to which the petition refers.[8] However, the description contained in a petition for a rule to bring ejectment must not be so indefinite that it would not support an order making the rule absolute.[9]

Answer. If respondent appears and claims an interest, he must show cause in his answer why he should not be compelled to bring an action to test such claim, or he will be ordered to do so as a matter of course;[10] and, in showing cause, respondent should state the facts with sufficient clearness to enable the court to determine whether his claim is one which could be asserted and enforced in an independent action during petitioner's lifetime.[11] Under a general denial, the only issue raised by the pleadings is that of plaintiff's possession.[12]

Where the answer to a rule to bring ejectment has been inadvertently forgotten by counsel, without any fault of respondent, the court may, in its discretion, allow it to be filed nunc pro tunc, if the application is made before judgment on the rule and its discloses a good defense;[13] and a defendant who has filed a motion to dismiss the proceedings for want of jurisdiction has been held entitled to additional time, after an order denying his motion, within which to file an answer.[14]

Where a judgment is the only one that could properly be rendered under the original pleadings, it is error to permit defendant to file a supplemental answer while the judgment stands unrevoked, and render judgment thereon dismissing the petition.[15] On the other hand, it has been held that the court will not refuse to consider a supplemental answer because it has not been filed within the statutory period,[16] especially where no objection or exception is taken to the filing.[17]

Disclaimer. Where respondent in his answer disclaims all right and title to the land, the case is at an end, since the disclaimer itself so filed amounts in law to a bar or estoppel against defendant's claiming any right or title adverse to plaintiff.[18] The disclaimer must, however, be unqualified.[19]

98. Mass.—Gurney v. Waldron, 137 Mass 376.

99. Mo.—Deware v. Wyatt, 50 Mo. 236.

1. Mo.—Murphy v. De France, 23 Mo.App. 337.

2. Pa.—Farmers', etc., Mfg. Co. v. Goldstine, 4 Pa.Co. 428.

3. Mass.—Blanchard v. Lowell, 59 N.E. 114, 177 Mass. 501.
51 C.J. p 292 note 42.

4. Mo.—Dyer v. Baumeister, 87 Mo. 134.

5. Me.—Ginn v. Ulmer, 74 A. 635, 105 Me. 286.
Mo.—Benoist v. Murrin, 47 Mo. 537.

6. Me.—Ginn v. Ulmer, 74 A. 635, 105 Me. 286.

7. Me.—Ginn v. Ulmer, supra—Oliver v. Look, 1 A. 833, 77 Me. 585.

8. Mo.—Rees v. McDaniel, 21 S.W. 913, 115 Mo. 145.
51 C.J. p 292 note 47.

9. U.S.—Hoffman v. New Jersey Federation of Young Men's and Young Women's Hebrew Ass'ns, C.C.A.Pa., 106 F.2d 204.
Pa.—Metz v. Hoffman, 200 A. 132, 131 Pa.Super. 303

10. Mo.—Colline Real Estate, etc., Assoc v. Johnson, 25 S.W. 190, 120 Mo. 299.
51 C.J. p 292 note 48.

11. Pa.—Petition of Kennedy, 19 Pa.Super 482.
51 C.J. p 292 note 49.

12. Mo.—Murphy v. De France, 23 Mo.App. 337.

13. Pa.—Birkel v. Rhoad, 16 Pa. Dist. 956.

14. U.S.—Hoffman v. New Jersey Federation of Young Men's and Young Women's Hebrew Ass'ns, C.C.A.Pa., 106 F.2d 204.

15. Mo.—Murphy v. De France, 23 Mo.App. 337.

16. Pa.—Herron v. Fetterman, 14 Wkly.N.C. 480.

17. Pa.—Huntzinger v. Helfenstein, 10 Pa.Co. 576.

18. Mo.—Jordan v. Stevens, 55 Mo. 361.
Pa.—Lyle v. Kemp, 31 Pa.Co. 663.

19. Me.—Ginn v. Ulmer, 74 A. 635, 105 Me. 286.
51 C.J. p 292 note 56.

c. Judgment or Decree and Compliance Therewith

The relief awarded to the petitioner where the respondent defaults or fails to bring an action as directed consists of a judgment barring the respondent from thereafter claiming any title or right adverse to the petitioner.

A final judgment forever barring respondent from claiming any title or right adverse to petitioner is proper when, and only when, such respondent, ordered to show cause why he should not bring an action to try title, defaults in appearance,[20] or, having appeared, disobeys a decree to prosecute such action to final judgment;[21] and a default judgment entered without notice to the respondent, although he had appeared, is improper.[22] Where the petitioner is forced by motion of court to take a nonsuit, and files the usual motion to set it aside, the court errs in sustaining the motion and then entering a judgment forever debarring petitioner from claiming any rights adverse to respondent.[23] In a proper case, the court may decree that respondent bring an action, and that he shall not set up any title acquired after the date of the petition;[24] but, where it is shown on the hearing of the petition that any claim made by respondent is unfounded, no order should be made requiring him to bring suit.[25] Under some provisions, a judgment may not be entered on a rule to bring ejectment until after the rule is made absolute.[26]

In proceedings of this nature, where petitioner avers that he is the owner of a specified tract of land, and that respondent is claiming a small portion thereof, and respondent in his answer sets up no claim, except for the small parcel, it is error for the court, after the expiration of the statutory period after the filing of the petition, to enter a final and conclusive judgment against respondent so as to cover the whole tract.[27] Where the statute provides that, if respondent appears and claims title, the court shall make such order or decree with respect to the bringing and prosecution of such action as may seem equitable and just, the court may, in a proceeding by a nonresident, make an additional order requiring plaintiff to enter his personal appearance in the action to be brought, so as to save the costs of publication.[28]

Necessity of final judgment. An order making absolute a rule to bring ejectment within a specified time is not sufficient to bar a subsequent ejectment suit, unless petitioner also procures a judgment that respondent is in default.[29]

Dismissal. A proceeding to compel respondents to bring ejectment will be dismissed where they concede that petitioner has a life estate in the premises, and all that could be decided in an ejectment suit is just what respondents concede.[30]

Effect of judgment on disclaimer. A judgment on respondent's disclaimer does not operate as a conveyance of any new source of title to petitioner.[31]

Compliance. Ordinarily, a respondent ordered to bring an action to test his claims may bring any appropriate form of action in any court of competent jurisdiction,[32] although it has been said that "it has usually been assumed that the action contemplated by the statute is a writ of entry, or possibly an action of tort in the nature of trespass."[33] Where a rule to bring ejectment under the statute is made absolute, after respondent has appeared and answered, the time in which ejectment must be brought runs from the date of the order making the rule absolute,[34] and if respondent fails to bring the action within such time, a writ of ejectment filed thereafter, without permission of court, will be quashed.[35] However, it has been held that, if the answer is not plainly frivolous or manifestly intended to delay, the court, on adjudging it insufficient and making the rule absolute, may, if the time

20. Pa.—Petition of Notley, 106 A. 716, 263 Pa. 377.
51 C.J. p 293 note 72.

21. Mass.—Orthodox Cong. Soc. v. Greenwich, 13 N.E. 380, 145 Mass. 112, 113.
51 C.J. p 293 note 73.

22. U.S.—Hoffman v. New Jersey Federation of Young Men's and Young Women's Hebrew Ass'ns, C.C.A.Pa., 106 F.2d 204.

23. Mo.—Yankee v. Thompson, 51 Mo. 234.
51 C.J. p 293 note 74.

24. Mass.—Slater v. Manchester, 36 N.E. 310, 160 Mass. 471.

25. Mo.—Burt v. Warren, 30 Mo. App. 332.

26. Pa.—Metz v. Hoffman, 200 A. 132, 131 Pa.Super. 303.

27. Pa.—Petition of Foster, 51 Pa. Super. 224, affirmed 89 A. 819, 243 Pa. 92.

28. Mo.—Root v. Mead, 58 Mo.App. 477.

29. Pa.—Letchford v. Dewees, 14 Phila. 108.

30. Pa.—Petition of Johnson, 25 Pa. Dist. 319.

31. Mass.—Weld v. Clarke, 95 N.E. 651, 209 Mass. 9.

32. Mo.—Northcutt v. Hager, 33 S. W. 1125, 132 Mo. 265.
51 C.J. p 293 note 80.

33. Me.—Smith v. Libby, 64 A. 612, 101 Me. 338, 342.

34. Pa.—In re Foster, 89 A. 819, 243 Pa. 92—First Nat. Bank of Ebensburg v. Cambria County, 51 Pa.Dist. & Co. 561—Valentine v. Valentine, Com.Pl., 3 Sch.Reg. 256—Glass v. Savings & Trust Co. of Indiana, Com.Pl., 32 West.L.J. 247.
Ejectment brought before the rule is made absolute is timely notwithstanding more than six months have elapsed since the service of the original rule to show cause why ejectment should not be brought.—Metz v. Hoffman, 200 A. 132, 131 Pa.Super. 303.

35. Pa.—Utley v. Cobb, 42 Pa.Super. 484.

has expired, allow respondent a reasonable time thereafter within which to bring his action.[36]

While the court in which the statutory proceedings are commenced has jurisdiction over respondent to enforce its decree, up to and including the order directing an ejectment suit,[37] such suit need not be in the court of the original proceedings,[38] but may be brought in a federal court where respondents are nonresidents.[39]

QUIETUS. A final discharge or acquittance, as from debt or obligation; that which silences claims.[1]

In Rhode Island, the name of a process by which an administrator may be fully discharged by the probate court.[2]

QUILIBET. As the first word of maxims as to which there have been no recent applications see 51 C.J. p 296 notes 26–30.

QUILL. The hard, horny part of the scape of any feather, which does not bear barbs, and by which the feather is inserted in the skin; the calamus as distinguished from the rachis. The word "quills" is appropriate to describe the wing and tail feathers of a bird.[3]

QUINQUEPARTITE. Consisting of five parts.[4]

QUINQUE PORTUS. The Cinque Ports.[5]

QUINTERONES. In the Spanish and French West Indies, the issue of a white peron and a quarterone.[6]

QUIRT. A rawhide whip plated with two thongs of buffalo hide.[7]

QUIS; QUISQUE; QUISQUIS. As the first words of maxims as to which there have been no recent applications see 51 C.J. p 298 notes 76, 80–87.

QUIT. The word "quit" is variously defined[8] as meaning to abandon;[9] to leave off or desist;[10] to release,[11] to discharge;[12] to sell.[13]

It is defined with respect to employment in Master and Servant § 40.

QUI TAM. See Qui ante p 4 note 80.

QUITCLAIM. As a noun, a release or acquittance given to one man by another, in respect of any action that he has or might have against him; also acquitting or giving up one's claim of title.[14]

36. Pa.—Petition of Foster, 51 Pa. Super 224, affirmed 89 A. 819, 243 Pa. 92.

37. Pa.—Petition of Notley, 106 A. 716, 263 Pa. 377.

38. Pa.—Petition of Notley, supra —Letchford v. Dewes, 14 Phila. 108.

39. Pa.—Petition of Notley, 106 A. 716, 263 Pa. 377.

1. La.—State ex rel. Jones v Edwards, 14 So.2d 829, 832, 203 La. 1039.

2. Mass.—White v. Ditson, 4 N.E. 606, 609, 140 Mass 351, 64 Am.S.R 473.

3. U. S.—Goodman v. U. S., 2 Ct. Cust.App. 112, 115.

4. Wharton L. Lex.

5. Black L.D.
See 14 C.J.S. p 1120 note 94.

6. Ark.—Daniel v. Guy, 19 Ark. 121, 131

7. La.—Miller v. Mechc, 35 So. 491, 492, 111 La. 143, 146.

8. "Webster defines the word 'quit,' so far as it has any application to our present inquiry, as follows. 'To set free as from anything harmful; to relieve or release; to clear; to liberate. . . . To release from obligation, accusation, penalty, or the like; to absolve, acquit To discharge, as, an obligation or duty; to meet and satisfy . . . To have done with; to cease from; to stop; hence, to depart from, forsake; as, to quit work; to quit the place; . . . to let go; yield; surrender.' And he gives the following synonyms: 'Leave, relinquish, resign, abandon, forsake, surrender, discharge, requite.' And Soule gives in addition, 'desert, forswear, cast-off' It will be noted that each of these definitions and synonyms, as applied to the act of a person, involves the idea of an intention of the party charged with the act to accomplish the result following it. To quit doing anything implies an operation of the mind whereby the decision is reached to abandon a course of procedure which had been thereto followed. The term in its common and ordinary acceptation involves the idea of finality, an ending of the state of, a complete departure from a former course of conduct, and would be entirely inappropriate as characterizing a mere failure or delay in the performance of an act. True, such failure or delay might be so long continued as to give rise to an inference of an intention upon the part of the person chargeable therewith to abandon the future performance of the act or contract in question, but this merely proves the correctness of the proposition that the intention of the actor is essentially involved in the term 'quit.'"—Liggett v. Bertwell, 198 N.W. 154, 155, 111 Neb 643.

9. Neb.—Liggett v. Bertwell, supra. Pa.—Schotter v. Carnegie Steel Co., 116 A. 358, 359, 272 Pa. 437.

Phrases employing the word as to which more recent applications have not been found see 51 C.J. p 299 notes 10–15.

10. Ind.—Ryan v. State, 31 N.E. 1127, 1128, 5 Ind.App. 396.

11. Neb.—Liggett v. Bertwell, 198 N.W. 154, 155, 111 Neb. 643. N.H.—Gordon v. Haywood, 2 N.H. 402, 404.

12. Neb.—Liggett v. Bertwell, 198 N.W. 154, 155, 111 Neb. 643.

Contraction of acquit

"The word 'quit' is a contraction of the word 'acquit,' meaning to discharge.—Sherman v. Sherman, 122 N.W. 439, 443, 23 S.D. 486.

13. N.H.—Gordon v. Haywood, 2 N.H 402, 404.

14. Black L.D.
"Quitclaim deed" defined see Deeds § 8.

As a verb, to discharge;[15] to release.[16]

QUITE. The word "quite" means completely, wholly, entirely, totally, to a considerable extent or degree.[17]

QUITRENT. Certain established rents of the freeholders and ancient copyholders of manors are denominated "quitrents," because thereby the tenant goes quit and free of all other services.[18]

QUITTANCE. An abbreviation of "acquittance;" a release.[19]

QUIVIS. As the first word of a maxim as to which there have been no recent applications see 51 C.J. p 300 note 37.

QUOAD. The introductory word of several Latin phrases employed in the law.[20]

QUO ANIMO. Literally, "With what intention." Used sometimes as a substantive, in lieu of the single word "animus," design or motive.[21]

QUOD. A Latin word introducing various phrases.[22] Maxims and writs commencing with the word "quod" are set out in the following subdivisions.

Maxims

Quod non apparet non est. A maxim meaning "That which does not appear, does not exist."[23]

Quod quisque juris in alterum statuerit, ut ipse eodem jure utatur. A maxim meaning "Let everyone be required to observe the law which he has applied, or caused to be applied, to another."[24]

Other maxims. "Quod" as the first word of maxims as to which there have been no recent applications see 51 C.J. p 300 note 45 p 304 note 77.

Writs

Quod clerici beneficiati de cancellaria. A writ to exempt a clerk of the chancery from the contribution

15. S.D.—Sherman v. Sherman, 122 N.W. 439, 443, 23 S.D. 486.

16. Neb. Barnard v. Duncan, 112 N.W. 353, 355, 79 Neb 189.
51 C.J. p 299 note 26.

17. Mo.—Conlin v. Kurn, 173 S.W. 2d 79, 87, 351 Mo. 395.
"Quite fast" antonym of "slowly" see 35 C.J.S. p 753 note 61.

18. Black L.D.
51 C.J. p 300 note 32.

19. Black L.D.

20. Phrases
(1) "Quoad fiscum:" "as regards the fisk, or the rights of the Crown." —Trayner Leg.Max. See Fiscus 36 C.J.S. p 825 notes 55 58.

(2) "Quoad hoc;" As to this; with respect to this; so far as this in particular is concerned.—Black L.D. "Hoc" defined see 40 C.J.S. p 404 note 7.

(3) Other phrases commencing with the word "quoad" see 51 C.J. p 300 note 42.

21. Black L.D.

22. Phrases
(1) "Quod billa cassetur." Literally, "That the bill be quashed." The common-law form of judgment sustaining a plea in abatement, where the proceeding is by bill, that is, by a capias instead of by original writ.—Black L.D.

(2) "Quod computet." Literally, "That he account."—Black L.D. As one of the two judgments in an action of account see Accounting § 9.

(3) "Quod cum." For that whereas.—Black L.D. As a form of introducing matter of inducement in certain actions see Pleading § 70.

(4) "Quod eat sine die." Literally, "That he go without day."—Black L.D. sub verb "Sine." As the old form of a judgment for defendant see Judgments § 62 c.

(5) "Quod fuit concessum." Literally, "Which was granted." A phrase in the reports, signifying that an argument or point made was conceded or acquiesced in by the court.—Black L.D.

(6) "Quod jussu." In the civil law, the name of an action given to one who had contracted with a son or slave, by order of the father or master, to compel such father or master to stand to the agreement.—Black L.D.

(7) "Quod natura omnia animalia docuit." Literally, "That which nature has taught to all animals." This is the civil-law definition of the law of nature.—Trayner Leg. Max.

(8) "Quod non fuit negatum." Literally, "Which was not denied." A phrase found in the old reports, signifying that an argument or proposition was not denied or controverted by the court.—Black L.D.

(9) "Quod nota." Literally, "Which note; which mark." A reporter's note in the old books, directing attention to a point or rule.—Black L.D.

(10) "Quod partes replacitent." Literally, "That the parties do replead." The form of judgment on award of a repleader.—Black L.D.

(11) "Quo partitio fiat." Literally, "That partition be made."—Black L.D. As the name of the judgment in a suit for partition see Partition § 115.

(12) "Quod permittat prostenere." Literally, "That he permit to abate." —Black L.D. See Nuisances § 102.

(13) "Quod prostravit" see Nuisances § 102.

(14) "Quod recuperet." Literally, "That he recover." The ordinary form of judgments for plaintiff in actions at law. Black L.D.

(15) "Quod si contingat." Literally, "That if it happens." Murkey v. Smith, 16 N.E.2d 20, 23, 301 Mass. 64, 18 A.L.R. 274. As proper words by which a conditional estate is created by deed see Deeds § 141 a.

(16) "Quod vide." Literally, "Which see." A direction to the reader to look to another part of the book, or to another book, there named, for further information.—Black L.D. Abbreviated "q.v." see 1 C.J.S. p 276 note 5.

(17) "Quod voluit non dixit." Literally, "What he intended he did not say, or express." An answer sometimes made in overruling an argument that the lawmaker or testator meant so and so. Black L.D.

23. Peloubet Leg.Max.

Applied in
U.S.—The Clara, N.Y., 102 U.S. 200, 202, 26 L.Ed. 146 Pfeifer Oil Transp. Co. v. The Ira S. Bushey, C.C.A.N.Y., 120 F.2d 606, 607.
51 C.J. p 302 note 16 [a].

24. La.—Tircuit v. Burton-Swartz Cypress Co., 110 So. 489, 491, 492, 163 La. 319.

toward the proctors of the clergy in parliament, etc.[25]

Quod clerici non eligantur in officio ballivi, etc. A writ which lay for a clerk, who, by reason of some land he had, was made, or was about to be made, bailiff, beadle, reeve, or some such officer, to obtain exemption from serving the office.[26]

Quod ei deforceat. In English law, the name of a writ given by the Statute of Westminster II, 13 Edward I chapter 4, to the owners of a particular estate, as for life, in dower, by the curtesy, or in fee-tail, who were barred of the right of possession by a recovery had against them through their default or nonappearance in a possessory action, by which the right was restored to him who had been thus unwarily deforced by his own default.[27]

Quod permittat. Literally, "That he permit." In old English law, a writ which lay for the heir of him that was disseized of his common of pasture, against the heir of the disseizor.[28]

QUO JURE. In old English practice, a writ which lay for one that had land in which another claimed common, to compel the latter to show by what title he claimed it.[29]

QUO MINUS. A writ on which all proceedings in the court of exchequer were formerly grounded.[30]

QUONIAM ATTACHIAMENTA. Literally, "Since the attachments." One of the oldest books in the Scotch law, so-called from the two first words of the volume.[31]

QUO; QUOCUMQUE; QUODCUMQUE; QUODCUNQUE; QUODQUE; QUOMODO. As the first words of maxims as to which there have been no recent applications see 51 C.J. p 300 note 44, p 301 notes 66, 67, p 303 note 50, p 304 notes 79, 80, p 305 note 82, p 306 note 21.

QUORUM. The word "quorum," now in common use, is from the Latin,[32] and has come to signify such a number of the officers or members of any body as is competent by law or constitution to transact business;[33] such a number of an assembly as is competent to transact its business;[34] such a number of the members of any body as is, when duly assembled, legally competent to transact business;[35] such a number of a body as is competent to transact business in the absence of the other members.[36] The quorum of a body is an absolute majority of it unless the authority by which the body was created fixes it at a different number.[37] The idea of a "quorum" is that when that required number of persons goes into a session as a body the votes of a majority thereof are sufficient for binding action.[38] Thus the word "quorum" implies a meeting,[39] and the action must be group action, not merely action of a particular number of members as individuals.[40]

The term "quorum" is treated in Parliamentary Law § 5 b and Officers § 109. It is also treated in various other connections throughout this work, particular reference being made to the indexes to the titles Corporations and Municipal Corporations. See also the C.J.S. titles Associations § 18 c, Courts § 183, Grand Juries § 38, and States § 38, also 59 C.J. p 92 notes 5–8. For other particular applications and specific uses of the term consult the Descriptive-Word Index.

Maxim. "Quorum" as the first word of a maxim as to which there have been no recent applications see 51 C.J. p 305 note 86.

QUOT. One-twentieth part of the movable estate of a person dying in Scotland, anciently due to the bishop of the diocese wherein he had resided.[41]

QUOTA. A proportional part or share; the proportional part of a demand or liability, falling on

25. Black L.D.
26. Black L.D.
27. Black L.D.
28. Black L.D.
29. Black L.D.
30. Black L.D.
31. Black L.D.
32. Colo.—Snider v. Rinehart, 31 P. 716, 718, 18 Colo. 18.

Ancient use

"It was anciently used in the commissions by which the king of Great Britain designated certain justices 'jointly and severally to keep the peace, and any two or more of them to inquire of and determine felonies and other misdemeanors, in which number some particular justices, or one of them, are directed to be always included, and no business to be done without their presence.' The persons so designated as essential to the transaction of business were called 'justices of the quorum.' "—Snider v Rinehart, supra

33. Cal.—People v. Dale, 179 P.2d 870, 873, 79 Cal.App 2d 370.
Colo.—Snider v. Rinehart, 31 P. 716, 718, 18 Colo. 18.
W.Va.—West v. Stephenson, 151 S.E. 853, 855, 108 W.Va. 545.
34. N.M.—Lyons v. Woods, 21 P. 346, 353, 5 N.M. 327.
35. N.Y.—Application of McGovern, 51 N.E.2d 666, 667, 291 N.Y. 104—Application of McGovern, 44 N.Y.S.2d 132, 137, 180 Misc. 508.
36. Miss.—Slush v. Patterson, 29 So.2d 311, 201 Miss. 113.
37. N.Y.—Application of McGovern, 44 N.Y.S.2d 132, 137, 180 Misc. 508.

Quorum of four-member body is three

N.Y.—Application of McGovern, 51 N.E.2d 666, 667, 291 N.Y. 104.
38. N.Y.—Benintendi v. Kenton Hotel, 60 N.E.2d 829, 831, 832, 294 N.Y. 112.
39. N.Y.—Application of McGovern, 51 N.E.2d 666, 667, 291 N.Y. 104.
40. N.Y.—Application of McGovern, supra.
41. Black L.D.

each of those who are collectively responsible for the whole.[42]

QUOT ARTICULI TOT LIBELLI. As many points of dispute as libels.[43]

QUOTATION. A word capable of different meanings according to the connection in which it is used;[44] and it has been variously defined as meaning the production to a court or judge of the exact language of a statute, precedent, or other authority, in support of an argument or proposition advanced;[45] the transcription of part of a literary composition into another book or writing;[46] a statement of the market price of one or more commodities,[47] or the price specified to a correspondent;[48] notation or enumeration.[49]

Quotations from copyrighted works may or may not constitute infringement as discussed in Copyright and Literary Property § 105.

QUOTE. To name as the price of an article; to name as the price of stocks, produce, etc.; to name the current price of; to state as the price of merchandise.[50]

QUOT GENERATIONES TOT GRADUS. Literally, "As many generations, so many degrees." In regulating intestate movable succession, the nearness of degree in relationship is very important, the nearest of kin excluding all who are more remote, unless they have the privilege of representation.[51]

QUOTIENS. As the first word of maxims as to which there have been no recent applications see 51 C.J. p 305 notes 11, 12.

QUOTIENT VERDICT. In criminal prosecutions see Criminal Law § 1374, and in civil actions see the C.J.S. title Trial § 472, also 64 C.J. p 1035 note 25 p 1037 note 37. See also the index to the title New Trial.

QUOTIES. As the first word of maxims as to which there have been no recent applications see 51 C.J. p 305 note 14 p 306 note 19.

QUOUSQUE. How long; how far; until.[52]

42. Black L.D.
Quota immigrants see Aliens § 84 c.

43. Trayner Leg.Max.

44. Eng.—Boyer v. Duke, [1905] 2 Ir. 617, 624.
Phrases employing the word as to which more recent adjudications have not been found see 51 C.J. p 305 notes 2, 3.

45. Black L.D.

46. Black L.D.

47. Black L.D.

48. Black L.D.

49. Eng.—Boyers v. Duke, [1905] 2 Ir. 617, 624.

50. Ont.—Johnston v. Rogers, 30 Ont. 150, 156.
51 C.J. p 305 notes 5-8.
Quoting list see 54 C.J.S. p 632 note 9.
"All of the dictionaries . . . concur that the definition of the term 'quoted' is to name or give the current market price."—Kings County Packing Co. v. Sunland Sales Co-op. Assoc., 279 P. 1036, 1039, 100 Cal. App. 126.
To quote property means nothing more than to offer it and to state the price asked.—Ruiz v. Kiehm's Pharmacy, La.App., 37 So.2d 720, 725.

51. Trayner Leg.Max.

52. Black L.D.
Prohibitory writ quousque see Prohibition § 1.
In old conveyances it is used as a word of limitation.—Black L.D.

QUO WARRANTO

This Title Includes writs of quo warranto and proceedings by information or action in the nature of writs of quo warranto to try title to offices, franchises, etc.; nature and scope of the remedy in general; grounds of such writs or proceedings and defenses thereto; to and against whom and as to what offices, franchises, etc., they are allowed; jurisdiction over and proceedings on such writs, informations, or actions; judgments and enforcement thereof; review of proceedings; and costs in such proceedings.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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I. DEFINITIONS, NATURE, AND GROUNDS

§ 1. Definitions, Origin, and Development of Remedy
a. In general
b. Writ of quo warranto
c. Information in nature of quo warranto
d. Constitutional and statutory provisions generally
e. Synonymous use of terms

a. In General

Quo warranto is a proceeding to determine the right to the exercise of a franchise or office and to oust the holder if his claim is not well founded, or if he has forfeited his right.

Quo warranto in its broadest sense is a proceeding to determine the right to the use or exercise of a franchise or office and to oust the holder from its enjoyment, if his claim is not well founded, or if he has forfeited his right to enjoy the privilege.[1] The term "quo warranto proceedings" is similarly defined.[2]

Distinctions. Quo warranto has been distinguished from other proceedings.[3]

b. Writ of Quo Warranto

The writ of quo warranto is one of the most ancient and important writs known to the common law. It has been obsolete in England for centuries.

1. Ga.—**Corpus Juris cited in** Patten v. Miller, 8 S.E.2d 757, 774, 190 Ga. 123.
N.Y.—Smith v. Dillon, 44 N.Y.S.2d 719, 267 App.Div. 39.
Utah.—**Corpus Juris quoted in** State ex rel. Staln v. Christensen, 35 P.2d 775, 813, 84 Utah 185.
51 C.J. p 309 note 1.
Other definitions
(1) Quo warranto is a writ of inquiry requiring of respondent warrant or authority for acts about which a complaint is made.—**People v. White Circle League of America,** 97 N.E.2d 811, 408 Ill. 564.
(2) Quo warranto is a demand made through state by some individual to show by what right an individual or corporation exercises a franchise or privilege belonging to state, which according to laws of the land they cannot legally exercise except by virtue of a grant or authority from state.—**People v. White Circle League of America,** supra.
(3) Additional definitions.—**State ex rel. Landis v. S. H. Kress & Co.,** 155 So. 823, 115 Fla. 189—51 C.J. p 309 note 1 [a].

2. Tex.—Staples v. State, 245 S.W. 639, 112 Tex. 61, 67.
51 C.J. p 309 note 2.

3. Tenn.—Morrison v. Crews, 337 S.W.2d 1—State ex rel. Bryant v. Maxwell, 224 S.W.2d 833, 189 Tenn. 187—State ex rel. Howell v. Sensing, 222 S.W.2d 13, 188 Tenn. 684.
Quo warranto distinguished from:
Election contest see Elections § 1 j (2).
Injunction see Injunctions § 96.
Judicial proceeding for removal of officer see Officers § 67 a.
Mandamus see Mandamus § 5.

The writ of quo warranto is an ancient[4] common-law,[5] prerogative[6] writ and remedy. Indeed, it is one of the most ancient[7] and important[8] writs known to the common law. The ancient writ was in the nature of a writ of right for the king, against him who claimed or usurped any office, franchise, or liberty, to inquire by what authority he supported his claim, in order to determine the right, or, in the case of nonuser, long neglect, misuser, or abuse of a franchise, a writ commanding defendant to show by what warrant he exercised such franchise, never having had any grant of it, or having forfeited it by neglect or abuse.[9]

The writ has been obsolete in England for centuries,[10] having been abandoned probably because of the length of its process[11] and the nature of the judgment.[12] The old writ of quo warranto, it has been said, was never in force in the United States.[13]

c. Information in Nature of Quo Warranto

The ancient writ of quo warranto was succeeded by an information in the nature of quo warranto which was also employed to try the right to an office or franchise.

The ancient writ of quo warranto was succeeded by an information in the nature of quo warranto,[14] which, while differing in origin,[15] form, and pro-

4. U S —State of Tenn., by Wolfenbarger, ex rel. Atchley v. Taylor, C A Tenn , 169 F.2d 626.
Or —**Corpus Juris cited in** State by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 36 P 2d 179, 181, 148 Or. 273.
Utah —**Corpus Juris quoted in** State ex rel. Stain v Christensen, 35 P. 2d 775, 813, 84 Utah 185.
51 C J. p 309 note 5.

5. U.S.—State of Tenn , by Wolfenbarger, ex rel Atchley v. Taylor, C.A.Tenn., 169 F.2d 626.
Fla —State ex rel Landis v. Prevatt, 148 So. 578, 110 Fla. 29.
N.Y.—Smith v Dillon, 44 N.Y S.2d 719, 267 App.Div. 39.
Or.—State by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No 9 of Tillamook County, 36 P.2d 179, 148 Or. 273
Utah —State ex rel. Stain v. Christensen. 35 P.2d 775, 84 Utah 185
51 C.J. p 309 note 6.

6. U.S.—Johnson v. Manhattan Ry Co., N.Y., 53 S.Ct. 721, 289 U S. 479, 77 L.Ed 1331.
Ill.—People v. White Circle League of America, 97 N.E 2d 811, 408 Ill. 564—Adair v. Williams, 95 N E 2d 345, 407 Ill. 309—People ex rel. Paxton v. Bloomington Cemetery Ass'n, 187 N.E. 455, 353 Ill. 534.
N J.—Pellecchia v Mattia, 193 A. 910, 118 N J.Law 512.
N M —Territory v. Ashenfelter, 12 P 879, 886, 4 N.M. 85
Pa.—Commonwealth v Keystone Pipe Line Co., 24 Pa.Dist. & Co. 400, 39 Dauph.Co. 1.

7. Utah.—State ex rel. Stain v. Christensen, 35 P.2d 775, 84 Utah 185.
51 C.J. p 309 note 7.

As ancient as common law itself
Pa —Commonwealth v. Wherry, 152 A. 846, 302 Pa. 134.

Origin and early use
Ky —Commonwealth v. Kentucky Jockey Club, 38 S W.2d 987, 238 Ky 739.
Minn.—State ex rel. Young v. Village of Kent, 104 N W. 948, 96 Minn 255, 1 L.R.A.,N S , 826, 6 Ann.Cas 905.
N Y —Smith v Dillon, 44 N Y S 2d 719, 267 App.Div 39
Or —State by Hagglund, ex rel. Security Savings & Trust Co v. School Dist. No. 9 of Tillamook County, 36 P 2d 179, 181, 148 Or 273.
51 C.J p 309 note 7 [a].

8. Colo.—People v Londoner, 22 P 764, 13 Colo 303, 6 L R A 444
Utah —State ex rel Stain v Christensen, 35 P.2d 775, 84 Utah 185

9. Ala —**Corpus Juris cited in** Birmingham Bar Ass'n v. Phillips & Marsh, 196 So. 725, 732, 239 Ala 650.
Fla —State ex rel. Landis v. Prevatt, 148 So. 578, 110 Fla. 29—State v Markle, 142 So. 822, 107 Fla. 742
Ill.—People ex rel Ray v. Lewistown Community High School Dist. No 241, 57 N.E 2d 486, 388 Ill. 78—Rowan v. City of Shawneetown, 38 N.E.2d 2, 378 Ill. 789.
Kan —**Corpus Juris cited in** State v. Perkins, 28 P.2d 765, 768, 138 Kan 899.
N.Y.—Smith v. Dillon, 44 N.Y S.2d 719, 267 App.Div. 39.
Or.—State by Hagglund, ex rel Security Savings & Trust Co. v. School Dist No. 9 of Tillamook County, 36 P.2d 179, 148 Or. 273.
51 C J. p 309 note 9.

Quo warranto was defined by Blackstone (3 Commentaries p 262) to be "in the nature of a writ of right for the King against one who claims or usurps any office, franchise or liberty, to inquire by what authority he supports his claim, in order to determine the right."
Fla.—State ex rel Landis v. Prevatt, 148 So. 578, 580, 110 Fla. 29—State ex rel Watkins v. Fernandez, 143 So 638, 639, 106 Fla. 779.
Mo.—State ex inf. McKittrick v. Murphy, 148 S.W.2d 527, 530, 347 Mo. 484.

10. Fla.—State ex rel. City of St. Petersburg v. Noël, 154 So. 214, 114 Fla. 175.
Md —Hawkins v. State, 32 A. 278, 81 Md 306
Okl —Jarman v Mason, 229 P. 459, 460, 102 Okl 278
51 C J p 310 note 10.
Substitution of information in nature of quo warranto see infra subdivision c of this section

11. Or —State v. Sengstacken, 122 P 292, 61 Or. 455, Ann.Cas.1914B 230.
51 C J p 310 note 11

12. Minn —State v Kent, 101 N.W 948, 96 Minn. 255, 1 L.R.A.,N S, 826, 6 Ann Cas 905.
Or.— State v Sengstacken, 122 P 292, 61 Or 455, Ann Cas.1914B 230.
Conclusiveness of ancient common-law writ see infra § 50

13. Tenn —State v. McConnell, 71 Tenn. 332—State v. Wright, 10 Heisk. 237
51 C J. p 311 note 30 [b] (1).

In Kentucky
It has been stated that "both the writ of quo warranto and a writ of scire facias were part of the Kentucky law before 1854, having come to us with the law of England."—Commonwealth v. Kentucky Jockey Club, 38 S.W.2d 987, 1005, 238 Ky. 739.

14. Ala.—**Corpus Juris cited in** Birmingham Bar Ass'n v Phillips & Marsh, 196 So. 725, 732, 239 Ala. 650.
Fla.—State ex rel. City of St. Petersburg v. Noel, 154 So. 214, 114 Fla. 175.
Ill.—Rowan v. City of Shawneetown, 38 N.E.2d 2, 378 Ill. 789.
Mo.—State ex inf McKittrick v. Murphy, 148 S.W.2d 527, 347 Mo. 484.
51 C.J. p 310 note 16.

Statute of Anne, 9 Anne c 20, set out.
N.M —Territory v. Ashenfelter, 12 P. 879, 888, 889, 4 N.M 85.
Tenn.—State v. Standard Oil Co., 110 S.W. 565, 573, 120 Tenn 86, affirmed 30 S.Ct. 543, 217 U.S. 413, 54 L.Ed. 817.

15. Del.—Brooks v. State, 79 A 790,

cedure from the ancient writ, was likewise of a prerogative character[16] and was employed for the same purpose, namely, to try the right to an office or franchise.[17]

Under the principles considered in Common Law § 11 et seq, in some jurisdictions the action in the nature of quo warranto, in the absence of statutory modifications, is a common-law remedy, its office and scope depending on the use and limitations authorized by the common law and statute laws of England, as they existed as of the date that they were adopted, by the laws of the state;[18] but the common-law information in the nature of quo warranto never became a part of the law of other jurisdictions.[19]

d. Constitutional and Statutory Provisions Generally

In various jurisdictions constitutional and statutory provisions govern and regulate the remedy of quo warranto or proceedings in the nature thereof.

In various jurisdictions there are constitutional, code, or statutory provisions adopting, defining, or regulating the remedy of quo warranto, or proceedings in the nature thereof, and in some states the code or statutory provisions have abolished both the writ of quo warranto and the information in the nature of quo warranto and substituted an action or statutory proceeding therefor.[20] In some jurisdictions the statutory substitute for the common-law remedy was enacted to avoid the result of that remedy and to eliminate the cumbersome method of the common-law practice by affording relief through the form of a simple ordinary action,[21] but in other jurisdictions it has been held that the fact that the statutory proceeding is in lieu of the ancient common-law writ does not abolish the remedies for which that writ was created[22] and that statutes providing that the remedies formerly attainable by the writ of quo warranto and proceedings by information in the nature of quo warranto may be obtained by civil action do not abolish the former remedies, but simply provide a cumulative, rather than an exclusive, remedy.[23]

At any rate the substance of the remedy remains the same under the statutory provisions,[24] although

26 Del. 1, 51 L.R.A.,N.S., 1126, Ann. Cas.1915A 1133
51 C.J. p 310 note 17.

16. Ala.—Birmingham Bar Ass'n v. Phillips & Marsh, 196 So. 725, 239 Ala. 650.
51 C.J. p 310 note 20.
Information as civil or criminal see infra § 3.
Jurisdiction and pleading on information see infra §§ 24, 36.

17. Ala.—Birmingham Bar Ass'n v. Phillips & Marsh, 196 So. 725, 239 Ala. 650.
51 C.J. p 310 note 21.

18. Fla.—State ex rel. Landis v. Prevatt, 148 So. 578, 110 Fla. 29.
51 C.J. p 310 note 25 [a].
Constitutional and statutory provisions see infra subdivision d of this section and infra § 5.

19. Tenn.—State v. Standard Oil Co., 110 S.W. 565, 120 Tenn. 86, affirmed 30 S.Ct. 543, 217 U.S. 413, 54 L.Ed. 817—State v. McConnell, 71 Tenn. 332.
51 C.J. p 311 note 30 [b] (1).
In Maryland
The information in the nature of quo warranto is not, in the absence of statute, used, as in the case of public officers.—Soper v. Jones, 187 A. 333, 171 Md. 643—Hawkins v. State, 32 A. 278, 81 Md. 306.

20. U.S.—People of Puerto Rico v. Rubert Hermanos, Inc., Puerto Rico, 60 S.Ct. 699, 309 U.S. 543, 84 L.Ed. 916.
Ala.—Baxter v. State ex rel. Metcalf, 9 So.2d 119, 243 Ala. 120.
Ariz.—State ex rel. Sullivan v. Moore, 64 P.2d 809, 49 Ariz. 51.
Cal.—People ex rel. Attorney General v. Association, 24 P. 277, 84 Cal. 114, 12 L.R.A. 117.
Colo.—People ex rel. Rogers v. Lefford, 79 P.2d 274, 102 Colo. 284.
D.C.—U. S. ex rel. Noel v. Carmody, 148 F.2d 684, 80 U.S.App.D.C. 58
Ga.—Conley v. Brophy, 60 S.E.2d 122, 207 Ga. 30.
Ill.—Adair v. Williams, 95 N.E.2d 345, 407 Ill. 309—People ex rel. Sandberg v. Grabs, 36 N.E.2d 494, 373 Ill. 423—People, by Kerner v. United Medical Services, 200 N.E. 157, 362 Ill. 442, 103 A.L.R. 1220.
Ky.—Richardson v. Commonwealth, by Meredith, 122 S.W.2d 156, 275 Ky. 486—Jenkins v. Congleton, 45 S.W.2d 456, 242 Ky. 46.
Miss.—O'Neal v. Fairley, 200 So. 722, 190 Miss. 650.
Mo.—State ex inf. McKittrick v. Murphy, 148 S.W.2d 527, 347 Mo. 484.
Neb.—State ex rel. Johnson v. Conservative Savings & Loan Ass'n, 11 N.W.2d 89, 143 Neb. 805.
Okl.—Jarman v. Mason, 229 P. 459, 102 Okl. 278.
Or.—State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 31 P.2d 751, 36 P.2d 179, 148 Or. 273.
W.Va.—State ex rel. Bumgardner v. Mills, 53 S.E.2d 416.
Wis.—State ex rel. Brister v. Weston, 6 N.W.2d 648, 241 Wis. 584.
51 C.J. p 310 note 26.
Power of legislature to abolish or change remedy of quo warranto see infra § 5.

21. Ky.—Commonwealth ex rel. Attorney General v. Howard, 180 S.W.2d 415, 297 Ky. 488—McClendon v. Hamilton, 127 S.W.2d 605, 277 Ky. 734.
Procedure see infra § 16 et seq.
Statutory provisions must be followed
Wash.—State ex rel. Carter v. Superior Court for King County, 138 P.2d 843, 18 Wash.2d 130.

22. Ark.—State ex rel. Robinson v. Jones, 108 S.W.2d 901, 194 Ark. 445.
Existence of other remedy as barring quo warranto see infra § 15.

23. N.D.—State ex rel. Sathre v. Roberts, 269 N.W. 913, 67 N.D. 92, 108 A.L.R. 37.
S.D.—Wright v. Lee, 55 N.W. 931, 4 S.D. 237.
Existence of other remedy as precluding quo warranto see infra § 15.

24. Ark.—State ex rel. Robinson v. Jones, 108 S.W.2d 901, 194 Ark. 445.
Me.—Burkett ex rel. Leach v. Ulmer, 15 A.2d 858, 137 Me. 120.
Or.—State by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 36 P.2d 179, 148 Or. 273.
51 C.J. p 311 note 30.
Common-law principles in force
Former common-law principles governing the issuance of writs of quo warranto are left in full force

under some statutes the remedy, while a proceeding in the nature of quo warranto,[25] is of greater scope and vigor than the ancient writ.[26]

Amendment of statute. General rules regulating amendments to statutes usually apply to statutes governing quo warranto and similar remedies.[27] An amendment to the quo warranto statute authorizing an alternative method of pleading does not change the substantive requirements.[28]

Repeal of statutes. General rules governing repeal of statutes ordinarily are applicable to statutes governing and regulating quo warranto and similar remedies.[29]

e. Synonymous Use of Terms

The term "quo warranto" sometimes is used to describe not only proceedings under the common-law writ of quo warranto, but also proceedings under an information in the nature of quo warranto or similar statutory remedies.

Sometimes the term "quo warranto" is used to describe, not only proceedings under the common-law writ of quo warranto,[30] but also proceedings under an information in the nature of a writ of quo warranto[31] or similar statutory remedies.[32] Also the distinctions between a writ of quo warranto and information in the nature of quo warranto are frequently disregarded[33] and the terms used as synonymous and convertible.[34]

Constitutional provisions relating to the issuance of writs of quo warranto are construed to comprehend proceedings by information in the nature of quo warranto[35] or a statutory action for the recovery of similar relief.[36]

As used in some statutes, the term "quo warranto" is deemed to refer to "an information in the nature of quo warranto" as existing at common law.[37]

§ 2. Form and Nature

Quo warranto is an extraordinary remedy and where an information is filed by a prosecuting attorney ex officio the proceeding is of a public nature.

Quo warranto is an extraordinary remedy.[38] At least where an information is filed by a prosecuting attorney ex officio,[39] a quo warranto proceeding is

by the statute—U. S ex rel. Noel v. Carmody, 148 F.2d 684, 80 U.S App. D C. 58.

Prerogative in character

Statutory quo warranto proceeding is prerogative in character, notwithstanding extension of right to institute proceeding to person giving security for costs.—Birmingham Bar Ass'n v. Phillips & Marsh, 196 So. 725, 239 Ala. 650.

Procedural changes as affecting purpose

"The various procedural changes . . . do not affect the basic purposes for which the writ was originally designed"—State ex inf. McKittrick v. Murphy, 148 S.W.2d 527, 539, 347 Mo. 484.

Substitute as effective as common-law writ

Statutory substitute for quo warranto should be construed so as to render it as effective as the common-law writ.—McClendon v. Hamilton, 127 S W 2d 605, 277 Ky. 734.

25. Tenn.—Jones v Talley, 230 S. W.2d 968, 190 Tenn. 471—State v. McConnell, 71 Tenn. 332.
51 C J. p 311 note 30 [b] (3).

26. Tenn.—State v. Wright, 10 Heisk. 237.

Enlargement of common-law remedy

Quo warranto statute is enlargement of common-law remedy.—State ex rel Watson v. Pigg, 46 N.E.2d 232, 221 Ind. 23.

27. Ill.—People ex rel. Barrett v Gentile Co-op. Ass'n, 64 N.E.2d 907, 392 Ill. 393.

28. Ill—People ex rel. Barrett v Gentile Co-op. Ass'n, supra.

29. **Implied repeal**

Provisions of civil code of practice authorizing institution of proceeding by attorney general to prevent usurpation of office were not impliedly repealed by, or in conflict with, statutes authorizing institution of proceedings for removal of school officers by superintendent of public instruction at a trial with power of removal by state board of education.—Richardson v. Commonwealth, by Meredith, 122 S.W.2d 156, 275 Ky. 486.

Repeal by election contest statute

Election contest statute which contains provision repealing all laws in conflict therewith does not repeal quo warranto statute—Brown v. State ex rel. Stack, 84 N.E.2d 883, 227 Ind 183—State ex rel. Watson v Pigg, 46 N.E.2d 232, 221 Ind. 23.

30. Okl.—Jarman v. Mason, 229 P. 459, 102 Okl 278.

31. Okl.—Jarman v. Mason, supra.
51 C J. p 311 note 32.

32. Okl.—Jarman v. Mason, supra.
51 C.J. p 311 note 33.

33. Ark.—Moody v. Lowrimore, 86 S W. 400, 74 Ark. 421.

34. Okl.—Jarman v. Mason, 229 P. 459, 102 Okl. 278.
51 C.J. p 311 note 35.

35. S.D.—State v Gardner, 54 N.W. 606, 3 S.D 553.
51 C.J. p 311 note 36.

36. Okl.—Jarman v. Mason, 229 P. 459, 102 Okl. 278
51 C.J. p 311 note 37.

37. Minn.—State ex rel. Burnquist v. Village of North Pole, 6 N W. 2d 458, 213 Minn 297—State ex rel. Young v. Village of Kent, 104 N W. 948, 96 Minn. 255, 1 L.R.A., N.S., 826, 6 Ann.Cas. 905—State v. Tracy, 51 N W. 613, 48 Minn 497

38. U.S.—Johnson v. Manhattan Ry. Co., N.Y., 53 S.Ct. 721, 289 U.S. 479, 77 L.Ed. 1331.
Cal.—City of Oakland v Key System, 149 P 2d 195, 64 Cal.App.2d 427.
Ga.—Casey v. McElreath, 169 S.E. 342, 177 Ga. 35
Kan.—State ex rel. Beck v. Board of Com'rs of Allen County, 57 P.2d 450, 143 Kan 898.
Minn.—State ex rel. City of St. Paul v. Ochler, 15 N.W 2d 783, 218 Minn 282—State ex rel. Burnquist v. Village of North Pole, 6 N.W.2d 458, 213 Minn. 297
Ohio.—State ex rel. Herbert v. Standard Oil Co, 35 N.E.2d 437, 138 Ohio St. 376—State ex rel. Bartlett v. National Ass'n of Angling & Casting Clubs, App., 51 N.E.2d 662.
Or.—State ex rel. Hallgarth v. School Dist. No. 23, Union County, 172 P.2d 655, 179 Or. 441.
Wash.—State v. Hovey, 294 P. 258, 159 Wash. 584.
51 C J. p 311 note 39.

39. Mo.—State v. Consolidated School Dist. No. 1, 209 S.W. 938, 277 Mo. 458
51 C J. p 311 note 40.

of a public nature,[40] and is not a personal action,[41] it being rather an inquisition which the sovereignty, by its courts, institutes to ascertain whether its prerogative rights have been invaded;[42] but a proceeding by information to try title to an office is personal as to the persons claiming the office,[43] and in the sense that it is against an individual,[44] rather than against an officer as such.[45]

While quo warranto is a direct, rather than a collateral, attack on the record or other matter assailed,[46] it is not a writ of correction or review.[47] It is not a substitute for mandamus or injunction or for an appeal or writ of error.[48]

Legal or equitable. Generally speaking, quo warranto proceedings are of a legal, rather than an equitable, nature,[49] and equitable rules are not applicable to them,[50] but the writ originally issued out of chancery,[51] and in some states the proceeding in the nature of quo warranto authorized by code or statute is equitable in character.[52]

Action or special proceeding. Except in some jurisdictions,[53] a quo warranto proceeding is an action,[54] and not a special proceeding.[55]

In personam or in rem. In strictness an information for writ of quo warranto is a proceeding in personam,[56] but an information and the court's action thereon may be closely analogous to a proceeding in rem.[57]

Persons entitled to sue see infra §§ 25–31

40. Mo.—State ex inf. McKittrick v. Wymore, 119 S.W.2d 941, 343 Mo. 98, 119 A.L.R. 710
Neb.—State ex rel. Johnson v. Conservative Savings & Loan Ass'n, 11 N.W.2d 89, 143 Neb. 805.
N.J.—Tonkin v. Kenworthy, 170 A. 233, 112 N.J.Law 274
Pa.—Commonwealth ex rel. Schermer v. Franek, 166 A. 878, 311 Pa. 341.
Tenn.—Skelton v. Barnett, 227 S.W. 2d 774, 190 Tenn. 70.
51 C.J. p 311 note 41
Restriction of subject matter of remedy to public offices or franchises see infra §§ 6, 8.

41. N.J.—Anderson v. Myers, Sup., 67 A. 1036.—Attorney General v. Delaware, etc., R. Co., 38 N.J.Law 282.

42. N.J.—Anderson v. Myers, Sup., 67 A. 1036—Attorney General v. Delaware, etc., R. Co., 38 N.J.Law 282.
Presumptions and burden of proof in quo warranto proceedings see infra § 43.

Quo warranto calls on defendant to show by what authority he or it is exercising powers or franchises.—Romine v. Black, 25 N.E.2d 404, 304 Ill.App. 1.

Incident of sovereignty
Right to call on any person, natural or artificial, by quo warranto, to justify his acts is an incident of sovereignty.—People ex rel Ray v. Lewistown Community High School Dist. No. 241, 57 N.E.2d 486, 388 Ill. 78.

43. Neb.—State v. Broatch, 94 N.W. 1016, 68 Neb. 687, 110 Am.S.R. 477.
N.C.—Rhodes v. Love, 69 S.E. 436, 153 N.C. 468.

44. N.M.—State v. Leib, 125 P. 601, 17 N.M. 270.

45. N.M.—State v. Leib, supra.

46. Ariz.—Corpus Juris cited in Parnell v. State ex rel. Wilson, 206 P.2d 1047, 1049, 68 Ariz. 401.
51 C.J. p 311 note 47.

47. U.S.—Johnson v. Manhattan Ry. Co., N.Y., 53 S.Ct. 721, 289 U.S. 479, 77 L.Ed. 1331.
Mo.—State ex inf. Walsh v. Thatcher, 102 S.W.2d 937, 340 Mo. 865.—State ex inf. McKittrick v. American Colony Ins. Co., 80 S.W.2d 876, 336 Mo. 406.
51 C.J. p 312 note 48.

In Florida
It has been stated that quo warranto, and mandamus, habeas corpus, certiorari, and prohibition, are original in their nature, although they may be invoked to perform functions which are appellate in their nature.—State ex rel. Associated Utilities Corporation v. Chillingworth, 181 So. 346, 132 Fla. 587.

48. Mo.—State ex inf. McKittrick v. Murphy, 148 S.W.2d 527, 347 Mo. 484.—State ex inf. McKittrick v. American Colony Ins. Co., 80 S.W.2d 876, 336 Mo. 406.

49. Ariz.—Corpus Juris quoted in Garcia v. Sedillo, 218 P.2d 721, 726, 70 Ariz. 192.
Ill.—People v. White Circle League of America, 97 N.E.2d 811, 408 Ill. 564.
Mo.—State ex inf. McKittrick v. Wymore, 119 S.W.2d 941, 343 Mo. 98, 119 A.L.R. 710.—State ex inf. Mallett ex rel. Womack v. City of Joplin, 62 S.W.2d 393, 332 Mo. 1193.
51 C.J. p 312 note 49.

50. Ariz.—Garcia v. Sedillo, 218 P. 2d 721, 70 Ariz. 192.
Mo.—State v. People's Ice Storage, etc., Co., 151 S.W. 101, 246 Mo. 168.

Chancery rules do not apply where they conflict with a statute governing quo warranto.—People ex rel. Sandberg v. Grabs, 26 N.E.2d 494, 373 Ill. 423.

51. Ariz.—Garcia v. Sedillo, 218 P. 2d 721, 70 Ariz. 192.
Ill.—People ex rel. Ray v. Lewistown Community High School Dist. No. 241, 57 N.E.2d 486, 388 Ill. 78
Or.—State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 36 P.2d 179, 148 Or. 273
51 C.J. p 312 note 51.

52. Or.—State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 36 P.2d 179, 148 Or. 273.
Tenn. **Corpus Juris cited in** State v. Meux, 61 S.W.2d 974, 166 Tenn. 286.—State v. Ward, 43 S.W.2d 217, 163 Tenn. 265.—State v. Robertson, 5 Tenn.Civ.App. 438.

Abuse, misuse, or nonuse of franchise
When quo warranto is invoked to remedy the abuse, misuse, or nonuse of a franchise, the action is similar to an equity proceeding by injunction and it may partake of the essentials of an action to quiet title or for declaratory relief and it should be determined so as to make remedy effective if possible.—City of Oakland v. Key System, 149 P.2d 195, 64 Cal.App.2d 427.

53. Minn.—State ex rel. Burnquist v. Village of North Pole, 6 N.W. 2d 458, 213 Minn. 297.
51 C.J. p 312 note 53.

54. Cal.—People v. Los Angeles, 269 P. 934, 93 Cal.App. 532.
51 C.J. p 312 note 54.

Civil action by ordinary proceedings
Iowa. State ex rel. Adams v. Murray, 252 N.W. 556, 217 Iowa 1091.

Suit
Tex.—Adamson v. Connally, Civ.App., 112 S.W.2d 287.

55. Cal.—People v. Los Angeles, 269 P. 934, 93 Cal.App. 532.
51 C.J. p 312 note 55.

56. U.S.—Lillard v. Lonergan, C.C. A.Kan., 72 F.2d 865, certiorari denied Lonergan v. Lillard, 55 S. Ct. 147, 293 U.S. 615, 79 L.Ed. 704.

57. U.S.—Lillard v. Lonergan, C.C. A.Kan., 72 F.2d 865, certiorari de-

§ 3. —— Civil or Criminal

The remedy of quo warranto, or an action or proceeding in the nature thereof, generally is regarded as a civil, rather than a criminal, proceeding

Except in some jurisdictions wherein the proceeding is regarded as quasi-criminal,[58] it is, and for some time has been, a rule that the remedy of quo warranto, or an action or proceeding in the nature thereof, whether denominated a quo warranto proceeding, an information in the nature of quo warranto, or a statutory remedy, is civil and not criminal.[59]

The ancient writ of quo warranto was strictly a civil remedy.[60] Originally the information in the nature of quo warranto, which succeeded the ancient writ, was essentially a criminal prosecution[61] instituted for the purpose of subjecting defendant to punishment by fine, as well as a judgment of ouster,[62] but it has long since lost its character as a criminal proceeding in everything except form.[63] The general effect of legislation has been to relieve the old civil remedy of the burden of a criminal form of procedure with which it had become encumbered, and to restore it to its original character as a civil action for the enforcement of a civil right.[64]

§ 4. —— Exclusiveness of Remedy

In the absence of constitutional or statutory regulations providing otherwise, quo warranto proceedings are the only proper remedy in cases in which they are available.

In the absence of constitutional or statutory regulations providing otherwise, quo warranto proceedings are the only proper remedy in cases in which they are available.[65] Thus quo warranto, or a proceeding in the nature thereof, is the sole and exclusive remedy and method by which various matters may be tried and determined,[66] as, for example, the right and title to office,[67] whether such office is a

nied Lonergan v. Lillard, 55 S.Ct. 147, 293 U.S. 615, 79 L.Ed. 704.

58. Idaho—Archbold v. Huntington, 201 P. 1041, 34 Idaho 558.
51 C.J. p 312 note 57.
Particular procedural matters as governed by civil or criminal rules see infra §§ 24, 36.

59. Ala.—Farmer v. State ex rel. Killcrease, 187 So. 735, 28 Ala. App. 398, certiorari denied 187 So. 737, 237 Ala. 555.
Fla.—State ex rel. Watkins v. Fernandez, 143 So. 638, 106 Fla. 779.
Ill.—People v. White Circle League of America, 97 N.E.2d 811, 408 Ill. 564—People ex rel. Ray v. Lewistown Community High School Dist. No. 241, 57 N.E.2d 486, 388 Ill. 78—People, by Kerner, v. United Medical Service, 200 N.E. 157, 362 Ill. 442, 103 A.L.R. 1229.
Kan.—State ex rel. Bock v. Harvey, 80 P.2d 1095, 148 Kan. 166.
Neb.—State ex rel. Johnson v. Consumers Public Power Dist., 5 N.W.2d 202, 142 Neb. 114—State v. Standard Oil Co., 84 N.W. 413, 61 Neb. 28, 87 Am.S.R. 449.
Ohio—Muskingum County Democratic Ex-Committee v. Burrier, 17 Ohio Supp. 51.
Or.—State ex rel. Hallgarth v. School Dist. No. 23, Union County, 172 P.2d 655, 179 Or. 441.
51 C.J. p 312 note 58.

60. Fla.—State ex rel. City of St. Petersburg v. Noel, 154 So. 214, 114 Fla. 175.
51 C.J. p 312 note 59.

61. Fla.—State ex rel. City of St. Petersburg v. Noel, 154 So. 214, 114 Fla. 175.
Ill.—Rowan v. City of Shawneetown, 38 N.E.2d 2, 378 Ill. 789.
Pa.—Commonwealth ex rel. Schermer v. Franek, 166 A. 878, 311 Pa. 341.
51 C.J. p 313 note 61.

62. Ill.—Rowan v. City of Shawneetown, 38 N.E.2d 2, 378 Ill. 789.
Ky.—McClendon v. Hamilton, 127 S.W.2d 605, 277 Ky. 734.
51 C.J. p 313 note 62.
Judgment see infra §§ 48-50.

63. Fla.—State ex rel. City of St. Petersburg v. Noel, 154 So. 214, 114 Fla. 175.
Ill.—People, by Kerner, v. United Medical Service, 200 N.E. 157, 362 Ill. 442, 103 A.L.R. 1229.
Ky.—Commonwealth v. Kentucky Jockey Club, 38 S.W.2d 987, 238 Ky. 739.
51 C.J. p 313 note 63

64. Tex.—Denison v. State, Civ.App., 61 S.W.2d 1017, error refused Denison v. State ex rel. Allred, 61 S.W.2d 1022, 122 Tex. 459
51 C.J. p 313 note 65.

65. Ala.—Corpus Juris cited in Birmingham Bar Ass'n v. Phillips & Marsh, 196 So. 725, 733, 239 Ala. 650
Iowa.—Walling v. Iowa Mut. Liability Ins. Co., 292 N.W. 157, 228 Iowa 503
Mich.—Petition of Crawford, 18 N.W.2d 280, 311 Mich. 70
Tenn.—State ex rel. Bryant v. Maxwell, 224 S.W.2d 833, 189 Tenn. 187.
51 C.J. p 313 note 70.
Election contest as exclusive or cumulative remedy see Elections § 247 b.
Quo warranto:
As:
Excluding:
Appeal see Appeal and Error § 31.
Certiorari see Certiorari § 37 b (1)
Mandamus see Mandamus §§ 24, 201.
Prohibition see Prohibition § 15.
Only common-law remedy to contest election see Elections § 246.
Exclusion of, by another remedy see infra § 15.

66. Cal.—Curtz v. City of San Bruno, 48 P.2d 142, 8 Cal.App.2d 399

67. Mich.—Lindquist v. Lindholm, 241 N.W. 922, 258 Mich. 152.
N.J.—Burnson v. Evans, 60 A.2d 891, 137 N.J.Law 511—Flanagan v. Miller, 38 A.2d 854, 132 N.J.Law 192—Duncan v. Board of Fire and Police Com'rs of City of Paterson, 37 A.2d 85, 131 N.J.Law 443—Morgan v. Mayor and Council of Borough of Roselle Park, 28 A.2d 620, 129 N.J.Law 233—Tonkin v. Kenworthy, 170 A. 233, 112 N.J.Law 274—Martini v. De Muro, 58 A.2d 597, 26 N.J.Misc. 182.
Pa.—Brinton v. Kerr, 181 A. 562, 320 Pa. 62
Tex.—Walker v. State, 171 S.W.2d 887, 146 Tex.Cr. 138.
Quo warranto as proper remedy to try title to office generally see infra § 7.
Under ordinary circumstances, only an action in the nature of quo warranto will lie to try title to office.—Seavey v. Van Hatten, 94 N.Y.S.2d 402, 276 App.Div. 260.
Office
(1) In fraternal union.—Siranovich v. Butkovich, 58 A.2d 461, 359 Pa. 134.
(2) In unincorporated association.

public[68] or whether such office is corporate,[69] the | unlawful practice of law,[70] or an election at which

—Wolff v. Wolf, 193 A. 783, 122 N.J. Eq. 243

68. Ala.—Beasley v. McCorkle, 184 So. 904, 237 Ala. 4.
Cal.—Klose v. Superior Court in and for San Mateo County, 217 P.2d 97, 96 Cal.App.2d 913.
Ga.—Rogers v. Croft, 47 S.E.2d 739, 203 Ga. 654.
Ill.—Wegler v. Stoecker, 66 N.E.2d 408, 393 Ill. 560—People ex rel. Prescott v. Scheffler, 45 N.E.2d 36, 381 Ill. 173.
Iowa.—**Corpus Juris cited in** Clark v. Murtagh, 254 N.W. 54, 55, 218 Iowa 71—State ex rel. Adams v. Murray, 252 N.W. 556, 217 Iowa 1091.
Mass.—Bell v. Treasurer of Cambridge, 38 N.E.2d 660, 310 Mass. 484.
Mich.—Sempliner v. FitzGerald, 2 N.W.2d 494, 300 Mich. 537—Lindquist v. Lindholm, 241 N.W. 922, 258 Mich. 152.
Minn.—State ex rel. Burk v. Beaudoin, 40 N.W.2d 885, 230 Minn. 186.
Miss.—McKenzie v. Thompson, 191 So. 487, 186 Miss. 524—Omar v. West, 183 So. 917, 186 Miss. 136.
Mo.—State ex rel. McGaughey v. Grayston, 163 S.W.2d 335, 349 Mo. 700.
N.H.—Stickney v. Town of Salem, 78 A.2d 921.
N.M.—Tadlock v. Smith, 31 P.2d 708, 38 N.M. 288.
N.J.—Shibla v. Township Committee of Wall Tp., Monmouth County, 61 A.2d 242, 137 N.J.Law 692—Vanderbach v. Hudson County Board of Taxation, 37 A.2d 93, 131 N.J.Law 491, reversed on other grounds 42 A.2d 848, 133 N.J.Law 126—Morgan v. Mayor and Council of Borough of Roselle Park, 28 A.2d 620, 129 N.J.Law 233—Application of Hudson County Board of Taxation, 27 A.2d 643, 128 N.J.Law 574—Di Mona v. Mariano, 8 A.2d 97, 123 N.J.Law 75—Chapman v. Frohlsher, 8 A.2d 76, 123 N.J.Law 127—Tideman v. Board of Com'rs of Town of West Orange, 4 A.2d 381, 122 N.J.Law 145—Murphy v. Board of Com'rs of City of Newark, 195 A. 339, 119 N.J.Law 163—Murphy v. Ellenstein, 195 A. 337, 119 N.J.Law 159—O'Connell v. Board of Com'rs of City of Bayonne, 181 A. 902, 116 N.J.Law 61—Ziegler v. City Council of Hackensack, 176 A. 324, 114 N.J.Law 186—Tonkin v. Kenworthy, 170 A. 233, 113 N.J.Law 274—Nickerson v. Board of Com'rs of City of Wildwood, 168 A. 142, 111 N.J.Law 169—Castles v. Governing Body, to wit, Mayor and Council of Town of Kearny, 180 A. 561, 13 N.J.Misc. 770—Kidd v. Crier, 161 A. 49, 10 N.J.Misc. 866.
N.Y.—Seavey v. Van Hatten, 94 N.Y.S.2d 402, 276 App.Div. 260—Application of Wier, 19 N.Y.S.2d 247, 259 App.Div. 839—Cudney v. Spaulding, 78 N.Y.S.2d 473, 191 Misc. 979—Ginsberg v. Heffernan, 60 N.Y.S.2d 875, 186 Misc. 1029—Macy v. Clayton, 100 N.Y.S.2d 890, affirmed 101 N.Y.S.2d 162, 277 App.Div. 1131
Ohio.—State ex rel. Kay v. Nixon, 81 N.E.2d 399, 82 Ohio App. 264—Morrow v. City of Cleveland, 56 N.E.2d 333, 73 Ohio App. 460—State ex rel. Bateman v. City of Cleveland, 6 Ohio Supp. 31.
Okl.—Robertson v. Brower, 156 P.2d 804, 195 Okl. 222—Goodwin v. Calmes, 25 P.2d 1073, 165 Okl. 260.
Pa.—Spencer v. Snedeker, 64 A.2d 771, 361 Pa. 234—Mahanoy Tp. Authority v. Draper, 52 A.2d 653, 356 Pa. 573—Commonwealth ex rel. McCreary v. Major, 22 A.2d 686, 343 Pa. 355—Driskel v. O'Connor, 15 A.2d 366, 339 Pa. 556—In re Murphy, 199 A. 194, 330 Pa. 529—Commonwealth ex rel. Shoemaker v. Thomas, 195 A. 103, 328 Pa. 19—In re School Dist. of Sewickley Tp., 194 A. 488, 327 Pa. 396—Brinton v. Kerr, 181 A. 569, 320 Pa. 62—Commonwealth ex rel. District Attorney of Mercer County v. Gibson, 175 A. 389, 316 Pa. 429—In re Hughestown Borough Councilman, 167 A. 587, 312 Pa. 477—Commonwealth v. Blume, 161 A. 551, 307 Pa. 406—Cella v. Davidson, 156 A. 99, 304 Pa. 389—Commonwealth v. Wherry, 152 A. 846, 302 Pa. 134—Dando v. Lord, 71 Pa.Dist. & Co. 370, 46 Sch.L.R. 60—Kurtz v. Steinhart, 60 Pa.Dist. & Co. 345, 19 Northumb.L.J. 195—Tooks v. Hardy, 48 Pa.Dist. & Co. 690—In re Election Board Officers, 42 Pa.Dist. & Co. 245—Commonwealth ex rel. v. Brady, 38 Pa.Dist. & Co. 107, 7 Sch.Reg. 39—Hayes v. Harris, Com.Pl., 54 Dauph.Co. 270, affirmed 42 A.2d 51, 351 Pa. 600—White v. City of Chester, Com.Pl., 30 Del.Co. 86—Commonwealth v. Peoples, Com.Pl., 30 Del.Co. 80—In re Clifton Heights Tax Collector, Com.Pl., 28 Del.Co. 235—Hartman v. City of Scranton, Com.Pl., 42 Lack.Jur. 157—Petition of Auditors of Borough of Nuangola, Com.Pl., 34 Luz.Leg.Reg. 321—Bowers v. County Controller, Com.Pl., 8 Sch.Reg. 1.
Tenn.—State ex rel. Bryant v. Maxwell, 224 S.W.2d 833, 189 Tenn. 187.
Tex.—Kaml v. Camp, Civ.App., 78 S.W.2d 1046, error dismissed—**Corpus Juris cited in** Barrett v. Tatum, Civ.App., 66 S.W.2d 444, error refused.
Utah.—Mann v. Morrison, 144 P.2d 543, 106 Utah 15.
Wash.—Llewellyn v. Langlie, 224 P.2d 321—Manlove v. Johnson, 88 P.2d 397, 198 Wash. 280—Smith v. Baughman, 76 P.2d 1022, 194 Wash. 78
51 C.J. p 313 note 72.
Quo warranto as proper remedy to try title to public office see infra § 8.

Reason for rule

"The generally recognized rule that quo warranto proceedings or the substituted statutory proceedings are the exclusive method of determining the right to hold and exercise a public office is founded upon considerations of policy and necessity. It would be detrimental to the public welfare and highly inexpedient that title to a public office should be put in question whenever any private citizen sees fit to make the assault."—Jenkins v. Congleton, 45 S.W.2d 456, 457, 242 Ky. 46.

Effect of declaratory judgments statute

The statute providing for declaratory judgments does not change the law giving the attorney general authority to bring an action to determine title to public office, or provide another method for that purpose, at least when quo warranto is available.—Brush v. City of Mount Vernon, 20 N.Y.S.2d 455, affirmed 24 N.Y.S.2d 355, 260 App.Div. 1048.

Failure of voting machine to record votes

N.Y.—Mullen v. Heffernan, 84 N.Y.S.2d 571, 193 Misc. 334, affirmed 85 N.Y.S.2d 301, 274 App.Div. 972, affirmed 83 N.E.2d 473, 298 N.Y. 785—In re Carson, 299 N.Y.S. 978, 164 Misc. 945, affirmed 4 N.Y.S.2d 289, 254 App.Div. 801.

69. La.—Leidenheimer v. Schutten, 194 So. 32, 194 La. 598.
N.J.—Tonkin v. Kenworthy, 170 A. 233, 112 N.J.Law 274—Regular Democratic Club of Little Ferry v. Tracy, 9 A.2d 56, 126 N.J.Eq. 394—Scott v. Cholmondeley, 18 A.2d 617, 129 N.J.Eq. 152.
51 C.J. p 313 note 73.
Quo warranto as proper remedy to try title to office in private corporation see infra § 9.

Office in incorporated church

Ill.—Shavers v. Thomas, 171 N.E. 625, 339 Ill. 622.
N.J.—Ebenezer Baptist Church v. Barber, 183 A. 469, 14 N.J.Misc. 192.
51 C.J. p 313 note 73 [a].

70. Ala.—Birmingham Bar Ass'n v. Phillips & Marsh, 196 So. 725, 239 Ala. 650.
Quo warranto as proper remedy against person unlawfully practicing law see infra § 6.
Unauthorized practice of law as contempt see Attorney and Client § 16 c (1).

there has been submitted any constitutional amendment, question, or proposition.[71]

In addition, quo warranto proceedings are the sole and exclusive remedy by which the legality of the existence and organization of a corporation,[72] whether a private corporation[73] or a municipal or other public corporation,[74] school district,[75] levee district,[76] or drainage, protection, irrigation, conservancy, or reclamation district[77] may be questioned and attacked, the forfeiture of a corporate franchise may be enforced[78] or the validity of a change of territory of a municipality,[79] school dis-

Effect of declaratory judgments statute

Declaratory judgment law was not intended to strike down public policy that proceedings against persons engaging in unlawful practice of law should be had in name of state and should be instituted in manner designated by quo warranto statutes—Birmingham Bar Ass'n v. Phillips & Marsh, 196 So. 725, 239 Ala. 650.

71. Mich.—Finlayson v. West Bloomfield Tp., 31 N.W.2d 80, 320 Mich 350—Lake v. North Branch Tp., 22 N.W 2d 248, 314 Mich. 140—Youells v. Morrish, 187 N W. 250, 218 Mich 194.

72. Ala—Alabama Power Co v. Cullman County Electric Membership Corporation, 174 So. 866, 234 Ala. 396, adhered to 178 So. 919, 235 Ala. 694.
Fla.—Certain Lands on Which Taxes are Delinquent v. City of Stuart, 188 So. 605, 137 Fla. 784.
Ind.—Joint County Park Board of Ripley, Dearborn and Decatur Counties v. Stegemoller, 88 N E. 2d 686, rehearing denied 89 N.E. 2d 720.
N M—Thrall v. Grant County Board of Education, 33 P.2d 908, 38 N. M 358.
Pa.—In re Eighth Ward Club of Upper Darby, Com Pl., 29 Del.Co. 5, 53 York Leg.Rec. 103.
51 C.J. p 313 note 74.
Quo warranto as proper remedy to try corporate existence or franchise see infra §§ 12–14.

Rule applies to corporations de facto as well as corporations de jure.—Fieldner v. Eckfeldt, 166 N. E. 504, 335 Ill. 11.

73. U S.—American Co-op. Serum Ass'n v. Anchor Serum Co., C.C A. Ill, 153 F 2d 907, certiorari denied 67 S.Ct. 57, 329 U.S. 721, 91 L.Ed. 625, and Illinois Farm Bureau Serum Ass'n v. American Co-op. Serum Ass'n, 67 S.Ct. 57, 329 U.S. 721, 91 L.Ed. 625, rehearing denied 67 S Ct. 132, 329 U.S. 826, 91 L.Ed. 701, and 67 S.Ct. 133, 329 U.S. 826, 91 L.Ed 702.
Ill.—First Nat. Bank v. Lindberg, 12 N.E.2d 917, 293 Ill.App. 474, certiorari denied O'Brien v. First Nat. Bank, 59 S Ct. 103, 305 U.S. 636, 83 L.Ed. 409, rehearing denied 59 S.Ct. 145, 305 U.S. 671, 83 L.Ed 435.
Iowa.—Walling v. Iowa Mut. Liability Ins. Co., 292 N.W 157, 228 Iowa 503.
Mont—State ex rel. Bottomly v. District Court of Eighth Judicial Dist. in and for Cascade County, 143 P.2d 559, 115 Mont. 400.
51 C.J p 313 note 74.
Dissolution or forfeiture of corporate franchise generally see Corporations §§ 1638–1782
Unlawful combination as ground for quo warranto see Monopolies § 120.
Merger of corporations
Iowa.—Walling v Iowa Mut. Liability Ins Co., 292 N.W. 157, 228 Iowa 503.

74. U S—Selser v. City of Stuart, C.C.A.Fla, 135 F.2d 211, certiorari denied 64 S.Ct. 81, 320 U S. 769, 88 L Ed 460.
Fla—Farrington v. Flood, 40 So.2d 462—Riviera Club v. City of Ormond, 2 So.2d 721, 147 Fla. 401—Heyward v. Hall, 198 So. 114, 144 Fla. 344—Certain Lands on Which Taxes are Delinquent v. City of Stuart, 188 So. 605, 137 Fla 784.
Ill—Heaney v. Northeast Park Dist. of Evanston, 195 N.E 649, 360 Ill. 254—Emery v Hennessy, 162 N E. 835, 331 Ill 296.
Minn—State ex rel. Burnquist v Village of North Pole, 6 N.W.2d 458, 213 Minn. 297.
N.Y.—Kress v. Village of Watkins Glen, 196 N E 19, 267 N.Y. 184
Okl.—City of Bethany v. Mason, 210 P.2d 353.
Tex.—Miller v Davis, 150 S.W.2d 973, 136 Tex. 299, 136 A L.R. 177—Germany v. Pope, Civ.App., 222 S. W.2d 172, refused no reversible error—Fritter v. West, Civ.App., 65 S.W 2d 414, error refused—Cook v. Bayne, Civ.App., 38 S.W.2d 419, error dismissed.
51 C J. p 313 note 74.
Attacking validity of municipal corporation generally see Municipal Corporations § 32.

Where attempted incorporation is void, it is subject to collateral attack, as discussed in Municipal Corporations § 32, without the joinder of the state in quo warranto proceedings.—City of Galena Park v. City of Houston, Tex.Civ.App., 133 S.W.2d 162, error refused.

75. Iowa.—Cook v. Consolidated School Dist. of Truro in Madison and Warren Counties, 38 N.W.2d 265, 240 Iowa 744—Nelson v Consolidated Independent School Dist, 164 N.W. 874, 181 Iowa 424.
Okl—Thomas v. Dawson, 115 P.2d 136, 189 Okl. 193
Tex—Crain v Adams, Civ.App, 120 S.W 2d 290—Miller v School Trustees of Milam County, Civ.App, 52 S.W 2d 806, error refused—King's Estate v. School Trustees of Willacy County, Civ.App., 33 S. W 2d 783, error refused.
51 C.J p 314 note 75.

Consolidated rural school district was not corporation within rule that quo warranto is sole method for attacking corporate existence.—Thrall v. Grant County Board of Education, 33 P 2d 908, 38 N M. 358.

76. Tex.—Poole v. Dallas County Levee Imp Dist. No. 9, Civ.App., 128 S.W.2d 502, error dismissed—Glenn v. Dallas County Bois d'Arc Island Levee Dist., Civ.App, 275 S W. 137, reheard 282 S W. 339 and reversed on other grounds Dallas County Bois d'Arc Island Levee Dist. v. Glenn, Com.App., 288 S.W. 165.
36 C.J p 1008 note 28.

77. Tex—Trimmier v. Carlton, Civ. App., 264 S.W. 253, affirmed 296 S. W 1070, 116 Tex 572.
51 C.J. p 314 note 76.
Water improvement district
Tex.—La Salle County Water Improvement Dist. No 1 v. Guinn, Civ.App., 40 S.W.2d 892, error refused.

78. Iowa.—O'Connor v. Home Savings & Loan Ass'n of Council Bluffs, 278 N.W. 636, 224 Iowa 1127.
Minn—Miller v. Minneapolis Underwritors Ass'n, 33 N.W.2d 48, 226 Minn. 367.
51 C.J. p 314 note 77.

Where corporation acts beyond its charter powers or exercises powers not conferred by law, statutory action in name of state, in nature of quo warranto, is exclusive remedy—Orman v. Bransford Realty Co., 73 S.W.2d 713, 168 Tenn. 70.

Rule prohibiting investigation into internal affairs of a corporation in other than quo warranto proceedings can be invoked only by the corporation.—State v. Hovland, 169 P.2d 341, 113 Mont. 454.

79. Cal.—Crowl v. Board of Trustees of City of Southgate, 292 P. 985, 109 Cal.App. 214.
Mo.—State ex rel. Kansas City v. Harris, 212 S.W.2d 733, 357 Mo. 1166—Central Missouri Oil Co. v.

trict,[80] or drainage district[81] may be attacked.

On the other hand, quo warranto is not an exclusive remedy where a cumulative remedy is provided for by constitutional or statutory provisions.[82] In the absence of constitutional restrictions, the legislature may provide a different remedy.[83]

Dispute as to facts According to some decisions quo warranto lies only when the facts are in dispute, as considered infra § 6, and it is the exclusive remedy when the relief sought is of such nature as otherwise to warrant the use of the remedy;[84] where the facts are undisputed quo warranto is not an exclusive remedy.[85]

Concurrent remedy in equity. In the absence of constitutional or statutory provisions conferring equitable jurisdiction, there is no concurrent remedy in equity when quo warranto is available.[86] Equitable relief may, however, be allowed where the remedy of quo warranto is not an adequate remedy.[87] The remedy of quo warranto has been held to be inadequate where the person interested must appeal to the discretion of some other person or body to maintain the proceeding,[88] such as the attorney general, district attorney, or the court,[89] although it has been held that it may not be presumed that the public officer, such as the attorney general, having the authority to institute quo warranto proceedings will fail to act if a petition in appropriate form and having the appearance of merit is presented to him.[90]

Equity may assume jurisdiction in a proper case although it is necessary in the proceeding for the court to make an incidental determination of title to office.[91]

City of St. James, 111 S.W.2d 215, 232 Mo.App. 142

Tex.—Plemmons Independent School Dist. v. Stinnett Independent School Dist., Com.App., 59 S.W.2d 812—Leffer v. City of Dallas, Civ. App., 177 S.W.2d 231.

51 C.J. p 314 note 78.

Prevention of or attack on change of boundaries of municipality see Municipal Corporations § 65 et seq.

80. Mo.—Spilker v. Bethel Special School Dist. of Shelby County, App., 235 S.W.2d 78.

Tex.—Leffer v. City of Dallas, Civ. App., 177 S.W.2d 231 Mize v. County School Trustees of Grimes County, Civ.App., 111 S.W.2d 289, error dismissed—Plemmons Independent School Dist. v. Stinnett Independent School Dist., Civ.App., 59 S.W.2d 812—King's Estate v. School Trustees of Willacy County, Civ.App., 33 S.W.2d 783, error refused.

51 C.J. p 314 note 79.

81. Ill.—Commissioners of Drainage Dist. No. 5 v. Arnold, 50 N.E. 2d 825, 383 Ill. 498.

82. U.S.—Toledo Traction, Light & Power Co. v. Smith, D.C.Ohio, 205 F. 643.

Cal.—Stessel v. Santa Ana River Water Co., 94 P.2d 1052, 35 Cal.App. 2d 117.

Ind.—State ex rel. McCormick v. Superior Court of Knox County, 95 N.E.2d 829.

Minn.—Miller v. Minneapolis Underwriters Ass'n, 33 N.W.2d 48, 226 Minn. 367—Dennistoun v. Davis, 239 N.W. 353, 179 Minn. 273.

N.Y.—Seavey v. Van Hatten, 94 N.Y.S.2d 402, 276 App.Div. 260—In re Lake Placid Co., 81 N.Y.S.2d 36, 274 App.Div. 205.

Tenn.—State ex rel. Phillips v. Greer, 98 S.W.2d 79, 170 Tenn. 529.

Tex.—Shaw v. Taylor, Civ.App., 146 S.W.2d 452—Adamson v. Connally, Civ.App., 112 S.W.2d 287.

51 C.J. p 313 note 68

Statutory remedy as exclusive of quo warranto see infra § 16.

In divorce case involving validity of appointment of chancellor who heard case under act creating additional division of chancery court and designating temporary chancellor, quo warranto did not constitute exclusive remedy, but supreme court on appeal treated cause as having been brought up by certiorari.—Howell v. Howell, 208 S.W.2d 22, 213 Ark. 398.

83. Mass.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.

84. N.Y.—Application of Wier, 19 N.Y.S.2d 247, 259 App.Div. 839—Heeran v. McNally, 244 N.Y.S. 151, 136 Misc. 851, reversed on other grounds 246 N.Y.S. 913, 231 App. Div. 779, affirmed 178 N.E. 787, 257 N.Y. 542—Kessler v. Silleck, 57 N.Y.S.2d 327.

51 C.J. p 313 note 72 [a].

85. U.S.—U. S. v. Malmin, C.C.A. Virgin Islands, 272 F. 785.

N.Y.—Sheehy v. Hamburg, 236 N. Y.S. 166, 134 Misc. 702.

86. Ala.—Birmingham Bar Ass'n v. Phillips & Marsh, 196 So. 725, 239 Ala. 650.

Ga.—Rogers v. Croft, 47 S.E.2d 739, 203 Ga. 654.

Ill.—Manchester Community High School Dist., No. 121, v. Murrayville Community High School Dist., No. 123, 141 N.E. 129, 309 Ill. 403.

Iowa.—Corpus Juris quoted in Walling v. Iowa Mut. Liability Ins. Co., 292 N.W. 157, 161, 228 Iowa, 503.

Mass.—Brierly v. Walsh, 12 N.E.2d 827, 299 Mass. 292.

N.Y.—Marfran Realty Corporation v. Agin, 25 N.Y.S.2d 486, 261 App. Div. 927, affirmed 43 N.E.2d 351, 288 N.Y. 727.

51 C.J. p 314 note 80.

Jurisdiction in equity for recovery of public office see Officers § 79.

Quo warranto as precluding equitable relief:

Generally see Equity § 31.

Injunctive relief see Injunctions §§ 25 c (1), 122.

87. D.C.—Columbian Cat Fanciers v. Koehne, 96 F.2d 529, 68 App. D.C. 257.

Ga.—Tarpley v. Carr, 51 S.E.2d 638, 204 Ga. 731 Cummings v. Robinson, 21 S.E.2d 627, 191 Ga. 336—Patten v. Miller, 8 S.E.2d 776, 190 Ga. 105.

Ill.—Smith v. Illinois Adjustment Finance Co., 63 N.E.2d 264, 326 Ill.App. 664.

N.J.—Sibilia v. Western Elec. Emp. Ass'n, 59 A.2d 251, 142 N.J.Eq. 77—De Cecter v. Wolkin, 42 A.2d 561, 136 N.J.Eq. 510.

N.M.—Orchard v. Board of Com'rs of Sierra County, 76 P.2d 41, 42 N.M. 172.

88. U.S.—Toledo Traction, Light & Power Co. v. Smith, D.C.Ohio, 205 F. 643.

D.C.—Columbian Cat Fanciers v. Koehne, 96 F.2d 529, 68 App.D.C. 257.

Persons entitled to maintain quo warranto see infra §§ 25 31.

89. D.C.—Columbian Cat Fanciers v. Koehne, supra.

90. Mass.—Brierly v. Walsh, 12 N. E.2d 827, 299 Mass. 292.

91. D.C.—Columbian Cat Fanciers v. Koehne, 96 F.2d 529, 68 App. D.C. 257.

Jurisdiction of equity where title to public office incidentally involved see Officers § 79 a.

§ 5. Power of Legislature to Abolish or Change

In the absence of constitutional restrictions the legislature may abolish the remedy of quo warranto, actions in the nature of quo warranto and kindred statutory remedies and provide for substitute remedies.

In the absence of a constitutional provision as to the remedy, quo warranto,[92] actions in the nature of quo warranto,[93] and kindred statutory remedies[94] may be abolished, and substitutions made in place thereof, by statute. In some states it has been held that, where the constitution empowers the supreme court or other courts to issue writs of quo warranto, the legislature is not competent to change or modify the scope of the remedy;[95] but in other jurisdictions a more liberal view is taken as to the power of the legislature under such a constitutional provision.[96]

92. Iowa.—State v. Winneshiek Co-op. Burial Ass'n, 15 N.W.2d 367, 234 Iowa 1196—Kosman v. Thompson, 215 N.W. 261, 204 Iowa 1254.

93. Iowa.—State v. Winneshiek Co-op. Burial Ass'n, 15 N.W.2d 167, 234 Iowa 1196—Kosman v. Thompson, 215 N.W. 261, 204 Iowa 1254.

94. Iowa.—State v. Winneshiek Co-op. Burial Ass'n, 15 N.W.2d 167, 234 Iowa 1196—Kosman v. Thompson, 215 N.W. 261, 204 Iowa 1254.

95. Fla.—Ex parte Beattie, 124 So. 273, 98 Fla. 785.
Mo.—State ex inf. McKittrick v. Wymore, 119 S.W.2d 941, 343 Mo. 98, 119 A.L.R. 710.
S.D.—Wright v. Lee, 55 N.W. 931, 4 S.D. 237.
Legislative abolition of jurisdiction of courts see Courts § 120 et seq.

96. Okl.—Newhouse v. Alexander, 110 P. 1121, 27 Okl. 46, 30 L.R.A., N.S., 602, Ann.Cas.1913B 674.
51 C.J. p 314 note 86.

97. Fla.—Winter v. Mack, 194 So. 225, 142 Fla. 1.
Iowa.—State v. Winneshiek Co-op. Burial Ass'n, 15 N.W.2d 367, 234 Iowa 1196.
Exclusiveness of remedy of quo warranto see supra § 4.
Existence and adequacy of other remedies see infra § 15.

98. Ala.—Birmingham Bar Ass'n v. Phillips & Marsh, 196 So. 725, 239 Ala. 650.
Cal.—City of Oakland v. Key System, 149 P.2d 195, 64 Cal.App.2d 427.
Fla.—City of South Miami v. State ex rel. Gibbs, 197 So. 109, 143 Fla. 524—Winter v. Mack, 194 So. 225, 142 Fla. 1—State ex rel. Gibbs v. Bloodworth, 184 So. 1, 134 Fla. 369.
Ill.—People ex rel. Ray v. Lewistown Community High School Dist. No. 241, 57 N.E.2d 486, 388 Ill. 78—People ex rel. Barber v. Hargreaves, 25 N.E.2d 416, 303 Ill. App. 387
Iowa.—State v. Winneshiek Co-op. Burial Ass'n, 15 N.W.2d 367, 234 Iowa 1196
Mo.—Corpus Juris cited in State ex inf. McKittrick v. American Colony Ins. Co., 80 S.W.2d 876, 892, 336 Mo. 406.
Neb.—State ex rel. Johnson v. Consumers Public Power Dist., 10 N.W.2d 784, 143 Neb. 753, 152 A.L.R. 480.
Ohio.—Muskingum County Democratic Ex-Committee v. Burrier, Com. Pl., 17 Ohio Supp 51.
51 C.J. p 314 note 88—26 C.J. p 1047 note 59.
Mode of questioning validity of franchise or of enforcing forfeiture generally see Franchises § 29 d.

Ordinary procedure for enforcing forfeiture of a privilege granted by the legislature is by a proceeding in the nature of quo warranto.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 310 Mass. 528.

Meaning of term "franchise"

(1) As used in connection with the writ of quo warranto, the word "franchise" means a special privilege conferred by government on individuals and not belonging to citizens generally by common right, and the powers granted by law to public officers and agencies of government, and a royal privilege or branch of the King's prerogative subsisting in the hands of a subject.—State ex inf. McKittrick v. Murphy, 148 S.W.2d 527, 347 Mo. 484.

(2) "Franchise" defined generally see Franchises § 1.

Words "unlawfully execute any franchise" within statute authorizing quo warranto proceedings where any person shall unlawfully execute any franchise mean acting without authority and do not mean acting with authority, but not in accordance with law.—State ex inf. Walsh v. Thatcher, 102 S.W.2d 937, 340 Mo. 865.

Noncorporate franchises are within rule.
Mo.—State v. Dawson, 224 S.W. 824, 284 Mo. 427.
N.J.—Tonkin v. Kenworthy, 170 A. 233, 112 N.J.Law 274.

Actual exercise of franchise

Defendant must be actually exercising a franchise or jurisdiction before quo warranto can be brought to test that right.—Romine v. Black, 25 N.E.2d 404, 304 Ill.App. 1—Zieboll v. Village of Posen, 257 Ill.App. 32.

99. Neb.—State ex rel. Johnson v. Consumers Public Power Dist., 10 N.W.2d 784, 797, 143 Neb. 753, 152 A.L.R. 480.
Tex.—Germany v. Pope, Civ.App., 222 S.W.2d 172, refused no reversible error.
51 C.J. p 315 note 89.

Municipal contract

The remedy by quo warranto cannot be used for the enforcement or forfeiture of a municipal contract.
Ala.—State v. Birmingham Water Works Co., 64 So. 23, 185 Ala. 398, Ann.Cas.1916B 166.
Neb.—State ex rel. Johnson v. Consumers Public Power Dist., 10 N.W.2d 784, 143 Neb. 753, 152 A.L.R. 480

Preventing competition

Quo warranto should not be resorted to at the instance of a competitor for the purpose of preventing

§ 6. Propriety and Grounds of Remedy in General

a. In general
b. Judicial discretion

a. In General

Quo warranto proceedings ordinarily are appropriate to procure a trial and determination of the right to an office, franchise, or privilege.

Quo warranto, or a proceeding in the nature thereof, is a proper and appropriate remedy in certain cases and it is not uncommon for the statutes regulating quo warranto proceedings to specify the grounds on which the writ may issue.[97] The proceeding usually lies to procure a trial and determination of the right to an office, as discussed infra §§ 7-11, franchise, or privilege,[98] but ordinarily not in other cases in the absence of constitutional or statutory regulations extending the remedy,[99] or

even in the cases mentioned unless the office, franchise, or privilege,[1] or the right to be determined or vindicated,[2] is of a public nature.

The proceeding does not lie merely to establish, determine, and vindicate private rights and interests, or to redress private grievances in which the public has no interest,[3] unless it is so provided by statute.[4] However, where the requisite public interest appears, the fact that the relief sought may benefit,[5] or redress an individual wrong of,[6] the relator does not preclude resort to the remedy. The mere fact that private citizens appearing as relators are interested in an information or may have employed counsel to assist or conduct the hearing does not make a proceeding private in its nature or change its character from one in which the public is interested.[7]

Quo warranto lies only to right an existing wrong and not to try moot questions.[8]

Testing election on proposition. A quo warranto proceeding is not a proper remedy in testing an election on a proposition[9] unless such remedy is made available by statute.[10]

competition.—State ex rel. Herbert v. Standard Oil Co., 35 N.E.2d 437, 138 Ohio St. 376—State v. Dayton Traction Co., 60 N.E. 291, 64 Ohio St. 272.

Question of fact within jurisdiction of administrative agency

Quo warranto is not proper remedy for one seeking, by way of original adjudication, a court determination on a question of fact constitutionally placed within civil service commission for determination.—People ex rel. Metzger v. Watrous, Colo., 215 P.2d 344.

Regulating exercise of powers conferred

(1) Quo warranto is intended to prevent exercise of powers which are not conferred by law, and ordinarily is not available to regulate the manner of exercising such powers.

Mo.—State ex inf. McKittrick v. Murphy, 148 S.W.2d 527, 347 Mo. 484

Neb.—State ex rel. Johnson v. Conservative Savings & Loan Ass'n, 11 N.W.2d 89, 143 Neb. 805—State ex rel Johnson v. Consumers Public Power Dist., 10 N.W.2d 784, 143 Neb. 753, 152 A.L.R. 480—State ex rel. Wright v. Eastern Nebraska Public Power Dist., 266 N.W. 594, 130 Neb. 683—State ex rel. Wright v. Lancaster County Rural Public Power Dist., 266 N.W. 591, 130 Neb. 677—State ex rel. Gantz v. Drainage Dist. No. 1, 160 N.W. 997, 100 Neb. 625.

(2) Generally, quo warranto will not lie for mere irregular exercise of conferred power, even though such irregularity may be sufficient, when tested by other remedies, to vitiate or render void the act done.—State ex rel. Johnson v. Consumers Public Power Dist., 10 N.W.2d 784, 143 Neb. 753, 152 A.L.R. 480.

(3) Powers exercised by officers see infra § 11.

Testing constitutionality of law

Quo warranto will not lie to determine the constitutionality of a municipal law, the proper mode to challenge such law would be to interpose an objection as a defense to the enforcement of the ordinance.

Ill.—People v. Whitcomb, 55 Ill 172.

Tex.—Ex parte Lewis, 73 S.W. 811, 45 Tex.Cr. 1, 108 Am.S.R. 929.

Validity of tax to be levied

Information in nature of quo warranto to test validity of a school tax election is not proper means of testing validity of tax sought to be levied, although sought with popular approval.—Barbee v. Board of Com'rs of Wake County, 188 S.E. 314, 210 N. C. 717.

In Florida

(1) Quo warranto is remedial and the court will not refuse to extend its use on a proper showing made, and there have been instances in which the common-law writ has been extended and employed for purposes other than for which it was originally conceived.—State ex rel. Pooser v. Wester, 170 So. 736, 126 Fla. 49—State ex rel. Watkins v. Fernandez, 143 So. 638, 106 Fla. 779, explaining Ex parte Smith, 118 So. 306, 96 Fla. 512, and State v. Gerow, 85 So. 144, 79 Fla. 804—State ex rel Bauder v. Markle, 142 So. 822, 107 Fla. 742.

(2) Test whether quo warranto will be extended to wrongs which constantly arise from new conditions is not what remedy previously extended to, but whether one complaining has suffered injury in his lands, goods, person, or reputation that should in right and justice be atoned for.—State ex rel. Pooser v. Wester, supra.

(3) Correlation of right, wrong and remedy see Actions § 4.

1. Del.—State ex rel. Green v. Glenn, 4 A.2d 366, 9 W.W.Harr. 584.
Fla.—State ex rel. Landis v. City of Coral Gables, 163 So. 303, 120 Fla. 492, 101 A.L.R. 573.
Mo.—State ex inf. McKittrick v. American Colony Ins. Co., 80 S. W.2d 876, 336 Mo. 406—State ex inf. McAllister ex rel. Manion v. Albany Drainage Dist., 234 S.W. 339, 290 Mo. 33.
51 C.J. p 315 note 91.

Public nature of:
Office see infra § 8.
Quo warranto proceeding see supra § 2.

2. Utah.—State v. Ryan, 135 P. 666, 41 Utah 327.

3. Del.—State ex rel. Green v. Glenn, 4 A.2d 366, 9 W.W.Harr. 584.
Ill.—Rowan v. City of Shawneetown, 38 N.E.2d 2, 378 Ill. 789.
Iowa—State ex rel. Maley v. Civic Action Committee, 28 N.W.2d 467, 238 Iowa 851.
Neb.—**Corpus Juris quoted in** State ex rel. Johnson v. Conservative Savings & Loan Ass'n, 11 N.W.2d 89, 193, 143 Neb. 805.
N.J.—Tonkin v. Kenworthy, 170 A. 233, 112 N.J.Law 274.
N.C.—Cooper v. Crisco, 161 S.E. 310, 201 N.C. 739.
Or.—State ex rel. Hallgarth v. School Dist. No. 23, Union County, 172 P.2d 655, 179 Or. 441.
51 C.J. p 315 note 94.

4. Ill.—Adair v. Williams, 95 N.E. 2d 345, 407 Ill. 309 · People ex rel. Paxton v. Bloomington Cemetery Ass'n, 187 N.E. 455, 363 Ill. 534.
Neb.—State ex rel. Johnson v. Conservative Savings & Loan Ass'n, 11 N.W.2d 89, 143 Neb. 805.
51 C.J. p 315 note 95.

5. Ala.—Longshore v. State, 76 So. 33, 200 Ala. 267.
51 C.J. p 315 note 96.

6. Colo.—Lockhard v. People, 178 P. 565, 65 Colo. 558.

7. Ill.—People ex rel. Sandberg v. Grabs, 26 N.E.2d 494, 373 Ill. 423 · People ex rel. Golconda Northern Ry. v. Toledo, St. L. & N. O. R. Co., 117 N.E. 701, 280 Ill. 495, Ann. Cas.1918D 224—People ex rel. Cullen v. Anderson, 87 N.E. 1019, 239 Ill. 266.

8. Cal.—People ex rel. Strong v. City of Whittier, 24 P.2d 219, 133 Cal.App. 316.

9. Colo.—People v. Grand County, 6 Colo. 202.
Ill.—People v. Whitcomb, 55 Ill. 172.

10. Mich.—Finlayson v. West Bloomfield Tp., 31 N.W.2d 80, 320 Mich. 350—Lake v. North Branch Tp.,

Unauthorized operation of collection agency. It has been held that a license issued to those who qualify under statute to operate a collection agency does not constitute a franchise within the quo warranto statute so as to authorize quo warranto proceedings against an association operating a collection agency without having obtained the required license [11]

Unauthorized practice of profession. Quo warranto proceedings usually are available, sometimes under express statutory provision, against persons who are practicing a profession without first having obtained the required license or certificate,[12] such as the professions of law[13] and medicine.[14]

Validity of liquor license. It has been affirmed in some jurisdictions,[15] and denied in others,[16] that a quo warranto proceeding may be maintained to test the validity, or enforce the forfeiture, of a liquor or dramshop license.

When facts are in dispute. According to some decisions quo warranto is a proper remedy when the facts are in dispute[17] and the remedy is available only where there are disputed questions of fact.[18]

b. Judicial Discretion

With some exceptions, the general rule is that the grant or denial of a writ of quo warranto and the entry or withholding of judgment in such a proceeding are addressed to the discretion of the court.

In a few jurisdictions the discretion of the court in a quo warranto proceeding is limited to the grant or refusal of leave to file an information,[19] and is expended when leave to file is granted[20] and an information is filed in pursuance thereof.[21] In other jurisdictions, however, the grant or denial of a writ of quo warranto is addressed to the discretion of the court,[22] which may in its discretion withhold

22 N.W.2d 248, 314 Mich. 140—Youells v. Marrish, 187 N.W. 250, 218 Mich. 194.

11. Wis.—State ex rel Fairchild v. Wisconsin Automotive Trades Ass'n, 37 N.W.2d 98, 254 Wis 398.

12. Ala.—Birmingham Bar Ass'n v. Phillips & Marsh, 196 So 725, 239 Ala 650.
Kan.—State ex rel. Boynton v. Perkins, 28 P.2d 765, 138 Kan. 899.
51 C.J. p 314 note 88 [c] (1).
Power of corporations to practice professions see Corporations § 956

13. Ala.—Birmingham Bar Ass'n v. Phillips & Marsh, 196 So. 725, 239 Ala. 650—Berk v. State ex rel Thompson, 142 So. 832, 225 Ala. 324.
Ill.—Smith v. Illinois Adjustment Finance Co., 63 N.E.2d 264, 326 Ill.App. 654.
Kan.—State ex rel Boynton v. Perkins, 28 P.2d 765, 138 Kan 899.
Practice of law without admission generally see Attorney and Client § 16.
Quo warranto as exclusive remedy see supra § 4.

14. Ala.—Ferguson v. State ex rel. Bailey, 172 So. 350, 27 Ala.App. 337.
Ill.—People, by Korner, v. United Medical Service, 200 N.E. 157, 362 Ill 442, 103 A.L.R. 1229.
51 C.J. p 314 note 88 [c] (2).
License to practice medicine see Physicians and Surgeons § 6 et seq.

Practice of chiropractic
Ala.—Harris v. State ex rel. Wilson, 109 So. 291, 215 Ala 56—Robinson v. State ex rel. James, 102 So. 693, 212 Ala. 459—Farmer v. State ex rel. Killcrease, 187 So. 735, 28 Ala. App. 398, certiorari denied 187 So. 737, 237 Ala. 555.

Practice of medicine and surgery by osteopath
Kan.—State ex rel. Beck v. Gleason, 83 P.2d 425, 148 Kan. 459, rehearing denied 84 P.2d 48, 148 Kan. 458.

15. Ill.—People v. Heidelberg Garden Co., 84 N.E 230, 233 Ill. 290.
51 C.J p 315 note 98—33 C.J. p 532 note 11.
Validity of license and collateral attack generally see Intoxicating Liquors §§ 106, 107.

16. N.C.—Hargett v Bell, 46 S.E. 719, 134 N.C. 394
Vt.—State v Gibbs, 74 A. 229, 82 Vt. 526, 24 L.R.A.,N.S., 555, 18 Ann.Cas. 525.

17. N.Y.—People ex rel Kelly v. The Common Council of the City of Brooklyn, 77 N.Y. 503, 33 Am. R. 659.
Quo warranto as exclusive remedy when facts in dispute see supra § 4.
One of the objects of quo warranto is to ascertain the facts.—People ex rel. Kelly v. The Common Council of the City of Brooklyn, 77 N.Y. 503, 33 Am.R. 659—Lenc v. Zicha, 227 N.Y.S. 704, 223 App.Div. 158.

18. **In New York**
(1) Quo warranto lies only when the facts are in dispute.—Smith v. Dillon, 44 N.Y.S.2d 719, 267 App.Div. 39—Rivette v. Baker, 37 N.Y.S.2d 912, 265 App.Div. 89, 894—Lenc v. Zicha, 227 N.Y.S. 704, 223 App.Div. 158—Kingston Associates v. La Guardia, 281 N.Y.S. 390, 156 Misc. 116, affirmed 285 N.Y.S. 19, 246 App. Div 803.

(2) However, it has also been held that quo warranto is not restricted to cases in which there are issues of fact.—Brush v. City of Mount Vernon, 20 N.Y.S 2d 455, affirmed 24 N.Y.S.2d 355, 260 App.Div. 1048.

19. R.I.—State v Brown, 5 R.I. 1.

20. N.J.—Reihl v. Wynne, Sup., 146 A. 204
51 C.J p 332 note 30.

21. R.I.—State v. Brown, 5 R.I. 1.
51 C.J p 332 note 31.

22. Ala.—Baxter v. State ex rel Metcalf, 9 So.2d 119, 243 Ala 120
Ill.—People v. White Circle League of America, 97 N.E.2d 811, 408 Ill 564.
Ill.—People ex rel. Universal Oil Products Co. v. Village of Lyons, 79 N.E.2d 38, 400 Ill 82.
Kan.—State ex rel. Dalton v. Joint Grenola Rural High School Dist. No 6 of Counties of Chautauqua, Cowley, and Elk, 142 P.2d 695, 157 Kan. 614—State ex rel. Beck v Board of Commissioners of Allen County, 57 P.2d 450, 143 Kan 898.
Mo.—State ex inf. McKittrick ex rel City of Lebanon v. Missouri Standard Tel. Co., 85 S.W 2d 613, 337 Mo. 642—State at Inf. of McKittrick v. Seibert, 65 S.W.2d 129, 228 Mo App. 1133.
Pa.—Commonwealth v. Keech, Com. Pl., 54 York Leg.Rec. 169.
Discretion as to character of judgment see infra § 40.

Considerations in exercise of discretion
The court may consider all circumstances and conditions, relators' motives in having proceedings instituted, and whether public interest will be served or damaged by writ, and necessity for and policy of allowing remedy.—People ex rel. Petty v. Thomas, 198 N.E. 363, 361 Ill. 448—People v. Miller, 163 N.E. 139, 331 Ill. 395.

Judgment of ouster
The court may properly exercise

relief or decline to proceed to judgment.[23] The court may exercise this discretion, and dismiss the proceeding or render judgment for defendant, on the case made by the pleadings,[24] or at the final hearing,[25] where the facts disclosed are such that, if they had been made known in the first instance, leave to file the information would have been refused,[26] as where there has been laches or long acquiescence[27] on the part of the relators[28] or the public,[29] or where the rendition of a judgment of ouster would not be in the public interest[30] or serve any good end or purpose.[31] Under some statutes the trial court, although it may be of the opinion that the best interests of the state do not require forfeiture of a corporate charter, has no discretion as to whether such penalty shall be enforced when a quo warranto proceeding for that purpose is instituted and the statutory ground of complaint is sustained by proof.[32]

judicial discretion in granting or refusing judgment of ouster in quo warranto proceeding.

Fla.—City of Winter Haven v. State ex rel. Landis, 170 So. 100, 125 Fla. 392.

Mo.—State ex inf. McKittrick ex rel. City of Campbell v. Arkansas-Missouri Power Co., 93 S.W.2d 887, 339 Mo. 15—State ex rel. Worsham v. Ellis, 44 S.W.2d 129, 329 Mo. 124—State ex rel. Crain v. Baker, App., 104 S.W.2d 726.

Sound discretion

Discretion of court in a quo warranto proceeding is a judicial discretion which is not to be used without reason and does not authorize the court to ignore a valid statute which has been promptly invoked.—State ex rel. Faizer v. Kansas City, 222 P.2d 714, 169 Kan. 702.

Private rights

When writ of quo warranto is sought to enforce private rights, court in the exercise of its discretion must determine from the facts whether there has been any unreasonable delay, acquiescence, or inequitable conduct by the relator or whether public interest justifies a refusal to proceed to a judgment of ouster after complaint had been filed.—People ex rel. Universal Oil Products Co. v. Village of Lyons, 79 N.E.2d 33, 400 Ill. 82.

"May"

Word "may" as used in act providing that writ of quo warranto "may" also be issued by common pleas is used in its permissive and not its mandatory sense, and whether writ shall issue, or having issued, shall be tried, rests in discretion of court.—Commonwealth ex rel. Margiotti v. Union Traction Co. of Philadelphia, 194 A. 661, 327 Pa. 497.

Abuse of discretion shown

Minn.—State ex rel. Dahl v. Fredrickson, 277 N.W. 407, 202 Minn. 79.

23. Kan.—State ex rel. Beck v. Board of Com'rs of Allen County, 57 P.2d 450, 143 Kan. 898.
Mo.—State ex rel. Crain v. Baker, App., 104 S.W.2d 726—Corpus Juris cited in State at Inf. of McKittrick v. Selbert, 65 S.W.2d 129, 134, 228 Mo.App. 1133.
51 C.J. p 332 note 32.

Petitioner's remote interest

Quo warranto held not to lie to remove attorney for commonwealth of city on ground that he was attorney for Home Owners' Loan Corporation and receiving emoluments from United States where corporation was created as temporary expediency and employment for United States was temporary, no one was claiming office held by attorney, and petitioner seeking quo warranto had only remote interest in question presented.—Commonwealth ex rel. Kelly v. Rouse, 178 S.E. 37, 163 Va. 841.

In Florida

(1) Generally speaking, quo warranto is a discretionary remedy.—State ex rel. Hawthorne v. Wisheart, 28 So.2d 589, 158 Fla. 267.

(2) It has, however, been held that in quo warranto by attorney general to oust foreign corporation from permit to do business in state, court has no discretion but to issue the writ, irrespective of sufficiency in law of the allegations of the information.—State ex rel. Landis v. S. H. Kress & Co., 155 So. 823, 115 Fla. 189.

24. Pa.—Corpus Juris quoted in Commonwealth ex rel. Margiotti v. Union Traction Co. of Philadelphia, 194 A. 661, 668, 327 Pa. 497.
51 C.J. p 332 note 33.

25. Mo.—State v. Cupples Station Light, etc., Co., 223 S.W. 75, 283 Mo. 115.
51 C.J. p 332 note 34.

26. Pa.—Commonwealth ex rel. Margiotti v. Union Traction Co. of Philadelphia, 194 A. 661, 327 Pa. 497.
51 C.J. p 332 note 35.

27. Mo.—Corpus Juris cited in State at Inf. of McKittrick v. Selbert, 65 S.W.2d 129, 134, 228 Mo. App. 1133.
51 C.J. p 332 note 36.

Drainage district

Where an attempt was made to establish drainage district under statutes and for many years thereafter district was operated and was recognized as having at least a de facto existence with jurisdiction and powers, pursuant to which contractual and other rights had been acquired but had not been fully discharged, a writ in quo warranto challenging the existence of the district and authority of its officers would be denied.—State, by Watson, v. Covington, 3 So.2d 521, 148 Fla. 42.

School district

Where township high school district purported to be organized under law authorizing such districts exercised powers thereof for twenty-five years, state itself could not by quo warranto question organization thereof.—Fiedler v. Eckfeldt, 166 N.E. 504, 335 Ill. 11.

28. Ill.—People v. Crowley, 103 N.E. 173, 260 Ill. 341.
51 C.J. p 332 note 37.

29. Ill.—People v. Brinkley, 152 N.E. 585, 332 Ill. 29.
51 C.J. p 332 note 38.

30. Fla.—City of Winter Haven v. State ex rel. Landis, 170 So. 100, 125 Fla. 392.
Mo.—Corpus Juris cited in State at Inf. of McKittrick v. Selbert, 65 S.W.2d 129, 134, 228 Mo.App. 1133.
N.J.—Robilboro v. Hillery, 58 A.2d 596, 137 N.J.Law 96.
Ohio.—State ex rel. Herbert v. Standard Oil Co., 35 N.E.2d 437, 138 Ohio St. 376.
51 C.J. p 332 note 39.

Chief consideration

Public good in element chiefly to be considered as guide to court in exercise of its discretionary authority, in granting judgment of ouster in quo warranto proceeding.—State ex inf. McKittrick ex rel. City of Campbell v. Arkansas-Missouri Power Co., 93 S.W.2d 887, 339 Mo. 15.

31. D.C.—U. S. ex rel. Nosl v. Carmody, 148 F.2d 684, 80 U.S.App. D.C. 58.
Mo.—Corpus Juris cited in State at Inf. of McKittrick v. Selbert, 65 S.W.2d 129, 134, 228 Mo.App. 1133.
51 C.J. p 332 note 40.

32. Miss.—Kennington-Saenger Theatres v. State ex rel. Dist. Atty., 18 So.2d 423, 196 Miss. 841, 152 A.L.R. 883.

§ 7. Unlawful Holding or Exercise of Office

Quo warranto proceedings are appropriate to try and determine the right or title to an office.

Quo warranto, or a proceeding in the nature thereof, is a proper and appropriate remedy to test the right or title to an office,[33] and procure a trial[34] and determination[35] thereof, the removal or ouster of the incumbent,[36] and in some,[37] although not other,[38] jurisdictions the possession of the office where the relator is a claimant of the office and is legally entitled thereto. In a quo warranto proceeding by the state, on the relation of a prosecuting attorney, merely to oust the possessor of an office, respondent's right to hold the office depends on the strength or validity of his own title,[39] and not on any infirmity in the title of another person;[40] and a person holding an office may be ousted although the right of the relator to the office is no better.[41] In a proceeding wherein the relator seeks possession of the office, he may recover only on the strength of his own title,[42] and not on any infirmity or weakness in the title of defendant or respondent.[43]

33. Fla.—Winter v. Mack, 194 So. 225, 142 Fla. 1.
Ga.—Overton v. Gandy, 153 S.E. 520, 170 Ga. 562—Swent v. Barnhill, 153 S.E. 364, 170 Ga. 545
Ill.—People v. White Circle League of America, 97 N.E.2d 811, 408 Ill. 564—People ex rel. Cromer v. Village of Maywood, 45 N.E.2d 617, 381 Ill. 337, certiorari denied Markham v. People of State of Ill. ex rel. Cromer, 63 S.Ct. 854, 318 U.S. 783, 87 L.Ed. 1151, rehearing denied 63 S.Ct. 1026, 319 U.S. 780, 87 L.Ed. 1725.
Ind.—State ex rel. McCormick v. Superior Court of Knox County, 95 N.E.2d 829
La.—Slater v. Blaize, 14 So.2d 872, 204 La. 21.
Neb.—State ex rel. Johnson v. Consumers Public Power Dist., 10 N.W.2d 784, 143 Neb. 753, 152 A.L.R. 480
N.J.—Burnson v. Evans, 60 A.2d 891, 137 N.J.Law 511—Finnegan v. Miller, 38 A.2d 854, 132 N.J.Law 192—Lazarus v. Home Building & Loan Ass'n, 32 A.2d 441, 133 N.J.Eq. 367
N.C.—Barbee v. Board of Com'rs of Wake County, 188 S.E. 314, 210 N.C. 717
Pa.—Commonwealth ex rel. Offner v. Uthmann Chor, Ind., Com.Pl., 33 Erie Co. 104
S.D.—**Corpus Juris cited in** Warren v. Brown, 234 N.W. 38, 41, 57 S.D. 528.
Utah.—**Corpus Juris quoted in** State ex rel. Stain v. Christensen, 35 P.2d 775, 782, 84 Utah 185.
51 C.J. p. 315 note 2—43 C.J. p. 676 note 35
Actions and other proceedings for recovery of office see Officers § 79
Judicial proceedings for removal of public officer see Officers § 67.
Office in private corporation see infra § 9.

Adequate remedy
Utah.—Mann v. Morrison, 144 P.2d 543, 106 Utah 15.

34. Mont.—State ex rel. Casey v. Brewer, 88 P.2d 49, 107 Mont. 550
51 C.J. p. 315 note 3.

35. Ariz.—Garcia v. Sedillo, 218 P.2d 721, 70 Ariz. 192.
Mo.—State ex inf. McKittrick v. Wymore, 119 S.W.2d 941, 343 Mo. 98, 119 A.L.R. 710
51 C.J. p. 315 note 4

36. Conn.—Alcorn ex rel. Hoerle v. Thomas, 17 A.2d 514, 127 Conn. 426
Miss.—Mitchell v. Finley, 137 So. 330, 161 Miss. 527.
51 C.J. p. 315 note 5
Scope and extent of relief see infra § 49.

De facto or de jure officer
(1) An information in the nature of quo warranto is the appropriate process to oust from an office a person who has no legal title thereto and who is holding office de facto but not de jure.—Attorney General v. Loomis, 114 N.E. 676, 225 Mass. 372.

(2) Quo warranto proceeding lies only to test defendant's right to hold office de jure.—Alcorn ex rel. Hoerle v. Thomas, 17 A.2d 514, 127 Conn. 426.

37. Miss.—Mitchell v. Finley, 137 So. 330, 161 Miss. 527.
51 C.J. p. 316 note 6.

38. Conn.—State v. Fowler, 32 A. 102, 33 A. 1005, 66 Conn. 294.
N.M.—De Vigil v. Stroup, 110 P. 830, 15 N.M. 544.

39. Ind.—Relender v. State, 49 N.E. 30, 149 Ind. 283.
Iowa.—State ex rel. Halbach v. Claussen, 250 N.W. 195, 216 Iowa 1079.
Scope of inquiry see infra § 45.

If there be more than one defendant, in order to prevail as against a quo warranto proceeding, a defendant must convince court that he is entitled to hold office on his own strength and not on weakness of his adversary.—State ex rel. Nagle v. Stafford, 34 P.2d 372, 97 Mont. 275.

40. Ind.—Relender v. State, 49 N.E. 30, 149 Ind. 283.
Iowa.—State ex rel. Halbach v. Claussen, 250 N.W. 195, 216 Iowa 1079.

41. Colo.—People ex rel. Dick v. Mosco, 167 P.2d 949, 114 Colo. 464.

42. Ga.—**Corpus Juris quoted in** Stephens v. Wohlwender, 30 S.E.2d 470, 471, 197 Ga. 795.
Ind.—State ex rel. Schrage v. Boyle, 190 N.E. 743, 206 Ind. 574—Rule v. State ex rel. Dickinson, 194 N.E. 151, 207 Ind.App. 546
Mich.—Ebright v. Buck, 40 N.W.2d 122, 326 Mich. 208
Minn.—State ex rel. Maffett v. Turnbull, 3 N.W.2d 674, 212 Minn. 382.
Miss.—State ex rel. Parks v. Tucei, 166 So. 370, 175 Miss. 218
N.J.—Morgan v. Mayor and Council of Borough of Roselle Park, 28 A.2d 620, 129 N.J.Law 233—Toomey v. McCaffrey, 184 A. 835, 116 N.J.Law 364
Ohio.—State ex rel. Davis v. Plapp, 22 N.E.2d 456, 61 Ohio App. 76
Pa.—Hoover v. Zemo, Com.Pl., 7 Fay.L.J. 161
R.I.—Black v. Cummings, 5 A.2d 858, 62 R.I. 361
Utah.—State ex rel. Stain v. Christenson, 35 P.2d 775, 84 Utah 185.
51 C.J. p. 316 note 10.

Failure to give bond
Quo warranto proceeding cannot be maintained to place in office one who has forfeited his right thereto by failure to give bond within time fixed by statute.—State ex rel. Stain v. Christensen, supra.

Rule was inapplicable to action by church members to test pastor's right to office where no one else claimed such office.—Scott v. Cholmondeley, 13 A.2d 617, 129 N.J.Eq. 152.

43. Ga.—Stephens v. Wohlwender, 30 S.E.2d 470, 197 Ga. 795.
Ind.—State ex rel. Schrage v. Boyle, 190 N.E. 743, 206 Ind. 574—Rule v. State ex rel. Dickinson, 194 N.E. 151, 207 Ind.App. 546
Minn.—State ex rel. Maffett v. Turnbull, 3 N.W.2d 674, 212 Minn. 382.
Miss.—State ex rel. Parks v. Tucei, 166 So. 370, 175 Miss. 218.
N.J.—Burke v. Kenny, 75 A.2d 633, 9 N.J.Super. 160—Morgan v. Mayor and Council of Borough of Roselle Park, 28 A.2d 620, 129 N.J.Law 233—Devlin v. Cooper, 11 A.2d 29, 124 N.J.Law 155, affirmed 15 A.2d 630, 125 N.J.Law 444—Murphy v. Cuddy, 1 A.2d 758, 121 N.J.Law 209—Toomey v. McCaffrey, 184 A. 835, 116 N.J.Law 364—McCarthy v. Walter, 156 A. 772, 108 N.J.Law 282.

It has been variously held or stated by the courts of different jurisdictions that quo warranto, or an information or suit in the nature thereof, is,[44] or is not,[45] a proper remedy where the petitioner does not claim the office for himself.

§ 8. —— Existence and Nature of Office in General

a. In general
b. Legal existence

a. In General

Quo warranto proceedings are appropriate to try and determine the title to a public office and also, under some statutes, a private office.

Quo warranto, or an action or proceeding in the nature thereof, is a proper and appropriate remedy to test, try, and determine the right or title to a public office,[46] regardless of the value of the office.[47] Conversely, in order to justify the employment of a quo warranto proceeding to try title to an office, there must be involved not only an office,[48] as distinguished from a mere position or employment,[49] held at the will of the officer or body hav-

R.I.—Black v. Cummings, 5 A.2d 858, 62 R.I. 361.
Utah—State ex rel. Stain v. Christensen, 35 P.2d 775, 84 Utah 185
51 C.J. p 316 note 11.

44. D.C.—U. S. ex rel. Noel v. Carmody, 148 F.2d 684, 80 U.S.App.D.C. 58.
51 C.J. p 316 note 12.

Proper way by which to try title to a public office where plaintiff does not claim the office for himself is by an information in the nature of quo warranto.—Hill v. Trustees of Glenwood Cemetery, 32 N.E.2d 238, 323 Mass. 388—Brierly v. Walsh, 12 N.E.2d 827, 299 Mass. 292.

45. Me.—Lemaire v. Crockett, 101 A. 302, 116 Me. 263.
51 C.J. p 316 note 13.

46. Cal.—People v. Chambers, 72 P.2d 746, 22 Cal.App.2d 687.
Conn.—Plymouth v. Painter, 17 Conn. 585, 44 Am.D. 574.
Fla.—State ex rel. Page v. Dannelly, 190 So. 503, 139 Fla. 320.
Ga.—Thompson v. Stone, 53 S.E.2d 458, 205 Ga. 243—Rogers v. Croft, 47 S.E.2d 739, 203 Ga. 654—Patton v. Miller, 8 S.E.2d 757, 190 Ga. 123—Wood v. Arnall, 6 S.E.2d 722, 189 Ga. 362.
Ind.—State ex rel. McCormick v. Superior Court of Knox County, 95 N.E.2d 829—State ex rel. Brown v. St. Joseph Circuit Court, 95 N.E.2d 632—State ex rel. Watson v. Pigg, 46 N.E.2d 232, 221 Ind. 23.
Iowa.—State v. Winneshiek Co-op. Burial Ass'n, 15 N.W.2d 867, 234 Iowa 1196.
Miss.—O'Neal v. Fairley, 200 So. 722, 190 Miss. 650.
Mo.—State ex inf. McKittrick v. Wymore, 119 S.W.2d 941, 343 Mo. 98, 119 A.L.R. 710.
N.H.—Stickney v. Town of Salem, 78 A.2d 921.
N.J.—Pellecchia v. Mattia, 193 A. 910, 118 N.J.Law 512—Scott v. Cholmondeley, 18 A.2d 617, 129 N.J.Eq. 152—Martini v. De Muro, 58 A.2d 597, 26 N.J.Misc. 182.
N.Y.—Schlobohm v. Municipal Housing Authority for City of Yonkers, 62 N.Y.S.2d 71, 188 Misc. 318, reversed on other grounds 62 N.Y.S.2d 541, 270 App.Div. 1022, affirmed 79 N.E.2d 742, 297 N.Y. 911.
N.C.—Swearingen v. Poplin, 191 S.E. 746, 211 N.C. 700.
Ohio.—State ex rel. Kirk v. Wheatley, 12 N.E.2d 491, 133 Ohio St. 164—Heffner v. State ex rel. Johnson, 1 N.E.2d 146, 131 Ohio St. 13—Morrow v. City of Cleveland, 56 N.E.2d 333, 73 Ohio App. 460—Muskingum County Democratic Ex-Committee v. Burrier, Com.Pl., 17 Ohio App. 51.
Pa.—Commonwealth ex rel. Koontz v. Dunkle, 50 A.2d 496, 355 Pa. 493, 169 A.L.R. 1277—Commonwealth ex rel. Shoemaker v. Thomas, 195 A. 103, 328 Pa. 19—Commonwealth v. Wherry, 152 A. 846, 302 Pa. 134—Dando v. Lord, 71 Pa.Dist. & Co. 370, 46 Sch.L.R. 60—In re Clifton Heights Tax Collector, Com.Pl., 28 Del.Co. 235—Commonwealth ex rel. v. Odlinski, Com.Pl., 38 Luz.Leg.Reg. 410.
Tenn.—Jones v. Talley, 230 S.W.2d 968, 190 Tenn. 471—State ex rel. Bryant v. Maxwell, 224 S.W.2d 833, 189 Tenn. 187—State v. Hammons, 43 S.W.2d 395, 163 Tenn. 290.
Tex.—State ex rel. Downs v. Harney, Civ.App., 164 S.W.2d 55, error refused—Poole v. Dallas County Levee Imp. Dist., No. 9, Civ.App., 128 S.W.2d 502, error dismissed—Gates v. Hays, Civ.App., 95 S.W.2d 1020, error dismissed.
Utah.—Olsen v. Merrill, 5 P.2d 226, 78 Utah 453.
Wash.—State ex rel. Brown v. Warnock, 122 P.2d 472, 12 Wash.2d 473—Clarken v. Blomstrom, 26 P.2d 87, 174 Wash. 612.
W.Va.—State ex rel. Bumgardner v. Mills, 53 S.E.2d 416.
51 C.J. p 316 note 15—20 C.J. p 210 note 67.
Existence of other remedy see infra § 15.

Adequate remedy
Ga.—Patten v. Miller, 8 S.E.2d 757, 190 Ga. 123—Townsend v. Carter, 164 S.E. 49, 174 Ga. 759.

Except governorship
Ga.—McDuffie v. Parkerson, 173 S.E. 151, 178 Ga. 230, 91 A.L.R. 1002.

Preferable procedure to try title to office on ground that ordinance creating office was void would be by quo warranto, since judgment of ouster would become effective if facts warranted that result.—Brierly v. Walsh, 12 N.E.2d 827, 299 Mass. 292.

Testing right to emolument of office
The right of the sheriff to reside in the county jail as an emolument of his office within the constitutional provision prohibiting any increase or decrease in salary or emoluments of a public officer during his term of office may be tested by quo warranto proceedings.—Commonwealth ex rel. v. Elliott, 40 Pa.Dist. & Co. 665.

47. Tex.—Gray v. State, 49 S.W. 699, 19 Tex.Civ.App. 521.

48. N.J.—Civil Service Commission v. Rife, 27 A.2d 214, 128 N.J.Law 503—Weitz v. Preston, 174 A. 429, 113 N.J.Law 271.
51 C.J. p 317 note 18.
Legal existence of office see infra subdivision b of this section.

In Florida
(1) Without deciding whether or not the position involved was an office or employment, the court has held, but not without dissent, that in view of the constitutional provision insuring open courts and remedies for injuries, a person summarily dismissed from a public position could bring quo warranto proceedings against his appointed successor to test his claim or title.—State v. Markle, 142 So. 832, 107 Fla. 742.

(2) Office must be of public nature in order to justify employment of quo warranto to try title to office.—State ex rel. City of St. Petersburg v. Noel, 154 So. 214, 114 Fla. 175.

(3) Right to justice and remedies for injuries see Constitutional Law §§ 705-720.

49. Del.—State ex rel. Green v. Glenn, 4 A.2d 366, 9 W.W.Harr. 584.
N.J.—Pellegrino v. Evans, 43 A.2d 269, 133 N.J.Law 159.
Ohio.—La Polla v. Davis, Com.Pl.,

ing the power of appointment,[50] but also, in a majority of jurisdictions, a public office or an office of a public nature.[51]

Quo warranto proceedings have been held proper to try and determine the right or title to various public offices,[52] as, for example, constable,[53] county commissioner,[54] county treasurer,[55] director, trustee, member of board of education, or other officer of a public school or school district,[56] district and prosecuting attorney,[57] judge,[58] members of board of supervisors of levee and drainage district,[59] tax collector,[60] town commissioner,[61] and township authority members.[62]

On the other hand, certain positions have been held not to constitute an office or a public office within the rule allowing quo warranto to test, try, and determine the right or title to a public office,[63] such as assistant clerk of county board of election,[64] grand jurors,[65] and special tax attorney appointed by state tax commission.[66]

In some jurisdictions quo warranto proceedings lie to try the right or title of a policeman and to oust him,[67] but in other jurisdictions the position of

89 N E 2d 706, appeal dismissed 86 N E 2d 615, 152 Ohio St 550
51 C J p 317 note 19
"Office" distinguished from.
"Employment" see Officers § 5.
"Position" see Officers § 2 a.

50. Ohio.—La Polla v Davis, Com Pl, 89 N E 2d 706, appeal dismissed 86 N.E 2d 615, 152 Ohio St 550
51 C.J. p 317 note 20.

51. Del.—State ex rel Green v Glenn, 4 A 2d 366, 9 W W.Harr 584.
Me.—Corpus Juris cited in Burkett ex rel Leach v. Ulmer, 15 A.2d 858, 859, 137 Me. 120.
Mont.—State ex rel Nagle v. Page, 37 P 2d 575, 98 Mont. 14.
N.J.—Tonkin v Kenworthy, 170 A. 233, 112 N J.Law 274
N M.—State ex rel Gibson v. Fernandez, 58 P 2d 1197, 40 N M. 288.
Ohio.—La Polla v. Davis, Com Pl, 89 N E.2d 706, appeal dismissed 86 N.E.2d 615, 152 Ohio St. 550
Pa.—Commonwealth ex rel Koontz v. Dunkle, 50 A.2d 496, 355 Pa. 493, 169 A L.R. 1277.
51 C.J. p 317 note 21.

"It has long been settled in England that the office, with respect to which the remedy by information would lie, must have been public in its nature."—Tonkin v. Kenworthy, 170 A. 233, 236, 112 N.J.Law 274

52. Colo.—People ex rel Dick v. Mosco, 107 P 2d 949, 114 Colo. 464
Ga.—Rogers v. Croft, 47 S E.2d 739, 203 Ga 654
Ind.—State ex rel McCormick v. Superior Court of Knox County, 95 N. E 2d 829.
N J.—Pellegrino v. Evans, 43 A.2d 269, 133 N J Law 159—Martini v. De Muro, 58 A.2d 597, 26 N.J.Misc. 182.
Pa.—Commonwealth ex rel. McCreary v. Major, 22 A.2d 686, 343 Pa. 355—Commonwealth v. Wherry, 152 A. 846, 302 Pa. 134—Commonwealth ex rel. v. Sullivan, 34 Pa. Dist. & Co 294, 32 Luz.Leg Reg. 339, 30 Mun.L R. 156, 9 Som Co L.J. 188—In re Chester Housing Authority, Com.Pl., 30 Del.Co. 25—In re Petition of Citizens of Avoca Borough, Quar.Sess., 35 Luz.Leg Reg 433, 34 Mun L R. 119.
Tex.—State ex rel La Crosse v. Averill, Civ.App., 110 S.W 2d 1173, error refused.
51 C J. p 316 note 15 [a].

Directors of water conservancy district
Colo.—People ex rel Rogers v Letford, 79 P.2d 274, 102 Colo 284.

Harbor master
Fla.—State ex rel Watson v. Friend, 11 So.2d 182, 152 Fla. 74.

Manager of state hail insurance department
N.D.—State ex rel. Johnson v Myers, 19 N W 2d 745, 74 N.D 678.

Secretary of league of municipalities
N J.—Tonkin v. Kenworthy, 170 A 233, 112 N J Law 274.

Trustee of Tecolote land grant
N M.—State ex rel. Valdez v. Moise, 76 P.2d 1155, 42 N.M. 280.

53. **Deputy constable**
Tex.—State v. Johnson, Civ.App., 52 S.W.2d 110, error dismissed.

54. N C.—Swaringen v. Poplin, 191 S.E. 746, 211 N C. 700.

County soldiers' relief commissioner
Ohio.—State ex rel. Davis v. Plapp, 16 N.E.2d 586, 58 Ohio App. 321.

55. Pa.—Bowers v. Reitz, 172 A. 707, 315 Pa 310.

Constitutional officer
A county treasurer, being a constitutional officer, can be removed from office by quo warranto proceedings.—In re Turner, 36 Pa.Dist & Co. 448, 38 Pittsb.Leg.J. 9.

56. Conn.—Alcorn ex rel. Hoerle v. Thomas, 17 A 2d 514, 127 Conn. 426.
Ga.—Conley v. Brophy, 60 S.E.2d 122, 207 Ga. 30—Townsend v. Carter, 164 S E 49, 174 Ga. 759.
Okl.—Smith v. State, 149 P. 884, 47 Okl. 682.
Tex.—Kaml v. Camp, Civ.App., 78 S.W 2d 1046, error dismissed.
51 C J. p 316 note 15 [a] (19).

Effect of statute vesting powers in boards of education
Statutes constituting county board of education a tribunal for hearing and determining any matter of local controversy in reference to construction and administration of school law and providing state board of education should have appellate jurisdiction and all school matters appealed from any county or city board of education and that its decisions in all matters should be final and conclusive do not take from courts of state power to inquire into right to hold office of school district trustee by quo warranto proceedings.—Conley v. Brophy, 60 S E 2d 122, 207 Ga 30.

57. Colo.—People v. Hallett, 1 Colo. 352.
S D.—Howard v. Burns, 85 N.W. 920, 14 S D. 382.
Wis.—Lask v. U. S, 1 Pinn 77

58. Miss.—Hill v. State, 128 So 878, 157 Miss. 648
51 C J p 316 note 15 [a] (23)

59. Mo.—State ex rel. Byrd v. Knott, App, 75 S W 2d 86.

60. Pa.—Commonwealth v. Blume, 161 A. 551, 307 Pa 406

61. N C.—Hedgpeth v. Allen, 17 S. E 2d 781, 220 N.C. 528.

62. Pa.—Mahanoy Tp. Authority v. Draper, 52 A.2d 653, 356 Pa. 573.

63. Del.—State ex rel Green v. Glenn, 4 A.2d 366, 9 W.W Harr. 584.
51 C.J p 317 notes 18 [a], 19 [a].

State boiler inspector
Mont.—State ex rel. Nagle v. Page, 37 P.2d 575, 98 Mont. 14.

64. Ohio.—State v. McDonald, 178 N.E. 266, 124 Ohio St 315.

65. Ga.—McDuffie v. Perkerson, 173 S.E 151, 178 Ga. 230, 91 A.L.R. 1002.

66. N.M.—State ex rel. Gibson v. Fernandez, 58 P.2d 1197, 40 N.M. 288.

67. N.J.—Wm. Eckelmann, Inc. v. Jones, 59 A.2d 246, 137 N.J.Law 210—Shibla v. Township Committee of Wall Tp., Monmouth County, 56 A 2d 734, 136 N.J.Law 506, affirmed 61 A.2d 242, 137 N.J.Law 692.
Okl.—City of Tulsa v. District Court

policeman is not an office or public office authorizing quo warranto proceedings.[68]

Private office. At common law quo warranto does not lie to inquire into the title of a private office.[69] However, under the construction placed on code or statutory provisions in some jurisdictions, the remedy of quo warranto is available to test the right or title to a private office;[70] but even in these jurisdictions quo warranto does not lie to test the right to membership in a committee which does not constitute either a public or private office.[71]

Nominee of political party. In the absence of constitutional or statutory provisions, quo warranto proceedings are not available to determine the nomination of a political party at a primary election.[72] A party nomination is not a public office within the rule that in the absence of statute quo warranto proceedings lie only to try title to an office which is public in its nature.[73] On the other hand, quo warranto proceedings lie to determine the nomination of a political party at a primary election where the proceeding is expressly or impliedly authorized by constitutional or statutory provisions.[74] Under a statute providing that all primary election contests shall be determined in the same manner as provided for by law for general elections, quo warranto proceedings may be used where available after a general election and where no other adequate remedy is available.[75]

Political office or position. In some jurisdictions, in the absence of statute, quo warranto will not lie to try and determine the title of a committeeman of a political party.[76] Such a person at the most is an officer of a political party and not a public officer within the rule in many jurisdictions restricting the remedy of quo warranto to try title to office to public offices.[77] In other jurisdictions, however, quo warranto proceedings are available to test the right to the position of a committeeman elected at a primary election, at least where such proceedings are authorized by constitutional or statutory provisions.[78] Quo warranto proceedings have been allowed to try and determine the right to the chairmanship of a state executive committee of a political party where the chairman is elected at a party convention.[79]

b. Legal Existence

Quo warranto proceedings are appropriate, in some jurisdictions, to determine the legal existence of an office

of Tulsa County, 51 P.2d 511, 174 Okl. 470.

51 C.J. p 317 note 25.

Municipal policeman as officer or public officer see Municipal Corporations § 568.

68. Mich.—Attorney General v. Cain, 47 N.W. 484, 84 Mich. 223.

69. Me.—Burkett ex rel. Leach v. Ulmer, 15 A.2d 858, 137 Me. 120.

Office in private corporation see infra § 9.

70. Ga.—Morris v. Peters, 46 S.E.2d 729, 203 Ga. 350.

51 C.J. p 317 note 22.

Quo warranto is not limited to cases in which public office is involved.—State ex rel. Moss v. Willis, La.App., 192 So. 138.

71. Ga.—Benson v. Hines, 144 S.E. 287, 166 Ga. 781.

51 C.J. p 317 note 23

72. Me.—Burkett ex rel. Leach v. Ulmer, 15 A.2d 858, 137 Me. 120.

Primary election contest generally see Elections § 120.

Authorities reviewed

Me.—Burkett ex rel. Leach v. Ulmer, 15 A.2d 858, 137 Me. 120.

Party nomination is not party position, and right to nomination at primary cannot be tested by quo warranto.—In re Bowley, 245 N.Y.S. 105, 138 Misc. 108.

In Oklahoma

(1) Under Act of April 9, 1925, c 96, p 145, S.L. 1925, proceedings in substitution of writ of quo warranto and information in the nature of quo warranto were made inapplicable to primary elections.—Dabney v. Hooker, 249 P. 381, 121 Okl. 193.

(2) Formerly, under Comp.St.1921 § 6133, providing that all contests arising out of primary elections shall be settled and decided in the same manner as by law provided for general elections, quo warranto proceedings were available.—Jarman v. Mason, 229 P. 459, 102 Okl. 278 20 C. J. p 119 note 7.

73. Me.—Burkett ex rel. Leach v. Ulmer, 15 A.2d 858, 137 Me. 120.

74. Fla.—State ex rel. Posner v. Wester, 170 So. 736, 126 Fla. 49.

Where proceedings on petition for mandamus resolved themselves into an inquiry as to which, if either, of two principal contestants was entitled to a place on the ballot as nominee for sheriff, and attorney general had appeared in behalf of secretary of state, proceeding was not subject to objection that proper remedy was quo warranto and that such writ could not be granted on ground that attorney general was a necessary party.—O'Brien v. Fuller, 39 A.2d 220, 93 N.H. 221.

75. Fla.—State ex rel. Watkins v. Fernandez, 143 So. 638, 106 Fla. 779, 86 A.L.R. 240, explaining Ex parte Smith, 118 So. 306, 96 Fla. 512, and followed in State ex rel. Jones v. Fernandez, 143 So. 642, 107 Fla. 849, and State ex rel. Gillespie v. Mobley, 144 So. 846.

76. Ill.—People v. Brady, 136 N.E. 87, 302 Ill. 576.

Pa. Commonwealth ex rel. Koontz v. Dunkle, 56 A.2d 196, 356 Pa. 493, 169 A.L.R. 1477.

51 C.J. p 317 note 24 [a] (2), (3).

77. Pa. Commonwealth ex rel. Koontz v. Dunkle, supra.

51 C.J. p 317 note 24 [a] (2).

Political committeeman as public officer generally see Officers § 2 a.

78. Fla.—State ex rel. Feltman v. Hughes, 49 So.2d 491 ;State ex rel. Page v. Donnelly, 130 So. 693, 130 Fla. 320 ;State v. Gerow, 85 So. 144, 79 Fla. 304.

N.Y. In re McLaughlin, 274 N.Y.S. 592, 242 App.Div. 756.

79. **Basis for decision**

(1) "While the *statutes* of this State, imposing duties upon the Chairman of any political party holding a primary election, do not make the office a public office of the State, they do, however . . . give to the office a status in law at least equivalent to that of an office in a private corporation, and thus on principle make it equally subject to the writ of quo warranto".—Morris v. Peters, 46 S.E.2d 729, 726, 203 Ga. 350.

(3) Quo warranto to try title to corporate office see infra § 9.

and to oust the person who is assuming to discharge the duties of such office

In some jurisdictions quo warranto proceedings may be maintained in order to determine the legal existence of an office and to oust the person who is assuming to discharge the duties of such office,[80] as where it is contended that the law creating the office is unconstitutional,[81] that the office has been abolished,[82] or that the court, district, or municipality of which defendant or respondent claims to be an officer was not legally created or organized[83] or has been legally abolished or terminated.[84]

In other jurisdictions it has been held or stated that quo warranto will not lie to try title to an office not shown to have a legal existence,[85] and, while some of the decisions to this effect involved only the question whether any office at all, as distinguished from a mere position or employment, had been created by law,[86] others hold that quo warranto proceedings do not lie for the usurpation of an office created by an unconstitutional law.[87]

A relator cannot assert a legitimate claim to an office in a quo warranto proceeding where the office claimed by relator does not exist.[88]

§ 9. —— Office in Private Corporation

Quo warranto proceedings ordinarily are a proper remedy to try title to office in a private corporation.

Except in some jurisdictions,[89] quo warranto, or an information or action in the nature thereof, is a proper remedy to try title to office in a private corporation.[90] In some jurisdictions, statutes ex-

80. Ala.—Corprew v. Tallapoosa County, 3 So.2d 53, 241 Ala. 492—City of Birmingham v. Henry, 139 So. 283, 224 Ala. 239.
Fla.—**Corpus Juris cited in** Winter v. Mack, 194 So. 225, 229, 142 Fla. 1.
Miss.—Hill v. State, 128 So. 878, 157 Miss. 648.
S.D.—Hurley v. Coursey, 265 N.W. 4, 64 S.D. 131.
51 C.J. p. 317 note 27.
Legal existence of office as within scope of inquiry in proceeding relating to office see infra § 45.

81. Ala.—Corprew v. Tallapoosa County, 3 So.2d 53, 241 Ala. 492—Hale v. State ex rel. Algee, 186 So. 168, 237 Ala. 191.
Ill.—People v. Spaid, 82 N.E.2d 435, 401 Ill. 534.
51 C.J. p. 317 note 28.
Invalid ordinance
Ohio.—State v. Newark, 49 N.E. 407, 57 Ohio St. 430.

82. N.J.—Worthley v. Steen, 43 N.J. Law 542.

83. Tex.—Harness v. State, 13 S.W. 535, 76 Tex. 566.
51 C.J. p. 317 note 30.

84. Mo.—State v. Smith, 196 S.W. 17, 271 Mo. 168.
51 C.J. p. 317 note 31.

85. Conn.—State v. Mackie, 74 A. 759, 82 Conn. 398, 26 L.R.A.,N.S., 660.
51 C.J. p. 317 note 32.
Action to compel defendants to deliver property in their control to city could not be maintained as an action in quo warranto, where it was made clear by complaint that no public office was involved.—State ex rel. City of Loogootee v. Larkin, 33 N.E. 2d 112, 218 Ind. 382.

86. Conn.—State v. Brethauer, 75 A. 705, 83 Conn. 143.
Ga.—Benson v. Hines, 144 S.E. 287, 166 Ga. 781.
Impropriety of quo warranto to try right to position see supra subdivision a of this section.

87. Conn.—State v. Mackie, 74 A. 759, 82 Conn. 398, 26 L.R.A.,N.S., 660.

88. N.J.—Murphy v. Cuddy, 1 A.2d 758, 121 N.J.Law 209—Pellecchia v. Mattia, 193 A. 910, 118 N.J.Law 512.

89. Mass.—Haupt v. Rogers, 48 N.E. 1080, 170 Mass. 71.
51 C.J. p. 318 note 38.
Actions and proceedings to determine validity of election of corporate officers generally see Corporations § 725.
Injunction to try and determine right to corporate office see Injunctions § 104.
In England quo warranto has not been available to try and determine the right to an office in a private corporation.—Weitz v. Preston, 174 A. 429, 113 N.J.Law 271.

90. Cal.—Elberta Oil Co. v. Superior Court of California in and for Kings County, 239 P. 415, 74 Cal. App. 114.
D.C.—U.S. ex rel. Noel v. Carmody, 148 F.2d 684, 80 U.S.App.D.C. 58.
Fla.—State ex rel. Page v. Dannelly, 190 So. 593, 139 Fla. 320.
La.—Leidenheimer v. Schutten, 194 So. 32, 194 La. 598—George M. Cox, Inc., v. Eddy, 189 So. 283, 192 La. 802—State ex rel. Moss v. Willis, App., 192 So. 138—State ex rel. Moss v. Willis, App., 185 So. 46—**Corpus Juris quoted in** State ex rel. Palfrey v. Simms, App., 152 So. 395, 396.
Minn.—Ray v. Homewood Hospital, 27 N.W.2d 409, 223 Minn. 440.
N.J.—Weitz v. Preston, 174 A. 429, 113 N.J.Law 271—Scott v. Cholmondeley, 18 A.2d 617, 129 N.J.Eq. 152.
Ohio.—Muskingum County Democratic Ex-Committee v. Burrier, 17 Ohio Supp. 51.
Pa.—Hanna v. Chester Times, 166 A. 243, 310 Pa. 583—Pittsburgh Steel Co. v. Walker, Com.Pl., 92 Pittsb. Leg.J. 464—Greek Catholic Union v. Molchany, Com.Pl., 86 Pittsb. Leg.J. 519.
Wash.—State ex rel. Lidral v. Superior Court for King County, 89 P.2d 501, 198 Wash. 610.
51 C.J. p. 318 note 39.
Usurpation of privilege as jurisdictional basis
(1) "The jurisdictional basis for the employment of an information in the nature of a quo warranto, as a remedy for an unlawful usurpation of an office in a merely private corporation, is the same as in cases of public or municipal corporations. There is in both cases an unfounded claim to the exercise of a corporate franchise, amounting to a usurpation of the privilege granted by the state."—Tonkin v. Kenworthy, 170 A. 233, 235, 112 N.J.Law 274.
(2) "The theory upon which these decisions (in Georgia) were based was that quo warranto was the proper remedy to test the title to the office involved, not because the incumbent was a public officer within the literal meaning of that term, but because the corporations involved had been granted, by legislative authority, a franchise, and that the usurpation of a corporate office, therefore, amounts to the usurpation of a privilege granted by the state."—Morris v. Peters, 46 S.E.2d 729, 735, 203 Ga. 350.
Officers and directors of particular corporations
(1) Benevolent societies.
Ariz.—Garcia v. Sedillo, 218 P.2d 721, 70 Ariz. 192.
Ohio.—State ex rel. Cullitan v. Toth, 194 N.E. 371, 129 Ohio St. 198.
51 C.J. p. 318 note 39 [a] (2).
(2) Religious societies generally.
Ill.—Shavers v. Thomas, 171 N.E. 625, 339 Ill. 622.

pressly authorize quo warranto proceedings to try and determine title to an office in a corporation,[91] but under such statutes the proceedings will not lie against persons who are not officers.[92] Apart from statute, an office in a private corporation, created and chartered by the state, is deemed to be of a public character,[93] or the public is deemed to have an interest therein,[94] in such a sense and to such an extent as to render the remedy available against a person who, not being lawfully entitled to do so, holds the office.

Quo warranto is not available to test the legality of the official action of corporate officers.[95]

§ 10. —— Possession and User of Office

Quo warranto proceedings to try the right to an office ordinarily will not lie unless the defendant or respondent is in actual present possession and user of the office.

In order to maintain a proceeding by quo warranto to try the right to an office, it has been held in many decisions that it must appear that defendant or respondent is in actual present possession and user of the office[96] in question.[97] It is not sufficient that the person against whom the jurisdiction is invoked should have merely claimed the right to take the official oath, but an absolute user must also be shown.[98] An incumbent of an office cannot proceed by quo warranto against another person who does not usurp or unlawfully hold or execute such office,[99] even though steps are taken which threaten to disturb the incumbent in the enjoyment of his term.[1] However, the remedy of quo warranto is available where the relator and respondent are each in part possession, and are performing part of the duties, of the office.[2]

In some jurisdictions, it has been held that it is not indispensable to justify quo warranto proceedings that there be a contest between two claimants for the same office[3] so that the proceedings may

N.J.—Scott v. Cholmondeley, 18 A. 2d 617, 129 N.J.Eq. 152.

Pa.—Tooks v. Hardy, 48 Pa.Dist. & Co. 696.

51 C.J. p 318 note 39 [a] (5).

(3) Pastor of church.- Skinner v Holmes, 33 A.2d 819, 133 N.J.Eq. 593—Scott v. Cholmondeley, 18 A.2d 617, 129 N.J.Eq. 152.

91. Pa.—Latham v. Watson, 185 A. 642, 322 Pa. 221 Commonwealth ex rel. v. Petro, Com.Pl., 95 Pittsb. Leg.J. 39, 60 York Leg.Rec. 179.

92. Pa.—Latham v. Watson, 185 A. 642, 322 Pa. 221—Commonwealth ex rel. v. Petro, Com.Pl., 95 Pittsb Leg.J. 39, 60 York Leg.Rec. 179.

General manager

Quo warranto is not proper remedy to determine right to act as general manager of corporation, relator not having shown that he holds either "office" or "franchise" within quo warranto statute.—Weitz v. Preston, 174 A. 429, 113 N.J.Law 371.

Corporators in a nonprofit, nonstock cemetery corporation are not officers within statute.—Latham v. Watson, 185 A. 642, 322 Pa. 221.

Trustees selected to effect incorporation are not officers within statute.—Dismukes v. State, 58 So. 195, 176 Ala. 616.

93. Del.—Brooks v. State, 79 A. 790, 36 Del. 1, 51 L.R.A.,N.S., 1126, Ann. Cas.1915A 1133.

94. Ind.—Covington, etc., Plank-Road Co. v. Moore, 3 Ind. 510.

95. Neb.—State ex rel. Johnson v. Consumers Public Power Dist., 10 N.W.2d 784, 143 Neb. 753, 152 A.L.R. 480.

96. Ga.—Cummings v. Robinson, 21 S.E.2d 627, 194 Ga. 336—Wood v. Arnall, 6 S.E.2d 722, 189 Ga. 362—Sweat v. Barnhill, 155 S.E. 18, 171 Ga. 294.

Ill.—Romine v. Black, 25 N.E.2d 404, 304 Ill.App. 1.

Ind.—**Corpus Juris cited in** State ex rel. McCormick v. Superior Court of Knox County, 95 N.E.2d 829, 832.

Ky.—Broyles v. Commonwealth, 219 S.W.2d 52, 309 Ky. 837.

Miss.—**Corpus Juris cited in** O'Neal v. Fairley, 200 So. 722, 723, 190 Miss. 650.

Mont.—Snyder v. Boulware, 96 P.2d 913, 109 Mont. 427.

Neb.—State ex rel. Good v. Marsh, 249 N.W. 295, 125 Neb. 125.

N.J.—Wentzell v. Steelman, 151 A. 116, 8 N.J.Misc. 503.

N.Y.—Schlobohm v. Municipal Housing Authority for City of Yonkers, 62 N.Y.S.2d 71, 188 Misc. 318, reversed on other grounds 62 N.Y.S. 2d 541, 270 App.Div. 1022, affirmed 79 N.E.2d 742, 297 N.Y. 91.

Pa.—Commonwealth ex rel. v. Zug, 43 Pa.Dist. & Co. 402.

51 C.J. p 318 note 44.

Object of quo warranto is to have one in possession adjudged guilty of usurpation.—De Gaetor v. Wolklin, 42 A.2d 501, 136 N.J.Eq. 510.

Color of right

Quo warranto is available only where the office in dispute is that held by another party under color of right.—Smith v. Dillon, 44 N.Y.S.2d 719, 267 App.Div. 39—In re Allied Fruit & Extract Co., 276 N.Y.S. 153, 243 App.Div. 52.

Where defendant had not yet assumed office action in the nature of quo warranto would not lie.—Seavey v. Van Hatten, 94 N.Y.S.2d 402, 276 App.Div. 260.

Where office involved is vacant, quo warranto proceedings do not lie. Miss.- O'Neal v. Fairley, 200 So. 722, 190 Miss. 650.

N.Y.—Sheils v. Flynn, 299 N.Y.S. 20, 163 Misc. 506, affirmed 297 N.Y.S. 705, 252 App.Div. 140 Kingston Associates v. La Guardia, 281 N.Y.S. 390, 156 Misc. 116, affirmed 285 N.Y.S. 19, 246 App.Div. 803.

51 C.J. p 318 note 44 [c] (2).

One of several holding office

In quo warranto proceeding to oust directors of corporation, fact that only one respondent was actually shown to be holding office, although it was alleged that all respondents claimed to be officers in the corporation, did not affect right of relators to relief where all respondents were charged as illegally holding office as directors and were recognized by judgment as holding office as directors illegally.—State ex rel. Moss v. Willis, La.App., 193 So. 138.

97. Miss. O'Neal v. Fairley, 200 So. 722, 190 Miss. 650.

51 C.J. p 319 note 45.

98. Ill.—Romine v. Black, 25 N.E. 2d 404, 304 Ill.App. 1.

99. Ind.—**Corpus Juris cited in** State ex rel. Denton v. Kinkle, 86 N.E.2d 677, 680, 227 Ind. 564.

51 C.J. p 319 note 46.

1. N.J.—Hartley v. Passaic County Board of Elections, 107 A. 817, 93 N.J.Law 313- Bradshaw v. Camden, 39 N.J.Law 416.

2. N.J.—Schneider v. Atkinson, 92 A. 81, 86 N.J.Law 392.

51 C.J. p 319 note 48.

3. Wash.—Clarken v. Blomstrom, 26 P.2d 87, 174 Wash. 612- State ex rel. Forstall v. Otis, 230 P. 414, 131 Wash. 455.

be maintained, although respondent disclaims all right and title to the office in question.[4]

§ 11. —— Particular Grounds

Quo warranto proceedings may be maintained against an incumbent of an office on various grounds, such as usurpation of the office, ineligibility or disqualification, failure to qualify, illegality of the election and forfeiture of the office.

Quo warranto proceedings may be maintained against an incumbent of an office on various particular grounds some of which are specifically provided for by statute.[5] The particular grounds include his intrusion into, or usurpation of, the office,[6] the appointment of him to fill a vacancy which did not legally exist,[7] or acceptance of an incompatible office,[8] and his exercise of the office after the expiration of the term for which he was elected or appointed.[9] Under a statute declaring that the writ of quo warranto may issue to inquire into the right of any person to any public office the duties of which he is in fact discharging, the writ may not be used merely to obtain an advisory opinion as to the termination of a respondent's term of office.[10]

Failure to qualify by filing the bond and taking the oath required is ground for ouster by quo warranto, at least where such failure results in a vacancy in the office,[11] but the rule is otherwise as to a failure to take the oath, or do some other act, within the required time, where it is done before the institution of the proceeding.[12]

Ineligibility or disqualification of the incumbent of an office,[13] but not ineligibility of another per-

4. Wash.—Clarken v. Blomstrom, 26 P.2d 87, 174 Wash. 612

5. Ala.—State ex rel. Gunn v. Argo, 151 So. 844, 227 Ala. 657
Ark.—Barber v. Barker, 192 S.W.2d 353, 209 Ark. 704

6. Ala.—State ex rel. McIntyre v. McEachern, 166 So. 36, 231 Ala. 609—State ex rel. Moore v. Blake, 142 So. 418, 225 Ala. 124
Ariz.—State ex rel. Sullivan v. Moore, 64 P.2d 809, 49 Ariz. 51.
Fla.—State ex rel. Gibbs v. Bloodworth, 184 So. 1, 134 Fla. 369.
Me.—Burkett ex rel. Leach v. Ulmer, 15 A.2d 858, 137 Me. 120.
Mich.—Attorney General ex rel. Cook v. Burhans, 7 N.W.2d 370, 304 Mich. 108
Mont.—State ex rel. Nagle v. Page, 37 P.2d 575, 98 Mont. 14.
Neb.—Thompson v. James, 250 N.W. 237, 125 Neb. 350, dissenting opinion 253 N.W. 431, 125 Neb. 888.
N.J.—Brookhoven v. Kennedy, 14 A.2d 789, 125 N.J.Law 178, affirmed 17 A.2d 152, 125 N.J.Law 507—Moore v. Ennis, 162 A. 751, 10 N.J.Misc. 1131.
Ohio.—State ex rel. Kirk v. Wheatley, 12 N.E.2d 491, 133 Ohio St. 164—State ex rel. Hogan v. Hunt, 95 N.E. 666, 84 Ohio St. 143.
Tex.—State v. Johnson, Civ.App., 52 S.W.2d 110, error dismissed.
W.Va.—State ex rel. Bumgardner v. Mills, 53 S.E.2d 416.
51 C.J. p. 319 note 50.
Intrusion into office proceedings see Officers § 79 b.

Object of writ of quo warranto is to have one in possession of an office adjudged guilty of usurpation.—Chapman v. Frobisher, 8 A.2d 76, 123 N.J.Law 127.

After being ordered to surrender books and papers to another claimant in mandamus proceeding one holding over in public office after term expired may bring action in nature of quo warranto to test title to office.—Burnett v. Langston, 162 S.E. 72, 164 S.C. 99

What constitutes usurpation

(1) Usurpation of public office authorizing quo warranto action may be with or without forcible seizure of office, and prerogatives thereof, and may consist of mere unauthorized assumption and exercise of power in performing duties of office on claim of right thereto.—State ex rel. Kirk v. Wheatley, 12 N.E.2d 491, 133 Ohio St. 164

(2) Usurpation of office generally see Officers §§ 80–82

Officers held not usurpers

Ky.—Commonwealth ex rel. Meredith v. Whitt, 165 S.W.2d 347, 291 Ky. 682.

Void appointment

Tex.—State v. Johnson, Civ.App., 52 S.W.2d 110, error dismissed

7. N.Y.—People v. Neubrand, 52 N.Y.S. 280, 32 App.Div. 49
51 C.J. p. 319 note 51

8. Cal.—People, on Complaint of Chapman, v. Rapsey, 107 P.2d 388, 16 Cal.2d 636.
51 C.J. p. 319 note 53.

Acceptance of incompatible "position"

Where state senator held a position or employment as distinguished from an office in another branch of the state government, even though such post be deemed incompatible with office of senator, he may not be ousted under quo warranto proceedings.—Wilentz ex rel. Golat v. Stanger, 29 A.2d 413, 129 N.J.Law 294, affirmed 30 A.2d 885, 129 N.J.Law 606.

9. Conn.—Alcorn ex rel. Hoerle v. Thomas, 17 A.2d 514, 127 Conn. 426
51 C.J. p. 319 note 54.

10. Ga.—Bowling v. Doval, 58 S.E.2d 173, 206 Ga. 641.

11. Utah.—**Corpus Juris quoted in** State ex rel. Stain v. Christensen, 35 P.2d 775, 782, 84 Utah 185.
51 C.J. p. 319 note 65

Failure not vacating office

Wash.—State ex rel. Austin v. Superior Court for Whatcom County, 97 P.2d 171, 2 Wash.2d 46.

12. Utah.—State ex rel. Stain v. Christensen, 35 P.2d 775, 84 Utah 185
51 C.J. p. 319 note 66.

13. Ga.—Chapman v. Walden, 188 S.E. 885, 183 Ga. 395
Ill.—Wagler v. Stoecker, 66 N.E.2d 408, 393 Ill. 560
N.J.—Burnson v. Evans, 60 A.2d 891, 137 N.J.Law 511—Wm. Eckelmann, Inc., v. Jones, 59 A.2d 246, 137 N.J.Law 210.
51 C.J. p. 319 note 55

Quo warranto "will lie to test the qualifications of one to hold office when they are sufficient to make it unlawful for him with them to hold the office. Those qualifications must go to his eligibility to hold the office or [be] sufficient to cause its forfeiture."—State ex rel. McIntyre v. McEachern, 166 So. 36, 39, 231 Ala. 609.

Legislature may provide for removal by quo warranto for something which renders officer incapable of holding office or ineligible to office.—State ex rel. Chambers v. Bates, 171 So. 370, 233 Ala. 251.

Violation of Corrupt Practice Act

Candidate or office holder who violates Corrupt Practice Act in way which makes him ineligible or disqualified by its terms becomes "usurper," "intruder," or "unlawful holder of office" and may be removed by quo warranto.—State ex rel. Chambers v. Bates, supra.

Acceptance of campaign contributions

Under statute providing that if on audit of expense account of candidate it shall appear that he has accepted any contributions, incurred

son,[14] such as a clerk or inspector officiating at the election at which the incumbent was elected,[15] constitutes a ground for a quo warranto proceeding It has been held that an officer elected by the people may be ousted in quo warranto proceedings where he does not possess the statutory professional qualifications,[16] but it has also been held that quo warranto proceedings will not lie to oust an appointed officer whose professional qualifications have been passed on by the officer or agency appointing him or by a civil service commission.[17] Where the incumbent becomes ineligible to hold office, and continues to exercise its functions he may be ousted by quo warranto proceedings[18] as a usurper.[19] Where the office becomes vacant as a result of the removal of the residence of the incumbent outside of the district, quo warranto proceedings are proper to oust him from office.[20] Quo warranto proceedings against certain members of the state legislature on the ground that such members are not eligible and qualified to act as members because of the legislature's failure to reapportion the state into districts on the basis of population as required by the constitution may not be maintained because of the lack of power of the court to coerce legislative reapportionment of the state.[21]

Illegality of election. Unless a statutory election contest is an exclusive remedy in the particular jurisdiction, as considered in Elections § 247 b, quo warranto may be maintained against the incumbent of an office on the ground of illegality in his election.[22] Quo warranto does not lie to review a statutory election contest,[23] but the rule is not applicable where the contest is a nullity.[24] Quo warranto will not lie to set aside an election which has become final for the reason that no contest has been instituted.[25]

Acts and conduct of officer; forfeiture and removal. The mere function of an office, as distinguished from the office itself, may not be the subject of quo warranto.[26] Quo warranto proceedings may not be maintained to command the performance of official functions by an officer to whom they may run.[27] A quo warranto proceeding against an officer is not a proper remedy to test the legality of his past or future conduct or acts and to compel, restrain, or obtain a review of such conduct or acts where they do not ipso facto operate as, or constitute grounds for, forfeiture of the office and neither title

any expense, or disbursed any money in contravention of the statute the court of quarter sessions shall certify the fact to the attorney general who shall file a suggestion for a writ of quo warranto against such candidate, the legislature did not contemplate that every passive act or omission should automatically visit on candidates the drastic penalty of quo warranto proceedings but contemplated such penalty only on a showing of fraud or corruption. —In re Laub, 21 A.2d 575, 145 Pa. Super. 513.- In re Kearney, 7 A.2d 159, 136 Pa.Super. 78.

Action or nonaction by election officials at or before election will not preclude court from inquiring into right of elector to qualify and discharge duties of office.- State ex rel. Mitchell v. McDonald, 145 So. 508, 164 Miss. 405, 86 A.L.R. 290.

14. Ala.—State v. Thomas, 62 So. 504, 181 Ala. 605.

15. Ala.—State v. Thomas, supra.

16. Kan.—Janaky v. Baldwin, 243 P. 302, 120 Kan. 332, 47 A.L.R. 476.

County surveyor who, being without statutory professional qualifications for surveyor, is personally disqualified to perform professional acts or services of his office may be ousted in quo warranto.- State ex rel. Landis v. Ward, 158 So. 273, 117 Fla. 585.

17. Ala.—State ex rel. McIntyre v. McEachern, 166 So. 36, 231 Ala. 669.

Colo. People ex rel. Beardsley v. Hart, 124 P.2d 233, 109 Colo. 223.

18. Ala.- State ex rel. Moore v. Blake, 142 So. 418, 225 Ala. 124.

Pa.- Commonwealth v. Owen, 39 Pa. Dist. & Co. 169, 54 York Leg.Rec. 69.

Failure to pay poll tax

Ala.- State ex rel. Coe v. Harrison, 114 So. 905, 217 Ala. 80.

19. Ala. State v. Blake, 142 So. 418, 225 Ala. 124.

20. Colo. Harris v. People ex rel. Gonzales, 81 P.2d 383, 102 Colo. 496.

Pa. Commonwealth ex rel. Remminger v. English, 17 Pa.Dist. & Co. 265, 48 Mont.Co. 19, 23 Mun. 146.

21. Ill.- People v. Blackwell, 173 N. E. 750, 342 Ill. 223.

22. Ala.—Walker v. Junior, 24 So. 2d 431, 247 Ala. 342.
51 C.J. p 319 note 62.

23. Ohio.—State ex rel. Shriver v. Hayes, 76 N.E.2d 869, 148 Ohio St. 681.
51 C.J. p 319 note 63.

24. Ohio.—State v. Price, 164 N.E. 765, 30 Ohio App. 218, affirmed 165 N.E. 44, 119 Ohio St. 558.

25. Ohio.—State ex rel. Shriver v. Hayes, 76 N.E.2d 869, 148 Ohio St. 681.

26. Fla.—State ex rel. Landis v. Valz, 157 So. 651, 117 Fla. 311.

Ohio. State v. Hunt, 95 N.E. 666, 81 Ohio St. 143.

Failure of officer to exercise individual judgment

Members of board of education who had unquestionable title to their office, but who, in keeping with campaign pledges, failed to exercise their own individual judgment and discretion in performance of their duties did not "unlawfully hold or exercise any public office" within meaning of statute authorizing removal of person who so holds or exercises an office in an action in the nature of quo warranto, since such words refer to right of holder of office to act as an officer and do not refer to his acts in discharge of his duties.—State ex rel. Brister v. Weston, 6 N.W.2d 618, 241 Wis. 541.

27. Mo.- State ex inf. McKittrick v. Murphy, 148 S.W.2d 577, 347 Mo. 481 State ex inf. Walsh v. Thatcher, 102 S.W.2d 937, 340 Mo. 865.

N.J.—Kinnard v. Geller, 188 A. 670, 15 N.J.Misc. 42.

Wis.—Attorney General v. Barstow, 4 Wis. 567.

"It is not directed to the officer as such, but always to the person holding the office or exercising the franchise, and then not for the purpose of dictating or prescribing his official duties, but only to ascertain whether he is rightfully entitled to exercise the functions claimed."—State ex inf. Walsh v. Thatcher, 102 S.W.2d 937, 340 Mo. 865.

to the office nor the right to a franchise is involved.[28] Where the constitution or statutes in conformity therewith intrusts an officer with the performance of a certain governmental function and he proceeds to perform that function in a manner contrary to law, there is no usurpation and quo warranto will not lie,[29] but where the officer steps entirely outside of the scope of his authority to exercise a function which the constitution or statutes do not confer on him, the remedy of quo warranto is available.[30]

Quo warranto proceedings may be maintained, sometimes as a result of express statutory provision, against an incumbent of an office because of forfeiture of the office by misconduct.[31] The proceedings may be maintained on account of a forfeiture of office when such forfeiture automatically results from the officer's acts or misconduct,[32] or where a forfeiture of the office, or the removal of the incumbent, has been declared by competent authority,[33] or where forfeiture occurs on conviction in a criminal prosecution.[34]

Where an officer has been removed from office, quo warranto proceedings are not appropriate to determine whether the removal proceedings were free of error.[35]

28. Ala.—**Corpus Juris cited in** State ex rel McIntyre v. McEachern, 166 So. 36, 39, 231 Ala. 609
Colo.—Burkholder v. People, by Johnson ex rel. Nazarene, 147 P. 347, 60 Colo. 46
Fla.—State ex rel. Adams v. Lee, 171 So. 333, 126 Fla. 396, 109 A.L.R. 319—State ex rel. Landis v. Valz, 157 So. 651, 117 Fla. 311.
Ga.—Turner v. Wilburn, 56 S.E.2d 285, 206 Ga. 149
Ill.—People ex rel. Hyatt v. Hogan, 257 Ill.App. 206.
Minn.—State ex rel. Lommen v. Gravlin, 295 N.W. 654, 209 Minn. 136.
Mo.—State ex inf. McKittrick v. Wymore, 119 S.W.2d 941, 343 Mo. 98, 119 A.L.R. 710.
Neb.—State ex rel. Johnson v. Consumers Public Power Dist., 10 N.W.2d 784, 143 Neb. 753, 152 A.L.R. 480—State ex rel. Good v. Conklin, 255 N.W. 925, 127 Neb. 417—State ex rel. Good v. Marsh, 249 N.W. 295, 125 Neb. 125.
Pa.—Commonwealth v. Peoples, 40 Pa.Dist. & Co. 689, 30 Del.Co. 210—Thomas v. County Board of School Directors and Elmhurst School Directors, Com.Pl., 41 Lack.Jur. 177.
Tex.—State ex rel. Phillips v. Trent Independent School Dist., Civ.App., 141 S.W.2d 438, error refused
Wis.—State ex rel. Brister v. Weston, 6 N.W.2d 648, 241 Wis. 584.
51 C.J. p. 320 note 67.

29. Mo.—State ex inf. McKittrick v. Murphy, 148 S.W.2d 527, 347 Mo. 484.

30. Mo.—State ex inf. McKittrick v. Murphy, supra
Execution of lease
Under a statute authorizing a civil action by ordinary proceedings in the name of the state against any corporation exercising powers not conferred by law, quo warranto was proper remedy to challenge validity of lease of portion of courthouse executed by county board of supervisors without authority.—State ex rel. Wadsworth v. Board of Sup'rs of Linn County, 6 N.W.2d 877, 232 Iowa 1092

31. Ala.—State ex rel. McIntyre v. McEachern, 166 So. 36, 231 Ala. 609
Ill.—People ex rel. Hyatt v. Hogan, 257 Ill.App. 206.
Minn.—**Corpus Juris cited in** State ex rel. Lommen v. Gravlin, 295 N.W. 654, 655, 209 Minn. 136
Mo.—State ex inf. McKittrick v. Murphy, 148 S.W.2d 527, 347 Mo. 484—State ex inf. McKittrick v. Wymore, 119 S.W.2d 941, 343 Mo. 98, 119 A.L.R. 710.
Neb.—State ex rel. Good v. Marsh, 249 N.W. 295, 125 Neb. 125
Pa.—Commonwealth v. Peoples, 40 Pa.Dist. & Co. 689, 30 Del.Co. 210—Commonwealth v. Owen, 39 Pa.Dist. & Co. 169, 54 York Leg.Rec. 69—Commonwealth ex rel. v. Ollendick, 17 Pa.Dist. & Co. 36, 33 Lack.Jur. 29.
51 C.J. p. 319 note 52
Conduct not creating forfeiture of office
(1) Failure of officer of drainage district to file required reports within the proper time did not forfeit office so as to authorize quo warranto proceedings to oust him where the failure was waived by the acceptance of the reports by the appropriate state officer.—People ex rel. Loesch v. Link, 259 Ill.App. 126
(2) Forfeiture of office for misconduct generally see Officers § 57.

32. Colo.—Burkholder v. People, by Johnson ex rel. Nazarene, 147 P. 347, 60 Colo. 46.
Ill.—People ex rel. Hyatt v. Hogan, 257 Ill.App. 206.
Mo.—State ex inf. McKittrick v. Wymore, 119 S.W.2d 941, 343 Mo. 98, 119 A.L.R. 710—State ex inf. Norman v. Ellis, 28 S.W.2d 363, 325 Mo. 154.
Pa.—Commonwealth v. Peoples, 40 Pa.Dist. & Co. 689, 30 Del.Co. 210—Commonwealth v. Owen, 39 Pa.Dist. & Co. 169, 54 York Leg.Rec. 69.
Tex.—State ex rel. La Crosse v. Averill, Civ.App., 110 S.W.2d 1173, error refused
Necessity for removal proceedings
Where under the constitution or statute a forfeiture and vacancy ipso facto result from the misconduct or conviction of the incumbent, quo warranto proceedings may be maintained without the removal of the officer by removal proceedings.—State ex rel. Salisbury v. Vogel, 256 N.W. 404, 65 N.D. 137.

33. Ill.—People ex rel. Hyatt v. Hogan, 257 Ill.App. 206
Officer removed at pleasure of appointing power
Mont.—State ex rel. Bonner v. District Court of First Judicial Dist. in and for Lewis and Clark County, 206 P.2d 166.
Removal for drunkenness
Fla.—State ex rel. Hand v. McDonald, 18 So.2d 16, 154 Fla. 456.
Ineffective removal
Quo warranto did not lie to test right of incumbent to hold office of county road and bridge foreman who had been removed by county commissioners who appointed new road and bridge foreman, where occupant had been road foreman and record of proceedings of county commissioners failed to show that removal was for cause or that occupant had reasonable notice of charge and opportunity to be heard.—State ex rel. McIntyre v. McEachern, 166 So. 36, 231 Ala. 609.

34. Pa.—Commonwealth v. Peoples, 40 Pa.Dist. & Co. 689, 30 Del.Co. 210.
Conviction of criminal offense as condition precedent to suit see infra § 17
Conviction of felony in federal court
N.D.—State ex rel. Salisbury v. Vogel, 256 N.W. 404, 65 N.D. 137.

35. N.J.—Finnegan v. Miller, 38 A.2d 854, 132 N.J.Law 192.
De facto officer was not entitled to have proceedings resulting in his removal from office set aside in quo warranto.—Morgan v. Mayor and

§ 12. Exercise of Corporate Existence or Franchise

Quo warranto proceedings as a proper remedy with respect to attacking the legal existence of a corporation or the exercise of its franchise are discussed infra §§ 13, 14. The exclusiveness of the remedy of quo warranto is considered supra § 4.

Examine Pocket Parts for later cases.

§ 13. —— Public Corporation

Quo warranto proceedings are proper to attack the legal existence of, or the validity of the organization of or of the annexation of territory to, a municipal or other public corporation.

Quo warranto, or a proceeding in the nature thereof, is a proper mode of attacking the legal existence, or the validity of the organization, of a municipal or other public corporation,[36] such as a city, town, or village,[37] a county,[38] a township,[39] a school district,[40] a road district,[41] a drainage district,[42] or a levee district.[43] In addition, quo warranto proceedings lie to test the validity of the annexation of lands or territory to a municipal corporation,[44] or school district[45] or to test the validity

Council of Borough of Roselle Park, 28 A.2d 620, 129 N.J.Law 233.

36. Ill.—People ex rel. Greening v. Green, 47 N.E.2d 465, 382 Ill. 577.
Minn.—State ex rel. Burnquist v. Village of North Pole, 6 N.W.2d 458, 213 Minn. 297.
Okl.—School Board of Rural School Dist. No. 71, Beaver County, v. Henson, 291 P. 115, 144 Okl. 202.
Tex.—Fannin-Lamar-Delta Improvement Dist. No. 3 v. State, Civ.App., 73 S.W.2d 1101, error dismissed.
51 C.J. p. 320 note 69—43 C.J. p. 99 note 91.
Attacking validity of municipal corporation generally see Municipal Corporations § 32.

Fire district

N.Y.—Petition of Board of Fire Com'rs of Columbia Litchfield Fire Dist., 29 N.Y.S.2d 605.

37. Minn.—State ex rel. Burnquist v. Village of North Pole, 6 N.W. 458, 213 Minn. 297.
Mo.—State ex inf. McKittrick ex rel. Oehler v. Church, App., 158 S.W. 2d 215.
51 C.J. p. 320 note 70—43 C.J. p. 99 note 91.

Inclusion of unbenefited lands

(1) Where a municipality in violation of organic rights includes large areas of land not actually or potentially useful for municipal purposes except for taxation purposes without any corresponding benefit, quo warranto proceedings are appropriate to oust such lands from the jurisdiction of the municipality.—City of Coral Gables v. State ex rel. Watson, Fla., 38 So.2d 48—City of Winter Haven v. A. M. Klemm & Son, 192 So. 646, 141 Fla. 75—State ex rel. Attorney General v. City of Avon Park, 149 So. 409, 108 Fla. 641, rehearing denied State ex rel. Davis v. City of Avon Park, 151 So. 701, 117 Fla. 556, modified on other grounds 158 So. 159, 117 Fla. 565, 98 A.L.R. 230.

(2) Quo warranto to oust certain land from a city on the ground that the land has not been furnished electric service, street lighting, water service, garbage collection service, fire protection, street cleaning or repairing, and other municipal benefits, is the proper remedy for hearing and determining such alleged injustice. City of South Miami v. State ex rel. Landis, 192 So. 624, 140 Fla. 740.

Attack on bonds validated by decree

Statute providing that final result of statutory proceeding to validate municipal bonds should never be called in question in subsequent proceedings precluded attack by quo warranto proceeding on validity of bonds validated by decree to which state was party, where total lack of constitutional power to issue bonds was not apparent on face of record of validation proceedings. State ex rel. Fidelity Life Ass'n v. City of Cedar Key, 165 So. 672, 122 Fla. 154.

38. Miss. State v. Jackson, 81 So. 1, 119 Miss. 727.
Wyo.—State v. Snyder, 219 P. 735, 30 Wyo. 287, rehearing denied 225 P. 1102, 31 Wyo. 333.
15 C.J. p. 419 note 86.

39. Okl.—Earlboro Township v. Howard, 149 P. 136, 47 Okl. 455.
51 C.J. p. 320 note 71.

40. Iowa.—State v. Spellman, 183 N.W. 577, 191 Iowa 1181. State v. Hall, 181 N.W. 633, 190 Iowa 1283.—Nelson v. Consolidated Independent School Dist., 161 N.W. 874, 181 Iowa 424. State v. Alexander, 105 N.W. 1021, 129 Iowa 538.
Mich. Perrizo v. Kesler, 53 N.W. 391, 93 Mich. 380.
Okl.—School Board of Rural School Dist. No. 71, Beaver County, v. Henson, 291 P. 115, 144 Okl. 202.
Or.—State ex rel. Hallgarth v. School Dist. No. 23, Union County, 172 P.2d 655, 179 Or. 441.
Tex.—McLeod Independent School Dist. v. Kildare Independent School Dist., Civ.App., 157 S.W.2d 181, error refused.—State ex rel. Phillips v. Trent Independent School Dist., Civ.App., 141 S.W.2d 438, error refused.—Consolidated Common School Dist. No. 5 v. Wood, Civ.App., 112 S.W.2d 231, error dismissed.—King's Estate v. School Trustees of Willacy County, Civ.App., 33 S.W.2d 783, error refused.
51 C.J. p. 320 note 72.

What law governs

In quo warranto proceedings to test the validity of a community consolidated district, the case is to be decided on the law as it exists since the enactment of L. 1921 p. 796, validating the organization of such districts, although that act was approved after the cause was submitted.—People v. Chynoweth, 133 N.E. 699, 301 Ill. 65.

41. Mo.—State v. Colbert, 201 S.W. 52, 273 Mo. 198.

42. Ill.—People v. Baldridge, 108 N.E. 19, 267 Ill. 190.
51 C.J. p. 320 note 74.

43. Tex.—Fannin-Lamar-Delta Improvement Dist. No. 3 v. State, Civ.App., 73 S.W.2d 1101, error dismissed.

44. Ala. State v. City of Gadsden, 106 So. 229, 214 Ala. 66, explaining City of North Birmingham v. State, 52 So. 202, 166 Ala. 122, 139 Am.St.R. 17, 21 Ann.Cas. 1123 and State v. City of Birmingham, 48 So. 843, 160 Ala. 196.
Cal. American Distilling Co. v. City Council of City of Sausalito, 213 P.2d 701, 34 Cal.2d 660.
Fla.—State ex rel. Harrington v. City of Pompano, 188 So. 610, 136 Fla. 730.
Ill. People ex rel. Gage v. Village of Wilmette, 31 N.E.2d 774, 375 Ill. 420. Opowski v. Calumet City, 153 N.E. 613, 322 Ill. 575.
Minn.—State ex rel. Hilton v. Village of Kinney, 178 N.W. 815.
Nev. State ex rel. Bibb v. City of Reno, 178 P.2d 366, 67 Nev. 127.
Or. State v. Port of Tillamook, 124 P. 637, 62 Or. 332, Ann.Cas.1914C 483.
Tex.—City of San Antonio v. State ex rel. Town of Olmos Park, Civ. App., 195 S.W.2d 431.—State ex rel. Walker v. City of Gladewater, Civ. App., 139 S.W.2d 283.
43 C.J. p. 135 note 88.
Alteration of boundaries of municipality generally: see Municipal Corporations § 41 et seq.

45. Ill.—People ex rel. Mills v. Fairfield Community High School Dist. No. 225, 73 N.E.2d 293, 397 Ill. 233.

of the annexation of territory to a drainage district,[46] or a reduction of the territory of a city.[47] Quo warranto proceedings will not, however, lie where the land or territory has not yet been annexed and respondent has not yet assumed to exercise authority over it.[48]

The particular grounds on which the incorporation, organization, or annexation may be attacked by a quo warranto proceeding include fraud in obtaining the charter or in the incorporation, organization, or annexation proceedings,[49] lack of jurisdiction of such proceedings,[50] and the invalidity, on its face, of an order establishing a district,[51] but, except on these grounds, a quo warranto proceeding cannot be maintained for the purpose of attacking the judicial action or determination of a court or judge in the incorporation, organization, or annexation proceedings,[52] and, in some jurisdiction a like rule obtains as to the findings of a board[53] or officer[54] in such proceedings.

Protection district. A proceeding in the nature of quo warranto does not lie to test the right of a "protection district" to its existence where it is not a public corporation, does not exercise any corporate franchise, and has no semblance of a corporate existence other than that it has a name.[55]

Particular powers or franchises. Where a municipal or other public corporation usurps or exercises powers or franchises not conferred on it by law, quo warranto is the appropriate remedy to oust it from the exercise thereof;[56] but where the corporation lawfully possesses a certain power, the irregular or improper exercise thereof is not ground

Mo.—Spilker v. Bethel Special School Dist. of Shelby County, App., 235 S.W.2d 78.

Tex.—Mathis Independent School Dist. v. Odem Independent School Dist., Civ.App., 222 S.W.2d 270—Kermit Independent School Dist. No. 5 v. State ex rel. Wink Independent School Dist. No. 1, Civ.App., 208 S.W.2d 717—School Trustees of Runnels County v. State, Civ.App., 95 S.W.2d 1001, error dismissed—State v. Bradshaw, Civ.App., 228 S.W. 655.

46. Ill.—People v. Arcola Drainage Commissioners, 123 Ill.App. 604.

47. Kan.—State v. Hutchinson, 169 P. 1140, 102 Kan. 325.

48. Cal.—City of Anaheim v. City of Fullerton, App., 227 P.2d 494.

Ill.—Romine v. Black, 25 N.E.2d 404, 304 Ill.App. 1—Ziebell v. Village of Posen, 257 Ill.App. 32.

Available remedies to prevent attempted annexation by municipality see Municipal Corporations § 65 et seq.

49. Tex.—Mathis Independent School Dist. v. Odom Independent School Dist., Civ.App., 222 S.W.2d 270—Fannin - Lamar - Delta Improvement Dist. No. 3 v. State, Civ.App., 73 S.W.2d 1101, error dismissed.

51 C.J. p. 320 note 79.

What constitutes fraud

Action of county court in incorporating within a village territory all but one sixth of which was used as an amusement park and golf course was not so unreasonable and arbitrary as to amount to an attempt to perpetrate a fraud on the law so as to warrant setting aside decree of incorporation in quo warranto proceeding.—State ex inf. McKittrick ex rel. Oehler v. Church, Mo.App., 158 S.W.2d 215.

50. Ill.—People ex rel. Mills v. Fairfield Community High School Dist. No. 225, 73 N.E.2d 292, 397 Ill. 233.

Mo.—State ex inf. McKittrick ex rel. Oehler v. Church, App., 158 S.W.2d 215.

51 C.J. p. 320 note 80.

51. Ill.—People v. Astle, 169 N.E. 185, 337 Ill. 253.

52. Kan.—State ex rel. Stroberg v. Drainage Dist. No. 3 of McPherson County, 215 P.2d 161, 168 Kan. 568.

Mo.—State ex inf. McKittrick ex rel. Oehler v. Church, App., 158 S.W.2d 215.

51 C.J. p. 320 note 82.

Amount of territory included

It is only when the area incorporated in a village includes territory which has no natural connection with the proposed municipal corporation and no reasonable adaptability to municipal purposes that decree of incorporation may be annulled in a quo warranto proceeding.—State ex inf. McKittrick ex rel. Oehler v. Church, supra.

Honest exercise of discretion lodged in trustees of town and county court in annexing territory to town could not be controlled by trial court or court of appeals in quo warranto proceeding, and could be controlled only in case of a grave abuse of such discretion.—State ex rel. Hart v. Whitaker, Mo.App., 218 S.W.2d 121—State on Inf. of Wallach v. Stanwood, Mo.App., 208 S.W.2d 291.

53. Kan.—State v. Dowling, 232 P. 615, 117 Kan. 493.

Mo.—State ex rel. Hart v. Whitaker, App., 218 S.W.2d 121.

51 C.J. p. 321 note 83.

54. La.—State v. Ehret, 65 So. 871, 135 La. 643.

55. Cal.—Harpham v. Ventura County, 182 P. 324, 41 Cal.App. 192.

56. N.M.—**Corpus Juris quoted in** Orchard v. Board of Com'rs of Sierra County, 76 P.2d 41, 47, 42 N.M. 172.

Neb.—State ex rel. Johnson v. Consumers Public Power Dist., 10 N.W.2d 784, 143 Neb. 753, 152 A.L.R. 480.

Tex.—Town of De Kalb v. State ex rel. King, Civ.App., 71 S.W.2d 299.

51 C.J. p. 321 note 86.

Municipal corporation as "corporation"

(1) Municipal corporation is "corporation" within statute authorizing an information in the nature of quo warranto where any "corporation" exercises powers not conferred by law.—People ex rel. Gage v. Village of Wilmette, 31 N.E.2d 774, 375 Ill. 420—People v. City of Chicago, 182 N.E. 419, 349 Ill. 304.

(2) Nature and status generally see Municipal Corporations § 8.

"Exercise of power"

(1) Within statute authorizing the filing of an information in the nature of quo warranto where a corporation "exercises power" not conferred by law, a city by passing ordinance granting permit to establish local transportation system and obligating itself to construct subways thereby "exercised powers"—People v. City of Chicago, supra.

(2) Mere acceptance by grantee of right under ordinance to operate local transportation system is not "exercise of power" by city within statute.—People v. City of Chicago, supra.

Testing right to tax bonds, etc.

Writ has been allowed against a municipal corporation by the attorney general in behalf of the state, in order to test the right of the corporation to tax by ordinance certain bonds, notes, and other obligations.—State v. Charleston, 8 S.C.L. 36.

for quo warranto proceedings;[57] nor will quo warranto lie against a municipal corporation to enforce the exercise of a corporate power,[58] the remedy being inapplicable because the judgment would be forfeiture.[59]

§ 14. —— Private Corporation

Quo warranto proceedings are proper to vacate the charter of a private corporation, to oust it from exercising particular franchises or powers, or to oust it from continuing ultra vires or offensive acts or conduct.

On proper grounds quo warranto proceedings may be maintained, sometimes under statutes expressly so providing, to forfeit or vacate the charter of a private corporation or to oust it from the franchise to be a corporation,[60] to oust it from exercising particular franchises or powers,[61] or to oust it from continuing, or to compel it to desist from, certain ultra vires or offensive acts or conduct.[62] The proceedings may be employed to test or attack the legal existence of a corporation,[63] or they may be based on the usurpation and exercise by a corporation of powers, franchises, or privileges which it is not authorized, or is forbidden, to exercise,[64] the mis

57. Neb.—**Corpus Juris cited in** State ex rel. Johnson v. Consumers Public Power Dist., 10 N.W.2d 781, 793, 143 Neb. 753, 152 A.L.R. 480.
51 C.J. p. 321 note 87.

Validity of contract

Quo warranto will not lie to test validity of contract which is mere incident to execution of power conferred.—State ex rel. Johnson v. Consumers Public Power Dist., 10 N.W.2d 784, 143 Neb. 753, 152 A.L.R. 480—51 C.J. p. 321 note 87 [a].

Validity of ordinance within the scope of the powers of the municipality cannot be questioned by quo warranto.

Ill.—People v. Springfield, 61 Ill.App. 86.

Iowa.—State v. Nebraska Tel. Co., 103 N.W. 120, 127 Iowa 194.
43 C.J. p. 535 notes 31, 32.

58. Mass.—Attorney General v. Salem, 103 Mass. 138.

59. Mass.—Attorney General v. Salem, supra.

60. U.S.—Lillard v. Lonergan, C.C.A.Kan., 72 F.2d 865, certiorari denied Lonergan v. Lillard, 55 S.Ct. 147, 293 U.S. 615, 79 L.Ed. 701.

Ill.—People v. White Circle League of America, 97 N.E.2d 811, 408 Ill. 564—People ex rel. Barrett v. Shurtleff, 187 N.E. 271, 353 Ill. 248.

Kan.—State ex rel. Mitchell v. Sage Stores Co., 141 P.2d 655, 157 Kan. 404, rehearing denied 143 P.2d 652, 157 Kan. 622, affirmed 65 S.Ct. 9, 323 U.S. 32, 89 L.Ed. 25.

Ky.—Commonwealth v. Kentucky Jockey Club, 38 S.W.2d 987, 238 Ky. 739.

Mo.—State, on Inf. of Taylor v. Salary Purchasing Co., 218 S.W.2d 571, 358 Mo. 1022—**Corpus Juris cited in** State ex inf. McKittrick v. American Colony Ins. Co., 80 S.W.2d 876, 892, 336 Mo. 406.

N.Y.—Moore v. Brooklyn City R. Co., 15 N.E. 191, 108 N.Y. 98.

Pa.—Commonwealth v. United Republican Club of Ridley Tp., Com.Pl., 33 Del.Co. 200.
51 C.J. p. 321 note 93—14 C.J. p. 251 note 27.

Corporation as person within statutes relating to quo warranto proceedings see Corporations § 8 a

Unlawful combination as ground for quo warranto see Monopolies § 120

At common law, remedy for dissolution of a corporation is by information in the nature of a quo warranto.—Petition of Collins-Doan Co., 70 A.2d 159, 3 N.J. 382.

61. Mich.—Black v. Contract Purchase Corp., 42 N.W.2d 768, 327 Mich. 636.
51 C.J. p. 321 note 94.

62. Ill.—People ex rel. Hughes v. Universal Service Ass'n, 7 N.E.2d 310, 365 Ill. 542.

Mo. **Corpus Juris cited in** Whitehead v. Farmers' Fire & Lightning Mut. Ins. Co., 60 S.W.2d 65, 70, 71, 227 Mo.App. 891.

Pa.—Borough of Midland v. Steubenville, East Liverpool & Beaver Valley Traction Co., 150 A. 300, 300 Pa. 134 Commonwealth v. United Republican Club of Ridley Tp., Com.Pl., 32 Del.Co. 545.
51 C.J. p. 321 note 95.

63. Ill.—People, by Kerner, v. United Medical Service, 200 N.E. 157, 362 Ill. 442, 103 A.L.R. 1229.
51 C.J. p. 321 note 96—14 C.J. p. 251 note 27.

Improper grant of franchise

Quo warranto proceedings are appropriate to determine whether franchise was improperly granted and to oust the corporation if there has been an improper grant.—People, by Kerner, v. United Medical Service, 200 N.E. 157, 362 Ill. 442, 103 A.L.R. 1229—People v. Larsen, 106 N.E. 947, 265 Ill. 406.

Duration of corporation

Refusing to vacate corporate charter on ground of failure to observe letter of statutes for renewal and continuation of corporate existence was not error, where corporation by declaration extending life of corporation filed within twenty years and by application for renewal of charter filed within five years after expiration of extended charter substantially complied with statutes.—State ex rel. Flowers v. Oden, 26 So.2d 550, 248 Ala. 39.

64. U.S.—State of Tenn., by Wolfenbarger, ex rel. Atchley v. Taylor, C.A.Tenn., 169 F.2d 626.

Ill.—People v. White Circle League of America, 97 N.E.2d 811, 408 Ill. 564—People ex rel. Hughes v. Universal Service Ass'n, 7 N.E.2d 310, 365 Ill. 542.

Mass.—Delaney v. Grand Lodge A. O. U. W. of Massachusetts, 138 N.E. 918, 241 Mass. 556.

Mich.—Black v. Contract Purchase Corp., 42 N.W.2d 768, 327 Mich. 636.

Mo. State ex inf. McKittrick v. American Colony Ins. Co., 80 S.W.2d 876, 336 Mo. 406.

Ohio. State ex rel. Powers v. Capital Endowment Co., 196 N.E. 643, 129 Ohio St. 651, appeal dismissed Capital Endowment Co. v. State of Ohio ex rel. Bowen, 56 S.Ct. 174, 296 U.S. 546, 80 L.Ed. 387.

Wash. State ex rel. Troy v. Lumbermen's Clinic, 58 P.2d 812, 189 Wash. 384.
51 C.J. p. 322 note 97.

Contravention of public policy

Issuance of writ of quo warranto does not depend on whether corporation contravenes public policy, but whether its acts come within prohibition of quo warranto statute providing for issuance of writ where corporation exercises powers not conferred by law.—People v. White Circle League of America, 97 N.E.2d 811, 408 Ill. 564.

Exercising franchise in contravention of law

A corporation which fixes a rate of freight per hundred pounds for carrying petroleum oil in tank cars which is substantially lower than its rate for transporting in barrels in carload lots exercises "a franchise, privilege, or right, in contravention of law," within the meaning of a statute which authorizes an action of quo warranto to be brought against a corporation under these circumstances.—State v. Cincinnati, etc., R. Co., 23 N.E. 928, 47 Ohio St. 130, 7 L.R.A. 319.

Repeal of statute

Provision of Quo Warranto Act concerned in part with corporate ex-

user or nonuser of its charter or franchises,[65] or its violation of a statute.[66] Quo warranto proceedings lie against a private corporation for violation of the criminal laws of the state.[67] The proceedings will lie for one clear inexcusable violation of the criminal laws of the state and persistent and repeated violations are not required.[68]

The general rule, discussed supra § 6, that, in the absence of a statute providing otherwise, quo warranto proceedings lie only to redress a public grievance, applies to quo warranto proceedings against a private corporation.[69]

Municipal franchise. Except in some jurisdictions,[70] the fact that the grant, consent, franchise, or license involved is one to use the streets of a city does not prevent the employment of quo warranto proceedings against a corporation.[71]

Foreign corporation. Quo warranto proceedings are proper to oust a foreign corporation on the ground that it is exercising its franchises within the state in contravention or without authority of law,[72] but a state cannot, by quo warranto, inquire whether a foreign de facto corporation has a legal existence, since that question is determinable only by the state under whose laws the corporation claims to be organized.[73]

Fraud or bad faith. Quo warranto is an appropriate remedy where fraud has been practiced in

ercise of powers unlawfully conferred was not superseded or impliedly repealed by sections of Business Corporation Act providing for involuntary dissolution and receivership of corporations by informations in equity.—People, by Kerner, v United Medical Service, 200 N.E. 157, 362 Ill. 412, 103 A.L.R. 1229

65. U.S.—State of Tenn., by Wolfenbarger, ex rel Atchley v Taylor, C.A.Tenn., 169 F.2d 626.
Kan.—State ex rel Mitchell v. Sage Stores Co., 141 P.2d 655, 157 Kan. 404, rehearing denied 143 P.2d 652, 157 Kan. 622, affirmed 65 S.Ct. 9, 323 U.S. 32, 89 L.Ed 25.
Mich.—Black v Contract Purchase Corp., 42 N.W.2d 768, 327 Mich. 636
Mo.—State ex inf McKittrick v. Murphy, 148 S.W.2d 527, 347 Mo. 484.
Pa.—Commonwealth v. Cameron County Bank, 157 A. 586, 305 Pa. 499—Commonwealth v U. S. Annuity Soc., 154 A. 24, 303 Pa. 19—Commonwealth v United Republican Club of Ridley Tp., Com.Pl., 33 Del.Co. 200.
51 C.J. p 322 note 98

66. Kan.—State ex rel. Mitchell v. Sage Stores Co., 141 P.2d 655, 157 Kan. 404, rehearing denied 143 P.2d 652, 157 Kan. 622, affirmed 65 S.Ct. 9, 323 U.S. 32, 89 L.Ed 25.
51 C.J. p 322 note 99.

Sunday laws

Quo warranto is available to prevent violations of Sunday laws by private corporations.—Commonwealth v Philadelphia American Baseball Club, 138 A. 497, 290 Pa. 136, 53 A.L.R. 1027—Commonwealth v. Sesqui-Centennial Exhibition Assoc., 8 Pa.Dist & Co. 77

Violation of one and compliance with another statute

Motor Vehicle Title Act, providing that violations of requirements that amount of finance charge and amount of insurance charge must be set forth separately in statement to buyers of automobile shall constitute misdemeanors, punishable as such, and authorizing revocation of licenses thereunder by secretary of state for good cause shown, makes no provision for quo warranto relief by attorney to oust dealer from exercise of privileges afforded by his license, where there is full compliance with requirements of Motor Vehicle Retail Installment Sales Act.—Black v Shaw, 42 N.W.2d 774, 327 Mich. 648.

67. Mo.—State, on Inf. of McKittrick, v American Ins. Co., 140 S.W.2d 36, 346 Mo. 269.
Criminal prosecution as bar to remedy see infra § 15.

68. Mo.—State, on Inf. of McKittrick, v American Ins. Co., 140 S.W.2d 36, 346 Mo. 269.

69. Iowa.—State ex rel. Maley v. Civic Action Committee, 28 N.W.2d 467, 238 Iowa 851.

Grievance as private or public

Where the statute forbids the increasing of rates except with the approval of the superintendent of insurance, collection of increased rate by numerous fire insurance companies pursuant to void court order impounding rate increase after superintendent of insurance had denied increase concerned public interest so that attorney general could institute quo warranto proceedings to prevent collection.—State ex inf. McKittrick v American Colony Ins. Co., 80 S.W.2d 876, 336 Mo. 406.

70. Mich.—People v. Ft. Wayne, etc., R. Co., 52 N.W. 1010, 92 Mich. 522, 16 L.R.A. 752—People v Detroit Mut. Gaslight Co., 88 Mich. 154.

71. Pa.—Borough of Midland v. Steubenville, East Liverpool & Beaver Valley Traction Co., 150 A. 300, 300 Pa. 134
51 C.J. p 322 note 2.

After expiration of municipal franchise quo warranto will lie to oust corporation from using city streets and to compel removal of equipment.—State ex Inf McKittrick ex rel City of California v Missouri Utilities Co., 96 S.W.2d 607, 339 Mo. 385, 106 A.L.R. 1169—State ex inf McKittrick ex rel City of Lebanon v Missouri Standard Tel Co., 85 S.W.2d 613, 337 Mo. 642.

72. Fla.—**Corpus Juris cited in** State ex rel Landis v S. H. Kress & Co., 155 So. 823, 830, 115 Fla. 189
Mich.—Attorney General v. A. Booth, etc., Co., 106 N.W. 868, 143 Mich. 89
Mo.—State on Inf. of Taylor v. American Ins. Co., 200 S.W.2d 1, 355 Mo. 1053—State, on Inf. of McKittrick, v American Ins. Co., 140 S.W.2d 36, 346 Mo. 269.
Neb.—State v Beck Finance Corporation, 225 N.W. 49, 111 Neb. 382—State v Central Purchasing Co., 225 N.W. 46, 118 Neb. 383—State v Brieton Mfg. Co., 205 N.W. 246, 113 Neb. 781, 41 A.L.R. 992, modified on other grounds 207 N.W. 664, 114 Neb. 341, 44 A.L.R. 1172.
Pa.—Commonwealth ex rel. Schnader v Fidelity Land Value Assur. Co., 167 A. 300, 312 Pa. 425.
14a C.J. p 1293 note 64.

Proceeding to test validity of license

The proper remedy to test the validity of a license issued to a foreign corporation is quo warranto, brought directly against the corporation, and not mandamus to compel the licensing official to revoke the license.—State v. Gearhart, 135 N.E. 606, 104 Ohio St. 422.

Fact that superintendent of insurance has exclusive control of all matters of insurance rates would not preclude maintenance of quo warranto proceedings based on misconduct of foreign insurance companies in securing approval of proposed rates.—State, on Inf. of McKittrick, v. American Ins. Co., 140 S.W.2d 36, 346 Mo. 269.

73. Ill.—Hudson v. Green Hill Seminary Corp., 113 Ill. 618.

organizing, or in obtaining the charter of, a corporation,[74] or where the corporate franchise has been used for the purpose of defrauding the public,[75] or there has been a misrepresentation of facts in reports to the secretary of state.[76] On the other hand, mere lack of good faith is not ground for ouster,[77] and the facts in a particular case may not be sufficient to constitute fraud.[78] Quo warranto will not lie to ascertain whether a corporation intends in good faith to carry out the express purpose of its organization.[79]

Property and taxation matters. The state may contest the claim of a corporation to use state lands;[80] and if the corporation's ownership of its property is limited to the time of its existence, its charter providing that thereafter the property shall be the property of a city, quo warranto to enforce such forfeiture may be sustained;[81] but, except on such grounds, and unless otherwise provided by statute,[82] it will not be divested of its property, although it is ousted of the right to exercise its franchises;[83] and if it takes and uses for a private purpose the land of a private person, it cannot be ousted from possession of the land by quo warranto.[84]

There is no authority to maintain quo warranto proceedings against a corporation because of its failure to pay a tax assessed and charged against it.[85] Some statutes relating to quo warranto proceedings do not authorize such a proceeding to obtain a judgment withdrawing from a corporation's property the immunity from taxation conferred by statute.[86]

§ 15. Existence and Adequacy of Other Remedies

Quo warranto proceedings ordinarily will not lie where there exists another adequate remedy at law or in equity.

As a general rule, quo warranto will not lie if another adequate remedy exists at law or in equity.[87] The rule is applicable only in cases wherein the redress of the relator's private injury is the main object and the fact that the relator, or other individuals aggrieved, can seek their remedy in another manner is no bar to proceedings by the state or its officers.[88] Resort to quo warranto proceedings is not precluded by the existence of another remedy where it cannot be said that the other remedy is complete and adequate.[89]

Administrative remedies. Quo warranto will not lie where plaintiff has failed to avail himself of administrative remedies,[90] provided the remedy is adequate.[91]

74. Ala.—State v. Citizens' Light, etc., Co., 55 So. 193, 172 Ala. 232
51 C.J. p 322 note 6.

75. Ala.—Stanford v. Norwood Transp. Co., 95 So. 829, 19 Ala. App. 173.

76. Mo.—State v. American Can Co., 4 S.W.2d 448, 319 Mo. 456.

77. Mo.—State v. American Can Co., supra.
51 C.J. p 322 note 9.

78. Mo.—State v. Bray, 20 S.W.2d 56, 323 Mo. 562.

79. Neb.—State ex rel. Johnson v. Consumers Public Power Dist., 10 N.W.2d 784, 143 Neb. 753, 152 A.L.R. 480.

80. Ohio.—State v. Pittsburg, etc., R. Co., 41 N.E. 205, 53 Ohio St. 189.

Canal lands

Ohio.—State v. Miami Conservancy Dist., 180 N.E. 893, 125 Ohio St. 201.

81. Miss.—State v. Washington Steam Fire Co., 24 So. 877, 76 Miss. 449

82. **Corporate ownership in excess of five hundred acres**

U.S.—People of Puerto Rico v. Rubert Hermandos, Inc., C.C.A.Puerto Rico, 60 S.Ct. 699, 309 U.S. 543, 84 L.Ed. 916.

83. Ohio.—State v. Pittsburgh, etc., R. Co., 33 N.E. 1051, 50 Ohio St. 239.

84. Ohio.—State v. Pittsburgh, etc., R. Co., supra.

85. Pa.—In re Continental R. Co., 36 Pa.Co. 450.

86. Tex.—International, etc., R. Co. v. State, 12 S.W. 685, 75 Tex. 356.

87. Fla.—State ex rel. Gibbs v. Bloodworth, 184 So. 1, 134 Fla. 369.—State v. Duval County, 141 So. 173, 105 Fla. 174.
Ga.—Casey v. McElreath, 169 S.E. 342, 177 Ga. 35.
Kan.—State ex rel. Beck v. Board of Commissioners of Allen County, 57 P.2d 450, 143 Kan. 898.
Minn.—State ex rel Burnquist v. Village of North Pole, 6 N.W.2d 458, 213 Minn. 297.—Dennistoun v. Davis, 229 N.W. 353, 179 Minn. 373.
Neb.—**Corpus Juris cited in** State ex rel. Johnson v. Consumers Public Power Dist., 10 N.W.2d 784, 796, 143 Neb. 753, 152 A.L.R. 480.
Ohio.—State ex rel. Shriver v. Hayes, 76 N.E.2d 869, 148 Ohio St. 681.
Okl.—City of Tulsa v. District Court of Tulsa County, 51 P.2d 511, 174 Okl. 470.
51 C.J. p 323 note 18.

Where appropriate remedy is by mandamus writ of quo warranto will not be entertained.—Commonwealth v. Blume, 161 A. 551, 307 Pa. 406.

88. Mont.—State v. Martin, 219 P. 632, 68 Mont. 392.
51 C.J. p 323 note 20.

89. Ill.—People, by Kerner v. United Medical Service, 200 N.E. 157, 362 Ill. 442, 103 A.L.R. 1229.
Ohio.—State ex rel. Kirk v. Wheatley, 12 N.E.2d 491, 133 Ohio St. 164.
Tex.—**Corpus Juris cited in** State ex rel. Walker v. City of Gladewater, Civ.App., 139 S.W.2d 283, 287.
51 C.J. p 323 note 21.

90. Ill.—People ex rel. Michajlowski v. Tannachuk, 45 N.E.2d 984, 317 Ill.App. 380.
Primary jurisdiction of, and exhaustion of remedies before public administrative agencies, generally see Public Administrative Bodies and Procedure §§ 40 16.

Remedy within private organization

Where it appeared that plaintiff had a remedy within church organization by appeal to question proceedings of parish meeting at which defendant was elected elder and did not avail himself of such remedy, plaintiff could not bring quo warranto proceeding to determine defendant's right to exercise the office of elder.—People ex rel. Michajlowski v. Tannachuk, supra.

91. Ariz.—Garcia v. Sedillo, 218 P. 2d 721, 70 Ariz. 192.

Criminal prosecution. It is no bar to quo warranto against a corporation for misusing its powers or franchises that the acts constituting such misuser have rendered it or its officers criminally liable [92] A statute providing for a criminal prosecution does not bar quo warranto proceedings where such statute does not afford an adequate remedy.[93]

Remedy provided in franchise or contract does not exclude quo warranto, or proceedings in the nature thereof, by the state or a municipality [94]

Statutory remedy The general rule that quo warranto does not lie if another adequate remedy exists may be applicable where another adequate remedy is provided by statute,[95] at least where the statute providing the remedy clearly manifests an intent to supersede the remedy of quo warranto;[96] but unless an intention to the contrary clearly appears, the statutory remedy will be considered cumulative rather than exclusive.[97] Quo warranto proceedings are not precluded where the issue involved may not be tried in the statutory proceeding.[98] A statute providing a remedy in favor of municipalities for the enforcement of the municipal franchise contracts of public service corporations is no bar to quo warranto by the state,[99] and a statute providing a remedy by appeal or writ of error to review a final order of a court in a proceeding to organize a drainage district does not prevent an attack on the order in quo warranto proceedings where the order was entered at a time when the court was without jurisdiction.[1]

Repeal of charter. The right reserved by the legislature to repeal a charter which it has granted does not impair the right to proceed by quo warranto in case the legislature does not exercise its power [2]

Impeachment. It has been held that officers subject to impeachment under constitutional provisions cannot be removed from office by quo warranto.[3] However, it has also been held that the power to impeach executive officers, vested in the legislature, does not affect the jurisdiction of the supreme court to try the right to office, since such right to an office is a proper matter of judicial cognizance, and impeachment is not a remedy equivalent to, or intended to take the place of, quo warranto [4]

92. Mo —State of Inf of Taylor v. American Ins Co, 200 S W 2d 1, 355 Mo 1053—State, on Inf of McKittrick, v American Ins Co., 140 S W 2d 36, 346 Mo 269.
Pa —Commonwealth v United Republican Club of Ridley Tp, Com Pl, 33 Del Co 200—Commonwealth v United Republican Club of Ridley Tp, Com.Pl, 32 Del Co 545.
51 C J p 323 note 22.

93. Ill —People, by Korner, v. United Medical Service, 200 N E 157, 362 Ill. 442, 103 A L R 1229

94. Ala —Eutaw Ice, etc, Co. v. Eutaw, 79 So 609, 202 Ala. 143
Ohio —State v. Columbus, etc., Electric Co., 135 N.E 297, 104 Ohio St. 120.

95. Ark —Barber v. Barker, 192 S W 2d 353, 209 Ark 704.
Fla —State v Duval County, 141 So. 173, 105 Fla 174
Ohio —State ex rel. Shriver v. Hayes, 76 N E 2d 869, 148 Ohio St 681—Heffner v. State ex rel Johnson, 1 N E 2d 146, 131 Ohio St. 13
Pa —Commonwealth ex rel v. Zug, 43 Pa Dist & Co 402
Tenn —State ex rel Thurman v. Scott, 195 S W.2d 617, 184 Tenn. 76.
51 C.J. p 323 note 26.

96. Ga —Alexander v Ryan, 43 S. E 2d 654, 202 Ga. 578.
Miss —Warren v. State, 141 So 901, 163 Miss 817.
N.M.—Orchard v. Board of Commissioners of Sierra County, 76 P.2d 41, 42 N M 172—State ex rel Abercrombie v. District Court of Fourth Judicial Dist, etc, 24 P 2d 265, 37 N M 407
Okl —State ex rel King v Payton, 41 P 2d 61, 170 Okl 455
Tenn —State ex rel. Thurman v Scott, 195 S W 2d 617, 184 Tenn 76
51 C J p 323 note 27.
Remedy prescribed by constitution
Ky —Commonwealth ex rel Attorney General v Howard, 180 S.W. 2d 415, 297 Ky. 488

97. Ala —Walker v. Junior, 24 So. 2d 431, 247 Ala 342—State ex rel Highsmith v Brown Service Funeral Co, 182 So 18, 236 Ala 249
Ark —**Corpus Juris cited in** State ex rel Robinson v Jones, 108 S.W 2d 901, 903, 194 Ark 445
Cal —City of Oakland v. Key System, 149 P 2d 195, 64 Cal App.2d 427
Fla —State ex rel Watkins v Fernandez, 143 So 638, 106 Fla. 779, 86 A L R 240, followed in State ex rel Jones v Fernandez, 143 So 642, 107 Fla. 849, and State ex rel Gillespie v. Mobley, 144 So 840.
Ill.—Nesladek v Kanka, 173 N E 94, 341 Ill 180.
Ind —Brown v State ex rel. Stack, 84 N E.2d 883, 227 Ind. 183—State ex rel Watson v. Pigg, 46 N E 2d 232, 221 Ind. 23—State ex rel Nicely v. Wildey, 197 N E. 844, 209 Ind. 1.
Mo —State ex inf McKittrick v. Wymore, 119 S W 2d 941, 343 Mo 98, 119 A L R 710—State ex inf. McKittrick v American Colony Ins Co., 80 S W 2d 876, 336 Mo 406.
N C —Swaringen v Poplin, 191 S E 746, 211 N.C 700
N.D —State ex rel Sathre v Quickstad, 268 N.W 683, 66 N.D 689, 107 A L R 202
Tex —State ex rel. La Crosse v Averill, Civ.App, 110 S.W 2d 1173, error refused—State v Johnson, Civ.App, 52 S W 2d 110, error dismissed
51 C.J. p 323 note 28

98. Ohio.—Heffner v State ex rel. Johnson, 1 N.E 2d 146, 131 Ohio St 13
Pa —Commonwealth v Owen, 39 Pa. Dist & Co. 169, 54 York Leg Rec 69

99. Ala —State v Birmingham Water Works Co, 64 So 23, 185 Ala 388, Ann Cas 1916B 166.

1. Ill —People v Darst, 106 N.E. 936, 265 Ill 354

2. Miss —Grand Gulf R., etc, Co v State, 18 Miss 428.
Pa.—Commonwealth v Cameron County Bank, 157 A. 586, 305 Pa 499.

3. Ala —State v. Owens, 117 So 298, 217 Ala. 668
Impeachment of officers generally see Officers § 68.

4. Fla —State v. Gleason, 12 Fla. 190.

II. JURISDICTION, PROCEEDINGS, AND RELIEF

§ 16. Practice and Procedure Generally

The practice and procedure belonging to the common-law information in the nature of quo warranto have been adopted by some states as part of the common law.

The practice and procedure belonging to the common-law information in the nature of quo warranto have been adopted by some states as part of the common law.[5] Various code or statutory provisions have prescribed or regulated the procedure in quo warranto proceedings[6] and some of these provisions are exclusive of the common law,[7] but in some jurisdictions the procedure is governed by the common law as modified by statute.[8] In a number of jurisdictions, such as those wherein there are statutes abolishing the writ of quo warranto, and an information in the nature thereof, and substituting a civil action therefor, the action is governed by the same rules of practice and procedure as other actions.[9]

§ 17. Conditions Precedent in General

Conviction in a criminal prosecution, or judgment of forfeiture, is not a condition precedent to quo warranto for forfeiture of an office where the officer's misconduct ipso facto works a forfeiture of office.

Where an officer's misconduct ipso facto works a forfeiture of office, conviction in a criminal prosecution[10] or judgment of forfeiture[11] is not a condition precedent to quo warranto for forfeiture of an office, but conviction in a criminal prosecution is a condition precedent where, under constitutional or statutory provisions, the forfeiture of an office is dependent on conviction.[12] It seems that a judgment denying the right of a person to an office is an obstacle which would have to be removed before a quo warranto action could be maintained by such person to try title to the office.[13]

Matters held not to be conditions precedent to a quo warranto proceeding to try title to an office include a judicial declaration of a vacancy in the office,[14] the service of a notice of removal from the office,[15] the issuance of a commission to the office by the governor,[16] the making of an objection before election officials to the counting of ballots,[17] the securing of a recount of ballots by mandamus proceedings,[18] and compliance by claimant with the formal requirements for induction into the office,[19] such as the taking, or offering to take, an oath of office.[20] Presentation to school officials of the question of the validity of the acts of a school district in exercising taxing power over territory beyond its boundaries is not a condition precedent to maintenance of quo warranto proceedings to determine such question.[21]

5. Del.—Brooks v. State, 79 A. 790, 36 Del. 1, 51 L.R.A.,N.S., 1126, Ann. Cas.1915A 1133.

6. Ga.—State v. Goff, 65 So. 481, 135 La. 335.
51 C.J. p 324 note 36 [a].

7. Ala.—Baxter v. State ex rel. Metcalf, 9 So.2d 119, 243 Ala. 120.
Wash.—State ex rel. Carter v. Superior Court for King County, 138 P.2d 843, 18 Wash.2d 130.
51 C.J. p 324 note 37.

8. Minn.—State ex rel. Burnquist v. Village of North Pole, 6 N.W. 2d 458, 213 Minn. 297—Scott v. Dover, 130 N.W. 74, 539, 118 Minn. 452.

Prosecution by attorney general or state's attorney

A proceeding in quo warranto prosecuted by the attorney general or state's attorney is as it was at common law. Bowan v. City of Shawneetown, 38 N.E.2d 2, 378 Ill. 289.

9. Kan.—State v. Harper, 116 P. 1169, 94 Kan. 478, Ann.Cas.1917B 464.
51 C.J. p 324 note 40.

Civil form of procedure

Under the Quo Warranto Act the procedure in quo warranto cases has ceased to be criminal in form; it is governed by the Civil Practice Act and is civil in form. People ex rel. Ray v. Lewistown Community High School Dist. No. 211, 57 N.E. 2d 486, 388 Ill. 78.

10. Ill.—People ex rel. Hyatt v. Hogan, 257 Ill.App. 206.
Mo.—State ex inf. McKittrick v. Wymore, 119 S.W.2d 941, 343 Mo. 98, 119 A.L.R. 710, overruling State v. Dearing, 162 S.W. 618, 253 Mo. 604.
51 C.J. p 324 note 46.

11. Mo.—State ex inf. McKittrick v. Wymore, 119 S.W.2d 941, 343 Mo. 98, 119 A.L.R. 710, overruling State v. Dearing, 162 S.W. 618, 253 Mo. 604.

12. Ill.—People ex rel. Hyatt v. Hogan, 257 Ill.App. 206.
Neb.—State ex rel. Good v. Conklin, 255 N.W. 925, 127 Neb. 417.
Pa.—Commonwealth v. Peoples, 40 Pa.Dist & Co. 689, 30 Del.Co. 210.

13. N.Y.—Abell v. Hunter, 207 N.Y.S. 203, 211 App.Div. 467, affirmed 148 N.E. 765, 240 N.Y. 702.

14. Ind. Wells v. State, 94 N.E. 321, 175 Ind. 380, Ann.Cas.1913C 86.

Declaration by board

The prosecuting attorney had right to institute quo warranto proceedings against county commissioner on ground of rendition of judgment against commissioner for breach of his official bond, without first submitting the matter to board of county commissioners for a declaration of vacancy in office. State ex rel. Austin v. Superior Court for Whatcom County, 106 P.2d 1077, 6 Wash.2d 61.

15. Mich.—Attorney General v. Parsell, 58 N.W. 335, 99 Mich. 381.

16. Ga.—Overton v. Gandy, 153 S. E. 520, 170 Ga. 562.

17. N.C.—Hardrader v. Lawrence, 130 S.E. 35, 190 N.C. 441.

18. Fla. State ex rel. Clark v. Klingensmith, 163 So. 704, 121 Fla. 297.

19. N.C.—Osborne v. Town of Canton, 13 S.E.2d 265, 219 N.C. 139.

20. Colo.—**Corpus Juris cited in** People ex rel. Dick v. Mosco, 167 P.2d 949, 950, 114 Colo. 461.
51 C.J. p 321 note 44.

21. Tex.—McLeod Independent School Dist. v. Kildare Independent School Dist., Civ.App., 157 S. W.2d 181, error refused.

Security for costs. In accordance with statutory provisions, the giving of security for costs is a condition precedent to the right to institute quo warranto proceedings,[22] and, in the absence of an order of the judge of the circuit court to institute the proceedings without giving security, failure to give security is jurisdictional and fatal to the proceedings.[23]

§ 18. Consent of Attorney General or Prosecuting Attorney

The consent of the attorney general or prosecutor is ordinarily necessary to the institution of quo warranto proceedings, although under exceptional circumstances or statutory authorization such a proceeding may be instituted by a private person without the consent of such official.

Generally speaking, the institution of a quo warranto proceeding or the making of an application for leave of court to institute it, is a matter within the discretion of the attorney general or prosecuting attorney,[24] and, in the absence of a statute providing otherwise,[25] the proceeding cannot be instituted or maintained without his consent.[26] In a case which is of purely public interest and does not involve any private or individual right or grievance the foregoing rules have been held to obtain to their full extent,[27] and the discretion of the attorney general or

22. Ala.—Birmingham Bar Ass'n v Phillips & Marsh, 196 So 725, 239 Ala. 650—Ex parte Talley, 192 So 271, 238 Ala 527.

Insufficient amount

(1) In quo warranto proceeding, trial court committed error by forcing respondent to a hearing on the merits of the suit where a penalty bond filed by relators was insufficient under statute governing quo warranto proceedings—Ex parte Talley, supra.

(2) Where an instrument filed as security for costs on bringing of quo warranto proceeding was defective because it was for an insufficient amount and signed only by relators, trial court did not abuse its discretion in permitting a good and sufficient security to be filed and approved on hearing of motion to quash the summons where relators were acting in good faith—Ex parte Talley, supra.

Signature

An instrument filed as security for costs in quo warranto proceeding which was signed only by parties to action was not the "security" required by statute to be given, since obligors were only those already bound for costs as parties.—Ex parte Talley, supra.

23. Ala.—Wenzel v. State ex rel. Powell, 3 So 2d 26, 241 Ala. 406.

County court

The authority to order the institution of quo warranto proceedings without security for costs to restrain defendant from treating diseases by chiropractics without a certificate of qualification was held not conferred on the judge of a particular county court—Wenzel v. State ex rel. Powell, supra.

24. Fla.—Farrington v. Flood, 40 So 2d 462.

Kan.—State ex rel. Mitchell v. Sage Stores Co., 143 P 2d 652, 157 Kan. 622, affirmed 65 S Ct. 9, 323 U.S 32, 89 L Ed. 25.

Mo.—State ex rel Smith v. Gardner, 204 S.W 2d 319.

Or.—**Corpus Juris quoted in** State, by Hagglund, ex rel Security Savings & Trust Co v School Dist No 9 of Tillamook County, 31 P 2d 751, 753, 148 Or. 273.

Pa.—In re "We the People" Expense Account, Quar Sess., 30 Del Co. 570—Commonwealth v Peoples, Com Pl., 30 Del Co 80.

51 C J. p 324 note 49

Necessity of leave of court see infra § 20

Statute held directory

Statute investing prosecuting attorney with authority to institute quo warranto proceedings is directory and not mandatory.—State ex rel. Brophy v Crawford, 190 N.E 221, 127 Ohio St. 580.

25. **Municipality**

Under some statutes a municipality may maintain quo warranto proceedings in its own name to test the title to office of an alleged usurper, where the attorney general has refused to act—State ex rel City of St Petersburg v. Noel, 154 So. 214, 114 Fla. 175.

Under statutes permitting claimants to office to bring quo warranto where the attorney general fails or refuses to act, persons not claiming office may not do so—State ex rel. Wurn v Kasserman, 179 So. 410, 131 Fla 234, followed in State ex rel. Harris v. King, 183 So 926, 134 Fla. 58, and State ex rel. Vaughn v. Beall, 183 So. 924, 134 Fla. 59

26. Fla.—State ex rel. City of St. Petersburg v. Noel, 154 So. 214, 114 Fla. 175.

Ky.—**Corpus Juris cited in** Hermann v. Morlidge, 183 S.W 2d 807, 809, 298 Ky. 632.

Mich.—Marian v. Beard, 242 N.W. 880, 259 Mich. 183.

Minn.—State ex rel. Christianson v. Johnson, 275 N.W. 684, 201 Minn. 219.

Or.—**Corpus Juris quoted in** State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist No. 9 of Tillamook County, 31 P. 2d 751, 753, 148 Or. 273.

Pa.—Commonwealth ex rel. Scheimer v Franek, 166 A. 878, 311 Pa 341

51 C J p 324 note 51.

Fatal delay

Delay of more than four months after instituting action, in nature of quo warranto, to determine validity of election before obtaining attorney general's leave to institute action was held fatal—Cooper v. Crisco, 161 S E 310, 201 N C. 739.

Refusal to interfere

The judgment of attorney general, who refused to institute quo warranto proceedings or to give his consent thereto to question legality of appointment of village recorder by village council after court had declared that there was vacancy in such office, would not be interfered with by court, where exceptional circumstances were not disclosed to justify such interference.—State ex rel. Christianson v. Johnson, 275 N. W. 684, 201 Minn. 219

Time, form, and sufficiency of consent

(1) Generally.—State v. Huffman, Mo App., 248 S W. 985—51 C J. p 324 note 51 [c]

(2) In quo warranto case to have school district declared illegal in so far as boundaries included relators' land, fact that complaint contained district attorney's signature in his official capacity sufficiently showed that action was brought with his consent.—State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist No 9 of Tillamook County, 31 P.2d 751, 148 Or. 273.

Second action

Leave given by attorney general to contest election could not avail plaintiff in second action within year after nonsuit—Cooper v. Crisco, 161 S E. 310, 201 N.C. 739.

27. Or.—**Corpus Juris quoted in** State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 31 P.2d 751, 753, 148 Or. 273.

51 C.J. p 324 note 52.

prosecuting attorney has been held to be arbitrary[28] and uncontrollable,[29] and his refusal to act does not confer on a private person a right to proceed.[30] On the other hand, it has also been held that in an exceptional case the court may in its own discretion authorize a private person to proceed notwithstanding the attorney general's refusal to institute proceedings or consent to their institution by another,[31] and that under statute or rule of court the discretion of the attorney general is not arbitrary,[32] but that on the contrary he is subject to the order of the court to file an information in the nature of quo warranto if the court deems such action in the public interest,[33] and that on refusal of the attorney general to act a private citizen may bring such proceedings where essential to vindicate the public right.[34]

Also, in a case within a statute authorizing the attorney general or state's attorney to institute the proceeding, or apply for leave of court to institute it, at the instance of private persons, if private rights or grievances are involved, the consent of the officer is essential,[35] but he has no arbitrary and uncontrolled discretion;[36] the only discretion vested in him is to determine whether the documents and evidence presented to him are in proper legal form and prima facie sufficient,[37] and, if they are, it is his duty to sign the petition and present it to the court.[38] Indeed, under some statutes making it the mandatory duty of a district attorney to bring suit on request, as discussed in Mandamus § 69 f, it is incumbent on him to present the cause of action to the court in proper form,[39] and he has no right to raise the question that the petition addressed to him does not set forth ultimate facts sufficient to warrant a judgment of ouster.[40] Under statutes authorizing

28. Ill.—Rowan v. City of Shawneetown, 38 N.E.2d 2, 378 Ill. 289.
Or.—**Corpus Juris quoted in** State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 31 P.2d 751, 753, 148 Or. 273.
51 C.J. p 321 note 53

29. Ky.—**Corpus Juris cited in** Hermann v. Morlidge, 183 S.W.2d 807, 809, 298 Ky. 632.
Or.—**Corpus Juris quoted in** State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 31 P.2d 751, 753, 148 Or. 273.
51 C.J. p 324 note 51.

30. Or.—**Corpus Juris quoted in** State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 31 P.2d 751, 753, 148 Or. 273.
51 C.J. p 324 note 55

31. Minn.—State ex rel. Dahl v. Fredrickson, 277 N.W. 407, 202 Minn. 79.

Necessity that case be exceptional

The district court has discretionary power to grant leave to file an information in the nature of quo warranto at the instance of a private relator who has no interest in the matter distinct from that of the general public, notwithstanding the attorney general's refusal to institute or consent to the proceedings, but the case should be exceptional and one in which it clearly appears that the public interests require it, and, where the case is not exceptional, leave should be refused.—State ex rel. Dahl v. Fredrickson, supra.

Grant of leave held unauthorized

Granting of leave to file information in the nature of quo warranto to test an alderman's right to office for the six months remaining in term at time alderman was appointed to fill a vacancy, at instance of one who had no interest distinct from that of the general public, was unauthorized in view of the brief period of the term for which alderman was appointed, the interference with municipal affairs possibly resulting if he were ousted, and, in absence of showing that public interest would be better served by entertaining the proceedings, notwithstanding substantial defect in appointee's title to the office.—State ex rel. Dahl v. Fredrickson, supra.

Grant of leave to town

Supreme court could grant town leave to file information for writ of quo warranto to test propriety of proceeding to include within city limits territory belonging to town, over objections of attorney general. —State ex rel. Town of Stuntz v. City of Chisholm, 266 N.W. 689, 196 Minn. 285.

32. Wash.—State ex rel. Brown v. Warnock, 122 P.2d 472, 12 Wash. 2d 478.

33. Wash.—State ex rel. Brown v. Warnock, supra.

Even though prosecuting attorney might not deem it his duty to file information on showing made by a petitioner if a case is stated which convinces the court that the rights involved are of such public moment as to make it essential that they be determined by the court after full trial on the law and the facts, the court is empowered by statute to direct prosecuting attorney to file an information in the nature of quo warranto to determine title to an office.—State ex rel. Brown v. Warnock, supra.

34. Iowa.—State ex rel. Maley v. Civic Action Committee, 28 N.W. 2d 467, 238 Iowa 851.
Wis.—State ex rel. Martin v. Ekern, 280 N.W. 393, 228 Wis. 645

35. Or.—**Corpus Juris quoted in** State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 31 P.2d 751, 753, 148 Or. 273.
51 C.J. p 324 note 56.

36. Ill. People v. Healy, 83 N.E. 453, 231 Ill. 629.
Or. **Corpus Juris quoted in** State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 31 P.2d 751, 753, 148 Or. 273.

Sound discretion

Where a claimant of an office lacks power to proceed as of right with proceedings in the nature of quo warranto, it has been held that the matter is addressed to the sound discretion of the attorney general.—Brierly v. Walsh, 12 N.E.3d 827, 299 Mass. 292.

Use of name

District attorney may not arbitrarily refuse to permit use of his name by private relator in prosecuting quo warranto action.—Commonwealth ex rel. Schermer v. Franck, 166 A. 878, 311 Pa. 341.

37. Or.—**Corpus Juris quoted in** State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 31 P.2d 751, 753, 148 Or. 273.
51 C.J. p 325 note 58.

38. Or.—**Corpus Juris quoted in** State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 31 P.2d 751, 753, 148 Or. 273.
51 C.J. p 325 note 59.

39. La.—Thomas v. Fuller, 113 So. 42, 166 La. 847.

40. La.—Thomas v. Fuller, supra.

the institution of a quo warranto proceeding by a person who has an interest distinct from that of the public, as discussed infra § 28, such as a right in himself to an office, infra § 30, he may proceed independently on his own relation where the attorney general[41] or prosecuting attorney[42] has consented or has refused to act, or, in some jurisdictions, without either the consent of the attorney general or his refusal to act, where the action is based on the usurpation of an office pertaining to a county, town, city, village, or school district.[43]

Failure of a party who has joined in a quo warranto proceeding to demand of the attorney general or state's attorney that quo warranto proceedings be brought has been held not to deprive the court of jurisdiction to hear the case where no objection is made by defendant.[44]

§ 19. Leave of Court

In a proper case the court may grant leave to file an information in the nature of quo warranto

In a proper case the court may, in its discretion, grant leave to file an information in the nature of quo warranto [45]

§ 20. —— Necessity

In the absence of a statute providing otherwise, leave or permission of court is a condition precedent to the filing of an information or the institution of proceedings in the nature of quo warranto by, or on the relation of, a private citizen, but at common law the attorney general ex officio may institute the proceeding without application to, or leave of, court.

The ancient common-law writ of quo warranto was a writ of right of the crown,[46] but the modern writ, or an information or action in the nature of quo warranto, is not a matter of absolute right,[47] at least where a private citizen seeks to institute the proceeding or to become a relator,[48] and even, it has been held, where the attorney general attacks the legality of the organization of a municipality.[49] In the absence of a statute providing otherwise, leave or permission of court is a condition precedent to the filing of an information or other institution of the proceeding by, or on the relation of, a private citizen [50] At common law and under a number of the statutes the attorney general ex officio may institute the proceeding without application to, or leave of, court,[51] and in at least one jurisdiction it has been held that the proceeding may be instituted

41. Fla.—City of South Miami v. State ex rel Landis, 192 So 624, 140 Fla. 740—State ex rel Swanson v Strickland, 166 So. 313, 122 Fla 784.
51 C.J. p 325 note 65.

42. Colo.—Grant v. Elder, 170 P. 198, 64 Colo 104.
51 C J p 325 note 66.

Adaptation of common law
The statutory provision for bringing of quo warranto by private person when district attorney neglects or refuses to act is an adaptation of the general provisions of the common law requiring the private relator to have some special interest as distinguished from that held by the general public.—Norton v. People ex rel Rudbeck, 81 P 2d 393, 102 Colo. 489

43. Wis.—State v Feuerstein, 150 N W. 486, 159 Wis 356
51 C.J. p 325 note 67.

44. Ill.—People ex rel Universal Oil Products Co v. Village of Lyons, 79 N.E 2d 33, 400 Ill. 82.

45. N J.—Maloney v MacDonald, 151 A. 374, 8 N.J Misc. 631.

Debatable question
Where, of five remaining council members, two voted for and two against mayor's appointee to vacancy, mayor giving casting vote, debatable question was presented justifying grant of leave to file an information in the nature of quo warranto.—Maloney v. MacDonald, supra.

Direction to institute proceedings
Attorneys and bar associations can bring to attention of circuit judge specific acts of corporations or individuals constituting the unlawful practice of law, and circuit judge can direct the institution of a proceeding in the nature of quo warranto against such corporations or individuals.—Birmingham Bar Ass'n v. Phillips & Marsh, 196 So. 725, 239 Ala 650

46. Mass.—Attorney General v Sullivan, 40 N E. 843, 163 Mass 446, 28 L R A 455.
51 C J. p 325 note 68.

47. Fla.—City of Winter Haven v State ex rel Landis, 170 So. 100, 125 Fla 392.
Pa.—Commonwealth ex rel. Margiotti v. Union Traction Co of Philadelphia, 194 A. 661, 327 Pa 497—In re Kearney, 7 A.2d 159, 136 Pa. Super 78
R I.—Black v. Cummings, 5 A.2d 858, 62 R I. 361
51 C.J p 325 note 69

48. N.M.—State v Raithel, 172 P 1137, 24 N.M 42.
51 C.J. p 325 note 70.

49. Mass.—Attorney General v. Methuen, 129 N E 662, 236 Mass. 564.

50. Iowa.—State ex rel. Adams v Murray, 252 N W. 556, 217 Iowa 1091.
51 C J p 325 note 72.

Scope and extent of leave
Where private person obtained leave of court to bring quo warranto only as against one of rival claimants to office, such claimant could not by cross petition contest title of other claimant as to whom no request had been made of county attorney to commence action.—State ex rel Adams v. Murray, supra

In New Jersey
Under statute, a relator who claims title to a municipal office and charges that another unlawfully holds it need not ask leave of supreme court to exhibit an information in nature of a quo warranto in name of attorney general, but may file it as matter of right, and the practice of asking leave is properly invoked where a person, himself a stranger to office, complains that a named respondent usurps or unlawfully holds any office or franchise in the state.—Duncan v. Board of Fire and Police Com'rs of City of Paterson, 37 A 2d 85, 131 N.J Law 443—Van Brookhoven v. Kennedy, 14 A 2d 789, 125 N J Law 178, affirmed 17 A. 2d 152, 125 N J Law 507—Williams v Godfrey, 165 A 724, 11 N.J Misc. 283—51 C.J. p 325 note 72 [b].

51. Fla.—State ex rel. Landis v. S. H Kress & Co., 155 So. 828, 115 Fla 189.
Idaho.—State ex rel. Taylor v Beneficial Protective Ass'n, 94 P 2d 787, 60 Idaho 587.
Or.—State by Hagglund ex rel Security Savings & Trust Co v School Dist. No. 9 of Tillamook County, 36 P 2d 179, 148 Or. 273
51 C.J. p 325 note 75.

by a private relator without leave of court, where the district attorney consents that the relator may act.[52] Under some code provisions an order of a judge directing the bringing of a quo warranto proceeding is a condition precedent to the bringing of such a proceeding in the name of the state alone without the joinder of an individual relator and without security for costs,[53] but no order or leave of court is necessary where there is an individual relator who gives security for costs.[54]

§ 21. —— Application for Leave and Proceedings Thereon

a. In general
b. Persons entitled to apply for leave
c. Notice and rule to show cause
d. Grant or refusal of leave in general
e. Discretion of court
f. Attack on, and vacation of, order

a. In General

It has been held that application for leave to file an information in the nature of quo warranto may properly be made instead of application for issuance of a writ of quo warranto; and ordinarily an application or petition should state facts instead of conclusions, and should be verified or supported by accompanying affidavits.

It has been held that it is proper to apply to the court for leave to file an information in the nature of quo warranto,[55] rather than apply to the court to issue a writ of quo warranto.[56] The application should be in statutory form, if any such form is prescribed,[57] and, if not so prescribed, the procedure conformable to common-law usage should be followed.[58] In some states a petition is necessary.[59] The application should be verified or accompanied by affidavits,[60] unless it is made by the attorney general.[61] The petition or affidavits in support thereof should not only recite facts,[62] rather than conclusions,[63] but should also state all the material facts necessary to justify or warrant the granting of leave,[64] and be so framed that perjury may be assigned thereon if any material allegation contained therein is false.[65] Attaching copies of documentary papers relied on as evidence to the petition as exhibits is desirable,[66] but not indispensable.[67]

The filing of an answer to a petition for leave to file an information in the nature of quo warranto has been held not to be authorized[68] or required[69] by law. In some jurisdictions the court may, in the

Reason for rule
The attorney general represents the sovereignty and is its attorney. —State ex rel. Landis v. Valz, 157 So. 651, 117 Fla. 311.

In Illinois
(1) Under the present statute the text rule is followed.—Rowan v. City of Shawneetown, 38 N.E.2d 2, 378 Ill. 289.

(2) Under the former statute an information for quo warranto could not be filed for the correction of wrongs done to either public or private rights except by leave of court.—People v. Union Cons. Ill. R. Co., 105 N.E. 12, 263 Ill. 32, Ann. Cas.1915C 383—51 C.J. p 325 notes 73, 74.

52. Colo.—People v. Lockard, 143 P. 278, 26 Colo.App. 430.

53. Ala.—Evans v. State, 109 So. 357, 215 Ala. 61.

54. Ala.—Capital City Water Co. v. State, 18 So. 62, 105 Ala. 406, 29 L.R.A. 743.
51 C.J. p 326 note 78.

55. N.D.—State v. McLean County, 92 N.W. 385, 11 N.D. 356.
51 C.J. p 326 note 79.

56. N.D.—State v. McLean County, supra.

57. Ala.—State v. Elliott, 23 So. 43, 117 Ala. 172.

58. Mo.—State v. Merry, 3 Mo. 278.

59. N.J.—Hunt v. Christensen, 126 A. 671, 98 N.J.Law 676.
51 C.J. p 326 note 83.

60. Ga.—Hicks v. Liner, 52 S.E.2d 846, 205 Ga. 232.—Roan v. Rogers, 40 S.E.2d 551, 201 Ga. 696.
51 C.J. p 326 note 84

Verification may be made by amendment if necessary.—Roan v. Rogers, supra—51 C.J. p 326 note 84 [d].

61. Pa.—Commonwealth v. Philadelphia, etc., R. Co., 3 Leg.Gaz. 371.

62. Ill.—People v. France, 115 N.E. 240, 314 Ill. 51.—People v. Emmerson, 145 N.E. 106, 313 Ill. 209.

63. Ill.—People v. Kimmel, 118 N.E. 717, 282 Ill. 344.
51 C.J. p 326 note 87.

64. Ill.—People v. Emmerson, 145 N.E. 106, 313 Ill. 209.
51 C.J. p 326 note 88.

Private right and personal interest
A petition by a private citizen for leave to file an information in nature of quo warranto where attorney general and state's attorney of proper county had refused to institute action must show on its face that plaintiff has an interest that is personal and peculiar to him and how he would be adversely affected if leave to file were not granted.—Adair v. Williams, 95 N.E.2d 345, 407 Ill. 309.—Rowan v. City of Shawneetown, 38 N.E.2d 2, 378 Ill. 289.

Application or petition held sufficient
Ga.—Blake v. Middlebrooks, 185 S.E. 786, 182 Ga. 500.—Henderson v. Young, 176 S.E. 388, 179 Ga. 540.
Ill.—People v. Sackett, 184 N.E. 646, 351 Ill. 363.
51 C.J. p 326 note 88 [c].

Application or petition held insufficient
Ill.—Rowan v. City of Shawneetown, 38 N.E.2d 2, 378 Ill. 289.—People v. Padley, 172 N.E. 763, 340 Ill. 314.—People v. Union Cons. Ill. R. Co., 105 N.E. 12, 263 Ill. 32, Ann. Cas.1915C 383.

Reasonable belief
Probable ground exists for granting leave to file information in nature of quo warranto, where petition alleges facts sufficient to engender reasonable belief that rights, privileges, or offices are being usurped or unlawfully exercised to detriment of public.—People v. Sackett, 184 N.E. 646, 351 Ill. 363.

65. Ill.—People v. Emmerson, 145 N.E. 106, 313 Ill. 209.
51 C.J. p 326 note 89.

66. Ga.—Harris v. Pounds, 66 Ga. 123.

67. Ga.—Harris v. Pounds, supra.

68. Ill.—People v. Chandlerville Community High School Dist. No. 62, 142 N.E. 453, 311 Ill. 324.
51 C.J. p 326 note 92.

69. Ill.—People v. Mineral Marsh Drain. Dist., 62 N.E. 225, 193 Ill. 428.

exercise of its discretion, hear either the petition alone or affidavits on both sides,[70] but it should not consider affidavits of respondent which merely deny facts alleged in the petition,[71] or which set up facts which are proper subject matter of pleas.[72]

A motion to dismiss the petition on the ground that the averments of the petition do not disclose a prima facie case is in the nature of a demurrer, requiring the court to consider the allegations of the petition as true.[73]

b. Persons Entitled to Apply for Leave

Better practice has been said to require a private citizen first to ask the attorney general to make application to the court for leave to institute quo warranto proceedings, but under some statutes any person having a private interest in the matter involved may make the application.

Although a private citizen may make application for leave to file an information in the nature of quo warranto,[74] it has been said to be better practice first to apply to the attorney general to institute the proceedings.[75] Under some statutory provisions application for leave to file an information in the nature of quo warranto may be made by "any person interested"[76] The "interest" required must be personal to the relator and other than that of a mere citizen and taxpayer,[77] and under such statutes it is essential that the court be satisfied that applicant is a person interested before it grants leave.[78]

c. Notice and Rule to Show Cause

Ordinarily the court may, on presentation of a proper application, grant an order for the defendant to show cause why an information in the nature of quo warranto should not be filed, and in some, but not other, jurisdictions notice of the application must be given to the defendant.

Except under some code provisions,[79] the court may, on due presentation of a proper application, grant an order or rule on defendant to show cause why an information should not be filed,[80] and in some jurisdictions, on application by a private person for leave to file an information, defendant is entitled to be heard on the question of filing,[81] and the granting of a rule to show cause is a customary preliminary step,[82] unless the subject matter of the proceeding is a small annual office;[83] but in other jurisdictions a rule nisi is not necessary,[84] and the court may, in its discretion, act on the petition ex parte or enter a rule nisi requiring respondent to show cause.[85] Such a rule or order does not determine any question of legal right either as to subject matter or procedure.[86]

Notice. There is considerable diversity of holding as to notice of the application made, or steps taken, to obtain leave to bring a quo warranto proceeding, and it has been variously held in different jurisdictions that notice to defendant is,[87] or is

70. Ill.—People v. Mineral Marsh Drain. Dist., supra.
51 C.J. p. 326 note 94.

71. Ill.—People v. Chandlerville Community High School Dist. No. 62, 142 N.W. 453, 311 Ill. 224.

72. Ill.—People v. Chandlerville Community High School Dist. No. 62, supra.

73. Del.—State ex rel. James v. Deakyne, 58 A.2d 129, 5 Terry 217.

74. N.J.—Klair v. Bacharach, 159 A. 538, 10 N.J.Misc. 448.

75. N.J.—Klair v. Bacharach, supra
Persons entitled to bring quo warranto proceedings or those in nature thereof see infra §§ 25–31.

76. Va.—Hammer v. Commonwealth ex rel. Hoover, 193 S.E. 496, 169 Va. 355.

Admission by defendant

In quo warranto proceeding instituted by individual under statute providing that attorney general or commonwealth's attorney "or any person interested" may in state's name apply for leave to file information in nature of writ of quo warranto, defendant's statement that words "if either refuse or fail to do so" should be interpolated between words "or" and "any" was an admission that statute does not require "any person interested" to request attorney general or commonwealth's attorney to apply for writ as condition precedent to instituting quo warranto proceeding.—Hammer v. Commonwealth ex rel. Hoover, supra.

77. W.Va.—State ex rel. Scanes v. Babb, 20 S.E.2d 683, 124 W.Va. 428.

One neither de jure nor de facto officer was not a "person interested" in the office which he claimed defendant was usurping, within statute authorizing a person interested to apply for leave to file an information in the nature of a writ of quo warranto.—State ex rel. Scanes v. Babb, supra.

Interest held sufficiently shown

Relator alleging that he had been legally elected to office of city justice, that he had duly qualified, performed duties, and received emoluments of office, and that he was entitled to continue in office until his successor was legally elected, but that, under color of a void election, defendant had unlawfully ousted him from office, if he was a bona fide claimant and made out a prima facie case, was a "person interested," entitled under statute to apply in name of state for leave to file information in nature of writ of quo warranto.—Hammer v. Commonwealth ex rel. Hoover, 193 S.E. 496, 169 Va. 355.

78. Va.—Hammer v. Commonwealth ex rel. Hoover, supra

79. S.C.—State v. Tollison, 78 S.E. 521, 95 S.C. 58.—State v. Evans, 12 S.E. 816, 33 S.C. 612.

80. Mich.—Ferzacca v. Freeman, 216 N.W. 469, 240 Mich. 682.
51 C.J. p. 327 note 98

81. N.J.—Hunt v. Christensen, 126 A. 671, 98 N.J.Law 676.—Miller v. Seymour, 51 A. 719, 67 N.J.Law 482.
Pa.—Commonwealth v. Keech, Com. Pl., 54 York Leg.Rec. 169.

82. Del.—State v. Hancock, 45 A. 850, 18 Del. 231.
51 C.J. p. 327 note 1.

83. N.J.—Casterline v. Gummersall, 24 N.J.Law 529.

84. Ga.—Milton v. Mitchell, 77 S.E. 821, 139 Ga. 614.
51 C.J. p. 327 note 3.

85. Ill.—People v. France, 145 N.E. 240, 314 Ill. 51.
51 C.J. p. 327 note 4.

86. Vt.—State v. Smith, 48 Vt. 14.

87. N.J.—Hunt v. Christensen, 126 A. 671, 98 N.J.Law 676.

not,[88] necessary; that notice of an application by a private relator need not be given to the attorney-general;[89] that an application for an order or rule to show cause may be made without notice,[90] but that the rule or order must be served on defendant;[91] and that service of the petition, or a copy thereof, on defendant is necessary.[92]

Return of rule and subsequent proceedings. A rule to show cause may be made returnable at such time as the court shall fix,[93] and its discretion governs the question unless otherwise provided by statute.[94] When a rule to show cause has been entered, respondent may file counter-affidavits.[95] On the hearing, the court may discharge the rule if the affidavits in support thereof are insufficient,[96] or if they are clearly and satisfactorily answered by counter-affidavits;[97] and, where the facts relied on in an answer to the rule are undisputed, and the questions of law presented may be given adequate consideration at the time, the court will determine them.[98] On the other hand, the rule should be made absolute in order that the questions may receive a full and final determination where the facts relied on in answer to the rule are disputed,[99] or where new and doubtful questions of law, requiring more time for their satisfactory solution than can be reasonably given on the application, are presented.[1]

For the purpose of determining a motion by defendant to discharge a rule to show cause why leave should not be granted to file an information in the nature of quo warranto, the facts alleged in the information are admitted to be true.[2]

d. Grant or Refusal of Leave in General

Some authorities hold that in order to justify a grant of leave to institute proceedings for quo warranto or in the nature thereof the applicant must make a showing which is precise and positive, while other authorities hold that a mere showing of probable cause is sufficient.

Some authorities hold that in order to justify a grant of leave to institute proceedings in quo warranto or in the nature thereof applicant must make a precise and positive showing;[3] while other authorities hold that leave should be granted wherever probable cause is shown,[4] at least where no good reason for refusing leave appears.[5] In any event, the matter is ordinarily addressed to the sound discretion of the court, as discussed infra subdivision e of this section.

The court may properly refuse to permit the filing of an information questioning the right or title

88. Mich.—Ferzacca v. Freeman, 216 N.W. 469, 240 Mich. 682.
51 C.J. p. 327 note 7.

No substantial right lost

Ex parte order, granting citizens leave to file information in nature of quo warranto to determine defendant's right to office of member of district school board, deprived defendant of no substantial right either as to subject matter or procedure.—Marian v. Beard, 242 N.W. 880, 259 Mich. 183.

Statute changing common-law rule

At common law, leave to bring quo warranto proceeding to inquire into authority by which corporation exercised its franchise was granted on application of attorney general, and the court, in its discretion, directed notice of such application to be given to the corporation or to its officers previous to granting such leave, and the court could hear the corporation in opposition thereto; but, where the common-law proceeding has been abolished by statute, it is not necessary for attorney general to file an application to bring quo warranto proceeding, or to give defendant an opportunity to show cause why proceeding should not be commenced.—State ex rel. Taylor v. Beneficial Protective Ass'n, 94 P.2d 787, 60 Idaho 587.

89. N.J.—Day v. Lyons, 56 A. 153, 70 N.J.Law 114.

90. Vt. State v. Smith, 48 Vt. 14.

91. N.J. Hunt v. Christensen, 126 A. 671, 98 N.J.Law 676.
51 C.J. p. 327 note 12.

92. N.J.—Hunt v. Christensen, supra.

93. Ark. State v. McDiarmid, 26 Ark. 480.

94. Ark.—State v. McDiarmid, supra.

95. Ill.—People v. France, 145 N.E. 240, 314 Ill. 51.
51 C.J. p. 327 note 17.

96. Del.—Lynch v. Martin, 11 Del. 487.
N.J. State v. Bruggemann, 20 A. 730, 53 N.J.Law 122.

97. Del.—Lynch v. Martin, 11 Del. 487.

98. Ill.—People v. France, 145 N.E. 240, 314 Ill. 51.
51 C.J. p. 327 note 20.

99. Ill.—People v. France, supra.
51 C.J. p. 327 note 21.

1. Ill.—People v. France, supra.
51 C.J. p. 327 note 22.

2. Del.—State ex rel. Green v. Glenn, 4 A.2d 366, 9 W.W.Harr. 584.

3. Mich.—Marian v. Beard, 242 N.W. 880, 259 Mich. 183.—Boucha v. Alger Cir. Judge, 124 N.W. 532, 159 Mich. 610.

Prima facie case

In quo warranto, the moving party must show a prima facie case, and the writ obtained by him may be sustained only if legally supported. Commonwealth ex rel. Margiotti v. Union Traction Co. of Philadelphia, 194 A. 661, 327 Pa. 497.

4. Ill.—People v. Young, 133 N.E. 693, 301 Ill. 67.
51 C.J. p. 327 note 26.

Denial on pleadings

Order, "On showing made, and considering petition proposed to be filed, leave to file proceeding in nature of quo warranto is denied," was construable as refusing application for leave merely on inspection of pleadings, not as refusal of application because of evidence submitted, and refusal predicated solely on such inspection was improper where the pleadings were sufficient.—Blake v. Middlebrooks, 185 S.E. 786, 182 Ga. 500.

Discretion no excuse for error

Where judgment in quo warranto proceedings in favor of respondent was erroneous, judgment could not be sustained on ground that judge had a discretion to refuse the writ.—Britton v. Bowden, 5 S.E.2d 47, 188 Ga. 806.

5. Ill.—People v. Graham, 135 N.E. 496, 303 Ill. 303.
51 C.J. p. 327 note 27.

Application held properly refused under facts.—Klair v. Bacharach, 159 A. 538, 10 N.J.Misc. 448.

of a person to an office where, by virtue of circumstances occurring after the making of the application, he is legally acting in his office when the application is heard and decided[6] An order granting leave to sue to annul a charter should specify the grounds on which the action is to be brought.[7] Permission to bring the action or proceeding may be granted nunc pro tunc[8] An order granting leave is effective according to its terms[9]

Statutes authorizing a judge of a specified court to direct that an action in the nature of quo warranto be brought when he believes that certain facts can be proved have been construed to vest the power in the judge and not in the court to order the solicitor to proceed,[10] and to contemplate that the judge shall have advance information leading him to believe that the charge can be proved[11] and that the proceeding will be for the public good[12] Such a statute has also been held to contemplate that the judge may acquire information in his own way to guide him in making his decision as to whether or not to order the solicitor to proceed.[13]

e. Discretion of Court

An application for leave to institute quo warranto proceedings by filing an information or otherwise is ordinarily addressed to the sound discretion of the court.

Granting or refusing leave to institute a quo warranto proceeding by filing an information or otherwise rests largely in the discretion of the court to which the application is made[14] This is true notwithstanding the existence of a substantial defect in the title by which the office or franchise in question is held,[15] and, on considerations of public policy, the court may deny an application for leave to file an information, although the facts are such that, if the proceeding was entertained, judgment would have to be given against respondent[16] The discretion to be exercised is a sound judicial and legal discretion.[17]

6. Ga.—Widincamp v. Wood, 144 S.E. 900, 167 Ga. 57
51 C.J. p. 328 note 31.

7. N.Y.—Matter of Attorney General, 30 N.Y.S. 1093, 81 Hun 541

8. S.C.—State v. Belue, 136 S.E. 641, 138 S.C. 393

9. Del.—Brooks v. State, 79 A. 790, 26 Del. 1, 51 L.R.A.,N.S., 1126, Ann.Cas. 1915A. 1133.
51 C.J. p. 328 note 34

10. Ala.—Wenzel v. State ex rel. Powell, 3 So.2d 26, 241 Ala. 406.

11. Ala.—Owen v. State ex rel. Bailes, 200 So. 412, 240 Ala. 582

12. Ala.—Owen v. State ex rel. Bailes, supra.

13. Ala.—Wenzel v. State ex rel. Powell, 3 So.2d 26, 241 Ala. 406.

Preliminary affidavit

A preliminary affidavit filed with circuit judge containing specification of facts was properly made the means of giving judge advance information on which to act in ordering that a quo warranto proceeding be commenced against unlicensed chiropractor.—Owen v. State ex rel. Bailes, 200 So. 412, 240 Ala. 582.

14. Ala.—**Corpus Juris cited in** Baxter v. State ex rel. Metcalf, 9 So.2d 119, 121, 243 Ala. 120—State, on Inf. of Murphy, v. Johnson, 8 So.2d 890, 243 Ala. 114.

Fla.—**Corpus Juris cited in** City of Winter Haven v. State ex rel. Landis, 170 So. 100, 104, 125 Fla. 392

Ill.—People ex rel. Universal Oil Products Co. v. Village of Lyons, 79 N.E.2d 33, 400 Ill. 82

N.J.—Scott v. Cholmondeley, 18 A.2d 617, 129 N.J.Eq. 152—Klair v. Bacharach, 159 A. 538, 10 N.J.Misc. 448.

Or.—**Corpus Juris cited in** State v. School Dist. No. 23, 172 P.2d 655, 662, 179 Or. 441—**Corpus Juris cited in** State by Hagglund ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 36 P.2d 179, 182, 148 Or. 273

Pa.—Commonwealth ex rel. Koontz v. Dunkle, 50 A.2d 496, 355 Pa. 493, 169 A.L.R. 1277

R.I.—Black v. Cummings, 5 A.2d 858, 62 R.I. 361

Wash.—State ex rel. Winters v. Steele, 224 P.2d 332—State v. Hovey, 294 P. 258, 159 Wash. 584.
51 C.J. p. 328 note 36

Broad discretion

N.J.—Scott v. Cholmondeley, 18 A.2d 617, 129 N.J.Eq. 152—Mulsoff v. Sloat, 151 A. 113, 8 N.J.Misc. 554

Grant of leave to municipality

Minn.—State ex rel. Town of Stuntz v. City of Chisholm, 264 N.W. 798, 196 Minn. 285.

15. Colo.—People v. Keeling, 4 Colo. 129

Minn.—State ex rel. Arpagaus v. Todd, 29 N.W.2d 810, 225 Minn. 91, 175 A.L.R. 776

N.J.—Robibero v. Hillery, 58 A.2d 596, 137 N.J.Law 96
51 C.J. p. 328 note 37.

Relator not claiming office

Court has wide discretion in granting or withholding permission to file information in nature of quo warranto at instance of relator making no claim to office, even where a good objection to the title of the person whose right is called in question is shown.—Robibero v. Hillery, supra.

16. N.M.—State v. Raithel, 172 P. 1137, 24 N.M. 42

Tex.—State v. Hoff, 31 S.W. 290, 88 Tex. 297

Public injury outweighing private right

Extraordinary relief, such as quo warranto, will not be granted where it plainly appears that, although complainant may be ordinarily entitled to relief, granting of such relief will result in confusion and disorder and will produce injury to public which outweighs individual right of complainant to have relief.—State ex rel. Pooser v. Wester, 170 So. 736, 126 Fla. 49

17. Ill.—People ex rel. Petty v. Thomas, 198 N.E. 363, 361 Ill. 448—People v. Sackett, 184 N.E. 646, 351 Ill. 363.

Kan.—Gas Service Co. v. Consolidated Gas Utilities Corporation, 65 P.2d 584, 145 Kan. 423.

Minn.—State ex rel. Arpagaus v. Todd, 29 N.W.2d 810, 225 Minn. 91, 175 A.L.R. 776—State ex rel. Christianson v. Johnson, 275 N.W. 684, 201 Minn. 219

Pa.—Commonwealth ex rel. Koontz v. Dunkle, 50 A.2d 496, 355 Pa. 493, 169 A.L.R. 1277—Commonwealth v. Sommer, 164 A. 515, 309 Pa. 447—In re Kearney, 7 A.2d 159, 136 Pa. Super. 78.

Tex.—Fannin-Lamar-Delta Improvement Dist. No. 3 v. State, Civ.App., 73 S.W.2d 1101, error dismissed
51 C.J. p. 328 note 40—20 C.J. p. 210 note 79

Discretion held not abused

Minn.—State ex rel. Christianson v. Ingelbretson, 275 N.W. 686, 201 Minn. 222—State ex rel. Christianson v. Johnson, 275 N.W. 684, 201 Minn. 219

Wash.—State v. Hovey, 294 P. 258, 159 Wash. 584.

In exercising its discretion, the court may and should consider all the circumstances of the case,[18] the motives of the relator in having the proceeding instituted,[19] the time which has elapsed since the cause of complaint occurred,[20] and whether the public interest will be served by allowing the information to be filed;[21] and it may refuse leave or decline to entertain the proceeding on considerations of public policy, interest, or convenience,[22] because of such conduct on the part of applicants as to preclude them from making the inquiry,[23] because of long, unexcused, and prejudicial delay or acquiescence[24] on the part of the persons complaining[25] or the public generally,[26] or because of the prior institution of actions, proceedings, or contests involving the same questions,[27] or where the term of office in question will expire at an early date[28] and before the questions involved in the proceeding can be tried and decided.[29] In a proceeding brought primarily for the benefit of the relator, the court's discretion is much greater than where purely public interests are involved.[30]

f. Attack on, and Vacation of, Order

An order granting leave to institute proceedings for quo warranto or in the nature thereof is not subject to collateral attack, but may be vacated in a direct proceeding.

While an order granting leave to institute a quo warranto action or proceeding is not subject to collateral attack,[31] nevertheless the court which granted leave may, at the same term,[32] vacate and set aside

18. Ala.—**Corpus Juris quoted in** Baxter v. State ex rel. Metcalf, 9 So.2d 119, 122, 243 Ala. 120.
Fla.—**Corpus Juris cited in** City of Winter Haven v State ex rel Landis, 170 So. 100, 108, 125 Fla 392
Ill.—People ex rel. Petty v. Thomas, 198 N.E. 363, 361 Ill. 448.
Kan.—Gas Service Co. v. Consolidated Gas Utilities Corporation, 65 P.2d 584, 145 Kan. 423.
Minn.—State ex rel. Christianson v. Johnson, 275 N.W. 684, 201 Minn. 219.
Or.—**Corpus Juris cited in** State v. School Dist. No. 23, 172 P.2d 655, 662, 179 Or. 441—**Corpus Juris cited in** State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 36 P.2d 179, 182, 148 Or. 273.
51 C.J. p 328 note 42.

19. Ala.—**Corpus Juris quoted in** Baxter v. State ex rel. Metcalf, 9 So.2d 119, 122, 243 Ala. 120.
Ill.—People ex rel. Petty v. Thomas, 198 N.E. 363, 361 Ill. 448
Minn.—State ex rel. Christianson v. Johnson, 275 N.W. 684, 201 Minn. 219.
N.J.—Mulsoff v. Sloat, 151 A. 113, 8 N.J.Misc. 554.
Or.—**Corpus Juris cited in** State v. School Dist. No. 23, 172 P.2d 655, 662, 179 Or. 441—**Corpus Juris cited in** State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 36 P.2d 179, 182, 148 Or. 273.
51 C.J. p 328 note 43.

20. Fla.—**Corpus Juris cited in** City of Winter Haven v. State ex rel. Landis, 170 So. 100, 108, 125 Fla. 392.
N.J.—Robilero v. Hillery, 58 A.2d 596, 137 N.J.Law 96.
Or.—**Corpus Juris cited in** State v. School Dist. No. 23, 172 P.2d 655, 662, 179 Or. 441—**Corpus Juris cited in** State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 36 P.2d 179, 182, 148 Or. 273.
51 C.J. p 328 note 44.

21. Ala.—**Corpus Juris quoted in** Baxter v. State ex rel. Metcalf, 9 So.2d 119, 122, 243 Ala. 120.
Fla.—**Corpus Juris cited in** City of Winter Haven v. State ex rel. Landis, 170 So. 100, 108, 125 Fla 392.
Ill.—People ex rel. Petty v. Thomas, 198 N.E. 363, 361 Ill. 448.
Minn. State ex rel. Town of Stuntz v. City of Chisholm, 264 N.W. 798, 196 Minn. 285.
Or. **Corpus Juris cited in** State v. School Dist. No. 23, 172 P.2d 655, 662, 179 Or. 441 **Corpus Juris cited in** State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 36 P.2d 179, 182, 148 Or. 273.
R.I.—Black v. Cummings, 5 A.2d 858, 62 R.I. 361.
51 C.J. p 328 note 45.

22. N.J.—Robilero v. Hillery, 58 A. 2d 596, 137 N.J.Law 96—Mulsoff v. Sloat, 151 A. 113, 8 N.J.Misc. 554.
Or.—**Corpus Juris cited in** State v. School Dist. No. 23, 172 P.2d 655, 662, 179 Or. 441 **Corpus Juris cited in** State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 36 P.2d 179, 182, 148 Or. 273.
51 C.J. p 328 note 46.

23. Ga.—Dorsey v. Ansley, 72 Ga. 460.
Vt.—Pomeroy v. Kelton, 62 A. 56, 78 Vt. 230.

24. Fla.—**Corpus Juris cited in** City of Winter Haven v. State ex rel. Landis, 170 So. 100, 108, 125 Fla. 392.
Or.—**Corpus Juris cited in** State v. School Dist. No. 23, 172 P.2d 655, 662, 179 Or. 441—**Corpus Juris cited in** State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 36 P.2d 179, 182, 148 Or. 273.
51 C.J. p 329 note 49.

Absence of injury
Defendants cannot invoke rule of unreasonable delay or acquiescence as ground for refusing leave to file information in nature of quo warranto against them because of mere delay not disadvantageous to them.
Ill. People v. Sackett, 181 N.E. 646, 351 Ill. 362.
Or. **Corpus Juris cited in** State v. School Dist. No. 23, 172 P.2d 655, 662, 179 Or. 441.

25. Or. **Corpus Juris cited in** State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 36 P. 2d 179, 182, 48 Or. 273.
51 C.J. p 329 note 50.

26. Ill. People v. Keene, 153 N.E. 379, 322 Ill. 255.
51 C.J. p 329 note 51.

27. Kan.—Little v. Davis, 104 P. 560, 80 Kan. 777.
51 C.J. p 329 note 52.

28. Vt. State v. Hinsdale, 112 A. 357, 95 Vt. 95 State v. Foley, 94 A. 841, 89 Vt. 193.

29. Mass.—Commonwealth v. Athearn, 3 Mass. 285.
51 C.J. p 329 note 55.

30. Or. **Corpus Juris cited in** State v. School Dist. No. 23, 172 P.2d 655, 662, 179 Or. 441 **Corpus Juris cited in** State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 36 P.2d 179, 182, 148 Or. 273.
51 C.J. p 329 note 56.

31. Iowa.—State v. Bohst, 218 N.W. 353, 205 Iowa 605.
51 C.J. p 329 note 57.

32. Ill.—People v. Wanmer, 114 N. E. 1015, 276 Ill. 460.
51 C.J. p 329 note 58.

the order where it is shown that leave was inadvertently or improperly granted under a misapprehension of law or fact[33] Whether the order shall be vacated rests largely in the discretion of the court;[34] but the court's discretion in this respect is a sound judicial discretion[35] It is proper to file affidavits in support of a motion to vacate;[36] but the order should not be vacated on affidavits amounting merely to a denial of allegations of fact in the petition for leave;[37] and, although leave has been granted without any rule to show cause or other notice to respondent as required by the practice of the particular jurisdiction, nevertheless it will not be vacated where this course would lead only to a new application followed by a rule to show cause, and where the case has merit, and is one in which the relator has a right to file an information, without leave of court, on giving security for costs[38]

§ 22. Time to Sue, Limitations, Laches, and Estoppel

a. In general
b. Limitations
c. Laches and estoppel

a. In General

Quo warranto proceedings or those in the nature thereof should be timely, and may be dismissed where premature. Ordinarily, the proceeding may not be brought to try title to office before defendant has assumed or usurped such office.

Quo warranto proceedings or those in the nature thereof should be timely,[39] and will be dismissed if brought prematurely.[40] Proceedings to try title to office cannot be brought until defendant or respondent has assumed,[41] usurped,[42] been inducted into,[43] or is in possession of,[44] the office, and therefore cannot be brought before the term of office commences[45] Also, quo warranto to try the title to an office during a particular term cannot ordinarily be begun after the expiration of that term.[46] Even though a person elected for a certain term may be entitled to hold the office after the expiration of the term until his successor is elected and qualified, it is not true that quo warranto will not lie until the successor has qualified,[47] and, where the official holds for a designated period and not until the qualification of his successor, quo warranto may be brought to oust him after expiration of his term, even though his successor has not qualified.[48]

Attack on incorporation proceedings. An action in the nature of quo warranto, raising the question of the validity of proceedings for incorporation of a municipality, is premature when brought after the appointment of commissioners to call and hold, but before the holding of, an election on the question of incorporation,[49] since it is not certain that the proposed corporation will ever be formed.[50]

Time and mode of raising objection The objection that the proceedings are begun too late may in

33. Mich.—**Corpus Juris cited in** Marian v Beard, 242 N.W. 880, 881, 259 Mich. 183.
Minn.—**Corpus Juris cited in** Dollenmayer v. Ryder, 286 N.W. 297, 298, 205 Minn. 207.
51 C.J. p 329 note 59.

34. Ill.—People v. Springfield, 159 N.E. 248, 328 Ill. 172.
51 C.J. p 329 note 60

35. Ill.—People v. Wanmer, 114 N.E. 1015, 276 Ill. 460—People v. Union El. R. Co., 110 N.E. 1, 269 Ill. 212.

36. Ill.—People v Chicago, 110 N.E. 366, 270 Ill. 188

37. Ill.—People v. Sackett, 184 N.E. 646, 351 Ill 363
51 C.J. p 329 note 63

38. N.J.—Campbell v. Champion, 139 A. 57, 5 N.J.Misc. 397.

39. Iowa.—State v. Hall, 181 N.W. 638, 190 Iowa 1283.
Or.—State ex rel. Hallgarth v. School Dist. No. 23, Union County, 172 P. 2d 655, 179 Or. 441.

40. Ohio.—State ex rel. Bricker v. Kroger Grocery & Baking Co., 191 N.E. 1, 128 Ohio St. 167.

The cause of action should exist and be complete when proceedings are commenced.
Ky.—Broyles v Commonwealth, 219 S.W.2d 52, 309 Ky. 837.
Neb.—State ex rel. Johnson v. Consumers Public Power Dist., 10 N.W.2d 784, 143 Neb. 753, 152 A.L.R. 480

41. Fla.—State ex rel. Gibbs v. Bloodworth, 184 So. 1, 134 Fla. 869.
Ky.—**Corpus Juris cited in** Broyles v Commonwealth, 219 S.W.2d 52, 54, 309 Ky. 837.
51 C.J. p 329 note 71 [a]

Subsequent assumption of office
Where quo warranto proceeding to prevent defendant from usurping office which was to begin on January 3 was prematurely instituted on January 1, fact that defendant subsequently assumed the office and petition was thereafter amended would not give life to the premature petition, and action should have been dismissed without prejudice.—Broyles v. Commonwealth, 219 S.W. 2d 52, 309 Ky. 837.

42. Ky.—**Corpus Juris cited in** Broyles v. Commonwealth, 219 S.W.2d 52, 54, 309 Ky. 837.
N.H.—Stearns v. O'Dowd, 101 A. 31, 78 N.H. 358

43. Okl.—Harris v. Boggess, 238 P. 477, 113 Okl. 60

Induction held shown
Plea in abatement to quo warranto proceeding on ground that defendants were not inducted into office at commencement of proceeding was erroneously sustained, under evidence showing defendants in office when information was filed.—Sweat v Barnhill, 155 S.E. 18, 171 Ga. 294

44. Ky.—**Corpus Juris cited in** Broyles v. Commonwealth, 219 S.W.2d 52, 54, 309 Ky. 837.
51 C.J. p 329 note 70

45. Okl.—Harris v. Boggess, 238 P. 477, 113 Okl. 60.
51 C.J. p 329 note 71.

46. Pa.—Commonwealth v Smith, 45 Pa. 59.
Expiration of term after commencement of action see infra § 23 b

47. Tex.—Griffith v. State, Civ.App., 216 S.W. 469.

48. S.D.—Territory v Hauxhurst, 14 N.W. 432, 3 S.D. 205.

49. Colo.—People v. Garfield County Court, 147 P. 329, 59 Colo. 52.

50. Colo.—People v. Garfield County Court, supra.

some cases be made on presentation of a petition for leave to file an information,[51] or, if not made at that time, such objection may be raised subsequently by plea or answer.[52]

b. Limitations

A quo warranto proceeding may be barred by limitations.

A quo warranto action or proceeding may be barred by limitation where it is within an applicable statute of limitations;[53] but not otherwise.[54]

c. Laches and Estoppel

Some authorities allow the defense of laches and estoppel to be urged against quo warranto proceedings brought on behalf of the public, while others do not. In any event laches and estoppel may be available to bar a private relator.

It has been held in some jurisdictions that, in the absence of an applicable statute of limitations, mere lapse of time does not estop the people,[55] or bar a quo warranto proceeding by the state, people, or attorney general,[56] even though brought by a public attorney at the instance of a private relator, where the public is in any event interested as such.[57] Also, in such jurisdictions the personal conduct, acquiescence, laches, or estoppel of an individual relator,[58] or even mere neglect by public officers,[59] does not bar or estop the state, public, or attorney general. In other jurisdictions, however, the state or public may be precluded by laches, estoppel, or waiver from maintaining quo warranto proceedings,[60] such as those attacking the organization of a county,[61] or of a municipal corporation,[62] or such

51. Pa.—Commonwealth v. New York, etc., R. Co., 10 Pa.Co. 129.

52. Ill.—People v. Schnepp, 53 N.E. 632, 179 Ill. 305—People v. Pullman's Palace Car Co., 51 N.E. 664, 175 Ill. 125, 64 L.R.A. 366.

Plea or answer generally see infra § 38.

53. Mich.—Finlayson v. West Bloomfield Tp., 31 N.W.2d 80, 320 Mich. 350—Lake v. North Branch Tp., 22 N.W.2d 248, 314 Mich. 140—Fulton Township School District v. School Dist. No. 4 Fractional, Essex Township, 5 N.W.2d 467, 302 Mich. 566.

N.J.—Zimmerman v. Cherivich, 68 A.2d 577, 5 N.J.Super. 590.

Ohio.—State v. Northern Ohio Tract., etc., Co., 34 Ohio Cir.Ct. 262.

Or.—State ex rel. v. Port of Cascade Locks, 127 P.2d 351, 169 Or. 197.

51 C.J. p. 330 note 80.

54. Cal.—People v. Bailey, 158 P. 1036, 30 Cal.App. 581.

Iowa.—State v. Mohr, 199 N.W. 278, 198 Iowa 89.

51 C.J. p. 330 note 81.

Computation of time

Under the facts disclosed the statute of limitations did not bar quo warranto to test sufficiency of incorporation, because limitations had not yet begun to run, where decree of county court reciting that all proceedings "unto this time" were in accordance with law and ordering publication of notice that incorporation should be denominated an incorporated town "upon the further compliance with the law in such cases made and provided" was insufficient as decree adjudging incorporation to be complete.—Norton v. People ex rel. Rudbeck, 81 P.2d 393, 102 Colo. 489.

55. Ill.—People ex rel. Pfeiffer v. Morris, 6 N.E.2d 864, 365 Ill. 470.

51 C.J. p. 330 note 88.

56. Iowa.—State ex rel. Schlegel v. Munn, 250 N.W. 471, 216 Iowa 1232—State v. Mohr, 199 N.W. 278, 198 Iowa 89.

Tex.—Fannin-Lamar-Delta Improvement Dist. No. 3 v. State, Civ.App., 73 S.W.2d 1101, error dismissed.

51 C.J. p. 330 note 89.

Discretion of court

While the doctrine of laches is not ordinarily applicable to bar proceedings by the state, nevertheless the court, at hearing or in applying remedy in quo warranto, has discretionary power enabling it to take cognizance of laches or delay.—State ex rel. Jordan v. City of Greenwood, 129 So. 682, 157 Miss. 836.

Ultra vires act

Where appointment of respondent was not made in accordance with statute, laches was no defense in quo warranto proceeding since act questioned was ultra vires act by governmental officer and no hardship was inflicted on respondent.—Haines v. Appleton, 9 A.2d 778, 123 N.J.Law 492.

57. Tex.—Town of De Kalb v. State ex rel. King, Civ.App., 71 S.W.2d 299.

Suit to annul annexation

Laches was held not available to municipality in quo warranto proceeding to annul annexation of territory notwithstanding proceeding was brought at instance of private owner who with other owners was interested in result, since proceeding was essentially by state in public interest.—Town of De Kalb v. State ex rel. King, supra.

58. Ill.—People ex rel. Universal Oil Products Co. v. Village of Lyons, 79 N.E.2d 33, 400 Ill. 82—People ex rel. Shriver v. Frazier, 55 N.E.2d 159, 386 Ill. 620—People v. Holmes, 180 N.E. 780, 348 Ill. 204.

51 C.J. p. 330 note 90.

Information not for relator's benefit

Conduct of relator constitutes no bar to proceeding in nature of quo warranto against drainage district, where it does not appear that information is filed for relator's private and exclusive benefit.—People v. Holmes, supra.

59. Ill.—People v. Le Roy, 127 N.E. 695, 293 Ill. 278.

Kan.—State ex rel. Boynton v. Wheat Farming Co., 22 P.2d 1093, 137 Kan. 697.

60. Minn.—State v. Dakota County School Dist. No. 108, 88 N.W. 751, 85 Minn. 230.

Mo.—State on Inf. of Wallach ex rel. H. B. Deal & Co. v. Stanwood, App., 208 S.W.2d 291—State at Inf. of McKittrick v. Seibert, 65 S.W.2d 139, 228 Mo.App. 1133.

Pa.—Commonwealth v. Hensel, 35 A. 1105, 153 Pa. 47—Commonwealth ex rel. Marigotti v. Union Traction Co. of Philadelphia, Com.Pl., 44 Dauph.Co. 415, affirmed 194 A. 661, 327 Pa. 497.

Invocation of doctrine by defendant

Pa.—Commonwealth v. United Republican Club of Ridley Tp., Com.Pl., 32 Del.Co. 545.

Laches held shown

(1) Generally. State ex rel. Crain v. Baker, Mo.App., 104 S.W.2d 726.

(2) Proceeding in nature of quo warranto brought on relation of district attorney eight years after organization of union high school district to determine validity thereof was held barred by laches.—State ex rel. Weatherford v. Hayworth, 53 P.2d 1048, 152 Or. 416.

Laches held not shown

Pa.—Commonwealth ex rel. Snyder v. Baker, 13 Pa.Dist. & Co. 415.

61. N.D.—State v. Mountrail County, 149 N.W. 120, 28 N.D. 389.

62. Mo.—State on Inf. of Wallach ex rel. H. B. Deal & Co. v. Stanwood, App., 208 S.W.2d 291—State v. Mansfield, 72 S.W. 471, 99 Mo. App. 146.

as those attacking the organization of a private corporation,[63] or the validity of proceedings annexing territory to a school district,[64] and it has been held that, where the state, through its own agents, assumed the superintendence of subscriptions to the capital stock of a corporation, it cannot, in quo warranto proceedings, charge the corporation with the mala fides of the agents.[65]

At any rate, estoppel or laches may bar a private relator[66] from attacking the validity of an election;[67] and acquiescence,[68] or unreasonable delay,[69] on the part of a private relator may preclude him from maintaining a quo warranto proceeding. On the other hand, there is no estoppel or laches against either a private or a public relator where the facts do not disclose such acquiescence, recognition, or lapse of time as to constitute an estoppel or unreasonable delay.[70]

Private corporation usurping municipal powers

While laches is equity doctrine, in proper case, it may be applied to municipal corporations in quo warranto proceedings, such as those seeking to oust a private company from usurping municipal privileges —State ex inf. Shartel ex rel City of Sikeston v. Missouri Utilities Co., 53 S.W.2d 394, 331 Mo. 337, 89 A.L.R. 607

Proceeding brought in name of state

Fact that quo warranto, questioning validity of incorporation of municipality and legality of acts of officials, is brought in name of state does not preclude municipality from setting up acquiescence in exercise of corporate jurisdiction and powers —State ex rel. Kinney v. Town of Steppville, 168 So. 433, 232 Ala. 407

63. Ind.—White v. State, 69 Ind. 273—State v. Bailey, 19 Ind. 452

Practical construction of statutes by officials may afford defense to quo warranto questioning powers of bank with respect to receipt of deposits —State ex rel. Ervin v. Crookston Trust Co., 282 N.W. 138, 203 Minn. 512.

64. Mo.—State v. Lathrop School Dist., 284 S.W. 135, 314 Mo. 315

65. Ind.—McCulloch v. State, 11 Ind. 424

66. Ill.—People ex rel. Universal Oil Products Co. v. Village of Lyons, 79 N.E.2d 33, 400 Ill. 82.
Iowa.—State v. Mediapolis Cons. Independent School Dist., 186 N.W. 426, 193 Iowa 856—State v. Des Moines, 65 N.W. 818, 96 Iowa 521, 59 Am.S.R. 381, 31 L.R.A. 186.
Mo.—Central Missouri Oil Co. v. City of St. James, 111 S.W.2d 215, 232 Mo.App. 142.

Laches of state

In this connection, it has been said that the charge of laches is against the state rather than against a private person as relator, and that, even though the latter is not guilty of laches, he may be barred by those of the state.—State on Inf. of Wallach ex rel. H. B. Deal & Co. v. Stanwood, Mo.App., 208 S.W.2d 291

67. Fla.—State ex rel. Pooser v. Wester, 170 So. 736, 126 Fla. 49
Ill.—People ex rel. Elder v. Quilici, 33 N.E.2d 492, 309 Ill.App. 466.

Propriety of remedy of quo warranto to attack validity of election see supra § 11.

Four months' delay

Citizens were not entitled to quo warranto to have nominating election invalidated on ground that more than half of voters were not qualified because of failure to register and pay poll tax, where citizens were guilty of laches in waiting over four months, and until less than one month before general election before seeking relief.—State ex rel. Pooser v. Wester, 170 So. 736, 126 Fla. 49

Estoppel not shown

Where two candidates receiving the highest number of votes were elected to four-year terms as city commissioners and candidate receiving third highest number of votes was elected for a two-year term, candidate elected to two-year term by entering on his duties as city commissioner was not estopped to contest the election of one of the candidates to a four-year term, where there was no incompatibility in offices and no other issue was involved in contest other than question of tenure.—State ex rel. Whitley v. Rinehart, 193 So. 819, 140 Fla. 645

68. Fla.—City of Coral Gables v. State ex rel. Gibbs, 5 So.2d 241, 148 Fla. 671, followed in 5 So.2d 244, 148 Fla. 679
Kan.—Gas Service Co. v. Consolidated Gas Utilities Corporation, 65 P.2d 584, 145 Kan. 423
51 C.J. p. 330 note 96

69. Kan.—Gas Service Co. v. Consolidated Gas Utilities Corporation, 65 P.2d 584, 145 Kan. 423.
N.J.—**Corpus Juris cited in** O'Leary v. Reiner, 156 A. 120, 121, 9 N.J. Misc. 950.
51 C.J. p. 330 note 97

Delay held to constitute laches

(1) One year.—State ex rel. Hallgarth v. School Dist. No. 23, Union County, 172 P.2d 655, 179 Or. 441.

(2) About three years.—O'Leary v. Reiner, 156 A. 120, 9 N.J.Misc. 950

(3) Nineteen years.—State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 36 P.2d 179, 148 Or. 273.

Explanation of delay

Where result of a judgment in favor of relator in quo warranto proceeding would be to render a sizeable area served by defendant school district devoid of school facilities, relator was required to explain his delay in bringing the proceeding.—State ex rel. Hallgarth v. School Dist. No. 23, Union County, 172 P.2d 655, 179 Or. 441.

70. Fla.—City of South Miami v. State ex rel. Gibbs, 197 So. 109, 143 Fla. 524—State v. City of Homestead, 130 So. 28, 100 Fla. 354, 361
Ill.—People ex rel. Universal Oil Products Co., 79 N.E.2d 33, 400 Ill. 82—People ex rel. Mills v. Fairfield Community High School Dist. No. 225, 73 N.E.2d 292, 397 Ill. 233—People ex rel. Lange v. Old Portage Park Dist., 190 N.E. 664, 356 Ill. 340.
Minn.—State ex rel. Town of Stuntz v. City of Chisholm, 273 N.W. 235, 199 Minn. 403
Mo.—State, on Inf. of McKittrick, v. American Ins. Co., 140 S.W.2d 36, 346 Mo. 269
N.J.—Moore v. Ennis, 162 A. 751, 10 N.J.Misc. 1131.
51 C.J. p. 330 note 98.

Reasonable diligence

Where building inspector of the city was dismissed without charges being filed or a hearing accorded him and promptly appealed to civil service commission and, when his status there was determined to be that of an officer in the unclassified service, instituted quo warranto suit to test successor's right to office, he moved with reasonable diligence and was not in laches.—Pellegrino v. Evans, 43 A.2d 269, 133 N.J.Law 159.

Organization of school district

Fact that a school-house site has been selected, contracts for work and material made, bonds issued and sold, and a teacher engaged does not operate as an estoppel against a proceeding by information in the nature of a quo warranto against school directors to test the legality of the organization of a school district, where it does not appear that the bonds were sold or the money expended before the filing of the information, and the hiring of the teacher was done after that time.—Mason v. People, 56 N.E. 1069, 185 Ill. 302.

§ 23. Defenses to, and Abatement or Dismissal of, Proceeding

a. In general
b. Abatement or dismissal of proceeding

a. In General

The availability of various matters as defenses to quo warranto proceedings has been judicially determined.

The availability of various matters as defenses to quo warranto proceedings has been judicially determined.[71] Accordingly, in a quo warranto proceeding instituted by the state the doctrine of waiver may be appealed to and applied in defense,[72] and considerations of public interest may operate as a defense to bar relief.[73] The fact that irregularities in an election did not affect the result will afford a good defense to a quo warranto proceeding attacking such election,[74] and the illegality of votes cast for a claimant of an office may constitute a defense to a quo warranto proceeding brought by him.[75] However, the facts that a certificate of election has been issued to the incumbent of an office,[76] and that he has taken the oath of office,[77] and assumed the duties thereof,[78] do not prevent an inquiry into his title.

If the incumbent prevents his successor from qualifying by unlawfully detaining his certificate and commission, he will not be allowed to set up his right to hold over as a defense to quo warranto proceedings,[79] and thereby reap a benefit from his own wrong.[80] An incumbent may not assert as a defense the invalidity of a statute under which he was declared elected and under which he assumed the duties of office.[81] An agreement by defendant corporation with a borough is not a defense to proceedings by the state to forfeit defendant's charter.[82]

Where quo warranto is filed against a corporation on the ground that it acted as trustee without legal authority to do so, the fact that the efforts of the corporation in construction of buildings were beneficial to the state affords no defense.[83] Failure to make due protest before the council of an annexing town does not afford a defense to a proceeding by the relator in quo warranto to attack the annexation of territory, where such annexation was made in violation of the fundamental requirements of the statute governing annexation.[84] In the absence of estoppel, accumulation of costs in carrying out illegal proceedings is not ground for denying relief under an information in the nature of quo warranto.[85] Where a statute expressly provides a method of filling vacancies, a claim that, if the incumbent is ousted, the resultant vacancy cannot be filled is without merit.[86]

In accordance with the practice in some jurisdictions, where the attorney general institutes quo warranto proceedings to oust a foreign corporation of its privilege to do business in the state, the rule is to issue the writ as applied for in the first instance and put respondent to a showing by plea or answer why it should not be ousted.[87] Where a quo warranto proceeding is brought against a foreign corporation on the grounds that it is transacting business within the state without authority, proof that defendant had obtained a certificate of authority from the proper state official is a complete defense.[88]

71. **Removal of ineligibility**
The fact that the ineligibility of defendant to hold office had ceased before the institution of the proceeding constituted a valid defense. —State ex rel. Hawthorne v. Wiseheart, 28 So.2d 589, 158 Fla. 267.

72. Ala.—State v. Gadsden, 113 So. 6, 216 Ala. 243.
Limitations, laches, and estoppel see supra § 22.
Inaction of relators in quo warranto proceeding against levee district for nearly five years with knowledge of proceedings to create district, election authorizing bonds, and construction work performed in district, waived relators' rights to object to validity of district bonds in hands of holders who purchased in good faith, for value, and without notice of alleged fraud in creation of district.—Fannin-Lamar-Delta Improvement Dist. No. 3 v. State, Tex. Civ.App., 73 S.W.2d 1101, error dismissed.

73. Ill. People ex rel. Universal Oil Products Co. v. Village of Lyons, 79 N.E.2d 33, 400 Ill. 82.
Lack of public interest held not shown
Mo.—State on Inf. Huffman v. Sho-Me Power Co-op., 191 S.W.2d 971, 354 Mo. 892.

74. Mich.—Sturdevant v. Stevenson, 246 N.W. 183, 261 Mich. 466.
Error in counting
Quo warranto will be dismissed notwithstanding error in counting and failure to segregate rejected ballots, where irregularity was unintentional and miscount did not affect result of election.—McLyman v. Pontbriand, R.I., 163 A. 882.

75. Ga.—Alexander v. Ryan, 43 S.E.2d 654, 202 Ga. 578.
Availability of quo warranto as remedy to attack election see supra § 11.

76. Ga.—Garrett v. Cowart, 101 S.E. 186, 149 Ga. 557.

77. Ga.—Garrett v. Cowart, supra.

78. Ga.—Garrett v. Cowart, supra.

79. Mo.—State v. Steers, 44 Mo. 223.

80. Mo.—State v. Steers, supra.

81. Ga.—Butler v. McClure, 170 S.E. 678, 177 Ga. 552.

82. Pa.—Commonwealth v. Potter County Water Co., 61 A. 1099, 212 Pa. 463.

83. Fla.—Marion Mortg. Co. v. State, 146 So. 222, 107 Fla. 472.

84. Cal.—People ex rel. Pagaani v. Town of Corte Madera, 218 P.2d 810, 97 Cal.App.2d 736.

85. Ill.—People v. Holmes, 180 N.E. 780, 348 Ill. 204.

86. N.J.—Haines v. Appleton, 9 A.2d 778, 123 N.J.Law 492.

87. Fla.—State ex rel. Landis v. S. H. Kress & Co., 155 So. 833, 115 Fla. 189.

88. Ill.—People ex rel. Barber v.

b. Abatement or Dismissal of Proceeding

(1) In general

(2) Withdrawal from office or expiration of term

(1) In General

A motion to quash the writ or dismiss the proceeding should be sustained where the writ was improvidently granted, and it is ground for abatement or dismissal that the officer or person filing the information was without right or authority to do so.

A motion to quash the writ or dismiss the proceeding should be sustained where the writ was improvidently granted[89] It is ground for abatement or dismissal that the officer or person filing the information was without right or authority to do so,[90] and it has been held that a motion to quash a writ of quo warranto, or one in the nature thereof, is well taken only where there was no authority for bringing the proceeding,[91] and that, where the information and answer present issues of fact, it is improper to dismiss the proceeding.[92] Failure to file security for costs may constitute ground for quashing a writ and dismissing the proceedings.[93] In original quo warranto proceedings in an appellate court, the appellate court may dismiss the proceedings with leave to file copies of the pleadings for trial of the issues in a lower court.[94] The fact that the relator, an attorney, violated a canon of professional ethics in prosecuting the case affords no ground for dismissal of the proceeding.[95]

Pendency of another action. The general rules as to the pendency of another action as ground for abatement, as discussed in Abatement and Revival §§ 17–81, govern in quo warranto proceedings,[96] and the pendency of another proceeding is

Hargreaves, 25 N.E.2d 416, 303 Ill App 387

89. Pa.—Commonwealth ex rel. Crow v Smith, 23 A.2d 440, 343 Pa 446—Commonwealth ex rel. Schermer v Franck, 166 A. 878, 331 Pa 341—Commonwealth v. Owens, Com Pl., 36 Luz Leg Reg 281, 35 Mun L R 15—Commonwealth ex rel Schwartz v. Kasper, Com Pl., 35 Luz.Leg.Reg 244

Discretion to grant or dismiss application see supra § 6.

Respondents clearly entitled to office

Trial court properly vacated ex parte order issuing writ of quo warranto directing respondents to show by what warrant they claimed the right to act as trustees of religious corporation where it conclusively appeared from the petition, writ, and affidavits filed that respondents were in fact and law such trustees and that hence the writ had been improvidently issued.—Dollenmayer v. Ryder, 286 N.W 297, 205 Minn 207.

Issuance of writ in vacation

Petition in quo warranto proceeding to command public utility to show its authority and claim to rights, privileges, and franchises in operating plant was held not so positive as to public necessity or as to irreparable injury as to justify issuance of writ in vacation on grounds of threatening of great and irreparable injury.—State ex rel McKittrick v. Missouri Service Co., Mo App., 102 S.W.2d 675.

Showing defect after writ out

In quo warranto proceeding for forfeiture of charters of railway and traction companies, respondents, by motion to quash, could show that the suggestion was defective in substance, after the writ was out.—Commonwealth ex rel. Margiotti v. Union Traction Co. of Philadelphia, 194 A 661, 327 Pa 497.

Lack of jurisdiction of subject matter

Ill.—People v. Blackwell, 173 N E 750, 342 Ill 223

90. Minn.—State ex rel. Burk v Thuet, 41 N.W.2d 585, 230 Minn 365

51 C.J. p 331 note 1.

Persons entitled to bring quo warranto proceedings see infra §§ 25–31

Commonwealth not entitled to assert forfeiture

In quo warranto proceeding for forfeiture of charters of railway and traction companies, court properly sustained motion to quash, as against contention that motion to quash did not lie, and that there was no alternative but to demur, answer, or plead, where suggestion showed that commonwealth was not entitled to assert forfeiture.—Commonwealth ex rel. Margiotti v. Union Traction Co. of Philadelphia, 194 A 661, 327 Pa. 497.

Time of making objection

An objection that the person filing the information was without right or authority to do so must be made seasonably or it will be deemed to be waived.—State v McSpaden, 39 S W 81, 137 Mo 628.

91. Ala.—Farmer v State ex rel Killcrease, 187 So. 735, 28 Ala App. 398, certiorari denied 187 So. 737, 237 Ala 555.

Pa.—Commonwealth v. Peoples, Com Pl., 30 Del.Co 80—Commonwealth ex rel Weiss v. Snyder, Com.Pl., 26 North Co 145.

Motion to quash or dismiss pleading see infra § 40

92. Fla.—State ex rel. Harris v. King, 188 So 122, 137 Fla. 190.

Issues of law and fact

Under the terms of the civil code, issues of law or of fact in quo warranto proceedings could not be raised by motions to abate and dismiss the information.—State ex rel Johnson v Consumers Public Power Dist., 5 N W 2d 202, 142 Neb 114

93. Ala.—Wenzel v. State ex rel Powell, 3 So 2d 26, 241 Ala 406

94. Fla.—State ex rel Bell v Rinehart, 192 So 824, 140 Fla. 655

95. Mich.—Attorney General ex rel. Wendrow v. Knapp, 17 N.W 2d 223, 310 Mich 385.

Canon of ethics not involved

Where issue in quo warranto proceeding was whether defendant was disqualified to hold the office of school commissioner, supreme court was without authority to dismiss proceeding on alleged ground that relator violated canon of professional ethics as a lawyer in prosecuting case, since canon of ethics was not involved.—Attorney General ex rel Wendrow v. Knapp, supra

96. Ind.—Vogel v. State, 8 N E. 164, 107 Ind. 374.

51 C.J. p 331 note 11 [a]—1 C.J. p 77 note 32.

Dismissal refused

Proceeding in nature of quo warranto to require telephone company to remove equipment from streets of city would not be dismissed on ground that similar information was pending in circuit court and that city did not authorize attorney general to file information in supreme court, where proceeding in circuit court was dismissed on day following filing of information in supreme court and aldermen of city passed resolution ratifying action of attorney general.—State ex inf McKittrick ex rel. City of Lebanon v. Missouri

not ground for abatement where there is a lack of identity of parties or issues, or both.[97]

Unauthorized substitution of attorneys of record for plaintiff does not abate or discontinue the action.[98]

Death of private relator or complainant terminates the proceeding, and it will be dismissed.[99]

Moot or speculative case. A quo warranto proceeding may be dismissed where it is moot,[1] and a proceeding brought for the sole purpose of obtaining a determination as to who has the power of appointment to an office will be dismissed where the relator and respondent have no real dispute and the occupant will remain in office whatever may be the decision.[2] Also, the case will be dismissed where the controversy has become moot by reason of circumstances occurring subsequent to the institution of the suit,[3] and quo warranto to test the validity of a statute will be dismissed where the statute is repealed pending the action.[4] Moreover, quo warranto will not lie to prevent a purely speculative occurrence.[5]

Regarded as demurrer. A motion to dismiss an action in the nature of quo warranto may properly be treated as a demurrer,[6] and on a motion to quash the writ the facts alleged in the information are deemed to be admitted.[7]

Voluntary dismissal or motion to dismiss. Where a quo warranto suit is brought in the name of the state on relation of an individual and other persons are added as relators by amendment, a subsequent motion of the original relator for a dismissal of the suit, while sufficient as a withdrawal of such relator from the suit,[8] does not work a discontinuance.[9]

Dismissal by, or on order of, attorney general or district attorney. At common law the attorney general may dismiss the proceeding if, in the discharge of his official duty, he deems it proper to do so.[10] Under statute it has been held that a county attorney who has the right to file an information in the nature of quo warranto is not required to dismiss it on the order of the attorney general despite the latter's general supervisory control of county attorneys.[11] On the other hand, it has also been held that the attorney general may dismiss such a proceeding over the objections of the rela-

Standard Tel. Co., 85 S.W.2d 613, 337 Mo. 642.

97. Ohio. State v. Schneider, 134 N.E. 443, 103 Ohio St. 492.
51 C.J. p 331 note 11 [a].

Proceeding by different claimant

A claimant of public office is not precluded from instituting quo warranto proceedings against person holding such office simply because of pendency of another quo warranto proceeding against same person by another claimant of, or person interested in, office.—Stephens v. Wohlwender, 30 S.E.2d 469, 197 Ga. 793.

98. N.Y.—McIntyre v. Sawyer, 166 N.Y.S. 631, 179 App.Div. 535.

99. Vt.—Noyes v. Hyde Park, 50 A. 1068, 73 Vt. 261.
51 C.J. p 331 notes 5, 6.

Taxpayer

Quo warranto proceedings by a taxpayer to inquire into the validity of a tax to be subsequently assessed abate on his death.—Noyes v. Hyde Park, 50 A. 1068, 73 Vt. 261.

1. Fla.—State ex rel. Landis v. Heaton, 180 So. 766, 132 Fla. 443.
Ill.—People ex rel. Dosch v. Wise, 32 N.E.2d 328, 308 Ill.App. 389.
Kan.—State ex rel. Zimmer v. Schean, 66 P.2d 383, 145 Kan. 695.
Ky.—Commonwealth ex rel. Meredith v. Amburgey, 125 S.W.2d 725, 276 Ky. 805.
Tenn.—Phillips v. Greer, 98 S.W.2d 79, 170 Tenn. 529.

Termination of incumbency in office as rendering proceeding moot see infra subdivision b (2) of this section.

Proceedings held not to be moot

Proceeding in nature of quo warranto on relation of county clerk, who had been removed after conviction of felony, was not moot because relator, after successor's appointment, was again convicted of other infamous crimes, since decision was governed by conditions prevailing when information was filed. Attorney General ex rel. O'Hara v. Montgomery, 267 N.W. 550, 275 Mich. 504.

2. Nev.—State v. McCullough, 18 P. 756, 20 Nev. 154.

3. Okl.—Sanford v. Markham, 221 P. 36, 96 Okl. 156.

Abstract title to office

Where no substantial benefit would inure to plaintiff, quo warranto proceeding will not be continued merely to try abstract title to office.—People v. Muche, 300 P. 829, 114 Cal.App. 739.

Confirmation in office

Proceeding in nature of quo warranto to oust member of county tax board will be dismissed as presenting academic question after state senate's confirmation of governor's nomination of successor to defendant.—Kelley v. Higham, 172 A. 803, 12 N.J.Misc. 495.

4. Kan.—State ex rel. Zimmer v. Shean, 66 P.2d 383, 145 Kan. 695.

5. Fla. State ex rel. Landis v. Valz, 157 So. 651, 117 Fla. 311.

Possible issuance of racing permit

Quo warranto to prevent city commissioners from issuing permit for construction of racing plant in restricted district under provision of zoning ordinance giving commissioners power to vary provisions of zoning ordinance in specific case to prevent hardship was held not to lie, where issuance of permit was only speculative. State ex rel. Landis v. Valz, supra.

6. Iowa. State ex rel. Adams v. Murray, 257 N.W. 553, 219 Iowa 108.

As to notice

District court properly treated motion to dismiss action in nature of quo warranto as demurrer, which under code provisions could be disposed of without five days' notice after transfer of cause from equity to law calendar without objection.—State ex rel. Adams v. Murray, supra.

7. Fla.—State ex rel. Landis v. Ward, 158 So. 273, 117 Fla. 585.

8. Ala.—Ferguson v. State, 110 So. 20, 215 Ala. 244.

9. Ala.—Ferguson v. State, supra.

10. Ill.—People v. Franklin County Bldg. Assoc., 161 N.E. 56, 329 Ill. 582.

11. Wash.—State ex rel. Hamilton v. Superior Court, Whatcom County, 101 P.2d 588, 3 Wash.2d 633.

tor,[12] although there is also authority to the contrary.[13] Where both public and private interests are involved, it has been held that a district attorney who has previously consented to the bringing of quo warranto may not block further prosecution by an arbitrary motion to dismiss where no legal ground exists for dismissal.[14]

(2) Withdrawal from Office or Expiration of Term

Ordinarily the defendant's voluntary withdrawal from office while quo warranto proceedings are pending, or the expiration of his term, justifies dismissal of the proceedings; but under some circumstances the proceeding may survive, as where damages are sought

Ordinarily proceedings for quo warranto, or in the nature thereof, are abated and may be dismissed where, after commencement of such proceedings, defendant voluntarily withdraws from the office,[15] or his appointment or election thereto is declared void,[16] or his term expires pending such proceedings,[17] and, where no substantial benefit would inure to plaintiff, the proceedings will not be continued merely to try the abstract title to the office.[18] On the other hand, respondent's surrender or renunciation of, or withdrawal from, the office after the institution of the proceeding does not necessarily abate it or require its dismissal,[19] and in an otherwise proper case a quo warranto action or proceeding commenced during the term of office in question may, after the expiration thereof, be tried[20] and prosecuted to final judgment,[21] where the ousting of defendant is not the sole object of the proceeding,[22] and it has been held that the proceeding may be continued where necessary for the recovery of damages or costs which plaintiff has sustained or incurred because of the wrongful assumption of authority.[23]

Abandonment of office by relator. Where the relator is a claimant of the office in controversy, his voluntary abandonment of the office and surrender thereof to respondent, while the action is still pending and undetermined, amounts to an abandonment of the action,[24] and the point that the relator's abandonment of the office resulted from his misapprehension of the facts will not enable him to maintain quo warranto.[25]

12. Cal.—State ex rel. Cage v. Petroleum Rectifying Co. of California, 68 P.2d 984, 21 Cal.App.2d 289.

13. Mo.—State ex rel. Handlan v. Wilke Land Co., 162 S.W.2d 846, 349 Mo. 666.

Quo warranto to forfeit corporate charter

Where attorney general instituted action in nature of quo warranto to forfeit defendant's corporate charter and franchise at request of an individual as relator, the attorney general was not authorized to dismiss the action without consent of relator.—State ex rel. Handlan v. Wilkie Land Co., supra.

14. Or.—State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 31 P.2d 751, 148 Or. 273.

15. Cal.—People v. Muehe, 300 P. 829, 114 Cal.App. 739.

Abandonment effective, although resignation unaccepted

An information in quo warranto contesting validity of appointment must be quashed as presenting moot question, where respondent's answer alleges that he has resigned and abandoned his office, even though it does not allege that resignation has been accepted by governor.—State ex rel. Landis v. Heaton, 180 So. 766, 132 Fla. 443.

Unless necessary to accomplish purpose beyond ouster, further prosecution of quo warranto proceeding is improper, and proceeding abates by voluntary surrender of offices challenged after institution of proceeding.—People v. Muehe, 300 P. 829, 114 Cal.App. 739.

16. Ky.—Commonwealth ex rel. Meredith v. Amburgey, 125 S.W.2d 725, 276 Ky. 805.

17. La.—State ex rel. Davis v. Bankston, 13 So.2d 266, 202 La. 920.—**Corpus Juris quoted in** State v. Webster Parish School Board, App., 150 So. 446, 448.
Tenn.—State ex rel. Phillips v. Greer, 98 S.W.2d 79, 170 Tenn. 529.
51 C.J. p. 331 note 27

Despite reelection

Where quo warranto proceeding was brought, not against corporation, but against three individuals, to remove them from office of president, vice president, and secretary-treasurer of corporation, but term of office of all three defendants expired during pendency of the proceeding, the proceeding was required to be dismissed, even though the secretary-treasurer had been reelected to new term.—State ex rel. Davis v. Bankston, 13 So.2d 266, 202 La. 920.

18. Cal.—People v. Muehe, 300 P. 829, 114 Cal.App. 739.
La.—**Corpus Juris quoted in** State v. Webster Parish School Board, App., 150 So. 446, 448.
51 C.J. p. 332 note 28.

19. N.H.—Attorney General v. Johnson, 7 A. 381, 63 N.H. 622.
N.Y.—Nichols v. Maclean, 5 N.E. 347, 101 N.Y. 526, 54 Am.R. 730.
51 C.J. p. 331 note 23

20. La.—**Corpus Juris quoted in** State v. Webster Parish School Board, App., 150 So. 446, 448.
Mo.—State v. Heffernan, 148 S.W. 90, 243 Mo. 442.
Time to sue see supra § 22

21. La.—**Corpus Juris quoted in** State v. Webster Parish School Board, App., 150 So. 446, 448.
Mo.—State, on inf. McKittrick, v. Wymore, 132 S.W.2d 979, 345 Mo. 169.
N.J.—Turtur v. Turley, 138 A. 209, 103 N.J.Law 526.

22. Mich.—Hawkins v. Voisine, 290 N.W. 827, 292 Mich. 357.

23. La.—**Corpus Juris quoted in** State v. Webster Parish School Board, App., 150 So. 446, 448.
Mich.—Hawkins v. Voisine, 290 N.W. 827, 292 Mich. 357.
51 C.J. p. 331 note 26.

24. Neb.—State v. Boyd, 51 N.W. 964, 34 Neb. 435.
51 C.J. p. 331 note 22.

25. Mont.—State ex rel. Flynn v. Ellis, 98 P.2d 879, 110 Mont. 43.

Ignorance as to disqualification of opponent

Where relator, who had been incumbent in office of county superintendent, after election of defendant to office abandoned the office, fact that relator would not have abandoned office to defendant if he had known that defendant did not possess requisite qualifications did not avail relator in quo warranto proceeding to oust defendant from office.—State ex rel. Flynn v. Ellis, supra.

§ 24. Jurisdiction and Venue

a. Jurisdiction
b. Venue

a. Jurisdiction

(1) In general
(2) Lower courts
(3) Appellate courts

(1) In General

Constitutional and statutory provisions ordinarily control in respect of what courts have jurisdiction of proceedings in the nature of quo warranto.

In order to ascertain what courts may take jurisdiction of proceedings by quo warranto, reference must be had to the organic law and statutes of the state.[26] The attorney general cannot, by consent, confer on a court jurisdiction which it does not possess under the constitution or statutes.[27] Where lack of jurisdiction is urged on the ground that a necessary party was not a legal entity when the proceeding was begun, such contention will be overruled where it appears that such party had become a legal entity at the time when the objection was raised.[28] The exclusive character of quo warranto as a remedy is discussed supra § 4.

Criminal jurisdiction. In some jurisdictions an information in the nature of quo warranto has been held criminal in form to the extent that matters of jurisdiction are governed by the rules applicable to criminal proceedings.[29] In other jurisdictions, however, it has been held that, in the absence of the imposition of a fine, a proceeding by information is not criminal, or quasi-criminal, to the extent that no valid action can be taken in it out of term.[30]

Effect of prayer for judgment. In a jurisdiction wherein the judgment in quo warranto proceedings against the incumbent of an office must be limited to an ouster from office, as discussed infra § 49, the fact that the petition prays not only for the ouster of respondent from the office but also that the relator be put in possession thereof does not affect the jurisdiction of the court to entertain the proceeding.[31]

Judge. The court, rather than the judge, hears proceedings in quo warranto,[32] and, unless expressly authorized by statute to do so,[33] a judge out of court cannot issue a writ of quo warranto,[34] or grant leave to file such an information in the nature of quo warranto.[35]

(2) Lower Courts

Lower courts of general and original jurisdiction, such as the district, circuit, or superior courts, are ordinarily accorded jurisdiction of quo warranto proceedings or those in the nature thereof.

District, circuit, superior, common pleas, and other like courts of original and general jurisdiction are vested with jurisdiction of quo warranto proceedings.[36] This is true not only under constitutional or statutory provisions expressly conferring jurisdiction of quo warranto proceedings,[37] but also under the construction placed on general provisions conferring jurisdiction on such courts.[38] Where jurisdiction of claims to office is not expressly or impliedly placed elsewhere, as discussed in Elections § 247 b, and Officers §§ 79, 80, it has been held that a lower court of general jurisdiction has residuary jurisdiction under the constitution irrespective of whether actions are termed election contests, proceedings in the nature

26. Miss.—Lindsey v. Attorney General, 33 Miss. 508.
51 C.J. p 332 note 42.

27. Colo.—State Railroad Commission v. People, 98 P. 7, 44 Colo. 315, 22 L.R.A.,N.S., 810.

28. Mich.—De Young v. Banks Tp., Antrim County, 20 N.W.2d 166, 312 Mich. 217.

School district

Where an election to establish a township unit school district was held August 29, information in nature of quo warranto by taxpayers to test legality of election was filed and process issued September 5, board of education was not elected until September 9, process was served on district on September 20, and defendants township and district filed an answer on October 3, the court did not lack jurisdiction over district on ground district at time the action was commenced had not become a legal entity. De Young v. Banks Tp., Antrim County, 20 N.W. 2d 166, 312 Mich. 217.

29. Wis.—State v. West Wisconsin R. Co., 34 Wis. 197.
51 C.J. p 332 note 44.

30. N.M.—Territory v. Armijo, 89 P. 267, 14 N.M. 205.

31. Hawaii.—Kanealli v. Hardy, 17 Hawaii 9.

32. Ala.—Newman v. State, 39 So. 648.

33. Miss.—Bowen v. Gilleylen, 58 Miss. 813.
51 C.J. p 332 note 49.

34. Wis.—State v. Conklin, 33 Wis. 685—U. S. v. Lockwood, 1 Pinn. 359.

35. Mich.—McDonald v. Alcona County, 51 N.W. 1114, 91 Mich. 459.

36. Ark.—Purdy v. Glover, 132 S.W. 2d 821, 199 Ark. 63.

Mo. State, on Inf of Wallach v. Beckman, 185 S.W.2d 810, 353 Mo. 1015

N.J.—Waldor v. Untermann, 76 A.2d 906, 10 N.J.Super. 188.

Pa. Commonwealth v. Kelser, 37 Pa.Dist. & Co. 473, affirmed Commonwealth ex rel. Kelley v. Kelser, 16 A.2d 307, 340 Pa. 59.

Tenn. State ex rel. Howell v. Sensing, 222 S.W.2d 13, 188 Tenn. 681.

Tex.—State ex rel. Sharp v. Martin, Civ.App., 186 S.W.2d 111, refused for want of merit Denison v. State, Civ.App., 61 S.W.2d 1017, error refused Denison v. State ex rel. Allred, 61 S.W.2d 1022, 122 Tex. 459.

51 C.J. p 333 note 54.

37. Pa.—Commonwealth v. Wherry, 152 A. 846, 302 Pa. 134.

38. Ill.—Snowball v. People, 35 N. E. 538, 147 Ill. 260.
51 C.J. p 333 note 56.

of quo warranto, or suits to oust usurpers.[39]

The jurisdiction of such courts extends, on the one hand, and is restricted on the other hand, to the political division for which they are established,[40] unless, by statute, they are given jurisdiction throughout the state in cases wherein the state or commonwealth is plaintiff.[41] Inferior courts, and those of limited jurisdiction, such as city courts, do not usually have jurisdiction of quo warranto proceedings,[42] although it may be conferred on them by constitutional or statutory provisions.[43]

Proceedings involving state office. Quo warranto proceedings involving the right or title to a state office are within the jurisdiction of district, superior, or common pleas courts under the constitutional provisions of some,[44] but not other,[45] states.

Discretion of attorney general. Under statute it has been held that a quo warranto proceeding may be brought either in the district court or in the supreme court as determined by the attorney general.[46]

(3) Appellate Courts

Appellate courts may have original jurisdiction of proceedings in quo warranto or in the nature thereof, but will ordinarily decline to exercise it where a lower court possesses concurrent jurisdiction.

Under constitutional or statutory provisions original jurisdiction of proceedings in quo warranto, or in the nature thereof, may be conferred on appellate courts.[47] The exercise of such jurisdiction is not always mandatory,[48] and ordinarily the court will decline to exercise it unless some good reason is shown for not making an application to a lower court possessing concurrent jurisdiction,[49] and it will also decline to exercise it where a substantially similar, although technically different, cause, involving the same matters, is pending in a lower court.[50] On the other hand, where a speedy determination seems desirable and it appears that, if the case were referred to a lower court, it would in any event come before the appellate court on review, the appellate court may exercise its original jurisdiction to entertain a proceeding in quo warranto by the state in the public interest to oust one usurping a state office.[51]

b. Venue

A proceeding in quo warranto or in the nature thereof should be brought in the place designated by statute.

Quo warranto proceedings or those in the nature thereof should be brought in the place designated by statute,[52] which may be the county of defendant's residence,[53] or that in which the duties of the office involved are performed,[54] or the county in which a school district is located,[55] or, where a court has state wide jurisdiction, venue may be laid in any county wherein such court is sitting.[56] In the absence of exceptions relating to quo warranto, the general statutes of the state with respect to venue will control.[57]

Change of venue may be made in a proper case

39. Ark.—Purdy v. Glover, 132 S.W 2d 821, 199 Ark. 63.

40. Del—State v. Hancock, 45 A 850, 18 Del 231
51 C.J. p 333 note 57.

41. Pa.—Commonwealth v. Towanda Water-Works, 15 A. 440.
51 C.J p 333 note 58.

42. Cal—People v. Gillespie, 1 Cal 342, followed in People v King, 1 Cal 345.

43. Ala—Lee v. State, 49 Ala 43

44. Ariz—State v. Jones, 137 P. 544, 15 Ariz 215.
N M—State v. Van Stone, 121 P. 611, 17 N M. 41

45. Pa.—Commonwealth v. Skinner, 14 Pa.Co. 347.

46. Minn—State ex rel. Burnquist v Village of North Pole, 6 N W 2d 458, 213 Minn. 297.

47. Ariz.—State ex rel. De Concini v. Sullivan, 188 P.2d 592, 66 Ariz 348—State ex rel. Sullivan v. Moore, 64 P 2d 809, 49 Ariz. 51.
Mich.—Attorney General ex rel. Baird v Johnson, 293 N.W. 545, 294 Mich 250.
Ohio—Muskingum County Democratic Ex-Committee v Burrier, 17 Ohio Supp. 51.
Jurisdiction of particular courts see Courts §§ 314–485

48. Kan.—State v Kansas Casualty, etc., Co, 206 P. 331, 111 Kan. 139.

49. Mo.—State ex rel McKittrick v. Missouri Service Co, App., 102 S. W 2d 675
51 C.J. p 333 note 65.

50. Kan—State v. Kansas Casualty, etc, Co, 206 P. 331, 111 Kan 139.

51. Ariz—State ex rel. Sullivan v. Moore, 64 P 2d 809, 49 Ariz 51.

52. Tex.—Woodson Independent School Dist. v. State ex rel. Cox, Civ.App., 130 S W.2d 1038, error dismissed, judgment correct—Denison v. State, Civ.App., 61 S. W 2d 1017, error refused Denison v. State ex rel. Allred, 61 S.W 2d 1022, 122 Tex 459.
51 C.J. p 333 note 67.

53. Ind.—Robertson v. State, 10 N. E. 582, 643, 109 Ind. 79.
51 C.J. p 333 note 67 [b] (1), [1].

54. Miss—State v. Anderson, 97 So. 884, 133 Miss 533.
Tex—Denison v. State, Civ.App, 61 S W 2d 1017, error refused Denison v State ex rel Allred, 61 S. W 2d 1022, 122 Tex 459
51 C.J. p 333 note 67 [d] (1), (2).

55. Tex.—Woodson Independent School Dist. v. State ex rel. Cox, Civ.App., 130 S.W 2d 1038, error dismissed, judgment correct.

Where defendant served and district situated

Quo warranto attacking organization of a joint rural high school district may be instituted in any one of the counties in which some defendants may be served with process and in which the school district may be situated—State ex rel McQueary v. Board of County Com'rs of Miami County, 215 P.2d 631, 168 Kan. 723.

56. Neb—State v. Frazier, 44 N.W. 471, 28 Neb 438.
51 C.J. p 333 note 67 [e]

57. Tex.—Woodson Independent School Dist. v. State ex rel Cox, Civ.App., 130 S.W.2d 1038, error dismissed, judgment correct.

in quo warranto proceedings or those in the nature thereof,[58] and a change of venue will, in some jurisdictions, be allowed in such proceedings brought for the protection of the rights of a private person.[59] However, if the supreme court has specified a county for the trial of an issue of fact, the general law as to a change of venue does not apply.[60] Statutes relating to a change of venue in criminal cases do not apply to quo warranto [61]

§ 25. Plaintiffs, Petitioners, and Relators

The person on whose complaint, or at whose instance, an information or writ of quo warranto is filed, and who is quasi the plaintiff, is called the relator.

The person on whose complaint, or at whose instance, an information or writ of quo warranto is filed, and who is quasi the plaintiff in the proceeding, is known as the relator [62]

The question as to who may make an application for leave, in connection with quo warranto proceedings, is discussed supra § 21 b.

§ 26. —— Government or People

Except where statutes permit proceedings in the name of the attorney general or a private individual, quo warranto proceedings must be in the name of the state or people, or, in some cases, the United States.

Except where the case falls within a statute authorizing the action or proceeding to be brought in the name of the attorney general, as discussed infra § 27, or a private individual, as discussed infra § 28, a quo warranto action or proceeding may and must be brought and carried on in the name of the state or commonwealth,[63] or the people thereof,[64] or, in some cases, in the name or at the instance of the United States [65] However, under some circumstances the state may be a nominal, or only a formal, party, rather than the real party in interest,[66] as where the proceeding involves the title to an office in a private corporation, as discussed infra § 30.

§ 27. —— Attorney General or Prosecuting Attorney

The attorney general or, in some jurisdictions, a local prosecuting attorney or similar officer may generally bring a quo warranto action on behalf of the state; in some jurisdictions such authority is exclusive. Such officer may ordinarily direct and control the proceedings.

Generally speaking, the attorney general may bring an action or proceeding in the nature of quo warranto, or apply for leave to do so, on behalf of the state,[67] and he may do so ex officio on his own information or relation without naming any

58. Tex.—Woodson Independent School Dist. v. State ex rel. Cox, supra.

59. Ill.—People v. Shaw, 13 Ill. 581.

60. Mo.—State v. Townsley, 56 Mo. 107.

61. Ill.—Ensminger v. People, 47 Ill. 384, 95 Am.D. 495.

62. Mo.—State v. Duncan, 175 S.W 940, 942, 265 Mo. 26, Ann.Cas. 1916D 1.
"Relator" defined generally see the C.J.S. definition Relator, also 53 C. J. p 1100 notes 82–85.

63. Fla.—City of South Miami v. State ex rel. Landis, 192 So. 634, 140 Fla. 740.
Okl.—State v. Holtzclaw, 2 P.2d 1022, 151 Okl. 163.
Pa.—Commonwealth ex rel. Schermer v. Franck, 166 A. 878, 311 Pa. 341.
51 C.J. p 334 note 77.

Dismissal of proceeding not so brought
A quo warranto proceeding must be brought in the name of the state by the district attorney general, and, if it is not so brought, it must be dismissed.—Jones v. Talley, 230 S. W.2d 968, 190 Tenn. 471.

State a party plaintiff
Tex.—Adamson v. Connally, Civ. App., 112 S.W.2d 287.

State as necessary party
Ala.—Corprew v. Tallapoosa County, 3 So.2d 53, 241 Ala. 493.

Change as to manner of exercising power
Under statutes or rules of civil procedure, quo warranto action must be brought in name of the state, and whatever change has been wrought by the rules affects only the manner in which the state's power may be invoked and exercised.—State v. Winneshiek Co-op. Burial Ass'n, 15 N.W.2d 367, 234 Iowa 1196.

The Declaratory Judgment Law does not dispense with the requirement that a suit in the nature of quo warranto proceedings be brought in the name of the state; suit for a declaratory judgment determining and declaring the rights of two candidates seeking office and for an interpretation of meaning of statute as to election was clearly a suit in the nature of "quo warranto" proceedings and was not maintainable where not brought in the name of the state by the district attorney general.—Jones v. Talley, 230 S.W. 2d 968, 190 Tenn. 471.

An election contest by the incumbent of an office against one who had been declared elected by the governing authorities could not be treated as a quo warranto proceeding, because it was not in the name of the state. Omar v. West, 188 So. 917, 186 Miss. 136.

64. Ill.—People v. City of Paris, 44 N.E.2d 154, 380 Ill. 503.
51 C.J. p 334 note 78.

65. U.S.—Wallace v. Anderson, Ohio, 5 Wheat. 291, 5 L.Ed. 91.

Assignment of judge to hold court
Quo warranto proceeding to test authority of senior circuit judge to assign himself to hold district court must be brought by United States against judge. Johnson v. Manhattan Ry. Co., N.Y., 53 S.Ct. 721, 289 U.S. 479, 77 L.Ed. 1331.

66. U.S. Hill v. Carr, D.C.Conn., 38 F.Supp. 578.
Ala.—**Corpus Juris cited in** Baxter v. State ex rel. Metcalf, 9 So.2d 119, 120, 243 Ala. 120.
51 C.J. p 334 note 81.

67. Tex.—Adamson v. Connally, Civ. App., 112 S.W.2d 287.
51 C.J. p 334 note 84.

Public interest
Attorney general has right at any time to file in supreme court information in nature of quo warranto in any matter in which public interest is involved.—State ex inf. McKittrick ex rel. City of Campbell v. Arkansas-Missouri Power Co., 93 S. W.2d 887, 339 Mo. 15.

Discretion as to filing information
Mo.—State on inf. of McKittrick ex rel. Handlan v. Wilkie Land Co., App., 165 S.W.2d 432.

other person as relator,[68] or he may act at the instance or on the complaint, relation, or information, of a private person.[69] Also, in a number of jurisdictions,[70] although not in all,[71] a local prosecuting attorney or other similar officer has power to act on behalf of the state in quo warranto proceedings, provided he is an officer of the county or district in which the wrong was committed and the proceeding is instituted.[72] Whether the attorney general may act in a case in which a prosecuting attorney or other like officer may act depends on the construction of the statutes of the particular jurisdiction, it being held in some jurisdictions that he may,[73] and in others that he may not.[74]

Exclusive authority. At common law, no one but the law officers of the crown could sue out a writ of quo warranto,[75] and it has been variously said that the public prosecutor or attorney general had the exclusive right or power to commence proceedings by information in the nature of quo warranto[76] and that the matter of instituting quo warranto proceedings was a prerogative of the attorney general.[77] Likewise, under the construction placed on the constitutional or statutory provisions of some jurisdictions a quo warranto proceeding cannot be instituted in any case by any person other than the attorney general, or state's attorney, or a similar district or county officer;[78] but under the statutes of other jurisdictions quo warranto proceedings may be instituted by private persons in some cases, as discussed infra §§ 28, 30.

Proceeding in name of officer. Where the case is within a statute so providing, proceedings in the nature of quo warranto may be brought in the name of the attorney general or some other designated public officer.[79]

Control of proceedings. Ordinarily, the attorney

68. Fla.—City of South Miami v State ex rel Landis, 192 So. 624, 140 Fla. 740
W Va.—State ex rel. Bumgardner v. Mills, 53 S E 2d 416
51 C J p 334 note 85.

Entertainment of action by court
Where quo warranto is properly invocable at instance of state on relation of county attorney, supreme court entertains such action as readily when brought by county attorney, on compliance with statute requiring showing of reasons for bringing original action, as if original jurisdiction had been invoked by private litigant.—State ex rel. v. Peterson, 78 P.2d 60, 147 Kan 626.

69. Tex.—Staples v. State, 245 S.W 639, 112 Tex. 61.
51 C J p 335 note 86.

Words "on relation of another," in quo warranto statute, refer to person at whose instance and for whose benefit proceeding is instituted.—State v Henderson, 146 So. 456, 166 Miss 530.

Retention of counsel by people of community
Mere fact that people of community affected are interested and retain counsel to aid state's attorney in prosecuting quo warranto proceeding brought on relation of individual does not invalidate it, where interests involved are not private.—People v. Sackett, 184 N.E. 646, 351 Ill. 363.

The person making a preliminary affidavit containing specification of facts and filed with the judge as a means of giving him advance information on which to act in ordering the commencement of a quo warranto proceeding need not be made a relator, and should not be made a party to the proceedings.—Owen v. State ex rel. Bailes, 200 So. 412, 240 Ala 582.

70. Ohio.—**Corpus Juris quoted in** State ex rel Finley v Lodwich, 29 N E 2d 959, 960, 137 Ohio St 329, 131 A L R 1205
Tex.—Adamson v Connally, Civ App, 112 S W 2d 287.—City of West University Place v State, Civ App, 56 S W 2d 1081, error refused
W.Va.—State ex rel. Bumgardner v. Mills, 53 S E 2d 416.
51 C.J p 335 note 87.

71. Md.—Hawkins v. State, 32 A 278, 81 Md 306.

72. Ohio.—**Corpus Juris quoted in** State ex rel Finley v. Lodwich, 29 N E 2d 959, 960, 137 Ohio St 329, 131 A L R 1205.
51 C.J p 335 note 89

State officer not acting in attorney's county
A prosecuting attorney was not authorized to bring quo warranto in the name of the state against an officer of the state who was neither performing nor asserting a right to perform any official duties in the county of the prosecuting attorney.—State ex rel. Finley v. Lodwich, 29 N E.2d 959, 137 Ohio St. 329, 131 A L R 1205

73. Iowa.—State v. Winneshiek Co-op Burial Ass'n, 15 N.W.2d 367, 234 Iowa 1196
Pa.—Commonwealth v. Commercial Bank, 28 Pa. 391.—Commonwealth v. Fischer, 26 Pa Dist 997.

74. Ind.—State v Home Brewing Co, 105 N E 909, 182 Ind 75, followed in State v Fred Miller Brewing Co, 105 N E. 917, 182 Ind 713
51 C J. p 335 note 92.

75. Fla.—State v. Gleason, 12 Fla 210.
Okl.—Robison v Chapman, 13 P 2d 173, 158 Okl 244.

76. Wash.—State ex rel. Brown v Warnock, 122 P 2d 472, 12 Wash 2d 478

77. Ala.—Baxter v. State ex rel. Metcalf, 9 So 2d 119, 243 Ala. 120.

78. Tenn.—Jones v Talley, 230 S W 2d 968, 190 Tenn 471.
51 C J p 335 note 94 [a]

The purpose of the requirement that a quo warranto proceeding be brought in the name of the state by the district attorney general is to subserve the public interest, since such a suit is regarded as that of the state.—Jones v. Talley, supra.—Weaver v. Maxwell, 224 S W 2d 832, 189 Tenn. 183

Authority of legislature
Under a constitutional provision that an action of quo warranto must be brought by attorney general or district or county attorney, legislature has no constitutional power to authorize action to be brought by any other person without one of such officers.—Adamson v. Connally, Tex Civ App, 112 S W 2d 287.

Enforcement of public right
A proceeding in the nature of quo warranto to enforce a public right cannot be brought without intervention of the attorney general.—Black v. Cummings, 5 A 2d 858, 62 R.I. 361.

The Declaratory Judgment Law does not dispense with the requirement that a suit in the nature of quo warranto proceedings be brought by the attorney general.—Jones v. Talley, 230 S W 2d 968, 190 Tenn 471.—Weaver v. Maxwell, 224 S.W 2d 832, 189 Tenn. 183.

79. N.J.—Bonynge v. Frank, 98 A. 456, 89 N J Law 239.
51 C J. p 335 note 96.

general or other officer authorized to act on behalf of the state may direct and control the proceedings on an information in the nature of quo warranto,[80] but in at least one jurisdiction this is not true where the information is filed on the request, or at the relation, of private persons.[81]

§ 28. —— Private Persons

A private person may bring quo warranto proceedings only where a statute authorizes him to do so; such statutes are generally construed to require that he have a special interest distinct from that of the public.

Unless the case is within a statute authorizing him to do so,[82] and leave of court, if necessary in the particular jurisdiction, is obtained, as discussed supra § 20, a private person cannot bring a quo warranto action or proceeding[83] in his own name,[84] or in the name of the state,[85] attorney general, or prosecuting attorney,[86] independently of the attorney general or prosecuting attorney,[87] but he may call the wrong in question to the attention of,[88] and furnish aid to,[89] the attorney general or other proper officer, and where for all practical purposes the suit is one by the attorney general in behalf of the people, the fact that the name of an individual is added as a relator is not fatal.[90] However, it has been declared that when the enforcement of a public right is sought, the people are the real party to the cause, and the relator need not show that he has any real or personal interest in it.[91]

Under the statutes in a number of jurisdictions, the institution of a quo warranto proceeding by a private person is authorized.[92] Regardless of the variance in their language, the statutes are generally construed not to authorize the institution or maintenance of a quo warranto action or proceeding by a private person unless, according to the decisions, he has a special[93] or personal[94]

80. Cal.—State ex rel Cage v. Petroleum Rectifying Co. of California, 68 P.2d 984, 21 Cal.App.2d 289.
Tenn.—State v Ward, 43 S.W.2d 217, 163 Tenn. 265.
51 C.J. p 335 note 97.

Cases of public interest

In quo warranto information filed by district attorney in cases in which interest is public, and private interest, if any, is only incidental to main relief, district attorney has sole control over prosecution, both in circuit court and on appeal.—State, by Hagglund, ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 31 P.2d 751, 148 Or. 273.

Effect of joinder of private persons

In quo warranto by attorney general to oust foreign corporation from permit to do business in state, joinder of private persons did not affect his power or responsibility for conduct of case, which could not be left by him to counsel appearing for so-called corelators.—State ex rel. Landis v. S. H. Kress & Co., 155 So. 823, 115 Fla. 189.

The public is not estopped by anything a relator may have done in a quo warranto proceeding where it does not appear that the information was filed for his private and exclusive benefit.—People ex rel. Sandberg v. Grabs, 26 N.E.2d 494, 378 Ill. 423.

81. Mo.—State v. Taylor, 106 S.W. 1023, 208 Mo. 442, 13 Ann.Cas. 1058.
51 C.J. p 335 note 98.

82. Ala.—Baxter v. State ex rel. Metcalf, 9 So.2d 119, 243 Ala. 120.
51 C.J. p 335 note 99.

At common law private individuals without intervention of attorney general could not, either as of right or by leave of court, institute quo warranto proceedings.—Burkett ex rel. Leach v. Ulmer, 15 A.2d 858, 137 Me. 120

83. Ohio.—State v. Burke, 166 N.E. 354, 120 Ohio St. 410.
51 C.J. p 335 note 2.

One not a public official; stenographer

No officer less than a public official may invoke the aid of quo warranto; an official stenographer of the court of common pleas is not such an official. State v. Conley, 178 N.E. 207, 121 Ohio St. 265.

84. Mass.—Haupt v. Rogers, 48 N. E. 1080, 170 Mass. 71.
51 C.J. p 335 note 3.

Action to have prohibition election declared illegal

Tex.—Adamson v. Connally, Civ. App., 112 S.W.2d 287.

85. Ala.—Ex parte Talley, 192 So. 271, 238 Ala. 527.
Utah.—State v. Ryan, 125 P. 666, 41 Utah 327.

Authority as strictly statutory

Authority to file bill in nature of quo warranto in state's name is strictly statutory.—State ex rel. Thurman v. Scott, 195 S.W.2d 617, 184 Tenn. 76.

86. Mass.—Attorney General v. Sullivan, 40 N.E. 843, 163 Mass. 446, 28 L.R.A. 455.
Mo.—State v. Taylor, 106 S.W. 1023, 208 Mo. 442, 13 Ann.Cas. 1058.

87. Tex.—State ex rel. Candler v. Court of Civil Appeals, Fourth Supreme Judicial Dist., 75 S.W.2d 253, 123 Tex. 549.
51 C.J. p 336 note 6.
Necessity of consent of attorney general or prosecuting attorney see supra § 18.

88. Mo.—State v. Cupples Station Light, etc., Co., 223 S.W. 75, 283 Mo. 115
51 C.J. p 336 note 7.

89. Ill.—Heidelberg Garden Co. v. People, 131 Ill.App. 331, affirmed 84 N.E. 230, 233 Ill. 290.
51 C.J. p 336 note 8.

90. Cal.—People v. Central California Milk Producers' Assoc., 212 P. 957, 60 Cal.App. 439.

91. Fla.—State ex rel. Pooser v Wenter, 170 So. 736, 738, 126 Fla. 49.
"It is enough that he is a citizen and interested in having the law upheld, but this, like all other rules of law, has its limitations." State ex rel. Pooser v. Wenter, supra.

92. Ala.—Birmingham Bar Ass'n v. Phillips & Marsh, 196 So. 725, 239 Ala. 650 Ex parte Talley, 192 So. 271, 238 Ala. 527.
Ill.—Adair v. Williams, 95 N.E.2d 345, 407 Ill. 309.
W.Va.—State ex rel. Bumgardner v. Mills, 53 S.E.2d 416.
51 C.J. p 336 note 12.

Security for costs

By statute the right is given an individual to institute quo warranto proceedings in the name of the state if he also makes himself a party thereto individually, and security for cost is given.—Baxter v. State ex rel. Metcalf, 9 So.2d 119, 243 Ala. 120.

93. Ind.—Rule v. State ex rel. Dickinson, 191 N.E. 151, 207 Ind.App. 546.
51 C.J. p 336 note 17.

94. Ill.—People ex rel. Buchanan v. Mulberry Grove Community High School Dist. No. 34-A, 61 N.E.2d 256, 390 Ill. 341—Rowan v. City of Shawneetown, 38 N.E.2d 2, 378 Ill. 289—People ex rel. Hiller v. Be-

or peculiar[95] interest[96] which is distinct from that of the public,[97] in the subject matter of the action or proceeding; but, as stated infra § 30 b (1) (a), there is a conflict of authority on the question whether a quo warranto proceeding to try title to a public office may be instituted by a private citizen without any special interest in the office.

A proceeding on the relation of an individual who makes himself a party is pursuant to authority conferred by the state,[98] and the purpose is the same as in a proceeding by the state on the relation of a public officer designated for the purpose.[99]

Control of proceedings. In so far as the public interests are concerned, a private relator or individual cannot control a quo warranto action or proceeding,[1] or, at least he has no absolute right to do so,[2] and he cannot stipulate away the rights of other interested persons.[3] At common law, the relator in an information cannot take any step in the cause in his own name independently of the attorney general.[4]

§ 29. —— Corporations or Associations

A private corporation possessed of a special interest in the subject matter of the inquiry may be a relator in a quo warranto proceeding

When possessed of a special interest in the subject matter of the inquiry, a private corporation may be a relator in a quo warranto proceeding.[5] Where a proceeding is brought by the attorney general in the name of the people, a further recital in the complaint that the proceeding is brought on the information and complaint of a named association does not make the association plaintiff[6] or sustain a contention that the relator has no legal capacity to sue.[7]

The right of a municipality to be plaintiff or the relator in proceedings involving the right or franchise of private corporations to use city streets is discussed infra § 30 c (2).

§ 30. —— Depending on Purpose of Proceeding

a. In general
b. Trial of title to office
c. Attack on corporate existence, franchise, or action

a. In General

Under a statute authorizing the issuance of the writ on the suggestion of the attorney general, or district attorney, or any person desiring to prosecute it, it may issue at a private person's instance in case of a private wrong.

Under a statute authorizing the issuance of a writ of quo warranto on the suggestion of the attorney general, or district attorney, or any person desiring to prosecute it, the writ may issue at the instance of a private person where a private wrong

virt, 17 N.E.2d 629, 297 Ill.App. 335.

95. Ill.—Rowan v. City of Shawneetown, 38 N.E.2d 2, 378 Ill. 289—People ex rel. Hiller v. Bevirt, 17 N.E.2d 629, 297 Ill.App. 335.

96. Colo.—Norton v. People ex rel. Rudbeck, 81 P.2d 393, 102 Colo. 489.
Pa.—Commonwealth ex rel. v. Stauffenberg, Com.Pl., 29 Mun.L.R. 1, 4 Sch.Reg. 285
51 C.J. p. 336 note 18.

Interest in question being litigated
Under statute requiring an individual who seeks leave to file a complaint in quo warranto to have an "interest" in the question, the question to which his interest must attach is the question being litigated —People ex rel. Hiller v. Bevirt, 17 N.E.2d 629, 297 Ill.App. 335.

97. Ill.—People ex rel. Buchanan v. Mulberry Grove Community High School Dist. No. 34-A, 61 N.E.2d 256, 390 Ill. 341—Rowan v. City of Shawneetown, 38 N.E.2d 2, 378 Ill. 289—People ex rel. Hiller v. Bevirt, 17 N.E.2d 629, 297 Ill.App. 335
51 C.J. p. 336 note 19.

Interest other than as citizen and taxpayer
W.Va.—State ex rel. Bumgardner v. Mills, 53 S.E.2d 416

Interest as taxpayer, resident, and citizen held insufficient—People ex rel. Buchanan v. Mulberry Grove Community High School Dist. No. 34-A, 61 N.E.2d 256, 390 Ill. 341—Rowan v. City of Shawneetown, 38 N.E.2d 2, 378 Ill. 289.

Purpose of statute
Under the statute, there is a fundamental distinction between a proceeding to protect purely public interests involving no individual rights differing from those of the general public and a proceeding brought on relation of an individual citizen to enforce a private right in which citizen has a purely individual and substantial interest, differing from that of the general public, and in which the interest or concern of the state may be small or entirely theoretical; the purpose of statute authorizing proceeding by an individual was to make it possible for individual wronged in his private right to have writ on his own relation, and statute was not intended to give individual right to the writ to correct a wrong common to the public.—Rowan v. City of Shawneetown, 38 N.E.2d 2, 378 Ill. 289

98. Ala.—Corprew v. Tallapoosa County, 3 So.2d 53, 241 Ala. 492

99. Ala.—Corprew v. Tallapoosa County, supra.

1. Cal.—People v. Central California Milk Producers' Assoc., 212 P. 957, 60 Cal.App. 439.
Control by attorney general or other officer see supra § 27.

2. Colo.—Lockhard v. People, 178 P. 565, 65 Colo. 558.

3. Colo.—Lockhard v. People, supra.

4. Ill.—People v. Franklin County Bldg. Assoc., 161 N.E. 56, 329 Ill. 582.

5. N.M.—State v. Huller, 168 P. 528, 23 N.M. 306, 1 A.L.R. 70, certiorari denied 38 S.Ct. 336, 246 U.S. 667, 62 L.Ed. 929
51 C.J. p. 336 note 26.
Proceeding to oust individuals from exercise of corporate franchises see infra § 30 c (2).

6. Cal.—People v. California Protective Corp., 244 P. 1089, 76 Cal.App. 354.

7. Cal.—People v. California Protective Corp., supra.

is to be redressed,[8] but not in a case of public right involving no individual grievance,[9] where a public wrong alone is to be redressed, the attorney general or district attorney may and must suggest the issuance of the writ.[10]

Unlawful practice of profession The right of a citizen to use the name of the state in prosecuting an information in the nature of quo warranto against one who intrudes into a profession without a license has been held purely statutory,[11] and it has been held that proceedings against persons engaging in the unlawful practice of law should be had in the name of the state and be instituted in the manner designated by the quo warranto statute.[12]

b. Trial of Title to Office

(1) Public office

(2) Office in association or private corporation

(1) Public Office

(a) In general

(b) Name in which action brought

(a) In General

A quo warranto proceeding to try title to public office may generally be brought by the attorney general or a prosecuting attorney; under some statutes a person may bring the action where his interest is merely that of a citizen, voter, or taxpayer, but others require that he have a special interest, different from that of the general public, in the office in question.

A quo warranto action or proceeding to try title to a public office may be brought by the attorney general or a prosecuting or district attorney[13] on his own information,[14] relation,[15] or motion,[16] or on the complaint, information, or relation of a private person.[17] Also, under the statutes of most jurisdictions, and the construction placed thereon,

8. Pa.—In re Township Supervisors, 17 Pa.Dist. 6, 33 Pa.Co. 630—Commonwealth v. Hough, 8 Pa.Dist. 685, 22 Pa.Co. 440.

9. Pa.—Commonwealth v. Cluley, 56 Pa. 270, 94 Am.D. 75—In re Township Supervisors, 17 Pa.Dist. 6, 33 Pa.Co. 630

10. Pa.—Commonwealth v. Pfromm, 100 A. 276, 255 Pa. 485.

51 C.J. p 336 note 35.

11. Ala.—Ex parte Talley, 193 So. 271, 238 Ala. 527.

12. Ala.—Birmingham Bar Ass'n v. Phillips & Marsh, 196 So. 725, 239 Ala. 650.

13. Ark.—State ex rel. Robinson v. Jones, 108 S.W.2d 901, 194 Ark. 445.

Fla.—State ex rel. Landis v. S. H. Kress & Co., 155 So. 823, 115 Fla. 189.

Mo.—State on Inf. of Wallach v. Beckman, 185 S.W.2d 810, 353 Mo. 1015—State ex Inf. Norman v. Ellis, 28 S.W.2d 363, 325 Mo. 154.

Ohio.—Heffner v. State ex rel. Johnson, 1 N.E.2d 146, 131 Ohio St. 13.

Pa.—Commonwealth ex rel. Schermer v. Franek, 166 A. 878, 311 Pa. 341—Commonwealth ex rel. v. Kelser, 37 Pa.Dist. & Co. 473, affirmed Commonwealth ex rel. Kelley v. Kelser, 16 A.2d 307, 340 Pa. 59.

Tex.—Fannin-Lamar-Delta Improvement Dist. No. 3 v. State, Civ.App., 73 S.W.2d 1101, error dismissed.

51 C.J. p 336 note 36.

County attorney

(1) Under statute, county attorney had right to file an information in the nature of quo warranto against county commissioner.—State ex rel. Hamilton v. Superior Court, Whatcom County, 101 P.2d 588, 3 Wash.2d 633.

(2) The attorney general cannot institute action for removal of sheriff from office, but such power and duty vest in county attorney under constitutional provision for representation of state by such attorneys in all cases in district and inferior courts in their counties; the statute providing for quo warranto proceedings does not authorize attorney general to institute and maintain action for removal of sheriff from office under statute providing for removal of county officers by district judges.—State ex rel. Downs v. Harney, Tex.Civ.App., 161 S.W.2d 55, error refused

Necessity of intervention of attorney general

Intervention of attorney general in filing of petition in nature of quo warranto to determine right to public office is necessary unless the facts stated in the petition and the relief sought thereby are such that the petition is, in the judgment of the supreme court, a proper one to be filed and heard on its merits even though not signed by the attorney general.—Black v. Cummings, 5 A.2d 858, 62 R.I. 361.

Illegality of ordinance creating board

A municipal employee, whose position in the classified service was abolished, could not maintain quo warranto to question title to office of members of municipal board of health on ground that ordinance creating board was illegal, but proceedings could only be instituted by the attorney general.—Brierly v. Walsh, 12 N.E.2d 827, 299 Mass. 292.

Invalidity of election

A charge that entire election in a voting district is a nullity should be prosecuted by public officer.—Black v. Cummings, 5 A.2d 858, 62 R.I. 361.

14. Ariz.—State v. Boehringer, 141 P. 126, 16 Ariz. 48.

15. Wash.—State ex rel. Brown v. Warnock, 132 P.2d 472, 12 Wash.2d 478.

Absence of claimant

Statutory requirement that complaint contain name of the person who claims to be entitled to the office the authority to hold which is brought in question does not preclude the bringing of an action on relation of attorney general in interest of public to test authority of one holding a public office, where there is no other claimant.—State ex rel. Giles v. Hyde, 142 P.2d 665, 105 Utah 436.

16. Me.—Burkett ex rel. Leach v. Ulmer, 15 A.2d 858, 137 Me. 120.

Okl.—State ex rel. Williams v. Batson, 39 P.2d 76, 170 Okl. 103.

17. Me.—Burkett ex rel. Leach v. Ulmer, 15 A.2d 858, 137 Me. 120.

51 C.J. p 337 note 38.

Relation of person claiming office

(1) Bill held in proper form.—State v. Hammons, 43 S.W.2d 395, 163 Tenn. 290.

(2) Where relator in proceeding to test the right of another to hold an office had no legal claim to the office, the proceeding is by the state in her prerogative capacity to be exercised in the public interest.—State, on Inf. of Murphy, v. Johnson, 8 So.2d 890, 243 Ala. 114.

Under common law, no person, however interested, is authorized to institute quo warranto proceedings to determine right of city managers to exercise functions of offices of city managers except through the attorney general.—State ex rel.

the action or proceeding may be instituted by a person or officer other than the attorney general or a prosecuting attorney where such person or officer has an interest in the subject matter of the inquiry,[18] as where he claims to be entitled to the office,[19] or, in some jurisdictions, where his interest is merely that of a citizen, resident, voter, elector, or taxpayer;[20] but in other jurisdictions the proceeding cannot be instituted or maintained by a mere citizen or taxpayer,[21] and to entitle a per-

Wurn v Kasserman, 179 So 410, 131 Fla 234, followed in State ex rel Harris v King, 183 So 926, 134 Fla 58, and State ex rel Vaughn v Beall, 183 So 927, 134 Fla 59

The normal role of the attorney general in matters of this kind when an information is filed in his name is to represent the sovereign power —Wilentz ex rel Golat v Stanger, 29 A 2d 413, 129 N J Law 294, affirmed 30 A 2d 885, 129 N J Law 606.

18. Ga —Wood v Arnall, 6 S E 2d 722, 189 Ga 362.
51 C J p 337 note 40

19. Ga —Wood v. Arnall, supra.
Ind —State v Adams, 65 Ind 393.
51 C J p 337 note 41.

Name of state

In quo warranto proceedings wherein relators claimed offices, the information should not have been filed in the name of the state, since such an information could be filed as a matter of right.—Metzler v. Belcher, 15 A 2d 105, 125 N J Law 183—Van Brookhoven v Kennedy, 14 A 2d 789, 125 N J.Law 178, affirmed 17 A.2d 152, 125 N.J.Law 507.

Claim of identical office

Relator, to succeed in quo warranto proceeding, must claim identical office held by alleged usurper
N.J.—McCarthy v. Walter, 156 A. 772, 108 N.J.Law 282.
Ohio —State ex rel McCormick v Raschig, 72 N.E.2d 262, 147 Ohio St 522.

Former incumbent entitled to hold over until his successor is legally elected and qualified has such an interest as entitles him to bring quo warranto proceedings to oust the present incumbent on the grounds that he is ineligible or that his election was invalid.
Miss.—Wilkins v Large, 141 So. 585, 163 Miss. 279.
R.I —McGroarty v. Ferretti, 184 A. 508, 56 R I 152.
51 C J p 337 note 41 [a].

Appointee under an invalid appointment cannot maintain quo warranto for the office and emoluments —Brigman v. Baley, 195 S E 617, 213 N C 119.

Repeal of law under which office held

Petitioner did not show right to maintain proceedings as claimant to office where act repealed law under which he held office.—Sweat v. Barnhill, 155 S E. 18, 171 Ga. 294.

Official stenographer of the court of common pleas is not a public official, and is therefore not entitled to try the right to office by quo warranto —State v Conley, 178 N E 207, 124 Ohio St 265

20. Ga —Thompson v Stone, 53 S E 2d 458, 205 Ga. 243—Rogers v. Croft, 47 S E 2d 729, 203 Ga. 654—Sweat v Barnhill, 155 S E 18, 171 Ga 294—Malone v Minchew, 153 S E 773, 170 Ga 687, followed in McCranie v Minchew, 153 S E 776, 170 Ga 691, and Davis v. Minchew, 154 S E 189, 170 Ga 691—Stanford v. Lynch, 94 S E. 1001, 147 Ga. 518
N J —Tonkin v Kenworthy, 170 A 233, 112 N J Law 274.
N C —State ex rel. Barlow v Benfield, 58 S.E 2d 637, 231 N.C 663.
Wis —State ex rel Martin v Ekern, 280 N W 393, 228 Wis. 645.
51 C J p 337 note 42.

Proceeding to declare office vacant

Any citizen and taxpayer may file proceeding in nature of quo warranto to declare public office vacant — McDuffie v. Perkerson, 173 S E 151, 178 Ga 230, 91 A L R 1002.

Interest

(1) Borough resident and taxpayer may file information in nature of quo warranto to test right to office of borough clerk, although he has no legal title thereto.—Walton v Brindle, 154 A. 524, 9 N.J.Misc 496.

(2) Right to maintain action to vacate office is not dependent on fact that relator or plaintiff is entitled to office or any of its emoluments, but party cannot maintain suit in which he has no interest, suit to remove members of state board of cosmetic art examiners on ground of disqualification could not be maintained by corporation not alleging that it was taxpayer or voter or how it was affected by, or interested in, the board —Associated Cosmetologists of North Carolina v. Ritchie, 175 S. E 308, 206 N C. 808.

Through defeated candidate

An interested citizen and taxpayer of county, through a defeated candidate for the office, could institute proceeding to test the eligibility of county officer to hold office —Hulgan v. Thornton, 55 S E.2d 115, 205 Ga. 753.

Discretion of court

R I.—Black v. Cummings, 5 A.2d 858, 62 R I 361.

Dismissed patrolmen

Patrolman who was dismissed from police department for economic reasons held entitled, in pursuance of leave granted by a justice, to challenge, "as a private citizen and taxpayer only," validity of title to office of patrolman appointed in violation of statute requiring new appointments to be made from special list of patrolmen dismissed for economic reasons, but other patrolman, who was first on list of patrolmen dismissed for economic reasons, from which list new appointments were required to be made, held not entitled to challenge validity of title to office of patrolman not appointed from such list, on ground that challenging patrolman was entitled to office, in absence of proof that party first on such special list was required to be appointed first in event of a new appointment —Harcher v Hurley, 181 A 309, 116 N J Law 18

21. Fla —State ex rel. Wurn v. Kasserman, 179 So. 410, 131 Fla. 234, followed in State ex rel. Harris v King, 183 So 926, 134 Fla. 58, and State ex rel Vaughn v Beall, 183 So. 927, 134 Fla 59
Ill —People ex rel. Buchanan v Mulberry Grove Community High School Dist No 34-A, 61 N E 2d 256, 390 Ill 341—People ex rel. Hiller v Bevirt, 17 N E 2d 629, 297 Ill App. 335
Ky —Jenkins v Congleton, 45 S W 2d 456, 242 Ky. 46
Mich —**Corpus Juris cited in** Marian v Beard, 242 N W 880, 881, 259 Mich 183
Pa —Commonwealth ex rel. Schermer v. Franek, 166 A 378, 311 Pa. 341.
W Va —State ex rel. Bumgardner v Mills, 53 S E 2d 416
51 C J p 337 note 43

However it has also been held that quo warranto lies on relation of citizen to correct violation of laws requiring voters to pay poll tax and register before voting, where citizen acts seasonably and appropriately.—State ex rel. Pooser v. Wester, 170 So. 736, 126 Fla. 49.

Extraordinary circumstances

A private citizen has no right, except under extraordinary or exceptional circumstances, to the use of quo warranto to test the title of an incumbent of a public office — State ex rel. Burk v. Thuet, 41 N W. 2d 585, 230 Minn 365—State ex rel Wells v. Atwood, 277 N W. 357, 202 Minn. 50

Intervention of attorney general required

Mass —Lord v. Griffin, 70 N.E.2d 298, 320 Mass. 761.
51 C.J. p 337 note 43 [a].

son or officer other than the attorney general or a prosecuting attorney to institute and maintain the action or proceeding it is necessary that he shall have some special or particular interest, different from that of the public generally, in the office in question,[22] or that he shall claim, or show himself, to be entitled to the office,[23] and that there shall be some prima facie valid ground for his claim.[24]

Defeated candidate Unless, by reason of ineligibility or otherwise, a defeated candidate for an office is not entitled to it in any event,[25] he has an interest sufficient to warrant him in bringing quo warranto proceedings to try the title of the incumbent.[26]

Quo warranto proceeding attacking the legal existence of an office cannot be instituted by a private relator.[27]

Control of action or proceeding Under statutes allowing a claimant of an office to bring the action,

Suit to have election adjudged void in order to redress a public wrong was in the nature of a quo warranto proceeding which would have to be brought on relation of the state and was not maintainable at instance of a private citizen.--Skelton v. Barnett, 227 S.W.2d 774, 190 Tenn. 70.

Officer whose term has expired
Fla.--State ex rel. Smith v. Hamilton, 166 So. 742, 123 Fla. 381.

22. Ill.--People v. Kidd, 75 N.E.2d 851, 398 Ill. 405.--People ex rel. Buchanan v. Mulberry Grove Community High School Dist. No. 34 A, 61 N.E.2d 256, 390 Ill. 341.
Ind.--State ex rel. Johnson v. Clayton, 7 N.E.2d 32, 211 Ind. 327.--Rule v. State ex rel. Dickinson, 194 N.E. 151, 207 Ind.App. 546.
Mich.--Marian v. Board, 242 N.W. 880, 259 Mich. 183.
Pa.--Commonwealth ex rel. Schermer v. Franek, 166 A. 878, 311 Pa. 341.
S.D.--Smith v. Reid, 244 N.W. 353, 60 S.D. 311.--Gibbs v. Bergh, 214 N.W. 838, 51 S.D. 432.
Wash.--State v. Superior Court for King County, 9 P.2d 1087, 167 Wash. 655.
51 C.J. p 337 note 44.

Effect of judgment of ouster as test of interest
If judgment of ouster would not place relator in office, he has no such right as would warrant such judgment against official in office.--Commonwealth ex rel. Schermer v. Franek, 166 A. 878, 311 Pa. 341.

Interest in office, rather than in performance of duties thereof is necessary.
Ill.--People ex rel. Hiller v. Bevirt, 17 N.E.2d 629, 297 Ill.App. 335.
Ind.--State v. Dudley, 68 N.E. 899, 161 Ind. 431.

Petition for appointment
One entitled to consideration of his claim to office before appointment of another, because of political party representative's petition for his appointment, is proper person to maintain quo warranto action to oust appointee.--Commonwealth ex rel. District Attorney of Mercer County v. Gibson, 175 A. 389, 316 Pa. 429.

Lack of election certificate and regular nomination
One who has no certificate of election to a state office from the state canvassing board is not entitled to quo warranto to test the title of an incumbent appointee thereto; quo warranto for such purpose would not lie on behalf of one who was not regularly nominated, who had received only eighty-seven of about a million votes cast in the general election held eight days after the vacancy occurred, and who received no certificate of election.--State ex rel. Wells v. Atwood, 277 N.W. 357, 202 Minn. 50.

Requisite interest held present
(1) Borough tax collector appointed by borough council held to have sufficient interest in office of collector of school taxes to enable him to maintain quo warranto against another appointed by school board.--Commonwealth v. Blume, 161 A. 551, 307 Pa. 406.

(2) Justice of peace for township appointed by county board of commissioners to fill vacancy, qualified and duly commissioned, held to have sufficient interest to qualify him as relator in proceeding to test right to such office claimed by another.--Smith v. State ex rel. Canary, 188 N.E. 576, 206 Ind. 138.

Requisite interest held lacking
(1) In general.
Ill.--People ex rel. Hiller v. Bevirt, 17 N.E.2d 629, 297 Ill.App. 335.
Miss.--Temple v. State, 86 So. 580, 123 Miss. 741.
51 C.J. p 337 note 44 [b].

(2) Alderman held to have no such right as would warrant judgment of ouster of justice of peace whose term had not expired when borough became city.--Commonwealth ex rel. Schermer v. Franek, 166 A. 878, 311 Pa. 341.

23. Ohio.--State ex rel. McCormick v. Raschig, 72 N.E.2d 262, 147 Ohio St. 522.--State ex rel. Smith v. Nazor, 21 N.E.2d 124, 135 Ohio St. 364.--State ex rel. Joecken v. Lynch, 177 N.E. 765, 123 Ohio St. 676.--Klick v. Snavely, 164 N.E. 233, 119 Ohio St. 308.--State ex rel. Bolsinger v. Oridge, 16 N.E.2d 840, 58 Ohio App. 491, affirmed 16 N.E.2d 334, 134 Ohio St. 206.
S.D.--Smith v. Reid, 244 N.W. 353, 60 S.D. 311.--Gibbs v. Bergh, 214 N.W. 838, 51 S.D. 432.
Wash.--State v. Superior Court for King County, 9 P.2d 1087, 167 Wash. 655.
51 C.J. p 338 note 45

24. Pa.--Commonwealth ex rel. Tell v. Lupino, Com.Pl., 42 Sch.Leg. Reg. 64.
R.I.--Gorham v. Robinson, 186 A. 833, 57 R.I. 1.
51 C.J. p 338 note 46.

One whose term has expired does not have the status prescribed by statute for filing an information in the nature of quo warranto against a person usurping a municipal office.--Morgan v. Mayor and Council of Borough of Roselle Park, 28 A.2d 630, 129 N.J.Law 333.

Claimant held divested of title to office by election
Ohio.--State ex rel. Bolsinger v. Oridge, 16 N.E.2d 840, 58 Ohio App. 491, affirmed 16 N.E.2d 334, 134 Ohio St. 206.

De facto officers held entitled to offices as against predecessors, so that latter could not dispute title to office in quo warranto proceedings.--State ex rel. Johnson v. Clayton, 7 N.E.2d 32, 211 Ind. 327.

25. Minn.--Barnum v. Gilman, 8 N.W. 375, 27 Minn. 466, 38 Am.R. 304.
51 C.J. p 338 note 47.--20 C.J. p 222 note 28.

26. Nev.--State v. Baker, 120 P. 452, 35 Nev. 300.
51 C.J. p 338 note 48.

27. N.J.--Holloway v. Dickinson, 51 A. 539, 69 N.J.Law 72, followed in Moore v. Seymour, 55 A. 91, 69 N.J.Law 606.
Pa.--Commonwealth v. Moffitt, 19 Pa.Dist. 811.

Right to maintain action exclusively in attorney general in official public capacity.--McCarthy v. Walter, 156 A. 772, 108 N.J.Law 282.

he alone may control it;[28] but where the action is brought by the state at the instance of some interested individual, the control of the proceedings on the trial and on appeal has been held to be vested exclusively in the designated officers of the state.[29] The attorney general's appearance in an action to determine the title to an office does not exclude the relator from control over the action where a substituted petition, stating that the relator appeared in person and by the attorney general, was filed by leave of court and the attorney general made no move to exclude the relator.[30] A private person cannot prosecute an information against a judge unless the proceeding is directed by the attorney general or other authorized official.[31]

It has been declared that the state is concerned only with the usurpation, and takes no part in the controversy further than to have the office declared vacant and the usurper ousted.[32]

(b) Name in Which Action Brought

Apart from statutes having a different effect, a quo warranto proceeding to try title to public office must ordinarily be brought in the name of the state, or attorney general, or in the name of the United States where a federal or territorial office is involved.

Ordinarily, a quo warranto action or proceeding to try title to a public office may and must be brought in the name of the state or commonwealth,[33] or of the attorney general,[34] or in the name of the United States where a federal[35] or territorial[36] office is involved. However, where there is a statute so providing, and the case is within it a claimant of the office may[37] and must[38] bring the action in his own name; and in at least one jurisdiction it is held that, in the absence of a statute specifically covering the matter, a citizen and taxpayer may bring the action in his own name.[39]

(2) Office in Association or Private Corporation

Authorities differ as to whether a quo warranto action to try title to an office in a private corporation or association may be brought by a private person, and, if so, whether he must be one having a personal interest in the office.

In some jurisdictions, a quo warranto action or proceeding to try title to an office in a private corporation may be instituted by,[40] and only by,[41] the attorney general or state's attorney, but such officer may act on the complaint of a director or stockholder[42] and the state may be only a nominal party, rather than the real party, in interest.[43] In other jurisdictions the action or proceeding may be instituted by a private person interested in the corporation or association,[44] such as a stockholder,[45]

28. Utah—State v. Ryan, 125 P. 666, 41 Utah 327.

29. Tex—Denison v. State, Civ App, 61 S.W.2d 1017, error refused Denison v. State ex rel. Allred, 61 S.W.2d 1022, 122 Tex. 459

30. Iowa—State ex rel Adams v Murray, 257 N.W. 553, 219 Iowa 108.

31. Pa—Coyle v. Commonwealth, 104 Pa 117.
51 C.J. p 338 note 59.

32. Ga.—Bowling v. Doval, 58 S.E. 2d 173, 206 Ga. 641—Holmes v. Sikes, 38 S.E. 978, 113 Ga 580.

33. Tenn—State v. Hammons, 43 S.W.2d 895, 163 Tenn 290.
Wis—State ex rel. Martin v Ekern, 280 N.W. 393, 228 Wis. 645.
51 C.J. p 338 note 50.

Absence of district attorney's name
Where action is brought in name of commonwealth, fact that district attorney's name does not appear in records is not fatal defect where he consented to use of his name, although he made no formal appearance—Commonwealth ex rel. Schermer v. Franek, 166 A. 878, 311 Pa. 341.

Dismissal of bill proper
Tenn.—Jones v. Talley, 230 S.W.2d 968, 190 Tenn. 471.

Filing at instance of adverse claimant unnecessary
State may bring suit through designated officers, either of its own accord or at instance of interested party, filing thereof at instance of adverse claimant to office being unnecessary.—Denison v. State, Tex. Civ.App., 61 S.W.2d 1017, error refused Denison v. State ex rel. Allred, 61 S.W.2d 1022, 122 Tex 459

Claimant held not necessary or proper party
Ariz—State ex rel. Sullivan v. Moore, 64 P.2d 809, 49 Ariz 51.

34. N.J.—Duncan v. Board of Fire and Police Com'rs of City of Paterson, 37 A.2d 85, 131 N.J Law 443

One not himself claiming title to the office may file an information in the nature of a quo warranto in the name of the attorney general—Duncan v. Board of Police Com'rs of City of Paterson, supra.

35. S.C.—State v. Bowen, 8 S.C. 400
51 C.J. p 338 note 51.

36. U.S.—Nebraska v Lockwood, Neb, 3 Wall. 236, 18 L.Ed. 47.
51 C.J. p 338 note 52.

37. Kan—Harrington v. Smith, 217 P. 270, 114 Kan 262.
51 C.J. p 338 note 54.

38. Ariz.—State v. Boehringer, 141 P. 126, 16 Ariz. 48.

Testing validity of election
A bill in nature of quo warranto cannot be filed in state's name to test validity of quarterly election by county court of members of county beer committee—State ex rel Thurman v. Scott, 195 S.W.2d 617, 184 Tenn. 76.

39. Ga—Garrett v. Cowart, 101 S.E. 186, 149 Ga. 557

40. N.Y.—People v. Albany, etc., R. Co., 1 Lans. 308, 55 Barb 344, 7 Abb.Pr.,N.S., 265, 38 How.Pr 228, modified on other grounds 5 Lans 25, affirmed 57 N.Y. 161.

41. N.Y—People v. John, 141 N.Y.S. 225, 80 Misc. 418.

42. Ill.—Place v. People, 83 Ill.App. 84
Ohio—State v. McDaniel, 22 Ohio St 354.

43. U.S—Bill v. Carr, D.C.Conn, 88 F.Supp 578.
Del—State v. Biedler, 99 A. 278, 29 Del. 262.

44. D.C.—U. S. ex rel. Noel v. Carmody, 148 F.2d 684, 80 U.S.App. D.C. 58.
51 C.J. p 338 note 64.

Attorney general not a necessary party
Me.—Burkett ex rel. Leach v. Ulmer, 15 A.2d 858, 137 Me. 120.

45. Pa—Commonwealth v. Stevens, 32 A. 111, 168 Pa. 582—Common-

including a person who claims to have been elected to the office,[46] but it has been held that a member of an association, in order to be a relator, need not be seeking the same office,[47] although under other authority quo warranto to determine the title to a corporate office may be brought only by a person claiming title thereto and out of possession thereof.[48]

Also, in some jurisdictions a quo warranto action or proceeding to try the right or title to an office in a club, society, or fraternal order may be brought by a member.[49] In other jurisdictions, however, the action or proceeding may not be brought by a mere member,[50] but only by a person having a personal interest in the office by reason of having been legally elected thereto;[51] and in still other jurisdictions the action may not be brought by a claimant of the office.[52]

A corporation itself may not bring quo warranto to determine the title to corporate offices.[53]

c. Attack on Corporate Existence, Franchise, or Action

(1) Public corporation
(2) Private corporation

(1) Public Corporation

The attorney general or prosecuting attorney may institute a quo warranto action to test the validity of the organization of a public corporation or question its exercise of corporate powers, and he must control the proceeding; in most jurisdictions such a proceeding cannot be instituted by a private person interested only as a citizen or taxpayer.

The attorney general, state's attorney, or prosecuting attorney of the proper county or district, may file, or ask leave to file, an information in the nature of quo warranto to test the validity of the organization of a municipal or other public corporation or to question its exercise of corporate powers,[54] and, except in some jurisdictions,[55] or, it has been held, in exceptional cases,[56] such an information cannot be filed, or such action or proceeding otherwise instituted, by a private person whose only interest is that of a citizen, resident, or taxpayer.[57]

wealth ex rel. v. Cramer, Com.Pl., 4 Sch.Reg. 364.
51 C.J. p 338 note 65.

46. Ind. Beckett v. Houston, 32 Ind. 393.
51 C.J. p 338 note 66.

47. D.C.—U. S. ex rel. Noel v. Carmody, 148 F.2d 684, 80 U.S.App. D.C. 58.

48. D.C. Columbian Cat Fanciers v. Koehne, 96 F.2d 529, 68 App. D.C. 257.

A stockholder who was not elected to office, even though such failure was the result of mistaken advice by the corporation's counsel, has no standing to question the title of persons elected to the office.—Commonwealth ex rel. Fortenbaugh v. Kay, 29 Pa.Dist. 1150.

49. Ga.—Hornady v. Goodman, 146 S.E. 173, 167 Ga. 555.
51 C.J. p 338 note 67.

50. Pa.—Commonwealth v. Murray, 11 Serg. & R. 73, 14 Am.S.R. 614.
51 C.J. p 338 note 68.

51. Pa.—Commonwealth v. Morris, 112 A. 770, 269 Pa. 476.

52. Ohio.—Crawford v. State, 38 N. E. 614, 52 Ohio St. 62.
51 C.J. p 338 note 70.

53. D.C.—Columbian Cat Fanciers v. Koehne, 96 F.2d 529, 68 App. D.C. 257.

54. Fla.—State ex rel. Wurn v. Kasserman, 179 So. 410, 131 Fla. 234, followed in State ex rel. Harris v. King, 183 So. 926, 134 Fla. 58, and State ex rel. Vaughn v. Beall, 183 So. 927, 134 Fla. 59.
51 C.J. p 339 note 71.

Annexation of territory by city
Tex.—City of West University Place v. State, Civ.App., 56 S.W.2d 1081, error refused.

Drainage district
Ill.—People v. Holmes, 180 N.E. 780, 348 Ill. 204.

Attorney's own accord or individual's instance
A proceeding to test the legal existence of a school district concerns, in a legal point of view, the public alone, and it is immaterial whether the state's attorney prosecutes the proceeding of his own accord or at the instance of any individual relator.—People v. Kidd, 75 N.E.2d 851, 398 Ill. 405.

Action not maintainable by city
An action in the nature of quo warranto to challenge validity of incorporation of city and to oust alleged official usurpers must be prosecuted in the name of the state on relation of attorney general or of county attorney in which the territory involved is located, and could not be maintained by another city.—City of Bethany v. Mason, 210 P. 2d 353, 206 Okl. 66.

55. Or.—State v. Goff, 218 P. 556, 221 P. 1057, 110 Or. 349.
51 C.J. p 339 note 72.

56. Minn.—State v. McDonald, 112 N.W. 278, 101 Minn. 349.

Discretion of court
Minn.—State v. McDonald, supra.

57. Fla. State ex rel. Wurn v. Kasserman, 179 So. 410, 131 Fla. 234, followed in State ex rel. Harris v. King, 183 So. 926, 134 Fla. 58, and State ex rel. Vaughn v. Beall, 183 So. 927, 134 Fla. 59.

Ill. People v. Kidd, 75 N.E.2d 851, 398 Ill. 405. People ex rel. Buchanan v. Mulberry Grove Community High School Dist. No. 34 A, 61 N. E.2d 256, 390 Ill. 341.

Iowa. State v. Consolidated Independence School Dist. of Mediapolis, 186 N.W. 426, 193 Iowa 856.
51 C.J. p 339 note 73. 15 C.J. p 419 note 88.

Annexation of land by city
Ill. Rowan v. City of Shawneetown, 38 N.E. 2, 378 Ill. 289.

School district incorporation
Okl. State v. Holtzclaw, 2 P.2d 1022, 151 Okl. 163.

Interest held sufficient
The owner and active manager of a filling station in a town who was subject to license and police regulations of town had sufficient interest to maintain action to test sufficiency of incorporation of town after having received written permission from district attorney.—Norton v. People ex rel. Rudbeck, 81 P.2d 393, 102 Colo. 489.

Proceeding must run in name of state on relation of attorney general. —City of South Miami v. State ex rel. Landis, 192 So. 624, 140 Fla. 740. —State ex rel. Fidelity Life Ass'n v. City of Cedar Key, 166 So. 672, 122 Fla. 454.

Also, the action or proceeding may and must be under the control or supervision of the attorney general or prosecuting attorney, rather than that of a private citizen,[58] but it has been held that if the suit is in fact conducted by the proper officer, it is no objection that a private person is named as relator,[59] and that a proceeding wherein the state's attorney appears as relator is none the less public in nature because individuals interested have employed counsel at their own expense to assist in prosecuting the suit.[60]

Where a new or consolidated school district embraces part or all of the territory of an old district, a director of the old district,[61] but not the old district itself,[62] may be a relator in a quo warranto action or proceeding to test the legality of the formation of the new district.

(2) Private Corporation

Except where statutes so provide, a proceeding to forfeit a private corporation's charter or oust it from the exercise of powers not conferred by law should be instituted by the appropriate officer on behalf of the state and not by a private person.

Ordinarily a quo warranto proceeding to oust individuals from exercising franchises and privileges of a corporation without authority of law,[63] to forfeit or vacate the charter of a private corporation,[64] or to oust it from the exercise of powers or franchises not conferred by, or contrary to, law,[65] may and should be instituted by the attorney general or other appropriate officer, ex officio, on behalf of the state, and not by a private citizen or relator,[66]

De facto existence of municipal corporation

Where one seeks to attack legal validity of a municipal corporation which has at least de facto existence, right to institute proceeding in quo warranto is in the state.—Farrington v. Flood, Fla., 40 So.2d 462

58. Mass.—Attorney General v. Methuen, 129 N.E. 662, 236 Mass. 564
Tex.—State v. Nelson, Civ.App., 170 S.W. 814.

Effect of responsibility of private relator

Prosecution of quo warranto proceeding to annul municipality's wrongful assumption of powers remains under exclusive control of state's attorney and court, notwithstanding private relator is responsible for setting proceeding in motion and becomes liable for costs of suit.—Town of De Kalb v. State ex rel. King, Tex.Civ.App., 71 S.W.2d 299.

59. Ill.—People v. Burns, 72 N.E. 374, 212 Ill. 227

60. Ill.—McGahan v. People, 61 N.E. 418, 191 Ill. 493.

61. N.D.—Tallmadge v. Walker, 159 N.W. 71, 34 N.D. 590.
S.D.—State v. Tralstead, 156 N.W. 75, 36 S.D. 568

62. Or.—State v. Goff, 218 P. 556, 221 P. 1057, 110 Or. 349

63. Mich.—Attorney General v. Gay, 127 N.W. 814, 162 Mich. 612.
14 C.J. p. 251 note 27.

64. Fla.—State ex rel. Landis v. S. H. Kress & Co., 155 So. 823, 115 Fla. 189.
51 C.J. p. 339 note 80.

Authority of prosecuting or district attorney

(1) Under statutes, prosecuting attorney of proper county had power to file and prosecute information in nature of quo warranto, in circuit court of his county, for purpose of forfeiting charter of domestic corporation alleged to have misused and abused its corporate privileges and franchises.—People ex rel. O'Brien v. Society of Good Neighbors, 42 N.W.2d 761, 327 Mich. 620

(2) Quo warranto proceeding to forfeit right and franchise of foreign corporation to do business throughout state was on behalf of general public of entire state and could be brought only by attorney general and district attorney may institute such proceeding only where exercise of corporate functions is limited by charter or the nature of powers conferred by charter to a certain county or judicial district, it was the duty of trial court to determine from the face of the proceeding the legal capacity of district attorney to appear for the state in such proceeding and unless he had such authority trial court was without jurisdiction to render any judgment binding either on state or corporation, except a judgment of dismissal without prejudice; court had no jurisdiction of proceeding instituted by district attorney to forfeit right and franchise of theater corporation to do business throughout the state, although judgment limited relief to cancellation of right and franchise to operate theaters in a certain city on Sunday.—Kennington-Saenger Theatres v. State ex rel. Dist. Atty., 18 So.2d 483, 196 Miss. 841, 153 A.L.R. 883.

65. Cal.—Collins v. Consolidated Water Co. of Pomona, 9 P.2d 872, 122 Cal.App. 348
51 C.J. p. 339 note 81.

State as plaintiff

(1) In such a proceeding, the state is the plaintiff, and not the attorney general, who is supposed to be impartial and to seek only the vindication of the rights of the state.—State ex rel. Mitchell v. Sage Stores Co., 143 P.2d 652, 157 Kan. 622, affirmed 65 S.Ct. 9, 323 U.S. 32, 89 L.Ed. 25.

(2) Action questioning validity of gas franchise granted by city because of alleged illegal and corrupt practices at election could be maintained by state on relation of county attorney.—State ex rel. Morgan v. City of Newton, 23 P.2d 463, 138 Kan. 78.

Statute held constitutional

Statute authorizing quo warranto proceedings by attorney general when fraternal benefit society is exceeding its powers, etc., and providing that proceedings not brought by him shall not be entertained, is constitutional.—Delaney v. Grand Lodge A.O.U.W. of Massachusetts, 138 N.E. 918, 244 Mass. 556

Failure to recognize insurance commissioner

Attorney general is not authorized to commence quo warranto proceeding without recognition of insurance commissioner to correct delinquencies of life insurer in conducting its business.—State ex rel. Boynton v. Kansas Life Ins. Co., 36 P.2d 88, 140 Kan. 267

Suit against insolvent foreign corporation

Attorney general had authority, at request of insurance commissioners, to bring in state's name suit in nature of quo warranto against insolvent foreign insurance company which had permitted state license to expire and was disposing of property to prejudice of state policyholders.—Fire Protection Co. of America v. State, Tex.Civ.App., 59 S.W.2d 888.

66. Ky.—Russell v. Cumberland, etc., R. Co., 8 Ky.Op. 344.
Pa.—Commonwealth v. Sesqui-Centennial Exhibition Assoc., 8 Pa. Dist. & Co. 77.

Rule prior to statutory amendments

Cal.—Collins v. Consolidated Water Co. of Pomona, 9 P.2d 872, 122 Cal. App. 348.

particularly one who has no interest in the corporation;[67] but where the parties have treated an information as properly filed on behalf of a private relator, the court will so consider it,[68] and in an effort to prevent usurpation of its delegated power to grant a franchise, it is not improper for a municipality to be relator in a quo warranto proceeding.[69]

Some statutes authorize a person to institute a quo warranto proceeding in his own name where his private right or interest has been injured or is put in hazard by the exercise of a franchise or privilege not conferred by law, by a private corporation or by persons claiming to be a private corporation;[70] under the statutes of at least one jurisdiction, any person who gives security for costs may be a relator;[71] and it has been held that the corporation itself is a proper relator where the object of the proceeding is to oust individual respondents from exercising corporate franchises usurped by them.[72]

Control of action. Where an action is instituted by the attorney general to forfeit defendant's corporate charter and franchise at the request of an individual as relator, the latter is the real party in interest,[73] and controls the action.[74]

Right to use city streets. In some jurisdictions the right or franchise of a private corporation to use city streets cannot be attacked in quo warranto proceedings by the municipality[75] or a private individual,[76] but in other jurisdictions the municipality may be plaintiff or the relator,[77] an individual may be the relator in a proceeding brought by the public prosecutor,[78] or a citizen owning property abutting on the street in question may maintain the action on the refusal of the county attorney to act.[79]

The legislative body of a municipality may be empowered by statute to bring an action in quo warranto against the unlawful holding or exercise of a franchise.[80]

§ 31. —— Joinder

Joinder, as relators, of persons possessing like interests may be proper. An aggrieved private citizen may or must join with the state or attorney general under some statutes.

The joinder as relators, in quo warranto proceedings, of persons possessing like interests may be proper,[81] but unnecessary.[82] While several persons claiming different offices ordinarily cannot join in one proceeding,[83] such joinder is proper where the rights of such persons depend on the

67. Pa.—Commonwealth v. Dillon, 81 Pa. 41.
51 C.J. p 339 note 83.

68. N.M.—State v. Tularosa Community Ditch, 143 P. 207, 19 N.M. 352.

69. Mo.—State ex inf. Shartel, ex rel. City of Sikeston, v. Missouri Utilities Co., 53 S.W.2d 394, 331 Mo. 337, 89 A.L.R. 607.

70. Mass.—Haupt v Rogers, 48 N. E. 1080, 176 Mass. 71.
51 C.J. p 339 note 86—14 C.J. p 251 note 27.

Plaintiff gas company which had served city for many years under valid franchise held entitled to maintain action in nature of quo warranto in its own name challenging validity of ordinances granting franchise to defendant company, where plaintiff would suffer loss if defendant should be permitted to build rival gas plant, and especially where city, on its and defendant's motions, was made a party defendant.—Gas Service Co v. Consolidated Gas Utilities Corporation, 65 P. 2d 584, 145 Kan. 423.

71. Ala.—State v. U. S Endowment, etc., Co., 37 So. 442, 140 Ala. 610, 103 Am.S.R. 60.
51 C.J. p 339 note 88—14 C.J. p 251 note 27.
Security for costs generally see infra § 52.

72. N.M.—State v. Huller, 168 P. 528, 23 N.M. 306, 1 A.L.R. 70, certiorari denied 38 S.Ct. 336, 246 U.S. 667, 62 L.Ed. 929.

73. Mo.—State ex rel. Handlan v. Wilkie Land Co., 102 S.W.2d 846, 340 Mo. 666.

74. Mo.—State ex rel. Handlan v. Wilkie Land Co., supra.

75. N.Y. Fredonia v. Fredonia Natural Gas Light Co., 155 N.Y.S. 212, 169 App.Div. 690.
51 C.J. p 340 note 90.

76. Pa.—Thirteenth, etc., Sts. Pass. R. Co. v. Broad St. Rapid Transit R. Co., 67 A. 901, 219 Pa. 10.

77. Kan.—Olathe v. Missouri, etc., Interurban R. Co., 96 P. 42, 78 Kan. 193.
Mo.—State v St. Louis Light, etc., Co., 152 S.W. 67, 246 Mo. 618.
City as real party in interest
Where quo warranto proceeding to oust water company from streets of particular city was brought in the name of the attorney general, but no objection was made to respondent's pleadings wherein caption described case as at the city's relation, and city's attorneys, rather than attorney general, were active in the case, the city was the real party in interest and the case would be styled in its name as relator.—State ex inf. McKittrick ex rel. City of Springfield v. Springfield City Water Co., 131 S.W.2d 525, 345 Mo. 6.

78. Ill. People v. Commercial Tel., etc., Co., 115 N.E. 379, 277 Ill. 265, L.R.A.1917D 704.

79. Iowa. State v. Des Moines City R. Co., 109 N.W. 867, 135 Iowa 694.
Refusal of officer to act generally see supra § 18.

80. Cal. City of Oakland v. El Dorado Terminal Co., 106 P.2d 1000, 41 Cal.App.2d 320—City of Oakland v. Hogan, 106 P.2d 987, 41 Cal.App.2d 333.
City board of port commissioners
Cal. City of Oakland v. El Dorado Terminal Co., 106 P.2d 1000, 41 Cal.App.2d 320 City of Oakland v. Hogan, 106 P.2d 987, 41 Cal. App.2d 333.
Operation and maintenance of wharf
Cal. City of Oakland v. Hogan, supra.

81. Ill.—People v. Barber, 124 N.E. 594, 289 Ill. 556.
51 C.J. p 340 note 95.

82. Pa.—Commonwealth v. Straus, 32 Pa.Super. 389.
51 C.J. p 340 note 96.

83. Mich.—People v. De Mill, 15 Mich. 164, 93 Am.D. 179.
Pa.—Commonwealth v. Martin, 3 Lanc.L.Rev. 177.

same matters or questions of law or fact.[84] A mere desire on the part of persons who voted for the relator that he hold the office in question does not constitute such a direct legal interest as to make them necessary parties to the litigation.[85]

Joinder with state or attorney general. In at least one jurisdiction the joinder of an aggrieved private citizen with the attorney general as a corelator is unnecessary,[86] but under the code or statutory provisions of other jurisdictions the informant or person interested may and must join with the state or people as plaintiff.[87] In an information by the attorney general against a corporation, private persons cannot join for the purpose of trying their rights to offices in the corporation.[88]

§ 32. Defendants or Respondents

a. In general
b. Proceedings relating to corporations or associations
c. Proceedings to try title to office

a. In General

The proper parties defendant or respondent in quo warranto proceedings are determined by the language of the statute.

The statute providing for the action of quo warranto may prescribe who the defendants may be.[89] It has been held that no joinder of defendants is proper which unites separate causes of action against several defendants,[90] but, under statute, it has been held that a plaintiff in quo warranto may join as many defendants as may be desired,[91] and that any person may be joined as a defendant whom it may be necessary to make a party for the complete determination or settlement of any questions involved, or against whom a liability is asserted, either jointly, severally, or in the alternative, arising out of the same transaction or series of transactions, regardless of the number of causes of action joined.[92] The filing of a petition under a statute relating to a quo warranto proceeding has been held not, of itself, to make defendant a party to the proceeding.[93]

b. Proceedings Relating to Corporations or Associations

In most jurisdictions a quo warranto proceeding to question the existence of a corporation as never legally organized should be brought against the individuals claiming to exercise the franchise, not the corporation; but in a proceeding complaining that a corporation, legally organized, has ceased to exist, has forfeited its franchise, or has usurped powers or franchise beyond its charter, the corporation itself is the proper defendant.

A proceeding in quo warranto against a corporation has been held to admit the corporate existence,[94] and in many jurisdictions a quo warranto proceeding instituted for the purpose of questioning the existence of a public or private corporation on the ground that it was never legally organized may and should be brought against the individuals who claim the right to exercise the corporate franchise, and not against the corporation itself,[95] which is not a necessary party to the pro-

84. Neb.—**Corpus Juris cited in** Thompson v James, 250 N.W. 237, 240, 125 Neb. 350, 253 N.W. 431, 125 Neb. 888.
51 C.J. p. 340 note 98.

85. Neb.—State v. Barr, 134 N.W. 525, 90 Neb. 766.

86. Fla.—State v. Rose, 122 So. 225, 97 Fla. 710.

Attack on creation of municipality
Persons who reside in town and own property therein need not be joined as corelators with attorney general in proceeding attacking constitutionality of act creating municipality.—State ex rel. Landis v. Town of Lake Placid, 158 So. 497, 117 Fla. 874.

Ouster of foreign corporation
Joinder of private persons as corelators in quo warranto by attorney general to oust foreign corporation from permit to do business in state and inclusion of unnamed persons supposed to be affected by operations of respondent held surplusage and without effect on power of attorney general to institute such proceeding or his responsibility therefor.—State ex rel. Landis v. S. H. Kress & Co., 155 So. 823, 115 Fla. 189.

87. Ala.—Baxter v. State ex rel. Metcalf, 9 So. 2d 119, 243 Ala. 120.
51 C.J. p. 340 note 2.

Necessary party
Ala.—Baxter v. State ex rel. Metcalf, supra.

Supplier of facts
The statute has no application to an informant who merely supplies facts on which a judge acts when he makes an order as authorized by statute providing that a circuit judge may direct the commencement of an action in nature of quo warranto.—Owen v. State ex rel. Bailes, 200 So. 412, 240 Ala. 582.

A person giving security for costs in quo warranto proceeding which is brought in name of state on relation of such person becomes a joint party with the state.—Birmingham Bar Ass'n v. Phillips & Marsh, 196 So. 725, 239 Ala. 650.

88. N.J.—Gibbs v. Somers Point, 10 A. 377, 49 N.J. Law 515.

89. Neb.—State ex rel. Johnson v. Conservative Savings & Loan Ass'n, 11 N.W.2d 89, 143 Neb. 805.—State ex rel. Johnson v. Consumers Public Power District, 5 N.W. 2d 202, 142 Neb. 114.

90. Ga.—Sweat v. Barnhill, 155 S.E. 18, 171 Ga. 294.
51 C.J. p. 340 note 4.

91. Ill.—People ex rel. Ray v. Lewistown Community High School Dist. No. 241, 57 N.E.2d 486, 388 Ill. 78.

92. Ill.—People ex rel. Ray v. Lewistown Community High School Dist. No. 241, supra.

93. W.Va.—State ex rel. George v. Lutz, 46 S.E.2d 245, 131 W.Va. 129.

94. Ill.—People ex rel. Barrett v. Gentile Co-op. Ass'n, 64 N.E.2d 907, 392 Ill. 393.—People ex rel. Ray v. Lewistown Community High School Dist. No. 241, 57 N.E. 2d 486, 388 Ill. 78.
51 C.J. p. 340 note 6 [a].

95. Ill.—People ex rel. Barrett v. Gentile Co-op. Ass'n, 64 N.E.2d 907, 392 Ill. 393.—People ex rel.

ceeding,[96] but in a number of jurisdictions it has been held by the courts that the pretended or de facto corporation, in its assumed corporate name, is a proper party defendant,[97] and by force of statute, a municipal or public corporation may be a necessary party defendant in quo warranto proceedings to test the validity of the election by which it was organized.[98] Where the ground of complaint is that a corporation, legally organized, has ceased to exist or has so acted as to incur a forfeiture of its corporate franchise, the corporation itself is the proper defendant,[99] and a like rule obtains where it is claimed that a corporation usurps powers or franchise beyond those given it by its charter.[1] In a proper case, where the issues are such as to justify the joinder, both the corporation and individuals may be joined.[2]

Joinder of two corporations generally. In a proper case two corporations may be joined as defendants in quo warranto proceedings.[3]

A county has been held not a necessary party in quo warranto against the trustees of a county fair corporation organized and receiving taxes under an invalid statute.[4]

Lessor or lessee. A lessee of part or all of a railroad company's road may properly be joined with the company in an action to vacate its charter.[5] A city which leased to a corporation certain land which had been transferred to it by the state, and which the state alleges the city has forfeited by abandonment of the uses for which it was granted, is not a necessary party to a quo warranto action to oust the corporation from the land.[6] In other circumstances, a lessor has been held not a necessary party in a quo warranto proceeding against a

Ray v. Lewistown Community High School Dist. No. 241, 57 N.E.2d 486, 388 Ill. 78.

Mo.—State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 96 S.W.2d 607, 339 Mo. 385, 106 A.L.R. 1169.

Tex.—Crain v. Adams, Civ.App., 120 S.W.2d 290.

51 C.J. p 340 note 6.

Consolidation of school districts

In proceeding attacking the validity of consolidated school district made up of what had been a common school district and an independent school district, and challenging authority of those who had taken over control of the consolidated district, the information was not subject to general demurrer because the common school district and the independent school district were not made parties respondent.—Crain v. Adams, Tex.Civ.App., 120 S.W.2d 290.

96. Fla.—State ex rel. Landis v. Prevatt, 156 So. 731, 116 Fla. 718.

97. U.S.—New Orleans Debenture Redemption Co. v. Louisiana, La., 21 S.Ct. 378, 180 U.S. 320, 45 L.Ed. 550.

51 C.J. p 341 note 7.

98. Mich.—Smith v. Norton Tp., Muskegon County, 29 N.W.2d 836, 319 Mich. 365—De Young v. Banks Tp., Antrim County, 20 N.W.2d 166, 312 Mich. 317—Ruppert v. Township School Dist. of Marion Tp., Osceola County, 233 N.W. 387, 252 Mich. 482.

51 C.J. p 340 note 6 [b] (2).

99. Mo.—State v. Business Men's Club, 163 S.W. 901, 178 Mo.App. 548.

Pa.—Commonwealth ex rel. Margiotti v. Union Traction Co. of Philadelphia, Com.Pl., 44 Dauph.Co., 415, affirmed 194 A. 661, 327 Pa. 497.

51 C.J. p 341 note 8.

1. Ill.—People ex rel. Barrett v. Gentile Co-op. Ass'n, 64 N.E.2d 907, 392 Ill. 393.—People ex rel. Ray v. Lewistown Community High School Dist. No. 241, 57 N.E.2d 486, 388 Ill. 78. People ex rel. Webber v. City of Spring Valley, 21 N.E. 843, 129 Ill. 169.

51 C.J. p 341 note 9.

Annexation of territory

A legally organized school or drainage district is a necessary party in its corporate capacity to a quo warranto proceeding to test the validity of an extension of its boundaries.—State ex inf. Prosecuting Attorney ex rel. Hutnell v. Chipley, 116 S.W.2d 140, 233 Mo.App. 61 51 C.J. p 341 note 9 [a].

Holding company not necessary or proper party

In proceeding to oust electrical company from use of city's streets, holding company owning common stock and bonds of electrical company held not necessary or proper party defendant, electrical company being only proper party defendant.—State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 96 S.W.2d 607, 339 Mo. 385, 106 A.L.R. 1169.

Collection of unauthorized rate increase

Quo warranto to prevent insurance companies from collecting increase in rate pursuant to unauthorized court order should be directed to companies which maintained suit below and collected and impounded increased rate, although such companies surrendered their licenses to transact new business in state before quo warranto was instituted.—State ex inf. McKittrick v. American Colony Ins. Co., 80 S.W.2d 876, 336 Mo. 406.

2. Ill.—People ex rel. Ray v. Lewistown Community High School Dist. No. 241, 57 N.E.2d 486, 388 Ill. 78.

3. Ill. People v. Toledo, etc., R. Co., 117 N.E. 701, 280 Ill. 496, Ann. Cas.1918D 234.

Joinder of several corporations constituting illegal combination see Monopolies § 120 a.

Insurance companies; collection of increased rate

Quo warranto held to lie jointly against insurance companies to oust them of privilege of collecting increased rate where state inspection bureau, acting under powers of attorney from companies, applied for rate increase for all of companies, postponed effective date of increase, and finally directed collection of increased rate; companies which came into state after filing of suit to review order of superintendent of insurance denying rate increase and which voluntarily joined in suit and collected increase under court order could be joined with others in suit.—State ex inf. McKittrick v. American Colony Ins. Co., 80 S.W.2d 876, 336 Mo. 406.

Misjoinder

Pa.—Commonwealth ex rel. Margiotti v. Union Traction Co. of Philadelphia, Com.Pl., 44 Dauph.Co. 415, affirmed 194 A. 661, 327 Pa. 497.

4. Fla.—State ex rel. Landis v. Prevatt, 156 So. 731, 116 Fla. 718.

5. Ind.—Mel River R. Co. v. State, 57 N.E. 388, 155 Ind. 433.

N.Y.—People v. Albany, etc., R. Co., 77 N.Y. 232.

6. Ohio.—State v. Cleveland, etc., R. Co., 12 Ohio Cir.Ct.,N.S., 321, 31 Ohio Cir.Ct. 377.

building and loan association.[7]

Assignor and assignee of franchise. An action to forfeit franchises which have been illegally assigned by one corporation to another must be brought against the assignee company.[8] The assignor company is a proper party to the action or proceeding,[9] and according to one,[10] although not another,[11] authority, it is a necessary party.

The receiver of a corporation, appointed by a federal court, is neither a necessary nor a proper party to quo warranto by the state to forfeit the charter.[12]

Purchaser at execution sale of a franchise of corporation need not be made a party to a proceeding to forfeit the charter of the corporation.[13]

c. Proceedings to Try Title to Office

In quo warranto proceedings to try title to office, general rules have been applied as to proper or necessary parties defendant, or the joinder thereof.

The incumbent is a necessary party to a quo warranto proceeding instituted to determine his title to an office.[14] Under some authorities, the person who claims and exercises an office is the only proper defendant in a quo warranto proceeding to test the right to such office,[15] unless it is alleged that a person, other than the incumbent, is entitled to the office, in which case, under the construction placed on some code provisions, he must be made a party defendant,[16] or unless the object of the information is not only to oust the incumbent of the office, but also to require another officer to restore the relator to the office, in which case the latter officer may be made a party.[17] However, a corporation may be held to have an interest legally sufficient to have it constituted a proper party defendant in proceedings questioning election to a number of offices therein,[18] as where ouster of the officers would cause a definite disruption in its affairs.[19]

In a case where the rights involved and the proof are not substantially similar as to all defendants, it is improper to join two or more defendants in one proceeding to try their titles to different offices;[20] but the incumbents of several offices may be named as defendants or respondents in one proceeding where the rights or titles of all depend on the same matters of law or fact,[21] such as the validity of the same election,[22] and this is especially true where all are members of one body, such as a board or council.[23]

A proceeding against one acting as mayor of a city may be against the officer, describing him as

7. **Lessor claiming no interest adverse to state** in quo warranto action to prevent building and loan association from unlawfully continuing to hold lawfully acquired ninety-nine year leasehold was not a necessary party to complete settlement of question involved therein so as to extend jurisdiction of court in action to a determination of issues between association and lessor as to existence of obligations of lease and rights and liabilities of parties thereunder—State ex rel. Johnson v Conservative Savings & Loan Ass'n, 11 N W 2d 89, 143 Neb. 805

8. Ill—People v Toledo, etc., R. Co., 117 N.E 701, 280 Ill. 495, Ann. Cas 1918D 224.
N Y—People v New York City Cent Underground R Co, 21 N Y.S. 373, 66 Hun 633, affirmed 33 N E. 744, 137 N Y 606

9. N Y.—People v. New York City Cent Underground R. Co., supra.

10. Ill—People v. Toledo, etc., R. Co, 117 N.E. 701, 280 Ill. 495, Ann. Cas 1918D 224.

11. N Y—People v. New York City Cent Underground R. Co., 21 N Y S. 373, 66 Hun 633, affirmed 33 N.E 744, 137 N Y. 606.

12. Tex.—City Water Co. v. State, 32 S W. 1033, 88 Tex. 600.

13. Mass.—Commonwealth v. Tenth Massachusetts Turnp. Corp, 5 Cush 509.

14. N J—Burnson v Evans, 60 A. 2d 891, 137 N J Law 511.
Pa—Commonwealth ex rel Weiss v Snyder, Com Pl., 26 North.Co 159.

15. La—State v Kohnke, 33 So 793, 109 La 838.
51 C J. p 341 note 20.
Action to oust officer
Under quo warranto statute providing that all persons claiming to be entitled to same office or franchise may be made defendants in same action, third person who claimed office of county commissioner under a valid election did not have to be joined as a party defendant in action by attorney general to oust county commissioner from office—State ex rel Bible v Malone, Nev, 226 P.2d 277.
Mayor held not proper party
(1) In proceedings to determine defendant's title to office of city clerk after the mayor had cast deciding vote for defendant at a meeting of the board of mayor and aldermen, it was improper to make mayor a party—Attorney General ex rel Quinn v. Hunter, 29 A 2d 116, 92 N. H. 206.
(2) The mayor of a city should not have been named as a defendant in proceedings to determine right of relators to office of assistant superintendent of weights and measures, where mayor did not hold office in controversy—Van Brookhoven v Kennedy, 14 A.2d 789, 125 N J.Law 178, affirmed 17 A.2d 152, 125 N.J. Law 507.
Person vacating office
Pa—Commonwealth ex rel. Weiss v Snyder, Com Pl., 26 North Co 163

16. N Y—People v McClellan, 104 N.Y.S 447, 119 App Div 416.

17. Wash—State v. Fassett, 125 P. 963, 69 Wash. 555.

18. Pa—Siranovich v Butkovich, 76 A 2d 640, 366 Pa 56

19. Pa.—Siranovich v. Butkovich, supra.

20. Ga—Sweat v Barnhill, 155 S E 18, 171 Ga. 294.
51 C.J. p 342 note 23.

21. R I—**Corpus Juris cited in** Black v Cummings, 5 A.2d 858, 859, 62 R I 361.
51 C J p 342 note 24.

22. Pa—Commonwealth v. Pfromm, 100 A. 276, 255 Pa 485.
51 C.J. p 342 note 25.

23. Neb.—Thompson v. James, 250 N W 237, 125 Neb. 350, 253 N.W. 431, 125 Neb. 888.
51 C.J. p 342 note 26.

such, for usurping a franchise, or against him as an individual, charging the usurpation of the office.[24]

§ 33. Intervention and Substitution of Parties

General rules and statutes governing the intervention or substitution of parties have been applied in quo warranto proceedings.

Intervention of persons or corporations having an interest in the subject matter of the litigation is sometimes allowed in quo warranto proceedings;[25] but in jurisdictions wherein the proceeding is deemed quasi-criminal in character, as discussed supra § 3, there is no right to intervene.[26] It has been both affirmed[27] and denied[28] that there may be a right to intervene in a proceeding to forfeit or vacate the charter of a corporation. It is no objection to an intervention that the intervenor may oppose both parties.[29]

A petition to intervene has been held to call on the trial judge to exercise his discretion as to whether the issue presented by the petition is germane to the particular purpose of the proceeding[30] and would determine the several rights of diverse parties, as to the same office;[31] and a statute providing that where a complete determination of the controversy cannot be had without the presence of other parties the court may direct them to be brought in, and that where a person, not a party, has an interest or title which the judgment may affect, the court, on application, shall direct him to be made a party, applies to quo warranto proceedings.[32]

Under a statutory provision that an intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, one who is permitted to intervene as defendant in a quo warranto proceeding has not been permitted to enter a special appearance and move for dismissal of the main proceedings.[33]

Change or substitution of relator is proper in case of the death of the original relator;[34] but the court will not permit the substitution of a private person as a relator in the place of the attorney general who desires to discontinue the proceeding.[35] Where,

24. Mo.--State v. Coffee, 59 Mo. 59.

25. N.Y.--People v. Albany, etc., R. Co., 77 N.Y. 232.
N.C.--Attorney General v. Simonton, 78 N.C. 57.

Inclusion of property within city limits

(1) In proceeding for exclusion from city limits of part of a tract which had been included in the municipality by statute, owners of other property in the same tract had the right to intervene and ask for exclusion of their property, although not invited to join the suit.--City of Auburndale v. State ex rel. Landis, 184 So. 787, 135 Fla. 172.

(2) In proceeding by town to challenge propriety of proceeding to include within city limits territory belonging to town, another town occupying practically same position as relator would be allowed to intervene; and taxpayers, residents, and mining companies owning property in affected area, who or which might have special rights which would be affected by final determination, would be permitted to intervene, although they might not have been permitted to come in as original and only relators.—State ex rel. Town of Stuntz v. City of Chisholm, 206 N. W. 689, 196 Minn. 285.

Interest of interveners

(1) Individual taxpayers having only general public interest could not maintain action as interveners in quo warranto against consolidated school district.—Fritts v. Thorpe, 299 P. 884, 140 Okl. 219—Sugart v. Thorpe, 295 P. 605, 147 Okl. 152.

(2) In so far as it conflicts with the statute governing quo warranto, the chancery rule that an intervenor must have such interest in the suit that a full and complete determination cannot be had without him and that he may neither change the issues between the parties nor raise new ones cannot apply; where the original complaint was filed by the state's attorney on the relation of persons claiming offices which they alleged defendants were usurping on a city board of fire and police commissioners, the chief of police, the acting police matron, and certain police officers and firemen had an interest which entitled them to intervene, and they were not required to allege that they did not participate in the election, since the proceeding was a public one.--People ex rel. Sandberg v. Grabs, 26 N. E.2d 494, 373 Ill. 423.

Request that attorney general file petition

Where the proceeding, already on file, is public in its nature, interveners need not allege that they had asked the attorney general and state's attorney to file their petition to intervene, the court's leave to intervene being all that need be obtained.—People ex rel. Sandberg v. Grabs, 26 N.E.2d 494, 373 Ill. 423.

26. Idaho.—People v. Green, 1 Idaho 235.

27. N.Y.—People v. Albany, etc., R. Co., 77 N.Y. 232.

28. Pa.—Commonwealth v. Altoona, etc., Connecting R. Co., 15 Pa.Dist. 812, 31 Pa.Co. 646.
51 C.J. p 342 note 32.

29. Ill.--People ex rel. Sandberg v. Grabs, 26 N.E.2d 494, 373 Ill. 423.

30. Ill.--People ex rel. Boyington v. Northfield Tp. High School Dist. No. 225, 84 N.E.2d 553, 402 Ill. 435
--People ex rel. Sandberg v. Grabs, 26 N.E.2d 494, 373 Ill. 423.

Petition questioning existence of school district held sufficient for court to exercise its discretion.—People ex rel. Boyington v. Northfield Tp. High School Dist. No. 225, 84 N.E.2d 553, 402 Ill. 435.

Striking at existence of office in contention

An intervening petition which seeks to strike at the very existence of the office over which the original parties are contending is germane to a proceeding instituted on behalf of the public and is properly allowed.
--People ex rel. Sandberg v. Grabs, 26 N.E.2d 494, 373 Ill. 423.

Discretion held not abused in permitting intervention. People ex rel. Sandberg v. Grabs, supra.

31. Ill.--People ex rel. Sandberg v. Grabs, supra.

32. Ill.--People ex rel. Boyington v. Northfield Tp. High School Dist. No. 225, 84 N.E.2d 553, 402 Ill. 435--People ex rel. Sandberg v. Grabs, 26 N.E.2d 494, 373 Ill. 423.

33. Mich. Smith v. Norton Tp., Muskegon County, 29 N.W.2d 826, 319 Mich. 365.

34. Colo.—People v. Lindsey, 253 P. 465, 80 Colo. 465, certiorari denied 47 S.Ct. 767, 274 U.S. 757, 71 L.Ed. 1336.

35. Pa.--Commonwealth v. Dillon, 81 Pa.St. 41.

pending the determination of proceedings to test the legality of a corporate election, the terms of office of the original respondents expire, the court may order the substitution, for the original respondents, of the persons elected or appointed to fill their respective places.[36]

§ 34. Process

Except in some instances, as in the case of special statutes, general rules governing process in civil actions apply in quo warranto proceedings

In the absence of voluntary appearance, jurisdiction of defendant in a quo warranto proceeding may be acquired only by proper notice to, or service of proper process on, him;[37] and in the absence of special legislative direction, the courts may, in the interests of justice, direct that notice be served on parties who may probably or possibly be interested in the outcome of the litigation under constitutional or legislative provisions.[38] In the absence of statute, the form or manner of notifying defendant or other person to appear[39] and the length of notice[40] are within the discretion of the court. Rules and statutes relating to process in civil actions generally are sometimes held not applicable to quo warranto proceedings,[41] especially where there are other statutes making special provision for the issuance and return of process in such proceedings.[42] However, where a civil action under the code is substituted for quo warranto, as discussed supra § 1, the process is the same as in other civil actions;[43] and a statute providing that jurisdiction in actions in the nature of quo warranto be obtained by the service of notice "as in other actions" means the same process by which jurisdiction is obtained in civil actions.[44] A summons requiring defendant to answer in a shorter time than that allowed by a code or statutory provision is fatally defective.[45]

At common law the first process was a venire facias or subpœna, and, if defendant failed to appear in response thereto, a distringas or attachment was next issued.[46]

Alternative writ is sufficient where it follows the language of the prayer of the information for the issuance of process requiring and commanding defendant to show by what authority he is practicing the profession in question.[47] The issuance of an alternative writ has been held neither authorized nor required.[48]

Rule to appear and plead or to show cause Unless authorized by statute,[49] a rule on defendant to appear and plead within a time fixed is not sufficient

36. Pa.—Commonwealth ex rel. v. Haney, 41 Pa.Dist. & Co. 298

Substitution limited to holders of same offices as original respondents.—Commonwealth ex rel. v. Haney, supra

Amendment of suggestion; answer

The relators should amend their suggestion to relate specifically to the substituted respondents and the election at which they were chosen, and the substituted respondents should be given an opportunity to answer such suggestion in order that the case may proceed in an orderly manner, although the issues remain the same as on the original suggestion.—Commonwealth ex rel. v. Haney, supra.

37. Or.—State v. Kleckner, 239 P. 817, 240 P. 1115, 116 Or. 371.
51 C.J. p 342 note 36

Writ issued in vacation held improperly issued without notice to respondent—State ex rel. McKittrick v. Missouri Service Co., Mo.App., 102 S.W.2d 675.

38. Cal.—City of Oakland v. Key System, 149 P.2d 195, 64 Cal.App. 2d 427.

Railroad commission

Cal.—City of Oakland v. Key System, supra.

39. Cal.—City of Oakland v. Key System, supra.

Me.—Reed v. Cumberland, etc., Canal Corp., 65 Me. 53

40. Cal.—City of Oakland v. Key System, 149 P.2d 195, 64 Cal.App. 2d 427.

Me.—Reed v. Cumberland, etc., Canal Corp., 65 Me. 53.

Notice of filing

In quo warranto proceeding to oust electrical company from use of city's streets, fact that court rule requiring notice of filing of original information to be served on respondent before such information is presented to court was not complied with was held not to invalidate proceeding where full opportunity was afforded electrical company to make defenses and safeguard its substantial rights.—State ex Inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 96 S.W.2d 607, 339 Mo. 385, 106 A.L.R. 1169.

41. N.J.—Attorney General v. Delaware, etc., R. Co., 38 N.J.Law 282.
N.M.—Territory v. Ashenfelter, 12 P. 879, 4 N.M. 85.

42. Ill.—People v. Moeckel, 100 N.E. 272, 256 Ill. 598.
51 C.J. p 342 note 41.

Statutes held not in conflict

Section of Quo Warranto Act dealing with form of summons held not to conflict with any of preceding sections of statute, but to be in entire harmony therewith.—People, by Koerner v. United Medical Service, 200 N.E. 157, 362 Ill. 442, 103 A.L.R. 1229

43. S.C.—State v. Sanders, 110 S.E. 808, 118 S.C. 498
51 C.J. p 342 note 43.

44. Wash.—State ex rel. Carter v. Superior Court for King County, 138 P.2d 843, 18 Wash.2d 130.

Show cause order insufficient

Wash.—State ex rel. Carter v. Superior Court for King County, supra.

45. Ohio.—State v. Robinson, 9 Ohio Dec., Reprint, 249, 11 Cinc.L.Bul. 294.
S.C.—State v. Tollison, 78 S.E. 521, 95 S.C. 58.

46. Vt.—State v. Hunton, 28 Vt. 594.
51 C.J. p 342 note 45
"Venire facias" generally see Venire, also 66 C.J. p 1602 notes 10, 11
"Distringas" generally see Distringas.

47. Ala.—Donovan v. State, 109 So. 290, 215 Ala. 55.

48. Ala.—Rainwater v. State ex rel. Strickland, 187 So. 484, 237 Ala. 482, 121 A.L.R. 981.

49. N.J.—Anderson v. Myers, 67 A. 1036.
51 C.J. p 342 note 48.

to confer jurisdiction over him[50] A private relator applying for a writ of quo warranto has been held not entitled to the writ without a previous rule to show cause.[51]

Extraterritorial service of process is permissible under the construction placed on some statutes.[52]

Service by publication on nonresidents in a proceeding in a particular court cannot be made where the statute provides that such court has jurisdiction of quo warranto only within the county in which defendant resides[53]

Motion to quash or set aside. A motion to quash the writ may be made before pleading to the information,[54] and may be entertained and acted on by the court even after the writ is issued.[55] The writ will be quashed where it is made returnable at a time not authorized by law[56] On the other hand, the fact that the writ was not served in time, although ground for a motion to set aside the service,[57] is not ground for a motion to quash the writ.[58] A citation will not be quashed because of its failure to state the nature of the relator's demand where the nature of such demand is sufficiently stated in a certified copy of the petition accompanying the citation.[59]

Waiver of objections. Objections to the service of the writ or notice,[60] or to the lack of service,[61] are waived by pleading to the merits.

§ 35. Pleading

The defendant's appearance and pleading to the merits waive the objection that an information is demurrable and lays no foundation for bringing him into court.

Defendant's appearance and pleading to the merits waive the objection that an information is demurrable[62] and lays no foundation for bringing him into court.[63]

§ 36. —— Mode and Form in General

The pleadings in a quo warranto action or proceeding are governed by the rules applicable to pleadings in ordinary civil actions.

The pleadings in a quo warranto action or proceeding are governed in general by the rules applicable to pleadings in ordinary civil actions,[64] and, as far as possible, should conform to such rules.[65] In a code state the pleadings should conform to the general code of civil procedure;[66] and in a state where, except as changed by statute, the common law governs pleadings in civil actions, the pleadings should, in the main, be in accordance with the common law.[67] In early decisions, however, including some rendered in jurisdictions wherein the pleadings are now governed by the rules obtaining in civil actions generally, it was held that, in a proceeding by information in the nature of quo warranto, the rules of criminal pleading should be enforced as far as pertinent.[68]

§ 37. —— Information, Petition, or Complaint

a. Form and contents generally
b. In proceeding relating to corporation
c. In proceeding relating to office
d. In proceeding relating to profession

a. Form and Contents Generally

(1) In general
(2) General or definite allegations

50. N.Y.—People v. Richardson, 4 Cow. 97.—People v. Richardson, 3 Cow. 357.

51. Pa.—Commonwealth ex rel. Koontz v. Dunkle, 50 A.2d 496, 355 Pa. 493, 169 A.L.R. 1277.

52. Pa.—Commonwealth v. Dillon, 61 Pa. 488—Commonwealth v. Harmony Soc., 21 Pa.Dist. 431.

53. Ohio.—State v. Smith, 6 Ohio Cir.Ct. 410, 3 Ohio Cir.Dec. 515.
Jurisdiction and venue see supra § 24.

54. Ala.—Capital City Water Co. v. State, 18 So. 62, 105 Ala. 406, 29 L.R.A. 743.
51 C.J. p 342 note 53.
Motion to quash or dismiss pleading see infra § 40.
Grounds for quashing writ
Pa.—Commonwealth v. United Republican Club of Ridley Tp., Com. Pl., 32 Del.Co. 545.

55. Fla.—City of Winter Haven v. State ex rel. Landis, 170 So. 100, 125 Fla. 392.

56. Pa.—Commonwealth v. Brisbin, 17 Pa.Dist. 558, 34 Pa.Co. 255.

57. Pa.—Commonwealth v. Getz, 4 Pa.Dist. 391.

58. Pa.—Commonwealth v. Getz, supra.

59. Tex.—Griffin v. State, Civ.App., 147 S.W. 328.

60. Mo.—State v. Bacon Club, 44 Mo.App. 86.
Pa.—Commonwealth v. Helms, 26 Wkly.N.C. 358.

61. Or.—State v. Hodgin, 146 P. 86, 149 P. 530, 76 Or. 480.

62. Conn.—State v. Kennedy, 37 A. 503, 69 Conn. 220.
Demurrer generally see infra § 40.

63. Conn.—State v. Kennedy, supra.

64. Minn.—Corpus Juris cited in State ex rel. City of St. Paul v. Oehler, 16 N.W.2d 783, 784, 218 Minn. 287.
Mo.—State on Inf. of McKittrick v. Wiley, 160 S.W.2d 677, 349 Mo. 239.
Mont.—State ex rel. Nagle v. Stafford, 34 P.2d 372, 97 Mont. 275.
51 C.J. p 343 note 60.

65. Minn.—Corpus Juris cited in State ex rel. City of St. Paul v. Oehler, 16 N.W.2d 783, 784, 218 Minn. 287.
51 C.J. p 343 note 61.

66. Mo.—State v. Missouri Pac. R. Co., 144 S.W. 1088, 240 Mo. 35.
51 C.J. p 343 note 62.

67. Ill.—People v. Blair, 170 N.E. 680, 339 Ill. 57.
51 C.J. p 343 note 63.

68. Ill.—Lavalle v. People, 68 Ill. 252.
51 C.J. p 343 note 64.

(1) In General

Under some statutes a quo warranto proceeding may be instituted by complaint and summons or by making application for a writ by petition, but an information may be employed except where the codes require use of a complaint While a complaint or information is a pleading in one sense, strictly its office is not to tender an issue of fact but to call on defendant in general terms to show by what warrant he holds and exercises the privilege claimed The sufficiency of the pleading may be determinable by common-law rules, but there must be compliance with statutes relating to form and contents.

Under some statutes a quo warranto proceeding may be instituted by complaint and summons,[69] or by the ancient practice of making application for a writ by petition,[70] but an information may be employed,[71] except in jurisdictions wherein the use of a complaint is required by code provision,[72] and even in such jurisdictions the complaint may be the same in effect as the common-law information.[73]

A complaint or information in a quo warranto proceeding is, in one sense, a pleading,[74] but it is not a pleading in the strict sense;[75] its office is not to tender an issue of fact,[76] but, following the function of the ancient writ, it is the voice of sovereignty calling on defendant in general terms to show by what warrant he holds and exercises the privilege claimed,[77] and plaintiff is not required to allege any fact.[78] It is not a pleading founded on a written instrument within the meaning of a statute requiring a copy of the instrument to be filed in such cases.[79]

The sufficiency of the pleading may be determinable by common-law rules,[80] but there should be a compliance with any applicable code or statutory provisions relating to the form or contents of the pleading.[81] An information must make some charge against defendant or respondent,[82] where it is sought to invoke a statutory remedy in the nature of quo warranto, it is necessary to allege matters showing that the case is within the statute;[83] and, if the case-made is one to which another remedy would ordinarily apply, the information must be so drawn as to show that such other remedy has been exhausted or is inapplicable.[84] Where technical words are not employed, the court will use the ordinary meaning of the words in the pleading.[85]

Consent of state officer. In a case which may be presented only by a state officer, or with his consent, the information should be exhibited by him,[86] and show on its face that it is presented on his authority.[87]

Interest of private relator. Where there is a private relator or plaintiff, the petition or information must set forth such an interest on his part in the subject matter of the inquiry as will be sufficient, in the particular jurisdiction, to give him a standing to institute and maintain the proceeding.[88]

69. Ala.—Rainwater v. State ex rel. Strickland, 187 So 484, 237 Ala. 482, 121 A.L.R. 981.
Summons see supra § 34.

70. Me.—Burkett ex rel Leach v. Ulmer, 15 A.2d 858, 137 Me. 120.

71. Ala.—West End v. State, 36 So 423, 138 Ala. 295.
Me.—Burkett ex rel. Leach v Ulmer, 15 A.2d 858, 137 Me. 120.
Tenn.—State v Ward, 43 S.W.2d 217, 163 Tenn 265.
51 C.J. p 343 note 67.

72. Mont.—Territory v. Virginia Road Co., 2 Mont. 96.
S.C.—State v. Evans, 12 S.E 816, 33 S.C. 612.
51 C.J. p 343 note 68.

73. Mont.—Territory v. Virginia Road Co., 2 Mont. 96.

74. Ala.—Louisville, etc., R. Co. v. State, 45 So 296, 154 Ala. 156.

75. Ill.—People ex rel Ray v Lewistown Community High School Dist No. 241, 57 N.E.2d 486, 388 Ill. 78.

76. Ill.—People ex rel. Ray v. Lewistown Community High School Dist No. 241, supra.
51 C.J. p 344 notes 2, 4.

77. Ill.—People ex rel. Ray v. Lewistown Community High School Dist No 241, supra
51 C.J. p 344 notes 3, 4.
"Respondent" defined
Mo.—State v. Duncan, 175 S.W. 940, 265 Mo 26, 36, Ann.Cas.1916D 1.
54 C.J. p 726 note 21 [b].

78. Ill.—People ex rel. Ray v. Lewistown Community High School Dist, 57 N.E.2d 486, 388 Ill 78
General or definite allegations see infra subdivision a (2) of this section.

79. Ind.—Yonkey v. State, 27 Ind 236.

80. Mont.—Territory v. Virginia Road Co., 2 Mont. 96

81. Wis.—State v. Rosenthal, 102 N.W. 49, 123 Wis 442.
51 C.J. p 343 note 71.
Writ treated as pleading
(1) Under the statute permitting demurrer to a writ of quo warranto, the writ must be treated as a pleading as well as a process, and, since it is the only pleading at that stage of the proceeding, must contain factual averments which, if true, will justify the relief sought.—State ex rel. George v. Lutz, 46 S.E.2d 245, 131 W.Va 126
(2) Under the statute, restricting a defendant to a plea of not guilty or to a demurrer or both to a writ of quo warranto, a plea of not guilty goes only to the writ which must contain sufficient factual averments so that defendant may join issue by a plea of not guilty.—State ex rel. George v. Lutz, supra

82. Ill.—People v. Miller, 136 N.E 674, 304 Ill. 279

83. Ill.—People v. Ridgley, 21 Ill 65
51 C.J. p 343 note 73.

84. Mass.—Keeney v. Consumers' Gas Co., 8 N.E. 138, 142 Mass. 417.

85. W.Va.—State ex rel. Scanes v Babb, 20 S.E.2d 683, 124 W.Va. 428.

86. Ind.—Eaton v. State, 7 Blackf 65
Mo.—State v. Taylor, 106 S.W. 1023, 208 Mo. 442.
51 C.J. p 343 note 75.

87. Mo.—State v. Taylor, supra
51 C.J. p 343 note 76

88. Mich.—**Corpus Juris cited in** Marian v. Beard, 242 N.W. 880, 881, 259 Mich 188.
Mo.—State ex inf Ellis ex rel. Patterson v. Ferguson, 65 S.W.2d 97, 333 Mo 1177, certiorari denied Ferguson v. State of Missouri ex inf.

Departure from, or conformity with, petition for leave. An information in the nature of a quo warranto is not necessarily bad because it does not follow the petition for leave of court to file the information,[89] provided it does not go outside of the substantial subject matter of the petition[90] or of the order allowing the information to be filed.[91] The filing of an information without leave of court, when leave is required, is not the commencement of the suit; until the petition for leave is granted, the information on file is a mere nullity.[92] On order of court authorizing the proceeding, however, the original petition becomes effective without the filing of a new pleading.[93]

Recital of giving bond by the relator can have no proper place in the information where the statute requires the bond to be given on the filing of the information.[94]

Surplusage. An unnecessary allegation in an information may be disregarded as surplusage.[95]

Conclusion. In some,[96] but not in other,[97] jurisdictions, a complaint or information in quo warranto proceedings should conclude against the peace and dignity of the state or the people thereof.

Prayer. In determining whether a complaint or information states a cause of action, the prayer thereof may be disregarded[98] and the complaint or information may be held sufficient if it states a cause of action for some relief,[99] either under a statute[1] or at common law.[2] Where several matters are included in the information, a prayer for relief need not be added to each paragraph,[3] since a prayer at the end of the information will be taken distributively.[4]

Term for filing In some jurisdictions an information in the nature of a quo warranto should be filed at the law term,[5] rather than at the trial term;[6] and, if wrongly filed, may be transferred.[7]

(2) General or Definite Allegations

In some jurisdictions the complaint or information may be in general terms, but in other jurisdictions the facts on which the complainant relies must be alleged in the complaint or information positively and certainly, and in a traversable form.

In some jurisdictions the complaint or information may be in general terms,[8] at least where usurpation is claimed,[9] and it is sufficient to set forth the rights and privileges usurped,[10] and the wrongful act or omission complained of,[11] as by alleging that defendant or respondent holds and exercises or enjoys the right, license, privilege, or franchise in question without lawful authority.[12] These rules

Ellis, 54 S.Ct. 559, 291 U.S. 682, 78 L.Ed. 1070.
51 C.J. p 344 note 77.

89. Ga.—Welchel v. State, 76 Ga. 644.
Ill.—People v. Strawn, 106 N.E. 840, 265 Ill. 392.
Leave of court see supra §§ 19–21.
Showing leave without allegation thereof see infra § 42.

90. Ga.—Welchel v. State, 76 Ga. 644.

91. Ga.—Welchel v. State, supra.
Complaint held not a variance from order.—Farmer v. State ex rel. Killcrease, 187 So. 735, 28 Ala.App. 398, certiorari denied 187 So. 737, 237 Ala. 555.

92. Ill.—People v. Sackett, 184 N.E. 646, 351 Ill. 363.

93. Tex.—Blackburn v. State ex rel. Echols, Civ.App., 72 S.W.2d 627.

94. N.J.—Hosp v. Martin, 84 A. 1059, 83 N.J.Law 299.

95. Ariz.—State ex rel. Sullivan v. Moore, 64 P.2d 809, 49 Ariz. 51.
Mo.—State, ex inf. Ellis ex rel. Patterson v. Ferguson, 65 S.W.2d 97, 333 Mo. 1177, certiorari denied Ferguson v. State of Missouri ex inf. Ellis, 54 S.Ct. 559, 291 U.S. 682, 78 L.Ed. 1070—State v. Armour Packing Co., 176 S.W. 382, 265 Mo. 121.

96. Ill.—People v. Larsen, 106 N.E. 947, 265 Ill. 406.

97. Vt.—State v. Greene, 88 A. 515, 87 Vt. 94.

98. Mo.—State v. Missouri Pac. R. Co., 144 S.W. 1088, 240 Mo. 35.

99. Wis.—State v. Norcross, 112 N. W. 40, 132 Wis. 534, 122 Am.S.R. 998.

1. Mo.—State v. Missouri Pac. R. Co., 144 S.W. 1088, 240 Mo. 35.

2. Mo.—State v. Missouri Pac. R. Co., supra.

3. Ind.—State v. Bailey, 16 Ind. 46, 79 Am.D. 405.

4. Ind.—State v. Bailey, supra.

5. N.H.—State v. Portland, etc., R. Co., 58 N.H. 113.
Time to sue generally see supra § 23.

6. N.H.—State v. Portland, etc., R. Co., supra.

7. N.H.—State v. Portland, etc., R. Co., supra.

8. Cal.—People ex rel. Paganini v. Town of Corte Madera, 218 P.2d 810, 97 Cal.App.2d 726—City of Oakland v. El Dorado Terminal Co., 106 P.2d 1000, 41 Cal.App.2d 320—People ex rel. Stephenson v. Hayden, 49 P.2d 314, 9 Cal.App.2d 312.
Fla.—State ex rel. Watson v. Hurlbert, 20 So.2d 693, 155 Fla. 531—State ex rel. Landis v. Sovereign Camp, W. O. W., 180 So. 33, 131 Fla. 867.
Ill.—People ex rel. Ray v. Lewistown Community High School Dist. No. 241, 57 N.E.2d 486, 388 Ill. 78—People v. Sackett, 184 N.E. 646, 351 Ill. 363.
Mo.—State ex inf. of McKittrick v. Wiley, 160 S.W.2d 677, 347 Mo. 239.
51 C.J. p 344 note 96.

9. Cal.—People ex rel. Stephenson v. Hayden, 49 P.2d 314, 9 Cal.App. 2d 312.
Ill.—People ex rel. Ray v. Lewistown Community High School Dist. No. 241, 57 N.E.2d 486, 388 Ill. 78.
Mo.—State ex inf. of McKittrick v. Wiley, 160 S.W.2d 677, 347 Mo. 239.
51 C.J. p 344 note 97.

10. Mich.—People v. River Raisin, etc., R. Co., 12 Mich. 389, 86 Am. D. 64.

11. Ohio.—State v. Toledo R., etc., Co., 3 Ohio Cir.Ct.,N.S., 385, 23 Ohio Cir.Ct. 603.

12. Cal.—City of Oakland v. El Dorado Terminal Co., 106 P.2d 1000, 41 Cal.App.2d 320.
Ill.—People ex rel. Ray v. Lewistown Community High School Dist. No. 241, 57 N.E.2d 486, 388 Ill. 78.

obtained at common law,[13] and in some code states the allegations need not be more specific and detailed than was required at common law.[14] In jurisdictions where such rules obtain, however, specific matters which might be set up in the replication may, at the pleader's option, be alleged in the information,[15] and, if the complaint, besides making general allegations which, standing alone, would be sufficient, specifies the particular facts claimed to show usurpation or other illegality, and these do not amount to a cause of action, the entire pleading is bad.[16]

In other jurisdictions the facts known to complainant, and on which he relies, must be alleged in the complaint or information[17] positively,[18] with certainty,[19] and in a traversable form;[20] and statements which are mere conclusions of law are insufficient;[21] and in jurisdictions where such provisions exist, effect will be accorded code or statutory provisions that the complaint shall set forth facts warranting the issue of the writ and the judgment sought thereon,[22] that the information shall consist of a plain statement of the facts which constitute the grounds of the proceeding,[23] or that the complaint must concisely and clearly set forth the act or omission complained of.[24]

b. In Proceeding Relating to Corporation

(1) Public corporations
(2) Private corporations

(1) Public Corporations

A petition, complaint, or information attacking the formation of a public corporation, or seeking to restrain the unlawful exercise of powers by such a corporation, must state a cause of action.

A petition, complaint, or information attacking the formation or incorporation of a municipal or other public corporation must state a cause of action,[25] and it is insufficient to do so where it shows that the incorporation is valid;[26] but, if the object of the proceeding is to restrain the unlawful exercise of powers by a municipality whose existence is admitted, the fact of the incorporation of defendant should be stated so as to show its legality and powers,[27] and the information or petition should show an unlawful usurpation of authority by the municipality that is remedial in the quo warranto proceeding.[28] Facts, and not conclusions, must be

Mo.—State ex inf of McKittrick v. Wiley, 160 S.W.2d 677, 347 Mo. 239.
51 C.J. p. 344 note 1.

13. Ind.—Bush v. State, 119 N.E. 417, 187 Ind. 339.
51 C.J. p. 344 note 4.

14. Colo.—Lockhard v. People, 178 P. 565, 65 Colo. 558.

15. Cal.—People ex rel. Paganini v. Town of Corte Madera, 218 P.2d 310, 97 Cal.App.2d 726.
Fla.—State v. Stuart, 120 So. 335, 97 Fla. 69, 64 A.L.R. 1307.
51 C.J. p. 344 note 7.
Matters which may be alleged in replication see infra § 39.

16. Fla.—State ex rel. Landis v. Sovereign Camp, W.O.W., 180 So. 33, 131 Fla. 867.
51 C.J. p. 344 note 8.

17. Me.—State v. York Light, etc., Co., 93 A. 61, 113 Me. 144.

18. Vt.—State v. Greene, 88 A. 515, 87 Vt. 94.
51 C.J. p. 344 note 10.

19. Me.—State v. York Light, etc., Co., 93 A. 61, 113 Me. 144.
Vt.—State v. Greene, 88 A. 515, 87 Vt. 94.
51 C.J. p. 344 note 11.

20. Vt.—State v. Watson, 117 A. 663, 96 Vt. 131.
51 C.J. p. 345 note 12.

21. Vt.—State v. Watson, supra.
51 C.J. p. 345 note 13.

22. Vt.—State v. Watson, supra.
51 C.J. p. 345 note 15.

23. Ind.—Bush v. State, 119 N.E. 417, 187 Ind. 339.
51 C.J. p. 345 note 16.

Statement of ultimate fact

Allegation of information in nature of quo warranto that board of county commissioners was in regular session when it appointed township trustee was held statement of ultimate fact, not conclusion.—State v. Richey, 172 N.E. 119, 202 Ind. 116.

24. Ala.—State v. Matthews, 45 So. 307, 153 Ala. 646.
51 C.J. p. 345 note 17.

25. Kan.—State ex rel. McQueary v. Board of County Com'rs of Miami County, 215 P.2d 631, 168 Kan. 723.
Mo.—State ex inf. McKittrick ex rel. Oehler v. Church, App., 158 S.W. 2d 215.
51 C.J. p. 345 note 18.

Complaints, petitions, and informations held sufficient

Colo.—Norton v. People ex rel. Rudbeck, 81 P.2d 393, 102 Colo. 489.
Kan.—State ex rel. Stroberg v. Drainage Dist. No. 3 of McPherson County, 200 P.2d 278, 166 Kan. 225.
Tex.—Crain v. Adams, Civ.App., 120 S.W.2d 290.
51 C.J. p. 345 note 18 [d].

26. Fla.—Enterprise v. State, 10 So. 740, 29 Fla. 128.
51 C.J. p. 345 note 19.

27. Fla.—State v. Anderson, 8 So. 1, 26 Fla. 240.

28. Fla.—State ex rel. Landis v. City of Vero Beach, 153 So. 894, 114 Fla. 233.

Petition held sufficient

Kan.—State ex rel. Morgan v. City of Newton, 23 P.2d 463, 138 Kan. 78.

Information or petition held insufficient

(1) To test, in quo warranto, city's right to lease improved public levee, where petition disclosed that lease was valid.—State v. McCombs, 133 P.2d 134, 156 Kan. 391.

(2) To state cause of action in quo warranto on ground that respondent was prohibited by constitution from purchasing stock of private corporation.—State ex rel. Johnson v. Consumers Public Power Dist., 10 N.W.2d 784, 143 Neb. 753, 152 A.L.R. 480.

(3) To state cause of action on ground that ice plants and steam-heating systems of public service company were not properties which respondent public power district had authority to purchase when it acquired all of common stock of such company.—State ex rel. Johnson v. Consumers Public Power Dist., supra.

(4) To state cause of action on ground that public power district had no power to purchase interconnected transmission lines in another state.—State ex rel. Johnson v. Consumers Public Power Dist., supra.

(5) To state cause of action on ground that public power district purchasing electric system from pri-

alleged to show that the results would have been different if the matters complained of had not occurred.[29]

Annexation. A petition attacking the validity of annexation of territory to a city is sufficient where it clearly shows that the action of the city in the annexation was not a compliance with an applicable statute.[30] An information questioning the annexation of lands to a drainage district need not allege fraud.[31]

(2) Private Corporations

An information charging an association or a number of individuals with acting or assuming to act as a corporation without right, or to determine the right of a corporation to a franchise claimed to be usurped or exercised without lawful authority, may be in general terms; but in order to forfeit a corporate charter because of misuser or nonuser of the corporate franchise or powers, the complaint or information should clearly state specific facts.

An information charging an association or number of individuals with acting or assuming to act, as a corporation without right to do so or without being incorporated may be in general terms;[32] and an information to determine the right of a corporation to a franchise claimed to be usurped or exercised without lawful authority is sufficient if it sets forth the franchise, alleges its usurpation or unauthorized exercise in general terms, and calls on defendant to show by what authority the franchise is exercised.[33] An information stating generally that respondent was doing business in the state unlawfully is not insufficient,[34] but, when the information attempts by specific allegations to charge usurpation or illegal conduct on the part of respondent, it may be attacked for insufficiency.[35] A petition which attempts to specify the ground on which it is based should not be equivocal, but should show whether a usurpation or a forfeiture is claimed.[36]

In a proceeding to oust a corporation de facto, where its existence as such is admitted or charged, the defects in the proceedings for its organization must be set out distinctly;[37] in order to forfeit a charter because of misuser of the corporate franchise or powers, the complaint or information should allege clearly and distinctly the illegal acts constituting such misuser;[38] and similarly, specific facts

vate corporation terminated such corporation's contractual guaranties of payment of certain municipal bonds without notice to, or consent of, municipalities, and made no provision to fulfill obligations of franchises or contracts assigned to district.—State ex rel. Johnson v. Consumers Public Power Dist., supra.

(6) To state cause of action on ground that public power district purchasing electric system from private corporation violated agreements between such corporation and municipalities, giving them option to purchase certain electrical facilities of corporation within their borders. —State ex rel. Johnson v. Consumers Public Power Dist., supra.

29. Ill.—People v. City of Paris, 44 N.E.2d 154, 380 Ill. 503.

30. Kan.—State v. Coffeyville, 275 P. 134, 127 Kan. 759.
Nev.—State ex rel. Bibb v. City of Reno, 178 P.2d 366, 64 Nev. 127.

Existence of jurisdictional facts

Complaint in quo warranto to annul annexation of territory to city should allege that jurisdictional facts, alleged to have been determined by city council without taking evidence, did not exist to present issue as to council's fact findings.—People ex rel. Strong v. City of Whittier, 24 P.2d 219, 133 Cal.App. 316.

Allegations held insufficient

To show that city was exercising jurisdiction over territory involved in violation of constitution and laws. —City of Winter Haven v. State ex rel. Landis, 170 So. 100, 125 Fla. 392.

31. Ill.—People v. Barber, 106 N.E. 798, 265 Ill. 316.

32. Ill.—People v. Ottawa Hydraulic Co., 3 N.E. 413, 115 Ill. 281.
51 C.J. p 345 note 23.

33. Tex.—**Corpus Juris cited in** State ex rel. City of Jasper v. Gulf States Utilities Co., Civ.App., 185 S.W.2d 501, 502, reversed on other grounds 189 S.W.2d 693, 144 Tex. 184.
51 C.J. p 345 note 24.

Specification of statutory justification for proceeding

Where state's complaint in quo warranto proceeding did not charge defendant corporation in so many words with exercising powers not conferred by law, but did allege that by publication of certain specified scandalous matters defendant corporation had exceeded its corporate authority, and violated constitutional and statutory provisions and defendant made no specific objections, court had right to infer that state was relying on part of quo warranto statute authorizing a quo warranto proceeding to be brought when any corporation exercises powers not conferred by law, as justification for the proceeding.—People v. White Circle League of America, 37 N.E.2d 811, 408 Ill. 564.

In Missouri

(1) In a proceeding in the nature of quo warranto asking for a judgment of ouster, when the proceeding was ex officio by the attorney general, it is unnecessary that the pleading on its face show anything more than that the corporation assumed, usurped, and unlawfully exercised corporate privileges. This is sufficient to put it on its defense. If a corporate franchise is claimed by the state to have been usurped, it need only be alleged generally that the franchise is being exercised without lawful authority.—State v. Monarch Transfer, etc., Co., 20 S.W.2d 60, 323 Mo. 562.
51 C.J. p 345 note 24.

(2) If evident purpose of proceeding is to forfeit charter of corporation for usurpation of powers, relator must plead acts specifically.—State ex inf. Miller v. St. Louis Union Trust Co., 74 S.W.2d 318, 335 Mo. 845; State v. Grimm, 119 S.W. 626, 220 Mo. 483.

34. Fla.—State ex rel. Landis v. Sovereign Camp, W. O. W., 180 So. 33, 131 Fla. 867.

35. Fla.—State ex rel. Landis v. Sovereign Camp, W. O. W., supra.

36. Ala.—Louisville, etc., R. Co. v. State, 45 So. 296, 154 Ala. 156.
Cal.—People v. Stanford, 18 P. 85, 19 P. 693, 77 Cal. 360, 3 L.R.A. 92.
51 C.J. p 346 note 26.

37. Ind.—Bush v. State, 119 N.E. 417, 187 Ind. 339.
51 C.J. p 346 note 27.

38. U.S.—Rubert Hermanos, Inc., v. People of Puerto Rico, C.C.A.Puerto Rico, 106 F.2d 754, reversed on other grounds People of Puerto Rico v. Rubert Hermanos, Inc., 60 S.Ct. 699, 309 U.S. 543, 84 L.Ed. 916.
Mo.—State ex inf. Miller v. St. Louis

hould be clearly stated if a forfeiture is asked ecause of nonuser of franchises[39] or omission of statutory duty to make reports.[40] The misfeasance or nonfeasance charged as a ground of forfeiture must be alleged to be willful,[41] or at least o be either willful or due to lack of means,[42] but t need not be alleged to be in contravention of the xpress terms of a prohibitory statute or statute mposing a definite penalty.[43] In a proceeding to ust a foreign corporation from its permit to do usiness in the state, it is not necessary for the ttorney general to set out in his information with hat degree of certainty required in an indictment r declaration the ultimate facts on which he reies,[44] and allegations of so-called corelators must, or purposes of issuance of the writ, be accepted as rue and treated as if made on the authority of the ttorney general and in his name.[45]

Jurisdiction. An information against persons acting as a corporation must allege that they have o acted within the state,[46] and in a proceeding to issolve a corporation or forfeit its charter, there hould be allegations as to the time and place of incorporation[47]

Interest of relator. Where a private person claiming to have an interest is the relator, his interest must be shown by allegations of fact,[48] and not merely stated as a conclusion[49]

c. In Proceeding Relating to Office

(1) Public office
(2) Office in private corporation

(1) Public Office

In a proceeding against an incumbent of a public office, the pleading must show that the case is within the controlling statutory provisions, and, according to some authorities and under some circumstances, should sufficiently allege the legal existence of the office, the title or interest of the claimant or relator, and that the defendant usurps or intrudes into the office or holds, possesses, or exercises it unlawfully or without lawful authority.

In a jurisdiction wherein an information in the nature of quo warranto is governed by statute, an information, in order to state a cause of action against an incumbent of a public office, must make allegations showing that the case is within the statute,[50] but it has been held that a petition which

Union Trust Co, 74 S.W.2d 348, 335 Mo. 845

'a.—Commonwealth ex rel. Margiotti v Union Traction Co of Philadelphia, Com.Pl., 44 Dauph Co 415, affirmed 194 A 661, 327 Pa. 497

'ex.—Texas Mut Life Ins. Ass'n v. State, Com App, 58 S.W.2d 37.

1 C.J. p 346 note 28.

llegations held insufficient

(1) To show grounds for granting rit.—State ex rel. Watson v Dade 'ounty Roofing Co, 22 So.2d 793, 156 la 260.

(2) To make out case of corrupt bbying.—Commonwealth v. Kentucky Jockey Club, 38 S.W.2d 987, 38 Ky 739

(3) To form basis for forfeiting harters for engaging in transactions detrimental to public welfare —Commonwealth v. Kentucky Jockey Club, supra.

(4) To raise question of illegality f investments.—Commonwealth v. Kentucky Jockey Club, supra.

llegations held sufficient

(1) As a ground for ouster.

lo.—State, on Inf. of McKittrick, v American Ins. Co., 140 S.W.2d 36, 346 Mo. 269.

'a.—Commonwealth v United Republican Club of Ridley Tp, Com Pl, 32 Del.Co 545.

'ex.—State ex rel. City of Jasper v. Gulf States Utilities Co, 189 S.W., 2d 693, 144 Tex. 184.

(2) To make out case of corrupt bbying against horse racing club dissolved previously to filing petition for forfeiting charter—Commonwealth v. Kentucky Jockey Club, 38 S.W.2d 987, 238 Ky. 739.

39. Ind.—Bush v State, 119 N.E. 417, 187 Ind 339.

Mo.—State ex inf Miller v St. Louis Union Trust Co, 74 S.W.2d 348, 335 Mo. 845.

51 C.J. p 346 note 29.

40. Tex.—State v Southern Pac. R. Co, 24 Tex 80.

41. Tenn.—State v. Columbia, etc, Turnp Co, 2 Sneed 254.

42. Ala.—Eutaw Ice, etc, Co. v Eutaw, 79 So 609, 202 Ala. 143

43. Ind.—Eel River R. Co. v State, 57 N.E. 388, 155 Ind. 433

44. Fla.—State ex rel Landis v. S H Kress & Co., 155 So. 823, 115 Fla. 189.

45. Fla.—State ex rel. Landis v. S H Kress & Co, supra

46. Ind.—State v. Kingan, 51 Ind 142

47. Ind.—State v. Citizens' Gas, etc., Min Co., 51 N.E. 1067, 151 Ind. 505.

51 C.J. p 346 note 35.

48. Ind.—State v Ireland, 29 N.E. 396, 130 Ind. 77.

49. Ind.—State v. Ireland, supra.

50. Ind.—Stultz v. State, 65 Ind. 492

Prima facie case must be shown

R.I.—Black v Cummings, 5 A.2d 858, 62 R.I. 361.

Petition or information held sufficient

(1) In general.

Ala.—Baker v State, 133 So. 291, 222 Ala 467.

Fla.—State ex rel Landis v. Prevatt, 148 So. 578, 110 Fla 29

Ga.—Collier v Mitchell, 63 S.E.2d 338, 207 Ga. 528—Bower v. Avery, 158 S.E. 10, 172 Ga 272—Avery v. Bower, 152 S.E. 239, 170 Ga 202.

La.—State ex rel Sanchez v. Dixon, App, 4 So 2d 591, followed in State ex rel Sanchez v. Allen, 4 So 2d 602 and State ex rel. Sanchez v. Kleinpeter, 4 So 2d 602

Nev.—State ex rel. Bible v. Malone, 226 P 2d 277

N.C.—Hedgpeth v Allen, 17 S.E.2d 781, 220 N.C 528.

Okl.—State ex rel Williams v Batson, 39 P 2d 76, 170 Okl. 103.

(2) To raise question as to which governor had right to make appointment—State ex rel. Bland v St John, 13 So 2d 161, 244 Ala 269

(3) To require answer—State ex rel Clark v Klingensmith, 163 So 704, 121 Fla 297.

(4) To invest court with jurisdiction in quo warranto proceeding to oust sheriff from office for nonfeasance.—State, on Inf. of McKittrick, v. Williams, 144 S.W.2d 98, 346 Mo 1003.

Petition or information held insufficient

(1) To state cause of action

Ohio.—State ex rel. Willis v. Large, 95 N.E.2d 691, 154 Ohio St. 281

follows the language of the statute is sufficient.[51]

Existence of office. The petition or information must allege the legal existence of the office in question,[52] at least where the office, if it exists, was created by a local[53] or private[54] law, and the information questions the legality of the appointment or election of an individual to the office or his qualification to fill it;[55] but, where the information challenges the legal existence of a court, to which the office of judge appertains, and characterizes the court as a pretended one, it is not necessary to make the inconsistent allegation that the office exists.[56] An information has been held not demurrable, however, because the same count or paragraph thereof attacked respondent's right to office and also the validity of the statute creating the office.[57]

Value of office. The only purpose of an allegation of the value of the office in question is to show that the court in which the suit is brought has jurisdiction thereof by reason of the amount in controversy.[58] The value may be alleged in the same manner as the value of any tangible thing.[59]

Title or interest of claimant or relator. A complaint or information filed by, or at the instance of, a private person to oust the incumbent, and obtain possession of an office, must contain allegations showing that plaintiff or claimant is entitled to the office,[60] and this requires the statement of facts, not mere legal conclusions.[61] On the other hand, a complaint or petition to oust the incumbent of an office, when presented on behalf of the state by the attorney general or prosecuting attorney, need not set forth the name of a claimant to the office;[62] nor need it show that the relator is entitled to the office,[63] or that he has a special or peculiar interest,[64] unless respondent's alleged usurpation depends on the validity of relator's election;[65] but the interest of the relator in the suit should appear.[66] If the information is filed by the attorney general, the court will inquire whether or not the incumbent is a de jure officer.[67] Words in the information in-

Tex.—State ex rel. Neville v. Sanderson, Civ.App., 88 S.W.2d 1069.

(2) To move supreme court in exercise of its discretion to entertain petition on its merits. Moulton v. Collins, R.I., 12 A.2d 280.

(3) As not containing factual averments permitting defendant to join issue by a plea of not guilty.—State ex rel. George v. Lutz, 46 S.E.2d 245, 131 W.Va. 126.

51. Ala.—Miller v. State ex rel. Peek, 29 So.2d 411, 249 Ala. 14, 172 A.L.R. 1356.

52. Ala.—State ex rel. Kinney v. St. John, 172 So. 639, 233 Ala. 480.
Ill.—People v. Miller, 144 Ill.App. 630.

Public office

Where petition in action in nature of quo warranto alleged that the office usurped was the office of director of traffic and law enforcement for Anniston, complaint could not be held insufficient on ground that there was no allegation that the office usurped was a public office.—Miller v. State ex rel. Peek, 29 So.2d 411, 249 Ala. 14, 172 A.L.R. 1356.

Petition held not subject to demurrer on ground that it sought to remove respondent from a nonexistent office, notwithstanding it alleged that such office was created, or attempted to be created.—Miller v. State ex rel. Peek, supra.

53. Ala.—State ex rel. Kinney v. St. John, 172 So. 639, 233 Ala. 480.
Ill.—Hodrick v. People, 77 N.E. 441, 221 Ill. 374
51 C.J. p 346 note 40.

54. Ill.—Minck v. People, 6 Ill.App. 127.

55. Ill.—People v. Rodenberg, 98 N.E. 764, 254 Ill. 386.

56. Ill.—People v. Rodenberg, supra.

57. Ala.—Hale v. State ex rel. Agee, 186 So. 163, 237 Ala. 191.

58. Tex.—Little v. State, 12 S.W. 965, 75 Tex. 616.

59. Tex.—Little v. State, supra.

60. Ala. State ex rel. Gravitt v. Kellett, 162 So. 303, 230 Ala. 510.—Baker v. State, 133 So. 291, 222 Ala. 467
Fla. State ex rel. Clark v. Klingensmith, 163 So. 701, 121 Fla. 297.
Ga.—Souther v. Butler, 34 S.E.2d 668, 195 Ga. 566.
Ind.—State v. Ireland, 29 N.E. 396, 130 Ind. 77.
Mich. Marian v. Beard, 242 N.W. 880, 259 Mich. 183.
Ohio.—State ex rel. Bolsinger v. Oridge, 16 N.E.2d 840, 58 Ohio App. 491, affirmed 16 N.E.2d 354, 134 Ohio St. 206.—State ex rel. Davis v. Plapp, 16 N.E.2d 586, 58 Ohio App. 321.
R.I.—Black v. Cummings, 5 A.2d 858, 62 R.I. 361.
Wash.—State v. Superior Court for King County, 9 P.2d 1087, 167 Wash. 655.
W.Va.—State ex rel. Seanes v. Babb, 20 S.E.2d 683, 124 W.Va. 438.
51 C.J. p 346 note 46.

Allegations held sufficient

Ala.—Baker v. State, 133 So. 291, 222 Ala. 467.
Tenn.—State v. Hammons, 43 S.W. 2d 395, 163 Tenn. 290.
51 C.J. p 346 note 46 [b].

Petition held insufficient

(1) Where it showed that, if respondent was not entitled to office, a third person was elected to fill vacancy therein.—Stephens v. Wohlwender, 30 S.E.2d 470, 197 Ga. 795.

(2) To establish that relator was not constitutionally removed from office. State ex rel. Hand v. McDonald, 18 So.2d 16, 154 Fla. 456.

(3) Other petitions held insufficient see 51 C.J. p 346 note 46 [a].

61. Ala.—Baker v. State, 133 So. 291, 222 Ala. 467.

Held mere conclusion

Allegation that relator was duly commissioned and lawfully entitled to the office was a mere conclusion.—State ex rel. Davis v. Plapp, 16 N.E.2d 586, 58 Ohio App. 321.

62. La. State ex rel. Sanchez v. Dixon, App., 4 So.2d 591, followed in State ex rel. Sanchez v. Allen, 4 So.2d 602 and State ex rel. Sanchez v. Kleinpeter, 4 So.2d 602.
Mont.—**Corpus Juris cited in** State ex rel. Nagle v. Kelsey, 55 P.2d 685, 687, 102 Mont. 8.
51 C.J. p 347 note 47.

63. Mont.—**Corpus Juris cited in** State ex rel. Nagle v. Kelsey, 55 P.2d 685, 687, 102 Mont. 8.
51 C.J. p 347 note 48.

64. Mo. State, on Inf. of Wallach v. Beckman, 185 S.W.2d 810, 353 Mo. 1015.

65. Conn. State v. Bulkeley, 23 A. 186, 61 Conn. 287, 14 A.L.R. 657.
Vt.—State v. Greene, 88 A. 515, 87 Vt. 94.

66. N.Y.—People v. Ryder, 12 N.Y. 433.
N.C.—State v. Vann, 23 S.E. 952, 118 N.C. 3.

67. Neb.—State v. Hamilton, 45 N.W. 279, 29 Neb. 198.

dicating that the proceeding was on relation of designated persons may be treated as surplusage, and demurrer thereto for failure to state facts showing their special interest in the case overruled if enough remains to state a cause of action,[68] as where, after elision of the matter in question, the information contains sufficient allegations to state a cause of action in the nature of quo warranto and to show that it was brought by the prosecuting attorney in his official capacity as the representative of the state and for the protection of the public interest[69]

Defendant's wrong. Except in a few jurisdictions,[70] it is sufficient to allege in general terms that defendant usurps or intrudes into a designated public office or holds, possesses, or exercises it unlawfully or without lawful authority,[71] but, when the pleading goes further and by its averments discloses a state of facts which prima facie entitle respondent to the office, and does not specify the objections intended to be made to his title, it is subject to attack.[72] Ordinarily some allegation of usurpation, intrusion, or unlawful possession or exercise of the office is necessary;[73] and, where specific allegations are made, they must be sufficient to state a cause of action.[74] Various independent acts or omissions may be alleged, and they may be entirely unrelated to other allegations, provided each independent act or omission alleged, if proved, must be such as would work a forfeiture of the office.[75]

Where the information is filed by, or at the instance of, a private person to obtain possession of the office, it is necessary in some jurisdictions that the information, in addition to setting out the relator's title, should specify the objections to defendant's title;[76] but in other jurisdictions it is not necessary to allege anything regarding defendant's title[77]

Facts affecting validity of statute. Where it is asserted that the legislative act under which defendant claims to hold office is unconstitutional as special legislation, it is not necessary to plead the facts

68. Mo.—State ex inf Ellis ex rel Patterson v Ferguson, 65 S W 2d 97, 333 Mo 1177, certiorari denied Ferguson v State of Missouri ex inf Ellis, 54 S Ct. 559, 291 U S 682, 78 L Ed 1070

69. Mo.—State ex inf. Ellis ex rel Patterson v. Ferguson, 65 S W.2d 97, 333 Mo. 1177, certiorari denied Ferguson v State of Missouri ex inf Ellis, 54 S.Ct. 559, 291 U.S 682, 78 L.Ed. 1070

70. Vt.—State v. Greene, 88 A 515, 87 Vt 94.
Wis.—State v. Messmore, 14 Wis 115

71. Ala.—Miller v. State ex rel Peek, 29 So 2d 411, 249 Ala 14, 172 A L R. 1356—Hale v. State ex rel. Algee, 186 So 163, 237 Ala 191—State ex rel. Chambers v. Bates, 171 So. 370, 233 Ala. 251—State ex rel Gravitt v. Kellett, 162 So. 303, 230 Ala 510.
Fla.—State ex rel. Landis v. Gamble, 148 So. 551, 110 Fla. 98—State v. Green, ex rel. Landis, 144 So. 681, 107 Fla. 335.
Mo.—State ex Inf. of McKittrick v. Wiley, 160 S.W 2d 677, 347 Mo. 239.
1 C.J. p 347 note 52.

"The theory upon which the rule rests is that in quo warranto the state is not required to prove the usurpation or unlawful holding, but the entire proceeding is one in the nature of an order upon the defendant to show that he is lawfully holding and exercising the office"—People ex rel. Stephenson v. Hayden, 49 P.2d 314, 315, 9 Cal.App.2d 312.

Suit based on unlawful holding

Under statute giving right of action by state to effect ouster of one usurping, intruding into, or unlawfully holding or exercising public office, complaint in quo warranto seeking to oust tax commissioners was held not demurrable on ground that facts pleaded did not show usurpation, intrusion, illegal or invalid entry into office, since right of action for unlawful holding and exercising of office was basis for right of action, which is different from usurpation or intrusion into office.—State ex rel Sullivan v. Moore, 64 P.2d 809, 49 Ariz 51.

Allegation held sufficient predicate for issuance of writ

Fla.—State ex rel. Watson v. Hurlbert, 20 So 2d 693, 155 Fla 531

72. Ala.—State ex rel. Gravitt v Kellett, 162 So. 303, 230 Ala 510
Fla.—State v. Green, ex rel. Landis, 144 So. 681, 107 Fla. 335.

Information adjudged insufficient

Where information in quo warranto filed in the name of state on relation of attorney general sets out with particularity the facts on which alleged usurpation of office is predicated and such facts show a legal right to the office in respondent, information will be adjudged insufficient and writ denied.—State ex rel Watson v. Hurlbert, 20 So 2d 693, 155 Fla. 531.

73. Miss.—O'Neal v. Fairley, 200 So 722, 190 Miss. 650.
Ohio.—State ex rel. Bolsinger v. Oridge, 16 N E 2d 840, 58 Ohio App. 491, affirmed 16 N E 2d 334, 134 Ohio St 206
51 C J p 347 note 53

74. N.Y.—People v Goodrich, 87 N. Y S 114, 92 App Div 445, affirmed 72 N E 1148, 180 N.Y. 522.
51 C J. p 347 note 54.

Allegations held insufficient

Neb.—State ex rel Good v Conklin, 255 N.W 925, 127 Neb. 417.

Ineligibility for nonpayment of taxes

Petition, in quo warranto against sheriff, alleging sheriff's default in tax payment, was demurrable, where it did not allege who issued tax execution, authority therefor, when taxes were due, that taxes were legally due from sheriff, or that sheriff had had opportunity to pay taxes, although it did allege that sheriff paid taxes in question less than six months before election.—Chandler v. Barefield, 169 S E 347, 177 Ga. 103.

75. Pa.—Commonwealth v. Peoples, 40 Pa.Dist & Co. 689, 30 Del.Co 210

76. Ala.—Ham v State, 47 So. 126, 156 Ala 645—State v. Price, 50 Ala 568.

Direct and positive statements

Quo warranto to test right to office must be predicated on direct and positive statements of legal facts supporting cause of removal.—State ex rel Hatton v Joughin, 138 So 392, 103 Fla. 877, rehearing denied 145 So 174, 107 Fla. 850.

77. Ind.—State v. Slack, 162 N E. 670, 163 N.E. 21, 200 Ind. 241.

which render the statute objectionable,[78] at least where they appear on the face of the act.[79]

Prayer for unauthorized relief. A petition in a proceeding which is ostensibly one in quo warranto does not state a cause of action where it asks the court to order election officials, not made parties, to count certain undisputed ballots, averred not to have been counted, and there is no statutory authority for such an order.[80]

(2) Office in Private Corporation

A petition or information in a quo warranto proceeding based on the usurpation of an office in a private corporation should allege the interest or title of the relator or claimant, usurpation of a corporate office by defendant, and that the offense is of a nature which concerns the public.

A petition or information in a quo warranto proceeding based on the usurpation of an office in a private corporation should show the interest or title of the relator or claimant[81] and usurpation by defendant,[82] that the usurpation is of a corporate office,[83] and that the offense is of a nature which concerns the public.[84] Unless the corporation is one whereof the court will take judicial notice, its organization must be shown by alleging compliance with all the requisite forms of law.[85] An allegation that another person was elected to the office in question is not irrelevant or immaterial.[86] An information alleging that defendant was elected at an illegal meeting, and that he deceived the relators as to the time of such meeting, need not allege that the relators would, if present, have voted against defendant.[87]

Office in political party. A petition challenging respondent's rights to hold an office in a political party, which is not a state public office, but which has a status in law at least equivalent to that of an office in a corporation, has been held sufficient as against an objection that it showed on its face that the relator had made no attempt to pursue remedies available to him in the forums of the party,[88] and that he was himself the holder of the office.[89]

d. In Proceeding Relating to Profession

A complaint, petition, or information which follows the language of the statute in charging defendant with intruding into a profession without having obtained a license therefor, as required by statute, is sufficient.

A complaint, petition, or information which follows the language of the statute in charging defendant with intruding into the profession of treating, or offering to treat, diseases of human beings without having obtained a license or certificate of qualification therefor, as required by statute, is sufficient.[90]

§ 38. —— Plea or Answer

a. In general
b. In proceeding relating to corporation
c. In proceeding relating to office
d. In proceeding relating to profession

a. In General

In proceedings in the nature of quo warranto the merits are presented by pleas or answers, but ordinarily a simple traverse by a general denial or a plea of the general issue is insufficient, and it is necessary that respondent either disclaim or justify, and, if he justifies, that he plead fully and completely the facts necessary to establish his lawful right or authority.

In proceedings in the nature of quo warranto the merits are presented by pleas or answers.[91] Under the common law practice the defense to a quo warranto information is by plea,[92] and not in the form of an answer;[93] but under code provisions defendant may file an answer.[94] One good plea is suffi-

78. Kan.—State v. Nelson, 96 P. 662, 78 Kan. 408.

79. N.J.—State v. Riordan, 69 A. 494, 75 N.J.Law 16.

80. Ohio.—State v. Murray, 103 N.E. 246, 30 Ohio App. 37.

81. Mich.—People v. Nappa, 45 N. W. 355, 80 Mich. 484.
51 C.J. p 348 note 61.
Allegations held insufficient where it did not appear from allegations that in absence of improper matters complained of a different result would have been obtained.—People ex rel. Twardzik v. Swietlik, 6 N.E. 2d 695, 289 Ill.App. 609.

82. **Allegations held sufficient**
Pa.—Coleman v. Huffman, 36 A.2d 724, 348 Pa. 580.
51 C.J. p 348 note 62 [a].

83. U.S.—Clinton v. Ingle, D.C., 11 F.Cas.No.2,870, 4 Cranch C.C. 438.

84. U.S.—Clinton v. Ingle, supra.

85. Mich.—People v. De Mill, 15 Mich. 164, 93 Am.D. 179.

86. Ga.—Hornady v. Goodman, 146 S.E. 173, 167 Ga. 555.

87. Ind.—Armington v. State, 95 Ind. 421.

88. Ga.—Morris v. Peters, 46 S.E.2d 729, 203 Ga. 350.

89. Ga.—Morris v. Peters, supra.

90. Ala.—Ferguson v. State, 110 So. 20, 215 Ala. 244.
Complaints, petitions, and informations held sufficient
Ala.—Farmer v. State ex rel. Killcrease, 187 So. 735, 28 Ala.App. 398, certiorari denied 187 So. 737, 237 Ala. 555.
51 C.J. p 348 note 68 [a].

91. Fla.—State ex rel. Landis v. S. H. Kress & Co., 155 So. 823, 115 Fla. 189.

92. Ill.—People v. Kirkham, 133 N. E. 696, 301 Ill. 45.—People v. Percells, 8 Ill. 59.
Objection by plea or answer to time of instituting suit see supra § 32.

93. Ill.—People v. Percells, supra.

94. Neb.—State ex rel. Johnson v. Consumers Public Power Dist., 5 N.W.2d 302, 142 Neb. 114.
Ohio.—State v. Columbus, etc., Electric Co., 135 N.E. 297, 104 Ohio St. 120.
51 C.J. p 348 note 72.
Proceeding by information in nature of writ of quo warranto distinguished
(1) Under some statutes, defendant in a quo warranto proceeding under the code as distinguished from

cient,[95] and according to early authorities only one plea may be filed as of right,[96] but according to later authorities numerous defenses may be set up in the answer[97] or by separate pleas,[98] provided they are not inconsistent[99] and are not beyond the scope of the remedy[1] and the jurisdiction of the court,[2] as defined and limited by statute. The question as to the jurisdiction of the court is properly raised by answer if the lack of jurisdiction appears dehors the information.[3]

Ordinarily, a simple traverse by a general denial or a plea of the general issue is insufficient in a quo warranto proceeding,[4] at least where defendant is charged generally with exercising a privilege, power, or franchise without authority of law and is called on to show his warrant or authority,[5] and it is necessary in such case that he either disclaim or justify,[6] and, if he justifies, that he plead fully and completely the facts necessary to establish his lawful right or authority,[7] but he need not anticipate a matter which may properly be pleaded in the replication;[8] and in a code state wherein an ordinary civil action has been substituted for the common-law remedies, defendant's pleading will be liberally construed[9] and held not to be vitiated by a mere excessive claim.[10] A high degree of certainty is required.[11] An information in quo warranto is sufficiently answered by a plea which sets out all material facts relative to the questions properly raised by the information;[12] but a plea is insufficient if it contains nothing on which a material issue can be formed,[13] and in such case judgment may be rendered on the record, without any evidence being introduced.[14]

Matter of inducement is not traversable,[15] and as to it the plea should be silent.[16]

Plea of estoppel as to only some of the relators is faulty.[17] In order to be sufficient, the plea must show that the events alleged to constitute the estoppel occurred before the filing of the information.[18]

Plea of non usurpavit is a form of traverse, in an action or proceeding against one alleged to have usurped an office or franchise, denying the usurpation charged.[19]

Failure of relator to pay taxes. Where the relator has alleged that he is a citizen and taxpayer, a plea charging that the relator, although having returned property for taxation, has failed to pay taxes is insufficient.[20]

a code proceeding by information in the nature of writ of quo warranto is limited to a plea of not guilty, demurrer to the writ, or both, but may not answer, but, if the proceeding is by information in the nature of a writ of quo warranto, he may answer the information, demur, or both —State ex rel George v Lutz, 46 S.E.2d 245, 131 W.Va 126.

(2) In a proceeding by writ of quo warranto under the code restricting defendant to a plea of not guilty, demurrer, or both, defendant's answer to factual matters set forth in the relator's petition was demurrable as not responsive —State ex rel George v. Lutz, supra

95. Ill —People v. Miller, 163 N.E. 139, 331 Ill 395—People v Douglas, 118 N E 94, 281 Ill 478.
51 C J p 348 note 73.

96. N Y —People v. Jones, 18 Wend. 601
51 C.J. p 348 note 74.

97. Mont.—State ex rel. Nagle v. Stafford, 34 P 2d 372, 97 Mont. 275.
Ohio —State v. Columbus, etc., Electric Co., 135 N.E 297, 104 Ohio St. 120.
51 C.J. p 348 note 75

98. Ill —People v Heidelberg Garden Co, 84 N E 230, 233 Ill 290
Mont —State ex rel. Nagle v. Stafford, 34 P.2d 372, 97 Mont. 275.
51 C J. p 348 note 76.

99. Ill.—People v. Heidelberg Garden Co., 84 N.E. 230, 233 Ill. 290.

1. Ohio.—State v Columbus, etc, Electric Co, 135 N.E. 297, 104 Ohio St 120.

2. Ohio —State v Columbus, etc, Electric Co, supra

3. Mo —State on inf. of McKittrick ex rel. Handlan v Wilkie Land Co, App, 165 S W 2d 432

4. Ala —State v Citizens Light & Power Co, 55 So 193, 172 Ala 232.

5. Del —Brooks v State, 79 A 790, 26 Del 1, 51 L R A.,N.S, 1126, Ann. Cas.1915A 1133
51 C J. p 348 note 81.

6. Ill —People ex rel. Ray v. Lewistown Community High School Dist No 241, 57 N.E.2d 486, 388 Ill. 78—People ex rel Lange v. Old Portage Park Dist, 190 N E 664, 356 Ill 340—People v. Sackett, 184 N E. 646, 351 Ill 363—Carrico v People, 14 N E 66, 123 Ill. 198.
51 C J. p 348 note 82.

7. Ga —Morris v Peters, 46 S.E 2d 729, 203 Ga. 350
Ill.—People ex rel. Lange v. Old Portage Park Dist., 190 N E. 664, 356 Ill 340—People v Sackett, 184 N E. 646, 351 Ill 363—Carrico v People, 14 N E 66, 123 Ill 198.
Mo —State on Inf. of McKittrick v. Wiley, 160 S W 2d 677, 349 Mo 239.
51 C J. p 348 note 83.
Plea held sufficient
Fla —Hicks v State ex rel. Landis, 156 So. 603, 116 Fla 603.

8. Ill —People v Heidelberg Garden Co, 84 N E 230, 233 Ill 290—Massey v. People, 66 N E 392, 201 Ill 409.
Replication see infra § 39.

9. Wis —State v Steber, 143 N.W. 156, 154 Wis. 505.

10. Wis —State v Steber, supra

11. Fla.—State ex rel Landis v S H Kress & Co, 155 So 823, 115 Fla. 189

12. Ill —People v Gary, 63 N.E 749, 196 Ill. 310.

13. Mich —People v River Raisin & Lake Erie R. Co., 12 Mich 389, 86 Am D 64
51 C.J. p 349 note 89.

14. Ga —Whelchel v. State, 76 Ga. 644
51 C J. p 349 note 89.

15. Ill —People v. Gary, 63 N.E. 749, 196 Ill 310.

16. Ill.—People v. Gary, supra.

17. Ill —People v Swearingen, 113 N E 166, 273 Ill. 630.

18. Ill.—Hallock Tp Dist No. 7 v. People, 75 Ill App. 539.

19. Black L D.
Held not plea of non usurpavit
Pa.—Commonwealth v. Cross Cut R Co, 53 Pa. 62.

20. Ga.—Shaw v. De Vane, 151 S.E 347, 169 Ga. 702.

Pendency of another action having the same object in view is not sufficiently pleaded to bring the matter before the court for consideration where the allegations made for this purpose are mere conclusions of the pleader that the allegations and issues in the two suits are the same and do not set forth any substantive facts from which the court may ascertain for itself what the allegations and issues in the other suit are.[21]

b. In Proceeding Relating to Corporation

In a proceeding attacking the organization of a public corporation or the annexation of land thereto, or to oust certain lands from the jurisdiction thereof, the plea or answer must set out all facts necessary to show the legality of the challenged action; and similar rules apply where an illegal exercise of the franchise of a private corporation is charged.

On an information attacking the organization of an alleged municipal or other public corporation, the plea or answer must set out all facts necessary to show a legal incorporation.[22] Likewise, where the annexation of lands or territory to a district or municipality is challenged, defendants must allege all the facts necessary to show the legality of the annexation.[23] In proceedings to oust certain lands from the jurisdiction of a municipality, it is the duty of the respondent to answer the allegations of the information fully and specifically, showing what it has done or failed to do or planned to do with respect to furnishing municipal benefits to the described territory,[24] and, where the information alleges a total absence of municipal benefits, a return alleging speculative future benefits is an insufficient answer,[25] but allegations showing that the property in question has received some benefit, that obligations have been undertaken by the municipality on the strength of the territory, and that the incorporation was encouraged and acquiesced in for a number of years are sufficient to raise a defense of laches.[26]

Private corporation. Where an illegal exercise of corporate franchises is charged, the plea should, as a general rule, be either of justification or a disclaimer,[27] and a plea of justification must contain allegations of all such facts as are necessary to show authority for the use of the franchises.[28] A denial of legal conclusions is insufficient;[29] but, where the complaint sets out facts establishing the illegality of the alleged corporation, a denial of the allegations of fact is proper;[30] and such an answer by the individuals composing the corporation is good without any disclaimer or justification by the corporation itself.[31] In a proceeding to oust a foreign corporation from its permit to do business in the state, a high degree of certainty is required in the plea or answer.[32] In proceedings to forfeit defendant's charter for violation of a law against combinations, it may be pleaded that such law is unconstitutional.[33]

c. In Proceeding Relating to Office

(1) Public office
(2) Office in private corporation

(1) Public Office

On an information to oust the occupant of a public office, defendant may disclaim holding the office or justify by setting out in his plea or answer all the facts necessary to establish a lawful right or valid title to the office.

On an information to oust the occupant of a

21. Mo.—State v. Springfield African Social, etc., Club, 154 S.W. 458, 169 Mo.App. 137.

22. Mo.—State at inf. McKittrick ex rel. Martin v. Stoner, 146 S.W.2d 591, 347 Mo. 342.
51 C.J. p 349 note 97.

Pleas and answers held sufficient
Ill.—People v. Sackett, 184 N.E. 646, 351 Ill. 363.
51 C.J. p 349 note 97 [d].

23. Or.—State v. Evans, 160 P. 140, 82 Or. 46.
51 C.J. p 349 note 98.

Answer held insufficient
(1) As showing that ordinance purporting to annex territory was a nullity.—People ex rel. Universal Oil Products Co. v. Village of Lyons, 79 N.E.2d 38, 400 Ill. 82.

(2) As not disclosing that relators had been guilty of unreasonable delay, acquiescence, or inequitable conduct or that a judgment of ouster would result in great public detriment.—People ex rel. Universal Oil Products Co. v. Village of Lyons, supra.

24. Fla.—City of Coral Gables v. State ex rel. Watson, 38 So.2d 48.

Answer alleging merely conclusions of pleader is insufficient.—City of South Miami v. State ex rel. Gibbs, 197 So. 109, 143 Fla. 524.

25. Fla.—City of Coral Gables v. State ex rel. Watson, 38 So.2d 48.

26. Fla.—City of Auburndale v. State ex rel. Landis, 184 So. 787, 135 Fla. 172.

27. N.M.—State v. Muller, 168 P. 528, 23 N.M. 306, 1 A.L.R. 170, certiorari denied 38 S.Ct. 336, 246 U.S. 667, 62 L.Ed. 929.
51 C.J. p 349 note 99.

28. N.M.—State v. Muller, supra.
51 C.J. p 349 note 1.

Plea held sufficient
Ala.—Louisville, etc., R. Co. v. State, 45 So. 296, 154 Ala. 156.

Fla.—State ex rel. Landis v. Florida Ferry Co., 175 So. 811, 128 Fla. 852.

29. Cal.—People v. Lowden, 8 P. 66, 2 Cal.Unrep.Cas. 537.

30. Ala.—State v. Citizens Light, etc., Co., 55 So. 193, 172 Ala. 232.

31. Cal.—People v. Stanford, 18 P. 85, 19 P. 693, 77 Cal. 360, 2 L.R.A. 92.
51 C.J. p 349 note 4.

32. Fla.—State ex rel. Landis v. S. H. Kress & Co., 155 So. 833, 115 Fla. 189.

Compliance with statute
Allegation that there was filed complete statement of financial condition of foreign corporation was not mere conclusion, but sufficiently set forth compliance with statute.—People v. New York Title & Mortgage Co., 178 N.E. 661, 346 Ill. 278.

33. Mo.—State v. Firemen's Fund Ins. Co., 52 S.W. 595, 152 Mo. 1, 45 L.R.A. 363.

public office, defendant may disclaim holding the office,[34] but, if he does not, he may and must justify by setting out in his plea or answer all the facts necessary to establish a lawful right or valid title to the office,[35] and the plea is sufficient if it sets up facts showing a right on the part of respondent to exercise the powers and duties of the office alleged to have been usurped.[36] A plea of non usurpavit is not permissible,[37] except in some jurisdictions wherein the statutes require the complaint to set forth the facts warranting the issuance of the writ.[38]

The plea or answer must allege the existence or performance of all conditions precedent to defendant's right to exercise the privilege of office,[39] and it must also show that his right to hold the office continued to the time of filing the information.[40] It may and must show that defendant was properly appointed or elected,[41] and also that he is eligible to hold the office[42] and that he qualified by taking the proper oath and filing a bond or otherwise complying with the legal requirements.[43] A plea may be bad for duplicity,[44] because it contains a negative pregnant,[45] or because of any other of the grounds on which pleas at common law may be attacked.[46] Defendant may set up several titles to the office.[47]

Matter affecting claimant or relator. While it is no answer to an information by the state to allege that the relator is not entitled to the office,[48] or that claimant is estopped to question defendant's title, by reason of an agreement between them to abide by the result of another suit involving their respective claims,[49] in proceedings begun by a claimant of the office, to enforce his private right, a plea is good which shows that claimant's title is invalid.[50] On the other hand, in a proceeding brought on behalf of the state by the attorney general to determine which of two respondents is entitled to an office, one respondent is not called on to show that the other is disqualified therefor,[51] particularly if such facts are not necessarily involved in the determination of the issue with respect to his own right to hold the office as between himself and the relator.[52]

(2) Office in Private Corporation

A plea which attempts to justify the respondent's right to hold an office in a private corporation or in a political party must set out specifically all the facts necessary to show a good right or title on his part.

A plea which attempts to justify respondent's right to hold an office in a private corporation must

34. Mich.—People v. Crawford, 28 Mich. 88
Pa.—Commonwealth v. Shepp, 10 Phila. 518

35. Ala.—Miller v. State ex rel. Peck, 29 So.2d 411, 249 Ala. 14, 172 A.L.R. 1356—Hale v. State ex rel. Algee, 186 So. 163, 237 Ala. 191—State ex rel. Chambers v. Bates, 171 So. 370, 233 Ala. 251
Fla.—State ex rel. Landis v. Gamble, 148 So. 551, 110 Fla. 98.
Mo.—State ex Inf. of McKittrick v. Wiley, 160 S.W.2d 677, 347 Mo. 239.
Pa.—Commonwealth ex rel. v. Oslincik, Com.Pl., 38 Luz.Leg.Reg. 410
W.Va.—State ex rel. Crouse v. Holdren, 36 S.E.2d 481, 128 W.Va. 365
51 C.J. p. 350 note 7
Striking out general denial as sham or irrelevant see infra § 40

Defense of waiver of benefit of tenure

In quo warranto proceedings by exempt firemen to secure their reinstatement to positions in volunteer fire department, which they had held, under a one-year appointment, at time of enactment of statute giving them tenure, respondents were required to plead affirmatively defense of waiver of benefits of tenure resulting from relators' acceptance of office for a fixed term.—Metzler v. Belcher, 15 A.2d 105, 125 N.J.Law 183.

36. Fla.—State ex rel. Landis v. Gamble, 148 So. 551, 110 Fla. 98

37. Fla.—State v. Saxon, 5 So. 801, 25 Fla. 342.
Wis.—Attorney General v. Foote, 11 Wis. 14, 78 Am.D. 689.

38. Vt.—State v. Greene, 88 A. 515, 87 Vt. 94.
General or definite allegations in information, petition, or complaint see supra § 37 a (2)

39. Ill.—Greening ex rel. Rowe v. Barnes, 188 N.E. 805, 355 Ill. 99—People v. Flaningam, 179 N.E. 823, 347 Ill. 328—Carrico v. People, 14 N.E. 66, 123 Ill. 198.
51 C.J. p. 350 note 13

40. Ill.—Greening ex rel. Rowe v. Barnes, 188 N.E. 805, 355 Ill. 99—People v. Flaningam, 179 N.E. 823, 347 Ill. 328
51 C.J. p. 350 note 14.

41. Ala.—State ex rel. Sherrill v. Payne, 139 So. 99, 224 Ala. 223.
Ill.—Carrico v. People, 14 N.E. 66, 123 Ill. 198
Mo.—State at inf. McKittrick ex rel. Martin v. Stoner, 146 S.W.2d 891, 347 Mo. 242.
51 C.J. p. 350 note 15.

42. Ill.—People v. Flaningam, 179 N.E. 823, 247 Ill. 328.
51 C.J. p. 350 note 16.

43. Fla.—State v. Phillips, 11 So. 922, 30 Fla. 579.
51 C.J. p. 350 note 17

44. Mo.—State v. Steer, 44 Mo. 238

45. Fla.—State v. Anderson, 8 So. 1, 26 Fla. 240.
51 C.J. p. 350 note 19.

46. Mich.—Attorney General v. Parsell, 58 N.W. 335, 99 Mich. 381.
51 C.J. p. 350 note 20.

47. Mont.—State ex rel. Nagle v. Stafford, 34 P.2d 372, 97 Mont. 275.
51 C.J. p. 350 note 21

48. Pa.—Commonwealth ex rel. v. Oslincik, Com.Pl., 38 Luz.Leg.Reg. 410
51 C.J. p. 350 note 22.

49. Mo.—State v. Bernoudy, 36 Mo. 279.
Estoppel generally see supra § 22

50. N.J.—Colton v. Kreutzinger, 185 A. 18, 116 N.J.Law 456, affirmed 191 A. 878, 118 N.J.Law 183
51 C.J. p. 350 note 24.

Allegations that relator was not resident citizen

Allegations in plea of respondent holding over after expiration of his term that relator elected as county superintendent of education was not resident citizen of state and county for required time were allegations of facts.—Wilkins v. Large, 141 So. 585, 163 Miss. 279.

51. Mo.—State on Inf. of McKittrick v. Wiley, 160 S.W.2d 677, 347 Mo. 239.

52. Mo.—State on Inf. of McKittrick v. Wiley, supra.

Reason for rule

Absence of right in another claiming office is immaterial unless such fact serves to qualify, explain, or justify respondent's right.—State on Inf. of McKittrick v. Wiley, supra.

The proper mode of attacking indefiniteness is, in some jurisdictions, by a motion to make more definite and certain.[91]

The facts alleged in a plea, answer, or return must be assumed and taken to be true on a motion to strike[92] or for judgment on the pleadings.[93] A motion by the relator for judgment on the pleadings waives everything not appearing on the face of the pleadings.[94] On defendant's motion for determination of proposed questions of law in advance of trial, allegations of fact in the petition are conclusive.[95]

(2) Demurrer

The legal sufficiency of a pleading in quo warranto proceedings may be tested by demurrer, but even an indefinite pleading may be sufficient to withstand a demurrer.

In a quo warranto proceeding or action, a demurrer will lie to test the legal sufficiency of a pleading,[96] such as a petition, complaint, or information,[97] plea or answer,[98] or replication;[99] but, even though indefinite, a pleading may be sufficient to withstand a demurrer,[1] or at least a general demurrer.[2] An information is not subject to demurrer on the grounds that it was improvidently ordered filed,[3] that the petition on which leave to file was granted was not filed in the clerk's office before the information was filed,[4] or that a defective copy of the information was served on defendant, where he was not misled thereby, and when, being in court otherwise, the service of the copy was not essential.[5] A complaint is not demurrable on the ground that it fails to state a cause of action in favor of a private person, named as the relator with the state's attorney, where the state is the real party plaintiff and the particular interest which the relator may have is immaterial;[6] and a demurrer is not a proper mode of presenting possession of a license as a defense.[7] The question as to the jurisdiction of the court is properly raised by demurrer if lack of jurisdiction appears on the face of the information,[8] but the question of authority to institute the proceeding cannot be raised by demurrer where lack of authority does not appear on the face of the information.[9] If an information or plea is insufficient in any respect which might be cured by amendment, but the objection is not made by demurrer or otherwise, the defect will be deemed waived,[10] and may not be urged after trial and verdict.[11]

Speaking demurrer is of no avail to raise any question as to the sufficiency of a petition or information.[12]

91. Ind.—Jones v. State, 13 N.E. 416, 112 Ind. 193.
51 C.J. p 352 note 74.

92. N.J.—Doughty v. Scull, Sup., 96 A. 564.

93. Mo.—State v. Merchants' Exch., 190 S.W. 903, 269 Mo. 346, Ann.Cas. 1917C 871—State v. Missouri Pac. R. Co., 141 S.W. 643, 237 Mo. 338.
Amended motion for judgment of ouster directed to the answer and amended answer admitted all well-pleaded facts in the answer.—City of Auburndale v. State ex rel. Landis, 184 So. 787, 135 Fla. 172.

94. Mo.—State v. Thompson, 260 S.W. 84.

95. Kan.—State v. McCombs, 133 P. 2d 134, 156 Kan. 391.

96. Fla.—State ex rel. Landis v. Sovereign Camp, W. O. W., 180 So. 33, 131 Fla. 867.
Ga.—Souther v. Butler, 24 S.E.2d 668, 195 Ga. 566.
Neb.—**Corpus Juris quoted in** State ex rel. Johnson v. Consumers Public Power Dist., 5 N.W.2d 202, 205, 142 Neb. 114.
51 C.J. p 352 note 67.

97. Ala.—State ex rel. Kinney v. St. John, 172 So. 639, 233 Ala. 480—State ex rel. Gravitt v. Kellett, 162 So. 303, 230 Ala. 510.
Fla.—City of Winter Haven v. State ex rel. Landis, 170 So. 100, 125 Fla. 392.
Ill.—People v. Blackwell, 173 N.E. 760, 342 Ill. 223.
Kan. State ex rel. McQueary v. Board of County Com'rs of Miami County, 215 P.2d 631, 168 Kan. 723.
Miss. Hill v. State, 128 So. 878, 157 Miss. 648.
Neb.—**Corpus Juris quoted in** State ex rel. Johnson v. Consumers Public Power Dist., 5 N.W.2d 202, 205, 142 Neb. 114.
Ohio.—State ex rel. Davis v. Clapp, 16 N.E.2d 586, 58 Ohio App. 321.
W.Va.—State ex rel. George v. Lutz, 46 S.E.2d 245, 131 W.Va. 126.
51 C.J. p 352 note 68.

98. Ga.—Morris v. Peters, 46 S.E. 2d 729, 203 Ga. 350.
Ill.—Greening ex rel. Rowe v. Barnes, 188 N.E. 805, 355 Ill. 99.
Neb.—**Corpus Juris quoted in** State ex rel. Johnson v. Consumers Public Power Dist., 5 N.W.2d 202, 205, 142 Neb. 114.
51 C.J. p 352 note 69.
Amended plea
Ill.—People ex rel. Dilks v. Board of Education of Paxton Community High School Dist. No. 117, Ford County, 283 Ill.App. 378.

99. Ala.—State ex rel. Chambers v. Bates, 171 So. 370, 233 Ala. 251.

1. Fla.—State ex rel. Landis v. Sovereign Camp, W. O. W., 180 So. 33, 131 Fla. 867.
51 C.J. p 352 note 72.
Motion to make more definite and certain see supra subdivision a (1) of this section.

2. Ga. Ledbetter v. Reese, 95 S.E. 209, 147 Ga. 710.
Neb. State v. Donahue, 135 N.W. 1030, 91 Neb. 311, Ann.Cas.1913D 18.

3. Ill. People v. Dodds, 142 N.E. 241, 310 Ill. 607.
Attack on order generally see supra § 21.

4. Mich. McDonald v. Alcona County, 51 N.W. 1114, 91 Mich. 459.

5. Mich.—People v. Miller, 15 Mich. 354.

6. S.D.—State v. Public Drug Co., 170 N.W. 161, 41 S.D. 287.

7. Colo. People v. Palmieri Parker Dentist, 275 P. 928, 85 Colo. 304.

8. Mo.—State on inf. of McKittrick ex rel. Handlan v. Wilkie Land Co., App., 165 S.W.2d 433.

9. Mo.—State on inf. of McKittrick ex rel. Handlan v. Wilkie Land Co., supra.

10. Ill.—Bishop v. People, 65 N.E. 421, 200 Ill. 33.

11. Ill.—Bishop v. People, supra.
51 C.J. p 354 note 34.

12. Mo.—State v. Monarch Transfer, etc., Co., 26 S.W.2d 60, 323 Mo. 562.
51 C.J. p 353 note 83.

Abandonment or withdrawal A demurrer filed may not be withdrawn and a plea presented as matter of right,[13] but it may be deemed abandoned when it is incorporated in, and made a part of, the return or answer and no ruling is demanded or made thereon.[14]

Argument and issues The argument of a demurrer will not be given a preference on the calendar,[15] although the office in question is an annual one.[16] Where, in the information, the relator claims the office, respondent, by demurring to the information, puts in issue the relator's title to the office.[17] On a joinder in demurrer to a plea of due incorporation, the only question in issue is the legal incorporation of defendant[18] A question of fact cannot be determined on demurrer in quo warranto proceedings.[19]

Construction of pleading on demurrer. A complaint seeking quo warranto is construed against the pleader on demurrer.[20] Separate counts in an information must be considered independently of each other when a demurrer is interposed;[21] but, where an information seeking to oust respondent from office and induct the relator into office is but a single pleading, all facts averred must be read and treated as the statement of the relator's cause of action[22] All allegations inconsistent with constitutional, statutory, or charter provisions relating to the subject matter of the proceeding should be disregarded.[23]

Effect as admission. A demurrer is an admission of all facts well pleaded;[24] but it does not admit conclusions of law stated in the pleading[25] or the construction given by the pleader to a complaint and order of court in other proceedings[26] Where the complaint does not allege that defendant did not qualify, as provided by law, before entering on the duties of his office, the presumption, on demurrer to the complaint, is that he did[27]

b. Disposition and Subsequent Proceedings

On demurrer to a pleading in quo warranto, it is to be tested by the rules applicable to ordinary civil actions; and the demurrer should be sustained if the pleading is insufficient, and not sustained if the pleading is sufficient. In a proper case, authority may be given to file new or amended pleadings, or final judgment may be rendered.

On demurrer to a pleading in quo warranto, it is to be tested by the rules applicable to ordinary civil actions;[28] and on demurrer to the information or a motion to quash it, the court may proceed to determine the law as affecting the rights and powers of the persons proceeded against.[29] A demurrer should be sustained if the pleading demurred to is insufficient when tested by the demurrer,[30] and should not be sustained if the pleading is sufficient;[31] but it has been held that a demurrer to an information should not be sustained where the information presents many interesting questions of novelty and importance which may be more satisfactorily dealt with when proof is adduced.[32]

13. N J —Bownes v. Meehan, 45 N J.Law 189.
51 C.J. p 353 note 83

14. Mo.—State v Armour Packing Co., 176 S.W 382, 265 Mo. 121

15. Pa —Commonwealth v. Sparks, 6 Whart 416.

16. Pa.—Commonwealth v. Sparks, supra

17. N.J —Browne v Hagen, 100 A. 857, 90 N.J Law 423
Issues on pleadings generally see infra § 42.

18. Mich.—Attorney General v. McArthur, 38 Mich 204.

19. Ill.—People v Walker Opera House Co, 94 N E 159, 249 Ill 106.

20. Vt.—State v. Watson, 117 A. 663, 96 Vt. 131—State v Greene, 88 A. 515, 87 Vt. 94

Particular allegations construed
In quo warranto action attacking organization of school district, allegations that taxpayers who were not parties to the action had paid illegally levied taxes under protest would be treated as explanatory of claimed abuse of corporate power rather than as stating a cause of action for protesting taxpayers, for purpose of demurrer on ground of misjoinder of causes of action —State ex rel McQueary v Board of County Com'rs of Miami County, 215 P 2d 631, 168 Kan. 723

21. Ill —People v. McDonald, 70 N E 646, 208 Ill. 638.

22. Ala —State ex rel. Gravitt v. Kellett, 162 So. 303, 230 Ala 510

23. Tex —State v Martin, Civ.App, 51 S W 2d 815.

24. Colo.—Norton v. People ex rel. Rudbeck, 81 P 2d 393, 102 Colo. 489—Harris v People ex rel Gonzales, 81 P.2d 383, 102 Colo. 496
Fla —City of Auburndale v. State ex rel. Landis, 184 So 787, 135 Fla. 172
Ga —Copland v. Wohlwender, 30 S E. 2d 462, 197 Ga. 782.
Ind —State v. Richey, 172 N.E. 119, 202 Ind 116.
Mo —State ex inf. McKittrick v. Murphy, 148 S.W.2d 527, 347 Mo. 484 —State ex rel. McKittrick v. Carolene Products Co., 144 S.W 2d 153, 346 Mo 1049.
Pa —Commonwealth v. DeLeo, 34 Pa.Dist & Co 139.
51 C.J. p 353 note 90.

Usurpation
Demurrer to information admits allegation that defendant usurped and unlawfully held and exercised office —Tonkin v. Kenworthy, 170 A 233, 112 N J Law 274.

25. N.J.—Tonkin v Kenworthy, supra
Va —Commonwealth v. Portsmouth Gas Co, 112 S.E. 792, 132 Va. 480.

26. Ill —People v. North Fork Outlet Drain. Dist., 162 N.E. 184, 331 Ill. 68.

27. Ind —State ex rel. Schrage v. Boyle, 190 N E 743, 206 Ind 574

28. Vt —Slayton v Town of Randolph, 187 A. 383, 108 Vt. 288—State ex rel Tenney v. Watson, 117 A. 663, 96 Vt 131

29. Fla.—State ex rel Landis v. Valz, 157 So 651, 117 Fla 311.

30. Ill.—People v. Whitaker, 159 Ill.App. 287
N.J.—Bonynge v. Frank, 98 A. 456, 89 N.J.Law 239, Ann Cas.1918D 211
51 C.J. p 353 note 2.

31. Mo.—State v. Monarch Transfer, etc., Co., 20 S.W 2d 60, 323 Mo 562
51 C.J. p 353 note 3.

32. Va —Commonwealth v. Bush Bluff R. Co, 81 S E 66, 116 Va. 48

Where, in an original proceeding in the highest court of the state, the judges are equally divided in opinion, demurrers and motions will be overruled or denied.[33] Where a demurrer to the information was filed after answer without leave of court, consideration of the demurrer is discretionary with the court.[34] In a proceeding to test the legality of defendant's organization, a court order declaring defendant a public corporation, as shown by a certified copy thereof filed by defendant, should not be considered in ruling on the sufficiency of the petition as against a demurrer.[35] The absence of the attorney general from the particular hearing on which the merits of a demurrer to the bill were discussed does not require a dismissal of the bill.[36] In a proper case judgment may be granted on the pleadings.[37]

Voluntary discontinuance or withdrawal of relator. After judgment for respondent on a demurrer, plaintiff cannot discontinue the suit without the consent of respondent;[38] nor can private persons who have appeared as relators withdraw from the proceeding as a matter of right.[39]

Filing of new or amended pleading. On the sustaining of a demurrer to a petition or complaint, plaintiff should be allowed to amend where the demurrer relates to amendable defects,[40] but leave to amend may be refused where plaintiff's case cannot be effectually aided by amendment.[41] On the overruling of a demurrer, demurrant may, and should, in a proper case, be allowed time and opportunity to plead.[42] While the relator, by filing a replication to a plea of justification after a demurrer thereto has been overruled, admits the sufficiency of the plea in law to bar a recovery,[43] such admission does not prevent him from making an issue of fact on allegations of the plea.[44]

Rendition of final judgment Judgment may be entered against defendant, on overruling a demurrer to the information, where the information is sufficient, if uncontroverted, to entitle plaintiff to the relief sought[45] and respondent elects to abide by the demurrer and refuses to plead further.[46] Where, in such case, the information is a new one filed after the voluntary dismissal of a prior one, judgment may be rendered without passing on pleas in abatement to the prior information,[47] since the dismissal of that information disposed of all pending motions and pleas concerning it.[48] Also, judgment of ouster should be given, if a demurrer to a plea is sustained,[49] any count of the information is good, and no plea legally states a sufficient answer,[50] and defendant declines to plead further;[51] and judgment may be rendered for plaintiff where defendant's motion for judgment on the pleadings is denied and he rests on the motion.[52] The fact that the court, after overruling respondent's demurrer to the complaint, permitted him to cross-examine some of the relator's witnesses gave to respondent no right to challenge the sufficiency of the evidence to support the judgment, where respondent by his demurrer, on which he

33. Fla.—State v. Giblin, 124 So. 375, 98 Fla. 802.

34. Ala.—Roberts v. State ex rel. Bailey, 153 So. 432, 228 Ala. 223.

35. Kan.—State ex rel. Stroberg v. Drainage Dist. No. 3 of McPherson County, 200 P.2d 278, 166 Kan. 225.

36. Tenn.—State ex rel. Bryant v. Maxwell, 224 S.W.2d 833, 189 Tenn. 187.

37. Fla.—State ex rel. Landis v. Town of Lake Placid, 164 So. 531, 131 Fla. 839.

Where plaintiff and defendant both moved for judgment on pleadings, and the court entered judgment on the pleadings, such judgment is final. —State ex rel. Beck v. Gleason, 83 P.2d 425, 148 Kan. 459, rehearing denied 84 P.2d 48, 148 Kan. 458.

Grant of motion without notice

Motion for judgment of ouster against municipality notwithstanding answer to information of quo warranto was held properly granted, although municipality was not notified of court's purpose to consider motion, where answer merely denied that passage of act creating municipality resulted from unlawful scheme whereas information was sufficient to attack constitutionality of act as well as to raise issue of unlawful scheme.- State ex rel. Landis v. Town of Lake Placid, 164 So. 531, 131 Fla. 839.

38. Pa.—Commonwealth v. O'Donnell, Brightly 111.

39. Tex. Mathews v. State, 18 S.W. 711, 82 Tex. 577.

40. Ga.—Avery v. Bower, 152 S.E. 239, 170 Ga. 202.

41. Vt.—State v. Watson, 117 A. 663, 96 Vt. 131.

42. Pa.—Commonwealth v. Morleka, 42 Pa.Dist. & Co. 169, 38 Mun.L.R. 67, 89 Pittsb.Leg.J. 414.
51 C.J. p 354 note 10.

Requirement to answer forthwith

Defendant in quo warranto may be required to answer forthwith after motion for dismissal for want of jurisdiction and demurrer to complaint or information have been overruled.—State ex rel. Sathre v. Roberts, 269 N.W. 913, 67 N.D. 92, 108 A.L.R. 37.

43. Ill.- People v. Karr, 91 N.E. 455, 244 Ill. 371.

44. Ill.- People v. Karr, supra.

45. Fla.- State v. Herndon, 2 So. 4, 23 Fla. 287.
Pa.- Commonwealth v. DeLeo, 34 Pa. Dist. & Co. 139.
Abatement or dismissal of proceeding generally see supra § 73.
Judgment generally see infra §§ 48 - 50.

46. Ill.—People v. Dodds, 142 N.E. 241, 310 Ill. 607.

47. Ill.- People v. Dodds, supra.

48. Ill.- People v. Dodds, supra.

49. Fla.- State v. Herndon, 2 So. 4, 23 Fla. 287.

50. N.J.—Grey v. Newark Plank Road Co., 48 A. 557, 65 N.J.Law 603.
51 C.J. p 354 note 19 [a].

51. Ill.—Place v. People, 33 Ill.App. 84.

52. Kan.—Thompson v. Downer, 216 P. 824, 114 Kan. 205.

elected to stand, had admitted the truth of the well pleaded portions of the complaint.[53]

A complaint or petition may be dismissed, on sustaining a demurrer thereto, where certain phases of the case are clearly beyond the reach of amendment and it would serve no good purpose to delay the final determination of the case,[54] but it should not be dismissed where the grounds of the demurrer relate to amendable defects,[55] and the sustaining of a demurrer to averments of the relator's right does not affect the judgment which ought to be rendered if the information sufficiently shows a usurpation by defendant.[56] Where a demurrer to the replication by which the relator sought to show some disqualification or forfeiture of office was sustained, the relator has no burden to carry by the status of the pleadings, and may suffer dismissal without offering proof, and secure a review of the ruling on the demurrer.[57] Final judgment is properly rendered for defendant, on the overruling of a demurrer to a plea, where plaintiff elects to stand by the demurrer[58] or does not ask leave to traverse the plea or amend the information;[59] and the petition may be dismissed on the overruling of a demurrer to the answer, where the petition affirmatively shows that the relator refused to appear at a hearing on charges on which he was removed from the office in question.[60]

Construction of order An order overruling a demurrer to the petition and finding for plaintiff, in a case involving an office and in which plaintiff has moved for judgment on the pleadings, is an adjudication that all matters well pleaded in defendant's response, if true, do not show title to the office.[61] Where the case has been heard not only on motions to quash, dismiss, and abate, but also on a stipulation showing that the organization proceedings in question are within the terms of a curative statute, an order that the information be quashed is a disposition of the cause on the merits,[62] rather than an abatement of the suit.[63] A ruling on a motion attacking the petition, not excepted to, becomes the law of the case as respects allegations in the answer which were repetitious of the allegations in the motion.[64]

§ 41. —— Amended and Supplemental Pleadings

As in ordinary civil actions generally, pleadings in a quo warranto proceeding are subject to amendment, both as to form and substance.

Pleadings in a quo warranto action or proceeding are subject to amendment, as in ordinary civil actions,[65] and are within the application of statutes relating to amendments in civil suits generally.[66] It is largely within the discretion of the trial court as to whether a particular amendment will be permitted.[67] Amendments may be as to form,[68] or as to substance;[69] but it is not permissible to set up, in an amendment, grounds essentially different from those alleged in the original information;[70] and leave to amend plaintiff's pleading will not be granted where justice does not require it,[71] where the time limited by statute for the institution of the proceeding has expired,[72] where

53. Colo.—Norton v People ex rel Rudbeck, 81 P.2d 393, 102 Colo 489

54. Vt—State v. Watson, 117 A 663, 96 Vt 131.

55. Ga—Avery v. Bower, 152 S.E 239, 170 Ga 202.

56. Ala.—State v. Price, 50 Ala 568

57. Ala.—State ex rel Chambers v. Bates, 171 So. 370, 233 Ala. 251.

58. Ill—People v. Weinberg, 158 N E 407, 327 Ill. 158
51 C.J. p 354 note 25.

59. Ill.—People v. Canty, 55 Ill. 33.

60. Ohio—State v. Eschliman, 154 N.E 810, 115 Ohio St. 509.

61. Ga.—Ledbetter v. Reese, 95 S.E. 209, 147 Ga. 710.

62. Ill.—People v. Roberts, 120 N. E 499, 284 Ill. 519

63. Ill.—People v. Roberts, supra.

64. Iowa—State ex rel. Wadsworth v. Board of Sup'rs of Linn County, 6 N.W.2d 877, 232 Iowa 1092.

65. Ala—Baxter v. State ex rel. Metcalf, 9 So 2d 119, 243 Ala 120
Pa—Commonwealth v. Peoples, Com Pl, 30 Del Co 80.
51 C.J p 351 note 47

66. Ala—West End v. State, 36 So 423, 138 Ala 295
51 C.J. p 352 note 48.

67. Mich.—Hawkins v. Voisine, 278 N.W. 811, 284 Mich 181.

68. Ind—Smith v State ex rel. Canary, 188 N.E. 576, 206 Ind. 138.
Pa—Commonwealth v United Republican Club of Ridley Tp., Com. Pl, 32 Del Co. 545.
51 C.J p 352 note 49

69. Pa—Commonwealth v. Peoples, 40 Pa Dist. & Co 689, 30 Del.Co. 210
51 C.J. p 352 note 50.

70. Tex—Davis v. State, 12 S.W. 957, 75 Tex 420—Hunnicutt v. State, 12 S.W. 106, 75 Tex. 233.
After decision on merits it was proper to deny relator's application to amend or supplement information and to have reargument on new legal issue thereby presented, where the matter by which it was proposed to present a new legal situation was available to relator when he caused his original pleading to be filed—Conklin v. Ronnie, 19 A.2d 625, 126 N.J Law 424

Inconsistency
Where an information in quo warranto against a municipal corporation was inconsistent with itself in admitting the existence of the corporation, it was not harmful error to refuse to permit it to be amended by adding the words "never having been lawfully and legally incorporated" after the corporate name—People ex rel. Webber v City of Spring Valley, 21 N.E. 843, 129 Ill. 169.

71. N.H—Attorney General v. Gates, 116 A. 443, 80 N.H. 280.
51 C.J p 352 note 52.

72. Mich—Youells v. Morrish, 187 N.W. 250, 218 Mich. 194.
Limitation of time for institution of proceeding see supra § 22.

the original controversy has become moot,[73] or where, at the time of the application for leave to amend, there exist reasons which would induce the court to refuse leave to file an information.[74] An amended answer is properly rejected where some of the allegations are in direct conflict with the allegations of the original plea or answer and other allegations were simply a repetition and enlargement of the former allegations set forth in the original answer;[75] and an amended information amounting to an effort to obtain a further rehearing on a question already adjudicated will not be permitted to be filed.[76] Where the information challenges the legal organization of a district, a question as to the power of commissioners of the district to make a particular agreement cannot be raised by a supplemental information.[77] An original information is not abandoned by filing an amended or supplemental information;[78] nor are the allegations of fact in an original petition superseded by an amendment consisting simply of conclusions based on the original petition.[79]

Matters of defense arising after defendant has answered may be set up in a supplemental answer,[80] or by plea puis darrein continuance.[81]

§ 42. —— Issues, Proof, and Variance

The issues in a quo warranto proceeding are confined to such as are properly made by the pleadings; and, when properly traversed or put in issue, allegations of fact in a pleading must be sustained by proof, although a variance between the pleadings and proof as to an immaterial matter is not fatal.

The issues in a quo warranto action or proceeding are simple,[82] they are confined to such as are properly made by the pleadings,[83] and, where the remedy is statutory, they must of necessity be so limited as to come within the authority granted by the legislature,[84] and also so as to come within the authority of the court, where recourse is had to the original jurisdiction of an appellate court.[85] In a quo warranto action or proceeding to test the title to an office, the only issue is title to the office,[86] and, at common law, the only issue is respondent's title to the office.[87]

Matters to be proved; admissions. When properly traversed or put in issue, allegations of fact in a plea or other pleading must be sustained by proof.[88] In both the common law writ of quo war-

73. Okl.—Sanford v. Markham, 221 P. 36, 96 Okl. 158.

74. N.J.—Van Riper v. Parsons, 40 N.J.Law 123, 29 Am.R. 210.
Grant or refusal of leave to file information see supra § 21.

75. Va.—Hammer v. Commonwealth ex rel. Hoover, 193 S.E. 496, 169 Va. 355.

76. Fla.—State ex rel. Adams v. Lee, 171 So. 333, 126 Fla. 396, 109 A.L.R. 319.

77. Ill.—People v. Baldridge, 108 N.E. 49, 267 Ill. 190.

78. Tex.—Hunnicutt v. State, 12 S.W. 106, 75 Tex. 233.

79. Iowa.—State v. Nichols, 41 N.W. 4, 78 Iowa 747.

80. U.S.—U. S. v. Avery, C.C.Cal., 24 F.Cas.No.14,481, Deady 204.

81. U.S.—U. S. v. Avery, supra.

82. Ill.—People v. Keys, 141 N.E. 722, 310 Ill. 198.
Scope of inquiry see infra § 45.

83. Mo.—State ex inf. McKittrick ex rel. City of Campbell v. Arkansas-Missouri Power Co., 93 S.W.2d 887, 339 Mo. 15.
N.J.—Valden v. Baumann, 34 A.2d 745, 131 N.J.Law 43.
51 C.J. p 354 note 37.
Issues on demurrer see supra § 40 a (2).

Issues formed by answer and reply
Ill.—People ex rel. Ray v. Lewistown Community High School Dist. No. 341, 57 N.E.2d 486, 388 Ill. 78 People v. Strohm, 121 N.E. 323, 285 Ill. 580.

Issues joined on information, answer, and reply
Mo.—State on Inf. of McKittrick v. Wiley, 160 S.W.2d 677, 349 Mo. 239.

Issues made by information and answer
Neb.—State ex rel. Johnson v. Conservative Savings & Loan Ass'n, 11 N.W.2d 89, 143 Neb. 805.

Time of raising issue
Respondent could not rely on proposition which was not raised in answer and return, since question was not raised at first time it was procedurally possible. State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 96 S.W.2d 607, 339 Mo. 385, 106 A.L.R. 1169.

84. Ohio.—State v. Columbus, etc., Electric Co., 135 N.E. 297, 104 Ohio St. 120.

Sections of statute held not to conflict
Section of Quo Warranto Act dealing with manner in which issues should be made up was held not in conflict with preceding sections of statute.—People, by Kerner v. United Medical Service, 200 N.E. 157, 362 Ill. 442, 103 A.L.R. 1229.

85. Ohio.—State v. Columbus, etc., Electric Co., 135 N.E. 297, 104 Ohio St. 120.

86. Ga.—Morris v. Peters, 46 S.E. 2d 729, 202 Ga. 350.
Ohio.—State v. Schneider, 134 N.E. 443, 103 Ohio St. 402.

Rights under contract of employment
One having contract to be corporation's general manager for a period of years cannot have rights under contract determined in quo warranto to determine his right to presidency.—State v. Berge, 217 N.W. 736, 195 Wis. 73.

87. Md.—Hunmenihime v. Hirsch, 79 A. 38, 114 Md. 39.
Scope and extent of relief see infra § 49.

88. Fla.—City of Coral Gables v. State ex rel. Gibbs, 5 So.2d 241, 148 Fla. 671, followed in 5 So.2d 244, 148 Fla. 679.
Iowa.—State ex rel. Miley v. Civic Action Committee, 28 N.W.2d 467, 238 Iowa 851.
N.J.—Colton v. Kreutzinger, 185 A. 18, 116 N.J.Law 456, affirmed 191 A. 878, 118 N.J.Law 183.
51 C.J. p 355 note 42.

Criminal liability
In quo warranto proceeding to oust or punish stock fire insurance companies, on ground that agent of companies, in order to settle litigation against companies, bribed superintendent of insurance, it was not required to be shown that companies allegedly participated in bribery so as to have incurred criminal liability for agent's acts.—State ex Inf. of Taylor v. American Ins. Co., 200 S.W.2d 1, 355 Mo. 1053.

Disqualification of office holder
One apparently elected to county office has prima facie right thereto,

ranto and information in the nature of quo warranto the ordinary rules of pleading are reversed, and the state is bound to show nothing.[89] Thus, plaintiff is not required to allege or prove any fact,[90] and no issues of fact are tendered by the complaint,[91] but the burden is on defendant,[92] defendant, not plaintiff, must tender the issues on which the rights claimed by him are to be litigated,[93] and such facts as he alleges may be rebutted.[94] It has been held, however, that in proceedings to forfeit a corporate charter, the burden rests on the state to plead and prove that the corporation has forfeited its charter by violating its terms,[95] and that, when the state institutes proceedings to oust respondent from a profession, the state must, in the first instance, offer evidence to sustain the material averments of the complaint, and, failing to meet this burden, respondent is entitled to be discharged;[96] and it has also been held that in a proceeding by a private individual to oust respondent from a public office, the burden rests on the relator to allege and prove that he is entitled to the office under the law,[97] and that respondent unlawfully holds and exercises it,[98] although, when the sovereign, the state, or its proper officer, brings an action alleging that one is wrongfully usurping an office which belongs to another, the common-law rule places the burden on respondent to show his title to the office.[99] The fact that a single information was filed against two claimants to an office does not change the rule that the issues are still between the relator and the respective respondents,[1] and each is called on to show his own title to the office.[2] In proceedings to have it adjudged that proceedings to incorporate a city were illegal and void, and to oust the city from the exercise of the municipal franchise, the question whether the territory was incorporated or unincorporated is not within the issues, and the only issue is whether the city was usurping the municipal franchise at the time of the action.[3]

While effect will be given admissions in a pleading,[4] including admissions arising from the failure of one party to deny or traverse material and relevant facts alleged by the opposite party,[5] and matters admitted or agreed on need not be proved,[6] nevertheless an admission in the answer that the relator accepted the office in question and entered

and cannot be ousted by proceedings in nature of quo warranto without proof of disqualifications specifically mentioned by law—Chandler v Barefield, 169 S E 347, 177 Ga. 103.

89. Cal.—People ex rel Smith v City of San Jose, App., 222 P.2d 947—People ex rel. Paganini v. Town of Corte Madera, 218 P 2d 810, 97 Cal.App 2d 726

90. Ill.—People ex rel Ray v. Lewistown Community High School Dist., 57 N.E 2d 486, 388 Ill 78

91. Ill—People ex rel. Ray v. Lewistown Community High School Dist., supra.

92. Ala.—State ex rel. Chambers v. Bates, 171 So. 370, 233 Ala 251
Ill.—People ex rel. Ray v. Lewistown Community High School Dist, 57 N.E 2d 486, 388 Ill. 78.

De jure office and lawful holding

When one is called on in quo warranto proceedings to show by what right he exercises, or assumes to exercise, the function of a public office, he must show that there is a de jure office as well as a lawful holding thereof by him.—Miller v. State ex rel. Peek, 29 So 2d 411, 249 Ala. 14, 172 A.L.R 1356—Hale v State ex rel. Algee, 186 So. 163, 237 Ala. 191.

93. Ill—People ex rel. Ray v. Lewistown Community High School Dist., 57 N.E.2d 486, 388 Ill. 78.

94. Ill.—People ex rel. Ray v. Lewistown Community High School Dist, supra.

95. Tex—Texas Mut Life Ins Ass'n v State, Com App, 58 S.W 2d 37.

96. Ala.—Ferguson v. State ex rel Bailey, 172 So. 350, 27 Ala.App. 337.

97. Ohio—State ex rel. Bolsinger v. Oridge, 16 N E.2d 840, 58 Ohio App. 491, affirmed 16 N E 2d 334, 134 Ohio St. 206
Wash.—State v. Superior Court for King County, 9 P.2d 1087, 167 Wash. 655.

98. Ohio—State ex rel. Bolsinger v. Oridge, 16 N E 2d 840, 58 Ohio App 491, affirmed 16 N.E 2d 334, 134 Ohio St 206.

99. Wash.—State v. Superior Court for King County, 9 P.2d 1087, 167 Wash. 655.

1. Mo—State on Inf of McKittrick v Wiley, 160 S W.2d 677, 349 Mo. 239

Issues made by pleadings

(1) In quo warranto proceeding by attorney general to determine which of two respondents was prosecuting attorney of county where information alleged that one respondent was duly qualified prosecuting attorney of such county and entitled to hold such office until duly qualified successor was elected and qualified and such respondent's answer and return alleged same facts and that no duly qualified successor was elected and qualified as such officer, it was only necessary for such respondent to show such facts—State on Inf of McKittrick v. Wiley, supra.

(2) Plea in one respondent's answer as to other respondent's disqualification raised no proper issue for court's consideration as between relator and such pleader, since facts pleaded with respect to other respondent did not tend to show any right in pleader with respect to such office.—State on Inf. of McKittrick v. Wiley, supra.

(3) Charges made against the incumbent in claimant's answer could not broaden the issues between the attorney general and claimant, and incumbent could not be required to prove as against the attorney general the facts previously conceded by him—State on Inf of McKittrick v. Wiley, supra.

2. Mo.—State on Inf. of McKittrick v. Wiley, supra.

3. Cal—Bray v Payne, 292 P 478, 210 Cal. 465

4. Mich—Hawkins v. Voisine, 278 N.W. 811, 284 Mich. 181.
N.J.—Haines v. Appleton, 9 A 2d 778, 123 N J Law 492.
Ohio.—State v. Sherman, 22 Ohio St 411.
51 C.J p 355 note 43

5. Cal.—People ex rel. Smith v. City of San Jose, App., 222 P.2d 947.
51 C.J p 355 note 44.

6. Ill—People v. City of Chicago, 182 N E 419, 349 Ill. 304.
51 C J p 355 note 45.

on a discharge of the duties thereof is not an admission that he took an oath of office,[7] and a matter alleged in the information cannot be taken as admitted where it is substantially traversed by plea.[8]

Admissibility of evidence under pleadings. Evidence which is not objectionable on general grounds is admissible where it bears on the issues made by the pleadings.[9] Conversely, the evidence admitted must ordinarily be confined to that which bears on the issues made by the pleadings,[10] as properly construed.[11] Each count of the complaint must stand alone, and the determination of the admissibility of evidence under any count depends on the issues raised between the parties as to that count.[12] If leave of court to institute the proceeding is essential, it may be sufficiently shown by proceedings of record without an allegation thereof in the information;[13] and the unconstitutionality of the statute creating the office in question may be shown under a complaint which merely alleges that defendant unlawfully intrudes into and usurps the office.[14]

Variance between the pleadings and proof as to an immaterial matter is not fatal.[15]

§ 43. Evidence

a In general
b Presumptions and burden of proof

a. In General

The general rules of evidence governing civil actions have been applied in quo warranto proceedings with respect to the admissibility and the weight and sufficiency of evidence.

In some jurisdictions, wherein the writ of quo warranto has been abolished by code provision and a civil action has been substituted therefor, as discussed supra § 1, the action is to be tried by applying the same rules of evidence that apply in other civil actions.[16] In a majority of jurisdictions, however, while the general rules of evidence obtaining in civil actions are applied in determining the admissibility, and the weight and sufficiency of evidence, a different rule prevails in determining the burden of proof, as considered infra subdivision b of this section.

Admissibility. The rules governing the admissibility of evidence in civil actions generally are applicable in quo warranto proceedings[17] to test right or title to office,[18] to determine corporate exist-

7. Wis. State v. Darby, 190 N.W. 994, 179 Wis. 147.

8. Colo.—People v. Reid, 17 P. 302, 11 Colo. 138.

9. Ill.—People ex rel. Ray v. Lewistown Community High School Dist., 57 N.E.2d 486, 388 Ill. 78.
Mo.—State v. Sullivan, 8 S.W.2d 616, 320 Mo. 362.
Or.—State ex rel. Brown v. Union High School Dist. No. 7 of Yamhill County, 90 P.2d 202, 161 Or. 410.
51 C.J. p 355 note 49.
Admissibility of evidence generally see infra § 43.

10. Mo.—State v. Heffernan, 148 S.W. 90, 243 Mo. 442.
51 C.J. p 355 note 50.

Who employed counsel

In quo warranto action, question who employed counsel for state was held immaterial where good faith was not in issue.—State v. School Dist. No. 118, Mo.App., 48 S.W.2d 135.

11. Ala.—McMillan v. State, 119 So. 652, 218 Ala. 602.

12. Ill.—People ex rel. Ray v. Lewistown Community High School Dist., 57 N.E.2d 486, 388 Ill. 78.

13. N.C.—Giles v. Hardie, 23 N.C. 42.
Necessity of leave of court see supra § 20.

14. Or.—State v. Stevens, 44 P. 898, 29 Or. 464.

15. Tex.—State v. Fortinberry, Civ. App., 276 S.W. 466, reversed on other grounds, Com.App., 283 S.W. 146.

Variance held immaterial

Conn. State ex rel. Schenck v. Barrett, 184 A. 379, 121 Conn. 237.
51 C.J. p 356 note 55 [a].

16. Kan. State v. Harper, 146 P. 1169, 94 Kan. 478, Ann.Cas.1917B 464.

17. Ala. Fraser v. State, 113 So. 289, 216 Ala. 426.
51 C.J. p 356 note 83.
Admissibility of evidence as affected by pleadings see supra § 42.

18. Ga.—Kelly v. Horton, 173 S.E. 4, 178 Ga. 127.

Disclosure of secret vote

(1) In quo warranto proceeding to try title to office, voter can waive his right to ballot secretly and disclose on witness stand how, or for whom, he voted. Ex parte Henry, 126 S.W.2d 1, 132 Tex. 575, followed in Ex parte O'Brien, 126 S.W.2d 3, 132 Tex. 579, Ex parte McAfee, 126 S.W.2d 3, 132 Tex. 579, and Ex parte Kincaid, 126 S.W.2d 3, 132 Tex. 580.

(2) Where, however, voter refuses to divulge for whom he registered his vote on voting machine, such refusal is no evidence one way or the other.—Wood v. State ex rel. Lee, 126 S.W.2d 4, 133 Tex. 110, 121 A.L.R. 931.

Identity of documents

With respect to payment of taxes, affecting eligibility for office, witnesses, referring to land assessment roll as land roll sufficiently identified it so as to render it admissible. - State ex rel. Mitchell v. McDonald, 115 So. 508, 164 Miss. 405, 86 A.L.R. 290.

Evidence held admissible

(1) Evidence showing payment by claimant of bar enrollment fees successively in various counties, in determining where the claimant resided during the year immediately preceding the election; and evidence of issuance to the claimant of notary's commission in county. State on Inf. of McKittrick v. Wiley, 160 S.W.2d 677, 349 Mo. 239.

(2) Evidence that certain persons pleaded guilty to indictments, as showing existence of law violations, in proceeding to oust law enforcement officers for failure to perform their duties. - State, on Inf. of McKittrick, v. Williams, 144 S.W.2d 98, 346 Mo. 1003 State on Inf. of McKittrick v. Graves, 144 S.W.2d 91, 346 Mo. 990.

(3) Evidence of conditions of widespread law violation existing during prosecuting attorney's prior terms and until beginning of attorney's present term, in connection with similar evidence referring to conditions existing during attorney's present term, to establish the further continuance of such conditions. —State on Inf. of McKittrick v. Graves, 144 S.W.2d 91, 346 Mo. 990.

(4) Newspaper articles concerning lawless conditions in county.—State, on Inf. of McKittrick, v. Williams, 144 S.W.2d 98, 346 Mo. 1003

ence and the right or propriety of exercising certain powers or franchises,[19] or to exclude a person from practicing a profession without a license or certificate.[20] Evidence which is not properly excepted to will be treated as properly in the case.[21]

Weight and sufficiency. In most jurisdictions, the rules governing the weight and sufficiency of evidence in civil actions generally, discussed in Evidence §§ 1016–1050, have been applied in quo warranto proceedings[22] to test right or title to office,[23]

—State on Inf of McKittrick v Graves, 144 S W 2d 91, 346 Mo 990

(5) Other evidence held admissible see 51 C J. p 356 note 83 [a]

Evidence held inadmissible

(1) Evidence concerning the intention of claimant to acquire residence in county.—State on Inf of McKittrick v Wiley, 160 S.W.2d 677, 349 Mo 239.

(2) Evidence with respect to defendant's plea of guilty to indictment for perjury, in federal court, on issue of defendant's qualification to hold county office—State ex rel Mitchell v McDonald, 145 So 508, 164 Miss. 405, 86 A L R. 290

(3) A judgment of ouster in a prior action as against one not a party to the action and who does not take office from, or in any way hold under, the defeated party.—People v Murray, 73 N Y. 535

(4) In quo warranto against officers of consolidated school district to which county superintendent was not party, evidence that in investigating boundaries of proposed district the superintendent made false statements as to probable cost of the district—State ex rel School Dists. Nos 52 and 53, Cass County, v. Wright, 194 S W 35, 270 Mo 376

(5) Mayor's statement stipulated into the record, that mayor had always concurred in removal of respondent by city comptroller.—Commonwealth ex rel. Reinhardt v. Randall, 51 A 2d 751, 356 Pa 302

(6) Resolution of county board of commissioners of roads and revenues, pending litigation, wherein board attempted to ratify respondent's payment of tax to commissioner as payment to board, since board could not thus remove respondent's disqualification, and resolution was not relevant as corroborating respondent's contention that he paid tax by paying it to commissioner—Taylor v. Aultman, 170 S E 355, 177 Ga 524.

(7) County auditor's testimony as to how much of township funds he paid to one appointed township trustee by him.—State v. Richey, 172 N E 119, 202 Ind 116.

(8) Other evidence held inadmissible see 51 C J. p 356 note 83 [b]

19. Evidence held admissible

(1) Evidence that operations of corporation resulted in profits to its members by furnishing services for which state charged more, on question whether it was hospital association within statute authorizing employers to contract with such associations for care of injured workmen—State ex rel Troy v Lumbermen's Clinic, 58 P 2d 812, 186 Wash 384.

(2) Testimony as to where witnesses transacted business and attended church and fact that some children living within district's territory attended school outside district, on question whether territory described in petition to organize district was single compact and contiguous community for educational purposes—People ex rel Snowden v Hurst, 81 N E 2d 491, 401 Ill. 158

(3) Other evidence held admissible see 51 C.J p 356 note 83 [a].

Evidence held inadmissible

Cal—People ex rel Strong v City of Whittier, 24 P 2d 219, 133 Cal App 316

N J—Wilson v Morris R Co, 168 A 748, 11 N J Misc 787

51 C J p 356 note 83 [b].

20. Advertising

In quo warranto proceeding against unlicensed chiropractor, overruling respondent's objections to the state's evidence with respect to public talks over radio and newspaper advertisements concerning nature of chiropractic and that respondent was engaged in business of a chiropractor was not error, where it was shown that respondent was responsible for the advertising—Owen v State ex rel. Bailes, 200 So 412, 240 Ala. 582.

21. Vt—State v. Zanleoni, 122 A. 495, 97 Vt 212

Exceptions not briefed

In original quo warranto proceedings in the supreme court, in which no exceptions to the admission of evidence are briefed, all of the evidence before the court is to be treated as properly in the case—State v Zanleoni, supra

22. Ala.—Owen v State ex rel Bailes, 200 So 412, 240 Ala. 582

51 C J p 357 note 85.

23. Ill—People ex rel Aken v. Puffer, 8 N E 2d 198, 290 Ill App. 196

Preponderance of evidence, which must be clear and dependable, is required—Hood v Cruso, 174 So. 552, 179 Miss 234.

Direct or circumstantial evidence

Defendant in proceeding in nature of quo warranto to oust him from office on ground that he was not of good character had right to prove his good character by direct or circumstantial evidence—People ex rel. Aken v Puffer, 8 N.E 2d 198, 290 Ill. App 196.

Evidence viewed with suspicion under circumstances

In proceeding to oust member of county board of education because of educational disqualification, where member in sworn answer alleged that he had passed state board of education examination as evidenced by certificate filed with answer to effect that named person was qualified for membership to the board, and member admitted in deposition that he was not the person who took the examination and subsequently he withdrew allegation and certificate and attempted to excuse himself, court would look with suspicion on any evidence member might offer in proof of his eligibility.—Chadwell v. Commonwealth, by Meredith, 157 S. W 2d 280, 288 Ky 644.

Assessment roll

In determining whether person holding office had paid taxes, assessment roll was only prima facie evidence of ownership of property assessed—State ex rel Mitchell v. McDonald, 145 So. 508, 164 Miss 405, 86 A L R 290

Uncontroverted evidence may be accepted as true—State ex rel Wm Eckelmann, Inc v Jones, 68 A 2d 352, 4 N J Super 599, reversed on other grounds 72 A 2d 322, 4 N.J. 207, reargument denied 72 A 2d 872, 4 N J. 374

Evidence held sufficient

(1) In general.

Ga—Engram v Faircloth, 54 S E 2d 598, 205 Ga 577.

Ill—People ex rel Czachorski v. Fisher, 6 N E 2d 693, 289 Ill App 610

Kan—State ex rel. Fatzer v Axton, 216 P 2d 784, 169 Kan 49

Mo—State on inf McKittrick v. Wallach, 182 S W 2d 313, 353 Mo 312, 155 A L R 1.

Neb—Stafrin v. Malster, 236 N W. 453, 121 Neb 178

N J—Moore v Ennis, 162 A. 751, 10 N J Misc. 1131

Ohio—State ex rel Tilden v. Harbourt, 46 N.E 2d 435, 70 Ohio App. 417.

R.I—Jackvony ex rel v. Berard, 18 A 2d 889, 66 R I. 290

51 C J p 357 note 85 [c]

(2) To show that particular candidate was duly elected to office

N.C.—Hill v. Ponder, 19 S E 2d 5, 221 N.C 58.

Wash—State ex rel. David v Dailey, 158 P.2d 330, 23 Wash.2d 25

to determine corporate existence and the right or propriety of exercising certain powers or franchises,[24] or to exclude a person from practicing a pro-

(3) To authorize finding that election commissioners issued certificate of election to relator because of threats of violence.—State ex rel Pike v Hammons, 63 S.W.2d 660, 166 Tenn. 469

(4) To sustain finding in favor of eligibility of incumbent.
Ga. Cloud v. Maxey, 23 S.E.2d 668, 195 Ga. 90.
Wyo.- State ex rel. Pape v. Hockett, 156 P.2d 299, 61 Wyo. 145.

(5) To establish officer's residence in district or county so as to render him eligible to hold office therein.
Mo.- State ex inf McKittrick ex rel Chambers v. Jones, 185 S.W.2d 17, 353 Mo 900.
Tex. Chaney v. State ex rel. Bundrick, Civ.App., 116 S.W.2d 258

(6) To identify officer's birth record showing his birth more than twenty-one years before date of his father's naturalization.—Commonwealth v. Joyce, 181 A. 481, 319 Pa. 507.

(7) To establish ineligibility of person to hold office.- State ex rel. Suhre v. Quickstad, 268 N.W. 683, 66 N.D. 689, 107 A.L.R. 202.

(8) To make prima facie case in proceeding challenging right of defendant to hold office, based on delinquency in payment of taxes State ex rel. Mitchell v. McDonald, 145 So. 508, 164 Miss 405, 86 A.L.R. 200.

(9) To sustain judgment ousting member of county board of education because of lack of educational qualifications prescribed by statute. —Chadwell v. Commonwealth, by Meredith, 157 S.W.2d 280, 288 Ky. 644.

(10) To sustain findings as to identity of persons elected.— State v. Kylmanen, 231 N.W. 197, 180 Minn. 486.

(11) To show irregularities of election officials in conduct of recount of votes cast in certain precincts sufficient to change result of election. -Behrendt v. Wilcox, 269 N.W. 155, 277 Mich. 232.

(12) To establish that ballots cast for relator had been credited to respondent and that relator had in fact received a majority of votes cast for position in question. State ex rel. Page v. Donnelly, 190 So. 593, 139 Fla. 320.

(13) To establish claim of losing candidate that he had specifically asked for a recount from floor of the convention hall, and that he had received more than a majority of votes.—Garcia v. Sedillo, 218 P.2d 721, 70 Ariz. 192.

(14) To support finding that sheriff had forfeited his office for neglect of official duty in failing to enforce liquor, vice and gambling laws -- State, on Inf of McKittrick, v Williams, 144 S.W.2d 98, 346 Mo 1003.

(15) To sustain finding that director was legally removed as corporation's president. -Zachary v. Milm, 293 N.W. 770, 294 Mich. 622

(16) To sustain finding that justice of the peace was guilty of willful misconduct in office, justifying his ouster State ex rel. Parker v. Burr, 99 P.2d 742, 151 Kan. 383.

(17) To sustain finding that prosecuting attorney was guilty of official misconduct in failing to prosecute criminal actions for illegal operation of slot machines in county. State, on Inf. of McKittrick, v Wymore, 132 S.W.2d 979, 345 Mo. 169.

Evidence held insufficient

(1) In general
Ind. -Heathco v. State ex rel. Addison, 199 N.E. 260, 209 Ind. 667.
La. -State ex rel. Palfrey v. Simms, App., 152 So. 305.
51 C.J. p 357 note 85 [d].

(2) To sustain burden of showing good title to office.—Commonwealth ex rel. Kelley v. Keiser, 16 A.2d 307, 340 Pa. 59.

(3) To establish that person claiming office was not entitled thereto.—McGroarty v. Ferretti, 184 A. 508, 56 R.I. 152.

(4) To establish eligibility to hold office.- Commonwealth by Funk v. Clark, 325 S.W.2d 118, 311 Ky. 710.

(5) To establish ineligibility to hold office.
Ga.—Powell v. Hall, 170 S.E. 354, 177 Ga. 488.
Ky.—Richardson v. Commonwealth, by Meredith, 122 S.W.2d 156, 275 Ky. 486.

(6) To sustain judgment ousting member from office on ground that member was directly or indirectly "interested" in employment of son and daughter and committed acts making him ineligible for reelection. -Chadwell v. Commonwealth by Meredith, 157 S.W.2d 280, 288 Ky. 644.

24. Ohio.—State ex rel. Bartlett v. National Ass'n of Angling & Casting Clubs, App., 51 N.E.2d 662.

Evidence held sufficient

(1) In general.
Kan.—State v. McCombs, 133 P.2d 134, 156 Kan. 391.
Minn.—State ex rel. Town of Stuntz v. City of Chisholm, 273 N.W. 235, 199 Minn. 403.
Mo.—State ex rel. Hart v. Whitaker, App., 218 S.W.2d 121.
Tex.—State ex rel Walker v City of Gladewater, Civ.App., 139 S.W.2d 283, reversed on other grounds City of Gladewater v. State ex rel Walker, 157 S.W.2d 641, 138 Tex 173
51 C.J. p 357 note 85 [c]

(2) To establish that a particular district or organization was properly incorporated.
Ill.—People ex rel Tudor v. Vance, 29 N.E.2d 673, 374 Ill. 415.
Or.—State ex rel. v Port of Cascade Locks, 127 P.2d 351, 169 Or. 197.

(3) To sustain verdict for corporation exercising franchise. Wilson v. Morris R Co., 168 A. 748, 11 N.J. Misc 787.

(4) To disclose that association transacted business in accordance with charter. Texas Mut. Life Ins. Ass'n v. State, Tex.Com.App., 58 S.W.2d 37.

(5) To establish that alleged agent of companies willfully bribed superintendent of insurance to settle pending litigation against companies State on Inf of Taylor v. American Ins. Co., 260 S.W.2d 1, 365 Mo. 1053.

(6) To sustain finding that city consented to, acquiesced in and ratified franchise which county had granted to electric utility for use of streets before incorporation as a city.- State ex rel. City of Jasper v. Gulf States Utilities Co., Civ.App., 185 S.W.2d 501, reversed on other grounds 189 S.W.2d 693, 144 Tex. 184.

(7) To establish that territory was legally annexed to city.
Cal. People v. City of South Gate, 5 P.2d 482, 118 Cal.App. 482.
Fla. State ex rel. Watson v. City of Miami, 15 So.2d 151, 153 Fla. 653, followed in 15 So.2d 485, 153 Fla. 660.

(8) To establish that particular persons were or were not eligible to sign petitions for annexation of land to district. Merriman v. Newman Tp High School Dist. No. 150, 39 N.E.2d 332, 379 Ill. 32.

(9) To sustain finding that the land was not benefited by inclusion within municipal limits and that landowner was not estopped to raise question of usurpation of municipal authority by acquiescence for unreasonable length of time.- City of South Miami v. State ex rel. Landis, 176 So. 171, 130 Fla. 125.

Evidence held insufficient

(1) To support judgment for relators in proceedings to exclude property from city limits.- City of Coral Gables v. State ex rel. Gibbs, 10 So.2d 922, 152 Fla. 100.

fession without a license or certificate.[25] However, in a few jurisdictions it is held that, in a quo warranto proceeding to remove a person from office on the ground of his commission of an unlawful act working a forfeiture of office, the strong evidence which is necessary to convict in a criminal case, discussed in Criminal Law §§ 910–913, is required.[26]

b. Presumptions and Burden of Proof

Subject to some exceptions, it is generally held that the burden of proof in quo warranto proceedings, such as a proceeding to test the right or title of a person to office, is on respondent; but a private relator seeking to recover possession of an office has the burden of showing good title to the office in himself.

In a majority of jurisdictions, the burden of proof rests on respondent in a quo warranto action or proceeding[27] to make disclosure concerning the facts averred by the relator;[28] and it is not incumbent on the state or people to prove anything in the first instance.[29] However, in some states this rule does not obtain;[30] and in such states presumptions may be invoked against the state as readily as against an individual in ordinary civil actions.[31] It has been held that in quo warranto proceedings where respondent interposes a general denial the burden is on the relator to prove the things charged as a usurpation;[32] but if respondent admits the acts so charged or relator proves them, the burden of justification by license, title, or authority is on the respondent.[33]

Various presumptions obtaining in civil actions generally have been held to obtain in proceedings in the nature of quo warranto.[34] Thus, it is not to be presumed that the attorney general applied for the writ for personal or private ends.[35]

Title to office. Subject to some exceptions, it is a general rule that, in a quo warranto action or proceeding by the state to test the right of the occupant to hold an office, the burden is on respondent to show a good legal title to the office;[36] and

(2) To disclose incorporators acted fraudulently or arbitrarily in excluding certain territory from corporate limits of town—State v. Stein, Tex Civ App, 52 S W 2d 690, error refused.

(3) To sustain finding that school district was not "compact and contiguous" within meaning of statute providing for creation of community high school districts—People ex rel. Beedy v. Regnier, 37 N E 2d 186, 377 Ill 562.

(4) To show that signer's disqualifications for voting and signing annexation petition arising from conviction were removed—Messman v. Newman Tp High School Dist. No 150, 39 N E 2d 332, 379 Ill 32.

(5) To show misuse of franchise rights—State ex rel Bartlett v National Ass'n of Angling & Casting Clubs, Ohio App., 51 N E 2d 662.

(6) To sustain charge of usury—Black v. Contract Purchase Corp., 42 N.W 2d 768, 327 Mich 636.

(7) To show that officers of defendant had ever been guilty of any fraud in management of organization or that any attempt had ever been made to lead any applicant to believe that he was buying life insurance.—State ex rel. Kuble v. Capitol Ben. Ass'n, 21 N.W.2d 890, 237 Iowa 363.

(8) To justify judgment of ouster depriving society of its immunities from local and county taxes—Wilentz v. Society for Establishing Useful Manufactures, 190 A. 79, 118 N J Law 20, affirmed 1 A.2d 880, 121 N.J Law 197.

25. Evidence held insufficient
To support verdict for defendant in proceeding to exclude defendant from profession of treating diseases of human beings without certificate of qualification—State ex rel Biggs v Higbee, 138 So 819, 224 Ala 121

26. Puerto Rico.—People v. Manescau, 33 Puerto Rico 703.

27. Ill—People v Sackett, 184 N. E. 646, 351 Ill 363
Or.—State ex rel Brown v Bailey, 51 P 2d 671, 151 Or. 496.
Pa—Commonwealth v. Peoples, Com Pl, 30 Del Co 80
51 C J. p 355 note 61.

28. Or—State ex rel Hallgarth v. School Dist No 23, Union County, 172 P 2d 655, 179 Or 441

29. Colo.—Lockhard v. People, 178 P. 565, 65 Colo 558.
51 C J p 355 note 62.

30. Kan.—State v Harper, 146 P. 1169, 94 Kan. 478, Ann.Cas.1917B 464.

31. Kan.—State v. Harper, supra

32. Ala—Wilkey v. State ex rel. Smith, 189 So. 198, 238 Ala. 121.

33. Ala—Wilkey v. State, ex rel Smith, supra.

34. Mo.—State ex Inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 96 S.W.2d 607, 339 Mo. 385, 106 A.L.R. 1169.

Good faith of city council
Del.—State ex rel. Green v. Holzmueller, 5 A 2d 251, 1 Terry 16.

Propriety of action of court
Mo—State ex Inf. McKittrick ex rel City of California v Missouri Utilities Co., 96 S W.2d 607, 339 Mo 385, 106 A.L.R. 1169

35. Fla—State ex rel Landis v S. H Kress & Co, 155 So. 823, 115 Fla. 189.

36. Ala—Roberts v State ex rel. Bailey, 153 So 432, 228 Ala. 222—Berk v State, 142 So 832, 225 Ala 324, 84 A L R 740—Baker v. State, 133 So 291, 222 Ala 467.
Conn—State ex rel Jewett v. Satti, 54 A 2d 272, 133 Conn. 687
Ill—Greening ex rel. Rowe v. Barnes, 188 N E 805, 355 Ill 99—People ex rel Czachorski v. Fisher, 6 N E 2d 693, 289 Ill.App 610
Ky—Commonwealth ex rel Meredith v Bogie, 152 S W.2d 286, 287 Ky. 103—McClendon v. Hamilton, 127 S W.2d 605, 277 Ky. 734.
Miss—Jones v State ex rel. McFarland, 42 So.2d 123, 207 Miss. 208
Or—State ex rel. Brown v Bailey, 51 P 2d 671, 151 Or 496.
Pa—**Corpus Juris cited in** Commonwealth ex rel Kelley v. Keiser, 16 A 2d 307, 313, 340 Pa 59.
Va—Hammer v Commonwealth ex rel Hoover, 193 S E 496, 169 Va 355.
51 C J. p 355 note 65—20 C.J. p 240 note 80.

Confirmation of nomination
Burden was on defendant to show that his nomination for office by governor was confirmed by two-thirds of senators present in executive session, where senate's official record showed rejection of nomination—Denison v. State, Civ App, 61 S.W 2d 1017, error refused Denison v State ex rel. Allred, 61 S.W 2d 1022, 122 Tex. 459.

To establish eligibility
Ky—Commonwealth by Funk v. Clark, 225 S W.2d 118, 311 Ky 710—Chadwell v. Commonwealth, by Meredith, 157 S W 2d 280, 288 Ky. 644—Commonwealth v. Mullins, 150 S.W 2d 668, 286 Ky. 242.

this has been held to be true even where the action is brought in the names of the state or people on the relation of the attorney general at the instance of a private person,[37] or where it is brought by the attorney general in the name of the state or people on his own information or on the complaint of a private person under a statutory remedy which supersedes the ancient writ of quo warranto or proceedings by information in the nature of quo warranto.[38] So also, where the proceeding is against the incumbent and a claimant each defendant has the burden of proving matters essential to his claim to the office.[39] However, a judgment of ouster against the respondent does not establish the title of a private relator to the office,[40] and in a proceeding brought by a private relator to recover possession of an office, public or corporate, the relator has the burden of showing good title to the office in himself;[41] and in a proceeding by a private relator who is not a claimant of the office, the burden rests on him to show his interest or capacity to maintain the proceeding.[42] Similarly, where relator is asserting the right of a third person to an office he has the burden of showing not only respondent's lack of right, but also the legal right of such third person, to hold the office.[43]

The general rule stated above is not universally followed,[44] and in a few instances the burden of proving particular matters has been held to rest on plaintiff.[45] It has been held, under statute so providing, that it is the duty of the attorney general in whose name an information in the nature of quo warranto is filed to prove affirmatively all the facts alleged in the information.[46]

In any event, where defendant has introduced evidence sufficient to make a prima facie showing supporting his contention on a particular matter, the burden is cast on petitioner or relator to prove the contrary,[47] and to establish that his right should be recognized.[48]

In a proceeding by a private individual, the title of the present incumbent of the office will ordinarily be presumed to be good until the contrary is shown.[49] Thus, in the absence of a showing that the electors had either actual or constructive knowl-

37. N.Y.—People v. Perley, 80 N.Y. 624
20 C.J. p 240 note 81.

38. N.Y.—People v. Thacher, 55 N.Y. 525, 14 Am.R. 312.
20 C.J. p 241 note 82

39. Mo.—State on Inf. of McKittrick v. Wiley, 160 S.W.2d 677, 349 Mo. 239.

40. N.Y.—People v. Thacher, 55 N.Y. 525, 14 Am.R. 312.
20 C.J. p 241 note 83.

41. Fla.—State ex rel. Clark v. Klingensmith, 163 So. 704, 121 Fla. 297.
Ky.—McClendon v. Hamilton, 127 S.W.2d 605, 277 Ky. 734.
N.J.—Van Brookhoven v. Kennedy, 17 A.2d 152, 125 N.J.Law 507—Devlin v. Cooper, 11 A.2d 29, 124 N.J.Law 155, affirmed 15 A.2d 630, 125 N.J.Law 414—Murphy v. Cuddy, 1 A.2d 758, 121 N.J.Law 209—Pellecchia v. Mattia, 193 A. 910, 118 N.J.Law 512—Colton v. Kreutzinger, 185 A. 18, 116 N.J.Law 456, affirmed 191 A. 878, 118 N.J. Law 183—McGlynn v. Grosso, 178 A. 86, 111 N.J.Law 540—Burke v. Kenny, 75 A.2d 633, 9 N.J.Super. 160.
N.Y.—People v. Thacher, 55 N.Y. 525, 14 Am.R. 312.
Ohio.—State v. Lynch, 177 N.E. 765, 123 Ohio St. 676—State ex rel. Davis v. Plapp, 22 N.E.2d 456, 61 Ohio App. 76.
R.I.—Jackvony ex rel. v. Berard, 18 A.2d 889, 66 R.I. 290—Gorham v. Robinson, 186 A. 832, 57 R.I. 1.
Tex.—Wood v. State ex rel. Lee, 126 S.W.2d 4, 133 Tex. 110, 121 A.L.R. 931.
Utah.—State ex rel. Stain v. Christensen, 35 P.2d 775, 84 Utah 185.
51 C.J. p 356 note 67.

Reason for rule

In such case the presumption of right rests with the occupant of the office.—Hood v. Cruso, 174 So. 552, 179 Miss. 234.

Existence of vacancies

In quo warranto action for possession of offices of town trustees, trustees who had received highest number of votes for office, and had been certified as elected by proper officers, had burden also of proving that they were vacancies in offices to which they were elected or that terms of incumbents had expired.—Heathco v. State ex rel. Addison, 199 N.E. 360, 209 Ind. 667.

42. Mo.—State v. Hefferman, 148 S.W. 90, 243 Mo. 442.

43. Ala.—State ex rel. Gravitt v. Kellett, 162 So. 303, 230 Ala. 510.

44. D.C.—Newman v. U. S., 43 App. D.C. 53, reversed on other grounds 35 S.Ct. 881, 238 U.S. 537, 59 L.Ed. 1446.

Presumption to be overcome

Mere possession of office, accompanied by a commission from the proper appointing officer, creates a presumption that respondent possesses the legal qualifications to hold the office, and the relator, having the burden of proof, has the burden of overcoming this presumption.—Newman v. U. S., supra.

45. Kan.—State v. Trimble, 78 P. 854, 70 Kan. 396.
51 C.J. p 356 note 66

Particular matters within rule

(1) Plaintiff has the burden of proving that defendant is disqualified to hold office.—Brack v. Harrell, 176 S.E. 29, 179 Ga. 461—Grimsley v. Morgan, 172 S.E. 49, 178 Ga. 10.

(2) In quo warranto against directors of insurance company, relators had burden of showing that number of proxies sufficient to affect result of election was illegal and fraudulent.—State ex rel. Palfrey v. Simms, La.App., 152 So. 395.

(3) Relator has burden of proving disqualification of challenged electors, in view of presumption arising from official certificate declaring defendant elected to office and relator's concession that challenged electors were registered in county and that absentee ballots were in proper form.—Owens v. Chaplin, 48 S.E.2d 37, 229 N.C. 797.

46. N.J.—Wilentz ex rel. Golat v. Stamler, 29 A.2d 413, 129 N.J.Law 294, affirmed 30 A.2d 885, 129 N.J. Law 606.

47. R.I.—McGroarty v. Ferretti, 184 A. 508, 56 R.I. 152.

Good character of officer

Ill.—People ex rel. Aken v. Puffer, 8 N.E.2d 198, 290 Ill.App. 196.

48. R.I.—McGroarty v. Ferretti, 184 A. 508, 56 R.I. 152.

49. Vt.—Burke v. Beecher, 144 A. 200, 101 Vt. 441.
51 C.J. p 356 note 69.

edge of defendant's alleged ineligibility when they voted, it will not be presumed that they willfully or obstinately threw away their votes by casting them for a candidate known to be ineligible [50] Similarly, where the legality and fairness of an election are not challenged, the relator has the burden of showing that defendant was ineligible as not of good character, since it will be presumed that the voters knew of such requirement, and that their vote recorded their judgment that he was of good character [51] However, where respondent forcibly obtained possession of the office in question, no presumption will be indulged in his favor by reason of his possession [52] It cannot be presumed that one filing an information in the nature of quo warranto to test the right of defendant to office did so in bad faith.[53] It will not be presumed that persons appointed to office after enactment of a statute giving them tenure waived the benefits thereof and accepted office for a fixed term [54] Where relator was appointed to office before the statutory time and respondent was appointed at the statutory time the presumption of appointment in accordance with the law will apply to the latter and not to the former.[55]

Corporate existence or franchise. Except in some jurisdictions,[56] and in special circumstances,[57] and except where the original incorporation was lawful, or the franchise was possessed at one time, and ouster or forfeiture is sought by reason of subsequent matters,[58] where the right to a corporate franchise is attacked, respondent must prove the existence of the franchise,[59] and the right to exercise it,[60] as well as facts showing compliance with all conditions precedent to the complete organization of the corporate body,[61] but, where the petition does not allege that defendant corporation was not created in accordance with statute, it will be presumed that the statutory requirements were complied with [62] So also, in a quo warranto proceeding against a municipal corporation, the burden is on defendant to prove the validity of its powers or the exercise thereof [63] Presumptions obtaining in civil proceedings generally have been held to obtain in quo warranto proceedings to determine corporate existence or franchise [64] Thus, where the validity of an ordinance annexing property is involved, any doubt is required to be resolved in favor of the ordinance [65] Where many years have elapsed since the organization of a drainage district, it will be presumed that its ditches and drains have been constructed,[66] and that the lands within its boundaries have been assessed to pay for such construction.[67] The acts of directors in reincorporating, pursuant to statutory provisions, to perfect an incomplete organization will be presumed to have been authorized by the members of the body, where it appears that thereafter the body acted as a corporation.[68]

50. Ind —State v. Johnston, 89 N. E 393, 173 Ind 14
51 C.J. p 356 note 70.

51. Ill —People ex rel Aken v Puffer, 8 N E 2d 198, 290 Ill App 196.

52. Wyo —People v. Shawver, 222 P. 11, 30 Wyo 306.

53. N J.—Walton v Brindle, 154 A. 524, 9 N J Misc. 496

54. N J.—Metzler v. Belcher, 15 A. 2d 105, 125 N J Law 183.

55. Ohio.—State ex rel. Davis v. Plapp, 16 N E 2d 586, 58 Ohio App. 321

56. Iowa —State ex rel Kuble v. Capitol Ben. Ass'n, 21 N W 2d 890, 237 Iowa 363
51 C J p 356 note 73.

57. Tex —Fannin-Lamar-Delta Improvement Dist No. 3 v. State, Civ App, 73 S W.2d 1101, error dismissed.

Delay in instituting suit
Relators in quo warranto proceeding against levee district had burden of showing that holder of negotiable district bonds was not innocent purchaser for value, where relators took no action for nearly five years, although knowing of proceedings for formation of district and issuance of bonds —Fannin-Lamar-Delta Improvement Dist. No 3 v. State, supra.

After stipulation as to certain fact
Where plaintiffs entered into a stipulation showing that signer of petition for annexation of land was disqualified, burden was on plaintiffs to show that disqualification had been removed —Messman v. Newman Tp High School Dist. No. 150, 39 N E 2d 332, 379 Ill 32.

58. Mo.—State ex inf. Miller v. St. Louis Union Trust Co, 74 S W 2d 348, 335 Mo 845
Tex —Texas Mut Life Ins Ass'n v. State, Com App, 58 S.W.2d 37.
51 C.J. p 356 note 74.

59. Ill —People ex rel. Snowden v Hurst, 81 N.E 2d 491, 401 Ill. 158.
Or —State ex rel Brown v. Bailey, 51 P 2d 671, 151 Or 496.
51 C J. p 356 note 75.

60. Neb —State v. Lincoln Tract. Co., 134 N W. 278, 90 Neb. 535.
51 C.J. p 356 note 76.

61. Ill —People v. Baldridge, 108 N E. 49, 267 Ill 190.
51 C J p 356 note 77.

62. Ohio —State v Miami Conservancy Dist Co., 128 N E 87, 100 Ohio St. 483.

63. Cal —People ex rel. Smith v City of San Jose, App, 222 P 2d 947

Validity of annexation
Cal —People ex rel Smith v. City of San Jose, supra
Ill —People ex rel Lange v Old Portage Park Dist, 190 N.E. 664, 356 Ill. 340.

64. Mo —State v Clements, 264 S W. 984, 305 Mo 297.

Regularity of vote for dissolution
On quo warranto involving validity of dissolution of consolidated school district, in which it was claimed that two thirds of the resident voters and taxpayers did not vote for dissolution, it must be presumed that none but resident voters and taxpayers voted at the meeting until the contrary is shown.—State v. Clements, supra

65. Mo —State ex rel. Hart v Whitaker, App, 218 S.W 2d 121.

66. Ill.—People v. Crews, 92 N.E 245, 245 Ill 318.

67. Ill.—People v. Crews, supra.

68. Minn —State v Steele, 34 N.W. 903, 37 Minn. 428.

License to practice profession. In a quo warranto proceeding to exclude a person from practicing a profession without a license or certificate the state or relator has been held to have the burden of proving the matters charged as usurpation,[69] at least where respondent interposes a general denial.[70] However, if respondent admits the acts charged or relator proves them, the burden of justification is on the respondent,[71] that is, the burden shifts to him to prove that he is authorized, by a proper license or certificate, to practice.[72]

§ 44. Trial

The trial procedure in quo warranto proceedings is not necessarily the same as that in civil actions generally.

Since quo warranto is an extraordinary remedy, as discussed supra § 2, the trial procedure therein is not necessarily the same as that in civil actions generally.[73] Thus, the statutory requirements of service of notice of trial applicable in ordinary civil actions do not apply in quo warranto proceedings;[74] and on the ground that it is a summary proceeding it has been held that ordinary rules as to statutory time for trial are not necessarily applicable.[75] Under a statutory provision to that effect, where the prosecuting attorney, by whom a quo warranto proceeding was properly instituted, is absent the court may appoint a member of the bar to act as special prosecutor to present the case.[76]

§ 45. —— Scope of Inquiry and Powers of Court

a. In general

b. In proceedings relating to corporations

c. In proceedings relating to office

a. In General

In a quo warranto action or proceeding the court will decide all questions properly arising in the controversy and involved in the final result, subject to the rule that the scope of inquiry and decision extends, and is limited, to questions which have properly been put in issue

On a trial in a quo warranto action or proceeding, the court will decide all questions properly arising in the controversy and involved in the final result,[77] subject to the rule that the scope of inquiry and decision extends,[78] and is limited,[79] to the questions which have properly been put in issue by the pleadings. Accordingly, the court is without jurisdiction to adjudicate the rights of persons who are not parties to the proceedings;[80] the motives of the attorney general in applying for the writ may not be questioned by the court;[81] and title to property cannot be litigated or determined in a quo warranto proceeding.[82]

b. In Proceedings Relating to Corporations

In a quo warranto proceeding to determine the existence or powers of a corporation, the court is interested only in whether the corporation is validly incorporated, and whether it may properly exercise the powers in issue.

In accordance with the general rule, stated supra subdivision a of this section, that the scope of inquiry and decision in a quo warranto proceeding or action extends and is limited to questions which have been properly put in issue, in a pro-

69. Ala.—Owen v. State ex rel. Bailes, 200 So. 412, 240 Ala. 582.

70. Ala.—Wilkey v. State ex rel. Smith, 189 So. 198, 238 Ala. 121.

71. Ala.—Wilkey v. State ex rel. Smith, supra.

72. Ala.—McMillan v. State, 119 So. 652, 218 Ala. 603.
51 C.J. p 356 note 72.

73. Minn.—State ex rel. Burnquist v. Village of North Pole, 6 N.W.2d 458, 213 Minn. 297.

74. Minn.—State ex rel. Burnquist v. Village of North Pole, supra.

75. Tex.—State ex rel. Candler v. Court of Civil Appeals, Fourth Supreme Judicial Dist., 75 S.W.2d 253, 123 Tex. 549.

Where statutory time would have been exhausted before the election in issue it will not be allowed. State ex rel. Candler v. Court of Civil Appeals, Fourth Supreme Judicial Dist., supra.

76. Ohio.—Heffner v. State ex rel. Johnson, 1 N.E.2d 146, 131 Ohio St. 13.

77. Mich.—Taggart v. Perkins, 41 N.W. 426, 73 Mich. 303.
51 C.J. p 358 note 93.

Court must determine issues of law and fact on the merits as in ordinary proceedings.—State ex rel. Landis v. S. H. Kress & Co., 155 So. 823, 115 Fla. 189.

78. Minn.—Dennistoun v. Davis, 229 N.W. 353, 179 Minn. 373.
51 C.J. p 358 note 90.

79. Mo.—Corpus Juris cited in State ex inf. McKittrick v. American Colony Ins. Co., 80 S.W.2d 876, 892, 336 Mo. 406.
Utah.—State ex rel. Stain v. Christensen, 35 P.2d 775, 84 Utah 185.
51 C.J. p 358 note 91.

Source of information
In quo warranto proceeding, supreme court was not concerned with whether information on which attorney general saw fit to act in instituting proceeding came from minister or propitious source but sole province of court was to determine whether evidence adduced at hearing before commissioner and under review supported attorney general's claim. State ex rel. Fatzer v. Axton, 216 P.2d 784, 169 Kan. 49.

80. Fla. Tervin v. State ex rel. Landis, 156 So. 627, 116 Fla. 633.

81. Fla. State ex rel. Landis v. S. H. Kress & Co., 155 So. 823, 115 Fla. 189.

Reason for rule
If the attorney general abuses his power or seeks by such use of it to advance personal or selfish ends, he is responsible only to the people at the trial of their ballots or to their representatives in the legislature. State ex rel. Landis v. S. H. Kress & Co., supra.

82. Ill.—Gulf Lines Connecting R. Co. v. Golconda Northern R. Co., 135 N.E. 357, 290 Ill. 384.
51 C.J. p 358 note 94.

ceeding to determine the existence or powers of a corporation the court is interested only in whether the corporation is validly incorporated, and whether it may properly exercise the powers in issue.[83] Various matters have been held to be beyond the scope of inquiry in a quo warranto proceeding brought to challenge or terminate the existence of a public or private corporation, or a corporate franchise, or particular powers,[84] including the motives or intentions of organizers or corporators,[85] the rights of stockholders,[86] the acts of stockholders who are not parties to the proceeding,[87] taxation matters,[88] matters of regulation and supervision of the corporation,[89] and the existence of another corporation.[90] Where an adjudication is made against defendant, the court has no power to determine that there has never been a de facto corporation[91] or that its acts under color of its supposed character are void.[92]

In a quo warranto proceeding to determine whether a municipal corporation had a certain power or the right to exercise such power the court will not inquire into the actual exercise of the power;[93] and the acts of the corporation's officials in the exercise of the power are not open to inquiry.[94] In a proceeding involving the legality of the organization of a district, it is immaterial whether particular tracts of land, inaccurately described in certain portions of the organization proceedings, are properly within the district,[95] and, where the district was established by an order or decree of court, the only question to be considered in a quo warranto proceeding is whether the court had jurisdiction.[96] In a proceeding relating to the incorporation of a municipality, the court will give consideration or special attention to the needs of the community in the light of what may reasonably be expected in the future.[97]

Municipal annexation of land. In a proceeding to determine the validity of an annexation of certain lands by a municipal corporation the court can construe the statute authorizing the annexation and determine whether it had been misapplied;[98] but the court will not inquire into the city council's knowledge of the territory[99] or the motives or intentions of petitioners for annexation.[1] Where an area has existed for many years as a village, its suitability for municipal government, for annexation to a city, is no longer open to question.[2]

Irregularities in an election to authorize or approve the exercise of a power by a municipal corporation cannot be considered, where such irregularities do not appear to have affected the result of the election;[3] and disregard of the election

83. Mo.—State, at Inf. of Huffman, v. Sho-Me Power Co-op., 204 S.W. 2d 276, 356 Mo. 832—State ex inf Shartel, ex rel City of Sikeston, v Missouri Utilities Co., 53 S.W 2d 394, 331 Mo 337, 89 A.L.R 607.
Neb.—State ex rel Johnson v. Consumers Public Power Dist., 10 N. W 2d 784, 143 Neb 753, 152 A.L.R 480.

Sole question in quo warranto proceeding against fire insurance companies to prevent them from collecting increased rates under impounding orders of circuit court, in absence of charge of fraud in procurement of orders, was whether circuit court exceeded its jurisdiction —State ex inf. McKittrick v. American Colony Ins. Co., 80 S.W.2d 876, 336 Mo 406.

Jurisdiction of municipal corporation, together with truth of requisite facts, may be put in issue—People ex rel McGroarty v. City of Los Angeles, 50 P.2d 101, 9 Cal.App 2d 431.

84. Mo.—**Corpus Juris** cited in State ex inf McKittrick v. American Colony Ins. Co., 80 S.W.2d 876, 892, 336 Mo 406.

Particular matters held beyond scope of inquiry

In quo warranto action by state to prevent building and loan association from unlawfully continuing to hold lawfully acquired ninety-nine-year leasehold, wherein lessor was impleaded, court had no jurisdiction to determine issues between association and lessor as to existence of obligations of lease and rights and liabilities of each thereunder—State ex rel. Johnson v. Conservative Savings & Loan Ass'n, 11 N.W.2d 89, 143 Neb. 805.

85. Ill.—People ex rel Honefenger v. Burris, 95 N.E.2d 882, 408 Ill. 68
51 C.J. p 358 note 96.

86. Ohio.—State v. Union Cent. Life Ins Co., 13 Ohio Cir.Ct.,N.S., 49, 32 Ohio Cir Ct 262, affirmed 95 N E. 1156, 84 Ohio St. 459.

87. Mo.—State v. Missouri Pac. R Co., 144 S.W. 863, 241 Mo. 1.

88. Mo.—State v. Carterville, App., 183 S.W. 1093.

89. Mo.—State, at Inf. of Huffman, v. Sho-Me Power Co-op., 204 S.W. 2d 276, 356 Mo. 832.

90. N.J.—Westcott v. Passaic Paid Firemen's Relief Assoc., 103 A. 817, 91 N.J Law 501.

91. Ohio.—Society Perun v. Cleveland, 3 N.E. 357, 43 Ohio St 481.

92. Ohio.—Society Perun v. Cleveland, supra.

93. Ill.—People v City of Paris, 44 N.E 2d 154, 380 Ill 503

94. Ill.—People v. City of Paris, supra

95. Ill.—People v Hartquist, 146 N. E. 140, 315 Ill. 228.

96. Ill.—People v Wells, 126 N.E 575, 291 Ill. 584
51 C.J. p 358 note 5.

97. Minn.—State ex rel Burnquist v. Village of Leetonia, 298 N.W. 717, 210 Minn. 404

Court, in considering referee's findings and evidence on which based, will give special attention to village's community needs, examined in light of what reasonably may be expected in the future.—State ex rel Burnquist v. Village of Leetonia, supra.

98. Nev.—State ex rel. Bibb v City of Reno, 178 P 2d 366, 67 Nev. 127

99. Cal.—People ex rel. Strong v. City of Whittier, 24 P.2d 219, 133 Cal.App 316

1. Cal.—People ex rel. Strong v. City of Whittier, supra

2. Minn.—State ex rel Town of Stuntz v. City of Chisholm, 273 N. W. 235, 199 Minn 403.

3. Ill.—People v. City of Paris, 44 N.E.2d 154, 380 Ill 503.

laws will not be considered where the provisions violated are directory and not mandatory.[4]

Alleged invalidity of city charter amendments adopted at an election may be inquired into,[5] and should be passed on,[6] in a proceeding brought in pursuance of a statute allowing it to be instituted wherever any material fraud or error has been committed at an election on a proposition.

In proceeding to oust foreign corporation, the action of the proper officials in refusing respondent's application for a license to transact business in the state will not be reviewed;[7] nor will the contracts of the corporation made within the state be annulled.[8] However, the court must look through the forms of the transactions to determine whether defendant was engaged in a business for which a license, permission, or charter power is required.[9]

c. In Proceedings Relating to Office

In a quo warranto proceeding to test the right to an office, the scope of inquiry and decision is ordinarily limited to the validity of defendant's title to the office; collateral matters or matters outside the scope of the action will not be investigated or adjudicated.

In accordance with the general rule, stated supra subdivision a of this section, that the scope of inquiry and decision in a quo warranto proceeding or action extends and is limited to questions which have properly been put in issue, in a proceeding to test a person's authority to exercise an office, the primary and fundamental question is whether defendant is legally entitled to hold the office involved,[10] and not as to the rights of any other person who may claim it.[11] The court may determine whether defendant has the qualifications expressly required by constitutional or statutory provisions;[12] and, if illegality in his election is charged, the validity of the election may be examined in all respects concerning the office involved,[13] it being permissible,[14] except in some jurisdictions,[15] to go behind the returns or certificates and, except in some jurisdictions,[16] to extend the inquiry even to the ballots.[17] In the case of an officer of a private corporation, the records of the corporation are determinative and must be considered.[18]

In adjudging the right to hold public office, the court considers only the title,[19] and there is no adjudication of official rights,[20] or powers,[21] or of

4. Ill.—People v. City of Paris, supra.

Statute held not mandatory

Ill. People v. City of Paris, supra.

5. Mich. Sprister v. Sturgis, 218 N. W. 96, 243 Mich. 68.

6. Mich. Sprister v. Sturgis, supra.

7. Kan. State v. Kansas Natural Gas Co., 81 P. 506, 71 Kan. 785.

8. Kan.—State v. American Book Co., 69 P. 563, 75 Kan. 847.

9. Pa.—Commonwealth ex rel. Schnader v. Fidelity Land Value Assur. Co., 167 A. 300, 312 Pa. 425.

10. Colo.—People ex rel. Dick v. Mosco, 167 P.2d 949, 114 Colo. 461.
Ill.—People ex rel. Jones v. Woodrum, 190 N.E. 916, 356 Ill. 427.
Mo.—State on Inf. of McKittrick v. Wiley, 160 S.W.2d 677, 349 Mo. 239

Who received greater number of votes

In quo warranto proceeding to test title to office of sheriff to which defendant had been declared elected real issue was who received greater number of votes.—Behrendt v. Wilcox, 269 N.W. 155, 277 Mich. 232.

11. Mo.—State on Inf. of McKittrick v. Wiley, 160 S.W.2d 677, 349 Mo. 239.

Incumbent cannot controvert right or title of person alleged in information to be entitled to office; nor can court adjudicate on such right, unless it is necessarily involved in determination of issue between people and respondent. State on Inf. of McKittrick v. Wiley, supra.

12. Miss.—Wilkins v. Largo, 141 So. 585, 163 Miss. 279.
51 C.J. p 358 note 10.

Legal effect of failure to give bond

Utah.—State ex rel. Stain v. Christensen, 35 P.2d 775, 84 Utah 185.

13. La.—State ex rel. Moss v. Willis, App., 192 So. 138.
51 C.J. p 358 note 11.

Fraud in elections is proper subject of inquiry in quo warranto.

Mo.—State at Inf. McKittrick ex rel. Martin v. Stoner, 146 S.W.2d 891, 347 Mo. 242.

N.C.—Swarlingen v. Poplin, 191 S.E. 746, 211 N.C. 700.

Legal and illegal votes inseparable

Tex.—State ex rel. Lukovich v. Johnston, Civ.App., 235 S.W.2d 932, reversed on other grounds, Sup., 238 S.W.2d 957.

14. Ga.—Alexander v. Ryan, 43 S. E.2d 654, 202 Ga. 578. McDonald v. De La Perriere, 172 S.E. 1, 178 Ga. 54.
N.C.—Harkrader v. Lawrence, 130 S. E. 35, 190 N.C. 411.
51 C.J. p 358 note 12.

15. Pa.—Commonwealth v. Baxter, 35 Pa. 263.

Under statutory provision that the validity of no election which may be contested under other provisions can be tried in quo warranto, the election of relator cannot be inquired into in such proceeding.—Baker v. State, 133 So. 291, 223 Ala. 467.

16. Mo. State v. Francis, 88 Mo. 557.
51 C.J. p 359 note 14.

17. Ind. State ex rel. McCormick v. Superior Court of Knox County, 95 N.E.2d 829.
Tex. State ex rel. Lukovich v. Johnston, Civ.App., 228 S.W.2d 327, error dismissed.
51 C.J. p 359 note 15.

18. Ill. People ex rel. Courtney v. Botts, 31 N.E.2d 403, 376 Ill. 476, 134 A.L.R. 983.

Where stock appeared of record in such manner as to require its being voted jointly by stockholder's two testamentary trustees, it was not germane in quo warranto proceeding to test title to office of director, who was voted for only by one trustee, to decide how the stock ought to be voted under construction of stockholder's will which might give one trustee a separate right to vote the stock as opposed to joint right appearing on corporate records. People ex rel. Courtney v. Botts, supra.

19. Ga. Bowling v. Doval, 58 S.E. 2d 173, 206 Ga. 641. Center v. Arp, 32 S.E.2d 308, 198 Ga. 574.
Ill.—People ex rel. Jones v. Woodrum, 190 N.E. 916, 356 Ill. 427.
Neb. State v. Brontch, 94 N.W. 1016, 68 Neb. 687, 110 Am.S.R. 477.

20. Ill.—People ex rel. Jones v. Woodrum, 190 N.E. 916, 356 Ill. 427.
Neb.—State v. Brontch, 94 N.W. 1016, 68 Neb. 687, 110 Am.S.R. 477

21. Colo.—People ex rel. Rogers v.

the right to the salary or emoluments of the office,[32] although it has been held, in a proceeding to test the right of judges to hold office and exercise jurisdiction, that the validity of the jurisdiction conferred is necessarily a matter for consideration.[23] Conversely, while in a proceeding therefor it is proper for the court to inquire into whether certain officers are attempting to exercise a power which has not been given them,[24] if the purpose is to determine the right of an officer to exercise a particular function, the legality of his election is not subject to inquiry.[25] Similarly, where the proceeding depends on the validity of the removal of respondent from office by proper authority, the court will not inquire into his appointment or election or his qualifications to hold the office.[26] In a quo warranto proceeding by one removed from office against the incumbent appointed as his successor, the court may inquire into the sufficiency of the charges and findings on which the removal was made,[27] but only to determine whether there was any evidence to sustain the judgment of the removing officer.[28] However, after an officer has gone to trial on charges preferred against him, without objection to their sufficiency, and the issues have been found against him, resulting in his removal from office, he cannot, by quo warranto proceedings, raise the objection that the charges were not sufficiently specific.[29]

Matters which are merely collateral will not be investigated;[30] nor will matters which are entirely outside the scope of the action be decided.[31] Thus, the court may not adjudicate the rights of persons who are not parties to the proceedings.[32] So, also, where respondent's title rests on an appointment, the court will not go back of the power of appointment to inquire into the title of the appointing officer,[33] or into his reasons and motives for making the appointment,[34] or for removing the prior appointee,[35] nor will it inquire into the right or title of a member of a board which appointed,[36] or which confirmed the appointment of,[37] respondent. However, the jurisdiction of a board to make an appointment may be inquired into.[38]

Letford, 79 P.2d 274, 102 Colo. 284.

Application of constitutional provision not determinable

In original proceedings in quo warranto to try right to office of directors of water conservancy district, court could not determine, in view of state of administrative development of district, whether constitution authorizing county commissioners to establish water rates was applicable to water conservancy district in exercise of power to sell, lease, or otherwise dispose of water, to fix rates for water disposed of, and to levy assessments.—People ex rel. Rogers v. Letford, supra.

22. Pa.—Commonwealth v. Wehr, 17 Pa.Dist. & Co. 689.

Claim for compensation by borough marshal who was dismissed by council was held not properly before the court in a proceeding in the nature of quo warranto wherein marshal sought reinstatement.—Kinnard v. Geiler, 188 A. 670, 15 N.J. Misc. 42.

23. N.J.—Wilentz v. Galvin, 15 A.2d 903, 125 N.J.Law 455.

24. Mo.—State ex inf. McKittrick v. Murphy, 148 S.W.2d 527, 347 Mo. 484.

Maintenance of office outside city

Mo.—State ex inf. McKittrick v. Murphy, supra.

25. Pa.—Commonwealth v. Kempsmith, 13 Pa.Co. 667.

26. Ala.—State ex rel. McIntyre v. McEachern, 166 So. 36, 231 Ala. 609.

27. Ohio.—State v. Donahey, 140 N.E. 609, 108 Ohio St. 440.
43 C.J. p. 676 note 35.

28. Ohio.—State v. Donahey, supra.

29. Wash.—State v. Kirkwood, 46 P. 331, 15 Wash. 298.
43 C.J. p. 676 note 37.

30. Fla.—State v. Gleason, 12 Fla. 190.
51 C.J. p. 359 note 23.

Particular matters held collateral

(1) Argument, based on public policy, involving question whether a public office should or should not be surrendered by an official accepting a commission in the army, was not for consideration by the courts.—Commonwealth ex rel. Crow v. Smith, 23 A.2d 440, 343 Pa. 446.

(2) In quo warranto proceedings to determine respondent's title to the office of member of board of tax levy for Hennepin County, an attack could not be made on respondent's title to office of de facto city comptroller of Minneapolis to which he had been appointed by city council on city comptroller's death, although by special law the city comptroller was ex officio a member of the board of tax review for Hennepin county since such attack is a collateral matter.—State ex rel. Hennepin County v. Brandt, 31 N.W.2d 5, 225 Minn. 345.

31. S.C.—State v. Whitten, 75 S.E. 880, 92 S.C. 409.
51 C.J. p. 359 note 24.

32. Fla.—Tervin v. State ex rel. Landis, 156 So. 627, 116 Fla. 633.

Rights of bondholders

In quo warranto to oust officers of purported drainage district, court had no jurisdiction to adjudicate validity of bonds issued by district or validity of appointment of receiver in suit instituted by bondholders against district.—Tervin v. State ex rel. Landis, supra.

Vote of stockholder not party to suit

In quo warranto proceeding by stockholders to review the election of directors of corporation, superior court had no jurisdiction to pass on question of whether vote of another stockholder was properly accepted, where such stockholder was not party to cause, notwithstanding such stockholder had full knowledge of the pendency of proceedings, and person who voted stockholder's shares by proxy was made defendant in proceeding.—State ex rel. Lidral v. Superior Court for King County, 89 P.2d 501, 198 Wash. 610.

33. Mont.—State v. Smith, 163 P. 784, 53 Mont. 341.
Nev.—State v. Horton, 8 P. 171, 19 Nev. 199.

34. Ala.—State v. Adams, 2 Stew. 231.

35. Mont.—State ex rel. Matson v. O'Hern, 65 P.2d 619, 104 Mont. 126.

36. N.J.—Weitz v. Preston, 174 A. 429, 113 N.J.Law 271.

37. N.J.—Rhinesmith v. Goodfellow, 169 A. 279, 111 N.J.Law 604.

38. Ohio.—State v. McClymon, 7 Ohio Dec., Reprint, 109, 1 Cinc.L. Bul. 116.

If a forfeiture is claimed by reason of facts arising subsequent to a valid election, the court may inquire thereinto, even though misconduct is charged which constitutes a criminal offense of which defendant has not been convicted,[39] but the question whether one person has forfeited his right to the office of judge cannot be determined in a quo warranto proceeding against another person chosen judge pro tempore,[40] and in at least one jurisdiction it has been held that charges of misfeasance in office cannot be tried by the highest court of the state.[41]

Legal existence of office or body. In some jurisdictions it is held that, in an action against an individual for exercising unlawfully an office in a municipality, not only the question of the legal existence of the office,[42] but also that of the corporation itself,[43] may be tried and decided. However, in other jurisdictions, it has been held that the legal existence of a body to which respondent was appointed a member cannot be tried out in a proceeding in the nature of quo warranto,[44] and that certiorari is the normal remedy therefor;[45] and that the invalidity of an ordinance establishing a township office cannot be adjudicated in a quo warranto proceeding to try title to the office.[46] In a proceeding to test the right to an office in a private corporation, the inquiry may extend to the validity of the statute authorizing the office,[47] but not to the validity of the charter of the corporation.[48]

Matters pertaining to relator Where the relator is a claimant of the office, it has been held that the only question presented is whether he or respondent has the right to the office;[49] but it has also been held that only the relator's title is in question,[50] so that the court is not concerned with the strength or weakness of respondent's title.[51] When a relator seeks to avail himself of such an extraordinary remedy as quo warranto the courts are justified in viewing his application with scrutinizing eyes,[52] especially where it appears that the one whose office is attacked is serving the public interests without compensation.[53]

§ 46. —— Mode and Conduct of Trial

Ordinarily material and disputed issues of fact may be submitted to a jury for trial. In original proceedings in the highest court of the state, the court tries the facts as well as determines the law.

Ordinarily issues of fact in a quo warranto action or proceeding may be submitted to a jury for trial;[54] but immaterial issues need not be sub-

39. Pa. Commonwealth v. Walter, 83 Pa. 105, 24 Am.R. 154.
51 C.J. p 359 note 17.
Conviction as condition precedent to action or proceeding; see supra § 17.

40. Kan. State v. Rea, 177 P. 538, 104 Kan. 148.

41. Minn.—State v. Bergeron, 194 N.W. 624, 156 Minn. 276.

42. Mo.—State v. Coffee, 59 Mo. 59.
N.Y.—People v. Carpenter, 24 N.Y. 86.
Availability of quo warranto to oust holder of office claimed not to have legal existence; see supra § 8 b.

43. Mo.—State v. Coffee, 59 Mo. 59.
N.Y.—People v. Carpenter, 24 N.Y. 86.

44. N.J.—Wass v. Impellezeri, 4 A. 2d 28, 122 N.J.Law 213.

45. N.J.—Wass v. Impellezeri, supra.

46. N.J.—Bors v. Davis, 142 A. 760, 6 N.J.Misc. 793.

47. Philippine.—Government v. Springer, 50 Philippine 259, affirmed 48 S.Ct. 480, 277 U.S. 189, 72 L.Ed. 845.

48. Pa.—Commonwealth v. Yetter, 43 A. 226, 190 Pa. 488.
51 C.J. p 359 note 32.

49. N.C.—Salisbury v. Croom, 83 S.E. 354, 167 N.C. 233.
51 C.J. p 359 note 33.

50. Ohio.—State ex rel. Flask v. Collins, 73 N.E.2d 195, 148 Ohio St. 45.

51. Ohio.—State ex rel. Flask v. Collins, supra.

52. Or.—State ex rel. Hallgarth v. School Dist. No. 23, Union County, 172 P.2d 655, 179 Or. 411.

53. Or. State ex rel. Hallgarth v. School Dist. No. 23, Union County, supra.

54. Ga. Kelly v. Horton, 172 S.E. 4, 178 Ga. 127.
N.J.—**Corpus Juris cited in** Di Mona v. Mariano, 8 A.2d 97, 98, 123 N. J.Law 75.
51 C.J. p 359 note 34—20 C.J. p 360 note 39.
Constitutional right to jury trial in quo warranto proceedings see Juries § 51.

Credibility of voter who tells for whom he registered his vote on voting machine is for jury.—Wood v. State ex rel. Lee, 126 S.W.2d 4, 133 Tex. 110, 121 A.L.R. 931—Ex parte Henry, 126 S.W.2d 1, 132 Tex. 575, followed in Ex parte O'Brien, 126 S.W.2d 3, 132 Tex. 579, Ex parte McAfee, 126 S.W.2d 3, 132 Tex. 579, and Ex parte Kincaid, 126 S.W.2d 3, 132 Tex. 580.

Questions held for jury

(1) Where information in quo warranto proceeding instituted in supreme court charged that governor elect was not citizen of United States and that he had not resided five years next preceding election within state, and respondent denied such averments, questions of fact, properly triable to jury, were held presented.—State ex rel. Sathre v. Moodie, 258 N.W. 558, 65 N.D. 340.

(2) In quo warranto proceeding to forfeit charter of corporation chartered to do a general advertising business on ground that business conducted by corporation was ultra vires, and was not advertising business, whether corporation's business came within meaning of term "advertising" as understood by those engaged in the business was for jury.—State v. Guardian Foundation of Texas, Tex.Civ.App., 128 S.W.2d 880, error dismissed, judgment correct.

(3) In quo warranto proceeding to determine tenure of defendant's second term as judge, where defendant on day he was appointed to second term signed an undated resignation to take effect at governor's pleasure, which resignation governor at later date received and accepted, and defendant contended that he delivered resignation to state house before he was appointed to second term and withdrew it before governor accepted it, question whether resignation was given before or after beginning of second term was for jury.—Huber

mitted[55] A question of intent should be withheld from the jury where any deduction could rest only on conjecture, and not on any reasonable inference,[56] and, if the facts are conceded, there is nothing for a jury to try[57] Accordingly, an affirmative charge may be given, or a verdict may be directed, for the state or people where the evidence in behalf of plaintiff is direct, positive, and undisputed,[58] and there is no evidence of a defense,[59] or the evidence of a defense is insufficient to go to the jury,[60] but not otherwise[61]

On a trial before a jury, the right to open and close lies with the party who has the burden of proof;[62] and instructions should be given in accordance with the rules governing instructions in ordinary actions.[63] Where the trial is before the court alone, a material issue should not be ignored in the findings of fact[64]

Original proceeding in appellate court. In a proceeding brought originally in the highest court of the state, the court tries the facts,[65] as well as determines the law[66] While the court may appoint a commissioner to take evidence and make findings of fact and conclusions of law,[67] where final judgment is entered on the pleadings on motions therefor, in accordance with the rules discussed supra § 40, the motion of a party for the appointment of a commissioner will be overruled.[68] When a commissioner has been appointed, his findings of fact are advisory only,[69] and, although entitled to consideration,[70] are not binding,[71] and the court has ample power and the duty to go behind the findings and examine the evidence,[72] not only where exceptions to the findings are filed,[73] but even where the findings are in favor of defendant as to a particular cause of action and counsel for the state concedes that the evidence is not sufficient to

v Umansky, 1 A 2d 887, 121 N J Law 230

55. Tenn—State v. Robertson, 5 Tenn Civ.App. 438.

56. Wis—State v. Acker, 125 N W 952, 142 Wis. 394, 20 Ann Cas 670

57. N.C.—State v. Wilson, 28 S E 554, 121 N.C 425.

Jury finding properly disregarded
In quo warranto proceeding to annul annexation of territory to municipality, trial court under the undisputed facts in evidence properly disregarded jury's finding that sole purpose of suit was enforcement of individual rights of relator, where relator owned only a small portion of annexed territory.—Town of De Kalb v. State ex rel. King, Tex Civ App., 71 S.W 2d 299.

Question held one of law on agreed facts
Defendant in quo warranto to determine right to office of county judge and clerk of district court was held not entitled to jury trial where sole question on the agreed facts was whether incumbent removed by board of county commissioners had been judicially determined to be insane, since such question was one of law for court.—State ex rel. Sathre v. Roberts, 269 N W. 913, 67 N.D. 92, 108 A.L.R 37.

58. Ala.—Harris v. State, 109 So 291, 215 Ala. 56.

In proceeding to prohibit practicing law by independent insurance adjusters where there was direct and undisputed testimony showing that some of the activities in which respondents were engaged constituted practicing law contrary to statute, the general affirmative charge with hypothesis as given by court was proper—Wilkey v State ex rel Smith, 14 So 2d 536, 244 Ala 568, 151 A L R 765, certiorari denied 64 S Ct 195, 320 U S 787, 88 L Ed. 473

After submission of issues to jury
Fact that judge had submitted quo warranto case to jury to pass on questions of fact raised by pleadings did not deprive judge of power to direct verdict for relator, where such verdict was demanded by uncontradicted evidence—Compton v. Hix, 193 S E 252, 184 Ga 749

59. Ala—Harris v. State, 109 So 291, 215 Ala. 56.

60. Ill.—People v. Drainage Commissioners, Union Dist No. 1, 118 N E 742, 282 Ill. 514

61. Ga—Phillips v. Rozar, 159 S.E 245, 172 Ga. 862.

Nonsuit was held erroneously granted where evidence and reasonable inferences therefrom authorized finding for petitioners seeking to oust county school superintendent—Phillips v. Rozar, supra

62. D C—Newman v U S, 43 App D C 53, reversed on other grounds 35 S Ct 881, 238 U S 537, 59 L Ed 1446
51 C J p 359 note 41.

63. Ill—Elston, etc., Gravel Road Co v People, 96 Ill 584.

Instructions held proper or not erroneous
Ala—Owen v State ex rel. Bailes, 200 So 412, 240 Ala 582.
Mich—Behrendt v. Wilcox, 269 N. W. 155, 277 Mich. 232.
51 C J. p 359 note 42 [a].

Instructions held properly refused
Ala—Owen v State ex rel. Bailes, 200 So. 412, 240 Ala 582.
Miss—Jones v State ex rel McFarland, 42 So.2d 123, 207 Miss. 208.

64. Tex—State v. Pease, Civ App, 147 S W 649.

65. Fla—**Corpus Juris quoted in** State ex rel Davis v City of Avon Park, 158 So 159, 163, 117 Fla. 565, 98 A L.R 230
Kan—State v Barker, 241 P. 253, 119 Kan 853.
R.I—Jackvony ex rel v. Berard, 18 A 2d 889, 66 R.I 290

66. Fla—**Corpus Juris quoted in** State ex rel Davis v City of Avon Park, 158 So 159, 163, 117 Fla. 565, 98 A L.R 230
Kan—State v Barker, 241 P. 253, 119 Kan 853.

67. Kan—State ex rel Fatzer v. Axton, 216 P 2d 784, 169 Kan 49.

68. Kan—State ex rel Beck v. Gleason, 83 P 2d 425, 148 Kan. 459, rehearing denied 84 P.2d 48, 148 Kan 458

69. Kan—State ex rel. Fatzer v. Axton, 216 P.2d 784, 169 Kan 49—State ex rel Boynton v Buchanan, 51 P 2d 5, 142 Kan. 515
Mo—State on Inf of McKittrick v. Graves, 144 S W 2d 91, 346 Mo. 990.
51 C.J. p 360 note 46

70. Mo—State ex rel. Gentry v. Sullivan, 8 S W.2d 616, 320 Mo. 362

71. Mo—State ex inf Miller v St Louis Union Trust Co, 74 S W 2d 348, 335 Mo. 845.

72. Kan—State ex rel. Fatzer v. Axton, 216 P 2d 784, 169 Kan. 49—State ex rel. Boynton v. Buchanan, 51 P 2d 5, 142 Kan. 515.
Mo.—State on Inf of McKittrick v. Graves, 144 S W.2d 91, 346 Mo. 990.
51 C.J. p 360 note 47.

73. Kan.—State v Foley, 193 P. 361, 107 Kan. 608.

support that cause of action.[74] Accordingly, even though the reception of evidence by the commissioner was error, it would not require the recommittal of the case to the commissioner.[75] Similarly, where a referee is appointed to make findings of fact, his rulings on the proceeding are subject to review.[76] However, where exceptions to the commissioner's findings of fact are not briefed, they are abandoned.[77]

In some jurisdictions,[78] but not others,[79] the case may be sent down to the circuit court of the county where the controversy arose, for the trial of issues.

§ 47. New Trial or Rehearing

A new trial may be granted in a quo warranto proceeding on the same grounds and on the same showing as in civil cases generally.

A new trial may be granted in a quo warranto proceeding on the same grounds and on the same showing as in civil cases generally.[80] Thus, if a new trial is sought on the ground of newly discovered evidence, it must be shown that the newly discovered evidence is of such a character as seriously to affect the result;[81] and a new trial will not be granted on the ground that the verdict is against the evidence, unless the impropriety of the verdict is clearly shown.[82] Grounds of a motion for new trial which are not urged or argued are deemed waived.[83]

Time for making motion. A motion for a new trial should be timely,[84] and it will not be granted where it appears at the time of the motion that the term of the office which is being litigated has expired.[85]

§ 48. Judgment and Enforcement Thereof

The judgment to be entered in quo warranto proceedings is either a judgment quashing or denying the writ or a judgment of ouster, and it is subject to the rules governing judgments and decrees in civil actions generally.

The judgment to be entered in quo warranto proceedings is either a judgment quashing or denying the writ or a judgment of ouster;[86] and each case must be decided on the facts peculiar to it.[87] A judgment of ouster from the franchise or office involved is proper when it is made to appear that

74. Kan. State v. Barker, 241 P. 253, 119 Kan. 853.
51 C.J. p 360 note 49.

75. Mo. State on Inf. of McKittrick v. Graves, 144 S.W.2d 91, 346 Mo. 990.

76. Minn. State ex rel. Town of Stuntz v. City of Chisholm, 273 N.W. 235, 199 Minn. 403.

Refusal to open case held proper
In quo warranto proceeding by town to question legality of taking of territory from town on incorporation of city, refusal of referee to open proceeding to show that town did not originally authorize institution of proceeding but ratified it by resolution after its institution was held proper. State ex rel. Town of Stuntz v. City of Chisholm, supra.

77. Mo. State on Inf. McKittrick v. Wallach, 182 S.W.2d 313, 353 Mo. 312, 155 A.L.R. 1.

78. Mich.—People v. Sackett, 15 Mich. 315.
51 C.J. p 360 note 50.

Contents of postea
Where issues in quo warranto action were referred by supreme court to circuit court judge, recital in postea that judgment final be entered in defendant's favor was held improper, since postea should contain only facts and findings germane to issues.—Ithinemith v. Goodfellow, 169 A. 279, 111 N.J.Law 604.

No right to jury on such trial
Where supreme court, in quo warranto proceedings to test defendant's legal qualifications to hold the office of a school commissioner, referred taking of testimony and return thereof to circuit judge, defendant had no right to have a jury determine the facts. Attorney General ex rel. Woodrow v. Knapp, 17 N.W.2d 223, 310 Mich. 385.

79. Fla.—State ex rel. Davis v. City of Avon Park, 158 So. 159, 117 Fla. 565, 98 A.L.R. 230.

80. Mich.—People v. Sackett, 14 Mich. 243.
Grounds for new trial in civil actions generally see New Trial §§ 13-114.

New trial held not warranted
Contention of elected state treasurer, filing quo warranto petition to oust one appointed as his successor because of his failure to give bond, that he was given no opportunity to be heard on merits of his claim that certain public officers prevented him from securing bond, cannot be considered on his petition for rehearing, where quo warranto petition alleged no such facts and he did not formally request leave to amend petition or inform court of such facts in petition for rehearing; and petitioner, not requesting leave to amend petition, but submitting cause on merits after full opportunity to plead all facts relied on, was held not entitled to rehearing on petition pleading additional facts not claimed to be unknown to him when he filed quo warranto petition. State ex rel. Stam v. Christensen, 35 P.2d 775, 84 Utah 185.

81. Mich.—People v. Sackett, 14 Mich. 320.

82. Mich.—People v. Sackett, supra.

83. Minn. State ex rel. Barnquist v. Village of St. Anthony, 26 N.W. 2d 193, 223 Minn. 149.

84. Mich. People v. Plymouth Plank Road Co., 32 Mich. 248.
51 C.J. p 360 note 54.

85. Conn. State v. Tudor, 5 Day 329, 5 Am.D. 162.

86. Fla. Tervin v. State ex rel. Landis, 156 So. 627, 116 Fla. 633.
Discretion of court as to grant or refusal of judgment of ouster in quo warranto proceedings see supra § 6.

Writ denied
Fla. State ex rel. Watson v. Clements, 1 So.2d 186, 146 Fla. 394.
Pa. Commonwealth v. O'Leary, 46 Pa.Dist. & Co. 397, 90 Pittsb.Leg.J. 653.

87. Fla.—City of Coral Gables v. State ex rel. Gibbs, 5 So.2d 241, 148 Fla. 671, followed in 5 So.2d 244, 148 Fla. 679.

Exclusion of property from city limits
Each case in quo warranto for the exclusion of property from city limits must be decided on the facts peculiar to it.—City of Coral Gables v. State ex rel. Gibbs, supra.

defendant's use or occupancy is illegal,[88] or, in jurisdictions wherein the burden of proof rests on defendant, as discussed supra § 43 b, when he fails to sustain his plea by proof showing his right or title to the office or franchise in question.[89] Where, however, the burden is on the relator to establish good title to an office in himself, if he fails to sustain such burden, judgment for respondent is proper.[90] If defendant appears and pleads, a trial of the issues must be had, before the court will be authorized to enter a judgment of ouster,[91] unless defendant withdraws his plea,[92] or unless, as considered supra § 40, a demurrer thereto is sustained.

Where plaintiff in quo warranto sues a corporation and challenges its right to exercise certain powers and it appears that the legality of the organization of the corporation is in issue, plaintiff is not entitled to a judgment against the corporation,[93] because he cannot sue the corporation as such and at the same time be permitted to show that it has no corporate existence.[94] Similarly, the court cannot enter a judgment against the individuals exercising the franchise of a nonexistent corporation and at the same time enter a judgment against the corporation.[95]

The judgment or decree in quo warranto proceedings is subject to the rules governing judgments and decrees in civil actions generally.[96] The application to judgments in quo warranto proceedings of the general rule that judgments must conform to pleadings, issues, and proof, is discussed in Judgments § 51 d; and the necessity of proof to sustain a judgment by default in quo warranto proceedings, in Judgments § 213 a. Since an ouster is in effect an order to cease and desist from the exercise of the franchise or power in issue, as discussed infra § 50 a, a provision in a judgment that respondents should be enjoined from such exercise is unnecessary,[97] and, as considered in Judgments § 84, will not necessarily invalidate the judgment.

Where actual legal results of election are duly established by pleadings or proofs in a proper quo warranto proceeding, it is the duty of the court to award judgment in accordance with the law and the established facts.[98]

Judgment on verdict. Defendant is entitled to a judgment in his favor and against the state where a verdict has been rendered in his favor in a proceeding instituted by the attorney general, in his official capacity, on behalf of the state.[99]

Time of rendition. Under a statute providing that the court shall be open at all times for the

88. Pa.—Commonwealth ex rel. Schermer v. Franck, 166 A. 878, 311 Pa. 341
51 C J. p 360 note 60.

Statute held not to require tentative judgment
Act requiring payment of salary and expenses to one receiving certificate of election as judge while acting as such, regardless of result of contest or action to test validity of election, and validating his acts, was held not to require entry of tentative judgment, effective only on affirmance by supreme court, instead of judgment ousting person receiving plurality of votes at invalid election, in action in nature of quo warranto to determine title to office.—State ex rel. Adams v Murray, 257 N.W. 553, 219 Iowa 108.

Ouster from office
Conn.—Alcorn ex rel. Hoerle v. Thomas, 17 A.2d 514, 127 Conn. 426.
Fla.—State ex rel. Landis v. Prevatt, 148 So. 578, 110 Fla. 29.
Ga.—Guy v. Nelson, 44 S.E.2d 775, 202 Ga. 728
Kan.—State ex rel. Parker v. McKnaught, 107 P.2d 693, 152 Kan. 689
Mo.—State on Inf. of McKittrick v. Williams, 144 S.W.2d 98, 346 Mo. 1003.—State on Inf. of McKittrick v. Graves, 144 S.W.2d 91, 346 Mo. 990
Tenn.—State ex rel. Bryant v. Maxwell, 224 S.W.2d 833, 189 Tenn. 187.

Ouster of corporation
Colo.—Norton v. People ex rel. Rudbeck, 81 P.2d 393, 102 Colo. 489
Fla.—State ex rel. Landis v. Prevatt, 148 So. 578, 110 Fla. 29

Ouster of school district and directors
Mo.—State v. School Dist. No. 118, App., 48 S.W.2d 135.

Ouster from jurisdiction over territory
Ill.—People ex rel. Universal Oil Products Co. v. Village of Lyons, 79 N.E.2d 33, 400 Ill. 82
Minn.—State ex rel. Town of Stuntz v. City of Chisholm, 273 N.W. 235, 199 Minn. 403.

89. Ill.—People v. Thomas, 201 Ill. App. 350
51 C.J. p 360 note 62.

90. N.J.—Colton v. Kreutzinger, 185 A. 18, 116 N.J.Law 456, affirmed 191 A. 878, 118 N.J.Law 183.

91. Ill.—Paul v. People, 82 Ill. 82
51 C.J. p 360 note 66.

92. Ill.—People v. O'Connor, 87 N.E. 1016, 239 Ill. 272.

93. Ill.—People ex rel. Ray v. Lewistown Community High School Dist. No. 241, 57 N.E.2d 486, 388 Ill. 78

94. Ill.—People ex rel. Ray v. Lewistown Community High School Dist. No. 241, supra.

95. Ill.—People ex rel. Barrett v. Gentile Co-op. Ass'n, 64 N.E.2d 907, 392 Ill. 393.

96. Idaho.—State ex rel. Taylor v. Beneficial Protective Ass'n, 94 P.2d 787, 60 Idaho 587

Decree held not too general
Idaho.—State ex rel. Taylor v. Beneficial Protective Ass'n, supra.

Uncertainty
A judgment is open to criticism where it is so worded as to create uncertainty as to whether or not it is a judgment of ouster in favor of the people.—People v. Miller, 144 Ill. App. 630.

97. Mo.—State on Inf. of McKittrick v. Koon, 201 S.W.2d 446, 356 Mo. 284
Tex.—McLeod Independent School Dist. v. Kildare Independent School Dist., Civ.App., 157 S.W.2d 181, error refused.

98. Fla.—Kitching v. State, 59 So. 971, 64 Fla. 334.

99. N.J.—McCran v. Plainfield Union Water Co., 136 A. 204, 103 N.J.Law 243.

granting of orders in quo warranto proceedings, a judgment against respondent is not void or irregular because it was rendered at a time other than during the regular term of the court.[1]

§ 49. —— Scope and Extent of Relief

a. In general
b. In proceeding against corporation
c. In proceeding against incumbent of office

a. In General

The relief that may be granted in a quo warranto proceeding is limited by the nature of the action, and depends on the pleading and proof. A fine may generally be imposed

The relief that may be granted in a quo warranto proceeding is limited by the nature of the action.[2] Thus, it is not within the legitimate scope of the relief afforded by such proceedings to declare null and void what may have been done,[3] but only to affirm or adjudge as unauthorized the franchise or power which may have been, with or without color of right, unlawfully exercised.[4] The relief to be granted does not necessarily depend on the relator's theory of appropriate relief,[5] or the prayer for relief,[6] although it has also been held that the lack of a proper prayer may, under some circumstances, result in a refusal of the ouster;[7] but rather it depends on the general purpose of the proceeding,[8] the allegations of the complaint,[9] and the evidence.[10]

While a judgment will be limited so as not unnecessarily to impose too great a burden on respondent,[11] the scope of the judgment may not be limited except for good cause.[12]

Discretion of court. It has been held that, where a court has discretion in granting or refusing a judgment of ouster in a quo warranto proceeding, as discussed supra § 6, the character and terms of the judgment are largely within the discretion of the court,[13] taking all material facts into consideration.[14]

1. Ala. Jackson v. State, 42 So. 61, 143 Ala. 115.

2. Neb. State ex rel. Johnson v. Consumers Public Power Dist., 10 N.W.2d 784, 143 Neb. 753, 152 A.L.R. 480.

3. Neb. State ex rel. Johnson v. Consumers Public Power Dist., supra.

4. Neb. State ex rel. Johnson v. Consumers Public Power Dist., supra.

5. Ala. State v. Birmingham Water Works Co., 64 So. 23, 185 Ala. 388, Ann.Cas.1916D 166.

6. U.S. Standard Oil Co. v. Missouri, Mo., 32 S.Ct. 466, 224 U.S. 270, 56 L.Ed. 760, Ann.Cas.1913D 936.
51 C.J. p 361 note 80.

Bas'n of rule
"This rule arises from the fact that quo warranto was originally considered a criminal proceeding and, like an indictment, the petition or information did not contain any prayer whatsoever, nor was it necessary."—Crain v. Adams, Tex.Civ.App., 120 S.W.2d 290, 293.

Relief prayed for is not always granted, even though questions of law on which relief prayed for depends are decided for plaintiff.—Gas Service Co. v. Consolidated Gas Utilities Corporation, 65 P.2d 584, 145 Kan. 423.

7. Fla.—State ex rel. Attorney General v. City of Avon Park, 149 So. 409, 108 Fla. 641, rehearing denied State ex rel. Davis v. City of Avon Park, 151 So. 701, 117 Fla. 556, modified on other grounds 158 So. 159, 117 Fla. 565, 98 A.L.R. 230.

Prayer held to require refusal
In quo warranto proceeding on relation of owners of allegedly unbenefited rural lands included in municipality, where there was no prayer to oust municipality from all lands so included, ouster as to corelators' lands scattered throughout included territory was refused.—State ex rel. Attorney General v. City of Avon Park, 149 So. 409, 108 Fla. 641, rehearing denied State ex rel. Davis v. City of Avon Park, 151 So. 701, 117 Fla. 556, modified on other grounds 158 So. 159, 117 Fla. 565, 98 A.L.R. 230.

8. Ala.- State v. Birmingham Water Works Co., 64 So. 23, 185 Ala. 388, Ann.Cas 1916D 166.

9. Tex. Crain v. Adams, Civ.App., 120 S.W.2d 290.
51 C.J. p 361 note 83.

10. Tex.—Crain v. Adams, supra.
51 C.J. p 361 note 84.

11. Kan.- State ex rel. Beck v. Gleason, 83 P.2d 425, 148 Kan. 459, rehearing denied 84 P.2d 48, 148 Kan. 458.

On ouster from the practice of medicine and surgery, an osteopath, who owned and operated a hospital, would not be ousted from permitting other osteopaths to practice medicine and surgery generally in his hospital, since such order would put too much of a burden on the osteopath.—**State ex rel. Beck v. Gleason, supra.**

12. Miss.—Kennington - Saenger Theatres v. State ex rel. Dist. Atty., 18 So.2d 483, 196 Miss. 841, 152 A.L.R. 883.

Cause held insufficient
Trial court did not have jurisdiction to limit the scope of its judgment in quo warranto proceeding merely because state purported to appear through district attorney rather than attorney general. Kennington-Saenger Theatres v. State ex rel. Dist. Atty., supra.

13. Mo. State on Inf. of McKittrick v. Koon, 201 S.W.2d 416, 356 Mo. 281; State, on Inf. McKittrick, v. Wymore, 132 S.W.2d 979, 345 Mo. 169; State ex rel. McKittrick v. C. S. Dudley & Co., 102 S.W.2d 895, 340 Mo. 852, certiorari denied C. S. Dudley & Co. v. State of Missouri, 58 S.Ct. 12, 300 U.S. 693, 82 L.Ed. 535; State ex inf. McKittrick ex rel. City of Lebanon v. Missouri Standard Tel. Co., 85 S.W.2d 613, 337 Mo. 61; State ex inf. Miller v. St. Louis Union Trust Co., 74 S.W.2d 348, 335 Mo. 815, followed in State ex inf. Miller v. Mississippi Valley Trust Co., 74 S.W.2d 361, 335 Mo. 872 and State ex inf. Miller v. Mercantile-Commerce Bank & Trust Co., 74 S.W.2d 362, 335 Mo. 873; State v. St. Louis First Nat. Bank, 249 S.W. 619, 297 Mo. 397, 30 A.L.R. 918.

14. Mo.- State on Inf. of Taylor v. American Ins. Co., 200 S.W.2d 1, 355 Mo. 1053.

In assessing the punishment in quo warranto proceeding to oust or punish stock fire insurance companies because agent of companies, in order to settle litigation against companies, bribed superintendent of insurance, court would take into consideration fact that impounded funds in litigation were restored and paid

Fine. In general, the court may impose a fine in addition to, or in lieu of, ouster,[15] and in some,[16] but not all,[17] jurisdictions a substantial fine may be imposed. However, the propriety of imposing a fine is usually regarded as a matter of sound judicial discretion,[18] and ordinarily the fine will be omitted,[19] or limited to a nominal amount.[20]

In proceeding under ancient common-law writ of quo warranto, a judgment for the king was that the franchise be seized in his hands,[21] if it was of such a nature as to subsist in his hands;[22] and, if not, the judgment was merely one of ouster.[23] In case of judgment for defendant, he was allowed the franchise.[24]

b. In Proceeding against Corporation

In a proceeding against a corporation, the court may enter judgment of ouster as to the franchise or merely as to particular powers, and may oust the officers from the exercise of their functions.

In a proceeding against a corporation, the court may enter a judgment of ouster as to the corporate franchise or merely as to particular powers,[25] or as to the exercise of powers in certain places;[26] and, if the corporation is dissolved, the court may order incidentally that the officers shall no longer exercise the functions of their offices.[27] However,

to policyholders, that litigation had been in courts for many years, and had become particularly irksome to many insurance executives—State on Inf of Taylor v. American Ins Co, supra.

15. Ill—People v. White Circle League of America, 97 N.E.2d 811, 408 Ill. 564.
Mich—Black v. Contract Purchase Corp., 42 N.W.2d 768, 327 Mich. 636.
Mo—State on Inf of Taylor v. American Ins Co, 200 S.W.2d 1, 355 Mo. 1053—State on Inf of McKittrick v. Williams, 144 S.W.2d 98, 346 Mo. 1003—State on Inf of McKittrick v. Graves, 144 S.W.2d 91, 346 Mo. 990—State, on Inf of McKittrick, v. American Ins Co, 140 S.W.2d 36, 346 Mo. 269—State, on inf. McKittrick, v. Wymore, 132 S.W.2d 979, 345 Mo. 169
Or.—State ex rel. Hallgarth v. School Dist. No. 23, Union County, 172 P.2d 655, 179 Or. 441
51 C.J. p. 361 note 86

Private officers

The punishment for usurpation of office as provided in quo warranto statute is not limited to public officials, but applies also to private officers—People ex rel. Courtney v. Botts, 34 N.E.2d 403, 376 Ill. 476, 134 A.L.R. 983.

16. U.S.—Standard Oil Co. v. Missouri, Mo., 32 S.Ct. 406, 224 U.S. 270, 56 L.Ed. 760, Ann.Cas.1913D 936.
Mo.—State on Inf of McKittrick v. Graves, 144 S.W.2d 91, 346 Mo. 990—State, on inf. McKittrick, v. Wymore, 132 S.W.2d 979, 345 Mo. 169

Fines based on percentages

In quo warranto proceeding to oust or punish stock fire insurance companies because agent of companies, in order to settle litigation against companies, bribed superintendent of insurance, a fine was imposed, based on percentage of amount which each company had in impounded fund in litigation, with a minimum fine of ten thousand dollars.—State on Inf of Taylor v. American Ins. Co., 200 S.W.2d 1, 355 Mo. 1053

17. Ky.—Commonwealth v. Kentucky Jockey Club, 38 S.W.2d 987, 238 Ky. 739

18. Mo.—State, on inf. McKittrick, v. Wymore, 132 S.W.2d 979, 345 Mo. 169.

19. Mo.—State v. McAdoo, 36 Mo. 452
51 C.J. p. 361 note 88.

Fines held not warranted

(1) Where there was no showing of fraud or misconduct, evidence was held not to justify imposition of fines on persons elected to office of city aldermen and attempting qualification and serving as such aldermen, although at time of election ineligible to office by reason of being in arrears in payment of taxes due city.—State ex rel. Sathre v. Quickstad, 268 N.W. 683, 66 N.D. 689, 107 A.L.R. 202.

(2) Fire insurance companies should not be fined in quo warranto proceedings to prevent collection of increase in rate denied by superintendent of insurance, where companies collected increase in obedience to impounding order of circuit court.—State ex inf. McKittrick v. American Colony Ins. Co., 80 S.W.2d 876, 336 Mo. 406.

20. Mo.—State on Inf. of McKittrick v. Williams, 144 S.W.2d 98, 346 Mo. 1003
51 C.J. p. 361 note 89.

Only nominal fine required

(1) Where no improper motives are alleged or shown against the party ousted, the fine imposed will be merely nominal—State, on inf. McKittrick, v. Wymore, 132 S.W.2d 979, 345 Mo. 169—51 C.J. p. 361 note 89 [b]—20 C.J. p. 262 note 88

(2) Purpose of proceeding in nature of quo warranto to determine whether respondent trust company, charged with doing law business, could lawfully draft wills and trust agreements and give legal advice concerning them in consideration of its appointment as executor or trustee, was held to require only imposition of nominal fine and costs on it and order that it cease such practices on penalty of forfeiture of its charter—State ex inf. Miller v. St. Louis Union Trust Co., 74 S.W.2d 348, 335 Mo. 845, followed in State ex inf. Miller v. Mississippi Valley Trust Co., 74 S.W.2d 361, 335 Mo. 872 and State ex inf. Miller v. Mercantile-Commerce Bank & Trust Co., 74 S.W.2d 362, 335 Mo. 873

21. Ark.—State v. Ashley, 1 Ark. 279.

22. Neb.—State v. Moores, 76 N.W. 530, 56 Neb. 1
Utah—State v. Elliott, 44 P. 248, 13 Utah 200

23. Neb.—State v. Moores, 76 N.W. 530, 56 Neb. 1
Utah—State v. Elliott, 44 P. 248, 13 Utah 200

24. Ark.—State v. Ashley, 1 Ark. 279.

25. Ill.—People v. White Circle League of America, 97 N.E.2d 811, 408 Ill. 564.
Mich.—Black v. Contract Purchase Corp., 42 N.W.2d 768, 327 Mich. 636
51 C.J. p. 361 note 94.

26. Kan.—Gas Service Co. v. Consolidated Gas Utilities Corporation, 65 P.2d 584, 145 Kan. 423

Ouster as to certain streets

In action in nature of quo warranto by plaintiff gas company, which had been occupying field in city for many years, challenging validity of resolutions extending territory of defendant gas company, supreme court, in exercise of its discretion, would not oust defendant from streets already occupied by virtue of resolutions, notwithstanding resolutions were invalid, but would enjoin defendant from doing any further construction work in streets covered by resolutions.—Gas Service Co. v. Consolidated Gas Utilities Corporation, supra.

27. Vt.—State v. Bradford, 32 Vt. 50.

the forfeiture of the franchises of the corporation and the ouster of its officers from the exercise of official power constitute the limits of the relief which may be granted,[28] although, as appears supra subdivision a of this section, it is generally held that a fine may also be imposed. It is not erroneous for the court to oust a municipal corporation from jurisdiction over a parcel of land without declaring the statute conferring such jurisdiction void in toto.[29]

In view of the seriousness of the forfeiture of a corporate charter, courts proceed with caution when such relief is asked,[30] and, even where a corporation is guilty of improper conduct, the court may determine that under all the facts forfeiture of the charter is not warranted.[31]

Allowance of time for compliance. In a proper case the court may and should grant the corporation a reasonable time within which to comply with the statutes, so as to minimize the resulting hardships,[32] and may reserve jurisdiction for such period to entertain motions and make such orders as it may deem appropriate,[33] and may provide for the entry of a judgment of ouster and liquidation of the business of the corporation if at the end of the time allowed it has taken no steps for compliance.[34]

Appointment of trustee or receiver. In a proper case the court may, on judgment of ouster, appoint a trustee to discharge a trust partly performed by a corporation.[35] In a quo warranto proceeding brought for the forfeiture of the franchise, and dissolution of a corporation holding land in excess of a restriction contained in a statute which also provides that such land may, in the option of the people, be confiscated or be sold at public auction, the court, under general receivership statutes, has the power, in the exercise of a sound discretion, to appoint a receiver to handle the property until the option is exercised.[36]

c. In Proceeding against Incumbent of Office

Under statute the court may not only oust the wrongful possessor of an office, but may place the relator therein; and the judgment may include the franchises, privileges, and emoluments of the office.

When granting relief against one exercising an office, the court, which will go no further under its common law powers than to oust the wrongful possessor of the office, will not give possession thereof to the relator or any other person,[37] or

28. Mo.—**Corpus Juris cited in** State ex inf. McKittrick v. American Colony Ins. Co., 80 S.W.2d 876, 892, 336 Mo. 406.
51 C.J. p. 361 note 96.

The repayment of usurious sums exacted by corporation engaged in lending money at usurious rates in violation of statutes and in violation of charter powers could be done, if at all, only by appropriate civil suits and not in quo warranto proceeding against corporation.—State, on Inf. of Taylor v. Salary Purchasing Co., 218 S.W.2d 571, 358 Mo. 1022.

Accounting for taxes
In quo warranto against trustees of fair corporation organized and receiving taxes under invalid statute, accounting for moneys received could not properly be had as incident to judgment of ouster.—State ex rel. Landis v. Prevatt, 156 So. 731, 116 Fla. 718. State ex rel. Landis v. Prevatt, 148 So. 578, 110 Fla. 39.

Punishment of individual operating corporation
Mo.—State, on Inf. of Taylor, v. Salary Purchasing Co., 218 S.W.2d 571, 358 Mo. 1022.

29. Fla.—Town of Boynton v. State, 138 So. 639, 103 Fla. 1113.

30. Iowa.—State ex rel. Maley v. Civic Action Committee, 28 N.W. 2d 467, 238 Iowa 851.

31. Mo.—State ex Inf. McKittrick v. Globe-Democrat Pub. Co., 110 S.W.2d 705, 341 Mo. 862, 113 A.L.R. 1104.

Good faith
Although newspaper corporation was guilty of operating a lottery in conducting contest wherein contestants selected most appropriate name, from suggested list, for a series of cartoons, charter of corporation would not be forfeited, but corporation would be assessed a nominal fine and taxed costs of quo warranto proceeding where corporation acted in good faith. State ex Inf. McKittrick v. Globe-Democrat Pub. Co., supra.

32. Mo. State on Inf. Hutfman v. Sho-Me Power Co-op., 191 S.W.2d 971, 351 Mo. 892. State ex Inf. McKittrick ex rel. City of Lebanon v. Missouri Standard Tel. Co., 85 S.W.2d 613, 337 Mo. 642.
Tex.—State v. Texas Mut. Life Ins. Co. of Texas, Civ.App., 51 S.W.2d 405, followed in State v. Mutual Protective Ass'n of Texas, 51 S.W. 2d 415 and State v. National Mutual Benefit Ass'n, 51 S.W.2d 415; reversed on other grounds Texas Mut. Life Ins. Ass'n v. State, Com. App., 58 S.W.2d 37.
Wash.—State ex rel. Troy v. Lumbermen's Clinic, 58 P.2d 812, 186 Wash. 384.

33. Mo.—State ex Inf. McKittrick ex rel. City of Lebanon v. Missouri Standard Tel. Co., 85 S.W.2d 613, 337 Mo. 642.

34. Wash. State ex rel. Troy v. Lumbermen's Clinic, 58 P.2d 812, 186 Wash. 384.

35. Fla. Marion Mortg. Co. v. State, 146 So. 225, 107 Fla. 472.

Where vested rights had accrued, court of chancery could on proper application appoint trustee to discharge completely trust partly performed by corporation found, in quo warranto proceeding, to be acting as trustee without authority. Marion Mortg. Co. v. State, supra.

36. U.S.—People of Puerto Rico v. Rubert Hermanos, Inc., Puerto Rico, 62 S.Ct. 771, 315 U.S. 637, 86 L.Ed. 1081.

Discretion held not abused
The action of the court in appointing a receiver was held not to be an abuse of discretion, notwithstanding the filing of a lis pendens notice which would prevent the valid conveyance of any interest in the property, where a conveyance or encumbrance of the property might nevertheless result in confusion, misunderstanding, and needless litigation.—People of Puerto Rico v. Rubert Hermanos, Inc., supra.

Order held not too broad
U.S.—People of Puerto Rico v. Rubert Hermanos, Inc., supra.

37. Pa.—Commonwealth ex rel.

order respondent to deliver the records and equipment of the office to the relator.[38] However, under or without reference to statutes so providing, the relator's title may be adjudicated if it is put in issue by respondent,[39] and, if the relator succeeds, and makes a clear showing as to the right to the office, the proper judgment is that defendant be ousted and the relator,[40] or a claimant joined as defendant under statutory authority,[41] placed in possession of the office, although the relator will not be installed where he is not entitled to the office, even though defendant is ousted.[42]

A judgment awarding an office to claimant or the relator may include its franchises, privileges, and emoluments,[43] may direct respondent to deliver to the relator all the records, property, and emblems which belong to the office and are in the custody of respondent;[44] and in a proper case may, under or apart from statutes so providing, include damages against respondent for loss of fees or salary to the relator by reason of being deprived of the office.[45] However, a judgment for salary cannot be upheld where it is not supported by either the pleadings or the evidence.[46] The judgment of ouster may be limited to defendant's present term of office,[47] so that, as discussed infra § 50 c, defendant may serve a subsequent term.

Order for new election Where the case is within the terms of a statute conferring authority to do so,[48] but not otherwise,[49] the court may order the holding of a new election.

Retention of powers by defendant. A judgment which both ousts defendant from office and provides that he shall retain certain powers cannot stand.[50]

Injunction. In a proper case, the court in a quo warranto proceeding may, as ancillary aid to an action at law, issue an injunction restraining an alleged usurper from performing the duties of office.[51]

Illegally incorporated municipality. In a proceeding brought against individuals who are purporting to act as officers of a village, and based on the ground that the incorporation of the village is illegal, the judgment may properly contain a recital of the finding of the court that the attempted incorporation of the village is void;[52] but the judgment to be rendered on the finding should be merely one of ouster of defendants from the offices which they are assuming to fill,[53] and should not adjudge that the village be disincorporated.[54]

§ 50. —— Effect and Enforcement

a. In general
b Judgments against corporations
c. Judgments in proceedings relating to office

a. In General

A judgment of ouster in quo warranto proceedings orders the person or corporation ousted to cease and desist from exercising the franchise or power involved; and the remedy for disobedience is through proceedings as for contempt of court.

A judgment or order of ouster in quo warranto

Harter v Bobby, 11 Pa Dist & Co 350
51 C J p 361 note 98—20 C J p 210 note 65.

38. N M —Albright v Territory, 79 P. 719, 13 N.M. 64.

39. N J.—Sheridan v. McCurnin, 12 A 2d 255, 124 N J Law 493—State ex rel Manahan v. Watts, 45 A. 813, 64 N J Law 465

40. Ariz —Garcia v. Sedillo, 218 P 2d 721, 70 Ariz. 192.
Ga —Guy v. Nelson, 44 S E 2d 775, 202 Ga. 728
51 C J p 361 note 2—20 C J. p 210 notes 68, 69

41. Ill —People v Mortenson, 224 Ill App 221

42. N.Y —People v. Tobey, 47 N E 800, 153 N.Y. 381.
51 C J p 362 note 4
Relator ineligible
Ala.—Baker v State, 183 So. 291, 222 Ala. 467.

43. Ariz.—Garcia v. Sedillo, 218 P. 2d 721, 70 Ariz. 192

44. Ariz —Garcia v Sedillo, 218 P 2d 721, 70 Ariz 192
51 C J p 362 note 6

45. Kan —Rule v Fait, 18 P 160, 38 Kan 705
51 C J p 362 notes 7, 8.
Statute construed
The term "evicted," in a statute providing that a person adjudged entitled to office may claim damages sustained "by reason of the usurpation by the defendant, of the office from which such defendant has been evicted," means deprivation by one of office, or of salary attached thereto, to which another is, or may be, entitled —Hawkins v. Voisine, 290 N W 827, 292 Mich. 357
Plaintiff held entitled to salary
Mich —Hawkins v. Voisine, supra

46. Tex —Pease v. State, Com App, 208 S W. 162.

47. Mo —State on Inf. of McKittrick v Graves, 144 S W 2d 91, 346 Mo 990—State, on inf. McKittrick, v. Wymore, 132 S W 2d 979, 345 Mo 169

48. Pa —Commonwealth v. Zug, 43 Pa Dist & Co 402
51 C J p 362 note 11.

49. S.C —State v. Belue, 136 S E. 641, 138 S C 393.

50. Mo —State v Mansfield Special Road Dist, 253 S W. 714, 299 Mo 663

51. Ky —Richardson v Commonwealth, by Meredith, 122 S W.2d 156, 275 Ky 486.
Irreparable damage
An injunction was properly granted, notwithstanding action was at law in nature of quo warranto, where irreparable damage would have resulted from failure to preserve the existing status —Richardson v Commonwealth, by Meredith, supra.

52. Mo.—State v. Hyde, App, 2 S. W 2d 212.

53. Mo —State v Hyde, supra.

54. Mo —State v Hyde, supra.

proceedings has been construed as meaning that the person or corporation ousted from any claimed franchise or power should cease and desist from exercising such franchise or power.[55] If respondents persist in exercising the functions from which they have been so ousted, the established remedy is through proceedings as for contempt of court,[56] and rules governing contempt proceedings generally apply to such proceedings for the enforcement of a judgment in quo warranto proceedings.[57] In determining what will constitute obedience to a judgment or order in quo warranto proceedings, the judgment or order must be fairly construed;[58] and, where there is more than one way of complying with a judgment or order, it should not be construed as requiring that it be complied with only in a particular way.[59]

A judgment of ouster rendered in a quo warranto action or proceeding is not retroactive,[60] but the judgment of ouster may be made to take effect as of the date of the filing of the information on which the proceeding is based.[61]

Conclusiveness In general, the judgment is binding and conclusive on parties to the proceeding,[62] and is not binding on persons or organizations who are not parties thereto.[63] Judgment on ancient common law writ of quo warranto was conclusive,[64] even on the crown.[65]

Vacation of judgment. In accordance with rules governing the vacation of judgments in civil actions generally, discussed in Judgments §§ 265-310, a judgment in a quo warranto proceeding may, in the discretion of the court, be vacated in a proper case;[66] but it will not be vacated on a mere technicality, at least where no useful purpose would be served thereby.[67]

Judgment excluding defendant from practice of profession will be construed not to prevent him from practicing after he obtains a license or certificate.[68]

55. Mo.—State on Inf. of McKittrick v. Koon, 201 S.W.2d 446, 356 Mo. 284.

Such provision implied in judgment
Tex.—McLeod Independent School Dist. v. Kildare Independent School Dist., Civ.App., 157 S.W.2d 181, error refused.

56. Iowa.—State v. Cahill, 108 N.W. 453, 131 Iowa 286.

Criminal contempt
Officers of association who were ousted in quo warranto proceeding from unlawfully usurping franchise but who disobeyed such judgment, were guilty of criminal contempt.—State, on Inf. of McKittrick, v. Koon, 201 S.W.2d 446, 356 Mo. 284.

A prayer for injunctive relief was not necessary for purpose of procuring a basis on which a judgment for relators could be enforced by contempt proceedings.—Crain v. Adams, Tex.Civ.App., 120 S.W.2d 290.

Conduct held technical contempt
Fla.—State ex rel. Gibbs v. Bloodworth, 185 So. 339, 135 Fla. 525.

57. Mo.—State, on Inf. of McKittrick, v. Koon, 201 S.W.2d 446, 356 Mo. 284.

Evidence
In contempt proceeding against officers of association who were ousted from selling burial insurance in the state, but who thereafter organized an association in another state to carry on the same business, evidence established that disobedience of judgment of ouster was intentional.—State, on Inf. of McKittrick, v. Koon, supra.

Penalty; fine
Mo.—State, on Inf. of McKittrick, v. Koon, supra.

58. Neb. State ex rel Johnson v. Conservative Savings & Loan Ass'n, 11 N.W.2d 89, 143 Neb. 805.

59. Neb. State ex rel. Johnson v. Conservative Savings & Loan Ass'n, supra.

60. Cal. Bray v. Payne, 202 P. 478, 210 Cal. 165.
51 C.J. p 362 note 18.

61. Mo.—State on Inf. of McKittrick v. Williams, 144 S.W.2d 98, 346 Mo. 1003. State on Inf. of McKittrick v. Craven, 144 S.W.2d 91, 346 Mo. 990.—State, on Inf. McKittrick, v. Wymore, 132 S.W.2d 979, 345 Mo. 169.

62. Fla. State ex rel. Gibbs v. Williams, 186 So. 816, 136 Fla. 110.
Ill.—People ex rel. Malone v. Mueller, 66 N.E.2d 516, 328 Ill.App. 593.

63. Ill.—People ex rel. Malone v. Mueller, supra.
Wash.—State ex rel. Johnson v. Heap, 95 P.2d 1039, 1 Wash.2d 316.
Judgment an bar to subsequent proceeding with different relator see Judgments § 796 b (1).

64. Or. State v. Sengstacken, 122 P. 292, 61 Or. 455, Ann.Cas.1914B 230.
Utah.—State v. Elliott, 44 P. 248, 13 Utah 200.

65. Or.—State v. Sengstacken, 122 P. 292, 61 Or. 455, Ann.Cas.1914B 230.
Utah.—State v. Elliott, 44 P. 248, 13 Utah 200.

66. N.J.—Sheridan v. McCurnin, 12 A.2d 355, 124 N.J.Law 493.

Removal of disqualification
Judgment of ouster from office of state's attorney on ground that incumbent was not qualified because not licensed to practice law in state should have been vacated and new hearing granted on incumbent's motion, filed within thirty days after judgment of ouster, which showed that his disqualification no longer existed in that he had received license to practice in state as result of successfully passing examination which he had taken prior to judgment of ouster, but the results of which he did not learn until after entry of the judgment. People ex rel. Elliott v. Benefiel, 91 N.E.2d 427, 405 Ill. 500.

Judgment by default
A motion to vacate judgment of ouster by default in quo warranto proceeding was addressed to discretion of supreme court; and, apart from the inherent power of the court to open a default judgment, if its enforcement would defeat the ends of justice with respect to the individual litigants, the public interest demands that controversies as to title to public office be adjudicated on the merits to the end that an intruder be ejected. Sheridan v. McCurnin, 12 A.2d 355, 124 N.J.Law 493.

67. N.J.—Weinberger v. Hilfman, 150 A. 198, 8 N.J.Misc. 317.

Time of entry of judgment after postea
Quo warranto judgment would not be vacated because postea adjudging relator entitled to immediate possession of office was signed during term, where new term opened on day motion to set judgment aside was made.—Weinberger v. Hilfman, 150 A. 198, 8 N.J.Misc. 317.

68. Ala.—Bolding v. State, 107 So. 853, 214 Ala. 380.

b. Judgments against Corporations

A judgment of ouster immediately dissolves a municipal corporation and takes away all its rights, liberties, privileges, and franchises; but it has been held not to affect rights previously acquired and the powers incidental thereto A judgment against a private corporation may oust the officers personally from the usurpation of the franchise involved

The effect of a judgment of ouster against a municipal corporation is immediately to dissolve the corporation,[69] work its dissolution,[70] and take away all its rights, liberties, privileges, and franchises,[71] and the judgment of dissolution operates as an absolute revocation of all power and authority on the part of others to act in its name or behalf.[72] However, it has been held that it does not affect rights previously acquired;[73] and that a judgment dissolving a municipal corporation does not destroy the powers necessary to protect the rights of the corporation,[74] such as, at least with respect to validated bonds under a statute providing that bonds which have been judicially validated may never be called in question in subsequent legal proceedings, its taxing powers.[75] Moreover, apart from statute, a judgment to oust a municipal corporation from jurisdiction over certain lands does not affect the authority of the corporation to impose lawful taxation on such lands proportionately to pay indebtedness incurred prior to the judgment of ouster and for public municipal improvements beneficial to such lands;[76] and such a judgment does not affect the rights of holders of municipal bonds, where such lands were included within the municipality when the bonds were issued,[77] and the bondholders are not parties to the action.[78] Furthermore, notwithstanding a judgment ousting a municipal corporation from exercising jurisdiction over certain territory, the municipality may, under certain circumstances, retain de facto jurisdiction thereof.[79]

A judgment declaring void all orders theretofore issued by a school board with respect to annexing or grouping the district is binding on all the parties affected thereby,[80] although it does not deprive the board of the right to thereafter proceed to create a new district under authority of statute.[81]

As to private corporations or associations. A judgment of ouster in a suit against a corporation or association and its officers from the usurpation of a franchise may in a proper case operate as an ouster of the officers personally from such usurpation,[82] so that the officers are thereafter excluded from the exercise of such franchise directly or indirectly,[83] and the organization by the officers of another corporation or association for the same purposes constitutes a violation of the judgment.[84] However, after a judgment of ouster and dissolution has been rendered against a private corporation, it is a matter of indifference to the state that a new corporation, complying with the general law relating to the organization of corporations, has appropriated and is using the name of the extinct corporation.[85] Moreover, the judgment cannot bind persons who are not parties to the proceedings.[86] Where a money judgment has

69. Ill.—People v. Sandman, 170 N E. 211, 338 Ill. 404—People v Calloway, 160 N E 834, 329 Ill. 505.

De jure or de facto corporation

Ill.—People v. Calloway, supra.

70. Ill.—People v. Sandman, 170 N E. 211, 338 Ill 404—People v. Calloway, 160 N E 834, 329 Ill. 505.

71. Ill.—People v Sandman, 170 N E. 211, 338 Ill 404—People v. Calloway, 160 N E. 834, 329 Ill. 505.

72. Ill.—People v Calloway, supra. 51 C J. p 362 note 25

73. Tex.—Beyer v Templeton, 212 S.W.2d 134, 147 Tex 94.

Previous annexation

Tex.—Beyer v. Templeton, supra.

74. Fla.—State ex rel Fidelity Life Ass'n v. City of Cedar Key, 165 So. 672, 122 Fla. 454.

75. Fla.—State ex rel. Fidelity Life Ass'n v. City of Cedar Key, supra

Judgment must be construed in light of statute

Fla.—State ex rel. Fidelity Life Ass'n v. City of Cedar Key, supra.

76. Fla.—City of Sebring v Harder Hall, Inc, 9 So 2d 350, 150 Fla 824.

77. Fla.—City of Coral Gables v State ex rel. Watson, 38 So 2d 48

78. Fla.—City of Coral Gables v. State ex rel Watson, supra

79. Fla.—City of Winter Haven v. A M Klemm & Son, 181 So 153, 132 Fla 334, rehearing denied 182 So. 841, 133 Fla 525

80. Tex.—County Board of School Trustees of Hale County v Mayfield Common School Dist. No 22, Civ.App, 140 S W 2d 956, error dismissed, judgment correct.

81. Tex.—County Board of School Trustees of Hale County v. Mayfield Common School Dist. No. 22, supra.

82. Mo.—State on Inf of McKittrick v. Koon, 201 S.W.2d 446, 356 Mo. 284.

Effect of judgment of ouster:

As evidence of nonexistence of corporation see Corporations § 76 h.

On prior status and acts as de facto corporation see Corporations § 107

Burial insurance association

Where quo warranto proceeding was instituted against officers of association who were unlawfully usurping a franchise of writing and selling burial insurance, and information was filed against the association and it was made a party only incidentally at officers' request and only for the purpose of trust fund and costs, and a judgment of ouster was rendered, the officers were personally ousted from usurping the franchise.—State, on Inf of McKittrick, v. Koon, supra.

83. Mo.—State, on Inf. of McKittrick, v Koon, supra.

84. Mo.—State on Inf. of McKittrick v. Koon, supra.

85. Mo.—State v American Can Co., 12 S W.2d 437.

86. Wash.—State ex rel Johnson v. Heap, 95 P 2d 1039, 1 Wash.2d 316.

Stockholder's right to vote

Where books of corporation dis-

issued in quo warranto proceedings, corporations to which defendant corporation has transferred its assets in order to defeat collection of such judgment will be liable, at least to the extent of the assets received by them, for such money judgment.[87]

Confiscation or sale of property. Under a statute so providing, where a corporation is unlawfully holding realty the state may at its option, in the same quo warranto proceeding, and within a specified period after the judgment of dissolution becomes final, institute in its behalf the confiscation of such property or the sale thereof at public auction,[88] and the final judgment shall fix the reasonable price to be paid for such property.[89]

c. Judgments in Proceedings Relating to Office

A judgment of ouster against the incumbent of an office determines that he is not entitled thereto, ousts him at once, and in some instances establishes the relator's title to the office. It is self-executing, and binding on the parties.

The legal effect of a judgment of ouster against a person in possession of an office is to determine that he is not entitled to the office,[90] and to oust him,[91] at once,[92] so that, while the judgment does not affect the previous official acts of the incumbent, and bears no relation thereto,[93] any subsequent acts as such officer will be invalid.[94] However, a judgment against defendant because his term has expired will not prevent his continuing to act until a successor is qualified, as provided by statute;[95] and, where a judgment of ouster is limited to the present term of office, defendant will not be precluded from serving a subsequent term to which he has been elected subsequent to the institution of the quo warranto proceeding.[96] A judgment of ouster against some of the trustees of a religious corporation does not invalidate the title to the office of the remaining trustees.[97]

In the absence of a statutory provision to the contrary,[98] the judgment is self executing,[99] and requires no process to enforce it;[1] and the appointing power can immediately fill the office by appointment of some qualified person.[2]

closed that stockholder who was not party to quo warranto proceeding was owner of certain stock, his right to vote stock either personally or by proxy could not be taken from him in quo warranto proceeding. State ex rel. Johnson v. Heap, supra

87. Ky.—Commonwealth v. Kentucky Jockey Club, 38 S.W.2d 987, 238 Ky. 739.

88. U.S.—Rubert Hermanos, Inc. v. People of Puerto Rico, C.C.A.Puerto Rico, 118 F.2d 752, reversed on other grounds People of Puerto Rico v. Rubert Hermanos, Inc., 62 S.Ct. 771, 315 U.S. 637, 86 L.Ed. 1081.

When judgment of dissolution becomes final

Under statute providing that when any corporation is unlawfully holding realty in the jurisdiction the people may, at its option, through the same quo warranto proceedings brought for dissolution, institute in its behalf the confiscation of such property, or the alienation thereof at public auction, within a term of not more than six months counting from the date on which final sentence is rendered, the people have six months after the judgment of dissolution becomes final within which to apply for confiscation or sale of property, and, hence, a judgment of dissolution did not become a "final judgment" until a mandate of the United States supreme court was received by the clerk of the supreme court of the jurisdiction.—Rubert Hermanos, Inc. v. People of Puerto Rico, C.C.A.Puerto Rico, 118 F.2d 752, reversed on other grounds People of Puerto Rico v. Rubert Hermanos, Inc., 62 S.Ct. 771, 315 U.S. 637, 86 L.Ed. 1081.

89. U.S.—Rubert Hermanos, Inc. v. People of Puerto Rico, C.C.A.Puerto Rico, 118 F.2d 752, reversed on other grounds People of Puerto Rico v. Rubert Hermanos, Inc., 62 S.Ct. 771, 315 U.S. 637, 86 L.Ed. 1081.

Final decree of nullity distinguished

The statute providing that when the decree of nullity of acts of a corporation sought to be dissolved by quo warranto proceedings affects realty and the people have chosen to confiscate it or order it sold at public auction, the final judgment shall fix the reasonable price to be paid therefor, does not necessarily mean that there should be only one final judgment in the course of the proceedings, but there may be a final decree of nullity and a final judgment ordering sale and fixing the reasonable price to be paid. Rubert Hermanos, Inc. v. People of Puerto Rico, C.C.A.Puerto Rico, 118 F.2d 752, reversed on other grounds People of Puerto Rico v. Rubert Hermanos, Inc., 62 S.Ct. 771, 315 U.S. 637, 86 L.Ed. 1081.

90. Ga.—State v. Johnson, 40 Ga. 164.

Judicial determination of facts and status

Wash.—State ex rel. Guthrie v. Chapman, 60 P.2d 245, 187 Wash. 327, 106 A.L.R. 640.

91. Wash.—State ex rel. Guthrie v. Chapman, supra.
51 C.J. p 363 note 28.

92. Ga. State v. Johnson, 40 Ga. 164.
Ky. McClendon v. Hamilton, 127 S.W.2d 605, 277 Ky. 734.
Wash. State ex rel. Guthrie v. Chapman, 60 P.2d 245, 187 Wash. 327, 106 A.L.R. 640.

93. Ga. Center v. Arp, 33 S.E.2d 303, 198 Ga. 571.

94. Ga. Center v. Arp, supra - State v. Johnson, 40 Ga. 164.

95. R.I. State v. Smith, 22 A. 1020, 17 R.I. 415.

96. Mo. State, on Inf. Mcl Hrick, v. Wymore, 132 S.W.2d 979, 345 Mo. 169.
Judgment limited to present term of office see supra § 49 c.

97. N.Y. People v. Fleming, 13 N.Y.S. 715, 59 Hun 618.

98. Ky. McClendon v. Hamilton, 127 S.W.2d 605, 277 Ky. 734.

99. Del. State ex rel. Jones v. Wise, 200 A. 418, 9 W.W.Harr. 409.
Ky.- McClendon v. Hamilton, 127 S.W.2d 605, 277 Ky. 734.
Wash. State ex rel. Austin v. Superior Court for Whatcom County, 106 P.2d 1077, 6 Wash.2d 61- State ex rel. Austin v. Superior Court for Whatcom County, 97 P.2d 171, 2 Wash.2d 46 State ex rel. Guthrie v. Chapman, 60 P.2d 245, 187 Wash. 327, 106 A.L.R. 640.
51 C.J. p 362 note 31.

1. Del.- State ex rel. Jones v. Wise, 200 A. 418, 9 W.W.Harr. 409.
Wash. -State ex rel. Guthrie v. Chapman, 60 P.2d 245, 187 Wash. 327, 106 A.L.R. 640.
51 C.J. p 362 note 32.

2. Wash.—State ex rel. Austin v.

Effect on rights of claimant to office. While ouster of the occupant does not of itself adjudge the rights of a claimant to the office,[3] or actually put him in possession thereof,[4] in some instances the decision may establish relator's right to the office.[5] Thus, the decision may necessarily involve a holding that he was illegally removed by the governor,[6] and leave him entitled to possession of the office,[7] and, where he is expressly adjudged to be entitled to the office, he becomes eo instanti invested with it on qualifying as required by law,[8] or, where he has previously qualified, on the filing of the judgment.[9] Under a statute so providing, a party obtaining a judgment for possession of an office is entitled, on giving bond, to an order directing the surrender of the office by respondent.[10]

Conclusiveness and binding effect. The judgment is binding on the state or people,[11] parties,[12] claimants who are parties,[13] and a successor standing in the shoes of defendant.[14] On the other hand, a judgment in a quo warranto proceeding does not conclude persons or corporations who are not parties to the proceeding;[15] and an adjudication of the right of a claimant to an office for a specified time does not determine the right of a successor to the office holding by appointment from the same authority for a different term.[16] A judgment of removal from office is not res judicata as to defendant's citizenship in a subsequent suit wherein there is a different adverse party.[17]

§ 51. Appeal and Error

a. In general
b. Review and disposition

a. In General

Subject to some exceptions, the general rules governing appeal and error in civil actions apply in proceedings to review quo warranto proceedings.

Subject to some exceptions, the general rules governing appeal and error in civil actions have been applied in proceedings to review quo warranto proceedings.[18] Thus, an appeal or writ of error will generally lie under the statutes from a judgment or order in a quo warranto proceeding, if it disposes of the case, so that it is a final one,[19] but not otherwise.[20] So, also, it has been held

Superior Court for Whatcom County, 97 P.2d 171, 2 Wash.2d 46

3. Ill.—Allen v. Patterson, 85 Ill App. 256
Ky.—Taylor v. Commonwealth, 3 J J Marsh 401.

4. N.M.—Territory v Mann, 120 P 313, 16 N M 744.

5. N.Y.—McVeany v New York, 80 N Y 185, 36 Am.R. 600, 59 How. Pr 106
34 C J p 973 note 27 [a]

De jure title to office of judge of juvenile court was held judicially established in relator in quo warranto proceeding.—Graham v Lindsey, 280 P 884, 86 Colo 240

6. N M.—Territory v. Mann, 120 P 313, 16 N M. 744

7. N M.—Territory v Mann, supra

8. N Y.—McVeany v. New York, 80 N.Y. 185, 36 Am.R 600, 59 How Pr. 106—Welch v. Cook, 7 How Pr 282
Mandamus by person adjudged entitled to office see Mandamus § 222 a.

9. N.C.—State v. Wilson, 28 S E 554, 121 N.C 480

10. N J.—Weinberger v. Hilfman, 150 A 198, 8 N J Misc. 317.

11. N.Y.—Hartt v Harvey, 32 Barb 55, 10 Abb Pr 321.

City commission
Under judgment awarding ouster in quo warranto proceeding in which it was held to be contrary to public policy for city commission to remove city clerk while engaged in duties incident to proposed recall election involving the majority of city commissioners, the city commission was precluded from exercising its power to suspend or remove city clerk as long as such action would result in hindering or delaying orderly proceeding by which recall election was required to be accomplished, notwithstanding motive or grounds for removal of clerk.—State ex rel. Gibbs v Williams, 186 So. 816, 136 Fla 110

12. Ill.—People ex rel Malone v Mueller, 66 N E 2d 516, 328 Ill. App 593
Conclusiveness of judgment in proceedings to try title to office generally see Judgments § 755

Voluntary appearance by city made it a party to the proceeding, and by failing to appeal or otherwise contest judgment city assented to such judgment.—People ex rel. Malone v Mueller, supra

13. N Y.—Hartt v. Harvey, 32 Barb 55, 10 Abb Pr. 321.

14. Ohio.—State v. McDaniel, 22 Ohio St 354.
51 C J. p 363 note 42.

15. Ill.—People v Board of Education of Nonhigh School Dist No 400 in Christian County, 162 N E. 150, 330 Ill. 522.—People ex rel Malone v Mueller, 66 N E 2d 516, 328 Ill App 593
Conclusiveness and effect of judgment in election contests generally see Elections § 306.

Judgment of ouster against city in quo warranto proceedings was not available to city officials thereof as defense against right, asserted by municipal bondholder not party to such proceedings, to writ of mandamus requiring them to levy taxes for payment of bonds and interest coupons issued by city before judgment.—State ex rel. Fidelity Life Ass'n v. City of Cedar Key, 165 So 672, 122 Fla 454.

16. Neb.—State v Broatch, 94 N W 1016, 68 Neb 687, 110 Am S R 477.

17. Puerto Rico.—People v. Pietri, 34 Puerto Rico 576.

18. Ill.—People v. Village of Niles Center, 137 N E 437, 306 Ill. 145.

19. Ga.—McWilliams v Jacobs, 57 S E 509, 128 Ga. 375.
3 C J p 558 note 2.

20. Ga.—Walker v Norris, 68 S E 70, 134 Ga 518.
3 C J p 558 note 3.

Order denying motion to dismiss, inasmuch as it retained the cause for further determination of matters of substantial controversy between the parties, was not a final and appealable order.—People v. Village of Niles Center, 137 N E 437, 306 Ill 145

Judgment merely sustaining demurrer to complaint in quo warranto is not appealable, where it is not a final disposition of the case.—State v. Callaway, 79 So. 146, 16 Ala.App. 472.

that proper exceptions are necessary to obtain a review of orders or rulings in quo warranto proceedings;[21] and a bill of exceptions must be prepared and submitted in accordance with statutory requirements.[22] Moreover, an appeal may be dismissed where the question in issue has become moot,[23] but a quo warranto proceeding to test title to office has been held not to become moot by the termination of the term for which defendant claimed he was elected to office.[24] In view of the summary nature of the proceeding, it has been held that ordinary statutory times for appellate court procedure are not necessarily applicable;[25] but there must be a compliance with rules as to the time for filing a transcript and statement of facts on appeal in quo warranto proceedings.[26] Under rules to that effect, the appellate court must give preference to appeals in quo warranto proceedings and hear and determine them as early as practicable.[27]

Where respondent has been brought into court by its corporate name and so appeared and pleaded, its corporate existence cannot be questioned on review in the appellate court;[28] and, where the record discloses that the relator's right to participate in the proceedings was not questioned, the proceeding will be regarded as one properly instituted by a proper party.[29]

The application of various general rules of review to the review of quo warranto proceedings is discussed in Appeal and Error. Thus, for example, the application of the rule that the appellate court will not consider matters not raised in the lower court is discussed in § 240 of that title; and the effect of an appeal, or writ of error, or supersedeas bond as staying a judgment of ouster is discussed in § 632 d.

Who may appeal. Subject to the qualification that appellant must be a party in interest who is aggrieved by the decision,[30] and, in some jurisdictions, subject to the further qualification that the relator alone may not appeal,[31] an appeal in quo warranto proceedings may be taken by either party.[32]

b. Review and Disposition

In general there is no hearing de novo on appeal in quo warranto proceedings, and general rules as to the scope of review apply.

While in those jurisdictions in which quo warranto proceedings are regarded as equitable in nature, as discussed supra § 2, statements set forth in the judgment of the trial court are advisory only, and not conclusive on appeal,[33] in general, since the proceeding is regarded as legal in nature, there is no hearing and determination de novo on appeal;[34] and on an appeal from an order quash-

21. Ill.—People v. Cooper, 29 N.E. 873, 139 Ill. 461.
3 C.J. p 952 note 19.

22. Ga.—Henderson v. Young, 176 S.E. 388, 179 Ga. 540.

Time for submission for approval
Exceptions to judgment dismissing quo warranto, when supreme court was in session, should be tendered for approval within ten days after trial judge's decision, but exceptions properly certified, and reciting tender to judge within time, will not be dismissed for judge's failure to sign within statutory limit without fault of party or because certificate was dated over ten days after judgment. Sweat v. Barnhill, 155 S.E. 18, 171 Ga. 394.

23. Ill.—People ex rel. Courtney v. Botts, 34 N.E.2d 403, 405, 376 Ill. 476, 134 A.L.R. 983.

24. Ill.—People ex rel. Courtney v. Botts, supra.

Reason for rule
"The expiration of the office might terminate the private right of the plaintiff, but it would not terminate the jurisdiction of the court to adjudge punishment for the violation of the law."—People ex rel. Courtney v. Botts, supra.

25. Tex.—State ex rel. Candler v. Court of Civil Appeals, Fourth Supreme Judicial Dist., 75 S.W.2d 253, 123 Tex. 549.

Where statutory time would have been exhausted before the election in issue it will not be allowed.—State ex rel. Candler v. Court of Civil Appeals, Fourth Supreme Judicial Dist., supra.

26. Tex.—Mathis Independent School Dist. v. Odom Independent School Dist., Civ.App., 222 S.W.2d 270.

Rule held jurisdictional and mandatory
Tex.—State ex rel. Crawford v. Wagner, Civ.App., 203 S.W.2d 795, error refused.

Mistake held no excuse
Tex.—State ex rel. Crawford v. Wagner, supra.

Proceeding held "appeal in quo warranto proceeding" within rule
Tex.—Mathis Independent School Dist. v. Odom Independent School Dist., Civ.App., 222 S.W.2d 270.

27. Tex.—State ex rel. Crawford v. Wagner, Civ.App., 203 S.W.2d 795, error refused.

28. Ill.—People v. Citizens' Telephone Co. of Pekin, 186 Ill.App. 360.

29. Conn.—Aiken ex rel. Hoerle v. Thoman, 17 A.2d 514, 127 Conn. 426.

30. Va.—Watkins v. Venable, 39 S.E. 147, 99 Va. 110.
51 C.J. p 363 note 52.

31. Cal.—State ex rel. Cano v. Petroleum Rectifying Co. of California, 68 P.2d 984, 21 Cal.App.2d 389.
Tex.—State ex rel. Candler v. Court of Civil Appeals, Fourth Supreme Judicial Dist., 75 S.W.2d 253, 123 Tex. 549. State v. Heath, Civ.App., 44 S.W.2d 398, error refused.
51 C.J. p 363 note 53.

Where state's legal representatives did not appeal from judgment in quo warranto challenging validity of incorporation of school district or prosecute appeal, appeal was dismissed. State v. Holtsclaw, 2 P.2d 1023, 151 Okl. 163.

32. Tex.—State ex rel. Crawford v. Wagner, Civ.App., 203 S.W.2d 795, error refused.
51 C.J. p 363 note 54.

33. Or.—State by Hagglund ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 36 P.2d 179, 148 Or. 273.

34. Mo.—State v. Hall, 228 S.W. 1055.

ing a writ of quo warranto, the review is the same as on certiorari[35]

Rules governing the scope and extent of review on appeals in civil actions generally, discussed in Appeal and Error §§ 1453–1834, have been applied in appeals in quo warranto proceedings[36] Thus, the appellate court will not consider and decide matters which are not within the issues raised by the pleadings,[37] and where it holds that the information does not state a cause of action for removal of an officer, it need not decide whether a statutory remedy of impeachment is cumulative or exclusive.[38] The action of the trial court in sustaining a demurrer to the petition is reviewable on appeal from a judgment of nonsuit;[39] but, in reviewing such an order, the court cannot consider facts not alleged in the petition.[40] Where only some of the owners of several tracts of land appeal from a judgment in a proceeding to test the legality of an annexation of the lands to a district, appellants may not complain of error in,[41] and the court is without jurisdiction to review,[42] the judgment as to the lands of the persons who do not appeal.

Judicial discretion of the court to grant or refuse leave to file an information in the nature of quo warranto,[43] or to vacate or refuse to vacate an order granting leave,[44] or to grant or refuse the issuance of the writ,[45] is subject to review; but, in the absence of a clear abuse of discretion, such action of the court will not be disturbed[46] Stated otherwise, it has been held that the appellate court will not review the discretion exercised by the court of original jurisdiction unless it plainly appears that its discretion has been abused.[47]

It will be presumed, in the absence of any showing to the contrary, that the trial court investigated and ascertained the capacity of the relator to sue before granting leave to file the information.[48]

Disposition of cause. Under some statutes the reviewing court possesses broad power as to the disposition of the cause.[49] In a proper case the judgment of the lower court may be reversed,[50] but a judgment will not be reversed merely to permit the imposition of a nominal fine.[51] On reversal of a judgment for the relator the reviewing court may compel the relator to surrender to defendant all the books, papers, and insignia belonging or appertaining to the office in question.[52] In view of the summary character of the proceeding it has been held that the appellate court may order a dismissal of the suit in the lower court[53]

Motion for rehearing. In view of the summary character of the proceeding, the appellate court has discretion summarily to refuse to permit the filing of a motion for a rehearing,[54] and, for the same reason, ordinary statutory times allowed for such motions are not necessarily applicable, and the court can limit the time allowed.[55] A motion for rehearing by the appellate court will be denied where the prosecuting attorney declines to join with relator in the motion and where he is a necessary party plaintiff.[56]

§ 52. Costs

Subject to some exceptions, such as that costs cannot be awarded against the state, the unsuccessful party is liable for costs in a quo warranto proceeding, and may be required to furnish bond therefor.

Under the statutes of the different jurisdictions, and the construction placed thereon, it is a general rule that the successful party is entitled to,

35. Pa.—Commonwealth v. Sommer, 164 A. 515, 309 Pa. 447—Commonwealth v. Luker, 102 A. 276, 258 Pa. 602.

36. Wis.—State v Kenosha Electric R. Co, 129 N.W. 600, 145 Wis. 337.

37. Wis.—State v Kenosha Electric R. Co., supra

38. Ala.—State v Owens, 117 So 298, 217 Ala 668

39. Ala.—State v. Roberts, 83 So. 49, 203 Ala. 325

40. Miss.—State v Nichols, 63 So 1025, 106 Miss. 419

41. Ill.—People v. Barber, 124 N.E 594, 289 Ill 556.

42. Ill.—People v. Barber, supra

43. Tex.—State v. Huntsaker, Civ. App., 17 S.W 2d 63.
51 C.J. p 364 note 86.

44. Ill.—People v Union El. R Co., 110 N.E. 1, 269 Ill. 212.

45. Pa.—Commonwealth v. Sommer, 164 A 515, 309 Pa 447—Commonwealth ex rel Huston v. Luker, 102 A. 276, 258 Pa. 602.

46. Pa.—Commonwealth v. Sommer, 164 A 515, 309 Pa 447—Commonwealth ex rel Huston v. Luker, 102 A. 276, 258 Pa. 602.
51 C.J. p 364 note 88.

47. Wash.—State v. Hovey, 294 P. 258, 159 Wash 584.

48. Colo.—Canon City Labor Club v People, 121 P 120, 21 Colo App. 37.

49. Ga.—Hornady v. Goodman, 146 S.E 173, 167 Ga 555.
51 C.J. p 364 note 91.

50. Ky.—McClendon v. Hamilton, 127 S.W.2d 605, 277 Ky 734.

51. Ky.—Commonwealth v. Kentucky Jockey Club, 88 S.W.2d 987, 238 Ky 739

52. Mont.—**Corpus Juris quoted in** State ex rel. Kurth v. Grinde, 32 P 2d 15, 16, 96 Mont 608.
N.Y.—People v. Livingston, 80 N. Y. 66

53. Tex.—State ex rel. Candler v. Court of Civil Appeals, Fourth Supreme Judicial Dist., 75 S.W.2d 253, 123 Tex. 549

54. Tex.—State ex rel. Candler v. Court of Civil Appeals, Fourth Supreme Judicial Dist., supra.

55. Tex.—State ex rel. Candler v. Court of Civil Appeals, Fourth Supreme Judicial Dist., supra—Staples v. State, Civ.App., 244 S.W. 1068.

56. Tex.—State ex rel. Candler v. Court of Civil Appeals, Fourth Supreme Judicial Dist., 75 S.W.2d 253, 123 Tex. 549.

and the unsuccessful party is liable for, costs in a quo warranto action or proceeding.[57] However, costs cannot be adjudged against persons not before the court,[58] and it has been held that, if there is no relator in the proceedings, the occupant of an office, although ousted, should not be ordered to pay costs.[59] Moreover, under a statute authorizing the court to adjudge such costs as are equitable, it may be proper not to award costs to either party under the circumstances of the particular case.[60] It has been held that costs will not be allowed where a public question is involved.[61]

Costs cannot be awarded against the people[62] or against a state prosecutor appearing as relator or prosecuting the proceeding in his official capacity;[63] nor need such an officer furnish a bond for costs.[64]

When so provided by statute, a private relator must file a bond for costs[65] before the commencement of the suit,[66] and he is liable for costs where judgment is rendered for defendant.[67] However, in the absence of a statute so providing, costs cannot be recovered from the relator;[68] and even under a statute providing for payment of costs by the relator under some circumstances, costs should not be imposed on an individual where, although his name appears in the title as relator, he was not authorized by the court to prosecute the action and the action was actually commenced and prosecuted by the county attorney.[69] Certainly costs should not be taxed against individuals named as relators where they have no interest in the proceeding other than that common to all citizens.[70] It has been both affirmed[71] and denied[72] that costs may be properly imposed on the relator where he had good ground for instituting the proceeding and would have prevailed but for matters which arose after the institution of the proceeding and resulted in a judgment for respondent.

Disclaimer or resignation. If an officer disclaims or resigns on application for the writ, the costs will not be assessed against him,[73] but he may properly be taxed with all costs accruing before the filing of his plea of disclaimer.[74]

An intervener may properly be charged with costs where judgment is rendered for the relator.[75]

On discharge of rule to show cause why a writ should not issue, costs should not be allowed defendant,[76] unless it is so provided by statute.[77]

Double costs should not be allowed.[78]

57. Ill. People ex rel. Dilks v. Board of Education of Paxton Community High School Dist. No. 117, Ford County, 283 Ill.App. 378.
Pa. Commonwealth v. Safe Deposit Bank & Trust Co., 11 Pa.Dist.& Co. 267.
51 C.J. p 365 note 95.

Liability of individual defendant
Ordinarily an unsuccessful individual defendant is liable for costs. Fisher v. Birkey, 139 N.E. 126, 307 Ill. 62. 51 C.J. p 365 note 11.

Defendants taxed with costs
(1) Ousted corporation. State, on Inf. of Taylor, v. Salary Purchasing Co., 218 S.W.2d 571, 358 Mo. 1022.
(2) Ousted officer. State on Inf. of McKittrick v. Williams, 144 S.W. 2d 98, 346 Mo. 1003. State on Inf. of McKittrick v. Graves, 141 S.W. 2d 91, 346 Mo. 990.

58. Kan. State v. Combination Oil, etc., Co., 182 P. 547, 105 Kan. 340.
59. Pa. Commonwealth v. Woelper, 3 Serg. & R. 52.
51 C.J. p 365 note 13.
60. Vt. State v. Foley, 94 A. 841, 89 Vt. 193.
61. Mich. Black v. Contract Purchase Corp., 42 N.W.2d 768, 327 Mich. 636.

Constitutionality of statute in issue
Quo warranto proceedings based on statute annexing qualifications for circuit judges not found in constitution and declared to be unconstitutional were dismissed without costs, since public question was involved. Attorney General ex rel. Cook v. O'Neill, 274 N.W. 445, 280 Mich. 649.

62. Ill.—People v. Graham, 186 Ill. App. 217. People v. Whitaker, 169 Ill.App. 287.

Provision as to relator held inapplicable
The provision of Quo Warranto Act that a successful defendant should have costs against the relator was inapplicable to proceeding in which complaint was filed by state's attorney for and on behalf of the people of the state and not at the instance of an individual relator. People v. Summy, 36 N.E.2d 331, 377 Ill. 255.

63. N.J. McCran v. Plainfield Union Water Co., 136 A. 204, 103 N.J. Law 243.
N.C. Houston v. Neuse River Nav. Co., 53 N.C. 476.
64. Ala. Donovan v. State, 109 So. 290, 215 Ala. 55.
51 C.J. p 365 note 3.
65. Ala.—Wenzel v. State ex rel. Powell, 3 So.2d 26, 241 Ala. 406. Birmingham Bar Ass'n v. Phillips & Marsh, 196 So. 725, 239 Ala. 650. Ex parte Talley, 192 So. 271, 238 Ala. 527.
Ohio. State v. Chandler, 2 Ohio Dec., Reprint, 164, 1 West.L. Month. 602.
51 C.J. p 365 note 5.
66. Ala. Birmingham Bar Ass'n v. Phillips & Marsh, 196 So. 725, 239 Ala. 650. Ex parte Talley, 192 So. 271, 238 Ala. 527.
Necessity and sufficiency of security as condition precedent to right to institute proceeding, see supra § 17.
67. Ill. People v. Campbell, 121 N. E. 183, 286 Ill. 32.
51 C.J. p 365 note 6.
68. Colo. Burkholder v. People, 152 P. 896, 60 Colo. 16.
69. Iowa. State v. Creston Mut. Tel. Co., 191 N.W. 988, 195 Iowa 1368.
70. Miss. State v. Henderson, 146 So. 456, 166 Miss. 530.
71. Ill. People v. Peltier, 113 N.E. 856, 275 Ill. 217.
72. Ga. Maxwell v. Meyers, 95 S.E. 693, 148 Ga. 50.
73. Vt. State v. Bradford, 32 Vt. 50.
51 C.J. p 365 note 12.
74. Miss. Mitchell v. Finley, 137 So. 330, 161 Miss. 527.
75. Cal. People v. Campbell, 70 P. 918, 138 Cal. 11.
76. Mass. Commonwealth v. Athearn, 3 Mass. 285.
77. Ill. People v. Mineral Marsh Drain. Dist., 62 N.E. 225, 193 Ill. 428.
78. N.Y. People v. Adams, 9 Wend. 464.

QUUM. As the first word of maxims as to which there have been no recent applications see 51 C.J. p 365 note 1–p 366 note 5.

QUYKE. In old records, quick, living, a quick or live beast.[1]

Q.V. As an abbreviation for "quod vide" see 1 C J. S. p 276 note 5. "Quod vide" defined see 74 C.J.S. p 170 note 22.

R. The eighteenth letter of the English alphabet.[2] The letter occurs in various abbreviations see 1 C.J. S. p 276 note 5.

RABBIT. An animal of the hare family.[3] Regulatory measures applying to rabbits are treated in Game §§ 7, 10–12, 15, 18.

RABIES. A dread disease known from the earliest times, and referred to by Aristotle and other ancient writers as a well-known illness. It is an infectious disease of the central nervous system, the virus of which is present in the saliva of diseased animals and generally passes to a new host, animal or man, through wounds inflicted by a dog bite. It is incurable, but is in large measure preventable by control of the dog population.[4] The usual term for the disease in man is "hydrophobia."[5]

RACE. In one sense the word "race" connotes descent,[6] and it is frequently employed to denote the descendants of a common ancestor, or a family, tribe, people, or nation.[7] It is defined as meaning a descendant of a common ancestor;[8] a tribe, people, or nation,[9] belonging or supposed to belong to the same stock or lineage,[10] an ethnical stock,[11] an ethnical stock from a distinct, primitive source;[12] a tribal or national stock;[13] a tribal stock, or subdivision of the racial stocks of mankind.[14]

Races are commonly classified into five divisions, Caucasian, Mongolian, Ethiopian, American, and Malay.[15]

The word "race" is also employed in a sense which involves the idea of competitive locomotion, and when so employed it embraces every contest or trial of progression, including speed and endurance, one or both, whether in running, trotting, walking, driving, riding, or rowing.[16] It therefore includes a foot race, a horse race of any kind, an automobile race, a steamboat or yacht race, or any other form of competitive movement or progression.[17] Figuratively, or otherwise, the term may be and has been applied to a competitive action of any kind, as in the phrase "political race."[18]

The term is also defined as meaning a strong, rapid current of water.[19]

Race as affecting the status of persons generally see Aliens § 124 and Citizens § 1 a; as a subject of

1. Burrill L D.
2. Webster New Int.D.
3. Webster New Int D
4. N Y—Steinberg v Stebbins, 55 N Y S 2d 503, 507, 184 Misc. 794
Liability for injuries caused by dog suffering from rabies see Animals §§ 154, 156
5. Stedman Med D.
6. U S—In re Halladjian, C.C Mass, 174 F. 834, 837
7. U.S.—International Longshoremen's & Warehousemen's Union v. Ackerman, D.C.Hawaii, 82 F.Supp. 65, 121.
"Race" is not "nationality" if the two words are employed in a strict ethnological sense.—International Longshoremen's & Warehousemen's Union v. Ackerman, supra
8. U S—Ex parte Fung Sing, D.C. Wash, 6 F 2d 670
9. U S.—Ex parte Fung Sing, supra.
10. Black L D.
11. U.S.—In re Halladjian, C.C. Mass, 174 F. 834, 837.
12. U.S—Ex parte Fung Sing, D C. Wash, 6 F 2d 670.
13. U.S.—In re Halladjian, C.C. Mass., 174 F. 834, 837.
14. U S—Ex parte Fung Sing, D C. Wash., 6 F 2d 670
51 C.J p 366 note 16
Similarly defined
(1) "A great division of mankind having in common certain distinguishing physical peculiarities, and thus a comprehensive class appearing to be derived from a distinct primitive source."—In re Halladjian, C C.Mass, 174 F. 834, 837.
(2) "A division or subdivision of one of the great racial stocks of mankind, distinguished by minor peculiarities: as, the Celtic race, the Finnic race is a branch of the Mongolian, the English, French, and Spaniards are mixed races"—In re Halladjian, supra.
15. Wash.—In re Takuji Yamashita, 70 P 482, 483, 30 Wash. 234, 94 Am.S R. 860, 59 L.R A 671.
American see 3 C.J.S. p 1044 note 91 1.
Caucasian see 14 C J S p 38 note 42.
Ethiopian see 31 C J S. p 469 note 56.
Malay see 54 C J.S p 909 note 27.
Mongolian see 58 C.J.S. p 949 note 1.
This division was adopted from Buffon, with some changes in names, and is founded on the combined characteristics of complexion, hair, and skull—In re Takuji Yamashita, 70 P. 482, 483, 30 Wash 234, 94 Am S R 860, 59 L R A 671.
Similar classifications
"Linnaeus makes four divisions, founded on the color of the skin (1) European, whitish; (2) American, coppery, (3) Asiatic, tawny, and (4) African, black. Cuvier makes three: Caucasian, Mongol, and Negro Others make many more, but no one includes the white or Caucasian with the Mongolian or yellow race, and no one of those classifications recognizing color as one of the distinguishing characteristics includes the Mongolian in the white or whitish race"—In re Takuji Yamashita, supra
16. Tenn—State v. Hayes, 93 S W 98, 99, 116 Tenn 40
"Race" distinguished from "game" see Gaming § 1 b (1).
Racing
The term "racing" is defined as meaning a contest of speed; a running in competition.—Thomas v. Rasmussen, 184 N.W. 104, 105, 106 Neb 442—51 C J. p 366 note 18
17. Tenn—State v Hayes, 93 S.W 98, 99, 116 Tenn 40.
18. State v Hayes, supra.
19. Webster New Int D.

discrimination see Civil Rights § 5 and Constitutional Law §§ 538 543; as affecting marriage see Marriage § 15 and Miscegenation § 1 et seq.; and with respect to competency to testify in actions generally see the C.J.S. title Witnesses § 56, also 70 C.J. p 91 notes 81--91. See also the title indexes to Juries and Grand Juries.

With reference to matters pertaining to races within various gaming statutes, and in connection with the operation of motor vehicles on public highways, consult the title indexes to Gaming and Motor Vehicles. Consult also the Descriptive-Word Index.

Negligence in connection with racing on public highways and criminal liability therefor are discussed generally in Highways §§ 242, 247. Racing motor vehicles on public highways as constituting negligence see Motor Vehicles § 297.

Phrases employing various forms of the word are set out in the note.[20]

RACERS. Carriers for delivering the strands of leather to be braided in a whiplash-braiding machine.[21]

RACEWAY. A technical term in hydraulics, meaning an artificial canal dug in the earth, leading from the dam of a stream to the machinery which it draws, and also to a similar watercourse leading from the bottom of a water wheel.[22]

RACK. A framework, stand, or grating, on or in which articles are placed, as for keeping or display,[23] and which, for the purposes of a conveyance or mortgage, may be considered a part of the realty, as stated in Fixtures § 45.

Anciently, the term "rack" was applied to an engine of torture used in the inquisitorial method of examining persons charged with crime, the office of which was to break the limbs or dislocate the joints.[24]

Rack men. Newspaper distributors are known in the business as rack men.[25]

Rack-rent is a rent of the full value of the tenement, or near it;[26] a rent which represents the full annual value of the holding.[27]

RACKET. The word "racket" has several meanings,[28] and in one sense it signifies a confused, clattering noise.[29]

As a slang expression of recent origin,[30] the word "racket" has become a part of our language.[31] The term, in its slang sense, has various shades of meaning, and in and of itself conveys no definite or certain signification.[32] It may be innocently employed with no opprobrious connotation intended,[33] and is thus often used to describe one's vocation, business, or diversion; as, the football racket, the baseball racket, the comic-strip racket, the hair-dressing racket, or the prize fighting racket;[34] and a method of earning money easily out of certain things or litigation is sometimes denominated a "racket" even though there is nothing sinister or evil about the method.[35] However, in recent times the term has been employed in a more sinister sense,[36] and the word "racket" has a sinister meaning with which the general public is familiar.[37] In this sense the word "racket" is defined as meaning engaging in an oc-

20. Phrases
(1) "Race course" see 20 C.J.S. p 1304 note 81.1.
(2) "Race field" see Gaming §§ 1 f, 89 b.
(3) "Race horse" see 41 C.J.S. p 329 note 31.
(4) "Race meeting" see Gaming § 1 i.
(5) "Racing of horses" compared with "trotting" or "trotting horses" see 41 C.J.S. p 329 note 31.
(6) "Racing tip," in its narrow sense, means false assumption of vaticination concerning the result of a speed contest between animals justly termed thoroughbred.—Armstrong Racing Publications v. Moss, 43 N.Y.S.2d 171, 173, 181 Misc. 966.

21. U.S.—Mesick v. Hassler, C.C. Mass., 134 F. 395.
51 C.J. p 366 note 35.

22. Minn.—Wilder v. De Cou, 1 N. W. 48, 51, 26 Minn. 10.

23. Webster New Int.D.

24. Black L.D.

25. U.S.—Schroepfer v. A. S. Abell Co., D.C.Md., 48 F.Supp. 88, 90.

26. Black L.D.
Statutory definition
Eng.—Truman v. Kerslake, [1894] 2 Q.B. 774, 777.

27. Eng.—Sawyer v. Withall, [1919] 2 Ch. 333, 336—Ex parte Connolly, [1900] 1 Ir. 1, 6.

28. N.Y.—Finkle v. Westchester Newspapers, 256 N.Y.S. 908, 235 App.Div. 817.
Vt.—Kinsley v. Herald & Globe Ass'n, 34 A.2d 99, 101, 113 Vt. 272, 148 A.L.R. 1164.

29. Vt.—Kinsley v. Herald & Globe Ass'n, supra.

30. Ariz.—Central Arizona Light & Power Co. v. Akers, 46 P.2d 126, 132, 45 Ariz. 526.
Product of prohibition
N.Y.—Bradley v. Conners, 7 N.Y.S.2d 294, 295, 169 Misc. 442.

31. N.Y.—Bradley v. Conners, supra.

32. Ariz.—Central Arizona Light & Power Co. v. Akers, 46 P.2d 126, 132, 45 Ariz. 526.

33. Ariz.—Central Arizona Light & Power Co. v. Akers, supra.
Vt.—Kinsley v. Herald & Globe Ass'n, 34 A.2d 99, 101, 113 Vt. 272, 148 A.L.R. 1164.

34. Ariz.—Central Arizona Light & Power Co. v. Akers, 46 P.2d 126, 132, 45 Ariz. 526.
Vt.—Kinsley v. Herald & Globe Ass'n, 34 A.2d 99, 101, 113 Vt. 272, 148 A.L.R. 1164.

35. N.Y.—Continental Bank & Trust Co. of New York v. 200 Madison Avenue Corporation, 43 N.Y.S.2d 403, 408.

36. Vt.—Kinsley v. Herald & Globe Ass'n, 34 A.2d 99, 101, 113 Vt. 272, 148 A.L.R. 1164.

37. Ariz.—Central Arizona Light & Power Co. v. Akers, 46 P.2d 126, 132, 45 Ariz. 526.

cupation to make money illegitimately;[38] a dodge or trick; a fraudulent scheme, game, or the like, an imposture,[39] specifically, a system of obtaining money or other advantage fraudulently or undeservedly, usually with the outward consent of the victims; as, the fortune-telling racket, the alimony racket.[40]

The connection in which the word "racket" is used in its slang sense determines whether its connotation is innocent or derogatory,[41] and thus resort to the context of which it is a part must be had in order to determine the meaning of the term.[42] The term "racket" may indicate continuity of behavior,[43] or it may refer to a single incident.[44]

RACKETEER. The word "racketeer" connotes a criminal act,[45] and a racketeer is a person who makes money by violations of the penal law, particularly those violations which are accompanied by violence.[46] The term has been compared with, or distinguished from, "crook" see 24 C J S. p 1264 note 48.1.

"Racketeering" is defined as meaning an organized conspiracy to commit the crimes of extortion or coercion, or attempts to commit extortion or coercion, within the definition of these crimes as found in the penal law;[47] the organized use of threats, coercion, intimidation, and use of violence to compel the payment for actual or alleged services of arbitrary or excessive charges under the guise of membership dues, protection fees, royalties, or service rates, the cloak of blackmail and extortion.[48]

RACKETS. A game played in a court with an implement called a "racket," consisting in knocking a ball against a high wall and keeping the ball constantly in motion by striking the ball with the racket.[49]

RADIAL. Of or pertaining to a ray, as of light, or a radius, as of a circle or sphere, extending from a center in the manner of rays; as, the spokes of a wheel are radial; hence, figuratively, divergent.[50]

RADIATE. To emit or send forth in rays, as heat.[51]

RADIATION. The word "radiation" is defined as meaning an act or process of radiating, or state of being radiated; emission and diffusion of rays, as of light or heat.[52] It means something more than radiators, having reference to the heating capacity of radiators when connected up with a boiler.[53]

The term has been distinguished from "conduction" see 15 C.J.S. p 816 note 63, and "convection" see 18 C.J.S. p 37 note 71.

RADICAL. A term derived from the Latin,[54] and, as an adjective, defined as meaning having to do with or proceeding from the root, source, origin, or foundation; forming part of the essential nature; not accidental; fundamental.[55]

As a noun, and as a term of chemistry, the word "radical" is defined as meaning an atom or element, or a group of atoms or elements, that is the chief constituent of the molecules of a given compound

38. N.Y.—Finkle v. Westchester Newspapers, 256 N.Y.S. 908, 235 App.Div 817—Bradley v Conners, 7 N Y S.2d 294, 295, 169 Misc 442.
Vt—Kinsley v. Herald & Globe Ass'n, 34 A.2d 99, 101, 113 Vt. 272, 148 A L R 1164.
Publication of term "racket" as defamation see Libel and Slander §§ 18, 73.

39. Ariz—Central Arizona Light & Power Co. v. Akers, 46 P 2d 126, 132, 45 Ariz 526
Vt—Kinsley v. Herald & Globe Ass'n, 34 A 2d 99, 101, 113 Vt. 272, 148 A.L R. 1164.
A trick, dodge, or scheme
N Y—Finkle v. Westchester Newspapers, 256 N Y S 908, 235 App. Div. 817

40. Ariz.—Central Arizona Light & Power Co. v Akers, 46 P 2d 126, 132, 45 Ariz 526.

41. Ariz.—Central Arizona Light & Power Co. v Akers, supra
Vt—Kinsley v. Herald & Globe Ass'n, 34 A.2d 99, 101, 113 Vt 272, 148 A.L R. 1164.

42. Ariz—Central Arizona Light & Power Co. v. Akers, 46 P 2d 126, 132, 45 Ariz. 526

43. N.Y.—Finkle v. Westchester Newspapers, 256 N Y.S 908, 235 App.Div. 817—Bradley v. Conners, 7 N Y S 2d 294, 295, 169 Misc. 442.

44. N Y.—Finkle v. Westchester Newspapers, 256 N.Y.S. 908, 235 App.Div. 817.

45. N Y—Continental Bank & Trust Co. of New York v. 200 Madison Avenue Corporation, 43 N.Y.S.2d 402, 408
Publication of term "racketeer" as defamation see Libel and Slander §§ 37, 73

46. N.Y.—Continental Bank & Trust Co. of New York v. 200 Madison Avenue Corporation, 43 N.Y.S.2d 402, 408.
Racketeer as one who extorts money or advantages by threats of violence see Threats and Unlawful Communications § 3.

47. U.S—U S. v McGlone, D C.Pa., 19 F Supp. 285, 287.
Racketeering from standpoint of coercion and extortion see Threats and Unlawful Communications §§ 4, 10.

48. U S—U. S. v. McGlone, D C.Pa., 19 F Supp 285, 287

49. Ont—Reg v Carter, Ont, 31 Can.L J. 664, 665.

50. New Standard D.
Phrases
(1) "Radial engine" see 30 C.J.S. p 251 note 13
(2) "Radial highway common carrier" defined see Carriers § 3

51. U S—Watts v Praeger, Cust & Pat.App, 93 F.2d 904, 907.
51 C.J. p 367 note 47.

52. U.S.—Watts v. Praeger, supra

53. Iowa—Cooper v. Scott Co., 120 N.W. 631, 633, 143 Iowa 744.
N.Y.—Berger Properties v. Kay Jewelry Co, 263 N.Y S. 576, 581, 147 Misc. 173.

54. Ga.—Harrison v. Hartford Steam Boiler Inspection & Insurance Co, 187 S.E 648, 661, 183 Ga. 1.

55. New Standard D
"Radical difference" defined see 26 C.J S. p 1305 note 60.1.

or that will not decompose in the ordinary chemical reactions to which a compound is liable More specifically, a group of different atoms acting as a single element in a compound and incapable of independent existence [56]

RADIO. See the C.J.S. title Telegraphs and Telephones § 290, also 51 C.J. p 367 notes 49, 50.

RADISH. The pungent fleshy root of a plant eaten raw as a relish; the plant which produces this root.[57]

RADIUS. In common usage the term "radius" ordinarily signifies a distance or circular limit defined by a radius of specified length,[58] and it is loosely defined as any area bounded, or conceived of as bounded, by certain prescribed limits.[59] Standing alone,[60] and as defined in geometry,[61] a radius is a straight line extending from the center of a circle to its circumference[62] or surface.[63] "Radius" is also defined as meaning a straight line drawn from the center of a circle to any point of the circumference;[64] a right line extending from the center of a circle or sphere to the curve or surface;[65] a right line drawn or extending from the center of a circle to its periphery,[66] the semi-diameter of a circle or sphere [67]

The word is often used metaphorically, as when we speak of the radius of a man's commercial activities[68] or of one's social circle.[69]

RADIX ET VERTEX IMPERII IN OBEDIENTIUM CONSENSUS. See 51 C.J. p 367 note 57

RÆPUBLICÆ CEDUNT BELLO PARTA. See 51 C.J. p 367 note 58.

RAFFIA. A fiber derived from the raffia palm, which is native to the island of Madagascar and is closely related to the Jupati palm.[70]

RAFFLE. See Gaming §§ 1, 86, and Lotteries § 10.

RAFT. A structure made by lashing together two pieces of plank, or a floating structure of timber of great value and extent;[71] a body of timber, held together by attraction or the force of external pressure; a frame or float made by laying pieces of timber across each other.[72]

Rafts as subject to admiralty jurisdiction see Admiralty § 18 b, and to maritime liens see Maritime Liens § 8 b. Driving, floating, or rafting logs is discussed in Logs and Logging §§ 46 58. See also Collision §§ 27, 94, 132, and Navigable Waters §§ 6, 44.

RAFTAGE. See Logs and Logging § 1 d.

RAG. The word "rag" is defined as meaning a tattered piece of cloth;[73] a waste piece of cloth torn

56. New Standard D.
Alkyl radicals
"If a hydrogen atom is thought of as being removed from the paraffin hydrocarbons, groups of atoms remain—called radicals which may combine with other atoms or groups of atoms to form derivatives, known as monovalent derivatives of the hydrocarbons. Those radicals are referred to as 'alkyl radicals' and are characterized by the ending ' yl': thus—methyl (CH_3); ethyl (C_2H_5); propyl (C_3H_7); butyl (C_4H_9); amyl (C_5H_{11}); hexyl (C_6H_{13}); heptyl (C_7H_{15}); octyl (C_8H_{17}), etc. The general formula of the alkyl radicals is C_nH_{2n} (where 'n' represents the number of carbon atoms)." Application of Henze, Cust. & Pat.App., 181 F.2d 196, 198.

57. Webster New Int.D.
A vegetable
"Radishes are unquestionably a vegetable, but, according to Bacon, they are not for nourishment but for condiment."—S. S. Pierce Co. v. U. S., C.C.Mass., 176 F. 440, 442.

58. Md.—Pennsylvania Threshermen & Farmers' Casualty Ins. Co. v. Messenger, 29 A.2d 653, 655, 181 Md. 295.

59. Mass. Saltman v. Smith, 46 N.E.2d 550, 555, 313 Mass. 135.
N.Y. Eisner v. Schulman, 96 N.Y.S.2d 458, 460, 198 Misc. 21.

60. N.J. Scuitier v. Barile, 70 A.2d 894, 895, 6 N.J.Super. 595.

61. Md.—Pennsylvania Threshermen & Farmers' Mut. Casualty Ins. Co. v. Messenger, 29 A.2d 653, 655, 181 Md. 295.

62. Md.—Pennsylvania Threshermen & Farmers' Mut. Casualty Ins. Co. v. Messenger, supra.
N.J.—Scuitier v. Barile, 70 A.2d 894, 895, 6 N.J.Super. 595.
The term imputes a circle
Wash. Mead v. Anton, 207 P.2d 227, 232, 33 Wash.2d 741.

63. Md.—Pennsylvania Threshermen & Farmers' Mut. Casualty Ins. Co. v. Messenger, 29 A.2d 653, 655, 181 Md. 295.

64. La.—State v. Berard, 3 So. 463, 464, 40 La.Ann. 172, 174.
51 C.J. p 367 note 51.

65. N.Y. Eisner v. Schulman, 96 N.Y.S.2d 458, 460, 198 Misc. 21.
Wash. Mead v. Anton, 207 P.2d 227, 232, 33 Wash.2d 741.
51 C.J. p 367 note 52 [a] (2).

66. Mass. Saltman v. Smith, 46 N.E.2d 550, 555, 313 Mass. 135.
51 C.J. p 367 note 52.
Similarly defined
A line drawn from the center of a circle to its periphery. Saltman v. Smith, supra.

67. N.Y. Eisner v. Schulman, 96 N.Y.S.2d 458, 460, 198 Misc. 21.
Wash. Mead v. Anton, 207 P.2d 227, 232, 33 Wash.2d 741.
Its length is half the diameter, or the space between center and circumference. State v. Berard, 3 So. 463, 464, 40 La.Ann. 172.

68. La. State v. Lahiff, 80 So. 590, 592, 144 La. 362.
Mass. Saltman v. Smith, 46 N.E.2d 550, 555, 313 Mass. 135.

69. La. State v. Lahiff, 80 So. 590, 593, 144 La. 362.

70. U.S. Steinhardt v. U. S., 9 Cust. App. 62, 64.
51 C.J. p 367 note 59.

71. N.H.—State v. Gilmanton, 14 N.H. 467, 479.

72. Pa.—Deddrick v. Wood, 15 Pa. 9, 13.
50 C.J. p 368 note 63.

73. N.Y. People on Complaint of Meltzer v. Nierman, 71 N.Y.S.2d 598, 601, 190 Misc. 149.

or cut off;[74] a fragment of cloth, torn or partly torn from its original connection, especially a worn, frayed, or torn patch of a garment;[75] a comparatively worthless piece of any textile fabric, either wholly or partly detached from its connection by violence or abrasion,[76] an old torn piece, small or large, of any woven fabric which has subserved one purpose and goes into the market as secondhand material;[77] a shred; a tatter.[78]

"Rag" is also defined as something resembling or suggesting a rag or rags and considered of little worth or service; used contemptuously, jocularly, or ironically, as of a flag, newspaper, etc.[79] The term has been applied to small particles of cloth, assembled promiscuously, with extensive intervening air spaces,[80] and by custom, in the junk trade, to all articles used as material in the manufacture of paper.[81]

The term "rags" has been distinguished from "waste."[82]

RAGE. Insanity; mania; an instance of, or as of, madness; hence, folly; impetuousness, rashness.[83]

RAIL. A bar of timber or metal extending from one post or support to another, as a guard or barrier, as in fences, balustrades, staircases, etc.; a construction of bars or posts, a fence, etc.[84]

In another sense, a strip of timber or metal used generally for wheels to run upon.[85]

RAILING. A barrier, as a fence or balustrade, consisting of a rail or rails and supports.[86]

The placing of railings and other guards or danger signals at obstructions and dangerous places in a highway is discussed in Highways § 262. Consult also the title indexes to Municipal Corporations and Negligence.

RAILROAD. As a noun, the term "railroad" is discussed in Railroads § 1.

As an adjective, the word "railroad" is employed in various phrases which are set out in the note.[87]

As a verb, "railroad" is defined as meaning to send or put through at high speed;[88] and, with respect to legislation, to force through over the objection of a minority.[89]

RAILROADING. See Railroads § 1.

"Rags" within Tariff Act see Customs Duties §§ 40, 42, 73.

74. Ark.—Johnson v State, 163 S. W.2d 153, 154, 204 Ark 476
N.Y.—People on Complaint of Meltzer v Nierman, 71 N.Y.S.2d 598, 601, 190 Misc 149
"Rag flock" see 36 C.J.S. p. 1028 note 5

75. N.Y.—People on Complaint of Meltzer v. Nierman, 71 N.Y.S.2d 598, 601, 190 Misc 149—Tenement House Dept v. Hutkoff, 149 N.Y.S. 457, 459
51 C.J. p. 368 note 69.

76. N.Y.—Tenement House Dept v. Hutkoff, supra
51 C.J. p. 368 note 70

77. U.S.—Train-Smith Co v. U. S., C.C.N.Y., 140 F. 113, 115.
51 C.J. p. 368 note 68

78. Ark.—Johnson v State, 163 S.W.2d 153, 154, 204 Ark. 476
N.Y.—People on Complaint of Meltzer v Nierman, 71 N.Y.S.2d 598, 601, 190 Misc 149

79. Ark.—Johnson v State, 163 S.W.2d 153, 154, 204 Ark. 476

80. N.Y.—People v. Krinka, 177 N.Y.S. 846, 847.

81. Mass.—Mooney v Howard Ins. Co., 138 Mass 375, 52 Am.R. 277.

82. U.S.—U. S. v Pearson & Emmott, C.C.N.Y., 131 F. 571, 572

83. Webster New Int. D.
"Rage" distinguished from "anger" see 3 C.J.S. p. 1073 note 70.

84. N.M.—Thwaits v. Kennecott Copper Corp., Chino Mines Division, 192 P.2d 553, 556, 52 N.M. 107.

85. N.C.—Willis v. Jarrett Constr. Co., 67 S.E. 265, 267, 152 N.C. 100
51 C.J. p. 368 note 76
"Rail car," "rail chair" see Railroads § 1.

86. Webster New Int. D.
"Banister and railing" see 8 C.J.S. p. 385 note 27.

87. **Phrases defined in Railroads § 1**
(1) "Railroad bridge."
(2) "Railroad car."
(3) "Railroad cattle gap or guard."
(4) "Railroad company."
(5) "Railroad corporation."
(6) "Railroad crossing."
(7) "Railroad cut."
(8) "Railroad division."
(9) "Railroad mortgage."
(10) "Railroad property."
(11) "Railroad purposes."
(12) "Railroad station."
(13) "Railroad terminal."
(14) "Railroad track."
(15) "Railroad yard."

Phrases elsewhere discussed
(1) "Railroad adjustment board" see Master and Servant § 28(2) c
(2) "Railroad commission" see Public Utilities § 31
(3) "Railroad ferry" see Ferries § 1.
(4) "Railroad hazard" see Master and Servant § 355 a and Negligence § 171 c.
(5) "Railroad labor board" see Master and Servant § 28(2) c
(6) "Railroad line" see Line, 54 C.J.S. p. 561 note 21.
(7) "Railroad ticket" see Carriers § 603 b

88. Webster New Int. D.

89. Wash.—Roane v Columbian Pub. Co., 218 P. 213, 215, 126 Wash 416

RAILROADS

This Title includes the construction, maintenance, regulation, and operation of railroads in general; organization of railroad companies, and their rights, powers, and liabilities in respect of grants of franchises and public aid, and of the construction and maintenance of their roads and other property, and their ownership and conveyance thereof, and the rights and liabilities of their stockholders and officers; and also rights, duties, and liabilities of railroad companies, as to the public and as to individuals, in respect of the management and operation of their roads, otherwise than in their capacities of employers or carriers.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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a. Railroad or Railway

(1) In general
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(1) In General

A "railroad" has been defined as a road specially laid out and graded, having parallel rails of iron or steel for the wheels of carriages or cars, drawn by steam or other motive power, to run upon; the term has no definite and precise signification, either as to the character of the road, or the width, character, or amount of the structure, land, or property included, and such matters must be determined from the connection in which the term is used.

A "railroad" has been defined as a road specially laid out and graded, having parallel rails of iron or steel for the wheels of carriages or cars, drawn by steam or other motive power, to run upon,[1] and, more specifically, as such a road to the possession or ownership of which important franchises or rights affecting the public are attached.[2] In some jurisdictions, for particular purposes, the word has been defined by statute,[3] and it has been held that the word may have a different meaning in different statutes, since the legislature may use it in a broad sense in one statute and in a technical or popular sense in another.[4] The term "railway" ordinarily is used interchangeably with "railroad" and is regarded as synonymous therewith,[5] unless the con-

1. N Y—People v Hughes, 215 N Y. S. 710, 713, 216 App Div. 626. 51 C J. p 404 note 2.

Similar definitions

(1) In general.—State v. York Utilities Co., Me, 45 A 2d 634, 635—51 C.J p 404 note 2 [a]

(2) A road or way on which iron rails are laid for wheels to run on, for the conveyance of heavy loads in vehicles—Watson v. Brady, 185 N. E 516, 517, 205 Ind 1—51 C J. p 404 note 2 [a] (3).

(3) The term "railroad" as employed in general legislation relates to institutions of a quasi-public character, to highways or roads constructed by authority of the state, with fixed metallic rails upon which public carriers may propel their carriages, or cars, speedily in the transportation of passengers and freight.—Watson v Brady, supra—McCleary v. Babcock, 82 N.E. 453, 169 Ind 228

"Roadbed"

(1) Compared with "railroad."—Skiles v. St Louis, etc, R. Co, 108 S W. 1082, 1084, 130 Mo App 162

(2) "Roadbed" defined see infra subdivision j of this section.

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(1) Compared with "railroad."—U. S. Trust Co. v. Atlantic, etc., R Co, 47 P. 725, 8 N M. 673, 689

(2) "Roadway" defined see infra subdivision j of this section.

2. Fla.—Gibbs v Drew, 16 Fla. 147, 26 Am R 700.

3. Mass—Libby v. New York, N. H & H R Co, 174 N E 171, 273 Mass. 522, 73 A L R. 101.

What constitutes railroad within application of statutes regulating operation see infra § 398.

4. Pa—Oxford Coal Co. v. New York Fidelity, etc., Co., 93 A. 1072, 248 Pa 311.

5. Ala.—Mobile Light, etc, Co v. Mackay, 48 So. 509, 158 Ala 51, 53 51 C.J. p 407 note 55.

"Railway" defined

"A 'railway' is a way which is made for the movement of cars, or something of that character, upon tracks that are laid down either on the street or somewhere else, they are not propelled as ordinary vehicles, such as wagons and carriages, are on the highways generally, but require for their operation that tracks be expressly formed to be moved upon"—Minneapolis St. Ry.

ection in which it is used shows that a distinction as o the character of the road is intended.[6]

The term "railroad" has no definite and precise ignification, either as to the character of the road[7] r the width, character, or amount of the structure, nd, or property included;[8] and such matters must e determined from the connection in which the erm is used,[9] and the proper construction, purpose, nd intention of the constitutional provision,[10] statte,[11] or instrument[12] in which it appears. The erm is restricted, however, to a road on which the arriages or cars operate on rails.[13] Whether a oad is properly a railroad does not depend primarily n its charter,[14] its length,[15] its location, course, or irection,[16] the kind of motive power used,[17] its osition with reference to the surface of the round,[18] the character of its traffic,[19] whether it s owned by a railroad company,[20] the name asumed or borne by the company constructing or perating it,[21] or whether it is a common carrier,[22] but on the powers it exercises and its method of doing business.[23]

As track, right of way, or appurtenances. The term "railroad" is sometimes used to designate merely the track or rails,[24] or the roadbed upon which rails are laid,[25] or it may extend to the right of way[26] or the roadbed or right of way with its superstructure, exclusive of rolling stock and other property,[27] but it may also include other real and personal property used in connection with railroad operation[28] and so may comprehend the rolling stock[29] and all the lands, depots, shops, buildings, structures, and appurtenances incidental to the operation of the road and the transaction of its business.[30] Even in its extended sense, however, the term does not include property which is not necessarily an appendage of the railroad or of the business of transportation.[31] The term "railroad" ordinarily includes side tracks and spur tracks,[32] although such tracks have been said not to be designated as "railroads" in com-

o. v. City of Minneapolis, C.C.Minn., 155 F. 989, 995

3. Pa.—Philadelphia v. Philadelphia Tract. Co., 55 A. 762, 206 Pa. 35.

51 C.J. p 408 note 56.

Distinction discussed

"Railroad" is usually limited to roads for heavy steam transportation and also to steam roads partially or wholly electrified or roads for heavy traffic designed originally for electric traction, and lighter electric streetcar lines and like are usually termed railways.—Wisconsin Employment Relations Board v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emp. of America, Division 998, 42 N.W.2d 471, 475, 257 Wis. 43.

7. U.S.—Massachusetts L. & T. Co. v. Hamilton, Mont., 88 F. 588, 32 C.C.A. 46.

51 C.J. p 405 note 5.

8. U.S.—Lake Superior & M. R. Co. v. U. S., Ct.Cl., 93 U.S. 442, 23 L.Ed. 965.

Ill.—St. Louis, etc., R. Co. v. Postal Tel. Co., 51 N.E. 382, 173 Ill. 508.

9. Pa.—Oxford Coal Co. v. Fidelity, etc., Co., 93 A. 1072, 248 Pa. 311.

51 C.J. p 405 note 7.

10. Ill.—People v. City of Chicago, 182 N.E. 419, 349 Ill. 304.

Steam trunk line railroads

Terms "railroad" and "railroad corporations" within constitution held applicable only to steam trunk line railroads, not railroads or railways engaged in purely local transportation.—People v. City of Chicago, supra.

11. Pa.—Oxford Coal Co. v. Fidelity, etc., Co., 93 A. 1072, 248 Pa. 311.

51 C.J. p 405 note 8.

12. Ill.—Peoria, etc., R. Co. v Tamplin, 40 N.E. 960, 156 Ill. 285.

Mo.—Munkers v Kansas City, etc., R. Co., 60 Mo. 334.

13. Me.—State v. York Utilities Co., 45 A.2d 634, 635.

14. Ohio.—Cincinnati, etc., R. Co. v Poland, 10 Ohio N.P.,N.S., 617.

15. N.J.—National Docks, etc., R. Co. v. State, 21 A. 570, 53 N.J.Law 217, 26 Am.S.R. 421.

51 C.J. p 405 note 11.

16. Tenn.—Collier v. Union R. Co., 83 S.W. 155, 113 Tenn. 96.

51 C.J. p 405 note 12.

17. Me.—State v. York Utilities Co., 45 A.2d 634, 635.

51 C.J. p 405 note 13.

18. Ill.—Lieberman v. Chicago, etc., R. Co., 30 N.E. 544, 141 Ill. 140.

51 C.J. p 405 note 14.

19. Tenn.—Collier v. Union R. Co., 83 S.W. 155, 113 Tenn. 96.

51 C.J. p 405 note 15.

20. U.S.—U. S. v. Brooklyn Eastern Dist. Terminal, N.Y., 39 S.Ct. 283, 249 U.S. 296, 63 L.Ed. 613.

51 C.J. p 405 note 16.

21. Iowa.—Lewis v. Omaha, etc., R. Co., 138 N.W. 1092, 158 Iowa 137.

Tex.—Houston, etc., R. Co. v. Hornberger, Civ.App., 143 S.W. 272.

22. Mo.—Mound City Transfer R. Co. v. Wabash R. Co., 133 S.W. 611, 154 Mo.App. 156.

23. Ohio.—Cincinnati, etc., R. Co. v. Poland, 10 Ohio N.P.,N.S., 617.

24. N.Y.—Buffalo Creek R. Co. v. New York Cent. R. Co., 160 N.Y.S. 546, 96 Misc. 462.

51 C.J. p 406 note 25.

25. Ill.—People v. Southern Gem Co., 163 N.E. 825, 332 Ill. 370.

51 C.J. p 406 note 26

26. U.S. Union Pac. R. Co. v. Cook, Neb., 98 F. 281, 39 C.C.A. 86.

51 C.J. p 406 note 27.

27. U.S. Lake Superior & M. R. Co. v. U. S., Ct.Cl., 93 U.S. 442, 23 L.Ed. 965.

51 C.J. p 406 note 28.

28. N.Y. New York v. New York, etc., R. Co., 169 N.Y.S. 12.

51 C.J. p 406 notes 29 31.

29. U.S.—U. S. v. Chaplin, C.C.Or., 31 F. 890, 12 Sawy. 605.

51 C.J. p 406 note 30.

30. U.S.—U. S. v. Chaplin, C.C.Or., 31 F. 890, 12 Sawy. 605.

51 C.J. p 406 note 31.

31. N.J.—State v. Mansfield Tp., 23 N.J.Law 510, 57 Am.D. 409.

51 C.J. p 407 note 32.

32. U.S.—Rock Creek Tp. v. Strong, Kan., 96 U.S. 271, 276, 24 L.Ed. 815.

Ark.—Conway Oil & Ice Co. v. Gibson Oil Co., 1 S.W.2d 60, 175 Ark. 95.

Conn.—State v. Railroad Com'rs, 16 A. 756, 757, 56 Conn. 308.

Ill.—People v. Southern Gem Co., 163 N.E. 825, 332 Ill. 370.

Mich.—Detroit & M. Ry. Co. v. Michigan R. Commission, 137 N.W. 329, 332, 171 Mich. 336.

Neb.—Roby v. State, 107 N.W. 766, 767, 76 Neb. 450.

Pa.—Black v. Philadelphia & R. R. Co., 58 Pa. 249, 253.

W.Va.—Town of Mason v. Ohio River R. Co., 41 S.E. 413, 420, 51 W. Va. 183.

mon parlance,[33] and additional tracks for yard purposes are not included in the term.[34]

As completed road. The term "railroad" may be so used as to mean the completed road ready for use, as distinguished from a merely graded roadway or partly constructed railroad[35] or from a franchise to construct a railroad.[36]

As railroad company. The term "railroad" is sometimes used as meaning "railroad company,"[37] or "railroad corporation,"[38] although properly it is to be distinguished therefrom, as discussed infra subdivision b of this section.

(2) Particular Kinds
- (a) In general
- (b) Lateral or branch railroad or line

(a) In General

The term "railroad" or "railway" is a generic term which includes all roads upon which the carriages or cars have wheels adapted to run, and which in operation do run, upon metallic rails, but the term ordinarily refers only to ordinary commercial railroads for the transportation of freight and passengers. The terms "belt railroad," "commercial railroad," "steam railroad," "tramroad," and "trunk railway" have also been defined.

Technically speaking the term "railroad" or "railway" is a generic term,[39] which includes all roads upon which the carriages or cars have wheels adapted to run, and which in operation do run, upon metallic rails.[40] While it may include street railroads and interurban railroads, as discussed infra subdivision a (3) of this section, the term standing alone ordinarily refers only to ordinary commercial railroads for the transportation of freight and passengers,[41] as distinguished also from a private tramway or railroad used only in the conduct of another business,[42] and from other ways or means of transportation,[43] and it is so used in this title.

Belt railroad. A railroad encircling a city or other restricted territory, intersected by other railroads, not having a common right of way into the territory for the purpose of transferring and switching cars from one railroad to another with which it is not otherwise connected, or for transferring cars between such railroads and industrial plants located in the neighborhood of but not on such railroads.[44]

Commercial railroad. A term embracing all railroads for general freight and passenger traffic between one town and another or between one place and another;[45] a railroad properly equipped for the running of passenger trains, freight trains, and doing and conducting a general freight and railway passenger business,[46] one whose general business is not carried on within a city.[47]

Steam railroad. A term used to describe an ordinary commercial railroad, because the latter, which carries both passengers and freight is usually propelled by steam.[48]

Tramroad or tramway. The term "tramroad" has no settled or well-defined meaning,[49] but is applied to railways which are built generally along the surface of the ground, where no particular attention is paid to a uniform grading of the roadbed.[50]

The term "tramway" likewise has no fixed and

33. Ill.—People v. Southern Gem Co, 163 N.E. 825, 332 Ill. 370

34. Mich.—Highway Com'r of Ecorse Tp v. Wabash R. Co, 111 N.W. 1090, 1091, 148 Mich. 436.

35. Vt.—Miller v. Rutland, etc., R. Co, 36 Vt. 452.
51 C.J. p 407 note 33.

36. Pa.—Wood v. Bedford, etc., R. Co., 8 Phila. 94.

37. U.S.—Calhoun v. Memphis & P. R. Co., Tenn., 4 F.Cas.No. 2,309, 2 Flipp. 442.
Ark.—Chicago, etc., R. Co. v. Jaber, 107 S.W. 1170, 85 Ark. 232.

38. D.C.—Nicolson v. Brown, 135 F. 2d 245, 246, 77 U.S.App.D.C. 314.

39. Ariz.—City of Phoenix v. Moore, 113 P.2d 935, 57 Ariz. 350.
Ind.—Watson v. Brady, 185 N.E. 516, 517, 205 Ind. 1.
60 C.J. p. 161 note 80.

40. Me.—State v. York Utilities Co., 45 A.2d 634, 635.

41. Kan.—**Corpus Juris cited in** Kniffen v. Hercules Powder Co, 188 P.2d 980, 989, 164 Kan. 196.
51 C.J. p. 406 note 22

42. Kan.—**Corpus Juris cited in** Kniffen v. Hercules Powder Co., supra.
51 C.J. p. 406 note 23.

43. Tenn.—Lookout Incline, etc., R. Co. v. King, Ch., 59 S.W. 805.
51 C.J. p. 406 note 24.

44. S.C.—**Corpus Juris quoted in** Summer v. State Highway Commission of South Carolina, 141 S.E. 366, 372, 143 S.C. 196.
7 C.J. p. 1044 note 77.

45. Ill.—Wilder v. Aurora, etc., Electric Tract. Co., 75 N.E. 194, 216 Ill. 493.
12 C.J. p. 142 note 42—14 C.J. p. 85 note 13 [c].
Similar definition
By "commercial railroads" is meant those larger, more expensive, and more permanent lines or systems extending from town to town and city to city, accommodating a heavier and more miscellaneous traffic, and requiring larger forces of employees, who are exposed to greater risks than is the case with street car lines and systems.—McLeod v. Chicago, etc., R. Co, 101 N.W. 77, 125 Iowa 270, 277

46. Ind.—Demaree v. Bridges, 65 N.E. 601, 602, 30 Ind.App. 131

47. Ga.—Savannah, etc., R. Co v. Savannah, 37 S.E. 393, 112 Ga. 164, 165.

48. Ill.—Wilder v. Aurora, etc., Electric Traction Co., 75 N.E. 194, 216 Ill. 493, 526.
60 C.J. p. 16 note 21.

49. Ark.—Poinsett Lumber, etc., Co. v. Board of Directors of St. Francis Levee Dist., 171 S.W. 875, 115 Ark. 454
63 C.J. p. 766 note 10.

50. Ark.—Poinsett Lumber & Mfg. Co. v. Board of Directors of St. Francis Levee Dist., supra.
63 C.J. p. 765 note 83 [a], p. 767 note 18.

strict meaning.[51] Although it has been held that a tramway is but an improved road or passway,[52] in the ordinary use of the word it is a railroad or railway over which cars are operated.[53] Nevertheless, it has been said that whether a tramway is a railway in a given case must of necessity depend on the facts of the concrete case, and not on an abstract definition.[54]

Trunk railway. A commercial railway, whose main line, whether operated by steam, electricity, or any other motive power, connects towns, cities, counties, or other points within the state or in different states, and which railroad company, under its charter, or under the general law, has the legal capacity of constructing, purchasing, and operating branch lines or feeders connecting with its main stem or trunk, the main or trunk line bearing the same relation to its branches that the trunk of a tree bears to its branches, or the main stream of a river bears to its tributaries.[55]

(b) Lateral or Branch Railroad or Line

A lateral or branch railroad is one running from some point on the main line, usually as an offshoot of such line, from a point between its termini, and intended as a connecting line or feeder, as distinguished from a cut-off or auxiliary main line; the determination as to what is a branch road does not depend on either its length or direction

While it has been held that the phrase "branch railroad" is of such ambiguous import that its meaning cannot be determined without reference to the circumstances surrounding the parties when they used it,[56] generally a "lateral" or "branch" railroad, the one term being an equivalent of the other,[57] is one running from some point on the main line,[58] usually as an offshoot of such line,[59] from a point between its termini,[60] and intended as a connecting line or feeder,[61] as distinguished from a cut-off or auxiliary main line.[62] The term implies the existence of a main line,[63] to which the branch or lateral road is an appendage and of which it is properly a part,[64] and so, strictly speaking, a disconnected line of railroad is not a branch;[65] and, on the other hand, the term does not include a mere spur track.[66]

The determination as to what is a branch road does not depend on either its length or its direction,[67] and the character of a road as a lateral or branch road is not affected by the fact that it connects with the road of another company,[68] or

51. N.Y.—Bradley v. Degnon Contracting Co., 120 N.E. 89, 91, 224 N.Y. 60.

52. Ky.—Duncan v. American Standard Asphalt Co., 97 S.W. 392, 393, 30 Ky.L. 84.

53. N.Y.—Gough v. Jewett, 52 N.Y.S. 707, 32 App.Div. 79, 81, rehearing denied 54 N.Y.S. 1102, 34 App.Div. 624.
63 C.J. p 767 note 15.

"Railway" compared
Ala.—Woodward Iron Co. v. Lewis, 54 So. 566, 570, 571, 171 Ala. 233.
63 C.J. p 767 note 15 [a].

"Railroad" or "railway" distinguished
Ala.—Woodward Iron Co. v. Lewis, supra.
63 C.J. p 767 note 15 [b].

54. Ala.—Woodward Iron Co. v. Lewis, supra.

55. Ky.—Diebold v. Kentucky Traction Co., 77 S.W. 674, 117 Ky. 146, 158, 25 Ky.L. 1275, 111 Am.S.R. 230, 63 L.R.A. 637.
65 C.J. p 181 note 96.

"Main line" synonymous
Ky.—Diebold v. Kentucky Traction Co., supra.

56. Cal.—Grennan v. McGregor, 20 P. 559, 78 Cal. 258.

57. Ill.—Newhall v. Galena, etc., R. Co., 14 Ill. 273.

"Lateral track" used as meaning the equivalent of branch line or branch road see infra subdivision p of this section.

"Lateral roads"
The several branches of a railroad company are "lateral roads."—Levin v. Baltimore & O. R. Co., 17 A.2d 101, 113, 179 Md. 135.

Interchangeable terms
Tenn.—Armstrong v. Illinois Cent. R. Co., 282 S.W. 382, 386, 153 Tenn. 283.

58. Wash.—Biles v. Tacoma, etc., R. Co., 32 P. 211, 5 Wash. 509.
51 C.J. p 407 note 39—36 C.J. p 956 note 35.

"Main line" compared with "lateral line"
Or.—Union Pac. R. Co. v. Anderson, 120 P.2d 578, 588, 167 Or. 687.

What constitutes a branch line
A track extended from the main line of a railroad to the plant of a manufacturing company is a branch line within the meaning of a statute authorizing railroad companies incorporated thereunder to construct branch lines.—Bethlehem v. Lehigh, etc., R. Co., 97 A. 1074, 253 Pa. 251.

"Branch or lateral line" distinguished from "switch track"
Ill.—State Equalization Board v. People, 82 N.E. 324, 325, 229 Ill. 430.

59. Or.—Union Pac. R. Co. v. Anderson, 120 P.2d 578, 588, 167 Or. 687.
51 C.J. p 407 note 40.

60. Fla.—Florida, etc., R. Co. v. Pensacola, etc., R. Co., 10 Fla. 145.
51 C.J. p 407 note 41.

61. U.S.—Baltimore & O. S. W. etc., R. Co. v. U. S., Com.Ct., 195 F. 962, 967, affirmed 33 S.Ct. 5, 226 U.S. 14, 57 L.Ed. 101.
36 C.J. p 956 note 35.

62. Va.—Norfolk, etc., R. Co. v. Lynchburg Cotton Mill Co., 56 S.W. 146, 100 Va. 376.

63. Wash.—Biles v. Tacoma, etc., R. Co., 32 P. 211, 5 Wash. 509.
51 C.J. p 407 note 44.

64. Ill.—Newhall v. Galena, etc., R. Co., 14 Ill. 273.

65. Ark.—St. Louis, etc., R. Co. v. Petty, 21 S.W. 884, 57 Ark. 359, 20 L.R.A. 434.

66. U.S.—Detroit & M. Ry. Co. v. Boyne City, G. & A. R. Co., D.C. Mich., 286 F. 540, 546.
S.D.—Illinois Cent. R. Co. v. East Sioux Falls Quarry Co., 144 N.W. 724, 33 S.D. 63.
51 C.J. p 407 note 47.
"Spur track" defined see infra subdivision p of this section.

67. Pa.—Appeal of McAboy, 107 Pa. 548—Vollmer v. Schuylkill River East Side R. Co., 1 Pa.Co. 301, affirmed 8 A. 223, 115 Pa. 166.

68. Md.—Baltimore, etc., R. Co. v. Waters, 66 A. 686, 105 Md. 396, 13 L.R.A.,N.S., 326.
Va.—Blanton v. Richmond, etc., R. Co., 10 S.E. 925, 86 Va. 618.

with another road or branch of the same company,[69] or a union depot in the same city as one of its original termini.[70]

(3) Street or Interurban Railroad Distinguished From Other Railroads

Although in some features there is a similarity between a steam or commercial railroad and a street or interurban railroad, the law recognizes a clear distinction between them in view of the difference of the main purposes and functions of the two classes of roads and in the manner of their construction and operation.

While in some features there is a similarity between a steam or commercial railroad and a street railroad, in view of the distinguishing features of the latter and of the difference of the main purposes and functions of the two classes of roads, the law recognizes a clear distinction between them;[71] and, although the words "railroad" and "street railroad" have, at present, a significance somewhat different from that which they had in the early development of these different classes of railroads, the general character of each is still distinguishable.[72]

The term "railroad" or "railway" is a generic term, as discussed supra subdivision a (2) (a) of this section, and is broad enough to include a street railroad,[73] and may, of course, be used as to mean a street railway,[74] but in ordinary popular usage a commercial railroad is understood to be referred to by the term "railroad" or "railway," unless it is qualified by the word "street" or other expression of similar import.[75] The distinction between a street railroad and an ordinary commercial railroad is not alone in the motive power used,[76] but is in the manner of construction and operation.[77] It has been held that the distinctive and essential feature of a street railroad, considered in relation to other railroads, is that it is a railroad for the transportation of passengers and not of freight,[78] but in view of the recent development of street railroads there is now no such inherent distinction.[79]

As used in constitutional and statutory provisions relating to railroads, where there is doubt as to the true meaning of the term "railroad" or "railway," the legislative intent is to be determined from the circumstances and the whole body of the legislation bearing on the question,[80] and as so construed may or may not include a street railroad according to the purpose and intention of the particular statute or ordinance.[81] Some courts emphasize the similarity between the two kinds of railroad, and the word "railroad" as used in a statute includes a street railroad unless there appears from the title of the act, its purpose, or context something to indicate the contrary.[82] Other courts emphasize the dissimilarity and hold that the term "railroad" or "railway" without qualification does not include a street railroad[83] unless the intention to do so is apparent from the general legislation on the subject or the context of the particular statute.[84]

Elevated railroad. It has been held that an elevated railroad is included in the term "railroad corporation" as used in a general railroad act.[85]

69. D.C.—Glick v. Baltimore, etc, R Co., 19 D.C. 412.
Md.—Baltimore, etc, R. Co. v. Waters, 66 A. 685, 105 Md. 396, 12 L. R.A.,N.S, 326.

70. Mo.—State v. St. Louis, etc, R Co., 3 Mo.App. 180.

71. Mich.—Ecorse Tp. v. Jackson, etc, R. Co., 117 N.W. 89, 153 Mich. 393.
60 C.J. p 161 note 77.
Street railway company distinguished from other railroad companies see infra subdivision b of this section.

72. Kan.—O'Malley v. Board of Com'rs of Riley County, 121 P. 1108, 86 Kan. 752, 755, Ann.Cas 1913C 576.

73. Ariz.—**Corpus Juris cited in** City of Phœnix v Moore, 113 P.2d 935, 936, 57 Ariz. 350.
60 C.J. p 162 note 81.
Broader term than "street railroad"
The term "railroad" is a broader term than "street railroad," and is the generic term, "street railroad" applying to a species under the general term.—Shreveport Tract Co v Kansas City, etc., R Co., 44 So. 457, 119 La. 759.
Depending on the context, the word "railroad" may or may not include a street railroad.—State v York Utilities Co, Me, 45 A 2d 634, 635.

74. Iowa.—Fidelity L & T Co v Douglas, 73 N.W. 1039, 104 Iowa 532.

75. Minn.—Funk v St. Paul City R Co., 63 N.W. 1099, 61 Minn. 435, 442, 52 Am.S.R. 608, 29 L.R.A. 208.
60 C.J. p 162 note 83.

76. Me.—Briggs v. Lewiston, etc, Horse R. Co., 10 A. 47, 79 Me 363, 1 Am.S.R. 316
60 C.J. p 162 note 84.

77. Ill.—Wilder v. Aurora, De Kalb & R. Electric Traction Co., 75 N E. 194, 216 Ill. 493
60 C.J. p 162 note 85.

78. Cal.—Montgomery v Santa Ana & Westminster R Co., 37 P. 786, 104 Cal 186, 43 Am.S.R 89, 25 L.R.A. 654
60 C.J. p 162 note 86.

79. Ind.—Michigan Cent R Co v. Hammond, 83 N.E. 650, 42 Ind.App. 66.
60 C.J. p 163 note 87.

80. U.S.—Massachusetts L. & T. Co. v. Hamilton, Mont., 88 F. 588, 32 C.C.A. 46.
60 C.J. p 163 note 89

81. Ariz.—City of Phoenix v. Moore, 113 P.2d 935, 57 Ariz. 350.
60 C.J. p 163 note 90.

82. Pa.—Gyger v. Philadelphia City Pass R Co, 20 A. 399, 136 Pa. 96, 9 L.R.A. 369.
60 C.J. p 163 note 91.

83. Kan.—Kansas City, etc, R Co. v. Board of R. Comrs., 84 P. 755, 73 Kan. 168
60 C.J. p 163 note 92.

84. Kan.—Kansas City, etc., R Co. v. Board of R. Comrs., supra.
60 C.J. p 163 note 93.

85. N.Y.—Manhattan Ry. Co. v Astor, 107 N.Y.S. 666, 667, 56 Misc. 353.

Interurban railroad. While an interurban railroad has in some respects the characteristics of an ordinary commercial railroad,[86] and may sometimes be considered as included within the term "railroad,"[87] it is recognized as a distinct and separate class of railroad as distinguished from a commercial or steam railroad.[88]

b. Railroad or Railway Company or Corporation

A railroad company or railroad corporation is a company which is engaged in operating a railroad, whether or not it owns rolling stock or the track over which it operates; and accordingly, whether a particular company is to be regarded as a railroad company depends principally on whether or not it is engaged in the railroad business, and not on the name of the company, or the primary purpose for which, if a corporation, it was incorporated.

While "railroad company" or "railroad corporation" has been defined as a corporation, company, or individual who lays out, constructs, maintains, or operates a railroad,[89] it is, more specifically, a company which is engaged in operating a railroad,[90] for it is not essential to the idea of a railroad company that it should both construct and operate a railroad,[91] and a mere construction company, although authorized to construct a railroad, is not a railroad company.[92] However, a corporation engaged as a carrier in transportation by rail,[93] or a terminal company operating tracks and facilities to be used by other roads,[94] is a railroad company, whether or not it owns rolling stock[95] or the track over which it operates.[96]

The question whether a particular company is to be regarded as a railroad company or within the application of statutes relating in terms to such companies depends principally on whether or not it is engaging in the railroad business,[97] and not on the name of the company,[98] or the primary purpose for which, if a corporation, it was incorporated,[99] or the right or title by which the property is held;[1] and, as used in a statute relating to taxation, the terms "railroad company" and "railroad corporation" should be construed as designating the character of the property rather than of its ownership.[2] Neither term necessarily imports a corporation,[3] and both ordinarily include natural persons engaged in the operation of a railroad;[4] but it has been held that, unless the contrary appears, a railroad company will be presumed to be a corporation.[5]

As including receivers, mortgagees, or trustees. Statutes applicable in terms to railroad companies have been held to apply to a receiver operating a railroad,[6] a mortgagee or trustee under a mortgage in possession,[7] and a trust company operating a road for the benefit of stockholders.[8]

86. Ill.—Hartzell v. Alton, Granite & St. Louis Traction Co., 104 N.E. 1080, 1081, 263 Ill. 205.
60 C.J. p 160 note 43.

87. Tex.—North Texas Transfer, etc., Co. v. State, 191 S.W. 550, 108 Tex. 235.
51 C.J. p 405 note 21.

88. Ohio.—Cincinnati, etc., R. Co. v. Poland, 10 Ohio N.P.,N.S., 617, 620.
60 C.J. p 160 note 49.

89. Mass.—Libby v. New York, N. H. & H. R. Co., 174 N.E. 171, 173, 273 Mass. 522, 73 A.L.R. 101.
51 C.J. p 408 note 58.

90. Mont.—Crowley v. Polleys Lumber Co., 9 P.2d 1068, 1070, 92 Mont 27.
51 C.J. p 408 note 59.

91. Iowa.—Davenport First Nat. Bank v. Davies, 43 Iowa 424.
51 C.J. p 408 note 60.

92. Miss.—Bradford Constr. Co. v. Heflin, 42 So. 174, 88 Miss. 314, 12 L.R.A.,N.S., 1040, 8 Ann.Cas. 1077.

93. U.S.—U. S. v. Delaware & Hudson Co., Pa., 29 S.Ct. 527, 213 U.S. 366, 53 L.Ed. 836.
51 C.J. p 408 note 62.

94. Mo.—Clark v. Atchison, etc., R. Co., 6 S.W.2d 954, 319 Mo. 865.

Company incorporated as railroad company and not as union depot company, and maintaining union station and network of railroad tracks in and about city was entitled to all of the powers and benefits conferred by law on railroad companies and amenable to all of the responsibilities cast on such companies.—Gillespie v. Terminal R. Ass'n of St. Louis, Mo.App., 204 S.W.2d 593.

Terminal companies distinguished from railroad transportation companies

U.S.—U. S. v. Terminal Railroad Association of St. Louis, Mo., 32 S. Ct. 507, 224 U.S. 383, 402, 56 L.Ed. 810.

Tenn.—State v. Union Railway, 168 S.W. 575, 579, 129 Tenn. 705, Ann. Cas.1915D 1240—Illinois Cent. R. Co. v. City of Memphis, 110 S.W. 2d 352, 357, 21 Tenn.App. 327.

95. U.S.—Sault Ste. Marie Bridge Co. v. Powers, C.C.Mich., 138 F. 262.
51 C.J. p 408 note 64.

96. Ark.—Chicago, etc., R. Co. v. Jaber, 107 S.W. 1170, 85 Ark. 232.

97. Ga.—Bridwell v. Gate City Terminal Co., 56 S.E. 624, 127 Ga. 530, 10 L.R.A.,N.S., 909.
Kan.—Union Trust Co. v. Kendall, 20 Kan. 515.

98. Ga.—Bridwell v. Gate City Terminal Co., 56 S.E. 624, 127 Ga. 530, 10 L.R.A.,N.S., 909.
51 C.J. p 408 note 67.

99. U.S.—Kentucky Impr. Co. v. Slack, Mass., 100 U.S. 648, 25 L.Ed. 609.
51 C.J. p 408 note 68.

1. Kan.—Union Trust Co. v. Kendall, 20 Kan. 515.

2. Iowa.—Dubuque v. Chicago, etc., R. Co., 47 Iowa 196.
Mo.—State v. Wiggins Ferry Co., 106 S.W. 1005, 208 Mo. 632.

3. Iowa.—Dubuque v. Chicago, etc., R. Co., 47 Iowa 196.
Vt.—State v. Mead, 27 Vt. 722.

4. Colo.—Union Pac. R. Co. v. De Busk, 20 P. 752, 12 Colo. 294, 13 Am.S.R. 221, 3 L.R.A. 350.
51 C.J. p 408 note 72.

5. Ky.—Madisonville, etc., R. Co. v. Commonwealth, 130 S.W. 1084, 140 Ky. 255.

6. Tenn.—Parris v. Tennessee Power Co., 188 S.W. 1154, 136 Tenn. 198.
51 C.J. p 408 note 74.

7. Mass.—Daniels v. Hart, 118 Mass. 543.
Tenn.—Parris v. Tennessee Power Co., 188 S.W. 1154, 136 Tenn. 198.

8. Kan.—Union Trust Co. v. Kendall, 20 Kan. 515.
Tenn.—Parris v. Tennessee Power Co., 188 S.W. 1154, 136 Tenn. 198.

Company organized for other purposes. A company authorized to operate a railroad for the transportation of persons and property is none the less a railroad company because it is also authorized to conduct some other business, as that of a bridge, mining, or manufacturing company;[9] and even though organized primarily for some other purpose, if it is also authorized to, and does, operate a railroad, not only for the transportation of its own product, but as a public railway for the conveyance of freight or passengers, it is a railroad company,[10] whether or not it is in fact doing any public business.[11] However, a company organized to carry on another business, which operates a tramroad or railroad merely in connection with, and for the purposes of, its own business, and not as a transportation business for the public generally, ordinarily is not properly designated a "railroad company" or included within the term,[12] although in some cases it has been held to be such;[13] nor is a union depot company a railroad company.[14]

Distinguished from "railroad." While the term "railroad" may sometimes be used to mean "railroad company," as discussed supra subdivision a (1) of this section, properly speaking, there is a clear distinction between the terms, the latter applying to the agency which may construct or own, and the former to the thing constructed or owned,[15] and either may exist without the other.[16]

Railway company. The terms "railroad company" and "railway company" are interchangeable[17] and synonymous.[18]

"Street railway company" compared and distinguished. A street railway company is a kind of railroad company;[19] and the term "railroad corporation" as used in a statute may include a street railway corporation;[20] but it has also been held that there is a distinction between a street railroad company and a commercial railroad company.[21]

c. Brake; Emergency or Service Stop

The term "brakes" refers to all the mechanism employed to stop or retard the motion of a train. An emergency stop is the full application of all the brake power, with the effect of locking the wheels, while a service stop is the gradual checking of the train, without locking of the wheels.

As applied to railroads, the term "brakes" includes all the mechanism which is used to stop or retard the motion of a train.[22]

Dead man's control. A part of the emergency air brake system consisting of a pedal which the engineer must keep fully and continuously depressed in order to keep the train running; any slight lessening of the pressure of the foot on the pedal causes the opening of an attending valve and the complete engaging of the brakes.[23] The term "dead man's control" is derived from the fact that when the operator dies while on duty, or otherwise becomes seriously incapacitated, a quick stop results when his foot releases the pedal.[24]

Emergency brake. A term applied to the operation of the air brake to make an emergency stop; it consists in a full application of all the brake power available which has the effect of locking the wheels, and is used only for a sudden stop in case of danger.[25]

Service brake. In the operation of railroad trains, if the service brake is applied it will stop the train gradually, without locking the wheels.[26]

Emergency stop. A stop made by means of the

9. Tenn.—Parris v. Tennessee Power Co., supra.
51 C.J. p 409 note 77.

10. N.Y.—Guenther v. Patch, 140 N.Y.S. 223, 155 App.Div. 27.
51 C.J. p 409 note 78

11. Va.—Wilson v. Virginia Portland R. Co., 94 S.E. 347, 122 Va. 160.

12. Mont.—Corpus Juris cited in Crowley v. Polleys Lumber Co., 9 P.2d 1068, 1070, 92 Mont. 27.
51 C.J. p 409 note 80.

13. S.C.—Crawford v. Mullins Lumber Co., 96 S.E. 494, 110 S.C. 318
Tex.—Sullivan-Sanford Lumber Co. v. Watson, 155 S.W. 179, 106 Tex. 4.

14. Colo.—People v. Cheeseman, 3 P. 716, 7 Colo. 376.

15. Tex.—International, etc., R. Co. v. Anderson County, 59 Tex. 654.
51 C.J. p 409 note 85.

16. Tex.—International, etc., R. Co. v. Anderson County, 59 Tex. 654.

17. Ind.—Davis v. Hert, 90 N.E. 634, 46 Ind.App. 242.

18. Pa.—Philadelphia v. Philadelphia Tract. Co., 55 A. 762, 206 Pa. 35.

19. Conn.—Stafford Springs St. R. Co. v. Middle River Mfg. Co., 66 A. 775, 80 Conn. 37, 40.

20. Pa.—In re Accident Company Investments, 16 Pa.Co. 312.

21. Ga.—Arlington v. Central of Georgia R. Co., 56 S.E. 1015, 1016, 127 Ga. 721.

22. Cal.—Valente v. Sierra R. Co., 111 P. 95, 97, 158 Cal. 412.

23. La.—McClain v. Missouri Pac. R. Co., App., 200 So. 57, 62.

24. La.—McClain v. Missouri Pac. R. Co., supra.

25. Mo.—Benedict v. Chicago Great Western R. Co., 78 S.W. 60, 61, 104 Mo.App. 218.

"Service brake" distinguished
"What is known as the 'service brake' differs from the emergency brake only in degree. If the full force of air is turned upon the brake, that is an 'emergency brake.' In ordinary cases less than the full force is turned on, and that is the service brake. In other words, there is only one set of brakes, and the difference consists in the amount of air pressure which is applied."—Norfolk, etc., R. Co. v. Dean, 59 S.E. 389, 391, 107 Va. 505—20 C.J. p 500 note 13 [a].

26. Mo.—Benedict v. Chicago Great Western R. Co., 78 S.W. 60, 61, 104 Mo.App. 218.

full application of all the brake power, with the effect of locking the wheels.[27]

Service stop. The checking of a train gradually, without locking the wheels,[28] a stopping used in ordinary cases, where the stop can be accomplished by a gradual application of the brakes.[29]

d. Bridge, Crossing, Cut, and Junction

A railroad bridge is a viaduct constructed for the exclusive use of railroad transportation. A railroad crossing is the crossing of a railroad track. A railroad cut comprises as well the sloping sides as the deepest part of the excavation. A junction is the point or locality where two or more lines of railway meet.

A railroad bridge is a viaduct constructed for the exclusive use of railroad transportation.[30] "Low bridge" in railroad parlance, is a term used to designate a bridge so low as to prevent those engaged upon box cars in the freight service from passing under it in a standing position.[31]

Crossing. A railroad crossing is the crossing of a railroad track;[32] an intersection of railway tracks;[33] the crossing by a railroad of a public highway.[34]

A farm crossing is a crossing constructed for the use of proprietors of lands adjoining the railroad;[35] a crossing used in connection with a farm.[36]

A private crossing, with respect to a railroad crossing, is a crossing neither required nor used for any public purpose.[37] The fact that a private crossing over railroad tracks is used by the public as a means of ingress to, and egress from, the property of the owners of part of the dominant estate used for commercial purposes does not make it a public crossing in a legal sense.[38]

Cut. "Railroad cut" is a term said to have a certain and definite meaning and to comprise as well the sloping sides as the deepest part of the excavation.[39]

"Deep cut" in railroad parlance is a relative term which means such a cut in its entirety as may be reasonably necessary to enable a railroad to use for track purposes the entire width of its right of way.[40]

Junction In the ordinary acceptation as applied to railroads, the term "junction" is frequently employed to designate the point or locality where two or more lines of railway meet.[41]

e. Car or Carriage

(1) In general
(2) Particular kinds

(1) In General

"Car," "railroad car," and "carriage" are words generally employed to designate the vehicles used on railroads, and they refer to a vehicle adapted to the rails of a railroad or a vehicle running upon rails.

"Car," as used in railroad terminology, is the word generally employed to designate the vehicles used on railroads.[42] So the word has been defined or employed as meaning a vehicle running on rails;[43] a vehicle adapted to the rails of a railroad;[44] a carriage for running on the rails of a railway;[45] any wheeled carriage used for carrying goods or passengers on a railroad, whether the road is a tramway over the streets of a city, to be operated by horses, or a more extended road to be worked by steam tractors.[46]

27. Mo.—Benedict v. Chicago Great Western R. Co., supra.

Distinguished from "service stop"

Mo.—Benedict v. Chicago Great Western R. Co., supra.

28. Mo.—Benedict v. Chicago Great Western R. Co., supra.

29. Mo.—Benedict v. Chicago Great Western R. Co., supra.

30. Ky.—Diebold v. Kentucky Tract. Co., 77 S.W. 674, 117 Ky. 146, 154, 25 Ky.L. 1275, 111 Am.S.R. 230, 63 L.R.A. 637—Louisville, etc., R. Co. v. Louisville City R. Co., 2 Duv. 175, 178.

31. Minn.—Koller v. Chicago, etc., R. Co., 129 N.W. 220, 221, 113 Minn. 173.

32. Mo.—Kirkdoffer v. St. Louis-San Francisco Ry. Co., 37 S.W.2d 569, 573, 327 Mo. 166.

33. Kan.—Atchison, etc., R. Co. v. Kansas City, etc., R. Co., 70 P. 939, 73 P. 899, 67 Kan. 569, 574.

"Crossing" distinguished from "switch"

U.S.—Thomson-Houston Electric Co. v. Ohio Brass Co., C.C.Mass., 130 F. 542, 546.

34. Ga.—Atlantic Coast Line R. Co. v. Bunn, 58 S.E. 538, 2 Ga.App. 305. 51 C.J. p 369 note 2.

35. Ill.—Cooke v. Chicago, O. & P. Ry. Co., 226 Ill.App. 73, 78.

36. Iowa.—Chicago, M., St. P. & P. R. Co. v. Cross, 234 N.W. 569, 572, 212 Iowa 218.

37. Ind.—Wabash R. Co. v. Williamson, 3 N.E. 814, 104 Ind. 154, 156.

38. W.Va.—Racco v. Chesapeake & O. Ry. Co., 32 S.E.2d 449, 127 W. Va. 321.

39. Ala.—Newton v. Louisville, etc., R. Co., 19 So. 19, 110 Ala. 474, 477.

40. Pa.—Pennsylvania R. Co. v. Braddock Borough, 83 A. 304, 234 Pa. 312, 318.

41. Ark.—Missouri Pac. R. Co. v. Henry, 269 S.W. 51, 52, 168 Ark. 146.
35 C.J. p 126 note 56.

42. Mo.—Burrus v. Continental Life Ins. Co., 40 S.W.2d 493, 494, 225 Mo.App. 1129.
9 C.J. p 1284 note 12 [h].

43. Ala.—Kansas City, etc., R. Co. v. Crocker, 11 So. 262, 264, 95 Ala. 412, 422.

44. Mo.—Burrus v. Continental Life Ins. Co., 40 S.W.2d 493, 494, 225 Mo.App. 1129.
Pa.—Beardorff v. Continental Life Ins. Co., St. Louis, Mo., 151 A. 814, 301 Pa. 179.
9 C.J. p 1283 note 12.

45. Wis.—Nicholls v. State, 32 N.W. 543, 546, 68 Wis. 416, 60 Am.R. 870.

46. Mo.—State v. Lang, 14 Mo.App. 247, 249.

The word "car" is sometimes used in its generic sense to embrace locomotive engines[47] and all kinds of railroad cars.[48] The word does not, however, always include locomotives,[49] and, where the context makes a distinction between cars and locomotives used as the motive power for a train of cars, the term has been held to exclude engines, helper engines, and pusher engines where they constitute part of the motive power of the train,[50] but to include a dead engine coupled into a train to be hauled.[51] The word has been held both to include and to exclude a locomotive tender, the tender being governed by the classification accorded the locomotive of which it is a part.[52] Other special types of cars held to be embraced by the term are hand cars,[53] passenger cars,[54] push cars,[55] and shovel cars.[56]

Carriage. It has been held that the word "carriage" embraces railroad cars.[57]

Railroad car. A vehicle adapted to the rails of a railroad;[58] a vehicle running upon rails[59] The term, in its general sense, has been held to include a freight car[60] and a hand car;[61] but the term as used in some statutes does not include electric railway passenger coaches[62]

(2) Particular Kinds

A qualifying term is usually added to the word "car" to indicate the particular use or style, such as, freight car, box car, platform car, etc. Terms referring to other particular kinds of cars have also been defined.

While the word "car" is the general term employed for the designation of vehicles used on railroads, a qualifying term is usually added to indicate the particular use or style, such as freight car, box car, platform car, dining car, parlor car, smoking car, etc.[63]

Blind car. A term applied to railroad mail and baggage cars, meaning that there is neither step nor platform at the ends of these cars[64]

Box car. An inclosed and covered freight car;[65] a roofed freight car with inclosed sides.[66]

Caboose or *caboose car.* "Caboose" is a word used interchangeably with "caboose car;"[67] a car attached to the rear of a freight train, fitted up for the accommodation of the conductor, brakeman, and chance passengers;[68] a car used on freight or construction trains for workmen or train crew;[69] a car for the accommodation of the men connected with the train.[70]

A "bobtailed caboose" is one with a door in the front end without any platform.[71]

A "dead caboose," in railway parlance, is an un-

47. U S.—U. S. v Chicago, St. P., M & O. Ry. Co., D C.Wis., 42 F 2d 248, 249.
9 C J. p 1284 note 18.
"Locomotive" defined see infra subdivision i of this section

48. Tex.—Missouri, etc., R Co v Smith, 99 S W. 743, 744, 45 Tex Civ App. 128.
9 C J. p 1283 note 12 [b].

49. U S.—Lehigh Valley R Co v. Beltz, C C.A N Y., 10 F.2d 74, 76

50. U.S.—U. S. v. Chicago, St P, M & O Ry Co., C.C.A.Minn., 43 F 2d 300, 305—U. S v Chicago, St P., M. & O. Ry. Co., D C.Minn, 34 F. 2d 812, 814.

51. U S.—U S. v. Chicago, St P., M & O. Ry. Co, D.C.Minn., 34 F 2d 812, 814.

52. Mo.—Satterlee v. St. Louis-San Francisco Ry. Co, 82 S.W.2d 69, 73, 336 Mo. 943.
9 C J. p 1284 notes 19, 20.
"Tender" defined see infra subdivision i of this section.

53. Me.—State v. Tardiff, 90 A. 424, 425, 111 Me 552, L R A 1915A 817
9 C.J. p 1283 note 12 [c]—29 C.J. p 211 note 64 [a].

54. U S.—U. S. v. Norfolk & W. R. Co., D C.Va., 184 F. 99, 101

55. Tex.—Seery v. Gulf, etc., R Co., 77 S W 950, 951, 34 Tex Civ.App. 89
9 C J p 1283 note 12 [e].

56. U.S.—Schlemmer v Buffalo, L & P. R Co, Pa., 27 S Ct. 407, 408, 205 U.S. 1, 51 L Ed 681.

57. Minn.—Duluth v Mallett, 45 N W 154, 43 Minn 204.
9 C.J. p 1295 note 88

58. Me.—State v Tardiff, 90 A 424, 425, 111 Me. 552, L R A 1915A 817.
51 C.J. p 369 note 95.

59. Me.—State v. Tardiff, supra

60. U S.—Goldstein v. U. S., C C.A Cal, 73 F.2d 804, 808.

61. Minn.—Benson v. Chicago, St P, M & O. Ry. Co., 77 N.W. 798, 799, 75 Minn 163, 74 Am.S R 444.

62. Ala.—Pullman-Standard Car Mfg. Co v State, 46 So 2d 500, 501, 253 Ala. 638.

63. Mo.—Burrus v. Continental Life Ins. Co., 40 S.W.2d 493, 494, 225 Mo App. 1129.

64. Kan.—Helm v. Hines, 196 P. 426, 109 Kan 48

65. Ill.—Williams v. New York Cent R. Co, 81 N.E.2d 15, 18, 335 Ill.App. 159.
Mont.—State v. Green, 39 P. 322, 15 Mont 424.

66. Ill.—Williams v. New York Cent. R Co, 81 N E 2d 15, 18, 335 Ill App 159.

67. U S.—Shoemaker v Kingsbury, Kan., 12 Wall. 369, 20 L Ed 432
Ky.—Louisville, etc, R. Co v Commonwealth, 78 S.W 167, 117 Ky. 345, 350.

68. Ky.—Mammoth Cave R Co v. Commonwealth, 197 S W. 406, 407, 176 Ky. 747—Louisville, etc., R. Co v. Commonwealth, 78 S W. 167, 117 Ky 345, 350.

69. Conn.—Bergan v. Central Vermont R. Co., 74 A 937, 82 Conn. 574
9 C.J. p 1114 note 78

70. U.S.—Shoemaker v. Kingsbury, Kan., 12 Wall 369, 20 L Ed. 432.
9 C J. p 1114 note 76.

Similar definition

A caboose is a railroad car furnished for the housing of train crews and equipped for their safety; it provides a place for the crew to carry necessary flagging equipment, raincoats, extra or excess clothing, necessary first aid equipment and lunches; also to do any necessary clerical work.—Brotherhood of Railroad Trainmen v. Terminal Railroad Ass'n of St. Louis, 41 N.E 2d 481, 484, 379 Ill 403.

71. Tex.—St Louis Southwestern Ry. Co of Texas v. Johnson, Civ. App., 249 S W. 1092.

attached caboose.[72]

A "dinkey caboose" is a shorter and lighter caboose with steps built on an iron frame attached to the side of the car, like the steps of a ladder.[73]

Coal car. A flat car with a coal bin on top of it.[74]

Combination car. A railroad car with a door in each side and each end, and with a platform at the end next to the locomotive, but none at the other end.[75]

Company fuel car. A car belonging to a railroad company and used by it when necessary for the movement of coal from the mines on its own line, and which coal had been bought by the carrier and used solely for its own fuel purposes.[76]

Doser. A flat car equipped with wings, constructed of steel and wood, which can be raised and lowered for the purpose of improving the railway roadbed close to the ends of the ties.[77]

Foreign railway fuel car. A car owned by another railroad company, and which has been by it delivered to the carrier on whose line mines are situated, for the purpose of enabling the car to be loaded with coal and returned to the company by whom the car has been furnished, the coal being intended for use as fuel by such foreign railroad company.[78]

Freight car. A railroad car adapted to the transportation from one point to another of movable articles of every kind, character, and description;[79] a railroad car for carrying freight commonly called a "box car."[80] It may include any car used in the movement of freight,[81] whether freight is actually stored in it[82] or it is used for the purpose of moving the train.[83] It may include a box car, at least temporarily while carrying freight,[84] and also an express car,[85] although every railroad freight car is not an express car.[86] "Freight car" has been distinguished from "refrigerator car."[87]

Gon or *Gondola car.* In railroad parlance, a gondola car is referred to as a "gon."[88]

Hand car. A car constructed and used for running on the lines of rails of a railroad, being propelled by hand by those riding on it, through the aid of cranks and gearing;[89] a car, equipped with mechanical apparatus for its propulsion, in general use for the purpose of conveying laborers and others, often for considerable distances along the tracks of steam railroad companies.[90] It has been distinguished from "push car."[91]

Lever car. A car propelled by hand on the track of a railway.[92]

Pile driver car. A flat car on which is built a pile driver and an engine, which propels the car forward and backward with its own power by means of sprocket chains and wheels.[93]

Pool car. A car carrying less than carload shipments of several parties, which are "pooled" together in the same car for freight purposes.[94]

Private car. In railroad terminology, a car not of railway ownership.[95] In a particular connection, it may signify a car owned either by a coal mining company or shipper or consumer, and used for the benefit of its owner in conveying coal from the mine to a designated point of delivery.[96]

72. Mo.—Ellington v. St. Louis, etc., R. Co., 102 S.W. 491, 204 Mo. 61, 66.

73. Tex.—Texas, etc., R. Co. v. Hemphill, 86 S.W. 350, 38 Tex.Civ. App. 435.

74. Kan.—Losey v. Atchison, etc., R. Co., 114 P. 198, 84 Kan. 224, 33 L.R.A.,N.S., 414.
11 C.J. p 934 note 45.

75. La.—Lewis v. Vicksburg, etc., R. Co., 38 So. 92, 114 La. 161, 163, 108 Am.S.R. 335.

76. U.S.—Interstate Commerce Commission v. Illinois Cent. R. Co., Ill., 30 S.Ct. 155, 215 U.S. 452, 461, 54 L.Ed. 280.
13 C.J. p 222 note 92.

77. Minn.—Winter v. Great Northern R. Co., 136 N.W. 1089, 118 Minn. 487, 488.

78. U.S.—Interstate Commerce Commission v. Illinois Central R. Co., Ill., 30 S.Ct. 155, 156, 215 U.S. 452, 54 L.Ed. 280.

79. W.Va. State v. Jones, 99 S.E. 271, 274, 84 W.Va. 85.
27 C.J. p 904 note 39.

80. Mont.—State v. Green, 39 P. 332, 15 Mont. 424, 426.

81. U.S.—Chicago, M. & P. S. R. Co. v. U. S., Mont., 196 F. 882, 883, 116 C.C.A. 444.
27 C.J. p 904 note 41.

82. U.S.—Chicago, M. & P. S. R. Co. v. U. S., supra.
27 C.J. p 904 note 42.

83. U.S.—Chicago, M. & P. S. R. Co. v. U. S., supra.
27 C.J. p 904 note 43.

84. W.Va.—State v. Jones, 99 S.E. 271, 274, 84 W.Va. 85.

85. Wis.—Nicholls v. State, 32 N.W. 543, 546, 68 Wis. 416, 60 Am.R. 870.

86. Wis.—Nicholls v. State, supra.

87. Tex.—Gulf, etc., R. Co. v. Lone Star Salt Co., 63 S.W. 1025, 1027, 26 Tex.Civ.App. 531.

88. Cal.—Showalter v. Western Pac. R. Co., 106 P.2d 895, 902, 16 Cal.2d 460.

89. Minn. Benson v. Chicago, St. P., M. & O. Ry. Co., 77 N.W. 798, 799, 75 Minn. 163, 74 Am.S.R. 444.
39 C.J. p 211 note 64.
Wis. Ramey v. Oconto Co., 217 N. W. 323, 324, 194 Wis. 541.

90. Mo. Cuccio v. Terminal R. Ass'n, 203 S.W. 493, 495, 199 Mo. App. 365.

91. Mo. Cuccio v. Terminal R. Ass'n, supra.

92. Ala. Kansas City, M. & B. R. Co. v. Crocker, 11 So. 262, 95 Ala. 413.

93. Minn.—Johnson v. Great Northern R. Co., 116 N.W. 936, 104 Minn. 444, 18 L.R.A.,N.S., 477.

94. U.S.—Walling v. Mutual Wholesale Food & Supply Co., C.C.A. Minn., 141 F.2d 331, 336.

95. La.—Mellon v. J. M. Burguieres Co., 120 So. 15, 16, 167 La. 583.

96. U.S.—Interstate Commerce Com-

Push car. A car pushed by railroad laborers by hand along the track from place to place where they might be working.[97] It is a car in the broadest sense of the word, yet with characteristics peculiarly its own, being without any mechanical apparatus for its propulsion and primarily intended to convey tools and kindred paraphernalia used by workmen, yet not intended to be used for the conveying of the workmen themselves[98] It has been distinguished from "street railway car"[99]

Rail car. A railroad car.[1]

Refrigerator car; "reefer." A car built for the purpose of carrying freight and provided with appliances for using ice in order to preserve its contents[2] In railroad parlance, a refrigerator car is referred to as a "reefer."[3]

System car. A car owned by the carrier and in use for the transportation of coal[4]

Tank car. A railroad car especially constructed for transporting liquor or gases in bulk in non-detachable tanks.[5]

f. Depot and Freight House

The term "depot" may mean one thing or another, under different circumstances, but ordinarily it means a station or place where railroad trains regularly come to a stop for the convenience of passengers and for the purpose of receiving and discharging freight. The term "depot grounds" means the place and grounds necessary and useful for the loading and unloading of passengers and freight. A "freight house" is a depot where freight is received and temporarily stored.

The term "depot" has been frequently defined,[6] and it may mean one thing or another, under different circumstances.[7] The word has been said to be synonymous with "station"[8] While it may[9] or may not[10] correctly be used to designate a station at which trains merely stop, as for wood and water, more specifically it means a station at which trains stop for the transaction of the ordinary business of the company, the receiving and delivering of freight and passengers;[11] a place where railroad trains regularly come to a stop[12] for the convenience of passengers and for the purpose of receiving and discharging freight;[13] the place where a carrier is accustomed to receive, deposit, and keep ready for transportation or delivery the merchandise carried by it;[14] a certain place situate alongside of or near its railroad, fitted up by it with suitable buildings, erections, appliances, and conveniences for carrying on generally and continuously, in an orderly man-

mission v. Illinois Central R Co., Ill., 30 S Ct. 155, 156, 215 U S. 452, 54 L Ed. 280.

97. Mo.—Cuccio v. Terminal R. Ass'n, 203 S.W 493, 495, 199 Mo App. 365

98. Mo —Cuccio v. Terminal R Ass'n, supra

99. Mo —Cuccio v. Terminal R. Ass'n, supra.

1. Mont —State v. Green, 39 P 322, 15 Mont. 424.

2. Tex —Gulf, etc, R. Co. v. Lone Star Salt Co, 63 S W 1025, 1027, 26 Tex.Civ.App 531, 534.
53 C.J p 1063 note 9.

3. Cal.—Showalter v. Western Pac R. Co., 106 P 2d 895, 902, 16 Cal. 2d 460

4. U S.—Interstate Commerce Commission v Illinois Central R. Co., Ill, 30 S Ct. 155, 156, 215 U.S. 452, 54 L Ed 280.

5. Ark —Barnsdall Refining Corporation v. Ford, 109 S.W.2d 151, 153, 194 Ark. 658.

6. Ill —Illinois Cent. R. Co. v. Illinois Commerce Commission, 74 N E 2d 526, 528, 397 Ill. 387.

7. Kan —**Corpus Juris quoted in** Brenner v. Amrine, 100 P.2d 688, 690, 151 Kan 788.
18 C.J. p 781 note 13

"Freight and passenger depot"
S C.—Murray v. Northwestern R. Co., 42 S.E. 617, 64 S.C. 520.

8. Kan.—**Corpus Juris quoted in** Brenner v Amrine, 100 P 2d 688, 690, 151 Kan. 788
Me —In re Atlantic & St L. R. Co, 62 A. 141, 143, 100 Me 430.
"Station" defined see infra subdivision m of this section

In a limited sense "depot" means a railroad station; a building for the accommodation and protection of railroad passengers or freight —Illinois Cent. R Co. v. Illinois Commerce Commission, 74 N.E 2d 526, 528, 397 Ill. 387

9. Conn.—State v. New Haven, etc., R Co, 37 Conn. 153, 163.
Kan —**Corpus Juris quoted in** Brenner v Amrine, 100 P.2d 688, 690, 151 Kan. 788.

10. Kan —**Corpus Juris quoted in** Brenner v Amrine, 100 P 2d 688, 690, 151 Kan 788.
18 C.J. p 781 note 16.

11. Kan —**Corpus Juris quoted in** Brenner v. Amrine, 100 P.2d 688, 690, 151 Kan 788
18 C J. p 781 note 17.

Similar definitions
Ill.—Illinois Cent R Co. v. Illinois Commerce Commission, 74 N. E 2d 526, 528, 397 Ill. 387
N H —Baldwin v. Grand Trunk R. Co, 15 A. 411, 64 N H 596
W.Va.—Hunter v Norfolk & W. Ry Co., 128 S.E. 137, 138, 99 W.Va 188.
18 C.J. p 781 note 17 [a].

"A railroad station"
Ill —Illinois Cent R. Co. v. Illinois Commerce Commission, 74 N.E 2d 526, 528, 397 Ill. 387
18 C J. p 781 note 17 [b].

12. Kan.—**Corpus Juris quoted in** Brenner v Amrine, 100 P.2d 688, 690, 151 Kan 788
18 C.J. p 781 note 18.

"Flag station" distinguished
Ark —St Louis, etc., R Co. v. State, 31 S W 570, 61 Ark. 9
18 C J. p 781 note 18 [b].

13. Kan —**Corpus Juris quoted in** Brenner v Amrine, 100 P 2d 688, 690, 151 Kan. 788.
18 C J p 782 note 19.

Similar definitions
Ill —Illinois Cent R Co. v. Illinois Commerce Commission, 74 N E 2d 526, 528, 397 Ill. 387.
18 C.J. p 782 note 19 [a].

14. Ill —Illinois Cent. R. Co. v Illinois Commerce Commission, supra.
Kan.—**Corpus Juris quoted in** Brenner v. Amrine, 100 P.2d 688, 690, 151 Kan. 788.
Va —Chesapeake & O. Ry. Co. v. Ricks, 135 S.E. 685, 688, 146 Va. 10
18 C J. p 782 note 20

The law recognizes depots as warehouses, when the goods are held for the consignee under certain circumstances.—New England Equitable Ins Co. v. Mechanics' American Nat. Bank, Tex.Civ.App., 213 S.W. 685, 688.

ner, the business of transporting freights, as is usually done by such companies.[15] The maintenance of either a depot building or an agent is not indispensable to a depot;[16] it depends more on the business done and the matters incidental thereto.[17]

Buildings, etc. The term "depot" usually includes, not only the idea of a stopping place for trains, but also that of a building, or something of the kind, for the protection and convenience of passengers and freight.[18] Such buildings and other things necessary for a regular depot or station may be greater or smaller in number and extent, or more or less elaborate, than others of like kind and for like purposes;[19] but whether they are sufficient, or good, or indifferent, or are intended for, and well or ill adapted to, the purpose of prosecuting the business of transporting freights and passengers, receiving from shippers generally and at all seasonable times such freights as the railroad company is required to transport over its road, such depots imply ordinarily such suitable and sufficient buildings, erections, and appliances as may be necessary in receiving and delivering freights, and for their temporary protection until they shall be transported or delivered to the persons entitled to have them, and that the company has a business office there, and suitable agents and employees to receive and deliver freights, to give receipts, bills of lading for them, and to do like and similar service.[20] They are settled recognized places to which shippers of freights may, at all appropriate times, go to ship or receive them.[21]

In its broadest sense, the word "depot" will include not only the depot building, but the platforms and grounds connected therewith and used by the company for its business purposes with the public at the depot and station,[22] not merely the station house built for the accommodation of passengers, but the grounds prepared and used as depot grounds for the benefit of persons traveling upon the particular railroad, and used by the company, at such point, in operating it as a common carrier;[23] the entire grounds used by the company for its business purposes with the public at that station.[24]

Passenger depot. A depot building used for the reception of passengers.[25] The term as used in some statutes refers not merely to a station house built for the accommodation of passengers, but the grounds prepared and used as depot grounds,[26] including passageways, walkways, or platforms prepared for passengers in boarding and leaving trains,[27] but under other statutes the term is limited so as to include only the whole of the building so used as a depot.[28]

Depot grounds. "Depot grounds" is not only a comprehensive, but is also a flexible, term.[29] Generally it means the place where passengers get on and off trains, and where goods are loaded and unloaded, and all grounds necessary and convenient and actually used for such purposes by the public

15. Kan.—Corpus Juris quoted in Brenner v. Amrine, 100 P.2d 688, 690, 151 Kan. 788.
N.C.—Land v. Wilmington, etc., R. Co., 10 S.E. 80, 104 N.C. 48.

16. Kan.—Corpus Juris quoted in Brenner v. Amrine, 100 P.2d 688, 690, 151 Kan. 788.
18 C.J. p 782 note 22.

17. Kan.—Corpus Juris quoted in Brenner v. Amrine, supra.
18 C.J. p 782 note 23.

18. Ark.—Arkansas Cent. R. Co. v. Smith, 71 S.W. 947, 71 Ark. 189.
18 C.J. p 782 note 24.

Box car not a depot
A contract to establish a "depot" on certain land is not complied with by constructing a sidetrack and placing a box car where freight may be received and cars stopped when flagged, the term "depot" implying a permanent structure to be used as a receptacle for freight and passengers and to be of the kind usually erected at similar stations along the same railroad.—Missouri Pac. R. Co. v. Williamson, 112 S.W.2d 957, 958, 195 Ark. 487—St. Louis, etc., R. Co. v. Berry, 110 S.W. 1049, 86 Ark. 309.

19. N.C.—Land v. Wilmington, etc., R. Co., 10 S.E. 80, 104 N.C. 48.

20. N.C.—Land v. Wilmington, etc., R. Co., supra.
18 C.J. p 783 note 26.

21. N.C.—Land v. Wilmington, etc., R. Co., supra.

22. Ark.—Moore v. Campbell, 109 S. W. 544, 85 Ark. 581.
18 C.J. p 783 note 28.

23. Ind.—State v. Indiana, etc., R. Co., 32 N.E. 817, 133 Ind. 69, 18 L.R.A. 502.
Miss.—Illinois Cent. R. Co. v. Causey, 63 So. 336, 106 Miss. 36, Ann. Cas.1917A 1281.

24. Miss.—Illinois Cent. R. Co. v. Causey, supra.
18 C.J. p 783 note 30.

Approaches included
"The term 'depot' is sufficiently broad to embrace within its meaning a 'passway' used for the convenient and safe egress and ingress of passengers. It is not restricted in its signification to the 'house' or structure used also for their convenience in this respect."—Corpus Juris quoted in Brenner v. Amrine, 100 P.2d 688, 690, 151 Kan. 788—18 C.J. p 783 note 30 [b].

25. Ark.—St. Louis, etc., R. Co. v. State, 31 S.W. 570, 61 Ark. 9.

Held not "passenger depots"
N.Y.—Crouch v. State, 228 N.Y.S. 736, 737, 131 Misc. 907.

"Passenger depot" and "station" held synonymous
Ind.—State v. Indiana, etc., R. Co., 32 N.E. 817, 133 Ind. 69, 74, 18 L.R.A. 502.
Minn. Minnesota Transfer Ry. Co. v. Railroad and Warehouse Commission, 274 N.W. 408, 410, 200 Minn. 422.

26. Ind. State v. Indiana & I. S. R. Co., 32 N.E. 817, 818, 133 Ind. 69, 18 L.R.A. 502.

27. Miss.—Illinois Cent. R. Co. v. Archer, 74 So. 135, 137, 113 Miss. 158—Illinois Cent. R. Co. v. Causey, 63 So. 336, 337, 106 Miss. 36.

28. U.S.—King v. Illinois Cent. R. Co., Miss., 114 F. 855, 862, 52 C. C.A. 489.

29. Tex.—St. Louis Southwestern Ry. Co. v. Buice, Civ.App., 262 S. W. 558, 559.

and by the railroad company,[30] the grounds necessary or useful and used for the purposes of the freight and passenger business of the road, which includes all the business in which the public is interested;[31] the right of way and land used for station purposes,[32] land for suitable station purposes and for tracks and yard room to be used in connection therewith,[33] yard limits.[34] The term is frequently used interchangeably with "depot."[35]

Freight house. The term "freight house" has been used interchangeably with "freight depot."[36]

g. Employees of Railroad

A "railroad employee" is a person employed to work on and about a railroad; one whose employer operates a railroad. Terms referring to particular employees or employees having particular duties have also been defined.

A "railroad employee" is a person employed to work on and about a railroad,[37] one whose employer operates a railroad.[38]

Back shop workers. Railroad workers whose jobs have to do with instrumentalities in the repair of railroad equipment completely withdrawn from service.[39]

Brakeman The man whose business it is to manage the brake on railways.[40] The term has been distinguished from "conductor,"[41] and has been distinguished from, and compared with, "extra conductor."[42] An "extra brakeman" is one who has no regular employment, but takes the place of a regular employee when off duty.[43]

A "rear brakeman" is a brakeman posted at or near the rear of the train.[44]

Conductor. Generally speaking, a conductor of a railroad train is the manager of the train,[45] or, as otherwise expressed, the man in charge of the train.[46] He is the superior in authority and grade in every train crew, who has charge of the train and its operations; and all the other members of the crew are under his control and subject to his orders.[47]

30. W.Va.—Hunter v. Norfolk & W. Ry Co, 128 S.E. 137, 138, 99 W Va 188.
Wis.—Prince v Chicago & N. W. Ry. Co., 161 N.W. 765, 766, 165 Wis 212.
18 C.J. p 783 note 32

"Distance from depots is not the controlling consideration in determining 'depot grounds'"—Rabidon v. Chicago, etc, R. Co, 73 N.W 386, 387, 115 Mich 390, 39 L.R.A. 405—18 C.J. p 783 note 32 [c].

Held "depot grounds"
Wis.—Wolf v Chicago, M. & St. P. Ry Co, 199 N.W. 142, 143, 184 Wis. 193.

31. W.Va.—Hunter v Norfolk & W. Ry. Co, 128 S.E. 137, 138, 99 W. Va. 188.
18 C.J. p 783 note 33.

Area included
(1) Depot grounds include space for switching and making up of trains and the use of sidetracks for the storing of cars and the place where the public requires open and free access to the road for the purposes of such business.—Prince v. Chicago & N. W. Ry. Co., 161 N.W. 765, 766, 165 Wis. 212—18 C.J. p 783 note 33 [a].

(2) Term "depot grounds" means not only the depot proper, with platforms and approaches, but also all territory and switch tracks convenient and reasonably necessary for use of public in transacting business with the carrier and actually so used, and facilities reasonably necessary to enable such company to discharge its duty to the public with promptness and efficiency and safety to its employees, and actually so used.—St Louis Southwestern Ry. Co. v. Buice, Tex Civ.App, 262 S.W. 558, 559.

(3) Term "depot or station grounds," includes all of right of way within yards and switching limits at depot or station.—St Louis Southwestern Ry. Co. v. Buice, supra.

32. Me.—Appeal of Atlantic, etc., R. Co, 62 A. 141, 100 Me 430

33. Me.—Appeal of Atlantic, etc., R Co, supra.
Mass.—Norwich, etc., R Co. v. Worcester County, 23 N.E. 721, 151 Mass. 69.

"Station" synonymous
The words "depot grounds" are synonymous with "station."—Pecos & N. T. Ry. Co v Railroad Commission of Texas, Tex Civ.App., 193 S.W. 770, 773

34. Mich.—Rabidon v. Chicago, etc., R Co, 73 N.W. 386, 115 Mich 390, 39 L.R.A. 405
Or.—Harvey v. Southern Pac. Co., 80 P. 1061, 46 Or. 505

35. Wis.—Fowler v. Farmers' L. & T. Co., 21 Wis 77, 79

36. N.Y.—Crouch v State, 228 N.Y.S. 736, 737, 131 Misc. 907.

Held not "freight houses"
Switches, temporary buildings, tool shed, coal chute, turn table, water tower, scales and tracks leading thereto, held not to constitute "freight houses."—Crouch v. State, supra.

37. Ga.—Yancey v. Aetna L. Ins. Co., 33 S.E. 979, 108 Ga. 349, 351.
51 C.J. p 369 note 6.

38. Ga.—Yancey v. Aetna L. Ins. Co, supra.
51 C.J. p 369 note 7.

39. N.Y.—Baird v New York Cent R. Co, 86 N.E.2d 567, 568, 299 N.Y. 213.

40. Va.—Chesapeake, etc., R Co. v. Anderson, 25 S.E. 947, 948, 93 Va. 650

"Railway freight brakeman"
Minn.—Cook v. Modern Brotherhood of America, 131 N.W. 334, 114 Minn 299, 302.

41. U.S.—Chicago, M. & St. P. Ry. Co. v. Ross, Minn, 5 S.Ct 184, 190, 112 U.S. 377, 28 L.Ed. 787.

42. Tex.—Standard L, etc, Ins Co. v Koen, 33 S.W. 133, 134, 11 Tex. Civ.App. 273.
9 C.J. p 318 note 67 [a].

43. Ky.—Louisville, etc., R Co. v Mulfinger, 80 S.W. 499, 26 Ky.L. 3.

44. Neb.—Erb v. Eggleston, 60 N.W. 98, 41 Neb. 860.

45. Ky.—Louisville, etc., R. Co v Renfro, 135 S.W 266, 270, 142 Ky. 590, 33 L.R.A.,N.S., 133.

Distinguished from "engineer"
Ill.—Chicago, etc., R. Co. v. Casey, 9 Ill App. 632, 640.
23 C.J p 71 note 48 [b].

46. Mo.—Council v. St. Louis, etc., R. Co., 100 S.W. 57, 123 Mo App. 432.

47. Tenn.—Alabama Great Southern R. Co. v. Baldwin, 82 S.W. 487, 113 Tenn. 409, 67 L.R.A. 340, 3 Ann. Cas. 916.
12 C.J. p 413 note 79 [c]—23 C.J. p 71 note 48 [b].

"Extra conductor," in railroad parlance, is the position in which a man is called on to act in the capacity of conductor, without having continuous employment as such conductor.[48]

Depot police. Men employed by a railroad depot company to direct passengers what trains to take and to make reports of trains coming into and going out of the depot or station.[49]

Engine driver. An engineer.[50]

Engineer As used in connection with railroads, the person in charge of the locomotive,[51] a person in charge of a steam-propelled locomotive;[52] an engine driver;[53] a motorneer or motorman.[54] His duties are limited to running and managing his engine.[55]

Engineman. An engineer;[56] an engine driver.[57]

Hooker. A term which, when used in connection with railroad work and dealing with the construction of bridges, is equivalent to "topman."[58] The term also refers to a person who engages the grappling hook on the cable attached to the derrick crane on a railroad flatcar.[59]

Hostler. One whose duty it is to care for locomotives at the roundhouse and to run them in and out of it;[60] one who takes charge of a locomotive after a trip.[61] He is the employee having the duty to move incoming locomotive engines from the yard to the roundhouse, and outgoing engines from the roundhouse to the yard, and to see that they are there properly serviced with water, sand, and fuel, and placed for outgoing trains.[62] Although his duties and work are confined to the depot yard, he is as much an engineer as one operating an engine from point to point on a line of railroad.[63]

Local superintendent. As the term is used when applied to an officer of a railroad company, an officer whose duties are confined or limited to a particular county, city, town, place, district, or section.[64]

Night chief dispatcher. The employee who during the night hours has general supervision of the movements of traffic over the division under his jurisdiction, and the supervision of "trick train dispatchers" who direct the movement of traffic over different portions of the railroad trackage making up the traffic division.[65]

Placers. Men working with a derrick crane on a railroad flatcar who take matter hoisted and lay it.[66]

Rope pullers. Men working with a derrick crane on a railroad flatcar who man ropes attached to the pulley end of the boom.[67]

Spiker. A railroad workman whose duty it is to drive spikes into the crossties, by which the track rails are held in place.[68]

Station agent. An agent of a company operating or owning a railroad;[69] the agent locally in charge of a railroad station or depot.[70]

48. Tex.—Standard L., etc., Ins. Co. v. Koen, 33 S.W. 133, 11 Tex.Civ. App. 273, 279.

49. Utah.—Brown v. Southern Pac. Co., 88 P. 7, 31 Utah 318, 322.

50. U.S.—Devere v. Delaware, L. & W. R. Co., C.C.N.J., 60 F. 886, 887.

51. U.S.—Whitehouse v. Grand Trunk R. Co., C.C.Me., 29 F.Cas. No.17,565, 2 Hask. 189.

52. U.S.—Spokane & I. E. R. Co. v. Campbell, Wash., 217 F. 518, 521, 133 C.C.A. 370.

53. U.S.—Devere v. Delaware, L. & W. R. Co., C.C.N.J., 60 F. 886, 887.

54. Ill.—Roy v. East St. Louis, etc., R. Co, 119 Ill.App. 313, 317.

55. Ill.—Chicago, etc., R. Co. v. Casey, 9 Ill.App. 632, 640.
23 C.J. p 71 note 48 [b].

56. U.S.—Whitehouse v Grand Trunk R. Co, C.C.Me., 29 F.Cas. No.17,565, 2 Hask. 189.

57. U.S.—Whitehouse v. Grand Trunk R. Co, supra.

58. Ind.—Southern Ind. R. Co. v. Harrell, App., 66 N.E. 1016, 1017.

59. Mo.—Hartgrove v. Chicago, B. & Q. R. Co., 218 S.W.2d 557, 559, 358 Mo. 971.

60. Mo.—Tash v. St. Louis-San Francisco Ry. Co., 76 S.W.2d 690, 691, 335 Mo. 1148.
30 C.J. p 471 note 17.

61. Ky.—Louisville & N. R. Co. v. McCoy, 110 S.W.2d 433, 435, 270 Ky. 603.

62. Mo.—Tash v. St. Louis-San Francisco Ry. Co., 76 S.W.2d 690, 691, 335 Mo. 1148.

Other statement of duties

A hostler has the duty to inspect the locomotive in a general way for leaks, loose parts, or other defects, have it supplied with grease, sand, water, etc.; shake down the fire and ashes, and make such minor repairs as are needed and can be done without sending the engine to the roundhouse.—Louisville & N. R. Co. v. McCoy, 110 S.W.2d 433, 435, 270 Ky. 603.

63. Ky.—Howard v. Chesapeake, etc., R. Co., 90 S.W. 950, 951, 28 Ky.L. 891.

64. Kan.—St. Louis, etc., R. Co. v. De Ford, 16 P. 442, 38 Kan. 299, 300.

65. U.S.—Crowley v. Delaware & H. R. Corp., D.C.N.Y., 63 F.Supp. 164, 166.

His duties also include the ascertainment of the number of cars to be moved over his division during his tour of duty, the ascertaining and arranging for the necessary power and personnel to accomplish such movement according to schedule, and the making out of certain reports related to the equipment and freight within his jurisdiction, and any unusual occurrence within his tour of duty.—Crowley v. Delaware & H. R. Corp., supra.

66. Mo.—Hartgrove v. Chicago, B. & Q. R. Co., 218 S.W.2d 557, 559, 358 Mo. 971.

67. Mo.—Hartgrove v. Chicago, B. & Q. R. Co., supra.

68. Neb.—Nocita v. Omaha, etc., R. Co., 131 N.W. 214, 89 Neb. 209, 210.

69. Iowa.—Welsh v. Chicago, B. & Q. R. Co., 6 N.W. 13, 53 Iowa 632, 633.
59 C.J. p 335 note 50.

70. Mich.—Detroit v. Wabash, etc.,

Tailers. Men working with a derrick crane on a railroad flatcar who steady the matter hoisted.[71]

Trainman. One whose duties are performed on the engines and in the cars.[72]

Wiper. A wiper is a railroad employee whose duty, as the name imports, is to take care of the locomotive engines when housed between trips, to wipe the machinery, bank the fires, and keep the necessary supply of water in the boilers, so that the engines may be ready for immediate service when required.[73] He is sometimes called a "hostler."[74]

h. Engine House, Shop, and Yard

An "engine house" or "roundhouse" is a place where locomotive engines are kept "Railroad shop" is a term referring to shop buildings and the tracks and grounds set apart for shop purposes. A "railroad yard" is a tract of ground upon which are railroad tracks, used for the purpose of receiving and storing cars when not in use, or used for the purpose of switching, in the distribution of cars and engines to other places, and in the making up of trains.

An "engine house" or "roundhouse," in common parlance, is a place where locomotive engines are kept.[75]

Railroad shop. A term which has been construed as including not only the shop buildings[76] but also all the tracks and grounds set apart for shop purposes.[77]

Railroad yard. A tract of ground upon which are railroad tracks, used for the purpose of receiving and storing cars when not in use, or used for the purpose of switching, in the distribution of cars and engines to other places, and in the making up of trains,[78] or for incidental purposes, as for storage, repairs, equipment, cleaning, furnishing of equipment, etc.,[79] a place for the deposit of cars and the making up of trains,[80] consisting of sidetracks upon either side of the main tracks, and adjacent to some principal station or depot grounds, where cars are placed for deposit, and where arriving trains are separated and departing trains made up,[81] the place where such switching is done as is essential to the proper placing of cars either for deposit or for departure[82]

"Gravity yard" is a term employed where a switch track is constructed on a downgrade for a certain distance, and from thenceforth on a level, so that cars are switched by allowing them to run down by gravity, thereby saving the handling of cars by locomotive.[83]

A "plugging yard" is a railroad yard in which cars are placed for "plugging."[84]

i. Locomotive, Tender, and Related Terms

The term "locomotive" in its comprehensive sense applies to all self-propelling engines or machines used on railroads for the ordinary purpose of transporting freight or passengers. A "tender" is a small car carrying water and fuel for the engine, to which the first passenger or freight car of the train is usually coupled.

The term "locomotive," in its comprehensive sense, applies to all self-propelling engines or machines used on railroads for the ordinary purpose of transporting freight or passengers.[85] A "steam

R. Co., 30 N.W. 321, 63 Mich. 712, 714.
59 C.J. p 335 note 51.

71. Mo.—Hartgrove v. Chicago, B & Q. R. Co., 218 S.W.2d 557, 559, 358 Mo. 971.

72. U.S.—Coke v. Illinois Cent R Co., D.C.Tenn., 255 F. 190, 194.

73. N.Y.—McGucken v. Western New York & P. R Co., 28 N.Y.S. 298, 299, 77 Hun 69, 59 N.Y.St. 846.
Similarly defined
Iowa.—Grannis v. Chicago, etc., R. Co., 46 N.W. 1067, 81 Iowa 444.
69 C.J. p 1307 note 55.

74. Iowa.—Grannis v. Chicago, etc., R. Co, supra
N.Y.—McGucken v. Western New York & P. R. Co, 28 N.Y.S. 298, 299, 77 Hun 69, 59 N.Y.St. 846

75. Ill.—Kincaid v. People, 28 N.E. 1060, 139 Ill. 213
20 C.J. p 1261 note 51.

76. U.S.—Chicago, R. I. & P R. Co. v. Denver & R. G R. Co., C.C. Colo., 45 F. 304, 314.

77. U.S.—Chicago, R I. & P. R. Co. v Denver & R G R. Co, supra.
51 C.J. p 370 note 20.

78. Ark.—**Corpus Juris cited in** St Louis-San Francisco R. Co v State, 223 S.W.2d 186, 187, 217 Ark 714.
N.H.—Smith v. Boston & M. R. R., 191 A. 833, 88 N.H. 430.
51 C.J. p 372 note 46.
System of tracks
A railroad yard is a system of tracks within defined limits over which movements of engines and cars not authorized by timetable or train order may be made, subject to prescribed signals and rules or special instructions.—Order of Ry. Conductors of America v. Swan, Ill., 67 S.Ct. 405, 408, 329 U.S. 520, 91 L. Ed 471.
"Depot yards"
Utah.—Brown v. Southern Pac. R. Co., 88 P. 7, 8, 31 Utah 318.

79. N.Y.—New York v. New York, etc., R. Co, 169 N.Y.S. 12, 14.
"Right of way" distinguished
N.Y.—New York v. New York, etc, R. Co., 169 N.Y.S. 12, 14.

80. Fla.—Atlantic Coast Line R. Co. v Mallard, 44 So. 366, 372, 54 Fla. 143.
51 C.J. p 372 note 48.

81. U.S.—Harley v Louisville & N. R. Co, C.C.Tenn., 57 F. 144, 145.
51 C.J. p 372 note 49.

82. U.S.—Harley v. Louisville & N. R. Co., supra
Ind.—Baltimore, etc, R. Co. v Little, 48 N.E. 862, 149 Ind. 167.

83. Minn.—Haesley v. Winona, etc, R Co, 48 N.W. 1023, 46 Minn. 233, 24 Am.S.R. 220

84. U.S.—Granger v Davis, C.C.A. Ohio, 2 F.2d 695, 696, 699.
"Plug" defined see infra subdivision r of this section.

85. Ark.—Chicago, etc., R. Co. v. Bryant, 162 S.W. 51, 110 Ark. 444.
"Locomotive" as included within term "car" see supra subdivision e (1) of this section.
Held not to be a "locomotive"
Ohio.—Lake Shore, etc, R. Co. v. Benson, 97 N.E. 417, 419, 85 Ohio

locomotive" is a machine which derives its energy or power from steam produced by coal or oil fire applied to a boiler containing a sufficient quantity of water.[86]

Locomotive engine. A term with a well-known significance;[87] one which moves cars by its own forward and backward motion,[88] a vehicle moved by a steam engine and designed to run over the track of a railroad from place to place.[89] In its common and ordinary meaning "locomotive engine" is one which is operated by steam in drawing or propelling cars.[90]

Dead engine or live engine. A "dead engine" is one without steam, with a part of its machinery disconnected, and which is drawn the same as regular cars;[91] it is distinguished from an engine with steam which is a "live engine."[92]

Dinkey engine. A "dinkey engine" is a locomotive of regular pattern, but small size.[93]

Locomotive steam. Such as is used in a locomotive engine.[94]

Lone engine. A locomotive not hauling any cars except its own tender.[95]

Road engines; yard engines. Engines which regularly run between different points on a railroad line are known as "road engines," in contradistinction to "yard engines," which perform service only in the yards.[96]

Shifting engine. One used to shift cars from one track to another and to and from a yard.[97]

Tender and pit. A "tender" is a small car carrying water and fuel for the engine, to which the first passenger or freight car of the train is usually coupled.[98] The "pit" of a locomotive tender is the part of the tender next to the engine in which the coal for use in the locomotive is stored.[99]

Terms relating to parts of locomotive. The term "blind flue" or its equivalent, "flue pocket," as applied to a locomotive, refers to a short flue which extends into a boiler for about six or eight inches behind the flue sheet, and is closed at the inner end.[1]

"Grates of the engine" is a term which is understood not to mean any part of that particular contrivance by which the steam itself is applied to the wheels, but as one of the component parts which go to make up and complete a machine in position to propel railroad cars by steam.[2]

The term "keyhole," as applied to a locomotive, refers to the crosshead of the locomotive to which the driving rod is connected or fastened by a bolt or pin.[3]

The "pony truck" of an engine consists of the small wheels in front of the drivers; they are at the front of the engine immediately behind the pilot.[4]

"Spark arrester" is a term referring to the spark catcher of a locomotive.[5]

j. Right of Way, Roadbed, Roadway, Substructure, and Superstructure

The "right of way" is the strip of land ordinarily used for the building and maintaining of grades, and the ties and rails thereon constituting the railroad track. The "roadbed" is that part of the right of way especially prepared for the emplacement of ties, rails, and other necessary superstructures, and to which they are affixed. The "roadway" is the right of way. The "substructure" consists of the embankment, cuts, fills, and other things

St. 215, 41 L.R.A.,N.S., 49, Ann.Cas. 1913A 945.
38 C.J. p 135 notes 21 [d], 27 [b].

86. Tex.—State R. Commission v. Texas, etc., R. Co., Civ.App., 42 S.W.2d 1091, 1094.

87. Ind.—Jarvis v. Hitch, 67 N.E. 1057, 1059, 161 Ind. 217.

88. Mo.—Hudson v. Southwest Missouri R. Co., 159 S.W. 9, 12, 173 Mo.App. 611.
N.Y.—Stranahan v. Sea View R. Co., 84 N.Y. 308, 314.
38 C.J. p 135 note 27.

89. Mo.—Mudd v. Missouri, etc., R. Co., 124 S.W. 59, 61, 146 Mo.App. 388.
38 C.J. p 135 note 29.

"Locomotive engine or train upon a railroad"
Ind.—Indianapolis, etc., Co. v. Andis, 72 N.E. 145, 150, 33 Ind.App. 625.
Mass.—Fallon v. West End St. R. Co., 50 N.E. 536, 171 Mass. 349.

90. Mo.—Hudson v. Southwest Missouri R. Co., 159 S.W. 9, 12, 173 Mo.App. 611.
38 C.J. p 135 note 30.

91. Ill.—Wabash R. Co. v. Thomas, 117 Ill.App. 110, 111.

92. Kan.—Turner v. Atchison, etc., R. Co., 111 P. 423, 83 Kan. 315.

93. Tex.—Howard v. Waterman Lumber, etc., Co., Civ.App., 134 S.W. 387, 388.
18 C.J. p 1042 note 96.

94. N.Y.—Stranahan v. Sea View R. Co., 84 N.Y. 308, 314.

95. Neb.—Kielbeck v. Chicago, etc., R. Co., 97 N.W. 750, 70 Neb. 571.

96. Ga.—Central of Georgia R. Co. v. Goodson, 45 S.E. 680, 681, 118 Ga. 833.

97. Va.—Richmond, etc., R. Co. v. Norment, 4 S.E. 211, 84 Va. 167, 10 Am.S.R. 827.

98. Del.—Winkler v. Philadelphia, etc., R. Co., 53 A. 90, 20 Del. 80.
"Tender" as included within term "car" see supra subdivision e of this section.

99. Tex.—Missouri, etc., R. Co. v Hannon, Civ.App., 90 S.W. 1122.

1. U.S.—Atchison, T. & S. F. R. Co. v. Howard, Colo., 49 F. 206, 207, 1 C.C.A. 229.
26 C.J. p 744 note 47.

2. Ga.—Brown v. Benson, 29 S.E. 215, 101 Ga. 753, 757.

3. Tex.—St. Louis, etc., R. Co. v. Vestal, 86 S.W. 790, 791, 38 Tex. Civ.App. 554.

4. U.S.—Eker v. Pettibone, C.C.A. Ind., 110 F.2d 451, 452.

5. Or.—Oregon Box & Mfg. Co. v. Jones Lumber Co., 244 P. 813, 117 Or. 411.

necessary to make up the roadbed. The "superstructure" is the roadbed with whatever has been constructed upon it

The term "right of way" as used in provisions of law relating to railroads means the strip of land ordinarily condemned or acquired by railroad companies for the building and maintaining of grades, and the ties and rails thereon constituting the railroad track[6] The terms "right of way" and "roadbed" have been compared and distinguished.[7]

Roadbed. In railroad parlance "roadbed" is a word of plain import,[8] with a well-understood meaning[9] It has been said that, strictly speaking,[10] and in its restricted sense,[11] the roadbed is the bed or foundation on which the superstructure of the railroad rests.[12] In a less strict sense "roadbed" has been defined as that part of the right of way especially prepared for the emplacement of ties, rails, and other necessary superstructures, and to which the ties, rails, and other necessary superstructures are affixed;[13] the road, including the roadway or right of way, with the roadbed and its superstructure of ties, rails, etc, in place thereon;[14] and accordingly it has been said that the roadbed may include land for sidings and turnouts,[15] snowsheds,[16] and crossing planks,[17] but not the rails and ties,[18] a railroad bridge,[19] a coal and ore terminal,[20] or steamers.[21] From an engineering standpoint, the roadbed includes all that is necessary to support the superstructure.[22] By statute, the roadbed of a railroad may include all side tracks, switches, trestles, bridges, and the ties, rails, fastenings, and superstructure of every kind[23] The term has been compared with, and distinguished from, "railroad," as discussed supra subdivision a (1) of this section, "roadway,"[24] and "superstructure,"[25] and in particular circumstances the term has been held synonymous with "track"[26]

Roadway The right of way[27] According to the ordinary and popular meaning of the word as applied to railroad, it includes simply the continuous strip of land within which the railroad is constructed,[28] whatever space of ground the company is allowed by law in which to construct its roadbed and lay its track[29] "Roadway" has, however, been held to include not only the strip of land upon which the main line is constructed, but all ground necessary for the construction of side tracks, turnouts, connecting tracks, station houses, freight houses, and all other accommodations necessary to accomplish the objects of the incorporation of the railroad[30] It has been held that the term may not include a telegraph line[31] or steamers.[32]

6. U S —Joy v City of St Louis, Mo., 11 S Ct. 243, 256, 138 U.S. 1, 34 L.Ed. 843.
Kan —Lee v. Missouri Pac. R Co., 5 P.2d 1102, 1104, 134 Kan 225—Smith v. Railway Co, 136 P. 253, 90 Kan. 757.
Minn —Bosell v Rannestad, 33 N W 2d 40, 43, 226 Minn. 413.
Other definition
In railroad parlance, "right of way" means either strip of land on which track is laid or legal right to use such land.—Quinn v. Pere Marquette Ry. Co, 239 N W. 376, 379, 256 Mich. 143
7. Iowa.—McClure v. Great Western Acc. Assoc, 110 N.W 466, 133 Iowa 224, 119 Am S.R. 598, 8 L R.A ,N.S , 970, 12 Ann Cas. 41.
54 C J. p 848 note 75 [d].
8. N J.—In re United New Jersey R., etc., Co., 67 A. 1075, 1076, 75 N J Law 385.
9. Ark —Standard L. Ins. Co. v. Langston, 30 S.W. 427, 60 Ark. 381.
10. Minn.—Dunn v. Burlington, etc., R. Co., 27 N.W. 448, 35 Minn. 73.
11. Mo.—State v. Hannibal, etc, R. Co., 37 S W. 532, 135 Mo. 618
12. U S.—Santa Clara County v Southern Pac. R Co., Cal., 6 S Ct. 1132, 118 U.S. 394, 30 L Ed. 118.
54 C.J. p 848 note 75.
Similarly defined
N.J —In re New York Bay R Co, 67 A. 1049, 1051, 75 N.J.Law 389.
54 C J p 848 note 75 [a].
13. Mont —Great Northern R. Co v. Flathead County, 202 P. 198, 61 Mont. 263.
54 C J p 849 note 76.
14. Mo —State v Hannibal, etc, R Co, 37 S W. 532, 135 Mo. 618, 637.
15. Pa —Philadelphia v. Philadelphia, etc, R. Co, 35 A 610, 177 Pa 292, 34 L R A. 564.
16. Mont —Great Northern R Co v. Flathead County, 202 P. 198, 61 Mont. 263
17. Mo —Woosley v. Wabash R. Co, App, 274 S.W 871.
18. Mich —Attorney General v Detroit, 111 N.W. 860, 148 Mich. 71
19. Neb —Cass County v. Chicago, etc, R. Co., 41 N.W. 246, 247, 25 Neb. 348, 2 L.R.A. 188
20. Pa —Philadelphia v. Philadelphia, etc., R. Co, 35 A. 610, 177 Pa. 292, 34 L.R.A. 564.
21. Cal.—San Francisco v Cent Pac R Co., 63 Cal. 467, 469, 49 Am.R. 98.
22. N.H.—Osgood v. U S Health. etc, Ins. Co, 84 A 50, 76 N.H. 475, 51 Ann Cas 1913C 425.
23. Tenn.—Nashville, etc., R. Co. v. Board of Equalization for Assessment, etc, 122 S W. 467, 474, 122 Tenn. 1.
24. U S —Santa Clara County v. Southern Pac R Co, Cal, 6 S Ct. 1132, 1142, 118 U S 394, 30 L Ed. 118.
54 C J. p 848 note 75 [f].
25. Pa —Philadelphia v Philadelphia, etc, R Co, 35 A 610, 177 Pa 292, 34 L.R A 564.
54 C J p 848 note 75 [g].
26. Ala —Mobile, etc., R. Co v. Alabama Midland R. Co., 6 So. 407, 408, 87 Ala 520.
54 C.J p 848 note 75 [h].
27. Cal.—San Francisco, etc., R. Co v. State Board of Equalization, 60 Cal. 12, 34
54 C.J. p 849 note 1.
28. Cal —San Francisco, etc., R. Co v Stockton, 84 P. 771, 774, 149 Cal. 83, 90.
29. Cal.—San Francisco, etc., R. Co. v Stockton, supra.
54 C J. pp 850–1000 note 3.
30. N.D —Chicago, etc, R. Co. v. Cass County, 76 N.W. 239, 8 N.D. 18.
31. Mont.—Northern Pac R Co. v. Brogan, 158 P. 320, 52 Mont 461.
32. Cal —San Francisco v. Central Pac R. Co., 63 Cal, 467, 469, 49 Am R. 98.

Substructure. The embankment, cuts, fills, and other things necessary to make up the roadbed.[33]

Superstructure. The roadbed with whatever has been constructed upon it.[34] The meaning of the word has been limited to sleepers, rails, and fastenings,[35] in distinction from the roadbed.[36] The rails in place, it has been said, constitute the superstructure resting upon the roadbed.[37]

k. Siding and Turnout

A "siding" is a railroad track by the side of, or branching from, the main track, but connected with the main track at one or both ends, either for switching a train to allow another train to pass or to convey freight or passengers to depots or stations adjacent to the main track. A "turnout" is a short line of track, having connection by means of switches with the main track, which lies parallel to the main track, or nearly so.

In railroad parlance or construction, a "siding" is a railroad track by the side of, or branching from, the main track, but connected with the main track at one or both ends, either for switching a train to allow another train to pass or to convey freight or passengers to depots or stations adjacent to the main track;[38] the turnout of a railroad.[39]

A "blind siding" is a sidetrack where there is no telegraphic station.[40]

Turnout. With respect to railroads, "turnout" is not a technical word,[41] and the law attaches no particular meaning to it;[42] but in common and general use the term is used to designate a short line of track, having connection by means of switches with the main track;[43] a short side track;[44] a short side track designed to enable one train to pass another;[45] a short side track, upon which one train may be shunted to permit another to pass on the main track;[46] a short side track which may be occupied by one train while another is passing on a main track;[47] a siding;[48] a siding, having connection with the main line track, upon which one train may be switched to permit another train to pass on the main-line track;[49] a shunt.[50] One characteristic of a "turnout" is that it lies parallel to the main track, or nearly so.[51] The word relates to tracks in the nature of side tracks adjacent to, and used in connection with, another line of track,[52] and does not refer to a track which branches off entirely from the existing line and extends laterally to a distant objective point, and which can only be properly described as a lateral road.[53] Certain tracks in use night and day, during the busy seasons of shipment, for storing, handling, switching, transferring, and assorting the freight of two yards, connecting one with the other, and simply a narrowing up of the two yards and a part thereof are not "turnouts," as understood by railroad men.[54]

33. Tenn.—Louisville, etc., R. Co. v. U. S. Iron Co., 101 S.W. 414, 118 Tenn. 194.

34. Pa.—Philadelphia v. Philadelphia, etc., R. Co., 35 A. 610, 177 Pa. 292, 34 L.R.A. 564.

35. Pa.—Philadelphia v. Philadelphia, etc., R. Co., supra.

36. Mich.—Bird v. Common Council of City of Detroit, 111 N.W. 860, 878, 148 Mich. 71.
Neb.—Cass County v. Chicago, etc., R. Co., 41 N.W. 246, 25 Neb. 348, 2 L.R.A. 188.

37. Cal.—San Francisco, etc., R. Co. v. State Board of Equalization, 60 Cal. 12, 34.
La.—City of Shreveport v. Belt Railway Co., 32 So. 189, 107 La. 785.

38. Pa.—Williamsport v. Pennsylvania R. Co., 22 Pa.Dist. 362.

39. Ind.—Indiana R., etc., Co. v. Kokomo, 108 N.E. 771, 772, 183 Ind. 543.
Pa.—Philadelphia v. River Front R. Co., 19 A. 356, 133 Pa. 134.

40. Tex.—Galveston, etc., R. Co. v. Brown, Civ.App., 59 S.W. 930, 932, reversed on other grounds 63 S.W. 305, 95 Tex. 2.

41. Ind.—Indiana Rys. & Light Co. v. City of Kokomo, 108 N.E. 771, 772, 183 Ind. 543.
65 C.J. p 1121 note 52.

42. Ind.—Indiana Rys. & Light Co. v. City of Kokomo, supra.
Pa.—Bridgewater v. Beaver Valley Traction Co., 63 A. 796, 214 Pa. 343.

43. Ind.—Indiana Rys. & Light Co. v. City of Kokomo, 108 N.E. 771, 772, 183 Ind. 543.
65 C.J. p 1121 note 54.

44. Cal.—Simons Brick Co. v. City of Los Angeles, 187 P. 1066, 1067, 182 Cal. 230.
"Side track" synonymous
Cal.—Carson v. Central R. Co., 35 Cal. 325, 334.
"Side track" defined see infra subdivision p of this section.
"Switch" synonymous
N.Y.—Erie R. Co. v. Steward, 70 N.Y.S. 698, 701, 61 App.Div. 480.
"Switch" defined see infra subdivision n of this section.
"Cut-off" distinguished
N.Y.—Erie R. Co. v. Steward, 70 N.Y.S. 698, 61 App.Div. 480, 483.
"Cut-off" defined see infra subdivision p of this section.

45. N.Y.—Erie R. Co. v. Steward, 70 N.Y.S. 698, 61 App.Div. 480, 483.

46. N.Y.—Erie R. Co. v. Steward, supra.

47. Cal.—Carson v. Central R. Co., 35 Cal. 325, 334.
65 C.J. p 1122 note 58.

48. Pa.—Philadelphia v. River Front R. Co., 19 A. 356, 133 Pa. 134.
65 C.J. p 1122 note 59.

49. Cal.—Simons Brick Co. v. City of Los Angeles, 187 P. 1066, 1067, 182 Cal. 230.

50. Cal.—Carson v. Central R. Co., 35 Cal. 325, 334.

51. Ind.—Indiana Rys. & Light Co. v. City of Kokomo, 108 N.E. 771, 772, 183 Ind. 543.

52. U.S.—City of Memphis v. St. Louis & S. F. R. Co., Tenn., 183 F. 529, 539, 106 C.C.A. 75.
Ind.—Indiana Rys. & Light Co. v. City of Kokomo, 108 N.E. 771, 772, 183 Ind. 543.

53. U.S.—City of Memphis v. St. Louis & S. F. R. Co., Tenn., 183 F. 529, 539, 106 C.C.A. 75.
Ind.—Indiana Rys. & Light Co. v. City of Kokomo, 108 N.E. 771, 772, 183 Ind. 543.
"Branch or lateral railroad" defined see supra subdivision a (2) (b) of this section.

54. N.Y.—People v. New York Cent., etc., R. Co., 51 N.E. 312, 313, 315, 156 N.Y. 570.

l. Signal and Signal System

A "signal" is the doing of some act whereby notice or warning is given, such as ringing a bell, blowing a whistle, waving a lantern, or shooting a torpedo The "block system" is a system of regulating the running of trains by automatic signals or otherwise, in which the track is divided into sections called blocks, on any one of which, ordinarily, only one train at a time is allowed.

The common understanding of the word "signal" as used in connection with the operation of a railroad is one which implies action; the doing of some act whereby notice or warning is given, such as ringing a bell, blowing a whistle, waving a lantern, or shooting a torpedo.[55]

Back-up signal. A signal meaning that the engineer shall back up the train[56]

Highball signal. A term used in railroading to describe a signal directing the engineer on a train to go past a station without stopping.[57]

Kick signal. A signal calling for a quick and sudden movement of the train.[58]

Move slow signal. A signal calling for a slow and gradual movement of the train.[59]

Points. A complicated apparatus for giving or making signals.[60]

Semaphore. A mechanical device for displaying signals, generally used to denote when a railroad track is clear or otherwise.[61]

Block system. A system of regulating the running of trains on a railroad by automatic signals or otherwise, in which the track is divided into sections called blocks, on any one of which, ordinarily, only one train at a time is allowed.[62]

Interlocking signal system. A tower built on or near the point of crossing of two roads, in which are placed wires connected by levers with signals to insure each way on the road, at a distance sufficient to insure the stoppage of a train before it reaches the point of crossing.[63]

m. Station

"Station" in a broad sense means a place at which both freight and passengers are received for transportation or are delivered after transportation, including the yard and the grounds and buildings prepared for, and used by, the traveling public in waiting for, taking, and leaving trains; in a narrower sense it means a building or place prepared for the reception and discharge of passengers and freight.

The word "station," as far as it applies to railroads and their management, has acquired no technically legal meaning,[64] and it is a question of fact as to just what constitutes a station.[65] In a broad sense, it means a place at which both freight and passengers are received for transportation or are delivered after transportation;[66] a place where passengers are received upon, and discharged from, railroad trains,[67] a place on a railroad at which a halt is made for the purpose of taking on, or letting down, passengers or goods;[68] a place where railroad trains regularly come to a stand for the convenience of passengers, taking in freight, etc,[69] every regular stopping place of a railway train,

55. Kan.—Coleman v. St. Louis-San Francisco R Co., 286 P. 254, 257, 130 Kan. 325.
58 C J. p 715 note 36.

56. Tex—Gulf, etc, R. Co v. Hill, 70 S W. 103, 105, 29 Tex.Civ App 12.

Distinguished from "kick signal"
Tex.—Gulf, etc., R. Co. v. Hill, supra.

57. Tex.—International, etc., R Co v. Stephenson, 54 S W. 1086, 1087, 22 Tex Civ.App. 220.

58. Tex.—Texas, Mexican R. Co. v. Higgins, 99 S.W. 200, 201, 44 Tex. Civ.App. 523.
35 C.J. p 901 note 35.

59. Tex—Texas, etc., R. Co. v. Higgins, 99 S W. 200, 201, 44 Tex.Civ. App 523.

60. Ala—Coghill v. Louisiana, etc, R Co., 44 So. 683, 685, 152 Ala. 154

61. Me—Tillson v. Maine Cent. R. Co., 67 A. 407, 102 Me 463, 466.

62. R.I—Buteau v. New York, etc., R. Co., 87 A. 324, 35 R I. 545, 52 L.R A.,N.S., 1127.
W.Va.—Flannegan v. Chesapeake, etc, R Co, 21 S E 1028, 40 W Va 436, 52 Am S R. 896

63. N.J—Jersey City, etc, R Co. v. New York, etc, R Co., 53 A. 709, 710, 62 N.J Eq 390
33 C J. p 268 note 17 [a], [b].

64. N.J—Falk v New York, Susquehanna & Western R Co, 29 A 157, 56 N J.Law 380.

No fixed or invariable meaning
Minn.—Minnesota Transfer Ry Co v. Railroad and Warehouse Commission, 274 N W 408, 410, 200 Minn. 422

65. Minn—Minnesota Transfer Ry. Co. v. Railroad and Warehouse Commission, supra.
"What is essential to constitute a given place a station, is a question depending largely upon the facts of each case. In our opinion, it will not depend upon an office and agent being maintained, but depends more upon the business done, not with one or two or three individuals, firms or companies but with the public and whether or not trains stop regularly or on signal to receive and discharge passengers and freight and whether inducements are held out and accommodations afforded to the public to enter into reciprocal business relations."—Acord v. St Louis Southwestern R Co., 87 S W. 537, 113 Mo App. 84.

Held a "station"
Minn—Minnesota Transfer Ry. Co. v. Railroad and Warehouse Commission, 274 N W. 408, 410, 200 Minn 422.

66. Minn—Minnesota Transfer Ry Co v. Railroad and Warehouse Commission, supra.
59 C.J. p 334 notes 23, 24.

Similar definition
Mo.—McGuire v. St Louis, etc, R Co., 87 S W. 564, 113 Mo.App. 79

67. Ark—St Louis, etc., R. Co. v. Neal, 51 S W. 1060, 66 Ark. 543, 544.
51 C.J. p 370 note 24.

68. N J.—Falk v. New York, etc, R Co, 29 A 157, 56 N J.Law 380, 383.
59 C.J. p 334 note 25.

69. Okl.—Midland Val. R. Co. v. State, 119 P. 413, 414, 29 Okl. 777.

where it receives or leaves passengers.[70] Moreover, the word has been construed to include the yard,[71] the whole track within the limits of the station yard,[72] or as much of the track adjacent to the structure as is commonly used by trains.[73] It may include the place, the grounds, and the buildings prepared for and used by the traveling public in waiting for, taking, and leaving trains.[74] It has been said that a depot building or the presence of a station agent is not indispensable to constitute a station,[75] and in fact the word includes a flag station.[76]

In a narrower sense the word "station" means a building or place prepared for the reception and discharge of passengers and freight.[77] The term is said to be synonymous with "depot," and has been construed to be a synonym of "depot grounds" and "passenger depot," as discussed supra subdivision f of this section.

Blind station. A station where there is no station house or agent, but at which all passenger and freight trains stop when flagged.[78]

Flag station. A railroad station at which trains do not stop unless signaled, as by a flag.[79]

Station grounds. The place where passengers get on or off the train, and where freight is loaded or unloaded, including all grounds reasonably necessary or convenient to that purpose.[80]

n. Switch

"Switch" has been defined as a mechanical contrivance or movable opening to pass cars from one track to another; in its simplest form, two parallel lengths of rails joined together by rods, pivoted at one end, and free to move at the other end, forming a part of the track at its junction with a branch or siding. The word "switch" as a verb means to shift from one track to another.

With respect to railroads, "switch" is a word of modern growth,[81] and has been defined as but a mechanical contrivance or movable opening to pass the cars from one track to another;[82] a mere side track, so constructed as to permit the passage of cars from and to the main track.[83] It is a device for moving a small section of track so that rolling stock may be run or shunted from one line of track to another;[84] a movable part of a track by which the direction of a train is changed from one set of rails to another;[85] in its simplest form, two parallel lengths of rails joined together by rods, pivoted at one end, and free to move at the other end, forming a part of the track at its junction with a branch or siding.[86]

The purpose of a switch is to direct a car from the course which it was formerly pursuing.[87] The term "switch" may, in addition to its technical meaning, have a meaning dependent on facts which indicate its character;[88] thus, in common speech the word is often used as a synonym for "siding"[89]

70. Me.—Ricker v. Portland, etc., R. Co., 38 A. 338, 90 Me. 395, 401.
59 C.J. p 334 note 27.

Similar definition
Any place owned or under the control of a railway company, and designated by it as a regular point at which it receives and discharges passengers or freight.—Dixon v. Great Falls, etc., R. Co., 38 App.D.C. 591, 594, Ann.Cas.1913C 571—51 C.J. p 370 note 25.

71. Minn.—Hall v. Chicago, etc., R. Co., 49 N.W. 239, 46 Minn. 439.
Miss.—Smithwick v. Illinois Cent. R. Co., 32 So.2d 862, 866, 202 Miss. 868.

72. Miss.—Smithwick v. Illinois Cent. R. Co., supra.
Vt.—Morrisette v. Canadian Pac. R. Co., 56 A. 1102, 1105, 76 Vt. 267.

73. Cal.—Wilkinson v. United Railroads of San Francisco, 232 P. 131, 135, 195 Cal. 185.

74. Minn.—Minnesota Transfer Ry. Co. v. Railroad and Warehouse Commission, 274 N.W. 408, 410, 200 Minn. 422.

75. Mo.—McGuire v. St. Louis, M. & S. E. R. Co., 87 S.W. 564, 565, 113 Mo.App. 79.
59 C.J. p 335 note 31.

76. Ark.—Daniel v. Doyle, 204 S.W. 210, 211, 135 Ark. 547.
Cal.—Wilkinson v. United Railroads of San Francisco, 232 P. 131, 135, 195 Cal. 185.

77. N.J.—Jacquelin v. Erie R. Co., 61 A. 18, 20, 69 N.J.Eq. 432.
59 C.J. p 335 note 41.

78. Mo.—Hoffmann Heading, etc., Co. v. St. Louis, etc., R. Co., 94 S.W. 597, 119 Mo.App. 495.

79. Ark.—Clark v. Jonesboro, etc., R. Co., 112 S.W. 961, 87 Ark. 385.
La.—Marx v. Louisiana Western R. Co., 36 So. 862, 863, 112 La. 1085.

"Regular station" distinguished
Ark.—Clark v. Jonesboro, etc., R. Co., 112 S.W. 961, 87 Ark. 385.

80. Or.—Wilmot v. Oregon R. Co., 87 P. 528, 530, 48 Or. 494, 7 L.R.A., N.S., 302, 120 Am.S.R. 840, 11 Ann. Cas. 18.
59 C.J. p 335 note 53.

"Station grounds" and "switch limits" synonymous
Okl.—Atchison, etc., R. Co. v. McCall, 150 P. 173, 175, 48 Okl. 602.

81. Pa.—Philadelphia v. River Front R. Co., 19 A. 356, 357, 133 Pa. 134, 139.
60 C.J. p 1199 note 4.

82. Ind.—Pennsylvania Co. v. Mosher, 94 N.E. 1033, 1036, 47 Ind.App. 556.
60 C.J. p 1199 note 5.

83. Tex.—City of Denison v. Denison & S. R. Co., 127 S.W. 804, 805, 103 Tex. 344 H. E. & W. T. Railway Co. v. Campbell, 45 S.W. 2, 4, 91 Tex. 551, 43 L.R.A. 225.

84. Ind.—Pennsylvania Co. v. Mosher, 94 N.E. 1033, 1036, 47 Ind.App. 556.
60 C.J. p 1199 note 7.

85. Ind.—Pennsylvania Co. v. Mosher, supra.

86. Cal.—Simons Brick Co. v. City of Los Angeles, 187 P. 1066, 1067, 182 Cal. 230.

87. Wis.—Jeffrey v. Kawaunee, G. B. & W. Ry. Co., 207 N.W. 283, 284, 189 Wis. 207.

"Crossing" distinguished from "switch" see supra subdivision d of this section.

88. Tex.—City of Denison v. Denison & S. R. Co., 127 S.W. 804, 805, 103 Tex. 344.

89. Pa.—Pittsburgh Rys. Co. v. Borough of Carrick, 103 A. 106, 108, 259 Pa. 333.
60 C.J. p 1199 note 13.

"Siding" defined see supra subdivision k of this section.

and "turnout."[90] An approach to a bridge must be regarded as a switch or side track rather than as a branch or lateral railway.[91] "Switch" has been held not to be included within "double tracks" as used in an ordinance.[92] A switch is not a drawbridge[93] nor does the word include a cut-off.[94] A switch is not necessarily a place where freight is received or discharged.[95]

"Switches," it has been said, is a term which may be employed as referring to tracks in the nature of side tracks, adjacent to, and used in connection with, another line of track,[96] but not as referring to a track which branches off entirely from the existing line, and extends laterally to a distant objective point, and which can only be properly described as a lateral road;[97] nor, as understood by railway men, does the word include tracks used exclusively in connection with freight yards, and as to a portion thereof, for the storing of cars, the making up of trains, and the transfer of trains from one yard to the other and from one railroad to another.[98]

As a verb. The word "switch," as a verb, means to shift from one track to another;[99] to shunt;[1] to transfer by a switch;[2] to transfer from one line of rails to another;[3] to turn from one railway track to another.[4] The word applies to cars and parts of trains as well as to entire trains.[5]

"Switching" is a word without technical meaning, common to railroad parlance,[6] applicable to cars and parts of trains as well as to entire trains,[7] and may be used as synonymous with "transferring."[8]

Derail switch. A device which when set will cause a car running loose on the sidetrack to run off its rails to the ground before reaching the main track.[9]

Drop switch. A switching of cars made in operation of railroads by detaching or cutting loose cars from the engine and permitting them to run or roll of their own momentum down an incline.[10]

Flying switch. A running switch;[11] a switch made by attaching to the car to be switched an engine, giving the car a sufficient impetus, and then detaching the engine, running it ahead out of the way, and allowing the car, with the impetus thus imparted, to run to the place desired;[12] a switch operated or effected in such a way, while a train is in motion, as to send different parts of the train, previously connected, along different lines.[13]

Private switch. A switch built for the use of an individual industry carried on at that point, and not to be used for other or general railroad business.[14]

"Split switch." A switch where there is one permanent rail, so that if the switch is open it allows the car or train to run up another track.[15]

"Split the switch." A term used to describe the

90. Pa.—Pittsburgh Rys Co. v. Borough of Carrick, supra.
60 C.J. p 1199 note 14.
"Turnout" defined see supra subdivision k of this section.

91. Ill.—State Board of Equalization v. People, 82 N.E. 324, 334, 229 Ill. 430.

92. Tex.—City of Denison v. Denison & S. R. Co., 127 S.W. 804, 805, 103 Tex. 344.

93. Wis.—Jeffrey v. Kewaunee, G. B. & W. Ry. Co., 207 N.W. 283, 284, 189 Wis. 207.

94. N.Y.—Erie R. Co. v. Steward, 70 N.Y.S. 698, 61 App.Div. 480, 482, 483.
60 C.J. p 1200 note 18.
"Cut-off" distinguished
N.Y.—Erie R. Co. v. Steward, 70 N.Y.S. 698, 61 App.Div. 480, 483.

95. Tex.—City of Denison v. Denison & S. R. Co., 127 S.W. 804, 805, 103 Tex. 344—H. E. & W. T. Railway Co. v. Campbell, 45 S.W. 2, 4, 91 Tex. 551, 43 L.R.A. 225.

96. U.S.—City of Memphis v. St. Louis & S. F. R. Co., Tenn., 183 F. 529, 539, 106 C.C.A. 75, 85.
Ind.—Indiana Rys. & Light Co. v. City of Kokomo, 108 N.E. 771, 772, 183 Ind. 543.

97. U.S.—City of Memphis v. St. Louis & S. F. R. Co., Tenn., 183 F. 529, 539, 106 C.C.A. 75.
Ind.—Indiana Rys. & Light Co. v. City of Kokomo, 108 N.E. 771, 772, 183 Ind. 543.

98. N.Y.—People v. New York, etc., R. Co., 51 N.E. 312, 156 N.Y. 570.

99. Ind.—Pennsylvania Co. v. Mosher, 94 N.E. 1033, 1036, 1037, 47 Ind. App. 556.

1. Ind.—Pennsylvania Co. v. Mosher, supra.

2. Ind.—Pennsylvania Co. v. Mosher, supra.
60 C.J. p. 1200 note 40.

3. Ind.—Pennsylvania Co. v. Mosher, supra.

4. Ind.—Pennsylvania Co. v. Mosher, supra.

5. Ind.—Pennsylvania Co. v. Mosher, supra.

6. Ind.—Pennsylvania Co. v. Mosher, supra.

7. Ind.—Pennsylvania Co. v. Mosher, supra.

8. Ohio.—J. B. Doppes Sons Lumber Co. v. Cincinnati, N. O. & T. P. R. Co., 110 N.E. 640, 642, 92 Ohio St. 206, 213 L.R.A. 1916D 452.

9. Mo.—Jones v. Kansas City, etc., R. Co., 77 S.W. 890, 178 Mo. 528, 101 Am.S.R. 434.

10. Ala.—Birmingham, etc., R. Co. v. Powell, 33 So. 875, 136 Ala. 232, 240.

11. Mo.—Baker v. Kansas City, etc., R. Co., 26 S.W. 20, 122 Mo. 533.

12. Minn.—Magner v. Truesdale, 55 N.W. 607, 53 Minn. 436.
26 C.J. p 745 note 62
"'Making flying switch' and 'kicking cars' are terms denoting very nearly the same thing".—Bradley v. Ohio River, etc., R. Co., 86 S.E. 181, 183, 126 N.C. 735—26 C.J. p 745 note 62 [a].

13. Mo.—Baker v. Kansas City, etc., R. Co., 26 S.W. 20, 122 Mo. 533.
26 C.J. p 745 note 63.

14. Ohio.—Kanawha, etc., R. Co. v. Public Utilities Commission, 117 N.E. 353, 355, 96 Ohio St. 414.

15. Ill.—Chicago Terminal Transfer R. Co. v. Berkowitz, 137 Ill.App. 95, 101.
58 C.J. p 1304 note 58.

unintended opening of a switch,[16] either by jarring[17] or in some unknown manner,[18] so that the forward trucks or wheels of a car continue on the main rails as intended, while the rear trucks or wheels are forced or switched onto the switch rail.[19]

o. Terminal

"Terminal" means a station at which trains regularly begin and end their respective runs. "Terminal facilities" are facilities owned by the carrier, equipped with the proper appliances necessary to enable the railroad to perform its full duty of transportation and delivery of freight of all kinds.

The word "terminal" as pertaining to a railroad, means a station at which trains regularly begin and end their respective runs;[20] property used for the purpose of furnishing terminal facilities in the operation of a railroad;[21] the end of a run;[22] the end or terminus of the road;[23] the fixed beginning or ending point of a given run.[24]

It has been held, however, that a "railroad terminal" is not simply the ending of a line, where there is a depot or yard office;[25] such a terminal may be, and is, a general place for the receipt of passengers and freight, and for the making up and classification of trains, the repairing and outfitting of engines or other conveyances, and is generally a combination of a workshop where the trains are prepared for transportation and where the men start their work.[26]

Terminal facilities Facilities owned by the carrier, equipped with the proper appliances necessary to enable the railroad to perform its full duty of transportation and delivery of freight of all kinds;[27] mechanical devices for the exchange, receipt, and distribution of traffic.[28] The term has been held to include docks,[29] freight houses, grain elevators, and warehouses,[30] but not to include tracks other than "make-up" tracks.[31]

Terminal point. The terminus as fixed in a city or town, and not the depot as located within such city or town.[32]

p. Track

A "railroad track," in the ordinary sense, is two continuous lines of rails on which railway cars run, forming, together with the ties, ballast, switches, etc., the permanent way. A "wye" is a track with two legs, one joining the main track from one direction and the other joining the main track from another direction.

A "railroad track," in the ordinary sense, is two continuous lines of rails on which railway cars run,[33] forming, together with the ties, ballast, switches, etc., the permanent way.[34] The term is

"Stub switch" distinguished
Ill.—Chicago Terminal Transfer R. Co. v. Berkowitz, supra.

16. Ala.—Birmingham Traction Co. v. Reville, 34 So. 981, 984, 136 Ala. 335.
R.I.—Simone v. Rhode Island Co., 66 A. 202, 203, 28 R.I. 186, 187, 9 L.R.A.,N.S., 740.

17. Ala.—Birmingham Traction Co. v. Reville, 34 So. 981, 984, 136 Ala. 335.

18. R.I.—Simone v. Rhode Island Co., 66 A. 202, 203, 28 R.I. 186, 187, 9 L.R.A.,N.S., 740.

19. Ala.—Birmingham Traction Co. v. Reville, 34 So. 981, 984, 136 Ala. 335.
58 C.J. p 1304 note 51.

20. Wis.—State v. Chicago, etc., R. Co., 237 N.W. 132, 134, 205 Wis. 252.

Held a "terminal"
Wis.—State v. Chicago, etc., R. Co., supra.
62 C.J. p 729 note 92.

Phrases employing the word "terminal," and as to which more recent adjudications have not been found, see 62 C.J. p 729 notes 97-4, p 731 notes 21-34.

21. Idaho.—Chicago, M. & St. P. Ry. Co. v. Kootenai County, 192 P. 562, 564, 33 Idaho 234.
62 C.J. p 729 note 93.

22. U.S.—U. S. v. Atchison, T. & S. F. Ry. Co., D.C.Ariz., 212 F. 1000, 1005
62 C.J. p 729 note 94.

23. Tex.—Missouri, K. & T. Ry. Co. of Texas v. State, Civ.App., 275 S.W. 673, 676.

24. U.S.—U. S. v. Atchison, T. & S. F. Ry. Co., D.C.Ariz., 212 F. 1000, 1007.
62 C.J. p 729 note 96.

25. Ill.—Wabash R. Co. v. Order of Ry. Conductors of America, 84 N.E.2d 406, 411, 402 Ill. 548.

26. Ill.—Wabash R. Co. v. Order of Ry. Conductors of America, supra.

Different types of work
The general understanding of the meaning of "terminal" is not to be found in any one decision, but may be derived from an examination of the series of cases which embrace different types of work carried on in what, for instance, is called a "terminal."—Wabash R. Co. v. Order of Ry. Conductors of America, supra.

27. Idaho.—Chicago, M. & St. P. R. Co. v. Kootenai County, 192 P. 562, 564, 33 Idaho 234.
Wis.—Minneapolis, St. P. & Sault Ste. Marie R. Co. v. Douglas County, 150 N.W. 422, 159 Wis. 408, 412, Ann.Cas.1916E 1199.

28. U.S.—U. S. v. Terminal Railroad Assoc. of St. Louis, Mo., 32 S.Ct. 507, 224 U.S. 383, 56 L.Ed. 810.

29. Wis.—Marie R. Co. v. Douglas County, 150 N.W. 422, 159 Wis. 408, 413, Ann.Cas.1916E 1199.
62 C.J. p 730 note 10.

30. Wis.—Minneapolis, St. P. & Sault Ste. Marie R. Co. v. Douglas County, 150 N.W. 422, 159 Wis. 408, Ann.Cas.1916E 1199.
62 C.J. p 730 note 11.

31. Idaho.—Chicago, M. & St. P. Ry. Co. v. Kootenai County, 192 P. 562, 563, 33 Idaho 234.
62 C.J. p 730 note 12.

32. Ill.—Chicago & N. W. R. Co. v. Chicago Mechanics Institute, 87 N.E. 933, 937, 239 Ill. 197, 203.

33. Ind.—Reid v. Klein, 37 N.E. 967, 138 Ind. 484, 494.
Kan.—Atchison, etc., R. Co. v. Kansas City, etc., R. Co., 70 P. 939, 73 P. 899, 67 Kan. 569.

Rails
The word "tracks" as used in a certain contract has been held to mean "rails."—City of Bayonne v. Public Service Ry. Corporation, 119 A. 9, 98 N.J.Law 255.

34. Kan.—Reid v. Klein, 37 N.E. 967, 138 Ind. 484, 494.
51 C.J. p 371 note 34.

It is a "structure" within the meaning of statute providing that, for injury on a highway, "caused

quite commonly used to denote the right of way of a railroad,[35] although it has been held that there is a vast difference between the location of a right of way and the location of a track on a right of way.[36] The term as generally understood refers only to a track on which steam is used as the motive power.[37] The meaning of the word "track" or "tracks" as used in a statute or ordinance may depend on the issues involved and the manner in which the word is employed.[38]

Cut-off. As applied to railroads, a shorter and straighter road by which the length of a course or passage is reduced;[39] and a railroad track leading from one main track to another by means of which cars approaching on one track may be switched to another is so called.[40]

Dead track. A track having a switch to other tracks at one end only, with a bumper at the other end.[41]

Industrial track. A spur or side track built for a factory or warehouse or other industry to handle its freight in carload lots.[42]

Lateral track. The term "lateral track" has sometimes been used as meaning the equivalent of branch line or branch road.[43]

Private track. In railroad terminology, a track not constructed or used for the purpose of traffic, public use.[44]

Public track. As applied to the track of a railroad company, a track which is open to the public use indiscriminately, and under the public control to the extent that railroad tracks generally are;[45] it includes a switch track, which, although used largely by one person, is open to all persons for shipping purposes.[46]

Repair track. One upon which cars needing repairs are put, and upon which it is not customary for the shifting engine to come without notice to the overhaulers at work there.[47]

Side track. The term is said to have a well-known signification,[48] and to mean a connection with some railroad affording communication with the market;[49] a short track connected by switches at one or more points with the main track,[50]

by a structure legally placed on such road by a railroad company," the latter shall be liable—New York, etc, R. Co. v. New Haven, 39 A 597, 70 Conn. 390.

35. Vt.—Bacon v Boston, etc, R. Co, 76 A. 128, 132, 83 Vt 421.

Road, course, and way

The track of a railroad is not merely the rails and ties upon which cars are run, but it is the "road, course, way," and includes all which enters into and composes the road, the course, and way—Gates v Chicago, etc., R. Co., 48 N W 1040, 1041, 82 Iowa 518.

36. Ind—Reid v. Klein, 37 N.E 967, 138 Ind. 484, 494.

37. Iowa.—Sears v Marshalltown St. R Co., 23 N.W. 150, 65 Iowa 742.
51 C.J. p 371 note 36.

"Length of track"

Under a statute providing that the salaries and expenses of railroad commissioners shall be borne by the several railroad companies according to their means, to be apportioned one half in proportion to the net income and one half in proportion to "the length of the main track or tracks on road," the length, where there are two or more parallel tracks between two terminal points, is the distance between those points and not the number of miles of rail—People v. Chapin, 12 N.E. 595, 106 N Y. 265.

38. Ga.—Rowland v. City Council of City of Augusta, 113 S E. 2, 153 Ga 763.

Construction of particular statutes and ordinances

Idaho—Pocatello v Ross, 6 P.2d 481, 51 Idaho 395.
Ky—City of Dayton v South Covington & C. St Ry Co, 197 S.W 670, 672, 177 Ky. 202, L R A 1918B 476, Ann.Cas 1918E 229
Mo—Woosley v Wabash Ry. Co, App, 274 S W 871, 874
N H—Wilson v. Berlin St Ry, 149 A 602, 84 N H 285
N C.—City of Durham v Durham Public Service Co., 109 S.E. 40, 42, 182 N.C. 333.

39. N.Y.—Erie R Co v. Steward, 70 N Y S. 698, 61 App Div 480, 484.
17 C J. p 690 note 32.

40. Tex.—Houston, etc, R. Co. v. Finn, 107 S.W 94, 95
"Switch" distinguished from "cut-off" see supra subdivision n of this section

41. U.S.—Hoyer v. Central R Co of New Jersey, C C.A.N.Y., 255 F. 493, 494.

42. U S.—Missouri, K. & T. R. Co of Tex. v. Texas & N. O R Co, C A Tex, 172 F 2d 768, 769.

"Industrial tracks" and "team tracks" compared and distinguished

La.—Miller Engineering Co. v. Louisiana R, etc., Co., 81 So. 314, 317, 144 La 786.
61 C J p 1751 note 26 [a].

43. Pa—Bethlehem Borough v. Lehigh, etc., R Co, 97 A. 1074, 253 Pa 251.
20 C J. p 569 note 70 [h]
"Lateral or branch line" defined see supra subdivision a (2) (b) of this section.

44. Minn—State v Wilmar, etc, R. Co, 93 N.W 112, 114, 88 Minn 448.
50 C J. p 372 note 19.

Held a "private track"

Ga—Louisville & N. R Co v Atlantic Co, 19 S E 2d 364, 371, 372, 66 Ga App. 791

45. Ga—Louisville & N. R. Co. v. Atlantic Co., supra.
50 C J p 864 note 59.

46. Ill.—St. Louis, etc, R Co. v. Commerce Commission, 141 N E 405, 407, 309 Ill. 621
Or—Wolfard v. Fisher, 84 P. 850, 87 P 530, 48 Or. 479, 7 L R A., N S., 991.

47. Va—Richmond, etc., R. Co. v Norment, 4 S E 211, 84 Va. 167, 10 Am S R. 827
54 C J. p 400 note 82.

48. U.S—Southern Pine Fibre Co. v. North Augusta Land Co., C.C. S C., 50 F. 26, 27.

49. U S.—Southern Pine Fibre Co. v North Augusta Land Co, supra.

50. U.S.—Missouri, K & T. R. Co. of Tex. v Texas & N. O. R. Co, C.A.Tex., 172 F.2d 768, 769.

a switch track;[51] or the tracks in a yard.[52]

Skeleton track. A term applied to a railroad track in such condition that the spaces between the ties are not filled to the tops of the ties, about one half of the ties being exposed.[53]

Spur track A short branch line of track,[54] leading from a line of railway, and connected with it at one end only;[55] a stub track;[56] a track for use in loading, reloading, storing, and switching the cars and other things merely incidental to the regular train haul;[57] a track which is projected and extended laterally or at an angle to the main line, and is not an adjunct usual or necessary to the primary operation of main line trains and cars.[58] A spur track is primarily a facility for one or several shippers, although open to all others who may be practicably served by it,[59] and it differs from an "extension"[60] in that the latter is for the convenience of the whole public as a part of the principal railroad system.[61]

Team track. A siding on a railroad for loading and unloading cars when freight comes in carload lots;[62] a track on which cars are placed to be loaded or unloaded by wagons, and now more frequently by trucks.[63]

Track delivery. The term "track delivery" as used in a statute referring to place of delivery of freight means tracks maintained by the railroad company at an accessible place for unloading, for the purpose of delivering freight in carload lots.[64]

Wye A term which necessarily means a track with two legs, one joining the main track from one direction and the other joining the main track from another direction;[65] it is also called a "Y;"[66] and it is said to be distinguished from "single track,"[67] as in the phrase "to lay a single track or wye."[68]

q. Train

(1) In general
(2) Particular kinds

(1) In General

"Train" in an ordinary and popular sense means a railway train, a continuous or connected line of cars or carriages on a railroad; a conveyance which serves the public in conveying passengers or freight, or both, and which runs upon fixed tracks.

"Train," in an ordinary and popular sense, means a railway train,[69] a connected line,[70] a continuous or connected line,[71] of cars or carriages on a rail-

51. Tex.—Texas Midland R. Co. v. Millson, 87 S.W. 213, 30 Tex.Civ. App. 172, 178.
58 C.J. p 712 note 33.
"Branch or lateral line" distinguished from "switch track" see supra subdivision a (2) (b) of this section.

52. Mo.—State v. Hannibal, etc., R. Co., 37 S.W. 532, 135 Mo. 618, 648.
58 C.J. p 712 note 34.

53. Tex.—St. Louis, etc., R. Co. v. Ames, Civ.App., 94 S.W. 1112, 1113, 1114.

54. U.S.—Missouri, K. & T. R. Co. of Tex. v. Texas & N. O. R. Co., C.A.Tex., 172 F.2d 768, 769.
Especially a side track connected with its main line by a single switch.—Missouri, K. & T. R. Co. of Tex. v. Texas & N. O. R. Co., supra.

55. U.S.—Detroit & M. Ry. Co. v. Boyne City, G. & A. R. Co., D.C. Mich., 286 F. 540, 546.
58 C.J. p 1309 note 13.
"Switch" and "turnout" distinguished from "spur track"
Cal.—Simons Brick Co. v. Los Angeles, 187 P. 1066, 1067, 182 Cal. 230.

56. U.S.—Detroit & M. Ry. Co. v. Boyne City, G. & A. R. Co., D.C. Mich., 286 F. 540, 546.
Ill.—Cleveland, etc., R. Co. v Illinois Commerce Commission, 146 N.E. 606, 610, 315 Ill. 461, 54 A.L. R. 45.

57. U.S.—Detroit, etc., Co. v. Boyne City, etc., R. Co., D.C.Mich., 286 F. 540, 546.
58 C.J. p 1309 note 15.

58. Cal.—Simons Brick Co. v. Los Angeles, 187 P. 1066, 1067, 182 Cal. 230.
58 C.J. p 1309 note 16.
"Branch road" distinguished from "spur track" see supra subdivision a (2) (b) of this section.
"Connecting lines" distinguished
Ill.—Cleveland, etc., R. Co. v. Illinois Commerce Commission, 146 N.E. 606, 315 Ill. 461, 470, 54 A. L.R. 45.
"New lines" distinguished
U.S.—Detroit, etc., R. Co. v. Boyne City, etc., R. Co., D.C.Mich., 286 F. 540, 547.
Ill.—Cleveland, etc., R. Co. v. Illinois Commerce Commission, 146 N.E. 606, 315 Ill. 461, 470, 54 A.L.R. 45.

59. Wis.—Menasha Woodenware Co. v. State R. Commission, 166 N.W. 435, 167 Wis. 19.

60. U.S.—Detroit, etc., Co. v. Boyne City, etc., R. Co., D.C.Mich., 286 F. 540, 546.
58 C.J. p 1309 note 15 [d].

61. Wis.—Menasha Woodenware Co. v. State R. Commission, 166 N.W. 435, 167 Wis. 19.

62. Ky.—Chicago & E. I. R. Co. v. Chestnut Bros., 89 S.W. 298, 299, 28 Ky.L. 404.

63. U.S.—Missouri, K. & T. R. Co. of Tex. v. Texas & N. O. R. Co., C.A.Tex., 172 F.2d 768, 769

64. Ala.—Greek-American Produce Co. v. Illinois Cent. R. Co., 58 So. 994, 995, 4 Ala.App. 377.
"Track delivery shipments"
Carload shipments are known as "track delivery shipments," as distinguished from ordinary freight unloaded from the cars, known as a "drop shipment" delivery.—Boshell v. Receivers of St. Louis & S. F. R. Co., 76 So. 282, 284, 200 Ala. 366.

65. Mich.—Falls v. Grand Rapids, G. H. & M. R. Co., 155 N.W. 548, 549, 189 Mich. 644.

66. Mo.—McGuire v. Quincy, O. & K. C. R. Co., 107 S.W. 411, 128 Mo. App. 677.

67. Mich.—Falls v. Grand Rapids, G. H. & M. R. Co., 155 N.W. 548, 549, 189 Mich. 644.

68. Mich.—Falls v. Grand Rapids, G. H. & M. R. Co., supra.

69. N.C.—Waters v. Greenleaf-Johnson Lumber Co., 20 S.E. 718, 115 N.C. 648.

70. U.S.—U. S. v. Grand Trunk Ry. Co. of Canada, D.C.N.Y., 203 F. 775, 776.

71. Pa.—Atlantic Refining Co. v. Pennsylvania R. Co., 113 A. 570, 571, 270 Pa. 415.
63 C.J. p 763 note 21.

road. In common language, a train is a conveyance which serves the public in conveying passengers or freight, or both, and which runs upon fixed tracks.[72] As used in certain statutes, the word "train" may signify cars in motion.[73]

As car or cars attached to locomotive. As usually understood, a train is composed of one or more engines, with one or more cars attached for the purpose of being moved to another place,[74] although it has been said that the word denotes and connotes "several" cars coupled together and moved by a locomotive.[75] The word "train" covers any string of cars hauled by an engine.[76] Likewise, a locomotive with one or more cars attached to it, with or without passengers or freight, in motion upon a railroad from one point to another by means of power furnished by the locomotive, would undoubtedly constitute a train.[77] However, under the construction put on certain statutes or railroad rules, the word "train" does not cover every car or string of cars attached to an engine.[78]

As moving without locomotive. Although, as used in certain statutes, "train" may signify cars in motion, and although the power is usually furnished by a locomotive, whether a number of cars, coupled together and in motion, forming one connected whole, do or do not constitute a train does not depend on whether a locomotive engine is attached to them at the time.[79] Accordingly, a number of cars coupled together, forming one connected whole and moving from one point to another upon a railroad, in the ordinary course of its traffic, under an impetus imparted to them by a locomotive which shortly before has been detached, may constitute a train within the meaning of a statute.[80] A number of runaway cars, coupled together, has been held to constitute a train within the meaning of a statute.[81]

As engine, engine and tender, or motor car. Generally, a single engine is not a train.[82] Under certain statutes or railroad rules, however, the word "train" may include an engine, or more than one engine coupled, with or without cars, or a motor car.[83]

Used as an adjective. "Train" is used as an adjective in certain phrases which have received judicial construction.[84]

(2) Particular Kinds

The particular character of a train is designated by a word preceding the word "train," such as "freight train," "passenger train," etc., and such particular kinds of trains have been specifically defined.

The word "train" is used with respect to railroad traffic to mean all kinds of trains, the character of the train being designated by a word, such as "freight train," "passenger train," "mail train," and "construction train."[85]

Accommodation train. A train running at moderate speed, and stopping at all or nearly all stations.[86]

Extra or wild train; wildcat train. A train which is not classified on the time-tables, and is required to keep entirely out of the way of all regular trains of whatever class.[87] So a "wild train" has been variously defined as a train consisting of a locomotive, tender, and caboose car on which no persons except the servants of the railroad com-

72. Tex.—Patillo v. State, 47 S.W. 2d 847, 120 Tex.Cr. 568.
63 C.J. p. 764 note 42.

Phrases employing the word train, and as to which more recent adjudications have not been found, see 63 C.J. p. 765 notes 60–62, 64, 66.

73. Colo.—Denver, etc., R. Co. v. Vitello, 121 P. 112, 21 Colo.App. 51.
Mass.—Caron v. Boston, etc., R. Co., 42 N.E. 112, 164 Mass. 523.

74. Iowa.—Larson v. Illinois Cent. R. Co., 58 N.W. 1076, 91 Iowa 81.
63 C.J. p. 764 note 25.

75. Iowa.—Mochel v. Iowa State Traveling Men's Ass'n, 213 N.W. 259, 260, 203 Iowa 623, 51 A.L.R. 1327.

76. U.S.—Chicago, B. & Q. R. Co. v. U. S., Mo., 211 F. 12, 18, 127 C.C.A. 438.
Minn.—La Mere v. Railway Transfer Co., 145 N.W. 1068, 1071, 125 Minn. 159.

77. Ill.—Southern R. Co. v. Cullen, 122 Ill.App. 293, 297.
Mass.—Caron v. Boston, etc., R. Co., 42 N.E. 112, 164 Mass. 523.

78. Minn.—Lynch v. Great Northern R. Co., 128 N.W. 457, 458, 112 Minn. 382.

79. Colo.—Denver, etc., R. Co. v. Vitello, 121 P. 112, 21 Colo.App. 51.
Mass.—Caron v. Boston, etc., R. Co., 42 N.E. 112, 164 Mass. 523.

80. Mass.—Caron v. Boston, etc., R. Co., supra.

81. Colo.—Denver & R. G. R. Co. v. Vitello, 121 P. 112, 118, 21 Colo. App. 51.

82. Iowa.—Larson v. Illinois Central R. Co., 58 N.W. 1076, 91 Iowa 81.

83. Mich.—Jones v. Pere Marquette R. Co., 133 N.W. 993, 996, 168 Mich. 1.

84. **Particular phrases.**
(1) "Train crew."—Forge v. Houston, etc., R. Co., 90 S.W. 118, 41 Tex.Civ.App. 81.

(2) "Train dispatcher."—Stroitman v. St. Louis, etc., R. Co., 109 S.W. 769, 779, 211 Mo. 227—Edge v. Southwest, etc., R. Co., 104 S.W. 90, 97, 206 Mo. 471.

(3) "Train dispatching."—Virginia & S. Ry. Co. v. Clowers' Adm'x, 47 S.E. 1002, 1004, 102 Va. 867.

(4) "Train movement."—Chicago & E. R. Co. v. U. S., C.C.A.Ind., 22 F.2d 729—Brooklyn Eastern Dist. Terminal v. U. S., N.Y., 239 F. 287, 289, 152 C.C.A. 275.

(5) "Train wreck."—Mochel v. Iowa State Traveling Men's Ass'n, 213 N.W. 259, 261, 203 Iowa 623, 51 A.L.R. 1327.

85. Mo.—State v. Missouri Pac. R. Co., 117 S.W. 1173, 219 Mo. 156.

86. Ill.—Gray v. Chicago, etc., R. Co., 59 N.E. 950, 189 Ill. 400.

87. Minn.—Hall v. Chicago, etc., R. Co., 49 N.W. 239, 46 Minn. 439, 442.

pany are permitted to ride;[88] a train not running by schedule, but under special instructions,[89] a train running under telegraphic orders, but without any schedule or time card.[90] Similarly, a "wildcat train" is an unscheduled train;[91] an occasional train moving without prearrangement, but by special order without reference to any schedule or the regular trains, and conforming to no conditions save the immediate order of the owner.[92]

Freight train. A term having a well-defined meaning;[93] a train primarily for the carriage of freight;[94] a train used for transporting commodities or matter of any kind.[95]

Local train In railroad parlance, a train which stops at all stations and does not run with great rapidity when in motion.[96]

Mixed train. A train equipped and having the appliances and facilities suited for the carriage of passengers as well as freight.[97]

Passenger train. A term with a well defined meaning.[98] Ordinarily it signifies a train advertised to take passengers generally, people traveling from place to place, on the terms and in the manner ordinarily applicable to such passengers;[99] in ordinary parlance, one which carries passengers, their baggage, mail, and express only.[1] The term "regular passenger train" has sometimes been used,[2] and it has been held that the difference in the significance of "passenger train" and "regular passenger train" is that the former term includes all passenger trains, regular and irregular, not only trains which move every day on schedule time, whereas the term "regular passenger train" means a passenger train on the regular schedule list.[3] While accommodation freight trains are not passenger trains in the ordinary sense of the term,[4] and the carrying of passengers in a caboose attached to a freight train does not change the freight train into a passenger train,[5] the term "passenger train" need not be applied only to a train devoted exclusively to the transportation of passengers.[6] A train is still a passenger train if it has all the facilities and conveniences for passengers which the law requires, even though the carrier may transport at the same time and on the same train shipments of freight.[7]

Revenue train. A train is a revenue train when

88. Minn.—Powers v. Chicago, etc., R. Co., 59 N.W. 307, 57 Minn. 332.

89. Ill.—Abend v. Terre Haute & I. R. R. Co., 111 Ill. 202, 207, 53 Am.R. 616.

90. U.S.—Northern Pac. R. Co. v. Poirier, Wash., 67 F. 881, 882, 15 C.C.A. 52.
N.Y.—Simpson v. Central Vermont R. Co., 39 N.Y.S. 464, 5 App.Div. 614, 615.

Train running "wild" is a train not on the schedule time of any train.—Larson v. St. Paul, etc., R. Co., 45 N.W. 722, 43 Minn. 423.

91. N.Y.—Kelly v. Delaware, L. & W. R. Co., 84 N.E. 801, 802, 192 N. Y. 203.

92. N.Y.—Sheehan v. New York Cent., etc., R. Co., 91 N.Y. 332, 335.

"Wild train" synonymous
N.Y.—Sheehan v. New York Cent., etc., R. Co., supra.

93. Ky.—Southern R. Co. v. Commonwealth, 110 S.W. 372, 373, 129 Ky. 87.

94. Ga.—Southern R. Co. v. Cunningham, 50 S.E. 979, 981, 123 Ga. 90.
27 C.J. p 905 note 55.

Similar definitions
Ariz.—Arizona Eastern R. Co. v. State, 242 P. 870, 871, 29 Ariz. 446.
27 C.J. p 905 note 55 [a].

Local freight train
(1) A local freight train is one which stops at any siding along the line where there is freight to load and unload, be the quantity what it may, as differentiated from one which takes and leaves freight only at certain definite stops.—Arizona Eastern R. Co. v. State, 242 P. 870, 871, 29 Ariz. 446.

(2) The term "local freight" means a train of freight cars receiving and delivering goods within a limited distance, and carrying a caboose for the accommodation of the train crew, and, incidentally, a few passengers.—State v. Missouri Pac. Ry. Co., 117 S.W. 1173, 1175, 219 Mo. 156.

Held a "freight train"
Tex.—Galveston, H. & S. A. Ry. Co. v. Tapley, Civ.App., 268 S.W. 491, 492.

95. Ill.—Chicago, etc., R. Co. v. Johnson, 53 Ill.App. 478, 481.
27 C.J. p 905 note 56.

96. Neb.—Hicks v. Union Pac. R. Co., 107 N.W. 798, 800, 76 Neb. 496.

97. Ariz.—Arizona Eastern R. Co. v. State, 242 P. 870, 871, 29 Ariz. 446.
40 C.J. p 1231 note 46.

Mixed train is not a "freight train with caboose attached"
Kan.—Schwartz v. Missouri, etc., R. Co., 109 P. 767, 83 Kan. 30.

98. Ky.—Southern R. Co. v. Commonwealth, 110 S.W. 372, 373, 129 Ky. 87, 33 Ky.L. 430.

Two words
With respect to railroad traffic, in the term "passenger train" the word "passenger" is used as an adjective to qualify the noun "train". The two words "passenger train" combine to form the name of the thing to which it is applied; neither word used alone would designate the object intended, but together they constitute the name.—State v. Missouri Pac. R. Co., 117 S.W. 1173, 1176, 219 Mo 156.

99. Ill.—Nadler v. Illinois Commercial Men's Assoc., 188 Ill.App. 459, 461.

1. Ariz.—Arizona Eastern R. Co. v. State, 242 P. 870, 871, 29 Ariz. 446.
47 C.J. p 1374 note 59.

2. Ill.—Chicago, etc., R. Co. v. People, 105 Ill. 657, 659.
47 C.J. p 1374 note 59 [b].

3. Mo.—State v. Missouri Pac. R. Co., 117 S.W. 1173, 219 Mo. 156.

4. Wis.—Chicago, etc., R. Co. v. State R. Commission, 140 N.W. 296, 299, 152 Wis. 654.

5. Ark.—Kansas City, etc., R. Co. v. Huff, 173 S.W. 419, 116 Ark. 461.
Ky.—Southern R. Co. v. Commonwealth, 110 S.W. 372, 373, 129 Ky. 87, 33 Ky.L. 430.

6. Ga.—Power v. Gainesville, etc., R. Co., 80 S.E. 61, 16 Ga.App. 733.

7. Ga.—Power v. Gainesville, etc., R. Co., supra.
47 C.J. p 1374 note 63.

it is moved for the purpose of transporting traffic for revenue.[8]

Stub train A term sometimes used in referring to a train composed of but two cars.[9]

r. Other terms

Numerous particular words or terms relating to railroads have been defined, including box step, cap, car mover, cellar, cinder pit, creeping, crosstie, dead blocks, and derailer.

In addition to the railroad terms defined supra subdivisions a–q of this section, other particular words or terms have been defined by the courts.[10] Phrases employing the word "railroad" or "railway" as to which more recent adjudications have not been found, see 51 C.J. p 372 note 51–p 373 note 85.

Box step. On railroad passenger cars, a platform step; a tread in a ledge consisting of risers and treads; distinguished from "sill step."[11]

Cap. A term used in railroad trestle construction, referring to a timber placed on top of each row of piles, on which stringers are laid, extending from one cross row of piles to the next.[12]

Car mover. A metal device with a wooden handle designed to move a railroad car by exertion of pressure against the wheel, manually operated by working the handle up and down.[13]

Cattle gap, cattle guard, or cattle pass; farm crossing. The terms "cattle guard," "cattle pass," and "farm crossing" have significance in connection with the construction of a railroad which has divided a farm in such a manner as to expose the stock of the owner to the danger of passing trains, to deprive him of access to some part of his pasture or some part of his tillage land; each of these terms, separately analyzed, has a distinct and limited application.[14]

A railroad "cattle gap" or "cattle guard" may be defined as a contrivance to restrain cattle.[15] The term "cattle guard" signifies some kind of a device alongside a railroad crossing to keep cattle off the track.[16] It is also defined as an appliance to prevent animals from escaping from inclosures in which they are confined over the railroad track and going upon land of others adjoining the right of way.[17]

A "cattle pass" is a narrow passageway under a railroad track, wide enough and high enough to admit the passage of a cow, horse, or ox to and from a pasture.[18]

A "farm crossing," in railroad parlance, is a roadway over the track at grade, for the purpose of reaching the tillage land cut off.[19]

Cellar. A receptacle on a truck of a railroad car or engine placed underneath the bearing of the axle for the purpose of keeping the bearing properly oiled while in motion.[20]

Cinder pit. A pit in a roundhouse extending the full width under a railroad track over which engines are "spotted" for the purpose of having fire boxes cleaned and cinders raked out;[21] an excavation beneath the rails, about three and a half feet deep, and walled up, into which the cinders are dropped, and from thence removed;[22] a depression beneath the track, deepest in the center and gradually decreasing to nothing at either end, where the engine wiper or "cinder pit man" gets under the engine to clean it of clinkers and cinders.[23]

Clevis pin and *Clevis.* A familiar device connected with, and constituting a part of, the automatic coupler of a railroad car, and used for the purpose

8. U.S.—Denver & R. G. R. Co. v U. S., Utah, 249 F. 822, 826, 162 C.C.A. 56

9. Iowa—Curl v. Chicago, etc., R. Co., 16 N.W. 69, 19 N.W. 308, 63 Iowa 417, 425, 426.

10. U.S.—Van Schaick v. McCarthy, C.C.A. Colo., 116 F.2d 987, 990.
"Express company" and "railway company" defined see Carriers § 7.
"Railroad ticket" defined see Carriers § 603 b.

"Central traffic control" is a term applied to a system of railroad operation by means of which the movement of trains over routes and through blocks on a designated section of track or tracks is directed by signals controlled from a central point without requiring the use of train orders and without the superiority of trains.—Van Schaick v. McCarthy, C.C.A. Colo., 116 F.2d 987, 990

11. Minn.—Hill v. Minneapolis, St Paul & S. S. M. Ry. Co., 200 N.W. 485, 486, 160 Minn. 484

12. Minn.—Johnson v. Great Northern Ry. Co., 116 N.W. 936, 104 Minn. 444.
"Stringer" defined see the C.J.S. definition Stringers, also 60 C.J. p 664 notes 66–68

13. Ill.—Robertson v. Louisville & N. R. Co., 63 N.E.2d 608, 327 Ill. App. 44.

14. Me.—True v. Maine Central R. Co., 94 A. 183, 184, 113 Me. 375.

15. Ala.—Carrollton Short Line R. Co. v. Lipsey, 43 So. 836, 837, 150 Ala. 570
51 C.J. p 869 note 97.

16. Me.—True v. Maine Central R. Co., 94 A. 183, 184, 113 Me. 375.

17. Ky.—Louisville, etc., R. Co. v. Beauchamp, 55 S.W. 716, 108 Ky. 47, 52, 21 Ky.L. 1476

18. Mo.—Owens v. Carthage, etc., R. Co., 85 S.W. 987, 110 Mo.App. 320, 326.
11 C.J. p 34 note 29.

19. Me.—True v. Maine Central R. Co., 94 A. 183, 184, 113 Me. 375.

20. Mo.—Crow v. Houck's Missouri, etc., R. Co., 111 S.W. 583, 212 Mo. 589, 598

21. Wash.—Mullin v. Northern Pac. R. Co., 80 P. 814, 38 Wash. 550.

22. Minn.—Stauning v. Great Northern R. Co., 93 N.W. 518, 519, 88 Minn. 480

23. Ind.—Atchison, T. & S. F. Ry. Co. v. Dickens, 103 S.W. 750, 7 Ind.T. 16.

of connecting the uncoupling lever and chain, so that uncoupling may be done without the necessity of men going between the ends of the cars.[24]

Creeping A technical term applied to steam locomotives, described as an unexpected movement of the engine, forward or in reverse, caused by temporary conditions affecting the apparatus which show their presence only in their untoward results,[25] and defined as a movement of the reversing mechanism as well as the valve gear without the operating lever in the cab having been adjusted, which causes an undesired change in the point at which the admission of steam into the cylinders is cut off.[26]

Crosstie. A sleeper, connecting and supporting the parallel rails of a railroad.[27]

Dead blocks. Bumpers placed on railway cars, to receive the concussion and the shock when moving cars come in contact with stationary cars.[28] They are constructed on the frame of the car above the drawheads, which are below, and attached to the trucks.[29]

Deadwood. A wooden block, part of the coupling attachment, fastened to the end of a railroad car;[30] the fixture or part of the car which comes in contact with the gooseneck of the tender when coupling is done.[31]

"Double deadwoods" is a term applied to the buffers on a railroad car.[32]

Derailer. A heavy metal safety device placed near the rail and controlled by lever to enable it to be pulled close against the rail, so that, when so placed, the inclined groove and flange on the derailer will serve to guide a car wheel onto and across the top of the rail, and derail the car.[33]

Division point A place where the officials of a division are permanently located or a place where trains are regularly made up and terminate their runs, and train crews are regularly changed.[34]

Double cut. The operation whereby an engine upon the lead track moves back with such force that the momentum of uncoupled cars, when the train is slackened, is sufficient to carry such cars upon the switch track.[35]

Double header. A term meaning a train drawn by two engines or locomotives.[36]

Drag A term applied to a number of freight cars, usually loaded, being transferred from one railroad yard to another.[37]

Drawbar. The part of a single deadwood which receives the concussion when railroad cars are coupled.[38]

Drifting. An expressive phrase applied to freight cars not billed to any destination, meaning available for any use,[39] waiting to be assigned for service.[40]

Dummy line. A railroad operated with trains pulled by small engines called "dummy engines."[41]

Dutchman. In the vernacular of railroad employees, a spliced rail is called a "dutchman."[42]

Dynamiting. In railroad parlance, "dynamiting" a train signifies using the means provided for emergency stops.[43]

24. U.S.—U. S. v. Atchison, T. & S. F. Ry. Co., D.C.Cal., 220 F. 215, 216.

25. U.S.—Baltimore & O. R. Co. v. U. S., D.C.Ohio, 5 F.Supp. 929, 934.

26. U.S.—Baltimore & O. R. Co. v. U. S., D.C.Ohio, 5 F.Supp. 929, 934.

27. Md.—Howser v. Cumberland & P. R. Co., 30 A. 906, 908, 80 Md. 146, 45 Am.S.R. 332, 27 L.R.A. 154.
17 C.J. p 886 note 35.

28. Va.—Norfolk, etc., R. Co. v. Cottrell, 3 S.E. 123, 83 Va. 512.
17 C.J. p 1135 note 94.

29. Va.—Norfolk, etc., R. Co. v. Cottrell, 3 S.E. 123, 83 Va. 512.

30. Minn.—Fay v. Minneapolis, etc., R. Co., 15 N.W. 241, 30 Minn. 231.

31. Iowa.—Grannis v. Chicago, etc., R. Co., 46 N.W. 1067, 81 Iowa 444.

32. Ala.—Louisville, etc., R. Co. v. Boland, 11 So. 667, 96 Ala. 626, 627, 18 L.R.A. 260.
17 C.J. p 1153 note 43.

"Single deadwood" distinguished
Mich. Michigan Cent. R. Co. v. Smithson, 7 N.W. 791, 45 Mich. 212.
17 C.J. p 1153 note 43 [b].

33. U.S.—Brady v. Southern Ry. Co., N.C., 64 S.Ct. 232, 234, 320 U. S. 476, 88 L.Ed. 239.
N.C.—Brady v. Southern Ry. Co., 23 S.E.2d 334, 336, 222 N.C. 367.
Its purpose is to prevent freight cars on a side track, which for any reason might be set in motion, from rolling down the track and onto the main line.—Brady v. Southern Ry. Co., 23 S.E.2d 334, 336, 222 N.C. 367.

34. Ark.—St. Louis, etc., R. Co. v. State, 143 S.W. 913, 102 Ark. 205.
18 C.J. p 1407 note 95 [c].

35. Minn.—Griffin v. Minnesota Transfer R. Co., 102 N.W. 391, 392, 94 Minn. 191.

36. Mo.—Vencill v. Quincy, etc., R. Co., 112 S.W. 1030, 132 Mo.App. 722.
Tex.—Galveston, etc., R. Co. v. Jenkins, 69 S.W. 233, 29 Tex.Civ.App. 440.

37. Minn.—La Mere v. Railway Transfer Co., 145 N.W. 1068, 1070, 125 Minn. 159, Ann.Cas.1915C 607.

38. Mich.—Michigan Cent. R. Co. v. Smithson, 7 N.W. 791, 45 Mich. 212.

39. U.S.—Pennsylvania R. Co. v. Knox, Pa., 218 F. 748, 751, 134 C.C.A. 426.

40. U.S.—Pennsylvania R. Co. v. Knox, supra.
Ill.—Missouri Pac. R. Co. v. Industrial Commission, 180 N.E. 912, 914, 348 Ill. 355.

41. Tenn.—Katzenberger v. Lawo, 16 S.W. 611, 612, 90 Tenn. 235, 25 Am.S.R. 681, 13 L.R.A. 185.
19 C.J. p 836 note 22.

42. Tex.—Galveston, etc., R. Co. v. Wallis, 104 S.W. 418, 419, 47 Tex. Civ.App. 120.

43. Wash.—Cross v. Spokane, P. & S. Ry. Co., 291 P. 336, 338, 158 Wash. 428, 71 A.L.R. 451.

Feather rails. The term is applied to the rails of a short detached movable railway track made to fit over and connect with the regular track.[44]

Flying drill. In railroad parlance, it is accomplished by uncoupling a car from a locomotive from which it has acquired its momentum and turning the switch after the locomotive has passed over it, but before the car has reached it, thereby diverting the car alone on to the switch track.[45]

Frog. A device, now usually made of several rail sections secured to a plate or bolted together through distance pieces, forming a connection of one track with another branching from or crossing it;[46] a section of a rail, or of several rails combined, at a point where two railways cross, or at the point of a switch from a line to a siding or to another line, and its function is to enable a car or train to be turned from one track to another[47]

General offices. As applied to a railroad company, the main offices used for the purpose of operating a railroad[48]

Gooseneck. Used in connection with "deadwood," a term which designates the fixtures or parts of the respective cars which come in contact when coupling is done.[49]

Grab iron. A round iron, three or four feet long, placed immediately over the door of the cupola of a caboose, and used by employees to protect them from injury through jars of the car.[50]

Handhold. A term sometimes used to describe an iron rod intended to assist railroad employees in riding on the footboard of the engine[51] or to assist them in getting on and off a car[52]

Headchair. A part of a block switch, a device used in railroading by which the footings of the ends of the two stationary rails are covered[53]

Hopper bottoms. As applied to railroad gravel cars, bottoms which open out, so that the contents of the car may be emptied on the track.[54]

In the hole. Where more extensive repairs are needed for a locomotive in a roundhouse than those of a minor nature not requiring more than twenty four hours to perform, the locomotive is deemed "in the hole."[55]

Janney coupler. A coupler of the Janney type[56]

Jerking. As applied to a railroad car, a term which means giving it a jerk with the engine and letting it run without the engine being attached to it.[57]

Kick. In railroad parlance, the operation of placing a car on a siding[58]

Knuckle or *Knuckles.* A part of the coupling on a car.[59] Railroad couplings, resembling two human hands or fists, with fingers clasped into each other, there being a coupling pin, which has to be pulled out before they will lock, are called "knuckles"[60]

44. Mo.—Burke v. St Louis Southwestern R. Co., 97 S.W. 981, 120 Mo.App. 683

45. N.J.—Cranbuck v. Delaware, etc., R. Co., 65 A. 1031, 74 N.J.Law 473.

46. Ky.—Commonwealth v. Louisville, etc., R. Co., 136 S.W. 869, 870, 143 Ky. 501
27 C.J. p. 907 note 25.
In a blocked frog the point of space between the rails, at the point where the car is switched from one track to another, is filled with wood or other material, so that the foot will not be held
U.S.—Southern Pac. Co. v. Seley, Utah, 14 S.Ct. 530, 152 U.S. 145, 150, 38 L.Ed. 391
Ky.—Commonwealth v. Louisville, etc., R. Co., 136 S.W. 869, 870, 143 Ky. 501.
Referred to as a "rerailer"
Tex.—Renegar v. Fort Worth Transit Co., Tex.Civ.App., 143 S.W.2d 443, 446.

47. U.S.—Southern Pac. Co. v. Seley, Utah, 14 S.Ct. 530, 152 U.S. 145, 150, 38 L.Ed. 391.
Ky.—Commonwealth v. Louisville, etc., R. Co., 136 S.W. 869, 870, 143 Ky. 501.
Ky.—Pollard v. Kentucky, etc., R. Co., 97 S.W. 735, 30 Ky.L. 129.
27 C.J. p. 907 note 26 [a].

48. Minn.—State v. Minneapolis, 21 N.W. 722, 32 Minn. 501, 506, 507.

49. Iowa.—Grannis v. Chicago, etc., R. Co., 46 N.W. 1067, 81 Iowa 444.

50. Ohio.—Lake Shore, etc., R. Co. v. Vogelson, 23 Ohio Cir.Ct. 361, 362
28 C.J. p. 753 note 27.
Other definitions
Tex.—Missouri, etc., R. Co. v. Box, Civ.App., 93 S.W. 134, 136.
28 C.J. p. 753 note 27 [a].

51. Ky.—Pollard v. Kentucky, etc., R. Co., 97 S.W. 735, 30 Ky.L. 129.

52. Tex.—Missouri, etc., R. Co. v. Box, Civ.App., 93 S.W. 134, 136.

53. Mich.—Eastman v. Lake Shore, etc., R. Co., 60 N.W. 309, 101 Mich. 597, 600.

54. Tex.—Gulf, etc., R. Co. v. Jackson, 109 S.W. 478, 480, 49 Tex.Civ.App. 573.

55. Cal.—Compton v. Southern Pac. Co., 161 P.2d 40, 41, 70 Cal.App.2d 267.

56. U.S.—Coup v. McConway & Torley Co., C.C.Pa., 127 F. 351, 352.
Construction described
"The Janney coupler had at the end of, and integral with, a rigid drawbar, a drawhead having a bifurcated jaw, with a vertical rotating hook, adapted to engage and interlock with a similar hook on another car, and so form a coupled joint." "Known as 'twin-jaw' or 'rotary vertical-hook' couplers"—Coup v. McConway & Torley Co., supra.

57. Ky.—Louisville, etc., R. Co. v. Logsdon, 71 S.W. 905, 114 Ky. 746, 24 Ky.L. 1566.

58. Neb.—Erb v. Eggleston, 60 N.W. 98, 41 Neb. 860
35 C.J. p. 901 note 34.
A car is said to be "kicked" when it is turned loose with a shove from the locomotive.—Hurt v. Louisville, etc., R. Co., 76 S.W. 502, 116 Ky. 545.

59. Mich.—Frebes v. Michigan Cent. R. Co., 188 N.W. 424, 218 Mich. 367

60. Mo.—McGuire v. Quincy, etc., R. Co., 107 S.W. 411, 412, 128 Mo.App. 677.

Landing. The platform of a railway station.[61]

Lap position. The term refers to a certain position of the brake handle in the railway automatic quick action brake system.[62]

Light or *Running light* An expression used with respect to a railroad engine when it is not drawing cars.[63]

Lineup. A list of movements scheduled over a railroad track for the day[64]

Lost motion. As applied to a locomotive, a jarring or swinging motion, caused by its worn-out condition[65]

Made up. A term applied to a railroad train when the cars are coupled together, and the train is completed, ready to start out on a trip over the road.[66]

Mail crane; mail catcher. A mail crane is an upright post planted close to the railroad track, with an arm, which, when not in use, hangs by the side of the post, but when in use is extended horizontally toward the track, and from which a suspended mail sack may be taken while the train is in motion by means of an iron hook or "mail catcher" attached to the door of the car, and operated by a mail clerk.[67]

Markers. Side lights on a caboose, showing green in front and red behind, utilized by the engineer and front brakeman for the purpose of readily discovering the train if it parts at night.[68]

Permanent way. A railroad term meaning a finished roadbed and track, including switches, crossings, bridges, viaducts, etc.[69]

Pickup. The movement by which cars are added to a train en route for delivery at another station.[70]

Pilot. A term in railway usage, applied to a person assigned to a train when the engineman or conductor, or both, are not fully acquainted with the physical characteristics, or running rules of the road or portions of the road, over which the train is to be moved,[71] also, the cowcatcher of an engine.[72]

Pinching. An operation whereby the end of a crowbar is placed on the iron rail under the wheel of the car and it is prized along until the car has acquired sufficient momentum to take it down a slight grade.[73]

Platform end sill. On passenger cars, the transverse end piece of the platform frame; also called the "end timber" and "buffer beam" on passenger equipment cars.[74]

Platform step. A part of the stairs at each end of a passenger coach or caboose car which affords the means of ingress or egress.[75] It is sometimes known as a "box step."[76]

Plug. In railroad terminology, to remove enough of the contents of a freight car to reveal the character of the remainder.[77]

Poling. An operation accomplished by adjusting a heavy piece of timber, called a "pole," with one end on and against the front of the engine and the other against the car to be moved, then starting the engine forward, thereby pushing the car by the pole to a point that will allow it to be passed by the engine.[78]

Pushing. In railroad parlance, that method of locomotion where the engine follows the car.[79]

61. Me.—McCann v. Minot, 78 A. 465, 467, 107 Me. 393.

62. U.S.—Westinghouse Air Brake Co. v. New York Air Brake Co., N.Y., 119 F. 874, 875, 56 C.C.A. 404.
36 C.J. p 720 note 37 [a].

63. Tex.—Galveston, etc., R. Co. v. Nicholson, Civ.App., 57 S.W. 693, 694.
W.Va.—Buchanan v. Norfolk & W. Ry. Co., 135 S.E. 384, 385, 102 W. Va. 426.

64. Mo.—New York Cent. R. Co. v. Chicago & E. I. R. Co., 231 S.W. 2d 174, 175.

65. Nev.—Southern Pac. Co. v. Johnson, Nev., 69 F. 559, 567, 16 C.C.A. 317

66. Neb.—Union Stock Yards Co. v. Conozer, 59 N.W. 950, 41 Neb. 617, 630.

67. Ill.—Chicago, etc., R. Co. v Gregory, 58 Ill. 272.
Tex.—International, etc., R. Co. v. Stephenson, 54 S.W. 1086, 22 Tex. Civ.App. 220.

68. Tex.—Texas, etc., R. Co. v. Stewart, 71 S.W. 330, 331, 30 Tex. Civ.App. 408.

69. Century D.
48 C.J. p 922 note 89.

70. Or.—Union Pac. R. Co. v. Anderson, 120 P.2d 578, 585, 167 Or. 687.

71. S.C.—Wilson v. Southern R. Co., 53 S.E. 968, 73 S.C. 481, 499.

72. Century D.

73. Va.—Street v. Norfolk, etc., R. Co., 45 S.E. 284, 101 Va. 746.

Similar definition

Mo.—Fassbinder v. Missouri Pac. R. Co., 104 S.W. 1154, 126 Mo.App. 563, 567.
48 C.J. p 1204 note 13.

74. Minn.—Hill v. Minneapolis, etc., R. Co., 200 N.W. 485, 486, 160 Minn. 484.

75. Minn.—Hill v. Minneapolis, etc., R. Co., supra.

"Sill step" distinguished

Minn.—Hill v. Minneapolis, etc., R. Co., supra.

76. Minn.—Hill v. Minneapolis, etc., R. Co., supra.

77. U.S.—Granger v. Davis, C.C.A. Ohio, 2 F.2d 695, 699.
49 C.J. p 1035 note 29.

78. Ky.—Howard v. Chesapeake, etc., R. Co., 90 S.W. 950, 28 Ky.L. 891.

Purpose

Poling is resorted to for moving a car which is on a different track from that occupied by the engine, but is so in the way of the movements of the engine as to prevent its passing such car.—Howard v. Chesapeake, etc., R. Co., supra.

79. Minn.—Mark v. St. Paul, etc., R. Co., 20 N.W. 131, 32 Minn. 208.

Rail chair. A device used where the ends of rails come together; it is intended to hold the separate rails firmly together and in alignment and to give them as far as possible the effect of being one continuous rail [80]

Railroad division. A unit of management established for convenience in operation.[81] It is not necessarily coincident with a seniority division, because it is sometimes necessary for trains and their crews to travel over more than one division in order to complete a run.[82]

Railroading. The management of, or work on, a railroad or railroads; the business of constructing or operating railroads;[83] the construction of, or work on, a railroad.[84]

Railroad line. An operating unit under one management over a designated way or right of way;[85] a regular line of vehicles for public use operated between distant points, or between different cities,[86] a line made up of one or more main tracks, with necessary side tracks, switches, signal blocks, and such other appurtenances as may be necessary to the operation of the railroad [87]

Railroad mortgage. A mortgage, or trust deed, of railway property, securing a large number of widely distributed bonds.[88]

Railroad property. The property which is essential to a railroad company to enable it to discharge its functions and duties as a common carrier by rail.[89]

Railroad purposes. Purposes incident to the proper construction, maintenance, and management of the railroad, or to its use by the corporation as a carrier of goods and passengers.[90]

Railroad weight. The combined weight of merchandise and car from which there is subtracted the weight of the car.[91]

Rolling stock. A definite and precise term, as to the scope of which there can be no misunderstanding,[92] embracing the movable property belonging to a railroad [93] The term implies the reverse of annexation and a permanent fixture [94]

Running connections. A railroad term said to include only such arrangements as to the time of arrival and departure of trains, and as to stations, platforms, and other facilities, as will enable companies desiring to connect to do so without detriment or serious inconvenience.[95]

Safety gates. Physical hindrances in the way of those seeking to cross railroad tracks.[96]

Shop card. According to railroad custom, a card placed upon crippled cars to denote that they have been injured and are to be taken to the shops for repair, to give notice to all concerned of the condition and destination of crippled cars.[97]

Shoving the Y. The expression used with respect to making up a train, meaning that an engine would be attached to the cars standing on the Y, so as to move and connect them with the train to be made up.[98]

Shunt. As a noun, a turn-off to a side or short rail so that the principal rail may be left free.[99] As a verb, to "kick;"[1] to set in motion by an impact from an engine and then detach so as to be allowed to travel forward.[2]

Sill and *Sill step.* The sill of a car is one of the main longitudinal timbers which are connected

80. U.S.—Railroad Supply Co. v. Hart Steel Co., Ill., 222 F. 261, 269, 138 C.C.A. 23.

81. Ky.—Day v. Louisville & N. R. Co., 175 S.W.2d 347, 348, 295 Ky. 679

82. Ky.—Day v. Louisville & N. R. Co., supra.

83. U.S.—Sullivan v. Atlantic Coast Line R. Co., D.C.Fla., 244 F. 606, 608
Fla.—Gulf, etc., R. Co. v. King, 74 So. 475, 476, 73 Fla. 325.

84. U.S.—Sullivan v. Atlantic Coast Line R. Co., D.C.Fla., 244 F. 606, 608
Fla.—Gulf, etc., R. Co. v. King, 74 So. 475, 477, 73 Fla. 325.

85. Ky.—Regenhardt Const. Co. v. Southern Ry. in Kentucky, 181 S.W.2d 441, 444, 297 Ky. 840.

86. Ky.—Commonwealth v. Walton, 104 S.W. 323, 31 Ky.L. 916.
51 C.J. p 370 note 12.

87. La.—Morgan's Louisiana, etc., R., etc., Co. v. Aucoin, 73 So. 859, 861, 140 La. 768.
51 C.J. p 370 note 13

88. Wis.—Chicago, etc., R. Co. v. State, 108 N.W. 557, 128 Wis. 553, 647.
51 C.J. p 370 note 14.

89. U.S.—Northern Pac. R. Co. v. Walker, C.C.N.D., 47 F. 681, 685
51 C.J. p 370 note 16.

90. N.J.—Delaware, etc., R. Co. v. Newark, 37 A. 629, 60 N.J.Law 60.
51 C.J. p 370 note 18.

91. N.J.—Bozza v. Leonardis, 131 A. 87, 88, 3 N.J.Misc. 1186.

92. Cal.—San Francisco, etc., R. Co. v. Stockton, 84 P. 771, 774, 149 Cal. 83.

93. Mont.—Great Northern R. Co. v. Flathead County, 202 P. 198, 200, 61 Mont. 263.
54 C.J. p 1102 note 64.

94. N.Y.—Beardsley v. Ontario Bank, 31 Barb. 619, 635.

95. U.S.—Oregon Short Line & U. N. R. Co. v. Northern Pac. R. Co., C.C.Or., 51 F. 465, 476, 478.

96. N.J.—West Jersey, etc., R. Co. v. Bridgeton, 44 A. 848, 64 N.J.Law 189, 190.

97. Del.—Shuster v. Philadelphia, etc., R. Co., 62 A. 689, 690, 22 Del. 4, 8.

98. Mo.—McQuire v. Quincy, etc., R. Co., 107 S.W. 411, 128 Mo.App. 677, 681.

99. Cal.—Carson v. Central R. Co., 35 Cal. 325, 334.

1. Mo.—Lang v. Missouri Pac. R. Co., 91 S.W. 1012, 115 Mo.App. 489, 495.

2. Mo.—Lang v. Missouri Pac. R. Co., supra.

transversely by the end sills, bolsters, and crossties[3]

A "sill step" is a U-shaped iron attached to the sill of a car as a step for trainmen,[4] a strip of iron in the nature of a stirrup.[5]

Snapshot In railroad parlance, it is a condition of the air brakes which causes the brakes to go into emergency, when they are put on for an ordinary stop;[6] also called an "undesired emergency"[7] It is said to be caused by a defective air brake.[8]

Spot, spotting a car. In railroad parlance, the practice of hauling cars to points along the spur convenient to shipper or consignee is known as "spotting."[9]

"Spotting a car" means placing a car either to be loaded or unloaded.[10]

Spout hook. A railroad appliance used in drawing the arm from the standpipe over to the manhole in the tank when an engine is taking water.[11]

Staking cars. A railroad operation whereby a stake attached to an engine or tender, on one track, extending diagonally across to a car on another, is used to shove the car along by the moving engine.[12]

Sun kink. A creeping together of the rails of a railroad track.[13]

Tie up. A railroad phrase meaning to cease to work.[14]

Turn-over The number of cars in a given zone[15]

Walk. To move, used in describing the movement of an engine, without any action by the operatives, after it has been brought to a stop.[16]

§ 2. Nature and Status of Railroad

The purpose of a railroad is the transportation of persons and property for the general public. It is the private and exclusive property of the company by which it is owned.

The purpose of a railroad is the transportation of persons and property for the general public,[17] and as to such purpose railroads have in some cases been termed "public roads" or "highways," whether they have been constructed by the government itself or by the agency of corporations or individuals under legislative authority, as discussed in Highways § 1. A railroad is, however, the private and exclusive property of the company by which it is owned,[18] and it is not a thoroughfare which may be used by pedestrians[19] or on which the public may use its own vehicles, cars, or motive power as on a turnpike or canal,[20] although this seems to have been the early conception of the character of railroads.[21]

§ 3. Nature and Status of Railroad Company

A railroad company is a public utility, created for the purpose of exercising the functions and performing the duties of a common carrier; and, considered as a

3. Minn.—Hill v. Minneapolis, St. P. & S. S. M. Ry. Co., 200 N.W. 486, 486, 160 Minn. 484.

Side sills, intermediate sills, and center sills

Sills are divided into side sills, intermediate sills, and center sills. The end sill is the transverse member of the under frame of a car framed across the ends of all the longitudinal sills. In passenger cars the end sill comes directly under the end door; the platform with its various parts usually being a separate construction. The platform end sill is the transverse end piece of the platform frame, and is also called the "end timber" and buffer beam on passenger equipment cars. —Hill v. Minneapolis, St. P. & S. S. M. Ry. Co., supra.

4. Minn.—Hill v. Minneapolis, etc., R. Co., supra.

5. Minn.—Hill v. Minneapolis, etc., R. Co., supra.

6. S.C.—Scott v. Atlantic Coast Line R. Co., 96 S.E. 305, 109 S.C. 471.

7. S.C.—Scott v. Atlantic Coast Line R. Co., supra.

8. S.C.—Scott v. Atlantic Coast Line R. Co., supra.

9. N.Y.—New York Cent. & H. R. R. Co. v. General Electric Co., 114 N.E. 115, 117, 219 N.Y. 227, 1 A.L.R. 1417.

10. Ark.—Missouri Pac. R. Co. v. Skipper, 298 S.W. 849, 954, 174 Ark. 1083.

11. Minn.—Jackson v. Chicago Great Western Ry. Co., 205 N.W. 680, 165 Minn. 58.

12. Mich.—Kelly v. Mich. Cent. R. Co., 31 N.W. 904, 906, 65 Mich. 186, 8 Am.S.R. 876.

13. Tex.—Hudson v. Ft. Worth & D. C. R. Co., Civ.App., 130 S.W. 617, 618.

"Sun kinks . . . are caused by an expansion, due to heat, of the iron or steel rails forming the track of a railroad."—Hudson v. Ft. Worth & D. C. R. Co., supra.

14. U.S.—U. S. v. Cassidy, D.C.Cal., 67 F. 698, 728.
62 C.J. p 954 note 34.

15. Mo.—Benson v. Missouri Pac. R. Co., 69 S.W.2d 656, 657, 658, 334 Mo. 851.

16. Ark. St. Louis, I. M. & S. Ry. Co. v. Fisher, 97 S.W. 279, 80 Ark. 376, 378.

17. N.Y.—Sun Printing, etc., Assoc. v. New York, 46 N.E. 499, 152 N. Y. 257, 37 L.R.A. 788.

Idaho.—**Corpus Juris quoted in** Oregon Short Line R. Co. v. Pfost, 27 P.2d 877, 881, 53 Idaho 559.

18. Idaho.—**Corpus Juris quoted in** Oregon Short Line R. Co. v. Pfost, 27 P.2d 877, 881, 53 Idaho 559.

W.Va.—Pittsburg, etc., R. Co. v. Benwood Iron Works, 8 S.E. 453, 31 W.Va. 710, 2 L.R.A. 680.
51 C.J. p 410 note 96.

19. Tenn.—Nashville, etc., R. Co. v. Lovejoy, 198 S.W. 61, 138 Tenn. 492.
51 C.J. p 410 note 98.

20. Ill.—Toledo, etc., R. Co. v. Pence, 68 Ill. 524.

N.Y.—Beekman v. Saratoga, etc., R. Co., 3 Paige 45, 22 Am.D. 679.

21. U.S.—Lake Superior, etc., R. Co. v. U. S., Ct.Cl., 93 U.S. 442, 23 L. Ed. 965.
51 C.J. p 410 note 1.

corporation, it is in a class by itself, being neither a strictly private nor a strictly public corporation, but possessing some of the characteristics of both

A railroad company is a public utility,[22] created for the purpose of exercising the functions and performing the duties of a common carrier;[23] and its usual and customary business is the receipt of freight and passengers at various points on its road for transportation to, and delivery at, other points thereon, the issuance of bills of lading, the sale of tickets, and the keeping of books and accounts relative to such business transactions.[24]

Considered as corporation, a railroad company has been said to be in a class by itself,[25] as being neither a strictly private nor a strictly public corporation,[26] but possessing some of the characteristics of both.[27] While it is, technically speaking, a private corporation, as distinguished from municipal or other strictly public corporations,[28] it is essentially different from strictly private corporations,[29] and, owing to the character of its functions, the powers with which it is invested, and the duties which it owes to the public, it is frequently termed a "quasi-public corporation[30] or agency."[31]

§ 4. Right to Engage in Railroad Business

The state itself may construct and operate a railroad unless prohibited by the constitution, or it may authorize others so to do; but the right to engage in the business of maintaining and operating a railroad for the public generally is a franchise which can be exercised only by legislative authority. A franchise to construct and operate a railroad, when granted, is property, and cannot be revoked or taken away unless power to do so is reserved, except in the proper exercise of the police power or the power of eminent domain.

Because of the public nature of a railroad, the state itself may construct and operate it,[32] unless prohibited by the constitution,[33] or it may authorize others so to do.[34] On the other hand, the right to engage in the business of maintaining and operating a railroad for the public generally is a franchise[35] which can be exercised only by legislative authority,[36] and, unless it has been given, even the owner of private property cannot authorize the

22. Fla.—Seaboard Air Line R. v. McRainey, 68 So. 753, 69 Fla. 462. 51 C.J. p. 411 note 2.

23. Okl.—Bromide Crushed Rock Co. v. Dolese Bros. Co., 247 P. 74, 121 Okl. 40.

Electric railroad held not "electrical corporation" within statute notwithstanding it sold electricity to others than corporations engaged in railroad business.—In re Chalmers, 234 N.Y.S. 174, 226 App. Div. 702.

24. Mo.—State v. Calhoun, 220 S.W. 6, 281 Mo. 583.

25. U.S.—Talcott v. Pine Grove Tp., C.C.Mich., 23 F.Cas.No.13,735, 1 Flipp. 120, affirmed 19 Wall. 666, 22 L.Ed. 227.

26. Kan.—Leavenworth County Comrs. v. Miller, 7 Kan. 479, 12 Am.R. 425.
51 C.J. p. 411 note 7.

27. N.Y.—People v. Batchellor, 53 N.Y. 128, 13 Am.R. 480.

A railroad company is, in one sense, a "public corporation" dependent on public for its franchises to exist and carry on business.—Gardner v. Commerce Commission, 79 N.E.2d 71, 400 Ill. 123.

28. Ky.—Meacham v. Louisville & N.R. Co., 169 S.W.2d 830, 293 Ky. 642.
51 C.J. p. 411 note 9.

29. Mich.—Swan v. Williams, 2 Mich. 427.
51 C.J. p. 411 note 11.

30. Ind.—Public Service Co. of Indiana v. City of New Castle, 8 N.E.2d 821, 212 Ind. 229.
N.C.—Sparrow v. Dixie Leaf Tobacco Co., 61 S.E.2d 700, 232 N.C. 589.
Tex.—Ft. Worth & D.C. Ry. Co. v. Strickland, Civ.App., 208 S.W. 410.
14 C.J. p. 76 note 50—43 C.J. p. 73 note 97—51 C.J. p. 411 note 15.

31. Ky.—Meacham v. Louisville & N.R. Co., 169 S.W.2d 830, 293 Ky. 642.

32. N.Y.—Clarke v. Rochester, 24 Barb. 446, 5 Abb.Pr. 107, 14 How.Pr. 193, affirmed 28 N.Y. 605.
Power of municipal corporation to construct, maintain, own, or operate railroads see Municipal Corporations § 1054 c.

Reserved power
State in operating railroad acts within power reserved to states under federal Constitution.—U.S. v. State of California, Cal., 56 S.Ct. 421, 297 U.S. 175, 80 L.Ed. 567.

33. Idaho.—Atkinson v. Ada County, 108 P. 1046, 18 Idaho 282, 28 L.R.A.,N.S., 412.

34. Mo.—State v. Roach, 184 S.W. 969, 267 Mo. 300.
N.Y.—Clarke v. Rochester, 24 Barb. 446, 5 Abb.Pr. 107, 14 How.Pr. 193, affirmed 28 N.Y. 605.

35. U.S.—Memphis, etc., R. Co. v. Berry, Ark., 5 S.Ct. 299, 112 U.S. 609, 28 L.Ed. 837.
26 C.J. p. 1011 note 51, p. 1012 note 60.

Special franchise
(1) A special franchise granted to a railroad corporation is a right granted to it to maintain its road where, without such authority to do so, it would be unlawful.—People ex rel. New York Cent. & H.R.R. Co. v. Priest, 99 N.E. 547, 555, 206 N.Y. 274.

(2) The right to build and operate a railroad in the streets of a city has been regarded as a special franchise.—Lord v. Equitable Life Assur. Soc., 87 N.E. 443, 194 N.Y. 221, 22 L.R.A.,N.S., 420.

Privilege
Operating by railroad carrier without competition in any particular territory merely constitutes privilege.—Indian Valley R.R. v. U.S., D.C.Cal., 52 F.2d 485, affirmed Indian Valley R. Co. v. U.S., 54 S.Ct. 775, 292 U.S. 608, 78 L.Ed. 1469.

Purpose
Franchises granted to a railroad company by the United States were granted for national purposes to subserve national ends.—California v. Central Pac. R. Co., Cal., 8 S.Ct. 1073, 127 U.S. 1, 40, 32 L.Ed. 150.

36. Minn.—Blake v. Winona, etc., R. Co., 19 Minn. 418, 18 Am.R. 345.
51 C.J. p. 411 note 22.

State or municipality
The power to construct, maintain, or operate a railroad springs from the state, and is not subject to grant by a municipality.—People ex rel. New York Cent. R. Co. v. State Tax Commission, 35 N.Y.S.2d 77, 264 App. Div. 80, modified on other grounds 54 N.E.2d 332, 292 N.Y. 130, motion denied 56 N.E.2d 122, 292 N.Y. 717.

Reasonable restrictions
Franchise granted by the legislature to railway company or its predecessor to operate railroad in the state was subject to such reasonable restrictions in the interest of public safety as the state might undertake to impose.—In re New York, O. & W. Ry. Co., D.C.N.Y., 59 F.Supp. 865.

operation of such a railroad on or across it.[37] A railroad company cannot delegate the exercise of its franchise to others not authorized by law to carry on the transportation business.[38]

While it has been said to be common knowledge that practically all railroads are now operated through the agency of corporations,[39] they need not necessarily be so operated but the right may be conferred on natural persons[40] or unincorporated associations of individuals;[41] but the incorporation of a railroad company, with power to construct and operate a railroad, necessarily involves the grant of a franchise to engage in the railroad business.[42] A grant of such right is not in contravention of a constitutional provision prohibiting the abridgment of the police power.[43] The right of a railroad to construct and maintain its line of railway over its right of way in accordance with the requirements of its business is subject to the restriction that it be used in such manner as not to impose unnecessary burdens on its neighbors.[44]

Right as property. A franchise to construct and operate a railroad, when granted, is property,[45] and cannot be revoked or taken away unless power so to do is reserved,[46] except in the proper exercise of the police power[47] or the power of eminent domain.[48]

Forfeiture. Notwithstanding it is property, the right or franchise to engage in the railroad business is subject to defeasance or forfeiture by failure to exercise it,[49] or by abandonment after it has been exercised,[50] and a railroad company, on forfeiting its corporate franchise, also forfeits its right to engage in the railroad business.[51] The question whether or not the franchise has been forfeited can be determined, however, only in a direct proceeding by the state,[52] except where, under the constitution or a statute, or the charter of the company, particular acts or omissions ipso facto work a forfeiture of the right.[53]

Enjoining unauthorized construction The unauthorized construction of a railroad may be enjoined by a company having a legal right to construct a railroad on the same location,[54] or by another railroad company or property owner who will be injured thereby.[55]

§ 5. —— Exclusive and Conflicting Franchises

A legislative grant of a franchise to engage in the railroad business within a certain territory or between certain places may be exclusive, in which case the rights and privileges granted may not be impaired by subsequent grants; but, where the franchise is nonexclusive, the same or a similar franchise may subsequently be granted to another company, even though the latter grant impairs the value of the former.

A legislative grant of a franchise to engage in the railroad business within a certain territory or between certain places may be exclusive,[56] either for all time,[57] or for a limited period.[58] When an exclusive franchise has been granted, the legisla-

Who may question franchise
State only is entitled to question right of railroad corporation to exercise franchise granted by state.—New York Cent. & H. R. R. Co. v. New York, 127 N.Y.S. 513, 142 App Div. 578, affirmed 95 N.E. 638, 202 N.Y. 212.

37. N.Y.—People v. Gilchrist, 221 N.Y.S. 613, 221 App.Div. 19, reversed on other grounds 161 N.E. 432, 248 N.Y. 97.
51 C.J. p 412 note 23.

38. Tenn.—Grace v. Louisville & N. R. Co., 89 S.W.2d 354, 19 Tenn. App. 382.

39. Colo.—Union Pac. R. Co. v. De Busk, 20 P. 752, 12 Colo. 294, 13 Am.S.R. 221, 3 L.R.A. 350.

40. N.Y.—New York v. Bryan, 89 N. E. 467, 196 N.Y. 158, 163.
51 C.J. p 412 note 25.

41. Cal.—Moran v. Ross, 21 P. 547, 79 Cal. 159.

42. N.Y.—New York Cent. & H. R. R. Co. v. New York, 127 N.Y.S. 513, 142 App.Div. 578, affirmed 95 N.E. 638, 202 N.Y. 212.
51 C.J. p 412 note 27.

43. Mo.—State v. Roach, 184 S.W. 969, 267 Mo. 300.

44. Ala.—Tennessee, A. & G. Ry. v. Gardon, 177 So. 171, 27 Ala.App. 585, certiorari denied 177 So. 173, 235 Ala. 53.

45. N.Y.—New York v. Bryan, 89 N. E. 467, 196 N.Y. 158.—Blume v. Interurban St. R. Co., 83 N.Y.S. 989, 41 Misc. 171.

Incorporeal hereditament
A railroad franchise is an incorporeal hereditament, as distinguished from land which is a corporeal hereditament.—Gibbs v. Drew, 16 Fla. 147, 26 Am.R. 700.

46. N.Y.—New York v. Bryan, 89 N. E. 467, 196 N.Y. 158.
51 C.J. p 412 note 30.

47. N.Y.—Blume v. Interurban St. R. Co, 83 N.Y.S. 989, 41 Misc. 171.
51 C.J. p 412 note 31.

48. N.Y.—Blume v. Interurban St. R. Co., supra.

49. N.Y.—New York v. Bryan, 89 N. E. 467, 196 N.Y. 158.
51 C.J. p 412 note 35.

50. N.Y.—New York v. Bryan, supra.

51. N.Y.—New York v. Bryan, supra

52. N.Y.—New York v. Bryan, supra.

53. Conn.—New York, etc., R. Co. v. Boston, etc., R. Co., 36 Conn. 196.
51 C.J. p 412 note 39.

54. Pa.—Warren, etc., R. Co. v. Clarion Land, etc., Co., 54 Pa. 28.
Enjoining construction or operation of railroad in violation of statute requiring prior issuance of certificate of necessity and convenience see infra § 6.

55. N.J.—New Jersey Cent. R. Co. v. Pennsylvania R. Co., 31 N.J.Eq. 475, reversed on other grounds 32 N.J.Eq. 755.

56. Tex.—Ft. Worth & D. C. Ry. Co. v. Strickland, Civ.App., 308 S.W. 410.

57. La.—Pontchartrain R. Co. v. Orleans Nav. Co., 15 La. 404.
N.J.—Pennsylvania R. Co. v. National R. Co., 23 N.J.Eq. 441.

58. Mass.—Boston, etc., R. Corp. v. Salem, etc., R. Co., 2 Gray 1.

ture cannot impair the obligation of the contract involved therein by granting the same or a similar franchise to another company;[59] nor can it grant to a railroad company franchises which impair the rights and privileges previously granted to another,[60] as to a ferry company.[61] Subsequent grants, however, which do not impair or prejudice exclusive rights previously granted are valid.[62]

Nonexclusive grant Where the grant of such a franchise to engage in the railroad business is not in terms exclusive, the same or a similar franchise may subsequently be granted to another company, even though the latter grant impairs the value of the former.[63] A provision in a charter that no person or corporation shall interfere with or injure any of the rights or privileges granted merely restrains the commission of unauthorized and illegal injuries and does not prevent the grant to another company of the right to engage in business in competition with the former company.[64]

§ 6. —— Determination of Convenience and Necessity

Under some statutes, the determination by a commission or tribunal designated for the purpose that a proposed railroad is justified by considerations of public convenience and necessity is a condition precedent to the establishment of such railroad. Whether the public convenience and necessity require construction of the rail line is a question of fact depending on the facts and circumstances of the particular case.

In some jurisdictions, under statutes providing therefor, the determination by a commission or tribunal designated for the purpose that a proposed railroad is justified by considerations of public convenience and necessity is a condition precedent to the establishment of such railroad.[65] So, under a federal statute regulating railroads, it is required that a certificate of convenience and necessity be obtained from the interstate commerce commission for the construction[66] or operation[67] of a railroad engaged or about to engage in interstate commerce, or for the building of any extension of any such line, as discussed infra § 54. A certificate is required, however, only in cases within the terms of the statute,[68] and the statute may be inapplicable to private construction of a rail line for private transportation.[69]

While the fact that a railroad is to be located wholly within one state and is to be built by an independent corporation does not necessarily prevent the application of the provisions of the federal statute requiring issue of a certificate by the interstate commerce commission,[70] if an intra-state line is to be used wholly in intra-state commerce, such certificate is not required,[71] and the mere fact

59. Md.—Pennsylvania R. Co. v Baltimore, etc, R Co, 60 Md. 263

60. Ky.—Chicago, etc., R Co v Louisville, etc, R. Co, 58 S.W 799, 22 Ky.L. 658

61. Minn.—McRoberts v. Southern Minnesota R. Co, 18 Minn 108
N Y.—Aikin v. Western R Corp, 20 N Y. 370

62. N J.—Delaware, etc, Canal Co v Camden, etc., R Co, 15 N J Eq 13, 16 N.J.Eq 321, modified on other grounds Raritan & D B R Co. v. Delaware & Raritan Canal Co, 18 N.J.Eq. 546.
51 C.J. p 413 note 48.

63. Ill.—East St. Louis Connecting R Co v. East St. Louis Union R. Co, 108 Ill 265
51 C.J. p 413 note 49.

64. Ind.—Newcastle, etc, R Co. v. Peru, etc., R. Co., 3 Ind. 464.

65. Wis.—Wisconsin Southern R Co v. State R. Commission, 201 N W 244, 185 Wis. 313.
51 C J. p 413 note 52.

66. U S.—Chesapeake & O. Ry Co. v. U. S., W Va., 51 S Ct 337, 283 U.S 35, 75 L.Ed. 824—Texas, etc, R. Co v. Northside Belt R Co., Tex., 48 S Ct. 361, 276 U.S. 475, 72 L Ed 661.

Purpose

(1) Purpose of statute requiring railroad undertaking construction of new line to obtain certificate of public convenience and necessity, and authorizing suit to enjoin violation of requirement, was to empower commission, in proceedings instituted by a carrier proposing to engage in transportation over or by means of additional line, authoritatively to decide whether it would be in the public interest.—Powell v U S, Ga, 57 S.Ct. 470, 300 U S 276, 81 L Ed 643

(2) Other statement of purpose see 51 C.J. p 415 note 88 [a].

Effect of lease

Action of secretary of war in leasing government line running to fort and approving railroad's employment of lessees to transport freight over tracks was held not inconsistent with exertion of authority of interstate commerce commission to grant or withhold certificate of public convenience and necessity, or to bring suit to enforce requirement to obtain certificate.—Powell v. U. S., supra.

67. U.S.—Transit Commission v U. S., N.Y., 53 S Ct 536, 289 U.S. 121, 77 L.Ed 1075.

Use of lines of another railroad

Phrase "operate any line of railroad" within section requiring certificate from commission, embraces any railroad having interstate relations that runs its trains over lines of another under trackage agreement entered into between two roads.—Transit Commission v. U S, supra.

68. U S.—Pennsylvania R. Co v. Pittsburgh, L. & W. R Co, C C.A. Ohio, 83 F 2d 861, certiorari denied 57 S Ct. 35, 299 U S 572, 81 L Ed 421

69. U S.—Pennsylvania R. Co. v. Pittsburgh, L. & W. R. Co, supra

70. U S.—Missouri-Kansas-Texas R. Co v Northern Oklahoma Rys, C C A.Okl, 25 F 2d 689, certiorari denied Northern Oklahoma Rys. v Missouri-Kansas-Texas R Co, 49 S Ct 13, 278 U.S. 610, 73 L Ed 536.

Effect on interstate commerce of new construction determines necessity of procuring certificate of convenience and necessity from interstate commerce commission.—Missouri-Kansas-Texas R Co. v. Northern Oklahoma Rys, C.C A Okl., 25 F. 2d 689, certiorari denied Northern Oklahoma Rys. v. Missouri-Kansas-Texas R. Co., 49 S.Ct. 13, 278 U.S. 610, 73 L Ed 536.

71. Miss.—Robinson Land & Lumber Co. of Alabama v Avera & N E. R. Co., 128 So. 738, 157 Miss. 700.
51 C.J. p 415 note 90.

that it might be used in interstate commerce will not justify enjoining its construction where it is not yet completed and there is no threat that it will be so used.[72]

Under the statutes in question, the commission or other designated tribunal generally has the duty of finding the facts, and in the exercise of reasonable judgment to determine whether the public convenience and necessity require the proposed construction of the railroad,[73] but the commission may not consider whether the proposed project is in the public interest unless it is one for construction or acquisition of a line as specified in the statute,[74] and, for lack of jurisdiction to determine that question, the commission may in certain circumstances be required to deny the application.[75] On presentation by the carrier of an application for a certificate of public convenience and necessity, the commission, in determining whether it has authority to consider the merits, may pass incidentally on the question whether the project is one covered by the statute, but the decision of that question is primarily one for the court, either in a suit to set aside the commission's order granting the certificate or in a suit to enjoin violation of the statute.[76]

Whether the public convenience and necessity require construction of the rail line is a question of fact depending on the facts and circumstances of the particular case,[77] considered from the viewpoint of the public and not of individuals affected,[78] and, if it does not in fact do so, a certificate should be refused;[79] but an adverse decision in one case does not render the matter res judicata on subsequent application by another company for permission to establish a similar service.[80] If a public necessity is shown, a certificate should be issued,[81] regardless of inconvenience to individuals.[82]

A certificate of convenience and necessity should not be denied because of a doubt as to whether the road would be a paying one,[83] nor is the fact that there is already adequate provision for through traffic sufficient reason for denying such certificate to another company, if there is not adequate provision for local traffic,[84] or the fact that a portion of the territory through which the proposed road is to run is adequately served, where another portion is not, and construction of the road as a whole is economically necessary.[85] The commission has power to authorize the construction of a railroad for the purpose of continuing competition between carriers,[86] and it has been held that the fact that the road for which application is made will give the public the advantage of desirable competition in transportation is ground for granting the certificate rather than denying it.[87]

The question is not whether public convenience

Railroad's application to interstate commerce commission for certificate of convenience and necessity does not preclude claim that contemplated new construction is solely intra-state.—Missouri - Kansas - Texas R. Co. v. Northern Oklahoma Rys., C.C.A.Okl., 25 F.2d 689, certiorari denied Northern Oklahoma Rys. v. Missouri-Kansas-Texas R. Co., 49 S. Ct. 13, 278 U.S. 610, 73 L.Ed. 536.

72. U.S.—Texas, etc., R. Co. v. Northside Belt R. Co., Tex., 48 S. Ct. 361, 276 U.S. 475, 72 L.Ed. 661.

73. U.S.—Chesapeake & O. Ry. Co. v. U. S., W.Va., 51 S.Ct. 337, 283 U. S. 35, 75 L.Ed. 824.

Administrative judgment

The granting or refusing of a certificate of public convenience and necessity for the construction of a railroad constitutes an exercise of administrative judgment under authority vested in the appropriate commission.—Indian Valley R. R. v. U. S., D.C.Cal., 52 F.2d 485, affirmed 54 S.Ct. 775, 292 U.S. 608, 78 L.Ed. 1469.

Necessity of facts

The commission cannot exercise discretion or render judgment respecting certificates of convenience and necessity without having the facts as to the situation before it —Pennsylvania R. Co. v. U. S., D.C. Pa., 40 F.2d 921.

74. U.S.—Powell v. U. S., Ga., 57 S. Ct. 470, 300 U.S. 276, 81 L.Ed. 643.

75. U.S.—Powell v. U. S., supra.

76. U.S.—Powell v. U. S., supra.

77. Ill.—Wabash, etc., R. Co. v. Commerce Commission, 141 N.E. 312, 309 Ill. 412.
51 C.J. p 413 note 54.

Necessity held shown

U.S.—Chesapeake & O. Ry. Co. v. U. S., W.Va., 51 S.Ct. 337, 283 U.S. 35, 75 L.Ed. 824—Indian Valley R. R. v. U. S., D.C.Cal., 52 F.2d 485, affirmed 54 S.Ct. 775, 292 U.S. 608, 78 L.Ed. 1469.
51 C.J. p 413 note 54 [a].

Necessity held not shown

Ill.—Roy v. Illinois Commerce Commission, 153 N.E. 648, 322 Ill. 452.
51 C.J. p 413 note 54 [b].

78. Ill.—Roy v. Illinois Commerce Commission, supra.
51 C.J. p 413 note 55

79. N.Y.—People v. Railroad Comrs., 114 N.Y.S. 122, 128 App. Div. 814.

80. N.Y.—People v. Aldridge, 110 N. Y.S. 820, 126 App.Div. 484, affirmed 89 N.E. 1109, 195 N.Y. 574.

81. Wis.—Eastern R. Co. v. McCoud, 116 N.W. 841, 136 Wis. 349.

82. Wis.—In re Milwaukee Electric R., etc., Co., Milwaukee County, 206 N.W. 201, 189 Wis. 96.

83. N.Y.—Matter of Ticonderoga Union Terminal R. Co., 101 N.Y.S. 107, 116 App.Div. 56.

84. N.Y.—Matter of Rochester, etc., Tract. Co., 103 N.Y.S. 1112, 118 App.Div. 521, appeal dismissed 81 N.E. 1174, 189 N.Y. 522.

85. N.Y.—People v. State R. Comrs., 110 N.Y.S. 862, 126 App.Div. 492.
51 C.J. p 414 note 62.

86. U.S.—Chesapeake & O. Ry. Co. v. U. S., W.Va., 51 S.Ct. 337, 283 U.S. 35, 75 L.Ed. 824.

87. N.Y.—People v. State R. Comrs., 110 N.Y.S. 862, 126 App.Div. 492.
51 C.J. p 414 note 63.

Traffic territory

Competing railroad carrier may enter into traffic territory of another when commission finds that public convenience and necessity require new construction.—Indian Valley R. R. v. U. S., D.C.Cal., 52 F.2d 485, affirmed 54 S.Ct. 775, 292 U.S. 608, 78 L.Ed. 1469.

and necessity require any railroad between the points in question, but whether they require the specific road proposed to be put into operation;[88] so the commission or tribunal ordinarily has no power to prescribe the route to be followed by the proposed railroad,[89] and no authority to issue a certificate on condition that the road shall be constructed on a specified line or a different route than that designated by applicant,[90] although there is authority for the view that the commission may consider other routes than that specified in the application.[91]

A certificate should be refused, however, if the commission determines that the company is not properly qualified or authorized to engage in the railroad business,[92] or has not the intention and ability to serve the public interest,[93] or if the proposed location or route of the road is different from that specified in the company's charter or articles of incorporation,[94] or where it appears that the proposed road would not pay expenses;[95] and the number of grade crossings which would be necessitated by a proposed road is to be considered in determining whether or not the certificate should be granted.[96] Under statutes in some jurisdictions so providing, a certificate of convenience and necessity is without effect where a specified portion of the capital stock of the railroad company has not been paid in cash.[97]

Notice of application. Where publication of notice of an application for a certificate or of the articles of incorporation of the applicant company is a condition precedent to the application, publication in each of the counties through which the proposed road is to extend is not necessary unless expressly required by statute.[98] Under a state statute empowering a regulatory commission to determine the matter of convenience and necessity, it is not necessary, with respect to purely interstate operations of a railroad, to publish notice of the filing of an application for a certificate, or to prove that there is any public convenience and necessity to be served.[99]

Opposition or resistance. While a railroad company operating within a particular territory has no right to hold its traffic against all competitors,[1] it has such an interest in an application made by another company for a certificate of convenience and necessity as to entitle it to intervene and be heard in opposition to, or resistance of, such application,[2] but it has no such interest as to authorize it to bring an independent proceeding to set aside an order granting a certificate.[3]

Evidence. The commission has a very wide discretion in determining what evidence it will or will not hear on an application for a certificate of convenience and necessity;[4] but the rejection of material and convincing evidence is reversible error.[5] It may require applicant to submit a map identifying the route of the proposed railroad.[6]

Rival applications. Where rival companies make application at the same time, the commission has jurisdiction to decide whether a certificate shall be issued to both or only to one, and if only to one, to which one.[7] Priority of organization or application does not give a particular company any right to such certificate as against another company desiring to construct a road between the same points,[8]

88. N.Y.—People v. Railroad Comrs., 38 N.Y.S. 528, 861, 4 App. Div. 259.

89. N.Y.—People v. Second Dist. Public Service Commission, 125 N.E. 438, 227 N.Y. 248—In re Frontier, etc., R. Co., 139 N.Y.S. 627, 155 App. Div. 57, appeal denied 141 N.Y.S. 1120, 156 App. Div. 926.

90. N.Y.—People v. Second Dist. Public Service Commission, 125 N.E. 438, 227 N.Y. 248—People v. Railroad Comrs., 87 N.Y.S. 334, 92 App.Div. 126.

91. N.Y.—Frontier, etc., R. Co. v. Second Dist. Public Service Commission, 139 N.Y.S. 627, 155 App. Div. 57, appeal denied 141 N.Y.S. 1120, 156 App.Div. 926.

92. N.Y.—People v. State R. Comrs., 93 N.Y.S. 584, 105 App.Div. 273.

51 C.J. p. 414 note 68.

93. Ill.—Roy v. Illinois Commerce Commission, 153 N.E. 648, 322 Ill. 452.

94. N.Y.—People v. Second Dist. Public Service Commission, 156 N.Y.S. 1023, 171 App.Div. 366, reversed on other grounds 125 N.E. 438, 227 N.Y. 248—Matter of Ticonderoga Union Terminal R. Co., 101 N.Y.S. 107, 116 App.Div. 56.

95. N.Y.—People v. State R. Comrs., 108 N.Y.S. 288, 124 App.Div. 47, affirmed 85 N.E. 1114, 192 N.Y. 573.

96. N.Y.—People v. State R. Comrs., 110 N.Y.S. 862, 126 App.Div. 492, followed in People v. State R. Comrs., 110 N.Y.S. 866, 126 App. Div. 938.

97. N.Y.—People v. Public Service Commission, 106 N.Y.S. 968, 122 App.Div. 283, affirmed 88 N.E. 261, 195 N.Y. 157.

98. N.Y.—People v. Railroad Comrs., 91 N.Y.S. 977, 101 App.Div. 251, 15 N.Y.Ann.Cas. 452, affirmed 76 N.E. 1103, 184 N.Y. 563.

99. Ohio.—Erie R. Co. v. Public Utilities Commission of Ohio, 177 N.E. 766, 123 Ohio St. 682.

1. U.S.—Pennsylvania R. Co. v. U.S., D.C.Pa., 40 F.2d 921.

2. U.S.—Pennsylvania R. Co. v. U.S., supra.

3. U.S.—Pennsylvania R. Co. v. U.S., supra.

4. U.S.—People v. Second Dist. Public Service Commission, 112 N.Y.S. 133, 127 App.Div. 480, modified on other grounds 87 N.E. 1125, 194 N.Y. 543.

51 C.J. p. 414 note 79.

5. N.Y.—People v. Second Dist. Public Service Commission, supra.

6. N.Y.—In re Frontier, etc., R. Co., 139 N.Y.S. 627, 155 App.Div. 57, appeal denied 141 N.Y.S. 1120, 156 App.Div. 926.

7. N.Y.—People v. Railroad Comrs., 38 N.Y.S. 528, 861, 4 App.Div. 259.

8. N.Y.—People v. Railroad Comrs.,

and, where the company to which a certificate has been granted fails or neglects to proceed with construction within the proper time, such delay is sufficient to authorize the commission to ignore any claim by it to protection against a subsequent applicant for a similar certificate.[9]

Review of decision. The decision of a railroad commission as to whether a proposed road is necessary may be reviewed on certiorari,[10] or by a special proceeding provided for by statute;[11] but the decision will not be reversed unless it clearly appears to have been based on erroneous legal principles or is contrary to the clear weight of evidence.[12]

Effect of failure to obtain certificate. Under the provisions of the federal statute requiring approval of the proposed construction or operation of certain railroad lines by the interstate commerce commission, any such construction or operation without obtaining the requisite certificate of necessity or convenience may be enjoined at the suit of the United States, the interstate commerce commission, or any party in interest.[13] By the term "party in interest" is meant one who has some special or peculiar interest which may be directly and materially affected by the alleged unlawful action;[14] and such a suit cannot be instituted by an individual unless he possesses something more than a common concern for obedience to the law, since the general or common interest finds protection in the permission to sue granted to public authorities.[15]

II. ORGANIZATION, EXISTENCE, AND FUNCTIONS OF RAILROAD COMPANIES

A. DOMESTIC COMPANIES

§ 7. In General

The right of a railroad company to corporate existence is derived from legislative enactment, and under the laws prevailing in different jurisdictions a railroad may be incorporated either by special act or under general law.

In accordance with principles governing corporations generally, discussed in Corporations § 23, the right of a railroad company to corporate existence can be derived only from a legislative enactment.[16] Such right of corporate existence cannot be divided up and made applicable to the different divisions of the railroad.[17] Corporations organized under statutes relating to railroads cannot escape the obligations imposed by law on railroad corporations,[18] and the duties and obligations imposed on such corporations, as found in the great mass of constitutional and statutory laws on the subject, are in effect written into the charter by operation of law.[19]

Special charter. In the absence of any constitutional provision to the contrary, a railroad corporation may be created by a special act or charter;[20] and a constitutional amendment prohibiting incorporation by special act does not affect a company created, prior to its adoption, by special charter;[21] nor does it apply to a subsequent amendment of the corporate charter by special act where the original charter was granted before adoption of the constitutional amendment;[22] nor, it has been held, does it deprive the legislature of power to amend by special act a special charter previously granted.[23]

81 N.Y.S. 26, 81 App.Div. 237, affirmed 68 N.E. 1123, 176 N.Y. 577.
51 C.J. p 415 note 83.

9. N.Y.—People v. Aldrich, 110 N.Y. S. 820, 126 App.Div. 484, affirmed 89 N.E. 1109, 195 N.Y. 574.

10. N.Y.—People v. Second Dist. Public Service Commission, 88 N. E. 261, 195 N.Y. 157.
51 C.J. p 415 note 85.

11. N.Y.—Matter of Rochester, etc., Tract. Co., 102 N.Y.S. 1112, 118 App.Div. 521, appeal dismissed 81 N.E. 1174, 189 N.Y. 522.
51 C.J. p 415 note 86.

12. U.S.—Pennsylvania R. Co. v. U. S., D.C.Pa., 40 F.2d 921.
51 C.J. p 415 note 87.

13. U.S.—Powell v. U. S., Ga., 57 S. Ct. 470, 300 U.S. 276, 81 L.Ed. 643.

14. U.S.—L. Singer & Sons v. Union Pac. R. Co., Mo., 61 S.Ct. 254, 311 U.S. 295, 85 L.Ed. 198.

15. U.S.—L. Singer & Sons v. Union Pac. R. Co., supra.

16. Tenn.—Collier v. Union R. Co., 83 S.W. 155, 113 Tenn. 96.
51 C.J. p 415 note 94.

Corporations to furnish local transportation

(1) Statute authorizing organization of corporations to furnish local transportation were held not illegally discriminatory against, or in favor of, steam or electric trunk line railroads.—People v. City of Chicago, 132 N.E. 419, 349 Ill. 304.

(2) In using word "railroad," the statute was held not impliedly to amend any other act.—People v. City of Chicago, supra.

(3) Section of statute prohibiting organization of railroad corporations thereunder, expressly excepting corporations to be organized under another section providing for corporations to furnish local transportation, was held not inconsistent.—People v. City of Chicago, supra.

17. La.—State v. Morgan, 28 La. Ann. 482.

18. Miss.—Robinson Land & Lumber Co. of Alabama v. Avera & N. O. R. Co., 128 So. 738, 157 Miss. 700.

19. Miss.—Robinson Land & Lumber Co. of Alabama v. Avera & N. O. R. Co., supra.

20. Ark.—Little Rock, etc., R. Co. v. Little Rock, etc., R. Co., 36 Ark. 662.
Tex.—Quinlan v. Houston, etc., R. Co., 34 S.W. 738, 89 Tex. 356.

21. Me.—Farnsworth v. Lime Rock R. Co., 22 A. 373, 83 Me. 440.
51 C.J. p 415 note 97.

22. Me.—Farnsworth v. Lime Rock R. Co., supra.

23. Mo.—St. Joseph, etc., R. Co. v.

General laws. Under a number of the statutes, a railroad company may be incorporated under general laws,[24] and, under some constitutions or amendments thereof, can be created only under the general laws, and not by special statute.[25] When a railroad company is organized under the general law, its articles of incorporation, together with the statutes applicable thereto, constitute the charter of the corporation,[26] but the mere repeal of a general railroad law does not affect or destroy the continued existence of a company previously incorporated thereunder.[27] While general laws are to be liberally construed,[28] a general statute for the incorporation of railroad companies does not authorize the incorporation of such company for private purposes, but only where it is for the public good.[29] A company incorporated under such a statute will be deemed an ordinary commercial railroad company,[30] as distinguished from either a street railroad company[31] or a narrow-gauge railroad company.[32] A statute authorizing a municipality or other corporation to subscribe for stock in a railroad corporation to be organized under the general law does not constitute a special act granting a charter to such railroad company or amending its charter;[33] nor does an express enactment subjecting railroad companies organized under special charters to the provisions of the general laws constitute a special amendatory act.[34]

Charter as contract. The corporate charter granted a railroad is in effect a contract between it and the state,[35] as well as between the corporation and its stockholders,[36] between the stockholders and the state,[37] and between the stockholders inter sese.[38]

§ 8. Incorporation and Existence

In order to create a railroad corporation de jure, there should be a substantial compliance with all statutory requirements, but irregularities in its organization will not preclude a railroad from becoming a corporation de facto.

Under the laws governing the organization of corporations generally, discussed in Corporations § 23 et seq, in order to create a railroad corporation de jure there must be at least a substantial compliance with all conditions precedent prescribed by statute,[39] including provisions as to the minimum number of persons who may unite to form the corporation;[40] and the courts have no power to dispense with statutory requirements or to supply statutory essentials, whatever may be the benefit, convenience, or necessity of so doing,[41] since what the statute requires to be done in order to complete the organization of a railroad corporation as a body politic is mandatory and essential, and without compliance therewith the charter is void and the incorporation is incomplete.[42]

Defects or irregularities in the organization of a railroad corporation are not, however, necessarily fatal to its existence,[43] and notwithstanding such defects it may be at least a corporation de facto.[44] Such irregularities or defects are cured by a subsequent legislative enactment recognizing or authorizing the company's existence as a corporation.[45]

Corporators. Unless otherwise provided by law, it is not necessary that the corporators of a railroad company shall be residents of, and dwellers in, the state of incorporation.[46] There is nothing to prevent officers and employees of one railroad com-

Shambaugh, 17 S.W. 581, 106 Mo 557.

24. Ga.—Bridwell v. Gate City Terminal Co., 56 S.E. 624, 127 Ga. 520, 10 L.R.A.,N.S., 909
51 C.J. p. 416 note 1.

25. Wis.—Attorney General v. Chicago, etc., R. Co., 35 Wis. 425
51 C.J. p. 416 note 3.

26. U.S.—Chicago, etc., R. Co. v. Cutts, State of Iowa, Iowa, 94 U.S. 155, 24 L.Ed. 94
Ky.—Bentler v. Cincinnati, etc., R. Co., 203 S.W. 199, 180 Ky. 497.

27. Conn.—New York, etc., R. Co. v. Motil, 71 A. 563, 81 Conn. 466.

28. Md.—Union R. Co. v. Canton R. Co., 65 A. 409, 105 Md. 12.

29. Pa.—In re Pittsburg Transfer R. Co., 1 Pa. Co. 411.
51 C.J. p. 416 note 8.

30. Ill.—Schlauder v. Chicago, etc., Tract. Co., 97 N.E. 238, 253 Ill. 154.

31. Ill.—Bradley Mfg. Co. v. Chicago, etc., Tract. Co., 82 N.E. 210, 229 Ill. 170.

32. Pa.—Pittsburg, etc., R. Co. v. Keating, etc., R. Co., 81 A. 935, 233 Pa. 71
51 C.J. p. 416 note 11.

33. N.Y.—People v. Mealy, 120 N.E. 155, 224 N.Y. 187

34. Wis.—State v. Northern Pac. R. Co., 147 N.W. 219, 157 Wis. 73.

35. Ga.—South Western R. Co. v. Benton, 58 S.E.2d 905, 206 Ga. 770, certiorari denied 71 S.Ct. 44, 340 U.S. 815, 95 L.Ed. —
51 C.J. p. 416 note 5.

36. Ga.—South Western R. Co. v. Benton, supra.

37. Ga.—South Western R. Co. v. Benton, supra.

38. Ga.—South Western R. Co. v. Benton, supra.

39. Mo.—St. Joseph, etc., R. Co. v. Shambaugh, 17 S.W. 581, 106 Mo 557
51 C.J. p. 416 note 17.

40. N.Y.—People v. State R. Comrs., 93 N.Y.S. 584, 105 App. Div. 273.
51 C.J. p. 416 note 18

41. Tenn.—Collier v. Union R. Co., 83 S.W. 155, 113 Tenn. 96.

42. Tenn.—Collier v. Union R. Co., supra

43. Pa.—Commonwealth v. Central Pass. R. Co., 52 Pa. 506

44. N.Y.—In re New York, etc., R. Co., 35 N.E. 1014, 193 N.Y. 72.
51 C.J. p. 416 note 22.

45. Ill.—McCartney v. Chicago, etc., R. Co., 112 Ill. 611.
51 C.J. p. 416 note 23.

46. N.J.—New Jersey Cent. R. Co. v. Pennsylvania R. Co., 31 N.J.Eq. 475, reversed on other grounds 32 N.J.Eq. 755
Personal liability of promoter on contracts to furnish or procure right of way see infra § 77.

pany from organizing another if they act in good faith, even though the organization of the new company is for the benefit of the older one.[47]

Approval of Interstate Commerce Commission has been held not essential to the valid incorporation of a railroad company although it is to be engaged in interstate commerce.[48]

Conditions subsequent. A failure to comply with a condition subsequent in a statute incorporating or authorizing the incorporation of a railroad company does not affect the validity of its organization or its existence,[49] although it may subject the franchises of the corporation to forfeiture at the instance of the state, as discussed infra § 18.

Reincorporation. Where a railroad company is reincorporated after having been dissolved because of a defective organization, it is subject to the laws in effect at the time of reincorporation and must comply therewith as in the case of a new company.[50]

Collateral attack. The valid corporate existence of a railroad company may not be collaterally attacked.[51]

§ 9. —— Subscription to, and Payment of, Portion of Stock

Under some provisions of law it is a prerequisite to the organization of a railroad corporation that shares of stock to a certain amount shall be subscribed and paid for.

Under constitutions, statutes, or charters providing therefor, it is a prerequisite to the valid organization of a railroad company that shares to a certain amount shall be subscribed,[52] and that a certain portion or per cent of such subscription shall be paid.[53] It is not necessary, under such provisions, that the required per cent be paid on each subscription at the time of making it or previous to the filing of the articles of association, but it is sufficient if the cash payments, by whomsoever made, amount in the aggregate to a sum equal to the required per cent of the required capital stock.[54] Subscriptions, within the meaning of such provisions, must be unconditional;[55] and conditional subscriptions made before organization cannot be considered in determining whether the requisite amount of stock has been subscribed to authorize the organization.[56] Under statutes requiring payment to be made in cash, a check drawn in good faith against a sufficient fund in a solvent bank is ordinarily held to be sufficient,[57] as is a deposit of the required amount in a solvent bank, to the credit of the company and subject to its checks.[58]

§ 10. —— Certificate or Articles of Incorporation

a. In general
b. Specification of termini

a. In General

The corporators should effect a substantial compliance with all statutory provisions governing the certificate or articles of incorporation, as with respect to its execution, form and contents, and the filing thereof.

The corporators of a railroad company should comply substantially with statutory provisions relative to the execution of its certificate or articles of incorporation[59] and the acknowledgment thereof,[60] and should attach thereto such supporting affidavits as may be required.[61] Statutes providing that failure to attach the requisite supporting affidavits may subsequently be remedied by filing a curative affidavit are intended to provide a remedy for the defect so as to preserve the rights of stockholders.[62]

Form and contents. Where the form of the certificate or articles of incorporation of a railroad company is prescribed by statute, it must be followed.[63] There should be a substantial compliance with statutory provisions requiring the certificate or articles to specify the object and purposes of the

47. Ohio—Chesapeake, etc., R. Co. v. Barger, 10 Ohio App. 443.

48. Ohio.—New York, etc., R. Co. v. Black, 26 Ohio N.P.,N.S., 375.

49. S.C.—Cheraw, etc., R. Co. v. White, 14 S.C. 51.
51 C.J. p 417 note 27.

50. N.Y.—In re New York, etc., R. Co., 85 N.E. 1014, 193 N.Y. 72.

51. Pa.—Pittsburg, etc., R. Co. v. Keating, etc., R. Co., 81 A. 935, 233 Pa. 71.
51 C.J. p 417 note 31.

52. N.C.—Kinston, etc., R. Co. v. Stroud, 43 S.E. 913, 132 N.C. 413.
51 C.J. p 417 note 35.

53. N.C.—Kinston, etc., R. Co. v. Stroud, supra.
51 C.J. p 417 note 36.

54. N.Y.—Lake Ontario, etc., R. Co. v. Mason, 16 N.Y. 451.
51 C.J. p 417 note 40.

55. Or.—Fairview R. Co. v. Spillman, 32 P. 683, 23 Or. 587.

56. Or.—Fairview R. Co. v. Spillman, supra.

57. Cal.—People v. Stockton, etc., R. Co., 45 Cal. 306, 13 Am.R. 178.
N.Y.—In re Staten Island Rapid Transit R. Co., 37 Hun 422, affirmed 101 N.Y. 686.

58. N.Y.—Matter of Wood, 91 N.Y.S. 225, 99 App.Div. 334, affirmed 73 N.E. 561, 181 N.Y. 93, 34 N.Y. Civ.Proc. 137.

59. U.S.—Griffin v. Clinton Line Extension R. Co., C.C.Ohio, 11 F.Cas. No.5,816.
51 C.J. p 418 note 47.

60. N.Y.—People v. Railroad Comrs., 77 N.Y.S. 380, 75 App.Div. 106.
51 C.J. p 418 note 48.

61. Cal.—People v. Stockton, etc., R. Co., 45 Cal. 306, 13 Am.R. 178.
51 C.J. p 418 note 50.

62. N.Y.—In re New York, etc., R. Co., 85 N.E. 1014, 193 N.Y. 72.

63. Tenn.—Collier v. Union R. Co., 83 S.W. 155, 113 Tenn. 96.

company,[64] the length of the road,[65] the name assumed by the company and by which it is to be known,[66] its principal place of business,[67] the names of the directors,[68] and other matters required to be shown.[69] Although the certificate or articles are defective, they may be sufficient to constitute the company a corporation de facto.[70] Matters not required by statute to be stated need not be set forth in the certificate or articles,[71] and provisions thereof as to such matters may be treated as surplusage.[72]

Filing. The corporators of a railroad company should comply substantially with statutory requirements as to the filing or registration of its certificate or articles of incorporation.[73] The filing of the articles of incorporation or association is, however, no part of such articles, but is a fact separate from, and independent of, them.[74] An indorsement of filing is not itself the filing,[75] but is at most prima facie evidence of the time of filing,[76] as to which parol evidence is also admissible.[77]

Amendments to a certificate or articles of incorporation must comply with statutory provisions relative thereto.[78] If a place which should be named as on the route of a railroad is omitted, such omission may be cured by amendment of the charter,[79] although an amendment attempting to effect a change in the proposed route and terminus of a railroad is insufficient where a certificate of change and a map and survey have not been filed as required by statute;[80] and no such change can be made by amendment under a statute providing merely for the cure of informalities or defects in the original articles or certificate.[81]

b. Specification of Termini

In the absence of statute so requiring, the charter of a railroad need not name its termini; but where statute so requires it should do so, with at least reasonable certainty.

In the absence of statute requiring it, the charter or articles of incorporation of a railroad company need not state the termini of the railroad proposed to be constructed or operated by the corporation.[82] Where, however, it is provided by statute that the termini shall be designated or described therein, there should be a substantial compliance with such requirement.[83] On the other hand, the purpose of providing for such designation is only to indicate the general location and direction of the railroad,[84] and so it has been said that great latitude should be allowed in naming the termini,[85] and that a statute requiring them to be designated should be liberally construed.[86] Accordingly, it is necessary to designate the termini only with reasonable certainty.[87] The designation of a particular town or city as a terminus is sufficient, without a more specific statement of the exact place of beginning or ending of the road;[88] but unless otherwise provided by statute it is not necessary that a city or town be named as a terminus,[89] and the designation of any point sufficiently described to be readily ascertain-

64. Mich.—Bay City Belt-Line R. Co. v. Hitchcock, 51 N.W. 808, 90 Mich. 533.

65. N.C.—Kinston, etc., R. Co. v. Stroud, 43 S.E. 913, 132 N.C. 413.
51 C.J. p. 418 note 55.

66. Ohio.—Atlantic, etc., R. Co. v. Sullivant, 5 Ohio St. 276.

67. U.S.—Canon City, etc., R. Co. v. Denver, etc., R. Co., C.C.Colo., 5 F. Cas.No.2,387, reversed on other grounds 99 U.S. 463, 25 L.Ed. 438.

68. Ind.—Eakright v. Logansport, etc., R. Co., 13 Ind. 404.
51 C.J. p. 418 note 58.

69. Md.—Hyattsville v. Washington, etc., R. Co., 87 A. 828, 120 Md. 128.
51 C.J. p. 418 note 59.

70. N.Y.—Buffalo, etc., R. Co. v. Cary, 26 N.Y. 75.
Corporations de facto generally see Corporations §§ 93–107.

71. Pa.—Pittsburg, etc., R. Co. v. Keating, etc., R. Co., 81 A. 935, 233 Pa. 71.

72. Pa.—Pittsburg, etc., R. Co. v. Keating, etc., R. Co., supra.

73. N.C.—Kinston, etc., R. Co. v. Stroud, 43 S.E. 913, 132 N.C. 413.
Tenn.—Anderson v. Middle, etc., Cent. R. Co., 17 S.W. 803, 91 Tenn. 44.

74. Ind.—Johnson v. Crawfordsville, etc., R. Co., 11 Ind. 280.

75. Ind.—Johnson v. Crawfordsville, etc., R. Co., supra.

76. Ind.—Johnson v. Crawfordsville, etc., R. Co., supra.

77. Ind.—Johnson v. Crawfordsville, etc., R. Co., supra.

78. N.Y.—Matter of Riverhead, etc., R. Co., 55 N.Y.S. 938, 36 App.Div. 514.
Amendment of charter or franchise generally see infra § 18.

79. Md.—Hyattsville v. Washington, etc., R. Co., 87 A. 828, 120 Md. 128.

80. N.Y.—Matter of Riverhead, etc., R. Co., 55 N.Y.S. 938, 36 App.Div. 514.

81. N.Y.—Matter of Riverhead, etc., R. Co., supra.

82. Wis.—Milwaukee Light, etc., Co. v. Milwaukee Northern R. Co., 112 N.W. 663, 132 Wis. 313, followed in Milwaukee Light, etc., Co. v. Milwaukee-Northern R. Co., 112 N.W. 672, 132 Wis. 342.

83. Tenn.—Collier v. Union R. Co., 83 S.W. 155, 113 Tenn. 96.
51 C.J. p. 419 note 74.
Change of terminus by amendment see supra subdivision a of this section.

84. Md.—Union R. Co. v. Canton R. Co., 65 A. 409, 105 Md. 12.

85. Ill.—Alton, etc., R. Co. v. Vandalia R. Co., 111 N.E. 531, 271 Ill. 558.
51 C.J. p. 419 note 76.

86. Md.—Hyattsville v. Washington, etc., R. Co., 90 A. 515, 122 Md. 660.
51 C.J. p. 419 note 77.

87. Md.—Hyattsville v. Washington, etc., R. Co., 87 A. 828, 120 Md. 128.
51 C.J. p. 419 note 78.

88. N.Y.—New York, etc., R. Co. v. O'Brien, 106 N.Y.S. 909, 121 App. Div. 819, affirmed 85 N.E. 1113, 192 N.Y. 558.
51 C.J. p. 419 note 79.

89. Md.—Hyattsville v. Washington, etc., R. Co., 87 A. 828, 120 Md. 128.—Union R. Co. v. Canton R. Co., 65 A. 409, 105 Md. 12.

able is sufficient.[90] Where the designation of the termini indicates that the proposed railroad is for a private use rather than a public one, a charter should be refused.[91]

Railroad running to or from place outside the state. Under a statute requiring the termini of a proposed railroad to be specified in the charter or articles, termini within the state must be designated, in view of the legislature's lack of power to authorize construction or operation of a railroad outside the state.[92] Where the road is to extend through a state from or to points outside the state, it is sufficient to designate as termini the places where the road is to cross the state line,[93] but it is not necessary that the precise points be named as long as they are otherwise sufficiently described.[94] So the statute is complied with as designating as a terminus a point outside the state where it is so near the state line that the place where the road, passing to such terminus along the route indicated by the charter, would intersect the line may be ascertained with reasonable certainty;[95] and the designation of a city outside the state as a terminus is sufficient where a boundary of such city is coincident with the state line.[96]

Branch lines. A statute requiring the charter or articles to state the termini of the road has been held to apply only to the main line of the railroad,[97] and not to require the specification of termini of branch lines.[98]

Route. Unless otherwise provided by statute the charter or articles of a railroad company need not contain any description of the route of the proposed railroad except as the specification of the termini may be required,[99] although the route may be generally stated therein.[1] Under some statutes, however, the county or counties, city or cities, through which the railroad is to pass should be stated,[2] and it is sometimes required that the route of a railroad through a city or town shall be designated in order that the company may obtain proper permission to occupy the streets over which it is intended to build the road.[3] A statute requiring the charter to name the cities and towns through or near which the railroad is to run does not mean that every incorporated place through or past which the road is eventually laid out must be named,[4] since the object of such provision is merely to procure a description of the general location and direction of the proposed road;[5] and, in any event, if a place which should be named is omitted, the failure to name it may be cured by amendment of the charter, as discussed supra subdivision a of this section. A more definite designation of the route than is required by statute is mere surplusage and does not restrict the company to the route so designated.[6]

§ 11. —— Acceptance of Charter

Incorporation of a railroad formed by special charter is incomplete until acceptance of the charter by the corporators.

Where a railroad company is formed by a special charter, the incorporation is not complete until the charter is accepted by the corporators.[7] On due acceptance, however, of a special act vesting designated persons with corporate powers and declaring them to be a corporation, the corporation is created eo instante,[8] and acceptance of the charter is all that need be shown to prove corporate existence,[9] provided the grant of corporate capacity is not subject to any conditions precedent, as discussed supra § 10.

Mode and manner of acceptance. In the absence

90. Ill.—Alton, etc., R. Co. v. Vandalia R. Co., 111 N.E. 531, 271 Ill. 558.
51 C.J. p 419 note 81.

91. Pa.—In re Pittsburg Transfer R. Co., 1 Pa.Co. 411.
51 C.J. p 419 note 82.

92. Md.—Hyattsville v. Washington, etc., R. Co., 87 A. 828, 120 Md. 128.

93. Md.—Hyattsville v. Washington, etc., R. Co., 87 A. 828, 120 Md. 128.

94. Md.—Hyattsville v. Washington, etc., R. Co., 87 A. 828, 120 Md. 128.

95. Md.—Hyattsville v. Washington, etc., R. Co., 87 A. 828, 120 Md. 128.
51 C.J. p 419 note 86.

96. Md.—Hyattsville v. Washington, etc., R. Co., 87 A. 828, 120 Md. 128.

97. Neb.—Trester v. Missouri Pac. R. Co., 49 N.W. 1110, 33 Neb. 171.

98. Neb.—Trester v. Missouri Pac. R. Co., supra.

99. N.Y.—People v. Second Dist. Public Service Commission, 156 N.Y.S. 1023, 171 App.Div. 366, reversed on other grounds 125 N.E. 438, 227 N.Y. 248.
Tenn.—Collier v. Union R. Co., 83 S.W. 155, 113 Tenn. 96.
51 C.J. p 419 note 90.

1. Tenn.—Collier v. Union R. Co., supra.

2. Md.—Piedmont, etc., R. Co. v. Speelman, 10 A. 77, 293, 67 Md. 260.
51 C.J. p 420 note 92.

3. Tenn.—Collier v. Union R. Co., 83 S.W. 155, 113 Tenn. 96.

4. Md.—Hyattsville v. Washington, etc., R. Co., 87 A. 828, 120 Md. 128.

5. Md.—Hyattsville v. Washington, etc., R. Co., 87 A. 828, 120 Md. 128.

6. Ohio.—Hayes v. Toledo R., etc., Co., 6 Ohio Cir.Ct.,N.S., 281, 26 Ohio Cir.Ct. 395, affirmed 72 N.E. 1165, 70 Ohio St. 425.
51 C.J. p 420 note 98.

7. Tex.—Quinlan v. Houston, etc., R. Co., 34 S.W. 738, 89 Tex. 356.
51 C.J. p 420 note 2.

8. Ark.—Little Rock, etc., R. Co. v. Little Rock, etc., R. Co., 36 Ark. 663.

9. Mo.—Roosa v. St. Joseph, etc., R. Co., 21 S.W. 1124, 114 Mo. 568—St. Joseph, etc., R. Co. v. Shambaugh, 17 S.W. 581, 106 Mo. 557.

of any provision requiring it, the acceptance of a charter in any formal manner is not necessary[10] Acceptance may be implied from the circumstances,[11] as where the act creating the corporation was passed at the request of the directors designated in the charter.[12] Acceptance may also be implied from acts done in apparent reliance on the charter,[13] such as the organization of the company pursuant to its provisions,[14] the exercise of corporate powers,[15] the construction and operation by the company of a part of its railroad,[16] the subsequent obtainment of an amendment to the charter,[17] or other unequivocal acts,[18] even though performed outside the territorial limits of the state by which the charter was granted.[19] Without an organization of the corporation under the charter there can be no acceptance.[20]

Conditions or restrictions. As a general rule, when a charter is granted, whether it is one of creation, or an amendment to a preexisting charter, it must either be accepted or rejected as offered and without condition.[21] Acceptance of the privileges conferred by the charter constitutes a submission to the restrictions and reservations accompanying the grant,[22] and to all conditions imposed thereby,[23] and carries with it as well an assumption of all the duties and obligations imposed by general law except as modified by the special charter.[24]

§ 12. —— Organization Fee or Tax

Statutes imposing organization taxes on all corporations without specification of railroad corporations have been held nevertheless applicable to the latter, but, where general statutes and statutes specifically covering railroads coexist, the general statutes may be held inapplicable to railroads

Statutes imposing on corporations organizing in the state an organization fee or tax measured ordinarily by a specified per cent of the authorized capital of the company, and in terms applicable to every corporation organized and doing business under the laws of the state, are applicable to railroad corporations, even though railroads are not specifically referred to therein, unless the contrary intention appears,[25] but, where there are coexisting general statutes and statutes specifically applicable to railroads, the general statutes may be held inapplicable[26] Unless otherwise provided by statute, however, failure to pay an organization tax does not prevent the company from being a corporation,[27] although it may be prohibited from carrying on its business until the tax has been paid, as discussed infra § 27. Under such a statute a railroad company formed by the consolidation of two or more others is subject to the tax even though the consolidating companies had paid taxes on their original organization,[28] and where the property and franchises of a railroad company are sold under foreclosure and a new company formed it is liable for the tax;[29] but the statute has no application where there is merely a purchase of the property and franchises of one railroad company by another.[30] The mere extension of a charter has been held not to constitute the incorporation of a new company so as to require payment of the fees prescribed for incorporation,[31] but, where a statute so provides, the tax is payable on an extension of the charter.[32]

10. Tex.—Quinlan v. Houston, etc., R. Co., 34 S.W. 738, 89 Tex. 356.

11. Me.—Farnsworth v. Lime Rock R. Co., 22 A. 373, 83 Me. 440—Bangor, etc., R. Co. v. Smith, 47 Me. 34.

12. Mo.—St. Joseph, etc., R. Co. v. Shambaugh, 17 S.W. 581, 106 Mo. 557.

13. Mo.—St. Joseph, etc., R. Co. v. Shambaugh, supra.

14. N.C.—Seaboard Air Line R. Co. v. Olive, 55 S.E. 263, 142 N.C. 257.
51 C.J. p. 420 note 10.

15. Md.—Lyons v. Orange, etc., R. Co., 32 Md. 18.
Mo.—St. Joseph, etc., R. Co. v. Shambaugh, 17 S.W. 581, 106 Mo. 557.

16. Mo.—St. Joseph, etc., R. Co. v. Shambaugh, supra.

17. Me.—Farnsworth v. Lime Rock R. Co., 22 A. 373, 83 Me. 440.

18. Md.—Lyons v. Orange, etc., R. Co., 32 Md. 18.

19. Mo.—Ohio, etc., R. Co. v. McPherson, 35 Mo. 13, 86 Am.D. 128.

20. Tex.—Quinlan v. Houston, etc., R. Co., 34 S.W. 738, 89 Tex. 356.

21. Md.—Lyons v. Orange, etc., R. Co., 32 Md. 18.

22. N.Y.—People v. State Tax Commission, 159 N.E. 703, 247 N.Y. 9.

23. Md.—Lyons v. Orange, etc., R. Co., 32 Md. 18.

24. Ind.—Cincinnati, etc., R. Co. v. Connersville, 83 N.E. 503, 170 Ind. 316, affirmed 31 S.Ct. 93, 218 U.S. 336, 54 L.Ed. 1060.

25. Wis.—State v. Northern Pac. R. Co., 147 N.W. 219, 157 Wis. 73.

26. Ill.—Chicago, B. & Q. R. Co. v. Doyle, 102 N.E. 260, 258 Ill. 624, Ann.Cas.1914B 385.

Fee on renewal of charter

Statute requiring corporations, on renewal of their charters, to pay the fees required of new corporations, does not apply to a railroad company renewing its charter under the provisions of a statute which contains no provision as to the payment of fees.—Chicago, B. & Q. R. Co. v. Doyle, supra.

27. N.Y.—Muehlenbeck v. Babylon, etc., R. Co., 55 N.Y.S. 1023, 26 Misc. 136.

28. Mo.—State v. Lesueur, 46 S.W. 1075, 145 Mo. 322.
51 C.J. p. 420 note 25.

29. N.Y.—People v. Cook, 18 N.E. 113, 110 N.Y. 443, affirmed 13 S.Ct. 645, 148 U.S. 397, 37 L.Ed. 498, 14 S.Ct. 1150, 154 U.S. 512, 38 L.Ed. 1073.
51 C.J. p. 421 note 26.

30. N.H.—In re Opinion of Justices, 23 A. 620, 65 N.H. 673.

31. Ill.—Chicago, etc., R. Co. v. Doyle, 102 N.E. 260, 258 Ill. 624, Ann.Cas.1914B 385.

32. Tex.—Flowers v. Pecos River R. Co., 156 S.W.2d 260, 138 Tex. 18.

Construction and operation of statutes

Business corporations act which required public utilities to pay same fees as other corporations, but which

Where the statute exempts from payment of an incorporation tax a railroad which has built a railway into or through the state, the secretary of state may not refuse to renew the license of such a railroad on the ground that the statute is unconstitutional, since his duties are purely ministerial.[33]

License fees or privilege taxes imposed on railroads are discussed infra § 27.

Amendment tax. Under a statute providing that, on the filing by a railroad company of an amendment to its charter, it shall pay a tax based on its authorized capital, a company filing an amendment not increasing its capital stock is not subject to such tax;[34] and, where by amendment the capital stock is increased, the tax is required to be paid on the increase only, and not on the original capital.[35]

§ 13. Capital and Stock

a. In general
b. Issuance and distribution

a. In General

The general rules governing questions as to the capital, stock, and stockholders of corporations ordinarily control in respect of such questions when arising in connection with railroad companies.

Except as modified by special constitutional or statutory provisions relating to railroad companies, the general rules governing the capital stock and stockholders of corporations, discussed in Corporations §§ 192-714, control in respect of such matters when arising in connection with railroad companies,[36] as in the case of questions as to dividends.[37]

Increase of capital stock. In the exercise of its broad power to regulate railroad companies, the legislature has authority to enact statutes regulating the increase of their capital stock and prescribing the purposes for which and the conditions on which such an increase may be made,[38] in order to prevent secrecy of operation and accounts and the issuance of fictitious or watered stock.[39] Where such a statute exists, the capital stock of a railroad company may be increased only in the manner and on the conditions thereby prescribed;[40] and such a provision is a restriction on a general statute permitting corporations by their by-laws to fix the amount of capital stock.[41] Under a statute providing for increases of stock only with the consent of a majority of the stockholders, no distinction is to be made between holders of common and preferred stock, for such purpose,[42] and the stock may be increased with the consent of the majority, without regard to the character of their stock.[43] A statute prohibiting the issuance of preferred stock without the consent of all the stockholders does not prevent a railroad company which has issued preferred stock from increasing it in the manner provided by statute without such consent.[44] Where two or more statutes relating to increases of capital stock each provide complete modes thereof, they will not be regarded as in conflict,[45] and they should be construed as provid-

contained certain exceptions relating to railroads, did not repeal provisions of railroads act relating to payment of fees for extending corporate duration of railroad and general corporations act and railroads act remained independent statutes.—Peoria & E. Ry. Co. v. Wright, 37 N.E.2d 322, 377 Ill. 626.

33. Mo.—State ex rel. Chicago, R. I. & P. Ry. Co. v. Becker, 41 S.W. 2d 188, 328 Mo 541.

34. Tex.—St. Louis South Western R. Co. v. Tod, 64 S.W. 778, 94 Tex. 632.

35. Tex.—St. Louis South Western R. Co. v. Tod, supra.

36. U.S.—Kell v. Gross, C.A.Tex., 171 F.2d 715, certiorari denied 70 S.Ct. 55, 338 U.S. 815, 94 L.Ed. 493.
N.H.—Hackett v. Boston & Maine R. R., 67 A.2d 340, 95 N.H. 511.
Subscriptions to stock; rights and liabilities of stockholders, see infra § 14.

Purchase of entire capital stock
Where writing was deliberately adopted by all parties as expression of their contract for purchase of entire capital stock of railway company, all previous negotiations were merged into it and each party must be held to its provisions.—Kell v. Gross, C.A.Tex., 171 F.2d 715, certiorari denied 70 S.Ct. 55, 338 U.S. 815, 94 L.Ed. 493.

Sale of corporate property, valuation of stock
N.H.—Hackett v. Boston & Maine R. R., 67 A.2d 340, 95 N.H. 511.

37. U.S.—Guttmann v. Illinois Cent. R. Co., D.C.N.Y., 91 F.Supp. 285.
Wis.—Bilichik v. Green Bay & W. R. Co., 26 N.W.2d 633, 250 Wis. 177, certiorari denied 68 S.Ct. 216, 332 U.S. 835, 92 L.Ed. 408.

Discretion of directors to withhold
Board of directors of railroad company, in exercise of sound business judgment could withhold declaration of dividends on noncumulative preferred stock during certain years despite existence of net income in each of years in question in excess of amount which would have been required to pay such dividends.—Guttmann v. Illinois Cent. R. Co., D.C.N.Y., 91 F.Supp. 285, applying Illinois law.

Source
Directors of railroad corporation have duty to pay dividends only from net earnings after necessary expenses are paid except as dividends may be paid out of accumulated surplus.—Bilichik v. Green Bay & W. R. Co., 26 N.W.2d 633, 250 Wis. 177, certiorari denied 68 S.Ct. 216, 332 U.S. 835, 92 L.Ed. 408.

38. Minn.—State v. Great Northern R. Co., 111 N.W. 289, 100 Minn. 445, 10 L.R.A.,N.S., 260.

39. Minn.—State v. Great Northern R. Co., supra.

40. Pa.—Chartiers Connecting R. Co., 1 Pa.Co. 270.

41. Tenn.—Union R. Co. v. Sneed, 41 S.W. 364, 47 S.W. 89, 99 Tenn. 1.

42. U.S.—Pollitz v. Wabash R. Co., C.C.N.Y., 167 F. 145, reversed on other grounds 176 F. 335, 100 C.C.A. 1, certiorari denied 31 S.Ct. 226, 218 U.S. 677, 54 L.Ed. 1206.

43. U.S.—Pollitz v. Wabash R. Co., supra.

44. U.S.—Pollitz v. Wabash R. Co., supra.

45. Ind.—Jackson v. Pittsburgh, etc., R. Co., 139 N.E. 320, 193 Ind. 157.

ing different manners of increase of the capital stock.[46]

A statute requiring public utilities to pay specified fees for increases of their stock is applicable to railroad companies.[47]

Redemption of stock. Where stock of a railroad corporation is issued on the condition that it may be redeemed by the company, the exercise of the right to redeem is not subject to a general statutory provision permitting corporations to reduce their stock only with the consent of a majority of the stockholders,[48] and redemption may be made by the directors of the company as a corporate act.[49] A redemption of stock does not constitute a violation of a statute prohibiting corporations from purchasing their own stock.[50]

Expenditure of capital on railroad. Under some statutory provisions a railroad company is required to expend a certain per cent of its capital on the road within a specified time,[51] but a failure to make such expenditure within the required time may not be asserted collaterally.[52] Such a provision has been held to apply to a railroad company formed by the consolidation of others.[53]

b. Issuance and Distribution

Stock should be issued in proportion to the respective interests of the recipients. Generally speaking, provisions forbidding stock of railroads to be issued for anything other than money, labor, or property do not require that the consideration received should be of equal market value with the stock issued.

In accordance with the rules applicable to corporations generally, discussed in Corporations §§ 196–209, stock of a railroad company is properly issued and distributed to the persons concerned in the proportions of their respective interests.[54] Where receipts for payments made are surrendered and stock certificates accepted in exchange for the principal amount thereof, no right exists to demand additional stock to the amount of the interest accrued on such payments.[55]

Consideration. Constitutional or statutory provisions prohibiting railroad companies from issuing capital stock except for money, labor, or property, and declaring fictitious issues of stock invalid, do not require that the money, labor, or property received shall be of equal value in the market with the stock issued therefor,[56] and in the absence of fraud the validity of the stock issued does not depend on the question of such equality,[57] although an exchange of new stock for stocks or bonds of lesser value is invalid.[58] Under such a provision stock may be issued in exchange for outstanding bonds of the company,[59] but an issue of paid-up stock as a bonus to purchasers or underwriters of bonds of the company is invalid.[60] Notes secured by trust deeds conveying land may legally be accepted in payment for stock under such a provision.[61] Under a statute requiring lands taken in exchange for stock to be sold, the question of a reasonable time for such sale is one of fact.[62] Stock issued for a consideration other than that permitted by law is void.[63]

Exchange of common for preferred stock. A provision in the articles of incorporation of a railroad company for the exchange of common stock for preferred stock is not modified or avoided by a statute requiring the approval by a public utility commission of every stock issue,[64] but the obligation is imposed on the company to use due diligence to

46. Ind.—Jackson v. Pittsburgh, etc., R. Co., supra.

47. Ill.—Chicago, etc., R. Co. v. Emmerson, 158 N.E. 857, 327 Ill. 574, 57 A.L.R. 664, certiorari denied 48 S.Ct. 562, 277 U.S. 601, 72 L.Ed. 1009.

48. U.S.—Mannington v. Hocking Valley R. Co., C.C.Ohio, 183 F. 133.

49. U.S.—Mannington v. Hocking Valley R. Co., supra.

50. Ill.—Venner v. Public Utilities Commission, 134 N.E. 17, 302 Ill. 232.

51. Ind.—Thornburgh v. Newcastle, etc., R. Co., 14 Ind. 499.
Utah.—Rio Grande Western R. Co. v. Telluride Power, etc., Co., 51 P. 136, 16 Utah 125, error dismissed 20 S.Ct. 245, 175 U.S. 639, 44 L.Ed. 305.

52. Ind.—Thornburgh v. Newcastle, etc., R. Co., 14 Ind. 499.

53. Utah.—Rio Grande Western R. Co. v. Telluride Power, etc., Co., 51 P. 136, 16 Utah 125, error dismissed 20 S.Ct. 245, 175 U.S. 639, 44 L.Ed. 305.

54. S.C.—Williams v. Bamberg, etc., R. Co., 121 S.E. 775, 128 S.C. 281.
Disposition of stock of railroad terminal companies see Corporations § 205.

55. Ky.—Louisville, etc., R. Co. v. Keyer, 7 Ky.Op. 50.

56. U.S.—Lake St. El. R. Co. v. Ziegler, Ill., 99 F. 114, 39 C.C.A. 431, certiorari denied 20 S.Ct. 1029, 177 U.S. 695, 44 L.Ed. 946.

57. U.S.—Lake St. El. R. Co. v. Ziegler, supra.

58. N.Y.—Pollitz v. Wabash R. Co., 152 N.Y.S. 803, 167 App.Div. 669, rehearing denied 154 N.Y.S. 1140, 170 App.Div. 903.

59. U.S.—Pollitz v. Wabash R. Co., C.C.N.Y., 167 F. 145, reversed on other grounds 176 F. 333, 100 C.C.A. 1, certiorari denied 31 S.Ct. 226, 218 U.S. 677, 54 L.Ed. 1206.
Mass.—Brown v. Boston, etc., R. Co., 124 N.E. 322, 233 Mass. 502.

60. Mich.—Union City Lumber Co. v. Traverse City, etc., R. Co., 136 N.W. 463, 170 Mich. 205.

61. Tex.—Lumpkin v. Brown, Com. App., 229 S.W. 498.
Wis.—Blunt v. Walker, 11 Wis. 334, 78 Am.D. 709.

62. Ind.—Tabor v. Cincinnati, etc., R. Co., 15 Ind. 459.

63. U.S.—Lake St. El. R. Co. v. Ziegler, Ill., 99 F. 114, 39 C.C.A. 431, certiorari denied 20 S.Ct. 1029, 177 U.S. 695, 44 L.Ed. 946.

64. U.S.—Marony v. Wheeling, etc., R. Co., D.C.N.Y., 33 F.2d 916.

obtain the approval of the commission of the issue of stock to be so given in exchange.[65]

§ 14. Subscriptions to Stock; Rights and Liabilities of Stockholders

a. Subscriptions
b. Rights and liabilities of stockholders

a. Subscriptions

(1) In general
(2) Conditional subscriptions

(1) In General

Liability for the price or value of railroad stock must be based on contract, express or implied. Under statutes requiring a certain portion of the stock subscription to be paid at the time of subscribing, no subscription is valid until the required payment has been made.

In general, any liability for the price or value of the stock of a railroad company must be founded on a valid contract, express or implied.[66] Ordinarily no formal acceptance of a subscription by the company is required,[67] and failure to reject a subscription renders the contract sufficiently mutual to be effective.[68] A contract with a railroad company to construct a railroad in return for an agreed amount of stock does not constitute a subscription for such stock so as to render the contractor liable for the par value thereof.[69] Where several subscribers sign the same subscription agreement by which each agrees to purchase the amount of railroad stock set opposite his name, the obligation of each subscriber is several and not joint.[70]

Validity. A subscription is not invalid or unenforceable because at the time it is made the issuance of stock subscribed for has not been approved by a state railroad commission or public utility commission, where required by law, provided such approval is subsequently given.[71] Where a subscription contract is not conditioned on construction or completion of the road, failure of the company or its inability to carry out its purpose does not release the subscribers;[72] and, in the absence of any fraud inducing it, a subscription is not rendered invalid by the fact that the stock subscribed for is valueless.[73]

Effect. Unless otherwise provided by statute, one who subscribes to the stock of a railroad company prior to its organization becomes liable therefor as soon as the company is organized.[74] A subscription creates a debt against the subscriber for any unpaid balance thereof,[75] and an assignment or transfer of the stock by him does not relieve him of such liability without the consent of the directors.[76] The breach of a subscription contract by either party renders him liable in damages to the other party.[77]

Delivery of certificates. Under a statute providing for the delivery of certificates of stock to subscribers when payment therefor has been fully made, a subscriber is not entitled to have delivery until he has paid the full amount of such subscription.[78]

Payment. Where the statute requires a specified portion of the amount of a subscription to the stock of a railroad company to be paid at the time of subscribing, no subscription is valid until the required portion has been paid,[79] and each subscription must be deemed provisional or conditional pending such payment;[80] but actual payment at any time made with intent to effectuate and complete the subscription is sufficient therefor.[81] Such a statute has been held to relate to subscriptions made after organization of the company as distinguished from those required as a condition to its valid organization.[82]

Interest on subscriptions. Under some statutes providing for the payment by railroad companies of interest on amounts paid for stock up to the time of making the first dividend, interest runs only from the time at which payment is made to the company.[83]

65. U.S.—Cheatham v. Wheeling, etc., R. Co., D.C.N.Y., 37 F.2d 593—Marony v. Wheeling, etc., R. Co., D.C.N.Y., 33 F.2d 916.

66. N.Y.—Bostwick v. Young, 103 N.Y.S. 607, 118 App.Div. 490, affirmed 87 N.E. 1115, 194 N.Y. 516.

67. Ind.—Smith v. Hollett, 34 Ind. 519.

68. Vt.—Connecticut, etc., R. Co. v. Bailey, 24 Vt. 465, 58 Am.D. 181.

69. N.Y.—Bostwick v. Young, 103 N.Y.S. 607, 118 App.Div. 490, affirmed 87 N.E. 1115, 194 N.Y. 516.

70. Ind.—Price v. Grand Rapids, etc., R. Co., 18 Ind. 137.

71. Mich.—Leelanau Transit Co. v. Houdek, 214 N.W. 142, 239 Mich. 101.

72. Ky.—McMillan v. Maysville, etc., R. Co., 15 B.Mon. 218, 61 Am. D. 181.

73. Wis.—Lynch v. Eastern, etc., R. Co., 15 N.W. 743, 825, 57 Wis. 430.

74. N.Y.—Lowville, etc., R. Co. v. Elliott, 101 N.Y.S. 328, 115 App. Div. 884, affirmed 89 N.E. 1104, 196 N.Y. 545.
51 C.J. p. 423 note 91.

75. Ohio.—Ewin v. Cincinnati, etc., R. Co., 2 Ohio Dec., Reprint, 198, 2 West L.Month. 41.
Pa.—Graff v. Pittsburgh, etc., R. Co., 31 Pa. 489.

76. Pa.—Graff v. Pittsburgh, etc., R. Co., supra.

77. Ind.—Scarce v. Indiana, etc., R. Co., 17 Ind. 193.

78. Mo.—Spurlock v. Missouri Pac. R. Co., 2 S.W. 219, 90 Mo. 199.
51 C.J. p. 423 note 96.

79. N.Y.—Beach v. Smith, 30 N.Y. 116.

80. N.Y.—Beach v. Smith, supra.

81. N.Y.—Beach v. Smith, supra.

82. N.Y.—Ogdensburgh, etc., R. Co. v. Frost, 21 Barb. 541.

83. Ky.—Louisville, etc., R. Co. v. Hart County, 75 S.W. 288, 77 S.W. 361, 116 Ky. 186, 25 Ky.L. 395.
51 C.J. p. 423 note 11.

(2) Conditional Subscriptions

In the absence of charter or statutory restrictions, subscriptions to the stock of a railroad may be made conditional.

Unless restricted by statute or its charter, the promoters or officers of a railroad company have the right to receive subscriptions to its stock conditioned on such terms as may be accepted or agreed on,[84] and as soon as the condition has happened or been performed the subscription becomes binding and enforceable.[85] Where the time within which the condition is to be performed is not specified, a reasonable time is allowed therefor.[86] A subscription conditioned on the completion of the railroad does not become absolute as long as a necessary bridge is uncompleted, although rolling stock is being transported by a ferry pending completion.[87] Where one has subscribed to the stock of a railroad company on condition, he may, with the assent of the company, vary the conditions,[88] or make his subscription absolute,[89] and where he executes a note containing an absolute promise to pay there is a presumption that he undertook to pay it on sufficient consideration.[90]

Purpose of subscription. The mere recital in a subscription of the purpose for which the capital is subscribed,[91] as for the construction or extension of the railroad to a specified point,[92] does not make the subscription conditional.

Parol evidence is not admissible to show that a subscription absolute on its face was made on a condition.[93]

b. Rights and Liabilities of Stockholders

The stockholders of a railroad corporation have final control of its affairs. Under contract or statute the stockholders may incur a personal liability for the obligations of the railroad company.

As in the case of corporations generally, as discussed in Corporations § 482 et seq, the stockholders of a railroad company have the final control of its affairs,[94] and a provision in its charter for government directors does not abrogate their rights[95]

Personal liability of stockholders of railroads for railroad obligations may arise from contract[96] or from statute.[97] Under some statutes the stockholders of a railroad company are liable for all debts owing to laborers or servants for services performed for the company[98] The liability expressly imposed on stockholders of railroad companies for all the debts due or owing to any of its laborers and servants for services performed for the corporation has been said to extend to the services of a civil engineer, master mechanic, and conductor,[99] but an independent contractor for the construction of the railroad is not a laborer or servant within such a statute,[1] nor does such a statute include debts due a laborer employed by an independent contractor in the construction of the railroad[2] An inseparable part of a claim against a railroad corporation for labor not performed by the claimant himself is not a debt due a laborer under the statute.[3]

Statutes exempting stockholders of railroads from the liability imposed on stockholders of other corporations have been construed to apply not merely to corporations operating railroads but also to those organized for the purpose of furnishing materials for building and equipping them.[4]

84. Mass—Portage County v Wisconsin Cent R. Co., 121 Mass 460 51 C J. p 423 note 3.

85. Ind—Smith v. Hollett, 34 Ind 519.

86. Ind—Smith v Hollett, supra.

87. Ala.—Garner v Hall, 25 So 187, 122 Ala 221

88. Ky.—Henderson & N. R Co v. Moss, 2 Duv. 242

89. Ky—Henderson & N. R. Co. v. Moss, supra.

90. Ky—Henderson & N. R. Co. v Moss, supra

91. Ind.—New Albany, etc, R. Co. v. Pickens, 5 Ind. 247.

92. Ind—New Albany, etc, R. Co v. Pickens, supra

93. N C.—North Carolina R. Co. v. Leach, 49 N.C. 340

94. U S.—Union Pac R. Co v. Chicago, etc., R. Co., Neb, 16 S Ct 1173, 163 U.S. 564, 41 L.Ed. 265.

95. U S—Union Pac R Co. v. Chicago, etc, R Co., supra.

96. Mo—Vrooman v Burdett, 83 S. W 2d 95, 336 Mo 1181.

97. **Insolvency of company**
In order to enforce the statutory liability of stockholders of a railroad company for the debts of the company, it is not necessary to prove that the company is insolvent —Texas, etc, R. Co v. Berlin, Tex Civ.App, 165 S.W. 62.

98. N.Y—Boutwell v. Townsend, 37 Barb 205
51 C J p 424 note 17.

Effect of transfer of stock
Pa.—Cass v Pittsburgh, etc, R. Co, 80 Pa. 31.
14 C.J p 1017 note 10 [f] (1).

99. N.Y—Conant v. Van Schaick, 24 Barb. 87.

1. Mich—Peck v. Miller, 39 Mich. 594.
N.Y—Aikin v. Wasson, 24 N.Y. 482.

Exclusion of middle man
"The natural meaning of the provision in question is that the work must be performed for the company, and create a company liability to the person who performs it. If the labor is not performed for the company but for some one else with whom the company is in contract relations, it requires some expansion of the language to reach the middle man, and this would not be allowable unless upon plain evidence of such an intent"—Peck v. Miller, 39 Mich. 594, 598

2. N.Y.—McMahon v. Macy, 51 N. Y. 155—Gallaghar v. Ashby, 26 Barb. 143.

3. N.Y.—McMahon v. Macy, 51 N Y. 155.

4. Iowa.—Langan v. Iowa, etc, Constr. Co., 49 Iowa 317—Davenport First Nat Bank v Davies, 43 Iowa 424.
N.Y.—Jessup v. Carnegie, 80 N.Y.

Meetings Unless otherwise provided by statute or charter, stockholders present at a regular annual meeting may transact the business of the meeting, including the election of officers and directors, even though a majority in interest or in number of stockholders is not present;[5] but, where a statute requires the presence of a majority, no legal meeting of the stockholders of a railroad may be held in the absence of a majority of the stock being represented.[6] Where a railroad company is incorporated in two or more states, a stockholders' meeting held in one of them and conducted in accordance with its laws is regular and valid,[7] although the laws of another of such states require such meetings to be differently conducted.[8]

Voting. The rules governing the voting rights of stockholders in corporations generally, discussed in Corporations §§ 547–553, ordinarily control in the case of stockholders of a railroad corporation.[9]

Actions. In an action by a minority stockholder of a railroad company against a majority stockholder wherein unfair and improper management of the company is alleged, the burden of proof is on plaintiff,[10] but as to specific contracts made with the company by a managing stockholder the burden is on him to show the fairness and justness of his dealings.[11]

§ 15. Officers and Agents

a. In general
b Election or appointment and qualification
c. Powers and authority
d. Personal rights and liabilities

a. In General

The general rules with respect to officers and agents of corporations apply with respect to officers and agents of railroad corporations

The general rules with respect to officers and agents of corporations apply with respect to officers and agents of railroad corporations.[12] The general officers of a railroad company are the president, vice president, general manager, secretary, and treasurer, selected by the corporation through its board of directors.[13] Persons employed in connection with the operation of trains, such as a yardmaster, roundhouse foreman, or conductor, are not officers of the corporation.[14] In common acceptation, the "agent" of a railroad company is the person representing the company at a station or depot on its line.[15] "Freight solicitor" is a term sometimes applied to an officer or employee of a railroad corporation.[16] A railway policeman may not do any act on behalf of the state until he has complied with statutory provisions requiring appointments as railway policemen to be registered and ratified.[17]

b. Election or Appointment and Qualification

In the absence of special statutory or charter provisions, the election or appointment, qualification, and tenure of officers and agents of railroad companies are governed by the rules applicable to corporations generally.

In the absence of special statutory or charter provisions, the election or appointment, qualification, and tenure of officers and agents of railroad companies are governed by the rules applicable to corporations generally.[18]

Directors. Where directors are required by statute or charter of the company to be stockholders, the fact that stock was transferred to one for the express purpose of qualifying him as a director does not prevent him from holding that office,[19] and under a statute rendering ineligible as a director one

441, 36 Am R. 643, construing Iowa statutes

5. Ga.—Sylvania, etc., R. Co. v. Hoge, 59 S.E. 806, 129 Ga. 734.

6. Mass.—Brown v. Boston, etc., R Co., 124 N E 322, 233 Mass 502.

7. Mass —Brown v. Boston, etc., R. Co., supra

8. Mass —Brown v. Boston, etc., R. Co, supra

9. U S —Kansas City Southern Ry Co v. Chicago Great Western R. Co., D.C.Mo, 58 F 2d 810.

Who may challenge right to vote

State statute forbidding any railroad to acquire stock of a domestic railroad without authorization of public service commission, although it might justify state in challenging voting of stock acquired without such authorization, did not justify railroad in interfering with voting of its stock legally issued for a consideration —Kansas City Southern Ry Co. v. Chicago Great Western R. Co., supra.

10. U.S.—Continental Securities Co v Michigan Cent. R. Co, C.C.A. Mich., 16 F.2d 378, certiorari denied 47 S.Ct 587, 274 U S. 741, 71 L Ed. 1320

11. U.S.—Continental Securities Co. v. Michigan Cent. R. Co, supra.

12. Ark.—Missouri Pac. R. Co. v Pennington, 40 S.W.2d 985, 184 Ark. 145

13. Ind.—Bedford Belt R. Co. v. McDonald, 46 N.E. 1022, 17 Ind. App. 402, 60 Am S.R. 154.

14. Okl —Sovereign Camp, W. O. W., v. Wright, 86 P.2d 977, 184 Okl. 301.

15. Tex —Houston, E. & W. T. R. Co. v. Campbell, Civ.App., 40 S.W 431, modified on other grounds, 45 S.W. 2, 91 Tex. 551, 43 L.R.A. 225

16. Mo —Davis v. Jacksonville South Eastern Line, 28 S.W. 965, 126 Mo. 69, 75.

17. N J.—Dellabello v. Central R Co. of New Jersey, 124 A. 59, 99 N.J Law 348.

18. Conn —New York, B. & E. R. Co. v. Motil, 71 A. 564, 81 Conn. 466.

Ga.—Sylvania & Girard R. Co. v. Hoge, 59 S.E. 806, 129 Ga. 734.

Election or appointment, qualification, and tenure of corporate officers generally see Corporations §§ 715–740.

19. Ill.—People v. Diesterweg, 193 Ill.App. 360, affirmed 109 N.E. 1055,

who is a stockholder of, or interested in, another company, an employee of such another company is not disqualified to be a director [20] Under a constitutional or statutory provision permitting only residents of the state to be directors, a nonresident who receives more votes than any other candidate is not entitled to be a director or to act as such on the theory that his election is valid until declared invalid by a direct proceeding by the state;[21] but in such case no new election is necessary and the resident receiving the most votes should be declared elected.[22] Such a provision has no application to an interstate company organized prior to its adoption [23] A candidate receiving a smaller number of votes than another is not entitled to be declared elected in place of such other on the ground that the latter is a director of other railroads and is thereby ineligible under a statute prohibiting interlocking directorates except with the approval of the interstate commerce commission, where the commission has not refused its permission.[24]

Under special statutes conferring the right, holders of certificates of indebtedness may vote for directors [25]

c. Powers and Authority

(1) In general
(2) Particular officers and agents
(3) Imputation of knowledge of agent to railroad company

(1) In General

For ordinary purposes the authority of a railroad company is vested in its board of directors.

Broadly speaking, for ordinary purposes the authority of a railroad company is vested in its board of directors,[26] and, except as otherwise provided by statute or charter, the power of its officers and agents depends on the action of the directors in conferring power on them,[27] subject to the qualification that an officer or agent who has or is given authority to do particular acts has implied power to do whatever is reasonably necessary to perform his duties [28] A railroad company is civilly liable for torts committed by its agents under its express or implied authority.[29]

One dealing with an officer or agent ordinarily is charged with the duty of ascertaining his authority to bind the company,[30] the burden of proving such authority rests on the person asserting it,[31] and, in the absence of any evidence of custom or precedent indicating authority of an agent to make a contract, one dealing with the agent must at his peril ascertain the scope of the agent's authority in respect of the making of such a contract.[32] However, as in the case of other agents, under rules discussed in Agency § 96, the rights of persons dealing with an agent of a railroad company depend not on the actual limitations placed on his power by his superiors, but on the apparent scope of his authority,[33] and such persons are not bound to take notice of private instructions given to, or restrictions imposed on, one who has been put forward as a general agent.[34] In general, the mere fact that an agent assumes authority does not authorize

269 Ill 602—People v Lihme, 193 Ill.App 357, affirmed 109 N.E 1055, 269 Ill 602.

20. Ohio—Devou v Cincinnati Interterminal R Co, 29 Ohio Cir Ct. 113

21. Mo.—Meyer v St. Louis South Western R Co, 2 S W 2d 185, 221 Mo App 265.

22. Mo—Meyer v St Louis South Western R Co, supra

23. N Y—Venner v. New York Cent., etc, R. Co, 164 N Y S. 626, 177 App Div 296, affirmed 123 N E 893, 226 N Y. 583, certiorari denied 39 S Ct. 391, 249 U S 617, 63 L Ed 803.

24. Mo—Meyer v. St Louis South Western R. Co., 2 S.W 2d 185, 211 Mo.App. 265.

25. Mass—Phillips v. Eastern R. Co., 138 Mass. 122.

26. Tex—Kansas City, etc., R. Co. v. Sweetwater, 137 S.W. 1117, 104 Tex. 329—Midland, etc., R. Co. v. Midland Mercantile Co., Civ.App., 216 S.W. 627.

Maintenance of properties

The directors of a railroad have a duty to maintain its physical properties and to keep the road in proper operation—Biltchik v Green Bay & W R. Co., 26 N W.2d 633, 250 Wis. 177, certiorari denied 68 S Ct 216, 332 U.S 835, 92 L Ed 408.

27. Tex—Midland, etc, R. Co. v. Midland Mercantile Co., Civ.App, 216 S W. 627.
51 C J p 424 note 38.

28. Tex—Houston, etc., R. Co. v. Jones, Civ.App, 1 S W 2d 743

Unexpected exigencies

Railroad employee has implied authority to make contracts reasonably necessary to carry out prescribed duties, where exigencies not anticipated arise—Missouri Pac. R. Co v Pennington, 40 S.W.2d 985, 184 Ark 145.

29. Mo.—Meade v Chicago, etc., R Co, 68 Mo App. 92.
51 C J. p 428 note 50

30. Iowa.—Carson v. Chicago, etc., R. Co, 164 N W. 747, 181 Iowa 310
51 C.J p 424 note 40.

Access to witness

There is no presumption that a railroad corporation has authorized its local agent to hinder access by the counsel of an adverse suitor to a witness in the employment of the company, and, unless the delegation of such authority appears in evidence, the corporation will not be affected by conduct of the agent tending to prevent such access—Marsh v. South Carolina R Co, 56 Ga. 274.

31. Kan.—Hornick v. Union Pac R. Co, 118 P 60, 85 Kan 568, 38 L R A.,N S, 826, Ann Cas 1913A 208.

32. Miss—Busby v. Yazoo, etc., R. Co, 48 So 1, 90 Miss. 13.

33. Wash.—Brace v. Northern Pac R. Co, 115 P. 841, 63 Wash. 417, 38 L R A,N.S, 1135.
51 C.J. p 425 note 43.

34. Mo.—Cross v. Atchison, etc., R. Co., 42 S.W. 675, 141 Mo 132—Southwest Missouri Electric R. Co.

others to believe that he possesses it rightfully,[35] since it is the conduct of the company and not that of the agent which determines the apparent scope of his authority;[36] but, when a communication has been addressed to the company, the individual responding thereto and assuming to represent the company will be presumed to be the proper officer therefor until the contrary appears.[37]

Fraudulent acts An act of an agent done in pursuance of a conspiracy to defraud third persons to whom the railroad company owes no duty is not within the scope of his employment or binding on the company[38] unless it has knowledge of facts from which it could reasonably anticipate the wrong to such persons.[39] On the other hand, a railroad is a party to a deliberate plan to form a corporation technically independent of it, but which would operate as its agency to control other roads or their securities contrary to law where its officials participate in such formation and where in addition it appears that the board of directors formally went on record as stating that the purposes of the new corporation would be in the interests of the railroad,[40] and, although the railroad company is a legal entity theoretically incapable of wrongful or ultra vires acts, it may not deny liability when its agents acting within the scope of their duties enter into a combination or agreement to serve its purposes,[41] and in such a case the railroad company may be guilty of constructive fraud.[42]

Mistake of fellow agent. The railroad company cannot escape liability on a contract made for it by an authorized agent merely because such agent relied on mistaken information furnished him by another agent of the company.[43]

Officers of lessee company An officer or agent of a railroad company by whom a railroad is leased can bind only his own company and not the lessor or owning company.[44]

Ratification. The acts of an officer or agent of a railroad company may be ratified by it in accordance with the ordinary rules as to ratification;[45] and the company is responsible for the agent's acts when ratified.[46]

(2) Particular Officers and Agents

The general rules of corporate law ordinarily serve to define the power and authority of particular officers and agents of railroad companies.

Except as may be otherwise provided by statute,[47] or the charter of a railroad company, or by regulations and by-laws duly adopted, the powers and functions of the respective officers and agents of such company are governed by the rules applicable to corporations generally.[48]

The authority of officers and agents to bind a railroad company to pay for medical or surgical attendance or for board and lodging is discussed in Corporations § 1050 c.

Directors While the general authority over a railroad company is treated for most purposes as vested in its board of directors, as discussed supra subdivision c(1) of this section, the power of di-

v. Missouri Pac. R. Co., 85 S.W. 966, 110 Mo.App. 300.

35. Nev.—Mirodias v. Southern Pac. Co., 145 P. 912, 38 Nev. 119.

36. Nev.—Mirodias v. Southern Pac. Co., supra.

37. Conn.—New York, etc., R. Co. v. Cella, 91 A. 972, 88 Conn. 515, Ann.Cas.1917D 590.

38. Tex.—Western Weighing, etc., Bureau v. Armstrong, Com.App., 288 S.W. 119.

39. Tex.—Western Weighing, etc., Bureau v. Armstrong, supra.

40. U.S.—Overfield v. Pennroad Corp., D.C.Pa., 42 F.Supp. 586, opinion supplemented 48 F.Supp. 1008, affirmed, C.C.A., 146 F.2d 889.

41. U.S.—Overfield v. Pennroad Corp., supra.

42. U.S.—Overfield v. Pennroad Corp., supra.

Honest convictions

The actions of the officers and directors of a railroad company in forming and managing a corporation to serve the interests of the railroad in the accomplishment of a purpose which it could not accomplish in its own capacity, but with the honest conviction that they were fulfilling their duties, constituted at most a constructive fraud or legal fraud on those who suffered.—Overfield v. Pennroad Corp., supra.

43. Ala.—Southern R. Co. v. Birmingham Rail, etc., Co., 98 So. 727, 210 Ala. 540.

44. N.J.—Blackwood Impr. Co. v. Public Service Corp., 109 A. 820, 91 N.J.Eq. 220.

45. Okl.—Atchison, etc., R. Co. v. Kinkaid, 120 P. 963, 30 Okl. 699. 51 C.J. p. 425 note 52.

46. N.C.—Starnes v. Raleigh, etc., R. Co., 87 S.E. 43, 170 N.C. 222. Or.—Branson v. Oregonian R. Co., 10 Or. 278.

47. Ga.—Tappan v. Western, etc., R. Co., 62 Ga. 198. 51 C.J. p. 425 note 54.

48. Ark.—St. Louis, etc., R. Co. v. Jones, 132 S.W. 636, 96 Ark. 558, 37 L.R.A.,N.S., 418.
La.—Eunice Clinic & Hospital v. Baldwin, App., 167 So. 868.
Mass.—Tortorelli v. New York Cent. R. Co., 95 N.E.2d 674.
Miss.—Stilley v. Illinois Cent. R. Co., 47 So.2d 840.
Mo.—Prince v. Kansas City Southern Ry. Co., 229 S.W.2d 568.
Mont.—Pue v. Northern Pac. Ry. Co., 252 P. 313, 78 Mont. 40.

District traffic agent

In suit by former tenant to recover unamortized value of buildings on the rented land which had been erected by plaintiff and by prior tenant from whom plaintiff had purchased lease, evidence failed to establish that a district traffic agent of railroad who allegedly had orally assured plaintiff that lease would be renewed on expiration of lease term, for such time as would enable plaintiff to amortize plaintiff's investment in buildings on land, had authority to make such oral agreement.—Stilley v. Illinois Cent. R. Co., Miss., 47 So.2d 840.

rectors is derivative only, and in order to bind the company they must keep within the scope of the authority conferred on them by the stockholders.[49] The directors cannot bind the stockholders without their assent to duties or responsibilities not cognate to the ends and purposes of the company's organization,[50] nor, in general, can they bind the company by oral declarations or promises[51] Subject to such qualifications, the directors may contract for the construction or reconstruction of the road[52] A contract made by a single director ordinarily is not binding on the company,[53] even though he owns a majority of its stock.[54]

President. By common usage the president of a railroad company is treated as its executive head,[55] and he may perform for the company, without special or express authority, such ordinary routine acts as are incident to the execution of the trust reposed in him,[56] and direct the performance of such acts by subordinate employees.[57] He has no authority, however, merely by virtue of his office, to locate or contract for the location of the road or its termini,[58] or stations, offices, shops, or roundhouses,[59] to invoke the right of eminent domain,[60] to contract for the construction of the road,[61] to execute a mortgage on the property of the company,[62] or to sell or convey land belonging to the company.[63]

Vice president. The vice president, like the president, has general and discretionary authority by virtue of his office to carry out his ordinary and routine duties without express authorization by the directors,[64] but he has no power to bind the company by any act or contract not authorized by the by-laws,[65] and when acting in the place of the president he has no implied authority beyond that possessed by the president.[66]

General superintendent or manager. The general superintendent or general manager of a railroad company may bind it by such acts and contracts as are within the general scope of his agency and incident to his duties,[67] as by a contract for fencing the right of way[68] or an offer of an award for the apprehension of persons obstructing the railroad;[69] but he has no power to sell property of the company without authority from the directors.[70]

Division superintendent. The authority of the superintendent or assistant superintendent of a division of a railroad to dispose of perishable freight stopped in transit by an emergency is inferable without evidence.[71] On the other hand, he has no implied authority to bind the company by an agreement to give life employment to an employee of the company in settlement of a claim for personal injuries[72]

General attorney. Where the general attorney of a railroad company has power to employ local attorneys, the employment by him of a local attorney at a yearly salary or retainer is within his apparent authority, and binding on the company,[73] even though he had private instructions to make no such contract, where such instructions were not known to the attorney employed.[74]

49. U S—Dows v. Chicago, etc., R Co, C C Iowa, 7 F Cas No 4,048, affirmed 94 U.S. 444, 24 L.Ed. 207.

50. U S—Chicago, etc, R Co v. Des Moines Union R Co, Iowa, 41 S Ct 81, 254 U.S. 196, 65 L.Ed 219—Dows v Chicago, etc., R. Co, C C Iowa, 7 F.Cas No 4,048, affirmed 94 U S. 444, 24 L.Ed 207.

51. U S.—Dows v. Chicago, etc, R. Co., supra.

52. Md—State v. Baltimore, etc, R Co, 6 Gill 363.

53. Ind—Allemong v Simmons, 23 N.E 768, 124 Ind 199.
Tex—International, etc., R. Co. v. Anderson County, Civ App, 174 S. W. 305, affirmed 38 S.Ct. 370, 246 U S 424, 62 L Ed 807.

54. Ind.—Allemong v. Simmons, 23 N E. 768, 124 Ind. 199.

55. Ill—Chicago, etc., R. Co. v. Coleman, 18 Ill, 297, 68 Am D 544.

56. Ill.—Chicago, etc, R. Co. v. Coleman, supra.

57. N.Y.—Bogart v. New York, etc., R. Co., 102 N.Y.S. 1093, 118 App. Div 50, affirmed 85 N E. 1106, 191 N Y. 550

58. Ga—Bridwell v. Gate City Terminal Co, 56 S E 624, 127 Ga 520, 10 L R.A,N S, 909, followed in Volberg v. Gate City Terminal Co, 56 S E 991, 127 Ga 537.

59. Tex—Logue v. Southern Kansas R. Co., 167 S W. 805, 106 Tex. 445.
51 C J p 426 note 70

60. Ga—Bridwell v Gate City Terminal Co, 56 S.E 624, 127 Ga 520, 10 L R.A.,N S, 909

61. Iowa—Griffith v Chicago, etc., R. Co, 36 N W. 901, 74 Iowa 85—Templin v Chicago, etc., R Co, 35 N W. 634, 73 Iowa 548

62. Or—Luse v. Isthmus Transit R. Co., 6 Or. 125.

63. Tex—Emory v. Bailey, Civ. App, 181 S W 831, reversed on other grounds 234 S.W. 660, 111 Tex. 337, 18 A L R. 901.

64. Nev—Bradley v. Nevada-California-Oregon R. Co., 178 P. 906, 42 Nev. 411.

65. Tex—Missouri, etc, R Co v. Faulkner, 32 S W 883, 88 Tex 649.

66. Tex—Kansas City, etc, R Co v Sweetwater, 137 S W. 1117, 104 Tex. 329.

67. Ark—Arkansas Southwestern R Co. v Dickinson, 95 S W. 802, 78 Ark. 483, 115 Am S R 54.

68. Ind.—New Albany, etc, R Co. v Haskell, 11 Ind 301.

69. Ark—Arkansas Southwestern R Co v Dickinson, 95 S W. 802, 78 Ark 483, 115 Am S R. 54.

70. N H.—Bowen v. Mt Washington R Co, 62 N.H 502.

71. U.S.—Chicago, etc., R. Co v Collins Produce Co., Ill., 235 F 857, 149 C.C.A 169, affirmed 39 S. Ct 189, 249 U.S. 186, 63 L.Ed 552

72. Mich—Maxson v. Michigan Cent. R Co, 75 N.W. 459, 117 Mich. 218

73. Mo—Cross v. Atchison, etc., R Co., 42 S W. 675, 141 Mo. 132.

74. Mo.—Cross v. Atchison, etc., R. Co., supra.

Railroad physician or surgeon may bind the railroad where he acts within the scope of his authority,[75] but not otherwise.[76] The physician or surgeon in charge of a hospital maintained by a railroad company for its employees has no authority to bind the company by promising to notify third persons of the condition of an inmate or patient,[77] and the company is not liable for his failure to perform such a promise.[78] The power of a railroad physician to bind the company in respect of medical or surgical attendance is discussed in Corporations § 1050 c.

Chief or subordinate engineer. A chief engineer on whom authority has been conferred to make contracts for the construction of a railroad has no implied power to contract for the construction of private spur tracks or branches.[79] Whether a division engineer, intrusted with control and maintenance of track and bridges of his territory, has authority to make contracts of employment in connection with such control depends on the facts of the particular case.[80] A civil engineer merely placed in control or supervision of construction work has no implied authority to bind the company by a contract for any such construction.[81] One employed as chief engineer of a railroad to survey and establish its line has apparent authority to employ such subordinates, and to incur such expenses, as are reasonably suitable to the purposes for which he is employed.[82]

Claim agent. The scope of the authority of a claim agent of a railroad company is, in the absence of express statute, not defined by law,[83] and ordinarily depends on what powers have been conferred on him, which is a question of fact in each case.[84] A general claim agent has authority to refuse or allow claims against the company,[85] and to make settlement of such claims,[86] and ordinarily the company is bound by agreements for settlements made by him,[87] at least where claimant had no knowledge of any limitation on his power.[88] In the absence of express authority the claim agent has no power to make a contract for employment,[89] and in the absence of proper proof of authority a claim agent will be held unauthorized to promise permanent employment in settlement of a damage claim.[90] A claim agent authorized only to ascertain the amount for which a claim can be settled has no authority to settle the claim or bind the company to pay any specific amount.[91] The authority of a railroad claim agent to bind the road for medical attention for injured employees or others is considered in Corporations § 1050 c (2) (a).

Special agent. A railroad policeman or special agent having authority to employ guards may bind the company to protect one employed as such in going to undertake his duties.[92]

Purchasing agent. The authority of a purchas-

75. Mo.—Prince v. Kansas City Southern Ry. Co., 229 S.W.2d 568.

Misrepresentations

In action against railroad company by injured employee asserting avoidance of release on ground that he was induced to sign by belief in, and reliance on, misstatements of facts as to physical condition by company's physician treating employee, evidence warranted finding that physician was acting as agent of company in dealing with employee.—Prince v. Kansas City Southern Ry. Co., supra.

76. Tex.—Carroll v. St. Louis Southwestern R. Co., 120 S.W. 1079, 56 Tex.Civ.App. 1079.

77. Tex.—Carroll v. St. Louis Southwestern R. Co., supra.

78. Tex.—Carroll v. St. Louis Southwestern R. Co., supra.

79. Ky.—Wier v. Elizabethtown, etc., R. Co., 8 Ky.Op. 705.

80. Kan.—Townsend v. Missouri Pac. R. Co., 128 P. 389, 88 Kan. 260.

81. Ala.—Alabama Western R. Co. v. Bush, 62 So. 89, 182 Ala. 113.

82. Minn.—Gillis v. Duluth, etc., R. Co., 25 N.W. 603, 34 Minn. 301.

83. Kan.—St. Louis, etc., R. Co. v. Daugherty, 83 P. 821, 72 Kan. 678.

84. Kan.—St. Louis, etc., R. Co. v. Daugherty, supra.

Burden of proof rests on party asserting authority of a claim agent.—Cleveland, C., C. & St. L. R. Co. v. Green, 186 N.E. 365, 126 Ohio St. 512, 87 A.L.R. 1268, certiorari denied Green v. Cleveland, C. & St. L. Ry. Co., 55 S.Ct. 516, 294 U.S. 715, 79 L.Ed. 1249, rehearing denied 55 S.Ct. 551, 294 U.S. 734, 79 L.Ed. 1262, motion denied 55 S.Ct. 653, 295 U.S. 768, 79 L.Ed. 1709.

Question for jury

Whether railroad's claim agent had authority to agree to pay injured section laborer according to local workmen's compensation law if laborer would return to work was held for jury.—Belanger v. Chicago & N. W. Ry. Co., 249 N.W. 893, 264 Mich. 407.

85. Tex.—Galveston, etc., R. Co. v. Booth, Civ.App., 209 S.W. 198.

86. Okl.—Chicago, etc., R. Co. v. Burke, 198 P. 620, 82 Okl. 114.

87. Okl.—Chicago, etc., R. Co. v. Burke, supra.

88. Mo.—Southwest Missouri Electric R. Co. v. Missouri Pac. R. Co., 85 S.W. 966, 110 Mo.App. 300.

89. Kan.—Hornick v. Union Pac. R. Co., 118 P. 60, 85 Kan. 568, 38 L.R.A.,N.S., 826, Ann.Cas.1913A 208. 51 C.J. p. 426 note 98.

90. Ohio.—Cleveland, C., C. & St. L. R. Co. v. Green, 186 N.E. 365, 126 Ohio St. 512, 87 A.L.R. 1268, certiorari denied Green v. Cleveland, C. & St. L. Ry. Co., 55 S.Ct. 516, 294 U.S. 715, 79 L.Ed. 1249, rehearing denied 55 S.Ct. 551, 294 U.S. 734, 79 L.Ed. 1262, motion denied 55 S.Ct. 653, 295 U.S. 768, 79 L.Ed. 1709.

Mere authority to settle claim

Proof of authority of railroad's claim agent to settle claim was insufficient to show implied authority to contract to give employee lifetime job.—Cleveland, C., C. & St. L. R. Co. v. Green, 186 N.E. 365, 126 Ohio St. 512, 87 A.L.R. 1268, certiorari denied Green v. Cleveland, C. & St. L. Ry. Co., 55 S.Ct. 516, 294 U.S. 715, 79 L.Ed. 1249, rehearing denied 55 S.Ct. 551, 294 U.S. 734, 79 L.Ed. 1262, motion denied 55 S.Ct. 653, 295 U.S. 768, 79 L.Ed. 1709.

91. Ark.—Jonesboro, etc., R. Co. v. McClelland, 143 S.W. 528, 104 Ark. 150.

92. Tex.—Schaff v. Stripling, Civ. App., 265 S.W. 264.

ing agent includes power to bind the company for supplies purchased by him for its use.[93]

Train crew, conductor. Unless specially authorized, members of a train crew,[94] including the conductor,[95] have no general authority to make contracts for the railroad company or to employ servants or agents for it[96] unless there is a custom to the contrary actually or presumptively known to the officers of the company,[97] but in cases of necessity or emergency, where circumstances demand it, a conductor or other trainman may bind the company by such contracts of employment or otherwise as are clearly necessary to enable him to carry out his prescribed duties.[98] Whether such necessity or emergency exists as impliedly to confer such power is a question of fact dependent on the circumstances of each case.[99] The authority of a conductor ordinarily extends to the control of the movements of his train and the immediate direction of employees engaged in operating the train,[1] and he is, in the absence of any superior officer, the general agent of the company as far as the direction and immediate management of the train are concerned when it is out on the road;[2] so, in emergency or necessity, he has large control over his subordinates,[3] and may command their obedience[4] and discharge one who refuses to obey.[5]

Station agents ordinarily have no implied authority to make contracts in behalf of the railroad company,[6] and so, in the absence of express authorization, a station agent cannot bind the company by a contract of employment[7] or by a contract for the feeding and care of live stock injured in transit,[8] and has no authority to rent or lease a building for the transaction of the company's business[9] or to extend the liability imposed by law on the company as a carrier;[10] nor can he be said to act as the representative of the company or within the scope of his employment in accusing a third person of the theft of personal property from another employee.[11] In emergencies, however, his general powers vest a station agent with authority to make such contracts in behalf of the company as may be necessary under the circumstances,[12] and an assistant station agent has authority in the station agent's absence to make any contracts within the scope of the regular agent's duties,[13] although on completion of acts and contracts essential to meet the emergency the agent or his assistant may lack power to proceed further in the matter.[14] It is within the apparent authority of a station agent to maintain proper sanitary conditions on the premises under his control,[15] and a proper contract made by him in connection therewith is binding on the company.[16]

Freight agent. A local freight agent has no authority to bind the railroad company to purchase

93. Mo.—Illinois Fuel Co. v. Mobile, etc., R. Co., 8 S.W.2d 834, 319 Mo. 899, certiorari denied 49 S.Ct. 34, 278 U.S. 640, 73 L.Ed. 555.

94. Ind.—Pittsburgh, etc., R. Co. v. Hall, 90 N.E. 498, 91 N.E. 743, 46 Ind.App. 219.

95. Va.—Taylor v. Baltimore, etc., R. Co., 62 S.E. 798, 108 Va. 817.

96. Ark.—St. Louis, etc., R. Co. v. Jones, 132 S.W. 636, 96 Ark. 558, 37 L.R.A.,N.S., 418.
Tenn.—Louisville, etc., R. Co. v. Ginley, 45 S.W. 348, 100 Tenn. 472.

97. Ark.—St. Louis, etc., R. Co. v. Jones, 132 S.W. 636, 96 Ark. 558, 37 L.R.A.,N.S., 418.

98. Tenn.—Louisville, etc., R. Co. v. Ginley, 45 S.W. 348, 100 Tenn. 472.
51 C.J. p. 427 note 9.

Coupling cars
A conductor has been held to have implied authority to employ a person to couple cars and thereby bind the company for injuries received by such person while making the coupling.—Newport News, etc., R. Co. v. Carroll, 31 S.W. 132, 17 Ky.L. 374.

99. Tenn.—Louisville, etc., R. Co. v. Ginley, 45 S.W. 348, 100 Tenn. 472.

1. Va.—Taylor v. Baltimore, etc., R. Co., 62 S.E. 798, 108 Va. 817.

2. Ind.—Terre Haute, etc., R. Co. v. McMurray, 98 Ind. 358, 49 Am. R. 752.
La.—**Corpus Juris quoted in** Doyle v. Thompson, App., 50 So.2d 505, 507.

3. Ala.—St. Louis, etc., R. Co. v. Hunt, 60 So. 530, 6 Ala.App. 434.

4. Ala.—St. Louis, etc., R. Co. v. Hunt, supra.

5. Ala.—St. Louis, etc., R. Co. v. Hunt, supra.

6. Tex.—Missouri Pac. R. Co. v. Hood, Civ.App., 172 S.W. 1120.

7. Ky.—Louisville, etc., R. Co. v. Vaughn's Transfer Co., 123 S.W. 253.
Mo.—Silver v. Missouri, etc., R. Co., 102 S.W. 621, 125 Mo.App. 402.

8. Tex.—Lancaster v. Futrell, Civ. App., 218 S.W. 805.

9. Tex.—Missouri, etc., R. Co. v. Hood, Civ.App., 172 S.W. 1120.

10. Md.—Hoffman v. Cumberland Valley R. Co., 37 A. 214, 85 Md. 391.

11. Tex.—Beaumont, etc., R. Co. v. Daniels, Civ.App., 204 S.W. 481.

12. Ky.—Louisville, etc., R. Co. v. Vaughn's Transfer Co., 123 S.W. 253.

13. Ark.—Missouri Pac. R. Co. v. Pennington, 40 S.W.2d 985, 184 Ark. 145.

Removal and temporary storage of wrecked auto
Assistant station agent had implied authority to remove wrecked automobile from tracks and to store it temporarily in garage.—Missouri Pac. R. Co. v. Pennington, supra.

14. Ark.—Missouri Pac. R. Co. v. Pennington, supra.

Storage of automobile after notification of owner
After garage owner removed wrecked automobile from railroad tracks at request of assistant station agent and notified owner, railroad was not liable for further storage, in absence of contract by agent with express authority.—Missouri Pac. R. Co. v. Pennington, supra.

15. Mont.—Pue v. Northern Pac. R. Co., 252 P. 313, 78 Mont. 40.

16. Mont.—Pue v. Northern Pac. R. Co., supra.

goods damaged in shipment [17]

Foremen The mere fact that one is a foreman on a railroad does not necessarily authorize him to hire others[18] or to fix the terms of their employment.[19]

The foreman of a roundhouse or a master mechanic authorized to hire employees has no power, in the absence of special authorization, to make a contract for permanent or lifetime employment[20] or to agree that the employee shall not be discharged except for cause.[21]

A section foreman having authority to hire laborers for work upon the railroad has apparent authority to state the terms of the contract of employment.[22]

Laborer. A railroad laborer cannot bind the company by contract in the absence of express authority so to do.[23]

(3) Imputation of Knowledge of Agent to Railroad Company

The knowledge of an officer of a railroad company obtained in the discharge of his official duties is the knowledge of the company, but knowledge of an agent as to matters outside the scope of his employment cannot be imputed to the company.

Knowledge of, or notice to, an officer or agent of a railroad company will be imputed to the company only with respect to matters which the officer or agent has power or authority to regulate or with which he has power to deal [24] The knowledge of any officer obtained in the discharge of his official duties is the knowledge of the company,[25] but knowledge of an agent as to matters outside the scope of his employment cannot be imputed to the company.[26] Knowledge of a railroad employee acquired in a different capacity and not imparted to the company may not be charged to it [27]

d. Personal Rights and Liabilities

The general rules governing corporate officers and agents ordinarily are applicable in defining the personal rights and liabilities of railroad officers and agents.

The general rules governing the rights and liabilities of corporate officers and agents, discussed in Corporations §§ 761–932, ordinarily control in respect of the rights and liabilities of railroad officers and agents,[28] except as modified by special statutory provisions [29] Officers who contract with respect to the construction of a railroad as a personal speculation and not in behalf of the company are personally liable on their contracts [30]

Directors ordinarily are not liable for debts contracted by them in behalf of the company,[31] even though such debts exceed in amount a limitation imposed by statute,[32] but directors who participate in an illegal refunding plan are accountable to the company for damage sustained by it as a result of their illegal acts.[33] While ordinarily directors are held to be trustees for the company of land purchased by them which is necessary to its purposes, as discussed in Corporations § 784, a director who buys land in good faith cannot be held to be a trustee thereof where the route of the railroad is subsequently changed so as to pass through such land [34] Directors rightfully entitled to office, although not in actual possession thereof, may maintain against mere intruders an action for money had and received as fees [35]

President. Where the rules and regulations of a railroad company provide that the president of the company shall keep in his special charge all bonds of special officers, and that the secretary of the company shall give a bond as specified, where

17. Me.—Gauthier v. Hines, 115 A. 258, 120 Me. 476.

18. Mass.—Tortorelli v. New York Cent R. Co., 95 N.E.2d 674.

19. Mass.—Tortorelli v. New York Cent. R Co., supra.

20. N.D.—Blake v. Chicago, etc., R. Co., 210 N.W. 183, 54 N.D. 677.

21. N.D.—Blake v. Chicago, etc., R. Co., supra.

22. Wash.—Liliopoulos v. Oregon-Washington R., etc., Co., 151 P. 818, 87 Wash. 396.

23. Ky.—Kentucky Union R. Co. v. Forkner, 40 S.W. 462, 19 Ky.L. 378.

24. Tex.—Davis v. Clark, Civ.App., 271 S.W. 190.

25. Wash.—Liliopoulos v. Oregon-Washington R., etc., Co., 151 P. 818, 87 Wash. 396.
51 C.J. p. 427 note 32.

26. Tex.—Western Weighing, etc., Bureau v. Armstrong, Com.App., 288 S.W. 119.

27. Mo.—Scott v. Atchison, T. & S. F. R. Co., App., 32 S.W.2d 139.

Section hand

With respect to liability for death of cow, knowledge acquired by section hand as owner's son and not imparted to foreman was not binding on railroad.—Scott v. Atchison, T. & S. F. R. Co., supra.

28. N.H.—Concord R. Co. v. Clough, 49 N.H. 257.
N.C.—Howerton v. Tate, 70 N.C. 161.

29. Ga.—Scofield v. Perkerson, 46 Ga. 325, 350.
51 C.J. p. 427 note 35.

30. Tex.—Eastern Texas Tract. Co. v. Harrison, Civ.App., 189 S.W. 302
51 C.J. p. 428 note 36

31. N.H.—Niagara Bridge Works v. Jose, 59 N.H. 81.

32. N.H.—Niagara Bridge Works v. Jose, supra.

33. N.Y.—Pollitz v. Wabash R. Co., 152 N.Y.S. 803, 167 App.Div. 669, rehearing denied 154 N.Y.S. 1140, 170 App.Div. 903.

34. Me.—Sandy River R. Co. v. Stubbs, 2 A. 9, 77 Me. 594.

35. N.C.—Howerton v. Tate, 70 N.C. 161.

no such bond has been required the president has been held personally liable for defalcations of the secretary to the amount of the bond the secretary should have given [36]

Conductor. A railroad conductor is liable to the company for the amount of fares which he improperly failed to collect [37]

Ticket agent. A ticket agent who engages in buying and selling joint tickets issued by other roads is liable to his company for any profits made by him,[38] but he may not be held liable for loss resulting from mistakes made in the sale of tickets generally, where there was no negligence on his part [39]

A freight agent who was appointed by a railroad company under a printed contract by which agents who furnish a warehouse rent free to the company are entitled to retain certain charges cannot maintain an action for rent of a warehouse on an implied contract against the company, if he has retained such charges.[40]

Railroad policeman. A policeman commissioned by the state on the application of a railroad company is not entitled to costs in a criminal proceeding as though he were a constable or public officer,[41] and his compensation depends on an agreement between him and the company for which he has been appointed.[42]

Remedies. Redress for fraudulent acts of officers ordinarily is to be obtained in a suit brought by the company,[43] unless it refuses to bring suit, in which case a stockholder may sue [44] Where an officer of the railroad violates his fiduciary duty to it in the consummation of a transaction, the road may rescind such transaction,[45] but if the officer acted in good faith the transaction may not be rescinded merely because he exercised poor judgment in the matter.[46]

§ 16. Powers

a. In general
b. Charging for transportation
c. Engaging in other business

a. In General

A railroad company possesses and may exercise only such powers as are conferred on it by charter or statute.

The statute under which a railroad company is organized is the primary source of its corporate power,[47] and it possesses and may exercise only such powers as are conferred on it by its charter or by governing statutes [48] Limitations prescribed by statute are binding on the company regardless of anything that may appear in its articles of incorporation,[49] which can confer on it no greater power than that authorized by the statute which gives it life.[50] Powers fairly implied in the charter or statute are, however, granted to the company as well as those expressed,[51] and it possesses, broadly speaking, all the rights or powers which are essential to the execution of its corporate purposes;[52] but the charter or statute still remains the measure of such power.[53]

Unless otherwise provided by statute or its charter, a railroad company ordinarily possesses all of the powers conferred by law on strictly private corporations, as well as those conferred on railroad corporations as such,[54] but the rule is subject to the qualification that a railroad company may exercise powers conferred by general corporation statutes only as far as they are appropriate to, and not inconsistent with, the railroad statutes under

36. La.—Pontchartrain R. Co. v. Paulding, 11 La. 41, 30 Am. D. 708

37. N.H.—Concord R. Co. v. Clough, 49 N.H. 257.

38. N.H.—Concord R. Co. v. Clough, supra

39. Ill.—Bryant v. Vandalia R. Co., 184 Ill. App. 284.

40. Pa.—Pennsylvania R. Co. v. Brisbin, 1 Walk. 67.

41. Pa.—Hamlin v. Berks County, 8 Pa. Co. 462

42. Pa.—Hamlin v. Berks County, supra.

43. U.S.—U. S. v. Union Pac. R. Co., C.C. Conn., 28 F.Cas. No. 16,598, 11 Blatchf. 385, affirmed 98 U.S. 569, 25 L.Ed. 143.

44. U.S.—U. S. v. Union Pac. R. Co., supra.

45. N.Y.—Lonsdale v. Speyer, 19 N.Y.S.2d 746, 174 Misc. 532, affirmed 19 N.Y.S.2d 773, 259 App.Div. 802, reargument denied 20 N.Y.S.2d 399, 259 App.Div. 863, affirmed 31 N.E.2d 512, 284 N.Y. 756.

46. N.Y.—Lonsdale v. Speyer, supra

47. Mo.—Clark v. Atchison, etc., R. Co., 6 S.W.2d 254, 319 Mo. 865

48. U.S.—In re Missouri Pac. R. Co., D.C.Mo., 13 F.Supp. 888
51 C.J. p. 428 note 54
Powers granted by federal law
Under the Interstate Commerce Act of 1940, 49 U.S.C.A. § 5, a railroad may exercise certain powers in addition to its powers under its corporate charter and state laws.—Seaboard Air Line R. Co. v. Daniel, S.C., 68 S.Ct. 426, 333 U.S. 118, 92 L.Ed. 580.

49. Mo.—Clark v. Atchison, etc., R. Co., 6 S.W.2d 954, 319 Mo. 865

50. Mo.—Clark v. Atchison, etc., R. Co., supra
Tex.—Missouri, etc., R. Co. v. State, Civ.App., 275 S.W. 673, certiorari granted 46 S.Ct. 483, 271 U.S. 653, 70 L.Ed. 1134, writ vacated 48 S.Ct. 82, 275 U.S. 494, 72 L.Ed. 391.

51. Va.—National Car Adv. Co. v. Louisville, etc., R. Co., 66 S.E. 88, 110 Va. 413, 24 L.R.A.,N.S., 1010.

52. Ga.—Brinson R. Co. v. Springfield Exch. Bank, 85 S.E. 634, 16 Ga.App. 425
51 C.J. p. 428 note 58.

53. Va.—National Car Adv. Co. v. Louisville, etc., R. Co., 66 S.E. 88, 110 Va. 413, 24 L.R.A.,N.S., 1010

54. Iowa.—State v. Wapello County, 12 Iowa 388.

which the company is organized,[55] and so a railroad company may not claim any general power which is not appropriate to, and consistent with, the construction, maintenance, and operation of its railroad.[56]

Construction of charter. In determining the extent of the powers conferred on a railroad company its charter must be construed as an entirety,[57] and so as to give effect to the intention of the legislature by which it was granted, as expressed by the language used or as fairly implied therefrom.[58] A grant of power is presumed to be made at the solicitation of the company and to be in form prepared by it,[59] and, accordingly, it will be construed in favor of the state and against the company.[60] Powers not conferred by express words or by necessary implication must be deemed withheld,[61] and if a particular power is omitted from those enumerated in the charter its exercise must be deemed to be prohibited unless there is an imperative implication to the contrary,[62] the enumeration of certain powers ordinarily implies the exclusion of all others.[63]

Contracts. In general, and in the absence of any express restriction or prohibition, a railroad company may, within the boundaries of legal action, make any contract for its corporate benefit for a proper consideration,[64] where the subject matter of the contract is not foreign to the purposes for which the company is created, but may fairly be regarded as incidental to, or consequential on those things which the legislature has authorized;[65] and the lawful result to be obtained is often, if not usually, the test of corporate power.[66] Power to construct and operate a railroad includes by implication the power to make all such contracts and agreements as the execution of its purposes and the convenience and interests of the company may require, as far as not forbidden by any restrictive provision.[67] The company has power to make a conditional agreement as well as a direct or absolute one.[68]

On the other hand, public policy precludes any agreement by a railroad which might prejudice either it or the welfare of the general public,[69] and any contract by which a railroad company attempts to absolve itself from its duties to the public or to render itself incapable of performing them is void and unenforceable, in the absence of the consent of the state,[70] except that, it has been held, where a merely permissive power to consolidate with other railroads has been conferred on it, a contract by which a company binds itself not to exercise such right is not invalid.[71] In the absence of express authorization a railroad company has no power to enter into a partnership.[72]

Acquisition of property. A railroad corporation may acquire and hold whatever properties are necessary for the operation of its business,[73] and, looking to future needs, it may acquire and hold more than it requires for present purposes.[74]

Application of money and property. A railroad company has no power to apply any of its money

55. N.J.—State v. Atlantic City, etc., R. Co., 72 A. 111, 77 N.J.Law 465.

56. N.J.—State v. Atlantic City, etc., R. Co., supra.
Question of law
Question of what is necessary to maintenance and operation of railroad where contracts entered into by railroad for purchase of properties are contested as being ultra vires is one of law for courts.—In re Missouri Pac. R. Co., D.C.Mo., 13 F.Supp. 888.

57. Va.—New York, etc., R. Co. v. Armstrong, 102 A. 791, 92 Conn. 349.
Va.—Richmond, etc., R. Co. v. Richmond, etc., R. Connection Co., 133 S.E. 888, 145 Va. 266.

58. Va.—Richmond, etc., R. Co. v. Richmond, etc., R. Connection Co., supra.

59. Va.—Richmond, etc., R. Co. v. Richmond, etc., R. Connection Co., supra.

60. N.Y.—In re Long Island R. Co., 82 N.E. 443, 189 N.Y. 428.
51 C.J. p. 429 note 67.

61. Ohio.—Columbus, etc., R. Co. v. Burke, 10 Ohio Dec., Reprint, 136, 19 Cinc.L.Bul. 27.
51 C.J. p. 429 note 68.

62. Pa.—Connellsville, etc., R. Co. v. Markleton Hotel Co., 93 A. 635, 247 Pa. 565, Ann.Cas.1916E 1218.

63. Va.—National Car Adv. Co. v. Louisville, etc., R. Co., 66 S.E. 88, 110 Va. 413, 24 L.R.A.,N.S., 1010.

64. U.S.—Equitable Trust Co. v. Denver, etc., R. Co., N.Y., 250 F. 327, 162 C.C.A. 397, certiorari denied 38 S.Ct. 426, 246 U.S. 672, 62 L.Ed. 932.

65. U.S.—Union Pac. R. Co. v. Chicago, etc., R. Co., Neb., 16 S.Ct. 1173, 163 U.S. 564, 41 L.Ed. 265.

66. U.S.—Equitable Trust Co. v. Denver, etc., R. Co., N.Y., 250 F. 327, 162 C.C.A. 397, certiorari denied 38 S.Ct. 426, 246 U.S. 672, 62 L.Ed. 932.

67. Wis.—Scotland Western Bank v. Tallman, 17 Wis. 530.
51 C.J. p. 429 note 75.

68. U.S.—Equitable Trust Co. v. Denver, etc., R. Co., N.Y., 250 F. 327, 162 C.C.A. 397, certiorari denied 38 S.Ct. 426, 246 U.S. 672, 62 L.Ed. 932.

69. U.S.—Oldham v. Chicago & N. W. Ry. Co., C.C.A.S.D., 52 F.2d 111.
Tex.—Texas & P. Ry. Co. v. Price, Civ.App., 61 S.W.2d 195, reversed without opinion.

70. Ind.—Booker v. Lake Erie, etc., R. Co., 114 N.E. 998, 66 Ind.App. 521.
51 C.J. p. 429 note 77.

71. U.S.—Boyd v. New York, etc., R. Co., D.C.N.Y., 230 F. 174.

72. Mass.—Williams v. Johnson, 95 N.E. 90, 208 Mass. 544.

73. U.S.—In re Missouri Pac. R. Co., D.C.Mo., 13 F.Supp. 888.
Construction, maintenance, and equipment of railroads see infra §§ 121–196.

74. U.S.—In re Missouri Pac. R. Co., supra.

or property for any purpose except as directed and provided for by its charter or governing statute.[75] Thus, it is improper and wrong for a railroad company to embark its funds in other railroad undertakings, except when authorized by statute so to do.[76]

b. Charging for Transportation

The right to collect charges for transportation of freight and passengers is one of the essential powers of a railroad company.

It is an essential power of a railroad company to demand and receive tolls or charges for the transportation of freight and passengers[77]

Rates and rate making by carriers of goods are discussed in Carriers §§ 275–333; and passenger fares and tickets, in Carriers §§ 578–624 Rates and rate making by public utilities generally are considered in Public Utilities §§ 13–30, 41. Jurisdiction and powers of the Interstate Commerce Commission over rates are considered in Commerce § 143.

c. Engaging in Other Business

A railroad company may engage in any business within its express charter or statutory authorization or which is reasonably implied as incidental thereto.

In accordance with the principles governing the scope of the powers of corporations generally, discussed in Corporations §§ 941–959, a railroad company may engage in any business authorized by its charter or by statute,[78] and in any business incidental or auxiliary to the powers granted, the conduct of which becomes necessary and expedient in the care and management of its principal business.[79] Despite the absence of express statutory or charter provisions therefor, and in the absence of positive restrictions it has been held that a railroad company may, where it is necessary and convenient so to do, provide the services of a customs broker for its shippers,[80] operate telegraph and telephone lines and instruments for the purposes of its business,[81] or operate and maintain hotels, eating houses, and dining cars for the accommodation of its employees and passengers.[82] The fact that a railroad company is not authorized to engage in the business of buying and selling grain does not prevent it from holding a membership in a grain exchange for the purposes of learning when grain is to be transported to other markets, coming in contact with shippers, and soliciting the consignment of their grain over its road.[83]

On the other hand, a railroad company lacks authority to engage in any business which is neither within its express charter or statutory powers nor reasonably incidental thereto,[84] and may be restrained by appropriate action from so doing[85] Thus, it has been held that a railroad company lacks power to operate stages from its termini to distant towns,[86] or to carry on an express business,[87] or to engage in banking,[88] or to deal generally in commercial paper,[89] or to conduct a real estate business[90] A company chartered for the operation of an ordinary commercial railroad has no power to operate a street railroad or to extend its line as such.[91]

It has been variously held that a railroad company using electricity for motive power may,[92] or may not,[93] sell excess electric power to others or to the general public. While it has been held that where necessary and convenient in connection with its business, a railroad company may collect and deliver freight,[94] and that it is not beyond the im-

75. Ga.—Brinson R Co. v. Springfield Exch. Bank, 85 S E 634, 16 Ga App. 425.
51 C.J. p 429 note 81.

76. Mass —Codman v. Dumaine, 144 N E. 408, 249 Mass 451.
51 C J. p 430 note 88.

77. Minn —Blake v. Winona, etc., R. Co, 19 Minn. 418, 18 Am.R. 345, affirmed 94 U S 180, 24 L.Ed. 99.
51 C.J. p 431 note 17.

78. Miss.—Illinois Cent. R. Co. v. King, 88 So. 322, 125 Miss. 734.
51 C.J p 430 note 87.

79. Mich —Federal Gravel Co. v. Detroit & M. Ry. Co., 248 N.W. 831, 263 Mich. 341
51 C J. p 430 note 88.

80. Mich —Duluth, etc, R. Co. v. Wilson, 167 N.W. 55, 200 Mich. 313, L.R.A 1918E 763.

81. Ind.—Logansport v. Smith, 93 N E 883, 47 Ind App. 64.

82. Ill —State v. Illinois Cent. R. Co, 92 N.E. 814, 246 Ill. 188.
51 C J. p 430 note 96.

83. Neb —Twambey v. Chicago Great Western R. Co., 196 N.W. 319, 111 Neb 311.

84. Ga —Georgia Cent. R. Co, v. Collins, 40 Ga 582
N C —Beasley v. Aberdeen, etc., R. Co, 59 S.E. 60, 145 N C. 272.

85. Mass —Attorney General v. New York, etc., R. Co., 84 N E 737, 198 Mass 413.

86. Conn.—Hood v. New York, etc, R. Co., 22 Conn 1.
51 C J. p 430 note 99.

87. U.S.—Dinsmore v. Louisville, etc., R. Co., C C Ky., 2 F. 465, 2 Flipp. 672.

88. Ill —Goodrich v. Reynolds, 31 Ill. 490, 83 Am.D 240.
Mich —People v. River Raisin, etc, R. Co., 12 Mich 389, 86 Am D 64

89. Ill.—Goodrich v. Reynolds, 31 Ill. 490, 83 Am D. 240.

90. Mass —Williams v Johnson, 95 N E 90, 208 Mass. 544

91. Ohio —Cincinnati Incline Plane R Co v. Cincinnati, 5 Ohio S. & C P. 562, 7 Ohio N P 541.
Pa.—Commonwealth v. Northeastern El. R. Co., 29 A. 112, 161 Pa. 403.

92. Ill —Dickman v Madison County Light, etc., Co., 136 N.E. 790, 304 Ill. 470.

93. Pa.—Citizens' Electric Illumn. Co v Lackawanna, etc, R. Co, 99 A. 465, 255 Pa. 176.

94. U.S —Camblos v. Philadelphia, etc., R. Co., C.C.Pa., 4 F.Cas No. 2,331, 4 Brewst. 563, 39 Phila. 411.

plied powers of a railroad to engage a transfer line to carry on a pick-up and delivery service by truck for receiving or delivering freight going between shippers and the railroad,[95] there is also authority to the effect that a railroad may not transfer freight beyond its terminus to a station of another railroad.[96] Although a railroad may store or be a depository of goods which are to be or have been transported by it,[97] it may not carry on a general warehouse or storage business.[98]

Operation of ferry or steamer. Even though authorized to operate a ferry for the transportation of its passengers and freight,[99] a railroad may not engage in a general ferry business.[1] A railroad company may properly operate steamboats for the purpose of transporting its freight and passengers over waters constituting a part of its route or over those lying between the end of its railroad and the real terminus thereof;[2] but it may not operate a steamboat line on waters forming no part of its route or termini.[3]

Holding stock as engaging in business. The mere holding by a railroad company of the stock of a company engaged in another business is not engaging in such other business.[4]

Who may question right. The right of a railroad company to engage in a particular business cannot be attacked collaterally,[5] and, ordinarily, the question may be raised only in a direct action by the state or by a stockholder.[6]

§ 17. Duration and Termination of Corporate Existence

In the absence of a limiting provision of statute or charter, a railroad corporation has a perpetual existence in the sense that its charter will not expire by limitation of time, although it may be surrendered or forfeited under certain circumstances.

Under the general rule that corporations may have perpetual existence, discussed in Corporations § 78, a railroad company, in the absence of any limiting provision of its charter or the statute under which it is incorporated, has no specific duration and its existence as a corporation does not terminate merely by reason of the passage of time,[7] but, where charter or statute fixes a definite period of time during which its corporate life may continue, the company automatically ceases to exist as a corporation at the end of such period.[8] At any time a railroad company, like any other corporation, may have its corporate existence terminated by a voluntary surrender of its corporate franchises under principles discussed infra § 18, by consolidation with another company, infra § 239, or by an involuntary dissolution or forfeiture of its franchises at the instance of the state, infra § 18. Under some statutes, however, a railroad company continues to exist for a specified period after its charter has expired or been annulled for the purposes of suing and being sued, and closing up its business,[9] at the end of which period it entirely ceases to exist.[10]

Extension and renewal. To extend a railroad charter is to give one presently existing a greater or longer time within which to operate than that to which it was originally limited,[11] and the legislature ordinarily has power to extend such a charter;[12] and, where it has done so, the charter will be extended in accordance with the provisions of

95. Tenn.—Grace v. Louisville & N R. Co., 89 S.W.2d 354, 19 Tenn.App. 382.

96. Ga.—Macon v. Macon, etc., R. Co., 7 Ga. 221.

97. N.H.—Smith v. Nashua, etc., R. Co., 27 N.H. 86, 59 Am.D. 364.
Pa.—Bessemer, etc., R. Co. v. Ford Collieries Co., 116 A. 802, 273 Pa. 166.

98. Pa.—Bessemer, etc., R. Co. v. Ford Collieries Co., 116 A. 802, 273 Pa. 166.
51 C.J. p 430 note 3.

99. Conn.—Fitch v. New Haven, etc., R. Co., 30 Conn. 38.
51 C.J. p 431 note 9.

1. Conn.—Fitch v. New Haven, etc., R. Co., supra.
51 C.J. p 431 note 8.

2. Cal.—Wheeler v. San Francisco, etc., R. Co., 31 Cal. 46, 89 Am.D. 147.
51 C.J. p 430 note 97.

3. Ala.—Central R., etc., Co. v. Smith, 76 Ala. 572, 52 Am.R. 353.
51 C.J. p 430 note 7.

4. Pa.—Hartwell v. Buffalo, etc., R. Co., 6 Pa.Dist. 212, 19 Pa.Co. 231.

5. Pa.—Hilt v. Philadelphia, etc., R. Co., 43 Wkly.N.C. 429.
Tex.—English v. Landa Motor Lines, Civ.App., 166 S.W.2d 721, error refused.

6. Pa.—Hilt v. Philadelphia, etc., R. Co., 43 Wkly.N.C. 429.
Tex.—English v. Landa Motor Lines, Civ.App., 166 S.W.2d 721, error refused.

7. Mass.—Roxbury v. Boston, etc., R. Corp., 6 Cush. 424.
51 C.J. p 431 note 22.
Express grant of perpetual charter by legislature to railroad company constituted grant in perpetuity.—New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 55 F.2d 1028, 60 App.D.C. 403, reversed on other grounds 53 S.Ct. 106, 287 U.S. 178, 77 L.Ed. 248.

8. La.—New Orleans, etc., R. Co. v. New Orleans, 34 La.Ann. 429.
51 C.J. p 431 note 23.

9. U.S.—Ford v. Delta, etc., Land Co., Miss., 43 F. 181, affirmed 17 S.Ct. 230, 164 U.S. 662, 41 L.Ed. 590.
Me.—Maine Shore Line R. Co. v. Maine Cent. R. Co., 43 A. 113, 92 Me. 476.

10. U.S.—Ford v. Delta, etc., Land Co., Miss., 43 F. 181, affirmed 17 S.Ct. 230, 164 U.S. 662, 41 L.Ed. 590.
Me.—Maine Shore Line R. Co. v. Maine Cent. R. Co., 43 A. 113, 92 Me. 476.

11. Ky.—Fidelity & Columbia Trust Co. v. Louisville Ry. Co., 81 S.W. 2d 896, 258 Ky. 817.

12. Ky.—Fidelity & Columbia Trust Co. v. Louisville Ry. Co., supra.

the particular statute enacted[13] Where a statute expressly provides that the charter of a railroad company "is hereby extended" and also confers certain powers on it, such statute should be construed as effecting an extension and not as limited to the grant of enumerated powers.[14] The corporate existence of one railroad company may be continued by an act of the legislature in a new company under a new name;[15] but a statute incorporating a railroad company and transferring to and vesting in it all the property and franchises of a company whose corporate existence had previously terminated does not revive or continue the latter company[16]

Retention of corporate identity despite operation by others. It has been held that a railroad corporation retains its corporate identity despite the fact that its stock is owned by a holding company and that its road is operated as part of another railroad system.[17]

§ 18. Amendment, Revocation, or Forfeiture of Charter or Franchise, and Dissolution

a. Amendment and revocation
b. Forfeiture of charter or franchise and dissolution

a. Amendment and Revocation

(1) In general
(2) Assent or acceptance

(1) In General

The contractual character of a railroad charter ordinarily precludes its material alteration or amendment by the legislature without the consent of the corporation, except where the right of alteration or amendment has been reserved.

Inasmuch as a railroad company is a private corporation, as discussed supra § 3, the state cannot violate the contractual relations created by its charter,[18] and does not have the broad power of control which it may exercise over strictly public corporations.[19] After a railroad company has been duly incorporated or its charter has been accepted, the state cannot, without the consent of such company, alter or amend its charter in such a way as materially to affect its rights;[20] but railroad charters are subject to any constitutional provisions, existing at the time of the company's incorporation, which authorize the alteration or revocation of such charters,[21] or empower the legislature to pass regulatory laws,[22] and subject also to existing general laws relating to railroad companies,[23] except as modified or superseded by special charters,[24] as well as to any power expressly reserved by the legislature to revoke, alter, or amend the charter[25]

Where a railroad company is incorporated or a charter accepted subject to the reserved power of amendment, the legislature may withdraw powers previously granted to the company[26] or confer new powers or duties on it and require their exercise;[27] and the company is bound by any reasonable alteration or amendment the legislature may see fit to make,[28] at least where the amendment does not go beyond regulation, supervision, and control of the company in the public interest.[29] A lease of its road does not affect a reserved right to amend the charter of the company.[30] An amendment may be

13. Tex.—Flowers v Pecos River R. Co, 156 S W 2d 260, 138 Tex 18.
Organization fee or tax on extension of charter see supra § 12
Period of extension
Under some statutes the renewal of charter of railroad company renewed company's corporate existence for fifty years from date of filing of renewal resolution—Flowers v. Pecos River R. Co, 156 S.W 2d 260, 138 Tex 18.
Statute held not repealed
Tex—Flowers v. Pecos River R. Co., supra

14. Ky.—Fidelity & Columbia Trust Co v. Louisville Ry. Co, 81 S W.2d 896, 258 Ky. 817.

15. Va—Wilson v. Chesapeake, etc, R. Co, 21 Gratt 654, 62 Va 654.

16. Minn—Huff v Winona, etc, R Co, 11 Minn 180.
51 C.J p 431 note 30

17. Miss.—Illinois Cent. R. Co. v. Mississippi Cotton Seed Products Co, 148 So 371, 166 Miss 579.

18. Wis—Whiting v Sheboygan, etc, R. Co, 25 Wis 167, 3 Am R 30
51 C J p 431 note 34.

19. Ill—East Side Levee, etc, Dist v East St Louis, etc, R Co, 116 N E 720, 279 Ill 123.
51 C J p 431 note 35.

20. Ind—Cincinnati, etc, R. Co v. Clifford, 15 N E 524, 113 Ind. 460.
51 C.J p 432 note 36.

21. N Y.—New York Cent. R. Co. v. Middleport Gas, etc, Co, 184 N.Y. S 221, 193 App Div. 273, motions denied 184 N.Y S. 939, 193 App. Div. 933
51 C J. p 432 note 37.

22. Mich.—Wellman v. Chicago, etc., R. Co, 47 N.W. 489, 83 Mich. 592.

23. Mass—Worcester v. Norwich, etc, R Co, 109 Mass. 103.
S.C.—McCandless v Richmond, etc, R Co., 16 S.E. 429, 38 S C. 103, 18 L R A 440
51 C.J p 432 note 39

24. Mo—Scotland County v. Missouri, etc, R Co, 65 Mo. 123.
51 C.J. p 432 note 40.

25. N Y—People v Public Service Commission, 125 N Y S 1000, 140 App Div 839
51 C J. p 432 note 41.

26. Wis—Attorney General v. Chicago, etc, R Co, 35 Wis. 425.
51 C J. p 432 note 42.

27. Mass—Worcester v. Norwich, etc, R Co, 109 Mass 103.
Wis—Milwaukee, etc., R. Co v. Field, 12 Wis 340.

28. Mass.—Roxbury v Boston, etc., R. Corp., 6 Cush 424.

29. S.C.—Charlotte, etc., R Co. v. Gibbes, 4 S E 49, 27 S.C 385

30. Mass—Worcester v. Norwich, etc., R. Co, 109 Mass. 103.

made by a statute which does not in terms refer to the charter or modify it;[31] but a statute will ordinarily not be deemed to be enacted in exercise of the power of amendment or revocation unless the intention to amend or revoke the charter clearly appears.[32]

Before acceptance of charter. Until there has been an acceptance of the original charter of a railroad company, when so required, it is within the control of the legislature and may be amended or revoked,[33] and an amendment under such circumstances is merely a revival of the legislative right to form a corporation.[34]

Validity. In order that an amendment to a railroad company's charter or articles of incorporation may be valid, there must be a compliance with any statutory requirements as to filing or registration.[35] Defects in an amendment may be cured by a subsequent statute.[36]

(2) Assent or Acceptance

In the absence of a power of amendment reserved to the legislature, the assent of the railroad company to an amendment of its charter is essential in order to make it binding.

From the general rule that the charter of a railroad company cannot be amended without the consent of the company, discussed supra subdivision a (1) of this section, it follows that, where no power of amendment has been reserved to the legislature, or in the case of an amendment which does not come within the reserved power, an amendment must be assented to, or accepted by, the company in order to be binding on it,[37] but the company has the right to accept or assent to an amendment,[38] and on so doing becomes bound thereby.[39]

Assent is sufficiently manifested by asking the legislature to make the amendment,[40] or by expressly accepting an amendment theretofore enacted,[41] or by acting on, or acquiescing in, such amendment.[42]

Unanimous or majority assent of stockholders While a majority of the stockholders of a corporation may in some cases bind the others by accepting or assenting to an amendment, as discussed in Corporations § 81, unanimous consent of the stockholders, corporators, or members of a railroad company may be required, and dissenters be released, where an amendment is fundamental, radical, or vital in character,[43] as where it in fact constitutes a separate and distinct charter, creating a new company,[44] unless such stockholders, corporators, or members are estopped by acquiescence or otherwise, as considered in Corporations § 81 d (2). The want of an acceptance by a sufficient number of stockholders may be waived by those dissenting or not joining therein;[45] and the state may not object that proper assent was not given.[46] The failure of any stockholder to object to the exercise of a power conferred by an amendment, at a meeting held for that purpose, constitutes a sufficient concurrence in, and assent to, such amendment by all the stockholders.[47]

Where power to amend has been reserved, no acceptance of an amendment to a charter is necessary and it becomes operative without the assent of the company.[48]

b. Forfeiture of Charter or Franchise and Dissolution

(1) In general
(2) Lease or sale of property
(3) Failure to construct or complete road
(4) Suspension or abandonment of railroad business
(5) Waiver or nonenforcement of forfeiture
(6) Proceedings
(7) Operation and effect

(1) In General

A railroad corporation may forfeit its charter and

31. Wis.—State v. Railroad Commission, 117 N.W. 846, 137 Wis. 80. 51 C.J. p. 432 note 47.

32. U.S.—Union Pac. R. Co. v. Laramie Stockyards Co., Colo., 34 S.Ct. 101, 231 U.S. 190, 58 L.Ed. 179. 51 C.J. p. 432 note 48.

33. Ind.—Cincinnati, etc., R. Co. v. Clifford, 15 N.E. 524, 113 Ind. 460. 51 C.J. p. 432 note 50.

34. Tex.—Quinlan v. Houston, etc., R. Co., 34 S.W. 738, 89 Tex. 356.

35. Tenn.—Anderson v. Railroad Co., 17 S.W. 803, 91 Tenn. 44. Wis.—State v. Railroad Commission, 117 N.W. 846, 137 Wis. 80.

36. Tenn.—Tennessee Cent. R. Co. v. Campbell, 73 S.W. 112, 100 Tenn. 655. 51 C.J. p. 432 note 54.

37. Conn.—Hartford, etc., R. Co. v. Wagner, 48 A. 218, 73 Conn. 506. 51 C.J. p. 433 note 57.

38. Ala.—Louisville, etc., R. Co. v. State, 45 So. 296, 154 Ala. 156. 51 C.J. p. 433 note 58.

39. Ind.—Smead v. Indianapolis, etc., R. Co., 11 Ind. 104.

40. Ind.—Smead v. Indianapolis, etc., R. Co., supra.

41. Ala.—Louisville, etc., R. Co. v. State, 45 So. 296, 154 Ala. 156. Ind.—Smead v. Indianapolis, etc., R. Co., 11 Ind. 104.

42. Ala.—Louisville, etc., R. Co. v. State, 45 So. 296, 154 Ala. 156. 51 C.J. p. 433 note 62.

43. Ga.—Snook v. Georgia Impr. Co., 9 S.E. 1104, 83 Ga. 61. 51 C.J. p. 433 note 64.

44. Ga.—Youngblood v. Georgia Impr. Co., 10 S.E. 134, 83 Ga. 797. 51 C.J. p. 433 note 65.

45. Ala.—Louisville, etc., R. Co. v. State, 45 So. 296, 154 Ala. 156.

46. Ala.—Louisville, etc., R. Co. v. State, supra.

47. Vt.—Vermont, etc., R. Co. v. Vermont Cent. R. Co., 34 Vt. 1.

48. Conn.—State v. New Haven, etc., Co., 43 Conn. 351.

suffer dissolution for misuse of, or failure to use, its franchise and powers in essential matters; or it may, within limitations imposed by its public duties, effect a voluntary dissolution.

It may be ground for forfeiting the franchise of a railroad company and dissolving the company that it has willfully and repeatedly misused or failed to exercise its franchise and powers with respect to matters which are of the essence of the contract between the company and the state,[49] as where it makes a material departure from the points designated in the charter for the location of the road,[50] or where the management makes discriminations clearly showing an intention to exclude from the benefits of the road all except its principal stockholders for the purpose of preventing competition,[51] and the company may also be dissolved for any act or omission on its part made a cause for forfeiture by its charter or governing statute,[52] as for a breach of a material condition subsequent prescribed therein.[53] Unless otherwise provided by constitution or statute, however, an isolated case of nonuser or misuser is not in itself ground for a forfeiture of a company's charter,[54] nor is the fact that the company intends to neglect the performance of its full duties to the public[55] or that it has obtained a charter from another state.[56] A misuser or nonuser with respect only to a matter not materially concerning the public or the performance of the company's public duties is not cause for a forfeiture.[57] Misconduct or infidelity on the part of the officers or trustees of a railroad company is not ground for dissolving it,[58] and the remedy in such case is to enjoin the misconduct or remove the officers.[59]

In the absence of constitutional, statutory, or charter provisions to the contrary,[60] a railroad company is not ipso facto dissolved by an improper act or omission.[61] Failure to construct or complete the road as effecting an automatic dissolution is discussed infra subdivision b (3) of this section.

Voluntary dissolution A railroad company may be dissolved by a voluntary surrender of its franchises,[62] except in so far as its public duties may limit the right so to do, as considered infra subdivision b (4) of this section, and the legislature may release the company from such limitation.[63] The failure of a railroad company which has been divested of its property by judicial sales to do any business or maintain its corporate organization for many years has been held to show a voluntary surrender of its corporate franchise.[64] A voluntary dissolution is not a corporate act but the act of the members of the company,[65] and its officers in effecting such an arrangement act as trustees of the members, and not as corporate functionaries.[66]

(2) Lease or Sale of Property

The lease or sale of all its property by a railroad corporation does not of itself effect a dissolution of the corporation or relieve it from its debts and obligations; but such a lease or sale, in combination with other factors, may be ground for forfeiture of its charter.

The mere leasing by a railroad company of all or any part of its property,[67] or the voluntary[68] or judicial[69] sale thereof, does not of itself work such a dissolution of the company as to disable it from thereafter exercising its corporate powers; nor does it relieve the company from its debts and obligations.[70] On the other hand, a sale of all the corporate property may be deemed a dissolution of the company for the purpose of protecting and en-

49. Tex.—East Line, etc, R. Co. v State, 12 S W. 690, 75 Tex 434
51 C J. p 433 note 74—26 C J. p 1044 note 95.

50. Ark—Mississippi, etc, R. Co. v. Cross, 20 Ark 443.

51. Me—Ulmer v. Lime Rock R Co, 57 A. 1001, 98 Me 579, 66 L R. A. 387

52. Tex—State v. Southern Pac. R. Co, 24 Tex 80.
51 C.J p 434 note 77.

53. Ark—Brown v. Wyandotte, etc, R Co, 56 S W. 862, 68 Ark 134.
Tenn.—La Grange, etc, R. Co. v. Rainey, 7 Coldw. 420.

54. Pa—Commonwealth v. New York, etc., R Co., 10 Pa.Co. 129.

55. Kan—State v. Martin, 33 P. 9, 51 Kan. 462
Pa—Commonwealth v. Pittsburg, etc, R. Co., 58 Pa. 26.

56. Pa.—Commonwealth v. Pittsburg, etc., R. Co., supra.

57. Miss—Harris v. Mississippi Valley, etc, R Co, 51 Miss 602

58. N Y—Belmont v. Erie R Co, 52 Barb. 637.

59. N.Y.—Belmont v. Erie R. Co, supra.

60. N.Y.—Delaware & H. Co. v. Mechanicville & Fort Edward R. Co, 197 N E 325, 268 N Y. 394.
51 C.J. p 434 note 85.

Although no sentence of death has been issued by a court, a railroad corporation may automatically cease to exist because of its failure to comply with statutory conditions within the period limited by the legislature—Delaware & H Co. v Mechanicville & Fort Edward R. Co, supra

61. Wis.—Attorney General v. Superior, etc., R. Co., 67 N.W. 1138, 93 Wis. 604.

62. Wis.—Combes v Keyes, 62 N.W. 89, 89 Wis 297, 46 Am S R 839, 27 L R A 369
51 C J. p 434 note 88.

63. Pa—Lauman v. Lebanon Valley R Co, 30 Pa 42, 72 Am.D 685

64. Wis—Combes v Keyes, 62 N.W. 89, 89 Wis 297, 46 Am S R. 839, 27 L R A 369

65. Pa—Lauman v. Lebanon Valley R Co., 30 Pa. 42, 72 Am.D 685.

66. Pa.—Lauman v. Lebanon Valley R. Co, supra

67. Iowa—State v Omaha, etc, R., etc, Co, 60 N.W. 121, 91 Iowa 517.
51 C J. p 434 note 95.

68. Minn.—State v. St. Paul, etc., R. Co, 28 N.W. 245, 35 Minn. 222
51 C J. p 434 note 96.

69. Tex—Gulf, etc., R Co., v. Morris, 4 S W. 156, 67 Tex 692.

70. Tex.—Gulf, etc, R. Co. v. Morris, supra.
51 C.J. p 434 note 98.

forcing the rights of third persons,[71] and in case of a judicial sale of all the corporate property and franchises of the company the court may be justified in administering the assets of the company as if a legal dissolution had occurred.[72] Where a sale or lease is accompanied by acts made a cause of forfeiture by statute,[73] or by acts or omissions which amount to a willful misuser or nonuser of the corporate franchises of the company,[74] it may work a forfeiture or constitute grounds on which the state may have a forfeiture declared.

(3) Failure to Construct or Complete Road

A railroad may suffer dissolution or forfeiture of its charter for misuse or nonuse of its powers in respect of construction of the road Under some statutes, but not under others, failure to complete construction of the road within a specified time may result in an automatic forfeiture of its charter or in an automatic loss of certain powers thereunder.

In accordance with the general rules relating to the involuntary dissolution of a railroad company and the forfeiture of its charter and corporate franchise, discussed supra subdivision b (1) of this section, a railroad company may be dissolved by reason of a wrongful misuse or nonuse of its corporate powers relative to the construction of the road,[75] as where it delays for an unreasonable time to construct the line provided in its charter,[76] or constructs a railroad wholly unsuited to the needs of the public;[77] but mere delay in construction or completion is not, in the absence of statutory restriction as to time, ground for forfeiture of its charter rights unless the lapse is so long as to amount to an abandonment,[78] and delay in actual construction does not render the charter liable to forfeiture where the company is engaged in continuous endeavors to finance the proposed construction.[79] In the absence of a provision to the contrary, failure to construct or to maintain a railroad is not ground for automatic dissolution of the corporation, but may be taken advantage of only by a direct proceeding against the company in behalf of the state for the purpose of procuring a judgment of forfeiture by reason of the nonuser of the franchise,[80] and the state may have an election whether or not to proceed to forfeit the franchise.[81]

Construction within prescribed time. In the absence of a statutory or charter provision to that effect the mere fact that a railroad company fails to begin, carry on, or complete the construction of its road within a time or at a rate of progress specified in its charter or governing statute does not of itself work a dissolution of the company,[82] although it is usually ground for which a forfeiture may be declared in a direct proceeding by or on behalf of the state,[83] but under some statutes such a failure constitutes a forfeiture or dissolution, without the intervention of the courts or any action on the part of the state.[84] Where the condition is that the company expend a certain amount of its capital within a specified time, the fact that it has granted to another company the privilege of laying tracks on parts of its route will not enable it to retain its corporate existence without making the prescribed expenditures;[85] nor will a reservation to the lessor in such case of a right to run cars over part of the track laid by the lessee avail to give the lessor the benefit of expenditures by the lessee.[86] Such a provision for construction or completion cannot be defeated by transferring the right of way to another company.[87]

In some jurisdictions failure to construct or complete the road is ground for forfeiture only as to

71. Ala.—Davis v. Memphis, etc., R. Co., 6 So. 140, 87 Ala. 633.

72. Mo.—Moore v. Whitcomb, 18 Mo. 543.
51 C.J. p. 434 note 1.
Proceedings for dissolution or forfeiture see infra subdivision b (6) of this section.

73. Ark.—Louisiana, etc., R. Co. v. State, 88 S.W. 559, 75 Ark. 435, 5 Ann.Cas. 637.

74. Ind.—Eel River R. Co. v. State, 57 N.E. 388, 155 Ind. 433.
51 C.J. p. 434 note 3

75. Ohio.—State v. Hazelton, etc., R. Co., 40 Ohio St. 504.

76. Ohio.—State v. Hazelton, etc., R. Co., supra.

77. Ohio.—State v. Hazelton, etc., R. Co., supra.

78. La.—Stephens v. Louisiana Long Leaf Lumber Co., 47 So. 887, 122 La. 547.
51 C.J. p. 435 note 10

79. Iowa.—Young v. Webster City, etc., R. Co., 39 N.W. 234, 75 Iowa 140.

80. Pa.—A. D. Graham & Co. v. Pennsylvania Turnpike Commission, 33 A.2d 22, 347 Pa. 622.

81. U.S.—Farmers' L. & T. Co. v. Henning, C.C.Kan., 8 F.Cas.No. 4,066
N.Y.—People v. Albany, etc., R. Co., 24 N.Y. 261, 82 Am.D. 295.

82. Ind.—Cluthe v. Evansville, etc., R. Co., 95 N.E. 543, 176 Ind. 162, Ann.Cas.1914A 935.
51 C.J. p. 435 note 12.
Performing preliminary work
"The law does not provide that a railroad company shall forfeit its charter if it does not commence the building of its road within two years after it acquires its charter rights. It may use 'its franchises' as effectually in raising means to build its road, in making preliminary surveys, and in many other ways, as it can in grading and laying ties and iron."—Young v. Webster City, etc., R. Co., 39 N.W. 234, 75 Iowa 140, 143

83. Vt.—Vermont, etc., R. Co. v. Vermont Cent. R. Co., 34 Vt. 1.
51 C.J. p. 435 note 13.

84. N.Y.—Delaware & H. Co. v. Mechanicville & Fort Edward R. Co., 197 N.E. 325, 208 N.Y. 394.
51 C.J. p. 435 note 14—26 C.J. p. 1041 note 48 [a].

85. N.Y.—In re Brooklyn, etc., R. Co., 81 N.Y. 69.

86. N.Y.—In re Brooklyn, etc., R. Co., supra.

87. Ill.—People v. Toledo, etc., R. Co., 117 N.E. 701, 280 Ill. 495, Ann.Cas.1918D 224.

such portion of the road as has not been constructed within the time limited,[88] or for the automatic forfeiture of all unexercised charter powers;[89] and it has been held under the latter type of statute that the general rule that omission to perform a duty merely exposes a corporation to the hazard of forfeiture of its charter by court proceedings without ipso facto effecting its dissolution does not preclude an automatic deprivation of unused charter powers.[90] A provision requiring construction or completion within a specified time relates, however, only to the line of railroad authorized by the company's original charter or articles of incorporation,[91] and so failure to complete extensions subsequently authorized or undertaken is not ground for forfeiture[92] It has been held that a period during which a railroad company was in the hands of a receiver is not to be included in determining whether its road has been completed within the time prescribed therefor.[93]

(4) Suspension or Abandonment of Railroad Business

Unjustifiable failure to operate its road or business, or voluntary surrender thereof, may afford ground for dissolution of a railroad company or forfeiture of its charter.

The unjustifiable failure of a railroad company to operate its railroad or business, or its voluntary abandonment thereof, is ground for the dissolution of the company and the forfeiture or annulment of its corporate franchise,[94] and, under some statutes, an abandonment of a part of its line is ground for a forfeiture of the company's corporate franchise as to the entire line[95] In the absence of statute providing therefor, however, it is no cause for forfeiture that the company discontinues unprofitable trains,[96] and it has also been held that a forfeiture will not be declared for a failure or refusal to run trains to a certain place, where there is no injury to the public and a forfeiture would not redress the grievance of which complaint is made[97]

Length of suspension. In some jurisdictions, under particular statutes, a suspension of the maintenance and operation of the road for a specified time is ground for a forfeiture[98] It has been held that a suspension or abandonment extending beyond the period so prescribed admits of no explanation or excuse to prevent a forfeiture from occurring or being declared,[99] but a nonuser for any period less than that specified by the statute is no ground for a dissolution.[1]

Voluntary dissolution by abandonment. A railroad company cannot incur a forfeiture or dissolve itself at its own pleasure and in disregard of the rights of others merely by abandoning its road or business,[2] and such abandonment or the entire disuse of the railroad is not enough to absolve the company from the performance of its duties.[3]

88. Minn—State v. St Paul, etc, R Co, 28 N.W 245, 35 Minn 222
51 C.J. p 435 note 18.

89. U S—Chicago, B & Q. R. Co v North Kansas City Development Co., C.C.A Mo, 134 F 2d 142, certiorari denied North Kansas City Development Co. v Chicago, B & Q. R. Co., 63 S Ct 1437, 319 U S 771, 87 L Ed 1719.

Public policy

The state as part of its public policy imposes rigid limitation on time within which railroad company must complete special undertakings of its charter and makes failure to do so operate automatically as a forfeiture of all of unexercised charter powers, except such as may be necessary to maintain facilities placed in operation prior to the forfeiture —Chicago, B & Q. R. Co. v. North Kansas City Development Co, C.C A Mo, 134 F.2d 142, certiorari denied North Kansas City Development Co v. Chicago, B & Q. R. Co, 63 S Ct. 1437, 319 U.S. 771, 87 L Ed 1719.

Statute held self-executing

U S—Chicago, B & Q. R. Co. v. North Kansas City Development Co., C.C A Mo, 134 F 2d 142, certiorari denied North Kansas City Development Co. v. Chicago, B. & Q R Co, 63 S Ct. 1437, 319 U.S 771, 87 L Ed. 1719.

Union depot

The forfeiture provisions of statute providing that if railroad corporation shall not within designated period begin construction of its road its corporate powers shall cease, apply to a union depot company, and term "road" is intended as a generic reference to all of special undertakings in charter of railroad company or union depot company or hybrid combination of both.—Chicago, B & Q R. Co. v. North Kansas City Development Co, C.C.A.Mo., 134 F.2d 142, certiorari denied North Kansas City Development Co. v. Chicago, B & Q R Co, 63 S Ct. 1437, 319 U S 771, 87 L Ed. 1719.

90. U S—Chicago, B & Q R Co. v North Kansas City Development Co, C C A Mo, 134 F 2d 142, certiorari denied North Kansas City Development Co v Chicago, B & Q R Co., 63 S Ct 1437, 319 U S. 771, 87 L.Ed. 1719.

91. Cal—People v. Southern Pac R Co, 158 P. 177, 177 Cal 692

92. Cal—People v. Southern Pac R Co, supra.

93. N Y—In re New York, etc, R Co., 85 N E 1014, 193 N Y. 72.

94. Ark—State R Commission v Saline River R Co, 177 S W. 896, 119 Ark 239
51 C J. p 435 note 23.

95. Mass—Brownell v. Old Colony R Co, 41 N E. 107, 164 Mass 29, 49 Am S R 442, 29 L R A 169
N Y—People v. Albany, etc, R. Co, 24 N Y. 261, 82 Am D 295.

96. Mass—Commonwealth v. Fitchburg R Co., 12 Gray 180.

97. Mich.—Attorney General v. Erie, etc., R. Co, 20 N.W 696, 55 Mich. 15
51 C J. p 436 note 26.

98. Minn—State v. Minnesota Cent. R Co., 30 N W 816, 36 Minn 246
51 C J. p 436 note 27.

99. N.Y—People v Northern R Co, 53 Barb 98, affirmed 42 N Y. 217, error dismissed 12 Wall. 334, 20 L. Ed 412.

1. N Y—People v. Atlantic Ave. R. Co, 26 N E 622, 125 N Y. 513,
51 C.J. p 436 note 29

2. N Y—People v. Troy, etc, R Co., 37 How Pr. 427.

3. N.Y.—People v. Troy, etc, R. Co, supra.
Duty to operate see infra §§ 390–392.

(5) Waiver or Nonenforcement of Forfeiture

The state may waive the right to forfeit the franchise of a railroad company.

Forfeiture of the franchise of a railroad company is a prerogative of the state,[4] which may be waived by it,[5] even after the occurrence of an act or omission which by constitution or statute is made a cause of forfeiture ipso facto,[6] and a cause of forfeiture is waived by acquiescing for an unreasonable time in the construction and operation of the railroad,[7] or by the enactment of a statute recognizing the company and authorizing the construction or operation of its road,[8] or extending the time for the completion of the road,[9] or expressly releasing the company from a cause of forfeiture or legalizing a violation.[10] A statute, however, relieving railroad companies from past defaults has no application to causes of forfeiture arising after the passage of the act.[11]

A waiver on condition may be revoked on a breach of the condition.[12]

(6) Proceedings

As a general rule the charter or franchise of a railroad company may be forfeited only in a direct proceeding for that purpose instituted by the state.

While under some constitutional, statutory, or charter provisions improper acts or omissions on the part of a railroad company may ipso facto render its charter and corporate franchise forfeited and the company dissolved, as discussed supra subdivisions b (1), (3) of this section, in the absence of any such provision a company may be deprived of its corporate franchise and an involuntary dissolution decreed against it only in a direct judicial proceeding, usually in the nature of quo warranto, instituted by, or in behalf of, the state for that purpose.[13] So, it has been held that except where forfeiture has resulted ipso facto from acts or omissions specified by statute,[14] the right of the company to corporate existence cannot be questioned in a collateral proceeding,[15] and, where the state has not proceeded to have a forfeiture declared or enforced, it cannot be invoked by a private individual or corporation.[16] Accordingly, where a pleading in a collateral proceeding seeks to set up the fact of forfeiture, it must usually allege that the forfeiture has been judicially declared in a suit for that purpose.[17]

Parties. In a proceeding to forfeit the charter of a railroad company because of the sale of its road, the purchaser is not a necessary party.[18] The lessee of a railroad has such an interest in the forfeiture of the charter of the lessor company as to entitle it to intervene in proceedings therefor.[19]

Pleading. The information or complaint in a proceeding by the state to enforce a forfeiture of a charter of a railroad company must set forth facts showing a good cause of forfeiture,[20] but it need not be expressed in technical language.[21] The complaint ordinarily need not allege that the acts or omissions alleged were prohibited by statute[22] or that injury to the public has resulted therefrom.[23]

Presumptions and burden of proof. In the case of an act or omission which would ipso facto terminate the corporate existence of the company, the presumption will be indulged, in the absence of evidence to the contrary, that no forfeiture has occurred,[24] and the burden of proving the contrary is on the one asserting it.[25] Where minority stockholders seek dissolution of a railroad corporation, there is a presumption that its officers and directors acted honestly and in good faith in continuing

4. N.C.—Brummitt v. Snow Hill R. Co., 148 S.E. 444, 197 N.C. 381.

5. N.C.—Brummitt v. Snow Hill R. Co., supra.
51 C.J. p. 436 note 33.

6. Ark.—St. Louis, etc., R. Co. v. St. Smith, etc., R. Co., 148 S.W. 531, 104 Ark. 344.

7. Ind.—State v. Bailey, 19 Ind. 452
51 C.J. p. 436 note 35

8. Wis.—Attorney General v. Superior, etc., R. Co., 67 N.W. 1138, 93 Wis. 604.
51 C.J. p. 436 note 36.

9. Ark.—St. Louis, etc., R. Co. v. Ft. Smith, etc., R. Co., 148 S.W. 531, 104 Ark. 344.
51 C.J. p. 436 note 37.

10. Ark.—Mississippi, etc., R. Co. v. Cross, 20 Ark. 443
Pa.—Commonwealth v. Pittsburg, etc., R. Co., 58 Pa. 26.

11. N.Y.—Brooklyn Steam Transit Co. v. Brooklyn, 78 N.Y. 524.

12. Tenn.—La Grange, etc., R. Co. v. Rainey, 7 Coldw. 420.
51 C.J. p. 436 note 40.

13. U.S.—Utah, etc., R. Co. v. Utah, etc., R. Co., C.C.Nev., 110 F. 879
51 C.J. p. 436 note 44

14. Ark.—St. Louis, etc., R. Co. v. Ft. Smith, etc., R. Co., 148 S.W. 531, 104 Ark. 344.

15. Ind.—Cluthe v. Evansville, etc., R. Co., 95 N.E. 543, 176 Ind. 162, Ann.Cas.1914E 935.
51 C.J. p. 437 note 46.

16. Va.—Dismal Swamp R. Co. v. John L. Roper Lumber Co., 77 S.E. 598, 114 Va. 537, Ann.Cas.1914C 641.
51 C.J. p. 437 note 47.

17. Ind.—Logan v. Vernon, etc., R. Co., 90 Ind. 552.

18. Tex.—East Line, etc., R. Co. v. State, 12 S.W. 690, 75 Tex. 434.

19. N.Y.—People v. Albany, etc., R. Co., 77 N.Y. 232.

20. N.C.—Attorney General v. Petersburg, etc., R. Co., 28 N.C. 456.
51 C.J. p. 437 note 52.

21. N.C.—Attorney General v. Petersburg, etc., R. Co., supra.

22. Ind.—Eel River R. Co. v. State, 57 N.E. 388, 155 Ind. 433.

23. Ind.—Eel River R. Co. v. State, supra.

24. D.C.—Chesapeake Beach R. Co. v. Washington, etc., R. Co., 23 App. D.C. 587.

25. Mo.—Edwards v. Missouri, etc., R. Co., 82 Mo.App. 96.

the operation of the road,[26] and a clear and convincing showing of bad faith is required to warrant the interference of the court.[27]

Determination and disposition. Where, in proceedings by, or on behalf of, the state, the evidence clearly shows the existence of a ground for forfeiting the company's charter, it is mandatory on the court to declare a forfeiture.[28]

(7) Operation and Effect

The dissolution of a railroad company deprives it of its corporate powers, but its property rights survive for the benefit of those who may have a right to, or just claims against, its assets.

The general rules relative to the operation and effect of forfeiture of corporate charters and the dissolution of other corporations, discussed in Corporations §§ 1727-1737, are applicable to railroad companies,[29] except as they may be modified or superseded by special statutory or charter provisions.[30] Thus all its general powers, as to be a corporation, to sue and be sued, to have a corporate seal, to acquire and hold property, and the like,[31] and such additional powers as may have been conferred on it,[32] cease and can no longer be exercised. Similarly, the officers of the company are divested by the forfeiture or dissolution of all their powers,[33] except that under some statutes they may continue to exercise powers necessary to wind up the company.[34]

On the other hand, the property rights of the company ordinarily survive for the benefit of those who may have a right to, or just claims against, its assets,[35] subject to loss by abandonment or forfeiture,[36] and so consents and franchises granted it by a municipality continue in existence and pass to the directors as trustees for the creditors and stockholders,[37] provided they are not subject to forfeiture for nonuser, as considered in Franchises § 27. It has been held that a railroad, although there has been a forfeiture or repeal of the company's charter, remains a public highway subject to the management and control of the state.[38]

Recovery of money deposited with state. It has been said that, on forfeiture of its charter for failure to construct its road, a railroad company has no right to recover moneys deposited with the state under a statute requiring such deposit at the time of organization, and providing for repayment of specified sums as construction proceeds.[39]

B. FOREIGN COMPANIES

§ 19. In General

Subject to exceptions provided for by constitutions or statutes, general rules relating to foreign corporations, as far as applicable, govern foreign railroad corporations.

Except as they may be modified or superseded by special constitutional or statutory provisions, the general rules relating to foreign corporations govern foreign railroad companies, as far as applicable thereto.[40] The privilege of a foreign corporation to operate a railroad within a state has been held to

26. N.Y.—Hayman v. Brown, 26 N.Y.S.2d 898, 176 Misc. 176
Sufficiency of evidence to overcome presumption
In action by minority stockholders to compel liquidation of a domestic corporation which operated a railroad in a foreign country, evidence was insufficient to overcome presumption of honesty of action and motive on part of directors in continuing operation of corporation, so as to warrant interference of the court.—Hayman v. Brown, 26 N.Y.S.2d 898, 176 Misc. 176.

27. N.Y.—Hayman v. Brown, supra.

28. Minn.—State v. Minnesota Cent. R. Co., 30 N.W. 816, 36 Minn. 246

29. U.S.—Terminal Shares v. Chicago, B. & Q. R. Co., D.C.Mo., 65 F. Supp. 678.

30. Va.—Sillyman v. Fredericksburg, etc., R. Co., 27 Gratt. 119, 68 Va. 119.
61 C.J. p. 437 note 61.

31. N.Y.—Brooklyn Steam Transit Co. v. Brooklyn, 78 N.Y. 524—New York v. Bryan, 115 N.Y.S. 551, 130 App.Div. 658, reversed on other grounds 89 N.E. 467, 196 N.Y. 158
Right to appear before commissions
A corporation which had forfeited railroad powers under its charter because of failure to comply with state laws requiring certain railroad construction within a fixed period would be without any right to appear before either the interstate commerce commission or the public service commission of the state as a railroad seeking orders and authority applicable only to railroads.—Terminal Shares v. Chicago, B. & Q. R. Co., D.C.Mo., 65 F. Supp. 678

32. N.Y.—New York v. Bryan, 115 N.Y.S. 551, 130 App.Div. 658, reversed on other grounds 89 N.E. 467, 196 N.Y. 158.

33. Mo.—Ford v. Kansas City, etc., R. Co., 52 Mo.App. 439

34. Mo.—Ford v. Kansas City, etc., R. Co., supra.

35. Ill.—Gulf Line Connecting R. Co. v. Golconda Northern R. Co., 125 N.E. 357, 290 Ill. 384
Tex.—Sulphur Springs, etc., R. Co. v. St. Louis, etc., R. Co., 22 S.W. 107, 23 S.W. 1012, 2 Tex.Civ.A. 650.

36. Tex.—Allison v. Richardson, Tex.Civ.App., 171 S.W. 1031, reversed on other grounds, Com.App., 213 S.W. 252
51 C.J. p. 437 note 67

37. N.Y.—New York v. Bryan, 115 N.Y.S. 551, 130 App.Div. 658, reversed on other grounds 89 N.E. 467, 196 N.Y. 158.

38. Pa.—Erie, etc., R. Co. v. Casey, 26 Pa. 287

39. U.S.—Jones v. Moore, D.C.Del., 198 F. 301

40. N.Y.—Long Island R. Co. v. Department of Labor of State of New York, 247 N.Y.S. 278, 138 Misc. 612, affirmed 177 N.E. 17, 256 N.Y. 498.
51 C.J. p. 438 note 75—p. 439 note 6.
Foreign corporations generally see Corporations §§ 1783-1960.

rest in comity,[41] although such a corporation may be authorized to build and operate a railroad within a state by act of the legislature.[42]

Under some constitutional provisions a railroad company chartered under the laws of a foreign state cannot operate any railroad within the state.[43] The view has been taken, however, that only the state may take advantage of such a constitutional provision.[44] A statutory provision prohibiting a corporation not chartered under the laws of the state to construct, acquire or operate a railroad within the state does not apply to a natural person.[45]

Under a statute requiring the payment of a tax, equal to the organization tax imposed on domestic railroad companies, by all foreign corporations doing business within the state except those which have theretofore built lines of railroad into or through the state, a foreign company thereafter extending an existing line within the state becomes liable for the payment of the organization tax on all that part of its capital employed in the state except such portion as was expended in the construction of the existing line.[46]

§ 20. Domestication or Domestic Incorporation

A state may require a foreign railroad company to become a corporation of the state as a condition precedent to the right of such company to own or operate a railroad within the state.

A state may impose on a foreign railroad company, as a condition precedent to its right to own or operate a railroad within the state, the duty of becoming a corporation of the state,[47] and under some constitutional provisions a railroad in a state belonging to a foreign company can be operated only after the owners or projectors shall have first become incorporated under the laws of the state.[48] In some jurisdictions statutes have been enacted providing for the domestication of such foreign companies.[49] Such statutes, however, ordinarily should be given a prospective rather than a retrospective construction,[50] and, unless the contrary appears, should be construed as applicable only to foreign companies thereafter desiring to engage in the railroad business in the state rather than to companies already operating therein,[51] and such a statute has been held inapplicable to a foreign company acquiring in due course rights previously granted by the state to another foreign company.[52]

A statute recognizing a foreign railroad company as such, and giving it authority to construct or operate a railroad within the state, does not make it a domestic corporation;[53] but under a statute declaring railroad companies doing business within the state under a charter or laws of another specified state to be, as to their property, operations, and business in the state, domestic corporations, the status of such a railroad company doing business in the state has been regarded as equivalent to that of a resident of the state.[54]

The matter of a multiple or consolidated corporation existing under the laws of several states is discussed in general aspects in Corporations § 1795; the right of railroad companies of different states to consolidate is discussed infra § 235, and the operation and effect of consolidation with a foreign railroad company infra § 240.

Mode. Where the method by which a foreign railroad company may become a domestic corporation

41. N.Y.—Long Island R. Co. v. Department of Labor of State of New York, supra.

42. N.Y.—Long Island R. Co. v. Department of Labor of State of New York, supra.

43. S.C.—Blue Ridge Power Co. v. Southern R. Co., 115 S.E. 306, 122 S.C. 222.

44. Miss.—Illinois Cent. R. Co. v. Mississippi Cent. R. Co., 148 So. 371, 166 Miss. 579.

45. Tex.—Boston, etc., Corp. v. Guarantee Life Ins. Co., Civ.App., 233 S.W. 1022.

46. Mo.—State v. Cook, 71 S.W. 829, 171 Mo. 348.

Organization fee or tax in general see supra § 12.

47. Ky.—Plummer v. Chesapeake, etc., R. Co., 136 S.W. 162, 143 Ky. 102, 33 L.R.A.,N.S., 362.

48. S.C.—Blue Ridge Power Co. v. Southern R. Co., 115 S.E. 306, 122 S.C. 222.

Domestication statute invalid

(1) A statute providing for the domestication of foreign railroad companies has been regarded as invalid under a constitutional provision prohibiting the grant to a foreign corporation of a license to build or operate a railroad within the state and the operation by such a corporation of such a railroad and providing that the owners or projectors of a railroad, which is to be built or operated, or is being operated, in the state and which is partly in the state and partly in another or other states, shall first become incorporated under the laws of the state.—Carolina, etc., R. v. McCown, 66 S.E. 413, 84 S.C. 318.

(2) It has also been stated that the words "owners," "projectors," and "stockholders" refer to the persons or individuals who own or project the railroad, or own or hold the stock of the foreign corporation interested in building or operating the railroad.—Carolina, etc., R. v. McCown, 66 S.E. 413, 84 S.C. 318.

49. Ky.—Plummer v. Chesapeake, etc., R. Co., 136 S.W. 162, 143 Ky. 102, 33 L.R.A.,N.S., 362.

50. Mo.—State v. Roach, 184 S.W. 969, 267 Mo. 300.

51. Mo.—State v. Roach, supra.

52. Mo.—State v. Roach, supra.

53. U.S.—Bryan v. Louisville, etc., R. Co., Mo., 244 F. 650, 157 C.C.A. 98, error dismissed and certiorari denied 38 S.Ct. 334, 246 U.S. 651, 62 L.Ed. 921.

54. W.Va.—Gridelli v. Norfolk, etc., R. Co., 125 S.E. 99, 97 W.Va. 400.—Stout v. Baltimore, etc., R. Co., 63 S.E. 317, 64 W.Va. 502, 131 Am.S.R. 940.

is prescribed by statute, such method must be pursued to the exclusion of all others.[55] Under some statutes owners or projectors of a railroad who have already obtained a charter in another state and who seek to be incorporated in the state must comply with all the regulations, such as those relating to subscription of stock, election of officers, and other steps in organization, applicable to domestic companies.[56]

Effect. The incorporation within a state of a foreign railroad company does not divest it of its original citizenship,[57] but it has been stated broadly that, on compliance with the statute, the foreign company becomes a domestic corporation for all purposes except federal jurisdiction.[58]

Under a constitutional provision prohibiting foreign companies from operating railroads within a state except on condition that the owners or stockholders of such companies incorporate within the state, a company so incorporated within the state is a distinct and separate corporation from the foreign company;[59] the foreign company may own the entire railroad property, including that portion of it within the state which is managed and controlled by the domestic company,[60] and the grant of a domestic charter does not have the effect of transferring the property of the foreign company to the domestic company.[61] Under such constitutional provision the powers of the domestic company are limited to business done within the state or to business outside the state necessarily connected with its operation within the state,[62] and it has no power to make contracts having no connection with the business within the state,[63] nor is it responsible on contracts made by the foreign company.[64]

§ 21. State Regulation

Generally, subject to certain limitations, a foreign railroad corporation may not exercise its corporate powers or do business within a state except by permission of such state and on the conditions imposed by such state.

In accordance with general rules, and subject to limitations to such rules, with respect to foreign corporations, stated in Corporations §§ 1788, 1810, 1811, a railroad company may not exercise its corporate powers or do business within a state other than that of its incorporation except by permission or authority of such foreign state and on the conditions imposed by it,[65] and in some jurisdictions statutes have been enacted prescribing the conditions on which such foreign companies may operate within the state or regulating the exercise of their corporate powers therein.[66] A foreign railroad company is within the terms of a regulatory statute relating to every railroad company doing business in the state.[67] The mere fact that a foreign railroad corporation has acquired property of a domestic corporation does not give such foreign corporation the right to transact business in the state without complying with a statute imposing conditions on the transaction of business by foreign corporations.[68] A statute prescribing the terms on which foreign railroad companies may acquire real estate or exercise the power of eminent domain is applicable to a foreign company purchasing an existing railroad as well as to a company desiring to come into the state for the purpose of constructing a railroad.[69]

55. Ky.—Plummer v. Chesapeake, etc., R. Co., 136 S.W. 162, 143 Ky. 102, 33 L.R.A.,N.S., 362.

56. S.C.—Lyles v. McCown, 63 S.E. 355, 82 S.C. 127, 17 Ann.Cas. 436.
Incorporation and organization of domestic railroad companies see supra §§ 8–12.

Organization tax
Under a different statute the view has been taken that there was no liability for the organization tax imposed on domestic corporations at their formation.—State v. Tompkins, 25 S.E. 982, 48 S.C. 49.

57. Ky.—Plummer v. Chesapeake, etc., R. Co., 136 S.W. 162, 143 Ky. 102, 33 L.R.A.,N.S., 362.

58. S.C.—Geraty v. Atlantic Coast Line R. Co., 60 S.E. 936, 80 S.C. 355.

59. S.C.—Blue Ridge Power Co. v. Southern R. Co., 115 S.E. 306, 122 S.C. 222.

60. S.C.—Blue Ridge Power Co. v. Southern R. Co., supra.

61. S.C.—Blue Ridge Power Co. v. Southern R. Co., supra.

62. S.C.—Blue Ridge Power Co. v. Southern R. Co., supra.

63. S.C.—Blue Ridge Power Co. v. Southern R. Co., supra.

64. S.C.—Blue Ridge Power Co. v. Southern R. Co., supra.

65. N.Y.—People v. Gilchrist, 161 N.E. 432, 248 N.Y. 97.
Regulation of railroad companies generally see infra §§ 27–31.

Reference to lines outside state
The legislature might constitutionally identify railroads to be regulated in the state by reference to lines of railroad outside state, and it would not thereby be guilty of extraterritorial legislation.—Union Pac. R. Co. v. Anderson, 120 P.2d 578, 167 Or. 687.

66. Ill.—Cincinnati, I. & W. R. Co. v. Barrett, 94 N.E.2d 294, 406 Ill. 499.—People v. Chicago, etc., R. Co., 79 N.E. 144, 223 Ill. 581, 7 Ann. Cas. 1.

67. Ill.—People v. Chicago, etc., R. Co., supra.

68. Ill.—Cincinnati, I. & W. R. Co. v. Barrett, 94 N.E.2d 294, 406 Ill. 499.
Imposition of fees or taxes on exercise of privileges by foreign corporations see C.J.S. title Taxation § 190, also 37 C.J. p. 235 notes 98, 99.
61 C.J. p. 340 note 7–p. 345 note 68.

69. Ky.—Plummer v. Chesapeake, etc., R. Co., 136 S.W. 162, 143 Ky. 102, 33 L.R.A.,N.S., 362.
Exercise of power of eminent domain by foreign corporation generally see Eminent Domain § 25.

§ 22. —— What Constitutes "Doing Business"

Generally a foreign corporation is doing business within a state so as to be subject to regulatory statutes of such state where it is operating a railroad line within such state or where it maintains its general offices and conducts its affairs therein.

In accordance with the rules relating to foreign corporations generally, stated in Corporations §§ 1828–1842, a foreign railroad company is doing business within a state, so as to subject it to regulatory statutes enacted therein, when it is operating a line of railroad within the state[70] or when it maintains its general offices and conducts its affairs therein,[71] but a foreign railroad company not owning or operating a railroad within the state is not to be treated as doing business therein by reason of the fact that its cars are brought into the state by another railroad company under a joint traffic arrangement.[72]

C. ACTIONS BY OR AGAINST RAILROAD COMPANIES

§ 23. In General

General rules governing civil actions against corporations apply to actions against railroad companies, except as modified or superseded by particular statutes.

Except as modified or superseded by particular statutes, the general rules governing civil actions against corporations, discussed in Corporations §§ 1287–1357, 1917–1959, apply to actions against railroad companies.[73] Some statutes do not authorize an amendment as to parties which results in the substitution of one railroad company for another and different railroad company as defendant.[74] A sale under execution on a judgment against a railroad company of all the property of such company does not include real property of another, of which such company had taken possession without instituting condemnation proceeding and without giving compensation or security to the owner of such real property.[75]

Actions or proceedings against railroad companies involving various types of matters or situations are considered in detail in appropriate places infra this title, and actions against railroad companies to enforce their liability as common carriers of goods or passengers are treated in detail in appropriate places in the title Carriers.

§ 24. Limitation of Actions

A statute limiting the time for bringing action against any railroad company owning or operating any railroad within the state has been regarded as applicable to both foreign and domestic railroad companies.

A statute limiting the time for bringing action against any railroad company owning or operating any railroad within the state has been regarded as applicable to both foreign and domestic railroad companies operating within the state.[76] A provision in the charter of a railroad company limiting the time within which actions against the company may be begun is not repealed by implication by a general statute subsequently enacted prescribing a longer period of limitation.[77] Limitation with respect to actions against railroad companies involving various

70. Ark.—State v. Chicago, etc., R. Co., 128 S.W. 555, 95 Ark. 114.

71. Cal.—Bullfrog Goldfield R. Co. v. Jordan, 163 P. 40, 174 Cal. 342

72. Minn.—Slaughter v. Canadian Pac. R. Co., 119 N.W. 398, 106 Minn. 263.
Traffic agreements generally see infra §§ 225–233.

73. N.Y.—Norman v. Long Island R. Co., 18 N.Y.S.2d 51, 258 App.Div. 1089, affirmed 35 N.E.2d 500, 285 N.Y. 829
51 C.J. p. 439 note 11-p. 446 note 75.
Designation of defendant
(1) In an action against a "railway company" its answer and appearance were not sufficient to bring another and different company, which was associated with the designated defendant, before the court as a proper party defendant, even though the designated defendant was not properly served with process.—Gillette Motor Transport Co. v. Whitfield, Tex.Civ.App., 160 S.W.2d 290.

(2) It has been held, however, that where the court has acquired jurisdiction of the person of defendant, as well as of the subject matter, it may permit an amendment of the complaint to correct a misnomer of defendant company.—Thompson v. Southern Pac. Co., 183 P. 153, 160 Cal. 730—Haverstick v. Southern Pac. Co., 87 P.2d 146, 1 Cal.App.2d 605
Dismissal of complaint
In action against railroad company for personal injuries, where plaintiff failed to establish negligence of the company, complaint was properly dismissed.—Norman v. Long Island R. Co., 18 N.Y.S.2d 51, 258 App.Div. 1089, affirmed 35 N.E.2d 500, 285 N.Y. 829.
Furnishing information as to proper party defendant
The view has been taken that an agent of a railroad company who has been served with process in an action against such company is not obliged voluntarily to inform plaintiff that the action should have been brought against another railroad company, notwithstanding such agent is also the agent of such other company.—Van Landingham v. Alabama Great Southern R. Co., 8 So.2d 266, 243 Ala. 31.

74. Ala.—Van Landingham v. Alabama Great Southern R. Co., 8 So.2d 266, 243 Ala. 31—Western Ry. of Alabama v. McCall, 7 So. 650, 89 Ala. 375.

75. U.S.—Hustead v. Barron, C.C.A.Pa., 75 F.2d 169.

76. N.J.—Plaut v. Pennsylvania R. Co., 135 A. 505, 103 N.J.Law 40.

77. U.S.—Lehigh Valley R. Co. v. Comar, N.Y., 151 F. 559, 81 C.C.A. 39.
Amendment, revocation, or forfeiture of charter or franchise generally see supra § 18.

types of matters or situations is considered in appropriate places infra this title.

§ 25. Jurisdiction and Venue

a. In general
b. Actions against domestic companies
c. Actions against foreign companies

a. In General

The venue of actions against railroad companies depends on the terms of the statutes, duly construed.

While some statutes providing for the venue of actions against corporations, without specifying any particular type of corporation, have been regarded as applicable to railroad corporations,[78] other statutes have made express provision for the venue of actions against railroad corporations.[79] Where the venue of actions against railroad companies is prescribed by mandatory statutory provision, an action against such a company may not be brought in a county not designated in such provision.[80] A statute permitting certain classes of actions to be brought in particular counties has no application to any other action,[81] which may be maintained only at a place otherwise prescribed or permitted by law.[82] The word "may," as used in a statute providing that actions against railroad companies "may" be brought in certain described counties, has been regarded as mandatory so as to prevent the bringing of an action in a county other than so described,[83] but in some cases the word "may," as used in some statutes of this general type, has been regarded as permissive and not mandatory and as not necessarily preventing the bringing of an action in a county not described in the statute.[84] A statutory provision designed merely to regulate the service of process does not necessarily affect the venue of actions against railroad companies otherwise prescribed.[85]

According to some authorities a railroad company may be regarded as a resident, for the purpose of laying venue, of a county through which it operates its road[86] or in which it is doing business.[87] Under some circumstances an action cannot be brought in a county in which the company has no agent on whom process can be served.[88]

78. Ohio—Casebolt v. Kanawha, etc, R Co, 5 Ohio App. 431, 26 Ohio Cir Ct ,N S , 161

79. U S—Bird v J. M Farrin & Co, D C Mo, 4 F R D 257
Ark.—Viking Freight Co v Keck, 153 S W 2d 163, 202 Ark 656, reheard 153 S W 2d 167, 202 Ark 656.
Ga—Southern R Co v Clark, 134 S E. 605, 162 Ga 616
Ill—Taylor v Southern Ry Co, 182 N.E 805, 350 Ill 139
Mich—Pere Marquette Ry. Co v Slutz, 256 N.W 458, 268 Mich 388
Mo—State ex rel Hines v Calhoun, 220 S W. 6, 281 Mo. 583
N C.—Forney v. Black Mountain R. Co, 74 S.E. 884, 159 N C 157—Allen-Fleming Co v Southern Ry. Co, 58 S E 793, 145 N.C. 37
Ohio—New York, C. & St L R. Co v Matzinger, 25 N.E 2d 349, 136 Ohio St 271.
Venue of actions against corporations generally see Corporations §§ 1295-1302, 1932, 1933

County through which line passes

Some statutes have made provision for bringing an action against a railroad company in any county through which its road passes or is operated.—Bruce Transfer Co v. Johnston, 287 N.W. 278, 227 Iowa 50, followed in Bruce Transfer Co v Johnston, 287 N W. 281.

80. Ky—Chesapeake & O. Ry. Co. v. Glaspy's Adm'r, 64 S W.2d 564, 251 Ky 243.
Mo—State ex rel. Hines v. Calhoun, 220 S W. 6, 281 Mo 583.
Ohio—New York, C. & St. L. R. Co, v Matzinger, 25 N E 2d 349, 136 Ohio St 271—Sanzone-Palmisano Co v Pere Marquette R Co., 187 N E 738, 48 Ohio App. 218

Injury to person or property

(1) Some statutes have limited the venue of actions against railroad companies for injury to person or property to the county in which the cause of action or some part thereof arose, or to the county in which claimant resided when the cause of action arose, or the county nearest to which he so resided, in which any part of the road is located—New York, C & St L R Co v Matzinger, 25 N E 2d 349, 136 Ohio St. 271.

(2) The purpose of the statute is to prevent the filing of actions, in a court far removed from place where cause of action arose, with an exception as to the residence of plaintiff—New York, C. & St. L. R. Co. v. Matzinger, supra.

(3) A resident of another state may not sue in the county nearest his place of residence, but must bring his action in the county in which his cause of action accrued—Klappert v N. Y. Central R. Co, 28 Ohio N P.,N S., 346.

81. Iowa—Atchison, etc, R. Co v. Mershon, 165 N W. 86, 181 Iowa 892

82. Iowa—Atchison, etc., R. Co. v. Mershon, supra.

83. Ark—Viking Freight Co. v Keck, 153 S.W.2d 163, 202 Ark. 656, reheard 153 S W.2d 167, 202 Ark. 656—Chicago, R. I. & P. R. Co v. Jaber, 107 S W. 1170, 85 Ark. 332

In Illinois

(1) The statute involved was given effect in accordance with the rule stated in the text—Taylor v Southern Ry Co., 182 N.E. 805, 350 Ill 139.

(2) In an earlier case in a lower court, however, the word "may," as used in the statute, was construed as permissive and not mandatory.—O'Donoghue v St Louis Southwestern R. Co, 181 Ill App 286.

84. Ohio—Casebolt v. Kanawha, etc, R Co, 5 Ohio App. 431, 26 Ohio Cir Ct., N.S., 161
Vt—Snyder v. Central Vermont Ry., 22 A 2d 181, 112 Vt. 190.

85. Ill—Taylor v Southern Ry Co, 182 N E 805, 350 Ill 139.
Ky—Chesapeake & O. Ry Co. v. Glaspy's Adm'r, 64 S W 2d 564, 251 Ky 243.

86. N Y.—Polley v. Lehigh Valley R. Co., 122 N Y S. 708, 138 App Div 636, affirmed and certified question answered 94 N.E. 1098, 200 N Y. 585.

Rule confined to railroad companies

N Y—Williams v. A Hollander & Son, 292 N Y S. 228, 249 App Div. 784

87. N.Y.—De Groat v. New York Cent R. Co., 256 N.Y.S. 353, 235 App.Div. 816—Burman v. Delaware & H. R Co., 85 N.Y S.2d 579—Pond v Hudson River R. Co., 17 How.Pr. 543.

88. U.S.—Fisher v. Cleveland, etc., R. Co., C.C Ky, 169 F. 956.

Some statutes authorize the maintenance of an action against a railroad company in any county in which it has or usually keeps an office for the transaction of its usual or customary business[89] A statutory provision authorizing the maintenance of an action against a railroad company for an injury to a person or his property in the county in which the injury occurred refers to the county in which the facts occur out of which the cause of action arises[90] Some general statutes authorize the bringing of an action against a railroad company for a personal injury occurring within the state in the county in which plaintiff resided at the time of the injury.[91]

The validity of a statute authorizing the bringing of an action against two or more railroad companies in a county in which one of the roads is situated has been upheld.[92] Under certain statutes an action against several railroad companies may properly be brought in a county which is the proper venue as to one of such companies.[93] A statute fixing the venue of actions against railroad companies has been regarded as applicable only where the railroad company alone is defendant, and not to cases where there are other parties defendant.[94] So the view has been taken that a statute authorizing the bringing of an action in any county in which any part of defendant railroad company's line may be applies when such a company is sued alone,[95] but not necessarily where two or more railroad companies which own railroad lines or other property within the state are parties defendant,[96] or where there are defendants living in separate counties in the state.[97]

Jurisdiction and venue of actions against domestic railroad companies are treated in detail infra in subdivision b of this section, and of actions against foreign railroad companies infra in subdivision c of this section Jurisdiction and venue of actions against corporations generally are discussed in Corporations §§ 1294–1302, 1918–1926, 1932, 1933, and the venue of actions against corporations in federal courts as between courts in different districts is discussed in Federal Courts § 21.

What constitutes "doing business" in county A railroad company maintaining a station within a county, where trains are stopped and freight and passengers received and delivered, is doing business within the county, within the meaning of statutes relating to the venue of actions against it,[98] even though it employs no agent at such station,[99] and the fact that the engines and cars of a railroad company pass into a particular county does not constitute it a company doing business therein where they do so in pursuance of a contract with another company, under which they travel over the property of such other company and are under its sole control.[1] A railroad company which receives and discharges freight and sells tickets,[2] or which maintains an office for the transaction of fiscal and corporate matters,[3] in a particular county is doing business in such county, even though it does not have tracks,[4] cars, and locomotives in such county.[5]

Action by railroad company. The view has been taken that, unless otherwise provided by statute, the residence of a domestic railroad company for the purpose of the venue of an action by it is in the county, on the line of its road, where its prin-

89. **"Usual and customary business"** of a railroad company, within the meaning of the statute, consists in the receipt of freight and passengers, at various points on its road, transporting and delivering them at other points thereon, the issuance of bills of lading, the sale of tickets, and keeping the books and accounts relating to such transactions.—State ex rel. Hines v. Calhoun, 220 S.W. 6, 281 Mo. 583.

Case held not within statute

Mo.—State ex rel Hines v. Calhoun, supra.

90. Ky.—Louisville & N. R Co. v Moore's Adm'r, 166 S.W.2d 68, 292 Ky 233—Melton's Adm'r v. Southern Ry Co., 83 S.W.2d 690, 236 Ky. 629.

91. Ark.—Chicago, R I. & P. Ry. v. Bone, 160 S.W.2d 51, 203 Ark. 1067.

Repeal of statute

A statute authorizing the bringing of an action against a railroad company for a personal injury in any county through or into which its road passes, whether the cause of action originated in or out of the state, was repealed with respect to personal injuries occurring within the state by a general statute fixing the venue of actions for personal injuries either in the county in which the accident occurred which caused the injury or in the county in which the person injured resided at the time of the injury.—Chicago, R I & P. Ry. v. Bone, 160 S.W.2d 51, 203 Ark. 1067

92. Tex.—St. Louis, I. M. & S. F. Ry. Co. v White, Civ.App., 103 S. W. 673, error refused.

93. Ark.—St Louis-San Francisco R. Co. v McDonald, 299 S.W. 999, 175 Ark. 630.

51 C.J. p 440 note 46.

94. N.C.—Smith v Patterson, 74 S. E. 923, 159 N.C. 138

95. Miss.—Clark v. Louisville & N. R. Co., 130 So 302, 158 Miss. 287.

96. Miss.—Clark v. Louisville & N. R. Co., supra.

97. Miss.—Clark v. Louisville & N R. Co, supra.

98. Ala.—Louisville, etc., R. Co. v. Dawson, 68 So. 674, 14 Ala.App. 272.

99. Ala.—Louisville, etc., R. Co. v. Dawson, supra.

1. U.S.—Fisher v. Cleveland, etc, R. Co., C.C.Ky., 169 F. 956.

2. N.Y.—De Groat v. New York Cent R. Co., 256 N.Y.S. 853, 235 App.Div. 816.

3. N.Y.—Burman v. Delaware & H R. Corp, 85 N.Y.S.2d 579.

4. N.Y.—De Groat v. New York Cent. R. Co., 256 N.Y.S. 853, 235 App.Div. 816—Burman v. Delaware & H. R. Corp., 85 N.Y.S 2d 579.

5. N.Y.—De Groat v. New York Cent. R. Co., 256 N.Y.S. 853, 235 App.Div. 816.

cipal office and the center of its business are situated.[6]

b. Actions against Domestic Companies

The venue of actions against domestic railroad companies depends largely on the terms of governing statutes, duly construed.

It has been held or recognized that, unless the right to sue elsewhere is specially given or the bringing of actions elsewhere is expressly required by statute, a suit against a domestic railroad company is properly brought in the county of its principal place of business;[7] and within this rule it has been held that action is maintainable in the county in which the company is required by law to maintain its principal offices, even though they are actually maintained in another county.[8] In some jurisdictions, however, statutes have been enacted permitting or requiring certain or all classes of actions against such companies to be brought in other counties,[9] and, unless otherwise provided by law, a statute relating to the venue of actions against corporations generally may be applicable to actions against corporations engaged in operating railroads[10] The view has been taken, however, that, the right to sue a railroad company elsewhere than in the county of its principal office being in the nature of an exception to the general rule,[11] a statutory provision conferring such right must be strictly construed,[12] and the burden is on one suing elsewhere than in the county of such principal office to show that the court to which the action is addressed has jurisdiction.[13]

A statute providing merely that actions against railroad companies may be brought in particular places is not necessarily mandatory so as to require actions to be brought only at places so designated,[14] and, where the statute permits actions to be brought in any of several places, plaintiff may elect among the places so designated[15] Where, however, the venue of an action is prescribed by statute, no court at any other place has jurisdiction,[16] so that, under some statutes at least a judgment rendered elsewhere is void.[17]

Under some statutes certain actions may be brought in a county in which defendant company does not have an agent on whom process may be served[18] According to some decisions, unless otherwise provided, a transitory action may be maintained in any county in which, under the statute, the company does business and may properly be served with notice or process,[19] and, under a statute permitting service to be made on station agents, such an action may be brought in any county wherein the company has a station agent.[20]

According to some authorities a railroad company which is doing business in a particular county is deemed a resident of such county for the purpose of

6. Vt—Connecticut & Pasumpsie Rivers R. R. Co v Cooper, 30 Vt 476, 73 Am D 319
Venue of actions by corporations.
Generally see Corporations §§ 1295–1302, 1906
As between districts in federal courts see Federal Courts § 21

7. Ga—McCall v Central of Georgia R. Co, 48 S E 157, 120 Ga 602
51 C J p 439 note 14
Domicile or residence of domestic railroad company generally see Corporations § 176 b.

Principal place of business as residence
The county in which a railroad company had its principal place of business has been regarded as the residence of such company for the purpose of the venue of an action against it, notwithstanding no part of its road was in such county—Bristol v. Chicago & Aurora R. Co., 15 Ill. 436.

8. Tex.—International, etc, R. Co v. Anderson County, 156 S.W. 499, 106 Tex. 60—International, etc., R Co. v Anderson County, Civ App., 174 S.W 305, affirmed 38 S Ct. 370, 246 U.S. 424, 62 L.Ed. 807.

9. Ill—Maguire v Peoria & Pekin Union R Co, 264 Ill App 333

County where cause of action arose
Ga—Grand Trunk Western R Co v. Barge, 44 S E 2d 281, 75 Ga App 646

County in which defendant company has road or line
Miss—Yazoo & M V. R Co v. Denton, 133 So 656, 160 Miss. 850, affirmed Denton v. Yazoo & M V R. Co, 52 S.Ct 141, 284 U.S 305, 76 L.Ed 310
Ohio.—Cleveland, C, C & I R. Co v McLean, 1 Ohio Cir.Ct. 112, 1 Ohio Cir Dec 67.

Statute held not repealed
Ga—Atlantic Log & Export Co. v Central of Georgia Ry. Co., 155 S E 525, 171 Ga 175, answers conformed to 155 S.E. 530, 42 Ga App. 256

10. Ohio.—Casebolt v. Kanawha, etc., R Co, 5 Ohio App. 431, 26 Ohio Cir Ct.,N.S., 161.

11. Tex.—Pecos, etc, R. Co. v Thompson, 167 S.W. 801, 106 Tex 456.

12. Tex—Pecos, etc, R. Co. v. Thompson, supra.

13. Tex—Pecos, etc, R. Co. v. Thompson, supra.
51 C J p 439 note 20.

14. Ohio.—Casebolt v Kanawha, etc, R Co., 5 Ohio App. 431, 26 Ohio Cir Ct,N S, 161.
Vt—Snyder v. Central Vermont Ry, 22 A 2d 181, 112 Vt. 190

15. N.C—Forney v. Black Mountain R Co., 74 S E 884, 159 N C. 157.

16. Ga—Central of Georgia R Co. v Dowe, 65 S E. 1091, 6 Ga.App 858
Ill—Maguire v. Peoria & Pekin Union R Co, 264 Ill.App. 333.
51 C.J p 439 note 25.

17. Ga—Roy v Georgia R., etc, Co, 86 S E 328, 17 Ga.App. 34
51 C J p 439 note 26

18. Ga—Central of Georgia R. Co. v. Alford, 115 S.E 771, 154 Ga. 863.
51 C.J. p 439 note 30.

19. Mich.—Pollock v. Detroit United R. Co., 134 N W. 1029, 168 Mich 581.
W.Va.—Gridelli v. Norfolk, etc, R. Co, 125 S.E. 99, 97 W Va 400.

20. Kan—Henry v. Missouri, etc, R Co., 142 P 972, 92 Kan. 1017, followed in 142 P. 973, 92 Kan. 1020.

laying venue,[21] and such company may have several places of business and, therefore, residences in different counties for venue purposes.[22]

Actions ex contractu. An action against a railroad company founded on contract may or must, under some statutes, be maintained either in the county in which the contract was made[23] or that in which it is to be performed,[24] or, under some circumstances it seems, in the county in which the company's principal place of business is located[25]

Actions ex delicto. Under statutes so requiring, an action against a railroad company for an injury to person or property must be brought in the county in which the cause of action originated,[26] unless the company has no agent in such county on whom service can be made, in which case the action may be maintained in the county of the company's residence or domicile.[27]

Under some statutes an action against a railroad company for a personal injury must be brought either in the county in which the injury occurred or in the county in which plaintiff resided at the time of the injury,[28] subject to certain specified qualifications, as where defendant company does not run or operate its road in or through the county in which plaintiff resided at the time of the injury and has no agent in such county, in which case action must be brought in the county in which the injury occurred or in the county nearest that in which plaintiff resided at the time of the injury, in which defendant company runs or operates its road or has an agent,[29] or where plaintiff is a

21. N Y—De Groat v. New York Cent R Co, 256 N.Y S. 853, 235 App Div. 816—Burman v. Delaware & H. R. Corp, 85 N Y S 2d 579—Pond v. Hudson River R. Co., 17 How.Pr 543

22. N Y—Pond v Hudson River R Co., 17 How.Pr 543.

23. Ga—Central of Georgia R Co. v. Crapps, 61 S E. 1126, 4 Ga App 550

51 C J. p 440 note 35.

24. Ga—Central of Georgia R. Co. v Crapps, supra.

51 C.J. p 440 note 36.

25. Ga.—Central of Georgia Ry Co. v. W T. Kuhns Lumber Co., 86 S.E. 56, 16 Ga.App 700

26. Ga—Coakley v. Southern Ry. Co., 48 S E 372, 120 Ga. 960—Jordan v. Georgia S & F. Ry. Co, 30 S E. 748, 105 Ga. 274—Gilbert v Georgia Railroad & Banking Co, 30 S.E 673, 104 Ga. 412, followed in 30 S.E. 888, 105 Ga 486—Grand Trunk Western R Co. v Barge, 44 S.E.2d 281, 75 Ga.App. 646.

51 C J. p 440 note 38.

Validity of statute

The statute is not in conflict with a constitutional provision that civil actions shall be tried in the county where defendant resides.—Gilbert v. Georgia Railroad & Banking Co., 30 S E. 673, 104 Ga. 412.

Leased railroad

The statute applied to a railroad company, which had been leased, notwithstanding the act for the lease of such company provided for bringing actions against it in any county through which the road ran—La Croix v Western & A. R Co., 44 S.E. 840, 118 Ga. 98.

27. Ga.—Coakley v. Southern Ry. Co., 48 S.E. 372, 120 Ga. 960—Georgia Southern & F. R. Co. v. Pearson, 47 S.E. 904, 120 Ga. 284.

51 C.J. p 440 note 39.

28. Tex—Lewis v Gulf, C. & S. F. Ry Co, Civ App, 229 S.W 2d 395, error dismissed.

Nature of statute

The subdivision containing the provision here under consideration is one of the exceptions to the principal provision of the statute that no inhabitant of the state shall be sued out of the county in which he has his domicile except in cases stated, and the statute is a protective statute which guarantees the right of defendant to have the venue in its home county, if the exceptions stated are not applicable.—Commercial Standard Ins. Co v. Texas & N. O. R. Co., Tex Civ App, 198 S.W.2d 913.

County of plaintiff's residence

(1) Action was properly brought in the county of the permanent residence of plaintiff, which had never been abandoned, notwithstanding plaintiff was temporarily residing elsewhere.—Gulf, C. & S. F. Ry. Co v. Overton, Civ.App., 107 S.W. 71, reversed on other grounds 110 S.W. 736, 101 Tex. 583, 19 L.R.A.,N.S., 500.

(2) The corporate subrogee of a cause of action was not entitled to bring an action in the county in which it resided which was not the county in which the injury occurred or in which the injured person resided—Commercial Standard Ins. Co. v. Texas & N. O. R Co., Tex.Civ. App., 198 S.W.2d 913.

(3) In this connection the view was expressed that the statute does not provide for venue to follow the chose in action.—Commercial Standard Ins. Co. v. Texas & N. O. R. Co., supra.

What corporation within statute

(1) The term "railroad corporation," as used in the statute, does not include a corporation chartered for other purposes but which operates a railroad as a mere incident of its corporate duties—Humble Oil & Refining Co. v Hamer, Tex.Civ App, 167 S W 2d 272.

(2) Thus the statute does not apply to a corporation chartered for the purposes of storing, buying, and selling oil, gas, and the like, and for prospecting for, producing, treating, refining, reducing, and manufacturing oil, gas, and the like, notwithstanding such corporation operates a railroad as an incident of its corporate activities—Humble Oil & Refining Co. v. Hamer, supra.

29. Tex.—Burlington-Rock Island R. Co v. Garlitz, Civ.App., 151 S W. 2d 889.

Construction and effect of provision

(1) The provision of the statute for bringing suit, under the conditions stated, in the county nearest to that in which plaintiff resided is not to be subordinated to the right to bring suit where the injury occurred or in the county of residence of plaintiff where the railway operates its road or has an agent in that county, but such provision is as mandatory as the other provisions, and the rights conferred are of equal dignity.—Dennis v. Gulf, C. & S. F. Ry. Co., Tex., 224 S.W.2d 704.

(2) The view has been expressed that "nearest county," as used in the statute, means the county, the courthouse of which is nearest to the courthouse of the county in which plaintiff resided at time suit was filed since the courthouse is the place designated by law as the locus of litigation.—Burlington-Rock Island R. Co. v. Garlitz, 151 S.W.2d 889.

(3) The phrase "in the county nearest that in which the plaintiff resided at the time of the injury" has been construed to mean the county nearest to that in which any plaintiff resided, where there are

nonresident of the state [30]

A general statute providing for the trial of an action for an injury to property in the county in which defendant resides has been regarded as applicable to an action against a domestic railroad company, in the absence of any other controlling statute [31]

A statute making the venue of actions for tort dependent on the residence of plaintiff refers, unless otherwise provided, to the time of the commencement of the suit and not to the time the cause of action arose;[32] so, under a statute permitting such actions to be brought in the county in which plaintiff resides, suit may be maintained in the county in which plaintiff resides at the time action is commenced, even though he resided elsewhere when the injury occurred [33]

The view has been taken that, in the absence of a contravening statute, an action on a cause originating outside the state should be brought at the place of the company's principal office,[34] but, under some statutes, an action for an injury occurring outside the state by a resident of the state who was a nonresident at the time of the injury may be brought in a county through which defendant company operates its road.[35] A statute requiring that an action for injury to person or property must be brought in the county in which the cause of action arose or in which the claimant resided when the cause of action arose has so been construed as to prevent the maintenance of an action by a nonresident of the state for injuries occurring outside the state [36]

Objections, waiver, and change of venue In some instances the question of venue must be timely raised in order to avail defendant,[37] and unless the petition or declaration shows on its face that the venue is improper the action will not be dismissed pending a full hearing [38] In view of the provisions of some statutes, however, defendant cannot waive the question of jurisdiction by pleading to the merits [39]

Where a statute contains a mandatory provision fixing the venue of an action, generally defendant railroad company is entitled to have the case transferred to the county so prescribed [40] It has been held that defendant company does not waive its plea of privilege to be sued in the county in which its principal office is located by agreeing to proceed with the trial together of the venue issue and of the cause on the merits,[41] or by failing to request the submission to the jury of a controverted question involving the venue, where the duty to make such request does not devolve on defend-

several parties plaintiff —Dennis v Gulf, Colorado & Santa Fe Ry. Co, Tex Civ App., 221 S.W 2d 852, 853, certified question answered, Sup., 224 S.W 2d 704.

(4) Accordingly, when action was brought in the proper nearest county to the residence of one of several necessary plaintiffs, venue was properly laid in such county as to all plaintiffs —Dennis v, Gulf, Colorado & Santa Fe Ry. Co, supra.

30. In Texas

(1) Prior to the amendment of 1947, it was provided by Tex Civ St art 1995 subd 25 that where plaintiff was a nonresident of the state, suit could be brought in any county in which defendant corporation ran or operated its railroad or had an agent —Texas & P. Ry Co v Wood, 199 S W 2d 652, 145 Tex 534, conformed to, Civ App, 203 S W 2d 994—Panhandle & S F Ry Co v. Smith, Civ.App, 112 S W 2d 281, error dismissed

(2) Such provision referred to the nonresidence of plaintiff at the time the actron was brought.—Texas & Pac. Ry. Co. v Wood, Civ App., 203 S W 2d 994—Panhandle & S. F. Ry. Co v. Smith, Civ.App., 112 S.W.2d 281, error dismissed—Texas, etc., R. Co. v. Wimberly, Civ App, 19 S W. 2d 604—Texas & P. Ry Co v Conway, Civ.App, 182 S.W 52.

(3) A person who was a resident of the state when the injury occurred, but who was a nonresident when the action was commenced, could bring action in any county in which defendant company operated its road and had an agent —Panhandle & S F Ry. Co. v. Smith, supra—Texas & P. R. Co. v. Conway, supra.

(4) Such statute did not apply where an action was brought by a subrogee who was a resident of Texas —Commercial Standard Ins Co v Texas & N. O R. Co, Civ.App., 198 S W 2d 913.

31. S C —Tobin v Chester & L. Narrow-Gauge R Co, 25 S E. 283, 47 S C. 387, 58 Am S R 890.

What constitutes residence

Within the meaning of the statute, the company is a resident of the county or counties in which its line is located and in which it maintains a public office for the transaction of its business and an agent on whom process may be served,— Tobin v Chester & L. Narrow-Gauge R. Co., supra.

32. Tex —Texas, etc, R Co v. Conway, Civ App, 182 S W 52.
51 C.J p 440 notes 43, 44.

33. Ky —Allen v Cincinnati, etc, R Co., 137 S W. 230, 143 Ky. 723—Louisville, etc, R. Co v. Hoskins, 108 S.W. 305, 32 Ky.L 1263.

34. Ga —Atlanta, K & N. Ry. Co v Wilson, 42 S.E. 356, 116 Ga 189 —Robertson v. Tallulah Falls R. Co., 116 S E. 65, 29 Ga App. 530.

35. Tex —Texas, etc, R Co v. Wimberly, Civ.App, 19 S W.2d 604.

36. Ohio —Loftus v. Pennsylvania R. Co , 140 N.E. 94, 107 Ohio St. 352

37. Ga —Central of Georgia R Co v Dowe, 65 S E. 1091, 6 Ga App 858

38. La.—Buteau v Morgan's Louisiana, etc, R., etc, Co, 46 So 813, 121 La. 807.

39. Ga.—Central of Georgia R Co. v. Dowe, 65 S E. 1091, 6 Ga App. 858.

40. Tex.—Lewis v Gulf, C. & S. F Ry Co., Civ.App., 229 S.W 2d 395, error dismissed

41. Tex.—Texas & P. Ry. Co v. Wood, 199 S W 2d 652, 145 Tex 534; conformed to, Civ.App, 203 S. W.2d 994.

ant and plaintiff's request for such submission has been improperly refused.[42]

c. Actions against Foreign Companies

(1) In general
(2) Venue
(3) What constitutes "doing business" or "presence"

(1) In General

A foreign railroad company must be present in the state, either in person or by authorized agent, before jurisdiction in personam of a state court may attach in an action against such company.

A foreign railroad company must be present in the state, either in person or by authorized agents, before the jurisdiction in personam of a court in the state may attach in an action against such company.[43] Accordingly, as a general rule, a foreign railroad company may be sued in personam in another state only when doing business in such other state,[44] and no action may be maintained against it in a state in which it is not doing business;[45] but, generally speaking, if it is doing business, or is present, in the state it is subject to suit therein,[46] even, as a general rule, in the case of a transitory cause of action which arose outside the state.[47] The designation by a foreign railroad company of an agent to receive service of process, under a statute requiring consent by the company that any lawful process served on the agent so designated shall be valid service on the company, constitutes a consent by the company to be served in a cause of action arising outside the state as well as within the state.[48] In some jurisdictions a foreign company may be subject to suit in the state for a cause of action arising in the state either in personam[49] or by attachment.[50]

(2) Venue

Generally speaking, the venue of actions against foreign railroad companies depends on the terms of the statute, duly construed.

It has been held or recognized that, unless otherwise provided by statute, a foreign railroad company doing business within a state may be sued in any county thereof where it has a place of business[51] and an agent[52] on whom process may be

42. Tex.—Texas & P. Ry. Co. v Wood, supra

Issue as to plaintiff's nonresidence

Tex.—Texas & P. Ry Co v. Wood, supra.

43. Iowa.—Jones v Illinois Cent. R. Co, 175 N.W. 316, 188 Iowa 850.

44. Mo.—State ex rel Nashville, C. & St L. Ry. v Hall, 88 S.W.2d 342, 337 Mo. 1229—State ex rel. Ferrocarilles Nacionales De Mexico v Rutledge, 56 S W 2d 28, 331 Mo. 1015, 85 A.L.R. 1375, certiorari denied Ferrocarilles Nacionales De Mexico, 53 S.Ct. 689, 289 U.S. 746, 77 L.Ed. 1492

51 C J. p 441 note 53.

Jurisdiction of suits against foreign corporations generally see Corporations §§ 1918–1926.

Alien railroad corporation

U.S.—Maxfield v Canadian Pac Ry. Co., C.C.A.Minn, 70 F.2d 982, certiorari denied 55 S.Ct 140, 293 U. S. 610, 79 L.Ed 700, rehearing denied 55 S Ct. 212, 293 U.S. 632, 79 L.Ed. 717.

45. U.S.—Fowble v. Chesapeake, etc., R Co., D.C.N.Y., 16 F.2d 504.

Tex.—Pecos, etc, R. Co. v. Cox, 157 S.W. 745, 106 Tex. 74.

46. U.S.—Fisher v. Canadian Pac. Ry. Co, D.C.N.Y., 1 F Supp. 235.

Ga.—Louisville & N R. Co v. Meredith, 21 S.E.2d 101, 194 Ga 106—Southern Ry. Co. v. Parker, 21 S E 2d 94, 194 Ga. 94—Reeves v. Southern R Co., 49 S.E. 674, 121 Ga. 561, 70 L.R.A. 513—Southern Ry. Co. v. Wells, 29 S.E 714, 103 Ga. 209—South Carolina & G. R. Co. v. Dietzen, 29 S E. 292, 101 Ga. 730.

N.Y.—Weiss v. Southern Pac. Co., 18 N.Y.S 2d 86, 173 Misc. 670.

Utah.—Wabash R. Co. v District Court of Third Judicial Dist. in and for Salt Lake County, 167 P. 2d 973, 109 Utah 526.

51 C.J. p 441 note 55.

47. Cal.—Denver & R. G. R. Co. v Roller, C.C.A.Cal., 100 F. 738, 47 L.R.A. 77.

Ga.—Louisville & N. R. Co v Meredith, 21 S.E.2d 101, 194 Ga. 106—Southern Ry. Co. v. Parker, 21 S E.2d 94, 194 Ga. 94—Reeves v. Southern R. Co, 49 S E 674, 121 Ga. 561, 70 L.R.A. 513—South Carolina & G R. Co v. Dietzen, 29 S E. 292, 101 Ga. 730.

Minn.—Erving v. Chicago & N W. Ry. Co, 214 N.W. 12, 171 Minn. 87.

Mo.—Draper v. Louisville & N. R Co, 156 S.W.2d 626, 348 Mo. 886—Busch v Louisville & N. R. Co., 17 S W.2d 337, 322 Mo. 469, certiorari denied Louisville & N. R Co. v. Busch, 50 S.Ct. 27, 280 U.S. 569, 74 L.Ed. 622.

N.J.—Kopenhafer v. Pennsylvania R. Co, 148 A. 629, 106 N.J.Law 530

N.Y.—Weiss v. Southern Pac. R. Co., 18 N Y.S.2d 86, 173 Misc. 670.

Tex.—Missouri, K. & T. Ry. Co. of Texas v. Kellerman, 87 S.W. 401, 39 Tex.Civ.App. 274, error refused.

Jurisdiction of action by nonresident against foreign corporation see Courts § 77 b.

Maintenance of action as undue burden on interstate commerce see Commerce § 138

Claim of forum non conveniens

Refusal to dismiss action based on a cause which arose in another state, where motion to dismiss was based on claim of forum non conveniens, was upheld.—Hoch v Byram, 230 N.W. 823, 180 Minn 298.

48. U.S.—Louisville, etc., R. Co. v. Chatters, La., 49 S.Ct. 329, 279 U. S 320, 73 L.Ed. 711.

Officer or agent of foreign company who may be served see infra § 26 c (3).

49. Ga.—Hazlehurst v. Seaboard Air Line Ry, 45 S E. 703, 118 Ga. 858—Grand Trunk Western R Co v Barge, 44 S.E.2d 281, 75 Ga.App. 646.

50. Ga.—Hazlehurst v. Seaboard Air Line Ry., 45 S E. 703, 118 Ga. 858—Grand Trunk Western R. Co v. Barge, 44 S.E.2d 281, 75 Ga App 646.

Remedy by attachment against foreign corporation generally see Corporations § 1930.

51. Ga.—King v. Atlantic Coast Line R. Co., 129 S.E. 86, 160 Ga. 842

51 C J. p 441 note 57.

Venue of actions against foreign corporations generally see Corporations §§ 1932, 1933.

52. Tex.—Southern Pac. Co. v. Craner, Civ.App., 101 S.W. 534.

51 C.J. p 441 note 58.

Offices; agents

(1) An action for breach of contract against a foreign company and

served,[53] and that, under some statutes, a company may be sued in certain actions in any county in which service of process may be obtained.[54] It has been held or recognized that a foreign company may be regarded as a resident of a county in the state for purpose of venue,[55] and that, for such purpose, a foreign company may be deemed a resident of any county through which it operates its road.[56]

While a statute conferring on foreign railroad companies the rights and powers of domestic corporations does not make applicable to such company a constitutional provision requiring a domestic corporation to be sued in the county where its principal place of business is situate,[57] some statutes fixing the venue of actions against railroad companies without specific reference to foreign or domestic companies apply to foreign, as well as to domestic, companies.[58] Some statutes providing for the venue of actions against foreign corporations generally are limited by other statutory provisions specifically fixing the venue of actions against railroad companies.[59] An action against a foreign company may not be brought in a county other than that prescribed by a mandatory statute.[60]

Under some statutes, the same requirements as to venue apply both to actions in personam and to actions by attachment against foreign companies.[61] An attachment suit against a foreign company under some statutes may be prosecuted in a court of a city in which property of such company is found.[62]

In the absence of constitutional or statutory provision for a different venue, generally a foreign

the superintendent of one of its divisions was properly brought in a county in which the company had offices and agents, notwithstanding such superintendent resided in another county—Reynolds v Atlantic Coast Line R Co, 59 S E 2d 344, 217 S C 16

(2) Some statutes authorize the bringing of an action against a foreign company in a county in which it has or usually keeps an office or agent for the transaction of its usual and customary business—Draper v. Louisville, 156 S W 2d 626, 348 Mo 886

53. Okl—Trumble Gas Trap Co v Chicago, etc, R Co., 239 P. 668, 115 Okl 18.
51 C J p 441 note 58
Officer or agent who may be served see infra § 26 c (3).

54. Ky.—Chesapeake & O Ry Co. v Cowherd, 27 S W 990, 96 Ky. 113, 16 Ky L 373

55. Ky—Melton's Adm'r v. Southern Ry Co, 33 S W.2d 690, 236 Ky. 629.

Foreign corporation which has complied with so-called "domestication statute"
Ky—James v Nashville, C & St. L Ry, 221 S.W 2d 449, 310 Ky 616—Knight v Pennsylvania R. Co, 94 S.W.2d 1013, 264 Ky 412.

Action for personal injury occurring outside state
Ky—James v Nashville, C & St L. Ry, 221 S W 2d 449, 310 Ky. 616—Melton's Adm'r v. Southern Ry Co, 33 S W 2d 690, 236 Ky. 629.

What constitutes residence
(1) A general statutory provision, relative to practice, that the words "residence" and "reside" mean, with reference to a corporation, its chief office or place of business has been regarded as applicable to a foreign railroad company with respect to venue of actions against it—Wright v Pennsylvania R Co, 94 S W 2d 1013, 264 Ky 412—Melton's Adm'r v Southern Ry Co, 33 S W.2d 690, 236 Ky. 629.

(2) The residence of such company is in the county in the state in which its chief officer or agent resides when the action is commenced—James v Nashville, C & St L Ry., 221 S W 2d 449, 310 Ky. 616—Knight v Pennsylvania R. Co, 94 S W 2d 1013, 264 Ky. 412

(3) Where a foreign railroad company is present in a county of the state and conducts therein a part of the business for which it was organized, it becomes a resident of the county for purposes of suit—Louisville & N R Co v. Meredith, 21 S E 2d 101, 194 Ga 106—King v Atlantic Coast Line R Co, 129 S E 86, 160 Ga 842.

(4) Foreign railroad company, which had complied with so-called "domestication statute," did not reside in county in which it maintained an office and an agent who was merely a soliciting agent and who had no authority to bind defendant company by contract—James v Nashville, C & St L. Ry, 221 S.W.2d 449, 310 Ky. 616.

56. N.Y.—Polley v Lehigh Valley R Co, 122 N Y.S 708, 138 App Div 636, affirmed and certified question answered 94 N E 1098, 200 N.Y. 585.

57. Cal.—Waechter v Atchison, etc, R Co., 101 P 41, 10 Cal App 70.

58. Ark—Viking Freight Co. v Keck, 153 S.W 2d 163, 202 Ark 656, reheard 153 S W 2d 167, 202 Ark 656.
Ga—Southern R Co v. Clark, 134 S E 605, 162 Ga 616—King v. Atlantic Coast Line R. Co., 129 S E 86, 160 Ga 842—Bracewell v. Southern R Co, 68 S E 98, 134 Ga 537, answer to certified question conformed to 68 S E 308, 8 Ga App. 17—Coakley v Southern Ry Co, 48 S E 372, 120 Ga 960—Hazlehurst v Seaboard Air Line Ry, 45 S E 703, 118 Ga 858—Mitchell v. Southern R Co, 45 S E 703, 118 Ga 845—Grand Trunk Western R Co v Barge, 44 S E 2d 281, 75 Ga App 646.
Mo—Draper v Louisville & N R Co, 156 S W 2d 626, 348 Mo 886
N C—Forney v. Black Mountain R Co, 74 S E 884, 159 N C 157—Propst v Southern R. Co, 51 S E. 920, 139 N C 397.

Statutes construed
The rule stated in the text was announced notwithstanding another statute in general terms prescribed the venue of actions against foreign corporations, and the view was taken that such other statute was applicable to foreign corporations other than railroad companies—Propst v Southern R Co, supra

59. Ohio.—Sanzone-Palmisano Co. v Pere Marquette Ry. Co, 187 N E 738, 48 Ohio App 218

60. Ohio—Sanzone-Palmisano Co. v. Pere Marquette Ry Co, supra.

61. Ga—Hazlehurst v. Seaboard Air Line Ry, 45 S E. 703, 118 Ga 858—Grand Trunk Western R Co. v Barge, 44 S.E 2d 281, 75 Ga App. 646

Attachment in action on contract
Ga—Hazlehurst v. Seaboard Air Line Ry., 45 S.E 703, 118 Ga. 858.

62. Mo—State ex rel. Ferrocarriles Nacionales De Mexico v. Rutledge, 56 S.W 2d 28, 331 Mo. 1015, 85 A L R 1375, certiorari denied Ferrocarriles Nacionales De Mexico v Rutledge, 53 S.Ct. 689, 289 U.S. 746, 77 L.Ed. 1492.

company is not properly sued in a county in which it does not maintain an office or agent or operate its road,[63] and, under some practice rules, such company must be sued either in a county where its registered office or principal place of business is located or in a county where it regularly conducts business.[64] Under a statute permitting action to be brought against a foreign railroad company in any county in which it operates its trains or has an agent, such a company operating its trains over the lines of a domestic railroad company in a particular county is suable there,[65] even though it maintains an agent and an office for the transaction of its business in another county,[66] and a statute authorizing the bringing of an action against a railroad company in any county through or into which the road of defendant passes permits the bringing of an action against a foreign company in a county in which such company operates its trains over the tracks of another railroad company under an arrangement with such other company.[67]

Some constitutional provisions authorize the maintenance of an action against a foreign company in the county in which plaintiff resides,[68] even though the cause of action did not arise in such county,[69] and even though defendant has no agent in such county and has no part of its line therein.[70]

Under some statutes an action against a foreign company for injury to person or property sustained within the state must be brought in the county in which the cause of action originated if defendant has an agent in such county,[71] or, in the case of a defendant company which is not operating a domestic franchise, even if it does not have an agent in such county,[72] but, if such company is operating a domestic franchise, an action may be brought in the county of residence of the company owning such franchise.[73]

An action against a foreign company for breach of contract, under permissive statute, may be brought either in the county in which the contract was made[74] or in the county in which it was to be performed.[75] The view has been taken, however, that such statute is not controlling if the contract is the basis of an equitable action to enforce some right growing out of the contract.[76]

The view has been taken that a statute requiring certains actions against railroad companies to be brought in the county where the cause of action arose does not apply to actions against foreign railroad companies on causes arising beyond the limits of the state,[77] and that in such cases action may be brought in any county in the state in which service may be obtained.[78]

63. Tex.—Atchison, etc., R. Co v. Stevens, 206 S.W. 921, 109 Tex. 262
51 C.J. p. 441 note 62.

64. Pa.—Law v. Atlantic Coast Line R. Co., 71 Pa.Dist. & Co. 150.

65. Tex.—St. Louis, etc., R. Co. v. Sizemore, 116 S.W. 403, 53 Tex. Civ. App. 491

66. Tex.—St. Louis, etc., R. Co. v. Sizemore, supra

67. Ark.—St. Louis Southwestern Ry. Co. v. Steele, 80 S.W.2d 623, 190 Ark. 662.

68. Okl.—Kansas City Southern Ry. Co., 117 P.2d 123, 189 Okl. 345—Atchison, T. & S. F. Ry. Co. v. Lambert, 123 P. 428, 32 Okl. 665.

69. Okl.—Kansas City Southern Ry. Co. v. Ware, 117 P.2d 123, 189 Okl. 345—Atchison, T. & S. F. Ry. Co. v. Lambert, 123 P. 428, 32 Okl. 665.

70. Okl.—Kansas City Southern Ry. Co. v. Ware, 117 P.2d 123, 189 Okl. 345—Atchison, T. & S. F. Ry. Co. v. Lambert, 123 P. 428, 32 Okl. 665

71. Ga.—Southern R. Co. v. Clark, 134 S.E. 605, 162 Ga. 616—Tatum v. Seaboard Air Line Ry., 58 S.E. 465, 128 Ga. 813—Atlantic Coast Line R. Co. v. Dupont, 50 S.E. 103, 122 Ga. 251—Coakley v. Southern Ry. Co., 48 S.E. 372, 120 Ga. 960—Mitchell v. Southern R. Co., 45 S.E. 703, 118 Ga. 845—Grand Trunk Western R. Co. v. Barge, 44 S.E.2d 281, 75 Ga.App. 646.
51 C.J. p. 441 note 67.

72. Ga.—Coakley v. Southern Ry. Co., 48 S.E. 372, 120 Ga. 960—Grand Trunk Western R. Co. v. Barge, 44 S.E.2d 281, 75 Ga.App. 646.

Perfecting service

Where a foreign railroad company had no agent in the county in which an action for personal injuries arose, the action could nevertheless be brought in the county, the court having power to perfect service on defendant.—Coakley v. Southern R. Co., 48 S.E. 372, 120 Ga. 960.

Attachment

Where an attachment is issued against a nonresident railroad company, which is not operating under a domestic franchise and which does not maintain an office, agent, or place of business in the state, based on a cause of action for damages for personal injuries sustained in a county of the state, the attachment must be returned to, and tried in, the county in which the cause of action originated by a court having jurisdiction.—Grand Trunk Western R. Co. v. Barge, 44 S.E.2d 281, 75 Ga. App. 646.

73. Ga.—Coakley v. Southern R. Co., 48 S.E. 372, 120 Ga. 960.

74. Ga.—King v. Atlantic Coast Line R. Co., 129 S.E. 86, 160 Ga. 842—Friedman v. Seaboard Air Line Ry. Co., 52 S.E. 763, 124 Ga. 472

75. Ga.—King v. Atlantic Coast Line R. Co., 129 S.E. 86, 160 Ga. 842—Friedman v. Seaboard Air Line Ry. Co., 52 S.E. 763, 124 Ga. 472—Hazlehurst v. Seaboard Air Line Ry., 45 S.E. 703, 118 Ga. 858

76. Ga.—King v. Atlantic Coast Line R. Co., 129 S.E. 86, 160 Ga. 842

77. Ga.—South Carolina & G. R. Co. v. Dietzen, 29 S.E. 292, 101 Ga. 730.
51 C.J. p. 441 note 65.

78. Ga.—Wright v. Southern R. Co., 67 S.E. 272, 7 Ga.App. 542.
51 C.J. p. 441 note 66.
Jurisdiction of transitory action arising out of state by nonresident against foreign corporation see Courts § 77 b.

Effect of statute

The statute under consideration did not affect the law in force as to venue at the time of the passage of such statute with respect to an action against a foreign company for an injury to person or property which occurred outside the state.—South Carolina & G. R. Co. v. Dietzen, 29 S.E. 292, 101 Ga. 730.

Change of venue. In some jurisdictions, where a foreign company is sued in a county in which it has no property and is not operating, the place of trial may be changed, on due application, to another county in which such company has property and is doing business,[79] but if defendant fails to ask for removal to the county in which it is doing business it will be deemed to have submitted itself to the jurisdiction.[80] Under some statutes a change of venue may be allowed, on application of defendant company, if both the convenience of witnesses and the ends of justice will be promoted by the change.[81] Allegations of the complaint tending to show that an action against a foreign company has been brought in the proper county, when denied by defendant company, raise an issue of fact on an application by defendant for a change of venue on the ground that action has not been brought in the proper county,[82] and the court may, if satisfied that action was brought in the proper county, deny the application.[83]

(3) What Constitutes "Doing Business" or "Presence"

No all-embracing rule has been laid down for determining whether a foreign railroad company is doing business or is present in a state so as to be subject to action against it in a court of such state; the question is determinable in each case in accordance with the facts involved.

No precise or all-embracing rule has been formulated to determine in each case whether a foreign railroad company is doing business or is present in a state so as to be subject to action against it in a court in such state.[84] The question is one of fact,[85] to be determined in each case on the facts therein appearing.[86] While it has been stated broadly that it is sufficient if the facts warrant the inference that the foreign company is present in the state,[87] the general rule has been announced that, in order to constitute doing business, the foreign company must have entered the state and have carried on there, through its agents, the ordinary business in which it is engaged,[88] and that the business done by it within the state must be such in character and extent as to warrant the inference that the company has subjected itself to the jurisdiction.[89] In cases of doubt whether or not a foreign company is subject to suit in a particular state considerations of public policy may properly enter into the determination.[90]

The view has been expressed that the question whether a foreign railroad company is doing business within a state so as to be subject to the jurisdiction of its courts is distinct from the question whether it is doing business in the state within the purview of statutes regulating foreign corporations or prescribing the conditions on which they may exercise their corporate powers,[91] or from the question whether the corporation is doing business in the state so as to be subject to the payment of a franchise tax,[92] and that not as great a degree of

79. N Y —Gaboury v. Central Vermont R Co, 231 N Y.S. 630, 225 App Div. 145, reversed on other grounds 165 N E 275, 250 N.Y. 233.
Change of venue in actions against foreign corporations generally see Corporations § 1933

80. Minn.—Witort v. Chicago, etc., R Co., 226 N.W 934, 178 Minn. 261.

81. S C.—Reynolds v. Atlantic Coast Line R. Co, 59 S E 2d 344, 217 S. C 16.

82. S.C.—Rafield v. Atlantic Coast Line Co, 68 S E 631, 86 S C. 324.

83. S C —Rafield v. Atlantic Coast Line Co, supra

84. U.S.—St. Louis Southwestern Ry. Co. of Texas v. Alexander, N. Y., 33 S Ct. 245, 227 U.S. 218, 57 L. Ed 486—Fisher v Canadian Pac Ry Co, D C N.Y., 1 F Supp. 235
D C.—Atlantic Coast Line R. Co v. Goldberg, Mun App, 39 A.2d 563.
Mo —State ex rel Ferrocarilles Nacionales De Mexico v Rutledge, 56 S.W.2d 28, 331 Mo. 1015, 85 A.L. R. 1375, certiorari denied Ferrocarilles Nacionales De Mexico, 53 S Ct. 689, 289 U S 746, 77 L. Ed. 1492—Detmer, Bruner & Mason v. New York Cent R Co., 80 S W 2d 222, 229 Mo App 702.
N Y.—Pomeroy v. Hocking Valley R Co, 113 N E 504, 218 N Y 530—Sperling v. McGee, 49 N Y S 2d 477, affirmed 51 N.Y S.2d 274, 268 App Div. 925.
51 C.J. p 441 note 69.

85. Pa.—Law v. Atlantic Coast Line R. Co., 71 Pa.Dist. & Co. 150.

86. U S.—St. Louis Southwestern Ry Co. of Texas v. Alexander, N. Y, 33 S Ct. 245, 227 U S 218, 57 L Ed 486
Mo.—State ex rel. Ferrocarilles Nacionales De Mexico v. Rutledge, 56 S W 2d 28, 331 Mo. 1015, 85 L R A. 1375, certiorari denied Ferrocarilles Nacionales De Mexico, 53 S Ct 689, 289 U S. 746, 77 L.Ed. 1492—Detmer, Bruner & Mason v. New York Cent R Co, 80 S.W.2d 222, 229 Mo App. 702
N.Y —Pomeroy v. Hocking Valley R. Co., 113 N E. 504, 218 N Y. 530—Geller v. Macon, D. & S. R. Co., 75 N.Y.S 2d 818, 190 Misc 903—Cohen v. Gulf, M. & O. R. Co., 95 N Y.S. 2d 633—Sperling v. McGee, 49 N.Y. S.2d 477, affirmed 51 N.Y.S.2d 274, 268 App Div. 925.

87. N Y.—Sperling v. McGee, supra.

88. Mo —State ex rel. Ferrocarilles Nacionales De Mexico v. Rutledge, 56 S W 2d 28, 331 Mo 1015, 85 L. R A 1375, certiorari denied Ferrocarilles Nacionales De Mexico, 53 S.Ct 689, 289 U S. 746, 77 L Ed. 1492—Detmer, Bruner & Mason v. New York Cent. R Co., 80 S.W.2d 222, 229 Mo App 702.

89. U.S —St. Louis Southwestern R. Co. v. Alexander, N.Y., 33 S.Ct. 245, 227 U S. 218, 57 L Ed. 486.
51 C.J. p 441 note 70.

90. U S.—Atchison, etc., R. Co. v. Weeks, Tex., 254 F. 513, 166 C C.A. 71, certiorari denied Weeks v. Atchison, etc., R. Co, 39 S.Ct. 259, 249 U.S. 602, 63 L Ed. 797
D.C —Cancelmo v Seaboard Air Line R. Co., 12 F.2d 166, 56 App D C. 225.

91. Ga —Vicksburg, etc., R. Co. v. De Bow, 98 S E 381, 148 Ga. 738.

92. Utah.—Wabash R. Co. v. District Court of Third Judicial Dist. in and for Salt Lake County, 167 P.2d 973, 109 Utah 526.
Carrying on business by foreign corporation with respect to franchise tax generally see the C.J.S. titles

business activity is required to render such a corporation subject to the jurisdiction of a state court as is required in the case of taxing or licensing,[93] although the view has apparently been taken that the fact that a foreign corporation is doing business for the purposes of registration or taxation does not necessarily show that it is doing business so as to be subject to suit in a particular county[94]

Particular activities. A foreign railroad company may be doing business, within the rules relating to the jurisdiction or venue of actions against it, in a state in which it maintains executive offices for the conduct of its general business or financial affairs,[95] or into or through which it operates a railroad[96] or trains,[97] or, under some circumstances, where it maintains an agent or agency for the sale of tickets[98] or the conduct of the freight business,[99] including the issuance of bills of lading,[1] for transportation or carriage over its lines, or a freight agency for the conduct of freight business and the settlement of claims growing out of it.[2] Even though a foreign company has no railroad within the state, it is doing business therein when it operates tugs, boats, and barges on the waters of the state and delivers freight to piers within the state,[3] and the solicitation of business within the state, in connection with certain other activities on the part of a foreign company, may constitute the doing of business.[4] However, the mere solicitation within the state of business to be done outside the state,[5] without the making of contracts of any kind,[6] is not such doing of business therein by a foreign rail-

Commerce § 118, and Taxation § 190, also 61 C.J. p 342 note 32–p 343 note 38

93. N Y—Sperling v. McGee, 49 N Y S 2d 477, affirmed 51 N.Y S 2d 274, 268 App Div 925

94. Pa—Law v. Atlantic Coast Line R Co, 71 Pa Dist & Co 150

95. N Y.—Pomeroy v Hocking Valley R. Co., 113 N E. 504, 218 N.Y 530.
51 C J. p 441 note 72

96. Ga.—Louisville & N. R Co v. Meredith, 21 S E.2d 101, 194 Ga 106.
51 C.J. p 442 note 73.

97. Ill.—O'Donoghue v. St. Louis Southern R. Co, 181 Ill App. 286.
Mo—Draper v. Louisville & N. R Co, 156 S.W 2d 626, 348 Mo. 886.
51 C J p 442 note 74.

98. U S.—Fisher v. Canadian Pac. Ry. Co., D C N.Y., 1 F Supp 235.
51 C J. p 442 note 75

99. U.S.—Fisher v. Canadian Pac. Ry. Co., supra

1. Md—Central of Georgia R. Co. v. Eichberg, 68 A. 690, 107 Md. 363, 14 L.R.A.,N.S., 389.
Tex.—Missouri, etc., R. Co v. Demere, Civ.App., 145 S.W 623.

2. U.S.—St Louis Southwestern R Co. v Alexander, N.Y., 33 S Ct 245, 227 U S. 218, 57 L.Ed. 486
51 C.J. p 442 note 77

Discretionary powers with respect to claims

Fact that agent in state exercised discretionary powers with respect to claims presented against company was given weight in determining that foreign company was doing business in the state.—American Laundry Machinery Co. v. Chicago, B. & Q R. Co., 177 N.E. 533, 39 Ohio App. 430.

3. U.S.—Cafasso v. Philadelphia, etc., R Co, C.C.N Y., 169 F. 887.

4. D C—Atlantic Coast Line R. Co v. Goldberg, Mun App., 39 A 2d 563
Mass—Reynolds v Missouri, K. & T. Ry Co, 113 N.E 413, 224 Mass 379
N Y.—Ledermann v Pennsylvania R. Co, 85 N.Y S 2d 485, 193 Misc. 941—Weiss v. Southern Pac Co, 18 N Y S 2d 86, 173 Misc 670—Sperling v McGee, 49 N.Y S 2d 477, affirmed 51 N.Y S 2d 274, 268 App Div 925
Utah—Wabash R. Co. v. District Court of Third Judicial Dist. in and for Salt Lake County, 167 P 2d 973, 109 Utah 526.

Continued solicitation of business

U.S.—Perkins v Louisville & N. R. Co., D.C.Cal., 94 F Supp. 946.

5. U S.—Maxfield v. Canadian Pac. Ry Co., C C.A Minn, 70 F.2d 982, certiorari denied 55 S Ct 140, 293 U S. 610, 79 L.Ed 700, rehearing denied 55 S Ct. 212, 293 U S. 632, 79 L.Ed. 717—Denver & R. G R. Co. v. Roller, C.C.A Cal., 100 F 738—Sowl v. Union Pac. R Co., D. C.Minn., 72 F.Supp. 542—Livingston v. Chesapeake & O. Ry Co., D.C.Okl., 18 F.Supp 863.
D.C.—Cancelmo v. Seaboard Air Line Ry., 12 F.2d 166, 56 App.D C. 225—Atlantic Coast Line R. Co. v. Goldberg, Mun.App., 39 A 2d 563.
Ill.—G. W. Bull & Co v. Boston & M. R. R, 175 N.E. 837, 344 Ill 11
Mo.—State ex rel. Nashville, C. & St. L. Ry. v. Hall, 88 S W.2d 342, 337 Mo. 1229—Detmer, Bruner & Mason v. New York Cent R Co., 80 S W.2d 222, 229 Mo.App. 702.
51 C J. p 442 note 79.

Doing business not shown

(1) Visits by freight agent of foreign railroad company, each of a few days duration and occurring six weeks apart, did not constitute a continuous course of conduct sufficient to constitute doing business in state bringing corporation within jurisdiction of a court of the state especially where it was not shown that the solicitation of business on the visits resulted in obtaining a substantial volume of business—Geller v Macon, D & S. R Co, 75 N.Y S.2d 818, 190 Misc 903.

(2) Where foreign interstate railroad maintained passenger and freight offices in state with a few employees hired by home office and offices solicited substantial freight and passenger business, called on large number of customers and obtained reservations for passengers, and through dining cars passed through the state on trains of another railroad and were tended on entire trip by same crew which sometimes served food or drink in the state, railroad was not "doing business" within the state and could not be served there—Law v. Atlantic Coast Line R. Co., 79 A 2d 252, 367 Pa. 170.

Alien corporation

The rule stated in the text has been applied in an action against an alien railroad corporation.—Maxfield v. Canadian Pac. Ry. Co., C.C.A. Minn., 70 F.2d 982, certiorari denied 55 S.Ct. 140, 293 U.S. 610, 79 L.Ed. 700, rehearing denied 55 S.Ct 212, 293 U.S. 632, 79 L.Ed. 717.

6. U S—Goldstein v. Chicago, R. I & P R. Co., D.C.N.Y., 93 F.Supp. 671.
Mo—State ex rel. Ferrocarriles Nacionales De Mexico v. Rutledge, 56 S.W.2d 28, 331 Mo. 1015, 85 A. L R. 1375, certiorari denied Ferrocarriles Nacionales De Mexico v. Rutledge, 53 S Ct. 689, 289 U.S 746, 77 L.Ed 1492.
N.Y.—Cohen v. Gulf, M. & O. R. Co., 95 N.Y.S.2d 633—Worthy v. Louisville & N. R. Co., 79 N Y.S.2d 588, affirmed 96 N.Y S.2d 489, 276 App. Div. 1068.
51 C.J. p 442 note 79.

In county

(1) Solicitation of business, to-

road company as to render it liable to suit within the state, nor is the sale of tickets by another or connecting railroad company or its agent for transportation over the lines of the foreign company,[7] or the maintenance by the foreign company, in the state, of a stock transfer agent,[8] or a financial office for the payment of interest on bonds of the company,[9] or a bank account from which disbursements are made by checks drawn outside the state,[10] or the ownership by the foreign company of a controlling interest in the stock of a domestic railroad company operating within the state;[11] and the fact that a subsidiary company does business within the state or in a county in the state does not of itself constitute doing business by the parent company.[12] The maintenance of an office in a state to accomplish matters which in themselves do not constitute doing business in the state does not render a foreign railroad company subject to the jurisdiction of the courts of that state.[13]

A foreign railroad company is not doing business, and is not present, in a state for jurisdictional purposes merely because an officer or officers of such company reside or are present in the state[14] or because meetings of its board of directors are customarily held in the state.[15]

Various other activities of a foreign company have been held not to be the doing of business in the state for jurisdictional purposes.[16]

§ 26. Process

a. In general
b Service in general
c On whom service may be made
d. Return and proof of service

a. In General

Generally speaking, the general rules as to process in civil actions and those applicable in actions against corporations apply in actions against railroad companies, except as modified or superseded by special statutory provisions.

Except as modified or superseded by special statute, the general rules relating to process in civil actions, stated in Process § 1 et seq, and those applicable in actions against corporations considered in Corporations §§ 1305–1322, 1937–1949, are applicable to actions against railroad companies.[17] Requirements of law as to process in such an action must be duly complied with,[18] and, in the absence of such compliance, a motion to quash the serv-

gether with certain other incidental activities, did not show that foreign corporation was doing business in particular county—Law v. Atlantic Coast Line R Co., 71 Pa Dist & Co 150

(2) Where a company has no line of railroad within a county, the employment by it of an agent who merely solicits freight and passenger business, and who does not make contracts, sell tickets, or issue bills of lading, does not constitute doing business within the county—Trumble Gas Trap Co v Chicago, etc, R Co, 239 P. 668, 115 Okl 18

7. U S.—General Inv Co v Lake Shore, etc., R. Co, Ohio, 43 S Ct 106, 260 U.S 261, 67 L Ed. 244—General Inv Co. v. Lake Shore, etc, R. Co, Ohio, 250 F. 160, 162 C C A 296
Pa—Law v Atlantic Coast Line R Co, 71 Pa Dist & Co 150.
14a C J p 1381 note 51—51 C J. p 442 note 80.

8. U S—Fowble v. Chesapeake, etc, R Co., D C N.Y, 16 F 2d 504
51 C.J. p 442 note 81.

9. N.Y.—Worthy v. Louisville & N R. Co., 79 N.Y S. 588, affirmed 96 N.Y S 2d 489, 276 App Div. 1068.

10. U S—Fowble v Chesapeake, etc, R Co., D.C N Y, 16 F.2d 504

11. U S.—Peterson v Chicago, etc, R. Co, Tex, 27 S.Ct. 513, 205 U S 364, 51 L Ed. 841.
51 C J. p 442 note 83.

12. Tex—Atchison, etc, R Co v Stevens, 206 S W 921, 109 Tex 262
51 C J. p 442 note 84.

13. U S—Fowble v Chesapeake, etc, R Co, D C N Y, 16 F 2d 504
Direction of operations outside state
The maintenance of an office in a state, the activities of which are confined to the direction of the operation of a railroad outside the state, does not necessarily constitute doing business in the state for the purpose of jurisdiction of an action for a tort committed outside the state—Atchison, etc, R Co v Weeks, Tex, 254 F 513, 166 C C A 71, certiorari denied Weeks v. Atchison, etc., R Co, 39 S Ct. 259, 249 U.S. 602, 63 L.Ed. 797.

14. N Y.—Geller v. Macon, D & S R. Co, 75 N Y S 2d 818, 190 Misc 903—Garson v. Richmond, F. & P R. R, 82 N Y S 637.
Utah—Wabash R. Co v. District Court of Third Judicial Dist in and for Salt Lake County, 167 P 2d 973, 109 Utah 526.

15. N Y.—Garson v Richmond, F. & P. R. R, 82 N Y S 2d 637.

16. **Particular activities**
(1) Provisions in mortgage trust indenture covering property outside state and bond issue executed by foreign railroad corporation for payment of bonds and coupons in state at office of trust company which was one of trustees, and fact that payments were made at office of such trustee, did not constitute doing business within state bringing corporation within jurisdiction of state court—Geller v Macon, D & S R Co, 75 N.Y S 2d 818, 190 Misc 903

(2) Foreign railroad corporation was not doing business in state, where officers visited state to consult with local lawyers and worked out plan to extend maturity of corporate bonds, and office in state designated as office of company on letterheads used in correspondence with bondholders and others concerning extension plan, was not real office of corporation, but was nothing more than law office of lawyers who consulted with corporation officers, and all activities of corporation in state were connected solely with extension plan—Geller v. Macon, D. & S R Co, supra.

(3) Mere fact that defendant railroad company's representative in state made inquiry as to nature and extent of plaintiff's claim did not constitute doing business in state—Cohen v. Gulf, M & O R Co, 95 N Y S 2d 638.

17. Okl—Kansas, Oklahoma & Gulf Ry. Co. v. Hill, 99 P.2d 115, 186 Okl 531
51 C.J. p 442 note 90–p 446 note 75.

18. Okl—Kansas, Oklahoma & Gulf Ry. Co. v. Hill, supra.

ice of summons should be granted.[19] It has been held that, where the complaint has properly been amended by correcting a misnomer with respect to defendant company and an alias summons giving the correct name, with a copy of the amended complaint, has been duly served, a motion to quash service of the original summons may be properly denied,[20] and the view has been taken that defendant company may waive defects in process with respect to a misnomer of defendant by filing a demurrer and answer after a motion to quash the service of summons has been denied.[21]

b. Service in General

A mode of service of process on a railroad company which is prescribed by statute is exclusive and service in any other manner is not sufficient.

When the mode of service of process on a railroad company is prescribed by statute, such mode is exclusive and service in any other manner is insufficient,[22] and, in the absence of due compliance with statutory requirements in this respect, a motion to quash service should be granted.[23]

Service by publication. Under a statute authorizing a service of process by publication where no officer or agent of the company is found within the county in which the action is brought, such service is proper, even though the action might properly have been commenced in another county where personal service on an officer or agent of the company could have been had.[24]

c. On Whom Service May Be Made

(1) In general
(2) Action against domestic company in general
(3) Action against foreign company in general
(4) Effect of receivership
(5) Effect of sale or lease of railroad

(1) In General

Generally the determination as to what officer, agent, or employee of a railroad company may be served with process in an action against it depends on the terms of the governing statute, duly construed, and there should be due compliance with such statute in this respect.

The broad general rule has been announced in an action against a railroad company that, apart from statutory regulation, service of process on a corporation is sufficient if made on a person on whom it may fairly be presumed that the duty rests by virtue of his official position, or of his employment, to communicate the fact of service to the governing power of the corporation,[25] but that the agent served must either represent the company in some general capacity or have such connection with the business out of which the cause of action arose as to make him the company's representative with respect to that business.[26] Some statutes designating the persons who may be served in actions against railroad companies have been construed liberally.[27] Statutes sometimes require a railroad company to appoint an agent in each county through or into which its line runs or in which it does business on whom process may be served,[28] and designate certain agents or employees of the company on whom process may be served if the company fails to appoint an agent on whom service may be made.[29] Some statutes which designate officers, agents, or employees who may be served divide them into classes with respect to the order in which an attempt to serve should be made[30] and require that an attempt to serve those of the primary or earlier class shall be made before resorting to service on

19. Okl.—Kansas, Oklahoma & Gulf Ry. Co., supra—Kansas, O. & G. Ry Co v. Martin, 51 P.2d 577, 175 Okl 173.

20. Cal.—Haverstick v. Southern Pac. Co., 87 P.2d 146, 1 Cal App 2d 605.

21. Cal.—Haverstick v. Southern Pac Co., supra.

22. Okl.—Kansas, Oklahoma & Gulf Ry. Co. v. Hill, 99 P.2d 115, 186 Okl. 531—Kansas, O & G. Ry. Co v. Martin, 51 P.2d 577, 175 Okl. 173.

51 C.J. p 442 note 90.

Notice to attorneys

Where service of citation was properly made on an agent of defendant company, the view was taken that, under the circumstances involved, no duty rested on such agent or on plaintiff to see that the citation or a copy thereof was delivered to district attorneys of defendant.—St. Louis Southwestern Ry. Co of Texas v. McWilliams, Tex.Civ.App., 61 S.W.2d 598, error dismissed.

23. Okl.—Kansas, Oklahoma & Gulf Ry. Co. v. Hill, 99 P.2d 115, 186 Okl. 531—Kansas, O & G. Ry. Co. v. Martin, 51 P.2d 577, 175 Okl 173.

24. Ill.—Nelson v. Chicago, etc., R. Co., 80 N.E. 109, 225 Ill. 197, 116 Am.S.R. 133, 8 L.R.A.,N.S., 1186.

25. Md.—Central of Georgia R. Co. v. Eichberg, 68 A. 690, 107 Md. 363, 14 L.R.A.,N.S., 389.

Who may be served in actions against corporations generally see Corporations §§ 1312–1316, 1941–1945.

26. N.J.—Brainard v. New York, etc., R. Co., 150 A. 681, 8 N.J.Misc. 322.

27. U.S.—Kunz v. Lowden, C.C.A. Kan., 124 F.2d 911.

28. U.S.—Kunz v. Lowden, supra

Okl.—Kelley v. Travelers Indem. Co., 184 P.2d 759, 199 Okl. 151—Kansas, Oklahoma & Gulf Ry. Co. v. Hill, 99 P.2d 115, 186 Okl. 531.

29. U.S.—Kunz v. Lowden, C.C.A. Kan., 124 F.2d 911.

Okl.—Midland Val. R. Co. v. Pettie, 162 P.2d 548, 196 Okl. 52.

Service held not sufficient

Okl.—Kansas, Oklahoma & Gulf Ry. Co. v. Horath, 118 P.2d 660, 189 Okl. 555.

30. Okl.—Kansas, Oklahoma & Gulf Ry. Co. v. Hill, 99 P.2d 115, 186 Okl. 531—St. Louis & G. F. Ry. Co. v. Reed, 158 P. 399, 59 Okl. 95.

those of a later class.[31] Under a statute which provides for service on particular agents or classes of agents, service on any other agent of the company is not sufficient.[32]

Under various statutory provisions the effectiveness of service in an action against a railroad company has been recognized where it is made on a station or depot agent,[33] on a passenger and freight agent,[34] on a ticket agent,[35] on a freight agent,[36] or on a local superintendent of repairs[37]

A statute providing for the service of process on any person who has control of the business of a railroad company as agent contemplates service on an agent at a fixed place of business and not merely on an agent who happens to be within the county at the time of service,[38] and, accordingly, does not authorize service on the conductor of a train passing through a county in which the company maintains no station[39]

Under a statute permitting process against a railroad company to be served on its passenger or freight agent stationed at or nearest to the county seat of the county in which the action was brought, service should be made on the agent conducting the passenger and freight business of the company at its nearest station,[40] and not on an agent whose business merely incidentally includes the sale of tickets or the quoting of freight rates.[41] Under such statute the agent served need not be stationed within the county in which the action is pending.[42]

Under a statute authorizing service on defendant company by leaving a copy at a depot or station of such company with a person in the employ of such company, service may not be made by leaving a copy with an employee at a place where defendant company does not have a depot or station.[43]

An objection that the person served was not the proper officer or agent to be served in behalf of the company may be waived by appearing generally and going to trial on the merits without reserving the objection.[44]

(2) Action against Domestic Company in General

What officer, agent, or employee of a domestic railroad company may be served with process in an action against such company depends largely on the terms of the governing statute, duly construed.

It has been laid down broadly that process in civil actions against a domestic railroad company should and may be served on such officer or agent of the company as may reasonably be expected to communicate the fact of service to the governing body of the company.[45] The officers or agents on whom service may or must be made have frequently been designated by statute.[46] Under some statutes the view has been taken that service on an officer of a domestic corporation in a particular county is not effective where at the time of service such officer is not in the county for the purpose of transacting business for such company,[47] notwithstanding he is a resident of such county.[48]

31. N Y—Vlasak v. Delaware, L & W. R. Co, 47 N Y.S 2d 13.
Okl.—Kansas, Oklahoma & Gulf Ry Co. v. Hill, 99 P.2d 115, 186 Okl 531—St Louis, etc, R Co. v Reed, 158 P 399, 59 Okl. 95.

32. Mich—Detroit v. Wabash, etc, R Co, 30 N.W. 321, 68 Mich 712.
51 C J. p 443 note 7.

"Any station agent or ticket agent"
A statute authorizing service on any station agent or ticket agent at any station along the line, or at the end, of the railroad, did not authorize service on a "commercial agent" who presumably might have duties at any point, or number of points, or away from the road entirely—Detroit v. Wabash, etc, R. Co, supra.

33. W.Va.—Douglass v. Kanawha, etc., R. Co, 28 S.E. 705, 44 W.Va 267.
Wis.—State ex rel. Fontaine v. Sullivan, 22 N W 2d 535, 248 Wis. 441.

Particular statute
Under a statute authorizing service, under some circumstances, on an agent to sell tickets or a station keeper, it has been held that, where a depot and the residence of the station agent were in one county and part of the station platform was in another county, service on the agent in the latter county was sufficient to confer jurisdiction—St. Louis, etc, R. Co. v. Mobley, 174 P 510, 70 Okl 297

34. W Va—Harrow v Ohio River R Co, 18 S E. 926, 38 W Va 711.

35. U S—Kunz v Lowden, C C A. Kan, 124 F 2d 911.
Ohio—State v. Standard Oil Co., 15 Ohio Cir.Ct,N S., 212.

36. Ohio.—State v. Standard Oil Co, supra
Okl—Midland Val R. Co. v. Pettie, 162 P.2d 543, 196 Okl. 52.
51 C.J. p 443 note 1.

37. **Section foreman**
Under a statute providing for service on a local superintendent of repairs, service on a section foreman was sufficient—St. Louis, etc, R Co. v De Ford, 16 P. 442, 38 Kan 299.

38. Ark—St Louis-San Francisco R. Co v Soldmon, 256 S.W. 862, 161 Ark. 552

39. Ark.—St. Louis-San Francisco R Co. v. Solomon, supra

40. Ky—Louisville, etc, R Co. v. Commonwealth, 46 S W. 207, 104 Ky. 35, 20 Ky.L 371

41. Ky—Louisville, etc., R Co. v. Commonwealth, supra.

42. Ky.—Nashville, etc, R Co v. Mattingly, 40 S.W 673, 19 Ky.L. 373—Nashville, etc, R. Co. v. Carrico, 26 S W. 177, 95 Ky. 489, 16 Ky.L 66.

43. Okl—Chicago, etc, R Co. v. Groves, 54 P. 484, 7 Okl. 315.

44. Ark—St Louis-San Francisco R. Co v. Solomon, 256 S.W. 862, 161 Ark. 552

45. Mo—State v. Myers, 104 S.W. 1146, 126 Mo App. 544

46. U S.—Collins v. Erie R. Co, D. C N Y, 6 F.Supp. 562.
Ill—Maguire v. Peoria & Pekin Union R. Co., 264 Ill App. 333.
51 C.J. p 443 notes 95–13.

47. Ill—Maguire v. Peoria & Pekin Union R Co, 264 Ill.App. 333.

48. Ill—Maguire v. Peoria & Pekin Union R. Co, supra.

The view has been taken that a statute providing for service of process by serving an agent of the company should be liberally construed,[49] and that it does not require that service should be made on one designated by the company by the title "agent,"[50] but that it is sufficiently complied with by service on any agent in charge of an office or the business of the company at the time of service.[51]

It has been held or recognized, under various statutes, that it is sufficient to serve process on a station or depot agent[52] or on a regular ticket agent,[53] and that, under a statute authorizing service on any agent, it is permissible to serve process on an agent maintaining an office for the solicitation of freight business.[54]

A statute permitting but not requiring service to be made on a particular agent of the company does not prevent valid service on any other agent permitted by law to be served on behalf of the company;[55] but where a statute requires service to be made on a particular agent or an agent of a particular character, service on any other agent of the company is of no avail.[56]

A "managing agent," within the meaning of a statute authorizing service on such an agent, is an agent who has charge and control of the business activities of the company or of some part thereof and who is vested with powers requiring the exercise of judgment and discretion.[57] It has been held that such a statute does not authorize service on an ordinary freight agent in charge of a station who performs his duties under the supervision of a superintendent,[58] a subordinate agent for the solicitation of freight and passenger business,[59] or an agent in charge of a consolidated ticket office operated by a railroad association, who is not in the employ of defendant company.[60]

The term "clerk," as used in a statute authorizing service on a clerk to the corporation, has been construed to mean some general officer of the corporation,[61] and as not authorizing service on a person who holds a mere clerical position with the corporation.[62]

Under a statute permitting service on a railroad company by leaving a copy at any "business office" of the company with the person in charge thereof, service on the person in charge of an office where any business affairs of the company are conducted is sufficient,[63] and it need not be an office whose business is transacted directly with the public;[64] but a mere shelter for an employee, as distinguished from a place where his duties are performed, is not a business office within the meaning of such a statute.[65]

Agent of another company. An agent of another railroad company who sells tickets or issues bills of lading for transportation or carriage over several lines, including that of defendant company, is not thereby made agent of defendant company so that service of process against it can be made on him;[66] but the mere fact that an agent of defendant company is also agent for other companies does not disqualify him to be served in its behalf.[67] However, service on an agent as representative of one company cannot avail as service on another company represented by him.[68]

(3) Action against Foreign Company in General

What officer, agent, or employee of a foreign railroad company may be served with process in an action against such company depends largely on the terms of the governing statute, duly construed.

Under a statute permitting service of process, in

49. Ga.—Central of Georgia R. Co. v. Ellis, 87 S.E. 815, 17 Ga.App. 536.

50. Ga.—Central of Georgia R. Co. v. Ellis, supra.

51. Ga.—Central of Georgia R. Co. v. Ellis, supra.

52. Wis.—Ruthe v. Green Bay, etc., R. Co., 37 Wis. 344.
51 C.J. p 443 note 99.

53. Ohio.—Cleveland, C., C. & I. R. Co. v. McLean, 1 Ohio Cir.Ct. 112, 1 Ohio Cir.Dec. 67.

54. Mich.—Amyot v. Lamb, 190 N. W. 741, 221 Mich. 256.

55. Ind.—Jeffersonville, etc., R. Co. v. Dunlap, 29 Ind. 426.
Mo.—State v. Hannibal, etc., R. Co., 51 Mo. 532.

56. Minn.—Hatinen v. Payne, 185 N. W. 386, 150 Minn. 344.
51 C.J. p 443 note 7.
Invalidity not cured
Where service was made on an agent not designated by the statute, the fact that the person served sent the summons and complaint to some one in authority over him did not cure the ineffective service.—Collins v. Erie R. Co., D.C.N.Y., 6 F.Supp. 562.

57. Minn.—Hatinen v. Payne, 185 N. W. 386, 150 Minn. 344.

58. U.S.—Collins v. Erie R. Co., D.C. N.Y., 6 F.Supp. 562.

59. Minn.—Hatinen v. Payne, 185 N.W. 386, 150 Minn. 344.

60. U.S.—Collins v. Erie R. Co., D. C.N.Y., 6 F.Supp. 562.

61. N.Y.—Baker v. New York Cent. R. Co., 16 N.Y.S.2d 78, 258 App.Div. 854.

62. N.Y.—Baker v. New York Cent. R. Co., supra.

63. Mo.—State v. Myers, 104 S.W. 1146, 126 Mo.App. 544.

64. Mo.—State v. Myers, supra.
51 C.J. p 443 note 12.

65. Mo.—State v. Myers, supra.
51 C.J. p 443 note 13.

66. Ill.—Bristow v. St. Louis, etc., R. Co., 184 Ill.App. 305.
51 C.J. p 444 note 18.

67. Mich.—Amyot v. Lamb, 190 N. W. 741, 221 Mich. 256.
51 C.J. p 444 note 19.

68. Ohio.—Pittsburgh, etc., R. Co. v. Copenhaver, 31 Ohio Cir.Ct. 515, 12 Ohio Cir.Ct.,N.S., 69.

actions against a foreign railroad company, to be made on any agent of the company, or in the absence of statute requiring service on particular agents or agents of a particular character, it has been said that service may be made on any agent of the company, as long as he is to some extent its representative,[69] or on an agent whose character and rank are such as to afford reasonable assurance that he will inform his company that process has been served on him.[70] These rules are subject, however, to the qualification that the agent served must be one who represents the company with respect to business which it does within the state where the action was commenced.[71] It has been stated broadly, in a case in which service in an action against a foreign railroad company was involved, that an officer of a foreign corporation, while casually in the state, is not the representative of the corporation there.[72] The view has been expressed that there is no presumption of agency for the purpose of receiving process for a foreign railroad company.[73]

Under various statutory provisions it has been held or recognized that process is properly served within the state on the superintendent of the company,[74] its chief clerk,[75] a local ticket agent[76] or other agent who sells tickets or issues bills of lading,[77] an assistant cashier in a freight office of the company,[78] or a conductor on one of its trains running to or from a point within the state,[79] even though, according to some authorities, the train is being operated over the lines of a domestic railroad company under an agreement providing that the train crews, while in the state, shall be employees of the domestic company.[80] The propriety of service on the agent duly designated by defendant company as the person on whom process may be served has been recognized.[81]

While it has been held or recognized in some cases that one employed by a foreign railroad company merely as a solicitor of freight and passenger business to be done outside the state, and having no power to sell any ticket or make any contract for the company, is an agent who may properly be served with process,[82] the view usually taken is that he is not such an agent of the company that service on him will be binding on it,[83] except, according to some authorities, when the company is doing business within the state.[84]

Some statutes designating who may be served with process in actions against corporations, without specifically referring to foreign or domestic corporations, have been regarded as applicable to foreign railroad corporations.[85] The fact that defendant corporation does not have any trackage within the state does not necessarily affect the question as to

69. Wash.—Sunada v. Oregon-Washington R., etc., Co., 203 P. 64, 118 Wash. 241.
Who may be served in actions against foreign corporations generally see Corporations §§ 1941–1945.

70. Ga.—Louisville & N. R. Co. v. Meredith, 21 S.E.2d 101, 104 Ga. 106.
Md.—Central of Georgia R. Co. v. Eichberg, 68 A. 690, 107 Md. 363, 14 L.R.A.,N.S., 389.

71. U.S.—Peterson v. Chicago, etc., R. Co., Tex., 27 S.Ct. 513, 205 U.S. 364, 51 L.Ed. 841
51 C.J. p. 444 note 23

72. Minn.—W. J. Armstrong Co. v. New York Cent., etc., R. Co., 151 N.W. 917, 129 Minn. 104, L.R.A.1916E 232, Ann.Cas.1916E 335

73. Tex.—Pecos, etc., R. Co. v. Cox, 157 S.W. 745, 106 Tex. 74.

74. Mich.—Sherrill v. Canada Grand Trunk R. Co., 126 N.W. 830, 161 Mich. 495.

75. Ga.—Louisville, etc., R. Co. v. Mitchell, 64 S.E. 1134, 6 Ga.App. 390.
Ill.—O'Donoghue v. St. Louis Southwestern R. Co., 181 Ill.App. 286.

76. Mich.—Sherrill v. Canada Grand Trunk R. Co., 126 N.W. 830, 161 Mich. 495
51 C.J. p. 444 note 27.

Agent not in charge of all of company's business
Service was sufficient even though the ticket agent was not in charge of all the company's business in the particular locality.—Seaboard Air-Line R. Co. v. Browder, 87 S.E. 6, 144 Ga. 322.

77. U.S.—Woodcock v. Baltimore, etc., R. Co., C.C.Ohio, 107 F. 767.
51 C.J. p. 444 note 28

78. Wash.—Sunada v. Oregon-Washington, R., etc., Co., 203 P. 64, 118 Wash. 241.

79. Mich.—Sherrill v. Canada Grand Trunk R. Co., 126 N.W. 830, 161 Mich. 495
Tex.—St. Louis, etc., R. Co. v. Sizemore, 116 S.W. 403, 53 Tex.Civ.A. 491.

80. Tex.—St. Louis, etc., R. Co. v. Sizemore, supra

81. Ky.—Southern R. Co. v. Avey, 191 S.W. 460, 173 Ky. 598

82. Ga.—Louisville & N. R. Co. v. Meredith, 21 S.E.2d 101, 104 Ga. 106
51 C.J. p. 444 note 32.

83. U.S.—Livingston v. Chesapeake & O. Ry. Co., D.C.Okl., 18 F.Supp. 863
14a C.J. p. 1413 note 90, 51 C.J. p. 444 note 33
Whether soliciting agent of foreign corporation may be served generally see Corporations § 1942 e.

84. U.S.—Ketch v. Atlantic Coast Line R. Co., D.C.Tenn., 51 F.Supp. 243
Ill.—American Hide, etc., Co. v. Southern R. Co., 142 N.E. 200, 310 Ill. 524
Whether solicitation of business constitutes doing business in state for jurisdictional purposes generally see supra § 25 c (3).

What constitutes doing business
Foreign railroad company was doing business within the rule where it was jointly operating a railroad in the state.—Ketch v. Atlantic Coast Line R. Co., D.C.Tenn., 51 F. Supp. 243.

Cause of action arising out of state
Effectiveness of service on soliciting agent of foreign corporation doing business in the state was not affected by the fact that the cause of action arose outside the state.—Ketch v. Atlantic Coast Line R. Co., supra.

85. U.S.—Ketch v. Atlantic Coast Line R. Co., supra.

the validity of service of process on an agent of such company within the state.[86] Where a statute permits process to be served by leaving a copy at the depot or place of business of the company, the official character of the person with whom the process is left is not material to the validity of the service.[87] The mere fact that one is known and advertised as "agent" of a foreign railroad company does not authorize service to be made on him if he is not in fact its agent.[88] Where service is made on an agent or person not competent to be served, the mere fact that he transmits the process to a general officer of the company does not create an agency so as to render the service valid.[89]

Statutory designation of particular officer, agent, or employee or one of particular character. Generally speaking, a state has authority to prescribe by statute the officers or agents of a foreign railroad company doing business within the state on whom service of process may be made,[90] and in a number of jurisdictions statutes have been enacted permitting or requiring service to be made on particular agents or agents of a particular character.[91] It is not essential to the validity of service that the company shall have expressly authorized any officers or agents so designated to receive service in its behalf.[92] When an officer or agent on whom process must be served is designated by statute, the court does not obtain jurisdiction under an attempted service on any other person,[93] notwithstanding the fact that the process server receives information from persons in an office of defendant company that the person served is the proper person on whom to make service,[94] that the person who is served assures the process server that the matter will be attended to,[95] that defendant company actually receives information as to the attempted service[96] or receives the summons,[97] or that defendant company had actually appeared in other actions after a like service[98]

Under a statute permitting service on any cashier of the company, service may be made on an assistant cashier in a freight office of the company.[99]

A general passenger agent may properly be served with process under a statute providing for service on a chief agent of the company.[1]

The term "managing agent," as used in a statute authorizing service on such an agent of a foreign company, has been variously construed to mean one who is vested with some general powers involving the exercise of independent judgment or discretion,[2] or as one who, as agent of some sort of the foreign company, manages any business which such company transacts at an office which it maintains in the state.[3]

An agent for the solicitation of traffic over the line of a foreign company outside the state,[4] a general agent for the conduct of the freight and

86. Ohio—Railway Supply & Manufacturing Co v. Gulf, M. & O R Co, Com.Pl, 8 Ohio Supp 90

87. N.J.—Smallbein v. Erie R. Co., 76 A. 1011, 79 N.J.Law 593—Hygea Brewing Co. v. Erie R Co., 69 A. 981, 76 N J.Law 261.

88. Wash.—Arrow Lumber, etc., Co. v. Union Pac. R. Co., 102 P. 650, 53 Wash. 629

89. N.J.—Erie R. Co. v. Van Allen, 69 A. 484, 76 N.J.Law 119.

90. Tex.—El Paso, etc., Co. v. Chisholm, Civ.App., 180 S W. 156.

91. U S.—Diamond v New York, S & W. R. Co., D.C.N.Y., 18 F.Supp 605.
51 C.J. p 445 notes 40–46.

92. Tex.—El Paso, etc, Co. v. Chisholm, Civ.App., 180 S.W. 156.

93. Minn—Aaltio v. Chicago, B. & Q. R. Co, 267 N.W. 384, 197 Minn. 461—Bernier v. Illinois Cent R. Co., 223 N.W. 674, 176 Minn. 415.
N.Y.—Vlasak v. Delaware, L. & W. R. Co., 47 N.Y.S.2d 13.

94. N.Y.—Vlasak v. Delaware, L. & W. R. Co., supra.

95. N.Y—Vlasak v. Delaware, L. & W. R. Co., supra.

96. N.Y.—Vlasak v Delaware, L. & W. R. Co., supra

97. N.Y.—Vlasak v. Delaware, L. & W. R. Co, supra.

98. N Y.—Vlasak v. Delaware, L. & W. R. Co., supra.

99. Wash—Sunada v. Oregon-Washington R., etc., Co, 203 P. 64, 118 Wash. 241.

1. Ky—Chesapeake, etc., R Co. v. Cowherd, 27 S.W. 990, 96 Ky. 113, 16 Ky.L. 373.

2. U.S.—Diamond v. New York, S & W R. Co., D.C.N.Y., 18 F.Supp. 605.
N.Y—Yeckes-Eichenbaum, Inc., 49 N.E 2d 517, 290 N.Y. 437, motion denied 50 N.E.2d 1022, 291 N.Y. 642.

Service upheld
N.Y—Wajtman v. Pennsylvania R. Co., 83 N.Y.S 2d 493, 274 App.Div. 942, affirmed 85 N.E.2d 57, 298 N. Y. 909.

3. Ohio—Railway Supply & Manufacturing Co. v. Gulf, M. & O. R Co., Com.Pl, 8 Ohio Supp. 90.

4. Ohio.—Price v. Davis, 153 N.E. 529, 22 Ohio App. 388.

Particular agent
(1) Under the statute in question service may be made on an agent in charge of an office for the solicitation of business, the sale of tickets, and the settlement of freight claims —Price v. Davis, 153 N.E. 529, 22 Ohio App. 388.

(2) An agent in charge of an office for the solicitation of traffic over the line of defendant company outside the state, who exercised discretionary powers as to claims presented, could be served with summons, under the statute in question, even though bills of lading were not issued, and tickets were not sold, at such office.—American Laundry Machinery Co. v. Chicago, B. & Q. R. Co., 177 N.E. 533, 39 Ohio App. 430.

(3) An agent for the solicitation in the state of freight for shipment over the line of defendant company outside the state, known as a district freight agent, was a managing agent on whom service could be made, notwithstanding he did not issue bills of lading for freight shipped.—Railway Supply & Manufacturing Co. v. Gulf, M. & O. R. Co., Com.Pl., 8 Ohio Supp. 90.

passenger business,[5] a general freight agent who has subordinates and whose duties include the handling of freight claims and soliciting traffic, although he has no power to extend credit, collect or disburse money, or employ, control, or discharge other agents,[6] the general agent of the passenger department,[7] or a local station agent doing business for defendant company within the state[8] has been regarded as a managing agent for the purpose of service under such a statute, but the view has been taken that such a statute does not authorize service on a service supervisor whose functions are merely clerical and of a subordinate nature,[9] or on the acting agent of a consolidated ticket office operated by a railroad association, who was not employed by defendant corporation.[10] Under some statutes it is essential to the effectiveness of service on a managing agent that a diligent effort should first have been made to effect service on certain other officers designated by the statute.[11]

A statute permitting process to be served on "any officer, director, agent, clerk or engineer" of the company requires service to be made on some officer having general or supervisory authority,[12] or, as sometimes stated, on one who has such connection either with the corporation or with the business out of which the alleged cause of action arose that he should be considered the representative of the corporation for the purpose of service,[13] and the courts have regarded such rules as applicable under amendments to such statute adding other classes of employees on whom service may be made.[14] Under such a statute service cannot properly be made on a mere subordinate agent or clerk having no general charge of its corporate concerns or any such connection with the business out of which the cause of action arose as fairly to support an inference that he had authority to represent the company for the purpose of the service of process;[15] nor can service be made under such statute on a locomotive engineer[16] or on the engineer of a steamboat operated by defendant railroad company.[17]

Some statutes have authorized service on a station agent, or, if there is no station or agent, on the conductor of any train.[18] It has been held that a statute authorizing service on a regular freight agent of defendant company authorizes service on an agent for the solicitation of freight business in the state, for shipment over the lines of such company outside the state,[19] notwithstanding such agent does not issue bills of lading.[20] It has been held that, under a statute authorizing service on a ticket or freight agent within the county in which action is brought, service on a freight agent in a county other than that in which action is brought does not confer jurisdiction.[21]

Service on another company or its agent. Service on another railroad company, or its agent, including a company operating a connecting road, does not of itself constitute service on a foreign company.[22] Accordingly, the agent of another or

5. **Managing or business agent under statute**
U.S.—Denver & R. G. R. Co. v. Roller, C.C.A.Cal., 100 F. 738.
Both a freight agent and a passenger agent were covered by the term "managing agent" as used in the statute.—Fisher v. Canadian Pac. Ry. Co., D.C.N.Y., 1 F.Supp. 235.

6. N.Y.—Hewitt v. Canadian Pac. R. Co., 207 N.Y.S. 797, 124 Misc. 186, affirmed 207 N.Y.S. 851, 212 App. Div. 815.

7. N.Y.—Tuchband v. Chicago & A. R. Co., 22 N.E. 360, 115 N.Y. 437.

8. N.D.—Brown v. Chicago, M. & St. P. R. Co., 95 N.W. 153, 12 N.D. 61, 102 Am.S.R. 564.

9. N.Y.—Vlasak v. Delaware, L. & W. R. Co., 47 N.Y.S.2d 13.

10. U.S.—Diamond v. New York, S. & W. R. Co., D.C.N.Y., 18 F.Supp. 605.

11. N.Y.—Vlasak v. Delaware, L. & W. R. Co., 47 N.Y.S.2d 13.
Plaintiff was not excused from exercising due diligence in attempting to effect service on others designated, as required by statute, by the fact that, on inquiring at an office of defendant company, the process server was informed that the person who was served and who was alleged to be a managing agent was the proper person on whom to make service.—Vlasak v. Delaware, L. & W. R. Co., supra.

12. N.J.—Erie R. Co. v. Van Allen, 69 A. 484, 76 N.J.Law 119.—Brainard v. New York, O. & W. Ry. Co., 150 A. 681, 8 N.J.Misc. 322.

13. N.J.—Carroll v. N. Y., N. H. & H. R. Co., 46 A. 708, 65 N.J.Law 124.

14. N.J.—Brainard v. New York, O. & W. Ry. Co., 150 A. 681, 8 N.J.Misc. 322.
Freight agent
Evidence did not establish that milk collector of foreign railroad corporation was freight agent on whom process could be served, within meaning of amendment.—Brainard v. New York, O. & W. Ry. Co., supra.

15. N.J.—Hygea Brewing Co. v. Erie R. Co., 69 A. 981, 76 N.J.Law 261.—Erie R. Co. v. Van Allen, 69 A. 484, 76 N.J.Law 119.

16. **In New Jersey**
(1) It has been stated that the word "engineer" as used in the statute did not include a locomotive engineer.—Erie R. Co. v. Van Allen, supra.
(2) In an earlier federal case in which the same New Jersey statute was involved, a contrary view was taken.—De Vere v. Delaware, L. & W. R. Co., C.C.N.J., 60 F. 886.

17. N.J.—Carroll v. N. Y., N. H. & H. R. Co., 46 A. 708, 65 N.J.Law 124.

18. U.S.—Denver, R. G. R. Co. v. Wagner, Colo., 167 F. 75, 92 C.C.A. 527.

19. Ohio.—Railway Supply & Manufacturing Co. v. Gulf, M. & O. R. Co., Com.Pl., 8 Ohio Supp. 90.

20. Ohio.—Railway Supply & Manufacturing Co. v. Gulf, M. & O. R. Co., supra.

21. Minn.—Aaltio v. Chicago, B. & Q. R. Co., 267 N.W. 384, 197 Minn. 461.

22. Ky.—Louisville & N. R. Co. v.

connecting line of railroad is not an agent of a foreign railroad company so that service of process can legally be made on him as such, merely because he sells tickets covering transportation over the line of the foreign railroad company[23] or solicits freight and passenger business for transportation over the line of the foreign company;[24] nor is the railroad company operating such other or connecting line an agent of the foreign company by reason of such sale of tickets[25] or the issuance of through bills of lading.[26] Service on a mere subsidiary company is not service on the foreign company by which it is controlled[27] The fact that an agent of a foreign railroad company is also agent of another or other railroad companies does not prevent him from being served in behalf of the former.[28] Under a statute permitting service on any agent who makes contracts for the transportation of passengers or property over the railroad of a foreign company, process may be served on an agent of any railroad company who makes such contracts and need not be served on an agent of defendant company[29] The agent of a railroad company over the tracks of which defendant foreign company operates its trains under agreement between the two companies has been regarded as the agent of defendant company for the purpose of service of process, where such agent performs some service for defendant.[30]

(4) Effect of Receivership

While, according to some authorities, in an action against a railroad company for which a receiver has been appointed, service may be made on any person who, in the absence of the receivership, might properly be served, the view has also been taken that service on one who has been an agent of the company is not service on the company, on the ground that agents of the company cease to be such and become agents of the receiver on his appointment.

In an action against a railroad company for which a receiver has been appointed, service is properly made, according to some authorities, on any person who in the absence of the receivership would be a proper person to be served in behalf of the company[31] Service on one aiding in the operation of the road as agent, together with service on an officer of such company, has been regarded as sufficient, notwithstanding such road is being operated by the receiver of another railroad company under a lease.[32] The view has been taken, however, that service on one who had been an agent of the railroad company prior to the receivership is not service on the company, on the ground that agents of the company cease to be such and become agents of the receiver on his appointment[33] It has been held that service on an officer of a foreign company, after the appointment of receivers, in an action by a nonresident against such company, based on a cause of action arising outside the state, is not effective, on the ground that the officer does not represent defendant company in such case.[34] The

Chestnut, 72 S.W 351, 115 Ky. 43, 24 Ky L Rep. 1846.
51 C J. p 445 note 48.

Effect of Carmack amendment

(1) The view has been taken that the federal statute, known as the Carmack amendment, which made the initial carrier of property liable for the entire damage or loss whether occurring on its own line or on the line of a connecting carrier did not make the agent of the connecting or delivering railroad carrier an agent of the initial carrier for the purpose of service of process.
Iowa.—Dye Produce Co. v Davis, 209 N.W 744, 202 Iowa 1008.
Ky.—Basham's Adm'r v. Missouri Pac R. Co., 258 S W. 690, 201 Ky. 807.

(2) Liability of initial carrier under Carmack amendment generally see Carriers § 406 a.

23. U S.—General Inv Co. v. Lake Shore, etc., R Co., Ohio, 250 F. 160, 162 C.C.A. 296.
51 C J. p 445 note 48.

24. Wash.—Arrow Lumber, etc., Co. v. Union Pac. R. Co., 102 P. 650, 53 Wash. 629.

25. Wash.—Royce v. Chicago, etc., R. Co., 156 P. 16, 90 Wash 378
51 C J. p 445 note 49.

26. Wash.—Royce v. Chicago, etc., R. Co., supra.

27. Wash.—Royce v. Chicago, etc., R. Co., supra.

In Texas

(1) Some cases have recognized the effectiveness with respect to a foreign company of service on a company subsidiary to such foreign company or on the agent of such subsidiary company.—St. Louis, etc., R. Co. v. Casselberry, Tex Civ.App., 139 S W 1161—51 C.J. p 446 note 63.

(2) In a case in the state supreme court, however, which was actually decided on another point, the sufficiency of the service was questioned.—St. Louis, etc., R Co. v. Hale, 206 S.W. 75, 109 Tex 251.

28. U S.—Union Pac. R. Co. v. Novak, Wash., 61 F. 573, 9 C.C.A. 629, error dismissed 17 S.Ct. 1001, 41 L.Ed. 1184.
Ga.—Seaboard Air Line R Co. v. Browder, 87 S.E. 6, 144 Ga. 322.
51 C.J. p 445 note 50.

29. Tex.—Missouri, etc., R. Co. v. Demere, Civ.App., 145 S.W. 623.

30. Ark.—St. Louis Southwestern Ry. Co. v. Steele, 80 S.W.2d 623, 190 Ark 662.

31. Mich.—Innest v. Pere Marquette R. Co., 142 N.W. 567, 176 Mich. 398, 47 L.R.A.,N.S., 179, Ann. Cas.1915B 594.
51 C J p 445 note 54
Receivers of railroad companies generally see infra §§ 376–389.

32. Ga.—Georgia Southern R. Co. v. Bigelow, 68 Ga. 219.

33. N.C.—Harper v. Seaboard Air Line Ry. Co., 190 S.E. 750, 211 N. C. 398.
51 C J. p 445 note 55.

Evidence

With respect to whether there had been due service on a railroad company for which a receiver had been appointed, the evidence was regarded as insufficient to show that one served with summons was agent of such company when served.—Sellers v. Carolina R. Co., 170 S.E. 632, 205 N.C. 149.

34. N.Y.—Gaboury v. Central Vermont R. Co., 165 N.E. 275, 250 N.Y. 233.

appointment of a receiver for a railroad company does not bring it within the provisions of a statute designating the persons to be served in behalf of a railroad company which has permitted its road to be used by any other person or corporation.[35]

(5) Effect of Sale or Lease of Railroad

Service on a person who has been an agent or employee of a railroad company which has sold its property to another company does not constitute service on the vendor company, where at the time of service the relationship of such agent or employee to the vendor company has ceased and he has become an agent or employee of the purchasing company, and an agent of a lessee railroad company is not necessarily an agent of the lessor company for the purpose of service of process.

Where a railroad company has sold its property to another company and its agents and employees have become agents and employees of the latter, service of process on such an agent or employee is not service on the vendor company.[36] An agent of a lessee railroad company is not an agent of the lessor company for the purpose of service of process;[37] and a statute imposing on a railroad company, which has leased its road, liability for claims against the lessee does not authorize service to be made on such lessee in behalf of the lessor company [38]

d. Return and Proof of Service

Generally speaking, the general rules as to return of process in civil actions and rules as to return in actions against corporations apply in actions against railroad companies, in the absence of statute providing otherwise, and in such actions there must be due compliance with requirements of law as to return of process.

In the absence of statute providing otherwise, generally speaking, rules as to return of process in civil actions, stated in Process §§ 90–105, and rules as to return of process in actions against corporations generally, discussed in Corporations §§ 1321, 1948, apply in actions against railroad companies,[39] and there must be due compliance with requirements of law as to return in such actions.[40] Where a statute permits service to be made on particular officers or agents of the company or in a particular manner only in specified circumstances, a return of such service which fails to show the existence of circumstances authorizing it is insufficient,[41] but a return need not set forth other matters or circumstances not required to be shown [42]

The recitals of the return are not conclusive;[43] they may be overcome by clear and convincing proof.[44]

Officer or agent served. The return must show that the person served was an officer or agent of the company on whom service might properly be made,[45] and the return is not conclusive of the fact that the person served was in fact the agent of defendant company.[46] A return is sufficient which states that service was made on a certain conductor without stating that he was conductor of a train passing through the county,[47] or which recites service on a certain agent without giving his full name,[48] or which states that it was served on defendant company by handing a copy to the station agent at a certain station without stating that he was an agent of defendant,[49] but a return reciting service on a designated railroad company by serving a named person as "agent," without showing that he was agent for the company, has been held too indefinite to confer jurisdiction.[50] A return describing the person served as the highest officer of the company found in the county is not insufficient as failing to show that no higher officer could be found.[51] The view has been taken that, in order to show the effectiveness of service under a statute authorizing service on employees or agents of a designated type if defendant company has not appointed a person on whom process may be served, the return must negative the fact of such appointment,[52] and that,

35. Ala.—Ex parte Charles, 18 So 73, 106 Ala. 203.

36. Ga.—Pennington v Douglas, etc, R Co., 65 S E 1084, 6 Ga App 854

Sale of railroad property:
Generally see infra §§ 199–207.
As ground for forfeiture of franchise see supra § 18.

37. Ill.—Chicago, etc., R. Co v. Suta, 123 Ill App 125.
51 C J p 446 note 62.

Lease of railroad property:
Generally see infra §§ 208–224.
As ground for forfeiture of franchise see supra § 18.

38. Ga.—Perry v Brunswick, etc., R Co, 47 S E. 172, 119 Ga. 819.
5 C J p 446 note 62.

39. Okl.—Kansas, Oklahoma & Gulf Ry. Co. v. Hill, 99 P.2d 115, 186 Okl 531.
51 C J p 446 notes 67–75.

40. Okl.—Kansas, Oklahoma & Gulf Ry Co v. Hill, supra—Kansas, O & G Ry Co v. Martin, 51 P 2d 577, 175 Okl. 173

41. U S.—St. Louis, etc, R Co. v. Loughmiller, D C Okl, 193 F. 689.

42. Okl.—Empire Refineries v. Atchison, etc, R Co., 217 P. 160, 91 Okl. 171.

43. Okl.—Kansas, Oklahoma & Gulf Ry. Co. v Horath, 118 P 2d 660, 189 Okl. 555

44. Okl.—Kansas, Oklahoma & Gulf Ry. Co. v. Horath, supra

45. Mo.—Antonelli v. Basile, 93 Mo. App 138.
51 C.J p 446 note 69.

46. Tex.—Pecos, etc, R. Co. v. Cox, 157 S W. 745, 106 Tex. 74.

47. Ind.—Ohio, etc, R Co v. Quier, 16 Ind 440—New Albany, etc, R Co v. Powell, 13 Ind 373

48. Ind.—Cincinnati, etc., R. Co v McDougall, 8 N.E 571, 108 Ind. 179

49. Mich.—Talbot v Minneapolis, etc, R. Co, 45 N W. 1113, 82 Mich 66.

50. Mich.—Price v Delano, 153 N. W 7, 187 Mich. 49

51. Ind.—Baltimore, etc, R. Co. v Miles, 112 N E 524, 184 Ind 719

52. Okl.—Kansas, Oklahoma & Gulf Ry Co v Hill, 99 P.2d 115, 186 Okl 531, overruling so far as in conflict Empire Refineries v. At-

where service on a particular officer, agent, or employee, on whom service is authorized only if other designated officers or persons cannot be served or found, is relied on, the return or proof of service should show why one of such other officers or persons was not served[53] or that he could not be served[54]

Place of service. A recital in a return that service was made at the office and usual place of business of a railroad company in a designated city is sufficient to show that service was made at a depot or station of the company as required by statute[55]

III. REGULATION AND CONTROL IN GENERAL

§ 27. In General

Railroad companies are subject to the imposition of license fees or privilege taxes

"Regulation," as applied to railroads, embraces two ideas, control of operation and fixing compensation to be received.[56]

License fee or privilege tax. The state may impose a license fee or privilege tax on railroads[57] for doing a purely intra-state business;[58] and a railroad company subject to such a tax may be prohibited from carrying on its business until the tax has been paid.[59] Whether or not a particular company or operation of a company is within a statute or ordinance imposing such a tax depends on the intent of the law-making body as gathered from the language of the provision.[60] Where by statute railroad companies are divided into different classes, and a privilege tax imposed varying according to the classification of the roads to be made by railroad commissioners, the making of such classification is a condition precedent to the right to collect the tax,[61] and the commissioners cannot make a back classification so as to subject a railroad company to an additional privilege tax for past years for which it would not be liable under the former classification.[62] Long acquiescence by a company in a classification of it as a company within the statute is persuasive, although not conclusive, in any proceeding in which the issue is raised,[63] but a judgment of the commission classifying a railroad for purposes of the privilege taxes is conclusive as to the years in question unless an appeal is duly taken.[64] The rules governing collection of license fees and taxes generally, as discussed in Licenses §§ 52–55, are applicable.[65] In a suit by

chison, etc, R. Co., 217 P. 160, 91 Okl. 171.

53. Okl.—St. Louis, etc, R. Co. v. Reed, 158 P. 399, 59 Okl 95.

54. U S—Fisher v. Canadian Pac. Ry. Co, D C N Y, 1 F.Supp. 235.

Proof held sufficient

U S—Fisher v. Canadian Pac. Ry. Co, supra.

55. Okl.—Shawnee-Tecumseh Tract Co. v. Henry, 236 P. 894, 110 Okl 160.

56. U S—Boston, etc, R. Co v. Hooker, Mass, 34 S.Ct. 526, 233 U. S 97, 116, 117, 58 L Ed. 868.

53 C.J. p 1179 note 91

Regulation of operation of railroads generally see infra §§ 393–399.

Regulation of rates of railroads see Carriers §§ 275–311 and §§ 580–583

57. Miss—New Orleans, M. & C. R Co. v. State, 70 So. 355, 110 Miss. 290.

Wis.—State v. Chicago & N. W. Ry. Co., 112 N.W. 515, 132 Wis. 345, followed in State v Chicago, M & St. P. Ry. Co., 112 N.W. 522, 132 Wis. 364.

Imposition of license fees or privilege taxes on carriers generally see Carriers §§ 20, 567.

58. Miss.—New Orleans, M. & C R. Co. v. State, 70 So. 355, 110 Miss. 290.

59. N.Y.—Muehlenbeck v. Babylon, etc, R. Co, 55 N Y S. 1023, 26 Misc 136.

60. Ark.—City of Ft Smith v. Midland Valley R. Co., 246 S.W. 842, 156 Ark 479.

Ill—City of Chicago v. Chicago River & Indiana R. Co, 14 N E 2d 285, 294 Ill App. 577

Tenn—Illinois Cent R Co. v. City of Memphis, 110 S.W 2d 352, 21 Tenn App 327.

Determination of legislative intent

In arriving at legislative intent, in designating railroad terminal companies liable for payment of privilege tax, court should not be entirely controlled by any narrow technical definition, but by what a terminal company has authority to do, and what it actually does—Memphis Union Station Co. v. Stratton, 186 S.W.2d 621, 182 Tenn. 323.

Held subject to tax

Tenn—Memphis Union Station Co. v. Stratton, supra—Illinois Cent. R. Co. v. City of Memphis, 110 S W. 2d 352, 21 Tenn.App. 327—State v. Union Ry Co., 168 S.W. 575, 129 Tenn. 705, Ann Cas.1915D, 1240.

61. Miss.—Craig v. Gulf, Mobile & Ohio R. Co., 16 So.2d 760, 196 Miss 172—Gulf, etc., R. Co v. Adams, 86 So 144, 83 Miss. 306.

Classification of other lines

The tax commissioner's classifications of the main and branch lines of a railroad after opportunity for hearing cannot be invoked as an assessment or classification against another railroad, which acquired first railroad's lines, without further affirmative action by commissioner.—Craig v. Gulf, Mobile & Ohio R Co., 16 So. 2d 760, 196 Miss. 172.

Transfer of lines after payment

Where company which formerly owned railroad lines paid privilege taxes for year ending Dec. 1, 1940, another company which acquired such lines Sept. 1, 1940, could not be required to pay privilege tax for intervening period to Dec. 1, 1940, on same lines, where the new operator was otherwise already entitled to operate its own lines of railroad in state under licenses previously acquired—Craig v Gulf, Mobile & Ohio R Co, supra.

62. Miss—Gulf, etc., R. Co. v. Adams, 38 So. 348, 85 Miss. 772.

63. Tenn.—Memphis Union Station Co v Stratton, 186 S.W.2d 621, 182 Tenn. 323.

64. Miss.—New Orleans, M. & C. R Co. v. State, 70 So. 355, 110 Miss 290.

65. Wis.—State v. Chicago & N. W. R. Co, 112 N W. 515, 132 Wis. 345, followed in State v Chicago, M. & St. P. R. Co., 112 N.W. 522, 132 Wis. 364.

10 C.J. p 62 note 4 [a], [b].

a city against a railroad company to recover a license fee or privilege tax imposed by an ordinance on a railroad company having an office in, or running cars through or in the city for the business of transporting freight or passengers, a plea averring that defendant had neither an agent nor an office in the city and had not had is properly stricken on motion as not defeating the entire cause set forth.[66]

§ 28. —— Power to Regulate

A railroad company is subject to the police power and may be regulated and controlled by public authority for the common good within constitutional limits.

A railroad company is, of course, subject to the police power,[67] and its property, being devoted to the public use, is affected with a public interest.[68] Accordingly, such a company, like every other public utility, as discussed in Public Utilities §§ 10–12, may be regulated and controlled by public authority for the common good and to the extent of the public interest,[69] but power to regulate may not be so exercised as to trammel or interfere unnecessarily with the operation of railroad properties and business.[70] Further, the regulatory power may be restricted by the character of the company or by general statute,[71] and is subject to the constitutional guaranties as to the impairment of vested rights,[72] equal protection of the laws,[73] and due process of law.[74] Constitutional provisions regulating railroads are ingrafted on every law concerning them.[75]

The regulatory power of the state extends to the performance of the railroad's public functions[76] as well as to every act incidental to such functions,[77] but not to uses of its property by the railroad which do not involve a duty to the public.[78] The state may order improvements necessary to the public safety[79] regardless of the effect of such order on the railroad's financial condition.[80] The fact that a railway company is chartered by the United States does not relieve it from regulation by state laws as far as the state's police power is concerned.[81]

Of courts. In some jurisdictions, under statutes providing therefor, the courts have power to prescribe regulations for the control of railroad companies,[82] but in the absence of such statutes no such power exists.[83]

66. Ala.—Nashville, etc, R Co v. Alabama City, 32 So. 731, 134 Ala. 414

67. Ill—Chicago, N S & M R Co v. Illinois Commerce Commission ex rel Department of Public Works and Buildings, 188 N E 177, 354 Ill 58
Tex—Texas & P Ry. Co. v. State, Civ App, 52 S W 2d 957, affirmed 78 S W 2d 580, 124 Tex. 482, certiorari denied Texas & P Ry. Co v. State of Texas, 56 S Ct 91, 296 U.S 581, 80 L Ed 410, appeal dismissed 56 S Ct. 369, 296 U S. 552, 80 L.Ed. 390.
51 C J. p 446 note 77.

68. Ohio—State v. Black Diamond Co, 119 N E. 195, 97 Ohio St. 24, L.R A.1918E 352
51 C.J p 446 note 78.
Special interest of private industry
The uses for which a railroad track is desired are not less public because the motive which dictates its location is to reach a private industry or because the proprietors of that industry contribute to the cost, with respect to state's power of regulation—Alton R. Co. v. Illinois Commerce Commission, Ill., 59 S.Ct 340, 305 U.S 548, 83 L Ed. 344.
Sovereign interest
The state, as representative of the public, has a sovereign interest in railroads—Fort Worth & D. C. Ry. Co v. Ammons, Tex.Civ.App, 215 S. W 2d 407, refused no reversible error.

69. Ill—Chicago, N. S. & M. R. Co v. Illinois Commerce Commission ex rel Department of Public Works and Buildings, 188 N E 177, 354 Ill. 58
N Y—People v. Brooklyn & Queens Transit Corp., 28 N E 2d 925, 283 N.Y 484
51 C.J. p 446 note 80.

70. U S—Atchison, T. & S F. Ry Co v. Railroad Commission of State of California, Cal., 51 S Ct 553, 283 U S 380, 75 L Ed. 1128.

71. Fla—Atlantic Coast Line R Co. v. Coachman, 52 So. 377, 59 Fla 130, 20 Ann Cas 1047.
Inconsistent statutes
The Railroad Act and Public Utilities Act are so inconsistent that both cannot operate, and therefore, repugnant provisions of Railroad Act must yield to Public Utilities Act insofar as the acts are inconsistent, since Public Utilities Act is the later act, and as so construed both acts may operate in their respective fields—Illinois Cent. R. Co v. Franklin County, 56 N.E.2d 775, 387 Ill 301.

72. U.S—Louisville, etc., R. Co. v. Tennessee R. Commission, Tenn., 19 F. 679.
51 C.J. p 447 note 82.

73. U.S.—Chicago, etc., R. Co. v. Minnesota, Minn., 10 S Ct 462, 702, 134 U.S. 418, 33 L.Ed. 970.
51 C.J. p 447 note 83.

74. U S.—Chicago, etc, R. Co. v. Minnesota, supra
51 C J. p 447 note 84

75. Ill—People v City of Chicago, 182 N E 419, 349 Ill. 304.

76. N.Y.—People v. Brooklyn & Queens Transit Corp, 28 N E 2d 925, 283 N.Y. 484

77. N Y—People v. Brooklyn & Queens Transit Corp., supra.

78. Mich—Bohn Lumber Products Co v. Michigan Public Service Commission, 26 N.W.2d 875, 317 Mich 174.

79. Mo.—State ex rel. Alton R. Co. v Public Service Commission, 70 S.W 2d 61, 334 Mo 1001.

80. Mo—State ex rel. Alton R. Co. v. Public Service Commission, supra.

81. Tex—Texas & P. Ry. Co. v. State, Civ.App, 52 S.W.2d 957, affirmed 78 S.W.2d 580, 124 Tex. 482, certiorari denied Texas & P Ry. Co. v. State of Texas, 56 S Ct. 91, 296 U.S. 581, 80 L Ed. 410, appeal dismissed 56 S.Ct. 369, 296 U.S. 552, 80 L Ed. 390.

82. N.J.—In re Atlantic Highlands, etc., R. Co, 35 A. 387.
51 C.J. p 447 note 87.

83. U.S—Northern Pac. R. Co. v. Washington Territory, Wash., 12 S Ct. 283, 142 U S. 492, 35 L.Ed. 1092.
51 C.J. p 447 note 88.

§ 29. —— Regulation by Commission

The regulation of railroads may be delegated to a board or commission, and as long as such board or commission acts within the limits of its authority its orders will be sustained.

There is nothing in the federal Constitution or statutes which prevents a state from creating a commission to regulate and control railroads,[84] except that, as discussed in Commerce § 78, a state cannot authorize the regulation thereby of interstate commerce. As long as such a board or commission acts within the limits of its authority its orders will be sustained.[85] Whether, and to what extent, a particular board or commission has regulatory powers over railroads generally or over particular roads depends on the terms and language of the statutes creating and governing the commission.[86] A railroad commission has jurisdiction over such roads only as may be included within its grant of power;[87] but it has the same jurisdiction over the use by a railroad of private tracks as it has over the tracks of such railroad.[88]

§ 30. —— Enforcement of Duties

The courts have power to determine the duties which a railroad owes to the public and to enforce the performance thereof.

The courts have power to determine the duties owed by a railroad company to the public,[89] and to enforce the performance thereof;[90] and the right of the state to institute proceedings to forfeit the charter of the company or annul the corporation for failure to perform its public duties, discussed supra § 18, does not preclude it from invoking the powers of the courts to compel such performance.[91] The courts will enforce an order of the commission only where such order is reasonable and just and where refusal to comply therewith constitutes neglect on the part of the railroad company to perform a public obligation.[92] The duty sought to be enforced must ordinarily be one that is imposed on the railroad by statute.[93] The exercise of purely discretionary powers on the part of railroad companies cannot be controlled or interfered with by the courts unless manifestly abused.[94]

The performance by the railroad company of a clear legal duty may, in a proper case, be enforced by a proceeding in a court of equity.[95] A court of equity, however, is not ordinarily justified in retaining future control of a railroad and its facilities and in supervising its operation.[96]

§ 31. Federal Wartime Control

a. In general
b. Scope and extent
c. In whom vested
d. Effect on particular matters
e. Right to moneys accruing from operation
f. Termination of federal control
g. Compensation and guaranty of income

84. U.S.—Mobile, etc., R. Co. v. Mississippi, Miss., 28 S.Ct. 650, 210 U.S. 187, 52 L.Ed. 1016.
Tenn.—Pharr v. Nashville, C. & St. L. Ry., 208 S.W.2d 1013, 186 Tenn. 154.
Creation, nature, and powers of commissions generally see Public Utilities §§ 1-68.

85. Tenn.—Pharr v. Nashville, C. & St. L. Ry., 208 S.W.2d 1013, 186 Tenn. 154.
Tex.—Missouri, K. & T. R. Co. of Tex. v. City of Whitney, Civ.App., 222 S.W.2d 1009.

86. Cal.—Holder v. Key System, 200 P.2d 98, 88 Cal.App.2d 925.
Ill.—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 74 N.E.2d 885, 397 Ill. 406.
Minn.—Rock Island Motor Transit Co. v. Murphy Motor Freight Lines, 40 N.W.2d 896, 229 Minn. 291.
Neb.—Application of Chicago, B. & Q. R. Co., 41 N.W.2d 165, 152 Neb. 367.
S.C.—Piedmont & Northern Ry. Co. v. Scott, 24 S.E.2d 353, 202 S.C. 207—Darby v. Southern Ry. Co., 10 S.E.2d 465, 194 S.C. 421.

87. Mo.—State ex rel. and to Use of Kansas City Southern Ry. Co. v. Public Service Commission, 30 S.W.2d 112, 325 Mo. 862.
Ohio—Cooperative Legislative Committee of R. R. Brotherhoods v. Public Utilities Commission, 80 N.E.2d 159, 149 Ohio St. 511.
51 C.J. p. 447 note 95.
Subsidiary corporations, owned, controlled, and operated by railroads to carry on pick-up and delivery service for less than carload lots of freight, do not possess separate legal individuality from their parent railroads, with respect to jurisdiction of state railroad commission.—Atchison, T. & S. F. Ry. Co. v. Railroad Commission of Texas, Tex.Civ.App., 77 S.W.2d 773.

88. Ohio—Morgan Run R. Co. v. State Public Utilities Commission, 128 N.E. 295, 98 Ohio St. 218.

89. Fla.—State v. Atlantic Coast Line R. Co., 44 So. 213, 53 Fla. 650, 13 L.R.A.,N.S., 320, 12 Ann.Cas. 359.
Neb.—State v. Missouri Pac. R. Co., 115 N.W. 757, 81 Neb. 174, reversed on other grounds 30 S.Ct. 461, 217 U.S. 196, 54 L.Ed. 727, 18 Ann.Cas. 989.
Power of courts to prescribe regulations see supra § 28.

90. Fla.—State v. Atlantic Coast Line R. Co., 44 So. 213, 53 Fla. 650, 13 L.R.A.,N.S., 320.
51 C.J. p. 447 note 99.
Proceedings to compel operations and furnishing facilities see infra §§ 449-452.

91. N.Y.—People v. New York Cent., etc., R. Co., 28 Hun 543, 3 N.Y.Civ.Proc. 11, 2 McCarty Civ. Proc. 345.

92. Iowa.—Lowden v. Iowa State Commerce Commission, 294 N.W. 749, 229 Iowa 526.

93. Iowa.—Lowden v. Iowa State Commerce Commission, supra.

94. Ga.—Georgia R., etc., Co. v. Maddox, 42 S.E. 315, 116 Ga. 64.
51 C.J. p. 448 note 3.

95. U.S.—McCoy v. Cincinnati, etc., R. Co., C.C.Ohio, 13 F. 3.

96. Ohio—New York Cent. R. Co. v. City of Bucyrus, 136 N.E. 450, 126 Ohio St. 558, followed in Bush v. Hague, 191 N.E. 5, 128 Ohio St. 342.

a. In General

Under a statute to such effect, the president has power to take possession and control of all systems of transportation within the United States in time of war.

During the period of United States participation in World War I, congress enacted a statute giving the president power "in time of war" to take possession and assume control of systems of transportation within the boundaries of the continental United States,[97] and in pursuance thereof the president issued his proclamation declaring that he took possession and assumed control of each and every system of transportation within such boundaries, consisting of railroads engaged in general transportation, including terminals and all other equipment and appurtenances commonly used on, or operated as a part of, such rail systems of transportation.[98] By a later statute rights and liabilities under the federal control were defined and the manner of such control prescribed.[99] Subsequently, as discussed infra subdivision f of this section, the Transportation Act of 1920 was enacted, terminating federal possession and control of the railroads; hence, the many decisions construing and applying the statutes and rules governing such control would appear to be limited to the period and circumstances of federal control during and for a short time after World War I. However, the authority granted to the president to take possession and control of railroads in time of war has not been abolished, and has been exercised in a number of instances during periods in which the country was technically at war.[1] In taking over the control and operation of such railroads the United States acts in its sovereign capacity,[2] under a right in the nature of eminent domain,[3] and the statute providing therefor is not unconstitutional.[4]

By proclamation the president of the United States assumed control of the American Railway Express Company, in connection with the federal control of the railroads, and directed that it should be controlled and operated by the director general.[5] It was the duty of the express company to give precedence to shipments of the government during the period of such control.[6]

b. Scope and Extent

Federal control of railroads in time of war extends to their entire organization including physical property, but control of the owning companies or corporations is not taken over and the railroads remain the private property of their respective owners.

During the period of federal control of railroads during and for a short period after World War I, complete possession by the United States replaced the ordinary incidents of private ownership,[7] and its control extended not merely to the physical property but to the entire organization, including officers, directors, and employees,[8] who thereupon became agents and employees of the government rather than of the respective railroad companies.[9] So the railroads became mere agencies or instrumentalities of the government,[10] and it was a bailee of property being transported thereby,[11] and a carrier of passengers.[12] However, control of the owning companies or corporations was not taken

97. **Through whom possession taken** The provision of Act of 1916 empowering the president in time of war to take possession of a transportation system "through the Secretary of War" was a mandatory limitation of power of the president to such possessory action through the Secretary of War, and, hence, the president had no power under the Act to designate some agency or person other than the Secretary of War to take possession of a railroad—Toledo, P. & W. R. R. v. Stover, D.C.Ill., 60 F.Supp. 587.

98. U.S.—Krichman v. U. S., C.C.A.N.Y., 263 F. 538, reversed on other grounds 41 S.Ct. 514, 256 U.S. 363, 65 L.Ed. 992

99. U.S.—Toledo, P. & W. R. R. v. Stover, D.C.Ill., 60 F.Supp. 587.
51 C.J. p. 448 note 11.

1. D.C.—U. S. v. Brotherhood of Locomotive Engineers, D.C.D.C., 79 F.Supp. 485, certiorari denied 69 S.Ct. 137, 335 U.S. 867, 93 L.Ed. 412, cause remanded 174 F.2d 160, 85 U.S.App.D.C. 417, certiorari denied Brotherhood of Locomotive Firemen and Engineers v. U. S., 70 S.Ct. 140, 338 U.S. 872, 94 L.Ed. 535.

2. Ala.—Vaughn v. State, 81 So. 417, 17 Ala.App. 35, certiorari denied Vaughn, Ex parte, 82 So. 894, 203 Ala. 700
51 C.J. p. 448 note 12

3. U.S.—Dupont de Nemours v. Davis, Ark., 44 S.Ct. 364, 264 U.S. 456, 68 L.Ed. 788—North Carolina R. Co. v. Lee, N.C., 43 S.Ct. 2, 260 U.S. 16, 67 L.Ed. 104.

4. U.S.—Wainwright v. Pennsylvania R. Co., D.C.Mo., 253 F. 459
Miss.—Mobile, etc., R. Co. v. Jobe, 84 So. 910, 122 Miss. 696

5. Mo.—Edwards v. American R. Express Co., App., 216 S.W. 781.

6. Mo.—Edwards v. American R. Express Co., supra.

7. Ala.—Moon v. Hines, 87 So. 603, 205 Ala. 355, 13 A.L.R. 1020.
51 C.J. p. 448 note 15.

8. Ala.—Kittrell v. Hatter, 10 So.2d 827, 243 Ala. 472.
51 C.J. p. 448 note 16

9. D.C.—U. S. v. Brotherhood of Locomotive Engineers, D.C., 79 F.Supp. 485, certiorari denied 69 S.Ct. 137, 335 U.S. 867, 93 L.Ed. 412, cause remanded 174 F.2d 160, 85 U.S.App.D.C. 417, certiorari denied, Brotherhood of Locomotive Engineers & Broth. of Locomotive Firemen and Engineers v. U. S., 70 S.Ct. 140, 338 U.S. 872, 94 L.Ed. 535
51 C.J. p. 448 note 17.

10. N.Y.—Second Dist. Public Service Commission v. New York Cent. R. Co., 185 N.Y.S. 267, 193 App.Div. 615, affirmed 129 N.E. 455, 230 N.Y. 149, 14 A.L.R. 449.
Tenn.—Dickens v. Bransford Realty Co., 210 S.W. 644, 141 Tenn. 387.

11. U.S.—Bloch v. U. S., C.C.A.Tex., 261 F. 321, certiorari denied 40 S.Ct. 481, 253 U.S. 484, 64 L.Ed. 1025

12. N.Y.—Gainer v. Hines, 184 N.Y.S. 768, 194 App.Div. 21.

over,[13] and they retained their identities and existence;[14] and the railroads remained the private property of their respective owners,[15] the relations between the companies and the United States being analogous to those of lessor and lessee.[16]

The extent of the power conferred by statute on the president[17] and the validity of orders attempted to be made under such authority[18] are necessarily judicial questions, and it was held that such power extended to all matters having direct relation to the facilitation of the transport of troops, war materials, and supplies.[19] The power granted was broad enough to include both interstate and intra-state transportation,[20] but did not necessarily extend to every short line or "tap line;"[21] nor did it extend to property of a railroad company not used in, or necessary to, its business of carriage;[22] and a purely military railroad was not within the statute.[23] The federal control did not abrogate the requirements of the general laws regulating commerce,[24] the rules and regulations of the interstate commerce commission,[25] or the federal statutes regulating the operation of railroads,[26] except as far as they were inconsistent therewith.

c. In Whom Vested

The president may appoint a director general or designate some other person in whom the possession, control and management of the railroads shall vest.

By the president's proclamation assuming possession and control of the railroads during World War I a director general of railroads was appointed and authorized to take possession and control of the systems of transportation embraced by the proclamation and to operate and administer them.[27] Such appointment and delegation of authority were within the power conferred on the president,[28] and by virtue of it the possession, control, and management of such railroads became completely and exclusively vested in the director general,[29] whose status was not that of a carrier, but rather of an operator of carriers,[30] and whose orders, made within the scope of his powers, were in legal effect orders of the president.[31] The power of the director general and managers appointed by him continued, of course, only during the period of federal control.[32]

Under the statute, the president may appoint the secretary of the army to take over railroads and act on behalf of the government.[33]

13. U.S.—Hines v. Dahn, C.C.A. Iowa, 267 F. 105, affirmed 42 S.Ct. 320, 258 U.S. 421, 66 L.Ed. 696.
N.D.—McGregor v. Great No. R. Co., 172 N.W. 841, 42 N.D. 269, 4 A.L.R. 1365.

14. Ark.—Davis v. Chrisp, 252 S.W. 606, 159 Ark. 335, certiorari denied 44 S.Ct. 36, 263 U.S. 710, 68 L.Ed. 518.
51 C.J. p. 448 note 22.

15. Mo.—Brown v. St. Louis-San Francisco R. Co., App., 268 S.W. 678.
51 C.J. p. 448 note 23.

16. Mich.—Peacock v. Detroit, etc., R. Co., 175 N.W. 580, 208 Mich. 403, 8 A.L.R. 964.

17. U.S.—U. S. Railroad Administration v. Burch, D.C.S.C., 254 F. 140.

18. U.S.—Cheney v. Hines, C.C.A. N.Y., 266 F. 310—U. S. v. Metropolitan Lumber Co., D.C.N.J., 254 F. 335.

19. N.Y.—Zuckerbraum v. Old Dominion SS. Co., 197 N.Y.S. 299, 119 Misc. 790.

Intent

Congress intended that in time of war a transportation system taken over by executive order should be operated by Secretary of War for prime purpose of the war effort, and that secretary's possession would dedicate operation of the system to war effort rather than as a government agency with the war effort incidental to possession and control taken over by the government.—Toledo, P. & W. R. R. v. Stover, D.C. Ill., 60 F.Supp. 587.

Partially constructed railroad

The statute did not include a partially constructed railroad of a land company.—Burroughs v. Southern Colonization Co., 173 N.E. 716, 96 Ind.App. 93.

20. N.J.—Lehigh Valley R. Co. v. Maas, etc., Co., 124 A. 111, 99 N.J.Law 194.
51 C.J. p. 449 note 28.

21. Ill.—State Public Utilities Commission v. Springfield Terminal R. Co., 127 N.E. 128, 292 Ill. 505.

22. U.S.—U. S. Railroad Administration v. Burch, D.C.S.C., 254 F. 140.
Pa.—Austin v. Hines, 123 A. 502, 278 Pa. 537.

23. U.S.—Bryson v. Hines, C.C.A. N.C., 268 F. 290.
51 C.J. p. 449 note 31.

24. Ala.—Payne v. Zimmern, 92 So. 433, 207 Ala. 155.

25. U.S.—U. S. v. Metropolitan Lumber Co., D.C.N.J., 254 F. 335.
Ala.—Payne v. Zimmern, 92 So. 433, 207 Ala. 155.

26. U.S.—U. S. v. Geer, D.C.Pa., 268 F. 385, certificate dismissed 43 S.Ct. 165, 260 U.S. 756, 67 L.Ed. 498.

27. U.S.—Krichman v. U. S., C.C.A. N.Y., 263 F. 538, reversed on other grounds 41 S.Ct. 514, 256 U.S. 363, 65 L.Ed. 992.

28. Mass.—West v. New York, etc., R. Co., 133 N.E. 621, 233 Mass. 162.
Tex.—Rhodes v. Tatum, Civ.App., 206 S.W. 114.

29. U.S.—Morgenthau v. Sugar Land Ry. Co., C.C.A.Tex., 83 F.2d 72.
Ala.—Vaughn v. State, 81 So. 417, 17 Ala.App. 35.
51 C.J. p. 449 note 39.

30. U.S.—Dupont de Nemours v. Davis, Ark., 44 S.Ct. 364, 264 U.S. 456, 68 L.Ed. 788.
Pa.—Florida East Coast Growers Assoc. v. Davis, 83 Pa.Super. 472.

31. U.S.—Davis v. O'Hara, Neb., 45 S.Ct. 104, 266 U.S. 314, 69 L.Ed. 303.

32. U.S.—Crawshaw v. Corbett, C.C.A.Mo., 264 F. 962.

33. D.C.—U. S. v. Brotherhood of Locomotive Engineers, D.C., 79 F.Supp. 485, certiorari denied 69 S.Ct. 137, 335 U.S. 867, 93 L.Ed. 412, cause remanded 174 F.2d 160, 85 U.S.App.D.C. 417, certiorari denied Brotherhood of Locomotive Firemen and Engineers v. U. S., 70 S.Ct. 140, 338 U.S. 872, 94 L.Ed. ——.

Authority to act in labor dispute

Where government had taken over railroads and placed them in jurisdiction of the secretary of the army, he had authority to act on behalf of government and take such action as seemed to be wise and proper under the circumstances concerning such railroads and their labor rela-

d. Effect on Particular Matters

(1) On separate identities of railroads
(2) On rights of action
(3) Offenses
(4) Other matters

(1) On Separate Identities of Railroads

Federal control did not change or destroy the separate identity of the individual railroads or result in a consolidation so as to render all the railroad companies in effect one company.

The enactment of the statutes authorizing the government to take possession of the railroads in no way changed or destroyed their separate identities,[34] and the taking of possession did not result in such a consolidation as to render all the railroad companies in effect one company.[35] While such statutes placed the operation of all the railroads of which possession and control had been assumed under one directing head,[36] the director general, in the operation of each road, sustained to it a relation separate and distinct from his relation to other roads under his control,[37] and, in actions against him, he was brought into court only as the government's representative in the operation of the railroad on whose agent notice was served,[38] and was liable only with respect to the particular railroad out of the operation of which the liability in question arose.[39] Accordingly, in order to establish a claim for damages against the director general growing out of the operation of a railroad under his control, the identity of the railroad must have been disclosed, and plaintiff's right to a judgment against the director general as operator of the particular road must have been shown;[40] and a petition against him as operator of one road would not support a judgment against him as operator of another;[41] nor would service on an agent or officer of one railroad give jurisdiction in a suit against the director general on a cause of action arising out of the operation of another railroad.[42] An action against the director general on a cause arising out of the operation of two or more railroads was required to proceed as if against the several railroad companies,[43] and liability fixed among or between them as if the government or director general were not a party.[44]

(2) On Rights of Action

(a) Accruing before federal control
(b) Accruing during federal control

(a) Accruing before Federal Control

A railroad's liability on a cause of action arising before federal possession and control began continued thereafter and could be enforced against it.

The liability of a railroad company on a cause of action arising before possession and control of such road was assumed by the United States continued thereafter and could be enforced against it,[45] and the director general had no authority to make any order whereby an existing right of action would be extinguished or cut off;[46] but the procedure governing such an action was subject to restrictions imposed by, or under authority of, the federal statutes,[47] and no judgment could be collected by levying on railroad property as long as the federal control continued.[48] No liability ex-

tions even though he expressed the thought to certain labor leaders that he should not interfere as long as the president was conducting negotiations—U. S. v. Brotherhood of Locomotive Engineers, D.C.D.C., 79 F.Supp. 485, certiorari denied 69 S.Ct. 137, 335 U.S. 867, 93 L.Ed. 412, cause remanded 174 F.2d 160, 85 U.S.App.D.C. 417, certiorari denied, Brotherhood of Locomotive Engineers & Broth. of Locomotive Firemen and Engineers v. U. S., 70 S.Ct. 140, 338 U.S. 872, 94 L.Ed. ——.

34. Minn.—Granquist v. Duluth, etc., R. Co., 193 N.W. 126, 155 Minn. 217
51 C.J. p 455 note 29.

35. Ga.—Davis v. McMillan, 112 S.E. 913, 28 Ga.App. 689, reversed on other grounds 115 S.E. 494, 154 Ga. 803.
51 C.J. p 455 note 30

36. U.S.—Globe, etc., F. Ins. Co. v. Hines, C.C.A.N.Y., 273 F. 774, certiorari denied 42 S.Ct. 54, 257 U.S. 643, 66 L.Ed. 413.
51 C.J. p 455 note 31.

37. Tex.—St. Louis, etc., R. Co. v. McLean, Com.App., 253 S.W. 248.
51 C.J. p 455 note 32

38. U.S.—Manbar Coal Co. v. Davis, C.C.A.W.Va., 297 F. 24.
51 C.J. p 455 note 33

39. U.S.—Davis v. Alexander, Okl., 46 S.Ct. 34, 269 U.S. 114, 70 L.Ed. 186.
51 C.J. p 455 note 34.

40. U.S.—Manbar Coal Co. v. Davis, C.C.A.W.Va., 297 F. 24.
51 C.J. p 455 note 35

41. La.—Luckett v. Texas, etc., R. Co., 2 La.App. 752, annulled on other grounds, 108 So. 405, 161 La. 175
Tex.—Davis v. Standard Rice Co., Civ.App., 293 S.W. 593.
Pleadings in actions on causes accruing during federal control generally see infra subdivision d (2) of this section.

42. U.S.—Seaver v. Hines, D.C.N.H., 263 F. 454—Seaver v. Hines, D.C.N.H., 261 F. 239.
Process and service in actions on causes accruing during federal control see infra subdivision d (2) of this section

43. Ala.—Lynn v. Mellon, 114 So. 680, 217 Ala. 75

44. Ala.—Lynn v. Mellon, supra.
Ill.—Cardwell v. Payne, 226 Ill.App. 227.

45. U.S.—Davis v. L. N. Dantzler Lumber Co., Miss., 43 S.Ct. 349, 261 U.S. 280, 67 L.Ed. 387, 28 A.L.R. 834.
51 C.J. p 450 note 66—37 C.J. p 1048 note 79 [a]

46. U.S.—Bryson v. Hines, C.C.A.N.C., 268 F. 290
51 C.J. p 450 note 67.

47. U.S.—Davis v. L. N. Dantzler Lumber Co., Miss., 43 S.Ct. 349, 261 U.S. 280, 67 L.Ed. 387, 28 A.L.R. 834
51 C.J. p 450 note 68.

48. Ky.—Louisville, etc., R. Co. v. Steele, 202 S.W. 878, 180 Ky. 290.
Tex.—Bell v. Baker, Civ.App., 249 S.W. 246, reversed on other grounds Com.App., 260 S.W. 158.

isted, however, and no suit could be maintained, against the director general on such a cause of action.[49]

Service of process. The fact that one employed in the operation of a railroad was an employee of the government did not prevent his being an employee or agent of the company so that process could be served on him as such in an action on a cause arising before federal control.[50]

Express company. Under a rule similar to that applying to actions on causes arising out of the operation of railroads, actions on causes arising prior to the federal control of the express company were maintainable against the American Railway Express Company.[51]

(b) Accruing during Federal Control

There being no provision to the contrary, an action on a cause accruing during the period of federal control could be maintained against the director general, as representative of the United States, on such conditions as were prescribed by statute and orders, and with the consent of the director general; general rules governing procedure in civil actions were applicable.

Under the statutes providing for federal possession and control of railroads, and the orders promulgated under the authority thereby conferred, an action was maintainable for any cause arising during the period of such control for which it could have been maintained in the absence thereof, except as otherwise provided by such statutes or orders,[52] and no defense was interposable on the ground that the railroad was an instrumentality of the government.[53] The United States being suable, however, only when it has consented thereto, as discussed in the title United States § 176, also 65 C. J. p 1403 note 58, it, or the director general, as its representative, was subject to suit only to the extent and on the conditions prescribed by the statute and his orders,[54] and no action could be maintained on any cause as to which consent had not been given,[55] nor except within the time specified by the statute.[56] It was incumbent on the director general to defend actions brought on causes arising during federal control.[57] A claim against the director general for injuries was a claim against the United States,[58] and so was barred by a recovery under the Federal Employees' Compensation Act.[59] The director general's order remitting soldiers injured on railroads to claims for compensation under the war risk insurance acts was intended to deprive soldiers so injured of any right of action against the director general,[60] but such order had no application to injuries sustained before its promulgation.[61]

Venue. Prior to the issuance by the director general of any order to the contrary, an action against him might be brought at any place where the railroad company would have been suable in the absence of federal control;[62] but after the making of orders prescribing the place for bringing such actions, the director general could be sued only at the place designated, as long as the federal control continued.[63]

49. U.S.—Hines v. Woodson, C.C.A. Ill., 280 F. 966
51 C.J. p 450 note 70.

50. U.S.—Vicksburg, etc., R. Co. v. Anderson-Tully Co., C.C.A.Miss., 261 F. 741, affirmed 41 S.Ct. 524, 256 U.S. 408, 65 L.Ed. 1020.

51. Mass.—Clapp v. American Express Co., 125 N.E. 162, 234 Mass. 174.

52. Mo.—Bradford v. McAdoo, 219 S.W. 92, 202 Mo.App. 412
Neb.—Schneider v. Davis, 192 N.W. 230, 109 Neb. 638.
Tex.—Hines v. Steele, Civ.App., 224 S.W. 606, dismissed for want of jurisdiction.
51 C.J. p 450 note 73.

53. U.S.—Hines v. Atlantic Refining Co., C.C.A.W.Va., 265 F. 839—Hines v. Henaghan, C.C.A.W.Va., 265 F. 831.
51 C.J. p 451 note 74.

Common-law rules as to liability applicable
Fla.—Williams v. Hines, 86 So. 695, 80 Fla. 690.

Defense available
Since the federal control of railroads was primarily to supply transportation needed for the Great War, and only secondarily to supply such transportation for the public, the fact that cars were needed for shipments of the government is a defense to an action for breach of contract by the carrier's station agent to have cars ready for plaintiff at a stated time and place.—Underwood v. Hines, Mo.App., 222 S.W. 1037.

54. U.S.—Davis v. O'Hara, Neb., 45 S.Ct. 104, 266 U.S. 314, 69 L.Ed. 303.
51 C.J. p 451 note 76.

55. D.C.—Ft. Smith, etc., R. Co. v. Mellon, 24 F.2d 613, 58 App.D.C. 38.
51 C.J. p 451 note 77.

56. D.C.—U.S. v. Davis, 8 F.2d 907, 56 App.D.C. 46, certiorari denied 46 S.Ct. 352, 270 U.S. 653, 70 L.Ed. 782.
51 C.J. p 451 note 78.

57. U.S.—Johnson v. McAdoo, D.C. La., 257 F. 757, reversed on other grounds, C.C.A., 274 F. 207.

58. U.S.—Sandoval v. Davis, C.C.A. Ohio, 288 F. 56.

59. U.S.—Dahn v. Davis, Iowa, 42 S.Ct. 330, 258 U.S. 421, 66 L.Ed. 696—Sandoval v. Davis, C.C.A. Ohio, 288 F. 56.

60. U.S.—Sandoval v. Davis, D.C. Ohio, 278 F. 968, affirmed, C.C.A., 288 F. 56.

61. Mo.—Skinner v. Davis, 230 S.W. 37, 312 Mo. 581, appeal dismissed 47 S.Ct. 333, 273 U.S. 776, 71 L.Ed. 887.

62. Mo.—State ex rel. Hines v. Calhoun, 220 S.W. 6, 281 Mo. 583.
51 C.J. p 451 note 85.

63. U.S.—Davis v. O'Hara, Neb., 45 S.Ct. 104, 266 U.S. 314, 69 L.Ed. 303.
51 C.J. p 451 note 86.

Place of residence of plaintiff's assignor
Where the director general's order required the action to be brought in the county or district where plaintiff resided at the time the cause of action accrued, the county in which a corporation, which assigned its cause of action to plain-

Parties. General rules as to parties plaintiff were applicable in an action against the director general.[64] During the early part of the period of federal control an action on a cause arising during such period was maintainable against the railroad company from the operation of whose lines the action arose,[65] although a judgment recovered therein was in effect one against the director general.[66] Subsequently, however, under an order so providing, all such actions were required to be brought against the director general, and the railroad company was not liable for any action founded on any cause so arising.[67]

Accordingly, where an action was instituted against the company, the director general was properly substituted as party defendant,[68] and a succeeding director general substituted for his predecessor,[69] but unless so substituted no judgment could be rendered against him.[70] The liability of the director general was, of course, in his official, and not in his personal, capacity,[71] and it was unnecessary to name the incumbent,[72] but the insertion of his name was harmless surplusage.[73] The substitution, however, of a person who did not at the time occupy the position of director general rendered the action defective.[74] The fact that an action was brought against the director general operating a designated railroad company instead of its railroad was immaterial.[75] The appearance of the director general and his proceeding to trial on the merits waived any defect in naming him as party defendant.[76]

Actions founded on the torts of the American Railway Express Company while under the control of the United States were properly maintainable against the director general, and not against the express company,[77] although the company could waive the defense of nonliability.[78]

An action by the director general for damages to a bridge under federal control could be prosecuted to final judgment, notwithstanding failure to substitute his successor within the time prescribed by statute.[79]

Process and service. The statutes providing for federal control did not change the manner or mode of service of process in actions brought during the period of such control,[80] and service on any agent of the director general was sufficient to bring him into court, where no agent for service had been designated.[81] Under an order, however, requiring service of process in an action against the director general to be made on officials operating the railroad for the director general in the same manner as was theretofore made on operating officials of the railroad company, service on any other official was insufficient.[82] Any want or defect of service was waived by a general appearance by the director general.[83]

Pleading. A petition or complaint which sufficiently set forth a cause of action against a railroad company, and alleged that the railroad was under the control of the director general at the time the cause arose, was sufficient to state a cause of action against the director general.[84]

Trial. The plaintiff in an action against the di-

tiff, resided was the proper place to bring the action, since "plaintiff" means the party in whose favor the cause of action originally accrued —Goodwin Preserving Co v Davis, 258 S.W. 97, 201 Ky 646, 650

Effective date of order

Tex —El Paso & S. W R Co. v. Lovick, Civ App., 210 S W 283, affirmed 218 S W 489, 110 Tex 244, appeal dismissed 41 S Ct. 6, 254 U S 659, 65 L Ed. 462.

64. Mo —Forest Green Farmers' Elevator Co v Davis, 270 S.W. 394, 216 Mo App. 545.

65. N.D —McGregor v. Great Northern R. Co., 172 N.W. 841, 42 N D. 269, 4 A L R. 1635.
51 C.J p 452 note 88.

66. S C —Calhoun v Southern R. Co, 106 S E 780, 115 S C. 489, certiorari denied 41 S Ct. 376, 255 U.S. 573, 65 L.Ed. 792.

67. Ga.—Sanders v. Atlantic Coast Line R Co, 172 S E. 649, 48 Ga App. 284
51 C J p 452 note 91.

68. U S —Missouri Pac R Co v Ault, Ark, 41 S Ct. 593, 256 U.S. 554, 65 L Ed. 1087.
51 C J p 453 note 92.

69. Tex —Kilgore v. Hines, Civ App, 265 S W. 744.

70. Ky —Payne v. Ramsey, 242 S. W. 5, 195 Ky. 117.

71. Ala.—Hines v. Wimbish, 85 So 765, 204 Ala. 350

72. D C.—Mellon v. Seymoure, 12 F 2d 836, 56 App D C. 301.
Va —Bailey v. Hines, 109 S.E 470, 131 Va. 421.

73. U S —Blevins v Hines, D C Va, 264 F. 1005.

74. Ala —McAdoo v. Booker, 88 So 196, 17 Ala App 623.
51 C J. p 453 note 98.

75. Ala —Hines v Dollar, 87 So. 825, 205 Ala. 330.

76. Ala —Lynn v. Mellon, 114 So. 680, 217 Ala 75

77. Mass —Lonergan v. American R Express Co, 144 N E 756, 250 Mass 30.
51 C J. p 459 note 51

78. Mass —Lonergan v. American R Express Co, supra.

79. Mass —Hines v. Eastern S. S Lines, 139 N E. 823, 245 Mass. 385

80. Ark —Farr v St Louis Southwestern R. Co, 243 S W. 800, 154 Ark 585

81. N C —Lanier v. Pullman Co., 105 S.E. 21, 180 N C. 406.
51 C J. p 454 note 3.

Service on connecting railroad

Iowa —Dye Produce Co. v. Davis, 209 N.W 744, 202 Iowa 1008

82. N.Y.—Hartog v. Hines, 180 N Y S. 375, 190 App Div 640

83. Mo —Sonken-Galamba Iron, etc, Co v Hines, App, 238 S W 135.

84. Ark —Payne v. Mallory, 230 S. W 270, 148 Ark. 431.
51 C.J. p 454 note 6.

rector general had to prove all the essential allegations of his pleading,[85] and general rules of evidence were applicable on questions relating to admissibility[86] or weight and sufficiency[87] of evidence General rules also were applicable in determining the sufficiency of evidence to take the case to the jury,[88] and with respect to instructions to the jury.[89]

Stay of proceedings. Under the director general's order providing that trial of an action against him should be stayed where the interests of the government would be prejudiced by a present trial, the granting of a stay was within the discretion of the court,[90] and the propriety thereof depended on the circumstances of each case.[91]

Judgment or verdict; amount of recovery. A judgment against the director general was a judgment against the United States,[92] and it was the duty of the director general to pay it out of his receipts.[93] Where compensatory damages were recoverable, the judgment might reasonably include interest[94] and costs.[95] The verdict was required to conform to the evidence and findings.[96]

The measure of damages in an action against the director general was the same as in an action against a railroad.[97] The amount of recovery for goods damaged or lost in transit was limited to the value placed thereon by the contract of shipment.[98]

Appeal. An order of the director general that no bond should be required of him on appeal was beyond his powers, and ineffective.[99]

Process to enforce right or judgment. The possession of the director general was not subject to interference by any process,[1] and so no judgment was enforceable by execution during the period of federal control,[2] but the enforcement of a mechanic's lien was not within the statutory prohibition;[3] nor was the initiation of an action by a trustee process.[4] Such prohibition of interference with the director general's possession did not preclude the owner of goods in transit from replevying them.[5]

(3) Offenses

Federal assumption of control did not prevent a state from punishing a railroad company for an offense committed prior to the enactment of the control law, but it did prevent prosecution of a railroad company for acts or omissions occurring during and arising out of federal control and operation; taking goods in which the United States had property as bailee in connection with its operation of a railroad, and interfering with federal possession and operation, were offenses against the United States.

Nothing in the federal statutes providing for possession and control of the railroads by the United States interfered with the power of a state to punish a railroad company for an offense committed prior to the enactment of such statutes;[6] but a railroad company whose property was under federal control could not be prosecuted for the violation of a state statute for acts or omissions occurring during the period of such control and arising out of the operation of the road by the director general.[7]

85. Mo.—Bradford v. McAdoo, 219 S.W. 92, 202 Mo.App. 412.

86. Tex.—Hines v. Whiteman, Civ. App., 228 S.W. 979.

87. Ark.—Payne v. Mallory, 230 S.W. 270, 148 Ark. 431—Hines v. Morgan, 218 S.W. 672, 142 Ark. 272.
Ky.—Hines v. Harris, 258 S.W. 930, 202 Ky. 75.
Mass.—Fahy v. Director General of R., 126 N.E. 784, 235 Mass. 510.
Mo.—Neeley v. Hines, 227 S.W. 650, 206 Mo.App. 621.
Mont.—Cornwell v. Davis, 213 P. 218, 66 Mont. 100, reversed on other grounds 44 S.Ct. 410, 264 U.S. 560, 68 L.Ed. 848, mandate conformed to 226 P. 1117, 70 Mont. 608.
Tex.—Davis v. Sullivan & Opry, Civ. App., 242 S.W. 764, affirmed Com. App., 258 S.W. 157.

88. U.S.—Bryson v. Hines, C.C.A. N.C., 268 F. 290.
Ark.—Payne v. Cotner, 230 S.W. 275, 148 Ark. 401.
Ky.—Hines v. Harris, 258 S.W. 930, 202 Ky. 75.

89. Ky.—Hines v. Harris, supra.
Tex.—Davis v. Sullivan & Opry, Civ. App., 242 S.W. 764, affirmed Com. App., 258 S.W. 157.

90. U.S.—Harnick v. Pennsylvania R. Co., D.C.N.Y., 254 F. 748.
51 C.J. p. 454 note 8.

91. U.S.—Cocker v. New York, etc., R. Co., D.C.N.Y., 253 F. 676.

92. La.—Aymond v. Western Union Tel. Co., 91 So. 671, 151 La. 184.

93. U.S.—Johnson v. McAdoo, D.C. La., 257 F. 757, reversed on other grounds, C.C.A., 274 F. 207.

94. U.S.—Missouri Pac. R. Co. v. Ault, Ark., 41 S.Ct. 593, 256 U.S. 554, 65 L.Ed. 1087.
51 C.J. p. 454 note 12.

95. U.S.—Missouri Pac. R. Co. v. Ault, supra.
51 C.J. p. 454 note 13.

96. Tex.—Davis v. Sullivan & Opry, Civ.App., 242 S.W. 764, affirmed, Com.App., 258 S.W. 157.

97. Ark.—Hines v. Morgan, 218 S.W. 672, 142 Ark. 272.

98. Tex.—Gulf, C. & S. F. Ry. Co. v. Harrell, Civ.App., 270 S.W. 187.

99. Tex.—Bryson v. Payne, Civ. App., 232 S.W. 362.

1. U.S.—Nueces Valley Town-Site Co. v. McAdoo, D.C.Tex., 257 F. 143
51 C.J. p. 454 note 15.

2. U.S.—Seaboard Air Line R. Co. v. Fowler, D.C.N.C., 275 F. 239.
51 C.J. p. 454 note 16.

3. U.S.—McGill v. Oregon Short Line R. Co., C.C.A.Idaho, 295 F. 41.

4. N.H.—Fitzhugh v. Grand Trunk R. Co., 109 A. 562, 79 N.H. 372.
Vt.—Northfield Trust Co. v. Cutting, 115 A. 289, 95 Vt. 343.

5. N.Y.—Salant v. Pennsylvania R. Co., 177 N.Y.S. 475, 188 App.Div. 851, affirmed 132 N.E. 907, 231 N.Y. 607.

6. Miss.—State v. Southern R. Co., 89 So. 769, 126 Miss. 875.

7. Ky.—Commonwealth v. Louisville, etc., R. Co., 224 S.W. 847, 189 Ky. 309.

Against the United States. A statute providing punishment for the taking of any property of the United States applied to goods in which the United States had a special property as bailee in connection with its operation and control of the railroads,[8] and the taking of goods in the course of transportation interfered with and impeded the government's possession, operation, and control in violation of a statute prohibiting such interference or impediment,[9] but goods being transported were not property derived from, or used in connection with, the possession, use, or operation of the railroads within a statute punishing the taking of such property.[10]

(4) Other Matters

The director general was not bound to carry out preexisting contracts of the railroads unless he adopted them, the power of possession and control conferred by the statute included the power to make and enforce rates; federal possession and control did not relieve the railroads of their obligations under state tax laws.

The proclamation of the president establishing federal control of railroads did not purport to take over the rights and obligations of the carriers under contracts theretofore made by them for supplies and service,[11] and the director general was not bound to carry out such contracts,[12] but had a reasonable time within which to determine whether to adopt or reject them.[13] Unless he had adopted them, he could take no advantage of their terms,[14] and, on the other hand, no action lay against him for failing to perform them;[15] but he was liable in quantum meruit for supplies received and accepted by him after contracts therefor made by the railroad had been terminated.[16] When a contract made by a railroad was adopted by the director general, however, it became binding on him,[17] and he had such legal interest in its performance as entitled him to maintain an action for damages for interference therewith or breach thereof.[18] Contracts of the carriers which were rendered impossible of performance by the governmental assumption of control became terminated,[19] but the mere fact that control of a railroad was taken by the government did not excuse the company from performing a contract where it had ample opportunity before the period of such control to comply with the terms thereof.[20]

Rates and charges. The general power of possession and control of railroads conferred by statute on the president included the power to make and enforce the rates to be charged by such railroads for carriage and transportation,[21] intra-state as well as interstate.[22] A rate so fixed became the sole legal rate,[23] even though it conflicted with rates previously established by state authority.[24] The mere fact that control of the railroads was taken over by the government, however, did not abrogate rates and tariff regulations then in force,[25] but they continued in force until changed.[26] The order of the director general providing for a general increase of all rates then in effect was not an order establishing rates but one authorizing new rates to be established in a proper manner.[27]

State and municipal regulations. The statutes under which the United States assumed possession and control of the railroads superseded all state

8. U.S.—Kamberlz v. U. S., C.C.A. N.Y., 262 F. 378.

Sufficiency of evidence

U.S.—Vaughn v. U. S., C.C.A.Or., 272 F. 451.

9. U.S.—Kamberlz v. U. S., C.C.A. N.Y., 262 F. 378.

10. U.S.—Kamberlz v. U. S., supra.

11. U.S.—Corona Coal Co. v. Davis, C.C.A.Miss., 20 F.2d 738.

12. U.S.—Martin v. Richmond, etc., R. Co., C.C.A.Va., 3 F.2d 26.

13. U.S.—Martin v. Richmond, etc., R. Co., supra.

14. U.S.—Herbert v. Payne, C.C.A. N.M., 291 F. 555.

15. U.S.—Corona Coal Co. v. Davis, C.C.A.Miss., 20 F.2d 738—Martin v. Richmond, etc., R. Co., C.C.A. Va., 3 F.2d 26.

16. U.S.—Martin v. Richmond, etc., R. Co., supra.

17. Ga.—Davis v. Gossett, 118 S.E. 773, 30 Ga.App. 576.

Ind.—U. S. Railroad Administration v. Monahan, 137 N.E. 778, 188 N. E. 785, 79 Ind.App. 673.

18. U.S.—Gulf, etc., R. Co. v. Cities Service Co., D.C.Del., 273 F. 946.

19. U.S.—Corona Coal Co. v. Davis, C.C.A.Miss., 20 F.2d 738.

51 C.J. p. 449 note 51.

20. Ky.—Louisville, etc., R. Co. v. Tuttle, 258 S.W. 688, 201 Ky. 798.

21. Tex.—Lutcher & Moore Lumber Co. v. Beaumont, S. L. & W. Ry. Co., Civ.App., 33 S.W.2d 1077, affirmed, Com.App., 49 S.W.2d 726.

51 C.J. p. 449 note 54.

22. U.S.—Northern Pac. R. Co. v. North Dakota, N.D., 39 S.Ct. 502, 250 U.S. 135, 63 L.Ed. 897.

51 C.J. p. 449 note 55.

23. U.S.—Atlantic Coast Line R. Co. v. Georgia R. Commission, D.C. Ga., 281 F. 321.

24. U.S.—Northern Pac. R. Co. v. North Dakota, N.D., 39 S.Ct. 502, 250 U.S. 135, 63 L.Ed. 897—New York Cent. R. Co. v. New York Second Dist. Public Service Commission, D.C.N.Y., 268 F. 558.

Failure to adopt state tariff in part

Director general's failure to adopt general circular of state commission for purpose of lumber tariff after adopting it for other tariffs was affirmation of intention to exclude it in determining rates on lumber—Lutcher & Moore Lumber Co. v. Beaumont, S. L. & W. Ry. Co., Tex.Civ.App., 33 S.W.2d 1077, affirmed, Com.App., 49 S.W.2d 726.

25. Neb.—Lincoln Commercial Club v. Missouri Pac. R. Co., 172 N.W. 687, 103 Neb. 504.

26. U.S.—Morgenthau v. Sugar Land Ry. Co., C.C.A.Tex., 33 F.2d 72.

Wis.—Mellon v. Johnson Co., 219 N. W. 352, 196 Wis. 64.

Division of joint interstate rates

U.S.—Morgenthau v. Sugar Land Ry. Co., C.C.A.Tex., 33 F.2d 72.

27. Okl.—St. Louis, etc., R. Co. v. State, 244 P. 440, 116 Okl. 95.

Pro-rating among participants in joint rates

U.S.—Morgenthau v. Sugar Land Ry. Co., C.C.A.Tex., 33 F.2d 72.

or municipal regulations inconsistent therewith or with orders made thereunder by the director general, as to the railroads of which control was taken,[28] but, so far as not inconsistent with the federal statutes or such orders, lawful regulations imposed by the states continued in force and effect,[29] and the full regulatory power of the state continued as to railroads over which the federal control did not extend.[30]

Condemnation proceedings The right of another public utility to condemn a right of way or user over property of a railroad company was not suspended by the federal control and operation of the railroads.[31]

Taxes and assessments. Inasmuch as the railroads remained the property of the respective owning companies during the period of federal operation and control, they were not relieved of any of their obligations under state tax laws,[32] including the obligation to report property for assessment.[33] A notice of a special assessment was properly given to the railroad company and was not required to be given to the director general.[34]

e. Right to Moneys Accruing from Operation

Money accruing from federal operation was the property of the United States, and an action could be maintained for its recovery.

Moneys and other property accruing from the federal operation of the railroads were the property of the United States;[35] and an action to recover on a liability arising out of such operation was an action on behalf of the United States in its governmental capacity,[36] and was not subject to statutes of limitation not expressly applicable to the government.[37] The director general was the proper party plaintiff in such an action,[38] rather than the United States co nomine,[39] and a railroad company was not properly joined with him as plaintiff.[40] A failure to substitute the successor of the director general by whom such an action had been commenced did not cause an abatement of the action.[41]

f. Termination of Federal Control

(1) In general
(2) Effect on actions
(3) Effect on rates and charges

(1) In General

The statutory termination of federal control rendered orders of the director general thenceforth ineffective, and restored the effectiveness of laws and regulations governing railroads which had been suspended during federal control.

Although the power conferred by statute on the president to take possession and assume control of the railroads related to the "time of war," the termination of hostilities under the armistice did not justify judicial interference to restrain the further exercise by him of such extraordinary executive powers.[42] By the Transportation Act of 1920, however, the federal possession and control assumed during World War I were terminated on March 1, 1920,[43] whereupon the orders of the di-

28. U.S.—Nueces Valley Town-Site Co. v. McAdoo, D.C.Tex., 257 F. 143.
51 C.J. p 450 note 63.

29. Colo.—Chicago, etc., R. Co. v. Public Utilities Commission, 190 P. 539, 68 Colo. 475.
51 C.J. p 450 note 64.

30. Ill.—State Public Utilities Commission v. Springfield Terminal R. Co., 127 N.E. 128, 292 Ill. 505.

31. U.S.—Postal Tel.-Cable Co. v. Call, Fla., 255 F. 850, 167 C.C.A. 178.

32. U.S.—Southern Ry. Co. v. Commonwealth of Kentucky, Ky., 52 S.Ct. 160, 284 U.S. 338, 76 L.Ed. 327, mandate stayed Southern R. Co. v. Commonwealth of Kentucky, 52 S.Ct. 639, set aside on other grounds 53 S.Ct. 24, 287 U.S. 561, 77 L.Ed. 495.
Cal.—Payne v. Richardson, 207 P. 547, 189 Cal. 103.
County's lien for taxes attached to railroad property in receivership notwithstanding railroad was under federal control.—Board of Com'rs of Routt County v. Denver & S. L. R. Co., 291 P. 1020, 88 Colo. 14, dismissed 51 S.Ct. 216, 282 U.S. 814, 75 L.Ed. 729, and certiorari denied 51 S.Ct. 348, 283 U.S. 826, 75 L.Ed. 1440, followed in Board of Com'rs of Moffat County v. Denver & S. L. R. Co., 291 P. 1022, 88 Colo. 21, dismissed 51 S.Ct. 216, 282 U.S. 814, 75 L.Ed. 729, and certiorari denied 51 S.Ct. 348, 283 U.S. 826, 75 L.Ed. 1440.

33. U.S.—Southern Ry. Co. v. Commonwealth of Kentucky, Ky., 52 S.Ct. 160, 284 U.S. 338, 76 L.Ed. 327, mandate stayed 52 S.Ct. 639, set aside on other grounds 53 S.Ct. 24, 287 U.S. 561, 77 L.Ed. 495.

34. Iowa.—Chicago, etc., R. Co. v. Clinton County, 198 N.W. 640, 197 Iowa 1209.

35. U.S.—Du Pont de Nemours v. Davis, Ark., 44 S.Ct. 364, 264 U.S. 456, 68 L.Ed. 788.

36. U.S.—Davis v. Dupont de Nemours, C.C.A.Ark., 287 F. 522, affirmed 44 S.Ct. 364, 264 U.S. 456, 68 L.Ed. 788.—In re Tidewater Coal Exch., C.C.A.N.Y., 280 F. 648, certiorari denied 43 S.Ct. 12, 260 U.S. 721, 67 L.Ed. 481.

37. U.S.—Davis v. Corona Coal Co., La., 44 S.Ct. 552, 265 U.S. 219, 68 L.Ed. 987.—Du Pont de Nemours v. Davis, Ark., 44 S.Ct. 364, 264 U.S. 456, 68 L.Ed. 788.

38. U.S.—Du Pont de Nemours v. Davis, supra.—Philadelphia, etc., R. Co. v. Laurel Coal Min. Co., D.C.Pa., 276 F. 1019.
51 C.J. p 455 note 43.

39. U.S.—Davis v. Dupont de Nemours, C.C.A.Ark., 287 F. 522, affirmed 44 S.Ct. 364, 264 U.S. 456, 68 L.Ed. 788.

40. U.S.—Philadelphia, etc., R. Co. v. Laurel Coal Min. Co., D.C.Pa., 276 F. 1019.

41. Mass.—Illnes v. Eastern SS. Lines, Inc., 139 N.E. 823, 245 Mass. 385.

42. N.D.—State v. Northern Pac. R. Co., 172 N.W. 324, 43 N.D. 556, reversed on other grounds 39 S.Ct. 502, 250 U.S. 135, 63 L.Ed. 897.

43. U.S.—Toledo, P. & W. R. R. v. Stover, D.C.Ill., 60 F.Supp. 587.
51 C.J. p 456 note 50.

rector general ceased to be effective,[44] and it became his duty to transfer and redeliver to the respective railroad companies all of their property in his possession.[45] On the resumption of possession and operation of the railroads by the respective companies, those persons who had been employees of the federal government during the period of its control became employees of such companies as of the date on which possession was resumed by them.[46] Laws and regulations in effect prior to the federal control, which had been suspended during the period thereof by the statutes providing therefor, automatically resumed their effectiveness,[47] except laws prescribing rates and charges, as discussed infra subdivision f (3) of this section; and, similarly, contract obligations of the railroad companies which had not been frustrated by the assumption of control by the government were revived by the termination of such control.[48] No contract binding on a railroad company after its resumption of possession, operation, and control could be inferred from dealings of the federal railroad administration with third persons.[49]

(2) Effect on Actions

After termination of federal control, an action could be brought against the United States through its representative on a cause arising out of federal control, possession, and operation, but compliance with rules and provisions relating to limitations, jurisdiction and venue, parties, process and pleading was required.

Under the statute terminating the possession and control of the railroads by the United States, such termination did not put an end to the government's liability on causes of action arising out of its possession, use, and operation of the railroads,[50] but an action on a cause arising during the period of federal control could be brought after the termination thereof, subject to the limitations provided by the statute,[51] and an action pending when control was terminated did not abate, but could be maintained and prosecuted to final judgment.[52] Only causes of action of such character as prior to federal control could have been brought against the railroad company were maintainable against the government.[53] No action lay against the United States or its representative on a cause arising after the federal possession and control had been terminated.[54]

Limitations. Under the Transportation Act the right to bring action on causes arising out of the federal possession and control of the railroads was restricted to such period of limitation as might be prescribed by federal or state statutes,[55] but not exceeding two years from the date of the passage of the act.[56] Such restriction was not a statute

44. Pa.—Erie, etc., R. Co. v. Public Service Commission, 74 Pa.Super 338.

45. U.S.—In re Tidewater Coal Exch., D.C.N.Y., 292 F. 225, affirmed, C.C.A., 296 F. 701, certiorari denied 44 S.Ct. 454, 264 U.S. 596, 68 L.Ed. 868

46. Mass.—Sheridan v. Boston, etc., R. Co., 149 N.E. 150, 253 Mass. 446.

47. U.S.—Director General of Railroads v. Viscose Co., Pa., 41 S.Ct. 151, 254 U.S. 498, 65 L.Ed. 372.
51 C.J. p. 456 note 56.

Election not to come within compensation law

A railroad company's election, made prior to the period of federal control, not to come within the scope of a state workmen's compensation law was revived at the termination of federal control, and another election was not necessary to take the company out of the operation of such law.

Ind.—**Corpus Juris cited in** Illinois Cent. R. Co. v. Public Service Commission, Ind., 75 N.E.2d 900, 903, 225 Ind. 643.

Kan.—McFarland v. Atchison, T. & S. F. Ry. Co., 211 P. 635, 112 Kan. 620

48. Ky.—Louisville, etc., R. Co. v. Johnson, 270 S.W. 58, 207 Ky. 813.

49. Md.—Pennsylvania R. Co. v. S. M. Hamilton Coal Co., 125 A. 405, 144 Md. 556.

50. Ark.—Payne v. Stockton, 229 S.W. 44, 147 Ark. 598

Ohio.—Davis v. Oswald, 149 N.E. 861, 113 Ohio St. 499, certiorari denied 45 S.Ct. 354, 267 U.S. 599, 69 L.Ed. 807

51. U.S.—Rosenzweig v. Hines, D.C.N.Y., 285 F. 622, affirmed, C.C.A., Payne v. Rosenzweig, 285 F. 1021

Tex.—St. Louis, etc., R. Co. v. McLean, Civ.App., 241 S.W. 1072, reversed on other grounds, Com.App., 253 S.W. 248.

52. U.S.—Davis v. Cohen, Mass., 45 S.Ct. 633, 268 U.S. 638, 69 L.Ed. 1129
51 C.J. p. 456 note 64.

53. U.S.—Corona Coal Co. v. Davis, D.C.La., 8 F.2d 297, reversed on other grounds, C.C.A., 20 F.2d 738
51 C.J. p. 456 note 65

54. U.S.—Mellon v. Weston Dodson & Co., Mass., 20 F.2d 549.
51 C.J. p. 456 note 66.

55. Ark.—Davis v. Chrisp, 252 S.W. 606, 159 Ark. 335, certiorari denied 44 S.Ct. 36, 263 U.S. 710, 68 L.Ed. 518, error dismissed 45 S.Ct. 227, 267 U.S. 572, 69 L.Ed. 793.
51 C.J. p. 456 note 67.

Effect of statute relating to admiralty suits

Suits in Admiralty Act did not repeal limitation with respect to suit in admiralty under Transportation Act of 1920 against director general of railroads for damage to drill scow caused by car float in tow of railroad tug.—Pullen v. Morgenthau, C.C.A.N.Y., 73 F.2d 281.

56. U.S.—Bartlesville Zinc Co. v. Mellon, C.C.A.Ill., 56 F.2d 154, certiorari denied Bartlesville Zinc Co. v. Mills, 53 S.Ct. 8, 287 U.S. 602, 77 L.Ed. 524.

Ga.—Sanders v. Atlantic Coast Line R. Co., 172 S.E. 649, 48 Ga.App. 284
51 C.J. p. 456 note 68

Joinder of additional party after expiration of the two-year period did not bar prosecution of an action brought within such period.—Stephens v. Davis, 36 P.2d 316, 140 Kan. 220, certiorari denied Morganthau v. Stephens, 55 S.Ct. 542, 294 U.S. 720, 79 L.Ed. 1252, time extended 55 S.Ct. 652

Substitution of party

Where an action was brought under the Federal Transportation Act within the time allowed but in the warrant the designated agent was sued personally and without being designated in his official character and later after the expiration of two

of limitations, but a qualification of the consent of the United States to be sued[57] and a condition of liability,[58] and, accordingly, it operated by its own force and was not required to be specially pleaded[59] and could not be waived by the presidential agent[60] Periods of limitation prescribed by other statutes continued to operate, subject to the two-year restriction of the Transportation Act,[61] and the provision limiting the right to bring action to two years after the enactment of the statute had no application.[62] Where, however, an action was already pending at the termination of federal control, no time within which the agent was required to be substituted as defendant was prescribed by the statute.[63]

In computing periods of limitation of actions on causes arising prior to federal control, under the provisions of the Transportation Act the period of federal control was to be excluded[64] in state as well as federal courts,[65] although there is authority holding that such period was not to be excluded[66] at least in an action in a state court[67] Although there was some authority to the contrary,[68] the provision was held applicable even as to cases where the state limitation period had expired before the Transportation Act was enacted,[69] but it did not invalidate a judgment, rendered before the enactment of that statute, dismissing a petition for death caused by the negligence of a railroad company on the ground that the action was not brought within the year after the accident as required by the state statute[70] Such provision for exclusion of the period had no application to causes arising during federal control,[71] but it was effective to authorize the Interstate Commerce Commission to award reparation for an excessive charge made prior to federal control, although the claim would otherwise have been barred.[72] The provision was not applicable to actions under the Federal Employers' Liability Act.[73]

Jurisdiction and venue. Actions against the representative of the government on causes arising during the federal possession and control of the railroads were maintainable after the termination thereof only at such place or in such courts as designated by the Transportation Act,[74] which superseded the orders of the director general as to venue.[75] Under its provisions, such an action was ordinarily to be brought where the railroad company, out of the operation of whose road the cause arose, would have been suable in the absence of federal control,[76] as provided by state statutes,[77] but, when a contract made between the director general and a railroad company provided where action thereon should be brought, the tribunal or tribunals so designated had exclusive jurisdiction[78] The statute did not, however, invalidate the defense that an action pending at the termination of federal control was not brought at the place designated by orders of the director general in force at the time of its commencement.[79]

years the warrant was amended to state his official character, the amendment constituted the bringing in of a new party and the cause of action was barred under the transportation act.—Mellon v. American Flour & Grain Co., 9 Tenn App 383.

57. U.S.—Knickerbocker Fuel Co. v. Mellon, C.C.A.N.Y., 22 F.2d 500, certiorari denied 48 S.Ct. 320, 276 U.S. 626, 72 L.Ed. 738.

58. Tenn.—Mellon v. American Flour & Grain Co., 9 Tenn.App. 383.

59. Cal.—Tutsch v. Director-General of Railroads, 199 P. 961, 52 Cal. App. 650.

60. Mont.—Vassau v. Northern Pac. R. Co., 221 P. 1069, 69 Mont 305.
51 C.J. p 456 note 71.

61. Mont.—Pierson v. Davis, 224 P. 235, 70 Mont 106.

62. N.Y.—De Witt v. New York Cent. R. Co., 196 N.Y.S. 870, 119 Misc. 456, affirmed 198 N.Y.S. 909, 206 App.Div 638.

63. Mass.—Sack v. Director General of Railroads, 139 N.E. 819, 245 Mass. 114.
51 C.J. p 457 note 78.

64. U.S.—Arcadia Mills v. Carolina, C. & O. R. Co., D.C.S.C., 293 F. 639.
51 C.J. p 457 note 73.

Validity of provision

Since, under its war power, congress could provide that no action of any kind should be brought against carriers over whom control was taken by the government during the war in any court, state or federal, during the period of such control, it follows that it could effectively enact the provision referred to in the text.—Cravens v. Louisville & N. R. Co., 242 S.W. 628, 195 Ky. 257.

65. Ky.—Cravens v. Louisville & N. R. Co., supra.

66. N.C.—Vanderbilt v. Atlantic Coast Line R. Co., 125 S.E. 387, 188 N.C. 568, 52 A.L.R. 287, error dismissed 46 S.Ct. 204, 270 U.S. 625, 70 L.Ed. 767.

67. Ga.—Georgia Southern, etc., R. Co. v. Smiley, 108 S.E. 273, 151 Ga. 795.

68. Minn.—Kanellos v. Great Northern R. Co., 186 N.W. 389, 151 Minn. 157.

69. U.S.—Arcadia Mills v. Carolina, C. & O. R. Co., D.C.S.C., 293 F. 639.
Ky.—Cravens v. Louisville & N. R. Co., 242 S.W. 628, 195 Ky. 257.

70. Ky.—Cravens v. Louisville & N. R. Co., supra.

71. Pa.—Hilbert v. Pennsylvania R. Co., 120 A. 778, 277 Pa. 105

72. U.S.—San Diego & A. R. Co. v. Atchison, T. & S. F. R. Co., D.C. Cal., 293 F. 139.

73. N.J.—Jones v. Delaware, etc., R. Co., 114 A. 331, 96 N.J.Law 197.

74. Tex.—Davis v. Young, Civ.App., 248 S.W. 409.

75. Iowa.—Payne v. Knapp, 198 N.W. 62, 197 Iowa 737.

76. U.S.—Walters v. Payne, C.C.A. Pa., 292 F. 124, certiorari denied 44 S.Ct. 136, 263 U.S. 715, 68 L.Ed. 521.
51 C.J. p 457 note 83.

77. Ohio.—Jamieson v. Davis, 144 N.E. 291, 110 Ohio St. 636.

78. U.S.—Missouri Southern R. Co. v. U. S., 65 Ct.Cl. 136, certiorari denied 49 S.Ct. 19, 278 U.S. 614, 73 L.Ed. 538.

79. U.S.—Davis v. Wechsler, Mo., 44 S.Ct. 13, 263 U.S. 22, 68 L.Ed. 143.

Person liable; parties Under the statutory provision for the designation by the president of an agent for the purpose of being sued, actions on causes arising out of the operation of the railroads by the federal government were, after the termination of federal control, properly brought against the agent so designated,[80] and in actions pending at such termination the agent was properly substituted as party defendant.[81] Accordingly, the agent was the only proper party defendant in any such action after federal control had been terminated,[82] and action could not be brought or maintained against a railroad company[83] or against the director general,[84] although where the agent of the president appeared in such an action the court had jurisdiction,[85] and, where one was properly sued as agent, the additional designation of him as director general was harmless surplusage;[86] but the agent could properly be substituted as party defendant in an action wrongly brought after the period of such control against a railroad company[87] or the director general,[88] subject to the period of limitation prescribed by the statute.[89] Unless he was so substituted, however, no judgment could be rendered against him[90]

When one person succeeded another as agent, the former was properly substituted for the latter as party defendant in a pending action;[91] but an action brought against one as agent who had theretofore resigned or ceased to be such was against the wrong party, and subject to dismissal.[92] It was not sufficient to sue the agent merely by his title without naming the incumbent of the office;[93] but failure to designate the agent by his exact official title did not defeat jurisdiction, being susceptible of correction by amendment.[94] Actions on causes which, although accruing during the period of federal control, did not arise out of the possession and use of the railroads by the government were properly brought against the railroad company responsible after the federal control had terminated,[95] as were actions on causes arising after such termination,[96] but in the latter case the burden was on plaintiff to show that the federal control had terminated when the cause arose.[97]

Process and appearance. When action was brought against the agent of the president, process was required to be served on such officer or agent of the railroad company, out of the operation of whose road the cause arose, as was designated by or under the provisions of the statute,[98] and service on the presidential agent in person was unauthorized.[99] The substitution of the agent as party defendant in place of the director general did not necessitate any new service.[1] A general appearance by the agent obviated any failure or defect of service.[2]

Pleadings. The petition or complaint was required to set forth sufficient facts to state a cause of action.[3]

(3) Effect on Rates and Charges

On termination of federal control, rates and charges

80. U.S.—Davis v. Cohen, Mass., 45 S.Ct. 633, 268 U.S. 638, 69 L.Ed. 1129.
51 C.J. p. 457 note 88

81. U.S.—Davis v. Cohen, supra.
51 C.J. p. 457 note 89.

82. Tenn.—Mellon v. American Flour & Grain Co., 9 Tenn.App. 383.
51 C.J. p. 457 note 90.

83. U.S.—Schroeder v. Davis, C.C.A. Mo., 32 F.2d 454.
51 C.J. p. 457 note 91.

84. Ga.—Shiell v. Davis, 119 S.E. 539, 31 Ga.App. 87.
51 C.J. p. 457 note 92.

85. U.S.—Rosenzweig v. Hines, D.C. N.Y., 285 F. 622, affirmed, C.C.A., Payne v. Rosenzweig, 285 F. 1021.
Mo.—Adams v. Quincy, etc., R. Co., 229 S.W. 790, 287 Mo. 535

86. Pa.—Hanlon v. Davis, 119 A. 822, 276 Pa. 113, certiorari denied 43 S.Ct. 520, 262 U.S. 742, 67 L.Ed. 1210, error dismissed 43 S.Ct. 704, 262 U.S. 762, 67 L.Ed. 1221

87. Minn.—Borsheim v. Great Northern R. Co., 183 N.W. 519, 149 Minn. 210.
51 C.J. p. 458 note 95.

88. Mont.—Pierson v. Davis, 224 P. 235, 70 Mont. 106
51 C.J. p. 458 note 96

89. U.S.—Mellon v. Weiss, Mass., 46 S.Ct. 378, 270 U.S. 565, 70 L.Ed. 736.
51 C.J. p. 458 note 97.

After period of limitation had expired, amendment of complaint which did not designate defendant as agent so as to designate him as such constituted the commencement of an action against a new party, which was barred by expiration of the period of limitation.—Mellon v. American Flour & Grain Co., 9 Tenn. App. 383.

90. S.C.—Wilhelm v. Seaboard Air Line R. Co., 120 S.E. 705, 127 S.C. 82.

91. Ala.—Davis v. Smitherman, 96 So. 208, 209 Ala. 244.
51 C.J. p. 458 note 99.

92. U.S.—Davidson v. Payne, C.C.A. Kan., 289 F. 69.
51 C.J. p. 458 note 1.

93. Cal.—Valley Lumber Co. v. Davis, 282 P. 512, 102 Cal.App. 126.
51 C.J. p. 458 note 2.

94. U.S.—Acheson Graphite Co. v. Mellon, D.C.N.Y., 21 F.2d 562
N.C.—Wright v. Davis, 117 S.E. 347, 185 N.C. 354.

95. U.S.—The Arizona, D.C.N.Y., 267 F. 598

96. S.C.—Bowman v. Northwestern R. Co., 130 S.E. 878, 133 S.C. 298.

97. S.C.—Bowman v. Northwestern R. Co., supra

98. D.C.—Whalen Paper, etc., Mills v. Davis, 288 F. 438, 53 App.D.C. 84.
51 C.J. p. 458 note 8.

99. D.C.—Whalen Paper, etc., Mills v. Davis, supra.

1. Ark.—Payne v. Stockton, 229 S.W. 44, 147 Ark. 598.
51 C.J. p. 458 note 10.

2. Cal.—Gilinsky Fruit Co. v. Davis, 276 P. 1050, 98 Cal.App. 301

3. U.S.—St. Louis, K. & S.E. R. Co. v. U.S., Ct.Cl., 45 S.Ct. 245, 267 U.S. 346, 69 L.Ed. 649.

in effect continued in force until changed thereafter by due authority.

Under the provisions of the Transportation Act, which were held valid as an exercise of the war powers of congress and an incident to the federal control,[4] rates and charges in effect on the railroad systems at the termination of federal control thereof continued in force until thereafter changed by due authority,[5] and state statutes or regulations fixing rates, which were suspended during the period of federal control, did not automatically become effective again at the termination thereof;[6] but such provisions did not prevent the award of reparation of excessive charges collected during the period such rates continued in effect.[7] A statute fixing rates, which was passed during the period of federal control, but which by its terms took effect only at the termination of such control, did not have the effect of changing rates in force at such termination;[8] but an affirmative reduction by the proper authority was binding on the railroad companies, even though the rate as so reduced was the same as that in effect prior to federal control.[9] As to the rates so continued in effect, however, the general rule that a rate fixed by public authority is presumed to be reasonable and proper did not apply.[10]

g. Compensation and Guaranty of Income

On termination of federal control, a railroad company was entitled to just compensation for the period of such control and possession, and to a guaranty of income for a six-month period thereafter.

The provisions of the Federal Control Act authorizing the president to agree with railroad companies, on a specified basis, on the compensation to be paid them for the federal possession and use of their roads did not establish a rule of compensation,[11] and when no agreement on such basis had been made the director general had authority to agree to the payment of such sums as under all the circumstances he should find just,[12] but the company was entitled to just compensation, determined by judicial inquiry, for each year of federal control.[13] If the parties failed to agree, a company had the right to proceed under the statute to have its just compensation determined by a board of referees;[14] and such procedure was a prerequisite to any suit against the government in the court of claims.[15]

In such a proceeding the just compensation due to the company was to be ascertained as a question of fact,[16] and the burden was on the company to prove the value of the use made of its road or the damage caused to it,[17] the fact that the right to compensation was a statutory one not relieving it of such burden.[18] The report of the board of referees provided for by the statute ordinarily was prima facie evidence of the compensation justly due,[19] but findings of such board not based on evidence showing loss or damage were of no effect.[20] A railroad company was entitled to no compensation where it had actually retained possession of its road and continued to operate it during the period for which it was theoretically or technically under federal control, and had suffered no pecuniary loss.[21]

Guaranty of income. Under the Transportation Act, a railroad company which had entered into an agreement with the president as to the amount of compensation to be paid it was guaranteed a railway operating income for a period of six months

4. Tex.—Lutcher & Moore Lumber Co. v. Beaumont, S. L. & W. R. Co., Civ.App., 33 S.W.2d 1077, affirmed, Com.App., 49 S.W.2d 726.
51 C.J. p. 458 note 13.

5. Tex.—San Antonio & A. P. Ry. Co. v. D. M. Picton & Co., Civ.App., 111 S.W.2d 842, error refused—Lutcher & Moore Lumber Co. v. Beaumont, S. L. & W. Ry. Co., Civ. App., 33 S.W.2d 1077, affirmed, Com.App., 49 S.W.2d 726.
51 C.J. p. 458 note 14.

6. U.S.—Michigan Cent. R. Co. v. Michigan Public Utilities Commission, D.C.Mich., 271 F. 319.
Utah.—Wasatch Coal Co. v. Baldwin, 208 P. 1109, 60 Utah 397.

7. Cal.—Southern Pac. Co. v. State R. Commission, 231 P. 28, 194 Cal. 734.

8. U.S.—Michigan Cent. R. Co. v. Michigan Public Utilities Commission, D.C.Mich., 271 F. 319.

9. N.Y.—Public Service Commission v. New York Cent. R. Co., 139 N.E. 455, 230 N.Y. 149

10. Idaho.—Chicago, etc., R. Co. v. Public Utilities Commission, 238 P. 970, 41 Idaho 181, reversed on other grounds 47 S.Ct. 604, 274 U.S. 344, 71 L.Ed. 1085

11. U.S.—Marion, etc., R. Co. v. U. S., Ct.Cl., 46 S.Ct. 253, 270 U.S. 280, 70 L.Ed. 585.

12. U.S.—Railway Steel Spring Co. v. Chicago & E. I. R. Co., D.C.Ill., 261 F. 690.

Acceptance of benefits
U.S.—Ann Arbor R. Co. v. C. I. R., C.C.A.6, 97 F.2d 348.

Basis of payment
On return of railroads to their owners after period of federal control, the United States had the obligation to return the railroads in as good physical condition as when taken, or to compensate owners in damages for impairment.—Ann Arbor R. Co. v. C. I. R., supra.

13. U.S.—Commissioner of Internal Revenue v. Midland Valley R. Co., C.C.A., 57 F.2d 1042.

14. U.S.—Railway Steel Spring Co. v. Chicago & E. I. R. Co., D.C.Ill., 261 F. 690.

15. U.S.—New York, etc., R. Co. v. U. S., 61 Ct.Cl. 961.

16. U.S.—Marion, etc., R. Co. v. U. S., Ct.Cl., 46 S.Ct. 253, 270 U.S. 280, 70 L.Ed. 585.

17. U.S.—Marion, etc., R. Co. v. U. S., supra.

18. U.S.—Marion, etc., R. Co. v. U. S., supra.

19. U.S.—Marion, etc., R. Co. v. U. S., supra.

20. U.S.—Marion, etc., R. Co. v. U. S., supra.

21. U.S.—Marion, etc., R. Co. v. U. S., supra.

next after the termination of federal control equal to at least one half of the annual compensation specified in its contract,[22] and a railroad company which had not entered into such an agreement was guaranteed an income for such guaranty period of not less than one half of the annual amount estimated by the president or determined in proper proceedings to be just compensation for the use of its road.[23]

While the amount of the compensation to be paid a railway company was to be determined by a board of referees, the statute did not authorize the appointment of such a board to determine the amount of the guaranty alone.[24] A certificate from the Interstate Commerce Commission as to the amount due a railroad company on such guaranty was conclusive and not an order reviewable by the courts,[25] and the court had no jurisdiction to annul it or set it aside.[26] Even if payments made on certificates proved subsequently to be in excess of the amount to which the railroad was entitled, the company would not, in the absence of fraud or mistake, be required to make restitution.[27]

Payment of deficit. The provision of the Transportation Act for payment to any railroad company which sustained a deficit in its railway operating income during the guaranty period related only to an actual red-ink balance in such operating income and not to a mere decrease thereof.[28] A note of a railroad company held by the United States was available as an offset against the guaranty made by the government.[29] The decision of the commission as to the amount of reimbursement for deficit sustained was conclusive;[30] if, in adjudicating such question, the commission erred as to matters within its jurisdiction, the government, as well as the railroad company, was without remedy,[31] whether the error was one of fact or law.[32]

Release or settlement by railroad companies. The director general had authority to enter into an agreement with a railroad company releasing the United States from liability on claims for compensation or guaranty of income.[33] Such a release by a railroad company of all claims against the government growing out of the federal control of railroads, when founded on a valuable consideration, concluded its rights to compensation for the use of its road during the period of such control,[34] but not to compensation for war transportation service prior to federal control.[35]

IV. PUBLIC AID

§ 32. In General

In order that a grant of public aid to a railroad company may be valid there must be substantial compliance with all of the provisions authorizing and governing such grants.

In a number of jurisdictions constitutional and

22. D C—Interstate Commerce Commission v U. S, 17 F 2d 860, 57 App D C 101.

Railroads included

A company not incorporated as a carrier, but to manufacture, rent, and sell cars, and owning no railroad lines, was not a "carrier by railroad," within Transportation Act guaranteeing a minimum railway operating income to such carriers for a six-month period—U. S ex rel Chicago, New York & Boston Refrigerator Co v Interstate Commerce Commission, 44 S Ct 558, 265 U.S. 292, 68 L Ed 1024.

23. D C—Interstate Commerce Commission v U. S, 17 F.2d 860, 57 App.D C. 101.

24. D C—Interstate Commerce Commission v. U. S, supra

25. U S—U. S. v. Great Northern Ry. Co., Minn, 53 S Ct 28, 287 U. S. 144, 77 L Ed 223—Great Northern R. Co. v U S., D C Minn, 22 F.2d 865, affirmed 48 S Ct. 466, 277 U S 172, 72 L Ed. 838.

Analogy to decision of arbitrator

Interstate Commerce Commission authorized to certify amounts ascertained to be owed railroads under statutory guaranty of income following federal control occupies position analogous to that of arbitrator agreed on by contract providing that his finding is final—U S v Great Northern Ry Co, C C A Mich, 57 F 2d 385, affirmed 53 S.Ct 28, 287 U.S 144, 77 L Ed 223

26. U S—Great Northern R Co v. U S, Minn, 22 F 2d 865, affirmed 48 S Ct 466, 277 U S 172, 72 L Ed 838.

27. U S—U. S v. Great Northern Ry. Co, Minn, 53 S Ct 28, 287 U. S 144, 77 L Ed 223—U S v Great Northern Ry Co, D C.Minn., 46 F. 2d 999—Northern Pac Ry. Co v. U S, Ct Cl, 18 F Supp. 543, certiorari denied U S. v Northern Pac. R. Co, 58 S Ct. 270, 302 U S. 750, 82 L Ed. 580

Mistake not shown

U S—Northern Pac Ry. Co v. U S, Ct.Cl, 18 F Supp. 543, certiorari denied U S v. Northern Pac R. Co, 58 S Ct. 270, 302 U.S. 750, 82 L.Ed. 580.

28. U S.—U S v Butte, A. & P. R Co, D.C Mont., 38 F.2d 871.

29. U S—Birmingham Trust & Savings Co. v. Atlanta, B & A R Co., D C Ga, 300 F 173

30. U S—Butte, A & P Ry Co. v. U S, Mont, 54 S Ct 108, 290 U S 127, 78 L Ed 222

31. U S—Butte, A. & P Ry Co v. U S, supra.

32. U S.—Butte, A. & P Ry Co v. U S, supra

33. U S.—Cairo, etc., R Co v U. S, Ct Cl, 45 S Ct 247, 267 U S 350, 69 L Ed 651—St Louis, etc, R Co v U. S, Ct Cl., 45 S Ct. 245, 267 U S. 346, 69 L Ed 649.

Settlement construed

U S.—Chicago & Eastern Illinois Ry Co. v U S, 66 Ct Cl 193.

34. U S—St Louis, etc., R Co v U. S., Ct Cl, 45 S Ct 245, 267 U S 346, 69 L Ed 649—Missouri Southern R. Co v. U. S, 65 Ct Cl 136, certiorari denied 49 S Ct 19, 278 U S 614, 73 L Ed 538—Cairo, etc, R Co v U S, 58 Ct Cl 336, affirmed 45 S.Ct. 247, 267 U.S. 350, 69 L Ed. 651.

35. U S.—Pere Marquette R Co. v. U. S, Ct Cl., 46 S Ct. 267, 270 U S. 320, 70 L.Ed 606.

statutory provisions, or municipal ordinances enacted pursuant to such provisions, have at various times provided for the extension to railroad companies of public aid in the establishment and construction of railroads, either by gifts of money or property, the issuance of public securities, subscriptions to or purchases of the stock of the companies, or the like, and in order that a grant of public aid to a railroad company may be valid there must be substantial compliance with all such provisions authorizing it;[36] but a mere irregularity in the proceedings will not necessarily invalidate the grant or destroy the company's right thereto,[37] and may be cured by statutes subsequently enacted.[38]

Where a municipality is authorized merely to make gifts or donations in aid of a railroad company, a grant made on the condition or in consideration that the company perform certain acts is void and the company cannot enforce it, although it has performed such acts on the faith thereof.[39] The fact that a railroad company is authorized to construct and operate a telegraph line in connection with, and as incidental to, the operation of its road will not invalidate a grant of public aid in the construction of the road.[40]

A grant of a right of way for a railroad is not a "gratuity" within a constitutional provision prohibiting the grant of any gratuity in favor of any person, corporation, or association.[41]

§ 33. Indemnity or Security for Aid Granted

Where so required, the railroad company must give proper security in order to be entitled to the benefit of a grant of public aid.

Railroad companies to which aid is granted by the state ordinarily are required by constitutional or statutory provisions to secure or indemnify the state for the amount of such aid; and when so required the company is not entitled to the benefit of the grant without giving the required security.[42] The purpose of such a provision for security or indemnification is to secure the state in the loan of its credit to the company,[43] and the state is not thereby made a trustee for the benefit of the company's bondholders,[44] nor do such bondholders have any interest in the security taken by the state.[45]

The security given by the company must be of such character as may be required by the constitutional or statutory provisions relating thereto, such as a mortgage or pledge of the company's stock,[46] a mortgage of its property,[47] or such other lien or security, real or personal, as may be agreed on by the parties.[48] Where a municipality is authorized to require the execution of a bond guaranteeing the application of the funds covered by the public grant to the construction of a road, its failure to require such a bond does not invalidate its right to indemnity under other security taken by it.[49] A statute requiring security from the railroad company does not apply to grants of public aid made prior to its enactment.[50]

§ 34. Control of Grant by Commissioners or Other Officers

A railroad company is not entitled to the benefits of a grant of public aid until such action as a board or other group of officers is required to take has been taken; and such board or officers may not take the necessary action until all conditions attached to the grant have been complied with.

Where a legislative provision for public aid to railroad companies places the control of the grant in a board of commissioners or other officers, a company has no right to the benefit of such grant or to receive aid thereunder until such board or officers have acted in its favor,[51] as until after they have determined that all conditions attached to the grant have been complied with[52] and have made an appropriation or donation of the money voted,[53] which can be done only after it is collected.[54]

On the other hand, the board has no authority to execute the grant in favor of a railroad company

36. Pa.—Commonwealth v. Allegheny County, 37 Pa. 237.

37. Ind.—Darby v. Anderson, 77 N.E. 1083, 167 Ind. 707.
51 C.J. p. 460 note 57.

38. Mass.—Portage County v. Wisconsin Cent. R. Co., 121 Mass. 460.

39. Ind.—Indiana North, etc., R. Co. v. Attica, 56 Ind. 476.
51 C.J. p. 460 note 59.

40. Iowa.—Snell v. Leonard, 8 N.W. 425, 55 Iowa 553.

41. U.S.—State of Georgia v. Trustees of Cincinnati Southern Ry., 39 S.Ct. 14, 248 U.S. 26, 63 L.Ed. 104.

42. Miss.—Hemmingway v. Vicksburg, etc., R. Co., 52 Miss. 16.

43. U.S.—Cunningham v. Macon & B. R. Co., C.C.Ga., 6 F.Cas.No.3,483, 3 Woods 418.

44. U.S.—Cunningham v. Macon, etc., R. Co., supra.

45. U.S.—Weil v. Alabama State Land Co., C.C.Ala., 175 F. 252.

46. U.S.—Cincinnati v. Morgan, 3 Wall. 275, 18 L.Ed. 146.

47. U.S.—Cunningham v. Macon & B. R. Co., C.C.Ga., 6 F.Cas.No.3,483, 3 Woods 418.
51 C.J. p. 460 note 69.

48. U.S.—Cincinnati v. Morgan, 3 Wall. 275, 18 L.Ed. 146.

49. Ky.—Sinking Fund Comrs. v. Northern Bank, 1 Metc. 174.

50. Ky.—Russell v. Cumberland, etc., R. Co., 8 Ky.Op. 344.

51. Iowa.—Muscatine Western R. Co. v. Horton, 38 Iowa 33.

52. Ind.—Demaree v. Bridges, 65 N.E. 601, 30 Ind.App. 131.
51 C.J. p. 460 note 74.

53. Ind.—State v. Clinton County, 76 N.E. 986, 166 Ind. 162.

54. Ind.—State v. Clinton County, supra.

until the performance by such company of the conditions on which the grant is made.[55] The determination of the commissioners as to whether the conditions of the grant have been complied with is not conclusive in a direct action before a court of competent jurisdiction,[56] although it cannot be collaterally attacked,[57] but no action for damages can be maintained against the commissioners for failure to act in favor of a railroad company unless such failure is willful or corrupt.[58] Where a public agency has subscribed to stock of a railroad company, as an aid to the construction of its road, it is the duty of the commissioners to exchange or otherwise dispose of such stock in the manner authorized by statute,[59] and to account for the proceeds thereof to the proper county, state, or municipal authorities,[60] who may maintain an action against the commissioners for an accounting.[61]

Abandonment and termination of office. Commissioners or other similar officers charged with the control of a grant of public aid cannot, while they continue to hold office, transfer their official rights[62] or divest themselves of their official duties,[63] and, on the other hand, they cannot perform any official acts after they cease to hold office.[64] Such commissioners or similar officers may be removed from office for unlawful or willful nonfeasance in office.[65]

§ 35. Assignments of Right to Aid Granted

A railroad company may assign its right to aid which has been granted to it.

A railroad company to which aid has been granted may assign its right thereto,[66] and whether such assignment is with or without consideration ordinarily is no concern of the state, county, or municipal corporation by which the grant is made.[67] Similarly, a company has power to make a general assignment of its right to avail itself of a standing offer of public aid,[68] even though it has not yet complied with the terms or conditions on which the offer is made.[69] Such an assignment of aid granted or of the right to obtain it may be made to private persons.[70]

§ 36. Negotiation and Transfer of Securities

In the absence of a provision to the contrary, a railroad company may negotiate securities issued to it by a state or a municipal corporation, or its own securities indorsed by a state or municipal corporation, as a measure of public aid; and the rights of holders of negotiable bonds so issued are the same as those of holders of other negotiable instruments.

Except as may be provided otherwise by constitution or statute,[71] a railroad company has full authority to negotiate or transfer bonds or other securities issued to it by a state, county, or municipality in aid of the establishment and construction of its road,[72] or its own securities indorsed by a state, county or municipality, as a measure of public aid;[73] and the company may assign and transfer scrip issued to it.[74]

Rights of purchasers and transferees. Holders of negotiable bonds or securities issued in aid of a railroad company are entitled, as against a state, county, or municipality by which such bonds or securities are made or indorsed, to the same rights, privileges, and immunities as holders of other negotiable instruments.[75] Where bonds are invalid as against the state, an innocent holder thereof may hold the railroad which negotiated the bonds.[76] An innocent holder is not affected by any fraud or mistake in the issue of the bonds[77] although the

55. U.S.—Buffalo & J. R. Co. v. Falconer, N.Y., 103 U.S. 821, 26 L.Ed. 471.

56. Minn.—McManus v. Duluth, etc., R. Co., 52 N.W. 980, 51 Minn. 30

57. Ind.—Demaree v. Bridges, 65 N.E. 601, 30 Ind.App. 131.

58. Iowa—Muscatine Western R. Co. v. Horton, 38 Iowa 33

59. N.Y.—People v. Eddy, 3 Lans. 80—People v. Burnside, 3 Lans. 74

60. N.Y.—Griggs v. Griggs, 56 N.Y. 504.

61. N.Y.—Griggs v. Griggs, supra.

62. N.Y.—Biddlecom v. Newton, 13 Hun 582

63. N.Y.—Biddlecom v. Newton, supra

64. N.Y.—Biddlecom v. Newton, supra.

65. N.Y.—People v. Eddy, 3 Lans. 80—People v. Burnside, 3 Lans. 74.

66. Iowa—Manning v. Mathews, 30 N.W. 749, 70 Iowa 303—Arkansas Southern R. Co. v. Wilson, 42 So. 976, 118 La. 395.
51 C.J. p. 461 note 88.

67. La.—Arkansas Southern R. Co. v. Wilson, 42 So. 976, 118 La. 395.

68. Minn.—State v. Hastings, 24 Minn. 78
Wis.—Crogster v. Bayfield County, 74 N.W. 635, 77 N.W. 167, 99 Wis. 1.

69. Minn.—State v. Hastings, 24 Minn. 78

70. La.—Arkansas Southern R. Co. v. Wilson, 42 So. 976, 118 La. 395.

71. Ga.—Jones v. Mason, etc., R. Co., 39 Ga. 138.
51 C.J. p. 461 note 93.

72. U.S.—Chicago, R. I. & P. R. Co. v. Howard, Iowa, 7 Wall. 392, 19 L.Ed. 117.
51 C.J. p. 461 note 94.

73. Ala.—State v. Cobb, 64 Ala. 127.

74. Mass.—Commonwealth v. Haupt, 10 Allen 38.

75. U.S.—Curtis v. Butler County, C.C.Pa., 6 F.Cas.No. 3,500.
Conn.—Society for Sav. v. New London, 29 Conn. 174.
Rights in particular case determined
U.S.—Cunningham v. Macon & B. R. Co., Ga., 15 S.Ct. 361, 156 U.S. 400, 39 L.Ed. 471.

76. U.S.—Tompkins v. Little Rock & Ft. S. R. Co., C.C.Ark., 18 F. 344, 5 McCrary 597, affirmed 8 S.Ct. 762, 125 U.S. 109, 31 L.Ed. 615—Tompkins v. Little Rock & Ft. S. R. Co., C.C.Ark., 15 F. 6.

77. U.S.—Florida Cent. R. Co. v. Schutte, Fla., 103 U.S. 118, 26 L.Ed. 327.
51 C.J. p. 461 note 98.

company may be liable to the state because of it;[78] but a purchaser or holder who has notice, actual or constructive, of irregularities or informalities in the bonds or securities or their negotiation takes subject thereto,[79] and if they were fraudulently issued it is incumbent on a holder thereof to show that he is a bona fide purchaser for value[80]

§ 37. Termination, Avoidance, and Forfeiture of Grant

A grant of public aid may expire by its own terms on the occurrence of a designated event, and may be avoided if secured by fraud; it may be lost by failure to perform certain acts.

A grant of public aid to a railroad company expires by its own terms on the occurrence of any acts or circumstances expressly made a cause for such expiration,[81] and may be avoided or its execution restrained if secured by fraud or misrepresentation.[82] The right to the benefit of a grant may be lost by failure to claim it within a prescribed time[83] or failure to perform conditions precedent, on which the grant is to be made;[84] but such right is not forfeited by an assignment of the aid granted,[85] or by a temporary suspension of the work on the road,[86] or by an omission to make compensation to a landowner for land taken;[87] and, where a railroad company has substantially performed the conditions on which it becomes entitled to aid, its right thereto is not affected by its subsequent misconduct in operating the road.[88]

No parol contract, stipulation, or limitation can be set up to defeat a tax voted in aid of a railroad company[89] except to establish fraud,[90] and, where the road has been completed before the tax is levied, an omission to state in the levy the time when the road was to be completed, will not defeat the tax[91] The repeal of a statute authorizing a tax to be levied for the purpose of aiding a railroad company does not take away the right to such tax of a company which had expended money in construction on the faith of it, even though no levy has been made at the time of the repeal,[92] but, when no money has been expended in reliance on the tax, the repeal of the statute deprives the company of all right to have the tax collected[93] A grant of aid is not invalidated by a subsequent amendment to the charter of the company changing its name[94] or by any other change not a fundamental one[95]

§ 38. —— Effect of Sale, Lease, or Consolidation of Railroad

According to some, but not other, authorities, where a railroad company which has been granted public aid transfers its property and franchises to another company before performing the conditions attached to the grant, the vendee company is not entitled to the benefit of the grant, even though it complies with such conditions; a grant of aid is not invalidated by an agreement of a company to sell or transfer its road after completion A grant of public aid is not necessarily invalidated by consolidation.

It has been held that, where a railroad company to which public aid has been granted transfers its property and franchises to another company without having performed conditions which were attached to the grant, the vendee company is not entitled to the benefit of the grant, even though it complies with such conditions,[96] except when the grant was made with knowledge and in contemplation of a proposed transfer or assignment by the company in whose favor the grant was made;[97] but there is authority to the contrary that, in the absence of statutory restriction, the sale of the railroad before compliance with the attached conditions does not destroy the right to the aid granted, where such conditions are thereafter complied

78. Mass.—Commonwealth v. Haupt, 10 Allen 38.

79. U.S.—Curtis v. Butler County, C.C.Pa., 6 F.Cas.No.3,500.
51 C.J. p. 461 note 1.

80. U.S.—Curtis v. Butler County, supra.

81. Pa.—West Branch Canal Co. v. Elmira, etc., R. Co., 85 Pa. 180
51 C.J. p. 461 note 4.

82. Neb.—Nash v. Baker, 56 N.W. 376, 37 Neb. 713.
51 C.J. p. 461 note 5.

83. Iowa.—Cedar Rapids, etc., R. Co. v. Elseffer, 51 N.W. 27, 84 Iowa 510.
51 C.J. p. 462 note 6.

84. W.Va.—West Virginia, etc., R. Co. v. Harrison County Ct., 34 S.E. 786, 47 W.Va. 273.

85. La.—Arkansas Southern R. Co. v. Wilson, 42 So. 976, 118 La. 395

86. Iowa.—Merrill v. Welsher, 50 Iowa 61
51 C.J. p. 462 note 9

87. N.H.—Manchester, etc., R. Co. v. Keene, 62 N.H. 81.

88. Minn.—Hodgman v. St. Paul, etc., R. Co., 23 Minn. 153.

89. Iowa.—Harwood v. Quinby, 44 Iowa 385—Muscatine Western R. Co. v. Horton, 38 Iowa 33.

90. Iowa.—Muscatine Western R. Co. v. Horton, supra.

91. Iowa.—Burges v. Mabin, 27 N.W. 464, 70 Iowa 633.

92. Iowa.—Cantillon v. Dubuque, etc., R. Co., 42 N.W. 613, 78 Iowa 48, 5 L.R.A. 776—Burges v. Mabin, 27 N.W. 464, 70 Iowa 633.

93. Iowa.—Barthel v. Meader, 33 N.W. 446, 72 Iowa 125.

94. Ill.—Reading v. Wedder, 66 Ill. 80.
Kan.—Chicago, etc., R. Co. v. Stafford County, 12 P. 593, 36 Kan. 121.

95. Ill.—Reading v. Wedder, 66 Ill. 80.

96. Neb.—Midland Tp. v. Gage County, 56 N.W. 317, 37 Neb. 582.

97. Wis.—Lynch v. Eastern, etc., R. Co., 15 N.W. 743, 825, 57 Wis. 430

with,[98] even though such sale works a dissolution of the original company.[99]

Under a statute giving taxpayers a right to stock in a railroad company on the payment of a tax voted in its aid, a sale of the road before completion works a forfeiture of the tax[1] except where the transfer provides that stock of the purchasing company of equal or greater value shall be issued to taxpayers in return for the aid voted.[2] A grant of aid is not, however, invalidated by the agreement of a company to sell or transfer its road after completion,[3] or by a partial assignment of its franchises,[4] or by the alienation[5] or perpetual lease[6] of the railroad after completion; and, where there is no question as to the performance of conditions precedent, a state, county, or municipality cannot, after the collection and payment into the public treasury of a tax voted in aid of a railroad company, set up the defense that the company had sold and disposed of its property and franchises before the tax became due.[7]

Effect of consolidation of company. A grant of public aid to a railroad company is not necessarily invalidated by its consolidation or merger with another company,[8] and the consolidated company ordinarily is entitled to the benefit of the grant;[9] but, where the aid granted consists in a subscription to bonds of a railroad company, the company formed by its consolidation with another or others cannot claim the benefit of the grant on tendering bonds of such consolidated company.[10]

§ 39. Rights and Liabilities of Railroad Company

A grant of public aid should be strictly construed in favor of the rights of property. Where a grant is duly made and all the conditions are complied with, it becomes a binding contract, and the grant cannot be withdrawn or revoked without the consent of the company.

Since grants of public aid to railroad companies impose a burden on the public and deprive owners of property of the full rights of control and disposition thereof, such grants should be strictly construed in favor of the rights of property;[11] but they should not be construed so strictly as to deprive a company of aid clearly intended to be given it.[12] Where a grant of aid is duly made and all the conditions, if any, annexed thereto are performed by the railroad company, it becomes a binding contract, to the benefit of which the company is entitled,[13] in preference to any other company to which a later grant has been or may be made,[14] even though the conditions of the later grant may first be complied with by such other company,[15] and this is true irrespective of the company's financial ability to complete or maintain its road,[16] and although the company has issued its own bonds in excess of the statutory limit;[17] nor is the company's right to such aid affected by its noncompliance with additional conditions in a subsequent statute[18] or by independent conditions which are to be performed after the company is entitled to the aid.[19]

After it has so become binding, a grant cannot be withdrawn or revoked without the consent of the company;[20] but until aid has actually been granted the company has no vested right thereto,[21] and until then the method by which grants may or must be made may be altered without infringing any right.[22] Under some statutes a mere vote of the public to issue bonds or levy a tax in aid of a

98. Iowa—Muscatine Western R. Co v. Horton, 33 Iowa 33.

99. Iowa—Muscatine Western R Co v. Horton, supra.

1. Iowa—State v. Iowa Cent. R Co., 32 N.W. 409, 71 Iowa 410, 60 Am.R. 806.
51 C.J. p 462 note 25.

2. Iowa—Cantillon v. Dubuque, etc., R. Co., 35 N.W. 620, reversed 42 N. W. 613, 78 Iowa 48, 5 L.R.A. 776.

3. Kan.—Southern Kansas, etc., R. Co. v Towner, 21 P. 221, 41 Kan. 72.

4. U.S.—Cass County v. Gillett, Mo., 100 U.S. 585, 25 L.Ed. 585.
Wis.—Lynch v. Eastern, etc., R. Co., 15 N.W. 743, 825, 57 Wis. 430.

5. Iowa.—Parsons v. Childs, 36 Iowa 108

6. Iowa—Chicago, etc., R Co. v. Shea, 25 N.W. 901, 67 Iowa 728.

7. Iowa—Merrill v. Marshall County, 36 N.W. 778, 74 Iowa 24.

8. U.S.—Bates County v. Winters, Mo., 5 S.Ct. 157, 112 U.S. 325, 28 L. Ed. 744.
Kan.—Chicago, etc., R. Co. v. Stafford County, 12 P. 593, 36 Kan. 121.

9. U.S.—Livingston County v. First National Bank of Portsmouth, Mo., 9 S.Ct. 18, 128 U.S. 102, 32 L.Ed. 359
51 C.J. p 462 note 34.

10. N.J.—New Jersey Midland R. Co. v. Strait, 35 N.J.Law 322.

11. Ind.—Demaree v. Johnson, 49 N. E. 1062, 50 N.E. 376, 156 Ind. 419.

12. S.C.—State v. Ashmore, 44 S.C. L. 248
51 C.J. p 463 note 39.

13. U.S.—Red Rock v. Henry, Minn., 1 S.Ct. 434, 106 U.S. 596, 27 L.Ed. 251
51 C.J. p 463 note 40.

14. Kan.—Chicago, etc., R Co. v. Osage County, 16 P. 828, 38 Kan. 597.

15. Kan.—Chicago, etc., R Co. v. Osage County, supra.

16. Ind.—Zintsmaster v. Gill, 114 N. E. 210, 185 Ind. 610.
Iowa—Whitney v. Chicago, etc., R. Co., 110 N.W. 912, 133 Iowa 508.

17. Iowa.—Whitney v. Chicago, etc., R. Co., supra.

18. Ala.—Tennessee, etc., R. Co. v. Moore, 36 Ala. 371.

19. Iowa—Zorger v. Rapids Tp., 36 Iowa 175.
51 C.J. p 463 note 46.

20. U.S.—Red Rock v. Henry, Minn 1 S.Ct. 434, 106 U.S. 596, 27 L.Ed. 251.
51 C.J. p 463 note 47

21. Mo.—State v. Garroutte, 67 Mo. 445.

22. Mo.—State v. Garroutte, supra.

railroad is not sufficient to entitle the company to the aid voted until there is also made an agreement between the company and the county or municipality, fixing the conditions on which the money or bonds are to be delivered,[23] or until the tax voted has been collected.[24]

Where money granted is to be paid over to the railroad company "when ordered by the court," the company has no lien on money collected but not ordered to be paid over, and until so ordered the money may be recalled from the agent holding it.[25] Where a railroad company issues warrants in anticipation of taxes voted by a municipality in aid of the company, providing that they shall be receivable by the company from the county treasurer in payment of the aid voted, neither the railroad company issuing them nor the indorser thereof is liable thereon until after a demand that they be received by the county treasurer in payment of the railroad tax, and his refusal so to receive them.[26]

§ 40. —— Acceptance and Performance of Conditions

a. In general
b. Construction, maintenance, and operation of railroad
c. Location of railroad, offices, stations, etc.
d. Amount or value of work done
e. Expenditure of aid

a. In General

A railroad company becomes entitled to the benefit of aid granted to it only on substantial compliance with all the conditions precedent on which the grant was made, unless performance of such conditions is waived or excused; acceptance of the grant is an acceptance of all its conditions and estops the company to attack them.

In order that a railroad company may become entitled to aid granted to it by a state, county, or other municipal corporation, and compel the collection of the tax, the issue of bonds, or the like, as the case may be, it must at least substantially perform on its part all the conditions precedent on which the grant was made[27] unless the performance of such conditions has been waived[28] or is sufficiently excused,[29] and the acceptance of a grant is an acceptance of all its terms and conditions,[30] so that the company is estopped to assert that such terms or conditions are void or unreasonable.[31] In determining whether conditions have been complied with, the language used in the grant should be considered according to its ordinary and popular meaning, that is, as it would be understood by the voters or public generally.[32]

Where the condition is the running of the first locomotive over the line of road between certain points, the running of the company's trains along the road of another company for a part of the distance under a lease from the latter, liable to be terminated by either party on notice, is not a substantial compliance,[33] although it has been said that it would be otherwise if the performance were under a perpetual lease[34] or a purchase of the other road.[35] Bonds or moneys granted as aid should not be deposited in escrow, in advance of compliance with the conditions of the grant,[36] and such a deposit, if made, does not enlarge the company's rights or give it any vested rights in advance of compliance with such conditions.[37] Where aid granted is payable in portions or installments, the right of the company to one installment is not affected by its failure to comply with the conditions on which another or other installments are payable.[38]

Conditions subsequent. Where a railroad company fails to perform fully conditions subsequent attached to a grant or acts in consideration of which the grant was made, the municipality granting the aid has a cause of action against the company on common-law principles to recover the mon-

23. U.S.—Pope v. Board of Com'rs of Lake County, C.C.Ind., 51 F. 769.
51 C.J. p. 463 note 50.

24. U.S.—Pope v. Board of Com'rs of Lake County, supra.

25. Mo.—Henry County v. Allen, 50 Mo. 231.

26. Iowa.—Lisle v. Iowa, etc., R. Co., 6 N.W. 696, 54 Iowa 499

27. Minn.—Birch Cooley v. Minneapolis First Nat. Bank, 90 N.W. 789, 86 Minn. 385.
51 C.J. p. 463 note 55.

28. U.S.—Randolph County v. Post, Ill., 93 U.S. 502, 23 L.Ed. 957
Kan.—Memphis, etc., R. Co. v. Thompson, 24 Kan. 170

29. Mo.—State v. Daviess County Ct., 64 Mo. 30

30. W.Va.—West Virginia, etc., R. Co. v. Harrison County Ct., 34 S.E. 786, 47 W.Va. 273.

31. Tenn.—Mobile, etc., R. Co. v. Wisdom, 5 Heisk. 125.
W.Va.—West Virginia, etc., R. Co. v. Harrison County Ct., 34 S.E. 786, 47 W.Va. 273.

32. Ill.—People v. Clayton, 88 Ill. 45.

33. Ill.—People v. Clayton, supra.

34. Ill.—People v. Clayton, supra.

35. Ill.—People v. Clayton, supra.

36. W.Va.—West Virginia, etc., R. Co. v. Harrison County Ct., 34 S.E. 786, 47 W.Va. 273.

37. W.Va.—West Virginia, etc., R. Co. v. Harrison County Ct., supra.

38. Tenn.—Sholl v. Carter County, Ch.App., 42 S.W. 78.
51 C.J. p. 464 note 66.

ey or bonds delivered to it, or the value of the aid.[39]

b. Construction, Maintenance, and Operation of Railroad

A railroad company's right to aid granted depends on its performance of any conditions relative to the construction, maintenance, or operation of the railroad; in the absence of a provision specifying the time within which such conditions should be performed, the railroad company is entitled to a reasonable time.

In accordance with the general rules relating to the performance of conditions attached to a grant of public aid, a railroad company's right to aid granted depends on its performance of any conditions relative to the construction, maintenance, and equipment of the road,[40] as that it shall be constructed between designated points or to or through a designated place[41] or that it shall be completed and put into operation.[42] In the absence of anything in the grant to the contrary, a provision making the construction of the railroad a condition of the grant does not require construction in any other manner or a railroad of any other character than that which is contemplated by the charter of the company and is usual under like circumstances,[43] and, unless the terms of the grant describe the kind of road, the condition is complied with by constructing any road which is capable of doing the business of the territory through which it passes, even though it be a narrow-gauge road.[44]

While it has been held that a purchase of a completed line of railroad is not sufficient compliance with such a condition,[45] there is authority for the contrary view, at least where the road purchased constitutes only a minor part of the line for the construction of which the aid was granted.[46] Under a condition requiring completion or operation, the railroad need not be perfect in every respect so long as it is in a condition to be operated;[47] but it must be so far completed that it may be properly and regularly used for the purpose of transporting freight and passengers,[48] and must be in as reasonably fit condition, and as safe and convenient for public use, as new roads usually are in similar localities,[49] and construction in such an incomplete and imperfect manner that the ordinary business of the company cannot be transacted thereon is not sufficient.[50]

Even though not expressed by the grant, and unless otherwise provided therein, the maintenance and operation of the railroad during the life of the company as fixed by its charter or articles of incorporation is ordinarily, by clear implication, either a condition of, or the consideration for, the grant of aid.[51]

Time for commencement and completion of construction. In the absence of express provision in a grant of public aid, conditioned on the construction or completion of the railroad, as to the time within which construction shall be commenced or the railroad be completed, the company is entitled to a reasonable time,[52] and mere lapse of time, provided it is not unreasonable, will not cause a forfeiture of the company's rights,[53] except where the charter of the company requires its road to be completed within a specified period, in which case such requirement will be regarded as a condition of the grant.[54] Where, however, the time for commencement[55] or completion[56] is specified in the grant, the right of the railroad company to the aid granted depends on compliance with such provisions, and a court of equity will not relieve it from a failure to comply therewith[57] unless such failure is caused by the state, county, or municipality granting the aid.[58] An act of God is not, it has been held, an excuse for failure of compliance;[59] nor is a delay excusable which results from the company's negligence in taking the steps necessary to

39. Minn.—Hinckley v. Kettle River R. Co., 72 N.W. 835, 70 Minn. 105. 51 C.J. p. 464 note 67.

40. Iowa.—Lamb v. Anderson, 3 N.W. 416, 6 N.W. 268, 54 Iowa 190.

41. Iowa.—Burges v. Mabin, 27 N.W. 464, 70 Iowa 633. 51 C.J. p. 464 note 71.

42. Me.—Portland, etc., R. Co. v. Hartford, 58 Me. 23.

43. Minn.—Hodgman v. St. Paul, etc., R. Co., 23 Minn. 153.

44. Iowa.—Casady v. Lowry, 49 Iowa 523.—Meader v. Lowry, 45 Iowa 684.

45. Iowa.—Iowa, etc., R. Co. v. Schenck, 10 N.W. 215, 56 Iowa 628. 51 C.J. p. 465 note 75.

46. Kan.—Chicago, etc., R. Co. v. Makepeace, 24 P. 1104, 44 Kan. 676. 51 C.J. p. 465 note 77.

47. Iowa.—Chicago, etc., R. Co. v. Shea, 25 N.W. 901, 67 Iowa 728. 51 C.J. p. 465 note 78.

48. Minn.—Hodgman v. St. Paul, etc., R. Co., 23 Minn. 153. 51 C.J. p. 465 note 79.

49. N.H.—Manchester, etc., R. Co. v. Keen, 62 N.H. 81.

50. Iowa.—Cox v. Forest City, etc., R. Co., 22 N.W. 672, 66 Iowa 289. 51 C.J. p. 465 note 81.

51. Minn.—Hinckley v. Kettle River R. Co., 72 N.W. 835, 70 Minn. 105.

52. U.S.—Green v. Dyersburg, C.C. Tenn., 10 F.Cas.No.5,756, 2 Flipp. 477.

53. Minn.—State v. Lime, 23 Minn. 521. 51 C.J. p. 465 note 84.

54. U.S.—Green v. Dyersburg, C.C. Tenn., 10 F.Cas.No.5,756, 2 Flipp. 477.

55. N.Y.—Farnham v. Benedict, 13 N.E. 784, 107 N.Y. 159. 51 C.J. p. 565 note 86.

56. U.S.—Grattan Tp. v. Chilton, Neb., 97 F. 145, 38 C.C.A. 84. 51 C.J. p. 465 note 87.

57. W.Va.—West Virginia, etc., R. Co. v. Harrison County Ct., 34 S.E. 786, 47 W.Va. 273.

58. Ill.—People v. Holden, 82 Ill. 93.

59. Kan.—Memphis, etc., R. Co. v. Thompson, 24 Kan. 170.

secure the right to cross the lines and road of another company.[60]

A statute providing that the running of the period for the performance of such conditions shall be stayed during such time as performance is prevented by an injunction is not retroactive.[61] Under some statutes the failure of a railroad company to commence work or complete the road within the specified time does not operate as a forfeiture of the aid voted until a declaration of forfeiture is made by the proper board or officers and in the manner prescribed.[62]

The commencement of work on the railroad, within the requirements of conditions as to the time thereof, means the time of beginning the work of construction,[63] and not the acquirement of the right of way[64] or the letting of contracts for the construction of the road.[65]

c. Location of Railroad, Offices, Stations, Etc.

A railroad company is entitled to the benefit of a grant of aid only on complying with any condition thereto attached relative to the location of the railroad or the establishment and maintenance of its offices, stations, etc, unless performance of such conditions has been waived.

In accordance with the general rules relating to the performance of conditions attached to a grant of public aid, a railroad company is entitled to the benefit of such a grant only on complying with any condition thereto attached relative to the location of its railroad[66] or the establishment and maintenance of offices,[67] stations,[68] and repair shops and roundhouses,[69] unless performance of such conditions has been waived,[70] or unless the change in location is authorized by law[71] or was contemplated by the municipality or county when it made its subscription.[72]

Substantial performance of such conditions, however, ordinarily is sufficient; and so, where the road is completed and accomplishes the main purposes of the grant, in making connection between designated points, inconsiderable changes made by the company in the route originally proposed,[73] such as alterations in the line of the road which do not change the terminal points or materially affect the general route,[74] do not deprive the company of the right to the aid granted. The survey of a line of a railroad before voting a tax to aid in its construction does not constitute a representation as to the location of the line of the road which is binding on the company or on which a taxpayer is authorized to rely,[75] and the fact that there is some deviation from the original route as set forth in the company's articles of incorporation does not disentitle the company to the aid where it does not appear that the location of the road on such route is a condition on which the aid was granted.[76] However, where at the time of submitting such proposition the route of such road was located, it will be presumed, in the absence of proof to the contrary, that such location was a part of the proposition,[77] and so, if after the vote is taken the location is changed to a route materially different from the original one, the right to such aid is lost.[78]

d. Amount or Value of Work Done

In order to become entitled to the benefit of a grant of public aid, a railroad company must comply substantially with a condition attached to the grant requiring the company to do an amount of work on the railroad equal to a specified value.

Under a condition attached to a grant of public aid requiring the railroad company to do work on the railroad equal in value to the amount of aid granted, earth work is not alone to be included in determining whether or not such condition has been

60. Minn—McManus v Duluth, etc, R. Co., 52 N.W. 980, 51 Minn. 30.

61. Minn—McManus v. Duluth, etc., R. Co, supra.

62. Ind—Nixon v Campbell, 4 N E 296, 7 N.E 258, 106 Ind. 47.
51 C J. p 466 note 94.

63. Ind.—State v. Wheadon, 39 Ind. 520

64. Ind—State v. Wheadon, supra.

65. Ind—State v. Wheadon, supra.

66. Tex—Kansas City, etc, R. Co. v. State, 163 S.W 582, 106 Tex 249, error dismissed 36 S Ct. 553, 241 U.S 650, 60 L.Ed 1221.
51 C J. p 466 note 1.

67. Minn—State v. Minneapolis, 21 N W. 722, 32 Minn. 501.
51 C.J. p 466 note 2.

68. Ark—Fayetteville Wagon, etc, Co v. Kenefick Constr. Co., 88 S. W 1031.
51 C J. p 466 note 3.

69. La—Bradley-Ramsay Lumber Co. v. Perkins, 33 So. 351, 109 La. 317.

70. Me—Bucksport, etc, R. Co. v. Brewer, 67 Me. 295.
Ohio—Stewart v. Little Miami R Co., 14 Ohio 353.

71. Me—Lowell v. Washington County R. Co., 37 A. 869, 90 Me 80.
51 C J. p 466 note 6.

72. Wis—Lynch v Eastern, etc, R Co, 15 N.W. 743, 825, 57 Wis 430

73. Cal—Stockton, etc., R. Co. v Stockton, 51 Cal. 328.
Ind.—Marion County v. Center Tp, 2 N E. 368, 7 N E. 189, 105 Ind. 422.

74. Ind—Marion County v. Center Tp, supra.

75. Iowa—Merrill v. Welsher, 50 Iowa 61.

76. Iowa—Cantillon v Dubuque, etc., R Co., 42 N W. 613, 78 Iowa 48, 5 L.R.A 776
Me—Lowell v. Washington County R. Co, 37 A. 869, 90 Me. 80.

77. W Va—Ravenswood, etc, R. Co. v. Ravenswood, 24 S.E. 597, 41 W. Va. 732, 56 Am S.R. 906.

78. La.—Lawson v. Opelousas, etc, R Co, 56 So 625, 129 La. 649.
W.Va—Ravenswood, etc, R. Co v. Ravenswood, 24 S.E. 597, 41 W.Va. 732, 56 Am.S R. 906.

complied with,[79] but all the work which enters into the construction of the roadbed complete for the transportation of cars may be included.[80] Substantial performance of such a condition is necessary, as in the case of every other condition attached to such grants, in order to entitle the company to the aid granted;[81] but although a company does not expend a sum sufficient to entitle it to the whole aid granted it may be entitled to collect the part earned in satisfaction of the whole.[82]

e. Expenditure of Aid

Public aid granted to a railroad company must be expended in the manner and for the purpose prescribed, if any.

Where a grant of public aid to a railroad company is by its terms made for a designated purpose or to be expended in a prescribed manner, the aid must be expended by the company in the manner prescribed,[83] and must be applied on such part of the railroad as the grant may designate.[84] When the condition is that the aid shall be expended at a particular place or for particular purposes "if necessary," the company is bound to exercise reasonable judgment as to such necessity,[85] and is at liberty to use any surplus remaining for other purposes.[86] However, except where so provided in the grant or by general statute,[87] it is not necessary that aid granted by a county or other municipal corporation be expended within the territorial limits thereof.[88]

§ 41. —— Delivery of Stock to Municipality or Taxpayers

Under a statute to such effect, a railroad company to whose stock a state or municipal corporation subscribes in order to aid in the establishment and construction of the railroad must deliver its stock in such manner, to such persons, and on such terms as may be prescribed.

In some jurisdictions statutes provide for or permit subscriptions to be made by the state, counties, or other municipal corporations to the stock of a railroad company, in order to aid in the establishment and construction of its railroad, and direct the delivery of stock so subscribed to such public corporation or to the taxpayers thereof; and, where a subscription is made, the company has no right to the value of the aid as a donation,[89] but must exchange therefor its stock in such manner, to such persons, and on such terms as may be prescribed by the subscription or the statute authorizing it,[90] whereupon the municipality or taxpayer to whom stock is delivered becomes a stockholder of the company, with all the rights, privileges, and liabilities of other stockholders.[91] A provision in a railroad company's charter that a certain per cent of its stock shall be paid in cash does not apply to public aid extended to the company.[92]

§ 42. —— Payment of Interest and Securities or Repayment of Aid

The liability of the company to pay interest on securities issued or indorsed in its aid, or to pay or redeem such securities or repay other aid lent, and the time, mode, and terms of such payment, are governed by the statute or grant under which the securities were issued or indorsed.

The liability of a railroad company to pay interest on securities issued or indorsed by a state, county, or other municipal corporation in its aid,[93] or to pay or redeem such securities or repay other aid lent,[94] and the time[95] and mode, manner, and terms[96] of such payment or repayment, depend on the terms of the statute or grant under which such securities were so issued or indorsed or the aid was granted, although even where there is no express covenant by the railroad company receiving such securities or aid to repay the amount thereof there may be implied from the statute and the acceptance of the aid an absolute promise of repayment.[97] The public corporation cannot be com-

79. Ill.—Illinois Midland R. Co. v. Barnett, 85 Ill. 313

80. Ill.—Illinois Midland R. Co. v. Barnett, supra.

81. Ill.—People v. Waynesville, 88 Ill. 469.

82. Iowa.—Casady v. Lowry, 49 Iowa 523.

83. Ind.—Barner v. Bayless, 33 N.E. 907, 34 N.E. 502, 134 Ind. 600.
N.Y.—Biddlecom v. Newton, 13 Hun 582.

84. N.Y.—People v. Morgan, 65 Barb. 473, 1 Thomps. & C. 101, reversed on other grounds 55 N.Y. 587.

85. Ky.—Marion County v. Louisville, etc., R. Co., 78 S.W. 437, 25 Ky.L. 1600.

86. Ky.—Marion County v. Louisville, etc., R. Co., supra.

87. Iowa.—Lamb v. Anderson, 3 N.W. 416, 6 N.W. 268, 54 Iowa 190
51 C.J. p. 467 note 24.

88. Ind.—Brocaw v. Gibson County, 73 Ind. 543.

89. Ind.—Hamilton County v. State, 4 N.E. 589, 17 N.E. 855, 115 Ind. 64.

90. Pa.—Pittsburg, etc., R. Co. v. Allegheny County, 79 Pa. 210.

91. Ky.—Louisville, etc., R. Co. v. Hart County, 75 S.W. 288, 77 S.W. 361, 116 Ky. 186, 25 Ky.L. 1152.

Pa.—Pittsburg, etc., R. Co. v. Allegheny County, 79 Pa. 210.

92. Tex.—Austin v. Gulf, etc., R. Co., 45 Tex. 234.

93. U.S.—U. S. v. Union Pac. R. Co., Ct.Cl., 91 U.S. 72, 23 L.Ed. 224.
51 C.J. p. 467 note 32.

94. Cal.—People v. Central Pac. R. Co., 18 P. 90, 76 Cal. 29.
51 C.J. p. 467 note 33.

95. U.S.—U. S. v. Central Pac. R. Co., Cal., 99 U.S. 449, 25 L.Ed. 237.
51 C.J. p. 467 note 34.

96. U.S.—Rolston v. Crittenden, Mo., 7 S.Ct. 599, 120 U.S. 390, 30 L.Ed. 721.
51 C.J. p. 467 note 35.

97. U.S.—U. S. v. Stanford, 69 F. 25,

pelled to accept payment before maturity;[98] nor can the railroad company make the payment in a manner not contemplated by the statute.[99] Under some statutes, if a railroad company fails to pay such securities when due, the municipality issuing them may take possession of the road,[1] provided it does so in the manner prescribed by the statute.[2]

§ 43. Enforcement of Grant

A grant of money out of general public funds or of money which has been commingled with the general funds may be enforced by an ordinary action at law to recover the amount thereof; where the grant consists of bonds an action at law will not lie to enforce the grant, nor will a proceeding in equity to compel issuance of such bonds ordinarily lie.

Where a state, county, or other municipal corporation has made a grant of money to a railroad company out of the general public funds, or moneys granted have been mingled with the general funds, an ordinary action at law may be maintained by the company entitled to the benefit of such grant to recover the amount thereof,[3] although no such action will lie where the moneys granted are held in the treasury as a separate and distinct fund;[4] and no such action lies where the aid granted consists of bonds rather than money.[5] Where a bill in equity has been instituted to enjoin the issuance of bonds granted in aid of a railroad company, the company may maintain a cross bill to enforce their issuance;[6] but ordinarily proceedings in equity to compel the issuance of bonds will not lie.[7]

§ 44. Grants of Aid by Federal Government

The rights and liabilities of parties under grants of aid to railroads by the federal government are controlled by the acts under which such grants are made.

Grants of public aid to railroad companies by lending money, bonds, or credit, or, as discussed in Public Lands §§ 148-169, by granting public lands, have been made in some cases by the United States, through acts of congress, as in the case of the "Pacific Railroad Acts,"[8] and the rights and liabilities of the parties under such grants are controlled by the terms of such acts.[9] Thus, under the "Pacific Railroad Acts," it has been held that the grants made by such acts to the Central Pacific Railroad Company were precisely the same in character and amount as those made to the Union Pacific;[10] that the Union Pacific was under an obligation to build and operate a telegraph line along its right of way,[11] and to transport mail, passengers, supplies, etc., for the government at a fair and reasonable rate not to exceed that paid by private parties for the same kind of service,[12] a certain portion of such compensation to be applied on the government bonds and interest;[13] that a certain per cent of the net earnings of the road should be applied to the payment of bonds and interest;[14] that the United States has no claim against the stockholders of the Central Pacific on account of the aid bonds issued to that company;[15] that under such acts the United States sustains two distinct relations to the Union Pacific Railroad Company, namely, that of the government creating it and exercising legislative and visitatorial powers, and that growing out of the contract contained in the charter and its amendment,[16] but that it did not thereby become a trustee vested with power to enforce the proper use of the property and franchises granted for the benefit of the public, since there were no cestuis que trust.[17]

affirmed 70 F. 346, 17 C.C.A. 143, affirmed 16 S.Ct. 576, 161 U.S. 412, 40 L.Ed. 751.

98. Me.—Portland v. Atlantic, etc., R. Co., 74 Me. 241

99. Me.—Portland v. Atlantic, etc., R. Co., supra.

1. Me.—Bath v. Miller, 51 Me. 341

2. Me.—Bath v. Miller, supra.

3. Iowa.—Merrill v. Marshall County, 36 N.W. 778, 74 Iowa 24.

4. Iowa.—Merrill v. Marshall County, supra.

5. U.S.—Smith v. Bourbon County, Kan., 8 S.Ct. 1043, 127 U.S. 105, 32 L.Ed. 73.

6. Ill.—Chicago, etc., R. Co. v. Mallory, 101 Ill. 583

7. U.S.—Smith v. Bourbon County, Kan., 8 S.Ct. 1043, 127 U.S. 105, 32 L.Ed. 73.

8. U.S.—Union Pac. R. Co. v. U. S., 10 Ct.Cl. 548.
51 C.J. p. 468 note 51.

9. U.S.—U. S. v. Chicago, M. & St. P. R. Co., Wis., 77 F. 732, 23 C.C.A. 430
51 C.J. p. 468 note 52.

10. U.S.—U. S. v. Stanford, C.C.Cal., 69 F. 25, affirmed 70 F. 346, 17 C.C.A. 143, affirmed 16 S.Ct. 576, 161 U.S. 412, 40 L.Ed. 751.

11. U.S.—Western Union Tel. Co. v. Union Pac. R. Co., C.C.Kan., 3 F. 721, 1 McCrary 581.

12. U.S.—Union Pac. R. Co. v. U. S., Ct.Cl., 6 S.Ct. 772, 117 U.S. 355, 29 L.Ed. 920
51 C.J. p. 468 note 55.

13. U.S.—Union Pac. R. Co. v. U. S., 10 Ct.Cl. 548.
51 C.J. p. 468 note 56.

14. U.S.—Union Pac. R. Co. v. U. S., 20 Ct.Cl. 70.
51 C.J. p. 468 note 57

15. U.S.—U. S. v. Stanford, Cal., 16 S.Ct. 576, 161 U.S. 412, 40 L.Ed. 751.

16. U.S.—U. S. v. Union Pac. R. Co., Conn., 98 U.S. 569, 25 L.Ed. 143.

17. U.S.—U. S. v. Union Pac. R. Co., Conn., 98 U.S. 569, 25 L.Ed. 143.

V. LOCATION OF ROUTE, TERMINI, STATIONS, DIVISION POINTS, ETC.

A. DESIGNATION AND DETERMINATION OF LOCATION

§ 45. Main Line

The location of a railroad consists in the selection, and adoption of the particular line or route on which it is to be constructed. Such location by the company invests it with title as against third persons or rival companies, and, as against the landowner, invests the company with an inchoate title constituting an encumbrance on the title of the landowner.

The location of a railroad consists in the selection and adoption of the particular line or route on which it is to be constructed.[18] A mere survey is not a location;[19] but in order to constitute a valid location there must be an adoption of a particular line or survey by the company itself,[20] and until it has done so it has no right to condemn lands,[21] nor has the landowner any right to recover damages as for a taking of his lands.[22] The actual construction of the road may operate as a definite location thereof;[23] also, there is a valid location whenever the railroad company has adopted a particular line or survey,[24] although actual construction is not begun until years afterward,[25] and such location invests the railroad company with title as against third persons or rival companies.[26] As against the landowner, such location invests the railroad company with an inchoate title which constitutes an encumbrance on the title of the landowner,[27] and gives the company the right to proceed to condemn the lands[28] and the landowner a right to recover damages,[29] although the title of the company as against the landowner is not complete until compensation has been made or secured.[30] The mere making of a preliminary survey by a railroad company does not prevent the owner of the land from alienating his title pending the final adoption of the line,[31] and where the land is alienated after preliminary survey, but before final adoption, the alienee having title at the time of such final adoption is the party entitled to damages.[32]

§ 46. —— Statutory and Charter Provisions

While charter or statutory provisions relating to the route of a railroad must be conformed to, they will be reasonably construed.

It is competent for a state to prescribe the route of a railroad created by it,[33] and, in so far as the location of a road is regulated by a statutory or charter provision, the company must comply therewith.[34] The company may, in the absence of any constitutional or charter restrictions as to the length or direction of a railroad, be authorized to construct a road lying entirely in one county,[35] or town or city,[36] or having a circular or polygonal route beginning and terminating at the same place.[37] Where the legislature has reserved a general power to alter or amend all charters, it may, after the road has been located, but before it is constructed, limit a discretion previously vested in the company as to the selection of the route and require that it be located through a certain point.[38] Constitutional or statutory provisions may require railroads pass-

18. W.Va.—Chesapeake, etc., R. Co. v. Deepwater R. Co., 50 S.E. 890, 57 W.Va. 641.
38 C.J. p 133 note 90—51 C.J. p 471, note 41

19. Pa.—Williamsport, etc., R. Co. v. Philadelphia, etc., R. Co., 21 A. 645, 141 Pa. 407, 12 L.R.A. 220.
51 C.J. p 471 note 42.
Survey generally see infra § 62.

20. W.Va.—Chesapeake, etc., R. Co. v. Deepwater R. Co., 50 S.E. 890, 57 W.Va. 641.
51 C.J. p 471 note 43.

21. Pa.—Williamsport, etc., R. Co. v. Philadelphia, etc., R. Co., 21 A. 645, 141 Pa. 407, 12 L.R.A. 220.

22. Pa.—Kaufman v. Pittsburg, etc., R. Co., 60 A. 2, 210 Pa. 440—Williamsport, etc., R. Co. v. Philadelphia, etc., R. Co., 21 A. 645, 141 Pa. 407, 12 L.R.A. 220.

23. U.S.—Jamestown, etc., R. Co. v. Jones, N.D., 20 S.Ct. 568, 177 U.S. 125, 44 L.Ed. 698.

24. Pa.—Johnston v. Callery, 39 A. 73, 184 Pa. 146.
W.Va.—Chesapeake, etc., R. Co. v. Deepwater R. Co., 50 S.E. 890, 57 W.Va. 641.

25. Pa.—Pittsburgh, etc., R. Co. v. Commonwealth, 101 Pa. 192.

26. Pa.—Williamsport, etc., R. Co. v. Philadelphia, etc., R. Co., 21 A. 645, 141 Pa. 407, 12 L.R.A. 220.
51 C.J. p 472 note 51.
Conflicting locations see infra § 71

27. N.Y.—Rochester, etc., R. Co. v. New York, etc., R. Co., 17 N.E. 680, 110 N.Y. 128
51 C.J. p 472 note 52.

28. Pa.—Johnston v. Callery, 39 A. 73, 184 Pa. 146.

29. Pa.—Williamsport, etc., R. Co. v. Philadelphia, etc., R. Co., 21 A. 645, 141 Pa. 407, 12 L.R.A. 220
51 C.J. p 472 note 54.

30. Pa.—Johnston v. Callery, 39 A. 73, 184 Pa. 146—Williamsport, etc., R. Co. v. Philadelphia, etc., R. Co., 21 A. 645, 141 Pa. 407, 12 L.R.A. 220.

31. Pa.—In re Buffalo, etc., R. Co., 17 Pa.Dist. 70.

32. Pa.—In re Buffalo, etc., R. Co., supra.

33. U.S.—Mobile, etc., R. Co. v. Mississippi, Miss., 28 S.Ct. 650, 210 U.S. 187, 52 L.Ed. 1016.

34. Mo.—Kansas City Interurban R. Co. v. Davis, 95 S.W. 881, 197 Mo. 669, 114 Am.S.R. 790.
51 C.J. p 472 note 60.

35. Kan.—State v. Martin, 33 P. 9, 51 Kan. 462.

36. N.J.—Long Branch Commissioners v. West End R. Co., 29 N.J. Eq. 566.

37. Kan.—State v. Martin, 33 P. 9, 51 Kan. 462.
Tenn.—Collier v. Union R. Co., 33 S.W. 155, 113 Tenn. 96.

38. Ga.—Macon, etc., R. Co. v. Gibson, 11 S.E. 135, 85 Ga. 1, 21 Am.S.R. 135.
51 C.J. p 472 note 64.

ing within a specified distance of certain towns to pass through them, and the recovery of a penalty for failure to comply therewith may be authorized.[39] Such provisions are mandatory.[40]

Construction. Constitutional or statutory provisions imposing duties,[41] or charter provisions conferring powers,[42] on a railroad company in respect of the route of the railroad will be reasonably construed. Indefinite terms of description as to the route or points along it, such as "at," "near," "at or near," and the like, should be so construed as to vest in the company a reasonable discretion as to the exact location,[43] and, where the terminal points are fixed, indefinite terms of discretion must be construed with reference thereto.[44] A provision authorizing a railroad company to construct a railroad "along" a river does not authorize the company to locate it in or upon the river,[45] but where the company is authorized to locate its road through certain towns it need not pass through such towns in the order named in the statute.[46] Under a charter provision authorizing a railroad company to construct its road on the most practicable route "passing near" a particular place, it may construct the road through such place;[47] and, where two different routes are authorized, the fact that a certain place is specified as a necessary intermediate point on one route does not necessarily prevent its being made an intermediate point on the other if the latter be adopted.[48] So, also, where a railroad company is authorized to construct a railroad between certain points, the route not being specifically designated, and to construct a lateral road from the main line to an intermediate point, it may construct the main line through such point if the location is made in good faith and does not show an abuse of discretion.[49] An authority to construct a double track road should be construed to mean two tracks essentially upon the same location in order to enable cars to run in opposite directions without detention or collision, and not two essentially different routes such as would be occupied by parallel roads[50]

§ 47. —— Discretion of Railroad Company

Where the exact location of a railroad is not prescribed by charter or statute, the location between the termini named or within the limits of the general description given rests in the sound discretion of the railroad company.

Where the exact location of a railroad is not prescribed by a statutory or charter provision, the location between the termini named or within the limits of the general description given rests in the sound discretion of the railroad company,[51] subject to any restrictions which a municipality may lawfully impose under statutory authority.[52] It may select the route which it deems feasible and advantageous;[53] and it has been held bound to select such route as will best serve its own and the public interests rather than the speculative interests of its officers and stockholders or land speculators.[54]

§ 48. —— Method of Determination, Remedies, and Proceedings

a. In general
b. Remedies

a. In General

Ordinarily the final determination of the location of a railroad must be made by the directors of the company and be the corporate act of the company.

The location of the route of a railroad must be determined by proceedings taken under, and in the manner provided by any statutes governing the subject.[55] As a general rule, the location of its line

39. Tex.—Kansas City, etc., R. Co. v. State, Civ.App., 155 S.W. 561, modified on other grounds 163 S.W. 582, 106 Tex. 249, error dismissed 36 S.Ct. 553, 241 U.S. 650, 60 L.Ed. 1221.

40. Tex.—Kansas City, etc., R. Co. v. State, 163 S.W. 582, 106 Tex. 249, error dismissed 36 S.Ct. 553, 241 U.S. 650, 60 L.Ed. 1221.
51 C.J. p. 472 note 67.

41. Tex.—Felton v. Kansas City, etc., R. Co., Civ.App., 132 S.W. 650.
51 C.J. p. 472 note 68.

42. Mo.—Chicago, etc., R. Co. v. McCooey, 200 S.W. 59, 273 Mo. 29.
51 C.J. p. 473 note 70.

43. Tenn.—Collier v. Union R. Co., 83 S.W. 155, 113 Tenn. 96.
51 C.J. p. 473 note 71.
Discretion of company generally see infra § 47.

44. Ga.—Bridwell v. Gate City Terminal Co., 56 S.E. 624, 127 Ga. 520, 10 L.R.A.,N.S., 909.
51 C.J. p. 473 note 72.

45. N.J.—Stevens v. Erie R. Co., 21 N.J.Eq. 259
51 C.J. p. 473 note 73.

46. Mass.—Commonwealth v. Fitchburg R. Co., 8 Cush. 240.

47. S.C.—Hill v. Southern R. Co., 46 S.E. 486, 67 S.C. 548.

48. N.H.—State v. Wilton R. Co., 19 N.H. 521.

49. U.S.—Bonaparte v. Camden, etc., R. Co., C.C.N.J., 8 F.Cas.No.1,617, Baldw. p. 205.

50. N.Y.—People v. New York, etc., R. Co., 45 Barb. 73, 26 How.Pr. 44.
51 C.J. p. 473 note 78.
Parallel roads see infra § 49.

51. N.Y.—Rochester, etc., R. Co. v. New York, etc., R. Co., 17 N.E. 680, 110 N.Y. 128
51 C.J. p. 473 note 80.
Construction of charter or statute using indefinite terms of description as vesting reasonable discretion in company see supra § 46.

52. Ill.—Chicago, etc., R. Co. v. Dunbar, 100 Ill. 110.
51 C.J. p. 473 note 81.

53. Mont.—State v. Tenth Judicial Dist. Ct., 88 P. 44, 34 Mont. 535, 115 Am.S.R. 540.
Or.—Pacific R., etc., Co. v. Astoria, etc., R. Co., 99 P. 1044, 53 Or. 247.

54. U.S.—Oldham v. Chicago & N.W. Ry. Co., C.C.A.S.D., 52 F.2d 111.

55. N.Y.—In re Long Island R. Co., 45 N.Y. 364.
51 C.J. p. 474 note 84 [a].

is intrusted to the company alone,[56] and the final determination must be by the corporate act of the company itself.[57] If the statute expressly provides by whom and in what manner the company shall act, the requirements must be complied with.[58] Ordinarily the location should be determined by the directors of the company,[59] but in the absence of a statute so requiring it has been held that the formal action of the directors of the company is not essential to a valid location.[60] It has been held that an engineer cannot locate the line.[61]

In so far as the location is discretionary with the railroad company, the courts will not attempt to control or interfere with the exercise of such discretion unless it is clearly shown that it has been abused;[62] nor can persons whose lands may be taken or affected by the location selected object that a different route might have been adopted[63] unless they are authorized by statute to make such objection and have a review of the propriety of the location selected.[64] Under a statute providing that the location selected by the railroad company shall be approved by the court on view of a jury, the company may waive its right to select the location in the first instance and permit the jury to do so.[65]

Presumption of regularity. Every presumption in favor of the regularity of proceedings whereby a railroad is located should be indulged after a lapse of more than twenty-five years during which the railroad was maintained and operated without objection.[66]

b. Remedies

The construction of a railroad on an unauthorized location may be enjoined, or the company may be compelled by mandamus or mandatory injunction to comply with constitutional or statutory requirements as to the places through which the road shall pass; but sometimes an injunction applied for by a person specially injured will be refused and the plaintiff left to his action at law.

A writ of mandamus or mandatory injunction may be employed to compel a railroad company to comply with constitutional or statutory provisions as to the places through which its road must pass,[67] even though the road has passed the place before suit is filed.[68] Where a railroad company is required under its charter or by reason of constitutional or statutory provisions to locate its road so as to pass through a particular town or city, such municipality or its citizens,[69] or the state,[70] has sufficient interest to be entitled to sue to compel compliance therewith. The construction of a railroad on an unauthorized location may also be enjoined at the suit of a person who will be specially injured thereby;[71] but, if the railroad has already been constructed, ordinarily the court will not enjoin the continued operation of trains thereon, which would result in inconvenience to the public, but will leave plaintiff to his action at law.[72] So also, if the location of the road is not specifically designated by the statute or charter, the company will not be enjoined at the suit of a private landowner from constructing its road on the route selected unless it is clearly shown that the discretion of the company has been abused, but plaintiff will be left to his action at law.[73] The fact that a railroad company has violated a provision of its charter as to the location of its road may not be set up by a subscriber to stock as a defense in an action by the company to recover the amount of the

56. Ill.—Chicago, etc., R. Co. v. Dunbar, 100 Ill. 110
Pa.—New York, etc., R. Co. v. Young, 33 Pa. 175.

57. W.Va.—Chesapeake, etc., R. Co. v. Deepwater R. Co., 50 S.E. 890, 57 W.Va. 641
51 C.J. p. 474 note 86.

58. U.S.—Weidenfeld v. Sugar Run R. Co., C.C.Pa., 48 F. 615
51 C.J. p. 474 note 89.

59. Ill.—Golconda Northern R. Co. v. Gulf Lines Connecting R. Co., 106 N.E. 818, 265 Ill. 194, Ann.Cas. 1916A 833.
51 C.J. p. 474 note 90

60. Tenn.—Tennessee Cent. R. Co. v. Campbell, 73 S.W. 11, 109 Tenn. 655.
51 C.J. p. 474 note 91.

61. Pa.—Williamsport, etc., R. Co. v. Philadelphia, etc., R. Co., 21 A. 645, 141 Pa. 407, 12 L.R.A. 220.
51 C.J. p. 474 note 92.

62. U.S.—Bonaparte v. Camden, etc., R. Co., C.C.N.J., 3 F.Cas.No.1,617, Baldw. p. 205
51 C.J. p. 474 note 94.

63. Mont.—State v. Meagher County, 88 P. 44, 34 Mont. 535, 115 Am.St.R. 540.
51 C.J. p. 474 note 95.

64. N.Y.—Matter of Niagara Falls Hydraulic Power, etc., Co., 23 N.Y.S. 31, 68 Hun 391, affirmed 39 N.E. 21, 143 N.Y. 669.
51 C.J. p. 474 note 96 [a]

65. Pa.—In re Philadelphia, etc., R. Co., 6 Whart. 25, 36 Am.D. 202.

66. Me.—U.S. Peg Wood, etc., Co. v. Bangor, etc., R. Co., 72 A. 190, 104 Me. 472.

67. Tex.—Kansas City, etc., R. Co. v. State, Civ.App., 155 S.W. 561, modified on other grounds 163 S.W. 582, 106 Tex. 249, error dismissed 36 S.Ct. 553, 241 U.S. 650, 60 L.Ed. 1221.
Mandamus to compel performance of duty by railroad company generally see Mandamus § 231 d

68. Tex.—Kansas City, etc., R. Co. v. State, supra.

69. Ga.—Macon, etc., R. Co. v. Gibson, 11 S.E. 442, 85 Ga. 1, 21 Am.St.R. 135.
51 C.J. p. 474 note 1.

70. Tex.—Kansas City, etc., R. Co. v. State, Civ.App., 155 S.W. 561, modified on other grounds 163 S.W. 582, 106 Tex. 249, error dismissed 36 S.Ct. 553, 241 U.S. 650, 60 L.Ed. 1221.
51 C.J. p. 474 note 2.

71. N.J.—Stevens v. Erie R. Co., 21 N.J.Eq. 259.
N.Y.—Mason v. Brooklyn City, etc., R. Co., 35 Barb. 373.

72. N.J.—Stevens v. Erie R. Co., 21 N.J.Eq. 259

73. U.S.—Bonaparte v. Camden, etc., R. Co., C.C.N.J., 3 F.Cas.No.1,617, Baldw. p. 205.

subscription.[74]

A commission may have jurisdiction to investigate and make an order in a proceeding to compel a railroad to locate its road through a place specified in its charter or provision.[75]

Questions of law and fact. The question as to the existence of natural obstacles preventing the construction of a railroad through a specified place is one of fact,[76] as is also the question whether a road is begun at or near a particular place as required by contract.[77]

Judgment. In an action to compel a railroad company to locate its line through a specified town, a judgment conditioned on the performance of certain acts and requirements by the citizens of the town may be granted where by constitutional or statutory provisions such matters must be provided before the road need be constructed through such town.[78]

§ 49. Parallel Roads

A charter or statutory prohibition of the construction of a railroad parallel to, and within a certain distance of, an existing railroad will be construed strictly and not extended further than its terms require.

The mere grant of a right to construct a railroad between certain points does not prevent the state from subsequently authorizing the establishment of another parallel and competing railroad[79] or other mode of transportation,[80] and no monopoly will be presumed to have been intended in the enactment of a general law for the formation of railroad companies.[81] One railroad company may, in the absence of any legislation to the contrary, be authorized to build a second railroad parallel with its own road.[82]

In some cases the construction of parallel railroads within a certain distance of an existing railroad is prohibited by the charter of the first company,[83] or by a general statute,[84] in which case a railroad company which has already constructed or located its road may enjoin another company from constructing a road within the limits prohibited by the statute;[85] but exclusive grants of this character will be construed strictly and not extended further than their terms require.[86] It has been held that the prohibition applies only to an entire road in itself extending to each point and not to a chain or series of railroads, one of which might reach one of the prohibited points and another the other;[87] but there is also authority to the contrary.[88]

§ 50. Lateral or Branch Roads, Spurs, Switches, Sidings, and Extensions

The length and location of lateral or branch roads are discussed infra § 51, of spurs, switches, turnouts, and sidings infra § 52, and of extensions infra § 53.

Examine Pocket Parts for later cases.

§ 51. —— Lateral or Branch Roads

In the exercise of authority conferred by the proper legislative body, and subject to the conditions or restrictions imposed by such body, a railroad company may construct lateral or branch roads and, before doing so, determine in good faith such matters as location, length, direction, and termini.

While a railroad company has an implied authority to construct such switches, turnouts, and sidings as may be necessary for the proper operation of the road and conduct of its business, as discussed infra § 122, it cannot construct lateral or branch roads without legislative authority.[89] Such authority is

74. Ark.—Mississippi, etc., R. Co v. Cross, 20 Ark. 443.
51 C.J. p. 475 note 6.
Rights and liabilities of stockholders see supra § 14.

75. S.D.—Chicago, etc., R. Co v. Dougherty, 163 N.W. 715, 39 S.D. 147.
51 C.J. p. 475 note 8.

76. Tex.—Kansas City, etc., R. Co v. State, Civ.App., 155 S.W. 561, modified on other grounds 163 S.W. 582, 106 Tex. 249, error dismissed 36 S.Ct. 553, 241 U.S. 650, 60 L.Ed. 1221.

77. Wash.—Hunt v. Upton, 87 P. 56, 44 Wash. 124.

78. Tex.—Kansas City, etc., R. Co. v. State, Civ.App., 155 S.W. 561, modified on other grounds 163 S.W. 582, 106 Tex. 249, error dismissed 36 S.Ct. 553, 241 U.S. 650, 60 L.Ed. 1221.
51 C.J. p. 475 note 13.

79. Ill.—East St. Louis Connecting R. Co. v. East St. Louis Union R. Co., 108 Ill. 265.
Parallelism of roads as affecting right of companies to:
Consolidate see infra § 235.
Contract for control, operation, or use see infra § 227.
Make or take lease see infra § 212.
Sell or purchase road see infra § 201.

80. Ind.—Lafayette Plankroad Co. v. New Albany, etc., R. Co., 13 Ind. 90, 74 Am.D. 246.
51 C.J. p. 475 note 16.

81. Ill.—East St. Louis Connecting R. Co. v. East St. Louis Union R. Co., 108 Ill. 265.

82. Pa.—Catawissa R. Co. v. Philadelphia, etc., R. Co., 3 Pa.Dist. 111, 14 Pa.Co. 280.
Tenn.—Memphis, etc., R. Co. v. Union R. Co., 95 S.W. 1019, 116 Tenn. 500.

83. Mich.—Michigan Cent. R. Co. v. Michigan Southern R. Co., 4 Mich. 361.
51 C.J. p. 475 note 19.

84. Special statute is void where the subject is dealt with by an existing general law.—Morrison v. Cook, 91 S.E. 671, 146 Ga. 570.—51 C.J. p. 475 note 20 [a].

85. Ga.—Georgia Northern R. Co. v. Tifton, etc., R. Co., 35 S.E. 104, 109 Ga. 762.

86. Va.—Wheelwright v. Commonwealth, 49 S.E. 647, 103 Va. 512.
51 C.J. p. 475 note 22.

87. Mich.—Michigan Cent. R. Co. v. Michigan Southern R. Co., 4 Mich. 361.

88. Mass.—Boston, etc., R. Corp. v. Salem, 2 Gray 1.

89. Ill.—Lake Shore, etc., R. Co. v.

frequently granted by charter, general statutory provisions, or city ordinances,[90] which often contain conditions precedent to the exercise of the right which must be complied with,[91] and any limitation as to the length, character, or location of such roads must be observed.[92] Except in so far as expressly restricted, the railroad company has a broad discretion in determining not only the necessity for the proposed branch, but also such matters as its location, length, direction, and termini,[93] which, unless exercised in bad faith, will not be interfered with by the courts[94] or restrained at the instance of persons whose lands may be taken or affected thereby;[95] but, if a railroad has no right to construct a branch road, its construction may be enjoined at the suit of a person who will be injured thereby.[96] So, where a railroad company is authorized to construct lateral or branch roads, it is, except in so far as restricted by statute, invested with the same power and authority as it possesses and can exercise in the construction of its main line,[97] including the power to acquire and condemn lands,[98] and subject to the same rules with respect to the occupation or use of streets and highways.[99]

Connection with main line. A lateral or branch line should be connected with, and lead from some point on, a main line.[1] It may proceed from some point between the termini[2] or it may be constructed from one of the terminal points of the main line.

A company authorized to construct a main line and certain branches cannot abandon the construction of the main line and retain the right to construct the branches.[4]

Length or direction compared with that of main line. A lateral or branch road may be constructed in the same general direction as the main line.[5] Also, in the absence of any provision to the contrary, a branch road which is of greater length than the main line may be constructed,[6] or a branch may be constructed from a branch, or two branches have a common stem leading to the main line, provided neither exceeds the length prescribed by statute from such line.[7]

§ 52. —— Spurs, Switches, Turnouts, and Sidings

Switches, sidings, and spur tracks may be constructed in pursuance of statutory authority.

Under some railroad statutes private owners of lands, mills, quarries, mines, or limekilns, in the vicinity of any railroad, canal, or slack-water navigation are authorized to construct,[8] or have constructed,[9] lateral or spur railroads, and to acquire

Baltimore, etc., R. Co., 37 N.E. 91, 149 Ill. 272.
51 C.J. p. 476 note 26.

90. Md.—Levin v. Baltimore & O. R. Co., 17 A.2d 101, 179 Md. 125.
Pa.—C. O. Struse & Sons Co. v. Reading Co., 153 A. 350, 302 Pa. 211.
51 C.J. p. 476 note 27.

Statute not affected or repealed by later statute.
A statute authorizing railroad companies to extend their lines on certain conditions does not repeal or affect a previous statute authorizing the construction of branch roads.—Appeal of Volmer, 8 A. 223, 115 Pa. 166.

91. U.S.—Memphis v. St. Louis, etc., R. Co., Tenn., 183 F. 529, 106 C.C.A. 75.
51 C.J. p. 476 note 28.

92. Cal.—Boca, etc., R. Co. v. Sierra Valleys R. Co., 84 P. 298, 2 Cal. App. 546.
51 C.J. p. 477 note 29.

Company authorized to construct only particular branch cannot construct any other.
Cal.—Boca, etc., R. Co. v. Sierra Valleys R. Co., supra.
Wash.—Biles v. Tacoma, etc., R. Co., 32 P. 211, 5 Wash. 509.

93. Ill.—Newhall v. Galena, etc., R. Co., 14 Ill. 273.
51 C.J. p. 477 note 30.

94. Me.—Ulmer v. Lime Rock R. Co., 57 A. 1001, 98 Me. 579, 66 L.R.A. 387.
51 C.J. p. 477 note 31.

Location held determinable by corporation, not by court.
Pa.—C. O. Struse & Sons Co. v. Reading Co., 153 A. 350, 302 Pa. 211.

95. Pa.—Rudolph v. Pennsylvania, etc., R. Co., 31 A. 131, 166 Pa. 430.
51 C.J. p. 477 note 32.

96. N.Y.—Goelet v. Metropolitan Transit Co., 1 N.Y.S. 74, 48 Hun 520.
51 C.J. p. 477 note 33.

97. Pa.—Pittsburgh v. Pennsylvania R. Co., 48 Pa. 355.

98. Ill.—Newhall v. Galena, etc., R. Co., 14 Ill. 273.
Pa.—French v. Philadelphia, etc., R. Co., 13 Phila. 187.
Condemnation of property for lateral or branch roads see Eminent Domain § 39.

99. Pa.—Appeal of McAboy, 107 Pa. 548.

1. Wash.—Biles v. Tacoma, etc., R. Co., 32 P. 211, 5 Wash. 509.

Statute held not to require physical connection enabling cars to be run directly from a lateral railroad directly to and on the rails of the main railroad; but where the roads are of different gauge it is necessary to provide reasonable facilities for handling traffic by transferring the contents of the cars on one railroad into cars on the other railroad.
—In re Gladys Coal Mining Co., 91 Pa.Super. 57.

2. Va.—Baltimore, etc., R. Co. v. Wheeling, 13 Gratt. 40, 54 Va. 40.
51 C.J. p. 477 note 39.

3. N.Y.—New York Cent., etc., R. Co. v. Untermyer, 117 N.Y.S. 443, 133 App.Div. 146, affirmed 89 N.E. 1106, 196 N.Y. 531.
51 C.J. p. 477 note 40.

4. N.Y.—Goelet v. Metropolitan Transit Co., 1 N.Y.S. 74, 48 Hun 520.

5. Pa.—Appeal of McAboy, 107 Pa. 548.
51 C.J. p. 477 note 41.

6. Pa.—Appeal of Volmer, 8 A. 223, 115 Pa. 166.

7. W.Va.—Wheeling Bridge, etc., Co. v. Camden Consolidated Oil Co., 13 S.E. 369, 35 W.Va. 205.

8. Ind.—Westport Stone Co. v. Thomas, 94 N.E. 406, 175 Ind. 319, 35 L.R.A.,N.S., 646.
51 C.J. p. 477 note 46.

9. Wis.—Manasha Woodenware Co. v. State R. Commission, 166 N.W. 435, 167 Wis. 19.
51 C.J. p. 478 note 47.

wharves and landings where such roads connect with a canal or other navigation;[10] but such roads are authorized only in connection with a public improvement, railroad, or highway of some description,[11] and any limitation as to their length, character, or location must be observed.[12] Where railroads are required to construct sidings and spur tracks at stations, they must do so only where it is necessary in order to furnish sufficient accommodations for the transportation of passengers and property.[13] Inasmuch as commissioners may not be appointed to pass on the propriety of constructing an industrial switch on a route not described in the petition therefor[14] or to substitute a new route for that described,[15] a motion for leave to construct such a switch may be denied where the route described is conceded faulty in that it includes private property which cannot be acquired.[16]

§ 53. —— Extensions

The right of a railroad company to extend its road depends on statutory authorization and the observance of requirements or conditions imposed by statute. An extension must be from one of the original termini and be substantially in the same general direction as the road already constructed.

A railroad company cannot, without legislative authority, extend its road beyond the termini originally authorized,[17] but the legislature may authorize it to do so[18] and to construct an extension longer than the original line.[19] Ordinarily whether a railroad company having the requisite authority will extend its line to points not before reached is for it to determine;[20] but if at any time it fails to make extensions which its duty as a common carrier bound to keep up with public demands requires the remedy is through appropriate proceedings instituted by the commonwealth.[21] Where the right to extend is given by the statute under which the company is incorporated, no specific amendment of the charter is necessary to authorize an extension.[22] A power to extend a road beyond its original terminus includes the power to acquire the use of the road of another company beyond such point,[23] but a statute authorizing an alteration in the route or termini for the purpose of improving the line does not authorize an extension of the line beyond one of the original termini.[24]

Any requirements or conditions imposed by the statute authorizing the extension must be complied with.[25] Where a railroad company is authorized to extend its road, the extension must be from a point on the road already built and not a separate and independent road,[26] and the extension must be from one of the original termini and not a departure from an intermediate point,[27] and it must be substantially in the same general direction as the road already constructed.[28] So also, where a railroad company is authorized to extend its road to a specified point, the statute will be construed as contemplating the most direct eligible route considered with reference to facility of construction.[29]

§ 54. —— Federal Control

Under a federal statute, a railroad company engaged in interstate commerce may not extend its line of railroad unless and until it obtains from the Interstate Commerce Commission a certificate of public convenience and necessity; and where it undertakes to do so, the construction of the extension may be enjoined at the suit of a party in interest.

10. Pa.—Hays v. Briggs, 74 Pa. 373. 51 C.J. p. 478 note 48.

11. Pa.—Appeal of Waddell, 84 Pa. 90—Keeling v. Griffin, 56 Pa. 305.

12. D.C.—Oppenheimer v. Philadelphia, etc., R. Co., 39 App. D.C. 253. 51 C.J. p. 478 note 50.

13. Tex.—State R. Commission v. Pecos, etc., R. Co., Civ. App., 212 S.W. 535.

14. N.Y.—George Sweet Mfg. Co. v. Van der Hoof, 121 N.Y.S. 842, 137 App. Div. 492.

15. N.Y.—George Sweet Mfg. Co. v. Van der Hoof, supra.

16. N.Y.—George Sweet Mfg. Co. v. Van der Hoof, supra.

17. N.Y.—Greenwich, etc., R. Co. v. Greenwich, etc., Electric R. Co., 65 N.E. 278, 172 N.Y. 462.

18. Ind.—Newcastle, etc., R. Co. v. Peru, etc., R. Co., 3 Ind. 464. 51 C.J. p. 478 note 57.

The term "extend," as used in a statute giving a railroad company which had been authorized to build a single or double track on certain streets in a city the right to extend its course, means to continue or prolong its course, and not to build independent branch roads.—People v. New York, etc., R. Co., 45 Barb., N.Y., 73, 74, 26 How. Pr. 43.—25 C.J. p. 225 note 85 [a].

19. N.H.—Laconia St. R. Co.'s Pet., 52 A. 458, 71 N.H. 355. 51 C.J. p. 478 note 58.

20. Ohio.—Morgan Run R. Co. v. State Public Utilities Commission, 120 N.E. 295, 98 Ohio St. 218. 51 C.J. p. 478 note 59.

21. Pa.—Pioneer Coal Co. v. Cherrytree, etc., R. Co., 116 A. 45, 272 Pa. 43.

22. Fla.—Florida Cent., etc., R. Co. v. Bell, 31 So. 259, 43 Fla. 359.

23. U.S.—Union Pac. R. Co. v. Mason City, etc., R. Co., Neb., 128 F. 230, 64 C.C.A. 348, affirmed 26 S. Ct. 19, 199 U.S. 160, 50 L.Ed. 134.

24. N.Y.—Greenwich, etc., R. Co. v. Greenwich, etc., Electric R. Co., 65 N.E. 278, 172 N.Y. 462.

25. N.Y.—Brooklyn, etc., R. Co. v. Long Island R. Co., 76 N.Y.S. 777, 72 App. Div. 496, appeal dismissed 70 N.E. 1096, 178 N.Y. 593. 51 C.J. p. 479 note 65.

Necessity of obtaining certificate of public convenience and necessity from interstate commerce commission see infra § 54.

26. Ga.—Savannah, etc., R. Co. v. Shiels, 33 Ga. 601. 51 C.J. p. 479 note 66.

27. Ga.—Leverett v. Middle Georgia, etc., R. Co., 24 S.E. 154, 96 Ga. 385. 51 C.J. p. 479 note 67.

28. N.Y.—People v. New York, etc., R. Co., 45 Barb. 73, 26 How. Pr. 44. 51 C.J. p. 479 note 68.

29. Ind.—Newcastle, etc., R. Co. v. Peru, etc., R. Co., 3 Ind. 464. 51 C.J. p. 479 note 69.

Obtaining a certificate of public convenience and necessity from the Interstate Commerce Commission is a prerequisite to the construction of new trackage where the proposed construction is within the provisions of the federal statute, 49 U.S.C.A. § 1 par. (18), which prohibit a railroad company from undertaking an extension of its line of railroad unless and until it obtains such certificate;[30] but in a particular case the proposed trackage may not be an "extension" within the meaning of the statute,[31] or the statute may be otherwise inapplicable,[32] or the facts may be within an express statutory exemption, 49 U.S.C.A. § 1 par (22), of the construction of spur, industrial, team, or switching tracks, or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam railroad system.[33] In determining whether a proposed construction constitutes an extension of a line of railroad or a mere spur, industrial, switching, or side tracks, resort must be had not only to the words and context, but also to the policy disclosed by the statute.[34]

Under the federal statute, 49 U.S.C.A. § 1, par (20), the construction of an extension without a certificate having been obtained may be enjoined at the suit of a party in interest;[35] but in order to be a party in interest an individual must possess something more than a common concern for obedience to law, and it is necessary that he have some special or peculiar interest which may be directly and materially affected.[36] Another railroad com-

30. U.S.—Missouri Pac. R. Co. v. St. Louis Southwestern Ry. Co., C.C.A.Ark., 73 F.2d 21—Southern Pac. Co. v. Western Pac. California R. Co., C.C.A.Cal., 61 F.2d 732—Interstate Commerce Commission v. Piedmont & N. Ry. Co., D.C.S.C., 51 F.2d 766, affirmed Piedmont & N. Ry. Co. v. Interstate Commerce Commission, 52 S.Ct. 541, 286 U.S. 299, 76 L.Ed. 1115—51 C.J. p. 479 note 72

Certificate for construction of new line see supra § 6.

Power of commission to authorize or require extension of line see Commerce § 142 b.

Statute held not unconstitutional

U.S.—Interstate Commerce Commission v. Piedmont & N. Ry. Co., D.C.S.C., 51 F.2d 766, affirmed Piedmont & N. Ry. Co. v. Interstate Commerce Commission, 52 S.Ct. 541, 286 U.S. 299, 76 L.Ed. 1115.

Parties

(1) Railroad threatened with competition through proposed extension of another road has interest in application for extension entitling it to intervene—Pennsylvania R. Co. v. U. S., D.C.Pa., 40 F.2d 921.

(2) Other decisions with respect to parties see 51 C.J. p. 479 note 72 [i].

Evidence

(1) Exercise of discretion by Interstate Commerce Commission in issuing certificate authorizing extension of railroad lines will not be set aside if supported by evidence—Pennsylvania R. Co. v. U. S., D.C. Pa., 40 F.2d 921.

(2) Evidence held sufficient to support finding of commission of public convenience and necessity for railroad's construction of extension—Pennsylvania R. Co. v. U. S., supra—51 C.J. p. 479 note 72 [k] (3).

(3) Whatever regard commission may have given former application as related matter in determining convenience and necessity of railroad extension, distinguished from evidential matter, in determining later application, cannot invalidate last order—Pennsylvania R. Co. v. U. S., supra.

(4) Other decisions with respect to evidence see 51 C.J. p. 479 note 72 [k]

31. U.S.—Missouri, K. & T. R. Co. of Texas v. Texas & N. O. R. Co., C.A.Tex., 172 F.2d 768

Ark.—St. Louis Southwestern Ry. Co. v. Missouri Pac. Ry. Co., 49 S.W.2d 1054, 185 Ark. 824, affirmed 53 S.Ct. 516, 289 U.S. 76, 77 L.Ed. 1042.

51 C.J. p. 479 note 72 [b], [n]

32. **Construction begun in good faith prior to effective date of statute**

Fla.—Seaboard Air Line R. Co. v. Tampa Southern R. Co., 121 So. 477, 97 Fla. 340.

51 C.J. p. 479 note 72 [l].

Carrier engaged in intra-state commerce

The statutory provision under consideration is restricted in its application to carriers engaged in transporting persons or property in interstate and foreign commerce and is intended to affect intra-state commerce only as that may be incidental to the effective regulation of interstate commerce—Claiborne-Annapolis Ferry Co. v. U. S., App. D.C., 52 S.Ct. 440, 285 U.S. 382, 76 L.Ed. 808.

33. Ark.—St. Louis Southewestern Ry. Co. v. Missouri Pac. Ry. Co., 49 S.W.2d 1054, 185 Ark. 824, affirmed 53 S.Ct. 516, 289 U.S. 76, 77 L.Ed. 1042

51 C.J. p. 480 note 73.

34. U.S.—Missouri Pac. R. Co. v. Chicago, R. I. & P. Ry. Co., C.C.A. Ark., 41 F.2d 188, certiorari denied 51 S.Ct. 74, 282 U.S. 866, 75 L.Ed 765.

51 C.J. p. 480 note 73 [c].

Purpose of statute

(1) Purpose of statute is to empower commission, in proceedings instituted by a carrier proposing to engage in transportation over or by means of extended line, authoritatively to decide whether it would be in the public interest.—Powell v. U.S., Ga., 57 S.Ct. 470, 300 U.S. 276, 81 L.Ed. 643.

(2) Other purposes see 51 C.J. p. 479 note 72 [a].

35. U.S.—Western Pacific California R. Co. v. Southern Pacific Co., Cal., 52 S.Ct. 56, 284 U.S. 47, 76 L.Ed. 160, conformed to C.C.A., Southern Pac. Co. v. Western Pac. California R. Co., 161 F.2d 732—L. Singer & Sons v. Union Pac. R. Co., C.C.A.Mo., 109 F.2d 493, affirmed 61 S.Ct. 254, 311 U.S. 295, 85 L.Ed. 198.

51 C.J. p. 479 note 72 [h], [i] (2).

Laches by a company contesting construction of an extension was not shown where it protested immediately on learning that the line was planned.—Texas, etc., R. Co. v. Gulf, etc., R. Co., Tex., 46 S.Ct. 263, 270 U.S. 266, 70 L.Ed. 578.

Two companies covered by single order

The court cannot separate and divide a line authorized by the interstate commerce commission and so, where a single order authorized two railroads to build separate sections of lines found necessary, the order cannot be enjoined as to one railroad company—Chesapeake, etc., R. Co. v. U. S., D.C.W.Va., 35 F.2d 769, affirmed 51 S.Ct. 337, 283 U.S. 35, 75 L.Ed. 824.

36. U.S.—L. Singer & Sons v. Union Pac. R. Co., Mo., 61 S.Ct. 254, 311 U.S. 295, 85 L.Ed. 198.

Right to sue is individual so that plaintiffs are not helped by uniting.—L. Singer & Sons v. Union Pac. R. Co., supra.

pany which will be affected as a competitor by the extension may sue for an injunction;[37] but it has been held that the interest of a railroad company threatened with competition does not alone authorize it to maintain an independent suit to set aside an order of the commission authorizing an extension.[38]

§ 55. Termini

A railroad company has a reasonable discretion in locating a terminus not definitely fixed by the legislature, as where the terminus is designated by terms of indefinite description, such as "at," "near," and the like; and where it is authorized to construct its road from or to a certain town or city, it is not obliged to begin or stop construction at the corporate limits, but may, as far as the state is concerned, fix a terminus at any point within the corporate limits.

In the absence of any constitutional or statutory restrictions a railroad company may be authorized to construct a railroad having both of its termini in the same town, city, or village.[39] If the statute or charter under which a railroad is constructed specifies its termini, such provision must be complied with;[40] but the terminus need not be located at exactly the place specified by the charter or articles of incorporation, as long as there is no substantial variance therefrom.[41]

Where the legislature does not undertake definitely to fix the termini or one of the termini of a railroad, a reasonable discretion should be allowed the company as to the location,[42] and such discretion, unless clearly abused, will not be interfered with.[43] This rule applies where the terminus is designated by terms of indefinite description such as "at," "near," and the like,[44] or as being on a state or county line without fixing the particular point.[45] Where a railroad company is authorized to construct a road to one or the other of two cities named, it may select either of such places as its terminus.[46]

Construction into cities, towns, and villages. An authority to construct a railroad "to" or "from" a certain city, town, or village is not restricted to the corporate limits;[47] but authorizes the company to construct its road from a point within,[48] or to a point within,[49] the place named as a terminus, particularly where the company is authorized by its charter to acquire property within such place.[50] A railroad company may also construct its road into a certain place where the charter designates its terminus as being "at,"[51] or "at or near,"[52] such place; and where a statute authorizes the construction of a railroad "between" two places, such places are not excluded and the road may be constructed into them.[53] In such case, in the absence of any restriction, express or implied, the company may, as far as the state is concerned, fix its terminus at any point within such place.[54]

Under a charter authorizing the construction of a railroad "to" or "from" a certain town or city, the company is not obliged to construct its road into such place but may stop at the corporate limits,[55] or, if it goes within the corporate limits, is not obliged to establish its terminal at any particular point within such limits;[56] but when authorized to construct its road from a certain place it cannot begin at a point neither on nor within, but entirely outside of, the corporate limits.[57]

37. U.S.—Detroit, etc., R. Co. v. Boyne City, etc., R. Co., D.C.Mich., 286 F. 540.

Company constructing railroad in good faith

U.S.—Western Pacific California R. Co. v. Southern Pacific Co., Cal., 52 S.Ct. 56, 284 U.S. 47, 76 L.Ed. 160, conformed to Southern Pac. Co. v. Western Pac. California R. Co., C.C.A., 61 F.2d 732.

38. U.S.—Pennsylvania R. Co. v. U.S., D.C.Pa., 40 F.2d 921.

39. Tenn.—Collier v. Union R. Co., 83 S.W. 155, 113 Tenn. 96.
51 C.J. p. 480 note 74.

40. Pa.—Commonwealth v. Franklin Canal Co., 21 Pa. 117.
51 C.J. p. 480 note 75.

41. N.Y.—People v. Public Service Commission, 156 N.Y.S. 1023, 171 App.Div. 366, reversed on other grounds 125 N.E. 438, 227 N.Y. 248.

42. Wis.—Northern Pac. R. Co. v. Doherty, 75 N.W. 1079, 100 Wis. 39.
51 C.J. p. 480 note 77.

43. Wis.—Northern Pac. R. Co. v. Doherty, supra.
51 C.J. p. 480 note 78.

44. Wis.—Northern Pac. R. Co. v. Doherty, 75 N.W. 1079, 100 Wis. 39, affirmed 20 S.Ct. 677, 177 U.S. 421, 44 L.Ed. 830.
51 C.J. p. 480 note 79.

45. Pa.—Commonwealth v. Cross Cut R. Co., 53 Pa. 62.
51 C.J. p. 481 note 80.

46. Va.—Sherwood v. Atlantic, etc., R. Co., 26 S.E. 943, 94 Va. 291.

47. Ala.—Georgia Cent. R. Co. v. Union Springs, etc., R. Co., 39 So. 473, 144 Ala. 639, 2 L.R.A.,N.S., 144.
51 C.J. p. 481 note 82.

48. Ill.—McCartney v. Chicago, etc., R. Co., 112 Ill. 611.
51 C.J. p. 481 note 83.

49. Ala.—Georgia Cent. R. Co. v. Union Springs, etc., R. Co., 39 So. 473, 144 Ala. 639, 2 L.R.A.,N.S., 144.
51 C.J. p. 481 note 84.

50. Ill.—Moses v. Pittsburgh, etc., R. Co., 21 Ill. 516.

51. N.Y.—Mason v. Brooklyn City, etc., R. Co., 35 Barb. 373.

52. N.Y.—Mohawk Bridge Co. v. Utica, etc., R. Co., 6 Paige 554.

53. N.J.—Morris, etc., R. Co. v. New Jersey Cent. R. Co., 31 N.J.Law 205.

54. U.S.—Colorado Eastern R. Co. v. Union Pac. R. Co., C.C.Colo., 41 F. 293.
51 C.J. p. 481 note 89.

55. Ill.—People v. Louisville, etc., R. Co., 5 N.E. 379.

56. Ill.—People v. Louisville, etc., R. Co., supra.
51 C.J. p. 482 note 91.

57. Pa.—Commonwealth v. Erie, etc., R. Co., 27 Pa. 339, 67 Am.D. 471.

§ 56. Connections

a. With other railroads
b. With private tracks or switches
c. Remedies and proceedings

a. With Other Railroads

Subject to the exclusive jurisdiction of the Interstate Commerce Commission over physical connections between railroads engaged in interstate commerce, a railroad may be empowered, under a state constitution or statute, to connect with another intersecting or contiguous railroad The right to a connection between railroads is, however, not absolute, but is dependent on the proposed connection, being practicable and a public necessity.

At common law connecting carriers are not bound to make track connections.[58] As a general rule a state possesses the power to compel connections to be made between different railroads;[59] but this power resides in the federal government in so far as it affects interstate commerce.[60] Subject to the jurisdiction of the Interstate Commerce Commission over physical connections between railroads engaged in interstate commerce, discussed in Commerce § 142 b, which is exclusive of that of the states, discussed in Commerce § 78 c (2), railroads which intersect or are contiguous may be empowered, under state constitutions or statutes, to connect with others and the latter required to permit it,[61] or they may be required to establish connections,[62] or boards or commissions may be empowered to require connections in proper cases.[63] The statutes frequently provide for a determination by commissioners of matters with respect to such connections as to which the companies are unable to agree.[64] A constitutional or statutory provision merely authorizing one railroad to connect with other roads is not mandatory but permissive,[65] and the authority conferred thereby need not, in the absence of express limitation, be exercised within any particular time,[66] and a connection once made under such authority may, in the absence of agreement to the contrary, be discontinued without the consent of the other company.[67] So also, a statutory right on the part of one company to connect with the road of another will not prevent the latter from changing the gauge of its road, at least where the power to do so is granted and accepted before the first company has elected to make the connection.[68]

The right to a connection between railroads is not an absolute right;[69] it cannot be compelled regardless of its necessity,[70] but is dependent on whether the proposed connection is practicable[71] and a public necessity.[72] An order of a commission requiring a connection which is unreasonable will not be enforced.[73] In determining the propriety of a connection all the facts must be considered.[74] Thus the cost of making the connection,[75] the income to be derived from its operation,[76] and the possibility of loss therefrom[77] are important, but not the only criteria to be considered,[78] since the public interest and the fact that the connecting track will become part of the regular equipment, the cost of which will be considered in fixing rates, must also be considered.[79] It is no objection to an order of a railroad commission for a connection that such con-

58. U S.—The No, 37, 53 S.Ct. 328, 288 U S. 239, 77 L.Ed 721

59. U S —Seaboard Air Line R Co v. Georgia R Commission, Ga, 36 S Ct. 260, 240 U S 324, 60 L Ed 669.
51 C J. p 482 note 94.

60. N.Y.—People v. State Public Service Commission, 135 N E. 195, 233 N Y. 113, 22 A L R 1073.
51 C J p 482 note 95

61. Pa.—Graff v. Evergreen R Co, 2 Pa Co 502.
51 C.J. p 482 note 97.

62. Fla —Atlantic, etc., R. Co. v. State, 29 So 319, 42 Fla. 358, 89 Am S.R 233.
51 C.J. p 482 note 98

63. S C—Shealy v. Seaboard Air Line R. Co, 126 S.E 622, 131 S.C. 144.
51 C J. p 483 note 99.

64. N.C.—Richmond, etc., R. Co. v. Durham, etc, R., Co, 10 S E. 659, 104 N.C. 658
51 C.J. p 483 note 1.

65. Iowa.—Richmond v Dubuque, etc, R. Co, 33 Iowa 422.
Me —Androscoggin, etc,, R. Co. v. Androscoggin, etc, R. Co, 52 Me 417

66. Mo —Atlantic, etc, R Co v St Louis, 66 Mo 228
51 C J. p 483 note 3.

67. Me —Androscoggin, etc., R Co v Androscoggin, etc, R Co, 52 Me 417
Mass —Boston, etc., R Corp v. Boston, etc, R Co., 5 Cush. 375.

68. Me —Androscoggin, etc., R Co. v Androscoggin, etc., R. Co, 52 Me. 417.

69. Ohio —Akron, etc., R Co v State Public Utilities Commission, 117 N E. 314, 96 Ohio St. 359

70. Iowa —Smith v. Chicago, etc, R Co, 53 N.W. 128, 86 Iowa 202
51 C J. p 483 note 7.

71. Ohio.—Akron, etc., R. Co. v. State Public Utilities Commission, 117 N E. 314, 96 Ohio St. 359.
51 C J p 483 note 8

72. Ohio —Akron, etc, R Co v. State Public Utilities Commission, supra.
51 C.J. p 483 note 9

73. Miss —State R. Commission v Yazoo, etc., R. Co., 56 So. 668, 100 Miss 595.
51 C J. p 484 note 10.

74. Ohio —Akron, etc, R Co v. State Public Utilities Commission, 117 N.E 314, 96 Ohio St 359.
51 C J p 484 note 11

75. U S —State of Washington ex rel Oregon R & Nav. Co. v. Fairchild, Wash, 32 S.Ct. 535, 224 U.S 510, 56 L Ed. 863.
51 C J p 484 note 12.

76. S D.—Mitchell Commercial Club v Chicago, etc., R. Co., 170 N.W. 149, 41 S.D. 314.

77. Ohio —Pennsylvania Co. v. State Public Service Commission, 14 Ohio N.P ,N S, 262.

78. Ohio —Pennsylvania Co. v. State Public Service Commission, supra.
S D —Mitchell Commercial Club v. Chicago, etc., R Co., 170 N W. 149, 41 S D. 314.

79. S D.—Mitchell Commercial Club v. Chicago, etc., R. Co, supra

nection will greatly increase the danger of handling the traffic of one of the railroads,[80] or that the connection will cross at grade a siding and a yard track,[81] or that the objecting company will be deprived of a small amount of trackage,[82] or that it owns most of the land to be occupied by the connecting track.[83] A connection will not be ordered for the purpose of aiding or assisting one carrier as against another in its competition for business,[84] nor will it be denied because it will afford facilities which will be of advantage to one of the companies and detrimental to the other.[85] Such matters are foreign to the considerations which control the commission in making its decision.[86]

Place of connection. Where a railroad company is authorized to construct its road so as to connect with another railroad, if the statute or charter does not definitely specify the point of connection, a reasonable discretion should be allowed the company as to its selection,[87] as where the point of connection is indefinitely designated as "at" or "at or near" a certain place,[88] and such discretion, unless manifestly abused, will not be interfered with.[89] Under a general authority to connect with another railroad the connection need not be made in a city, town, or village;[90] but, on the contrary, an authority to connect with another railroad does not, in the absence of express provision, authorize a railroad company to construct its road through an incorporated city without the consent of the municipal authorities for the purpose of forming such a connection,[91] and a statute merely authorizing a municipality to permit connections between railroad companies within its limits only invests it with a discretionary power and does not require that it should do so.[92] Where a railroad company is authorized to extend its road to any point in a certain county and to connect with any other railroad, if such county is on the border line of the state the company may connect with a road of another state at the state line.[93]

Under a provision giving a state commission the power to designate the place at which connections may be located, if the petition of an applicant for a connection at a particular point shows that the hearing therefor is not to be restricted to one point, the commission may locate the connection at a point other than that mentioned.[94]

b. With Private Tracks or Switches

The right, if any, to connect private tracks or switches with a railroad is dependent on constitutional, statutory, or contract provisions.

The state has the power to require a railroad to furnish or allow connections with the private tracks or switches of the owners of lands, mills, warehouses, mines, or manufacturing plants;[95] and under some constitutional and statutory provisions the owners of lands, mills, warehouses, mines, and the like have an absolute right to connect private tracks or switches with railroads in their vicinity,[96] which right cannot be defeated by any contract between the railroad company and a third person.[97] Such statutes may provide for a determination by boards or commissions of matters as to which the parties are unable to agree.[98] The right to a switch connection is incidental to the ownership of mills and manufactories and the shipper's right to construct a siding to the railroad[99] or his location adjoining the railroad.[1] A shipper already having connection with one road and not situated on a second road cannot compel the latter to permit a connection,[2]

80. Ind.—Pittsburgh, etc., R. Co. v. State R. Commission, 86 N.E. 328, 171 Ind. 189
51 C.J. p. 484 note 17.

81. Pa.—In re Western Allegheny R. Co., 82 A. 687, 233 Pa. 438

82. Ind.—Pittsburgh, etc., R. Co. v. State R. Commission, 86 N.E. 328, 171 Ind. 189.

83. Ind.—Pittsburgh, etc., R. Co. v. State R. Commission, supra.
51 C.J. p. 484 note 20

84. Ind.—Chicago, etc., R. Co. v. Public Service Commission, 121 N.E. 276, 123 N.E. 465, 188 Ind. 334.

85. Ind.—Chicago, etc., R. Co. v. Public Service Commission, supra

86. Ind.—Chicago, etc., R. Co. v. Public Service Commission, supra.

87. N.C.—Purifoy v. Richmond, etc., R. Co., 12 S.E. 741, 108 N.C. 100.
Pa.—Appeal of Parke, 64 Pa. 137.

88. Pa.—Appeal of Parke, supra.
51 C.J. p. 484 note 28

89. Ga.—Georgia R., etc., Co. v. Maddox, 42 S.E. 315, 116 Ga. 64
Pa.—Appeal of Parke, 64 Pa. 137.

90. N.J.—Long Branch Comrs. v. West End R. Co., 29 N.J.Eq. 566.

91. Ga.—Augusta v. Port Royal, etc., R. Co., 74 Ga. 658.

92. Ga.—Augusta v. Port Royal, etc., R. Co., supra.

93. Pa.—Commonwealth v. Pittsburg, etc., R. Co., 58 Pa. 26—Commonwealth v. Cross Cut R. Co., 58 Pa. 62.

94. Kan.—State v. Chicago, etc., R. Co., 118 P. 872, 85 Kan. 649

95. Mich.—Detroit v. Michigan Cent. R. Co., 120 N.W. 592, 156 Mich. 121
N.Y.—People v. Public Service Commission, 156 N.Y.S. 198, 170 App. Div. 429.

96. Pa.—Reeser v. Philadelphia, etc., R. Co., 64 A. 376, 215 Pa. 136
51 C.J. p. 485 note 40.

97. Pa.—Reeser v. Philadelphia, etc., R. Co., supra

98. N.Y.—People v. Public Service Commission, 156 N.Y.S. 198, 170 App. Div. 429
51 C.J. p. 485 note 42.

99. Pa.—Moser v. Philadelphia, etc., R. Co., 82 A. 362, 233 Pa. 259, 40 L.R.A.,N.S., 519.
51 C.J. p. 1005 note 52.

1. Ill.—State Public Utilities Commission v. Lake Erie, etc., R. Co., 115 N.E. 519, 277 Ill. 574, 582
51 C.J. p. 1005 note 53.

2. Ill.—Cleveland, etc., R. Co. v. Commerce Commission, 146 N.E. 606, 315 Ill. 461, 54 A.L.R. 45.
51 C.J. p. 1004 note 32.

especially where this would amount to an extension of the second road by connection with the first.[3]

In the absence of statute or agreement, the owners of adjacent property have no right to connect private tracks or switches with a railroad without the consent of the railroad company.[4] Where the right to such a connection is secured by contract, the rights of the parties depend on a proper construction of the agreement;[5] and the agreement must be deemed to have been made subject to any existing statutes under which the company may be required to change or elevate the grades of its tracks in the interest of public safety or to abolish grade crossings.[6] A personal agreement between a railroad company and a landowner, permitting such a connection, does not pass to a lessee of the property.[7]

Reimbursement of another shipper. An applicant for a switch connection with a siding cannot be required to reimburse another shipper for expenses voluntarily incurred in previously changing the location of the siding.[8]

c. Remedies and Proceedings

A statutory right to form a connection with a railroad may be enforced by a mandatory injunction. The power of a state commission to order the making of a connection may be exercised only in the manner prescribed by statute.

A statutory right to form a connection with a railroad may be enforced in a suit in equity[9] by a mandatory injunction;[10] and, where railroad companies are authorized to make connections for an interchange of traffic, they may acquire land by purchase or condemnation for the purpose of effecting such connections[11]

The power of a state commission to order the making of a connection may be exercised only in the manner prescribed by statute,[12] and an order to establish a connection which does not comply with the provisions of the statute is void[13] Before a board or commission orders a connection to be made between railroads a hearing must be had[14] and such facts as are necessary to justify the connection must be found,[15] and the burden of proof rests on applicant for the connection.[16] The finding of the commission is deemed prima facie correct,[17] and all presumptions are in favor of its action[18] In a suit to enjoin a railroad commission from requiring a railroad to make a connection with another line, a temporary injunction will be issued if the injury to plaintiff, in case it should succeed, cannot be compensated for, while the other road can be protected by a bond.[19]

Parties. Under a statute authorizing a shipper to complain to the commission if a railroad fails to install a connection on the application either of any lateral branch railroad or of any shipper tendering interstate traffic, a complaint by a lateral branch line railroad is not authorized[20]

Exceptions in proceedings to determine the manner of a proposed connection between two railroads, not based on any facts in the case, are properly dismissed[21]

§ 57. Stations

a. Stations of one railroad
b. Union stations

a. Stations of One Railroad

(1) In general
(2) Powers and proceedings of commission

3. Ill—Cleveland, etc, R Co. v Commerce Commission, supra.
51 C J. p 1004 note 33.

4. Ill—People v. Chicago, etc, R Co, 57 Ill 436.
51 C.J. p 485 note 36.

5. Pa—In re Ohio River Junction R Co, 68 A 830, 219 Pa. 345.
51 C.J p 485 note 37.

6. N.J—Swift v. Delaware, etc, R Co, 57 A 456, 66 N.J.Law 34.

7. Ill—People v. Chicago, etc, R Co, 57 Ill. 436.

8. Ohio—Cincinnati Crushed Stone, etc, Co v State Public Utilities Commission, 117 N E 217, 96 Ohio St 288.

9. Md—Union R Co v. Canton R Co, 65 A. 409, 105 Md. 12.
51 C.J. p 485 note 44.

10. U S—Beech Creek R Co v. Olanta Coal Min Co, Pa, 158 F 36, 85 C C A. 148
Pa—Beech Creek R Co v. Olanta Coal Min Co, 17 Pa Dist 30

11. Tenn—Louisville, etc, R Co. v State, 9 Baxt 522

12. Ind—New York Cent R. Co. v State Public Service Commission, 134 N E 282, 191 Ind 627

13. Ind—New York Cent R Co. v State Public Service Commission, supra
51 C J p 486 note 48.

14. Ala—State R Commission v Louisville, etc, R Co, 72 So 397, 197 Ala 161
51 C.J. p 486 note 49

15. Ala.—State R. Commission v. Louisville, etc, R. Co., supra.
51 C J. p 486 note 50.

16. Ohio—Wheeling, etc, R. Co v State Public Utilities Commission, 117 N.E 317, 96 Ohio St 370.

17. Kan—State v Chicago, etc, R. Co, 118 P 872, 85 Kan 649
51 C J p 486 note 52

18. Ind—Pittsburgh, etc, R Co. v. State R. Commission, 86 N E 328, 171 Ind. 189.
51 C J. p 486 note 53

19. S.C—Seaboard Air Line R Co v. Hampton, 88 S E 5, 103 S C. 455

20. U S—Delaware, L & W. R Co v Interstate Commerce Commission, C C N.Y., 166 F. 498, affirmed 30 S Ct. 415, 216 U S 531, 54 L.Ed 605.

21. Pa—In re Ohio River Junction R. Co., 68 A. 830, 219 Pa. 345.

(1) In General

Both the power which the legislature possesses to determine and direct at what places a railroad company shall establish stations and the discretion which the company possesses, in the absence of statute, as to the location of stations must be exercised reasonably and with due regard to the interests of the company and the public.

A place may become a station either by designation by the railroad company or designation by statute, or by being established as a siding or stopping place to receive and discharge passengers and freight.[22] The legislature of any state may, within certain limitations, determine and direct at what places a railroad company shall establish and maintain depots or stopping places for the convenience of the public,[23] or it may delegate such power to a board or commission, as discussed infra subdivision a (2) of this section. Such power may exist under either the police power[24] or a power reserved to repeal, alter, or amend a railroad charter.[25] However, it must be exercised reasonably and with due regard to the rights of the railroad.[26]

In some jurisdictions statutes require railway companies to designate their depot grounds before constructing their roads.[27] In the absence of statute railroad companies have a large discretion as to the location of their stations;[28] this discretion, however, is not arbitrary but is a reasonable discretion to be exercised with due regard to the interests of both the company and the public.[29] A railroad company is not necessarily obliged to establish a station at every town or village through which the road passes,[30] or at a place constituting a suburb of another larger place at which it maintains a station,[31] or, in case it establishes a station at a certain place, to establish it within the corporate limits of such place.[32]

A limitation as to the location of mills, warehouses, and other structures located on the right of way has no application to the location of a depot.[33]

Location at crossing A statute requiring depots to be built at all crossings and intersections of other railroads and providing a penalty for failure therefor is a penal statute[34] and must be strictly construed.[35] A statute requiring the construction of passenger depots at all intersections of railroads carrying passengers has been construed as inapplicable to an intersection of nonpassenger roads.[36] Under a statute requiring provision of a depot at the intersection of two or more railroads, there is no obligation to erect a depot at the intersection of a railroad with one of its own side tracks.[37]

A municipality, as such, has no power, not delegated to it by the legislature, to determine whether public convenience and necessity require the erection of a station by a railroad company at a particular place or to compel the erection of the station if public convenience and necessity so require.[38]

Vote of town. Under a statute providing that, if the proprietors of any railroad shall not, on request, establish proper stopping places or depots for

22. Tex.—State R. Commission v. Pecos, etc., R. Co., Civ. App., 212 S.W. 535.
Accommodations and facilities at stations see infra §§ 403–408.

23. Utah.—State v. Ogden Rapid Transit Co., 112 P. 120, 38 Utah 242.
51 C.J. p. 486 note 59.
Railroads may be compelled by state legislation to establish stations at proper places for convenience of patrons.—Atchison, T. & S. F. Ry. Co. v. Railroad Commission of State of California, Cal., 51 S.Ct. 553, 283 U.S. 380, 75 L.Ed. 1128.—Norfolk & W. R. Co. v. West Virginia Public Service Commission, W.Va., 44 S.Ct. 439, 265 U.S. 70, 68 L.Ed. 904.

24. Okl.—St. Louis, etc., R. Co. v. Sutton, 119 P. 423, 29 Okl. 553.
51 C.J. p. 486 note 61.
Lack of denial of due process of law see Constitutional Law § 698 b (1).

25. Mass.—Commonwealth v. Eastern R. Co., 103 Mass. 254, 4 Am.R. 555.

26. Ark.—Louisiana, etc., R. Co. v. State, 106 S.W. 960, 85 Ark. 12.
51 C.J. p. 486 note 63.

27. Tex.—Pecos, etc., R. Co. v. State R. Commission, Civ. App., 193 S.W. 770.
51 C.J. p. 486 note 64.

28. Fla.—Florida Cent. R. Co. v. State, 13 So. 103, 31 Fla. 482, 34 Am.S.R. 30, 20 L.R.A. 419.
51 C.J. p. 487 note 65.

29. Ill.—Chicago, etc., R. Co. v. People, 78 N.E. 784, 222 Ill. 396.
51 C.J. p. 487 note 66.
Duty of company
(1) Railroad companies owe a duty to the general public to locate their stations at such places as will best serve the public interests.—Minnesota, etc., R. Co. v. Way, 148 N.W. 858, 34 S.D. 435, L.R.A.1915B 925.

(2) A railway company is bound to locate its stations so as best to serve its own and the public interests rather than the speculative interests of its officers, and stockholders or land speculators.—Oldham v. Chicago & N.W. Ry. Co., C.C.A.S.D., 52 F. 2d 111.

30. Ill.—Chicago, etc., R. Co. v. People, 38 N.E. 562, 152 Ill. 230, 26 L.R.A. 224.
Under a statute requiring railroads to construct depots "at all villages," a railroad will not be compelled to construct a depot at an unincorporated village.—State v. Minneapolis, etc., R. Co., 79 N.W. 510, 76 Minn. 469.

31. Ill.—Chicago, etc., R. Co. v. People, 38 N.E. 562, 152 Ill. 230, 26 L.R.A. 224.

32. Ill.—Chicago, etc., R. Co. v. People, supra.

33. S.D.—Emery v. Chicago, etc., R. Co., 164 N.W. 108, 39 S.D. 334.

34. Mo.—State v. St. Louis, etc., R. Co., 142 S.W. 279, 238 Mo. 605.

35. Mo.—State v. St. Louis, etc., R. Co., supra.
51 C.J. p. 487 note 79.

36. Mo.—State v. Wabash, etc., R. Co., 83 Mo. 144.
51 C.J. p. 991 note 11.

37. Mo.—State v. St. Louis, etc., R. Co., 142 S.W. 279, 238 Mo. 605.

38. N.Y.—City of New York v. New York Cent. R. Co., 9 N.E.2d 931, 275 N.Y. 287.

the public accommodation, they may be required to do so on vote by any town, a notification of the vote of the town is equivalent to a request under the statute.[39]

Judicial control or interference. In some jurisdictions it has been held that in the absence of statute the courts cannot compel a railroad company to establish a station at a particular place,[40] but in other jurisdictions the courts may require the establishment of a station at a place where a failure on the part of a railroad company to establish one shows a manifest disregard of its duties to the public,[41] although the discretion of the railroad company will not be interfered with unless it is clearly abused.[42] Where a railroad company is required by statute to establish such stations as "shall be necessary," the courts may determine the question of necessity and require the establishment of a station at any place where such necessity is shown to exist.[43] In at least one jurisdiction the power to require the establishment of stations at particular places is expressly vested by statute in the supreme court.[44]

(2) Powers and Proceedings of Commission

(a) In general

(b) Judicial review or enforcement of orders

(a) In General

A board of railroad commissioners, or similar board or commission, may, within the limits of the authority conferred on it by statute, make orders relative to the location of railroad stations. In arriving at a decision, it may and must consider the various interests involved.

The legislature may confer on a board or commission the power to determine the location of stations and depots;[45] but a board of railroad commissioners or similar board or commission may make only such orders with respect to the location of railroad stations as it is authorized by statute to make,[46] and the statute will be strictly construed as to matters in derogation of the common-law rights of railroad companies.[47] In most jurisdictions where there is such a board or commission it may require the establishment of a station at a particular point[48] or the reestablishment of a station at a place where one formerly existed.[49] It has power to enforce statutory requirements as to the location of stations.[50]

The commission may not act arbitrarily.[51] In arriving at its decision it must consider the interests of the particular locality, the traveling public, and the general situation and operating requirements of the railroad.[52] It may consider the safety of the public and of the railroad employees,[53] the topographical and geographical features of the particular locality,[54] and the cost of maintenance and the income to be derived,[55] but it may not ignore the benefit to, and interest of, the railroad-using public and base its decision on considerations arising from a townsite controversy,[56] nor may it give the business convenience and property valuation in a city importance paramount to advantages from an operating standpoint in determining on a particular depot site.[57]

The findings of the board or commission are considered prima facie correct,[58] and its orders are presumptively just and reasonable.[59] Where an

39. N.H.—Nashua, etc., R. Co v. Derry, 58 N H 65

40. Utah.—State v. Ogden Rapid Transit Co., 112 P. 120, 38 Utah 242
51 C J p 487 note 67.
Judicial review of order of board or commission see infra subdivision a (2) (b) of this section.
Mandamus to compel establishment and maintenance of station see Mandamus § 231 d (2) (d).

41. Ill.—People v. Chicago, etc., R. Co., 22 N.E. 857, 130 Ill. 175.

42. Neb.—Chicago, etc, R Co. v. State, 103 N.W. 1087, 74 Neb. 77.
51 C.J p 487 note 69

43. Neb.—State v. Republican Valley R. Co., 26 N.W. 205, 18 Neb. 512.

44. Vt.—In re Railroad Comrs., 65 A. 82, 79 Vt. 266.

45. Ala.—Horton v. Southern R. Co., 55 So. 531, 173 Ala. 231, Ann.Cas. 1914A 685—Nashville, etc, R. Co. v. State, 34 So 401, 137 Ala. 439.

46. N D—Aandahl v Great Northern R Co., 171 N W. 628, 41 N.D 577.
51 C J. p 489 note 3.

47. Miss.—State v. Yazoo, etc, R Co., 40 So. 263, 87 Miss. 679.

48. Ala.—State R Commission v Alabama Northern R. Co., 62 So 749, 182 Ala 357
51 C J. p 489 note 5.

49. Minn.—Brogger v Chicago, etc., R Co, 163 N W 662, 164 N W. 368, 137 Minn. 338.
51 C J. p 489 note 6.

50. Tex.—State R Commission v. Chicago, etc., R. Co., 117 S.W. 794, 102 Tex. 393
51 C.J. p 489 note 7.

51. Okl.—Atchison, etc., R Co. v. State, 112 P. 1010, 27 Okl 565.

52. Minn.—Brogger v. Chicago, etc., R Co., 163 N W 662, 164 N.W. 368, 137 Minn 338
51 C J p 489 note 15

53. Okl.—Kansas City Southern R Co v Redwine, 143 P. 847, 43 Okl 610
51 C.J p 490 note 16

54. Okl.—Atchison, etc, R. Co v. State, 112 P 1010, 27 Okl. 565.
51 C J p 490 note 17.

55. La.—Morgan's Louisiana, etc, R., etc., Co v. State R Commission, 33 So 214, 109 La. 247.
51 C J p 490 note 18.

56. Okl.—Missouri, etc, R. Co v. State, 156 P. 1155, 53 Okl 341.

57. Okl.—St. Louis, etc., R. Co. v. State, 122 P. 217, 31 Okl. 509.

58. Tex.—Mosel v. San Antonio, etc., R. Co., Civ.App., 249 S.W. 893.
51 C.J. p 490 note 21.

59. Colo.—Chicago, etc, R. Co v. Public Utilities Commission, 190 P. 539, 68 Colo. 475.
51 C J. p 490 note 22.

order of the railroad commissioners is merely permissive to the company, nothing further is necessary in order to make it effective.[60]

Expenditures after notice. A railroad company which proceeds with the establishment of a station after notice has been given it by the commission to delay until after an investigation of the proposed site has been made does so at its own peril for any expenditures made.[61]

(b) Judicial Review or Enforcement of Orders

An order of a railroad board or commission concerning the location of stations is reviewable by the courts; and, if an order requires affirmative action on the part of a railroad company, it may be enforced by the courts.

The orders of railroad boards or commissions concerning the location of stations are reviewable by the courts.[62] The courts will reverse orders of a commission which are not within the powers conferred on it,[63] or orders within the scope of its powers which under the circumstances of the particular case are unreasonable or unjust.[64] On the other hand, unless clearly erroneous, the orders of the commission will not be reversed,[65] but will be upheld if they are within the powers conferred on the commission and not unjust or unreasonable.[66]

If an order is mandatory, requiring affirmative action on the part of the company, it may be enforced by the courts[67] except as to matters concerning which the powers of the commission are merely advisory.[68] Under some statutes the commissioners cannot maintain a suit to compel compliance with their orders, but the remedy is by an action to be brought by the attorney general on the request of the commissioners.[69]

Injunction is the proper remedy for a railroad company to employ in objecting to an order by the railroad commission for the erection of a new depot on a different site.[70]

The burden of proof rests on him who attacks the order;[71] but where the lower court has decided against the order of the commission its decree will not be disturbed if under the testimony the court could have so found.[72]

b. Union Stations

In the exercise of authority conferred on it by the legislature, a board or commission may select the site on which a union depot is to be located.

A board or commission, to which power with reference to union depots has been delegated by the legislature, may,[73] but need not,[74] select the site on which the depot is to be located. The safety of the employees and patrons of the railroads[75] and the needs and accommodation of the public, together with the effect it will have on the property rights of the railroad,[76] must be considered in determining the proper location of the depot.

Power of court. It has been held that, where the

60. N.Y.—People v. Railroad Comrs., 53 N.E. 163, 158 N.Y. 421.

61. Va.—Southern R. Co. v. Commonwealth, 105 S.E. 65, 128 Va. 176.

62. Wash.—State v. Public Service Commission, 135 P. 244, 75 Wash. 487.
51 C.J. p. 490 note 29.

63. Ala.—Nashville, etc., R. Co. v. State, 34 So. 401, 137 Ala. 439
Miss.—State v. Yazoo, etc., R. Co., 40 So. 263, 87 Miss. 679.

64. Okl.—Kansas City Southern R. Co. v. State, 178 P. 662, 72 Okl. 38.
51 C.J. p. 490 note 26.

65. Ala.—State R. Commission v. Alabama Northern R. Co., 62 So. 749, 182 Ala. 357.
51 C.J. p. 490 note 23.

66. Colo.—Chicago, etc., R. Co. v. Public Utilities Commission, 190 P. 539, 68 Colo. 475.
51 C.J. p. 490 note 24.

67. N.Y.—People v. Delaware, etc., Canal Co., 52 N.Y.S. 350, 32 App. Div. 120, affirmed 59 N.E. 138, 165 N.Y. 362

68. Ala.—Nashville, etc., R. Co. v. State, 34 So. 401, 137 Ala. 439.

69. S.C.—Railroad Comrs. v. Railroad Co., 2 S.E. 127, 26 S.C. 353.

70. Miss.—State R. Commission v. Mobile, etc., R. Co., 75 So. 778, 115 Miss. 101, Ann.Cas.1918B 828.

71. Tex.—San Antonio, etc., R. Co. v. State R. Commission, Civ.App., 275 S.W. 261
51 C.J. p. 491 note 42.

72. Miss.—State R. Commission v. Mobile, etc., R. Co., 75 So. 778, 115 Miss. 101, Ann.Cas.1918B 828
51 C.J. p. 491 note 43.

73. Ala.—State R. Commission v. Alabama Northern R. Co., 62 So. 749, 182 Ala. 357.
51 C.J. p. 488 note 84.
Matters, other than location, pertaining to union depots see infra § 405.

Proper location

Location of union depot at the terminus of an important and much frequented street, two hundred and ten feet from the corporate line, within four blocks of the former depot in the city and within the police jurisdiction of the city, was held proper.—Dewey v. Atlantic Coast Line R. Co., 55 S.E. 292, 142 N.C. 392

74. Tex.—Gulf, etc., R. Co. v. State, Civ.App., 167 S.W. 192.
51 C.J. p. 488 note 86.

75. Okl.—Missouri, etc., R. Co. v. State, 133 P. 35, 38 Okl. 401.
51 C.J. p. 488 note 90.

76. Ala.—State R. Commission v. Alabama Northern R. Co., 62 So. 749, 182 Ala. 357

Depot site prescribed is presumed suitable and such that sufficient ground can be obtained therefor at reasonable figures.—State R. Commission v. Alabama Great Southern R. Co., 64 So. 13, 185 Ala. 354, L.R.A. 1915D 98.

Railroads must show, when objecting as to the cost of a depot, a more suitable and less costly site.—State v. St. Louis Southwestern R. Co., Tex.Civ.App., 199 S.W. 329, modified on other grounds, Com.App., 255 S.W. 390.

legislature has invested no other tribunal with the power of locating railroad stations, the supreme court may determine the location of a union depot which the public good requires.[77]

B. CONTRACTS AS TO LOCATION

§ 58. In General

An agreement by a railroad company, for a valuable consideration, to locate its road within the authorized limits on a particular route or through a particular place is valid and not against public policy where it does not violate any public rights or duties and it is made in good faith and in the interest of the company; but it is otherwise as to a contract made by officers, agents, or directors of the company for their individual benefit.

A railroad company may for a valuable consideration agree to locate its road within the authorized limits upon a particular route or through a particular place, provided the contract is made in good faith in the interest of the company, and no public rights or duties are thereby violated.[78] Such contracts are not void as against public policy,[79] and may be enforced by[80] or against[81] the railroad company, provided they are entered into by the proper authorities.[82] Such a contract is, however, void if made by officers, agents, or directors of the company for their individual benefit,[83] and this is true without regard to the propriety of the route agreed on or the effect of its selection on the company or the public.[84]

Where a railroad company has by a valid contract bound itself to a particular location, it may not subsequently change it[85] unless it appears that a paramount public interest requires it,[86] but the mere adoption of a particular route through a city after a controversy with respect thereto does not amount to a contract which will preclude the railroad company from subsequently, by legislative authority, changing the location,[87] nor will a specific contract for a particular location prevent the railroad company from subsequently exercising a power conferred on it to make a shorter and cheaper route, provided the road already located pursuant to the contract is continued in use with proper facilities for traffic.[88]

It is the duty of the court to construe contracts as to location.[89]

§ 59. Extensions and Branch or Spur Lines

A contract on the part of a railroad company to build a branch or spur track from its main line to a mill may be valid.

A contract on the part of a railroad company to build a branch or spur track from its main line to a mill or other private enterprise is not contrary to public policy,[90] and such a contract is not void for lack of mutuality because it contains a provision giving the railroad the right to remove the track when in its judgment the business is not sufficient to justify its maintenance.[91] A particular contract has been construed not to bind the company to extend its line.[92]

§ 60. Terminal Buildings, Division Terminal, Offices, Shops, Etc.

A railroad company may contract for the location of its general offices, machine shops, and roundhouses at

77. N H—Concord, etc., R. Co. v. Boston, etc., R. Co, 41 A. 263, 67 N.H 464.
51 C J. p 487 note 72.

78. Cal—McCowen v. Pew, 98 P 893, 153 Cal. 735, 21 L R.A.,N.S., 800, 15 Ann Cas. 630.
51 C J p 492 note 48.
Conditions in:
Conveyance to railroad company see infra § 92.
Grant of public aid see supra § 40.
Subscriptions or contributions by private persons see the C.J S. title Subscriptions § 13, also 51 C. J. p 470 notes 21, 24.

Consideration moving to other party held sufficient
Iowa.—Mills County v. Burlington, etc, R. Co., 47 Iowa 66, affirmed 2 S Ct. 654, 107 U.S. 557, 27 L Ed. 578.
13 C J. p 322 note 53.

79. Pa.—Cumberland Valley R. Co. v. Baab, 9 Watts 458, 36 Am D 132.
51 C J. p 492 note 49.

80. Okl—Piper v Choctaw Northern Townsite, etc, Co, 85 P. 965, 16 Okl 436.
51 C.J. p 492 note 50.

81. Ohio—Chapman v Mad River, etc, R Co, 1 Ohio Dec, Reprint, 559, 10 West.L.J 391.
51 C.J. p 492 note 51.

82. Mass—Central Mills Co. v. New York, etc., R Co, 127 Mass 537.
51 C.J. p 492 note 52.

83. U.S—Woodstock Iron Co v. Richmond & D. Extension Co, Ala., 9 S Ct. 402, 129 U S. 643, 32 L Ed 819.
51 C J. p 492 note 53.

84. Ill—Bestor v. Wathen, 60 Ill. 138.
51 C J. p 492 note 54.

85. Ohio—Chapman v. Mad River R. Co, 1 Ohio Dec., Reprint, 559, 10 West L J. 391.
Change of location generally see infra § 65.

86. U S.—Armour & Co v Texas & P. R. Co, La, 258 F. 185, 169 C C A. 253, certiorari denied 40 S Ct 56, 251 U S 551, 64 L.Ed 410
51 C J p 492 note 56.

87. U S.—Milnor v. New Jersey R Co, C C N J., 17 F Cas No.9,620, 3 Wall appendix 782, 16 L.Ed appendix 1.

88. Ohio—Chapman v. Mad River, etc, R. Co, 1 Ohio Dec, Reprint, 565, 10 West L J. 399

89. Wash—Hunt v. Upton, 87 P. 56, 44 Wash 124
51 C.J p 492 note 59.

90. Ga—Butler v. Tifton, etc., R Co, 49 S E 763, 121 Ga. 817.

91. Mich—Michigan Cent R Co v. Chicago, etc, R. Co., 93 N W. 882, 132 Mich. 324.

92. U S—Oldham v. Chicago & N. W. Ry. Co., C.C.A S.D., 52 F.2d 111.

a particular place, or for the purchase of land and the erection of terminal buildings thereon.

A railroad company may, in return for a bonus or other consideration, contract with property owners in a city to buy lots and erect and maintain its terminal buildings thereon,[93] and, where officers of the company have so contracted with property owners, a bond executed by the company guaranteeing their performance is not ultra vires.[94]

Division terminal, offices, shops, etc. A contract for the location of the general offices, machine shops, and roundhouses of a railroad at a particular place is valid,[95] and under some statutes where such a contract exists their location may not be changed to another place.[96] In order to be binding on the railroad, such a contract must be made by the proper authorities.[97]

§ 61. Stations

Contracts not to locate stations at designated points or within certain limits are void as against public policy, as are also contracts by officers, agents, or stockholders of a railroad company for their own gain to secure the location of stations at certain places; but it is otherwise as to a contract by the company merely to locate a station at a designated point. Damages may be recovered for breach of a valid contract for the location of a station; but reasonable compliance with such a contract is sufficient.

The majority rule, although there is authority to the contrary,[98] is that a contract made by a railroad company merely to locate a station or depot at a designated point is valid and not in contravention of public policy.[99] However, any contract entered into by a railroad company which tends to interfere or come in conflict with the full and proper exercise of its duty to locate its stations at such places as will best serve the public interests will be deemed illegal and against good morals,[1] and in all cases, if it is made to appear that contracts concerning the location of stations are prejudicial to the interests of the public, the rights of the contracting parties must yield to those of the public.[2] Thus contracts which limit the power of the railroad to locate and relocate its stations,[3] as where they prohibit the location of a station or depot at a designated point or within certain prescribed limits,[4] or contracts by officers, agents, or stockholders of the railroad for their own gain to secure the location of stations or depots at certain places,[5] are void as against public policy; but a contract to pay a given sum of money to one who should present a petition or proposition to the directors of a railroad company for the location of a depot in certain land is not void as against public policy unless it appears that sinister, extraneous, or corrupting influences were brought to bear on the company.[6]

A contract obligation to locate a station at a designated place is not a charge or lien on the property of the railroad[7] and does not pass by foreclosure or sale to, or devolve on, its successors.[8] Where a station is constructed by one railroad company upon the land of another under an agreement for its joint use by both companies, if the business of the companies increases so that it becomes inadequate the owner of the land may require its removal.[9]

Railroad commissioners have no power or jurisdiction over contracts between railroad compa-

93. Tex.—Eastern Texas Tract Co v. Harrison, Civ.App., 189 S.W. 302

94. Tex.—Eastern Texas Tract. Co. v. Harrison, supra.
51 C.J. p 493 note 64.

95. Tex.—International, etc., R. Co. v. Anderson County, Civ.App., 150 S.W. 239, affirmed 156 S.W. 499, 106 Tex. 60
51 C.J. p 493 note 65.

96. Tex.—Nueces Valley Townsite Co v San Antonio, U. & G. R Co., 67 S.W.2d 215, 123 Tex 167.
51 C.J. p 493 note 66, p 501 note 9.
Statute held constitutional
Tex.—Nueces Valley Townsite Co. v. San Antonio, U. & G. R Co., supra.

97. Tex.—Kansas City, etc., R. Co. v Sweetwater, 137 S.W. 1117, 104 Tex. 329
51 C.J. p 493 note 68.

98. Mo.—Pacific R Co. v. Seely, 45 Mo. 212, 100 Am D 369.

99. Cal.—Herzog v. Atchison, etc., R Co., 95 P. 898, 153 Cal. 496, 17 L.R.A.,N.S., 428.
51 C.J. p 493 note 73.
Permission of federal commission
A provision in a federal statute requiring railroads to secure approval of Interstate Commerce Commission before issuing securities did not render illegal an alleged contract between municipality and railroads for erection of station at a particular point, but at most rendered contract unenforceable until permission should be given to issue and sell securities to obtain funds for erection of station.—City of New York v. New York Cent. R. Co., 9 N.E.2d 931, 275 N.Y. 287
Contract construed not to require location of stations at particular places
U.S.—Oldham v. Chicago & N. W. Ry. Co., C.C.A.S.D., 52 F.2d 111.

1. S.D.—Minnesota, etc., R. Co. v. Way, 148 N.W. 858, 34 S.D. 435, L.R.A.1915B 925.

2. Ga.—Atlanta, etc., R. Co. v. Camp, 60 S.E. 177, 130 Ga. 1, 124 Am.S.R. 151, 15 L.R.A.,N.S., 594, 14 Ann.Cas. 439.
51 C.J. p 494 note 74

3. U.S.—**Corpus Juris cited in** Oldham v. Chicago & N. W. Ry Co., C.C.A.S.D., 52 F.2d 111, 114.
51 C.J. p 494 note 75, p 502 note 21

4. U.S.—**Corpus Juris cited in** Oldham v. Chicago & N. W. Ry Co., C.C.A.S.D., 52 F.2d 111, 114.
51 C.J. p 494 note 76.

5. U.S.—**Corpus Juris cited in** Oldham v. Chicago & N. W. Ry Co., C.C.A.S.D., 52 F.2d 111, 114.
51 C.J. p 494 note 77.

6. Mo.—Workman v. Campbell, 46 Mo. 305.

7. N.Y.—People v. Rome, etc., R. Co., 8 N.E. 369, 103 N.Y. 95.

8. N.Y.—People v. Rome, etc., R Co., supra.

9. La.—McCormick v. Louisiana, etc., R. Co., 33 So. 762, 109 La. 704.

nies and private individuals as to the location and maintenance of stations,[10] and in the location of a depot[11] or in the determination of an application for permission to discontinue a station[12] the commissioners should disregard such contracts.

Performance or breach. Contracts to locate and maintain depots must be construed in the light of the exigencies of the business of the railroad and the needs of the public.[13] Compliance in a reasonable way is sufficient.[14] Thus a contract to establish a depot at a specified town is complied with by locating it at a convenient distance from the business portion of the town,[15] and a contract to locate a station at a given place is fairly complied with by the erection and maintenance of a station at the designated place for a period of years, until the exigencies of business, the convenience of the public, and the welfare of the railroad demand its removal.[16] In a contract between two individuals, a condition for the location of a depot at a certain place within a designated time is complied with if, within the time limited, the ground is staked off, a platform built, and the premises actually used for depot purposes.[17]

Damages. Where there is a valid contract with respect to the location or maintenance of a station, an action may be maintained for damages for a breach thereof[18] or to recover the value of the land conveyed as the consideration for the agreement.[19]

Injunction. A contract not to locate a depot at a certain place or within certain limits will not be enforced by injunction restraining the building of a depot within the prescribed limits.[20]

C. SURVEY OR RECORD OF LOCATION

§ 62. Survey

A railroad company may enter on private property and make preliminary surveys before finally locating its route.

A railroad company when authorized to lay out and construct a railroad may enter on private property for the purpose of exploration and preliminary surveys, without being guilty of a trespass or actionable wrong,[21] and such entry and survey, if no unnecessary damage is done, do not constitute a taking of the property for which compensation must be made, as discussed in Eminent Domain § 113. The company may make any number of experimental surveys at pleasure before finally locating its route,[22] but it has no right to institute experimental condemnation proceedings along the different surveys before making a final selection in order to ascertain which would be the cheapest route.[23]

§ 63. Filing Map, Profile, or Record

It is necessary to comply with charter or statutory requirements as to the filing of a map, profile, or description of the location of the road.

It is frequently required by general statutes or charter provisions that a railroad company shall file a map, profile, or description of the location of its road in the counties through which it passes,[24] or with a specified state officer[25] or commission,[26] and there are similar requirements with respect to branch roads,[27] extensions,[28] and changes of

10. N.Y.—People v. Railroad Comrs., 53 N.E. 163, 158 N.Y. 421.
51 C.J. p. 489 note 8.

11. La.—Louisiana R., etc., Co. v. State R. Commission, 46 So. 884, 121 La. 848.

12. N.Y.—People v. Railroad Comrs., 53 N.E. 163, 158 N.Y. 421

13. Tenn.—Cross v. Southern R. Co., 2 Tenn. Civ. A. 588.

14. Tex.—Wooters v. International, etc., R. Co., 54 Tex. 294
51 C.J. p. 494 note 84.

15. Tex.—Frey v. Ft. Worth, etc., R. Co., 24 S.W. 950, 6 Tex. Civ. App. 29, affirmed 25 S.W. 609, 86 Tex. 465.
51 C.J. p. 494 note 85.

16. Md.—Maryland, etc., R. Co. v. Silver, 73 A. 297, 110 Md. 510
51 C.J. p. 494 note 86.

17. Ill.—Waldron v. Marcier, 82 Ill. 550.

18. Fla.—Atlanta, etc., R. Co. v. Thomas, 53 So. 510, 60 Fla. 412
51 C.J. p. 491 note 44.

19. Tex.—International, etc., R. Co. v. Dawson, 62 Tex. 260

20. U.S.—Beasley v. Texas & P. R. Co., La., 24 S.Ct. 164, 191 U.S. 492, 48 L.Ed. 274

21. Ky.—Corpus Juris cited in Thomas v. City of Horse Cave, 61 S.W. 2d 601, 604, 249 Ky. 713.
51 C.J. p. 494 note 88.

22. Pa.—Neal v. Pittsburgh, etc., R. Co., 2 Grant 137.
Effect of preliminary survey:
As constituting location see supra § 45.
As affecting right to change location see infra § 65.
In cases of conflicting locations see infra §§ 71, 72.

23. Pa.—Neal v. Pittsburgh, etc., R. Co., supra.

24. Mo.—Kansas City Interurban R. Co. v. Davis, 95 S.W. 881, 197 Mo. 669, 114 Am.S.R. 790
51 C.J. p. 495 note 92

25. W.Va.—Chesapeake, etc., R. Co. v. Deepwater R. Co., 50 S.E. 890, 57 W.Va. 641
51 C.J. p. 495 note 93.

26. Me.—U. S. Peg Wood, etc., Co. v. Bangor, etc., R. Co., 72 A. 190, 104 Me. 472.
51 C.J. p. 495 note 94

27. S.D.—Illinois Cent. R. Co. v. East Sioux Falls Quarry Co., 144 N.W. 724, 33 S.D. 63.
Wash.—Biles v. Tacoma, etc., R. Co., 32 P. 211, 5 Wash. 509.

28. N.J.—Mercer County Tract. Co. v. United New Jersey R., etc., Co., 56 A. 897, 65 N.J.Eq. 574, reversed on other grounds 61 A. 461, 68 N.J.Eq. 715
S.D.—Illinois Cent. R. Co. v. East

location,[29] but such requirements do not apply to spur tracks or industrial side tracks[30] Branches constituting a part of the proposed road and designated and surveyed at the same time as the main line may be included in the map filed of the survey thereof;[31] but where a railroad company is authorized to construct branches before or after the completion of its main line, a survey for a branch line may be filed separately and need not be filed with the survey of the main line[32] The object of these requirements is to enable the public to know the line of the railroad,[33] to furnish permanent record evidence of the true and exact location and boundaries of the road,[34] and to fix and determine the rights of the railroad company and others interested or affected by such location[35] The filing should be done by authority of the directors of the company.[36]

Any express provisions of the statute as to what the map or location filed shall show must be complied with,[37] and in any case a mere general designation of the location is insufficient,[38] but the exact location and limits thereof must be shown.[39] While a requirement that the company shall file a "survey" of its route does not necessarily require a map or profile but may be complied with by designating the location by words and figures,[40] there must be sufficient data in some form from which the exact and true location may be ascertained.[41] Where a railroad company is required to file the "location" of its road, a definite reference in the written description to a map or plan is a part of the description to which reference may be made to explain or make certain the terms of such description,[42] but not to modify or control the written description of the location,[43] and a map or plan not referred to in the written description cannot be used to supply defects therein[44] So, also, the map filed cannot in any way control or modify the charter of the company, and when the two conflict the latter must control.[45] It is not essential that the location when filed should bear any date,[46] and where the statute requires the location to be filed with the county commissioners "approved by them and recorded," the approval of the location need not be signed by the different members of the board, but it is sufficient if attested by the clerk who is the recording officer of the commissioners as a court[47]

Under some of the statutes the filing of the map and survey or location is a condition precedent to the right to institute condemnation proceedings, as discussed in Eminent Domain § 226 a, but if the landowner has agreed to allow the railroad company to cross his premises he is estopped subsequently to set up, as against the validity of the taking, the failure to file the plan[48] Some of the statutes expressly require that the filing shall be done before any part of the road is constructed,[49] but under others it may be done after the road is constructed[50] or located,[51] and is not an essential step in effecting a valid location[52]

§ 64. Evidence of Location

A map or other paper, or, where it is on record, a certified copy of the record, may be the best evidence of

Sioux Falls Quarry Co, 144 N.W. 724, 33 S.D. 63.

29. N.J.—Vail v. Morris, etc., R. Co., 21 N.J. Law 189
N.Y.—Matter of Riverhead, etc., R. Co., 55 N.Y.S. 938, 36 App. Div. 514

30. N.J.—Akers v. United New Jersey R., etc., Co., 43 N.J. Law 110.
51 C.J. p. 495 note 98

31. Mich.—Toledo, etc., R. Co. v. East Saginaw, etc., R. Co., 40 N.W. 436, 72 Mich. 206.

32. N.J.—Greenville, etc., R. Co. v. Grey, 43 A. 568, 62 N.J.Eq. 768.

33. Mich.—Grand Rapids, etc., R. Co. v. Cheseboro, 42 N.W. 66, 74 Mich. 466
51 C.J. p. 495 note 2.

34. Mass.—Hazen v. Boston, etc., R. Co., 2 Gray 574
N.Y.—Stephens v. New York, etc., R. Co., 67 N.E. 119, 175 N.Y. 72.

35. Mass.—Hazen v. Boston, etc., R. Co., 2 Gray 574

36. Wis.—Northern Pac. R. Co. v. Doherty, 75 N.W. 1079, 100 Wis. 39, affirmed 20 S.Ct. 677, 177 U.S. 421, 44 L.Ed. 830.
51 C.J. p. 495 note 5.

37. Mass.—Housatonic R. Co. v. Lee, etc., R. Co., 118 Mass. 391
N.J.—Mercer County Tract Co. v. United New Jersey, etc., R. Co., 56 A. 897, 65 N.J.Eq. 574, reversed on other grounds 61 A. 461, 68 N.J.Eq. 715.

38. Mich.—Appeal of Conver, 18 Mich. 459

39. N.Y.—Stephens v. New York, etc., R. Co., 67 N.E. 119, 175 N.Y. 72.
51 C.J. p. 495 note 8

40. N.J.—Attorney General v. Stevens, 1 N.J.Eq. 369, 22 Am.D. 526.

41. Mich.—Appeal of Conver, 18 Mich. 459

42. Mass.—Grand Junction R., etc., R. Co. v. Middlesex County Comrs., 14 Gray 553

43. Mass.—Hazen v. Boston, etc., R. Co., 2 Gray 574.

44. Mass.—Housatonic R. Co. v. Lee, etc., R. Co., 118 Mass. 391.

45. N.Y.—Mason v. Brooklyn City, etc., R. Co., 35 Barb. 373.

46. Me.—Nicholson v. Maine Cent. R. Co., 53 A. 839, 97 Me. 43.
51 C.J. p. 496 note 15

47. Me.—Nicholson v. Maine Cent. R. Co., supra.

48. Me.—U. S. Peg Wood, etc., Co. v. Bangor, etc., R. Co., 72 A. 190, 104 Me. 472.

49. Ark.—St. Louis, etc., R. Co. v. Memphis, etc., R. Co., 143 S.W. 107, 102 Ark. 492
51 C.J. p. 496 note 19.

50. N.C.—Fayetteville, etc., R. Co. v. Aberdeen, etc., R. Co., 55 S.E. 345, 142 N.C. 423.

51. W.Va.—Chesapeake, etc., R. Co. v. Deepwater R. Co., 50 S.E. 890, 57 W.Va. 641

52. N.C.—Fayetteville, etc., R. Co. v. Aberdeen, etc., R. Co., 55 S.E. 345, 142 N.C. 423.
W.Va.—Chesapeake, etc., R. Co. v. Deepwater R. Co., 50 S.E. 890, 57 W.Va. 641.

location; but, where the best evidence is lacking, secondary evidence is admissible.

In order to prove that a location was made it is not necessary for the railroad company to produce the engineers who made the survey to testify to their work, but the plan or map of the survey is the best evidence of what was done.[53] In case of a controversy between rival companies as to priority of location, if there is no statute requiring a record of the location adopted, the action of the company must be proved by other evidence, but when proved it has the same effect as though it had been recorded and settles the date of appropriation and the exact location;[54] and where the statute requires a map to be filed but permits it to be done after the road is located, the filing of a map of its survey, if authorized by the company, while not conclusive, is prima facie proof of its adoption as the location of the road.[55] The map or location filed by the railroad company pursuant to a statutory requirement is conclusive evidence against the railroad company as to what has been taken.[56] A certified copy of the record of the location of a railroad from the records of a town is admissible to prove the location;[57] and in a proceeding to enforce a tax in aid of a railroad, the permanent location of the road is sufficiently shown by the map and profile filed by it as required by statute, together with proof that the road has been actually constructed on the line indicated thereon.[58]

Secondary evidence to show the adoption by the directors of a railroad company of a survey as the location of its road,[59] or the approval of the location by the railroad commissioners,[60] or that a plan of the location of the road was duly filed with the clerk of court of county commissioners[61] and with the railroad commissioners[62] is admissible where the best evidence is lacking. A map issued by a railway company which shows the location of a station on a road which in fact, although not in name, was built and owned by the former, is admissible in evidence to show such location.[63]

D. CHANGE OR ABANDONMENT OF LOCATION

§ 65. Change of Location

a. Route
b. Termini

a. Route

When authorized to do so by charter or statute, and statutory conditions precedent, such as obtaining the consent of municipal authorities or a board or commission, have been complied with, a railroad company may change the location of its road; but, without legislative authority, it may not do so after a particular location has been definitely adopted, especially after the road has been actually constructed, although some authorities favor a right to change location before actual construction, at least for the limited purpose of correcting engineering errors or avoiding obstacles to proper construction.

A change of location or a relocation of a railroad means a removal of the road from one right of way to another.[64] A mere shifting of the position of the tracks within the limits of the right of way is not a change of location;[65] nor is the construction of new switch tracks, or side tracks, or even of a new track as a part of the main line necessarily a relocation of the railroad;[66] nor will an inconsequential or minor change of trackage which does not affect the public be held a relocation within the application of the statutes.[67]

After a railroad company has definitely adopted a particular location for its road, the general rule is that it cannot change it without legislative authority,[68] but as to what constitutes a location within the application of the rule the decisions are not uniform.[69] A mere survey not adopted by the

53. Pa.—Johnston v. Callery, 39 A. 73, 184 Pa. 146.
54. Pa.—Williamsport, etc., R. Co. v. Philadelphia, etc., R. Co., 21 A. 645, 141 Pa. 407, 12 L.R.A. 220.
55. W.Va.—Chesapeake, etc., R. Co. v. Deepwater R. Co., 50 S.E. 890, 57 W.Va. 641.
56. Mass.—Hazen v. Boston, etc., R. Co., 2 Gray 574.
51 C.J. p. 496 note 26.
57. Vt.—Hatch v. Vermont Cent. R. Co., 28 Vt. 142.
58. Ind.—Caffyn v. State, 91 Ind. 324.
59. U.S.—Denver, etc., R. Co. v. Arizona, etc., R. Co., N.M., 34 S.Ct. 691, 233 U.S. 601, 58 L.Ed. 1111.
51 C.J. p. 496 note 29.
60. Me.—U. S. Peg Wood, etc., Co. v. Bangor, etc., R. Co., 72 A. 190, 104 Me. 472
51 C.J. p. 496 note 30.
61. Me.—U. S. Peg Wood, etc., Co. v. Bangor, etc., R. Co., supra.
62. Me.—U. S. Peg Wood, etc., Co. v. Bangor, etc., R. Co., supra.
63. Tex.—Pecos, etc., R. Co. v. State R. Commission, Civ.App., 193 S.W. 770.
64. Ill.—Chicago, etc., R. Co. v. Chicago, etc., R. Co., 71 N.E. 1017, 211 Ill. 352
51 C.J. p. 497 note 35.
65. Ill.—Chicago, etc., R. Co. v. Chicago, etc., R. Co., supra.
51 C.J. p. 497 note 36.
66. Ill.—Chicago, etc., R. Co. v. Chicago Mechanics' Inst., 87 N.E. 933, 239 Ill. 197.
51 C.J. p. 497 note 37.
67. Va.—Chesapeake, etc., R. Co. v. Williams Slate Co., 129 S.E. 499, 143 Va. 722, error dismissed 46 S. Ct. 202, 269 U.S. 540, 70 L.Ed. 401.
51 C.J. p. 497 note 38.
68. Ill.—Lake Shore, etc., R. Co. v. Baltimore, etc., R. Co., 37 N.E. 91, 149 Ill. 272
51 C.J. p. 497 note 39.
69. Del.—Williams v. Odessa, etc., R. Co., 44 A. 821, 7 Del.Ch. 303.
Ga.—Brown v. Atlantic, etc., R. Co., 55 S.E. 24, 126 Ga. 248.

directors of the company is not a location which will prevent a subsequent survey and adoption of a different route,[70] and contracting for the construction of a road on a particular route will not prevent the company from changing the route if it has never been actually adopted by the directors of the company in the manner prescribed.[71] So, also, if the first location as shown by the map filed is not such as is authorized by the charter of the company, it cannot control the charter and will not prevent a second location which is so authorized.[72] The authorities are practically uniform to the effect that after the road has been located and actually constructed no change can be made without legislative authority,[73] even where the object of the change of location is to straighten curves and reduce grades, and if made would be a benefit to the public;[74] and, while there is some conflict as to the right to change the location after it has been selected and before the road is constructed, the better rule would seem to be that after a particular location has been definitely adopted the company cannot, without legislative authority, change it merely from motives of convenience, expediency, or economy,[75] or to avoid an unsatisfactory assessment of damages,[76] but that such changes may be made as are necessary to correct errors in engineering or to avoid obstacles which would defeat or interfere with a proper construction of the road.[77] In some cases it has been held that no change can be made after the assessment of damages,[78] but that a change may be made after the adoption of a location and before the assessment;[79] and in others that it may be made after assessment,[80] at any time before actual construction,[81] the railroad company being liable for the damages already actually sustained by landowners by reason of the prior location.[82]

Under charter or statutory authority generally. A railroad charter may be amended so as to require the company to change its route.[83] Where authorized to do so by a statutory or charter provision a railroad company may change the location of its road,[84] and the authority for such change need not be given in the charter or by an amendment thereto but may be given by a special enactment or general railroad law,[85] or even by legislative ratification after its occurrence,[86] or it may be implied from a statute providing for the establishment and use of union depots.[87] Also it has been held that a railroad company may, for the purpose of carrying out the object of its creation, change the location of its main line.[88] Any conditions precedent imposed by the statute must be complied with,[89] whether the owner of the railroad be a company or an individual.[90]

Construction and application of statutes. Statutes authorizing changes in the location of railroads are strictly construed,[91] and if the authority is to change the location for certain causes or on certain conditions the right is limited accordingly.[92] A statute authorizing a railroad company

70. Ill—East St Louis, etc, R Co v. Illinois State Trust Co, 94 N.E. 149, 248 Ill. 559.
51 C.J. p 497 note 41.

71. N.Y—Hudson, etc., Canal Co. v New York, etc., R Co., 9 Paige 323
Ohio—Baldwin v. Hillsboro, etc, R. Co., 1 Ohio Dec., Reprint, 546, 10 West L J. 356.
Right to change location of road as affected by contract for particular location see supra § 58

72. N.Y—Mason v. Brooklyn City, etc., R. Co., 35 Barb. 373.

73. U.S—Bryan v. Louisville, etc, R. Co, Mo., 244 F. 650, 157 C.C.A. 98, error dismissed and certiorari denied 38 S.Ct. 334, 246 U.S. 651, 62 L.Ed. 921.
51 C.J. p 497 note 44.

74. Ill—Cairo, etc, R. Co. v. Woodyard, 80 N.E. 382, 226 Ill. 331

75. Miss—Lusby v Kansas City, etc, R Co., 19 So. 235, 73 Miss 360, 36 L.R.A. 510

76. Pa—Beale v. Pennsylvania R. Co., 86 Pa 509
51 C.J p 498 note 47.

77. Ohio—Devou v. Cincinnati Interterminal R. Co., 29 Ohio Cir.Ct. 113
51 C.J p 498 note 48.

78. Pa—Beale v. Pennsylvania R Co., 86 Pa 509—Neal v. Pittsburgh, etc, R. Co., 31 Pa 19

79. Pa—Hagner v. Pennsylvania St. R. Co, 25 A. 1082, 154 Pa. 475—In re Philadelphia, etc., R. Co., 15 Pa. Dist. 42.

80. Del.—Williams v. Odessa, etc, R Co, 44 A 321, 7 Del Ch 303
Iowa—Gear v Dubuque, etc, R. Co, 20 Iowa 523, 89 Am D. 550

81. Iowa.—Mahaska County R. Co v. Des Moines Valley R. Co, 28 Iowa 437—Gear v Dubuque, etc., R. Co, 20 Iowa 523, 89 Am D 550

82. Iowa.—Gear v. Dubuque, etc, R. Co., supra.
51 C.J. p 498 note 53.
Liability of railroad company on change or abandonment of location generally see infra § 69

83. Ga—Macon, etc, R. Co. v. Gibson, 11 S.E. 412, 85 Ga. 1, 21 Am. S.R. 135.
51 C.J. p 498 note 54.

84. Ohio—Lorain County v. Lake Shore, etc, R. Co., 11 Ohio Cir.Ct, N.S, 419, 22 Ohio Cir.Ct. 805
51 C.J. p 498 note 55.

85. N.C—Dewey v. Atlantic Coast Line R. Co, 55 S.E. 292, 142 N.C 392
51 C.J. p 498 note 56.

86. Tex—Jeff Bland Lumber, etc, Co v. Galveston, etc., R. Co., Civ. App, 212 S.W. 750.

87. N.C—Dewey v Atlantic Coast Line R. Co, 55 S.E 292, 142 N.C 392.

88. Md—Whalen v. Baltimore, etc, R Co., 69 A 390, 108 Md 11, 129 Am.S.R. 428, 17 L.R.A.,N.S, 130.
51 C.J. p 499 note 59.

89. N.Y.—Matter of Riverhead, etc, R Co, 55 N.Y.S. 938, 36 App Div 514
51 C.J. p 499 note 61.

90. Iowa—State v. Beaton, 178 N. W. 1, 180 N.W. 166, 190 Iowa 216.
51 C.J. p 499 note 62.

91. Ga—Brown v. Atlantic, etc, R. Co, 55 S.E. 24, 126 Ga. 248.
51 C.J. p 499 note 68.

92. U.S.—Works v. Junction R. Co,

after beginning the construction of its road to make all necessary changes in its course or direction does not authorize any change after the road is completed;[93] nor will a mere prohibition against making any change of location within a town or city after the road has been constructed impliedly authorize a change of location after construction at points outside of a town or city,[94] but where a railroad company is authorized to change the route of the road it seems that such change may be made at any time before construction,[95] and a change of location may be made after the road is constructed under an authority to change the location of and "reconstruct" the road,[96] or to acquire such lands as the company might find necessary for the site of the road "or to vary the plans thereof,"[97] and where a railroad company is authorized to change the location after construction a limitation on the time for the completion of the construction of the road applies only to the original construction and will not prevent a relocation.[98] Where a change of location is authorized because of difficulty of construction, it may be made after the road has been partly constructed at any time before its construction is complete at the place where the change is made,[99] but not after the road is finally completed.[1] A provision that the relocation shall not depart from the original line of road between the termini means the original termini of the road and not two points on the line between which there is a relocation of the track.[2]

A statute permitting a change of line only with the consent of stockholders is intended to apply only to a change of a proposed line and does not apply to a change in the line of a completed railroad.[3]

Power of state commissions. In some jurisdictions power has been conferred on boards or commissions to require or allow a change in the location of a railroad.[4]

Consent of municipal authorities. Some statutes provide that changes of location within cities, towns, or villages shall not be made after the road is constructed without the consent of the municipal authorities.[5]

Federal control. Under the federal statute, 49 U.S.C.A. § 1(18), providing that no railroad shall extend its lines, construct or acquire new lines, or abandon any line or the operation thereof without first obtaining from the interstate commerce commission a certificate of convenience and necessity, a railroad company must obtain such a certificate before relocating its line or a portion thereof, if such relocation constitutes a new construction or if abandonment is desired,[6] and a certificate authorizing a railroad to abandon a portion of its trackage does not authorize or require its relocation.[7]

A resolution of the board of directors of a railroad company relocating the route of their road is not void because passed in another state.[8]

On application of landowner. Some statutes require a railroad company to make and file a map or profile of the proposed location of its road and give notice thereof to every occupant of land through which the route passes;[9] and within fifteen days after such notice any owner or occupant of such lands aggrieved by the proposed location may apply to a justice of a court of general jurisdiction for the appointment of commissioners to examine the route proposed by the railroad company and the substitute therefor suggested by petitioner.[10] No person can make the application except one whose lands have not been acquired by

C.C.Ohio, 30 F.Cas.No.18,046, 5 McLean 425.
51 C.J. p 499 note 69.

93. Miss.—State v. Mobile, etc., R. Co., 38 So. 732, 86 Miss. 172, 122 Am.S.R. 277.

94. Ga.—Brown v. Atlantic, etc., R. Co., 55 S.E. 24, 126 Ga. 248.

95. Mo.—North Missouri R. Co. v. Lackland, 25 Mo. 515.
51 C.J. p 500 note 72.

96. Minn.—Hewett v. St. Paul, etc., R. Co., 28 N.W. 255, 35 Minn. 226

97. S.C.—Ex parte South Carolina R. Co., 31 S.C.L. 434.

98. Minn.—Hewett v. St. Paul, etc., R. Co., 28 N.W. 255, 35 Minn. 226

99. Ohio.—Atkinson v. Marietta, etc., R. Co., 15 Ohio St. 21.

1. Ohio.—Moorhead v. Little Miami R. Co., 17 Ohio 340.

2. U.S.—Bryan v. Louisville, etc., R. Co., Mo., 244 F. 650, 157 C.C.A. 98, writ of error dismissed and certiorari denied 38 S.Ct. 334, 246 U.S. 651, 62 L.Ed. 921.

3. U.S.—Atwater v. Wheeling & L.E. Ry. Co., C.C.A.Ohio, 56 F.2d 720

4. Ill.—Roy v. Illinois Commerce Commission, 153 N.E. 648, 322 Ill. 452
51 C.J. p 499 note 60.
Power of commission to order relocation of tracks in connection with abolition of grade crossings see infra § 163.

5. Ga.—Chattanooga, etc., R. Co. v. Warthen, 25 S.E. 988, 98 Ga. 599.
51 C.J. p 499 note 63.

6. U.S.—Purcell v. U.S., D.C.Md., 41 F.Supp. 309, affirmed 62 S.Ct. 709, 315 U.S. 381, 86 L.Ed. 910.

N.Y.—Hudson River Regulating Dist. v. Fonda, etc., R. Co., 217 N.Y.S. 781, 127 Misc. 866, affirmed 228 N.Y.S. 686, 223 App.Div. 358, modified on other grounds 164 N.E. 541, 249 N.Y. 445.

7. U.S.—U.S. Feldspar Corp. v. U.S., D.C.N.Y., 38 F.2d 91.
51 C.J. p 499 note 67.
Certificate authorizing abandonment generally see infra § 67.

8. Pa.—Illig v. Chartiers Southern R. Co., 112 A. 116, 268 Pa. 467.

9. N.Y.—Matter of Niagara Falls Hydraulic Power, etc., Co., 23 N.Y.S. 31, 68 Hun 391, affirmed 39 N.E. 21, 143 N.Y. 669.
51 C.J. p 500 note 79.
Filing map or profile generally see supra § 63.

10. N.Y.—Matter of Niagara Falls Hydraulic Power, etc., Co., 23 N.

the railroad company and after the service on him of the notice provided for,[11] and the court cannot appoint the commission until the fifteen days allowed for the filing of such petition has elapsed,[12] and all persons entitled to notice of the application have been served.[13] The justice to whom the application is made cannot pass on the merits of the case but may merely appoint the commission,[14] one of whom must be a civil engineer.[15]

It is the duty of the commissioners to examine the proposed route, and to affirm or alter it as may be consistent with the just rights of all the parties and the public;[16] and they can adopt only the route proposed by the railroad company or the substitute proposed by the objecting party, and cannot reject both and select a different route.[17] However, they are not limited to a consideration of that part of the route within the bounds of the land of the party procuring their appointment,[18] but must examine the entire route intended to be adopted in the county,[19] and in making an alteration they must do it in such a manner as to preserve the continuity of the line.[20] The statute contemplates that one commission shall hear and determine all objections to the proposed location within the county;[21] but if the appointment of the first commission was premature and unauthorized and its proceedings void, a second commission may be appointed.[22] The determination of the commissioners may be based on a personal examination of the route and of the adjacent property as well as on testimony given before them.[23]

On appeal from the decision of the commissioners, the appellate court can consider only questions of law,[24] and cannot substitute its judgment for that of the commission as to the merits of the proposed routes;[25] and if errors of law have been committed, all that the appellate court can do is to send back the report.[26] Where it appears that the commissioners have gone beyond the scope of their powers their decision will be set aside.[27]

b. Termini

A change of termini of a railroad is permissible when, but only when, there is legislative authority therefor.

Where a railroad company has once selected and made valid location of its termini, it cannot change the location without legislative authority,[28] and an authority to change the location of the route of the road applies only to the route between the termini and does not authorize a change of the termini;[29] but a railroad company on constructing its road to or into a place named as a terminus may temporarily use a particular point as a terminal without losing the right to establish its permanent terminal at a different point within such place.[30] If the location of the termini is fixed in the articles of incorporation they cannot be changed by order of a public service commission.[31] However, a railroad charter may be amended so as to change the termini.[32] If expressly authorized by statute to do so the company may change the location of its termini,[33] and a change within a particular place may be impliedly authorized by a statute providing

Y S 31, 68 Hun 391, affirmed 39 N E 21, 143 N Y 669.
51 C.J. p 500 note 80

11. N.Y.—People v Tubbs, 59 Barb. 401, affirmed 49 N.Y. 356.

12. N.Y—In re Long Island R Co, 45 N.Y. 364.

13. N.Y.—People v Lockport, etc., R. Co, 13 Hun 211.
51 C.J. p 500 note 83.

Persons entitled to notice
All owners and occupants of land to be affected by the proposed location, as well as the railroad company, are entitled to notice of the proceedings and an opportunity to be heard.—Norton v. Wallkill Valley R Co, 63 Barb., N.Y., 77—51 C.J. p 500 note 86.

14. N.Y.—Norton v. Wallkill Valley R. Co, 61 Barb. 476, 42 How.Pr. 228, reversed on other grounds 63 Barb 77.

15. N Y—Matter of Niagara Falls Hydraulic Power, etc., Co, 28 N Y.S. 31, 68 Hun 391, affirmed 39 N E 21, 143 N.Y. 669.
51 C.J. p 500 note 85.

16. N.Y—People v. Tubbs, 49 N Y. 356

17. N Y—Matter of Niagara Falls Hydraulic Power, etc, Co., 28 N. Y S 31, 68 Hun 391, affirmed 39 N. E 21, 143 N.Y. 669.
51 C J. p 500 note 88.

18. N Y—People v Tubbs, 49 N Y. 356—In re Long Island R Co, 45 N.Y. 364.

19. N Y.—People v. Tubbs, 49 N.Y. 356—In re Long Island R. Co., 45 N.Y 364.

20. N.Y.—People v. Tubbs, 49 N.Y. 356.

21. N Y—People v. Tubbs, supra.
51 C.J. p 501 note 92.

22. N.Y—In re Long Island R. Co, 45 N Y. 364

23. N.Y.—People v. Tubbs, 49 N.Y. 356.

24. N Y.—In re Lake Shore, etc., R. Co, 89 N Y. 442.
51 C.J. p 501 note 95.

25. N Y.—Matter of Niagara Falls Hydraulic Power, etc., Co., 28 N. Y S 31, 68 Hun 391, affirmed 39 N E 21, 143 N Y. 669

26. N.Y.—In re Lake Shore, etc, R. Co, 89 N Y. 442.

27. N.Y.—People v Tubbs, 59 Barb. 401, affirmed 49 N.Y. 356.

28. Ill.—Chicago, etc., R. Co. v Chicago Mechanics' Inst., 87 N.E 933, 239 Ill. 197.
51 C J. p 501 note 1.

29. Wis.—Attorney General v. West Wisconsin R Co., 36 Wis. 466.

30. U S—Colorado Eastern R. Co. v. Union Pac. R Co, C.C.Colo, 41 F 293
Ala.—Georgia Cent. R. Co v. Union Springs, etc., R. Co, 39 So 473, 144 Ala. 639, 2 L.R.A.,N.S, 144.

31. N Y.—People v. Second Dist Public Service Commission, 125 N.E 438, 227 N Y. 248.

32. Tenn—Anderson v. Railroad Co., 17 S W. 803, 91 Tenn 44.

33. Tenn—Memphis, etc., R. Co v. Union R Co., 95 S.W. 1019, 116 Tenn. 500
51 C.J. p 501 note 6.

for the construction and use of union depots.[34] It has been held that terminal facilities within a city may be extended from time to time as the industrial expansion of the city requires[35]

Consent of stockholders A statute permitting a change of termini only with the consent of stockholders is intended to apply only to a change of proposed termini and does not apply to a change of termini of a completed railroad.[36]

§ 66. —— Stations

A change of location of a railroad station may be made if it is done in good faith with due regard to the interests of both the company and the public, and the new location furnishes proper accommodation to the public.

A railroad company may, at least to the extent permitted by statute, change the location of its stations and depots,[37] and, in the absence of statute, the duty of maintaining or continuing stations at particular places is governed largely by the same principles as relate to their original establishment and location.[38] In the relocation of a station a railroad company is discharging a public duty.[39] It cannot consult merely its own convenience but must consider its duties to the public;[40] the new site must be convenient and accessible.[41] The mere fact that a station has been maintained at a particular place will not prevent a change of location,[42] and a change may be made if it is done in good faith with due regard to the interests of both the company and the public, and the new location furnishes proper accommodation to the public.[43] In such cases, where no improper motive or abuse of discretion is shown, the courts will not attempt to interfere with its exercise,[44] and although it appears that the original change of location was improper, the court will not require the reëstablishment of a station at its original location after conditions have so changed that the general public is better accommodated by the new location and the conditions do not warrant the maintenance of a station at both places[45]

The right to change the location of a station in a particular case cannot be controlled or prevented by contract, as discussed supra § 61, or by the fact that private citizens in the expectation of the continuance of a station at a particular place have made donations of land or money to the railroad company,[46] or purchased property or established business enterprises in the vicinity of the original location.[47] A railroad company cannot, when compelled to remove a depot erected on land dedicated to a public street, recover for the value thereof.[48]

Power of board or commission. In some jurisdictions power has been conferred on boards or commissions to direct, authorize, or prevent the relocation of a station or depot,[49] and in determining whether a new depot shall be built or alterations made in an old one the commission can consider the dangers which exist in the present location of the old depot.[50] Statutory provisions prohibiting the abandonment of a station without legislative authority and permitting a change of location with the permission of the railroad commissioners and the municipal authorities of the place where the station is located are not necessarily conflicting.[51]

§ 67. Abandonment of Location

After actual construction on a particular location, a railroad or part thereof may be abandoned by the company when, but only when, there is legislative authority for the abandonment or permission or consent is grant-

34. Mo.—State v. St Louis, etc., R. Co, 3 Mo.App. 180.
N.C.—Dewey v Atlantic Coast Line R. Co., 55 S.E 292, 142 N.C. 392

35. Or—Oregon-Washington R., etc, Co v Spokane, etc, R Co, 163 P. 600, 989, 83 Or 528.
Pa—Appeal of Western Pennsylvania R. Co., 99 Pa. 155.

36. U.S—Atwater v. Wheeling & L. E Ry Co., C.C.A.Ohio, 56 F.2d 720.

37. Ky.—Beatty v Louisville, etc., R. Co, 195 S.W. 487, 176 Ky. 100.
51 C.J. p 501 note 11.

38. Ill.—Mobile, etc., R Co. v. People, 24 N.E 643, 132 Ill. 559, 22 Am S.R 556.
51 C.J. p 501 note 12.

39. Va.—Southern R. Co. v. Commonwealth, 105 S.E. 65, 128 Va. 176.

40. Minn.—State v. Northern Pac. R. Co., 96 N.W 81, 90 Minn. 277.
51 C.J p 501 note 14.

41. Va—Southern R Co. v. Commonwealth, 105 S.E 65, 128 Va 176.
51 C.J. p 501 note 15.

42. Ill—Chicago, etc, R Co. v. People, 78 N.E 734, 222 Ill. 396.

43. Ill—Chicago, etc., R. Co. v. People, supra.
51 C.J. p 502 note 17.

44. Ill.—Chicago, etc., R. Co. v. People, supra
51 C.J. p 502 note 18.

45. U.S.—Northern Pac. R. Co. v. Washington Terr., Wash., 12 S.Ct. 283, 142 U.S. 492, 35 L.Ed 1092
Tex.—Mosel v San Antonio, etc., R. Co, Civ.App, 249 S.W. 893.

46. Fla—College Arms Hotel Co. v. Atlantic Coast Line R. Co, 54 So. 459, 61 Fla. 550.
Ill—Mobile, etc, R. Co. v People, 24 N.E. 643, 132 Ill. 559, 22 Am. S.R. 556.

47. Ky—Beatty v Louisville R. Co, 195 S.W. 487, 176 Ky 100.
51 C.J. p 502 note 23.

48. Tex—Galveston, etc., R. Co v. Eagle Pass, Civ.App., 249 S.W. 268, reversed on other grounds, Com.App, 260 S.W. 841.

49. Ark—St Louis, etc., R. Co. v. Bellamy, 169 S.W. 322, 113 Ark. 384, L.R.A.1915D 91.
51 C.J. p 502 note 24.

50. Minn—St. James Commercial Club v Chicago, etc, R. Co., 171 N.W. 312, 142 Minn. 169.
51 C.J. p 502 note 25.

51. Mass—Cunningham v Railroad Commissioners, 32 N.E. 959, 158 Mass. 104.

ed by a commission in the exercise of power conferred on it by statute.

In the absence of any statutory provision on the subject the question whether a railroad company has abandoned a particular location is largely one of intention,[52] and, in the absence of other facts showing such intention, a mere lapse of time without constructing a railroad on the location adopted will not constitute an abandonment thereof.[53] A railroad company authorized to construct a single road cannot have more than one location in full force at the same time;[54] so if a company which has adopted one location subsequently adopts another it thereby abandons the former;[55] and if a railroad company is given an alternative right to construct a single railroad on one of several specified routes its adoption of one constitutes an abandonment of the others.[56] A railroad company incorporated to construct a road between certain points has no right to abandon a portion of the chartered route and construct only the remainder,[57] nor in the absence of statutory authority can a railroad company after constructing its road on a particular location abandon it[58] and reconstruct the road on another.[59] If authorized by statute to do so it may abandon a portion of its road after it has been constructed,[60] provided it complies with any conditions imposed by the statute.[61]

Consent or permission of commission. Under the federal statute, 49 U.S.C.A. § 1(18), a railroad engaged in interstate commerce may not abandon all or any portion of a line of railroad unless and until there is first obtained from the interstate commerce commission a certificate that public convenience and necessity permit of such abandonment.[62] When not empowered by statute to do so, a state commission may not authorize or permit a railroad company to abandon its road or a portion thereof[63] on the ground that the road can be operated only at a loss,[64] nor may it order abandonment of side tracks or switch tracks as a means of assuring proper sanitary conditions.[65] A commission may have power, in granting a certificate of public convenience for abandonment of part of a line, to attach reasonable conditions to its consent as long as the conditions are proper under the company's franchise or under contracts previously entered into by it with municipal authorities;[66] but after it has been actually carried into effect, a certificate issued without any conditions attached thereto may not be rescinded by the commission.[67]

§ 68. —— Stations

Under some statutes a railroad company may not abolish or abandon a station without the consent of a designated commission.

No general rule of law applicable to all cases can be laid down as to what change of station will constitute an abandonment or a relocation, but the decision in each case must rest on the facts thereof.[68] It is not an abandonment of a station to change its location from one point to another in the same vicinity,[69] or to consolidate two stations in the same vicinity into one by relocating each at a single intermediate point, although the number of stations is thereby reduced,[70] or to enter into a contract granting a terminal company temporary possession of its grounds with a restoration clause if a contract for the building of a union station is not approved by a commission.[71]

52. Ill.—Stannard v. Aurora, etc., R. Co., 77 N.E. 254, 220 Ill. 469.
51 C.J. p. 502 note 31.
Abandonment of:
Operation of road or portion thereof see infra § 392.
Right of way see infra § 117.

53. Pa.—Pittsburgh, etc., R. Co. v. Pittsburgh, etc., R. Co., 28 A. 155, 159 Pa. 331.
51 C.J. p. 502 note 32.

54. Pa.—Hagner v. Pennsylvania, etc., R. Co., 25 A. 1082, 154 Pa. 475.

55. Pa.—Hagner v. Pennsylvania, etc., R. Co., supra.
51 C.J. p. 502 note 34.

56. Ky.—Louisville, etc., R. Co. v. Louisville City R. Co., 2 Duv. 175.
51 C.J. p. 503 note 35.

57. Mo.—Kansas City Interurban R. Co. v. Davis, 95 S.W. 881, 197 Mo. 669, 114 Am.St.R. 790.

58. Tex.—Railroad Commission of Tex. v. Texas & N. O. R. Co., Civ. App., 197 S.W.2d 176, reversed on other grounds 200 S.W.2d 626, 145 Tex. 541.

59. Miss.—Lusby v. Kansas City, etc., R. Co., 19 So. 239, 73 Miss. 360, 36 L.R.A. 510.
51 C.J. p. 503 note 37.
Change of location generally see supra § 65.

60. N.H.—Northern R. Co. v. Manchester, etc., R. Co., 31 A. 17, 66 N.H. 560.
51 C.J. p. 503 note 38.

61. Mich.—Williams v. Flint, etc., R. Co., 74 N.W. 641, 116 Mich. 392
51 C.J. p. 503 note 39.

62. U.S.—Woodruff v. U. S., D.C. Conn., 40 F.Supp. 949.
Power of interstate commerce commission to authorize or require abandonment see Commerce § 142 b.

63. Tex.—State v. Sugarland R. Co., Civ.App., 163 S.W. 1047.
51 C.J. p. 503 note 37 [d].

64. Minn.—Minneapolis & St. P. S. R. Co. v. Village of Birchwood, 244 N.W. 57, 186 Minn. 563.

65. Tenn.—Pharr v. Nashville, C. & St. L. Ry., 208 S.W.2d 1013, 186 Tenn. 154.

66. Pa.—Jennings v. Pennsylvania Public Utility Commission, 14 A.2d 382, 140 Pa.Super. 569.

67. Pa.—Jennings v. Pennsylvania Public Utility Commission, supra.

68. Va.—Southern R. Co. v. Commission, 105 S.E. 65, 128 Va. 176.
51 C.J. p. 503 note 40.

69. Ky.—Louisville, etc., R. Co. v. Callahan, 136 S.W. 1018, 143 Ky. 517, 34 L.R.A.,N.S., 412.
51 C.J. p. 503 note 41.

70. Mass.—Cunningham v. Railroad Commissioners, 32 N.E. 959, 158 Mass. 104.

71. U.S.—Wheeling, etc., R. Co. v. Pittsburgh, etc., R. Co., C.C.A.Ohio, 33 F.2d 390, certiorari denied 50 S.Ct. 40, 280 U.S. 593.

In some jurisdictions power has been conferred on boards or commissions to deal with the question of discontinuance or abandonment of an existing station.[72] Statutes expressly providing that a railroad company shall not abolish or abandon a station or one which has been maintained for a certain length of time without the consent of the railroad commissioners, are, when applicable, accorded effect,[73] and under such statutes the commissioners may authorize the discontinuance of a station.[74] On an application for permission to abandon a station the commissioners are only to determine the issue as to whether it shall be abandoned and cannot impose conditions.[75] A petition filed before a board or commission for an abandonment of a station must be broad enough to justify the relief sought,[76] and the burden of proof is on petitioner to show that it is entitled thereto.[77] The abandonment of a station with the consent of the railroad commissioners, as authorized by statute, and the construction of a new station at a different place, do not constitute a contract with the state which will prevent the legislature from subsequently requiring the reestablishment of the station abandoned.[78]

If one station will furnish proper accommodation to the public, a company having two stations in the same place or near each other may be granted leave to discontinue the use of one of them.[79]

§ 69. Liability of Railroad Company

In the absence of statute or special contract, no right to damages accrues to a member of the public from an authorized removal, abandonment, or change of location of a railroad line or portion thereof.

Some statutes provide for the payment of damages by a railroad to those injured by the removal of its tracks;[80] but in the absence of statute or special contract no right to damages accrues to a member of the public from an authorized removal, abandonment, or change of location of a railroad line or a portion thereof, since any injury sustained is damnum absque injuria,[81] and if authority to change its route has been granted unconditionally to a railroad it owes no duty to fill or bridge a cut on the abandoned location.[82] On the other hand, if a railroad company has made an unauthorized change of location it is liable for a resulting injury to property caused by the new location, although such location does not actually touch plaintiff's property;[83] but even in the case of a change of location alleged to be unlawful, an action for damages predicated thereon may not be maintained by a person not injured or affected thereby,[84] and penalties for abandonment and removal of tracks without first making application to a commission for authority to do so may not be recovered from a railroad company by the state where, during the pendency of the suit, the statute providing for the penalties was repealed and superseded by another statute containing no special saving clause and providing that a general saving statute should not apply.[85]

A right to damages from the removal of a station does arise from the mere fact that one is the owner of property adjoining the station.[86]

72. N.J.—Fritts v. Delaware, etc., R. Co., 73 A. 92, 75 N.J.Eq. 384
51 C.J. p. 503 note 44.

73. Minn.—Minnesota Transfer Ry. Co. v. Railroad and Warehouse Commission, 274 N.W. 408, 200 Minn. 422.
51 C.J. p. 503 note 45

74. N.Y.—People v. Railroad Commissioners, 53 N.E. 163, 158 N.Y. 421.

75. Conn.—Chester v. Connecticut Valley R. Co., 41 Conn. 348
51 C.J. p. 504 note 49.

76. Ill.—Chicago, etc., R. Co. v. Illinois Commerce Commission, 164 N.E. 147, 333 Ill. 215.
51 C.J. p. 504 note 50.

77. Ill.—Chicago, etc., R. Co. v. Illinois Commerce Commission, supra.

78. Conn.—State v. New Haven, etc., Co., 43 Conn. 351.

79. Va.—Clayville Mfg. Co. v. Southern R. Co., 76 S.E. 942, 114 Va. 356.
51 C.J. p. 504 note 47.

80. Ind.—Cleveland, etc., R. Co. v. Cook, 151 N.E. 20, 85 Ind.App. 356
51 C.J. p. 504 note 52.

81. U.S.—Woodruff v. U. S., D.C. Conn., 40 F.Supp. 949
Mont.—Briggs v. Great Northern Ry. Co., 15 P.2d 840, 92 Mont. 463
Neb.—Scully v. Central Nebraska Public Power & Irrigation Dist., 9 N.W.2d 207, 143 Neb. 184
51 C.J. p. 504 note 53.
Liability of company, after change of location, for damages actually sustained by landowners from prior location see supra § 65.

Petition held not to state cause of action

Ga.—Southern Ry. Co. v. Toccoa Rock Crushing Co., 171 S.E. 179, 47 Ga.App. 558

Decision of federal commission or court

It has been said that neither the decision of interstate commerce commission that public convenience or necessity permitted of the abandonment of a branch line railroad, nor decision of federal court, refusing to enjoin operation of order authorizing abandonment, would have any effect on the right to compensation, if any, for injury inflicted by abandonment on operator of a coal mine located on the branch line.—Purcell v. U. S., D.C.Md., 41 F.Supp. 309, affirmed 62 S.Ct. 709, 315 U.S. 381, 86 L.Ed. 910

82. Miss.—Alabama, etc., R. Co. v. Brandon, 14 So. 438.
51 C.J. p. 504 note 57

83. Ohio.—Little Miami R. Co. v. Naylor, 2 Ohio St. 235, 59 Am.D. 667.

84. Mont.—Briggs v. Great Northern Ry. Co., 15 P.2d 840, 92 Mont. 463.

85. Minn.—State v. Chicago Great Western Ry. Co., 25 N.W.2d 294, 222 Minn. 504.

86. Ky.—Beatty v. Louisville, etc., R. Co., 195 S.W. 487, 176 Ky. 100
51 C.J. p. 492 note 46.

Property fronting on alley and opposite to depot

Ky.—Watson v. Chesapeake & O. Ry. Co., 56 S.W.2d 699, 247 Ky. 135

A railroad company seeking to remove shop facilities and terminals which were located under a contract to maintain them at that place forever must show by clear and satisfactory evidence that the public interest in the proper discharge of its duties demands it.[87]

§ 70. Remedies and Proceedings

A railroad company may be enjoined from making an unauthorized relocation or abandonment of its road; but an injunction against discontinuance of a station at a certain place will not be granted for the purpose of enforcing a contract to maintain a station at that place.

A railroad company may be restrained by injunction from making an unauthorized relocation or abandonment of its road,[88] and any person who will sustain a special injury by such change which is of an irreparable character or cannot be adequately compensated in damages may maintain the suit.[89] Also, where a company authorized to construct a certain line of railroad resolves to abandon a portion of the authorized route and construct a road only on the remainder, a landowner may resist the condemnation of his land for such purpose.[90] It has been held, however, that, where a location has been surveyed and adopted, the question of abandonment can be raised only by the state and not by a rival company seeking to appropriate the same location.[91]

A railroad company which has put in a private siding under a contract for the payment of its cost cannot remove it because of a failure to receive the entire amount due.[92]

Discontinuance or change of location of station or depot. A contract to maintain a station at a certain place will not be enforced by injunction restraining its discontinuance,[93] and, where the company is restrained from abandoning its old route through a town and the relocation of its depot at the old site necessarily follows, it cannot be restrained from making such change.[94] A railroad company which seeks to change the location of its depot on the ground that it is for the public benefit has the burden of proving such benefit in an action to restrain the change.[95]

Judicial review of order of commission. An order of a commission requiring a railroad company to relocate its stock pens is appealable,[96] and on appeal is presumed to be just and reasonable.[97] Towns and cities are not aggrieved parties so as to be entitled to bring exceptions to rulings by a commission on petitions by railroad companies for changes in locations.[98]

E. CONFLICTING LOCATIONS

§ 71. In General

In the absence of statutory provisions to the contrary, priority of location and of right thereto, as between two or more railroad companies, belongs to the company which first defines, marks out, and adopts its route as a permanent location, by authoritative corporate action.

In the case of conflicting grants of a specific location to different companies, the prior grant will control,[99] but if no specific route is granted to either of two companies, no right to any particular route accrues to either until it has determined on a location.[1] In such cases where the exact route is to be selected by the company, the prior right will attach to that company which first definitely

87. Tex.—Missouri, etc., R Co. v State, Civ App, 275 S W. 673, certiorari granted 46 S Ct 483, 271 U S 653, 70 L Ed 1134, writ vacated 48 S Ct. 82, 275 U S 494, 72 L. Ed 391—Houston, etc, R Co v. Ennis, Civ.App, 201 S W. 256, certiorari denied 40 S Ct. 393, 252 U S 583, 64 L Ed. 728, and error dismissed 41 S Ct. 622, 256 U S. 684, 56 L Ed 1171.

88. Ga.—Brown v. Atlantic, etc., R Co, 55 S E 24, 126 Ga 248.
Application by landowner for change of location and proceedings thereon see supra § 65.
Mandamus to prevent, or to compel restoration after, abandonment or removal of station or part of road see Mandamus § 231 d (2).

89. Ga.—Atlantic, etc, R Co v Kirkland, 59 S E 220, 129 Ga. 552
51 C J. p 504 note 61.

90. Mo.—Kansas City Interurban R Co. v. Davis, 95 S.W. 881, 197 Mo 669, 114 Am.S R 790.

91. Pa.—Pittsburgh, etc., R Co. v Pittsburgh, etc, R. Co, 28 A. 155, 159 Pa 331.

92. N J.—Smith v. Atlantic City R Co., 76 A. 977, 78 N.J Law 708.
51 C.J. p 505 note 66.

93. N J.—Fritts v. Delaware, etc., R. Co., 73 A. 92, 75 N.J.Eq 384.
51 C J p 491 note 33.

94. Miss.—Cooper v Mobile, etc., R Co., 48 So. 832, 94 Miss 413.

95. Tex.—San Antonio, etc, R. Co. v. Mosel, Civ App., 180 S.W 1138

96. Okl.—St Louis, etc., R. Co v. Miller, 123 P. 1047, 31 Okl. 801.

97. Okl.—St Louis, etc., R. Co. v Miller, supra.

98. Me.—In re Maine Cent. R. Co, 183 A. 844, 134 Me 217.

99. Md.—Chesapeake, etc, Canal Co v Baltimore, etc., R. Co, 4 Gill & J. 1.
N.J.—Morris, etc, R. Co. v. Blair, 9 N J Eq 635.

Exclusive right
A statute which granted a railroad a franchise to lay down its line on a right of way surveyed by it was held to be a grant of an exclusive right to use that particular route—Rochester, etc, R Co v. New York, etc, R Co, 44 Hun 206, affirmed 17 N E 680, 110 N Y. 128.

1. N J.—Morris, etc, R Co. v. Blair, 9 N J.Eq 635.

locates its line,[2] without regard to the dates of their respective charters[3] or dates of entry on the property or preliminary surveys or work of construction,[4] and, in the absence of statutory regulations to the contrary, the first location belongs to the company which first defines, marks out, and adopts its route for its permanent location by authoritative corporate action.[5] In order to constitute a valid location for such purpose a mere preliminary survey is not sufficient,[6] but there must be an adoption of a particular line or survey as a corporate act of the company itself,[7] and if after such survey but before its adoption another company surveys and adopts the same location, the latter company will acquire the prior right thereto.[8] Mere mental selection or intention by officers or members of the corporation to construct a line over a specified route is not sufficient,[9] but it has been held that a preliminary survey followed by actual possession of the ground is sufficient.[10] It seems that if there is a definite line or survey marked out which may be adopted, it is not material when or by whom it was made;[11] and so it has been held that a company may without a survey by engineers acquire a valid location as against another company by staking out a line on the abandoned roadbed of another company,[12] or by adopting a survey made by promoters for the benefit of the company prior to its incorporation.[13]

Where the statute or charter requires a railroad company before constructing its road or instituting condemnation proceedings to file a map or survey of its route, that company acquires the prior right which first selects and adopts a location and files the map or survey required,[14] but if the statute authorizes this to be done after the road is located or constructed, it is not essential to a valid location as against another company.[15] The institution of condemnation proceedings or acquisition of title to the property is not essential to priority of location against rival companies,[16] and where priority of right has been secured by priority of location it cannot be defeated by a rival company agreeing with the owners and purchasing the property,[17] or instituting condemnation proceedings in advance of such proceedings by the company first completing its location,[18] since, while the location does not give title as against the landowner, it fixes the prior right as between companies to acquire such title.[19] If a railroad company has marked out the line of its location it need not as against a rival company be exact as to the width of the right of way or other matters of mere detail,[20] such as the marks for grades, slopes, cuts, and fills nec-

2. Ill.—Golconda Northern R. Co. v. Gulf Lines Connecting R. Co., 106 N.E. 818, 265 Ill. 194, Ann.Cas. 1916A 833.
51 C.J. p. 505 note 70.

3. N.J.—Morris, etc., R. Co. v. Blair, 9 N.J.Eq. 635.
Wis.—Milwaukee Light, etc., Co. v. Milwaukee Northern R. Co., 112 N.W. 663, 132 Wis. 313.

4. U.S.—Atlanta, etc., R. Co. v. Southern R. Co., Tenn., 131 F. 657, 66 C.C.A. 601, certiorari denied 25 S.Ct. 791, 195 U.S. 634, 49 L.Ed. 354.—Utah, etc., R. Co. v. Utah, etc., R. Co., C.C.Nev., 110 F. 879.

5. N.C.—Fayetteville St. R. Co. v. Aberdeen R. Co., 55 S.E. 345, 142 N.C. 423.
51 C.J. p. 505 note 73.

Text rule has been recognized in a decision which holds, however, that mere location by railroad of its future lines does not carry with it right to occupy land but gives rise to incipient right only, which if perfected into right of occupancy must be followed with dispatch by further action relating to acquisition of the property or an easement therein, either by purchase or institution of condemnation proceedings, and which also holds that railroad company which was given consent by legislature to cross roadway and which secured permission of abutting owner, who retained fee of roadway, to cross it and which thereafter acquired title to land from owner, had right perfected to cross roadway and such right was superior to inchoate right of defendant company to lay tracks for commercial railroad along roadway on ground that it was not perfected for failure to compensate abutting owners.—Texas & N.O.R. Co. v. Thompson, Tex.Civ.App., 194 S.W.2d 123, error refused.

6. N.J.—Morris, etc., R. Co. v. Blair, 9 N.J.Eq. 635.
51 C.J. p. 505 note 74.
Requisites of location generally see supra § 45.

7. U.S.—Utah, etc., R. Co. v. Utah, etc., R. Co., C.C.Nev., 110 F. 879.
51 C.J. p. 505 notes 75, 77

8. N.J.—Morris, etc., R. Co. v. Blair, 9 N.J.Eq. 635.
51 C.J. p. 505 note 76.

9. Mont.—Great Falls, etc., R. Co. v. Ganong, 136 P. 391, 48 Mont. 43.
N.J.—Morris, etc., R. Co. v. Blair, 9 N.J.Eq. 635.

10. U.S.—Denver, etc., R. Co. v. Alling, Colo., 99 U.S. 463, 25 L.Ed. 438.

11. N.J.—Morris, etc., R. Co. v. Blair, 9 N.J.Eq. 635.
51 C.J. p. 506 note 80.

12. N.C.—Fayetteville St. R. Co. v. Aberdeen, etc., R. Co., 55 S.E. 345, 142 N.C. 423.

13. W.Va.—Chesapeake, etc., R. Co. v. Deepwater R. Co., 50 S.E. 890, 57 W.Va. 641
51 C.J. p. 506 note 82.

14. Vt.—Barre R. Co. v. Montpelier, etc., R. Co., 17 A. 923, 61 Vt. 1, 15 Am.S.R. 877, 4 L.R.A. 785.
51 C.J. p. 506 note 83.

15. W.Va.—Chesapeake, etc., R. Co. v. Deepwater R. Co., 50 S.E. 890, 57 W.Va. 641
51 C.J. p. 506 note 84.

16. W.Va.—Chesapeake, etc., R. Co. v. Deepwater R. Co., supra
51 C.J. p. 506 note 85.

17. Vt.—Barre R. Co. v. Montpelier, etc., R. Co., 17 A. 923, 61 Vt. 1, 15 Am.S.R. 877, 4 L.R.A. 785
51 C.J. p. 506 note 86.

18. Wis.—Milwaukee Light, etc., R. Co. v. Milwaukee-Northern R. Co., 112 N.W. 663, 132 Wis. 313
51 C.J. p. 506 note 87.

19. Pa.—Dilts v. Plumville R. Co., 71 A. 1072, 222 Pa. 516.
51 C.J. p. 506 note 88.

20. Pa.—Pittsburgh, etc., R. Co. v. Pittsburgh, etc., R. Co., 28 A. 155, 159 Pa. 331.
W.Va.—Chesapeake, etc., R. Co. v. Deepwater R. Co., 50 S.E. 890, 57 W.Va. 641.

essary for the actual construction of the road,[21] and where a company has surveyed, marked out, and adopted its location, it is not necessary that it should maintain the stakes and keep them in position in order to hold such location against another company.[22] A railroad company may also, prior to a survey of its entire line, locate and hold as against another company a particular section or portion thereof,[23] as long as it proceeds in good faith and with reasonable diligence in the prosecution of the work contemplated by its organization.[24]

§ 72. Remedies and Proceedings

Where one railroad company, by first making a valid location, has secured a prior right thereto, another railroad company may be enjoined from interfering therewith.

As a general rule a court of equity will not interfere to protect an unlocated or indefinite right of way,[25] but it will intervene to protect rights acquired by prior location against the trespasses of another road.[26] Thus, a company which has merely made a preliminary survey but never adopted it has no standing in equity to enjoin another company from surveying and adopting the same location;[27] but when one railroad company by first making a valid location has secured a prior right thereto, another railroad company will be enjoined from interfering therewith,[28] notwithstanding the latter company has expended a large sum of money in grading.[29] Such cases are, however, governed by the general rules relating to the granting of injunctions,[30] and a preliminary injunction will not ordinarily be granted where the right of plaintiff is not clear, as where the validity of its location is in dispute,[31] and it does not appear that any great or irreparable injury can result from denying an injunction until final hearing.[32]

VI. RIGHT OF WAY AND OTHER INTERESTS IN LAND

§ 73. Capacity to Acquire and Hold Land

a. In general
b. Foreign railroad companies

a. In General

The general rule, as sometimes expressly given and regulated by statute, is that a railroad company has power to acquire, hold, and use necessary real estate for the construction, maintenance, and operation of its road.

As long as it is a properly going corporation,[33] and in the absence of restrictions in its charter or the governing statute, the general rule, as sometimes expressly given and regulated by statute, is that a railroad company has power to acquire, hold, and use necessary real estate for the construction, maintenance, and operation of its road.[34] Such power arises, in the absence of an express grant thereof, by necessary implication from the power to construct and operate a railroad.[35] Where such power is given and regulated by statute, it is subject to such restrictions or limitations as are imposed by the statute.[36] Where statutory power is acquired while such a statute is in force, it becomes a vested right which cannot be taken away or affected by the subsequent repeal or modification of the stat-

21. Pa.—Titusville, etc., R. Co. v. Warren, etc., R. Co., 12 Phila. 642.—Wilkesbarre, etc., R. Co. v. Danville, etc., R. Co., 29 Leg. Int. 373.

22. Pa.—Pittsburgh, etc., R. Co. v. Pittsburgh, etc., R. Co., 28 A. 155, 159 Pa. 331.

23. W.Va.—Chesapeake, etc., R. Co. v. Deepwater R. Co., 50 S.E. 890, 57 W.Va. 641.
51 C.J. p. 506 note 92.

24. W.Va.—Chesapeake, etc., R. Co. v. Deepwater R. Co., supra.

25. S.C.—Marion County Lumber Co. v. Tilghman Lumber Co., 55 S.E. 337, 75 S.C. 220.

26. N.M.—Arizona, etc., R. Co. v. Denver, etc., R. Co., 117 P. 730, 16 N.M. 281, affirmed 34 S.Ct. 691, 233 U.S. 601, 58 L.Ed. 1111.
51 C.J. p. 507 note 95.

27. Pa.—Williamsport, etc., R. Co. v. Philadelphia, etc., R. Co., 21 A. 645, 141 Pa. 407, 12 L.R.A. 220.

28. Pa.—Titusville, etc., R. Co. v. Warren, etc., R. Co., 12 Phila. 642.
51 C.J. p. 507 note 97.

29. Pa.—Titusville, etc., R. Co. v. Warren, etc., R. Co., supra.

30. U.S.—Utah, etc., R. Co. v. Utah, etc., R. Co., C.C.Nev., 110 F. 879.

31. W.Va.—Kanawha, etc., R. Co. v. Glen Jean, etc., R. Co., 30 S.E. 86, 45 W.Va. 119.
51 C.J. p. 507 note 1.

32. N.Y.—New York, etc., R. Co. v. New York, etc., R. Co., 11 Abb.N. Cas. 386.

33. N.Y.—Greenwood Lake, etc., R. Co. v. New York, etc., R. Co., 8 N.Y.S. 26, 5 Silv. Sup. 305, affirmed 31 N.E. 874, 134 N.Y. 435.
51 C.J. p. 507 note 5.

34. U.S.—Magnolia Petroleum Co. v. Thompson, C.C.A.Mo., 106 F.2d 217, certiorari denied Thompson v. Magnolia Petroleum Co., 60 S.Ct. 180, 308 U.S. 613, 84 L.Ed. 513, reversed on other grounds 60 S.Ct. 628, 309 U.S. 478, 84 L.Ed. 876.
Conn.—Parsons v. Town of Wethersfield, 60 A.2d 771, 135 Conn. 24.
Ill.—Keen v. Cleveland, C., C. & St. L. Ry. Co., 64 N.E.2d 499, 392 Ill. 362.
Mo.—State ex rel. State Highway Commission v. Union Electric Co. of Missouri, 148 S.W.2d 503, 347 Mo. 690.
Okl.—Higgins v. Oklahoma City, 127 P.2d 845, 191 Okl. 16, reversed on other grounds 56 S.Ct. 562, 297 U.S. 431, 80 L.Ed. 816—Oklahoma City v. Dobbins, 44 P.2d 148, 172 Okl. 194.
Tenn.—Pemberton v. Southern Ry. Co., 34 S.W.2d 444, 162 Tenn. 65.
51 C.J. p. 507 note 6.

35. Ill.—Lake St. El. R. Co. v. Carmichael, 56 N.E. 372, 184 Ill. 348.
N.J.—Morris, etc., R. Co. v. Newark, 10 N.J.Eq. 352.

36. Pa.—Jarden v. Philadelphia, etc., R. Co., 3 Whart. 502.

ute,[37] and such power is unaffected by the limitations of a constitution subsequently adopted.[38]

The power to acquire property can be questioned only by the state.[39]

Additional and unused property. Power to acquire land is not exhausted by the acquisition of as much real estate as the company needs at the time, but it may afterward acquire such additional property as its necessities require,[40] and in anticipation of its ultimate needs it may hold unused available land which it will require, within a reasonable time, for necessary future uses,[41] and this rule applies notwithstanding a constitutional provision which prohibits a corporation from holding land, other than that used for its legitimate business, for longer than a specified period.[42] The fact that a city grants a right of way in an alley does not prevent the railroad company from acquiring by purchase a private right of way in addition thereto on lands adjoining the alley.[43]

Validity of unauthorized acquisition. A railroad cannot acquire land which is not reasonably necessary for railroad purposes by procuring a trustee to make entry upon the land in its behalf;[44] nor can it enforce a trust in such land, held by another for it.[45] It has been held, however, that a conveyance to a railroad company of land which it is not authorized to acquire, such as for an unauthorized purpose, is not void,[46] but is good as against all the world except the state.[47]

b. Foreign Railroad Companies

Unless limited or prohibited by constitutional provisions, statutes, or other manifestations of public policy of the state in which the land is situated, a railroad company has the right, to the extent of its charter authority, to acquire land in a state other than that of its creation.

In accordance with, and subject to, the rules regulating the power of foreign or nonresident corporations generally to acquire and hold land in another state, unless limited or prohibited by constitutional provisions, statutes, or other manifestations of public policy of the state in which the land is situated, a railroad company has the right, to the extent of its charter authority, to acquire land in a state other than that of its creation.[48] This power, however, is subject to such conditions and restrictions as may be imposed by the laws of the domestic state,[49] such as that the nonresident company cannot acquire and hold land within the state unless it is specially authorized by the local legislature[50] or becomes a corporation under the local laws.[51]

On the other hand, where a nonresident railroad company is not absolutely prohibited from acquiring and holding land within a state, but is required only to perform certain conditions, a conveyance to such a railroad company which has not complied with the statute is not void, but passes title as against the grantor and others, and can be attacked, if at all, only by the state,[52] and a title may be acquired by it by adverse possession which will be good against all but the state.[53] Even where a foreign company has power to hold land in the state, it cannot acquire it by eminent domain without the assent of the local legislature, as discussed in Eminent Domain § 25; but a provision prohibiting it from acquiring land by condemnation proceedings does not prevent it from acquiring land by agreement with any citizen having the right to contract.[54] A statute granting power to acquire and hold land to a domestic railroad company has been held by implication to deny such power to a foreign company.[55]

37. Ala.—Georgia Pac. R. Co. v. Wilks, 6 So. 34, 86 Ala. 478.

38. Okl.—Oklahoma City v. Dobbins, 44 P.2d 148, 172 Okl. 194.

39. Tenn.—Pemberton v. Southern Ry. Co., 34 S.W.2d 444, 162 Tenn. 65.

40. N.C.—Raleigh, etc., R. Co. v. McGuire, 88 S.E. 337, 171 N.C. 277.
51 C.J. p. 507 note 11

41. Ky.—Louisville, etc., R. Co. v. Commonwealth, 151 S.W. 934, 151 Ky. 325, 152 S.W. 976, 151 Ky. 774.
51 C.J. p. 508 note 12.

42. Ky.—Louisville Property Co. v. Commonwealth, 143 S.W. 412, 146 Ky. 827, 38 L.R.A.,N.S., 880.
51 C.J. p. 508 note 13.

43. Iowa.—Morgan v. Des Moines Union R. Co., 85 N.W. 902, 113 Iowa 561.

44. N.C.—Wallace v. Moore, 100 S.E. 287, 178 N.C. 114.

45. U.S.—Case v. Kelly, Wis., 10 S. Ct. 216, 133 U.S. 21, 33 L.Ed. 513.
Alaska.—Alaska Northern R. Co. v. Alaska Cent. R. Co., 5 Alaska 377.

46. Tex.—Knowles v. Northern Texas Tract. Co., Civ.App., 121 S.W. 232.
51 C.J. p. 508 note 18.

47. Ill.—Rockford Trust Co. v. Moon, 18 N.E.2d 447, 370 Ill. 250.
51 C.J. p. 508 note 19.

48. Neb.—Myers v. McGavock, 58 N.W. 522, 39 Neb. 843, 42 Am.S.R. 627.
51 C.J. p. 508 note 21.
Power of foreign corporations to acquire and hold land in another state generally see Corporations §§ 1868–1873

49. U.S.—Chattanooga, etc., R. Co. v. Evans, Tenn., 66 F. 809, 14 C.C.A. 116.

50. Pa.—Commonwealth v. New York, etc., R. Co., 7 A. 756, 114 Pa. 340.
51 C.J. p. 508 note 23

51. U.S.—Chattanooga, etc., R. Co. v. Evans, Tenn., 66 F. 809, 14 C.C.A. 116.
51 C.J. p. 508 note 24.

52. U.S.—Chattanooga, etc., R. Co. v. Evans, supra.
51 C.J. p. 508 note 25.

53. Neb.—Hanlon v. Union Pac. R. Co., 58 N.W. 590, 40 Neb. 52.

54. U.S.—St. Louis, etc., R. Co. v. Foltz, C.C.Ark., 52 F. 627.

55. Iowa.—Holbert v. St. Louis, etc., R. Co., 45 Iowa 23.

§ 74. —— Purposes for Which Land May Be Acquired

Except in so far as restricted by its charter or by statute, a railroad company may acquire and hold such real estate as is reasonably necessary to enable it to carry out any purpose authorized by its charter.

Except in so far as restricted by its charter or by statute,[56] a railroad company may acquire and hold such real estate as is reasonably necessary to enable it to carry out any purpose authorized by its charter, that is, such real estate as is reasonably necessary to enable it to perform its corporate duties and functions in constructing, maintaining, and operating a railroad.[57] It may acquire and hold land other than that occupied by its tracks,[58] as for the construction of necessary appurtenances without which the road cannot be successfully operated,[59] such as sidings, turnouts, and extra tracks,[60] depot grounds and approaches,[61] ground at its terminals for warehouses to be constructed thereon to facilitate the receipt and delivery of freight,[62] slopes,[63] or lands reasonably necessary to procure timber or other materials for the economical construction and maintenance of the road,[64] such as land for the purpose of getting crossties and firewood,[65] or for collecting and holding a water supply for its engines,[66] or from which to obtain gravel to construct or keep its roadbed in repair.[67]

It has also been held that real estate may be acquired and held for the purpose of procuring material to be transported as a commodity as a means of promoting the purposes of the railroad and increasing its business,[68] or even as security for debts.[69] In case of an electric railway company, land may be acquired for the construction of a power transmission line from a distant point.[70]

Under the power incident to its statutory duty to provide suitable and convenient waiting rooms and facilities for the accommodation of its passengers, as discussed infra § 405, a railroad company may hold land adjacent to its depot and maintain it as a park for the convenience and enjoyment of its passengers and employees,[71] and this rule applies notwithstanding a constitutional provision that no corporation shall hold any real estate, except such as may be necessary for carrying on its legitimate business, for longer than a given period of time.[72]

In the absence of statute providing otherwise, ordinarily it is a question for the railroad company, when acting in good faith, to decide what lands are reasonably necessary for the purpose of its road.[73]

Purposes for which land may not be acquired. Unless authorized by statute, a railroad has no power to acquire and hold land which is not reasonably necessary for the construction or maintenance of its road or the carrying on of its business as authorized by its charter.[74] In the absence of

56. U S —Case v. Kelly, Wis, 10 S. Ct 216, 133 U S 21, 33 L Ed. 513.
Purposes for which land may be taken by a railroad company by condemnation proceedings see Eminent Domain §§ 37–43.

57. U S —Magnolia Petroleum Co. v. Thompson, C C A.Mo, 106 F 2d 217, certiorari denied Thompson v. Magnolia Petroleum Co., 60 S.Ct 180, 308 U S. 613, 84 L Ed 513, reversed on other grounds 60 S Ct. 628, 309 U.S 478, 84 L.Ed 876
Conn —Parsons v Town of Wethersfield, 60 A 2d 771, 135 Conn. 24.
Mo —State ex rel State Highway Commission v Union Electric Co of Missouri, 148 S.W.2d 503, 347 Mo. 690—Coates & Hopkins Realty Co. v. Kansas City Terminal Ry. Co., 43 S.W 2d 817, 328 Mo. 1118
51 C.J. p 509 note 32.

Changes in circumstances

Railroad purposes include such a variety of uses as changes in circumstances may bring about, depending on the facts in each case The use, if reasonably necessary, is generally sustained —Mitchell v. Illinois Cent. R. Co, 51 N E.2d 271, 384 Ill. 258, 149 A.L.R. 369—Toledo, P. & W R. R v. Brown, 31 N E 2d 767, 375 Ill. 438.

58. U.S.—Oregon Short Line R Co v. Ada County, D C Idaho, 18 F Supp 842, affirmed, C C.A., Ada County v. Oregon Short Line R Co, 97 F 2d 666
Ill —Toledo, P & W. R R v. Brown, 31 N.E 2d 767, 375 Ill 438.
Ind —Pfaff v. Terre Haute, etc., R Co., 9 N.E 93, 108 Ind 144.

59. La —Lawrence v. Morgan's Louisiana, etc., R., etc, Co, 2 So 69, 39 La Ann 427, 4 Am S R. 265.

60. Ind —Pfaff v. Terre Haute, etc, R. Co, 9 N.E. 93, 108 Ind. 144.
51 C.J. p 509 note 35.

61. N.C.—Hickory v. Southern R. Co, 49 S E 202, 137 N.C. 189.
51 C J. p 509 note 36.

62. U.S.—Oregon Short Line R Co v. Ada County, D.C.Idaho, 18 F. Supp. 842, affirmed, C C.A, Ada County v. Oregon Short Line R. Co, 97 F.2d 666.

63. Pa —Aliquippa v. Pittsburgh, etc, R. Co., 94 Pa Super. 279.

64. U.S.—Midland Valley R. Co. v Sutter, C.C.A.Kan, 28 F 2d 163, certiorari denied 50 S.Ct. 65, 280 U S 521, 74 L Ed. 590.
Ohio —Overmyer v. Williams, 15 Ohio 26.

65. N C —Mallett v. Simpson, 94 N C. 37, 55 Am R 595.
51 C J p 509 note 39

66. U S.—Summers v. Atchison, etc, R. Co, D C Mo, 2 F 2d 717
51 C.J p 509 note 40.

67. Tex.—Small v McMurphy, 32 S W 788, 11 Tex Civ.App 409

68. Mass —Old Colony R Corp v. Evans, 6 Gray 25, 66 Am D 394.
51 C.J. p 509 note 42

69. Wis —Blunt v. Walker, 11 Wis 334, 78 Am D. 709.
51 C.J. p 509 note 43.

70. U S —Westinghouse Electric Mfg Co v. Binghamton R. Co., D C.N D, 268 F. 262.
51 C.J. p 509 note 44

71. Ky —Louisville Property Co v. Commonwealth, 143 S W 412, 146 Ky. 827, 38 L R A,N S, 830.
51 C J. p 509 note 47

72. Ky —Louisville Property Co. v. Commonwealth, supra.

73. Neb.—Hull v. Kansas City, etc., R. Co., 98 N W 47, 70 Neb. 756.
51 C J p 510 note 50

74. Mo.—Coates & Hopkins Realty Co v. Kansas City Terminal Ry. Co, 43 S W 2d 817, 328 Mo 1118.
51 C J. p 510 note 53.

statutory authority therefor, a railroad company cannot acquire and hold real estate indefinitely without regard to the uses to be made of it,[75] or for speculation only,[76] or for the purpose of erecting dwelling houses for employees,[77] or car or locomotive factories,[78] or for purposes of mining.[79]

Presumptions. Where a railroad company is authorized by its charter or statute to acquire land only for railroad purposes, it will be presumed that land conveyed to it was acquired for such purposes.[80] Accordingly, where land so acquired is soon after actually and continuously appropriated for railroad purposes by the successor of the company which acquired it, it affords a reasonable presumption that it was acquired for those purposes.[81]

§ 75. Modes of Acquiring Land or Rights Therein

a. In general
b. Adverse possession or prescription

a. In General

Where a method of acquiring property for a right of way is prescribed in the charter of a railroad company, that method generally must be strictly followed, and in the absence of a statutory or charter restriction a railroad company may acquire real estate or an interest therein by grant, purchase, or other contract with the owner.

Where a method of acquiring property for a right of way is prescribed in the charter of a railroad company, that method generally must be strictly followed,[82] and the charter method may be pursued, although it is inconsistent with statutory provisions, enacted after the company was incorporated, as to the mode in which a railroad company may acquire real property.[83] In the absence of a statutory or charter restriction a railroad company may acquire real estate or an interest therein for the construction, maintenance, and operation of its road, by deed or grant,[84] and under some statutes such grant may be made in advance and in aid of the organization of the company,[85] and, after it is organized, be made obligatory on the grantor, by the company ratifying and accepting the grant by entering upon and using the land for railroad purposes.[86] Unless restricted by its charter or a governing statute, a railroad company may also acquire real estate by purchase[87] or other contract with the owner,[88] and by completing a road over the lands and thereby exposing the company to liability for compensation.[89]

75. U S—Case v Kelly, Wis, 10 S Ct. 216, 133 U S 21, 33 L Ed. 513.

76. U.S.—In re Missouri Pac. R Co, D.C Mo., 13 F Supp. 888.
51 C.J. p 510 note 55

77. N J—State v. Mansfield Tp, 23 N J Law 510, 57 Am.D 409.

78. N.J.—State v Mansfield Tp., supra.
Vt—Eldridge v. Smith, 34 Vt. 484.

79. Ala.—Wilks v. Georgia Pac. R. Co., 79 Ala. 180.
51 C.J. p 510 note 58.

80. N.Y.—Atlantic Mills v. New York Cent. R. Co., 214 N Y.S 123, 126 Misc 349.
51 C J. p 510 note 60.

81. Mo.—Chouteau v Missouri Pac. R Co, 22 S W. 458, 30 S.W. 299, 122 Mo 375.

82. S C.—Carolina, etc, R Co. v. Alexander, 151 S.E. 893, 155 S C. 91.
51 C J p 510 note 63.
Acquisition of title by:
Dedication see Dedication § 8.
Estoppel see Estoppel § 95.
Act clothed with authority
Where taking of right of way by railroad was by virtue of charter, action of railroad in taking the right of way without obtaining a deed for the right of way or paying assessed or appraised value of the land was not that of a trespasser, but rather the act of one clothed with authority.—Carolina & N. W. Ry. Co. v Piedmont Wagon & Mfg. Co, 51 S E.2d 301, 229 N C. 695.

83. N Y—Clarkson v. Hudson River R. Co., 12 N Y. 304.

84. U S—Magnolia Petroleum Co. v. Thompson, C.C.A.Mo., 106 F 2d 217, certiorari denied Thompson v. Magnolia Petroleum Co, 60 S Ct 180, 308 U.S. 613, 84 L Ed 513, reversed on other grounds 60 S.Ct. 628, 309 U S. 478, 84 L Ed 876
Mich.—Quinn v. Pere Marquette Ry. Co., 239 N.W. 376, 256 Mich. 143
Mo—Brown v. Weare, 152 S W 2d 649, 348 Mo 135, 136 A.L R. 286.
51 C.J. p 511 note 65.
"Voluntary grants"
(1) Term "voluntary grant" means a conveyance without a valuable consideration—Brown v Weare, 152 S W 2d 649, 348 Mo 135, 136 A.L.R. 286.

(2) It also means grants without voluntary consideration; gratuitous. —University City v. Chicago, R I. & P. Ry. Co., 149 S.W.2d 321, 347 Mo. 814

(3) "Voluntary" is defined in its legal aspect as without valuable consideration; gratuitous "Grant" means give, bestow, or confer, to transfer property by an instrument in writing—Coates & Hopkins Realty Co. v. Kansas City Terminal Ry. Co, 43 S W 2d 817, 328 Mo. 1118.

85. Ind—Bravard v. Cincinnati, etc., R. Co, 17 N.E. 183, 115 Ind. 1.
Grant of public lands for right of way or in aid of railroad see Public Lands §§ 148–169.

86. Ind—Bravard v. Cincinnati, etc., R. Co., supra.

87. Ill—Toledo, P. & W. R. R. v. Brown, 31 N E.2d 767, 375 Ill. 438.
Ky—Reynolds v. Keith's Admr, 3 Ky.Op 646.
Mich—Quinn v. Pere Marquette Ry. Co, 239 N.W. 376, 256 Mich 143.
Mo—State ex rel. State Highway Commission v. Union Electric Co. of Missouri, 148 S.W.2d 503, 347 Mo 690
Tex.—Brightwell v. International-Great Northern R. Co., Civ.App., 41 S W.2d 319, affirmed 49 S W 2d 437, 121 Tex 338, 84 A.L.R. 265.
51 C.J. p 511 note 68.
Limitation on power
Constitutional provision that fee of land taken for railroad tracks without consent of owner thereof shall remain in owner subject to use for which it is taken does not constitute limitation on power of railroad to acquire by purchase right of way in fee simple—Cleveland, C., C. & St. L Ry. Co. v. Central Illinois Public Service Co., 43 N.E.2d 993, 380 Ill. 130.

88. Ill.—Cleveland, C., C. & St L. Ry. Co. v. Central Illinois Public Service Co, supra.
51 C.J. p 511 note 69.

89. N.C.—Beattie v. Carolina Cent. R. Co., 12 S E. 913, 108 N.C. 425.

A railroad company may also be authorized to take property by the exercise of the power of eminent domain, as discussed in Eminent Domain § 24, but where it is without charter power to condemn land its remedy against an owner who refuses to sell is not by injunction against the person who is obstructing its entering on the land,[90] but by an amendment of its charter so as to give it the power of condemnation.[91]

Under lease. Where a lease to a railroad company gives it no rights to lay tracks in a projected street, shown on a plat of certain real estate, it can acquire such right only by condemnation[92] or by agreement with the owners of the land.[93]

Consent of railroad commissioners. A statute providing that companies incorporated to construct buildings and tracks for the use of railroad companies may acquire such rights of way as the railroad commissioners shall deem necessary does not apply to railroad companies; and hence the consent of the railroad commissioners is not necessary under such a statute to an acquisition of a right of way.[94]

b. Adverse Possession or Prescription

Generally, a railroad company by remaining in the adverse and uninterrupted possession and use of land, for the statutory period and complying otherwise with statutory conditions, may acquire title to the land by adverse possession, or a prescriptive right to an easement therein.

Subject to the rules which control adverse possession, and easements generally, a railroad company by remaining in the adverse and uninterrupted possession and use of land, for the statutory period and complying otherwise with statutory conditions, may acquire title to the land for a right of way or other railroad purpose, by adverse possession,[95] or a prescriptive right to an easement therein;[96] and by the weight of authority such title may be acquired by adverse possession, notwithstanding a constitutional provision that private property shall not be taken for public use without adequate compensation first being made.[97] The erection, maintenance, and operation of a telegraph line by a railroad company does not constitute an appropriation of the strip of land between the poles and the line or the railroad so

90. Md.—Piedmont, etc., R. Co. v. Speelman, 10 A. 77, 293, 67 Md. 260
51 C.J. p 511 note 75.

91. Md.—Piedmont, etc., R. Co. v. Speelman, supra.

92. Md.—Northern Cent. R. Co. v. Canton Co., 65 A. 337, 104 Md. 682.

93. Md.—Northern Cent. R. Co. v. Canton Co., supra.

94. Iowa.—Morgan v. Des Moines Union R. Co., 85 N.W. 902, 113 Iowa 561.

95. Cal.—People v. Ocean Shore R. R., 196 P.2d 570, 32 Cal.2d 406.
51 C.J. p 511 note 83.
Power of corporations generally to acquire title by adverse possession see Adverse Possession § 6
Title acquired by mere user or adverse possession see infra § 85

96. La.—Gumbel v. New Orleans Terminal Co., 173 So. 518, 186 La. 882.
Tex.—Peterson v. Holland, Civ.App., 189 S.W.2d 94, error refused.
51 C.J. p 512 note 84.

Public purpose

Spur tracks of railroad which served three industrial plants and which were available to any industrial plants which might locate in area in future were held to serve public purpose within doctrine of acquisition of a servitude by unopposed use for a public purpose, and not a mere private purpose.—Gumbel v. New Orleans Terminal Co., 173 So. 518, 186 La. 882.

Not dependent on any specific period

Application of doctrine of acquisition of servitude by unopposed use for public purpose, such as for railroad purposes, is not dependent on lapse of any specific prescriptive period, and even a brief period of occupancy and use of property by public utility, with knowledge, consent, or acquiescence of landowner, will suffice to effectuate doctrine in favor of utility.—Gumbel v. New Orleans Terminal Co., supra.

New servitude

Sale by railroad of half of tract on which its tracks were situated, if it extinguished existing servitude in favor of railroad, did not prevent subsequent creation of new servitude for railroad purposes across entire tract by virtue of unopposed exercise of servitude by railroad for many years.—Gumbel v. New Orleans Terminal Co., supra.

Furnishing of current to others

Where poles and electric wires placed on right of way easement of an electric railway are employed primarily in operation of railway system, the furnishing and sale of a part of electric current flowing through such wires to others is incidental to the primary use and is not hostile to right of fee owners so as to give rise to an easement by prescription or adverse user.—Pierce v. Cherry Val. Farms, 66 N.E.2d 639, 146 Ohio St. 400.

Public nuisances

The erection of obstructions in a public street, such as a railroad trestle, which materially interfere with public travel and are public nuisances, cannot ripen into a right of use by the running of the statute of limitations, even though the statute may in some instances run against municipalities.—Yackee v. Village of Napoleon, 21 N.E.2d 111, 135 Ohio St. 344.

In Puerto Rico

A right of way for a railroad, which is a discontinuous servitude, cannot be acquired by prescription, but only by title.—Mendez v. Eastern Sugar Associates, C.C.A. Puerto Rico, 89 F.2d 399.—Central Cambalache, Inc. v. Martinez, C.C.A. Puerto Rico, 82 F.2d 37.

Claim of right of way

If sole use of realty is as a right of way, the user will ripen into an easement, and it is only where there is some additional type of user or other action which will give notice that the claim is to more than a right of way that the use and permission may ripen into a fee title.—People v. Ocean Shore R. R., 196 P.2d 570, 32 Cal.2d 406.

Color of title

Deeds from railroad to trustees of railroad's realty and from trustees reconveying realty to railroad were not color of title to fee in parcel of realty which railroad had used adversely as a right of way, and which was not specifically mentioned in deeds, and railroad could not successfully claim title in fee to parcel, on ground of adverse possession, rather than a mere easement in the parcel.—People v. Ocean Shore R. R., supra.

97. Mo.—Boyce v. Missouri Pac. R. Co., 68 S.W. 920, 168 Mo. 583, 58 L.R.A. 442
2 C.J. p 229 note 84.

as to give the company title thereto after twenty years.[98] Moving spur tracks crossing another's property, at the latter's request, without interrupting the continuity of the use of the tracks, does not interrupt the running of the prescriptive period[99] or impair rights already accrued.[1]

Adverse possession immaterial. Where the contract under which a right of way is acquired is fully complied with, the title under the contract alone is sufficient,[2] and adverse occupancy for the statutory period is not material.[3]

§ 76. Agreements, Licenses, and Implied Grants

Agreements, licenses, and implied grants with respect to railroad rights of way and other interests in land are discussed infra §§ 77–80.

Examine Pocket Parts for later cases.

§ 77. —— Agreements as to Right of Way or Use of Land

a. In general
b. Options
c. Contract to furnish or procure right of way

a. In General

A railroad company may enter into a contract to acquire real property or an interest therein which is necessary or convenient for the operation of its road.

Under the power to acquire land for railroad purposes, a railroad company may enter into a contract to acquire real property or an interest therein which is necessary to, or convenient for, the operation of its road[4] and to agree to pay such price for land as shall be fixed by arbitration;[5] and, in the absence of specific provisions in its charter to the contrary, the power of making or receiving such contracts may be exercised by the president of the railroad company.[6] Such agreement, in order to be valid, must be mutual,[7] and definite and certain in its terms,[8] and for a sufficient consideration,[9] which may consist of advantages to the owner, in the increase in the value of his land, from the construction and operation of the road,[10] or of a detriment to the railroad company.[11] The agreement must not be contrary to public policy,[12] and under some statutes it must be recorded.[13]

Where a proposed right of way extends through demised premises, the lessee is a necessary party to the negotiations and contracts leading up to the procurement of the right of way,[14] but a lessee who has only a license or easement on the land cannot authorize the construction of a railroad thereon.[15]

Effect of agreement. The general rules relating to contracts, particularly those relating to the purchase of real estate, apply to a contract by a railroad company for the acquisition of a right of way or other interest in land with respect to the rights and liabilities of the parties thereunder,[16] such as under

98. Ind.—Pittsburgh, etc., R. Co. v. Beck, 53 N.E. 439, 152 Ind. 421.
99. U.S.—Ayres Mercantile Co. v. Union Pac. R. Co., C.C.A.Colo., 16 F.2d 395.
1. U.S.—Ayres Mercantile Co. v. Union Pac. R. Co., supra.
2. U.S.—Scott v. Texas, etc., R. Co., Tex., 94 F. 340, 36 C.C.A. 282
3. U.S.—Scott v. Texas, etc., R. Co., supra.
51 C.J. p. 512 note 90.
4. U.S.—Quality Realty Co. v. Wabash Ry. Co., C.C.A.Mo., 50 F.2d 1051.
Mich.—F. W. Stock & Sons v. Litchfield Co-op. Shippers' Ass'n, 232 N.W. 395, 251 Mich. 488.
51 C.J. p. 512 note 93.
5. N.Y.—Wood v. Auburn, etc., R. Co., 8 N.Y. 160, Seld. p. 79
6. N.C.—Hickory v. Southern R. Co., 49 S.E. 202, 137 N.C. 189.
7. Iowa—Chicago, etc., R. Co. v. Estes, 33 N.W. 124, 71 Iowa 603.
51 C.J. p. 513 note 96.
8. Va.—Camp Mfg. Co. v. Carpenter, 70 S.E. 497, 112 Va. 79.
51 C.J. p. 513 note 97.
9. Ky.—Sparks v. Ritter, 265 S.W. 26, 204 Ky. 623
51 C.J. p. 513 note 98.
10. Cal.—Bell v. Southern Pac. R. Co., 77 P. 1124, 144 Cal. 560
51 C.J. p. 513 note 99.
11. Ky.—Cadiz R. Co. v. Roach, 72 S.W. 280, 114 Ky. 934, 24 Ky.Law 1761.
51 C.J. p. 513 note 1.
12. Ga.—Dowman-Dozier Mfg. Co. v. Central of Georgia R. Co., 114 S.E. 815, 29 Ga.App. 187.
51 C.J. p. 513 note 2.
13. Ill.—Baltimore, etc., R. Co. v. Brubaker, 75 N.E. 523, 217 Ill. 462.
51 C.J. p. 513 note 3.
14. N.Y.—Thompson v. Erie R. Co., 89 N.Y.S. 92, 96 App.Div. 539.
51 C.J. p. 513 note 4.
15. Utah.—Snell v. Wasatch, etc., R. Co., 2 P. 193, 3 Utah 122.
51 C.J. p. 514 note 5.
16. Ky.—Meacham v. Louisville & N.R. Co., 169 S.W.2d 330, 293 Ky. 642
51 C.J. p. 514 note 8.

Subject to law of sovereign.

Contract with railroads regarding right of way is subject to law of the sovereign, and such contractual obligations cannot be extended to defeat legitimate governmental authority.—Meacham v. Louisville & N.R. Co., supra.

Agreement for benefit of owner

Under an agreement to the effect that the railroad company was to furnish a switch at such points as might be required by the owner of the land, the railroad was not entitled to construct a spur track to serve one owner over lands of a neighboring owner, since the agreement was for the benefit of the respective owners of the property and not for the benefit of the railroad.—River & Rail Terminals v. Louisiana Ry. & Nav. Co., 130 So. 337, 171 La. 223.

Benefiting other shippers

Agreement for construction of side track and lease to railroad did not authorize railroad to construct other tracks connecting with side track for benefit of other shippers.—F. W. Stock & Sons v. Litchfield Co-op. Shippers' Ass'n, 232 N.W. 395, 251 Mich. 488.

an agreement to convey or secure conveyance to the railroad company[17] or for the ascertainment and payment of compensation to the owner of the land[18] Where the agreement for a conveyance of a right of way is acted on and the railroad constructed, the provisions of the agreement are binding on the landowner[19] and others claiming under him[20] As long as the contract remains executory, however, the railroad company is not authorized to enter upon the land and locate its road,[21] nor may it demand a conveyance.[22]

b. Options

An option given a railroad company to purchase a right of way is not invalid because of the nonpayment of a nominal consideration which has been tendered and refused.

An option given a railroad company to purchase a right of way is not invalid because of the nonpayment of a nominal consideration which has been tendered and refused;[23] nor is it waived by the continuance of proceedings to condemn the right of way.[24] Where such an option is to become null and void unless exercised within a specified time by the payment of a specified sum, time is of the essence of the contract, and if tender is not made within the time fixed the contract is at an end,[25] and the railroad company cannot compel performance thereof, although it has entered and expended money in construction.[26] Such an option is not changed into a binding contract, freed from the conditions of the option as to time and payment, by a letter written by the company stating that the payments agreed on will be made.[27]

c. Contract to Furnish or Procure Right of Way

A contract to furnish or procure a right of way for a proposed railroad must be certain as to parties and subject matter.

A contract to furnish or procure a right of way for a proposed railroad must be certain as to parties and subject matter;[28] and a bond given to a railroad company conditioned to secure land for a right of way and depot grounds, etc, requires that a good title be secured and that the land be paid for by the obligor before the condition is performed.[29] A provision in such a contract that the railroad must be built to a specified point within a specified time, followed by an agreement to pay a bonus to be agreed on, is merely a limitation on the bonus obligation, and not a limitation on the obligation to furnish the right of way only in the event the road is built within the time specified.[30] Where a company, having a contract to construct a railroad and stations for a railroad company, contracts to purchase land for a station at a particular location, it has been held not relieved from its obligation to purchase the land by a subsequent change of the location of the railroad,[31] and it is liable for damages sustained by its breach of the contract.[32]

Promoter's obligation. A promoter who, in consideration of another furnishing and grading a right of way, contracts to procure the organization of the proposed railroad and the operation of trains thereon at all times is personally bound to procure the continuous and permanent operation of the railroad involved,[33] and if he fails to do so the person furnishing the right of way under the contract is entitled to damages sufficient to make him whole on his investment in reliance on the contract.[34] A provision that an accepted title is to be furnished within a specified time after request does not require the

17. Wis.—Chicago, etc., R. Co. v. H. W. Wright Lumber Co., 100 N.W. 1034, 123 Wis. 46.
51 C.J. p. 514 note 9.

18. U.S.—Quality Realty Co. v. Wabash Ry. Co., C.C.A.Mo., 50 F.2d 1051.
51 C.J. p. 514 note 10.
Contract with predecessor
Owner of land was not entitled to compensation for use by railroad company of side track, constructed under contract with predecessor, under which contract predecessor had consistently claimed compensation and railroad had consistently denied such claim.—Quality Realty Co. v. Wabash Ry., supra.

19. Ill.—Waggoner v. Wabash R. Co., 56 N.E. 1050, 185 Ill. 154.
51 C.J. p. 514 note 11.

20. **Grantee with notice**
Ill.—Waggoner v. Wabash R. Co., supra.
51 C.J. p. 515 note 13.

21. Or.—Boring Lumber Co. v. Roots, 90 P. 487, 49 Or. 569.
51 C.J. p. 515 note 14.

22. Pa.—Weigold v. Pittsburg, etc., R. Co., 57 A. 188, 208 Pa. 81.
51 C.J. p. 515 note 15.

23. Ill.—Seyforth v. Groves, etc., R. Co., 119 Ill.App. 275, affirmed 75 N.E. 522, 217 Ill. 483.

24. Wis.—Stamnes v. Milwaukee, etc., R. Co., 111 N.W. 62, 131 Wis. 85.

25. Wash.—Spokane, etc., R. Co. v. Ballinger, 97 P. 739, 50 Wash. 547.

26. Wash.—Spokane, etc., R. Co. v. Ballinger, supra.
51 C.J. p. 515 note 20.

27. Wash.—Spokane, etc., R. Co. v. Ballinger, supra.

28. Tex.—Risinger v. Clark, Civ. App., 246 S.W. 1092.
51 C.J. p. 515 note 22.

29. Tex.—Frey v. Ft. Worth, etc., R. Co., 24 S.W. 950, 6 Tex.Civ.App. 29, reversed on other grounds 25 S.W. 609, 86 Tex. 465.
51 C.J. p. 515 note 23.

30. Tex.—Risinger v. Clark, Civ. App., 246 S.W. 1092.

31. N.Y.—Fairchild v. City, etc., Contract Co., 143 N.Y.S. 35, 158 App.Div. 166, motion denied 105 N.E. 1084, 211 N.Y. 526, and affirmed 109 N.E. 1073, 215 N.Y. 671.

32. N.Y.—Fairchild v. City, etc., Contract Co., supra.

33. U.S.—Drummond v. Steele, C.C.A.Ga., 11 F.2d 595, affirmed 48 S.Ct. 53, 275 U.S. 199, 72 L.Ed. 238.
51 C.J. p. 515 note 27.

34. U.S.—Drummond v. Steele, supra.
51 C.J. p. 515 note 28.

promoters of the railroad to wait until the expiration of such time before they may begin acquiring any of the right of way, where the contractors, after receiving notice of the location, fail to take steps to procure the right of way.[35] Where the parties making such contract repudiate their obligation to furnish a portion of the right of way to a particular place, and thus render it impossible for the promoters to construct a road to that place in the time specified in the contract, the promoters are under no obligation to hasten the construction of the road on other portions of the right of way.[36]

Bonus contract. Where under such a contract a landowner agrees to pay the railroad a specific amount as soon as it puts into operation a railroad line from a specific point to a described piece of land, and gives a specified service, it is binding as a bonus contract,[37] and is certain and definite as to the time when the obligation will mature,[38] but does not require that the road shall be operated on or over such piece of land in order to earn the bonus.[39]

§ 78. —— License or Consent

a. In general
b. Duration and termination

a. In General

Unless prohibited by statute, a railroad company may acquire the right to construct and operate its railroad upon the land of another by license from the owner or other person entitled to give consent thereto.

Subject to the rules relating to licenses in respect of real property generally, unless prohibited by statute,[40] a railroad company may acquire the right to construct and operate upon the land of another by license from the owner[41] or other person entitled to give consent thereto.[42] Although there is authority to the contrary,[43] as a general rule consent to such a license may be implied from acts of acquiescence on the part of the owner;[44] and this rule applies to land which the railroad company is otherwise prohibited from invading,[45] as where, with full knowledge on his part, he permits or acquiesces in the taking of possession by the railroad company of his land and expending large sums of money in constructing and operating its road.[46] Consent may also be presumed where the owner is unknown[47] or has no immediate right to object by reason of the nature of his title.[48]

Where the license is given on certain conditions, the railroad company must observe the conditions imposed,[49] and cannot compel specific performance of the license without performing such conditions.[50] A failure, however, to comply with municipal ordinances does not prevent the company from holding its right of way as against the owner,[51] since the right to complain is confined to the municipality.[52]

Operation and effect. Such a license will excuse any acts properly done under the license while it is in force;[53] and improvements placed on the land thereunder do not become a part of the land,[54] and the landowner is not entitled to recover from the railroad company the value of such improvements after their removal.[55]

Such a license is good as against a tenant of the land, with notice thereof,[56] and a purchaser of land over which railroad tracks are in operation at the time of the sale is chargeable with notice of a license granted by the landowner to the railroad

35. Tex.—Risinger v. Clark, Civ. App., 246 S.W. 1092

36. Tex.—Risinger v. Clark, supra

37. Idaho.—Boise Valley Constr. Co. v. Kroeger, 105 P. 1070, 17 Idaho 384, 28 L.R.A.,N.S., 968
Tex.—Risinger v. Clark, Civ.App., 246 S.W. 1092.

38. Idaho.—Boise Valley Constr. Co. v. Kroeger, 105 P. 1070, 17 Idaho 384, 28 L.R.A.,N.S., 968.

39. Idaho.—Boise Valley Constr. Co. v. Kroeger, supra.

40. Md.—Baltimore, etc., R. Co. v. Algire, 63 Md. 319.
51 C.J. p. 516 note 36.

41. U.S.—Plazuela Sugar Co. v. Pastoriza, Puerto Rico, 245 F. 115, 157 C.C.A. 411
51 C.J. p. 516 note 37.
Licenses in respect of real property generally see Licenses §§ 79-96

42. N.Y.—McCarty v. New York Cent., etc., R. Co., 76 N.Y.S. 321, 73 App.Div. 34
51 C.J. p. 516 note 38

43. N.J.—Heifield v. Central R. Co., 29 N.J.Law 571
51 C.J. p. 516 note 39

44. Wis.—Maginnis v. Knickerbocker Ice Co., 88 N.W. 300, 112 Wis. 385, 69 L.R.A. 833
51 C.J. p. 516 note 40

45. U.S.—Norfolk Southern R. Co. v. Stricklin, D.C.N.C., 264 F. 546.
51 C.J. p. 516 note 41.

46. W.Va.—Dulin v. Ohio River R. Co., 80 S.E. 145, 73 W.Va. 166, 168, L.R.A.1916B 653, Ann.Cas.1916D 1183
51 C.J. p. 516 note 42.

47. S.C.—Moore v. North, etc., Carolina, R. Co., 77 S.E. 926, 94 S.C. 243

48. S.C.—Moore v. North, etc., Carolina R. Co., supra

49. Pa.—Appeal of Unangst, 55 Pa. 128.
Covenants and conditions in conveyance see infra §§ 89-97.

50. N.Y.—Rome, etc., R. Co. v. Gleason, 59 N.Y.S. 647, 42 App.Div. 530.
51 C.J. p. 517 note 46.

51. Tex.—Knowles v. Northern Texas Tract. Co., Civ.App., 121 S.W. 232

52. Tex.—Knowles v. Northern Texas Tract Co., supra

53. N.H.—Blaisdell v. Portsmouth, etc., R. Co., 51 N.H. 483

54. Ind.—Cranor v. Lake Erie, etc., R. Co., 149 N.E. 97, 83 Ind.App. 449.
51 C.J. p. 517 note 51.

55. Ill.—O'Connell v. Heed, 219 Ill.App. 598.

56. Mo.—Darlington v. Missouri Pac. R. Co., 72 S.W. 122, 99 Mo.App. 1.
51 C.J. p. 517 note 53.

company to lay and operate such tracks.[57] Where however, a license is given by one who holds an equitable title to the land, as by a mortgagor in possession, it cannot avail as against one holding the legal title,[58] such as a title derived from the foreclosure of the mortgage[59]

b. Duration and Termination

If the license or contract of the company is of a temporary nature, it terminates on the abandonment or exhaustion of the purpose for which the railroad was constructed thereunder, but if it is for a specified period, in the absence of a written extension, it expires at the end of that period.

If the license or contract of the company is of a temporary nature, it terminates on the abandonment or exhaustion of the purpose for which the railroad was constructed thereunder.[60] If the license or contract is for a specified period, in the absence of a written extension, it expires at the end of that period,[61] unless under the terms of the contract written notice is required before termination;[62] and unless the company procures an additional right, and sufficient time has not elapsed to acquire an easement by prescription, the company does not, under such a contract, become the owner of an easement for its right of way,[63] and the contract is thereafter no bar to an action of ejectment.[64] In a suit against it, after the expiration of such period, to recover possession of the land, the railroad company may not contend that plaintiff's only remedy is by condemnation.[65]

Such a contract should be construed as of the time when it was made, and not in the light of conditions which existed some years thereafter;[66] and, where the contract contains express provision for its renewal by written notice, if such notice is not given a further provision that, when notice of renewal is given, the contract shall continue until notice of termination does not operate,[67] and the continued use for several years after expiration of the time specified, although no steps are taken to oust the company, will not continue the contract.[68] Where the parties to such a contract, after the bankruptcy of one owner, enter into a contract for a joint use, the power of termination rests in the surviving owners, and not in their successors in title.[69]

Where one of several contiguous owners, who have entered into a contract for a spur track, is adjudged a bankrupt and his lot sold, no period of enjoyment short of the bar of the statute or permissive use will give the purchaser at bankruptcy sale or its assignee a right to continued use of the right of way.[70]

Revocation. In accordance with rules relating to the revocation of licenses in respect of real property in general, a mere license to enter on land and construct and maintain a railroad thereon is revocable at the option of the licensor as to anything in the future,[71] unless the license is coupled with an interest[72] or is necessary to the possession or enjoyment of a right or title arising from the act or contract of the person who creates the license.[73] In some jurisdictions, where the railroad company enters in good faith under the license, and expends

57. Ill.—Chicago, etc., R. Co. v. Hay, 10 N.E. 29, 119 Ill. 493
Ind.—Indiana, etc., R. Co. v. McBroom, 15 N.E. 831, 114 Ind. 198—Campbell v. Indianapolis, etc., R. Co., 11 N.E. 482, 110 Ind. 490—Paul v. Connersville, etc., R. Co., 51 Ind. 527.
Ky.—Kamer v. Bryant, 46 S.W. 14, 103 Ky. 723, 20 Ky.L. 340
Mo.—Edwards v. Missouri, etc., R. Co., 82 Mo.App. 96
Ohio.—Day, Williams & Co. v. Atlantic, etc., R. Co., 41 Ohio St. 392.
51 C.J. p. 517 note 54.

Although contract granting right of way was not recorded, possession of portion thereof by railroad put purchaser on inquiry as to extent.—Dunford v. Dardanelle & R. R. Co., 287 S.W. 170, 171 Ark. 1036.

Additional tracks

The fact that a railroad company was in possession and use of a track on a street was not notice to a purchaser of an abutting lot of an unrecorded deed from his grantor executed to the company more than six months previously, granting permission to lay additional tracks.—Varwig v. Cleveland, etc., R. Co., 44 N.E. 92, 54 Ohio St. 455.

58. Mass.—Meriam v. Brown, 128 Mass. 391.

59. Mass.—Meriam v. Brown, supra

60. Ind.—Vandalia R. Co. v. Terre Haute Vitrified Brick Co., 108 N.E. 953, 183 Ind. 551.
51 C.J. p. 517 note 58.

61. Ala.—Patterson v. Atlantic Coast Line R. Co., 81 So. 85, 202 Ala. 583.
Ind.—Cranor v. Lake Erie, etc., R. Co., 149 N.E. 97, 83 Ind.App. 449.

62. Ala.—Patterson v. Atlantic Coast Line R. Co., 81 So. 85, 202 Ala. 583
51 C.J. p. 517 note 60

63. Ind.—Cranor v. Lake Erie, etc., R. Co., 149 N.E. 97, 83 Ind.App. 449.

64. Ala.—Patterson v. Atlantic Coast Line R. Co., 81 So. 85, 202 Ala. 583.

65. S.C.—Griffin v. Charleston, etc., R. Co., 128 S.E. 855, 132 S.C. 492.
51 C.J. p. 517 note 63.

66. Ala.—Patterson v. Atlantic Coast Line R. Co., 81 So. 85, 202 Ala. 583

67. Ala.—Patterson v. Atlantic Coast Line R. Co., supra.

68. Ala.—Patterson v. Atlantic Coast Line R. Co., supra.

69. Ala.—Patterson v. Atlantic Coast Line R. Co., supra.

70. Ala.—Patterson v. Atlantic Coast Line R. Co., supra.

71. Minn.—Minneapolis, etc., R. Co. v. Minneapolis, etc., R. Co., 59 N.W. 983, 58 Minn. 128.
51 C.J. p. 518 note 71.

72. Mo.—Darlington v. Missouri Pac. R. Co., 72 S.W. 122, 99 Mo.App. 1.
51 C.J. p. 518 note 72.

73. Ill.—Illinois Southern R. Co. v. Borders, 66 N.E. 382, 201 Ill. 459.
51 C.J. p. 518 note 73.

money in constructing and maintaining its road, the license cannot be revoked as long as the company is using its right of way for the operation of its road.[74] On a proper revocation of the license the railroad company may be directed to remove its railroad from the owner's land.[75]

Where the license is granted on certain conditions precedent and the railroad company fails to perform such conditions, the licensor may revoke the license[76] unless the condition is waived.[77] The failure of a railroad company to perform conditions subsequent, however, contained in the agreement, furnishes no ground for the revocation of the license under which it entered and constructed its road, where complete indemnity in damages is recoverable therefor in an action at law,[78] and in such a case the landowner cannot recover possession of the right of way or other land in an action of ejectment for the breach of such conditions.[79]

§ 79. —— Implied Grants

Where the owner permits the railroad to take possession and use his land for a right of way or other railroad uses, and to make expenditures accordingly, for a long period of time, the company may be regarded as having an implied grant of the property for such purposes.

The mere fact that a railroad company has entered on land, constructed its road, and occupied it for several years raises no presumption that the owner has sold the right of way to the company[80] or that the tracks laid thereon belong to the company.[81] However, where the owner knowingly permits the company to take possession and use his land for a right of way, or other railroad uses, and to make expenditures accordingly, for a long period of time, the company may be regarded as having an implied grant of the property for such purposes,[82] and the owner will be estopped to deny the company's right to use the property and to maintain an action against it therefor, as discussed in Estoppel § 95. A subsequent vendee of the owner takes the land subject to the burden thus acquired by the railroad company.[83]

Under some charters or statutes the presumption of a conveyance to a railroad company arises from its taking possession and completing the road without any contract, or without grant or condemnation of the right of way, and the failure of the landowner to take steps to have his damages assessed within a specified time thereafter.[84] The burden is on the party claiming the benefit of such presumption to show every fact out of which it arises,[85] and, therefore, the burden is on the railroad company to show its entry and the construction of its road without a contract.[86] This presumption does not arise where a deed from the owner of the land to the railroad company is made within such time.[87]

As to exempt property. Real property, which is exempt from acquisition for railroad purposes without the owner's consent, cannot be acquired by a railroad company by presumptive consent from lapse of time,[88] and the owner need not act to preserve his rights until adverse title is asserted by the company.[89]

74. Ky.—Koch v. Kentucky, etc., R., etc., Co., 80 S.W. 1133, 26 Ky.L. 216.
51 C.J. p. 518 note 74.

75. U.S.—Plazuela Sugar Co. v. Pastoriza, Puerto Rico, 245 F. 115, 157 C.C.A. 411.

76. Ill.—Littlejohn v. Chicago, etc., Co., 76 N.E. 840, 219 Ill. 584.

77. Ill.—Littlejohn v. Chicago, etc., R. Co., supra.
50 C.J. p. 518 note 77.

78. N.C.—Williamston, etc., R. Co. v. Battle, 66 N.C. 540.
51 C.J. p. 518 note 78.

79. Ill.—Morris v. Indianapolis, etc., R. Co., 76 Ill. 522.

80. Ill.—Toledo, etc., R. Co. v. Darst, 61 Ill. 231.

81. Minn.—Washburn Flouring Mills Co. v. Minneapolis, etc., R. Co., 57 N.W. 309, 56 Minn. 200.
51 C.J. p. 518 note 81.

82. N.C.—Carolina & N. W. Ry. Co. v. Piedmont Wagon & Mfg. Co., 51 S.E.2d 301, 229 N.C. 695.
51 C.J. p. 518 note 82.

83. Ga.—Central of Georgia R. Co. v. Standard Fuel Supply Co., 86 S.E. 228, 144 Ga. 92.

Private railroad

Plaintiff was not estopped to assert his title to land against private corporation operating railroad for its own purposes by fact that plaintiff knew, when he purchased land, that it was crossed by corporation's tracks, where corporation was without contract right and paid no consideration for right to maintain tracks over plaintiff's land.—Central Cambalache v. Martinez, C.C.A.Puerto Rico, 82 F.2d 37.

84. N.C.—Carolina & N. W. Ry. Co. v. Piedmont Wagon & Mfg. Co., 51 S.E.2d 301, 229 N.C. 695.
51 C.J. p. 519 note 85.

Change of location

The fact that the present location of the railroad constructed many years after the date of the charter did not coincide with the original location was immaterial.—Southern Ry. Co. v. Liessenbee, 13 S.E.2d 561, 219 N.C. 318.

Law incorporating railroad held not to give any presumptive grant or right of way through lands over which railroad might be constructed.—Willard v. Southern Ry. Co., 155 S.E. 833, 158 S.C. 522.

Evidence held sufficient to take case to jury

N.C.—Southern Ry. Co. v. Lissenbee, 13 S.E.2d 561, 219 N.C. 318.

85. N.C.—Southern Ry. Co. v. Lissenbee, supra.—Barker v. Southern Ry. Co., 49 S.E. 115, 137 N.C. 214.

86. U.S.—Norfolk Southern R. Co. v. Stricklin, D.C.N.C., 264 F. 546.
51 C.J. p. 519 note 86.

87. N.C.—Hickory v. Southern R. Co., 49 S.E. 202, 137 N.C. 189.

88. N.C.—Earnhardt v. Southern R. Co., 72 S.E. 1062, 157 N.C. 358.
51 C.J. p. 519 note 89.

89. S.C.—Atlantic Coast Line R. Co. v. Dawes, 88 S.E. 286, 103 S.C. 507.

§ 80. —— Remedies of Parties

a. Remedies of landowner
b. Remedies of railroad company

a. Remedies of Landowner

Where a railroad constructs its road over or occupies land to which it has acquired no requisite right or title by conveyance or license, express or implied, the owner of the land may maintain an action of ejectment, a suit for injunction, or a suit to cancel or rescind his contract with respect to a railroad right of way or other interest claimed in his land.

Where a railroad company constructs its road over or occupies land to which it has acquired no requisite right or title by condemnation, conveyance, or license, express or implied, it is a mere trespasser, and acquires no right to hold the land,[90] and unless the owner has by his acquiescence or consent estopped himself, as discussed in Estoppel § 95, he may maintain ejectment or other possessory action for the recovery of the possession of the land,[91] or he may institute proceedings to recover compensation for the right of way after the railroad is completed.[92]

Acquiescence in, or consent to, the building of a railroad is not of itself sufficient to show that a landowner has waived his right to be ultimately compensated for his land;[93] and in such a case, if the land is taken without just compensation, the landowner may maintain an action for compensation by way of damages for the value of the land taken and for injuries done by the construction and operation of the road,[94] or, if the road has been transferred to another, the landowner may maintain an equitable action for damages against such transferee.[95] If the location of the railroad through his land is abandoned before the owner surrenders possession and before the construction of the road is commenced, an action for specific performance cannot be maintained, and he is relegated to an action for damages.[96]

If the railroad company fails to comply with the contract or grant, the owner may maintain an action for damages, for breach of contract,[97] and where he retains the legal title, he may, in a jurisdiction in which equitable relief is administered in common-law actions, maintain ejectment to enforce payment, by means of a conditional verdict, of the purchase money due.[98] Thus, where one of two tenants in common grants a right of way through their premises to a railroad company on certain conditions, and the grantee enters but fails to fulfill the conditions, the granting tenant can recover for a breach of the contract,[99] and the other tenant, where the entry is without his consent may recover for the trespass.[1]

Where a railroad company wrongfully appropriates another's land to its use, the proper remedy of the owner for compensation and damages is, under some statutes, to compel an appropriation or condemnation, and assessment of compensation, as discussed in Eminent Domain § 398, and it has also been held that this is the proper remedy, in the absence of gift or purchase, where the company builds its road over certain land with the owner's consent and with the understanding that the question of damages shall be settled after the road is built,[2] or where a person having knowledge of the possession and use of land by a railroad company afterward takes a lease of the mineral beneath.[3]

A license to occupy land for railroad purposes constitutes a defense to an action of trespass against the company for acts properly performed thereunder, while it is in force,[4] except in those jurisdictions which hold that a right of way cannot be acquired by a mere license.[5]

Injunction. The landowner may maintain a suit for injunction to restrain the railroad company from

90. Iowa.—Hibbs v. Chicago, etc., R. Co., 39 Iowa 340
Compelling proceedings for failure to assess compensation and damages of the owner see Eminent Domain § 398.
Recovery of damages for property appropriated or injured for a public use without payment of compensation see Eminent Domain § 400.

91. N C.—Carolina & N W. Ry. Co. v. Piedmont Wagon & Mfg. Co., 51 S E 2d 301, 229 N C 695.
51 C.J. p 519 note 95.

92. Iowa.—Hibbs v. Chicago, etc., R. Co., 39 Iowa 340.

93. Ala.—Hendrix v. Southern R. Co., 30 So. 596, 130 Ala. 205, 89 Am. S.R. 27.

94. N C.—Carolina & N. W. Ry Co. v. Piedmont Wagon & Mfg. Co, 51 S E 2d 301, 229 N C 695.
51 C.J. p 520 note 1

95. Ind.—Chicago, etc, R. Co v Hall, 34 N E 704, 135 Ind. 91, 23 L R A. 231.
N J.—New York, etc, R Co. v Stanley, 34 N.J Eq. 55, affirmed 35 N. J.Eq. 283.

96. Ohio.—Detroit, etc, R. Co. v. Murry, 152 N E 771, 21 Ohio App 97.
Suit for specific performance of contract for right of way generally see Specific Performance § 74

97. Ark.—Kansas, etc., R. Co. v. Smithson, 168 S.W. 555, 113 Ark. 305.
51 C J. p 520 note 6.

98. Pa.—Daubert v. Pennsylvania R. Co., 26 A. 108, 155 Pa. 178

99. Iowa.—Rush v. Burlington, etc., R. Co., 10 N W. 628, 57 Iowa 201.

1. Iowa.—Rush v. Burlington, etc., R. Co., supra

2. Minn.—St. Paul, etc., R. Co. v. Murphy, 19 Minn. 500.

3. Pa.—Philadelphia, etc., R. Co. v. Lawrence, 10 Phila. 604.

4. Miss.—Currie v. Natchez, etc, R. Co, 61 Miss 725.
51 C.J. p 521 note 15.

5. Md.—Baltimore, etc., R. Co. v. Algire, 63 Md. 319.

continuing its possession and use of the property, where the company has entered and taken possession without having acquired the legal right or title to the land and without making compensation therefor,[6] or from occupying more land than it has acquired.[7] Where the landowner has, expressly or impliedly, agreed to the construction of the railroad on his land, he is not entitled to an injunction to restrain the company from its use and enjoyment because it is prejudicial to the landowner's rights;[8] nor is he entitled to injunctive relief because the railroad company abandons the right of way contracted for.[9] A landowner, seeking to enjoin the use of a railroad right of way as a trespass, on the ground of nonpayment of a balance due on the sale of the land, has the burden of proving such default in payment,[10] and may not rely on the statute of limitations to maintain affirmatively his claim;[11] and where intermediate instruments refer to the "land of the . . . Railroad" which has been in open and constant use, a subsequent grantee's suit to restrain the use of the right of way on the ground that defendant railroad company had not paid therefor is stale and inequitable.[12]

Cancellation or rescission of contract. Subject to the rules relating to the rescission of contracts generally, particularly those relating to the rescission or forfeiture of contracts for the sale of the land, a landowner may maintain a suit to cancel or rescind his contract with respect to a railroad right of way or other interest claimed in his land, on the ground of nonperformance of a condition precedent,[13] or on the ground of fraud or mistake,[14] provided he acts promptly and makes known his intention on discovery of the facts;[15] and if with such knowledge he acquiesces in the construction of the road equity may require him specifically to perform his contract.[16] For example, if he has a right to rescind a license for delay in the construction of the railroad, good faith requires him to give notice of such intention before the company takes possession of the land and constructs its road so that it may adopt another location or take proceedings to condemn before rendering itself otherwise liable.[17] Where the railroad has been dedicated to public use, the landowner is not entitled to rescind for nonperformance, where performance of the contract on the part of the railroad company is thereafter made illegal by statute,[18] and the remedy of the owner in such a case is recovery of compensation to the extent of the value of land not paid for.[19]

b. Remedies of Railroad Company

Where a railroad company has performed its part of a contract for the purchase of land, it may maintain an action for specific performance against the landowner to compel a conveyance to it, and may also maintain an action to enjoin an action of ejectment for the possession of the land.

Where a railroad company has performed its part of a contract for the purchase of land, it may maintain an action for specific performance against the landowner to compel a conveyance to it,[20] and may avail itself of this remedy by cross complaint in an action against it with respect to the land.[21] Under such circumstances the railroad company may also maintain an action to enjoin an action of ejectment for the possession of the land,[22] or to enjoin the landowner from interfering with the easement over the land;[23] or may maintain an action to quiet title[24] or to recover possession of the land.[25] So also, on the owner's failure or refusal to perform his contract to sell a right of way, the railroad com-

6. N.C.—Carolina & N. W. Ry. Co v. Piedmont Wagon & Mfg. Co., 51 S.E.2d 301, 229 N.C. 695.
51 C.J. p 521 note 18.

7. Ind.—Barth v. Pittsburgh, etc., R. Co, 90 N.E. 322, 45 Ind.App 434.
51 C.J. p 521 note 20.

8. W.Va.—Mullens v. Virginian R Co., 123 S.E. 287, 96 W.Va. 465.
51 C.J. p 521 note 21.

9. Pa.—Gallagher v. Fayette County R. Co, 38 Pa. 102.

10. N.Y.—Cherrington v. South Brooklyn R. Co, 168 N.Y.S. 322, 180 App.Div. 659.
51 C.J. p 521 note 23.

11. N.Y.—Cherrington v. South Brooklyn R Co, supra.
51 C.J. p 521 note 24.

12. N.Y.—Cherrington v. South Brooklyn R. Co, supra.

13. W.Va.—Adams v. Guyandotte Valley R Co., 61 S.E. 341, 64 W. Va. 181.
51 C.J. p 521 note 29.

14. Iowa.—Smith v. Waterloo, etc, R. Co, 182 N.W. 890, 191 Iowa 668.
51 C.J. p 521 note 30

15. Neb.—Ensign v. Citizens' Interurban R. Co., 138 N.W. 718, 92 Neb 363
51 C.J. p 522 note 31.

16. Neb.—Ensign v. Citizens' Interurban R. Co, supra.

17. Ill.—Ross v. Chicago, etc., R. Co, 77 Ill. 127.

18. W.Va.—Bell v. Kanawha Tract., etc, Co., 98 S.E. 885, 83 W.Va. 640.
51 C.J. p 522 note 34.

19. W.Va.—Bell v. Kanawha Tract., etc, Co, supra.

20. Iowa.—Chicago, etc., R. Co. v. Swinney, 38 Iowa 182.
Puerto Rico.—R. Co. v. Feliu, 6 Puerto Rico Fed 216.
Va.—Tidewater R. Co. v. Hurt, 63 S.E. 421, 109 Va. 204.
51 C.J. p 522 note 36.

21. N.J.—Huntington v. Headley, Ch., 41 A. 670
51 C.J. p 522 note 37.

22. Ill.—St. Louis, etc., R. Co v Van Hoorebeke, 61 N.E. 326, 191 Ill. 633.
51 C.J. p 522 note 38.

23. S.C.—Carolina, etc., R. Co. v. Ford, 89 S.E. 309, 105 S.C. 80.
51 C.J. p 522 note 39.

24. Wash.—Walla Walla Valley R. Co v. Carter, 233 P. 329, 133 Wash. 205
51 C.J. p 522 note 40.

25. S.C.—Atlantic Coast Line R Co. v. Dawes, 88 S.E. 286, 103 S.C. 507.
51 C.J. p 523 note 41.

pany, notwithstanding it has condemned the right of way,[26] may maintain an action for damages for breach of the contract,[27] such as for breach of covenants of warranty contained in the contract of sale,[28] or it may rescind the contract and sue to recover the purchase price paid by it,[29] but where the contract is an entire one the company must either stand on its contract rights or rescind in toto.[30]

On contract to furnish right of way A railroad company may also maintain an action for damages for breach of contract against persons who have contracted to furnish a right of way for a proposed railroad;[31] and it has been held that, where it is agreed that the company may recover such sum as it is bound to pay for the right of way, it is entitled to recover as damages amounts expended in good faith for lands of a sufficient width for the roadbed and such width in addition thereto as is necessary for the proper construction and security of the road,[32] land damages which it is obliged to pay,[33] including money paid for farm bridges and bank walls, if the land damages are thereby decreased to an amount equal to their cost,[34] ordinary legal costs and attorney's fees in the land damage cases,[35] and also unpaid damages for land taken for the use of the road ordered to be paid by the county commissioners to one of the defendants,[36] but is not entitled to recover for land taken for stations or for procuring gravel to be used in the construction of the road[37] or for money paid to county commissioners for assessing land damages.[38] In such action, an allegation of the market value of property purchased by plaintiff may be made for the purpose of showing its reasonable value so as to hold defendants liable for the amount expended in procuring the right of way,[39] and a defense that plaintiffs violated the contract in procuring a portion of the right of way before the time allowed for furnishing it is not available, in the absence of allegations and proof that plaintiff paid more than the right of way would have cost defendants.[40]

§ 81. Conveyances to or for Railroad Company

a In general
b. Persons entitled to convey
c Location of way or land conveyed
d. Operation and effect in general

a. In General

The general rules regulating conveyances apply with respect to the requisites and validity of a deed of conveyance of a right of way, or other interest in land, to a railroad company.

The general rules regulating conveyances, particularly those relating to conveyances to corporations, apply with respect to the requisites and validity of a deed of conveyance of a right of way, or other interest in land, to a railroad company[41] A conveyance in fee to a railroad company authorized to acquire an easement only is valid until assailed in a direct proceeding by the government,[42] and may not be collaterally attacked by private persons.[43]

Consideration. Where a consideration for a deed to a right of way is necessary, the general rules apply as to the sufficiency of the consideration.[44] It may consist of the benefit to be received by the grantor from the construction and operation of the railroad.[45] Where the right of way deed expressly provides that it shall not be binding until the consideration is paid, an entry and trespass thereunder cannot be justified where the consideration is not paid.[46]

26. Ind.—Baltimore, etc, R Co v Adams, 60 N.E 1004, 27 Ind App 185.

27. Ind —Baltimore, etc, R Co v. Adams, supra.

28. S C—Seaboard Air Line R. Co. v. Jones, 131 S.E 434, 134 S C 305. 51 C J. p 523 note 44.

29. Ind.—Baltimore, etc, R Co v. Adams, 60 N E. 1004, 27 Ind.App. 185

30. Pa —Semple v. Cleveland, etc., R Co, 33 A. 564, 172 Pa 369
51 C J p 523 note 46

31. Tex —Risinger v. Clark, Civ. App, 246 S W. 1092.
51 C J. p 523 note 47.

32. Mass —New Haven, etc., Co v. Hayden, 117 Mass. 433.

33. Mass —New Haven, etc., Co. v. Hayden, supra.

34. Mass.—New Haven, etc., Co v Hayden, supra.

35. Mass —New Haven, etc., Co v Hayden, supra.

36. Mass.—New Haven, etc, Co. v. Hayden, supra

37. Mass.—New Haven, etc., Co. v. Hayden, supra

38. Mass —New Haven, etc., Co v. Hayden, supra.

39. Tex —Risinger v. Clark, Civ. App, 246 S W. 1092.

40. Tex —Risinger v. Clark, supra

41. W.Va.—Ohio River R. Co. v. Johnson, 40 S E. 407, 50 W.Va. 499.
51 C J p 523 note 60
Grant of right in highway or street see infra §§ 103, 104.

42. Wis.—Attorney General v. Smith, 85 N W 512, 109 Wis. 532.

43. Wis —Attorney General v. Smith, supra.

44. Mo.—Bagby v Missouri-Kansas-Texas R. Co., 171 S W 2d 673, 351 Mo 79
51 C.J p 524 note 66.

45. La —Simoneaux v Lebermuth, etc, Planting Co., 99 So. 531, 155 La 689.
51 C.J p 524 note 67
Erection of car and coach shops
Where land was conveyed to railroad company on condition that it build its car and coach shops thereon, erection of such shops constituted a valuable and substantial consideration for the deed.—Bagby v. Missouri-Kansas-Texas R. Co., 171 S. W.2d 673, 351 Mo. 79.

46. S C.—Moore v. North, etc, Carolina R. Co., 77 S.E. 926, 94 S.C 242.

Description. Subject to the rules relating to the description of property in deeds generally, a conveyance of a right of way to a railroad company must describe the land conveyed with sufficient certainty to identify it.[47] A conveyance indefinite in its description may be made certain by the conduct of the parties acting under it.[48] An obvious clerical error will be rejected where the right of way may be sufficiently identified by that which remains.[49] A conveyance of a right of way across land is not void for indefiniteness or uncertainty, because it does not describe the exact route or location thereof, where it describes its purpose as enabling the railroad to reach a designated place,[50] or where its location is made certain by reference to a survey,[51] or where its location is made definite and certain by the filing of a map and profile of the road[52] or by the construction of the road.[53]

Execution and delivery. Where the conveyance is duly acknowledged and recorded and is beneficial to the railroad company, its acceptance is presumed;[54] and, if the company takes possession and duly performs the covenants of the deed, it constitutes an acceptance thereof,[55] and under such circumstances a formal execution of the deed including delivery and acceptance is not necessary.[56] However, a contract to convey or conveyance, which is not executed and acknowledged, as required by law, does not operate to convey the legal title to the railroad company;[57] but, where the agreement has been performed on the part of the railroad company, it is sufficient to pass the equitable title[58] and to entitle it to compel a legal conveyance.[59] An unacknowledged deed expressing an inadequate consideration for the granting of a railroad right of way, until set aside, passes an equitable title to the right of way,[60] even though there was fraud in obtaining it.[61]

A deed to a third person reserving a strip for railroad purposes according to a diagram showing the railroad company's name will not operate as a conveyance to the company,[62] or as a dedication;[63] but, as against a subsequent grantee of lands crossed by a right of way, the railway company is the owner of the strip, notwithstanding the deed to such grantee contains no reference thereto.[64]

Construction. The rules of construction applicable to deeds usually apply in construing instruments conveying a right of way or other interest in land to a railroad.[65] Effect will be given to the intention of the parties as far as it is lawful and can be gathered from the contents of the instrument,[66] irrespective of all technical or arbitrary rules of construction.[67] The instrument must be considered as

47. Ga.—Gainesville Midland R. Co. v. Tyner, 50 S.E.2d 108, 204 Ga. 535
Wash.—Bank v. Eastern R., etc., Co., 252 P. 916, 142 Wash. 204.
Description held sufficient
Ga.—Woods v. Flanders, 181 S.E. 83, 180 Ga. 835
51 C.J. p. 524 note 70 [a].

48. Cal.—People v. Ocean Shore R. R., 196 P.2d 570, 32 Cal.2d 406

49. Cal.—Blume v. MacGregor, 148 P.2d 656, 64 Cal.App.2d 244

50. Ark.—Dunford v. Dardanelle, etc., R. Co., 287 S.W. 170, 171 Ark. 1036.

51. U.S.—Carter Oil Co. v. Welker, C.C.A.Ill., 112 F.2d 299, motion denied 62 S.Ct. 122. Reversed 63 S.Ct. 70, 317 U.S. 592, 87 L.Ed. 485.

52. Kan.—Abercrombie v. Simmons, 81 P. 208, 71 Kan. 538, 114 Am.St.R. 509, 1 L.R.A.,N.S., 806, 6 Ann.Cas. 239.
51 C.J. p. 524 note 72.

53. Ark.—Dunford v. Dardanelle, etc., R. Co., 287 S.W. 170, 171 Ark. 1036
51 C.J. p. 524 note 73.

54. Ind.—Pittsburgh, etc., R. Co. v. Kearns, 108 N.E. 873, 58 Ind.App. 694.

55. Ind.—Pittsburgh, etc., R. Co. v. Kearns, 128 N.E. 42, 191 Ind. 1.
51 C.J. p. 524 note 76

56. Ind.—Pittsburgh, etc., R. Co. v. Kearns, supra
La.—Fazende v. Morgan, 31 La.Ann. 549.

57. Ohio.—Baltimore, etc., R. Co. v. Oak Hill, 157 N.E. 817, 25 Ohio App. 301
51 C.J. p. 524 note 78.

58. Wash.—Matson v. Port Townsend Southern R. Co., 37 P. 705, 9 Wash. 449
51 C.J. p. 524 note 79.

59. Ohio.—Baltimore, etc., R. Co. v. Oak Hill, 157 N.E. 817, 25 Ohio App. 301.
51 C.J. p. 524 note 80.

60. Mo.—Graves v. St. Louis, etc., R. Co., 112 S.W. 736, 133 Mo.App. 91.

61. Mo.—Graves v. St. Louis, etc., R. Co., supra.

62. Ill.—Illinois Cent. R. Co. v. Indiana, etc., R. Co., 85 Ill. 211.
Md.—Hines v. Symington, 112 A. 814, 137 Md. 441.

63. Ill.—Illinois Cent. R. Co. v. Indiana, etc., R. Co., 85 Ill. 211.

64. Ohio.—Miller v. L. S. & M. S. R. Co., 12 Ohio N.P.,N.S., 683

65. Tex.—Brightwell v. International-Great Northern R. Co., Civ.App., 41 S.W.2d 319, affirmed 49 S.W.2d 437, 121 Tex. 338, 84 A.L.R. 265.
Construction as though grantees were individuals
Tex.—Brightwell v. International-Great Northern R. Co., Civ.App., 41 S.W.2d 319, affirmed 49 S.W.2d 437, 121 Tex. 338, 84 A.L.R. 265.
Liberal construction
A deed of right of way to railroad company and deeds of like kind, given by landowners having no choice in matter because lands can be taken by condemnation if they refuse to convey them, should be given such liberal construction as will effectuate parties' intention and fully protect rights of grantors and their assigns.—Keokuk County v. Reimer, 288 N.W. 676, 227 Iowa 499
Use as station grounds
A deed to a railroad of land for use as station grounds for railroad purposes must be read with the limitations and conditions which the law put into it, and in the light of public policy of the state.—Brown v. Weare, 152 S.W.2d 649, 348 Mo. 135, 136 A.L.R. 286.

66. Ga.—Atlantic Coast Line R. Co. v. Sweat, 171 S.E. 128, 177 Ga. 698.

67. Ga.—Atlantic Coast Line R. Co. v. Sweat, supra.

a whole,[68] all its clauses contextually,[69] without technical distinction or arbitrary preference of any of them because of the order in which they come in the instrument, or their historical significance.[70] The consideration of inferences drawn from extraneous facts in aid of interpretation is not justified where the language of the instrument is unambiguous.[71]

b. Persons Entitled to Convey

The owner of the land is ordinarily the proper person to convey it to a railroad company for a right of way or other purposes.

The owner of the land is ordinarily the proper person to convey it to a railroad company for a right of way or other purposes,[72] and this he may do notwithstanding he has previously leased rights thereon to a third person under a lease which conveys no interest in the land,[73] although the lessee is entitled to be protected in his rights.[74]

The owner of the fee in a private way, subject to certain easements, may authorize the construction of a track across such way for railroad purposes, without the consent of the owners of the easements, where the reasonable use and enjoyment of such easements are not thereby interfered with.[75] In case of public property, a right of way thereover may be conveyed by the proper public officer.[76] A charter provision, of a railroad company, for voluntary relinquishments of property for railroad purposes by the owner of land impliedly makes it unnecessary for a wife to join in a conveyance by her husband by reason of her inchoate right of dower,[77] and it makes no difference that the husband does not convey directly to the railroad company, but by mesne conveyances.[78]

Conveyance without authority. Where a conveyance to a railroad company is made by persons not having proper authority, it may be afterward repudiated by the persons having the authority to convey;[79] but, if the company has acted in good faith in constructing its road, it may be entitled to be protected in equity.[80]

c. Location of Way or Land Conveyed

The general rules relating to the construction of contracts to convey and deeds of conveyance apply in determining the rights of a railroad company under a contract to convey or a conveyance which describes the land conveyed in the terms of the location of the right of way.

The general rules relating to the construction of contracts to convey and deeds of conveyance apply in determining the rights of a railroad company under a contract to convey or a conveyance which describes the land conveyed in the terms of the location of the right of way,[81] such as with respect to the time when the land granted is to be selected;[82] and, where the conveyance fails to describe clearly the exact situation of the land conveyed, parol evidence is admissible to assist in ascertaining its true location.[83] Where the conveyance describes the land conveyed, as being along a line or route which has already been established by the company, it has no right to select a different location,[84] but is entitled to a right of way or land only along such line or route.[85] A conveyance of a "right of way" across land without further description, made after the tracks across the land have been constructed, refers to the road as constructed,[86] and is in effect a grant and license to maintain a roadbed as then existing.[87] Where the terms of the grant are general and indefinite without any definite description of

68. N.C.—Reidsville Grocery Co v Southern Ry Co, 1 S.E.2d 535, 215 N.C. 223

69. N.C.—Reidsville Grocery Co. v Southern Ry. Co, supra.

70. N.C.—Reidsville Grocery Co. v. Southern Ry Co, supra.

71. N.C.—Reidsville Grocery Co. v. Southern Ry Co, supra.

72. Ohio.—Ohio Oil Co v. Toledo, etc, R Co, 4 Ohio Cir Ct. 210, 2 Ohio Cir.Dec. 505

73. Ohio—Ohio Oil Co. v. Toledo, etc, R. Co, supra
51 C.J. p 525 note 87
Agreement as to right of way on leased land generally see supra § 77.

74. Ohio—Ohio Oil Co v. Toledo, etc, R. Co, supra.

75. Mass—Salter v Boston, etc, R Co., 132 N.E. 37, 239 Mass 235.
51 C.J. p 525 note 95.

76. N.Y.—People v. Walsh, 105 N.E. 136, 211 N.Y. 90
51 C.J. p 525 note 90

77. Mo—Chouteau v. Missouri Pac. R Co., 22 S.W. 458, 30 S.W. 299, 122 Mo. 375

78. Mo.—Chouteau v. Missouri Pac R Co., supra

79. Ga—Macon, etc, R Co v. Riggs, 13 S.E. 312, 87 Ga. 158.
51 C.J. p 525 note 93

80. Pa—McClane v McClane, 62 A. 861, 213 Pa. 286
51 C.J. p 525 note 94.

81. Ga.—Gainesville Midland R Co v Tyner, 50 S.E.2d 108, 204 Ga. 535
51 C.J. p 528 note 24
Location of road, termini, or station as condition of grant see infra §§ 92, 93.

82. Ohio.—Warner v. Columbus, etc, R Co, 39 Ohio St 70.
51 C.J. p 528 note 25

83. Ga.—Gainesville Midland R Co. v. Tyner, 50 S.E.2d 108, 204 Ga. 535
51 C.J. p 528 note 26.

84. Mich—Wood v Michigan Air Line R Co, 51 N.W. 263, 90 Mich 334
S.C—Moore v North, etc., Carolina R Co, 77 S.E. 926, 94 S.C. 243
51 C.J. p 528 note 28.

85. S.C—American Spinning Co. v Southern R Co, 62 S.E. 787, 81 S.C. 482.
51 C.J. p 528 note 28

86. Tex—Olive v Sabine, etc, R. Co, 33 S.W. 139, 11 Tex Civ.App. 208

87. Minn—Evans v Northern Pac R. Co., 134 N.W. 294, 117 Minn. 4.
51 C.J. p 528 note 30.

location, it does not give the railroad company the right to choose the exact location of the right of way.[88] If, however, the grantor acquiesces in the location and use of a right of way by the company, such acquiescence will operate to identify and locate the route or property conveyed,[89] and has the same legal effect as though it had been definitely described,[90] especially where the company pays the purchase price of the property granted and it is afterward fully located.[91]

Under contract to convey. A contract to convey a right of way or land in a certain tract of land vests in the company the right to select the particular location of such right of way or land.[92] Where the contract also provides for a conveyance of a specified number of acres adjoining and on the other side of the right of way, it means a strip of land of uniform width extending along the railway through the entire tract described, and having one half of the specified number of acres on each side of the right of way.[93]

d. Operation and Effect in General

A conveyance of land to a railroad company for an agreed consideration presumptively embraces in such consideration all reasonably necessary damages to the grantor's adjoining land, which have already been caused or which may be caused by the construction, maintenance, and operation of the road in a reasonably careful and prudent manner; and, therefore, in the absence of any showing to the contrary, such conveyance relieves the company from all liability for such damages.

A conveyance of land to a railroad company for an agreed consideration presumptively embraces in such consideration all reasonably necessary damages to the grantor's adjoining land, which have already been caused or which may be caused by the construction, maintenance, and operation of the road in a reasonably careful and prudent manner,[94] and which might have been recovered in condemnation proceedings;[95] and, therefore, in the absence of any showing to the contrary, such conveyance relieves the company from all liability for such damages,[96] especially where the conveyance contains a general waiver or release to this effect.[97] Until the deed is set aside, this rule applies, although the railroad company is the holder only of an equitable title by reason of the deed being unacknowledged and for an inadequate consideration.[98] On the same principle a conveyance of a right of way relieves the railroad company from damages for additional fence building required,[99] and from the duty of constructing and maintaining stock gaps or bridges,[1] or private ways or crossings,[2] unless such duty is imposed on it by the conditions or stipulations contained in the conveyance,[3] or by statute.[4]

A conveyance to the railroad company also relieves it from liability for other damages which the terms of the instrument or the attendant circumstances expressly or impliedly show to have been included in the compensation paid;[5] and, where the conveyance expressly authorizes the railroad company to do particular acts in constructing its road and releases it from all claims for damages by reason thereof, the grantor is not entitled to recover such damages, although they are the result of bad engineering judgment.[6] A recital in the deed that the consideration is in full liquidation and settlement of claims for damages sustained prior to the date of the deed precludes a recovery for any permanent injury by reason of construction prior

88. Ill.—Chicago, etc., R. Co. v. Langer, 123 N.E. 61, 288 Ill. 16

89. Ga.—Jackson v. Rodgers, 54 S.E.2d 132, 205 Ga. 581
Ky.—Buck Creek R. Co. v. Haws, 69 S.W.2d 333, 253 Ky. 203.
51 C.J. p. 528 note 32.

90. Ga.—Martin v. Seaboard Air-Line R. Co., 77 S.E. 1060, 139 Ga. 807
51 C.J. p. 528 note 33.

91. Ga.—Jackson v. Rogers, 54 S.E.2d 132, 205 Ga. 581.—Johnson v. Valdosta, etc., R. Co., 150 S.E. 845, 169 Ga. 559.

92. Wash.—Netherlands American Mortg. Bank v. Eastern R., etc., Co., 252 P. 916, 142 Wash. 204
51 C.J. p. 528 note 36.

93. Ill.—Chidester v. Springfield, etc., R. Co., 59 Ill. 87.

94. Ill.—Catello v. Chicago, B. & Q. R. Co., 131 N.E. 591, 298 Ill. 248.
Tex.—Corpus Juris cited in State v. Brewer, 169 S.W.2d 468, 471, 141 Tex. 1
51 C.J. p. 525 note 96.

95. Ill.—Catello v. Chicago, B. & Q. R. Co., 131 N.E. 591, 298 Ill. 248
51 C.J. p. 525 note 97.

96. Tenn.—Knott v. Louisville, etc., R. Co., 234 S.W. 1003, 144 Tenn. 676, 19 A.L.R. 482.
51 C.J. p. 526 note 98.

97. Iowa.—Swanson v. Ft. Dodge, etc., R. Co., 133 N.W. 351, 153 Iowa 78.
51 C.J. p. 526 note 99

98. Mo.—Graves v. St. Louis, etc., R. Co., 112 S.W. 736, 133 Mo.App. 91.

99. Ark.—St. Louis, etc., R. Co. v. Walbrink, 1 S.W. 545, 47 Ark. 330
Construction and maintenance of crossings, fences, and cattle guards generally see infra §§ 169–181.

1. Ga.—Cook v. North, etc., R. Co., 50 Ga. 211.

2. Tex.—Gulf, etc., R. Co. v. Jones, 3 Tex. A. Civ. Cas. § 23.

3. Ga.—Cook v. North, etc., R. Co., 50 Ga. 211.
Tex.—Gulf, etc., R. Co. v. Jones, 3 Tex. A. Civ. Cas. § 21
Covenants or conditions as to crossings, fences, and cattle guards generally see infra § 94.

4. N.Y.—Smith v. New York, etc., R. Co., 63 N.Y. 58
51 C.J. p. 527 note 20.

5. Minn.—Liedel v. Northern Pac. R. Co., 94 N.W. 877, 89 Minn. 284.
51 C.J. p. 526 note 2

6. U.S.—Schoening v. Chicago, etc., R. Co., C.C.A.Wyo., 30 F.2d 803
51 C.J. p. 526 note 3.

to such time, whether or not it was prudent construction.[7]

Unless the terms of the instrument require such a construction,[8] such a conveyance does not relieve the railroad company from liability for damages which are caused by its negligence in designing, constructing, and maintaining the road,[9] or for damages resulting from improper encroachments on land outside the right of way,[10] or arising out of a breach of the conditions on which the deed was delivered,[11] nor does it relieve the company from such damages as from the terms of the instrument are not to be presumed to have been in contemplation of the parties at the time of the sale,[12] such as damages from acts of the company on a different parcel of land from that granted,[13] nor does it relieve the company from damages which were expressly reserved.[14]

As against subsequent purchaser. A subsequent purchaser from the same grantor of adjoining land with notice of the right of way cannot recover for reasonable and necessary damages to his land,[15] unless his property rights are invaded;[16] and, where the conveyance to the company is recorded, it operates as notice to the subsequent grantee of the company's rights in this respect.[17]

§ 82. Extent of Way or Land Acquired

a. In general
b. Right of way

a. In General

The nature and extent of the way or land acquired by a railroad under a grant or conveyance for a right of way or other uses depend on the terms of the description or limitations employed in the instrument.

The nature and extent of the way or land acquired by a railroad company under a grant or conveyance for a right of way or other uses depend on the terms of the description or limitations employed in the instrument.[18] Under a contract to convey such lands as shall be required for the road, an owner is not bound to convey more land than the company fairly requires for its legitimate uses under its charter;[19] but a vendor may not complain that the contract of sale calls for the purchase of more land than the railroad company actually requires.[20]

As against subsequent purchaser. Where the grant to the railroad company has been recorded, the grant, together with the company's occupation and use, charges a subsequent purchaser of the land with notice of the extent of land to which the company has right or title;[21] and, even though it has been granted more, if the company fails to record its title, it is restricted, as against a subsequent purchaser for value without notice, to the land in its actual occupation and use.[22]

b. Right of Way

(1) In general
(2) As confined to space actually occupied
(3) Width of right of way

(1) In General

It has been stated that the ordinary signification of the term "right of way," when used to describe land which a railroad corporation owns or is entitled to use for railroad purposes, is the entire strip or tract which the company owns or has found it necessary or convenient to acquire the right to use for these purposes, and not any specific or limited part thereof on which its main track or other particular improvements are located.

7. Ky.—Elkhorn, etc., R Co. v Martin, 241 S.W. 344, 195 Ky. 20
8. Ala.—Alabama Western R Co. v Wilson, 55 So 932, 1 Ala App 306
9. Wash.—Jordan v Welch, 112 P 656, 61 Wash. 569.
51 C.J. p 526 note 5
10. Ala.—Alabama Western R Co v. Wilson, 55 So. 932, 1 Ala App 306.
51 C.J p 527 note 6.
11. Iowa.—Swanson v Ft Dodge, etc, R Co., 133 N.W. 351, 153 Iowa 78
12. Ill.—Catello v. Chicago, B & Q R. Co, 131 N.E 591, 298 Ill. 248
51 C J. p 527 note 8
13. Va.—Pamplin v. Norfolk, etc, R Co, 98 S E 51, 124 Va 254.
51 C J p 527 note 9
14. Pa.—North, etc, Branch R. Co v Swank, 105 Pa 555.
51 C J p 527 note 10.
15. Ga.—Darnall v. Georgia R., etc., Co, 68 S E 584, 134 Ga. 656
51 C J. p 527 note 12.
16. Ga.—Darnall v. Georgia R, etc, Co., supra.
17. N.Y.—Allerton v. New York, etc, R Co, 93 N.E. 270, 199 N.Y. 489
51 C J. p 527 note 14.
18. U.S.—Mendez v. Eastern Sugar Associates, C C A.Puerto Rico, 89 F 2d 399.
Miss.—Gulf & S. I. R. Co v. Patten, 178 So 468, 180 Miss. 756
51 C.J. p 529 note 40
Location of way or land see supra § 81 c.

Where servitude or right of way for railroad resulted from a contract between parties and not by mere operation of law, the extent and mode of using the servitude are governed by the provisions in the agreement.—Rock Island, A. & L. R Co. v. Gournay, 17 So.2d 21, 205 La. 164.

Grant not implied

Fact that area within legs of railroad wye should be unobstructed and unoccupied did not give rise to implied grant, in right of way deed to a wye, of land within legs of wye.—Gulf & S I R Co. v. Patten, 178 So 468, 180 Miss. 756.

19. Vt.—Hill v. Western Vermont R. Co., 32 Vt 68.
20. Pa.—Delaware, etc., R Co. v Welser, 81 A. 994, 233 Pa. 154.
51 C J. p 529 note 42.
21. Ky.—Fishback v. Glasgow R. Co., 130 S W. 982, 140 Ky. 155.
51 C J. p 529 note 43.
22. La.—John T. Moore Planting Co. v. Morgan's Louisiana, etc., R, etc, Co, 53 So. 22, 126 La. 840.
51 C.J. p 529 note 44.

It has been stated that the ordinary signification of the term "right of way," when used to describe land which a railroad corporation owns or is entitled to use for railroad purposes, is the entire strip or tract which the company owns or has found it necessary or convenient to acquire the right to use for these purposes,[23] and not any specific or limited part thereof on which its main track or other particular improvements are located.[24] It includes land immediately beneath the tracks, switches, and buildings used in the operation of the road,[25] and also such portions as, in connection therewith, are necessary to the use of the tracks and buildings,[26] although it is not of the same width, or used in the same manner, at all points.[27] It includes lands and lots acquired for necessary side tracks and turnouts, and the improvements thereon in the way of coal sheds, freight houses, water tanks, repair shops, roundhouses, and the like,[28] and, where the railroad company acquires the fee, it is for the company, and not for the adjacent landowner, to determine how much land is reasonably necessary for depot grounds and right-of-way purposes.[29] Where, however, a strip of a distinct width is used and marked by fences or otherwise, as the right of way, additions thereto are not integral parts of the right of way.[30] Where conveyance by deed is made, the limits of the right of way are to be determined by the calls in the deed,[31] and they cannot be extended by an actual survey of the boundary beyond the limits called for.[32] If the right of way is granted in general terms, its extent depends on what the railroad company requires in order to operate its road properly over the right of way.[33] It has been held that neither the fact that a tract of land adjoining the right of way and used by the railroad company for railroad purposes was assessed and taxed by the state tax commission,[34] nor the fact that the use made of such adjacent tract was within the list of purposes for which it might have been condemned,[35] will make it necessarily a part of the railroad right of way.

Additional land. Where the grant of a right of way includes the right to use such additional land as may be necessary for the construction and maintenance of the road, the necessity for taking additional land is to be determined by ordinary care in constructing the road,[36] but, where the parties expressly so agree, such additional land must be taken in parcels of specific dimensions,[37] and must be used for the railroad purposes agreed on;[38] and, where the additional land is so used, the fact that buildings thereon, used in connection with the land for incidental railroad purposes, were erected by third persons does not prevent the company from claiming that they are so used.[39]

Height and depth. A right of way of a railroad under an easement extends only to such height and depth as reasonably permit the full and free enjoyment of the surface for railroad purposes,[40] and the space or distance upward or downward which is necessary for the full free use of its franchise is a question of fact to be determined from the circumstances of each case.[41] It has been stated

23. U S—St Louis, etc, R. Co v. Wabash R. Co, Mo, 152 F 849, 81 C C.A. 643, modified on other grounds 30 S Ct. 510, 217 U S 247, 54 L Ed 752
51 C.J. p 529 note 46.
"Right of way" defined generally see supra § 1.

24. Cal.—Shannon v. Wilson, 101 P. 2d 116, 38 Cal App.2d 219.
51 C J. p 529 note 47.

25. Ky—Illinois Cent. R Co v Taylor, 177 S W. 293, 165 Ky 503

26. Ky—Illinois Cent. R. Co. v. Taylor, supra.
51 C J. p 529 note 49.
Adjoining grounds
A railroad "right of way" includes all adjoining grounds covered by easement and reasonably necessary for such use.—Shannon v Wilson, 101 P.2d 116, 38 Cal.App 2d 219.
Loading and unloading
Railroad presumptively acquired right of way of such extent as to enable it and persons dealing with it to load and unload freight at point where it established freight depot without being guilty of trespassing on rights of adjacent landowner.—Anderson v Peters, 124 S W.2d 717, 22 Tenn App 563.

27. Utah.—Rio Grande Western R Co v. Salt Lake Inv. Co., 101 P. 586, 35 Utah 528

28. Ind—Pfaff v. Terre Haute, etc, R Co, 9 N E 93, 108 Ind. 144
51 C J. p 530 note 51.

29. Neb—Hull v. Kansas City, etc, R. Co, 98 N.W. 47, 70 Neb 756.

30. Utah.—Rio Grande Western R Co v Salt Lake Inv. Co., 101 P 586, 35 Utah 528, 537.
51 C.J. p 530 note 53

31. Tex—Missouri, etc., R Co. v Anderson, 81 S.W 781, 36 Tex.Civ App. 121

32. Tex.—Missouri, etc., R. Co. v. Anderson, supra.

33. U S—Midland Valley R. Co. v Sutter, C.C.A.Kan., 28 F 2d 163, certiorari denied 50 S.Ct. 65, 280 U.S. 521, 74 L Ed. 590.

34. Kan.—Danielson v. Woestemeyer, 293 P. 507, 131 Kan. 796.

35. Kan—Danielson v. Woestemeyer, supra.

36. Tex—Gulf, etc, R. Co. v. Richards, 18 S W. 611, 83 Tex. 203.
51 C.J. p 530 note 57.

37. N Y.—New York, etc., R Co v Dunning, 123 N Y.S 15, 138 App. Div. 377.
51 C.J. p 530 note 58

38. Wash—Walla Walla Valley R Co v Carter, 233 P. 329, 133 Wash 205.

39. Wash.—Walla Walla Valley R. Co v Carter, supra.
51 C J. p 530 note 60.

40. Ill.—Farmers Grain & Supply Co. of Warsaw v. Toledo, P. & W. R. R., 44 N.E 2d 77, 316 Ill.App. 116.

41. Ill.—Farmers Grain & Supply Co. of Warsaw v. Toledo, P. & W. R. R., supra.
Reasonable construction of deed
Where deed conveying right of way easement to railroad was silent regarding the distance above surface of earth within which the gran-

that the property rights of a railroad company, under an easement, in its right of way extend upward for a space necessary for the use of its franchise,[42] and downward to a line of support for its tracks and superstructures.[43] Where the company acquires a fee-simple title, its absolute ownership will extend indefinitely upward so as to include proprietorship of the air and space above the land.[44]

(2) As Confined to Space Actually Occupied

In the absence of a paper title or condemnation proceedings, or title by adverse possession, a railroad company is generally confined to the land which is actually occupied and used by it.

In the absence of a paper title or condemnation proceedings, or title by adverse possession, a railroad company is generally confined to the land which is actually occupied and used by it;[45] and, if it seeks to go beyond its previously occupied land, it must show title outside of its present occupancy, either by the record of condemnation proceedings,[46] or by the production of a deed or written muniments of title,[47] or by proof showing the actual delivery of the land as ascertained by landmarks, fences, etc.[48] A subsequent vendee as owner of the servient estate may object to the enlargement of an easement of right of way.[49] Where a strip of a specified width is granted, the company is not required to exercise its option to occupy the entire strip on any single occasion or within any precise period, but may locate one track first and add others later.[50]

(3) Width of Right of Way

- (a) Width definitely specified
- (b) Width not definitely specified
- (c) Effect of charter or statutory limitations
- (d) Presumptions

(a) Width Definitely Specified

Where the grant or conveyance of a right of way specifies the width, the extent thereof is determined by a proper construction of the terms of the instrument.

A railroad company is not entitled to a right of way of a specified width as a matter of law,[51] but its right of way, in the absence of a conveyance, depends on its charter and on condemnation proceedings.[52] Where the grant or conveyance of a right of way specifies the width, the extent thereof is determined by a proper construction of the terms of the instrument,[53] and, unless there is a further grant, or some act of estoppel on the part of the grantor,[54] the occupancy and use of a great-

tee could exercise its rights, the deed was required to be given a reasonable construction which was required to be in accord with what the parties had in mind when the deed was made.—Cleveland, C., C. & St. L. Ry. Co. v. Central Illinois Public Service Co., 43 N.E.2d 993, 380 Ill. 130.

42. U.S.—**Corpus Juris quoted in** United States v. Great Northern Ry. Co., D.C.Mont., 32 F.Supp. 651, 654.
Ill.—**Corpus Juris cited in** Cleveland, C., C. & St. L. Ry. Co. v. Central Illinois Public Service Co., 43 N.E.2d 993, 997, 380 Ill. 130—**Corpus Juris quoted in** Farmers Grain & Supply Co. of Warsaw v. Toledo, P. & W. R. R., 44 N.E.2d 77, 81, 316 Ill.App. 116.
51 C.J. p 530 note 61.

Safe and convenient passage
An easement for railroad right of way extends to height sufficient for safe and convenient passage of all trains and their burdens of whatever nature.
Ill.—Farmers Grain & Supply Co. of Warsaw v. Toledo, P. & W. R. R., 44 N.E.2d 77, 316 Ill.App. 116.
Ky.—Citizens' Tel. Co. v. Cincinnati, etc., R. Co., 233 S.W. 901, 192 Ky. 399.

Construction by another above right of way
(1) A railroad company cannot complain of, or interfere with, construction of improvement above its right of way by a stranger to fee, if it is above and beyond use and purpose of easement granted to such company.—Farmers Grain & Supply Co. of Warsaw v. Toledo, P. & W. R. R., 44 N.E.2d 77, 316 Ill.App. 116

(2) A railroad company, owning right of way easement, has no right to require, or maintain action for, removal of structure erected above tracks by another, if it does not interfere with full enjoyment of right of way and is of such permanent and substantial nature as not to be a menace to persons passing under it.—Farmers Grain & Supply Co. of Warsaw v. Toledo, P. & W. R. R., supra.

43. U.S.—**Corpus Juris quoted in** United States v. Great Northern Ry. Co., D.C.Mont., 32 F.Supp. 651, 654
Ill.—**Corpus Juris quoted in** Farmers Grain & Supply Co. of Warsaw v. Toledo, P. & W. R. R., 44 N.E.2d 77, 81, 316 Ill.App. 116.
Pa.—Cumberland Valley, etc., R. Co. v. Chambersburg, etc., R. Co., 15 Pa.Dist. 965.

44. Ill.—**Corpus Juris quoted in** Farmers Grain & Supply Co. of Warsaw v. Toledo, P. & W. R. R., 44 N.E.2d 77, 81, 316 Ill.App. 116.
51 C.J. p 530 note 63.

45. N.Y.—Jones v. Delaware, etc., R. Co., 101 N.E. 763, 208 N.Y. 40
51 C.J. p 530 note 64.

46. Pa.—Goddard v. Philadelphia, etc., R. Co., 2 Del.Co. 337, 2 Lanc.L.Rev. 265.

47. N.C.—Heaton v. Kilpatrick, 143 S.E. 644, 195 N.C. 708.
51 C.J. p 531 note 66.

48. Pa.—Goddard v. Philadelphia, etc., R. Co., 2 Del.Co. 337, 2 Lanc.L.Rev. 265.

49. Ga.—Central of Georgia R. Co. v. Standard Fuel Supply Co., 86 S.E. 228, 144 Ga. 92.

50. Conn.—New York, etc., R. Co. v. Armstrong, 102 A. 791, 92 Conn. 349.

51. Tenn.—Smith v. Zwicker, 133 S.W. 595, 136 Tenn. 77, 80.

52. Tenn.—Smith v. Zwicker, supra.
51 C.J. p 531 note 73.

53. Wash.—Northwestern Lumber Co. v. Bloom, 237 P. 295, 135 Wash. 195.
51 C.J. p 531 note 74.

Fraud
The company may be estopped from claiming the width specified where the conveyance thereof has been induced by fraud.—Atlanta, etc., R. Co. v. Victor Mfg. Co., 76 S.E. 1091, 93 S.C. 397—51 C.J. p 532 note 85.

54. Wash.—Northwestern Lumber

er width than that specified may not be claimed by the company,[55] especially where to do so would interfere with another's rights which have been acquired in the meantime;[56] and this rule applies, although the width conveyed is less than the width the company is permitted by statute to acquire.[57] The fact that a conveyance of a part of a tract indicates a right of way of a specified width across the part conveyed does not establish an intention of the parties that the right of way across the rest of the tract of the same owner shall be of the same width;[58] and the fact that a deed and plat are made by the owner of the land after the railroad is constructed across it by permission, in which deed and plat the railroad has no interest, and for which it furnishes no consideration, does not give the railroad title to its right of way for the full width shown on such deed and plat.[59]

Not exceeding specified width. A deed for a right of way, not exceeding a specified width, is not an absolute conveyance of a right of way of the width specified,[60] but only a right to locate a right of way not exceeding the width stated,[61] and, where the company locates its road on a narrower strip, it may not thereafter claim the specified width, as against a subsequent grantee in whose occupancy it has acquiesced.[62]

Slopes. A railroad company having a right of way of a specified width also has the right to the necessary slopes for embankments, although they extend in some places beyond such right of way.[63]

(b) Width Not Definitely Specified

In the absence of a definite specification in the grant or conveyance as to the width of the right of way, such width as is reasonably necessary for the construction and maintenance of the railroad and its convenient operation is contemplated.

Where the width granted or conveyed is not definitely specified in the instrument, parol or extrinsic evidence is admissible to show the intention of the parties in respect thereof.[64] In the absence of a definite specification in the grant or conveyance as to the width of the right of way, such width as is reasonably necessary for the construction and maintenance of the railroad and its convenient operation is contemplated[65] It has been held that such an instrument conveys merely such a strip of land as is of sufficient width to locate and construct the roadbed,[66] to the outer line of poles, carrying a telegraph wire used in operating the railroad,[67] including the ditches on each side of its right of way necessary for drainage;[68] or such a width as the parties have assented to by practical construction[69] It has also been held that, where a deed conveys "the full and perfect right of way" without specifying its width, the railroad company may appropriate such width as its board of directors in its honest judgment deems necessary for its present and future purposes;[70] and, where the company thereafter duly condemns a right of way on each side of the grant of a specified width, it indicates to the grantor that the right of way will be that width,[71] and, if with knowledge thereof he acquiesces, the company is not estopped to claim such width under its grant.[72]

Where, although the width is specified, it is too indefinitely described to be located, it conveys

Co. v. Bloom, 237 P. 295, 135 Wash. 195.
51 C.J. p 531 note 75.

55. Ill.—Cleveland, C., C. & St L Ry. Co. v. Central Illinois Public Service Co., 43 N.E.2d 993, 380 Ill. 130.
51 C.J. p 531 note 76.

56. Mo.—Joplin, etc., R. Co. v. Kansas City, etc., R. Co., 37 S.W. 540, 135 Mo. 549.

57. Ind.—Lake Erie, etc., R. Co. v. Michener, 20 N.E. 254, 117 Ind. 465.
Iowa.—Gray v. Burlington, etc., R. Co., 37 Iowa 119.

58. Md.—Hines v. Symington, 112 A. 814, 137 Md. 441.

59. Md.—Hines v. Symington, supra.

60. Miss.—Vicksburg, etc., R. Co. v. Barrett, 7 So. 549, 67 Miss. 579.

61. Miss.—Vicksburg, etc., R. Co. v. Barrett, supra.

62. Miss.—Vicksburg, etc., R. Co. v. Barrett, supra
51 C.J. p 532 note 83.

63. Pa.—Rodgers v. Pittsburgh, etc., R. Co., 100 A. 271, 255 Pa. 462.

64. Va.—South, etc., R. Co. v. Mann, 62 S.E. 354, 108 Va. 557.
51 C.J. p 532 note 87.

65. Ky.—Buck Creek R. Co. v. Haws, 69 S.W.2d 333, 253 Ky. 203.
Criterion of reasonableness is a statute allowing a designated number of feet.—Buck Creek R. Co. v. Haws, supra.
Remedy for taking excess
(1) Owner of surface subject to easement for railroad can recover land or value thereof taken for right of way beyond width reasonably necessary therefor and also damages for trespasses as to such excess.—Buck Creek R. Co. v. Haws, supra.
(2) Owner of servient estate suing within limitation period has been held not estopped from recovering excess land or value thereof.—Buck Creek R. Co. v. Haws, supra.

66. Ga.—Martin v. Seaboard Air-Line R. Co., 77 S.E. 1060, 139 Ga. 807.
51 C.J. p 532 note 88.

67. Ark.—St. Louis, etc., R. Co. v. Stevenson, 188 S.W. 832, 125 Ark. 357.

68. La.—John T. Moore Planting Co. v. Morgan's Louisiana, etc., R., etc., Co., 53 So. 22, 126 La. 840.
51 C.J. p 532 note 90.

69. W.Va.—Miller v. Chesapeake, etc., R. Co., 116 S.E. 521, 93 W.Va. 257.
51 C.J. p 532 note 91.

70. Pa.—Rodgers v. Pittsburgh, etc., R. Co., 100 A. 271, 255 Pa. 462, 464.

71. Pa.—Rodgers v. Pittsburgh, etc., R. Co., supra.

72. Pa.—Rodgers v. Pittsburgh, etc., R. Co., supra.

the right of way actually occupied under the deed,[73] including space occupied by rails, ties, switches, side tracks, ditches, etc., with means of ingress and egress on both sides, such as are reasonably necessary for operation and maintenance of the road in the customary way,[74] and is not presumed to extend an equal distance on either side of the center line of tracks as located, but only to include space actually occupied[75]

Additional width. A grant of such additional width as may be required for the use of the railroad for side tracks, turnouts, and so forth, as finally located, limits the grant to the necessity of the railroad as finally located,[76] and limits the grant of land for side tracks and turnouts to such as were originally constructed,[77] and does not authorize the taking of additional land therefor.[78]

(c) Effect of Charter or Statutory Limitations

The width of the strip which a railroad company acquires for its right of way may be expressly limited either by the provisions of the charter of the company or by statute.

The width of the strip of land which a railroad company acquires for its right of way may be expressly limited either by the provisions of the charter of the company[79] or by statute.[80] A charter provision to this effect should be construed in the light of conditions existing when the charter was granted.[81] Such a provision does not definitely fix the rights of the parties;[82] and, if the company takes a deed for less than the charter or statutory width, the limitation does not apply[83] Where there has been no conveyance or the conveyance to the company does not definitely specify the width of the land granted, the company may ordinarily occupy any width it chooses not exceeding that allowed by the charter or statute,[84] with this limitation in some jurisdictions, however, that it does not take more than is reasonably necessary for the convenient use and maintenance of the road in the customary mode[85]

In jurisdictions in which the company is presumed to have acquired only the width actually occupied and used, if the company occupies and uses less than the maximum width, it may not thereafter claim a greater width up to the maximum,[86] unless it has acquired to the additional width by a new grant from the owner[87] by condemnation,[88] or by adverse occupancy,[89] or unless it has entered on the land and occupied it under such circumstances that the owner is estopped to reclaim possession;[90] and it has been held that, where the railroad company maintains on the right of way one or more railroad tracks, it has done all that is necessary to assert its right to the entire width.[91]

A charter or statutory limitation of the amount of land a railroad company may acquire by appropriation proceedings does not limit the amount which the company may acquire by purchase;[92] and hence a grant of a right of way of such width as the law provides may be used by the company does not fix the statutory limit, as the width granted,[93] but the company takes only as much land as is necessary to construct and maintain its road.[94] A grant of as much as and no more than the company could acquire under its right to condemn for a right of way is a grant of the statutory width, and not only of the land occupied[95]

Grant by life tenant. A grant by a life tenant of a railway right of way wider than the company is empowered to condemn under its charter does

73. Ill.—Chicago, etc., R. Co. v. Langer, 123 N.E. 61, 288 Ill. 16.
51 C.J. p. 532 note 95.

74. Ill.—Chicago, etc., R. Co. v. Langer, supra.

75. Ill.—Chicago, etc., R. Co. v. Langer, supra.

76. Md.—Kensington R. Co. v. Moore, 80 A. 614, 115 Md. 36, Ann. Cas. 1912C 1306.

77. Md.—Kensington R. Co. v. Moore, supra.

78. Md.—Kensington R. Co. v. Moore, supra.

79. N.C.—Earnhardt v. Southern R. Co., 72 S.E. 1062, 157 N.C. 358—Seaboard Air Line R. Co. v. Olive, 55 S.E. 263, 142 N.C. 257.

80. Tenn.—Southern Ry. Co. v. Moore, 7 Tenn. App. 319.

81. N.C.—Earnhardt v. Southern R. Co., 72 S.E. 1062, 157 N.C. 358—Seaboard Air Line R. Co. v. Olive, 55 S.E. 263, 142 N.C. 257.

82. Ind.—Ft. Wayne, etc., R. Co. v. Sherry, 25 N.E. 898, 126 Ind. 334, 10 L.R.A. 48.

83. N.C.—Dargan v. Carolina Cent. R. Co., 18 S.E. 653, 113 N.C. 596.

84. Tenn.—Southern Ry. Co. v. Moore, 7 Tenn. App. 319.
51 C.J. p. 533 note 7.

85. Ala.—Whitewater Lumber Co. v. Prather, 100 So. 549, 211 Ala. 361.
51 C.J. p. 533 note 8.

86. Ark.—St. Louis, etc., R. Co. v. Stevenson, 188 S.W. 832, 125 Ark. 357.
51 C.J. p. 533 note 10.

87. Ark.—St. Louis, etc., R. Co. v. Stevenson, supra.

88. Ark.—St. Louis, etc., R. Co. v. Stevenson, supra.
51 C.J. p. 533 note 12.

89. Ill.—Waggoner v. Wabash R. Co., 56 N.E. 1050, 185 Ill. 154
Ind.—Lake Erie, etc., R. Co. v. Michener, 20 N.E. 254, 117 Ind. 465.

90. Ind.—Lake Erie, etc., R. Co. v. Michener, supra
51 C.J. p. 533 note 14.

91. Pa.—Templeton v. Lehigh, etc., Coal Co., 50 Pa. Super. 341.

92. Ohio.—Baltimore, etc., R. Co. v. Oak Hill, 157 N.E. 817, 25 Ohio App. 301
51 C.J. p. 533 note 17.

93. Ohio.—Baltimore, etc., R. Co. v. Oak Hill, supra.

94. Ohio.—Baltimore, etc., R. Co. v. Oak Hill, supra.
51 C.J. p. 533 note 19.

95. N.C.—Seaboard Air Line R. Co. v. Olive, 55 S.E. 263, 142 N.C. 257.

not give any easement as against remaindermen or their grantee beyond the authorized width.[96]

Lands for depots, sidetracks, etc. It has been held that a statutory provision that any railroad constructed under the statute shall not exceed a specified number of feet in width is not limited to roadbed and tracks, but includes all necessary appurtenances.[97] On the other hand it has been held that a charter provision authorizing the company to take a strip of land not exceeding a specified width refers to the right of way, and does not prohibit the company from acquiring more lands for depot grounds and side tracks;[98] and under some statutes it may acquire even more than the charter or statutory width, when necessary for the successful operation of the road,[99] such as for the purpose of maintaining slopes and cuts.[1]

(d) Presumptions

Under some charters or statutes limiting the width of the land which a railroad company may acquire for a right of way, it is held that the occupancy and use by the company of a strip of land without a conveyance or under a conveyance which does not specify the width granted are presumed to be of the full width allowed by its charter or by statute and not merely of the width actually used.

Under some charters or statutes limiting the width of the land which a railroad company may acquire for a right of way, it is held that, in the absence of any showing to the contrary, the occupancy and use by the company of a strip of land without a conveyance or under a conveyance which does not specify the width granted are presumed to be of the full width allowed by its charter or by statute and not merely of the width actually used.[2] This presumption, however, is only a prima facie presumption,[3] and may be overcome by evidence rebutting the inference,[4] but it cannot be overcome by a general reputation as to the width acquired by railroad companies.[5] Such a presumption does not arise as against land which is exempt by statute from acquisition by a railroad company for a right of way without the consent of the owner,[6] such as land inclosed within the yard, dwelling house, garden, or graveyard of a citizen,[7] but the burden is on the railroad company to show that the then owner of such land consented to its use.[8] So, also, the statutory presumption does not apply when the company has entered on the land and constructed its roadway under a description limiting the width to that of its present use,[9] or otherwise limiting it to less than the statutory width;[10] nor does the presumption extend to lands adjoining those of the grantor, whose owners are not parties to the conveyance.[11]

Acquisition of only width actually occupied and used. Under some statutes it has been held in such cases that, in the absence of proof that the company acquired the full statutory width, it will be presumed to have acquired only the strip occupied and used.[12] The fact that the company is empowered to lay out its road to a specified width does not raise a presumption that a grant of a right of way which fails to define the width of the strip was intended to convey the full authorized width,[13] or that the company in occupying the land for a part of the authorized width intended to locate over the entire width;[14] and evidence is admissible to

96. S.C.—Northwestern R. Co. v. Colclough, 72 S.E. 494, 89 S.C. 555

97. N.J.—New Jersey Cent. R. Co. v. Hudson Terminal R. Co., 46 N.J.Law 289.

98. Ill.—Carmody v. Chicago, etc., R. Co., 111 Ill. 69.

99. Del.—Bubenzer v. Philadelphia, etc., R. Co., Ch., 61 A. 270.
51 C.J. p. 534 note 24.

1. Pa.—Aliquippa v. Pittsburgh, etc., R. Co., 94 Pa.Super. 279.
51 C.J. p. 534 note 25.

2. Ariz.—Boyd v. Atchison, T. & S.F. Ry. Co., 4 P.2d 670, 39 Ariz. 154.
N.C.—Carolina & N. W. Ry. Co. v. Piedmont Wagon & Mfg. Co., 51 S.E.2d 301, 229 N.C. 695
S.C.—Atlantic Coast Line R. Co. v. Little, 12 S.E.2d 7, 195 S.C. 455
51 C.J. p. 534 note 26.

Strong presumption

The fact that railroad right of way is fixed under authority of the state creates strong presumption that whole of it should be preserved as necessary for the purpose for which it is set apart.—Atlantic Coast Line R. Co. v. Little, supra.

Constructive notice

Where predecessor of railroad company acquired right of way under statute providing for right of way two hundred feet wide with presumption after expiration of two years following construction of road that right of way was granted to company by the owners thereof, owner who acquired her lands after construction of the railroad would be regarded as having "constructive notice" that right of way extended one hundred feet on each side of the center of the track.—Atlantic Coast Line R. Co. v. Little, supra.

3. N.C.—Tighe v. Seaboard Air Line R. Co., 97 S.E. 164, 176 N.C. 239.
51 C.J. p. 534 note 27.

4. Iowa.—Cedar Rapids Canning Co. v. Burlington, etc., R. Co., 95 N.W. 195, 120 Iowa 724.
51 C.J. p. 534 note 28.

5. U.S.—Norfolk Southern R. Co. v. Stricklin, D.C.N.C., 264 F. 546
51 C.J. p. 534 note 29.

6. S.C.—Atlantic Coast Line R. Co. v. Dawes, 88 S.E. 286, 103 S.C. 507

7. S.C.—Atlantic Coast Line R. Co. v. Dawes, supra.

8. S.C.—Atlantic Coast Line R. Co. v. Dawes, supra.

9. N.C.—Wearn v. North Carolina R. Co., 132 S.E. 576, 191 N.C. 575.

10. N.C.—Wearn v. North Carolina R. Co., supra.

11. N.C.—Wearn v. North Carolina R. Co., supra.

12. Neb.—Omaha, etc., R. Co. v. Rickards, 57 N.W. 739, 38 Neb. 847.
51 C.J. p. 535 note 36.

13. Ind.—Indianapolis, etc., R. Co. v. Reynolds, 19 N.E. 141, 116 Ind. 356

14. Conn.—New York, etc., R. Co. v. Armstrong, 102 A. 791, 92 Conn. 349.
51 C.J. p. 535 note 39.

show that the road was originally laid out at a shorter width, so as to explain the intention of the parties.[15]

§ 83. Title, Estate, or Interest Acquired

A railroad company may acquire a title in fee simple, a determinable fee, an easement, a lease, or a license in a strip of land for a right of way.

A railroad company may acquire a title in fee simple, a determinable fee, an easement, a lease, or a license in a strip of land for a right of way.[16] The same title or rights that would have been acquired by condemnation proceedings are generally acquired by company under a grant or conveyance of land for a right of way[17] and the nature and quality of the right or title that may be acquired are usually fixed by the charter of the company or by statute.[18] Accordingly where, it is so authorized by its charter or by statute, a railroad company, although created for a limited period,[19] may acquire a fee-simple title in land for its right of way, depot grounds, and other railroad necessities, by purchase.[20] While it has been held that this right is not affected by the fact that the company may obtain only an easement or determinable fee if it resorts to condemnation proceedings,[21] it has also been held that, where the statute authorizes only an easement or interest in land and not a fee to be taken by condemnation proceedings, a deed will not be construed to convey a fee in the absence of a clearly apparent intention to that effect.[22]

15. Ind.—Indianapolis, etc., R Co. v. Reynolds, 19 N.E. 141, 116 Ind. 356

16. Mich.—Quinn v. Pere Marquette Ry. Co., 239 N.W. 376, 256 Mich. 143.
Rights in highways and public places see infra § 112.

Easement or fee-simple title
U.S.—Magnolia Petroleum Co. v. Thompson, C.C.A. Mo., 106 F.2d 217, certiorari denied Thompson v. Magnolia Petroleum Co., 60 S.Ct. 180, 308 U.S. 613, 84 L.Ed. 513, reversed on other grounds 60 S.Ct. 628, 309 U.S. 478, 84 L.Ed. 876
Miss.—Williams v. Patterson, 21 So.2d 477, 198 Miss. 120
Tex.—Brightwell v. International-Great Northern R. Co., Civ.App., 41 S.W.2d 319, affirmed 49 S.W.2d 437, 121 Tex. 338, 84 A.L.R. 265

Perpetual servitude
Where deed gave perpetual right of way for railroad lines of grantee in favor of rural property of grantee without any restrictions, the servitude created could be perpetual in character.—Mendez v. Bowie, C.C.A. Puerto Rico, 118 F.2d 435, certiorari denied Mendez Rios v. Bowie, 62 S.Ct. 76, 314 U.S. 639, 86 L.Ed. 513.

Revocable license
Instrument executed by landowner granting railroad, a private corporation, right to maintain tracks, which was without consideration, gave only revocable license, not right of way or servitude.—Central Cambalache v. Martinez, C.C.A. Puerto Rico, 82 F.2d 37.

Discontinuous servitude
Presence of railroad tracks for passage of trains over another's lands was a discontinuous servitude which could only be acquired by virtue of title.—Central Cambalache v. Martinez, supra

17. Mo.—**Corpus Juris quoted in** State ex rel. State Highway Commission v. Union Electric Co. of Missouri, 148 S.W.2d 503, 505, 347 Mo. 690
51 C.J. p. 535 note 43

18. Mo.—**Corpus Juris quoted in** State ex rel. State Highway Commission v. Union Electric Co., 148 S.W.2d 503, 505, 347 Mo. 690.

19. Mo.—**Corpus Juris quoted in** State ex rel. State Highway Commission v. Union Electric Co. of Missouri, 148 S.W.2d 503, 505, 347 Mo. 690.
51 C.J. p. 535 note 45.

20. U.S.—Knoell v. Frisco Lease, C.C.A. Okl., 78 F.2d 286.
Cal.—Lemon v. Los Angeles Terminal Ry. Co., 102 P.2d 387, 38 Cal. App.2d 659
Conn.—Parsons v. Town of Wethersfield, 60 A.2d 771, 135 Conn. 24, 4 A.L.R.2d 330
Ill.—Keen v. Cleveland, C., C. & St. L. Ry. Co., 64 N.E.2d 499, 392 Ill. 362
Miss.—Williams v. Patterson, 21 So.2d 477, 198 Miss. 120.
Mo.—**Corpus Juris quoted in** State ex rel. State Highway Commission v. Union Electric Co. of Missouri, 148 S.W.2d 503, 505, 347 Mo. 690—**Corpus Juris cited in** Coates & Hopkins Realty Co. v. Kansas City Terminal Ry. Co., 43 S.W.2d 817, 822, 328 Mo. 1118
Okl.—Higgins v. Oklahoma City, 127 P.2d 845, 191 Okl. 16, reversed on other grounds 56 S.Ct. 562, 297 U.S. 481, 80 L.Ed. 816—Cumbey v. Urschel, 42 P.2d 902, 171 Okl. 389—Cobbs v. Wiedmann, 40 P.2d 1075, 170 Okl. 493—Marland v. Gillespie, 33 P.2d 207, 168 Okl. 376
Tex.—Brightwell v. International-Great Northern R. Co., 49 S.W.2d 437, 121 Tex. 338, 84 A.L.R. 265—Nesral Production Co. v. St. Louis, B. & M. Ry. Co., Civ.App., 84 S.W.2d 805, error dismissed.
51 C.J. p. 535 note 46.

Constitutional provision held inapplicable
The constitutional provision that fee of land taken for railroad tracks without consent of owner thereof shall remain in such owner subject to the use for which it is taken is applicable only to condemnation proceedings.—Cleveland, C., C. & St. L. Ry. Co. v. Central Illinois Public Service Co., 43 N.E.2d 993, 380 Ill. 130.

Lack of authority
Where railroad company had no authority to acquire fee-simple title to land within Indian nation, deed conveying to railroad company part of allotment of an enrolled Indian freedman citizen, in so far as it purported to convey fee-simple title, was a nullity; and approval by secretary of interior of deed purporting to convey fee-simple title to part of the allotment of an enrolled freedman citizen could not make the deed convey fee-simple title.—Gutensohn v. McGuirt, 147 P.2d 777, 194 Okl. 64.

Occupancy and payment of taxes by a railroad company on its property located on its right of way did not evidence its ownership of fee title or color of title to freehold.—Farmers Grain & Supply Co. of Warsaw v. Toledo, P. & W. R. R., 44 N.E.2d 77, 316 Ill.App. 116.

21. Cal.—Lemon v. Los Angeles Terminal Ry. Co., 102 P.2d 387, 38 Cal.App.2d 659.
Mo.—**Corpus Juris quoted in** State ex rel. State Highway Commission v. Union Electric Co. of Missouri, 148 S.W.2d 503, 505, 347 Mo. 690—**Corpus Juris cited in** Coates & Hopkins Realty Co. v. Kansas City Terminal Ry. Co., 43 S.W.2d 817, 822, 328 Mo. 1118.
51 C.J. p. 535 note 47.

22. Ohio.—Hinman v. Barnes, 66 N.E.2d 911, 146 Ohio St. 497.

Perfecting defective title. The fact that a railroad company has constructed and commenced operating its road in reliance on a title subsequently found to be defective is no objection to proceedings on its part to perfect its title to lands so occupied under a statute authorizing railroad corporations to perfect defective titles.[23]

Waiver of defect. Where the value of land appropriated by a railroad company is by agreement submitted to arbitration and an award is made, and the company enters for the purposes of its road, its act in taking possession waives all right to object to a defect in the title, existing at the time a deed is tendered, but which is removed a few days afterward.[24]

§ 84. —— Under Grant or Conveyance from Owner

a. In general

b. Title in fee

c. Easement

a. In General

The question as to what estate or interest is acquired by a railroad company by a grant or conveyance of land to it must be determined from the intention of the parties as shown by the whole instrument, as construed in connection with the charter of the company or governing statutes, and, in case of ambiguity, with the accompanying circumstances.

Where there has been a grant or conveyance of land to a railroad company, the question as to what estate or interest is thereby acquired by the company must be determined from the intention of the parties as shown by the whole instrument,[25] as construed in connection with the railroad company's charter or governing statutes,[26] and, in case of ambiguity, with the accompanying circumstances.[27]

23. N.Y.—Matter of Prospect Park, etc., R. Co., 67 N.Y. 371.

24. N.Y.—Viele v. Troy, etc., R. Co., 20 N.Y. 184.

25. U.S.—Polk v. Ball, C.C.A.La., 149 F.2d 263—In re Chicago & N. W. Ry. Co., C.C.A.Ill., 127 F.2d 1001, certiorari denied Thomson v. Hicks, 63 S.Ct. 59, 317 U.S. 659, 87 L.Ed. 530, rehearing denied 63 S.Ct. 155, 317 U.S. 708, 87 L.Ed. 564—U. S. v. Certain Parcels of Land in Rapides Parish, D.C.La., 57 F. Supp. 486.

Ga.—Jackson v. Rodgers, 54 S.E.2d 132, 205 Ga. 581—Rogers v. Pitchford, 184 S.E. 623, 181 Ga. 845.

Ill.—Keen v. Cleveland, C., C. & St. L. Ry. Co., 64 N.E.2d 499, 392 Ill. 362—Cleveland, C., C. & St. L. Ry. Co. v. Central Illinois Public Service Co., 43 N.E.2d 993, 380 Ill. 130—Farmers Grain & Supply Co. of Warsaw v. Toledo, P. & W. R. R., 44 N.E.2d 77, 316 Ill.App. 116.

Kan.—Danielson v. Woestemeyer, 293 P. 507, 131 Kan. 796.

Ky.—Sherman v. Petroleum Exploration, 132 S.W.2d 768, 280 Ky. 105, 132 A.L.R. 137.

La.—Rock Island, A. & L. R. Co. v. Gournay, 17 So.2d 21, 205 La. 164—Texas & Pac. Ry. Co. v. Ellerbe, 6 So.2d 556, 199 La. 489—Arkansas Imp. Co. v. Kansas City Southern Ry. Co., 181 So. 445, 189 La. 921—Persigo v. Johnson & Co., App., 18 So.2d 186.

Md.—Richfield Oil Corp. of New York v. Chesapeake & C. B. R. Co., 20 A.2d 581, 179 Md. 560.

Mass.—Putnam Furniture Bldg. v. Commonwealth, 80 N.E.2d 649, 323 Mass. 179.

Mo.—Brown v. Weare, 152 S.W.2d 649, 348 Mo. 135, 136 A.L.R. 286—**Corpus Juris quoted in** State ex rel. State Highway Commission v. Union Electric Co. of Missouri, 148 S.W.2d 503, 505, 347 Mo. 690.

Ohio.—**Corpus Juris cited in** Hinman v. Barnes, 66 N.E.2d 911, 916, 146 Ohio St. 497.

Tenn.—Nashville, C. & S. L. Ry. v. Bell, 39 S.W.2d 1026, 162 Tenn. 661.

Tex.—Brightwell v. International-Great Northern R. Co., 49 S.W.2d 437, 121 Tex. 338, 84 A.L.R. 265—Peterson v. Holland, Civ.App., 189 S.W.2d 94, error refused.

51 C.J. p. 536 note 50.

Consideration

Fact that money consideration received by landowner for conveyance to railroad was only nominal, and remaining consideration was the benefit which would accrue to landowner by construction of railroad through owner's land, did not require conclusion that only an easement rather than title to land was conveyed.—Jackson v. Rogers, 54 S.E.2d 132, 205 Ga. 581.

Indefiniteness in description

Indefiniteness in description of land would not be considered in determining whether conveyance to railroad was of title to land or merely an easement over lands of grantor where railroad occupied a particular route with consent of grantor.—Jackson v. Rogers, supra.

Terms of grant

Where railroad purchases land, character of estate is determined, as in other cases, by terms of grant.—Quinn v. Pere Marquette Ry. Co., 239 N.W. 376, 256 Mich. 143.

Release of fee title from mortgage

Fact that mortgagee released from his mortgage the fee title to tract described in mortgagor's right-of-way deed to railroad was not evidence that the railroad had acquired the fee rather than a servitude.—Polk v. Ball, C.C.A.La., 149 F.2d 263.

The words "for railroad purposes" in conveyance to railroad would not create an estate on condition, or an estate with a conditional limitation.—Jackson v. Rogers, 54 S.E.2d 132, 205 Ga. 581.

26. Kan.—Danielson v. Woestemeyer, 293 P. 507, 131 Kan. 796.

Mo.—**Corpus Juris quoted in** State ex rel. State Highway Commission v. Union Electric Co. of Missouri, 148 S.W.2d 503, 505, 347 Mo. 690.

Tenn.—Nashville, C. & S. L. Ry. v. Bell, 39 S.W.2d 1026, 162 Tenn. 661.

51 C.J. p. 536 note 51.

Not continuous servitude

A grant of right of way for railroad is not continuous servitude within Puerto Rico statute, but a discontinuous, although apparent servitude.—Mendez v. Eastern Sugar Associates, C.C.A.Puerto Rico, 89 F.2d 399.

27. Md.—Richfield Oil Corp. of New York v. Chesapeake & C. B. R. Co., 20 A.2d 581, 179 Md. 560.

Miss.—New Orleans & N. E. R. R. v. Morrison, 35 So.2d 68, 203 Miss. 791.

Mo.—**Corpus Juris quoted in** State ex rel. State Highway Commission v. Union Electric Co. of Missouri, 148 S.W.2d 503, 505, 347 Mo. 690.

Tenn.—Nashville, C. & S. L. Ry. v. Bell, 39 S.W.2d 1026, 162 Tenn. 661.

51 C.J. p. 536 note 52.

An indefinite or ambiguous conveyance of land specifically for a railroad right of way is in its interpretation subject to influence of a gi n-

As thus construed the grant or conveyance may convey the title in fee, as considered infra subdivision b of this section, a mere easement, infra subdivision c of this section, a fee simple in land taken by the company for the roadbed, and an easement in adjoining land for certain purposes,[28] or the grant or conveyance may create merely a lease of a tenancy at will,[29] or an option,[30] or it may amount merely to a temporary use during the continuance of a joint enterprise between the company and the owner of the land.[31] Ordinarily, where no limitation or restriction on the right conveyed to a railroad corporation in lands or property necessary for its use appears in the grant, the grantee takes all the estate possessed by the grantor,[32] and only such right or title as he possesses.[33]

A right of way acquired by a railroad and its tracks are its private property,[34] although subject to public use, as considered infra § 98.

b. Title in Fee

A grant or conveyance to a railroad company will be held to convey a fee-simple title in the land and not a mere easement where such appears to be the intention of the parties as gathered from the entire instrument

A grant or conveyance to a railroad company which has power to acquire by purchase such real estate as may be necessary for the construction and operation of its road, and to take a fee-simple title thereto, will be held to convey a fee-simple title in the land and not a mere easement where such appears to be the intention of the parties as gathered from the entire instrument,[35] particularly where the conveyance is in the usual form of a general warranty deed,[36] or quitclaim deed,[37] without any words of limitation or restriction[38] and

eral knowledge that much railroad right of way is expressly or by operation of law limited to an easement, which has usually been found sufficient for purposes desired—Sherman v. Petroleum Exploration, 132 S.W.2d 768, 280 Ky. 105, 132 A.L.R. 137

28. Mo.—Clevenger v. Chicago, etc., R. Co., 210 S.W. 867
51 C.J. p. 536 note 55.

29. Ind.—Pittsburgh, etc., R. Co. v. Barth, 114 N.E. 81, 185 Ind. 593.
51 C.J. p. 536 note 56.

30. S.C.—Alderman, etc., Co. v. Wilson, 50 S.E. 643, 71 S.C. 64
51 C.J. p. 537 note 57.
Options generally see supra § 77.

31. Ala.—Patterson v. Atlantic Coast Line R. Co., 86 So. 20, 204 Ala. 453.
51 C.J. p. 537 note 58.

32. Cal.—East San Mateo Land Co. v. Southern Pac. R. Co., 157 P. 634, 30 Cal.App. 223
51 C.J. p. 537 note 59.

33. Ohio.—Collins v. Craig Shipbuilding Co., 7 Ohio Cir.Ct.,N.S., 350, 27 Ohio Cir. Ct. 802.
51 C.J. p. 537 note 60.

34. Neb.—Luedeke v. Chicago & N.W. Ry. Co., 231 N.W. 695, 120 Neb. 124, 71 A.L.R. 912
Pa.—Lehigh Nav. Coal Co. v. Pennsylvania Public Utility Commission, 1 A.2d 540, 133 Pa.Super. 67—Pennsylvania R. Company v. Public Service Commission, 64 Pa.Super. 586

35. U.S.—Knoell v. Frisco Lease, C.C.A.Okl., 78 F.2d 286—Playa De Flor Land & Imp. Co. v. U.S., D.C. Canal Zone, 70 F.Supp. 281, modified on other grounds, 160 F.2d 131—U.S. v. Certain Parcels of Land in Rapides Parish, D.C.La., 57 F.Supp. 486—Phillips v. Missouri-Kansas-Texas Ry. Co., D.C.Okl., 20 F.Supp. 498—Gates v. Missouri, K. & T. Ry. Co., D.C.Okl., 13 F.Supp. 466, appeal dismissed 79 F.2d 993
Ala.—Rowell v. Gulf, M. & O. R. Co., 28 So.2d 209, 248 Ala. 463
Ga.—Jackson v. Rogers, 54 S.E.2d 132, 205 Ga. 581—Woods v. Flanders, 181 S.E. 83, 180 Ga. 835
Ill.—Keen v. Cleveland, C., C. & St. L. Ry. Co., 64 N.E.2d 499, 392 Ill. 362.
Iowa.—Montgomery County v. Case, 232 N.W. 150, 212 Iowa 73
Kan.—Nott v. Beightel, 122 P.2d 747, 155 Kan. 94—Danielson v. Woestemeyer, 293 P. 507, 131 Kan. 796.
La.—Arkansas Imp. Co. v. Kansas City Southern Ry. Co., 181 So. 445, 189 La. 921—Askew v. Vicksburg, S. & P. Ry. Co., 132 So. 510, 171 La. 947.
Mich.—Quinn v. Pere Marquette Ry. Co., 239 N.W. 376, 256 Mich. 143.
Mo.—**Corpus Juris quoted in** State ex rel. State Highway Commission v. Union Electric Co. of Missouri, 148 S.W.2d 503, 505, 347 Mo. 690.
Okl.—Gutensohn v. McGuirt, 147 P.2d 777, 194 Okl. 64—Higgins v. Oklahoma City, 127 P.2d 845, 191 Okl. 16, reversed on other grounds 56 S.Ct. 562, 297 U.S. 481, 80 L.Ed. 816—Cobbs v. Wiedmann, 40 P.2d 1075, 170 Okl. 493—Marland v. Gillespie, 33 P.2d 207, 168 Okl. 376.
S.C.—Groce v. Southern Ry. Co., 162 S.E. 425, 164 S.C. 427.
Tenn.—**Corpus Juris quoted in** Nashville, C. & St. L. Ry. v. Bell, 39 S.W.2d 1026, 1028, 162 Tenn. 661.
Tex.—Texas & P. Ry. Co. v. Martin, 71 S.W.2d 867, 123 Tex. 383, certiorari denied 55 S.Ct. 121, 293 U.S. 598, 79 L.Ed. 691—Brightwell v. International-Great Northern R. Co., 49 S.W.2d 437, 121 Tex. 338, 84 A.L.R. 265—Texas Conservative Oil Co. v. Thompson, Civ.App., 163 S.W.2d 854, error refused—Nesral Production Co. v. St. Louis, B. & M. Ry. Co., Civ.App., 84 S.W.2d 805, error dismissed—Texas & P. Ry. Co. v. Vaughan, Civ.App., 73 S.W.2d 632.
Va.—Hale v. Davis, 195 S.E. 523, 170 Va. 68
51 C.J. p. 537 note 63

"Forever in fee simple"

The use of the words "forever in fee simple," in conveyance to railroad, did not require construction that title to land rather than an easement was conveyed, but the words were potent when considered in connection with other terms of instrument in inducing holding that title was conveyed.—Jackson v. Rogers, 54 S.E.2d 132, 205 Ga. 581.

Grant by statute

Mont.—State v. Northern Pac. Ry. Co., 295 P. 257, 88 Mont. 529

36. U.S.—Phillips v. Missouri-Kansas-Texas Ry. Co., D.C.Okl., 20 F.Supp. 498—Gates v. Missouri, K. & T. Ry. Co., D.C.Okl., 13 F.Supp. 466, appeal dismissed 79 F.2d 993.
Ga.—Jackson v. Rogers, 54 S.E.2d 132, 205 Ga. 581.
Kan.—Nott v. Beightel, 122 P.2d 747, 155 Kan. 94.
Tenn.—**Corpus Juris quoted in** Nashville, C. & St. L. Ry. v. Bell, 39 S.W.2d 1026, 1028, 162 Tenn. 661.
Tex.—Texas & P. Ry. Co. v. Vaughan, Civ.App., 73 S.W.2d 632
51 C.J. p. 537 note 64.

37. Ill.—Keen v. Cleveland, C., C. & St. L. Ry. Co., 64 N.E.2d 499, 392 Ill. 362.
Tenn.—**Corpus Juris quoted in** Nashville, C. & St. L. Ry. v. Bell, 39 S.W.2d 1026, 1028, 162 Tenn. 661.
51 C.J. p. 538 note 65.

38. U.S.—Knoell v. Frisco Lease, C.C.A.Okl., 78 F.2d 286—Phillips v. Missouri-Kansas-Texas Ry. Co., D.C.Okl., 20 F.Supp. 498.

without purporting to convey merely a right of way,[39] or where the only reservation made is the use of the granted premises by the grantor for ingress and egress to and from adjoining lands.[40] This rule is particularly applicable under a statutory provision that every estate in land conveyed shall be deemed an estate in fee simple unless limited by express words.[41]

If the conveyance is in the form of a general warranty deed, or otherwise shows an intention to convey a fee-simple title, it will be so construed, although the instrument is entitled "deed of right of way,"[42] or employs the term "right of way" in describing the property conveyed,[43] or states that the conveyance is for railroad purposes only.[44] So, also, the fee passes under such an instrument, although the deed provides that the title conveyed is subject to forfeiture or reverter, or to a condition subsequent,[45] or the governing statute limits the authority of the company to take and hold title except for special purposes,[46] or puts it under disability to hold title to its right of way in case of long nonuser,[47] since in such cases the title passes as a fee, but a fee liable to divestment when the use of the land becomes inconsistent with the limitation of the deed or statute.[48]

Fee simple, determinable fee, or qualified fee. The distinction has been made that, where the fee is conveyed for the use and purposes of a railroad, it conveys the fee simple for purposes of alienation;[49] but for purposes of use and enjoyment it creates merely a determinable fee for as long as the land is used for railroad purposes.[50] The words "for and during the continuance" of the railroad in the habendum clause of the conveyance do not create a qualified fee, determinable by abandonment by the railroad company or its successors for railroad purposes,[51] but create a fee determinable only if and when the railroad shall cease to exist.[52]

Lease as base fee. A lease to a railroad company for an indefinite term, to continue until the happening of one of several events, which may happen

Ala.—Rowell v. Gulf, M & O. R Co., 28 So 2d 209, 248 Ala 463.
Cal.—Lemon v. Los Angeles Terminal Ry Co., 102 P.2d 387, 38 Cal App.2d 659.
Ill.—Keen v Cleveland, C, C & St L. Ry Co, 64 N E 2d 499, 392 Ill 362
Kan.—Nott v. Beightel, 122 P 2d 747, 155 Kan 94.
Okl.—Higgins v. Oklahoma City, 127 P 2d 845, 191 Okl 16, reversed on other grounds 56 S Ct 562, 297 U S. 431, 80 L Ed. 816—Cobbs v Wiedmann, 40 P 2d 1075, 170 Okl 493.
Tenn.—**Corpus Juris quoted in** Nashville, C. & S L Ry v. Bell, 39 S W.2d 1026, 1028, 162 Tenn. 661.
Tex.—Nesral Production Co v. St Louis, B & M. Ry. Co, Civ App., 84 S W.2d 805, error dismissed.
51 C J. p 538 note 66.

Recital of consideration

Where deed conveying land to railroad for right of way purports to convey the land itself, the recital of consideration which moved the grantor to make the conveyance cannot be construed as a limitation on the estate granted in lands conveyed.—Keen v. Cleveland, C., C. & St. L. Ry. Co, 64 N.E.2d 499, 392 Ill. 362.

39. U.S.—Knoell v. Frisco Lease, C. C.A.Okl., 78 F.2d 286.
Tenn.—**Corpus Juris quoted in** Nashville, C. & S. L Ry. v. Bell, 39 S. W.2d 1026, 1028, 162 Tenn. 661.
51 C J. p 538 note 67.

40. Mass.—Battelle v. New York, etc., R. Co., 97 N.E. 1004, 211 Mass 442.
51 C.J. p 538 note 68.

41. U.S.—Kynerd v. Hulen, C.C.A Tex., 5 F 2d 160, certiorari denied 46 S Ct 20, 269 U S 560, 70 L Ed 411.
51 C J p 538 note 69.

42. Ky.—Ballard v. Louisville, etc., R. Co, 5 S W. 484, 9 Ky L. 523.

43. U S.—Polk v. Ball, C C A La., 149 F 2d 263—U. S. v Certain Parcels of Land in Rapides Parish, D C La., 57 F Supp. 486—**Corpus Juris cited in** Carter Oil Co v. Welker, D C.Ill., 24 F Supp 753, 756, affirmed, C.C.A., 112 F 2d 299, motion denied 62 S Ct. 122, reversed on other grounds 63 S Ct. 70, 317 U S. 592, 87 L Ed 485—Phillips v. Missouri-Kansas-Texas Ry. Co, D C. Okl., 20 F Supp. 498
Cal.—Lemon v Los Angeles Terminal Ry. Co., 102 P.2d 387, 38 Cal App.2d 659.
La.—Arkansas Imp. Co. v. Kansas City Southern Ry. Co., 181 So. 445, 189 La. 921
Tex.—Brightwell v. International-Great Northern R Co., 49 S W 2d 437, 121 Tex 338, 84 A L R 265
Va.—Hale v. Davis, 195 S E 523, 170 Va 68.
51 C.J. p 538 note 71.

44. U.S.—Polk v. Hall, C.C.A.La., 149 F.2d 263.
La.—Arkansas Imp. Co. v. Kansas City Southern Ry. Co, 181 So. 445, 189 La. 921.
Mich.—Quinn v. Pere Marquette Ry. Co., 239 N W. 376, 256 Mich. 143.
S.C.—Groce v. Southern Ry. Co, 162 S.E. 425, 164 S.C 427.
Tenn.—Nashville, C. & S. L. Ry v. Bell, 39 S.W.2d 1026, 162 Tenn 661.
51 C J. p 538 note 72.

Words considered

The words "for railroad purposes" in conveyance to railroad would be considered in construing instrument but did not require a holding that an easement rather than title was conveyed to railroad.—Jackson v Rogers, 54 S E 2d 132, 205 Ga. 581.

45. Mich.—Dolby v. Dillman, 278 N W 694, 283 Mich. 609, 117 A.L R. 538—Quinn v. Pere Marquette Ry. Co, 239 N W. 376, 256 Mich. 143.
51 C J p 538 note 74.
Conditions subsequent generally see infra § 89
Loss or forfeiture of land or rights generally see infra §§ 116–120

46. Iowa.—Des Moines City R. Co. v. Des Moines, 159 N.W 450, 183 Iowa 1261, 165 N.W. 398, L.R.A 1918D 839

47. Iowa.—Chicago, etc., R. Co. v. Churdan, 195 N.W. 996, 196 Iowa 1057.

48. Iowa.—Des Moines City R Co v. Des Moines, 159 N.W. 450, 183 Iowa 1261, 165 N.W. 398, L R.A. 1918D 839.

49. N.Y.—In re Buffalo, 99 N.E. 850, 206 N.Y 319.
51 C.J. p 538 note 78.

50. Iowa.—Reichard v. Chicago, B. & Q. R Co., 1 N.W.2d 721, 231 Iowa 563.
Mich.—Quinn v. Pere Marquette Ry Co., 239 N.W. 376, 256 Mich. 143.
51 C J. p 538 note 79.

51. N.J.—Camden, etc, Land Co. v. West Jersey, etc., R. Co., 105 A. 229, 92 N J.Law 385.

52. N.J.—Camden, etc., Land Co. v. West Jersey, etc., R Co., supra

at any time or may never happen, so that the lease may never come to an end, has the effect of conveying a base fee.[53]

c. Easement

(1) In general

(2) Nature of easement

(1) In General

As a general rule, where land obtained by purchase or agreement is conveyed by an instrument which purports to convey a right of way only, it does not convey title to the land itself, but the railroad company acquires a mere easement in the land for right-of-way purposes.

A "right of way" in its legal and generally accepted meaning with respect to the interest of a railroad company in land is a mere easement for railroad purposes in the lands of others,[54] and, therefore, as a general rule, where land obtained by purchase or agreement is conveyed by an instrument which purports to convey a right of way only, it does not convey title to the land itself, but the railroad company acquires a mere easement in the land for right-of-way purposes,[55] leaving the fee

53. Mass.—Merrimack River Locks, etc. v Boston, etc., R. Co., 139 N. E. 839, 245 Mass 52

54. U S —Magnolia Petroleum Co v. Thompson, C C A.Mo., 106 F 2d 217, 226, reversed on other grounds Thompson v Magnolia Petroleum Co., 60 S Ct 628, 309 U S 478, 84 L Ed. 876

Md.—Richfield Oil Corp. of New York v. Chesapeake & C. B. R Co., 20 A 2d 581, 588, 179 Md 560

Mo.—**Corpus Juris quoted in** University City v Chicago, R. I. & P Ry. Co., 149 S W 2d 321, 325, 347 Mo 814—**Corpus Juris quoted in** State ex rel State Highway Commission v. Union Electric Co. of Missouri, 148 S W 2d 503, 506, 347 Mo. 690—**Corpus Juris quoted in** State ex rel. State Highway Commission v. Griffith, 114 S W 2d 976, 978, 342 Mo. 229.

Tenn.—**Corpus Juris quoted in** Baird v. Southern Ry. Co., 166 S W.2d 617, 618, 179 Tenn. 366—**Corpus Juris quoted in** Nashville, C. & S L. Ry v. Bell, 39 S.W.2d 1026, 1028, 162 Tenn 661.

51 C J. p 539 note 84

"Right of way" defined generally see supra § 1.

May mean easement

In railroad parlance, "right of way," when meaning legal right to use land on which track is laid, may mean easement.—Quinn v Pere Marquette Ry. Co., 239 N W. 376, 379, 256 Mich. 143.

55. U.S.—East Alabama Ry Co. v. Doe, Ala., 5 S Ct 869, 114 U.S 340, 29 L.Ed 136—Polk v Ball, C C.A La., 149 F 2d 263—In re Chicago & N. W. Ry. Co., C.C.A Ill., 127 F.2d 1001, certiorari denied Thomson v Hicks, 63 S Ct. 59, 317 U.S. 659, 87 L Ed. 530, rehearing denied 63 S Ct 155, 317 U S 708, 87 L.Ed. 564—Magnolia Petroleum Co. v. Thompson, C C.A.Mo., 106 F.2d 217, reversed on other grounds, Thompson v. Magnolia Petroleum Co., 60 S Ct. 628, 309 U.S. 478, 84 L Ed 876

Ark.—St Louis-San Francisco Ry Co. v White, 132 S.W 2d 807, 199 Ark 56.

Cal.—Moakley v. Los Angeles Pac Ry. Co., 34 P.2d 218, 139 Cal App. 421

Ga.—Byrd v. Goodman, 25 S.E 2d 34, 195 Ga 621—Jackson v Crutchfield, 191 S E 468, 184 Ga 412—Rogers v Pitchford, 184 S E 623, 181 Ga 845

Ill.—Cleveland, C., C & St L. Ry. Co v. Central Illinois Public Service Co., 43 N E 2d 993, 380 Ill. 130—Tallman v. Eastern Illinois & Peoria R Co., 41 N E 2d 537, 379 Ill 441—Woodward Governor Co v City of Loves Park, Winnebago County, 82 N E 2d 387, 335 Ill.App. 528.

Ky.—Sherman v. Petroleum Exploration, 132 S W 2d 768, 280 Ky 105, 132 A L R. 137—Mammoth Cave Nat Park Ass'n v. State Highway Commission, 88 S W.2d 931, 261 Ky 769.

La.—Rock Island, A. & L. R Co v Gournay, 17 So 2d 21, 205 La 164—Texas & Pac. Ry. Co v Ellerbe, 6 So 2d 556, 199 La 489—Noel Estate v. Kansas City Southern & Gulf Ry. Co., 175 So. 468, 187 La 717—Bond v. Texas & P. R. Co., 160 So. 406, 181 La 763—Persigo v. Johnson & Co., App., 18 So 2d 186.

Md.—Richfield Oil Corp of New York v Chesapeake & C B R. Co., 20 A.2d 581, 179 Md 560—Hodges v. Owings, 13 A 2d 338, 178 Md 300.

Miss.—Williams v. Patterson, 21 So. 2d 477, 198 Miss 120.

Mo.—Brown v. Weare, 152 S W.2d 649, 348 Mo. 135, 136 A.L.R 286—**Corpus Juris quoted in** University City v. Chicago, R I. & P. R. Co., 149 S W 2d 321, 325, 347 Mo. 814—**Corpus Juris quoted in** State ex rel State Highway Commission v. Union Electric Co. of Missouri, 148 S.W.2d 503, 505, 347 Mo 690—State ex rel State Highway Commission v. Griffith, 114 S W.2d 976, 342 Mo. 229—Broderick v. Tyer, 187 S.W.2d 476, 239 Mo.App. 118.

N.J.—Lee v. Pennsylvania-Reading Seashore Lines, 20 A.2d 71, 129 N. J Eq. 530.

Ohio.—Hinman v. Barnes, 66 N.E.2d 911, 146 Ohio St 497.

Okl.—Kansas, O. & G Ry Co. v. Rogers, 191 P.2d 209, 200 Okl 111.

Pa.—Dalton St Ry Co v Commonwealth, 53 Pa Dist. & Co. 650, 46 Lack Jur 209.

Tenn.—**Corpus Juris quoted in** Baird v Southern Ry Co., 166 S W 2d 617, 618, 179 Tenn. 366—**Corpus Juris quoted in** Nashville, C. & S. L. Ry v. Bell, 39 S W 2d 1026, 1028, 162 Tenn 661—**Corpus Juris cited in** City of Knoxville v. Phillips, 36 S W 2d 434, 435, 162 Tenn. 328—**Corpus Juris quoted in** Pemberton v. Southern Ry. Co., 34 S W.2d 444, 445, 162 Tenn. 65—Croft v. Gentry, App., 232 S W 2d 424—Summers v. Linx, 84 S W.2d 1043, 19 Tenn App 245

Tex.—Boles v. Red, Civ.App., 227 S W 2d 310, refused no reversible error—Peterson v. Holland, Civ App., 189 S.W 2d 94, error refused—Penn v Holland, Civ.App., 105 S W 2d 351, error refused—Houston & T C. R Co. v. Contral Texas Securities Corporation, Civ.App., 68 S W 2d 585.

51 C J p 539 note 85.

In the construction of a deed conveying land to a railroad for "railroad right of way," the quoted words could not be rejected as surplusage, since it is presumed that no clause or word in a deed was used without meaning or intent, and words could be considered as a declaration of purpose or use to be made of the land.—Sherman v. Petroleum Exploration, 132 S.W.2d 768, 280 Ky. 105, 132 A.L R. 137.

Floating easement

Grant by deed of a right of way through certain land reserving to grantor the privilege of using timber and cultivating parts not used in operation of railroad and identifying no particular strip with a certainty required by conveyance of a fee, created only a floating easement or right of user.—New Orleans & N. E. R. R. v. Morrison, 35 So 2d 68, 208 Miss. 791.

Grant of fee not implied

Miss.—New Orleans & N. E. R. R. v. Morrison, supra.

subject to such servitude in the owner,[56] particularly where the deed provides for reverter to the grantor if the land is not used for such purposes.[57] This rule applies, although the conveyance, for right of way purposes only, is in the usual form of a general warranty deed,[58] particularly under a statute which authorizes the railroad company to acquire land only for the purposes of constructing, maintaining, and operating a railroad,[59] since, although the language used in the granting part of the deed and in the habendum is appropriate and that commonly used to convey the fee, the clause descriptive of the use to be made of the land may so limit or qualify the grant as to change it from a fee to an easement.[60]

An easement only is conveyed under such a grant or conveyance, however extensive its duration,[61] and however exclusive and paramount may be the rights conveyed,[62] and although the agreement to convey provides for the execution of a deed in fee simple.[63] Such a grant or conveyance is not enlarged by a clause giving the company the right to take and use timber, earth, stone, and mineral within the right of way.[64]

On the other hand, in at least one jurisdiction, a railroad right of way, which may be acquired by purchase or condemnation, vests a fee in the company acquiring it.[65]

Under an implied grant, which arises, under some charters or statutes, from the company's taking possession and constructing its road without any contract with the owner, and without the owner taking steps to have his damages assessed within a specified time, the railroad company acquires only an easement in the land on which it has constructed its road.[66]

Voluntary grant. Under a statutory provision that real estate received by voluntary grant to a railroad company shall be held and used for the purpose of the grant only, a deed to a railroad company conveys an easement only.[67]

56. U S —Magnolia Petroleum Co v Thompson, C C A Mo, 106 F 2d 217, reversed on other grounds, Thompson v. Magnolia Petroleum Co, 60 S Ct. 628, 309 U.S. 478, 84 L Ed 876
Md.—Richfield Oil Corp. of New York v. Chesapeake & C B. R Co, 20 A.2d 581, 179 Md 560
Mo —Brown v. Weare, 152 S W.2d 649, 348 Mo. 135, 136 A L.R 286—**Corpus Juris quoted in** University City v Chicago, R I. & P Ry Co, 149 S.W 2d 321, 325, 347 Mo. 814
Ohio —Cincinnati, etc, R. Co. v Wachter, 70 N E 974, 70 Ohio St 113—Pennsylvania R Co. v. Kearns, 48 N E 2d 1012, 71 Ohio App 209.
Tenn —**Corpus Juris quoted in** Baird v Southern Ry Co, 166 S.W.2d 617, 618, 179 Tenn 366—**Corpus Juris quoted in** Nashville, C & S L. Ry v Bell, 39 S W 2d 1026, 1028, 162 Tenn 661—**Corpus Juris quoted in** Pemberton v. Southern Ry Co, 34 S W 2d 444, 445, 162 Tenn 65—Summers v. Linx, 84 S.W.2d 1043, 19 Tenn App 245.
51 C J. p 539 note 85.

Highway rule applicable
The rule that in the absence of evidence to contrary the title to the fee of a highway is presumed to be in the abutting owners and that the title of each extends to the center of the way and that such presumption may be rebutted by evidence to show that the entire way has been taken from the land of only one of the abutting owners applies to land acquired by railroad for railroad purposes —Brown v. Weare, 152 S W 2d. 649, 348 Mo. 135, 136 A.L R. 286.

57. Cal —Moakley v. Los Angeles Pac Ry. Co, 34 P 2d 218, 139 Cal. App 421.
Ill —Woodward Governor Co. v City of Loves Park, Winnebago County, 82 N E 2d 387, 335 Ill App. 528
La —Noel Estate v. Kansas City Southern & Gulf Ry Co., 175 So. 468, 187 La 717.
Mo —**Corpus Juris quoted in** University City v Chicago, R. I. & P Ry Co, 149 S W.2d 321, 325, 347 Mo 814.
Tenn —**Corpus Juris quoted in** Pemberton v. Southern Ry. Co, 34 S. W 2d 444, 445, 162 Tenn. 65.
51 C.J. p 540 note 87.

58. U S.—Polk v. Ball, C.C A La, 149 F 2d 263—Magnolia Petroleum Co. v. Thompson, C C.A Mo., 106 F 2d 217, reversed on other grounds, Thompson v. Magnolia Petroleum Co, 60 S Ct. 628, 309 U. S 478, 84 L.Ed 876.
Ky —Sherman v. Petroleum Exploration, 132 S.W 2d 768, 280 Ky. 105, 132 A L R. 137—Mammoth Cave Nat Park Ass'n v. State Highway Commission, 88 S W 2d 931, 261 Ky. 769.
Mo —**Corpus Juris quoted in** University City v. Chicago, R. I. & P Ry Co., 149 S W.2d 321, 325, 347 Mo 814—State ex rel. State Highway Commission v Griffith, 114 S W 2d 976, 342 Mo. 229.
51 C J p 540 note 88.

59. Mo —**Corpus Juris quoted in** University City v Chicago, R. I. & P. Ry Co, 149 S.W.2d 321, 325, 347 Mo. 814—Chouteau v. Missouri Pac R Co, 22 S.W. 458, 30 S.W 299, 122 Mo 375.

60. U S —Polk v. Ball, C.C.A La, 149 F 2d 263.
Ky —Sherman v Petroleum Exploration, 132 S W 2d 768, 280 Ky. 105, 132 A L R. 137.
La —Noel Estate v. Kansas City Southern & Gulf Ry. Co., 175 So. 468, 187 La. 717.
51 C J p 540 note 90.

61. La.—Persigo v. Johnson & Co, App, 18 So.2d 186
51 C.J. p 540 note 91.

62. Ga —Atlanta, etc., R. Co. v. Coffee County, 110 S E. 214, 152 Ga. 432.
51 C J. p 540 note 92.

63. Iowa —Ottumwa, etc, R. Co. v. McWilliams, 32 N.W. 315, 71 Iowa 164
51 C J. p 540 note 93

64. Tex.—Gladys City Oil, etc, Mfg. Co. v. Right of Way Oil Co., Civ. App., 137 S.W. 171, affirmed 157 S. W. 737, 106 Tex. 94, 51 L.R A.,N S, 268.
51 C J. p 540 note 94.

65. Fla.—Atlantic Coast Line R. Co v Duval County, 154 So. 331, 114 Fla. 254.

66. N.C —Sparrow v. Dixie Leaf Tobacco Co., 61 S.E.2d 700, 232 N.C 589.
51 C J. p 540 note 96.

67. Mo —Brown v. Weare, 152 S.W 2d 649, 348 Mo 135, 136 A L R 286 —Coates v. Hopkins Realty Co, 43 S W.2d 817, 328 Mo. 1113—Allen v. Beasley, 249 S W. 387, 297 Mo. 544

Deed held voluntary grant
A deed to a railroad of land for station grounds and for railroad purposes was a voluntary grant within

(2) Nature of Easement

An easement acquired by a railroad company for a right of way is more than a mere "easement" in the strict technical sense of the term, and differs therefrom in important respects.

An easement acquired by a railroad company for a right of way is more than a mere "easement" in the strict technical sense of the term,[68] and differs therefrom in important respects.[69] It is in the nature of an interest in the land of a special and exclusive nature,[70] and also an encumbrance thereon,[71] and generally leaves the remaining fee of nominal value only.[72] Except where it is granted for a limited term only,[73] it includes the actual possession or right to actual possession of the entire surface[74] and has, as to its use and enjoyment, the attributes of a fee,[75] including perpetuity, in that as long as the land is used for railroad right-of-way purposes, it continues in the railroad company,[76] its successors and assigns,[77] even after the time limited by the charter of the company for its corporate existence has expired.[78]

As public easement. Although a railroad right of way is not strictly a public easement, it possesses some characteristics thereof, in that the use is a public one;[79] but the company has no such broad easement in its right of way as a city has in its streets.[80]

§ 85. —— By Mere Use or Adverse Possession.

A mere easement is generally acquired by a railroad company where the land is acquired by occupancy for a right of way without condemnation proceedings and without any contract with the owner.

A mere easement is generally acquired where the land is acquired by occupancy for a right of way without condemnation proceedings and without any contract with the owner,[81] as where it is acquired by adverse possession or prescription,[82] but there is also authority to the contrary.[83]

the statute, and was not removed therefrom by express consideration of one dollar—Brown v Weare, 152 S W 2d 649, 348 Mo. 135, 136 A.L R 286.

68. Mo.—Brown v. Weare, 152 S W 2d 649, 348 Mo. 135, 136 A L.R. 286. 51 C J. p 540 note 98.

Not tenant of owner

A railroad does not possess its right of way as tenant of the owner of the land so as to enable owner to rely on possession of railroad to defeat a title by adverse possession, but railroad only exercises its own easement, and its possession is in its own right without reference to the servient estate—Federal Crude Oil Co v Yount-Lee Oil Co., C.C A. Tex, 103 F 2d 171, certiorari denied 60 S.Ct. 96, 308 U S. 579, 84 L Ed 485.

69. Mo.—Brown v Weare, 152 S W 2d 649, 348 Mo. 135, 136 A L R. 286 51 C.J. p 540 note 99.

70. Mo—Brown v Weare, supra. 51 C.J. p 540 note 1.

Nature of corporeal estate

The term "easement" as applied to the interest in land which a railroad acquires for right of way and railroad purposes is a term of convenience and is not used in its technical and limited sense, and in some respects such interest which has been referred to as a special peculiar interest, subject to its own rules, partakes of the nature of a corporeal estate—Brown v. Weare, supra.

71. Minn—Delisha v Minneapolis, etc, Electric Tract. Co, 126 N.W 276, 110 Minn. 518, 27 L.R A, N S, 963.

72. Minn—Delisha v Minneapolis, etc., Electric Tract Co, supra 51 C.J. p 540 note 3

Little or no value

U S—Polk v Ball, C C A.La, 149 F. 2d 263.

73. S C—Griffin v Charleston, etc, R Co, 128 S E 855, 132 S C. 492 51 C J p 540 note 4

74. Ala—Sadler v Alabama Great Southern R Co, 85 So. 380, 204 Ala 155.

Exclusiveness of possession and use see infra § 100

75. Ark—St. Louis-San Francisco Ry. Co v. White, 132 S W 2d 807, 199 Ark 56.

Ill—Mitchell v. Illinois Cent. R. Co, 47 N.E.2d 115, 317 Ill.App 501, reversed on other grounds 51 N E 2d 271, 384 Ill. 258, 149 A.L R 369. 51 C J. p 541 note 6.

76. U.S—Magnolia Petroleum Co v. Thompson, C C A.Mo., 106 F 2d 217, reversed on other grounds, Thompson v. Magnolia Petroleum Co., 60 S Ct. 628, 309 U.S. 478, 84 L Ed 876.

Ark—St Louis-San Francisco Ry. Co. v. White, 132 S W.2d 807, 199 Ark. 56.

Cal.—**Corpus Juris cited in** City of San Gabriel v. Pacific Electric Ry. Co., 18 P.2d 996, 998, 129 Cal App. 460.

Ill.—Mitchell v. Illinois Cent. R. Co., 51 N.E 2d 271, 384 Ill. 258, 149 A L R. 369.

Ky—Sherman v. Petroleum Exploration, 132 S.W.2d 768, 280 Ky. 105, 132 A.L.R. 137.

51 C.J. p 541 note 7.

77. Cal.—Northwestern Pac. R Co v. Humboldt Milling Co., 200 P. 9, 186 Cal 599.

78. Iowa—Henry v. Dubuque, etc, R Co, 2 Iowa 288.

79. N.Y—Atlantic Mills v. New York Cent R Co, 214 N.Y S 123, 126 Misc 349, reversed on other grounds 223 N Y S. 206, 221 App Div 886, affirmed 162 N E 514, 248 N Y 535.

80. Tenn—Western Union Tel. Co v Nashville, etc, R Co, 237 S. W. 64, 145 Tenn 85, certiorari denied 42 S Ct. 382, 258 U S. 626, 66 L.Ed. 798.

81. Ariz—Boyd v Atchison, T. & S. F Ry. Co., 4 P.2d 670, 39 Ariz 154.

La—Gumbel v New Orleans Terminal Co., 173 So. 518, 186 La 882

N C—Carolina & N. W Ry. Co. v. Piedmont Wagon & Mfg Co., 51 S E 2d 301, 229 N C 695. 51 C.J p 541 note 14.

82. Cal—People v Ocean Shore R R, 196 P 2d 570, 32 Cal.2d 406, 6 A L R.2d 1179.

Tex—International-Great Northern R Co. v. John T. Brady Corporation, Com.App, 283 S.W. 484. 51 C J. p 541 note 15

Acquisition by adverse possession generally see supra § 75.

Title or right acquired by adverse possession generally see Adverse Possession §§ 199–208.

Color of title

Inapplicable charter provisions of different railroad was not color of title sufficient to base adverse possession of right of way—Willard v. Southern Ry. Co, 155 S.E. 833, 158 S.C. 522.

83. Ill.—Illinois Cent. R. Co. v Noyes, 96 N E. 830, 252 Ill. 178. 51 C.J. p 541 note 16.

§ 86. —— Rights in Adjoining Lands

The grant of a railroad right of way confers the right to make a reasonable use of the adjoining land of the same owner, for the purposes expressed in the grant or deed, and for such other purposes as may be reasonably necessary for the enjoyment of the grant or license.

The grant of a railroad right of way confers the right to make a reasonable use of the adjoining land of the same owner, for the purposes expressed in the grant or deed,[84] and for such other purposes as may be reasonably necessary for the enjoyment of the grant or license,[85] such as for the widening and deepening of streams on adjoining land so as to secure the railroad and the adjoining land from damage by washing.[86] It does not, however, give the company the right to use the adjoining land for purposes neither expressed in the grant nor reasonably necessary thereto.[87] Thus a grant "for all purposes connected with the construction, use, and occupation" of the right of way confers no right to take sand therefrom for the construction of a roundhouse without compensating the owner of the land therefor;[88] nor in the absence of agreement has the company a right to go outside its right of way and take sand, gravel, or other material for the construction of its road,[89] nor has it the right to deposit large quantities of earth, rock, and waste matter from other portions of its right of way on land beyond the line of the slope or embankment contemplated by the owner's grant.[90]

Changing watercourse. Where a railroad company, by agreement with the landowner, for an adequate consideration has rightfully turned the course of a stream, it is not obliged to observe the action of the water, or take other timely measures to protect adjoining land;[91] but it is the duty of the landowner thereafter to do what is necessary to protect the bank of the stream on his land against erosion, and he cannot hold the company liable therefor.[92]

Cutting timber. Where a railroad company in good faith, under a supposed charter or statutory authority, enters on and uses adjoining land for the purpose of cutting timber, but without a right to do so, it will be liable for the actual damage sustained by the landowner,[93] but not for a statutory penalty of treble damages.[94]

Drainage. A railroad company has also been held to have the incidental right to make carefully constructed ditches and culverts for draining water from the right of way,[95] subject, however, to the limitation that it be done without negligence and unnecessary injury to the adjoining land.[96] On the other hand it has been held that a grant of a right of way does not carry, as incident thereto, any right on the part of the company to discharge onto the land surface water collected by drainage,[97] or to construct a grade in such a manner as to throw surface water on the grantor's property to its injury.[98]

Right of way for servants. A voucher showing that a railroad company, which laid out a highway over another's land, had paid damages for the taking of the land, and for injury to the remaining land, does not of itself show that the servants of the railroad company were entitled to cross the owner's other property for the purpose of reaching the new highway.[99]

Temporary structures Under some charters or statutes a railroad company or contractor may enter on and use such adjoining land as is reasonably necessary for temporary buildings or structures while constructing the road.[1]

§ 87. —— Priority of Right

Where a railroad acquires title by purchase, it is governed by the same principles as private persons with respect to the priority of its right or title, such as in claiming compensation for improvements put on the land of which it is deprived.

Where a railroad company acquires title by pur-

84. Conn—Earley v. Hall, 95 A. 2, 89 Conn. 606.
51 C.J. p 541 note 17.

85. Mass—Babcock v. Western R Corp, 9 Metc 553, 43 Am D. 411.

86. Mass—Babcock v. Western R Corp, supra.

87. Ala—Whitewater Lumber Co. v. Prather, 100 So. 549, 211 Ala. 361.
51 C.J. p 542 note 21.

88. Iowa—Vermilya v Chicago, etc., R Co., 24 N.W. 234, 66 Iowa 606, 55 Am.R. 279.

89. Pa.—Hendler v. Lehigh Valley R Co, 58 A. 486, 209 Pa 256, 103 Am S R 1005
51 C J p 542 note 23

90. Pa—Bigham v. Pittsburg Constr, Co., 29 Pa Super. 86.
51 C J. p 542 note 24

91. W Va—Briscoe Home v Ohio River R Co, 89 S E 727, 78 W.Va. 502, L R A 1916F 1294.

92. W.Va—Briscoe Home v. Ohio River R Co, supra.

93. Mo—Lindell v. Hannibal, etc., R Co., 25 Mo. 550.

94. Mo.—Lindell v. Hannibal, etc., R. Co., supra.

95. Mass—Babcock v Western R. Corp, 9 Metc. 553, 43 Am.D 411
N C—Parks v Southern R. Co, 55 S E 701, 143 N C. 289, 12 L R A.,N. S, 680
Covenant or condition as to culverts, ditches, and drains see infra § 91.

96. N C—Parks, v. Southern R. Co, supra

97. Iowa—Earhart v. Cowles, 97 N. W. 1085, 122 Iowa 194

98. Ky—Childers v. Louisville, etc, R. Co., 74 S.W. 241, 24 Ky.L. 2375.

99. Vt.—Rogers v. Bigelow, 96 A. 417, 90 Vt. 41.

1. Pa—Lauderbrun v. Duffy, 2 Pa. 398.

chase, it is governed by the same principles as private individuals, with respect to the priority of its right or title,[2] such as in claiming compensation for improvements put on the land of which it is deprived.[3] The possession by a railroad company of its right of way is notice to all subsequent purchasers or encumbrancers of its rights in the premises.[4] The right or title of a railroad company in a right of way legally acquired by it is superior to that of a lessee of the land whose lease has expired, although such lessee purchases the land before the expiration of the lease, but after the grant of the right of way;[5] or to a lease made subsequent to its entry with the owner's consent;[6] or to a subsequent dedication of the right of way[7] or a part thereof[8] for the purposes of a street; or to subsequent purchasers with notice from the landowner.[9]

Existing rights and liens. A private conveyance to a railroad company for a right of way conveys it subject to all inchoate rights and liens existing at the time of the conveyance,[10] such as a covenant running with the land.[11] Where the owner of the fee of land already encumbered for purchase money conveys a right of way over it to a railroad company which takes possession and constructs its road under such conveyance, the lienor can claim his full compensation from the railroad company for the land conveyed to, and appropriated by, it.[12] It has been held that in such a case the lienor is not entitled to sell the land with the improvements thereon in satisfaction of his lien;[13] but on the other hand it has been held that, if the company purchases and constructs a part of its road on land which is subject to judgment liens, the land with the improvements thereon may be sold to satisfy the liens.[14]

§ 38. Exceptions and Reservations

a. In general
b. Private way or crossing
c. Exception or reservation of railroad right of way

a. In General

A railroad company may accept a conveyance of land or right of way subject to such exceptions or reservations contained therein as are not inconsistent with the use of the land or right of way for railroad purposes.

A railroad company may accept a conveyance of land or right of way subject to such exceptions or reservations contained therein as are not inconsistent with the use of the land or right of way for railroad purposes,[15] and where such a grant or conveyance is made, the general rules apply as to the creation and nature of the exceptions or reservations,[16] and as to their construction and operation,[17] such as that they relate only to the property conveyed.[18] If the company accepts and holds under such deed, it is bound by the exceptions contained therein,[19] notwithstanding it has otherwise acquired an absolute right to use the lands.[20] Under such a grant the railroad company has title to

2. U.S.—Clarke v. Boysen, C.C.A. Wyo., 39 F.2d 800.
Va.—Fulkerson v. Taylor, 46 S.E. 309, 102 Va. 314.
Conflicting locations see supra §§ 71, 72.

3. Va.—Fulkerson v. Taylor, supra.

4. Ariz.—Boyd v. Atchison, T. & S. F. Ry. Co., 4 P.2d 670, 39 Ariz. 154.
51 C.J. p. 543 note 40.

5. Tex.—Olive v. Sabin, etc., R. Co., 33 S.W. 139, 11 Tex. Civ.App. 208.
51 C.J. p. 543 note 41.

6. Ark.—Caststeel v. St. Louis, etc., R. Co., 99 S.W. 540, 81 Ark. 364.

7. Tex.—Galveston, H. & S. A. Ry. Co. v. City of Eagle Pass, Com. App., 260 S.W. 841.

8. Pa.—Nalley v. Pennsylvania R. Co., 35 A. 638, 177 Pa. 117.
51 C.J. p. 543 note 43.

9. Md.—Richfield Oil Corp. of New York v. Chesapeake & C. B. R. Co., 20 A.2d 581, 179 Md. 560
51 C.J. p. 543 note 44.

10. Ky.—Cincinnati, etc., R. Co. v. Slaughter, 104 S.W. 293, 31 Ky.L. 894.
51 C.J. p. 543 note 45.

11. N.Y.—Flynn v. New York, etc., R. Co., 123 N.Y.S. 759, 139 App. Div. 199.

12. Ala.—Gadsden First Nat. Bank v. Thompson, 22 So. 668, 116 Ala. 166.
51 C.J. p. 544 note 47.

13. Ala.—Gadsden First Nat. Bank v. Thompson, supra.

14. Va.—Flanary v. Kane, 46 S.E. 312, 681, 102 Va. 547.
51 C.J. p. 544 note 49.

15. Mich.—Hustina v. Grand Trunk Western R. Co., 6 N.W.2d 902, 303 Mich. 581.
Mo.—Granite Bituminous Paving Co. v. St. Louis & M. R. R. Co., 55 S.W.2d 468, 331 Mo. 899, followed in Granite Bituminous Paving Co. v. Meryl Realty & Investment Co., 55 S.W.2d 473
51 C.J. p. 544 note 51.

16. Ill.—Littlejohn v. Chicago, etc., R. Co., 76 N.E. 840, 219 Ill. 584.
51 C.J. p. 544 note 53.

Right of reentry
Where wife and husband made quitclaim deed conveying land to railroad for right of way and reserved right of reentry should property cease to be used for such purposes, wife's subsequent deed to third person did not transfer right of reentry.—Oklahoma City v. Wainwright, 197 P.2d 956, 200 Okl. 552.

17. Ga.—Tift v. Savannah, etc., R. Co., 30 S.E. 266, 103 Ga. 580.
51 C.J. p. 544 note 54.

Provision held void
Provision in deed to railroad company that land should not be sold or leased without consent of grantor or his heirs has been held void.—Nashville, C. & S. L. Ry. v. Bell, 39 S.W. 2d 1026, 162 Tenn. 661.

18. Me.—Brown v. Boston, etc., R. Co., 76 A. 692, 106 Me. 248.
51 C.J. p. 544 note 55.

19. Fla.—Silver Springs, etc., R. Co. v. Van Ness, 34 So. 884, 45 Fla. 559.
51 C.J. p. 544 note 56.

20. Mass.—White v. New York, etc., R. Co., 30 N.E. 612, 156 Mass. 181.

the land or right of way subject to the exceptions or reservations specified,[21] and is entitled to use and enjoy the land conveyed in all lawful ways not inconsistent with the rights excepted or reserved;[22] and, on the other hand, the grantor must exercise the rights reserved so as not to interfere with the railroad,[23] unless the right to do so is reserved by either express words or necessary implication.[24]

Subject to these rules, grants have been made reserving an easement to the grantor,[25] such as to the use and occupancy of a spring or stream,[26] or the use or cultivation of the outside portion of the right of way,[27] or of that portion of the land which is not actually used and occupied by the company.[28]

Exception and condition. A grant of a railroad right of way excepting a certain plant with the land it occupies, as long as it is used as such, conveys at most a possibility of title following a breach of the condition for continuous use of the plant;[29] and therefore, where the railroad company claims title, the burden is not on the grantor to show a continuous use,[30] but on the company to show a breach of the condition,[31] and the railroad company cannot by destroying the plant without authority work a forfeiture of the grantor's rights and acquire title to the land, since the latter's failure to fulfill the condition is caused by the company.[32]

As to grantor's successors or subsequent grantees. A reservation of a right to use portions of the railroad right of way will not extend beyond the grantor's own life,[33] unless the reservation contains words of limitation or inheritance;[34] or unless the reservation is in the nature of a covenant running with the land.[35]

b. Private Way or Crossing

Clauses in deeds which reserve to the grantor a right of way for passing over and across the railroad have been held binding on the railroad company.

Clauses in deeds which reserve to the grantor a right of way for passing over and across the railroad have been held binding on the railroad company,[36] and the character and extent of such right of way depend on the terms of the reservation,[37] the railroad company has no right in constructing and maintaining its road to interfere with the grantor's reasonable use of the right of way so reserved.[38] Such a reservation does not entitle the landowner to cross over any and every part of the right of way, but only to such a crossing as is reasonably necessary,[39] and where a definite place is to be selected, after selection there is no

21. U S—Iowa R, etc, Co v. Chicago, etc, R Co, Iowa, 241 F. 581, 154 C C A 357.
51 C J. p 544 note 58.

22. Mo—Porter v. Kansas City, etc, R Co., 77 S.W 582, 103 Mo. App 422
N Y—Matthews v. Delaware, etc., Canal Co, 20 Hun 427.

23. Fla—Silver Springs, etc, R. Co v Van Ness, 34 So 884, 45 Fla 559.

24. Fla—Silver Springs, etc., R Co. v. Van Ness, supra.

25. Mich.—Hustina v. Grand Trunk Western R. Co, 6 N W.2d 902, 303 Mich 581.
51 C J. p 544 note 62.

Loss of easement
An easement of way from and to rear portion of lot, reserved in deed of right of way to railroad, was not lost by mere nonuser in absence of proof of clear and decisive act of dominant owner showing intention to abandon and release such right —Hustina v. Grand Trunk Western R. Co, supra.

26. Ind—Smith v. Holloway, 24 N. E. 886, 124 Ind 329
51 C J. p 544 note 63.

27. Ind—Chicago, etc., R. Co. v. Wood, 66 N E. 923, 30 Ind App. 650.

28. U S—Iowa R., etc., Co. v. Chicago, etc, R. Co, Iowa, 241 F. 581, 154 C C A 357.

29. N Y—Walker v Marcellus, etc, R Co, 166 N Y.S. 354, 179 App Div. 313, affirmed, 123 N.E 736, 226 N. Y. 347.

30. N Y.—Walker v. Marcellus, etc, R. Co, supra.

31. N.Y—Walker v. Marcellus, etc, R. Co, supra.

32. N Y—Walker v. Marcellus, etc., R. Co, supra

33. U S.—Iowa R, etc, Co. v. Chicago, etc, R Co, Iowa, 241 F. 581, 154 C C A 357.

34. U S—Iowa R, etc, Co. v. Chicago, etc, R. Co, supra

35. U.S—Ferguson v Omaha, etc., R Co, Neb, 227 F 513, 142 C.C.A 145.

36. Ind—New York Cent. R. Co v. Yarian, 39 N E 2d 604, 219 Ind. 477, 139 A.L R. 455.
Mich—Hustina v. Grand Trunk Western R. Co., 6 N.W.2d 902, 303 Mich 581
Or—Butcher v. Flagg, 203 P.2d 651, 185 Or 471.
51 C J p 545 note 76.
Covenant or condition to maintain private or farm crossing see infra § 94.

37. Mich—Hustina v Grand Trunk Western R. Co., 6 N.W.2d 902, 303 Mich. 581
51 C.J. p 545 note 77.

Public crossing not established
Where grant to railroad of right of way for its tracks reserved a crossing at grade, the reservation did not inure to benefit of public and did not establish a public crossing —Butcher v. Flagg, 203 P.2d 651, 185 Or 471

Underground conduit
(1) A conveyance of strip of land across farm to railroad as right of way, which reserved to grantor right to maintain two farm crossings over right of way, is broad enough to permit installation of an underground conduit for purpose of supplying electricity to farm of grantor for domestic and farm purposes.—New York Cent R Co. v. Yarian, Ind, 39 N E 2d 604, 219 Ind. 477, 139 A L R 455.

(2) Where deed provided that railroad should maintain crossing, railroad was not required to maintain conduit and electric wires transporting electricity to farm for farm and domestic purposes, since such a structure would be more in the nature of a vehicle—New York Cent R. Co v Yarian, supra.

38. Mo—Porter v. Kansas City, etc., R Co, 77 S.W 582, 103 Mo App 422
51 C J. p 545 note 78.

39. Ky—Chesapeake, etc, R Co. v. Richardson, 98 S.W. 1042, 30 Ky. L. 426.

right to pass over any other part of the right of way [40]

A reservation of a right to cross the railroad right of way with roadways of any and every character includes crossings by the grantor's industrial plant railway,[41] and imposes a servitude by way of affirmative easement benefiting the remaining lands and the industrial use thereof by the grantor by the commission of acts on the land granted.[42] Such a reservation is not modified by the grantor's amicable construction of overhead and underground electric power lines across the railroad right of way, so as to prohibit crossing by a plant railway at grade;[43] and where such grade crossing is approved by the public utilities commission, the grantor is entitled to maintain it as a matter of right.[44] The grantor's enjoyment of such right is not affected by his failure to comply with a statutory requirement with respect to the plant locomotives and equipment operated across the railroad right of way.[45]

Implied reservation. Where the conveyance to the railroad company is absolute without reservation, there is no implied reservation of an existing private roadway or crossing,[46] unless it is necessary as an outlet to a public road or railroad [47] Therefore, where a landowner with an easement across a railroad track conveys an additional right of way unconditionally and without reservation of the easement across the newly conveyed tract of land, he cannot maintain an action for the obstruction of the old crossing by a change in the grade of the railroad, where another crossing on his land is available to him.[48]

c. Exception or Reservation of Railroad Right of Way

It has been held that a deed from the landowner to a third person excepting the part of the land occupied by a railroad right of way excepts the soil itself, and not merely the right of way, and on its abandonment for railroad purposes it does not revert to the grantee.

It has been held that a deed from the landowner to a third person excepting the part of the land occupied by a railroad right of way excepts the soil itself,[49] and not merely the right of way,[50] and such an exception is not repugnant to the grant,[51] and the title to the land excepted remains in the grantor,[52] and, on its abandonment for railway purposes, does not revert to the grantee [53] On the other hand, it has been held that where a landowner conveys land to a third person excepting a railroad right of way and station grounds he does not retain title to the servient estate.[54] A deed given, subject to an agreement for a railroad right of way, does not except the right of way from the terms of the grant,[55] unless it is so agreed between the grantor and the grantee;[56] and an exception of rights of way now located over the land does not apply to a railroad company occupying the land as a trespasser [57] So, where a conveyance is made subject to all rights of way over such property, the rights of way do not include a portion of the tract claimed by a railroad company as depot grounds.[58]

§ 89. Covenants and Conditions

A railroad company may accept a conveyance on any covenant or condition which may be lawfully annexed to an ordinary grant and which is reasonable and possible to be performed.

A railroad company in buying land as an ordinary purchaser may make its own terms,[59] and may ac-

40. Ky.—Chesapeake, etc., R. Co. v. Richardson, supra.
51 C.J. p 545 note 80

41. Mich.—Michigan Limestone, etc., Co. v. Detroit, etc., R. Co., 213 N. W. 96, 238 Mich. 221.

42. Mich.—Michigan Limestone, etc., Co. v. Detroit, etc., R. Co., supra.

43. Mich.—Michigan Limestone, etc., Co. v. Detroit, etc., R. Co., supra.

44. Mich.—Michigan Limestone, etc., Co. v. Detroit, etc., R. Co., supra.

45. Mich.—Michigan Limestone, etc., Co. v. Detroit, etc., R. Co., supra.

46. Ga.—Carlton v. Seaboard Air-Line R. Co., 85 S.E. 863, 143 Ga. 516, Ann Cas 1917A 497.
51 C.J. p 545 note 86

47. N.Y.—Birkett Mills v. Fenner, 142 N.Y.S. 1045.
51 C J p 545 note 87.

48. Ky.—Witt v. Louisville, etc., R. Co., 270 S.W. 732, 208 Ky. 126—McGurn v. Louisville, etc., R. Co., 198 S.W. 222, 177 Ky. 835

49. Iowa.—Hall v. Wabash R. Co., 110 N.W. 1039, 133 Iowa 714

50. Iowa.—Hall v. Wabash R. Co., supra
Ky.—Corpus Juris quoted in Marr v. Wood, 141 S.W.2d 573, 576, 283 Ky. 428

51. Iowa.—Hall v. Wabash R. Co., 110 N.W. 1039, 133 Iowa 714

52. Iowa.—Hall v. Wabash R. Co., supra
51 C.J. p 546 note 93.

53. Iowa.—Hall v. Wabash R. Co., supra

54. Mo.—Brown v. Weare, 152 S.W. 2d 649, 348 Mo. 135, 136 A.L.R. 286.
Where owner had conveyed easement in land for railroad purposes and in conveying the land subsequently excepted from grant land covered by easement, it was not intention of owner to retain title to the servient estate in the strip over which the right of way ran while disposing of the abutting land, since "right of way" has two meanings in railroad parlance, as the strip of land on which the track is laid, and the legal right to use such strip, and, hence, owner must have intended to except the use only.—Brown v. Weare, supra.

55. Ill.—Littlejohn v. Chicago, etc., R. Co., 76 N.E. 840, 219 Ill. 584.
51 C.J. p 546 note 95

56. Wis.—Barkhausen v. Chicago, etc., R. Co., 124 N.W. 649, 125 N. W. 680, 142 Wis. 292.
51 C J p 546 note 96.

57. Iowa.—Clark v. Wabash R. Co., 109 N.W. 309, 132 Iowa 11.
51 C J. p 546 note 97.

58. Iowa.—Mead v. Illinois Cent. R. Co., 83 N.W. 979, 112 Iowa 291.

59. Or.—Oregon R., etc., Co. v. Mc-

cept a conveyance on any covenant or condition in writing,[60] which may be lawfully annexed to an ordinary grant,[61] and which is reasonable and possible to be performed;[62] and such a contract may create an estate less than a fee in land taken for a right of way.[63] Such conditions and covenants are governed by the rules regulating covenants and conditions in deeds generally, as in respect of whether the deed contains a particular covenant or condition,[64] and as to the construction and operation thereof,[65] as to whether the terms of the grant or conveyance, as showing the intention of the parties, create a condition precedent, the performance of which is essential before the railroad company can claim title or assert any rights under the deed,[66] or whether they create a condition subsequent, a breach of which renders the company's right or title, which has already vested, subject to forfeiture, at the election of the grantor,[67] or whether they create merely a covenant or limitation, a breach of which does not invalidate the deed but merely entitles the grantor to damages.[68] Where the language used in the deed is ambiguous and may import a condition subsequent or a covenant, it will be construed to be the latter in preference to the former.[69]

An agreement on the part of the railroad company as part of the consideration to perform certain acts, contained in a deed poll not signed by the company, does not constitute a covenant;[70] but, where the railroad company accepts such a conveyance, it becomes the mutual contract of the parties, and the company must perform the condition annexed to the grant constituting its consideration, although it has not signed the grant.[71]

Discharge of condition by subsequent deed. A condition contained in an agreement is discharged where a deed covering the same subject matter is substituted for the agreement, without mentioning the condition.[72]

§ 90. —— Particular Covenants and Conditions in General

a. In general
b. Use for railroad purposes in general
c. Time for construction of road

Donald, 112 P. 413, 58 Or. 228, 32 L.R.A.,N.S., 117, appeal dismissed 34 S.Ct. 772, 233 U.S. 665, 58 L.Ed. 1145

60. Ga.—Hutchens v. Seaboard Air-Line R. Co., 87 S.E. 28, 144 Ga. 312
51 C.J. p. 546 note 2

61. Cal.—Conlin v. Southern Pac. R. Co., 182 P. 67, 40 Cal.App. 733.
51 C.J. p. 546 note 3.

62. Tex.—Sullivan-Sanford Lumber Co. v. Reeves, 125 S.W. 96, 58 Tex.Civ.App. 488.
51 C.J. p. 546 note 4.

63. Cal.—Conlin v. Southern Pac. R. Co., 182 P. 67, 40 Cal.App. 733.
51 C.J. p. 546 note 5.

64. Tenn.—Baird v. Southern Ry. Co., 166 S.W.2d 617, 179 Tenn. 366.
51 C.J. p. 546 note 7.

Language held not to import condition

Ill.—Rockford Trust Co. v. Moon, 18 N.E.2d 447, 370 Ill. 250.
Tenn.—Baird v. Southern Ry. Co., 166 S.W.2d 617, 179 Tenn. 366.—Nashville, C. & S. L. Ry. v. Bell, 39 S.W.2d 1026, 162 Tenn. 661.

Covenant running with land

Where deed to railroad provided that, if railroad ceased to operate as contemplated in contracts whereby citizens donated land, railroad should pay to contributors actual cost price of property and railroad operated for many years and at end of period it was directed to abandon the road by court and interstate commerce commission because of expansion of other transportation routes, condition in deed did not constitute a covenant running with the land so as to render receiver of railroad liable for purchase price on cessation of operation of the road.—Central United Nat. Bank of Cleveland v. Fort Smith & W. Ry. Co., D.C.Ark., 32 F.Supp. 568

65. Ohio.—Central Ohio Light & Power Co. v. Hixenbaugh, 3 N.E.2d 919, 52 Ohio App. 467.
51 C.J. p. 546 note 8.

Construction by acts and conduct of parties

Ohio.—Central Ohio Light & Power Co. v. Hixenbaugh, supra.

Construed against grantor

Debasing of fee in grant to railroad company is not favored by law, and provisions tending thereto are to be construed against grantor.—Central Land Co. v. City of Grand Rapids, 4 N.W.2d 485, 302 Mich. 105, 144 A.L.R. 478.

66. Ill.—Littlejohn v. Chicago, etc., R. Co., 76 N.E. 340, 219 Ill. 584.
51 C.J. p. 547 note 9.

67. Cal.—Rosecrans v. Pacific Electric Ry. Co., 134 P.2d 245, 21 Cal.2d 602.
Mich.—Dolby v. Dillman, 278 N.W. 694, 283 Mich. 609, 117 A.L.R. 538.—Avery v. Consumers' Power Co., 253 N.W. 189, 265 Mich. 696.—Rhines v. Consumers' Power Co., 242 N.W. 898, 259 Mich. 236.
N.Y.—In re Opening and Extending of North Conduit Avenue, Borough of Queens, City of New York, 27 N.Y.S.2d 841, 262 App.Div. 70.
Okl.—Oklahoma City v. Local Federal Savings & Loan Ass'n of Oklahoma City, 134 P.2d 565, 192 Okl. 188.
51 C.J. p. 547 note 10.

Possibility of reverter held alienable

Where deed expressly provided that land was conveyed for depot grounds and for a railroad route through it and that on permanent abandonment of such use, the land was to revert to the grantors, their heirs or assigns, the possibility of reverter was alienable.—Reichard v. Chicago, B. & Q. R. Co., 1 N.W.2d 721, 231 Iowa 563.

68. Ark.—Bain v. Parker, 90 S.W. 1000, 77 Ark. 168
51 C.J. p. 547 note 11.

Provision held not covenant of use

Mich.—Quinn v. Pere Marquette Ry. Co., 239 N.W. 376, 256 Mich. 143.

69. Ark.—Bain v. Parker, 90 S.W. 1000, 77 Ark. 168
51 C.J. p. 547 note 12.

70. Mass.—Plimpton v. New York, etc., R. Co., 109 N.E. 732, 221 Mass. 548.—Childs v. Boston, etc., R. Co., 99 N.E. 957, 213 Mass. 91, 43 L.R.A.,N.S., 373.

71. Mass.—Plimpton v. New York, etc., R. Co., 109 N.E. 732, 221 Mass. 548.
51 C.J. p. 547 note 14.

72. Ark.—Ozark, etc., R. Co. v. Ferguson, 122 S.W. 624, 92 Ark. 254.
51 C.J. p. 547 note 15.

a. In General

A grant may be made to a railroad company on a condition subsequent that the company shall maintain a spur track or side track on the premises, or that the railroad company shall stop trains at a depot on the right of way granted.

Grants may be made, and held binding on the company, on a condition subsequent that the company shall maintain a spur track or side track on the premises;[73] or that the railroad company shall stop certain trains at a depot on the right of way granted;[74] and this condition continues as long as the company holds the land and runs such trains,[75] and is not satisfied by performance merely for a number of years[76] A covenant binding on the company may be created by a provision that the grantor and others shall have free passage on the trains of the road,[77] unless a further condition is annexed that a failure to furnish such pass shall work a forfeiture of the land, in which case it becomes a condition subsequent;[78] or by a provision that it will drill wells to supply the grantor's premises with water.[79]

A covenant has been held to be created by a provision that other railroads shall have the right to run a parallel track on or along the right of way.[80] Under such a covenant, such use may be made of the right of way by another company without compensation,[81] and the covenant may be enforced at the suit of another company, although it was not in existence at the time the deed was made,[82] and mere lapse of time and increase of business of the grantee company will not prevent such enforcement.[83] Such provision contemplates that the grantee company may acquire the right to the exclusive use of all the right of way in case of sufficient growth in its business,[84] and, therefore, before another company may enforce its right to construct thereon, it must show that there is space on the right of way on which to build its track[85]

As to damages from construction and maintenance. A stipulation in a grant to a railroad company releasing it from damages caused or to be caused by the location, construction, maintenance, and operation of the road, releases the company from liability for such damages as are a necessary result of the location, construction, maintenance, and operation of the road in a legal and proper manner;[86] including injuries caused by the proper construction of a ditch, culvert, or embankment,[87] and protects the company from liability for such damages to a subsequent purchaser of the land, with notice[88] Such a stipulation does not release the company from such damages as are the result of its negligence or unskillfulness[89] A recital in a deed granting a right of way that the grantor has been fully paid for the damage done or which may be done to his property by the location and construction of the roadway does not preclude the grantor's right to have his damages assessed according to law, where the railroad company has not fulfilled a condition in the deed requiring it to complete the road within a specified time.[90]

A release from damages arising "by reason of the location or construction" of a railroad does not release the grantor's right to a way of necessity across the land conveyed unless facts are shown which favor such a construction.[91]

b. Use for Railroad Purposes in General

A grant is made on a condition subsequent where it provides, either expressly or impliedly, that the land shall revert to the grantor, if the railroad is not constructed or if the land ceases to be used for railroad purposes.

73. Fla.—Taylor v. Florida East Coast R. Co., 45 So. 574, 54 Fla. 635, 127 Am.S.R. 155, 16 L.R.A., N.S., 307, 14 Ann.Cas. 472.
51 C.J. p. 548 note 18

74. Ill.—Gray v. Chicago, etc., R. Co., 59 N.E. 950, 189 Ill. 400.
51 C.J. p. 548 note 19.

75. Ill.—Gray v. Chicago, etc., R. Co., supra.

76. Ill.—Gray v. Chicago, etc., R. Co., supra.

77. Mass.—Dodge v. Boston, etc., R. Corp., 28 N.E. 243, 154 Mass. 299, 13 L.R.A. 318
51 C.J. p. 548 note 22.

78. Mo.—Ruddick v. St. Louis, etc., R. Co., 22 S.W. 499, 116 Mo. 25, 38 Am.S.R. 570.

79. Pa.—Beedy v. Nypano R. Co., 95 A. 343, 250 Pa. 51.

80. Ala.—South, etc., Alabama R. Co. v. Highland Ave., etc., R. Co., 23 So. 973, 117 Ala. 395.

81. Ala.—South, etc., Alabama R. Co. v. Highland Ave., etc., R. Co., supra.

82. Ala.—South, etc., Alabama R. Co. v. Highland Ave., etc., R. Co., supra.

83. Ala.—South, etc., Alabama R. Co. v. Highland Ave., etc., R. Co., supra.

84. Ala.—South, etc., Alabama R. Co. v. Highland Ave., etc., R. Co., supra.

85. Ala.—South, etc., Alabama R. Co. v. Highland Ave., etc., R. Co., supra.

86. S.C.—White v. Southern R. Co., 140 S.E. 560, 142 S.C. 284, 57 A.L.R. 634.
51 C.J. p. 559 note 89.
Effect of conveyance as waiver of damages independent of stipulations see supra § 81 d.

87. Pa.—Updegrove v. Pennsylvania Schuylkill Valley R. Co., 19 A. 283, 132 Pa. 540, 7 L.R.A. 213—Hoffoditz v. Southern Pennsylvania R., etc., Co., 18 A. 125, 129 Pa. 264.

88. Ind.—Burrow v. Terre Haute, etc., R. Co., 8 N.E. 167, 107 Ind. 432.

89. Pa.—McMinn v. Pittsburg, etc., R. Co., 23 A. 325, 147 Pa. 5.
51 C.J. p. 559 note 94

90. Pa.—Bredin v. Pittsburg, etc., R. Co., 31 A. 39, 165 Pa. 262.

91. Mass.—New York, etc., R. Co. v. Railroad Commissioners, 38 N.E. 27, 162 Mass. 81.

A grant is made on a condition subsequent, which must be complied with, where it provides, either expressly or impliedly, that the land shall revert to the grantor, if the railroad is not constructed,[92] or if the land ceases to be used for railroad purposes,[93] or for the particular railroad purpose for which it was granted,[94] such as for a coal road to be operated as a public railroad,[95] or if the land is devoted to a different use.[96] A mere promise to construct a railroad and operate cars over the land granted is merely a covenant,[97] and not a condition subsequent;[98] and does not require the company to operate the road in perpetuity.[99]

Construction and operation. A deed with such a condition and reversion clause should in case of doubt be construed in favor of the grantee railroad company.[1] It is a continuing obligation which cannot be satisfied by the operation of the road on the land conveyed for a limited period only.[2] It does not require that the company shall at once use all parts of the land conveyed;[3] and the company is entitled to possession of the entire strip as long as any part of it is used for railroad purposes,[4] except where the condition provides for the reverter of such portions as are not so used;[5] nor does it require that the road shall be built over the entire charter route of the grantee.[6] The condition may be fulfilled by the use of the land for railroad purposes by a successor of the railroad company.[7]

Period of nonuse. A temporary nonuser is not a breach of such a condition,[8] and if the reverter clause does not purport to specify the period of nonuse necessary to a breach of the condition it will be construed to mean a reasonable period of time.[9] If it purports to specify the period, and leaves blank the space intended for the designation of the length of such period, the reverter clause as a condition subsequent is void,[10] although it may still be considered for the purpose of determining the purpose of the grant.[11]

Effect of disposal of adjacent property by grantor. Where a conveyance with such a condition subsequent is made in consideration of benefits to be realized, the railroad company takes an indefeasible title if, after improvements have been made, the company purchases the grantor's adjacent property[12] or it is sold by the owner to another.[13]

c. Time for Construction of Road

A provision in a grant of a right of way that the railroad or a certain portion thereof shall be constructed and operated within a certain time, as construed from the language employed, may be either a condition precedent, or a condition subsequent, or a mere covenant.

A provision in a grant of a right of way that the road or a certain portion thereof shall be constructed and operated within a certain time, as construed from the language employed, may be either a condition precedent,[14] or a condition sub-

92. Ala.—Seaboard Air Line R. Co. v. Anniston Mfg. Co., 65 So. 187, 186 Ala. 264.
51 C.J. p 548 note 33.

93. Cal.—Romero v. Department of Public Works, 109 P.2d 662, 17 Cal. 2d 189.
N.Y.—In re Opening and Extending of North Conduit Avenue, Borough of Queens, City of New York, 27 N.Y.S.2d 841, 262 App.Div. 70
Okl.—Oklahoma City v. Wainwright, 187 P.2d 226, 199 Okl. 470—Fuhr v. Oklahoma City, 153 P.2d 115, 194 Okl. 482—Jones v. Oklahoma City, 145 P.2d 971, 193 Okl. 637.
51 C.J. p 548 note 34.

Construction of underpass

Use of land for construction of underpass on railway property to take place of grade crossing was not violative of restriction on land which required land to be used for railway purposes, since underpass did not require appropriation to new purpose, but was merely a means of making safer use of land for railway purposes.—Shelton v. City of Abilene, Tex.Civ.App., 80 S.W.2d 351.

94. Ark.—St. Louis Southwestern R. Co. v. Curtis, 167 S.W. 489, 113 Ark. 92.
51 C.J. p 549 note 35.

95. Iowa.—Monarch Coal Co. v. Phillips Coal Co., 156 N.W. 297, 178 Iowa 660
51 C.J. p 549 note 37.

96. Neb.—Carr v. Miller, 181 N.W. 557, 105 Neb. 623.
51 C.J. p 549 note 38.

97. Cal.—Palmer v. Los Angeles, etc., R. Co., 203 P. 1012, 55 Cal. App. 519.
Wash.—Scheller v. Tacoma R., etc., Co., 184 P. 344, 108 Wash. 348, 7 A.L.R. 810.

98. Cal.—Palmer v. Los Angeles, etc., R. Co., 203 P. 1012, 55 Cal. App. 519.

99. Wash.—Scheller v. Tacoma R., etc., Co., 184 P. 344, 108 Wash. 348, 7 A.L.R. 810
51 C.J. p 549 note 41.

1. Cal.—Tamalpais Land & Water Co. v. Northwestern Pac. R. Co., 167 P.2d 825, 73 Cal.App.2d 917
Tex.—Broun v. Texas, etc., R. Co., Civ.App., 295 S.W. 670.

2. Ill.—Lyman v. Suburban R. Co., 60 N.E. 515, 190 Ill. 320, 2 L.R.A. 645.
51 C.J. p 549 note 43.

3. Ark.—Graham v. St. Louis, etc., R. Co., 65 S.W. 1043, 66 S.W. 344, 69 Ark. 562
51 C.J. p 549 note 44.

4. Ark.—Ritter v. Thompson, 144 S.W. 910, 102 Ark. 442.

5. Cal.—Hannah v. Southern Pac. R. Co., 192 P. 304, 48 Cal.App. 517.
51 C.J. p 549 note 46.

6. Mo.—Morrill v. Wabash, etc., R. Co., 9 S.W. 657, 96 Mo. 174.

7. U.S.—Jones v. Southern R. Co., C.C.A.Ga., 285 F. 19.

8. Mich.—Hickox v. Chicago, etc., R. Co., 44 N.W. 143, 78 Mich. 615, 53 N.W. 1105, 94 Mich. 237.
Wash.—Mouat v. Seattle, etc., R. Co., 47 P. 233, 16 Wash. 84.

9. Va.—Robertson v. Bertha Mineral Co., 104 S.E. 832, 128 Va. 93.

10. Va.—Robertson v. Bertha Mineral Co., supra
51 C.J. p 549 note 51.

11. Va.—Robertson v. Bertha Mineral Co., supra.

12. Tex.—Broun v. Texas, etc., R. Co., Civ.App., 295 S.W. 670
51 C.J. p 549 note 53.

13. Tex.—Stevens v. Galveston, etc., R. Co., Com.App., 212 S.W. 639.
51 C.J. p 549 note 54.

14. W.Va.—Adams v. Guyandotte

sequent,[15] or a mere covenant.[16] A substantial compliance with such a condition ordinarily is sufficient.[17] If the condition is the commencement of work on the road, the construction and operation of any part of the road will satisfy the condition,[18] but if the condition is the construction of the road across the premises within a specified time, a completion of about one half of the grading is not a substantial compliance with the condition.[19] Where the performance of the condition is dependent on the grantor's selection of the route, the time specified does not begin to run against the company until the grantor has made such selection.[20]

Where no time stipulated. Where, in case of such condition, no time for construction of the road or appropriation of the land is specified, there is an implied obligation on the part of the company to construct it within a reasonable time,[21] and what is such a reasonable time is largely a question of fact, under all the facts and circumstances of the particular case.[22] Where the deed is made with respect to a statute or ordinance which sets a time limit, that time will prima facie be the reasonable time implied by law to comply with the condition.[23]

Limitation of exclusiveness. A provision in a deed conveying a right of way in general terms, that this right of way shall be exclusive for a fixed period, does not limit the right of the company to enter to such period,[24] but limits only the exclusiveness of the right for that period, after which the grantor may grant other rights of way to other companies.[25]

§ 91. —— Mode of Construction in General

A railroad company is bound by a covenant or condition, in the grant to it, with respect to the mode of constructing and maintaining its roadbed.

A railroad company is bound by a covenant or condition, in the grant to it with respect to the mode of constructing and maintaining its roadbed,[26] such as that it shall be so constructed as not to interfere with the landowner's water power,[27] or irrigation ditches;[28] or so as to permit the building of a dam by the landowner,[29] and to protect its own roadway from injury from such dam,[30] with a corresponding duty on the landowner to use every reasonable precaution to prevent injury to the railroad.[31] So, also, the company is bound by a covenant or condition that it construct and maintain in a proper condition necessary culverts, drains, and ditches to carry off surplus water and drain[32] or otherwise benefit the adjoining land;[33] or that it construct a levee.[34] Where, in compliance with such condition or covenant, the company has constructed its roadbed so as to drain the land to the best advantage, it cannot afterward be compelled to change its roadbed because natural changes have made the drainage insufficient.[35] A covenant to make a culvert or pass under the railroad for the grantor's benefit does not justify the company in digging a ditch on the adjoining land of the grantor to drain the passway.[36]

Bridges. Where a contract with the landowner gives the railroad company a right to construct a bridge over the owner's land for use in connection with its road, such right implies the right to use all proper means to make the bridge an adequate

Valley R Co., 61 S E 341, 64 W. Va. 181.
51 C J p 550 note 57

15. N Y.—In re Opening and Extending of North Conduit Avenue, Borough of Queens, City of New York, 27 N.Y.S 2d 841, 262 App Div 70.
51 C J. p 550 note 58.

16. Mo.—Krueger v. St. Louis, etc., R Co, 84 S.W. 898, 185 Mo. 227.
51 C J. p 550 note 59

17. Ga.—Lester v. Georgia, etc, R. Co, 17 S.E 113, 90 Ga 802.
N.C.—Thomas v. Blue Ridge, etc, R. Co., 57 S.E. 523, 144 N.C 729.

18. Ga.—Lester v. Georgia, etc, R. Co., 17 S.E 113, 90 Ga. 802.

19. N.C.—Thomas v Blue Ridge, etc., R. Co., 57 S.E. 523, 144 N.C. 729.

20. Mich—Waldron v. Toledo, etc, R. Co., 21 N.W. 870, 55 Mich 420.

21. Or—Southern Pac. Co v Erickson, 204 P. 942, 103 Or. 311.
51 C.J. p 550 note 64.

22. Or—Southern Pac Co. v. Erickson, supra
51 C J p 551 note 65.

23. Ala—Seaboard Air Line R. Co v Anniston Mfg. Co., 65 So. 187, 186 Ala. 264.

24. Tenn—Virginia, etc, R. Co. v. Crow, 64 S W. 485, 108 Tenn. 17.

25. Tenn.—Virginia, etc., R. Co. v. Crow, supra.

26. Ohio—Miller v. Lake Shore, etc., R. Co, 103 N E. 374, 88 Ohio St 499.
51 C J. p 551 note 71.

27. Pa—Appeal of Unahgsts, 55 Pa. 128.
Wis.—Hutchinson v. Chicago, etc, R. Co., 37 Wis. 582

28. S D—Taylor v. White River Valley R Co., 135 N W. 758, 29 S D. 12, 132 N W 152, 27 S.D 528
51 C.J p 551 note 73.

29. U S.—Eastern Oregon Land Co v. Deschutes R. Co., Or., 246 F. 400, 158 C C A. 464, certiorari denied 38 S Ct. 192, 245 U.S. 672, 62 L Ed. 540, and appeal dismissed 39 S Ct. 18, 248 U.S. 534, 63 L Ed 407

30. U S—Eastern Oregon Land Co v Deschutes R. Co., supra.
51 C.J. p 551 note 75.

31. U.S—Eastern Oregon Land Co v. Deschutes R. Co., supra.
51 C.J. p 551 note 76.

32. Ark—St. Louis, etc, R. Co v. Hardie, 113 S.W 31, 87 Ark 475.
51 C.J p 551 note 77.
Right of drainage of roadbed to adjoining land generally see supra § 86.

33. Mass.—Whitney v. Cheshire R. Co., 96 N.E 676, 210 Mass. 263.
51 C.J. p 551 note 78.

34. Ark—St. Louis, etc., R. Co. v. Sanders, 121 S.W. 337, 91 Ark. 153
51 C J. p 551 note 79.

35. Mo—Harrelson v. Kansas City, etc., R Co., 52 S.W. 368, 151 Mo. 482.
51 C.J p 552 note 80.

36. N H—Hills v. Boston, etc; R. Co., 18 N.H. 179.

one for the purpose intended,[37] including the construction of piers and abutments,[38] and the right to change such piers;[39] and, where the contract authorizes the company to use as much of the land as may be necessarily occupied by the piers, it also gives it the right to do so in respect of abutments which are but terminal piers of the bridge.[40]

Diversion of watercourse. Where the diversion of a watercourse is expressly authorized by the terms of the deed of a right of way, the company is not liable for the consequential damages resulting therefrom unless the work is done negligently or unnecessarily.[41] Such authority, however, does not give the company a right to flood the grantor's land with the waters of streams which before did not touch it;[42] and, if the company has the right to bring such streams on the grantor's land, it must prepare a proper channel.[43]

Retaining wall. A covenant that, if the railroad company makes excavations on the grantor's land, interfering with the natural support of its surface, it is to construct retaining walls to prevent its slopes from encroaching on the grantor's property contemplates a protective construction necessary to prevent resulting damage,[44] and it is not intended that the wall is to be erected after the construction of the slope.[45]

§ 92. —— Location and Operation of Road

A railroad company is bound by a covenant or condition in a deed that in consideration of a grant of certain land it will locate, construct, and operate its road over or through the land conveyed, along a contemplated or specified line or route.

A railroad company is bound by a covenant or condition in a deed that in consideration of a grant of certain land it will locate, construct, and operate its road over or through the land conveyed,[46] along a contemplated or specified line or route.[47] If there is any doubt as to the meaning of the terms employed in the grant as to the location of the right of way, it should be solved in favor of the grantee,[48] particularly where the probabilities of the case favor such a condition.[49] Where the grant provides that the right of way shall be located by the chief engineer of the state, the boundary, as designated by him or by his assistant under his authority or direction, is binding on the grantor and his privies,[50] particularly where considerable time has been allowed to elapse after such location has been made.[51]

Period of maintenance. While it has been held that in ascertaining whether a railroad is required perpetually to maintain the railroad service each case must be determined on its particular facts,[52] the clear intention of the parties requiring the railroad to maintain perpetual railway service cannot be brushed aside by invoking the rule that conditions are to be construed against the one relying thereon,[53] and particular conditions in a deed have been construed to require perpetual use of a right of way for passenger train service.[54] On the other hand, it has been held that it is not required that the road shall be maintained on the land in perpetuity,[55] but its maintenance thereon for a long period of years is a compliance with the contract,[56] and its removal to a new location after such time is not a breach thereof.[57]

§ 93. —— Location and Maintenance of Station or Termini

a. In general

b. Performance of covenant or condition

37. Pa.—Terminal Coal Co. v. Pennsylvania R. Co., 139 A. 612, 291 Pa. 103.

38. Pa.—Terminal Coal Co. v. Pennsylvania R. Co., supra.

39. Pa.—Terminal Coal Co. v. Pennsylvania R. Co., supra.

40. Pa.—Terminal Coal Co. v. Pennsylvania R. Co., supra.

41. Ark.—St. Louis, etc., R. Co. v. Walbrink, 1 S.W. 545, 47 Ark. 330. Md.—Qursler v. Baltimore, etc., R. Co., 60 Md. 358.

42. Ark.—St. Louis, etc., R. Co. v. Harris, 1 S.W. 609, 47 Ark. 340, followed in St. Louis, etc., R. Co. v. Ussery, 1 S.W. 873, 47 Ark. 340.

43. Ark.—St. Louis, etc., R. Co. v. Harris, 1 S.W. 609, 47 Ark. 340.

44. N.J.—Gumaard Lead, etc., Co. v. Erie R. Co., 104 A. 134, 92 N.J. Law 216.

45. N.J.—Gumaerd Lead, etc., Co. v. Erie R. Co., supra

46. Neb.—Moseley v. Chicago, etc., R. Co., 78 N.W. 293, 57 Neb. 636. 51 C.J. p. 552 note 93.

A substantial compliance with such a covenant or condition is generally sufficient.—Union Pac. R. Co. v. Cook, Neb., 98 F. 281, 39 C.C.A. 86

47. S.C.—Groce v. Greenville, etc., R. Co., 78 S.E. 888, 94 S.C. 199. 51 C.J. p. 552 note 94. Location of way or land conveyed generally see supra § 81 c.

48. Ill.—Kirby v. Wabash, etc., R. Co., 109 Ill. 412.

49. Ill.—Kirby v. Wabash, etc., R. Co., supra.

50. Ga.—Dougherty v. Western, etc., R. Co., 53 Ga. 304

51. Ga.—Dougherty v. Western, etc., R. Co., supra.

52. Cal.—Rosecrans v. Pacific Electric Ry. Co., 134 P.2d 245, 21 Cal. 2d 602.

53. Cal.—Rosecrans v. Pacific Electric Ry. Co., supra.

54. Cal.—Rosecrans v. Pacific Electric Ry. Co., supra.

55. U.S.—Bryan v. Louisville, etc., R. Co., 244 F. 650, 157 C.C.A. 98, error dismissed and certiorari denied 38 S.Ct. 334, 246 U.S. 651, 62 L.Ed. 921.

56. U.S.—Bryan v. Louisville, etc., R. Co., supra.

57. U.S.—Bryan v. Louisville, etc., R. Co., supra. 51 C.J. p. 552 note 2.

a. In General

A provision in a conveyance of land to a railroad company that the company shall locate, construct, and maintain a station or depot on the land conveyed is, according to the intention of the parties, binding as a covenant, condition precedent or condition subsequent.

A provision in a conveyance of land to a railroad company that the company shall locate, construct, and maintain a station or depot on the land conveyed, either as the whole or as a part of the consideration therefor, unless it is too indefinite to be enforceable,[58] is, according to the intention of the parties, binding on the company as a covenant,[59] as a condition precedent,[60] or as a condition subsequent,[61] where it appears from the terms of the condition that it was intended by the parties that, if the land was not used for station purposes, it should revert to the grantor; and the failure of such a covenant or condition to specify the length of time it is to run does not render it void per se.[62] Where under statutory authority a railroad has come into the control of the state, and it accepts lots as a donation for the purpose of erecting depots and turnouts thereon, the state does not obligate itself thereby to fix on such lots as a terminus,[63] although if the lots are not used for the purpose designated a reconveyance thereof may be enforced.[64]

At particular place. A railroad company may agree to a covenant or condition to erect and perpetually to maintain a depot at a particular place on the land,[65] unless the interests of the public demand its removal,[66] and the grantor may burden the land with such a covenant for the benefit of other land in the vicinity, whether or not owned by him.[67] Accordingly, a covenant requiring the company to erect and maintain a depot at a particular place on the land conveyed in consideration of a grant of a right of way is a valid covenant for a breach of which the company will be liable in damages,[68] except that it is invalid as being contrary to public policy where performance thereof will render it impossible for the company to discharge its duties to the public,[69] as where the provision also prohibits the company from erecting other depots within prescribed limits.[70]

b. Performance of Covenant or Condition

In the absence of a provision for maintenance in perpetuity or during a specified period, a covenant or condition by a railroad company to locate, construct, or maintain a station on the land conveyed does not obligate the company to maintain a station, on the land or at the place specified, indefinitely or forever, and the company may abandon the station or depot when, by reason of changing conditions of traffic and public interests, it is no longer required.

A substantial compliance with a covenant or condition requiring the location and maintenance of a station or depot on the premises is generally sufficient.[71] In the absence of a provision for maintenance in perpetuity, or during a specified period, such a covenant or condition does not obligate the company to maintain a station, on the land or at the place specified, indefinitely or forever,[72] but the covenent or condition is presumed to be made subject to the exigencies of the company's further development and needs and the interests of the public,[73] and the railroad company may abandon the station or depot when, by reason of changing conditions of traffic and public interests, it is no longer

58. Ark.—St. Louis, etc., R. Co v. Berry, 110 S.W. 1049, 86 Ark. 309.
51 C.J. p. 553 note 6.
Location of station in absence of covenant or condition see supra § 57.

59. Tenn.—Farrar v. Nashville, C & St. L. Ry., 36 S.W.2d 95, 162 Tenn. 313
51 C.J. p. 553 note 7.
Covenant held not to run with land Tenn.—Farrar v. Nashville, C. & St. L. Ry., supra.
The phrase "erect and maintain", as used in connection with covenant to erect and maintain railroad depot, has a well-defined meaning which must control interpretation of deed conveying land to railroad.—Cunningham v. New York Cent. R. Co., 48 N.E.2d 176, 114 Ind.App. 90.

60. Miss.—Maxwell v. Mississippi Valley Co., 48 So. 610, 95 Miss. 466.
51 C.J. p. 553 note 8.

61. Miss.—Yazoo, etc., R. Co. v. Lakeview Tract. Co., 56 So. 393, 100 Miss. 281
51 C.J. p. 553 note 9.

62. W.Va.—Harper v. Virginian R. Co., 86 S.E. 919, 76 W.Va. 788.

63. Ill.—Taylor v. Whitney, 5 Ill. 61.

64. Ill.—Taylor v. Whitney, supra.

65. Tex.—Mosel v. San Antonio, etc., R. Co., Civ.App., 177 S.W. 1048.
Contracts as to location of stations generally see supra § 61.

66. U.S.—Texas, etc., R. Co. v. Marshall, Tex., 10 S.Ct. 846, 136 U.S. 393, 34 L.Ed. 385.
51 C.J. p. 553 note 15.

67. Tex.—San Antonio, etc., R. Co. v. Mosel, Civ.App., 195 S.W. 621.
51 C.J. p. 553 note 16.

68. Ky.—Lexington, etc., R. Co. v. Moore, 131 S.W. 257, 140 Ky. 514.
51 C.J. p. 553 note 17.
Damages for breach of covenant or condition generally see infra § 97.

69. Ga.—Reidsville, etc., R. Co. v. Baxter, 79 S.E. 187, 13 Ga.App. 357.

70. Ky.—Lexington, etc., R. Co. v. Moore, 131 S.W. 257, 140 Ky. 514.
51 C.J. p. 554 note 19.

71. Ind.—Cunningham v. New York Cent. R. Co., 48 N.E.2d 176, 114 Ind.App. 90.
Miss.—City of Jackson v. Alabama & V. R. Co., 160 So. 602, 172 Miss. 528.
51 C.J. p. 554 note 21.

72. U.S.—Central United Nat. Bank of Cleveland v. Fort Smith & W. Ry. Co., D.C.Ark., 32 F.Supp. 568.
Ind.—Cunningham v. New York Cent. R. Co., 48 N.E.2d 176, 114 Ind.App. 90.
51 C.J. p. 554 note 22.

73. Colo.—Denver & S. L. Ry. Co. v. St. Clair, 28 P.2d 340, 94 Colo. 67.
Ind.—Cunningham v. New York Cent. R. Co., 48 N.E.2d 176, 114 Ind.App. 90.
51 C.J. p. 554 note 23.

required,[74] regardless of the enhanced value of the adjoining land of the owner, by the continuance of the station.[75] Accordingly, if it is maintained for a number of years and until the company's interest and public convenience require its abandonment or removal, it is a substantial compliance with the covenant or condition,[76] and is sufficient to discharge the company from further liability thereunder;[77] and this rule has been held to apply notwithstanding the covenant or condition provides for the "permanent" establishment of the depot, etc,[78] since such a provision is sufficiently complied with by the establishment of the depot, with no intention at the time of removing or abandoning it.[79] This does not mean, however, that a railroad may arbitrarily refuse to establish or maintain a station at any place, when it has obligated itself so to do,[80] or escape its obligation merely because it is losing money,[81] and it is not a sufficient compliance that the company has used the land for other railroad purposes as its business requires.[82]

Character of station. The character of the station to be located and maintained under such a covenant or condition, including the stopping of trains thereat, is to be determined by the needs of those who use it, and of the public, as construed in connection with the terms of the grant.[83] In the absence of any stipulation as to size and character of the building, ordinarily such a station or depot only is required as is suitable and adequate for the reasonable requirements of the normal passenger and freight business in that place;[84] and, since this in effect means a good and substantial station or depot,[85] the legal effect of such a covenant or condition is not changed by the insertion of the words "good and substantial" before the word "depot"[86] or by the modification of the deed before execution to provide for a passenger as well as a freight depot.[87]

Time for construction. Where the contract fixes no time for the construction of the depot, it will be concluded that the parties intended that it should be erected within a reasonable time after the operation of trains began over the road.[88]

Extension of terminus. A condition in a deed of land for depot purposes, not to use the premises for any other purposes, is not violated by extending the road beyond the point of its terminus as it existed when the deed was given.[89]

§ 94. —— Private Crossings, Fences, and Cattle Guards

a. In general
b. Time for construction and excuses
c Character and sufficiency

a. In General

A railroad company is bound by a covenant or condition imposed by the conveyance that it will erect and maintain a fence along its roadway on the premises con-

74. U.S.—Central United Nat Bank of Cleveland v Fort Smith & W Ry Co, D C Ark, 32 F Supp 568
Colo.—Denver & S. L Ry Co v St Clair, 28 P 2d 340, 94 Colo 67
Ky.—Meacham v Louisville & N. R. Co, 169 S W 2d 830, 293 Ky 642.
51 C J. p 554 note 24.

Power of determination
Public utilities commission has power, subject to review by district court, to determine whether public interest requires termination of contract with private person to maintain station at certain point.—Denver & S L. Ry Co. v. St. Clair, 28 P 2d 340, 94 Colo. 67.

75. Ky.—Johnson v Louisville, etc, R Co., 11 S.W 2d 96, 226 Ky 397

76. U S.—Central United Nat. Bank of Cleveland v Fort Smith & W. Ry. Co, D C Ark, 32 F Supp 568
Colo.—Denver & S L. Ry. Co v. St. Clair, 28 P 2d 340, 94 Colo. 67.
Ind.—Cunningham v New York Cent R Co, 48 N E 2d 176, 114 Ind App. 90.
51 C.J. p 554 note 26.

77. Ky.—Meacham v. Louisville & N R. Co., 169 S.W.2d 830, 293 Ky 642.
51 C J p 554 note 27.

Order of public service commission
Permissive order of public service commission authorizing railroad to abandon depot, in and of itself, does not justify abandonment of depot so as to relieve railroad from liability for damages for breach of covenant to erect and maintain depot on land conveyed to railroad for such purpose.—Cunningham v New York Cent R Co, 48 N E 2d 176, 114 Ind App 90.

78. Ky.—Meacham v Louisville & N R. Co, 169 S W.2d 830, 293 Ky. 642
51 C J p 554 note 28.

79. U S.—Texas, etc, R Co v. Marshall, Tex, 10 S Ct. 846, 136 U S 393, 34 L Ed. 385
51 C J. p 554 note 29

80. Ind.—Cunningham v New York Cent R Co, 48 N E.2d 176, 114 Ind App 90
Md.—Maryland, etc, R Co. v. Silver, 73 A. 297, 110 Md. 510.

81. Ind.—Cunningham v. New York Cent. R. Co., 48 N E 2d 176, 114 Ind App. 90.

82. Ky.—Louisville, etc, R. Co. v. Baskett, 104 S W 695, 31 Ky L. 1035
51 C.J p 555 note 31

83. Colo.—Denver & S. L Ry Co v. St Clair, 28 P 2d 340, 94 Colo 67.
51 C J p 555 note 32.

The word "station" has been construed to mean a regular station with an agency and an agent in accordance with a practical construction of the contract by the parties.—Denver & S L Ry. Co. v. St Clair, 28 P 2d 340, 94 Colo 67

84. Ky.—Louisville, etc., R. Co v. Johnson, 270 S W 58, 207 Ky. 813.
51 C J. p 555 note 33

85. Ky.—Louisville, etc, R Co v. Letcher County Coal, etc, Co., 243 S W 45, 195 Ky. 297

86. Ky.—Louisville, etc, R Co. v. Letcher County Coal, etc, Co., supra.
51 C J p 555 note 35

87. Ky.—Louisville, etc., R. Co. v. Letcher County Coal, etc, Co., supra
51 C J. p 555 note 36.

88. Ky.—Elkhorn, etc., R. Co. v. Dingus, 220 S W 1047, 187 Ky 812.

89. N J.—Southard v New Jersey Cent. R Co, 26 N J Law 13.

veyed, or construct and maintain cattle guards, or construct and maintain a private or farm crossing thereon.

Where a railroad company accepts a conveyance,[90] and occupies a right of way granted therein, it is bound, in the absence of any right to cross the land save under the conveyance,[91] by a covenant or condition imposed by the conveyance, in definite terms,[92] that it will erect and maintain a fence along its roadway on the premises conveyed,[93] or construct and maintain cattle guards;[94] or construct and maintain a private or farm crossing thereon,[95] even though it is necessary to reduce the grade of the road in order to do so;[96] and, where such duty is agreed on in the agreement for the sale, the landowner has a right to incorporate it as a covenant in the deed of conveyance,[97] and, even though such agreement is not incorporated in the deed, it may be held binding on the company where it constitutes a part of the consideration for the deed.[98]

Such a crossing clause in a deed of a right of way, dividing the grantor's farm, creates a right in the nature of an equitable restriction over the right of way, and establishes a quasi easement of perpetual use of the way for the crossing.[99] Whether such a covenant contemplated maintenance as well as the making of a crossing depends on the intention of the parties as construed from the terms thereof in connection with the nature of the subject matter;[1] and where, under a deed containing such a covenant, no right is reserved or granted to the landowner to enter and build or maintain a crossing, owing to the character thereof and the continuing necessity therefor, a covenant for the permanent maintenance of the crossing by the railroad company is implied.[2] A covenant or condition for the construction of a crossing without any limitation on the use of contiguous land is not broken by the construction of a station and switch near the crossing, whereby traffic at that point is greatly increased.[3]

Location of crossing. If the covenant does not designate the location of the crossing it contemplates that it shall be on land then owned by the grantor,[4] and where the performance of the condition is dependent on the grantor's selecting the place at which the crossing is to be constructed, the obligation becomes fixed only when such selection is made,[5] and it has been held that, in such a case, damages for a failure to perform such condition can be recovered only on a showing that the grantor designated the place.[6]

Duty on landowner. The company and owner may, by their contract, place the duty of erecting and maintaining fences, etc., on the landowner,[7] and under some statutes, if the landowner, in such a case, elects not to perform the work himself, the railroad company may erect the fence at the reasonable expense of the landowner.[8]

90. Ind.—Pittsburgh, etc., R Co. v. Wilson, 72 N.E 666, 34 Ind App. 324.
51 C J. p 555 note 41.

91. Ind —Pittsburgh, etc, R Co v. Kearns, 108 N E. 873, 58 Ind.App. 694.

92. Md —Linthicum v. Washington, etc, Electric R. Co., 92 A. 917, 124 Md. 263.
51 C J. p 555 note 43.

93. Ind —Louisville, etc, R. Co. v. Moore, 5 N.E. 413, 106 Ind 600.
51 C.J. p 555 note 44.
Construction and maintenance of fences generally see infra §§ 176–181.
Conveyance as releasing company from fence building see supra § 81 d.

94. Ky.—Louisville, etc, R. Co. v. Durbin, 198 S W. 908, 178 Ky. 363
51 C J. p 556 note 45.
Construction and maintenance of cattle guards generally see infra §§ 176–181.

95. W.Va.—Recco v. Chesapeake & O. Ry. Co., 32 S E 2d 449, 127 W Va. 321.
51 C.J. p 556 note 46.
Construction and maintenance of private or farm crossings generally see infra §§ 169–175.
Duty to construct private crossing generally see infra § 170.

96. Miss —Yazoo, etc., R. Co v. Hughes, 103 So. 805, 139 Miss 177.
51 C J. p 556 note 47.

97. Pa —Hall v. Clearfield, etc., R Co, 31 A. 940, 168 Pa. 64
51 C J p 556 note 48.

98. Pa —Perkiomen R. Co v. Bromer, 66 A 359, 217 Pa 263.
51 C J. p 556 note 49.

99. Miss —Childs v Boston, etc, R. Co, 99 N E. 957, 213 Mass 91, 48 L.R.A.,N S., 378.

Use by public

Where private crossing over railroad tracks was created by covenant running with land contained in deed conveying right of way through farmlands, fact that owners of portions of dominant estate which had been subdivided into town lots had made no objections to use of such crossing by public as connecting link with public highway, in absence of dedication, did not destroy the right to a private crossing—Recco v Chesapeake & O. Ry. Co, supra

1. Ind.—Pittsburgh, etc., R. Co v. Wilson, 72 N.E 666, 34 Ind App 324.
51 C J. p 556 note 51

2. W.Va —Briscoe Home v Ohio River R Co, 89 S.E 727, 78 W Va 502, L R A 1916F 1294.
51 C J. p 556 note 52.

3. N.Y.—Perry v. Lehigh Valley R. Co, 30 N.Y.S. 140, 9 Misc 515, affirmed 35 N Y S. 1114, 86 Hun 617
51 C J p 556 note 53.

4. Ky —Big Sandy R Co. v. Rice, 143 S W 46, 146 Ky. 619, rehearing denied 143 S W. 1199, 147 Ky 645
51 C J p 556 note 54

5. Iowa.—Hull v. Chicago, B & P. R Co, 22 N.W 940, 65 Iowa 713.
51 C J p 557 note 55.

6. Iowa.—Hull v. Chicago, B. & P R Co, supra.
51 C J p 557 note 56.

7. Ky —Louisville, etc, R Co. v Durbin, 198 S.W. 908, 178 Ky. 363

8. Mass.—New York Cent., etc., R Co. v Clarke, 117 N.E. 322, 228 Mass 274
51 C.J. p 557 note 58.

b. Time for Construction and Excuses

Unless the conveyance specifies the time within which private crossings, cattle guards, or fences are to be constructed, the obligation of the railroad company is to comply with such duty within a reasonable time after it takes possession, or after the road is completed.

Unless the conveyance specifies the time within which crossings, cattle guards, or fences are to be constructed,[9] the obligation of the railroad company is to comply with such duty within a reasonable time after it takes possession[10] or after the road is completed.[11] If the company fails to perform this duty, within the time specified, or within a reasonable time, it is not liable as a trespasser for running on the right of way secured from the landowner.[12]

A railroad company cannot avoid its duty to perform a covenant or condition to construct and maintain a private or farm crossing on the ground that, since the conveyance and covenant or condition were made, it has made such changes in its tracks, etc., that the erection and maintenance of such crossing would be a great embarrassment to it in operating its road,[13] or on the ground that the building of the crossing at the particular place or grade designated would be at a considerable expense,[14] or because of the public service character of the railroad company;[15] nor can it exonerate itself from such duty by a statutory condemnation of the right of way.[16] Where the company has assumed responsibility for the maintenance of a fence or crossing, it cannot exempt itself from such obligation by conveying the property to another company, without the landowner's consent,[17] nor is it excused for failing to maintain the crossing by the fact that it had constructed it according to plans agreed on, but that it had collapsed.[18]

c. Character and Sufficiency

The language of the particular covenant or condition, as construed in connection with the general rules relating to the character and sufficiency of private or farm crossings over a railroad right of way, controls in determining the character and sufficiency of the crossing to be constructed and maintained thereunder.

The language of the particular covenant or condition, as construed in connection with the general rules relating to the character and sufficiency of private or farm crossings over a railroad right of way, controls in determining the character and sufficiency of the crossing to be constructed and maintained thereunder;[19] and as so construed may include the duty of constructing necessary approaches to the crossing,[20] as where it is necessary to elevate the tracks above or lower them beneath the natural surface of the ground,[21] and also extends to a crossing over an additional width of the right of way which the company has acquired by condemnation.[22]

Such a covenant or condition also includes a bridge over a watercourse, through the lands of the grantor, which is diverted by the railroad company so as to run parallel to the tracks, and partly on the right of way and partly on the land of the grantor,[23] but where, through negligence of the owner of the stream, the channel is deepened and widened, the railroad company cannot be required to pay the entire cost of rebuilding the bridge which has been destroyed or washed away by high water.[24]

Even though the railroad company is not bound to construct and maintain a particular mode of

9. Ind—Cincinnati, etc, R Co. v Harris, 61 Ind. 290.
51 C J p 557 note 59.

10. Ind—Indiana, etc, R Co v. Koons, 5 N.E 549, 105 Ind 507.

11. Ill—Springfield, etc, Tract Co. v. Warrick, 94 N.E 933, 249 Ill. 470, Ann Cas 1912A 187
51 C J. p 557 note 61.

12. Ky—Mt Sterling Coal Road Co. v Beatty, 4 Ky.L. 365.

13. Ill—Cleveland, etc., R. Co. v. Hobbie, 61 Ill App. 396
Excuses for nonperformance of covenants or conditions generally see infra § 96.

14. Ky—Cincinnati Southern R. Co v. Hudson, 11 S W. 509, 88 Ky 480, 10 Ky L 1043.
Md—Linthicum v. Washington, etc., Electric R. Co., 92 A. 917, 124 Md. 268.

15. Md—Linthicum v Washington, etc, Electric R Co, supra

16. Ky—Stafford v Big Sandy R. Co, 105 S W 389, 32 Ky L. 154
51 C J p 557 note 69.

17. Ky—Louisville R Co v. Wiggington, 161 S W 209, 156 Ky. 400.

18. Wash—Clemons v Grays Harbor, etc, R. Co, 114 P. 865, 63 Wash 38
51 C J. p 558 note 71.

19. Ky.—Louisville & N. R. Co v. Pierce, 230 S W 2d 430, 313 Ky. 139
Mass—Cooley v. Boston & M. R. R., 21 N.E 2d 953, 303 Mass. 371, 122 A.L.R. 1166.
W Va—Recco v. Chesapeake & O Ry Co, 32 S.E.2d 449, 127 W.Va. 321
51 C J. p 558 note 74.
Character and sufficiency of private or farm crossing generally see infra § 173.

Underground crossing
Where landowner and railroad acquiesced in construction of underground railroad crossing pursuant to easement calling for grade crossing, county, as grantee of highway right of way from railroad, could not complain—Beck v. Lane County, 18 P.2d 594, 141 Or. 580.

20. Ky—Louisville, etc, R Co. v. Tuttle, 258 S.W 688, 201 Ky. 798.
51 C.J. p 558 note 75.

21. Ky—Louisville, etc., R. Co. v. Tuttle, supra

22. Ind—Pittsburgh, etc, R. Co. v. Kearns, 128 N E. 42, 191 Ind 1.
51 C.J. p 558 note 77.

23. W Va.—Briscoe Home v. Ohio River R. Co., 89 S E. 727, 78 W.Va. 502, L R A 1916F 1294.

24. W Va.—Briscoe Home v. Ohio River R. Co., supra.

crossing, if it does so and acquiesces therein for a number of years, it cannot afterward abolish it and substitute another mode of crossing without the landowner's consent unless it makes proper compensation therefor,[25] or makes a crossing that is as convenient to the landowner as the old one was.[26]

Fence or cattle guard. Where a covenant to fence does not specify how it shall be done, the law implies a promise to do it in the usual way, and that it shall be complete for the purpose for which it was intended.[27] Where the character of the fence or cattle guard to be erected is regulated by statute, the statutory regulation must be complied with by whomsoever the fence or cattle guard is erected.[28] For example, if the deed requires the grantor to erect and maintain all necessary fencing, and the railroad company to make proper cattle guards, the fencing required to be erected is such as both parties would have been required to construct and maintain by statute except for the contract,[29] and the cattle guards such as the statute requires the railroad company to provide,[30] and, where under such a deed the grantor does not build any parallel fencing on the railroad's right of way, the railroad company is not required to provide cattle guards.[31]

§ 95. —— Effect of Succession to, or Transfer of, Property

a. Of grantee
b. Of grantor

a. Of Grantee

A successor of a railroad company, such as a grantee or assignee, is ordinarily bound by all the conditions and covenants in a conveyance to the original company which run with the land.

Subject to the rules relating to conditions or covenants running with the land in general, a successor of a railroad company, such as a consolidated company,[32] or a grantee or assignee, unless it has never taken possession of or used the land or exercised any ownership over it,[33] is bound by all conditions and covenants in a conveyance to the original company which run with the land,[34] such as a covenant to furnish the grantor with an annual pass and on condition that a failure to do so will work a forfeiture of the grant,[35] or a covenant or condition to construct and maintain a station or depot on the premises,[36] or to construct or maintain fences,[37] cattle guards, or crossings.[38] A corporation purchasing a railroad is charged only with such conditions as attach by law,[39] and no presumption arises from its mere occupancy of the land under a deed that there has been a private agreement as to certain conditions which would not otherwise attach.[40]

A succeeding company is not bound by a covenant or condition which does not run with the land,[41] or which is contained in an unrecorded contract, not made a part of its deed, in the absence of proof of actual notice of the contract providing therefor;[42] nor is it bound by a parol agreement with its predecessor, the consideration for which is a claim for damages which is not a lien on the land, where the burden imposed by the agreement is junior to a trust deed under which the succeeding company acquires title, and is not necessary for the proper construction and operation of the road.[43] The mere fact that one railroad company is operating a road constructed by another does not establish an assumption by it of an obligation incurred by the latter in the construction of its road.[44]

25. N.Y.—Fox v. Buffalo, etc., R. Co., 123 N.Y.S. 183, 67 Misc. 621
51 C.J. p 558 note 80.

26. N.Y.—Fox v. Buffalo, etc., R. Co., supra.

27. Idaho.—Lane v. Pacific, etc., R. Co., 67 P. 656, 8 Idaho 230

28. Ky.—Louisville, etc., R. Co v. Durbin, 198 S.W. 908, 178 Ky. 363.

29. Ky.—Louisville, etc., R. Co. v. Durbin, supra.

30. Ky.—Louisville, etc., R. Co. v Durbin, supra.
51 C.J. p 558 note 86.

31. Ky.—Louisville, etc., R. Co. v. Durbin, supra.

32. N.Y.—Morgan Lake Co v. New York, N. H. & H. R. Co, 186 N.E. 685, 262 N.Y. 234
51 C.J. p 559 note 1.

33. Tenn.—Carnegie Realty Co. v. Carolina, etc, R. Co., 189 S.W. 371, 136 Tenn. 300.

34. N.Y.—Morgan Lake Co. v. New York, N. H & H. R Co., 186 N.E. 685, 262 N.Y 234—Morgan Lake Co. v. New York, N H & H R Co, 245 N.Y.S. 116, 230 App.Div. 356
51 C.J. p 559 note 3.

35. Mo.—Ruddick v. St. Louis, etc, R. Co., 22 S.W. 499, 116 Mo. 25, 38 Am.S.R. 570.

36. Ill.—Latham v. Illinois Cent. R Co., 97 N.E. 254, 253 Ill. 93.
51 C.J. p 559 note 5.

37. Ind.—Millikan v. Hunter, 100 N. E. 1041, 180 Ind 149.
51 C.J. p 559 note 6.

38. N.Y.—Munro v. Syracuse, etc, R Co, 93 N.E 516, 200 N.Y. 224, 21 Ann Cas. 594
51 C.J. p 559 note 7.

39. Tex.—Logue v. Southern Kansas R. Co, 167 S.W. 805, 106 Tex. 445.

40. Tex.—Logue v. Southern Kansas R Co, supra.
51 C.J p 560 note 9

41. Fla.—Armstrong v. Seaboard Air Line R. Co., 95 So 506, 85 Fla 126.
51 C.J. p 560 note 10.

Private crossing
Ohio.—Zens v Railroad Co., 14 Ohio N.P.,N.S., 202.

42. Ky.—Witt v Louisville, etc., R Co, 270 S.W. 732, 208 Ky. 126
51 C.J. p 560 note 11.

43. Iowa.—Hunter v. Burlington, etc, R. Co., 41 N.W. 305, 76 Iowa 490.

44. **Obligation to construct farm crossing**
Mo.—Sheridan v. Atchison, etc., R. Co., 56 Mo.App. 68.

Purchase through third person. Notwithstanding a railroad company procures the premises indirectly through a third person employed by it, it is bound to perform all conditions and undertakings in the deed conveying such premises if it constructs and operates its road under such conveyance.[45] Where the deed to the right of way is made to such third person and the covenants therein are made with him personally, he is personally bound for their subsequent performance or breach,[46] although the grade for the railroad thereon is constructed by a railroad company[47]

Assignment of contract of purchase. Where a contract of purchase, containing covenants which run with the land, is assigned to another company, to whom a deed is made by the grantor, containing such covenants, the contract becomes merged in the deed, and cannot thereafter be enforced against the original purchaser, as containing personal covenants.[48]

b. Of Grantor

Covenants and conditions, in a deed of land for railroad purposes, may be enforced by the grantor, although he subsequently conveys the adjoining land to a third person if the later grant reserves rights against the railroad company. In the absence of such a reservation, however, a covenant or condition that runs with the land ordinarily may be availed of and enforced against the railroad company by the original grantor's successor in title, such as his assignee or grantee.

Covenants and conditions, in a deed to land for railroad purposes, may be enforced by the grantor, although he subsequently conveys the adjoining land to a third person, if the later grant reserves rights against the railroad company;[49] and, where there is a reversion clause for condition broken in the original deed to the railroad company, no estate or interest in the strip of land so conveyed passes to a subsequent grantee of the adjoining land,[50] unless it is transferred to him by terms of the conveyance to him;[51] and especially he has no such estate or interest where the deed to him expressly reserves or excepts such strip of land.[52] In the absence of such a reservation, however, the conveyance of a tract of land abutting on a railroad right of way includes the servient estate in the right of way,[53] and a covenant or condition that runs with the land ordinarily may be availed of and enforced, against the railroad company, by the original grantor's successor in title, such as his assignee or grantee,[54] to the extent that it could have been availed of by the original grantor,[55] except that, where the covenant has already been broken at the time of the transfer, it does not pass without an express assignment.[56]

A covenant by a railroad company to erect and maintain fences, cattle guards, or a farm crossing, when in the form of a covenant running with the land, is available, against a company claiming under the conveyance, for the protection of the grantor's assignees or grantees,[57] including a lessee of

45. Purchase through construction company
Ga.—Chattanooga, etc., R. Co. v. Davis, 15 S.E. 626, 89 Ga. 708.

46. Ind.—Polk v. Givens, 90 N.E. 19, 44 Ind. App. 667.
51 C.J. p. 560 note 15.

47. Ind.—Polk v. Givens, supra.

48. Ga.—Nelson v. Atlanta, etc., R. Co., 69 S.E. 1118, 135 Ga. 572.

49. Ky.—Cincinnati Southern R. Co. v. Hogan, 13 Ky. Op. 1096.

50. Cal.—Hannah v. Southern Pac. R. Co., 192 P. 304, 48 Cal. App. 517.

51. Cal.—Hannah v. Southern Pac. R. Co., supra.

52. Cal.—Hannah v. Southern Pac. R. Co., supra.

53. U.S.—Roxana Petroleum Corp. v. Sutter, C.C.A. Kan., 28 F.2d 159.

54. Md.—Middleton Realty Co. v. Roland Park Civic League, 78 A.2d 200.
Mass.—Miles v. Boston, R. B. & L. R. Co., 174 N.E. 200, 274 Mass. 87.
W.Va.—Recco v. Chesapeake & O. Ry. Co., 32 S.E.2d 449, 127 W.Va. 321.
51 C.J. p. 560 note 23.

Right of reentry
(1) Under statute prohibiting transfer of mere right of reëntry for breach of condition subsequent to anyone except owner of property affected thereby, such a right in grantor and his heirs under reverter provision in deed conveying parts of two lots to railroad company for right of way purposes was inalienable to anyone except such company, so that grantor's subsequent deed, conveying lots in their entirety to individual, did not convey right of reëntry.—Fuhr v. Oklahoma City, 153 P.2d 115, 194 Okl. 482.—Jones v. Oklahoma City, 145 P.2d 971, 193 Okl. 637.

(2) Where right of reëntry, reserved to landowner in deed conveying portion of lot to railroad for right of way purposes, was not alienable when right was created, but thereafter law was changed making contingent remainders the equivalent of a conditional limitation and alienable, landowner's subsequent conveyance by quitclaim deed of all his interest in lot carried with it right of reëntry.—Fuhr v. Oklahoma City, supra.

55. Ala.—Patterson v. Atlantic Coast Line R. Co., 81 So. 85, 202 Ala. 583.
51 C.J. p. 561 note 24.

56. Ky.—Witt v. Louisville, etc., R. Co., 270 S.W. 732, 208 Ky. 126.
51 C.J. p. 561 note 25.

57. Ky.—Louisville & N. R. Co. v. Pierce, 230 S.W.2d 430, 313 Ky. 189.
Mass.—Miles v. Boston, R. B. & L. R. Co., 174 N.E. 200, 274 Mass. 87.
51 C.J. p. 561 note 26.

Owners of dominant estate
A railroad's covenant "to build and maintain a good crossing with cattle guards," contained in deed conveying right of way through farm lands, runs with land and is enforceable in suit by owners of any portion of dominant estate which has been subdivided into town lots, in absence of any limitation in covenant as to duration or purpose of crossing.—Recco v. Chesapeake & O. Ry. Co., 32 S.E.2d 449, 127 W.Va. 321.

Purchaser of land on both sides of track
The fact that portion of tract of land exclusively on one side of rail-

such a grantee[58] or of the grantor.[59] Under a statute requiring a railroad company to keep and maintain its general offices at the place where it has contracted for the locating thereof, the grantee of a tract of land on which a railroad company has located its depot, offices, etc., is entitled to the benefit of any contract with his grantor for the permanent maintenance of them thereon.[60] Where a railroad company accepts and registers a deed conveying the land on which a depot is erected, and containing a covenant on its part to maintain its depot on such land, and thereby induces purchasers to buy contiguous lands of the grantor on the faith of the recitals in the deed, it is estopped to deny that it is bound by the covenant, even though it has in fact obtained the full title through another instrument;[61] and even though such a covenant is not for the benefit of land previously conveyed by the grantor to other parties, the removal of the depot may be restrained at the instance of a person who purchased land that was owned by the common grantor at the time of the covenant, and is therefore entitled to the benefit of the covenant.[62]

Covenant or condition by grantor. Likewise such a covenant or condition, on the part of the grantor, is enforceable against his successor in title,[63] such as a covenant binding the grantor to erect or maintain fences along the right of way.[64] A subsequent purchaser from the grantor is not bound by written agreements of which he had no notice, actual or constructive, at the time of the purchase.[65]

§ 96. —— Excuses for Nonperformance and Waiver of Performance

The general rules as to the release or waiver of covenants or conditions in a deed or of excuses for the nonperformance or breach of such covenants or conditions usually apply with respect to the nonperformance or breach of covenants or conditions in a grant of land to a railroad company.

The general rules as to the release or waiver of covenants or conditions in a deed or of excuses for the nonperformance or breach of such covenants or conditions apply with respect to the nonperformance or breach of covenants or conditions in a grant of land to a railroad company.[66] Thus a railroad company cannot excuse its failure to perform conditions or covenants contained in a grant on the ground of financial embarrassment,[67] or for want of room, where it can acquire additional land by condemnation,[68] or on the ground that it has concentrated its force on some other part of its line;[69] or on the ground of defects of title, if with knowledge thereof it retains exclusive and undisputed possession of the land;[70] or because the part of its roadbed in question has been damaged or washed away by the ordinary action of waters, without any fault on its part, but not to such extent that it cannot be repaired and protected against further injury,[71] unless it protects itself by contract against such damages;[72] nor in case of a grant in a town can it be released from the performance of such conditions by an ordinance of the town.[73] The railroad company is excused from performing a condition or covenant, the performance of which is rendered void by a subsequent statute,[74] and it has been held that, if the estate has already vested in the railroad company, it will not be divested by reason of such nonperformance;[75] but on the other hand it has been held that, if such covenant or condition constituted the consideration for the grant, on

road track running through tract was owned by another than persons purchasing rest of tract on both sides of track from grantors of railway right of way did not preclude such purchasers from enforcing their right under right of way deed to additional cattle passway under track —Louisville & N R Co. v. Pierce, 230 S.W.2d 430, 313 Ky. 189.

58. Ky.—Louisville & N. R Co v. Pierce, supra.

59. Pa.—Kelemenan v Pittsburg, etc, R. Co., 52 Pa.Super. 52.
51 C.J. p 561 note 28.

60. Tex.—Logue v. Southern Kansas R Co., 167 S.W. 805, 106 Tex 445.

61. Tex.—San Antonio, etc, R Co v. Mosel, Civ.App, 195 S.W. 621

62. Tex.—San Antonio, etc, R. Co. v. Mosel, supra.

63. Ind.—Union Tract. Co. v. Thompson, 111 N.E. 648, 61 Ind. App. 183
51 C.J. p 562 note 34.

64. Mass.—New York Cent, etc., R. Co. v. Clarke, 117 N.E. 322, 228 Mass. 274
51 C.J. p. 562 note 34.

65. Ohio.—Pittsburg, etc, R Co v Bosworth, 18 N.E. 533, 46 Ohio St 31, 2 L.R.A. 199
51 C.J. p 562 note 35.

66. Ky.—Chicago, etc., R. Co v. Dodds, 181 S.W. 666, 167 Ky. 624.
51 C.J. p 562 note 39.
As to fences, cattle guards, and crossings see supra § 94 b.

67. R.I.—New York, etc, R Co. v. Providence, 19 A. 759, 16 R.I. 746.

68. Ga.—Reidsville, etc, R Co v. Baxter, 79 S.E. 187, 13 Ga.App 357.
51 C.J. p 562 note 41.

69. N.C.—McDowell v. Blue Ridge, etc, R. Co., 57 S.E. 520, 144 N.C. 721
51 C.J. p 562 note 42.

70. Ky.—Louisville, etc., R. Co. v. Letcher County Coal, etc., Co., 243 S.W. 45, 195 Ky 297.
51 C.J. p 562 note 43.

71. U.S.—Ferguson v Omaha, etc, R Co., Neb, 227 F. 513, 142 C.C.A. 145

72. U.S.—Ferguson v. Omaha, etc., R. Co., supra.

73. Ill.—Lyman v Suburban R Co, 60 N.E. 515, 190 Ill. 320, 52 L.R.A. 645
51 C.J. p 562 note 46.

74. Ill.—Hite v. Cincinnati, etc., R Co., 119 N.E. 904, 284 Ill 297.
W.Va.—Bell v. Kanawha Traction & Electric Co., 98 S.E. 885, 83 W.Va 640

75. Ill.—Hite v. Cincinnati, etc., R. Co, supra.
51 C.J. p 562 note 48.

the covenant or condition thus becoming impossible of performance, the company should either restore the property or pay for it on equitable terms.[76]

Waiver or release. A covenant or condition may be waived or a forfeiture saved by acts of the grantor which show an intention to forego the benefits of the condition.[77] A railroad company's statutory duty to construct necessary culverts or sluices is not waived by the grantor by recitals in the conveyance that, as a consideration therefor, the company will maintain in good condition all drainage ditches, etc., as long as they are deemed necessary by the grantor;[78] but such provision merely adds the further duty of maintaining existing ditches.[79] A grantor's release of his right to recover damages from the railroad for its failure to discharge such statutory duty must be sustained by a sufficient consideration.[80]

§ 97. —— Rights and Remedies of Parties

a In general
b Cancellation, rescission, or reformation
c Injunction
d. Damages

a. In General

Where a railroad company fails to comply with the covenants or conditions on which land was granted to it, the grantor may maintain an action against the company for damages sustained by reason of the breach.

As in the case of a breach of covenants or conditions in a deed generally, where a railroad company fails to comply with the covenants or conditions on which land was granted to it, the grantor, unless he is estopped by his acquiescence or laches,[81] may maintain an action against the company for damages sustained by reason of the breach,[82] in which action the general rules apply as to parties,[83] pleading,[84] evidence,[85] and trial.[86]

While it has been held that, where the deed conveying land to a railroad company expressly provides that land conveyed shall revert in case of breach of covenant, the grantor is relegated to the remedy so provided,[87] it has also been held that the grantor may sue for damages, even though the contract conveying the land gives the grantor a right to have a reconveyance on a breach of a condition, but does not specifically provide that such reconveyance shall be the exclusive remedy on such breach,[88] and the fact that the grantor has such an election does not give the grantee a right to elect whether it will respond in damages or by a reconveyance.[89] The grantor may sue to recover the land or its value together with such other considerations as have

76. Ky—Louisville, etc, R Co v Crowe, 160 S W 759, 156 Ky 27, 49 L R A,N S, 848
51 C J p 562 note 49

77. Ohio—Central Ohio Light & Power Co v Hixenbaugh, 3 N E. 2d 919, 52 Ohio App 467.
51 C J. p 562 note 50

78. Tex—Missouri, etc, R Co. v. Riverhead Farm, 117 S W. 1049, 53 Tex.Civ App 643

79. Tex—Missouri, etc, R. Co. v Riverhead Farm, supra

80. Tex—Missouri, etc, R Co v Riverhead Farm, supra.

81. La—Gayden v Louisville, etc., R Co., 1 So 792, 39 La Ann. 269.
51 C.J p 563 note 58.

82. Ky—Louisville & Interurban R. Co. v Guenther, 105 S W 2d 1029, 268 Ky 790
La—Louisiana Farms Co v Yazoo & M. V. R Co, 154 So 445, 179 La. 539
N Y—Morgan Lake Co. v. New York, N. H & H R Co, 245 N Y S 116, 230 App.Div. 356.
51 C J p 557 note 63, p 563 note 59
Lien for damages for breach of condition see infra § 264.

Maintenance of switch and flag stop
Where railroad was prevented from carrying out agreement in right-of-way deed to maintain switch and flag stop on plaintiff's premises by interstate commerce commission order directing abandonment of line, and railroad did not seek to retain benefit received and offered to return right of way to plaintiff, railroad was not obligated to compensate plaintiff for loss of switch and flag stop—Meacham v. Louisville & N. R Co, 169 S W.2d 830, 293 Ky. 642

Defenses
In action against railroad for breach of an agreement in right-of-way deed to maintain switch and flag stop on plaintiff's premises, plea that railroad had abandoned line and switch under an order of interstate commerce commission stated a good defense—Meacham v. Louisville & N R Co, supra.

83. Ky—Chicago, M. & G R Co. v. Dodds & Johnson, 181 S.W. 666, 167 Ky 624.

Tenants
In action by grantor to recover for injury to crops, caused by breach of covenant in deed to railroad of right of way to fence and ditch, tenants are not necessary parties—Chicago, M. & G. R. Co v. Dodds & Johnson, supra.

84. Ind—Pittsburgh, etc., R Co. v. Kearns, 108 N.E. 873, 58 Ind.App. 694.
51 C J. p 563 note 60.

85. N Y—Morgan Lake Co. v. New York, N. H & H. R. Co., 186 N E 685, 262 N Y 234
51 C.J. p 563 note 61

Evidence held sufficient
La—Louisiana Farms Co v. Yazoo & M V. R Co, 154 So. 445, 179 La. 539.

Evidence held insufficient
N Y—Morgan Lake Co. v New York, N H & H R. Co., 186 N.E. 685, 262 N Y. 234.

86. **Directed verdict held authorized**
Ind—Cunningham v. New York Cent. R Co., 48 N E 2d 176, 114 Ind.App. 90.

Questions for jury
N J—Gumaerd Lead, etc., Co v Erie R Co, 104 A. 134, 92 N J. Law 216
51 C J p 563 note 62 [b].

Instructions held proper
Ind—Pittsburgh, etc., R Co v. Kearns, 128 N E. 42, 191 Ind. 1.
51 C J p 563 note 62 [a].

87. Ohio—New York Cent. R Co v. City of Bucyrus, 186 N.E 450, 126 Ohio St 558, followed in Bush v. Hague, 191 N E. 5, 128 Ohio St. 342.

88. N.Y—Fairchild v. City, etc., Contract Co, 138 N.Y.S. 133, 153 App.Div. 277.

89. N.Y.—Fairchild v. City, etc., Contract Co., supra.

passed,[90] but he may not sue both for the land and for damages for its taking.[91] It has been held that, where the condition is a condition subsequent, without any promissory undertaking on the part of the grantee, the grantor is entitled only to a forfeiture of the estate,[92] and not to a decree for specific performance[93] or a judgment for damages.[94]

b. Cancellation, Rescission, or Reformation

Ordinarily, a grantor is not entitled to a cancellation or rescission of a grant to a railroad company for the mere breach of a covenant or condition, unless the whole enterprise is abandoned.

Ordinarily, a grantor is not entitled to a cancellation or rescission of a grant to a railroad company for the mere breach of a covenant or condition,[95] unless the whole enterprise is abandoned.[96] Equity will not cancel a right-of-way deed on the ground of failure to issue an annual pass as consideration additional to that expressed in the deed, where compliance with the agreement is prohibited by the Interstate Commerce Act.[97] So, also, in the absence of fraud, a right-of-way deed will not be canceled because of a breach of a contemporaneous parol agreement,[98] nor in a suit to cancel such a deed will alternative relief in damages be granted for such breach, where the deed itself recites a money consideration that is actually paid and the nonperformance complained of is not incorporated in or made a condition in the written conveyance.[99]

The grantor may, on tendering back the price paid,[1] maintain a suit in equity for the cancellation of a conveyance which has been obtained by fraud.[2]

It has been held that a violation by the railroad of a provision of a right-of-way contract does not authorize the termination of the contract by the grantor and the forcible removal of the tracks.[3]

Where a railroad company receives a right-of-way grant on payment of money and an agreement to construct a crossing, the agreement to construct the crossing has been held to be severable from the grant, and the railroad company may rescind such agreement, if it is found necessary in the improvement of its road, and subject itself to monetary damages without losing the grant.[4]

Reformation. The grantor may maintain an action for the reformation of the contract to convey by the insertion of a covenant or condition, to make it conform to the terms agreed on.[5]

c. Injunction

The grantor may sue for an injunction to restrain the railroad from breaking the covenants or conditions of a conveyance of land.

The grantor, instead of suing for damages or for forfeiture of the land, may sue for an injunction to restrain the railroad company from breaking the covenants or conditions of a conveyance of land,[6] and for damages for breaches already made;[7] and the mere fact that the grantor has delayed in bringing suit does not bar him from equitable relief where defendant is not prejudiced by such delay.[8] Thus until the public interest requires the removal of a depot, the railroad company may be restrained from removing it in violation of a covenant,[9] but a judg-

90. Tex.—Tyler v. St. Louis Southwestern R. Co., Civ.App., 87 S.W. 238, reversed on other grounds 91 S.W. 11, 99 Tex. 491
51 C.J. p. 564 note 67.

91. Tex.—Gulf, etc., R. Co. v. Dunman, 11 S.W. 1094, 74 Tex. 265

92. Iowa.—Close v. Burlington, etc., R. Co., 19 N.W. 886, 64 Iowa 149
Wash.—Mills v. Seattle, etc., R. Co., 39 P. 246, 10 Wash. 520.
Forfeiture for breach of condition in private grant see infra § 120.

93. Iowa.—Close v. Burlington, etc., R. Co., 19 N.W. 886, 64 Iowa 149

94. Iowa.—Close v. Burlington, etc., R. Co., supra.
Wash.—Mills v. Seattle, etc., R. Co., 39 P. 246, 10 Wash. 520

95. Mo.—Haydon v. St. Louis, etc., R. Co., 121 S.W. 15, 222 Mo. 126
51 C.J. p. 565 note 87.
Forfeiture for breach of condition see infra § 120

96. Ga.—Savannah, etc., R. Co. v. Atkinson, 21 So. 1010, 94 Ga. 780.
51 C.J. p. 565 note 89.

97. W.Va.—Dorr v. Chesapeake, etc., R. Co., 88 S.E. 666, 78 W.Va. 150, L.R.A. 1916E 622
51 C.J. p. 565 note 90.

98. Miss.—New Orleans Great Northern R. Co. v. Belhaven Heights Co., 84 So. 178, 122 Miss. 190, 13 A.L.R. 560
51 C.J. p. 565 note 91.

99. Miss.—New Orleans Great Northern R. Co. v. Belhaven Heights Co., supra.

1. S.C.—Cochran v. Greenville, etc., R. Co., 81 S.E. 191, 97 S.C. 34.
51 C.J. p. 565 note 85.

2. S.C.—Cochran v. Greenville, etc., R. Co., supra
51 C.J. p. 565 note 86.

3. Ind.—Barth v. Pittsburgh, C., C. & St. L. Ry. Co., 93 N.E. 535, 175 Ind. 554.

4. Pa.—Williams v. Delaware, etc., R. Co., 99 A. 477, 255 Pa. 133—Lilley v. Pittsburg, etc., R. Co., 62 A. 852, 213 Pa. 247.

5. Mo.—Jewett v. Chicago, etc., R. Co., 45 Mo.App. 58.
51 C.J. p. 565 note 84.

6. Ga.—Wardlaw v. Southern Ry. Co., 33 S.E.2d 304, 199 Ga. 97.
51 C.J. p. 564 note 73
Petition held insufficient
Petition to enjoin use of land for any purpose at variance with stipulation in deed to railroad that it should be used only for railroad depot did not state a cause of action against railroad in absence of allegation of any understanding between railroad and its grantees that grantees would attempt an illegal use of land conveyed.—Wardlaw v. Southern Ry. Co., supra

7. N.Y.—Atlantic Mills v. New York Cent. R. Co., 223 N.Y.S. 206, 221 App.Div. 386, affirmed 162 N.Y.S. 514, 248 N.Y. 535.

8. N.Y.—Atlantic Mills v. New York Cent. R. Co., supra.
51 C.J. p. 564 note 75.

9. Tex.—San Antonio, etc., R. Co. v. Mosel, Civ.App., 195 S.W. 621—Mosel v. San Antonio, etc., R. Co., Civ.App., 177 S.W. 1048.
51 C.J. p. 564 note 77 [a].

ment restraining such removal in violation of a covenant does not prevent such removal in obedience to an order of the railroad commission when public benefit requires such removal,[10] since while the railroad commission has authority to enforce the law as to the removal of railway depots, it is not its duty to enforce contracts of railroad companies with private individuals as to the maintenance of depots.[11] So, where the condition of a license granted is that the license shall be void unless the road is constructed within a certain time, the licensor may enjoin the further extension of the road over the line after such time has elapsed[12] Where the company subsequently finds it necessary to disregard a covenant or condition in order properly to discharge its duty to the public, it will not be enjoined against a breach of its agreement,[13] but the owner of the land will be remanded to a suit for damages growing out of the breach.[14]

A grantor cannot compel discontinuance of railroad operations as a means of securing performance of a contract obligation to himself.[15]

A railroad company may maintain a suit against the landowner to enjoin interference with the right of way and to quiet title,[16] and in such suit the court may restrict the right of the landowner to a private crossing of the track to be maintained by him at the place designated in the conveyance.[17]

d. Damages

(1) In general
(2) Failure to erect or removal of station
(3) Failure to construct and maintain fence or crossings

(1) In General

As a general rule, the measure of damages for a breach of a covenant or a condition by a railroad company is the actual damage sustained by reason of such breach, and the landowner is not entitled to recover speculative damages.

As a general rule, the measure of damages for a breach of a covenant or a condition by a railroad company is the actual damage sustained by reason of such breach,[18] and the landowner is not entitled to recover speculative damages.[19] The measure of damages has been held to be the difference in the value of the land before and after the breach,[20] or the difference in the rental value of the land before and after the breach.[21]

As to ditches and drains; levees. Where a railroad company violates its contract as to constructing and maintaining a culvert or ditches, by reason of which adjacent land is injured, the amount to which plaintiff is entitled is the actual damages sustained,[22] and, in case of injury to growing crops, is the difference in value of such crops immediately before the injury and their value immediately after[23] The measure of damages in such cases as to land in cultivation is the difference in value between what was raised and what could have been raised except for the breach,[24] and, as to land the grantor was prevented from cultivating, has been held to be its rental value,[25] or the cost and expense of restoring the land to its former condition, and the loss occasioned by being deprived of the use of it, with interest.[26] It has been held that the measure of damages for a breach of contract to construct a proper levee is what it would reasonably cost to build the levee which the railroad company con-

10. Tex—San Antonio, etc, R Co v. Mosel, Civ.App, 195 S W 621.

11. Tex.—San Antonio, etc, R Co v. Mosel, Civ App, 195 S W 621—Mosel v San Antonio, etc, R Co, Civ App, 177 S W 1048

12. Mich—Detroit, etc, Plank Road Co. v Detroit Suburban R Co, 61 N E 880, 103 Mich 585
N C—McDowell v. Blue Ridge, etc, R Co, 57 S E 520, 114 N C 721

13. Ohio—Miller v L S & M S R. Co, 12 Ohio N.P.,N S, 683

14. Ohio—Miller v. L S & M S. R Co, supra.

15. Fla—Taylor v Florida East Coast R Co, 45 So. 574, 54 Fla 635, 16 L R A,N S, 307.
51 C J p 565 note 83½.

16. Or—Oregon-Washington R., etc., Co v. Reed, 169 P 342, 170 P 300, 87 Or. 398

17. Or—Oregon-Washington R, etc, Co. v. Reed, supra.

18. N Y.—Morgan Lake Co. v. New York, N H & H R Co, 186 N E 685, 262 N Y. 234—Morgan Lake Co v New York, N. H & H R Co, 245 N Y S. 116, 230 App Div 356
51 C J p 565 note 97
Stipulations with respect to damages see supra § 90.

Interest was properly allowed on amount recovered as damages for breach of covenant.—Morgan Lake Co v New York, N H & H. R. Co, 186 N E 685, 262 N Y. 234.

Damaged ice
Measure of damages for railroad's breach of covenant to pay for damages by sparks, ashes, cinders, or coal dust to ice beyond right-of-way strip was difference between market value of clear ice, and fair reasonable value in market of damaged ice —Morgan Lake Co v. New York, N. H. & H. R Co., 186 N E. 685, 262 N. Y. 234.

19. Ga.—Reidsville, etc, R. Co. v. Baxter, 79 S E 187, 13 Ga App 357
51 C J p 565 note 96.

20. U S—Loewenthal v Georgia Coast, etc, R Co, D C Ga, 265 F 961, affirmed, C C A., Clarke v. Aiken, 276 F 21
51 C J p 565 note 98

21. Ind—Louisville, etc, R Co v Malott, 34 N.E 709, 135 Ind 113.

22. Wash—Moorman v Seattle, etc, R Co, 35 P 596, 8 Wash. 98
51 C J p 566 note 1.

23. Tex—Sabine, etc, R. Co v Joachimi, 58 Tex. 456.
51 C J. p 566 note 2.

24. Ky—Chicago, etc, R Co v. Stahr, 212 S W. 115, 184 Ky. 529—Chicago, etc., R. Co. v. Dodds, 181 S W 666, 167 Ky 624.

25. Ky—Chicago, etc., R Co v Stahr, 212 S W. 115, 184 Ky. 529.

26. Tex—Sabine, etc., R. Co. v. Joachimi, 58 Tex. 456.

tracted to construct;[27] and that the landowner is not entitled to recover, in addition, damages sustained by loss of crops due to the railroad company's failure properly to construct the levee, since, if plaintiff wished to avoid such loss, he might have done the work himself.[28]

A stipulation for liquidated damages for the breach of one covenant or condition does not apply to and authorize the recovery of such damages for the breach of a different covenant or condition.[29]

(2) Failure to Erect or Removal of Station

The measure of damages for a breach of a covenant or condition to erect and maintain a station on the land conveyed is determined by the injury actually sustained by reason of such a breach.

The measure of damages for a breach of a covenant or condition to erect and maintain a station on the land conveyed, in consideration of the conveyance, is determined by the injury actually sustained by the grantor by reason of such breach,[30] and, in case of a failure to erect a station, the measure of damages has been held to be the value of the land or right of way given,[31] with interest from the time the company took possession;[32] and also the amount in which the adjacent land would have been increased in value by the erection of the depot, that is, the difference between the value of the land without a depot and its value if a suitable depot had been constructed.[33] The increased value of the property with a depot for business purposes may be considered in this connection,[34] but not the profits which might have been made in business on the land.[35] Where the depot is eventually erected, and the breach consists in the failure to erect it within the time agreed, or within a reasonable time, the damages are measured by the benefit which the grantor would have derived therefrom to the time of performance,[36] or, as has been held, by the legal interest on the amount by which the value of land of such owner would have been enhanced by the erection of the building for the time its erection was delayed.[37] Where land is conveyed in consideration of a depot being established thereon, and the depot, after being established, is ordered by the railroad commission to be moved to another point, the grantor may recover the fair value of the land conveyed to, and appropriated and retained by, the company,[38] but not for consequential damages that may result to plaintiff in matters of business convenience and decreased values of contiguous property, from a change in the depot site ordered by an authorized governmental agency.[39]

(3) Failure to Construct and Maintain Fence or Crossings

Where a railroad company violates a covenant or condition to construct or maintain a fence or private crossing, recovery may be had for the reasonable cost of erecting the fences or constructing and maintaining the crossing, and for damages to the adjoining land caused by such construction, together with such damages as may have resulted from the inconvenience of not having the fence or crossing, and also together with special damages proximately caused by the omission of such structures.

Where a railroad company violates a covenant or condition to construct or maintain a fence or private crossing, although the grantor has not first done such work,[40] recovery may be had for the reasonable cost of erecting the fences or cattle guards or constructing and maintaining the crossing,[41] and for damages to the adjoining land caused by such construction,[42] together with such damages as may have resulted up to the time of trial, to the use and enjoyment of the adjoining land, from the inconvenience of not having the fence or crossing,[43] such as the depreciation in the rental value of the land,[44] and also together with special damages proximately

27. Ark.—St. Louis, etc., R. Co. v. Sanders, 121 S.W. 337, 91 Ark. 153

28. Ark.—St. Louis, etc., R. Co. v. Sanders, supra.

29. Wash.—Clemons v. Grays Harbor, etc., R. Co., 114 P. 865, 63 Wash. 38.
51 C.J. p. 566 note 8.

30. Ind.—Louisville, etc., R. Co. v. Sumner, 5 N.E. 404, 106 Ind. 55, 55 Am.R. 719.

31. Ark.—St. Louis, etc., R. Co. v. Berry, 110 S.W. 1049, 86 Ark. 309
N.J.—New York, etc., R. Co. v. Stanley, 35 N.J.Eq. 283

32. N.Y.—New York, etc., R. Co. v. Stanley, supra.

33. Ky.—Louisville, etc., R. Co. v. Letcher County Coal, etc., Co., 243 S.W. 45, 195 Ky. 297.
51 C.J. p. 566 note 13.

34. Pa.—Watterson v. Allegheny Valley R. Co., 74 Pa. 208.

35. Ky.—Elkhorn, etc., R. Co. v. Dingus, 220 S.W. 1047, 187 Ky. 812
Pa.—Watterson v. Allegheny Valley R. Co., 74 Pa. 208.

36. Ky.—Louisville, etc., R. Co. v. Baskett, 104 S.W. 695, 31 Ky.L. 1035

37. Ky.—Louisville, etc., R. Co. v. Johnson, 270 S.W. 58, 207 Ky. 813
—Elkhorn, etc., R. Co. v. Dingus, 220 S.W. 1047, 187 Ky. 812.

38. Fla.—Armstrong v. Seaboard Air Line R. Co., 95 So. 506, 85 Fla. 126.

39. Fla.—Armstrong v. Seaboard Air Line R. Co., supra.

40. Ind.—Indiana, etc., R. Co. v. Koons, 5 N.E. 549, 105 Ind. 507.
51 C.J. p. 567 note 21

41. Ind.—Louisville, etc., R. Co. v. Power, 21 N.E. 751, 119 Ind. 269.
51 C.J. p. 567 note 22.

42. Ind.—Pittsburgh, etc., R. Co. v. Wilson, 91 N.E. 725, 46 Ind.App. 444.
51 C.J. p. 567 note 23.

43. Ky.—Louisville, etc., R. Co. v. Tuttle, 258 S.W. 688, 201 Ky. 798
51 C.J. p. 567 note 24.

44. Ind.—Lake Erie, etc., R. Co. v. Griffin, 53 N.E. 1042, 57 N.E. 722, 25 Ind.App. 138
51 C.J. p. 567 note 25.

caused by the omission of such structures,[45] such as the value of cattle killed,[46] and damage to crops or pasturage.[47] If the crossing is not intended as a farm crossing alone, but is to be used by others claiming under the grantor, the damages are not to be estimated merely with respect to the value of the land to the owner, but the uses to which it is reasonably capable of being put should be considered.[48] The court, however, in any action for such damages, may grant leave to the railroad company to construct the crossing within a reasonable time, in lieu of paying the amount that it would reasonably cost to construct it.[49] On a breach of stipulation to maintain a crossing, which collapses from an undisclosed cause, the company is liable for at least nominal damages and such actual damages as the grantor can show.[50]

§ 98. Use of Land or Rights Acquired

As a general rule, land acquired by a railroad company for a right of way is charged with a public use for railroad purposes, but, in some jurisdictions, if the railroad acquires a fee-simple title to the land, the right to use the land is as absolute and unrestricted as that of an individual as long as the state does not complain.

As a general rule, land acquired by a railroad company for a right of way, either by condemnation or by purchase or grant from the owner is the private property of the company, but is charged with a public use for railroad purposes,[51] and may be used only for railroad purposes,[52] since, as discussed supra § 2, a railroad is a quasi-public corporation, and due to the fact that to subject the property to an additional use of a private nature imposes on the servient estate an additional burden for which the easement was not acquired and the owner has not been compensated.[53]

Unrestricted rights. In some jurisdictions, however, if the railroad company acquires a fee-simple title in the land, its right to use the land is as absolute and unrestricted as that of an individual,[54] at least as long as the state does not complain.[55] Accordingly, with the exceptions that its operations must not interfere with its railroad business,[56] or seriously invade and endanger public rights,[57] a railroad may exercise the rights and powers usually incident to such ownership in any manner and for any purpose not hurtful to others,[58] regardless of any

45. Ind.—Louisville, etc., R. Co. v. Power, 21 N.E. 751, 119 Ind. 269
51 C.J. p. 557 note 64.

46. Ind.—Louisville, etc., R. Co. v. Power, supra
51 C.J. p. 567 note 27.

47. Ky.—Chicago, etc., R. Co. v. Dodds, 181 S.W. 666, 167 Ky. 624
51 C.J. p. 567 note 23

48. Md.—Washington, etc., Electric R. Co. v. Linthicum, 96 A. 448, 127 Md. 257

49. Ind.—Pittsburgh, etc., R. Co. v. Kearns, 108 N.E. 873, 58 Ind. App. 694
51 C.J. p. 567 note 30

50. Wash.—Clemons v. Grays Harbor, etc., R. Co., 114 P. 865, 63 Wash. 38

51. U.S.—Sioux City, Iowa v. Missouri Valley Pipe Line Co., D.C. Iowa, 46 F.2d 819.
Ky.—City of Grayson v. Eastern Kentucky Southern Ry. Co., 62 S.W.2d 1034, 250 Ky. 316—Louisville & N.R. Co. v. Williams, 53 S.W.2d 751, 245 Ky. 466—Louisville & N.R. Co. v. Hagan, 131 S.W. 1018, 141 Ky. 20, 35 L.R.A.,N.S., 189
Mo.—Brown v. Weare, 152 S.W.2d 649, 348 Mo. 135, 136 A.L.R. 286.
Neb.—Luedeke v. Chicago & N.W. Ry. Co., 231 N.W. 695, 120 Neb. 124, 71 A.L.R. 912.
N.C.—Sparrow v. Dixie Leaf Tobacco Co., 61 S.E.2d 700, 232 N.C. 589
Pa.—Lehigh Nav. Coal Co. v. Pennsylvania Public Utility Commission, 1 A.2d 540, 133 Pa.Super. 67.
51 C.J. p. 568 note 35.

Condemnation of land for railroad purposes see Eminent Domain §§ 36-43, 451.
Railroad as public highway see Highways § 1.
Title or estate acquired under grant from owner see supra § 84

52. U.S.—Magnolia Petroleum Co. v. Thompson, C.C.A.Mo., 106 F.2d 217, applying Illinois law, reversed on other grounds Thompson v. Magnolia Petroleum Co., 60 S.Ct. 628, 309 U.S. 478, 84 L.Ed. 876
N.C.—Sparrow v. Dixie Leaf Tobacco Co., 61 S.E.2d 700, 232 N.C. 589.
51 C.J. p. 568 note 36

53. N.C.—Sparrow v. Dixie Leaf Tobacco Co., supra.

Rights of owner of fee

The owner of the fee of land subject to public easement of a railroad company may maintain trespass or ejectment against any other person whose entrance or acts on the premises would support the action, unless such person can justify under authority of railroad company having the easement.—Mitchell v. Illinois Cent. R. Co., 51 N.E.2d 271, 384 Ill. 258, 149 A.L.R. 369.

Subject to governmental supervision

Tenure of land acquired for right of way is in nature of trust for public use, subject to governmental supervision, whether obtained by grant or condemnation.—St. Louis-San Francisco Ry. Co. v. King, 50 S.W.2d 94, 329 Mo. 1203.

54. U.S.—Mendez v. Bowie, C.C.A. Puerto Rico, 118 F.2d 435, certiorari denied Mendez Rios v. Bowie, 62 S.Ct. 76, 314 U.S. 639, 86 L.Ed. 513
Mich.—Attorney General v. Pere Marquette Ry. Co., 248 N.W. 860, 263 Mich. 431, 94 A.L.R. 520
Tex.—Brightwell v. International-Great Northern R. Co., 49 S.W.2d 437, 121 Tex. 338, 84 A.L.R. 265—Nesral Production Co. v. St. Louis, B. & M. Ry. Co., Civ.App., 84 S.W.2d 805, error dismissed
51 C.J. p. 568 note 38.

55. Tex.—Brightwell v. International-Great Northern R. Co., 49 S.W.2d 437, 121 Tex. 338, 84 A.L.R. 265.
51 C.J. p. 568 note 39.

Private person having no restrictive estate or interest in land owned by railroad cannot question its use in any manner which would be lawful if held by individual.—Quinn v. Pere Marquette Ry. Co., 239 N.W. 376, 256 Mich. 143.

56. Mich.—Attorney General v. Pere Marquette Ry. Co., 248 N.W. 860, 263 Mich. 431, 94 A.L.R. 520.

57. Mich.—Attorney General v. Pere Marquette Ry. Co., supra.
Neb.—Luedeke v. Chicago & N.W. Ry. Co., 231 N.W. 695, 120 Neb. 124, 71 A.L.R. 912.

58. Alaska.—Berger v. Ohlson, 9 Alaska 605.
51 C.J. p. 568 note 40.

limitations contained in a prior grant of an easement to the company,[59] and notwithstanding statutory restrictions and limitations in respect of land acquired by condemnation[60]

Estoppel. Although the railroad may not be entitled to occupy or control a given space or area, if it assumes control thereover, it cannot dispute such occupancy or control as against one who enters thereon by its invitation.[61]

§ 99. —— Incidental Uses

a. In general
b. Determination of necessity of use in general
c. As limited by terms of grant
d. Use or removal of materials
e. Use or removal of minerals
f. Use of telegraph or telephone line

a. In General

Except to the extent that the company is restricted by the terms of the grant to it, or by its charter or by a statute, land or a right of way acquired by a railroad company may be used for any legitimate incidental purpose that is reasonably necessary or convenient to the construction, maintenance, and operation of the railroad.

Except to the extent that the company is restricted by the terms of the grant to it,[62] or by its charter or by a statute,[63] land or a right of way so acquired by a railroad company may be used for any legitimate incidental purpose that is reasonably necessary or convenient to the construction, maintenance, and operation of the railroad,[64] and the mere fact that the company has not yet occupied or made use of the right of way to its full width does not abridge such right.[65] This rule applies as well against the owner of the land,[66] as against all other persons,[67] such as subsequent grantees of adjacent land from the common grantor[68]

Particular uses. Unless restricted by charter or statute, or by the terms of the grant, a railroad company may use land acquired by it for a right of way for the erection of a freight depot,[69] warehouse,[70] water tanks,[71] necessary side tracks and switches,[72] turntables,[73] and other structures or buildings necessary or proper for facilitating the transaction of its ordinary business.[74] The right of way may also be

59. Tex.—Stephenson v. St. Louis Southwestern R. Co., Civ.App., 181 S.W. 568.

60. Tex.—Calcasieu Lumber Co. v. Harris, 13 S.W. 453, 77 Tex. 18.
51 C.J. p 568 note 42.

61. Ga.—Central of Georgia R. Co. v. Lawley, 126 S.E. 273, 33 Ga.App. 375.
51 C.J. p 568 note 43.

62. Mo.—Corpus Juris cited in Rombauer v. St. Louis-San Francisco Ry Co., 34 S.W.2d 155, 156, 225 Mo.App. 78.
As limited by terms of grant generally see infra subdivision c. of this section.

63. Ill.—Mitchell v. Illinois Cent. R. Co., 51 N.E.2d 271, 384 Ill. 258, 149 A.L.R. 369.
Mo.—Corpus Juris cited in Rombauer v. St. Louis-San Francisco Ry Co., 34 S.W.2d 155, 156, 225 Mo.App. 78.
51 C.J. p 568 note 45.

64. Ga.—Tift v. Atlantic Coast Line R. Co., 131 S.E. 46, 161 Ga. 432.
Ill.—Mitchell v. Illinois Cent. R. Co., 51 N.E.2d 271, 384 Ill. 258, 149 A.L.R. 369.
Mo.—Corpus Juris cited in Rombauer v. St. Louis-San Francisco Ry. Co., 34 S.W.2d 155, 156, 225 Mo.App. 78.
51 C.J. p 568 note 46.

Easement

(1) An easement for railroad purposes entitles the railroad to devote its right of way to any use which is indispensable to, or which will facilitate the performance of, the objects of its corporate existence as a common carrier or that is reasonably in aid of those purposes.—Sparrow v. Dixie Leaf Tobacco Co., 61 S.E.2d 700, 232 N.C. 589.

(2) Ownership of railroad easements carries with it the right to use of property within the bounds of the right of way for any purpose the primary object of which is the furtherance of the business of the railroad.—Sparrow v. Dixie Leaf Tobacco Co., supra

65. N.C.—Carolina & N. W. Ry. Co. v. Piedmont Wagon & Mfg. Co., 51 S.E.2d 301, 229 N.C. 695
51 C.J. p 569 note 47.
Right of way as confined to space actually occupied see supra § 82

66. U.S.—Wright v. St. Louis Southwestern R. Co., C.C.Ark., 175 F. 845, appeal dismissed 181 F. 1023, 104 C.C.A. 670.
Pa.—Terminal Coal Co. v. Pennsylvania R. Co., 139 A. 612, 291 Pa. 103.

Where owner of easement for railroad purposes uses the property within bounds of the right of way for any purpose the primary object of which is the furtherance of the business of the railroad, the owner of the servient estate has no cause to complain, since the grant of the easement was for such purpose and constitutes a part of the dominant estate.—Sparrow v. Dixie Leaf Tobacco Co., 61 S.E.2d 700, 232 N.C. 589.

67. Pa.—Terminal Coal Co. v. Pennsylvania R. Co., 139 A. 612, 291 Pa. 103.

68. Mont.—Smith v. Northern Pac. R. Co., 148 P. 393, 50 Mont. 539
51 C.J. p 569 note 50.

69. Ala.—Elyton Land Co. v. South Alabama, etc., R. Co., 10 So. 270, 95 Ala. 631
51 C.J. p 569 note 53.

70. Ga.—Louisville, etc., R. Co. v. Maxey, 77 S.E. 801, 139 Ga. 541.
51 C.J. p 569 note 54

71. Tenn.—Louisville, etc., R. Co. v. French, 43 S.W. 771, 100 Tenn. 209, 66 Am.S.R. 752.

72. Ind.—Bennett v. Lake Erie, etc., R. Co., 127 N.E. 777, 74 Ind.App. 156.
51 C.J. p 569 note 56.

73. Ill.—Illinois Cent. R. Co. v. Anderson, 73 Ill.App. 621.

74. Ill.—Farmers Grain & Supply Co. of Warsaw v. Toledo, P. & W. R. R., 44 N.E.2d 77, 316 Ill.App. 116
Mo.—Corpus Juris cited in Rombauer v. St. Louis-San Francisco Ry. Co., 34 S.W.2d 155, 156, 225 Mo.App. 78.
51 C.J. p 569 note 58.
Permission to others to erect buildings on right of way see infra § 101.

Houses, shanties, and bunkhouses

(1) Maintenance of bunkhouses along right of way for section men was authorized under grant of way "for all purposes incidental to or connected with the maintenance and

used for the storage of freight cars, to be used in shipping products,[75] the making of cuts and embankments,[76] the inclosure of the track with fences,[77] and for otherwise keeping its premises in proper and safe condition for the prosecution of its business,[78] as by removing trees or other things placed or growing on the right of way which the company may deem necessary to remove to insure the safe management of its road.[79]

Changes in the grade of the road and in the tracks may also be made from time to time as the exigencies of traffic and public interest require,[80] although neither the railroad company nor its successor can afterward change the tracks so as to acquire other land of the grantor without compensation,[81] or so as to deprive him of his consideration under the original grant,[82] or so as to shut out those having a right to cross the tracks,[83] or so as unnecessarily or wantonly to interfere with the owner's rights in or under the land.[84]

In the exercise of its right thus to use its right of way a railroad company may abate a private nuisance on adjoining property,[85] as by trimming a hedge extending over and obstructing the right of way.[86]

Unlawful uses. Except where the company is the owner in fee, and as such is unrestricted in its right to use the land, as discussed supra § 98, a railroad company as a general rule has no right to make such use of the land acquired as is not incidental to the construction, maintenance, and operation of the road.[87] Accordingly, an easement for railroad purposes does not entitle the railroad company to use the property for private or nonrailroad purposes.[88] Likewise, a railroad may not use the land in a manner or for a purpose that is detrimental to its use for railroad purposes,[89] or which materially interferes with the rights of property pertaining to the adjacent land,[90] unless the right to make such use of adjoining property is acquired either by purchase or condemnation.[91]

b. Determination of Necessity of Use in General

Whether or not a particular use is necessary for railroad purposes is primarily, at least, a matter to be determined by the railroad company in the exercise of its judgment, but the mere decision of the officers of the railroad that a proposed use is a railroad use does not make it so.

Whether or not a particular use is necessary for railroad purposes is primarily, at least, a matter to be determined by the railroad company in the exercise of its judgment,[92] and in the absence of evidence showing that such use is not necessary and is in bad faith, the courts will not interfere therewith.[93] However, while the railroad is the judge of the necessity of extending the use of its right of way, the proposed additional use must be incidental to, or in furtherance of, the business of the railroad.[94] Only as long as the use is in furtherance of the business of the railroad does the extent of

operation of a railroad"—Rombauer v. St Louis-San Francisco Ry. Co., 84 S.W.2d 155, 225 Mo.App. 75

(2) Other decisions with respect to right to erect houses and shanties see 51 C.J. p 569 note 58 [a].

75. Tex.—Magnolia Petroleum Co. v. Caswell, Civ.App., 295 S.W. 653, reversed on other grounds, Com.App., 1 S.W.2d 597, certiorari denied 49 S.Ct. 34, 278 U.S. 640, 73 L.Ed. 555.

76. Va.—Pamplin v. Norfolk, etc., R. Co., 98 S.E. 51, 124 Va. 254
51 C.J. p 569 note 60.

77. Tex.—Peterson v. Holland, Civ. App., 189 S.W.2d 94, error refused.
51 C.J. p 569 note 61.
Covenant or condition to erect fences see supra § 94.

78. Tex.—Olive v. Sabin, etc., R. Co., 33 S.W. 139, 11 Tex.Civ.App. 208.

79. U.S.—Wright v. St. Louis Southwestern R. Co., C.C.Ark., 175 F. 845, appeal dismissed 181 F. 1023, 104 C.C.A. 670.
51 C.J. p 570 note 63.

80. Pa.—McKee v. Pittsburg R. Co., 44 Pa.Super. 325
51 C.J. p 570 note 64.
Change as to highway crossings see infra § 145.

81. Ind.—Wysor v. Lake Erie, etc., R. Co., 42 N.E. 353, 143 Ind. 6.

82. Ind.—Wysor v. Lake Erie, etc., R. Co., supra.

83. N.Y.—Townsend v. New York Cent., etc., R. Co., 106 N.Y.S. 381, 56 Misc. 253.

84. Ind.—Cleveland, etc., R. Co. v. Simpson, 104 N.E. 301, 108 N.E. 9, 182 Ind. 693.

85. Ill.—Toledo, etc., R. Co. v. Green, 67 Ill. 199

86. Ill.—Toledo, etc., R. Co. v. Green, supra

87. La.—Corpus Juris cited in Bond v. Texas & P. Ry. Co., 160 So. 406, 409, 181 La. 763
51 C.J. p 570 note 73.

88. N.C.—Sparrow v. Dixie Leaf Tobacco Co., 61 S.E.2d 700, 232 N.C. 589.

89. Va.—Danville, etc., R. Co. v. Lybrook, 69 S.E. 1066, 111 Va. 623, Ann.Cas.1912A 175.

90. Ill.—Mitchell v. Illinois Cent. R. Co., 51 N.E.2d 271, 384 Ill. 258, 149 A.L.R. 369
51 C.J. p 570 note 76.

91. N.Y.—Garvey v. Long Island R. Co., 54 N.E. 57, 159 N.Y. 323, 70 Am.S.R. 550.
51 C.J. p 570 note 76.
Rights in adjoining land generally see supra § 82.

92. Mo.—Corpus Juris cited in Rombauer v. St. Louis-San Francisco Ry. Co., 84 S.W.2d 155, 156, 225 Mo.App. 78.
N.C.—Carolina & N. W. Ry. Co. v. Piedmont Wagon & Mfg. Co., 51 S.E.2d 301, 229 N.C. 695—Southern Ry. Co. v. Lissenbee, 13 S.E.2d 561, 219 N.C. 318.
51 C.J. p 570 note 77.

93. Mo.—Corpus Juris cited in Rombauer v. St. Louis-San Francisco Ry. Co., 84 S.W.2d 155, 156, 225 Mo.App. 78
51 C.J. p 571 note 78.

94. N.C.—Sparrow v. Dixie Leaf Tobacco Co., 61 S.E.2d 700, 232 N.C. 589.

that use rest with the railroad authorities,[95] and the mere decision of the officers of the railroad that a proposed use is a railroad use does not make it so.[96] Accordingly, when there is a finding supported by the evidence that the use and occupancy of the right of way are not necessary for railroad purposes and that such use is in bad faith, and not the result of an honest exercise of judgment, the courts will not permit such use and occupancy by the railroad to the detriment of others.[97]

c. As Limited by Terms of Grant

Where the grant or conveyance contains words of restriction and limitation to the effect that the land or right of way granted shall be used only for certain specified purposes, it may be used only for purposes that come within the terms of such provision.

Where the grant or conveyance contains words of restriction and limitation to the effect that the land or right of way granted shall be used only for certain specified railroad purposes, it may be used only for purposes that come within the terms of such provision,[98] and it cannot be lawfully used by the railroad company for any other purpose,[99] unless a prescriptive right for the new use is acquired;[1] nor can it be used for a purpose which is expressly excepted in the terms of the grant.[2]

Accordingly, a deed for corporate purposes only conveys the land for such purposes as appertain to the legitimate business of the railroad company under its charter powers,[3] and if the railroad company does not need all the land for such purposes, the grantor may recover as much of the land as is not required by the company for its present and future necessities.[4] If the conveyance mentions only railway and railway purposes, without designation of kind, the land may be used by an interurban line not operated by steam, where it otherwise appears that franchises obtained along the right of way are for permission to operate a line by any motive power except steam.[5] Where the grant is made "for railway and similar purposes," the land may be used for such legitimate railroad and public purposes as the future necessities and convenience of the public require.[6] So, where the land is acquired as a right of way for the passage of trains only, it may be used for the construction thereon of main and necessary side tracks,[7] but it cannot be lawfully used as a switch yard for switching and making up trains,[8] or for machine or repair shops.[9] Likewise, where it is granted as subsidiary to mining rights, it cannot be used for the business of carrying passengers and freight generally,[10] notwithstanding a provision in the grant for a depot and site for the use of the grantor.[11]

On the other hand, where the grant is absolute in form, it conveys to the railroad company all privileges and appurtenances;[12] and where it is made for all legitimate railroad and depot purposes,

95. N.C.—Sparrow v Dixie Leaf Tobacco Co, supra.

96. N C.—Sparrow v. Dixie Leaf Tobacco Co., supra

97. N C —Powell v. Hamlet Ice Co., 183 S E 386, 209 N.C. 195

Defense of bad faith held improperly stricken

In railroad's ejectment action against owner of railroad refrigerating plant located on right of way, defense that action was not brought in good faith, but to destroy owner's business and enable railroad and others to obtain owner's business for inadequate price by demanding possession of the land on which the business was located, was held improperly stricken.—Powell v. Hamlet Ice Co, supra

98. La.—Bond v. Texas & P. Ry. Co, 160 So 406, 181 La 763

Mo —**Corpus Juris cited in** Rombauer v. St. Louis-San Francisco Ry. Co, 34 S.W 2d 155, 157, 225 Mo.App. 78

51 C J p 571 note 79.

99. Mo.—**Corpus Juris cited in** Rombauer v. St Louis-San Francisco Ry. Co., 34 S.W.2d 155, 157, 225 Mo. App. 78.

51 C.J p 571 note 80.

Grant held unrestricted

(1) Where deed gave perpetual right of way for railroad lines of grantee for benefit of rural property of grantee, addition of the words expressly granting the right to run the rolling stock freely and without restriction was intended to grant a right to unlimited use to the owner of the dominant tenement, even if such use were not strictly for the benefit of grantee's property.—Mendez v Bowie, C C A Puerto Rico, 118 F 2d 435, certiorari denied Mendez Rios v. Bowie, 62 S.Ct. 76, 314 U.S. 639, 86 L Ed 513.

(2) A grant of right of way across grantor's land to railway company for spur track was held not so modified by further provision of instrument containing grant as to restrict use of right of way to service of grantor's enterprises or industries located on land described—Reidsville Grocery Co. v Southern Ry. Co, 1 S E 2d. 535, 215 N C 223.

(3) Other grants held unrestricted see 51 C J. p 571 note 80 [e].

1. Va.—Robertson v. Bertha Mineral Co., 104 S E 832, 128 Va. 93.

2. Ky.—Grubbs v. Louisville, etc., R. Co., 123 S.W. 1195.

51 C.J. p 571 note 82.

Exceptions and reservations generally see supra § 88

3. Pa.—Erie v Pennsylvania R Co, 92 A 192, 246 Pa 238.

4. Pa.—Erie v. Pennsylvania R. Co., supra.

5. Mich.—Dunham v. Toledo-Detroit R. Co., 214 N.W. 156, 238 Mich 596

6. Wash.—Tacoma Mill Co. v Northern Pac. R Co, 154 P. 173, 89 Wash 187

51 C J p 571 note 86.

7. Tex.—Missouri, etc, R. Co v Anderson, 81 S W. 781, 36 Tex Civ App. 121.

8. Mich.—Backus v. Detroit, etc., R Co., 40 N W 60, 71 Mich 645

Tex.—Missouri, etc., R Co. v Anderson, 81 S.W. 781, 36 Tex Civ App 121.

9. Tex.—Missouri, etc., R. Co. v Anderson, supra.

10. W Va.—Jackson v Big Sandy, etc., R Co., 59 S E. 749, 63 W.Va 18.

51 C J. p 572 note 90.

11. Va.—Robertson v. Bertha Mineral Co., 104 S E 832, 128 Va 93.

12. Ky.—Elizabethtown, etc., R. Co. v. Dillon, 7 Ky.L. 607.

51 C J. p 572 note 92.

it authorizes the construction of a hotel or eating house on the land,[13] notwithstanding accommodations are granted to the general public,[14] and that another eating house or hotel, ample to accommodate passengers and employees, is near by.[15]

Remedies of owner If the wrongful use of the land for other purposes than those specified results in damages to the grantor, the railroad company is liable therefor to him.[16] Although injunctive relief may be proper to restrain a railroad from wrongfully using the property,[17] the granting of such relief is within the sound discretion of the court.[18]

d. Use or Removal of Materials

Material suitable and necessary for the construction and maintenance of the railroad and its appurtenances such as soil, sand, gravel, and the like, may be taken from the right of way and appropriated to such purpose, at least as far as is necessary for the construction and maintenance of the road through the property of the landowner from which the material is taken.

Material suitable and necessary for the construction and maintenance of the railroad and its appurtenances such as soil, sand, gravel, and the like, may be taken from the right of way and appropriated to such purpose,[19] at least as far as is necessary for the construction and maintenance of the road through the property of the landowner from which the material is taken.[20] This right has also been held to extend to timber growing on the right of way,[21] although there is authority that timber can be obtained from the owner only by agreement or purchase.[22]

Use on other parts of road. It has been held that the railroad company's rights in this respect extend no further, as against each owner, than the boundaries of his own land,[23] and that, ordinarily, the company cannot, without the owner's consent, take material from its right of way over one person's land for the purpose of using it on another part of the road,[24] but as to this there is also authority to the contrary.[25] Where, however, it becomes necessary to remove material, such as earth or dirt, in the construction of the road on its established grade or in changing the grade over a right of way, it has been held that the company may use such material on other parts of the road[26]

Sale or gift. The company cannot, without the owner's permission, sell stone or other material removed from the land;[27] nor can it give away such material.[28]

e. Use or Removal of Minerals

As a general rule, where the railroad company has only an easement for its right of way, minerals thereunder belong to the owner of the fee and cannot be ap-

13. Or.—Abraham v. Oregon, etc., R Co, 60 P 899, 37 Or. 495, 82 Am S R. 779, 64 L R.A 391; 69 P 653, 41 Or 550

14. Or.—Abraham v. Oregon, etc., R Co, supra

15. Or.—Abraham v. Oregon, etc., R. Co, supra

16. Ky.—Chesapeake, etc, R. Co. v. Blankenship, 170 S W. 620, 161 Ky. 315, rehearing denied 164 S W. 943, 158 Ky. 270.
Mich.—Backus v Detroit, etc., R. Co., 40 N.W. 60, 71 Mich. 645.
For breach of conditions generally see supra § 97.

Damnum absque injuria
Damage to land on theory of trespass, arising from erroneously supposed want of authority in railway company to use right of way, conveyed thereto for spur track, to serve owner of property adjacent to that of grantor, must be regarded as damnum absque injuria, in absence of allegation of negligent use thereof or malicious or wanton destruction of grantor's property, or any actionable cause other than described trespass.—Reidsville Grocery Co. v. Southern Ry. Co., 1 S.E.2d 535, 215 N.C. 223.

17. U.S.—Mendez v Baetjer, C.C.A. Puerto Rico, 106 F.2d 163, certiorari denied 60 S.Ct 263, 308 U.S 618, 84 L.Ed 516.

Burden of proof
In suit to enjoin alleged wrongful use of railroad across plaintiff's land, plaintiff had burden of proving his contentions concerning the exact nature and extent of the wrongful use.—Mendez v. Baetjer, supra.

18. U.S.—Mendez v. Baetjer, supra

Discretion held not abused
Where one who had lived all his life on a certain tract crossed by railroad right of way failed to allege the wrongful extent of railroad's use as a defense in railroad's action to enjoin interference with the use which resulted in splitting his cause of action, imposing delay and expense on railroad and showing lack of diligence, refusal to issue injunction against such allegedly wrongful use in subsequent suit by landowner was not an abuse of discretion.—Mendez v. Baetjer, supra.

19. Pa.—Hendler v. Lehigh Valley R Co, 58 A. 486, 209 Pa. 256, 103 Am.S.R. 1005.
51 C.J. p 572 note 99.
In case of condemnation see Eminent Domain § 451.
Right to material outside right of way see supra § 86.

20. N.H.—Chapin v. Sullivan R. Co., 39 N.H 564, 75 Am.D. 237
Pa.—Hendler v. Lehigh Valley R. Co, 58 A. 486, 209 Pa. 256, 103 Am. S.R. 1005.

21. Iowa.—Preston v. Dubuque, etc, R Co., 11 Iowa 15.
N.J.—Taylor v New York, etc, R. Co., 38 N.J Law 28.
51 C.J. p 572 note 2.

22. Pa.—Hendler v Lehigh Valley R. Co, 58 A 486, 209 Pa 256, 103 Am S.R 1005.

23. Pa.—Hendler v. Lehigh Valley R. Co., supra.

24. Pa.—Hendler v. Lehigh Valley R Co., supra
51 C.J. p 572 note 4.

25. Miss.—New Orleans, etc., R. Co. v. Brown, 1 So. 637, 64 Miss 479.
51 C.J. p 572 note 5.

26. S.C.—Sims v. Charleston, etc, R Co, 150 S.E 890, 153 S.C 390.
51 C.J. p 572 note 6.

27. Ala.—Nashville, etc, R. Co. v. Karthaus, 43 So 791, 150 Ala. 633.
51 C.J. p 573 note 7.

28. Ind.—Julien v. Woodsmall, 82 Ind. 568.
N.H.—Bailey v. Sweeney, 9 A. 543, 64 N.H. 296.

propriated or used by the company, but where the railroad company owns title in fee in the land, it is entitled to the minerals thereunder.

As a general rule, where the railroad company has only an easement for its right of way, minerals thereunder belong to the owner of the fee and cannot be appropriated or used by the railroad company,[29] except to the extent that the right to take minerals has been granted to the railroad company,[30] and except surface materials which must be removed in constructing the road.[31] However, this does not authorize the owner of the fee to use the right of way for the purpose of extracting the minerals;[32] and, furthermore, it is the duty of both the company and the owner to exercise reasonable care in the use of the property, not to injure the other's rights.[33]

On the other hand, where the railroad company owns the title in fee in the land, it is entitled to the minerals thereunder,[34] and it may not be enjoined from taking them,[35] and may contract with a third person to bore for oil and gas and other minerals thereon;[36] and persons so contracting on the faith of public records will be protected thereby, although the title of the railroad company is voidable.[37]

f. Use of Telegraph or Telephone Line

The construction of a telegraph or telephone line over a right of way by the railroad company in good faith for its use and benefit in the operation of its road and to facilitate its business, or if it is reasonably necessary for that purpose, is a proper use of the right of way, but it has been held that a railroad company may not authorize the erection and maintenance of such a line for general commercial purposes, disconnected from the railroad operation.

The construction of a telegraph or telephone line over a right of way by the railroad company in good faith for its use and benefit in the operation of its road and to facilitate its business, or if it is reasonably necessary for that purpose, is a proper use of the right of way,[38] and it may do this by itself or may employ another company to erect or maintain such a line within the limits of the right of way.[39] It has been held, however, that a railroad company may not authorize the erection and maintenance of such a line for general commercial purposes, disconnected from the railroad operation,[40] and where the main object in constructing such a line is to establish an extensive telephone and telegraph line for general commercial purposes, it is not a proper use of the right of way, if such line is not reasonably necessary for the purposes of the railroad company, although it incidentally benefits therefrom.[41] On the other hand, it has been held that,

29. U.S.—Thompson v. Magnolia Petroleum Co., Mo., 60 S.Ct. 628, 309 U.S. 478, 84 L.Ed. 876, applying Illinois law.
Ky.—Sherman v. Petroleum Exploration, 132 S.W.2d 768, 280 Ky. 105, 132 A.L.R. 137.
Mich.—Quinn v. Pere Marquette Ry. Co., 239 N.W. 376, 256 Mich. 143.
51 C.J. p. 573 note 10.
Ownership of minerals generally see Mines and Minerals, §§ 132–134
Sales and conveyances of minerals generally see Mines and Minerals §§ 143–163

"Other material" construed

Statute authorizing railroad to use any earth, timber, stone, or "other material" on its right of way necessary to construction and operation of railroad did not entitle railroad to drill for and produce oil and gas from its right of way for use in operating railroad, since term "other material" means material of the same class as materials enumerated —Texas & P. Ry. Co. v. State, 78 S.W.2d 580, 124 Tex. 482, certiorari denied Texas & P. Ry. Co. v. State of Texas, 56 S.Ct. 91, 296 U.S. 581, 80 L.Ed. 410, appeal dismissed 56 S.Ct. 369, 296 U.S. 552, 80 L.Ed. 390.

30. Tex.—Gladys City Oil, etc., Mfg. Co. v. Right of Way Oil Co., Civ.App., 137 S.W. 171, affirmed 157 S.W. 737, 106 Tex. 94, 51 L.R.A.,N.S., 268
51 C.J. p. 573 note 11.

31. Mo.—Evans v. Haefner, 29 Mo. 141.

32. U.S.—Kansas City Southern R. Co. v. Marietta Oil Corp., C.C.A. La., 102 F.2d 603.
51 C.J. p. 573 note 13

33. Ind.—Cleveland, etc., R. Co. v. Simpson, 104 N.E. 301, 108 N.E. 9, 182 Ind. 693.
51 C.J. p. 573 note 14
Remedies of owner of mineral rights generally see Mines and Minerals §§ 136–142

34. U.S.—Thompson v. Magnolia Petroleum Co., Mo., 60 S.Ct. 628, 309 U.S. 478, 84 L.Ed. 876, applying Illinois law.
Ky.—Cornett v. Louisville & N. R. Co., 182 S.W.2d 230, 298 Ky. 95
Mich.—Attorney General v. Pere Marquette Ry. Co., 248 N.W. 860, 263 Mich. 431, 94 A.L.R. 520—Quinn v. Pere Marquette Ry. Co., 239 N.W. 376, 256 Mich. 143
Tex.—Brightwell v. International-Great Northern R. Co., 49 S.W.2d 437, 121 Tex. 338, 84 A.L.R. 265—Nesral Production Co. v. St. Louis, B. & M. Ry. Co., Civ.App., 84 S.W.2d 805, error dismissed
51 C.J. p. 573 note 15.

35. Mich.—Quinn v. Pere Marquette Ry. Co., 239 N.W. 376, 256 Mich. 143
Tex.—Nesral Production Co. v. St. Louis, B. & M. Ry. Co., Civ.App., 84 S.W.2d 805, error dismissed—Crowell v. Howard, Civ.App., 200 S.W. 911.

36. La.—Nelson v. Texas, etc., R. Co., 92 So. 754, 152 La. 117.
Mich.—Attorney General v. Pere Marquette Ry. Co., 248 N.W. 860, 263 Mich. 431, 94 A.L.R. 520.
Tex.—Nesral Production Co. v. St. Louis, B. & M. Ry. Co., Civ.App., 84 S.W.2d 805, error dismissed
Permitting use by third persons generally see infra § 101

37. La.—Nelson v. Texas, etc., R. Co., 92 So. 754, 152 La. 117.

38. N.C.—Hodges v. Western Union Tel. Co., 45 S.E. 572, 133 N.C. 225.
51 C.J. p. 573 note 20
Right of owner to additional compensation see Eminent Domain § 134.

39. Ind.—Prather v. Western Union Tel. Co., 89 Ind. 501
N.C.—Hodges v. Western Union Tel. Co., 45 S.E. 572, 133 N.C. 225.

40. Mo.—**Corpus Juris cited in** Eureka Real Est. & Inv. Co. v. Southern Real Est. & Financial Co., 290 S.W.2d 328, 332, 355 Mo. 1199
51 C.J. p. 573 note 22, p. 577 note 64

41. Md.—American Tel., etc., Co

if, after the application of as much of the use of its right of way as the maintenance of its own railroad and telegraph line requires, there remains a surplus thereof, the company may lease or permit that surplus or any part of it for telegraph purposes which do not interfere with its own uses.[42]

§ 100. —— Exclusiveness of Possession and Use

a. In general
b. Use or interference by owner

a. In General

As a general rule a railroad company, after its right of way has been located and constructed, has practically the right to the uninterrupted and exclusive possession, use, and control of the surface of the land constituting its right of way and necessary for conducting its business, except where, by consent of the public authorities, it is built on a public highway or over public crossings

As a general rule a railroad company, after its right of way has been located and constructed,[43] has practically the right to the uninterrupted and exclusive possession, use, and control of the surface of the land constituting its right of way and necessary for conducting its business,[44] except where, by consent of the public authorities, it is built on a public highway or over public crossings.[45] As long as the railroad company occupies any portion of its right of way, it has the exclusive use and right of control coextensive with its boundaries,[46] and may occupy and use it at any time against all persons, even the owner of the fee, without showing any actual necessity for its possession for railway purposes, as long as the easement exists and the railroad is operated over it for the purposes of the grant.[47]

Under title in fee. Where the railroad company has title in fee to its right of way, it is entitled to enjoy, in the discharge of its duties as common carrier, the exclusive use and control of the right of way, relieved from any rights therein of adjoining owners to the same extent as a private person would be;[48] and the fact that the road is constructed through a tunnel or archway does not impair this exclusive right or give the original owner any right to the ground above.[49]

A railroad company may exclude persons from its property where they do not have business with the company in its capacity as a common carrier,[50] and to this extent may arbitrarily exclude one individual from its property while admitting others.[51]

b. Use or Interference by Owner

The owner of the servient estate may not so use his adjoining land as to interfere with the use by the railroad company of its right of way.

In accordance with the rule of exclusive use and possession in the railroad company, as discussed supra subdivision a of this section, the owner of the servient estate may not so use his adjoining land as to interfere with the use by the railroad company of its right of way;[52] and, in some jurisdictions, he has no right to enter on or occupy any part of the right of way, in any mode or for any purpose, without the consent of the company,[53] unless such rights

v. Pearce, 18 A. 910, 71 Md. 535, 7 L.R.A. 200.

42. U.S.—Northern Pac. R. Co. v. North American Tel. Co., Minn., 230 F. 347, 144 C.C.A. 489, L.R.A. 1916E 572,
Rule criticized
Tenn.—Western Union Tel. Co. v. Nashville, etc., R. Co., 237 S.W. 64, 145 Tenn. 85, certiorari denied 42 S.Ct. 382, 258 U.S. 626, 66 L.Ed. 798.

43. N.C.—Goldsboro Lumber Co. v. Hines Bros. Lumber Co., 35 S.E. 458, 126 N.C. 254
51 C.J. p. 574 note 28.
Nature and extent of rights acquired in case of condemnation see Eminent Domain § 449.

44. U.S.—Polk v. Ball, C.C.A.La., 149 F.2d 263—Magnolia Petroleum Co. v. Thompson, C.C.A.Mo., 106 F.2d 217, reversed on other grounds Thompson v. Magnolia Petroleum Co., 60 S.Ct. 628, 309 U.S. 478, 84 L.Ed. 876.
Ill.—Mitchell v. Illinois Cent. R. Co., 47 N.E.2d 115, 317 Ill.App. 501, reversed on other grounds 51 N.E.2d 271, 384 Ill. 258, 149 A.L.R. 369—Chicago, B. & Q. R. Co. v. Aman, 254 Ill.App. 498.
Mass.—Tamkun v. Boston & M. R. R., 18 N.E.2d 359, 302 Mass. 59.
Mo.—Hoops v. Thompson, 212 S.W. 2d 730, 357 Mo. 1160.
N.C.—Southern Ry. Co. v. Lissenbee, 13 S.E.2d 561, 219 N.C. 318.
Tenn.—**Corpus Juris cited in** Harrison v. Southern Ry. Co., 215 S.W. 2d 31, 35, 31 Tenn.App. 377.
Tex.—Peterson v. Holland, Civ.App., 189 S.W.2d 94, error refused
51 C.J. p. 574 note 28.

45. Ill.—Chicago, B. & Q. R. Co. v. Aman, 254 Ill.App. 498
Kan.—Atchison, etc., R. Co. v. Spaulding, 77 P. 106, 69 Kan. 431, 105 Am.S.R. 175, 66 L.R.A. 587.
Mo.—Hoops v. Thompson, 212 S.W. 2d 730, 357 Mo. 1160
Nature and extent of right or use of streets, highways, and other public places generally see infra § 112.

46. Ala.—Seaboard Air Line R. Co. v. Banks, 92 So. 117, 207 Ala. 194.
51 C.J. p. 574 note 30.

47. Ala.—Seaboard Air Line R. Co. v. Banks, 92 So. 117, 207 Ala. 194.
Tenn.—**Corpus Juris cited in** Harrison v. Southern Ry. Co., 215 S.W. 2d 31, 35, 31 Tenn.App. 377.

48. Tex.—Calcasieu Lumber Co. v. Harris, 13 S.W. 453, 77 Tex. 18
51 C.J. p. 574 note 32.

49. Pa.—Junction R. Co. v. Boyd, 8 Phila. 224.

50. Ga.—Kates v. Atlanta Baggage, etc., Co., 34 S.E. 372, 107 Ga. 636, 46 L.R.A. 431.
52 C.J. p. 637 note 26
Care required and liability of railroad in removal of trespassers see infra §§ 929–931.

51. Ga.—Weimer v. Savannah Union Station Co., 90 S.E. 84, 18 Ga.App. 570.

52. Ill.—Chicago, B. & Q. R. Co. v. Aman, 254 Ill.App. 498.
51 C.J. p. 575 note 35.

53. U.S.—Polk v. Ball, C.C.A.La.,

or privileges are conceded or agreed on by the company[54] or, either expressly or impliedly, reserved in the grant,[55] or authorized by statute;[56] and statutes have been enacted to prevent encroachments on a railroad right of way.[57] Furthermore, it is the duty of the railroad company to prevent the adjoining owner from placing dangerous constructions on the right of way.[58]

In other jurisdictions, however, this rule is so modified as to permit the adjoining owner to use portions of the right of way which are not being used by the railroad and not necessary to the safe and convenient use of used portions,[59] or to enter on and use the land in any manner not inconsistent or interfering with its use by the railroad company;[60] but this right of the owner of the fee does not extend to one who is not such owner or who does not claim under him.[61] The occupancy and use by the owner are subject to the right of the railroad company to extend its use of the right of way to its full extent, whenever the proper management and business necessities of the road require it,[62] and the company is the judge of such necessity[63]

Where the comany has the title in fee, there is no valid right in adjoining landowners or others to occupy as against the railroad company portions of the land not actually used by the company, and one attempting to take possession of such portion is a trespasser[64]

Timber right of way. A grant of a railroad right of way, to be used in carrying on timber operations, does not exclude the right of the owner to use the land subject thereto,[65] and, where he subsequently grants the timber rights and a right of way for a railroad to another company, the prior grantee is not entitled to enjoin the subsequent grantee from crossing the line of his right of way.[66]

Remedy for interference. A railroad company may bring an action of trespass for interference with its enjoyment of its easement in its right of way,[67] or the railroad company may be protected by injunction against such interference[68] without regard to the solvency of the persons interfering therewith.[69] Likewise, where a railroad company has the exclusive right to the enjoyment of an easement, it may maintain forcible entry and detainer.[70] Under the rule that the adjoining owner is not entitled to use the right of way for any purpose, the company is entitled, as against the owner of the servient estate, to recover possession without showing an immediate need of the land for railroad purposes, or that such occupancy by the servient owner disturbs the enjoyment of the right of way for railway purposes.[71] However, under the modi-

149 F.2d 263—Kansas City Southern R Co v. Marietta Oil Corp, C C A.La, 102 F 2d 603
Ill—Chicago, B. & Q R. Co. v Aman, 254 Ill App 498
Tex.—Peterson v Holland, Civ App, 189 S.W 2d 94, error refused—Gulf, C & S. F. Ry. Co. v. Candler, Civ.App, 40 S.W 2d 915, affirmed, Com.App., 61 S W.2d 997.
51 C.J p 575 note 36.

Rights of owner as against third person

The owner of adjoining land who is permitted to use a part of the right of way cannot recover damages against a third person for causing obstruction thereon—Campbell v. Southwestern Tel., etc., Co, 158 S W. 1085, 108 Ark. 569—51 C.J. p 579 note 84.

54. Mont.—Montana Ore Purchasing Co v Boston, etc., Min. Co., 22 P. 375, 20 Mont. 533.
51 C J. p 575 notes 37, 39.

55. Mich.—Hanselman v. Grand Trunk Western R Co., 128 N W 732, 163 Mich. 496.
51 C J. p 575 note 38.

56. Conn—New York, etc, R. Co. v. Armstrong, 102 A. 791, 92 Conn. 349.
51 C.J. p 575 note 40.

57. Pa—Downing v. McFadden, 18 Pa 334
51 C J p 575 note 41

58. Tenn—**Corpus Juris cited in** Harrison v Southern Ry Co, 215 S W 2d 31, 35, 31 Tenn App 377
51 C.J. p 575 note 42.

59. U S—Midland Valley R Co v Sutter, C C A Kan, 28 F 2d 163, certiorari granted 49 S Ct 185, 278 U.S. 597, 73 L Ed. 527, certiorari dismissed 50 S.Ct. 65, 280 U S. 521, 74 L Ed. 590.
N C—Atlantic Coast Line R. Co v. Bunting, 84 S E. 1009, 168 N.C. 579.

60. Ill.—Farmers' Grain & Supply Co. of Warsaw v. Toledo, P & W R R, 44 N E 2d 77, 316 Ill App. 116
N C.—Carolina & N W. Ry. Co. v. Piedmont Wagon & Mfg. Co, 51 S E 2d 301, 229 N.C. 695.
51 C.J. p 575 note 44.

61. Kan—Kansas, etc, R. Co. v. Burns, 79 P 238, 70 Kan 627.

62. N.C—Carolina & N. W. Ry Co v Piedmont Wagon & Mfg. Co, 51 S E.2d 301, 229 N C 695.

63. N.C—Carolina & N. W. Ry. Co. v. Piedmont Wagon & Mfg. Co, supra.

64. Pa.—Junction R Co. v. Boyd, 8 Phila. 224.

65. S C—Wilkins v Hilton-Dodge Lumber Co, 78 S E 873, 95 S C 248, Ann Cas.1915C 1190

66. S C—Wilkins v. Hilton-Dodge Lumber Co, supra

67. U S—New Mexico v U. S. Trust Co., N M., 19 S Ct 128, 172 U.S. 171, 43 L.Ed 407—Norfolk Southern R. Co. v. Stricklin, D C N.C., 264 F. 546.

68. N.C—Carolina & N. W. Ry Co. v Piedmont Wagon & Mfg. Co, 51 S.E 2d 301, 229 N C. 695.
51 C J p 576 note 50.

Drilling on right of way

Injunction is a proper remedy to prevent drilling and operation of oil and gas wells on the railroad right of way by persons claiming under the former owner.—Midland Valley R Co. v. Sutter, C C.A Kan, 28 F 2d 163, certiorari granted 49 S.Ct. 185, 278 U S 597, 73 L.Ed 527, certiorari dismissed 50 S Ct. 65, 280 U.S. 521, 74 L Ed 590.

69. N C—Seaboard Air Line R. Co. v. Olive, 55 S.E. 263, 142 N.C. 257

70. Ill.—Chicago, B. & Q. R. Co. v. Aman, 254 Ill.App. 498.

Instructions held properly refused

Ill.—Chicago, B. & Q. R. Co. v. Aman, 254 Ill.App. 498.

71. Minn—Chicago Great Western

fied rule an injunction will not issue where the use by the adjoining owner is not inconsistent or does not interfere with the use by the railroad company.[72] It has been held that an injunction will lie to restrain the railroad company from interfering with the use of the land by the owner where such use does not interfere with the reasonable and proper use of the right of way for railroad purposes.[73]

§ 101. —— Permitting Use by Third Person

a. In general
b. Provision for exemption or indemnity from liability

a. In General

Except to the extent that it is restricted by its charter, or the terms of its grant, or by public policy, a railroad company may, by lease or license, permit third persons to use a portion of its right of way or other land for purposes which are not inconsistent or which do not interfere with its use for railroad purposes.

Except to the extent that it is restricted by its charter,[74] or the terms of its grant,[75] or by public policy,[76] a railroad company may, by lease or license, permit third persons to use a portion of its right of way or other land for purposes which are not inconsistent or which do not interfere with its use for railroad purposes,[77] or which in no way concern or affect its duty as a common carrier,[78] or which become a part of the means of operation or of facilitating shipments.[79] A railroad company, however, may not alienate its right of way or any part of it so as to interfere with the full performance of its functions as a railroad.[80] Likewise, an

R Co. v Zahner, 177 N.W. 350, 145 Minn 312

72. Ill.—Farmers Grain & Supply Co. of Warsaw v Toledo, P & W. R R., 44 N.E.2d 77, 316 Ill.App. 116.
51 C.J. p 577 note 55

73. Md.—Richfield Oil Corp of New York v Chesapeake & C B R Co., 20 A.2d 581, 179 Md. 560.
Jurisdiction
Where there were breaches of peace by oil corporation and railroad companies before filing of bill of complaint by oil corporation to enjoin railroad companies from interfering with complainant's placing of pipe lines under defendants' right of way on complainant's property and parties to suit agreed to commit no further acts while case was pending, equity had jurisdiction thereof in order to avoid multiplicity of litigation.—Richfield Oil Corp of New York v. Chesapeake & C. B. R. Co., supra.
Decree held to conform to pleadings
Md.—Chesapeake & C. B R Co. v. Richfield Oil Corp. of New York, 23 A.2d 677, 180 Md. 192, certiorari denied 62 S.Ct. 1297, 316 U.S. 698, 86 L.Ed. 1768.

74. Tenn.—City of Knoxville v Kaiser, 33 S.W.2d 411, 161 Tenn. 607.
Lease or license held not ultra vires
Tenn.—City of Knoxville v. Kaiser, supra.
51 C.J. p 577 note 60 [c].

75. La.—Bond v. Texas & P. R. Co., 160 So. 406, 181 La. 763.
51 C.J. p 577 note 58.

76. Mich.—Detroit v C. H. Little Co., 109 N.W. 671, 146 Mich. 373.
Lease held not contrary to public policy
Tenn.—City of Knoxville v Kaiser, 33 S.W.2d 411, 161 Tenn. 607.
51 C.J. p 577 note 59 [a].

77. U.S.—Kansas City Southern Ry. Co v Marietta Oil Corp., D.C.La., 22 F.Supp 279, reversed on other grounds, C.C.A., 102 F.2d 603—Oregon Short Line R Co v Ada County, D.C.Idaho, 18 F.Supp 842, affirmed, C.C.A., Ada County v Oregon Short Line R. Co., 97 F.2d 666
Fla.—Flowers v. Atlantic Coast Line Ry. Co., 192 So. 321, 140 Fla. 805
Mo.—**Corpus Juris cited in** Eureka Real Est. & Inv. Co. v Southern Real Est. & Financial Co., 200 S.W.2d 328, 332, 355 Mo. 1199.
Tenn.—City of Knoxville v. Kaiser, 33 S.W.2d 411, 161 Tenn. 607.
Tex.—Turner v. Texas & N. O. Ry. Co., Civ.App., 59 S.W.2d 239, error refused.
51 C.J. p 577 note 60.
Incidental uses of lands or rights acquired see supra § 99.
Public use
Railroad may permit use of right of way for any purpose not interfering with public use.—Sioux City, Iowa v Missouri Valley Pipe Line Co., D.C.Iowa, 46 F.2d 819.
Injunction
Owner of fee cannot enjoin use of right of way by railroad's licensee for driving stock to station without showing special or irreparable damages.—Hall v. Bowers, 222 N.W. 40, 117 Neb. 619, 61 A.L.R. 724, opinion adhered to 225 N.W. 49, 117 Neb. 619, 61 A.L.R. 724.
Registration of lease
Railroad's lease of property for year, and thereafter subject to cancellation, was held not required to be registered as to third person.—City of Knoxville v. Kaiser, 33 S.W.2d 411, 161 Tenn. 607.

78. U.S.—National Transit Co. v. Davis, C.C.A.Pa., 6 F.2d 729, certiorari denied 46 S.Ct. 104, 269 U.S. 579, 70 L.Ed. 422.
51 C.J. p 577 note 61.
Right to use tracks, right of way, or other property of another road see infra § 114
Leases between railroad companies generally see infra §§ 208–213.
Exclusive license or lease
(1) Fact that a railroad company had for a long time allowed private individuals to engage in the business of loading logs at points between stations, and that plaintiff under a contract with the railroad, not as shipper, but merely as a log-loading agency, had built up a profitable business under that arrangement, does not give plaintiff any right to insist that it be continued, and he may not object that the railroad company thereafter gave another the exclusive license to load logs between stations.—Yazoo & M. V. R. Co. v. Crawford, 65 So. 462, 107 Miss. 355, L.R.A.1915C 250.

(2) Generally, railroad right of way adjacent to tracks, when not part of railroad transportation facilities devoted or necessary to public use, is private property, and carrier may lease it for private purposes to one or more persons and deny like privilege to others.
U.S.—Donovan v. Pennsylvania R Co., Ill., 26 S.Ct. 91, 199 U.S. 279, 50 L.Ed 192—Missouri P R. Co v Nebraska, Neb., 17 S.Ct 130, 164 U.S. 403, 41 L.Ed 489.
Neb.—Johnson v. Union Pac. R. Co., 274 N.W. 581, 133 Neb 243

79. U.S.—Oregon Short Line R. Co. v. Ada County, D.C.Idaho, 18 F.Supp. 842, affirmed, C.C.A., Ada County v. Oregon Short Line R Co., 97 F.2d 666.
Iowa.—Hohl v. Iowa Cent. R. Co., 143 N.W. 850, 162 Iowa 66.

80. U.S.—Oregon Short Line R. Co v Ada County, D.C.Idaho, 18 F.Supp. 842, affirmed, C.C.A., Ada

easement for railroad purposes does not entitle the railroad company to let the property for private or nonrailroad purposes.[81] Where the railroad company owns only an easement for railroad purposes, if the use of the right of way by a third person is primarily for the benefit of the railroad as a common carrier, it is for railroad purposes even though incidental benefits flow to the private user.[82] On the other hand, if the use of an easement for railroad purposes is primarily private in nature, the fact that the railroad is incidentally benefited thereby, through the acquisition of a new customer or increased shipments, does not convert it into a railroad use.[83] Accordingly, where the railroad company owns only an easement, it cannot, within the limits of its right of way, permit the erection of warehouses, factories, and the like, not necessarily connected with the use of its franchise,[84] or grant an easement in a private way over its tracks.[85] Further, it has been held that a lease of land by a railroad for a retail filling station is not a proper use of land in which the railroad has only an easement for railroad purposes,[86] although the letting by the railroad of part of its right of way for the purpose of maintaining a bulk oil station,[87] or a combination bulk oil and retail drive-in filling station,[88] has been held a proper use of the land, and such use may not be enjoined by the owner of the fee.[89]

Subject to the above rules, a railroad company may permit the erection of warehouses, elevators, or other buildings or platforms thereon for convenience in delivering and receiving freight,[90] provided the company's duty to shippers is discharged without discrimination;[91] permit the construction of a drainage ditch;[92] permit a third person to use the right of way to haul material to the station for transportation over the railroad,[93] although he makes a profit therefrom,[94] or permit the public to use a right of way across the tracks.[95] A railroad company may construct a spur track for the use of a third person,[96] or it may permit a third

County v. Oregon Short Line R. Co., 97 F.2d 666
51 C.J. p 577 note 63.
Right to alienate or transfer franchises or property generally see infra § 197.

81. N.C.—Sparrow v. Dixie Leaf Tobacco Co., 61 S.E.2d 700, 232 N. C. 589.

Uses held not for railroad purposes
(1) Private gin company serving general public—Bond v. Texas & P. R. Co., 160 So. 406, 181 La. 763
(2) Tobacco storage and curing business—Sparrow v. Dixie Leaf Tobacco Co., 61 S.E.2d 700, 232 N.C. 589

82. N.C.—Sparrow v. Dixie Leaf Tobacco Co., supra.

83. N.C.—Sparrow v. Dixie Leaf Tobacco Co., supra.

84. N.C.—Sparrow v. Dixie Leaf Tobacco Co., supra.

Ejectment
Where owners of fee who instituted ejectment action made no claim adverse to the right of the railroad in easement or its right to use the easement for railroad purposes but rested their claim on the allegation that the use by the defendants was for a nonrailroad purpose, the statute pertaining to the acquisition of a right of way and limiting owner of the fee to the maintenance of an action for damages resulting from the taking of the right-of-way easement was not applicable—Sparrow v. Dixie Leaf Tobacco Co., supra.

85. N.D.—Lincoln v. Great Northern R. Co., 144 N.W. 713, 26 N.D. 504.

86. U.S.—In re Chicago & N. W. Ry. Co., C.C.A.Ill., 127 F.2d 1001, certiorari denied Thomson v. Hicks, 63 S.Ct. 59, 317 U.S. 659, 87 L.Ed. 530, rehearing denied 63 S.Ct. 155, 317 U.S. 708, 87 L.Ed. 564.
Ill.—Mitchell v. Illinois Cent. R. Co., 47 N.E.2d 115, 317 Ill.App. 501, reversed on other grounds 51 N.E.2d 271, 384 Ill. 258, 149 A.L.R. 369

87. Ill.—Mitchell v. Illinois Cent. R. Co., supra
Miss.—Weir v. Standard Oil Co., 101 So. 290, 136 Miss. 205.

88. Ill.—Mitchell v. Illinois Cent. R. Co., 51 N.E.2d 271, 384 Ill. 258, 149 A.L.R. 369

Acquiescence of predecessors in title
The acquiescence by predecessors in title of owner in fee of land subject to an easement for railroad purposes for many years in similar uses afforded a practical interpretation of the easement, fortifying the conclusion that railroad's lease of land for use as a combination bulk oil and retail drive-in filling station was a proper use—Mitchell v. Illinois Cent. R. Co., supra.

89. Ill.—Mitchell v. Illinois Cent. R. Co., supra.

90. U.S.—Oregon Short Line R. Co. v. Ada County, D.C.Idaho, 18 F.Supp. 842, affirmed, C.C.A., Ada County v. Oregon Short Line R. Co., 97 F.2d 666.
Tenn.—City of Knoxville v. Kaiser, 83 S.W.2d 411, 161 Tenn. 607.
51 C.J. p 577 note 68.

Adverse possession
(1) Possession of railroad right of way by others must be deemed permissive and, in absence of positive notice to railroad, will not support necessary presumption of grant—Louisville & N. R. Co. v. Williams, 53 S.W.2d 751, 245 Ky. 466.
(2) Other decisions with respect to adverse possession see 51 C.J. p 577 note 68 [d].

91. Va.—Danville, etc., R. Co. v. Lybrook, 69 S.E. 1066, 111 Va. 623, Ann.Cas.1912A. 175.

Acts held not discriminatory
A railroad company owning title to land on which former lessee had erected packing house had power to grant or withhold lease of lands to such tenant as against contention that company, by agreement and trade with competitors of the former lessee discriminated against him—Flowers v. Atlantic Coast Line Ry. Co., 192 So. 321, 140 Fla. 805

92. Mont.—Mize v. Rocky Mountain Bell Tel. Co., 100 P. 971, 38 Mont. 521, 129 Am.S.R. 659, 16 Ann.Cas. 1189.
51 C.J. p 578 note 70.

93. Iowa.—Hohl v. Iowa Cent. R. Co., 143 N.W. 850, 162 Iowa 66.

94. Iowa.—Hohl v. Iowa Cent. R. Co., supra.

95. U.S.—Morgan's Louisiana, etc., R., etc., Co. v. Louisiana Public Service Commission, D.C.La., 287 F. 390, affirmed 44 S.Ct. 358, 264 U.S. 393, 68 L.Ed. 756.
51 C.J. p 578 note 73.

96. Tex.—Turner v. Texas & N. O. Ry. Co., Civ.App., 59 S.W.2d 239, error refused.

person to construct a spur track,[97] across or over its right of way for legitimate railroad purposes, and in such a case the spur track does not create an additional servitude on the land,[98] unless it has no connection with the railroad whose right of way it crosses,[99] in which case it is a trespass, for which the owner of the fee is entitled to an account[1]

Who may object. The act of leasing or permitting the use of the land may not be attacked as ultra vires, on the ground that the corporation cannot hold land for such purposes, by anyone except the state[2] A grantor of land "for railroad purposes only" is estopped to claim a right of reëntry because of the granting of certain licenses by the company for nonrailroad purposes, where he himself has accepted similar licenses;[3] and a person who claims to hold land under a railroad right of way may not deny the fact that it is a right of way.[4]

Rights of assignee. An assignee of an easement in railroad tracks has the same right to use the tracks as his assignor had[5]

Rights as between licensees. As between licensees of the same portion of a railroad right of way, claims of the licensee whose license is prior in time is superior to those of subsequent licensees,[6] and until such prior license is revoked subsequent licensees may not maintain an action for trespass against the prior licensee,[7] since the rights of the subsequent licensees do not rise any higher than those of the railroad company.[8]

Requisites and validity. General principles relating to the requisites and validity of contracts and leases apply to the requisites and validity of agreements permitting the use of a railroad right of way by third persons.[9]

Construction. General rules as to the construction of contracts and leases apply in the construction of contracts and leases permitting use of a railroad right of way by third persons.[10] Accordingly, where two or more instruments are executed contemporaneously, with respect to each other, for the purpose of attaining a preconceived object, they must all be construed together and effect given, if possible, to the purpose intended to be accomplished[11] Where a lease of railroad property on the right of way is prepared by the railroad company, it is to be construed favorably to the lessee.[12]

General rights and liabilities of lessor and lessee. The rights, duties, and liabilities of the lessor and lessee, as between themselves, in so far as they are provided for in the lease, must be governed by the terms and proper construction of that contract.[13] Accordingly, the lessee may not use the

97. S C—Cayce Land Co. v Guignard, 134 S E 1, 135 S.C. 446.

98. S C—Cayce Land Co v. Guignard, supra

99. S C—Cayce Land Co. v. Guignard, supra

1. S C—Cayce Land Co. v Guignard, supra.
51 C J. p 578 note 77

2. Mich—Attorney General v. Pere Marquette Ry Co, 248 N.W. 860, 263 Mich. 431, 94 A.L R 520
51 C J. p 578 note 78.

3. Ark—Ritter v. Thompson, 144 S W. 910, 102 Ark 442.

4. Puerto Rico—Gonzales v American R. Co, 6 Puerto Rico Fed 460

5. Minn—Minneapolis Mill Co v Minneapolis, etc, R. Co., 57 N.W. 64, 55 Minn. 371
51 C.J. p 578 note 83

6. Pa—Robertson Coal & Coke Co v. Rothey, 162 A 332, 106 Pa Super. 463.

Authority of "freight agent"

Where railroad company designated person as "freight agent," it clothed him with authority to do things usually done by such agents, including making of arrangements with shippers for unloading freight. —Robertson Coal & Coke Co. v. Rothey, supra.

7. Pa—Robertson Coal & Coke Co. v. Rothey, supra.

8. Pa—Robertson Coal & Coke Co v. Rothey, supra.

9. Tex.—Daugherty v. Missouri-Kansas-Texas R Co. of Tex., Civ. App., 221 S W.2d 928.

Offer and acceptance

Telegram sent by assistant director of industrial research and development of railroad to railroad's local agent approving request of grain dealer, who desired to build a grain elevator along railroad's right of way in certain city, to occupy railroad ground, and inquiring whether grain dealer wanted to lease all ground between certain streets, and inquiring on what side of track the ground was located, was not a sufficiently definite offer on part of railroad, and acceptance thereof by grain dealer did not give rise to a contract for breach of which grain dealer could recover damages.—Daugherty v. Missouri-Kansas-Texas R. Co. of Tex., supra

10. Cal—People v. Ganahl Lumber Co, 75 P 2d 1067, 10 Cal 2d 501.

11. Cal—People v. Ganahl Lumber Co., supra.

12. Ark.—St. Louis-San Francisco Ry Co. v. Travis Insulation Co., 223 S.W.2d 765, 215 Ark. 868.

Lease held not violated

Provision in lease of railroad property on right of way for warehouse purposes prohibiting "use" and "occupancy" of leased premises by third persons was not violated by lessee accepting property of third persons for safe-keeping under its own supervision.—St. Louis-San Francisco Ry. Co. v. Travis Insulation Co, supra.

13. S D—Babcock v. McKee, 18 N. W.2d 750, 70 S D. 442.

Implied covenant for quiet enjoyment

(1) A lessee had no cause of action for breach of implied covenant of power to demise existing in railroad attempting to lease property which it did not own where lessee expressly agreed in the lease to waive all right to question the right or power of the lessor to execute the lease sued on.—Johnson v. Missouri-Kansas-Texas R Co., Mo., 216 S.W. 2d 499.

(2) Where, under a lease of property abutting a railroad right of way for warehouse purposes, parties intended to waive all damages for breach of implied covenant for quiet enjoyment, a covenant that the premises be open both legally and actually for entry at the beginning of the term could not be implied, so

demised premises for a use different from that designated in the lease,[14] or for a use not contemplated or intended by the parties at the time of its execution and delivery,[15] and the lessee, as against the railroad, may not authorize others to make such different use while his rights as lessee remain fixed by the original terms of the lease.[16] The mere use of the premises for a purpose beyond the scope of the lease will not bind the railroad in the absence of its knowledge or consent,[17] and acquiescence of the railroad company is not the equivalent of an invitation.[18]

Termination of lease. Provisions in the lease with respect to its termination will be accorded effect.[19] If its termination is provided for on a specified notice by either party, in the absence of such termination it will be presumed to continue in existence,[20] although it is no longer fulfilling its function.[21] Accordingly, until the lease is terminated, the tenant has the exclusive right of possession,[22] and any obstruction thereof is a trespass for which damages may be recovered [23]

Authority of boards or commissions. Under some statutes, boards or commissions may regulate charges for leases of railroad property or property under the control of railroad companies [24] The primary purpose of such statutes is to prevent rate discrimination being accomplished indirectly by common carriers through the medium of leases of railroad property.[25] Under such statutes, boards and commissions have the authority to determine the rental value of a site on a railroad right of way where such site is used wholly for public purposes,[26] but they are not empowered to take property of the railroad which is not employed in the public service for the private use of another.[27] Accordingly, such statutes do not empower boards or commissions to compel a railroad company to lease its right of way[28] or to compel it to permit the continued use of the premises after a breach of the lease by the lessee,[29] or to compel a railroad to renew a lease,[30] even though the railroad does not desire to use the property in its business [31] Likewise, a statute authorizing a railroad commission to direct a railroad to furnish sites for private elevators or warehouses has been held invalid,[32] and to confer no power on the railroad

as to authorize recovery for breach thereof, where it was subsequently ascertained that railroad did not own property attempted to be leased.—Johnson v. Missouri-Kansas-Texas R. Co, supra.

14. Mass—O'Brien v Boston & M R. R., 91 N E 2d 218, 325 Mass 451

15. Mass—O'Brien v. Boston & M R. R, supra.

16. Mass—O'Brien v Boston & M. R R, supra.

17. Mass—O'Brien v. Boston & M R. R., supra.

18. Mass—O'Brien v. Boston & M. R R., supra.

19. Ky—Louisville & N R. Co. v Williams, 53 S.W.2d 751, 245 Ky. 466.

Removal of property on termination of lease

(1) Where railroad unequivocally stated in a letter to former lessee that elevator which lessee had neglected to remove on termination of lease of railroad's land belonged to railroad, subsequent negotiations between railroad and former lessee looking to the releasing of the premises and reacquisition of elevator by lessee did not establish a waiver by railroad of its right of ownership acquired under lease—Babcock v. McKee, 18 N.W 2d 750, 70 S D. 442.

(2) Where, under terms of lease, elevator erected on railroad land became property of railroad on lessee's failure to remove elevator before termination of lease, railroad's act in extending to former lessee privilege of removing elevator within a specified time, which lessee permitted to pass without removal, was not inconsistent with railroad's ownership of elevator—Babcock v McKee, supra

(3) Where railroad cancelled lease for nonpayment of rent and acquired ownership of elevator erected by lessee by virtue of lessee's failure to remove structure within the designated time after notice of termination as provided in lease, lessee's subsequent payment of a sum in settlement of rent due to time of cancellation merely indicated that all parties recognized effect of cancellation, and acceptance of such payment by railroad did not indicate waiver by railroad of ownership of elevator.—Babcock v. McKee, supra.

20. Ark—Clark v. St Louis, etc, R Co, 201 S W. 111, 132 Ark. 257.

21. Ark—Clark v. St. Louis, etc., R. Co, supra.
51 C.J. p 766 note 20.

22. Ky.—Louisville & N. R Co. v. Williams, 53 S.W.2d 751, 245 Ky. 466

23. Ky.—Louisville & N. R. Co. v. Williams, supra.

24. Mich—Bohn Lumber Products Co. v. Michigan Public Service Commission, 26 N.W.2d 875, 317 Mich 174.

Review

Railroad held not entitled to certiorari in supreme court to review order of railroad commissioners fixing rent for industrial site on railroad's right of way, in view of original jurisdiction of circuit court from whose decision an appeal could be taken to supreme court—Chicago, M, St P. & P R Co. v. Board of Railroad Com'rs of South Dakota, 266 N W 660, 64 S D. 297.

25. Mich—Bohn Lumber Products Co. v Michigan Public Service Commission, 26 N.W.2d 875, 317 Mich 174

26. Iowa—Ferguson v. Illinois Cent R Co, 210 N W 604, 202 Iowa 508, 54 A.L.R. 1
Mich.—Bohn Lumber Products Co. v Michigan Public Service Commission, 26 N W 2d 875, 317 Mich. 174.

27. Iowa.—Ferguson v. Illinois Cent R Co., 210 N.W. 604, 202 Iowa 508, 54 A L R. 1.
Mich—Bohn Lumber Products Co v. Michigan Public Service Commission, 26 N.W 2d 875, 317 Mich 174

28. Iowa—Ferguson v. Illinois Cent R Co., 210 N.W. 604, 202 Iowa 508, 54 A L R. 1.

29. Neb—Johnson v. Union Pac. R Co, 274 N W. 581, 133 Neb 243

30. Mich—Bohn Lumber Products Co v Michigan Public Service Commission, 26 N.W 2d 875, 317 Mich. 174.

31. Mich.—Bohn Lumber Products Co. v Michigan Public Service Commission, supra.

32. Wis—Chicago, etc., R. Co. v. Railroad Commission, 221 N.W. 399, 197 Wis. 59.

commission to direct the making of a lease for a portion of its right of way.[33]

b. Provision for Exemption or Indemnity from Liability

Where a contract permitting the use of its right of way in no way concerns or affects the duty of a railroad as a common carrier, it may contract with respect to such use as it sees fit, and may contract for exemption or indemnity from loss or liability for negligence.

Although a railroad company cannot contract for exemption from liability with respect to the performance of its duty as a common carrier, as discussed in Carriers §§ 88–118, 625–639, where a contract permitting use of its right of way in no way concerns or affects the railroad's duty as common carrier, it may contract with respect to such use as it sees fit,[34] and is not subject to any different rule of law than that applicable to other property owners.[35] Accordingly, it may contract for exemption or indemnity from loss or liability for negligence,[36] since the public has no interest as to which of the contracting parties shall suffer the loss.[37] Likewise, in leasing a portion of its right of way for such uses, it may provide that it shall not be liable for negligence resulting in damage to property placed on the leased premises,[38] and such a lease should be considered as extended to cover the use actually made of the property by the lessee or his assignee, in possession.[39] Such a contract is not affected by extensions and changes of location made by mutual consent and under express verbal agreements.[40] A provision in a lease which exempts the railroad from liability for damages resulting from the installation, maintenance, or use of an unloading device has been held not to free the railroad from liability for damages directly resulting from the negligence of the company in unreasonably blocking a crossing.[41]

§ 102. Rights in, and Use of, Streets, Highways, and Other Public Places

The acquisition by a railroad of powers to lay its tracks and operate its trains in public highways or streets involves a grant of two distinct rights, which are the property right to burden the landowner's fee with an additional servitude, and the right to diminish, obstruct, or affect the uses of the street by the public at large.

The acquisition by a railroad of powers to lay its tracks and operate its trains in public highways or streets involves a grant of two distinct rights.[42] One is the property right to burden the landowner's fee with an additional servitude,[43] the power to grant which, whether the landowner be a municipality or an abutter, is an attribute of land proprietorship, and is unrelated to sovereign or governmental power.[44] The other right is the right to diminish, obstruct, or affect the uses of the street by the public at large,[45] the conveyance of which may be made only by or through the sovereign or governmental power of the state legislature.[46]

§ 103. —— Legislataive Grant or Authority

The right of a railroad company to construct and operate its road on or along a public street or highway or other public place can be acquired only by virtue of an enactment or grant of the state legislature.

33. Wis.—Chicago, etc, R Co. v. Railroad Commission, supra.

34. U S—Michigan Millers Mut Fire Ins. Co. v. Canadian Northern Ry Co, C.C A Minn., 152 F 2d 292.
51 C J. p 579 note 86.

Where lease of grain warehouse property contained provision exempting railroad as lessor from liability to lessee for loss occasioned by railroad's negligent acts, fact that lease contained further provisions obligating lessee to ship all freight over railroad company's system as far as possible, did not make the lease a contract executed by railroad in its capacity as common carrier, so as to render the provision exempting railroad from liability invalid.—Michigan Millers Mut. Fire Ins Co. v. Canadian Northern Ry Co, D C. Minn., 58 F Supp. 326, affirmed, C.C. A, 152 F 2d 292.

35. U.S—Michigan Millers Mut. Fire Ins. Co. v. Canadian Northern Ry. Co., C.C.A.Minn., 152 F.2d 292.

36. Ark—St. Louis-San Francisco Ry Co v Travis Insulation Co., 223 S W 2d 765, 215 Ark 868
Neb—Luedeke v Chicago & N W Ry. Co, 231 N.W 695, 120 Neb 124, 71 A L.R. 912.
51 C.J p 579 note 87.

37. U.S—Michigan Millers Mut Fire Ins Co. v. Canadian Northern Ry Co, C.C A.Minn, 152 F.2d 292.

Lease held not contrary to public policy
U.S—Michigan Millers Mut. Fire Ins. Co v. Canadian Northern Ry Co, D.C.Mo., 58 F.Supp. 326, affirmed, C C.A., 152 F 2d 292.
51 C.J. p 579 note 88 [a].

38. U.S—Southern R. Co v. Stearns, C.C.A N.C., 28 F 2d 560, certiorari denied 49 S.Ct. 252, 279 U S. 838, 73 L Ed. 985.
51 C J. p 579 note 88.
Contract as exempting from liability for fire see infra § 510.

39. U.S—Southern R. Co. v. Stearns, supra
51 C J. p 579 note 90.

40. Ga—Davis v. Gossett, 118 S E 773, 30 Ga App. 576.

41. Neb.—Luedeke v. Chicago & N. W Ry Co, 231 N.W. 695, 120 Neb. 124, 71 A L.R. 912.

42. N Y.—People v State Tax Commission, 202 N Y S 310, 206 App Div 549, affirmed 148 N E. 718, 240 N Y. 591.

43. N.Y—People v. State Tax Commission, supra.

44. N.Y.—People v. State Tax Commission, supra.
51 C.J. p 579 note 94.
Grant or consent by municipal or other local authorities generally see infra § 104.
Consent or grant by abutting owner generally see infra § 108

45. N.Y.—People v. State Tax Commission, 202 N Y.S. 310, 206 App. Div. 549, 555, affirmed 148 N E. 718, 240 N.Y. 591.

46. N.Y—People v. State Tax Commission, supra.
51 C.J. p 579 note 96.

The right of a railroad company to construct and operate its road on or along a public street or highway or other public place can be acquired only by virtue of an enactment or grant of the state legislature, either directly or indirectly.[47] In the absence of legislative authority, a railroad company has no such right,[48] even though the company owns the fee in the land in the public street or highway,[49] and, in the case of streets, even though the municipal authorities consent to their occupation and use[50]

Power of legislature. The state legislature, subject to constitutional restrictions or limitations, may authorize or grant the occupancy and use of a public highway or other public place, for railroad purposes,[51] since such use is a benefit to the public and is not inconsistent with the purposes for which the public highway was originally intended.[52] The legislature may discriminate and enact that railway tracks may be laid on streets in smaller cities if the municipal authorities deem it safe to grant such permission, while in more densely populated cities tracks may be laid only by direct authority of the legislature.[53]

How right granted. This right or power, subject to prescribed conditions and regulations, may be granted by the legislature by a general statute,[54] or it may be granted directly by special legislation,[55] such as by the charter of the railroad company,[56] or in the charter of a particular municipality;[57] or certain state, county, or municipal boards or officers may be authorized to grant such a right or privilege,[58] or to lease a right of way.[59]

§ 104. —— Grant or Consent by Municipal or Other Local Authorities

a Necessity or propriety

b. Manner of giving or obtaining consent or grant

a. Necessity or Propriety

(1) In general

(2) When consent not required

(1) In General

Authority to construct a railroad on or along public streets and highways may be given by the legislature through municipal or other local authorities as its agents, or through certain courts of competent jurisdiction Where an order of a court or the consent of municipal or other local authorities is required, such order or consent is a condition precedent to the right to construct tracks along a city street or highway.

Authority to construct a railroad on or along public streets and highways may be given by the legislature through municipal or other local authorities as its agents,[60] or through certain courts of competent jurisdiction,[61] where the application to the court for such permission shows a necessity for constructing on the street or highway,[62] and the fact that it is more convenient and less expensive for a railroad company to construct its road on a highway than by some other route, while a proper matter for consideration, is not controlling.[63] If a statute requires an order of court to authorize the construction of tracks along a street or highway, such order is a condition precedent to the right to do so.[64] Likewise, where it is provided that a railroad company shall obtain a grant

47. U S—Montgomery v. Atchison, T. & S. F. Ry. Co., C C A Okl, 89 F 2d 94
N.Y—People ex rel New York Cent. R. Co v. State Tax Commission, 35 N.Y S 2d 77, 264 App.Div. 80, modified on other grounds 54 N.E 2d 232, 292 N.Y 130, motion denied 56 N E 2d 122, 292 N.Y. 717.
51 C J p 579 note 98.
Plan and mode of construction see infra §§ 128–132.

48. N.C.—Butler v. F. R. Penn Tobacco Co, 68 S E 12, 152 N.C. 416, 136 Am.S R. 831.
51 C.J. p 580 note 99.

49. N Y.—People v. Gresser, 98 N. E. 205, 205 N.Y. 24.
51 C J. p 580 note 1.

50. N.C—Corporation Commission v. Southern R. Co., 69 S E 621, 153 N.C. 559.

51. Pa.—Foley v. Beech Creek Extension R Co., 129 A. 845, 283 Pa 588.
51 C.J. p 580 note 6.
Power of legislature to grant right to use streets generally see Municipal Corporations § 1726 c.

52. N.J—Morris, etc, R Co v. Newark, 10 N J Eq 352.
51 C.J p 580 note 8.

53. N.J.—Burlington v. Pennsylvania R Co, 38 A. 849, 56 N J Eq 259, affirmed 43 A. 700, 58 N J Eq 547.

54. Pa—Commonwealth v Beaver Valley R Co., 32 Pa.Co. 472.
51 C.J. p 580 note 10

55. Tenn—Pepper v. Union R. Co, 85 S W. 864, 113 Tenn. 53.
51 C.J. p 580 note 11.

56. Ga—Athens Terminal Co v Athens Fdy, etc., Works, 58 S E 891, 129 Ga. 393
51 C.J. p 581 note 12.

57. Ga—Athens Terminal Co v. Athens Fdy., etc, Works, supra.

58. U.S.—Knoxville v. Africa, Tenn., 77 F. 501, 23 C C.A. 252.
51 C.J. p 581 note 14
Powers and functions of highway boards or commissioners generally see Highways § 157.

59. U S—Moffat Tunnel Improvement Dist. v Denver & S L Ry. Co, C.C A Colo, 45 F 2d 715, 51 S Ct 485, 283 U S 837, 75 L Ed 1448
51 C J. p 581 note 15.

60. Wash—Coleman v. Hammond Lumber Co, 294 P. 968, 160 Wash. 170
51 C J. p 581 note 17.
Power of municipality to grant right in general see Municipal Corporations § 1726 c.

61. N Y.—Sells v. Defense Plant Corp, 66 N E 2d 289, 295 N Y. 227.
51 C J. p 581 note 18.

62. N.Y—Hornell, etc, R. Co v. Dansville, 111 N.Y.S. 845, 127 App. Div 867.
51 C J. p 581 note 19.

63. N Y—Hornell, etc., R. Co. v. Dansville, supra.

64. N Y—Osborne v. Jersey City, etc, R Co, 27 Hun 589
Use of federal government in time of war
Consent of court held not required in construction of railroad for use

from or the consent of certain municipal or local authorities before it can construct its road on or along a city street or highway, such provision is in the nature of a condition precedent which must be complied with before the company can acquire a right to use the street or highway,[65] otherwise its use of a street constitutes a trespass.[66] Such consent, when required, is also a condition precedent to the construction of depots, engine houses, and other appurtenances of the road as well as the main track,[67] and to the construction of the road over lands subsequently included in the city limits,[68] and in some cases to the construction of additional tracks at a subsequent time, as discussed infra § 112. So, also, where general authority over streets is in the municipality, and there is no statutory provision authorizing a railroad company to use them, they cannot be subjected to the use of a railroad without the consent of the municipality.[69] Under some statutes a railroad company may locate its right of way on a street without consulting the municipality,[70] but cannot construct its tracks thereon without its consent,[71] or construct its road along or lengthwise of a street or highway without the consent of the local authorities.[72] The object of a provision requiring consent of the city or local authorities to such occupancy of streets is to enable the city to exercise police power over its streets;[73] and the propriety of granting such a right in a street is justifiable on the theory that a railroad is, in a sense, a public highway.[74]

Effect of disincorporation of municipality. The fact that, after such a franchise is granted, the municipality disincorporates for a short period, confers no vested rights on the railroad company to lay additional tracks or sidetracks, after reincorporation without the consent of municipal officers as required by statute.[75]

(2) When Consent Not Required

Where the consent of the municipal or other local authorities is not required by statute, and where the right of a railroad company to occupy and use a highway or street is granted in its charter or by statute, such right is paramount to the power of the municipality over its streets, and may be exercised without the consent of the municipal or other local authorities.

Where the consent of the municipal or other local authorities is not required by statute, and where the right of a railroad company to occupy and use a highway or street is granted in its charter or by statute, such right is paramount to the power of a municipality over its streets,[76] and may be exercised without the consent of the municipal or other local authorities,[77] and without the previous payment to the municipality of the damages occasioned by such occupation.[78] This rule applies, even though the statute under which the municipality was incorporated provides that the streets thereof shall be common highways forever.[79] Under some statutes consent of the municipal authorities is not required where consent has been given by the abutting owners[80] or public utility commission-

of federal government in time of war—Sells v Defense Plant Corp., 66 N E 2d 289, 295 N Y. 227.

65. Ga.—Tift v. Atlantic Coast Line R. Co., 131 S E. 46, 161 Ga. 432.
51 C J p 581 note 21.

No act of the legislature can authorize the laying of railroad tracks in the streets without the consent of the local authorities.—City of New York v. Bryan, 89 N.E 467, 196 N.Y 158—Beekman v. Third Ave. R. R. Co., 47 N E. 277, 153 N.Y. 144—People ex rel. New York Cent. R. Co v State Tax Commission, 35 N. Y S 2d 77, 264 App Div. 80, modified on other grounds 54 N E.2d 332, 292 N.Y. 130, motion denied 56 N E.2d 122, 292 N Y. 717.

Step in grant of franchise

The consent of city to the construction of tracks by a railroad is but a step in the grant of a single, invisible franchise to construct and operate a railroad—People ex rel. New York Cent R. Co v. State Tax Commission, supra.

66. Cal.—Sincerney v Los Angeles, 200 P 380, 53 Cal App 440.

67. U.S.—Illinois Cent. R. Co. v Chicago, Ill., 20 S.Ct. 509, 176 U.S. 646, 44 L Ed. 622.
Ill.—Pittsburg, etc., R. Co. v. Chicago, 42 N.E 781, 159 Ill. 369.

68. U S.—Illinois Cent. R. Co. v. Chicago, Ill., 20 S.Ct. 509, 176 U. S 646, 44 L Ed. 622.
Ill.—Pittsburg, etc., R. Co. v. Chicago, 42 N.E. 781, 159 Ill. 369.

69. Miss.—Donnaher v. State, 16 Miss. 649.
N.J.—Morris, etc., R. Co. v. Newark, 10 N.J Eq. 352.

70. U.S.—Chicago v. New York, etc., R Co., Ill., 216 F. 735, 132 C C A. 645.

71. U.S.—Chicago v. New York, etc., R. Co., supra.

72. Ill.—Cook County v. Great Western R. Co., 10 N.E. 564, 119 Ill. 218.
51 C.J p 582 note 29.

General statutory power in a railroad company to construct its road on or across any highway which it intersects does not give it a right to construct its road longitudinally on streets without the consent of the municipality or over its objection.—Town of New Castle v. Lake Erie & W R. Co., 57 N E 516, 155 Ind. 18.

73. Md.—State v. Baltimore, etc., R. Co., 96 A. 636, 127 Md. 434.

74. Ind.—Grand Trunk Western R. Co v. South Bend, 89 N E. 885, 91 N E 809, 174 Ind. 203, 36 L R.A.,N. S., 850, reversed on other grounds 33 S Ct 303, 227 U S. 544, 57 L Ed 633, 44 L.R.A.,N.S., 405.
51 C J. p 582 note 31.

75. Cal.—San Pedro, etc., R. Co v. Long Beach, 158 P. 204, 172 Cal. 631

76. Ky.—Louisville, etc., R. Co. v. Covington, 213 S.W. 568, 184 Ky. 811.

77. U S.—New York v. Davis, C.C.A. N Y., 7 F.2d 566
51 C.J. p 582 note 34.

78. Iowa.—Hine v. Keokuk, etc., R. Co., 42 Iowa 636.
51 C J. p 583 note 35
Compensation for taking of property generally see Eminent Domain §§ 96–208.

79. Pa.—Commonwealth v. Beaver Valley R. Co., 71 A. 7, 222 Pa. 220.

80. Iowa.—Interurban R. Co. v. Des

ers;[81] or if a municipality refuses a railroad company a right of way, the company may call on certain state officers, such as the state engineer, to designate the streets which it may use.[82]

b. Manner of Giving or Obtaining Consent or Grant

(1) In general
(2) Prescription or estoppel

(1) In General

The manner in which the consent or grant by municipal or other local authorities may be given or obtained depends on the terms of the municipal charter or statute by which the power to give consent or make a grant is conferred.

The manner in which the consent or grant by municipal or other local authorities may be given or obtained depends on the terms of the municipal charter or statute by which the power to give consent or make a grant is conferred,[83] and the manner so prescribed must be followed both on the part of the railroad company and of the municipality or local authorities.[84] Thus, it has been held, under the various charter or statutory provisions, in order that a railroad company may obtain permission from a city to occupy the streets over which it is intended to build its road, that the route of the railroad through the city must be designated in its charter,[85] and that consent must be given by the proper municipal authorities,[86] by a duly enacted by-law or ordinance,[87] or resolution.[88] Under some statutes this action must be assented to by a prescribed number of votes of the municipal or local officers[89] or taxpayers,[90] in which case the function of the municipal council is merely executive and administrative in carrying out the inauditory directions of the taxpayers, when, and not until, they have spoken.[91] The fact that the company's request for permission is referred to a committee, which reports favorably but proceeds no further, does not constitute a sufficient consent.[92] When a city council has jurisdiction to grant a railroad company certain rights in a street, an ordinance exceeding the council's jurisdiction is nevertheless valid to the extent of the council's power to grant.[93]

Acceptance of grant. The grant by the municipal authorities to use the streets or highways does not grant franchise rights.[94] It is at most a mere offer,[95] which, in order to be binding, must be accepted by the railroad company,[96] especially where the ordinance making the grant provides as a condition that the company shall file a written acceptance of its provisions.[97]

Ratification. Any doubt as to the existence or validity of the right of a railroad company under its charter or municipal grant to lay its tracks in a municipality may be removed by a subsequent act of the legislature recognizing and ratifying such right.[98]

Determination of use. Municipal authorities are not required to determine what use of the street is absolutely necessary for the grantee, but may simply determine what street or streets it will devote to the grantee's use, leaving to the railroad company the right to determine what use will be necessary and within the council's jurisdiction to grant, as time and experience shall determine.[99]

Sale of franchise. A statute requiring the sale of street railroad franchises to the highest bidder must be construed as applying to all railroads where

Moines, 199 N.W. 355, 197 Iowa 1398.
51 C.J. p 583 note 38.
Grant or consent by abutting owners generally see infra § 108.

81. N.J.—Elizabeth, etc., R. Co. v. Woodbridge Tp., 95 A. 987, 85 N.J. Eq 192.

82. Tex—Indianola v. Gulf, etc., R. Co., 56 Tex. 594.
51 C.J. p 583 note 40.

83. La.—Gill v. Lake Charles, 48 So. 440, 122 La. 1019.
Proceedings to obtain grant or license in public streets generally see Municipal Corporations, §§ 1728–1730.

84. La.—Gill v. Lake Charles, supra.
51 C.J. p 583 note 45.

85. Tenn.—Collier v. Union R. Co., 33 S.W. 155, 113 Tenn. 96.

86. Wash.—Schwede v. Hemrich Bros. Brewing Co., 69 P. 362, 29 Wash. 21.
51 C.J. p 583 note 47.

87. Ga.—Louisville, etc., R. Co. v. Merchants', etc., Bank, 143 S.E. 506, 166 Ga. 310.
51 C.J. p 583 note 48.

88. Iowa.—Merchants' Union Barb Wire Co. v. Chicago, etc., R. Co., 28 N.W. 494, 70 Iowa 105.
51 C.J. p 583 note 49.

89. Cal.—San Pedro, etc., R. Co. v. Long Beach, 158 P. 204, 172 Cal. 631.
51 C.J. p 583 note 50.

90. Ga.—Savannah, etc., R. Co. v. Woodruff, 13 S.E. 156, 86 Ga. 94.
51 C.J. p 583 note 51.

91. La.—Connell v. Baton Rouge Commission Council, 96 So. 657, 153 La. 788.

92. Cal.—San Pedro, etc., R. Co. v. Long Beach, 158 P. 204, 172 Cal. 631.

93. Cal.—Los Angeles v. Southern Pac. R. Co., 108 P. 65, 157 Cal. 363.

94. Cal.—People v. Ocean Shore R. R., 196 P.2d 570, 32 Cal.2d 406.
Grant as constituting franchise generally see infra § 112 b.

95. Cal.—People v. Ocean Shore R. R., supra.

96. Cal.—People v. Ocean Shore R. R., supra.
Tex.—Galveston, etc., R. Co. v. Galveston, Civ.App., 155 S.W. 273.
51 C.J. p 584 note 55.

97. U.S.—Memphis v. St. Louis, etc., R. Co., Tenn., 183 F. 529, 106 C.C.A. 75.

98. Ky.—Owensboro v. Owensboro, etc., R. Co., 40 S.W. 916, 19 Ky.L. 449.
51 C.J. p 584 note 57.

99. Cal.—Los Angeles v. Southern Pac. R. Co., 108 P. 65, 157 Cal. 363.

bona fide competition is possible.[1] Accordingly, such a statute has been held applicable to a steam railroad where, by its operation within the city limits, it originates a new character of business and obtains new, separate, and distinct sources of revenue.[2] However, the statute has been held not applicable to the extension of a steam railroad through the city en route between its termini, in which there can be no bona fide competition.[3] Where both railroads and street railways are expressly included in the grant of power to the municipal authorities, a provision requiring the sale of railroad franchises in the streets of a city to the highest bidder has been held applicable to steam railroads.[4] Where consent of the local authorities is obtained and confirmed by a subsequent statute, the fact that the franchise was not sold at public auction as required by a statute, which has since been repealed, does not affect the validity of the franchise.[5]

(2) Prescription or Estoppel

(a) Prescription

(b) Estoppel

(a) Prescription

Although occupation and use of public streets or places by a railroad company for a long period of time, with the knowledge and acquiescence of the municipal authorities, have been held to entitle the company to such right by prescription, and to raise a presumption of a grant of the right, there is also authority to the contrary.

Occupation and use of public streets or places by a railroad company for a long period of time, with the knowledge and acquiescence of the municipal authorities, have been held to entitle the company to such right by prescription,[6] and to raise a presumption of a grant of the right,[7] unless prescribed conditions have not been complied with in making application for the right of way and in taking possession.[8] On the other hand, it has been held that a railroad company cannot acquire prescriptive rights in the streets as against the public,[9] and that a grant will not be presumed from lapse of time during which the company has occupied the street, since limitations will not run as to streets and other property held by a city in trust for the public.[10]

(b) Estoppel

A municipality may be estopped, by its knowledge and acquiescence for a long period of time, from objecting to the occupation and use by a railroad company of a street. Likewise, a railroad company may, by its acts, be estopped from denying the validity of a grant or lease to it.

A municipality may be estopped by its knowledge and acquiescence for a long period of time from objecting to the occupation and use of a street by a railroad company,[11] unless the acquiescence is of a use under a revocable license,[12] or under a permission granted by officers without authority so to do.[13]

Estoppel of railroad company. The railroad company may be estopped to deny the validity of the grant or lease to it, where it is in possession and by its acts has acquiesced therein, and affirmed its binding effect.[14] Where land is dedicated by a municipality for street purposes with the assent of the owners, a railroad company, which has obtained municipal permission to use the street, recognizes the public right and cannot repudiate the

1. La.—New Orleans City, etc., R. Co. v Watkins, 21 So. 199, 48 La. Ann. 1550.
51 C J p 584 note 60.
Award of grant or license on competitive bidding generally see Municipal Corporations § 1729.
Sale of franchise to street railroad see Street Railroads § 52.

2. La.—New Orleans City, etc., R. Co. v. Watkins, supra.

3. La.—Capdevielle v. New Orleans, etc., R. Co., 34 So. 868, 110 La 904.
51 C.J. p 584 note 60.

4. La.—Gill v. Lake Charles, 48 So. 440, 122 La. 1019.
51 C.J. p 584 note 61.

5. N.Y.—New York, etc., R Co. v. O'Brien, 100 N.Y.S. 316, 50 Misc. 13, affirmed 106 N.Y.S. 909, 121 App.Div. 819, affirmed 85 N.E. 1113, 192 N.Y. 558.

6. Ind.—New Castle v Lake Erie, etc., R. Co., 57 N.E. 516, 155 Ind. 18.
Adverse rights to property dedicated to, or acquired for public use generally see Adverse Possession §§ 14–17.
Prescription as to property held for public use generally see Easements § 9 c.

7. Ark.—Lonoke v. Chicago, etc., R. Co., 123 S.W. 395, 92 Ark. 546, 135 Am.S.R 200.
51 C.J. p 584 note 65.
Implied grant of railroad right of way generally see supra § 79.

8. Ky.—Klosterman v. Chesapeake, etc., R. Co., 56 S.W. 820, 22 Ky.L 192.
51 C J. p 585 note 66.

9. Mich.—In re City of Detroit, 246 N.W. 51, 261 Mich. 278.

10. U.S.—Seaboard Air Line R Co. v. Raleigh, D.C.N.C., 219 F. 573, affirmed 37 S.Ct. 8, 242 U.S. 15, 61 L.Ed 121.
Ala.—Birmingham Belt R. Co. v. Birmingham, 101 So. 599, 211 Ala. 674.

11. Ill.—Chicago v. Union Stockyards, etc., Co., 45 N.E. 430, 164 Ill. 224, 35 L.R.A. 281.
51 C.J. p 585 note 69.
Estoppel by construction of railroad generally see Estoppel § 95
Estoppel as to grants or licenses to use streets generally see Estoppel § 145.

12. U.S.—Seaboard Air Line R. Co. v. Raleigh, D.C.N.C., 219 F. 573, affirmed 37 S.Ct. 8, 242 U.S. 15, 61 L.Ed. 121.

13. U.S.—Seaboard Air Line R. Co. v. Raleigh, supra.

14. U.S.—Denver, etc., R. Co. v. Moffat Tunnel Impr. Dist, D.C. Colo., 35 F.2d 365, modified on other grounds, C.C.A., Moffat Tunnel Improvement Dist. v. Denver & S L. Ry. Co., 45 F.2d 715, certiorari denied 51 S.Ct. 485, 283 U.S. 837, 75 L.Ed. 1443.
51 C.J. p 585 note 72.

existence of the street.[15] However, where the municipality has no power to authorize the use of any street for a railroad, the mere use by a railroad under an ordinance for the period limited thereby does not estop the railroad company from thereafter using the streets under its general powers.[16]

§ 105. —— What Constitutes Grant of Authority in General

The right of a railroad company to occupy and use a public street or highway must be conferred either in express terms or by necessary implication

Whether the right of a railroad company to occupy and use a public street or highway or other public place is granted by the legislature, or by municipal or other local authorities, it must be conferred either in express terms[17] or by necessary implication,[18] since no legislation will be construed to take away public rights in a highway or other public place unless such purpose is plainly expressed.[19] Thus, authority under a general law, to occupy and use public roads, gives a railroad company no authority to construct its road through streets which are under the supervisory control of the municipal authorities;[20] nor does authority to erect a depot in a certain city authorize the laying of tracks and the running of engines over the streets of that city.[21]

Authority to use specified route. Authority to construct a railroad between designated points, the exact location being left to the company's discretion, by necessary implication, gives the company the right to occupy a public place between those points on the authorized route, as far as necessary for its purposes;[22] and also gives an implied authority to cross public highways which such route may intersect,[23] and such crossings cannot be prevented by municipal corporations through which the road is laid.[24] However, authority to occupy a street or highway longitudinally will not be implied from authority to construct the road between certain designated points or termini,[25] especially where it is declared by statute that public highways shall not be appropriated to railroads in the absence of express authority in their charters,[26] unless the right so to occupy streets and highways is given either expressly or by necessary implication as being necessary for the authorized route.[27] So, where a railroad company is empowered to enter or pass through a city, this power has been held of necessity to give the right to locate the road somewhere, and, if need be, on a street or alley;[28] but there is also authority to the contrary.[29]

§ 106. —— Construction and Operation of Statute or Ordinance Granting Right

A grant of a right to use public streets or highways for railroad purposes must be construed most strongly against the railroad company and in favor of the public, and nothing is to be taken as passing thereby except what necessarily flows from the nature and terms of the grant.

General rules apply in respect of the construction and operation of a statute or municipal ordinance granting or authorizing a right or privilege to use public streets or highways for railroad purposes.[30] In accordance with such rules the grant must be construed most strongly against the railroad company and in favor of the public,[31] and nothing is to be taken as passing thereby except what necessarily flows from the nature and terms of the grant.[32] A company organized as a steam railroad company has no right, by changing its motive power, to operate on streets as a street surface railroad[33]

15. N.Y.—People v. Priest, 99 N.E 547, 206 N.Y. 274.
51 C.J. p 585 note 73.

16. Mo.—Atlantic, etc, R. Co. v. St. Louis, 66 Mo. 228

17. N.C.—Corporation Commission v. Southern R Co, 69 S.E. 621, 153 N.C. 559.
51 C.J. p 585 note 78.

18. N J.—Hoboken Land, etc., Co. v. Hoboken, 35 N J Law 205.
51 C J. p 586 note 79.

19. N J.—Newark v. Delaware, etc, R. Co., 7 A. 123, 42 N J Eq 196.

20. Ill.—Chicago, etc., R Co. v. Chicago, 11 N E 907, 121 Ill. 176.
51 C J p 586 note 81.

21. Ga.—Daly v Georgia Southern, etc., R. Co, 7 S.E 146, 80 Ga. 793, 12 Am.S R. 286.

22. Minn.—St. Paul v. Chicago, etc., R. Co, 63 N.W. 267, 65 N W. 649, 63 N.W. 458, 63 Minn. 330, 34 L R. A. 184.
51 C J. p 586 note 83.

23. N.J.—Thompson v. Ocean City R Co, 36 A. 1087, 60 N J Law 74
51 C J. p 586 note 84
Crossing highways generally see infra §§ 140–167.

24. Miss.—Canton v. Canton Cotton Warehouse Co., 36 So 266, 84 Miss. 268, 105 Am S R. 428, 65 L.R.A. 561.

25. N J.—Seaman v. Perth Amboy, 119 A. 278, 98 N.J.Law 174.
51 C.J. p 586 note 86.

26. Ga.—Davis v. East Tennessee, etc., R. Co., 13 S E 567, 87 Ga. 605
51 C.J. p 586 note 87.

27. Mass.—Springfield v. Connecticut River R. Co., 4 Cush. 63,

Tenn.—Tennessee, etc., R. Co. v Adams, 3 Head 596.
51 C J. p 586 note 88.

28. Pa.—Cleveland, etc, R. Co. v Speer, 56 Pa. 325, 94 Am D 84
51 C.J. p 586 note 89.

29. Ill.—Chicago, etc., R. Co. v Chicago, 11 N E 907, 121 Ill. 176.
51 C.J. p 586 note 90.

30. Tex.—Galveston, etc, R. Co v Galveston, Civ.App., 155 S W. 273.
51 C J. p 586 note 92.

31. Ill.—Oak Park v. Chicago, etc., R Co., 120 N E 761, 285 Ill. 459.
51 C.J p 587 note 93.

32. Pa.—Pennsylvania Schuylkill Valley R Co v Philadelphia, etc, R. Co, 27 A 683, 157 Pa. 42.
51 C J p 587 note 94.

33. N Y.—Matter of Keeseville, etc,

Where the statute authorizes the use of a "public road or street," it applies only to a public street or road which has been legally established.[34] Where a right of way in a city is acquired by one company by purchase from another, and the city by ordinance confirms and grants this right to the purchaser, the fact that the original purchase was illegal does not invalidate the grant.[35]

§ 107. —— Regulation of Use in General

a. In general
b. By municipality

a. In General

A franchise to a railroad to use a public street or highway or other public place is subject to the right of the state, in the exercise of its police power, to regulate the operation of the railroad in order to prevent injuries to persons or property.

A franchise to a railroad company to use a public street or highway or other public place is subject to the right of the state, in the exercise of its police power, to regulate the operation of the railroad in order to prevent injuries to persons or property;[36] and, although such a franchise is to use the streets of a city, subject to the assent of the city, it proceeds from the state and not from the city,[37] and is subject to regulation, modification, or alteration by the state legislature.[38]

b. By Municipality

A municipality may make all reasonable and necessary regulations as to the manner in which the tracks of a railroad company shall be constructed and the condition in which they shall be maintained.

The right of a railroad company to occupy and use a street for railroad purposes is subject to the right of the municipality to improve and control such street,[39] and to make all reasonable and necessary regulations as to the manner in which the tracks of the railroad company shall be constructed and the condition in which they shall be maintained,[40] even though the franchise to use the streets has been granted by or under legislative authority,[41] and the constitutionality of such regulations must be considered, in view of the charter and property rights and also of the consent and acquiescence of the railroad owners.[42] The municipality may regulate the manner of use by the railroad company so as not unreasonably to interfere with the use of the streets by the public or adjoining property owners.[43] Accordingly, the municipality may restrict the number of tracks on particular streets or parts thereof;[44] may regulate the limits in a street where the track of a railroad company shall be laid;[45] or may require a change in the location of tracks,[46] relaying of tracks flush with the street,[47] change of roadbed,[48] or a change of location or total removal of a sidetrack materially impairing the use of the street by rendering the part assigned for public passage too narrow.[49] Likewise, the municipality may restrict the time when a railroad train shall obstruct a street cross-

R Co, 161 N.Y.S 287, 116 App Div 72
51 C.J. p 587 note 95.

34. U.S.—Burns v. Multnomah R Co, C.C.Or., 15 F. 177, 8 Sawy. 543.

35. Tex.—Galveston, etc., R Co. v. Galveston, Civ.App., 155 S.W. 273.

36. U.S.—New York v. Davis, C.C.A. N.Y., 7 F.2d 566.
Regulation and control of railroads generally see supra §§ 27-31, infra §§ 390-436.

37. N.Y.—New York Cent., etc., R. Co. v. New York, 95 N.E. 638, 202 N.Y. 212.

38. Ill.—Chicago, N.S. & M.R. Co. v. City of Chicago, 163 N.E. 141, 331 Ill. 360
51 C.J. p 587 note 3.

39. Colo.—Colorado, etc., R. Co. v. Ft. Collins, 121 P. 747, 52 Colo. 281, Ann.Cas.1913D 646
51 C.J. p 587 note 4

40. U.S.—Illinois Cent. R. Co. v. City of Mayfield, C.C.A.Ky., 35 F. 2d 808, certiorari denied 50 S.Ct. 158, 280 U.S. 608, 74 L.Ed. 651.
Colo.—Denver v. Denver, etc., R Co., 167 P. 969, 63 Colo. 574, L.R.A. 1918D 659, affirmed 39 S.Ct. 450, 250 U.S. 241, 63 L.Ed. 958.
51 C.J. p 587 note 5—44 C.J. p 935 note 3
Power to control and regulate use of streets by public utilities generally see Municipal Corporations § 1692.

Prohibition of digging

(1) It has been held that prohibiting the digging up of the surface of any street except by permission of the council, as applied to a railroad company laying its track across a street within its located right of way, is unreasonable and invalid.—Allen v. Jersey City, 22 A. 257, 53 N.J.Law 522.

(2) Effect of ordinance forbidding digging of street as to right of railroad to make repairs see infra § 124.

41. U.S.—Illinois Cent. R. Co. v. City of Mayfield, C.C.A.Ky., 35 F. 2d 808, certiorari denied 50 S.Ct. 158, 280 U.S. 608, 74 L.Ed. 651.
51 C.J. p 587 note 6.

42. U.S.—Atlantic Coast Line R. Co. v. Goldsboro, N.C., 34 S.Ct. 364, 232 U.S. 548, 58 L.Ed. 721.
Fla.—Tampa Northern R. Co. v. Tampa, 107 So. 364, 91 Fla. 241.

43. Colo.—Colorado, etc., R. Co. v. Ft. Collins, 121 P. 747, 52 Colo. 281, Ann.Cas.1913D 646.
51 C.J. p 588 note 8

44. Ind.—Grand Trunk Western R. Co. v. South Bend, 89 N.E. 885, 91 N.E. 809, 174 Ind. 203, 36 L.R.A., N.S., 850, reversed on other grounds 33 S.Ct. 303, 227 U.S. 544, 57 L.Ed. 633, 44 L.R.A.,N.S., 405.
51 C.J. p 588 note 9.

45. Iowa.—Cain v. Chicago, etc., R. Co., 3 N.W. 736, 6 N.W. 268, 54 Iowa 255.
Va.—Wagner v. Bristol Belt Line R. Co., 62 S.E. 391, 108 Va. 594, 25 L.R.A.,N.S., 1278.

46. Ill.—Postal Telegraph-Cable Co. v. Baltimore, etc., R. Co., 219 Ill. App. 304
51 C.J. p 588 note 10—44 C.J. p 935 note 94

47. N.Y.—Albany v. Watervliet Turnp., etc., Co., 13 N.E. 370, 108 N.Y. 14

48. Ill.—People v. Chicago City R. Co., 155 N.E. 781, 324 Ill. 618.

49. W.Va.—Mason v. Ohio River R. Co., 41 S.E. 418, 51 W.Va. 183

ing;[50] regulate the time of day during which trains shall be operated along streets;[51] prohibit the use of steam power for railroads along the streets;[52] and may compel a railroad to suspend operations during construction of a municipal improvement.[53] On the other hand, the municipality cannot, by such regulations, deprive the railroad company of its right or franchise to use the street.[54]

Revocation of right to regulate. The right of a municipality to regulate the use of its streets by railroads, when once it has given its consent, may be revoked by the state legislature[55] and conferred on state boards or commissions.[56]

Switching. Although a municipality may not arbitrarily prohibit a railroad company from using the streets for switching cars on an established switch track,[57] it may, under its police power, order the removal of switch tracks when public safety requires it,[58] without regard to the character of the right under which they were first established and maintained.[59] Likewise, a municipality may regulate the manner in which switching may be done, with a view to public safety and welfare,[60] and may prohibit switching on certain streets, where the company has other space available for that purpose,[61] as where it has yards set apart for switching purposes.[62]

Crossings. Where the railroad is operated over a street which divides the city into two parts, the city authorities may, in the exercise of a sound discretion, determine at what points the public shall cross the railroad right of way,[63] and may establish such points as are required for the convenience of the public in the transaction of its business,[64] and for such other purposes as are common to the inhabitants of the city.[65]

§ 108. —— Consent or Grants by Abutting Owners

a. In general
b. Grants by owner

a. In General

As a general rule, where the fee of the land over which a public street or highway passes is in the abutting owner, a right to occupy and use such street or highway for railroad purposes may be granted only with the consent of the abutting owners, or, if they refuse consent, only by condemnation and compensation to such owners.

The power of the state legislature or a municipality to permit the use of highways or streets by railroads is subject to the limitation that no property rights of abutting owners are thereby unreasonably invaded;[66] an abutting owner is entitled to a right of ingress and egress to and from his property over the railroad right of way[67] except over a railroad on a strip of land which has never been dedicated and accepted as a highway, and which has been unconditionally conveyed to the railroad company.[68] As a general rule, therefore, where the fee of the land over which a public street or highway passes is in the abutting owner, as discussed in Highways § 136, and Municipal Corporations §§ 1681, 1682, a right to occupy and use such street or highway for railroad purposes may be granted only with the consent of the abutting owners,[69] or, if they refuse consent, only by

50. N.J.—State v. Jersey City, 37 N. J.Law 348
44 C.J. p. 935 note 98.

51. Ohio—Cincinnati Southern R. Co. v. Hurd, 20 Ohio N.P.,N.S., 10.

52. N.Y.—New York, etc., R. Co. v. New York, 1 Hilt. 562.
51 C.J. p. 590 note 54 [a]—44 C.J. p. 935 note 2.

53. Tex.—San Antonio v. San Antonio St. R. Co., 39 S.W. 136, 15 Tex.Civ.App. 1.
44 C.J. p. 935 note 4.

54. Ill.—Bushnell v. Chicago, etc., R. Co., 102 N.E. 785, 259 Ill. 391, 49 L.R.A.,N.S., 718.
51 C.J. p. 588 note 11.

55. Ill.—Chicago, N. S. & M. R. Co. v. City of Chicago, 163 N.E. 141, 331 Ill. 360.

Construction distinguished from regulation

Statutory provisions with respect to power of cities as to tracks on streets relate to construction of tracks, as distinguished from regulation of trains operated thereon—Chicago, N. S. & M. R. Co. v. City of Chicago, supra.

56. Ill.—Chicago, N. S. & M. R. Co. v. City of Chicago, supra.

57. Ill.—Bushnell v. Chicago, etc., R. Co., 102 N.E. 785, 259 Ill. 391, 396, 49 L.R.A.,N.S., 718.

58. Colo.—City and County of Denver v. Denver & R. G. R. Co., 167 P. 969, 63 Colo. 574, L.R.A. 1918D 659, affirmed 39 S.Ct. 450, 250 U.S. 241, 63 L.Ed. 958.

Ordinance held reasonable and warranted

Colo.—City and County of Denver v. Denver & R. G. R. Co., supra.

59. Colo.—City and County of Denver v. Denver & R. G. R. Co., supra.

60. U.S.—Illinois Cent. R. Co. v. City of Mayfield, C.C.A.Ky., 35 F.2d 808, certiorari denied 50 S.Ct. 158, 280 U.S. 608, 74 L.Ed. 651.
51 C.J. p. 588 note 13.

61. U.S.—Illinois Cent. R. Co. v. City of Mayfield, supra.
Colo.—Colorado, etc., R. Co. v. Ft. Collins, 121 P. 747, 52 Colo. 281, Ann.Cas. 1913D 646.

62. Colo.—Colorado, etc., R. Co. v. Ft. Collins, supra.

63. Fla.—DeFuniak Springs v. Louisville, etc., R. Co., 87 So. 47, 81 Fla. 27.

64. Fla.—DeFuniak Springs v. Louisville, etc., R. Co., supra.

65. Fla.—DeFuniak Springs v. Louisville, etc., R. Co., supra.

66. N.Y.—Reining v. New York, etc., R. Co., 28 N.E. 640, 128 N.Y. 157, 14 L.R.A. 133.

67. Ky.—Fulton v. Short Route R. Transfer Co., 4 S.W. 332, 85 Ky. 640, 9 Ky.L. 291, 7 Am.S.R. 619

68. Mich.—Tapert v. Detroit, etc., R. Co., 15 N.W. 450, 50 Mich. 267.

69. N.Y.—Washington Cemetery v. Prospect Park, etc., R. Co., 68 N. Y. 591, 4 Abb.N.Cas. 15.

condemnation and compensation to such owners.[70] Accordingly, where a railroad has been constructed in the street or highway, without lawful authority, such owner may, notwithstanding the public interest in the operation of the road, recover his land,[71] or otherwise dispute the right of the company to occupy and use it,[72] unless he has by his conduct estopped himself.[73]

Prescription. A railroad company using a street for its tracks by permission of a municipality may acquire an easement by prescription as against the abutting owners.[74]

Statutory conditions. Under some railroad charters or statutes permission to construct and operate a railroad along public streets may be granted by the municipal authorities only after notice of the application and an opportunity to resist it are given to persons interested;[75] or only on the petition of a certain proportion of the owners of the abutting property in front of which the road is to be constructed,[76] or with the assent of such proportion of the abutting owners.[77] This requirement applies to individuals, as well as to corporations or companies, seeking to lay railroad tracks in the streets,[78] as where they desire to lay switch tracks from their establishments to railroad tracks.[79]

Land dedicated by owner for street or way cannot be appropriated without his consent to the use of a railroad.[80] However, where a railroad company has rightfully built its road on a strip of land dedicated as a highway by the owner, its use thereof cannot be prevented by the abutting owner because the part of the strip next to complainant's land was never actually used as a highway;[81] and user by a railroad of a street for a number of years pursuant to an agreement as against the dedicators of the street is equivalent to a written conveyance of a right, although its original entry was under verbal contract and permissive only.[82]

b. Grants by Owner

A conveyance to a railroad company by an abutting owner of a right of way over a highway or street in front of certain described premises is a grant only of the right of way in front of the premises described, and is subject to the covenants or conditions in the conveyance.

A conveyance to a railroad company by an abutting owner of a right of way over a highway or street in front of certain described premises is a grant only of the right of way in front of the premises described,[83] and is subject to the covenants or conditions in the conveyance.[84] Such a grant releases the company from any incidental damages resulting from a reasonable use and operation of the road,[85] and is binding on subsequent grantees of the remaining property,[86] and on subsequent purchasers, with knowledge, of the railroad property.[87] A release in the conveyance, of all damages sustained by the grantor by reason of the construction of the road on the street or highway, etc., is limited to the damages sustained by the construction and operation of the road in front of the premises described.[88]

Conveyance in fee. Where land through which

S.C.—Wilkins v. Gaffney City, 32 S E. 299, 54 S.C. 199

70. S.C.—Wilkins v. Gaffney City, supra.
51 C.J. p 588 note 26.

71. Ky.—Louisville, etc., R. Co. v. Liebfried, 17 S.W. 870, 92 Ky. 407, 13 Ky.L. 645.

72. Vt.—Hatch v. Vermont Cent. R Co., 28 Vt. 142.
51 C.J. p 588 note 28.

73. Or.—Wolfard v. Fisher, 84 P. 850, 87 P. 530, 48 Or. 479, 7 L.R.A., N.S., 991.
51 C.J. p 588 note 29
Estoppel by construction of railroad generally see Estoppel § 95.

74. Mich.—In re City of Detroit, 246 N.W. 51, 261 Mich. 278—Felton v. Wedthoff, 151 N.W. 727, 185 Mich. 72.
Acquisition of title or rights of abutting owners in streets by adverse possession generally see Adverse Possession § 14.
Easement by prescription against municipal authorities see supra § 104 b (2) (a).

75. Ky.—Klosterman v. Chesapeake, etc., R. Co., 56 S.W. 820, 22 Ky.L. 192.

76. Ill.—McGann v. People, 62 N.E. 941, 194 Ill. 526.
51 C.J. p 589 note 32.

77. N.Y.—New York, etc., R. Co. v. O'Brien, 100 N.Y.S. 316, 50 Misc. 13, affirmed 106 N.Y.S. 909, 121 App.Div. 819, affirmed 85 N.E. 1113, 192 N.Y. 558
51 C.J. p 589 note 33.

78. Ill.—Chicago Dock, etc., Co. v. Garrity, 3 N.E. 448, 115 Ill. 155.

79. Ill.—McGann v. People, 62 N.E. 941, 194 Ill. 526.
51 C.J. p 589 note 35.

80. N.Y.—Bowen v. Delaware, etc., R. Co., 47 N.E. 907, 153 N.Y. 476, 60 Am.St.R. 667.
Rights of dedicator of property generally see Dedication § 53.
Misuser of dedicated property generally see Dedication § 65.

81. Cal.—Southern Pac. R. Co. v. Ferris, 28 P. 828, 93 Cal. 263, 18 L.R.A. 510.

82. Ky.—Arn v. Chesapeake, etc., R. Co., 188 S.W. 340, 171 Ky. 157.

83. Cal.—McDonald v. Southern California R. Co., 41 P. 812, 5 Cal. Unrep. Cas. 142.
Conveyance of right of way generally see supra § 81.

84. Minn.—Morrison v. St. Paul, etc., R. Co., 65 N.W. 141, 63 Minn. 75, 30 L.R.A. 546.
51 C.J. p 589 note 40.

85. Miss.—Conners v. Yazoo, etc., R. Co., 38 So. 320, 86 Miss. 356.
51 C.J. p 589 note 41.

86. Ohio.—Varwig v. Cleveland, etc., R. Co., 6 Ohio Cir.Ct. 439, 3 Ohio Cir.Dec. 528.
51 C.J. p 589 note 42.

87. Ohio.—Taylor v. Niles, 21 Ohio Cir.Ct.,N.S., 991, 2 Ohio App. 293.

88. Cal.—McDonald v. Southern California R. Co., 41 P. 812, 5 Cal. Unrep.Cas. 142.

is located a public highway, on and along which a railroad company has the right to construct its road and the fee to which is in the owner of the land, is granted in fee simple to the railroad company which covenants to construct and restore the public road and place it along the line of, and on, the premises conveyed, and to construct a good and convenient crossing over the railroad premises to the highway as reconstructed, the company acquires the fee to the highway subject to the public easement, and additional land adjoining sufficient for the highway when changed.[89]

Conveyance of platted land. Where the owner of a tract of land, platted with streets, conveys to a railroad company part of such tract between certain streets, with the right of making a cut in the bed of a street, and erecting and maintaining a bridge over such cut, the bed of the street is not included in the conveyance and the grantor is free to enlarge the use of the street on which the bridge is erected,[90] and may dedicate the way over the bridge to the general public.[91]

§ 109. —— Covenants and Conditions in Grants

a. In general
b. Breach of condition

a. In General

A grant or consent to a railroad company to use a street or highway may be made on reasonable covenants and conditions essential for the protection of the public interest.

A grant or consent to a railroad company to use a street or highway may be made on reasonable covenants or conditions, essential for the protection of the public interest,[92] the determination of which may be conferred on courts, commissioners, or public boards,[93] and, if such a grant is accepted by the railroad company, the covenants and conditions become contractual and binding on it[94] and its successors.[95] Thus a municipality, in granting or consenting to the occupation and use of its streets by a railroad company, may impose on the railroad company any reasonable conditions,[96] such as a requirement that the railroad company construct and maintain proper and safe means for public travel over, across, or under the railroad tracks,[97] and such a contract is not ultra vires as to the railroad company, although it could have procured the right of way through the municipality by application to a state officer.[98] However, it has no authority to impose an unreasonable, unusual, or burdensome condition;[99] and, where the right of occupying a street is granted or authorized directly by the state, requiring the municipality to consent thereto, the municipality has authority, in granting such consent, to annex thereto such terms and conditions only as require the performance by the railroad company of those things which are within the power of the municipal corporation to regulate and enforce against a corporation or individual occupying such streets,[1] and which are not inconsistent with the grant from the state;[2] and it has no authority to attach a condition subsequent, a failure to comply with which will defeat the right granted by the state.[3]

In accordance with these rules various covenants and conditions have been held reasonable and valid,[4] such as conditions that in case of occupancy of streets, the company will pay a certain compensation for the use of the streets,[5] or that it will keep

89. N.Y.—Post v. West Shore R. Co, 26 N.E. 7, 128 N.Y. 580.

90. Md.—South Baltimore Co. v. Washington, etc., Electric R. Co, 132 A. 269, 149 Md. 678.

91. Md.—South Baltimore Co. v. Washington, etc., Electric R Co, supra.
51 C.J. p 590 note 47.

92. U.S.—Pittsburg, etc., R Co. v. Hood, Ohio, 94 F 618, 36 C.C.A. 423.
Mich.—Fort-St Union Depot Co. v. State R Crossing Board, 45 N.W 973, 81 Mich. 248.
Covenants and conditions in conveyances to railroad generally see supra § 89.
Imposing conditions on use of street generally see Municipal Corporations § 1721.

93. Mich.—Fort-St. Union Depot Co. v. State R. Crossing Board, supra.
51 C.J. p 590 note 50.

94. U.S.—Southern Pac. Co v. Portland, Or., 33 S.Ct. 308, 227 U.S. 559, 57 L.Ed 642
51 C.J. p 590 note 51.

95. U.S.—Joy v St Louis, Mo, 11 S.Ct. 243, 138 U.S. 1, 34 L.Ed 843
Ill.—Chicago, etc, R Co. v. Chicago, 55 N.E. 648, 183 Ill 341.

96. U.S.—Pittsburg, etc, R. Co. v. Hood, Ohio, 94 F. 618, 36 C.C.A. 423.
51 C.J. p 590 note 54.
As to plan or mode of construction see infra §§ 128–131.

97. Ky.—Chesapeake & O Ry Co v City of Bellevue, 38 S.W 2d 943, 239 Ky. 61.

98. Tex.—Indianola v. Gulf, etc, R. Co, 56 Tex. 594.
51 C.J. p 590 note 55.

99. Ky.—Kentucky, etc., Bridge Co. v. Krieger, 19 S.W. 738, 93 Ky. 243, 14 Ky.L. 151.
51 C.J. p 590 note 56.

1. U.S.—T. B Townsend Brick, etc., Co v. Central Trust Co., Ohio, 187 F. 63, 109 C.C.A. 381.
51 C.J. p 590 note 57.

2. U.S.—Southern Pac. Co v. Portland, Or., 33 S.Ct. 308, 227 U.S. 559, 57 L.Ed. 642.

3. Tex.—Galveston, etc., R. Co. v. Galveston, 39 S.W. 920, 91 Tex. 17, 36 L.R.A. 44—Galveston, etc, R. Co. v. Galveston, Civ.App, 155 S.W 273.

4. N.J.—Jersey City v. Hudson, etc., R. Co., 101 A. 266, 90 N.J.Law 649.

5. N.J.—Jersey City v. Hudson, etc, R. Co, supra.
51 C.J. p 591 note 60.

and preserve the street in good condition,[6] or fix its terminus at a certain place,[7] or construct its road to a certain terminus,[8] or locate its offices, machine shops, and roundhouses within the city limits,[9] or that it will not carry freight through the streets without permission of the municipal authorities,[10] or that it will not use its road as a street railroad in competition with other companies operating street railroads in the city.[11] So, also, reasonable stipulations may be made as to the location of the track,[12] the manner of constructing the road,[13] and the time within which it must be constructed.[14]

Benefit of abutting owner. The conditions imposed by the city on its grant to a railroad company may be such as are for the benefit of the abutting property holders[15] or for the public,[16] or for both.[17] Under some statutes giving a railroad company the right to occupy a street, if the railroad is constructed on the side of the street owned by an abutting owner, its occupancy is subject to the condition that he be compensated for damages to his property,[18] but, if it is constructed on the opposite side of the street or on land not owned by him, he is entitled to compensation for any consequential damages sustained through impairment of his rights appurtenant to his property.[19] On the other hand, it has been held that a city cannot impose as a condition, for the benefit of property owners alone, that the company will pay the damages sustained by private owners of property from the use of the street.[20]

b. Breach of Condition

In the absence of a waiver, if a condition to a railroad's occupation of a street is broken, the railroad company is without authority to occupy the street, and the municipality may reenter and take possession of the street and remove the track, or may sue for damages or for specific performance.

In the absence of a waiver, if a condition to a railroad's occupation of a street is broken, the railroad company is without authority to occupy or use the street.[21] The ordinance granting authority may be repealed,[22] and the municipality may reenter and take possession of the street and remove the track,[23] or may sue for damages, as considered infra § 113, or for specific performance.[24] On breach of a condition to make certain improvements, the municipality may have the improvements made at the cost of the railroad company.[25]

Waiver of condition. A condition to occupation of a street by a railroad may be waived by the municipality.[26]

§ 110. —— Conflicting or Exclusive Grants and Priority of Rights

Although as between two railroad companies having the right to use the streets for their tracks, the company which first actually takes possession of the street acquires the better right to the use of the street to the exclusion of the right of the other company to interfere in any way with the construction and operation of its tracks, the occupancy by one company of a street does not prevent an occupancy by another company under a subsequent grant where it does not interfere with or obstruct the first railroad in its right of passage under its prior grant and location.

As between two railroad companies, having the right to extend their tracks in and through a certain street, the company which first actually takes possession of the street, by locating and constructing its tracks thereon, acquires the better right to the use of the street, to the exclusion of the right of the other company to interfere in any way with the construction and operation of its tracks.[27] However,

6. N.C.—New Bern v. Atlantic, etc., R. Co., 75 S.E. 807, 159 N.C. 542.
51 C.J. p. 591 note 61.
Restoring and maintaining street or highway generally see infra § 130

7. U.S.—New Orleans v. Texas, etc., R. Co., La., 18 S.Ct. 875, 171 U.S. 312, 43 L.Ed. 178.

8. Tex.—Indianola v. Indianola R. Co., 2 Tex.Unrep.Cas. 337.
51 C.J. p. 591 note 63.

9. Tex.—Kansas City, etc., R. Co. v. Sweetwater, 137 S.W. 1117, 104 Tex. 329
51 C.J. p. 590 note 65.

10. Ga.—Powell v. Macon, etc., R. Co., 17 S.E. 1027, 92 Ga. 209.

11. Cal.—Buswell v. Southern Pac. Co., 46 P. 291, 114 Cal. 445.

12. Iowa.—Cain v. Chicago, etc., R. Co., 3 N.W. 736, 6 N.W. 268, 54 Iowa 255.

13. Ky.—Owensboro v. Owensboro, etc., R. Co., 40 S.W. 916, 19 Ky.L. 449
51 C.J. p. 591 note 69.

14. Ill.—La Grange v. Indiana Harbor Belt R. Co., 204 Ill.App. 457.
51 C.J. p. 591 note 70

15. Ky.—Stein v. Chesapeake, etc., R. Co., 116 S.W. 733, 132 Ky. 322

16. Ky.—Stein v. Chesapeake, etc., R. Co., supra

17. Ky.—Stein v. Chesapeake, etc., R. Co., supra.
51 C.J. p. 591 note 74.

18. Wis.—Peters v. Chicago, etc., R. Co., 162 N.W. 916, 165 Wis. 529.

19. Wis.—Peters v. Chicago, etc., R. Co., supra.
51 C.J. p. 591 note 77.

20. Conn.—New Haven v. New Haven, etc., R. Co., 25 A. 316, 62 Conn. 252, 18 L.R.A. 256.

21. Pa.—Edwards v. Pittsburg Junction R. Co., 64 A. 798, 215 Pa. 597.

22. U.S.—New Orleans v. Texas, etc., R. Co., La., 18 S.Ct. 875, 171 U.S. 312, 43 L.Ed. 178.

23. U.S.—Pacific R. Co. v. Leavenworth, C.C.Kan., 18 F.Cas.No.10,649, 1 Dill. 393.

24. Ky.—Louisville Southern R. Co. v. Harrodsburg, 32 S.W. 604, 17 Ky.L. 780.
Tenn.—Louisville, etc., R. Co. v. Mississippi, etc., R. Co., 22 S.W. 920, 92 Tenn. 681.

25. Ky.—Illinois Cent. R. Co. v. Meacham Contracting Co., 202 S.W. 859, 180 Ky. 430
51 C.J. p. 592 note 86.

26. Idaho.—Coeur d'Alene v. Spokane, etc., R. Co., 169 P. 930, 31 Idaho 160.
51 C.J. p. 591 note 80.

27. N.Y.—Waterbury v. Dry Dock,

the occupancy by one company does not prevent an occupancy by another company under a subsequent grant where it does not interfere with or obstruct the first railroad in its right of passage under its prior grant and location,[28] as where the subsequent right of way is granted over the opposite side of the street[29] A grant to a railroad company to use certain streets does not give it the right to interfere with the tracks of a street railway company unless the necessity therefor is so absolute that without it the grant itself would be defeated;[30] and the necessity must also be a necessity that arises from the very nature of things over which the railroad company has no control, and not a necessity created by the company itself for its own convenience or for the sake of economy;[31] nor does such a grant impliedly give other companies the right to use the street by using the tracks of the licensed company.[32] Although the proper county authorities may grant a railroad company the right to cross and use the roadbed of another railroad company along a public highway,[33] it cannot do so without compensation to the original company;[34] nor can it grant such right without the consent of the first company, where such company's roadbed is not on an established and opened public road.[35]

Across canal. A constitutional provision that the legislature "shall not sell, lease or otherwise dispose" of canals does not forbid the granting to a railroad of the right to cross the canal where the use of the canal is not interefered with.[36]

Use of tunnel. Under a statute providing for a transportation tunnel, and expressly declaring that there shall be no monopoly in its use, a lease of the railroad rights in such tunnel is invalid in so far as it gives the lessee an exclusive use for railroad purposes[37] However, a lease for full railroad use to one railroad is not invalid as creating a monopoly, where the right is reserved in the lease permitting subsequent leases for railroad purposes until the total capacity of the railroad use of the tunnel is reached.[38]

§ 111. —— Duration of Right

The duration of a right to use a street or highway for railroad purposes is controlled by the act or ordinance granting the privilege.

The duration of a right to use a street or highway for railroad purposes is controlled by the terms of the act or ordinance granting the right or privilege, as construed by the usual rules of construction,[39] and as so construed, where the grant is of mere permission to lay tracks in a street, it does not constitute a contract or franchise in perpetuity,[40] but confers merely a temporary revocable license,[41] particularly where the granting authorities have no power to make such a grant in perpetuity.[42] Where the grant of a right to a railroad company to lay its tracks in public streets or highways is expressly limited to a definite time, such right terminates at the expiration of such time[43] unless it again obtains the consent of the proper authorities;[44] and the

etc., R. Co, 54 Barb. 388, 32 How. Pr 193

Conflicting grants or licenses by municipal corporations generally see Municipal Corporations § 1735.

Power to grant exclusive privileges see Municipal Corporations § 1724.

28. Pa.—Pennsylvania, etc., R. Co. v. Philadelphia, etc, R. Co., 27 A. 683, 157 Pa. 42.
51 C.J. p 592 notes 89, 90.

29. Iowa.—Merchants' Union Barb Wire Co. v. Chicago, etc, R. Co, 28 N.W 494, 29 N.W. 822, 70 Iowa 105.

30. Pa.—Appeal of Pennsylvania R. Co, 93 Pa. 150.

31. Pa.—Appeal of Pennsylvania R. Co, supra.

32. Mich.—Muskegon, etc., R. Co v. Muskegon Heights, 162 N.W. 92, 194 Mich. 643.

33. U.S.—Cincinnati St R. Co. v. Chattanooga Electric St. R. Co, C. C.Tenn., 44 F. 470.

34. U.S.—Cincinnati St. R Co. v. Chattanooga Electric St. R. Co., supra.

35. U.S.—Cincinnati St. R. Co v. Chattanooga Electric St R. Co., supra.
51 C.J. p 592 note 97.

36. N.Y.—Pryor v. Buffalo, 112 N.Y. S. 437, 60 Misc. 447.
Grant of license or privilege to cross canal generally see Canals § 40

37. U.S.—Moffat Tunnel Improvement Dist. v. Denver & S. L. Ry Co., C.C.A.Colo, 45 F.2d 715, certiorari denied 51 S.Ct. 485, 283 U. S. 837, 75 L.Ed. 1448.

Provision limiting future contracts for railroad use held invalid
U.S.—Moffat Tunnel Improvement Dist v. Denver & S. L. Ry. Co., supra.

38. U.S.—Moffat Tunnel Improvement Dist. v. Denver & S. L. Ry. Co., supra.

Provisions of lease held invalid
Provision in lease of tunnel to railroad precluding subsequent leases on more favorable terms was held invalid.—Moffat Tunnel Improvement Dist. v Denver & S. L. Ry. Co., supra

39. U.S.—Seaboard Air Line R. Co. v. Raleigh, D.C.N.C., 219 F. 573, affirmed 37 S.Ct 8, 242 U.S. 15, 61 L.Ed. 121.
Construction of statute or ordinance granting right generally see supra § 106.
Duration of grant of use of streets generally see Municipal Corporations § 1722.
Revocation or forfeiture of grant of rights in streets or public places see infra § 119.

40. N.Y.—Reimer v. Fullen, 19 N.Y.S.2d 847, 174 Misc. 54.
51 C.J. p 592 note 3

41. U.S.—Fletcher v. Delaware, L. & W. R Co, C.C.A.N.Y., 79 F.2d 306
N.Y.—Reimer v. Fullen, 19 N.Y.S.2d 847, 174 Misc. 54.
51 C.J. p 592 note 4.

42. U.S.—Conway v. Atlantic Coast Line R. Co., D.C.S.C., 20 F.2d 250

43. Ill.—Chicago Terminal Transfer R. Co. v. Chicago, 68 N.E. 99, 201 Ill. 576.
51 C.J. p 593 note 6.

44. Ga.—Augusta, etc., R. Co. v. Augusta, 28 S.E. 126, 100 Ga. 701.

mere fact that additional rights or enlarged powers are subsequently granted to the railroad company does not operate to extend the time specified, since, in the absence of a clear intention in the later grant to supersede the prescribed time limit, the additional rights granted are presumed to be for the original time specified.[45] However, where the right to occupy city streets, as granted by the state legislature, is indefinite as to its duration, it contemplates that the franchise should be enjoyed by the grantee and its successor or successors,[46] and although the grantee company's corporate existence is limited to a specified period, if, by an act of the legislature, it is consolidated with another company which has a longer period of corporate existence, the franchise to use the city streets is not limited to the period of existence of the original grantee, but continues during the corporate existence of the new company.[47]

Where the right to use a street for railroad purposes is granted under a petition of abutting property owners as required by statute, the municipal authorities in granting the right are bound by a limitation imposed by the terms of the petition as to the length of time the street is to be so used;[48] and the railroad company may not claim that the abutting property owners are estopped to assert such limitation by reason of the fact it has expended large sums of money,[49] or procured leases of additional property.[50]

In the absence of an express power in the charter of a city to grant a permanent easement in a street, a license granted to a railroad company to lay tracks and operate trains in a street cannot be construed as a grant of a permanent easement.[51]

§ 112. —— Nature and Extent of Right or Use

a. In general

b. Interest or title acquired

c. Designation or selection of street or highway

d. Width of right of way

e. Mutuality of rights of company and public in general

f. Mode and extent of use

g. Tracks, side tracks, switches, and turnouts

a. In General

The nature and extent of a railroad company's right in, or use of, streets or highways are measured by the terms of the grant or permission.

The construction and operation of a railroad on a street or highway, under and within the terms of a legislative or municipal grant or authority, are a lawful use of the street or highway,[52] and, where abutting property is not depreciated or access thereto unreasonably interfered with, are not objectionable as granting a monopoly of the street.[53] The nature and extent of the right, in a particular case, are measured by the terms of the grant or permission,[54] as construed by the usual rules of construction, together with such statute or ordinances as define and regulate such use,[55] and together with the circumstances existing at the time of the grant.[56] Such right or use cannot be extended by construction beyond the reasonable meaning of the terms in which the grant is expressed;[57] and, hence, a railroad company has no right of way in streets, or highways, or other public places outside the terms of the grant by virtue of which it enters.[58] If the grant is in general terms, the company may lawfully occupy the street or highway to the extent of a reasonable necessity;[59] although any part of the street which the company is authorized to take but has not occupied remains a part of the public high-

45. Ill.—Chicago Terminal Transfer R. Co. v. Chicago, 68 N.E. 99, 203 Ill. 576

46. N.Y.—New York Cent., etc., R. Co. v. New York, 95 N.E. 638, 202 N.Y. 212.

47. N.Y.—New York Cent., etc., R. Co. v. New York, supra.

48. Ill.—Chester v. Wabash, etc., R. Co., 55 N.E. 524, 182 Ill. 332.

49. Ill.—Chester v. Wabash, etc., R. Co., supra.

50. Ill.—Chester v. Wabash, etc., R. Co., supra.

51. N.C.—State v. Atlantic, etc., R. Co., 53 S.E. 290, 141 N.C. 736.

52. U.S.—Grand Trunk Western R. Co. v. South Bend, Ind., 33 S.Ct. 303, 227 U.S. 544, 57 L.Ed. 633, 44 L.R.A.,N.S., 405.
51 C.J. p 593 note 17.

53. Mo.—Seibel-Suessdorf Copper, etc., Mfg. Co. v. Manufacturers' R. Co., 130 S.W. 288, 230 Mo. 59.
51 C.J. p 593 note 18.

54. Ky.—Watson v. Chesapeake & O. Ry. Co., 36 S.W.2d 641, 238 Ky. 31.
Ohio.—Yackee v. Village of Napoleon, 21 N.E.2d 111, 135 Ohio St. 344.
51 C.J. p 593 note 19.
No greater right than that of city Railroad could not by grant from city get any greater right to public alley than city had.—Watson v. Chesapeake & O. Ry. Co., 36 S.W.2d 641, 238 Ky. 31.

55. Mo.—Lueders v. St. Louis, etc., R. Co., 161 S.W. 1159, 253 Mo. 97.
Regulation of use in general see supra § 107.

56. N.Y.—Stephens v. New York, etc., R. Co., 67 N.E. 119, 175 N.Y. 72
51 C.J. p 593 note 22.

57. Ind.—Chicago, etc., R. Co. v. Ehsert, 26 N.E. 759, 127 Ind. 156.
51 C.J. p 593 note 23.

58. U.S.—Southern Pac. Co. v. Portland, C.C.Or., 177 F. 958, affirmed 33 S.Ct. 308, 227 U.S. 559, 57 L.Ed. 642.
Pa.—Jones v. Erie, etc., R. Co., 32 A. 535, 169 Pa. 333, 47 Am.S.R. 916.

59. Pa.—Pennsylvania Schuylkill Valley R. Co. v. Philadelphia, etc., R. Co., 27 A. 683, 157 Pa. 42.
51 C.J. p 594 note 25.

way until the company actually occupies it for the uses intended [60] The conveyance of a right of way to operate a street railroad on certain streets is not sufficient to authorize the construction and operation of a steam railroad on such streets.[61]

On platted land. Where a railroad, with municipal approval, builds a track on land mapped as a street but which has not been opened as such, the subsequent opening of the street is subject to the right of the railroad to continue to use the street for such purpose.[62] However, the acceptance of a plat by the municipal authorities for the purpose of widening the street does not confer greater powers on the railroad company in the street as originally laid out.[63]

b. Interest or Title Acquired

As a general rule, unless there are express words to that effect, a grant of the right to lay and use tracks in a street is not a grant of the street in fee or otherwise, or of a permanent easement therein; nor does it constitute a vacation of the street, but is a grant simply of the right or easement thus to use the street or highway.

Unless there are express words to that effect, a grant of the right to lay and use tracks in a street is not a grant of the street in fee or otherwise[64] or of a permanent easement therein,[65] nor does it constitute a vacation of the street,[66] but is a grant simply of the right or easement thus to use the street or highway,[67] leaving in the grantor the title to the street,[68] and the right of every other use which may be enjoyed consistently with the right granted,[69] and the rights of the public in such street will be paramount to those of the railroad company for all purposes other than transit [70] Moreover, a railroad company, constructing and operating its road on the streets of a city under the city's consent, cannot acquire title to the streets by adverse possession or prescription,[71] nor can the city be estopped to assert its ownership of the streets.[72]

As special franchise. It has been held that, where the privilege of occupying the street or highway results solely from permission by the proper authorities, and the railroad company has no estate or interest in the land itself, such right or privilege constitutes a special franchise;[73] and where such a franchise is given by the state to run from a point within a city to a point outside the city and to occupy the streets and avenues of the city with the approbation of the city authorities, it constitutes a franchise not only to use the public streets and avenues of the city,[74] but also to use private property owned by the city not devoted to streets and avenues;[75] and the city's consent, where granted, becomes a component part of the franchise and inseparable therefrom [76] On the other hand, it has been held that such a right is not a franchise,[77] but merely a contractual property right, subject to the same conditions, restrictions, and limitations as any other property owned by other persons.[78] Likewise, it has been held that where the constitution prohibits a municipality from granting any franchise for any street without the approval

60. N.Y.—New York, etc., R. Co. v. Jackson, 15 N.Y.St. 167, affirmed 24 N.E. 1104, 120 N.Y. 664.

61. Mo.—Ettenson v. Wabash R. Co., 154 S.W. 785, 248 Mo. 395.

62. N.Y.—New York v. New York Cent. R. Co., 190 N.Y.S. 777, 198 App.Div. 517, affirmed 136 N.E. 311, 234 N.Y. 113.

63. Ill.—Chicago Terminal Transfer R. Co. v. Chicago, 68 N.E. 99, 203 Ill. 576.
51 C.J. p. 594 note 30.

64. N.Y.—New York v. New York Cent. R. Co., 136 N.E. 311, 234 N.Y. 113.
51 C.J. p. 594 note 32.
Title, estate, or interest acquired by railroad generally see supra § 83.

65. N.C.—State v. Atlantic, etc., R. Co., 53 S.E. 290, 141 N.C. 736.
51 C.J. p. 594 note 33.

66. Okl.—Tonkawa Milling Co. v. Tonkawa, 83 P. 915, 15 Okl. 672.
51 C.J. p. 594 note 34.

67. U.S.—Montgomery v. Atchison, T. & S. F. Ry. Co., C.C.A.Okl., 89 F.2d 94—McPhee, etc., Co. v. Union Pac. R. Co., Colo., 158 F. 5, 87 C.C.A. 619.
Alaska.—Berger v. Ohlson, 9 Alaska 605.
51 C.J. p. 594 note 35.
Interest in land
A right of way for a railway company is an "easement" although an easement is not a "franchise" but is an "interest in land."—Continental Illinois Nat. Bank & Trust Co. of Chicago v. City of Middlesboro, C.C.A.Ky., 109 F.2d 960.

68. Ill.—Chicago, etc., R. Co. v. Quincy, 28 N.E. 1069, 139 Ill. 355.

69. Ill.—Chicago, etc., R. Co. v. Quincy, supra.

70. Fla.—DeFuniak Springs v. Louisville, etc., R. Co., 87 So. 47, 81 Fla. 27.
51 C.J. p. 595 note 38.

71. N.Y.—New York v. New York Cent. R. Co., 136 N.E. 311, 234 N.Y. 113.
Acquisition of right to use street or highway by prescription or estoppel see supra § 104.
Adverse possession of property held for public use generally see Adverse Possession § 14.

72. N.Y.—New York v. New York Cent. R. Co., supra.

73. U.S.—Griffin v. Oklahoma Natural Gas Corporation, C.C.A.Kan., 37 F.2d 545—McPhee, etc., Co. v. Union Pac. R. Co., Colo., 158 F. 5, 87 C.C.A. 619.
26 C.J. p. 1011 note 51, p. 1012 note 60—51 C.J. p. 595 note 42.

74. N.Y.—New York v. New York Cent. R. Co., 190 N.Y.S. 777, 198 App.Div. 517, affirmed 136 N.E. 311, 234 N.Y. 113.

75. N.Y.—New York v. New York Cent. R. Co., supra.

76. N.Y.—New York v. New York Cent. R. Co., 136 N.E. 311, 234 N.Y. 113.

77. U.S.—Continental Illinois Nat. Bank & Trust Co. of Chicago v. City of Middlesboro, C.C.A.Ky., 109 F.2d 960—Montgomery v. Atchison, T. & S. F. Ry. Co., C.C.A.Okl., 89 F.2d 94.
Ill.—Chester v. Wabash, etc., R. Co., 55 N.E. 524, 182 Ill. 382.

78. Ill.—Chester v. Wabash, etc., R. Co., supra.
51 C.J. p. 594 note 34 [a].

of the taxpayers, but the charter authorizes the council to grant revocable permits, the right given a railroad company to construct a railroad through the city, by an ordinance providing that the permission was revocable at any time, does not constitute a franchise within the prohibition of the constitution but a revocable license within charter powers.[79]

As incorporeal hereditament. A railroad right-of-way easement over a public street is a mere incorporeal hereditament.[80]

As to adjacent land. A grant of a right of way over a street does not include an easement on adjacent land of an abutting owner.[81]

c. Designation or Selection of Street or Highway

Ordinarily, where the ordinance or other grant specifically names the streets that may be used by a railroad company, the company has no right to use other streets.

Where the ordinance or other grant specifically names the streets that may be used by a railroad company, the company has no right to use other streets,[82] except where it is necessary to cross them,[83] unless the intention to grant the use of other streets is apparent from all the facts and circumstances, including the language of the grant,[84] or unless the municipality consents to such relocation or use.[85] Likewise, where the company is authorized, by statute, to occupy a street by condemnation or contract with the city, it is not entitled to select any street for its right of way and obtain control thereof by such proceeding or contract.[86]

A charter right of way along or on "any street, highway, or turnpike in the state," etc., need not mention and designate the particular street on which the road is to be constructed,[87] and under it the railroad company may lay its tracks on the street of an unincorporated village along its route without further permission or authority.[88]

Change of route; relocation. Where a railroad company, under its franchise to use city streets, is given the power to alter or change its route, such right is not an absolute one,[89] and cannot be exercised at will, without regard to the rights of third persons who would be injured by the change;[90] nor can such an absolute right be derived from a subsequent void franchise.[91] Where consent of the municipal authorities is necessary to the occupancy of a street, the fact that part of a railroad in a city is appropriated for a public purpose does not, in the absence of statutory authority, give the railroad company the right to a relocation as a way of necessity, without the consent of the city;[92] nor is such right given by an order of the state railroad commission, authorizing the railroad company to relocate its track wherever it might acquire the right of way, where the commission has no authority to confer such right without the assent of the city.[93] An ordinance authorizing the relocation of a railroad track "at any time thereafter" does not postpone the right to make such relocation until the happening of certain events, but gives a present right.[94]

d. Width of Right of Way

A grant to a railroad company of the right to use a street or public highway gives it merely a right of way of such width as it appropriates and uses for the railroad, and generally, in the absence of express words to the contrary, it cannot occupy the whole width to the exclusion of the public or other railroads unless the whole width is reasonably necessary for its business.

A grant to a railroad company of the right to use a street or public highway gives it merely a right of way of such width as it appropriates and uses for the railroad,[95] and not what it claims or contemplates using.[96] Accordingly, in the absence of express words to the contrary, it cannot occupy the whole width of the street to the exclusion of the public,[97]

79. U S—McPhee, etc, Co v. Union Pac. R Co, Colo., 158 F. 5, 87 C. C A. 619

80. Mont—Chicago, etc, R Co. v. Poland, 172 P. 541, 54 Mont 497.

81. N C.—Wearn v North Carolina R. Co., 132 S E 576, 191 N C. 575.

82. Ill.—Chicago, etc., R Co. v. Chicago, 11 N E 907, 121 Ill. 176. 51 C J p 595 note 52.

83. La—Knight v. Carrollton R. Co., 9 La.Ann. 284. 51 C.J. p 595 note 53

84. Ill—Spring Valley v Chicago, etc., R. Co, 115 N.E. 168, 277 Ill. 313.

85. Tex—Galveston, etc, R. Co v. Galveston, Civ App, 186 S W 368. 51 C J p 595 note 55

86. Neb.—Omaha, etc, R Co. v. Lincoln, 149 N.W. 319, 97 Neb. 122.

87. La—Hepting v. New Orleans Pac R. Co., 36 La.Ann. 898.

88. La—Hepting v New Orleans Pac. R. Co, supra.

Necessity of consent generally see supra §§ 103, 104, 108

89. Colo—Ward v. Colorado Eastern R. Co, 125 P. 567, 22 Colo App 332

90. Colo.—Ward v. Colorado Eastern R Co, supra.

91. Colo—Ward v. Colorado Eastern R. Co., supra.

92. Tex—Galveston, etc., R Co. v. Galveston, Civ App, 155 S.W. 273. 51 C J. p 596 note 61.

93. Tex—Galveston, etc, R. Co v Galveston, supra.

94. Tex—Galveston, etc, R. Co. v. Galveston, supra.

95. Pa.—Pennsylvania, etc, R. Co. v Philadelphia, etc., R Co., 28 A. 771, 160 Pa. 232—Philadelphia, etc., R. Co. v. Berks County R. Co, 2 Woodw. 361.

Width of right of way generally see supra § 82

96. Pa.—Philadelphia, etc., R. Co. v. Berks County R. Co, supra.

97. Pa.—Pennsylvania Schuylkill

or other railroads,[98] unless the whole width of the street or highway is reasonably necessary for its business[99] or unless it provides for another highway to be used by the public in its place.[1] Where the company is authorized to occupy a strip of land in the street, not exceeding a certain width, it may elect to take less than that width, and by some plain and decisive act define the limits of the right of way so as to exclude whatever is unnecessary to the construction and operation of its line.[2] Where the owner of the fee of a street conveys to a railroad company a strip of land in the center thereof, together with the power of sloping embankments or excavations as much farther beyond the lines of the premises granted as may be necessary to support the works, not beyond the width of the street, the company is authorized, when necessary to support its works, to place an embankment in the street to its full width, as it existed at the time of the grant, for the purpose of procuring a proper slope;[3] and, when it is necessary to make rock cuts or excavations through high ground, the company may make such excavations as wide at the surface of the ground as the full width of the street, as it existed at the time of the grant, at least where that is necessary in order to give the proper slope to the excavation,[4] and, in such case, the railroad company, and not the grantor, is the proper judge to determine where excavations and embankments are necessary and the proper width and slope of them within the limits of the street as it existed at the time of the grant.[5]

e. Mutuality of Rights of Company and Public in General

As a general rule the right given to a railroad company to lay down and use tracks in a street or highway is not exclusive, but is merely the right to use the street on equal terms with, and subject to, the right of the general public to occupy and use it.

Unless an exclusive right is granted to the railroad company by or under the authority of the legislature, in clear and explicit terms or by necessary implication,[6] the right given to a railway company to lay down and use tracks in a street or highway is not exclusive,[7] but, as a general rule, is merely the right to use the street or highway on equal terms with, and subject to, the right of the general public to occupy and use it;[8] and the rights of each therein must be exercised with due regard to the rights and nature of the use of the other.[9] Moreover, in the absence of constitutional or statutory authorization, the municipal authorities cannot grant, or consent to, an exclusive, unreasonable, or oppressive use of a street or highway by a railroad company,[10] and a railroad company has no right, even under an ordinance purporting to authorize it to do so, to lay its track in a street which is so narrow that, if occupied by a railroad track, there would not be room for vehicles to pass.[11] A right to operate to a certain street, which is the city limits, continues to such street only, after the limits are extended.[12]

Constructing new highway or street. Acquiescence of the local authorities in the appropriation of a highway by a railroad, without consent or condemnation until after the railroad has been constructed and put in operation, does not prevent such authorities from requiring the railroad company to construct a sufficient substitute road, as nearly equal as is practical, in point of utility to the road so

Valley R. Co. v. Philadelphia, etc., R. Co., 27 A. 683, 157 Pa. 42.
51 C.J. p 596 note 67.
Interference with use by public in general see infra subdivision e of this section.

98. Pa.—Pennsylvania Schuylkill Valley R. Co. v. Philadelphia, etc., R. Co., 28 A. 771, 160 Pa. 232.
51 C.J. p 596 note 68.
Rights to use tracks, right of way, or other property of another road generally see infra § 114.

99. Pa.—Pennsylvania Schuylkill Valley R. Co. v. Philadelphia, etc., R. Co., 27 A. 683, 157 Pa. 42.

1. Pa.—Stroudsburg v. Wilkes-Barre, etc., R. Co., 2 Pa.Dist. 507, 12 Pa.Co. 395.

2. Pa.—Jones v. Erie, etc., R. Co., 23 A. 251, 144 Pa. 629, 32 A. 535, 169 Pa. 333, 47 Am.S.R. 916.

3. N.Y.—Welde v. New York, etc., R. Co., 61 N.E. 554, 168 N.Y. 597.

4. N.Y.—Welde v. New York, etc., R. Co., supra.

5. N.Y.—Welde v. New York, etc., R. Co., supra.

6. Alaska.—**Corpus Juris quoted in** Berger v. Ohlson, 9 Alaska 605, 615.
51 C.J. p 596 note 76.

7. Alaska.—**Corpus Juris quoted in** Berger v. Ohlson, 9 Alaska 605, 615.
Ky.—Watson v. Chesapeake & O. Ry. Co., 36 S.W.2d 641, 238 Ky. 31.
51 C.J. p 596 note 77.
Exclusiveness of rights granted in streets generally see Municipal Corporations § 1735.

8. Alaska.—**Corpus Juris quoted in** Berger v. Ohlson, 9 Alaska 605, 615.
Ga.—**Corpus Juris cited in** Louisville & N. R. Co. v. Ellis, 189 S.E. 559, 561, 54 Ga.App. 783.
Ky.—Watson v. Chesapeake & O. Ry. Co., 36 S.W.2d 641, 238 Ky. 31.
51 C.J. p 597 note 78.

9. Alaska.—**Corpus Juris quoted in** Berger v. Ohlson, 9 Alaska 605, 615.
Ga.—**Corpus Juris cited in** Louisville & N. R. Co. v. Ellis, 189 S.E. 559, 561, 54 Ga.App. 783.
51 C.J. p 597 note 79.

10. Mo.—Sherlock v. Kansas City Belt R. Co., 43 S.W. 629, 142 Mo. 172, 64 Am.S.R. 551.
51 C.J. p 597 note 80.
Limitations on power of municipality to grant use of street generally see Municipal Corporations §§ 1723, 1724.

11. Ala.—Mobile, etc., R. Co. v. Middleton, 36 So. 782, 139 Ala. 610.

12. Wis.—Milwaukee v. Milwaukee Electric R., etc., Co., 180 N.W. 339, 181 N.W. 321, 178 Wis. 400.

taken and occupied.[13] However, local authorities have no right, in such a case, to oust the railroad company from its location on the site of the former road, where it has by law the superior right of location enforceable by proper procedure.[14] So, too, where a railroad company and city agree that certain public streets shall be used exclusively by the company, and that in lieu thereof the company shall maintain on its own land certain other streets designated as private streets, which contract is ratified by the legislature, neither the company nor its successor can close the streets so designated[15] or prevent abutting owners from using them.[16]

f. Mode and Extent of Use

The right of a railroad company to occupy and use a public street or highway must be exercised in such manner as not unnecessarily or materially to obstruct or interfere with the rights of the general public therein, and so as not unnecessarily to obstruct or interfere with abutting property owners in the enjoyment of their property rights.

In accordance with the rules as to mutual rights discussed supra subdivision e of this section, the right of a railroad company to occupy and use a public street or highway must be exercised in such manner as not unnecessarily or materially to obstruct or interfere with the rights of the general public therein,[17] and so as not unnecessarily to obstruct or interfere with abutting property owners in the enjoyment of their property rights, including the right of ingress to and egress from their property to the street or highway;[18] and provision for the protection of the public generally or abutting owners in these rights is often made in railroad charters or by statute or ordinance.[19] Subject to these limitations, and the rules and regulations enacted by the state or municipality, a grant of a right to lay and operate a railroad over streets or highways carries with it the right to make such use of the street or highway in constructing or operating the road as is necessarily incident to the enjoyment of the original grant,[20] in the mode ordinarily adopted by railroad companies,[21] but it cannot subject the street or highway to a new and independent servitude without further authority.[22] Where the right is to use the street for a single track to transport a particular commodity, the company may not lay tracks for a general railroad business.[23] Likewise, where the right is to cross or pass along a street or highway, it is limited to a reasonable use by crossing, passing, and repassing consistent with the earlier public right,[24] and includes the taking on of passengers and freight on the street to a reasonable extent;[25] but does not include the right to occupy the street, or highway, or other public place with permanent structures[26] other than its tracks at the grade of the street,[27] such as for depot purposes[28] or car houses,[29] or to occupy a street for freight or railroad yard purposes,[30] especially where the charter of the railroad specifically authorizes the railroad to purchase land for terminal purposes,[31] or for a water tank.[32] The right to lay side tracks and turnouts, as considered infra subdivision g of this section, implies the right to use them for the transportation of goods to and from adjoining stores and warehouses;[33] and the grant of a right to cross

13. W.Va.—Wetzel County Court v. Baltimore, etc., R. Co., 87 S.E. 334, 77 W.Va. 535, L.R.A.1917C 967.
Restoring and maintaining street or highway generally see infra § 130.

14. W.Va.—Wetzel County Court v. Baltimore, etc., R. Co., supra.

15. Ala.—Greil v. Stollenwerck, 78 So. 79, 201 Ala. 303.

16. Ala.—Greil v. Stollenwerck, supra.

17. Ga.—Corpus Juris cited in Louisville & N. R. Co. v. Ellis, 189 S.E. 559, 561; 54 Ga.App. 783.
51 C.J. p 598 note 90.
Use of streets by railroads as constituting nuisance see Nuisances § 67.

18. Ky.—Watson v. Chesapeake & O. Ry. Co., 86 S.W.2d 641, 238 Ky. 31.
51 C.J. p 598 note 91.

19. Ga.—Corpus Juris cited in Louisville & N. R. Co. v. Ellis, 189 S.E. 559, 561, 54 Ga.App. 783.
51 C.J. p 598 note 92.

20. Ky.—Louisville, etc., R. Co. v. Covington, 213 S.W. 568, 184 Ky. 811.
51 C.J. p 598 note 94.

21. Ala.—Mobile v. Louisville, etc., R. Co., 4 So. 106, 84 Ala. 115, 5 Am.S.R. 342.

22. Miss.—Alabama, etc., R. Co. v. Inge, 22 So. 294.
51 C.J. p 598 note 96.
Subject to public veto
Use of a street for railway spur track is an additional servitude by a public utility subject to right of public to veto it.—Birmingham Realty Co. v. Birmingham Belt R. Co., 35 So.2d 503, 250 Ala. 623.

23. Mich.—Riedinger v. Marquette, etc., R. Co., 28 N.W. 775, 62 Mich. 29.

24. N.Y.—Ft. Edward v. Hudson Valley R. Co., 111 N.Y.S. 753, 127 App.Div. 438.
51 C.J. p 599 note 98.

25. N.Y.—Ft. Edward v. Hudson Valley R. Co., supra.

26. R.I.—Taber v. New York, etc., R. Co., 67 A. 9, 28 R.I. 269.
51 C.J. p 599 note 1.

27. R.I.—Taber v. New York, etc., R. Co., supra.

28. N.J.—State v. Morris, etc., R. Co., 25 N.J. Law 437.
51 C.J. p 599 note 3.

29. Pa.—Allegheny v. Ohio, etc., R. Co., 26 Pa. 355.

30. N.Y.—Ft. Edward v. Hudson Valley R. Co., 111 N.Y.S. 753, 127 App.Div. 438.
51 C.J. p 599 note 5.

31. N.J.—Camden v. West Jersey, etc., R. Co., 123 A. 509, 95 N.J.Eq. 346.

32. U.S.—Chicago Great Western R. Co. v. Leavenworth, City First M. E. Church, Kan., 102 F. 85, 42 C.C.A. 178, 50 L.R.A. 488.
51 C.J. p 599 note 7.

33. Ala.—Mobile v. Louisville, etc., R. Co., 4 So. 106, 84 Ala. 115, 5 Am.S.R. 842.
Pa.—Lake Shore, etc., R. Co. v. Wiley, 44 A. 583, 193 Pa. 496.

highways in municipal corporations includes the right to lay along the right of way pipes to conduct water needed for locomotives, and the other needs attendant on the operation of the road.[34] However, it has been held that a railroad company has no right to use its main tracks or sidings in a city street for the storage of cars to be loaded or unloaded,[35] or as a depot for cars.[36]

Shifting cars. A railroad company may not use its tracks in a city for the general purpose of shifting cars and making up trains;[37] but in making or breaking up a train in a city station, the temporary use by the railroad company occupying the station of an adjacent street may be necessary, and to that extent the authority to use the street grows out of the necessities of the case and is a necessary incident to the right to use the road and station;[38] and it also has a right to pass and repass over a highway in making up its trains and shifting its cars, provided this is done only to a reasonable extent and in a reasonable manner, without encroaching on the rights of others who have an equal right to use it.[39]

g. Tracks, Side Tracks, Switches, and Turnouts

Subject to the rules as to interference with public use, and of any limitation in its grant or license, a railroad company, as a necessary incident to its right to construct and operate its road on a public street or highway, may, when reasonably necessary, construct additional tracks, side tracks or switch tracks thereon.

Subject to the rules as to interference with public use, as discussed supra subdivision e of this section, and of any limitation in its grant or license, a railroad company, as a necessary incident to its right to construct and operate its road on a public street or highway, may, when reasonably necessary, construct side tracks or switch tracks thereon,[40] and may make a turnout in a street or highway to communicate with a depot, warehouse, or freight yard,[41] even though it is forbidden to make switches or turnouts for standing or passing trains.[42] Where they are delegated such authority, the municipal authorities may expressly grant the right to construct and operate such side tracks, turnouts, and switches in the streets,[43] provided they are not to be used for private purposes only,[44] and the nature and extent of the right in such a case depend on the terms of the grant or permission.[45] Where a railroad siding is laid in a public street for the convenience of property owners, the city may change the grade, even though it interferes with the siding and renders it useless.[46] Under statutory authority to construct such branches from its main line as the company may deem necessary, a company which has constructed its main line in a municipality with its consent may construct a branch line across a street to the plant of a manufacturing company.[47]

Additional tracks. When the necessities of the road require it, and there is sufficient room to do so within prescribed limits,[48] and there is no limitation as to the number of tracks,[49] the railroad company, under the view of public necessity, may construct and use in the street or highway additional tracks to accommodate the increase of its trade and business, and, if damages were assessed to the adjacent owners under the original grant, as under general proceedings of appropriation, it may construct such additional tracks, without paying additional damages.[50] Where the company is given the right to lay a specified number of tracks in a street at the time of the original location of its line, but lays only a part of them, it may thereafter, to ac-

34. Ky.—Louisville, etc., R. Co. v. Covington, 213 S.W. 568, 184 Ky. 811.
Miss.—Canton v. Canton Cotton Warehouse Co., 36 So. 266, 84 Miss. 268, 105 Am.S.R. 428, 65 L.R.A. 561.

35. Ga.—Atlantic, etc., R. Co. v. Montezuma, 49 S.E. 738, 122 Ga. 1.
51 C.J. p. 599 note 11.

36. Ky.—Owensborough, etc., R. Co. v. Sutton, 13 S.W. 1086, 12 Ky. L. 247.
Pa.—Allegheny v. Ohio, etc., R. Co., 26 Pa. 355.

37. N.C.—State v. Atlantic, etc., R. Co., 53 S.E. 290, 141 N.C. 736.
51 C.J. p. 599 note 14.

38. D.C.—Glick v. Baltimore, etc., R. Co., 19 D.C. 412, 21 D.C. 363.—Hopkins v. Baltimore, etc., R. Co., 17 D.C. 311.

39. Mass.—Gahagan v. Boston, etc., R. Co., 1 Allen 187, 79 Am.D. 724.

40. Iowa.—Hileman v. Chicago Great Western R. Co., 85 N.W. 800, 118 Iowa 591.
51 C.J. p. 599 note 18.

41. La.—New Orleans, etc., R. Co. v. New Orleans Second Municipality, 1 La.Ann. 128.
51 C.J. p. 600 note 19.

42. Pa.—Philadelphia v. River Front R. Co., 19 A. 356, 133 Pa. 134.
51 C.J. p. 600 note 20.

43. Ill.—Mills v. Parlin, 106 Ill. 60.
51 C.J. p. 600 note 22.
Municipal grant or consent to railroad generally see supra § 104.
Power of municipality to grant use of street for railroad purposes in general see Municipal Corporations § 1726 c.

44. Ill.—Greenlee Foundry Co. v. Borin Art Products Corp., 41 N.E. 2d 532, 379 Ill. 494.
51 C.J. p. 600 note 23.
Power of municipality to grant use of street by private railroad generally see Municipal Corporations § 1725 b.

45. N.Y.—Reimer v. Fullen, 19 N.Y.S. 2d 847, 174 Misc. 54.
51 C.J. p. 600 note 24.

46. Pa.—Murdoch v. Pittsburgh, 100 A. 869, 256 Pa. 268.

47. Pa.—Bethlehem Borough v. Lehigh, etc., R. Co., 97 A. 1074, 253 Pa. 251.

48. Ind.—Chicago, etc., R. Co. v. Eisert, 26 N.E. 759, 127 Ind. 156.

49. Ind.—Chicago, etc., R. Co. v. Eisert, supra.
51 C.J. p. 600 note 28.

50. Ind.—Chicago, etc., R. Co. v. Eisert, supra.

commodate the increase of its trade and business, lay the other authorized tracks.[51]

Further authority or consent. Where the power of the railroad company to lay tracks, side tracks, switches, etc., as conferred in the grant or permission to it, is not exhausted by the original laying of tracks on the streets, it may thereafter, without the consent of the municipal authorities, lay thereon additional tracks[52] or a branch line.[53] Accordingly, where a city ordinance purports to grant the unreserved and unrestricted use of a street for railroad purposes, the company is not compelled at the outset to construct all the tracks it has a right to lay in the street under the grant,[54] but it may construct a single track at first and then construct any additional track or tracks, authorized by the ordinance or statute, at any time in the future, whenever it becomes desirable from the necessity or for the convenience of operating its road.[55] However, where the right of the company is exhausted by the construction of its tracks, it has no right some years afterward to build additional tracks, without additional authority therefor,[56] unless they are demanded by public necessity and the railroad owns the right of way.[57] Municipal authority to construct a single track in a street confers no authority to construct a double track.[58] Where, if the location or route of a proposed railroad is indefinitely described on the map filed by the company and in the instrument executed by a property owner conferring a right of way on it, the track as established at the time of the grant of the right of way and with respect to the location of which the consent was given should be held unchangeable, and additional tracks, switches, or sidings may not be constructed without the property owner's permission[59] or the acquisition of the right through statutory condemnation proceedings;[60] since in such a case the consent of the property owner does not give the railroad company the right to utilize the street for as many tracks or for such sidings or switches as it may deem necessary in the accomplishment of its corporate purposes.[61] Where a railroad company, having a right by consent of abutting property owners to maintain only a single track in a highway, changes and adds to its track by constructing switches and sidings, it becomes a trespasser as to the abutting owners.[62]

§ 113. —— Remedies by or against Railroad Company

a. In general
b. Injunction
c. Mandamus

a. In General

The town or municipality in which the highway is situated may proceed in equity against the railroad company to ascertain whether or not the location and construction of the road are within the power granted to the company; whether or not a railroad company rightfully occupies a street or highway must be determined in a direct proceeding, by a proper public officer in the name of the state.

The town or municipality in which the highway is situated may proceed in equity against the railroad company to ascertain whether or not the location and construction of the road are within the power granted to the company;[63] and whether a railroad company rightfully occupies a street or highway must be determined in a direct proceeding, by a proper public officer in the name of the state,[64] and unless so raised the presumption is that the company is in rightful occupancy thereof.[65] Such question may not be raised for the first time in a property owner's action against the railroad for an injunction and for damages as for a nuisance,[66] or in an action for damages against the company for killing plaintiff's intestate;[67] but it may arise in a suit between different railroad companies as to

51. Pa.—Williamsport v. Pennsylvania R. Co., 40 Pa.Co. 267.
52. Pa.—Williamsport v. Pennsylvania R. Co., supra.
51 C.J. p 601 note 31.
53. Pa.—Bethlehem v. Lehigh, etc., R. Co., 97 A. 1074, 253 Pa. 251.
54. Cal.—Los Angeles v. Southern Pac. R. Co., 108 P. 65, 157 Cal. 363.—Workman v. Southern Pac. R. Co., 62 P. 185, 316, 129 Cal. 536.
55. Cal.—Los Angeles v. Southern Pac. R. Co., 108 P. 65, 157 Cal. 363.—Workman v. Southern Pac. R. Co., 62 P. 185, 316, 129 Cal. 536.
56. Iowa.—Henry v. Mason City, etc., R. Co., 118 N.W. 310, 140 Iowa 201.
51 C.J. p 601 note 35.
57. Ark.—McLaughlin v. Missouri Pac. R. Co., 300 S.W. 929, 175 Ark. 912.
58. Ky.—Klosterman v. Chesapeake, etc., R. Co., 56 S.W. 820, 22 Ky.L. 192, 114 Ky. 426, 71 S.W. 6, 24 Ky. L. 1183, 1233.
59. N.Y.—Stephens v. New York, etc., R. Co., 67 N.E. 119, 175 N.Y. 72.
60. N.Y.—Stephens v. New York, etc., R. Co., supra.
61. N.Y.—Stephens v. New York, etc., R. Co., supra.
62. N.Y.—Stephens v. New York, etc., R. Co., supra.
63. Mass.—Springfield v. Connecticut River R. Co., 4 Cush. 63.
51 C.J. p 601 note 48.

Actions for injuries to property see infra §§ 465-476.
Remedies for obstruction of highway generally see Highways §§ 222-231.
Summary removal of railroad track from street see Municipal Corporations § 1750.

64. N.Y.—People v. State Board Tax Commissioners, 146 N.Y.S. 112, 160 App.Div. 771.
51 C.J. p 601 note 49.
65. Ala.—Glass v. Memphis, etc., R. Co., 10 So. 215, 94 Ala. 581.
66. N.Y.—Willson v. New York Cent., etc., R. Co., 146 N.Y.S. 208.
67. Ala.—Glass v. Memphis, etc., R. Co., 10 So. 215, 94 Ala. 581.

their right to occupy the same highway,[68] in which suit the local authorities of the county or municipality must be made parties.[69]

Under a statute authorizing the highway commissioners or other local authorities to sue, to sustain the rights of the public in and to any highway, and to enforce the performance of any duty enjoined on a railroad company with respect to such highway, such commissioners may sue a railroad company, on its abandoning a turnpike, which it had taken over from the turnpike company, to compel it to surrender the turnpike to them;[70] or they may sue the company to compel it to restore a highway, which it has taken without authority of law, to its original condition,[71] and to recover damages or expenses sustained or which may be sustained by the town or city in consequence of any act or omission of a railroad company in violation of any law or condition with respect to such highway.[72]

Recovery of possession; ejectment; damages. A municipality may maintain ejectment to recover municipal land which a railroad company is occupying unlawfully.[73] Likewise, since city streets are in its possession and control, as discussed in Municipal Corporations §§ 1681–1695, an abutting owner cannot maintain an action for possession of any portion of the street or for ejectment, against a railroad company occupying it with the lawful consent of the municipality.[74] So, too, it has been held that, if an owner stands by and permits the railroad company to enter and construct its road or expend a considerable amount of money in its construction, he may not maintain an action of ejectment,[75] and the abutting property owner is left to his action for damages.[76]

Recovery by railroad of cost of relocation. Where a railroad has lawfully constructed its road through a street, and is occupying the street in a lawful manner under direct legislative authority, it is entitled to recover the reasonable cost of removing and relocating any part of its structures for the accommodation of the municipality without an order therefor.[77]

b. Injunction

(1) In general
(2) By abutting owner or other citizen
(3) By railroad company

(1) In General

An injunction will lie at the instance of the proper state, county, or municipal authorities to restrain a railroad company from constructing or operating its road on a public street or highway without authority of law, or to require its removal, or to restrain the company from using the street or highway in an unreasonable, wrongful, or unlawful manner, or to compel it to abate unlawful obstructions which it has placed in the street or highway.

An injunction will lie at the instance of the proper state, county, or municipal authorities[78] to restrain a railroad company from constructing and operating its road on a public street or highway without authority of law,[79] or to require its removal,[80] or to restrain the company from using the street or highway in an unreasonable, wrongful, or unlawful manner,[81] or to compel it to abate unlawful obstructions which it has placed in the street or highway.[82] Injunction will also lie to restrain the company from removing a roundhouse or other structure which it has contracted to maintain.[83] Where, however, a railroad company has obtained proper authority to construct its road on or along a street or highway, a court of equity ordinarily will not interfere to restrain such construction.[84] In ordering a

68. Pa.—Middletown, etc., St. R. Co. v Middletown Electric R. Co., 4 Pa Dist. 32, 16 Pa.Co. 127.

69. Pa.—Middletown, etc., St R. Co. v. Middletown Electric R. Co., supra

70. N.Y.—Palatine v. New York Cent., etc., R Co., 47 N.Y.S. 1024, 22 App Div. 181.

71. N.Y.—Barse v. Herkimer, etc., R. Co., 13 N.Y.St. 215.

72. N.Y.—Barse v. Herkimer, etc., R Co., supra
Ohio—Cincinnati, etc., R Co. v. Carthage, 36 Ohio St 631.

73. N.Y—New York v New York Cent. R. Co., 190 N.Y.S 777, 198 App Div. 517, affirmed 136 N.E. 311, 234 N.Y. 113.
51 C.J. p 602 note 56.

74. S.D.—Dewey v Chicago, etc., R Co., 158 N.W. 408, 37 S.D 390.

75. Ind.—Strickler v Midland Ry Co., 25 N.E. 455, 125 Ind 412

76. Ind.—Strickler v. Midland Ry. Co., supra
S.D.—Dewey v Chicago, etc., R. Co., 158 N.W. 408, 37 S.D 390

77. U.S.—New York v. Davis, C.C.A.N.Y., 7 F.2d 566.
51 C.J. p 602 note 59.

78. N.Y.—New York Cent., etc., R. Co. v. New York, 127 N.Y.S. 513, 142 App.Div. 578, affirmed 95 N.E. 638, 202 N.Y. 212.
51 C.J. p 602 note 61
Injunction for obstruction of highway generally see Highways §§ 226, 227.

79. Ala.—Birmingham Belt R. Co. v. Birmingham, 101 So. 599, 211 Ala. 674.
51 C.J. p 602 note 63.
Railroad as nuisance generally see Nuisances § 67.

80. Mich.—Grand Rapids v Pere Marquette R. Co., 227 N.W. 797, 248 Mich 686.
51 C.J. p 602 note 64.

81. Ind.—Pittsburgh, etc., R Co v Remington, 89 N.E. 614, 91 N.E. 249, 45 Ind.App. 561.
51 C.J. p 602 note 65

82. Cal.—Red Bluff v. Southern Pac. Co., 187 P. 152, 44 Cal.App. 667.
51 C.J. p 602 note 66.

83. Tex.—Dublin v. Fort Worth, etc., R. Co., Civ.App., 292 S.W. 591
51 C.J. p 603 note 67.

84. N.Y.—Baxter v Spuyten Duyvil, etc., R. Co., 61 Barb. 428, 11 Abb Pr.N.S., 178.
Pa.—Bethlehem v Lehigh, etc., R Co., 97 A. 1074, 253 Pa. 251.

removal of tracks, the court may take into consideration the matter of public interest in deciding on the time or manner of removal;[85] and an injunction which will interfere with the loading of freight in the street by a railroad company operating over the streets should not be ordered on the ground that the company is obstructing the highway, except on a full investigation by trial, since not only the company, but the public offering its freight for carriage, is affected.[86]

Estoppel. Municipal or local authorities will be estopped from enforcing such remedy where the railroad company has gone to considerable expense in constructing its tracks and they have acquiesced or delayed to take action for a number of years;[87] or where the public right in the street or highway has been extinguished by the vacation of it as a public highway, except for a short distance, over which public travel is not impeded.[88]

(2) By Abutting Owner or Other Citizen

As a general rule, where a railroad is rightfully occupying a street or highway, an injunction will not lie, at the instance of an abutting owner or other citizen, to restrain the railroad company from using the street or highway.

Injunction to restrain the construction and operation of a railroad on a street or highway without authority of law may also be maintained by an abutting owner or other citizen who is or will be specially injured thereby,[89] even though he is not irreparably injured,[90] and this rule applies, although the abutting owner is a railroad company which itself operates a railroad on the street without authority.[91] If the abutting owner is the owner of the fee of the street or highway and the railroad is constructed and operated without his consent or compensation to him, he is entitled to injunctive relief.[92]

On the other hand, it has been held that a court of equity is not bound to issue an injunction requiring removal of tracks which were erected without legislative authority or municipal consent over the center of a street, where such an order would produce great public or private mischief and would merely protect technical rights,[93] especially where an abutting owner made no objection to the laying of a railroad track over the highway,[94] since he is guilty of laches which prevents the issuance of an injunction.[95]

Railroad rightfully on street or highway. Where the railroad company is rightfully occupying the street or highway, as a general rule an injunction will not lie, at the instance of an abutting owner or other citizen, to restrain the railroad company from using the street or highway,[96] especially where he has consented to its location[97] or has acquiesced or delayed for a number of years to complain thereof,[98] and the rule is the same whether the fee of the street is in the public or in the abutting property owner.[99] Accordingly, it has been held that, if an owner stands by and permits the railroad company to enter and construct its road or complete its grade or expend a considerable amount of money in the construction of its roadbed, he may not obtain an injunction.[1]

On the other hand, he may insist that such streets be used in a manner not calculated to inflict unnecessary injury,[2] and may be entitled to injunctive relief where he receives or is threatened with such special injury, different from that suffered by the

85. N.J.—Camden v. West Jersey, etc., R. Co., 123 A. 509, 95 N.J.Eq. 346.
51 C.J. p. 603 note 69.

86. N.Y.—Ft. Edward v. Hudson Valley R. Co., 111 N.Y.S. 753, 127 App.Div. 438.

87. Mich.—Flint v. Grand Trunk Western R. Co., 174 N.W. 147, 207 Mich. 213.
51 C.J. p. 603 note 72.
Estoppel as to construction of railroad generally see Estoppel §§ 95, 145.

88. N.J.—Morris, etc., R. Co. v. Stickle, 20 N.J.Eq. 530.

89. Colo.—Ward v. Colorado Eastern R. Co., 125 P. 567, 22 Colo. App. 332.
Pa.—Pennsylvania R. Co. v. Philadelphia B. L. R. Co., 1 Pa.Dist. 1, 10 Pa.Co. 625, affirmed 24 A. 210, 149 Pa. 218, 29 Wkly.N.C. 202.
51 C.J. p. 603 note 75.

90. Pa.—Appeal of Pennsylvania R. Co., 5 A. 872, 115 Pa. 514.

91. Ala.—Louisville, etc., R. Co. v. Mobile, etc., R. Co., 26 So. 895, 124 Ala. 162
51 C.J. p. 603 note 77.

92. Md.—Northern Cent. R. Co. v. Canton Co., 65 A. 337, 104 Md. 682.
51 C.J. p. 603 note 78
Spur track
Use of street for railway spur track is an additional servitude by a public utility subject to claim of owner of adjacent lot and fee to center of street, to enjoin such additional servitude if it is without his consent, and without condemnation under eminent domain.—Birmingham Realty Co. v. Birmingham Belt R. Co., 35 So.2d 503, 250 Ala. 623.

93. Mich.—Kipp v. Van Wagoner, 231 N.W. 592, 286 Mich. 202.

94. Mich.—Kipp v. Van Wagoner, supra.

95. Mich.—Kipp v. Van Wagoner, supra.

96. U.S.—Whittaker v. Atlanta, etc., R. Co., C.C.Ga., 143 F. 583.
51 C.J. p. 603 note 79.

97. Ind.—Burkam v. Ohio, etc., R. Co., 23 N.E. 799, 122 Ind. 344
Or.—Wolfard v. Fisher, 84 P. 850, 87 P. 530, 48 Or. 479, 7 L.R.A.,N.S., 991.

98. U.S.—Beers v. Chicago, M. & St. P. Ry. Co., C.C.A.Ill., 141 F. 957.
51 C.J. p. 604 note 81.

99. U.S.—Whittaker v. Atlanta, etc., R. Co., C.C.Ga., 143 F. 583.

1. Ind.—Strickler v. Midland Ry. Co., 25 N.E. 455, 125 Ind. 412.
51 C.J. p. 604 note 81 [a].

2. La.—Laviosa v. Chicago, etc., R. Co., 1 McG. 229.

public in general, that an action at law would be an inadequate remedy,[3] even though his property is not situated on the part of the street on which the railroad is constructed or to be constructed;[4] but a strong case must be presented and the impending danger must be imminent and impressive in order to justify the issuing of an injunction as a precautionary and preventive remedy.[5] Thus, if this special injury is or will be such that the abutting owner or other citizen would have no adequate remedy at law, he may maintain an injunction to restrain the railroad company from doing unauthorized or negligent acts or placing obstructions in the street or highway;[6] or to compel it to remove its tracks to a greater distance from his property;[7] or to prevent, or compel the removal of, an unlawful obstruction which seriously interferes with the right of ingress or egress to or from his property,[8] or with the use of the street for traffic or travel.[9] Equity, however, will not enjoin a railroad company from using a public street, at the instance of a private citizen, where he has an adequate remedy at law,[10] or where the injury is due merely to a proper use and operation of the road;[11] nor will it require the railroad company to remove obstructions at the instance of abutting owners, on the ground of breach of conditions, which were not imposed for their special benefit.[12]

Enjoining removal. Owners for whose accommodation a railroad siding is laid in a public street may not enjoin its removal by the city.[13]

(3) By Railroad Company

Where a railroad company has lawfully laid its tracks through a street or highway, it may maintain an injunction to prevent the municipal or local authorities or an abutting owner from unreasonably tearing up or removing such tracks, or from interfering with the construction and use of necessary tracks or structures.

Where a railroad company has lawfully laid its tracks through a street or highway, it may maintain an injunction to prevent the municipal or local authorities or an abutting owner from unreasonably tearing up or removing such tracks,[14] or from interfering with the construction and use of necessary tracks or structures;[15] or where the road is constructed on a private right of way, it may sue to enjoin a municipality from encroaching thereon by the construction of a street.[16] An injunction will also lie at the instance of a railroad company to enjoin the enforcement of an ordinance which has for its purpose the destruction of the company's legally vested right to use a street for railroad purposes;[17] and in such suit the municipality may not by cross bill seek to enforce another ordinance requiring the placing of the tracks at a different grade,[18] since such right neither grows out of, nor is connected with, the subject matter of the bill and may be enforced in a separate suit at law.[19] An injunction may issue to enjoin local officers from interfering with the laying of tracks, as authorized by a general law, although consent of the local authorities has not been obtained,[20] or from preventing the company from constructing an additional track, as authorized by ordinance.[21] However, an injunction is not the

3. Colo.—Ward v. Colorado Eastern R. Co., 125 P. 567, 22 Colo.App. 332.
51 C.J. p 604 note 83.

4. Colo.—Ward v. Colorado Eastern R. Co., supra.

5. N.Y.—Drake v. Hudson River R. Co., 7 Barb 508

6. N.Y.—Coatsworth v. Lehigh Valley R. Co., 51 N.E. 301, 156 N.Y. 451.
51 C.J. p 604 note 86.

7. La.—Laviosa v. Chicago, etc., R. Co., 1 McG. 299.

8. Mo.—Ettenson v. Wabash R. Co., 154 S.W. 785, 248 Mo. 395.
51 C.J. p 604 note 88.

9. Mo.—Foudry v. St Louis, etc., R. Co., 109 S.W. 80, 130 Mo.App. 104
51 C.J. p 604 note 89.

Determination of interference

In determining whether tracks interfere with travel and traffic on a street so as to warrant an injunction, the population and business volume of the city, proximity and convenience of other streets, and environments should be considered, and, while even a considerable hindrance or inconvenience to travel and traffic will not necessarily make the occupation of a street by a railway company unlawful, the monopoly of the street by the company need not go to the extent of rendering passage by teams and vehicles impossible, and if the tracks so far engross a street that the public will forego the use of it rather than encounter the danger and difficulty of using it, injunction will lie.—Foudry v. St Louis, etc., R. Co., supra.

10. U.S.—Beers v. Chicago, M. & St. P. Ry. Co., C.C.A.Ill., 141 F. 957.
51 C.J. p 604 note 90.

11. N.Y.—Conabeer v. New York Cent., etc., R. Co., 51 N.E. 402, 156 N.Y. 474
51 C.J. p 604 note 91.

12. Pa.—Aldine Realty Co. v. Manor Real Est., etc., Co., 148 A. 56, 297 Pa. 583.
51 C.J. p 605 note 92.

13. Pa.—Murdoch v. Pittsburgh, 100 A. 869, 256 Pa. 268.

14. Cal.—Southern Pac. R. Co. v. Ferris, 28 P. 828, 93 Cal. 263, 18 L.R.A. 510.
51 C.J. p 605 note 93.

15. U.S.—Shelbyville v. Glover, Ky., 184 F. 234, 106 C.C.A. 376.
51 C.J. p 605 note 94.

16. S.C.—Carolina, etc., R. Co. v. Alexander, 151 S.E. 893, 155 S.C. 91.
51 C.J. p 605 note 95.

17. Ala.—Mobile v. Louisville, etc., R. Co., 4 So. 106, 84 Ala. 115, 5 Am.S.R. 342
51 C.J. p 605 note 96.

18. Ala.—Florala v. Louisville, etc., R. Co., 104 So. 769, 213 Ala. 342

19. Ala.—Florala v. Louisville, etc., R. Co., supra.

20. N.J.—Elizabeth, etc., R. Co. v. Woodbridge Tp., 95 A. 987, 85 N.J.Eq. 192, reversed 96 A. 404, 84 N.J.Eq. 72.

21. Ind.—Grand Trunk Western R. Co. v. South Bend, 89 N.E. 885, 91 N.E. 809, 174 Ind. 203, 36 L.R.A., N.S., 850, reversed on other

proper remedy to prevent a municipality from repealing orders granting assent to the occupation of the streets by the railroad company,[22] and, where the right of the company to construct its works on a street is subject to the municipality agreeing on the terms and conditions thereof, the company, on the rejection of its own terms and conditions, cannot enforce its right by enjoining the municipal authorities from interfering with the work,[23] since, as discussed infra subdivision c of this section, its remedy, if the municipal authorities arbitrarily refuse to agree on terms and conditions, is by mandamus or mandatory injunction to compel them to exercise their discretion in good faith.[24]

Use of bridge. Where a railroad company, in compliance with its contract, erects and agrees to maintain a substantial street bridge over a railroad cut in a street, it is entitled to an injunction to restrain any use of the bridge beyond or differing from those for which it is adopted, and which tend to increase the burden of maintenance or endanger the railroad and its traffic,[25] regardless of the ownership of the street bridge,[26] and of whether the bridge has been dedicated to public use.[27]

Against individual. Although a railroad company may be entitled to use a certain portion of a street, until it does make use of it, it is not entitled to an injunction to restrain a person from carrying on a transfer baggage business on that part of the street, if he conducts such business in the usual and ordinary manner and under proper authorization from the city.[28]

c. Mandamus

Mandamus will lie to compel the proper board or officers of a municipal corporation to act on the merits of the application of a railroad to extend its track through the streets of the municipality, or to compel their consent to the construction of certain works by the railroad.

Mandamus will lie to compel the proper board or officers of a municipal corporation to act on the merits of the application of a railroad to extend its track through the streets of the municipality,[29] or to compel their consent to the construction of certain works by the railroad company.[30]

Against railroad. Where a railroad company is unlawfully obstructing a street or highway, a writ of mandamus to compel it to remove its structures may be maintained by the municipal corporation,[31] or by a private relator, suing as a citizen and taxpayer,[32] unless the municipality has, by its acts and conduct, estopped itself to assert its right to an unobstructed use of the street.[33]

§ 114. Right to Use Tracks, Right of Way, or Other Property of Another Road

a. In general
b Statutory permission
c. Contracts and agreements between railroads
d. Covenants and conditions in grant of right of way
e. Remedies against interference with right of way or property
f. Enforcement of agreements

a. In General

As a general rule one railroad company may not enter on or use the tracks, depots, right of way, or other property of another railroad company without the latter's consent.

As a general rule one railroad company may not enter on or use the tracks, depots, right of way, or other property of another railroad company without the latter's consent,[34] and the rule has been said to apply even though the act of the first company in building the track in question was ultra

grounds 33 S Ct. 303, 227 U S 544. 57 L Ed 633, 44 L.R.A.,N.S., 405.
51 C J. p 605 note 1.

22. W.Va.—Belington, etc., R Co v. Alston, 46 S E. 612, 54 W Va 597.

23. Ky.—Louisville, etc., R Co v Covington, 203 S.W. 1060, 181 Ky 86.

24. Ky.—Louisville, etc., R. Co. v Covington, supra.

25. Md.—South Baltimore Co v Washington, etc., Electric R Co, 132 A. 269, 149 Md. 678.
51 C J. p 606 note 6.

26. Md.—South Baltimore Co. v Washington, etc., Electric R. Co., supra.

27. Md.—South Baltimore Co. v. Washington, etc., Electric R. Co., supra

28. N Y.—New York, etc., R. Co. v. Jackson, 15 N Y.St. 167, affirmed 24 N E. 1104, 120 N.Y. 664.

29. Cal.—People v. Craycroft, 44 P. 463, 111 Cal 544.
Mich.—Fort-St. Union Depot Co. v. State R Crossing Board, 45 N W. 973, 81 Mich. 248.
Mandamus to municipal and other public corporations and officers generally see Mandamus §§ 118–193.

30. Ky.—Louisville, etc., R. Co. v. Covington, 203 S.W. 1060, 181 Ky 86.

31. Ill.—People v. Rock Island, 74 N E 437, 215 Ill 488, 106 Am S.R 179.
51 C J. p 606 note 14.
Mandamus against railroad companies generally see Mandamus § 231.

32. Ill.—People v. Rock Island, supra.

33. Ill.—People v. Rock Island, supra.

34. U S.—Texas, etc., R. Co. v. Louisiana Public Service Commission, D.C La., 12 F.2d 798.
51 C J. p 606 note 18.
Conflicting locations see supra §§ 71, 72.
Right to cross other railroads see infra § 132.
Right to take in eminent domain proceedings see Eminent Domain § 76.

vires.[35] On the other hand, by reason of charter provisions, a railroad company may be authorized to enter on or use the facilities of another railroad, or it may be required to permit another railroad to enter on or use its facilities.[36] In addition, one railroad may acquire the right to use the facilities of another through the application of the doctrines of equitable estoppel.[37] So, where the acts and declarations of a railroad company have induced the expenditure of a large sum of money in the construction of a connecting railroad, it may not be permitted to control the portion of the road of which it is the proprietor in such a manner as to exclude the junction railroad from participation in its use as part of a continuous line.[38] Where such right is acquired, the second company may make only such reasonable use of the road and other property as is necessary to effectuate the common object,[39] and has no right so to use it as to deprive the first company of its use.[40]

While the mere fact that a junior company locates its right of way over the land of an existing company and files an act or instrument of appropriation may not give it any interest or right in the right of way or other real estate of the senior company,[41] it has been held that, in respect of lands which the senior company has not devoted to public use, if the senior company permits the junior company to use such land, it may not afterward restrain it from laying a side track thereon within the limits of its right of way.[42]

b. Statutory Permission

Provision is frequently made by statute for the acquisition by one railroad of a right to use the facilities of another railroad.

Provision is frequently made by statute for the acquisition by one railroad of a right to use the facilities of another.[43] The rights conferred by a statute granting other roads the right to use the property and facilities of a railroad company are governed by a proper and fair construction of the language used in the particular statute.[44] Thus, a statute which gives such a right has been held not to authorize such an invasion of the property or lands of a railroad company as will amount to a practical destruction of the specific use to which they have been appropriated[45] or for which they are manifestly needed,[46] and it has further been held that such a statute does not authorize such an encroachment as will prevent the discharge by the company of its duties to the government and to the public under its franchise.[47]

Ascertainment of compensation. Under some statutory provisions the ascertainment of the amount to be paid as compensation for the use by one railroad of the facilities of another is vested in particular officers or commissioners.[48] Under a statute which provides for the sitting of a railroad commission as arbitrator where the compensation to be paid for the use of property or facilities cannot be agreed on by the companies, the presumptions are in favor of an award duly made by the commission acting as arbitrator,[49] although such an award may be impeached where it so disregards, mistakes, or misapplies the evidence as to deprive the railroad of its rights,[50] and, where it is set aside, the court should proceed to determine reasonable compensation.[51]

Regulations and conditions. By virtue of statute, particular officers or commissioners may be empowered to establish reasonable regulations[52] and to impose reasonable conditions[53] as to the

35. Tex.—Texarkana, etc., R. Co. v. Texas, etc., R. Co., 67 S.W. 525, 28 Tex.Civ.App. 551.
51 C.J. p 606 note 19.

36. Md.—Union R. Co v. Canton R. Co., 65 A. 409, 105 Md. 12.
51 C.J. p 606 note 23.

37. U.S.—Union Pac R. Co v. Greeley, Colo., 189 F. 1, 110 C.C.A. 571, appeal dismissed 34 S.Ct. 824, 231 U.S. 757, 58 L.Ed 469.
51 C.J. p 607 note 25.

38. Pa.—Lathrop v. Junction R. Co., 14 Phila. 438.

39. Pa.—Lathrop v. Junction R. Co., supra.

40. Pa.—Lathrop v. Junction R. Co., supra.

41. Ind.—Chicago, etc., R. Co. v Cincinnati, etc., R. Co., 26 N.E. 204, 126 Ind. 513.
51 C.J. p 607 note 29.

42. Ind.—Chicago, etc., R Co. v. Cincinnati, etc., R. Co., supra.

43. Ind.—Chicago, etc., R. Co. v. Cincinnati, etc., R Co., 26 N.E. 204, 126 Ind 513.
51 C.J. p 607 note 32.

44. Pa.—Miller v. Canal Comrs., 21 Pa. 23.
51 C.J. p 608 note 33.

45. N.Y.—Jennings v. Delaware, etc., R. Co., 93 N.Y.S. 374, 103 App. Div. 164, affirmed 83 N.E. 1126, 190 N.Y 544
51 C.J. p 608 note 34.

46. N.Y.—Jennings v. Delaware, etc., R. Co., supra.
51 C.J. p 608 note 35.

47. U.S.—Union Pac. R. Co v Mason City, etc., R Co., Neb., 128 F. 230, 64 C.C.A. 348, affirmed 26 S.Ct. 19, 199 U.S. 160, 50 L.Ed. 134.

48. N.H.—Concord, etc., R. Co. v. Boston, etc., R. Co., 39 A. 1073, 68 N.H. 519.
51 C.J. p 608 note 37.

49. Or.—Oregon-Washington R., etc., Co. v Spokane, etc., R. Co., 163 P. 600, 989, 83 Or. 528, Ann.Cas 1918C 991.
51 C.J. p 608 note 39

50. Or.—Oregon-Washington R., etc., Co. v. Spokane, etc., R. Co., supra.

51. Or.—Oregon-Washington R., etc., Co. v. Spokane, etc., R. Co., supra.
51 C.J. p 608 note 41.

52. Mass.—Providence, etc., R. Co v. Norwich, etc., R. Co., 138 Mass. 277.

53. Mass.—Providence, etc., R Co. v. Norwich, etc., R. Co., supra.
51 C.J. p 608 note 43.

place and manner of the use by one company of the facilities of another, where necessary for public safety,[54] and the interest of the corporations.[55] However, the powers conferred on a railroad commission under such a statute have been held not to include the authority to determine the rights of several railroad companies under an agreement for the joint use of a track,[56] and it has further been held that such a statute may not be upheld where its effect would be to impair a contract.[57]

Under power to amend charters. Under a reserved power to alter or amend the charter of a railroad corporation, the legislature may compel the railroad to allow the use of its facilities by other railroads[58] on payment of reasonable compensation therefor,[59] and such an authorization does not impair the vested rights of the railroad company[60] or of its mortgage bondholders.[61]

c. Contracts and Agreements between Railroads

Ordinarily, a railroad company may by agreement allow another to use a portion of its line on such terms and conditions as it may deem proper as long as such use does not impair its power properly and adequately to perform its own duty to the public.

Ordinarily, a railroad company may by agreement allow another to use a portion of its line on such terms and conditions as it may deem proper[62] as long as such use does not impair its power properly and adequately to perform its own duty to the public.[63] Where the right to use the property of another railroad is acquired by agreement between the companies, the rights and liabilities of each thereunder are governed by the terms of such agreement.[64] A railroad company having a license from another company to use its right of way may do thereon any act which is necessary to the full enjoyment of the license, although the terms of the license must be strictly followed and may not be extended or varied.[65]

Although the contract between the companies may be irregular, if the second company takes possession thereunder and expends large sums of money on the road to which the directors and stockholders of the first company do not object, they may be estopped afterward to deny the validity of the agreement on the ground of irregularity.[66] Where a railroad company permits its charter to be used for purposes of condemnation of lands for another company's railroad and the latter locates its road, pays and takes title in its own name, the road is the property of the latter company; and if in such case any of the land condemned was paid for by the former company with its own funds which have not been repaid to it, the latter company has been held bound to refund such amount.[67]

d. Covenants and Conditions in Grant of Right of Way

One railroad may have the right to make use of the right of way or of the facilities of another railroad by virtue of a condition or covenant contained in the grant by which the right of way or facilities were originally acquired.

One railroad may have the right to make use of the right of way or of the facilities of another railroad by virtue of a condition or covenant contained in the grant by which the right of way or facilities were originally acquired,[68] as for example, where a railroad has acquired rights from a city to occupy public property on condition that it shall permit other roads the use of its right of way[69] or tracks.[70] By reason of such a covenant, an equitable easement in favor of another company seeking to take advantage of its provisions may be created,[71] and, where not restricted in that respect, such a covenant may include companies operating under a foreign charter[72] and be bind-

54. Mass.—Providence, etc, R. Co v Norwich, etc., R. Co, supra

55. Mass.—Providence, etc, R. Co. v. Norwich, etc., R. Co., supra

56. Ark.—St. Louis-San Francisco Ry Co v. Missouri Pac. R. Co, 245 S.W. 806. 156 Ark. 259.

57. Mass.—Attorney General v. Fitchburg R. Co., 6 N.E 854, 142 Mass 40.
51 C.J. p 608 note 46.

58. U.S.—Union Pac. R Co v. Mason City, etc., R Co, Neb, 128 F. 230, 64 C.C.A. 348, affirmed 26 S.Ct 19, 199 U.S 160, 50 L.Ed. 134.

59. U.S.—Union Pac. R. Co v. Mason City, etc., R. Co., supra.
51 C J. p 609 note 49.

60. U.S.—Union Pac. R. Co. v. Mason City, etc., R. Co., supra.

61. U.S.—Union Pac R Co. v Mason City, etc, R. Co, supra

62. Iowa.—Holbert v. St. Louis, etc., R Co, 38 Iowa 315.
51 C.J. p 609 note 52.

63. U.S.—Texas, etc., R. Co. v. Louisiana Public Service Commission, D.C.La., 12 F.2d 798.

64. D.C.—New York, N. H. & H R Co. v. Interstate Commerce Commission, 55 F.2d 1028, 60 App D.C. 403, reversed on other grounds Interstate Commerce Commission v. New York, N. H. & H. R. Co, 53 S.Ct. 106, 287 U.S. 178, 77 L.Ed. 248.
51 C J. p 609 note 54.

65. Ind.—Chicago, etc., R Co. v. Cincinnati, etc., R. Co., 26 N.E. 204, 126 Ind. 513.
51 C J. p 609 note 55.

66. Iowa.—Mahaska County R. Co v. Des Moines Valley R Co, 28 Iowa 437.

67. N.J.—Coe v. New Jersey Midland R. Co, 31 N.J.Eq 105.

68. U.S.—Joy v. St. Louis, Mo., 11 S.Ct 243, 138 U.S 1, 34 L.Ed. 843.

69. U.S.—Joy v. St. Louis, supra.
51 C.J. p 609 note 59.

70. Tenn.—Louisville, etc., R. Co. v. Mississippi, etc., R. Co., 22 S.W 920, 92 Tenn. 681.

71. Ala.—South, etc., Alabama R. Co. v. Highland Ave., etc., R. Co., 23 So 973, 117 Ala. 395.

72. Tenn.—Louisville, etc., R. Co. v. Mississippi, etc., R. Co., 22 S.W. 920, 92 Tenn 681.

ing on a subsequent purchaser with notice[73] as well as on a consolidating company.[74]

The right of one railroad company to locate on or use the road or property of another company within city limits may be acquired by virtue of an ordinance granting a right of way to such other company, as where the ordinance provides that the grantee's road within the city limits shall be open to all other railroad companies obtaining permission of the city;[75] and the right to use the tracks under such an ordinance has been held not affected by a further provision therein with respect to the method by which compensation shall be made by the second company.[76] It has been held not a ground for excluding an applicant that a portion of the tracks was built on private property,[77] or that applicant by the terms of its charter may use only animal power when such applicant has for years used steam power with the sanction of the city.[78] Moreover, where no limit is provided on the time within which other railroads may come in or on the number of railroads which may come in, a delay in making application during the course of which other railroads have come in is no ground for excluding an applicant,[79] unless it is shown that the road will be overburdened[80]

e. Remedies against Interference with Right of Way or Property

In a proper case, an injunction may be issued to restrain one railroad company from unlawfully interfering with the right of way or property of another company, and also the remedy of ejectment may be available to a railroad company to recover possession of a portion of its right of way from another railroad company which is wrongfully withholding it.

In a proper case, an injunction may be issued to restrain one railroad company from unlawfully interfering with the right of way or property of another company.[81] Thus, a company having a prior right of way may enjoin an intrusion thereon by another company until facts are shown making it necessary for the latter company to come on the right of way, where the latter company has a right, in case of necessity, to intrude on the right of way of the other company,[82] and in a suit for such injunction the latter company may show such necessity and enforce its right to enter on and use the right of way by a cross bill.[83]

On the other hand, the exercise of a later granted franchise may not be restrained unless its exercise will interfere with or obstruct the actual operation and exercise of the prior franchise;[84] and one railroad company will not be enjoined from constructing its road on the land of another company which is not in actual use.[85] A railroad company may have no rights to be protected and enforced by the equitable remedy of injunction where it has lost its easement of right of way because of nonuser.[86] So, where a railroad company has lost its right to occupy a certain route by consenting to its use by another road, it may be enjoined from interfering with such use by the latter company,[87] and it may not afterward enjoin the latter company from using the land within the limits of its right of way.[88]

Ejectment may be maintained by a railroad company to recover possession of a portion of its right of way from another railroad company, which is wrongfully withholding it,[89] unless it is estopped to enforce such remedy, in which case its remedy

73. U.S.—Joy v. St. Louis, Mo., 11 S. Ct. 243, 138 U.S. 1, 34 L.Ed. 843
51 C.J. p. 610 note 63.

74. U.S.—Joy v. St. Louis, supra

75. La.—Capdevielle v. New Orleans, etc., R. Co., 34 So. 868, 110 La. 904.
51 C.J. p. 610 note 65.

76. U.S.—Chicago, etc., R. Co. v. Kansas City, etc., R. Co., C.C.Mo., 38 F. 58.

77. Tenn.—Louisville, etc., R. Co. v. Mississippi, etc., R. Co., 22 S.W. 920, 92 Tenn. 681.

78. Tenn.—Louisville, etc., R. Co. v. Mississippi, etc., R. Co., supra

79. Tenn.—Louisville, etc., R. Co. v. Mississippi, etc., R. Co., supra.

80. Tenn.—Louisville, etc., R. Co. v. Mississippi, etc., R. Co., supra.

81. Tex.—Texarkana, etc., R. Co. v. Texas, etc., R. Co., 67 S.W. 525, 28 Tex.Civ.App. 551.
51 C.J. p. 610 note 71.

Findings in such a suit will be construed and given effect according to their import.—Delaware & H. Co. v. Rutland R. Co., 151 A. 510, 103 Vt. 12.

Decree

The use of tracks of railroad company as accessory only to use of that company's bridge over river, and not for purposes which, like local switching, are wholly independent of any use of bridge was what was authorized by decree based on statutes with respect to the bridge.—Union Pac. R. Co. v. Mason City & F. D. R. Co., Neb., 32 S.Ct. 86, 222 U.S. 237, 56 L.Ed. 180.

82. U.S.—Denver, etc., R. Co. v. Denver, etc., R. Co., C.C.Colo., 17 F. 867, 5 McCrary 443.
51 C.J. p. 610 note 72.

83. U.S.—Denver, etc., R. Co. v. Denver, etc., R. Co., supra.

84. Pa.—Appeal of Pennsylvania R. Co., 3 Walk. 454.

85. Pa.—Appeal of Pennsylvania R. Co., supra

86. S.C.—Boyleston v. Seaboard Air-Line R. Co., 106 S.E. 777, 115 S.C. 530

87. N.J.—Grey v. Greenville, etc., R. Co., 46 A. 636, 60 N.J.Eq. 153, reversed on other grounds 48 A. 568, 62 N.J.Eq. 768.

88. Ind.—Chicago, etc., R. Co. v. Cincinnati, etc., R. Co., 26 N.E. 204, 126 Ind. 513
51 C.J. p. 610 note 78.

89. Ala.—Tennessee, etc., R. Co. v. East Alabama R. Co., 75 Ala. 516, 51 Am.R. 475.
Cal.—Fresno St. R. Co. v. Southern Pac. R. Co., 67 P. 773, 135 Cal. 202

and express grant of authority, require a railroad to permit the use of its track for local business where it has a contract right to use such track for through business.[11]

§ 115. Conveyance or Release of Right of Way or Land by Railroad

a. Power to make and validity
b. Title and rights conveyed
c. Reservations and exceptions

a. Power to Make and Validity

(1) In general
(2) By dedication

(1) In General

Ordinarily, where a railroad has acquired title to its right of way in fee, it may, in the absence of an express or implied restriction contained in its charter or in the governing law, sell and convey it when no longer required for the uses of the road.

Ordinarily, where a railroad has acquired title to its right of way in fee, it may, in the absence of an express or implied restriction contained in its charter or in the governing law, sell and convey it when no longer required for the uses of the road,[12] or dispose of it by lease,[13] and likewise, where the railroad has acquired merely an easement, it may, ordinarily, release the easement to the owner of the fee,[14] although it may not have the authority to sell or in any way to alienate its right of way, where it has only an easement granted for a public purpose which it cannot defeat.[15]

While a general authority to convey such real estate as may be necessary and expedient to carry into effect the objects of an incorporation may not authorize a transfer of real estate acquired and held for the exercise of the corporate franchise, without further legislative authority,[16] and while under a statute authorizing a railroad company to sell or lease any lands or real estate not necessary for its use, a railroad may have no authority to sell and convey its right of way,[17] a railroad may be authorized to sell its right of way or other interest in land or a portion thereof by statute[18] or by its charter,[19] and, where authorized to make such a sale on credit, a reasonable discretion may be inferred to fix terms,[20] and to fix a reasonable minimum price,[21] subject to the power of the courts to control any attempted abuse of the power.[22] Furthermore, a railroad may have authority voluntarily to grant a right which may be taken from it by condemnation proceedings.[23]

Who may object. The question of whether a particular conveyance of railroad property is in excess of the power of the railroad is one which concerns only the corporation itself,[24] the state,[25] or those persons who have some interest or title in the corporation or the property involved,[26] and may not be urged by others,[27] as, for example, another railroad.[28] So, an owner of property along a rail-

11. U.S.—Texas, etc., R. Co. v. Louisiana Public Service Commission, D.C.La., 12 F.2d 798.

12. Ky.—Kentucky Joint Stock Land Bank of Lexington v. Newman, 98 S.W.2d 33, 266 Ky. 13
51 C.J. p. 611 note 8.
Nature of title acquired by railroad see supra §§ 83-87.
Mortgages and trust deeds by railroad company see infra §§ 282-293

Successor to railroad

Where plaintiffs were in litigation with railroad company over title to two tracts, and railroad company, during course of litigation, agreed that, if they would acquire an outstanding title to the tract, the company would then settle the lawsuit by conveyance, one to the other, of certain parts of the lands, and plaintiffs pursuant to such agreement did acquire such outstanding title, government of United States, on succeeding to title of railroad company, would be bound by such agreement and would be estopped to question the outstanding title acquired by plaintiffs to the tracts.—Playa De Flor Land & Imp. Co. v. U. S., D.C. Canal Zone, 70 F.Supp. 281, modified on other grounds, C.C.A., 160 F.2d 131.

13. Colo.—Switzer v. Chaffee County, 203 P. 680, 70 Colo. 563.
Lease of road see infra §§ 208-224

14. Pa.—Jones v. Erie, etc., R. Co., 32 A. 535, 169 Pa. 333, 47 Am.S.R. 916.
51 C.J. p. 612 note 5.

15. Neb.—State v. Grimes, 148 N.W. 942, 96 Neb. 719.
51 C.J. p. 612 note 8.

16. N.J.—Kean v. Johnson, 9 N.J. Eq. 401.
Ohio.—Coe v. Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am.D. 518

17. Fla.—Seaboard Air-Line R. Co. v. McRainey, 68 So. 753, 69 Fla. 462.
51 C.J. p. 612 note 16.

18. Ala.—Coyne v. Warrior Southern R. Co., 34 So. 1004, 137 Ala. 553.
51 C.J. p. 612 note 9

19. U.S.—Venner v. Southern Pac. Co., C.C.A.N.Y., 279 F. 832, certiorari denied 42 S.Ct. 461, 258 U.S. 628, 66 L.Ed. 799.
51 C.J. p. 612 note 10.

20. Ill.—People v. Illinois Cent. R. Co., 62 Ill. 510.
51 C.J. p. 612 note 11.

21. Ill.—People v. Illinois Cent. R. Co., supra.
51 C.J. p. 612 note 12.

22. Ill.—People v. Illinois Cent. R. Co., supra.

23. U.S.—New Jersey Cent. R. Co. v. U. S. Pipe Line Co., D.C.Pa., 290 F. 983, affirmed, C.C.A., 1 F.2d 886
51 C.J. p. 612 note 6.

24. Ill.—Golconda Northern R. Co. v. Gulf Lines Connecting R. Co., 106 N.E. 818, 265 Ill. 194, Ann.Cas. 1916A 833.

25. Ill.—Golconda Northern R. Co. v. Gulf Lines Connecting R. Co., supra.

26. Ill.—Golconda Northern R. Co. v. Gulf Lines Connecting R. Co., supra.

27. Ill.—Golconda Northern R. Co. v. Gulf Lines Connecting R. Co., supra.

28. Ill.—Golconda Northern R. Co. v. Gulf Lines Connecting R. Co., supra.

road right of way may not question the validity of leases or privileges granted by the railroad for the use of portions of its right of way,[29] notwithstanding the railroad is engaged in interstate commerce, and it is asserted that the granting of such leases or privileges is a violation of the Interstate Commerce Act.[30]

(2) By Dedication

Where not forbidden by charter, a railroad company may dedicate land owned by it for a public use, provided this does not interfere with the purposes for which it was incorporated.

Where not forbidden by charter,[31] a railroad company may dedicate land owned by it for a public use,[32] provided this does not materially interfere with the purposes for which it was incorporated,[33] but not otherwise.[34] Thus, as a rule, a railroad company, in the absence of charter or statutory restriction, may dedicate a portion of its land as a public highway[35] or it may dedicate to the public the right of crossing its tracks or right of way,[36] and such an act is not ultra vires as an interference with the purposes for which the land was acquired, where the usefulness of the railroad will not be impaired by the crossing.[37] Moreover, the fact that a railroad has dedicated a crossing has been held not to interfere with its rights to lay an additional track,[38] and when evidence of an intent on the part of a railroad company to dedicate consists of its planking a way over the tracks, the width of the crossing has been held limited to the planking.[39]

Dedication by a railroad company of its land for a public use rests on the intention of the company to make such a dedication.[40] Where the dedication is not express, the acts of the company relied on to imply a dedication must be such as clearly to indicate an intent exclusively to devote the property to a public use,[41] and such acts must be inconsistent and irreconcilable with any construction except an assent on the part of the company to the dedication.[42] Moreover, in order to bind a railroad company beyond revocation, the dedication must be made by the directors, or be recognized by them in some way, or be expressly ratified by them, or by such public use for such time and under such circumstances as to justify the inference of such ratification;[43] the mere act of officers and agents making such dedication, without authority from the directors, ordinarily will not make a valid dedication, unless by such express or implied ratification.[44]

b. Title and Rights Conveyed

A purchaser of railroad land under a valid conveyance acquires only such title or interest as the grantor is capable of transferring, and which the conveyance is intended to transfer, and his title is at least good as against third persons.

A purchaser of railroad land under a valid conveyance acquires only such title or interest as the grantor is capable of transferring, and which the conveyance is intended to transfer,[45] and his title is at least good as against third persons.[46] Likewise,

29. U.S.—Fireproof Storage Co. v. Hines, D.C.Wash., 261 F. 215.

30. U.S.—Fireproof Storage Co. v. Hines, supra.

31. Cal.—Southern Pac. Co. v. Pomona, 37 P. 929, 144 Cal. 339.

32. Cal.—Southern Pac. Co. v. Pomona, supra.
W.Va.—Hast v. Piedmont, etc., R. Co., 44 S.E. 155, 52 W.Va. 396.

33. W.Va.—Hast v. Piedmont, etc., R. Co., supra.

34. U.S.—Holland Co. v. Northern Pac. R. Co., Wash., 214 F. 920, 131 C.C.A. 216.

35. Conn.—Loomis v. Connecticut R., etc., Co., 61 A. 539, 78 Conn. 156.
Ind.—Cleveland, etc., R. Co. v. Christie, 100 N.E. 299, 178 Ind. 691.
51 C.J. p. 612 note 17.

36. Ga.—Atlanta & W. P. R. Co. v. City of Atlanta, 119 S.E. 712, 156 Ga. 251—City of Atlanta v. Georgia R. & Banking Co., 98 S.E. 83, 148 Ga. 635.
18 C.J. p. 43 note 76.

37. U.S.—Northern Pac. R. Co. v. Spokane, C.C.Wash., 56 F. 915, affirmed 64 F. 506, 12 C.C.A. 246, appeal dismissed 17 S.Ct. 997, 41 L.Ed. 1179.

38. Ga.—Brunswick, etc., R. Co. v. Waycross, 17 S.E. 674, 91 Ga. 573.

39. N.J.—New York, etc., R. Co. v. Drummond, 45 N.J.Law 511, affirmed 46 N.J.Law 644.

40. Ga.—City of Atlanta v. Georgia R. & Banking Co., 98 S.E. 83, 148 Ga. 635.

41. Ga.—City of Atlanta v. Georgia R. & Banking Co., supra.
Ky.—City of Grayson v. Eastern Kentucky Southern Ry. Co., 62 S.W.2d 1034, 250 Ky. 316.
Clear and unequivocal facts
Facts as to intention necessary to imply dedication must be clear and unequivocal, in view of limitations on power of railroad to dispose of its lands so as not to interfere with its public duties.—City of Atlanta v. Georgia R. & Banking Co., 98 S.E. 83, 148 Ga. 635.

42. Ga.—City of Atlanta v. Georgia R. & Banking Co., supra.

43. W.Va.—Hast v. Piedmont, etc., R. Co., 44 S.E. 155, 52 W.Va. 396.

44. W.Va.—Hast v. Piedmont, etc., R. Co., supra.
18 C.J. p. 43 note 79.

45. S.C.—Chamberlain v. Northeastern R. Co., 19 S.E. 743, 996, 41 S.C. 399, 44 Am.S.R. 717, 25 L.R.A. 139.
51 C.J. p. 613 note 26
Description of boundary line
Under deed of property adjoining right of way describing boundary line as located designated number of feet from center line of railroad as "said railway is now constructed," quoted phrase referred to visible facts rather than location map filed by railroad as against contention that railroad was bound by location map in fixing boundaries.—Harrison v. New York Cent. R. Co., 6 N.Y.S.2d 978, 255 App.Div. 183, reargument denied 8 N.Y.S.2d 1017, 255 App.Div. 1032, affirmed 22 N.E.2d 483, 281 N.Y. 653.

46. S.C.—Chamberlain v. Northeastern R. Co., 19 S.E. 743, 996, 41 S.C. 399, 44 Am.S.R. 717, 25 L.R.A. 139.
51 C.J. p. 613 note 27.

linquish,[68] together with external acts by which the intent is carried into effect.[69] While the facts relied on to show an abandonment must be strong and convincing,[70] an intent to relinquish may be established by acts of the company clearly indicating its purpose not to use such right of way, followed by an actual relinquishment[71] or a long nonuser thereof.[72] Although it has been said in some cases that an abandonment may be found as a matter of fact from long nonuse,[73] as a general rule, and in the absence of an agreement otherwise providing,[74] a mere nonuser does not, in itself, establish an abandonment,[75] no matter how long the nonuser is continued,[76] inasmuch as an actual abandonment is necessary to terminate the estate of the railroad,[77] although a long-continued nonuser may constitute some evidence of an intent to abandon.[78]

Where the nonuser is accompanied by unequivocal and decisive acts on the part of a railroad company clearly showing an intention to abandon,[79] as where the nonuser is accompanied by acts which destroy the object for which the easement was created or the means of its enjoyment,[80] an abandonment may be inferred. Moreover, where nonuser is permanent, that is, without an intention to resume the use, it will constitute an abandonment without regard to the length of time the right of way has not been used.[81]

Various acts on the part of a railroad company have been held not, of themselves, to show or evidence an abandonment by it of a right of way,[82] such as a use of a right of way for an unauthorized purpose,[83] or an excessive use or misuse of a

68. Ill.—Abens v. Chicago, Burlington & Quincy R. Co., 57 N.E.2d 883, 388 Ill. 261—Chicago & E. I. R. Co. v. Clapp, 66 N.E. 223, 201 Ill. 418

Mo.—St. Louis-San Francisco Ry. Co. v. Dillard, 43 S.W.2d 1034, 328 Mo. 1154

N.Y.—**Corpus Juris quoted in** New York Connecting R. Co. v. Queens Used Auto Parts, 72 N.Y.S.2d 546, 550, modified on other grounds 77 N.Y.S.2d 505, 273 App.Div. 908, motion denied 79 N.Y.S.2d 325, 273 App.Div. 973.

Pa.—Lacy v. East Broad Top R. & Coal Co., 77 A.2d 706, 168 Pa.Super. 351.

51 C.J. p. 614 note 53.

69. Pa.—Lacy v. East Broad Top R. & Coal Co., 77 A.2d 706, 168 Pa.Super. 351

70. Mo.—St. Louis-San Francisco Ry. Co. v. Dillard, 43 S.W.2d 1034, 328 Mo. 1154.

Approval of application to abandon

Certificate of public utilities commission approving railroad's application to abandon a portion of its right of way on plaintiff's land and authorizing railroad to take up tracks on abandoned line did not, in itself, without more, constitute an abandonment.—Lacy v. East Broad Top R. & Coal Co., 77 A.2d 706, 168 Pa.Super. 351.

71. N.Y.—**Corpus Juris quoted in** New York Connecting R. Co. v. Queens Used Auto Parts, 72 N.Y.S.2d 546, 550, modified on other grounds 77 N.Y.S.2d 505, 273 App.Div. 908, motion denied 79 N.Y.S.2d 325, 273 App.Div. 973.

51 C.J. p. 614 note 54.

72. U.S.—Denver, etc., R. Co. v. Mills, Colo., 222 F. 481, 138 C.C.A. 77.

N.Y.—**Corpus Juris quoted in** New York Connecting R. Co. v. Queens Used Auto Parts, 72 N.Y.S.2d 546, 550, modified on other grounds 77 N.Y.S.2d 505, 273 App.Div. 908, motion denied 79 N.Y.S.2d 325, 273 App.Div. 973.

73. Pa.—Guss v. Westchester R. Co., 1 Chest.Co. 363.

51 C.J. p. 614 note 56

74. Ga.—Atlantic Coast Line R. Co. v. Sweat, 171 S.E. 123, 177 Ga. 698

75. Ga.—Atlantic Coast Line R. Co. v. Sweat, supra.

Idaho.—O'Brien v. Best, 194 P.2d 608, 68 Idaho 348

Mo.—St. Louis-San Francisco Ry. Co. v. Dillard, 43 S.W.2d 1034, 328 Mo. 1154

Pa.—Lacy v. East Broad Top R. & Coal Co., 77 A.2d 706, 168 Pa.Super. 351

51 C.J. p. 614 note 58.

76. Wash.—Netherlands American Mortg. Bank v. Eastern R., etc., Co., 252 P. 916, 142 Wash. 204.

51 C.J. p. 614 note 59.

77. Pa.—Lacy v. East Broad Top R. & Coal Co., 77 A.2d 706, 168 Pa.Super. 351.

78. U.S.—Townsend v. Michigan Cent. R. Co., Mich., 101 F. 757, 42 C.C.A. 570

Cal.—Home Real Est. Co. v. Los Angeles Pac. Co., 126 P. 972, 163 Cal. 710.

79. Cal.—People v. Ocean Shore R. R., 196 P.2d 570, 32 Cal.2d 406

Mo.—St. Louis-San Francisco Ry. Co. v. Dillard, 43 S.W.2d 1034, 328 Mo. 1154—St. Louis-San Francisco Ry. Co. v. Silver King Oil & Gas Co., 127 S.W.2d 31, 234 Mo.App. 589, transferred 117 S.W.2d 225, certiorari quashed State ex rel. St. Louis-San Francisco Ry. Co. v. Shain, 134 S.W.2d 89, 345 Mo. 574.

51 C.J. p. 615 note 61.

Evidence held sufficient to show abandonment

Cal.—People v. Ocean Shore R. R., 196 P.2d 570, 32 Cal.2d 406.

Okl.—Kansas, O. & G. Ry. Co. v. Rogers, 191 P.2d 209, 200 Okl. 111

51 C.J. p. 615 note 61 [d]

Evidence held insufficient to show abandonment

Mo.—Coates & Hopkins Realty Co. v. Kansas City Terminal Ry. Co., 43 S.W.2d 817, 328 Mo. 1118.

N.Y.—Syracuse Grade Crossing Commission v. Delaware, L. & W. R. Co., 97 N.Y.S.2d 279, 197 Misc. 192, modified on other grounds 32 N.Y.S.2d 620, 263 App.Div. 930, affirmed 49 N.E.2d 131, 290 N.Y. 632.

Evidence held sufficient to show no abandonment

U.S.—In re Chicago & N.W. Ry. Co., C.C.A.Ill., 127 F.2d 1001, certiorari denied Thomson v. Hicks, 63 S.Ct. 59, 317 U.S. 659, 87 L.Ed. 530, rehearing denied 63 S.Ct. 155, 317 U.S. 708, 87 L.Ed. 564.

80. Mich.—Jones v. Van Bochove, 61 N.W. 342, 103 Mich. 98.

51 C.J. p. 615 note 62.

81. Iowa.—McClain v. Chicago, etc., R. Co., 57 N.W. 594, 90 Iowa 646

82. Ky.—Young v. Chesapeake & O. Ry. Co., 163 S.W.2d 451, 291 Ky. 262

Particular acts held not to show abandonment

(1) In general.—Maier v. Dalles & Southern R. Co., 90 P.2d 782, 161 Or. 567—51 C.J. p. 615 note 61 [c].

(2) Failure to use small part of boundary on which depot was located.—Young v. Chesapeake & O. Ry. Co., 163 S.W.2d 451, 291 Ky. 262

83. Minn.—Gurney v. Minneapolis Union Ry. Co., 65 N.W. 336, 63 Minn. 70, 30 L.R.A. 534.

N.Y.—Roby v. New York Cent., etc., R. Co., 36 N.E. 1053, 142 N.Y. 176.

right of way,[84] but various other acts on the part of a railroad company have been held to constitute an abandonment by it of a right of way.[85] Although the fact that an entire right of way is not used may not, of itself, establish an abandonment,[86] in a proper case, the acts of a railroad company may be sufficient to constitute a partial abandonment.[87]

Ordinarily, an abandonment of an easement may be found by nonuser accompanied by adverse occupation under claim of title, as by the owner of the fee or those claiming under him, with recognition on the part of the railroad company that such claim of title is well founded,[88] but the fact that land is used by the owner of the fee for purposes not inconsistent with the use thereof for railroad purposes does not show an abandonment.[89] While a transfer or conveyance of its easement of a right of way by a railroad company for railroad purposes may not constitute an abandonment,[90] an attempted conveyance of a fee for other than railroad purposes, where the company has only an easement for a right of way, has been held to be an abandonment.[91]

Statutory nonuser or abandonment. By virtue of statute, nonuser on the part of a railroad company for a specified period may amount to, or show, an abandonment and result in an extinguishment or forfeiture of the right of the railroad company without regard to the intention of the company.[92] Such a statute should be construed and applied according to its terms,[93] and the word "revert" as used in such a statute has been held to be a technical word which should be accorded a meaning as such.[94] In order to operate as an abandonment under such a statute, the nonuser must have continued for the period fixed by the statute,[95] since nothing less than a nonuser for the statutory period will authorize the owner of the land, from whom the right of way was taken, to take possession,[96] so that where there has been a nonuser for less than the time fixed by statute, the railroad company has a right to take up again the use for which the right of way was granted, at any time within the statutory period.[97]

The extent of the user necessary to prevent an abandonment under such statutes depends on the terms thereof,[98] and such statutes have been held not to require that the full width of the right of way be covered with tracks.[99] It has been questioned whether such a statute applies to a grant of use of a public highway.[1] Under such a statute, the

84. N.Y.—Roby v. New York Cent., etc., R. Co., supra.

85. Okl.—Santa Fe, etc., R. Co v. Wichita Falls, etc., R. Co., 166 P. 168, 64 Okl. 88.

Particular acts held to evidence abandonment

(1) In general.—Norton v. Duluth Transf. R. Co., 151 N.W. 907, 129 Minn. 126, Ann.Cas.1916E 760—51 C. J. p 615 note 61 [b].

(2) Abandonment of use of railroad, tearing up and removal of its tracks, and attempt to convey land to others to be dedicated to other purpose.—Mammoth Cave Nat. Park Ass'n v. State Highway Commission, 88 S.W.2d 931, 261 Ky. 769.

86. Pa.—Pennsylvania R. Co. v. Freeport, 20 A. 940, 138 Pa. 91.
51 C.J. p 615 note 68.

87. Cal.—Tamalpais Land & Water Co. v. Northwestern Pac. R. Co., 167 P.2d 825, 73 Cal.App.2d 917.

Positive nonuser of segment of land conveyed for railroad right of way, and formerly used, where conveyance provided for reversion on abandonment, precluded railroad from asserting that contract was indivisible, and that railroad's claim to any part of right of way would not be lost as long as railroad used substantially all of it.—Atlantic Coast Line R. Co. v. Sweat, 171 S.E. 123, 177 Ga. 698.

88. Conn.—New York, etc., R. Co. v. Cella, 85 A. 521, 86 Conn. 275.
Mass.—New York, etc., R. Co. v. Benedict, 47 N.E. 1027, 169 Mass. 262.
51 C.J. p 615 note 63.

Reason for rule

Statutes providing that title by adverse possession may not be acquired as against a railroad company are held to have no application in case of abandonment of an easement for a right of way.—New York, etc., R. Co. v. Cella, 85 A. 521, 86 Conn. 275.

89. Tenn.—Southern R. Co. v. Vann, 216 S.W. 727, 142 Tenn. 76.
51 C.J. p 615 note 67.

90. N.Y.—Atlantic Mills v. New York Cent. R. Co., 214 N.Y.S. 123, 126 Misc. 349.
51 C.J. p 616 note 77.

91. Ky.—Barton v. Jarvis, 291 S.W. 38, 218 Ky. 239.

92. Iowa.—Fernow v. Chicago, etc., R. Co., 39 N.W. 869, 75 Iowa 526.
51 C.J. p 616 note 72.

Right to servitude

Under some statutory provisions, where a railroad company acquires a right to a servitude on land such right is extinguished by nonusage of the right for a stated period.

U.S.—Polk v. Ball, C.C.A.La., 149 F. 2d 263.
La.—Knox v. Louisiana R. & Nav. Co., 102 So. 685, 157 La. 602—Persigo v. Johnson & Co., App., 18 So. 2d 186.

93. Iowa.—Montgomery County v. Case, 232 N.W. 150, 212 Iowa 73.
Tex.—Stevenson v. Humble Oil & Refining Co., Civ.App., 186 S.W. 2d 115, error refused.

94. Iowa.—Reichard v. Chicago, B & Q. R. Co., 1 N.W.2d 721, 231 Iowa 563—Remey v. Iowa Cent. Ry. Co., 89 N.W. 218, 116 Iowa 133.

95. Iowa.—Monarch Coal Co. v. Phillips Coal Co., 156 N.W. 297, 178 Iowa 660.

96. Iowa.—Fernow v. Chicago, etc., R. Co., 39 N.W. 869, 75 Iowa 526.

97. Iowa.—Fernow v. Chicago, etc., R. Co., supra.

98. Tex.—Stevenson v. Humble Oil & Refining Co., Civ.App., 186 S.W. 2d 115, error refused.

99. Iowa.—Morgan v. Des Moines Union R. Co., 85 N.W. 902, 113 Iowa 561.
Tex.—Stevenson v. Humble Oil & Refining Co., Civ.App., 186 S.W.2d 115, error refused.

1. Iowa.—Morgan v. Des Moines Union R. Co., 85 N.W. 902, 113 Iowa 561.

fact that a part of a spur track may have been used and operated as roads usually are is not conclusive that the track was not abandoned as to another part.[2]

Question of law or fact. Generally, it is a question of fact whether there has been an abandonment,[3] and it is not a question of law,[4] but, in a proper case, the question may be decided as one of law,[5] as where the uncontradicted evidence shows that the company is in possession of its right of way and has not discontinued operation,[6] or that a substantial part of the land has been continuously used for strictly railroad purposes, and that there is no intent permanently to abandon any part of it.[7]

c. Rights of Parties or Privies on Abandonment Generally

Where a right of way or an easement has been lost by abandonment by a railroad company, neither the company nor its successor has any title which it may convey.

Where a right of way or an easement has been lost by abandonment by a railroad company, neither the company nor its successor has any title or interest in the land which it may convey.[8] Moreover, once a railroad company has abandoned a right of way, such right of way may not be revived by the company by use;[9] nor may a recognition by the grantor of any right of the company thereto stay the abandonment by the company[10] or revest in it the easement after it has been abandoned[11]

d. Right to Remove Tracks or Other Equipment

Ordinarily, tracks, railroad structures, and other railroad equipment do not become part of the realty and such items belong to, and may be removed by, the railroad company, or its assignee, on abandonment of the right of way or within a reasonable time thereafter.

Ordinarily, tracks, railroad structures, and other railroad equipment do not become part of the realty and such items belong to, and may be removed by, the railroad company, or its assignee, on abandonment of the right of way[12] or within a reasonable time thereafter,[13] in the absence of evidence sufficient to establish an abandonment on the part of the company of such equipment.[14] Moreover, a railroad company may have the right to remove such equipment from a right of way where such removal is prior to a complete abandonment of the land for railway purposes by it,[15] and at any time before abandonment a railroad company is entitled to remove such equipment from the land.[16] The fact that the landowner has been allowed to take possession of the land embraced in the right of way and hold it for a term of years less than is required to extinguish the company's easement does not imply relinquishment by the company of its right to enter and remove its rails

2. Iowa.—Gill v. Chicago, etc, R. Co, 90 N.W. 606, 117 Iowa 278.

3. Cal.—People v Ocean Shore R R. Co, 196 P.2d 570, 32 Cal 2d 406.
Pa.—**Corpus Juris cited in** Lacy v. East Broad Top Railroad & Coal Co, 77 A.2d 706, 707, 168 Pa.Super 351.
Tex.—Karchmer v. Texas Co, Civ. App., 28 S.W 2d 286, error dismissed.
51 C J p 616 note 79.

Partial abandonment
Cal.—Tamalpais Land & Water Co v Northwestern Pac R Co, 167 P 2d 825, 73 Cal.App.2d 917.

4. Cal.—Tamalpais Land & Water Co. v. Northwestern Pac. R. Co, supra.
Vt.—Stevens v. MacRae, 122 A. 892, 97 Vt. 76

5. Ala.—Birmingham Sawmill Co v. Southern R. Co., 97 So 78, 210 Ala. 126.
Ga.—Lawson v. Georgia Southern, etc, R. Co., 82 S E 233, 142 Ga. 14

6. Ala.—Birmingham Sawmill Co v. Southern R. Co., 97 So 78, 210 Ala. 126.

7. Ga.—Lawson v. Georgia Southern, etc, R. Co., 82 S.E. 233, 142 Ga. 14.

8. Ga.—Byrd v. Goodman, 25 S.E. 2d 34, 195 Ga. 621
Iowa.—Keokuk County v. Reinier, 288 N W. 676, 227 Iowa 499.

9. N.Y.—Atlantic Mills v. New York Cent. R. Co., 223 N Y.S 206, 221 App Div 386, affirmed 162 N.E. 514, 248 N.Y. 535.

10. Ark.—Gurdon, etc, R. Co. v. Vaught, 133 S W. 1019, 97 Ark. 234.

11. Ark.—Gurdon, etc., R. Co. v. Vaught, supra.

12. Ark.—St. Louis-San Francisco Ry Co. v White, 132 S W.2d 807, 199 Ark. 56.
Pa.—Baltimore & O R. Co. v. Bond, 29 A.2d 60, 345 Pa. 360.
Va.—Talley v Drumheller, 130 S E. 385, 143 Va. 439.
51 C J. p 616 note 90.

Reservation of right to remove rails and ties
Railroad's attempted quitclaim of right of way, if constituting technical abandonment, nevertheless did not justify forfeiture of right to rails, especially where deed expressly reserved right to remove rails and ties.—Farrar v. Nashville, C & St. L. Ry., 36 S.W.2d 95, 162 Tenn. 313.

The remedy of assignee of railroad against landowners adjoining right of way who claimed that rails, etc, belonged to them was in replevin or trover, if such remedy was as practical and efficient to the ends of justice as the remedy in equity, since rails, etc, were chattels.—American Steel & Iron Co v. Taft, 199 A. 261, 109 Vt. 469

13. Va.—Talley v. Drumheller, 130 S E 385, 143 Va. 439.
51 C.J. p 617 note 91.

14. Va.—Talley v. Drumheller, supra

15. Tenn.—Farrar v. Nashville, C & St. L Ry., 36 S.W 2d 95, 162 Tenn. 313

Attempted quitclaim by railroad company
Inasmuch as there is a presumption that rails placed on right of way are not fixtures, attempt by railroad to quitclaim to county land used for right of way, where county rejected quitclaim, was not such abandonment as precluded subsequent removal by railroad of ties and rails.—Farrar v. Nashville, C. & St. L. Ry., supra.

16. Pa.—Pennsylvania R. Co. v. Parke, 42 Pa. 31.

and other property which had composed its track[17] or structures built as part of its railroad[18]

e. Right to Reversion; Enforcement of Right

On abandonment by a railroad of a right of way or easement or of an interest in land, the title or right thereto may revert to the grantor or his heirs, or to his successors in title, or to the then owner of the servient estate.

On abandonment by a railroad company of a right of way or easement or of an interest in land, the title or right thereto may revert to the grantor or his heirs,[19] or to his successors in title,[20] or to the then owner of the servient estate.[21] Notwithstanding a subsequent conveyance by the original grantor, the right of way may revert to him if excepted or reserved therefrom;[22] otherwise the abandonment may inure to the benefit of the grantee or those holding under him at the time of the abandonment.[23] On the other hand, the grantee of a deed to land not intended to include any right of reversion in a railroad right of way may not claim that such a right of way reverted to him.[24] Moreover, one whose land is separated from an abandoned right of way by a strip of land acquired by the railroad company in fee and later conveyed by it has been held to have no right as abutting owner in and to the right of way as well as to the intervening strip.[25]

Enforcement of right. Under a statute providing for a reversion of a railroad right of way because of nonuser, a reëntry on the part of the grantor has been held not required.[26] On the other hand, under some statutory provisions, in order that a private person may maintain an action to establish a forfeiture on the part of a railroad and establish a right to a reversion, it has been held that there must first be an adjudication of forfeiture of the right of the railroad to operate in a proceeding in which the state is a party,[27] and that, even if such statute affords a grantor a remedy for the recovery of the land abandoned for railroad purposes without such a determination, the repeal of the statute, without a saving clause, extinguishes such remedy,[28] since such a statute is penal and not remedial.[29]

In a proper case, an action to quiet title may be maintained by the owner of the land where a railroad has abandoned a right of way.[30] It has

17. Ind.—Cranor v. Lake Erie, etc., R. Co., 149 N.E. 97, 83 Ind.App. 449.

18. Ohio—Wagner v. Cleveland, etc, R. Co., 22 Ohio St. 563, 10 Am. R. 770.

19. Ky.—Kentucky Joint Stock Land Bank of Lexington v. Newman, 98 S.W.2d 33, 266 Ky. 13—Mammoth Cave Nat. Park Ass'n v. State Highway Commission, 88 S.W.2d 931, 261 Ky. 769.
Md.—Hodges v. Owings, 13 A.2d 333, 178 Md. 300.
Mo.—Brown v. Weare, 152 S.W.2d 649, 348 Mo. 135, 136 A.L.R. 286—State ex rel. State Highway Commission v. Griffith, 114 S.W.2d 976, 342 Mo. 229.
Okl.—Corbyn v. Oklahoma City, 172 P.2d 384, 197 Okl. 483.
51 C.J. p. 617 note 96.

Voluntary grant or donation

Under statute, on abandonment of railroad, title to property taken through voluntary grant and donation is restored to donor or his representatives or assigns.—Quinn v. Pere Marquette Ry. Co., 239 N.W. 376, 256 Mich. 143.

20. Ky.—Mammoth Cave Nat. Park Ass'n v. State Highway Commission, 88 S.W.2d 931, 261 Ky. 769.
Mo.—Brown v. Weare, 152 S.W.2d 649, 348 Mo. 135, 136 A.L.R. 286.
Okl.—Crowl v. Tidnam, 181 P.2d 549, 198 Okl. 650.
Wash.—Swan v. O'Leary, 225 P.2d 199.
51 C.J. p. 617 note 97.

21. U.S.—U. S. v. Drumb, C.C.A. Okl., 152 F.2d 321.
Iowa.—Brugman v. Bloomer, 13 N.W.2d 313, 234 Iowa 813.
Ky.—**Corpus Juris cited in** Lee County v. Hieronymus, 42 S.W.2d 730, 732, 240 Ky. 490—Henry v. Board of Trustees of Diocese of Kentucky, 270 S.W. 476, 207 Ky. 846.
Mo.—Kelley v. Waymeyer, 204 S.W.2d 744, 356 Mo. 1043—Brown v. Weare, 152 S.W.2d 649, 348 Mo. 135, 136 A.L.R. 286—University City v. Chicago, R. I. & P. R. Co., 149 S.W.2d 321, 347 Mo. 814.
51 C.J. p. 617 note 98.

22. Iowa.—Spencer v. Wabash R. Co., 109 N.W. 453, 132 Iowa 129.
Kan.—Collins v. Baird, 263 P. 1048, 125 Kan. 303.

23. Tenn.—McLemore v. Charleston, etc, R. Co., 69 S.W. 338, 111 Tenn. 639.

24. Ky.—Davis v. Rose, 129 S.W.2d 530, 278 Ky. 752.

25. Kan.—Danielson v. Woestemeyer, 293 P. 597, 131 Kan. 796.

26. Iowa.—Reichard v. Chicago, B. & Q. R. Co., 1 N.W.2d 721, 231 Iowa 563.

Reason for rule

Under statute providing for the reversion of a railroad right of way because of nonuser, word "revert" means the return to owner of fee of easement formerly appropriated or removal of burden cast on fee, and the instant right of way reverts to owner, the easement, with all its incidents, is extinguished.—Reichard v. Chicago, B. & Q. R. Co., supra.

27. Cal.—Lemon v. Los Angeles Terminal Ry. Co., 102 P.2d 387, 38 Cal.App.2d 659.

Reason for rule

Where deed to railroad was in form sufficient to convey title in fee simple absolute, forfeiture of right to operate and reverter of land to grantor for failure of railroad to operate for stated time under statute enacted for a public purpose to compel railroad corporations to operate their roads was not self-executing and would not take place until there was a judicial determination of the forfeiture, since all intendments were against interpretation of statute as providing for a self-executing forfeiture, inasmuch as forfeitures must be strictly interpreted, and only clear compelling language would permit such an interpretation.—Lemon v. Los Angeles Terminal Ry. Co., supra.

28. Cal.—Lemon v. Los Angeles Terminal Ry. Co., supra.

29. Cal.—Lemon v. Los Angeles Terminal Ry. Co., supra.

30. Iowa.—Duggleby v. Chicago, R. I. & P. Ry. Co., 243 N.W. 372, 214 Iowa 776.

Joinder of parties

Owners of individual tracts comprising right of way of abandoned branch line of railroad were properly joined as plaintiffs in action against railroad to quiet title.—Dug-

also been held that the owner of the land may maintain ejectment on abandonment of an easement by a railroad company.[31] Where a railroad company is in possession, not under a grant of an easement or right of way, but under a release of damages for the occupancy, the owner or his grantee may, on abandonment of the use by the railroad, recover possession in ejectment.[32]

§ 118. —— Failure to Complete or Construct Road

Under some statutory provisions, the right of way of a railroad company does not revert to the original owner on forfeiture of the corporate charter because of the failure to construct the road within the time required by law; nor does it vest in the state, but it constitutes an asset of the company to be administered for the benefit of its creditors and stockholders on dissolution.

Under a statute providing that on forfeiture of the charter of a railroad company its right of way shall remain subject to an extension of the charter or to the grant of a new charter over the same way without a new consideration, the right of way of a railroad company does not revert to the original owner on forfeiture of the charter because of a failure to construct the road within the time required by law;[33] nor does it vest in the state,[34] but it constitutes an asset of the company to be administered for the benefit of its creditors and stockholders on dissolution;[35] and another railroad company not connected with the old one has no right to take possession of the unfinished road and hold it as its own property.[36] However, under a statute which provides that, if the road shall not be finished and put in operation within a specified time, the corporate existence and powers of the railroad shall cease, if at the end of such time the railroad has not been completed, the protection afforded by statute to a regularly located right of way is withdrawn and the land comprising the right of way assumes its former status as private property,[37] except where the property has been conveyed to the railroad corporation in fee.[38] Further, the effect of such a statute may not be evaded by a transfer by the original road of its property to a successor.[39] The fact that a railroad company has not completed its road within the time limited by its charter does not, as to third persons, affect its title to land acquired for a right of way, since only the state may take advantage of the default.[40]

§ 119. —— Revocation, or Forfeiture, or Loss by Estoppel, of Franchise to Use Streets or Public Place

A failure to comply with the conditions of the grant may operate as a forfeiture of a franchise or a privilege given to a railroad company to use streets for railroad purposes.

A failure to comply with the conditions of the grant may operate as a forfeiture of a franchise or privilege given to a railroad company to use streets for railroad purposes,[41] as where the estate granted is limited to exist as long only as such property shall be used for railroad purposes and the property is not appropriated to such purposes within a reasonable time.[42] Moreover, a municipality may revoke its consent to the use of its streets for

gleby v. Chicago, R. I. & P. Ry Co., supra.

31. Cal.—Home Real Est. Co. v. Los Angeles Pac. Co., 126 P. 972, 163 Cal. 710.

Pleading

(1) Plaintiff's pleadings must sufficiently describe premises sought to be recovered so as to enable sheriff to know what land should be placed in plaintiff's possession in event of his recovery.—Broderick v. Tyer, 187 S.W.2d 476, 239 Mo.App. 118.

(2) Where plaintiff alleged that railroad abandoned premises and that title thereto reverted to her and in original complaint and in both of railroad's preliminary objections there were references to proceedings before interstate commerce commission for a certificate of abandonment, if reliance was placed on that certificate, it should have been pleaded in amended complaint.—Lacy v. East Broad Top R. & Coal Co., 77 A.2d 706, 168 Pa.Super. 351.

Necessary parties

Mere fact that persons may derive benefit from existence of railroad is not sufficient to require them to be joined as parties in ejectment by owner of land on abandonment of easement, where they assert no interest in land or right to its possession.—Home Real Est. Co. v. Los Angeles Pac. Co., 126 P. 972, 163 Cal. 710.

32. Pa.—Guss v. Westchester R. Co., 1 Chest. Co. 363.

33. Tex.—Scott v. Missouri, etc., R. Co., Civ.App., 151 S.W. 578—Sulphur Springs, etc., R. Co. v. St. Louis, etc., R. Co., 22 S.W. 107, 23 S.W. 1012, 2 Tex.Civ.App. 650.

34. Tex.—Sulphur Springs, etc., R. Co. v. St. Louis, etc., R. Co., supra.

35. Tex.—Sulphur Springs, etc., R. Co. v. St. Louis, etc., R. Co., supra. 51 C.J. p. 617 note 7.

36. Tex.—Sulphur Springs, etc., R. Co. v. St. Louis, etc., R. Co., supra.

37. Ill.—People v. Toledo, etc., R. Co., 117 N.E. 701, 280 Ill. 495, Ann. Cas. 1918D 224.

38. Conn.—New York, etc., R. Co. v. Motil, 71 A. 563, 81 Conn. 466. 51 C.J. p. 617 note 11.

39. Conn.—New York, etc., R. Co. v. Motil, supra.

Ill.—People v. Toledo, etc., R. Co., 117 N.E. 701, 280 Ill. 495, Ann. Cas. 1918D 224.

40. Ill.—Chicago, etc., R. Co. v. Wright, 38 N.E. 1062, 153 Ill. 307.

41. Ill.—People v. Toledo, etc., R. Co., 117 N.E. 701, 280 Ill. 495, Ann. Cas. 1918D 224. 51 C.J. p. 618 note 32.

Implied condition

A condition which the municipality had no authority to impose will not be implied.—Galveston, etc., R. Co. v. Galveston, Tex.Civ.App., 155 S.W. 273.

42. Ga.—Macon v. East Tennessee, etc., R. Co., 9 S.E. 1127, 82 Ga. 501. 51 C.J. p. 619 note 33.

railroad purposes where, after obtaining such consent, a railroad company uses the streets for such purposes, but subsequently abandons the operation of a railroad on such streets.[43] Also, under a statute constituting a mere offer of a franchise for the use of streets or highways for railroad purposes, a railroad company may lose its right to accept such offer by ceasing to be a public utility.[44] However, a railroad may not be estopped to assert a right under a prior legislative grant to enter on and build its tracks on a city street where it had built tracks on the street under an invalid license from the city and subsequently took them up and surrendered possession of the street.[45]

On the failure of a railroad company to comply with the conditions of the grant, the municipality may be entitled to declare a forfeiture of the franchise by a resolution to that effect and by giving notice thereof,[46] although, in the case of an implied condition, where there is no provision for forfeiture in the grant itself, it has been held necessary for the municipality to bring a judicial proceeding in order to forfeit the rights of the railroad company.[47] The municipal corporation may, in a proper case, be entitled to reënter for condition broken unless there is a waiver or estoppel,[48] and it may be entitled to maintain ejectment,[49] or it may be entitled to take possession of the street involved and remove the railroad tracks.[50]

A breach of condition, on the other hand, may not ipso facto terminate the right of way of a railroad company so as to entitle an abutting owner to maintain an action for damages, as for an unlawful occupation of the street,[51] or so as to enjoin the company from entering on and using such street after the time limited for completion of the road.[52] Where an abutting owner consents to the use of a street adjoining his property, in consideration of the location of a line of railroad, and agrees to execute a release by an instrument which is construed to be a license which creates no title in the railroad and is, by law, revocable by the licensor, the fact of performance by the licensee and the expenditure of large sums of money in constructing the road may move a court of equity to protect the licensee's rights against revocation.[53]

Right to sue or enforce forfeiture. The state or municipality only is entitled to enforce a forfeiture because of a breach of a condition in a grant of the right to use a street or public highway for railroad purposes.[54] Where a legislative grant to use city streets becomes subject to be terminated for breach of condition, the city is a proper party to bring suit.[55]

Franchise as subject to police power of municipality While a franchise to use the streets is acquired by a railroad company subject to the power of the municipality to establish reasonable regulations necessary to secure the public safety,[56] mere incidental inconveniences consequent on the occupation and use of the streets under the franchise will not authorize the city, under the guise of exercising its police power, to revoke or annul it.[57]

Permit to use canal land. Where the right of a railroad company to use property owned by the state adjoining a canal is granted under a revocable permit, it has been held that such permit may be revoked without giving notice to the licensee,[58] as where the state abandons the canal and sells the land to another,[59] even though the state conveys

43 N.Y.—Village of Skaneateles v. Barber, 78 N.Y.S.2d 79.

44. Cal.—People v. Ocean Shore R. R., 196 P.2d 570, 32 Cal.2d 406.

45. Mo.—Atlantic, etc., R. Co. v. St. Louis, 66 Mo. 228.

46. Wash.—State v. Benton County Super. Ct., 111 P. 19, 60 Wash. 279
51 C.J. p. 622 note 79 [b].

47. Cal.—Arcata v. Arcata, etc., R. Co., 28 P. 676, 92 Cal. 639.
51 C.J. p. 622 note 80.

48. Pa.—Erie v. Pennsylvania R. Co., 92 A. 192, 246 Pa. 238.

49. Pa.—Erie v. Pennsylvania R. Co., supra.
51 C.J. p. 619 note 35

50. U.S.—Pacific R. Co. v. Leavenworth, C.C.Kan., 18 F.Cas.No.10,649, 1 Dill. 393.

51. Mo.—Knight v. Kansas City, etc., R. Co., 70 Mo. 231.
51 C.J. p. 619 note 37.

52. Tex.—McCammon, etc., Lumber Co. v. Trinity, etc., R. Co., Civ. App., 131 S.W. 85, reversed on other grounds 133 S.W. 247, 104 Tex. 8, 36 L.R.A.,N.S., 662, Ann. Cas.1913E 870.

53. N.Y.—Stephens v. New York, etc., R. Co., 67 N.E. 119, 175 N.Y. 72.

54. Tex.—Denison, etc., R. Co. v. St. Louis Southwestern R. Co., 72 S.W. 161, 96 Tex. 233.

55. Ga.—Macon v. East Tennessee, etc., R. Co., 9 S.E. 1127, 82 Ga. 501.
51 C.J. p. 619 note 43.

56. U.S.—Grand Trunk Western R. Co. v. South Bend, Ind., 33 S.Ct. 303, 227 U.S. 544, 57 L.Ed. 633, 44 L.R.A.,N.S., 405.
51 C.J. p. 618 note 29.

57. U.S.—Grand Trunk, etc., R. Co. v. South Bend, supra.
51 C.J. p. 618 note 31.

58. U.S.—Fletcher v. Delaware, L. & W. R. Co., C.C.A.N.Y., 79 F.2d 306.

59. U.S.—Fletcher v. Delaware, L. & W. R. Co., supra.

Grantee not estopped

Railroad's payment to state when superintendent of public works gave railroad revocable permit to build track on property owned by state adjoining canal and railroad's expenditures in laying tracks did not estop person acquiring title to lands to assert his legal rights thereto, where payment to state was merely to cover expenses that state was put to in making changes necessary for installation of track and railroad's expenditures were made with full knowledge that permit was re-

the land by quitclaim deed containing a grant of its interest and not by warranty deed.[60]

§ 120. —— Breach of Condition in Private Grant

a. In general
b. Mode of enforcement
c. Waiver or estoppel
d. Effect of enforcement; relief against forfeiture

a. In General

The failure of a railroad company to comply with conditions subsequent in a private grant of a right of way or other interest in land to it may work a forfeiture of the interest granted to the company and cause such interest to revert to the grantor or his heirs.

The failure of a railroad company to comply with conditions subsequent in a private grant of a right of way or other interest in land to it may work a forfeiture of the interest granted to the company and cause such interest to revert to the grantor or his heirs,[61] as, for example, a failure on the part of a railroad company to comply with conditions as to the time within which the road must be constructed,[62] or as to the use to be made of the premises,[63] such as a noncompliance with a condition requiring the use of the property in question for a station[64] or other terminal purposes,[65] or as to the erection and maintenance of a depot[66] or of a section house.[67] Where the condition is that the land shall not cease to be used for railroad purposes, it may be regarded as broken by a failure to construct the road within a reasonable time.[68]

Whether a grant or conveyance to a railroad company is on condition subsequent, the breach of which will work a forfeiture of the interest conveyed to the railroad, may be determined on the principles applicable to conveyances generally.[69] Since a condition may not be raised by implication, as, for example, in the case of a mere declaration in a deed that the grant is made for a special and particular purpose, where such declaration is not coupled with words appropriate to make such a condition, suitable words of forfeiture or reversion are necessary to create a condition subsequent,[70] and the words relied on must be interpret-

vocable.—Fletcher v. Delaware, L. & W. R. Co., supra.

60. U S.—Fletcher v. Delaware, L. & W. R. Co., supra.

61. Ark.—Missouri Pac R Co v. Williamson, 112 S.W 2d 957, 195 Ark. 487—St. Louis Southwestern Ry. Co. v. Curtis, 167 S.W. 489, 113 Ark. 92.
Cal.—Tamalpais Land & Water Co v. Northwestern Pac. R Co, 167 P.2d 825, 73 Cal.App.2d 917.
Mich.—Hawkins v Dillman, 256 N. W 492, 268 Mich 483.
51 C.J. p 619 note 44.

Statutory provision for forfeiture
Notwithstanding statute providing for forfeiture in case of nonuser, the parties to conveyance of land to railroad for right of way may agree on forfeiture of the easement on terms other than those provided in statute.—McClain v. Chicago, etc., R. Co, 57 N W. 594, 90 Iowa 646

Where separate parcels are conveyed, a breach of condition applicable to one only will not operate as a forfeiture as to the other.—Horner v. Chicago, etc., R Co., 38 Wis. 165—51 C.J. p 621 note 66.

62. U S.—Schlesinger v. Kansas City, etc, R Co, Mo, 14 S.Ct. 647, 152 U S 444, 38 L Ed 507
51 C J p 619 note 45

63. Ark.—Missouri Pac R. Co. v. Williamson, 112 S W 2d 957, 195 Ark 487
Cal.—Tamalpais Land & Water Co v. Northwestern Pac R Co., 167 P 2d 825, 73 Cal App 2d 917.
51 C J. p 619 note 46.

Use of property for additional purpose may not work a forfeiture, unless expressly so provided in grant or conveyance, where premises are still occupied and used by railroad company for purpose granted.—O'Brien v. New York, etc, R Co, 179 N.Y S. 160, 189 App Div. 703—51 C J p 619 note 46 [a].

Acquisition of land by city
Where intervener's ancestor conveyed land to railroad on condition subsequent that land be used as railroad right of way and city acquired land for use as park by agreement in lieu of condemnation proceeding, city's acquisition of land did not defeat intervener's right to terminate estate when use of land as railroad ceased.—Oklahoma City v. Local Federal Savings & Loan Ass'n of Oklahoma City, 134 P 2d 565, 192 Okl. 188.

64. Ark.—Missouri Pac R Co. v Williamson, 112 S.W.2d 957, 195 Ark. 487.
51 C J p 620 note 47.

Permission to discontinue station
The granting of permission by transit commission to railroad to discontinue station was not the equivalent of actual discontinuance, and title to land did not revert under deed to predecessor in interest to railroad providing for reversion when property was abandoned for railroad purposes.—Carter v New York Cent. R. Co, 73 N.Y S 2d 610, affirmed 77 N.Y S.2d 265, 273 App. Div 884, affirmed 80 N E 2d 671, 298 N.Y. 540.

65. Minn.—Chute v. Washburn, 46 N W 555, 44 Minn 312

66. Ark.—Missouri Pac R Co. v Williamson, 112 S.W 2d 957, 195 Ark 487
51 C J. p 620 note 49.

67. Ark.—St. Louis Southwestern Ry Co v. Curtis, 167 S.W. 489, 113 Ark 92

68. Ky.—Pollock v. Maysville, etc, R Co, 44 S W. 359, 103 Ky. 84, 19 Ky L 1717.
51 C.J. p 620 note 50.

69. Mo.—Bagby v Missouri-Kansas-Texas R Co., 171 S W.2d 673, 351 Mo 79

Side agreement with original grantees
Where ultimate grantee of land for railroad right of way had no knowledge of any side agreement between grantor and original grantees with respect to the kind of service to be rendered, ultimate grantee's obligations must be measured by provisions of deed.—Tamalpais Land & Water Co v. Northwestern Pac R Co, 167 P 2d 825, 73 Cal App 2d 917.

70. Mo.—Krueger v St. Louis, etc., R Co, 84 S.W 898, 185 Mo. 227.
Okl.—Stinson v Oklahoma Ry. Co, 126 P 2d 260, 190 Okl 624.
Tenn.—Nashville, C. & S. L. Ry. v. Bell, 39 S W 2d 1026, 162 Tenn 661
51 C.J p 620 note 52—12 C.J. p 401 note 29 [a] (3).

ed in connection with the rest of the instrument of which they are a part.[71] So, the provisions of a statute enacted to compel railroad companies to operate their roads may not be read into a deed to a railroad company to create a statutory condition subsequent resulting in a reversion to the grantor on the failure of the railroad company to operate its road under conditions not permitted by the statute.[72]

Where a provision of a deed to a railroad company constitutes a covenant as distinguished from a condition, a breach thereof will not entitle the grantor to enter as for a forfeiture,[73] and the remedy is an action for damages for breach of covenant.[74] Moreover, a forfeiture may not be enforced where it would be inequitable to do so,[75] or where there has been substantial compliance with the condition.[76]

Determinable fees; conditional limitations. Where a private grant to a railroad company conveys a determinable fee to the company, although before breach there is in the grantor only a possibility of reversion, after breach there is a vested right in the grantor, and the possibility of reverter is transformed into a fee simple divested of all conditions,[77] and a transferee of the railroad company taking after breach, where the deed to the company is of record, takes nothing, since the company has nothing to convey,[78] and the determinable character of the fee follows any transfer by the railroad company.[79] On the expiration of a conditional limitation in a private grant of land for a railroad right of way, the estate granted to the company terminates ipso facto,[80] and a new occupancy by the company or its successors will not reinvest the occupant with title.[81]

Conveyance in consideration of free transportation or services. Notwithstanding the provisions of the Hepburn Act, 49 U.S.C.A. § 1 (7), and state statutes prohibiting the giving of free transportation by a railroad company, the violation of an agreement by a railroad company to furnish free services or transportation in consideration of a conveyance made to it may work a forfeiture of the grant where the conveyance contains a provision for reversion on its breach,[82] but no forfeiture may result in the case of an agreement not constituting a condition subsequent.[83]

Partial reversion or extinguishment. Where a deed conveying land to a railroad company conveys a fee subject to a condition subsequent, there may be a partial violation of the condition and a partial reversion,[84] and, where a deed conveys to a railroad company a mere easement, there may be a

Express terms or clear implication necessary

When relied on to work a forfeiture, conditions subsequent must be created in express terms or by clear implication and are to be construed strictly.—Bagby v. Missouri-Kansas-Texas R. Co., 171 S.W.2d 673, 351 Mo. 79—51 C.J. p. 620 note 52 [a].

Conveyance merely defining use

No forfeiture will result where the terms of the conveyance merely define the use and no condition subsequent is created—Oldham v. Southern R. Co., 2 Tenn.C.C.A. 644—51 C.J. p. 620 note 54.

71. Mass.—Merrimack River Proprietors of Locks, etc. v. Boston, etc., R. Co., 139 N.E. 839, 245 Mass. 52.
51 C.J. p. 620 note 53.

72. Cal.—Wingard v. Los Angeles & S. L. R. Co., 102 P.2d 394, 38 Cal.App.2d 757—Lemon v. Los Angeles Terminal Ry. Co., 102 P.2d 387, 38 Cal.App.2d 659.

73. Ill.—Springfield, etc., Tract. Co. v. Warrick, 94 N.E. 933, 249 Ill. 470, Ann.Cas.1912A. 187.
51 C.J. p. 620 note 56.

74. Ill.—Springfield, etc., Tract. Co. v. Warrick, supra.
51 C.J. p. 621 note 57.

75. Mo.—Kansas City, etc., R. Co. v. Young, 152 S.W. 118, 167 Mo.App. 524.
51 C.J. p. 621 note 60.

76. Cal.—Tamalpais Land & Water Co. v. Northwestern Pac. R. Co., 167 P.2d 825, 73 Cal.App.2d 917.
Ky.—Young v. Chesapeake & O. Ry. Co., 163 S.W.2d 451, 291 Ky. 262.
Or.—Algoma Lumber Co. v. Herlihy, 288 P. 202, 132 Or. 667.
51 C.J. p. 621 note 61.

Discontinuance of service

Where agreement by grantors to convey right of way for railroad provided that, if railroad ceased to use land for railroad purposes for stated time, it should revert to grantors, and that railroad should run passenger trains on certain schedules between certain hours each day, discontinuance by railroad of passenger service after many years did not entitle grantors to reconveyance, since railroad was obligated only to devote property to railroad uses, including inauguration in good faith of passenger service with intention of maintaining passenger service permanently—O. T. Johnson Corp. v. Pacific Electric Ry. Co., 65 P.2d 868, 19 Cal.App.2d 306.

Change in name or merger

Where land was deeded to railroad on condition that, if railroad did not construct road through land or after construction permanently abandoned the route through the land, it should revert to and become property of grantors, their heirs or assigns, the condition was not breached by a mere change in the name of the operating railroad company or in any merger or consolidation of the grantee with another company—Reichard v. Chicago, B. & Q. R. Co., 1 N.W.2d 721, 231 Iowa 563.

77. Iowa.—Reichard v. Chicago, B. & Q. R. Co., supra.

78. Iowa.—Reichard v. Chicago, B. Q. R. Co., supra.

79. Iowa.—Reichard v. Chicago, B. & Q. R. Co., supra.

80. Ga.—Atlantic Coast Line R. Co. v. Sweat, 171 S.E. 123, 177 Ga. 698—Lawson v. Georgia Southern & F. Ry. Co., 82 S.E. 233, 142 Ga. 14.

81. Ga.—Atlantic Coast Line R. Co. v. Sweat, 171 S.E. 123, 177 Ga. 698.

82. Ohio.—Short v. Cleveland, etc., R. Co., 18 Ohio N.P.,N.S., 537.

83. Ala.—Birmingham Packing Co. v. Birmingham Belt R. Co., 77 So. 706, 201 Ala. 180
51 C.J. p. 621 note 65.

84. Cal.—Tamalpais Land & Water

partial extinguishment of the easement.[85]

b. Mode of Enforcement

(1) In general
(2) Reëntry or claim
(3) Pleadings and evidence

(1) In General

The general rules applicable to proceedings to enforce a forfeiture by reason of a breach of a condition subsequent in conveyances ordinarily apply to the procedure to enforce a forfeiture by reason of a breach of a condition subsequent in a private grant to a railroad company of a right of way or other interest in land.

The general rules applicable to proceedings to enforce a forfeiture by reason of a breach of a condition subsequent in conveyances ordinarily apply to the procedure to enforce a forfeiture by reason of a breach of a condition subsequent in a private grant to a railroad company of a right of way or other interest in land,[86] as with respect to questions of law and fact,[87] defenses,[88] and instructions[89]

As a general rule, the remedy of the grantor is by an action at law to recover possession,[90] and a court of equity usually will refuse to entertain a bill to declare a forfeiture of the estate for condition broken.[91] However, where the complaining party has an unquestioned right to the property and has for any cause no remedy at law, equity may take jurisdiction.[92] So, where the grantor has been in continuous possession and the railroad has abandoned whatever claim or right it may have had, an action to cancel the conveyance may be maintained.[93] Also, where, after a failure by the railroad company to perform conditions in the grant, there has been an abandonment and a reentry by the grantor followed by quiet and undisturbed possession, equity may entertain a bill to declare the right of way a cloud on the grantor's title[94]

Persons entitled to enforce. A forfeiture for a breach of condition subsequent may ordinarily be enforced only by the grantor, his heirs, or devisees,[95] but, where an easement only is granted, the grantee of the fee,[96] or the assignee of the grantor,[97] may bring an action to take advantage of a breach of condition or to enforce its performance.

Notice and demand. Where the contract is silent as to the time within which conditions are to be performed, the grantor has been held bound to give notice of his intention to claim a forfeiture,[98] together with a notice of the particular default relied on,[99] and the railroad should, after such notice, have a reasonable time within which to comply and to avoid forfeiture.[1] However, a demand that the railroad comply with the conditions may not be necessary before the grantor may sue in equity to enforce a forfeiture.[2]

(2) Reëntry or Claim

In accordance with general rules, an entry by the grantor, or some act equivalent thereto, showing a purpose to take advantage of the breach of the condition subsequent and to reclaim the estate forfeited by such breach, ordinarily is all that is required in order to enforce a forfeiture, but some act of this kind usually is essential where the grantor is not in possession.

Co. v. Northwestern Pac. R. Co., 167 P.2d 825, 73 Cal.App.2d 917.

85. Cal.—Tamalpais Land & Water Co. v. Northwestern Pac. R. Co., supra.

86. Ill.—Golconda Northern R. Co. v. Gulf Lines Connecting R. Co., 106 N.E. 818, 265 Ill. 194, Ann.Cas. 1916A 833.

Return of consideration

The grantor ordinarily is not required to tender back the consideration which he has received before he may maintain an action to recover possession for breach of condition.—Sullivan-Sanford Lumber Co. v. Reeves, 125 S.W. 96, 58 Tex.Civ. App. 488.—51 C.J. p. 622 note 91.

87. Ark.—Little Rock, etc., R. Co. v. Birnie, 26 S.W. 528, 59 Ark. 66.

Existence of breach

It is a question of fact whether there has been a breach of condition subsequent.—Little Rock, etc., R. Co. v. Birnie, supra.

88. Cal.—Tamalpais Land & Water Co. v. Northwestern Pac. R. Co., 167 P.2d 825, 73 Cal.App.2d 917.

89. Ga.—Atlantic Coast Line R. Co. v. Sweat, 171 S.E. 123, 177 Ga. 698.

Instructions held not insufficient or confusing

Ga.—Atlantic Coast Line R. Co. v. Sweat, supra.

90. N.D.—Griswold v. Minneapolis, etc., R. Co., 97 N.W. 538, 12 N.D. 435, 102 Am.S.R. 572.
51 C.J. p. 621 note 73.

91. Ill.—Golconda Northern R. Co. v. Gulf Lines Connecting R. Co., 106 N.E. 818, 265 Ill. 194, Ann.Cas. 1916A 833.
51 C.J. p. 621 note 74.

92. Ill.—Lyman v. Suburban R. Co., 60 N.E. 515, 190 Ill. 320, 52 L.R.A. 645.

Miss.—Vicksburg, etc., R. Co. v. Ragsdale, 54 Miss. 200

93. Miss.—Vicksburg, etc., R. Co. v. Ragsdale, supra.

94. Mich.—Dunham v. Toledo-Detroit R. Co., 214 N.W. 156, 238 Mich. 596.
51 C.J. p. 622 note 77.

95. Ill.—Golconda Northern R. Co. v. Gulf Line Connecting R. Co., 106 N.E. 818, 265 Ill. 194, Ann.Cas. 1916A 833
51 C.J. p. 621 note 69

96. Mich.—Mahar v. Grand Rapids Terminal R. Co., 140 N.W. 535, 174 Mich. 138.

Wash.—Reichenbach v. Washington Short-Line R. Co., 38 P. 1126, 10 Wash. 357.

97. Tex.—Stevens v. Galveston, etc., R. Co., Civ.App., 169 S.W. 644, reversed on other grounds, Com.App., 212 S.W. 639.

Wash.—Reichenbach v. Washington Short-Line R. Co., 38 P. 1126, 10 Wash. 357.

98. Mich.—Treat v. Detroit United R. Co., 122 N.W. 93, 157 Mich. 320, 133 Am.S.R. 347.

99. Mich.—Treat v. Detroit United R. Co., supra.

1. Mich.—Treat v. Detroit United R. Co., supra.

2. Ill.—Lyman v. Suburban R. Co., 60 N.E. 515, 190 Ill. 320, 52 L.R.A. 645.

In accordance with general rules, an entry by the grantor, or some act equivalent thereto, showing a purpose to take advantage of the breach of the condition subsequent and to reclaim the estate forfeited by such breach, ordinarily is all that is required in order to enforce a forfeiture,[3] but some act of this kind usually is essential where the grantor is not in possession,[4] since, until entry or its equivalent, by the grantor or his heirs, the estate vested in the grantee may not cease in it or revest in the grantor,[5] and a breach of a condition subsequent ordinarily does not revest title by mere operation of law.[6]

On the other hand, a reëntry on the breach of condition may be unnecessary where the grantor is in possession and the estate granted is less than a freehold,[7] inasmuch as the estate revests in him at once and his possession may be presumed to be for the purpose of holding under the forfeiture,[8] although in some cases it has been held that he must manifest an intention of holding by reason of the breach.[9] So, a reëntry as for breach of condition may not be necessary to divest the railroad company of its title where the estate created in the railroad in the deed to it is a determinable fee,[10] and reversion is not conditioned on any affirmative action by the grantor or those holding under him.[11]

(3) Pleadings and Evidence

In an action to enforce a forfeiture by reason of a breach of a condition subsequent in a private grant of an interest in land to a railroad company, the petition or complaint must be sufficient to warrant the relief prayed for; the general rules of evidence applicable in civil actions ordinarily apply to the evidence in such an action.

In an action to enforce a forfeiture by reason of a breach of a condition subsequent in a private grant of an interest in land to a railroad company, the petition or complaint must be sufficient to warrant the relief prayed for,[12] and the pleadings must be sufficient to show a breach of the condition relied on,[13] and a complainant, in an action to quiet title to land conveyed to a railroad company for railroad purposes for breach of condition, has been held not entitled to invoke a statute providing for a forfeiture where he has not referred thereto in his complaint or shown any facts under which he may avail himself of it.[14]

Evidence. The general rules of evidence applicable in civil actions ordinarily apply to the evidence in an action to enforce a forfeiture by reason of a breach of a condition subsequent in a private grant of an interest in land to a railroad company.[15] Thus the burden of proving a breach of the condition is on the one asserting such breach,[16] and the burden of proving an abandonment within the meaning of a limitation in a grant is on the one asserting such abandonment.[17]

3. U.S.—Schlesinger v. Kansas City, etc., R. Co., Mo., 14 S.Ct. 647, 152 U.S. 444, 38 L.Ed. 507.
51 C.J. p. 622 note 86.

Acts constituting reentry

Even if deed to railroad company created fee on a condition subsequent, the recording of an affidavit by grantors' successor in interest setting forth matters of lineage and descent, describing land in controversy and asserting abandonment by grantee, the giving and recording of conveyances placing title in plaintiffs and their institution of equitable action to quiet title and for possession of property were acts sufficient to comply with any demands of law with respect to reëntry.—Reichard v. Chicago, B. & Q. R. Co., 1 N.W.2d 721, 231 Iowa 563.

4. N.Y.—Thypin v. Magner, 28 N.Y.S.2d 262.
Tenn.—East Tennessee & W. N. C. R. Co. v. Gouge, 203 S.W.2d 170, 30 Tenn.App. 40
51 C.J. p. 622 note 87.

5. Tenn.—East Tennessee & W. N. C. R. Co. v. Gouge, supra.

6. U.S.—Jones v. Southern R. Co., C.C.A.Ga., 285 F. 19.

7. Iowa.—Taylor v. Cedar Rapids, etc., R. Co., 25 Iowa 371
51 C.J. p. 622 note 88.

8. Iowa.—Taylor v. Cedar Rapids, etc., R. Co., supra.

9. N.C.—Thomas v. Blue Ridge, etc., R. Co., 57 S.E. 523, 144 N.C. 729.
51 C.J. p. 622 note 90.

10. N.Y.—Thypin v. Magner, 28 N.Y.S.2d 262.

What constitutes determinable fee

(1) Where realty was conveyed to railroad for railroad purposes and for "so long as" railroad should use realty for its railroad, and deed provided that, when realty should cease to be permanently used for railroad, then realty should revert to grantor or his heirs or assigns, estate created was a "determinable fee" rather than a fee on "condition subsequent," and, in order to divest railroad of its title, reentry by grantor or his representative was not necessary when railroad ceased to use realty for railroad purposes.—Thypin v. Magner, supra.

(2) Under deed expressly providing that land was conveyed for depot grounds and for railroad route through it and that, on permanent abandonment of such use, land was to revert to grantors, their heirs or assigns, estate conveyed by deed was a determinable fee, reverting automatically and at once on happening of event stated in deed.—Reichard v. Chicago, B. & Q. R. Co., 1 N.W.2d 721, 231 Iowa 563.

11. Iowa.—Reichard v. Chicago, B. & Q. R. Co., supra.

12. Wash.—Mouat v. Seattle, etc., R. Co., 47 P. 233, 16 Wash. 84.

Petition held demurrable

Mo.—Bagby v. Missouri-Kansas-Texas R. Co., 171 S.W.2d 673, 351 Mo. 79.

13. Wash.—Mouat v. Seattle, etc., R. Co., 47 P. 233, 16 Wash. 84.
51 C.J. p. 622 note 92.

14. Cal.—Behlow v. Southern Pac. R. Co., 62 P. 295, 130 Cal. 16.

15. Ark.—Little Rock, etc., R. Co. v. Birnie, 26 S.W. 528, 59 Ark. 66.
Ga.—Atlantic Coast Line R. Co. v. Sweat, 171 S.E. 123, 177 Ga. 698.

16. Cal.—Tamalpais Land & Water Co. v. Northwestern Pac. R. Co., 167 P.2d 825, 73 Cal.App.2d 917.
51 C.J. p. 622 note 95.

17. Ga.—Lawson v. Georgia Southern, etc., R. Co., 82 S.E. 233, 142 Ga. 14.

c. Waiver or Estoppel

One entitled to enforce a forfeiture because of a breach of condition in a private grant of an interest in land to a railroad company may be precluded from so doing by reason of waiver or estoppel.

One entitled to enforce a forfeiture because of a breach of condition in a private grant of an interest in land to a railroad company may be precluded from so doing by reason of waiver or estoppel.[18] So, one may, by his acts or conduct, waive[19] or estop himself to enforce[20] a forfeiture. However, in order that one may be precluded from enforcing a forfeiture by reason of waiver[21] or estoppel[22] his acts or conduct must be such as to be sufficient to constitute a waiver or estoppel. So, while there may be no estoppel where the owner has not misled the company in any respect, or caused it to alter its position by inducement, promise, or acquiescence,[23] and while it has been held that delay, acquiescence, and silence, no matter how long continued, do not create an estoppel,[24] it has also been held that one may be estopped to assert a forfeiture where he fails to reënter or assert some claim within a reasonable time after the breach of condition,[25] particularly where the railroad company is permitted to use and make valuable improvements on the land after the condition is broken,[26] or is suffered to make them without objection.[27]

d. Effect of Enforcement; Relief against Forfeiture

After the enforcement of a forfeiture against a railroad company for breach of condition subsequent in a private grant of an interest in land to the company, the company no longer has any interest in the property. Equity will not relieve against a proper forfeiture where there is no sufficient excuse for the breach or default.

After the enforcement of a forfeiture against a railroad company for breach of a condition subsequent in a private grant of an interest in land to the company, the company no longer has any interest in the property,[28] and the property is not subject to an attachment thereafter issued for its debts.[29]

Equity will not relieve against a proper forfeiture where there is no sufficient excuse for the breach or default,[30] and where there is nothing harsh or inequitable in its terms or enforcement,[31] although, where the execution of a judgment of ejectment will operate harshly and seriously affect public interests, the court may properly stay execution for a period of time sufficient to allow the railroad an opportunity to acquire title by condemnation.[32]

VII. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT

A. AUTHORITY AND DUTY OF RAILROAD COMPANY

§ 121. Duty to Construct

a. In general
b. Switches, spurs, and sidings

a. In General

In the absence of an express provision of a statute or charter requiring the construction of a railroad, the company cannot be compelled to construct it.

A statute or charter which does not expressly require but merely authorizes the construction of a railroad does not impose any positive obligation on the company to construct it[33] or to complete the en-

18. Miss.—Vicksburg, etc., R. Co. v. Ragsdale, 54 Miss. 200.
S.C.—Hammond v. Port Royal, etc., R. Co., 15 S.C. 10.

19. S.C.—Hammond v. Port Royal, etc., R. Co., supra.
51 C.J. p. 623 note 97.

20. Miss.—Vicksburg, etc., R. Co. v. Ragsdale, 54 Miss. 200.
51 C.J. p. 623 note 98

21. Okl.—Oklahoma City v. Local Federal Savings & Loan Ass'n of Oklahoma City, 134 P.2d 565, 192 Okl. 188.

22. Ark.—Missouri Pac. R. Co. v. Williamson, 112 S.W.2d 957, 195 Ark. 487.

Lease of part of realty

Fact that grantor leased part of realty which he had conveyed to railroad for "station and depot purposes" did not estop grantor or his heirs to recover land for failure of railroad to comply with conditions of the deed.—Missouri Pac. R. Co. v. Williamson, supra

23. Or.—Oregon R., etc., Co. v. McDonald, 112 P. 413, 58 Or. 228, 32 L.R.A.,N.S., 117, error dismissed 34 S.Ct. 772, 233 U.S. 665, 58 L.Ed. 1145.
51 C.J. p. 623 note 3

24. N.Y.—In re Opening and Extending of North Conduit Avenue, Borough of Queens, City of New York, 27 N.Y.S.2d 841, 262 App. Div. 70.

25. Ky.—Kenner v. American Contract Co., 9 Bush 202.

26. Ky.—Kenner v. American Contract Co., supra.
Mo.—Baker v. Chicago, etc., R. Co., 57 Mo. 265.

27. Ark.—Bain v. Parker, 90 S.W. 1000, 77 Ark. 168.

28. U.S.—Schlesinger v. Kansas City, etc., R. Co., Mo., 14 S.Ct. 647, 152 U.S. 444, 38 L.Ed. 507.

29. U.S.—Schlesinger v. Kansas City, etc., R. Co., supra.

30. N.C.—Thomas v. Blue Ridge, etc., R. Co., 57 S.E. 523, 144 N.C. 729.—McDowell v. Blue Ridge, etc., R. Co., 57 S.E. 520, 144 N.C. 721.

31. N.C.—McDowell v. Blue Ridge, etc., R. Co., supra.
N.D.—Griswold v. Minneapolis, etc., R. Co., 97 N.W. 538, 12 N.D. 435, 102 Am.S.R. 572.

32. N.D.—Griswold v. Minneapolis, etc., R. Co., supra.

33. Pa.—A. D. Graham & Co. v. Pennsylvania Turnpike Commission, 33 A.2d 22, 347 Pa. 622.
51 C.J. p. 623 note 11.

tire line authorized after building a part of it,[34] and consequently the railroad company cannot be compelled to do so,[35] although, as considered supra § 18, its failure to do so subjects it to liability of forfeiture of the rights and franchises conferred. Also such duty is not imposed by a statute passed subsequently to the granting of the charter when the statute expressly provides that it shall not apply to previously organized corporations.[36]

If the railroad company receives a grant of land from the state in consideration of the construction of a particular line of road, its acceptance constitutes a contract on the part of the railroad company which the state is entitled to enforce;[37] but the rule is otherwise where the land was never received and the right to receive it has been forfeited by a failure to construct or complete the road within the time limited,[38] and, where the company was merely to receive land in installments of a certain amount after the completion of any section of the road of a certain length, the completion of a part of the road and the receipt of the land to which it was thereby entitled impose no obligation on the company to complete the road, but the failure to do so merely forfeits the right to any further benefits under the grant.[39]

An existing railroad cannot be compelled to extend its lines to serve territory not reached by its lines.[40]

b. Switches, Spurs, and Sidings

(1) In general
(2) Under constitutional provisions
(3) Under statutes
(4) Under contract

(1) In General

In the absence of a statutory or contractual duty, a railroad company is not required to construct switches or side or spur tracks away from its lines to accommodate private interests.

In the absence of a duty imposed by constitutional, statutory, or contract provisions, railroad companies are not obligated to construct switches or side or spur tracks away from their lines,[41] or over the railroad right of way,[42] to accommodate private interests.

(2) Under Constitutional Provisions

Constitutional provisions sometimes require a railroad to make switch connections with private sidings constructed by the owners of specified industries.

Under a constitutional provision requiring a railroad, where reasonably necessary and remunerative, to make switch connections with a private siding already constructed by an owner and operator of specified mines, mills, elevators, or other industries, the railroad is under a duty to make the connection on such terms as may be prescribed by the proper authorities,[43] such a provision being intended to provide special facilities for industrial plants and not for the benefit of the general public;[44] and private concerns desiring connections to accommodate their particular industries should proceed under these constitutional provisions and not under others relating to the establishment of public service facilities,[45] which latter will not be extended to include private switch connections, even though there may be an existing discrimination between individual shippers as to such switches.[46]

34. Ky.—Bentler v. Cincinnati, etc., R. Co., 203 S.W. 199, 180 Ky. 497, L.R.A. 1918E 315
51 C.J. p. 623 note 12
Charter provision permissive
U.S.—Oregon-Washington R. & Nav. Co. v. U.S., D.C.Or., 47 F.2d 250, affirmed Interstate Commerce Commission v. Oregon-Washington R. & Nav. Co., 53 S.Ct. 266, 288 U.S. 14, 77 L.Ed. 588.

35. Va.—Sherwood v. Atlantic, etc., R. Co., 26 S.E. 943, 94 Va. 291
51 C.J. p. 623 note 13.

36. Ky.—Bentler v. Cincinnati, etc., R. Co., 203 S.W. 199, 180 Ky. 497, L.R.A. 1918E 315

37. U.S.—Farmers' L. & T. Co. v. Henning, C.C.Kan., 8 F. Cas. No. 4,666.

38. U.S.—Kansas v. Southern Kansas R. Co., C.C.Kan., 24 F. 179

39. U.S.—Kansas v. Southern Kansas R. Co., supra.

Minn.—State v. Southern Minnesota R. Co., 18 Minn. 40.

40. Cal.—Atchison, etc., R. Co. v. State R. Commission, 160 P. 828, 173 Cal. 577.

41. Tex.—Railroad Commission v. St. Louis Southwestern R. Co., 80 S.W. 1141, 98 Tex. 67.
51 C.J. p. 1003 note 23
General duties as common carrier as to facilities for shipment of goods see Carriers §§ 41–43.
Right to connect private tracks or switches with railroad see supra § 56
To serve defense plant
In the absence of special contract, railroad was under no obligation to construct a side track on the opposite side of main line track from existing passing track for the benefit of a contractor engaged in work of constructing a defense plant for a governmental agency.—Illinois Cent. R. Co. v. R.F.C., D.C.Ky., 68 F.Supp. 78, affirmed, C.A., 177 F.2d 201.

42. Pa.—Pennsylvania R. Co. v. Public Service Commission, 64 Pa. Super. 586.
51 C.J. p. 1003 note 24

43. Okl.—Chicago, etc., R. Co. v. State, 157 P. 1039, 53 Okl. 712, L.R.A. 1916F 1281.
51 C.J. p. 1004 note 27
Right of owners of private tracks or switches to connect with railroad see supra § 56.

44. Okl.—St. Louis, etc., R. Co. v. Zalondek, 115 P. 867, 28 Okl. 746.
Public use of side or spur tracks generally see infra § 413

45. Okl.—St. Louis, etc., R. Co. v. Haywood, 106 P. 862, 25 Okl. 417.
51 C.J. p. 1004 note 29.

46. Okl.—Atchison, etc., R. Co. v. State, 104 P. 908, 24 Okl. 616.
51 C.J. p. 1004 note 30.

Phrase "other industries," as used in constitutional provisions imposing a duty to furnish a switch connection, has been held to include a cotton gin,[47] farm,[48] or oil mill.[49]

Duty will not arise except where there is an existing state of facts bringing the case within the provisions of the particular constitution invoked,[50] such as the shipper's previous construction of the private siding,[51] and an amount of traffic from the industry sufficient to justify the connection.[52]

(3) Under Statutes

(a) In general

(b) Switch connections

(c) Sidings and spurs

(a) In General

Statutes sometimes impose a duty on the railroad company to construct or provide switches, spurs, and sidings.

A duty to construct or provide switches, spurs, and sidings is sometimes imposed on a railroad by statute,[53] but the statutory conditions must prevail before such duty can arise.[54] When a shipper is entitled to a side-track connection under statute, his refusal to execute a contract respecting it does not deprive him of his statutory right.[55] A spur-track connection otherwise required cannot lawfully be refused by a road on the ground of resultant decrease in revenue,[56] but the railroad company is not under a duty to furnish a private spur, side track, or switch connection if such connection will seriously interfere with public requirements.[57]

(b) Switch Connections

Under some statutes a railroad company is under a duty to construct and maintain switch connections with private sidings constructed by shippers, if the statutory conditions prevail.

Under a statute providing that under specified conditions a railroad company may be compelled to furnish switch connections to a private shipper, such a company is under no duty to construct a private side track along its right of way.[58] Under statutes requiring a railroad company to construct and maintain a switch connection, when reasonably possible and remunerative, with private sidings constructed by the shipper, the railroad is under a duty to provide such facilities where the statutory conditions prevail,[59] but not otherwise.[60] The railroad need not construct service tracks beyond its own premises,[61] especially where to do so would necessitate exercise of the power of eminent domain through condemnation proceedings.[62]

Interstate Commerce Act. The provisions of the Interstate Commerce Act which, under specified conditions, require a carrier subject thereto to construct and maintain switch connections with private tracks has been held to impose no duty on a railroad company beyond its own right of way.[63] Under the act, an applicant for a switch connection is a "shipper" within the meaning of the section notwithstanding he may be connected with more than one

47. Okl.—Chicago, etc., R Co. v. State, 157 P. 1039, 53 Okl. 712, L. R.A 1916F 1281—St Louis, etc, R Co v. Zalondek, 115 P 867, 28 Okl 746.

48. Okl—Chicago, etc., R Co. v. State, 201 P. 260, 83 Okl 161

49. Okl—Chicago, etc., R. Co. v. State, 157 P. 1039, 53 Okl 712, L R.A.1916F 1281.

50. Okl.—Montgomery v. Atchison, T. & S F. Ry. Co., C.C.A Okl, 89 F. 2d 94
51 C.J. p 1004 note 39.

51. Okl.—Chicago, etc., R. Co. v. State, 157 P. 1039, 53 Okl 712, L. R.A 1916F 1281.
51 C J. p 1004 note 40.

52. Okl—Montgomery v. Atchison, T. & S. F. Ry Co, C C A Okl., 89 F 2d 94
51 C J. p 1004 note 41.

53. U S—Alton R. Co. v. Illinois Commerce Commission, Ill., 59 S. Ct. 340, 305 U S 548, 83 L Ed 344
Ill.—State Public Utilities Commission v. Lake Erie, etc., R. Co, 115 N E. 519, 277 Ill 574.
Minn.—State v Chicago, etc, R. Co, 131 N.W. 859, 115 Minn. 51.

54. U S—Booth-Kelly Lumber Co v. Southern Pac. Co, C A Or, 183 F 2d 902

55. Ill—Public Utilities Commission v. Cleveland, etc., R Co, 129 N E 869, 296 Ill. 513.
51 C J. p 1004 note 43

56. Va—Washington, etc, R Co. v F S. Royster Guano Co, 94 S E 763, 122 Va. 397.
51 C J. p 1005 note 44

57. Minn.—State v. Chicago, etc., R Co, 131 N.W 859, 155 Minn. 51.
51 C J. p 1005 note 45.

58. Pa—Pennsylvania R Co v. Public Service Commission, 64 Pa. Super 586.
51 C J p 1005 note 48

59. Ill.—State Public Utilities Commission v Lake Erie, etc., R Co., 115 N E. 519, 277 Ill. 574, 582.
51 C J. p 1005 note 50.
Right of owners of private tracks or switches to connect with railroad see supra § 56

60. Ill—State Public Utilities Commission v. Lake Erie, etc, R. Co, supra.
51 C.J. p 1005 note 51.
Size of track
The statute requiring railroad to lay track with necessary connections and switches whenever any warehouse may be built within one hundred fifty feet of main line does not apply to private industrial spur track two thousand two hundred fifty-seven feet long—Booth-Kelly Lumber Co v Southern Pac. Co, C A.Or., 183 F 2d 902.

61. Pa.—Erie, etc, R. Co v. Public Service Commission, 74 Pa Super 338.
51 C J p 1005 note 54.
Duty of railroad to carry freight over private tracks connected to railroad see infra § 413

62. Pa—Lycoming Edison Co v Public Service Commission, 67 Pa. Super 608.

63. U.S—Booth-Kelly Lumber Co v Southern Pac Co., C.A.Or., 183 F.2d 902
Ky.—Luton Mining Co v. Louisville & N. R. Co., 123 S.W.2d 1055, 276 Ky. 321.

railroad,[64] and notwithstanding he had not previously shipped via the railroad asked to construct the connection switch,[65] and notwithstanding in constructing the private track applicant, a corporation, may have committed an ultra vires act.[66] Under this section the railroad cannot be ordered to build the switch until after the shipper has constructed the private siding.[67] Other provisions of the act specifying that the authority of the commission shall not extend to the construction or abandonment of switching tracks wholly within one state apply only to switches connecting public railroads and not to switches connecting private tracks with public tracks,[68] and such a switch and private side track do not become an extension of the railroad merely because the side track extends to an industry located on another railroad,[69] or because other carriers might possibly use the connection,[70] or because of provisions of state statutes limited to intra-state commerce.[71]

(c) Sidings and Spurs

The statutory duty of a railroad company to build side tracks is subordinate to the paramount rights of the public.

Under statutes requiring a railroad company to construct and operate side tracks when reasonably necessary for established or prospective industries, and reasonably remunerative to the road, the company's duty to construct and maintain side tracks is subordinate to paramount rights of the public,[72] and the police power of municipalities,[73] with respect to separation of street and railroad grades,[74] as by depression of the railroad.[75]

Statutes requiring railroad companies to build and maintain sidings and spur tracks sufficient to handle the business tendered impose on a company the duty to build spurs or sidings at places other than regular stations where such facilities are needed by the general public,[76] but do not impose the duty to build spurs or sidings away from the main line to accommodate individual interests.[77]

"Indispensable" spurs. Under a statute providing that every railroad shall construct, connect, maintain, and operate a reasonably adequate spur track whenever not necessarily exceeding three miles in length and when practically indispensable to an existing or proposed enterprise or industry, a railroad is under a duty to construct the spur where the statutory conditions prevail,[78] but need not take over an existing spur where the element of indispensability is missing.[79]

(4) Under Contract

The duty to construct switches, spurs, or sidings for the benefit of private interests may be imposed on a railroad company by contract.

Within limitations imposed by statutory or constitutional provisions, railroad companies have the right to contract with respect to the construction of switches, spurs, and sidings for the benefit of private interests[80] on such terms as may be agreed on,[81] and a duty to construct switches or sidings for the benefit of private persons may be imposed by such a contract.[82] The respective rights of shippers and railroads as to construction of private side tracks rest entirely on the contract made.[83] A railroad,

64. U.S.—Cleveland, etc, R Co v. U. S., Ill, 48 S.Ct 189, 275 U.S 404, 72 L Ed. 338.
51 C.J. p 1006 note 58

65. U S.—Cleveland, etc., R. Co v. U. S., supra.
51 C.J. p 1006 note 59.

66. U S.—Cleveland, etc., R. Co v U. S, supra
51 C.J p 1006 note 60.

67. U S.—Cleveland, etc, R. Co. v. U S, supra.

68. U S —Cleveland, etc, R. Co. v. U. S, supra

69. U.S.—Cleveland, etc, R Co v U. S., Ill., 48 S Ct 189, 275 U S 404, 409, 72 L Ed 338.
51 C.J. p 1006 note 63.

70. U.S.—Cleveland, etc., R. Co. v. U. S., supra.

71. U.S.—Cleveland, etc., R. Co. v U. S., supra.

72. Minn —State v. Chicago, etc., R. Co, 131 N.W. 859, 115 Minn 51.

73. Minn.—Twin City Separator Co. v. Chicago, etc, R Co, 137 N W 193, 118 Minn. 491.
51 C J p 1006 note 69

74. Minn —Twin City Separator Co v Chicago, etc, R Co, supra
51 C J. p 1006 note 70.

75. Minn —Twin City Separator Co. v. Chicago, etc., R Co., supra.
51 C.J. p 1006 note 71.

76. Tex.—Crosbyton-Southplains R Co v Railroad Commission, Civ. App, 169 S W 1038
51 C J. p 1007 note 73.
Sidings at stations see infra § 408.

77. Tex —Railroad Commission v. St. Louis Southwestern R. Co., 80 S W. 1141, 98 Tex. 67.
51 C.J p 1007 note 74.

78. Wis —Menasha Woodenware Co. v State R Commission, 166 N.W. 435, 167 Wis 19
51 C J. p 1007 note 76.

79. Wis —Chicago, etc., R. Co. v. Railroad Commission, 225 N.W. 402, 199 Wis. 252.
51 C.J. p 1007 note 77.

80. Ga —Butler v Tifton, etc, R. Co, 49 S E 763, 121 Ga 817.
Mich —Grand Rapids & I. Ry. Co. v. Michigan Railroad Commission, 150 N W 154, 183 Mich. 383
Contract held valid
Tex.—Turner v. Texas & N O. Ry Co., Civ App., 59 S.W.2d 239, error refused.

81. Mich —Grand Rapids & I Ry. Co. v. Michigan Railroad Commission, 150 N W. 154, 183 Mich. 383.

82. Ga —Butler v. Tifton, T. & G. Ry Co, 49 S E 763, 121 Ga. 817.
51 C.J. p 624 note 21.
Specific performance of contract see infra § 125.

83. Mich —Grand Rapids, etc, R. Co. v Michigan R. Commission, 150 N W. 154, 183 Mich. 383, 397
51 C.J. p 1007 note 91
Cost of furnishing see infra § 414.
Construction of contract
Where purpose of contract was to afford switching facilities for benefit of industrial plant and railroad, contract must be read as a whole in

under a license to use tracks on property of another, cannot be compelled to construct a siding on such property to connect with such tracks without the consent of the owner[84] A successor in title to land, who, with knowledge of the predecessor's agreements with the railroad company for the construction of sidings to serve industry located on such land, adopted and accepted the terms of the agreement and enjoyed the benefits of the sidings was bound by the agreements.[85]

A stranger to the contract has no rights thereunder[86]

Waiver and modification. The provisions of such a contract may be waived[87] or modified.[88]

§ 122. Authority to Construct

A railroad may be constructed only by legislative authority.

Since the right of a railroad to corporate existence depends on legislative enactment, as considered supra § 7, the right to condemn property for and to construct and operate a railroad is a franchise which can be exercised only by legislative authority.[89] Any conditions precedent to the commencement of the construction prescribed by statute or the charter of the company must be complied with,[90] and it is in some cases required as a prerequisite to the commencement of the work that the full capital stock shall be subscribed and a certain amount paid in or other arrangements made to insure the completion of the road,[91] or that the company shall deposit with the state treasurer a certain sum for each mile of the proposed road, the amount to be refunded in installments as the work of construction progresses,[92] or, as discussed supra § 6, that before beginning the work of construction it shall be determined by some tribunal designated for that purpose whether the public convenience and necessity require the construction of the proposed road.

Telegraph lines may be constructed under the authority to construct the railroad.[93]

Switches and sidings. While a railroad company desiring to construct switches or side tracks must have legislative authority therefor,[94] the company may construct switches or side tracks for the purpose of facilitating its operation on any land which it may own or acquire the legal consent of the owner to use for such purpose if no public interest or private right is affected thereby,[95] and legislative authority to construct a railroad includes the right to construct such turnouts, sidings and switches as are incident to the convenient and proper operation of the road.[96]

§ 123. Time for Commencement or Completion of Construction

There should be compliance with statutory or charter provisions as respects the time within which construction of the railroad is to begin or is to be completed.

In some cases there are statutory or charter provisions limiting the time within which the railroad company must begin or complete the construction of its road,[97] or requiring that it shall complete a certain number of miles each year;[98] and, where the time for completion is so limited, the company has

light of such purpose—William Danzer & Co. v. Western Maryland Ry Co, 165 A. 463, 164 Md. 448.

84. Ala.—Alabama Cent. R Co. v Alabama Public Service Commission, 76 So 862, 200 Ala. 536, L.R.A.1918C 293.

Reason for rule

The railroad cannot be compelled to trespass on another's lands—Alabama Cent. R Co v. Alabama Public Service Commission, supra.

85. Md.—William Danzer & Co v. Western Maryland Ry. Co., 165 A. 463, 164 Md 448—Adamstown Canning & Supply Co v. Baltimore & O. R Co, 112 A. 286, 137 Md. 199.

86. Tex.—Beaumont, etc, R Co. v. Moore, Civ App., 174 S.W 844.
51 C.J. p 1008 note 94.

87. Ark.—Harbottle-Bailey Coal Co v. Bolton-Hale Coal Co., 234 S W. 476, 150 Ark. 473.
51 C.J p 1008 note 95.

88. Iowa.—Cedar Rapids, etc, R. Co. v Chicago, etc, R Co., 124 N W. 323, 145 Iowa 528.
51 C.J. p 1008 note 96

89. Ill.—Chicago, etc, R Co. v Dunbar, 95 Ill. 571.
Minn.—Blake v Winona, etc, R. Co., 19 Minn. 418, 18 Am.R. 345.
Right to construct lateral branch roads see supra § 51.

90. N Y.—Astor v. New York Arcade R Co., 1 N.Y.S. 174, 48 Hun 562, affirmed 20 N.E. 594, 113 N Y. 93, 2 L R A 789—Bailey v New York Arcade R Co., 1 N Y.S 304, affirmed 20 N E. 594, 113 N.Y. 615

91. N Y.—Astor v New York Arcade R Co, 1 N.Y.S 174, 48 Hun 562, affirmed 20 N E 594, 113 N.Y 93, 2 L R.A. 789.
51 C.J. p 624 note 26.

92. N J.—Schlicher v. Trenton, etc, R Co, 75 A 809, 73 N J.Eq. 425.
51 C.J. p 624 note 27.

93. Iowa.—Snell v. Leonard, 8 N.W 425, 55 Iowa 553

94. U.S.—City of Memphis v. St. Louis & S F. R Co, 183 F 529, 106 C C A. 75

A branch track to connect with private tracks of a cotton compress company was held not to be a terminal facility or a turnout or switch within the meaning of a statute authorizing the construction of such tracks—City of Memphis v. St. Louis & S. F. R. Co., supra.

95. Ill.—Walther v. Chicago, etc, R Co, 117 Ill.App 364, affirmed 74 N E. 461, 215 Ill. 456
Me.—Bangor, etc., R. Co v. Smith, 47 Me. 34.
Lateral or branch roads as distinguished from switches and sidings see supra § 51.

96. Ill.—Lake Shore, etc, R Co v Baltimore, etc, R Co, 37 N E 91, 149 Ill. 272.
51 C J. p 624 note 32.

97. Conn.—Danbury, etc, R. Co v Wilson, 22 Conn 435.
51 C J. p 624 note 34.

98. Cal.—Madera R. Co. v. Raymond

no absolute right to extend its road beyond the point completed at the expiration of such time.[99] The commencement of the railroad, within the meaning of such statutes, is the actual commencement of the work of construction.[1] The time specified by a statute or charter for the commencement or completion of a railroad is not, however, irrevocable, but the legislature and the railroad company may by mutual consent change it at any time,[2] or the legislature may grant an extension of time,[3] but a statute granting an extension of time for the completion of any railroad not finished within the time originally limited does not extend the time originally limited for the commencement of its construction,[4] or have the effect of reviving a company whose corporate powers have already been forfeited at the time of the enactment of the statute;[5] nor does a general statute extending the time for the construction of railroads already in default apply so as to extend the time for constructing a railroad not then in default.[6] A contract between a railroad company and a landowner, by which the railroad company agrees to construct a bridge over its road at a certain point within a certain time after the completion of the road, imposes no obligation on the company to complete the road within any particular time or within a reasonable time.[7] Statutes declaring a forfeiture are not to be extended by implication beyond their direct meaning.[8]

Switches, sidings, branches, and extensions. Statutory or charter provisions limiting the time for the construction of a railroad do not apply to the construction of sidings and switches,[9] or to branch lines,[10] even where such branch lines are described in the articles of incorporation as a line of railroad.[11] If the company has constructed its road within the time limited, it may subsequently construct from time to time such switches and sidings as may be necessary for the handling of its business or proper operation of the road.[12] So, also, the time limited for the construction of a railroad applies to the road as authorized by its charter and not to an extension authorized by a subsequent statute.[13] Where a company is authorized to construct two branches from different places converging at a certain point, it is immaterial which of such branches is constructed first.[14]

§ 124. Maintenance and Repair

a. In general
b. Switches, spurs, and sidings

a. In General

A railroad company is under a duty to maintain its road in such condition and repair as properly to perform its duties to the public.

Since, as discussed infra § 390, it is the duty of a railroad company which has constructed a railroad to operate it, it is also its duty to maintain the road in such condition and repair as properly to perform its duties to the public,[15] and in some cases railroad commissioners are invested with authority to determine the necessity for, and character of, such repairs;[16] but it has been held that such a commission has no jurisdiction over a railroad making repairs which are mere replacements.[17] A railroad

Granite Co., 87 P. 27, 3 Cal.App. 668.
51 C.J. p. 625 note 35.

99. Mich.—Muskegon, etc., R. Co. v. Muskegon Heights, 162 N.W. 92, 194 Mich. 643.
51 C.J. p. 625 note 36.

1. N.J.—State v. Bergen Neck R. Co., 20 A. 762, 53 N.J.Law 108.
2. Ill.—Ross v. Chicago, etc., R. Co., 77 Ill. 127.
3. N.J.—State v. Bergen Neck R. Co., 20 A. 762, 53 N.J.Law 108.
51 C.J. p. 625 note 41.
4. N.Y.—Farnham v. Benedict, 13 N.E. 784, 107 N.Y. 159.
5. N.Y.—Farnham v. Benedict, supra—Sodus Bay, etc., R. Co. v. Lapham, 43 Hun 314, 6 N.Y.St. 159.
6. N.Y.—In re Brooklyn, etc., R. Co., 72 N.Y. 245.
7. Ill.—St. Louis, etc., R. Co. v. Lurton, 72 Ill. 118.
8. Cal.—Northwestern Pac. R. Co. v. Lambert, 137 P. 1116, 166 Cal. 749, followed in Northwestern Pac. R. Co. v. Snider, 137 P. 1119, 166 Cal. 781.
51 C.J. p. 626 note 55.

9. Cal.—Arcata v. Arcata, etc., R. Co., 28 P. 676, 92 Cal. 639.
Pa.—Pottsville Borough v. People's R. Co., 23 A. 900, 148 Pa. 175.
51 C.J. p. 625 note 47.

10. Pa.—Pittsburgh, etc., R. Co. v. Pittsburgh, etc., R. Co., 28 A. 155, 159 Pa. 331.
51 C.J. p. 625 note 48.

11. Cal.—Northwestern Pac. R. Co. v. Lambert, 137 P. 1116, 166 Cal. 749, followed in Northwestern Pac. R. Co. v. Snider, 137 P. 1119, 166 Cal. 781.
12. Pa.—Pottsville Borough v. People's R. Co., 23 A. 900, 148 Pa. 175.
13. N.Y.—Hamilton v. New York, etc., R. Co., 9 Paige 171.
14. Ark.—St. Louis, etc., R. Co. v. Petty, 37 S.W. 300, 63 Ark. 94.
15. U.S.—Lowden v. Denton, C.C.A. Mo., 110 F.2d 274, certiorari denied Denton v. Lowden, 60 S.Ct. 1100, 310 U.S. 652, 84 L.Ed. 1417.
51 C.J. p. 626 note 55.

Mandamus to compel maintenance and repair see Mandamus § 231 d (2).

16. Kan.—State v. Kansas Cent. R. Co., 28 P. 208, 47 Kan. 497.
51 C.J. p. 626 note 56.

Sufficiency of findings and orders

The public utility commission's fact findings and order dismissing its order to show cause for denial of order to correct improper conditions in railroad company's yards because of absence of sufficient switch lights were not manifestly against weight of evidence, unreasonable, or unlawful and were not unlawful or unreasonable because of commission's alleged refusal to determine whether reflectorized target switch signals were safe, where there was no showing that accidents would be caused by use of reflectorized targets.—Cooperative Legislative Committee of Transp. Brotherhoods v. Public Utilities Commission, 85 N.E.2d 554, 151 Ohio St. 325.

17. Pa.—Schuylkill R. Co. v. State

company, for the purpose of making necessary repairs, may dig up and temporarily disturb the surface of a street within the limits of its location.[18] It is also the duty of a railroad company to exercise ordinary care in guarding against probable obstructions of its track from causes not located on its own right of way,[19] and it may maintain a suit in equity for their removal from adjacent lands if they are of such a character as to constitute a source of danger.[20] In the absence of statute, a railroad company is not bound to keep in repair bridges on the company's right of way, but not in the roadbed, and not constructed by the company or required for its purposes.[21]

b. Switches, Spurs, and Sidings

In the absence of statute or contract, a railroad company ordinarily is under no duty to continue the maintenance of a spur track for the benefit of private interests.

In the absence of a duty imposed by statute or contract, a railroad company is not obligated to continue the maintenance of a spur track for the benefit of private interests.[22] Where, however, a switch track built and owned by private industries had become a part of the main line, was used for the benefit of the railroad company to serve such industries, and could be used to serve other shippers and the public at large, the railroad company was held to be under a duty of maintaining such switch track.[23] In order to invoke a constitutional provision relating to the duty of a railroad company to maintain switch connections with private sidings, it is essential that the conditions set forth in the provision be shown to exist.[24]

Contract. Within limitations imposed by constitutional or statutory provisions, a railroad company has the right to contract with respect to the maintenance of switches, spurs, and sidings for the benefit of private interests,[25] and the respective rights of the parties rest entirely on the contract made.[26] A duty to continue the maintenance of a spur track does not arise from a promise of the railroad unsupported by a valid consideration.[27] A contract by a railroad company to construct a switch to plaintiff's quarry does not require the company to maintain such switch in repair after its construction.[28]

Cost of maintaining a side track or trestle operated on the property and for the benefit of an individual is, in the absence of a contract or valid order of the public service commission to the contrary, on the individual,[29] unless a statute provides other-

Public Service Commission, 85 Pa Super. 259.

18. Mass.—New York Cent., etc., R. Co. v. Cambridge, 71 N.E. 557, 186 Mass. 249.
51 C.J. p. 626 note 58.

Ordinance requiring license

(1) A city ordinance forbidding the digging up of any street or otherwise obstructing it without first obtaining a written license from the superintendent of streets will not be construed as applying to a railroad company in making necessary repairs within the limits of its location at a street crossing.—New York Cent., etc., R. Co. v. Cambridge, 71 N.E. 557, 186 Mass. 249.

(2) Effect of ordinance on right to lay tracks in street see supra § 107

19. Ky.—Filbin v. Chesapeake, etc., R. Co., 16 S.W. 92, 91 Ky. 444, 13 Ky.L. 14.
51 C.J. p. 626 note 59.

20. Ky.—Louisville, etc., R. Co. v. Johnson, 37 S.W. 844, 100 Ky. 153, 18 Ky.L. 624.
51 C.J. p. 626 note 60.

21. S.C.—Felder v. Southern R. Co., 57 S.E. 524, 76 S.C. 554.

22. Ga.—Southern Ry. Co. v. Toccoa Rock Crushing Co., 171 S.E. 179, 47 Ga.App. 558.

23. Ill.—Alton R. Co. v. Illinois Commerce Commission ex rel. Moulding-Brownell Corp., 15 N.E. 2d 508, 368 Ill. 584, affirmed Alton R. Co. v. Illinois Commerce Commission, 59 S.Ct. 340, 305 U.S. 548, 83 L.Ed. 344

Public switches

The statute requiring railroads to maintain adequate switches, spurs, and side tracks for handling freight transported by such railroads requires maintenance of public, not private, switches.—Booth-Kelly Lumber Co. v. Southern Pac. Co., C.A.Or., 133 F.2d 902

Switch track across public thoroughfare

Where railroad used switch track built by private funds and for most part on private property, but crossing public thoroughfares for railroad's benefit to serve industries located on switch track, and could use it and extensions of it to serve other shippers and public at large, the switch track and extensions constituted a part of the carrier's system, as regards carrier's duty to maintain switch track.—Alton R. Co. v. Illinois Commerce Commission, Ill., 59 S.Ct. 340, 305 U.S. 548, 83 L.Ed. 344.

24. U.S.—Montgomery v. Atchison, T. & S. F. Ry. Co., C.C.A.Okl., 89 F.2d 94.

Quantity of business

In order to invoke provisions of constitutional provision relating to maintenance of switch connection by railroad, quantity of business must be sufficient to justify switch, and owners of industry must defray expense of construction and repair.—Montgomery v. Atchison, T. & S. F. Ry. Co., C.C.A.Okl., 89 F.2d 94.

25. Mich.—Grand Rapids & I. Ry. Co. v. Michigan Railroad Commission, 150 N.W. 154, 183 Mich. 383

26. Ark.—Standard Gravel Co. v. Missouri Pac. R. Co., 43 S.W.2d 246, 184 Ark. 1194.
Md.—William Danzer & Co. v. Western Maryland Ry. Co., 165 A. 463, 164 Md. 448.
51 C.J. p. 1007 note 91

27. Ga.—Lucas v. Southern Ry. Co., 61 S.E. 404, 130 Ga. 606.—Southern Ry. Co. v. Toccoa Rock Crushing Co., 171 S.E. 179, 47 Ga.App. 558

Damnum absque injuria

Quarry owner, having no right to continued maintenance of spur track erected for his benefit, could not recover from railroad for depreciation in value of quarry caused by removal of spur track, such damage being damnum absque injuria.—Southern Ry. Co. v. Toccoa Rock Crushing Co., supra.

28. Mo.—Stolle Stone Co. v. Missouri Pac. R. Co., 175 S.W. 250, 189 Mo.App. 683.

29. N.C.—Aileen Mills v. Norfolk-Southern R. Co., 140 S.E. 306, 194 N.C. 647.

wise.[30] The cost of such maintenance, however, may be fixed by valid agreement, in which case the contract determines the obligation to pay such costs.[31]

§ 125. Remedies

A railroad company may be enjoined from commencing the construction of its road where it has failed to comply with statutory provisions on which construction of the road is conditioned.

If a railroad company has not complied with a statutory requirement which is a condition precedent to the commencement of the construction of its road, a person whose property will be injuriously affected thereby may enjoin the company from commencing the work of construction.[32] If a railroad company fails to commence or complete the construction of its road within the time limited by statute or its charter, the state alone can ordinarily take advantage of the failure and object to a continuation of the work of construction,[33] and such failure may be waived by the state and an extension of time granted.[34]

In the absence of such an extension or after it has expired, if the railroad company has not commenced the construction of its road, a landowner may resist a subsequent condemnation of his land therefor,[35] or, if partly completed, he may resist any new condemnation of his property for extending the road beyond the point then completed;[36] but, if the company before the expiration of such period has acquired the right of way, he cannot prevent the company from continuing the construction of its road thereon after the time limited for its completion has expired.[37]

So, also, if a landowner has agreed to convey a right of way before the expiration of the time limited, he is not released from his agreement where there is an extension of time for the construction of the road.[38] Where during the process of construction a controversy arises between a landowner and the company as to the true location of the road, which is a disputable question of fact depending on parol testimony, the court will not grant a preliminary injunction restraining the construction of the road, but will require the company to give security for the damages which the landowner may sustain if the decision on final hearing is adverse to the railroad company.[39] Where a railroad company has by contract bound itself to construct and maintain a siding for the benefit of a landowner, a court of equity may compel specific performance of the contract.[40] The railroad is liable in damages for failure to construct according to its agreement.[41]

30. Wis.—New Dells Lumber Co. v. Chicago, St. P., M. & O. Ry. Co., 276 N.W. 632, 226 Wis. 614.

31. Ark.—Standard Gravel Co. v. Missouri Pac. R. Co., 43 S.W.2d 246, 184 Ark. 1194.
Iowa.—State v. Sprague, 281 N.W. 349, 225 Iowa 766.
51 C.J. p. 1008 note 93.

Contract construed

(1) An agreement between the state and a railway company for construction of a spur track from state property to the main track of the railway company, where by the first section thereof the state was obligated to pay the actual cost of materials necessary for construction, maintenance, or operation of the track and by the second section thereof the railway company was to construct, maintain, and operate the track, was held to obligate the state to pay the cost of maintenance while obligating the railway company to perform the physical acts necessary for such maintenance.—State v. Sprague, 281 N.W. 349, 225 Iowa 766.

(2) One using six hundred sixty-two feet of one thousand eight hundred-foot spur track under agreement to pay one half of construction, maintenance, and rental costs of track used was held properly charged with one half of one third of total cost.—Rockcastle River Ry. Co. v. Jewell Coal Co., 74 S.W.2d 340, 255 Ky. 389.

(3) Evidence of previous correspondence and oral discussions warranted conclusion that railroad company, which submitted detailed written estimate of costs in repairing defendant's switch track and received instructions from defendants to repair tracks, was entitled to recover actual cost of repairing track and not merely the estimated cost.—New Orleans Terminal Co. v. Dixie Rendering, La.App., 179 So. 98.

Change of grade

Where the contract relating to the construction of a spur track imposed the cost thereof, except for the rails, on the owner of the property, and railroad changed main line grade, expense of making spur track conform thereto was held required to be borne by owners of spur track.—Black's Executors and Trustees v. Louisville & N. R. Co., 47 S.W.2d 59, 242 Ky. 617.

Items recoverable

A railroad company suing for balance due on contract requiring defendant to pay cost of repair of switch track could not recover an item, representing rails which were not used by railroad company in the performance of the work, or a charge of overhead on labor and material, where railroad company did not include the overhead charges in detailed estimate furnished defendant.—New Orleans Terminal Co. v. Dixie Rendering, La.App., 179 So. 98.

32. N.Y.—Astor v. New York, etc., R. Co., 1 N.Y.S. 174, 48 Hun 562, affirmed 20 N.E. 594, 113 N.Y. 93, 2 L.R.A. 789.

33. Ill.—Ross v. Chicago, etc., R. Co., 77 Ill. 127.
Mo.—Atlantic, etc., R. Co. v. St. Louis, etc., R. Co., 66 Mo. 228.

34. Ill.—Ross v. Chicago, etc., R. Co., 77 Ill. 127.

35. N.Y.—In re Brooklyn, etc., R. Co., 72 N.Y. 245.

36. Me.—Peavey v. Calais R. Co., 30 Me. 498.

37. Mo.—Atlantic R. Co. v. Chicago, etc., R. Co., 66 Mo. 228.

38. Ill.—Ross v. Chicago, etc., R. Co., 77 Ill. 127.

39. U.S.—Rainey v. Baltimore, etc., R. Co., C.C.Pa., 15 F. 767.

40. W.Va.—M. M. & D. D. Brown v. Western Maryland Ry. Co., 99 S.E. 457, 84 W.Va. 271, 4 A.L.R. 522.

41. Okl.—St. Louis, etc., R. Co. v. Farmers' Union Gin Co., 125 P. 894, 34 Okl. 270.
51 C.J. p. 627 note 76.

Cost of maintenance and repair. The railroad company may sue to enforce valid agreements with respect to the cost of maintaining and repairing side or spur tracks for the benefit of private interests.[42]

§ 126. Interference with Construction

Interference with construction of the road by the railroad company may be enjoined in a proper case.

It has been said that the courts are loath to interfere with the construction of railroads.[43] When the ownership of certain land over which the railroad seeks to construct a track is in dispute, an order granting an injunction to the railroad, restraining defendant from interfering with the construction, will not be reversed when the railroad has constructed its track according to the terms of that order pending the appeal,[44] but the order granting the injunction should not have been made unless the railroad was likewise enjoined from proceeding with the construction so as to preserve the status quo.[45]

It has been held that a state statute cannot interfere with the federal government in the construction and maintenance of a railroad right of way acquired by the condemnation decree of a federal court.[46]

§ 127. Penalties for Failure to Construct or Maintain

Penalties for failure to construct a crossing are considered infra § 147; and penalties for violation of regulations as to the operation and maintenance of the railroad are discussed infra §§ 437-446.

Examine Pocket Parts for later cases.

B. PLAN AND MODE OF CONSTRUCTION

§ 128. In General

In the absence of statutory restrictions or agreements, a railroad company may construct its tracks on any part of the right of way it deems proper.

In the absence of any statutory restriction or agreement, a railroad company is not obliged to construct its track in the center of its right of way,[47] but may construct it on any part of the right of way it may deem proper,[48] and after construction may subsequently change its location to any point within the limits of the right of way.[49] So, also, in the absence of any restriction as to how the track shall be constructed with respect to the surface of the ground, the company is not obliged to construct it on the surface,[50] but may elevate its tracks whenever the character of the country makes it either convenient or necessary,[51] or it may construct them under ground.[52] It is also discretionary with the railroad company, where it is authorized to construct a road between different points, as to where it will begin the work of construction,[53] provided it is on the line authorized by the statute or charter,[54] and, where a railroad company is authorized to cross a river by means of a bridge or ferry "as may be most convenient," the decision as to which is most convenient rests with the railroad company.[55]

Branch roads. A railroad company authorized to construct a branch road may begin at a point remote from the main line,[56] provided it is the bona fide intention of the railroad company to continue it to a connection with the main line.[57]

Stations, baggage rooms, and platforms. Where the regulation and control of railroads are in the

42. Ky.—Louisville & N. R Co. v. Dry Branch Coal Co., 117 S.W 2d 1003, 274 Ky. 82.

Action against assignor

Ky —Louisville & N R Co. v. Dry Branch Coal Co., supra.

Evidence explaining ambiguous contract

(1) In weighing evidence of prior correspondence and oral discussions which were competent to explain ambiguity in contract for repair of switch track, motives of parties must be considered —New Orleans Terminal Co v. Dixie Rendering, La. App., 179 So. 98.

(2) A railroad company's statement, in letter to defendant, that work of repairing track would be started on receipt of certified check in a designated amount to cover "costs" of repairs, did not warrant conclusion that railroad agreed to do work for amount of check, where word "costs" referred to detailed estimate of costs contained in earlier portion of letter.—New Orleans Terminal Co. v. Dixie Rendering, supra.

43. N C —Seaboard Air Line R Co. v Thompson, 91 S.E 1013, 173 N.C 258

44. N.C —Seaboard Air Line R. Co. v Thompson, supra

45. N.C —Seaboard Air Line R. Co v Thompson, supra

46. N.Y.—Sells v. Defense Plant Corp, 66 N E 2d 289, 295 N Y. 227

47. W.Va —Ohio River, etc, R Co v Johnson, 40 S E 407, 50 W.Va 499.
51 C J. p 627 note 79.

48. Mo.—Munkers v. Kansas City, etc, R. Co, 60 Mo 334.
51 C J p 627 note 80

49. Mo —Dougherty v. Wabash, etc, R. Co, 19 Mo App 419

50. Pa —Sparks v Philadelphia, etc, R Co, 61 A. 881, 212 Pa 105.

51. Ky —Fulton v Short Route R Transfer Co, 4 S.W. 332, 85 Ky 640, 9 Ky L. 291, 7 Am S R. 619
51 C.J p 627 note 83.

52. Pa —Sparks v Philadelphia, etc, R Co, 61 A 881, 212 Pa. 105.
51 C.J p 627 note 84

53. Pa —Cleveland, etc., R Co v Speer, 56 Pa 325, 94 Am D. 84

54. Pa —Commonwealth v. Franklin Canal Co, 21 Pa 117.

55. N J —Easton v New York, etc, R Co., 24 N J Eq. 49

56. Ark —St. Louis, etc., R Co v Petty, 37 S W 300, 63 Ark 94

57. Ark —St Louis, etc., R Co v Petty, 21 S W. 884, 57 Ark. 359, 20 L R A. 434.

public service commission, the commission may order the construction and plan of construction of improvements of approaches to stations whenever necessary,[58] and a plan submitted to the commission by the railroad, which is dangerous, may be rejected by it.[59] The material to be used in construction of a station is a matter for the discretion of the commission,[60] and its order, when reasonable, will not be interfered with.[61] Baggage rooms and platforms ordered constructed by the public service commission adjacent to a team track need not be constructed along and adjoining the team track.[62] Surroundings and approaches to stations must be constructed and maintained in a reasonably safe manner.[63]

§ 129. Construction in or along Streets and Highways

a. In general
b. Construction at, above, or below grade

a. In General

Where a railroad company is duly authorized to construct its railroad along a public street or highway, its right is subject to reasonable regulation by the municipality.

The right to construct a railroad on public streets, within corporate limits, is subject to reasonable regulations imposed by the municipality,[64] although such regulations cannot abridge or impair the rights and franchises of the railroad company as granted by the legislature,[65] and whenever a statute and an ordinance conflict, the former must control.[66] The right to construct a railroad on or along a street or highway gives the railroad company no right to destroy the street or highway[67] unless the legislature has so enacted,[68] nor does municipal consent to the construction of a railroad in a street confer any right to obstruct the street,[69] or impair the value of abutting property,[70] but it is the duty of the railroad company so to construct its road as not unnecessarily to injure the street or highway or impair the rights of the public in its use.[71]

Where municipal consent for the construction of the railroad is necessary, the municipality may, in granting it, do so subject to reasonable conditions,[72] such as pertain to the mode of construction,[73] or the performance of certain acts on the part of the railroad company, such as grading, paving, and the like,[74] and a railroad company assenting to or constructing its road under an ordinance prescribing such conditions will be bound thereby;[75] but the municipality will also be bound by its part of the agreement in respect to the rights and privileges conferred if it had authority to make such agreement.[76]

Where a railroad company is authorized to construct its road along a street, it need not necessarily construct it in the middle of the street,[77] and a municipality cannot compel a railroad to move its tracks from its private right of way along the side of a street to the center of the street;[78] but a provision in a franchise to use a public highway, requiring a change of the location of the tracks from the side to the center of the highway on permanent improvement thereof by paving, must be complied with.[79] The grade of a street is not altered by authorizing a railroad company to lay its tracks in a street on condition that it pay all damages occasioned by any change of grade.[80]

58. Vt—Bacon v Boston, etc, R Co, 77 A 858, 83 Vt. 528

59. Vt—Bacon v Boston, etc., R Co., supra.

60. Okl—St Louis, etc, R Co. v Sutton, 119 P 423, 29 Okl 553

61. Okl—St Louis, etc., R Co v. Sutton, supra

62. Vt—Bacon v Boston, etc., R. Co, 77 A 858, 83 Vt 528

63. Vt—Sabre v Rutland R Co, 85 A. 693, 86 Vt 347, Ann Cas 1915C 1269

64. Ill—Pittsburg, etc, R Co v Chicago, 42 N E 781, 159 Ill 369
51 C.J p 628 note 99.

65. Ky.—Owensboro v. Owensboro, etc, R Co., 40 S.W 916, 19 Ky L. 449
N J.—Allen v. Jersey City, 22 A. 257, 53 N J Law 522.

66. Wis—Oshkosh First Cong Church v. Milwaukee, etc, R. Co, 45 N.W 1086, 77 Wis 158.

67. Pa—Harnish v Quarryville R Co, 92 A 501, 246 Pa 426
51 C J p 628 note 3.

68. W Va—Moundsville v. Ohio River R Co, 16 S E 514, 37 W Va. 92, 20 L R A 161

69. Ind—Tate v. Ohio, etc, R. Co, 7 Ind 479
Tenn—Pepper v. Union R. Co, 85 S W 864, 113 Tenn 53

70. La—Lewis v Colorado Southern, etc, R. Co, 47 So 906, 122 La. 572

71. Tenn—Pepper v. Union R Co, 85 S.W 864, 113 Tenn 53
51 C J. p 628 note 7.

72. Md—Northern Cent. R. Co. v. Baltimore, 21 Md 93.
W Va—Moundsville v. Ohio River R. Co, 16 S E. 514, 37 W Va 92, 20 L R.A 161.

73. W.Va—Moundsville v. Ohio River R. Co, supra.

74. W Va—Moundsville v. Ohio River R. Co, supra
51 C J. p 628 note 11.

75. Ga—Lamb v Robinson, 87 S E 17, 144 Ga 334
W Va—Moundsville v. Ohio River R Co, 16 S E 514, 37 W Va 92, 20 L.R A 161.

76. Ill—Chicago, etc., R Co v Quincy, 27 N E 232, 136 Ill. 489

77. Wis—Oshkosh First Cong Church, etc v Milwaukee, etc, R Co, 45 N W 1086, 77 Wis. 158.

78. Wis—State v. Milwaukee Light, etc, Co., 180 N.W. 938, 173 Wis 225

79. Ohio—State v Columbus, etc, Electric Co, 135 N.E. 297, 104 Ohio St 120.

80. Ohio—Little Miami R. Co. v. Martin, 1 Ohio Dec., Reprint, 440, 10 West L J 54.

Lights. A railroad cannot be compelled to light streets adjacent to its tracks unless the presence of the railroad renders additional street lighting necessary.[81]

b. Construction at, above, or below Grade

While a railroad constructed along a public street should ordinarily conform to the grade of the surface of the street, the company may be authorized or required to construct its tracks above or below grade.

Where a railroad is constructed along a street, it should ordinarily conform to the grade of the surface of the street;[82] and an ordinance requiring conformity to the street grade must be complied with;[83] but owing to the variations in the grade of many streets and the necessity of maintaining a uniform grade for the railroad, conformity to the street grade is often impracticable, and in such case the railroad company may construct cuts and fills provided the use of the street is not unnecessarily interfered with.[84] Such necessary elevations and depressions of the track may be authorized by a municipality,[85] and, in the exercise of its police power, a municipality which has granted a railroad the right to lay its tracks in a street may, when necessary, by a reasonable ordinance, require the elevation of the tracks,[86] but it cannot impose such restrictions as to the grade of the railroad as will practically deprive the company of a statutory right to construct its road in the street;[87] and, where a railroad is constructed to conform to the existing surface of a street which has not been graded to the established line, the railroad company should not be required to raise or lower its tracks to such line until the city has graded the street conformably thereto.[88]

When the company charter was accepted under laws reserving to the legislature the right to alter, modify, or repeal it, by a subsequent act the railroad may be required to elevate or depress its tracks along its right of way within the limits of a street.[89] Where municipal consent is essential to the occupancy of a street by a railroad, such consent is also necessary for any subsequent material change in the mode of construction, such as a change in the grade of its tracks.[90] Authority to construct an elevated railroad along and over streets carries with it the right to place temporary posts in the street.[91]

§ 130. —— Restoring and Maintaining Highway

Where a railroad is constructed on a street or highway, the company should restore it to its former state or to such state as does not unnecessarily impair its usefulness.

Where a railroad company constructs its road on a street or highway, it is the duty of the company to restore it to its former state or to such state as not unnecessarily to have impaired its usefulness.[92] This is a common-law duty,[93] but it is frequently imposed by statute[94] or ordinance,[95] and is a continuing duty[96] which devolves on a company suc-

81. D.C.—Washington Terminal Co v. District of Columbia, 265 F. 965, 49 App.D.C. 325.
Duty to light tracks on public streets see infra § 430

82. Ind.—Tate v. Ohio, etc., R. Co., 7 Ind. 479.
51 C.J. p. 629 note 19.

83. Iowa.—Slatten v. Des Moines Valley R. Co., 29 Iowa 148, 4 Am. R. 205
51 C.J. p. 629 note 20.

84. W.Va.—Arbenz v. Wheeling, etc., R. Co., 10 S.E. 14, 33 W.Va. 1, 5 L.R.A. 371.
51 C.J. p. 629 note 21.

85. Iowa.—Slatten v. Des Moines Valley R. Co., 29 Iowa 148, 4 Am. R. 205.
W.Va.—Arbenz v. Wheeling, etc., R. Co., 10 S.E. 14, 33 W.Va. 1, 5 L.R.A. 371.

86. Ill.—Murphy v. Chicago, etc., R. Co., 93 N.E. 381, 247 Ill. 614
51 C.J. p. 629 note 23.
Abolition of grade crossings see infra §§ 161-167.

87. Ky.—Owensboro v. Owensboro, etc., R. Co., 40 S.W. 916, 19 Ky.L. 449.

88. Iowa.—Given v. Des Moines, 27 N.W. 803, 70 Iowa 637

89. N.Y.—Long Island R. Co. v. New York, 92 N.E. 681, 199 N.Y. 288.

90. Pa.—Chester v. Baltimore, etc., R. Co., 66 A. 654, 217 Pa. 402

91. Del.—Solomon v. Philadelphia, etc., R. Co., 77 A. 970, 23 Del. 21.

92. Mo.—State ex rel. Titus v. Wabash Ry. Co., 103 S.W. 1137, 206 Mo. 251.
51 C.J. p. 629 note 30.

93. Mo.—State v. Hannibal, etc., R. Co., 86 Mo. 13.
W.Va.—Moundsville v. Ohio River R. Co., 16 S.E. 514, 37 W.Va. 92, 20 L.R.A. 161.

94. N.Y.—Sells v. Defense Plant Corp., 66 N.E.2d 289, 295 N.Y. 227
51 C.J. p. 630 note 32.
Improvement of highway
Provision of statute requiring railroad to pay for improvement of portion of highway occupied by its tracks, which imposed lien for cost of such improvement, was held not ineffective on ground that it was vague and indefinite as to property to be subject to lien.—State v. Indiana R. R., 2 N.E.2d 404, 210 Ind. 222.

95. Tex.—Houston & T. C. Ry. Co. v. City of Houston, Civ.App., 41 S.W. 2d 352
Right of way necessary for streets
Ordinances were held to make it duty of railroads operating trains through city to place and keep in repair portions of right of way found reasonably necessary for public streets.—Houston & T. C. Ry. Co. v. City of Houston, supra.

96. N.Y.—Sells v. Defense Plant Corp., 66 N.E.2d 289, 295 N.Y. 227
Pa.—Commonwealth v. Allegheny Valley Railway Co., 14 Pa.Super. 336
51 C.J. p. 630 note 33.
Duty to repair
(1) Railroad company occupying portion of public highway must keep that portion of highway occupied by its tracks in proper repair, even though no such duty is imposed on it by charter, franchise, statute, or contract; and, if it fails to do so, it is liable for damages caused thereby.—Geiger v. Pennsylvania R. Co., 30 Pa.Dist. & Co. 107.

(2) Notwithstanding absence of ordinance requiring it, railroad maintaining tracks in street must

ceeding to the rights and franchises of the company which constructed the road.[97] A county or municipality in which the highway is situated cannot release the company from this duty,[98] or aid it by agreeing to bear part of the expenses of restoration.[99] This statutory duty is not discharged by merely using ordinary care to maintain the tracks along a street,[1] but also requires the railroad to make such alterations of its highway appurtenances as from time to time become necessary to public safety and convenience in keeping with regional developments and growth of traffic.[2]

The requirement as to restoring streets and highways does not impose on the railroad company the duty of removing all danger incident to the use of the railroad lawfully constructed parallel with, and in close proximity to, a highway,[3] or require the railroad company to construct fences or barriers in such cases between the highway and the railroad track;[4] nor is there any common-law duty to do so.[5] Also the requirement does not contemplate that the highway shall be restored to its exact former state or its use in no degree impaired,[6] but only that there shall be no material and unnecessary impairment of its use;[7] but it does require that the highway shall be restored in such manner as not unnecessarily to impair its usefulness for ordinary travel.[8] If the railroad is constructed on, and so as to destroy the use of, the highway, the highway must be reconstructed on a new location.[9] Where it is necessary to construct a new highway, this must be done before the original highway is appropriated,[10] although the contrary has been held;[11] and any work of restoration must be done within a reasonable time.[12]

§ 131. Roadbed and Tracks

The roadbed and tracks of a railroad should be constructed in a skillful manner and with suitable materials so as to make the railroad safe for travel.

It is the duty of a railroad company to construct its roadbed and tracks in a skillful manner and with suitable materials so as to make the road safe for travel,[13] and subsequently to keep it in proper condition and repair;[14] but the company is not required. in order to make travel on the road entirely free from peril, to incur a degree of expense which would render the operation of the road impracticable.[15] A state or municipality may, in the exercise of its police power, compel a change of the roadbed where the safety of the public requires it.[16]

Statutes providing for clearances of structures adjacent to the tracks must be complied with;[17] and one seeking to construct a track with less than the required clearances must show that compliance with the requirement is impracticable.[18] The railroad

keep portion of street so occupied and used in repair—Columbus, Delaware & Marion Electric Co. v. Brown, 181 N.E 654, 42 Ohio App. 109.

97. Pa.—Commonwealth v Allegheny Valley R. Co., 14 Pa Super. 336.

98. N.Y—Butin v New York Cent., etc, R. Co., 90 N.Y.S. 909, 100 App. Div. 42.
51 C.J. p 630 note 34.

99. Minn—Minneapolis, etc, Electric Tract Co. v Minneapolis, 145 N.W 609, 124 Minn. 351, 50 L.R.A., N.S, 143.

1. Tex—International, etc, R. Co v Haddox, 81 S.W. 1036, 36 Tex Civ App 385.

2. N.Y.—Sells v. Defense Plant Corp, 66 N.E 2d 289, 295 N.Y. 227.

3. Conn—State v. New Haven, etc, Co, 45 Conn. 331.

4. N.Y.—Coy v. Utica, etc, R Co, 23 Barb. 643, disapproving Moshier v Utica, etc, R. Co., 8 Barb. 427

5. N.Y—Coy v. Utica, etc, R. Co, 23 Barb. 643, disapproving Moshier v. Utica, etc, R. Co., 8 Barb. 427.

6. Mo.—Ettenson v. Wabash R. Co., 154 S.W. 785, 248 Mo. 395.
51 C.J. p 630 note 41.

7. W.Va.—Arbenz v. Wheeling, etc, R Co, 10 S.E 14, 33 W.Va. 1, 5 L R.A. 371.

8. W.Va—Moundsville v Ohio River R. Co, 16 S.E 514, 37 W.Va 92, 20 L.R.A. 161

9. Pa—Luzerne v. Monongahela Rys Co, 154 A. 26, 303 Pa 37.
51 C.J. p 630 note 44.
Same width
Statute permitting railroad to appropriate road, and substitute new road therefor, was held to require that new road be same kind of road as old road; railroad appropriating old road discharged obligation under statute by reconstructing new road with same potential width and with same actual width as old road, and, while acceptance of reconstructed road by township supervisors did not, per se, discharge railroad from statutory obligations to reconstruct new road properly, the fact that township officials accepted new road as substitute for old road appropriated by railroad and acquiesced therein for many years was held evidence that reconstructed road was adequate—Luzerne Tp. v. Monongahela Rys. Co, supra.

10. Utah—Barboglio v. Gibson, 213 P. 885, 61 Utah 314.
51 C.J. p 630 note 45.

11. Pa—Danville, etc., R. Co. v. Commonwealth, 73 Pa. 29.

12. Wis—Jamestown v. Chicago, etc., R. Co, 34 N.W 728, 69 Wis. 648.

13. Va.—Fisher v Chesapeake, etc., R. Co., 52 S.E 373, 104 Va 635, 2 L.R.A,N.S, 954.
51 C.J. p 630 note 49.

14. Me—Libby v Maine Cent R. Co, 26 A. 943, 85 Me. 34, 20 L.R.A. 812.
51 C.J. p 630 note 50.
Maintenance and repair generally see supra § 124
Duty of inspection
Pa.—Hart v. Reading Co., Com Pl, 44 Sch Leg Rec 157.

15. Ill—Pittsburgh, etc, R. Co. v. Thompson, 56 Ill. 138.

16. Minn.—Twin City Separator Co v. Chicago, etc., R. Co., 137 N.W. 193, 118 Minn. 491.
51 C.J. p 630 note 52.

17. Mo—State v. Brown, 19 S.W.2d 484, 323 Mo 382.
51 C.J. p 631 note 53.

18. Mo.—State v. Brown, supra.

company may also change the kind of rails on its road.[19] A statutory or charter authority to use steam as a motive power and to carry freight and passengers authorize the company to construct its track and roadbed in a manner suitable for the use of heavy cars and locomotive engines,[20] and to use the heavy "T" rails commonly used on steam railroads.[21] Where a statute prescribes a certain regulation as to the condition of railroad tracks which must be complied with by a certain date, a company whose road is not completed at the time specified is entitled to a reasonable time thereafter to comply with the statute.[22]

Gauge. Where a railroad is constructed under a statute expressly regulating the gauge, the company must conform thereto and cannot subsequently alter the gauge of the road,[23] but, if there is no statutory or charter provision or restriction as to the gauge, the company may adopt such gauge as it may deem proper,[24] and may, after the construction of the road, change from the gauge originally adopted,[25] which change may be made without the consent of the municipality through the streets of which the road is constructed.[26] What is a reasonable time for effecting and completing an authorized change of gauge depends on the circumstances of the particular case.[27]

§ 132. Remedies

The duty of a railroad company to restore a street or highway along which a railroad has been built may be enforced by injunction in a proper case.

Where a railroad company fails to restore a street or highway, along which a railroad has been built, to its former condition as required by statute, it may be compelled to do so by mandamus, as considered in Mandamus § 231 d (2) (c), or by suit in equity for a mandatory injunction,[28] and a town or municipality which is responsible for the condition of its streets and highways may maintain such suit.[29] So, also, a municipality may sue to enjoin a railroad company from obstructing a highway by abandoned structures erected by the company.[30] Where, in consideration of a grant by a municipality of the right to construct a railroad on a street, the railroad company assumes obligations with respect to the mode of construction or work to be done by it on the streets so used, the performance of such duties may be enforced by a suit in equity[31] or the municipality may sue for damages for breach of the agreement.[32] A court of equity has no power at the instance of highway commissioners to enjoin the construction of a railroad on or along highways where such construction is authorized by statute.[33]

With respect to the rights and remedies of abutting property owners, the general rule applies that equitable relief will not be granted where there is an adequate remedy at law.[34] An abutting lot owner cannot enjoin the railroad company from constructing its road in a particular manner if the mode of construction is authorized by competent authority,[35] or if the character and extent of the injury which may result are merely speculative,[36] but he may compel the restoration of the street where the railroad has failed to perform this duty.[37] One who suffers no injury different from that suffered by the public generally cannot enjoin the construction of the

19. Pa.—Millvale v Evergreen R Co, 18 A. 993, 131 Pa. 1, 7 L.R.A. 369

20. Pa.—Millvale v. Evergreen R. Co., supra.

21. Pa.—Millvale v. Evergreen R Co, supra.

22. Me.—Gillin v. Patten, etc., R Co., 44 A. 361, 93 Me. 80.
51 C.J. p 631 note 58

23. Pa.—Western New York, etc., R. Co. v. Buffalo, etc., R. Co., 44 A. 242, 193 Pa. 127.
51 C.J. p 631 note 59.

24. N.C.—State v. Richmond, etc., R. Co, 72 N.C. 634.
Pa.—Millvale v Evergreen R. Co., 18 A. 993, 131 Pa. 1, 7 L.R.A. 369.

25. Colo.—Denver, etc., R. Co. v. Domke, 17 P. 777, 11 Colo. 247.
51 C.J. p 631 note 61.

26. Pa.—Millvale v. Evergreen R. Co., 18 A. 993, 131 Pa. 1, 7 L.R.A. 369.

27. Mo.—State v. Missouri Pac R. Co, 80 Mo 117.

28. W.Va.—Moundsville v. Ohio River R. Co., 16 S.E. 514, 37 W.Va. 92, 20 L.R.A. 161.
Wis.—Jamestown v. Chicago, etc, R. Co, 34 N.W 728, 69 Wis. 648.

29. W.Va.—Moundsville v. Ohio River R Co., 16 S.E. 514, 37 W. Va. 92, 20 L.R.A. 161.
Wis.—Jamestown v. Chicago, etc, R Co, 34 N.W. 728, 69 Wis. 648.
Remedies by or against railroad company relating to use of street or highway generally see supra § 113

30. N.Y.—Village of Skaneateles v. Barber, 78 N.Y.S.2d 79.
Proper parties
In suit to enjoin obstruction of village street by structures which had been erected by railroad but which had been abandoned by railroad, one in possession and control of the structures was a necessary and proper party.—Village of Skaneateles v. Barber, supra

31. W.Va.—Moundsville, etc, R. Co v Ohio River R Co, 16 S.E. 514, 37 W.Va. 92, 20 L.R.A. 161.

32. Ohio.—Cincinnati, etc, R Co v Carthage, 36 Ohio St 631.
51 C.J. p 631 note 72.

33. N.Y.—Baxter v. Spuyten Duyvil, etc, R. Co., 61 Barb. 428, 11 Abb.Pr.,N.S, 178.

34. W.Va.—Arbenz v. Wheeling, etc., R. Co, 10 S.E. 14, 33 W.Va. 1, 5 L.R.A. 371.
51 C.J. p 631 note 74.

35. Minn.—Twin City Separator Co v. Chicago, etc, R. Co., 137 N.W 193, 118 Minn. 491.
51 C.J. p 632 note 77.

36. Ky.—Fulton v. Short Route, etc, R. Co., 4 S.W 332, 85 Ky. 640, 9 Ky.L. 291, 7 Am.S.R. 619

37. Mo.—Ettenson v Wabash R Co., 154 S.W. 785, 248 Mo. 395.

road.[38] So, also, if a railroad company has by lawful authority constructed its road in a street and is not restricted as to the gauge, an abutting lot owner cannot enjoin the company from subsequently widening the gauge.[39]

If, however, the railroad company is proceeding in an unauthorized manner which will occasion a special injury for which there is no adequate remedy at law, the abutting landowner is entitled to an injunction,[40] unless he has lost his right to such relief by his laches or acquiescence,[41] or, if the road has already been located on the street so as to occasion an injury of this character, he may by a suit in equity compel the company to relocate its tracks.[42] In order to recover damages for injuries resulting from nonperformance of duties incidental to the construction of the railroad it must be shown that such nonperformance was the cause of the injury.[43] Where a railroad has occupied a street for a long period of time, it will be presumed, in an action to restrain continued use of the street, that the railroad has acquired the right to use the street.[44]

A public service commission, under its power to determine the terms and conditions on which a railroad company may appropriate a county road, cannot order the company to construct a highway in lieu of one appropriated, as it has agreed to do.[45]

Interference with waters and watercourses. A suit in equity may also be maintained to restrain a railroad company from wrongfully diverting the waters of a stream,[46] or to compel it to restore a stream wrongfully diverted to its former channel,[47] or to remedy an improper mode of construction which will occasion constantly recurring injuries by overflowing plaintiff's land.[48] The statutory duty of a railroad company to construct necessary drains or culverts in connection with its roadbed necessarily implies an obligation to maintain the roadbed in accordance with the initial requirements of the statute[49] and a company failing to discharge such duty to the damage of others may be compelled to do so by injunction.[50] Several landowners may unite in a suit for injunctive relief from obstruction of a stream by construction of the road.[51]

Measure of damages for destruction of a road is only the cost of restoring it to as good a condition as it was before the railroad was built,[52] and inconvenience or injury to the traveling public cannot be considered.[53]

38. Pa.—Weihle v. Pennsylvania R. Co, 8 Pa Dist. 309—Dilley v. Wilkes-Barre, etc, Pass R Co, 2 Pa Dist 91, 12 Pa.Co. 270.

39. Colo.—Denver, etc, R. Co. v Barsaloux, 25 P. 165, 15 Colo. 290, 10 L.R.A. 89
51 C J. p 632 note 81.

40. Tenn.—Pepper v. Union R Co, 85 S W. 864, 113 Tenn. 53.
51 C J. p 632 note 82

41. Wash.—Kakeldy v. Columbia, etc, R. Co, 80 P 205, 37 Wash 675.
51 C.J. p 632 note 83.

42. La.—Hepting v. New Orleans Pac R. Co, 36 La Ann 898

43. Va.—Chesapeake, etc, R Co v Catlett, 94 S E 934, 122 Va. 232
51 C J. p 632 note 85.
Sufficiency of complaint
In an action against a railroad for injuries resulting from leaving stumps above the height prohibited by law, on a road which it constructed in place of a part of a public road taken for its right of way, fact that plaintiff alleged the injury was caused by not restoring the original road to its former state or to such condition as not to impair its usefulness, instead of from the company's failure to cut down the stumps in the new road, would not bar a recovery, even though the latter was the proximate cause of the injury, where the petition showed a cause of action without that averment, it being merely a legal conclusion.—Hall v Houston & T. C. R. Co, 114 S.W. 891, 52 Tex.Civ.App. 90.

44. N Y.—Mosner v. Rome, etc, R. Co, 5 N Y S. 807, 51 Hun 638.

45. Or.—In re County Road No 65, 177 P 426, 90 Or. 519.
51 C.J p 601 note 47

46. Kan.—Atchison, etc, R Co. v. Long, 27 P. 182, 46 Kan 701, 26 Am S R 165.
N Y.—Garwood v. New York Cent, etc, R Co, 83 N.Y. 400, 38 Am. R. 452

47. N Y.—Wright v Syracuse, etc., R Co, 3 N Y S 480, 49 Hun 445, affirmed 27 N.E 854, 124 N.Y. 668.

48. Tex.—Burlington-Rock Island R Co v. Newsom, Civ.App, 219 S.W 2d 129.

49. Tex.—Burlington-Rock Island R Co v. Newsom, supra.

50. Tex.—Burlington-Rock Island R Co. v Newsom, supra.
Sufficiency of evidence
Evidence sustained express finding of jury that culvert under railroad was insufficient to carry surface water from ordinary rainfall from adjoining land and findings of trial court implicit in judgment granting a mandatory judgment requiring railroad to construct such necessary culverts and drains as natural lay of the land adjacent thereto might require for necessary drainage of ordinary rainfall.—Burlington-Rock Island R Co v. Newsom, supra.

51. U. S.—Hagge v Kansas City, etc, R. Co., C C.Mo, 104 F. 391.

52. Ky.—Big Sandy R Co. v Boyd County, 101 S.W. 354, 125 Ky 345, 31 Ky L. 17.

53. Ky.—Big Sandy R. Co. v. Boyd County, supra.

C. CROSSING OTHER RAILROADS

§ 133. Right to Cross

a. In general
b. Street railroads and other railroads occupying streets or highways
c. Agreement or acquiescence
d. Injunction

a. In General

A railroad company may be authorized to construct its road across the tracks of another railroad company.

Railroad companies accept their charters and use their tracks subject to the power of the state to authorize the construction of other railroads across their tracks whenever the public welfare so requires,[54] and this right of crossing is not affected by the priority of charters[55] or the location or construction of the roads thereunder,[56] by the comparative length or amount of traffic on the respective roads,[57] or by the fact that the road crossed is in the hands of a receiver,[58] or that such company owns the title in fee to the property crossed,[59] nor is the right confined to the main tracks, but applies to the lateral and spur tracks and switches constituting a part of the system and necessary to enable the company properly to carry on its business.[60] The railroad seeking to cross must secure a right of way either by purchase or condemnation.[61]

The right to cross another railroad is generally provided for by statutory[62] or constitutional provisions,[63] which must be followed,[64] and where so conferred by statute it is paramount to a mortgage or lien on the property of one of the companies,[65] and the physical character of the railroad does not affect the applicability of such a statute.[66] However, the right to cross need not be conferred in express terms, since it will be implied from the right to construct a road between certain termini, where such crossing is necessary.[67] Statutory provisions applicable to the crossing of one railroad by any new railroad do not apply to a new and additional track of a railroad already crossing another.[68]

Where it is practicable to locate the second road without crossing the first, it should not be permitted to cross and recross the first merely as a matter of convenience or economy in construction,[69] and even where the right to cross is conferred by statute, it should not, in the absence of unequivocal language, be construed as conferring an absolute right to a crossing at the option of the company desiring to make it without regard to its necessity and the interests of the public.[70] One railroad company has no right so to cross the track of another as to deprive the latter of the use of the track or materially impair the exercise of its franchises;[71] but a crossing which is not of such a character may be made,[72] and even a temporary deprivation may, when necessary to effect the crossing, be permitted.[73] The inconvenience in op-

54. Wash.—State v. Northern Pac R. Co, 176 P 539, 104 Wash 405.
51 C J. p 632 note 94.

55. Mo.—Kansas City, etc, R. Co. v. Kansas City, etc, R. Co, 24 S W. 478, 118 Mo 599
Ohio—Lake Shore, etc., R. Co. v. Cincinnati, etc, R. Co., 30 Ohio St. 604.

56. Mo—Kansas City, etc., R. Co. v Kansas City, etc, R Co, 24 S. W 478, 118 Mo. 599.
51 C J. p 633 note 96.

57. Wash.—Seattle, etc., R Co v. State, 34 P. 551, 7 Wash. 150, 38 Am S.R. 866, 22 L.R A. 217.

58. N.J.—New Jersey Cent R Co. v Pennsylvania R. Co, 31 N.J Eq. 475, reversed on other grounds 32 N.J Eq. 755

59. Pa.—Williams Valley R. Co. v. Lykens, etc, R. Co, 44 A. 46, 192 Pa. 552
51 C.J. p 633 note 99.

60. Ala.—Mobile, etc, R Co v Louisville, etc., R. Co, 68 So. 905, 192 Ala. 136
51 C J p 633 note 1.

61. Wash—State v. State Public Works Dept, 286 P. 39, 155 Wash 665
Authority to take property of another railroad see Eminent Domain § 77.

62. N Y—Ft Edward v. Hudson Valley R Co., 84 N.E 962, 192 N. Y. 139
51 C.J. p 633 note 3.

63. U.S.—Missouri, etc., R Co. v. Texas, etc, R Co, C.C.Tex., 10 F. 497, 4 Woods 360
51 C J. p 633 note 4

64. Ind.—Lake Shore, etc, R. Co v Cincinnati, etc, R. Co, 19 N.E 440, 116 Ind. 578.
51 C.J. p 633 note 5

65. Ala.—Alabama, etc, R Co. v. South Alabama, etc, R. Co., 3 So 286, 84 Ala. 570, 5 Am.S R. 401.
51 C.J. p 633 note 6

66. W.Va—Tri-State Tract. Co v. Pittsburg, etc., R. Co., 68 S.E. 25, 67 W.Va. 389.
51 C.J. p 633 note 7.

67. Pa.—Kushequa R. Co v. Pittsburgh, S. & N. R. Co., 50 A. 169, 200 Pa. 526—Perry County R Extension Co v. Newport, etc, R Co, 24 A 709, 150 Pa. 193.
51 C J p 633 note 8

68. N Y.—Buffalo Creek R. Co v. New York Cent R. Co, 160 N.Y S 546, 96 Misc 462

69. Pa.—Perry County R. Extension Co. v Newport, etc., R Co, 24 A 709, 150 Pa 193
Wash—Seattle, etc, R. Co. v. State, 34 P 551, 7 Wash 150, 38 Am S R 866, 22 L.R A. 217.

70. Minn.—In re St Paul, etc, R Co, 33 N W. 701, 37 Minn 164
Wash—Seattle, etc., R Co v. State, 34 P. 551, 7 Wash 150, 38 Am S.R 866, 22 L R.A. 217.

71. Mo—Kansas City, etc, R Co v. Kansas City, etc., R. Co, 24 S. W 478, 118 Mo. 599.
Wash.—Seattle, etc, R. Co. v State, 34 P 551, 7 Wash 150, 38 Am.S.R 866, 22 L R.A 217.

72. N.J—National Docks, etc, Co v State, 21 A. 570, 53 N.J.Law 217, 26 Am S.R. 421.

73. N.J.—National Docks, etc, R.

eration and the increased danger necessarily incident to the existence of the crossing are not such an impairment of the franchise,[74] and the crossing may be made although it shortens the storage tracks of the railroad crossed,[75] or necessitates a slight change of their grade,[76] or even an expensive alteration of the car yard when no other practical place for crossing can be found.[77]

b. Street Railroads and Other Railroads Occupying Streets or Highways

Street railroads and other railroads in or along a street or highway may be authorized to cross each other's tracks.

A railroad may be authorized to cross the tracks of another railroad located in or along a street or highway.[78] Such authority to cross may exist in a street railroad with respect to a steam railroad so located,[79] or in a steam railroad with respect to a street railroad.[80] Where the right of a street railroad to cross the tracks of another railroad is conferred by statutory or constitutional provision, there must be compliance with any conditions precedent imposed by such provisions before the crossing may be made.[81] It has been held that, in the absence of legislative authority, a private company because it must be assumed that the steam railroad company constructed its tracks across a street or highway with the understanding that a street railroad might thereafter be lawfully located on the street or highway and across the tracks at that point.—South East, etc., R. Co. v. Evansville, etc., R. Co., 82 N.E. 765, 169 Ind. 339, 13 L.R.A.,N.S., 916—Baltimore & O. S. W. R. Co. v. Cincinnati L. & A. Electric St. R. Co., 99 N.E. 1018, 52 Ind. App. 639

"Unite" and "connect" compared

Within the provision of the railroad law conferring on every steam railroad the right to cross or to unite its railroad with any other railroad already constructed, to any point on its road, and providing that every railroad corporation whose road is intersected by any new railroad shall unite with such road in forming necessary intersections and shall grant the requisite facilities, the word "cross" hardly could have been intended to apply to one kind of a railroad, and the word "unite" to another kind, and, as the legislature by the word "cross" intended to preserve the right of railroads of different kinds to cross each other, the word "connect" also should be construed to apply to different railroads, and, hence, the electric railroads are subject to the provisions of the statute.—Stillwater, etc., St. R. Co. v. Boston, etc., R. Co., 64 N.E. 511, 514, 171 N.Y. 589, 59 L.R.A. 489.

Co v. Pennsylvania R Co, 33 A. 860, 54 N J Eq 142, affirmed 41 A 1116, 55 N J Eq 820.

51 C.J. p 633 note 14.

74. Mo.—Kansas City, etc, R Co v Kansas City, etc, R Co., 24 S W 478, 118 Mo 599

51 C J p 633 note 15.

75. Mo —Kansas City, etc, R Co v Kansas City, etc, R Co., 24 S W 478, 118 Mo 599.

Mont.—Butte, etc, R Co v. Montana Union R Co, 41 P 248, 16 Mont 550.

76. Mont —Butte, etc., R. Co v. Montana Union R Co, supra

77. N J —National Docks, etc, R Co. v. State, 21 A. 570, 53 N.J.Law 217, 26 Am S.R. 421.

78. Mo —St Louis Transfer R. Co v. St Louis Merchants' Bridge Terminal R. Co., 20 S.W. 319, 111 Mo. 666

Pa.—Pennsylvania Schuylkill Valley R. Co v. Philadelphia, etc, R Co, 28 A. 784, 160 Pa. 277

Compensation see Eminent Domain § 131.

79. Conn —New York, etc, R. Co. v Bridgeport Traction Co, 32 A. 953, 65 Conn. 410, 29 L R A 367

Ind.—Pittsburgh, C, C & St L Ry Co. v Muncie & Portland Traction Co, 91 N.E. 600, 174 Ind 167—South East, etc., R. Co. v. Evansville, etc, Electric R. Co, 82 N E. 765, 169 Ind 339, 13 L R.A,N S, 916, 14 Ann Cas 214—Baltimore & O. S W. R. Co v Cincinnati L A. Electric St. R. Co., 99 N E 1018, 52 Ind App. 639.

Neb.—Chicago, etc., R. Co v. Steel, 66 N.W. 830, 47 Neb 741.

N.Y —Stillwater, etc., R Co. v. Boston, etc, R. Co, 64 N.E. 511, 171 N.Y. 589, 59 L.R.A. 489.

Ohio —Akron & Cuyaho Falls Rapid Transit Co. v Erie Ry., 28 Ohio Cir.Ct. 36, 76 Ohio Cir.Ct.,N S., 199 —Cleveland, etc., R. Co. v Urbana, etc., R. Co, 26 Ohio Cir.Ct. 180—Cincinnati, etc., Electric R Co v. Cincinnati, etc, R. Co., 21 Ohio Cir. Ct. 391, 12 Ohio Cir.Dec. 113.

Pa —Pennsylvania R. Co. v. Greensburg, etc, St R Co, 35 A 122, 176 Pa St 559, 36 L R A. 839—Pennsylvania R Co v Suburban Rapid Transit Co, 11 Pa Co 591.

Tex —Galveston, H. & S. A. Ry. Co. v Houston Electric Co, 122 S W. 287, 57 Tex Civ App 170

51 C J p 634 note 22.

Reasons for rule

(1) The right of way acquired by a railroad is subject to the easement of the public in the street.

U S —East St Louis R Co. v. Louisville, etc, R Co, Ill., 149 F. 159, 79 C C.A. 107—Pennsylvania Co v Lake Erie, etc., R. Co., C C.Ohio, 146 F. 446.

Ga —Southern R. Co. v. Atlanta Rapid Transit Co., 36 S E. 873, 111 Ga 679, 51 L.R A. 125

Ill —Chicago, etc., R. Co v West Chicago St R. Co, 40 N E 1008, 156 Ill. 255, 29 L.R.A. 485.

Ind —South East, etc., R Co. v. Evansville, etc, R Co, 82 N.E 765, 169 Ind 339, 13 L.R A,N S, 916, 14 Ann.Cas 214—Evansville, etc., Traction Co v. Evansville Belt R Co, 87 N.E. 21, 44 Ind App. 155—Michigan Cent. R Co. v. Hammond, etc., Electric R Co., 83 N E 650, 42 Ind App 66

Neb —Chicago, etc., R. Co. v. Steel, 66 N.W 830, 47 Neb. 741.

(2) A steam railroad takes a grant of a right to occupy a city street subject to the power of the city to authorize the construction of a street car line over the same, and to the right of the street car company to cross the railroad tracks by proper means, and with due regard for the railroad's rights —Evansville & S I Traction Co. v. Evansville Belt Ry. Co., 87 N E 21, 44 Ind.App. 155

(3) Operation of a street railroad imposes no additional burden on a street —Chicago, etc., R. Co v. Whiting, etc., R. Co., 38 N.E. 604, 139 Ind 297, 47 Am.S.R. 264, 26 L.R.A. 337—Baltimore & O. S. W. R Co. v Cincinnati, L. & A. Electric St. R. Co., 99 N E 1018, 52 Ind.App. 639.

Priority of construction confers no advantage on the steam railroad

80. Mass.—Lynn, etc., R Co. v. Boston, etc., R Corp., 114 Mass. 88

81. Conn —New York, N. H. & N. R Co v. Bridgeport Traction Co., 32 A 953, 65 Conn. 410, 29 L.R.A. 367.

Ga —Southern R. Co. v. Atlanta R., etc., Co., 36 S.E. 873, 111 Ga. 679, 51 L.R.A. 125.

Ky.—Elizabethtown, etc., R. Co. v. Ashland, etc., St. R. Co., 26 S.W. 131, 96 Ky 347, 16 Ky.L.Rep 42.

N Y.—Delaware, etc., R Co. v Syracuse, etc., R. Co, 59 N.Y.S 1035, 38 Misc. 456, affirmed 60 N.Y.S 336, 43 App.Div. 621.

tramroad cannot be constructed over a railroad track.[82]

c. Agreement or Acquiescence

The right of one railroad company to cross the tracks of another railroad company may be acquired by agreement between the companies.

The right to cross the tracks of another railroad may be acquired by agreement between the companies as well as by legal proceedings pursuant to statutory authority.[83] Where such a contract has been entered into, its terms determine the rights of the parties.[84] A waiver of the right to compensation is sufficient consideration for an agreement to cross.[85] Where the grant of the right to cross is a mere license to cross, it may be revoked at any time before the crossing is actually constructed.[86] A contract giving one railroad company the right to cross the tracks of another does not include the right to cross yards used for terminal purposes,[87] and a contract for a crossing will not be specifically enforced where plaintiff claims the right to cross at a place not contemplated by the parties and where it would greatly damage the other company.[88]

Where the officers of one railroad company assent, although not in the form of a binding contract, to a grade crossing of their road by another company and permit the latter to expend large sums of money in constructing their road with respect to such crossing, they cannot afterward enjoin the latter from constructing such crossing and insist on a crossing of a different character involving large additional expense,[89] but the fact that one railroad company is permitted to construct its road with the manifest intention of crossing another without objection by the latter constitutes no estoppel by acquiescence to a claim for damages,[90] nor does the fact that a railroad company permitted a street railroad company to cross its tracks for several months pending negotiations between the companies as to such crossing, which were subsequently broken off by the latter company, give such company any legal right to the use of the crossing.[91]

Under an agreement giving the right to cross but reserving to the grantor the right to lay additional tracks, the grantor may thereafter lay an additional track to convert its road from a narrow to a standard gauge.[92]

d. Injunction

An unauthorized crossing by one railroad of the tracks of another may be enjoined in a proper case. Conversely interference with a crossing may also be enjoined by a railroad duly authorized to make the crossing.

A court of equity will enjoin one railroad company from crossing the tracks of another without any legal authority to do so,[93] or from crossing

W.Va.—Wellsburg, etc., R. Co. v. Panhandle Traction Co., 48 S.E. 746, 56 W.Va. 18.

Railroad chartered by legislature

Where the charter of a street railroad company, although granted by the secretary of state, has been confirmed and validated by the legislature, such company is "chartered by the legislature," within a statute permitting any railroad company "heretofore or hereafter chartered by the legislature of this State" to cross the tracks of any other railroad under certain conditions.—Southern R. Co. v. Atlanta, R., etc., Co., 36 S.E. 873, 111 Ga. 679, 51 L.R.A. 125.

82. Fla.—Seaboard Air Line R. Co. v. McRainey, 68 So. 753, 69 Fla. 462.

83. U.S.—Chicago, etc., R. Co. v. Old Colony Trust Co., Iowa, 216 F. 577, 132 C.C.A. 581.
51 C.J. p. 634 note 26.

Application of contract to future

A contract giving a street railway company the right to cross the tracks of a railroad company, and allowing the street railroad company to make additional crossings required by additional tracks laid by the grantor, was held to apply to new tracks laid at any future times.—Louisville & N. R. Co. v. Central Kentucky Traction Co., 144 S.W. 739, 147 Ky. 513, Ann.Cas.1915A. 857.

84. N.J.—New Jersey Junction R. Co. v. Erie R. Co., 17 A.2d. 265, 128 N.J.Eq. 497.

Tracks which may be crossed

N.J.—New Jersey Junction R. Co. v. Erie R. Co., supra.

Despite a new franchise, the rights of a street railway corporation to a crossing over a railroad was held fixed by the contract made by its predecessor.—Louisville & N. R. Co. v. Central Kentucky Traction Co., 144 S.W. 739, 147 Ky. 513, Ann.Cas.1915A. 857.

"Flag the crossing" defined

Ill.—Toledo, etc., R. Co. v. East St. Louis, etc., R. Co., 206 Ill.App. 216.

Right to remove trolley wires

Although a contract authorized removal of street railway company's trolley wire, if it sagged where the street railway crossed its tracks, the railroad company was not justified in running wrecking train against it where it sagged, and breaking it.—Owensboro City R. Co. v. Louisville, H. & St. L. Ry. Co., 178 S.W. 1043, 165 Ky. 683.

85. U.S.—Chicago, etc., R. Co. v. Old Colony Trust Co., Iowa, 216 F. 577, 132 C.C.A. 581.

86. Pa.—Lehigh, etc., R. Co. v. Bangor, etc., R. Co., 77 A. 552, 228 Pa. 350.
51 C.J. p. 634 note 30.

87. N.J.—Delaware, etc., R. Co. v. Collector, 4 N.J.Law J. 247.

88. N.J.—Coe v. New Jersey Midland R. Co., 31 N.J.Eq. 105.

89. Pa.—Appeal of Catawissa R. Co., 2 Walk. 175.

90. N.J.—Coe v. New Nersey Midland R. Co., 31 N.J.Eq. 105.

91. N.Y.—Port Richmond, etc., Electric R. Co. v. Staten Island Rapid Transit R. Co., 39 N.E. 392, 144 N.Y. 445.

92. Pa.—Pittsburg, etc., R. Co. v. Keating, etc., R. Co., 81 A. 935, 233 Pa. 71.

93. U.S.—Denver, etc., R. Co. v. Arizona, etc., R. Co., N.M., 34 S.Ct. 691, 233 U.S. 601, 58 L.Ed. 1111.
51 C.J. p. 634 note 37.
Injunction with respect to place or manner of crossing see infra § 134 e.

Grounds for relief

Where a bill to restrain a street railroad company from constructing a crossing over complainant's rail-

without first making compensation where there is a right to such compensation,[94] although the contrary has been held where the statute does not make the fixing and payment of such compensation a condition precedent to the crossing;[95] and conversely, where one railroad company has a right to cross and is proceeding in a lawful and proper manner, the court will enjoin the company whose tracks are crossed from interfering with the work of construction,[96] or from interfering with the crossing or its use after it is constructed.[97] On the other hand, where a commercial railroad crosses a street or highway the company cannot enjoin the construction of a street railroad over such crossing, duly authorized, on the ground that it will interfere with property of the railroad company and render the crossing dangerous,[98] especially if the railroad does not own the fee in the right of way and the crossing is made with due regard to the railroad's property rights and the danger thereof is not increased.[99] The company whose road is being crossed cannot enjoin the crossing pending appeal from the proceedings in which the right to cross was granted.[1]

If a crossing has been already effected without authority and the company making it could not by legal proceedings acquire a right to the crossing in question, the court may not only enjoin its use but may compel its removal and the restoration of the road crossed to its original condition;[2] but if the company which has made the crossing might by proper proceedings acquire the right and has merely proceeded in an unauthorized manner, the court may, instead of enjoining its use unconditionally, require the company to conform to the legal requirements and make proper compensation, giving bond to comply with the order of the court.[3] Where a railroad company is proceeding in good faith with the construction of its road with apparent ability properly to perform the work of crossing another railroad, it will not be enjoined from so crossing merely because it has not yet secured a right of way over its entire route,[4] and where one railroad company is authorized to cross another below grade, provided the structures for crossing are approved by the railroad commissioners, the company whose location is crossed cannot, after such approval has been granted, alter the existing conditions and enjoin the other company from constructing the crossing as authorized.[5]

A railroad will not be enjoined from reconstructing spur tracks destroyed by another company in effecting a crossing.[6]

§ 134. Place, Mode, and Expense of Crossing

a. In general
b. Agreement between companies
c. Crossing at, above, or below grade
d. Expense of crossing
e. Injunction

a. In General

The crossing by one railroad of another should be so located and constructed as not to do unnecessary injury to the road crossed.

Where one railroad company crosses another, the crossing should be so located and constructed as not to do any unnecessary injury to the road crossed,[7] and in many jurisdictions the statutes in effect so provide;[8] but while such provisions clearly

road tracks alleged that defendant was a corporation organized under the laws of Illinois, and prayed relief solely on the ground that complainant was about to improperly extend its street railway system across complainant's main track without complying with the law, and, on defendant denying that it was an Illinois corporation and alleging that it was organized under the laws of Maine, complainant did not seek to amend or file a replication, it could not claim relief on the ground that a foreign corporation could not maintain a street railway system or exercise its corporate functions in Illinois.—Chicago, P. & St. L. Ry. Co. v. Jacksonville Ry. & Light Co., 91 N.E. 1024, 245 Ill. 155

94. Ga.—Georgia Midland, etc., R. Co. v. Columbus Southern R. Co., 15 S.E. 305, 89 Ga. 205
Ill.—Chicago, etc., R. Co. v. Chicago, etc., R. Co., 15 Ill.App. 587.

95. N.Y.—New York, etc., R. Co. v. Forty-second St., etc., R. Co., 50 Barb. 309, 32 How.Pr. 481.

96. Ind.—Chicago, etc., R. Co. v. Whiting, etc., St. R. Co., 38 N.E. 604, 139 Ind. 297, 47 Am.S.R. 264, 26 L.R.A. 337
Pa.—Du Bois Tract. Pass. R. Co. v. Buffalo, etc., R. Co., 24 A. 179, 149 Pa. 1.

Crossing by street railroad
Ohio.—The C. & H. Electric St. Ry. Co. v. The C. H. & I. R. R. Co., 21 Ohio Cir.Ct. 391, 12 Ohio Cir. Dec. 113.

97. Pa.—Du Bois Tract. Pass. R. Co. v. Buffalo, etc., R. Co., 24 A. 179, 149 Pa. 1.
51 C.J. p. 635 note 42.

98. Ga.—Southern Ry. Co. v. Rome Ry. & Light Co., 77 S.E. 1126, 139 Ga. 726.

99. Pa.—Cumberland Val., etc., R. R. Co. v. Chambersburg, etc., Ry. Co., 15 Pa.Dist. 965.

1. Ind.—Vandalia R. Co. v. La Fayette, etc., Tract., 94 N.E. 483, 175 Ind. 391.

2. U.S.—Chattanooga Terminal R. Co. v. Felton, C.C.Tenn., 69 F. 273

3. Mich.—Toledo, etc., R. Co. v. Detroit, etc., R. Co., 30 N.W. 595, 63 Mich. 645.

4. N.J.—National Docks, etc., Junction Connecting R. Co. v. Pennsylvania R. Co., Ch., 30 A. 1102, reversed on other grounds Pennsylvania R. Co. v. National Docks, etc., Junction Connecting R. Co., 32 A. 220, 53 N.J.Eq. 178.

5. Mass.—Fitchburg R. Co. v. New Haven, etc., Co., 134 Mass. 547.

6. Ga.—Atlantic, etc., R. Co. v. Atlantic Coast Line R. Co., 58 S.E. 465, 129 Ga. 44.

7. Ala.—Mobile, etc., R. Co. v. Louisville, etc., R. Co., 68 So. 905, 907, 192 Ala. 136.
51 C.J. p. 635 note 50.

8. Va.—Norfolk, etc., R. Co. v. Tide-

recognize that the rights of the first occupant are superior to those of the second,[9] they do not require that there shall be no injury whatever to the rights of the road crossed,[10] or require the selection of the place and mode which will least injure the company crossed, without regard to the interests and necessities of the other company, which must also be considered and the question determined according to the circumstances of the particular case.[11]

The provisions also apply only to direct interference with rights and not to consequential injury to interests, such as a diminution of traffic by competition.[12] While it has been held, under a statute giving one railroad company the right to cross another at any point, that the crossing company may select the place and manner of crossing, subject only to the condition of paying the damages inflicted,[13] but it has also been held that the right of crossing cannot be exercised arbitrarily, without regard to the necessities of the case and the interests of the other company,[14] even though the statute confers the right to cross at any point.[15]

In determining the place and mode of crossing, consideration should be given to the future necessities of the company whose road is crossed,[16] and also to the rights and necessities of the public in the use of streets and highways on which the roads may be located,[17] but mere possibilities should not be provided for.[18] A statute giving the right to cross another railroad does not necessarily require that the crossing shall be at right angles,[19] but one company should not, in crossing, be permitted unnecessarily to obstruct the track of the other in a longitudinal direction so as to impair the use of such road.[20] Where one railroad company has the right to cross the track of another, the latter has no right to dictate the terms on which the crossing shall be made.[21]

Street railways crossing a railroad on the bridge constructed to carry the street over the railroad are not bound to maintain any portion of the structure of the bridge, except to meet the expense caused by the extra burden of its tracks.[22] However, a street railway company which crossed a railroad bridge without obtaining leave as provided by statute cannot claim immunity from contribution to needed repairs entailed by reason of its operation over the bridge.[23]

Safety devices. In some states the statutes provide that the crossing company may be required to interlock the crossing,[24] and, although such a statute exempts from its requirements the crossing of side tracks, it does not exempt the crossing of a side track and a main line.[25] Such statutes have been held not to apply to crossings of railroads by street railways or interurban roads,[26] or to the crossing of street railroads by other railroads.[27] A

water R. Co., 52 S.E. 852, 105 Va. 129
51 C.J. p 635 note 51.

Particular provisions

In some cases, the statutes provide that the crossing shall be made at such place and in such manner as will not unnecessarily impede or endanger the travel or transportation on the railroad so crossed.

N.J.—In re Atlantic, Highlands, etc., R. Co., Ch., 35 A. 387.

Pa.—Delaware, etc., Canal Co. v. Scranton, etc., Traction Co., 4 Pa. Dist. 287, 7 Kulp 509.

51 C.J. p 635 note 51 [a].

Reasonable or feasible point

Ky.—Louisville, etc., R. Co. v. Bowling Green R. Co., 63 S.W. 4, 110 Ky. 788, 23 Ky.L.Rep. 273.

9. Pa.—Smethport R. Co. v. Pittsburg, etc., R. Co., 52 A. 88, 203 Pa. 176—Kushequa R. Co. v. Pittsburgh, S. & R. Co., 50 A. 169, 200 Pa. 526.
51 C.J. p 635 note 52.

10. Ala.—Mobile, etc., R. Co. v. Louisville, etc., R. Co., 68 So. 905, 192 Ala. 136
51 C.J. p 635 note 53.

11. Ala.—Mobile, etc., R. Co. v. Louisville, etc., R. Co., supra.
51 C.J. p 635 note 54.

12. Pa.—Pennsylvania R. Co. v. Greensburg, etc., R. Co., 35 A. 122, 176 Pa. 559, 36 L.R.A. 839

13. Ill.—Lake Shore, etc., R. Co. v. Chicago, etc., R. Co., 97 Ill. 506.
51 C.J. p 636 note 56.

14. Wash.—Seattle, etc., R. Co. v. State, 34 P. 551, 7 Wash. 150, 38 Am.S.R. 866, 22 L.R.A. 217.

15. Wash.—Seattle, etc., R. Co. v. State, supra.

16. Pa.—Smethport R. Co. v. Pittsburg, etc., R. Co., 52 A. 88, 203 Pa. 176.
51 C.J. p 636 note 59.

17. Pa.—Pennsylvania R. Co. v. Conshohocken R. Co., 4 Pa. Dist. 12, 15 Pa. Co. 454.
Wash.—Seattle, etc., R. Co. v. State, 34 P. 551, 7 Wash. 150, 38 Am.S.R. 866, 22 L.R.A. 217.

18. Wash.—Chicago, etc., R. Co. v. Tacoma, R., etc., Co., 102 P. 778, 53 Wash. 682
51 C.J. p 636 note 61.

19. Ala.—Alabama, etc., R. Co. v. South Alabama, etc., R. Co., 3 So. 286, 84 Ala. 570, 5 Am.S.R. 401.
51 C.J. p 636 note 62.

20. Wash.—Seattle, etc., R. Co. v. State, 34 P. 551, 7 Wash. 150, 38 Am.S.R. 866, 22 L.R.A. 217.

21. U.S.—Arkansas, etc., R. Co. v. St. Louis, etc., R. Co., C.C.Ark., 103 F. 747.
51 C.J. p 636 note 64

22. R.I.—United Electric R. Co. v. Cranston, 128 A. 213, 46 R.I. 425

23. N.H.—City of Laconia v. Boston & M. R. R., 128 A. 350, 81 N.H. 408.

24. Ohio.—Lake Shore, etc., R. Co. v. Cleveland, etc., R. Co., 7 Ohio S. & C.P. 558, 5 Ohio N.P. 83.
51 C.J. p 636 note 65.

25. Tex.—International-Great Northern R. Co. v. Texas R. Commission, Civ.App., 281 S.W. 1084, affirmed 48 S.Ct. 155, 275 U.S. 503, 72 L.Ed. 395.

26. Iowa.—Illinois Cent. R. Co. v. Waterloo, etc., R. Co., 173 N.W. 283, 186 Iowa 1207.
Ohio.—Cincinnati, etc., R. Co. v. Cincinnati, etc., R. Co., 21 Ohio Cir. Ct. 391, 12 Ohio Cir.Dec. 113.

27. Tex.—Galveston & W. Ry. Co. v. Galveston Electric Co., 123 S.W. 1140, 58 Tex.Civ.App. 427.

All that street railroad company could require as to the crossing of its tracks by a steam railroad would be the installation of a reasonably safe crossing and one that was in common use.—Galveston, etc., R. Co.

statute authorizing a street railroad company to cross at grade, diagonally or transversely, any railroad operated by steam or otherwise, has been held not to confer an unqualified right so to cross at a place other than the crossing of the street or highway.[28]

b. Agreement between Companies

The place and manner of crossing may be based on an agreement between the companies.

The companies may agree on the place and manner of crossing,[29] and, where one company has assented to a crossing at a particular place and the other has constructed its road with respect thereto, the former should be held to be estopped to deny the necessity for the crossing or the propriety of the place agreed on.[30] An agreement between railroads allowing the new road to cross the other at grade will not prevent the senior road from elevating its tracks.[31] On failure of an electric railroad company to construct a bridge at a crossing as required by an agreement with a railroad company whose tracks were to be crossed, the latter may recover from the former the actual damages sustained[32] without first proceeding to construct such bridge.[33]

Lessee may be bound to maintain a crossing in compliance with a contract between its lessor and another railroad.[34]

c. Crossing at, above, or below Grade

The crossing of a railroad by another at, below, or above grade is often regulated by statute.

Whether or not a crossing may be at grade, or must be above or below grade, is, in most jurisdictions, regulated by statute.[35] In the absence of any express provision it has been held that a railroad having a right to cross the tracks of another has the right to determine the manner in which it will cross.[36] However, it has also been held that, unless the manner of crossing is specifically designated by statute, it is subject to the control of a court of equity, as discussed infra § 137, and that even a statutory right to cross at grade does not give the crossing company any perverse and arbitrary right to do so, regardless of the rights of the other company and the safety of the public.[37]

The state may, in the exercise of its police power, either authorize grade crossings[38] conditionally or unconditionally[39] or prohibit them.[40] A railroad has no absolute right to cross at grade under a constitutional provision authorizing a crossing but not specifying its character,[41] or under a statute giving the right to construct a road across, under,

v. Galveston Electric Co., 123 S.W. 1140, 58 Tex.Civ.App. 427.

28. Pa.—Northern Cent. Ry. Co. v. Harrisburg & M. Electric Ry. Co., 35 A. 624, 177 Pa. 142, 34 L.R.A. 572, modified on other grounds 36 A. 321, 180 Pa. 11, followed in Cumberland Valley R. Co. v. Harrisburg & M. Electric Ry. Co., 35 A. 1133, 177 Pa. 155, modified on other grounds 36 A. 321, 180 Pa. 12—The Allen St. Ry. Co. v. The Lehigh & New England R. R., 17 Pa.Dist. 810.

Reason for rule

Since the location of street railroads is ordinarily authorized only on streets and highways, such a statutory provision as the above is predicated on that fact, and, hence, the authority therein granted is necessarily applicable only to crossings at points where the railroad is crossed by a street or highway.—Northern Cent. R. Co. v. Harrisburg, etc., Electric R. Co., 35 A. 624, 177 Pa. St. 142, 34 L.R.A. 572—Trenton Cut-off R. Co. v. Newtown Electric St. R. Co., 8 Pa.Dist. 549.

29. Ill.—Chicago, etc., R. Co. v. Batchelder, 100 N.E. 495, 257 Ill. 107

51 C.J. p. 636 note 69.

Kind and character of the crossing, material, and appliances are proper subjects of contract.—Baltimore & O. S. W. R. Co. v. Cincinnati, L. & A. Electric St. R. Co., 99 N.E. 1018, 52 Ind.App. 639

30. U.S.—Arkansas, etc., R. Co. v. St. Louis, etc., R. Co., C.C.Ark., 103 F. 747.

31. Pa.—Lehigh, etc., R. Co. v. Delaware, etc., R. Co., 39 Pa.Co. 432.

32. La.—Illinois Cent. R. Co. v. Orleans-Kenner Electric Ry. Co., 100 So. 704, 156 La. 522.

Measure of damages

Where electric road, in consideration of the right to cross tracks of another railroad, agreed to construct bridge at crossing, the second railroad, on first railroad's failure to construct bridge, could recover as damages sustained the value of the bridge at time specified for delivery, as shown by proof of what it would have cost to construct bridge, and was not limited to difference in value between the property with and without the bridge.—Illinois Cent. R. Co. v. Orleans-Kenner Electric Ry. Co., supra.

33. La.—Illinois Cent. R. Co. v. Orleans-Kenner Electric Ry. Co., supra.

34. Mass.—New York Cent. R. Co. v. Central Vermont R. Co., 196 N.E. 825, 243 Mass. 56.

35. W.Va.—Tri-State Tract. Co. v. Pittsburg, etc., R. Co., 68 S.E. 25, 67 W.Va. 389.

51 C.J. p. 636 note 73.

36. N.J.—Jersey City, etc., R. Co. v. Central R. Co., 22 A. 728, 48 N.J.Eq. 379

51 C.J. p. 637 note 74.

37. Pa.—Pittsburg, etc., R. Co. v. Southwest Pennsylvania R. Co., 77 Pa. 173—Baltimore, etc., R. Co. v. Hanover, etc., R. Co., 13 Pa.Co. 291.

Proper regulations as to crossing

Although an electric railway may have the right to cross the tracks of a steam railroad at grade, the former may be compelled to adopt such regulations as to the structure of its road and the general management of the cars which may be run over it at the point of crossing, as may seem most likely to afford the greatest protection to the public.—Pennsylvania R. Co. v. Suburban Rapid Transit Co., 11 Pa.Co. 591.

38. Conn.—New York, etc., R. Co. v. Bridgeport Tract. Co., 32 A. 953, 65 Conn. 410, 29 L.R.A. 367.

39. Conn.—New York, etc., R. Co. v. Bridgeport Tract. Co., supra.

40. Conn.—New York, etc., R. Co. v. Bridgeport Tract. Co., supra.

Mich.—Jackson, etc., Traction Co. v. Railroad Com'r, 87 N.W. 133, 128 Mich. 164.

41. Pa.—Kushequa R. Co. v. Pitts-

or over another railroad subject to the limitation that the crossing shall not unnecessarily interfere with the road crossed,[42] but under such a statute a grade crossing will be permitted where reasonably necessary,[43] taking into consideration the relative cost of the crossings.[44]

Statutes in some jurisdictions, while not expressly prohibiting grade crossings, provide that they shall not be permitted whenever it is reasonably practicable to construct a crossing of a different character,[45] and public safety so requires.[46] Under such statutes the character of the crossing to be employed depends on the circumstances of each particular case;[47] and if, under the circumstances of the particular case, a different mode of crossing is not possible or reasonably practicable, a grade crossing should be permitted.[48] The rights of the crossing company are secondary and subordinate to those of the company to be crossed,[49] and the burden rests on the crossing company to show that no unnecessary injury will be inflicted on the other by a crossing at grade, and that such a crossing cannot reasonably be avoided.[50]

Such provisions have been held to apply to roads chartered before the passage of the act,[51] and under statutes authorizing them to cross at grade.[52] The fact that the railroad has selected a route crossing another road at a place where no other than a grade crossing is practicable is no reason for allowing a grade crossing when another practicable route avoiding such crossing could have been chosen.[53] In determining which is the crossing company, the company which first surveys and stakes out its line and fixes and adopts its grade is entitled to construct its road on that grade, and the other company, although constructing its road

burg, etc., R. Co., 50 A. 169, 200 Pa. 526
51 C.J. p. 637 note 79.

42. Iowa.—Chicago, etc., R. Co. v. Chicago, etc., R. Co., 58 N.W. 918, 91 Iowa 16.

43. Iowa.—Dubuque, etc., R. Co. v. Ft. Dodge, etc., R. Co., 125 N.W. 672, 146 Iowa 666, 670.
51 C.J. p. 637 note 81

44. Iowa.—Dubuque, etc., R. Co. v. Ft. Dodge, etc., R. Co., supra

45. N.J.—In re West Jersey Traction Co., 45 A. 282, 59 N.J.Eq. 63.
Ohio.—Akron & C. J. Ry. v. Sandusky, N. & M. Elec. Ry., 32 Ohio Cir. Ct. 608, 20 Ohio Cir.Ct.,N.S., 408.
Pa.—Delaware, etc. R. Co. v. Danville, etc., R. Co., 70 A. 578, 221 Pa.St. 149.
51 C.J. p. 637 note 83

Purpose of statutes is to discourage or do away with grade crossings, as far as is reasonable or practical
Ohio.—Akron & C. J. Ry. v. Sandusky, N. & M. Elec. Ry., 32 Ohio Cir. Ct. 608, 20 Ohio Cir.Ct.,N.S., 408.
Pa.—Kushequa R. Co. v. Pittsburgh, S. & N. R. Co., 50 A. 169, 200 Pa. 526.—Williams Valley R. Co. v. Lykens, etc., St. R. Co., 44 A. 46, 192 Pa.St. 552

Statute relating to street railroad
Ind.—Pittsburgh, C., C. & St. L. Ry. Co. v. Indianapolis, C. & S. Traction Co., 81 N.E. 487, 169 Ind. 634

46. N.J.—In re West Jersey Traction Co., 45 A. 282, 59 N.J.Eq. 63.

47. Pa.—Kushequa R. Co. v. Pittsburgh, S. & N. R. Co., 50 A. 169, 200 Pa. 526—Williams Valley R. Co. v. Lykens & Williams Valley St. Ry. Co., 44 A. 46, 192 Pa. 552
51 C.J. p. 637 note 84.

In absence of agreement
Ind.—Pittsburgh, C., C. & St. L. R. Co. v. Indianapolis, C. & S. Traction Co., 81 N.E. 487, 169 Ind. 634.

Determining factors
(1) Among the factors to be considered are the location and surroundings of the proposed crossing, the character of the roads and uses made and intended to be made of them, the increased cost of construction and expense of operation, the public safety and convenience, and the interest and convenience of the road intended to be crossed.—Altoona, etc., R. Co. v. Tyrone, etc., R. Co., 28 A. 997, 160 Pa. 623.—51 C.J. p. 637 note 84 [a] (1).

(2) What is reasonably practicable is determined mainly by what is physically practicable rather than by what is financially practicable to the road seeking to cross.—Delaware, etc., R. Co. v. Danville, etc., St. R. Co., 70 A. 578, 221 Pa.St. 149.—Williams Valley R. Co. v. Lykens, etc., St. R. Co., 44 A. 46, 192 Pa.St. 552.—Chester Traction Co. v. Philadelphia, etc., R. Co., 41 A. 449, 188 Pa.St. 105, 44 L.R.A. 269.

(3) But it has been held that the term "reasonably practicable" does not refer to engineering difficulties alone.—In re Saddle River Traction Co., N.J.Ch., 41 A. 107.

(4) The extent to which the risk may be reduced by care and the cost of an overhead crossing are not to be considered.—Delaware, etc., R. Co. v. Danville, etc., St. R. Co., 70 A. 578, 221 Pa.St. 149.—Pennsylvania R. Co. v. Warren St. R. Co., 41 A. 331, 188 Pa.St. 74.

(5) Nor does the fact that the traffic on one railroad is so great that the crossings of such railroad cross another are not sufficient to enable the former to quickly move its cars across the latter constitute such an "imperious necessity" as will entitle the former company to additional grade crossings on the latter.—Chester Traction Co. v. Philadelphia, etc., R. Co., 41 A. 449, 188 Pa.St. 105, 44 L.R.A. 269.

(6) If overhead crossings can be built, other considerations are immaterial.—Allen St. R. Co. v. Lehigh & New England R. R., 17 Pa.Dist. 810.

48. Del.—New Castle, etc., R. Co. v. Delaware R. Co., 68 A. 386, 8 Del.Ch. 419
51 C.J. p. 637 note 85.

Avoidance of grade crossing held practicable
Pa.—Williams Valley R. Co. v. Lykens, etc., St. R. Co., 44 A. 46, 192 Pa.St. 552.—Chester Traction Co. v. Philadelphia, etc., R. Co., 41 A. 449, 188 Pa.St. 105, 44 L.R.A. 269.—New York Cent., etc., R. Co. v. Warren St. R. Co., 41 A. 333, 188 Pa.St. 85.—Scranton, etc., Traction Co. v. Delaware, etc., Canal Co., 37 A. 122, 180 Pa.St. 636.
51 C.J. p. 637 note 85 [b]

49. Pa.—Kushequa R. Co. v. Pittsburgh, S. & N. R. Co., 50 A. 169, 200 Pa. 526.—Baltimore, etc., R. Co. v. Hanover, etc., R. Co., 13 Pa.Co.Ct. 291.

50. Pa.—Baltimore, etc., R. Co. v. Hanover, etc., R. Co., supra

51. Pa.—Pittsburg, etc., R. Co. v. Southwest Pennsylvania R. Co., 77 Pa. 173.

52. Pa.—Perry County R. Extension Co. v. Newport, etc., R. Co., 24 A. 709, 150 Pa. 193
51 C.J. p. 637 note 87

53. Ohio.—Toledo R., etc., Co. v. Lima, etc., Tract. Co., 86 N.E. 515, 79 Ohio St. 136
Pa.—Perry County R. Extension Co. v. Newport, etc., R. Co., 24 A. 709, 150 Pa. 193.

first, must so construct it as to avoid a grade crossing if practicable to do so.[54]

Where one railroad company crosses another by an overhead bridge, it is not required to maintain telltales to warn trainmen of the latter road of the danger,[55] but where one railroad crosses another by a bridge not originally intended for railroad purposes, the latter company is entitled to demand that it shall be strengthened and made safe for such use.[56]

A statute prohibiting grade crossings when practicable has been held applicable to the crossings of steam railroads by electric and street railroads;[57] and it is held that a statute subsequently enacted, authorizing street railroads to cross steam railroads at grade, is not intended to divest courts of equity of the power conferred by the prior statute to prevent grade crossings when practicable to do so.[58] A general statute prohibiting grade crossings by street railways except on application to, and approval by, the railroad commissioners does not apply to a street railway authorized to cross at grade by a special act passed before the general act took effect.[59]

d. Expense of Crossing

(1) In general
(2) Agreements between companies
(3) Remedies

(1) In general

Ordinarily the crossing company for whose benefit a crossing is made is under a duty to defray the entire cost of constructing the crossing and keeping it in repair.

Where one railroad crosses the track of another, it is ordinarily the duty of the crossing company at whose instance and for whose benefit the crossing is made to defray the entire expense of its construction in the first instance,[60] and subsequently to keep the crossing in repair,[61] and also to defray the expense of installing and maintaining whatever system of signals, safety devices, or precautions may be necessary for the public safety in the use of the crossing,[62] although it is held that seniority alone does not determine how the cost of constructing and maintaining such devices is to be borne,[63] and these rules have been held to apply to crossings by street railways of steam railroads.[64] A senior road does not become a junior road in relation to another road constructed after it by reason of an improvement of the senior road.[65]

54. Pa.—Kushequa R. Co. v Pittsburg, etc, R. Co, 50 A. 169, 200 Pa 526.

55. N.Y.—Neff v New York Cent, etc, R. Co., 30 N.Y.S 323, 80 Hun 394

56. Pa.—Pennsylvania R Co v Greensburg, etc, Electric St R Co, 35 A. 122, 176 Pa 559, 36 L R A 839.

57. Pa.—Pennsylvania R Co. v. Braddock Electric R Co, 25 A 780, 152 Pa St 116—Allen St Ry. Co. v. Lehigh & New England R R., 17 Pa Dist 810
51 C J. p 638 note 92.

58. Pa.—Williams Valley R Co. v Lykens, etc, St R Co, 44 A. 46, 192 Pa. 552.
51 C J. p 638 note 93.

59. Conn.—New York, etc, R Co. v Bridgeport Tract Co, 32 A 953, 65 Conn. 410, 29 L R A 367.

60. Ark.—St. Louis, etc, R Co. v Ft. Smith, etc., R Co, 148 S W 531, 104 Ark. 344.
51 C J. p 638 note 95.

61. Md.—Central Pass. Co. v. Philadelphia, etc., R Co., 52 A. 752, 95 Md. 428
51 C.J. p 638 note 96.

62. N J.—West Jersey, etc, R. Co. v. Atlantic City, etc, Tract. Co., 56 A. 890, 65 N.J.Eq. 613
Wash.—State v. Northern Pac. R. Co., 94 P 907, 49 Wash. 78.

63. N Y.—People v Public Service Commission, 168 N Y S 331, 180 App Div. 773
51 C J p 638 note 98.

Constitutional immunity

Railroad has no constitutional immunity from having to contribute to cost of safeguarding crossing with another railroad merely because former was built before crossing was made.—Nashville, C. & St. L Ry. v Walters, Tenn, 55 S Ct. 486, 294 U. S. 405, 79 L Ed 949.

64. Ind.—Chicago, etc., Terminal R. Co v Whiting, etc., St. R. Co, 38 N.E 604, 139 Ind. 297, 47 Am.S R. 264, 26 L R A 337.
N J.—West Jersey, etc, R Co. v. Atlantic City, etc, Traction Co., 56 A 890, 65 N J Eq. 613.
51 C J. p 638 note 99

Duty to repair is on junior street railroad

Ga.—Macon Ry & Light Co. v. Southern Ry. Co, 110 S.E. 912, 28 Ga.App. 339
Mich.—Pere Marquette Ry. Co v. Michigan Public Utilities Commission, 188 N.W. 515, 218 Mich. 307.

Uncompensated crossing

Where a street railroad constructs its tracks crossing the tracks of an existing railroad company, under its right to do so without compensation, it cannot thereby impose on the railroad company any added burden in maintaining its tracks, so that the street railroad is required to bear the entire expense of repairing the frogs at the crossing, in the absence of any statutory provision to the contrary.—Pere Marquette Ry. Co v Michigan Public Utilities Commission, supra

Change of crossing

A street railroad company, the right of which to cross a railroad has been determined, has the right, if it is not its duty, on the old crossing wearing out, to put in a more modern one, which is an improvement.—Chicago, etc, R Co. v Hamond-Whiting, etc., Electric R. Co, 46 N.E. 999, 151 Ind 577.

65. U.S.—Chicago, etc, R. Co. v Old Colony Trust Co, Iowa, 216 F. 577, 132 C.C A. 581

Scrambling possession

Where defendant's first railroad track was laid years before plaintiff's intersecting street car track and defendant started to lay a second track before plaintiff, but plaintiff procured possession of crossing from fifteen minutes to an hour prior to defendant by proceeding to erect a second track at night, it was held that "scrambling possession" of plaintiff conferred no rights on it, and that it was liable for expenses of installing and maintaining crossing.—Waterloo, C. F. & N. Ry. Co. v. Chicago Great Western R. Co., 173 N.W. 81, 186 Iowa 630.

A railroad is not liable for half the expense of a stationary flagman at a crossing when it derives no benefit therefrom,[66] nor will an order of a commission, requiring that a flagman be sent ahead at crossings, create any joint liability for the maintenance of a stationary flagman at the crossing.[67] Each company, however, owes a duty to the public as a common carrier to see that a grade crossing is kept in good repair, and either may and should make such repairs as are necessary,[68] unless the crossing is above or below grade,[69] and the company making them may recover from the other company if as between the companies it was the duty of the latter to do so,[70] or it may recover the proportion due from the other company where such expense is imposed by statute on the companies jointly.[71] Where, however, the safety of the public intervenes and requires a crossing of a particular character, to the necessity of which each of the roads contributes, the cost of construction should be apportioned,[72] and this is true where the safety of the public requires the installation of safety appliances at a crossing.[73] In some jurisdictions the question of the expense incident to the construction or maintenance of crossings and crossing appliances or its apportionment between the companies is regulated by statute.[74]

When the expense of construction and maintenance is to be apportioned, the amount for which each company may be assessed may be in proportion to the number of trains each operates over the crossing,[75] but it is held that the number of trains operated need not be taken arbitrarily as determinative of the amount to be assessed each road.[76] A city ordinance requiring apportionment of expenses of maintaining common crossings of street railroads in public streets has been held to apply to crossings of one steam railroad by another in a public street.[77]

Municipality operating street railway A municipality operating a street railway does not, in determining its right to require a railroad to construct a crossing over the tracks of the street railway, enjoy the status of a governmental agency.[78] The municipality in such a case is subject to same rules with respect to the cost of constructing and maintaining a crossing over the tracks of another railroad as is a private company,[79] and, where such cost and expense are imposed on a company seeking to cross another railroad, the municipality cannot impose the cost and expense on the railroad company whose tracks are to be crossed, under the guise of its sovereign privilege of regulation.[80]

(2) Agreements between Companies

As a general rule the companies may by valid agreement fix their respective rights and liabilities with respect to the cost of constructing and maintaining the crossing.

As a general rule it is competent for the companies to agree between themselves both as to the payment of the cost of original construction[81] and of subsequent maintenance and repairs,[82] even

66. La.—New Orleans Terminal Co. v. Pontchartrain R. Co., 99 So. 424, 155 La. 517

67. La.—New Orleans Terminal Co. v. Pontchartrain R. Co., supra.

68. Ga.—Macon R., etc., Co. v. Southern R. Co., 110 S.E. 912, 28 Ga.App. 339

Ill.—Chicago, etc., R. Co. v. Joliet, etc., R. Co., 105 Ill. 388, 44 Am.R. 799.

69. Ill.—Chicago, etc., R. Co. v. Springfield, etc., R. Co., 67 Ill. 142.

70. Ga.—Macon R., etc., Co. v. Southern R. Co., 110 S.E. 912, 28 Ga.App. 339.

Md.—Central Pass. R. Co. v. Philadelphia, etc., R. Co., 52 A. 752, 95 Md. 428.

71. Ind.—Pittsburgh, C., C. & St. L. Ry. Co. v. Ft. Wayne & Northern Indiana Traction Co., 138 N.E. 759, 193 Ind. 405

Ohio.—Baltimore, etc., R. Co. v. Walker, 16 N.E. 475, 45 Ohio St. 577

51 C.J. p 639 note 8.

72. Pa.—Pennsylvania R. Co. v. Conshohocken R. Co., 4 Pa.Dist. 12, 15 Pa.Co. 445, 454.

73. Mich.—Detroit, etc., R. Co. v. Railroad Comr., 86 N.W. 842, 127 Mich. 219, 62 L.R.A. 149

74. Wash.—State v. Northern Pac. R. Co., 161 P. 850, 94 Wash. 10.

51 C.J. p 639 note 11.

Statute as to street railway companies

Ohio.—The Northern Ohio Traction & Light Company v. City of Akron, 23 Ohio Cir.Ct.,N.S., 497.

75. Mo.—State v. Public Service Commission, 204 S.W. 531, 275 Mo. 72.

76. Wash.—State v. Northern Pac. R. Co., 176 P. 539, 104 Wash. 405.

77. La.—Louisville, etc., R. Co. v. New Orleans Terminal Co., 45 So. 962, 120 La. 978

51 C.J. p 640 note 14.

78. La.—Vicksburg, S. & P. Ry. Co. v. City of Monroe, 115 So. 136, 164 La. 1033.

79. La.—Vicksburg, S. & P. Ry. Co. v. City of Monroe, supra.

80. La.—Vicksburg, S. & P. Ry. Co. v. City of Monroe, supra.

Municipality must construct crossing at its own expense where it is the junior road.—Vicksburg, S. & P. Ry. Co. v. City of Monroe, supra.

Ordinance held ultra vires

La.—Vicksburg, S. & P. Ry. Co. v. City of Monroe, supra.

81. Ill.—Illinois Commerce Commission ex rel. East St. Louis C. & W. Ry. v. East St. Louis & C. Ry. Co., 198 N.E. 716, 361 Ill. 606.

Mo.—State v. Public Service Commission, 204 S.W. 531, 275 Mo. 72

51 C.J. p 640 note 15.

82. Ind.—New Jersey, etc., R. Co. v. New York Cent. R. Co., 146 N.E. 111, 89 Ind.App. 205

51 C.J. p 640 note 16.

Expense resulting from relocation and extension of tracks

Tex.—International-Great Northern R. Co. v. Texas & N. O. R. Co., Civ. App., 59 S.W.2d 295.

Construction of contracts

(1) Where the purpose of the contract between the railroad company and a crossing street railroad company was to provide for the joint payment of expenses incurred by the two companies in their joint use of the crossing, it did not require the street railroad to pay one half of

though the regulation of such crossings is vested in a commission[83] or a court,[84] and such contracts have been held valid and binding as between the parties,[85] although such agreements have also been held void as against public policy.[86] Such an agreement includes the cost of maintaining an interlocker ordered by a commission.[87] Where it is necessary to apportion any expense incident to the construction and maintenance of a crossing, the court or commissioners should consider and give effect to any existing contracts between the companies relative thereto.[88]

The right to cross has been held a sufficient consideration to support a contract for construction and maintenance of the crossing,[89] but the contrary is held where the crossing road had such right independently of the other's consent,[90] although the contract is not unenforceable if there are present other elements constituting a valid consideration.[91] Thus, consent by the railroad to the crossing, without requiring proceedings to secure the right to cross, is sufficient consideration for a street railway's agreement to construct and maintain the crossing.[92] So a contract imposing an obligation on the crossing railroad or street railway to pay part of the cost of maintaining the crossing, which contains mutual promises and benefits independent of the right to cross, is not without consideration

the wages of a gateman who operated the gates at the crossing, which the railroad was required by city ordinance to install, but who merely lowered and raised the gates on the approach and passing of trains, and gave no signals to the street cars, which were still required to be flagged by their conductors.—Southern Ry. Co v. South Carolina Light, Power & Rys. Co., 112 S E 75, 119 S C 162

(2) A contract between crossing railroads for contribution to expense of maintaining a flagman "whenever ordinances shall require" included ordinance theretofore existing—Illinois Cent. R. Co v Waterloo, C F. & N Ry. Co., 164 N.W 208, 182 Iowa 550, modified on other grounds 165 N W. 993.

(3) A contract between a railroad and a street railroad relating to the apportionment of cost for maintenance and repair of overhead bridge on which street railway maintained a double track railway was held to embrace the subsequent rebuilding of the bridge in accordance with directions of the public service commission, in that "renew," as used in the contract, naturally means to make new again, while "repair" is to mend—Pennsylvania R. Co v Pennsylvania-Ohio Electric Co, 145 A. 686, 296 Pa. 40.

83. Ill.—Illinois Commerce Commission ex rel East St Louis, C & W. Ry v East St. Louis & C. Ry. Co., 198 N E 716, 316 Ill 606
Mass—New York Cent R. Co. v Central Vermont R Co, 136 N E. 825, 243 Mass 56
Pa—Pennsylvania R. Co. v. Pennsylvania-Ohio Electric Co, 145 A. 686, 296 Pa. 40.
51 C J. p 640 note 17.
Powers of commission relating to apportionment, or fixing of liability for, expenses see infra § 136.

Effect of order of commission

Contract of street railway company with railroad company to pay half the expense, if at any time it shall become necessary to maintain watchmen at their crossings, was unaffected by order of public service commission, in proceeding against railroad company, alone, and without knowledge of the contract, simply directing railroad company to provide watchmen; such order of the public service commission that railroad company provide watchmen at grade crossings makes them necessary, within the contract—Director General of Railroads v. West Penn Rys Co., 126 A. 767, 281 Pa 309.

Order annulling contract

Statutes requiring railroads to provide adequate service, statutes relating to highway grade crossings, statutes relative to apportionment of expense of effecting crossing between railroad lines, and statute relative to safety regulations for crossings, held inapplicable on question of jurisdiction of Illinois commerce commission to enter order annulling contract which apportioned between railroads cost of maintaining interlocking plant—Illinois Commerce Commission ex rel East St Louis, C. & W. Ry. v East St Louis & C. Ry. Co., 198 N.E 716, 361 Ill. 606.

84. Ind—Baltimore, etc, R. Co. v Wabash R Co., 67 N E 544, 31 Ind App 201.

85. U S—Chicago, etc, R. Co. v Old Colony Trust Co, Iowa, 216 F. 577, 132 C C A 581.
51 C J. p 640 note 19.

Repairs under common duty to public

Where one of the companies makes necessary repairs to a grade crossing under its common duty to the public to keep the crossing in good repair, it may recover the cost thereof from the other company which, under the contract between the two, is obligated to make such repairs.
Ill—Chicago, etc., R. Co. v. Joliet, etc., R Co., 105 Ill. 388, 44 Am.R 799.
Ky—Louisville & N. R. Co v. Central Kentucky Traction Co, 144 S W 739, 147 Ky. 513, Ann Cas. 1915A 857
51 C J p 639 note 7.

86. Ind—Vandalia R. Co v. Ft. Wayne, etc, Tract. Co, 118 N E 839, 68 Ind App. 120.

As to expense of repair

Ind.—Terre Haute, I. & W. Traction Co v Ross, 138 N E. 90, 84 Ind App 697, rehearing denied 139 N.E 295, 84 Ind App. 697

87. N Y—People v. Public Service Commission, 168 N Y S. 331, 180 App Div 773

88. Ind.—Grand Trunk Western R. Co v. Hunt, 81 N E 524, 40 Ind App. 168

89. Ohio—Harmon v. Toledo, etc, Tract. Co, 21 Ohio N.P,N S., 76.

Contract to share expense

The granting by a railroad to a street railroad company of permission to cross the right of way of the former is sufficient consideration for a contract whereby the street railroad company agreed to pay one half the expense of maintaining a flagman or lights at the crossing, if they were required by city ordinance, even though the railroad did not own the fee of the right of way.—Southern Ry. Co. v. South Carolina Light, Power & Rys Co., 112 S E. 75, 119 S.C 162.

90. Ind.—Terre Haute, I. & W Traction Co. v. Ross, 138 N.E. 90, 84 Ind.App 697, rehearing denied 139 N.E. 295, 84 Ind App. 697—Union Traction Co. of Indiana v. Ross, 125 N E. 72, 71 Ind App. 473.
51 C J. p 640 note 23.

91. U.S—Northern Ohio Traction & Light Co. v. Erie R Co., C.C.A Ohio, 8 F.2d 962, certiorari denied 46 S Ct. 350, 270 U.S. 650, 70 L Ed 780.

92. W.Va.—Steubenville, etc, Tract Co v. Pittsburgh, etc, R. Co, 142 S E 257, 105 W.Va 276.

merely because the right to cross exists apart from the contract.[93] The implied obligation in a contract between a street railway company and a railroad company for the latter's maintenance of gates at the crossing has been held to constitute sufficient consideration for the contract placing the larger part of maintaining the crossing on the street railway company, notwithstanding a statute requires the expense to be borne jointly.[94] The adjustment of controverted questions between a railroad and a street railroad relative to the right of the latter to use an overhead bridge for tracks, together with the settlement of pending litigation involving such right, afforded ample consideration for a contract apportioning the cost of maintenance of the bridge between the railroad and the street railroad.[95] In a suit between crossing railroads on a contract provision relating to contribution towards a particular expense of maintaining the crossing, other covenants may furnish the consideration to sustain the one on which the action is based.[96]

Agreements to maintain the crossing at the expense of one railroad are binding on the lessee of that road,[97] and a covenant in the lease which binds a lessee to perform all contracts of the lessor runs with the land so as to bind an assignee of the lease.[98]

(3) Remedies

Contracts relating to the cost of repairing the crossing may be enforced in the courts.

The question of the enforcement of a contract between a railroad company and a street railway company as to the expense of repairing a crossing has been held to be for the courts.[99] When the assignee of a lease is bound to repair a crossing in accordance with the lessor's agreement, the assignee may be sued by the other road to recover expenses incurred by it in making repairs which the assignee was bound to make,[1] without first obtaining an apportionment of the expenses by the railroad commission.[2]

General rules govern the pleadings in actions to enforce agreements with respect to the expense of constructing and maintaining a crossing.[3] A petition alleging a judgment requiring a railroad to maintain a crossing and its failure to do so states a cause of action.[4] Findings in such an action must be supported by the evidence.[5]

e. Injunction

Equity may enjoin a railroad company from crossing the tracks of another railroad company in an arbitrary or oppressive manner unnecessarily prejudicial to the rights of the latter.

A court of equity may enjoin one railroad company from exercising its right of crossing in an arbitrary and oppressive manner unnecessarily prejudicial to the rights of the other company,[6] and may enjoin the construction of a crossing at grade, where the statute provides that such crossings shall be prevented wherever it is practicable to do so,[7] or provides that the crossing shall be so constructed as not unnecessarily to impede the travel and transportation on the road crossed, and a grade crossing would, under the circumstances, constitute

93. U.S.—Northern Ohio Traction & Light Co. v. Erie R. Co., C.C.A. Ohio, 8 F.2d 962, certiorari denied 46 S.Ct. 350, 270 U.S. 650, 70 L.Ed. 780.
Ky.—Owensboro City R. Co. v. Louisville, H. & St. L. Ry. Co., 178 S.W. 1043, 165 Ky. 683.
Mutual protection
When the rights of intersecting roads are equal, and the law and the terms of their franchises leave unsettled the details as to the manner in which the crossing is to be effected, maintained, and guarded, the mutual protection of the roads from the perils of the crossing alone furnishes a sufficient consideration for any contract they may make, and courts will not inquire into the manner in which the burden imposed by the contract is adjusted between the parties; hence, a contract, whereby a railroad whose tracks crossed a city street agreed to permit a street railroad to cross its tracks, the latter agreeing to construct and maintain the crossing at its own expense, and in a manner satisfactory to the railroad, was supported by a valid consideration, although the street railroad had under its franchise a right to use the street.—Evansville & S. I. Traction Co. v. Evansville Belt Ry. Co., 87 N.E. 21, 44 Ind.App. 155.

94. U.S.—Erie R. Co. v. Cleveland Ry. Co., C.C.A. Ohio, 15 F.2d 374.

95. Pa.—Pennsylvania R. Co. v. Pennsylvania-Ohio Electric Co., 145 A. 686, 296 Pa. 40.

96. Iowa.—Illinois Cent. R. Co. v. Waterloo, C. F. & N. Ry. Co., 164 N.W. 208, 182 Iowa 550, modified on other grounds 165 N.W. 993.

97. Mass.—New York Cent. R. Co. v. Central Vermont R. Co., 136 N.E. 825, 243 Mass. 56.
Pa.—Lehigh Valley R. Co. v. Schuylkill R. Co., 11 Pa.Dist. & Co. 15.

98. Mass.—New York Cent. R. Co. v. Central Vermont R. Co., 136 N.E. 825, 243 Mass. 56.

99. Pa.—Schuylkill Ry. Co. v. Public Service Commission, 85 Pa.Super.Ct. 259.

1. Mass.—New York Cent. R. Co. v. Central Vermont R. Co., 136 N.E. 825, 243 Mass. 56.

2. Mass.—New York Cent. R. Co. v. Central Vermont R. Co., supra.

3. Ind.—Pittsburgh, C., C. & St. L. Ry. Co. v. Ft. Wayne & Northern Indiana Traction Co., 138 N.E. 759, 193 Ind. 405.

4. Ohio.—Toledo, etc., R. Co. v. Toledo, etc., R. Co., 153 N.E. 295, 21 Ohio App. 231, affirmed 150 N.E. 621, 114 Ohio St. 98.

5. Mass.—New York Cent. R. Co. v. Central Vermont R. Co., 136 N.E. 825, 243 Mass. 56.
51 C.J. p. 640 note 32.

6. N.J.—West Jersey, etc., R. Co. v. Atlantic City, etc., Tract. Co., 56 A. 890, 65 N.J.Eq. 613.
51 C.J. p. 641 note 33.

7. Pa.—Williams Valley R. Co. v. Lykens, etc., R. Co., 44 A. 46, 192 Pa. 552.
51 C.J. p. 641 note 34.
Enjoining crossing generally see supra § 133 d.

an unnecessary interference therewith,[8] but, in the absence of statutory provisions as to the method of crossing, a court of equity cannot enjoin a grade crossing[9] except where, under the circumstances of the case, a grade crossing is not necessary and would materially interfere with the operation of the road crossed.[10] A bill by one railroad company to enjoin another from crossing its track on a highway at grade will be dismissed on the requisite authority for such a crossing being obtained from the county commissioners after the filing of the bill,[11] and the court will not require a trestle, constructed and used by the crossing company as a temporary substitute for a bridge, to be removed from property of the other company, which is not in actual use.[12]

Where, by statute, a court of equity must ascertain the mode of crossing to be used, an injunction will be granted restraining a crossing until after the decree determining the mode.[13] Where a railroad has been granted a crossing over another road, it cannot enjoin its grantor from subsequently altering its own road.[14] A railroad will not be enjoined from constructing a crossing in a manner authorized by a valid conclusive order of a railroad commission,[15] but where the order merely authorizes a crossing, a court of equity will enjoin the construction of a dangerous crossing.[16] Where the petition seeks only an injunction, the court cannot prescribe a crossing of a particular character.[17]

Street railroad. In the absence of constitutional or statutory provisions as to the method of crossing, equity will not enjoin a street railroad operating on a street or highway from crossing at grade the tracks of a steam railroad crossing such street or highway,[18] on the mere ground that the operation of the trains of the steam railroad company will be inconvenienced and the dangers of the street crossing increased,[19] unless it appears that the crossing company is insolvent,[20] or that the injury is irreparable,[21] or the proposed crossing will amount to a public nuisance.[22] Also, the mere fact that the street railroad company proceeds ultra vires or usurps a franchise does not give the steam railroad company any standing to ask for such an injunction unless it suffers some special damage differing in kind from that suffered by the rest of the community.[23]

8. Iowa—Chicago, etc, R. Co v Chicago, etc., R. Co, 58 N.W 918, 91 Iowa 16—Humeston, etc, R Co v Chicago, etc, R Co, 38 N.W. 413, 74 Iowa 554.

9. U S—Union R Co v Illinois Cent R. Co, Tenn, 207 F 745, 125 C C A 283, certiorari denied 34 S Ct 323, 231 U.S 754, 58 L Ed. 467
Ky—Elizabethtown, etc, R Co v Ashland, etc, St. R Co., 26 S W 181, 96 Ky 347, 16 Ky.L 42.

10. U S—Union R. Co. v. Illinois Cent R Co., Tenn, 207 F. 745, 125 C.C A 283, certiorari denied 34 S Ct 323, 231 U S 754, 58 L Ed 467—Chicago, etc., R Co. v. Chicago, etc., R. Co, C.C Ill., 5 F Cas No 2,665, 6 Biss. 219

11. Mass.—Lynn, etc, R Co. v Boston, etc, R. Co, 114 Mass 88.

12. Pa—Appeal of Philadelphia R. Co, 2 Walk 243.

13. Pa—Philadelphia, etc., R. Co. v. Pennsylvania Schuylkill Valley R Co, 7 Pa.Co. 491.

14. N.Y—Buffalo Creek R Co v New York Cent. R. Co, 160 N Y S 546, 96 Misc 462
Pa—Lehigh, etc., R. Co v Delaware, etc., R Co, 87 A. 709, 240 Pa. 401.

15. Ky—Chicago, etc., R. Co. v. Louisville, etc, R Co, 58 S W 799, 22 Ky L 658.

16. Va.—Southern R. Co v Washington, etc, R. Co., 46 S E. 784, 102 Va. 483.
51 C J p 641 note 44.

17. Tex—Galveston, etc, R. Co. v. Galveston Electric Co, 123 S.W 1140, 58 Tex Civ App. 427.

18. U S—Pennsylvania Co v. Lake Erie, etc., R Co, C C Ohio, 146 F 446
Del.—Philadelphia, etc., R. Co. v. Wilmington City R. Co., 38 A. 1067, 8 Del Ch 134.
Ga—Southern R Co v. Atlanta R, etc, Co, 36 S.E. 873, 111 Ga. 679, 51 L R A 125.
Ind—South East, etc, R. Co. v. Evansville, etc, Electric R. Co, 82 N E 765, 169 Ind. 339, 13 L R A,N S, 916, 14 Ann Cas. 214—Evansville, etc., Traction Co. v. Evansville Belt R. Co., 87 N E 21, 44 Ind App 155—Michigan Cent. R Co. v. Hammond, etc., Electric R. Co., 83 N E 650, 42 Ind App 66.
Ohio—Cleveland, etc, R Co. v Urbana, etc, R. Co, 26 Ohio Cir Ct 180

Where railroad company has located but not constructed a branch across a public road, it may sue to enjoin a street railway company from constructing its road across such branch at grade until the rights of the parties at the crossing are adjusted—Ohio River Junction R. Co. v. Freedom, etc, R. Co., 53 A. 773, 204 Pa 127.

19. U S.—East St. Louis R Co v. Louisville, etc., R. Co., Ill., 149 F. 159, 79 C C.A 107.
Conn—New York, N H. & H R Co. v. Bridgeport Traction Co., 32 A. 953, 65 Conn 410, 29 L.R A 367.
Ky—Louisville, etc., R. Co. v. Bowling Green R Co., 63 S W. 4, 110 Ky. 788, 23 Ky L Rep 273.
Ohio—Cleveland, etc, R Co. v. Urbana, etc., R. Co., 26 Ohio Cir Ct. 180.

Preliminary injunction

Where, in a suit by a steam railroad to restrain a street railway company from laying its tracks at grade over the tracks of the steam railroad, it appeared that the street was so closely built up that no view of coming trains could be had until the crossing was reached, that fourteen trains passed across the street daily, that because of a neighboring switch a large amount of shifting across the street was required, and that many vehicles and pedestrians passed hourly, a preliminary injunction to maintain the status quo was held proper—Delaware, etc., R. Co v. Danville, etc., R. Co., 61 A. 80, 211 Pa.St. 591.

20. Ala.—Highland Ave, etc, R. Co. v. Birmingham Union R. Co., 9 So 568, 93 Ala. 505.

21. Ala—Highland Ave., etc, R. Co v. Birmingham Union R. Co, supra.

22. Ala—Highland Ave, etc, R Co. v. Birmingham R, etc., Co, 21 So. 342, 113 Ala 239.

23. Del.—Philadelphia, etc., R. Co. v. Wilmington City R. Co., 38 A. 1067, 8 Del Ch 134.
N J.—Consolidated Traction Co. v. South Orange, etc, Traction Co, 40 A 15, 56 N.J Eq. 569—West Jersey R Co. v. Camden, etc, R. Co., 29 A. 423, 52 N.J Eq 31—Mor-

Where the street railroad company is proceeding in a lawful and proper manner, the court will enjoin the railroad company whose tracks are to be crossed from interfering with the work of construction[24] or from interfering with the crossing or its use after it is constructed.[25] Where, by statute, the place and manner of crossing is to be determined by the court, the court in an action by a railroad to enjoin a street railway from crossing its tracks will not restrain the company whose tracks are to be crossed from interfering with the street railroad company in laying its tracks,[26] except to maintain or restore the status quo[27]

§ 135. Determination as to Necessity, Place, Mode, and Expense of Crossing

The legislature may regulate, or provide for the regulation of, the crossing of one railroad by another.

Under the general powers of control and regulation of railroads, as discussed supra §§ 27–30, the legislature may regulate the crossing of one railroad by another,[28] and such regulation is a valid exercise of the police power.[29] Where the railroad has a right to cross by virtue of a constitutional provision, as discussed supra § 133, the legislature cannot destroy such right,[30] but a statute requiring consent of a commission to a grade crossing does not deprive the railroad of its constitutional right.[31] The necessity for the crossing of one railroad by another is, in some cases, decided by the legislature itself.[32] Where a special procedure relative to crossings is provided by statute, it must be followed,[33] and the general provisions as to acquiring property for railroad purposes or determining the rights of other property owners are not applicable.[34]

In some jurisdictions the statutes conferring the right to cross provide that if the companies are unable to agree as to the compensation, place, and manner of crossing, these questions shall be determined by commissioners appointed by the court, as discussed infra § 136 b. Under other statutes these questions are to be determined by railroad commissioners, as considered infra § 136 a, and under others the place and manner of crossing are to be determined by courts of equity or other designated courts, as discussed infra § 137.

§ 136. —— Powers and Proceedings of Commissioners

a. In general
b. Commissioners appointed by courts

a. In General

The regulation and determination of the place and manner of crossings by one railroad over the tracks of another are, under many statutes, in a board of commissioners.

As discussed supra § 29, in many jurisdictions the regulation and control of railroads are vested in a commission or board of commissioners, and the statutes creating such a board give to the commission the right to regulate and determine all questions relating to the place and manner of crossings.[35] Such statutes have been held to give the commission power to order the raising of the grade

ris, etc., R. Co. v. Newark Pass. R. Co., 29 A. 184, 51 N.J.Eq. 379, affirmed 31 A. 383, 52 N.J.Eq. 340.

Who may complain

Remedies to restrain, abate, or punish a public nuisance are to be invoked by the public officials who are charged with the duty in that respect and not by a mere volunteer, who is without special cause of complaint.—West Jersey R. Co. v. Camden, etc., R. Co., 29 A. 423, 52 N.J.Eq. 31.

Injury to property of railroad was held sufficient basis for injunction against street railroad attempting to build its tracks across those of the railroad at grade without authority—Chicago, etc., R. Co. v. General Electric R. Co., 79 Ill.App. 569.

24. Ind.—Chicago, etc., R. Co. v. Whiting, etc., St. R. Co., 38 N.E. 604, 139 Ind. 297, 47 Am.S.R. 264, 26 L.R.A. 337.

25. Pa.—Du Bois Traction Pass. R. Co. v. Buffalo, etc., R. Co., 24 A. 179, 149 Pa. St. 1.

26. N.M.—Atchison, T. & S. F. Ry. Co. v. Citizens' Traction & Power Co., 113 P. 813, 16 N.M. 163

27. N.M.—Atchison, T. & S. F. Ry. Co. v. Citizens' Traction & Power Co., supra.

Mandatory injunction

N.M.—Atchison, T. & S. F. Ry. Co. v. Citizens' Traction & Power Co., supra.

28. Pa.—Pittsburg, etc., R. Co. v. Southwest Pennsylvania R. Co., 77 Pa. 173.

Wash.—State v. Kuykendall, 222 P. 211, 128 Wash. 88.

29. U.S.—Northern Pac. R. Co. v. Puget Sound, etc., R. Co., Wash., 39 S.Ct. 474, 250 U.S. 332, 63 L.Ed. 1013.

30. Wash.—State v. Kuykendall, 222 P. 211, 128 Wash. 88.

31. S.C.—Atlantic Coast Line R. Co. v. State R. Commission, 72 S.E. 18, 89 S.C. 472.

32. Wis.—In re Eastern Wisconsin R., etc., Co., 107 N.W. 496, 127 Wis. 641.

33. N.Y.—In re New York, etc., R. Co., 18 N.E. 120, 110 N.Y. 374. 51 C.J. p. 642 note 58.

Public is not affected where there is separation of crossing between two lines of railroad—State ex rel. and to Use of St. Paul & K. C. Short Line R. Co. v. Public Service Commission of Missouri, 92 S.W.2d 126, 338 Mo. 724.

34. Vt.—Central Vermont R. Co. v. Woodstock R. Co., 50 Vt. 452

35. Ill.—Chicago, P. & St. L. Ry. Co. v. Jacksonville Ry. & Light Co., 91 N.E. 1024, 245 Ill. 155

Mich.—Pere Marquette Ry. Co. v. Michigan Public Utilities Commission, 188 N.W. 515, 218 Mich. 307.

N.H.—City of Laconia v. Boston & M. R. R., 128 A. 350, 81 N.H. 408.

N.Y.—Lake Shore, etc., R. Co. v. Chautauqua Traction Co., 104 N.Y.S. 550, 54 Misc. 275.

51 C.J. p. 642 note 61, p. 641 note 56.

As to fixing liability for, or apportioning, expense

(1) Powers of commission under particular statutes generally.

of the senior road to enable the junior road to cross at grade,[36] or to require the installation of interlocking devices at grade crossings;[37] and it has been held that a municipal grant of the right to lay track in a street is subject to the right of the commission to regulate a crossing of another track previously laid.[38]

It has been held that the commission has no jurisdiction to determine the rights of the parties in an attempt by one road to take part of another's right of way where there is no intersection or union of the respective tracks;[39] nor has it jurisdiction to enforce contracts for the repair and maintenance of a crossing.[40] When no restrictions are placed on the commission as to the time and conditions on which it will approve a crossing, it may withhold its consent altogether[41] or grant it on such terms as it sees fit,[42] and where consent is secured on condition, the railroad has no absolute right to cross[43] without compliance with the orders of the commission.[44]

The order of a commission is sufficient authority for a railroad to enter on the right of way of another road for the purpose of constructing an interlocking system at the crossing.[45] The railroad commission cannot require the installation of a certain type of safety device where the railroads have agreed to another type equally safe.[46] Where the commission has made its final determination as to the necessity, place, mode, and compensation for the crossing, its authority is at an end,[47] and it cannot modify or change its decision.[48]

Street and electric railroads. As considered supra § 29, in some jurisdictions statutes giving supervision of railroads to the railroad commission have been held not to extend to electric roads, and in such case the commission has no jurisdiction to entertain an application for a crossing between a

Mich—Michigan Air Line Ry v Michigan Public Utilities Commission, 188 N.W 520, 218 Mich 320—Pere Marquette Ry. Co v Michigan Public Utilities Commission, 188 N W. 515, 218 Mich. 307.

N H—City of Laconia v. Boston & M R. R, 128 A. 350, 81 N H 408

51 C.J. p 642 note 61 [c] (1), (2), [d], [f], [h] (4), [i] (2), (4), p 639 note 11 [a], [c], [e] (2)

(2) Illinois commerce commission was held without jurisdiction to enter order annulling contract which apportioned between railroads cost of maintaining interlocking plant at crossing of lines, although contract injuriously affected net income of one of railroads.—Illinois Commerce Commission ex rel. East St Louis C & W Ry. v. East St. Louis & C. Ry Co, 198 N.E. 716, 361 Ill. 606.

(3) The public service commission, in allocating cost of installing and operating an interlocking switch and signal mechanism at place where tracks of two railroads crossed, was not bound to adopt allocation agreed to by railroads a number of years before relative to an entirely different system, which was to cost about seven times as much, even though contract had been approved by commission, where approval was conditioned on immediate construction of system and nothing was done for many years.—Pennsylvania R. Co. v. Pennsylvania Public Utility Commission, 193 A. 127, 127 Pa Super. 544.

Approval of interstate commerce commission

(1) State railway commission could fix place and manner of crossing of railroad spur tracks, notwithstanding applicant's failure to secure certificate from interstate commerce commission for building proposed track—St Louis Southwestern Ry Co v. Missouri Pac R Co, Ark, 53 S Ct 516, 289 U S. 76, 77 L.Ed 1042

(2) Statutory injunction, to restrain construction of spur track or extension over another railroad without obtaining certificate from interstate commerce commission, affords competing carrier affirmative and complete remedy.—St Louis Southwestern Ry. Co. v. Missouri Pac. R Co, supra.

(3) Decree enjoining proceedings for grade crossing over another company's tracks before state commission until certificate of convenience from interstate commerce commission was obtained was held proper.—Missouri Pac R. Co. v. Chicago, R. I. & P. Ry. Co, C C A Ark, 41 F.2d 188, certiorari denied 51 S.Ct 74, 282 U S 866, 75 L.Ed. 765.

Matters considered by commission

On petition of one railroad for permission to cross the main line tracks of a second railroad with a spur track, where territory sought to be reached by first railroad was undeveloped, public service commission was not required to concern itself with questions of public convenience and necessity, and the dangers that inhere from the crossing by spur line of one railroad of main line tracks of second railroad at grade do not require public service commission, in exercise of its discretion, to deny authorization of such crossing if management of petitioning railroad feels that something is to be gained by such construction and crossing and if commission determines that by methods proposed crossing will be reasonably safe—Detroit & T. S L. R. Co. v. Michigan Public Service Commission, 36 N W. 2d 896, 324 Mich 195.

36. Ill.—Alton, etc, R. Co v. Vandalia R Co, 108 N E 800, 208 Ill. 68.

37. Mo.—State v Missouri Pac. R. Co, 218 S W 310, 280 Mo. 456.

51 C.J. p 643 note 63.

38. Ill—Chicago, etc, Tract. Co. v. Illinois Cent. R. Co, 92 N.E 583, 246 Ill. 146.

39. Kan—Atchison, etc, R Co v. Kansas City, etc., R. Co, 70 P. 939, 73 P. 899, 67 Kan 569

40. Pa—Schuylkill R Co. v State Public Service Commission, 85 Pa Super. 259.

41. S.C—Atlantic Coast Line R. Co. v. State R. Commission, 72 S E. 18, 89 S C. 472.

42. S C—Atlantic Coast Line R. Co. v. State R. Commission, supra

51 C J. p 643 note 68.

43. S.C—Atlantic Coast Line R. Co. v. State R Commission, supra—Atlantic Coast Line R. Co. v Seaboard Air Line R Co, 71 S E. 84, 88 S.C. 464.

44. S.C—Atlantic Coast Line R Co. v. Seaboard Air Line R Co, 71 S. E. 34, 88 S C. 464

45. Mo.—State v. Missouri Pac. R. Co., 218 S W. 310, 280 Mo 456.

46. N.C—State Corp. Commission v. Seaboard Air Line R. Co., 92 S. E 150, 173 N C. 413.

47. Kan.—Union Terminal R. Co. v. Railroad Comrs., 38 P 290, 54 Kan. 352.

48. Me.—Boston, etc., R. Co v. Saco Valley Electric R. Co, 86 A. 202, 98 Me. 78.

51 C.J. p 643 note 73.

steam and an electric railroad,[49] and an order approving or defining the mode and character of the crossing is not a condition precedent to the right to cross.[50] However, some statutes expressly extend jurisdiction of the commission to street or electric railroads in so far as a crossing over another railroad is concerned.[51] A constitutional provision prohibiting the passage of any law granting the right to construct and operate a street railroad within any municipality without consent of the municipality has been held not to preclude passage of a statute giving to a railroad commission jurisdiction to determine the manner in which one railroad shall cross another in so far as it relates to crossings within the streets of municipalities.[52]

b. Commissioners Appointed by Courts

Under some statutes where the companies involved fail to agree on the place and manner of crossing the questions are determined by commissioners appointed by the court.

In some jurisdictions statutes conferring the right to cross provide that if the companies are unable to agree as to the compensation, place, and manner of crossing the court will appoint commissioners to determine these questions,[53] and under some of these statutes it is held that an attempt and failure to agree are a necessary condition precedent to the right to invoke the legal proceeding provided for.[54] Such statutes have been held applicable to crossings of street and steam railways.[55] Under such statutes the court will not on an application for the appointment of commissioners, pass on any questions with respect to the crossing which it is the province of the commissioners to determine.[56]

These statutes are held to confer on the commissioners the power to determine all matters with respect to the crossing which would ordinarily be provided for by a contract or agreement between the companies if they had been able to agree,[57] and not only to determine such matters as relate to the interests of the companies, but also those relating to the safety of the public.[58] The commissioners may provide as to the materials to be used,[59] and the right to determine the manner of crossing does not relate merely to the mechanical means and appliances to be used, but includes the manner of using the crossing and precautions against accidents.[60] The commissioners should go on and view the premises where the crossing is located, but this fact need not be stated in their report.[61]

§ 137. —— Jurisdiction and Power of Courts

Jurisdiction to determine the place and manner of crossing is by some statutes conferred on the courts.

Statutory provisions in many jurisdictions authorize certain courts to regulate the place and manner of crossing.[62] Such a statute is an exer-

49. Kan.—Kansas City R. Co. v. Railroad Comrs., 84 P. 755, 73 Kan 168.

50. Ky.—Louisville, etc., R. Co. v. Bowling Green R. Co., 63 S.W. 4, 110 Ky. 788, 23 Ky L. 273.
Tex.—Galveston, etc., R. Co. v. Galveston Electric Co., 123 S.W. 1140, 58 Tex.Civ.App. 427.

51. Kan.—State v. Parsons St. Ry. Co. & Electrical Co., 105 P. 704, 81 Kan. 430, 28 L.R.A.,N.S., 1082.
Wis.—Wisconsin Public Service Co. v. Railroad Commission, 201 N.W. 977, 185 Wis. 536, 40 A.L.R. 706.

Extent of power

(1) Under a statute empowering the railroad commissioners to determine whether there is a necessity for the crossing of a railroad by a street railway "and, if so, the plan thereof, whether it shall be over or under the existing railroad, or at grade, and in other respects the manner of such crossing," the board can authorize a street railway to construct a subway in a street under the tracks of a railroad, in accordance with whatever regulations it may see fit to impose, so that they have relation to the safe operation of both roads and are not unreasonable.—State v. Parsons St. Ry. Co. & Electrical Co., 105 P. 704, 81 Kan. 430, 28 L.R.A.,N.S., 1082.

(2) Under a statute giving the commissioner of railroads power to make all reasonable rules and regulations for the operation of street railroads, the railroad commissioner has power to compel a street railroad company to elevate its tracks over those of a steam railroad.—Jackson, etc., Traction Co. v. Railroad Com'r, 87 N.W. 133, 128 Mich. 164.

Apportionment of cost of viaduct

Fifty per cent of cost of widening and strengthening viaduct over railroad tracks for street car company was held properly apportioned by the commission to street car company, and balance to railroads; city not being chargeable therewith.—State ex rel. and to Use of Kansas City Southern Ry. Co. v. Public Service Commission, 30 S.W.2d 112, 325 Mo. 862.

52. Ill.—Chicago & S. Traction Co. v. Illinois Cent. R. Co., 92 N.E. 583, 246 Ill. 146.

53. N.Y.—Jennings v. Delaware, etc., R. Co., 83 N.E. 1126, 190 N.Y. 544.
51 C.J. p. 644 note 77.

54. Ind.—Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co., 19 N.E. 440, 116 Ind. 578.
51 C.J. p. 641 note 54.

55. N.Y.—Stillwater, etc., R. Co. v. Boston, etc., R. Co., 64 N.E. 511, 171 N.Y. 589, 59 L.R.A. 489.—Matter of Saratoga Electric R. Co., 12 N.Y.S. 318, 58 Hun 287
51 C.J. p. 641 note 55.

56. N.Y.—Buffalo, etc., R. Co. v. New York, etc. R. Co., 25 N.Y.S. 265, 72 Hun 583
51 C.J. p. 644 note 78.

57. Mo.—Chicago, etc., R. Co. v. Kansas City, etc., R. Co., 19 S.W. 826, 110 Mo. 510
N.Y.—In re Lockport, etc., R. Co., 19 Hun 38

58. N.Y.—In re Lockport, etc., R. Co., supra.

59. Mo.—Chicago, etc., R. Co. v. Kansas City, etc., R. Co., 19 S.W. 826, 110 Mo. 510.

60. N.Y.—In re Lockport, etc., R. Co., 19 Hun 38
51 C.J. p. 644 note 82.

61. Mo.—St. Louis Transfer R. Co. v. St. Louis, etc., R. Co., 13 S.W. 710, 100 Mo. 419

62. N.M.—Atchison, T. & S. F. Ry. Co. v. Citizens' Traction & Power Co., 182 P. 871, 25 N.M. 345.—Atchison, T. & S. F. Ry. Co. v. Citizens' Traction & Power Co., 113 P. 810, 16 N.M. 154.
51 C.J. p. 644 note 84.

cise of the police power of the state,[63] and incorporation prior to the passage of such a statute has been held not to affect its applicability.[64] A statute giving to the court the power to determine the mode and apportionment of costs of a crossing applies to all crossings whether at, above, or below grade,[65] and its judgment thereon cannot be affected by a subsequent ordinance.[66] In some jurisdictions it has been held that the court may, in the exercise of the powers conferred on it, change the location of the crossing,[67] while in others the contrary has been held.[68]

Under some statutes it has been held that the court may prescribe the safety precautions to be taken by the railroad seeking to cross[69] or make a decree requiring the existing railroad to do certain acts.[70] Where the legislature has not prescribed the mode of crossing, courts of equity have jurisdiction to regulate the manner of crossing so as to protect the rights of the parties and prevent the infliction of unnecessary injury on the road crossed,[71] but it has been held that, unless the circumstances require it, the court cannot require other than a grade crossing.[72] A court of equity also has jurisdiction specifically to enforce a contract between the companies as to how a crossing shall be used,[73] and where two railroad companies have a community of interest in the land on which they cross each other and disagree as to their respective rights, a court of equity will control and direct its use.[74]

A court of equity having jurisdiction to prevent grade crossings may, on ordering a crossing of a different character, authorize the temporary use of a grade crossing for construction purposes,[75] but the time it may be used should be limited by the court.[76] A statute giving a court of equity power to determine the place and manner of crossing does not authorize it to condemn the property of the road crossed and fix the compensation, but the right to cross, unless the parties can agree, must be secured by proper proceedings at law.[77] Where the determination is by a court of equity, the proper proceeding is by bill or petition in equity.[78]

Change of crossing after construction is, in some jurisdictions, regulated by statute.[79]

Street railroad crossings. Various statutes giving the court the power to regulate crossings have been held applicable[80] and inapplicable[81] to street

Change of venue in controversies over the point of crossing of one steam railroad by another is not authorized—Vandalia R. Co. v. La Fayette & L Traction Co, 94 N.E 483, 175 Ind 391.

Laches

Where, by a supplemental complaint, railroad seeking to have the court determine the method of crossing its tracks by a street railroad showed that since the reversal of a former judgment for the street railroad and the filing of the supplemental complaint it had sought to settle its dispute, the complaint was not demurrable for laches, although five years had elapsed between the reversal of the former judgment and filing of the supplemental complaint —Atchison, T. & S. F. Ry. Co v Citizens' Traction & Power Co, 182 P 871, 25 N M. 345.

63. Pa.—Delaware, etc, Canal Co. v. Scranton, etc, Tract. Co, 4 Pa Dist 287, 7 Kulp 509.

64. Pa.—Pittsburg, etc., R. Co v. Southwest Pennsylvania R. Co, 77 Pa. 173.

65. Ohio—Lima, etc, Tract. Co. v. Toledo R, etc, Co, 11 Ohio Cir Ct,N S, 17, 30 Ohio Cir Ct 355.

66. Ohio—Toledo, etc., R Co. v Toledo, etc., R Co, 153 N.E. 295, 21 Ohio App. 231.

67. Minn—State v. Hennepin County Dist. Ct, 29 N.W. 60, 35 Minn 461.

68. N.J.—In re Atlantic Highlands, etc., Electric R. Co, Ch, 35 A 387

69. Minn—Winona, etc, R. Co v. Chicago, etc., R. Co., 52 N W. 657, 50 Minn 300.

70. Pa.—Pennsylvania R Co. v. Conshohocken R. Co., 4 Pa Dist 12, 15 Pa Co. 445, 454.

71. Iowa.—Illinois Cent. R. Co v. Waterloo, etc, R Co, 164 N.W 208, 165 N W. 993, 182 Iowa 550. 51 C J. p 645 note 93.

72. U S—Union R. Co. v Illinois Cent. R. Co, Tenn, 207 F 745, 125 C C.A. 283, certiorari denied 34 S Ct. 323, 231 U S 754, 58 L Ed. 467

73. Pa.—Appeal of Cornwall, etc, R Co., 17 A. 427, 125 Pa. 232, 11 Am S.R 839.

74. N J.—West Jersey, etc., R. Co v. Atlantic City, etc, R. Co., 56 A 890, 65 N J Eq 613—National Docks, etc, R. Co. v. Pennsylvania R. Co., Ch, 30 A. 1102, reversed on other grounds Pennsylvania R Co v. National Docks & N J. J. C. Ry. Co, 32 A. 220, 53 N.J.Eq 178.

75. Pa.—Smethport R. Co. v. Pittsburg, etc., R. Co, 52 A. 88, 203 Pa. 176.

76. Pa.—Smethport R. Co. v. Pittsburg, etc., R. Co., supra.

77. W.Va.—Wellsburg, etc., R. Co v Panhandle, etc., Tract. Co., 48 S.E 746, 56 W Va. 18.

78. Pa.—Pennsylvania Schuylkill Valley R Co. v Philadelphia, etc., R. Co, 7 Pa Co 490—Philadelphia, etc, R Co v. Pennsylvania, etc., R. Co, 7 Pa.Co. 381.

79. Ind.—Pittsburgh, etc, R. Co v. Indianapolis, etc., Tract. Co., 81 N. E. 487, 169 Ind 634.
51 C J. p 645 note 2.

80. N.J.—In re Saddle River Traction Co., Ch, 41 A. 107—New York, etc, R. Co. v. Atlantic Highlands, etc, Electric R Co, 37 A. 736, 55 N J.Eq. 522.
N M.—Atchison, T. & S F. Ry. Co. v. Citizens' Traction & Power Co, 182 P. 871, 25 N M 345—Atchison, T. & S. F. Ry. Co v. Citizens' Traction & Power Co., 113 P. 810, 16 N.M. 154.
51 C J. p 645 note 3.

Apportionment of expense

Where a street railroad illegally made a crossing over a railroad, the court, after determining the amount a street railroad should have contributed to the installation of the crossing and its maintenance, will direct that a street railway should pay to the railroad moneys so expended—Atchison, T. & S. F. Ry. Co. v. Citizens' Traction & Power Co, 182 P. 871, 25 N.M. 345.

81. Ohio.—Dayton, etc, R. Co. v. Dayton, etc., Traction Co, 26 Ohio Cir Ct 1.
51 C.J. p 645 note 4.

railroads. An act giving street railroads the power to cross railroads at grade has been held not to affect the power of the court to prevent them from so doing.[82]

§ 138. —— Parties, Pleading, and Evidence

A petition to secure or fix a crossing must allege the necessary facts. On application to the court to define the place and manner of crossing the right to cross must be proved.

In a proceeding in equity to fix a crossing, holders of the mortgage bonds of defendant railroads are not necessary parties when the trustees in the mortgage are joined as parties.[83] Where a complete determination of the controversy cannot be had without the presence of other parties, such other parties may be brought into the case by a supplemental petition.[84]

Pleadings. A petition to fix or secure a crossing must sufficiently allege all the necessary facts.[85] The petition for appointment of commissioners in cases of disagreement must show a compliance with any statutory requirements and allege such facts as are necessary to show plaintiff's right to the crossing and to institute the proceedings therefor;[86] and so, where an attempt and failure on the part of the companies to agree as to the compensation, place, and manner of crossing are a necessary condition precedent to the right to institute legal proceedings to determine the same, this fact must be alleged.[87]

Evidence. On an application to the court to define the place and manner of crossing, the petitioning company must show that it has a legal right to construct its road,[88] but it is not necessary to show specifically a grant by a city of the right to cross when a franchise from the city to construct the road is shown.[89] Where the statute provides that the crossing shall be so located as to inflict the least practicable injury on the road crossed, the petitioning company must show such to be the case with respect to the proposed crossing,[90] and where the statute provides that grade crossings shall be prohibited whenever it is reasonably practicable to do so, it will be presumed that such a crossing may be avoided, and the burden is on the petitioning company to show the contrary,[91] but where grade crossings are permitted unless destructive of the senior company's rights, one seeking to prevent such a crossing must introduce evidence sufficient to show a practical destruction of such rights.[92] Where the abolition of a grade crossing is sought, evidence showing the possibility, but not the practicability, of the change is insufficient.[93]

§ 139. —— Review

As a general rule the decisions of court commissioners or of a railroad commission are reviewable by the courts.

Where the compensation, place, and manner of crossing are determined by commissioners appointed by the court, their decision is reviewable by the court[94] not only as to the compensation awarded, but also as to the place and manner of crossing,[95] and the decision of the trial court thereon is

82. Pa.—Pennsylvania R. Co. v. Braddock Electric R. Co., 25 A. 780, 152 Pa. 116—Delaware, etc., R. Co. v. Wilkes-Barre, etc., R. Co., 11 Pa.Co. 165—Delaware, etc., Canal Co. v. Lackawanna Valley Traction Co., 2 Lack.Leg.N. 295.

83. W.Va.—Tri-State Tract. Co. v. Pittsburg, etc., R. Co., 68 S.E. 25, 67 W.Va. 389.

84. N.M.—Atchison, T. & S. F. Ry. Co. v. Citizens' Traction & Power Co., 182 P. 871, 25 N.M. 345.

85. W.Va.—Tri-State Tract. Co. v. Pittsburg, etc., R. Co., 68 S.E. 25, 67 W.Va. 389.
51 C.J. p. 645 note 8.

Necessary allegations

N.J.—Mercer County Traction Co. v. United New Jersey R., etc., Co., 61 A. 461, 68 N.J.Eq. 715—Trenton St. R. Co. v. United New Jersey R., etc., Co., 46 A. 763, 60 N.J.Eq. 500—In re West Jersey Traction Co., 45 A. 282, 59 N.J.Eq. 63—In re Trenton St. Ry. Co., 44 A. 177, 58 N.J.Eq. 533.

Supplemental complaint

N.M.—Atchison, T. & S. F. Ry. Co. v. Citizens' Traction & Power Co., 182 P. 871, 25 N.M. 345.

86. Ind.—Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co., 19 N.E. 440, 116 Ind. 578.
51 C.J. p. 645 note 9.

Consent of property owners

N.Y.—Matter of Saratoga Electric R. Co., 12 N.Y.S. 318, 58 Hun 287.

87. Ind.—Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co., 19 N.E. 440, 116 Ind. 578.
51 C.J. p. 646 note 10.

88. N.J.—Mercer County Tract. Co. v. United New Jersey R., etc., Co., 61 A. 461, 68 N.J.Eq. 715.

89. W.Va.—Tri-State Tract. Co. v. Pittsburg, etc., R. Co., 68 S.E. 25, 67 W.Va. 389.

90. Pa.—Pittsburg, etc., R. Co. v. Southwestern Pennsylvania R. Co., 77 Pa. 173—Baltimore, etc., R. Co. v. Hanover, etc., R. Co., 2 Pa.Dist. 774.

91. Pa.—Baltimore, etc., R. Co. v. Hanover, etc., St. R. Co., supra—Moosic Mountain Coal Co. v. Delaware, etc., R. Co., 4 C.P.Rep. 189.

92. U.S.—Union R. Co. v. Illinois Cent. R. Co., Tenn., 207 F. 745, 125 C.C.A. 283, certiorari denied 34 S.Ct. 323, 231 U.S. 754, 58 L.Ed. 467.
51 C.J. p. 646 note 16

93. Ind.—Pittsburgh, etc., R. Co. v. Indianapolis, etc., Tract. Co., 81 N.E. 487, 169 Ind. 634.

94. Mo.—State v. Dearing, 73 S.W. 485, 173 Mo. 492.
51 C.J. p. 646 note 18.

Form of remedy

Railroad had right to appeal from order of public service commission, in nature of an action to vacate such order, where order permitted a competitor to cross railroad's main line tracks at grade with a spur track.—Detroit & T. S. L. R. Co. v. Michigan Public Service Commission, 36 N.W. 2d 896, 324 Mich. 195.

95. Mo.—State v. Dearing, 73 S.W. 485, 173 Mo. 492—St. Louis Trans-

reviewable on appeal[96] but the decision cannot be considered on a bill to enjoin the crossing pending review of the decision.[97] It has been decided that an appeal does not lie to review a question of fact decided after hearing testimony and inspecting the place of crossing.[98] On appeal from an order appointing commissioners, the court cannot pass on the questions as to the place and manner of crossing which are to be determined in the first instance by the commissioners,[99] and it has also been held that the order appointing the commissioners is not appealable.[1]

While the decisions of a railroad commission have been held conclusive,[2] it also has been held that an appeal may be taken from the decision of the railroad commission,[3] but its decision is final unless appealed from,[4] and it will not be altered or reversed unless manifestly illegal or unjust,[5] or arbitrary,[6] or unless the findings are against the manifest weight of the evidence.[7] The exercise of discretion will not be reviewed unless there has been a clear abuse thereof,[8] hence, where the requirement of safety devices is, by statute, discretionary, an order, in the proper exercise of the commission's discretion, which does not provide for such devices will not be interfered with.[9]

Where the decision as to the place and manner of crossing is made by the court, the supreme court in reviewing the decision will only inquire as to legal errors or an abuse of discretion on the part of the trial court,[10] and may examine the record to see that the proceedings are in accordance with the provisions and purpose of the statutes.[11] Where a railroad company is enjoined from constructing a grade crossing and subsequently constructs an overhead crossing at the place in question, it waives any right to a grade crossing and the question of its right to such crossing will not be considered on appeal.[12] An objection to a proceeding to fix a crossing on the ground that the route of the road had not been finally determined is not tenable where the proceedings fixing the route had terminated before the order was made from which the appeal is taken.[13]

On review of a judgment setting aside an order of the commission apportioning the cost of the construction of a crossing, the court is limited, under some statutes, to consideration of the questions of whether the commission acted within its authority and whether its findings are supported by evidence or infringe constitutional rights.[14]

D. CROSSING HIGHWAYS

§ 140. What Constitutes a Crossing

A crossing of a railroad and highway generally includes an overhead crossing and an underpass as well as grade crossings.

A railroad crossing is the crossing of a public highway by a railroad.[15] A railroad "crossing" of roads, in the primary and natural sense of the

fer R. Co. v. St. Louis, etc., R. Co., 13 S.W. 710, 100 Mo. 419

96. Mo.—St. Louis Transfer R. Co. v. St. Louis, etc., R. Co., supra.

97. Ind.—Cincinnati, etc., R. Co. v. Wabash R. Co., 70 N.E. 256, 162 Ind. 303.

98. N.Y.—In re New York, etc., R. Co., 2 N.E. 35, 99 N.Y. 388.

99. N.Y.—In re Boston Hoosac Tunnel, etc., Co., 79 N.Y. 64

Wis.—In re Eastern Wisconsin R., etc., Co., 107 N.W. 496, 127 Wis. 641.

1. N.Y.—Stillwater, etc., R. Co. v. Boston, etc., R. Co., 73 N.Y.S. 744, 67 App.Div. 367, appeal dismissed 62 N.E. 1100, 170 N.Y. 573.

2. Ky.—Chicago, etc., R. Co. v. Louisville, etc., R. Co., 58 S.W. 799, 22 Ky.L. 658.

3. Ind.—Grand Rapids, etc., R. Co. v. Railroad Commission, 78 N.E. 358, 38 Ind.App. 657.

51 C.J. p. 646 notes 26–28, p. 647 notes 29–33

Apportionment of costs

Pa.—Pennsylvania R. Co. v. Pennsylvania Public Utility Commission, 193 A. 127, 127 Pa.Super. 544

4. Kan.—Union Terminal R. Co. v. Railroad Comrs., 38 P. 290, 54 Kan. 352

Me.—Boston, etc., R. Co. v. Saco Valley Electric R. Co., 56 A. 202, 98 Me. 78.

5. Me.—Maine Cent. R. Co. v. Waterville, etc., R., etc., Co., 36 A. 453, 89 Me. 328.

51 C.J. p. 646 note 28.

6. Kan.—State v. Parsons St. Ry. Co. & Electrical Co., 105 P. 704, 81 Kan. 430, 28 L.R.A.,N.S., 1082

7. Ill.—Alton, etc., R. Co. v. Vandalia R. Co., 108 N.E. 800, 268 Ill. 68.

51 C.J. p. 647 note 29.

8. Mich.—Jackson & S. Traction Co. v. Commissioner of Railroads, 87 N.W. 133, 128 Mich. 164.

9. Wash.—State v. Kuykendall, 222 P. 211, 128 Wash. 88.—State v. Northern Pac. R. Co., 176 P. 539, 104 Wash. 405.

10. Minn.—In re Minneapolis, etc., R. Co., 32 N.W. 556, 36 Minn. 481.

11. Ohio.—Toledo R., etc., Co. v. Lima, etc., Tract. Co., 86 N.E. 515, 79 Ohio St. 136.

12. Iowa.—Chicago, etc., R. Co. v. Chicago, etc., R. Co., 58 N.W. 918, 91 Iowa 16.

13. N.Y.—In re New York, etc., R. Co., 88 N.Y. 279

14. Ill.—Chicago, N. S. & M. R. Co. v. Illinois Commerce Commission ex rel. Department of Public Works and Buildings, 188 N.E. 177, 354 Ill. 58.

15. Ga.—Atlantic Coast Line R. Co. v. Bunn, 58 S.E. 538, 2 Ga.App. 305

51 C.J. p. 369 note 2.

Accidents at crossings see infra § 710 et seq.

Footpath permissively used

A pathway which crossed a ditch by footlog, and continued over defendant's track, permissively used by public, was held not a crossing or an "alley," within a statute prohibiting blocking of crossings by trains for more than ten minutes, and, therefore, defendant, by failing to separate its train, violated no statu-

word, is an intersection of them in the same plane,[16] and does not include an underpass which eliminates the necessity for a crossing.[17] In a broader sense the word includes all means by which one may pass from one side of the obstructing railroad to the other,[18] and includes an underpass or overhead crossing as well as grade crossings.[19] A bridge carrying a highway over a railroad is a crossing.[20] A railroad crossing has been held to include the necessary approaches as well as the entire structure,[21] even though a part of the structure is outside the railroad right of way,[22] but it has also been held that a railroad crossing is limited to the space included within the boundaries of the right of way and the boundaries of the highway.[23]

§ 141. Right to Cross

The legislature may authorize a railroad to cross public highways, turnpikes, or streets.

The legislature may authorize a railroad company to construct its road across public highways,[24] turnpikes,[25] or streets.[26] The authority to cross need not be conferred in express terms since it will be implied from a grant of authority to construct a railroad on a certain route or between certain termini,[27] or to connect with another railroad,[28] and in cases where the right is expressly granted, it is not necessary to specify the particular streets or highways which may be crossed.[29] Such authority, however, does not extend to include branch lines not a part of, or appurtenant to, the main line.[30] In many jurisdictions the right to cross is given by statute.[31] The right to cross may not be acquired by purchase or condemnation.[32] If a statute requires an order of court to authorize the construction of tracks across a street or highway, such order is a condition precedent to the right to do so.[33] The power of a municipal corporation to construct subways under, or viaducts over, railroad tracks or property is discussed in Municipal Corporations § 1044 c (3).

Consent of municipal or other authorities. The legislature may authorize a railroad company to cross streets without the consent of the municipality,[34] and under some of the statutes regulating crossings it is held that such consent is not necessary.[35] It is also competent for the legislature to

tory duty, and was not liable for injuries to a boy five years old who was run over while attempting to crawl under train, or while hanging on attempting to ride—St Louis Southwestern Ry. Co. v. Christian, 261 S.W. 297, 298, 164 Ark. 65.

16. Vt.—Libby v. Canadian Pac. R. Co., 73 A. 593, 82 Vt. 316.
51 C.J. p. 647 note 37.

17. Vt.—Libby v. Canadian Pac. R. Co., supra.

18. Vt.—Libby v. Canadian Pac. R. Co., supra.

19. Mo.—State ex rel. Missouri, K. & T. Ry. Co. v. Public Service Commission, 197 S.W. 56, 58, 271 Mo. 270.
Tex.—Hays v. Texarkana & Fort Smith Ry. Co., Civ.App., 87 S.W.2d 1106, error dismissed.

20. N.H.—Pierce v. Boston & M. R. R., 143 A. 903, 83 N.H. 466—City of Laconia v. Boston & M. R. R., 128 A. 350, 351, 81 N.H. 408—Concord v. Boston, etc., R. Co., 38 A. 378, 69 N.H. 37.

21. Ark.—Payne v. Stockton, 229 S. W. 44, 47, 147 Ark. 598.
Tenn.—Louisville, etc., R. Co. v. State, 159 S.W. 601, 128 Tenn. 172.
17 C.J. p. 385 note 24.

22. Tenn.—Louisville, etc., R. Co. v. State, 159 S.W. 601, 128 Tenn. 172.
17 C.J. p. 385 note 24.

23. Ark.—Chicago, etc., R. Co. v. Redding, 187 S.W. 651, 124 Ark. 368, 372, Ann.Cas.1918D 183.
Tex.—Gulf, C. & S. F. Ry. Co. v. Woods, Com.App., 290 S.W. 729.
39 C.J. p. 351 note 86.

24. Minn.—International Falls v. Minnesota, etc., R. Co., 134 N.W. 302, 117 Minn. 14.
51 C.J. p. 647 note 43.

25. Ohio.—Cincinnati, etc., R. Co. v. Spring Grove Ave. Co., 9 Ohio Dec., Reprint, 625, 15 Cinc.L.Bul. 384.
Vt.—White River Turnp. Co. v. Vermont Cent. R. Co., 21 Vt. 590.

26. Miss.—Canton v. Canton Cotton Warehouse Co., 36 So. 266, 84 Miss. 268, 105 Am.S.R. 428, 65 L.R.A. 561.
51 C.J. p. 647 note 45.

27. Pa.—Northern Coal, etc., Co. v. Wilkes-Barre, 67 A. 352, 218 Pa. 269.
51 C.J. p. 647 note 46.

28. Tenn.—Louisville, etc., R. Co. v. State, 9 Baxt. 522.

29. Miss.—Canton v. Canton Cotton Warehouse Co., 36 So. 266, 84 Miss. 268, 105 Am.S.R. 428, 65 L.R.A. 561.

30. Minn.—St. Paul, etc., R. Co. v. Duluth, 76 N.W. 35, 73 Minn. 270, 43 L.R.A. 433.

31. Ky.—Husbands v. Paducah, etc., R. Co., 195 S.W. 831, 176 Ky. 290.
51 C.J. p. 647 note 50.

Failure to exercise power

Code section providing that every railroad shall have power to construct its roads across, along, or on any street, avenue, or highway, which the route of its road intersects, crosses, or runs along, does not grant franchise rights and is at most a mere offer which must be accepted by user, and, until such acceptance by user, no right vests under it—People v. Ocean Shore R. R., 196 P.2d 570, 32 Cal.2d 406.

32. N.Y.—People v. State Tax Commission, 199 N.Y.S. 820, 205 App. Div. 462.

33. N.Y.—Osborne v. Jersey City, etc., R. Co., 27 Hun 539.
Ohio.—Youngstown & Ohio River Ry. v. East Liverpool, 10 Ohio N.P.,N.S., 157.

Construction by federal agency for war purposes

Under railroad law, New York supreme court has power to say whether railroad's construction along, on, or across a public highway in a town or village is proper as a matter of public propriety; but in construction of railroad to acquire materials for use of federal government in war, federal agency was not subject to provisions of state railroad law requiring an enabling order of the New York supreme court for construction of a railroad across state highways—Sells v. Defense Plant Corp., 66 N.E.2d 289, 295 N.Y. 227.

34. Iowa.—Clinton v. Cedar Rapids, etc., R. Co., 24 Iowa 455.
Miss.—Canton v. Canton Cotton Warehouse Co., 36 So. 266, 84 Miss. 268, 105 Am.S.R. 428, 65 L.R.A. 561.

35. Iowa.—Morgan v. Des Moines

require that the consent of the municipality shall be first obtained;[36] but, unless required, the municipal franchise is not necessary.[37] Under some statutes it has been held necessary to secure such consent[38] unless the railroad is empowered by its charter to cross without consent,[39] and other statutes expressly require such consent.[40] When consent is necessary, such permission when granted may be restricted by such reasonable conditions as the municipality may see fit to impose[41] Where its consent has been given, it may not be revoked.[42] Statutes prohibiting the construction of a railroad in or on a street or highway without consent of the municipality or county authorities have been held not to apply to a crossing,[43] and the same has been held of a statute providing for condemnation proceedings if the railroad and the municipality disagree as to the crossing.[44]

Consent of highway commissioner is not required by a statute prohibiting construction of a railroad over or across a highway which has been or may be improved except on such conditions as the highway commissioner prescribes.[45]

Consent of adjoining owners is not necessary when the railroad has the consent of the municipality and abutting owners to the crossing[46] Statutes requiring the consent or petition of abutting property owners to use the streets for railroad purposes do not apply to a mere crossing of the street.[47]

Nature and extent of rights acquired. Where a railroad crosses a highway, the company does not take the land of the highway as real estate of individuals is taken,[48] and the railroad company acquires no exclusive rights in the crossing, but only the right to use it in common with the public traveling on the highway,[49] and it has no right so to construct and use it as injuriously to affect the public traffic over the highway.[50] It may use the highway only for the purpose of crossing,[51] and the right to cross does not confer a right to use the full width of its authorized right of way but only such space as is reasonably necessary for the purpose of passage,[52] and, if the company acquires any rights within the limits of the highway beyond that actually occupied by the rails and roadbed, it is only such as is necessary to the full enjoyment of its right to lay the track across the highway and use it beneficially.[53] Where a railroad company constructs a bridge over its tracks at a street crossing, which is to constitute a part of the highway and to be maintained as such by the municipality, the title to the bridge is in the municipal-

Union R. Co, 85 N.W 902, 113 Iowa 561.
51 C J p 648 note 55.

36. Minn—International Falls v. Minnesota, etc, R Co, 134 N.W 302, 117 Minn 14

37. Minn—International Falls v Minnesota, etc, R Co, supra
51 C J p 648 note 57.

38. Pa—Philadelphia v Philadelphia, etc, R Co, 7 Pa Co 390.
51 C J p 648 note 58

39. Pa.—Pittsburg R Co. v Pittsburg, 75 A. 681, 226 Pa. 498.
51 C J. p 648 note 59.

40. N Y—People ex rel. New York Cent. R. Co. v State Tax Commission, 35 N Y S 2d 77, 264 App Div 80, modified on other grounds 54 N E 2d 332, 292 N Y 130, motion denied 56 N E 2d 122, 292 N Y. 717.
51 C J. p 648 note 60

Railroad constructed before area added to city

N Y—City of New York v Staten Island Rapid Transit Ry. Co, 82 N.Y.S.2d 682.

Additional tracks

N Y—City of New York v. Staten Island Rapid Transit Ry. Co, supra.

41. Ill—Chicago Terminal Transfer Co v. Chicago, 77 N E 204, 220 Ill 310.
51 C J. p 649 note 61.

Ordinance incorporated in contract

All material parts of ordinance affecting construction, including city's reservation of right to removal, were held incorporated into contract between manufacturing company and railroad for construction of switch tracks across street—City of Louisville v Chess & Wymond Co, 56 S W 2d 537, 247 Ky 53.

42. N.Y.—Ward v. Erie R. Co, 149 N Y S 717, 87 Misc 365, affirmed 154 N Y.S 94, 167 App Div 950, affirmed 109 N E 1095, 215 N Y. 629

43. Minn—International Falls v. Minnesota, etc, R Co, 134 N W 302, 117 Minn 14.
51 C J p 649 note 64

44. Minn—International Falls v Minnesota, etc, R Co, supra.

45. N Y—People v Delaware, etc, Co, 170 N Y S 240, 183 App Div 149, affirmed 127 N E 244, 228 N Y 279.
51 C J. p 649 note 66.

Railroad constructed by federal agency

Section of Highway Law empowering superintendent of public works to prescribe conditions and regulations in respect of construction of a railroad on any portion of a state highway was not applicable to construction of railroad by federal agency pursuant to authority obtained in federal courts—Sells v Defense Plant Corp., 66 N E 2d 289, 295 N.Y. 227

46. Mich—Wisher v Pere Marquette R. Co, 211 N W. 68, 237 Mich 117.

47. Ill—Chicago, etc., R Co v Dunbar, 100 Ill 110
N.Y.—Beekman v Brooklyn, etc, R. Co, 35 N.Y S 84, 89 Hun 14.

48. Me—Bangor, etc, R. Co. v. Smith, 47 Me 34
Rights in, and use of, highways for right of way see supra § 102 et seq.

49. U S—Webster v. Chicago, etc., R. Co, Mo, 158 F 769, 86 C C A. 125, 42 L R A, N S, 568.
51 C J. p 649 note 70.

50. N J—Newark v Erie R Co, 71 A 620, 75 N J Eq 20, reversed on other grounds 74 A 505, 76 N.J. Eq. 317.
N C.—Tate v Seaboard Air Line R. Co, 84 S E 808, 168 N C 523

51. N.J—Newark v Erie R. Co, 71 A. 620, 75 N J Eq 20, 30, reversed on other grounds 74 A. 505, 76 N.J. Eq 317.
51 C J. p 649 note 72

52. Pa.—Jones v. Erie, etc., R. Co., 32 A 535, 169 Pa. 333, 47 Am S R. 916.
Vt—State v. Vermont Cent. R Co., 27 Vt. 103

53. Me.—Bangor, etc, R. Co. v. Smith, 47 Me. 34.

ity and not in the railroad company.[54]

Rights and remedies of public. A town may maintain an action for injunction to determine the right of a railroad to construct a crossing[55] Where the consent of the municipal or other public authorities is essential to the right to construct a railroad across a street or highway, a railroad may be enjoined from constructing such a crossing without the necessary consent,[56] or from operating its trains thereon if already constructed,[57] or the court of equity may grant such other equitable relief as may be appropriate and necessary;[58] but, unless a highway is materially obstructed or irreparable injury threatened, a mandatory injunction requiring the removal of the tracks will not be granted before final hearing,[59] and a railroad will not be enjoined from constructing an additional track at a crossing where such track is conducive to safety thereat.[60]

§ 142. Place, Mode, and Expense of Crossing

The legislature may, in the exercise of the police power, regulate the manner and character of railroad crossings

Where a railroad crosses a street or highway, the legislature, in the exercise of its police power, may regulate the manner and character of crossing,[61] or may delegate such power to an administrative agency[62] or to a municipal corporation,[63] and, where the mode and manner of crossing are prescribed by statute, the requirements must be complied with.[64] The mere right to cross a highway

54. Pa.—Pennsylvania R. Co. v. Greensburg, etc., St. R. Co., 35 A. 122, 176 Pa. 559, 36 L.R.A. 839

55. Mass.—Springfield v. Connecticut River R. Co., 4 Cush. 63

56. Pa.—Pittsburg R. Co. v. Pittsburg, 75 A. 681, 226 Pa. 498
51 C.J. p. 650 note 78.

57. Ohio.—Cincinnati Northern R. Co. v. Cincinnati, 8 Ohio Dec., Reprint, 554, 8 Cinc. L. Bul. 334.

58. Mo.—State v. St. Louis, etc., R. Co., 86 Mo. 288.

59. Ohio.—Cincinnati Northern R. Co. v. Cincinnati, 8 Ohio Dec., Reprint, 554, 8 Cinc. L. Bul. 334.

60. N.J.—Newark v. New Jersey Cent. R. Co., 67 A. 1009, 73 N.J.Eq. 469.

61. Ill.—Illinois Cent. R. Co. v. Franklin County, 56 N.E.2d 775, 387 Ill. 301.
51 C.J. p. 650 note 83.

Statutes construed together

Statute authorizing erection of railroad bridges across city streets and statute authorizing municipal authorities to enter into contracts with railroads for location, relocation, or change of tracks, bridges or facilities are neither inconsistent nor incapable of reconciliation.—Delaware, L. & W. R. Co. v. Chiara, C.C.A.N.J., 95 F.2d 663, certiorari denied Chiara v. Delaware, L. & W. R. Co., 59 S.Ct. 68, 305 U.S. 609, 83 L.Ed. 387.

62. Ill.—Illinois Cent. R. Co. v. Franklin County, 56 N.E.2d 775, 387 Ill. 301.—Chicago & E. I. Ry. Co. v. Road Dist. No. 10, 187 N.E. 155, 353 Ill. 160.

Delegation of municipal functions

The statutes giving the public utility commission exclusive jurisdiction over construction and abolition of grade crossings and approval of contracts between cities and utilities are not violative of the constitution prohibiting the delegation of municipal functions to any "special commission" since the commission is not a "special commission."—Crown Products Co. v. Pennsylvania Public Utility Commission, 31 A.2d 913, 32 A.2d 305, 152 Pa. Super. 345.

Jurisdiction or power of commission

(1) Statutory jurisdiction of railroad and warehouse commission over railroad crossings extends to reconstruction of bridge over highway, and is not limited to original construction attendant on separation of grades.—State ex rel. City of St. Paul v. Minneapolis, St. P. & S. S. M. Ry. Co., 251 N.W. 275, 190 Minn. 162

(2) After a highway is once established, the location of the crossing where the highway crosses railroad and its construction and maintenance or alteration are within jurisdiction of corporation commission.—Kansas City Southern Ry. Co. v. Citizens of Westville, 89 P.2d 320, 184 Okl. 100, certiorari denied 59 S.Ct. 774, 306 U.S. 658, 83 L.Ed. 1055.—City of Ardmore v. Chicago, R. I. & P. Ry. Co., 45 P.2d 540, 172 Okl. 373

(3) The Public Utilities Act gives commerce commission plenary power over all questions relating to highway crossings over railroads and other equipment and appliances in interest of public safety.—Illinois Cent. R. Co. v. Franklin County, 56 N.E.2d 775, 387 Ill. 301.

(4) Where public highway exists at railroad crossing, power of state commerce commission is limited to separation of grades or relocation of grade crossing at such point.—Chicago & E. I. Ry. Co. v. Road Dist. No. 10, 187 N.E. 155, 353 Ill. 160.

Implied repeal

Statute giving jurisdiction of public railroad crossings to overseer of roads of any road district or council or board of trustees of any city or town, or to fifty petitioners of any city or town who are interested, was held impliedly repealed by statute giving jurisdiction to corporation commission.—City of Ardmore v. Chicago, R. I. & P. Ry. Co., 45 P.2d 540, 172 Okl. 373

63. Neb.—Chicago, etc., R. Co. v. State, 66 N.W. 624, 47 Neb. 549, 53 Am.S.R. 557, 41 L.R.A. 481.
51 C.J. p. 650 note 84.

Increase in public safety

Ordinance, compliance with which will not increase public safety, is unreasonable.—Richmond-Ashland Ry. Co. v. Commonwealth ex rel. City of Richmond, 173 S.E. 892, 162 Va. 296

Arbitrary action

To require railroad to use girder rails at street intersection and permit others similarly situated to use T rails is arbitrary exercise of police power.—Richmond-Ashland Ry. Co. v. Commonwealth ex rel. City of Richmond, supra.

Relocation of tracks

Need for expenditure required in relocating railroad's tracks, changing grade thereof, and requiring paving of intersection at company's expense, should be urgent before such burden is imposed on insolvent company by ordinance.—Richmond-Ashland Ry. Co. v. Commonwealth ex rel. City of Richmond, supra.

Controversies between railroad and municipality

The public service commission has jurisdiction to hear and determine controversies between a railroad and a municipality over the opening, closing, or maintenance of a railroad crossing within municipal limits, and rights of parties must be determined before that body.—Provo City v. Department of Business Regulation, Utah, 218 P.2d 675.

64. Me.—Bangor, etc., R. Co. v. Smith, 47 Me. 34.
51 C.J. p. 650 note 85.

confers no right on a railroad company to destroy the highway or render it useless as such,[65] but the railroad should be so located and constructed as not unnecessarily to injure the highway or impair the rights of the public in its use;[66] and frequently there are statutory provisions to this effect.[67] The railroad company must construct and maintain a safe and suitable crossing for the passage of persons and vehicles along the highway at the crossing,[68] and this duty is frequently expressly imposed by statute.[69] This duty is imposed on the railroad under the police power of the state to secure the public from injury.[70] A railroad having the right to cross a street is not restricted as to the angle at which it may cross so long as its tracks are not laid in front of property belonging to others.[71]

In some jurisdictions the expense of making and maintaining a crossing of a railroad and a highway falls on the last one there, so that the expense of making and maintaining a crossing over an existing way falls on the railroad.[72]

Approaches. Since the term "crossing" includes the necessary embankments and approaches to the railroad,[73] the company must also construct and maintain safe and suitable approaches to the crossing.[74] The question of what is a suitable and sufficient approach depends on the circumstances of the particular case,[75] and may require the erection of guardrails at cuts or embankments.[76] The width of the crossing and approaches thereto depends on the circumstances of the case and the character and use of the highway,[77] since they do not necessarily imply the full width of the highway or right of way of the railroad.[78]

In the case of a street in a city they should ordinarily cover the entire width of the street;[79] but in the case of ordinary highways it is not necessary that they should cover the entire width of the high-

Previously existing crossing

Statute prescribing conditions for construction of railroad crossing was held inapplicable to previously existing grade crossing where railroad was not required to change crossing —Norfolk & W. Ry Co. v. Faris, 157 S E 819, 156 Va. 205.

65. Fla.—Palatka, etc, R. Co v State, 3 So. 158, 23 Fla. 546, 11 Am S R 395.
51 C J. p 650 note 86.

66. Ky.—Wickliffe v. Illinois Cent . R Co, 108 S.W. 243, 32 Ky L 1159.
51 C J. p 650 note 87—20 C J. p 617 note 22

Minimum injury

At common law, if a railroad crosses an existing street, it must do so with as little injury as possible to the street —Albright v Louisiana & M. R. R. Co, 195 S.W 2d 648, 355 Mo 211.

Not subject to control by railroad

The public authorities and not the railroad control the location of railroad crossings on a public road —Long v Norfolk & W Ry. Co, 23 S. E.2d 849, 222 N C. 523

67. Pa —North Manheim Tp. v. Reading, etc., R Co., 14 A. 137, 10 Pa Cas 261.
51 C J. p 650 note 88.
Restoring highway see infra § 148 et seq.

68. Ark —St. Louis, I M & S Ry. Co. v. Smith, 175 S.W. 415, 118 Ark. 72.
51 C J p 651 note 90.

Where streets end at opposite sides of railroad track, there is no crossing and railroad is not required to maintain a way connecting the two streets.—Curtis v. Southern Pac. Co., 8 P.2d 1078, 39 Ariz. 576.

69. U S —Chicago, St. P., M & O Ry Co v. Washington, C A.Minn, 179 F 2d 548.
Ill —Chicago, N S & M R Co v Illinois Commerce Commission ex rel Department of Public Works and Buildings, 188 N E. 177, 354 Ill. 58.
51 C.J p 651 note 91.

Duty limited to crossings

Statute requiring railroad to construct sufficient crossings where railroad crosses roads or streets, providing manner of maintenance, and authorizing municipality to construct crossing if railroad fails to do so and to recover double amount expended, applies only to railroad crossings and approaches thereto and not to rights of way outside of crossings and approaches.—City of Higginsville ex rel. and to Use of Kasco, Inc, v Alton R. Co., 171 S.W.2d 795, 237 Mo App 1204.

70. Wis —Milwaukee v. Chicago, etc, R Co., 171 N.W 54, 168 Wis 534

71. Iowa —Morgan v. Des Moines Union R. Co., 85 N.W. 902, 113 Iowa. 561.

72. Mass —Boston & M. R. R. v. Worcester County Com'rs, 15 N.E 2d 455, 300 Mass. 415.
Pa.—Reed v. Allegheny County, 199 A 187, 330 Pa. 300.
Opening or extension of way across existing railroad see infra § 156.

Reason for rule

The expense required for the laying out of a railroad over an existing way is incurred for the sole benefit of the railroad corporation, and it is equitable that such expense should be paid out of the fares and charges collected by the railroad corporation from those for whom it performed services rather than from the taxes assessed on the general public —Trustees of New York, N. H & H. R. Co v City of New Bedford, 52 N.E 2d 324, 315 Mass 154

Duty to maintain

Where the railroad corporation, in order to cross an existing way, elevates the way and carries it over the railroad by a bridge which it constructs, the railroad corporation is primarily liable for any neglect or refusal to keep the bridge in a reasonably safe condition for travelers thereon, and to maintain it so that it will not obstruct travel on the public way —Trustees of New York, N. H. & H R. Co. v City of New Bedford, supra.

73. Iowa —Farley v. Chicago, etc., R. Co, 42 Iowa 234.
Mo —Moberly v. Kansas City, etc., R Co., 17 Mo App. 518.

74. Ill —Illinois Cent R Co. v. Paradise Highway Comrs, 61 Ill.App. 203
51 C.J p 651 note 95

75. Ill —Bloomington v Illinois Cent. R. Co, 39 N E 478, 154 Ill 539.
51 C.J. p 651 note 96.

76. Ind —Evansville, etc, R. Co v. Allen, 73 N E. 630, 34 Ind App. 636.
51 C.J. p 651 note 97.

77. Ill.—Sample v Chicago, etc., R. Co, 84 N E 643, 233 Ill. 564.
51 C.J. p 651 note 98

78. Ill —O'Fallon v. Ohio, etc., R Co, 45 Ill App. 572.
51 C.J. p 651 note 99.

79. Ill.—Cleveland, etc., R. Co. v. Johns, 106 Ill.App. 427.
Ind.—Indianapolis, etc., R. Co. v. State, 37 Ind. 489

way, but only what is reasonably necessary for the accommodation of the public travel thereon,[80] and the same is true to a considerable extent with regard to streets in villages and some cities or particular localities therein.[81] So, also, the length of the approaches depends on the circumstances of the case,[82] and they need not necessarily extend back for the full width on the railroad right of way,[83] although the circumstances may require that they shall do so.[84]

Sidewalks When necessary to fulfill its obligation to provide a safe crossing, the railroad must construct sidewalks for pedestrians.[85] In some jurisdictions the duty to construct sidewalks at the crossing is imposed by statute; and this is a valid exercise of the police power of the state.[86]

Lights may not be required to be maintained in a street when not necessary for the protection of the public.[87]

§ 143. —— Crossing at, above, or below Grade

Where a railroad company has the right to cross a street or highway, it may ordinarily do so at grade or by means of a bridge or viaduct; statutes in many jurisdictions prohibit or restrict grade crossings.

In the absence of any statutory provision to the contrary, a railroad company having a right to construct a railroad which will cross a street or highway may cross the same at grade,[88] or it may carry its road above the street or highway by means of a bridge or viaduct.[89] A statutory provision that a street or highway in a town or city may be crossed by a bridge is not mandatory but permissive, leaving it optional with the railroad company to grade or bridge the crossing,[90] and a requirement that the company shall in crossing so construct its road as not to impede or obstruct the safe and convenient use of the highway does not require that the crossing shall be at grade;[91] while on the other hand a statute providing how grade crossings shall be constructed does not authorize all crossings to be at grade, but applies only where such crossings are proper.[92]

In many jurisdictions, by statute, the construction of grade crossings is prohibited or restricted.[93] Such statutes have been held to apply to all crossings thereafter established regardless of the time when the construction of the railroad was authorized,[94] although the contrary has also been held.[95] Where the statute provides that the crossing may be so constructed that the highway shall pass over or under the railroad, as may be found most expedient, the choice rests within the discretion of the railroad company,[96] which, if exercised in good faith, will not be interfered with by the courts,[97] and it seems that the term "under or over" authorizes a crossing at grade,[98] but a charter provision that the crossing shall be "over" the railroad has

80. Kan.—Atchison, etc., R. Co. v. Henry, 45 P. 576, 57 Kan. 154.
51 C. J. p. 652 note 2.

81. Ill.—Bloomington v. Illinois Cent. R. Co., 39 N.E. 478, 154 Ill. 539.

82. Ill.—Illinois Cent. R. Co. v. Truesdall, 68 Ill. App. 324.

83. Ill.—O'Fallon v. Ohio, etc., R. Co., 45 Ill. App. 572.

84. Ill.—Illinois Cent. R. Co. v. Truesdall, 68 Ill. App. 324.

85. Ark.—Chicago, etc., R. Co. v. Redding, 187 S.W. 651, 124 Ark. 368, Ann.Cas.1918D 183.

86. U.S.—Great Northern R. Co. v. Minnesota, Minn., 38 S.Ct. 346, 246 U.S. 434, 62 L.Ed. 817.

87. Ill.—Chicago v. Pennsylvania Co., 96 N.E. 833, 252 Ill. 185, 36 L.R.A.,N.S., 1081, Ann.Cas.1912D 400.

88. U.S.—Morris v. Chicago, etc., R. Co., C.C.Iowa, 26 F. 22.
51 C. J. p. 652 note 11.

Grade crossing

(1) A grade crossing is a place where one highway crosses another; in particular, a place where a railroad is crossed at grade by a public or private road, or by another railroad.—Armour v. New York, etc., R. Co., 103 A. 1031, 41 R.I. 361.—28 C.J. p. 755 note 61.

(2) The term "grade crossings" applies to the crossing of a highway by an operating railroad, not by an abandoned track.—Jennings v. Pennsylvania Public Utility Commission, 14 A.2d 882, 885, 140 Pa. Super. 569.

(3) Where public service commission required street to pass under railroad tracks, specified permanent structure, and fixed nature of crossing as undercrossing, and railroad, with consent of commission and city, constructed temporary crossing and grade, decision of public service commission that crossing could not be included in elimination program because it was not a "grade crossing" was held error.—In re Grade Crossings in City of Buffalo, 167 N.E. 460, 251 N.Y. 331.

89. Del.—Bubenzer v. Philadelphia, etc., R. Co., Ch., 61 A. 270.

90. U.S.—De Lucca v. North Little Rock, C.C.Ark., 142 F. 597.

91. R.I.—Johnston v. Providence, etc., R. Co., 10 R.I. 365.

92. Minn.—State v. Minneapolis, etc., R. Co., 39 N.W. 153, 39 Minn. 219.

93. Ala.—Tuscaloosa County v. Alabama Great Southern R. Co., 162 So. 681, 230 Ala. 599.
N.Y.—Sells v. Defense Plant Corp., 66 N.E.2d 289, 295 N.Y. 227.
51 C. J. p. 652 note 13.
Abolition of grade crossings see infra §§ 161-167.

Statute held applicable only to grade crossings

N.Y.—Sells v. Defense Plant Corp., supra.

Order permitting grade crossing held supported by evidence

Pa.—Arsenal Board of Trade v. Pennsylvania Public Utility Commission, 72 A.2d 612, 166 Pa.Super. 548.

94. Pa.—Clifton Heights Borough v. Thomas Kent Mfg. Co., 69 A. 1114, 220 Pa. 585.

95. Mass.—Attorney General v. Ware River R. Co., 115 Mass. 400.

96. N.Y.—Jamaica v. Long Island R. Co., 21 N.Y.S. 327, 66 Hun 631.
51 C. J. p. 653 note 22.

97. N.Y.—People v. New York Cent., etc., R. Co., 74 N.Y. 302.
51 C.J. p. 653 note 23.

98. N.J.—In re West Jersey Tract. Co., 45 A. 282, 59 N.J.Eq. 63.

been held to mean above it.[99] A contract between a railroad and a municipality providing that the costs of all approaches to crossings above or below grade should be borne by the railroad has been construed to impose liability on the railroad only for reasonable incidental approaches.[1]

When railroad crosses by means of bridge, if practicable to do so, the bridge must be constructed so as to span the entire width of the way and not merely the traveled portion and without any pillars or abutments which will restrict the width or obstruct the use of the highway,[2] particularly in the case of streets.[3] It has been held that a municipal corporation has no right to authorize the construction of a bridge with pillars or abutments which constitute an obstruction to public travel,[4] but it has also been held that a grant to construct a bridge by erecting a foundation in the road to support center piers of the bridge was proper.[5]

Where highway is carried over railroad on bridge, the character of the bridge depends on the circumstances of the particular case,[6] and in the case of an ordinary highway it is not necessary to bridge the entire width of the highway, but only to construct a bridge reasonably sufficient to accommodate the public travel.[7] So, also, the bridge need only be of sufficient strength for the ordinary highway travel, and the railroad company is not required to make it sufficient to meet the additional use of a street railway.[8]

§ 144. —— Character of Highway

Statutes regulating the construction of crossings at intersections between railroads and public roads apply only to public crossings, and to legally established streets and highways.

The statutes regulating the construction of crossings at intersections between railroads and public roads or streets apply only to public crossings[9] and to streets and highways legally established,[10] and a statute requiring an under crossing where a railroad crosses "any public highway" at a certain grade above the original level of the highway applies only to a highway laid out pursuant to law or used for such length of time as to constitute it a public highway;[11] but a statute authorizing a town to require a bridge at the crossing of any highway therein applies to a highway established by law, although not constructed;[12] and a statute requiring that a railroad company when it crosses "any established road or way" shall be so constructed as not to impede the travel thereon applies to a street duly laid out, although not actually opened for public use;[13] and, where a city has obtained an easement for a crossing, it may require the railroad to construct it.[14] A statute prohibiting the crossing at grade of "the streets or highways in any city" does not apply to the crossing of a canal;[15] and a statute prohibiting a grade crossing of a street or highway leading to a public cemetery of a city does not apply to a street leading to a cemetery belonging to a private association.[16] A railroad is under no duty to establish and maintain a crossing over paths or unfrequented ways[17]

99. N J—South Amboy v. Pennsylvania R. Co, 73 A 852, 76 N J Eq 57, reversed on other grounds 76 A. 1038, 77 N.J Eq 242

1. N Y.—City of New York v. New York, W. & B Ry Co., 281 N Y S. 354, 245 App Div 109, affirmed 4 N E.2d 814, 272 N.Y 583

Structure required by natural conditions

Structure sixty feet wide and six hundred feet long, running from bridge over railroad tracks to abutment, and fill and retaining walls two hundred seventy feet long from abutment to natural level, was held required by natural conditions, rather than location of tracks of railroad, and not an "approach" within contract requiring railroad to bear cost of all "approaches" to crossings below or above grade—City of New York v. New York, W & B Ry. Co, supra.

2. N J—Raritan Tp v Port Reading R. Co, 23 A. 127, 49 N J Eq. 11

51 C.J. p 653 note 26.

Footbridges

Under a statute regulating the height of footbridges, and prohibiting the rebuilding of such bridges at less than the required height, a contract for repair is not within the prohibition against rebuilding—Ann Arbor R. Co. v Toledo, D C Ohio, 33 F 2d 939

3. Pa—Schwenk v. Pennsylvania Schuylkill R. Co., 2 Chest Co. 177.

4. N Y.—Delaware, etc., R. Co. v. Buffalo, 53 N E 44, 533, 158 N.Y. 266, 478

Ohio.—Elyria v. Lake Shore, etc, R Co., 23 Ohio Cir.Ct. 482.

5. U S—Delaware, L & W R Co v. Chiara, C C.A N J, 95 F 2d 663, certiorari denied Chiara v. Delaware W. R Co, 59 S.Ct. 68, 305 U.S. 609, 83 L Ed. 387.

6. N.Y.—People v. New York, etc, R. Co., 89 N.Y. 266.

7. N J.—State v. Lackawanna R. Co, 86 A. 386, 84 N.J.Law 289.

51 C.J. p 653 note 33.

8. N.Y—People v. Adams, 34 N.Y.S. 579, 88 Hun 122, affirmed 42 N.E. 725, 147 N Y. 722

51 C.J. p 653 note 36

9. Utah—Bamberger Electric R. Co. v. State Public Utilities Commission, 204 P. 314, 59 Utah 351.

10. Ga.—Poole v. Southern R. Co, 129 S E 297, 34 Ga App. 290

51 C.J p 653 note 40.

11. N.H.—Northumberland v. Atlantic, etc., R. Co, 35 N H 574.

12. N H.—Worcester, etc., R Co v. Nashua, 4 A. 298, 63 N.H. 593.

13. Pa.—Chester v. Baltimore, etc., R Co, 21 A 320, 140 Pa. 275.

14. Ga—Atlanta, etc., R. Co. v. Atlanta, 119 S E 712, 156 Ga. 251.

15. N.J.—Lehigh Valley R. Co. v. Dover, etc, R Co., 43 N J.Law 528

16. Ohio—Youngstown v. Pittsburgh, etc., R. Co, 3 Ohio Cir Ct. 214, 2 Ohio Cir.Dec. 121

17. Ga.—Berry v. Northeastern R. Co., 72 Ga. 137.

§ 145. —— Changing Location or Grade of Highway

A railroad company, in crossing a highway, may not change the location or grade of the highway unless authorized by statute.

In the absence of statute, a railroad company, in crossing a highway, has no right to change the location or route of the highway.[18] It may, however, be authorized to do so by its charter,[19] but to authorize such change the right must be conferred in express terms or by necessary implication.[20] The right is frequently expressly conferred by statutory provisions to make such changes in the location of a highway in certain cases and to acquire by purchase or condemnation such additional land as may be necessary for effecting the change.[21] Such statutes apply to crossings as well as to longitudinal occupation of a highway,[22] and, where so given, the exercise of such authority is discretionary with the railroad.[23] Such statutes are intended to preserve a highway for the public.[24]

The company is required, as discussed infra § 150, in making such change, to reconstruct the road at its own expense on a suitable location and in a proper manner so as to provide an adequate substitute for the original road, which when duly established becomes a part of the public highway, to be maintained as such and not a private road of the railroad company;[25] and after the new location has been duly completed and adopted and used by the public, the old way may not be reopened and the railroad company compelled to restore it.[26] A change of grade is authorized by statutes in some jurisdictions, and, if authorized to change the grade of highways, the railroad may alter the grade of a highway to bring it to the same level as the railroad,[27] or make such changes as are necessary on laying additional tracks;[28] but, when the grade is altered, it must be done in such manner as not substantially to impair the usefulness of the public road.[29] Under a statute conferring a right to cross a highway it has been held that the railroad may alter the grade of the highway.[30] It has been held that a statute authorizing a railroad to change the location of a highway does not authorize a change of grade.[31] Some statutes authorizing the raising or lowering of highways so that the railroad may cross over or under them have been held not to authorize a change of grade to make a grade crossing.[32]

§ 146. —— Remedies in General

Equity may compel the performance of duties imposed on a railroad with respect to railroad crossings.

A railroad company, when legally bound to construct a crossing or a crossing of a particular character, may be compelled to do so by a bill in equity to enforce the specific performance of such duty.[33] Where a railroad is in the hands of a receiver, the duty of constructing a crossing may be enforced by application to the court appointing the receiver.[34] Where the mode of crossing is discretionary with the railroad company, a court of equity will not interfere, in the absence of a gross abuse of such discretion after the road is built and in operation,[35] nor, where the construction has been allowed to proceed almost to completion without protest, will the railroad be required to change it.[36]

A railroad company may be enjoined from constructing a railroad bridge over a highway with abutments which encroach on the width of the highway,[37] or from constructing a crossing at grade

18. N.Y.—Buchholz v. New York, etc., R. Co, 43 N.E. 76, 148 N.Y. 640.
51 C.J. p. 654 note 50.
Relocation on abolition of grade crossings see infra § 163.

19. Ill.—Illinois Cent. R. Co. v. Bentley, 64 Ill. 438.
51 C.J. p. 654 note 51.

20. N.J.—State v. Warren R. Co, 29 N.J.Law 353.
51 C.J. p. 654 note 52.

21. Va.—Tazewell County v. Norfolk, etc, R. Co., 91 S.E. 124, 119 Va. 763.
51 C.J. p. 654 note 53.

22. Pa.—Appeal of Pennsylvania R. Co, 18 A. 522, 128 Pa. 509
51 C.J. p. 655 note 54.

23. Pa.—Appeal of Pennsylvania R. Co., supra
51 C.J. p. 655 note 55.

24. Fla.—Palatka, etc., R. Co. v. State, 3 So. 158, 23 Fla. 546, 11 Am.S.R. 395

25. Fla.—Palatka, etc., R. Co. v. State, supra.
51 C.J. p. 655 note 58.

26. N.Y.—Schermerhorn v. Mt. McGregor R. Co., 23 N.Y.S. 417, 69 Hun 512.
Pa.—Appeal of Pennsylvania R. Co., 18 A. 522, 128 Pa. 509

27. Mass.—Newburyport Turnp. Corp. v. Eastern R. Co, 23 Pick. 326.

28. Mass.—Commonwealth v. Hartford, etc., R. Co., 14 Gray 379.

29. Fla.—Palatka, etc, R. Co. v. State, 3 So. 158, 23 Fla. 546, 11 Am. S.R. 395.
Me.—Veazie v. Penobscot R. Co, 49 Me. 119.

30. N.Y.—Conklin v. New York, etc., R. Co., 6 N.E. 663, 102 N.Y. 107.

31. N.J.—State v. New Jersey Cent. R. Co, 32 N.J.Law 220

32. Iowa.—Gates v. Chicago, etc, R. Co, 48 N.W. 1040, 82 Iowa 518.

33. Mass.—Roxbury v. Boston, etc, R. Corp, 6 Cush. 424.
N.J.—Montclair Tp. v. New York, etc, R. Co., 18 A. 242, 45 N.J.Eq. 436

34. Iowa.—Ft. Dodge v. Minneapolis, etc., R. Co., 54 N.W. 243, 87 Iowa 389.
51 C.J. p. 655 note 70.

35. Pa.—South Waverly v. New York, etc, R. Co, 11 A. 245, 7 Pa. Cas. 386.
51 C.J. p. 655 note 71.

36. Mich.—Ecorse Tp. v. Detroit, etc, R. Co., 119 N.W. 575, 155 Mich. 347.

37. Pa.—Schwenk v. Pennsylvania Schuylkill Valley R. Co., 2 Chest. Co. 177.

where the statute provides that grade crossings shall be avoided whenever practicable to do so, and the proper authorities have not passed on and determined the character of crossing,[38] or from excessive use of its tracks,[39] or from laying such additional tracks as to destroy the street as a public highway,[40] or where, although having the power to cross at grade, it shows its intention not to comply with the laws relative to safeguards for grade crossings,[41] or where the only reason for constructing a new track at grade is a saving of some slight expense,[42] or from making an unauthorized change in the grade of a street at a crossing which will deprive the public of its convenient use.[43]

The court may not enjoin the construction of a crossing which the railroad is authorized to make.[44] No injunction will be granted where the mode of crossing does no serious public injury,[45] and construction of a grade crossing will not be enjoined merely because of some increase in danger.[46] Where no relief was asked against existing tracks, the construction of additional tracks will not be enjoined unless they further obstruct the highway.[47] A court of equity may compel a railroad to provide an equally convenient road after changing location, even though no contractual relation existed;[48] and a railroad having acted ex parte under the statute authorizing it to change the location of a road has the burden of showing that it performed its duties under that statute.[49]

When it is sought to enjoin the construction of a bridge over a turnpike on the objection that it is too low, the court may order the street to be lowered where this could be done at less than the cost of raising the bridge.[50] When an injunction is sought to restrain the obstruction of a highway by a grade crossing, the railroad, having alleged compliance with a statutory provision with respect to grade crossings, has the burden of proving compliance.[51] When a court decrees that a railroad either refrain from obstructing a highway or comply with the statute by constructing a grade crossing, in order to satisfy the decree it is only necessary for the railroad to show compliance with the statute.[52] An owner of private property will not be granted an injunction restraining construction across a street where he has an adequate remedy at law for any damage to his property.[53] An individual who suffers a peculiar injury to his property, in addition to the injuries suffered by the public generally, may enjoin the obstruction of a highway.[54]

Construction by county or municipal authorities. The county or municipal authorities may, on a failure or refusal of the railroad company to do so, do the work and recover from the railroad company.[55] Where a statute imperatively requires a railroad company to construct and maintain crossings where the railroad crosses a highway, the performance of such duty is not dependent on any notice from the public authorities in charge of highways,[56] but a notice to the railroad company is necessary in order to authorize the public authorities to do the work on a failure of the railroad company to do so and to recover therefor from the railroad company.[57] Where circumstances make it necessary that a road district construct a crossing, such district is not a mere volunteer as affecting its right to recover the cost from the railroad.[58] The existence of this right does not pre-

38. N.Y.—Bolivar v Pittsburg, etc, R. Co, 84 N Y S 678, 88 App Div 387, affirmed 71 N E 1141, 179 N. Y. 523

39. N J.—Newark v Erie R. Co, 71 A. 620, 75 N J.Eq. 20, reversed on other grounds 74 A. 505, 76 N J Eq. 317.

40. N.J.—Newark v. Delaware, etc, R Co., 7 A. 123, 42 N J Eq. 196.

41. N.J.—Hudson County v. New Jersey Cent R. Co, 59 A. 303, 68 N J.Eq. 500, affirmed 65 A. 1117, 70 N J.Eq 806

42. Pa.—Norristown v Philadelphia, etc., R. Co, 10 Pa Dist 539, 17 Montg.Co. 72.

43. N.J.—Jersey City v. New Jersey Cent. R. Co., 2 A. 262, 40 N. J Eq. 417.
51 C.J. p 655 note 79.

44. Pa.—Williamsport v. Pennsylvania R. Co., 22 Pa.Dist. 362.

45. N J.—Raritan Tp v. Port Reading R. Co, 23 A. 127, 49 N.J.Eq. 11.

46. Pa.—Abington Tp. v. Philadelphia, etc, R. Co., 10 Pa Dist. 719.

47. N.J.—Hudson County v. Delaware, etc, R Co, 91 A. 433, 83 N J.Eq 589.
51 C.J p 656 note 86

48. Va.—Tazewell County v. Norfolk, etc, R. Co., 91 S.E. 124, 119 Va. 763.

49. Va.—Tazewell County v. Norfolk, etc., R Co., supra.
51 C J. p 656 note 88

50. Ohio.—Wooster Turnp. Co. v Cincinnati, etc., R. Co., 15 Ohio Cir.Ct 268, 8 Ohio Cir Dec. 269.

51. Ark.—St. Louis, etc, R. Co. v. Taylor, 196 S W 930, 130 Ark. 64

52. Ark.—St. Louis, etc., R. Co. v. Taylor, supra.

53. Ky.—Husbands v. Paducah, etc., R. Co, 195 S W 831, 176 Ky. 290.
51 C J. p 656 note 92

54. Ark.—St Louis, etc., R Co. v Taylor, 196 S.W 930, 130 Ark. 64

55. Ark.—St Louis-San Francisco R Co v Little River County Road Impr. Dist. No. 7, 4 S.W.2d 505, 176 Ark. 731.
Tex.—Galveston, etc., R. Co v. Baudat, 45 S W. 939, 18 Tex.Civ.App. 595.

56. Ark.—St. Louis-San Francisco R. Co v. Little River County Road Impr Dist. No. 7, 4 S.W.2d 505, 176 Ark. 731.
51 C J. p 656 note 95.

57. Mo.—Henry v. Wabash Western R Co., 44 Mo.App. 100.
51 C J. p 656 note 96.

58. Ark.—Little River County Road Impr. Dist. No. 7 v. St. Louis-San Francisco R Co., 288 S.W. 884, 172 Ark. 368.

clude the right to maintain a suit or proceeding to compel the railroad company to perform such duty,[59] and the cost of construction of a crossing may be recovered even though a remedy exists by mandamus[60]

Remedies of railroad. Where a city has the right to do so, a court will not generally interfere with its actions to compel the railroad to conform to the street grade.[61] A change in the location of a crossing will not be enjoined at the instance of the railroad where the change is not detrimental to the railroad.[62] Where interference with construction of a bridge which the railroad has a right to build will work irreparable injury, the railroad is entitled to an injunction against interference with its work.[63] When a crossing is clearly dangerous and a nuisance, a railroad cannot enjoin the municipality from removing it as a nuisance.[64]

§ 147. —— Penalty for Failure to Construct Crossing

Under some statutes, provision is made for a penalty for failure to construct a crossing within a specified time after the construction of the railroad.

Where the statutes provide for a penalty for failure to construct a crossing over a highway within a certain time after the railroad is constructed, the railroad is constructed, within the meaning of such a statute, when its track is laid at the crossing and ready for its trains to pass over it.[65] The penalty may be recovered without further condemnation proceedings when such proceedings were had before the building of the railroad, although the highway was not built until after the railroad[66] An action to recover a penalty payable to the county should be brought in the name of the state for the use of the county,[67] and not for the use of the road district in which the highway is located.[68] Where the penalty is designed to prevent temporary obstruction of a public way, it may not be recovered where no public way has ever been opened at the point where the crossing is to be built[69]

§ 148. Restoring and Maintaining Highway

It is the duty of a railroad company to keep and maintain crossings in a safe and suitable state of repair.

It is the duty of a railroad company to keep and maintain crossings in a safe and suitable state of repair,[70] including not only the crossing of the tracks, but also the approaches thereto.[71] This is a common-law duty,[72] although frequently imposed by statute,[73] and a statute providing merely that the

59. Mass.—Roxbury v. Boston, etc., R Corp, 6 Cush. 424.
N.J.—Montclair Tp. v New York, etc, R Co, 18 A. 242, 45 N J Eq 436

60. Ark.—Little River County Road Impr Dist. No 7 v St Louis-San Francisco R. Co, 288 S.W 884, 172 Ark 368.

61. Neb.—Omaha, etc., R. Co. v Lincoln, 149 N W. 319, 97 Neb. 122.
51 C J p 656 note 1.

62. Ga.—Seaboard Air-Line Ry. Co. v. Camden County, 159 S.E. 668, 173 Ga. 93

63. N J.—United New Jersey R., etc., Co. v. Hudson, 104 A 98, 89 N J Eq. 95, affirmed 105 A. 895, 89 N J Eq. 580
51 C J. p 656 note 2.

64. N Y.—New York, etc., R Co. v New York, 154 N.Y.S. 141, 90 Misc 178.

65. Ark.—St Louis, etc., R Co v. State, 114 S W. 703, 88 Ark 338

66. Ark.—St Louis, etc, R Co v. State, 109 S W 545, 85 Ark 561

67. Ark.—St Louis, etc., R. Co. v. State, supra.

68. Ark.—St. Louis, etc., R. Co. v. State, supra.

69. S C.—Pickens County v. Southern R. Co, 127 S E. 365, 131 S C 18.

70. Ga.—Atlantic Coast Line R. Co. v. Donalsonville Grain & Elevator Co, 191 S E. 87, 184 Ga. 291
51 C J p 659 note 54.

Duty to keep clean

Railroad commission's order requiring railroad to "maintain" certain portion of viaduct was held to require keeping such portion in proper repair, but did not include duty of keeping roadway clean and free of foreign substances, such duty resting on city.—Bosqui v. City of San Bernardino, 43 P.2d 547, 2 Cal 2d 747.

Snow and ice

Statute imposes no duty on railroad to keep its crossing sidewalks free from snow and ice. Railroad Law, § 21.—Ego v Erie R Co, 252 N Y.S. 769, 234 App.Div. 649.

Trunk highway system

Constitution creating state trunk highway system and statute carrying system into effect was held not to relieve railroads from statutory burden of properly maintaining trunk highway crossing approaches.—Engstrom v Duluth, M. & N Ry. Co, 251 N W 134, 190 Minn 208

71. Wash.—Bullock v. Yakima Valley Transp Co, 184 P. 641, 108 Wash 413.
51 C J. p 659 note 55.

72. Wash.—Bullock v. Yakima Valley Transp. Co., supra.
51 C.J. p 659 note 56

73. Ga.—Atlantic Coast Line R Co v. Donalsonville Grain & Elevator Co, 191 S E 87, 184 Ga. 291.
Ind.—State v Indiana R. R., 2 N E 2d 404, 210 Ind 222
51 C.J. p 659 note 57.

Full width

Statutory requirement that railroad repair crossing "to full width of county road" is to be reasonably construed in light of purpose of statute, and requirement refers to full width of generally traveled way; if county widened right of way after construction of railroad crossing, railroad must likewise increase width of its right of way; but county authorities may not relieve railroad of duty to maintain crossing to full width of road, by constructing approaches of less than statutory width.—Norfolk & W Ry. Co. v. Faris, 157 S E 819, 156 Va. 205.

Implied repeal

(1) Statute requiring highway commission to take over duties of county or township in maintaining highways designated as state detours was held not to relieve railroads of duty of maintaining crossings imposed on them by prior statute, as against contention that subsequent statute repealed by implication statute imposing duty.—Chicago, I. & L Ry Co v. Downey, 5 N E 2d 656, 103 Ind App 672

(2) Statute providing for mainte-

road be restored is not to be construed as abridging the common-law duty of maintaining the crossing.[74] These statutes, being police regulations, apply to railroads built before, as well as after, their passage.[75] While at common law the railroad was obliged to maintain approaches outside its right of way,[76] in some jurisdictions the statutes have been held not to require such maintenance.[77]

A continuing obligation to keep the crossing in repair is imposed by a statutory or charter provision that it shall be so constructed as not to obstruct the safe and convenient use of the highway;[78] that the highway shall be put in such condition and state of repair as not to impair its proper use;[79] or that the highway shall be restored to its former condition or such as not to have impaired its usefulness.[80] The structure of the crossing, whether of earth, wood, or other material which the existence of the railroad renders necessary, must be maintained and kept in repair by the railroad company;[81] but the duty to repair applies only to what is properly the crossing and approaches thereto, which do not necessarily include the entire width of the street or highway or right of way of the railroad.[82] It is not the duty of the railroad company to keep in repair as a part of the crossing a part of the highway which is not within the limits of the crossing,[83] but, where a railroad company constructs two parallel tracks close together across a highway, it must keep in repair the space between the two lines of tracks.[84]

Sidewalks. The common-law duty of maintaining a crossing requires the maintenance of sidewalks forming a part of the crossing or approaches thereto,[85] but a sidewalk which is no part of the crossing or approach thereto need not be maintained, even though within the limits of the railroad right of way.[86]

§ 149. —— Duty to Restore Highway

Where a railroad crosses a highway, it is the duty of the railroad company to restore the highway to its former condition or such condition as not unnecessarily to impair its usefulness.

Where a railroad crosses a highway, it is the duty of the railroad company to restore the highway to its former condition or such condition as not unnecessarily to impair its usefulness.[87] This is a common-law duty,[88] but is very generally imposed on railroad companies by statutory or charter provisions.[89] Such a statute contemplates restoration with respect to the new dangers rather than the old conditions.[90] Such statutes are a valid exercise of the power of the state to prescribe the conditions on which railroads acquire their right of way.[91] The duty of restoring the highway applies to any and all cases where the railroad crosses a highway, whether at grade or otherwise,[92]

nance of railroad grade crossings in certain manner was held not repealed by statute authorizing highway commission to compel railroads to improve crossings in manner approved by commission, and, until highway commission does undertake to order some change in particular crossing, statute providing for maintenance of grade crossings is in effect—Pagan v. Lowden, 66 P.2d 567, 145 Kan. 513.

74. Mich.—Maltby v. Chicago, etc., R Co, 17 N.W. 717, 52 Mich 108.
51 C J p 660 note 58.

75. Va—Norfolk & W. Ry. Co v Faris, 157 S E. 819, 156 Va. 205
51 C J. p 660 note 59

76. Ky—Fulton County Fiscal Ct v. Nashville, etc, R Co, 261 S W 617, 202 Ky. 846.

77. Ky—Fulton County Fiscal Ct v Nashville, etc, R Co, supra—Louisville, etc, R Co v Commonwealth, 149 S W 898, 149 Ky 459.

78. Me—Wellcome v. Leeds, 51 Me 313.
Vt.—Clarendon v Rutland R Co., 52 A. 1057, 75 Vt 6.

79. Minn—Wayzata v Great Northern R. Co., 52 N W. 913, 50 Minn 438.

80. N Y—New York Cent. R. Co v State, 287 N Y S. 850, 247 App Div 421.
51 C J p 660 note 64.

81. Iowa—Farley v. Chicago, etc, R Co, 42 Iowa 234.

82. Ill.—Bloomington v Illinois Cent R Co, 39 N E. 478, 154 Ill 539.
51 C J. p 660 note 66.

83. Ga—Brookins v. Central R, etc, Co, 48 Ga. 523—Gulf, etc, R. Co v Sneed, 36 So. 261, 84 Miss. 252.

84. Mass—Scanlan v. Boston, 2 N. E 787, 140 Mass 84.

85. Wash—Bullock v Yakima Valley Transp. Co., 184 P. 641, 108 Wash 413
51 C J. p 660 note 69.

86. Ill—Bloomington v. Illinois Cent. R Co, 39 N E 478, 154 Ill 539

87. Tex—**Corpus Juris cited in** Lee v Gulf, C & S. F. Ry. Co., Civ. App, 157 S.W.2d 424, 426.
51 C J p 657 note 10.

88. Ky—Chesapeake & O. Ry. Co v. City of Bellevue, 38 S.W 2d 943, 239 Ky 61
Mo—Albright v. Louisiana & M R R. Co, 195 S W.2d 648, 355 Mo. 211.
Tex.—**Corpus Juris cited in** Lee v. Gulf, C. & S F Ry. Co, Civ App, 157 S W 2d 424, 426
51 C J p 657 note 11.

89. Ind—Cincinnati, etc, R Co. v. Connersville, 83 N E 503, 170 Ind. 316.
Ky—Chesapeake & O Ry Co. v City of Bellevue, 38 S W 2d 943, 239 Ky. 61.
Wis.—Town of Janesville v Chicago & N W Ry. Co., 46 N W 2d 847, 258 Wis, 547.
51 C.J p 657 note 12.
Declaratory of common law
U.S.—In re Madison Rys. Co, C.C. A Wis, 115 F 2d 586

90. N.Y—Allen v. Buffalo, etc, R Co., 45 N E. 845, 151 N Y. 434

91. Ind—New York, etc, R Co v. Rhodes, 86 N E 840, 171 Ind. 521, 24 L.R A.,N S, 1225.

92. Ala.—Tuscaloosa County v. Alabama Great Southern R. Co, 162 So 681, 230 Ala. 599
Ky—Chesapeake & O. Ry Co v City of Bellevue, 38 S W 2d 943, 239 Ky 61
Wis.—Town of Janesville v. Chicago

and is a condition inseparable from the right to cross,[93] or the right to alter the grade of a highway,[94] or to change the location of the highway where such change is authorized,[95] but is not a condition precedent to the right to cross it with the railroad.[96] Where in crossing it is necessary to reconstruct the highway, the company will not be required to complete the reconstructed way before it occupies the bed of the original way,[97] but until the company has proceeded in accordance with the statutory or charter provisions, to substitute the new way constructed by it for the old, the latter will be regarded as still existing.[98]

The duty of restoring a highway to a proper condition is imperative and it not discharged merely by the exercise of ordinary care.[99] The duty to restore the highway subsists and remains until such condition is fully performed,[1] and it does not mean a temporary, but a permanent, restoration, which continues as long as the highway exists and the company enjoys the right of crossing.[2] So, also, if changes are made by the railroad company, or occur in consequence of its operation, which affect the safety of the highway, the duty to preserve its usefulness attaches and remains until performed,[3] as where the railroad company subsequently changes the grade of its road at an existing crossing.[4] The statutory provisions have been held to apply where a road is crossed by an excavation and before any track is laid across such road.[5]

A public footpath falls within these rules as to restoration.[6]

§ 150. —— Mode and Sufficiency of Restoration

The duty to restore a street or highway crossed by a railroad requires that the street or highway be restored so that its use will not be materially or unnecessarily impaired or interfered with.

Statutes requiring the restoration of streets and highways to their former state or such state as not to impair their usefulness are to be given a reasonable construction,[7] and it is not necessary that the highway should be restored to its actual former condition, which would be practically impossible,[8] or that its use should not in any degree be impaired, since some increased danger or inconvenience to travel is necessarily incident to all crossings;[9] but the highway must be restored so that its use will not be materially or unnecessarily impaired or interfered with.[10] The duty to restore includes the doing of whatever is necessary to be done in order to restore the highway to such condition.[11] Whether the railroad company has fully and properly performed its duty in this respect must necessarily depend largely on the circumstances of the particular case,[12] and is ordinarily a question of fact for the jury in actions based on an alleged breach of such duty.[13]

Where a railroad crosses a city street, it must

& N. W. Ry. Co., 46 N.W.2d 847, 258 Wis. 547.
51 C.J. p 657 note 15

Subway or viaduct

Wis.—Town of Janesville v. Chicago & N. W. Ry. Co., supra.

93. Wis.—Oshkosh v. Milwaukee, etc., R. Co., 43 N.W. 489, 74 Wis. 534, 17 Am.S.R. 175.
51 C.J. p 657 note 16.

94. Conn.—Hamden v. New Haven, etc., Co., 27 Conn. 158.

95. N.Y.—Allen v. Buffalo, etc., R. Co., 45 N.E. 845, 151 N.Y. 434
51 C.J. p 657 note 18.

96. Vt.—Richardson v. Vermont Cent. R. Co., 25 Vt. 465, 60 Am.D 283.

97. Pa.—Ridley Tp. v. Baltimore, etc., R. Co., 2 Lanc.L.Rev. 375.

98. Vt.—Barber v. Essex, 27 Vt. 62.

99. Tex.—International, etc., R. Co. v. Butcher, Civ.App., 81 S.W. 819, reversed on other grounds 84 S.W. 1052, 98 Tex. 462.

1. Mich.—Thayer v. Flint, etc., R. Co., 53 N.W. 216, 93 Mich. 150.
51 C.J. p 658 note 23

2. Tenn.—Dyer County v. Paducah, etc., R. Co., 11 S.W. 943, 87 Tenn. 712.
51 C.J. p 658 note 25.

3. N.Y.—Allen v. Buffalo, etc., R. Co., 45 N.E. 845, 151 N.Y. 434.

Bridge destroyed by fire

Where railroad company constructed its railroad across the road by cutting a deep cut through the road, and it restored road by building a bridge over railroad tracks so that highway was in such condition that its usefulness was not materially impaired and so that public travel on highway passed above railroad traffic, and the bridge was destroyed by fire, and successor railroad refused to reconstruct the bridge, town was entitled to a mandatory injunction to compel successor railroad to reconstruct the bridge.—Town of Janesville v. Chicago & N. W. Ry. Co., 46 N.W.2d 847, 258 Wis. 547.

4. N.Y.—People v. Delaware, etc., R. Co., 69 N.E. 651, 177 N.Y. 337

Change after construction generally see infra § 157.

5. Ga.—Mixon v. Savannah, etc., R. Co., 111 S.E. 197, 152 Ga. 670, answers to certified questions conformed to 111 S.E. 690, 28 Ga.App. 390.

6. Va.—Norfolk, etc., R. Co. v. Bristol, 83 S.E. 421, 116 Va. 955.

7. Minn.—State v. St. Paul, etc., R. Co., 28 N.W. 3, 35 Minn. 131, 59 Am.R. 313.

Va.—Charlottesville v. Southern R. Co., 34 S.E. 98, 97 Va. 428.

8. Kan.—Atchison, etc., R. Co. v. Townsend, 81 P. 205, 71 Kan. 524
51 C.J. p 658 note 32.

9. N.Y.—People v. New York Cent., etc., R. Co., 74 N.Y. 302.
51 C.J. p 658 note 33

10. Minn.—State v. St. Paul, etc., R. Co., 28 N.W. 3, 35 Minn. 131, 59 Am.R. 313.
51 C.J. p 658 note 34

11. Ky.—Chesapeake & O. Ry. Co. v. City of Bellevue, 38 S.W.2d 943, 239 Ky. 61.
51 C.J. p 658 note 35.

12. N.J.—South Amboy v. Pennsylvania R. Co., 73 A. 852, 76 N.J.Eq. 57, reversed on other grounds 76 A. 1038, 77 N.J.Eq. 242.
51 C.J. p 658 note 36.

13. Tex.—Horton v. Texas Midland R. Co., Civ.App., 171 S.W. 1023.
51 C.J. p 658 note 37.

be restored and made passable for the full width of the street,[14] and the same has been held in respect of an ordinary highway.[15] The duty of restoring the highway carries with it the right to exercise any powers conferred on the railroad company by statute which are necessary therefor;[16] and it has been held that for the purpose of restoration the railroad company may change the grade of a highway,[17] or change the location of the highway,[18] and acquire by purchase or condemnation the lands necessary for such change.[19] The mode of restoration should ordinarily be left in the first instance to the discretion of the railroad company,[20] and, in the absence of statutes, it may use its discretion as to the material it will use,[21] but it has no discretion as to whether it will restore the highway.[22] The duty to restore is not performed by a restoration which, although practicable, seriously affects the use of the highway, when another method of restoration would restore the use wholly unimpaired.[23]

After change in location of highway. Where, in constructing a crossing, it is necessary to change the location of a highway, it is not required that the new road be better than the old road,[24] but the new way must be so located and constructed as to furnish as safe and convenient a substitute for the original way as the circumstances will permit.[25] If the new road is dangerous because it is near a precipice, the railroad may be required to provide a guard or barrier.[26] It has been held that the railroad need not maintain the substitute road after it has been constructed.[27]

§ 151. —— Bridges and Approaches Thereto

If the proper restoration of a street or highway so as not to impair its usefulness demands a crossing by means of a bridge or viaduct, it is the duty of the railroad company to construct and maintain such a crossing.

While a railroad need not construct a bridge for a crossing unless it is necessary to secure the proper restoration of the highway,[28] if the proper restoration of a street or highway so as not to impair its usefulness demands a crossing by means of a bridge or viaduct, it is the duty of the railroad company to provide such a crossing[29] with the necessary excavations, embankments, and approaches thereto,[30] and it is the continuing duty of the railroad,[31] existing at common law,[32] but in many jurisdictions imposed by statute,[33] or in some jurisdictions in-

14. Ind.—Indianapolis, etc., R. Co v. State, 37 Ind 489
51 C.J. p 658 note 38

15. Ind.—Lake Shore, etc., R. Co v McIntosh, 38 N.E. 476, 140 Ind 261.
51 C.J. p 658 note 39

16. N.Y.—People v. Dutchess, etc., R Co, 58 N.Y. 152

17. N.Y.—Rauenstein v. New York, etc, R Co., 32 N.E. 1047, 136 N. Y. 528, 18 L.R.A 768—Uline v. New York Cent, etc., R Co, 4 N.E. 536, 101 N.Y. 98, 54 Am R. 661.

18. N.Y.—Post v. West Shore R Co, 26 N.E 7, 123 N.Y. 580.
51 C.J. p 659 note 42.

19. N.Y.—Post v. West Shore R. Co, supra.
W.Va.—Davis v. Twin Mountain, etc., R Co, 87 S.E. 544, 77 W.Va. 400

20. N.Y.—People v. Delaware, etc, R. Co, 69 N.E. 651, 177 N.Y. 337—Post v. West Shore R Co., 26 N E 7, 123 N.Y 580.

21. N.C.—State v. Roanoke, R, etc., Co., 13 S.E. 719, 109 N.C. 860.

22. N.Y.—People v. Dutchess, etc., R. Co, 58 N.Y 152.

23. N.Y.—People v. Delaware, etc, Co., 69 N.E. 651, 177 N.Y. 337.

24. W.Va.—Wetzel County Ct. v. Baltimore, etc., R. Co, 87 S.E. 884, 77 W.Va. 538, L.R.A 1917C 967.

25. Pa.—Commonwealth v. Delaware, etc., R. Co, 64 A. 417, 215 Pa. 149
51 C.J. p 659 note 50

26. W.Va.—Wetzel County Ct. v Baltimore, etc, R Co, 87 S.E 884, 77 W.Va 538, L.R.A.1917C 967.

27. W.Va.—Wetzel County Ct. v. Baltimore, etc., R Co., supra.

28. Neb.—Sarpy County v. Omaha, etc, R. Co, 218 N.W. 403, 116 Neb. 516.

"Necessary"

Under statute requiring railway company to erect and keep in order bridges over highways at such points as bridges may be necessary to cross railway, railway's duty was not limited to erection and maintenance of bridges only at points where it was impossible otherwise to cross tracks. —Alabama & V. Ry. Co v. Graham, 157 So. 241, 171 Miss. 695.

Bridge under or over way

A "bridge under a public way," within statute requiring newly built railroad to maintain bridges which it is required to construct under a public way, is a bridge for travelers to use as part of a highway crossing railroad over level thereof, and a "bridge over a public way" means a bridge on which railroad runs above highway.—Boston & M. R. R. v. Worcester County Com'rs, 15 N.E.2d 455, 300 Mass. 415.

29. Mass.—Boston & M. R. R. v. Worcester County Com'rs, supra.
Miss.—**Corpus Juris cited in Alabama & V Ry. Co v Graham, 157 So. 241, 245, 171 Miss. 695.**
51 C.J. p 660 note 72.

Police power

State, under police power, may require railroad which crosses highway to build and maintain bridge — Connersville Hydraulic Co. v. City of Connersville, 173 N.E 641, 95 Ind. App 234.

Underpass held necessary

Ky.—Chesapeake & O. Ry Co. v. City of Bellevue, 38 S.W.2d 948, 239 Ky. 61.

30. Minn.—State v. St. Paul, etc, R. Co., 28 N.W. 3, 35 Minn. 131, 59 Am.R. 313.
Okl.—Chicago, etc, R Co. v. Taylor, 192 P. 349, 79 Okl. 142.

31. Miss.—**Corpus Juris cited in Alabama & V. Ry Co v. Graham, 157 So. 241, 245, 171 Miss. 695.**
51 C.J. p 660 note 74.

32. Miss.—**Corpus Juris cited in Alabama & V Ry. Co v. Graham, 157 So. 241, 245, 171 Miss 695**
Tenn.—Louisville & N. R. v. Evins, 13 Tenn App. 57.
51 C.J p 660 note 75.

33. Miss.—**Corpus Juris cited in Alabama & V. Ry. Co. v. Graham, 157 So 241, 245, 171 Miss. 695.**
51 C.J p 660 note 76.

County assuming part of cost

Fact that county assumed part of cost of railway bridge over highway, and burden of erecting and maintaining bridge and approaches

corporated as a provision in the charter,[34] subsequently to keep the bridge in repair,[35] and also to keep in repair the approaches thereto,[36] even though the bridge was formerly built and maintained by the municipality.[37]

The duty of making repairs applies to the whole structure built by the railroad company for the purpose of crossing,[38] although extending beyond the limits of the right of way,[39] and applies not only to the substructure or support, but also to the surface or roadway on the bridge or approaches,[40] unless it is otherwise provided by statute;[41] and, where the railroad crosses below the grade of the highway in a cut, the duty extends to the entire width of the excavation made for the railroad.[42]

The duty of a railroad company with respect to the maintenance and repair of bridges at crossings is not, however, any greater than that of the public authorities charged with the same duty as to other bridges along the highway,[43] and it need not keep in repair any portion of the street or highway beyond the limits of the approaches proper;[44] but a bridge which is a necessary part of the crossing or approach must be kept in repair by the railroad company.[45] It has been held that, in repairing a bridge, the railroad need not do more than bring the bridge to the standard of efficiency it had when constructed, and it need not strengthen it to meet increased traffic conditions.[46]

thereto, did not relieve railway of statutory duty of maintaining bridge and approaches in good order and in condition reasonably safe for ordinary uses of public—Alabama & V Ry. Co v. Graham, 157 So. 241, 171 Miss. 695.

Subsequent statutes

Statutory requirement that railroads shall restore highways and streets intersected by rights of way has been limited by subsequent provision that roadway over bridge and approaches thereto shall be maintained by municipal or state authority and by provision that alterations can be made only pursuant to order of the commission, but original statutory requirement is a vital part of the statute and, with respect to bridges, there has been little change in view of provision that, when a highway crosses tracks by overhead bridge, framework of bridge and abutments shall be maintained by railroad.—Sturman v. New York Cent. R. Co., 19 N.E.2d 679, 280 N. Y. 57, reargument denied 21 N.E.2d 197, 280 N.Y. 688.

34. Vt.—Clarendon v. Rutland R. Co., 52 A. 1057, 75 Vt. 6.

35. Miss.—**Corpus Juris cited in** Alabama & V. Ry. Co v. Graham, 157 So. 241, 245, 171 Miss. 695.
51 C.J. p 661 note 78.

Constitutional limitation

The power to require railroad to maintain bridges crossing highways is subject to constitutional limitation that it may not be exerted unreasonably—Pennsylvania R. Co v. Pennsylvania Public Utility Commission, 35 A.2d 588, 154 Pa.Super. 86

Duty to replace bridge

The duty of railroad to maintain and keep bridge in repair included duty to replace bridge when it ceased to be usable—Boston & M. R. R v. Worcester County Com'rs, 15 N.E.2d 455, 300 Mass 415—Boston & M. R. R. v. County Commissioners of Middlesex, 131 N.E. 283, 239 Mass. 127.

Agreement for joint operation

A railroad, under police power, may be required to maintain bridges over streets notwithstanding any agreement with another railroad for joint operation.—Pennsylvania R. Co. v. Pennsylvania Public Utility Commission, 35 A.2d 588, 154 Pa.Super. 86.

Transfer of jurisdiction over highways

Amendment to constitution authorizing transfer of exclusive jurisdiction over state highways to state highway commission, and statutes, giving state highway commission such jurisdiction and charging it with duty of maintaining such highways, did not affect statutory duty of railway of maintaining bridges over railways and approaches thereto—Alabama & V Ry. Co. v Graham, 157 So. 241, 171 Miss. 195.

Duty enforceable by commission

N.J.—Hudson County v. Board of Public Utility Com'rs, 8 A.2d 556, 123 N.J.Law 204, affirmed 12 A. 2d 878, 124 N.J.Law 563, and 12 A. 2d 879, 124 N.J.Law 564—Erie R. Co. v. Board of Public Utility Com'rs, 153 A. 268, 107 N.J.Law 409.

36. Miss.—**Corpus Juris cited in** Alabama & V. Ry Co v Graham, 157 So 241, 245, 171 Miss. 695.
51 C.J. p 661 note 79.

37. Ky.—Illinois Cent. R. Co. v. Commonwealth, 129 S.W. 94, 138 Ky. 742.

38. Mass.—White v. Quincy, 97 Mass. 430.
51 C.J. p 661 note 81.

39. Mass.—White v. Quincy, supra.

40. Ill.—McFarlane v. Chicago, 57 N.E. 12, 185 Ill. 242.
51 C.J. p 661 note 83.

41. N.Y.—Sturman v. New York Cent. R. Co, 19 N.E.2d 679, 280 N Y. 57.

Tex.—Hays v. Texarkana & Fort Smith Ry. Co., Civ.App., 87 S.W. 2d 1106, error dismissed.
51 C.J. p 661 note 84.

"Framework;" "roadway"

(1) Under statute requiring the "framework" and "abutments" of an overhead crossing to be maintained by the railroad and the "roadway" and approaches by the county, the word "framework" is used in the statute in contradistinction to the term "roadway" which is to be placed on the framework and the "abutments," and, hence, everything above the framework and abutments is a part of the roadway which would include the flooring and everything above that, as to which the duty to maintain would be on the county and not on the railroad—Pridmore v. Northern Pac. R. Co., 186 P. 862, 109 Wash 305.

(2) Railroads were held obligated to maintain and repair framework and abutments, but not roadways, of highway bridges passing over city railroad property used both for yard purposes and for operation of main line trains.—City of New York v Long Island R. Co., 5 N.E.2d 380, 272 N.Y. 658.

42. Mass.—Titcomb v. Fitchburg R. Co., 12 Allen 254

43. Pa.—Conshohocken R Co. v. Pennsylvania R. Co, 15 Pa.Co. 445.
Tenn.—Louisville & N R. Co. v Evins, 13 Tenn.App. 57.

44. Minn.—In re Morrison County Trunk Highway No. 37 Separation of Grades, 223 N.W. 915, 176 Minn. 501.
51 C.J. p 662 note 87.

45. Ala.—Southern R. Co. v. Morris, 42 So. 19, 149 Ala 672.
51 C.J. p 662 note 88.

46. N.Y.—Matter of Morris Ave Bridge, 174 N.Y.S. 682, 105 Misc 659
Change after construction see infra § 157.

Where a railroad is carried over the highway by means of a bridge, it is not the duty of the railroad company to keep in repair that portion of the highway beneath the bridge,[47] although the contrary has been held;[48] and in some jurisdictions the statutes have been construed to require this to be done.[49] Where the bridge was originally constructed at a proper height above the level of the highway, the company is not required to keep the space the same by preventing any raise in the level of the highway or by raising the bridge in case the level of the highway is raised by natural causes or the action of the public authorities in repairing it.[50] Where a highway bridge over a railroad has become out of repair and dangerous, the railroad company has a right to close it to prevent persons going thereon, although it is a part of the public highway;[51] but, where a railroad company in making necessary repairs on a bridge over its tracks closes the bridge and opens a temporary roadway across its tracks at a different point, it must make the temporary roadway reasonably safe.[52] Where a bridge is already in existence, elevation of it by a railroad which constructs its tracks under it imposes no duty to repair it.[53] Where two or more railroads are liable for the repair of a viaduct, the cost of repairs will be apportioned between them.[54]

Highway bridges over streams. A railroad company is not required to bridge a stream where the necessity for the bridge as a part of the highway is not caused or affected by the existence of the railroad,[55] although it is within the limits of the railroad right of way.[56] It is not the duty of a railroad company to keep in repair a highway bridge across a stream outside of the limits of its right of way,[57] and, where a railroad company in crossing changes the location of a highway, it is not required to keep in repair a bridge which it constructs across a stream in building a new way, and which is outside of the right of way and not at the crossing,[58] although as to this the contrary has been held.[59] The company is not required to keep in repair bridges over streams or ditches, although within the limits of the right of way, if so far removed from the crossing as not to be included within the approaches thereto,[60] or the necessity for which is in no way caused or affected by the construction of the railroad;[61] but, if by construction of a railroad a bridge over a stream is made necessary as an approach to a crossing, it must be constructed and maintained by the railroad.[62]

Street railroads, whose tracks in a street do not constitute an additional servitude, need not contribute to the expense of a highway bridge over a railroad.[63] A street railway which passes over a bridge already constructed and sufficient for ordinary use imposes an additional servitude on the bridge so that it must contribute to the maintenance thereof.[64]

Lights for streets under viaducts. A statute requiring a railroad to light streets under its viaducts where such viaducts darken the streets has been held to be a valid exercise of police power.[65] When an ordinance requiring lights under a viaduct has been held invalid as not within the police power of

47. Conn.—Gray v. Danbury, 10 A. 198, 54 Conn 574.
Ill.—People v Illinois Cent R. Co., 85 N.E. 606, 235 Ill 374, 18 L.R.A., N.S., 915.

Grade of street
Under the statute providing that, when a public way passes under a railroad, the bridge and its abutments shall be kept and maintained by the railroad company, and the public way and its approaches be maintained and kept in repair by the municipality in which they are situated, a municipality has the duty of resurfacing a street and determining the grade of the street.—Yackee v. Village of Napoleon, 21 N.E.2d 111, 135 Ohio St 344.

48. N.J.—Metuchen v. Pennsylvania R. Co., 69 A. 465, 73 N.J.Eq. 359.

49. N.J.—Hudson County v. Board of Public Utility Com'rs, 8 A.2d 556, 123 N.J.Law 204, affirmed 12 A.2d 878, 124 N.J.Law 563, and 12 A.2d 879, 124 N.J.Law 564.

Vt.—Waterbury v. Central Vermont R. Co., 108 A. 423, 93 Vt. 461.

50. Conn.—Gray v. Danbury, 10 A. 198, 54 Conn 574.

51. Ohio.—Toledo St. R. Co. v. Mammet, 13 Ohio Cir. Ct. 591, 6 Ohio Cir. Dec. 244

52. Va.—Marshall v. Valley R. Co., 34 S.E. 455, 97 Va. 653.

53. Mich.—Burdell Tp. v. Grand Rapids, etc., R. Co., 121 N.W. 743, 157 Mich. 255.

54. Ill.—Chicago Terminal Transfer R. Co. v. Chicago, 140 Ill.App. 591

55. Ill.—Ohio, etc., R. Co. v. Bridgeport, 63 Ill.App. 224
Minn.—State v. St. Paul, etc., R. Co., 64 N.W. 1140, 62 Minn. 450.

56. Ill.—Ohio, etc., R. Co. v. Bridgeport, 63 Ill.App. 224.

57. Ga.—Brookins v. Central R., etc., Co., 48 Ga. 523

58. Ga.—Brookins v. Central R., etc., Co., supra.
51 C.J. p. 662 note 2.

59. Pa.—Pennsylvania R. Co. v. Irwin, 85 Pa. 336.

60. Ill.—Rutland v. Chicago, etc., R. Co., 71 Ill.App. 442.
51 C.J. p. 662 note 4.

61. Ill.—White County v. Louisville, etc., R. Co., 172 N.E. 22, 340 Ill. 42
51 C.J. p. 662 note 5.

62. Ill.—Henderson County v. Chicago, etc., R. Co., 151 N.E. 542, 320 Ill. 608.
Minn.—Goodhue County v. Duluth, etc., R. Co., 69 N.W. 898, 67 Minn. 213.

63. Mich.—Chicago, etc., Grand Trunk Junction R. Co. v. St. Clair Cir. Judge, 121 N.W. 297, 156 Mich. 567.

64. N.C.—Carolina Cent. R. Co. v. Wilmington St. R. Co., 26 S.E. 913, 120 N.C. 520.

65. D.C.—Washington Terminal Co. v. District of Columbia, 265 F. 965, 49 App.D.C. 325.
51 C.J. p. 662 note 9.

a municipality, a reënactment of the ordinance is likewise invalid.[66]

§ 152. —— Agreements for Restoration and Maintenance

Railroad companies and municipalities may contract as to the construction and maintenance of crossings.

A railroad may, by agreement with a municipality, bind itself to construct and maintain a crossing;[67] and a town or municipality invested with the regulation, control, and duty of maintaining and repairing the streets or highways within its limits may by contract assume and thereby relieve the railroad company from the duty of keeping a bridge or crossing in repair,[68] and such contract will relieve the railroad company from further liability to the public in this respect.[69] Since the acceptance of a municipal ordinance is a contract, the ordinance measures the duties and obligations of the railroad,[70] and the railroad is bound to perform the conditions of the ordinance[71] at its own expense,[72] but a railroad which, by accepting an ordinance, agrees to do what the city may require, is not bound to obey a subsequent unreasonable ordinance.[73] Any agreement of this nature is made subject to police power of the municipality to require maintenance by the railroad,[74] and is likewise subject to control by the state under its police power.[75]

Where the railroad is under a statutory duty to restore a highway, an agreement to do so does not transfer this legal duty into a mere personal obligation,[76] or in any sense limit or reduce the duty imposed by the statute;[77] and, where a railroad company constructs a bridge or viaduct pursuant to a contract with a municipality, by which the latter agrees to keep the same or its approaches in repair, if the railroad company was already legally bound to do the entire work of construction and maintenance, the contract is not only without consideration,[78] but is one which the municipality has no power to make,[79] and the existence of such contract will not prevent the municipality from instituting proceedings to compel the railroad company to make any necessary repairs.[80] If, however, the railroad company was under no legal obligation to construct the bridge, it may not be compelled to waive the contract of the municipality and repair it.[81]

An agreement on the part of a railroad company to construct suitable street crossings, in consideration of a right of way through a city, is enforceable against the railroad company;[82] but an agreement made in consideration of the right to lay a switch track across certain streets that the railroad company will construct and maintain "all the crossings of streets" over its tracks will be construed as applying only to the streets crossed by the switch track in question.[83] Where a railroad company changes the location of a highway in crossing and

66. Ill.—Cohen v. Chicago, etc., R Co., 239 Ill.App. 76

67. Fla.—Florida East Coast R Co v. Miami, 79 So 682, 76 Fla. 277.
51 C J. p 663 note 11

68. Va.—Hicks v Chesapeake, etc., R. Co., 45 S.E. 888, 102 Va 197.
51 C J. p 663 note 12.

Deed not within contract

Where written contract between city and railroads provided for ceding properties, closing streets, and granting easements, subsequent deed provisions whereby railroads sought to impose obligation on city to maintain bridges entirely constituted material variation from contract, requiring, at least, resolution of approval by board of estimate to render deed effectual, and comptroller and corporation counsel had no power to bind city even if they did accept and record deed.—City of New York v. Long Island R. Co., 289 N.Y S. 217, 248 App.Div. 820, affirmed 5 N.E.2d 380, 272 N.Y. 658.

69. Va.—Hicks v. Chesapeake, etc., R. Co., 45 S.E. 888, 102 Va. 197.

70. N Y.—New York, etc., R. Co v New York, 154 N.Y.S. 141, 90 Misc 178.
51 C.J. p 663 note 14.

71. Ill.—Chicago Terminal Transfer R Co. v. Chicago, 140 Ill.App. 591

72. Ky.—Chesapeake, etc, R Co v. Dayton, 197 S W 969, 199 S.W. 25, 177 Ky. 502.

73. Kan.—Emporia v Atchison, etc., R. Co., 147 P. 1095, 94 Kan. 718

74. Pa.—Pittsburgh, etc, R. Co v. Public Service Commission, 75 Pa Super. 282

75. Pa.—Pennsylvania R. Co v. Public Utility Commission, 7 A 2d 86, 136 Pa.Super. 1.
51 C.J. p 663 note 19.

Enforcement of contract

Where railroad erected bridge, at its own expense, in order to eliminate grade crossing, and municipalities in which bridge was located each agreed in writing to accept and maintain portion of bridge which was located within particular municipality, the calling on railroad by public utility commission to maintain bridge, notwithstanding railroad's contracts with municipalities, did not abrogate railroad's contracts with municipalities, but, after commission had fixed liabilities of those concerned to the public, railroad could enforce its contract rights, if any, against municipalities.—Pennsylvania R. Co. v. Public Utility Commission, supra

76. Va.—Norfolk, etc, R. Co. v. Carroll County, 65 S.E. 531, 110 Va. 95.

77. N Y.—Matter of Henner, 211 N. Y.S. 334, 125 Misc. 472, affirmed 216 N Y.S. 844, 217 App Div. 785.

78. Minn.—State v. Northern Pac. R Co, 108 N W. 269, 98 Minn 429, affirmed 28 S Ct. 341, 208 U S. 583, 52 L.Ed 630.
51 C.J p 663 note 23.

79. Minn.—State v. Northern Pac R Co, supra.
51 C J. p 663 note 24.

80. Iowa.—Newton v. Chicago, etc., R. Co., 23 N.W. 905, 66 Iowa 422.
51 C.J. p 663 note 25.

81. Minn.—State v. Chicago, etc., R. Co., 89 N.W. 1, 85 Minn 416.

82. Ky.—Louisville, etc, R. Co. v. Harrodsburg, 32 S.W. 604, 17 Ky. L. 780

83. La.—State v. Morgan's Louisiana, etc., R. Co., 35 So. 432, 111 La. 120.

purchases additional land for a new location, it may legally agree with the grantor as to the character and location of the new way to be constructed thereon, which contract will be valid and binding between the parties, although not conclusive on the public as to whether the company has properly restored the use of the original highway.[84] Where a railroad has constructed a bridge and has for a long period of time kept the entire structure in repair, it is assumed that the bridge was built pursuant to an agreement with the municipality to make such repair.[85]

Agreement with street car company whereby the street car company undertakes to maintain a highway bridge over a railroad does not relieve the railroad from its statutory liability.[86]

§ 153. —— Character of Highway

Ordinarily a railroad is not under a duty to keep in repair a crossing of a road not legally established as such.

Since the duty of the railroad to construct a crossing is ordinarily limited to crossings of legally established streets and highways, as discussed supra § 144, a railroad is under no duty to keep in repair a crossing of a road not legally established as such,[87] and a provision as to "any regularly laid out public highway" in a statute imposing a penalty for noncompliance therewith will not be construed as including a public highway established by user only;[88] but a city street is a "highway" within the application of the statutes,[89] and the duty of restoring it applies to a street regularly designated and dedicated to the public, although not opened and fitted for use,[90] and in some jurisdictions it is held that the same duty attaches, under the statute, to neighborhood roads.[91]

Wherever a way existed as a public highway, however established, at the time the railroad company was constructed across it, it is the duty of the railroad company to keep the crossing in repair;[92] and if, although the highway crossed is not legally a public highway, the railroad company recognizes and invites the public to use it as such by assuming to construct or maintain a bridge or crossing, it is its duty to keep it in proper repair;[93] but the duty in such a case is a common-law and not a statutory duty,[94] and the rule does not apply where the railroad company has at no time recognized the way crossed as a public highway.[95]

§ 154. —— Companies and Persons Liable

The duty of restoring, maintaining, and repairing highways crossed by a railroad is a condition inseparable from the right to cross, and attaches to whatever person or company exercises the franchise.

The duty of restoring, maintaining, and repairing highways crossed by a railroad attaches to whatever person or company exercises the franchise,[96] and is therefore binding on the successors of the company by which the crossing was originally effected,[97] including purchasers at judicial sales[98] and lessees of the road.[99] This duty is not affected by the fact that the railroad company may be insolvent and in the hands of a receiver,[1] or the fact that a street railroad company whose tracks run along the highway is also under obligation to keep the highway between the rails of its tracks in repair,[2] or that, by contract another railroad company uses the tracks of defendant.[3] The fact that the charter of the railroad company imposes certain requirements as to crossings does not prevent the application of general statutory provisions not inconsistent therewith;[4] nor, in the absence of a contrary intention, express or

84. N.Y.—Post v. West Shore R. Co., 26 N.E. 7, 123 N.Y. 580.

85. Mich.—Pere Marquette R. Co. v. Michigan Public Utilities Commission, 195 N.W. 807, 225 Mich. 12

86. N.Y.—Middletown v. Wallkill Transit Co., 193 N.Y.S. 297, 118 Misc. 334

87. Kan.—Missouri, etc., R. Co. v. Long, 27 Kan. 684.
51 C.J. p. 663 note 33.

88. Kan.—Missouri, etc., R. Co. v. Long, supra

89. Miss.—Hamline v. Southern R. Co., 25 So. 295, 76 Miss. 410.
51 C.J. p. 664 note 35.

90. Wis.—Racine v. Chicago, etc., R. Co., 65 N.W. 857, 92 Wis. 118.

91. N.C.—Goforth v. Southern R. Co., 57 S.E. 209, 144 N.C. 569.

92. Pa.—Lehigh Valley R. Co. v. Laceyville Bridge Co., 23 Pa. Co. 225.
51 C.J. p. 663 note 39.

93. Minn.—Lillstrom v. Northern Pa. R. Co., 55 N.W. 624, 53 Minn. 464, 20 L.R.A. 587.
51 C.J. p. 664 note 40.

94. Tex.—Taylor, etc., R. Co. v. Warner, 32 S.W. 868, 88 Tex. 642.

95. Kan.—Missouri, etc., R. Co. v. Long, 27 Kan. 684.
Tex.—Gulf, etc., R. Co. v. Montgomery, 19 S.W. 1015, 85 Tex. 64.

96. Tex.—Wichita Valley R. Co. v. Meyers, Civ.App., 248 S.W. 444.
51 C.J. p. 664 note 43

97. Tex.—Wichita Valley R. Co. v. Meyers, supra.
51 C.J. p. 664 note 44.

98. Ky.—Louisville, etc., R. Co. v. Speckman, 133 S.W. 915, 169 Ky. 385
N.J.—New York, etc., R. Co. v. State, 13 A. 1, 50 N.J.Law 303, affirmed 23 A. 168, 53 N.J.Law 244.

99. Tex.—Wichita Valley R. Co. v. Meyers, Civ.App., 248 S.W. 444.
51 C.J. p. 664 note 46.

1. Iowa.—Ft. Dodge v. Minneapolis, etc., R. Co., 54 N.W. 243, 87 Iowa 389.

2. N.Y.—Masterson v. New York Cent., etc., R. Co., 84 N.Y. 247, 38 Am.R. 510.
Va.—Roanoke Ry. & Electric Co. v. Brown, 154 S.E. 526, 155 Va. 259.

3. Mich.—Chicago, etc., Grand Trunk Junction R. Co. v. St. Clair Cir. Judge, 121 N.W. 297, 156 Mich. 567.

4. Mo.—Henry v. Wabash Western R. Co., 44 Mo.App. 100.

implied does it affect any common-law duties of the railroad company in this respect.[5]

§ 155. —— Rights and Remedies of Public

A railroad's duty to restore and maintain a highway may be enforced by a proceeding in equity, or by an action for the expense incurred in doing the requisite work.

In many jurisdictions statutory provisions have been enacted to provide a means for enforcing performance of a railroad's duty to restore and maintain a highway,[6] but statutory remedies in such cases are ordinarily held to be cumulative and not to prevent a resort to the other remedies existing at common law or in equity.[7] Where a railroad company fails in its duty as to restoring and maintaining a street or highway which it has crossed, it may be proceeded against by indictment for a public nuisance in obstructing the highway, as discussed infra §§ 194–196, or by mandamus to compel a performance of such duty, as discussed in Mandamus § 231 d, or the public authorities may sue in equity to enjoin the further obstruction of the highway,[8] or to compel the railroad company properly to restore or maintain it,[9] and for damages for the obstruction prior to the suit.[10]

So, also, where a railroad company acquires a right of way through a town on condition that it will construct proper street crossings, the town may sue in equity for a specific performance of the agreement,[11] and, having accepted a right-of-way ordinance, the railroad may not deny that the street is a public way.[12] If an injury results for which the municipality is held liable in damages it may recover indemnity from the railroad company;[13] but a town has no such possession of a national road, the fee of which is in the state, as will enable it to maintain an action of trespass quare clausum fregit against a railroad company for failing to restore it at a crossing.[14]

It is not a bar to the maintenance of a suit or a proceeding to compel the railroad company to perform its duty that the public authorities might do the work and recover from the railroad company,[15] or proceed by indictment,[16] or recover a statutory penalty,[17] or sue the railroad company for indemnity in case of a resulting injury for which they should be held liable.[18] The duty to restore a highway, being a continuous duty, is not affected by the statute of limitations.[19] Laches may not be imputed to the state or the officers of the municipality in permitting the obstruction to exist for a long time [20] Enforced use of a new road is not an acceptance thereof so as to prevent an action to compel proper restoration of the old road.[21]

In an action to compel the restoration of a crossing in the absence of any testimony on the subject, the court may not assume that a railroad company acquired from the owner of the fee rights to the portion of its right of way which was a highway crossing other than those which the law entitled it to demand from him,[22] and, therefore, may not assume that the railroad company acquired from the owner of the fee the right to grant or withhold from the public permission to use as a public way such portion of its right of way as was a highway crossing,[23] but the court may assume that the railroad built its line by virtue of its right to occupy land of another in accordance with the general laws

5. Tenn.—Dyer County v. Paducah, etc, R. Co., 11 S.W. 943, 87 Tenn 712.

6. W.Va.—Davis v. Twin Mountain, etc, R. Co, 87 S.E. 544, 77 W.Va. 400.
51 C.J. p 664 note 52.

Order directing compliance
Court order that federal agency, and other defendants involved in construction of railroad, restore public highways at crossings to former condition thereof in accordance with railroad law, was unwarranted, where there was neither allegations nor evidence, nor finding of any failure of defendants to comply with railroad law.—Sells v. Defense Plant Corp., 66 N.E.2d 289, 295 N.Y. 227.

7. N.Y.—People v. New York Cent, etc., R. Co., 74 N.Y. 302.
Ohio.—State v. Dayton, etc, R. Co., 36 Ohio St. 434.

8. Ohio.—State v. Dayton, etc, R. Co, 36 Ohio St 434.
51 C.J. p 664 note 55.

9. N.J.—South Amboy v. Pennsylvania R. Co, 73 A. 852, 76 N.J.Eq 57, reversed on other grounds 76 A. 1038, 77 N.J.Eq 242.
51 C.J. p 665 note 56.

10. Ky.—Greenup County v. Maysville, etc, R. Co, 11 S.W. 774, 88 Ky. 659, 11 Ky.L. 169.
51 C.J. p 665 note 57.

11. Ky.—Louisville Southern R. Co. v. Harrodsburg, 32 S.W. 604, 17 Ky. L. 780.
51 C.J. p 665 note 59.

12. Ky.—Chesapeake, etc., R. Co. v Dayton, 197 S.W. 969, 199 S.W. 25, 177 Ky. 502

13. Conn.—Hamden v. New Haven, etc., Co., 27 Conn. 158.
51 C.J. p 665 note 62

14. Ill.—St. Louis, etc, R. Co. v. Summit, 3 Ill.App. 155.

15. U.S.—Indiana v. Lake Erie, etc., R. Co, C.C.Ind., 83 F. 284.
51 C.J. p 665 note 67.

16. U.S.—Indiana v. Lake Erie, etc, R. Co, supra

17. U.S.—Indiana v. Lake Erie, etc, R. Co, supra

18. Ind.—Indianapolis, etc, R. Co v. State, 37 Ind 489.

19. N.Y.—Windsor v. Delaware, etc, Canal Co, 36 N.Y.S. 863, 92 Hun 127, affirmed 49 N.E. 1105, 155 N.Y. 645—Hatch v. Syracuse, etc, R. Co, 4 N.Y.S. 509, 50 Hun 64

20. Pa.—Sharon Borough v. Pennsylvania Co, 44 Pa.Super 526.

21. Va.—Norfolk, etc, R. Co v. Carroll County, 65 S.E. 531, 110 Va. 95.

22. Tex.—Phillips v. Texas, etc, R. Co., Com.App, 296 S.W. 877.

23. Tex.—Phillips v. Texas, etc, R. Co., supra.

relating to that subject,[24] and may assume that it obtained from the owner in fee the right to construct on that portion of its right of way which was a highway crossing.[25]

Parties. A municipality, having power over the highway crossings within its limits, is the proper party to bring an action to compel removal of obstructions,[26] and a county in which the crossing lies may also sue,[27] and it has been held that suit may be brought by the attorney general of the state, with or without a relator.[28] It has been held that a county may be properly joined as complainant in a suit by a municipality to compel specific performance of the railroad's duty to repair.[29] Such suit may be maintained by an individual, suing on behalf of the public, if he has a special interest in the highway[30] When highway commissioners have no power over railroad crossings, they may not maintain an action to remove obstructions,[31] but, when given the necessary power, they may sue in the name of the town.[32]

Railroad commissions. In some jurisdictions the commissions created by statute to regulate and control railroads have been held to possess the power to require a railroad to repair a crossing.[33] Where, by statute, the control of highways at railroad crossings is vested in railroad commissioners, if a railroad company neglects to maintain crossings, the remedy of the public authorities is by application to the railroad commissioners.[34] An order of the commission must show what repairs are necessary and proper.[35] The commission may assess the costs of repair.[36]

Damages. A municipality which has suffered no injury may not recover damages on failure of a railroad to repair streets in accordance with its contract.[37] When a new road is formally accepted in lieu of the old road, the county is not entitled to damages for the taking of the old road,[38] and, if the new road is injured by the railroad, the measure of damages is the cost of restoring it to its condition when accepted by the county.[39] When a new ford across a stream is constructed but not accepted because defective, the measure of damages is the reasonable cost of making it reasonably safe.[40]

Penalty for failure to repair. Statutory provisions in some jurisdictions provide for the recovery of penalties on failure of the railroad to keep crossings in repair.[41] The provisions must be strictly complied with.[42] Where it is found that the railroad performed its duty to repair, a judgment for the statutory penalty should be reversed.[43] Where no crossing has ever been established, the penalty may not be recovered.[44] These statutes, being penal, have been held not to authorize actions for the penalty against receivers,[45] even though the receiver was appointed under the federal laws.[46]

Recovery of expense of restoring or maintaining highway. Where a railroad company has failed to restore a highway at a crossing to its former usefulness or to keep the crossing, bridge, or approaches in a proper state of repair, the municipal or other public authorities charged with the duty of main-

24. Tex.—Phillips v. Texas, etc., R Co, supra.

25. Tex.—Phillips v. Texas, etc., R. Co., supra

26. N.Y.—Mt Vernon v. New York, etc., R. Co., 133 N.E. 900, 232 N.Y. 309
Wis.—Jamestown v. Chicago, etc, R Co., 34 N.W. 728, 69 Wis. 648.

27. Ky.—Greenup County v Maysville, etc, R. Co., 11 S.W. 774, 88 Ky. 659, 11 Ky.L. 169.

28. Ohio—State v. Dayton, etc., R. Co., 36 Ohio St. 434.

29. N.J.—South Amboy v. Pennsylvania R. Co., 73 A. 852, 76 N.J.Eq 57.

30. Ala.—Alabama Great Southern R Co v. Denton, 195 So. 218, 239 Ala. 301.

Action by public authorities

Where ordinance giving railroad right to use of city streets provided that crossing was to be constructed when city council so directed, and property owner, instead of requesting city council to direct railroad to build crossing, wrote letter to railroad official, railroad was not liable for damages for refusal to build crossing, without some showing of fraud or oppression in failure of council to direct crossing to be constructed—Call Bond & Mortgage Co v. Great Northern Ry. Co., 287 N.W. 832, 227 Iowa 142.

31. Ill.—Stephens v. Chicago, etc, R. Co., 135 N.E 68, 303 Ill 49

32. N.Y.—Windsor v. Delaware, etc., Canal Co, 36 N.Y.S. 863, 92 Hun 127, affirmed 49 N.E. 1105, 155 N. Y. 645

33. Ill.—White County v. Louisville, etc, R. Co, 172 N.E. 22, 340 Ill. 42
51 C.J. p 666 note 85

34. Conn.—New York, etc, R. Co. v. New Haven, 39 A. 597, 70 Conn 390.
51 C.J. p 666 note 86.

35. Pa.—Pittsburgh, etc., R. Co v. Public Service Commission, 75 Pa. Super 282

36. Pa.—Pittsburgh, etc., R Co v. Public Service Commission, supra.

37. Ky.—Louisville, etc., R. Co. v. Shelbyville, 200 S.W. 334, 179 Ky. 132.

38. Ky.—Elkhorn, etc, R. Co v Floyd County, 224 S.W. 682, 189 Ky 201.

39. Ky.—Elkhorn, etc., R. Co. v. Floyd County, supra.
51 C.J. p 666 note 91.

40. Ky.—Elkhorn, etc., R Co v. Floyd County, supra.

41. Ind.—Cummins v. Evansville, etc, R Co, 18 N.E. 6, 115 Ind. 417
51 C.J. p 666 note 93

42. Tex.—San Marcos v. International, etc, R Co., Civ.App., 203 S.W. 795.
51 C.J. p 666 note 94.

43. Ill.—People v. Illinois Cent R. Co, 152 Ill.App. 544.

44. Tex.—Atlanta v Texas, etc., R. Co, 120 S.W. 923, 56 Tex.Civ.App. 226.

45. Tex.—San Marcos v. International, etc., R Co., Civ.App, 203 S.W 458.

46. Tex.—San Marcos v. International, etc, R. Co, supra.

taining the highway at such place may do so and recover from the railroad company the expenses necessarily incurred,[47] and in some cases it is so provided by statutory provisions,[48] such statutes being valid police regulations.[49] Under a statute providing for repair by a municipality and recovery of expenses from the railroad on failure of the road to repair after notice, it is necessary, before serving any notice, that a record of the necessity and details of improvement should be made by the board.[50]

The right to do such work and recover therefor is not an exclusive remedy.[51] No recovery may be had for paving highways outside the right of way and in front of station grounds,[52] but the railroad may be required to pay for construction of a necessary drain across such a highway.[53] The fact that a street railroad agreed to maintain a bridge will not prevent recovery by the municipality from the railroad when the municipality was not a party to the contract.[54] Where a municipality reconstructs a road partly within and partly outside of the railroad right of way, it may recover only the cost of the part outside the right of way.[55] Where the city has parted with its possession and control of the street, it is a mere volunteer and may not recover from the railroad.[56]

§ 156. Opening or Extension of Public Ways across Existing Railroad

a. In general
b. Necessity for crossing
c. Manner of crossing
d. Construction and maintenance

a. In General

The public authorities authorized to open and extend streets and highways may ordinarily lay out or extend a street or highway across a railroad.

The public authorities authorized to open and extend streets and highways may ordinarily lay out or extend a street or highway across a railroad.[57] A mere permissive statute authorizing an agreement between a municipality and a railroad has been held not to deprive the city of its right to extend a street in accordance with the general statutory provisions.[58] In some jurisdictions the power to establish or extend highways or other public ways across an existing railroad has been vested by statute in a state board or commission,[59] but commis-

47. Kan.—McPherson County v. U. S. Railroad Administration, 203 P. 912, 110 Kan. 274, rehearing denied 206 P. 882, 111 Kan. 205.
51 C. J. p. 666 note 99.

48. W. Va.—Davis v. Twin Mountain, etc., R. Co., 87 S.E. 544, 77 W. Va. 400.
51 C. J. p. 667 note 1.

49. Vt.—Clarendon v. Rutland R. Co., 52 A. 1057, 75 Vt. 6.
Wis.—State v. Chicago, etc., R. Co., 197 N.W. 247, 182 Wis. 605.

50. Ill.—Chicago Great Western R. Co. v. Leaf River, 135 Ill. App. 559.

51. Ind.—Indianapolis, etc., R. Co. v. State, 37 Ind. 489.
51 C. J. p. 667 note 5.

52. Wis.—State v. Chicago, etc., R. Co., 197 N.W. 247, 182 Wis. 605.

53. Wis.—State v. Chicago, etc., R. Co., supra.

54. N.Y.—Middletown v. Wallkill Transit Co., 193 N.Y.S. 297, 118 Misc. 334.

55. Pa.—Sugar Creek Tp. v. Erie R. Co., 89 A. 683, 242 Pa. 573.

56. Ill.—Chicago v. Pittsburg, etc., R. Co., 146 Ill. App. 403, affirmed 89 N.E. 648, 242 Ill. 30.

57. Mo.—State ex rel. Alton R. Co. v. Public Service Commission, 70 S.W.2d 57, 334 Mo. 995—State ex rel. and to Use of Chicago Great Western R. Co. v. Public Service Commission of Missouri, 51 S.W.2d 73, 330 Mo. 729, certiorari denied Chicago Great Western R. Co. v. Public Service Commission of State of Missouri, 53 S.Ct. 89, 287 U.S. 641, 77 L.Ed. 555.
Exercise of power of eminent domain to extend street or highway over railroad see Eminent Domain § 78.

Presumed exercise of police power
Ark.—St. Louis-San Francisco Ry. Co. v. State, 31 S.W.2d 739, 182 Ark. 409.

Quorum
Where a quorum of county board consisting of seven members was at all times present during a hearing with respect to the establishment of a crossing over a railroad and whether it was required by public convenience and necessity, such matter could be determined by a majority of the board acting for that body as effectively as though the entire membership were present, and the fact that three absent members joined the signing of the order respecting the establishment of the crossing did not affect its validity.—Prosser v. Seaboard Air Line R. Co., 56 S.E.2d 591, 216 S.C. 33, certiorari denied Seaboard Air Line R. Co. v. Prosser, 70 S.Ct. 559, 339 U.S. 911, 94 L.Ed. 1338.

58. N.Y.—Matter of Third Ave., 170 N.Y.S. 470, 183 App.Div. 688.

59. Cal.—City of Mountain View v. Southern Pac. R. Co., 36 P.2d 650, 1 Cal.App.2d 317.
Ill.—Yowell v. Cleveland, C., C. & St. L. R. Co., 195 N.E. 667, 360 Ill. 272.
Ind.—Louisville & N. R. Co. v. Public Service Commission of Indiana, 185 N.E. 902, 206 Ind. 51, rehearing denied 188 N.E. 321, 206 Ind. 51.
N.J.—Central R. Co. of New Jersey v. Board of Public Utility Com'rs, 170 A. 246, 112 N.J.Law 215 and 172 A. 357, 112 N.J.Law 559, affirmed Central R. Co. of New Jersey v. State Highway Commission, 176 A. 725, 114 N.J.Law 397—State Highway Commission v. Board of Public Utility Com'rs, 170 A. 246, 112 N.J.Law 215 and 172 A. 357, 112 N.J.Law 559, affirmed 176 A. 725, 114 N.J.Law 397.
Okl.—Thompson v. State, 164 P.2d 232, 196 Okl. 190.
51 C. J. p. 667 note 14.

Highway authorities and railroad unable to agree
Where construction of a state highway requires installation of a railroad crossing regarding which an agreement cannot be reached with railroad, controversy must be determined in first instance by public service commission, acting in a quasi-judicial capacity.—Great Northern Ry. Co. v. McDonnell, N. D., 45 N.W.2d 721.

Consent of commission
Road, although laid out, may not be built across tracks of railroad without permission of public utilities commission.—West Jersey & S. R. Co. v. Stafficker, 151 A. 201, 106 N.J. Eq. 412.

Interference with railroad
The establishment of a railroad crossing which will substantially in-

sions vested with control over railroads have no such power in the absence of statute,[60] and, unless authorized to do so, may not consider questions relating to the necessity, expediency, or propriety of establishing streets even when they cross railroads,[61] and a statute giving such commissions power to regulate the manner in which a crossing may be made does not qualify the power vested in local authorities to extend a highway over an existing railroad.[62] It has been held that a statute authorizing a railroad commission to determine the necessity for, and order the construction of, crossings of new highways over railroads does not give it exclusive jurisdiction to do so,[63] but is supplemental to all other statutes affecting such crossings.[64]

A parkway has been held to be a park and not a highway within the meaning of statutory provisions regulating extension of new streets or highways over railroads.[65]

b. Necessity for Crossing

Under some statutes, a new street or highway may not be established across a railroad unless such crossing is necessary.

Under some statutes, a new street or highway may not be established across a railroad unless such crossing is necessary.[66] Under such a statute the question to be decided is whether, in view of the location of other facilities for crossing, and other places where safe crossings could be ordered, the volume of public travel reasonably requires the crossing.[67] The determination of necessity may be appealed from,[68] and a decision thereon will be reversed when not supported by the evidence,[69] but, where no appeal is taken, it may not be questioned on an appeal from an order of the commission directing the manner of crossing.[70]

Notice and hearing. In some jurisdictions the statutes require that the railroad be given notice of the intention to establish the new street or highway and opportunity to be heard on the question of the necessity for it,[71] and, when required, no legal highway is established if sufficient notice is not given,[72] but a notice to the railroad that a resolution "will be adopted" at a stated hearing is sufficient.[73]

c. Manner of Crossing

Statutes prohibiting grade crossings, at least in the absence of specified conditions, apply to a crossing of a railroad by a new street or highway or an extension of an old one.

terfere with use of railroad facilities is a matter of state-wide concern rather than a "municipal affair" under control of city, and public utilities commission has exclusive jurisdiction to make the primary determination of the necessity and advisability of the change—Northwestern Pac. R. Co. v. Superior Court in and for Humboldt County, 211 P.2d 571, 34 Cal.2d 454.

60. N.D.—State v. Chicago, etc., R. Co., 163 N.W. 730, 37 N.D. 98
51 C.J. p 667 note 15.

61. Mo.—State ex rel Alton R. Co. v. Public Service Commission, 70 S.W.2d 55, 334 Mo. 992.
51 C.J. p 667 note 16.

62. Mo.—State ex rel Alton R. Co. v. Public Service Commission, supra.
N.D.—Ashley v. Minneapolis, etc., R. Co., 163 N.W. 727, 37 N.D. 147.
S.C.—Thomas v. Atlantic Coast Line R. Co., 167 S.E. 239, 168 S.C. 185.

Matter of procuring right of way for highway over railroad right of way is within jurisdiction of local authorities—Midland Valley R. Co. v. Town of Panama, 12 P.2d 503, 158 Okl. 55.

63. Ark.—St. Louis-San Francisco R. Co. v. Bay, 23 S.W.2d 968, 180 Ark. 1040.

64. Ark.—St. Louis-San Francisco R. Co. v. Bay, supra.

65. N.Y.—In re Westchester County, 158 N.E. 881, 246 N.Y. 314.
51 C.J. p 667 note 21.

66. N.Y.—In re Town Highway in Town of Ballston, Saratoga County, 23 N.E.2d 10, 281 N.Y. 322.

67. N.Y.—Matter of Eighty-Fourth St., 178 N.Y.S. 617, 189 App.Div. 315.
51 C.J. p 667 note 23.

Discretion

Question of what is reasonable exercise of town board's discretion and judgment in determining necessity of new highway crossing railroad tracks depends on surrounding facts and circumstances.—In re Town Highway in Town of Ballston, Saratoga County, 23 N.E.2d 10, 281 N.Y. 322.

68. N.Y.—In re Town Highway in Town of Ballston, Saratoga County, supra—51 C.J. p 668 note 24.

69. N.Y.—In re Town Highway in Town of Ballston, Saratoga County, supra—In re Town Highway on Bridge W-454, Town of Brutus, Cayuga County, 46 N.Y.S.2d 293, 267 App.Div. 893
51 C.J. p 668 note 25.

Fully sufficient evidence required

N.Y.—In re Town Highway in Town of Ballston, Saratoga County, 23 N.E.2d 10, 281 N.Y. 322.

Evidence as to cost

In proceeding before town board in the matter of laying out highway across right of way and under railroad tracks, board erred in not receiving evidence proffered by railroad companies as to cost of proposed new highway—In re Town Highway on Bridge W-454, Town of Brutus, Cayuga County, 46 N.Y.S.2d 293, 267 App.Div. 803.

Where finding is supported by evidence, court is bound thereby—Prosser v. Seaboard Air Line R. Co., 56 S.E.2d 591, 216 S.C. 33, certiorari denied Seaboard Air Line R. Co. v. Prosser, 70 S.Ct. 569, 339 U.S. 911, 94 L.Ed. 1338—Thomas v. Atlantic Coast Line R. Co., 167 S.E. 239, 168 S.C. 185.

Findings held supported by evidence
Okl.—Thompson v. State, 164 P.2d 232, 196 Okl. 190.
S.C.—Prosser v. Seaboard Air Line R. Co., 56 S.E.2d 591, 216 S.C. 33, certiorari denied Seaboard Air Line R. Co. v. Prosser, 70 S.Ct. 569, 339 U.S. 911, 94 L.Ed. 1338

70. N.Y.—Matter of Hobart, 198 N.Y.S. 638, 204 App.Div. 595, affirmed 142 N.E. 292, 236 N.Y. 582.

71. Mass.—Old Colony, etc., R. Co. v. Plymouth County, 11 Gray 512.
51 C.J. p 668 note 27.

72. N.Y.—Matter of Overheiser Road, 184 N.Y.S. 483, 193 App.Div. 924.

73. N.Y.—Matter of Hobart, 198 N.Y.S. 638, 204 App.Div. 595, affirmed 142 N.E. 292, 236 N.Y. 582.

Where a street or highway is laid out across a railroad, it should be so located and constructed as not unnecessarily to injure the railroad.[74] A statute providing that the street or highway may be constructed "over or across" the railroad authorizes the public authorities at their election to construct the street or highway across the railroad at grade,[75] and the right to cross at grade is not affected by a requirement that they shall restore the railroad crossing to its former state or so as not to impair its usefulness.[76]

In many jurisdictions statutes prohibit generally or except on specified conditions the crossing of a railroad by a new highway at grade,[77] while in other jurisdictions the statutes have been held to authorize municipalities to lay out grade crossings.[78] A statute requiring the crossing to be "under or over" the railroad contemplates a crossing at a different level and prohibits a grade crossing.[79] Statutes prohibiting the construction of streets or highways across railroads at grade apply to highways located and even partly constructed prior to the statute, if not fully completed for use by the public at the place of crossing,[80] and to crossings incidental to the relocation of an existing highway,[81] and apply notwithstanding the railroad company may consent to a crossing of its tracks at grade,[82] or a grade crossing would be more convenient to the public.[83]

Under some statutes, where a new highway is to be laid out over a railroad, the county commissioners must determine the mode of crossing,[84] and their decision is final.[85] Even if a municipality has power to lay out a new street over a railroad, it may not do so without the consent of the county commissioners.[86]

Regulation by state boards or commissions. The control of the manner in which streets, opened or extended across existing railroads, may cross such railroads is, by statute in many jurisdictions, vested in the commissions or boards given control generally over railroads,[87] or the consent of such commission is required for a crossing at grade.[88] These stat-

74. Vt.—Central Vermont R. Co. v. Royalton, 4 A. 868, 58 Vt. 234.
51 C J. p 668 note 30.

75. Ill.—Illinois Cent. R. Co v. Chicago, 30 N.E. 1044, 141 Ill. 586, 17 L.R.A. 530.
51 C J. p 668 note 31.

76. Ill.—Illinois Cent. R Co. v. Chicago, supra.

77. Ind.—Louisville & N. R Co. v. Public Service Commission of Indiana, 188 N.E. 321, 206 Ind. 51.
51 C J. p 668 note 33.

No prohibition

The statutes relating to the establishment, method of construction, and maintenance of street crossings over railroad tracks in a municipality, while indicating an inclination toward the elimination of grade crossings, do not in fact prohibit such crossings.—City of Youngstown v. Youngstown & Suburban Ry. Co., 46 N.E.2d 682, 68 Ohio App 295.

78. Mass.—Cambridge v. Railroad Comrs., 26 N.E. 241, 153 Mass. 161.

Reasonably required

Proposed improvement consisting of extension of village street at grade over railroad right of way to accommodate approximately one fourth of the inhabitants of village was "reasonably required to accommodate the public" within statute permitting such crossing at grade when reasonably required.—Village of Coldwater v. Cincinnati Northern R. Co., 14 Ohio Supp. 14.

79. Vt.—Central Vermont R. Co. v. Royalton, 4 A. 868, 58 Vt. 234.
51 C J. p 668 note 35.

80. Or.—Butcher v Flagg, 203 P 2d 651, 185 Or 471.
51 C J. p 668 note 36.

81. Pa.—Pennsylvania R Co v Bogert, 59 A. 100, 209 Pa. 589.—In re Mifflinville Bridge, 55 A. 1122, 206 Pa. 420.

82. Conn.—New York, etc., R. Co v. Waterbury, 10 A. 162, 55 Conn. 19.

83. Pa.—Pennsylvania R Co. v. Bogert, 59 A. 100, 209 Pa 589.

84. Mass.—Old Colony, etc., R. Co. v. Plymouth County Comrs., 11 Gray 512.
51 C J. p 669 note 56.

85. Mass.—Boston, etc., R. Co. v. Middlesex County, 1 Allen 324.

86. Mass.—Boston, etc., R. Co. v. Brookline, 136 N.E. 147, 242 Mass. 455.

87. Mo.—State ex rel. Alton R. Co. v. Public Service Commission, 70 S.W.2d 55, 334 Mo. 992.
N Y.—New York Cent R. Co. v. Public Service Commission, 194 N.E 761, 266 N.Y. 294.—People ex rel City of Niagara Falls v. New York Cent. & H. R. R. Co., 58 N.E. 166, 158 N.Y. 410.
51 C.J. p 668 note 40.

Power of highway commission

Although it was for highway commission to determine whether highway should cross railroad, it was for public service commission to determine its particular location and character and structure of crossing, and grant of such power to public service commission is not contrary to constitutional provision defining powers of highway commission.—State ex rel. and to Use of Chicago Great Western R. Co. v. Public Service Commission of Missouri, 51 S.W. 2d 73, 330 Mo 729, certiorari denied Chicago Great Western R Co v. Public Service Commission of State of Missouri, 53 S.Ct. 89, 287 U.S. 641, 77 L.Ed. 555.

Incomplete order

Failure of commission's order to provide for paving, curbing, gutters, and sidewalks within scope of project but outside the rights of way of railroads was held not to invalidate order in view of recitals therein that city had agreed that such street improvements should not be considered part of project, since agreement relieved railroads of any responsibility for payment for such improvements.—Petition of City of Buffalo, 279 N.Y.S. 873, 245 App.Div. 19.

88. Ind.—Louisville & N. R. Co. v. Public Service Commission of Indiana, 188 N.E 321, 206 Ind. 51.
Or.—Butcher v. Flagg, 203 P.2d 651, 185 Or. 471.

Subject to power of commission

Town had authority to lay out and establish a public highway across railroad tracks at grade subject to power of commission, on application to it to determine if crossing should be at grade; the statute providing that, when a turnpike is laid out after the laying out and construction of a railroad so as to cross such railroad, the turnpike may pass over, under, or across railroad was not impliedly repealed by statute giving public service commission jurisdiction of matters relating to elimination of, or changes in, existing cross-

utes have been held not to require that the layout of the highway be completed before the commission may act.[89]

The commission, having jurisdiction over railroads, may, within reason, determine the manner in which a new highway may cross a railroad.[90] Under such statutes the commission's determination as to the manner of crossing is valid only as far as it acts within the authority delegated to it.[91] The commission is not bound to allow a dangerous grade crossing merely because that was the only feasible method by which the necessity for the road could be met.[92] These statutes have been held not to give the commission power to question the necessity for the new way,[93] or the reasonableness of its width.[94] The power of the commission extends to crossings laid out but not opened until after the passage of the statute.[95]

Where the power to open streets and control railroad crossings in incorporated cities, and villages is given to the municipal authorities, a commission's power is limited to crossings outside of cities and villages.[96] A statute giving the commission power to determine the manner in which a new street, or an additional width of a street or highway, shall cross a railroad refers to the carrying of a street, or a new portion of a street either as originally existing or as widened, across the tracks so as to furnish a direct line of traffic over the railroad,[97] and not the mere widening of a street running alongside of a railroad.[98] The fact that the contemplated extension may be illegal does not affect the power and duty of the commission to determine the manner in which the extension shall cross.[99] The commission has no power to order the construction of a bridge over a valley when only a small portion of the bridge would carry the street over the tracks,[1] but it may require the railroad to construct such portion.[2] Under a statute requiring permission of the railroad commission before a new street may be laid across a railroad and giving the commission the power to determine the mode of crossing, the commission may require an overhead crossing, even though local needs do not require it.[3]

Judicial interference with, or review of, orders. Statutes in many jurisdictions provide for review of orders of the commission,[4] but the court will not interfere so long as the order is not unreasonable or arbitrary.[5] Review is limited to the commission's power to enter the order;[6] the wisdom of the commission's order is not subject to consideration by the court.[7] An order which is not final may not be appealed from.[8] An order which is merely an approval of a general plan for carrying new streets across a

ing or by statute giving public service commission general jurisdiction over grade crossings.—Central Vermont Ry. v. Hanley, 17 A.2d 249, 111 Vt. 425.

89. Conn.—Smith v. New Haven, 22 A. 146, 59 Conn. 203.

Acquisition of property

Public service commission's order was held not invalid because city had not taken preliminary steps toward acquiring property from private owners necessary for improvement. —Petition of City of Buffalo, 279 N.Y.S. 873, 245 App.Div. 19

90. Neb.—State v. Omaha, etc., R. Co., 170 N.W. 496, 103 Neb. 40.
51 C.J. p. 668 note 42.

91. N.Y.—McAneny v. New York Cent. R. Co., 144 N.E. 362, 238 N.Y. 122
51 C.J. p. 669 note 43

92. N.Y.—Matter of Royalton, 122 N.Y.S. 844, 138 App.Div. 412.

93. Mo.—State ex rel. Alton R. Co. v. Public Service Commission, 70 S.W.2d 55, 334 Mo. 992.
51 C.J. p. 669 note 45.

94. N.Y.—Matter of Third Ave., 170 N.Y.S. 470, 183 App.Div. 688

95. Or.—Butcher v. Flagg, 203 P.2d 651, 185 Or. 471.
51 C.J. p. 669 note 47.

"Constructed"

The use of the word "constructed" in act providing that no highway shall be constructed across the tracks of any railroad company at grade without permission from the board of public utility commissioners manifestly means the preparation of the highway for actual ordinary use, and not for mere delineation thereof on paper, or the taking of land for the purpose of a street.—Paterson, etc., R. Co. v. Paterson, 86 A. 68, 81 N.J.Eq. 124, 127.

96. Neb.—Chicago, etc., R. Co. v. Nebraska State R. Commission, 132 N.W. 409, 89 Neb. 853.

97. N.Y.—Matter of Third Ave., 170 N.Y.S. 470, 183 App.Div. 688.

98. N.Y.—Matter of Third Ave., supra.
51 C.J. p. 669 note 50.

99. N.Y.—Matter of Third Ave., supra.

1. N.Y.—McAneny v. New York Cent. R. Co., 144 N.E. 362, 238 N.Y. 122.

2. N.Y.—In re East Two Hundred Thirty-Eighth St., 213 N.Y.S. 356, 215 App.Div. 152, affirmed 154 N.E. 610, 243 N.Y. 574

3. Mo.—State v. State Public Service Commission, 297 S.W. 47.

4. S.D.—Davison County v. Chicago, etc., R. Co., 127 N.W. 728, 26 S.D. 57.
51 C.J. p. 669 note 59.

5. N.D.—Minneapolis, etc., R. Co. v. Stutsman, 154 N.W. 654, 31 N.D. 597.
51 C.J. p. 669 note 60.

6. N.Y.—In re Elimination of Existing Highway-Railroad Crossings at Grade of Railroads Operated by Pennsylvania R. Co., 299 N.Y.S. 693, 252 App.Div. 404, reargument denied In re Farnham-Irving State Highway, 4 N.Y.S.2d 163, 254 App.Div. 634 and 4 N.Y.S.2d 166, 254 App.Div. 634, affirmed In re Farnham-Irving State Highway in Town of Brant, 19 N.E.2d 915, 280 N.Y. 495.

7. N.Y.—In re Elimination of Existing Highway-Railroad Crossings at Grade of Railroads Operated by Pennsylvania R. Co., 299 N.Y.S. 693, 252 App.Div. 404, reargument denied In re Farnham-Irving State Highway, 4 N.Y.S.2d 163, 254 App.Div. 634 and 4 N.Y.S.2d 166, 254 App.Div. 634, affirmed In re Farnham-Irving State Highway in Town of Brant, 19 N.E.2d 915, 280 N.Y. 495.

8. N.Y.—Matter of Royalton, 122 N.Y.S. 844, 138 App.Div. 412.
51 C.J. p. 669 note 61.

railroad is not res judicata of the party to bear the expense of construction.[9]

d. Construction and Maintenance

As a general rule, under the police power, a state or municipality may require railroad companies at their own expense to construct and maintain crossings where streets or highways are established across existing railroads.

Since there is no common-law duty on a railroad to construct and maintain crossings where highways are laid out after the railroad has been constructed,[10] in the absence of statutes a railroad may not be required to do so,[11] even though its charter requires it to construct and maintain crossings,[12] but such duty is on the public authorities by whom the street is established and constructed.[13] In some jurisdictions, this view is reaffirmed by statute, and expenses incident to the construction[14] and maintenance[15] of a new way across an existing railroad are to be borne by the public body responsible for the way and not by the railroad.

While it has been held that a railroad company may not constitutionally be required by statute to do so without compensation,[16] as a general rule, a state or municipality may, under the police power, require railroad companies at their own expense to construct and maintain crossings where streets or highways are established across a railroad already constructed,[17] or to pay a portion of such expense,[18] and this rule applies to crossings by means of a bridge underpass, or viaduct as well as to crossings at grade,[19] and the right to enforce such

9. N.Y.—McAneny v. New York Cent. R. Co., 144 N.E. 362, 238 N.Y. 122.

10. U.S.—Contino v. Baltimore & Annapolis R. Co., C.A.Md., 178 F.2d 521.

Ala.—Corpus Juris cited in Tuscaloosa County v. Alabama Great Southern R. Co., 150 So. 328, 329, 227 Ala. 428.

51 C.J. p. 669 note 63

11. Pa.—Mauch Chunk Nat. Bank v. Mauch Chunk Switch-Back Ry. Co., 14 A.2d 95, 339 Pa. 317.

51 C.J. p. 669 note 64

12. Ala.—Corpus Juris cited in Tuscaloosa County v. Alabama Great Southern R. Co., 150 So. 328, 329, 227 Ala. 428.

N.J.—West Jersey, etc., R. Co. v. Woodbury, 84 A. 1047, 80 N.J.Eq. 412.

13. U.S.—Contino v. Baltimore & A. R. Co., C.A.Md., 178 F.2d 521.

51 C.J. p. 669 note 66.

14. Mass.—Trustees of New York, N. H. & H. R. Co. v. City of New Bedford, 52 N.E.2d 324, 315 Mass. 151—Boston & M. R. R. v. Worcester County Com'rs, 15 N.E.2d 455, 300 Mass. 415.

15. Mass.—Trustees of New York, N. H. & H. R. Co. v. City of New Bedford, 52 N.E.2d 324, 315 Mass. 154.

16. Minn.—State v. Hennepin County Dist. Ct., 44 N.W. 7, 42 Minn. 247, 7 L.R.A. 121.

51 C.J. p. 670 note 67.

17. N.Y.—In re Elimination of Existing Highway-Railroad Crossings at Grade of Railroads Operated by Pennsylvania R. Co., 299 N.Y.S. 693, 252 App.Div. 404, reargument denied In re Farnham-Irving State Highway, 4 N.Y.S.2d 163, 254 App.Div. 634 and 4 N.Y.S.2d 166, affirmed In re Farnham-Irving State Highway in Town of Brant, 19 N.E.2d 915, 280 N.Y. 495—Pennsylvania R. Co. v. City of Rochester, 37 N.Y.S.2d 471, affirmed 47 N.Y.S.2d 288, 267 App.Div. 801, affirmed 59 N.E.2d 178, 293 N.Y. 813.

Pa.—Pennsylvania R. Co. v. Pennsylvania Public Utility Commission, 35 A.2d 584, 154 Pa.Super. 272.

S.C.—Prosser v. Seaboard Air Line R. Co., 56 S.E.2d 591, 216 S.C. 33, certiorari denied Seaboard Air Line R. Co. v. Prosser, 70 S.Ct. 569, 339 U.S. 911, 94 L.Ed. 1338.

Va.—Richmond-Ashland Ry. Co. v. Commonwealth ex rel. City of Richmond, 173 S.E. 892, 162 Va. 296.

51 C.J. p. 670 note 70.

Where relocated highway required a new crossing, it must be regarded as a new road for purpose of crossing and proceeding lies under statute under which railroad may be required to bear expense of constructing crossing for new road, notwithstanding sole purpose of proceedings was the economical elimination of a dangerous crossing over two other railroads against which proceedings were brought under the Grade Crossing Elimination Act.—In re Elimination of Existing Highway-Railroad Crossings at Grade of Railroads Operated by Pennsylvania R. Co., 299 N.Y.S. 693, 252 App.Div. 404, reargument denied In re Farnham-Irving State Highway, 4 N.Y.S.2d 163, 254 App.Div. 634 and 4 N.Y.S.2d 166, 254 App.Div. 634, affirmed In re Farnham-Irving State Highway in Town of Brant, 19 N.E.2d 915, 280 N.Y. 495.

Side track.

(1) Order of public utility commission that railroad adjust to grade of new highway a portion of side track and maintain it, etc., was subject to implied limitation that railroad should be responsible for maintenance only as long as its trains were operated over the side track; on abandonment of side track, railroad's remedy would be to apply to commission for termination of order or relief from complying with it.—Pennsylvania R. Co. v. Pennsylvania Public Utility Commission, 35 A.2d 584, 154 Pa.Super. 272.

(2) Whether railroad company or industrial plant should ultimately bear cost of construction and maintenance of side track to grade of new highway depended on railroad tariffs and contract unaffected by order of commission directed to railroad company.—Pennsylvania R. Co. v. Pennsylvania Public Utility Commission, supra.

Permission to construct.

Fact that board of public utilities commissioners gave permission to erect proposed bridge did not settle question of duty to construct as between borough and railroad.—De Marmon v. Borough of Roselle, 152 A. 656, 8 N.J.Misc. 904.

18. Conn.—New York, etc., R. Co. v. Waterbury, 22 A. 439, 60 Conn. 1.

51 C.J. p. 670 note 71.

19. U.S.—Nashville, C. & St. L. Ry. v. Walters, Tenn., 55 S.Ct. 486, 294 U.S. 405, 79 L.Ed. 949.

N.J.—De Marmon v. Borough of Roselle, 152 A. 656, 8 N.J.Misc. 904.

N.Y.—In re Elimination of Existing Highway-Railroad Crossings at Grade of Railroads Operated by Pennsylvania R. Co., 299 N.Y.S. 693, 252 App.Div. 404, reargument denied In re Farnham-Irving State Highway, 4 N.Y.S.2d 163, 254 App.Div. 634 and 4 N.Y.S.2d 166, 254 App.Div. 634, affirmed In re Farnham-Irving State Highway in Town of Brant, 19 N.E.2d 915, 280 N.Y. 495—Pennsylvania R. Co. v. City of Rochester, 37 N.Y.S.2d 471, affirmed 47 N.Y.S.2d 288, 267 App.Div. 801, affirmed 59 N.E.2d 178, 293 N.Y. 813.

Pa.—Lehigh Valley R. Co. v. Public

a requirement as a police regulation may not be divested by any contract between a municipality and a railroad company.[20]

Where the right to alter or amend a charter has been reserved, the legislature may require the construction and maintenance of such crossing by the railroad at its own expense.[21] It has been held proper, under the police power, to require the railroad to construct and maintain that portion of the highway within the limits of its right of way,[22] and by planking or its equivalent to adjust the surface of the street to the tops of the rails;[23] but on the contrary it has been held that the public authorities should construct and maintain that portion of the highway within the limits of the right of way which they would have been required to build if the railroad had not been constructed,[24] or that the expense thereof should be included in the estimate of damages to the railroad company,[25] notwithstanding the statute in terms imposes this duty on the railroad company,[26] and that the legislature may not constitutionally require the railroad company to construct at its own expense all that portion of the highway within the limits of the railroad right of way.[27]

Under some statutes, the railroad is required to pay part of the costs of the crossing,[28] and a statute requiring the railroad to pay half the costs has been held to require it to pay half the cost of approaches to the crossing.[29] In some jurisdictions the commission authorized to determine questions relating to crossings may apportion the costs of construction,[30] or, where the facts warrant it, may impose the entire costs on the railroad.[31] Where the statutes are held applicable and their validity sustained, the expense of constructing and maintaining a crossing is not to be considered or included in estimating the railroad company's damages for the condemnation of a right of way across its tracks.[32]

In some cases it has been held that particular statutes relating to the construction and maintenance of crossings were not intended to apply to streets and highways laid out across a railroad already constructed;[33] but in most jurisdictions the statutes

Service Commission of Pennsylvania, 161 A. 422, 105 Pa Super 423

S.C.—Prosser v. Seaboard Air Line R. Co., 56 S.E.2d 591, 216 S.C. 33, certiorari denied Seaboard Air Line R. Co. v. Prosser, 70 S.Ct. 569, 339 U.S. 911, 94 L.Ed. 1338.

51 C.J. p. 670 note 72, p. 680 note 53 [c].

Practical construction by parties

Where railroad company maintained bridge, built by it in 1890 to carry city street over its tracks, until 1932, and city always insisted that company was bound to make repairs to such bridge, company cannot deny its responsibility for such repairs and maintenance of bridge under statutes as interpreted by it, since such "practical construction" of terms of original grant by parties and acquiescence by railroad company are entitled to great weight in fixing scope of its statutory duty—Pennsylvania R. Co. v. City of Rochester, 37 N.Y.S.2d 471, affirmed 47 N.Y.S.2d 288, 267 App.Div. 801, affirmed 59 N.E.2d 178, 293 N.Y. 813.

Time to sue

City was held not required to construct through street up to both sides of railroad fill before it could sue to compel railroad to construct underpass.—Chesapeake & O. Ry. Co. v. City of Bellevue, 38 S.W.2d 943, 239 Ky. 61.

20. Minn.—St. Paul v. Minnesota Transfer R. Co., 193 N.W. 175, 155 Minn. 237.
51 C.J. p. 670 note 73.

21. Conn.—New York, etc., R. Co. v. Waterbury, 22 A. 439, 60 Conn. 1.

22. Me.—Boston, etc., R. Co. v. York County Com'rs, 10 A. 113, 79 Me. 386—Portland, etc., R. Co. v. Deering, 2 A. 670, 78 Me. 61, 57 Am.R. 784

23. Wis.—Chicago, etc., R. Co. v. Fair Oaks, 122 N.W. 810, 140 Wis. 334—Chicago, etc., R. Co. v. Milwaukee, 72 N.W. 1118, 97 Wis. 418.

24. Neb.—State v. Chicago, etc., R. Co., 45 N.W. 469, 29 Neb. 412.
51 C.J. p. 671 note 76.

25. Neb.—Missouri Pac. R. Co. v. Cass County, 107 N.W. 773, 76 Neb. 396.

26. Neb.—Missouri Pac. R. Co. v. Cass County, supra.

27. Mich.—People v. Lake Shore, etc., R. Co., 17 N.W. 841, 52 Mich. 277

28. N.Y.—In re McKinley Parkway Extension Highway in City of Lackawanna, Erie County, 15 N.Y.S.2d 710, 258 App.Div. 844, reargument denied 17 N.Y.S.2d 862, 258 App.Div. 1033.
51 C.J. p. 671 note 80.

Motor way system

The provision of the special law providing for the greater motorways system of highways for Erie County that the highways shall be built and maintained at the expense of Erie County does not mean that the county is deprived of its right to resort to the provisions of the Railroad Law to compel railroads to contribute to the cost of building overhead bridges.—In re McKinley Parkway Extension Highway in City of Lackawanna, Erie County, 15 N.Y.S.2d 710, 258 App.Div. 844, reargument denied 17 N.Y.S.2d 862, 258 App.Div. 1033, appeal granted 26 N.E.2d 837, 282 N.Y. 808.

29. N.Y.—Matter of Park Lane South, 200 N.Y.S. 555, 206 App.Div. 269.

30. Mo.—State ex rel. Alton R. Co. v. Public Service Commission, 70 S.W.2d 57, 334 Mo. 995—State ex rel. Alton R. Co. v. Public Service Commission, 68 S.W.2d 691, 334 Mo. 832.
51 C.J. p. 672 note 93.

New or relocated underpass

Construction of new highway subway under railroad tracks near existing underpass, to be abandoned for highway purposes on completion of new highway, was held not mere reconstruction of present underpass to which statute prohibiting apportionment of over half of cost to state highway commission would not apply.—State ex rel. Alton R. Co. v. Public Service Commission, supra.

31. Mo.—State v. Public Service Commission, 272 S.W. 957, 308 Mo. 359.
51 C.J. p. 672 note 94.

32. Conn.—New York, etc., R. Co. v. Waterbury, 22 A. 439, 60 Conn. 1.
51 C.J. p. 671 note 85.

33. N.J.—Hackensack Impr. Commission v. New Jersey Midland R. Co., 22 N.J.Eq. 94.
51 C.J. p. 671 note 82.

have been construed as applying to such cases,[34] although, since the duty imposed thereby exists solely by reason of the statute, it should not be extended beyond the fair import of the language used.[35]

A statute providing that all the expenses incident to the construction and maintenance of a way across a railroad shall be borne by the county, city, town, or other owner thereof, but that if the crossing is at grade the railroad company shall at its own expense guard and protect the rails so as to secure a safe and easy passage across its road, has been held to require payment by the municipality of the expense of maintaining a gateman;[36] and the railroad is entitled to compensation for erecting and maintaining the necessary structures,[37] but it must prepare the way over the space between the rails,[38] and the statute is given practical effect by including the expense for which the railroad company is not liable in its estimate of damages;[39] but, if the railroad company refuses to do the necessary work, it may not prevent the public authorities from going on its right of way and performing the work in any suitable manner.[40] Where the action of the public authorities in laying out the highway across the railroad is unauthorized, the railroad company may not be required to construct and maintain a crossing.[41]

Penalty for failure to construct crossing of a new highway over the railroad as provided by statute may not be recovered from the railroad where it had no notice or opportunity to be heard.[42]

§ 157. Change after Construction

The state, in the exercise of the police power, may compel a railroad to make such changes in railroad crossings at its own expense as the public safety and convenience may reasonably require.

The legislature may compel a railroad company after the construction of its road to make whatever changes in respect of the crossing of streets and highways the public safety and convenience may reasonably require,[43] and this power may be given to an administrative agency[44] or to a municipality,[45]

Statute relating to elimination of crossings

S C—State ex rel. State Highway Department v. Piedmont & N Ry. Co., 194 S E 631, 186 S C. 49.

34. Tex—Texas, etc., R Co v. Kaufman County, 42 S W. 586, 17 Tex Civ App 251
51 C.J. p 671 note 83.

35. Ill—O'Fallon v. Ohio, etc., R. Co., 45 Ill.App. 572.

36. Mass—Old Colony R Co. v. New Bedford, 74 N E. 468, 188 Mass. 234.

37. Mass—Boston, etc., R. Co. v Cambridge, 34 N.E 382, 159 Mass. 283

38. Mass—Old Colony R. Co. v. Fall River, 18 N E 425, 147 Mass. 455.
51 C.J p 672 note 90.

39. Mass—Boston, etc., R. Co. v. Cambridge, 34 N.E. 382, 159 Mass. 283.

40. Mass—Old Colony R. Co. v Fall River, 18 N E 425, 147 Mass. 455

41. Me.—Chapin v. Maine Cent. R. Co., 53 A. 1105, 97 Me 151.
51 C.J p 671 note 86.

42. Tex.—Kansas, etc., R. Co. v. Grayson County, Civ.App., 5 S.W. 2d 542.

43. N.Y.—Petition of City of Rochester, 36 N.E.2d 72, 286 N Y. 109.
Va.—Norfolk & W. Ry. Co. v. Faris, 157 S E 819, 156 Va. 205.
51 C.J p 672 note 97.

Power exercisable at any time

Pa.—Lehigh & New England R. Co v. Public Service Commission, 191 A. 880, 126 Pa Super. 565.

Right to do work

Where railroads were required to "reconstruct" viaduct by a statute, and ordinance provided that railroads should "pay for the cost thereof," railroads had right to do the work themselves if they chose to do so.—Finlay v. Union Pac. R. Co, D C Kan, 6 F.R D 284.

44. Ill—Illinois Cent. R. Co. v Franklin, County, 56 N E 2d 775, 387 Ill 301—White County v Louisville & N. R. Co., 172 N E 22, 340 Ill 42

Mo—State ex rel Kurn v. Hughes, 153 S.W 2d 46, 348 Mo. 177, conformed to, App., 154 S W.2d 397—State ex rel. Alton R Co v. Public Service Commission, 70 S.W.2d 57, 334 Mo 995

N.Y.—Petition of City of Rochester, 36 N E.2d 72, 286 N.Y 109

Okl.—Kansas City Southern Ry Co v. Citizens of Westville, 89 P.2d 320, 184 Okl. 100, certiorari denied 59 S Ct. 774, 306 U S. 658, 83 L Ed. 1055.

Literal interpretation

Okl.—Kansas City Southern Ry Co v. Citizens of Westville, supra.

Public convenience, safety

(1) Commerce commission can order reconstruction or improvement of railroad crossing only when necessary to preserve public safety.—White County v. Louisville & N. R Co., 172 N.E. 22, 340 Ill. 42.

(2) Railroad commission's order directing railroad to construct viaduct "as necessary for public convenience" was held not authorized by statute authorizing order for alterations of grade crossings "required for public safety."—Chicago & N. W Ry Co v. Railroad Commission, 238 N.W. 365, 205 Wis. 506.

Board's powers exceeded

Iowa.—Incorporated Town of Huxley v. Conway, 284 N.W. 136, 226 Iowa 268

Necessity of order

Cal—Black v Southern Pac Co., 12 P.2d 981, 124 Cal App 321.

Extension of underpass

N J—Erie R. Co v Board of Public Utility Com'rs, 153 A 268, 107 N. J Law 409, affirmed 160 A. 537, 109 N.J.Law 264.

Bridge

A bridge which crossed railroads only and which was erected by the city of Wilkes-Barre, a city of the third class, assisted by contributions of the county of Luzerne and the railroads was a "public utility" which the public utility commission could order the department of highways to reconstruct and allocate cost thereof among the railroads crossed, the city, the county, and state department of highways—City of Wilkes-Barre v Pennsylvania Public Utility Commission, 63 A.2d 452, 164 Pa Super. 210

Duty to seek change

There is no statutory duty of railroad to take initiative in advance of public to seek relocation of crossing with highway where inadequacy of such crossing is result of increase and change in character of travel over highway, duty of railroad arising where relocation has been made necessary by its own operation—Shea v. Boston & M R R, 191 A. 650, 88 N H. 462.

45. Ohio—**Corpus Juris cited in** Yackee v Village of Napoleon, 21 N.E 2d 111, 116, 135 Ohio St. 344.
51 C.J. p 672 note 98.

which must exercise it reasonably.[46] The duty of maintaining and keeping in repair and restoring highway crossings so as not to impair their usefulness is a continuing duty, requiring the railroad to put the street in such condition as changes in circumstances require;[47] and, when a crossing or mode of restoration originally sufficient becomes insufficient by reason of subsequent conditions, increased travel, character of vehicles used, and the like, it is the duty of the railroad company to do whatever the public convenience and necessity may require in order to meet such conditions,[48] rather than what may be required by convenience of the railroad.[49]

Changes within the application of the foregoing rules have been held to include the construction of a bridge or viaduct at a crossing formerly constructed at grade,[50] with the necessary excavations, embankments, and approaches therefor,[51] the widening of a crossing or its approaches to make it sufficient to accommodate the increased amount of travel or character of vehicles used,[52] the widening of a bridge and its approaches,[53] or strengthening it to bear the increased traffic,[54] construction of a fireproof bridge to replace a wooden bridge over the tracks,[55] the widening of the space where the street or highway passes under a railroad,[56] and the removal therefrom of pillars or abutments which reduce the width or obstruct the use of the highway,[57] altering the location of a crossing,[58] the removal of embankments closing a street,[59] reconstruction of inadequate drains to prevent water from flowing from the right of way into an underpass,[60] lowering the grade of a railroad constructed on an embankment to the level of a street,[61] or the changing of the grade of the railroad in order to conform to a change in the grade of a street.[62] However, it is not the duty of a railroad company to strengthen or reconstruct a bridge which is sufficiently strong and suitable for the ordinary highway traffic, so as to make it suitable for the additional use of a street railway,[63] although as to this the contrary has been held when the use of the street by a street railway is an appropriate and needed use.[64]

In the absence of express legislative requirement, a railroad company may not be required to change the location of its road in order to avoid frightening horses on a parallel highway, where the road was lawfully located and the only change of condition is that a greater number of persons are exposed to the danger and that the danger is increased by reason of the greater speed and number of trains.[65] Relocation of highways may, where necessary for the safety of the public, be required of the railroad at its expense under the police power of the state.[66] The closing of a crossing and the opening of a new crossing has been held to be within a statute providing for the alterations of cross-

46. Tex.—Houston & T. C. Ry Co v City of Houston, Civ App, 41 S W 2d 352.
51 C J. p 672 note 99

Evidence held to justify relocation
N Y.—In re South Oyster Bay Road, in Town of Oyster Bay, 101 N Y. S 2d 258, 277 App Div. 1142.

47. N.Y.—Sells v. Defense Plant Corp, 66 N E 2d 289, 295 N Y 227—Sturman v. New York Cent R Co, 19 N.E 2d 679, 280 N.Y 57, reargument denied 21 N E 2d 197, 280 N Y. 688—New York Cent R Co v State, 287 N Y S. 850, 247 App Div 421
Va.—Norfolk & W Ry. Co. v. Faris, 157 S E 819, 156 Va. 205.
51 C.J p 672 note 1.

48. N Y.—Sells v. Defense Plant Corp, 66 N E 2d 289, 295 N Y 227—Sturman v New York Cent R Co, 19 N E 2d 679, 280 N.Y. 57, reargument denied 21 N E 2d 197, 280 N.Y. 688.
Va.—Norfolk & W Ry. Co. v Faris, 157 S.E 819, 156 Va. 205.
51 C.J. p 672 note 2.

49. Va.—Norfolk, etc, R. Co. v Bristol, 83 S E. 421, 116 Va 955.

50. Minn.—State v. Chicago, etc, R Co, 142 N W 312, 122 Minn 280
51 C J p 672 note 4

51. Conn.—Burritt v. New Haven, 42 Conn 174
Minn.—State v St. Paul, etc, R. Co, 28 N.W. 3, 35 Minn 131, 59 Am R 313

52. U S.—Indiana v Lake Erie, etc, R Co, C C Ind, 83 F 284.
Kan.—Atchison, etc, R Co. v. Henry, 45 P 576, 57 Kan 154

53. Mo.—State v Kansas City Terminal R Co, 168 S.W. 1144, 260 Mo 489
51 C J p 672 note 7.

54. Minn.—St Paul v. Great Northern R Co., 226 N.W 470, 178 Minn 193
R I.—Briden v New York, etc, R Co, 65 A. 315, 27 R I 569.

55. U S.—Carolina, etc., R. Co. v Lincolnton, C C A.N.C, 33 F.2d 719

56. Ind.—New York, C. & St L R. Co. v. Singleton, 190 N.E. 761, 207 Ind 449, certiorari denied 56 S.Ct 89, 296 U S 578, 80 L Ed. 409.
51 C J p 673 note 11.

57. Mass.—Boston, etc., R. Co. v Middlesex County, 131 N E 283, 239 Mass. 127
51 C J p 673 note 12.

58. N Y.—In re State Department of Public Works, 251 N Y.S 655, 233 App Div. 64.

59. Kan.—Emporia v. Atchison, etc, R Co, 129 P 161, 88 Kan 611.

60. N J.—Metuchen v Pennsylvania R Co, 69 A 465, 73 N J.Eq. 359.

61. Tex.—Houston, etc, R Co v. Dallas, 84 S W 648, 98 Tex 396, 70 L R.A 850.
51 C J. p 673 note 15.

62. N C.—Atlantic Coast Line R. Co. v. Goldsboro, 71 S E 514, 155 N C. 356, affirmed 34 S Ct. 364, 232 U.S. 548, 58 L Ed 721.
51 C J. p 673 note 16.

63. R.I.—Briden v. New York, etc., R Co, 65 A. 315, 27 R.I 569.
51 C.J. p 673 note 17.

64. Minn.—St Paul v. Great Northern R Co, 163 N W. 788, 138 Minn. 25, L.R A 1917F 485.

65. Conn.—State v New Haven, etc., R. Co., 45 Conn. 331.

66. Ill.—Chicago, etc., R. Co. v. Illinois Commerce Commission, 158 N E. 376, 326 Ill. 625, 55 A.L R. 654.

ings[67] When the statutes provide for alteration of a highway on obtaining consent of the county supervisors,[68] the railroad need not build the new road before it can obtain the necessary consent.[69]

Cost of change. The legislature has the power to determine at whose expense an improvement at an existing crossing shall be made,[70] and any such changes falling properly within the police power of the state may be required to be made at the sole expense of the railroad company,[71] or the expense may be apportioned between the railroad and the municipality, in accordance with the various statutes permitting such apportionment.[72] It has been held that the proper basis of apportionment is the extent to which the presence of the railroad enhances the cost of the necessary improvements.[73]

Where the amount to be assessed the railroad is in accordance with the benefits it receives, the fact that it will not be required to separate grades may be considered,[74] but this does not preclude a subsequent separation.[75] Where an underpass may be used with safety by changing the highway to reduce a sharp curve therein, it is improper to require the railroad to bear the expense of a relocation of the underpass.[76] Under an agreement with the municipality whereby the railroad assumed the expense of all changes necessary and incident to a change of a crossing, the railroad is not liable for the cost of unnecessary changes.[77] Statutes providing for apportionment of cost of changes do not authorize the charging to a municipality a part of the cost of removing an illegal structure at a crossing.[78] If a railroad refuses to make the required changes, the municipality may do so and recover the expense thereof from the railroad.[79]

Review of orders requiring change. An order of a commission requiring a change in a railroad crossing will not be reversed where its findings are not against the weight of the evidence[80] and the order is not unreasonable or arbitrary[81] The court will

67. N.Y.—In re James Street Crossing, City of Oneida, 292 N Y S 877, 249 App Div. 875, affirmed In re Crossing of James St in City of Oneida and New York Cent R Co., 11 N.E 2d 779, 275 N Y. 609.

68. Va.—Carolina, etc, R Co v. Scott County, 63 S E. 412, 109 Va 34.
51 C J. p 673 note 21.

69. Va.—Carolina, etc, R Co v. Scott County, supra

70. N Y.—Petition of City of Rochester, 36 N E.2d 72, 286 N Y 109.
Va.—Norfolk & W Ry Co v. Faris, 157 S E 819, 156 Va 205.
51 C.J p 673 note 23

71. Va.—Norfolk & W. Ry Co. v. Faris, supra
51 C.J p 673 note 24

72. U.S.—Jackson County v. Alton R Co, C C A Mo., 105 F 2d 633, certiorari denied Alton R Co. v. Jackson County, Mo, 60 S Ct 175, 308 U S. 610, 84 L Ed. 510.
Ill.—Illinois Cent. R Co v Franklin County, 56 N E 2d 775, 387 Ill. 301.
N.Y.—Petition of City of Rochester, 36 N E 2d 72, 286 N.Y. 109—Public Service Commission. State Division, Department of Public Service v. Long Island R. Co, 18 N Y S 2d 914, 173 Misc 165.
Pa.—Lehigh & New England R Co. v. Public Service Commission, 191 A. 380, 126 Pa Super 565.
51 C J. p 674 notes 25, 26.

Exercise of police power
Ill.—Illinois Cent. R. Co. v Franklin County, 56 N.E.2d 775, 387 Ill 301.

Street railroad
The cost of changing a bridge to accommodate a street railroad may be apportioned between the railroad and the street railroad in accordance with a statutory provision authorizing it.—New York, etc, R Co v Orange, 100 A 25, 91 Conn. 472

Binding effect of order
An order of public service commission requiring railway company to pay part of cost of constructing viaduct was binding on company after entry of supreme court's judgment, and the federal district court was required to recognize and give full credit to supreme court's judgment in county's action to recover part of cost of viaduct from railway company.—Jackson County v Alton R. Co, C C.A Mo., 105 F 2d 633, certiorari denied Alton R. Co v. Jackson County, Mo., 60 S.Ct. 175, 308 U S 610, 84 L Ed. 510.

73. Mo.—State ex rel. Alton R Co v. Public Service Commission, 70 S.W.2d 57, 334 Mo 995—State ex rel. Kansas City Terminal R Co v Public Service Commission, 272 S W 957, 308 Mo. 359

Benefit to railroad is not fundamental consideratio in proportioning expense of widening viaduct, but true basis of apportionment is extent to which presence of railroad at place enhances cost of necessary improvements.—State ex rel. Alton R. Co v. Public Service Commission, 70 S W.2d 57, 334 Mo. 995.

Elimination of danger of collision between vehicles and trains and benefit to railroad should be considered in proportioning cost of widening viaduct, but such matters are not alone controlling.—State ex rel Alton R Co. v. Public Service Commission, supra

Approaches are properly considered as necessary parts of overhead crossings in making apportionment of cost between railroad and county.—State ex rel. Alton R Co v Public Service Commission, supra

74. Wis.—Chicago, etc, R Co. v. State R. Commission, 188 N.W 86, 178 Wis 485.

75. Wis.—Chicago, etc, R Co. v. State R Commission, supra

76. N Y.—In re State Department of Public Works, 251 N Y S. 655, 233 App Div. 64

77. Md.—Pennsylvania R. Co v Baltimore, 116 A. 859, 140 Md 77.

78. N.Y.—Mt Vernon v Public Service Commission, 196 N Y S 648, 119 Misc. 561.

79. R I.—Briden v. New York, etc, R Co, 65 A. 315, 27 R I. 569

80. N J.—Rahway Valley R Co v. Board of Public Utility Com'rs, 21 A 2d 302, 127 N J Law 164
51 C J p 674 note 34.

Prior ruling
The board of public utility commissioners was not concluded by opinion expressed more than ten years before that single highway crossing of railroad right of way at particular point was adequate, since increase of traffic demanded new measures to meet public need.—Rahway Valley R Co. v. Board of Public Utility Com'rs, supra

81. N J.—Rahway Valley R. Co v. Board of Public Utility Com'rs, supra.
51 C.J p 674 note 35.

not substitute its judgment for that of the commission.[82]

Proceedings under Massachusetts statutes. In Massachusetts the procedure to secure the alteration of a crossing, where such alteration does not involve a change of grade, is regulated by particular statutory provisions.[83] Under these provisions the county commissioners may require whatever changes may be necessary,[84] such as the widening of the highway,[85] reconstruction of a footbridge,[86] or the alteration of the surface of a railroad bridge so as to prevent the discharge of water on a street below,[87] but the powers given the county commissioners by these provisions gives them no power to order elimination of a grade crossing.[88] The commissioners must prescribe the manner of making the changes and the limits in which they are to be made,[89] and an order which fails to do this properly is void for indefiniteness.[90] The decree of the county commissioners must be specifically performed.[91]

Where county commissioners are required to determine the necessity for alterations in a crossing, on an expression of an opinion by the municipal authorities or directors of the railroad company that it is necessary, an objection to the sufficiency of such expression of opinion should be made before the county commissioners, and may not be made in a collateral proceeding after they have ordered the alteration.[92] The supreme judicial court is given jurisdiction in equity to enforce the orders of county commissioners relating to crossings,[93] and the court has no authority to change the order but only to enforce it as made;[94] but the court may, where its jurisdiction is invoked under the statute, inquire whether the county commissioners have acted in excess of their jurisdiction.[95] The petition required by the statute must be brought under this statute and not the statute providing for relocation of highways,[96] or under the statute providing for abolition of grade crossings.[97] The petition need not set out any definite specification of the alteration.[98]

The statute provides for appointment of a special commission to apportion the costs of the alteration, and the apportionment must be left to this commission,[99] and the special commission may assess costs on the city.[1] The commission may apportion part of the costs on the railroad, even though it receives no benefit from the alteration,[2] and it has been held that it may not be ruled as a matter of law that a railroad receives no benefit from changes providing a more substantial and safe bridge.[3] A street railway having tracks on a way to be altered may be required to share in the expense of the alteration.[4] The special commission has no jurisdiction to apportion costs of a crossing already built,[5] and the appearance of a county's representative at the hearing before the commission will not confer jurisdiction.[6]

In view of its liability to compensate the railroad for the taking of land in order to establish the new highway, a town may, as a compromise, validly agree to bear the expense of future alterations of the crossings.[7] The railroad is not liable for interest on the amount it is required to pay until after the award, even though the town voluntarily did work before the decree.[8] When, as provided for

82. N J—Rahway Valley R Co v. Board of Public Utility Com'rs, supra.

83. Mass—Petition of Brookline, 128 N E 97, 236 Mass. 260
51 C.J p 674 note 36.

84. Mass—Petition of Boston, etc, R. Co, 122 N.E. 191, 232 Mass 171.

85. Mass—Holliston v New York Cent., etc, R. Co, 81 N.E 204, 195 Mass 299—New England R Co v. Railroad Comrs, 50 N E 549, 171 Mass 135.

86. Mass—Petition of Boston, etc., R. Co, 136 N.E. 147, 242 Mass. 455.

87. Mass—Boston, etc, R Co. v. Hampden County, 42 N.E. 100, 164 Mass. 551.

88. Mass.—Boston, etc., R Corp v Middlesex County, 85 N E 108, 198 Mass 584—Boston, etc, R Co v. Hampden County, 116 Mass 73
Elimination of grade crossings generally see infra § 161 et seq.

89. Mass—Boston, etc., R. Corp. v Middlesex County, 85 N E. 108, 198 Mass 584.

90. Mass.—Boston, etc., R. Corp. v Middlesex County, supra
51 C.J p 674 note 43.

91. Mass.—Petition of Vermont, etc, R Co., 136 N E 599, 242 Mass. 590

92. Mass—Parsons v. Northampton, 28 N E 350, 154 Mass. 410.

93. Mass—Nichols v. Boston, etc, R. Co., 54 N.E. 881, 174 Mass. 379
51 C J p 675 note 46.

94. Mass—Stanley v. Old Colony R Co., 57 N E 344, 176 Mass. 145.

95. Mass.—Nichols v. Boston, etc, R Co, 54 N E. 881, 174 Mass. 379

96. Mass—Boston, etc., R. Co v. Middlesex County, 59 N E. 115, 177 Mass 511.

97. Mass—Northampton v. New Haven, etc, R. Co., 56 N.E. 598, 175 Mass. 430.

98. Mass.—Boston, etc., R Co v. Hampden County Comrs, 42 N E 100, 164 Mass. 551.

99. Mass—Petition of Boston, etc, R Co, 140 N E 739, 246 Mass 286.
51 C.J. p 675 note 53.

1. Mass—Petition of Boston, etc, R Co, 122 N E 191, 232 Mass 171

2. Mass—Petition of Brookline, 128 N E 97, 236 Mass 260
51 C.J p 675 note 55.

3. Mass—Petition of Brookline, supra.
51 C.J. p 675 note 56

4. Mass—Fitchburg v Boston, etc., R. Co, 89 N E 438, 203 Mass 304.

5. Mass—Petition of Vermont, etc, R Co, 136 N E. 599, 242 Mass. 590.

6. Mass.—Petition of Vermont, etc., R. Co, supra

7. Mass.—Petition of Boston, etc, R Co, 136 N.E. 147, 242 Mass. 455.
51 C.J. p 675 note 60.

8. Mass—Petition of Brookline, 128 N E 97, 236 Mass. 260.

by the statute, a jury is applied for to revise the findings of the special commission apportioning the costs, the decision of the county commissioners must be assumed to rest on satisfactory evidence,[9] and evidence of another plan is not admissible.[10] The question of the necessity for, and manner of, making the alteration is not in issue.[11] It is for the attacking party to show that the apportionment by the special commission is wrong.[12] Where a jury is asked for, it may apportion the cost of the alterations,[13] and may lawfully assess the whole or part of the costs on the municipality.[14] On revision by a jury, immaterial rulings will not be given,[15] or requests which would require the jury to pass on all the facts found by the commissioners appointed to apportion costs.[16]

§ 158. Changing Crossings from Different Level to Grade

A municipality may change the grade of a street so as to reduce an overhead crossing to the grade of the railroad.

The exigencies of a particular locality may demand a grade crossing instead of a crossing at a different level,[17] and a municipality invested with authority to regulate, control, and improve its streets may, when it deems that the public necessities so require, change the grade of a street so as to reduce an overhead crossing to the grade of the railroad,[18] and it may not, in the absence of express legislative authority, divest itself of the power to make such a change,[19] although the legislature may authorize such a contract.[20]

§ 159. Determination as to Necessity, Place, Mode, and Expense of Crossings

In many jurisdictions, a commission or board, usually the one intrusted with the regulation of railroads generally, may determine all questions relative to crossings of railroads and highways

In many jurisdictions, a commission or board, usually the one intrusted with the regulation of railroads generally, may determine all questions relative to crossings of highways and railroads.[21] This

9. Mass.—Petition of Boston, etc., R. Co., 140 N.E. 739, 246 Mass. 286

10. Mass.—Boston, etc., R. Corp. v. Winchester, 30 N.E. 1139, 156 Mass. 217.

11. Mass.—Petition of Boston, etc., R. Co., 140 N.E. 739, 246 Mass. 286

12. Mass.—Petition of Boston, etc., R. Co., 140 N.E. 739, 246 Mass. 286

13. Mass.—Petition of Boston, etc., R. Co., 136 N.E. 147, 242 Mass. 455.—Boston, etc., R. Co. v. Newton, 20 N.E. 106, 148 Mass. 474

14. Mass.—Petition of Boston, etc., R. Co., 136 N.E. 147, 242 Mass. 455

15. Mass.—Petition of Brookline, 128 N.E. 97, 236 Mass. 260

16. Mass.—Petition of Brookline, supra.

17. U.S.—Wabash R. Co. v. Defiance, Ohio, 17 S.Ct. 748, 167 U.S. 88, 42 L.Ed. 87.

Abandonment of underpass

Evidence sustained findings of public service commission as to need, safety, and advisability of abandonment of railroad underpass and that proposed construction of railroad-highway grade crossing protected by automatic warning signals would not be unduly hazardous to life and property considering volume of railroad and highway traffic involved.—Great Northern Ry. Co. v. McDonnell, N.D., 45 N.W.2d 721.

18. U.S.—Wabash R. Co. v. Defiance, Ohio, 17 S.Ct. 748, 167 U.S. 88, 42 L.Ed. 87.

19. U.S.—Wabash R. Co. v. Defiance, supra.

51 C.J. p. 675 note 72.

20. Pa.—Appeal of Philadelphia, etc., R. Co., 15 A. 476, 121 Pa. 44

51 C.J. p. 676 note 73.

21. U.S.—City of Tulsa, Okl. v. Midland Valley R. Co., C.C.A.Okl., 168 F.2d 252.

Mo.—American Petroleum Exchange v. Public Service Commission, 172 S.W.2d 952, transferred, see 176 S.W.2d 533, 238 Mo.App. 92—State ex rel. Alton R. Co. v. Public Service Commission, 70 S.W.2d 57, 334 Mo. 995—State ex rel. and to Use of Chicago Great Western R. Co. v. Public Service Commission of Missouri, 51 S.W.2d 73, 330 Mo. 729, certiorari denied Chicago Great Western R. Co. v. Public Service Commission of Missouri, 53 S.Ct. 89, 287 U.S. 641, 77 L.Ed. 555—Liddle v. Thompson, 162 S.W.2d 614, 236 Mo.App. 1071

N.J.—Central R. Co. of New Jersey v. Board of Public Utility Com'rs, 170 A. 246, 112 N.J.Law 215, 172 A. 357, 112 N.J.Law 559, affirmed Central R. Co. of New Jersey v. State Highway Commission, 176 A. 725, 114 N.J.Law 397—State Highway Commission v. Board of Public Utility Com'rs, 170 A. 246, 112 N.J.Law 215, 172 A. 357, 112 N.J.Law 559, affirmed 176 A. 725, 114 N.J.Law 397.

N.Y.—In re State Department of Public Works, 251 N.Y.S. 655, 233 App.Div. 64.

Pa.—Petition of Allegheny County, 76 A.2d 184, 366 Pa. 66—St. Peter's Roman Catholic Congregation of McKeesport v. Pennsylvania Public Utility Commission, 54 A.2d 92, 161 Pa.Super. 64

51 C.J. p. 676 notes 75, 76.

Opening or extension of public way across existing railroad see supra § 156

Jurisdiction over private corporation

On petition of state highway commission to public service commission for an order modifying previous order permitting grade crossing on U.S. highway and its intersection with railroad tracks, public service commission did not have and could not exercise any jurisdiction over a private corporation owning buildings located on railroad's right of way under lease from railroad and allegedly obstructing views of travelers.—American Petroleum Exchange v. Public Service Commission, 172 S.W.2d 952, transferred, see 176 S.W.2d 533, 238 Mo.App. 92.

Private convenience

The convenience and necessity required to support an order directing the construction of a crossing are those of the public and not of the individual or a number of individuals.—Yowell v. Cleveland, C., C. & St. L. R. Co., 195 N.E. 667, 360 Ill. 272.

Findings

(1) Original determination of question whether public convenience and necessity exist for a highway-railroad grade crossing is for corporation commission and its findings of fact are prima facie just, reasonable, and correct.—Thompson v. State, 164 P.2d 232, 196 Okl. 190.

(2) Commerce commission's findings that statutory requirements for opening of highway had been complied with, that highway would more conveniently serve certain residents, that public convenience and neces-

power of regulation covers grade, subway, and overhead crossings,[22] and the commission may ordinarily determine and prescribe the manner in which the crossing is to be made,[23] the place where the crossing may be constructed,[24] the apportionment of expense,[25] and the safeguards to be provided where the crossing is to be at grade;[26] and a statute requiring the railroad to construct and maintain crossings at its own expense is not inconsistent with a statute giving a commission power to determine the place, mode, and expense of crossings so far as the latter gives the commission exclusive power to determine location.[27]

The commission has no authority beyond what is given it by the terms of the statute,[28] and a statute giving the commission exclusive power to determine and prescribe the manner of constructing crossings has no reference to granting permission to install them,[29] and statutory authority to regulate railroads in matters of transportation gives a commission no power to order construction of a crossing.[30] Where grade crossings are permitted, it is nevertheless improper to require the railroad to construct a grade crossing which would be dangerous.[31] The commission need not determine the manner of crossing at the time a certificate of public convenience and necessity is granted.[32] Where the commission has the right to change its orders on due notice to interested persons, the validity of its findings and order are not affected by the inclusion therein of a provision for reopening the matter on the occurrence of a specified event.[33]

Character of highway. The statutes giving a commission power to regulate crossings apply only to

sity required highway to be extended at grade at certain point, and that no crossings had theretofore been provided in such part of town were held mere conclusions, and not to justify order requiring railroad to construct and maintain grade crossing at such point—Yowell v. Cleveland, C, C & St. L. R. Co, 195 N E 667, 360 Ill. 272.

22. Mo—State ex rel. Alton R Co v. Public Service Commission, 70 S.W.2d 52, 334 Mo 985—State v. Public Service Commission, 197 S W. 56, 271 Mo. 270
N J—Erie R Co. v. Board of Public Utility Com'rs, 153 A 268, 107 N. J.Law 409, affirmed 160 A. 537, 109 N J.Law 264.

Exclusive power as to grade crossings
Mo.—American Petroleum Exchange v. Public Service Commission, 172 S W 2d 952, transferred, see 176 S.W 2d 533, 238 Mo App. 92—Liddle v. Thompson, 162 S.W.2d 614, 236 Mo App. 1071.

23. Mo.—State ex rel. Alton R. Co. v Public Service Commission, 70 S.W.2d 57, 334 Mo. 995—City of St. Louis v. St Louis-San Francisco Ry. Co., 50 S W.2d 637, 330 Mo 499
Okl—Midland Valley R. Co. v. Town of Panama, 12 P.2d 503, 158 Okl. 55.
Utah.—Provo City v. Department of Business Regulation, 218 P.2d 675.
51 C J. p 676 note 78.

Legislative or administrative question
Determination of question whether permission should be granted to construct a highway across railroad tracks at grade is a legislative or an administrative question—Butcher v. Flagg, 203 P.2d 651, 185 Or. 471

"And;" "or"
Statutory provision that width, height, strength, and materials of viaduct city of the first class intends to require railroad company to construct, shall be as required by board of public works, "and" as may be approved by the mayor and city council, would be construed to read "or" as may be approved by mayor and council, and mayor and council thereunder could require and approve the width, length, strength, and material of proposed underpass where city had no board of public works.—State ex rel City of Grand Island v. Union Pac R. Co, 42 N W.2d 867, 152 Neb 772.

24. U S—City of Tulsa, Okl v Midland Valley R. Co., C.C A.Okl., 168 F.2d 252
Mo—State ex rel. Alton R. Co. v. Public Service Commission, 70 S. W.2d 57, 334 Mo. 995—State ex rel and to Use of Chicago Great Western R. Co. v. Public Service Commission of Missouri, 51 S.W.2d 73, 330 Mo. 729, certiorari denied Chicago Great Western R. Co v Public Service Commission of Missouri, 53 S Ct. 89, 287 U S. 641, 77 L.Ed. 555.
Okl.—Thompson v. State, 164 P.2d 232, 196 Okl. 190—Kansas City Southern Ry. Co v. Citizens of Westville, 89 P 2d 320, 184 Okl 100, certiorari denied 59 S Ct. 774, 306 U.S 658, 83 L Ed 1055.
51 C.J. p 677 note 79

25. Mo.—State ex rel. Alton R. Co v. Public Service Commission, 70 S.W.2d 57, 334 Mo 995—State ex rel. and to Use of Chicago Great Western R Co v. Public Service Commission of Missouri, 51 S.W 2d 73, 330 Mo. 729, certiorari denied Chicago Great Western R. Co v Public Service Commission of State of Missouri, 53 S.Ct. 89, 287 U.S 641, 77 L.Ed. 555.
51 C.J. p 677 note 80.

Full expense apportioned to railroad
It is within the discretion of the commission to assess the whole cost of maintenance on the railroad, and unless it abuses its discretion the ruling will not be set aside—Missouri, etc., R. Co. v State, 200 P. 208, 82 Okl. 221.

26. Mich—Fort-St Union Depot Co. v. State R Crossing Board, 45 N W 973, 81 Mich. 248.
51 C J. p 677 note 81.

27. Mo.—Kirksville v. Hines, 225 S. W. 950, 285 Mo. 233.

28. Mo—State v. Public Service Commission, 289 S.W. 785, 316 Mo. 233.
51 C.J p 677 note 83.

29. Mo—State v. Public Service Commission, 257 S.W. 462, 301 Mo. 179.

30. Okl.—Atchison, etc., R. Co. v. State Corporation Commission, 170 P. 1156, 68 Okl. 1.

31. N.J—New York, etc., R. Co. v. Public Utility Comrs, 103 A. 1053, 91 N J.Law 701.

32. N.Y—People v. Railroad Comrs., 110 N Y.S. 862, 126 App.Div. 492.

33. Wash.—State ex rel. Oregon-Washington R. & Nav. Co v. Walla Walla County, 104 P.2d 764, 5 Wash.2d 95.

Res judicata
Denial by corporation commission of application to open a crossing across railroad tracks was not determinative of the matter on subsequent application to open the same crossing and construct an overpass on same street over tracks of another railroad company, since the applications were not the same and, in any event, doctrine of res judicata is not applicable in proceedings before corporation commission.—Chicago, R. I. & P. R. Co. v. State, Okl, 225 P.2d 363.

public crossings.[34] Since a railroad need not construct a crossing at a point where no street or highway has been legally established, the commission has no authority to order such a crossing.[35]

Powers of courts. A court of equity, where it has jurisdiction, may decree the mode of crossing,[36] and, where the evidence warrants it, will order a grade crossing,[37] and, where a change from an overhead crossing to an underpass is necessary, the court may, where the parties fail to agree, authorize the construction of the underpass.[38] The necessity for the change of location of a highway has been held a question for the court.[39]

§ 160. —— Appeal from Orders of Commission

A commission's orders as to the necessity, place, mode, and expense of a crossing are generally subject to judicial review, but will not be disturbed where supported by substantial evidence.

When no appeal from the order of a commission is provided for, an appeal will be dismissed for want of jurisdiction;[40] and the order is as conclusive as a judgment of a court of last resort.[41] However, the commission's orders are generally subject to judicial review.[42] The question on review is whether or not the order is reasonable and lawful and not whether the court would have made the same order,[43] and the burden is on the party attacking the order to show that it is unreasonable and unlawful.[44] An order must be supported by substantial evidence,[45] and an order which has a substantial basis in the evidence will not be interfered with,[46] unless it is arbitrary, capricious, unreasonable, an

34. Utah.—Bamberger Electric R Co v State Public Utilities Commission, 204 P. 314, 59 Utah 351.

Unused right of way

The statute providing that no public utility engaged in transportation of passengers or property shall without prior order of the public utility commission construct, alter, or abolish its facilities across any highway concerns only crossings where the line of an operating railroad crosses a highway or the line of another operating railroad and does not apply where a highway is crossed by an unused or abandoned right of way, since hazards with which the statute was intended to deal were those created by the movements of trains over tracks crossing the highway and not the mere presence of the highway or abandoned or dead rails.—Jennings v. Pennsylvania Public Utility Commission, 14 A. 2d 882, 140 Pa Super 569

35. Okl.—St. Louis-San Francisco R. Co. v. State Corporation Commission, 218 P. 821, 95 Okl. 140
51 C.J. p 678 note 94.

36. N.J.—Hudson County v. New Jersey Cent R. Co., 59 A. 303, 68 N.J Eq 500, affirmed 65 A. 1117, 70 N J.Eq. 806.
51 C.J. p 678 note 96

37. N.J.—Hudson County v. New Jersey Cent. R. Co., supra.

38. N.J.—New Jersey Cent. R. Co. v. Hudson County, 130 A. 566, 98 N.J Eq. 677.

39. Ohio.—Brown v. Akron, etc., R. Co., 35 Ohio Cir Ct. 35, modified on other grounds 87 N.E. 1131, 79 Ohio St. 440.

40. Okl.—St. Louis, etc., R. Co. v Miller, 123 P. 1047, 31 Okl. 801—St. Louis, etc., R. Co. v. State, 115 P. 874, 28 Okl. 802.

41. Conn.—Appeal of Waterbury, 17 A. 355, 57 Conn 84.
51 C.J. p 678 note 2.

42. N.J.—Central R Co of New Jersey v. Board of Public Utility Com'rs, 170 A. 246, 112 N.J Law 215, 172 A. 357, 112 N.J Law 559, affirmed Central R Co of New Jersey v. State Highway Commission, 176 A. 725, 114 N.J Law 397—State Highway Commission v. Board of Public Utility Com'rs, 170 A. 246, 112 N.J.Law 215, 172 A. 357, 112 N.J.Law 559, affirmed 176 A. 725, 114 N.J Law 397.
51 C.J. p 678 note 3.

43. Mo.—State ex rel. Alton R. Co v. Public Service Commission, 70 S.W 2d 52, 334 Mo 985.

Public convenience and necessity, considering interest and rights of public and railroad, are determinative factors as to reasonableness of corporation commission's order.—In re Protest Against Closing of Crossing Nine Poles South of Mile Post No. 31 at Moriarty, 20 P 2d 1029, 37 N.M. 226.

Evidence held to show order reasonable or not unreasonable

Mo.—State ex rel. Alton R. Co. v. Public Service Commission, 70 S W.2d 57, 334 Mo. 995—State ex rel Alton R. Co. v. Public Service Commission, 70 S.W 2d 55, 334 Mo. 992—State ex rel. Alton R Co v. Public Service Commission, 70 S W.2d 52, 334 Mo. 985.

N.J.—Erie R. Co. v. Board of Public Utility Com'rs, 153 A. 268, 107 N. J.Law 409, affirmed 160 A. 537, 109 N.J.Law 264

Okl.—City of Tulsa v. State Corporation Commission, 37 P.2d 619, 169 Okl. 455.

Order held unreasonable

N.M.—In re Protest Against Closing of Crossing Nine Poles South of Mile Post No. 31 at Moriarty, 20 P 2d 1029, 37 N.M. 226

44. Mo.—State ex rel. Alton R Co v. Public Service Commission, 70 S W.2d 57, 334 Mo 995—State ex rel. Alton R Co v Public Service Commission, 70 S.W.2d 52, 334 Mo 985

Stipulation of parties that evidence introduced in circuit court should not be referred to commissioner, as provided in statute, did not relieve plaintiff of statutory burden of showing that commissioner's determination was unlawful and did not have the effect of transferring from commissioner to court determination of question whether permission should be granted.—Butcher v. Flagg, 203 P 2d 651, 185 Or 471.

45. Wash.—State ex rel. Oregon-Washington R. & Nav. Co v. Walla Walla County, 104 P 2d 764, 5 Wash 2d 95.

46. Ill.—Public Utilities Commission v. Smith, 131 N.E 371, 293 Ill. 151.

Wash.—State ex rel Oregon-Washington R & Nav Co. v Walla Walla County, 104 P.2d 764, 5 Wash 2d 95

Evidence held sufficient to sustain findings or order

Mo.—State ex rel and to Use of Chicago Great Western R. Co. v. Public Service Commission of Missouri, 51 S.W 2d 73, 330 Mo. 729, certiorari denied Chicago Great Western R Co. v. Public Service Commission of State of Missouri, 53 S Ct. 89, 287 U.S. 641, 77 L.Ed 555.

Okl.—Chicago, R. I. & P. R. Co. v. State, 225 P.2d 363.

Or.—Butcher v. Flagg, 203 P.2d 651, 185 Or 471

Pa.—St. Peter's Roman Catholic Congregation of McKeesport v. Pennsylvania Public Utility Commission, 54 A.2d 92, 161 Pa.Super. 64

error of law, or a violation of constitutional rights [47] Where the necessary jurisdictional facts appear by implication, the order will not be reversed for want of adequate findings of jurisdictional facts.[48]

§ 161. Abolition and Removal of Grade Crossings

Statutes as to the elimination of grade crossings are to be liberally and reasonably construed, having in mind their objectives.

The desirability of abolishing grade crossings is generally recognized,[49] and authority for, and the procedure to be followed in, eliminating grade crossings is frequently provided by statute.[50] The subject of grade crossing abolition may from time to time be regulated by the legislature and changes made in the statutes,[51] and such changes may be made applicable to pending cases.[52] Statutes as to the elimination of grade crossings are to be liberally and reasonably construed, having in mind their objectives,[53] and should not be so construed as to produce absurd consequences.[54] The elimination of a grade crossing is a public improvement or project,[55] even though the railroad will benefit thereby,[56] but a declaration by the legislature that the work of eliminating railroad crossings is public work has been held not to enlarge the legislature's power to regulate such work.[57] The public is affected by the elimination of a grade crossing both in the matter of the elimination of the crossing and the cost of the separation.[58]

A railroad may abolish a grade crossing of its own motion, as where the abolition of grade crossings has been a declared policy of the state,[59] or when required by law to construct and maintain bridges and passages at crossings and authorized to alter and grade highways so that public travel thereon shall not be impeded.[60]

§ 162. —— Contracts and Agreements for Abolition or Removal

Municipalities are generally authorized to enter into contracts with railroad companies to secure the abolition of grade crossings.

Municipalities are generally authorized to enter into contracts with railroad companies to secure the abolition of grade crossings,[61] and may also con-

Wash.—State ex rel. Oregon-Washington R. & Nav. Co. v. Walla Walla County, 104 P.2d 764, 5 Wash.2d 95.

47. Pa.—St. Peter's Roman Catholic Congregation of McKeesport v. Pennsylvania Public Utility Commission, 54 A.2d 92, 161 Pa.Super. 64.

48. Vt.—Waterbury v. Central Vermont R. Co., 108 A. 423, 93 Vt. 461. 51 C.J. p. 678 note 5.

49. N.Y.—Matter of Boston, etc., R. Co., 72 N.Y.S. 32, 64 App.Div. 257, affirmed 63 N.E. 1115, 170 N.Y. 619.

50. Neb.—Chicago & N. W. Ry. Co. v. County Board of Dodge County, 28 N.W.2d 396, 148 Neb. 648.

Statute held complete and comprehensive

Neb.—Chicago & N. W. Ry. Co. v. County Board of Dodge County, supra.

Lessee of a railroad is the company operating a railroad within the meaning of a grade crossing's elimination act, so that it may be required to eliminate the grade crossing.—Erie R. Co. v. Public Utility Comrs., 98 A. 13, 89 N.J.Law 57, affirmed 103 A. 1052, 90 N.J.Law 673, affirmed 41 S.Ct. 169, 254 U.S. 394, 65 L.Ed. 322.

51. Mass.—In re Mayor and Aldermen of Taunton, 194 N.E. 919, 290 Mass. 118.

52. Mass.—In re Mayor and Aldermen of Taunton, supra.—In re City of Northampton, 33 N.E. 568, 158 Mass. 299.

53. N.Y.—City of New York v. Maltbie, 53 N.Y.S.2d 234, affirmed 53 N.Y.S.2d 953, 269 App.Div. 662, appeal denied 54 N.Y.S.2d 700, 269 App.Div. 685, affirmed 63 N.E.2d 119, 294 N.Y. 931.

54. N.Y.—City of New York v. Maltbie, supra.

55. Md.—Brehm v. Tabler, 5 A.2d 320, 6 A.2d 378, 176 Md. 411.

Neb.—Chicago & N. W. Ry. Co. v. County Board of Dodge County, 28 N.W.2d 396, 148 Neb. 648.

N.Y.—Long Island R. Co. v. Department of Labor of State of New York, 247 N.Y.S. 278, 138 Misc. 612, affirmed 177 N.E. 17, 256 N.Y. 498.—Columbia Mach. Works v. Long Island R. Co., 41 N.Y.S.2d 581, reversed on other grounds 47 N.Y.S.2d 383, 267 App.Div. 582.

State's power of "supervision" over elimination of railroad grade crossings includes power to direct that work proceed in manner which will reasonably tend to promote efficiency and diminish danger of delay and interruption.—Long Island R. Co. v. Department of Labor of State of New York, 177 N.E. 17, 256 N.Y. 498.

Street improvements

The necessary change or elevation of grades of streets and the depression and elevation of railroad tracks crossing public streets, as authorized by a statute, abolishing grade crossings, are street improvements for the benefit of the traveling public, within the police power for the conservation of the public safety and welfare.—Morris v. Indianapolis, 94 N.E. 705, 177 Ind. 369, Ann.Cas. 1915A 65.

56. Md.—Brehm v. Tabler, 5 A.2d 320, 6 A.2d 378, 176 Md. 411.

N.Y.—Long Island R. Co. v. Department of Labor of State of New York, 247 N.Y.S. 278, 138 Misc. 612, affirmed 177 N.E. 17, 256 N.Y. 498.

57. N.Y.—Long Island R. Co. v. Department of Labor of State of New York, 177 N.E. 17, 256 N.Y. 498.

58. Mo.—State ex rel. and to Use of St. Paul & K. C. Short Line R. Co. v. Public Service Commission of Missouri, 92 S.W.2d 126, 338 Mo. 724.

59. Pa.—Ritter v. Lehigh Coal, etc., Co., 16 Pa.Dist. 715.

60. N.J.—West Jersey, etc., R. Co. v. Waterford Tp., 55 A. 157, 64 N.J.Eq. 663.

51 C.J. p. 678 note 10.

61. Mich.—Case v. City of Saginaw, 288 N.W. 357, 291 Mich. 130.

N.C.—Jones v. City of Durham, 147 S.E. 824, 197 N.C. 127.

51 C.J. p. 678 note 12.

Capacity and power of municipal corporations to contract generally see Municipal Corporations § 976 et seq.

Special legislation controlling

The provisions of Greater New York Charter that no contract not to be paid by assessments on prop-

tract with the state with respect to the elimination of such crossings.[62] Where the statute authorizes contracts by municipalities, a township may enter into such a contract,[63] and where the statute authorizes a municipality to enter into contracts with companies entering the city, it has the power to enter into contracts with railroads constructed wholly within the city limits.[64] Where the legislature has power in the first instance to authorize a contract between the municipality and a railroad as to the abolition of grade crossings, it may ratify and confirm such a contract when made.[65] Where the exclusive power to determine the manner of crossing is vested in a commission, a railroad and a municipality may not determine the manner by agreement,[66] but a contract between a municipality and a railroad is subject to the approval of the commission.[67]

Such a contract may not be created by implication,[68] and the expenditure of a sum of money by a highway commission in anticipation of a contract does not constitute a contract so as to prevent the commission having control over crossings ordering abolition in accordance with another plan.[69] Under some statutes, provision is made for the appointment of commissioners, among whom representatives of the municipality shall be included for the negotiation of agreements for the accomplishment of such purpose and for the apportionment of the cost of the work,[70] and the validity of such a statute has been upheld,[71] notwithstanding the existence of general statutes requiring the consent of the municipality to the construction of railroad tracks on or across its streets;[72] but a statute providing that the filing in court of the resolution of the municipal council as to the conditions of an elimination of grade crossings, together with the railroad company's acceptance thereof, shall have the effect of a judicial decree is invalid as an interference with the judicial power of the courts.[73]

Validity The validity of agreements entered into under statutes of the character under consideration has been upheld,[74] for example, as against such

erty benefited shall be binding without indorsement by comptroller were not applicable to contract for construction of sewers in connection with grade crossing elimination project, and the special legislation authorizing the grade crossing elimination was controlling—Remo Engineering Corporation v City of New York, 23 N Y S.2d 314, 260 App Div 587, affirmed 36 N E 2d 695, 286 N.Y 657.

Resolution or ordinance

Where statute authorized city to declare necessity for grade separation by resolution and charter of city did not require that contracts entered into by city be by ordinance, city was authorized to enter into contract for the erection of combination bridge and grade separation over an intersecting railroad by resolution as against contention that proceedings should have been by ordinance—Case v. City of Saginaw, 288 N.W 357, 291 Mich. 130.

Widening of highway

Although the powers conferred on the municipality with regard to agreements are limited to the elimination of grade crossings, nevertheless if it becomes necessary in order to eliminate the crossing that a street or highway should be widened, the widening is a proper exercise of the power conferred—Whittingham v. Millburn Tp, 100 A 854, 90 N J Law 344, affirmed 102 A 1054, 1055, 90 N J.Law 344, 348

Contemplation of more far reaching project

County commissioners who proceeded under statutory authority to eliminate grade crossings had right, in considering public convenience and necessity, to contemplate entire project as it would be when completed, and to contract with railway company that at proper time they would institute proceedings to vacate portion of road, and so to consider and contemplate did not constitute fraud, illegal collusion, or evidence of bad faith—Williams v. Chesapeake & O Ry. Co., 7 N E.2d 570, 54 Ohio App 343

Contract for performance of work

(1) Where contract covering grade crossing elimination work expressly provided that project was being performed by railroad in conjunction with the transit commission, although contract named contractor and railroad as parties, law imposed on state obligation to pay expense of the project, which obligation was capable of enforcement in court of claims by appropriate action brought by appropriate party—Tomasetti Const. Co. v. Long Island R Co, 63 N.E.2d 78, 294 N.Y 501.

(2) Where state agreed to furnish certain materials for the relocation of a railroad line during construction of a grade crossing separation project, delay in furnishing material, which held up cement work until winter weather, constituted a breach of contract for which contractor could recover added costs, the state having given notice that it was ready to perform—E W. Foley, Inc., v. State, 61 N.Y.S.2d 118

62. Vt—Menut & Parks Co v. Cray, 39 A.2d 342, 114 Vt. 41, 156 A.L.R 404.

63. N J—Whittingham v Millburn Tp, 100 A. 854, 90 N J Law 344, affirmed 102 A. 1054, 1055, 90 N.J Law 344, 348
51 C J. p 679 note 18

64. N J—Morris, etc., Dredging Co. v. Jersey City, etc, R. Co., 46 A. 609, 64 N.J Law 587.

65. N.Y—Ward v. Erie R. Co., 149 N.Y S. 717, 87 Misc. 365, affirmed 154 N Y S. 94, 167 App.Div 950, affirmed 109 N E. 1095, 215 N.Y. 629.

66. Mo—State v. Public Service Commission, 272 S.W. 957, 308 Mo 359.

67. N.Y.—Borek v. Golder, 74 N.Y S 2d 675, 190 Misc 366.
Pa—Crown Products Co v. Pennsylvania Public Utility Commission, 31 A 2d 913, 32 A 2d 305, 152 Pa Super 345

68. U.S—Cincinnati, N. O. & T P. Ry. Co v. City of Lexington, D C Ky, 86 F Supp 913.

69. U.S.—Lehigh Valley R. Co. v. New Jersey Public Utility Comrs, N.J, 49 S Ct. 69, 278 U S. 24, 73 L.Ed. 161, 62 A L R. 805.

70. Conn—Mooney v. Clark, 37 A. 506, 1080, 69 Conn 241
Apportionment of costs see infra § 165.

71. Conn—Mooney v. Clark, supra

72. N.Y.—McCutcheon v. Terminal Station Commission, 111 N E 661, 217 N.Y. 127.

73. Ohio.—Stockwell v. New York, etc, R. Co, 10 Ohio N.P.,N S, 29.

74. Mass—Old Colony R Co. v. Boston, 75 N E 134, 189 Mass. 116.
51 C.J. p 679 note 22.

contentions as that they are without consideration,[75] ultra vires the municipality,[76] or a surrender of the police power of the state[77] or of the municipality,[78] or that they are against public policy.[79] A contract which gives a railroad a right forever to maintain overhead bridges is not a violation of a city charter provision prohibiting the granting of a franchise for more than a certain period of time.[80] An agreement is not unlawful because it does not provide for the elimination of all grade crossings.[81]

Construction and operation. Contracts for the elimination of a grade crossing are governed by the provisions of the grade crossing statutes and by other laws and statutes,[82] and general rules apply as to the construction of such contracts.[83] Contracts of the character under consideration have been held to impose obligations on the railroad paramount to its prior private contracts,[84] as, for example, as to the maintenance of a siding[85] A contract between a city and a traction company with respect to the maintenance of a bridge over a railroad does not impose any contractual obligation in favor of the railroad.[86] An ordinance as to separation of grades which is contractual in its nature is not affected by a subsequent statute conferring on a state commission authority to regulate the construction and use of railroad crossings[87] Where a contract is embodied within an ordinance, the entire ordinance may be resorted to to determine the meaning of the words employed.[88]

Amendment of contract or plan. Contracts made under statutes authorizing them may be amended when the amendments concern the security of life and property[89] Where the statute, under which the commission acts, provides that the general plan when adopted may be amended only in matters of detail, a plan which involves no change of grade may not be amended so as to compel the railroad company to reconstruct its terminals and change the elevation of its tracks.[90]

Procedure on failure to agree. Where grade crossings are to be abolished by agreement, in some jurisdictions the statutes provide that, on failure to agree, the railroad or municipality may by petition submit the matter to a court, and the court may thereupon adopt the most reasonable and practicable of the plans submitted by the parties,[91] which may require a reasonable lateral diversion of the street or railroad where vertical elevation or depression of the tracks is impracticable.[92] The petition must show an attempt to reach an agreement.[93] A provision for the arbitration of disagreements between the parties to the contract has been held valid.[94]

Enforcement of agreement. In an action by a municipality to compel compliance with the con-

Abuse of discretion

Evidence was held insufficient to sustain finding of arbitrary abuse of discretion by city, contracting with railroad company for grade separations, because of wide discrepancy between agreed cost of railroad underpasses and value of street rights of way, acquired from railroad by city, and jury's findings of reasonable cost and value thereof—City of Beaumont v. Priddie, Civ App, 65 S W.2d 434, reversed on other grounds Texas & N. O. R Co v Priddie, 95 S W.2d 1290, 127 Tex 629.

75. N Y—Ward v. Erie R. Co, 149 N Y S 717, 87 Misc. 365, affirmed 154 N.Y S. 94, 167 App Div. 950, affirmed 109 N.E 1095, 215 N.Y 629, 51 C J p 679 note 24

76. N.Y.—Ward v. Erie R. Co., supra.
Pa—Pittsburgh, etc, R Co. v. McKees Rocks, 135 A. 227, 287 Pa 311.

77. N Y.—Ward v. Erie R. Co, 149 N.Y.S. 717, 87 Misc 365, affirmed 154 N Y.S. 94, 167 App Div. 950, affirmed 109 N.E. 1095, 215 N.Y 629.
51 C.J. p 679 note 26.

78. Mo.—Kansas City v. Kansas City Terminal R Co., 25 S W.2d 1055, 324 Mo. 882.

79. N Y.—Ward v Erie R. Co, 149 N Y S 717, 87 Misc. 365, affirmed 154 N Y S. 94, 167 App Div 950, affirmed 109 N.E. 1095, 215 N.Y 629.
51 C J p 679 note 28.

80. N Y—Long Island R. Co. v Sherwood, 136 N.Y S. 752.

81. N Y—McCutcheon v. Terminal Station Commission, 111 N E. 661, 217 N Y. 127.

82. N.Y—Tomasetti Construction Co v. Long Island R Co, 63 N E 2d 78, 294 N.Y 501—Borek v. Golder, 74 N Y S 2d 675, 190 Misc. 366—Tomasetti Const Co v. State, 59 N Y S 2d 863, 186 Misc 790.

83. Wash—City of Seattle v. Northern Pac R Co., 121 P.2d 382, 12 Wash.2d 487.

Policy

The meaning of the word "policy" in constitutional amendment authorizing city to construct, maintain, and operate one or more railroad passenger stations and as an incident thereto to eliminate certain grade crossings did not control meaning of that word as used in contract entered into under the amendment.—Hotard v. City of New Orleans, 35 So.2d 752, 213 La 843, appeal dismissed 69 S. Ct. 57, 335 U.S. 803, 93 L.Ed. 360

84. N.J.—Swift v. Delaware, etc., R. Co, 57 A. 456, 66 N J.Eq. 34, affirmed 58 A. 939, 66 N J Eq. 452

85. N J.—Swift v. Delaware, etc, R. Co., supra.
51 C.J. p 679 note 32.

86. U S.—Cincinnati, N O. & T. P. Ry. Co. v. City of Lexington, D. C Ky, 86 F.Supp. 913.

87. Mo—Kansas City v Kansas City Terminal R Co, 25 S.W.2d 1055, 324 Mo. 882
51 C J p 679 note 33.

88. Mo—Kansas City v. Kansas City Terminal R. Co, supra.
51 C J. p 679 note 36

89. N J.—American Malleables Co. v. Bloomfield, 85 A. 167, 83 N J. Law 728.

90. N Y—Lehigh Valley R Co. v. Adam, 68 N E 665, 176 N Y 420.

91. Ohio.—Sandusky v. Baltimore, etc, R Co., 128 N E 84, 101 Ohio St 225
51 C J p 680 note 41.

92. Ohio.—Sandusky v. Baltimore, etc., R. Co., supra.

93. Ohio.—Arbaugh v. Baltimore, etc., R Co., 135 N E. 281, 104 Ohio St. 110

94. La.—Hotard v. City of New Orleans, 35 So 2d 752, 213 La 843, appeal dismissed 69 S.Ct. 57, 335 U.S. 803, 93 L.Ed. 360.

tract, collateral matters as to title and maintenance of new crossings will not be considered.[95] Insolvency or financial difficulty will not relieve a railroad from performance of its contract.[96] The railroad may enjoin construction in violation of its agreements.[97]

Annulment or relief against agreement. The judgment of the municipality as to the necessity of eliminating grade crossings will not be reviewed in the absence of statutory provision therefor,[98] and a court of equity will not interfere with a contract unless on strong and conclusive evidence to justify such interference.[99] One who appeared and objected to a proceeding for the elimination of a grade crossing, not being a party to the proceeding, may maintain a taxpayer's suit to annul an agreement between the railroad and the municipality,[1] and, where the suit is in equity for injunctive relief, the rights of plaintiff, where dependent on a statute, are to be determined with respect to the statute in force at the time when the relief, if any, is to be awarded.[2] An injunction to restrain the performance of an agreement between a railroad and a municipality will not be granted a taxpayer where there is no reason why it should be granted.[3]

§ 163. —— Power to Require Abolition or Removal

a In general
b Public boards or commissions
c Municipal corporations
d. Courts of equity
e Special commissions

a. In General

The state in the exercise of its police power may require the elimination of grade crossings between railroads and streets or highways.

The elimination of grade crossings has been held to be a matter of state-wide concern,[4] and the state, in the exercise of its police power, may require the abolition or elimination of existing grade crossings between streets or highways and railroads,[5] or it may require such abolition by statute under a reserved power to alter or amend the charter of the railroad.[6] The state may confer such power on municipalities,[7] or it may act through the instrumentality of a commission,[8] which may be either general or special,[9] or it may act through some other state agency.[10] The police power of the state may not be alienated by contract.[11]

95. Mo.—Kansas City v. Kansas City Terminal R. Co., 25 S.W.2d 1055, 324 Mo. 882.

96. Ky.—Pennsylvania R. Co. v. City of Louisville, 126 S.W.2d 840, 277 Ky. 402.
Mo.—Kansas City v. Kansas City Terminal R. Co., 25 S.W.2d 1055, 324 Mo. 882.

97. N.Y.—Erie R. Co. v. Buffalo, 73 N.E. 26, 180 N.Y. 192.

98. N.J.—Swift v. Delaware, etc., R. Co., 57 A. 456, 66 N.J.Eq. 34, affirmed 58 A. 939, 66 N.J.Eq. 452.

99. Pa.—Chew v. Philadelphia, 101 A. 915, 257 Pa. 589, L.R.A.1918A 986.

1. N.Y.—Coykendall v. Kingston, 188 N.Y.S. 769, 115 Misc. 557.

2. N.Y.—Coykendall v. Kingston, supra.

3. N.Y.—Society for Prevention of Municipal Waste, etc. v. Mitchell, 166 N.Y.S. 17, 99 Misc. 552.

4. Cal.—Constantine v. City of Sunnyvale, 204 P.2d 922, 91 Cal.App.2d 278.

5. N.J.—Public Service Coordinated Transport v. Board of Public Utility Com'rs, 33 A.2d 579, 130 N.J.Law 409, affirmed 35 A.2d 895, 131 N.J.Law 226.
N.Y.—In re Elimination of Existing Highway-Railroad Crossing at Gate Grade of Lehigh Valley R. Co. in Village of Spencer, Tioga County, 5 N.Y.S.2d 946, 254 App.Div. 412—In re New York, O. & W. Ry. Co., 280 N.Y.S. 174, 244 App.Div. 664, affirmed In re New York, O. & W. Ry. at Seneca St. in City of Oswego, 3 N.E.2d 188, 271 N.Y. 567.
Tex.—City of Beaumont v. Priddie, Civ.App., 65 S.W.2d 434, reversed on other grounds Texas & N.O.R. Co. v. Priddie, 95 S.W.2d 1290, 127 Tex. 629.
51 C.J. p. 680 note 53.
Requiring elimination of grade crossing as.
Denial of due process see Constitutional Law § 698
Denial of equal protection of laws see Constitutional Law § 518
Impairment of obligation of contracts see Constitutional Law § 333.
Interference with interstate commerce see Commerce § 78.

6. U.S.—New York, etc., R. Co. v. Bristol, Conn., 14 S.Ct. 437, 151 U.S. 556, 38 L.Ed. 269.
51 C.J. p. 681 note 57.
Reservation of power to alter or amend charter see supra § 18.

7. N.Y.—People v. Public Service Commission, 114 N.E. 1050, 220 N.Y. 1.
51 C.J. p. 681 note 54.
County, had right to improve county highway for purpose of eliminating railroad grade crossing.—Sherlock v. Mobile County, 2 So.2d 405, 241 Ala. 247.
Location of viaduct
Where statute authorized commissioners of District of Columbia to eliminate railroad grade crossing by constructing viaduct north of present line of avenue as might be determined by the commissioners, fact that viaduct was not entirely north of avenue did not require determination that viaduct as constructed was not authorized and was not within terms of statute, especially where statute left to discretion of commissioners exact location of viaduct.—Ralph v. Hazen, 93 F.2d 68, 68 App.D.C. 55.

8. Ill.—City of Chicago v. Illinois Commerce Commission ex rel. Chicago & W. I. R. Co., 190 N.E. 896, 356 Ill. 501.
N.C.—Broadhurst v. Blythe Bros. Co., 17 S.E.2d 646, 220 N.C. 464.
51 C.J. p. 681 note 55.
Delegation of legislative power to abolish grade crossings generally see Constitutional Law § 138.

9. Conn.—Appeal of New York, etc., R. Co., 26 A. 122, 62 Conn. 527.
51 C.J. p. 681 note 56.

10. N.Y.—Solkat Realty Corp. v. State, 16 N.Y.S.2d 649, 172 Misc. 981, affirmed 29 N.Y.S.2d 622, 262 App.Div. 944, reargument denied 30 N.Y.S.2d 702, 262 App.Div. 987, affirmed 42 N.E.2d 13, 288 N.Y. 547.

11. U.S.—Erie R. Co. v. New Jersey Public Utility Comrs., N.J., 41 S.Ct. 169, 254 U.S. 394, 65 L.Ed. 322.
51 C.J. p. 681 note 58.

The public safety is the primary consideration in determining the necessity and extent of a grade crossing elimination.[12] The power to eliminate grade crossings must be reasonably exercised[13] and its exercise is always subject to judicial review on the question of reasonableness[14] Danger to the public will not justify great expenditures, unreasonably burdening the railroad, when less expenditure may reasonably accomplish the object of the improvement and eliminate the danger[15] In order to be authorized by the police power, the advantage to be gained by the elimination of a grade crossing must be real and substantial and must affect enough individuals so that it may reasonably be said that the public, and not an isolated few, are benefited.[16] The power may not be used to accomplish some other purpose not reasonably incident to the elimination of grade crossings.[17]

b. Public Boards or Commissions

State boards and commissions, usually those intrusted with the general control and regulation of railroads, are frequently given general control with respect to the elimination of grade crossings.

State boards or commissioners, usually those intrusted with the general control and regulation of railroads, are frequently given general control with respect to the elimination of grade crossings.[18] Their powers are controlled by the statutes confer-

12. N.Y.—In re Elimination of Creedon Crossing, 248 N.Y.S. 284, 231 App Div. 531.

13. Tex.—City of Beaumont v Priddie, Civ App., 65 S W 2d 434, reversed on other grounds Texas & N. O. R. Co. v. Priddie, 95 S.W.2d 1290, 127 Tex. 629

14. Tex—City of Beaumont v. Priddie, Civ App., 65 S W 2d 434, reversed on other grounds Texas & N O R. Co. v Priddie, 95 S.W.2d 1290, 127 Tex. 629.

15. U S.—Lehigh Valley R. Co. v. Board of Public Utility Com'rs of New Jersey, N.J., 49 S Ct. 69, 278 U S. 24, 73 L.Ed. 161, 62 A L.R. 805

N Y.—In re Existing Highway-Railroad Crossings at Grade Operated by New York Cent. R. Co., 295 N Y. S 831, 251 App Div 72

Disproportion between benefit and expense

Public should not be compelled to share in expense of elimination of grade crossings, which expense is out of all proportion to benefit to be derived from improvement.—In re Existing Highway-Railroad Crossings at Grade Operated by New York Cent. R. Co., supra.

16. N Y.—In re New York, O. & W Ry Co., 280 N.Y.S. 174, 244 App Div. 664, affirmed In re New York, O & W. Ry. at Seneca St. in City of Oswego, 3 N.E.2d 188, 271 N.Y. 567

17. N Y.—Long Island R Co v. Department of Labor of State of New York, 247 N.Y.S. 278, 138 Misc. 612, affirmed 177 N.E. 17, 256 N Y. 498.

18. Cal.—City of San Mateo v. Railroad Commission, 68 P 2d 713, 9 Cal 2d 1—S H Chase Lumber Co v. Railroad Commission of State of California, 300 P. 12, 212 Cal. 691.

Ill.—Chicago, N. S. & M. R. Co. v. Illinois Commerce Commission ex rel. Department of Public Works and Buildings, 13 N.E 2d 177, 354 Ill. 58.

Mo—State ex rel. Kurn v Hughes, 153 S W 2d 46, 348 Mo 177—State ex rel. Alton R Co v Public Service Commission, 70 S W 2d 57, 334 Mo. 995—State ex rel Town of Carrollton v. Public Service Commission of Missouri, 63 S W 2d 26

Neb—Chicago & N. W. Ry Co v. County Board of Dodge County, 28 N.W 2d 396, 148 Neb 648—Butler County v. Chicago & N. W. Ry. Co., 263 N W. 895, 130 Neb. 75.

N J—Neureiter & Horre v. Central R. Co of New Jersey, 200 A. 754, 124 N J.Eq 163—R. & A. Realty Corp. v Pennsylvania R Co, 3 A. 2d 293, 16 N J Misc 537—Pennsylvania R Co. v Board of Public Utility Com'rs, 180 A. 551, 13 N. J.Misc 766, appeal dismissed 184 A. 842, 116 N J Law 527.

N Y—In re Elimination of Existing Highway-Railroad Crossings at Grade of Railroads Operated by Pennsylvania Railroad Co., 299 N. Y.S 693, 252 App.Div. 404, reargument denied In re Farnham-Irving State Highway, 4 N.Y.S 2d 163, 254 App.Div 634, and 4 N.Y.S 2d 166, 251 App Div 634, affirmed In re Farnham-Irving State Highway in Town of Brant, 19 N.E 2d 915, 280 N.Y. 495

Pa.—Bartron v. Northampton County, 19 A 2d 263, 342 Pa 163—Pennsylvania R. Co. v. Pennsylvania Public Utility Commission, 35 A 2d 588, 154 Pa Super. 86—Borough of Middletown v. Pennsylvania Public Utility Commission, 17 A.2d 904, 143 Pa.Super. 444—Lehigh & New England R. Co. v Public Service Commission of Commonwealth, 191 A. 380, 126 Pa.Super. 565.

Utah—Provo City v Department of Business Regulation, 218 P.2d 675.

51 C J. p 681 note 62.

Legislative power

Making of regulations governing separation of grades by railroads is exercise of legislative or administrative power, not judicial power.—In re Chicago, M., St P. & P. R. Co., D.C.Minn., 50 F 2d 430.

Police power

In grade crossing eliminations, the public utility commission exercises the police power of the commonwealth—Philadelphia Suburban Water Co v. Pennsylvania Public Utility Commission, 78 A 2d 46, 168 Pa. Super 360

Plenary and exclusive jurisdiction

(1) Commerce commission's jurisdiction over all phases of grade crossing regulation is plenary and exclusive.—City of Chicago v. Illinois Commerce Commission ex rel Chicago & W I. R Co, 190 N.E. 896, 356 Ill. 501.

(2) The powers of public utility commission are plenary with relation to crossing of railroad tracks by highways and construction of bridges or viaducts for elimination of grade crossings of railroads—Department of Highways of Pennsylvania v. Pennsylvania Public Utility Commission, 14 A.2d 611, 141 Pa Super. 376.

Protection of public travel

The statute authorizing the board of public utility commissioners to act in eliminating danger at grade crossings evidences legislative policy to protect public travel.—Hudson County v. Board of Public Utility Com'rs, 8 A.2d 556, 123 N.J Law 204, affirmed 12 A 2d 878, 124 N J.Law 563, and 12 A.2d 879, 124 N.J.Law 564

Plan for improvement of highways

A certificate of public convenience evidencing public utility commission's approval of abolition of railroad crossings and erection of new overhead crossing was necessary, and commission had exclusive jurisdiction over a part of the project, notwithstanding the elimination of the crossings and the construction of the overhead crossing were part of a comprehensive plan of the department of highways for the relocation and improvement of a state highway. —Somerset County v Pennsylvania Public Utility Commission, 1 A.2d 806, 132 Pa.Super. 585.

ring them,[19] and, where their powers conflict with those which would otherwise fall within the jurisdiction of municipal or highway authorities with respect to the control of streets or highways, the latter must give way,[20] and the action of a state agency in eliminating a grade crossing within a municipality has been held not to be an invasion of municipal powers.[21]

The commission may ordinarily determine the manner in which the separation is to be made,[22] the drainage requirements,[23] the clearance of a viaduct,[24] and, if an underpass is required, the commission may regulate the width of the road there-

19. Pa.—Borough of Whitaker v. Pennsylvania Public Utility Commission, 60 A.2d 341, 163 Pa.Super. 238—Somerset County v. Pennsylvania Public Utility Commission, 1 A.2d 806, 132 Pa.Super. 585.
51 C.J. p. 681 note 63

Power equal to that of legislature
N.J.—West Jersey & S. R. Co. v. Public Utility Com'rs, 152 A. 378, 8 N.J.Misc. 899.

All necessary authority
The Grade Crossing Elimination Act confers on the public service commission all the authority necessary to discharge the function of eliminating grade crossings.—City of New York v. Maltbie, 53 N.Y.S.2d 234, affirmed 53 N.Y.S.2d 953, 269 App.Div. 662, appeal denied 54 N.Y.S.2d 700, 269 App.Div. 685, affirmed 63 N.E.2d 119, 294 N.Y. 931.

Literal interpretation
Okl.—Kansas City Southern Ry. Co. v. Citizens of Westville, 89 P.2d 320, 184 Okl. 100, certiorari denied 55 S.Ct. 774, 306 U.S. 658, 83 L.Ed. 1055.

Property owned by government
The proviso that no property owned by Commonwealth or any municipal corporation thereof at effective date of act should be subject to public utility commission was not intended to nullify plenary power vested in commission to appropriate property for abolition of grade crossings, and to determine point at which and manner in which crossing may be constructed, altered, relocated, or abolished.—Borough of Whitaker v. Pennsylvania Public Utility Commission, 60 A.2d 341, 163 Pa.Super. 238.

Public utility facilities
Commission possesses power to compel a public utility to remove its facilities from vacated highway.—Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission, 78 A.2d 46, 168 Pa.Super. 360.

20. Ill.—City of Chicago v. Illinois Commerce Commission ex rel. Chicago & W. I. R. Co., 190 N.E. 896, 356 Ill. 501
N.Y.—Solkat Realty Corp. v. State, 16 N.Y.S.2d 649, 172 Misc. 981, affirmed 29 N.Y.S.2d 622, 262 App.Div. 944, reargument denied 30 N.Y.S.2d 702, 262 App.Div. 987, affirmed 42 N.E.2d 13, 288 N.Y. 547.
Okl.—Kansas City Southern Ry. Co. v. Citizens of Westville, 89 P.2d 320, 184 Okl. 100, certiorari denied 59 S.Ct. 774, 306 U.S. 658, 83 L.Ed. 1055
Pa.—Somerset County v. Pennsylvania Public Utility Commission, 1 A.2d 806, 132 Pa.Super. 585.
51 C.J. p. 682 note 64.

City subsequently organized
The railroad commission has authority under constitution and statutes to abolish hazardous and unnecessary grade crossings with railroad performing state-wide service, which is binding on cities organized under general law and on those cities organized under general law at time of adoption of constitutional amendment retaining in cities such vested power of control over public utilities as they then possessed, even though such cities were thereafter organized under freeholder charters, on ground that authority is germane to regulation of railroads performing state-wide service.—City of San Mateo v. Railroad Commission, 68 P.2d 713, 9 Cal.2d 1.

Contract with railroad
Where municipality closed crossing pursuant to agreement with railroad, which performed its part of the bargain, commission could order its reopening since closing of crossing was unauthorized and commission was not estopped.—Kansas City Southern Ry. Co. v. Citizens of Westville, 89 P.2d 320, 184 Okl. 100, certiorari denied 59 S.Ct. 774, 306 U.S. 658, 83 L.Ed. 1055.

Bridges
The act providing all bridges on state highways in cities of the third class shall be taken over by the department of highways and thereafter be maintained at the sole expense of the Commonwealth does not diminish the plenary power of the public utility commission under the law conferring power on the commission to regulate construction, alteration, or abolition of crossings of one utility by another and requiring the work incident thereto to be performed by the utility or municipal corporation concerned or by the commonwealth.—City of Butler v. Pennsylvania Public Commission, 75 A.2d 611, 167 Pa.Super. 463—City of Wilkes-Barre v. Pennsylvania Public Utility Commission, 63 A.2d 452, 164 Pa.Super. 210.

21. Mich.—Case v. City of Saginaw, 288 N.W. 357, 291 Mich. 130.
Pa.—Borough of Middletown v. Pennsylvania Public Utility Commission, 17 A.2d 904, 143 Pa.Super. 444

Special commission
The statutes giving the public utility commission exclusive jurisdiction over construction and abolition of grade crossings and approval of contracts between cities and utilities are not violative of the constitution prohibiting the delegation of municipal functions to any "special commission" since the commission is not a "special commission."—Crown Products Co. v. Pennsylvania Public Utility Commission, 31 A.2d 913, 32 A.2d 305, 152 Pa.Super. 345

22. Mo.—State ex rel. and to Use of Kansas City Southern Ry. Co. v. Public Service Commission, 30 S.W.2d 112, 325 Mo. 862.
N.Y.—Consolidated Edison Co. of N.Y. v. State, 97 N.Y.S.2d 431, 276 App.Div. 677, affirmed 98 N.E.2d 587, 302 N.Y. 711—In re Elimination of Existing Highway-Railroad Crossings at Grade of Railroads Operated by Pennsylvania Railroad Co., 299 N.Y.S. 693, 252 App.Div. 404, affirmed In re Farnham-Irving State Highway in Town of Brant, 19 N.E.2d 915, 280 N.Y. 495
51 C.J. p. 682 note 65.

Capacity of bridge
Fact that bridge, substituted by state roads commission for eliminated railroad grade crossing as farm crossing over railroad, was designed to bear load of only eight tons and farm owner sometimes sent out heavier loads did not render new way unreasonable outlet.—Brehm v. Tabler, 5 A.2d 820, 6 A.2d 378, 176 Md. 411

Inconvenience to railroad in rearranging its sidings made necessary by underpass construction for accommodation of its patrons was held not to justify rejection of underpass in favor of overhead crossing.—In re Elimination of Highway Grade Crossings in Town of Canton, St. Lawrence County, 242 N.Y.S. 601, 229 App.Div. 607, appeal dismissed 174 N.E. 695, 255 N.Y. 320.

23. Mo.—Chicago, etc., R. Co. v. State Highway Commission, 17 S.W.2d 535, 322 Mo. 419.

24. Mo.—State v. Public Service Commission, 295 S.W. 86, 317 Mo. 172.

under,[25] and the curve in the road so as to make it cross more nearly at right angles;[26] or it may extend a crossing over the entire right of way of the railroad,[27] or order whatever is necessary and incidental to the change of grade,[28] such as changes in property and facilities of the railroad,[29] relocation of a portion of the tracks,[30] relocation of a spur track,[31] construction of supporting abutments within the limits of the highway,[32] a change in the location of trolley tracks on the street or highway,[33] or construction of a farm crossing,[34] and it may provide for a contingent widening of the highway in the near future,[35] but the construction of a crossing abolishing a grade crossing may not be ordered because of some contingency which may not happen, the crossing not having any present use.[36]

The commission has no authority as an independent matter to discontinue existing highways or lay out new ones,[37] but, when necessary in order to effect the abolition of a grade crossing, the commission may change the location of the highway,[38] or may order a change in the grade of streets,[39] or the highway or a portion thereof may be discontinued and another substituted,[40] such changes being deemed to be merely alterations in the existing way and not an independent discontinuance or construction of a new way,[41] and such additional land may be taken as is necessary for effecting the change.[42] Where a grade crossing is eliminated by a change of grades, near-by crossings may be closed,[43] and the commission need not furnish a new crossing for each grade crossing which it or-

25. N J.—Lehigh Valley R. Co. v. Public Utility Comrs, 137 A. 442, 5 N J.Misc 559.

26. N J —Lehigh Valley R. Co. v. Public Utility Comrs, supra.

27. N.Y.—In re State Commission of Highways, 146 N E 379, 239 N Y 279.

28. N J.—Benton & Holden v Central R. Co. of New Jersey, 194 A 805, 122 N J Eq 309, affirmed 196 A 352, 123 N J Eq. 163.
51 C.J. p 682 note 71.

29. N.Y —In re Elimination of Highway-Railroad Crossing, City of Buffalo, 64 N Y.S 2d 764, 271 App Div. 266, appeal dismissed In re New York Cent R. R., 78 N E 2d 596, 297 N Y. 246
51 C J. p 682 note 72

Railroad station; signal system

In the elimination of grade crossings, a new railroad station and a new signal system were incidental improvements which the public service commission could order with the elimination and compel the railroad to pay for.—In re Elimination of Highway-Railroad Crossing, City of Buffalo, 64 N Y S.2d 764, 271 App Div 266, appeal dismissed In re New York Cent. R. R, 78 N E 2d 596, 297 N.Y. 246.

30. N.Y.—Matter of New York Cent, etc, R. Co, 121 N Y.S. 528, 136 App.Div. 756.

Necessity for change

Public service commission may make order requiring railroad to abandon its road and to relocate its tracks at another point, but such order can only be made where change of location is necessary to effect elimination of dangerous crossing, and change cannot be ordered unless it is reasonably necessary to abolish such crossing, and necessity must be shown by clear and convincing evidence.—In re Existing Highway-Railroad Crossings at Grade Operated by New York Cent. R. Co., 295 N. Y S 831, 251 App.Div 72.

31. Conn —Appeal of New York, etc, R Co, 53 A. 314, 75 Conn. 264
R I —Armour v. New York, etc, R Co, 103 A 1031, 41 R.I. 361.

32. Conn —Bristol v. New England R Co, 39 A. 235, 70 Conn. 305, 40 L R A 479
51 C J. p 682 note 75.

33. N Y.—New Paltz, etc, Tract Co v Central New England R. Co, 147 N Y S. 624, 84 Misc. 528
51 C J p 683 note 76

34. Vt —Sayers v. Montpelier, etc, R Co, 97 A. 660, 90 Vt. 201, Ann Cas 1918B 1050

35. N Y.—Matter of New York Cent R Co, 235 N Y.S. 505, 226 App Div 447, affirmed 170 N E 152, 252 N Y 583.

36. Neb —Sarpy County v. Omaha, etc., R Co, 218 N.W. 403, 116 Neb 516.
51 C J p 683 note 79.

37. Conn —Doolittle v. Branford, 22 A. 336, 59 Conn 402
51 C J. p 683 note 80.

38. Conn —Appeal of Town of Andover, 155 A. 717, 113 Conn. 494
Ind —Evansville, I. & T. H R. Co. v Board of Com'rs of Gibson County, 199 N.E 583, 210 Ind. 74.
51 C.J. p 683 note 82.

39. N.J.—Benton & Holden v. Central R Co of New Jersey, 194 A 805, 122 N J Eq. 309, affirmed 196 A 352, 123 N J Eq. 163.
N Y —Solkat Realty Corp. v State, 16 N Y S.2d 649, 172 Misc. 981, affirmed 29 N.Y.S.2d 622, 262 App. Div. 944, reargument denied 30 N. Y.S.2d 702, 262 App.Div. 987, affirmed 42 N E.2d 13, 288 N.Y. 547.

40. Cal.—S H Chase Lumber Co. v. Railroad Commission of State of California, 300 P. 12, 212 Cal. 691.
51 C J. p 683 note 84.

Power to determine usefulness of highway

(1) Under statute governing discontinuance of portion of state highway due to grade crossing elimination, determination that such portion of highway is no longer useful as part of state system need not be made by department of public works, and may be made by public service commission.—Isaac v. Town of Queensbury, 12 N.E.2d 785, 277 N Y. 37, reargument denied 15 N E 2d 73, 278 N.Y 483

(2) The public utility commission, in exercise of the police power, is authorized to abandon or vacate such highways or portions of highways as, in opinion of commission, may be rendered unnecessary for public use by the construction, relocation, or abandonment of grade crossings — Philadelphia Suburban Water Co v. Pennsylvania Public Utility Commission, 78 A.2d 46, 168 Pa Super 360

41. Conn.—Doolittle v. Branford, 22 A 336, 59 Conn. 402.

42. Me —Maine Cent R. Co v Bangor, etc, R. Co., 36 A. 1050, 89 Me 555.
Mo —State v. Public Service Commission, 267 S W. 102, 306 Mo. 149.
N Y.—In re Elimination of Highway-Railroad Crossing at Grade in Village of Burdett, Schuyler County, 190 N E. 344, 264 N.Y 195

43. N Y.—Matter of Buffalo Terminal R Co., 106 N.Y S. 655, 659, 122 App Div 59, 896, affirmed 84 N.E. 1121, 192 N.Y. 534.
51 C.J p 683 note 83.

Closing underpass

The power of state highway commission, after construction of an overhead bridge over railroad tracks replacing an underpass, to order the underpass closed was implied, if not expressly covered, in language of statute authorizing commission not only to abandon roads where advisable, but, on relocation, to substitute

ders closed.[44]

A commission authorized to alter or abolish any grade crossing may not close a highway by abolishing a railroad crossing,[45] but in such case the power of the commission is limited to requiring a separation of grades or a relocation of the crossing,[46] and, under the power to change the location of a highway for the purpose of avoiding or improving a grade crossing, the commission has no power to discontinue any part of a highway except as such discontinuance results from a change in location.[47] The commission may make only such a discontinuance or new construction as is properly incidental to the necessary change in location of the crossing,[48] and the new way must serve practically the same public needs so as to be in fact a substitute for the original way and not a new highway.[49] The commission may be authorized to order a nongrade crossing at a different place,[50] but it has been held that the commission may not change the location of a way where it is practicable to separate the grades at the existing location.[51]

A plan which does not require abandonment of a road should receive careful consideration when the abandonment will cause great loss and inconvenience for which no recovery could be had.[52] In a statute conferring powers on a commission to eliminate and alter grade crossings in order that the safety of the public may be assured, the word "alter" will not be construed as meaning the change of a grade crossing without its destruction,[53] and, in order that the safety of the public may be "assured," it should be made certain and put beyond doubt.[54]

Crossings which may be abolished Where no highway exists, the commission may not order the abolition of a grade crossing.[55] The power of the commission has been held not to extend to private crossings at grade.[56] A grade crossing constructed by order of the commission as a temporary substitute for an undercrossing is a grade crossing which the commission has power to abolish.[57] Under a statute empowering the board of public utility commissioners to eliminate a grade crossing that impedes public travel, it is sufficient that the crossing checks, hinders, or delays travel.[58] Statutes authorizing a change of a highway to eliminate a grade crossing give no power to change a highway to avoid a grade crossing of a railroad not yet constructed.[59] Under a statute authorizing the elimination of grade crossings, the commission has power to require the elimination of a grade crossing by a spur track,[60] and, under a statute providing for

one section for another; added inconvenience was not sufficient to support a cause of action by owners to prevent closing of the underpass.—Mosteller v. Southern Ry. Co., 17 S.E.2d 133, 220 N.C. 275.

44. Wis.—Chicago & N. W. R. Co. v. Railroad Commission of Wisconsin, 167 N.W. 266, 167 Wis. 185.

Reduction in number of crossings
Board of public utility commissioners had jurisdiction to authorize abandonment of five grade crossings and substitution of two others in place thereof.—West Jersey & S. R. Co. v. Public Utility Com'rs, 152 A. 378, 8 N.J.Misc. 899.

45. Ill.—Chicago & E. I. Ry. Co. v. Road Dist. No. 10, 187 N.E. 155, 353 Ill. 160.

Abandonment of highway
Only where there has been abandonment or vacation of highway as prescribed by law has state commerce commission power to abolish railroad grade crossing thereon.—Chicago & E. I. Ry. Co. v. Road Dist. No. 10, supra.

Substitute way
Board of public utility commissioners has no authority, under statute, to permit railroad to vacate a railroad crossing, in absence of proof that crossing was dangerous and the provision of a substitute way.—Pennsylvania-Reading Seashore Lines v. Board of Public Utility Com'rs, 176 A. 709, 13 N.J.Misc. 162

46. Ill.—Chicago & E. I. Ry. Co. v. Road Dist. No. 10, 187 N.E. 155, 353 Ill. 160.

47. N.H.—Blake v. Concord, etc., R. Co., 64 A. 202, 73 N.H. 597.

48. N.H.—Blake v. Concord, etc., R. Co., 64 A. 202, 73 N.H. 597.

49. N.H.—Blake v. Concord, etc., R. Co., supra.

50. Mo.—State ex rel. Alton R. Co. v. Public Service Commission, 68 S.W.2d 691, 334 Mo. 832.

Highway authorities have jurisdiction to establish underpass at point different from that at which existing highway crosses railroad
Miss.—New Orleans & N. E. R. Co. v. State Highway Commission, 144 So. 558, 164 Miss. 343.
Ohio.—Baltimore & O. R. Co. v. Public Utilities Commission of Ohio, 171 N.E. 854, 122 Ohio St. 380.

Order held not unreasonable
Public service commission's order, authorizing construction of subway under railroad tracks at new concrete highway crossing near existing gravel road underpass to eliminate danger from sharp curves and poor visibility as result of increased traffic and higher speed expected on new highway, was held not unreasonable or arbitrary.—State ex rel. Alton R. Co. v. Public Service Commission, 68 S.W.2d 691, 334 Mo. 832.

51. Conn.—Appeal of Fairfield, 17 A. 764, 57 Conn. 167

52. N.Y.—Matter of Grade Crossing Elimination, 234 N.Y.S. 605, 226 App.Div. 255.

53. R.I.—Armour v. New York, etc., R. Co., 103 A. 1031, 41 R.I. 361

54. R.I.—Armour v. New York, etc., R. Co., supra.

55. N.Y.—Long Island R. Co. v. Shinnecock Hills, etc., Realty Co., 131 N.Y.S. 885, affirmed 141 N.Y.S. 1129, 156 App.Div. 912
Ohio.—Grinnell v. Portage County, 27 Ohio Cir.Ct. 118

56. Utah.—Bamberger Electric R. Co. v. State Public Utilities Commission, 204 P. 314, 59 Utah 351.
51 C.J. p. 683 note 95

57. N.Y.—In re Grade Crossings, 167 N.E. 460, 251 N.Y. 331.

58. N.J.—Erie R. Co. v. Public Utility Com'rs, 98 A. 13, 89 N.J.Law 57, affirmed 103 A. 1052, 90 N.J.Law 672, affirmed 41 S.Ct. 169, 254 U.S. 394, 65 L.Ed. 322.

59. Ohio.—Grinnell v. Portage County, 27 Ohio Cir.Ct. 118.
51 C.J. p. 683 note 92.

60. R.I.—Armour v. New York, etc., R. Co., 103 A. 1031, 41 R.I. 361.

the elimination and alteration of grade crossings in order to assure the safety of the public, the commission may require the elimination of a spur track, although its use is not attended with the same elements of danger as attend the operation of through tracks.[61]

c. Municipal Corporations

Municipal corporations may have power to provide for the abolition of grade crossings within their borders.

A municipal corporation either by virtue of the general police power vested in it for the welfare and safety of its citizens,[62] or by virtue of powers expressly delegated[63] or necessarily implied from such powers,[64] may provide for the abolition of grade crossings within its limits, although its exercise of such powers must be reasonable,[65] and the municipality is confined to the exercise of such power as is expressly granted or reasonably implied.[66] The police power may not be in anyway impaired by the municipality,[67] and the fact that a railroad was permitted to cross a street at grade does not prevent the city from subsequently requiring a change of grade,[68] but the legislature may withdraw such power and confer it on a state agency.[69]

A statute authorizing a state commission to require the abolition of grade crossings has been held not to deprive a city of its police power, given by its charter, to do likewise.[70] A plan which is insufficient and unsafe,[71] or which is in conflict with the requirements of statutes of general application to railroads,[72] may not be enforced. It is not essential that the requirement of an overhead crossing be accompanied by a complete vacation or abandonment of the surface crossing,[73] and a grade crossing under a viaduct may be left open for travel.[74]

Legislative or judicial power. As a general rule, the power to compel an elimination of grade crossings is legislative rather than judicial,[75] and the city may not require the railroad to institute condemnation proceedings to bring about changes of grade and shift the burden of apportioning the cost to the courts.[76]

d. Courts of Equity

A court of equity may compel a railroad to perform its duty to abolish grade crossings.

When the charter of a railroad contains the provision that it shall keep in repair good and sufficient crossings over or under its road so as not to impede passage on the highway, a court of equity may compel the abolition of a grade crossing,[77] and, where the statute provides for suit in equity by a municipality to compel specific performance of a railroad's duties with respect to crossings, a court of equity has jurisdiction to require the railroad, by injunction, to cross in some manner other than at grade,[78] but, where the state has not, by statute, declared that grade crossings should be abolished, the court may not require their abolition unless by reason of some fact the grade crossings are especially dangerous.[79]

61. R.I.—Armour v. New York, etc., R. Co., supra.

62. Mont.—State v. Northern Pac. Ry. Co., 295 P. 257, 88 Mont. 529. Tenn.—**Corpus Juris cited in** Cincinnati, N. O. & T. P. R. Co. v. City of Chattanooga, 64 S.W.2d 196, 198, 166 Tenn. 626.
51 C.J. p. 684 note 2.

63. N.C.—Sanders v. Atlantic Coast Line R. Co., 4 S.E.2d 902, 216 N.C. 312.
51 C.J. p. 684 note 3.

64. Va.—Richmond, etc., R. Co. v. Richmond, 133 S.E. 800, 145 Va. 225.

Exclusive dominion over streets.
Delegation of state's police power to compel railroad company to eliminate grade crossings at its own cost or adjust expenses between them is implied in conferring on municipalities exclusive dominion over public streets within their boundaries.—City of Beaumont v. Priddie, Civ. App., 65 S.W.2d 434, reversed on other grounds Texas & N. O. R. Co. v. Priddie, 95 S.W.2d 1290, 127 Tex. 629.

65. U.S.—Chicago, etc., R. Co. v. Minneapolis, D.C.Minn., 238 F. 384.
51 C.J. p. 684 note 5.

66. Ind.—State v. Indianapolis Union R. Co., 66 N.E. 163, 160 Ind. 45, 60 L.R.A. 831.
51 C.J. p. 684 note 6.

67. Ill.—Otis El. Co. v. Chicago, 105 N.E. 338, 263 Ill. 419, 52 L.R.A., N.S., 192.
51 C.J. p. 684 note 7.

68. Minn.—State v. Chicago, etc., R. Co., 160 N.W. 773, 135 Minn. 277, L.R.A. 1917C 1174.

69. Ill.—City of Chicago v. Illinois Commerce Commission ex rel. Chicago & W. I. R. Co., 190 N.E. 896, 356 Ill. 501.

70. N.C.—Atlantic Coast Line R. Co. v. Goldsboro, 71 S.E. 514, 155 N.C. 356, affirmed 34 S.Ct. 364, 232 U.S. 548, 58 L.Ed. 721.

71. U.S.—Chicago, etc., R. Co. v. Minneapolis, D.C.Minn., 238 F. 384.

72. U.S.—Chicago, etc., R. Co. v. Minneapolis, supra.
51 C.J. p. 685 note 14.

73. U.S.—Missouri Pac. R. Co. v. Omaha, Neb., 197 F. 516, 117 C.C.A. 12, affirmed 35 S.Ct. 82, 235 U.S. 121, 59 L.Ed. 157.

74. U.S.—Missouri Pac. R. Co. v. Omaha, supra.

75. N.C.—Sanders v. Atlantic Coast Line R. Co., 4 S.E.2d 902, 216 N.C. 312.
51 C.J. p. 685 note 10.

76. Wash.—Spokane v. Spokane, etc., R. Co., 135 P. 636, 75 Wash. 651.

77. N.J.—Newark v. New Jersey Cent. R. Co., 67 A. 1009, 73 N.J.Eq. 469.—Newark v. Erie R. Co., 68 A. 413, 72 N.J.Eq. 447.

78. N.J.—Newark v. Erie R. Co., 71 A. 620, 75 N.J.Eq. 20, reversed on other grounds 74 A. 505, 76 N.J.Eq. 317.—Newark v. Erie R. Co., 68 A. 413, 72 N.J.Eq. 447.

79. N.J.—Newark v. Erie R. Co., 71 A. 620, 75 N.J.Eq. 20, 28, reversed on other grounds 74 A. 505, 76 N.J. Eq. 317.
51 C.J. p. 685 note 20.

e. Special Commissions

Under some statutes, provision is made for the appointment of a special commission to determine the necessity, place, mode, and expense of abolishing grade crossings.

Where the statute so provides, on petition of the proper party to a designated court, a commission must be appointed to determine the necessity, place, mode, and expense of abolishing grade crossings,[80] and such a statute requires proceedings for the abolition of grade crossings to be brought under its provisions and not under provisions for the alteration of crossings which do not involve a change in grade.[81] The commission may provide for everything which is fairly incidental to the abolition of the crossing,[82] but beyond this it may not go.[83] The commission may provide for discontinuance of streets,[84] or for extensive alteration in the location of the railroad.[85] The location of the crossing may be changed,[86] and such land as is necessary to effect the change may be taken;[87] but no greater change in the location of a highway should be made than is reasonably necessary in order to avoid the grade crossings,[88] and the new way must be no more than a fair equivalent for that which is given up.[89] The commission is not required to reproduce or restore the exact conditions which existed before the change of grade either in respect of the railroad or of the public use.[90]

§ 164. —— Proceedings to Abolish or Remove

a. In general
b. Proceedings before state board or commission
c. Proceedings by municipal corporations
d. Proceedings before special commissioners

a. In General

Statutes frequently make comprehensive provisions as to the procedure for abolishing or eliminating grade crossings between railroads and streets or highways.

Statutes frequently make comprehensive provisions as to the procedure for abolishing or eliminating grade crossings between railroads and streets or highways.[91] Where a street is closed or altered as part of a grade crossing elimination, the statute as to the elimination of railroad crossings rather than the statute as to the closing of streets governs the proceedings.[92] When a change of grade is incidental to general plan to acquire additional facilities, the proceedings are properly conducted in accordance with that plan, rather than under the statutory provisions for alteration of grades.[93] A statute dealing with the elimination of grade crossings within a particular city has been held to be exclusive of all other remedies.[94]

Proceedings in equity. A bill in equity to compel a separation of grades is not defective because it fails to specify what kind of crossing is sought,[95] or because it fails to state that notice of intent to file the bill was given to the railroad.[96]

b. Proceedings before State Board or Commission

(1) In general
(2) Judicial review

80. Mass.—In re Waltham, 92 N.E. 477, 206 Mass. 208.
51 C.J. p. 685 note 21.

81. Mass.—Boston, etc., R. Corp. v. Middlesex County, 85 N.E. 108, 198 Mass. 584.

82. Mass.—In re Waltham, 92 N.E. 477, 206 Mass. 208.

83. Mass.—In re Waltham, supra.
51 C.J. p. 685 note 24

84. Mass.—In re Westborough, 48 N.E. 763, 169 Mass. 495.
51 C.J. p. 685 note 25

85. Mass.—In re Westborough, supra.

86. Mass.—Davis v. Hampshire County Comrs., 26 N.E. 848, 153 Mass. 218, 11 L.R.A. 750.
51 C.J. p. 685 note 27

87. Mass.—Lancy v. Boston, 71 N.E. 302, 186 Mass. 128.

88. Mass.—Davis v. Hampshire County Comrs., 26 N.E. 848, 153 Mass. 218, 11 L.R.A. 750.

89. Mass.—Norwood v. New York, etc., R. Co., 37 N.E. 199, 161 Mass. 259.
51 C.J. p. 686 note 30

90. Mass.—In re Waltham, 92 N.E. 477, 206 Mass. 208.
51 C.J. p. 686 note 31

91. Neb.—Chicago & N. W. Ry. Co. v. County Board of Dodge County, 28 N.W.2d 396, 148 Neb. 648.

Prior statute repealed

The 1921 statute prohibiting state railway commission from projecting a new public highway crossing over railroad or abandoning an existing public crossing was superseded and repealed by 1925 statute requiring commission to hear, and determine on the merits, applications relating to relocation of highways for grade crossing elimination purposes.—Chicago & N. W. Ry. Co. v. County Board of Dodge County, supra.

92. Neb.—Chicago & N. W. Ry. Co. v. County Board of Dodge County, supra.

Special statute

A special statutory provision which relates to a particular subject and is part of an act complete in itself and which states that county board can establish, vacate, or relocate public highway at railroad crossing in compliance with board's agreement with railroad or order of state railway commission supersedes and governs general provisions of previously enacted statute requiring consent of majority of voters living within two miles of road to consent to vacation or change of road.—Chicago & N. W. Ry. Co. v. County Board of Dodge County, supra.

93. N.Y.—Long Island R. Co. v. Sherwood, 136 N.Y.S. 752.

94. N.Y.—Syracuse Grade Crossing Commission v. Delaware, L. & W. R. Co., 97 N.Y.S.2d 279, 197 Misc. 192, modified on other grounds 32 N.Y.S.2d 620, 263 App.Div. 930, affirmed 49 N.E.2d 131, 290 N.Y. 632.

95. N.J.—Newark v. Erie R. Co., 68 A. 413, 72 N.J.Eq. 447.

96. N.J.—Newark v. Erie R. Co., supra.

(1) In General

Where a state commission has exclusive jurisdiction over grade crossings between railroads and streets or highways, proceedings for the elimination of a grade crossing must be instituted before the commission, which must consider all the facts and circumstances.

Where a state commission has exclusive jurisdiction over grade crossings between railroads and streets or highways, proceedings for the elimination of a grade crossing must be instituted before the commission.[97] Proceedings before the commission are administrative, not judicial.[98] As a general rule, the commission may proceed for the abolition of grade crossings of its own motion,[99] and, under some statutes, is required to institute proceedings where a proper petition is filed.[1] A company operating a railroad under a perpetual lease is the owner of the road within the application of the statute and may institute such proceedings.[2] The municipality within which the grade crossing lies is the only municipality which may petition for its abolition,[3] and other municipalities through which the highway passes are not necessary parties to the proceeding.[4] The failure of the commission to make the governmental body in charge of the road a party to the proceedings will not invalidate its order where that body subsequently intervenes in the proceeding in support of the commission's order.[5] An application for a continuance is addressed to the sound discretion of the commission.[6]

Petition. A petition to discontinue a grade crossing must be sufficiently broad to justify the relief sought.[7] The petition may include one or more crossings,[8] although it has been held necessary to institute separate proceedings for each crossing.[9] An objection to a petition to railroad commissioners for the abolition of a grade crossing, on the ground that it was not properly brought, is in the nature of a plea in abatement, and should be made at the hearing before the commissioners.[10]

Consolidation. The commission may have power to consolidate related proceedings,[11] and an original and a subsequent proceeding involving the same crossing may be consolidated.[12]

Hearing and notice. The commission must conduct a fair hearing before ordering the elimination of a grade crossing.[13] Where the state acts through an administrative body, there must be provision for a fair hearing on the fundamental facts,[14] and a statute authorizing an administrative officer to require a railroad to abolish grade crossings without notice or hearing is invalid, even though his actions are subject to judicial review where arbitrary,[15] but a proceeding similar to one in a court is not necessary.[16] Under some statutes,

97. Pa.—Bartron v. Northampton County, 19 A.2d 263, 342 Pa. 163

Appeal to commission

Appeal to public utilities commission from order of highway director directing railroad's elimination of grade crossing constitutes proceeding de novo.—Lake Shore Electric Ry. Co. v. Public Utilities Commission, 180 N.E. 552, 125 Ohio St. 48

98. U.S.—In re Chicago, M., St. P. & P. R. Co., D.C.Minn., 50 F.2d 430

99. Pa.—Borough of Middletown v. Pennsylvania Public Utility Commission, 17 A.2d 904, 143 Pa. Super. 444

51 C.J. p. 686 note 33

1. Wash.—Department of Transp. of State v. Snohomish County, 212 P.2d 829, 35 Wash.2d 247

Purpose of statute dealing with petitions for change in existing railroad crossings is to promote the public safety.—Department of Transp. of State v. Snohomish County, supra

Department of highway proper petitioner

Pa.—Borough of Middletown v. Pennsylvania Public Utility Commission, 17 A.2d 904, 143 Pa. Super. 444.

2. Conn.—Appeal of Westbrook, 17 A. 368, 57 Conn. 95.

51 C.J. p. 686 note 34

3. N.Y.—People v. Public Service Commission, 114 N.E. 1050, 220 N.Y. 1.

4. Ill.—Chicago, N. S. & M. R. Co. v. Illinois Commerce Commission ex rel. Department of Public Works and Buildings, 188 N.E. 177, 354 Ill. 58

5. Pa.—Pennsylvania R. Co. v. Public Service Commission, 179 A. 850, 118 Pa. Super. 380

6. N.J.—Pennsylvania R. Co. v. Board of Public Utility Com'rs of State of New Jersey, 184 A. 841, 116 N.J. Law 415

7. Ill.—Chicago & E. I. Ry. Co. v. Road Dist. No. 10, 187 N.E. 155, 353 Ill. 160

8. N.J.—Erie R. Co. v. Public Utility Comrs., 98 A. 13, 89 N.J. Law 57, affirmed 103 A. 1052, 90 N.J. Law 672, affirmed 41 S.Ct. 169, 254 U.S. 394, 65 L.Ed. 322

9. Ill.—Chicago, etc., R. Co. v. Illinois Commerce Commission, 158 N.E. 376, 326 Ill. 625, 55 A.L.R. 654.

Mich.—Detroit v. Dailey, 120 N.W. 25, 156 Mich. 9

10. Conn.—Appeal of Westbrook, 17 A. 368, 57 Conn. 95

11. Pa.—Lehigh Valley R. Co. v. Public Service Commission of Pennsylvania, 161 A. 422, 105 Pa. Super. 423.

12. Wash.—State v. Department of Public Works, 238 P. 621, 135 Wash. 644

13. Md.—Brehm v. Tabler, 5 A.2d 820, 6 A.2d 378, 176 Md. 411.

Participation as waiver of lack of notice

Where city participated in original hearing before commission on question of whether to close street crossing over railroad, and thereafter twice applied for reconsideration and took appeal to court, city could not thereafter for first time attack order closing crossing because of failure to give it notice of the original proceeding.—City of Tulsa, Okl. v. Midland Valley R. Co., C.C.A.Okl., 168 F.2d 252.

14. U.S.—Southern Ry. Co. v. Commonwealth of Virginia ex rel. Shirley, Va., 54 S.Ct. 148, 290 U.S. 190, 78 L.Ed. 260

15. U.S.—Southern R. Co. v. Commonwealth of Virginia ex rel. Shirley, supra.

16. Md.—Brehm v. Tabler, 5 A.2d 820, 6 A.2d 378, 176 Md. 411

Failure to call witnesses

A hearing before state roads commission on question of eliminating

where a grade crossing is eliminated by a change of grade, only the railroad is entitled to notice and hearing,[17] but, where a grade crossing is eliminated by closing the crossing, the public and all persons affected are entitled to notice and hearing.[18] When a petition for the abolition of a grade crossing is brought by the railroad company, the municipality where the crossing is situated should be given notice of the proceedings, although the statute does not expressly require it.[19]

Necessity for elimination. The burden is on a railroad petitioning for permission to discontinue a grade crossing to establish that it is entitled to such relief.[20] It must be established that the elimination of the grade crossing is for the public benefit,[21] and is reasonably necessary,[22] and, in passing on the elimination of a grade crossing, the commission must consider all the facts and circumstances, including the location of the crossing, the surrounding physical conditions, and the volume of traffic.[23]

The commission may not require one railroad to eliminate a grade crossing in order to save another railroad the expense of eliminating another grade crossing, but the fact that such saving incidentally results from a valid order requiring the elimination of a grade crossing will not invalidate such order.[24] Grade crossing eliminations requiring great expenditures should not be ordered where the danger may be substantially eliminated by regulation of the manner of operation of the railroad.[25] Engineering questions are for the commission to determine.[26] The fact that a municipal corporation has not consented to the abolition of a grade crossing is not important where it will not bear the expense of, or be subjected to liability because of, the abolition.[27]

Findings The commission may be required to make findings of fact as to all of the principal issues,[28] and the findings should be sufficiently spe-

railroad grade crossing was not legally inadequate because of commission's failure to call witnesses as to facts testified to and shown by photographs in evidence with respect to train and automobile traffic and obstruction of view at crossing or facts bearing on issue as to proper location of substituted overhead crossing.—Brehm v. Tabler, supra.

17. Ky.—McCreary County Fiscal Court v. Roberts, 166 S.W.2d 977, 292 Ky. 527.

18. Ky.—McCreary County Fiscal Court v Roberts, supra.

19. Conn.—Appeal of Westbrook, 17 A. 368, 57 Conn. 95.

20. Ill.—Chicago & E. I. Ry. Co. v Road Dist. No. 10, 187 N.E 155, 353 Ill. 160.

21. Ill.—Illinois Cent R. Co. v. Illinois Commerce Commission, 70 N E.2d 64, 395 Ill 303.

Pa.—Pennsylvania R. Co. v. Pennsylvania Public Utility Commission, 35 A.2d 588, 154 Pa.Super. 86

Benefit of particular individuals

Order of commerce commission directing that highway bridge over railroad be reconstructed would be set aside where it appeared that reconstruction of the bridge would be practically for sole convenience of an experimental farm operated by University of Illinois, and that the convenience of other members of the public would be purely negligible.—Illinois Cent. R. Co. v. Illinois Commerce Commission, 70 N.E.2d 64, 395 Ill. 303.

22. N.Y.—In re Grade Crossing Elimination in Town of Wallkill, 263 N.Y.S 61, 238 App.Div. 854.

Va.—Richmond-Ashland Ry. Co. v. Commonwealth ex rel City of Richmond, 173 S E 892, 162 Va. 296.

Question of fact

Ill.—Commerce Commission v Cleveland, etc, R Co, 140 N E. 868, 309 Ill. 165—Cleveland, etc, R Co. v. State Public Utilities Commission, 112 N E. 689, 278 Ill 210.

Existence of grade crossing is not itself sufficient basis for determination by the commission that public safety required elimination.—Matter of Bay St Crossing, 221 N Y S 129, 220 App Div. 80, affirmed 157 N E 892, 245 N.Y. 643—51 C.J. p 687 note 47 [b].

Fact that no accident had ever happened at crossing does not preclude finding that crossing is dangerous.—Department of Transp of State v. Snohomish County, 212 P. 2d 829, 35 Wash 2d 247—51 C J. p 688 note 60 [a] (2)

Evidence as to use of pedestrian subway

N Y.—In re Elimination of Existing Highway-Railroad Crossings at Grade of Railroads Operated by Pennsylvania R. Co., 299 N Y S 693, 252 App Div 404, reargument denied In re Farnham-Irving State Highway, 4 N.Y.S 2d 163, 254 App Div 634, and 4 N Y.S 2d 166, 254 App Div. 634, affirmed In re Farnham-Irving State Highway In Town of Brant, 19 N.E.2d 915, 280 N Y 495

Reasonable necessity held not established

Minn.—Northern Pac Ry. Co. v Village of Rush City, Chisago County, 40 N.W.2d 886, 230 Minn. 144.

N.Y.—In re Grade Crossing Elimination in Town of Wallkill, 263 N. Y S. 61, 238 App.Div. 854.

23. Ill.—City of Chicago v. Illinois Commerce Commission ex rel. Chicago & W. I. R. Co, 190 N E 896, 356 Ill. 501.

24. N Y.—In re New York, O & W Ry. Co, 280 N.Y.S. 174, 244 App Div 664, affirmed In re New York, O & W Ry. at Seneca St. in City of Oswego, 3 N.E 2d 188, 271 N Y. 567

25. N Y.—In re New York O & W Ry. Co, 257 N Y.S 182, 235 App Div. 331.

26. N Y.—In re Elimination of Existing Highway-Railroad Crossings at Grade in City of Batavia, Genesee County, 8 N.Y.S.2d 910, 256 App Div 6, affirmed In re Grade Crossing Elimination in City of Batavia, 24 N E 2d 987, 282 N Y. 570, reargument denied 26 N E 2d 810, 282 N.Y. 679—In re New York, O & W. Ry Co, 257 N Y.S. 182, 235 App Div. 331.

Grade of track at crossing was largely an engineering problem.—In re Elimination of Existing Highway-Railroad Crossings at Grade of Railroads Operated by Pennsylvania R Co., 299 N Y S 693, 252 App.Div 404, reargument denied In re Farnham-Irving State Highway, 4 N Y S 2d 163, 254 App Div. 634 and 4 N.Y S. 2d 166, 254 App.Div. 634, affirmed In re Farnham-Irving State Highway in Town of Brant, 19 N E 2d 915, 280 N.Y. 495.

27. Pa.—Borough of Middletown v. Pennsylvania Public Utility Commission, 17 A.2d 904, 143 Pa Super. 444.

28. Ill.—Chicago, N. S. & M. R. Co.

cific to enable the court intelligently to review the commission's decision and ascertain if the facts found afford a reasonable basis for the order.[29]

Order. A valid order determining the mode of elimination has the force and effect of a statute enacted by the legislature,[30] and remains in full force and effect until appealed from or vacated.[31] Where an order tentatively approving plans for the separation of grades at a crossing provided for the reopening of the proceeding if the parties were unable to agree on the plans, but no petition to reopen was filed, the order became final[32] and warranted the railroad in proceeding in compliance with it.[33] An order with respect to the elimination of a grade crossing must be reasonable,[34] and should not be rendered until a well considered and comprehensive plan has been worked out;[35] nor should such an order be made without determining the manner in which it shall be carried out,[36] and without making a fairly accurate estimate of the cost of the project.[37] The fact that the railroad is financially unable to comply with the commission's order for the elimination of a grade crossing does not affect its validity,[38] but it has been held, under a statute providing for the elimination of grade crossings where necessary and expedient, that a determination of expedience requires the consideration of the financial condition of the railroad.[39]

Unless the statute so provides, it is not necessary that there be an ascertainment of all the damages likely to result to property owners from putting a plan of grade crossing elimination into operation before a final order establishing such plan may be made,[40] nor is the payment of anticipatory damages to adjacent property owners a condition precedent to a performance of the work.[41] An order for the elimination of a grade crossing is not invalid for failure to make provision for reimburse-

v. Illinois Commerce Commission ex rel Department of Public Works and Buildings, 188 N.E. 177, 354 Ill. 58.

Findings held sufficient

Ill.—Chicago, N. S. & M. R. Co. v. Illinois Commerce Commission ex rel Department of Public Works and Buildings, supra.

29. Ill.—Chicago, N. S. & M. R. Co. v. Illinois Commerce Commission ex rel Department of Public Works and Buildings, supra

Judicial review of orders of commission see infra subdivision b (2) of this section.

30. N.Y.—Matter of Highway-R. Crossings, 234 N.Y.S. 480, 226 App. Div. 287, reversed on other grounds 167 N.E. 460, 251 N.Y. 331

Construction of order

U.S.—Montgomery v. Atchison, T. & S. F. Ry. Co., C.C.A.Okl., 89 F. 2d 94.

31. N.Y.—Matter of Highway-R. Crossings, 234 N.Y.S. 480, 226 App. Div. 287, reversed on other grounds 167 N.E. 460, 251 N.Y. 331

Fraud or deception, if any, in obtaining conveyance of private roadway on grantor's land to railroad right of way by concealment of state roads commission's purpose to remove railroad grade crossing did not invalidate such removal, where conveyance did not bring about or aid in removal of crossing or placing of crossing and portion of road beyond it under commission's control.—Brehm v. Tabler, 5 A.2d 820, 6 A.2d 378, 176 Md. 411.

32. Ind.—Cleveland, C., C. & St. L. R. Co. v. Board of Com'rs of Delaware County, 27 N.E.2d 89, 108 Ind. App. 335.

33. Ind.—Cleveland, C., C. & St. L. R. Co. v. Board of Com'rs of Delaware County, supra

34. N.Y.—In re Elimination of Existing Highway-Railroad Crossings at Grade of Railroads Operated by Pennsylvania R. Co., 299 N.Y.S. 693, 252 App. Div. 404, reargument denied In re Farnham-Irving State Highway, 4 N.Y.S.2d 163, 254 App. Div. 634 and 4 N.Y.S.2d 166, 254 App. Div. 634, affirmed In re Farnham-Irving State Highway in Town of Brant, 19 N.E.2d 915, 280 N.Y. 495

Pa.—Pittsburgh & S. R. Co. v. Pennsylvania Public Utility Commission, 14 A.2d 903, 141 Pa. Super. 233.

Financial ability of railroad

(1) The financial inability of the railroad to comply is to be considered in determining the reasonableness of the order.—Cleveland, etc., R. Co. v. State Public Utilities Commission, 112 N.E. 689, 273 Ill. 210.

(2) Public service commission's order, authorizing construction of new highway subway under railroad tracks, was held not unreasonable or unlawful because of railroad company's distressed financial condition.—State ex rel Alton R. Co. v. Public Service Commission, 68 S.W.2d 691, 334 Mo. 832

(3) Allocation of expense of eliminating crossing see infra § 165.

35. N.Y.—In re Existing Highway-Railroad Crossings at Grade Operated by New York Cent. R. Co., 295 N.Y.S. 831, 251 App.Div. 72.

Choice of plan.

Public service commission must exercise its judgment and discretion in finally determining, after due hearing, which of several different plans for elimination of railroad grade crossing shall be adopted.—In re Elimination of Highway-Railroad Crossing at Grade in Village of Burdett, Schuyler County, 190 N.E. 344, 264 N.Y. 195.

36. N.Y.—In re Existing Highway-Railroad Crossings at Grade Operated by New York Cent. R. Co., 295 N.Y.S. 831, 251 App.Div. 72.

37. N.Y.—In re Existing Highway-Railroad Crossings at Grade Operated by New York Cent. R. Co., supra.

"Rough calculation" of cost of eliminating grade crossing will not justify public service commission in making final determination which will eventually result in expenditure by public and railroad of millions of dollars, although commission need not have before it exact amount which improvement will cost.—In re Existing Highway-Railroad Crossings at Grade Operated by New York Cent. R. Co., supra

38. N.Y.—In re New York, O. & W. Ry. Co., 280 N.Y.S. 174, 244 App. Div. 664, affirmed In re New York, O. & W. Ry. at Seneca St. in City of Oswego, 3 N.E.2d 188, 271 N.Y. 567

51 C.J. p. 688 note 60 [a] (3).

Allocation of expense of eliminating crossing see infra § 165.

39. Ohio.—Lake Shore Electric Ry. Co. v. Public Utilities Commission, 180 N.E. 552, 125 Ohio St. 48.

40. Pa.—Erie R. Co. v. Public Service Commission, 76 Pa. Super. 170, affirmed 114 A. 357, 271 Pa. 409.

Damages generally see infra § 166

41. N.J.—Central R. Co. of New Jersey v. Simandl, 1 A.2d 312, 124 N.J.Eq. 207, affirmed 4 A.2d 281, 125 N.J.Eq. 91.

ment of the railroad company as provided by statute, where the statute gives the railroad the right to reimbursement and the commission may enforce the right.[42] A statutory requirement that the railroad commissioners shall communicate their decision as to the abolition of a grade crossing to the parties within a certain time has been held to be merely directory and not to affect the validity of the order,[43] and the same has been held with respect to a requirement that the railroad commissioners shall file in their office and send copies of their decision to the railroad company.[44]

Rehearing. The commission may have power to reopen the proceeding[45] on its own motion,[46] even though its former decision has been approved on appeal,[47] and refusal to grant a rehearing has been held error when the railroad alleged new conditions justifying a modification of the order,[48] but it may not amend its order without affording the railroad notice and a hearing.[49]

Penalty for noncompliance with order. Where the statute provides for a penalty for noncompliance with the commission's order, the proceeding to recover such a penalty should be brought by the commission in the name of the state.[50] A plea excusing noncompliance must show facts indicating a reasonable effort to comply.[51] It is no defense that the date specified for compliance with the order passed because of litigation.[52]

Personal liability for order. The individual members of the board or commission are not personally liable for damages in an action arising out of an order directing the elimination of a grade crossing unless they were actuated by motives of private gain, oppression, or bad faith.[53]

(2) Judicial Review

Provision is generally made for judicial review of the commission's orders in grade crossing elimination proceedings.

Provision is generally made for judicial review of the commission's orders in grade crossing elimination proceedings.[54] As a general rule, a proceeding for judicial review does not lie until the commission has entered a final order,[55] but appeal has been held to lie from an interim order where the commission's jurisdiction is questioned.[56] Where proceedings for judicial review are not instituted within the time limited by law, the commission's order is final and conclusive,[57] and may not be reviewed in a collateral proceeding,[58] unless it is void, as where it was rendered without jurisdiction,[59] and this rule

42. N.Y.—Petition of City of Buffalo, 279 N.Y.S. 873, 245 App.Div. 19

43. Conn.—Appeal of Spencer, 61 A. 1010, 78 Conn. 301.

44. Me.—Maine Cent. R. Co. v. Bangor, etc., R. Co., 36 A. 1050, 89 Me. 555.

45. Conn.—Appeal of Town of Andover, 155 A. 717, 113 Conn. 494
N.Y.—People v. State Public Service Commission, 114 N.Y.S. 636, 130 App.Div. 335, appeal dismissed 89 N.E. 1128, 195 N.Y. 562.

New matters
Grounds for reconsideration by commission of its order must be restricted to new matters and new or changed conditions set up in petition for reconsideration, which had arisen since, and were not presented in previous petitions for rehearing, which were dismissed by commission, and from which no appeal was taken within time limited by law.—Pennsylvania R. Co. v. Public Service Commission, 179 A. 850, 118 Pa. Super. 380

46. N.Y.—City of New York v. Maltbie, 53 N.Y.S.2d 234, affirmed 53 N.Y.S.2d 953, 269 App.Div. 662, appeal denied 54 N.Y.S.2d 700, 269 App.Div. 685, affirmed 63 N.E.2d 119, 294 N.Y. 931.

47. N.Y.—People v. State Public Service Commission, 114 N.Y.S. 636, 130 App.Div. 335, appeal dismissed 89 N.E. 1128, 195 N.Y. 562.

48. Pa.—Delaware, etc., Co. v. State Public Service Commission, 96 Pa. Super. 169

Financial condition; change of purpose
N.Y.—In re Elimination of Existing Highway-Railroad Crossing at Grade of Lehigh Valley R. Co. in Village of Spencer, Tioga County, 5 N.Y.S.2d 946, 254 App.Div. 412.

49. N.Y.—In re Grade Crossing and Terminal Station Commission of City of Buffalo, 272 N.Y.S. 899, 242 App.Div. 36.

50. N.J.—State Public Utility Comrs. v. Lehigh Valley R. Co., 149 A. 263, 106 N.J.Law 411.

51. N.J.—State Public Utility Comrs. v. Lehigh Valley R. Co., supra.

52. N.J.—State Public Utility Comrs. v. Lehigh Valley R. Co., supra.

53. N.J.—R. & A. Realty Corp. v. Pennsylvania R. Co., 3 A.2d 293, 16 N.J.Misc. 537.

54. Conn.—Levitt v. Attorney General, 151 A. 171, 111 Conn. 634.
N.Y.—In re New York, O. & W. Ry. Co., 280 N.Y.S. 174, 244 App.Div. 664, affirmed In re New York, O. & W. Ry. at Seneca St. in City of Oswego, 3 N.E.2d 188, 271 N.Y. 567.
51 C.J. p. 686 note 46.

Cost bond
Superior court had jurisdiction to review an order by the director of the department of transportation closing grade crossing, although no cost bond was filed with petition for review.—Department of Transp. of State v. Snohomish County, 212 P.2d 829, 35 Wash.2d 247.

Review may not be used to delay the proceedings until the railroad is in a better financial position.—Pennsylvania R. Co. v. Board of Public Utility Com'rs, 180 A. 551, 13 N.J.Misc. 766, appeal dismissed 184 A. 842, 116 N.J.Law 527.

55. N.Y.—In re Grade Crossing of New York Cent. R. R., in City of Buffalo, 78 N.E.2d 596, 297 N.Y. 246.

56. Pa.—Borough of Whitaker v. Pennsylvania Public Utility Commission, 60 A.2d 341, 163 Pa.Super. 238.

57. Miss.—Alabama & V. Ry. Co. v. Graham, 157 So. 241, 171 Miss. 695.
Pa.—Pennsylvania R. Co. v. Public Service Commission, 179 A. 850, 118 Pa.Super. 380.

58. U.S.—Finlay v. Union Pac. R. Co., D.C.Kan., 6 F.R.D. 284
Conn.—Doolittle v. Branford, 22 A. 336, 59 Conn. 402
Pa.—Bartron v. Northampton County, 19 A.2d 263, 342 Pa. 163.

59. Vt.—Sayers v. Montpelier, etc.,

may not be avoided by an application to the commission for a rehearing after the time for appeal has expired.[60]

Parties. While the commission has been held not an indispensable party to judicial proceedings to determine the validity of its order,[61] it is a proper party.[62] Where the state has no pecuniary interest in the matter, it is not a real party in interest.[63] The railroad company may be a necessary party to an appeal from the commission's order,[64] but a railroad whose substantial rights are not affected by an order may not have it reviewed.[65] A demurrer has been held to lie to a pleading seeking judicial review of the commission's order where it fails to include all of the necessary parties.[66]

Scope of review. The courts will not interfere with the orders of the commission, without grave cause,[67] and the commission's orders as to the elimination of grade crossings may not be disturbed by the courts where they are lawful, reasonable, and supported by the evidence,[68] but it is the court's duty to keep the commission within the law and to protect the legal and constitutional rights of persons affected by its orders.[69] The commission's order may be set aside where it is illegal or unlawful,[70] as where it is beyond the commission's constitutional or statutory power,[71] or where it is unreasonable, arbitrary, and unjust,[72] or void for un-

R Co, 97 A 660, 90 Vt 201, Ann Cas 1918B 1050
51 C J p 688 note 75.

60. Pa—Pennsylvania R Co. v. Public Service Commission, 179 A 850, 118 Pa Super 380

61. U S—In re Chicago, M, St. P. & P. R Co, D C.Minn, 50 F.2d 430.

62. Conn.—Appeal of New York, etc, R Co, 26 A 122, 62 Conn 527, affirmed 14 S Ct 437, 151 U S 556, 38 L Ed 269

63. U.S—In re Chicago, M, St P. & P. R. Co., D C.Minn, 50 F 2d 430.

64. Conn—Appeal of Town of Andover, 155 A. 717, 113 Conn. 494.

65. N.Y—In re Grade Crossing of New York Cent R R, in City of Buffalo, 78 N E 2d 596, 297 N.Y. 246.

66. Conn—Appeal of Town of Andover, 155 A. 717, 113 Conn. 494

67. Wash—Department of Transp of State v Snohomish County, 212 P 2d 829, 35 Wash.2d 247

68. Mo—State ex rel. Chicago, R I & P. Ry. Co. v Public Service Commission of Missouri, 72 S W 2d 101, 335 Mo 180—State ex rel Town of Carrollton v. Public Service Commission of Missouri, 63 S W.2d 26.
51 C.J. p 687 note 48.

69. N Y—In re Existing Highway-Railroad Crossings at Grade Operated by New York Cent R Co., 295 N.Y S 831, 251 App Div 72.

70. Conn—Levitt v. Attorney General, 151 A 171, 111 Conn 634
Ill.—Chicago, N S & M. R. Co v. Illinois Commerce Commission ex rel Department of Public Works and Buildings, 188 N.E 177, 354 Ill 58
51 C J p 687 note 48

Compliance with statute

On appeal from orders of public service commission in grade crossing elimination proceedings, courts may ascertain if there has been compliance with statute—In re New York, O & W Ry Co, 257 N Y.S. 182, 235 App Div. 331.

Order held lawful

Mo—State ex rel. Alton R. Co. v. Public Service Commission, 70 S W 2d 61, 334 Mo. 1001

71. Ill—Chicago, N. S. & M R. Co v Illinois Commerce Commission ex rel. Department of Public Works and Buildings, 188 N E. 177, 354 Ill. 58.
N Y—In re Elimination of Existing Highway-Railroad Crossings at Grade of Railroads Operated by Pennsylvania Railroad Co, 299 N Y S. 693, 252 App Div. 404, affirmed In re Farnham-Irving State Highway in Town of Brant, 19 N E 2d 915, 280 N Y. 495—In re New York, O & W Ry. Co, 280 N Y S 174, 244 App Div. 664, affirmed In re New York, O & W Ry. at Seneca St in City of Oswego, 3 N.E.2d 188, 271 N Y 567.

Lawfulness of order

U S—In re Chicago, M, St. P & P R Co, D.C Minn, 50 F 2d 430.

Power held not exceeded

Conn.—Appeal of Town of Andover, 155 A 717, 113 Conn. 494.

72. Conn—Levitt v. Attorney General, 151 A 171, 111 Conn 634
N Y—In re Elimination of Highway Grade Crossings in Town of Canton, St Lawrence County, 174 N E. 695, 255 N Y 320—In re Elimination of Existing Highway-Railroad Crossings at Grade of Railroads Operated by Pennsylvania Railroad Co, 299 N.Y S 693, 252 App. Div. 404, affirmed In re Farnham-Irving State Highway in Town of Brant, 19 N.E 2d 915, 280 N.Y. 495—In re New York, O. & W Ry. Co, 280 N.Y.S 174, 244 App Div. 664, affirmed In re New York, O & W Ry. at Seneca St. in City of Oswego, 3 N.E.2d 188, 271 N.Y. 567—In re New York, O & W Ry. Co., 257 N Y S 182, 235 App.Div. 331.
51 C.J p 687 note 48.

Judicial question

U S—In re Chicago, M, St P & P. R Co, D C Minn, 50 F 2d 430.

In determining what is reasonable, the court does not substitute its own judgment for that of the commission, but does consider all the factors in the case—Lehigh Valley R Co v. Board of Public Utility Comrs, D.C N J., 33 F 2d 780, affirmed 49 S Ct 69, 278 U S. 24, 73 L Ed 161, 62 A L. R. 805—51 C J p 688 note 60

Test to be applied to commission's order requiring elimination of grade crossing is whether, in view of all the facts, commission's decision was arbitrary or was justified by public necessity which railroad could lawfully be compelled to recognize.—In re New York, O. & W. Ry Co, 280 N Y S 174, 244 App Div 664, affirmed In re New York, O. & W Ry at Seneca St in City of Oswego, 3 N E 2d 188, 271 N.Y 567.

Order held reasonable or not unreasonable

Md—Brehm v. Tabler, 5 A.2d 820, 6 A.2d 378, 176 Md 411.
Mo—State ex rel Alton R. Co. v. Public Service Commission, 70 S W.2d 61, 334 Mo 1001—State ex rel Town of Carrollton v Public Service Commission of Missouri, 63 S W.2d 26—State ex rel. St Louis-San Francisco Ry Co v Public Service Commission, 62 S. W 2d 1090—State ex rel. St. Louis-San Francisco Ry. Co. v Public Service Commission, 53 S.W.2d 868, 331 Mo. 438
N J.—West Shore R. Co. v. Board of Public Utility Com'rs, 164 A. 688, 112 N.J.Eq 149, affirmed 169 A. 829, 112 N.J Law 83, certiorari demed West Shore R Co. v. Board of Public Utility Com'rs of State of New Jersey, 54 S Ct. 629, 292 U. S. 624, 78 L.Ed 1479—Pennsylvania R. Co. v. Board of Public Utility Com'rs, 180 A. 551, 13 N J. Misc 766, appeal dismissed 184 A. 842, 116 N J.Law 527
N Y.—In re Elimination of Existing Highway-Railroad Crossings at

certainty,[73] or founded on erroneous legal principles,[74] or where it is not supported by substantial evidence.[75] The mere fact that the grade crossing could have been eliminated by a less expensive method does not make the order unreasonable,[76] but it is the court's duty, where the cost is questioned, to determine whether it is within reasonable limits.[77]

Judicial review of the orders of the commission is limited to questions of law,[78] and the courts may not usurp the functions of the commission or interfere with their proper exercise,[79] or substitute their judgment for that of the commission.[80] The court will not itself weigh the evidence or pass on the facts,[81] and the fact findings of the commission, where supported by substantial evidence, will be accepted by the court.[82]

Questions not involved in or passed on in the

Grade in City of Batavia, Genesee County, 8 N.Y.S.2d 910, 256 App. Div 6, reargument denied 11 N. Y S 2d 542, 256 App Div. 1043, affirmed In re Grade Crossing Elimination in City of Batavia, 24 N E 2d 987, 282 N.Y. 570, reargument denied 26 N E 2d 810, 282 N.Y. 679.
51 C J. p 687 note 48 [a]

73. Okl.—Missouri, etc, R Co. v. State, 200 P. 208, 82 Okl. 221.

Interlocutory provision

Provision in order eliminating grade crossing that subway drainage should be included as part of plan was held not to invalidate order because of indefiniteness, since provision was in its nature interlocutory and contemplated the furnishing of detailed plans for drainage system and final passing on such plans by commission.—Petition of City of Buffalo, 279 N.Y.S. 873, 245 App.Div. 19.

74. Ill—Chicago, N. S & M. R Co. v. Illinois Commerce Commission ex rel Department of Public Works and Buildings, 188 N.E 177, 354 Ill 58.
N.Y—In re New York, O & W Ry. Co, 280 N Y S. 174, 244 App Div 664, affirmed In re New York, O. & W Ry. at Seneca St. in City of Oswego, 3 N E 2d 188, 271 N.Y S 567.
51 C.J. p 687 note 50.

75. Ill—Chicago, N S & M. R. Co v Illinois Commerce Commission ex rel. Department of Public Works and Buildings, 188 N E 177, 354 Ill 58.
Mass.—Boston & A. R. Co v. Department of Public Utilities, 51 N E 2d 445, 314 Mass 634
51 C J. p 687 note 52

76. U.S—Lehigh Valley R Co. v Board of Public Utility Comrs, N J., 49 S.Ct. 69, 278 U S. 24, 73 L Ed 161, 62 A.L R 805.
58 C.J. p 688 note 61.

77. U.S—Lehigh Valley R. Co. v. Board of Public Utility Comrs, N J., 49 S.Ct. 69, 278 U S. 24, 73 L.Ed 161, 62 A.L.R. 105
N.Y.—In re Elimination of Existing Highway-Railroad Crossing at Grade of Lehigh Valley R. Co. in Village of Spencer, Tioga County, 5 N.Y S.2d 946, 254 App.Div 412.

78. Mass.—Boston & A. R Co. v. Department of Public Utilities, 51 N E 2d 445, 314 Mass. 634
N.Y—In re Elimination of Existing Highway-Railroad Crossings at Grade in City of Batavia, Genesee County, 8 N Y S 2d 910, 256 App Div 6, affirmed In re Grade Crossing Elimination in City of Batavia, 24 N.E 2d 987, 282 N Y 570, reargument denied 26 N E 2d 810, 282 N.Y 679—In re New York, O & W. Ry. Co, 280 N.Y S. 174, 244 App Div. 664, affirmed In re New York, O & W. Ry. at Seneca St in City of Oswego, 3 N E 2d 188, 271 N.Y. 567.

Discretion

Court is not called on to exercise any discretion—In re Elimination of Existing Highway-Railroad Crossings at Grade in City of Batavia, Genesee County, 8 N.Y.S 2d 910, 256 App Div 6, reargument denied 11 N Y S.2d 542, 256 App.Div. 1043, affirmed In re Grade Crossing Elimination in City of Batavia, 24 N.E 2d 987, 282 N.Y. 570, reargument denied 26 N.E.2d 810, 282 N.Y. 679.

79. N.Y.—In re Elimination of Existing Highway-Railroad Crossings at Grade of Railroads Operated by Pennsylvania Railroad Co, 299 N Y S 693, 252 App Div. 404, reargument denied In re Farnham-Irving State Highway, 4 N.Y S 2d 163, 254 App Div 634, and 4 N Y S 2d 166, 254 App Div. 634, affirmed In re Farnham-Irving State Highway in Town of Brant, 19 N E 2d 915, 280 N Y. 495—In re New York, O. & W. Ry. Co, 280 N Y S 174, 244 App Div. 664, affirmed In re New York, O. & W. Ry at Seneca St. in City of Oswego, 3 N E.2d 188, 271 N Y. 567.

Engineering questions will not be considered by the court—In re Elimination of Existing Highway-Railroad Crossings at Grade in City of Batavia, Genesee County, 8 N Y.S 2d 910, 256 App.Div. 6, reargument denied 11 N.Y.S.2d 542, 256 App Div 1043, affirmed In re Grade Crossing Elimination in City of Batavia, 24 N E.2d 987, 282 N.Y. 570, reargument denied 26 N E.2d 810, 282 N Y. 679.

Expediency and wisdom

Court may not pass on expediency or wisdom of commission's order requiring elimination of grade crossing—In re New York, O & W. Ry Co, 280 N Y S 174, 244 App Div 664, affirmed In re New York, O & W Ry. at Seneca St in City of Oswego, 3 N.E 2d 188, 271 N.Y 567

80. Ill—Chicago, N. S. & M R Co v. Illinois Commerce Commission ex rel. Department of Public Works and Buildings, 188 N E 177, 354 Ill 58
N Y.—In re Elimination of Highway Grade Crossings in Town of Canton, St. Lawrence County, 174 N E 695, 255 N Y 320—In re New York, O & W Ry Co, 280 N Y S 174, 244 App Div. 664, affirmed In re New York, O. & W Ry at Seneca Street in City of Oswego, 3 N.E.2d 188, 271 N.Y 567

81. Ill—Chicago, N S & M R Co v. Illinois Commerce Commission ex rel Department of Public Works and Buildings, 188 N E 177, 354 Ill 58
Mass—Boston & A. R. Co. v. Department of Public Utilities, 51 N. E 2d 445, 314 Mass 634.
N.Y—In re Elimination of Highway Grade Crossings in Town of Canton, St Lawrence County, 174 N E. 695, 255 N Y 320.

82. Cal.—City of San Mateo v. Railroad Commission, 68 P.2d 713, 9 Cal 2d 1.
Mo—State ex rel Chicago, R I & P Ry Co v Public Service Commission of Missouri, 72 S W 2d 101, 335 Mo 180—State ex rel Town of Carrollton v Public Service Commission of Missouri, 63 S W.2d 26—State ex rel and to Use of Chicago Great Western R Co v Public Service Commission of Missouri, 51 S.W.2d 73, 330 Mo 729, certiorari denied Chicago Great Western R Co. v. Public Service Commission of State of Missouri, 53 S.Ct 89, 287 U S. 641, 77 L Ed 555
N Y.—In re New York, O & W. Ry Co, 280 N Y.S. 174, 244 App Div. 664, affirmed In re New York, O. & W. Ry at Seneca St in City of Oswego, 3 N.E.2d 188, 271 N Y. 567
51 C J. p 687 notes 47, 51

Use insufficient to establish public crossing

Cal—City of San Mateo v. Railroad Commission, 68 P.2d 713, 9 Cal 2d 1.

order reviewed will not be considered.[83] On review of an order abolishing a crossing, based on an erroneous finding that the crossing was public instead of private, the court need not determine the powers of the commission with respect to private crossings.[84] Under some statutes, the court is required to remand the matter to the commission where the commission failed to receive evidence properly offered, unless the court finds that such evidence is not controlling,[85] but a finding that the evidence is not controlling is not required where the evidence was not properly presented to the commission.[86]

The necessity of a grade crossing elimination is to some extent subject to judicial review.[87] Where the abolition is discretionary, the exercise of discretion is reviewable,[88] but courts will not interfere where it is fairly exercised.[89]

Presumption and burden of showing error. It is presumed that the decision of the commission is prima facie just, reasonable, and correct,[90] and the burden of showing its invalidity is on the party attacking the order.[91]

Determination. An order may, on review, be set aside as to the portion of it assessing costs without affecting the remainder of it,[92] or may be held erroneous as to one crossing without disturbing it as to other crossings.[93] Where, on appeal, it appears to the court that more definite evidence is necessary, the record may be returned to the commission so that additional evidence can be taken.[94]

Costs of review should be assessed against the railroad where the order from which it appealed is affirmed.[95]

Elimination unnecessary

Finding that grade crossing separation at place where view was unobstructed and flash signals were operating was unnecessary and inexpedient was held justified.—In re Elimination of Grade Crossing Over Tracks of Baltimore & O R. Co., 179 N.E. 139, 124 Ohio St. 406.

Evidence held sufficient to support order

Ill.—St. Clair County v. Pennsylvania R. Co., 174 N.E. 852, 342 Ill. 646.

Miss.—New Orleans & N. E. R. Co. v. State Highway Commission, 144 So. 558, 164 Miss. 343.

Mo.—State ex rel. Alton R. Co. v. Public Service Commission, 68 S.W.2d 691, 334 Mo. 832.

N.Y.—In re New York, O. & W. Ry. Co., 280 N.Y.S. 174, 244 App. Div. 664, affirmed In re New York, O. & W. Ry. at Seneca St. in City of Oswego, 3 N.E.2d 188, 271 N.Y. 567.—In re Elimination of Highway Grade Crossings in Town of Canton, St. Lawrence County, 242 N.Y.S. 601, 229 App.Div. 607, appeal dismissed 174 N.E. 695, 255 N.Y. 320.

Okl.—Kansas City Southern Ry. Co. v. Citizens of Westville, 89 P.2d 320, 184 Okl. 100, certiorari denied 59 S.Ct. 774, 306 U.S. 658, 83 L.Ed. 1055.

Pa.—Pennsylvania R. Co. v. Public Service Commission, 179 A. 850, 118 Pa. Super. 380.

Drainage

Evidence respecting inability to drain underpass highway and railroad crossing did not warrant order for overpass crossing.—In re Elimination of Highway Grade Crossings in Town of Canton, St. Lawrence County, 242 N.Y.S. 601, 229 App. Div. 607, appeal dismissed 174 N.E. 695, 255 N.Y. 320.

Subsequent review

On appeal to supreme court from a judgment of superior court reversing an order of the department of transportation closing a grade crossing, supreme court was not required to give findings of trial court same weight which supreme court would ordinarily give such findings when a case was tried before superior court without a jury and superior court saw and heard witnesses, since superior court was a reviewing court and did not, as such, see witnesses or hear them testify, and reached its conclusions from a transcript of oral evidence given at departmental hearing.—Department of Transp. of State v. Snohomish County, 212 P.2d 329, 35 Wash.2d 247.

83. Ind.—Evansville, I. & T. H. R. Co. v. Board of Com'rs of Gibson County, 199 N.E. 583, 210 Ind. 74.

84. Utah.—Bamberger Electric R. Co. v. State Public Utilities Commission, 204 P. 314, 59 Utah 351.

85. Ill.—City of Chicago v. Illinois Commerce Commission ex rel. Chicago & W. I. R. Co., 190 N.E. 896, 356 Ill. 501.

86. Ill.—City of Chicago v. Illinois Commerce Commission ex rel. Chicago & W. I. R. Co., supra.

87. N.Y.—In re New York, O. & W. Ry. Co., 257 N.Y.S. 182, 235 App. Div. 331.

88. U.S.—Erie R. Co. v. New Jersey Public Utility Comrs., N.J., 41 S.Ct. 169, 254 U.S. 394, 65 L.Ed. 322.

51 C.J. p. 687 note 56.

89. N.Y.—Matter of New York Cent. R. Co. Grade Crossings, 235 N.Y.S. 505, 226 App. Div. 447, affirmed 170 N.E. 152, 252 N.Y. 583.

51 C.J. p. 688 note 57.

Court will not substitute its discretion for that of commission

Conn.—Levitt v. Attorney General, 151 A. 171, 111 Conn. 634.

Discretion held not abused

Neb.—Butler County v. Chicago & N. W. Ry. Co., 263 N.W. 895, 130 Neb. 75.

90. Va.—Southern R. Co. v. Commonwealth, 97 S.E. 343, 124 Va. 36.

91. Ind.—New York, C. & St. L. R. Co. v. Singleton, 190 N.E. 761, 207 Ind. 449, certiorari denied 56 S.Ct. 89, 296 U.S. 578, 80 L.Ed. 409.

Mo.—State ex rel. St. Louis-San Francisco Ry. Co. v. Public Service Commission, 53 S.W.2d 868, 331 Mo. 438.

51 C.J. p. 688 note 63.

Action growing out of exercise of powers

Action by railway to set aside order of public service commission requiring it to reconstruct and widen subway under its tracks was held "action growing out of exercise of authority and powers granted to commission," within statute placing burden on party adverse to commission to show that its ruling is unlawful.—New York, C. & St. L. R. Co. v. Singleton, 190 N.E. 761, 207 Ind. 449, certiorari denied 56 S.Ct. 89, 296 U.S. 578, 80 L.Ed. 409.

92. Mo.—State v. Public Service Commission, 272 S.W. 957, 308 Mo. 359.

93. Conn.—Appeal of Fairfield, 17 A. 764, 57 Conn. 167.

94. Pa.—Lehigh Valley R. Co. v. State Public Service Commission, 80 Pa.Super. 139.

95. Ill.—Cleveland, etc., R. Co. v. State Public Utilities Commission, 112 N.E. 689, 273 Ill. 210.

Injunction against enforcement of order. Injunction will be granted to restrain enforcement of an order of the commission when it is the only adequate remedy, since certiorari will not stay execution of the order.[96]

c. Proceedings by Municipal Corporations

Ordinances providing for the abolition of grade crossings are not required to recite the reasons for their enactment. The right to judicial review exists under some statutes.

Ordinances providing for the abolition of grade crossings are not required to recite the reasons for their enactment,[97] as, for example, that a crossing is a nuisance[98] or dangerous.[99] The passage of an ordinance declaring the necessity for the elimination of a grade crossing does not place a mandatory duty on the council to act.[1] Where the railroad is entitled to such details of the work required that an adherence thereto must be accepted as a fulfillment of the requirement,[2] it is not necessary that such details be incorporated in the ordinance requiring the abolition of the crossings;[3] but the requirements may be expressed in general terms[4] and may be supplemented by plans and specifications for the purposes of the work prepared by authority of the municipal council.[5] Unless the statute so requires, a determination of the public necessity for a separation of grades[6] and an assessment of damages[7] need not be made before any work is done on the grade separation.

Judicial review. Notwithstanding the power to abolish grade crossings is conferred on a municipal legislative body, the statutes may provide for a right to test the legality of the action of such body by the courts.[8] The courts will not, in general, interfere with the determination of a municipal legislative body as to the necessity[9] and expediency[10] of a separation of grades at crossings in the absence of fraud or oppression constituting an abuse of discretion.[11] Where it is contended that the power of the city has been abused, all reasonable doubts should be resolved in favor of the valid exercise of the power,[12] and the case should be a clear one to justify judicial interference.[13] Where the city has entered into a contract which it is seeking to enforce, a court may, for the purposes of the contract, determine its reasonableness as a judicial question.[14]

Enforcement of orders. The work must be constructed in accordance with the plans and specifications established.[15] The municipality having power to compel a separation of grades may enforce such separation by the imposition of a penalty.[16] Where the city, in the exercise of its power, has, by ordinance, ordered the railroad to construct a viaduct, its right of action to compel construction is not affected by a statute giving a commission power over abolition of grade crossings.[17]

Alteration of plan. Where an ordinance providing plans and specifications for an elevation of tracks confers property rights on the railroad, such rights may not be taken away by a subsequent alteration of the plans without just compensation or due process of law.[18]

Effect of repeal of ordinance by general law. Where a municipal ordinance as to a separation of grade is repealed by a general law in conflict therewith, the rights acquired by the city[19] and acts legally done under the charter of the city and the

96. Vt.—Bessette v Goddard, 88 A 1, 87 Vt. 77

97. Mo.—State v Missouri Pac. R Co, 174 S.W. 73, 262 Mo 720.

98. Mo.—State v Missouri Pac R. Co, supra.

99. Mo.—State v. Missouri Pac. R. Co., supra.

1. Ohio.—Schultz v City of Cincinnati, 194 N.E. 38, 48 Ohio App. 432.

Proceeding to compel municipality to act

Taxpayer cannot by mandatory injunction compel city and railroad company to proceed with elimination of a grade crossing after passage of ordinance declaring necessity for improvement and voting of bond issue therefor.—Schultz v. City of Cincinnati, supra

2. Colo.—Burlington, etc, R. Co. v People, 77 P. 1026, 20 Colo App 181.

3. Colo.—Burlington, etc., R Co. v. People, supra

4. Colo.—Burlington, etc., R. Co v. People, supra.

5. Colo.—Burlington, etc, R. Co v People, supra.

6. Mich.—Mead v. Michigan Cent R Co, 140 N.W. 973, 174 Mich 521.

7. Mich.—Mead v Michigan Cent R Co, supra

8. Ala.—Birmingham v. Louisville, etc, R. Co, 104 So. 258, 213 Ala. 92.

51 C J p 690 note 24.

9. Mo.—American Tobacco Co v. Missouri Pac. R Co., 157 S W 502, 247 Mo 374.

51 C J p 690 note 19

10. Mo.—American Tobacco Co. v. Missouri Pac. R Co, supra.

51 C J p 690 note 20

11. N.C.—Sanders v Atlantic Coast Line R. Co., 4 S E 2d 902, 216 N.C 312.

12. U.S.—Missouri Pac R Co v Omaha, Neb, 197 F 516, 117 C C A 12, affirmed 35 S Ct 82, 235 U S 121, 59 L Ed. 157.

13. U.S.—Missouri Pac. R. Co v. Omaha, supra

14. Mo.—Kansas City v Kansas City Terminal R. Co, 25 S W 2d 1055, 324 Mo 882

51 C.J p 690 note 25

15. U S.—Chicago, etc, R Co v Minneapolis, D C Minn, 238 F 384

51 C J. p 690 note 26

16. Ill.—Hampton v Chicago, etc., R Co., 125 Ill App 412.

17. Wis.—Superior v Roemer, 141 N W 250, 154 Wis 345.

51 C J p 690 note 29.

18. U S.—Chicago v New York, etc, R Co, Ill, 216 F 735, 132 C.C.A 645

51 C J. p 690 note 30

19. Mo.—State v. Missouri Pac R. Co, 174 S W 73, 262 Mo. 720.

ordinance prior to the enactment of the statute[20] are not affected where the constitution of the state prohibits retrospective legislation.

d. Proceedings before Special Commissioners

Proceedings for the elimination of a grade crossing by special commission appointed by the court are proceedings in equity.

Under a statute providing for the determination of questions as to the abolition of grade crossings by a special commission appointed by the court on petition, the proceedings are, where the statute so declares, proceedings in equity.[21] The court with which the petition for the appointment of a commission is filed should not consider matters which are properly for the consideration of the commission,[22] and on appointing the commission the court should not restrict its power to consider less than the statute provides.[23]

Special statutes. A statute enacted to abolish grade crossings in a certain city does not affect the general statutory provisions except so far as they are expressly changed by it.[24]

Parties. The owner of adjacent land liable to be taken has no right to be made a party, or demand a hearing, in proceedings by the commission.[25] After the commission's report is filed the owner may then come into court and object to the legality of the commission's action in deciding to take his property.[26] In some cases the state is a proper party to a proceeding brought by a railroad against a municipality.[27]

Petition. A petition for the abolition of a grade crossing need not set out the precise manner in which the separation of grades is to be accomplished, nor need any plan or specification thereof accompany the petition.[28]

Discontinuance. A railroad having brought proceedings to abolish a grade crossing cannot discontinue them over the objection of the municipality which has entered an appearance.[29]

Hearing and determination. Hearings as to all matters arising under the petition should be held before the commission.[30] The commissioners are ordinarily the tribunal to decide the questions of fact in regard to the proposed change or abolition of a grade crossing[31] The commission may properly consider the financial condition of the railroad,[32] but this must be considered together with the other factors bearing on the question of abolition.[33]

Report and confirmation. Under the provision that the commission shall specify in its report the changes in the railroad necessary to secure elimination, the change in location may not be implied[34] The statute provides for the appointment of an auditor[35] whose findings may not be set aside unless inconsistent and plainly wrong.[36] Although required to apportion the costs, the commissioners need not ascertain and estimate the actual cost[37]

Review The court on appeal or the presentation of the report of the commissioners for confirmation or rejection may not reject it merely because it differs with the commissioners as to questions of fact;[38] nor may it consider the entire matter as one before it for original action and substitute its own opinion for that of the commissioners and order the change to be made according to a method different from that determined on by them.[39] In passing on whether what the commissioners order is reasonably necessary or fairly incidental, every presumption is to be made in favor of the conclusion of the commission.[40]

When commissioners have decided that it is not necessary to abolish a grade crossing, it is within the discretion of the court to recommit the ques-

20. Mo—State v. Missouri Pac. R. Co, supra

21. Mass—In re Norwood, 66 N.E 637, 183 Mass 147
51 C J p 689 note 82

22. Mass—Framingham v. Boston, etc, R. Co, 167 N.E. 327, 268 Mass 93
51 C J p 689 note 83.

23. Mass.—Framingham v. Boston, etc, R. Co., supra.

24. Mass—Bay State R Co. v. Public Service Commission, 118 N.E. 669, 229 Mass 399
51 C J p 689 note 85

25. Mass—In re Old Colony R Co, 40 N E 198, 163 Mass 356

26. Mass.—In re Old Colony R Co, supra.

27. Mass—Boston, etc, R. Co v. Woburn, 165 N E 125, 266 Mass 358.

28. Mass.—Norwood v. New York, etc, R Co., 37 N E 199, 161 Mass. 259.

29. Mass—In re New York, etc., R. Co., 65 N.E. 815, 182 Mass. 439.

30. Mass.—Framingham v Boston, etc., R, 167 N E 327, 268 Mass. 93.

31. Mass.—In re Hadley, 59 N.E. 805, 178 Mass 319—In re Old Colony R Co., 40 N E. 198, 163 Mass. 356.

32. Mass—Framingham v. Boston, etc, R., 167 N.E. 327, 268 Mass 93—Lowell v. Boston, etc., R., 130 N.E 638, 238 Mass 328.

33. Mass—Framingham v. Boston, etc, R, 167 N E 327, 268 Mass. 93.

34. Mass—Howe v. Johnson, 128 N E. 634, 236 Mass 379.

35. Mass—Worcester v. Boston, etc, R., 100 N E 1014, 213 Mass 567

36. Mass—Worcester v. Boston, etc, R., supra.
51 C.J. p 689 note 98

37. Mass.—In re Westborough, 48 N.E. 763, 169 Mass. 495.

38. Mass—In re Hadley, 59 N E 805, 178 Mass 319.

39. Mass.—In re Old Colony R. Co., 40 N.E. 198, 163 Mass. 356

40. Mass.—In re Waltham, 92 N.E. 477, 206 Mass. 208.

tion to the commissioners.[41] When the public service commission acts as the special commission to abolish grade crossings, its rulings are subject to review under the statute relating to the abolition of grade crossings,[42] and not under the statute relating to review of orders and rulings of the commission acting as the public service commission.[43] When the report of the commissioners is sufficiently definite, it must be confirmed.[44]

Enforcement of order. Under the provisions of the statutes the superior court or any justice thereof sitting in equity may enforce the orders and decrees at the time of confirming the commissioners' decree.[45]

§ 165. —— Expenses and Apportionment

a. In general
b. Expenses which may be charged to railroad, or apportioned
c. Apportionment by commission
d. Contracts as to expenses

a. In General

Under the police power, a railroad may be required to bear part of, or the entire, expense of eliminating a grade crossing

Under its police power the state may require a railroad to bear part of, or the entire, expense of eliminating a grade crossing,[46] or may authorize a city to require it to do so;[47] and a municipality which has the power to require the abolition of grade crossings may require the railroad to bear the whole expense.[48] A railroad may be required to bear the expense of eliminating a grade crossing occasioned by a highway built after the railroad.[49] The exercise of this power is not precluded by the railroad's financial difficulties or prospective bankruptcy.[50] The fact that the railroad company will not receive any benefit from the elimination of a grade crossing does not preclude charging it with

41. Mass—Lowell v Boston, etc., R, 130 N.E. 638, 238 Mass. 328

42. Mass—Bay State St R. Co v Public Service Commission, 118 N. E 669, 229 Mass 399.

43. Mass—Bay State St R. Co v. Public Service Commission, supra

44. Mass—In re Westborough, 48 N E 763, 169 Mass. 495
51 C J. p 690 note 7.

45. Mass—Norwood v. New York, etc, R Co, 39 N E. 186, 162 Mass 564.

46. U S—Nashville, C & St L Ry v Walters, Tenn, 55 S Ct 486, 294 U.S 405, 79 L Ed 949, appeal dismissed Nashville, C. & St L Ry. v. Herndon, 55 S Ct 87, 293 U S 518, 79 L Ed 632.
Mo.—State ex rel. and to Use of St Paul & K. C Short Line R. Co. v Public Service Commission of Missouri, 92 S W.2d 126, 338 Mo 724
N.Y—Syracuse Grade Crossing Commission v. Delaware, L. & W R Co, 97 N.Y.S.2d 279, 197 Misc. 192, modified on other grounds 32 N.Y S 2d 620, 263 App Div. 930, affirmed 49 N E 2d 131, 290 N Y. 632—Long Island R Co. v. Department of Labor of State of New York, 247 N.Y.S. 278, 138 Misc 612, affirmed 177 N E. 17, 256 N.Y. 498.
Tenn—Nashville, C. & St. L Ry. v. Baker, 71 S.W 2d 678, 167 Tenn. 470, appeal dismissed Nashville, C & St. L Ry. v Herndon, 55 S Ct 87, 293 U.S. 518, 79 L Ed. 632, reversed on other grounds Nashville, C & St. L. Ry. v. Walters, 55 S. Ct. 486, 294 U S. 405, 79 L Ed 949
Tex.—City of Beaumont v Priddie, Civ.App., 65 S.W 2d 434, reversed on other grounds Texas & N. O. R. Co v Priddie, 95 S W.2d 1290, 127 Tex. 629.
51 C.J. p 691 notes 35, 40.

Park roads

Where park roads were improved at public expense and used by the public as roadways, they were public highways and the commission could assess part of the cost of removing railroad grade crossings against the railroad, especially when made necessary by separation of grades outside the park—State ex rel. Wabash Ry. Co. v Public Service Commission of Missouri, 100 S W 2d 522, 340 Mo. 225, 109 A L.R. 754.

Fact that federal government will reimburse state for a portion of the expenses of the improvement does not affect the liability of the railroad to contribute to the cost—Chicago, etc, R. Co v Public Service Commission, 287 S W 617, 315 Mo 1108.

47. Mo—American Tobacco Co. v Missouri Pac. R. Co, 157 S.W 502, 247 Mo 374.
51 C J. p 691 note 36.

48. Tenn—Cincinnati, N. O & T P. R Co v City of Chattanooga, 64 S W.2d 196, 166 Tenn. 626.
51 C J p 691 note 38.

Legislative policy

Where legislative policy of state was to require railroads to pay only part of cost of eliminating grade crossings, municipality could not require railroad to construct underpass for street at its own expense, in absence of special grant of such power by legislature.—City of Memphis v. Southern Ry Co, 87 S W 2d 552, 167 Tenn. 181—51 C J. p 691 note 38 [a].

Ordinance subject to subsequent exercise of state police power

Provisions of city ordinance requiring railroads to defray entire cost of subway were subject to such regulations as thereafter might be made by state in lawful exercise of its police power—City of Chicago v. Illinois Commerce Commission ex rel. Chicago & W I R Co, 190 N E. 896, 356 Ill 501

49. Tex—City of Beaumont v Priddie, Civ.App, 65 S W 2d 434, reversed on other grounds Texas & N O R Co v. Priddie, 95 S W 2d 1290, 127 Tex 629

50. Miss—New Orleans & N E R Co v State Highway Commission, 144 So. 558, 164 Miss 343.
N Y—In re Elimination of Existing Highway-Railroad Crossing at Grade of Lehigh Valley R Co. in Village of Spencer, Tioga County, 5 N Y S 2d 946, 254 App Div 412
Tex—City of Beaumont v Priddie, Civ.App, 65 S W 2d 434, reversed on other grounds Texas & N O R. Co v. Priddie, 95 S W.2d 1290, 127 Tex 629
51 C J. p 680 note 53 [a].

Current income less than current expenses

Inadequacy of railway company's revenues to meet current operating expenses and fixed charges was held not to relieve it from compliance with commission's order to pay for reconstructing subway at highway intersection, where its net income for five years exceeded its net loss for succeeding period by over fifty-one million dollars—State ex rel. Chicago, R I. & P. Ry. Co v. Public Service Commission of Missouri, 72 S W. 2d 101, 335 Mo 180.

all or part of the expense,[51] but in order to warrant imposing the cost of a grade crossing elimination on the railroad, there must be a reasonable relation between the elimination and the public safety and not merely the public convenience.[52] A contract by a municipality to pay for the construction of a railroad does not apply to the subsequent elimination of a grade crossing and does not preclude the railroad from being required to bear the expense of such elimination.[53]

The state may use its own funds to pay for such elimination,[54] or may apportion the burden between the railroad and a municipality.[55] There is no constitutional objection to requiring the county, town, or municipality where the crossing is located to pay a portion of the expense of the change.[56] Statutes in many jurisdictions provide for an apportionment of the expense between railroad companies, local authorities, and, sometimes, the state[57] which may be in proportions fixed without reference to the value of the property or the benefits severally received,[58] although the statute may provide that the expense shall be borne only by the municipalities or companies benefited.[59] Statutory provisions as to the manner of apportionment must be followed,[60] and,

51. Mo.—State ex rel Chicago, R I & P. Ry. Co v Public Service Commission of Missouri, supra.

Liability not limited to benefit

Mo.—State ex rel Alton R. Co v Public Service Commission, 68 S W 2d 691, 334 Mo. 832.

52. N Y.—In re Elimination of Existing Highway-Railroad Crossing at Grade of Lehigh Valley R Co in Village of Spencer, Tioga County, 5 N.Y S 2d 946, 254 App Div. 412

53. Mo.—State ex rel. Wabash Ry Co v Public Service Commission of Missouri, 100 S.W 2d 522, 340 Mo 225, 109 A L R 754

54. N.Y.—Long Island R Co v Department of Labor of State of New York, 247 N.Y.S 278, 138 Misc 612, affirmed 177 N E 17, 256 N.Y. 498

Motor fuel tax fund

Statute requiring state public works department to use its proportion of motor fuel tax fund for construction and maintenance of roads and separation of grades at railroad crossings does not require payment of entire expense of grade separation from such fund.—Chicago, N. S. & M. R. Co. v. Illinois Commerce Commission ex rel. Department of Public Works and Buildings, 188 N E. 177, 354 Ill 58.

Failure to provide for manner of payment

The department of highways was properly assessed by the public utility commission with commonwealth's share of cost of improving a viaduct carrying highway across tracks of railroads, notwithstanding statute does not specifically provide how expense charged to state shall be paid. —Department of Highways of Pennsylvania v. Pennsylvania Public Utility Commission, 14 A.2d 611, 141 Pa Super. 376.

Interest

N.Y.—New York Cent. R Co v. Tremaine, 276 N.Y.S. 856, 243 App Div 181.

Regulation of wages and hours

Railroad company, having elected to accept benefits of payment by state or municipalities of one-half expense of grade crossing separation, could not reject burden imposed by state in regulating hours of work and wages of workmen.—Long Island R. Co v Department of Labor of State of New York, 177 N E 17, 256 N Y 498

55. Ill.—Chicago, etc, R. Co v Lake County, 122 N E 526, 287 Ill 337

La.—City of Shreveport v Texas & P Ry. Co, 161 So 12, 182 La. 36

51 C.J p 691 note 39

56. U S.—New York, etc, R Co v Bristol, Conn, 14 S Ct 437, 151 U. S 556, 38 L Ed 269

51 C.J. p 691 note 41

Fact that entire cost might be charged to railroad does not forbid charging part of cost to municipality.—State ex rel Wabash Ry. Co v Public Service Commission of Missouri, 100 S W.2d 522, 340 Mo 225, 109 A L R 754.

57. Ill.—City of Chicago v. Illinois Commerce Commission ex rel Chicago & W. I R Co., 190 N E 896, 356 Ill 501.

Pa.—Somerset County v. Pennsylvania Public Utility Commission, 1 A 2d 806, 132 Pa Super. 585.

51 C J. p 691 note 42

State contribution ex gratia

Pa.—Philadelphia Suburban Water Co v Pennsylvania Public Utility Commission, 78 A.2d 46, 168 Pa.Super. 360

"Concerned;" "interested"

(1) Word "concerned," as used in statutory provision that public utilities commission may order work of construction, relocation, alteration, protection, or abolition of any grade crossing to be performed in whole or in part by any public utility or municipal corporation "concerned" or by commonwealth, is the equivalent of "interested."—Philadelphia Suburban Water Co v. Pennsylvania Public Utility Commission, supra.

(2) A county and township in which proposed grade-crossing elimination and new overhead crossing are located are "municipalities" which are "interested" or "concerned" in the improvement within statute authorizing public utility commission to place part of cost of such improvements on interested or concerned municipalities.—Somerset County v. Pennsylvania Public Utility Commission, 1 A.2d 806, 132 Pa. Super. 585

(3) Two boroughs, between which a bridge carrying state highway route over a railroad and canal was constructed, were "municipal corporations concerned" in improvement within statute authorizing public utility commission to place part of cost of such improvement on interested and concerned municipalities.—Borough of West Conshohocken v. Pennsylvania Public Utility Commission, 5 A 2d 590, 135 Pa Super. 295.

58. Mo.—Kansas City Southern Ry. Co v Public Service Commission, 30 S.W 2d 112, 325 Mo 862

Pa.—Lehigh Valley R Co. v Public Service Commission of Pennsylvania, 161 A. 422, 105 Pa Super. 423

51 C.J. p 691 note 48.

59. N Y.—In re Elimination of Highway-Railroad Crossing at Grade in Village of Burdett, Schuyler County, 190 N E. 344, 264 N Y. 195

60. N.Y.—In re Elimination of Highway-Railroad Crossing at Grade in Village of Burdett, Schuyler County, supra.

51 C J. p 692 note 51.

Adjustments

While cost of railroad grade-crossing elimination, including property required for new highways, must be apportioned as statute provides, adjustment must be made, if new highways are turned over to municipalities or railroad desires to retain property it can use as part of its right of way.—In re Elimination of Highway-Railroad Crossing at Grade in Village of Burdett, Schuyler County, supra.

where the statute requires apportionment, a railroad may not be compelled to pay the whole cost of elimination;[61] nor may a municipality be assessed more than the amount, if any, limited by the statute.[62] A railroad may not be held liable under a statute requiring it to pay all or part of the expense of eliminating a grade crossing unless the statute is complied with.[63]

Street railroads. It is within the police power of the state to require that a percentage of the costs be borne by a street railroad using the crossing,[64] but a railroad which could have been assessed the whole cost may not complain that only a small percentage of the cost was assessed on a street railroad.[65] When the street railroad permits an interurban railroad to use its tracks, a portion of the cost may be assessed against it,[66] but it has been held that no part of the cost may be assessed against the interurban railroad when it is operating over the tracks as a mere licensee.[67]

Apportionment between railroads Where several railroads have agreed to share the expense of construction of a bridge over their respective rights of way in proportion to the width of the rights of way, the same proportion is fair as to the cost of the approaches.[68] The width of used parts of the rights of way is a good basis for apportionment,[69] and a track of one road crossing another street should not be considered.[70] Both railroads may be required to contribute equally to the cost of the approaches.[71] Where a railroad seeks to construct on a highway, at a point where another road crosses at grade, a bridge carrying the highway may be ordered at the expense of both companies.[72] The laws relating to apportionment of expenses of highway grade crossing elimination are paramount to those relating to crossings between railroads.[73]

Joint or several ownership of tracks. Where railroad tracks are owned by different companies jointly, the obligation to build a bridge or viaduct over them is a joint obligation;[74] but, where companies severally own parallel tracks to be crossed by a single bridge or viaduct, the liability of each is several,[75] and each company should be required to build that part of the bridge above its own tracks, including the width of its right of way,[76] and, if there is an intervening space between the rights of way, each company whose tracks are adjacent thereto should build over one half of such space,[77] and the companies owning the outside tracks should each

61. Wash.—State v. Department of Public Works, 238 P. 621, 135 Wash. 644
51 C.J. p 691 note 44.

62. N.Y.—Coykendall v. Kingston, 188 N.Y.S. 769, 115 Misc. 557
51 C.J. p 691 note 45.

63. S.C.—Powell v. Greenwood County, 1 S.E.2d 624, 189 S.C. 463—State ex rel. State Highway Department v. Southern Ry. Co., 195 S.E. 633, 186 S.C. 315.

Proceed under statute

Where highway department intends to hold railroad liable for proportionate part of construction of a grade-crossing elimination project, pursuant to statute, the department must proceed under the provisions of the applicable statute.—State ex rel. State Highway Department v. Southern Ry. Co., supra.

Notice and hearing

A railroad may not be assessed part of the costs of a relocation when not given the required notice and opportunity to be heard on the question of relocation.—Chicago, etc., R. Co. v. State R. Commission, 222 N.W. 816, 197 Wis. 640.

Burden of proof

S.C.—State ex rel. State Highway Department v. Southern Ry. Co., 195 S.E. 633, 186 S.C. 315.

Notice and opportunity to do work

The highway department could not hold railroad liable for its proportionate part of cost of construction of a grade-crossing elimination project where the highway department did not give the railroad notice contemplated by statute, which would give railroad opportunity to do the construction work if it so elected, since railroad might have done the work at lower cost than the highway department charged against it.—State ex rel. State Highway Department v. Southern Ry. Co., supra

64. N.J.—Public Service Co-ordinated Transport v. Board of Public Utility Com'rs, 33 A.2d 579, 130 N.J.Law 409, affirmed 35 A.2d 895, 131 N.J.Law 226.
51 C.J. p 692 note 52.

65. Mo.—State ex rel. and to Use of Kansas City Southern Ry. Co. v. Public Service Commission, 30 S.W.2d 112, 325 Mo. 862.
51 C.J. p 692 note 53.

66. Ill.—Cleveland, etc., R. Co. v. State Public Utilities Commission, 112 N.E. 689, 273 Ill. 210.

67. Ill.—Cleveland, etc., R. Co. v. State Public Utilities Commission, supra.

68. Wash.—Oregon-Washington R., etc., Co. v. Pacific Coast R. Co., 244 P. 673, 138 Wash. 430.

69. Wash.—State v. Northern Pac. R. Co., 221 P. 991, 128 Wash. 73.

Approaches

In distributing contribution agreed to be made by three railroads toward cost of viaduct, cost of approaches and span should be divided according to widths of respective rights of way.—State v. Northern Pac. Ry. Co., 7 P.2d 29, 166 Wash. 437.

Possible number of tracks

Apportionment of cost of viaduct among railroads on basis of possible number of tracks maintainable on right of way of each railroad under viaduct was held proper.—State ex rel. and to Use of Kansas City Southern Ry. Co. v. Public Service Commission, 30 S.W.2d 112, 325 Mo. 862.

70. Wash.—State v. Northern Pac. R. Co., 221 P. 991, 128 Wash. 73.

71. Wash.—State v. Northern Pac. R. Co., supra.

72. Mich.—Ft.-St. Union Depot Co. v. State R. Crossing Board, 45 N.W. 973, 81 Mich. 248.

73. N.Y.—New Paltz, etc., Tract Co. v. Central New England R. Co., 147 N.Y.S. 624, 84 Misc. 528.

74. Minn.—State v. St. Paul, etc., R. Co., 78 N.W. 87, 75 Minn. 473

75. Kan.—Kansas City v. Union Pac. R. Co., 196 P.2d 184, 165 Kan. 575.
51 C.J. p 693 note 64.

76. Minn.—State v. St. Paul, etc., R. Co., 78 N.W. 87, 75 Minn. 473—State v. Minneapolis, etc., R. Co., 39 N.W. 153, 39 Minn. 219

77. Minn.—State v. St. Paul, etc., R. Co., 78 N.W. 87, 75 Minn. 473.

build the approach to the bridge adjacent to its tracks.[78] Where two railroads contribute to the danger of the grade crossing, they may be jointly required to construct and maintain a bridge eliminating it.[79]

b. Expenses Which May Be Charged to Railroad, or Apportioned

Expenses reasonably necessary for the elimination of a grade crossing, such as the cost of constructing an approach to an overpass, may be charged to the railroad.

Statutory provisions as to the costs which may be included as part of the expense of eliminating a grade crossing must be followed.[80] A relocation of a road so as to divert some traffic which would otherwise use grade crossings, which, however, remained open and were used after the relocation, is not an elimination of the crossings so as to charge the railroad with part of the cost,[81] although the contrary has been held.[82] A municipality may not be required to share the expense of elimination unless the crossing is a public highway;[83] nor is it liable for any part of the cost of constructing undergrade crossings on new highways which it agreed to accept when completed with the crossings in place.[84]

A railroad may be charged with a share of the expense of a project reasonably necessary for the elimination of a grade crossing.[85] The expense of eliminating a grade crossing includes the expense of building an approach to an overpass or underpass,[86] and a railroad may be charged with the expense of improving a highway where the main purpose of the improvement is the public safety at the crossing.[87] Where the elimination of a grade crossing requires changes in the highways and the opening of a new highway, the railroad may be required to contribute to the expense of such chang-

78. Minn.—State v. St. Paul, etc., R. Co., supra.—State v. Minneapolis, etc., R. Co., 39 N.W. 153, 39 Minn. 219.

79. Wash.—State v. Northern Pac. R. Co., 221 P. 991, 128 Wash. 73.

80. N.Y.—Petition of Syracuse Grade Crossing Commission, 3 N.Y.S.2d 942, 253 App. Div. 462.
51 C.J. p. 692 note 51.

Salaries of commissioners and employees

N.Y.—Kolb v. Holling, 32 N.E.2d 811, 285 N.Y. 104.—Petition of Syracuse Grade Crossing Commission, 3 N.Y.S.2d 942, 253 App. Div. 462.

Legal fees

N.Y.—Delaware, L. & W. R. Co. v. Fengler, 26 N.Y.S.2d 331, 175 Misc. 1037, modified on other grounds 31 N.Y.S.2d 403, 262 App. Div. 685, affirmed 42 N.E.2d 6, 288 N.Y. 141.
51 C.J. p. 692 note 51 [a] (7), [b] (3) (4).

81. Kan.—Harvey County v. Missouri Pac. R. Co., 220 P. 1056, 114 Kan. 816.

82. Wis.—Chicago, etc., R. Co. v. State R. Commission, 204 N.W. 606, 187 Wis. 364.
51 C.J. p. 693 note 69.

83. Vt.—Bacon v. Boston, etc., R. Co., 76 A. 128, 83 Vt. 421.
51 C.J. p. 692 note 46.

84. N.Y.—Long Island R. Co. v. Shinnecock Hills, etc., Realty Co., 131 N.Y.S. 885, affirmed 141 N.Y.S. 1129, 156 App. Div. 912.

85. N.Y.—In re Grade Crossing Elimination in Town of Whitestown, Oneida County, 264 N.Y.S. 651, 238 App. Div. 484, affirmed In re Elimination of Grade Crossing of New York Cent. R. Co. over State Highway in Town of Whitestown, 193 N.E. 412, 265 N.Y. 615.

86. N.Y.—In re Elimination of Highway-Railroad Crossing at Grade in Village of Burdett, Schuyler County, 190 N.E. 344, 264 N.Y. 195.—In re Elimination of Existing Highway-Railroad Crossings at Grade of Railroads Operated by Pennsylvania R. Co., 299 N.Y.S. 693, 252 App. Div. 404, reargument denied In re Farnham-Irving State Highway, 4 N.Y.S.2d 163, 254 App. Div. 634 and 4 N.Y.S.2d 166, 254 App. Div. 634, affirmed In re Farnham-Irving State Highway in Town of Brant, 19 N.E.2d 915, 280 N.Y. 495.
51 C.J. p. 691 note 35 [b], p. 692 note 51 [a] (1).

Different grade

The approach to an overhead crossing or an underpass is not confined to the points in the highway at which the grade is depressed below or raised above the level of the surrounding land, as respects railroad's participation in payment of expense involved in elimination of grade crossing.—In re Elimination of Highway-Railroad Crossing at Grade in Village of Burdett, Schuyler County, 190 N.E. 344, 264 N.Y. 195.—In re Elimination of Existing Highway-Railroad Crossings at Grade of Railroads Operated by Pennsylvania R. Co., 299 N.Y.S. 693, 252 App. Div. 404, reargument denied In re Farnham-Irving State Highway, 4 N.Y.S.2d 163, 254 App. Div. 634 and 4 N.Y.S.2d 166, 254 App. Div. 634, affirmed In re Farnham-Irving State Highway in Town of Brant, 19 N.E.2d 915, 280 N.Y. 495.

Three thousand feet of highway

Order requiring railroads to share in expense of building approximately three thousand three hundred thirty-two feet of relocated highway outside of underpass itself as part of grade-crossing elimination project was not unauthorized under the evidence, notwithstanding new road crossed two existing highways before reaching point where railroad's obligation ceased.—In re Elimination of Existing Highway-Railroad Crossings at Grade of Railroads Operated by Pennsylvania R. Co., 299 N.Y.S. 693, 252 App. Div. 404, reargument denied In re Farnham-Irving State Highway, 4 N.Y.S.2d 163, 254 App. Div. 634 and 4 N.Y.S.2d 166, 254 App. Div. 634, affirmed In re Farnham-Irving State Highway in Town of Brant, 19 N.E.2d 915, 280 N.Y. 495.

Bridge over river

(1) Public service commission's order, requiring railroad company to pay more than cost of reproducing or changing location of old superstructure over river in grade-crossing elimination proceedings, was held proper, new river span being part of approach to span over railroad.—In re Grade Crossing Elimination in Town of Whitestown, Oneida County, 264 N.Y.S. 651, 238 App. Div. 484, affirmed In re Elimination of Grade Crossing of New York Cent. R. Co. over State Highway in Town of Whitestown, 193 N.E. 412, 265 N.Y. 615.

(2) Grade-crossing elimination order requiring construction of bridge twenty-four feet wide over railroad and stream was held not unreasonable because existing modern bridge over stream was only twenty feet wide.—In re Elimination of Creedon Crossing, 248 N.Y.S. 284, 231 App. Div. 531.

87. N.Y.—In re Elimination of Creedon Crossing, supra.

es.[88] However, only expenses which are reasonably necessary to eliminate the grade crossing may be charged or apportioned to the railroad.[89] The railroad may not be required to pay all or any part of the expense of general improvements in a system of highways not fairly incidental to changes in the crossing at the railroad.[90] Thus, the expense of what is primarily a highway improvement plan may not be allocated under a statute providing for the allocation of the expense of eliminating a grade crossing.[91]

Under some constitutional and statutory provisions, the state contributes to the expense of grade crossing eliminations and "incidental improvements connected therewith."[92] The relocation and reconstruction of utility structures made necessary by the elimination of a grade crossing are not within such a provision.[93]

The commission charged with the regulation of crossings is frequently authorized to determine, at least in the first instance, the expenditures chargeable to the elimination of a grade crossing or a separation of grades,[94] and its determination will be upheld where made in good faith,[95] but it may not saddle the railroad with the cost of an improvement having little or nothing to do with the elimination of the grade crossing.[96] The commission in allocating the expense of the grade crossing elimina-

88. N.Y.—In re Elimination of Highway-Railroad Crossing at Grade in Village of Burdett, Schuyler County, 190 N.E. 344, 264 N.Y. 195.

Rule of reason

N.Y.—In re Elimination of Existing Highway-Railroad Crossings at Grade of Railroads Operated by Pennsylvania R. Co., 299 N.Y.S. 693, 252 App.Div. 404, reargument denied In re Farnham-Irving State Highway, 4 N.Y.S.2d 163, 254 App. Div 634, and 4 N.Y.S.2d 166, 254 App Div 634, affirmed In re Farnham-Irving State Highway v. Town of Brant, 19 N.E.2d 915, 280 N.Y. 495

89. N.Y.—In re Elimination of Highway-Railroad Crossing at Grade in Village of Burdett, Schuyler County, 190 N.E. 344, 264 N.Y. 195

Pa.—Somerset County v. Pennsylvania Public Utility Commission, 1 A.2d 806, 132 Pa.Super. 585.

51 C.J. p. 692 note 48

Bonus

Municipality may not be required to pay any part of a bonus given the contractors by the railroad—Richmond, etc., R. Co. v. Richmond, 133 S.E. 800, 145 Va. 225.

90. Mass.—Norwood v. New York, etc., R. Co., 37 N.E. 199, 161 Mass 259.

51 C.J. p. 692 note 50.

91. Pa.—Somerset County v. Pennsylvania Public Utility Commission, 1 A.2d 806, 132 Pa.Super. 585—In re Northern Pipe Line Co., 1 A.2d 526, 132 Pa.Super 406—Pennsylvania Railroad Co. v. Public Service Commission, 179 A. 850, 118 Pa.Super. 380—Erie R. Co. v. Public Service Commission, 77 Pa.Super. 196

Bridge across river

The construction of a highway bridge spanning a river and crossing railroad tracks was not within contemplation of statute requiring railroad to pay proportionate part of cost of construction of "grade-crossing elimination" projects, where the primary object of the project was to replace an old bridge which was subject to overflow and damage from high water—State ex rel. State Highway Department v. Southern Ry. Co., 195 S.E. 633, 186 S.C. 315.

92. N.Y.—In re Elimination of Highway Railroad Crossing in Town of Cheektowaga, Erie County, 18 N.Y.S.2d 613, 19 N.Y.S.2d 321, 259 App.Div. 141, affirmed In re Lehigh Valley R. Co. in Union Road, Town of Cheektowaga, Erie County, 28 N.E.2d 409, 283 N.Y. 687—Western New York Water Co. v. Brandt, 18 N.Y.S.2d 128, 259 App Div. 11, reargument denied 18 N.Y.S.2d 750, 259 App.Div. 764, appeal dismissed 28 N.E.2d 408, 283 N.Y. 686.

Railroad station and signaling system

Under the constitutional amendment and statute, the state is required to pay only for the elimination of dangers to the public arising from grade crossings, and the state was not required to pay for a railroad station and a signaling system which were required as result of elimination of grade crossings—In re Elimination of Highway-Railroad Crossing, City of Buffalo, 64 N.Y.S.2d 764, 271 App.Div. 266, appeal dismissed In re New York Cent. R. R., 78 N.E.2d 596, 297 N.Y. 246.

Improvement of highway

Under constitution and enabling act transit commission had authority to charge state with improvement of highway where such improvement was found to be reasonably incidental to entire grade-crossing elimination project.—Consolidated Edison Co. of N. Y. v. State, 97 N.Y.S.2d 431, 276 App.Div. 677, affirmed 98 N.E.2d 587, 302 N.Y. 711.

93. N.Y.—Public Service Commission of New York v. City of New York, 49 N.Y.S.2d 214, 268 App.Div. 121, affirmed 63 N.E.2d 183, 294 N.Y. 951.

94. N.Y.—Delaware, L. & W. R. Co. v. Fengler, 31 N.Y.S.2d 403, 262 App.Div. 685, affirmed 42 N.E.2d 6, 288 N.Y. 141.

Taking land for construction of highway

Whether the taking of private land for the construction of a new highway in connection with elimination of railroad grade crossings was an essential part of the grade separation, or merely accidental and required only for the new highway construction, was a matter of fact to be determined, in the first instance, by the public service commission.—Bartron v. Northampton County, 19 A.2d 263, 342 Pa. 163.

Condemnation proceeding

In condemnation proceeding by railroad to acquire realty in the city of Syracuse for railroad grade-crossing elimination, supreme court had no authority, as part of the judgment or award, to determine that reasonable compensation to attorneys was an "expense" of acquisition of realty within meaning of statute or to direct payment of such expense out of state moneys—Delaware, L. & W. R. Co. v. Fengler, 42 N.E.2d 6, 288 N.Y. 141.

Expenses of local commission

N.Y.—Petition of Syracuse Grade Crossing Commission, 3 N.Y.S.2d 942, 253 App.Div. 462.

95. N.Y.—Petition of Syracuse Grade Crossing Commission, supra.

96. N.Y.—In re Elimination of Existing Highway-Railroad Crossings at Grade of Railroads Operated by Pennsylvania R. Co., 299 N.Y.S. 693, 252 App.Div. 404, reargument denied In re Farnham-Irving State Highway, 4 N.Y.S.2d 163, 254 App. Div. 634 and 4 N.Y.S.2d 166, 254 App.Div. 634, affirmed In re Farnham-Irving State Highway in Town of Brant, 19 N.E.2d 915, 280 N.Y. 495—In re Elimination of Highway-Railroad Crossing at Grade in Village of Burdett,

tion which is part of a larger plan must determine the point at which the project ceases materially to concern the crossing.[97]

c. Apportionment by Commission

The commission having general jurisdiction over railroads or over railroad-highway crossings is frequently authorized to determine how the expense of eliminating a grade crossing shall be borne.

Statutes frequently provide for an apportionment or a determination by the commission having general jurisdiction over railroads or railroad-highway crossings of the manner in which the expense of eliminating a grade crossing shall be borne.[98] The apportionment must be just and reasonable[99] and must be made in accordance with the statute.[1] Where the commission may exercise the power of eminent domain, the necessary property should be condemned and its value ascertained before the work of elimination is commenced so that it may be known whether the order apportioning the expense is reasonable.[2]

The commission, in apportioning the costs, should consider all the factors entering into a proper division of the costs,[3] and it may, when the entire cost

Schuyler County, 265 N.Y.S. 963, 240 App. Div. 742.

97. Pa.—Somerset County v. Pennsylvania Public Utility Commission, 1 A.2d 806, 132 Pa.Super. 585

98. Ill.—City of Chicago v. Illinois Commerce Commission ex rel. Chicago & W. I. R. Co., 190 N.E. 896, 356 Ill. 501—Chicago, N. S. & M. R. Co. v. Illinois Commerce Commission ex rel. Department of Public Works and Buildings, 188 N.E. 177, 354 Ill. 58.

Mo.—State ex rel. and to Use of Kansas City Southern Ry. Co. v. Public Service Commission, 30 S.W.2d 112, 325 Mo. 862

N.Y.—Application of Grade Crossing and Terminal Station Commission of City of Buffalo, 8 N.Y.S.2d 424, 255 App. Div. 342.

Pa.—Department of Highways of Pennsylvania v. Pennsylvania Public Utility Commission, 14 A.2d 611, 141 Pa.Super. 376—Borough of West Conshohocken v. Pennsylvania Public Utility Commission, 5 A.2d 590, 135 Pa.Super. 295—Lehigh & New England R. Co. v. Public Service Commission of Commonwealth, 191 A. 380, 126 Pa. Super. 565

51 C.J. p. 694 note 90.

Power as affected by contract between parties as to expenses see infra subdivision d of this section

Legislative, not judicial, function

N.Y.—Application of Grade Crossing and Terminal Station Commission of City of Buffalo, 8 N.Y.S.2d 424, 255 App.Div. 342.

Parties to proceeding

(1) Receivers of railroad were proper parties to proceeding before public service commission to apportion cost of grade-crossing elimination, although permission of federal court appointing them had not been obtained.—State ex rel. Wabash Ry. Co. v. Public Service Commission of Missouri, 100 S.W.2d 522, 340 Mo. 225, 109 A.L.R. 754.

(2) The department of highways was a "necessary party" to proceedings wherein commission apportioned costs of improving and maintaining a viaduct carrying two state highway routes in city of third class across tracks and rights of way of two railroads among municipality, public utilities involved, and commonwealth.—Department of Highways of Pennsylvania v. Pennsylvania Public Utility Commission, 14 A.2d 611, 141 Pa.Super. 376

City streets taken over by state

The power of commission to assess against commonwealth a portion of costs was not restricted by act which made a large number of city streets, including routes over viaduct, state highways, and which placed limitations on responsibilities of commonwealth in taking over such streets.—Department of Highways of Pennsylvania v. Pennsylvania Public Utility Commission, supra.

Reconsideration of plan not required

Mo.—State ex rel. Wabash Ry. Co. v. Public Service Commission of Missouri, 100 S.W.2d 522, 340 Mo. 225, 109 A.L.R. 754.

Formal order

The highway department could not hold railroad liable for part of cost of construction of grade-crossing elimination project as provided by statute, in absence of a formal order directing the railroad to proceed with construction, in view of statute permitting railroad to appeal from an order requiring it to proceed with construction, since, in absence of order, there was nothing from which the railroad could appeal.—State ex rel. State Highway Department v. Southern Ry. Co., 195 S.E. 633, 186 S.C. 315.

Receivership

In assessing cost of separation of grades of city streets and railroad owned by one company and used by another, where owner was in receivership, city had right to have share of other company allocated directly to it instead of assessing shares of both companies against the owner.—State ex rel. Wabash Ry. Co. v. Public Service Commission of Missouri, 100 S.W.2d 522, 340 Mo. 225, 109 A.L.R. 754.

99. Mo.—State ex rel. and to Use of Kansas City Southern Ry. Co. v. Public Service Commission, 30 S.W.2d 112, 325 Mo. 862

N.Y.—In re Elimination of Highway-Railroad Crossing at Grade in Village of Burdett, Schuyler County, 190 N.E. 344, 264 N.Y. 195.

Pa.—Pittsburgh & S. R. Co. v. Pennsylvania Public Utility Commission, 14 A.2d 903, 141 Pa.Super. 233

Percentage basis not applied

Pa.—Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission, 78 A.2d 46, 168 Pa. Super. 360.

Apportionment held proper

Ill.—City of Chicago v. Illinois Commerce Commission ex rel. Chicago & W. I. R. Co., 190 N.E. 896, 356 Ill. 501

Mo.—State ex rel. Wabash Ry. Co. v. Public Service Commission of Missouri, 100 S.W.2d 522, 340 Mo. 225, 109 A.L.R. 754—State ex rel. Alton R. Co. v. Public Service Commission, 70 S.W.2d 61, 334 Mo. 1001.

Pa.—Lehigh & New England R. Co. v. Public Service Commission, 191 A. 380, 126 Pa.Super. 565—Lehigh Valley R. Co. v. Public Service Commission of Pennsylvania, 161 A. 422, 105 Pa.Super. 423.

1. U.S.—Northern Pac. Ry. Co. v. Public Service Commission of Oregon, D.C.Or., 47 F.2d 778.

When notice and hearing are necessary before the commission may apportion the costs, a county or town which had notice and was represented cannot contend that the order was made without it being a party.—Chicago, etc., R. Co. v. Lake County, 122 N.E. 526, 287 Ill. 337.

2. Pa.—Erie R. Co. v. Public Service Commission, 114 A. 357, 271 Pa. 409

3. Pa.—Pittsburgh, etc., R. Co. v. State Public Service Commission, 71 Pa.Super. 15

51 C.J. p. 694 note 93.

can be ascertained in advance, order the municipality to pay a gross sum representing its proportion.[4] Where the statute authorizes but does not require apportionment, the commission may nevertheless impose the entire expense on the railroad.[5] The power of the commission to apportion the expenses implies that the parties shall be liable for the amounts assessed against them,[6] and the commission may compel an accounting and settlement of the costs of the new crossing,[7] and, where a county has, pursuant to contract with the railroad, performed the work pending judicial determination of the validity of the commission's order as to the cost to be borne by the railroad, the county may enforce the order.[8] Similarly, a railroad which performed the work may enforce the commission's order requiring others to share in the expense.[9]

The commission's order apportioning the cost of eliminating a grade crossing is subject to judicial review,[10] but, in at least one jurisdiction where the statute authorizes the commissioners to apportion the costs of the alteration according to their discretion, it has been held that their decision as to such apportionment is not reviewable.[11] When a rehearing is necessary, the order of a commission apportioning the costs of eliminating a grade crossing will not be considered by a court on appeal from the order.[12] On judicial review of the commission's order apportioning the expense, the burden is on the party attacking the order to show error.[13] It has been held that the financial difficulty of complying with the order is a matter addressed to the discretion of the commission and is not available on appeal.[14] The court may with the consent of the parties modify the commission's order rather than remand the matter to the commission for further proceedings.[15]

d. Contracts as to Expenses

A municipality may ordinarily undertake by contract to pay part of the expense of eliminating a grade crossing.

A municipality having power to enter into agreements with a railroad for the abolition of grade crossings, as discussed supra § 162, it may also agree as to the manner in which the expense of such elimination is to be borne,[16] and general rules apply in the construction of such contracts,[17] and the words used are to be construed in accordance with their usual and customary meaning.[18] The fact that the municipality has the power to require the railroad to bear the expense of a grade crossing elimination does not bar the municipality from undertaking by contract to pay part of the expense,[19] and, where the parties contract as to the manner in which the expense shall be borne, they

Factors to be considered
In apportioning costs of grade-crossing elimination, it was proper for public service commission to consider amount of traffic on highway and railroad to ascertain the degree of danger which existed at the crossing and the inconvenience that was eliminated by the separation.—State ex rel. Wabash Ry. Co. v. Public Service Commission of Missouri, 100 S.W.2d 522, 340 Mo. 225, 109 A.L.R. 754.

4. Conn.—Doolittle v. Branford, 22 A. 336, 59 Conn. 402.

5. Conn.—Appeal of Fairfield, 17 A. 764, 57 Conn. 167.

6. Wis.—Polk v. State R. Commission, 143 N.W. 191, 154 Wis. 523.

7. N.Y.—People v. Public Service Commission, 159 N.Y.S. 48, 173 App. Div. 164, reversed on other grounds 114 N.E. 1050, 220 N.Y. 1.

8. U.S.—Jackson County v. Alton R. Co., C.C.A. Mo., 105 F.2d 633, certiorari denied Alton R. Co. v. Jackson County, Mo., 60 S.Ct. 175, 308 U.S. 610, 84 L.Ed. 510.

9. Ind.—Cleveland, C., C. & St. L. R. Co. v. Board of Commissioners of Delaware County, 27 N.E.2d 89, 108 Ind.App. 335.

10. Pa.—Pennsylvania R. Co. v. Pennsylvania Public Utility Commission, 35 A.2d 584, 154 Pa. Super. 272.

11. N.H.—Boston, etc., R. Co. v. Concord, 44 A. 808, 69 N.H. 91.
51 C.J. p. 688 note 58.

12. Pa.—Delaware, etc., Co. v. State Public Service Commission, 96 Pa. Super. 169.

13. Mo.—State ex rel. Alton R. Co. v. Public Service Commission, 70 S.W.2d 61, 334 Mo. 1001.

14. N.Y.—In re Elimination of Existing Highway-Railroad Crossings at Grade of Railroads Operated by Pennsylvania R. Co., 299 N.Y.S. 693, 252 App.Div. 404, reargument denied In re Farnham-Irving State Highway, 4 N.Y.S.2d 163, 254 App. Div. 634 and 4 N.Y.S.2d 166, 254 App. Div. 634, affirmed In re Farnham-Irving State Highway in Town of Brant, 19 N.E.2d 915, 280 N.Y. 495.

15. Mo.—State ex rel. and to Use of Kansas City Southern Ry. Co. v. Public Service Commission, 80 S.W.2d 112, 325 Mo. 862.

16. N.Y.—Westchester Electric R. Co. v. Westchester County Park Commission, 174 N.E. 660, 255 N.Y. 297.

Contract between railroad and utility company
N.Y.—Staten Island Edison Corp. v. Staten Island Rapid Transit Ry. Co., 44 N.Y.S.2d 874, 267 App. Div. 152, affirmed 67 N.E.2d 514, 295 N.Y. 869.

17. Wash.—City of Seattle v. Northern Pac. R. Co., 121 P.2d 382, 12 Wash.2d 247.

Understanding and agreement of parties
Where contract was drawn by counsel, it would be presumed that they drew it according to understanding and agreement of the parties.—City of Seattle v. Northern Pac. Ry. Co., supra.

18. Wash.—City of Seattle v. Northern Pac. Ry. Co., supra.

"Right of way"
Wash.—City of Seattle v. Northern Pac. Ry. Co., supra.

"Reconstruction"
Wash.—City of Seattle v. Northern Pac. Ry. Co., supra.

19. La.—Hotard v. City of New Orleans, 35 So.2d 752, 213 La. 843, appeal dismissed 69 S.Ct. 57, 335 U.S. 803, 93 L.Ed. 360.
51 C.J. p. 693 note 77.

Contract not abuse of discretion
La.—Hotard v. City of New Orleans, supra.

may not thereafter rely on the statute as to the apportionment of such expense,[20] but charter and statutory provisions authorizing a municipality to require a railroad to avoid or eliminate grade crossings at the cost of the railroad are exclusive and to prohibit the municipality from bearing all or part of the cost[21] even where the railroad is the senior way.[22]

A statute giving a city the power to contract with the railroad and share expense is not a limitation on, but is an extension of, the power, given it by its charter, to require construction of a viaduct over tracks at the expense of the railroad.[23] A contract between a city and a railroad company, by which the railroad grants a right of way for a crossing in consideration of the undertaking by the city to bear the cost of construction of a subway, is not invalid as a surrender by the city of its police power,[24] or of its power of eminent domain.[25]

When a municipality has agreed to pay one half of the expense of elimination, it must share the entire cost and not merely the cost of construction across the tracks,[26] and must bear its share of the increased cost when the railroad was forced to make new contracts with builders at higher prices than the original contracts,[27] and may not set off the expense of drainage of a street when it contracted to pay for drainage.[28] Where a railroad and municipality have agreed to share the expense of abolition of a grade crossing, the city may not avoid its obligation by a resolution of its board of estimate and apportionment.[29] Where the railroad and the municipality have entered into a contract, and the municipality has agreed to secure the removal or relocation of telegraph lines, the railroad may not be held liable for the cost of removal.[30] Agreements requiring the construction of viaducts at the railroad's expense are not unfair.[31]

Where the municipality is without power to contribute to the cost of a grade crossing elimination, a contract provision obligating the municipality to remove certain property without cost to the railroad is not invalid where the municipality may perform the obligation without expense by the exercise of its police power.[32] Where a railroad and municipality agreed to share the expense of eliminating a grade crossing but were unable to agree as to their respective shares, an ordinance apportioning the burden is not an exercise of legislative power subject to judicial review only for arbitrary abuse[33]

Effect on jurisdiction of commission. A contract between a railroad and municipality as to the cost of eliminating a grade crossing does not deprive a commission of the jurisdiction it would otherwise have to apportion the cost of such improvement,[34] but the commission may adopt the agreement where its provisions are fair and equitable.[35]

Enforcement. Where a governmental body has contracted with a railroad to perform the work in accordance with the specifications of the railroad commission, compliance with the provision is necessary before the railroad's obligation to bear part of the cost may be enforced,[36] but variations not amounting to material departures will not bar recovery.[37]

20. S.C.—Powell v. Greenwood County, 1 S.E.2d 624, 189 S.C. 463

21. Tex.—City of Beaumont v. Priddie, Civ.App., 65 S.W.2d 434, reversed on other grounds, Com.App., Texas & N. O. R. Co. v. Priddie, 95 S.W.2d 1290, 127 Tex. 629.
51 C.J. p. 693 note 78.

22. Wis.—Application of Kaiser, 174 N.W. 714, 176 N.W. 781, 171 Wis. 40.

23. Wis.—Schmidt v. Milwaukee, 135 N.W. 883, 149 Wis. 367.

24. U.S.—Missouri, etc., R. Co. v. Oklahoma, Okl., 46 S.Ct. 517, 271 U.S. 303, 70 L.Ed. 957.

25. U.S.—Missouri, etc., R. Co. v. Oklahoma, supra.

26. Va.—Richmond, etc., R. Co. v. Richmond, 133 S.E. 800, 145 Va. 225.
51 C.J. p. 693 note 81.

27. Va.—Richmond, etc., R. Co. v. Richmond, supra.

28. Va.—Richmond, etc., R. Co. v. Richmond, supra.

29. N.Y.—Long Island R. Co. v. Hylan, 206 N.Y.S. 239, 210 App.Div. 761, reversed on other grounds 148 N.E. 189, 240 N.Y. 199

30. N.J.—Postal Tel. Cable Co. v. Delaware, etc., R. Co., 104 A. 141, 89 N.J.Eq. 99, affirmed 106 A. 892, 90 N.J.Eq. 273.

31. Mo.—Kansas City v. Kansas City Terminal R. Co., 25 S.W.2d 1055, 324 Mo. 882

32. Tex.—City of Beaumont v. Priddie, Civ.App., 65 S.W.2d 434, reversed on other grounds Texas & N. O. R. Co. v. Priddie, 95 S.W.2d 1290, 127 Tex. 629.

33. Wash.—State v. Northern Pac. Ry. Co., 7 P.2d 29, 166 Wash. 437
Question of fact
Fair apportionment of contribution agreed to be made by railroads toward cost of viaduct was held question of fact that cannot be foreclosed by ordinance.—State v. Northern Pac. Ry. Co., supra.

34. Mo.—State ex rel. and to Use of St. Paul & K. C. Short Line R. Co. v. Public Service Commission of Missouri, 92 S.W.2d 126, 338 Mo. 724.
Apportionment by commission generally see supra subdivision c of this section.

35. Mo.—State ex rel. and to Use of St. Paul & K. C. Short Line R. Co. v. Public Service Commission of Missouri, supra.

36. U.S.—Jackson County v. Alton R. Co., C.C.A.Mo., 105 F.2d 633, certiorari denied Alton R. Co. v. Jackson County, Mo., 60 S.Ct. 175, 308 U.S. 610, 84 L.Ed. 510

37. U.S.—Jackson County v. Alton R. Co., C.C.A.Mo., 105 F.2d 633, certiorari denied Alton R. Co. v. Jackson County, Mo., 60 S.Ct. 175, 308 U.S. 610, 84 L.Ed. 510.

§ 166. —— Damages Because of Abolition

a. In general
b. Proceedings for assessment

a. In General

As a general rule one whose property is injured or damaged by the elimination of a grade crossing or a separation of grades is entitled to compensation, but recovery may not be had for damages different only in degree from those suffered by the general public; nor are consequential damages ordinarily recoverable.

Some statutes providing for the abolition of grade crossings also frequently, provide specifically for the ascertainment and award of damages occasioned by such improvements to property owners,[38] such provision being within the legislative power,[39] and the language, although permissive in form, is in fact peremptory.[40] Under general statutes allowing an abutting owner compensation for damages when the grade of a street or highway is changed, it has been held that the owner may recover damages for such a change of grade incidental to an elimination of a grade crossing by order of the railroad commissioners in proceedings under the general railroad law.[41]

One whose property is not taken but is damaged or injured by the elimination of a grade crossing or a separation of grades is entitled to compensation.[42] The property owner, when entitled to damages, is not limited to a damage sustained as to the particular use which is being made of the premises at the time of the assessment of damages.[43] Notwithstanding a statute may provide in general terms for compensation to the owners of property for damages sustained by them, they are not ordinarily regarded as entitled to recover damages different from those allowed in other cases of injury of an analogous nature.[44]

No recovery may be had for damages different only perhaps in degree from those suffered by the general public;[45] nor, in the absence of statute authorizing it, are consequential damages ordinarily recoverable.[46] A right of action may, however, arise where the act of the railroad is unlawful or without proper authority.[47] A statute whereby the state accepts liability in the first instance for damage to property in eliminating a grade crossing does not give landowners the right to recover for injuries which would not have been compensable in the absence of such statute,[48] and the same rule applies under statutes which provide for the deter-

38. Va.—Forest View Land Co. v Atlantic Coast Line R. Co, 91 S. E 198, 120 Va. 308.
51 C J. p 694 note 3.
Damages under provision against taking or injuring property for public use without compensation see Eminent Domain § 96 et seq.

Damages ascertained and determined by commission

Pa.—Philadelphia Suburban Water Co v. Pennsylvania Public Utility Commission, 78 A.2d 46, 168 Pa. Super 360.

Pending proceeding

A proceeding for the elimination of a grade crossing, which had been ordered by the public service commission in 1927 was "pending" within statute enacted in 1928 providing that it was not applicable to pending proceedings, notwithstanding work of elimination was not commenced until 1930.—Buffalo Co-op. Stove Co. v. State, 298 N.Y.S. 731, 252 App.Div. 228.

39. N.Y.—Corning v. O'Neill, 167 N.Y.S 743, 180 App.Div 454, affirmed 125 N.E. 914, 227 N.Y. 625.
Pa.—Knoll v. Harborcreek Tp, 86 Pa Super. 423.

40. N.J.—Clark v Elizabeth, 40 A. 616, 737, 61 N.J.Law 565.
51 C.J. p 695 note 5.

41. N.Y.—People v Hayes, 165 N. Y.S. 436, 178 App Div 301, modified on other grounds 166 N.Y.S. 1109, 179 App Div. 962.

42. N.Y.—Askey & Hager v State, 270 N.Y.S 704, 240 App Div. 451, affirmed 195 N.E. 212, 266 N.Y. 587

43. N.Y.—People v. Hennessy, 138 N.Y.S 659, 154 App.Div. 109.
51 C.J p 696 note 44.

44. Mass.—Farwell v. Boston, 62 N. E 751, 180 Mass 433
51 C.J. p 695 note 25.

45. Pa.—Rzasa v Public Service Commission of Pennsylvania, 156 A. 714, 103 Pa Super. 317.
51 C.J p 696 note 26.

46. N.Y.—Lane v. State, 37 N.Y.S 2d 810, 265 App Div 890—Judge v State, 31 N.Y.S 2d 59, 262 App.Div. 575, affirmed 45 N.E 2d 458, 289 N Y. 705.
Pa.—Hoffer v Reading Co, 134 A. 415, 287 Pa 120
51 C.J p 695 note 7.

Damage from change of grade

N.Y.—In re Buffalo Grade Crossing Commissioners, 94 N.E. 188, 201 N. Y. 32
51 C.J p 695 note 8

47. N.J.—United New Jersey R., etc., Co v. Lewis, 59 A. 227, 68 N.J.Eq 437, affirmed 66 A. 1134, 69 N.J.Eq. 843.
N.Y.—Brush v. New York, etc., R. Co., 112 N.E. 922, 218 N.Y. 264.

48. N.Y.—Consolidated Edison Co. of N. Y. v. State, 97 N.Y.S.2d 431, 276 App.Div. 677, affirmed 98 N.E. 2d 587, 302 N.Y. 711—Judge v. State, 31 N.Y.S.2d 59, 262 App Div. 575, affirmed 45 N.E.2d 458, 289 N Y 705—Hollman v. State, 13 N.Y. S 2d 857, 171 Misc. 768.

Town not liable

A town not being liable to landowners for damage caused by change of state highway grade in course of railroad grade-crossing elimination, where change was not made by town authorities, state assumed no liability therefor and such damage is damnum absque injuria.—Hollman v. State, supra.

Negligence in performance of work

(1) The statute providing that state shall be liable in first instance for damage to property caused by elimination of grade crossings does not embrace a claim for property damage resulting from negligence of state's agents.—Loft Properties v. Tully & Di Napoli, 55 N.Y.S 2d 659.

(2) The type of property damage for which state in first instance makes itself liable under statute consists of such damage as necessarily results to unappropriated property from elimination of grade crossings, such as deprivation of easements of light and air or completely cutting off or interfering with access to unacquired property, and does not include removal of lateral support caused by negligence of contractor and railroad in doing the work.—Loft Properties v. Tully & Di Napoli, supra.

mination of damages or which apportion the expenses of, or otherwise determine who shall pay for the damage caused by, the elimination of a grade crossing [49]

An abutting owner is entitled to compensation for damages arising from impairment of his easements of light, air, and access caused by a grade crossing elimination or a separation of grades.[50] He is not entitled, however, to damages for a mere change of grade of a street at some point not in front of his premises,[51] or the fact that it is closed altogether at some point not in front of, but beyond, his premises,[52] and this is more particularly true where his street facilities have been improved rather than impaired.[53] Where the statute so provides, the owners of land not abutting on the affected road may be entitled to compensation, provided the injury is proximate, immediate, and substantial.[54] Under such statute, recovery may be had for damages because of the vacation of a street, although the vacation is not directly in front of claimant's property.[55]

A statute providing for the payment of damages to any person whose land is taken and special damages which the owner of any land adjoining the street shall sustain by reason of a change of grade does not, by the provision for special damages, refer to mere consequential damages resulting from the vacation of a portion of the street,[56] and under such a statute the property owner may not recover for damages because of the vacation of a portion of the street on which his lot does not abut.[57] Where a statute for elimination provides for damages to persons injured by change of a street grade, no recovery can be had for change of a track grade.[58] Under a statute authorizing the recovery of damages by the owners of property abutting a street, the grade of which is changed by the abolition of a grade crossing, a property owner abutting on the railroad is not entitled to recover incidental damages,[59] as, for example, such as are occasioned by a diminution or loss in his ability to connect his property by switches or otherwise with the tracks as theretofore existing [60]

Questions of whether one, whose property is taken or injured by reason of a change of grade or other cause arising out of an abolition of a grade crossing, is entitled to damages therefor under a constitutional provision precluding the taking or injuring of property for public use without compensation therefor are treated in Eminent Domain § 96 et seq.

49. U S—S. B Penick & Co v. New York Cent. R. Co, C C.A.N J, 111 F 2d 1006.
Md—Krebs v. Uhl, 154 A. 131, 160 Md 584.
Pa.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. City of Philadelphia, 40 A 2d 461, 351 Pa 214—Hoffer v. Reading Co, 134 A. 415, 287 Pa. 120—Philadelphia Suburban Water Co v. Pennsylvania Public Utility Commission, 78 A.2d 46, 168 Pa. Super. 360.

50. N Y.—Harrison v. New York Central R. Co, 6 N.Y.S 2d 978, 255 App.Div. 183, reargument denied 8 N.Y.S.2d 1017, 255 App Div. 1032, affirmed 22 N E.2d 483, 281 N Y. 653—Buffalo Co-op Stove Co v. State, 298 N.Y S. 731, 252 App Div. 228—Knights v. State, 291 N.Y.S. 567, 161 Misc 552, affirmed 298 N. Y. 173, 251 App Div. 781—Caldwell & Ward Brass Co v State, 291 N. Y S. 564, 161 Misc. 147, affirmed 298 N.Y.S. 174, 251 App.Div. 781, affirmed 13 N E 2d 467, 277 N Y. 547—Champion Oil Co. v. State, 291 N Y S. 562, 161 Misc 143, affirmed 298 N Y.S. 174, 251 App.Div. 781.
Pa.—Knoll v. Harborcreek Tp., 86 Pa.Super. 423
51 C.J. p 696 note 28.
Damages for change of grade generally see Municipal Corporations § 1227 et seq.

Loss of view
Where following a grade-elimination project the railroad ran on an embankment above the level of claimant's land, while previously railroad was at grade, claimant was entitled to consequential damages against the state because of loss of view and because the embankment was unsightly—Lane v. State, 37 N Y.S 2d 810, 265 App Div. 890

51. N.Y.—Corning v. O'Neill, 167 N Y S. 743, 180 App Div. 454, affirmed 125 N E 914, 227 N.Y. 625.

52. N.Y—Buffalo Co-op Stove Co v. State, 298 N.Y S 731, 252 App Div. 228—Corning v. O'Neill, 167 N Y.S 743, 180 App Div. 454, affirmed 125 N.E 914, 227 N.Y. 625.

53. N Y.—Corning v. O'Neill, supra.

54. Pa.—Rzasa v. Public Service Commission of Pennsylvania, 156 A. 714, 102 Pa.Super. 317—Bodemer v. Northampton County, 101 Pa Super. 492.

No change in law
The Public Service Company Law, was not designed, by the use of the term "adjacent," as distinguished from "abutting," in referring to the allowance of compensation for damages which owners may sustain by reasons of changes in grade crossings, to effect any radical departure from the law regulating damages in eminent domain proceedings. In order to entitle adjacent property owners to recover damages the injury must still be proximate, immediate, and substantial—Holmes & Holmes v. Public Service Commission, 79 Pa Super. 381.

Light and air
It is error to allow a jury to award damages to an adjacent property owner for interference with the light and air of his property caused by a change in the grade of a railroad crossing in a public street, where there has been no disturbance of access, right of way, drainage, or any other existing right of property, and no actual invasion of property or imposition of an additional servitude—Holmes & Holmes v. Public Service Commission, supra.

55. Pa.—Donnelly v. Public Service Commission, 112 A. 160, 268 Pa. 345

56. Wis.—Chicago, etc., R. Co v. State R Commission, 167 N.W. 266, 167 Wis. 185.

57. Wis—Chicago, etc., R Co. v. State R. Commission, supra.

58. Mich.—Detroit v. Detroit United R. Co., 120 N.W. 600, 156 Mich. 106.
51 C.J. p 696 note 45.

59. U.S.—Pratt v. Cleveland, C.C. Ohio, 191 F. 65.

60. U S.—Pratt v. Cleveland, supra
51 C.J. p 696 note 47.

Temporary injuries. Special damages due to the property being rendered inaccessible in the carrying on of business during progress of the work,[61] or injury affecting the use of machinery from dust coming in during the process of construction,[62] may be recoverable under proper pleadings, but the owner may not recover for injuries suffered in common with the general public through inconvenience from the closing of the street totally or partially to travel during the progress of the work;[63] nor may he recover for injury to removable tools and appliances used in his business.[64] Damages for loss of profits of a business are too remote to be recoverable,[65] but incidental damages from loss of rentals may be recovered.[66] Under a statute providing for compensation for damages resulting from the change of grade of a street, damages may not be recovered for injury to a business as such carried on upon the land, whether by the owner of the land or by a tenant.[67]

Franchises in streets. Since persons having franchises in the streets hold them subject to the paramount rights of the public, they are not entitled to recover for the damage to such rights incident to the elimination of grade crossings [68]

Railroad property. Where land owned by the railroad is taken in connection with the elimination of a grade crossing, it has been held that the railroad is not entitled to compensation where no provision therefor is made in the statute,[69] even though the land was not being used for railroad purposes [70] Under some statutes, a railroad is entitled to compensation for its expense in connection

61. Mass.—Cornell-Andrews Smelting Co. v Boston, etc, R. Co, 89 N E 118, 202 Mass. 585.

62. Mass —Cornell-Andrews Smelting Co. v. Boston, etc., R. Co, supra

63. Mich —Detroit v. Detroit United R. Co, 120 N W. 600, 156 Mich 106.

64. Mass —Cornell-Andrews Smelting Co. v. Boston, etc, R Corp, 95 N E 887, 209 Mass 298—Cornell-Andrews Smelting Co. v. Boston, etc, R Co, 89 N E. 118, 202 Mass 585.

65. Mich.—Detroit v. Detroit United R. Co., 120 N W. 600, 156 Mich 106.
N.Y —Corning v Holmes, 167 N Y S 746, 180 App Div. 458, affirmed 125 N E 913, 227 N.Y. 624.

66. N.Y.—Corning v. Holmes, supra.

67. Mich.—Detroit v. Detroit United R. Co., 120 N W. 600, 156 Mich 106.

68. Ky.—Union Light, Heat & Power Co. v. Louisville & N. R Co., 79 S W 2d 199, 257 Ky. 761.
N Y —Consolidated Edison Co. of N. Y. v State, 97 N.Y S.2d 431, 276 App.Div. 677, affirmed 98 N E 2d 587, 302 N.Y. 711.

Utilities owned by municipality

(1) Expense of rearrangement of utility structures in a public highway made necessary by grade-crossing elimination must be borne by owner, whether a private corporation or a municipality, if municipally-owned structure is operated by municipality in its proprietary capacity.—Public Service Commission of New York v. City of New York, 49 N.Y S.2d 214, 268 App.Div. 121, affirmed 63 N.E 2d 183, 294 N Y. 951.

(2) Cost of removing, relocating, and protecting transit facilities owned by New York City and operated by city in its proprietary capacity, although such rearrangement was necessitated by grade-crossing elimination, was not payable out of state grade-crossing elimination bond moneys but must be borne by city, although previous location of such structures was fixed by public service commission.—Public Service Commission of New York v. City of New York, supra.

Relocation of water mains

(1) The constitutional provision relating to grade-crossing elimination in the absence of specific declarations to that effect will not be construed as abolishing the established law that the utility must bear the expense of relocating its water mains affected by grade-crossing elimination.—In re Elimination of Highway Railroad Crossing in Town of Cheektowaga, Erie County, 18 N Y S 2d 613, 259 App Div. 141, affirmed In re Lehigh Valley R. Co. in Union Road, Town of Cheektowaga, Erie County, 28 N E 2d 409, 283 N Y 687 —In re Elimination of Highway Railroad Crossings in Town of Cheektowaga, Erie County, 19 N.Y S. 2d 321, 259 App.Div. 141—Western New York Water Co. v. Brandt, 18 N.Y S 2d 128, 259 App Div. 11, reargument denied 18 N Y.S 2d 750, 259 App Div. 764, appeal dismissed 28 N.E 2d 408, 283 N.Y. 686.

(2) Where relocation of city's water mains was made necessary by separation of grades of railroad and city streets, cost thereof was properly allowed as part of total cost assessed against city and railroad — State ex rel. Wabash Ry. Co v. Public Service Commission of Missouri, 100 S W.2d 522, 340 Mo. 225, 109 A L R. 754.

(3) Public utility commission properly ordered water company to remove its pipe at its own expense from abolished portion of state highway.—Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission, 78 A 2d 46, 168 Pa.Super 360.

Relocation of gas mains

N Y.—Transit Commission v. Long Island R Co, 171 N E 565, 253 N Y 345.

Telegraph company, whose conduits and manholes in the street have been disturbed by a change of grade, has been held not to be an abutting owner entitled to damages. —Postal Tel. Cable Co v Baltimore, etc, R Co, 219 Ill App 304.

69. N.Y —Syracuse Grade Crossing Commission v. Delaware, L. & W R. Co, 97 N Y S 2d 279, 197 Misc. 192, modified on other grounds 32 N.Y.S 2d 620, 263 App Div. 930, affirmed 49 N E 2d 131, 290 N.Y 632 —Long Island R. Co. v. State, 102 N Y.S.2d 399.

Removal of switch tracks

Board of public works, in eliminating grade crossing which resulted in elimination of switch track, merely exercised right reserved in ordinance permitting construction which became part of contract between railroad and user of switch, so that user could not recover damages for removal.—City of Louisville v. Chess & Wymond Co, 56 S W.2d 537, 247 Ky. 53.

70. N Y.—Syracuse Grade Crossing Commission v. Delaware, L. & W R. Co, 97 N Y S 2d 279, 197 Misc 192, modified on other grounds 32 N Y.S 2d 620, 263 App Div 930, affirmed 49 N E 2d 131, 290 N.Y. 632 —Long Island R. Co. v. State, 102 N.Y.S 2d 399.

with or incidental to the elimination of a grade crossing.[71]

Lessee or lessor. Where the right to damages is recognized, a lessee may recover for injury to his leasehold,[72] or a recovery of damages may be apportioned between the lessee and the lessor,[73] the apportionment being a matter not concerning the railroad.[74] In the case of an injury to a leasehold through an abolition of a grade crossing, the measure of damages has been held to be the diminution in the fair market value of the leasehold, including its improvements.[75] The owner of a leasehold, who has been deprived of access to a street, is bound to make use of every reasonable means to obtain such access and may not enhance his damages by his inactivity,[76] but the damages which he actually suffers may not be diminished by his failure to make an attempt to obtain such access without a showing that practicable methods could have been adopted.[77]

Authority or power under which change made. Where the authority of the railroad to interfere with a street on an elevation of tracks is conferred by the state, notwithstanding the city exercises some police supervision over the change, the city may not be held liable in damages alleged to have been caused to abutting property by an illegal change of a street grade.[78] Where a municipality has no power to compel a railroad to construct subways under its tracks for streets or highways, the railroad may not be made responsible for damages because of a change of the grade of a street or a highway in connection therewith, in the absence of an agreement.[79] The railroad, as against a statutory liability for damages, may not assert that the change in the highway complained of was made without authority.[80]

Waiver or surrender of rights. When a franchise of a corporation reserves to the grantor the power to require changes in the company's works, such corporation is not entitled to damages for changes made by it because of a grade crossing elimination.[81] A waiver by a street car company of all damages includes damages suffered by it as an abutting owner.[82]

Contracts. When a railroad agrees with the municipality that it shall pay all damages, it must do so.[83] Where a railroad agrees to construct a viaduct and approaches at its own expense, it is liable for the damages to abutting property owners.[84] Contract provisions as to damages are normally construed as limited to such damages as are compensable aside from the contract.[85] Thus, under a provision that the railroad should pay for all damage resulting from the elimination of the grade crossing, the railroad is not liable to one who, in the absence of such contract, would not have been entitled to compensation,[86] and, where a city, for the purpose of securing elevation of tracks to eliminate grade crossings, agrees with the railroad to pay all damages for which the railroad company may be liable by reason of the elevation, the city is liable only where the company is liable.[87]

b. Proceedings for Assessment

The procedure for the assessment of damages arising out of the abolition of a grade crossing is ordinarily controlled by the statute conferring the right thereto.

The procedure for the assessment of damages, arising out of the abolition of a grade crossing, is ordinarily controlled by the statute conferring the right thereto.[88] Statutes as to the elimination of grade crossings are frequently construed as not

71. N.Y.—Staten Island Edison Corp. v. Staten Island Rapid Transit Ry. Co., 44 N.Y.S.2d 874, 267 App.Div. 152, affirmed 67 N.E.2d 514, 295 N.Y. 869.

Relocation of power lines on railroad's right of way was railroad company's expense incidental to elimination of grade crossing within statute requiring that railroad company be compensated for its expense in connection therewith.—Staten Island Edison Corp. v. Staten Island Rapid Transit Ry. Co., supra.

72. Mass.—Cornell-Andrews Smelting Co. v. Boston, etc., R. Corp., 89 N.E. 118, 202 Mass. 585.

73. Mass.—Cornell-Andrews Smelting Co. v. Boston, etc., R. Corp., 102 N.E. 625, 215 Mass. 381.
51 C.J. p. 695 note 22.

74. Mass.—Cornell-Andrews Smelting Co. v. Boston, etc., R. Corp., 102 N.E. 625, 215 Mass. 381.

75. Mass.—Cornell-Andrews Smelting Co. v. Boston, etc., R. Co., 89 N.E. 118, 202 Mass. 585.
51 C.J. p. 697 note 48.

76. Mass.—Cornell-Andrews Smelting Co. v. Boston, etc., R. Co., 89 N.E. 118, 202 Mass. 585.

77. Mass.—Cornell-Andrews Smelting Co. v. Boston, etc., R. Co., 89 N.E. 118, 202 Mass. 585.

78. Wis.—Pabst Brewing Co. v. Milwaukee, 147 N.W. 46, 157 Wis. 158.

79. Wis.—Appeal of Schuessler, 196 N.W. 213, 182 Wis. 169—Application of Doss, 174 N.W. 718, 171 Wis. 52.

80. Mass.—Parker v. Boston, etc., R. Co., 3 Cush. 107, 50 Am.D. 709.

81. Ind.—Indianapolis v. Indianapolis Light, etc., Co., 95 N.E. 246, 177 Ind. 396
51 C.J. p. 695 note 13.

82. Mich.—Detroit v. Detroit United R. Co., 120 N.W. 600, 156 Mich. 106

83. Mass.—Gardiner v. Boston, etc., R. Co., 9 Cush. 1

84. Tenn.—Cincinnati, N. O. & T. P. R. Co. v. City of Chattanooga, 64 S.W.2d 196, 166 Tenn. 626.

85. Pa.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. City of Philadelphia, 40 A.2d 461, 351 Pa. 214.

86. Ky.—Union Light, Heat & Power Co. v. Louisville & N. R. Co., 79 S.W.2d 199, 257 Ky. 761.

87. Ill.—Otis El. Co. v. Chicago, 105 N.E. 838, 263 Ill. 419, 52 L.R.A., N.S., 192.
51 C.J. p. 695 note 17.

88. Vt.—Menut & Parks Co. v. Cray,

affecting existing remedies for damage caused by the elimination,[89] but, where a right which does not exist at common law is conferred by statute, the statutory remedy for the enforcement thereof is exclusive.[90] Statutes providing a method for the recovery of damages may be made retroactive in the absence of constitutional restrictions.[91] A statute, applicable to the procedure with respect to claims for damages to property not acquired, is inapplicable to a claim by a public utility corporation for the expense of changing its structure in a public highway necessitated by elimination of the grade crossing.[92]

Defenses. Where proceedings to ascertain damages are instituted on the petition of the property owners by a commission as required by statute, the commission in so doing will not be regarded as waiving any rights which may exist on behalf of the railroad companies,[93] or of the city,[94] or any defense which the commission has the right to interpose before the court.[95] Where, in proceedings for the elimination of a grade crossing, the railroad company and the city have treated a highway as existing, the railroad may not, as against a recovery of damages by an abutting owner, contend that the highway is abandoned.[96]

Parties and intervention. Although a statute makes a board of county commissioners a necessary party to proceedings before a commission for separation of grades, the board is not a necessary party to an action for damages to property from the separation of grades.[97] On intervention by a lessor in proceedings brought by the lessee, he should file a petition covering the land described in the lease and not a larger tract owned by him.[98] The lessee's petition should not be tried before it is ascertained whether separate verdicts taken on independent petitions by the lessor are or are not to stand.[99]

Evidence. As a general rule, any evidence otherwise competent, relevant to the amount of damages sustained, may be admitted.[1] Evidence, which is too uncertain in its nature to establish a right to compensation under the statute, may not be rendered sufficient by indulging the idea that the city is responsible for such uncertainty, because it is the moving party for the improvement.[2] In a proceeding to determine a landowner's damage from the taking of land for a highway, it has been presumed that the commission's order for such taking was based on the conclusion that such highway was part of, and was necessitated by, the grade crossing elimination.[3]

Award. An award of damages by a particular board or commission is binding only as far as it is within the power expressly or impliedly conferred on the board,[4] and will not afford a basis of a right of action in behalf of the person in whose favor it is made, without a showing of such power or authority.[5] Where, under a statute, the railroad is primarily to pay for all damages, the entire damages sustained by a petitioner through the discontinuance of a private way at a grade crossing and the taking

39 A.2d 342, 114 Vt. 41, 156 A.L.R. 404

51 C.J. p 697 note 49.

Board to which claim presented

City council, and not board of public works, was held "board" to which claim was properly presented by property owners for damages from grade separation for construction of underpass beneath railroad.—Musto-Keenan Co. v. City of Los Angeles, 34 P.2d 506, 139 Cal.App. 506

Adequate remedy

A statute providing for damages to adjacent property from elimination of grade crossing provided adjacent property owners with an adequate remedy at law for damages sustained by them.—Central R. Co. of New Jersey v. Simandl, 1 A.2d 312, 124 N.J.Eq. 207, affirmed 4 A.2d 281, 125 N.J.Eq. 91.

89. N.Y.—Buffalo Co-op Stove Co. v. State, 298 N.Y.S. 731, 252 App.Div. 228—Askey & Hager v. State, 270 N.Y.S. 704, 240 App.Div. 451, affirmed 195 N.E. 212, 266 N.Y. 587

Remedy not created or destroyed

Statute relating to elimination of grade crossings in city did not create any new remedy against the state for damages resulting from work on grade-crossing elimination and did not destroy any remedy that existed under provisions of city charter.—Buffalo Co-op Stove Co. v. State, 298 N.Y.S. 731, 252 App.Div. 228.

90. N.Y.—Askey & Hager v. State, 270 N.Y.S. 704, 240 App.Div. 451, affirmed 195 N.E. 212, 266 N.Y. 587.

51 C.J. p 697 note 50.

91. Mich.—Detroit v. Grand Trunk R. Co. of Canada, 128 N.W. 250, 163 Mich. 229.

92. N.Y.—Transit Commission v. Long Island R. Co., 239 N.Y.S. 543, 228 App.Div. 290, reversed on other grounds 171 N.E. 565, 253 N.Y. 345.

51 C.J. p 697 note 52

93. N.Y.—In re Buffalo Grade Crossing Comrs., 94 N.E. 188, 201 N.Y. 32.

94. N.Y.—In re Buffalo Grade Crossing Comrs., supra.

95. N.Y.—In re Buffalo Grade Crossing Comrs., supra.

96. Wis.—Application of Kaiser, 174 N.W. 714, 176 N.W. 781, 171 Wis. 40.

97. Ind.—Rooker v. Lake Erie, etc., R. Co., 114 N.E. 998, 66 Ind.App. 521.

98. Mass.—Cornell-Andrews Smelting Co. v. Boston, etc., R. Corp., 95 N.E. 887, 209 Mass. 298

99. Mass.—Cornell-Andrews Smelting Co. v. Boston, etc., R. Corp., supra.

1. Mass.—Cornell-Andrews Smelting Co. v. Boston, etc., R. Corp., 102 N.E. 625, 215 Mass. 381.

51 C.J. p 697 note 61.

2. Mich.—Detroit v. Detroit United R. Co., 120 N.W. 600, 156 Mich. 106.

3. Pa.—Bartron v. Northampton County, 19 A.2d 263, 342 Pa. 163

4. Ind.—Indianapolis v. Indianapolis Light, etc., Co., 95 N.E. 246, 177 Ind. 396.

5. Ind.—Indianapolis v. Indianapolis Light, etc., Co., supra.

of land for a public way are to be assessed against the railroad and not partly against the town and partly against the railroad.[6]

Review. A railroad company which is neither a necessary nor a proper party to the proceedings, although it has been allowed to participate therein, may not appeal from the decision.[7] Where, on petition by a lessee for damages for the abolition of a grade crossing, the lessor was entitled to damages subsequent to the lease, the lessor, not asking for a ruling that the lessee had no right to remove buildings and machinery, could not, on exceptions, urge that the lessee had no such right.[8]

§ 167. —— Maintenance and Repair

Statutes as to the elimination of grade crossings frequently provide as to the maintenance and repair of the structure substituted for the old crossing or authorize a commission to make such determination.

In some jurisdictions the statutes providing for abolition of grade crossings also provide for the subsequent maintenance and repair of the structure substituted for the old crossing,[9] or authorize the commission charged with the general regulation of railroads or railroad crossings to make such determination.[10] Where a bridge carries a highway over two railroads, the repair and maintenance of the bridge may be charged to both railroads.[11] Under a statute requiring a municipality to maintain a public way which passes under a railroad, the municipality may not impose on the railroad the expense of improving the road.[12] Under some statutes, the railroad is liable for the expense of altering, but not of repairing, a bridge across the railroad,[13] and, where the highway crosses a railroad by an overhead bridge, the framework of the bridge and its abutments must be maintained and kept in

6. Mass.—Cornell-Andrews Smelting Co v Boston, etc., R Co., 89 N.E. 118, 202 Mass. 585

7. Mo.—Kansas City v. Kansas City Terminal R. Co., 201 S.W. 541.

8. Mass.—Cornell-Andrews Smelting Co v. Boston, etc., R. Corp., 102 N.E. 625, 215 Mass. 381.

9. S.C.—Powell v. Greenwood County, 1 S.E.2d 624, 189 S.C. 463

Statute as to elimination of grade crossings held inapplicable

U.S.—Cincinnati, N. O. & T. P. Ry. Co. v. City of Lexington, D.C.Ky., 86 F.Supp. 913.

S.C.—Powell v. Greenwood County, 1 S.E.2d 624, 189 S.C. 463

"County bridge"

A bridge carrying state highway route over a railroad and a canal, constructed by order of public service commission, was not a "county bridge" within meaning of statute requiring counties to maintain expenses of lighting county bridges.—Borough of West Conshohocken v. Pennsylvania Public Utility Commission, 5 A.2d 590, 135 Pa.Super. 295

Statute relieving railroad of duty

Ark.—Greer v. City of Texarkana, 147 S.W.2d 1004, 201 Ark. 1041.

Bridges and approaches

(1) Under statute empowering public utility commission to require utilities to construct and maintain suitable "bridges," commission's power extends not only to the bridge but the approaches thereto with right to allocate the cost for repairs and maintenance, provided they are just and reasonable, since approaches are a necessary part of bridges.—Pittsburgh & S. R. Co. v. Pennsylvania Public Utility Commission, 14 A.2d 903, 141 Pa.Super. 233.

(2) Where pursuant to order of board of public utility commissioners, issued under authority of Fielder Grade Crossing Act, a bridge was constructed over a railroad right of way and over a county highway running parallel to railroad right of way, responsibility of railroad to maintain and repair bridge was limited to portion of bridge within its right of way, and railroad was not required to maintain and repair the entire structure.—Bergen County v Board of Public Utility Com'rs, 68 A.2d 645, 5 N.J.Super. 185, petition denied 70 A.2d 539, 3 N.J. 381

(3) Portions of a bridge, although made of different types of construction, were not approaches to be repaired by the municipality.—Boston, etc., R. v. Lowell, 152 N.E. 633, 256 Mass. 293

10. Pa.—Pittsburgh & S. R. Co. v. Pennsylvania Public Utility Commission, 14 A.2d 903, 141 Pa.Super. 233.—Borough of West Conshohocken v. Pennsylvania Public Utility Commission, 5 A.2d 590, 135 Pa.Super. 295.

51 C.J. p. 691 note 39 [a].

Sidewalk

The public service commission had power to order that sidewalk on bridge over railroad tracks should be maintained by town.—New York Cent. R. Co. v. Erie County, 95 N.Y.S.2d 305, 197 Misc. 801.

Assigning definite items to each

Pa.—Borough of West Conshohocken, v. Pennsylvania Public Utility Commission, 5 A.2d 590, 135 Pa.Super. 295

Jointly operated bridge

The public utility commission's act in fixing initial liability for maintenance of bridges over streets on one railroad was not unreasonable notwithstanding bridges were operated jointly with another railroad, where contractual rights were not affected, and actual operating interests were not disclosed.—Pennsylvania R. Co. v. Pennsylvania Public Utility Commission, 35 A.2d 588, 154 Pa.Super. 86.

Assumption of responsibility by state

The statute providing that commonwealth would assume responsibility of county or township for construction or maintenance of bridge on state highway route carrying vehicular traffic over stream and facilities of any public service company, except that act shall not relieve any person, firm, association, or corporation of obligation under any agreement or order of court or under any order of public service commission, does not relieve boroughs from prorated cost of maintaining bridge assessed by public utility commission, since boroughs are "persons" within exception of statute.—Borough of West Conshohocken v. Pennsylvania Public Utility Commission, 5 A.2d 590, 135 Pa.Super. 295.

Order held valid

Pa.—Pittsburgh & S. R. Co. v. Pennsylvania Public Utility Commission, 14 A.2d 903, 141 Pa.Super. 233.—Borough of West Conshohocken v. Pennsylvania Public Utility Commission, 5 A.2d 590, 135 Pa.Super. 295

11. Mich.—Attorney General v. Fort St. Union Depot Co., 76 N.W. 85, 117 Mich. 609

12. Ohio.—City of Bucyrus v. Pennsylvania R. Co., 188 N.E. 355, 127 Ohio St. 201.

13. Mass.—Boston & A. R. Co. v. Department of Public Utilities, 51 N.E.2d 445, 314 Mass. 634.

"Repair" and "alteration" distinguished

Mass.—Boston & A. R. Co. v. Department of Public Utilities, supra.

repair by the railroad, while the roadway and its approaches are to be maintained by the municipality.[14] A municipality which fails to exercise its power to impose the burden of maintenance on a railroad may not recover from the railroad its expenditures in maintaining the crossing.[15] Where a railroad sought recovery against a county for expenditures for repairs under a grade crossing elimination statute, it was held that it could not thereafter seek recovery under another statute.[16]

Contracts. It has been held that a contract between a railroad and a municipality as to the repair and maintenance is subject to the lawful exercise of the police power under which the burden may be placed on the railroad, although the agreement places it on the municipality,[17] but it has also been held that a municipality is not relieved from a contract to maintain a crossing at its expense by an order of a commission apportioning the cost of repairs,[18] and the railroad may bring action on such a contract without having appealed from the order.[19] A contract with respect to the maintenance of a grade crossing is not affected by a subsequently enacted statute unless such legislative intent is unequivocally expressed.[20]

E. CROSSING PRIVATE LANDS

§ 168. In General

A railroad company in constructing its road across private lands must do so in such manner as not to cause unnecessary injury thereto

A railroad company in constructing its road across private lands must do so in such manner as not to cause unnecessary injury thereto;[21] and during the process of construction the railroad company must use all prudent and reasonable means to enable the landowner to enjoy his property in the ordinary mode and to prevent injury thereto.[22]

Private roads. In some jurisdictions statutory provisions require a railroad to restore private roads crossed by it.[23] Such provisions have been held not to apply when the railroad has, by purchase, acquired the private passway from the owner.[24] A charter provision requiring the railroad so to construct its way as not to obstruct any private way which it crosses requires it to construct and maintain a safe and suitable crossing for such private way.[25]

§ 169. Private or Farm Crossings

A private crossing or a farm crossing is defined supra § 1, and the right and duty to cross or construct a private or farm crossing, infra § 170. The character of the lands and the persons entitled to a private or farm crossing and the location, number character, sufficiency, removal, change, or obstruction of such crossings are discussed infra §§ 171–174 and the effect of an agreement with, or waiver by the landowner infra § 175.

Examine Pocket Parts for later cases.

§ 170. —— Right and Duty to Cross or Construct Crossings

a. In general
b. Duty of railroad to construct crossing
c. Maintenance and repair
d. Powers of railroad commission

a. In General

A private or farm crossing may be acquired by prescription in the absence of a statute providing otherwise, or the circumstances may be such as to entitle the landowner to a right of way of necessity.

The right to a private or farm crossing across or under a railroad track may be acquired by contract or covenant in the deed of conveyance of the right of way, as discussed supra §§ 88, 94, or by virtue of a statutory or charter provision expressly

14. N.Y.—City of New York v. New York Cent. R. Co., 48 N.Y.S.2d 189, 183 Misc. 104
51 C.J. p. 691 note 42 [b].

Railings along sidewalk
Under provision of Grade Crossing Elimination Act that "framework" of bridge shall be maintained by railroad, railings along sidewalk on bridge were not a part of the "framework," but were part of "sidewalk" and were required to be maintained by town under order of public service commission providing that framework should be maintained by railroad and sidewalks by town—New York Cent. R. Co. v. Erie County, 95 N.Y.S.2d 305, 197 Misc. 801.

15. Wis.—City of Milwaukee v. Chicago, M., St. P. & P. R. Co., 27 N.W.2d 356, 250 Wis. 451.

16. S.C.—Powell v. Greenwood County, 1 S.E.2d 624, 189 S.C. 463

17. Pa.—Pennsylvania R. Co. v. Public Utility Commission, 7 A.2d 86, 136 Pa.Super. 1.

18. Pa.—Pittsburgh, etc., R. Co. v. McKees Rocks, 135 A. 227, 287 Pa. 311.

19. Pa.—Pittsburgh, etc., R. Co. v. McKees Rocks, supra.

20. N.Y.—Western N. Y. & P. Ry. Co. v. City of Buffalo, 71 N.E.2d 108, 296 N.Y. 93.

21. La.—Heath v. Texas, etc., R. Co., 37 La.Ann. 728.
51 C.J. p. 698 note 71.

22. Mo.—Comings v. Hannibal, etc., R. Co., 48 Mo. 512.
51 C.J. p. 698 note 72.

23. Ga.—Willingham v. Macon, etc., R. Co., 38 S.E. 843, 113 Ga. 374.
51 C.J. p. 698 note 80.

24. Ky.—Turner v. Louisville, etc., R. Co., 225 S.W. 1072, 189 Ky. 714.

25. N.H.—Keefe v. Sullivan County R. Co., 63 N.H. 271.

conferring the right to cross,[26] or imposing on the railroad company the duty of constructing crossings, as discussed infra subdivision b of this section, or by prescription,[27] and, in the absence of statute providing otherwise, one whose land abuts on a strip of ground acquired by a railroad for its right of way may acquire by prescription a private right of way over[28] or under[29] the company's tracks, although, there is authority to the effect that a prescriptive way cannot be acquired across a railroad right of way, on the ground that it is held by the railroad for public purposes.[30]

The acquisition of a private right of way by prescription across a railroad company's tracks is not affected by a statute which prohibits persons from walking, standing, or driving on any railroad tracks,[31] or by a statute providing that, if an abutting landowner occupies for the purpose of cultivation or otherwise any land belonging to, or included within, the location of the railroad, no continuance of such occupancy shall create in him any right to the land so occupied.[32] On the other hand, a statute which provides that no right of way across any railroad track or location which is in use for railroad purposes shall hereafter be acquired by prescription, but nothing herein contained shall affect any existing right of way, prevents the acquisition of rights of way across railroads by prescription, whether or not the adverse use had begun prior to the passage of the statute.[33] In order to acquire an easement across, over, or under, a railroad track it is necessary that all of the conditions of adverse user essential to give a prescriptive right should be fulfilled,[34] and user, no matter how long continued, if permissive, cannot give such an easement by prescription.[35]

The circumstances may also be such as to entitle a landowner to a right of way of necessity,[36] and it has been held that one who conveys a right of way through his land so as to cut off access to a part of it has a way of necessity over the railroad,[37] although, where land is taken for a railroad but no right of crossing is reserved or ordered by the commissioners, there is no right of way by necessity, notwithstanding the owner is cut off from part of his land without such a right of way.[38] The

26. Limitation on right

A charter provision giving a landowner a right to cross the track gives him no right to cross in a manner which interferes with the reasonable use of the road by the railroad company.—Connecticut, etc, R Co. v. Holton, 32 Vt. 43.

27. Miss—Hardy v Alabama, etc, R Co., 19 So. 661, 73 Miss. 719
51 C.J. p 699 note 83.

28. Ariz—Curtis v. Southern Pac Co, 8 P.2d 1078, 39 Ariz. 570.
Ark—St. Louis Southwestern Ry Co. v. Wallace, 229 S.W 2d 659—St Louis Southwestern Ry. Co v. Elmore, 47 S W.2d 39, 185 Ark. 364.
19 C.J p 900 note 35.

29. Ill—Cleveland, etc, R. Co. v Munsell, 94 Ill App 10.
19 C J p 900 note 35

30. Tenn.—Cincinnati, N. O. & T P. R Co. v. Sharp, 207 S.W. 728, 141 Tenn. 146.
19 C J. p 900 note 34.

31. Mass.—McCreary v. Boston, etc, R. Co., 26 N.E 864, 153 Mass. 300, 11 L.R A. 359.
19 C.J. p 901 note 39.

32. Mass.—Hall v. Boston, etc., R. Co., 97 N.E. 914, 211 Mass. 174—Fisher v. New York, etc., R Co, 135 Mass. 107.
19 C.J. p 901 note 40, p 900 note 37 [a].

33. Mass—Brooks v. West Boston Gas Co., 157 N.E 362, 266 Mass. 407—Simpson v. Boston, etc, R. Co., 57 N.E. 674, 176 Mass. 362, N.H—Costello v Grand Trunk R. Co, 47 A. 265, 70 N H. 403.

34. Tex—Texas & P Ry Co. v. Phillips, Civ App, 289 S.W 697, reversed on other grounds Phillips v Texas & P Ry Co, Com App, 296 S W. 877—Davis v Clark, Civ.App, 271 S W. 190—Quannah, A. & P Ry. Co v. Wiseman, Civ App, 247 S W. 695.
19 C J p 901 note 42—51 C.J. p 699 note 83 [a].

Statutory right of user

Prescriptive title may not be based on a landowner's use of railroad farm crossing under a statutory right of user.—Holly v. New York Cent. R. Co, 171 N.E. 367, 35 Ohio App. 1.

35. Iowa—Chicago, M, St. P. & P. R. Co. v. Cross, 234 N.W. 569, 212 Iowa 218—Whitham v. Chicago, etc, R Co, 160 N W. 913, 178 Iowa 1296—Hastings v. Chicago, etc., R. Co, 126 N W 786, 148 Iowa 390—Schrimper v. Chicago, etc, R. Co, 82 N.W. 916, 87 N.W. 731, 115 Iowa 35
Mass—Cooley v. Boston & M R. R, 21 N.E 2d 953, 303 Mass. 371, 122 A.L R. 1166.
Tex.—Texas & P. Ry. Co. v. Phillips, Civ App, 289 S W. 697, reversed on other grounds Phillips v. Texas & P. Ry. Co, Com App, 296 S.W. 877.
51 C.J. p 699 note 83 [b]—19 C J. p 901 note 43, p 888 note 79 [a] (2)–(5).

36. Conn.—Housatonic R. Co. v. Waterbury, 23 Conn. 101.
51 C J p 699 note 88, p 575 note 44 [a]

Owner of land divided by railroad right of way may construct private driveway over right of way without permission from public service commission—Louisville & N. R. Co. v Public Service Commission of Indiana, 188 N E. 321, 206 Ind 51

Privity of ownership absent

Where tract owned by plaintiff was bisected by defendant's railroad track but there was no evidence that plaintiff or defendant was grantee or grantor of the other or that their predecessors in title occupied that status, plaintiff was not entitled to a private crossing over defendant's track on theory of easement of necessity impliedly granted or reserved—Texas & N. O. R. Co v Millard, Tex Civ.App, 181 S.W 2d 842

37. Ind—New York Cent. R. Co. v. Yarian, 39 N E.2d 604, 219 Ind. 477, 139 A.L.R 455—Cleveland, C, C & St. L. Ry. Co. v Smith, 97 N. E. 164, 177 Ind. 524
Mass.—New York, etc., R. Co. v. Railroad Comrs., 38 N E. 27, 162 Mass 81.
Ohio—Baltimore & O. R. Co. v. Gilmore, 19 Ohio App. 489.
19 C.J. p 927 note 48.

38. Mass.—Cooley v. Boston & M. R R, 21 N E.2d 953, 303 Mass 371, 122 A.L.R. 1166—Googins v. Boston & A. R. Co, 30 N.E 71, 155 Mass. 505—Smith v. New York & N. E. R. Co., 6 N.E. 842, 142 Mass. 21.

necessity must be actual and not a mere matter of convenience,[39] but it need not be absolute, and a landowner whose property is divided by a railroad is entitled to use or make such a crossing or crossings as may be necessary for the reasonably convenient use of his land, provided he exercises his right with due regard to the paramount rights of the railroad company.[40]

In the absence of such provisions or conditions, the right of the railroad company in its right of way is exclusive, and adjacent landowners have no right to cross it,[41] or to construct crossings,[42] or if regular crossings are established to cross it at other places;[43] and in at least one jurisdiction the construction of crossings without the consent of the railroad company is expressly prohibited by statute.[44] Statutes giving landowners the right to private farm crossings are not grounded in the police power of the state,[45] but are grounded in the legislative control over persons or corporations seeking to exercise quasi-public functions.[46] Such a statute has been held to give the landowner an absolute right to a crossing,[47] but, on the contrary, it has been held that the right is not absolute but is subservient to public welfare.[48]

b. Duty of Railroad to Construct Crossing

Generally in the absence of a statute or agreement a railroad company is not obliged to construct a private or farm crossings for the benefit of adjacent landowners.

While it has been held to be the duty of the railroad to construct a private crossing on request of the landowner,[49] it has been said that the right to demand a private or farm crossing rests in statutory provisions or in private contract,[50] and in the absence of statute or agreement a railroad company is not obliged to construct private or farm crossings for the benefit of adjacent landowners,[51] nor is the railroad obliged to construct the crossing even though the landowner has a right of way of necessity.[52] The duty may be imposed on railroad companies by contract or covenant in the conveyance of the right of way, as discussed supra § 94, or by provision in the charter of the company.[53] Under such provisions the duty of the railroad is continuing, so as to require it to construct such additional crossings as may become necessary,[54] or if such crossing is a part of the plan of construction filed or agreed on by the railroad company and is considered in the award of damages to the landowner, the railroad company is bound to construct and maintain the crossing.[55]

There are also in a number of jurisdictions statutory provisions requiring railroad companies to construct such crossings or to do so in certain cases or under certain conditions.[56] These statutory

39. Ark.—St. Louis-San Francisco Ry. Co. v. Logue, 224 S.W.2d 42, 216 Ark. 64.
Tex.—McDaniel v. Burlington-Rock Island R. Co., Civ.App., 200 S.W.2d 724.
51 C.J. p. 699 note 90.

Lands accessible from public highway

No way of necessity exists across railroad track from one portion of farm to another where both portions are accessible by highway.
Ala.—McBurney v. Central of Georgia Ry. Co., 136 So. 796, 223 Ala. 390.
Mass.—Childs v. Boston & Maine R. R., 99 N.E. 957, 213 Mass. 91, 43 L.R.A.,N.S., 378.
Ohio.—Holly v. New York Cent. R. Co., 171 N.E. 367, 35 Ohio App. 1.
51 C.J. p. 699 note 90 [b].

40. Tex.—Missouri-Kansas-Texas Ry. Co. of Texas v. Cunningham, Civ.App., 273 S.W. 697.
51 C.J. p. 699 note 91.

41. Conn.—New York, etc., R. Co. v. Comstock, 22 A. 511, 60 Conn. 200.

42. Pa.—Speese v. Schuylkill River East Side R. Co., 8 Pa.Dist. 584, 23 Pa.Co. 17, 44 Wkly.N.C. 493.
Vt.—Connecticut, etc., R. Co. v. Holton, 32 Vt. 43.

43. Ky.—Chesapeake, etc., R. Co. v. Richardson, 98 S.W. 1042, 30 Ky.L. 426.
Vt.—Connecticut, etc., R. Co. v. Holton, 32 Vt. 43.

44. Pa.—Mt. Pleasant Coal Co. v. Delaware, etc., R. Co., 50 A. 251, 200 Pa. 434.
51 C.J. p. 699 note 95.

45. S.D.—Dwyer v. Chicago, etc., R. Co., 166 N.W. 237, 40 S.D. 84.

46. S.D.—Dwyer v. Chicago, etc., R. Co., supra.

47. Iowa.—O'Malley v. Chicago, etc., R. Co., 165 N.W. 1002, 183 Iowa 749.

48. S.D.—Dwyer v. Chicago, etc., R. Co., 166 N.W. 237, 40 S.D. 84.
51 C.J. p. 699 note 99.

49. La.—Kirk v. Kansas City, etc., R. Co., 25 So. 463, 51 La.Ann. 664.—Heath v. Texas, etc., R. Co., 37 La.Ann. 728.

50. N.H.—Peppin v. Boston & M. R. R., 169 A. 877, 86 N.H. 395.
S.D.—Dwyer v. Chicago, etc., R. Co., 166 N.W. 237, 40 S.D. 84.
W.Va.—Recco v. Chesapeake & O. Ry. Co., 32 S.E.2d 449, 127 W.Va. 321.

51. Tex.—Gulf, etc., R. Co. v. Jones, 3 Tex.A.Civ.Cas. § 21.

52. Tex.—Gulf, etc., R. Co. v. Jones, supra.

53. Ky.—Louisville, etc., R. Co. v. Emerson, 100 S.W. 863, 125 Ky. 104, 30 Ky.L. 1149
51 C.J. p. 700 note 7

54. Ky.—Louisville, etc., R. Co. v. Troutman, 127 S.W. 474, 137 Ky. 827.—Louisville, etc., R. Co. v. Emerson, 100 S.W. 863, 125 Ky. 104, 30 Ky.L. 1149

55. Kan.—Stone v. Missouri Pac. R. Co., 90 P. 251, 75 Kan. 600.
51 C.J. p. 700 note 9.

56. Va.—Pennsylvania R. Co. v. Black, 8 S.E.2d 291, 175 Va. 256.
51 C.J. p. 700 note 10.

Construction and application of statutes

(1) The remedial statute authorizing establishment of wagonway across railroad right of way ought to receive a reasonable construction so as to make the remedy commensurate with the rights of the landowner and the mischief intended to be redressed, and should not be suffered to fall short of its admitted purpose by a too narrow interpretation.—Pennsylvania R. Co. v. Black, 8 S.E.2d 291, 175 Va. 256.—Adams v. Tidewater Ry. Co., 60 S.E. 129, 107 Va. 798.

(2) Words "necessary for proper use of land" in statute penalizing railroad for failure to provide neces-

requirements apply whether the railroad company acquires its right of way by purchase or condemnation,[57] and the duty is not affected by the assessment and payment of damages in condemnation proceedings,[58] although the contrary has been held where the statute has been enacted subsequent to the assessment and payment of damages,[59] and a statute which attempts to impose such duty on a railroad which, prior to its enactment, has obtained a right of way and paid full compensation therefor, is unconstitutional,[60] as is a statute which requires a railroad to establish an underground private crossing merely for the convenience and benefit of the owner of the property.[61]

They also apply to railroads in process of construction as well as to completed roads[62] These statutes have been held not to affect provisions of charters granted before their enactment,[63] although on the contrary it has been held that they supersede charter provisions.[64] Where the railroad company contests the right of the landowner to a crossing, it is entitled to a reasonable time after the determination of the right in favor of the landowner to construct the crossing;[65] and where the duty of constructing the crossing is imposed by covenant in a deed of right of way but no time is specified, the company is entitled to a reasonable time after the road is built.[66]

Approaches. The duty of constructing a crossing includes the duty of constructing the necessary approaches thereto.[67]

Logging railroads are not railroads within the meaning of statutes requiring construction of private or farm crossings.[68]

Successors of railroad. A railroad's agreement to construct crossings is binding on its subsequent grantee or purchaser having notice of the agreement,[69] but a purchaser is not bound to maintain a crossing built under an oral agreement of which it had no notice[70]

c. Maintenance and Repair

While it has been held that the railroad has no duty to maintain a private or farm crossing, the statutory duty of constructing private or farm crossings includes the duty of maintaining and keeping them in repair as long as needed.

While it has been held, in the absence of statute or agreement, that the railroad has no duty to maintain a private or farm crossing,[71] the statutory duty of constructing such crossings includes the duty of maintaining and keeping them in repair as long as needed[72] The crossing being for the benefit of the landowner, the railroad is not obliged to maintain it in good condition for use by the public.[73] The railroad is not required to maintain a statutory crossing after it has been dedicated as a public street and ordered closed by the proper authorities;[74] and, where the crossing is constructed and maintained under a contract between the railroad and the landowner, the question of maintenance and repair depends on the terms of the contract.[75] In order to escape a statutory liability for failure to keep the crossing in repair, the railroad must show that it has in some lawful way been relieved of

sary crossings mean way of necessity, not mere way of convenience.—McBurney v Central of Georgia Ry. Co, 136 So 796, 223 Ala. 390.

(3) Other statutes construed and applied see 51 C.J p 700 note 10 [a].

57. N.Y.—Smith v. New York, etc., R. Co, 63 N.Y. 58.
51 C.J p 701 note 11

58. N.Y—Beardsley v. Lehigh Valley R. Co, 36 N.E 877, 142 N.Y 173.
51 C.J. p 701 note 12.

59. Tex—Missouri, etc, R. Co. v. Chenault, 60 S.W 55, 24 Tex.Civ. App. 481.

60. Kan—Chamberlain v. Missouri Pac. R. Co, 191 P. 261, 107 Kan 341, 12 A.L.R. 224.
Tex.—Gulf, etc., R. Co v. Rowland, 7 S.W. 718, 70 Tex. 298.

61. U.S—Chicago, St. P., M. & O. Ry. Co. v. Holmberg, Neb., 51 S Ct. 56, 282 U.S. 162, 75 L.Ed. 270.

62. Va.—Adams v. Tidewater R. Co, 60 S.E. 129, 107 Va. 798.

63. Ky—Louisville, etc, R. Co v Robbins, 111 S.W. 283, 33 Ky.L 778.

64. N.H—Bolger v Boston, etc, R Co, 134 A 524, 82 N.H 372.

65. Miss—Alabama, etc., R. Co v Odeneal, 21 So. 52, 74 Miss. 824

66. Iowa—Livingston v. Iowa Midland R. Co, 35 Iowa 555

67. Mo—Birlew v. St. Louis, etc., R Co, 79 S.W. 490, 104 Mo.App. 561.

68. Miss—Eastman v. Sullivan, 95 So. 673, 131 Miss. 768—New Deemer Mfg Co v. Kilpatrick, 92 So. 71, 129 Miss. 268

69. Iowa—Swan v Burlington, etc, R Co., 34 N.W. 457, 72 Iowa 650.
51 C.J. p 701 note 23.

70. Ky—Forsythe v. Southern R Co, 113 S.W. 85.

71. Conn—New York, etc, R. Co v. Comstock, 22 A. 511, 60 Conn. 200.

72. Ky—Juett v. Cincinnati, N. O. & T P. Ry. Co, 53 S.W.2d 551, 245 Ky 379.
51 C.J. p 701 note 26.

73. Minn.—Johnson v. Chicago, etc, R. Co., 104 N.W. 961, 96 Minn. 316.

74. N.J.—Hollinshead v. Atlantic City R. Co., 131 A. 915, 102 N.J. Law 303.

75. Minn—Walters v. Minneapolis, etc, R Co, 79 N.W. 516, 76 Minn. 506.
51 C.J. p 701 note 30.

Termination of contract

Contract of property owner with railroad to pay one-half cost of repairs of overpass terminated when railroad destroyed old bridge and built new one of greater size—Juett v. Cincinnati, N. O & T. P. Ry. Co., 53 S.W.2d 551, 245 Ky. 379.

Estoppel not shown

Property owner who originally agreed to share cost of repairs to overpass was held not estopped to deny liability for repairs on new bridge by failure to protest when railroad destroyed and rebuilt overpass or by recognizing contract obligation in his subsequent deed to another—Juett v. Cincinnati, N. O. & T. P. Ry. Co., supra.

responsibility by providing other proper and suitable crossings.[76]

d. Powers of Railroad Commission

The power of the railroad commission over private crossings depends on statutory provisions.

The statutes in some jurisdictions give the railroad commission no power over private crossings,[77] but in other jurisdictions the commission may by its order establish a private crossing[78] and may make orders as to continued maintenance, location, or arrangement of existing crossings, however they were established,[79] and by implication may discontinue them,[80] but the enforcement of rights is for the court.[81] Where one has a way of necessity, as discussed supra subdivision a of this section, a statute giving railroad commissioners power to require the railroad to maintain crossings is constitutional.[82] On appeal from an order of the commission the court will sustain the order if it is not improper.[83] A rehearing will ordinarily be granted if the findings of the commission are erroneous.[84]

§ 171. —— Character of Lands and Persons Entitled to Crossings

The character of the lands and the persons entitled to private or farm crossings may depend on statutory provisions.

Under some statutes the owner of land is entitled to a crossing even though the land is not inclosed,[85] but under other statutes the contrary is held;[86] and under some statutes a person owning land on only one side of the railroad is not entitled to a crossing.[87] Where the statute requires the construction of crossings for the use of the proprietors of the lands "adjoining" the railroad, its application is not limited to cases where the railroad divides a farm or tract of land or to conditions existing at the time of the original construction,[88] and under such a statute the landowner of land on one side only is entitled to a crossing in order to reach a highway,[89] or where, at the time of the construction of the railroad, he owned land on one side and subsequently purchases land on the other side,[90] or where he owns land on both sides of the railroad but there is a strip of land belonging to another intervening between the railroad and his land on one side,[91] and such a statute does not require that any particular quantity of land shall be benefited;[92] but where a landowner owns land on only one side of the railroad and a crossing would serve no useful purpose, the company will not be required to construct it;[93] and one whose property does not adjoin the right of way cannot compel the maintenance of a crossing[94] even though he acquires an easement over land which does adjoin.[95]

Under a statute requiring the construction of crossings for the use of the proprietors, the railroad owes no duty to a tenant by sufferance.[96] Where the statute requires crossings when a person owns land "on both sides of any railway," the term "railway" does not mean merely the right of way.[97]

76. Va.—Gaulding v. Virginian R. Co., 92 S.E. 832, 121 Va. 19.

77. Kan.—Union Pac. R. Co. v. Public Utilities Commission, 158 P. 863, 98 Kan. 667.
51 C.J. p. 701 note 32.

78. N.H.—Bolger v. Boston, etc., R. Co., 134 A. 524, 82 N.H. 372.
51 C.J. p. 702 note 33.

79. N.H.—Bolger v. Boston, etc., R. Co., supra.
51 C.J. p. 702 note 34.

80. N.H.—Bolger v. Boston, etc., R. Co., supra.

81. N.H.—Bolger v. Boston, etc., R. Co., supra.

82. Mass.—New York, etc., R. Co. v. Railroad Comrs., 38 N.E. 27, 162 Mass. 81.

83. N.H.—Bolger v. Boston, etc., R. Co., 134 A. 524, 82 N.H. 372.
51 C.J. p. 702 note 39.

84. N.H.—Bolger v. Boston, etc., R. Co., supra.
51 C.J. p. 702 note 40.

85. Miss.—Hardy v. Alabama, etc., R. Co., 19 So. 661, 73 Miss. 719.

86. Tex.—Hines v. Baker, 248 S.W. 336, 112 Tex. 484.—Texas & N. O. R. Co. v. Millard, Civ. App., 181 S.W. 2d 842.

Transfer of land

One through whose farm a railroad company inclosed a right of way is entitled to have a farm crossing constructed, although, after construction of the railroad and fencing of the right of way, but before condemnation thereof, the owner deeded such inclosed strip to a third person.—Texas, etc., R. Co. v. Ford, Tex. Civ. App., 42 S.W. 589.—51 C.J. p. 702 note 50.

87. Ky.—Thompson v. Louisville, etc., R. Co., 76 S.W. 44, 25 Ky.L. 529.
51 C.J. p. 702 note 43.

88. Mo.—Quantock v. Missouri, etc., R. Co., 74 S.W. 1034, 117 Mo. App. 469, affirmed 94 S.W. 978, 197 Mo. 93.

89. N.Y.—Buffalo Stone, etc., Co. v. Delaware, etc., R. Co., 29 N.E. 121, 130 N.Y. 152.

Limitation

Statute requiring railroad to maintain farm crossing was never intended to give plaintiffs owning land only on one side of tracks right to access to lands of another on the opposite side.—Smith v. New York Cent. R. Co., 257 N.Y.S. 313, 235 App.Div. 262.

90. Mo.—Quantock v. Missouri, etc., R. Co., 94 S.W. 978, 197 Mo. 93.
51 C.J. p. 702 note 46.

91. Ill.—Shea v. Cleveland, etc., R. Co., 95 N.E. 63, 250 Ill. 97.
51 C.J. p. 702 note 47.

92. N.Y.—Clarke v. Rochester, etc., R. Co., 18 Barb. 350.

93. N.Y.—Kerr v. West Shore R. Co., 2 N.Y.S. 686, affirmed 53 Hun 634, 6 N.Y.S. 958, affirmed 27 N.E. 833, 127 N.Y. 269.

94. N.Y.—Smith v. New York Cent. R. Co., 257 N.Y.S. 313, 235 App. Div. 262.

95. Ill.—Chicago, etc., R. Co. v. Malmgren, 224 Ill. App. 93.

96. Vt.—Marsh v. Rutland R. Co., 67 A. 1098, 80 Vt. 397.

97. Iowa.—Mattice v. Chicago Great Western R. Co., 107 N.W. 949, 130 Iowa 749.
51 C.J. p. 702, note 52.

A statute requiring that when a person owns a certain amount of land in one body through which the railroad passes the railroad shall construct crossings applies only where the lands on each side are in one ownership at the time of the original construction,[98] and does not require the construction of additional crossings if the land is subsequently divided up into several tracts of over the amount specified,[99] although the contrary has also been held.[1]

A statute requiring "farm crossings" does not apply to residential property or to lots within city limits,[2] although the business conducted on such lots may necessitate crossing the railroad tracks in order to reach a street or alley.[3] A charter provision requiring a railroad company to provide proper crossings for persons through whose land the road passes imposes a continuing duty, and if at the time the road was constructed no crossing was necessary, but a crossing subsequently becomes necessary, it is the duty of the railroad company to construct it.[4] The statutes have been held not to apply unless the railroad enters the land of the owner seeking the crossing.[5] The fee owner of a right of way acquired by the railroad by an act of congress has no right to a private crossing.[6] Under a statute requiring a crossing where a railroad intersects land, if the parcel on one side is transferred, the grantee thereof is not entitled to a way across the railroad.[7] A railroad is not obliged to construct a crossing leading from a road into a private lane having no outlet.[8]

§ 172. —— Location, Number, and Purpose of Crossings

a. Location
b. Number
c. Purpose

a. Location

In the absence of a statute or agreement to the contrary, the railroad company may designate the location of the crossing, but where the statute authorizes the landowner to designate the place of crossing, the railroad company must construct it at the place designated if such location is a reasonable one.

In the location of the crossing the rights of both parties must be considered,[9] and whether the crossing is suitable and properly located is ordinarily a question of fact depending on the circumstances of the particular case.[10] In the absence of statute or agreement to the contrary, the railroad company may designate the location of the crossing,[11] but the landowner is entitled to be reasonably and fairly accommodated,[12] and the railroad company must consider his rights and cannot so locate the crossing as to subject him to needless and unreasonable injury or inconvenience.[13]

A landowner is not entitled to a crossing at a point where the safety of transportation would be endangered,[14] or at a point where the cost of construction would be out of all proportion to the benefits.[15] Where the statute authorizes the landowner to designate the place of crossing, the railroad company must construct it at the place designated if such location is a reasonable one;[16] but if the landowner refuses to designate the place of crossing, the railroad company may do so provided it furnishes an adequate crossing.[17]

Where the landowner is authorized to construct a crossing, on failure of the railroad to do so, and recover the cost from the railroad company, he must,

98. Ohio—Gratz v Lake Erie, etc., R. Co, 81 N.E. 239, 76 Ohio St 230

99. Ohio—Jones Fertilizing Co. v. Cleveland, etc, R Co, 2 Ohio S. & C. P. 511, 7 Ohio N.P 245

1. Ky—Louisville, etc, R Co v. Emerson, 100 S.W. 863, 125 Ky. 104, 30 Ky L. 1149
51 C.J. p 703 note 55

2. Iowa—Chicago, M, St. P & P R Co v Cross, 234 N.W. 569, 212 Iowa 218
N.Y.—Smith v. New York Cent. R. Co, 257 N.Y.S. 313, 235 App.Div 262.
51 C.J. p 703 note 58.
Purpose of crossing see infra § 172 c.

3. Ill.—Williams v. Chicago, etc., R Co, 81 N.E. 1133, 228 Ill. 593.

4. Md—Tolbert v. Philadelphia, etc., R. Co, 95 A. 49, 126 Md. 569.
51 C.J. p 703 note 60.

5. Miss.—Jackson v St Louis, etc., R. Co, 81 So. 796, 120 Miss. 149—State R Commission v. Illinois Cent R Co., 73 So 878, 113 Miss. 92, L.R.A.1917D 907.

6. Colo—Denver, etc., R. Co. v. Pacific Lumber Co., 278 P. 1022, 86 Colo 86

7. N.J—Marino v. New Jersey Cent. R Co., 56 A 306, 69 N.J.Law 628.

8. Tex—International, etc, R Co. v. Williams, Civ.App., 175 S.W. 486.

9. N.J.—W. A. Manda, Inc. v. Delaware, etc, R Co, 94 A. 637, 84 N.J.Eq 624.
51 C.J. p 703 note 65

10. N.Y.—Buffalo Stone, etc, Co. v Delaware, etc., R. Co., 7 N.Y.S. 604, affirmed 29 N.E 121, 130 N.Y. 152
51 C.J. p 703 note 66.

11. N.Y—Wademan v. Albany, etc, R Co., 51 N.Y. 568.
51 C.J. p 703 note 67.

12. N.Y.—Jones v. Seligman, 81 N. Y. 190.

13. N.Y—Beardsley v. Lehigh Valley R Co, 65 Hun 502, 20 N.Y.S. 458, affirmed 36 N.E. 877, 142 N.Y. 173.
51 C.J. p 703 note 69.

14. Tenn—Shipp v. Belt R Co, 180 S.W. 318, 133 Tenn 238
51 C.J. p 703 note 70.

15. Ill—Smith v. Bush, 211 Ill App. 83.
Tenn—Shipp v. Belt R. Co, 180 S. W. 318, 133 Tenn. 238.

16. Iowa.—Van Vranklin v Wisconsin, etc, R. Co, 27 N.W 761, 68 Iowa 576—Boggs v. Chicago, etc., R. Co, 6 N.W. 744, 54 Iowa 435.

17. Iowa.—Schrimper v. Chicago, etc., R. Co, 82 N.W. 916, 87 N.W 731, 115 Iowa 35.

in locating the crossing, do so with due regard to the interest of the railroad company and the safety of the public[18] The fact that the landowner and the railroad cannot agree on the location does not relieve the railroad of its duties under the statute,[19] and in some jurisdictions the statutes provide that if the parties cannot agree as to the number and location of the crossings, these questions shall be determined by commissioners or some other tribunal designated for that purpose.[20]

b. Number

Where, by contract or covenant in the deed of right of way, the railroad agrees to construct several crossings, it must comply with its agreement, even though a statute requires only a single crossing. Where a statute requires only one crossing, the landowner is not entitled to more than one, but where a statute requires crossings or suitable, sufficient, or necessary crossings, the railroad company must construct whatever number is reasonably necessary.

Where, by contract or covenant in the deed of right of way, the railroad agrees to construct several crossings, it must comply with its agreement,[21] even though a statute requires only a single crossing[22] Where a statute requires only one crossing, the landowner is not entitled to more than one if a suitable crossing is provided,[23] but where it does not specify any number but merely requires crossings or suitable, sufficient, or necessary crossings, the railroad company must construct whatever number is reasonably necessary for the proper accommodation of the landowner,[24] which is ordinarily a question of fact depending on the circumstances of the particular case,[25] and if it be shown that the number originally constructed is not sufficient, the company may be compelled to construct additional crossings,[26] but it is not required to construct any more than are reasonably necessary;[27] nor has the landowner any right to construct additional crossings at other places at his own expense[28]

c. Purpose

In some jurisdictions the statutes requiring farm crossings are held not limited to crossings solely for agricultural purposes, but in other jurisdictions it is held that owners of land not used for agricultural purposes are not entitled to crossings.

In some jurisdictions the statutes requiring farm crossings are held not limited to crossings solely for agricultural purposes,[29] but include crossings to remove the natural products of the land[30] In other jurisdictions, however, it is held that owners of land not used for agricultural purposes are not entitled to crossings[31]

§ 173. —— Character and Sufficiency of Crossings

Where a railroad company is required to construct crossings, the crossing must be such as reasonably to meet the necessities and convenience of the land owner. It is competent for the railroad company and the landowner to agree as to the character of the crossing. If the statutes do not specify the character of the crossing, its character is to be determined on a proper consideration of all the interests involved.

Where a railroad company is required to construct crossings, the crossing must be such as reasonably to meet the necessities and convenience of the land owner.[32] It is competent for the railroad

18. Ill.—Chalcraft v. Louisville, etc., R. Co., 113 Ill. 86.
51 C.J. p 703 note 74.

19. Del.—Richards v. Baltimore, etc, R Co., 143 A. 404, 4 W.W. Harr. 90.

20. Vt.—Connecticut, etc., R Co v Holton, 32 Vt 43.
51 C.J. p 703 note 76.

21. Iowa.—Gray v. Burlington, etc., R. Co., 37 Iowa 119.

22. Iowa.—Gray v. Burlington, etc., R. Co, supra.

23. Iowa.—State v. Burlington, etc., R. Co, 68 N.W. 819, 99 Iowa 565
Tex.—McDaniel v Burlington-Rock Island R. Co., Civ.App, 200 S W 2d 724.

24. Miss.—Alabama, etc, R. Co. v. Odeneal, 19 So. 202, 73 Miss. 34.
N.Y.—Jones v. Seligman, 81 N.Y 190.

25. N.Y.—Alabama, etc, R. Co v. Odeneal, 19 So 202, 73 Miss. 34.
51 C J p 704 note 81.

26. Ky.—Louisville, etc., R. Co. v. Emerson, 100 S W 863, 30 Ky.L 1149.
51 C J. p 704 note 82

27. N.Y.—Van Kleeck v. Dutchess County R Co, 78 Hun 263, 28 N Y.S. 902.

28. Vt.—Connecticut, etc., R. Co v. Holton, 32 Vt. 43.

29. Pa.—Quigg v. Commonwealth, 54 Pa.Dist & Co 141, 61 Montg.Co. 189—Hespenheide v. King, 48 Pittsb Leg J. 242.
51 C J. p 704 note 85.
Working of land
(1) It may be that the use of the crossing is confined by the act to some purpose necessary to the working of the land, but that purpose need not necessarily be farming—Quigg v. Commonwealth, 54 Pa.Dist. & Co. 141, 61 Mont.Co. 189.

(2) Where the land was used as a golf course, the railroad was entitled to an injunction to restrain players from using a crossing in going from one part of the links to another, but the occupier of the land, in order to keep the links in proper condition by rolling and cutting the grass, had a right to take its rollers and mowing machines over the crossing.—Pennsylvania R. Co. v. Bala Golf Club, 16 Pa Dist 357.

30. N.Y.—Buffalo Stone, etc, Co. v. Delaware, etc., R. Co, 29 N.E 121, 130 N.Y. 152

31. Ill.—Williams v. Chicago, etc, R. Co., 81 N E. 1133, 228 Ill 593
51 C.J. p 704 note 89
Statute requiring farm crossings as not applicable to residential property see supra § 171

32. Ky.—Louisville, etc., R. Co. v. Troutman, 127 S W. 474, 137 Ky. 827.
51 C.J. p 704 note 91.
Sufficiency for mining equipment
Under statute, a railroad company is required to build a sufficient causeway to enable occupant to pass over with wagons, carts and implements of husbandry, but a railroad is not required to construct a cause-

company and landowner to agree as to the character of the crossing,[33] if it is not such as to endanger the safety of the public,[34] and to provide whether it shall be at grade or otherwise.[35] If the statutes do not specify the character of crossing, its character is not to be determined solely with respect to the convenience of the landowner,[36] or the convenience of, or expense to, the railroad company,[37] but on a proper consideration of all the interests involved [38] In such cases the railroad company may decide the character of crossing, subject only to the limitation that it shall be suitable, sufficient, or adequate, within the meaning of the statutes,[39] which is ordinarily a question of fact to be determined with respect to the circumstances of the particular case,[40] and the landowner cannot demand as a matter of right either a grade crossing[41] or a crossing above or below grade.[42]

Grade crossings are the kind usually constructed and are ordinarily adequate;[43] but if owing to the location and conditions such a crossing is not adequate, the railroad company must provide an overcrossing or undercrossing,[44] although it involves considerable additional expense.[45] The statutes prohibiting grade crossings of highways do not apply to private ways,[46] but a statute abolishing private or farm grade crossings is a valid exercise of the police power of the state.[47] A statute requiring the railroad to construct farm crossings and cattle guards does not require construction of farm crossings which will need cattle guards.[48]

Open and closed crossings. The landowner and the railroad may agree on whether the crossing shall be open or provided with gates or bars.[49] Whether the crossing shall be an open one or may be constructed with gates or bars depends somewhat on the character of its use.[50] A closed crossing provided with suitable gates is not necessarily improper or inadequate,[51] and it has been held that such a crossing is sufficient as a means of affording access between adjacent fields or parts of a pasture,[52] but that, where the crossing is to afford access to a highway and is much used, the landowner is entitled to an open crossing unobstructed by gates,[53] unless the circumstances would render such a crossing dangerous to persons and property transported by the railroad.[54]

§ 174. —— Removal, Change, or Obstruction of Crossing

Where a landowner is entitled to the crossing and one has been constructed, the railroad company has no right to change or obstruct it.

Where a landowner is entitled to the crossing and one has been constructed, the railroad company has no right to change or obstruct it,[55] even though the obstruction of the crossing by the railroad company is created pursuant to an order of an administrative body,[56] and if it does so it may be required to restore the crossing or compensate the landowner

way adequate for the passage of equipment necessary to mine and transport coal which is on the land, the owner's remedy for interference with mining and transporting his coal being through the jury of view appointed to determine general damages from construction of the railroad —Petition of Ferguson, 86 A. 73, 238 Pa. 78

33. Kan.—Chicago, etc., R. Co. v. Wynkoop, 85 P. 595, 73 Kan. 590. 51 C.J. p 704 note 92.

34. Tex.—Missouri, etc., R. Co. v. Chenault, 60 S.W. 55, 24 Tex.Civ. App 481

35. Kan.—Chicago, etc., R. Co v. Wynkoop, 85 P. 595, 73 Kan. 590.

36. Iowa.—Klopp v. Chicago, etc., R. Co., 157 N.W. 230, 175 Iowa 534. 51 C.J. p 704 note 95.

37. Iowa.—Klopp v. Chicago, etc., R. Co., supra—Herrstrom v. Newton, etc., R. Co., 105 N.W. 436, 129 Iowa 507.

38. Iowa.—Truesdale v. Jensen, 59 N.W. 47, 91 Iowa 312. 51 C.J. p 705 note 97.

39. Iowa.—Guinn v. Iowa, etc., R. Co., 101 N.W. 94, 125 Iowa 301.

40. Iowa.—State v. Burlington, etc., R Co, 68 N.W. 819, 99 Iowa 565 51 C J. p 705 note 99.

41. Iowa.—Guinn v. Iowa, etc., R. Co., 101 N.W. 94, 125 Iowa 301.

42. Iowa —State v. Burlington, etc., R Co, 68 N.W. 819, 99 Iowa 565 51 C J. p 705 note 2

43. Iowa —Schrimper v. Chicago, etc, R Co., 82 N.W. 916, 87 N.W. 731, 115 Iowa 35. 51 C.J. p 705 note 3

44. Mo.—Powell v Atchison, etc., R Co., 114 S.W. 1067, 215 Mo. 339 51 C.J. p 705 note 4

45. Iowa.—Herrstrom v. Newton, etc., R. Co., 105 N.W. 436, 129 Iowa 507.

46. Ohio —Erie R. Co. v. S. H. Kleinman Realty Co., 110 N.E. 527, 92 Ohio St. 96.

47. Neb.—Holmberg v. Chicago, etc., R. Co., 214 N.W. 746, 115 Neb. 727.

48. Vt.—Libby v. Canadian Pac. R. Co., 73 A. 593, 82 Vt. 316.

49. N.H.—Peppin v. Boston & M. R. R., 169 A. 877, 86 N.H. 395. 51 C.J. p 705 note 9.

50. Iowa —State v. Burlington, etc, R. Co., 68 N.W. 819, 99 Iowa 565.

51. Miss —Yazoo, etc., R. Co. v. Anderson, 25 So. 295, 76 Miss. 582. 51 C.J. p 705 note 11.

52. Iowa.—State v. Burlington, etc., R. Co., 68 N.W. 819, 99 Iowa 565. 51 C.J. p 705 note 12.

53. Iowa —Boggs v. Chicago, etc., R. Co., 6 N.W. 744, 54 Iowa 435— Gray v. Burlington, etc., R. Co., 37 Iowa 119.

54. Iowa —Truesdale v. Jensen, 59 N.W. 47, 91 Iowa 312.

55. Wis.—Henbest v. Chicago, etc, R. Co., 207 N.W. 303, 189 Wis 141. 51 C.J p 705 note 15.

Expense of closing

If, in a proceeding for the elimination of public and grade crossings, it becomes necessary or expedient to close private crossings also, the expense of closing them must be borne by the railroad company and no part of it can be imposed on the municipal corporation.—In re New York Cent., etc., R. Co., 93 N.E. 515, 200 N.Y. 121.

56. Ariz —Curtis v. Southern Pac. Co., 8 P.2d 1078, 39 Ariz. 570.

in damages, as discussed infra § 182. It is held that the property owner has a vested right to the crossing,[57] and when a railroad, having agreed to maintain a crossing, constructs an open crossing, it cannot thereafter obstruct it with gates or bars;[58] and this is held where the railroad, having given a right of way deed over its tracks, allows an open crossing to be maintained for a long period of time;[59] and when a railroad, although not obliged to do so, constructs a crossing, it becomes the property of the landowner like any other fixture, so that it cannot be removed.[60] A landowner who is allowed the use of an archway under a track may go on the right of way to remove obstructions from the archway.[61] A crossing to which the landowner has no right, and has acquired none by prescription, may be closed by the railroad.[62] The landowner cannot require a change in the crossing constructed by the railroad under agreement with him unless changed conditions make the alteration necessary.[63] The landowner is, however, bound to anticipate such changes and alterations in the railroad as public necessity may require,[64] and the railroad company may, for the purpose of making such necessary alterations in its road, change the location of a crossing,[65] or change its character as from an under or overhead crossing to a grade crossing,[66] or place gates at an open crossing where its use as an open crossing has become dangerous to the operation of trains;[67] but where the only reason for changing the crossing is to save expense, safety of the public offers no excuse.[68] A railroad company may also change the location of a crossing where its existence at the original location interferes with the safe operation of the railroad.[69] However, the railroad company cannot, even where the changes are so made, deprive the landowner without compensation of the accommodation to which he is entitled,[70] and must provide such a crossing as he is entitled to or make compensation in damages,[71] although the changes are not made voluntarily by the railroad company but under the compulsion of a decree of court.[72] Where the contract of the railroad company to construct a crossing is so limited as not to include the approaches, if the grade of the crossing is subsequently changed the necessary alterations in the approaches must be made by the landowner.[73]

§ 175. —— Agreement with, or Waiver by, Landowner

The landowner may agree to the substitution of a new crossing at a different place for an old crossing to which he is entitled, and, where a railroad company is required by statute to construct crossings, this duty may be waived entirely by the landowner for whose benefit they are to be constructed.

The landowner may agree to the substitution of a new crossing at a different place for an old crossing to which he is entitled;[74] and, where a landowner expressly agrees to abandon an existing grade crossing in consideration of being allowed an overhead crossing, he cannot afterward use both.[75] So, also, where a railroad company is required by statute to construct crossings, this duty may be waived entirely by the landowner for whose benefit they are to be constructed;[76] but the right to a crossing or crossings of the number, location, and character to which he is entitled is not waived by the assessment and receipt of the damages in condemnation proceedings,[77] or by a conveyance of a right of way which makes no express provision as to crossings,[78] or by a right-of-way deed requiring the railroad to maintain cattle guards;[79] nor is an agree-

57. Pa.—Green v. Baltimore, etc., R. Co., 91 A. 248, 245 Pa. 35.

58. Mass.—Williams v. Clark, 5 N. E. 802, 140 Mass. 238.
Tex.—Gulf, etc., R. Co. v. Schawe, 55 S.W. 357, 22 Tex.Civ.App. 609

59. Mass.—Hamlin v. New York, etc., R. Co., 57 N.E. 1006, 176 Mass. 514.

60. N.H.—March v. Portsmouth, etc., R. Co., 19 N.H. 372.

61. Iowa.—Hastings v. Chicago, etc., R. Co., 126 N.W. 786, 148 Iowa 390

62. Ill.—Cleveland, etc., R. Co. v. Munsell, 61 N.E. 374, 192 Ill. 430

63. Neb.—Postle v. Chicago, etc., R. Co., 152 N.W. 379, 98 Neb. 192.

64. N.J.—Speer v. Erie R. Co., 60 A. 197, 68 N.J.Eq. 615.
51 C.J. p. 706 note 24.

65. N.H.—Costello v. Grand Trunk R. Co., 47 A. 265, 70 N.H. 403
51 C.J. p. 706 note 25.

66. Iowa.—Schrimper v. Chicago, etc., R. Co., 82 N.W. 916, 87 N.W. 731, 115 Iowa 35
51 C.J. p. 706 note 26.

67. Iowa.—Aistrope v. Tabor, etc., R. Co., 75 N.W. 334, 105 Iowa 463

68. Mo.—Swisher v. Chicago, etc., R. Co., 138 S.W. 505, 235 Mo. 430.

69. Iowa.—Hartshorn v. Chicago Great Western R. Co., 113 N.W. 840, 137 Iowa 324
N.H.—Bolger v. Boston, etc., R. Co., 134 A. 524, 82 N.H. 372.

70. N.J.—Speer v. Erie R. Co., 60 A. 197, 68 N.J.Eq. 615.
51 C.J. p. 706 note 30.

71. Ky.—Chesapeake, etc., R. Co. v. Richardson, 98 S.W. 1042, 30 Ky.L. 426.
51 C.J. p. 706 note 31.

72. N.J.—Speer v. Erie R. Co., 60 A. 197, 68 N.J.Eq. 615.

73. Mass.—Williams v. Clark, 5 N. E. 802, 140 Mass. 238.
51 C.J. p. 706 note 33.

74. Mass.—Hamlin v. New York, etc., R. Co., 44 N.E. 444, 166 Mass. 462.
51 C.J. p. 706 note 35.

75. Pa.—Speese v. Schuylkill River East Side R. Co., 51 A. 316, 201 Pa. 568.

76. Md.—Tolbert v. Philadelphia, etc., R. Co., 95 A. 49, 126 Md. 569
Mo.—Madison v. Missouri Pac. R. Co., 60 Mo.App. 599.

77. N.Y.—Beardsley v. Lehigh Valley R. Co., 36 N.E. 877, 142 N.Y. 173.
51 C.J. p. 707 note 38.

78. Md.—Tolbert v. Philadelphia, etc., R. Co., 95 A. 49, 126 Md. 569.
51 C.J. p. 707 note 39.

79. N.J.—Rockaway Rolling Mill

ment by a landowner to the construction of a public crossing on his land a waiver of his right to a private crossing to which he is entitled by statute;[80] but it has been held that conveyance of an additional strip of land along the right of way, without reserving a right to cross, estops the owner to claim a crossing.[81] Nonuser by the landowner may estop him to claim the right to a particular crossing.[82] Performance of the requirement of an agreement that stock gaps be constructed within a reasonable time is waived by the landowner thereafter urging performance and accepting it as satisfactory.[83]

§ 176. Fences and Cattle Guards

The duty to construct fences and cattle guards is discussed infra § 177, the time for construction infra § 178, and the places at which fences or cattle guards are required infra § 179. The nature and sufficiency of the fences and cattle guards are discussed infra § 180, and the effect of a waiver or an agreement with the adjoining landowner infra § 181.

Examine Pocket Parts for later cases.

§ 177. —— Duty to Construct

In the absence of a statute or agreement, a railroad company is not obliged to fence its tracks or to construct cattle guards, but the railroad must erect or construct fences or cattle guards where its charter or a statute so provides.

In the absence of a statute or agreement, a railroad company is not obliged to fence its tracks[84] or to construct cattle guards,[85] and if it does so voluntarily, it is not obliged subsequently to maintain and keep them in repair,[86] although it has been held that, where it has done so for the prescriptive period, there is a conclusive presumption of an agreement binding the railroad to do so.[87] In the absence of a special statute or agreement, an adjoining landowner is not required to erect or assist in maintaining any part thereof,[88] nor has he any right to go on the railroad right of way and construct cattle guards for his own benefit where the road passes through his land.[89] Where a right of way is secured by expropriation, it is held that the railroad's duty to construct cattle guards results not from contract, but from law.[90]

The railroad must erect and maintain fences where its charter[91] or a statute[92] so provides. The legislature may, under the police power of the state, require railroad companies to fence their tracks or construct cattle guards,[93] or make the company liable without regard to negligence in the operation of trains in case of failure to do so.[94] Some of these statutes are not designed for, and have no

Corp. v Delaware, etc, R. Co, 137 A. 650, 101 N.J.Eq 192.

80. Iowa—Herrstrom v. Newton, etc., R. Co., 105 N.W 436, 129 Iowa 507.

81. Tenn—Shipp v. Belt R Co, 180 S.W. 318, 133 Tex. 238.
51 C.J. p 707 note 43.

82. Md—Cityco Realty Co. v. Philadelphia, etc, R. Co, 148 A. 441, 158 Md 221
51 C.J. p 707 note 44.

83. Ga.—Westmoreland v. Gainesville, etc., R. Co., 107 S.E. 891, 27 Ga App. 176.

84. La—Friedman's Estate v Texas & Pac Ry Co, 25 So 2d 88, 209 La. 540, 160 A.L.R 1228—Jackson v. Texas & Pac Ry. Co., 117 So 805, 166 La 718—Sanders v Illinois Central Railroad Co., 54 So 147, 127 La. 917—Moody v. Texas & P. Ry. Co, App., 37 So.2d 346—Smith v. Thompson, App, 185 So. 71—Davis v Louisiana Railway & Navigation Co., 127 So. 441, 13 La App 148
N.M.—Hittson v. Chicago, R I. & P Ry. Co, 86 P.2d 1037, 43 N M 122
Pa.—Malischewski v. Pennsylvania R. Co., 52 A.2d 215, 356 Pa. 554
51 C.J. p 707 note 47.

85. La.—Moody v. Texas P. Ry. Co, App, 37 So.2d 346.
51 C.J p 707 note 48.

86. La—Moody v. Texas & P. Ry Co, supra.
51 C.J. p 707 note 49.

87. Fla—McRae v. Atlanta & S A B. Ry. Co, 23 So 2d 76, 156 Fla. 200
N.J.—Titus v. Pennsylvania R Co, 92 A 944, 87 N.J.Law 157, Ann.Cas 1917B 1251

Commencement of prescriptive period

Where statute requiring fences inclosing railroads did not require railroad to build connecting fences where it entered or departed from inclosed farm land through which it passed, connecting fences constructed by railroad at such points were not constructed under statute and commencement of prescriptive period giving rise to right of landowner to continued maintenance of fences was not delayed until date when statute was held invalid.—McRae v. Atlanta & S A. B. Ry. Co, 23 So 2d 76, 156 Fla. 200.

88. Mass—Boston, etc., R. Co. v. Briggs, 132 Mass. 24.
51 C.J. p 707 note 51.

89. Ill—Alton, etc., R. Co. v. Baugh, 14 Ill. 211.
51 C.J. p 707 note 52.

90. La—State v. Colorado Southern, etc, R. Co, 44 So. 905, 120 La 9.

91. Vt—Hurd v. Rutland, etc, R. Co., 25 Vt. 116.
51 C.J p 707 note 54.

92. Ohio—Davis v. Baltimore & O. R Co, 20 N.E.2d 381, 60 Ohio App. 245.
Utah—Wilde v. Union Pac. R. Co., 84 P.2d 1085, 96 Utah 164—Edwards v. Salt Lake & Utah R. Co, 261 P 445, 70 Utah 496.
51 C.J. p 707 note 55.

Damages not a penalty

In statute requiring railroad to fence track and erect farm crossings and cattle guards and imposing liability for "damages" in event of failure, word "damages" did not refer to a penalty.—Sycamore Preserve Works v. Chicago & N. W. R. Co., 1 N.E 2d 522, 284 Ill.App. 445, reversed on other grounds 7 N.E.2d 740, 366 Ill. 11, 111 A.L.R. 1133, conformed to 12 N.E.2d 42, 293 Ill.App. 20.

93. Okl.—Missouri-Kansas-Texas R. Co. v. Stephens, 16 P 2d 117, 160 Okl. 143—St. Louis & S F. R. Co v. Williams, 122 P. 152, 31 Okl. 450.
51 C.J. p 708 note 56.

94. Wis—Quackenbush v Wisconsin, etc., R Co, 22 N.W. 519, 62 Wis. 411, 37 N.W 834, 71 Wis. 472.
51 C.J. p 708 note 57.

application to, the protection of the lands or property of the adjoining landowner, but are designed solely for the public safety, the protection of the railroad company and its freight and passengers, or to prevent animals from coming on the track and being injured.[95]

There are, however, in a number of jurisdictions, statutory provisions which are designed for, or the application of which includes, the protection of the lands, stock, and crops of adjacent landowners, and which require the railroad company to construct fences and cattle guards.[96] The statutes apply whether the railroad company acquires its right of way by purchase or condemnation,[97] and whether it has merely an easement or an absolute title,[98] and whether the road was chartered before or after its passage,[99] but the requirement does not apply if, in the assessment of damages in condemnation proceedings, the landowner received compensation for such fences as the statute requires.[1] The obligation, being purely statutory, comes into existence, is modified, or goes out of existence by the enactment, change, or repeal of the statutes,[2] and its nature and extent are determined by the provisions of the statute.[3]

These statutes are generally strictly construed,[4] although it has been held that, being remedial, they should receive a liberal construction.[5] A statute with respect to fencing will not be construed as repealing a former statute on the same subject or affecting the duties and liabilities imposed thereby if the two are not inconsistent and can stand together;[6] but a statute requiring in general terms that all railroad companies shall fence their tracks and construct cattle guards will be construed as repealing a former statute under which such duties were dependent on the action of the county commissioners in prescribing rules for their construction.[7] The duty to fence may be implied from statutes making railroads liable for injuries to animals where their tracks are not fenced,[8] or permitting adjoining owners, after notice to the company, to construct fences on its failure to do so, and to recover from the company the expenses of such construction.[9]

Cattle guards. The railroad must construct cattle guards when the statute or charter expressly requires it.[10] Without an express cattle guard provision, it is held that the duty exists by implication whenever a statute requires the erection and maintenance of fences.[11] If the statute requires the railroad company to fence its right of way through certain lands, it is not sufficient merely to construct cattle guards where the road enters and leaves such lands[12] or to keep a watchman on guard at such places;[13] and, conversely, if the statute requires the construction of cattle guards where the road passes through a field or inclosure, it is not sufficient to fence the right of way through such land.[14]

Repair. It is the duty of the company to keep fences and cattle guards, erected pursuant to statute, in a proper state of repair.[15]

95. Okl.—Missouri-Kansas-Texas R. Co. v Stephens, 16 P.2d 117, 160 Okl. 143—St. Louis & S F R Co v. Williams, 122 P. 152, 31 Okl 450
51 C J. p 708 note 59.

96. Tenn—Louisville, etc, R. Co. v. Timmons, 91 S.W. 1116, 116 Tenn. 29
Tex.—Southwestern Tel., etc., Co v. Krause, Civ.App., 92 S W. 431

97. Tex—Missouri, etc., R Co v. Wetz, 80 S W. 988, 97 Tex 581
51 C.J. p 708 note 61.

98. Ark.—Chicago, etc, R Co. v. Fitzhugh, 100 S.W. 1149, 82 Ark. 179.
Kan—Missouri Pac. R. Co. v Manson, 2 P. 800, 31 Kan. 337.

99. Ill.—Illinois Cent R. Co v Willenborg, 7 N E 698, 117 Ill. 203, 57 Am R. 862.
Me.—Wilder v. Maine Cent R. Co., 65 Me. 332, 20 Am R 698

1. Ky.—Hanger v. Louisville, etc., R. Co., 236 S W. 568, 193 Ky. 419.
Pa.—Welles v. Northern Cent R. Co., 25 A. 51, 150 Pa. 620.

2. Wash—Huffman v. Oregon R., etc., Co, 107 P. 362, 57 Wash. 494.
51 C J p 709 note 65.

3. Ky—Crawford v. Southern R Co., 156 S.W. 861, 153 Ky. 812, 150 S W. 990, 150 Ky. 741.
51 C.J. p 709 note 66.

Acquisition of right of way prior to enactment

Where railroad right of way was donated by landowner prior to the enactment of a valid statute requiring railroad company to do all fencing and maintenance along right of way at its own cost, railroad was not required to repair and maintain the fencing along railroad right of way. —Southern Ry. Co. in Kentucky v. Dawson, 138 S.W.2d 326, 282 Ky. 198
51 C.J. p 709 note 66 [b] (6).

4. Ala.—Georgia Cent. R. Co. v. Carroll, 50 So. 235, 163 Ala. 84.
51 C.J p 709 note 67.

5. Ind.—Vandalia R. Co v. Miller, 90 N.E 907, 45 Ind.App. 366.
51 C.J. p 709 note 68.

6. Ind—Jeffersonville, etc., R. Co. v. Dunlap, 13 N E 403, 112 Ind 93.
51 C J. p 709 note 69.

7. Minn—Gowan v. St. Paul, etc., R Co, 25 Minn 328

8. Tenn—Louisville & N. R. Co v. Gillespie, 172 S W 2d 1015, 26 Tenn App. 390.
51 C J p 709 note 71.

9. N.H—Cornwall v. Sullivan R Co, 28 N H 161.

10. Ky—Lexington, etc., R. Co v. Russell, 197 S W. 523, 177 Ky. 79
51 C J. p 709 note 73.

11. Idaho—Patrie v Oregon Short-Line R Co., 56 P. 82, 6 Idaho 448.
51 C J p 710 note 74.

12. Mo—Shotwell v. St. Joseph, etc, R Co, 37 Mo.App. 654.

13. Mo—Shotwell v. St. Joseph, etc., R. Co., supra.

14. Tex—Missouri, etc., R. Co v Wetz, 80 S.W. 988, 97 Tex. 581

15. Ga—Elberton & E R. Co. v Campbell, 167 S E. 215, 46 Ga App. 203.
51 C.J. p 710 note 78.

Order by railroad commissions. Statutes in some jurisdictions empower the railroad commission to order fences and cattle guards[16] Such statutes have been held not to empower the commission to require cattle guards at crossings regardless of conditions thereat.[17] The commission should determine the kind of guards necessary to make the crossing safe.[18]

Electric railroads. Electric railroads have been held to be within the terms of statutes requiring fences and cattle guards.[19]

Statutes requiring demand or notice. Notice, or demand for construction, is in some jurisdictions required by statute before the railroad has the duty to do so[20] The notice or demand must comply with the statutory requirements.[21] Such a statute is not a penal statute requiring strict construction[22] While notice or demand, under such statutes, is necessary to secure the erection of cattle guards,[23] under some statutes no further demand is necessary to make it the duty of the railroad to repair.[24] Demand need not be made on the special agent who is authorized by the railroad to construct the guards[25] Where the railroad and landowner agree as to construction of fences, no demand is necessary.[26]

Application and effect of fence or stock laws. Railroad fences are not regarded as partition fences between adjoining landowners, to be constructed and maintained under the terms of the partition fence laws,[27] and the statutes relating to the construction and maintenance of partition fences are ordinarily held not to apply as between railroad companies and the owners of lands adjacent to the railroad right of way,[28] although a distinction has been made between cases where the railroad company has a mere easement and where it owns its right of way absolutely.[29] So, also, the existence of a stock law in a particular locality prohibiting stock from running at large does not affect the statutory duty of a railroad company to construct fences and cattle guards,[30] although it has been held that in such a locality stock gaps and cattle guards are unnecessary.[31]

§ 178. —— Time for Construction

The time for construction of fences or cattle guards depends on statutory provisions or on the provisions of the contract imposing the duty to construct.

In some jurisdictions the statutes require the construction of fences and cattle guards within a certain specified time,[32] and statutes requiring fencing within a certain time after the road is open for use have been held to mean after the railroad begins to run its trains.[33] Where the statutes require fencing but do not specify the time for their construction, the obligation is concurrent with the existence of the necessity for the protection which the requirement is designed to afford,[34] which necessity arises as soon as the railroad has opened up its right of way through the fences and inclosures of the lands through which it passes.[35]

The fences required should be constructed at least by the time the railroad is put in operation,[36] and while it cannot be said as a matter of law that the railroad company must construct them before this time,[37] it is not as a matter of law entitled to wait

Reasonable care
Railroad must exercise reasonable care in maintenance of its fences — Hildebrand v. Chicago, B. & Q. R. R., 17 P.2d 651, 45 Wyo. 175.

16. S.D.—Dwyer v. Chicago, etc., R. Co., 166 N.W. 237, 40 S.D. 84.
51 C.J. p. 710 note 79.

17. S.D.—Dwyer v. Chicago, etc., R. Co., supra.

18. S.D.—Dwyer v. Chicago, etc., R. Co., supra.

19. Mo.—Morrison v. Kansas City, etc., R. Co., 145 S.W. 137, 162 Mo. App. 662.

20. Iowa.—Rutherford v. Iowa Cent. R. Co., 121 N.W. 703, 142 Iowa 744.
51 C.J. p. 710 note 85.

21. Ala.—Alabama, etc., R. Corp. v. Norwood, etc., Farm, etc., Co., 92 So. 199, 18 Ala. App. 337.
51 C.J. p. 710 note 86.

22. Okl.—St. Louis, etc., R. Co. v. Steele, 133 P. 209, 37 Okl. 536.

23. Ala.—Georgia Cent. R. Co. v. Carroll, 50 So. 235, 163 Ala. 84—Alabama, etc., R. Corp. v. Norwood, etc., Farm, etc., Co., 92 So. 199, 18 Ala. App. 337

24. Ala.—Georgia Cent. R. Co. v. Carroll, 50 So. 235, 163 Ala. 84—Atlanta, etc., Air Line R. Co. v. Brown, 48 So. 73, 158 Ala. 607.

25. Ala.—Atlanta, etc., Air Line R. Co. v. Brown, supra.

26. Kan.—Stanley v. Atchison, etc., Co., 127 P. 620, 88 Kan. 84.
51 C.J. p. 710 note 91.

27. Minn.—Smith v. Minneapolis, etc., R. Co., 33 N.W. 316, 37 Minn. 103.
Mo.—Busby v. St. Louis, etc., R. Co., 81 Mo. 43.

28. U.S.—Ward v. Paducah, etc., R. Co., C.C.Tenn., 4 F. 862.
51 C.J. p. 710 note 93.

29. N.H.—Dean v. Sullivan R. Co., 22 N.H. 316.
51 C.J. p. 711 note 94.

30. N.C.—Shepard v. Suffolk, etc., R. Co., 53 S.E. 137, 140 N.C. 391.

Okl.—St. Louis, etc., R. Co. v. Steele, 133 P. 209, 37 Okl. 536.

31. Miss.—Canton, etc., R. Co. v. French, 23 So. 357, 75 Miss. 939

32. Ill.—Sycamore Preserve Works v. Chicago & N. W. R. Co., 1 N.E. 2d 522, 284 Ill. App. 445, reversed on other grounds 7 N.E.2d 740, 366 Ill. 11, 111 A.L.R. 1133, conformed to 12 N.E.2d 42, 293 Ill.App. 20.
51 C.J. p. 711 note 98.

33. Ill.—St. Louis, etc., R. Co. v. Smith, 74 N.E. 1063, 216 Ill. 339.
51 C.J. p. 711 note 98.

34. Mo.—Silver v. Kansas City, etc., R. Co., 78 Mo. 528, 47 Am.R. 118.
51 C.J. p. 711 note 99.

35. Mo.—Silver v. Kansas City, etc., R. Co., supra.
51 C.J. p. 711 note 1.

36. Mo.—Comings v. Hannibal, etc., R. Co., 48 Mo. 512.
51 C.J. p. 711 note 2.

37. Mo.—Comings v. Hannibal, etc., R. Co., supra.
51 C.J. p. 711 note 3.

until such time,[38] or until the road is so far completed as to enable it to transport materials thereon from a distance,[39] and where during the process of construction the railroad company makes openings through the fences of a landowner, if it does not then construct its fences it must adopt other measures to protect the landowner and prevent the escape of his stock and prevent other stock from trespassing on his lands.[40]

Where the duty of fencing is imposed by a contract which does not specify the time for their construction, fences must be constructed within a reasonable time.[41] An agreement to fence within a reasonable time "after the completion" of the railroad will be construed as referring to the completion of the part running through the lands agreed to be fenced, and not to the completion of the entire road, where the completed parts of the road are being operated in advance of the completion of the whole.[42]

§ 179. —— At What Places Required

Under a statutory duty to fence, the places where fences are required depend on such statutory provisions, and a railroad is not required to fence places which are expressly excepted from the operation of the statute. Where the statute expressly designates the points at which cattle guards shall be constructed, it must be complied with.

Under a statutory duty to fence, the places where fences are required depend on such statutory provisions,[43] and a railroad is not required to fence places which are expressly excepted from the operation of the statute.[44] Statutes in some jurisdictions require railroads to fence their roads when they pass through, along, or adjoining inclosed or cultivated lands.[45] Such statutes have been held not to require fences in municipalities[46] or where the road runs through a narrow cañon where there are no cultivated lands,[47] but the fact that the road is double-tracked does not excuse the company from its duty, under the statute, to fence its tracks between proper station limits.[48]

A statute requiring the railroad company to fence where its road passes through inclosed lands applies although the fence inclosing such lands is not strictly a lawful fence,[49] unless the statute expressly requires that it shall be a lawful fence,[50] but the lands must be inclosed.[51] A statute requiring a railroad to fence its right of way where it passes through privately owned and improved lands imposes no duty on the railroad to fence where the right of way is along side of, but not through or over, lands which were or had been privately owned.[52]

Both sides of road. Where the statute requires a railroad company to fence on both sides of its road, it has reference to the sides of the right of way and not merely the track,[53] and the fence must be constructed on the outer edge of the right of way along the line where it meets the lands of the adjoining owner.[54] Under such a statute, it is not necessary to fence between two parallel rail-

38. Mich.—Gardner v. Smith, 7 Mich. 410, 47 Am.D. 722.
51 C.J. p 711 note 4

39. Mo.—Gordon v. Chicago, etc., R. Co., 44 Mo.App. 201.

40. Mich.—Gardner v. Smith, 7 Mich. 410, 74 Am.D. 722.
51 C.J. p 711 note 7

41. Mass.—Lawton v. Fitchburg R. Co., 8 Cush. 230, 54 Am.D. 753.
51 C.J. p 711 note 8.

42. Ind.—Baltimore, etc., R. Co. v. McClellan, 59 Ind. 440

43. Fla.—McRae v. Atlanta & S. A. B. Ry. Co., 23 So.2d 76, 156 Fla. 200.
Particular places where fence of cattle guard required or not required as affecting liability for injury to animals see infra §§ 569–574.

44. **Property within corporate limits of city**
Ill.—Mitchell v. Illinois Cent. R. Co., 51 N.E.2d 271, 384 Ill. 258, 149 A.L.R. 369.

45. Idaho.—Bernardi v. Northern Pac. R. Co., 108 P. 542, 18 Idaho 76, 27 L.R.A.,N.S., 796.
51 C.J. p 711 note 11.

46. Idaho.—Bernardi v. Northern Pac. R. Co., supra.
51 C.J. p 711 note 12.

47. Idaho.—Bernardi v. Northern Pac. R. Co., supra

48. Mo.—Bridges v. Missouri, etc., R. Co., 141 S.W. 440, 159 Mo.App. 577.

49. Mo.—Biggerstaff v. St. Louis, etc., R. Co., 60 Mo. 567.

50. Kan.—Missouri Pac. R. Co. v. Youngstrom, 27 P. 982, 47 Kan. 349.

51. Ind.—Akers v. Louisville, etc., Tract. Co., 127 N.E. 297, 73 Ind.App. 290.
Inclosure completed by railroad fence
Under statute providing that any person, owning land by or through which railroad has been or may be constructed, who has inclosed or may inclose such land or any part thereof with either a lawful or hog-tight fence, may demand of railroad that it inclose its line next thereto with lawful or hog-tight fence, landowner cannot compel railroad to build hog-tight right of way fence until railroad's fence with landowner's fence will complete hog-tight inclosure.—Samuelson v. Union Pac. R. Co., 18 P.2d 122, 136 Kan. 831.

52. Utah.—Wilde v. Union Pac. R. Co., 84 P.2d 1085, 96 Utah 164.
The phrase "passes through" as used in statute requiring railroad to fence right of way where it passes through privately owned and improved lands may mean more than dividing lands privately owned so that the same owner will have lands on both sides of right of way, and may apply where railroad is laid out along the dividing line between two owners or where it takes a strip of privately owned land along one side and where the other side abuts on publicly owned lands.—Wilde v. Union Pac. R. Co., supra

53. Ill.—Ohio, etc., R. Co. v. People, 13 N.E. 236, 121 Ill. 483.

54. Ill.—Ohio, etc., R. Co. v. People, supra.
51 C.J. p 712 note 18.

roads whose exterior lines of their rights of way were properly fenced [55]

Track on bridge or trestle. Statutes requiring railroad companies to fence their tracks for the benefit of adjoining landowners apply although the road is constructed on a bridge or trestle, if there are openings through which stock could pass under the track from one side of the road to the other [56]

Highway crossing. A railroad is not required to fence its right of way across a highway, whether the highway is de facto or de jure a public way.[57]

Cattle guards. Where the statute expressly designates the points at which cattle guards shall be constructed, it must be complied with,[58] and if they cannot be located at the exact point required, they must be located as near thereto as practicable,[59] but the railroad is obliged to construct cattle guards only at the points designated by statute.[60] Where the statute requires cattle guards where a road passes through inclosed lands, it does not apply unless the lands are inclosed,[61] and if inclosed the inclosure must be a substantial one with a fence which will turn stock so as to make the cattle guards of some practical benefit;[62] but if the fence is reasonably sufficient for this purpose, it need not be a strictly lawful fence.[63] The owner of inclosed land has an unconditional right to a cattle guard.[64]

Under a statute requiring construction of cattle guards at terminal points of fences which are required by law, a railroad cannot be compelled to construct cattle guards except where fences may be required,[65] or until such fencing is erected.[66] A statute requiring cattle guards where the road enters or leaves inclosed lands applies to a town lot as well as lands in the country;[67] and a statute requiring cattle guards where the road enters or leaves any improved or fenced land applies to lands fenced or improved after the construction of the railroad as well as before,[68] and is not limited to division fences between different owners but applies to fences dividing the land of the same owner;[69] but if cattle guards are constructed where the road enters or leaves a large inclosure, it is not necessary to construct others between the different parcels of land into which it is divided if there are no fences between such parcels,[70] or to construct other cattle guards at a private crossing within such inclosure.[71]

A statute requiring cattle guards where the road enters the inclosure of a private owner does not apply where it runs between the lands of different owners without severing the lands of either;[72] and, where the statute requires the construction of suitable cattle guards, they need not be constructed at a private crossing where there is no dividing fence and the railroad company has fenced its track and provided gates;[73] and, where the statute requires cattle guards on the dividing line between adjoining owners "when necessary to protect such lands," it is not necessary to construct them if the lands are not inclosed.[74] A statute requiring cattle guards where a railroad crosses the line of any fence is not limited to fences existing at the time the road was built, but applies to those constructed at any time thereafter.[75] It does not apply when the land on which the fences stand is owned by the railroad in fee.[76]

A statute requiring cattle guards at road crossings applies to streets in municipalities as well as to country highways,[77] and the fact that inconven-

55. Ind.—Pickett v Toledo, etc, R. Co., 111 N.E 434, 61 Ind App. 26.

56. Mo.—Baker v Chicago, etc, R. Co, 41 Mo.App. 260

57. Mo.—Walker v Southwest Missouri R. Co, Mo.App, 198 S W. 441.

58. Tex.—Southwestern Tel., etc, Co v. Krause, Civ.App., 92 S.W 431.

59. Kan.—Missouri Pac. R. Co. v. Manson, 2 P 800, 31 Kan. 337.
51 C.J. p 712 note 24.

60. Ky.—Mansfield v. Frankfort, etc., R Co, 234 S.W. 956, 193 Ky 95
51 C J p 712 note 25.

61. Miss.—Yazoo, etc, R. Co. v Sallis, 42 So. 202, 89 Miss. 636
51 C J. p 712 note 26.

62. Miss.—Yazoo, etc., R. Co. v. Sallis, supra.

Tenn.—Louisville, etc., R. Co. v. Timmons, 91 S W 1116, 116 Tenn 29.

63. Ark.—St. Louis Southwestern R. Co v. Warner, 109 S W 1013, 86 Ark. 46—St. Louis, etc, R Co. v. Hale, 100 S W. 1148, 82 Ark 175.

64. Ark.—St. Louis Southwestern R Co v Warner, 109 S W. 1013, 86 Ark 46.
51 C J p 712 note 29.

65. Ky.—Parrish v. Louisville, etc., R Co, 104 S W. 690, 126 Ky. 638, 31 Ky L. 1020, 78 S.W. 186, 25 Ky. L 1524.

66. Ky.—Parrish v. Louisville, etc, R Co, supra.

67. N C.—Shepard v. Suffolk, etc., R Co., 53 S E 137, 140 N C. 391.

68. Iowa.—Heskett v. Wabash, etc., R. Co., 16 N.W. 525, 61 Iowa 467.

Kan.—Atchison, etc, R. Co v. Billings, 52 P. 61, 7 Kan App. 399

69. Iowa.—Smith v. Chicago, etc., R. Co, 38 Iowa 518.

70. Miss.—Gibbons v. Yazoo, etc, R. Co, 33 So. 5

71. Miss.—Gulf, etc, R. Co. v Ellis, 38 So 210, 85 Miss. 586.

72. Tex.—Gulf, etc, R. Co v London, 3 Tex.A Civ.Cas § 426

73. W Va.—Clarke v. Ohio River R. Co, 20 S E 696, 39 W.Va. 732.

74. Ga.—Alabama Great Southern R Co. v. Fowler, 30 S E 242, 104 Ga. 148.

75. S.C.—Burnett v. Southern R Co, 40 S E 679, 62 S C. 281.

76. S.C.—Anderson v. Atlantic Coast Line R. Co., 37 S.E. 944, 59 S C. 350.

77. N.Y.—Brace v. New York Cent. R. Co, 27 N.Y. 269.

ience would result to the railroad does not relieve them from compliance,[78] but such a statute does not require cattle guards at farm crossings.[79] When the statute requires cattle guards at highway crossings whenever the railroad right of way is fenced, the railroad must construct them whether its fencing was voluntary or required by law.[80]

Depot grounds. Fences and cattle guards are not required at depot grounds,[81] but a passing track has been held not to have such connection with a station as to be within the rule.[82] Under a statute expressly excepting depots from fencing, it is not necessary that the railroad maintain a building and a station agent at the point which it leaves unfenced as a depot.[83]

Intersecting railroads. An intersection of two railroads has been held not to be a public road crossing requiring construction of fences,[84] but it has been held that a statute requiring fences except at public crossings, and cattle guards at such crossings, requires a railroad to construct cattle guards connecting with its fences at an intersection with another railroad.[85]

§ 180. —— Nature and Sufficiency

Where a statute does not specifically describe the character of fence to be constructed, it must be reasonably sufficient to turn all kinds of domestic animals, and the cattle guards must also be such as are reasonably sufficient to prevent ingress or egress of stock.

Where a statute does not specifically describe the character of fence to be constructed, it must be reasonably sufficient to turn all kinds of domestic animals.[86] Gates of an efficiency corresponding to the statutory fencing requirements must be maintained by the railroad at private crossings.[87] The cattle guards must also be such as are reasonably sufficient to prevent ingress or egress of stock,[88] but the railroad company is not obliged to make them absolutely impassable for stock,[89] and they are sufficient if as well adapted for this purpose as it is practicable to make them with due regard to the safety of the roadbed and the operation of trains thereon.[90] The type of cattle guard should be that which is best calculated to keep out stock and at the same time be reasonably preservative of the safety of public travel.[91]

A cattle guard which is dangerous to stock attempting to pass over it is not for that reason negligently constructed.[92] The term "cattle guard" has no precise signification,[93] but the requirement contemplates a protection of the entire right of way against the passage of stock to and from adjoining lands;[94] so that the mere construction of a pit under the track is not sufficient,[95] but the cattle guards must, by means of wing fences or otherwise, be extended across the right of way to the adjoining lands,[96] the adjoining landowner not being required to extend his fences across the right of way to the track,[97] and in fact having no right to do so;[98] but they need not be extended across vacant lands owned by the railroad adjacent to its right of way.[99]

§ 181. —— Waiver or Agreement of Adjoining Landowner

The construction of fences and cattle guards, although required by statute, may be waived by an adjoining landowner, or he may agree with the company that he will himself construct and maintain them.

78. N Y—Tracy v Troy, etc., R. Co., 38 N.Y. 433, 98 Am D 54.

79. N.Y—Cross v New York Cent., etc, R Co, 123 N.Y.S 908
51 C J. p 713 note 45.

80. Idaho—Strong v. Oregon Short Line R. Co., 169 P 179, 31 Idaho 48.

81. Iowa.—Chicago, etc, R Co v. Hanken, 118 N.W 527, 140 Iowa 372, 19 L.R.A ,N.S, 216.
51 C J. p 713 note 47

82. Mo.—Bridges v. Missouri, etc, R Co, 112 S W. 37, 132 Mo App. 576.

83. Mo.—Hay v. St. Louis, etc., R. Co., 142 S W. 468, 161 Mo App. 1—Welch v. St. Louis, etc, R. Co., 109 S.W. 1074, 131 Mo.App. 464.

84. Utah—Edwards v. Salt Lake, etc, R. Co, 261 P. 445, 70 Utah 496.

85. Ill—Illinois Cent. R Co. v. Davidson, 125 Ill App. 420, affirmed 80 N E. 250, 225 Ill. 618.

86. Me—Cotton v. Wiscasset, etc, R Co., 57 A. 785, 98 Me. 511.
51 C J p 713 note 53.

87. Iowa—Claus v. Chicago Great Western R. Co., 111 N W. 15, 136 Iowa 7.

88. Ky—Nashville, etc., R. Co. v Russell, 110 S.W. 317, 129 Ky. 14, 33 Ky L. 447.
51 C.J. p 713 note 55

89. Ky.—Nashville, etc., R. Co. v. Russell, supra.
51 C J. p 713 note 56.

90. Ark—Choctaw, etc., R Co v. Vosburg, 72 S W. 574, 71 Ark 232—Choctaw, etc., R Co. v. Goset, 68 S W. 879, 70 Ark. 427.

91. Miss—Yazoo, etc, R. Co v. Harrington, 37 So. 1016, 85 Miss. 366.
51 C.J p 713 note 58.

92. Ala.—Davis v. Lawler, 96 So. 256, 209 Ala. 314—Carrollton Short Line R. Co v. Lipsey, 43 So. 836, 150 Ala 570

93. Iowa—Heskett v Wabash, etc, R. Co, 16 N W 525, 61 Iowa 467.

94. Ga—Alabama Great Southern R. Co. v. Dawkins, 85 S E. 343, 143 Ga. 415.
51 C J p 713 note 62.

95. Kan—Missouri Pac R Co v. Manson, 2 P 800, 31 Kan 337.
51 C J. p 713 note 63.

96. Tenn—Louisville, etc., R. Co v. Timmons, 91 S.W. 1116, 116 Tenn. 29.
51 C J. p 713 note 64.

97. Ga.—Alabama Great Southern R. Co. v. Dawkins, 85 S.E. 343, 143 Ga. 415.
Kan.—Missouri Pac. R. Co. v. Morrow, 4 P. 87, 32 Kan 217.

98. Iowa.—Heskett v Wabash, etc, R. Co, 16 N W. 525, 61 Iowa 467.

99. Miss—Gulf, etc, R. Co. v. Allen, 110 So 844, 145 Miss. 415.

The construction of fences and cattle guards, although required by statute, may be waived by an adjoining landowner,[1] or he may agree with the company that he will himself construct and maintain them.[2] Such a contract is not invalid for want of consideration,[3] or for being contrary to public policy,[4] or because it is not in writing.[5] However, if it contains a clause by which the railroad company seeks to exempt itself from liability to the landowner for its negligence in operating its trains, it is against public policy and void.[6]

A landowner does not waive his rights to fences under the statute by failing to demand from the railroad a compliance with the law,[7] or by the railroad's neglect to perform its duty for a period of time equaling the prescriptive term,[8] or by a release in the grant of a right of way of all damages and claims "occasioned by the location, construction and operation" of the road over the premises conveyed,[9] or by a release of liability for damages resulting from "the location or construction of said work, or the repairing thereof,"[10] or by a stipulation in the grant of right of way that the railroad should construct wagon crossings at certain points over its tracks,[11] or by contracting to build the fence as agent of the railroad.[12]

§ 182. Actions and Proceedings to Enforce Rights

The statutes in many jurisdictions provide a remedy for the landowner on failure of the railroad to perform its duties relative to private or farm crossings, and where the statute provides the method of enforcement of this duty the statutory method must be followed; but the remedy given by statute will not be held to be exclusive unless the language of the statute so requires. Where a railroad company fails to construct or maintain fences or cattle guards as required by statute, the landowner may sue for damages, but he is not limited to such remedy and may sue to compel the railroad company specifically to perform its duty.

The statutes in many jurisdictions provide a remedy for the landowner on failure of the railroad to perform its duties relative to private or farm crossings,[13] and where the statute provides the method of enforcement of this duty the statutory method must be followed;[14] but a remedy given by statute will not be held to be exclusive unless the language of the statute so requires.[15] Where a railroad company is required to construct private or farm crossings, the landowner may recover damages for the loss or inconvenience sustained by reason of its failure to do so,[16] and damages may also be recovered for injuries sustained in the use of the crossing due to its negligent or improper construction or condition.[17]

The railroad company may be compelled by mandamus to construct crossings, as discussed in Mandamus § 231 d (2) (b), or such duty may be enforced by a suit in equity,[18] or the railroad commissioners may take cognizance of the matter and make an order which may be enforced by the court,[19] unless the statute provides a purely personal right enforceable only by the landowner.[20] Where the landowner is entitled to a crossing and one has been constructed, he may sue to enjoin the railroad company from removing, closing, or obstructing it,[21] or, if the company has already done so,

1. Tenn.—Louisville, etc., R. Co. v. Timmons, 91 S.W. 1116, 116 Tenn. 29
51 C.J. p. 714 note 68.

2. Ill.—Lynch v. Baltimore, etc., R. Co., 88 N.E. 1034, 240 Ill. 567.
51 C.J. p. 714 note 69

3. Tenn.—Buford v. Louisville, etc., R. Co., 240 S.W. 759, 146 Tenn. 262.

4. Tenn.—Buford v. Louisville, etc., R. Co., supra.

5. N.Y.—Talmadge v. Rensselaer, etc., R. Co., 13 Barb. 493.

6. Ala.—Georgia Cent. R. Co. v. Hammond, 99 So. 73, 19 Ala. App. 515, certiorari denied Ex parte Georgia Cent. R. Co., 99 So. 74, 210 Ala. App. 687.
Contract releasing railroad from liability for injury to property by negligent operation generally see infra § 481.

7. Mo.—Parks v. Hannibal, etc., R. Co., 20 Mo. App. 440.

8. Mo.—Parks v. Hannibal, etc., R. Co., supra.

9. Mo.—Stoutimore v. Chicago, etc., R. Co., 39 Mo. App. 257, 259.

10. Ind.—Cleveland, etc., R. Co. v. Crossley, 36 Ind. 370, 374.

11. Or.—Dibblee v. Astoria, etc., R. Co., 111 P. 242, 112 P. 416, 57 Or. 428.

12. Ill.—Illinois Cent. R. Co. v. Swearingen, 33 Ill. 289.
51 C.J. p. 714 note 79.

13. Va.—Goulding v. Virginian R. Co., 92 S.E. 832, 121 Va. 19.
51 C.J. p. 714 note 81.

14. Ill.—Chicago, etc., R. Co. v. Eichman, 47 Ill. App. 156.
51 C.J. p. 715 note 82.

15. Iowa.—Swinney v. Chicago, 98 N.W. 635, 123 Iowa 219.
51 C.J. p. 715 note 83

16. Mo.—Price v. St. Louis, etc., R. Co., 113 S.W. 1136, 133 Mo. App. 653
51 C.J. p. 715 note 84.

17. N.Y.—Cotton v. New York, etc., R. Co., 20 N.Y.S. 347, 65 Hun 625—Prince v. New York Cent., etc., R. Co., 14 N.Y.S. 817, 60 Hun 581.

18. Ill.—Baltimore, etc., R. Co. v. Brubaker, 75 N.E. 523, 217 Ill. 462
51 C.J. p. 715 note 91.

19. Iowa.—State v. Mason, etc., R. Co., 52 N.W. 490, 85 Iowa 516.
51 C.J. p. 715 note 92.
Limitation
Statute providing that one whose land is cut off by railroad may secure right to cross on application to county commissioners or to department of public utilities, applies only where owner has right to cross or to where he has received no compensation.—Cooley v. Boston & M. R. R., 21 N.E.2d 953, 303 Mass. 371, 122 A.L.R. 1166.

20. Miss.—State R. Commission v. Illinois Cent. R. Co., 73 So. 878, 113 Miss. 92, L.R.A.1917D 907.
51 C.J. p. 715 note 93.

21. Conn.—New London v. New

it may be compelled to restore it by a suit in equity.[22] Likewise, he may recover damages resulting from obstruction or removal of an existing crossing to which he is entitled[23] or from delay in constructing a new crossing made necessary by the alteration of the railroad,[24] but not for damages suffered by obstruction by reason of the proper operation of the road.[25]

While the court may compel a railroad company specifically to perform its duty with respect to the construction and maintenance of crossings,[26] and will do so where the conditions authorizing such a decree are present and other remedies are inadequate,[27] such a decree ordinarily is discretionary with the court, and in many cases may properly be denied and plaintiff left to his action for damages,[28] especially where the acts of the landowner raise an estoppel barring such relief,[29] whether the duty is imposed by statute[30] or by agreement.[31] If a landowner is using a crossing which he has no right to use, the railroad company may sue to enjoin him from so doing[32] or maintain an action of trespass for the wrongful entry upon its property.[33] A disputed right to an easement over a railroad is determinable at law.[34] On failure to agree on the location of a crossing, the landowner's remedy is not an action for damages, but an appeal to a court of equity to fix the location,[35] and where a court decree provides for a crossing at a point to be selected by the landowner, in the absence of proof that the landowner or his heirs ever selected such point or called on the railroad company to construct such crossing, the railroad company is not liable for failure to maintain the crossing.[36]

Fences and cattle guards. Where a railroad company fails to construct or maintain fences or cattle guards as required by statute, the landowner may sue for damages,[37] but he is not limited to such remedy and may sue to compel the railroad company specifically to perform its duty,[38] and a performance of such duty may be enforced by mandamus, as discussed in Mandamus § 231 d (2) (b), or mandatory injunction.[39] In some jurisdictions the landowner is authorized to construct them himself and recover from the railroad company, as discussed infra § 184. Where the duty is imposed by contract, the landowner may sue for damages for breach of the contract,[40] in equity for specific performance thereof,[41] unless specific performance would work hardship on the railroad without any benefit to the landowner.[42] Ejectment is not a proper remedy where the landowner permits the railroad company to enter upon his land and construct its road without objection, and the agreement to fence is a condition subsequent and not precedent.[43]

On breach of a contract to construct fences the landowner may recover as damages the reasonable cost of their construction without first constructing them;[44] and, where there has been a breach of the contract and an action instituted, the railroad company cannot defeat plaintiff's right to recover by subsequently constructing the fences unless it is done with plaintiff's consent[45] or he accepts what is done as a partial or complete discharge of the agreement.[46] If the covenant was to construct at such places as the landowner may designate, no right of action accrues until the designation has been made.[47] The landowner may waive his right to

York, etc., R Co, 84 A. 114, 85 Conn 595.
51 C J. p 715 note 94.

22. Ky—Louisville, etc, R Co v Brooks, 77 S W. 693, 25 Ky.L. 1307
51 C J. p 715 note 96.

23. Pa.—Dubbs v. Philadelphia, etc., R Co., 23 A 883, 148 Pa. 66.
51 C.J. p 715 note 97.

24. N.H—Costello v. Grand Trunk R Co, 47 A. 265, 70 N H. 403.

25. Cal.—Matoza v. Southern Pac Co, 211 P. 252, 59 Cal App. 636.
51 C J p 716 note 99.

26. Ill.—Baltimore, etc., R. Co. v Brubaker, 75 N.E. 523, 217 Ill. 462.
51 C.J p 716 note 1.

27. Ill—Baltimore, etc., R. Co. v Brubaker, supra.
Ky.—Louisville, etc, R. Co v. Brooks, 77 S.W. 693, 25 Ky.L. 1307

28. Me—Goding v. Bangor, etc, R Co., 48 A. 114, 94 Me 542.
51 C.J. p 716 note 3.

29. Ky.—Louisville, etc., R. Co. v Smith, 78 S W. 160, 117 Ky. 364, 25 Ky L 1459.

30. N Y—Clarke v Rochester, etc, R. Co, 18 Barb 350

31. N.J—Speer v Erie R. Co., 60 A 197, 68 N.J Eq 615.
51 C J. p 716 note 5.

32. Conn—New York, etc, R. Co. v Comstock, 22 A. 511, 60 Conn 200.

33. Vt.—Connecticut, etc., R. Co. v. Holton, 32 Vt. 43.

34. N.J—Rockaway Rolling Mill Corp v Delaware, etc, R Co., 137 A. 650, 101 N.J.Eq 192

35. Ky.—Chesapeake, etc., R. Co. v. Herringer, 164 S W. 948, 153 Ky. 267.

36. Ky—Buck Creek R. Co. v Haws, 94 S W.2d 980, 264 Ky. 436.

37. Minn.—Gould v. Great Northern R. Co, 65 N W. 125, 63 Minn. 37, 56 Am.S.R. 453, 30 L R.A. 590.
51 C J. p 716 note 10.

38. N Y.—Jones v. Seligman, 81 N. Y 190.

39. Kan—Atchison, etc, R Co v. Billings, 93 P 590, 77 Kan 119.

40. Cal—Taylor v. Northern Pac. Coast R Co, 56 Cal 317.
51 C J p 716 note 15.

41. Mo—Baker v. Chicago, etc, R Co, 57 Mo 265.

42. W Va.—Johnson v Ohio River R Co., 56 S E. 200, 61 W.Va 141

43. Mo—Baker v. Chicago, etc., R. Co, 57 Mo. 265.

44. Cal—Taylor v. Northern Pac. Coast R. Co, 56 Cal. 317.
Ind—Logansport, etc., R. Co. v. Wray, 52 Ind 578.

45. Ind—Indiana, etc, R Co. v. Adams, 14 N E. 80, 112 Ind 302.
Mass.—Lawton v. Fitchburg R Co, 8 Cush 230, 54 Am D. 753.

46. Ind—Indiana, etc, R Co. v. Adams, 14 N E. 80, 112 Ind. 302.

47. W.Va.—Johnson v. Ohio River R. Co., 56 S E 200, 61 W.Va. 141.

damages for failure to construct by agreeing, for a consideration, to build the fences and cattle guards himself.[48] Under some statutes it has been held that the proper action is not for negligently failing to erect a cattle guard, but an action for damages for failure to comply with the statute[49] or an action for the penalty prescribed by the statute.[50]

Persons entitled to sue and parties. An action to compel a railroad company to construct crossings can be maintained only by a person who is entitled to the benefit of the statute.[51] A tenant of a landowner cannot maintain the action,[52] and only those interested in the subject matter of the litigation are necessary parties.[53] In order to recover damages one must show that he has a right to a crossing from his own lands without having to pass over lands of others over which he has no right of way.[54] An action for damages for breach of contract to construct crossings forming a part of the consideration of a grant of a right of way may be maintained by the grantor after he has conveyed his remaining land in fee.[55]

Pleading. The rules of pleading requiring the complaint, petition, or declaration to set out all the facts necessary to state a cause of action apply to actions for the recovery of damages for failure of a railroad to perform its duty to construct private crossings or fences and cattle guards.[56] In an action for damages for failure to construct crossings, the complaint must show such an estate or interest in plaintiff as imposes a duty to him on the part of defendant to construct them.[57] Where the action is brought under a statute, a declaration substantially in the terms of the statute may state a cause of action.[58] In an action to compel the construction of a fence required by statute, it is not necessary for the complaint to negative any exceptions in the statute imposing such duty.[59] Where the statute requires notice to repair as a condition precedent to an action under the statute, a complaint, in order to state a cause of action, must allege the giving of the required notice.[60]

Evidence. The general rule that the burden of proof rests on the party who has the affirmative of the issue applies in actions to require construction of private or farm crossings.[61] Likewise, the general rules of admissibility apply,[62] and so with the rules as to the weight and sufficiency of the evidence.[63]

Trial. Ordinarily it is a question of fact for the jury or the court trying the case without a jury whether, under the circumstances of the particular case, crossings which the railroad company has provided are suitable and sufficient,[64] properly located,[65] and of sufficient number,[66] or, where the statute requires crossings for "necessary plantation roads," whether a particular road is necessary.[67] It is also a question of fact for the jury whether a cattle guard constructed is reasonably sufficient to turn stock;[68] and, in an action for failure to maintain a fence which the railroad company has removed, if it is contended that the action is barred by the statute of limitations, but the evidence as to the time of removal is conflicting, this question should be submitted to the jury.[69] The amount of damages recoverable for failure to construct a crossing is for the jury to determine under the evi-

48. Mo.—Porter v Illinois Southern R Co., 117 S W. 680, 137 Mo App. 233

49. Ala.—Alabama, etc., R Corp. v Norwood, etc, Farm, etc, Co., 92 So. 199, 18 Ala App. 337

50. Ala.—Alabama, etc., R Corp. v Norwood, etc., Farm, etc, Co, supra.
Actions to recover penalties see infra § 183 b.

51. Ala.—Georgia Cent. R. Co v Sturgis, 43 So 96, 149 Ala. 573
51 C J. p 717 note 26.

52. Ga.—Louisville. etc., R. Co. v. Nanny, 73 S E. 1052, 137 Ga. 607.
51 C.J. p 717 note 27.

53. Ill.—Cleveland, etc, R. Co. v Hobbie, 61 Ill App. 396.
51 C.J. p 717 note 28

54. Ky.—Chesapeake, etc, R. Co. v. Patton, 143 S W. 25, 146 Ky 656.

55. Ky.—Cincinnati Southern R. Co v Hudson, 11 S W. 509, 88 Ky. 480, 10 Ky.L. 1043.

56. Kan.—Breitenbach v. Anthony, etc, R. Co, 193 P. 312, 107 Kan 564.
51 C.J. p 717 note 32.

57. Vt.—Marsh v Rutland R. Co, 67 A 1098, 80 Vt. 397.

58. Va.—Gaulding v. Virginian R Co, 92 S E 832, 121 Va. 19.
51 C.J. p 717 note 34.

59. Ky.—Steadd v. Southern R Co, 58 S.W 581, 109 Ky 214, 22 Ky. L 713.

60. Ark.—Hester v Chicago, etc, R. Co., 222 S W 356, 144 Ark. 340.

61. Tex.—Texas & N. O R. Co. v. Millard, Civ.App, 181 S.W.2d 842.
51 C J. p 717 note 38.

62. Iowa.—Hemphill v Cedar Rapids, etc, R, etc., Co., 151 N W. 449, 169 Iowa 498.
51 C.J. p 718 note 39.

63. **Evidence held sufficient**
Va.—Pennsylvania R. Co v. Black, 8 S E.2d 291, 175 Va. 256.
51 C J p 718 note 40 [a].
Evidence held insufficient
N H.—Farwell v. Boston, etc, R Co., 56 A. 751, 72 N.H 335.
51 C J. p 718 note 40 [b].

64. Tex.—Kendall v. Chicago, etc, R Co, Civ App, 95 S W. 757
51 C J. p 718 note 41

65. N.Y.—Jones v. Seligman, 81 N Y. 190—Buffalo Stone, etc., Co v Delaware, etc., R. Co, 7 N Y.S 604, affirmed 29 N E 121, 130 N.Y 152.

66. Miss.—Alabama, etc., R. Co. v. Odeneal, 19 So. 202, 73 Miss. 34.
N.Y.—Jones v. Seligman, 81 N.Y. 190.

67. Miss.—Alabama, etc., R. Co. v. Odeneal, 19 So 202, 73 Miss. 34.

68. Ark.—Choctaw, etc., R. Co. v. Goset, 68 S W. 879, 70 Ark. 427.

69. Iowa.—Hunter v. Burlington, etc, R. Co., 91 N W. 305, 76 Iowa 490.

dence.[70] As in other civil actions, the jury must be properly instructed.[71]

Review Under a statute providing for the establishment of crossings, the trial court is the final arbiter of the propriety of directing the crossing to be constructed and its judgment, unless contrary to law, should be affirmed.[72] When the sufficiency of the findings of a commission is not questioned on appeal, the absence of formal findings is not prejudicial.[73] The order will not be set aside when not an abuse of discretion.[74]

Damages. For breach of a statutory duty with respect to fences, cattle guards, etc., the railroad, where liable in damages, is, as in other cases, liable for the natural and direct or proximate consequences of the wrongful act or omission.[75] The measure of damages for breach of a contract on the part of a railroad company to construct fences, cattle guards, or crossings is not the difference in the value of the land with or without such improvements,[76] but is what it would reasonably cost to construct them.[77] Plaintiff is not, however, limited in his recovery to the cost of construction,[78] but he may also recover damages for the inconvenience which he has already sustained[79] and special damages occasioned by the failure of the railroad company to construct or maintain the fences, etc., such as for injuries to stock, crops, or pastures.[80] The measure of damages for the necessary destruction of a crossing in changing the grade of the railroad tracks depends on the character and use of the crossing.[81]

Contract to build and maintain. The measure of damages in an action for breach of the agreement, where a railroad company agrees to build and maintain a fence through a farm and only builds the fence, is the annual cost of keeping the fence in repair.[82]

§ 183. Penalty for Failure to Construct Crossings, Fences, or Cattle Guards

a. In general
b. Actions to recover penalties

a. In General

In many jurisdictions, by statute, a penalty may be recovered by a person interested on failure of a railroad to construct crossings, fences, or cattle guards when it passes through private lands. Such statutes, being penal, are to be strictly construed.

In order to compel a railroad to perform its duties relative to fences, the legislature may impose a penalty on it for its failure to do so;[83] and in many jurisdictions, by statute, a penalty may be recovered by a person interested on failure of a railroad to construct crossings, fences, or cattle guards when it passes through private lands.[84] These statutes, being penal, are to be strictly construed.[85] The statutes have been held to apply to a failure to repair as well as to a failure to construct.[86] Although a statute provides a penalty for failure to construct private crossings, and also for failure to construct cattle guards, where the crossing and the cattle guards are within the one inclosure only one penalty can be recovered.[87] The liability of the railroad does not depend on whether the "party interested" has suffered any damage.[88] The penalty may be recovered as often as the railroad fails to perform its duties,[89] but after judg-

70. Del.—Richards v. Baltimore, etc., R. Co., 143 A. 404, 4 W.W. Harr. 90

71. Mo.—Deal v. St. Louis, etc., R. Co., 129 S.W. 50, 144 Mo.App. 684. 51 C.J. p. 718 note 49.

72. Va.—Pennsylvania R. Co. v. Black, 8 S.E.2d 291, 175 Va. 256.

Weight attached to action of trial court

On appeal from judgment establishing wagonway across railroad track, action of trial court, which had advantage of seeing and hearing witnesses and of examining maps and estimates filed, in resolving all conflicts in evidence in favor of plaintiff is entitled to great weight. —Pennsylvania R. Co. v. Black, supra.

73. S.D.—Dwyer v. Chicago, etc., R. Co., 171 N.W. 760, 41 S.D. 535.

74. S.D.—Dwyer v. Chicago, etc., R. Co., supra.

75. Tex.—Southern Kansas R. Co. v. Isaacs, 49 S.W. 690, 20 Tex.Civ.App. 466. 51 C.J. p. 718 note 54.

76. Ky.—Cincinnati Southern R. Co. v. Hudson, 11 S.W. 509, 88 Ky. 480, 10 Ky.L. 1043. 51 C.J. p. 719 note 55.

77. Ind.—Louisville, etc., R. Co. v. Power, 21 N.E. 751, 119 Ind. 269 51 C.J. p. 719 note 56.

78. Ind.—Louisville, etc., R. Co. v. Sumner, 5 N.E. 404, 106 Ind. 55, 55 Am.R. 719.

79. Ky.—Cincinnati Southern R. Co. v. Hudson, 11 S.W. 509, 88 Ky. 480, 10 Ky.L. 1043.

80. Ind.—Louisville, etc., R. Co. v. Power, 21 N.E. 751, 119 Ind. 269. 51 C.J. p. 719 note 59.

81. N.J.—Speer v. Erie R. Co., 65 A. 1024, 72 N.J.Eq. 411.

82. Pa.—Erie, etc., R. Co. v. Johnson, 101 Pa. 555.

83. Idaho.—Hindman v. Oregon Short Line R. Co., 178 P. 837, 32 Idaho 133 51 C.J. p. 719 note 62.

84. Tex.—Bennett v. Gulf, etc., R. Co., Civ.App., 146 S.W. 353. 51 C.J. p. 719 note 63.

85. Ala.—McBurney v. Central of Georgia Ry. Co., 136 So. 796, 223 Ala. 390—Atlanta & St. Andrews Bay R. R. Co. v. Fowler, 68 So. 283, 192 Ala. 373. 51 C.J. p. 719 note 64.

86. Ark.—Missouri, etc., R. Co. v. State, 121 S.W. 930, 92 Ark. 1

87. Miss.—Kansas City, etc., R. Co. v. Spencer, 17 So. 168, 72 Miss. 491.

88. Ark.—Kansas City Southern R. Co. v. Greer, 119 S.W. 1121, 90 Ark. 531 51 C.J. p. 719 note 68.

89. Ark.—Chicago, etc., R. Co. v. Fitzhugh, 104 S.W. 175, 83 Ark. 481. Miss.—Kansas City, etc., R. Co. v. Spencer, 17 So. 168, 72 Miss. 491.

ment for a penalty the company is allowed a reasonable time before it is guilty of a further violation of its statutory duty.[90]

Notice to construct or repair. Under some of the statutes notice to the railroad to construct or repair is necessary to the recovery of the penalty.[91] Where no provision is made for service of notice, service on a station agent is sufficient.[92] However, where the notice must be served on an agent or officer of the railroad, service on a chief clerk in the office of a station agent is not service on an agent within the meaning of the statute.[93] Notice by one other than the owner of the land is not sufficient,[94] although an owner may authorize a tenant to give notice in the owner's name.[95]

Waiver. While it is said that a landowner may waive his right to recover a penalty for failure to construct stock guards by agreeing to accept a fence in lieu thereof,[96] when notice is given to construct stock guards before the railroad constructs the fence there is no waiver.[97]

b. Actions to Recover Penalties

Where no statutory provision is made as to the mode of recovery of the penalty, the common-law action of debt is the proper form of action. The statute can be invoked only by those whose lands are entered by the railroad, and the declaration, petition, or complaint must allege such facts as bring it within the law.

Although the mode of recovery of the penalty is frequently provided by statute, where no statutory provision is made the common-law action of debt is the proper form of action,[98] and not an action on the case.[99] The statutory penalty and also actual damages may be recovered in the same action [1] Under some of the statutes, however, it has been held that the right to recover the penalty prescribed is an exclusive remedy, and that the amount of the penalty is intended as full compensation for the injury received, so that no action for damages can be maintained.[2]

Persons entitled to sue and parties. The statute can be invoked only by those whose lands are entered by the railroad,[3] and cannot be invoked by one who owns land within the inclosure of a stock-law district when the railroad does not enter his land.[4] The fact that the crossing was from land owned in fee to land used by plaintiff as a tenant does not affect his right to the penalty.[5] A tenant or lessee may sue for the penalty,[6] although a tenant is not a necessary party to a suit by the landowner for a penalty.[7]

Pleading. In order to recover a penalty provided by statute, the declaration, petition, or complaint must allege such facts as bring it within the law.[8]

Evidence. The general rules applicable in civil actions as to the admissibility and weight and sufficiency of evidence apply in actions to recover penalties.[9] Evidence that the landowner took the proper steps to require construction of cattle guards should not be excluded.[10] Evidence of the value of stock injured by a defective cattle guard is admissible to enable the jury to determine the amount of the penalty.[11] In the absence of statute to the contrary, the return of a constable is not sufficient proof of service of the notice.[12]

Trial. Whether a crossing is convenient and suitable within the meaning of a statute providing a penalty for failure to construct a suitable crossing is a question of fact for the jury.[13] As in civil ac-

90. Miss.—Alabama, etc., R. Co. v. Odeneal, 21 So. 52, 74 Miss. 827.
51 C.J. p 719 note 70

91. Ark.—St. Louis, etc., R. Co. v. Hood, 55 S.W. 134, 67 Ark. 357.
51 C.J. p 719 note 71.

92. Ark.—St. Louis, etc., R. Co. v. Hale, 100 S.W. 1148, 82 Ark. 175.

93. Ga.—Smith v. Southern R. Co., 63 S.E. 801, 132 Ga. 57.

94. Ark.—Chicago, etc., R. Co. v. Adams, 106 S.W. 600, 84 Ark. 14.

95. Ark.—Chicago, etc., R. Co. v. Adams, supra.

96. Ark.—Kansas City Southern R. Co. v. Crossen, 147 S.W. 48, 103 Ark. 613.

97. Ark.—Kansas City Southern R. Co. v. Crossen, supra.

98. Va.—Russell v. Louisville, etc., R. Co., 25 S.E. 99, 93 Va. 322.

99. Va.—Russell v. Louisville, etc., R. Co., supra.

1. Miss.—Sardis, etc., R. Co. v. Gordon, 57 So. 219, 100 Miss. 786—Kansas City, etc., R. Co. v. Spencer, 17 So. 168, 72 Miss. 491.

2. Ark.—Choctaw, etc., R. Co. v. Vosburg, 72 S.W. 574, 71 Ark. 232.
51 C.J. p 720 note 82.

3. Miss.—Gulf, etc., R. Co. v. Allen, 110 So. 844, 145 Miss. 415.
51 C.J. p 720 note 83.

4. Miss.—Kansas City, etc., R. Co. v. Jones, 18 So. 684, 73 Miss. 397.

5. Miss.—Kansas City, etc., R. Co. v. Spencer, 17 So. 168, 72 Miss. 491.

6. Miss.—Yazoo, etc., R. Co. v. Young, 28 So. 826.
51 C.J. p 720 note 86.

7. Ark.—Kansas City Southern R. Co. v. Crossen, 147 S.W. 48, 103 Ark. 613.

8. Ga.—Gill v. Atlanta, etc., R. Co., 102 S.E. 457, 24 Ga.App. 780.
51 C.J. p 720 note 88.

9. Ala.—Atlanta, etc., R. Co. v. Fowler, 68 So. 283, 192 Ala. 373.
51 C.J. p 720 note 91.

Crossing not required

Evidence warranted finding, in action to recover penalty from railroad, that crossing which railroad failed to provide was not necessary for proper use of land.—McBurney v. Central of Georgia Ry. Co., 136 So. 796, 223 Ala. 390.

10. Va.—Russell v. Louisville, etc., R. Co., 25 S.E. 99, 93 Va. 322.

11. Ark.—St. Louis, etc., R. Co. v. Busick, 86 S.W. 674, 74 Ark. 588.

12. Ark.—St. Louis, etc., R. Co. v. Mendenhall, 71 S.W. 269, 71 Ark. 133.
51 C.J. p 720 note 94.

13. Miss.—Sardis, etc., R. Co. v. Gordon, 57 So. 219, 100 Miss. 786.

tions generally, proper instructions should be given to the jury.[14] An instruction which is substantially in the language of the statute is good[15]

§ 184. Construction by Landowner and Recovery from Railroad Company

a. In general
b. Notice to railroad company
c. Character and location of work done by landowner
d. Actions for recovery

a. In General

Under statutes in some jurisdictions, if the railroad company fails or refuses to construct the fences, cattle guards, or farm crossings required, the landowner may do so and recover therefor from the railroad company.

In some jurisdictions the statutes provide that, if the railroad company fails or refuses to construct the fences required, the landowner may do so and recover therefor from the railroad company,[16] and there are similar provisions with respect to cattle guards and farm crossings[17] The statutes authorizing construction by the landowner and a recovery from the railroad company ordinarily are of a penal character,[18] and plaintiff must bring himself clearly within their provisions.[19] The statutes also authorize the making of necessary repairs by the landowner, and if the railroad company constructs a fence, and it is not such as the law requires, the landowner may make it sufficient,[20] or if the railroad company undertakes to repair the fence, and does not repair it properly, the landowner may make such further repairs as are necessary,[21] or if the fence is permitted to become so defective that it cannot be repaired the landowner may build a new fence and recover therefor.[22]

The fact that the landowner's other fences are out of repair does not affect his right to repair a fence along the right of way and recover therefor on failure of the railroad company, after notice, to do so.[23] The statutes in some cases authorize a recovery of double the value[24] or the recovery of attorney's fees.[25] The landowner cannot recover compensation for any fencing which it was not the duty of the railroad company to provide,[26] as where his lands were not inclosed by a lawful fence and the statute only requires the company to fence its track in such cases;[27] and, if the statute allows a certain period after the road is completed before any liability for failure to fence will attach, the landowner cannot fence and recover therefor before the expiration of this period.[28]

Also there can be no recovery under the statute for a fence constructed by the landowner where the cost of such fencing as the statute requires was included in his assessment of damages in the condemnation proceedings[29] or the landowner agreed to construct them and received compensation therefor;[30] but a personal contract on the part of the landowner to construct fences will not prevent his grantee who takes without notice of the contract from fencing and recovering therefor from the railroad company.[31]

Itemized statement. Some statutes require that after the construction or repairs the landowner shall furnish the railroad company an itemized statement of the expense a certain number of days before suit.[32]

Receivership. Where the statute provides that on failure of the railroad company to fence its road the adjoining landowner may do so and recover double the cost of the fencing, an action for such recovery may be maintained against the company, although the road is in the hands of a receiver.[33]

14. Ark.—Kansas City Southern R Co. v. Greer, 119 S.W. 1121, 90 Ark 531.
51 C.J. p 720 note 97

15. Ark.—Kansas City Southern R. Co. v. Greer, supra.

16. Ill.—Indiana, etc., R. Co. v Sampson, 31 Ill.App. 513.
51 C.J. p 721 note 99.

17. Ind.—Indiana Union Tract Co v. Seisler, 106 N.E 911, 108 N.E 44, 58 Ind.App. 507.
51 C.J. p 721 note 2.

18. Ill.—Wabash, etc, R. Co. v Zeigler, 108 Ill 304.
51 C.J. p 723 note 39.

19. Ill.—Wabash, etc., R. Co. v. Zeigler, supra
51 C.J. p 723 note 40.

20. Ill.—Lake Erie, etc, R. Co. v. Deutsch, 60 Ill.App. 144—Chicago, etc, R. Co. v. Croy, 71 N.E 671, 33 Ind App. 461.

21. Ind.—Chicago, etc., R Co. v Irons, 78 N.E. 207, 38 Ind App. 196.

22. Ind.—Terre Haute, etc, R. Co v. Erdel, 71 N.E 960, 163 Ind. 348.
51 C.J. p 721 note 6.

23. Ind.—Vandalia R. Co. v. Fetters, 82 N.E. 978, 40 Ind.App. 615.

24. Ill.—Lake Erie, etc, R. Co. v. Deutsch, 60 Ill.App. 144.
51 C J. p 721 note 8.

25. Ind.—Vandalia R. Co. v. Stephens, 78 N.E. 1055, 39 Ind.App. 11.
51 C.J. p 721 note 9.

26. Mo.—Sharp v. Quincy, etc., R. Co, 123 S.W. 507, 139 Mo.App. 525.
51 C.J. p 721 note 10.

27. Kan.—Missouri Pac. R. Co v Youngstrom, 27 P. 982, 47 Kan 349.

28. Mo.—McNear v. Wabash R. Co, 42 Mo App 14.

29. Pa.—Welles v Northern Cent. R. Co., 25 A. 51, 150 Pa. 620.

30. Ohio.—Warner v. Baltimore, etc, R. Co., 31 Ohio St 265

31. Ohio.—Pittsburg, etc, R Co. v. Bosworth, 18 N.E. 533, 46 Ohio St. 81, 2 L.R.A. 199.

32. Ind.—Chicago, etc., R. Co. v. Croy, 71 N.E 671, 33 Ind.App. 461.
51 C.J. p 721 note 16.

33. Ill.—Ohio, etc, R Co v. Russell, 3 N.E. 561, 115 Ill. 52.
51 C.J. p 721 note 17.

Damages for failure to construct Although there is some authority to the contrary,[34] it is generally held that statutes providing that on failure of the railroad company to construct or repair fences the landowner may do so and recover the value thereof from the railroad company impose no duty on the landowner to do so,[35] but are merely permissive, affording a cumulative remedy,[36] and do not affect his right to recover damages sustained by reason of the failure of the railroad company to construct or repair them,[37] and the same rule applies to similar statutes relating to farm crossings,[38] but in an action for damages sustained plaintiff cannot also recover the cost of future construction which at the time of the action he has not performed.[39]

b. Notice to Railroad Company

Ordinarily the statutes require the landowner before proceeding to construct or repair fences or cattle guards to give notice to the railroad company, and, unless it has been waived, a compliance with this requirement is essential to a recovery.

Ordinarily the statutes require the landowner before proceeding to construct or repair fences or cattle guards to give notice to the railroad company,[40] and, unless it has been waived,[41] a compliance with this requirement is essential to a recovery;[42] but if the landowner has given notice of an intention to repair fences, and it is found that they are too defective to be repaired, he may proceed to construct new ones.[43] If the statute does not provide within what time after notice the landowner shall construct or repair the fence, a delay, if not prejudicial to the rights of the railroad company, will not affect his right to recover.[44]

c. Character and Location of Work Done by Landowner

Where a landowner constructs a fence on failure of the railroad company to do so, he must, in order to recover therefor, construct such a fence as the railroad company is required to construct, and must also locate the fence where the railroad company is required to locate it.

Where a landowner constructs a fence on failure of the railroad company to do so, he must, in order to recover therefor, construct such a fence as the railroad company is required to construct;[45] but he is not obliged to construct the cheapest kind of fence which will satisfy the requirement.[46] So also he need not fence both sides of the track, although the railroad company is required to do so,[47] or build the entire fence which he has notified the company to build, before he can recover for the part completed.[48] The landowner, in order to recover, must also locate the fence where the railroad company is required to locate it,[49] which, if the statute requires the company to fence on the sides of the road, means along the dividing line between the right of way and adjacent lands;[50] but a slight mislocation, while not concluding the railroad company as a boundary line,[51] will not defeat the landowner's right to recover the cost of constructing the fence.[52] The landowner has no right to set the fence back on the right of way so as to deprive the railroad company of any part thereof,[53] but if the railroad company itself voluntarily locates the fence away from this line on its right of way and fails to keep it in repair the landowner may repair it where located and recover therefor.[54]

d. Actions for Recovery

Under the statutes authorizing construction of fences,

34. Ohio—Millhouse v Chicago, etc., R. Co, 7 Ohio Cir Ct. 466, 4 Ohio Cir.Dec 682.

35. Ohio—Pittsburg, etc., R. Co. v. Smith, 38 Ohio St. 410.

36. Tex—San Antonio, etc., R. Co. v. Knoepfli, 17 S W. 1052, 82 Tex 270
51 C J p 721 note 20.

37. Tex.—San Antonio, etc, R Co v. Knoepfli, supra.
51 C J. p 722 note 21—1 C.J. p 992 note 11 [a] (3).

38. Mo.—Sheridan v. Atchison, etc., R. Co., 56 Mo.App. 68.
N.J—Green v. Morris, etc., R. Co., 24 N.J.Law 486.

39. Ill.—Baltimore, etc., R. Co. v Campbell, 109 Ill.App. 125.

40. Ill.—Shea v. Cleveland, etc., R. Co, 95 N E 63, 250 Ill. 97.
51 C.J. p 722 note 24.

41. Ky.—Pitman v. Louisville, etc, R. Co, 104 S W. 693, 31 Ky.L 988

42. Ind—Chicago, etc., R Co. v. Abbott, 37 N E 557, 10 Ind.App 99.
Ky—Pitman v. Louisville, etc, R. Co., 104 S W. 693, 31 Ky.L. 988.

43. Ind.—Terre Haute, etc., R. Co. v. Erdel, 71 N.E. 960, 162 Ind. 348
—Terre Haute, etc., R. Co. v Salmon, 73 N.E. 268, 34 Ind.App. 564.

44. Ind—Terre Haute, etc., R. Co v Barhart, 73 N E. 711, 35 Ind.App. 56.
51 C.J. p 722 note 28.

45. Neb.—Chicago, etc., R. Co. v. Lyon, 70 N W 261, 50 Neb. 640.
51 C.J. p 722 note 29.

46. Ind.—Terre Haute, etc., R. Co. v. Salisbury, 77 N.E. 1097, 38 Ind.App. 100.
51 C.J. p 722 note 30.

47. Mo.—Fletcher v. St. Louis, etc., R. Co, 73 Mo. 142.
51 C.J. p 722 note 31.

48. Ill—Toledo, etc, R. Co. v. Sieberns, 63 Ill 217.
51 C.J. p 722 note 32.

49. Ind.—Wabash, etc, R Co. v. Zeigler, 108 Ill. 304—Evansville, etc., R. Co v. Huffman, 70 N.E 173, 32 Ind.App. 425

50. Ind.—Chicago, etc., R Co. v Wood, 66 N E. 923, 30 Ind.App. 650.
51 C.J. p 722 note 34

51. Ind.—Vandalia R Co. v. Seltenright, 82 N E 980, 40 Ind App. 659.

52. Ind.—Vandalia R. Co. v. Seltenright, supra.
51 C J. p 722 note 36.

53. Ind.—Vandalia R. Co. v. Stephens, 78 N.E. 1055, 39 Ind.App. 11.
51 C.J. p 723 note 37.

54. Ill.—Lake Erie, etc, R. Co. v. Deutsch, 60 Ill.App 144.

etc., by the landowner and a recovery from the railroad company, the plaintiff must allege in the complaint, and on the trial establish by proof, every fact essential to a recovery.

Under the statutes authorizing construction of fences, etc., by the landowner and a recovery from the railroad company, plaintiff must allege in the complaint every fact essential to a recovery,[55] and so must allege that the road was not properly fenced at the time the notice was given,[56] that it had been constructed for such length of time as to make it the duty of the railroad company to fence,[57] that a proper notice to the railroad company was given,[58] and that the landowner constructed a fence of such character and at such place as the law required,[59] stating its cost,[60] and, where such fact is material, the date of its completion.[61] So it has been held necessary, where the statute excepts certain places from the duty of fencing, to negative such exceptions in the complaint.[62] It is not necessary, however, to file with, or embody in, the complaint the notice to the railroad company[63] or the itemized statement of the landowner's expenses which the statute requires to be furnished to the railroad company.[64]

Proof. Plaintiff must also establish by proof every fact essential to a recovery,[65] and must therefore show that the road had been completed for such time as to make it the duty of the railroad company to fence at the time the notice was given,[66] that his lands were inclosed by a lawful fence where the statute only requires the company to fence its tracks in such cases,[67] that a proper notice to the railroad company was given,[68] and that plaintiff constructed such a fence at such place as the law required.[69] Plaintiff's ownership of the land is sufficiently shown by proof that he and his grantees had been in possession for many years claiming to own it, without producing the title papers, in the absence of any evidence to the contrary.[70]

Basis of recovery. Where the statute allows a recovery of the value or double the value of the fence or repairs, the reasonable value and not the actual cost is the basis of calculation for the amount recoverable,[71] although the cost is evidence of the value.[72]

F. WATERS AND WATERCOURSES

§ 185. Right and Duty to Construct Railroad over or near Waters and Watercourses

Legislative authority is necessary to authorize a railroad company to construct its road and build bridges across an artificial watercourse and over nonnavigable waters.

While legislative authority is necessary, the legislature may, by express or implied provisions of statute, authorize a railroad company to construct its road and build bridges across an artificial watercourse such as a canal.[73] The construction of railroads over nonnavigable waters likewise requires legislative authority,[74] and such authority may be expressly conferred by statute,[75] or such authority

55. Ind.—Evansville, etc., R. Co. v. Huffman, 70 N.E. 173, 32 Ind.App. 425
51 C.J. p 723 note 41.
56. Ind.—Midland R. Co. v. Gascho, 34 N.E. 643, 7 Ind.App. 407
51 C.J. p 723 note 42.
57. Ind.—Midland R. Co. v. Gascho, supra.
51 C.J. p 723 note 43.
58. Ind.—Chicago, etc., R. Co. v. Vert, 56 N.E. 139, 24 Ind.App. 78.
51 C.J. p 723 note 44.
59. Ind.—Vandalia R. Co. v. Stephens, 78 N.E. 1055, 39 Ind.App. 11.
51 C.J. p 723 note 45.
60. Ill.—Indiana, etc., R. Co. v. Sampson, 31 Ill.App. 513.
61. Ind.—Evansville, etc., R. Co. v. Huffman, 70 N.E. 173, 32 Ind.App. 425.
62. Ind.—Evansville, etc., R. Co. v. Butts, 59 N.E. 1070, 26 Ind.App. 413
51 C.J. p 723 note 48.
63. Ind.—Chicago, etc., R. Co. v. Ross, 35 N.E. 290, 8 Ind.App. 188
64. Ind.—Vandalia R. Co. v. Fetters, 82 N.E. 978, 40 Ind.App. 615—Vandalia R. Co. v. Kanarr, 77 N.E. 1135, 38 Ind.App. 146.
65. Mo.—McNear v. Wabash R. Co., 42 Mo.App. 14.
66. Ind.—Chicago, etc., R. Co. v. Abbott, 37 N.E. 557, 10 Ind.App. 99
Mo.—McNear v. Wabash R. Co., 42 Mo.App. 14.
67. Kan.—Missouri Pac. R. Co. v. Youngstrom, 27 P. 982, 47 Kan. 349.
68. Ind.—Chicago, etc., R. Co. v. Woodard, 41 N.E. 544, 13 Ind.App. 296.
51 C.J. p 723 note 54.
69. Mo.—McNear v. Wabash R. Co., 42 Mo.App. 14.
70. Ill.—Terre Haute, etc., R. Co. v. Smith, 65 Ill.App. 101.
71. Ill.—Terre Haute, etc., R. Co. v. Smith, supra—Lake Erie, etc., R. Co. v. Deutsch, 60 Ill.App. 144.
72. Ill.—Terre Haute, etc., R. Co. v. Smith, 65 Ill.App. 101.
73. N.Y.—People v. Walsh, 105 N.E. 136, 211 N.Y. 90.
51 C.J. p 724 note 62.
Authority to:
Construct or maintain bridges over navigable waters see Navigable Waters § 33
Construct road below high-water mark see Navigable Waters § 109
74. Ill.—Chicago, etc., R. Co. v. Moffitt, 75 Ill. 524.
Mo.—Abbott v. Kansas City, etc., R. Co., 83 Mo. 271, 53 Am.R. 581.
75. Mont.—Heckaman v. Northern Pac. Ry. Co., 20 P.2d 258, 93 Mont. 363.
51 C.J. p 724 note 64.
"Watercourse" within statute authorizing railroad to cross watercourse with its road is channel cut by running water with well defined banks through which water flows for substantial periods of year.—Hecka-

may be impliedly conferred by statute [76]

Compelling construction and maintenance. A railroad company may be compelled by the exercise of the police power of the state to construct and maintain bridges or make changes in its roadbed so as to carry the road over a drain or watercourse [77] It cannot, however, be legally required to construct a larger opening or more bridging than is necessary or proper.[78] Similarly, it cannot be required to build a bridge over a ditch which was established after it had acquired its property and constructed a railroad thereon at its own expense.[79]

§ 186. Construction

a. In general
b. Statutory and charter provisions

a. In General

In crossing streams and watercourses, the railroad company must construct its road so as not to obstruct the flow of water, and it has no right to divert and collect surface waters and discharge them in large quantities upon the lands of another.

The construction of a permanent railroad bridge without draws across nonnavigable waters is not a public nuisance.[80] A railroad company which has erected a fixed bridge across a stream under a municipal franchise, and is about to construct a new bridge of the same kind on the abutments of the old one, cannot be compelled by the city to erect a drawbridge which will greatly increase the cost.[81]

Where a railroad company has in good faith located its road within the limits authorized by its charter, the fact that it may be constructed upon a wharf, or so as to injure it, does not entitle the owner to equitable relief against such construction.[82]

Obstructing or diverting flow of water in watercourse. In crossing streams and watercourses, the railroad company must construct its road so as not to obstruct the flow of water,[83] and must construct its bridges and culverts with sufficient openings and in such manner as properly to permit the passage of the water and prevent injury to riparian owners,[84] taking into consideration the nature of the country,[85] and making provision for the amount of water at all seasons,[86] and under conditions of storm and flood which are likely to occur,[87] and for the passage of floating ice[88] and driftwood[89] which may reasonably be expected. So a railroad company must construct its roadbed through a city in such a manner as not to obstruct a natural drain,[90] and this duty is a continuing one, to be performed as the necessity thereafter arises.[91] Where a railroad company builds an embankment on land of which it owns the fee, adjacent to a bridge over a stream, it should provide an outlet for overflowing water.[92]

The railroad company has no right to divert a stream so as to discharge the water upon the lands of another at a different place[93] or so as wrongfully to deprive one entitled thereto of the use of

man v Northern Pac. Ry. Co., 20 P.2d 258, 93 Mont. 363

76. Kan.—Kaw Valley Drain. Dist. v. Missouri Pac R. Co., 161 P. 937, 99 Kan 188.
51 C.J. p 724 note 65.

77. U.S.—Chicago, etc., R. Co. v. Appanoose County, Iowa, 182 F. 291, 104 C.C.A. 573, 31 L.R.A.,N.S., 1117.
51 C.J. p 724 note 67.

78. Ill.—Dettmer v. Illinois Terminal R. Co., 123 N.E. 37, 287 Ill. 513.

79. Ohio.—Ashland, etc., R. Co. v. Board of Commissioners of Wayne County, 14 Ohio Cir.Ct.,N.S. 344.

80. Ill.—Joliet, etc., R. Co. v. Healy, 94 Ill. 416.
51 C.J. p 724 note 71.
Construction and maintenance of bridges and culverts over drains see Drains § 44.
Manner of construction of bridges over navigable waters see Navigable Waters § 34.

81. N.Y.—Buffalo v. Delaware, etc., R. Co., 110 N.Y.S. 488, 126 App. Div. 125.

82. Mass.—Fall River Iron Works Co v. Old Colony, etc., R. Co., 5 Allen 221.

83. Mo.—Smithpeter v. Wabash R. Co., 231 S.W.2d 135, 360 Mo. 835.
51 C.J. p 724 note 75
Nonstatutory liability for obstructing flow of watercourses see Waters § 20.

84. Ky.—Corpus Juris cited in Chesapeake & O. Ry Co. v. Saulsberry, 88 S.W.2d 949, 951, 262 Ky 31.
Mo.—Smithpeter v. Wabash R. Co., 231 S.W.2d 135, 360 Mo. 835.
51 C.J. p 724 note 76.
Making new channel
A railroad company cannot legally fill up a part of an old watercourse and make a new channel which is insufficient to provide for an increased flow of water which will be occasioned by needed drainage by proper artificial means and then require upper owners to pay for removing obstructions to such drainage and for an increase in amount of bridging.—Dettmer v. Illinois Terminal R. Co., 123 N.E. 37, 287 Ill. 513.

85. Ind.—New York, etc., R. Co. v. Hamlet Hay Co., 47 N.E. 1060, 49 N.E. 269, 149 Ind. 344.

86. Ind.—New York, etc., R. Co. v. Hamlet Hay Co., supra—Dunn v. Chicago, etc., R. Co., 114 N.E. 888, 63 Ind.App. 553.

87. Ill.—Dettmer v. Illinois Terminal R. Co., 123 N.E. 37, 287 Ill. 513
Mo.—Smithpeter v. Wabash R. Co., 231 S.W.2d 135, 360 Mo. 835.
51 C.J. p 725 note 79.

88. Neb.—McGlenneghan v. Omaha, etc., R. Co., 41 N.W. 350, 25 Neb. 523, 13 Am.S.R. 508.

89. Ind.—Pennsylvania R. Co. v. Watson, 146 N.E. 763, 82 Ind.App. 496.

90. La.—Shreveport v. Kansas City, etc., R. Co., 51 So. 648, 125 La. 575.

91. La.—Shreveport v. Kansas City, etc., R. Co., supra.

92. N.Y.—Howard v. Buffalo, 105 N.E. 426, 211 N.Y. 241.

93. Ala.—Buckalew v. Lusk, 73 So. 917, 198 Ala. 519.
51 C.J. p 725 note 85.

the water of the stream,[94] and if any diversion is necessary because of cuts or fills a suitable new channel must be constructed and maintained.[95] The matter of diverting a stream may, however, be regulated by contract between the railroad company and the landowner.[96] Where a railroad crosses a watercourse, it is the duty of the company to restore such watercourse to its former condition of usefulness and saftey, even in the absence of express statutory requirement.[97] So, where a temporary diversion of the waters of a stream is necessary during the process of construction, the company must afterward restore the stream to its old channel.[98]

Obstructing or diverting flow of surface waters. A railroad must so construct its road as not to interfere with the natural drainage of the lands over or adjacent to which it passes,[99] and it has no right to divert and collect surface waters and discharge them in large quantities upon the lands of another.[1] It is not, however, obliged to keep open ditches outside its right of way upon the land of another,[2] or to construct ditches for the purpose of draining adjacent lands,[3] although, on the other hand, it has been held that, if the company builds an embankment it must construct culverts and drains sufficient to carry across the right of way the natural drainage,[4] but that it is not bound to provide sources of egress for accumulations of water due to extraordinary rains.[5]

b. Statutory and Charter Provisions

(1) Construction over or along watercourses
(2) Surface waters
(3) Wharves, docks, and access to waters
(4) Companies and persons affected

(1) Construction over or along Watercourses

Under some statutes, where a railroad company constructs its road along or across a stream it must do so in such manner as not to interfere with the free use thereof or it must restore the stream to its former state.

In some jurisdictions the statutes expressly provide that, where a railroad company constructs its road along or across a stream, it must do so in such manner as not to interfere with the free use thereof, and so as to afford security for life and property[6] or that it shall restore the stream to its former state or such state as will not unnecessarily impair its usefulness.[7] The right conferred thereby can only be exercised subject to the restrictions imposed,[8] and compliance with the statutory duty may be enforced by the proper governmental agencies.[9] Such statutes are merely declaratory of the common

94. Kan.—Atchison, etc., R. Co. v. Long, 27 P. 182, 46 Kan. 701, 26 Am S R 165.
51 C.J. p 725 note 86

95. N.Y.—Cott v. Lewiston R. Co., 36 N.Y. 214, 1 Transcr A. 26, 34 How Pr. 222.

96. Mo.—Harrelson v. Kansas City, etc., R. Co., 52 S.W. 368, 151 Mo. 482.
51 C.J. p 725 note 88

97. Ind.—Watts v. Evansville, etc., R. Co., 129 N.E. 315, 191 Ind. 27
51 C.J. p 725 note 90.

98. N.Y.—Lefurgy v. New York, etc., R. Co., 3 N.Y.S. 302, 50 Hun 606.

99. Ill.—Strange v. Cleveland, etc., R. Co., 91 N.E. 1036, 245 Ill. 246—Smith v. Toledo, etc., R. Co., 168 Ill.App. 670.

Nonstatutory liability for obstruction of natural flow of surface water see Waters § 115.

1. Del.—Chorman v. Queen Anne's R. Co., 54 A. 687, 19 Del. 407.
51 C.J. p 725 note 95.

2. Va.—Joliffe v. Chesapeake, etc., R. Co., 20 S.E. 781.

3. Mo.—Field v. Chicago, etc., R. Co., 76 Mo. 614.
51 C.J. p 725 note 97.

4. Ill.—Smith v. Toledo, etc., R. Co., 168 Ill.App. 670.

5. Ill.—Smith v. Toledo, etc., R. Co., supra.

6. U.S.—Northern Pac. Ry. Co. v. Wagner, C.C.A.Mont., 86 F.2d 63
Tex.—Chicago, R. I. & G. Ry. Co. v. Tarrant County Water Control & Improvement Dist. No. 1, 73 S.W.2d 55, 123 Tex. 432, certiorari denied 55 S.Ct. 921, 295 U.S. 762, 79 L.Ed. 1704.
51 C.J. p 726 note 3.

Statute construed

(1) Statute granting railroad right to construct road across, along, or upon stream must be interpreted in light of physiographic and meteorological conditions of territory to which it was intended to apply, and of constitutional, common-law, and statutory rights and privileges of those inhabiting territory—Chicago, R. I. & G. Ry. Co. v. Tarrant County Water Control & Improvement Dist. No. 1, supra.

(2) Statute giving railroad right to construct road across, along, or upon streams constituted grant of franchise subject to control of state and not irrevocable and uncontrollable grant of privilege.—Chicago, R. I. & G. Ry. Co. v. Tarrant County Water Control & Improvement Dist. No. 1, supra.

7. Mont.—Heckaman v. Northern Pac. Ry. Co., 20 P.2d 258, 93 Mont. 363.
Tex.—Chicago, R. I. & G. Ry. Co. v. Tarrant County Water Control & Improvement Dist. No. 1, 73 S.W. 2d 55, 123 Tex. 432, certiorari denied 55 S.Ct. 921, 295 U.S. 762, 79 L.Ed 1704.
51 C.J. p 726 note 4—26 C.J. p 1010 note 13 [a].

Nature of duty

"Usefulness" or "franchise" of the ordinary nonnavigable stream within statute requiring railroad intersecting stream to restore it to its former state of usefulness, is its use for irrigation and drainage, and railroad's duty, which is clear and cannot be added to by court, does not require full width of channel to be left open, but it is not discharged by exercising reasonable care and skill in initial construction of embankment, if original opening be thereafter narrowed, or if subsequent experience proves that opening is insufficient.—Heckaman v. Northern Pac. Ry. Co., 20 P.2d 258, 93 Mont. 363.

8. S.D.—Langness v. Chicago, etc., R. Co., 168 N.W. 1050, 40 S.D. 546.
51 C.J. p 726 note 5.

9. Tex.—Missouri, etc., R. Co. v. Rockwall County Levee Impr. Dist. No. 3, 297 S.W. 206, 117 Tex. 34.

law.[10] They impose a continuing obligation,[11] and apply to nonnavigable as well as navigable streams,[12] but not to drainage ditches.[13] It has been held, under such a statute, that the obstruction of the natural flow of water in a watercourse is unlawful per se, irrespective of any negligence in constructing the road.[14] A statute prohibiting the construction of a solid embankment across a watercourse does not apply to a slough which is not an independent watercourse, but merely receives the overflow from a creek.[15]

(2) Surface Waters

As to surface waters, railroad companies may be required by statute to construct drainage ditches along the sides of the roadbed, or to construct culverts or sluices for drainage purposes.

Statutes regulating the rights and duties of railroad companies in respect of surface waters have been enacted in a number of jurisdictions.[16] In some jurisdictions railroad companies are expressly required by statute to construct drainage ditches along the sides of the roadbed, or to construct culverts or sluices for drainage purposes,[17] and the duty so imposed is imperative.[18] It may similarly be the duty of a railroad to construct a drainage sewer from one side of its right of way to the other.[19] Penalties for failure of railroads to drain their roadbeds or to construct drainage ditches along the sides of the roadbed are imposed by some statutes.[20]

(3) Wharves, Docks, and Access to Waters

A statutory requirement that a railroad company shall restore a stream to its former state or so as not to impair its usefulness does not require it to construct

10. Ind.—Watts v. Evansville, etc., R. Co., 129 N.E. 315, 191 Ind. 27—Chicago, etc., R. Co. v. Luddington, 91 N.E. 939, 93 N.E. 273, 175 Ind. 35

11. Tex.—**Corpus Juris cited in** Chicago, R. I. & G. Ry. Co. v. Tarrant County Water Control & Improvement Dist. No. 1, 73 S.W.2d 55, 63, 123 Tex. 432, certiorari denied 55 S.Ct. 921, 295 U.S. 762, 79 L.Ed. 1704.
51 C.J. p. 726 note 8.

12. Ill.—Chicago, etc., R. Co. v. Moffitt, 75 Ill. 524.
Ind.—Graham v. Chicago, etc., R. Co., 77 N.E. 1055, 39 Ind.App. 294.

13. Ind.—New Jersey, etc., R. Co. v. Tutt, 80 N.E. 420, 168 Ind. 205.
51 C.J. p. 726 note 10.

14. Tex.—International, etc., R. Co. v. Walker, Civ.App., 97 S.W. 1081.

15. Mo.—Kenney v. Kansas City, etc., R. Co., 74 Mo.App. 301.
51 C.J. p. 726 note 14.

16. U.S.—Atchison, T. & S. F. Ry. Co. v. Ross, D.C.Mo., 88 F.Supp. 451
Tex.—Burlington-Rock Island R. Co. v. Newsom, Civ.App., 219 S.W.2d 129.
Wis.—Thomson v. Public Service Commission, 5 N.W.2d 769, 241 Wis. 243.
51 C.J. p. 726 note 15.
Statutory liability for property damage resulting from obstruction, diversion, or interference see infra § 471.

Flood waters

The law governing flood waters had no application in action to set aside an order of the commission requiring railroad to construct a culvert under its right of way so that property in the vicinity would not be damaged by surface waters accumulating in pot hole, since flood waters are those which break away from a stream under conditions which do not usually occur.—Thomson v. Public Service Commission, supra.

17. U.S.—Atchison, T. & S. F. Ry. Co. v. Ross, D.C.Mo., 88 F.Supp. 451—Vollrath v. Wabash R. Co., D.C.Mo., 65 F.Supp. 766
Mo.—Smithpeter v. Wabash R. Co., 231 S.W.2d 135, 360 Mo. 835—Albright v. Louisiana & M. R. R. Co., 195 S.W.2d 648, 355 Mo. 211—Jones v. Chicago, B. & Q. R. Co., 125 S.W.2d 5, 343 Mo. 1104—Harris v. St. Louis-San Francisco Ry. Co., 27 S.W.2d 1072, 224 Mo.App. 455.
Tex.—Burlington-Rock Island R. Co. v. Newsom, Civ.App., 219 S.W.2d 129—Fort Worth & D. C. Ry. Co. v. Kiel, Civ.App., 185 S.W.2d 144, reversed on other grounds 187 S.W.2d 371, 143 Tex. 601—International-Great Northern R. Co. v. Reagan, Civ.App., 36 S.W.2d 564, affirmed 49 S.W.2d 414, 121 Tex. 233.
51 C.J. p. 726 note 16.

Necessity of drain or ditch

Railroad company need not construct openings through roadbed unless there is ditch, drain, or watercourse with which openings can be connected.
U.S.—Atchison, T. & S. F. Ry. Co. v. Taylor, D.C.Mo., 87 F.Supp. 313—Vollrath v. Wabash R. Co., D.C.Mo., 65 F.Supp. 766
Mo.—White v. Wabash R. Co., 207 S.W.2d 505, 240 Mo.App. 344—Cottier v. Chicago, B. & Q. R. Co., App., 33 S.W.2d 173—Harris v. St. Louis-San Francisco Ry. Co., 27 S.W.2d 1072, 224 Mo.App. 455.
51 C.J. p. 726 note 16 [2] (3).

Water within statute

(1) "Surface water" includes water overflowing from a stream or watercourse as well as that falling as rain upon the surface of the land.—Jones v. Chicago, B. & Q. R. Co., 125 S.W.2d 5, 343 Mo. 1104—Harris v. St. Louis-San Francisco Ry. Co., 27 S.W.2d 1072, 224 Mo.App. 455—51 C.J. p. 726 note 16 [a] (7).

(2) Water moving down a watercourse is "water including surface water" which railroad has duty to let through its embankment.—Smithpeter v. Wabash R. Co., 231 S.W.2d 135, 360 Mo. 835—Terminal R. R. Ass'n of St. Louis v. City of Brentwood, 230 S.W.2d 768, 360 Mo. 777.

(3) Under the duty to maintain a "sufficient" outlet to permit all water to get through its embankment to lower side whenever draining of such water has been rendered necessary, the quoted word refers only to opening through embankment, and water which railroad must let through its embankment is not limited to such water as can be carried off within banks, drains, ditch or watercourse below railroad.—Smithpeter v. Wabash R. Co., 231 S.W.2d 135, 360 Mo. 835—Terminal R. R. Ass'n of St. Louis v. City of Brentwood, 230 S.W.2d 768, 360 Mo. 777.

18. Ill.—Swigert v. Chicago, etc., R. Co., 203 Ill.App. 98.
51 C.J. p. 728 note 17.

19. Mo.—Terminal R. R. Ass'n of St. Louis v. City of Brentwood, 230 S.W.2d 768, 360 Mo. 777.

Word "sewer" applies only to drainage sewers and railroad could not be compelled to construct portions of a sanitary sewer system proposed across its right of way.—Terminal R. R. Ass'n of St. Louis v. City of Brentwood, 230 S.W.2d 768, 360 Mo. 777.

20. U.S.—Atchison, T. & S. F. Ry. Co. v. Ross, D.C.Mo., 88 F.Supp. 451.
51 C.J. p. 728 note 18.

draw in its road, where constructed across a nonnavigable bay of a river, so as to afford access to a private wharf.

A statutory requirement that a railroad company shall restore a stream to its former state or so as not to impair its usefulness does not require it to construct a draw in its road, where constructed across a nonnavigable bay of a river, so as to afford access to a private wharf,[21] and a charter requirement that a railroad company shall construct drawbridges for the passage of vessels and boats, where it crosses bays, applies only to those which are generally navigable.[22] In some cases, however, railroad companies are required by statutory or charter provisions to extend docks which are cut off by the construction of a railroad[23] or to construct roads or passes over or under the road to afford adjacent landowners access to the water.[24]

(4) Companies and Persons Affected

A statutory provision requiring railroad companies to restore streams to their former state or so as not unnecessarily to have impaired their usefulness imposes an obligation which is binding on a purchasing company or consolidated company of which the company constructing the road is a constituent.

A statutory provision requiring railroad companies to restore streams to their former state or so as not unnecessarily to have impaired their usefulness imposes an obligation which is binding on a purchasing company[25] or consolidated company of which the company constructing the road is a constituent;[26] and a statute requiring every railroad company "operating" any railroad to construct ditches applies to a company taking charge of a road under a license from the owner.[27] A statute requiring railroad companies to keep in repair culverts sufficient for the free passage of water in watercourses crossed by the road has been held to apply only to roads constructed after the act went into effect.[28]

§ 187. Maintenance, Alterations, and Repairs

A railroad company which has constructed bridges or culverts over a watercourse must subsequently maintain them in proper condition and repair.

A railroad company which has constructed bridges or culverts over a watercourse must subsequently maintain them in proper condition and repair.[29] If a railroad fails to construct its structures so as not unnecessarily to impair the usefulness of streams, it must later adjust the structures when the public applies the streams to additional purposes,[30] and if a bridge, sufficient to meet the requirements at the time it was constructed, becomes inadequate through subsequent developments, it is the company's duty to improve it to meet the new conditions,[31] although it has been held that a statute requiring railroad companies to restore watercourses across or along where their roads are constructed to their former condition, and to build necessary culverts, does not require a change in the construction of a bridge which was built by a company before the enactment of the statute, and which was then sufficient to meet all requirements.[32]

The duty to keep bridges in repair is a statutory one in at least one jurisdiction.[33] In the absence of reservations, the grant of a franchise for the building of a bridge was held not only to include the right to maintain the original structure, but also the right to renew it when necessary, and, if worn out, to construct another of the same character without imposing an additional burden on the grantee because of the construction of such new bridge.[34]

Under statutes requiring railroad companies to construct necessary culverts for drainage purposes, it has been held to be the duty of a railroad to maintain such culverts in a proper condition,[35] and to maintain the roadbed in accordance with the initial requirements of the statute.[36] If they become insufficient by reason of a change of conditions

21. N.Y.—Kerr v. West Shore R. Co., 27 N.E. 832, 127 N.Y. 269.

22. N.Y.—Getty v. Hudson River R. Co., 31 Barb. 617.
51 C.J. p 728 note 21.

23. N.Y.—Tillotson v. Hudson River R. Co., 9 N.Y. 575.
51 C.J. p 728 note 22.

24. N.Y.—People v. New York Cent., etc., R. Co., 61 N.E. 172, 168 N.Y. 187.
51 C.J. p 728 note 24.

25. Ind.—Pennsylvania R. Co. v. Watson, 146 N.E. 763, 82 Ind.App. 496.
51 C.J. p 728 note 26.

26. Ill.—Chicago, etc., R. Co. v. Moffitt, 75 Ill. 524.

27. Mo.—Graves v. Kansas City, etc., R. Co., 69 Mo.App. 574.

28. Ill.—Wabash R. Co. v. Sanders, 47 Ill.App. 496.

29. La.—Kirk v. Kansas City, etc., R. Co., 25 So. 457, 51 La.Ann. 667.
51 C.J. p 728 note 31.

30. Tex.—Chicago, R. I. & G. Ry. Co. v. Tarrant County Water Control & Improvement Dist. No. 1, 73 S.W.2d 55, 123 Tex. 422, certiorari denied 55 S.Ct. 991, 295 U.S. 762, 79 L.Ed. 1704.

31. Okl.—Missouri, etc., R. Co. v. Johnson, 126 P. 567, 34 Okl. 582.

32. U.S.—Hines v. Woodson, C.C.A. Ill., 280 F. 966.

33. Iowa.—Mason City, etc., R. Co. v. Wright, 121 N.W. 39, 116 N.W. 805, 144 Iowa 10.
51 C.J. p 728 note 33.

34. N.Y.—Buffalo v. Delaware, etc., R. Co., 110 N.Y.S. 488, 126 App.Div. 125.

35. Tex.—Millerman v. Houston & T. C. R. Co., Civ.App., 27 S.W.2d 897, error refused.
51 C.J. p 729 note 37.

36. Tex.—Burlington-Rock Island R. Co. v. Newsom, Civ.App., 219 S.W. 2d 129.

through the clearing and cultivation of the land, the company must make them sufficient;[37] but the rule is otherwise where the conditions are changed by ditches, embankments, or other obstructions made by third persons.[38] A statute requiring railroad companies to keep open all ditches and culverts constructed by them applies to a ditch voluntarily constructed to drain a right of way, and in existence when the statute was enacted;[39] and such a statute is not an unreasonable exercise of the police power of the state.[40]

A railroad company may, after the construction of its roadbed, make changes therein which may be found to be proper, but must do so with due regard to the rights of others.[41] Where particular work is being done by the railroad for its own benefit, a stipulation as to the character of the materials to be used may be waived without the consent of the party which had undertaken to pay the cost thereof.[42] A prescriptive right to maintain a culvert at the place and of the size as originally constructed does not include the right to maintain it as it was after it sank into a watercourse over which it was constructed so as to obstruct the flow of water.[43] Where a drainage ditch was not constructed by the railroad, but was created by the landowner or by his tenants, they could not foist on the railroad company the duty to maintain it.[44]

G. LIABILITIES FOR LABOR, MATERIALS, OR SUPPLIES

§ 188. In General

A railroad company which has contracted with a third person for railroad construction or repair work is not liable for work done for, and under the employment of, the contractor, or for materials furnished to him, except to the extent that it has become liable by agreement.

A railroad company which has contracted with a third person for railroad construction or repair work is not liable for work done for, and under the employment of, the contractor,[45] or for materials furnished to him,[46] except to the extent that it has become liable by agreement,[47] or is made liable by statute, as discussed infra § 189. The mere fact that a railroad company has the benefit of the work done by another does not make it responsible for such work where it does not agree to pay therefor.[48]

§ 189. Statutory Liability and Perfection and Enforcement of Claim against Company

a. In general
b. Limitations and restrictions affecting liability
c. Persons liable
d. Nature and purpose of labor, materials, or supplies
e. Persons entitled to benefit of statute
f. Perfection and enforcement of claim against company

a. In General

Statutes imposing a personal liability on the part of a railroad company to laborers employed by the contractor in the construction of the railroad, or to those who furnish labor, materials, or supplies to the contractor apply only to a company organized and operating as a railroad company, although they include companies incorporated prior to the enactment of the statutes.

Statutes imposing a personal liability on the part of a railroad company to laborers who are employed by a contractor in the construction of the railroad, or to those who furnish labor, materials, or supplies to the contractor, apply only to a company organized and operating as a railroad company;[49] but include companies incorporated prior

37. Tex.—Missouri, etc., R. Co v. Rockwall County Levee Impr. Dist. No 3, 297 S.W. 206, 117 Tex 34—St. Louis Southwestern R. Co v. Jenkins, Civ.App., 89 S.W. 1106.

38. Tex.—St. Louis Southwestern R. Co. v. Jenkins, supra.

39. Minn.—Peterson v. Northern Pac. R. Co, 156 N.W. 121, 132 Minn. 265.

40. Minn.—Peterson v. Northern Pac. R. Co., supra.

41. Mo.—George v. Wabash Western R. Co., 40 Mo.App. 433.
51 C.J. p 729 note 42.

42. Kan.—Kaw Valley Drainage Dist. of Wyandotte County v. Missouri Pac. Ry. Co., 195 P. 983, 108 Kan. 314.

Regrading of track
Kan.—Kaw Valley Drainage Dist. of Wyandotte County v. Missouri Pac. Ry. Co., supra.

43. N.Y.—Corwin v. Erie R. Co., 82 N.Y.S. 753, 84 App.Div. 555, affirmed 70 N.E. 1097, 178 N.Y. 590.

44. Okl.—Gulf, C. & S. F. Ry. Co. v. Rutledge, 47 P.2d 83, 173 Okl. 245.

45. Ind.—Fleming v. Greener, 87 N. E. 719, 173 Ind. 260, rehearing denied and modified on other grounds 90 N.E. 72, 73, 140 Am.S.R. 254, 21 Ann.Cas. 959
51 C.J. p 729 note 47.

46. La.—Cameron v. Orleans, etc., R. Co., 32 So 208, 108 La. 83.
51 C.J. p 729 note 48.

47. Ohio.—Pennsylvania Co. v. Mehaffey, 80 N.E. 177, 75 Ohio St. 422, 116 Am.S.R. 746, 9 Ann.Cas. 305.
51 C.J. p 729 note 49.

48. N.Y.—Woodruff v. Rochester & P. R. Co., 14 N.E. 832, 108 N.Y. 39.

49. Wash.—Cloud v. Greenwood Logging Co., 288 P. 216, 157 Wash. 261.
49 C.J. p 729 note 52.

o the enactment of the statutes,[50] and have been ıeld to be constitutıonal,[51] at least in so far as they apply to future contracts,[52] but not as to contracts which were entered into prior thereto,[53] although not performed until after the statute took effect.[54] These statutes are remedial as to the laborers and others provided for,[55] but, since they impose on the railroad companies liabilities which would not otherwise exist, they should not be extended beyond the fair import of the terms used.[56] Materialmen and laborers, however, are not bound to accept anything in payment except money, whatever may be the contract between the owner and contractor.[57]

The personal liability imposed by such statutes is merely a statutory substitute for the lien in rem against specific property;[58] and the purport of the statutes is to protect laborers, mechanics, and materialmen,[59] and to enable them to resort to the railroad company for amounts due and not paid by a contractor for railroad work.[60] Such a statute has no extraterritorial force and is inapplicable to a foreign railroad contracting in another state for the construction of the part of the road lying therein.[61]

b. Limitations and Restrictions Affecting Liability

The liability of the railroad company may be limited to claims for not more than a specified number of days of labor or limited to the amount due from the railroad company to the contractor at the time of the presentation of the claim for labor or materials.

Under some statutes the liability of the railroad company to claims for labor is limited to claims for not more than a specified number of days of labor,[62] but this does not require that the labor shall be performed on consecutive days in order to recover for the full number of days allowed by the statute.[63] Under other statutes it is limited to the amount due from the railroad company to the contractor at the time of the presentation of the claim for labor or materials,[64] and authorizes the railroad company to withhold money due to the contractor until claims for which it would be liable are paid,[65] and, where the statute prohibits payments or advances to contractors until the amounts due to laborers at the time of such payments are paid or secured, the railroad company cannot be held liable on an order for money drawn by a contractor who has not provided for the payment of wages due to his laborers, and which order the company has refused to accept.[66]

Taking bond for payment; exemption from liability. Under a statute which requires the railroad company to take a bond from the contractors, conditioned for the payment of laborers, materialmen, and those furnishing goods and provisions to a contractor, and provides that in case of failure to do so the railroad company shall be liable therefor, if such a bond is taken the railroad company is relieved from liability,[67] although the bond has not been filed;[68] but if the railroad company fails to take such bond the laborers or mechanics may maintain their action against it.[69] Such a bond is required for the benefit of laborers and those who furnish material for railroad construction,[70] and serves the double purpose of securing the performance of the contract and the payment of claims for labor and material employed in the work,[71] and laborers and materialmen have rights thereunder independent of the obligee,[72] and may maintain an action on the bond;[73] and no agreement between the railroad company and the contractor or between him and the

50. Mo.—Grannahan v. Hannibal, etc., R. Co., 30 Mo. 546—Peters v. St. Louis, etc., R. Co., 23 Mo. 107.

51. Vt.—Brann v. Connecticut, etc., R. Co., 31 Vt. 214.
51 C.J. p. 729 note 54.

52. Mass.—Hart v. Boston, etc., R. Co., 121 Mass. 510.

53. Mass.—Parker v. Massachusetts R. Co., 115 Mass. 580.
51 C.J. p. 729 note 56.

54. Mass.—Parker v. Massachusetts R. Co., supra.

55. Mich.—Chicago, etc., R. Co. v. Sturgis, 7 N.W. 213, 44 Mich. 538.

56. Me.—Blanchard v. Portland, etc., R. Co., 32 A. 890, 87 Me. 241.
51 C.J. p. 730 note 59.

57. Ind.—Farmers' L. & T. Co. v. Canada, etc., R. Co., 26 N.E. 784, 127 Ind. 250, 11 L.R.A. 740.

58. Kan.—Crane Co. v. Wichita Union Terminal R. Co., 158 P. 59, 98 Kan. 336.
51 C.J. p. 730 note 61.

59. Mich.—Dudley v. Toledo, etc., R. Co., 32 N.W. 884, 65 Mich. 655.
Neb.—Finegan v. St. Joseph, etc., R. Co., 150 N.W. 818, 97 Neb. 474.

60. N.Y.—Kent v. New York Cent. R. Co., 12 N.Y. 628.

61. Vt.—Cartwright v. New York, etc., R. Co., 9 A. 370, 59 Vt. 675.

62. N.C.—Moore v. Cape Fear, etc., R. Co., 17 S.E. 152, 112 N.C. 236.
51 C.J. p. 730 note 65.

63. Mo.—Peters v. St. Louis, etc., R. Co., 24 Mo. 586.

64. Mich.—Dudley v. Toledo, etc., R. Co., 32 N.W. 884, 65 Mich. 655.
51 C.J. p. 730 note 67.

65. Mich.—Dawson v. Iron Range, etc., Co., 56 N.W. 106, 97 Mich. 33—Dudley v. Toledo, etc., R. Co., 32 N.W. 884, 65 Mich. 655.

66. La.—Meyer v. Vicksburg, etc., R. Co., 35 La. Ann. 897.

67. Kan.—Mann v. Burt, 10 P. 95, 35 Kan. 10.
51 C.J. p. 730 note 72.

68. Kan.—Mann v. Burt, supra.
51 C.J. p. 730 note 73.

69. Kan.—American Nat. Bank of Hutchinson v. Central Const. Co., 168 P.2d 369, 160 Kan. 400.
51 C.J. p. 730 note 74.

70. Kan.—Standard Asphalt, etc., Co. v. Texas Bldg. Co., 162 P. 299, 99 Kan. 567, L.R.A.1917C 490.

71. Kan.—Standard Asphalt, etc., Co. v. Texas Bldg. Co., supra.

72. Kan.—Standard Asphalt, etc., Co. v. Texas Bldg. Co., supra.

73. N.Y.—Adirondack Core & Plug Co. v. New York Cent. R. Co., 264 N.Y.S. 484, 238 App.Div. 346, affirmed 191 N.E. 503, 264 N.Y. 439.
51 C.J. p. 730 note 78.

guaranty company can affect such rights,[74] nor can their rights on the bond be impaired by omissions of the obligee or contractor for which they are not responsible.[75]

Where a surety becomes responsible merely for the performance of his principal's contract, however, and does not agree to pay for labor or material, he is not liable to laborers or materialmen.[76] Where the surety takes over the construction contract on the contractor's default, he is liable for the payment of an account for materials, which, for a sufficient consideration, he has assumed.[77] Where payments for materials furnished to a subcontractor are made by the contractor without directions to the subcontractor, who then pays by his own check out of his own bank account, the subcontractor has the right, as against the surety on the contractor's bond, to direct how the payments shall be applied.[78]

Prohibiting transfer of property. A statute which prohibits any transfer by a railroad company of its property while the claims of contractors and laborers employed in the construction or repair of its road are unpaid, and makes any transfer void as against such claims, applies only to those having a direct contractual relation with the company,[79] and this class of persons protected is not enlarged by a further statutory provision which merely aids such persons in their remedies,[80] nor is this statutory protection affected by another statute giving the railroad company authority to mortgage its property.[81]

c. Persons Liable

Under a statute which makes the stockholders of the railroad company individually liable after the assets of the company are exhausted for unpaid claims for labor performed in the construction of the road, a stockholder may not be held liable where the assets of the company have not been exhausted.

Under a statute which makes the stockholders of the railroad company individually liable after the assets of the company are exhausted for unpaid claims for labor performed in the construction of the road, a stockholder may not be held liable where the assets of the company have not been exhausted,[82] but a statutory provision for the liability of stockholders to laborers and servants, for services performed for the corporation, does not apply to services performed for contractors.[83] The liability of the railroad company and of a surety on a bond for payment are discussed supra subdivisions a, b.

Contractor. Where the construction contract requires the contractor to pay debts and liabilities against the railroad, except those created by the issuance of bonds and incurred for operating the road, and he carries on the construction work through the agency of the railroad and uses its credit for that purpose, he is responsible for the cost of the construction work,[84] and where the contract further stipulates that, if the railroad discharges any of the indebtedness incurred by doing any of the things contracted for, the sum paid shall be deducted from the amount owing to the contractor, whatever liability might be so incurred by the railroad is a debt of the contractor,[85] and the creditors of the railroad company, in the settlement of the affairs of the company on its insolvency, may insist that the contractor, before participating in the distribution of the assets, discharge his own obligations.[86] A contracting company, which receives money from the railway company under the provision of a contract, whereby a construction contract is assigned to it, that all amounts due the original contractor shall be paid to such company, does not, however, hold such money in trust for persons who furnished material, etc., to the original contract.[87]

d. Nature and Purpose of Labor, Materials, or Supplies

A railroad company's liability for labor and materials furnished to contractors applies only to labor performed

Provision for payment

Contractor's faithful-performance bond to railroad under grade crossing elimination contract did not render surety liable to materialman for material furnished before surety took over and completed contract, where contract contained no provision insuring prompt payment to materialmen, especially where railroad did not join in materialman's prayer.—Adirondack Core & Plug Co. v. New York Cent. R. Co., 264 N.Y.S. 484, 238 App.Div. 346, affirmed 191 N. E. 503, 264 N.Y. 439.

74. Kan.—Standard Asphalt, etc., Co. v. Texas Bldg. Co., 162 P. 299, 99 Kan. 567, L.R.A.1917C 496.

75. Kan.—Standard Asphalt, etc., Co v. Texas Bldg. Co, supra.

76. Ind.—Fleming v. Greener, 87 N. E. 719, 173 Ind. 260, rehearing denied and modified on other grounds 90 N.E. 72, 73, 140 Am.S.R. 254, 21 Ann.Cas. 959.

77. Wash.—Du Pont De Nemours v. Columbia Casualty Co., 273 P. 181, 149 Wash. 362.

78. Kan.—Crane Co. v. Wichita Union Terminal Co., 158 P. 59, 98 Kan. 336.

79. Pa.—Appeal of Hart, 96 Pa. 355.

80. Pa.—Appeal of Hart, supra.

81. Pa.—Tyron, etc., R. Co. v. Jones, 79 Pa. 60.
51 C.J. p 731 note 87.

82. Ind.—Marks v Indianapolis, etc., R. Co, 38 Ind 440.

83. N.Y.—Boutwell v Townsend, 37 Barb 205.

84. Tex.—U. S, etc., Trust Co. v. Delaware Western Constr Co, Civ. App., 112 S.W. 447.

85. Tex.—U. S, etc., Trust Co. v. Delaware Western Constr. Co., supra.

86. Tex.—U. S, etc., Trust Co. v. Delaware Western Constr. Co, supra.

87. Ind.—Fleming v. Greener, 87 N. E. 719, 173 Ind. 260, rehearing denied and modified on other grounds 90 N.E. 72, 73, 140 Am.S.R. 254, 21 Ann.Cas. 959.

and materials used in the construction or repair of the road.

A railroad company's liability for labor and materials furnished to contractors, under statutory provisions, applies only to labor performed and materials used in the construction or repair of the road;[88] and applies not only to the original construction of the main track,[89] but also to the construction of additional sidetracks,[90] or the construction of a new bridge in place of an old one.[91]

Labor. The term "labor," under these statutes, applies only to the manual labor of the persons employed,[92] and includes services performed on a quantum meruit basis as well as for a stipulated price,[93] but does not apply to the furnishing of the labor of others[94] or to teams or wagons used on the work.[95]

Materials or supplies. The term "materials" includes only those which enter into the construction or repair of the road,[96] and does not include board or feed furnished for teams[97] or for employees of the contractor;[98] nor does it include goods, provisions, and other such supplies,[99] unless the statute expressly includes goods and provisions furnished to a contractor,[1] in which case the statute applies only where they are furnished to the contractor himself,[2] and does not apply to those furnished to, or on the order of, a subcontractor.[3]

e. Persons Entitled to Benefit of Statute

The benefit of statutes imposing a liability on railroad companies to laborers, materialmen, or persons furnishing supplies to contractors should not be extended to include persons not fairly within the terms of the statute, and statutes for the protection of laborers and materialmen do not include the contractors or subcontractors themselves.

The benefit of statutes imposing a liability on railroad companies to laborers, materialmen, or persons furnishing supplies to contractors should not be extended to include persons not fairly within the terms of the statute,[4] and statutes for the protection of laborers and materialmen do not include the contractors themselves.[5] A construction contract and a nonstatutory bond given in connection therewith[6] and all of the contract provisions[7] must be construed together in order to determine the intent of such bond with respect to the protection of third-party claimants and the liability of the bonding company to them.

Where a director of a railroad company is forbidden by statute to be interested in the furnishing of materials or supplies to the company, he cannot recover for material or supplies furnished while he is such a director,[8] but if after he quits the directorate his contract is again ratified he may recover for materials or supplies furnished thereafter.[9] A breach of such a statute, however, is not malum in se, but merely malum prohibitum, and bondholders and other creditors of the railroad company cannot recover amounts paid for supplies and materials to a construction company of which certain directors of the railroad company are managers.[10]

Laborers. Under statutes imposing a liability on railroad companies to laborers employed by con-

88. Mich.—Dudley v. Toledo, etc., R Co., 32 N.W. 884, 65 Mich. 655.

Machinery, tools, and equipment

The purchase price, rent, or value of use of machinery, tools, and equipment used in constructing railroad bridge is neither labor, material, provisions nor goods within statute.—American Nat. Bank of Hutchinson v. Central Const. Co., 163 P.2d 369, 160 Kan. 400.

89. Kan.—Missouri, etc., R. Co. v. Brown, 14 Kan. 557.

90. Kan.—Missouri, etc., R. Co. v. Brown, supra.

91. Kan.—Atchison, etc., R. Co. v. McConnell, 25 Kan. 370.

92. Mich.—Dudley v. Toledo, etc., R. Co., 32 N.W. 884, 65 Mich. 655.
N.Y.—Atcherson v. Troy, etc., R Co., 1 Abb.Dec. 13, 6 Abb.Pr.,N S, 329.

93. N.Y.—Chapman v Utica, etc., R. Co., 4 Lans. 96.

94. Mich.—Chicago, etc, R. Co v. Sturgis, 7 N.W. 213, 44 Mich. 538.
N.Y.—Cummings v. New York, etc., R. Co., 1 Lans. 68.

95. Kan.—Mann v. Burt, 10 P 95, 35 Kan. 10.
51 C J. p 731 note 8.

96. Wash.—Du Pont De Nemours v. Columbia Casualty Co., 273 P. 181, 149 Wash. 362
51 C J. p 731 note 11.

97. Mich.—Dudley v. Toledo, etc, R. Co., 32 N.W. 884, 65 Mich. 655.

98. Mich.—Dudley v. Toledo, etc, R. Co., supra.

99. Mich.—Dudley v. Toledo, etc, R. Co., supra.

1. Kan.—Kansas City, etc., R. Co. v. Graham, 74 P. 232, 67 Kan. 791.
51 C.J. p 732 note 15.

2. Kan.—Parkinson v. Alexander, 14 P. 466, 37 Kan. 110.
51 C J. p 732 note 16.

3. Kan.—St. Louis, etc., R. Co. v. Ritz, 1 P. 27, 30 Kan 30.
51 C J p 732 note 17.

4. Me.—Blanchard v. Portland, etc., R. Co., 32 A. 890, 87 Me. 241.
51 C.J p 732 note 18.

5. Mich.—Martin v. Michigan, etc., R. Co., 29 N.W. 40, 62 Mich. 458.

6. Kan.—American Nat. Bank of Hutchinson v. Central Const. Co, 163 P.2d 369, 160 Kan. 400

Bond not complying with statute providing for bond of contractors for protection of laborers, mechanics, and others, when construed with construction contract, was not intended to protect claims of creditors for purchase price, rent or value of use of machinery, tools and equipment used in constructing bridge where none of the claims were basis of mechanics' liens nor basis of charges or claims against the work or the railroad.—American Nat. Bank of Hutchinson v. Central Const. Co., supra.

7. Kan.—American Nat. Bank of Hutchinson v. Central Const. Co, supra.

8. Mo.—Browning v. North Missouri Cent. R. Co., 188 S.W. 143.

9. Mo.—Browning v. North Missouri Cent. R. Co., supra.

10. Mo.—Baumhoff v. Grueninger, 178 S.W. 102, L.R.A 1916A 779.

tractors, the term "laborer" usually is held to include only ordinary manual laborers[11] who have personally performed the labor for which the claim is made.[12] It has been held that the term "laborer" does not include persons employed as superintendents and timekeepers,[13] clerks,[14] or persons merely furnishing the labor of others[15] or furnishing teams and wagons.[16]

Where a laborer furnishes and works with his own team, it has been held that he cannot recover under the statute, where the services were performed at an agreed price for the joint labor of himself and team,[17] although the amount due for such labor is capable of being accurately ascertained and distinguished from that due for the teams and the driver employed by the laborer;[18] but it has been stated that, if there were separate agreements as to each, the laborer might recover for his personal services;[19] and in other cases it has been held, without special reference to the question of separate agreements, that a laborer may recover not only for his personal labor, but for the use of his team with which he worked.[20] A statute revoking a grant to an insolvent railroad company and conferring it on another on condition that it shall pay the claims of laborers against the other company does not include civil engineers or an assistant general manager of such company.[21]

Subcontractors and persons dealing with them. In the absence of statute or agreement, a railroad company is not liable for work done for, and under the employment of, a subcontractor,[22] nor is the principal contractor liable for labor so performed for a subcontractor[23] or for supplies furnished to or on his order.[24] The statutes for the protection of laborers and materialmen do not include subcontractors,[25] and a subcontractor is not entitled to recover as a laborer, although he personally labors along with those employed by him;[26] nor can he recover for the work of his teams.[27]

Statutes imposing a liability on the part of railroad companies to laborers of contractors generally employed on the work are, however, held to apply to laborers employed by subcontractors as well as those employed by the original contractor;[28] but a statute making a transfer or assignment of its property by a railroad company void as against the unpaid claims of contractors and laborers employed in the construction of the road has been held to be limited to those having a direct contractual relationship with the company, as discussed supra subdivision b, and not to include subcontractors or other employees.[29]

Where a company constructing a railroad, after the failure of the contractor, completes the work through its general manager, and a subcontractor completes its work and files a claim for a lien, as authorized by statute, it is entitled to recover a personal judgment against the company, but not against the manager.[30]

Assignees or purchasers of claims. Claims against railroad companies under their statutory liability for labor, materials, or supplies furnished to contractors are assignable,[31] and may be enforced against the railroad company in an action by the assignee,[32] but the mere fact that the laborer is paid by a third person, on orders drawn by the contractor or subcontractor, does not constitute an

11. Me.—Blanchard v. Portland, etc., R. Co., 32 A. 890, 87 Me. 241.
51 C.J. p. 732 note 25

12. N.Y.—Balch v. New York, etc., R. Co., 46 N.Y. 521.
51 C.J. p. 732 note 26.

13. Kan.—Missouri, etc., R. Co. v. Baker, 14 Kan. 563.
51 C.J. p. 732 note 27.

14. Kan.—Mann v. Burt, 10 P. 95, 35 Kan. 10.

15. Mo.—Groves v. Kansas City, etc., R. Co., 57 Mo. 304.
51 C.J. p. 732 note 29.

16. N.Y.—Balch v. New York, etc., R. Co., 46 N.Y. 521.
51 C.J. p. 732 note 30.

17. Kan.—Mann v. Burt, 10 P. 95, 35 Kan. 10.
51 C.J. p. 732 note 31.

18. N.Y.—Atcherson v. Troy, etc., R. Co., 1 Abb.Dec. 13, 6 Abb.Pr., N.S., 329.

19. Kan.—Mann v. Burt, 10 P. 95, 35 Kan. 10.
N.Y.—Atcherson v. Troy, etc., R. Co., 1 Abb.Dec. 13, 6 Abb.Pr., N.S., 329.

20. Mich.—Chicago, etc., R. Co. v. Sturgis, 7 N.W. 213, 44 Mich. 538.
Vt.—Branin v. Connecticut, etc., R. Co., 31 Vt. 214.

21. Wis.—State v. Rusk, 13 N.W. 452, 55 Wis. 465.

22. Mo.—Baker v. McMurry Contracting Co., 223 S.W. 45, 282 Mo. 682.
51 C.J. p. 733 note 37.

23. Ind.—Ferguson v. Despo, 34 N. E. 575, 8 Ind.App. 523.
Kan.—Streeter v. Dowell, 23 P. 599, 43 Kan. 545.

24. Ind.—Ferguson v. Despo, 34 N. E. 575, 8 Ind.App. 523.
Kan.—Streeter v. Dowell, 23 P. 599, 43 Kan. 545.

25. Mich.—Martin v. Michigan, etc., R. Co., 29 N.W. 40, 62 Mich. 458.
Neb.—Finegan v. St. Joseph, etc., R. Co., 150 N.W. 818, 97 Neb. 474.

26. Me.—Rogers v. Dexter, etc., R. Co., 27 A. 257, 85 Me. 372, 21 L.R.A. 528.

27. Neb.—Finegan v. St. Joseph, etc., R. Co., 150 N.W. 818, 97 Neb. 474.

28. Wis.—Redmond v. Galena, etc., R. Co., 39 Wis. 426.
51 C.J. p. 733 note 43.

29. Pa.—Appeal of Hart, 96 Pa. 355.

30. Ky.—Simmons v. Fletcher, 170 S.W. 628, 161 Ky. 295.

31. Mich.—Chicago, etc., R. Co. v. Sturgis, 7 N.W. 213, 44 Mich. 538.

32. Tex.—San Antonio, etc., R. Co. v. Cockrill, 10 S.W. 702, 72 Tex. 613
51 C.J. p. 733 note 50.

assignment to such person of the laborer's claim, so as to entitle him to sue thereon.[33]

f. Perfection and Enforcement of Claim against Company

A person who seeks to avail himself of the benefit of a statute imposing liability on a railroad company for labor, materials, or supplies must comply with all the requirements of the statute.

A person who seeks to avail himself of the benefit of a statute imposing liability on a railroad company for labor, materials, or supplies must comply with all the requirements of the statute.[34] Where the statute makes the liability of the railroad company conditional on the existence of an indebtedness on its part to the contractor, the existence of such indebtedness must be established,[35] but where the statute imposes a direct liability on the railroad company and requires the action to be brought within a specified time after the labor is performed it is immaterial whether or not at the time of the action there is anything due from the railroad company to the contractor.[36]

Notice. Where the statute requires a notice of the claim to be presented to, or served on, the railroad company within a certain time, the requirements of the statute as to such notice must be complied with,[37] such as to the form and contents of the notice;[38] it must also be complied with as to the time of giving it,[39] and as to its service on the company.[40] A laborer or materialman who has failed to give notice of his claim or lien, as required by statute, cannot hold the railroad company liable, on the theory of estoppel, substantially as a trustee of money which it has recovered from the contractor's surety, where the materialman's lien was only one element of the company's claim against the surety and where the amount so recovered is insufficient to pay all lien claims and all other claims recoverable against the surety,[41] and, where the issues as to individual claims were not clearly defined in the railroad company's action, evidence is admissible, in an action against it by the materialman, to show that the alleged liens were not urged as a valid basis for recovery in the former action.[42]

Actions. An action against a railroad company by a laborer or materialman may be brought before a justice of the peace for amounts within his jurisdiction,[43] and it is usually required that the action to enforce the claim shall be instituted within a certain time after notice of the claim.[44] Under a statute requiring a railroad company to provide in its contract for the payment of claims for labor and supplies, it has been held that the remedy of a person furnishing supplies to the contractor is a suit in equity for an accounting and not an action at law for personal judgment against the company.[45] In an action against a railroad company for labor done or materials and supplies furnished, plaintiff must allege and prove every fact essential to bring the claim within the application of the statute and to show his right to recover thereon;[46] and the usual rules apply as to the pleadings, issues, proof, and variance,[47] evidence,[48] and verdict.[49]

33. Mich.—Dudley v. Toledo, etc., R. Co., 32 N.W. 884, 65 Mich. 655—Martin v. Michigan, etc., R. Co., 29 N.W. 40, 62 Mich. 458.

34. Mich.—Martin v. Michigan, etc., R. Co., 29 N.W. 40, 62 Mich. 458.
51 C.J. p. 733 note 53.

35. Mich.—Bottomly v. Port Huron, etc., R. Co., 7 N.W. 214, 44 Mich. 542.

36. Wis.—Redmond v. Galena, etc., R. Co., 39 Wis. 426.

37. Ohio.—Scioto Valley R. Co. v. Cronin, 38 Ohio St. 122.
51 C.J. p. 733 note 57.

38. Mich.—Quackenbush v. Chicago, etc., R. Co., 51 N.W. 383, 91 Mich. 308.
51 C.J. p. 733 note 58.

39. Me.—George v. Washington County R. Co., 44 A. 377, 93 Me. 134.
51 C.J. p. 734 note 59.

40. Mo.—Rapauno Chemical Co. v. Greenfield, etc., R. Co., 59 Mo. App. 6.
51 C.J. p. 734 note 60.

41. Or.—Pankey v. Oregon, etc., R. Co., 276 P. 277, 129 Or. 292.

42. Or.—Pankey v. Oregon, etc., R. Co., supra.

43. Mo.—Grannahan v. Hannibal, etc., R. Co., 30 Mo. 546.
Wis.—Redmond v. Galena, etc., R. Co., 39 Wis. 426.

44. Ohio.—Scioto Valley R. Co. v. Cronin, 38 Ohio St. 122.
51 C.J. p. 734 note 66.

45. Ohio.—Schneider v. Cincinnati, etc., R. Co., 10 Ohio Dec., Reprint, 364, 20 Cinc.L.Bul. 457.

46. Mich.—Chicago, etc., R. Co. v. Sturgis, 7 N.W. 213, 44 Mich. 538.
51 C.J. p. 734 note 67.

47. Tex.—Richardson v. Herbert Civ.App., 135 S.W. 628.
51 C.J. p. 734 note 69.

48. Kan.—American Nat. Bank o. Hutchinson v. Central Const. Co. 163 P.2d 369, 160 Kan. 400.
51 C.J. p. 734 note 70.

Burden of proof on claimant
Tex.—Texas & P. Ry. Co. v. Lucas Civ.App., 190 S.W. 800

Evidence held insufficient to support verdict
Tex.—Texas & P. Ry. Co. v. Lucas supra.

49. Tex.—Galveston, etc., R. Co. v. Howrin, 9 S.W. 661.
51 C.J. p. 734 note 71.

H. CREATION OF NUISANCE BY CONSTRUCTION OF RAILROAD

§ 190. In General

a. In general
b. Construction in or along streets or highways
c. Construction of crossing

a. In General

The construction of a railroad does not constitute a nuisance per se, but it may become one as a matter of fact.

The construction of a railroad does not constitute a nuisance per se[50] but it may become one as a matter of fact.[51] Thus the construction of a railroad embankment so as to deposit destructive quantities of sand or debris on adjoining land constitutes a nuisance without regard to whether the embankment was negligently or unskillfully constructed,[52] and the owner of the adjoining land is entitled to have the nuisance abated and to damages.[53] A railroad is liable for maintaining a nuisance where, by reason of its construction, it creates a stagnant pond of water because of obstruction of natural drainage.[54]

The railroad is not, however, responsible for annoyances necessarily and unavoidably created by the work of construction.[55] The rule that one who merely passively continues a nuisance must have notice of the nuisance, as discussed in Nuisances § 86, applies to nuisances created by the construction of the railroad.[56]

Where the railroad company is authorized by law to construct its line, nothing connected with such activities constitutes a nuisance per se.[57] A railroad is not responsible for a public nuisance caused by construction of an embankment by the owner of a switch connecting with the railroad, where it was required by statute to allow the connection to be made.[58] Where, however, a statute which ratifies and confirms the construction of a railroad is passed after the completion of an embankment complained of as a nuisance, the railroad company is not exempted from liability because of such embankment.[59]

b. Construction in or along Streets or Highways

The mere construction of a railroad, although in a street or highway, if done by lawful authority, is not a nuisance.

The mere construction of a railroad, although in a street or highway, if done by lawful authority, is not a nuisance,[60] even though damages to abutting owners were not ascertained and paid before its construction;[61] nor is a partial and temporary obstruction necessarily caused by, and during the process of, construction a nuisance which will be enjoined.[62] It is a public nuisance, however, for a railroad company to construct its road on a public street or highway without legislative authority, granted either directly or indirectly,[63] or in excess of the limitations of the authority given,[64] and the company may be guilty of maintaining a nuisance by reason of the negligent or improper manner of constructing or maintaining its road,[65] or failing to restore a street or highway to its former state as required by statute[66] or to construct a new highway in the place of one destroyed by the construction of the railroad,[67] or by erecting a freight depot in the center of a town, causing the obstruction of streets by cars and rendering the streets dangerous;[68] or it may constitute a nuisance for it to exercise the right to use the street or highway by construction

50. La.—McGee v. Yazoo & M. V. R. Co., 19 So.2d 21, 206 La. 121.
Operation of railroad as nuisance see Nuisances § 67.

51. La.—McGee v. Yazoo & M. V. R. Co., 19 So.2d 21, 206 La. 121.

52. Ala.—Alabama Western R. Co. v. Wilson, 55 So. 932, 1 Ala.App. 306.

53. Minn.—Heath v. Minneapolis, etc., R. Co., 148 N.W. 311, 126 Minn. 470, L.R.A.1916E 977.

54. Ga.—Georgia, etc., R. Co. v. Jernigan, 57 S.E. 791, 128 Ga. 501.

55. Tex.—Cantelou v. Trinity, etc., R. Co., Civ.App., 101 S.W. 1017.
51 C.J. p 735 note 78.

56. Tenn.—Grant v. Louisville, etc., R. Co., 165 S.W. 963, 129 Tenn. 398.
51 C.J. p 735 note 80.

57. Mont.—Cashin v. Northern Pac. Ry. Co., 28 P.2d 862, 96 Mont. 92.

58. Ky.—Louisville, etc., R. Co. v. Commonwealth, 101 S.W. 382, 31 Ky.L. 65.

59. Mass.—Salem v. Eastern R. Co., 98 Mass. 431, 96 Am.D. 650.

60. Pa.—Danville, H. & W. R. Co. v. Commonwealth, 73 Pa. 29.
51 C.J. p 735 note 82.

61. Mich.—Plantenga v. Grand Rapids Terminal R. Co., 157 N.W. 425, 190 Mich. 661.

62. Miss.—Canton v. Canton Cotton Warehouse Co., 36 So. 266, 84 Miss. 268, 105 Am.S.R. 428, 65 L.R.A. 561.

63. Mass.—Commonwealth v. Old Colony, etc., R. Co., 14 Gray 93—Commonwealth v. Vermont, etc., R. Corp., 4 Gray 22.
51 C.J. p 735 note 85.

64. Ohio.—Yackee v. Village of Napoleon, 21 N.E.2d 111, 135 Ohio St. 344.

65. Ind.—Kelly v. Pittsburgh, etc., R. Co., 63 N.E. 233, 28 Ind.App. 457, 91 Am.S.R. 134.
51 C.J. p 735 note 86.

66. W.Va.—State v. Ohio River R. Co., 18 S.E. 582, 38 W.Va. 242—State v. Monongahela River R. Co., 16 S.E. 519, 37 W.Va. 108—Moundsville v. Ohio River R. Co., 16 S.E. 514, 37 W.Va. 92, 20 L.R.A. 161.

67. W.Va.—State v. Monongahela River R. Co., 16 S.E. 519, 37 W.Va. 108.
Pa.—Commonwealth v. Allegheny Valley R. Co., 14 Pa.Super. 336.

68. N.C.—Hickory v. Southern R. Co., 53 S.E. 955, 141 N.C. 716.

of switches, sidetracks, and stations so as improperly or unreasonably to obstruct the public use thereof.[69]

A slight variation in the street surface by reason of the rails is not a nuisance where it does not affect or obstruct passage.[70] A switch track which is part of a general railway system, and which is open to all persons for shipping purposes, is a public utility, and does not constitute, when laid in a public street, a public nuisance per se,[71] although from its location and surroundings only a limited number of persons will have occasion to use it.[72] A company having the control and operation of a railroad will be equally liable with the owner thereof for the continuance of a nuisance growing out of the manner of its construction.[73]

c. Construction of Crossing

The mere construction of a railroad across a highway, pursuant to legislative authority, is not a public nuisance.

The mere construction of a railroad across a highway, pursuant to legislative authority, is not a public nuisance,[74] although the crossing is at grade;[75] nor, where a railroad in crossing has changed the location of the highway pursuant to legislative authority, is the new crossing a nuisance.[76] A railroad company may, however, be guilty of creating a nuisance by constructing a crossing in such a manner as improperly to obstruct or impair the use of the highway,[77] or to render the crossing of the tracks unsafe for travel,[78] or by locating the crossing at an unauthorized place,[79] or changing the location of the railroad without authority so as to cross the highway at a different place,[80] or changing the location or route of the highway,[81] or by erecting buildings within the limits of the highway.[82] It has been held that a grade crossing is in the nature of a nuisance which cannot exist without state authority.[83] Not every obstruction to the easement of the public in a street, by the construction of a railroad across it, is a public nuisance,[84] but only such an obstruction as is unnecessary to the more important easement of the public in the railroad.[85]

Failure to restore or maintain street crossed. A failure on the part of a railroad company to restore or maintain a highway which it has crossed, whereby the highway is improperly obstructed or travel thereon interfered with, or made dangerous, constitutes a public nuisance,[86] and renders the railroad company subject to indictment, as discussed infra §§ 194–196, or to an action for the abatement of the nuisance,[87] or liable in damages for special injuries sustained thereby, as discussed infra § 191, but not for a statutory penalty for obstruction of the road,[88] and the right to abate the nuisance is not lost by mere lapse of time.[89]

§ 191. Remedies

If the road is so constructed as to constitute a nuisance, a suit in equity may be maintained against the railroad to abate the nuisance, or an individual who sustains a special injury therefrom may maintain a private action to recover his special damages, or may bring suit for an injunction.

If the road is so constructed as to constitute a nuisance, the company is liable to indictment, as discussed infra §§ 194–196, or a suit in equity may be maintained to abate the nuisance,[90] or an in-

69. Ind.—State v. Louisville, etc., R. Co., 86 Ind. 114.

70. N.Y.—Drake v. Hudson River R. Co., 7 Barb. 508.

71. Or.—Wolfard v. Fisher, 84 P. 850, 87 P. 530, 48 Or. 479, 7 L.R.A., N.S., 991.
51 C.J. p 735 note 92.

72. Utah—Stockdale v. Rio Grande Western R. Co., 77 P. 849, 28 Utah 201.

73. Mo.—Tate v. Missouri, etc., R. Co., 64 Mo. 149.

74. Ky.—Commonwealth v. Illinois Cent. R. Co., 129 S.W. 96, 133 Ky. 749.
51 C.J. p 735 note 95.

75. N.J.—Hudson County v. New Jersey Cent. R. Co., 59 A. 303, 68 N.J.Eq. 500, affirmed 65 A. 1117, 70 N.J.Eq. 806.
51 C.J. p 736 note 96.

76. Ill.—Illinois Cent. R. Co. v. Bentley, 64 Ill. 438.

Pa.—Commonwealth v. Philadelphia, etc., R. Co., 37 Pa.Co. 5.

77. Mass.—Commonwealth v. Nashua, etc., R. Corp., 2 Gray 54.
51 C.J. p 736 note 98

78. Ky.—Paducah, etc., R. Co. v. Commonwealth, 80 Ky. 147.
51 C.J. p 736 note 99.

79. Pa.—Commonwealth v. Erie, etc., R. Co., 27 Pa. 339, 67 Am.D. 471.

80. N.Y.—People v. Northern Cent. R. Co., 58 N.E. 138, 164 N.Y. 289.

81. N.J.—State v. Warren R. Co., 29 N.J.Law 353.

82. Vt.—State v. Vermont Cent. R. Co., 27 Vt. 103.

83. Conn.—Cowles v. New York, etc., R. Co., 66 A. 1024, 80 Conn. 58—Cowles v. New York, etc., R. Co., 66 A. 1020, 80 Conn. 48, 12 L.R.A., N.S., 1067, 10 Ann.Cas. 481.

84. N.Y.—Ward v. Erie R. Co., 149 N.Y.S. 717, 87 Misc. 365, affirmed 154 N.Y.S. 94, 167 App.Div. 950, affirmed 109 N.E. 1095, 215 N.Y. 629.
51 C.J. p 736 note 5.

85. N.Y.—Ward v. Erie R. Co., supra.

86. Fla.—Palatka, etc., R. Co. v. State, 3 So. 158, 23 Fla. 546, 11 Am.S.R. 395.
51 C.J. p 736 note 7.

87. Mass.—Attwill v. Boston, etc., R. Co., 140 N.E. 928, 246 Mass. 292.
Ohio.—Little Miami, etc., R. Co. v. Green County, 31 Ohio St. 338.

88. Ky.—Commonwealth v. Chesapeake, etc., R. Co., 225 S.W. 502, 189 Ky. 599.

89. Mass.—Attwill v. Boston, etc., R. Co., 140 N.E. 928, 246 Mass. 292.

90. Wash.—State v. Benton County Super. Ct., 111 P. 19, 60 Wash. 279.
51 C.J. p 736 note 14.

Regarded as unabatable

Permanent structures of a public character, such as railroads, resulting in damage from nuisance, are

dividual who sustains a special injury therefrom may maintain a private action to recover his special damages or protect his rights,[91] or may bring suit for an injunction.[92]

A railroad track built under state franchise cannot be summarily removed by the municipality.[93] When a crossing, as constructed, constitutes a public nuisance, the municipality may summarily abate it,[94] and a municipality may compel the removal of tracks,[95] although where the track does not obstruct traffic the municipality cannot summarily remove it prior to formal declaration by the council that it is a nuisance.[96] In at least one jurisdiction it has been held that, if the railroad is constructed without authority, it is a public nuisance which cannot be enjoined by an abutting owner, but only by the public authorities.[97]

I. MOTIVE POWER AND ROLLING STOCK

§ 192. Motive Power

In the absence of any statutory or charter provision relating thereto, a railroad company may select the kind of motive power which it will use.

In the absence of any statutory or charter provision relating thereto, a railroad company may select the kind of motive power which it will use,[98] and may operate its trains by electricity,[99] the right to use electricity not being affected by the fact that, at the date of the statute under which the company was incorporated, electricity as a motive power was not known[1] or by the fact that the courts had been accustomed to designate railroads incorporated thereunder as steam railroads.[2] A railroad company expressly authorized to select its motive power may adopt whatever it chooses,[3] and may lawfully operate its trains by steam[4] or electricity;[5] and it has the same right with regard to the motive power to be used by another company which it may lawfully permit to use its tracks in the absence of any statutory restriction relating to the latter company.[6]

Where a railroad company is authorized to use either one or the other of two specified motive powers, its adoption of one is not final and it may subsequently change to the other;[7] and, where it is permitted by a municipality to construct its tracks therein on condition of using a certain motive power, the municipality may subsequently authorize it to change to another which it is authorized by its charter to use.[8] Where the right to select the kind of motive power is subsequently restricted by statute so as to exclude steam, the legislature may by a subsequent act remove the restriction.[9] Where

regarded as unabatable, and the damage occasioned is at once recoverable.—Kent v. City of Trenton, Mo. App., 48 S.W.2d 571.

91. N.C.—Sarah Good Hosiery Mills v. Carolina, C. & O. Ry., 10 S.E.2d 817, 218 N.C. 277.
51 C.J. p. 736 note 15.

Complaint held sufficient to state cause of action

N.C.—Sarah Good Hosiery Mills v. Carolina, C. & O. Ry., supra.

"Speaking demurrer"

Demurrer which made reference to particular section of code relating to authority of town to close streets of the town was not a "speaking demurrer," and was not subject to objection by plaintiffs, especially where plaintiffs cited the same statute in an amendment to the complaint.—Sanders v. Atlantic Coast Line R. Co., 4 S.E.2d 902, 216 N.C. 312.

92. N.Y.—Buchholz v. New York, etc., R. Co., 43 N.E. 76, 148 N.Y. 640.
51 C.J. p. 736 note 16.

93. N.Y.—New York Cent., etc., R. Co. v. New York, 127 N.Y.S. 513, 142 App.Div. 578, affirmed 95 N.E. 638, 202 N.Y. 212.
44 C.J. p. 1014 note 19.

94. N.Y.—Delaware, etc., R. Co. v. Buffalo, 53 N.E. 44, 533, 158 N.Y. 266, 478.

95. Ind.—City of Indianapolis v. Link Realty Co., 179 N.E. 574, 94 Ind.App. 1.

Switch tracks of private corporation

Duty of private corporation to remove its railroad switch tracks from street after service of notice by city to do so was mandatory and city had power to remove them on corporation's failure to do so.—City of Indianapolis v. Link Realty Co., 179 N.E. 574, 94 Ind.App. 1.

96. Ohio.—Cincinnati Northern R. Co. v. Cincinnati, 8 Ohio Dec., Reprint, 554, 8 Cinc.L.Bul. 334.

97. Ky.—Dulaney v. Louisville, etc., R. Co., 38 S.W. 1050, 100 Ky. 628, 18 Ky.L. 1088.

98. Pa.—Howley v. Central Valley R. Co., 62 A. 109, 213 Pa. 36, 2 L.R.A.,N.S., 138.

99. Pa.—Howley v. Central Valley R. Co., supra.—Sparks v. Philadelphia, etc., R. Co., 61 A. 881, 212 Pa. 105.

1. Pa.—Howley v. Central Valley R. Co., 62 A. 109, 213 Pa. 36, 2 L.R.A.,N.S., 138.—Sparks v. Philadelphia, etc., R. Co., 61 A. 881, 212 Pa. 105.

2. Pa.—Howley v. Central Valley R. Co., 62 A. 109, 213 Pa. 36, 2 L.R.A.,N.S., 133.
51 C.J. p. 740 note 86.

3. N.Y.—People v. Brooklyn, etc., R. Co., 89 N.Y. 75.—New York Cent., etc., R. Co. v. Untermyer, 117 N.Y.S. 443, 133 App.Div. 146, affirmed 89 N.E. 1106, 196 N.Y. 531.

4. N.Y.—People v. Brooklyn, etc., R. Co., 89 N.Y. 75.
S.C.—State v. Tupper, 23 S.C.L. 135.

5. N.Y.—New York Cent., etc., R. Co. v. Untermyer, 117 N.Y.S. 443, 133 App.Div. 146, affirmed 89 N.E. 1106, 196 N.Y. 531.

6. N.Y.—People v. Brooklyn, etc., R. Co., 89 N.Y. 75.

7. Ill.—McCartney v. Chicago, etc., R. Co., 112 Ill. 611.—Aledo v. Tri County Light, etc., Co., 187 Ill. App. 554.

8. Ill.—McCartney v. Chicago, etc., R. Co., 112 Ill. 611.

9. N.Y.—People v. Brooklyn, etc., R. Co., 89 N.Y. 75.
51 C.J. p. 741 note 93.

there are no restrictions in the charter as to motive power, an agreement by the company, in consideration of a subsidy from a township, to maintain the road, and to maintain its shops and terminals at a specified city, does not require it to continue the use of steam as a motive power.[10]

§ 193. Rolling Stock

The right to use steam as a motive power and to carry freight and passengers carries with it the right to construct and use the appliances ordinarily employed for such purposes.

The right to use steam as a motive power and to carry freight and passengers carries with it the right to construct and use the appliances ordinarily employed for such purposes, such as locomotive engines, heavy freight and passenger cars, and heavy T rails, commonly used on steam railroads;[11] and the fact that at the date of the statute under which the railroad company was incorporated particular kinds of rails and rolling stock were not in use does not, in the absence of express restriction, affect the right of the railroad company to adopt improved methods and appliances which will facilitate the conduct of its business and are consistent with the public safety.[12]

"Equipment," as applied to railroads, includes the rolling stock and other movable property used in operating the railroad,[13] such as cars, locomotives, etc.[14] While it may mean the necessary adjuncts of a railway,[15] it cannot, however, be construed to include everything that is necessary to the operation of the railroad, and therefore is not broad enough to include structures like machine shops, roundhouses, and the like.[16]

J. OFFENSES INCIDENT TO CONSTRUCTION AND MAINTENANCE

§ 194. Criminal Responsibility in General

A railroad company as well as a natural person is liable to indictment for unlawfully obstructing a public highway by the construction and maintenance of its road, and for a breach of duty imposed on it by law for the benefit of the public in respect of highways.

A railroad company as well as a natural person is liable to indictment for unlawfully obstructing a public highway by the construction and maintenance of its road,[17] and such indictment may be maintained either on common-law principles,[18] or under statutes making it an indictable offense for any person to obstruct a public highway.[19] So, also, a railroad company is liable to indictment for a breach of duty imposed on it by law for the benefit of the public in respect of highways,[20] whether such breach of duty assumes the shape of an act of misfeasance or of nonfeasance;[21] and, generally, whenever the act or omission of a company in the construction or maintenance of its road creates a public nuisance, the company is subject to indictment.[22]

Where a statute authorizes a railroad company to "alter and grade" highways at railroad crossings so that travel thereon will not be impeded, a change in the location or route of the highway, without any other statutory authority, is indictable.[23] A railroad company may also be criminally liable for failure to perform its duty to restore a highway to its former condition so as not unnecessarily to impair its usefulness,[24] or to construct a new and sufficient

10. Ind.—Union Trust Co. v. Curtin, 105 N.E. 562, 182 Ind. 61, L.R.A.1915A 699

11. Pa.—Millvale Borough v. Evergreen R. Co., 18 A. 993, 131 Pa. 1, 7 L.R.A. 369
Right to use steam as motive power see supra § 192.

12. Pa.—Howley v. Central Valley R. Co., 62 A. 109, 213 Pa. 36, 2 L.R.A.,N.S., 138.

13. Ala.—**Corpus Juris quoted in** W. T. Smith Lumber Co. v. Fox, 164 So. 214, 215, 231 Ala. 159.
Or.—**Corpus Juris quoted in** Paldanius v. Strauss, 198 P. 253, 255, 100 Or. 497.
Tex.—St. Louis, etc., R. Co. v. Sandal, 3 Tex. App. Civ. Cas. § 379.

14. Ala.—**Corpus Juris quoted in** W. T. Smith Lumber Co. v. Fox, 164 So. 214, 215, 231 Ala. 159
Or.—**Corpus Juris quoted in** Paldanius v. Strauss, 198 P. 253, 255, 100 Or. 497.
20 C.J. p. 1301 note 57.

15. Ala.—**Corpus Juris quoted in** W. T. Smith Lumber Co. v. Fox, 164 So. 214, 215, 231 Ala. 159.
Or.—**Corpus Juris quoted in** Paldanius v. Strauss, 198 P. 253, 255, 100 Or. 497.
20 C.J. p. 1301 note 55.

16. Tex.—Cleburne Nat. Bank v. Gulf, etc., R. Co., 66 S.W. 203, 95 Tex. 176.

17. Ky.—Commonwealth v. Chesapeake, etc., R. Co., 225 S.W. 502, 189 Ky. 599.
51 C.J. p. 736 note 20.

18. N.J.—State v. Lackawanna R. Co., 90 A. 1103, 86 N.J.Law 62—New York, etc., R. Co. v. State, 13 A. 1, 50 N.J.Law 303, affirmed 23 A. 168, 53 N.J.Law 244.

19. Miss.—Vicksburg, etc., R. Co. v. State, 8 So. 128, 64 Miss. 5.
51 C.J. p. 737 note 22.

20. Ky.—Commonwealth v. Louisville, etc., R. Co., 58 S.W. 478, 702, 109 Ky. 59, 22 Ky.L. 572.
51 C.J. p. 737 note 23.

21. N.J.—New York, etc., R. Co. v. State, 13 A. 1, 50 N.J.Law 303, affirmed 23 A. 168, 53 N.J.Law 244.
Pa.—Pittsburgh, etc., R. Co. v. Commonwealth, 101 Pa. 192.

22. W.Va.—State v. Ohio River R. Co., 18 S.E. 582, 38 W.Va. 242.
51 C.J. p. 737 note 26.

23. N.J.—State v. Warren R. Co., 29 N.J.Law 353.

24. W.Va.—State v. Monongahela River R. Co., 16 S.E. 519, 37 W.Va. 108.
51 C.J. p. 737 note 28.

highway in the place of the one appropriated.[25] So a failure to comply with the law requiring a railroad company to construct and maintain fences on the sides of its road,[26] or to construct suitable crossings at, and approaches to, highways,[27] or to keep such crossings and approaches in a safe and proper state of repair,[28] or to keep in repair a highway bridge crossing its track,[29] may render the company liable to prosecution. It is not an offense, however, to maintain an unguarded and dangerous crossing, lawfully constructed, in the absence of any statute requiring gates or watchmen at crossings.[30]

Companies liable. The lessee of a railroad may be liable to indictment for failing to construct a new highway in the place of the one taken by the lessor company in the construction of the road without performing such duty as required by statute.[31]

§ 195. Defenses

It is generally a good defense to an indictment and prosecution incident to construction and maintenance of a railroad that the act alleged was done under authority of the state or that it was done under authority of a municipality.

It is generally a good defense that the act alleged was done under authority of the state[32] or that it was done under the authority of a municipality.[33] So, on an indictment for obstructing a street, it is a good defense that the obstruction was caused by the act of the municipality in raising the grade of the street without requiring the railroad company to elevate its trestle, although such trestle constituted a nuisance.[34] A railroad company charged with maintaining a nuisance at a highway crossing may not show in defense that the crossing was no worse than other places on the highway;[35] nor is it a defense to an indictment against a company for obstructing a turnpike road that it would require a large sum of money so to lower the bed of the turnpike as to make it pass under the railroad, and thus remove the obstruction.[36] Long acquiescence by county authorities and the public in the obstruction of a highway by a railroad track across it will not bar the right to prosecute the company for a continuing obstruction of the road in violation of statute.[37]

Existence of other remedy. The remedy by indictment is not affected by the existence of a remedy by mandamus,[38] or the existence of a statutory remedy,[39] such as a penalty to be recovered by a civil action,[40] or by the fact that the public authorities in charge of highways might do what the railroad company omitted and recover therefor from the company;[41] nor does the fact that a person injured has a private remedy affect the right of the state to indict for the public wrong.[42]

Limitation of prosecution. Where the offense is a continuing one,[43] such as a failure to restore a highway to its former condition, or construct a new highway in lieu of one taken, as required by statute,[44] the statute of limitations does not apply, but the rule is otherwise where there is no act of continuous wrongdoing.[45]

§ 196. Prosecution and Punishment

a. In general
b. Evidence
c. Trial and judgment

a. In General

An indictment for obstructing a highway must allege with certainty every fact essential to show the commission of the offense charged, and the material facts must

25. Pa.—Commonwealth v. Pennsylvania R. Co., 12 A. 38, 117 Pa. 637.
51 C.J. p 737 note 29

26. N.Y.—People v. New York Cent. R. Co., 5 Park Cr. 195.

27. N.Y.—People v. New York Cent., etc., R. Co., 74 N.Y. 302.

28. Ky.—Commonwealth v. Louisville, etc., R. Co., 58 S.W. 478, 702, 109 Ky. 59, 22 Ky.L. 572.
51 C.J. p 737 note 32.

29. Me.—State v. Gorham, 37 Me. 451.
N.J.—New York, etc., R. Co. v. State, 13 A. 1, 50 N.J.Law 303, affirmed 23 A. 168, 53 N.J.Law 244.
51 C.J. p 737 note 33.

30. Pa.—Commonwealth v. Pennsylvania R. Co., 28 Pa.Dist. 872.

31. Pa.—Commonwealth v. Pennsylvania R. Co., 12 A. 38, 117 Pa. 637.

32. Pa.—Commonwealth v. Pennsylvania R. Co., 78 Pa.Super. 389
51 C.J. p 737 note 36.

33. Ky.—Commonwealth v. Illinois Cent. R. Co., 129 S.W. 96, 138 Ky. 749

34. Tenn.—Southern R. Co. v. State, 169 S.W. 1173, 130 Tenn. 261, L.R.A.1915B 766.

35. Ky.—Louisville, etc., R. Co. v. Commonwealth, 149 S.W. 898, 149 Ky. 459.

36. Pa.—Northern Cent. R. Co. v. Commonwealth, 90 Pa. 300.

37. W.Va.—State v. Western Maryland R. Co., 81 S.E. 1039, 74 W.Va. 256

38. Ind.—State v. Baltimore, etc., R. Co., 22 N.E. 207, 120 Ind. 298.
51 C.J. p 738 note 42.

39. Ark.—St. Louis, etc., R. Co. v. State, 11 S.W. 1035, 52 Ark. 51.

N.Y.—People v. New York Cent. R. Co., 74 N.Y. 302.

40. Ark.—St. Louis, etc., R. Co. v. State, 11 S.W. 1035, 52 Ark. 51.

41. N.J.—State v. Lackawanna R. Co., 90 A. 1103, 86 N.J.Law 62.
51 C.J. p 738 note 43.

42. Pa.—Northern Cent. R. Co. v. Commonwealth, 90 Pa. 300.

43. Pa.—Commonwealth v. Allegheny Valley R. Co., 14 Pa.Super. 336.
W.Va.—State v. Ohio River R. Co., 18 S.E. 582, 38 W.Va. 242.

44. Pa.—Commonwealth v. Allegheny Valley R. Co., 14 Pa.Super. 336.
W.Va.—State v. Ohio River R. Co., 18 S.E. 582, 38 W.Va. 242.

45. Ky.—Louisville, etc., R. Co. v. Commonwealth, 26 S.W. 536, 16 Ky.L. 68.
51 C.J. p 738 note 50.

be charged with such fullness as to show the complete offense.

An indictment for obstructing a highway must allege with certainty[46] every fact essential to show the commission of the offense charged,[47] and the material facts must be charged with such fullness as to show the complete offense.[48] Where the offense consists in the omission of some duty which is purely statutory, the duty of the railroad company to perform the act omitted must be averred.[49] It is not necessary to use the exact language of the statute if words of equivalent import are used;[50] nor on an indictment under a statute for obstructing a public highway is it necessary to allege that the act was "knowingly and willfully" done where the statute does not use this expression as an element of the offense,[51] although the rule is otherwise where the statute requires that the obstruction must be willful in order to constitute an offense.[52] An indictment for encroaching on the highway, which is not based on a statute imposing on railroads the duty to construct sufficient bridges or passages over its tracks so as not to impede travel, need not set out such statute.[53]

If the acts alleged as constituting the offense might, under certain circumstances, be lawful, these circumstances must be negatived by proper averments;[54] and, hence, where the statute authorizes railroad companies to obstruct highways temporarily, an indictment for obstructing a highway must allege facts showing that the obstruction was not such as was authorized by statute.[55] So, where a company is authorized to construct its road across a highway, an indictment for maintaining a public nuisance in so doing must allege that the obstruction was maintained for an unreasonable length of time;[56] and, where a railroad company is authorized to construct a bridge across navigable waters, provided it is not so constructed as "to prevent" the navigation of such waters, an indictment which merely alleges that navigation is "obstructed and impeded" is not sufficient.[57] It has been held, however, that it is not necessary to aver that the railroad company had no license to occupy the highway,[58] or that it had not complied with the conditions of its franchise to cross the highway.[59]

Any material variance between the allegations of the indictment and the proof is fatal to a conviction.[60] Where an indictment charges the unlawful obstruction of a highway, in violation of statute, by maintaining a track across it so as to render such highway impassable, the state is not limited to showing that the highway was rendered impassable, but may show any unlawful obstruction.[61]

b. Evidence

The burden is on the state to prove every essential element of the offense charged, and on defendant railroad company to establish any matter of affirmative defense

In accordance with the rules of criminal procedure, the burden is on the state to prove every essential element of the offense charged,[62] and on defendant railroad company to establish any matter of affirmative defense.[63] The general rules of criminal procedure as to the admissibility[64] and sufficiency[65] of evidence are applicable in prosecutions against railroads.

c. Trial and Judgment

On an indictment against a railroad company for obstructing a highway, the question of the validity of the company's charter cannot be raised or determined.

On an indictment against a railroad company for obstructing a highway, the question of the validity of

46. Ky.—Maysville, etc., R Co. v. Commonwealth, 10 Ky.L. 818.
51 C.J. p 738 note 52

47. Iowa.—State v. Chicago, etc., R. Co, 19 N.W. 299, 63 Iowa 508.
51 C J p 738 note 53

48. N.C.—State v. Roanoke R, etc, Co, 13 S E. 713, 109 N C. 860.
51 C J p 738 note 54.

49. N Y.—People v. New York Cent. R Co, 5 Park.Cr. 195.
51 C.J. p 738 note 55.

50. Fla.—Palatka, etc, R. Co. v. State, 3 So. 158, 23 Fla 546, 11 Am. S R. 395.
51 C.J. p 738 note 56.

51. W Va.—State v. Chesapeake, etc, R. Co., 24 W Va. 809.
51 C.J. p 738 note 57.

52. Fla.—Savannah, etc, R. Co. v. State, 3 So. 204, 23 Fla. 579.

53. N J.—State v. Lackawanna R. Co, 90 A. 1103, 86 N J Law 62
51 C J. p 739 note 59.

54. Iowa.—State v. Chicago, etc., R Co, 19 N.W. 299, 63 Iowa 508
51 C J. p 739 note 60.

55. Ky.—Commonwealth v. Illinois Cent. R. Co., 47 S W. 258, 104 Ky. 366, 20 Ky.L. 606.
51 C J. p 739 note 61.

56. Ky.—Commonwealth v. Morganfield, etc, R. Co., 101 S W. 304, 125 Ky 235, 30 Ky L 1274.
51 C.J. p 739 note 62.

57. Me.—State v. Portland, etc., R. Co., 57 Me. 402.

58. W Va.—State v. Dry Fork R. Co, 40 S.E 447, 50 W Va. 235.

59. W Va.—State v. Western Maryland R. Co., 81 S E 1039, 74 W.Va. 256.

60. Ky.—Louisville, etc., R Co. v. Commonwealth, 149 S W 898, 149 Ky 459
51 C J. p 739 note 66.

61. W.Va.—State v. Western Maryland R. Co, 81 S E 1039, 74 W.Va. 256.
51 C J. p 739 note 67.

62. W Va.—State v Chesapeake, etc., R. Co, 24 W.Va. 809.
51 C J. p 739 note 69.

63. W Va.—State v Western Maryland R. Co, 81 S.E. 1039, 74 W.Va. 256.
51 C.J. p 739 note 70

64. Ky.—Louisville, etc., R Co. v. Commonwealth, 149 S.W. 898, 149 Ky. 459
51 C.J. p 740 note 71.

65. Ky.—Illinois Cent R. Co. v. Commonwealth, 129 S W. 94, 138 Ky 742.
51 C J. p 740 note 72.

the company's charter cannot be raised or determined.[66]

Questions for jury. On an indictment against a railroad company for obstructing a highway, where defendant claims to have constructed a new highway in the place of the one appropriated, the question of the sufficiency of the new highway is for the jury;[67] and, where a statute requires a railroad company to construct crossings so as not to impede travel on the highway, and on an indictment for maintaining an illegal crossing it is shown that the width of the highway was somewhat narrowed, but it is not free from doubt as to whether it was such as to impede travel, the question is for the jury.[68]

Instructions. On the trial of an indictment against a railroad corporation for encroaching on a highway, by constructing a bridge less than the width of the highway where its road crossed the highway below grade, it was error for the court to charge that the question of defendant's guilt depended on whether the bridge obstructed or hindered the enjoyment of the highway by the public, independently of the further question whether the company had, in compliance with the statute, restored the highway as nearly as might be to its former state, so as not unnecessarily to impair its usefulness, since the language of the charter implies that a railroad crossing will, to some extent, impair the usefulness of the road.[69]

Judgment. On an indictment for obstructing a highway, a judgment can be rendered requiring the removal of the obstruction,[70] although, where the illegality of the obstruction is due merely to the manner in which the railroad was constructed, the judgment should permit the company to make such changes as will prevent the railroad from obstructing travel, rather than order its absolute removal from the highway.[71] On an indictment for breach of a statutory duty to reconstruct a highway in lieu of one taken, however, the sentence cannot require the company to remove the obstruction from the old road or to construct a new one, but can go no further than to punish for the offense committed.[72] The confirmation by statute of the illegal location of a railroad in a highway is no ground for arresting judgment on an indictment for a nuisance by such obstruction on which the railroad company has been convicted before the passage of the statute.[73]

VIII. SALES, LEASES, TRAFFIC CONTRACTS, AND CONSOLIDATION

A. IN GENERAL

§ 197. Right to Alienate or Transfer Franchises or Property Generally

The power of a railroad company to alienate or transfer its property and franchises is governed by the general principle that a corporation may exercise only such powers as are expressly conferred or necessarily implied as fairly incidental thereto, and a company cannot, without legislative authority, alienate its franchises or property necessary for the exercise thereof.

The power of a railroad company to alienate or transfer its property and franchises is governed by the general principle that a corporation may exercise only such powers as are expressly conferred or necessarily implied as fairly incidental thereto;[74] and, further, that a charter to operate a railroad is granted primarily in the interest of the public, and its acceptance imposes on the company certain obligations to the public from which it cannot voluntarily absolve itself,[75] so that, although the legislature may authorize such alienation either in whole or in part,[76] a company cannot, without legislative authority, alienate its franchises or property necessary for the exercise thereof,[77] or by contract,[78]

66. Pa.—Commonwealth v. Philadelphia, etc., R. Co., 23 Pa.Super. 235.

67. W.Va.—State v. Monongahela River R. Co., 16 S.E. 519, 37 W.Va. 108.

68. Pa.—Commonwealth v. Philadelphia, etc., R. Co., 23 Pa.Super. 235.

69. N.Y.—People v. New York, etc., R. Co., 89 N.Y. 266, 270.
51 C.J. p 740 note 77.

70. Pa.—Commonwealth v. Philadelphia, etc., R. Co., 33 Pa.Super. 452.
51 C.J. p 740 note 78.

71. Fla.—Palatka, etc., R. Co. v. State, 3 So. 158, 23 Fla. 546, 11 Am.S.R. 395.

72. Pa.—Pittsburgh, etc., R. Co. v. Commonwealth, 101 Pa. 192—Commonwealth v. Allegheny Valley R. Co., 14 Pa.Super. 336.

73. Mass.—Commonwealth v. Old Colony, etc., R. Co., 14 Gray 93.

74. N.J.—Stockton v. New Jersey Cent. R. Co., 24 A. 964, 50 N.J.Eq. 52, 17 L.R.A. 97.
51 C.J. p 741 note 97.

75. U.S.—Central Transp. Co. v. Pullman's Palace Car Co., Pa., 11 S.Ct. 478, 139 U.S. 24, 35 L.Ed. 55.
51 C.J. p 741 note 98.

76. Mass.—East Boston, etc., R. Co. v. Eastern R. Co., 13 Allen 422.

77. Ga.—South Western R. Co. v. Benton, 58 S.E.2d 905, 206 Ga. 770, certiorari denied 71 S.Ct. 44, 340 U.S. 815, 95 L.Ed. ——.
51 C.J. p 741 note 1.

78. Colo.—Pueblo, etc., R. Co. v. Taylor, 5 Colo. 1, 45 Am.R. 512.
51 C.J. p 741 note 2.
Lease to another railroad see infra § 203 et seq.
Sale or conveyance see infra § 199 et seq.

or otherwise[79] absolve or incapacitate itself from the proper performance of its public duties, or delegate them to another;[80] nor can a company, which has been granted a franchise to construct a public road, farm out a part of its franchise so as to enable a private individual to construct a part of such road on its right of way and operate it for his own benefit as a private road.[81]

§ 198. Constitutional and Statutory Provisions in General

Constitutional and statutory provisions authorizing a railroad to sell the road or to purchase the road of another are discussed infra § 199. Provisions authorizing the making or taking of a lease are discussed infra § 208, and authority to consolidate infra § 235.

Examine Pocket Parts for later cases.

B. SALES

§ 199. Right to Sell or Purchase

A railroad company cannot, without legislative authority, sell its franchise to be a corporation, or its road and franchises for maintaining and operating it, or any real estate acquired and held solely for the purpose of exercising such franchises, and the same rule applies to the right to purchase the road, property, and franchises of another company.

A railroad company cannot, without legislative authority, sell its franchise to be a corporation,[82] or its road and franchises for maintaining and operating it,[83] or any real estate acquired and held solely for the purpose of exercising such franchises.[84] The same rule applies to the right to purchase the road, property, and franchises of another company.[85] To constitute a valid sale there must be both a power to sell in the vendor and a power to purchase in the vendee,[86] and a charter provision authorizing a particular company to purchase any other railroad confers no authority on any other company to sell to it,[87] but a provision authorizing it to purchase the property and franchises of a particular company impliedly authorizes the latter to sell.[88]

Authority to sell a railroad or to purchase the road of another company is in some cases conferred in express terms.[89] Express authority to sell need not have been conferred exclusively by an express amendment of the selling corporation's charter,[90] but a grant of power in another mode may be sufficient.[91] Authority to sell or purchase cannot be implied from authority to lease[92] or mortgage,[93] or generally, although the contrary has been held,[94] to consolidate,[95] or make running arrangements,[96] or connect or unite with,[97] other roads; nor can a prohibition against a sale to a parallel or competing line be construed as authority to sell to a company whose road is not parallel or competing.[98] The right of a railroad to take up its rails and dispose of them will not be implied from a court ruling that an order of the railroad commission requiring the road to operate at a loss was unreasonable.[99]

Even in the case of express authority to sell or purchase, the right cannot be extended beyond the provisions of the statute,[1] as where the statute refers

79. Mass.—Attorney General v Boston, etc, R Co, 124 N.E 257, 233 Mass 460.
51 C J. p 741 note 5.

80. U.S.—Central Transp. Co. v. Pullman's Palace Car Co, Pa, 11 S.Ct. 478, 139 U S 24, 35 L Ed 55.

81. Pa.—Appeal of Stewart, 56 Pa. 413.

82. N Y.—Welch v Old Dominion Min, etc., Co., 10 N.Y S. 174, 56 Hun 647.
51 C J. p 741 note 11.

83. U S.—Louisville, etc, R. Co. v. Commonwealth, Ky, 16 S Ct 714, 161 U S 677, 40 L.Ed 849.
51 C J. p 741 note 12.

84. Ill.—Chicago, etc., R. Co. v. Englestein, 164 N E 189, 333 Ill. 117.
51 C J p 741 note 13.

85. N C.—Manning v. Atlantic, etc, R. Co, 125 S.E 555, 188 N.C. 648.
51 C.J p 742 note 14.

86. Tex.—East Line, etc., R. Co v. Rushing, 6 S W. 834, 69 Tex. 306.

87. Md.—State v. Consolidation Coal Co, 46 Md. 1.

88. Conn.—New York, etc, R. Co. v. New York, etc, R. Co., 52 Conn 274.

89. Ill.—People v. City of Chicago, 182 N.E 419, 349 Ill. 304.
51 C.J p 742 note 18.
Sale to competitor
Statute authorizing railroads to sell properties to domestic corporations empowered to purchase such properties was held not objectionable because not expressly prohibiting sale to competitor.—People v. City of Chicago, supra.

90. N.C.—Manning v. Atlantic, etc., R. Co., 125 S.E. 555, 188 N C. 648.

91. N.C.—Manning v. Atlantic, etc., R. Co, supra.

92. N J.—Elkins v Camden, etc., R Co., 36 N.J.Eq. 5.

93. N.M.—Southern Pac R. Co v. Esquibel, 20 P. 109, 4 N M. 337
Tex.—Gulf, etc, R Co v. Morris, 4 S.W. 156, 67 Tex 692.

94. N.C.—Manning v. Atlantic, etc, R. Co, 125 S E. 555, 188 N.C. 648
51 C.J p 742 note 23.

95. U S.—Mackintosh v. Flint, etc, R. Co, C.C Mich, 34 F. 582.
51 C.J. p 742 note 24.

96. N M.—Southern Pac. R Co. v. Esquibel, 20 P. 109, 4 N.M. 337.

97. U S.—Louisville, etc., R Co. v. Commonwealth, Ky., 16 S.Ct. 714, 161 U S. 677, 40 L.Ed 849.
Ind.—Tippecanoe County v. Lafayette, etc, R. Co., 50 Ind 85.

98. Tex.—East Line, etc, R. Co. v. State, 12 S.W. 690, 75 Tex. 434.

99. Ark.—State R. Commission v. Saline River R. Co., 177 S.W. 896, 119 Ark. 239.

1. Ala.—Spence v. Mobile, etc., R. Co, 79 Ala 576.
51 C J. p 743 note 30.

only to connecting lines[2] or companies of the same state[3] So, a statute authorizing a company which is unable to complete its road to sell to another company does not authorize the sale of a completed road;[4] and a statute authorizing a company to purchase any railroad "constructed" by any other company, if the roads of such companies are connected or continuous, does not authorize one company to purchase the property and franchises of another prior to the construction of its road[5] It has also been held that a grant of power to a company to locate and construct branch roads does not confer any authority to purchase and operate a road already constructed under a different charter,[6] but that a company authorized to construct a line of railroad on a particular route and to purchase property of all kinds may purchase as a part of its line a road already constructed on a part of the route authorized.[7] A company, although authorized to sell its road, has no power to sell its conditional stock subscriptions, where the condition has not been performed so as to entitle the purchaser to perform it and enforce the subscription;[8] and there can be no sale of the right of way apart from the franchise to operate the road to one having no right to exercise such franchise.[9]

Authority to sell franchise. The legislature may, subject to any constitutional limitations and restrictions, authorize one railroad company to purchase from another even its franchise to be a corporation.[10]

Ratification. The sale of a railroad, although made without legislative authority, may be ratified and rendered valid by a subsequent legislative enactment.[11]

§ 200. —— Continuous or Connecting Lines

A statute authorizing the purchase of connecting lines does not require a technical sale, but any contract or agreement by which a railroad acquires such lines in a lawful manner is sufficient.

A statute authorizing the purchase of connecting lines does not require a technical sale,[12] but any contract or agreement by which a railroad acquires such lines in a lawful manner is sufficient.[13] There is authority for the view that, where a railroad company, by reason of a lack of proper running arrangements with other roads, is unable to pay its expenses, and it appears unavoidable that it must go to sale, either under a mortgage or under judgments obtained by its general creditors, there is nothing wrong or fraudulent in connecting companies combining and forming an association for purchasing it, and for operating it, under such arrangements as will give it through connections, enable it better to serve the public, and afford profit to its owners.[14]

§ 201. —— Parallel or Competing Lines

The state may prohibit the sale of a railroad to a company owning a parallel or competing line, or restrict a general power to sell previously given so as to exclude sales to such companies where the right has not been acted on.

The state may prohibit the sale of a railroad to a company owning a parallel or competing line,[15] or restrict a general power to sell previously given so as to exclude sales to such companies where the right has not been acted on.[16] Accordingly, in some jurisdictions there are constitutional or statutory provisions expressly prohibiting a company from purchasing or acquiring control of a parallel or competing line,[17] the object being to promote competition and prevent monopolies.[18] Such a prohibition cannot be evaded by letting the transfer take the form of a judicial sale,[19] or a long-term lease with the power of renewal,[20] or the purchase of a controlling interest in the stock of such company,[21] or by interposing a nominal trustee as

2. Tex.—East Line, etc., R. Co. v. State, 12 S.W. 690, 75 Tex. 434—East Line, etc., R. Co. v. Rushing, 6 S.W. 834, 69 Tex. 306.
3. Ga.—Upson County R. Co. v. Sharman, 37 Ga. 644.
4. U.S.—Mackintosh v. Flint, etc., R. Co., C.C.Mich., 34 F. 582.
5. Neb.—Clarke v. Omaha, etc., R. Co., 4 Neb. 458, 5 Neb. 314.
6. N.J.—Elkins v. Camden, etc., R. Co., 36 N.J.Eq. 5.
51 C.J. p 743 note 35.
7. U.S.—Branch v. Jesup, Ga., 1 S. Ct. 495, 106 U.S. 468, 27 L.Ed. 279.
8. Ohio.—Toledo, etc., R. Co. v. Hinsdale, 15 N.E. 665, 45 Ohio St. 556.
9. U.S.—East Alabama, etc., R. Co. v. Doe, Ala., 5 S.Ct. 869, 114 U.S. 340, 28 L.Ed. 136.
51 C.J. p 743 note 38.
10. Ohio.—State v. Sherman, 22 Ohio St. 411
51 C.J. p 743 note 39.
11. Ill.—Hatcher v. Toledo, etc., R. Co., 62 Ill. 477.
R.I.—Boston, etc., R. Co. v. New York, etc., R. Co., 13 R.I. 260.
12. Ill.—Chicago, etc., R. Co. v. Doyle, 100 N.E. 278, 256 Ill. 514.
13. Ill.—Chicago, etc., R. Co. v. Doyle, supra.
14. Mo.—Kitchen v. St. Louis, etc., R. Co., 69 Mo. 224.
15. Tex.—East Line, etc., R. Co. v. Rushing, 6 S.W. 834, 69 Tex. 306.
16. U.S.—Louisville, etc., R. Co. v. Commonwealth, Ky., 16 S.Ct. 714, 161 U.S. 677, 40 L.Ed. 849—Pearsall v. Great Northern R. Co., Minn., 16 S.Ct. 705, 161 U.S. 646, 40 L.Ed. 838.
17. Ky.—Commonwealth v. Louisville, etc., R. Co., 146 S.W. 767, 148 Ky. 94
51 C.J. p 743 note 46.
18. Pa.—Pennsylvania R. Co. v. Commonwealth, 7 A. 363, 3 Pa.Cas. 83.
51 C.J. p 743 note 47.
19. U.S.—Louisville, etc., R. Co. v. Commonwealth, Ky., 16 S.Ct. 714, 161 U.S. 677, 40 L.Ed. 849.
20. Ind.—Tippecanoe County v. Lafayette, etc., R. Co., 50 Ind. 85.
21. Pa.—Pennsylvania R. Co. v.

purchaser;[22] and stockholders have no such right to sell their stock as will prevent the granting of an injunction to prevent a company from obtaining control of a competing line.[23] Independently of express prohibition, such purchases are contrary to public policy.[24]

Lines within prohibition. In order to be within the prohibition of the constitutional and statutory provisions referred to, the roads need not be parallel in a strictly mathematical sense,[25] and may be competing, although not parallel,[26] or may be competing by reason of their relations with, control, or management of lines other than their own.[27] Lines still under construction and uncompleted may be within the prohibition,[28] but lines running in different directions, and which do not run through and serve the same territory and are not competitors for business, are not,[29] although a distant point may be reached by such lines through their connections.[30] A company may, for the purpose of facilitating and enlarging its business, acquire land and build an additional road parallel to its own.[31]

In determining whether they are parallel or competing, the lines which the companies are authorized by their charters to construct as well as those which have been actually constructed must be considered.[32]

Construction. Constitutional and statutory provisions prohibiting acquisition of competing lines should be reasonably construed according to the purposes of their enactment and their application limited accordingly.[33] Penal statutes must, in accordance with the general rule, be strictly construed.[34]

§ 202. —— Subscription to, or Purchase of, Stock

A railroad company has no right to become an incorporator or subscriber to the stock of another railroad company, or to invest its corporate funds in the purchase of such stock, except where it is authorized to do so by its charter or statute.

While a railroad company may take stock of another railroad company by way of security for a debt,[35] it has no right to become an incorporator or subscriber to the stock of another railroad company,[36] or to invest its corporate funds in the purchase of such stock,[37] particularly where the object is to secure an interest in the management of such road,[38] except where it is authorized to do so by its charter or statute;[39] and independently of the right to hold stock in another corporation the rule against the sale or purchase of a railroad without legislative authority prevents one railroad company from acquiring the virtual ownership or control of another by the acquisition of a controlling interest in its stock.[40]

If a statute authorizes a company to acquire by purchase or other lawful contract the road and franchises of any other company, however, it may purchase a majority of the stock of another company for the purpose of gaining the control and practical ownership thereof,[41] and, where a statute authorizes one company which is unable to complete the construction of its road to sell it to another company, such other company may purchase a controlling interest in its stock.[42] The legislature may, under a power reserved to alter or amend a charter, authorize one railroad company to subscribe to, or

Commonwealth, 7 A. 368, 3 Pa.Cas 83.
51 C J. p 743 note 50.

22. Pa.—Pennsylvania R. Co. v. Commonwealth, supra—Commonwealth v. Beech Creek, etc, R. Co, 1 Pa.Co. 223, affirmed 7 A. 374, 3 Pa.Cas. 100

23. Pa.—Pennsylvania R. Co. v. Commonwealth, 7 A. 368, 3 Pa Cas. 83.

24. Ga.—Central R. Co. v. Collins, 40 Ga. 582.
51 C.J. p 744 note 53.

25. Ky.—Louisville, etc., R. Co. v. Commonwealth, 31 S.W. 476, 97 Ky. 675, 17 Ky.L. 427.

26. Tex.—East Line, etc., R Co. v. Rushing, 6 S.W. 834, 69 Tex. 306.

27. Tex.—East Line, etc., R. Co. v. State, 12 S W. 690, 75 Tex. 434.
51 C J. p 744 note 57.

28. Ohio.—State v. Cleveland, etc., R Co., 13 Ohio Cir.Ct.,N.S., 145, 32 Ohio Cir.Ct. 147.
51 C.J. p 744 note 58.

29. Ky.—Commonwealth v. Louisville, etc., R. Co, 146 S W. 767, 148 Ky. 94.
51 C.J p 744 note 59.

30. Ill.—Chicago, etc., R. Co. v. Franzen, 122 N.E. 492, 287 Ill. 346.

31. Ill.—Chicago, etc, R. Co. v. Chicago, etc, R. Co, 71 N.E 1017, 211 Ill 352.
51 C J p 744 note 61

32. Ill.—Illinois State Trust Co. v. St Louis, etc, R. Co., 75 N.E 562, 217 Ill. 504.
Pa.—Pennsylvania R. Co. v. Commonwealth, 7 A. 368, 3 Pa.Cas. 83.

33. U S.—Kimball v. Atchison, etc., R. Co., C.C.Mo., 46 F. 888.
Ill.—Illinois State Trust Co. v. St. Louis, etc., R. Co., 75 N E. 562, 217 Ill. 504

34. Ky.—Commonwealth v. Louisville, etc., R. Co., 146 S.W. 767, 148 Ky. 94.
51 C J. p 744 note 65.

35. N.Y.—Milbank v. New York, etc., R. Co., 64 How Pr. 20.

36. Mass.—Williams v. Johnson, 95 N E 90, 208 Mass 544.
51 C.J. p 744 note 68.

37. Ga.—Hazelhurst v. Savannah, etc., R. Co, 43 Ga. 13.
51 C.J. p 744 note 69.

38. Ga.—Central R. Co. v. Collins, 40 Ga 582.
51 C.J. p 744 note 70.

39. N.Y.—Oelbermann v. New York, etc., R. Co., 29 N.Y.S. 545, 77 Hun 332.
51 C.J. p 744 note 71.

40. Ga.—Central R. Co. v. Collins, 40 Ga. 582.
N.J.—Elkins v. Camden, etc., R. Co, 36 N.J.Eq. 5.

41. U.S.—Lisman v. Knickerbocker Trust Co., Mich., 211 F. 413, 128 C.C.A. 85.
N.Y.—Wehrhane v. Nashville, etc., R. Co., 42 Hun 660, 4 N.Y.St.R. 541.

42. Mich.—Dewey v. Toledo, etc., R. Co., 51 N.W. 1063, 91 Mich. 351.

purchase stock of, another company,[43] but the right to do so will not be implied but must be clearly conferred.[44]

A statute authorizing one company, for the purpose of forming a connection, to aid another in the construction of its road by means of a subscription to its capital stock does not authorize a purchase of the stock of such company from its stockholders,[45] or the purchase of the capital stock of a company other than a railroad company.[46] A provision forbidding a corporation to engage in business other than that expressly authorized does not prevent a railroad company from purchasing stock in other kinds of corporations.[47] In passing on such transaction the courts will have regard to their objects and purposes rather than the means by which they are effected.[48] Under some statutes, a railroad may own capital stock of a motor transportation company and enter into a working agreement with such company.[49]

Stock of connecting line. Ownership by a railroad company of the stock of a connecting line[50] or feeder[51] has been held not to be illegal. Statutes in some jurisdictions authorize railroads to purchase stock in connecting lines,[52] and a statute authorizing a railroad to purchase stock in any railroad whose line connects with its own applies to the purchase of stock of a foreign as well as a domestic company.[53]

§ 203. —— Consent and Rights of Stockholders

The consent of the stockholders of a railroad company, that seeks to sell, or purchase the road or the controlling interest in, the stock of another company, is a prerequisite to the validity of such sale or purchase, even where the sale or purchase is authorized by statute.

The consent of the stockholders of a railroad company, that seeks to sell its road, or purchase the road or the controlling interest in, the stock of another company, is a prerequisite to the validity of such sale[54] or purchase,[55] even where the sale or purchase is authorized by statute.[56] Where the sale or purchase is authorized and there is no provision to the contrary, the consent of a majority of the stockholders is sufficient,[57] but statutes in some jurisdictions control the matter.[58] Stockholders of one of the contracting railroads may sue to enjoin an ultra vires sale or purchase,[59] or, pending an inquiry into the adequacy of the consideration, a contemplated sale of the road.[60]

43. N.Y.—White v. Syracuse, etc., R. Co., 14 Barb. 559.

44. Ga.—Hazelhurst v. Savannah, etc., R. Co., 43 Ga. 13.

45. Ohio.—Columbus, etc., R. Co. v. Burke, 10 Ohio Dec. Reprint, 136, 19 Cinc. L. Bul. 27.

46. Ohio.—Columbus, etc., R. Co. v. Burke, supra.
51 C.J. p. 745 note 79.

47. Mo.—State v. Missouri Pac. R. Co., 144 S.W. 863, 241 Mo. 1.
51 C.J. p. 745 note 80.

48. N.J.—Elkins v. Camden, etc., R. Co., 36 N.J.Eq. 5.

49. Ohio.—Cleveland, Columbus & Cincinnati Highway v. Public Utilities Commission, 60 N.E.2d 166, 144 Ohio St. 557.

50. Mo.—State v. Missouri Pac. R. Co., 144 S.W. 863, 241 Mo. 1.
N.Y.—People v. Public Service Commission, 183 N.Y.S. 930, 193 App. Div. 322.

51. Ohio.—State v. Hocking Valley R. Co., 8 Ohio App. 450.

52. Kan.—Atchison, etc., R. Co. v. Cochran, 23 P. 151, 43 Kan. 225, 19 Am.S.R. 129, 7 L.R.A. 414.
51 C.J. p. 745 note 84.

53. U.S.—Venner v. Atchison, etc., R. Co., C.C.Kan., 28 F. 581, appeal dismissed 9 S.Ct. 804, 131 U.S. 449, 33 L.Ed. 221.

54. R.I.—Boston, etc., R. Corp. v. New York, etc., R. Co., 13 R.I. 260.

55. U.S.—Nashua, etc., R. Corp. v. Boston, etc., R. Corp., Mass., 10 S. Ct. 1004, 136 U.S. 356, 34 L.Ed. 363.
51 C.J. p. 745 note 87.

56. U.S.—Mackintosh v. Flint, etc., R. Co., C.C.Mich., 34 F. 582.
R.I.—Boston, etc., R. Corp. v. New York, etc., R. Co., 13 R.I. 260.

57. Ky.—Louisville, etc., R. Co. v. Jarvis, 87 S.W. 759, 27 Ky.L. 986.
51 C.J. p. 746 note 89.

58. Ga.—South Western R. Co. v. Benton, 58 S.E.2d 905, 206 Ga. 770, certiorari denied 71 S.Ct. 44, 340 U.S. 815, 95 L.Ed. ——.
51 C.J. p. 746 note 90.

Amendment to authorize sale by majority stockholders

(1) Where charter granted by state to a railroad corporation does not itself contain authority to corporation to sell its franchise and property, and state does not therein or by general law in force at time charter is granted reserve right to change, alter, or modify charter, it cannot thereafter by specific amendment authorize such a sale without unanimous consent of stockholders.—South Western R. Co. v. Benton, supra.

(2) Where United States supreme court held that question of whether sale by defendant railroad of its franchises and properties was required to be authorized by unanimous consent or by majority vote only of its stockholders was one to be determined by state courts and state courts held unanimous consent to be necessary under charter granted to such corporation and under state law, it would not be assumed by state supreme court that either interstate commerce commission or federal courts would override and nullify such judgment on application made by defendants, and sustaining of demurrers to amendments to defendant's answers based on such allegations was not error.—South Western R. Co. v. Benton, supra.

Minor changes in roadbed

Statutory provisions authorizing sale of part of railroad or extension thereof only with consent of stockholders were held inapplicable to minor changes in roadbed and method of operation made necessary to enable railroad to use union passenger station.—Atwater v. Wheeling & L. E. Ry. Co., C.C.A.Ohio, 56 F.2d 720.

59. Ga.—South Western R. Co. v. Benton, 58 S.E.2d 905, 206 Ga. 770, certiorari denied 71 S.Ct. 44, 340 U.S. 815, 95 L.Ed. ——.
51 C.J. p. 746 note 91.

Enjoining stockholders' meeting

Ga.—South Western R. Co. v. Benton, supra.

60. Ala.—South, etc., R. Co. v. Gray, 49 So. 347, 160 Ala. 497.
51 C.J. p. 746 note 92.

Estoppel. Stockholders may be estopped to question the validity of a sale or purchase, or to have it declared invalid.[61]

Stock of dissenting stockholder. An unauthorized attempted sale by the majority of the stock of minority stockholders may be enjoined by the latter.[62] Under a statute permitting a railroad corporation to petition for valuation of the stock, a dissenting minority stockholder may petition for an appraisal of his stock,[63] and, where the sale is made subject to the rights of the dissenting stockholder, the purchaser will be required to pay the excess value to him.[64]

Vendor's lien. When one company sells its right of way to another, a stockholder of the vendor company is not entitled to a vendor's lien on the property.[65]

§ 204. Requisites and Validity of Conveyance or Contract to Convey

Where the sale is authorized, a conveyance executed by the proper officers and under the corporate seal of the railroad corporation is prima facie valid.

General principles relating to deeds and the formal execution of corporate contracts govern in determining the validity of a conveyance of a railroad as affected by its formal requisites and mode of execution.[66] Where the sale is authorized, a conveyance executed by the proper officers and under the corporate seal of the corporation is prima facie valid.[67] Noncompliance with the requirements of the statute authorizing the sale that all the debts of the vendor shall first be paid will not invalidate the sale, where the amount of such debts is inconsiderable and the purchasing company agrees to pay them.[68]

Estoppel. Where the sale is authorized, the vendor company will be estopped to deny its validity, although there were irregularities in the proceeding, if the sale has been fully executed without question of its validity,[69] or if the purchasing company has been permitted without objection to take possession of the road and make improvements thereon;[70] and an estoppel to question the validity of the sale may also exist against nonconsenting stockholders, as discussed supra § 203, or creditors of the company.[71]

§ 205. Construction and Operation

The property and rights included under a sale of a railroad or of railroad property depends on the intention of the parties as shown by the terms and proper construction of the conveyance.

The property and rights included under a sale of a railroad or of railroad property depends on the intention of the parties as shown by the terms and proper construction of the conveyance,[72] construed in connection with, and subject to, the provisions of the statute authorizing the same,[73] and in connection with other instruments executed as part of the same transaction.[74] Generally speaking, the purchaser takes only what is described in the deed of conveyance,[75] and in the conveyance of a railroad and its "appurtenances" a separate road or interest therein cannot pass as an appurtenance to the road conveyed,[76] nor will land pass as appurtenant to other land, or property of the same class or kind as appurtenant to that conveyed.[77]

The sale of a railroad does not pass the franchise of being a corporation[78] or work a dissolution of the company.[79] A demise of all personal property of a railroad includes an equitable or contingent right to receive a possible surplus remaining from the proceeds of a foreclosure sale after satisfaction of the debt.[80] In a conveyance of railroad property it is not always practicable to require a specific description by metes and bounds of all grounds used for

61. Md.—Pennsylvania R. Co. v. Minis, 87 A. 1062, 120 Md. 461, 88 A. 310, 120 Md. 512
51 C.J. p. 746 note 93.

62. Ala.—South, etc., R. Co. v. Gray, 49 So. 347, 160 Ala. 497.

63. N.H.—Hackett v. Boston & M. R. R., 57 A.2d 266, 95 N.H. 45.

64. N.H.—Hackett v. Boston & M. R. R., supra.

65. Iowa.—Cross v. Burlington, etc., R. Co., 12 N.W. 71, 58 Iowa 62.

66. Mich.—Young v. Toledo, etc., R. Co., 43 N.W. 632, 76 Mich. 485.
51 C.J. p. 746 note 98.

67. Mo.—Atlantic, etc., R. Co. v. St. Louis, etc., R. Co., 66 Mo. 228.

68. Iowa.—Mahaska County R. Co. v. Des Moines Valley R. Co., 28 Iowa 437.

69. Ark.—Little Rock, etc., R. Co. v. Little Rock, etc., R. Co., 36 Ark. 663.
51 C.J. p. 747 note 2.

70. Iowa.—Mahaska County R. Co. v. Des Moines Valley R. Co., 28 Iowa 437.

71. U.S.—Fogg v. Blair, Mo., 10 S. Ct. 338, 133 U.S. 534, 33 L.Ed. 721
51 C.J. p. 747 note 5.

72. La.—Louisiana R., etc., Co. v. Coushatta, 48 So. 532, 122 La. 1079.
51 C.J. p. 747 note 6.

73. Tex.—Texas Southern R. Co. v. Harle, 105 S.W. 1107, 101 Tex. 170.
51 C.J. p. 747 note 7.

74. U.S.—McCulloch v. Canadian Pac. Ry. Co., D.C.Minn., 53 F.Supp. 534.

75. U.S.—Philadelphia Inv. Co. v. Ohio, etc., R. Co., C.C.Ohio, 41 F. 378.

76. Pa.—Philadelphia v. Philadelphia, etc., R. Co., 58 Pa. 253.

77. U.S.—Philadelphia Inv. Co. v. Ohio, etc., R. Co., C.C.Ohio, 41 F. 378.

78. Miss.—Arthur v. Commercial, etc., Bank, 17 Miss. 394, 48 Am.D. 719.

79. Miss.—Arthur v. Commercial, etc., Bank, supra
Dissolution by sale of property generally see supra § 18.

80. Mass.—Gray v. Massachusetts Cent. R. Co., 50 N.E. 549, 171 Mass. 116.

depots, side tracks, and the like,[81] and the description will be held sufficient to convey title if it is such that the property intended to be conveyed can be identified and distinguished from all other property.[82]

§ 206. Rights and Liabilities of Purchasers

a. In general
b. Debts, contracts, and personal obligations
c. Covenants or conditions in grant of right of way

a. In General

A railroad company which purchases the road of another must carry out and perform the charter obligations and public duties of its vendor, and takes the road subject to any limitations and conditions imposed on the rights exercised by the grantor.

A railroad company which purchases the road of another must carry out and perform the charter obligations and public duties of its vendor,[83] and takes the road subject to any limitations and conditions imposed on the rights exercised by the grantor,[84] including any limitation or restriction as to the rates chargeable on the road for transportation by the vendor.[85] Special statutory exemptions or privileges of the vendor,[86] such as an immunity from taxation,[87] or the right to fix and determine the rates for transportation,[88] do not, in the absence of express statutory provision, pass to the purchasing company, particularly where the charter of the purchasing company provides that it shall be subject to all the laws applying to railroad companies generally.[89]

Where a contract for the purchase of land by a railroad provides for determination of compensation by commissioners in accordance with the provisions of a statute, the court cannot, after appointing such commissioners, require them to conduct the proceedings in a manner different from that agreed on.[90] Where a railroad company is authorized to purchase stock of another company, it is entitled to vote on such stock[91] and will be liable for assessments thereon.[92]

As to vendor. Conveyance of a majority of the stock of a railroad is not a sufficient compliance with a contract calling for conveyance of perfect title to the railroad,[93] and the vendor is liable for any amount expended by the vendee in perfecting its title to the road in question.[94] A railroad is not liable for the purchase price of a proposed extension after refusal of the interstate commerce commission to award a required certificate of convenience,[95] although there was bad faith on the part of such railroad in applying for the certificate.[96] The assignor can recover from a purchaser of its railroad damages it has sustained as a result of such purchaser's failure to perform a contract assigned by the vendor to the purchaser.[97]

Property impressed with trust. In accordance with the general rule, where any trust is imposed on the property conveyed, and the purchaser takes with knowledge thereof, it takes subject to the performance of the trust.[98]

b. Debts, Contracts, and Personal Obligations

The purchaser is not, in the absence of any statutory provision or agreement to the contrary, liable for the debts, contracts, or personal obligations of the vendor.

The purchaser is not, in the absence of any statutory provision or agreement to the contrary, liable for the debts, contracts, or personal obligations of

81. Mo.—Fordyce v. Rapp, 33 S.W. 57, 131 Mo. 354.

82. Ill.—Lake Shore, etc., R. Co. v. Pittsburg, etc., R. Co., 71 Ill. 38.
Mo.—Fordyce v. Rapp, 33 S.W. 57, 131 Mo. 354.

83. Kan.—State v. Dodge, etc., R. Co., 36 P. 747, 53 Kan. 377, 42 Am. S.R. 295.
51 C.J. p. 748 note 17.
Purchasers at foreclosure sale see infra §§ 328-338.

84. Ga.—Atlanta, etc., R. Co. v. Atlanta, 119 S.E. 712, 156 Ga. 251.
51 C.J. p. 748 note 18.

85. Ala.—Mobile v. Steiner, 61 Ala. 559.
Ohio.—Campbell v. Marietta, etc., R. Co., 23 Ohio St. 168.

86. Mo.—Sublette v. St. Louis, etc., R. Co., 69 S.W. 745, 96 Mo.App. 113.
51 C.J. p. 748 note 20.

87. U.S.—Pickard v. East Tennessee, etc., R. Co., Tenn., 9 S.Ct. 640, 130 U.S. 637, 32 L.Ed. 1051.
51 C.J. p. 748 note 21.

88. U.S.—Matthews v. Corporation Comrs., C.C.N.C., 97 F. 400.
51 C.J. p. 748 note 22.

89. U.S.—Norfolk, etc., R. Co. v. Pendleton, Va., 15 S.Ct. 413, 156 U.S. 667, 39 L.Ed. 574.

90. N.Y.—In re New York, etc., R. Co., 7 N.E. 559, 103 N.Y. 704.
20 C.J. p. 1032 note 76.

91. N.Y.—Venner v. New York Cent., etc., R. Co., 164 N.Y.S. 626, 177 App.Div. 296, affirmed 123 N.E. 893, 226 N.Y. 583—Oelbermann v. New York, etc., R. Co., 29 N.Y.S. 545, 77 Hun 332.

92. Ohio.—Smith v. Newark, etc., R. Co., 8 Ohio Cir.Ct. 583, 4 Ohio Cir.Dec. 356.

93. Mo.—St. Louis, etc., R. Co. v. Houck, App., 193 S.W. 26.

94. Mo.—St. Louis, etc., R. Co. v. Houck, supra.

95. W.Va.—Carleton Min., etc., Co. v. West Virginia Northern R. Co., 145 S.E. 42, 106 W.Va. 126.

96. W.Va.—Carleton Min., etc., Co. v. West Virginia Northern R. Co., supra.

97. Or.—Corvallis, etc., R. Co. v. Portland, etc., R. Co., 163 P. 1173, 84 Or. 524.

98. N.Y.—Thornton v. St. Paul, etc., R. Co., 45 How.Pr. 416.
51 C.J. p. 748 note 35.

the vendor,[99] where the purchase of a railroad is authorized and is made in good faith for a valuable consideration,[1] but takes the road free from all contracts and claims against the vendor which do not constitute valid liens,[2] or do not run with the land or otherwise bind the property or franchises purchased.[3] Such liability is in some cases imposed by the statute authorizing the sale or purchase,[4] or incorporating the purchasers,[5] or is expressly assumed by the purchaser in the contract of conveyance,[6] but, where the purchaser expressly assumes the debts of its predecessor, the creditors of such company do not acquire a lien on the property but merely the right to look to the purchasing company for payment.[7] The purchaser may adopt the contract imposing the liability, and in such case it will be bound by the terms thereof.[8]

c. Covenants or Conditions in Grant of Right of Way

The purchaser of a railroad is bound by any covenants in the original grant of the right of way which run with the land, but not by covenants which do not run with the land.

The purchaser of a railroad is bound by any covenants in the original grant of the right of way which run with the land,[9] but not by covenants which do not run with the land,[10] although, if a company purchases a road with knowledge of a contract on the part of its vendor, made in consideration of a grant of the right of way, it takes the road subject thereto.[11] Any conditions subsequent in grants of rights of way which will defeat the estate granted should be strictly construed,[12] and a sale and conveyance to another railroad company are not of themselves a breach of a condition that the road constructed on the right of way shall be kept up and operated,[13] or that the land granted shall be used for depot purposes only.[14] Where a company is granted a mere easement for the operation of its own road, an attempted sale of a portion of the right of way to another company for the construction of a road thereon operates as an abandonment of that portion of the right of way,[15] and the purchaser at such sale takes nothing thereunder.[16]

§ 207. Actions

Where the vendors of a railroad covenanted to pay all outstanding debts and deliver the property free from encumbrance, the performance of the covenants is not a condition precedent to the bringing of a suit on a note evidencing the last of a series of payments.

Although any outstanding debt, when the contract so provides, may be pleaded in reduction of the last payment, in an action on a note evidencing the last of a series of payments,[17] where the vendors of a railroad covenanted to pay all outstanding debts and deliver the property free from encumbrance, the performance of the covenants is not a condition precedent to the bringing of such a suit,[18] but the purchasers, in the absence of any charge of the vendors' insolvency, nonresidence, or other equitable reason, are remitted to their remedy in an action on the contract for breach of such covenant.[19] Where property is sold to a railroad company subject to the approval of a commission, which approval is refused, the vendor may sue in equity to cancel the sale and conveyance and require the railroad company to account for the profits derived by it.[20]

Where the sale is authorized, a deed from one railroad to another, signed by the proper officer and under the corporate seal of the grantor, being prima facie valid, as discussed supra § 204, the burden is on any party claiming the sale to be invalid as not assented to by the stockholders to establish such invalidity;[21] but, where the charter of a railroad

99. Kan.—Hukle v. Atchison, etc., R. Co., 80 P. 603, 71 Kan. 251.
51 C.J. p. 748 note 36

1. Ga.—Hawkins v. Georgia, etc., R. Co., 46 S.E. 82, 119 Ga. 159
Mo.—Powell v. North Missouri R. Co., 42 Mo. 63.

2. Wis.—Menasha v. Milwaukee, etc., R. Co., 9 N.W. 396, 52 Wis. 414.
51 C.J. p. 749 note 38

3. U.S.—Des Moines, etc., R. Co. v. Wabash, etc., R. Co., Iowa, 10 S.Ct. 753, 135 U.S. 576, 34 L.Ed. 243.
51 C.J. p. 749 note 39

4. Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Johnson, Civ.App., 25 S.W.2d 956, error refused.
51 C.J. p. 749 note 40.

5. Ill.—St. Louis, etc., R. Co. v. Miller, 43 Ill. 199
51 C.J. p. 749 note 41

6. Iowa.—Woodworth v. Iowa Cent. R. Co., 149 N.W. 522, 170 Iowa 697.
51 C.J. p. 749 note 42.

7. U.S.—Hervey v. Illinois Midland R. Co., C.C.Ill., 28 F. 169.

8. U.S.—Taenzer v. Chicago, etc., R. Co., Tenn., 170 F. 240, 95 C.C.A. 436.
51 C.J. p. 749 note 44.

9. Ind.—Toledo, etc., R. Co. v. Cosand, 33 N.E. 251, 6 Ind.App. 222.
51 C.J. p. 749 note 45.

10. Mo.—Dickey v. Kansas City, etc., R. Co., 26 S.W. 685, 122 Mo. 223.
51 C.J. p. 749 note 46.

11. Iowa.—Swan v. Burlington, etc., R. Co., 34 N.W. 457, 72 Iowa 650.
51 C.J. p. 749 note 47.

12. N.J.—Southard v. New Jersey Cent. R. Co., 26 N.J.Law 13.

13. Ky.—Louisville, etc., R. Co. v. Covington, 2 Bush 526

14. N.J.—Southard v. New Jersey Cent. R. Co., 26 N.J.Law 13

15. Neb.—Blakely v. Chicago, etc., R. Co., 64 N.W. 972, 46 Neb. 272.

16. Neb.—Blakely v. Chicago, etc., R. Co., supra.

17. Ga.—Baker v. Smith, 70 S.E. 239, 135 Ga. 628.

18. Ga.—Baker v. Smith, supra.

19. Ga.—Baker v. Smith, supra.

20. W.Va.—Carleton Mining & Power Co. v. West Virginia Northern R. Co., 159 S.E. 44, 110 W.Va. 631.

21. Mo.—Atlantic, etc., R. Co. v. St. Louis, etc., R. Co., 66 Mo. 228.

requires that the incorporators shall purchase the property and franchises of an existing company as a condition precedent to their organization as a corporate body, such company must, under a plea of nul tiel corporation, show that the purchase was made before it can recover property of the previously existing company [22]

Where the purchaser of a railroad agrees to deliver as a part of the purchase price certain of its own stock and bonds to a certain value and such delivery is not made, the vendor, in suing to recover the balance of the debt, is entitled to recover the full amount, although the market value of such stock and bonds is below par.[23]

By creditors. Where the statute under which the purchase is made imposes a liability on the purchasing company for the debts and liabilities of the vendor, it need not provide any specific remedies in favor of the creditors, but they may sue the purchasing company at common law in debt or assumpsit as the case may be;[24] and, where the purchasing company agrees to assume or pay the debts and liabilities of the vendor, such agreement constitutes a direct liability to creditors of the latter on which they may sue,[25] notwithstanding a provision in the contract of sale that nothing therein should confer any rights on any persons other than the parties thereto.[26] One creditor may sue for and recover the full amount of his claim without making the other creditors parties or suing in their behalf;[27] but, although such liability is imposed by statute, a judgment cannot be rendered against the purchasing company in an action brought against the vendor alone.[28] A contract between the purchasing company and a third party who guarantees that the vendor shall deliver the road free from all liens and encumbrances is personal to the purchasing company, and is not enforceable in equity for the benefit of bondholders of the vendor.[29]

Where railroad properties are sold subject to certain conditions subsequent on the breach of which the property is to revert to the grantor, if such conditions are not performed and the grantor does any act showing an intention to take advantage of the breach, the property is not thereafter subject to attachment for any debt incurred by the purchaser during his possession.[30]

Under a statute providing that actions on liabilities or obligations of a railroad company assumed by a purchasing company shall be barred one year "after notice" of the sale to the creditor or obligee, actual notice, and not constructive notice, is required.[31]

By state to cancel transfer. The state may be barred by laches from prosecuting an action to cancel the transfer by one railroad company of a part of its road to another company.[32]

C. LEASES

§ 208. Right to Make or Take Lease

A railroad cannot, without legislative authority, lease its road to another company.

A railroad company cannot, without legislative authority, lease its road to another company,[33] and in order to constitute a valid lease the lessee must have authority to take as well as the lessor to execute the lease.[34] A railroad may, however, lease to another railroad property which is not actually or potentially in use for railroad purposes,[35] or property which is not presently required in the performance of its duty to the public,[36] and legislative sanction is unnecessary to authorize the railroad's

22. Ill.—Wheadon v. Peoria, etc., R. Co., 42 Ill. 494
23. Tex.—Texas Western R. Co. v. Gentry, 8 S.W. 98, 69 Tex. 625
24. Ill.—St. Louis, etc., R. Co. v. Miller, 43 Ill. 199.
51 C.J. p. 750 note 62.
25. Iowa.—Woodworth v. Iowa Cent. R. Co., 149 N.W. 522, 170 Iowa 697.
Wis.—Lenz v. Chicago, etc., R. Co., 86 N.W. 607, 111 Wis. 198.
26. Iowa.—Woodworth v. Iowa Cent. R. Co., 149 N.W. 522, 170 Iowa 697.
27. Tex.—Galveston, etc., R. Co. v. Butler, 56 Tex. 506.
28. Tex.—Missouri, etc., R. Co. v. Fulmore, Civ.App., 26 S.W. 238.
29. Mich.—Randall v. Detroit, etc., R. Co., 96 N.W. 567, 134 Mich. 493.
30. U.S.—Schlesinger v. Kansas City, etc., R. Co., Mo., 14 S.Ct. 647, 152 U.S. 444, 38 L.Ed. 507.
31. Ark.—St. Louis, etc., R. Co. v. Batesville, etc., Tel. Co., 110 S.W. 1047, 86 Ark. 300.
32. N.C.—Manning v. Atlantic, etc., R. Co., 125 S.E. 555, 188 N.C. 648.
51 C.J. p. 750 note 70.
33. Tenn.—Briggs v. Clawson Bros., 8 Tenn.App. 251.
51 C.J. p. 750 note 72.
Permitting use of land by third persons generally see supra § 101.
Adoption of lease
The operation of a railroad in accordance with lease subsequent to time when power to make the lease was created constitutes an adoption of the lease which would otherwise be void as an ultra vires act.—McCulloch v. Canadian Pac. Ry. Co., D.C.Minn., 53 F.Supp. 534.
34. U.S.—Pennsylvania R. Co. v. St. Louis, etc., R. Co., Ind., 6 S.Ct. 1094, 7 S.Ct. 24, 118 U.S. 290, 630, 30 L.Ed. 83, 284.
51 C.J. p. 751 note 74.
35. U.S.—Phoenix Ins. Co. of Hartford v. New York & H. R. Co., C.C.A.N.Y., 59 F.2d 962, certiorari denied 53 S.Ct. 91, 287 U.S. 645, 77 L.Ed. 558.
36. U.S.—Phoenix Ins. Co. of Hartford v. New York & H. R. Co., supra.

leases of property which it had discontinued using for railroad purposes.[37]

In construing legislative enactments to determine whether authority to make or take leases has been granted, general rules apply.[38] Thus, in determining the authority of a railroad to lease its property and franchises, its charter must be read as a whole,[39] and, if intention to authorize the power is doubtful, the authority must be considered not to have been granted.[40] A practical construction by the parties is not controlling in the absence of a legislative act acquiescing in such interpretation.[41]

An ultra vires lease made without statutory authority may be validated by a subsequent curative statute,[42] but the fact that the legislature, after a company has made an ultra vires lease, passes a statute forbidding the directors of the company, "its lessees or agents," from collecting more than a fixed sum of compensation for carrying passengers and freight, is not a ratification of the lease or an acknowledgment of its validity.[43]

Express grant. The right to lease is frequently conferred in express terms either generally[44] or as between companies of the same state,[45] and such authority may be given either by a charter provision or a subsequent statute, the provisions of which are accepted by the stockholders;[46] but a statute of one state authorizing a company to lease its road has no extraterritorial effect and does not authorize it to lease a road owned by it in another state.[47] In the case of express authority to lease, the right must be limited according to the express provisions of the statute,[48] as in cases where the statute refers only to connecting or continuous lines,[49] and a statute authorizing a lease to another railroad company does not authorize a lease to an individual,[50] nor does a charter provision authorizing a particular company to lease and operate other roads authorize it to lease its own road to another company.[51]

Implied grant. Authority to lease will not ordinarily be implied but must be clearly conferred.[52] Thus authority to lease will not be implied from the use of such terms as "assigns" or "successors,"[53] or from a prohibition against consolidation,[54] or from statutes authorizing the execution of mortgages,[55] or authorizing railroads to consolidate[56] or connect[57] with other roads, or to enter into traffic or other operating contracts,[58] or, although there is authority to the contrary,[59] from the usual grant of powers in railroad charters.[60] Similarly, a charter showing a railroad to be a connecting road between two existing roads,[61] or authorizing such a con-

37. U.S.—Phœnix Ins. Co. of Hartford v. New York & H. R. Co., supra.

38. U.S.—St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co., Ill., 12 S. Ct. 953, 145 U.S. 393, 36 L.Ed. 748
51 C.J. p. 751 note 76.

"Rates" defined in connection with company's power to lease its road—Georgia R. & Banking Co. v. Maddox, 42 S.E. 315, 116 Ga. 64

39. Va.—Richmond, etc., R. Co. v. Richmond, etc., R. Connection Co., 133 S.E. 888, 145 Va. 266.

40. Va.—Richmond, etc., R. Co. v. Richmond, etc., R. Connection Co., supra.
51 C.J. p. 751 note 78

41. Va.—Richmond, etc., R. Co. v. Richmond, etc., R. Connection Co., supra.

42. U.S.—Terre Haute, etc., R. Co. v. Cox, Ind., 102 F. 825, 42 C.C.A. 654, certiorari denied 21 S.Ct. 923, 181 U.S. 618, 45 L.Ed. 1030.

43. U.S.—Thomas v. West Jersey R. Co., Pa., 101 U.S. 71, 25 L.Ed. 950.

44. U.S.—Phœnix Ins. Co. of Hartford v. New York & H. R. Co., C.C.A.N.Y., 59 F.2d 962, certiorari denied 53 S.Ct. 91, 287 U.S. 645, 77 L.Ed. 558.
N.Y.—Frank v. New York, C. & St. L. R. Co., 24 N.Y.S.2d 846, 175 Misc. 902, applying Illinois law, affirmed 24 N.Y.S.2d 854, motion denied New York, C. & St. L. R. Co. v. Frank, 61 S.Ct. 729, affirmed 61 S.Ct. 833, 313 U.S. 538, 85 L.Ed. 1507, vacated 61 S.Ct. 938, 313 U.S. 596, 85 L.Ed. 1550, and affirmed 62 S.Ct. 258, 314 U.S. 360, 86 L.Ed. 277.
51 C.J. p. 751 note 82
Continuous or connecting lines see infra § 211

45. Ill.—People v. City of Chicago, 182 N.E. 419, 349 Ill. 304.
51 C.J. p. 751 note 83

46. Vt.—Vermont, etc., R. Co. v. Vermont Cent. R. Co., 34 Vt. 1.

47. U.S.—Briscoe v. Southern Kansas R. Co., C.C.Ark., 40 F. 273, affirmed 12 S.Ct. 538, 144 U.S. 133, 36 L.Ed. 377.
Pa.—Van Steuben v. New Jersey Cent. R. Co., 35 A. 992, 178 Pa. 367, 34 L.R.A. 577.

48. Tenn.—Briggs v. Clawson Bros., 8 Tenn. App. 251

49. Ind.—Eel River R. Co. v. State, 57 N.E. 388, 155 Ind. 433.
51 C.J. p. 751 note 88.

50. N.Y.—Abbott v. Johnstown, etc., R. Co., 80 N.Y. 27, 36 Am.R. 572.
Tenn.—Briggs v. Clawson Bros., 8 Tenn. App. 251.

51. N.J.—Mills v. Central R. Co., 2 A. 453, 41 N.J.Eq. 1.

52. U.S.—Oregon R., etc., Co. v. Oregonian R. Co., Or., 9 S.Ct. 409, 130 U.S. 1, 32 L.Ed. 837.
51 C.J. p. 751 note 93.

53. U.S.—Oregon R., etc., Co. v. Oregonian R. Co., supra—Briscoe v. Southern Kansas R. Co., C.C.Ark., 40 F. 273, affirmed 13 S.Ct. 538, 144 U.S. 133, 36 L.Ed. 377.

54. Tex.—Central, etc., R. Co. v. Morris, 3 S.W. 457, 68 Tex. 49.

55. La.—Muntz v. Algiers, etc., R. Co., 35 So. 624, 111 La. 423, 100 Am.S.R. 495, 64 L.R.A. 222
51 C.J. p. 751 note 96.

56. Ill.—Archer v. Terre Haute, etc., R. Co., 102 Ill. 493.
51 C.J. p. 751 note 97.

57. U.S.—St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co., Ill., 12 S.Ct. 953, 145 U.S. 393, 36 L.Ed. 748
Ind.—Tippecanoe County v. Lafayette, etc., R. Co., 50 Ind. 85

58. Va.—Richmond, etc., R. Co. v. Richmond, etc., R. Connection Co., 133 S.E. 888, 145 Va. 266.
51 C.J. p. 751 note 99.

59. N.C.—Hyder v. Southern R. Co., 83 S.E. 689, 167 N.C. 584.

60. U.S.—Pennsylvania R. Co. v. St. Louis, etc., R. Co., Ind., 6 S.Ct. 1094, 7 S.Ct. 24, 118 U.S. 290, 630, 30 L.Ed. 83, 284.

61. Va.—Richmond, etc., R. Co. v. Richmond, etc., R. Connection Co., 133 S.E. 888, 145 Va. 266.
51 C.J. p. 752 note 3.

recting road to agree on terms for transportation,[62] does not authorize a lease.

Certain statutes and charter provisions have, however, been held impliedly to authorize a lease, although not expressly so providing, as, for example, statutes authorizing companies to contract with others for the use of their respective roads,[63] or to purchase outright any other railroad,[64] or to purchase the property of any other railroad company not a competing or parallel line;[65] but a restricted right to sell to certain railroads does not carry the power to grant a perpetual lease.[66] So, a lease may be made under a charter authorizing a company to "farm out" its right of transportation,[67] or to "rent or farm out" its exclusive right of transportation on the road and the "privileges thereof;"[68] and it has been held that an authority granted to one company to take leases of other roads impliedly authorizes other companies to make leases.[69]

§ 209. —— Consent of Stockholders

Ordinarily a railroad has no right to make a lease of its road to another railroad without the consent of its stockholders.

Although there is authority to the contrary,[70] ordinarily a railroad has no right to make a lease of its road to another railroad without the consent of its stockholders,[71] and frequently the statutes so provide.[72] The consent of the stockholders must be obtained by a vote at a meeting,[73] and not by an informal consultation of them separately.[74] In the absence of evidence to the contrary, it will be presumed that the meeting was properly held[75] and that the proceedings were regular and valid,[76] but, if the lease undertakes to set out the proceedings, the presumption is that all are set out,[77] and, if no meeting is there shown, it will be presumed that there was none.[78]

Number of consenting stockholders. Statutes frequently prescribe the number of stockholders who must consent to the lease of a railroad.[79] In the absence of any provision as to the number, it has been held that a lease may be authorized by a majority,[80] but it has also been held that all of the stockholders must concur,[81] and that the legislature cannot authorize the execution of a lease by a majority against the will of a dissenting minority,[82] even where the right is reserved to alter or amend the charter.[83]

§ 210. —— Approval of Board or Commission

Statutes in some jurisdictions require railroad leases to be approved by the local board or commission charged with the supervision of railroad affairs.

Statutes in some jurisdictions require railroad leases to be approved by the local board or commission charged with the supervision of railroad affairs.[84] The primary purpose of such statutes is to prevent the making of leases which are inimical to

62. Va.—Richmond, etc., R. Co. v. Richmond, etc., R. Connection Co., supra.

63. N.Y.—Beveridge v. New York El R. Co., 19 N.E. 489, 112 N.Y. 1, 2 L.R.A. 648.
51 C.J. p. 752 note 6.

64. Pa.—Kaufman v. Pittsburg, etc., R. Co., 66 A. 1108, 217 Pa. 599.

65. Ky.—Illinois Cent. R. Co. v. McGuire's Adm'r, 38 S.W.2d 913, 239 Ky. 1.

66. Va.—Richmond, etc., R. Co. v. Richmond, etc., R. Connection Co., 133 S.E. 888, 145 Va. 266
51 C.J. p. 752 note 8.

67. U.S.—Southern R. Co. v. North Carolina R. Co., C.C.N.C., 81 F. 595.
51 C.J. p. 752 note 9.

68. Ga.—Central R., etc., Co. v. Macon, 43 Ga. 605.

69. Pa.—Kaufman v. Pittsburg, etc., R. Co., 66 A. 1108, 217 Pa. 599—Pinkerton v. Pennsylvania Tract. Co., 44 A. 284, 193 Pa. 229.

70. N.Y.—Beveridge v. New York, etc., R. Co., 19 N.E. 489, 112 N.Y. 1, 2 L.R.A. 648.
51 C.J. p. 752 note 13.
Rights of stockholders under lease see infra § 222.

71. N.C.—In re Opinion of Judges, 28 S.E. 18, 120 N.C. 623
51 C.J. p. 752 note 14.

72. U.S.—Atwater v. Wheeling & L. E. Ry. Co., C.C.A.Ohio, 56 F.2d 720.
Md.—Pennsylvania R. Co. v. Robert S. Green, Inc., 187 A. 877, 171 Md. 63.
51 C.J. p. 752 note 15.
Changes in roadbed and method of operation
Statutory provisions authorizing lease of part of railroad or extension thereof only with consent of stockholders were held inapplicable to minor changes in roadbed and method of operation made necessary to enable railroad to use union passenger station.—Atwater v. Wheeling & L. E. Ry. Co., C.C.A.Ohio, 56 F.2d 720.

73. Ala.—George v. Central R., etc., Co., 14 So. 752, 101 Ala. 607.
51 C.J. p. 752 note 16.

74. U.S.—Peters v. Lincoln, etc., R. Co., C.C.Neb., 12 F. 513, 2 McCrary 275.
Va.—Stevens v. Davison, 18 Gratt. 819, 59 Va. 819, 98 Am.D. 692

75. N.C.—Hill v. Atlantic, etc., R. Co., 55 S.E. 854, 143 N.C. 539, 9 L.R.A.,N.S., 606.

76. N.C.—Hill v. Atlantic, etc., R. Co., supra.

77. Ala.—George v. Central R., etc., Co., 14 So. 752, 101 Ala. 607.

78. Ala.—George v. Central R., etc., Co., supra.
51 C.J. p. 752 note 21.

79. N.Y.—Continental Ins. Co. v. New York, etc., R. Co., 79 N.E. 1026, 187 N.Y. 225.
51 C.J. p. 752 note 22

80. Me.—Waldoborough v. Knox, etc., R. Co., 24 A. 942, 84 Me. 469
51 C.J. p. 752 note 23.

81. N.J.—Mills v. New Jersey Cent. R. Co., 2 A. 453, 41 N.J.Eq. 1.
51 C.J. p. 752 note 24.

82. N.H.—Dow v. Northern R. Co., 36 A. 510, 67 N.H. 1.

83. N.H.—Dow v. Northern R. Co., supra.

84. Mass.—Hampden R. Corp. v. Boston, etc., R. Co., 124 N.E. 254, 233 Mass. 411.
51 C.J. p. 753 note 28.

the public interest[85] or which omit provisions requisite for the protection of such interest,[86] and accordingly the function of the commission in determining whether it shall approve the lease is not to guard the rights of the parties,[87] but to guard the rights of the public,[88] and to see that the statutes are complied with.[89] So it is the duty of the board to require that the instrument by which one railroad is leased to another shall be so framed as to put it beyond reasonable doubt that the limitations imposed on the right to lease have not been exceeded.[90] When the power to grant or withhold approval of leases is left by the legislature to the sound discretion of the board, a court will not substitute its own judgment in the matter for that of the legislative agent.[91]

§ 211. —— Continuous or Connecting Lines

In some jurisdictions the statutes expressly authorize leases in the case of roads which form connecting or continuous lines.

In some jurisdictions the statutes expressly authorize leases in the case of roads which form connecting or continuous lines.[92] Under these statutes it is not necessary that the roads should connect at their termini so as to make one an extension of the other,[93] or that the roads should be of the same gauge;[94] and the connection may be by means of an intervening road which one of the contracting companies has the right to operate or use,[95] but there must be an actual connection.[96]

§ 212. —— Parallel or Competing Lines

Where a statute authorizing a lease applies in terms only to connecting and continuous lines, it does not authorize a lease to a parallel and competing line.

In some jurisdictions the statutes expressly prohibit leases in the case of parallel or competing lines, and, where a statute authorizing a lease applies in terms only to connecting and continuous lines, it does not authorize a lease to a parallel and competing line.[97] In the absence of any express prohibition, it seems that such leases would be contrary to public policy.[98] It has been held, however, that where there is an express statutory authority to lease without any qualifications or restrictions,[99] or a general authority to railroads to contract with others "for the use of their respective roads,"[1] a lease may be made to parallel or competing lines, although, under a statute like the one last referred to, if the purpose is to hold the road vacant and unused, the lease is invalid.[2] An express prohibition against the consolidation of parallel or competing roads does not, according to one view, prevent a lease of one of them by the other;[3] but a contrary view has been taken.[4]

What roads are parallel or competing is to be determined principally by the question of competition,[5] and, in order to be within the constitutional or statutory prohibitions, the roads need not necessarily be parallel in a mathematical sense[6] or connect the same principal termini,[7] and may be competing by reason of their relations or connections with other

No undue burden on lessee assumed

Railroad's lease of its property to railroad stockholders being a contract between common carriers and subject to public regulation, it was assumed that it was intended by public authorities who were required to approve the lease that no undue burden was to be placed on the operating company and its revenues.—Louisville, H & St. L. Ry. Co. v. U. S., D.C.Ky., 20 F.Supp. 483.

85. N.J.—West Jersey, etc., R. Co. v. Public Utility Comrs, 94 A. 57, 87 N.J.Law 170.

86. N.J.—West Jersey, etc, R. Co. v. Public Utility Comrs., supra.

87. N.Y.—Westchester Fire Ins. Co. v. Syracuse, etc., R Co, 161 N.Y.S. 759, 97 Misc. 471, reversed on other grounds 183 N.Y.S. 602, 192 App Div. 463, affirmed 135 N.E. 934, 233 N.Y. 600

88. N.Y.—Westchester Fire Ins. Co. v. Syracuse, etc, R. Co, supra.

89. N.Y.—Westchester Fire Ins. Co. v. Syracuse, etc, R Co, supra.

90. N.J.—West Jersey, etc, R. Co v. Public Utility Comrs., 89 A. 1017, 85 N.J.Law 468, affirmed 94 A. 57, 87 N.J.Law 170.

91. N.J.—West Jersey, etc., R. Co v Public Utility Comrs, 94 A 57, 87 N.J.Law 170.

92. Md.—Pennsylvania R. Co. v Robert S. Green, Inc., 187 A. 877, 171 Md. 63
51 C.J. p 753 note 36.

93. U.S.—Hancock v. Louisville, etc, R. Co, Ky, 12 S.Ct. 969, 145 U.S. 409, 36 L.Ed. 755
51 C.J. p 753 note 37.

94. Pa.—Philadelphia, etc, R. Co. v. Catawissa R. Co., 53 Pa. 20.
51 C.J. p 753 note 38.

95. Kan.—Atchison, etc, R Co v. Fletcher, 10 P. 596, 35 Kan. 236.

96. Pa.—Pittsburgh, etc., R. Co. v. Bedford, etc., R. Co, 81 Pa. 104.
51 C.J. p 753 note 40.

97. Ind.—Eel River R. Co. v. State, 57 N.E. 388, 155 Ind. 433.

98. Ind.—Eel River R. Co. v. State, supra.

99. Mont.—State v. Montana R Co, 53 P. 623, 21 Mont. 221, 45 L.R.A 271.

1. N.Y.—Gere v New York Cent. R. Co, 19 Abb.N.Cas 193.

2. N.Y.—Troy, etc, R Co. v. Boston, etc, R. Co., 86 N.Y. 107

3. Mont.—State v Montana, etc., R. Co, 53 P. 623, 21 Mont. 221, 45 L.R.A. 271
N.Y.—Gere v. New York Cent. R Co., 19 Abb.N.Cas. 193

4. Neb.—State v. Atchison, etc, R Co, 38 N.W. 43, 24 Neb 143, 8 Am S.R. 164, 57 N.W. 20, 38 Neb. 437
51 C.J. p 753 note 51.

5. U.S.—East St. Louis Connecting R. Co v. Jarvis, Ill, 92 F. 735, 34 C.C.A. 639.
Mont.—State v Montana R Co, 53 P. 623, 21 Mont. 221, 45 L.R.A. 271.

6. U.S.—East St. Louis Connecting R. Co. v. Jarvis, Ill., 92 F. 735, 34 C.C.A. 639.
Mont.—State v. Montana R. Co, 53 P. 623, 21 Mont. 221, 45 L.R.A. 271.

7. U.S.—East St. Louis Connecting R. Co. v. Jarvis, Ill, 92 F. 735, 34 C.C.A. 639.
Mont.—State v. Montana R. Co., 53 P. 623, 21 Mont. 221, 45 L.R.A. 271.

roads or means of transportation.[8] Also it is not necessary that the roads should be actually engaged in cutting rates, but it is sufficient if they are in a position to do so.[9] Mere intersection with another line which might on occasion shorten a haul reached by a slightly more distant intersecting line is not, however, the sort of competition which concerns the public,[10] and a railroad is not in competition with another which has not actually constructed a competing line, and which would not do so if the lease were not executed.[11]

§ 213. —— Foreign Companies

Without legislative authority a company of one state cannot lease its road to a company of another state.

Without legislative authority a company of one state cannot lease its road to a company of another state,[12] and a statute authorizing leases to other companies of the same state confers no authority for a lease to a foreign company.[13] Such authority must be conferred on each of the contracting companies by their charters or the laws of the states creating them.[14] It has been held, however, that a lease to a company of another state may be made under a general authority to lease to another railroad company,[15] and in some cases the statutes authorizing the lease apply in express terms to companies of other states,[16] or to such companies in cases where their roads form a connecting and continuous line.[17] Conditions prescribed by statutes permitting lease to foreign companies must be complied with,[18] and a statute expressly prohibiting any lease to a foreign company until the assent of the legislature thereto has been obtained is not unconstitutional.[19] Where a statute authorizes leases to domestic companies but expressly prohibits leases to foreign companies, the prohibition cannot be evaded by interposing as a nominal lessee a domestic company which is in fact owned and controlled by a foreign company.[20] The view has been taken that only the state can take advantage of a violation of a constitutional provision prohibiting a foreign corporation from leasing a railroad within the state.[21]

§ 214. Requisites and Validity

a. In general
b. Validity

a. In General

Any statutory requirements with respect to leases between railroad companies must be complied with.

General principles relating to leases and the formal execution of corporate contracts govern the validity of a lease between railroad companies with respect to its formal requisites and mode of execution,[22] and any statutory requirements must be complied with;[23] but it will be presumed, in the absence of evidence to the contrary, that all the proceedings of the directors and stockholders were regular and valid,[24] and although irregular, the acts done, if within the powers of the company, may be subsequently ratified.[25]

Assignment. An assignment of a lease of a railroad must be in writing.[26]

8. Mont.—State v. Montana R. Co., supra
51 C.J. p 754 note 55.

9. Ohio—Hafer v. Cincinnati, etc., R. Co., 4 Ohio S. & C.Pl. 487, 29 Cinc.L.Bul. 68.

10. U.S.—Rogers v. Nashville, etc., R. Co., Tenn., 91 F. 299, 33 C.C.A. 517.

11. La.—New Orleans, etc., R. Co. v. New Orleans Southern R. Co., 50 So. 467, 124 La. 471.
51 C.J. p 754 note 58.

12. U.S.—Pennsylvania R. Co. v. St Louis, etc., R. Co., Ind., 6 S.Ct. 1094, 118 U.S. 290, 30 L.Ed. 83, 7 S.Ct. 24, 118 U.S. 630, 30 L.Ed. 284.
51 C.J. p 754 note 59.

13. Minn.—Freeman v. Minneapolis, etc., R. Co., 10 N.W. 594, 28 Minn. 443.
N.J.—Black v. Delaware, etc., Canal Co., 24 N.J.Eq. 455.

14. U.S.—St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co., Ill., 12 S.Ct. 953, 145 U.S. 393, 36 L.Ed. 748—Pennsylvania R. Co. v. St. Louis, etc., R. Co., Ind., 6 S.Ct. 1094, 118 U.S. 290, 30 L.Ed. 83, 7 S.Ct. 24, 118 U.S. 630, 30 L.Ed. 284.

15. N.H.—Boston, etc., R. Co. v. Boston, etc., R. Co., 23 A. 529, 65 N.H. 393.
N.Y.—Day v. Ogdensburgh, etc., R. Co., 13 N.E. 765, 107 N.Y. 129.

16. Mo.—Murrell v. Kansas City, etc., R. Co., 213 S.W. 964, 279 Mo. 92.
51 C.J. p 754 note 63.

17. Vt.—Sturges v. Knapp, 31 Vt. 1.
51 C.J. p 754 note 64.

18. Minn.—Freeman v. Minneapolis, etc., R. Co., 10 N.W. 594, 28 Minn. 443.
51 C.J. p 754 note 65.

19. N.J.—Stockton v. New Jersey Cent. R. Co., 24 A. 964, 50 N.J.Eq. 52, 17 L.R.A. 97.
51 C.J. p 754 note 66.

20. N.J.—Stockton v. New Jersey Cent. R. Co., supra.

21. Miss.—Illinois Cent. R. Co. v. Mississippi Cotton Seed Products Co., 148 So. 371, 166 Miss. 578.

22. U.S.—Dows v. Chicago & S. W. R. Co., C.C.Iowa, 7 F.Cas.No.4,048.
51 C.J. p 754 note 70.

23. Md.—Pennsylvania R. Co. v. Robert S. Green, Inc., 187 A. 877, 171 Md. 63.
50 C.J. p 754 note 71.

Filing requiring filing of lease in office of secretary of state, held not to require recordation of lease of railroad property among land records of each political or territorial unit of state through which railroad lines traversed.—Pennsylvania R. Co. v. Robert S. Green, Inc., supra.

24. U.S.—Oregon R. Co. v. Oregon R., etc., Co., C.C.Or., 28 F. 505, reversed on other grounds 10 S.Ct. 1072, 136 U.S. 646, 34 L.Ed. 552.
N.C.—Hill v. Atlantic, etc., R. Co., 55 S.E. 854, 142 N.C. 539, 9 L.R.A., N.S., 606.

25. U.S.—Oregon R. Co. v. Oregon R., etc., Co., C.C.Or., 28 F. 505.

26. N.Y.—Frank v. New York, etc., R. Co., 7 N.Y.St. 814, modified on other grounds 25 N.E. 332, 122 N.Y. 197.

b. Validity

Any conditions in a lease between railroad companies imposed by the lessor which would prevent the lessee from properly performing its public duties as a common carrier are contrary to public policy and void.

Any conditions in a lease between railroad companies imposed by the lessor which would prevent the lessee from properly performing its public duties as a common carrier are contrary to public policy and void,[27] but if the conditions are conditions subsequent the lessee takes the road free from the illegal condition.[28] So a provision in a lease that the lessor renounces all its duties to the public vitiates the lease.[29] When the lease is not made in pursuance of any duty required of the lessor as a common carrier, a railroad, as owner of the ground leased, may stipulate for any exemption which would be valid in a lease between individuals.[30] A lease of a railroad is not invalid because executed pursuant to a scheme that another corporation shall own the stock of the lessee.[31] A provision in a lease attempting to set up an agency for its modification different from that established by law has been held illegal.[32] Where a company by a single instrument, the provisions of which are, however, separate and distinct, contracts to sell its road, and, until it can make a good title thereto free from encumbrances, to lease it to the purchaser, the lease if authorized is valid, although the contract of sale may be ultra vires.[33] An unrecorded lease is valid as between the parties.[34]

The right to operate a railroad and take tolls therefrom is not necessarily of a corporate character, so as to render a lease to an individual invalid;[35] and, where a statute permits companies to lease their roads to other railroad companies, a lease to a private individual, while not expressly authorized, is not void on grounds of public policy,[36] although such a lease has been held not to be legal.[37]

A lease procured through fraud or collusion[38] or by directors who are pecuniarily interested in both companies[39] is voidable, but is not absolutely void,[40] and may be ratified,[41] which may be by acquiescence or conduct inconsistent with any right or intention to avoid it.[42] A lease which is strictly ultra vires as being beyond the corporate powers of the company is void.[43]

Term of lease. A company may lease its road for a term longer than the period of its corporate existence where the charter is subject to renewal.[44]

Who may question validity. If a lease, although ultra vires, is not in violation of any statute or contrary to public policy, it seems that only the immediate parties thereto, the companies or the stockholders who are parties by representation, may question its validity on the ground of a want of authority to make it.[45] So, where the lease complies with the conditions prescribed by law as essential to the consent of the state, the state cannot have it set aside,[46] even if it is illegal in violating a contract between the lessor's stockholders;[47] but where the lease is unauthorized and contrary to public policy the state, by its attorney general, may sue in equity for preventive relief,[48] and is not confined to an action at law to forfeit the charter.[49]

A third person not a party to the lease who has entered into a valid contract with the lessee for services to be rendered by the latter, and received the benefit thereof, cannot, in an action on such contract, plead as a defense that the lessee was

27. U.S.—Metropolitan Trust Co v. Columbus, etc., R. Co, C.C.Ohio, 95 F. 18.

28. U.S.—Metropolitan Trust Co. v. Columbus, etc, R. Co, supra.

29. Mo.—Anderson v. Union Terminal R. Co., 61 S.W. 874, 161 Mo. 411.

30. Pa.—Rundell v Lehigh Valley R. Co., 98 A. 1054, 254 Pa. 529.

31. N.Y.—Flynn v. Brooklyn City R. Co., 41 N.Y.S. 566, 9 App.Div. 269, affirmed 53 N.E. 520, 158 N.Y. 493

32. N.Y.—Peabody v. Interborough Rapid Transit Co., 202 N.Y.S. 287, 121 Misc. 647, modified on other grounds 209 N.Y.S 380, 212 App Div. 502, affirmed 148 N.E. 768, 240 N.Y. 708.
51 C.J. p 755 note 81.

33. U.S.—U. S Trust Co v Mercantile Trust Co., Cal., 88 F. 140, 31 C.C.A. 427.

34. U.S.—Myer v. Western Car Co, Iowa, 102 U.S 1, 26 L.Ed. 59.
51 C.J. p 755 note 83.

35. Vt.—Middlebury Bank v. Edgerton, 30 Vt. 182.

36. N.Y.—Woodruff v. Erie, etc, R. Co, 93 N.Y. 609.

37. Tenn.—Briggs v. Clawson Bros., 8 Tenn.App. 251.

38. U.S.—Jesup v. Illinois Cent. R. Co, C.C.Ill., 43 F. 483.
N.Y.—Barr v. New York, etc., R. Co., 26 N.E. 145, 125 N.Y. 263.

39. N.Y.—Barr v. New York, etc., R. Co, 26 N.E. 145, 125 N.Y. 263.

40. U.S.—Jesup v Illinois Cent. R. Co, C.C.Ill., 43 F. 483.
51 C.J. p 755 note 89.

41. N.Y.—Continental Ins. Co. v. New York, etc., R. Co., 79 N.E. 1026, 187 N.Y. 225.

42. N.Y.—Barr v New York, etc, R. Co, 26 N.E 145, 125 N.Y. 263

43. Tex.—Rue v. Missouri Pac R. Co, 8 S.W. 533, 74 Tex. 474, 15 Am. S.R. 852
51 C.J. p 755 note 92.

44. U.S.—Union Pac. R. Co. v. Chicago, etc., R. Co., Neb. 16 S.Ct 1173, 163 U.S 564, 41 L.Ed 265
N.Y.—Gere v. New York Cent., etc, R. Co, 19 Abb.N.Cas. 193.

45. Vt.—Vermont, etc, R. Co. v. Vermont Cent. R. Co, 34 Vt. 1.

46. N.H.—State v. Boston, etc, R. Co, 80 A. 858, 76 N.H. 146.

47. N.H.—State v. Boston, etc., R Co., supra.

48. N.J.—Stockton v. New Jersey Cent. R. Co, 24 A. 964, 50 N.J.Eq. 52, 17 L.R.A. 97.

49. N.J.—Stockton v. New Jersey Cent. R. Co., supra.

operating under a void lease;[50] and in an action by the lessor and lessee to enjoin a third company from constructing a competing line without legislative authority, the fact that the lease was not acknowledged and recorded as required by statute cannot be set up by defendant.[51] The right to avoid a lease made by common directors is in the corporation and not the minority stockholders.[52]

Estoppel to deny validity. While there is some conflict of authority as to the application of the doctrine of estoppel in the case of corporate contracts generally, where the contract is ultra vires, the weight of authority as to railroad leases is that, if the lease is strictly ultra vires, it is void and cannot be made good by ratification or estoppel,[53] and that, although the contract has been partly executed and one company has enjoyed benefits thereunder, it is not estopped to set up its invalidity in an action to enforce a covenant in the lease[54] or to recover rents due according to the terms of the lease;[55] but there is some authority to the contrary.[56] An estoppel may arise where the lease is authorized and the alleged invalidity consists only in some irregularity or informality in its execution or ratification by the stockholders,[57] or where it is merely voidable because of the conflicting pecuniary interests of common directors in both companies.[58]

§ 215. Construction

Leases between railroad companies are to be so construed so as to carry out the intention of the parties, which must be gathered from the instrument as a whole.

General rules as to construction of contracts and leases apply in construing leases between railroad companies.[59] The contract must be so construed as to carry out the intention of the parties,[60] which must be gathered from the instrument as a whole,[61] and in case of doubt by reference to the subject matter, situation of the parties, and circumstances and conditions existing at the time of its execution.[62] The practical construction given to the contract by the parties as shown by their subsequent acts is also, in such case, a material factor in determining their intention.[63] Mere practical construction, however, must yield to the language of the instrument,[64] and where there is no uncertainty or ambiguity the terms of the contract as expressed therein must govern.[65]

In the absence of anything to show a contrary intention, the words used will be construed according to their ordinary and popular sense[66] and the con-

50. U.S.—Southern Pac. R. Co. v U. S., 28 Ct.Cl. 77.

51. N.J.—Pennsylvania R. Co. v National R. Co., 23 N.J.Eq. 441.

52. N.Y.—Continental Ins. Co. v New York, etc., R. Co., 79 N.E. 1026, 187 N.Y. 225.

53. Va.—Richmond, etc., R. Co. v Richmond, etc., R. Connection Co., 133 S.E. 888, 145 Va. 266.
51 C.J. p. 756 note 9.

54. U.S.—Central Transp. Co. v Pullman's Palace Car Co., Pa., 11 S.Ct. 478, 139 U.S. 24, 35 L.Ed. 55

55. U.S.—Oregon R., etc., Co. v Oregonian R. Co., Or., 12 S.Ct. 814, 145 U.S. 52, 36 L.Ed. 620.
51 C.J. p. 756 note 11.

56. N.J.—Camden, etc., R. Co. v May's Landing, etc., R. Co., 7 A. 523, 48 N.J.Law 530, 567.
51 C.J. p. 756 note 12.

57. U.S.—Humphreys v. St. Louis, etc., R. Co., C.C.N.Y., 37 F. 307, appeal dismissed 12 S.Ct. 987, 145 U.S. 652, 36 L.Ed. 855.

58. U.S.—Jesup v. Illinois Cent. R. Co., C.C.Ill., 43 F. 483.
N.Y.—Barr v. New York, etc., R. Co., 26 N.E. 145, 125 N.Y. 263.

59. U.S.—McCulloch v. Canadian Pac. Ry. Co., D.C.Minn., 53 F.Supp. 534.
51 C.J. p. 756 note 18.

What law governs

(1) A lease of railroad properties, executed and to be performed in a state was governed by law of such state.—McCulloch v. Canadian Pac. Ry. Co., supra.

(2) The contractual rights and obligations created by railroad leases are determined by the law of the place where the engagements were entered into.—U. S. v. Warren R. Co., C.C.A.N.Y., 127 F.2d 134.

(3) The contractual rights and obligations created by a railroad long-term lease were to be determined by laws of the place where the lease was executed, performance was to be, the lessor and lessee lived, and the leased premises were located.—In re Central of Georgia Ry. Co., D.C. Ga., 47 F.Supp. 786.

Expenses, repairs, and improvements

U.S.—Chicago & W. I. R. Co. v. Chicago & E. R. Co., C.C.A.Ill., 140 F. 2d 130, certiorari denied 64 S.Ct. 1157, three cases, 322 U.S. 747, 88 L.Ed. 1579, rehearing denied 64 S.Ct. 1284, three cases, 322 U.S. 772, 88 L.Ed. 1596.—St. Paul Union Depot Co. v. C. I. R., C.C.A.8, 123 F.2d 235.

Other contracts construed

U.S.—Atlantic Coast Line R. Co. v. U. S., S.C., 52 S.Ct. 171, 284 U.S. 288, 76 L.Ed. 298.

Mo.—New York Cent. R. Co. v. Chicago & E. I. R. Co., 231 S.W.2d 174.

60. N.H.—Boston & M. R. R. v. Wilton R. Co., 181 A. 545, 87 N.H. 416.
51 C.J. p. 756 note 19.

61. Va.—Southern R. Co. v. Franklin, etc., R. Co., 32 S.E. 485, 96 Va. 693, 44 L.R.A. 297.
51 C.J. p. 756 note 20.

62. Mich.—Pere Marquette R. Co. v. Wabash R. Co., 104 N.W. 650, 141 Mich. 215.
51 C.J. p. 756 note 21

63. Tenn.—Nashville Terminal Co. v. Tennessee Central Ry. Co., 2 Tenn.App. 646.
51 C.J. p. 757 note 22.

Acts of assignee

Doctrine of practical construction held inapplicable to corporate acts of assignee done in performance of railroad lease executed by assignor corporation twenty to thirty years before.—Boston & M. R. R. v Peterborough R. R., 166 A. 275, 86 N.H. 217.

64. N.Y.—Brainard v. New York Cent. R. Co., 151 N.E. 152, 242 N. Y. 125, 45 A.L.R. 751.—Cayuga, etc., R. Co. v. Delaware, etc., R. Co., 213 N.Y.S. 586, 215 App.Div. 429.

65. N.H.—Boston, etc., R. Co. v. Northern R. Co., 142 A. 118, 83 N. H. 112.
51 C.J. p. 757 note 24.

66. Mich.—Michigan Cent. R. Co. v. Pere Marquette R. Co., 87 N.W. 271, 128 Mich. 333.

nection in which they are used.[67] The lease must also be construed with reference to the objects proposed by the existing charters of the companies at the time it was made.[68] Where the lessee controls a majority of the lessor's stock, the lease will be construed strictly against the lessee.[69] There is a presumption that a railroad lease was drafted in view of the general fund of knowledge at the time.[70]

Nature of contract. It is frequently important to determine, as affecting both the right to execute and the rights and liabilities resulting therefrom, whether a particular contract is in fact a lease,[71] and this must be determined not by the name given to it by the parties or the terms used, but by its essential character.[72] So where railroads have power to enter into certain contracts but not to lease, an instrument, although termed a lease, may be valid as a traffic or other operating contract,[73] while on the other hand, in the absence of statute, any contract is unauthorized which is in substance and effect a lease, although it is not so called.[74]

§ 216. Operation and Effect in General

An agreement in a lease between railroad companies to submit differences to arbitration does not permit one of the parties which has invoked the jurisdiction of a court of equity to limit such jurisdiction and to prevent the court from determining all the equities between the parties relative to the subject matter.

An agreement in a lease between railroad companies to submit differences to arbitration does not permit one of the parties which has invoked the jurisdiction of a court of equity to limit such jurisdiction and to prevent the court from determining all the equities between the parties relative to the subject matter,[75] or affect the right of stockholders to sue where the dispute is not between the companies but between the stockholders and the companies.[76] Such a provision for the submission to arbitration of disputes is binding not only on the parties thereto, but also on the real owner of the leased property.[77]

A lease made without legislative authority does not ipso facto dissolve the corporation[78] or release a subscriber to its stock from his subscription,[79] or affect the liability of the company to be sued on a liability incurred prior to the lease.[80] If the lease is strictly ultra vires, it is void, and cannot be made good by ratification or estoppel, as discussed supra § 214, or the basis of any right of action by or against either party.[81] Where the companies are in pari delicto, the court will aid neither party,[82] either to enforce the provisions of the lease or to cancel and set it aside.[83] Neither company can maintain a suit to enforce a covenant by the lessor that in case it should elect to terminate the lease before the end of the term it would pay the lessee the value of the unexpired term.[84] If, however, the lease is not only ultra vires but also contrary to

Connecting carrier

Railroad was a carrier connecting with leased railway within conditions of lease requiring maintenance of open route, notwithstanding connection was made over intermediate carrier rather than by direct physical connection. The term "connecting lines" is commonly used as referring to all the lines making up a through route.—Atlantic Coast Line R. Co. v. U. S., S.C., 52 S.Ct. 171, 284 U.S. 288, 76 L.Ed. 298.

67. Mass.—Boston, etc., R. Co. v. New York Cent. R. Co., 153 N.E. 19, 256 Mass. 600.
51 C.J. p 757 note 26.

68. N.H.—March v. Eastern R. Co., 43 N.H. 515.

69. N.Y.—Westchester F. Ins. Co. v. Syracuse, etc., R. Co., 183 N.Y.S. 602, 192 App.Div. 463.
51 C.J. p 757 note 28

Careful scrutiny

Lease of railroad required careful scrutiny, where lessee owned majority interest in lessor corporations.—New York Cent. Securities Corporation v. U. S., D.C.N.Y., 54 F.2d 122, affirmed 53 S.Ct. 45, 287 U.S. 12, 77 L.Ed. 138.

70. Mass.—Boston, etc., R. Corp. v. Old Colony R. Co., 169 N.E. 157, 269 Mass. 190

71. U.S.—Joliet & C. R. Co. v. U. S., C.C.A.Ill., 118 F.2d 174, reversed on other grounds 62 S.Ct. 442, 315 U.S. 44, 86 L.Ed. 658.
51 C.J. p 757 note 30.

Lease in perpetuity

U.S.—Joliet & C. R. Co. v. U. S., supra.

72. U.S.—Joliet & C. R. Co. v. U. S., supra.
51 C.J. p 757 note 31.

73. U.S.—Union Pac. R. Co. v. Chicago, etc., R. Co., Neb., 16 S.Ct. 1173, 163 U.S. 564, 41 L.Ed. 265
Mo.—St. Joseph, etc., R. Co. v. St. Louis, etc., R. Co., 36 S.W. 602, 135 Mo. 173, 33 L.R.A. 607.

74. Ohio.—Ohio, etc., R. Co. v. Indianapolis, etc., R. Co., 3 Ohio Dec., Reprint, 458, 5 Am.L.Reg.,N.S., 733.
51 C.J. p 757 note 33.

75. Conn.—Chamberlain v. Connecticut Cent. R. Co., 2 A. 244, 54 Conn. 472.

76. N.H.—March v. Eastern R. Co., 43 N.H. 515.

77. Ohio.—Cincinnati v. Cincinnati Southern R. Co., 6 Ohio Cir.Ct. 247, 3 Ohio Cir.Dec. 438.
44 C.J. p 1450 note 57 [2].

City as real owner

Ohio.—Cincinnati v. Cincinnati Southern R. Co., supra.

78. N.Y.—Troy, etc., R. Co. v. Kerr, 17 Barb. 581.

79. Ill.—Ottawa, etc., R. Co. v. Black, 79 Ill. 262
51 C.J. p 757 note 38.

80. U.S.—U. S. v. Little Miami, etc., R. Co., C.C.Ohio, 1 F. 700, reversed on other grounds 2 S.Ct. 627, 108 U.S. 277, 27 L.Ed. 727.

81. U.S.—St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co., 12 S.Ct. 953, 145 U.S. 393, 36 L.Ed. 748.
51 C.J. p 757 note 42.

82. Ohio.—Ohio, etc., R. Co. v. Indianapolis, etc., R. Co., 3 Ohio Dec., Reprint, 458, 5 Am.L.Reg.,N.S., 733.
51 C.J. p 758 note 43.

83. U.S.—St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co., Ill., 12 S.Ct. 953, 145 U.S. 393, 36 L.Ed. 748.
51 C.J. p 758 note 44.

84. U.S.—Thomas v. West Jersey R. Co., Pa., 101 U.S. 71, 25 L.Ed. 950.

public policy, an action will lie by one of the parties, although it be in pari delicto, to set it aside,[85] but in such case the court will not proceed any further in behalf of the party suing than to declare the lease invalid.[86]

If the contract of lease is ultra vires, a contract by a third company to guarantee the performance of its conditions is also void and cannot be enforced.[87]

§ 217. Property, Rights, and Franchises Included

The property rights and franchises included in a lease between railroad companies must be determined by the terms and proper construction of the contract.

The property rights and franchises included in a lease between railroad companies must be determined by the terms and proper construction of the contract,[88] which, however, will be presumed to include whatever rights and property of the lessor are necessary for the operation of the road and the proper exercise of the rights granted.[89] So, although the lease includes all property, real and personal, and all assets of every kind and description of the lessor, it will be presumed that all the property leased was to be used for railroad purposes.[90]

Where a lease is made of all property of every name and nature for the full continuance of the charter, and all renewals thereof, title to the leased lands vests in the lessee.[91] A lease of a railroad with all its appurtenances includes a contract right acquired by the lessor to use a portion of the track of a third company[92] in the absence of any provision in the contract against its assignment.[93] A lease, demising among other things "contracts now owned by the lessor," operates as an assignment of the lessor's contract of a third person to cut and deliver wood on its right of way as fuel for its locomotives,[94] especially where the lessee has notice of the fact that the contract is in course of performance when the lease is made.[95]

§ 218. General Rights and Liabilities of Lessor and Lessee

a. In general
b. Of lessor
c. Of lessee

a. In General

The rights, duties, and liabilities of the lessor and lessee as between themselves, in so far as they are provided for in the lease, must be governed by the terms and proper construction of that contract.

The rights, duties, and liabilities of the lessor and lessee as between themselves, in so far as they are provided for in the lease, must be governed by the terms and proper construction of that contract;[96] and, where the lease specifies the duties and liabilities

85. N.Y.—Union Bridge Co. v. Troy, etc, R. Co., 7 Lans. 240.
51 C J. p 758 note 49

86. N.Y.—Union Bridge Co. v. Troy, etc, R. Co, supra.

87. U.S—Pennsylvania R Co. v St Louis, etc, R. Co, Ind., 6 S Ct 1094, 118 U.S. 290, 30 L Ed. 83, rehearing denied 7 S Ct. 24, 118 U.S 630, 30 L Ed. 284.

88. N C—Atlantic, etc., R. Co v. Atlantic, etc., Co., 61 S.E 185, 147 N. C 368, 23 L R.A.,N.S., 223, 125 Am. S.R. 550, 15 Ann.Cas. 363.
51 C.J. p 758 note 52.

89. U S—Chicago, etc., R. Co. v. Denver, etc., R. Co, Colo, 12 S Ct. 479, 143 U.S. 596, 36 L.Ed. 277

90. Md.—Buckler v. Safe Deposit, etc., Co., 80 A. 899, 115 Md. 222.

91. N.J.—United States Pipe Line Co. v. Delaware, L. & W. R. R. Co., 41 A. 759, 62 N.J.Law 254, 42 L R. A. 572.
N.Y.—Syracuse Grade Crossing Commission v. Delaware, L. & W. R. Co., 97 N.Y.S.2d 279, 197 Misc. 192, modified on other grounds 32 N.Y S.2d 620, 263 App.Div. 930, affirmed 49 N.E.2d 131, 290 N.Y. 632.

92. Pa.—Philadelphia, etc., R. Co. v. Catawissa R. Co., 53 Pa. 20.

93. Pa.—Philadelphia, etc, R. Co. v. Catawissa R. Co., supra.

94. N.C.—Atlantic, etc., R. Co v. Atlantic, etc., Co, 61 S E 185, 147 N.C. 368, 23 L R A.,N S, 223, 125 Am S.R. 550, 15 Ann Cas 363.

95. N.C—Atlantic, etc, R. Co. v. Atlantic, etc, Co., supra.

96. N H.—Boston & M. R. R. v. Suncook Val. R. R, 46 A 2d 773, 94 N.H. 81, certiorari denied 67 S. Ct. 89, 329 U.S. 731, 91 L.Ed. 632, rehearing denied 67 S.Ct. 186, 329 U.S. 828, 91 L.Ed. 703.
51 C J. p 758 note 60.
Liability for injuries see infra §§ 351-360.

Duty to return property

Where property used for railroad purposes had been leased for a term of years and the city sought to condemn a part of it for public streets, the lessee would not be permitted to let the city take possession against the will of the owner of the fee, for after the city once had possession, the lessee would not be able to regain possession and return it to the owner of the fee at the termination of the lease.—City of Chattanooga v. State of Georgia, 3 Tenn.App. 42.

Location under eminent domain

Notwithstanding some evidence that a switch to a warehouse was constructed before an agreement permitting use of the land for a switch connection was executed and a reference in the agreement to the ground on which the switch was located, there was no presumption that the switch was located on ground acquired by the railroad company under its power of eminent domain—Klingler v. Wick, 109 A. 542, 266 Pa. 1.

Right to share in lessee's profits

Lease of railroad property held not to reserve to lessor right to share in profits earned by lessee from demised property not strictly devoted to railroad purposes—Phœnix Ins. Co. of Hartford v New York & H. R. Co, C.C.A.N.Y., 59 F.2d 962, certiorari denied 53 S.Ct. 91, 287 U. S. 645, 77 L.Ed. 553.

Operation by lessor over tracks demised

N.H.—Boston & M. R. R. v. Suncook Val. R. R., 46 A.2d 773, 94 N.H. 81, certiorari denied 67 S.Ct. 89, 329 U.S. 731, 91 L.Ed. 632, rehearing denied 67 S.Ct. 186, 329 U S 828, 91 L.Ed. 703.

of each, neither company is restricted in any manner not provided in the contract,[97] but may obtain new legislative grants and avail itself of any new powers which will not interfere with the due operation of its contract with the other company.[98]

Breach of lease. In an action for damages for breach of the lease, the complaint or petition must state all facts necessary to entitle plaintiff to recover.[99]

b. Of Lessor

In the absence of any statutory provision or agreement to the contrary, the lessor company is not bound by any contracts entered into between the lessee and third persons to which it is not a party.

In the absence of any statutory provision or agreement to the contrary, the lessor company is not bound by any contracts entered into between the lessee and third persons to which it is not a party,[1] but if there is an agreement covering the matter the rights of the parties will be governed accordingly.[2] A stipulation that the lessor shall pay for all improvements made with his written consent imposes no duty on him so to consent.[3] If the lease is unauthorized, the lessor company remains liable for the proper performance of all its charter obligations and public duties.[4]

It has also been held that the lessor company remains liable for the performance of any of its corporate obligations antecedent to the lease,[5] although the lease is authorized and the lessee company is also liable.[6] Where one company has leased its road to another, it cannot bring an action against the latter merely to obtain an opinion of the court as to whether the lease is ultra vires, where neither company claims that it is invalid or asks to be relieved therefrom.[7]

c. Of Lessee

The lessee ordinarily, with respect to the leased property, succeeds to all the rights and franchises of the lessor.

The lessee ordinarily, with respect to the leased property, succeeds to all the rights and franchises of the lessor,[8] and in its operation of the leased road is not bound by any limitations in its own charter with respect to the rates which it is permitted to charge on its own road,[9] but it succeeds to no greater rights than those of the lessor,[10] and must, in operating the leased road, be governed by the charter of the lessor.[11] An authorized lease imposes on the lessee the duty of operating and conducting the road as the statute from which the lessor company derived its powers prescribes.[12] So also, where a company of one state leases a road in another state, it is subject to local legislation in that state in the same manner as the lessor would have been if no lease had been made.[13] The lessee may be estopped to assert its rights under the lease.[14] On sale of the leased property, the lessee must hold the money as the property of the lessor and recognize and preserve the title of the lessor thereto.[15] It has been held that the lessee cannot redeem a duly authorized long-term railroad lease under a

97. N.H.—March v. Eastern R. Co., 43 N.H. 515.

98. N.H.—March v. Eastern R. Co., supra.

99. Ga.—State v. Western, etc., R. Co., 71 S.E. 1055, 136 Ga. 619.
51 C.J. p. 759 note 64

1. U.S.—Empire Trust Co. v. Egypt R. Co., C.C.N.C., 182 F. 100.
51 C.J. p. 759 note 65.

2. Pa.—Pittsburg, etc., R. Co. v. Harbaugh, 4 Brewst. 115.
51 C.J. p. 759 note 66.

3. N.H.—Boston, etc., R. Co. v. Northern R. Co., 142 A. 118, 83 N.H. 312.

4. Tex.—Central, etc., R. Co. v. Morris, 3 S.W. 457, 68 Tex. 49.

5. U.S.—Chicago, etc., R. Co. v. Crane, Iowa, 5 S.Ct. 578, 113 U.S. 424, 28 L.Ed. 1064.

6. U.S.—Chicago, etc., R. Co. v. Crane, supra.

7. N.Y.—Ogdensburgh, etc., R. Co. v. Vermont, etc., R. Co., 4 Hun 712

8. U.S.—Phoenix Ins. Co. of Hartford v. New York & H. R. Co., C.C.A.N.Y., 59 F.2d 962, certiorari denied 53 S.Ct. 91, 287 U.S. 645, 77 L.Ed. 558.
51 C.J. p. 759 note 76.

Exchanges of leased property

Lessee railroad's exchanges of portions of leased property for property belonging to city in connection with terminal station street improvement held not invalid.—Phoenix Ins. Co. of Hartford v. New York & H. R. Co., C.C.A.N.Y., 59 F.2d 962, certiorari denied 53 S.Ct. 91, 287 U.S. 645, 77 L.Ed. 558.

9. Pa.—Pennsylvania R. Co. v. Sly, 65 Pa. 205.
N.Y.—Palm v. New York, etc., R. Co., 17 N.Y.S. 471, 60 N.Y.Super. 162.

10. Miss.—State v. Mobile, etc., R. Co., 38 So. 732, 86 Miss. 172, 122 Am.S.R. 277.

11. S.C.—McCandless v. Richmond, etc., R. Co., 16 S.E. 429, 38 S.C. 103, 18 L.R.A. 440.
51 C.J. p. 759 note 79.

12. Ky.—Louisville & N. R. Co. v. Pierce, 230 S.W.2d 430, 313 Ky. 189.

13. U.S.—Stone v. Illinois Cent. R. Co., Miss., 6 S.Ct. 348, 388, 1191, 116 U.S. 347, 29 L.Ed. 650.
51 C.J. p. 759 note 80.

14. Va.—Richmond, etc., R. Co. v. Richmond, etc., R. Connection Co., 133 S.E. 888, 145 Va. 266.
51 C.J. p. 759 note 81.

15. U.S.—Kansas City, St. L. & C. R. Co. v. Alton R. Co., C.C.A.Ill., 124 F.2d 780.

Money deposited in lessee's general account

Where money derived from sale of leased railroad land was deposited in lessee's general banking account and was carried on books as a non-negotiable debt owing to lessor, the handling of the fund by lessee created a debtor and creditor relationship between lessee and lessor and failed to recognize the property right of lessor in the fund.—Kansas City, St. L. & C. R. Co. v. Alton R. Co., C.C.A.Ill., 124 F.2d 780.

statute intended primarily to provide for the extinguishment of ground rents.[16]

As to public duties. The lessee succeeds to the charter obligations of the lessor and the necessity of performing its public duties.[17] It must operate the leased road,[18] and cannot abandon or cease to operate any part thereof,[19] or ordinarily, change its location,[20] although the parties to the lease may, after the track has been located and built, by oral agreement change its location within the limits specified in the lease.[21] The lessee must also provide and maintain at stations used by it the conveniences and accommodations required by law.[22] It must furnish all necessary rolling stock and equipment for its proper operation and for the transportation of both freight and passengers,[23] and may be compelled by mandamus to do so,[24] or enjoined from abandoning any of its public duties [25] If the lease is void, the lessee will not be compelled to operate the road.[26]

As to contracts of lessor. Although the lessee takes the property subject to any liens thereon securing the obligations of the lessor,[27] in the absence of any statutory provision or agreement to the contrary the lessee is not liable for debts of the lessor not constituting a lien on the leased property,[28] and is not bound by any contracts made by the lessor[29] or liable for any breach of contract committed by the lessor prior to the lease.[30] Where there is a provision in the lease as to debts and contracts, the rights and liabilities of the parties depend on the terms and proper consideration of the agreement.[31] A free pass given by the lessor, being a mere license without any consideration, is revoked by the lease and need not be honored by the lessee.[32]

§ 219. Rents and Advances

The power of a railroad company to lease its road to another company includes the power to fix the rent and the manner in which it shall be paid.

The power of a railroad company to lease its road to another company includes the power to fix the rent and the manner in which it shall be paid,[33] and, similarly, the power to take a lease includes the power to make agreements concerning the payment of rent.[34] The lessee may agree as rent to pay or guarantee the payment of the interest on the bonds of the lessor during the term of the lease,[35] or a part of the principal of such bonds, annually,[36] or the entire amount thereof at the expiration of the lease,[37] or it may agree to pay or guarantee payment of certain dividends on the lessor's stock.[38] Where the rent is to be paid in the form of dividends or interest on bonds, it may be made payable directly to the stockholders or bondholders instead of to the lessor company to be distributed by it.[39] An agreement to pay rent to a third company does

16. Md.—Buckler v. Safe Deposit, etc., Co., 80 A. 899, 115 Md. 222.
51 C.J. p. 760 note 89.

17. Va.—Winchester, etc., R. Co. v. Commonwealth, 55 S.E. 692, 106 Va. 264.
51 C.J. p. 760 note 90.

18. Ill.—People v. St. Louis, etc., R. Co., 52 N.E. 292, 176 Ill. 512, 35 L.R.A. 656.

19. Miss.—State v. Mobile, etc., R. Co., 38 So. 732, 86 Miss. 172, 122 Am.S.R. 277.

20. Miss.—State v. Mobile, etc., R. Co., supra.

21. Minn.—Minneapolis, etc., R. Co. v. St. Paul, etc., R. Co., 28 N.W. 705, 35 Minn. 265.

22. Tex.—State v. Southern Kansas R. Co., Civ.App., 99 S.W. 167.

23. Ill.—People v. St. Louis, etc., R. Co., 52 N.E. 292, 176 Ill. 512, 35 L.R.A. 656.
51 C.J. p. 760 note 97.

24. Ill.—People v. St. Louis, etc., R. Co., supra.

25. Miss.—State v. Mobile, etc., R. Co., 38 So. 732, 86 Miss. 172, 122 Am.S.R. 277.
51 C.J. p. 760 note 99.

26. U.S.—People v. Colorado, etc., R. Co., C.C.Colo., 42 F. 638.

27. Ky.—Hurley v. Big Sandy, etc., R. Co., 125 S.W. 302, 137 Ky. 216.
51 C.J. p. 760 note 4.

28. U.S.—Taenzer v. Chicago, etc., R. Co., Tenn., 170 F. 240, 95 C.C.A. 436.
Tex.—Missouri, Pac. R. Co. v. Owens, 1 Tex.A.Civ.Cas. § 384.

29. Pa.—Pennsylvania Co. v. Erie, etc., R. Co., 108 Pa. 621.
51 C.J. p. 760 note 6.
Assumption of obligations
Fact that railroads with which storage company had entered into contracts for handling by company of railroads' unclaimed package freight had leased their lines to another railroad did not release lessee, which had assumed obligations of original parties and succeeded to their rights and liabilities on such contracts.—Pennsylvania R. Co. v. Houston, C.C.A.Ohio, 81 F.2d 704.

30. Tex.—Missouri Pac. R. Co. v. Owens, 1 Tex.A.Civ.Cas. § 384.

31. Mass.—New York Cent. R. Co. v. Central Vermont R. Co., 136 N.E. 825, 243 Mass. 56.
51 C.J. p. 760 note 8.

32. N.C.—Turner v. Richmond, etc., R. Co., 70 N.C. 1.

33. N.Y.—Day v. Ogdensburgh, etc., R. Co., 13 N.E. 765, 107 N.Y. 129.
51 C.J. p. 761 note 11.

34. N.Y.—Frank v. New York, C. & St. L. R. Co., 24 N.Y.S.2d 846, 175 Misc. 902, affirmed 24 N.Y.S.2d 854, motion denied New York, C. & St. L. R. Co. v. Frank, 61 S.Ct. 729, affirmed 61 S.Ct. 833, 313 U.S. 538, 85 L.Ed. 1507, vacated 61 S.Ct. 938, 313 U.S. 596, 85 L.Ed. 1550, affirmed 62 S.Ct. 258, 314 U.S. 360, 86 L.Ed. 277.

35. U.S.—Eastern Townships' Bank v. St. Johnsbury, etc., R. Co., C.C.Vt., 40 F. 423, appeal dismissed 13 S.Ct. 1046, 149 U.S. 772, 37 L.Ed. 957.
51 C.J. p. 761 note 12.

36. N.Y.—Day v. Ogdensburgh, etc., R. Co., 13 N.E. 765, 107 N.Y. 129.

37. N.Y.—Gere v. New York Cent., etc., R. Co., 19 Abb.N.Cas. 193.

38. N.Y.—Peabody v. Interborough Rapid Transit Co., 202 N.Y.S. 287, 121 Misc. 647, modified on other grounds 209 N.Y.S. 380, 212 App. Div. 502, affirmed 143 N.E. 768, 240 N.Y. 708.
51 C.J. p. 761 note 15.

39. U.S.—Ætna Ins. Co. v. Albany, etc., R. Co., C.C.N.Y., 156 F. 132, affirmed 170 F. 1019, 95 C.C.A. 393,

not make the lease void for want of consideration, where such company owns substantially all of the stock and bonds of the lessor.[40]

Where there are express provisions in the lease as to the amount or method of computing the rent and the time and manner of payment, the rights and liabilities of the companies must be determined by a proper construction of the contract,[41] and, if no particular amount is stipulated, a promise to pay whatever is a reasonable amount will be implied.[42] A failure on the part of the lessor to perform an independent covenant does not affect the liability of the lessee for the agreed rent,[43] and a condemnation suit instituted by a railroad, lessee of another railroad, against the original lessor does not of itself terminate any liability for rent or use and occupation until an award of compensation.[44]

Where the lease is invalid, an action for rent due thereunder will not lie.[45] If, however, the lease, although ultra vires, is not tainted with any immorality and has been partly executed, a court of equity will, independently of the contract, as far as possible do justice between the companies, by compelling one to return or account for what it has received under the lease,[46] or make such compensation as may be just for the use actually enjoyed of the leased property;[47] but in such case the action is not maintained on the contract or according to its terms but on the implied contract of defendant to return or make compensation for property or money which it has no right to retain,[48] although the attempted lease may be used as a basis for determining the amount of such compensation.[49]

§ 220. Taxes and Assessments

a. In general
b. Income tax

a. In General

Where the duty of paying taxes and assessments is provided for by the covenants in the lease, the rights and liabilities of the parties to a lease between railroads, as between themselves, depend on the terms and construction of their agreement.

The question whether the duty of paying taxes and assessments chargeable against the leased property rests on the lessor or the lessee of a lease between railroads is frequently provided for by covenants in the lease, and in such case the rights and liabilities of the parties as between themselves depend on the terms and construction of their agreement,[50] the lessee being required to pay only such taxes as it has expressly assumed.[51] No particular form of expression is essential to create a covenant on the part of a lessee to pay taxes,[52] and such covenants run with the land.[53]

A statute may require the lessee to pay the taxes in the first instance with a right to recover the amount from the lessor or deduct it from the rent,[54] and such a statute has been held valid.[55]

certiorari denied 30 S.Ct. 401, 215 U.S. 601, 54 L.Ed. 344.

40. U.S.—Union Pac. R. Co. v. Chicago, etc., R. Co., Neb., 16 S.Ct. 1173, 163 U.S. 564, 41 L.Ed. 265.

41. U.S.—Beneficial Corp. v. Reading & S. W. St. Ry. Co., D.C.Pa., 91 F.Supp. 803, affirmed, C.A., 185 F.2d 238.
51 C.J. p. 761 note 18.
Dividends on lessor's stock
U.S.—New York Cent. Securities Corporation v. U. S., D.C.N.Y., 54 F.2d 122, affirmed 53 S.Ct. 45, 287 U.S. 12, 77 L.Ed. 138—Beneficial Corp. v. Reading & S. W. St. Ry. Co., D.C.Pa., 91 F.Supp. 803, affirmed, C.A., 185 F.2d 238.
51 C.J. p. 761 note 18 [a].

42. Ga.—Rome R. Co. v. Chattanooga, etc., R. Co., 21 S.E. 69, 94 Ga. 422.

43. Va.—Miller v. Southern R. Co., 108 S.E. 838, 131 Va. 239.
51 C.J. p. 761 note 20.

44. Ill.—Leitch v. New York Cent. R. Co., 58 N.E.2d 16, 388 Ill. 236, 155 A.L.R. 835.

45. U.S.—Cox v. Terre Haute, etc., R. Co., Ind., 133 F. 371, 66 C.C.A. 433.
51 C.J. p. 761 note 22.

46. U.S.—Pullman's Palace-Car Co. v. Central Transp. Co., Pa., 18 S.Ct. 808, 171 U.S. 138, 43 L.Ed. 108
51 C.J. p. 762 note 23.

47. U.S.—St. Louis, etc., R. Co. v. Cleveland, etc., R. Co., Ind., 8 S.Ct. 1011, 125 U.S. 658, 31 L.Ed. 832—Farmers' Loan, etc., Co. v. St. Joseph, etc., R. Co., C.C.Neb., 2 F. 117, 1 McCrary 247.

48. U.S.—Central Transp. Co. v. Pullman's Palace-Car Co., Pa., 11 S.Ct. 478, 139 U.S. 24, 35 L.Ed. 55.
Va.—Richmond, etc., R. Co. v. Richmond, etc., R. Connection Co., 133 S.E. 888, 145 Va. 266.

49. Va.—Richmond, etc., R. Co. v. Richmond, etc., R. Connection Co., supra.

50. U.S.—In re Chicago & E. I. Ry. Co., C.C.A.Ill., 94 F.2d 296.
51 C.J. p. 762 note 28.
Special assessments which represented cost of permanent improvements and additions to lessor's property were, in view of practical construction by parties, not working expenses payable by lessees on wheelage basis under contract for lease of terminal facilities to several railroads which provided that working expenses should include all taxes and assessments but not cost of permanent improvements and of additions to property.—Chicago & W. I. R. Co. v. Chicago & E. I. Ry. Co., C.C.A.Ill., 86 F.2d 441.
Stock and franchise tax
U.S.—In re Chicago & E. I. Ry. Co., C.C.A.Ill., 94 F.2d 296.

51. Pa.—North Pennsylvania R. Co. v. Reading Co., 183 A. 918, 320 Pa. 566.
51 C.J. p. 762 note 29.

52. Mass.—Boston, etc., Corp. v. Old Colony R. Co., 169 N.E. 157, 269 Mass. 190—Pittsfield, etc., R. Corp. v. Boston, etc., R. Co., 157 N.E. 611, 260 Mass. 390.

53. W.Va.—West Virginia, etc., R. Co. v. McIntire, 28 S.E. 696, 44 W. Va. 210.

54. Vt.—Vermont, etc., R. Co. v. Vermont Cent. R. Co., 21 A. 262, 731, 63 Vt. 1, 10 L.R.A. 562
51 C.J. p. 762 note 32.

55. Vt.—Vermont, etc., R. Co. v. Vermont Cent. R. Co., supra.
51 C.J. p. 763 note 33.

b. Income Tax

A covenant in a lease between railroad companies that the lessee will pay all taxes and assessments which may be levied on the demised property or on the lessor by reason of its ownership thereof has been held not a covenant to pay the income tax on the rentals.

A covenant in a lease between railroad companies that the lessee will pay all taxes and assessments which may be levied on the demised property[56] or on the lessor by reason of its ownership thereof[57] is not a covenant to pay the income tax on the rentals, nor are general covenants to pay taxes,[58] or to pay all claims related to the railroad,[59] covenants to pay taxes on the business[60] or on the income or profits of the business[61] or on the lessor's business,[62] or the receipts, gross or net, derived therefrom,[63] on its franchise,[64] capital stock,[65] or dividends thereon,[66] or on bond issues, or interest thereon,[67] or to pay all taxes on any of its rights, privileges or franchises;[68] nor is an agreement to pay all expenses connected with the system growing out of the maintenance, operation, renewal, or replacement of the demised property a covenant to pay such income tax.[69]

Although there is some authority to the contrary,[70] it has been held that an agreement by the lessee to pay all taxes that may be imposed on or payable by the lessor on account of his property, franchise, capital stock, "or otherwise" binds it to pay an income tax on the rent paid,[71] as does an agreement to pay taxes on the rental of the lessor,[72] and as does an agreement to discharge all taxes imposed on the leased property or on any income therefrom.[73] Similarly, where the lessee is required to pay all taxes, ordinary or extraordinary, thereafter to be imposed on the lessor, he must pay the taxes on income from rentals.[74] Where the lessee assumes the obligation of taxes so that annually there might be a basis for the stockholders of the lessor to receive a certain per cent of their shares without any deduction whatever, the lessee will be liable for taxes on the rental.[75]

The determination of the question whether a federal income tax is included within the terms of an agreement to pay taxes depends on the words of the contract, the context in which they occur, and the subject matter to which they are applied.[76] A lessee will not be deemed to have covenanted to pay the income taxes of the lessor unless the obligation to do so is clearly and directly specified in the contract between them.[77] In any event, the intent of the parties will control,[78] and the matter may be gov-

56. U.S.—U. S. v Warren R. Co., C.C.A.N.Y., 127 F.2d 134.
N.Y.—New York Cent. R. Co. v. New York & H. R. Co., 56 N.Y.S.2d 712, 185 Misc. 420, affirmed 72 N.Y.S. 2d 404, 272 App.Div. 870, affirmed 78 N.E.2d 612, 297 N.Y. 820.
51 C.J. p. 763 note 35.

Assignee held not liable
N.H.—Boston & M. R. R. v. Wilton R. Co., 181 A. 545, 87 N.H. 416—Boston & M. R. R. v. Peterborough R. R., 166 A. 275, 86 N.H. 217.

57. N.Y.—Brainard v. New York Cent. R. Co., 151 N.E. 152, 242 N.Y. 125, 45 A.L.R. 751.

58. U.S.—Illinois Cent. R. Co v. Indianapolis Union R. Co., C.C.A.Ind., 6 F.2d 830.
Va.—Atlantic, etc., R. Co. v. Southern R. Co., 141 S.E. 770, 149 Va. 701.

59. U.S.—U. S. v Warren R. Co., C.C.A.N.Y., 127 F.2d 134.

60. U.S.—U. S. v. Warren R. Co., supra.

61. U.S.—U. S. v. Warren R. Co., supra.

62. Mass.—Boston, etc., Corp. v. Old Colony R. Co., 169 N.E. 157, 269 Mass. 190.
51 C.J. p. 763 note 38.

63. Pa.—Sharon R. Co. v. Erie R. Co., 112 A. 242, 268 Pa. 396—Catawissa R. Co. v. Philadelphia, etc., R. Co., 99 A. 807, 255 Pa. 269.

64. Pa.—Catawissa R. Co. v. Philadelphia, etc., R. Co., supra.
51 C.J. p. 763 note 40.

65. Mass.—Stony Brook R. Corp. v. Boston, etc., R. Co., 157 N.E. 607, 260 Mass. 357, 53 A.L.R. 700.
51 C.J. p. 763 note 41.

66. Pa.—Catawissa R. Co. v. Philadelphia, etc., R. Co., 99 A. 807, 255 Pa. 269—Little Schuylkill Nav., etc., Co. v. Philadelphia, etc., R. Co., 25 Pa.Dist. 132, 44 Pa.Co. 197.

67. Pa.—Sharon R. Co. v. Erie R. Co., 112 A. 242, 268 Pa. 396—Catawissa R. Co. v. Philadelphia, etc., R. Co., 99 A. 807, 255 Pa. 269.

68. U.S.—U. S. v. Warren R. Co., C.C.A.N.Y., 127 F.2d 134.

69. U.S.—Illinois Cent. R. Co. v. Indianapolis Union R. Co., C.C.A. Ind., 6 F.2d 830.

70. Iowa.—Des Moines Union R. Co. v. Chicago Great Western R. Co., 177 N.W. 90, 188 Iowa 1019, 9 A.L.R. 1557.
51 C.J. p. 763 note 45.

71. U.S.—Whitlock v. Boston, etc., R. Co., C.C.A.Mass., 29 F.2d 351.

72. U.S.—Gaston v. New London Northern R. Co., D.C.Conn., 38 F. 2d 183.
51 C.J. p. 763 note 47.

73. Ohio.—City of Cincinnati v. Cincinnati N. O. & T. P. Ry. Co., 75 N.E.2d 200, 80 Ohio App. 213.

Liability for penalties
Where lease by its terms made company liable for income tax imposed by another state on city's income under lease, but both city and company, because of mutual error, unsuccessfully coöperated to defeat the tax in court of such other state, company was liable, not only for city's taxes, but also for penalties incurred because of the failure to pay the taxes when due.—City of Cincinnati v. Cincinnati, N. O. & T. P. Ry. Co., supra.

74. U.S.—In re Georgia Ry. Co., D.C.Ga., 47 F.Supp. 786.

Long-term perpetually renewable lease
U.S.—In re Central of Georgia Ry. Co., D.C.Ga., 47 F.Supp. 786

75. Me.—European & North American Ry. v. Maine Cent. R. Co., 196 A. 842, 135 Me. 338.

76. Mass.—Boston, etc., Corp. v. Old Colony R. Co., 169 N.E. 157, 269 Mass. 190—Stony Brook R. Co. v. Boston, etc., R. Co., 157 N.E. 607, 260 Mass. 372, 53 A.L.R. 700.

77. U.S.—U. S. v. Warren R. Co., C.C.A.N.Y., 127 F.2d 134.

78. U.S.—In re Central of Georgia Ry. Co., D.C.Ga., 47 F.Supp. 786.
N.Y.—New York Cent. R. Co. v. New York & H. R. Co., 56 N.Y.S.2d 712, 185 Misc. 420, affirmed 72 N.Y.S.

erned by a practical construction of ambiguous language in the contract by the parties thereto.[79] The lease is to be read as a whole in the light of its general plan or scheme.[80] The words used are to be given their common signification[81] although a qualification of the words used may be necessary.[82]

On the failure of the lessee to pay the lessor's income tax when obligated to do so, a breach of contract occurs,[83] for which the lessor may sue at once, since he will not be required first to pay the taxes,[84] whether the promise was to pay taxes or to indemnify against liability for taxes.[85]

§ 221. Subletting or Assignment

If a conveyance is of the entire interest of the lessee of a railroad, it is an assignment of the lease, but if of only a part of the unexpired term, it is a sublease.

In accordance with the rules relating to leases generally, if a conveyance is of the entire interest of the lessee, it is an assignment of the lease, but if of only a part of the unexpired term, it is a sublease,[86] whatever may be the form or language of the instrument,[87] and if the transfer affects only a part of the leased property, but passes the entire interest of the lessee in such portion, it is an assignment pro tanto.[88] A company in possession other than the lessee will be presumed to be in possession as the assignee of the term,[89] but is not estopped to show that it is not an assignee.[90] Where one railroad leases the road of another and agrees to assume a lease taken by the latter of a third road, whether such assumption applies to the whole term of the assumed lease or only to the part thereof covered by the term of the second will depend on the intention of the parties as shown by a proper construction of the contract.[91]

Right to sublet or assign. The legislative authority of a company to lease its road passes to the lessee as a part of the franchise, in the absence of any provision to the contrary, in the lease;[92] and the lessee may, in the absence of statute, sublet or assign the lease[93] except where it contains a covenant to the contrary.[94] Such a covenant cannot be evaded by any indirect proceeding, such as the assignment by the lessee of the entire gross earnings, with an agreement to continue to operate the road under the direction of the assignee,[95] but a covenant against subletting or assignment is not broken by giving another a mere license to use the leased property;[96] and where one company leases to another a portion of its right of way on which to construct the road of the latter, the lease being to the lessee and to "its successors and assigns forever," and another clause provides that the lessee shall not assign or sublet any of the rights granted, the latter clause will be construed as only preventing an assignment of such rights, separate from the road of the lessee, and not to prevent their passing to an assignee of the lessee's road as a part thereof.[97]

The validity of an assignment of a lease is not affected by the insolvency of the assignee.[98]

Operation and effect. An assignment of the lease creates a privity of estate between the original lessor and the assignee,[99] and the assignee is bound by covenants in the original lease which run with the

2d 404, 272 App Div. 870, affirmed 78 N E 2d 612, 297 N.Y 820

79. U.S.—In re Central of Georgia Ry. Co., D.C Ga., 47 F.Supp. 786
N.Y.—New York Cent R. Co. v. New York & H. R. Co, 56 N.Y S 2d 712, 185 Misc. 420, affirmed 72 N Y S. 2d 404, 272 App.Div. 870, affirmed 78 N.E.2d 612, 297 N.Y. 820.
51 C.J. p 763 note 48.

80. N.Y.—New York Cent. R Co. v. New York & H. R. Co., supra.

81. U.S—In re Central of Georgia Ry. Co., D C.Ga., 47 F.Supp. 786.
Charges
Ohio—City of Cincinnati v. Cincinnati, N. O. & T. P. Ry. Co., Com. Pl., 71 N E.2d 484, affirmed 75 N. E 2d 200, 80 Ohio App 213

82. U.S—In re Central of Georgia Ry. Co, D C.Ga., 47 F Supp. 786

83. Pa.—Valley R. Co. v. Delaware, L & W. R. Co., 31 A 2d 276, 346 Pa 579.

84. Pa—Valley R. Co. v. Delaware, L. & W. R. Co., supra.

85. Pa.—Valley R Co. v. Delaware, L. & W. R Co, supra.

86. N.Y.—Stewart v. Long Island R. Co., 8 N E. 200, 102 N.Y. 601, 55 Am R. 844
51 C.J. p 763 note 50.

87. Mo—St. Joseph, etc, R Co v. St. Louis, etc, R Co, 36 S W. 602, 135 Mo. 173, 33 L R A. 607
N H—Boston, etc, R Co. v. Boston, etc, R Co., 23 A 529, 65 N H 393.

88. N H—Boston, etc., R Co. v. Boston, etc., R Co., supra.

89. Mo—Ecker v Chicago, etc., R. Co., 8 Mo App 223
N.Y—Frank v. New York, etc., R. Co., 7 N Y St 814, modified on other grounds 25 N.E. 332, 122 N.Y. 197.

90. N.Y.—Frank v. New York, etc., R. Co., supra.

91. U S.—Jesup v. Illinois Cent. R. Co., C C Ill., 43 F 483.
51 C.J. p 763 note 55.

92. Ga.—Georgia R, etc., Co. v. Maddox, 42 S E 315, 116 Ga. 64.
Property not needed for railroad purposes
Ga—State v. Western & Atlantic R. R., 196 S E 392, 185 Ga. 658

93. Pa—Philadelphia, etc, R Co. v. Catawissa R Co, 53 Pa. 20

94. Ill—Terre Haute, etc, R Co. v Peoria, etc, R Co, 61 Ill App. 405.
N H—Boston, etc, R Co v Boston, etc, R Co, 23 A. 529, 65 N.H. 393.

95. N.H—Boston, etc, R Co. v. Boston, etc., R Co, supra.

96. Minn—Pence v. St. Paul, etc., R. Co., 11 N.W. 80, 28 Minn. 488

97. Minn—Minneapolis, etc., R Co. v. St Paul, etc., R Co., 28 N W. 705, 35 Minn. 265.

98. N.Y.—Frank v. New York, etc, R. Co., 7 N Y.St. 814, modified on other grounds 25 N.E. 332, 122 N. Y. 197.

99. Mo.—St. Joseph, etc., R. Co. v. St. Louis, etc, R. Co, 36 S.W. 602, 135 Mo. 173, 33 L.R.A. 607.
51 C.J. p 764 note 64.

land,[1] including the covenants to pay rent,[2] and to pay bonds at maturity;[3] but there is no privity of contract between the original lessor and the assignee.[4] Between the original lessor and a sublessee there is no privity either of contract or estate,[5] and the sublessee is not bound by covenants in the original lease unless it has contracted to be bound.[6]

The assignee of a lease by taking assignment takes over the lessor's public utility duty,[7] and so, although a lease provides that it shall not be assignable, if the assignee takes and operates the road under and by virtue of the lease, it must be held to have assumed the duty imposed thereby on the lessee to operate the road.[8] Since the relationship between the lessor and lessee is one of privity, both of contract and estate, the lessee cannot avoid its liability by an assignment of the lease.[9] Where the lessee has assigned the demised property, the assignee is liable to the lessor for the rentals due thereon or for the value of such property as fixed in the lease if he has adopted the contract,[10] but not otherwise.[11]

§ 222. Rights and Remedies of Stockholders, Creditors, and Bondholders

a. Stockholders
b. Creditors and bondholders

a. Stockholders

Stockholders may sue to enjoin the execution of an unauthorized lease between railroad companies, or any operation thereunder, or to have it declared invalid and canceled.

Stockholders may sue to enjoin the execution of an unauthorized lease between railroad companies[12] or any operation thereunder,[13] or to have it declared invalid and canceled,[14] or to enforce any right growing out of the lease and affecting their interests where the company refuses to do so,[15] but not otherwise.[16] They have a right to insist that the terms of the lease as agreed on in so far as they affect their interests shall be carried out,[17] and in order to obtain this relief it is not necessary to charge any fraud or collusion on the part of the directors,[18] it being sufficient that the directors have misinterpreted the rights growing out of the lease.[19] Where, by statute, a certain proportion of the stockholders may authorize a lease, the minority cannot defeat the right on the ground that the lease would impair the market value of the stock or prevent the payment of dividends on the common stock during the term of the lease;[20] but where a lease is plainly unfair and oppressive of a minority stockholder the court may interfere for his protection.[21]

Rights on undertaking of lessee. An agreement by the lessee to pay a rental which will produce a certain dividend on the stock of the lessor does not constitute a contract to which the holders of such stock are parties or privies, so as to entitle them to maintain an action therefor against the lessee,[22] but

1. Mass.—New York Cent. R. Co. v Central Vermont R. Co., 136 N.E. 825, 243 Mass. 56.
51 C.J. p 764 note 65.

2. N.Y.—Stewart v. Long Island R. Co., 8 N.E. 200, 102 N.Y. 601, 55 Am.R. 844—Frank v. New York, etc., R. Co., 7 N.Y.St. 814, modified on other grounds 25 N.E. 332, 122 N.Y. 197.

3. U.S.—Zanes v. Lehigh Valley Transit Co., D.C.Pa., 41 F.2d 552, affirmed, C.C.A., Lehigh Valley Transit Co. v. Zanes, 46 F.2d 848, certiorari denied 52 S.Ct. 8, 284 U.S. 619, 76 L.Ed. 528

4. N.Y.—Frank v. New York, etc., R. Co., 7 N.Y.S. 814, modified on other grounds 25 N.E. 332, 122 N.Y. 197.

5. Mo.—St. Joseph, etc., R. Co. v. St. Louis, etc., R. Co., 36 S.W. 602, 135 Mo. 173, 33 L.R.A. 607.

Sublessee acts at his peril

Where lease of railroad property by state reserved to state power to authorize laying out and construction of ways, streets, roads, bridges, or viaducts along property leased, and sublease was made subject to conditions of leasehold granted by state, state would be authorized in future to use under ground and overhead space on right of way for construction of ways, streets, roads, bridges, or viaducts, and sublessee in erecting any structure in that space under sublease was acting at its peril.—State v. Western & Atlantic R. R., 196 S.E. 392, 185 Ga. 658.

6. Tex.—Missouri, etc., R. Co. v. Keahey, 83 S.W. 1102, 37 Tex.Civ. App. 330.

7. N.H.—Boston, etc., R. Co. v. Northern R. Co., 142 A. 118, 83 N.H. 312.

8. Ky.—Schmidt v. Louisville, etc., R. Co., 41 S.W. 1015, 101 Ky. 441, 19 Ky.L. 666, 38 L.R.A. 809.

9. N.Y.—Frank v. New York, etc., R. Co., 7 N.Y.St. 814, modified on other grounds 25 N.E. 332, 122 N.Y. 197.

10. Ga.—Seaboard Air-Line R. Co. v Ocilla Southern R. Co., 85 S.E. 91, 143 Ga. 407.
51 C.J. p 764 note 73.

11. Ga.—Henderson v. Seaboard Air Line R. Co., 96 S.E. 995, 148 Ga. 385.

12. N.J.—Black v. Delaware, etc., Canal Co., 24 N.J.Eq. 455.

13. N.H.—Dow v. Northern R. Co., 36 A. 510, 67 N.H. 1

14. Ala.—George v. Central R., etc., Co., 14 So. 752, 101 Ala. 607.
51 C.J. p 764 note 78.

15. Ohio.—Henry v. Pittsburg, etc., R. Co., 5 Ohio S. & C.P. 41, 2 Ohio N.P. 118.

16. N.Y.—Flynn v. Brooklyn City R. Co., 41 N.Y.S. 566, 9 App.Div. 269, affirmed 53 N.E. 520, 158 N.Y. 493.

17. N.H.—March v. Eastern R. Co., 43 N.H. 515.

18. N.H.—March v. Eastern R. Co., supra.

19. N.H.—March v. Eastern R. Co., supra.

20. Conn.—Middletown v. Boston, etc., R. Co., 5 A. 706, 53 Conn. 351.
51 C.J. p 764 note 84.

21. N.Y.—Westchester F. Ins. Co. v. Syracuse, etc., R. Co., 161 N.Y.S. 759, 97 Misc. 471, reversed on other grounds 183 N.Y.S. 602, 192 App. Div. 463, affirmed 135 N.E. 934, 233 N.Y. 600

22. N.Y.—Beveridge v. New York

a guaranty indorsed on stock certificates of the lessor's stockholders pursuant to the provisions of the lease is a promise to such stockholders on which they, as individuals, can sue,[23] without alleging that their corporation would not or could not sue thereon;[24] and the inability of the lessee in such case to pay does not permit it to repudiate its debts.[25]

Waiver and estoppel The consent of the stockholders, although required by law, as discussed supra § 209, is for their personal benefit and may be waived by them,[26] or the right to object that the lease was made without their consent may be barred by laches,[27] and this, although a contrary view has also been taken,[28] notwithstanding the statute provides that without such consent the lease shall not be perfected,[29] or shall be null and void.[30] A stockholder who voted for the lease cannot afterward dissent,[31] but acceptance by a stockholder of an extra dividend distributed at the time the lease was made does not estop him to object to it where the making of the lease had nothing to do with such dividend,[32] and a stockholder who voted for the lease will not be estopped to attack its validity after it has been formally repudiated as invalid by a subsequent meeting of the stockholders.[33]

b. Creditors and Bondholders

A railroad company in debt cannot lease its roads to a particular creditor to be operated by him indefinitely, according to his own discretion and for his own benefit.

A railroad company in debt cannot lease its road to a particular creditor to be operated by him indefinitely, according to his own discretion and for his own benefit.[34] A lease may be made on such terms as to constitute an assignment for the benefit of creditors,[35] in which case any provisions for preference, if forbidden by law, are void;[36] but, where a lease is authorized, an objection that it would impair the rights of bondholders or creditors can be made only by them and not by a stockholder.[37] A judgment rendered after a lease does not of its own right defeat the lease or deprive the lessee company of its interest or possession,[38] but operates against the lessor and the interest retained in the leased road.[39] Where a company has authority to lease its road, a statute authorizing it to mortgage the road will not be construed as impliedly prohibiting a lease,[40] but the lease will be enjoined at the instance of the mortgage trustee, where its terms are prejudicial to the rights of creditors as secured by the statute authorizing the mortgage.[41]

Remedies. A lease invalid as to creditors will be set aside in an action brought by them for the purpose,[42] but mortgage bondholders who stand on a security taken in express subjection to the lease cannot maintain such a suit.[43] If the lessee covenants to discharge all valid liens, creditors having such liens may sue in equity to enforce their payment,[44] and rents due under a lease are subject to garnish-

El R Co, 19 N E 489, 112 N.Y. 1, 2 L R A 648.

Rights in rent moneys

U S—U. S v. Warren R. Co., D.C.N. Y, 39 F Supp 135, reversed on other grounds, C.C.A., 127 F.2d 134.

23. N.Y—Peabody v. Interborough Rapid Transit Co., 209 N.Y.S. 380, 212 App.Div. 502, affirmed 148 N.E 768, 240 N.Y. 708.
51 C.J. p 765 note 87.

24. N.Y.—Bowers v. Interborough Rapid Transit Co, 201 N Y.S. 198, 121 Misc. 250, affirmed 202 N.Y S 917, 208 App.Div. 768.

25. N.Y.—Peabody v Interborough Rapid Transit Co., 209 N.Y.S. 376, 124 Misc. 801, affirmed 209 N.Y.S. 893, 213 App Div. 866, affirmed 148 N.E. 768, 240 N.Y. 708.

26. U.S.—McCulloch v. Canadian Pac. Ry. Co., D C.Minn, 53 F.Supp. 534, applying Michigan statute.
51 C J. p 765 note 91.

Consent to perpetual lease

Where railroad accepted rent during eighteen months between passage of statute authorizing conveyance of railroad property with consent of majority of stockholders and rescission of perpetual lease of railroad properties, and stockholders voiced no objection to lease, stockholders' consent to such lease would be presumed.—McCulloch v. Canadian Pac. Ry. Co, supra

27. N.J.—Mills v. New Jersey Cent. R. Co, 2 A. 453, 41 N J.Eq. 1.
51 C.J. p 765 note 92

28. Ind.—Tippecanoe County v. Lafayette, etc, R. Co., 50 Ind 85.
51 C.J. p 765 note 93.

29. U.S.—Eakin v. St Louis, etc, R. Co, C.C Mo., 8 F.Cas No.4,236.

30. U S—St. Louis, etc., R. Co v. Terre Haute, etc, R Co, C C.Ill., 12 S Ct. 953, 145 U S 393, 36 L.Ed. 748.

31. Mass.—Boston, etc., R. Co. v. Graham, 60 N E. 405, 179 Mass. 62
51 C.J. p 765 note 96.

32. N.Y.—Westchester F. Ins. Co. v. Syracuse, etc., R. Co., 161 N.Y.S. 759, 97 Misc. 471, reversed on other grounds 183 N Y S. 602, 192 App Div. 463, affirmed 135 N E. 934, 233 N.Y. 600.

33. Ala—Memphis, etc., R. Co. v. Grayson, 7 So. 122, 88 Ala. 572, 16 Am.S.R. 69.

34. U.S.—Cleveland, etc., R. Co. v. La Crosse, etc., R. Co, D C.Wis, 5 F.Cas No.2,887.

35. Pa—Bittenbender v. Sunbury, etc, R. Co., 40 Pa 269.
51 C.J. p 765 note 1.

36. Pa—Bittenbender v. Sunbury, etc., R. Co, supra.

37. Conn—Middletown v. Boston, etc, R Co., 5 A. 706, 53 Conn 351.

38. U S.—Chicago, etc., R Co v. Chicago Third Nat. Bank, Ill, 10 S Ct. 550, 134 U.S 276, 33 L Ed 900

39. U.S.—Chicago, etc, R Co v. Chicago Third Nat. Bank, supra.

40. Mass—Phillips v. Eastern R Co., 138 Mass. 122.

41. Mass.—Phillips v. Eastern R. Co, supra.

42. U.S.—Cleveland v. La Crosse, etc., R. Co., D C.Wis., 5 F.Cas No 2,887.
51 C.J. p 765 note 8.

43. Vt.—Vermont R. Co. v. Vermont Cent R Co, 34 Vt. 1.

44. U.S.—Chicago, etc., R. Co. v. Chicago Third Nat. Bank, Ill., 10 S.Ct. 550, 134 U.S. 276, 33 L.Ed. 900.
51 C.J. p 765 note 10.

ment by creditors of the lessor[45] The lessee is liable in equity to a judgment creditor of the lessor for a fraudulent diversion of the proceeds of bonds of the lessor which would otherwise have been available for the payment of the lessor's debts,[46] and the lessee is not relieved from such liability by the fact that it afterward expended a larger sum in betterments and extensions of the leased road.[47]

Where, simultaneously with the execution of a lease, and as part of the same transaction, certain mortgages and agreements are made for the benefit of bondholders, a trustee for such bondholders may sue to compel the lessee specifically to perform its agreement to operate the road[48] or to recover damages for the breach of conditions of the lease;[49] but, where the trustee in such an action for the benefit of the bondholders recovers judgment against the lessee, the fact that the lessee denied the breach and resisted a recovery will not prevent it from asserting as owner of a portion of such bonds its right to a pro rata share of the recovery.[50]

§ 223. Continuance and Termination

a. In general
b. Rescission or cancellation
c. Forfeiture

a. In General

If the termination of a lease between railroad companies is provided for on a specified notice by either party, the lease is terminated when the stipulated notice is properly given.

If the termination of a lease between railroad companies is provided for on a specified notice by either party, the lease is terminated when the stipulated notice is properly given.[51] If the contract of the parties provides for a lease to be terminated on notice, and also for services to be performed by the lessor for the lessee over a term of years at a specified price, such provisions are independent of each other,[52] and the lease may be terminated without regard to the arrangement for future services.[53] If it is optional with the parties whether or not the lease should be terminated, they cannot be compelled to give notice of termination.[54]

Where the lessee wrongfully refuses to allow the lease to be terminated on proper notice and reentry by the lessor, basing its refusal on a collateral contract, the lessor may protect its rights by injunction as well as by action at law.[55]

b. Rescission or Cancellation

Authority to cancel a lease by mutual consent will be implied from the power to enter into it, but the consent of the stockholders is essential to authorize its subsequent rescission.

Authority to cancel a lease by mutual consent will be implied from the power to enter into it,[56] but the same consent of the stockholders as is necessary for its authorization in the first instance is essential to authorize its subsequent rescission.[57] Where a company has made a lease which is ultra vires and void, it may rescind or abandon it at any time,[58] and ought to do so at the earliest opportunity.[59] So also, a lessee desiring to rescind the lease for fraud or breach of warranty must act promptly on discovering the fraud or breach.[60] Where the lease is not void but merely voidable, the right to a rescission may be lost by laches[61] or acquiescence.[62]

In the absence of fraud, one of the companies is not entitled to a decree for the cancellation of a lease merely because its directors have been guilty of an error of judgment with respect to its terms.[63] A decree for the sale of a portion of the leased road

45. U.S.—Milwaukee, etc., R. Co. v Brooks Locomotive Works, Wis., 7 S.Ct. 1094, 121 U.S. 430, 30 L.Ed. 995.
51 C.J. p 765 note 11.

46. U.S.—Northern Pac. R. Co. v Boyd, Wash., 33 S.Ct. 554, 228 U.S. 482, 57 L.Ed. 931.
51 C.J. p 766 note 12.

47. U.S.—Northern Pac. R. Co. v. Boyd, supra.

48. Ky.—Schmidtz v. Louisville, etc., R. Co., 41 S.W. 1015, 101 Ky. 441, 19 Ky.L. 666, 38 L.R.A. 809.

49. Ky.—Louisville, etc., R. Co. v. Schmidt, 66 S.W. 629, 112 Ky. 717, 23 Ky.L. 2097.

50. Ky.—Louisville First Nat. Bank v. Louisville, etc., R. Co., 79 S.W. 280, 25 Ky.L. 2051.

51. Iowa.—Chicago Great Western R. Co. v. Iowa Cent. R. Co., 119 N.W. 261, 142 Iowa 459.
51 C.J. p 766 note 21.

52. Iowa.—Chicago Great Western R. Co. v. Iowa Cent. R. Co., supra.

53. Iowa.—Chicago Great Western R. Co. v. Iowa Cent. R. Co., supra.

54. N.Y.—Syracuse Grade Crossing Commission v. Delaware, L. & W. R. Co., 97 N.Y.S.2d 279, 197 Misc. 192, modified on other grounds 33 N.Y.S.2d 620, 263 App.Div. 930, affirmed 49 N.E.2d 131, 290 N.Y. 632.

55. Iowa.—Chicago Great Western R. Co. v. Iowa Cent. R. Co., 119 N.W. 261, 142 Iowa 459.

56. N.Y.—Harkness v. Manhattan R. Co., 54 N.Y.Super. 174, 55 N.Y. Super. 532, affirmed 20 N.E. 877, 118 N.Y. 627.
Ohio.—Henry v. Pittsburg, etc., R. Co., 5 Ohio S. & C.P. 41, 2 Ohio N.P. 118.

57. Ohio.—Henry v Pittsburg, etc., R. Co., 5 Ohio S. & C.P. 41, 2 Ohio N.P. 118.

58. U.S.—Thomas v. West Jersey R. Co., Pa., 101 U.S. 71, 25 L.Ed. 950.

59. U.S.—Thomas v. West Jersey R. Co., supra.

60. N.Y.—Knickerbocker Trust Co. v. O'Rourke Engineering Constr. Co., 108 N.Y.S. 707, 124 App.Div. 210, affirmed 89 N.E. 1108, 196 N.Y. 509.

61. U.S.—Jesup v. Illinois Cent. R. Co., C.C.Ill., 43 F. 483.

62. N.Y.—Barr v. New York, etc., R. Co., 26 N.E. 145, 125 N.Y. 263.
51 C.J. p 766 note 33.

63. U.S.—Jesup v. Illinois Cent. R. Co., C.C.Ill., 43 F. 483.

to satisfy a mortgage made prior to the lease is not, while unexecuted, such an eviction of the lessee by paramount title as to entitle the lessee to a rescission,[64] nor will the appointment of a receiver, who is merely a receiver of the rents and profits due from the lessee and is under instruction not to interfere with the lessee's possession, have such effect.[65] The court will not, on failure of the lessor to perform its covenants, decree a rescission of the lease if such a decree would be inequitable.[66]

State as party. The state is not an indispensable party to a suit to cancel,[67] although the lease is claimed to be in violation of certain covenants of a mortgage which in turn are alleged to be illegal, so that, if the lease is abrogated, the parties will become liable to a forfeiture.[68]

c. Forfeiture

A forfeiture of a railroad lease is not favored by the courts.

A forfeiture of a railroad lease is not favored by the courts,[69] and provisions in the lease will, in cases of reasonable doubt, be construed as covenants, breach of which may be compensated by damages, rather than as conditions subsequent entailing a forfeiture.[70] Where the lease provides in case of a breach of any of its covenants for a right of reentry by the lessor, and termination of the rights and interests of the lessee, any breach of such covenants entitles the lessor to maintain an action for its forfeiture,[71] but a forfeiture will not be declared where the lessor did not elect so to declare it at the time of the breach, and the covenant was afterward performed by the lessee prior to the institution of suit.[72] It is competent for a state to provide that a foreign railroad company shall not enjoy a lease of a railroad in such state until it acquires it in conformity to the statutes, and that a failure to conform to the statutes shall be a ground for forfeiture of the lease.[73]

§ 224. Modification

The power to enter into a lease will impliedly authorize the companies by mutual consent subsequently to modify its terms, but the same consent of the stockholders as is necessary for the authorization of a lease in the first instance is essential to authorize a subsequent modification of its terms.

The power to enter into a lease will impliedly authorize the companies by mutual consent subsequently to modify its terms,[74] but the same consent of the stockholders as is necessary for the authorization of a lease in the first instance is essential to authorize a subsequent modification of its terms.[75] If such consent is not necessary to execute a lease, it is not necessary to modify one.[76] A requirement in the lease that certain modifications can be made only with the unanimous consent of the lessor's stockholders may, it has been held, be waived where the lease creates only obligations running from lessee to lessor.[77]

D. CONTRACTS FOR CONTROL, OPERATION, OR USE OF RAILROADS OR INCIDENTAL FACILITIES

§ 225. Right to Make Contracts

Railroads may make contracts for the control, operation, or use of their roads or other facilities, particularly where such contracts are in the public interest; but their power to contract is subject to statutory or charter restrictions.

While railroad companies, when not contracting in their character of common carrier, have the same

64. U.S.—Pittsburg, etc., R. Co. v. Columbus, etc., R. Co., C.C.Ind., 19 F.Cas.No.11,197, 8 Biss. 456, appeal dismissed 14 S.Ct. 1180, 154 U.S. 626, 24 L.Ed. 270.

65. U.S.—Pittsburg, etc., R. Co. v. Columbus, etc., R. Co., supra.

66. U.S.—Pittsburg, etc., R. Co. v. Columbus, etc., R. Co., supra.
51 C.J. p 759 note 75 [a].

67. U.S.—U. S. Mortgage, etc., Co. v. Missouri, etc., R. Co., C.C.A.Tex., 272 F. 458, certiorari denied 41 S. Ct. 538, 256 U.S. 699, 65 L.Ed. 1177.

68. U.S.—U. S. Mortgage, etc., Co. v. Missouri, etc., R. Co., supra.

69. N.C.—Hill v. Atlantic, etc., R. Co., 55 S.E. 854, 143 N.C. 539, 9 L.R.A.,N.S., 606.

70. N.C.—Hill v. Atlantic, etc., R. Co., supra.
51 C.J. p 767 note 43.

71. Ga.—South Carolina, etc., R. Co. v. Augusta Southern R. Co., 36 S.E. 593, 111 Ga. 420.

Property passing to trustee in reorganization proceedings

U.S.—In re Hoboken Mfrs. R. Co., C.C.A.N.J., 150 F.2d 921, reversed on other grounds 66 S.Ct. 947, 328 U.S. 123, 90 L.Ed. 1123, 168 A.L.R. 497—In re Hoboken Mfrs' R. Co., D.C.N.J., 93 F.Supp. 576.

72. Ga.—South Carolina, etc., R. Co. v. Augusta Southern R. Co., 36 S.E. 593, 111 Ga. 420.

73. Ark.—Louisiana, etc., R. Co. v. State, 88 S.W. 559, 75 Ark. 435.
51 C.J. p 767 note 46.

74. N.Y.—Harkness v. Manhattan R. Co., 54 N.Y.Super. 174, affirmed 20 N.E. 877, 113 N.Y. 627.
Ohio.—Henry v. Pittsburg, etc., R. Co., 5 Ohio S. & C.P. 41, 2 Ohio N. P. 113.

75. N.H.—March v. Eastern R. Co., 43 N.H. 515.
51 C.J. p 767 note 50.

76. N.Y.—Beveridge v. New York El. R. Co., 19 N.E. 439, 112 N.Y. 1, 2 L.R.A. 648.
51 C.J. p 767 note 51.

77. N.Y.—Peabody v. Interborough Rapid Transit Co., 202 N.Y.S. 287, 121 Misc. 647, modified on other grounds 209 N.Y.S. 330, 212 App. Div. 502, affirmed 148 N.E. 768, 240 N.Y. 708
51 C.J. p 767 note 52.

right of contract as other corporations or persons,[78] they can make only such contracts with respect to the control, operation, or use of their roads or incidental facilities as are within the powers expressly granted by their charters or other statutes, or may be implied as being fairly incidental thereto,[79] and they cannot, without legislative authority, make any contract which incapacitates them from performing their public duties[80] or delegate such duties to another,[81] although the mere fact that the contract may in the future interfere with the proper performance of public duties does not affect its validity.[82]

A company cannot, without legislative authority, by any form of contract turn over its road and franchises to another company,[83] nor can any other company without similar authority make any contract to receive and operate the road and franchises of the first,[84] nor can one railroad company guarantee the performance by another of a contract which the latter had no authority to make.[85] In the absence of statute, a railroad company cannot be compelled to enter into traffic contracts or contracts for trackage or terminal facilities with other companies,[86] and a constitutional right to establish a physical connection of the tracks of one company with those of another confers no right to a business connection.[87] Where by statute the use of the terminal facilities of one railroad by another may be required, the railroads in making an amicable agreement may fix reasonable terms considering the financial condition of the contracting companies.[88]

Interest and convenience of public. While contracts are contrary to public policy which tend to disable a railroad company from performing its public duties,[89] or, as discussed infra § 227, which tend to stifle competition, the rule is otherwise where the contract tends to increase facilities for connections, through transportation, or otherwise to promote the interest and convenience of the public.[90] Statutes will be liberally construed to sustain contracts of this character,[91] and, if the subject matter of the contract is not foreign to the purposes for which the company was created, and it may fairly be regarded as incidental to, or consequential on, those things which the legislature has authorized, it ought not, unless expressly prohibited, be held ultra vires.[92] The validity of the contract must be determined not by the form of expression or name given to it by the parties, but by what rights and privileges are in fact granted and what burdens and obligations assumed.[93]

So, as being within the implied powers of such companies or the proper construction and application of governing statutes, contracts of the following types have been held valid: A contract between companies for the joint or interchangeable use of

78. Tex.—Missouri, etc., R. Co. v. Carter, 68 S.W. 159, 95 Tex. 461—Hicks v. Gulf, etc., R. Co., Civ. App., 212 S.W. 840.

79. U.S.—Pennsylvania R. Co. v. St. Louis, etc., R. Co., Ind., 6 S.Ct. 1094, 118 U.S. 290, 30 L.Ed. 83, rehearing denied 7 S.Ct. 24, 118 U.S. 630, 30 L.Ed. 284.
51 C.J. p. 767 note 55.

Use by industrial company

Railroad could permit use of engines and tracks by industrial company to facilitate latter's intraplant system operation by its employees and state statutes have been held not to prevent as illegal railroad's permitting industrial company to use tracks and engine for switching operations.—Stevenson v. Lake Terminal R. Co., C.C.A.Ohio, 42 F.2d 357.

80. U.S.—Central Transp. Co. v. Pullman's Palace-Car Co., Pa., 11 S.Ct. 478, 139 U.S. 24, 35 L.Ed. 55.
51 C.J. p. 767 note 56.

81. U.S.—Thomas v. West Jersey R. Co., Pa., 101 U.S. 71, 25 L.Ed. 950.

82. U.S.—Union Pac. R. Co. v. Chicago, etc., R. Co., Neb., 16 S.Ct. 1173, 163 U.S. 564, 41 L.Ed. 265.
51 C.J. p. 767 note 58.

83. U.S.—Pennsylvania R. Co. v. St. Louis, etc., R. Co., Ind., 6 S.Ct. 1094, 118 U.S. 290, 30 L.Ed. 83, rehearing denied 7 S.Ct. 24, 118 U.S. 630, 30 L.Ed. 284.
51 C.J. p. 767 note 59.

84. U.S.—Pennsylvania R. Co. v. St. Louis, etc., R. Co., supra.

85. U.S.—Pennsylvania R. Co. v. St. Louis, etc., R. Co., supra.

86. U.S.—Atchison, etc., R. Co. v. Denver, etc., R. Co., Colo., 4 S.Ct. 185, 110 U.S. 667, 28 L.Ed. 291.
Ill.—Terre Haute, etc., R. Co. v. Peoria, etc., R. Co., 61 Ill.App. 405.

Implied contract

No implied promise to use a terminal company's station permanently by a railway company which owns part of the stock of the terminal company can be deduced from the fact that tracks connecting with those of another company were not built when the terminal station was constructed and that at the time of such construction the railway company intended to use the station permanently.—Chicago & Western Indiana R. Co. v. Chicago & E. I. R. Co., 172 Ill.App. 156, affirmed 103 N.E. 264, 260 Ill. 246.

87. U.S.—Atchison, etc., R. Co. v. Denver, etc., R. Co., Colo., 4 S.Ct. 185, 110 U.S. 667, 28 L.Ed. 291.

88. U.S.—Pittsburgh & W. V. Ry. Co. v. U. S., D.C.Ohio, 41 F.2d 806.

Freedom to contract

While railroads are free to contract as to terms for use of terminals, a railroad need not have used terminal on terms offered, recourse to interstate commerce commission being open.—Erie R. Co. v. Long Island R. Co., D.C.N.Y., 59 F.2d 822.

89. U.S.—Chicago, etc., R. Co. v. Des Moines Union R. Co., Iowa, 254 F. 927, 166 C.C.A. 289, modified on other grounds 41 S.Ct. 81, 254 U.S. 196, 65 L.Ed. 219.
Mo.—Wiggins Ferry Co. v. Chicago, etc., R. Co., 27 S.W. 568, 30 S.W. 430, 128 Mo. 224.

90. U.S.—Union Pac. R. Co. v. Chicago, etc., R. Co., Neb., 16 S.Ct. 1173, 163 U.S. 564, 41 L.Ed. 265.
51 C.J. p. 768 note 67.

91. U.S.—Union Pac. R. Co. v. Chicago, etc., R. Co., supra.

92. U.S.—Union Pac. R. Co. v. Chicago, etc., R. Co., supra.
51 C.J. p. 768 note 69.

93. U.S.—Union Pac. R. Co. v. Chicago, etc., R. Co., supra.
51 C.J. p. 768 note 70.

their tracks,[94] bridges,[95] or terminal facilities;[96] a contract between two companies for the operation by one of the road of the other for a limited period;[97] a contract between a railroad company and a shipping company for a certain amount of space on the vessels of the latter to be filled with goods transported by the railroad company,[98] a contract between a railroad company and a terminal company conveying property of the former to secure a more efficient and economical operation thereof,[99] a contract by a railroad company for the lease of a hotel at the terminus of its road located at a distance from any town;[1] and contracts between railroad companies and bridge companies;[2] but a contract between a railroad company and a bridge company made for the purpose of operating a road beyond the terminus authorized by law is ultra vires and void.[3]

Partnership agreement. A railroad company cannot, except by legislative authority, enter into a partnership with another railroad company.[4]

§ 226. —— Continuous or Connecting Lines

Traffic contracts between connecting or continuous roads are generally regarded as beneficial to the public and are in some cases expressly authorized by constitutional or statutory provisions.

Traffic contracts between connecting roads for through transportation are not contrary to public policy but are beneficial to the public,[5] particularly where they are intended not to defeat, but to meet, competition,[6] and are in some cases expressly authorized by constitutional or statutory provisions.[7] Under statutes so providing one railroad company may, for the purpose of effecting connections, assist in the construction or extension of another road.[8]

What constitutes connecting lines. In order to be a connecting road within the application of statutes permitting traffic contracts between connecting lines, the connection need not be direct but may be by means of an intervening road[9] or ferry line.[10]

Joint operation, control, or liability It has been held that, while railroad companies may lawfully make a business connection for through traffic where each company separately operates it own road, the companies cannot form a partnership arrangement for the joint operation by both of the entire line and a division of the profits,[11] or although separately operated agree to share jointly the accidental losses in the through traffic occurring on both roads;[12] but elsewhere it has been held that two companies whose roads form a continuous line may enter into a joint arrangement for operating their roads as one line and become jointly liable for money borrowed in the furtherance of the business of such line,[13] or contract for the joint purchase and ownership of locomotives to be run over both roads.[14]

Transfer of practical control and management. Under some statutes, it has been held that one company may transfer the practical control and management of its road and property to a connecting line to be operated as a part of the system of such connecting line[15]

Miscellaneous agreements. It has been held in different jurisdictions, either as being within the implied powers or the application of governing statutes, that connecting railroads may make traffic contracts for through transportation over their

94. U.S.—Union Pac. R. Co. v. Chicago, etc., R. Co., supra.
51 C.J. p 768 note 71.

95. U.S.—Union Pac. R. Co. v. Chicago, etc., R. Co., supra.
Minn.—Northern Pac. R. Co. v. Wisconsin Cent. R. Co., 135 N.W. 984, 117 Minn. 217.

96. U.S.—Union Pac. R. Co. v. Chicago, etc., R. Co., Neb., 16 S.Ct. 1173, 163 U.S. 564, 41 L.Ed. 265
51 C.J. p 768 note 73.

97. Mo.—St. Joseph, etc., R. Co. v. St Louis, etc., R. Co., 36 S.W. 602, 135 Mo. 173, 33 L.R.A. 607.
51 C.J. p 768 note 74.

98. Va.—Norfolk, etc., R. Co. v. Shippers' Compress Co., 2 S.E. 139, 83 Va. 272.

99. U.S.—Chicago, etc., R. Co. v. Des Moines Union R. Co., Iowa, 254 F. 927, 166 C.C.A. 289, modified on other grounds 41 S.Ct. 81, 254 U.S. 196, 65 L.Ed. 219.

1. U.S.—Jacksonville, etc., R. Co. v. Hooper, Fla., 16 S.Ct. 379, 160 U.S. 514, 40 L.Ed. 515.

2. U.S.—Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co., Ill., 9 S.Ct. 770, 131 U.S. 371, 33 L.Ed. 157.
51 C.J. p 769 note 77.

3. N.Y.—Union Bridge Co. v. Troy, etc., R. Co., 7 Lans. 240.

4. Ga.—South Carolina, etc., R. Co. v. Augusta, etc., R. Co., 33 S.E. 36, 107 Ga. 164.

5. Ohio.—Dayton, etc., R. Co. v. Pittsburgh, etc., R. Co., 25 Ohio Cir.Ct. 705, affirmed 67 N.E. 1100, 67 Ohio St. 523.
51 C.J. p 769 note 80.

6. Ga.—Graham v. Macon, etc., R. Co., 49 S.E. 75, 120 Ga. 757.

7. Ohio.—Dayton, etc., R. Co. v. Pittsburgh, etc., R. Co., 25 Ohio Cir.Ct. 705, affirmed 67 N.E. 1100, 67 Ohio St. 523.
51 C.J. p 769 note 82.

8. U.S.—Missouri Pac. R. Co. v. Sidell, N.Y., 67 F. 464, 14 C.C.A. 477.
51 C.J. p 769 note 83.

9. U.S.—Missouri Pac. R. Co. v. Sidell, supra.

10. Md.—Baltimore v. Baltimore, etc., R. Co., 21 Md. 50.

11. N.H.—Burke v. Concord R. Co., 61 N.H. 160.
51 C.J. p 769 note 85.

12. N.H.—State v. Concord R. Corp., 62 N.H. 375.

13. Ill.—Chicago, etc., R. Co. v. Ayres, 30 N.E. 687, 140 Ill. 644.

14. N.Y.—Olcott v. Tioga R. Co., 27 N.Y. 546, 84 Am.D. 298.

15. Ohio.—State v. Ohio, etc., R. Co., 6 Ohio Cir.Ct., 415, 3 Ohio Cir.Dec. 518.

lines,[16] or with connecting boat lines,[17] or ferries,[18] and that the companies may act together in fixing rates and agreeing on a uniform rate for through traffic over the entire line,[19] and may agree upon the basis of division of the joint profits of the through traffic,[20] which may be by an arbitrary schedule agreed on and not necessarily by giving to each company the share earned on its own line and on that only.[21]

The connecting companies may agree that, in so far as they may lawfully do so, each will deliver to the other all of the traffic controlled by it destined to points reached by way of the other,[22] and use its influence to promote the business of the other as far as it can do so with due regard to its own interests;[23] but while a railroad company may give a particular ferry the handling of all its business at a certain point to the exclusion of rival ferries,[24] it cannot bind itself not to use a different mode of transportation, such as a bridge, which will furnish a quicker and more convenient mode of crossing the stream.[25] A traffic contract for through transportation may include incompleted extensions or branches which have been authorized but not such as have not been authorized at the time of the contract.[26]

§ 227. —— Parallel or Competing Lines

While statutory provisions prohibit contracts between parallel or competing lines where the intention or effect is to stifle competition, independently of statute such contracts are regarded as contrary to public policy; but not all contracts between such lines are prohibited.

Besides the federal Interstate Commerce Act and the Anti-Trust Act, there are in some jurisdictions constitutional or statutory provisions prohibiting in the case of parallel or competing roads any contracts or combinations, the intention or effect of which is to give one the control of the other or otherwise stifle competition, and a contract contemplating an interchange of traffic between competing lines is within the prohibition of such statutes where one railroad agrees to guarantee the bonds of the other in consideration of transfer of half the latter's stock to stockholders of the former.[27] Independently of such provisions, as discussed in Monopolies §§ 63–72, contracts and combinations which tend to create monopolies or destroy proper competition are contrary to public policy.

"Pooling contracts" between competing roads are held to be invalid as against public policy,[28] and in violation of the statutes relating to contracts and combinations between parallel and competing roads,[29] and the same rule applies to a contract by which one company agrees not to extend its line beyond a certain point beyond which it would compete with another road.[30] All contracts which restrict competition are not, however, illegal or contrary to public policy,[31] and where the agreement is between roads parallel and competing for only a short distance, the local business insignificant, and the convenience to the public great, it may, in equity, be upheld.[32] So a contract which merely prevents an unlimited and ruinous competition without raising rates to an unjust standard or causing the other company to violate its duties to the public, should be sustained,[33] unless it falls within an express constitutional or statutory prohibition.[34]

§ 228. Requisites and Validity

The requisites and validity of traffic contracts are governed by the general rules as to contracts of corpora-

16. N.J.—Sussex R. Co. v. Morris, etc., R. Co., 19 N.J.Eq. 13, reversed on other grounds 20 N.J.Eq. 542.
51 C.J. p. 769 note 90.

17. U.S.—Green Bay, etc., R. Co. v. Union Steamboat Co., Wis., 2 S.Ct. 221, 107 U.S. 98, 27 L.Ed. 413.
51 C.J. p. 769 note 91.

18. Mo.—Wiggins Ferry Co. v. Chicago, etc., R. Co., 73 Mo. 389, 39 Am.R. 519.

19. U.S.—Columbus, etc., R. Co. v. Indianapolis, etc., R. Co., C.C.Ind., 6 F.Cas.No. 3,047, 5 McLean 450.
51 C.J. p. 769 note 93.

20. N.J.—Sussex R. Co. v. Morris, etc., R. Co., 19 N.J.Eq. 13, reversed on other grounds 20 N.J.Eq. 542.
N.Y.—Hartford, etc., R. Co. v. New York, etc., R. Co., 26 N.Y.Super. 411.

21. N.J.—Sussex R. Co. v. Morris, etc., R. Co., 19 N.J.Eq. 13, reversed on other grounds 20 N.J.Eq. 542.

22. Ga.—Graham v. Macon, etc., R. Co., 49 S.E. 75, 120 Ga. 757.
51 C.J. p. 770 note 96.

23. N.Y.—Tonawanda Valley, etc., R. Co. v. New York, etc., R. Co., 42 Hun 496, 4 N.Y.St. 744.
Pa.—Cumberland Valley R. Co. v. Gettysburg, etc., R. Co., 35 A. 952, 177 Pa. 519.

24. Mo.—Wiggins Ferry Co. v. Chicago, etc., R. Co., 73 Mo. 389, 39 Am.R. 519.

25. Mo.—Wiggins Ferry Co. v. Chicago, etc., R. Co., 27 S.W. 568, 30 S.W. 430, 128 Mo. 224.

26. N.J.—Morris, etc., R. Co. v. Sussex R. Co., 20 N.J.Eq. 542.

27. U.S.—Pearsall v. Great Northern R. Co., Minn., 16 S.Ct. 705, 161 U.S. 646, 40 L.Ed. 838.

28. U.S.—Chicago, etc., R. Co. v. Wabash, etc., R. Co., Mo., 61 F. 993, 9 C.C.A. 659.
51 C.J. p. 770 note 8.

29. N.H.—Morrill v. Boston, etc., R. Co., 55 N.H. 531.

30. N.Y.—Hartford, etc., R. Co. v. New York, etc., R. Co., 26 N.Y.Super. 411.

31. N.H.—Manchester, etc., R. Co. v. Concord R. Co., 20 A. 383, 66 N.H. 100, 49 Am.S.R. 582, 9 L.R.A. 689.
51 C.J. p. 770 note 12.

32. Ohio.—Dalton, etc., R. Co. v. Pittsburgh, etc., R. Co., 1 Ohio N.P.,N.S., 577.

33. N.H.—Manchester, etc., R. Co. v. Concord, etc., R. Co., 20 A. 383, 66 N.H. 100, 49 Am.S.R. 582, 9 L.R.A. 689.

34. U.S.—U. S. v. Trans-Missouri Freight Assoc., Kan., 17 S.Ct. 540, 166 U.S. 290, 41 L.Ed. 1007.
N.H.—Manchester, etc., R. Co. v. Concord, etc., R. Co., 20 A. 383, 66 N.H. 100, 49 Am.S.R. 582, 9 L.R.A. 689.

tions and such statutes as relate specifically to railroads or the particular railroad in question.

In the absence of any statutory provision relating specifically to railroads or to the particular railroad in question, the general rules as to contracts of corporations are applicable to contracts of the kind under consideration and such contracts are entitled to the same presumptions as those applicable generally.[35] In order to render the contract valid, each of the contracting companies must have power to enter into it;[36] and, if the rights contracted for constitute an interest in land, the contract must be in writing.[37] A statutory provision requiring a certificate of convenience and necessity before a railroad may extend its lines applies to extension by way of a trackage agreement providing for joint use of a railroad line.[38] A contract between two railroad companies is not invalid because the charter of one will expire during the term of the contract, where the charter is capable of renewal and the contract is expressly made binding on the assigns and successors of the parties.[39]

A distinction exists between contracts which are strictly ultra vires, as beyond the powers of the company or contrary to public policy, and contracts where the invalidity consists in some improper exercise or lack of authority on the part of its officers or informality in the execution of the contract.[40] While the latter type may become valid by waiver, ratification, or estoppel,[41] those of the former class which are strictly ultra vires are void and cannot so be rendered valid,[42] and may be disaffirmed, although partly executed,[43] but where the contract has been partly executed and one company has received its benefits, it will not be permitted to retain such benefits and at the same time set up the invalidity of the contract,[44] and may be required in equity to account for and return what it has received under the contract,[45] at least where the other partly is not in pari delicto[46] or the contract is merely malum prohibitum.[47]

Partial invalidity. The fact that a contract is invalid as to some of its provisions does not necessarily make it invalid as a whole,[48] and if the contract is divisible, that part which is valid will be enforced.[49]

Contracts with subsidiaries. Intercompany transactions between a parent railroad and its subsidiary are required to be fair,[50] the test being whether the

35. U.S.—Union Pac. R. Co. v. Chicago, etc., R. Co., Neb., 16 S.Ct. 1173, 163 U.S. 564, 41 L.Ed. 265—Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co., Ill., 9 S.Ct. 770, 131 U.S. 371, 33 L.Ed. 157

Reopening transaction

Where operating agreement was made with new railroad which had evolved from reorganization of old one, but negotiations therefor were between grantee and bondholders of old road, who presumably dealt with grantee at arm's length, transaction was not subject to be reopened fifty years later, at instance of bondholders, because at the same time that agreement was made grantee bought half the shares of new railroad.—Ewen v. Peoria & E. Ry. Co., D.C.N.Y., 34 F.Supp. 332, certiorari denied 61 S.Ct. 138, 311 U.S. 700, 85 L.Ed. 454—Gilbert v. Peoria & E. R. Co., D.C.N.Y., 34 F.Supp. 332, certiorari denied 61 S.Ct. 138, 311 U.S. 700, 85 L.Ed. 454.

36. U.S.—Central Transp. Co. v. Pullman's Palace-Car Co., Pa., 11 S.Ct. 478, 139 U.S. 24, 35 L.Ed. 55.

Agreement on terms

Under a statute authorizing carriers to agree on terms for use of terminal facilities, the word "terms" includes everything which may be regarded as consideration for affording these facilities, including relinquishment of damage claims against carrier owning terminal.—The Car Float No. 37, C.C.A.N.Y., 57 F.2d 144, reversed on other grounds The No. 37, 53 S.Ct. 328, 288 U.S. 239, 77 L.Ed. 721.

37. N.Y.—Port Jervis, etc., R. Co. v. New York, etc., R. Co., 30 N.E. 855, 132 N.Y. 439.

38. U.S.—Transit Commission v. U. S., N.Y., 53 S.Ct. 536, 289 U.S. 121, 77 L.Ed. 1075.

Agreement prior to statute

(1) Fact that joint use of tracks by two railroads under trackage agreement commenced before enactment of Transportation Act and was continuous thereafter did not prevent application of provision of statute requiring certificate of necessity and convenience from interstate commerce commission for extensions and operation of lines.—Transit Commission v. U. S., supra.

(2) Interstate commerce commission could attach conditions to certificate approving trackage agreement between two companies.—Transit Commission v. U. S., D.C.N.Y., 1 F.Supp. 595, certiorari denied 53 S.Ct. 536, 289 U.S. 121, 77 L.Ed. 1075

39. U.S.—Union Pac. R. Co. v. Chicago, etc., R. Co., Neb., 16 S.Ct. 1173, 163 U.S. 564, 41 L.Ed. 265

40. U.S.—Union Pac. R. Co. v. Chicago, etc., R. Co., Neb., 51 F. 309, 2 C.C.A. 174, affirmed 16 S.Ct. 1173, 163 U.S. 564, 41 L.Ed. 265.
Pa.—South Side Pass. R. Co. v. Second Ave. R. Co., 43 A. 346, 191 Pa. 492.

41. Ohio.—U.S. Rolling Stock Co. v. Atlantic, etc., R. Co., 34 Ohio St. 450, 32 Am.R. 380
51 C.J. p. 771 note 25

42. U.S.—Central Transp. Co. v. Pullman's Palace-Car Co., Pa., 11 S.Ct. 478, 139 U.S. 24, 35 L.Ed. 55.
51 C.J. p. 771 note 26.

43. U.S.—Central Transp. Co. v. Pullman's Palace-Car Co., supra.
51 C.J. p. 771 note 27.

44. N.H.—Manchester, etc., R. Co. v. Concord, etc., R. Co., 20 A. 383, 66 N.H. 100, 49 Am.S.R. 582, 9 L.R.A. 689.
51 C.J. p. 771 note 28.

45. N.H.—Manchester, etc., R. Co. v. Concord R. Co., supra.

46. N.H.—Manchester, etc., R. Co. v. Concord R. Co., supra.

47. N.H.—Manchester, etc., R. Co. v. Concord R. Co., supra.

48. U.S.—Union Pac. R. Co. v. Chicago, etc., R. Co., Neb., 16 S.Ct. 1173, 163 U.S. 564, 41 L.Ed. 265.
51 C.J. p. 771 note 32.

49. Ohio.—Western Union Tel. Co. v. Atlantic, etc., Tel. Co., 7 Ohio Dec., Reprint, 163, 1 Cinc.L.Bul. 261.

50. U.S.—In re Missouri Pac. R. Co., D.C.Mo., 93 F.Supp. 832.

Fiduciary relationship

Fiduciary relationship between parent railroad company and subsidiary railroad required only that parent railroad fix terms of loans to subsidiary fairly, and parent was under no duty to make financing

proposition submitted would have commended itself to an independent corporation.[51]

§ 229. Construction

Contracts between railroads are construed in accordance with the rules governing construction of contracts generally, the practical construction by the parties to the contract is a material factor in determining its meaning

In construing contracts between railroad companies the rules governing the construction of contracts generally apply[52] The contract must be given the meaning understood and intended by the parties at the time of its execution,[53] and in construing any part of it the court will examine the entire contract,[54] including the preamble thereto,[55] and may also consider the relations of the parties, their connection with the subject matter of the contract, and the circumstances under which it was signed,[56] as well as the conditions then existing.[57]

A rule that instruments executed contemporaneously and pertaining to the same transaction are to be read together has been held applicable.[58] If, however, there is no ambiguity in the language of the contract, the court cannot put on it any construction other than what the words signify,[59] and terms having a particular significance in the usage of persons operating railroads will be given that meaning in construing traffic contracts.[60] Where the contract is fairly and reasonably open to two constructions, one making it legal and the other illegal, the former will be adopted;[61] and where the contract is in any degree in restraint of competition, it will be strictly construed and not extended in its application beyond its express provisions;[62] nor will a contract be so construed as to militate against the convenience and comfort of the traveling public if it can fairly be construed otherwise.[63]

Practical construction. The practical construction given to the contract by the parties is a material factor in determining its meaning,[64] and where the parties by their acts and declarations have put a practical construction on the agreement existing between them, the courts will ordinarily adopt and enforce such construction;[65] but the doctrine of contemporaneous or practical construction has no application where the contract is unambiguous.[66]

available to the subsidiary at an interest rate lower than the subsidiary could obtain elsewhere, and where parent railroad fulfilled its fiduciary duty to subsidiary railroad in fairly fixing the terms of loan to subsidiary, subsidiary could escape the terms of its obligation to parent only by payment and discharge.—In re Missouri Pac. R. Co., supra.

Interest rates on indebtedness

Where indebtedness of subsidiary railroad to parent railroad was evidenced for the most part only by unsecured notes, interest rates of five and one-half per cent and six per cent were reasonable.—In re Missouri Pac. R Co, supra.

51. U.S.—In re Missouri Pac. R. Co., supra.

52. U.S.—Illinois Cent R. Co. v. Indianapolis Union R. Co., C.C.A.Ind., 6 F.2d 830.
51 C.J. p 771 note 35.

Particular contracts construed

U.S.—Toledo, P. & W. R. R. v. Peoria & P. U. Ry. Co., C.C.A.Ill., 72 F.2d 745—Ewen v. Peoria & E. Ry. Co., D.C.N.Y., 34 F.Supp. 332, certiorari denied 61 S.Ct. 138, 311 U.S. 700, 85 L.Ed. 454—Gilbert v. Peoria & E. R. Co., D.C.N.Y., 34 F. Supp. 332, certiorari denied 61 S. Ct. 138, 311 U.S. 700, 85 L.Ed. 454—Delaware & H. R. Corporation v. U. S., D.C.Pa., 19 F.Supp. 700.
51 C.J. p 771 note 35 [a].

53. U.S.—Illinois Cent R. Co. v. Indianapolis Union R. Co., C.C.A.Ind., 6 F.2d 830.
51 C.J. p 772 note 38.

54. U.S.—Chicago, etc., R. Co. v. Denver, etc., R. Co., Colo., 12 S.Ct. 479, 143 U.S. 596, 36 L.Ed. 277.

55. U.S.—New York, etc., R. Co. v. Pullman Co., D.C.Conn., 6 F.2d 36.

56. U.S.—Chicago, etc., R. Co. v. Denver, etc., R. Co., Colo., 12 S.Ct. 479, 143 U.S. 596, 36 L.Ed. 277.
51 C.J. p 772 note 39.

Joint or several operation

Where contract between five railroads for management and operation of a particular railroad yard facility established in fact a joint operation, the fact that agreements contained language appropriate to a landlord and tenant relationship and repeated assertion that railroads were contracting "severally" did not change fact that operation was a joint one.—Minker v. Pennsylvania R. Co., D.C.Pa., 63 F.Supp. 1017.

57. U.S.—Western Pac. R. Co. v. Nevada-California-Oregon R. Co., D.C.Cal., 40 F.2d 731.
51 C.J. p 773 note 40.

58. U.S.—McCulloch v. Canadian Pac. Ry. Co., D.C.Minn., 53 F.Supp. 534.

Effect of dates

Fact that a traffic agreement between two railroads bore date of May 27, 1890, whereas other two instruments bore date of July 17, 1890, did not destroy rule requiring instruments executed contemporaneously and pertaining to same transaction to be read together.—McCulloch v. Canadian Pac. Ry. Co., supra.

59. Mich.—New York Cent. R. Co. v. Detroit, etc., R. Co., 200 N.W. 110, 228 Mich. 430.
51 C.J. p 773 note 41.

60. U.S.—Toledo, P. & W. R. R. v. Peoria & P. U. Ry. Co., C.C.A.Ill., 72 F.2d 745.
Ill.—Jacksonville, etc., R. Co. v. Louisville, etc., R. Co., 37 N.E. 924, 150 Ill. 480.

61. U.S.—Delaware, etc., R. Co. v. Kutter, N.Y., 147 F. 51, 77 C.C.A. 315, certiorari denied 27 S.Ct. 776, 203 U.S. 588, 51 L.Ed. 330.
51 C.J. p 773 note 43.

62. Ill.—Wiggins Ferry Co. v. Ohio, etc., R. Co., 72 Ill. 360
Mo.—Wiggins Ferry Co. v. Chicago, etc., R. Co., 27 S.W. 568, 30 S.W. 430, 128 Mo. 224.

63. U.S.—Central Trust Co. v. Wabash, etc., R. Co., C.C.Mo., 29 F. 546, affirmed 11 S.Ct. 243, 138 U.S. 1, 34 L.Ed. 843.
Ohio.—Stanley v. Cleveland, etc., R. Co., 18 Ohio St. 552.

64. U.S.—Delaware, etc., R. Co. v. Kutter, N.Y., 147 F. 51, 77 C.C.A. 315, certiorari denied 27 S.Ct. 776, 203 U.S. 588, 51 L.Ed. 330.
51 C.J. p 773 note 46.

65. U.S.—Chicago, etc., R. Co. v. Des Moines Union R. Co., Iowa, 41 S.Ct. 81, 254 U.S. 196, 65 L.Ed. 219.
51 C.J. p 773 note 47.

66. Ala.—Southern Ry. Co. v. Louisville & N. R. Co., 4 So.2d 400, 241 Ala. 691.

The successor to a contract is not bound by the practical construction of its predecessor.[67]

§ 230. Assignment of Contract

Provision may be made for assignment of a contract between railroads.

An agreement between two companies, conferring on each the right to run its cars over the tracks of the other, each retaining the absolute control over its road for all other purposes, confers no interest which can be assigned or leased;[68] but the contract may expressly provide for an assignment of the rights acquired thereunder,[69] and one company may succeed to the rights and liabilities of another under a contract made expressly on behalf of the company "its successors and assigns,"[70] or which provides that it shall be binding on the lessees, assigns, grantees, or successors of each company.[71] An exception in the contract with respect to the rights granted is as binding on its representatives and assigns as on the original company.[72]

§ 231. Termination or Modification

Traffic or operating contracts may be terminated or modified in accordance with their express provisions or by agreement of the parties, but generally not by unilateral action.

A traffic or other operating contract between railroad companies cannot be altered or modified arbitrarily by either party but only by the concurrence of both,[73] and if the contract is fixed by its terms to continue for a certain period, it cannot be revoked by either party on notice,[74] but rights thereunder expire in accordance with the terms of the contract.[75] Where a franchise from the state is not required, the consent of the public service commission is not necessary for the termination of the agreement.[76] A contract may, of course, be terminated by either party in accordance with its express provisions.[77]

A contract between two companies for trackage, depot, or terminal facilities, containing no provision as to how long it is to remain in force, may be rescinded by either party at any time on reasonable notice.[78] So, where the legislature under a right reserved in the charter of a railroad permits another company to connect with, and enter on and use, its tracks for a fixed compensation, such right when acted on does not constitute a perpetual contract between the companies, and it is competent for the company using the tracks of the other to withdraw from such use and by legislative authority form connections with other roads.[79] In the absence of an agreement to the contrary, a trackage contract is not revoked by the lease of the tracks to another railroad which assumed all obligations of its lessor.[80] Where the same companies at different dates enter into traffic contracts with regard to their respective roads, if it appears that it was not the intention of the parties that the second contract should annul or alter the first, the failure of one of the companies to comply with the second contract will not affect its rights under the terms of the first.[81]

Waiver. The right to terminate a traffic or operating contract between railroads may be waived.[82]

Protection of rights after termination. If the companies cannot readjust their relations after the withdrawal of one from an existing contract, the courts will make such ad interim orders as may be

67. Ohio.—Dalton, etc., R. Co. v. Pittsburgh, etc., R. Co., 1 Ohio N. P.,N.S., 577.

68. N.Y.—Brooklyn Crosstown R. Co. v. Brooklyn City R. Co., 3 N. Y.S. 901, 51 Hun 600.

69. U.S.—Chicago, etc., R. Co. v. Denver, etc., R. Co., C.C.Colo., 46 F. 145, modified on other grounds 12 S.Ct. 479, 143 U.S. 596, 36 L.Ed. 277.
Mo.—Wiggins Ferry Co. v. Chicago, etc., R. Co., 73 Mo. 389, 39 Am.R. 519.

70. Ill.—Jacksonville, etc., R. Co. v. Louisville, etc., R. Co., 37 N.E. 924, 150 Ill. 480.

71. U.S.—Chicago, etc., R. Co. v. Denver, etc., R. Co., C.C.Colo., 46 F. 145, modified on other grounds 12 S.Ct. 479, 143 U.S. 596, 36 L.Ed. 277.

72. N.J.—Coe v. New Jersey Midland R. Co., 28 N.J.Eq. 100, affirmed 28 N.J.Eq. 593.

73. Pa.—Philadelphia, etc., R. Co. v. River Front R. Co., 31 A. 1098, 168 Pa. 357.
Modification by mutual consent
Ala.—Southern Ry. Co. v. Louisville & N. R. Co., 4 So.2d 400, 241 Ala. 691.

74. Pa.—Cumberland Valley R. Co. v. Gettysburg, etc., R. Co., 35 A. 952, 177 Pa. 519.
Va.—Norfolk Tidewater Terminals v. Norfolk & P. Belt Line R. Co., 195 S.E. 684, 170 Va. 118.

75. Ark.—St. Louis Southwestern Ry. Co. v. Missouri Pac. R. Co., 62 S.W.2d 955, 187 Ark. 803.

76. U.S.—General Finance Corporation v. New York State Rys., C.C. A.N.Y., 54 F.2d 1008.

77. Tex.—St. Louis, B. & M. Ry. Co. v. Texas Mexican Ry. Co., Civ.App., 181 S.W.2d 895, error refused, reversed on other grounds 66 S.Ct. 937, 328 U.S. 134, 90 L.Ed. 1132.
51 C.J. p. 774 note 57.

78. U.S.—Chattanooga, etc., R. Co. v. Cincinnati, etc., R. Co., C.C. Tenn., 44 F. 456.
Pa.—Philadelphia, etc., R. Co. v. River Front R. Co., 31 A. 1098, 168 Pa. 357.

79. Mass.—Boston, etc., R. Co. v. Boston, etc., R. Co., 5 Cush. 375.

80. Mass.—New York Cent. R. Co. v. Central New England R. Co., 162 N.E. 324, 264 Mass. 128, affirmed 49 S.Ct. 358, 279 U.S. 415, 73 L.Ed. 770.

81. Conn.—Bartlette v. Norwich, etc., R. Co., 33 Conn. 560.
51 C.J. p. 774 note 62.

82. U.S.—Blytheville, etc., R. Co. v. St. Louis-San Francisco R. Co., C. C.A.Ark., 33 F.2d 481.
51 C.J. p. 774 note 63.

necessary to protect the rights of the parties and secure the preservation and operation of the road.[83]

§ 232. Operation and Effect in General

The operation and effect of contracts between railroads will depend on their terms, but they do not run with the land or create a lien on the general property.

Traffic or operating contracts between two railroad companies do not run with the land[84] or create a lien on the general property;[85] nor is there a public interest which requires the imposition of such a lien to secure continued operation and use of the railroad facilities.[86] An improvement under a traffic agreement whereby one railroad operated trains over the lines of another between two points does not constitute an unauthorized construction by the former of a new railroad between such points;[87] and, although two railroads are operating under a traffic arrangement, one is not necessarily under the control of the other.[88]

A provision in a trackage agreement obligating one party to indemnify the other for loss or damage to it from its use or operation thereunder is not contrary to public policy and is valid,[89] as is a clause of a contract between a railroad company and a terminal company obligating the latter to make good any losses occasioned entirely through the fault of its own employees.[90] A contract may be of such a character as not to be affected by an authorized abandonment of that portion of the road connecting the lines of the contracting parties.[91]

§ 233. Rights, Liabilities, and Remedies

a. In general
b. Particular remedies

a. In General

The rights, duties, and liabilities of the parties to a traffic or operating contract as between themselves are governed by the terms and proper construction of the contract.

The rights, duties, and liabilities of the parties to a traffic or operating contract as between themselves in so far as they are provided for therein, must be governed by the terms and proper construction of the contract.[92] A company in permitting another to use a portion of its tracks is performing the duty of a common carrier in supplying an instrumentality of transportation and may charge only what is a reasonable sum for such use,[93] and a special charter privilege as to rates chargeable by a company does not so inhere in the road as to pass to another company which subsequently acquires the right to operate it.[94] An agreement for through traffic does not, in the absence of express stipulation, prevent one of the companies from subsequently altering the gauge of its road.[95]

Where a company contracts to allow another to use its right of way on such terms and for such compensation as may be agreed on by the companies, and subsequently denies the right to such use on any terms, so that a resort to the court is necessary to enforce the right, the court will determine the whole case and settle both the right and the compensation.[96] So, in a case involving trackage rights, some of which depend on whether certain features of a broad plan for constructing a new terminal would be carried out or abandoned, a court of equity should retain jurisdiction of the cause pending determination of that question.[97] In an action by a company to recover for the use of its tracks and terminal facilities, where there is no definite agreement as to the amount to be paid, the amount paid to it for a

83. Pa.—Philadelphia, etc., R. Co. v. River Front R. Co, 31 A. 1098, 168 Pa. 357.

84. Ark.—St. Louis Southwestern Ry. Co. v Missouri Pac. R. Co., 62 S.W 2d 955, 187 Ark. 803.
51 C.J. p 774 note 66.

85. U.S.—Des Moines, etc., R. Co v. Wabash, etc, R. Co., Iowa, 10 S.Ct. 753, 135 U.S. 576, 34 L.Ed. 243.
51 C.J. p 774 note 67.

86. U.S.—Kansas City Terminal R. Co. v. New York Cent. Union Trust Co., C.C.A.Mo., 294 F. 32, certiorari denied 44 S.Ct. 402, 264 U.S. 588, 68 L.Ed. 863.

87. Ill.—Chicago, etc., R. Co. v. Franzen, 122 N.E. 492, 287 Ill. 346, 357.
51 C.J. p 774 note 69.

88. Ark.—Fayetteville Wagon, etc., Co. v. Kenefick Constr. Co., 88 S.W. 1031, 338 Ark 31.
51 C.J. p 774 note 70.

89. W.Va.—Borderland Coal Co. v. Norfolk, etc., R. Co., 104 S.E. 624, 87 W.Va. 339
51 C.J. p 774 note 71.

90. La.—Illinois Cent. R. Co. v. New Orleans Terminal Co., 78 So. 738, 143 La. 467.

91. U.S.—Western Pac. R. Co. v. Nevada-California-Oregon R. Co, D.C.Cal., 40 F.2d 731.

92. Ala.—Southern Ry. Co. v. Louisville & N. R. Co., 4 So.2d 400, 241 Ala. 691.
Ky.—Elkhorn & Jellico Coal Co. v. Sandlick Coal Co., 204 S.W.2d 330, 305 Ky. 348.
51 C.J. p 775 note 75.

Rights of parent and subsidiary railroads
U.S.—Ewen v. Peoria & E. Ry. Co., D.C.N.Y., 78 F.Supp. 312.

93. Ohio.—Toledo, etc., R. Co. v. Michigan Cent. R. Co., 5 Ohio S. & C.P. 147, 7 Ohio N.P. 376.

94. Ohio.—Pittsburgh, etc, R Co v. Moore, 33 Ohio St. 384, 31 Am.R. 543.

95. N.J.—Sussex R. Co. v. Morris, etc., R. Co., 19 N.J.Eq. 13, reversed on other grounds 20 N.J.Eq. 542.

96. U.S.—Central Trust Co. v. Wabash, etc., R. Co., C.C.Mo., 29 F. 546, affirmed 11 S.Ct 243, 138 U.S. 1, 34 L.Ed. 843.

97. U.S.—Byram v. Chicago, etc, R. Co., C.C.A.Minn., 21 F.2d 383.

similar use by other roads, which in fact own all of its stock, affords no test of what is reasonable as between it and another company having no such connection with it.[98]

Where the contract between a bridge company and several railroad companies provides that they shall be charged on an equal basis and that the charges shall be limited to such rates as will produce a certain sum, if the bridge company charges a higher rate the surplus illegally accumulated may be recovered by the railroad companies in the same proportion in which it was paid.[99] Where several companies having termini in a certain city agree to connect their roads and organize a separate company for this purpose, the fact that one of them constructs a portion of the connecting line on its own land at its own expense makes it the legal owner of that portion,[1] but does not give it any right to prohibit its use by the other companies as a part of the continuous line.[2] A company by giving another company the right to use its tracks does not obligate itself to put the track in repair or make any change in its existing state.[3]

Where a corporation is formed to own and operate terminal facilities for the benefit of proprietary railroads, the railroads have such a beneficial interest in the terminal corporation as to make it a trustee,[4] and its officers and directors act in a fiduciary capacity,[5] precluding personal advantage;[6] and their acquisition as owners, through another corporation, of competing terminal facilities is a violation of their fiduciary duties, creating equities in favor of the trustee corporation.[7]

Under agreement to arbitrate. In the absence of statutes providing otherwise, the contract may require submission of any dispute arising therefrom to arbitrators whose decisions shall bind the parties;[8] and an award made by the arbitrators is final and conclusive,[9] and the matter cannot be relitigated on a charge of error in the award.[10]

As to third persons. The public duties of a carrier operating under a trackage agreement are not the general duties of a common carrier operating on its own road,[11] and such carrier cannot be required to furnish cars to a shipper if such service would violate a restriction contained in the agreement.[12]

b. Particular Remedies

Where the contract for control, etc., is valid, action may be brought thereon as in the case of contracts generally. In a proper case the remedy may be injunction, action to set aside the contract, a suit for accounting, or appropriate statutory remedies.

Where the contract is valid, the general rules with respect to contracts apply, and the party entitled may sue for and recover the amount due according to the terms of the contract,[13] or the damages sustained by reason of the breach thereof,[14] but no damages for the breach can arise until after the contract is made.[15] Where the contract is of such a character as not to be affected by an authorized abandonment of the line connecting the lines of the parties thereto, such abandonment is a defense to an action for breach of the agreement.[16]

98. U.S.—Peoria, etc., R. Co. v. Chicago, etc., R. Co., Ill., 8 S.Ct. 1125, 127 U.S. 200, 32 L.Ed. 110.

99. Ky.—Louisville Bridge Co. v. Louisville, etc., R. Co., 51 S.W. 185, 106 Ky. 674, 21 Ky.L. 271.

1. Pa.—Appeal of Pennsylvania R. Co., 80 Pa. 265.

2. U.S.—Lathrop v. Junction R. Co., C.C.Pa., 4 F. 41, 14 F.Cas.No.8,110, 9 Wkly.N.C. 277

3. N.H.—Murch v. Concord R. Corp., 29 N.H. 9, 61 Am.D. 631.

4. U.S.—Des Moines Terminal Co. v. Des Moines Union Ry. Co., C.C.A. Iowa, 52 F.2d 616, certiorari denied 52 S.Ct. 311, 285 U.S. 537, 76 L.Ed. 930.

5. U.S.—Des Moines Terminal Co. v. Des Moines Union Ry. Co., supra.

6. U.S.—Des Moines Terminal Co. v. Des Moines Union Ry. Co., supra.

7. U.S.—Des Moines Terminal Co. v. Des Moines Union Ry. Co., supra.

Rights, liabilities and remedies of proprietary railroads

U.S.—Des Moines Terminal Co. v. Des Moines Union Ry. Co., supra.

8. **Number of arbitrators**

Mich.—Pere Marquette Ry. Co. v. Pennsylvania R. Co., 22 N.W.2d 873, 314 Mich. 577.

9. D.C.—Washington R., etc., Co. v. Washington, etc., Electric R. Co., 32 F.2d 406, 59 App.D.C. 15.

10. U.S.—Washington R., etc., Co. v. Washington, etc., Electric R. Co., supra.

11. Ohio—Kanawha, etc., R. Co. v. State Public Utilities Commission, 117 N.E. 353, 96 Ohio St. 414.

12. Ohio—Kanawha, etc., R. Co. v. State Public Utilities Commission, supra.

13. U.S.—Central New England R. Co. v. Boston, etc., R. Co., Mass., 49 S.Ct. 358, 279 U.S. 415, 73 L.Ed. 770.
51 C.J. p. 775 note 94.

Parties

U.S.—Toledo, P. & W. R. R. v. Peoria & P. U. Ry. Co., C.C.A.Ill., 72 F.2d 745.

Plea or answer

N.C.—Willcox v. Durham & C. R. Co., 67 S.E. 758, 152 N.C. 316.

Interest

In dispute involving question whether railroad under contract was obligated to pay portion of taxes assessed against and paid by terminal company, in which there was decree for terminal company, allowance of interest was proper.—Toledo, P. & W. R. R. v. Peoria & P. U. Ry. Co., C.C.A.Ill., 72 F.2d 745.

14. Ga.—Graham v. Macon, etc., R. Co., 49 S.E. 75, 120 Ga. 757.
51 C.J. p. 776 note 95.

15. Tex.—Davis v. Phillips A. Ryan Lumber Co., Civ.App., 248 S.W. 448.
51 C.J. p. 776 note 96.

16. U.S.—Western Pac. R. Co. v. Nevada-California-Oregon R. Co., D.C.Cal., 40 F.2d 731.

Injunction. A court of equity will enjoin the execution of a contract by which one company without legislative authority unlawfully seeks to acquire the control of a parallel or competing line;[17] and where the road of one company, under the disguise of a traffic contract, has been illegally turned over to another, the stockholders who did not consent thereto may maintain a bill in equity to enjoin further operation under the contract and for an accounting and the appointment of a receiver.[18]

Where one company has a contract right to use a portion of the track of another as a part of its line, and such right is afterward denied, the company owning the track will be enjoined from interfering with such use,[19] but injunctive relief will be denied where plaintiff's right is doubtful,[20] or where plaintiff is in default,[21] or an action at law or in equity prosecuted in the ordinary manner will afford adequate redress.[22]

Action to set aside. A traffic contract may be set aside at the suit of the receiver of one of the companies as inequitable and unfair to such company.[23]

Accounting. One of several parties to an operating contract is, in a proper case, entitled to maintain an action against the other parties for an accounting.[24] If plaintiff predicates its right on the contract, it is not entitled to relief on the ground that the contract was unjustly discriminatory.[25] Where two railroads are under a joint manager who applies the joint funds belonging to both roads to the improvement of one of them, it may be required to account to the other therefor,[26] although the traffic contract for such joint management was ultra vires,[27] but the latter can recover only its proportionate share of the funds so expended, and not the entire amount.[28]

Statutory remedies. Where the right sought to be enforced, under a contract of the kind under consideration, is created by a statute which gives the appropriate remedy, such remedy is exclusive.[29]

E. CONSOLIDATION

§ 234. Definition and Distinctions

Consolidation as applied to railroad companies is the combination and union in one whole, by legal authority and agreement of the parties, of the rights, franchises, and effects of two or more corporations and the commission thereof to a single corporation.

While the term "consolidation," as applied to railroad companies, has been held to have no fixed, definite, and accepted meaning,[30] it may be defined as the combination and union in one whole, by legal authority and agreement of the parties, of the rights, franchises, and effects of two or more corporations, and the commission thereof to a single corporation, the stockholders of which are composed of those, who choose to become such, of the companies thus agreeing,[31] whether such single corporation, called the "consolidated company," be a new one then created, or one of the original companies continuing in existence with larger rights, capacities, and property,[32] although it has been said that a union of the latter character should be termed a "merger" rather than a "consolidation".[33] The term properly applies only to a corporate union of the

17. Pa.—Pennsylvania R. Co. v. Commonwealth, 7 A. 374, 2 Pa. Cas. 83.

18. U.S.—Earle v. Seattle etc, R Co., C.C.Wash., 56 F 909.

19. U.S.—Blytheville, etc, R. Co. v. St. Louis-San Francisco R. Co, C C A Ark, 33 F.2d 481.
51 C.J. p 776 note 3.

20. Ohio—Baltimore, etc, R. Co. v. Pittsburgh, etc, R. Co., 1 Ohio Cir. Ct. 100, 1 Ohio Cir.Dec. 60.

21. N.J.—Elmira Iron, etc., Rolling Mill Co. v. Erie R. Co, 26 N J.Eq 284.

22. Ohio—Baltimore, etc., R. Co. v. Pittsburgh, etc., R. Co., 1 Ohio Cir.Ct. 100, 1 Ohio Cir.Dec. 60.

23. U.S.—New York Cent. Trust Co. v. Wheeling, etc., R. Co., D.C.Ohio, 211 F. 515.
51 C.J. p 776 note 10.

24. N.Y.—Ticonderoga R. Co. v. Delaware, etc., Co., 97 N.E 475, 204 N.Y. 588
51 C J p 776 note 12.
Accounting between parent and subsidiary companies
U.S.—Ewen v. Peoria & E. Ry. Co., D.C.N.Y, 78 F.Supp 312.

25. U.S.—Illinois Cent. R. Co. v. Indianapolis Union R. Co., C.C.A. Ind, 6 F 2d 630.

26. Mass.—Nashua, etc., R. Corp v. Boston, etc, R. Corp, 41 N.E. 268, 164 Mass. 222, 49 Am.S R. 454.

27. Mass.—Nashua, etc., R. Corp. v. Boston, etc., R. Corp., 31 N.E. 1060, 157 Mass. 268.

28. Mass.—Nashua, etc., R. Corp. v. Boston, etc., R. Corp., supra.

29. Me.—Portland Terminal Co. v. Boston, etc, R. Co., 144 A. 390, 127 Me 428
51 C J. p 777 note 17.

30. Ala.—Meyer v. Johnston, 64 Ala 603

31. Ala.—State v. Atlantic Coast Line R Co, 81 So 60, 202 Ala. 558.
51 C J. p 777 note 22
Anything short of ownership by one corporate entity of another corporate entity is not "consolidation."
—New York Cent. Securities Corporation v. U. S., D.C N.Y., 54 F 2d 122, affirmed 53 S.Ct. 45, 287 U S. 12, 77 L Ed. 138.

32. Ala.—State v. Atlantic Coast Line R. Co., 81 So 60, 202 Ala. 558.
51 C.J. p 777 note 23

33. U.S.—Lee v. Atlantic Coast Line R. Co, C.C.S C, 150 F 775, reversed on other grounds 166 F. 850, 94 C.C.A. 128.
51 C.J. p 777 note 24.

companies concerned,[34] as distinguished from a mere physical union or connection of their tracks,[35] or a business agreement affecting the ownership, operation, use, or control of their roads,[36] and is clearly distinguishable from a purchase[37] or lease[38] by one company of the railroad of another, a traffic agreement,[39] or the acquisition by one company of stock in another,[40] although the purchase or acquisition of stock may be the mode adopted to effect a consolidation.[41]

Term "amalgamation," as used in English and Canadian cases to designate a combination or merger to two railroad companies, is unfavorably regarded in this country,[42] and is seldom adopted by American courts.[43]

§ 235. Right to Consolidate

a. In general
b. As affected by relation of railroads
c. Companies in different states
d. Right to question validity of consolidation
e. Effect of curative statutes

a. In General

In the absence of constitutional or statutory authority a railroad has no power to consolidate with another, and authority to consolidate must be clearly given.

In the absence of constitutional or statutory authority, a railroad company has no power to consolidate with another or others,[44] and the fact that a proposed consolidation would be of advantage to the public cannot be considered where such authority is lacking.[45] Authority to consolidate must be conferred on, and possessed by, each company entering into a consolidation agreement, in order to render it valid.[46]

Grant and existence of authority. Authority to consolidate must be clearly given to a railroad company, in order to be deemed to exist, and cannot be implied from any uncertain or doubtful language with respect to the powers conferred on it;[47] and a constitutional or statutory prohibition against the consolidation of particular companies does not by implication authorize the consolidation of others.[48] Such authority may be given by provision therefor in the charter of the company,[49] or general law,[50] or by an enabling act,[51] or by special act consolidating designated companies and incorporating the consolidated company as such;[52] and the legislature may authorize either a modified surrender of the old

34. Mich.—Pingree v. Michigan Cent. R. Co., 76 N.W. 635, 118 Mich. 314, 53 L.R.A. 274.
51 C.J. p 777 note 25.

35. U.S.—Louisville, etc., R. Co. v. Kentucky, Ky., 16 S.Ct. 714, 161 U.S. 677, 40 L.Ed. 849.

36. Mich.—Pingree v. Michigan Cent. R. Co., 76 N.W. 635, 118 Mich. 314, 53 L.R.A. 274.
Tex.—Morrill v. Smith County, 36 S.W. 56, 89 Tex. 529.

37. U.S.—Green County v. Conners, Mo., 3 S.Ct. 69, 109 U.S. 104, 27 L.Ed. 872
51 C.J. p 777 note 28.

38. Mont.—State v. Montana R. Co., 53 P. 623, 21 Mont. 221, 45 L.R.A. 271.
51 C.J. p 777 note 29.

39. U.S.—Galveston Causeway Constr. Co. v. Galveston, etc., R. Co., D.C.Tex., 284 F. 137, affirmed, C.C.A., 287 F. 1021, certiorari denied 43 S.Ct. 503, 262 U.S. 747, 67 L.Ed. 1212.
51 C.J. p 777 note 30.

40. U.S.—New York Cent. Securities Corporation v. U. S., N.Y., 53 S.Ct. 45, 287 U.S. 12, 77 L.Ed. 138.
N.J.—Elkins v. Camden, etc., R. Co., 36 N.J.Eq. 5.
Tex.—San Antonio, U. & G. R. Co. v. Nueces Valley Townsite Co., Civ. App., 34 S.W.2d 391, reversed on other grounds Nueces Valley Townsite Co. v. San Antonio, U. & G. R. Co., 67 S.W.2d 215, 123 Tex. 167.

41. Ga.—Atlanta, etc., R. Co. v. Atlantic Coast Line R. Co., 75 S.E. 468, 138 Ga. 353.
51 C.J. p 778 note 33.
Effect of ownership
A railroad company which has paid for the construction of the line of another, owns practically all of its capital stock, and is in possession of its road under an agreement for future consolidation, will be considered as the owner within the meaning of a statute permitting reconsolidation in case of the breaking up of a consolidated road.—Toledo, etc., R. Co. v. Continental Trust Co., Ohio, 95 F. 497, 36 C.C.A. 155, rehearing denied 96 F. 784, 37 C.C.A. 587, certiorari denied 20 S.Ct. 383, 176 U.S. 219, 44 L.Ed. 442.

42. Ala.—Meyer v. Johnston, 64 Ala. 603.
Significance of term
"An amalgamation implies such a consolidation as to reduce the companies to a common interest."—Powell v. North Missouri R. Co., 42 Mo. 63, 67.

43. Mont.—State v. Montana R. Co., 53 P. 623, 21 Mont. 221, 45 L.R.A. 271.

44. U.S.—Louisville, etc., R. Co. v. Kentucky, Ky., 16 S.Ct. 714, 161 U.S. 677, 40 L.Ed. 849.
51 C.J. p 778 note 38.

45. N.Y.—Continental Securities Co. v. New York Cent., etc., R. Co., 151 N.Y.S. 534, appeal dismissed 152 N.Y.S. 1105, 167 App.Div. 934.

46. U.S.—Louisville, etc., R. Co. v. Kentucky, Ky., 16 S.Ct. 714, 161 U.S. 677, 40 L.Ed. 849.
51 C.J. p 778 note 40.

47. U.S.—Louisville, etc., R. Co. v. Kentucky, supra.
Tex.—Morrill v. Smith County, 36 S.W. 56, 33 S.W. 899, 89 Tex. 529.

48. Tex.—East Line, etc., R. Co. v. State, 12 S.W. 690, 75 Tex. 434.

49. Ill.—American L. & T. Co. v. Minnesota, etc., R. Co., 42 N.E. 153, 157 Ill. 641.
51 C.J. p 778 note 44.

50. Ill.—American L. & T. Co. v. Minnesota, etc., R. Co., supra.
Ind.—Smith v. Cleveland, etc., R. Co., 81 N.E. 501, 170 Ind. 382.

51. Ill.—American L. & T. Co. v. Minnesota, etc., R. Co., 42 N.E. 153, 157 Ill. 641.
N.C.—Spencer v. Seaboard Air Line R. Co., 49 S.E. 96, 137 N.C. 107, 1 L.R.A.,N.S., 604.

52. Me.—State v. Maine Cent. R. Co., 66 Me. 488, affirmed 96 U.S. 499, 24 L.Ed. 836.

companies or their total extinction and the creation by their union of a new company [53]

Under a general statute authorizing the consolidation of railroad companies, more than two, unless otherwise provided, may be consolidated at one time,[54] even though the statute refers to the "two" consolidating companies [55] Authority conferred on a designated company to consolidate with another or others does not pass to the resulting consolidated company so as to authorize it to make successive consolidations with other companies;[56] but, where the right to consolidate is conferred on railroad companies generally, the right is not exhausted by a single exercise or affected by the fact that one of the constituent companies is the product of a prior consolidation [57] The mere fact that one company owns property which another company is not empowered to hold does not prevent their consolidation.[58] A statute empowering one railroad company to "unite"[59] or "connect"[60] with another or other companies authorizes merely a physical connection of the tracks or a traffic consolidation, and not a corporate consolidation.

Conditions. The legislature in authorizing a consolidation of railroad companies may impose such conditions as it may deem proper;[61] and a company by exercising the authority so given impliedly consents to, and becomes bound by, the conditions imposed.[62]

Revocation or restriction of authority. The legislature may revoke a power to consolidate previously given, if it has not been executed,[63] or limit a general power previously given so as to exclude consolidations between parallel or competing lines,[64] even though power to alter or amend the charter of the company has not been reserved to the state.[65]

b. As Affected by Relation of Railroads

(1) Continuous or connecting lines
(2) Parallel or competing lines

(1) Continuous or Connecting Lines

Statutory or constitutional provisions may authorize consolidation of continuous or connecting railroads only, but direct connection has been held not essential although connection by a railroad not a party to the consolidation, may be insufficient.

Under constitutional or statutory provisions authorizing the consolidation of those railroad companies only whose roads connect or form a continuous line, it has been held that two railroads need not be connected directly,[66] but the connection may be made by an intervening railroad[67] or bridge,[68] even though it does not belong to either of the consolidating companies;[69] but there is authority to the effect that a connection by means of an intervening railroad owned by a company not a party to the consolidation is insufficient.[70] Such provisions contemplate that the consolidated road shall form one instead of two or more lines of road,[71] and must be construed subject to any statutory limitations with respect to the consolidation of parallel or competing lines.[72] The mere fact of connection between two railroads does not necessarily make them continuous, within the meaning of such statutes.[73]

A statute authorizing companies operating railroads partly or wholly within the state to consolidate with other companies operating connecting lines does not prevent a consolidation from including companies operating roads wholly outside the state and not directly connected with the lines of any company operating within the state, as long as the lines of the consolidated company form a continuous connecting system,[74] where there is a simultaneous

53. Me.—State v. Maine Cent. R. Co, supra.

54. U.S.—Bonner v. Terre Haute, etc., R. Co., Ind, 151 F. 985, 81 C. C.A. 476.
51 C.J. p 778 note 49.

55. Ind.—Smith v. Cleveland, etc., R. Co., 81 N.E. 501, 170 Ind. 382.

56. Tex.—Morrill v. Smith County, 36 S.W. 56, 89 Tex. 529.

57. Ind.—Smith v. Cleveland, etc., R. Co., 81 N.E. 501, 170 Ind. 382
N.Y.—Taylor v. Atlantic, etc., R. Co., 57 How.Pr. 26.

58. N.Y.—Venner v. New York Cent., etc., R. Co., 164 N.Y.S. 626, 177 App.Div. 296, affirmed 125 N.E. 893, 226 N.Y. 583.

59. U.S.—Louisville, etc., R. Co. v. Kentucky, Ky., 16 S.Ct. 714, 161 U. S. 677, 40 L.Ed. 849.

60. Tex.—Morrill v. Smith County, 36 S.W. 56, 89 Tex. 529.

61. U.S.—Ashley v. Ryan, Ohio, 14 S.Ct. 865, 153 U.S. 436, 38 L.Ed. 773.
51 C.J. p 779 note 59.

62. U.S.—Ashley v. Ryan, supra.
51 C.J. p 779 note 60.

63. U.S.—Pearsall v. Great Northern R. Co., Minn., 16 S.Ct. 705, 161 U.S. 646, 40 L.Ed. 838.

64. U.S.—Pearsall v. Great Northern R. Co., supra.

65. U.S.—Louisville, etc., R. Co. v. Kentucky, Ky., 16 S.Ct. 714, 161 U. S. 677, 40 L.Ed. 849.

66. N.J.—Black v. Delaware, etc., Canal Co., 22 N.J.Eq. 130.
N.Y.—New York Cent., etc., R. Co. v. Yonkers, 103 N.Y.S. 252

67. N.J.—Black v. Delaware, etc., Canal Co., 22 N.J.Eq. 130.

68. N.Y.—New York Cent., etc., R. Co. v. Yonkers, 103 N.Y.S. 252

69. N.Y.—New York Cent., etc., R. Co. v. Yonkers, supra.

70. Ohio.—State v. Vanderbilt, 37 Ohio St 590.
51 C.J. p 779 note 68.

71. N.Y.—People v. Boston, etc., R. Co., 12 Abb.N.Cas. 230.

72. N.Y.—People v. Boston, etc., R. Co., supra.
Ohio.—State v. Vanderbilt, 37 Ohio St. 590.

73. N.Y.—People v. Boston, etc., R. Co., 12 Abb.N.Cas. 230
Ohio.—State v. Vanderbilt, 37 Ohio St. 590.

74. N.Y.—Venner v. New York Cent., etc., R. Co., 164 N.Y.S. 626, 177 App.Div. 296, affirmed 125 N.E. 893, 226 N.Y. 583.

consolidation of all the companies.[75] Where a company is authorized to consolidate with any company in an "adjoining state," so as to form a continuous line, it may enter into a consolidation with a company having a road in a state adjoining that into which its line extends, although not adjoining the state in which it is incorporated.[76] Companies whose roads will be connected and continuous may consolidate prior to the construction and actual connection of such roads.[77]

(2) Parallel or Competing Lines

Consolidation of parallel or competing railroads may be prohibited, and within such prohibition are roads which run between the same two points or localities, or roads which are rivals in business

It is competent for a state to prohibit the consolidation of railroad companies owning parallel or competing lines,[78] even though power to amend the charters of the companies has not been reserved,[79] legislation of such character being within the police power,[80] and, although affecting interstate railroads, not an infringement of the power of congress to regulate interstate commerce,[81] and, where so prohibited, such consolidations are illegal and invalid.[82] The object of such provisions is to prevent monopolies and combinations which would interfere with the benefit to the public resulting from competition,[83] and they cannot be evaded by means of a judicial sale,[84] or the purchase by, or transfer to, one company of a controlling interest in the stock of another,[85] or any agreement or business consolidation, even though not a corporate consolidation, which would have the effect which it is the design of such provisions to prevent.[86]

Also, legislative acquiescence in the acquisition by a company of local and branch lines, although some are parallel to its own, will not estop the state to oppose a consolidation with a parallel and competing through line running between the same principal termini.[87] Railroad companies cannot be allowed to consolidate in violation of such provisions merely because their consolidation will result in better service to the public[88] or because one of the roads cannot be operated independently at a profit.[89]

What are parallel or competing roads. Parallel railroads, within the meaning of constitutional or statutory provisions prohibiting the consolidation of companies operating parallel or competing roads, are those which run between the same two points or localities;[90] and competing railroad companies are those which are rivals in business.[91] While it has been held that such a provision should not be construed as if it related to parallel "and" competing roads,[92] the question as to what companies are within the prohibition ordinarily depends principally on whether or not their consolidation would substantially affect competition.[93] Thus two roads, although in some respects parallel, are not within the prohibition where they do not connect common points,[94] particularly where another road under a different management is located between them;[95] and if the roads are not in their general features competing, as where they are widely divergent and reach different commercial centers, they are not within the prohibition,[96] although some incidental competition may result from their intersecting or crossing other lines which serve as feeders[97] or

75. N.Y.—Venner v New York Cent., etc, R Co, supra.

76. Ohio.—Adelbert College v. Toledo, etc., R. Co., 5 Ohio S. & C. P. 14, 3 Ohio N.P. 15.

77. U.S.—Livingston County v. Portsmouth First Nat. Bank, Mo., 9 S.Ct. 18, 128 U.S. 102, 32 L.Ed 359.

78. U.S.—Mobile, etc, R Co. v. Mississippi, Miss., 28 S Ct 650, 210 U.S. 187, 52 L Ed 1016.
51 C J. p 779 note 77.

79. U.S—Louisville, etc., R Co v Kentucky, Ky., 16 S Ct. 714, 161 U. S. 677, 40 L.Ed. 849.

80. U.S—Louisville, etc., R. Co. v. Kentucky, supra.

81. U.S—Louisville, etc, R. Co. v. Kentucky, supra.

82. U.S—Pearsall v. Great Northern R. Co, Minn, 16 S Ct. 705, 161 U.S. 646, 40 L Ed. 838.
51 C.J. p 779 note 81

83. U.S—East St. Louis, etc., R. Co. v. Jarvis, Ill., 92 F. 735, 34 C.C.A. 639.
51 C J. p 779 note 82.

84. U.S—Louisville, etc., R. Co. v. Kentucky, Ky., 16 S Ct. 714, 161 U. S. 677, 693, 40 L Ed. 849.
51 C.J. p 779 note 83.

85. U.S—Pearsall v. Great Northern R Co., Minn, 16 S.Ct. 705, 161 U S. 646, 40 L.Ed. 838.

86. U.S—Pearsall v. Great Northern R. Co, supra.
51 C.J. p 780 note 85.

87. U.S.—Louisville, etc, R Co v. Commonwealth of Kentucky, Ky., 16 S.Ct. 714, 161 U.S. 677, 40 L.Ed 849.

88. Ky.—Commonwealth v. Louisville, etc., R Co, 138 S W 291, 144 Ky. 324, Ann.Cas.1913A 633.

89. Ky.—Commonwealth v. Louisville, etc., R Co., supra.

90. Ky.—Commonwealth v. Louisville, etc., R. Co, supra.

91. N.Y—People v. Boston, etc., R. Co., 12 Abb.N Cas 230.

92. Ky—Commonwealth v Louisville, etc., R Co, 138 S W 291, 144 Ky 324, Ann Cas.1913A 633.

93. U S—Louisville, etc., R Co v. Commonwealth of Kentucky, Ky, 16 S Ct. 714, 161 U.S 677, 40 L.Ed. 849.
51 C J. p 780 note 92.

94. U S—Louisville, etc., R. Co. v. Commonwealth of Kentucky, supra —Kimball v Atchison, etc., R. Co., C.C Mo, 46 F. 888.

95. U S—Kimball v. Atchison, etc., R. Co, supra.

96. U.S—Dady v Georgia, etc., R. Co., C.C.Ga, 112 F. 838.
Ohio.—Burke v. Cleveland, etc., R. Co., 10 Ohio Dec., Reprint, 525, 21 Cinc L.Bul. 11.

97. Ohio.—Burke v. Cleveland, etc., R. Co., supra.

crossing streams on which boats are operated as carriers.[98]

On the other hand, companies may be prohibited from consolidation, under such provisions, although their lines are not parallel in a mathematical sense;[99] so any roads which are parallel in a general sense and connect the same principal points so as to constitute competing lines are within the prohibition,[1] and two railroads, although not generally parallel or connecting the same termini, may be competing lines by reason of the companies' relations with, or control or management of, lines other than their own.[2] The applicability of such provisions is not affected by the fact that through trains are not run on one of the roads in question[3] or that one of the companies owns another line which is not parallel.[4]

Terminal railroad companies are not within the application of provisions prohibiting the consolidation of companies owning parallel or competing lines, such provisions being designed to apply to companies conducting an ordinary railroad business.[5]

c. Companies in Different States

Consolidation of companies of different states may be effected by concurrent acts of the respective legislatures authorizing companies organized under the laws of the respective states to consolidate.

A railroad company has no more power to consolidate with a company of another state without legislative authorization than it has to consolidate with any other company.[6] Moreover, a state legislature cannot grant complete authority for the consolidation of a company of its own state with a company or companies of a foreign state;[7] nor can the legislatures of two different states unite in forming from two or more existing companies a single company which shall be the same legal entity in both states;[8] but each may authorize a company organized under its own laws to consolidate with a company of the other,[9] and concurrent action of both legislatures is necessary to a valid consolidation.[10] Under such authority a consolidation may be effected prior to the construction of the railroads.[11] A statute authorizing companies of the state to consolidate with those of adjoining states applies to companies organized after, as well as before, the enactment of the statute;[12] but a statute authorizing such a consolidation and not in terms retroactive will not validate a consolidation with a foreign company entered into prior to its enactment.[13]

d. Right to Question Validity of Consolidation

(1) In general
(2) Estoppel

(1) In General

Generally, the validity of a consolidation may be questioned only by the state in a direct proceeding.

Ordinarily, the validity of a consolidation of railroad companies or the legal existence of the consolidated company may be attacked only by the state,[14] and cannot be questioned in a collateral proceeding,[15] or even in a direct action or proceeding by private persons,[16] such as stockholders[17] or bondholders[18] of the several companies consolidated, except that a stockholder who did not consent to the consolidation or have any knowledge of the proceedings is not precluded from questioning the validity of the consolidation in an action brought against him by the consolidated company to recover a stock assessment or to enforce his subscription even

98. U.S.—Dady v. Georgia, etc., R. Co., C.C.Ga., 112 F. 838.

99. Ky.—Commonwealth v. Louisville, etc., R. Co., 138 S.W. 291, 144 Ky. 324, Ann.Cas.1913A 633.
51 C.J. p 780 note 98.

1. U.S.—Louisville, etc., R. Co. v. Commonwealth of Kentucky, Ky., 16 S.Ct. 714, 161 U.S. 677, 40 L.Ed. 849.
51 C.J. p 780 note 99.

2. Mont.—State v. Montana R. Co., 53 P. 623, 21 Mont. 221, 45 L.R.A. 271.
51 C.J. p 780 note 1.

3. Ky.—Commonwealth v. Louisville, etc., R. Co., 138 S.W. 291, 144 Ky. 324, Ann.Cas.1913A 633.

4. Ky.—Commonwealth v. Louisville, etc., R. Co., supra.

5. Mo.—State v. St. Louis Terminal R. Assoc., 81 S.W. 395, 182 Mo. 284.

6. Ill.—American L. & T. Co. v. Minnesota, etc., R. Co., 42 N.E. 153, 157 Ill. 641.

7. N.Y.—People v. New York, etc., R. Co., 29 N.E. 959, 129 N.Y. 474, 15 L.R.A. 82.

8. Ill.—Ohio, etc., R. Co. v. People, 14 N.E. 874, 123 Ill. 467.
51 C.J. p 780 note 8.

9. N.Y.—People v. New York, etc., R. Co., 29 N.E. 959, 129 N.Y. 474, 15 L.R.A. 82.
51 C.J. p 780 note 9.

10. N.Y.—People v. New York, etc., R. Co., supra.

11. U.S.—Livingston County v. Portsmouth First Nat. Bank, Mo., 9 S.Ct. 18, 123 U.S. 102, 32 L.Ed. 359.

12. Ind.—Smith v. Cleveland, etc., R. Co., 81 N.E. 501, 170 Ind. 382.

13. Ill.—American L. & T. Co. v. Minnesota, etc., R. Co., 42 N.E. 153, 157 Ill. 641.

14. U.S.—Galveston Causeway Constr. Co. v. Galveston, etc., R. Co., D.C.Tex., 284 F. 137, affirmed, C.C.A., 287 F. 1021, certiorari denied 43 S.Ct. 503, 262 U.S. 747, 67 L.Ed. 1212.
51 C.J. p 781 note 14.

15. U.S.—Galveston Causeway Constr. Co. v. Galveston, etc., R. Co., supra.
51 C.J. p 751 note 15.

16. Wash.—Day v. Tacoma R., etc., Co., 141 P. 347, 80 Wash. 161, L.R.A.1915B 547.
51 C.J. p 751 note 16.

17. N.J.—Bell v. Pennsylvania, etc., R. Co., Ch., 10 A. 741—Terhune v. Midland R. Co., 38 N.J.Eq. 423.

18. N.J.—Terhune v. Potts, 47 N.J. Law 218.

though the proceedings were sufficient to constitute the new company a corporation de facto.[19] The rule precluding collateral attack applies, however, only where the consolidated company is at least a corporation de facto,[20] and if there was no statutory authority for the consolidation, its validity may be collaterally attacked.[21]

(2) Estoppel

A railroad company formed by voluntary consolidation may be estopped to deny the validity of the consolidation, as is any one who has participated in the consolidation or benefited from it.

A railroad company formed by a voluntary consolidation, which has succeeded to possession of the property and to the exercise of the franchises of the constituent companies, or induced third persons to contract with it on the faith of its legal existence as a corporation, is estopped to deny the validity of the consolidation,[22] or the validity of contracts made by it and from which it has received the benefit,[23] its title to property mortgaged by it,[24] or its liabilities as a consolidated company.[25] Each of the constituent companies which has participated in all the steps essential to the creation of a de facto corporation by consolidation is similarly estopped to deny its legal existence,[26] as are stockholders of a constituent company who participated in the proceedings of that company by which it agreed to, and effected, the consolidation,[27] or who have enjoyed the benefits thereof,[28] or who have been guilty of laches in failing to make any objection until after a long lapse of time, during which rights and equities of third persons have intervened.[29] So, also, creditors of a consolidated company de facto, who have dealt with it as a corporation, are estopped to deny the validity of the consolidation for the purpose of defeating a mortgage made by the company,[30] and a municipal corporation which has issued its bonds in aid of the consolidated company is estopped in an action against it on the bonds to deny the corporate existence of the company or the validity of the consolidation.[31]

e. Effect of Curative Statutes

Curative legislation may validate an unauthorized or informal consolidation.

An unauthorized or informal consolidation of railroad companies may be validated by a subsequent curative act[32] or by legislative recognition of the consolidated company as a corporation de jure;[33] but a statute merely authorizing consolidations like one previously entered into without authority, which is not in terms retroactive, will not validate such consolidation.[34]

Constitutionality. A constitutional provision prohibiting the granting of special privileges does not invalidate a statute legalizing a prior consolidation.[35]

§ 236. Assent of Stockholders and Bondholders

Consolidation of railroads must be accomplished by the stockholders, and generally the stockholders of each company must assent to the consolidation.

A consolidation of two or more railroad companies cannot be effected by the action of the directors alone, but must be done by the stockholders.[36] Except where at the time of the subscription there existed constitutional or statutory provisions authorizing a consolidation or reserving to the state power to amend the charter of the company, the stockholders of each company must assent to the consolidation, in order to be bound thereby,[37] since the relationship between the stockholders and the company is contractual and cannot be impaired by the

19. Mich.—Tuttle v. Michigan Air Line R. Co., 35 Mich. 247.
Ohio.—Mansfield, etc., R. Co. v. Stout, 26 Ohio St. 241.

20. Ill.—American L. & T. Co. v. Minnesota, etc., R. Co., 42 N.E. 153, 157 Ill. 641.

21. Ill.—American L. & T. Co. v. Minnesota, etc., R. Co., supra.

22. Ill.—Chicago, etc., R. Co. v. Ashling, 43 N.E. 373, 160 Ill. 373.
51 C.J. p 781 note 22.

23. U.S.—Dimpfel v. Ohio, etc., R. Co., C.C.Ill., 7 F.Cas.No.3,918, 9 Biss. 127, 8 Reporter 641, affirmed 3 S.Ct. 573, 110 U.S. 209, 28 L.Ed. 121.

24. Ill.—Racine, etc., R. Co. v. Farmers' L. & T. Co., 49 Ill. 331, 95 Am.D. 595.

25. Tex.—Gulf, etc., R. Co. v. Hutcheson, 3 Tex.A.Civ.Cas. § 96.

26. Ind.—Bradford v. Frankfort, etc., R. Co., 40 N.E. 741, 41 N.E. 819, 142 Ind. 383.

27. Ind.—Bradford v. Frankfort, etc., R. Co., supra.

28. Pa.—Rothschild v. Rochester, etc., R. Co., 1 Pa.Co. 620

29. U.S.—Dimpfel v. Ohio, etc., R. Co., C.C.Ill., 7 F.Cas.No.3,918, 9 Biss. 127, 8 Reporter 641, affirmed 3 S.Ct. 573, 110 U.S. 209, 28 L.Ed. 121.

30. U.S.—Toledo, etc., R. Co. v. Continental Trust Co., Ohio, 95 F. 497, 36 C.C.A. 155, certiorari denied 20 S.Ct. 383, 176 U.S. 219, 44 L.Ed. 442.
Ga.—Southern R. Co. v. Lancaster, 100 S.E. 380, 149 Ga. 434.

31. U.S.—Lewis v. Clarendon, C.C. Ark., 15 F.Cas.No.8,320, 5 Dill. 329.

32. Ill.—American L. & T. Co. v. Minnesota, etc., R. Co., 42 N.E. 153, 157 Ill. 641.
51 C.J. p 781 note 32.

33. Conn.—Mead v. New York, etc., R. Co., 45 Conn. 199.
Ill.—McAuley v. Columbus, etc., R. Co., 83 Ill. 348

34. Ill.—American L. & T. Co. v. Minnesota, etc., R. Co., 42 N.E. 153, 157 Ill. 641.

35. N.C.—Reid v. Norfolk Southern R. Co., 78 S.E. 306, 162 N.C. 355.

36. U.S.—Mowrey v. Indianapolis, etc., R. Co., C.C.Ind., 17 F.Cas.No. 9,891, 4 Biss. 78.

37. U.S.—Mowrey v. Indianapolis, etc., R. Co., supra.
51 C.J. p 782 note 39.

legislature;[38] but a consolidation authorized by statute is not necessarily void without the assent of all the stockholders of the consolidating companies.[39]

Subscriptions to the stock of the consolidating companies must be deemed to have been made with respect to any constitutional or statutory provisions existing at the time thereof, authorizing a consolidation of such companies with others,[40] in which case a majority of the stockholders may exercise the power;[41] and, where there was in existence at such time a right reserved to alter or amend the charter of a company, the legislature may authorize a consolidation without the consent of all the stockholders.[42]

Mode of obtaining assent. Each consolidating railroad company should obtain the requisite assent of its stockholders to the consolidation in such manner, and at a meeting called in such way, as may be prescribed by law and its charter;[43] and when the companies are of different states, the method by which each secures the assent of its own stockholders is governed by the laws of its state and need not conform to the laws of the state in which another of the consolidating companies is organized.[44]

Bondholders. Where a railroad company has issued bonds under an agreement that it will not consolidate with another company without the approval of the bondholders, the assent of such bondholders is essential to the validity of a consolidation.[45]

§ 237. Remedies of Dissenting Stockholders

In a proper case a dissenting stockholder may sue to enjoin the consolidation.

Where the consent of all the stockholders is necessary to a valid consolidation, a dissenting stockholder may sue to enjoin the consolidation,[46] provided he has not been guilty of laches in making his objection,[47] except where the statute provides for the condemnation of the stock of dissenters by the majority stockholders and the payment of its value.[48]

§ 238. Agreements and Procedure for Consolidation

Where the procedure for consolidation is prescribed by statute there must be substantial compliance with it; and the terms of the agreement may be controlled by statutory provisions.

Where statutes prescribe the procedure to be followed in effecting a consolidation of railroad companies, the provisions thereof must be at least substantially complied with,[49] as where there is required an agreement between the boards of directors of the consolidating companies,[50] due notice thereof to the stockholders,[51] ratification or confirmation of the agreement by them,[52] the approval of designated officers of the state,[53] the filing with the secretary of state of a certificate or articles of consolidation[54] in a prescribed form,[55] or the payment of a consolidation tax[56] or a fee for filing the articles of consolidation;[57] and where the statute provides therefor, the election of a new board of directors by the consolidated company is essential to vest in it the title to the property of the constituent companies.[58] On compliance with such statutory requirements, a valid consolidation is effected,[59] and no formalities not so prescribed are requisite thereto.[60] A failure, however, to comply strictly with all the

38. Ind.—McCray v. Junction R. Co., 9 Ind. 358
Ky.—Owensboro Deposit Bank v. Barrett, 13 S.W. 337, 11 Ky.L. 337.

39. Ind.—Booe v Junction R. Co., 10 Ind 93—McCray v. Junction R. Co., 9 Ind. 358.

40. U.S.—Bonner v. Terre Haute, etc., R Co., Ind., 151 F. 985, 81 C.C.A. 476.
51 C.J. p 782 note 43.

41. U.S.—Bonner v. Terre Haute, etc., R. Co., supra.

42. Cal.—Market St. R. Co. v. Hellman, 42 P. 225, 109 Cal. 571.
51 C.J. p 782 note 45.

43. Ind.—Bradford v. Frankfort, etc., R. Co., 40 N.E. 741, 41 N.E. 819, 142 Ind. 383.

44. Ind.—Bradford v. Frankfort, etc., R. Co., supra.

45. N.Y.—Continental Securities Co. v. New York Cent., etc., R. Co., 111 N.E. 484, 217 N.Y. 119.

46. U.S.—Mowrey v. Indianapolis, etc., R Co., C.C.Ind., 17 F.Cas.No 9,891, 4 Biss 78.
51 C.J. p 782 note 53.

47. N.J.—Bell v. Pennsylvania, etc., R Co., Ch., 10 A. 741.
N.C.—Spencer v. Seaboard, Air Line R. Co., 49 S.E. 96, 137 N.C. 107, 1 L.R.A.,N.S., 604

48. N.C.—Spencer v. Seaboard Air Line R Co., supra.

49. U.S.—Ashley v. Ryan, Ohio, 14 S.Ct. 865, 153 U.S. 436, 38 L.Ed. 773.
51 C.J. p 782 note 56

50. Mich.—Tuttle v. Michigan Air Line R. Co., 35 Mich. 247.

51. Mich.—Wells v. Rodgers, 27 N.W. 671, 60 Mich. 525.
51 C.J. p 782 note 58.

52. Mich.—Tuttle v. Michigan Air Line R. Co., 35 Mich. 247.

53. U.S.—Borg v. Illinois Terminal Co., C.C.A.Ill., 16 F.2d 988, certiorari denied 48 S.Ct. 20, 275 U.S. 528, 72 L.Ed. 408.

Mich.—Brown v. Dibble, 32 N.W. 656, 65 Mich. 520.

54. Ind.—State v Chicago, etc., R. Co., 43 N.E. 226, 145 Ind. 229
Mich.—Peninsular R. Co. v Tharp, 28 Mich. 506.

55. Ohio.—State v. Vanderbilt, 37 Ohio St. 590.

56. U.S.—Ashley v. Ryan, Ohio, 14 S.Ct. 865, 153 U.S. 436, 38 L.Ed. 773.

57. Ill.—State v. Chicago, etc., R. Co., 43 N.E. 226, 145 Ind. 229.

58. Ohio.—Mansfield, etc., R. Co. v. Brown, 26 Ohio St. 223.
51 C.J. p 783 note 65.

59. N.Y.—Western New York, etc., Tract Co. v. Erie R. Co., 178 N.Y. S. 491.
Pa.—Commonwealth v. Atlantic, etc., R. Co., 53 Pa. 9.

60. Ind.—Smith v. Cleveland, etc., R. Co., 81 N.E. 501, 170 Ind. 382

provisions of a statute will not necessarily render the consolidation void.[61] A failure on the part of one of several companies or of its stockholders to confirm an agreement of consolidation does not impair it as to the others, where the agreement expressly provides in such event for the perfection of the consolidation by those agreeing to it.[62] Rights acquired prior to the enactment of a statute prescribing the procedure for consolidation are not affected by the statute.[63]

Terms of agreement. While statutes sometimes in general language authorize railroad companies to consolidate on such terms as they may agree on, such provisions relate only to the adjustments of the interests of stockholders and to administrative details concerning the consolidation,[64] and do not authorize any action inconsistent with existing statutes or the provisions of the companies' charters,[65] or any contract or agreement between the companies which would conclude the rights of creditors or persons having claims against any of the consolidating companies,[66] or a transfer of the property and franchises of such companies to the consolidated company free from the liabilities, duties, and obligations which the former owed to private individuals or to the public generally.[67] Where a statute authorizing consolidations makes applicable to the consolidated company all the provisions of a general statute authorizing the incorporation of railroads, under which the incorporators are given power to fix the terms for which the company should continue to exist, it has been held that the agreement for consolidation may fix the term of existence of the consolidated company without regard to the time at which the charters of the consolidating companies would expire.[68]

§ 239. Operation and Effect of Consolidation

a. In general
b. Unauthorized or incomplete consolidation
c. Effect on particular matters

a. In General

The effect of consolidation generally is to create a new company and to dissolve or terminate the corporate existence of the consolidating companies; one or more companies may be absorbed or merged in another existing company which becomes the consolidated company

Ordinarily, the effect of a consolidation of railroad companies is to create a new company and to dissolve or terminate the corporate existence of the consolidating companies,[69] except in so far as their separate existence may be expressly continued by statute for the benefit of creditors,[70] and it has been asserted that such is the uniform and necessary effect of what is properly termed a consolidation.[71] However, such is not necessarily or always the case,[72] since a consolidation may be so effected that one or more companies are absorbed or merged into another existing company, which becomes the consolidated company, and does not lose its identity but merely continues with enlarged rights, capacities, and property under its original name,[73] or even under a new name without becoming a new company,[74] and it has even been said that a consolidation may be effected in such manner as to continue the corporate existence of each of the consolidating companies.[75] The question as to which result follows in a particular case is largely to be determined from the provision of the statute or charter authorizing the consolidation,[76] and the agreement made under, and by, the authority thereof.[77]

61. U.S.—Leavenworth County v. Chicago, etc., R. Co., Mo., 10 S.Ct. 708, 134 U.S. 688, 33 L.Ed. 1064.
51 C.J. p 783 note 68.

62. U.S.—Phinizy v. Augusta, etc., R. Co., C.C.S.C., 62 F. 678.

63. Mo.—Atlantic, etc., R. Co. v. St Louis, 66 Mo. 228.

64. Miss.—Adams v. Yazoo, etc., R. Co., 24 So. 200, 317, 28 So. 956, 77 Miss. 194, 60 L.R.A. 33, affirmed Yazoo, etc., R. Co. v. Adams, 21 S.Ct. 240, 180 U.S. 1, 45 L.Ed. 395.
51 C.J. p 783 note 73.

65. Miss.—Adams v. Yazoo, etc., R. Co., 24 So. 200, 317, 28 So. 956, 77 Miss. 194, 60 L.R.A. 33, affirmed Yazoo, etc., R. Co. v. Adams, 21 S.Ct. 240, 180 U.S. 1, 45 L.Ed. 395.

66. Md.—State v. Baltimore, etc., R. Co., 26 A. 865, 77 Md. 489.

67. Ga.—Tompkins v. Augusta Southern R. Co., 30 S.E. 992, 102 Ga. 436

68. N.Y.—New York Cent, etc., R. Co. v. Yonkers, 103 N.Y.S. 252.

69. U.S.—Gavin v. Hudson & M. R. Co., D.C.N.J., 90 F.Supp. 172, reversed on other grounds C.A., 185 F.2d 104.
51 C.J. p 783 note 79.

70. Me.—State v. Maine Cent R. Co., 66 Me. 488
Mont.—State v. Montana R. Co., 53 P. 623, 21 Mont. 221, 45 L.R.A. 271.

71. Miss.—Adams v. Yazoo, etc., R. Co., 24 So. 200, 317, 28 So. 956, 77 Miss. 194, 60 L.R.A. 33, affirmed Yazoo, etc., R. Co. v. Adams, 21 S.Ct. 240, 180 U.S. 1, 45 L.Ed. 395.
51 C.J. p 784 note 81.

72. U.S.—Central R., etc., Co. v. Georgia, Ga., 92 U.S. 665, 23 L.Ed. 757.
51 C.J. p 784 note 82.

73. U.S.—Central R., etc., Co. v. Georgia, supra.
51 C.J. p 784 note 83.

74. Ala.—Meyer v. Johnston, 64 Ala. 603.

75. Ill.—Pittsburgh, etc., R. Co. v. Gage, 117 N.E. 726, 280 Ill. 639—Chicago, etc., R. Co. v. Doyle, 100 N.E. 278, 256 Ill. 514.

76. U.S.—Keokuk, etc., R. Co. v. Missouri, Mo., 14 S.Ct. 592, 152 U.S. 301, 38 L.Ed. 450.
51 C.J. p 784 note 86.

77. Ill.—Chicago, etc., R. Co. v. Doyle, 100 N.E. 278, 256 Ill. 514.
51 C.J. p 784 note 87.

b. Unauthorized or Incomplete Consolidation

An attempt to consolidate without authority has no effect and does not create even a de facto corporation; but where authority exists, an attempted consolidation may create a de facto corporation despite irregularities in the proceedings

In view of the rule that a railroad company has no right to consolidate with another or other companies except where authorized by constitution or statute, an attempt to consolidate without such authority does not create even a corporation de facto,[78] and, accordingly, does not affect the identity of the constituent companies,[79] which will be liable for any acts done by the so-called consolidated company in the operation of their roads,[80] except that such constituent companies are not liable on contracts made by the consolidated company which were not within the corporate powers of those companies.[81] So a judgment rendered against the consolidated company is enforceable against the constituent companies where an illegal consolidation has been dissolved by judicial proceedings and a decree entered providing that obligations fairly incurred by the consolidated company for the benefit of the constituent companies shall be paid by them.[82]

Where, however, there is in existence a constitutional or statutory provision under which a consolidation might validly be made, the company formed by an attempted consolidation may be a corporation de facto notwithstanding irregularities in the consolidation proceedings[83] or the lack on the part of one or more of the consolidating companies of some of the necessary qualifications.[84]

Unexecuted authority to consolidate. So long as a constitutional or statutory provision authorizing one railroad company to consolidate with another or others is not acted on the unexecuted authority does not impose any liability on either company for debts of the other,[85] nor can any conditions imposed by the statute authorizing the consolidation be enforced;[86] and until the consolidation is consummated the several companies continue in the full enjoyment of their respective franchises.[87]

c. Effect on Particular Matters

(1) Property, rights, and privileges
(2) Duties and liabilities
(3) Liens and mortgages
(4) Pending actions

(1) Property, Rights, and Privileges

(a) In general
(b) Contract rights

(a) In General

Ordinarily the company formed by consolidation succeeds to all the property, and the rights, privileges and franchises previously enjoyed by the consolidating companies except as otherwise provided by statute.

Ordinarily, a railroad company formed by a consolidation of other companies succeeds to all the property of the consolidating companies,[88] and to causes of action belonging to it.[89] It has often been said that it succeeds also to all the rights, privileges, and franchises previously enjoyed by them,[90] except as otherwise provided by statute.[91] The rule so stated is, however, subject to qualification since, while the consolidated company succeeds to whatever rights, privileges, and immunities are possessed by each of the constituent companies in common,[92] and also to any special right or privilege enjoyed by one of them alone in so far as it may be separately exercised or enjoyed with respect only to the portion of the road or property derived from that company,[93] a separate right or privilege of one company does not pass to the consolidated company so as to become a general right of that company with respect to the entire road or property;[94] nor do any

78. Ill.—American L. & T. Co. v. Minnesota, etc., R. Co., 42 N.E. 153, 157 Ill. 641.

79. N.Y.—Latham v Boston, etc., R. Co., 38 Hun 265.

80. N.Y.—Latham v. Boston, etc., R. Co., supra.

81. U.S.—Pearce v. Madison, etc., R Co., Ind., 21 How. 441, 16 L.Ed. 184.
51 C.J. p 784 note 92.

82. Ind.—Ketcham v. Madison, etc., R. Co., 20 Ind 260.

83. Ind.—Bradford v. Frankfort, etc., R. Co., 40 N.E. 741, 41 N.E. 819, 142 Ind. 383.
N.J.—Terhune v. New Jersey Midland R. Co., 38 N.J.Eq. 423.

84. U.S.—Toledo, etc., R. Co. v. Continental Trust Co., Ohio, 95 F. 497, 36 C.C.A. 155, certiorari denied 20 S.Ct. 383, 176 U.S. 219, 44 L.Ed. 442

85. Mo.—Southgate v. Atlantic, etc., R. Co., 61 Mo. 89.

86. S.C.—Gibbes v. Greenville, etc., R. Co., 13 S.C. 228.

87. Ohio.—Mansfield, etc., R. Co. v. Brown, 26 Ohio St. 223.

88. Mass.—Proprietors Merrimack River Locks, etc. v. Boston, etc., R. Co., 139 N.E. 839, 245 Mass. 52.
51 C.J. p 786 note 42.

89. N.J.—Day v. New York, etc., R. Co., 34 A. 1031, 58 N.J.Law 677.
51 C.J. p 786 note 43.

90. U.S.—Green County v. Conness, Mo., 3 S.Ct. 69, 109 U.S. 104, 27 L.Ed. 873.
51 C.J. p 786 note 44, p 787 note 46 [a].

91. Ala.—Georgia Pac. R. Co v. Gaines, 7 So. 383, 88 Ala. 377—Georgia Pac. R. Co. v. Wilks, 6 So. 34, 86 Ala. 478.
51 C.J. p 786 note 45.

92. Tex.—International, etc., R. Co. v. Anderson County, Civ.App., 174 S.W. 305, affirmed 38 S.Ct. 370, 246 U.S. 424, 62 L.Ed. 807.
51 C.J. p 787 note 48.

93. U.S.—Tomlinson v. Branch, S.C., 15 Wall. 460, 21 L.Ed. 189.
51 C.J. p 787 note 49.

94. U.S.—Tomlinson v. Branch, supra.
51 C.J. p 787 note 50.

separate rights of the constituent companies pass to the consolidated company which from their nature cannot be exercised or enjoyed by it under its new constitution.[95] The consolidated company does not become invested with any other or greater rights than were possessed by the constituent companies,[96] unless they are conferred by statute.[97]

(b) Contract Rights

A consolidated railroad succeeds to the contract rights and privileges of its constituent companies.

A consolidated railroad company succeeds to the rights and privileges of its constituent companies under contracts made by them prior to the consolidation,[98] and may maintain actions to enforce them.[99] Its right to the benefit of such contracts is, however, subject to any conditions forming a part of the terms thereof,[1] which must be performed by it in order to entitle it to recover on the contract,[2] and if it is unable to do so according to the terms of the contract, it cannot recover thereon;[3] but if it can and does perform the conditions, it is entitled to recover on the contract.[4] The consolidated company may also recover on a fidelity bond given by an agent of one of the constituent companies to such company and its successors, for a defalcation occurring subsequent to the consolidation, where the agent is continued in the employment of the consolidated company with the same duties as before.[5]

(2) Duties and Liabilities

(a) In general

(b) Under contracts

(a) In General

Except as otherwise provided by statute a railroad company formed by consolidation is bound to perform the duties appertaining to the constituent companies.

Unless otherwise provided by statute, a railroad company formed by the consolidation of other companies is bound to perform the duties appertaining to the constituent companies,[6] and is liable for their existing debts, liabilities, and obligations,[7] at least to the extent of the assets received from the constituent company by which the liability was incurred.[8] While such liability of course exists where it is expressly imposed by the statute authorizing the consolidation[9] or expressly assumed by the articles of consolidation,[10] it exists independently of such provisions as a necessary legal result of the consolidation.[11] A statutory provision preserving the separate existence of consolidating companies with respect to their existing debts and liabilities so that actions may be maintained against them after the consolidation is merely a cumulative protection for creditors and does not affect the liability of the consolidated company.[12] If no part of the franchise is reserved to either of the constituent companies, they are not liable to the public after the consolidation for the performance of duties devolving on the consolidated company.[13]

(b) Under Contracts

A railroad corporation formed by consolidation succeeds to all obligations and liabilities of the constituent companies on contracts made by them before consolidation.

A railroad company formed by a consolidation succeeds to all the obligations and liabilities of its constituent companies arising out of contracts there-

95. U.S.—Maine Cent. R. Co. v. Maine, Me., 96 U.S. 499, 24 L.Ed. 836.
51 C.J. p 787 note 51.

96. Ill.—Ruggles v. People, 91 Ill. 256.
Pa.—Pennsylvania R. Co. v. Wehrle, 25 Pa.Dist. 824.

97. U.S.—Seaboard Air Line R. Co. v. Daniel, S.C., 68 S.Ct. 426, 333 U.S. 118, 92 L.Ed. 580.
Provision, in Interstate Commerce Act, relating to consolidations and mergers that any power granted thereunder to any carrier should be deemed to be in addition to, and in modification of, its powers under its corporate charter or under laws of any state, authorizes a railroad corporation to exercise the powers therein granted over and above those bestowed on it by the state of its creation and such federally conferred powers can be exercised in the same manner as though they had been granted a federally created corporation—Seaboard Air Line R. Co. v. Daniel, supra.

98. Tex.—Missouri, etc., R. Co. v. Carter, 68 S.W. 159, 95 Tex. 461
51 C.J. p 757 note 54

99. Ind.—Sparrow v. Evansville, etc., R. Co., 7 Ind. 369
Ohio.—Mansfield, etc., R. Co. v. Brown, 26 Ohio St. 223

1. Mich.—Brown v. Dibble, 32 N.W. 656, 65 Mich. 520.

2. Mich.—Brown v. Dibble, supra.

3. N.J.—New Jersey Midland R. Co. v. Strait, 35 N.J.Law 322.
51 C.J. p 787 note 58.

4. Ohio.—Mansfield, etc., R. Co. v. Stout, 26 Ohio St. 223.

5. Pa.—Pennsylvania, etc., R. Co. v. Harkins, 24 A. 175, 149 Pa. 121

6. Ill.—People v. Louisville, etc., R. Co., 10 N.E. 657, 120 Ill. 48—Peoria, etc., R. Co. v. Coal Valley Min. Co., 68 Ill. 489.

7. U.S.—Bailey v. New York Cent., etc., R. Co., N.Y., 22 Wall. 604, 22 L.Ed. 840.
51 C.J. p 787 note 63

8. Kan.—Berry v. Kansas City, etc., R. Co., 36 P. 724, 52 Kan. 774, 39 Am.S.R. 381, 371.
51 C.J. p 788 note 64.

9. U.S.—Bailey v. New York Cent., etc., R. Co., N.Y., 22 Wall. 604, 22 L.Ed. 840.
51 C.J. p 788 note 65.

10. Fla.—Atlantic Coast Line R. Co. v. Cone, 48 So. 514, 53 Fla. 1017.
51 C.J. p 788 note 66.

11. Tex.—Gueringer v. St. Louis, etc., R. Co., Com.App., 23 S.W.2d 704
51 C.J. p 788 note 67.

12. S.C.—Pickett v. Southern R. Co., 48 S.E. 466, 69 S.C. 445.
51 C.J. p 788 note 70.

13. Ill.—Peoria, etc., R. Co. v. Coal Valley Min. Co., 68 Ill. 489.

tofore made by them,[14] at least to the extent of the property acquired from the respective companies,[15] and in a proper case may be required specifically to perform[16] or respond in damages for failure to perform.[17]

(3) Liens and Mortgages

Existing liens and mortgages on property of the constituent companies are chargeable to the railroad company formed by consolidation.

A railroad company formed by consolidation is chargeable with notice of all existing liens on the property of the consolidating companies,[18] and such liens are not affected by the consolidation, but the new company takes the property subject thereto.[19] So the consolidation does not affect the rights of mortgage creditors[20] or bondholders.[21] However, a consolidation does not create any lien in favor of creditors of a constituent company who previously had none,[22] or extend an existing lien over property not previously subject thereto.[23]

(4) Pending Actions

Generally, consolidation of two or more railroad companies does not abate actions pending by or against the constituent companies, and the consolidated company may be substituted as a party.

Although there is authority for the view that the consolidation of two or more railroad companies works such a dissolution of the constituent companies as to abate any pending actions by or against them,[24] it is the more general rule that the consolidation does not abate pending actions,[25] and that the consolidated company may be substituted as plaintiff in an action theretofore brought by a constituent company.[26] In actions pending against a constituent company no new service of process is necessary,[27] but the consolidated company may be made a party by amendment of the pleadings,[28] or the pending action may be prosecuted to judgment against the constituent company and the judgment enforced against the consolidated company,[29] or the consolidated company may be substituted as a defendant even after verdict, and judgment rendered against it,[30] except where the statute authorizing the consolidation preserves the corporate existence of the consolidating companies and their liability for existing obligations, in which case judgment cannot be rendered against the consolidated company unless it is made a party to the action,[31] even though it has succeeded to, or assumed the liabilities of, its constituent companies.[32]

§ 240. —— Consolidation with Foreign Company

The consolidation of railroad companies of different states terminates the existence of the constituent companies and creates a new company, which is, however, a separate corporation in each state, having the status of a domestic corporation therein.

The consolidation of railroad companies of different states ordinarily has the effect of dissolving or terminating the existence of the constituent companies and creating a new company,[33] but the new

14. Ind.—Cox v Baltimore, etc., R Co., 103 N.E. 337, 180 Ind. 495, 50 L.R.A.,N.S., 453
51 C.J. p 788 note 72.

15. U.S.—Pullman's Palace-Car Co v Missouri Pac. R. Co., Mo., 6 S. Ct 194, 115 U.S. 587, 29 L.Ed. 499.
51 C.J. p 788 note 73.

16. U.S.—Union Pac R. Co. v. McAlpine, Kan., 9 S.Ct. 286, 129 U.S. 305, 32 L.Ed 673.
51 C.J. p 788 note 74.

17. U.S.—Lisman v. Milwaukee, etc., R. Co, C.C.Wis., 161 F. 472, affirmed 170 F. 1020, 95 C.C.A. 671, certiorari denied 29 S.Ct. 700, 214 U.S. 520, 53 L.Ed. 1065.
51 C.J. p 788 note 75.

18. U.S.—Western Div. R. Co. v. Drew, C.C.Fla., 29 F.Cas No 17,434, 3 Woods 691, affirmed 103 U.S. 118, 26 L.Ed. 327.
Miss.—Mississippi Valley Co. v. Chicago, etc., R. Co., 58 Miss. 846.

19. Ohio.—Citizens' Sav., etc., Co. v. Cincinnati, etc., Tract. Co., 140 N.E. 380, 106 Ohio St. 577.
51 C.J. p 789 note 78.

20. Ind.—Eaton, etc., R. Co. v. Hunt, 20 Ind 457.
51 C.J. p 789 note 79.
Interest on mortgage bonds
U.S.—In re Central of Ga. Ry. Co., D.C.Ga., 58 F.Supp. 816.
Practical construction of parties
Where a railroad purchased another line, part of whose bonds were delivered as collateral for the railroad's divisional purchase-money mortgage, and there had been a practical construction for many years to the effect that interest on the collateral should not be collectable as long as interest was paid under the divisional mortgage, it was too late to make a contrary contention.—In re Central of Ga. Ry. Co., supra.

21. N.Y.—Weaver v. Pacific Impr. Co., 191 N.Y.S. 3, 541, 198 App.Div. 825, affirmed 138 N.E. 42, 234 N.Y. 418.

22. U.S.—Wabash, etc., R. Co. v. Ham, Ind., 5 S.Ct. 1081, 114 U.S. 587, 29 L.Ed. 235.
51 C.J. p 789 note 81.

23. U.S.—Railway Steel Springs Co. v. Chicago, etc., R. Co, D.C.Ill., 246 F 338.

24. Kan.—Wagner v. Atchison, etc., R. Co., 58 P 1018, 9 Kan.App. 661.
51 C.J. p 789 note 84.

25. Ill.—Chicago, etc, R. Co. v. Ashling, 43 N.E. 373, 160 Ill. 373.
51 C.J. p 789 note 85.

26. N.J.—Day v. New York, etc, R. Co., 34 A. 1081, 58 N.J.Law 677.
51 C.J. p 789 note 86.

27. Mo.—Kinion v. Kansas City, etc., R. Co., 39 Mo.App. 574—Kinion v. Kansas City, etc., R. Co., 39 Mo.App. 382.

28. Mo.—Kinion v. Kansas City, etc., R. Co., 39 Mo.App. 574.

29. Ill.—Chicago, etc., R. Co. v. Ashling, 43 N.E. 373, 160 Ill. 373.
51 C.J. p 789 note 89.

30. Ind.—Louisville, etc., R. Co. v. Summers, 30 N.E. 873, 131 Ind. 241.
51 C.J. p 789 note 90.

31. Ga.—Selma, etc., R. Co. v. Harbin, 40 Ga. 706.

32. Ga.—Selma, etc., R. Co. v. Harbin, supra.

33. U.S.—Keokuk, etc., R. Co. v

company, although having a single name and management, and but one set of stockholders, is nevertheless a separate corporation in each state,[34] having in each the status of a domestic corporation,[35] and its rights and liabilities in each are derived from, and determined by, the laws of that state,[36] unaffected by the law of the other state or states in which the company also exists.[37]

So it has been said that the consolidated company stands in each state as the original company stood in that state, with the same rights and liabilities;[38] it succeeds to the rights and privileges of the original company in that state,[39] and may exercise with respect to the entire road and property whatever rights it enjoys under the laws of both states,[40] such as the issuance of preferred or guaranteed stock,[41] or the issuance of bonds and the execution of mortgages,[42] which may cover property owned by the company as incorporated in both or all the states,[43] although the action of the company in one state in issuing bonds and executing mortgages which are valid in that state will not create a debt binding on the property of the company as incorporated in another state unless valid according to the laws of such other state.[44]

The result is that the consolidated company frequently possesses very different rights, powers, and privileges and is subject to different liabilities in the various states in which it is incorporated,[45] although, having but a single management, name, and corporate seal, it must necessarily act in the transaction of its business as a single company.[46] The directors, stockholders, and officers of the company may hold meetings and transact corporate business in any of the states in which it is incorporated;[47] and the company is not subject to a provision of a state constitution requiring that a majority of the directors of any railroad company incorporated by the laws of the state shall be residents thereof.[48]

§ 241. —— Rights and Liabilities of Stockholders and Subscribers to Stock

Where consolidation of railroad companies is effected without the required consent of a stockholder he may sue to recover the value of his interest or pursue available statutory remedies. Exchange of stock in a consolidated company for stock of the constituent companies must be on a fair and just basis.

Where a consolidation of railroad companies has been effected without the consent of a stockholder or subscriber to stock of a constituent company whose assent thereto is required, he is released from his subscription,[49] and, although he has no standing to maintain a suit to dissolve the consolidated company, he may unless barred by laches,[50] maintain a suit against the consolidated company to recover the value of his interest in the constituent company wrongfully appropriated by the former,[51] or, where the statute provides therefor, maintain proceedings to compel the ascertainment and payment of the value of the stock;[52] but he cannot recover a personal judgment against the directors of the new company.[53]

Missouri, Mo., 14 S.Ct. 592, 152 U.S. 301, 38 L.Ed. 450.
51 C.J. p 784 note 1.

34. U.S.—Steckler v. Pennroad Corp., D.C.Pa., 44 F.Supp. 800, affirmed, C.C.A., 136 F.2d 197, certiorari denied 64 S.Ct. 64, 320 U.S. 757, 88 L.Ed. 451.
51 C.J. p 784 note 3.

35. U.S.—Steckler v. Pennroad Corp., supra.
51 C.J. p 785 note 4.

36. U.S.—Pelk v. Chicago, etc., R. Co., Wis., 94 U.S. 164, 24 L.Ed. 97.
51 C.J. p 785 note 5.

Status of new corporation

(1) Corporation resulting from consolidation of New York railroad and railroads of other states held not "corporation incorporated under any law of this state" within stock taxing statute.—New York Cent. R. Co. v. Flynn, 251 N.Y.S. 343, 233 App.Div. 123, affirmed 178 N.E. 791, 257 N.Y. 553.

(2) Although consolidated railroad corporation's increase in capital stock is not taxable, corporation may obtain state's consent to the increase.—New York Cent. R. Co. v. Flynn, supra.

37. Ala.—State v. Atlantic Coast Line R. Co., 81 So. 60, 202 Ala. 558
51 C.J. p 785 note 6

38. U.S.—Minot v. Philadelphia, etc., R. Co., Del., 18 Wall. 206, 21 L.Ed. 888
Ill.—Ohio, etc., R. Co. v. People, 14 N.E. 874, 123 Ill. 467.

39. Mo.—State v. Roach, 184 S.W. 969, 267 Mo. 300.
51 C.J. p 785 note 8.

40. Conn.—Mead v. New York, etc., R. Co., 45 Conn. 199.
N.Y.—Prouty v. Michigan Southern, etc., R. Co., 1 Hun 655, 4 Thomps. & C. 230.

41. N.Y.—Prouty v. Michigan Southern, etc., R. Co., supra.

42. Conn.—Mead v. New York, etc., R. Co., 45 Conn. 199.

43. Ill.—Racine, etc., R. Co. v. Farmers' L. & T. Co., 49 Ill. 331, 95 Am.D. 595.

44. Pa.—Rothschild v. Rochester, etc., R. Co., 1 Pa.Co. 620.

45. Mich.—Chicago, etc., R. Co. v. Auditor-Gen., 18 N.W. 586, 53 Mich. 79.

46. Ill.—Racine, etc., R. Co. v. Farmers' L. & T. Co., 49 Ill. 331, 95 Am.D. 595

47. U.S.—Pollitz v. Wabash R. Co., C.C.N.Y., 167 F. 145, reversed on other grounds 176 F. 333, 100 C.C.A. 1.
51 C.J. p 785 note 16.

48. Ill.—Ohio, etc., R. Co. v. People, 14 N.E. 874, 123 Ill. 467

49. Ind.—Booe v. Junction R. Co., 10 Ind. 93.
51 C.J. p 785 note 20.

50. Ark.—Auten v. St. Louis, etc., R. Co., 160 S.W. 873, 110 Ark. 24.
51 C.J. p 785 note 22.

51. Ky.—Owensboro Deposit Bank v. Barrett, 13 S.W. 337, 11 Ky.L. 910.
51 C.J. p 785 note 23.

52. Ohio.—Pittsburgh, etc., R. Co. v. Garrett, 34 N.E. 493, 50 Ohio St. 405.

53. Tex.—International, etc., R. Co. v. Bremond, 53 Tex. 96.

A dissenting stockholder is not released, however, if at the time of his subscription there was in existence a constitutional or statutory provision authorizing the consolidation,[54] or where at that time a right had been reserved to alter or amend the charter, and the consolidation has been authorized by the legislature to be made on consent of less than the entire number of stockholders,[55] or where the consolidation was clearly contemplated by the company's charter so that its effectuation does not constitute a fundamental change in the company's purposes or object.[56] A stockholder within a statute governing objections to merger of railroads has been held to be one who owns a share of corporate stock with the right to participate, according to his number of shares, in surplus profits and in assets or capital stock remaining after payment of debts on dissolution or termination of the corporation.[57] It is not necessary that he vote in order to dissent from the merger,[58] and he need not be a registered stockholder as long as he is the actual owner of stock.[59]

Exchange of stock. An exchange of stock in a consolidated company for the stock of the constituent companies must be made on a basis fair and just to all the stockholders,[60] and an unfair or unjust plan of exchange may be enjoined.[61] Where a statute or consolidation agreement provides for an exchange of stock, the approval of, or consent to, the consolidation constitutes an agreement to exchange;[62] but where such an exchange is not required thereby, the surrender by a stockholder of a consolidating company of a portion of his stock for shares of the new company does not bind him to exchange the balance.[63] Stockholders of a constituent company are not entitled to maintain any action against the new company to compel the issuance of stock which they could not have maintained against the former company before the consolidation.[64] Where a consolidation agreement provides that holders of unexchanged stock shall be entitled to share proportionately in the earnings of the consolidated company as if there had been no consolidation, a stockholder who has not exchanged his shares is entitled to an accounting of the earnings and cannot be compelled to take merely dividends declared.[65]

Enforcement of subscriptions. Since the consolidated company succeeds to the rights and property of the constituent companies, it may, except as to dissenting stockholders who have been released, sue for and recover any unpaid subscriptions to stock of the constituent companies,[66] and, for the purpose of rendering a subscription enforceable, may comply with any conditions attached thereto.[67] Similarly, creditors of the consolidated company on its insolvency may maintain a creditors' bill to enforce the liability of subscribers to stock of the constituent companies.[68]

Immunities of stockholders. An immunity from liability for debts of the corporation enjoyed by stockholders of the constituent companies does not, in the absence of express provision in the statute or the agreement of consolidation, pass to the stockholders of the consolidated company.[69]

§ 242. Actions Brought after Consolidation

After consolidation, actions on a cause arising prior to consolidation generally are maintainable by, or against, the consolidated company

In accordance with the general rule that on a consolidation of railroad companies the constituent

54. Ind.—Bish v. Johnson, 21 Ind 299
51 C.J. p 785 note 26.

55. Cal.—Market St. R. Co. v. Hellman, 42 P. 225, 109 Cal. 571.
Mass.—Hale v. Cheshire R. Co., 37 N. E. 307, 161 Mass. 443.

56. Ind.—Hanna v. Cincinnati, etc., R. Co., 20 Ind. 30.

57. N.Y.—Application of Friedman, 54 N.Y.S.2d 45, 184 Misc. 639, modified on other grounds 56 N.Y.S.2d 516, 269 App.Div. 834

The object of statute authorizing appraisal of stock held by persons objecting to merger of railroads is to prevent forcing a dissenting stockholder to transpose his investment from one corporation into another, and nothing should be read into the statute that would limit or frustrate this salutary purpose.—Applications of Friedman, supra.

58. N.Y.—Applications of Friedman, supra

59. N.Y.—Applications of Friedman, supra.

Inclusion of unregistered shares in objection

Even if registration of stock was a condition precedent, fact that railroad stockholder's written objection to merger and demand for payment for his stock erroneously referred to one hundred ten shares owned by objecting stockholder, when only one hundred were registered in his name, was a mere irregularity which did not invalidate the objection.—Applications of Friedman, supra.

60. U.S.—De Koven v. Lake Shore, etc., R. Co., D.C.N.Y., 216 F. 955.

61. U.S.—Boyd v. New York, etc., R. Co., D.C.N.Y., 220 F. 174.
51 C.J. p 786 note 30.

62. U.S.—Miller v. Chicago, etc., R. Co., N.Y., 193 F. 41, 113 C.C.A. 113

63. U.S.—Miller v. Chicago, etc., R. Co., supra.

64. N.Y.—Babcock v. Schuylkill, etc., R. Co., 31 N.E. 30, 133 N.Y. 420
51 C.J. p 786 note 34.

65. U.S.—Miller v. Chicago, etc., R. Co., N.Y., 204 F. 436, 122 C.C.A. 622.
51 C.J. p 786 note 35.

66. Ind.—Sparrow v. Evansville, etc., R. Co., 7 Ind. 369.
Ohio.—Mansfield, etc., R. Co. v. Brown, 26 Ohio St. 223

67. Ohio.—Mansfield, etc., R. Co. v. Stout, 26 Ohio St. 241.

68. Pa.—Hamilton v. Clarion, etc., R. Co., 23 A. 53, 144 Pa. 34, 13 L.R.R. 779.

69. U.S.—Minneapolis, etc., R. Co. v. Gardner, Minn., 20 S.Ct. 656, 177 U.S. 332, 44 L.Ed. 793.

companies cease to exist, actions brought after a consolidation on a cause arising prior thereto are maintainable by[70] or against,[71] the consolidated company only, rather than any of the companies out of which it was formed, except where, by constitutional or statutory provisions or by the terms of the consolidation agreement, the separate existence of the consolidating companies is continued, in which case action may also be brought against a constituent company after the consolidation on a liability previously incurred by it.[72] The petition or declaration should, however, designate the constituent company in favor of, or against which, the cause of action arose,[73] and allege the fact of consolidation and the consolidated company's assumption of, or succession to, the cause of action or the liability, as the case may be.[74] It is sufficient to allege that the companies were authorized to, and did, consolidate;[75] or, where the consolidation was under the laws of another state, to set out the statutes and allege that their provisions were complied with and the consolidation effected,[76] and it is not necessary that the steps taken to effect the consolidation be set forth,[77] or, it has been held, that legal authority for the consolidation be alleged.[78] It will be presumed, unless the contrary appears, that the consolidated company has been organized and a board of directors elected, so as to vest in it the rights of the constituent company, where it is shown that there was a consolidation,[79] but, where the date of such organization or election is material, the burden is on plaintiff to show that it occurred at such time as to authorize the maintenance of the action.[80] In an action against the consolidated company, a general denial, even though it is regarded as admitting defendant's corporate existence, does not admit an allegation of consolidation on which its liability depends.[81] Where railroad companies of different states consolidate, in whichever of such states the consolidated company is sued it is proper to designate it as a corporation created by, and existing under, the laws of that state.[82] In an action against the consolidated company to enforce a liability of one of the constituent companies, the directors or officers of the new company are not necessary or proper parties.[83]

IX. INDEBTEDNESS, SECURITIES, LIENS, AND MORTGAGES

A. NATURE AND EXTENT OF LIABILITIES

§ 243. In General

As a general rule, a railroad company has power to incur any indebtedness or obligation within the scope of its objects and purposes.

Within the limitations prescribed by its charter or governing statutes or by valid regulations, a railroad company, like any other corporation, as a general rule has power to incur any indebtedness or obligation for a proper or lawful purpose,[84] including those necessary to carry out the purposes and objects for which it was created,[85] such as indebtedness for construction.[86] A railroad company is liable on such obligations as its charter, which it has accepted, or governing statute expressly imposes on it.[87]

Limitation on power in general. Under general rules a railroad company has no power to make, and

70. Pa.—Dalmas v. Philipsburg, etc., R. Co., 98 A. 796, 254 Pa. 9.

71. Pa.—Dalmas v. Philipsburg, etc., R. Co., supra.
51 C.J. p 789 note 97.

72. S.C.—Stewart v. Walterboro, etc., R. Co., 41 S.E. 827, 64 S.C. 92.
51 C.J. p 790 note 99.

73. Mich.—Marquette, etc., R. Co v. Langton, 32 Mich. 251.

74. Tex.—Gueringer v. St. Louis, etc., R. Co., Com.App., 23 S.W.2d 704
51 C.J. p 790 note 2.

75. Tex.—Gueringer v. St. Louis, B. & M. Ry. Co., 82 S.W.2d 935, 125 Tex. 418.
Wis.—Collins v. Chicago, etc., R. Co., 14 Wis. 492.
Proof of consolidation
Tex.—Gueringer v. St. Louis, B & M. Ry. Co., 82 S.W.2d 935, 125 Tex 418.

76. N.Y.—Rothschild v. Rio Grande Western R. Co., 18 N.Y.S. 548, 63 Hun 632, affirmed 58 N.E. 1091, 164 N.Y. 594, 595

77. N.Y.—Rothschild v. Rio Grande Western R. Co., supra.
Wis.—Collins v. Chicago, etc., R. Co., 14 Wis. 492.

78. Tex.—Gueringer v. St. Louis, etc., R. Co., Com.App., 23 S.W.2d 704.
51 C.J. p 790 note 6.

79. Mich.—Detroit, etc., R. Co. v. Starnes, 38 Mich 698.

80. Ohio.—Mansfield, etc., R. Co. v. Brown, 26 Ohio St. 223.

81. Iowa.—Koons v. Chicago, etc., R. Co., 23 Iowa 493.

82. U.S.—Central Trust Co. v. St. Louis, etc., R. Co., C.C.Ark., 41 F. 551

83. N.Y.—Chase v. Vanderbilt, 62 N. Y. 307.

84. Mass.—Brown v. Boston, etc., R. Co., 124 N.E. 322, 233 Mass. 502.
N.C.—Craven v. Atlantic, etc., R Co., 77 N.C. 289.
Capacity of corporations to incur indebtedness see Corporations § 1118 et seq.

85. Me.—Belfast, etc., R. Co. v. Belfast, 1 A. 362, 77 Me. 445.
51 C.J. p 790 note 17.

86. Me.—Belfast, etc., R. Co. v. Belfast, supra.
51 C.J. p 790 note 18.
Liability for expense of construction in general see supra §§ 188, 189.

87. La.—State v. New Orleans, etc., R. Co., 3 Rob. 418.
51 C.J. p 790 note 19.

is not liable on, contracts or obligations which are outside its purposes and objects[88] or outside the powers which it can delegate to its officers;[89] and these rules apply although its business is benefited as a direct result of such contract,[90] since every person who enters into an obligation with it is bound at his peril to take notice of the legal limits of its capacity to contract,[91] although it has been held that, notwithstanding the act creating the obligation is ultra vires, if the railroad company, with the permission and acquiescence of the stockholders, holds itself out as competent to contract and carry on its business under color of law and procures credit and induces creditors to part with money on the faith of such contract, the contract will be binding in a court of equity not only on the corporation, but also on the stockholders.[92]

Compromise and settlement. The power of a railroad company to sue and be sued carries with it as a necessary incident power either to compromise the whole claim against, or to secure relief for a time from, the prosecution of an action founded on the claim.[93]

Refunding indebtedness. The power of the legislature to authorize a corporation to issue securities for the purpose of refunding its valid indebtedness, on a vote of a majority of the stockholders, where the corporation is in dire financial straits, has been upheld.[94]

Confirmation or validation. An indebtedness which is merely ultra vires and which the legislature originally could authorize may subsequently be confirmed or validated by statute.[95]

§ 244. Amount of Indebtedness

A railroad company may be forbidden to incur an indebtedness exceeding a prescribed amount or a single obligation of less than a certain amount.

It is the policy of some states to regulate and supervise the issuance of securities of a railroad corporation, so as to prevent stock watering or financial exploitation of such corporations, and to protect the public against overcapitalization or an excessive indebtedness.[96] Either by statute or by the charter of the particular company, a railroad company may be forbidden to incur an indebtedness exceeding a prescribed amount.[97] This amount may be fixed at a certain per cent or fraction of the capital stock, with exceptions permitting an increased amount in aid of location, construction, and equipment.[98] It has been held, however, that a railroad company is not exempt from the rule forbidding a corporation which has received the full benefit of a loan to avoid its liability therefor by reason of a statute limiting the amount of indebtedness which it may incur.[99]

Minimum amount. Under a statute so providing a company cannot incur a single obligation of less than a certain amount.[1]

§ 245. Regulation and Control by Commissioners or Other Public Officers

Designated public officers may be vested by statute with power to regulate and control the incurrence of indebtedness or the issuance of evidences of indebtedness by railroad companies.

Designated commissioners or other public officers may be vested by statute with power to regulate and control the incurrence of indebtedness or the issuance of securities or other evidences of indebtedness by railroad companies.[2] The authorization of the commission for the issuance of securities or evidences of indebtedness may be required by statute,[3] and, where the statute so provides, evidences of indebtedness issued without the required authorization are void.[4] Such statutes have been held not to ap-

88. Nev.—George v. Nevada Cent. R. Co., 38 P. 441, 22 Nev. 228
Ultra vires contracts of corporation in general see Corporations §§ 1130–1133.

89. Nev.—George v. Nevada Cent. R. Co., supra.

90. Nev.—George v. Nevada Cent. R. Co., supra.

91. Nev.—George v. Nevada Cent. R. Co., supra.

92. Ga.—Johnson v. Mercantile Trust, etc., Co., 21 S.E. 576, 94 Ga. 324.

93. Mass.—Codman v. Dumaine, 144 N.E. 408, 249 Mass. 451.

94. Mass.—Brown v. Boston, etc., R. Co., 124 N.E. 322, 233 Mass. 502.
51 C.J. p 791 note 27.

95. Mass.—Brown v. Boston, etc., R. Co., supra.
51 C.J. p 791 note 28.

96. Mass.—Bulkeley v. New York, etc., R. Co., 103 N.E. 1033, 216 Mass. 432.

97. Iowa.—Barnes v. Eastern Iowa R. Co., 134 N.W. 90, 136 N.W. 1058, 155 Iowa 721.

98. Iowa.—Barnes v. Eastern Iowa R. Co., supra.
51 C.J. p 791 note 33.

99. Iowa.—Beach v. Wakefield, 76 N.W. 688, 78 N.W. 191, 107 Iowa 567.

1. U.S.—Eastern Townships Bank v. St. Johnsbury & L. C. R. Co., C. C.Vt., 40 F. 423, error dismissed 13 S.Ct. 1046, 149 U.S. 772, 37 L.Ed. 957.
51 C.J. p 791 note 34.

2. Mass.—Bulkeley v. New York, etc., R. Co., 103 N.E. 1033, 216 Mass. 432.

3. N.Y.—People v. New York Cent., etc., R. Co., 123 N.Y.S. 125, 138 App.Div. 601, affirmed 92 N.E. 1096, 199 N.Y. 539.
51 C.J. p 791 note 38.

4. Tex.—Davis v. Watertown Nat. Bank, Civ.App., 178 S.W. 593.
51 C.J. p 791 note 41.
Theory of money had and received is not available, it seems, to evade the effect of such invalidating statute and permit recovery of money received by the railroad as a result of an unauthorized issue.—Lumpkin

ply to securities issued prior to their enactment,[5] or to a note executed in renewal and extension of a prior note and not in discharge thereof,[6] or in respect of an indebtedness which does not constitute a lien on the property of the railroad company essential to, or of use in, the operation of the road.[7]

The nature and scope of authority or jurisdiction of the commission to regulate and control the incurrence of indebtedness or the issuance of evidences of indebtedness are measured by the terms of statute conferring such authority construed in accordance with the general rules of statutory construction.[8] The commission usually is vested with discretionary powers,[9] and on an application for approval it is its duty to determine whether as a matter of law it is empowered to approve a proposed issue.[10] Under a statute so providing, it has authority to pass on the terms of the securities for which approval is sought,[11] and on the amount,[12] including the elements which may properly be considered in determining the amount.[13] The commission has no power to prevent the issuance of proposed securities for purposes for which the statute authorizes such issuance,[14] even though it may not agree with the company as to the wisdom of the business policy involved,[15] but it has power to ascertain whether the proposed issue is for such an authorized purpose[16] or whether the capital to be obtained is necessary and required for such purpose and will be used therefor.[17]

In giving effect either to general or specific statutory provisions governing the issuance of evidences of indebtedness, the courts have denied the authority of the state regulatory body to approve certain issues,[18] such as issues which would result in the capitalization of replacements of any physical property.[19] It has been held that an order of the public utilities commission authorizing the pledging of trust certificates, to be issued pursuant to an equipment trust agreement, is not objectionable as the creation of a double liability.[20] Under some statutes the commission may properly refuse authority to issue bonds where the railroad company has not obtained a certificate of convenience and necessity for the construction of the road.[21]

While in respect of a company operating an interstate railroad the right of a state through which it runs to ascertain whether any proposed issue of securities is bona fide has been recognized,[22] it has been held that such railroad company is not subject to the authority of the commission in respect of the financing of the entire system,[23] as where the moneys to be raised are to be expended beyond the limits of the state in the acquisition, extension, improvement, or maintenance of the facilities or terminals of the railroad.[24] However, the right of a company operating in several states to question the validity of a statutory requirement for the payment of fees in connection with a proceeding for the authorization of the issuance of securities, which it prosecuted without raising any objection as to the authority of the state commission to act in the matter, has been denied.[25]

The interstate commerce commission, on application by a newly organized railroad company for authority to issue securities to purchase the property

v. Brown, Tex.Com.App., 229 S.W. 498.

Statute applied to notes

Tex.—Davis v. Watertown Nat Bank, Civ.App., 178 S.W. 593
51 C.J. p 792 note 43.

5. Md.—Laird v. Baltimore, etc., R. Co., 88 A. 353, 121 Md. 193.

6. Tex.—Warren Cent. R. Co. v Texas Creosoting Co., Civ.App., 62 S.W.2d 691.

7. Tex.—Lumpkin v. Brown, Com. App., 229 S.W. 498.
51 C.J. p 793 note 42.

8. Commission held quasi-judicial tribunal

Mass.—Bulkeley v. New York, etc., R. Co., 103 N.E. 1033, 216 Mass. 432.

9. Mass.—Boston, etc., R. Co v. New York Cent. R. Co., 153 N.E. 19, 256 Mass. 600.

10. Mass.—Bulkeley v. New York, etc., R. Co., 103 N.E. 1033, 216 Mass. 432.

11. Mass.—Bulkeley v. New York, etc., R. Co., supra.
51 C.J. p 792 note 49.

12. Ohio.—Pollitz v. Public Utilities Commission, 119 N.E. 507, 97 Ohio St. 191.
51 C.J. p 792 note 50.

13. Mass.—Boston, etc., R. Co. v. New York Cent. R. Co., 153 N.E. 19, 256 Mass. 600.
51 C.J. p 792 note 51.

14. N.Y.—People v. Stevens, 90 N.E. 60, 197 N.Y. 1.
51 C.J. p 792 note 52.

15. N.Y.—People v. Stevens, supra.
51 C.J. p 792 note 53.

16. N.Y.—People v. Stevens, supra.
51 C.J. p 792 note 54.

17. Kan.—Kansas City, etc., R. Co. v. Bristow, 167 P. 1138, 101 Kan. 557.
51 C.J. p 792 note 55.

18. Mass.—Bulkeley v. New York, etc., R. Co., 103 N.E. 1033, 216 Mass. 432, 439.
51 C.J. p 792 note 56.

19. Ohio.—Pollitz v Public Utilities Commission, 119 N.E. 507, 97 Ohio St. 191.
51 C.J. p 792 note 57.

20. Ohio.—Pollitz v. Public Utilities Commission, supra.
51 C.J. p 792 note 58.

21. Wis.—Wisconsin Southern R. Co v. State R Commission, 201 N.W. 244, 185 Wis. 313.

22. Md.—Laird v Baltimore, etc., R. Co., 88 A. 347, 348, 121 Md. 179, 47 L.R.A.,N.S., 1167, Ann.Cas.1915B 728.

23. Md.—Laird v. Baltimore, etc., R. Co., 88 A. 347, 348, 121 Md. 179, 47 L.R.A.,N.S., 1167, Ann.Cas.1915B 728.
51 C.J. p 793 note 61.

24. Md.—Laird v. Baltimore, etc., R. Co., 88 A. 347, 348, 121 Md. 179, 47 L.R.A.,N.S., 1167, Ann.Cas.1915B 728.

25. Mo.—Union Pac. R. Co. v. Public Service Commission, 187 S.W. 827, 268 Mo. 641.

of an old railroad at foreclosure sale, is not concerned with a reorganization plan involved,[26] but will pass merely on the propriety of exchanging new securities for the old property.[27]

Proceedings before commission. In a proceeding by a railroad company before the interstate commerce commission for the issuance of new securities, the authorities of the states through which the railroad passes,[28] and no one else,[29] may object to the issuance of such securities. In such a proceeding the commission need make only such investigation as it considers necessary,[30] which investigation may be informal.[31] Under some statutes the commission has authority to require proof of the necessity for the issuance of securities other than that afforded by the verified application.[32] Where statutory authority therefor exists, the commission may impose, and fix the amount of, a fee on the authorization of the issuance of evidences of indebtedness.[33]

Review. General rules governing the review by the courts of decisions of public service commissions, as discussed in Public Utilities § 64, have been applied with respect to review of orders regulating or controlling the indebtedness or securities of railroad companies.[34] Accordingly, it has been held that a decision will not be set aside unless it appears from a consideration of the record that the decision was unreasonable or unlawful.[35] On the petition of stockholders of a railroad company who were not parties to a proceeding by the company to obtain authorization for a guaranty of bonds of another company, it has been held that the court will decide the question as to whether the guaranty was ultra vires.[36]

Objection by stockholders. Where statutory authority therefor exists, a stockholder has a right to invoke the protection of the court against a proposed issue of evidences of indebtedness after hearing and approval of the issue by the public utilities commission.[37]

Jurisdiction of equity. Where the remedy at law by appealing from an order of the commission is inadequate and incomplete, a court of competent jurisdiction may in a proper case issue an injunction modifying, suspending, staying, or annulling an order of the commission regulating or controlling the indebtedness or securities of a railroad company.[38]

§ 246. Borrowing Money

As a general rule, unless restrained by statute, a railroad company has power to borrow money for lawful or proper purposes.

In accordance with general rules with respect to corporations and subject to applicable exceptions and limitations, as discussed in Corporations § 1144, unless restrained by statute[39] a railroad company has power to borrow money for lawful or proper purposes,[40] including purposes incidental to its organization and operation,[41] such as for the purpose of constructing its road,[42] and in general to make and issue therefor negotiable paper, as discussed infra § 247, bonds, infra §§ 248-253, and mortgages, infra §§ 282-293. The power to borrow for corporate purposes has sometimes expressly been conferred by statute.[43] The power to borrow, however, may be subject to statutory restrictions,[44] such as that the company cannot borrow at a rate of interest exceeding a certain per cent, as discussed infra § 308. If money for the use of the railroad

26. U.S.—Miller v. U. S., D.C.N.Y., 277 F. 95.

27. U.S.—Miller v. U. S., supra. 51 C.J. p. 793 note 65.

28. U.S.—Miller v. U. S., supra.

29. U.S.—Miller v. U. S., supra. 51 C.J. p. 793 note 68.

30. U.S.—Miller v. U. S., supra.

31. U.S.—Miller v. U. S., supra.

32. Kan.—Kansas City, etc., R. Co. v. Bristow, 167 P. 1138, 101 Kan. 557.

33. **Fee assessed by commission held proper**
Mo.—Union Pac. R. Co. v. Public Service Commission, 187 S.W. 827, 268 Mo. 641.

34. **An appellant who did not raise a question as to the standard adopted by the commission in determining matters affecting the amount of the issue cannot question such standard,** at least where the reasons assigned by such body for its decision do not indicate the standard adopted.—Boston, etc., R. Co. v. New York Cent. R. Co., 153 N.E. 19, 256 Mass. 600—51 C.J. p. 793 note 74.

35. Ohio.—Pollitz v. Public Utilities Commission, 119 N.E. 507, 97 Ohio St. 191.
51 C.J. p. 793 note 75.

36. Mich.—Pollitz v. State R. Commission, 172 N.W. 611, 205 Mich. 549.

37. **Issue of convertible debentures and stock**
Mass.—Bulkeley v. New York, etc., R. Co., 103 N.E. 1033, 216 Mass. 432.

38. Pa.—York Rys. Co. v. Driscoll, 200 A. 864, 331 Pa. 193.
County court held to have jurisdiction
Pa.—York Rys. Co. v. Driscoll, supra—Beaver Valley Water Co. v. Driscoll, Com.Pl., 51 Dauph.Co. 105.

39. Ala.—Kelly v. Alabama, etc., R. Co., 58 Ala. 489.
Mass.—Brown v. Boston, etc., R. Co., 124 N.E. 322, 233 Mass. 502.

40. Mass.—Brown v. Boston, etc., R. Co., supra.
51 C.J. p. 793 note 82.

41. Pa.—Gloninger v. Pittsburgh, etc., R. Co., 21 A. 211, 139 Pa. 13.
51 C.J. p. 793 note 83.

42. Pa.—Gloninger v. Pittsburgh, etc., R. Co., supra.
51 C.J. p. 793 note 84.

43. N.Y.—Thompson v. Erie R. Co., 11 Abb.Pr.,N.S., 188, 42 How.Pr. 68.
51 C.J. p. 793 note 88.

44. U.S.—Memphis & L. R. Co. v. Dow, Ark., 7 S.Ct. 432, 120 U.S. 287, 30 L.Ed. 595.
Amount of indebtedness in general see supra § 244.

company is borrowed on the personal credit of an officer or agent of the company, and the lender accepts such personal responsibility, he cannot afterward make the company his debtor therefor.[45]

§ 247. Making, Accepting, and Indorsing Negotiable Instruments

As incidental to its other powers, a railroad company ordinarily has power to make, accept, and indorse negotiable paper in payment or settlement of debts or obligations which it may incur in respect of any matter within the purposes of its creation.

As incidental to its power to borrow money and to incur other indebtedness, and in accordance with rules with respect to corporations in general, and subject to applicable exceptions and limitations, a railroad company has power to make, accept, and indorse negotiable paper in payment or settlement of debts or obligations which it may incur in the course of its legitimate business or in respect of any matter within the purposes of its creation.[46] Under this power a railroad company may make and issue negotiable bonds[47] or negotiable certificates payable in money or bonds.[48] The power to issue notes is sometimes expressly conferred by statute.[49] In the absence of statutory authorization, a railroad company has no general power to make or accept negotiable instruments for purposes foreign to its creation,[50] such as accommodation paper to aid in an undertaking not contemplated by its charter.[51]

§ 248. Making and Issuing Bonds

The power of a railroad company to issue bonds, what law governs their validity, their form, requisites and validity generally, the negotiation or disposal thereof, and the rights of bondholders generally are considered infra §§ 249-253.

Examine Pocket Parts for later cases.

§ 249. —— Power to Issue

A railroad company may have express power to make and issue bonds, or such power may be implied from its other powers.

A railroad company may have express power to make and issue bonds by virtue of its charter or governing statutes,[52] or, as in the case of other private corporations, discussed in Corporations § 1147, this power may be implied from its power to mortgage its property[53] or borrow money,[54] or from its power to incur any other indebtedness in carrying out the legitimate purposes of its creation,[55] and this includes the power to issue them in exchange for bonds previously issued.[56]

§ 250. —— What Law Governs

Bonds valid where issued have been held to be valid everywhere, and it has been held that it will be presumed that the parties contracted with reference to the laws of the state where payment is called for.

Where a railroad extends through two or more states and is incorporated by the laws of each, it has been held that an issue of bonds, if valid under the laws of the state in which they are issued, is valid everywhere, notwithstanding they would have been invalid if issued under the laws of one or more of such other states through which the road runs.[57] Where railroad bonds are payable in a state other than that in which the railroad is incorporated, it has been held that it will be presumed that the parties contracted with reference to the laws of the state where payment is called for, in the absence of anything in the bonds evincing an intent to the contrary.[58]

§ 251. —— Form, Requisites, and Validity

a. In general

b. Amount of issue

45. Va.—Strider v. Winchester, etc., R. Co., 21 Gratt. 440, 62 Va. 440.

46. U.S.—Missouri Pac. R. Co. v. Texas & P. R. Co., C.C.A.La., 282 F. 61
51 C.J. p. 794 note 99.
Approval or consent of commission see supra § 245.
General power of corporations to make and indorse negotiable instruments see Corporations §§ 1224-1229.
Power to:
Borrow money see supra § 246.
Incur indebtedness see supra § 243.

47. N.Y.—Miller v. New York, etc., R. Co., 8 Abb.Pr. 431, 18 How.Pr. 374.
Issuance of bonds in general see infra §§ 248-253.

48. N.Y.—Pusey v. New York West Line R. Co., 14 Abb.Pr.,N.S., 434.
51 C.J. p. 794 note 2.

49. U.S.—Metropolitan Trust Co. v. Railroad Equipment Co., Ohio, 108 F. 913, 48 C.C.A. 135.
51 C.J. p. 794 note 3.

50. Ga.—Brinson R. Co. v. Springfield Exch. Bank, 85 S.E. 634, 16 Ga. App. 425.
51 C.J. p. 794 note 5.

51. Ind.—Smead v. Indianapolis, etc., R. Co., 11 Ind. 104.
51 C.J. p. 794 note 6.

52. N.Y.—Thompson v. Erie R. Co., 11 Abb.Pr.,N.S., 188, 42 How.Pr. 68.
51 C.J. p. 795 note 10.

53. Pa.—Gloninger v. Pittsburgh, etc., R. Co., 21 A. 211, 139 Pa. 13.

54. Ala.—Savannah, etc., R. Co. v. Lancaster, 62 Ala. 555
N.Y.—Miller v. New York, etc., R. Co., 8 Abb.Pr. 431, 18 How.Pr. 374.

55. Conn.—Mead v. New York, etc., R. Co., 45 Conn. 199
51 C.J. p. 795 note 14.

56. Conn.—Mead v. New York, etc., R. Co., supra.

57. Va.—Atwood v. Shenandoah Valley R. Co., 9 S.E. 748, 85 Va. 966.
51 C.J. p. 795 note 16

58. U.S.—Mississippi Val. Trust Co. v. Oklahoma Ry. Co., C.C.A.Okl., 156 F.2d 283.

c. Certification and delivery
d. Acquisition of bonds by directors

a. In General

Ordinarily a railroad company may issue its bonds in any form or on any conditions it deems proper, as long as they are not unauthorized and there is a compliance with all charter, statutory, or constitutional requirements in respect of the issuance of bonds.

Ordinarily a railroad company may issue its bonds in any form or on any conditions it deems proper, as long as they are not unauthorized[59] and the transaction possesses the essential and distinguishing qualities of a loan.[60] It is necessary that there be a compliance with all the charter, statutory, or constitutional requirements in respect of the issuance of bonds,[61] such as that they be issued within the restrictions and only for the purposes prescribed by such provisions,[62] although in respect of bona fide holders such bonds may be valid, although invalid as between the original parties, as considered infra § 253. The validity of bonds issued without any substantial consideration has been denied under general principles of equity.[63] A constitutional or statutory provision which prohibits railroad companies from issuing stock or bonds except for money, labor, or property actually received and applied to the purposes for which the company was created does not interfere with the usual methods of raising money by issuing stock and bonds for legitimate corporate purposes,[64] such as for the purpose of raising money to pay debts incurred in constructing and equipping its road,[65] nor does it prohibit the company from delivering bonds as advance payment on a contract obligation of as great value as the bonds.[66] An issue of bonds is not invalid as against the company merely because of some irregularity or fraud which does not affect the liability of the company as principal debtor.[67]

Invalidity of security. Bonds secured by mortgage are not necessarily invalid because of the invalidity of the security for the bonds,[68] as where they are secured by a mortgage and there was a want of power to execute the mortgage.[69]

Waiver and estoppel A railroad company may be estopped by its conduct to deny the validity of an issue of bonds.[70] It has been held that a subsequent creditor of a railroad company cannot attack the validity of bonds on grounds which the railroad company has waived or does not question.[71]

b. Amount of Issue

In general a railroad company may not issue bonds in an amount in excess of that fixed by its charter or other governing statute.

In accordance with general rules and subject to applicable qualifications and limitations, as discussed in Corporations § 1147, in general a railroad corporation may not issue bonds in an amount in excess of that fixed by its charter or other governing statute,[72] and ordinarily bonds are invalid if

59. N.J.—Willoughby v. Chicago Junction R., etc., Co., 25 A. 277, 50 N.J.Eq. 656
51 C.J. p 795 note 18.
Form, terms, and validity of corporate bonds generally see Corporations § 1150.

Provisions held sufficient to effect incorporation of trust deed provisions by reference into obligations of bonds.—Globe Indemnity Co. v. Mississippi Valley-Merchants' State Trust Co., 41 S.W.2d 962, 226 Mo.App. 92.

60. **Irredeemable bonds entitling holder to share of earnings**
A railroad company has no power, under its general authority to borrow money, to issue irredeemable or perpetual bonds entitling the holder merely to a share of earnings after payment of a certain dividend to stockholders, since such transaction lacks the essential qualities of a loan.—Taylor v. Philadelphia & R. R. Co., C.C.Pa., 7 F. 386, 14 Phila. 479—
51 C.J. p 796 note 35.

61. U.S.—Union Trust & Savings Bank v. Southern Tract. Co., C.C.A. Ill., 283 F. 50, certiorari denied 43 S.Ct. 166, 260 U.S. 744, 67 L.Ed. 492.

62. U.S.—Kemble v. Wilmington & N. R. Co., C.C.Pa., 14 F.Cas.No. 7,684, 13 Phila. 469, 5 Wkly.N.C. 172.
51 C.J. p 795 note 21.

63. U.S.—Union Trust & Savings Bank v. Southern Tract Co., C.C.A.Ill., 283 F. 50, certiorari denied 43 S.Ct. 166, 260 U.S. 744, 67 L.Ed. 492.
Price and consideration in general see infra § 252.

64. U.S.—Memphis & L. R. R. Co. v. Dow, Ark., 7 S.Ct. 482, 120 U.S. 287, 30 L.Ed. 595.
Ill.—Peoria, etc., R. Co. v. Thompson, 103 Ill. 187.
51 C.J. p 795 note 24.

65. Ill.—Peoria, etc., R. Co. v. Thompson, supra.
Pa.—Commonwealth v. Lehigh Ave. R. Co., 18 A. 414, 498, 139 Pa. 405, 5 L.R.A. 367.

66. Ill.—Peoria, etc., R. Co. v. Thompson, 103 Ill. 187.
N.Y.—Hudson River, etc., R. Co. v. Hanfield, 55 N.Y.S. 877, 36 App. Div. 605.

67. Ala.—Kelly v. Alabama, etc., R. Co., 58 Ala. 489.
51 C.J. p 795 note 27.

68. Cal.—Illinois Trust, etc., Bank v. Pacific R. Co., 49 P. 197, 117 Cal. 332.

69. Cal.—Illinois Trust, etc., Bank v. Pacific R. Co., 49 P. 197, 117 Cal. 332
Pa.—Philadelphia, etc., R. Co. v. Lewis, 33 Pa. 33, 75 Am.D. 574.

70. Ohio—Shoemaker v. Dayton, etc., R. Co., 10 Ohio Dec., Reprint, 252, 19 Cinc.L.Bul. 322.
51 C.J. p 797 note 51.

71. U.S.—Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., Ohio, 95 F. 497, 36 C.C.A. 155, 96 F. 784, 37 C.C.A. 587, certiorari denied 20 S.Ct. 383, 176 U.S. 219, 44 L.Ed. 442.
51 C.J. p 797 note 52.

72. Iowa—Barnes v. Eastern Iowa R. Co., 134 N.W. 90, 136 N.W. 1053, 155 Iowa 721
51 C.J. p 798 note 33.
Amount of indebtedness in general see supra § 244.

for an amount in excess of the limit so prescribed.[73] However, according to some authorities, where the corporation has acted within the scope of its general powers, bonds are not void for all purposes merely because the authorized amount is exceeded.[74] Where a statute authorizes the issuance of bonds convertible into stock, it has been held that the fact that the authorized amount of stock may be exceeded by a particular issue of such convertible bonds does not render the bonds invalid;[75] and, where bonds are issued in good faith to pay or secure some legitimate corporate indebtedness, they are not rendered invalid by the mere fact that they are issued for a sum in excess of the indebtedness which they are issued to secure.[76]

c. Certification and Delivery

As a general rule a bond does not become a valid obligation of a railroad company until it is actually delivered for a valuable consideration, and, where the bonds are secured by mortgage, certification of the trustee may be required.

In accordance with the general rule, governing corporate bonds, discussed in Corporations § 1157 a bond, although completely executed in due form to be used as security, does not become a valid obligation of a railroad company until it is actually delivered for a valuable consideration.[77] Where bonds are secured by mortgage, the trustee thereunder can be compelled to deliver and certify them only as provided for in the mortgage.[78] In the absence of a certification by the trustee, a bond is invalid in the hands of the original holder where the bond contains a provision that it shall not be valid until certified by the trustee,[79] as is a bond issued in disregard of a provision of the contract specifying the evidence on which the certification by the trustee shall be based.[80]

d. Acquisition of Bonds by Directors

In the absence of statutory restriction, a director of a railroad corporation is not prevented under all circumstances from acquiring ownership of company bonds.

In the absence of any statutory restriction, a director of a railroad corporation is not prevented under all circumstances, merely by his relation to the corporation, from acquiring ownership of its bonds secured by a mortgage.[81] A statutory provision that bonds purchased from a corporation by a director of such corporation, either directly or indirectly, for less than the par value, shall be null and void has been construed as rendering bonds so purchased voidable only,[82] and subsequent creditors may not attack the validity of such bonds in the hands of directors where it is not questioned by the corporation or its stockholders.[83] Such statute applies only to original sales made by the company and does not affect the validity of bonds in which a director has acquired an interest through a third person.[84]

§ 252. —— Negotiation or Disposal

a. In general
b. Pledge
c. Price and consideration
d. Rights of creditors against subscribers to bonds

a. In General

In the absence of special statutes, general rules applicable to the sale or transfer of corporate bonds apply to the sale or disposal of railroad bonds.

In the absence of special statutes, general rules applicable to the sale or transfer of corporate bonds, discussed in Corporations §§ 1155–1160, apply to the sale or disposal of bonds of a railroad company.[85] However, the disposition or sale of such bonds may

73. N.J.—Baker v. Guarantee Trust, etc., Co., Ch., 31 A. 174.
51 C.J. p 796 note 34.

74. U.S.—Gibson v. Kansas City Refining Co., C.C.A.Mo., 32 F.2d 658.
51 C.J. p 796 note 36.
Protection of bona fide holders see infra § 253.

75. N.Y.—Belmont v. Erie R. Co., 52 Barb. 637—Ramsey v. Erie R. Co., 7 Abb.Pr.,N.S., 156, 38 How.Pr. 193.

76. U.S.—Sioux City, O'N. & W. R. Co. v. Manhattan Trust Co., Neb., 92 F. 428, 34 C.C.A. 431.
51 C.J. p 796 note 38.

77. N.Y.—Zimmermann v. Timmermann, 86 N.E. 540, 193 N.Y. 486.

78. N.Y.—Lehigh, etc., R. Co. v. Central Trust Co., 117 N.Y.S. 595, 133 App.Div. 304, affirmed 93 N.E. 376, 199 N.Y. 599.
51 C.J. p 796 note 42.

79. U.S.—Stewart v. Florida, G. & W. R. Co., Fla., 255 F. 616, 166 C.C.A. 650.
Certification of corporate bonds in general see Corporations § 1154.

80. U.S.—Stewart v. Florida G. & W. R. Co., supra.
51 C.J. p 796 note 44.

81. N.Y.—Harpending v. Munson, 91 N.Y. 650.

82. U.S.—Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., Ohio, 95 F. 497, 36 C.C.A. 155, 96 F. 784, 37 C.C.A. 587, certiorari denied 20 S.Ct. 383, 176 U.S. 219, 44 L.Ed. 442.

83. U.S.—Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., supra.
51 C.J. p 797 note 49.

84. U.S.—Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., supra.
51 C.J. p 797 note 50.

85. Representation by seller that "the road is in successful operation and earning net more than the interest on all its bonds" has been held to be a representation, not that the road was earning that amount at the exact date of the representation, but that the road was then on a paying basis and was steadily earning net more than the interest on all its bonds.—Blake v. Watson, 45 Conn. 323, 29 Am.R. 683.

be regulated by special statute,[86] or by action taken by a public regulatory body pursuant to statutory authority.[87]

Negotiability. Bonds issued by a railroad payable to bearer have been held to be negotiable instruments.[88] If, however, it appears to be the intention to burden a railroad bond with conditions of a collateral instrument it is not negotiable.[89]

Contracts. Railroad mortgage bondholders who subscribe to its debenture bonds, agreeing to pay specified portions of their subscription as called for, in effect agree to lend the company money and receive the bonds as security.[90] Where a contract for the purchase of railroad bonds provided for the submission to the purchaser's attorney of certain transactions incident to the purchase for approval by such attorney, the purchaser is not liable for his refusal to carry out the agreement where his attorney in good faith refused to give his approval.[91] It has been held that an agreement to subscribe to bonds to be issued in the future by a railroad company is unenforceable where no consideration for the promise to subscribe is made to appear.[92]

Authority of officers. The president of a railroad company may be vested with authority to make usual and reasonable contracts for the sale of bonds,[93] and where such bonds, complete in form, and negotiable by delivery, are placed in the custody of the president or other managing officer of the company he thereby becomes clothed with an apparent authority to dispose of them.[94]

b. Pledge

General authority to issue and dispose of railroad bonds for corporate purposes authorizes a pledge of them to obtain money for corporate purposes or to secure a corporate obligation.

General authority to issue and dispose of railroad bonds for corporate purposes authorizes a pledge of them to obtain money for corporate purposes[95] or to secure a corporate liability or obligation.[96] Where a statute so requires, the authorization of a public regulatory body is essential to a valid pledge of bonds by a railroad,[97] and the right to pledge may be restricted by the terms of a collateral mortgage.[98] The trustee under a mortgage given by a railroad company to secure its bonds is not a neces-

86. Statute expressly authorizing sale of bonds by railroad
Ohio—Ashland Bank v. Jones, 16 Ohio St. 145.
51 C.J. p 797 note 58.

87. Provision barring sale held not to create trust
U.S.—In re Chicago & N. W. Ry. Co., D.C.Ill., 35 F.Supp 230, affirmed, C.C.A., 126 F.2d 351, certiorari denied Chicago & N. W. R. Co. v. Mutual Sav. Bank Group Committee, 63 S.Ct. 987, 318 U.S. 793, 87 L.Ed. 1158, rehearing denied 63 S.Ct 1160, 319 U.S. 781, 87 L.Ed. 1726, certiorari denied Susman v Mutual Sav. Bank Group Committee, 63 S.Ct. 987, 318 U.S 793, 87 L.Ed 1158, rehearing denied 63 S.Ct. 1161, 319 U.S. 781, 87 L.Ed. 1726, certiorari denied 63 S.Ct. 988, 318 U.S. 793, 87 L.Ed 1158, rehearing denied 63 S.Ct. 1161, 319 U.S. 781, 87 L.Ed. 1726, certiorari denied City Bank Farmers Trust Co. v Life Ins. Group Committee, 63 S.Ct 988, 318 U.S. 793, 87 L.Ed. 1158, certiorari denied Irving Trust Co v. Mutual Sav. Bank Group Committee, 63 S.Ct. 989, 318 U.S. 793, 87 L.Ed. 1158, rehearing denied 63 S.Ct. 1161, 319 U.S. 781, 87 L.Ed 1726, certiorari denied Protective Committee for Holders of Common Stock v. Mutual Sav. Bank Group Committee, 63 S.Ct. 989, 318 U.S. 793, 87 L.Ed. 1158, certiorari denied Protective Committee for Holders of Preferred Stock v. Mutual Sav. Bank Group Committee, 63 S.Ct. 990, 318 U.S 793, 87 L.Ed 1158.

88. N.Y.—Frank v. New York, C. & St. L. R. Co., 24 N.Y.S.2d 846, 175 Misc. 902, affirmed 24 N.Y.S.2d 854, motion denied New York, C. & St L. R. Co. v. Frank, 61 S.Ct. 729, affirmed 61 S.Ct. 833, 313 U.S 535, 85 L.Ed. 1507, vacated on other grounds 61 S.Ct 938, 313 U.S. 596, 85 L.Ed. 1550, affirmed 62 S.Ct. 258, 314 U.S. 360, 86 L.Ed. 277.
Negotiability of corporate bonds generally see Corporations § 1148.

89. Where trust deed precluding bondholders from suing on bonds was made part of bonds and interest coupons by reference, the bonds and coupons were nonnegotiable.
U.S.—Mississippi Val. Trust Co. v. Oklahoma Ry. Co., C.C.A.Okl., 156 F.2d 283.
Mo.—Globe Indemnity Co. v. Mississippi Valley-Merchants' State Trust Co., 41 S.W.2d 962, 226 Mo. App. 92.

90. Mass.—Pettibone v. Toledo, etc., R. Co., 19 N.E. 337, 148 Mass. 411, 1 L.R.A. 787.

91. N.Y.—Atkins v. Trowbridge, 148 N.Y.S. 181, 162 App.Div. 629.
51 C.J. p 797 note 60.

92. Pa.—Newport & S. V. R. Co v. Seager, 7 Pa.Super. 268.

93. N.Y.—Seligman v. South, etc., Alabama R. Co., 67 N.Y. 584.
51 C.J. p 797 note 62.

94. Ohio—Pittsburgh, etc., R. Co. v Lynde, 44 N.E. 596, 55 Ohio St. 23, affirmed 19 S.Ct. 238, 172 U.S. 493, 43 L.Ed 528.

95. U.S.—Farmers' L. & T. Co. v. Toledo & S. H. R. Co., Mich., 54 F. 759, 4 C.C.A. 561
51 C.J. p 797 note 66.

96. U.S.—Central Trust Co of New York v. Missouri, K. & T. Ry. Co., D.C.Mo., 247 F. 586.
51 C.J. p 797 note 67.

97. Sufficient authorization
Authorization given by commission to railroad to pledge bonds to government subject to government's right under former pledge, constituted authorization for first pledge—Guaranty Trust Co. of New York v. Minneapolis & St. L. R. Co., C.C.A. Minn., 52 F.2d 418.
Authorization held not required
U.S.—Guaranty Trust Co of New York v. Minneapolis & St. L. R. Co., supra.

98. Pledge held good in equity
Where it was provided in mortgage that certain quantity of bonds should be reserved and that they should be issued in exchange for prior bonds when presented, pledge by railroad of bonds as security for note which was used to take up prior bonds would be regarded as good in equity because effecting the same result as an exchange, although the form of achieving that result was improper.—Ewen v. Peoria & E. Ry. Co., D.C. N.Y., 34 F.Supp. 332, certiorari denied 61 S.Ct. 138, 311 U.S. 700, 85 L. Ed. 454—Gilbert v Peoria & E. R. Co., D.C.N.Y., 34 F.Supp 332, certiorari denied 61 S.Ct. 138, 311 U.S 700, 85 L.Ed. 454.

sary party to a suit to determine the validity of a pledge of the bonds by the company in which there is no controversy as to the validity of the mortgage or as to the enforcement of any right or remedy under such mortgage [99]

c. Price and Consideration

A sale of railroad bonds at less than par value is illegal where restrained or prohibited by charter or statutory provisions.

Where statutory authority therefor exists, bonds may be disposed of at less than par value,[1] and even in the absence of such statutory recognition the validity of bonds sold at a small discount has been upheld to the extent of the amount paid.[2] A railroad company authorized to sell its bonds at a discount may receive in payment therefor construction material as well as cash.[3] On the other hand, a sale at a discount is illegal where it is restrained or prohibited by charter or statutory provisions.[4] A statutory provision that bonds may be sold, negotiated, mortgaged, or pledged at not less than a certain per cent on the dollar has been construed to render invalid as to an excess a pledge of bonds to secure certain notes where the amount received for the notes was less than such specified per cent of the total par value of the pledged bonds.[5]

d. Rights of Creditors against Subscribers to Bonds

Persons subscribing to railroad bonds are not liable to creditors of the company for the amounts unpaid on such subscriptions.

Where railroad mortgage bondholders subscribe to its debenture bonds and agree to pay specified portions of their subscriptions as called for, the transaction does not create a trust in favor of creditors of the railroad company,[6] and such bondholders do not thereby become liable to creditors of the company for the amounts unpaid on such agreement on the analogy of the liability of stockholders to the extent of unpaid stock subscriptions [7] Likewise, where the agreement is executory, such creditors have no remedy in equity to reach and apply the amount so due as property belonging to the debtor.[8]

§ 253. —— Rights of Bondholders Generally

a. General rules
b. Bona fide holders; notice
c. Modification of contract by reorganization plan
d. Powers, acts, and proceedings of committees or agents for bondholders
e. Exchange or conversion of bonds

a. General Rules

General rules as to the rights of purchasers or pledgees of bonds apply to purchasers or pledgees of railroad bonds.

The general rules as to the rights of a purchaser or pledgee of bonds apply to purchasers or pledgees of bonds of a railroad company.[9] These rights may be varied by the special contract under which the bonds are acquired.[10] In the absence of the

99. U.S.—Pigeon River R. Co. v. Champion Fibre Co., C.C.A.N.C., 280 F. 557, certiorari denied 43 S. Ct. 14, 260 U.S. 724, 67 L.Ed. 482.

1. Ohio.—Coe v. Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am.D. 518.
51 C.J. p. 798 note 70.

2. Tex.—Northside R. Co. v. Worthington, 30 S.W. 1055, 88 Tex. 562, 53 Am.S.R. 778.

3. Ohio.—Coe v. Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am.D. 518.

4. N.C.—Craven v. Atlantic, etc., R. Co., 77 N.C. 289.

5. U.S.—Central Trust Co. of New York v. Wheeling & L. E. R. Co., D.C.Ohio, 211 F. 515

6. Mass.—Pettibone v. Toledo, etc., R. Co., 19 N.E. 337, 148 Mass. 411, 1 L.R.A. 787
51 C.J. p. 798 note 75.

7. Mass.—Pettibone v. Toledo, etc., R. Co., supra.

8. Mass.—Pettibone v. Toledo, etc., R. Co., supra.
51 C.J. p. 798 note 77.

9. U.S.—Wade v. Chicago, S. & St. L. R. Co., Ill., 13 S.Ct. 892, 149 U.S. 327, 37 L.Ed. 755.
51 C.J. p. 798 note 80.
Individual action by bondholder on bond or coupon see infra § 312.
Priorities between bondholders see infra § 306.
Rights of bondholders:
As to trustee under mortgage see infra § 293.
In respect of lease of road see supra § 222
On reorganization after foreclosure sale see infra § 340.
Right to interest see infra §§ 308, 309.
Rights and liabilities of parties:
Generally under pledge see Pledges §§ 29–42.
To bond:
Generally see Bonds §§ 70–87
Of corporation generally see Corporations §§ 1161–1164, 1192.

Where corporate action was necessary to fix amount due on railroad bonds which did not carry a fixed rate of interest but were entitled to share in net earnings of corporation, declaration of amounts payable out of net earnings was discretionary with directors and not mandatory—Williams v. Green Bay & W. R. Co., D.C.N.Y., 68 F.Supp. 509

Bonds of consolidated company

Where railroads consolidated under statute, purchasers of bonds of the consolidated railroad must be presumed to have known the law and to have purchased securities in the light of statutory provision that the constituent railroads should remain in being for purpose of meeting obligations of creditors and lienors—Smith v. Pacific Improvement Co., 172 N.Y.S. 65, 104 Misc. 481.

Rights against parent company

The holders of bonds issued by a railroad company, the proceeds of which were used for the construction of its road, are not creditors legally or equitably of another corporation which owned the majority of the stock of the railroad company—Male v. Atchison, T. & S. F. Ry. Co., 129 N.E. 458, 230 N.Y. 158, 15 A.L.R. 1098.

10. U.S.—McMurray v. Moran, Nev., 10 S.Ct. 427, 134 U.S. 150, 33 L.Ed. 814
51 C.J. p. 799 note 81.

bondholders' consent, the railroad company, after bonds secured by a mortgage have been issued, cannot by contract confer on a third person the right to share with the bondholders in the proceeds of the mortgaged property,[11] nor in general can it, by an agreement with one who takes its bonds, give such taker rights prejudicial to other holders of the same series.[12] The right of holders of bonds to attack an agreement between various companies, made prior to the issuance of such bonds and in furtherance of which such bonds were issued, has been denied[13]

Mutual rights. In accordance with general rules and subject to applicable limitations and exceptions, in the case of bonds secured by a mortgage, in general a particular bondholder is entitled to no rights superior to those of other bondholders of the same class[14] or of others in interest,[15] and, in the absence of authority contained in a statute or in a provision of the mortgage, a majority of the bondholders cannot take any action which will bind a minority without the consent of the latter.[16]

Rights affected by provisions of mortgage or trust deed. In accordance with general rules, the rights of the holders of bonds secured by mortgage are governed to some extent by the provisions of the mortgage or trust deed[17] especially where, by express reference, the terms of the mortgage or trust deed are incorporated into the bond.[18]

Stock pledged as security for bonds. A railroad company issuing bonds secured by a pledge of stock of another company under its management as majority stockholder is under a fiduciary obligation, which its bondholders may enforce, to handle honestly the affairs of each company and to exercise honest judgment and good faith to preserve the stock interest inviolate.[19]

Right of bondholders to register and vote at corporate meetings. General rules as to the right of bondholders to vote at stockholders' meetings, discussed in Corporations § 548, apply in the case of railroad companies,[20] and the rights of bondholders in this respect are regulated by their contracts and the governing statutes[21] The right to vote cannot be given to bondholders where it is inconsistent with, or contrary, to the constitution or the railroad company's charter or other governing statute[22]

b. Bona Fide Holders; Notice

Negotiable railroad bonds, valid on their face, are good in the hands of bona fide purchasers for value as against secret equities and defenses otherwise available to the railroad company or others.

Negotiable railroad bonds, valid on their face, are good in the hands of bona fide purchasers for value as against secret equities and defenses otherwise available to the railroad company or others.[23] This is true with respect to defects or irregularities in their issuance or application such as to make them voidable or inoperative in the hands of the original taker.[24] Such a holder, in the absence of notice to the contrary, has a right to assume that all charter

Extension of maturity of prior bonds held not to constitute default under terms of junior bonds—Fidelity & Columbia Trust Co v. Louisville Ry. Co, 81 S.W.2d 896, 258 Ky 817.

11. Pa—Fidelity Ins., etc, Co. v. Western Pennsylvania, etc., R Co, 21 A. 21, 138 Pa. 494, 21 Am S R 914.
51 C.J. p 799 note 82

12. U.S.—Vose v Bronson, Wis, 6 Wall. 452, 18 L Ed. 846.

13. N.Y.—Male v. Atchison, etc, R Co, 166 N Y.S 593, 179 App.Div 87, affirmed 129 N.E 458, 230 N.Y 158, 15 A.L.R. 1098

14. U.S—Trust Co of America v Norfolk & S. R. Co., C C.Va., 174 F. 269
51 C.J. p 799 note 86.

15. U S—Trust Co. of America v. Norfolk & S. R. Co., supra.

16. N Y.—Hollister v. Stewart, 19 N E. 782, 111 N Y. 644.

17. Vt—Vermont, etc., R. Co. v. Vermont Cent R. Co., 34 Vt. 1

18. N.Y.—Watson v. Chicago, etc., R. Co, 155 N Y.S. 808, 169 App Div. 663
51 C J. p 799 notes 91–92.

19. U S—Comstock v. Group of Institutional Investors Holding First and Refunding Mortgage 5% Gold Bonds of Missouri Pac. R. Co, C C. A Mo., 163 F 2d 350, followed in New Orleans, L & S. F. Ry Co v Group of Institutional Investors Holding First and Refunding Mortgage 5% Gold Bonds of Missouri Pac R Co., 163 F.2d 358, and affirmed Comstock v. Group of Institutional Investors, etc., 68 S.Ct. 1454, 335 U S 211, 92 L Ed. 1911, rehearing denied 69 S.Ct. 12, 335 U. S. 837, 93 L.Ed. 389.

20. Ill—Durkee v. People, 40 N E. 626, 155 Ill. 354.

21. N.Y.—Hart v. Ogdensburg, etc., R. Co., 23 N.Y.S. 639, 69 Hun 378.
51 C.J. p 803 note 63.

22. Ill.—Durkee v. People, 40 N.E. 626, 155 Ill. 354, 46 Am.S.R. 340.
51 C J. p 803 note 64.

23. U.S.—Porter v. Pittsburg Bessemer Steel Co., Ind., 7 S.Ct. 1206, 122 U.S 267, 30 L.Ed. 1210.
51 C J. p 799 note 94.

Sale including coupons
If bonds are sold and pass into the hands of a bona fide holder on the supposition that the sale covers all coupons attached and detached and not paid and canceled, past-due detached coupons in the hands of one not an innocent purchaser for value must be considered as passing to such bona fide holder.—Chicago, etc., R. Co v. Turner, 44 N.W 174, 79 Mich. 133.

24. U S—Galveston, H. & H. R. Co v. Cowdrey, Tex, 11 Wall. 459, 20 L Ed. 199.
51 C J. p 799 note 95.

Information not matter of public record
Since the information with respect to the manner of issuing bonds was not a matter of public record, guarantor and consolidated corporation of which guarantor was one of the constituents would be estopped to set up any mere irregularity in issuance of bonds as against an innocent purchaser for value—Frank v. New York, C. & St. L R. Co., 24 N.Y S 2d 846, 175 Misc. 902, affirmed 24 N.Y. S.2d 854, motion denied New York, C. & St. L. R. Co. v. Frank, 61 S.Ct.

and statutory requirements in respect of the issuance and application of the bonds have been complied with.[25] In accordance with this principle, railroad bonds are valid in the hands of such a purchaser, although they were issued in violation of restrictions in the charter,[26] especially where such restrictions are for the benefit of stockholders and they make no objection to the issuance or application,[27] or although they were issued[28] or used[29] for an unauthorized purpose, or although the proceeds were misapplied.[30] On the other hand, holders of nonnegotiable railroad bonds take them subject to all defenses, legal and equitable, of the company which issues them.[31]

Who are bona fide holders; notice. In accordance with general rules and subject to applicable qualifications and limitations, a person is a bona fide holder of railroad bonds who takes the bonds before maturity for a valuable consideration, supposing them to be valid and having no notice of matters affecting validity or title.[32] Except where fraud in the inception of the bonds is shown,[33] the presumption is that holders of negotiable bonds are bona fide holders for value,[34] especially where the recitals on the face of the bonds lull and satisfy inquiry.[35] However, where persons to whom bonds are issued have notice of facts showing illegality, such bonds are void in their hands,[36] and a purchaser of such bonds is bound to take notice of all facts affecting their validity which are apparent on the face of the bonds,[37] or which the circumstances attending their issuance or transfer, and which are sufficient to excite suspicion in the mind of a prudent person, call to his attention.[38] While the bonds may, by reference, so incorporate the terms or conditions of the mortgage or trust deed given as security as to constitute notice to the purchaser of such terms or conditions,[39] it has been held that a mere reference in the bond to the terms and conditions of the mortgage might properly be regarded as referring to the terms and conditions affecting the security, and that it did not constitute constructive notice of terms affecting the contract as expressed in the bond.[40] Where the bonds are issued under a public statute, every purchaser of such bonds is put on inquiry as to the terms of such statute and is bound at his peril to take notice of such terms.[41]

Purchaser from bona fide holder. One acquiring railroad bonds from a bona fide holder acquires all the latter's rights and will be protected even though he himself is not a holder without notice.[42]

c. Modification of Contract by Reorganization Plan

Except where such authority is given by statute or by the instrument creating the trust, the trustee and some of the bondholders may not enter into an agreement or scheme of reorganization, without foreclosure, to the prejudice of nonassenting bondholders.

In accordance with general rules and subject to applicable qualifications and limitations, every railroad bondholder secured by a mortgage is equally entitled under the agreement made with him to be protected in all the advantages legally secured by it, as discussed supra subdivision a of this section, and, except where such authority is given by stat-

729, affirmed 61 S.Ct. 833, 313 U.S. 538, 85 L.Ed 1507, vacated on other grounds 61 S.Ct 938, 313 U.S 596, 85 L.Ed 1550, affirmed 62 S.Ct. 258, 314 U.S. 360, 86 L.Ed 277.

25. N.Y.—Ellsworth v. St. Louis, etc., R. Co., 98 N.Y. 553.

26. Pa.—Fidelity Ins., etc., Co. v. Western Pennsylvania, etc., R. Co., 21 A. 21, 138 Pa. 494, 21 Am.S.R. 911.
51 C.J. p 800 note 97.

27. Mo.—Tyrell v. Cairo, etc., R. Co., 7 Mo.App. 294

28. U.S.—Central Trust Co. of New York v. California & N. R. Co., C.C.Cal., 110 F. 70, affirmed 128 F. 882, 63 C.C.A. 226.
51 C.J. p 800 note 99.

29. U.S.—Blackburn v. Selma, M. & M. R. Co., C.C.Tenn., 3 F.Cas.No. 1,467, 2 Flipp 525.
51 C.J. p 800 note 1.

30. U.S.—Western Division of Western North Carolina R. Co. v. Drew, C.C.Fla., 29 F.Cas.No.17,434, 3 Woods 691, affirmed 103 U.S 118, 26 L.Ed 327
51 C.J. p 800 note 2.

31. N.Y.—Kissel v. Chicago, etc., R. Co., 89 N.Y.S 796, 44 Misc 156.
51 C.J. p 800 note 4

32. U.S.—Galveston, H. & H. R. Co. v. Cowdrey, Tex., 11 Wall. 459, 20 L.Ed. 199.
51 C.J. p 800 note 7.
Person taking bonds as security for preëxisting debts without any present parting with property or losing any right of action or otherwise was held entitled to status of innocent holder for value.—Baker v. Guarantee Trust, etc., Co., N.J.Ch., 31 A. 174.

33. Pa.—Shellenberger v. Altoona, etc., Connecting R. Co., 61 A. 1000, 212 Pa. 413, 108 Am.S.R. 876.
51 C.J. p 800 note 9.

34. Ala.—Gilman v. New Orleans, etc., R. Co., 72 Ala. 566.
Pa.—Shellenberger v. Altoona, etc., Connecting R. Co., 61 A. 1000, 212 Pa. 413, 108 Am.S.R. 876.

35. U.S.—Stanton v. Alabama & C. R. Co., C.C.Ala., 22 F.Cas.No. 13,297, 2 Woods 523.

36. Ill.—Chicago v. Cameron, 11 N.E. 899, 120 Ill. 447.
14a C.J. p 637 note 55 [a].

37. Tex.—Davis v. Watertown Nat. Bank, Civ.App., 178 S.W. 593.
51 C.J. p 800 note 13.

38. U.S.—Riggs v. Pennsylvania & N. E. R. Co., C.C.N.J., 16 F. 804.
51 C.J. p 800 note 14.

39. N.Y.—McClelland v. Norfolk Southern R. Co., 18 N.E. 237, 110 N.Y. 469, 6 Am.S.R. 397, 1 L.R.A. 299.
51 C.J. p 800 note 15.

40. Ohio—Raymond v. Spring Grove, etc., R. Co., 10 Ohio Dec., Reprint, 416, 21 Cinc.L.Bul 103.

41. N.Y.—Smith v. Pacific Improvement Co., 172 N.Y.S. 65, 104 Misc. 481.
51 C.J. p 801 note 17.

42. U.S.—Porter v. Pittsburg Bessemer Steel Co., Ind., 7 S.Ct. 1206, 122 U.S. 267, 30 L.Ed. 1210.

ute[43] or by the instrument creating the trust,[44] no agreement or scheme of reorganization, without foreclosure, may be entered into by a trustee and some of the bondholders which would prejudicially affect the rights of nonassenting bondholders.[45]

d. Powers, Acts, and Proceedings of Committees or Agents for Bondholders

The validity of acts or contracts of committees or agents for bondholders depends on the terms of the agreement by which authority is conferred on them, and generally the bondholders are bound by acts of such a committee within the scope of its authority.

Where the holders of railroad bonds enter into an agreement by which they authorize a committee or agent to represent them in exchanging or disposing of their bonds or in otherwise representing their rights, the validity of the acts or contracts of such committee or agent in representing them will depend on the terms of the agreement by which the authority is given,[46] and in general the bondholders are all bound by the acts of such a committee within the scope of its authority.[47] Where a reorganization committee is vested with title to bonds, and, in assuming to act under the agreement, uses the bonds for a purpose within the general scheme of the agreement, it is not chargeable as for a conversion merely because it disregards a detail of the agreement.[48]

e. Exchange or Conversion of Bonds

(1) In general

(2) Bonds convertible into stock

(1) In General

General rules as to exchange or conversion of issues apply to the exchange or conversion of railroad bonds, and governing constitutional and statutory provisions must be observed.

General rules as to exchange or conversion of issues, discussed in Corporations § 1166, apply to the exchange or conversion of railroad bonds,[49] and governing constitutional and statutory provisions must be observed.[50] The rights and liabilities of bondholders under an agreement providing for the refunding of their indebtedness and the substitution of new for old bonds depend on the terms of the agreement.[51] Thus, under an agreement by a holder of railroad bonds to surrender them on receipt of other new bonds, the railroad company is not bound to deliver the stipulated new bonds until all of the outstanding old bonds are surrendered to it,[52] or their absence accounted for and adequate security offered to indemnify the company against liability to any adverse claimant,[53] even though a decree entered by the consent of the parties has directed a cancellation of the old bonds and a discharge of the mortgage securing them.[54] Where the surrender of the old bonds is not dependent on any contingency, and is without reservation, the bondholder thereby gives up his lien under the old mortgage and takes one under the new mortgage.[55] A bondholder who has not consented to, and has not made, an exchange,

43. U.S.—Canada Southern R. Co v Gebhard, N.Y., 3 S.Ct. 363, 109 U.S. 527, 27 L.Ed. 1020.
51 C.J. p. 801 note 21.

44. U.S.—Sage v Iowa Cent R. Co., Iowa, 99 U.S. 334, 25 L.Ed. 394
N.Y.—Hollister v. Stewart, 19 N.E. 782, 111 N.Y. 644.

45. N.Y.—Hollister v. Stewart, supra.
51 C.J. p. 801 note 23.
Reorganization of railroads:
After foreclosure in general see infra §§ 339–342.
Engaged in interstate commerce under federal Bankruptcy Act see Bankruptcy §§ 881–962

46. N.Y.—Olcott v. Powers, 15 N.Y.S. 263.
51 C.J. p. 801 note 25.
Rights or authority of committee for bondholders purchasing on foreclosure see infra § 339

47. Vt.—Langdon v. Vermont, etc., R. Co., 53 Vt. 228.

Committee guilty of laches

Bondholders' committee, which failed during long period to assert invalidity of certain bonds was guilty of laches.—Guaranty Trust Co. of New York v. Minneapolis & St. L. R. Co., C.C.A.Minn., 52 F.2d 418

48. N.Y.—Industrial, etc., Trust v. Tod, 63 N.E. 285, 170 N.Y. 233.

49. **If a promise to exchange bonds is conditional,** a bondholder cannot acquire any rights under it unless the condition happens or is performed.—Lober v. Canadian Pac. Ry. Co., C.C.A.Minn., 151 F.2d 758, certiorari denied 66 S.Ct. 490, 326 U.S. 797, 90 L.Ed. 485.

Agreement construed as giving option requiring acceptance

U.S.—Lober v. Canadian Pac. Ry. Co., supra.

Third-party beneficiary contract; rescission

Where series of transactions and agreements between railroads under which one of railroads agreed to issue new series of bonds and to exchange old bonds for those of new series made it reasonably clear that holders of old bonds were intended to be third-party beneficiaries, in the absence of fraud or bad faith or other facts showing inequity, the railroads could legally rescind the agreement to exchange so as to destroy the right of bondholders to exchange; and, in passing on the legality of the rescission, equities existing at the time of the rescission, and not those which may have existed at some time prior thereto, are the ones which must be considered.—McCulloch v. Canadian Pac. Ry. Co., D.C.Minn., 53 F.Supp. 534

50. **Provisions prohibiting fictitious issue and increase of indebtedness**

N.Y.—Pollitz v. Wabash R. Co., 152 N.Y.S. 803, 167 App.Div. 619, reargument denied 154 N.Y.S. 1140, 170 App.Div. 903
51 C.J. p. 802 note 38

51. U.S.—Central Trust Co. of New York v. Marietta & N. G. R. Co., C.C.Ga., 73 F. 589.
51 C.J. p. 801 note 31.

52. U.S.—Union Pac. R. Co v. Stewart, Kan., 95 U.S. 279, 24 L.Ed. 431.

53. U.S.—Union Pac. R. Co. v. Stewart, supra.

54. U.S.—Union Pac. R. Co v. Stewart, supra.

55. U.S.—Union Trust Co. of New York v. Illinois Midland R. Co.,

may not claim any greater rights than those to which he is entitled under his old contract.[56] Merely because it is planned to substitute scrip convertible into bonds for certain outstanding coupons of prior bonds, the holders of such prior bonds acquire no right to have such scrip issued or any vested interest in a mortgage executed in order to secure such scrip and bonds, where the latter are destroyed without being issued and the mortgage released.[57]

Acceptance of receivers' certificates by bondholders does not, in the absence of an express or implied agreement to that effect, operate as a waiver of the lien of the bonds[58] or as a novation.[59]

Time for conversion. If the agreement giving an option to convert bonds does not specify the time when the option is to be exercised, it must be exercised within a reasonable time,[60] and if not seasonably asserted may be lost by laches.[61]

(2) Bonds Convertible into Stock

General rules as to the rights of holders of corporate bonds convertible into stock apply to railroad bonds thus convertible.

General rules as to the rights of holders of corporate bonds convertible into stock, discussed in Corporations § 1167, apply in respect of such convertible bonds of a railroad company.[62] A holder of such bonds is not a stockholder, or entitled to the rights of such, before a conversion has been made.[63] If the company refuses or fails to make the exchange on a proper demand, the bondholder may recover damages for a breach of the agreement[64] or in a proper case may sue in equity for specific performance.[65]

Who may exercise option. The option to convert is available only to the actual holder of the bonds, and only as long as he continues to be such.[66]

Time for conversion. This option must be exercised by the bondholder within the time specified in the controlling agreement,[67] or, if no time is specified, within a reasonable time.[68]

Effect of consolidation or transfer of railroad by sale or by purchase of stock. While it has been held that a holder of a bond convertible into stock may not be prevented by a consolidation from converting the bond,[69] there is authority for the view that in general the contract for conversion does not prevent the company from consolidating with another in such a way as to make performance impossible,[70] or from transferring its property to another company which acquires the stock of the transferor so as to make performance impossible,[71] and, where no arrangement is made for furnishing stock in the new company, a consolidation which terminates the existence of the old companies may be presumed to put an end to the right of bondholders to call for stock.[72] However, under particular statutes or agreements pursuant to which a consolidation was effected, it has been held that a holder of convertible bonds is entitled to a compliance with his contract by the new company,[73] and that on its refusal to comply he may recover the resultant damages;[74] or, where the consolidation is on terms of perfect equality, the new company is bound to deliver its own stock for such bonds on demand, or to pay the damages occasioned by a refusal.[75] A bond-

Ill., 6 S.Ct. 809, 117 U.S. 434, 29 L.Ed. 963.
51 C.J. p. 802 note 35.

56. U.S.—Barry v. Missouri, K. & T. R. Co., C.C.N.Y., 34 F. 829.

57. Pa.—Commonwealth v. Wilmington, etc., R. Co., 17 A. 5

58. U.S.—Skiddy v. Atlantic, M. & O. R. Co., C.C.Va., 22 F.Cas.No. 12,922, 3 Hughes 320.

59. U.S.—Skiddy v. Atlantic, M. & O. R. Co., supra.

60. U.S.—McCulloch v. Canadian Pac. Ry. Co., D.C.Minn., 53 F.Supp. 534.
Time for conversion of bonds convertible into stock see infra subdivision e (2) of this section

61. U.S.—Lober v. Canadian Pac. Ry. Co., C.C.A.Minn., 151 F.2d 758, certiorari denied 66 S.Ct. 490, 326 U.S. 797, 90 L.Ed. 485
N.Y.—Morse v. Chicago & E. I. R. Co., 82 N.Y.S. 698, 84 App.Div. 406
—Mott v. New York Security & Trust Co., 60 N.Y.S. 357, 29 Misc. 39

62. Mass.—Parkinson v. West End St. R. Co., 53 N.E. 891, 173 Mass. 446.

63. Mass.—Parkinson v. West End St. R. Co., supra.

64. Pa.—Bratten v. Catawissa R. Co., 60 A. 319, 211 Pa. 21.
51 C.J. p. 802 note 44.

65. Mass.—Chaffee v. Middlesex R. Co., 16 N.E. 34, 146 Mass. 224.
51 C.J. p. 802 note 45.

66. Ohio.—Denney v. Cleveland, etc., R. Co., 26 Ohio St. 108.
51 C.J. p. 802 note 46.

67. U.S.—Loomis v. Chicago, M. & St. P. R. Co., N.Y., 102 F. 233, 42 C.C.A. 290.
51 C.J. p. 802 note 47.

68. Md.—Tagart v. Northern Cent. R. Co., 29 Md. 557.
Mass.—Chaffee v. Middlesex R. Co., 16 N.E. 34, 146 Mass. 224.

69. U.S.—Rosenkrans v. Lafayette, B. & M. R. Co., C.C.Ind., 18 F. 513.
51 C.J. p. 803 note 49.

70. Mass.—Parkinson v. West End St. R. Co., 53 N.E. 891, 173 Mass. 446.

71. U.S.—Lisman v. Milwaukee, L. S. & W. R. R. Co., C.C.Wis., 161 F. 472, affirmed 170 F. 1020, 95 C.C.A. 671, certiorari denied 29 S.Ct. 700, 214 U.S. 520, 53 L.Ed. 1065.
51 C.J. p. 803 note 51.

72. Mass.—Parkinson v. West End St. R. Co., 53 N.E. 891, 173 Mass. 446.

73. Mass.—John Hancock Mut. Ins. Co. v. Worcester, etc., R. Co., 21 N.E. 364, 149 Mass. 214.

74. Mass.—John Hancock Mut. L. Ins. Co. v. Worcester, etc., R. Co., supra.

75. Mass.—India Mut. Ins. Co. v. Worcester, etc., R. Co., 25 N.E. 975
—Day v. Worcester, etc., R. Co., 23 N.E. 824, 151 Mass. 302.

holder may be estopped by his acts to claim the right to convert on consolidation.[76]

Where bonds are converted in bad faith for the purpose of keeping the control of the company in the hands of the board of directors, a court of equity may interfere on the ground of fraud.[77]

§ 254. Indemnity, Guaranty, and Suretyship

a. In general
b. Rights of holders of securities guaranteed

a. In General

As a general rule a railroad company has no power to enter into any contract or indorsement by which it becomes a guarantor or surety, or otherwise lends its credit to another person, except when expressly authorized to do so or the power is implied from its general powers.

As a general rule a railroad company, like other private corporations other than surety or guaranty companies, as discussed in Corporations §§ 1230-1234, has no power to enter into any contract or indorsement by which it becomes a guarantor or surety, or otherwise lends its credit to another person or company,[78] even though the railroad company may derive some indirect benefit from the guaranty,[79] except in so far as it is expressly authorized to do so by its charter or other statute,[80] or except where the power to do so is implied from the general powers of the company, as being necessary and proper to enable it to accomplish the objects for which it was created, and in the conduct of its business.[81] A railroad company authorized to aid another in the construction of its road may guarantee bonds of the other as a means of raising money for such purpose,[82] and a company which has power to receive and dispose of the securities of another company has power to guarantee such securities.[83] The power of a company which enters into a valid contract for the leasing and operating of the road of another company to guarantee the securities of such other company,[84] or interest on such securities,[85] as part of the consideration, has been upheld. A railroad company may guarantee aid bonds issued to it by a municipality, in respect of both principal[86] and interest.[87] The validity of a contract which is not in the strict sense a guaranty, but by which one railroad company promises to purchase the obligations of another railroad company in order to furnish funds for the payment of interest on the mortgage bonds of such other company if the latter is not able to meet such interest, and to pay to the trustee under the mortgage, out of the purchase price of the notes, sufficient to make up the interest payments, has been upheld,[88] even though it required such purchases for an extended future period[89] and even after the mortgagor company might become insolvent.[90]

General rules as to the requisites, validity, and effect of guaranties apply in the case of a contract of guaranty when entered into by a railroad company.[91] According to some cases, where a guaranty,

76. Md.—Tagart v. Northern Cent. R. Co., 29 Md. 557.
51 C.J. p. 803 note 57.

77. Ohio.—Wm. H. Baldwin v. Hillsborough, etc., R. Co., 1 Ohio Dec., Reprint, 546, 10 West.L.J. 356.

78. U.S.—Louisville, N. A. & C. R. Co. v. Louisville Trust Co., Ky., 19 S.Ct. 817, 174 U.S. 552, 43 L.Ed. 1081.
51 C.J. p. 804 note 72.

When guarantor is in reality principal and the ostensible obligor is in reality the creature of the guarantor, the guaranty will be valid—Frank v. New York, C. & St. L. R. Co., 24 N.Y.S.2d 846, 175 Misc. 902, affirmed 24 N.Y.S.2d 854, motion denied New York, C. & St. L. R. Co. v. Frank, 61 S.Ct. 729, affirmed 61 S.Ct. 833, 313 U.S. 538, 85 L.Ed. 1507, vacated on other grounds 61 S.Ct. 938, 313 U.S. 596, 85 L.Ed. 1550, 62 S.Ct. 258, 314 U.S. 360, 86 L.Ed. 277.

79. Ohio.—Pollitz v. State Public Utilities Commission, 117 N.E. 149, 96 Ohio St. 49, L.R.A.1918D 166.
51 C.J. p. 804 note 73.

80. N.Y.—Venner v. New York Cent., etc., R. Co., 145 N.Y.S. 725, 160 App.Div. 127, affirmed 111 N.E. 487, 217 N.Y. 615.
51 C.J. p. 804 note 74.

81. N.Y.—Frank v. New York, C. & St. L. R. Co., 24 N.Y.S.2d 846, 175 Misc. 902, affirmed 24 N.Y.S.2d 854, motion denied New York, C. & St. L. R. Co. v. Frank, 61 S.Ct. 729, affirmed 61 S.Ct. 833, 313 U.S. 538, 85 L.Ed. 1507, vacated on other grounds 61 S.Ct. 938, 313 U.S. 596, 85 L.Ed. 1550, affirmed 62 S.Ct. 258, 314 U.S. 360, 86 L.Ed. 277.
51 C.J. p. 805 note 75.

82. U.S.—Zabriskie v. Cleveland, O., C. C. & C. R. Co., 23 How. 381, 16 L.Ed. 488.
N.Y.—Connecticut Mut. L. Ins. Co. v. Cleveland, etc., R. Co., 41 Barb. 9, 26 How.Pr. 225.

83. N.Y.—Frank v. New York, C. & St. L. R. Co., 24 N.Y.S.2d 846, 175 Misc. 902, affirmed 24 N.Y.S.2d 854, motion denied New York, C. & St. L. R. Co. v. Frank, 61 S.Ct. 729, affirmed 61 S.Ct. 833, 313 U.S. 538, 85 L.Ed. 1507, vacated on other grounds 61 S.Ct. 938, 313 U.S. 596, 85 L.Ed. 1550, 62 S.Ct. 258, 314 U.S. 360, 86 L.Ed. 277.
51 C.J. p. 805 note 77.

84. N.Y.—Frank v. New York, C. & St. L. R. Co., supra.
51 C.J. p. 805 note 78.

85. U.S.—Eastern Townships Bank v. St. Johnsbury & L. C. R. Co., C.C.Vt., 40 F. 423, error dismissed 13 S.Ct. 1046, 149 U.S. 772, 37 L.Ed. 957.
51 C.J. p. 805 note 79.

86. U.S.—Chicago, R. I. & P. R. Co. v. Howard, Iowa, 7 Wall. 392, 19 L.Ed. 117.

87. U.S.—Chicago R. I. & P. R. Co. v. Howard, supra—Evans v. Cleveland & P. R. Co., C.C.Pa., 8 F.Cas. No.4,557, 5 Phila. 512

88. U.S.—Equitable Trust Co. of New York v. Denver & R. G. R. Co., N.Y., 250 F. 327, 162 C.C.A. 397, certiorari denied 38 S.Ct. 423, 246 U.S. 672, 62 L.Ed. 922.

89. U.S.—Equitable Trust Co. of New York v. Denver & R. G. R. Co., supra.

90. U.S.—Equitable Trust Co. of New York v. Denver & R. G. R. Co., supra.

91. U.S.—Equitable Trust Co. of

or a contract to give one, is for an unauthorized purpose, it is regarded as strictly ultra vires, unlawful, and void,[92] and incapable of being made good by ratification or estoppel,[93] at least where the benefits received by the guarantor are merely an incidental, and not a direct, result of the guaranty.[94] It has been held that the opinion of a state commission in the matter of authorizing railroads to guarantee bonds of another company may not validate corporate action which, as to the state or stockholders, is invalid.[95]

Statutory prohibitions. Under a statute so providing, a railroad company, except as authorized in the statute, may not, directly or indirectly, guarantee the bonds of any other corporation.[96] Such statutory prohibition applies to domestic corporations,[97] but not to foreign corporations.[98]

Acquisition of securities by director of guarantor company. While the opinion has been expressed that a statute providing that all securities of a company purchased from the company by a director thereof, either directly or indirectly, for less than the par value, shall be null and void applies to securities guaranteed by such company,[99] the right of the company to recover from the director who takes such securities at less than par the difference between the par value and the amount paid by him, has been denied.[1]

b. Rights of Holders of Securities Guaranteed

General rules governing the rights of a guarantee have been applied in determining the rights of holders of railroad bonds under contracts of guaranty, and an unconditional transfer of bonds while a guaranty thereof is in force carries with it the rights incident to the guaranty.

General rules governing the nature and extent of a guarantor's liability and the corresponding rights of a guarantee or creditor, as discussed in Guaranty §§ 43–66, have been applied in determining the rights of holders of railroad bonds under contracts of guaranty.[2] It has been held that bondholders for whose benefit a contract of guaranty is made, although not parties to the agreement and even though not furnishing the consideration therefor, may enforce the guaranty.[3] An unconditional transfer of bonds while a guaranty thereof is still in force carries with it rights incident to the guaranty.[4] While it has been held that where a contract of guaranty is strictly ultra vires all purchasers of the securities guaranteed are chargeable with notice of the railroad company's want of power and cannot enforce the guaranty,[5] where the guaranty is merely voidable by reason of some irregularity in the exer-

New York v. Denver & R. G. R Co., D.C.Colo., 269 F. 987.
51 C.J. p. 805 note 87.

Guaranty held absolute guaranty of payment and not merely of collection
U.S.—R. E. Duvall Co. v. Washington, Baltimore & Annapolis Electric R. Co., D.C.Md., 15 F.Supp. 536.

92. U.S.—Louisville, N. A. & C. R. Co. v. Louisville Trust Co., Ky., 19 S.Ct. 817, 174 U.S. 552, 43 L.Ed. 1081—Central Trust Co. of New York v. Indiana & L. M. R. Co., Ind., 98 F. 666, 39 C.C.A. 220, certiorari denied 20 S.Ct. 1029, 178 U.S. 611, 44 L.Ed. 1215.

93. U.S.—Louisville, N. A. & C. R. Co. v. Louisville Trust Co., Ky., 19 S.Ct. 817, 174 U.S. 552, 43 L.Ed. 1081—Central Trust Co. of New York v. Indiana & L. M. R. Co., Ind., 98 F. 666, 39 C.C.A. 220, certiorari denied 20 S.Ct. 1029, 178 U.S. 611, 44 L.Ed. 1215.

94. Md.—Western Maryland R. Co. v. Blue Ridge Hotel Co., 62 A. 351, 102 Md. 307, 111 Am.S.R. 362, 2 L.R.A. 887.
51 C.J. p. 806 note 90.

95. Mich.—Pollitz v. State R. Commission, 172 N.W. 611, 205 Mich. 549.

96. Mass.—Attorney General v. New York, etc., R. Co., 84 N.E. 737, 198 Mass. 413.
51 C.J. p. 806 note 93.

97. Mass.—Attorney General v. New York, etc., R. Co., supra.
51 C.J. p. 806 note 95.

98. Mass.—Attorney General v. New York, etc., R. Co., supra.

99. Ohio.—Cincinnati, etc., R. Co. v. Kleybolte, 5 Ohio N.P.,N.S., 536.
Acquisition of bonds of company by director see supra § 251.

1. Ohio.—Cincinnati, etc., R. Co. v. Kleybolte, supra.

2. U.S.—R. E. Duvall Co. v. Washington, Baltimore & Annapolis Electric R. Co., D.C.Md., 15 F.Supp. 536.

Recovery of full amount from guarantor
Bondholder on default in payment of obligation is entitled to recover full amount of claim from one absolutely guaranteeing claim, without first deducting value of security, provided he does not collect from all sources more than amount of claim; and, where railroad guaranteed payment of secured bonds of second railroad from which it had acquired property, bondholders of second railroad who had purchased such property at sale by receiver of first railroad were not required to foreclose original security as prerequisite to setting up claim to share of proceeds from sale of property of first railroad in receivership proceeding, especially in view of fact that first railroad had benefited from use of property.—R. E. Duvall Co. v. Washington, Baltimore & Annapolis Electric R. Co., D.C.Md., 15 F.Supp. 536.

3. U.S.—R. E. Duvall Co. v. Washington, Baltimore & Annapolis Electric R. Co., supra.

Contract under seal
The fact that the contract of guaranty is under seal does not alter the rule stated in the text where by statute in suits brought on sealed instruments those entitled to sue or liable to be sued thereon, but for the seal, are entitled to sue and liable to be sued notwithstanding the seal.—R. E. Duvall Co. v. Washington, Baltimore & Annapolis Electric R. Co., supra.

Rescission of agreement
U.S.—McCulloch v. Canadian Pac. Ry. Co., D.C.Minn., 53 F.Supp. 534.

4. U.S.—Georgia S. & F. R. Co. v. Einstein, Ga., 218 F. 55, 133 C.C.A. 657, certiorari denied 36 S.Ct. 164, 239 U.S. 643, 60 L.Ed. 483.
51 C.J. p. 806 note 2.

5. U.S.—Central Trust Co. of New York v. Indiana & L. M. R. Co., Ind., 98 F. 666, 39 C.C.A. 220, certiorari denied 20 S.Ct. 1029, 178 U.S. 611, 44 L.Ed. 1215.

cise of the power, or, in other words, where it is ultra vires as between the corporators only because it is in violation of their rights, or because of some defect in the contract which may not be binding on the corporation, the guaranty, although invalid in the hands of a holder with notice,[6] is good and enforceable in the hands of a bona fide holder without notice.[7] In such cases both the company as an entity and the stockholders as such may be estopped to repudiate the guaranty as against one who has made investments and acted on the faith of such guaranty;[8] but it has been held that the claim that the stockholders of the guarantor company consented to the contract of guaranty may not successfully be interposed on behalf of holders of guaranteed bonds where a single individual owned most of the stock of both companies concerned and initiated and controlled the transaction for his own benefit.[9]

Even though the guaranty is ultra vires, the right of the holders of the securities to the benefit of a fund created as an incident to the guaranty has been recognized.[10] A guaranty by one railroad company of the bonds of another, owned by the guarantor, is obligatory in favor of the purchaser of the bonds, on the faith of the guaranty, notwithstanding the guaranty may, in its inception, have been ultra vires.[11] It has been held that one who takes the bonds of a railroad company on which is indorsed a guaranty of their payment by another railroad company is put on inquiry as to the relations between the companies which would reveal that the property of the company issuing the bonds has been leased to the company guaranteeing their payment.[12] Some contracts have been construed as imposing a duty on a company which agrees to furnish funds for payment of interest on the mortgage bonds of another company as imposing a direct duty on the promisor company to pay to or through, the mortgage trustee sufficient funds to pay the interest on the mortgage bonds if the mortgagor company does not make provision therefor.[13]

§ 255. Liens Generally

Particular matters with respect to liens on railroad property are discussed in the sections immediately following.

Examine Pocket Parts for later cases.

§ 256. —— Creation and Existence in General

A purely statutory lien must be secured in the manner provided by statute and a statute precluding a railroad from creating a lien which shall be valid against certain classes of claims does not create a lien in favor of such claims.

A purely statutory lien must be secured in the manner provided by the statute for that purpose.[14] A statute which precludes a railroad company from creating a lien which shall be valid and binding as against certain enumerated classes of claims does not create a lien in favor of such claims.[15]

§ 257. —— What Law Governs

The validity and effect of railroad liens are determined by the law of the place where the property is situated on which the liens are sought to be enforced.

The validity and effect of railroad liens are determined by the law of the place where the property is situated on which the liens are sought to be enforced.[16]

§ 258. —— Applicability of General Rules as to Construction and Operation

In the absence of a statute providing otherwise, liens on railroad property are governed by the rules regulating liens generally.

In the absence of a statute providing otherwise, liens on railroad property are governed by the rules regulating liens generally.[17] The rights and liabilities under a lien may be controlled by the con-

6. U.S.—Louisville, N A & C R. Co. v. Louisville Trust Co, Ky., 19 S Ct. 817, 174 U S 552, 43 L. Ed 1081.

7. U.S —Louisville N A. & C R. Co. v. Louisville Trust Co., supra.
51 C.J. p 806 note 5

8. U.S.—Central Trust Co. of New York v Indiana & L. M. R. Co., Ind., 98 F. 666, 39 C.C A. 220, certiorari denied 20 S.Ct. 1029, 178 U.S. 611, 44 L.Ed. 1215.
51 C.J. p 806 note 6.

9. Ohio.—Troy Trust Co. v. Columbus, etc, R. Co., 18 Ohio N.P.,N.S., 293.

10. U.S.—Central R. & Banking Co. of Georgia v Farmers' L. & T. Co, C C Ga., 116 F. 700.

11. N Y —Arnot v. Erie R. Co, 67 N. Y 315
51 C.J. p 807 note 9.

12. U S.—Pigeon River R. Co. v. Champion Fibre Co., C.C.A.N C, 280 F. 557, certiorari denied 43 S.Ct. 14, 260 U S. 724, 67 L.Ed. 482.

13. U S.—Equitable Trust Co. of New York v Denver & R. G. R. Co., N.Y., 250 F. 327, 162 C C.A. 397, certiorari denied 38 S.Ct. 423, 246 U S 672, 62 L.Ed. 932.
51 C.J. p 807 note 11.

14. Tex.—United States, etc., Trust Co. v Western Sunply, etc, Co, Civ.App, 109 S W 377

15. U S —Chattanooga. R. & C. R. Co. v Evans, Tenn., 66 F 809, 14 C.C.A. 116
Tenn.—Petition of Walker, 209 S.W. 739, 141 Tenn. 281.

16. Ark —Midland Valley R. Co. v. Moran Bolt, etc., Mfg. Co., 97 S.W. 679, 80 Ark. 393.
51 C.J. p 807 note 18.

17. U.S.—Merriman v. Chicago & E. I. R. Co., Ill., 66 F. 663, 14 C.C A. 36.
51 C.J. p 807 note 19.

tract under which the particular lien is created.[18] On the other hand, where the lien is created by statute, the rights and liabilities thereunder are regulated by such statute.[19]

§ 259. —— Loss or Waiver of Lien

a. In general
b. Liens for public aid granted

a. In General

The loss or waiver of a lien on railroad property is, in the absence of statute, regulated by the rules governing liens generally.

The loss or waiver of a lien on railroad property is, in the absence of statute, regulated by the rules governing liens generally.[20] A contractual waiver of the right to a lien should be in clear, certain, and unequivocal language.[21] A mechanic's lien on railroad property may be waived or lost by the acceptance of other security for the claim.[22] However, a contract for such security has the effect of a waiver only on the performance of the contract,[23] and where the contract is inconsistent with an intent to retain the lien,[24] or, in some jurisdictions, only where it appears affirmatively that there was an intent to look to such security and not to the lien.[25] A subcontractor's lien, under some statutes, is independent of that of the principal contractor or of its waiver or loss.[26] A provision for the creation of a particular fund, out of which payments under the contract are to be made, is not the giving of collateral security depriving the contractor of the right to a lien.[27]

The priority of a statutory lien may be lost by the failure of the claimants to proceed to enforce it in the manner and within the time prescribed by the statute.[28] So, where a note for the debt on which a lien claim is based is taken, which is not payable until after the expiration of the statutory limitation of time for enforcement of the lien, it will be deemed that the lien is waived.[29] While a statutory lien may not follow the claim into the hands of a purchaser thereof, as discussed infra § 279, such a parting with title as to result in the loss of a laborer's lien is not shown by the fact that in delivering his claim to a third person for collection the lienor indorses the claim as evidence of the authority to collect and borrows a small sum thereon.[30] Where a payment by the railroad to a firm of subcontractors left a balance due to them from the general contractor equal to the amount of lienable demands, for labor performed for the subcontractors, a firm of labor claimants is not estopped to assert its lien, notwithstanding a member of the firm was also a member of the firm of subcontractors and, as such, agreed to apply the payment to the discharge of labor claims.[31]

b. Liens for Public Aid Granted

A lien in favor of the state for public aid granted to a railroad ordinarily may be released or waived by the state, by an act of the legislature, foreclosure, or by compromise.

A lien in favor of a state for public aid granted to a railroad company ordinarily may be released or waived by the state, by an act of the legislature,[32] or by a foreclosure under the statute;[33] or such release may be accomplished by way of a compromise, notwithstanding a constitutional prohibition against a release.[34] If a lien attaches in favor of the state alone, it may be released or postponed by

18. Vt—Vermont, etc., R Co v. Vermont Cent R. Co., 34 Vt. 1.
51 C.J. p 808 note 20.

19. U.S.—Western Division of Western North Carolina R Co. v. Drew, C.C.Fla., 29 F.Cas.No 17,434, 3 Woods 691, affirmed 103 U.S. 118, 26 L.Ed 327.
51 C.J. p 808 note 21.

20. U.S.—Newgass v. Atlantic & D. R. Co., C.C Va., 56 F. 676.
51 C.J. p 808 note 22.
Waiver, loss, or discharge of liens generally see Liens § 17.

21. Okl—Kansas City Southern R. Co. v. Tansey, 139 P. 267, 41 Okl. 543.
51 C.J p 808 note 23.

22. U.S—Meyer v. Delaware R. Constr. Co., Iowa, 100 U.S. 457, 25 L.Ed. 593
51 C J p 808 note 24

23. U.S.—Central Trust Co. v. Richmond, N. I. & B. R. Co, Ky., 68 F. 90, 15 C.C.A. 273, 41 L.R.A 458, certiorari denied 16 S.Ct. 1199, 163 U.S. 679, 41 L.Ed. 310
Mo—Baumhoff v. St. Louis, etc, R Co., 71 S.W. 156, 171 Mo 120, 94 Am.S.R. 770

24. Ohio—Carnegie v. Lancaster, etc., R. Co., 3 Ohio S & C. P 343, 1 Ohio N.P. 300.
51 C.J. p 808 note 26

25. U.S—Hale v. Burlington, C. R & N. R. Co, C.C Iowa, 13 F. 203, 2 McCrary 558.
Tex.—McIlheney v. Binz, 13 S.W. 655, 80 Tex. 1, 26 Am.S.R. 705

26. U.S.—Central Trust Co v. Richmond, N. I. & B. R. Co., Ky., 68 F. 90, 15 C.C.A. 273, 41 L.R.A. 458, certiorari denied 16 S.Ct. 1199, 163 U.S 679, 41 L.Ed. 310.

27. U.S.—Meyer v. Delaware R. Constr. Co., Iowa, 100 U.S. 457, 25 L.Ed. 593—Galesburg & K Electric R. Co. v Hart, Ill., 221 F. 7, 136 C.C.A. 583.

28. Okl—Interurban Constr Co v. Keifer Cent. State Bank, 184 P. 905, 76 Okl. 281
51 C J. p 808 note 30

29. Tex.—Bryan College Interurban R. Co. v. Kropp, Civ App., 197 S.W. 733

30. Wis.—Matzewitz v. Wisconsin Cent. R. Co., 123 N.W. 121, 140 Wis. 643.

31. Mo—Rankin v. Atchison, etc., R Co., 129 S.W. 755, 150 Mo.App. 32.

32. U.S—Stevens v. Memphis, C. & L. R. Co., Tenn., 5 S.Ct. 974, 1098, 114 U.S. 663, 29 L.Ed. 281.
51 C.J. p 809 note 35.
Liens for public aid granted generally see infra § 265.

33. U.S—Stevens v. Memphis, C. & L. R. Co., supra.

34. U.S.—Woodson v. Murdock, Mo., 22 Wall. 351, 22 L.Ed. 716.
51 C.J. p 809 note 37.

the state, although the bonds which the lien secures are outstanding and unpaid;[35] but where such lien also attaches in favor of the bondholders it cannot be waived or postponed by the state alone.[36]

§ 260. —— Judgment Liens

A judgment against a railroad becomes a lien on its realty in the same manner as a judgment against a natural person.

A judgment against a railroad company becomes a lien on its road and realty in the same manner as a judgment against a natural person,[37] and cannot be displaced by the act of the railroad.[38] Where a judgment is recovered against the railroad company after its road has been sold under a mortgage foreclosure and the sale confirmed,[39] or after its entire equity of redemption has been extinguished by such a sale, and its property and franchises are in the entire possession and control of the purchaser as owner,[40] it does not become a lien at law on the road,[41] nor is it a lien in equity on the fund arising from the sale where the proceeds are less than the mortgage debt.[42]

§ 261. —— Liens for Right of Way or Land Granted

A vendor of land to a railroad for a right of way or other purpose is entitled to the same lien on the land sold for the unpaid purchase money as an ordinary vendor.

In accordance with the general rules governing vendors' liens, a vendor of land to a railroad company for a right of way or other purpose is entitled to the same lien on the land sold for the unpaid purchase money as an ordinary vendor.[43] This lien attaches as well where the sale is by operation of law as where it is by voluntary contract,[44] and attaches against the vendee and all subsequent purchasers with notice.[45] No lien attaches however, where the vendor accepts other security therefor with the intention to rely solely on it for payment.[46] It has been held that a lien for right of way is on the whole line of road and not only on the particular parcel sold.[47]

§ 262. —— Liens for Rolling Stock

Contracts reserving title or a lien on rolling stock furnished to a railroad are valid, subject to compliance with the requirements, if any, imposed by statute, such as filing or recording.

Contracts reserving title or a lien on rolling stock furnished to a railroad company are valid, subject to compliance with the requirements, if any, imposed by statute,[48] such as filing or recording.[49]

Car trust. A "car trust" has been defined as an association of capitalists formed to buy and sell rolling stock, usually for a particular road;[50] an association formed for the purpose of owning freight cars and leasing them to railroad companies.[51]

Car trust securities are a common form of financial securities, so called, from the fact that title to railroad rolling stock is placed, by bailment or sale, in one or more individuals in trust and certificates of ownership in the property issued to the persons investing their money on the faith of the property and the promise of the railroad company to pay for it;[52] a lien in the nature of a mortgage on the rolling stock of a railroad, usually to secure its purchase price.[53]

§ 263. —— Liens for Loans or Advances

In the absence of a statute providing therefore, or of circumstances giving rise to a lien under general equitable principles, an advance or loan of money to a railroad will not give rise to a lien.

In the absence of a statute providing therefor, or of circumstances giving rise to a lien under gen-

35. U.S.—Stevens v. Memphis, C. & L. R Co., Tenn., 5 S.Ct. 974, 1098, 114 U.S. 663, 29 L.Ed. 281, distinguishing Hand v. Savannah, etc., R. Co., 12 S.C. 314.

36. S.C.—Gibbes v. Greenville, etc., R. Co., 13 S.C. 228—Hand v. Savannah, etc., R. Co., 12 S.C. 314.

37. Tenn.—Barnett v. East Tennessee, etc., R. Co., Ch.A., 48 S.W. 817
51 C.J. p. 809 note 40.
Lien of judgment generally see Judgments §§ 454–511.

38. Iowa.—Continental, etc., Sav. Bank v. Muscatine, etc., R. Co., 210 N.W. 787, 202 Iowa 579, 50 A.L.R. 139.

39. U.S.—Jeffrey v. Moran, Ohio, 101 U.S. 285, 25 L.Ed. 785.

40. U.S.—Baltimore Trust & Guarantee Co. v. Hofstetter, Tenn., 85 F. 75, 29 C.C.A. 35.

41. U.S.—Jeffrey v. Moran, Ohio, 101 U.S. 285, 25 L.Ed. 785.

42. U.S.—Jeffrey v. Moran, supra.

43. Tex.—Howe v. Harding, 13 S.W. 41, 76 Tex. 17, 18 Am.S.R. 17.
51 C.J. p. 809 note 47.
Vendors' liens generally see the C.J.S. title Vendor and Purchaser §§ 377–419, also 66 C.J. p. 1210 note 67–p. 1283 note 53.

44. Ga.—Mims v. Macon, etc., R. Co., 3 Ga. 333.

45. Ga.—Mims v. Macon, etc., R. Co., supra.

46. Ark.—Springfield, etc., R. Co. v. Stewart, 10 S.W. 767, 51 Ark. 285.
51 C.J. p. 809 note 48.
Waiver or loss of lien see supra § 259.

47. Tenn.—Crosby v. Morristown, etc., R. Co., Ch.A., 12 S.W. 507.

48. Ga.—Real Est. Bank, etc., Co. v. Baldwin Locomotive Works, 90 S.E. 49, 145 Ga. 831.
Liens for supplies see infra §§ 267–281.

49. U.S.—Newgass v. Atlantic & D. R. Co., C.C.Va., 56 F. 676.
51 C.J. p. 810 note 50.

50. Bouvier L.D.
10 C.J. p. 1245 note 5.

51. U.S.—Mills v. Hurd, C.C.Conn., 29 F. 416

52. Bouvier L.D.

53. Car Trust Securities, 8 Am.Bar Assoc.Rep. p. 277 et seq.
10 C.J. p. 1245 note 8.

eral equitable principles, an advance or loan of money to a railroad will not give rise to a lien.[54] However, the circumstances attending an advance or loan to a railroad company may be such as to impose a lien on its property for the amount thereof,[55] as where it is made under an agreement that the loan shall be secured by a mortgage or deed of trust on the property.[56] Where, under an arrangement scaling down a railroad company's indebtedness, a creditor surrenders his bonds and receives new ones for all except a small portion of the reduced indebtedness to him, it has been held that he is entitled to a lien equal to that of other bond and mortgage creditors for the whole amount due him.[57] However, an agreement by a railroad company to prefer its bondholders in the disposition of a certain fund has been held to give them no lien on such fund.[58]

§ 264. —— Liens for Damages

Under some statutes a person is entitled to a lien for any loss or damage to the person or property sustained from a railroad on his compliance with statutory requirements, and where a railroad breaches a covenant in a grant of land the grantor may be entitled to a lien for the resulting damage.

Under some statutes a person is entitled to a lien for any loss or damage to the person or property sustained from a railroad on his compliance with the statutory requirements.[59]

Damages for breach of covenant. Where a railroad fails to perform covenants which it has entered into in connection with a grant of land to it for railroad purposes, the grantor may be entitled to a lien in the nature of a vendor's lien for the resulting damages,[60] as, for example, where the railroad fails to construct its road in the manner agreed on,[61] or fails to fence and build crossings along or over the right of way,[62] although a failure to build fences as agreed on does not entitle such owner to a lien for a trespass outside the right of way[63] or for damages caused by negligent construction of the road.[64] It has been held that this lien is confined to that portion of the road covered by the contract.[65]

§ 265. —— Liens for Public Aid Granted

Where the federal or state government grants aid to a railroad company, it does not thereby acquire a lien on the property of the railroad in the absence of a statute providing otherwise.

Where the federal or state government grants aid to a railroad company by guaranteeing its bonds or by authorizing an issuance of federal, state, or county bonds in aid of the company, it does not

54. U.S.—U. S. Trust Co. v. Western Contract Co., Ky., 81 F. 454, 26 C.C.A. 472.
51 C.J. p. 810 note 62.

Person who furnishes money for purchasing rights of way for a railroad company has not, in the absence of a specific agreement, a lien on the rights of way obtained with the money.—McDonald v. Charleston, etc., R. Co., 24 S.W. 252, 93 Tenn. 281.

55. U.S.—Farmers' L. & T. Co. v. Stuttgart & A. R. R. Co., C.C.Ark., 92 F. 246
51 C.J. p. 810 note 63.

56. Okl.—Carter v. Sapulpa, etc., R. Co., 153 P. 853, 49 Okl. 471.
51 C.J. p. 810 note 64.

57. U.S.—Blair v. St. Louis, H. & K. R. Co., C.C.Mo., 23 F. 524.

58. U.S.—Newby v. Oregon Cent. R. Co., C.C.Or., 18 F.Cas.No.10,144, Deady 609.

59. U.S.—Thompson v. Glover, C.C.A.Mo., 94 F.2d 544.
51 C.J. p. 811 note 67.

Main purpose of statute granting lien against railroad for loss or damage to person or property, superior to that of mortgagees and other secured creditors was to prevent the worthy, and in many respects defenseless, classes of persons named therein from being deprived of damages suffered by reason of negligence of railroad operators by having their claims made secondary to those of mortgage creditors and other secured creditors.—Thompson v. Glover, C.C.A.Mo., 94 F.2d 544.

Statutes should be liberally construed to effect their manifest object.—Thompson v. Evans, C.C.A.Mo., 113 F.2d 794.—Thompson v. Glover, C.C.A.Mo., 94 F.2d 544.

The lien is a perfected lien as of the date of the injury.—Thompson v. Evans, C.C.A.Mo., 113 F.2d 794.—Thompson v. Glover, C.C.A.Mo., 94 F. 2d 544.

Claim held not merged in judgment so as to work loss of right to lien.—Thompson v. Evans, C.C.A. Mo., 113 F.2d 794.

Limitation

(1) A provision in a statute conferring a lien, requiring that suit shall be brought on the claim or that the claim shall be filed with a receiver within a year, creates a condition on the performance of which the right to the lien rests
U.S.—Thompson v. Evans, supra.
Ark.—St. Louis, etc., R. Co. v. Ingram, 187 S.W. 452, 124 Ark. 298.

(2) Such suit may be brought within time limited in any court of competent jurisdiction, notwithstanding such court is not a court having jurisdiction to declare or enforce liens on railroad property within the state in which the lien arises.—Thompson v. Evans, supra.

Mentioning lien in judgment

Statutory requirement that lien be mentioned in judgment rendered for claimant, has been held to be addressed to court rather than to injured person and requirement, even though imperative in form, is directory in nature and does not cause injured person to forfeit his right if court fails to make entry.—Thompson v. Evans, supra.

60. Ohio.—Dayton, etc., R. Co. v. Lewton, 20 Ohio St. 401.
Tex.—Levy v. Tatum, Civ.App., 43 S.W. 941.
Rights and remedies of parties generally for breach of covenant and conditions in grant of land see supra § 97.
Vendor's lien see supra § 261.

61. Ohio.—Dayton, etc., R. Co. v. Lewton, 20 Ohio St. 401.
51 C.J. p. 811 note 69.

62. Iowa.—Hull v. Chicago, etc., R. Co., 22 N.W. 940, 65 Iowa 713
51 C.J. p. 811 note 70.

63. Iowa.—Hull v. Chicago, etc., R. Co., supra.

64. Ky.—Tolle v. Owensboro, etc., R. Co., 64 S.W. 455, 111 Ky. 623, 23 Ky.L. 864.
51 C.J. p. 811 note 72.

65. Iowa.—Davies v. St. Louis, etc., R. Co., 9 N.W. 117, 56 Iowa 192.—Varner v. St. Louis, etc., R. Co., 8 N.W. 634, 55 Iowa 677.

thereby acquire a lien on the property of the railroad company[66] unless the statute authorizing such guaranty or issue expressly provides for such a lien[67] or the terms of the statute are such as clearly show an intention that such a lien should be created.[68]

Nature and extent of lien. The nature and extent of such a lien depend on the wording of the statute under which it arises.[69] It has been held that the lien operates as a specific appropriation of the property of the company to the payment of the bonds, on default of principal and interest[70] and is not restricted to the portion of the road then finished, or to the property then owned by the company, but extends to the entire road, its franchises, and all the property then belonging to it or afterward acquired.[71]

Persons entitled to benefit of lien. Where bonds are issued by a state in aid of a railroad company, it has been held that such bonds become the debt of the state and the statutory lien in its favor does not inure to the benefit of bona fide holders of such bonds[72] unless the terms of the statute extend such lien to them;[73] nor does an indorsement by a railroad company of such bonds give a lien to holders thereof.[74] On the other hand, it has been held that, since a creditor is entitled to all securities or franchises which the surety may receive from the principal debtor, the statutory lien arising on an indorsement of railroad bonds by the state is a security for the payment of the indorsed bonds and operates as a specific appropriation of the property and franchises of the railroad company to their payment which the bondholders may enforce whenever default shall be made by the company in the payment of the principal or interest.[75] The summary remedies given by statute for the enforcement of the liens of the state to secure it against loss by reason of its indorsement of the bonds of a railroad company can be exercised only by the state;[76] but, where the state has failed to exercise such remedies and disclaims its liability for the indorsed bonds, such statutes afford no obstacle to a resort to a court of equity by the bondholders for the enforcement of the statutory lien for their benefit,[77] and the fact that the state cannot be made a party to the suit, no relief being asked against it, does not affect the jurisdiction of the court or the equity of the bill.[78] Where such bonds, issued in exchange for railroad bonds secured by a statutory mortgage, are declared invalid, the holders of the bonds may, in equity, enforce the mortgage for their own benefit.[79]

§ 266. —— Liens for Traffic Balances

Under a statute so providing, a lien exists in favor of a railroad company on the property of a connecting railroad for traffic balances due.

Under a statute so providing, a lien exists in favor of one railroad company on the property of a connecting railroad company for a balance due from the latter under a traffic agreement for the interchange of business.[80]

§ 267. Liens for Labor or Supplies

In the absence of statutory provision therefor, ordinarily a lien for labor or supplies will not arise against the property of a railroad company since it is imbued with a public interest.

Under the general rule that property affected with a public use is not subject to a mechanic's lien, as discussed in Mechanics' Liens § 11, ordinarily, and in the absence of statutory provision therefor, a mechanic's lien cannot be acquired or enforced against the property of a railroad,[81] and, in the absence of a statute authorizing such a lien, no lien arises from the mere fact that material sold for the purpose is used in the construction of a railroad.[82] On the other hand, independently of stat-

66. U.S.—McKittrick v. Arkansas Cent. R. Co., Ark., 14 S.Ct. 661, 152 U.S. 473, 38 L.Ed. 518.
51 C.J. p. 811 note 74

67. U.S.—Wilson v. Ward Lumber Co., C.C.Mo., 67 F. 674, dismissed 84 F. 1023, 23 C.C.A. 689.
51 C.J. p. 811 note 75

68. U.S.—Ketchum v. St. Louis, Mo., 101 U.S. 306, 25 L.Ed. 999.
51 C.J. p. 812 note 76.

69. Ala.—Forrest v. Luddington, 68 Ala. 1
51 C.J. p. 812 note 77.

70. Ala.—Forrest v. Luddington, supra.
51 C.J. p. 812 note 78.

71. U.S.—Wilson v. Ward Lumber Co., C.C.Mo., 67 F. 674, error dismissed 84 F. 1023, 23 C.C.A. 689.
51 C.J. p. 812 note 79.

72. U.S.—McKittrick v. Arkansas Cent. R. Co., Ark., 14 S.Ct. 661, 152 U.S. 473, 38 L.Ed. 518.
51 C.J. p. 812 note 80.

73. Fla.—Florida Cent. R. Co. v. Schutte, Fla., 103 U.S. 118, 26 L.Ed. 327.

74. U.S.—McKittrick v. Arkansas Cent. R. Co., Ark., 14 S.Ct. 661, 152 U.S. 473, 38 L.Ed. 518.
51 C.J. p. 812 note 82.

75. Ala.—Gilman v. New Orleans, etc., R. Co., 72 Ala. 566.
51 C.J. p. 812 note 83.

76. Ala.—Forrest v. Luddington, 68 Ala. 1.

77. Ala.—Forrest v. Luddington, supra.

78. Ala.—Forrest v. Luddington, supra.

79. U.S.—Western Division of Western North Carolina R. Co. v. Drew, C.C.Fla., 29 F.Cas.No.17,434, 3 Woods 691, affirmed 103 U.S. 118, 26 L.Ed. 327.

80. Tex.—International, etc., R. Co. v. Coolidge, 62 S.W. 1097, 26 Tex.Civ.App. 595, error dismissed 65 S.W. 181, 95 Tex. 92.
51 C.J. p. 826 note 33.

81. Pa.—McNulty Bros. Co. v. Pennsylvania R. Co., 116 A. 362, 272 Pa. 442.
40 C.J. p. 60 note 75.

82. Kan.—Chatten Lumber Co. v.

ute, a person selling goods to a railroad company may have a lien thereon for the unpaid purchase money as long as he retains actual or constructive control of the goods;[83] or an equitable lien for services or supplies furnished may arise by virtue of the contract between the railroad company and the person furnishing them.[84]

Under some statutes a lien may attach to the property of a railroad for labor and materials.[85] Statutes giving to every mechanic, builder, artisan, workman, or other person who shall do or perform any work or labor on or furnish any materials, machinery, fixtures, or other things toward the equipment or to facilitate the operation of a railroad a paramount lien therefor on the roadbed and other property of the company, are intended to protect laborers and persons furnishing materials for the construction and repair of railroads,[86] and to give a security for the debt.[87] The existence and extent of such lien therefor, being in derogation of the common law, must depend wholly on the provisions of the statute,[88] which must be strictly construed in respect, at least, of the ascertainment of the rights of the parties entitled,[89] although, where the lien has once attached, the statute should be liberally construed as to its remedial part.[90] According to other authorities, statutes of the character under consideration are to be liberally construed to advance their objects,[91] although they should not be extended to cases not reasonably within their purview.[92]

Since the statute itself fixes the limit beyond which the right to a lien does not exist,[93] and presupposes a right of action in the person claiming the lien, the lien is not intended to confer a right of action where none existed without it.[94] Likewise, the lien does not exist for claims not provided for by the statute,[95] such as a claim for damages arising from a breach of contract.[96] Where, however, the statute applies, a debt in whatever shape it may be has the benefit of the lien given by the statute,[97] and may be enforced against a purchaser of the railroad within the time limited by statute for its enforcement, although such purchaser's title was acquired without notice of the lien.[98] A statute creating a lien does not, in the absence of express provision therefor, create a personal liability against the owner of the property.[99]

Railroads to which applicable. A statute comferring a lien on subcontractors, laborers, materialmen, etc., in the construction of a railroad is applicable to a railroad constructed by a corporation for the conveyance of materials, etc., incidental to its main business,[1] even though the owner of the railroad is not incorporated.[2]

§ 268. —— Retroactive Effect of Statutes

Ordinarily statutes conferring liens on railroad property for labor or supplies are not accorded a retroactive effect.

Ordinarily, a statute giving a lien against the property of a railroad for labor or supplies relates only to the labor and materials furnished after its passage and gives no right to a lien for labor and materials furnished before it was enacted.[3] It does not give a lien for labor or supplies furnished un-

Scott City Northern R Co., 152 P. 665, 96 Kan 577.
51 C J. p 813 note 91.

83. Mass —Ware River R. Co. v. Vibbard, 114 Mass. 447

84. Ind.T —Denison, etc, R. Co v. Raney-Alton Mercantile Co., 53 S W. 496, 3 Ind.T. 104
51 C.J. p 812 note 90.

85. Conn.—Botsford v. New Haven, etc., R Co., 41 Conn. 454.
Wis —Hill v. La Crosse, etc., R. Co, 11 Wis 214.
Applicability of general lien laws see infra § 269.
Lien under statute and contract
Claim for material sold to railroad was held not invalid as violating stock and bond law, where materialman perfected claim under mechanics' lien law, and also received contract lien which did not conform with stock and bond law —Warren Cent. R. Co. v Texas Creosoting Co., Tex.Civ.App, 62 S W.2d 691.

86. Mich.—Dudley v. Toledo, etc, R. Co., 32 N W 884, 65 Mich. 655
51 C J. p 813 note 92.

87. Ind —Cincinnati, etc., R Co. v. Shera, 73 N.E. 293, 36 Ind.App. 315.

88. Ind.—Cincinnati, etc, R. Co v. Shera, 73 N E. 293, 36 Ind.App. 315.
51 C J. p 813 note 95.

89. U.S —Commonwealth Edison Co. v. Continental Nat. Bank & Trust Co of Chicago, C.C.A.Ill., 93 F.2d 265
51 C.J. p 813 note 96.

90. Ark.—Tucker v. St. Louis, etc., R Co., 26 S W 375, 59 Ark. 81.
Ind.—Cincinnati, etc., R. Co. v. Shera, 73 N.E. 293, 36 Ind.App. 315.

91. Okl.—Kansas City Southern R. Co. v. Reinman, 162 P. 726, 63 Okl. 69.

92. Okl —Kansas City Southern R. Co. v. Reinman, supra.

93. Ark.—Tucker v. St Louis, etc., R Co., 26 S W 375, 59 Ark 81.

94. Ark —Tucker v. St. Louis, etc., R. Co., supra.

95. Tex.—Cleburne Nat Bank v. Gulf, etc, R. Co., 66 S W 203, 95 Tex. 176
51 C J. p 813 note 3.

96. Fla —St. Johns, etc, R Co. v. Bartola, 9 So. 853, 28 Fla. 82.

97. U S.—Fox v. Seal, Pa., 22 Wall. 424, 22 L Ed 774.
51 C.J. p 813 note 5.

98. Ark.—Brown v. Buck, 16 S.W. 195, 54 Ark. 453.

99. Ind.—Fleming v. Greener, 90 N. E. 72, 73, 173 Ind. 260, 140 Am S R 254, 87 N.E. 719, 21 Ann.Cas 959.
51 C.J. p 813 note 7.

1. Tenn.—Parris v. Tennessee Power Co., 188 S.W. 1154, 136 Tenn. 198.
51 C.J. p 813 note 8.

2. Tenn.—Parris v. Tennessee Power Co., supra.

3. Ill —Arbuckle v. Illinois Midland R. Co., 81 Ill. 429.

der a contract executed prior to its passage,[4] although the labor or materials were furnished after the statute took effect.[5] On the other hand, it has been held that a lien may be had for labor, although the contract was entered into before the taking effect of the lien law,[6] and that, although the contract is entered into prior to the passage of such a statute, if the property subject to such lien was not in existence when the statute was enacted, but only comes into existence afterward by labor and supplies furnished under the contract, the person furnishing such labor and supplies is entitled to a lien under the statute, and that such application of the statute invades no right of property.[7]

§ 269. —— Applicability of General Lien Laws

General lien laws have been held inapplicable to liens against railroads, and, in the absence of a clear legislative intent to the contrary, a mechanics' lien law will not be construed to provide for liens on railroad property.

General lien laws have been held inapplicable to liens against railroads,[8] and, although a statute may expressly provide for such liens on a railroad,[9] or its language or intent may clearly include railroads,[10] such construction will not be put on a general mechanics' lien law unless the language of the statute clearly requires it to be done.[11]

§ 270. —— Inception and Duration of Lien

Ordinarily a lien for labor and materials expended on a railroad originates as an inchoate lien on the commencement of the work, and continues as such until perfected in the manner prescribed by statute.

The commencement and duration of the lien are regulated by the statute.[12] Ordinarily, the lien originates as an incipient or inchoate lien with the beginning of the work,[13] or with the delivery of the materials, as discussed infra § 273, and continues as such until perfected, in the manner prescribed,[14] or until it is lost by a failure to comply with statutory requirements within the prescribed time.[15] A provision that a lien shall cease to be operative in a certain time, if no steps are taken to enforce it, is in the nature of a statute of limitations and is not available to defeat the lien unless pleaded.[16]

§ 271. —— Contract with, or Consent of, Railroad

As a general rule, privity of contract between the claimant and the railroad is essential to creation of a lien against the property of the latter.

In the absence of a provision of the statute to the contrary, privity of contract between the lien claimant and the railroad is essential,[17] and the right to a lien does not arise merely because the alleged work or materials furnished inure to the benefit of the company.[18] A contract, such as is required to support a laborer's or mechanic's lien, need not, unless the statute so requires, be express or

4. Ark.—Choctaw, etc., R. Co. v. Sullivan, 68 S.W. 495, 70 Ark. 262.
51 C.J. p 813 note 11.

5. Mass.—Parker v. Massachusetts R. Co., 115 Mass. 580.

6. Okl.—Midland Valley R. Co. v. McLemore, 174 P. 1079, 73 Okl. 102.

7. Ky.—Knoxville, etc., R. Co. v. Hoge, 26 S.W. 534, 16 Ky.L. 9.

8. Mich.—Detroit Trust Co. v. Detroit, etc., R. Co., 124 N.W. 45, 159 Mich. 442.
51 C.J. p 814 note 15.

Bridges

(1) Under ordinary mechanics' lien laws a lien for work and materials has been denied in respect of a railroad bridge.—Cleveland, etc., R. Co. v. Knickerbocker Trust Co., C.C. Ohio, 86 F. 73.

(2) On the other hand, where a statute expressly specifies a bridge as subject to such a lien, the statute has been construed as including a railroad bridge.
Ohio.—Smith Bridge Co. v. Bowman, 41 Ohio St. 37, 52 Am.R. 66—Bowman v. Springfield, etc., R. Co., 1 Ohio Cir.Ct. 64, 1 Ohio Cir.Dec. 33.
Wis.—Purtell v. Chicago Forge, etc., Co., 42 N.W. 265, 74 Wis. 132.

(3) Where there is a statute expressly conferring a lien for work on a bridge, a laborer working on a railroad bridge may have a lien under the statute irrespective of the validity of other statutes giving liens on railroads.—Chapman v. Pennsylvania R. Co., 31 Ohio N.P., N.S., 103.

Lands and easement

Neither railroad companies' lands, nor easement granted by them to manufacturing company for construction of underpass to its plant, is subject to liens of subcontractors and materialmen.—McClintic-Marshall Co. v. Ford Motor Co., 236 N.W. 792, 254 Mich. 305, 72 A.L.R. 807.

9. N.Y.—Schaghticoke Powder Co. v. Greenwich, etc., R. Co., 76 N.E. 153, 183 N.Y. 306, 11 Am.S.R. 751, 2 L.R.A.,N.S., 283.
51 C.J. p 814 note 16.

10. Or.—George v. Oregon, etc., R. Co., 247 P. 780, 118 Or. 502—Giant Powder Co. v. Oregon Western R. Co., 117 P. 279, 59 Or. 236, Ann. Cas 1913C 93.
51 C.J. p 814 note 17.

11. U.S.—Pennsylvania Steel Co. v. J. E. Potts Salt, etc., Co., Mich., 63 F. 11, 11 C.C.A. 11.
51 C.J. p 814 note 18.

12. Ark.—Brown v. Buck, 16 S.W. 195, 54 Ark. 453.
51 C.J. p 814 note 19.

13. Ill.—St. Louis, etc., R. Co. v. Kerr, 38 N.E. 638, 153 Ill. 182
51 C.J. p 814 note 20.

14. U.S.—Central Trust Co. v. Richmond, etc., R. Co., Ky., 68 F. 90, 15 C.C.A. 273, 41 L.R.A. 456, certiorari denied 16 S.Ct. 1199, 163 U.S. 679, 41 L.Ed. 310.
51 C.J. p 814 note 22.

15. U.S.—Central Trust Co. v. Richmond, etc., R. Co., supra.
51 C.J. p 814 note 24.

16. Tex.—Hales v. San Antonio, etc., R. Co., 238 S.W. 1106, 111 Tex. 434.

17. Ark.—Tucker v. St. Louis, etc., R. Co., 26 S.W. 375, 50 Ark. 81.
51 C.J. p 814 note 27.

18. Ark.—Tucker v. St. Louis, etc., R. Co., supra.

in writing, but may be oral or implied.[19] A provision in the principal contract, making certain requirements as to the form of subcontracts, is not applicable to agreements between the contractor and persons hired for manual, machine, or team labor.[20] A lien which is created by statute in favor of certain classes of persons only cannot be created by an express agreement of the parties alone.[21]

§ 272. —— Nature and Purpose of Labor, Material, or Expenditure

The right to a lien is ordinarily restricted to claims for labor performed or materials furnished for use in the construction or repair of the railroad, or which, although not actually incorporated in the road, is necessary for the work.

The right to a lien under statutes of the character under consideration rests on the theory that the labor or materials have gone into the building of the road and to that extent added to its value, and, therefore, a lien for such labor and material should be given to him who does the one or furnishes the other.[22] Accordingly, the right to such a lien is ordinarily restricted to claims for labor performed or materials furnished for use in the construction or repair of the road,[23] or which, although not actually incorporated in the road, is necessary for the work,[24] and a statute should not be extended to cases not reasonably within its intent.[25]

In application of these rules, it has been held that a lien cannot be had for money expended in acquiring a right of way,[26] paying salaries or expenses of a construction company,[27] paying a commission for guaranteeing a contract of such company,[28] or for hiring teams[29] It is also necessary that, in order that a person may be entitled to such a lien, the labor and materials be furnished in such a manner that the railroad company would be liable to pay the contractor or materialman for them[30] Such lien does not arise where the labor or material is furnished to a principal contractor in his individual capacity[31] A lien may be claimed for labor performed or material furnished on a part of the property only.[32]

Materials. The term "materials," within the meaning of such a statute, ordinarily applies only to articles entering into the construction of the road and thereafter invisible except as they survive in tangible results.[33] It does not apply to materials which, while used in the doing of the work, survive its performance and remain the property of the owner,[34] or which only very remotely enter into the construction of the road,[35] such as materials furnished to be used in the erection of boarding houses for men and stables for horses.[36] A lien for materials cannot, it has been held, be had for camp equipment furnished to a subcontractor,[37] or for teams,[38] or tools[39] used on the work, or for the rental thereof,[40] or for medical services rendered,[41] or for clothing or board furnished to laborers,[42] or

19. Iowa.—Nielson v. Iowa Eastern R. Co., 1 N.W. 434, 51 Iowa 184, 33 Am.R. 124

20. Mo.—Rankin v. Atchison, etc., R. Co., 129 S.W. 755, 150 Mo.App. 32

21. Tex.—Texas, etc., R. Co. v. McCaughey, 62 Tex. 271.
51 C.J. p. 815 note 31.

22. Ind.—Cincinnati, etc., R. Co. v. Shera, 73 N.E. 293, 36 Ind.App. 315.
51 C.J. p. 815 note 32.

23. Ark.—St. Louis, etc., R. Co. v. Rogers, 79 S.W. 794, 72 Ark. 270.
51 C.J. p. 815 note 33.

24. Ind.—Dean v. Reynolds, 39 N.E. 763, 12 Ind.App. 97.
51 C.J. p. 815 note 34.

25. N.C.—Glazener v. Gloucester Lumber Co., 83 S.E. 696, 167 N.C. 676.
51 C.J. p. 815 note 35

26. U.S.—Richmond, etc., Constr. Co. v. Richmond, etc., R. Co., Ky., 68 F. 105, 15 C.C.A. 289, 34 L.R.A. 625, certiorari denied 16 S.Ct. 1199, 163 U.S. 679, 41 L.Ed. 310.

27. U.S.—Richmond, etc., Constr. Co. v. Richmond, etc., R. Co., supra.

28. U.S.—Richmond, etc., Constr. Co. v. Richmond, etc., R. Co., supra.

29. Ark.—St. Louis, etc., R. Co. v. Love, 86 S.W. 395, 74 Ark. 528
51 C.J. p. 815 note 39.

30. U.S.—Central Trust Co. v. Bridges, Tenn., 57 F. 753, 6 C.C.A. 539.
51 C.J. p. 815 note 40.

31. U.S.—Central Trust Co. v. Bridges, supra.

Lien for hire of machinery and equipment

Owner hiring machinery and equipment to construction company for stipulated price to be used exclusively by construction company in grading railway roadbed under contract with railroad was not entitled to lien for hire on railroad's property.—Southwestern Dredging Corporation v. Chicago, R. I. & P. Ry. Co., 32 P.2d 274, 168 Okl. 217.

32. Idaho.—Naylor v. Lewiston, etc., R. Co., 96 P. 573, 14 Idaho 789

33. Ohio.—Pennsylvania Co. v. Mehaffey, 80 N.E. 177, 75 Ohio St. 432, 116 Am.S.R. 746.
51 C.J. p. 815 note 43.

34. Ark.—St. Louis, etc., R. Co. v. Love, 86 S.W. 395, 74 Ark. 528.
51 C.J. p. 816 note 44.

35. Ky.—Carson v. Shelton, 107 S.W. 793, 32 Ky.L. 1083, 15 L.R.A., N.S., 509.
51 C.J. p. 816 note 45.

36. Neb.—Stewart-Chute Lumber Co. v. Missouri Pac. R. Co., 49 N.W. 769, 33 Neb. 29.
Tenn.—Luttrell v. Knoxville, etc., R. Co., 105 S.W. 565, 119 Tenn. 452, 123 Am.S.R. 737.

37. Wash.—Tsutakawa v. Kumamoto, 101 P. 869, 102 P. 766, 53 Wash. 231.

38. Okl.—Kansas City Southern R. Co. v. Reinman, 162 P. 726, 63 Okl. 69.
51 C.J. p. 816 note 48.

39. Tex.—Waters-Pierce Oil Co. v. U. S., etc., Trust Co., 99 S.W. 212, 44 Tex.Civ.App. 397.
51 C.J. p. 816 note 49.

40. Or.—George v. Oregon, etc., R. Co., 247 P. 780, 118 Or. 502.

41. U.S.—Newgass v. Atlantic, etc., R. Co., C.C.Va., 56 F. 676.

42. Ind.—Ferguson v. Despo, 34 N.E. 575, 8 Ind.App. 523.
51 C.J. p. 816 note 52.

for groceries and provisions furnished to a subcontractor,[43] or for food furnished for teams,[44] or for lubricating or illuminating oil for running the road,[45] or for coal furnished and used in the operation of machinery employed in railroad construction by the contractor,[46] although as to this last proposition there is also authority to the contrary.[47] On the other hand, under a statute conferring a lien for materials, a lien may be had for tools which are used and consumed in the construction of a work,[48] or for blasting powder and explosives used in the work,[49] or for lumber used in making forms for concrete work.[50]

Materials, supplies, or other articles. Under a statute conferring a lien on persons furnishing materials, supplies, or other articles necessary to the operation of a railroad, a railroad company may acquire a lien against another railroad for the use and hire of cars and equipment,[51] for coal,[52] for material used in repairing cars,[53] for the rental of a water tank,[54] for tariffs,[55] for material used in maintaining and operating a station,[56] but not for premiums on policies of fire insurance covering railroad property.[57]

Labor and wages. The term "labor" applies to manual labor of persons employed.[58] A foreman or superintendent, who performs some manual labor may be entitled to a lien as a laborer,[59] as may copartners who have entered into a contract for grading, upon which they work personally and employ teams and tools owned by them and also employ a number of laborers.[60] Legal services rendered by counsel cannot be regarded as labor within the meaning of a lien statute.[61] Under a statute making amounts due employees for wages a lien on the property of the railroad, one railroad is not entitled to a lien against the property of another railroad for the services of its agents and employees in the maintenance and operation of a joint station,[62] or for labor in repairing cars belonging to such other railroad,[63] or for an amount claimed for the switching of cars.[64] Where an employee is entitled to a lien for compensation, he may have a lien for expenses which are a part of his agreed compensation[65]

Profits. Under a statute giving a lien for labor performed and materials furnished, a contractor is entitled to a lien for his profit or compensation for the labor performed and material furnished.[66]

§ 273. —— Delivery and Use of Materials

The right to a lien against railroad property for materials ordinarily arises on their delivery.

The right to a lien for materials furnished arises as soon as the materials are delivered,[67] regardless of whether they are actually used in the construction of the road.[68] On the other hand, there can be no lien for materials contracted for and prepared but never delivered;[69] nor can a contractor have a lien

43. Wash.—Tsutakawa v. Kumamoto, 101 P. 869, 102 P. 766, 53 Wash. 231.
51 C.J. p. 816 note 53.

44. Mich.—Dudley v. Toledo, etc., R. Co., 32 N.W. 884, 65 Mich. 655
51 C.J. p. 816 note 54

45. U.S.—Central Trust Co. v. Texas, etc., R. Co., C.C.Mo., 23 F. 703.
Tex.—Waters-Pierce Oil Co. v. U. S., etc., Trust Co., 99 S.W. 212, 44 Tex. Civ. App. 397

46. Ind.—Cincinnati, etc., R. Co. v. Shera, 73 N.E. 293, 36 Ind. App. 315.
Wis.—Carnegie Fuel Co. v. Interstate Transfer R. Co., 160 N.W. 1046, 165 Wis. 46, L.R.A.1917C 580

47. Tenn.—Consolidated Engineering Co. v. Wedow, 289 S.W. 507, 154 Tenn. 358, d. sapproving Bon Air Coal, etc., Co. v. Lewisburg, etc., R. Co., 4 Tenn. C.C.A. 37.

48. Idaho.—Naylor v. Lewiston, etc., R. Co., 96 P. 573, 14 Idaho 789.

49. U.S.—Giant Powder Co. v. Oregon Pac. R. Co., C.C.Or., 42 F. 470, 8 L.R.A. 760
51 C.J. p. 816 note 59.

50. Tenn.—Cohn v. Walker Constr. Co., 175 S.W. 536, 131 Tenn. 445.

51. Ga.—Baltimore Trust Co. v. Seaboard Air-Line R. Co., 99 S.E. 867, 149 Ga. 260, certiorari denied 40 S.Ct. 16, 250 U.S. 673, 63 L.Ed. 1200.—Valdosta, etc., R. Co. v. Atlantic Coast Line R. Co., 98 S.E. 465, 148 Ga. 842.

52. Ga.—Baltimore Trust Co. v. Seaboard Air-Line R. Co., 99 S.E. 867, 149 Ga. 260, certiorari denied 40 S.Ct. 16, 250 U.S. 673, 63 L.Ed. 1200.

53. Ga.—Baltimore Trust Co. v. Seaboard Air-Line R. Co., supra.

54. Ga.—Baltimore Trust Co. v. Seaboard Air-Line R. Co., supra.

55. Ga.—Baltimore Trust Co. v. Seaboard Air-Line R. Co., supra.

56. Ga.—Baltimore Trust Co. v. Seaboard Air-Line R. Co., supra.

57. Ga.—Jones v. Peeples, 89 S.E. 195, 145 Ga. 335.

58. Mich.—Dudley v. Toledo, etc., R. Co., 32 N.W. 884, 65 Mich. 655.
51 C.J. p. 816 note 69.

59. Idaho.—Naylor v. Lewiston, etc., R. Co., 96 P. 573, 14 Idaho 789.
Tex.—Texas Bldg. Co. v. Collins, Civ. App., 187 S.W. 404.

60. Tex.—Texas Bldg. Co. v. Collins, supra.

61. U.S.—Richmond, etc., Constr. Co. v. Richmond, etc., R. Co., Ky., 68 F. 105, 15 C.C.A. 289, 34 L.R.A. 625, certiorari denied 16 S.Ct. 1199, 163 U.S. 679, 41 L.Ed. 310.

62. Ga.—Baltimore Trust Co. v. Seaboard Air-Line R. Co., 99 S.E. 867, 149 Ga. 260, certiorari denied 40 S.Ct. 16, 250 U.S. 673, 63 L.Ed. 1200

63. Ga.—Baltimore Trust Co. v. Seaboard Air-Line R. Co., supra

64. Ga.—Valdosta, etc., R. Co. v. Atlantic Coast Line R. Co., 98 S.E. 465, 148 Ga. 842.

65. Colo.—Chicago State Bank v. Plummer, 129 P. 819, 54 Colo. 144

66. Idaho.—Naylor v. Lewiston, etc., R. Co., 96 P. 573, 14 Idaho 789
51 C.J. p. 817 note 77.

67. Neb.—Stewart-Chute Lumber Co. v. Missouri Pac. R. Co., 44 N.W. 47, 38 Neb. 39.
51 C.J. p. 817 note 78.

68. Tenn.—Luttrell v. Knoxville, etc., R. Co., 105 S.W. 565, 119 Tenn. 452, 128 Am.S.R. 737.
51 C.J. p. 817 note 79.

69. U.S.—Richmond, etc., Constr. Co. v. Richmond, etc., R. Co., Ky.,

for material lost by his negligence, although the title to it had passed to the company.[70]

§ 274. —— Place of Performance or Delivery

Ordinarily the right to a lien attaches to the whole, continuous line of railroad where the labor or material was furnished in two or more counties, and is not confined to the property in any one county.

The right to a lien is not confined to one county where the labor or material is furnished in two or more counties; but it fastens on the entire and continuous line of the road, and may be enforced in any of the counties through which the road runs.[71] Under some statutes it is not essential to the enforcement of the lien within a particular state that the labor be performed or the materials delivered within that state.[72]

§ 275. —— Time of Furnishing of Labor or Material

There can be no lien for items of claims not accruing within a period set by statute within which claims must accrue in order to be lienable.

Where a statute provides the period within which the claim must arise in order that it may be lienable, a lien cannot be had for items of claims not accruing within that period.[73]

§ 276. —— Amount of Lien

A claimant cannot become entitled to a lien for an amount greater than that due him under his contract.

The lien claimant cannot, in any event, be entitled to a lien for more than the amount due him under his contract.[74] Where a lien is afforded to subcontractors to the extent and value of the work and labor performed or materials furnished, the railroad is liable only for the value of the work and material, no matter what may be the price fixed by the contract between the principal contractor and subcontractor.[75] Where the statute provides that the liens of subcontractors, laborers, and materialmen shall not in the aggregate be for a greater amount than the contract price of the original contractor, and there are several subcontractors entitled to liens, the contract price should be apportioned among all of them according to the whole amount of their lienable claims, whether or not actually perfected.[76]

§ 277. —— Necessity of Indebtedness of Railroad to Principal Contractor; Effect of Payments

Under some statutes a subcontractor is not entitled to a lien unless it appears that there is something due or to become due from the railroad to the principal contractor when the lien is formally perfected.

Where the statute provides that the railroad shall not be liable for any greater sum than the amount actually due by the corporation to the original contractor, in order that a subcontractor may be entitled to a lien it must appear that there is something due or to become due the original contractor,[77] at the time of the giving of notice or the taking of other steps necessary to perfect the lien.[78] Where a statute confers a direct lien on a subcontractor, laborer, or materialman, it attaches on compliance with the statutory requirements without regard to payments which have been made to the principal contractor,[79] and, after it has attached, it cannot be defeated by a payment to the contractor;[80] and, where, under the statute, it attaches to the sum due at the time notice is given and to sums accruing thereafter, the rights of one furnishing material to a subcontractor are to be determined by the state of accounts between the railroad and the principal contractor, and not of the account between the contractor and subcontractor,[81] although as to this there is also authority to the contrary.[82] The fact

68 F. 105, 15 C.C.A. 289, 34 L.R.A. 625, certiorari denied 16 S.Ct. 1199, 163 U.S. 679, 41 L.Ed. 310.

70. U.S.—Richmond, etc., Constr. Co. v. Richmond, etc., R. Co., supra.

71. Ind.—Midland R. Co. v. Wilcox, 12 N.E. 506, 122 Ind. 84.
51 C.J. p 817 note 82.

72. Minn.—Thompson v. St. Paul City R. Co., 47 N.W. 259, 45 Minn. 13.
51 C.J. p 817 note 83.

73. Ga.—Baltimore Trust Co. v. Seaboard Air-Line R. Co., 99 S.E. 867, 149 Ga. 260, certiorari denied 40 S.Ct. 16, 250 U.S. 673, 63 L.Ed. 1200.
51 C.J. p 817 note 84.

74. Iowa.—Beach v. Wakefield, 76 N.W. 688, 78 N.W. 197, 107 Iowa 567.
51 C.J. p 817 note 85.

75. Ind.—Chapman v. Elgin, etc., R. Co., 39 N.E. 289, 11 Ind.App. 632.
51 C.J. p 817 note 87.

76. U.S.—Central Trust Co. v. Richmond, etc., R. Co., Ky., 68 F. 90, 15 C.C.A. 273, 41 L.R.A. 458, certiorari denied 16 S.Ct. 1199, 163 U.S. 679, 41 L.Ed. 310
51 C.J. p 817 notes 88, 89

77. U.S.—Central Trust Co. v. Bridges, Tenn., 57 F. 753, 6 C.C.A. 539.
51 C.J. p 818 note 91.

78. Or.—Coleman v. Oregonian R. Co., 35 P. 556, 25 Or. 286.
51 C.J. p 818 note 92.

79. U.S.—Central Trust Co. v. Richmond, Ky., 68 F. 90, 15 C.C.A. 273, 41 L.R.A. 458, certiorari denied 16 S.Ct. 1199, 163 U.S. 679, 41 L.Ed. 310.
51 C.J. p 818 note 94.
Proceedings to protect lien see infra § 280.

80. Ind.—Indiana, etc., R. Co. v. Larrew, 30 N.E. 517, 130 Ind. 368.

81. N.C.—Atlas Powder Co. v. Denton, 97 S.E. 372, 176 N.C. 426.

82. S.D.—Congdon, etc., Hardware Co. v. Grand Island, etc., R. Co., 86 N.W. 633, 14 S.D. 575.
51 C.J. p 818 note 97.

that the railroad has paid to the contractor an amount exceeding that which is claimed by the subcontractor will not prevent the subcontractor from acquiring a lien on an unpaid balance due from the railroad to the contractor.[83] Where a payment by the contractor to the subcontractor is made directly from moneys paid by the railroad, it should be applied to lienable items of the subcontractor's account.[84]

§ 278. —— Property Subject to Lien

A lien for labor and materials ordinarily attaches to the whole road or the whole proceeds of a sale thereof; but the particular kind of railroad property included as lienable will depend on the provisions of the statute invoked.

As a general rule a statutory lien for labor and materials furnished to a railroad company attaches to the entire road or the proceeds of a sale thereof,[85] and cannot be enforced against a separate part of the road,[86] although such part may be all of the road which the lienor constructed or aided to construct.[87] This rule, however, is subject to the modification that the lien extends only to the completed portion of the road,[88] and not to a projected portion to be completed thereafter;[89] but the fact that the road as projected when the labor and materials are furnished is not fully completed will not defeat the lien.[90] Likewise the lien extends only to the interest in the road of the company by which the laborer or mechanic is employed.[91] Although the railroad has an interest less than a fee-simple title, it may be subject to a lien.[92]

A lien, conferred by a statute, attaches only to the property to which it is confined by the language of the statute.[93] Except where the statute provides otherwise,[94] such lien attaches only to real estate,[95] and does not attach to the rolling stock and other movables belonging to the company;[96] nor does it attach to the franchise of the company.[97] Under a statute providing that the lien shall attach to all property of the railroad, real, personal, and mixed, it attaches to the rolling stock.[98]

§ 279. —— Persons Entitled to Liens

a In general
b Contractors
c Subcontractors
d. Persons employed by, or otherwise dealing with, subcontractors
e. Laborers and others rendering services
f. Assignees or purchasers of claims

a. In General

Only the persons specified by the statute are entitled to claim a statutory lien against railroad property for labor or materials.

The persons who may claim a statutory lien for labor or material are to be determined by the proper construction of the statute under which the lien is claimed, and, unless claimant is within the class designated by the statutory provision under which he claims a lien, he is not entitled to such lien.[99] A mere creditor of one entitled to such a lien has no right to the lien, although money loaned by him may have been used to furnish the materials supplied to the railroad company.[1]

b. Contractors

Statutes creating liens in favor of laborers and materialmen have been construed not to apply in favor of contractors for the furnishing of labor and materials.

Statutes creating liens in favor of laborers and materialmen have been construed not to apply in

83. Wash.—Barbo v. Norris, 245 P. 414, 138 Wash. 627.

84. Wash.—Barbo v. Norris, supra.

85. Ind.—Farmers' Loan & Trust Co. v. Canada, etc., R. Co., 26 N.E. 784, 127 Ind. 250, 11 L.R.A. 740.
51 C.J. p. 818 note 2.

86. Mo.—Cranston v. Union Trust Co., 75 Mo. 29.
51 C.J. p. 818 note 3.

87. Ga.—Farmers' Loan & Trust Co. v. Candler, 13 S.E. 560, 87 Ga. 241.

88. Iowa.—Neilson v. Iowa Eastern R. Co., 1 N.W. 434, 51 Iowa 184, 33 Am.R. 124, 3 N.W. 779, 51 Iowa 714.

89. Iowa.—Neilson v. Iowa Eastern R. Co., supra.

90. Iowa.—Neilson v. Iowa Eastern R. Co., supra.

91. Ga.—Breed v. Nagle, 46 Ga. 112.
51 C.J. p. 819 note 8.

92. Idaho.—Naylor v. Lewiston, etc., R. Co., 96 P. 573, 14 Idaho 789.

93. Tex.—Concho, etc., R. Co. v. Kennedy, Civ.App., 146 S.W. 845.
51 C.J. p. 818 note 1.

94. Ark.—Brown v. Buck, 16 S.W. 195, 54 Ark. 453.
51 C.J. p. 819 note 10.

95. Iowa.—Nielson v. Iowa Eastern R. Co., 3 N.W. 779, 51 Iowa 714.

96. Iowa.—Nielson v. Iowa Eastern R. Co., 1 N.W. 434, 51 Iowa 184, 33 Am.R. 124, 3 N.W. 779, 51 Iowa 714.
51 C.J. p. 819 note 12.

97. Iowa.—Nielson v. Iowa Eastern R. Co., 3 N.W. 779, 51 Iowa 714.

98. Mo.—Bethune v. Cleveland, etc., R. Co., 51 S.W. 465, 149 Mo. 537.

98. Or.—George v. Oregon, etc., R. Co., 247 P. 780, 118 Or. 502.

99. Iowa.—Templin v. Chicago, etc., R. Co., 35 N.W. 634, 73 Iowa 548.
51 C.J. p. 819 note 17.

Person furnishing material to contractor

Statutory lien granted to all persons furnishing materials entering into construction, maintenance, or repair of permanent railroad bed is limited to those supplying materials directly to railroads, and is not extended to those furnishing materials to contractors.—Southern Coal Co. v. R. & P. Const. Co., 133 So. 491, 16 La.App. 213.

1. N.Y.—Fowler v. Buffalo, etc., R. Co., Sheld. 525.
Tenn.—Mellon v. Morristown, etc., R. Co., Ch.App., 35 S.W. 464.

favor of contractors for the furnishing of labor and materials [2] However, contractors for the performance of work, including the furnishing of labor and materials, have been held to be within the intent of statutes conferring liens on anyone who shall perform any labor on, or for the benefit of, any railroad,[3] or on any mechanic, builder, artisan, workman, laborer, or other person who shall perform any work on any railroad,[4] or on mechanics, laborers, and operatives.[5] Where the statute provides that all persons who furnish labor, material, or teams shall be entitled to a lien, a contractor for the furnishing of labor, etc, may be entitled to a lien.[6]

Who are contractors. A contractor within the meaning of a statutory provision giving such lien to contractors is one who furnishes labor or materials under a contract directly with the railroad company or through a duly authorized officer or agent.[7]

c. Subcontractors

A subcontractor must bring himself within the terms of the lien statute in order to acquire a lien on railroad property.

A subcontractor, in order to acquire a lien, must bring himself within the provisions of a statute applicable to subcontractors,[8] and can have no lien under a statute providing for contractors only.[9] While it has been held that a subcontractor may have a lien under a statute conferring a lien on any mechanic, builder, artisan, workman, laborer, or other person who shall perform any work on any railroad,[10] or a statute conferring a lien on mechanics, laborers, and operatives,[11] it has been held to the contrary that subcontractors are not within the scope of the title of an act relating to the liens of mechanics, laborers, and materialmen,[12] and that a subcontractor procuring work to be done through the labor of others does not come within the provisions of a statute imposing a lien on railroad property for the protection of laborers and mechanics who may perform work with teams or tools in its construction or repair,[13] although he may have a lien for his own personal services and that of his teams and tools, as discussed infra subdivision e of the current section.

Who are subcontractors. A subcontractor, within the meaning of these statutes, is one who furnishes labor or material under a contract with the principal contractor.[14] One who merely hires or rents tools or equipment to one employed on the work does not thereby become a subcontractor and entitled to a lien for the value of the use of the tools or equipment;[15] nor is a person performing labor rendered a subcontractor because of the fact that his compensation is fixed by units of work performed.[16]

d. Persons Employed by, or Otherwise Dealing with, Subcontractors

Some statutes providing for liens on railroad property, while including subcontractors or persons furnishing labor or materials to the principal contractor, do not embrace one who furnishes labor or materials under a contract with a subcontractor, but other statutes extend the benefit of the lien to such persons.

There is some conflict among the authorities as to whether railroad lien laws protect only those dealing with a contractor or his subcontractor, or whether they extend to those dealing with a subcontractor of any degree.[17] Some statutes, while including subcontractors or persons furnishing labor or materials to the principal contractor, do not embrace one who furnishes labor or materials under a contract with a subcontractor.[18] Under other stat-

2. Ark.—Little Rock, etc., R. Co. v Spencer, 47 S.W. 196, 65 Ark. 183, 42 L.R.A. 334
51 C.J. p 819 note 19.

3. U.S.—Couper v Gaboury, Fla., 69 F. 7, 16 C.C.A. 112.

4. Okl.—Kansas City Southern R. Co. v. Tansey, 139 P. 267, 41 Okl. 543—Kansas City Southern R. Co. v Wallace, 132 P. 908, 38 Okl. 233, 46 L.R.A.,N.S., 112.

5. Tex.—Hales v. San Antonio, etc., R. Co., 238 S.W. 1106, 111 Tex. 434.
51 C.J. p 819 note 22.

6. U.S.—Tod v. Kentucky Union R. Co., Ky., 52 F. 241, 3 C.C.A. 60, 18 L.R.A. 305.

7. Idaho.—Naylor v. Lewiston, etc., R. Co., 96 P. 573, 14 Idaho 789
51 C.J. p 819 note 24.

8. Iowa.—Templin v Chicago, etc., R. Co., 35 N.W. 634, 73 Iowa 548.
Road contractor
Under lien statute, road contractor who furnished principal contractor with steam shovel engineer and fireman used in grading and construction of railroad right of way had lien against railroad company for work and labor done.—Algiers, Winslow & Western Ry. Co. v. Foulkes Contracting Co., 200 N.E. 438, 101 Ind.App. 632

9. Ark.—Tucker v. St. Louis, etc., R. Co., 26 S.W. 375, 59 Ark. 81
51 C.J. p 820 note 26.

10. Okl.—Kansas City Southern R. Co. v. Tansey, 139 P. 267, 41 Okl. 543—Kansas City Southern R. Co. v. Wallace, 132 P. 908, 38 Okl. 233, 46 L.R.A.,N.S., 112

11. **In Texas**
(1) The text rule has been followed.—Cisco, etc., R. Co. v. Diefenderfer, Civ.App., 13 S.W.2d 126.
(2) There is also authority to the contrary.—Krakauer v. Locke, 25 S.W. 700, 6 Tex.Civ.App. 446

12. Ind.—Cleveland, etc., R. Co. v De Frees, 87 N.E. 732, 173 Ind. 717

13. Tex.—Ft. Worth, etc., R. Co. v Read, Civ.App., 140 S.W. 111.
51 C.J. p 820 note 30.

14. Neb.—Owen v Chicago, etc., R. Co., 126 N.W. 658, 86 Neb. 851.
51 C.J. p 820 note 32.

15. Cal.—Wood v El Dorado Lumber Co., 94 P. 877, 153 Cal. 230, 126 Am.S.R. 80, 16 L.R.A.,N.S., 585, 15 Ann.Cas. 382

16. Tex.—Ft. Worth, etc., R. Co. v. Read, Civ.App., 154 S.W. 1027.
51 C.J. p 820 note 34.

17. Ky.—E. I. Du Pont de Nemours Powder Co. v. Louisville, etc., R. Co., 156 S.W. 116, 153 Ky. 593

18. Fla.—Howard v. Moore, 20 Fla. 163
51 C.J. p 820 note 35.

utes, however, the lien is extended to subcontractors of the second,[19] or even third,[20] degree, and to persons doing labor for, or furnishing material to, either of these.[21] Where the statute requires the lien to be based on a contract with, or approved by, the railroad, one furnishing material under a contract with a third person having a contract with a subcontractor under the original contractor must show that the railroad approved the contract between himself and the third person.[22] One employed by a construction company may be regarded as employed at the instance of a contractor of the railway company, although the construction company was chartered and did considerable work before the railroad company obtained its charter, where the contract between the construction and the railroad companies covered the entire work of grading the road and thus related back, making the construction company the contractor of the railroad company from the beginning.[23]

e. Laborers and Others Rendering Services

While some lien laws are broad enough to provide liens for all persons furnishing valuable services to a railroad, ordinarily the terms of the statute are such that the lien is restricted to those furnishing manual labor.

Some statutes conferring liens of the character under consideration are sufficiently broad in their terms to include all persons rendering valuable services from which the railroad receives a benefit.[24] However, statutes affording a lien to persons performing labor or services are ordinarily construed to include only persons other than officers, managers, or general superintendents,[25] and to be intended to provide liens for those who actually perform manual labor, in the construction, repair, or operation of the road.[26]

Under the phraseology of the statute involved, and the construction placed thereon by the court, the railroad lien laws have been held to include the foreman or superintendent of a gang of laborers engaged in construction or repair work,[27] a civil engineer,[28] or a bookkeeper;[29] but have been held not to extend to one who merely has charge of the company's office and of the receipts and who keeps in a book the time of the workmen as handed to him.[30] The term "laborer" does not extend to contractors or subcontractors who supply laborers and teams,[31] even though they personally expend labor with that of the laborers employed by them.[32] A teamster is a laborer as far as his own personal services are concerned,[33] but has been held not to be such with respect to the use of his team.[34] He may, however, have a lien for his wages for himself and the team which he uses, where the statute provides that laborers who have performed labor or work with teams, to whom wages are due for such work or for the work of the team employed, shall have a lien.[35] Where the statute permits a lien in favor of claimant only for his own personal services and that of his teams and tools, a claimant must not intermingle with his claims for labor, tools, and teams furnished by other persons.[36]

f. Assignees or Purchasers of Claims

Some authorities have held that liens against railroad property for labor and materials are personal and nonassignable, while other authorities have held such liens to be assignable.

Although some authorities have held that liens of the character under consideration are personal rights which are not assignable at law,[37] other authorities have held that, in the absence of a statute so providing, such liens may be assigned so as to entitle

19. Minn.—Perry v. Duluth Transfer R. Co., 57 N.W. 792, 56 Minn. 306.
51 C.J. p 820 note 36.

20. Mont.—Eccleston v. Hetting, 42 P. 105, 17 Mont. 88.
51 C.J. p 820 note 37.

21. Ky.—Grigsby v. Lexington E. Ry. Co., 153 S.W. 232, 152 Ky. 164.
51 C.J. p 820 note 38.

22. Conn.—Alling v. Cheshire St. R. Co., 75 A. 143, 83 Conn. 82.
51 C.J. p 820 note 39.

23. Tex.—Gulf, etc., R. Co. v. Winder, 63 S.W. 1043, 26 Tex.Civ.App. 263.

24. Mo.—Van Frank v. St. Louis, etc., R. Co., 67 S.W. 688, 93 Mo. App. 412.
51 C.J. p 821 note 41.

25. N.Y.—Wick v. Ft. Plain, etc., R. Co., 50 N.Y.S. 479, 27 App.Div. 577.
Tenn.—McDonald v. Charleston, etc., R. Co., 24 S.W. 252, 93 Tenn. 281.

26. U.S.—Gilchrist v. Helena, etc., R. Co., C.C.Mont., 58 F. 708.
51 C.J. p 821 note 43.
Nature and purpose of labor or materials as affecting right to lien see supra § 272.

27. Ark.—St. Louis, etc., R. Co. v. Love, 86 S.W. 395, 74 Ark. 528.
51 C.J. p 821 note 45.

28. U.S.—Central Trust Co. v. Richmond, etc., R. Co., C.C.Ky., 54 F. 723, certiorari denied 16 S.Ct. 1199, 163 U.S. 679, 41 L.Ed. 310.
51 C.J. p 821 note 46.

29. N.Y.—Wick v. Ft. Plain, etc., R. Co., 50 N.Y.S. 479, 27 App.Div. 577.
51 C.J. p 821 note 47.

30. U.S.—Gilchrist v. Helena Hot Springs, etc., R. Co., C.C.Mont., 58 F. 708.

31. U.S.—Tod v. Kentucky Union R. Co., Ky., 52 F. 241, 3 C.C.A. 60, 18 L.R.A. 305.
51 C.J. p 821 note 49.

32. Me.—Rogers v. Dexter, etc., R. Co., 27 A. 257, 85 Me. 372, 21 L.R.A. 528.

33. Kan.—Mann v. Burt, 10 P. 95, 35 Kan. 10.

34. Kan.—Mann v. Burt, supra.
51 C.J. p 821 note 52.

35. Tex.—Cisco, etc., R. Co. v. Diefenderfer, Civ.App., 278 S.W. 267.
51 C.J. p 821 note 53.

36. Tex.—Cisco, etc., R. Co. v. Diefenderfer, supra.

37. Ark.—Dano v. Mississippi, etc., R. Co., 37 Ark. 564.
51 C.J. p 821 note 55.

the assignees to enforce them under the statute.[38] Under some statutes it has been held that, where the lien is inchoate, and all the statutory requirements have not been complied with, it cannot be assigned so as to entitle the assignee to perfect or create the lien by complying with such requirements;[39] but after the lien has once been perfected it may be assigned so as to entitle the assignee to enforce it.[40]

Under the view that the right to a lien is personal and not assignable, one who pays off lien claims and takes up the certificate of indebtedness does not acquire a lien,[41] even though he does so at the request of the railroad company.[42] Under the view that the right to a lien is not personal and is assignable, the lien passes with an assignment of the contract or evidences of the lien indebtedness,[43] such as laborers' time checks.[44] One who, under agreement with the contractor, furnishes money for the payment of laborers' claims and to whom drafts or checks drawn by the contractor, payable to the laborers, are indorsed without recourse, does not become an equitable assignee of the laborers' lien,[45] nor is he subrogated to the laborer's lien.[46]

§ 280. —— Proceedings to Perfect Lien

a. In general
b. Filing and notice
c. Successive or amended statements

a. In General

In order to perfect a valid and enforceable lien superior to other liens on railroad property, it is necessary that the lien claimant should at least substantially comply with all the statutory requirements and take all the steps required by statute.

Although the doing of work and furnishing of materials give an inchoate lien or right to acquire a lien on railroad property, as discussed supra § 270, in order to perfect a valid and enforceable lien superior to other liens, it is necessary that the lien claimant should at least substantially comply with all the statutory requirements and take all the steps required by the statute.[47]

b. Filing and Notice

(1) In general
(2) Time
(3) Contents

(1) In General

Where the statute so requires a claimant of a lien on railroad property must file or record his claim at the place specified and within the time fixed.

In the absence of a statutory requirement, the notice of or recordation of a lien is not essential to its preservation,[48] but, where a statute so requires, it has been held that it is essential that the lien claimant shall file or record his claim,[49] at the place specified,[50] and within the time fixed, as discussed infra subdivision b (2) of this section.

Unless the statute provides otherwise, it is sufficient to file the lien in the county wherein the work is done or material furnished,[51] or in each of such counties,[52] without filing it in all of the counties traversed by the railroad, and one notice filed in each of the proper counties will cover the entire line of the road where it is included in one contract and where the work has been done on it and the materials furnished for it as a continuous line.[53]

Notice to railroad. Where the statute so requires, notice must be given to the railroad,[54] and mere knowledge by the company that a certain person is doing work and furnishing materials is not sufficient to entitle such person to a lien without other notice by or on his behalf.[55] It is generally required that the notice shall be in writing, and compliance with the statute in this respect is essential.[56] The

38. Okl.—Midland Valley R. Co v. McLemore, 174 P. 1079, 73 Okl. 102.
51 C.J. p 821 note 56.

39. Tenn.—Norman v. Edington, 89 S.W. 744, 115 Tenn. 309.
51 C.J. p 822 note 57.

40. Tenn.—Norman v. Edington, supra.
51 C.J. p 822 note 58.

41. Ill.—Cairo, etc., R. Co. v. Fackney, 78 Ill. 116.

42. Ill.—Cairo, etc., R. Co v. Fackney, supra.

43. Ind.—Midland R. Co v. Wilcox, 23 N.E. 506, 122 Ind. 84.
51 C.J. p 822 note 63.

44. Ind.—Pere Marquette R. Co v. Baertz, 74 N.E. 51, 36 Ind. App. 408.
51 C.J. p 822 note 64.

45. Tex.—Gerlach v. North Texas, etc., R. Co., Civ.App., 244 S.W. 662

46. Tex.—Gerlach v. North Texas, etc., R. Co., supra.

47. Colo.—Greeley, etc., R. Co. v. Harris, 20 P. 764, 12 Colo. 226
51 C.J. p 822 note 68.

48. Tex.—Cisco, etc., R. Co. v. Diefenderfer, Civ.App., 278 S.W. 267.
51 C.J. p 822 note 69.

49. U.S.—Houston First Nat. Bank v. Ewing, Tex., 103 F. 168, 43 C.C.A. 150, certiorari denied 21 S.Ct. 919, 179 U.S. 686, 45 L.Ed. 386.
51 C.J. p 822 note 70.

50. Ark.—Arkansas Cent. R. Co. v. McKay, 30 Ark. 682

51. Ind.—Farmers' Loan & Trust Co. v. Canada, etc., R. Co., 26 N.E. 784, 127 Ind. 250, 11 L.R.A. 740
51 C.J. p 823 note 73.

52. U.S.—Central Trust Co. v. Richmond, etc., R. Co., Ky., 68 F. 90, 15 C.C.A. 273, 41 L.R.A. 458, certiorari denied 16 S.Ct. 1199, 163 U.S. 679, 41 L.Ed. 310.
51 C.J. p 824 note 90.

53. Ind.—Midland R. Co. v. Wilcox, 23 N.E. 506, 122 Ind. 84.

54. Colo.—Greeley, etc., R. Co. v. Harris, 20 P. 764, 12 Colo. 226.
51 C.J. p 823 note 77

55. Iowa.—Lounsbury v. Iowa, etc., R. Co., 49 Iowa 255.
51 C.J. p 823 note 78.

56. Ga.—Pou v. Covington, etc., R. Co., 10 S.E. 744, 84 Ga. 311.
51 C.J. p 823 note 79.

notice should be served in compliance with statutory provisions,[57] and ordinarily personal service of the notice is required,[58] and personal service on a domestic company in such case may be made, where service cannot be had on its chief officer or managing agent, by service on any officer whose official relation to the governing body or managing agent or chief officer is such as would make it his duty to communicate such notice to such body, agent, or officer;[59] but service on a station agent,[60] or on a person who has desk room in the office of the company but who has no connection with its officers,[61] is insufficient. Where the statute provides that the notice of claim by a laborer shall be delivered to the engineer, agent, or superintendent in the employ of a corporation having charge of that part of the road on which such labor was performed, it is not required that the notice be served on the person in the immediate charge of construction.[62] Under such a statute it is sufficient that the service be made on one who has the general charge of that part of the road, whatever may be his designation.[63]

Limitation of amount of lien. Under a statute providing that a failure to file a statement shall not defeat the lien except as against purchasers and encumbrancers, a statement filed limits the amount of the lien only with respect to purchasers and encumbrancers.[64]

(2) Time

A lien for labor or materials furnished a railroad should be filed within the period prescribed by statute.

It is essential to the existence of a lien on railroad property for labor and materials that the claim or statement shall be filed within the time limited by statute,[65] and that the required notice be served on the company within the prescribed time.[66] Where the statute so requires, the claim or statement must be filed within a designated period from the time the claim falls due,[67] in which case the period runs from the time the last installment falls due;[68] or within a designated period after claimant has completed the work or furnished the materials for which the lien is claimed[69] in which case the period runs from the date on which the last item is done or furnished,[70] under each separate contract.[71] Where such period has commenced to run by reason of the completion of the work or furnishing of the materials, claimant cannot thereafter extend or revive the time by doing or furnishing small items and thereby fix a date on which the period must commence anew,[72] especially where the doing or furnishing of such items is merely colorable, and the real intention is to save or restore a right which is already imperiled or lost.[73] Where, however, even after the contract is substantially completed, claimant does further work or furnishes further materials, which is necessary for the proper performance of the contract, and this is done in good faith, the period for filing the lien will run from the period of doing such work or the furnishing of such material.[74] The running of the period is suspended by a decree of court for an account.[75]

(3) Contents

The contents of the notice, claim, or statement should comply with statutory requirements, but a substantial compliance is sufficient.

The contents of a notice, claim, or statement must substantially comply with all the requirements of the statute,[76] and all matters which the statute requires to be stated must be substantially set forth;[77] and, conversely, the notice need contain only the

57. Colo.—Union Pac R Co v. Davidson, 39 P. 1095, 21 Colo. 93.
51 C J p 823 note 80.

58. Mo.—Williams v. Dittenhoefer, 86 S.W. 242, 188 Mo. 134.
51 C J p 823 note 81.

59. Mo.—Williams v. Dittenhoefer, supra.
51 C J p 823 note 82.

60. Mo.—Williams v. Dittenhoefer, supra.
51 C.J p 823 note 83.

61. Mo.—Heitzel v. Kansas City, etc., R. Co., 77 Mo. 482.

62. Wis.—Balley v. Wisconsin Cent. R. Co, 124 N.W. 1059, 142 Wis 102—Matzewitz v. Wisconsin Cant. R. Co., 123 N W. 121, 140 Wis 643.

63. Wis.—Balley v. Wisconsin Cent R. Co., 124 N W. 1059, 142 Wis. 102—Matzewitz v. Wisconsin Cent R. Co., 123 N.W. 121, 140 Wis. 643.

64. Iowa—Neilson v Iowa Eastern R. Co, 1 N W. 434, 51 Iowa 184, 33 Am R 124
51 C.J. p 824 note 89.

65. U.S.—Richmond, etc., Constr. Co v. Richmond, etc., R. Co., Ky., 68 F. 105, 15 C.C.A. 289, 34 L.R.A. 625.

66. Ill.—Chicago, etc., R. Co. v. Moran, 58 N E 335, 187 Ill. 316.

67. U.S.—Newgass v. Atlantic, etc., R. Co., C.C.Va., 56 F. 676.

68. U.S.—Newgass v. Atlantic, etc., R. Co., supra.
51 C.J. p 824 note 93.

69. Wash.—Seattle v. Ah Kow, 3 P. 188, 2 Wash.T. 36.
51 C.J. p 824 note 94.

70. U.S.—Frick Co. v. Norfolk, etc., R. Co., Va., 86 F. 725, 32 C.C.A. 31.
51 C.J. p 824 note 95.

71. Mass.—Lyon v. New York, etc., R. Co, 127 Mass 101.
51 C J. p 824 note 96.

72. U.S.—Westinghouse Air Brake Co. v. Kansas City Southern R. Co, Mo., 137 F. 26, 71 C C A. 1—Central Trust Co. v. Chicago, etc., R. Co., C.C.Mo., 54 F. 598.

73. U.S.—Central Trust Co. v. Chicago, etc., R. Co., supra.

74. Cal.—Gordon v. San Francisco, etc, R. Co., 25 P. 125, 86 Cal. 620
51 C.J. p 825 note 99.

75. U.S.—Newgass v Atlantic, etc, R. Co., C.C.Va., 56 F. 676.
51 C.J. p 825 note 1.

76. N.Y.—Mahley v. German Bank, 64 N.Y.S 1080, 53 App Div. 131.
51 C.J. p 825 note 2.

77. N.M.—Texas, etc, R Co. v. Orman, 9 P. 595, 3 N M 365.
51 C J. p 825 note 3.

matters required by statute.[78] Where the statute so requires, the notice or claim must state the name of the person or company by whom claimant was employed and to whom he furnished the materials,[79] designating, if there are several persons, what portion was furnished to each severally,[80] except where there is but one contract;[81] must state interest or ownership of the company in the land over which the road is constructed;[82] and must correctly describe the property to be charged.[83] The description may be aided by the notoriety which the character of the railroad gives the work,[84] and is sufficient if it enables one familiar with the location to identify with reasonable certainty the premises intended to be described.[85] Further, when the statute so provides, the claim or notice must clearly and definitely set forth the nature and amount of the labor and materials for which the lien is claimed,[86] the agreed price or value,[87] the whole contract price for the material or labor,[88] and the dates when the work was done or materials furnished.[89] Where the work is done or the materials furnished under separate contracts, there should be separate accounts or claims filed under each contract.[90] Defects in the notice may be waived by the company, as where it makes no objection thereto in the trial court.[91] The fact that the lien claimant seeks a lien for more than he is entitled to,[92] or that he claims less than he might have claimed,[93] will not defeat his lien, but he cannot be awarded more than his claim justifies.[94] Where the statute permits the entry of judgment for the amount to which claimant may be entitled, although he may have unintentionally failed to enter the full amount of credits in his account filed to which defendant may be entitled, the omission of proper credits will not defeat the lien in the absence of proof of an intentional omission.[95]

c. Successive or Amended Statements

Under some statutes successive liens cannot be filed for the same labor and materials.

Under some statutes it is held that the filing of one claim or account, sufficient to create a lien under the statute, exhausts the contractor's power to encumber the property, and that successive liens for the same labor and materials cannot be filed, even within the statutory period,[96] and that the prescribed time within which the lien may be enforced after filing cannot be extended by the filing of an amendment or a new lien.[97] On the other hand, even under such statutes, if the first lien filed is defective another lien may be filed within the prescribed period.[98] Where the statute provides that claim shall be filed within a specified time after the last day of the last month in which any labor was performed or material was furnished, successive claims for each month's work may be filed in the case of persons who were hired and should have been paid by the month.[99]

§ 281. —— Bond Supplanting Right to Lien

The purpose of statutory bonds taken by a railroad company from a contractor is to relieve its property from lien liability and to substitute therefor a right of action on the bond, and such a right of action runs in favor of the persons specified in the statute.

Under some statutes provision is made for the taking of a bond by the railroad company from the person with whom a contract is made which has to be filed in each county in which any part of the

78. Ga.—Hawkinsville, etc, R Co. v. Beckham, 93 S E. 109, 20 Ga App. 431
51 C J. p 825 note 4.

79. Cal.—Gordon Hardware Co. v. San Francisco, etc., R. Co., 22 P. 406, 23 P. 1025, 3 Cal.Unrep Cas. 140.
51 C J. p 825 note 5.

80. Cal —Gordon Hardware Co. v. San Francisco, etc., R. Co, supra.

81. Cal —Harmon v. San Francisco, etc., R. Co., 25 P. 124, 23 P. 1024, 86 Cal. 617.
51 C.J. p 825 note 7.

82. Wash.—Vincent v. Snoqualmie Mill Co., 35 P. 396, 7 Wash. 566.

83. S.D —Adams v. Grand Island, etc., R. Co., 81 N.W. 960, 12 S.D. 424.
51 C.J. p 825 note 9.
Description held sufficient
Tex.—Warren Cent R. Co. v. Texas Creosoting Co., Civ.App., 62 S.W. 2d 691.

84. W.Va.—Houston Lumber Co. v Wetzel, etc., R. Co., 72 S E 786, 69 W.Va. 682

85. Mont.—Dean v. Stewart, 143 P. 966, 49 Mont. 506.
51 C.J. p 825 note 11.

86. Cal.—Gordon Hardware Co. v San Francisco, etc., R. Co., 22 P. 406, 3 Cal.Unrep.Cas. 140.
51 C.J. p 825 note 12.

87. N.Y —Mahley v. German Bank, 64 N Y.S. 1080, 52 App.Div. 131.

88. N.Y.—Mahley v. German Bank, supra.

89. Mo.—Koken Iron Works v. Robertson Ave. R Co., 44 S.W. 269, 141 Mo. 228.
N.Y.—Mahley v. German Bank, 64 N. Y.S. 1080, 52 App.Div 131.

90. U.S —Central Trust Co. v. Chicago, etc., R. Co., C.C.Mo., 54 F. 598.
Mo —O'Connor v Current River R. Co., 20 S W. 16, 111 Mo. 185.

91. Tenn.—Luttrell v. Knoxville, etc, R. Co., 105 S W. 565, 119 Tenn. 492, 123 Am S R. 737.

92. Mont.—Dean v. Stewart, 143 P. 966, 49 Mont. 506.

93. Mont.—Dean v. Stewart, supra.

94. Mont.—Dean v. Stewart, supra.
N.M.—Texas, etc., R. Co. v. Orman, 9 P 595, 3 N.M. 365.

95. Mo.—Field v. Atchison, etc, R. Co., 129 S.W. 764, 150 Mo App. 77 —Rankin v. Atchison, etc., R. Co., 129 S.W. 755, 150 Mo.App. 32.

96. Cal.—Cox v. Western Pac. R. Co., 44 Cal. 18
51 C J p 826 note 23.

97. U.S.—Battle v. McArthur, C.C. Mo., 49 F. 715.

98. Mo.—Williams v. Chicago, etc, R. Co., 20 S.W. 631, 112 Mo. 463, 34 Am.S.R. 403.

99. U.S.—Central Trust Co. v. Richmond, etc., R. Co., C.C.Ky., 54 F. 723.

work is situated, and the purpose of such bond is to relieve the railway's property from lien liability and to substitute therefor, in favor of the persons mentioned in the statute, a right of action on the bond.[1] The right to a lien exists until the bond is taken and filed as required by the statute.[2] There can be no liability on the bond by virtue of the statute until the bond has been filed.[3] In order to predicate liability on the statutory bond, it is not necessary that a lien be filed.[4] A bond, which has not been filed, will not support an action as a common-law bond in favor of the materialmen because of the want of privity.[5]

§ 282. Mortgages and Trust Deeds

In the absence of a statute providing otherwise, any person or corporation may be trustee under a mortgage or trust deed executed by a railroad company.

In general, unless restricted by statute, any person may be mortgagee or trustee under a mortgage or trust deed executed by a railroad company in good faith,[6] whether or not he is beneficially interested in the security.[7] Thus a director of the mortgagor company is not, by virtue of his office, disqualified to be a mortgagee or trustee,[8] although it has been held that a mortgage executed by a railroad company to another corporation having directors in common with it is presumptively fraudulent.[9] The motive of a trustee in obtaining the qualifications necessary to serve in that capacity is not material where no improper object or purpose appears.[10] If a state officer is constituted ex officio trustee, each successor to the designated office is, during his incumbency, the person vested with power to act as trustee.[11]

Foreign corporations. Subject to the powers of corporations to act as trustees, as discussed in the C.J.S. title Trusts §§ 207, 208 also 14A C.J. p 514 note 28–p 515 note 42, a foreign corporation or trust company may act as trustee under a railroad mortgage,[12] and its right so to do is not impaired by the fact that it has not complied with statutes regulating the right of foreign companies to do business within the state.[13] A statute limiting the right to act as trustee to bona fide residents of the state and disqualifying them on removal therefrom has no application to corporations;[14] nor is such a statute violated when any one of two or more persons named as joint trustees is a resident of the state.[15]

§ 283. —— Power to Mortgage in General

A railroad company ordinarily has power to mortgage its property, subject to such statutory restrictions as may be imposed.

There is some authority for the view that, in the absence of restrictions imposed by statute or its charter, a railroad company has the same power to mortgage any of its property for a legitimate purpose as any other corporation.[16] It is the generally accepted rule, however, that while a railroad company has power to mortgage property belonging to it which is not so connected with its franchise to operate and maintain a railroad that a conveyance thereof would disable the company from performing its public duties,[17] the company cannot validly mortgage its franchise to engage in the railroad business or any corporate property essential to the operation of its road unless authority so to do has been conferred on it by charter or statute,[18] except that it may execute a mortgage for the purchase price of franchises and property lawfully purchased,[19] and that it may mortgage property on which there is an existing statutory lien in order to obtain an extension of time for the payment thereof.[20]

1. Wash.—Du Pont De Nemours Powder Co. v. National Surety Co., 162 P. 866, 94 Wash. 461.
2. Wash.—Laidlaw v. Portland, etc., R. Co., 84 P. 855, 42 Wash. 292.
3. Wash.—Du Pont De Nemours Powder Co. v. National Surety Co., 162 P. 866, 94 Wash. 461.
4. Wash.—Du Pont De Nemours Powder Co. v. National Surety Co., supra.
5. Wash.—Clarke v. Murphy, 170 P. 141, 99 Wash 643—Du Pont De Nemours Powder Co. v. National Surety Co., 162 P. 866, 94 Wash. 461.
6. Mass.—Ellis v. Boston, etc., R. Co., 107 Mass. 1.
7. Md.—Butler v. Rahm, 46 Md. 541.
8. Mass.—Ellis v. Boston, etc., R. Co., 107 Mass. 1.
N.Y.—Duncomb v. New York, etc., R. Co., 88 N.Y. 1.
9. U.S.—Thomas v. Brownsville, etc., R. Co., Neb., 3 S.Ct. 315, 109 U.S. 522, 27 L.Ed. 1018—James v. La Crosse, etc., R. Co., Wis., 6 Wall. 752, 18 L.Ed. 885.
10. N.H.—Richards v. Merrimack, etc., R. Co., 44 N.H. 127.
51 C.J. p 831 note 48.
11. Conn.—Boston, etc., Air Line R. Co. v. Coffin, 50 Conn. 150.
12. U.S.—Hervey v. Illinois Midland R. Co., C.C.Ill., 28 F. 169.
13. U.S.—Gilchrist v. Helena, etc., R. Co., C.C.Mont., 47 F. 593.
Ill.—St. Louis Union Trust Co. v. Wabash, etc., R. Co., 244 Ill.App. 466.
14. U.S.—Farmers' Loan & Trust Co. v. Chicago, etc., R. Co., C.C. Ind., 27 F. 146.
51 C.J. p 831 note 46.
15. U.S.—Farmers' L. & T. Co. v. Chicago, etc., R. Co., supra.
16. Ala.—Electric Lighting Co. v. Rust, 23 So. 751, 117 Ala. 680.
51 C.J. p 826 note 35.
Property of railroad subject to mortgage generally see infra § 284
17. U.S.—Platt v. Union Pac. R. Co., Neb., 99 U.S. 48, 25 L.Ed. 424.
51 C.J. p 826 note 36.
18. N.H.—Richards v. Merrimack, etc., R. Co., 44 N.H. 127.
51 C.J. p 826 note 37.
19. U.S.—Memphis, etc., R. Co. v. Dow, C.C.N.Y., 19 F. 388, reversed on other grounds 7 S.Ct. 482, 120 U.S. 287, 30 L.Ed. 595.
20. Tex.—Galveston, etc., R. Co. v.

While it would seem that such power to mortgage is usually expressly conferred on railroad companies either by their charters or by general statutes,[21] it may be implied from a grant of other powers,[22] as, for example, the power to borrow money,[23] to issue securities,[24] or to alienate, sell, or dispose of its property;[25] but, where the power to mortgage is expressly denied or limited, no general or additional power will be implied.[26] Where authority to mortgage their property is given to railroad companies by a general statute, the failure of a company to claim such power in its articles of incorporation does not deprive it thereof.[27]

Under a power to mortgage, a railroad company may execute a deed of trust in the nature of a mortgage,[28] and may execute a new mortgage in renewal of an existing one.[29] Where a statute conferring the power to mortgage is applicable only to a designated railroad company or class of companies, no other company can avail itself of the provisions thereof;[30] but the fact that a company authorized to construct and maintain a railroad is also empowered to engage in another business does not render inapplicable to it a general statute authorizing railroad companies to mortgage their property.[31]

What law governs. Where a railroad company is chartered in two or more states, its power to mortgage property in one of such states is governed by the laws of that jurisdiction.[32]

Restriction on statutory power. The power of a railroad company to mortgage its property is subject to such conditions and restrictions as may be prescribed by the constitution or by statute or its charter,[33] such as limitations on the amount of indebtedness or obligations to secure which a mortgage may be made,[34] or the margin of security,[35] and compliance therewith is essential to the validity of the mortgage.[36] A power to mortgage for a specified purpose ordinarily confers no authority to mortgage for any other purpose,[37] although statutory authority to execute mortgages to secure the payment of debts contracted in constructing and completing the road has been held to authorize a mortgage not only for the completion of the road as authorized at the time of the passage of the statute, but also for the necessary acquisition of rolling stock and the building or acquisition of such branches as may thereafter be authorized;[38] but the mere fact that a company is specially authorized to execute a mortgage for a particular purpose does not take away or abridge general powers to mortgage otherwise conferred on it.[39] In authorizing a mortgage, the legislature may direct the relation which the lien of the mortgage shall bear to other liabilities of the company.[40]

Curative Statutes. A mortgage executed by a railroad company without legislative authority may be ratified or cured by a statute subsequently enacted, and thereby made as binding as if originally authorized, as far as the state and the public are concerned,[41] although interests vested prior to the enactment of such a statute cannot be changed or affected thereby.[42] Thus, a mortgage of property or franchises which at the date of its execution were not subject to be mortgaged may be effectuated

Fontaine, 57 S.W. 872, 23 Tex Civ App. 519.

21. Tenn.—Hunt v. Memphis Gaslight Co., 31 S.W. 1006, 95 Tenn. 136.
51 C J. p 827 note 42.

22. Fla.—State v. Florida Cent. R. Co., 15 Fla. 690.
51 C.J. p 827 note 43.

23. Ky.—Bardstown, etc., R. Co. v. Metcalfe, 4 Metc. 199, 209, 81 Am. D. 541.
51 C J. p 827 note 44.

24. Wis.—Pierce v. Milwaukee, etc., R. Co., 24 Wis. 551, 1 Am.R. 203
51 C.J. p 827 note 45.

25. Miss.—McAllister v. Plant, 54 Miss. 106.
51 C J. p 827 note 46.

26. Ga.—Georgia Southern, etc., R. Co. v. Barton, 28 S.E. 842, 101 Ga. 466.
51 C J. p 827 note 47.

27. U.S.—Sioux City Terminal R., etc., Co. v. Trust Co. of North America, Iowa, 82 F. 124, 27 C.C.A. 73, affirmed 19 S.Ct. 341, 173 U.S. 99, 43 L.Ed. 628.

28. U.S.—Southern Pac. R. Co. v. Doyle, C.C.Cal., 11 F. 253, 8 Sawy. 60—Pullan v. Cincinnati, etc., Air-Line R. Co., C.C.Ind., 20 F.Cas.No. 11,461, 4 Biss. 35.

29. Ohio.—Miller v. Ratterman, 10 Ohio Dec., Reprint, 555, 22 Cinc.L. Bul. 99.

30. U.S.—Central Trust Co. v. East Tennessee, etc., R. Co., C.C.Ga., 69 F. 658.

31. Iowa.—Beach v. Wakefield, 76 N. W. 638, 78 N.W. 197, 107 Iowa, 567.

32. Pa.—Rothschild v. Rochester, etc., R. Co., 1 Pa.Co. 620.

33. N.J.—Baker v. Guarantee Trust, etc., Co., Ch., 31 A. 174.
Tenn.—Frazier v. East Tennessee, etc., R. Co., 12 S.W. 537, 88 Tenn. 138, affirmed 11 S.Ct. 517, 139 U.S. 288, 35 L.Ed. 196.

34. N.Y.—Flynn v. Coney Island, etc., R. Co., 50 N.Y.S. 74, 26 App. Div. 416.

35. U.S.—Central Trust Co. v. Wheeling, etc., R. Co., D.C.Ohio, 211 F. 515
51 C.J. p 827 note 56.

36. U.S.—Farmers' Loan & Trust Co. v. Oregon, etc., R. Co., C.C. Or., 24 F. 407.
Pa.—Rothschild v. Rochester, etc., R. Co., 1 Pa.Co. 620.

37. Tenn.—Frazier v. East Tennessee, etc., R. Co., 12 S.W. 537, 88 Tenn. 138, affirmed 11 S.Ct. 517, 139 U.S. 288, 35 L.Ed. 196.

38. Pa.—Gloninger v. Pittsburgh, etc., R. Co., 21 A. 211, 139 Pa. 13.

39. Ala.—Mobile, etc., R. Co. v. Talman, 15 Ala. 472—Allen v. Montgomery R. Co., 11 Ala. 437.

40. Pa.—Appeal of Steiner, 27 Pa. 313

41. U.S.—Hall v. Sullivan R. Co., C.C.N.H., 11 F.Cas.No.5,948, Brunn Coll.Cas. 613.
51 C.J. p 833 note 86.

42. N.H.—Richards v. Merrimack, etc., R. Co., 44 N.H. 127.

by statute,[43] since the objection to such mortgage affects the public alone and may be waived by the legislature as its representative.[44] Want of authority to execute a mortgage is sufficiently obviated or supplied by specific statutory recognition of the existence of the mortgage, as by conferring new powers on the company to enable it to pay the debt thereby secured,[45] or authorizing the issuance of new bonds in substitution for those outstanding,[46] or by a statute authorizing trustees under the mortgage to sell the mortgaged property;[47] and a statute authorizing the issuance of bonds and the execution of a mortgage to secure them renders effectual and valid a mortgage executed prior to the enactment of the statute where the bonds to be secured by it have not yet been issued,[48] since the mortgage is only an incident to the debt and has no force until the delivery of the bonds.[49]

§ 284. —— What Property May Be Mortgaged

a. In general
b. Franchises
c. After-acquired property

a. In General

Under a broad and general grant of power a railroad company can mortgage every kind of property which it owns.

A general grant to a railroad company of power to mortgage its franchises and property or its railroad ordinarily embraces, or implies as incidental thereto, the power to mortgage every kind of property owned by the company which may be necessary to the enjoyment of its franchises and the operation of its road.[50] Thus, under such provisions, a railroad company has been held to have power to execute a mortgage covering its easements or rights of way,[51] its rolling stock,[52] and unpaid subscriptions to its corporate stock.[53] Where the company is restricted by statute or its charter, however, as to the property which it may acquire and hold, a general power to mortgage extends only to property lawfully acquired and held.[54] General authority to mortgage the whole railroad or all the property of the company includes authority to mortgage any part of it,[55] except where the statute contemplates a mortgage of the road as an entirety only.[56] Property not owned by the company is not susceptible of being mortgaged by it.[57] Statutory authority to mortgage the real and personal property of a railroad has been construed as restricted, as far as personalty is concerned, to tangibles,[58] and under such a statute the power of the railroad company to mortgage certificates of stock or choses in action has been denied.[59]

Partial validity. Where property which the corporation has power to mortgage is included in a mortgage attempting to mortgage also property which the corporation has no power to mortgage, the mortgage may be good as to the former property if capable of separation.[60]

b. Franchises

While a railroad company may mortgage its secondary franchises, it may not mortgage its franchise to be a corporation.

Subject to the rule, generally obtaining, that a railroad company cannot mortgage its franchises without statutory authority, as discussed supra § 283, the secondary franchises of the company, such as the right to operate and maintain a railroad, and

43. U S—Hall v. Sullivan R Co, C C N H, 11 F Cas.No.5,948, Brunn. Coll Cas. 613
Ill—Hatcher v. Toledo, etc., R. Co, 62 Ill. 477.
Property subject to be mortgaged see infra § 284.

44. Ill.—Hatcher v. Toledo, etc, R. Co, supra.

45. U S—Hall v. Sullivan R. Co., C.C N.H., 11 F.Cas.No.5,948 Brunn Coll Cas 613.

46. N.J.—Coe v. New Jersey Midland R. Co, 31 N.J.Eq. 105, modified on other grounds 34 N J Eq. 266.

47. N.H.—Richards v. Merrimack, etc., R. Co., 44 N H. 127.

48. Vt.—Miller v. Rutland, etc., R. Co., 36 Vt. 452.

49. Vt.—Miller v. Rutland, etc., R. Co., supra.

50. Ky.—Phillips v. Winslow, 18 B Mon 431, 68 Am D 729.
51 C J p 828 note 65

51. Ohio—Junction R. Co. v. Rugles, 7 Ohio St. 1.

52. U S—Pennock v. Coe, Ohio, 23 How 117, 16 L Ed. 436.
11 C J. p 427 note 29 [b] (1).

53. Ky—Eckstein v. Meyer, 2 Ky.L 124, 10 Ky Op 942.

54. Ind—Taber v. Cincinnati, etc, R. Co, 15 Ind. 459.
51 C J. p 828 note 68.

55. U.S.—Minnesota Co v St. Paul Co, Wis., 2 Wall. 609, 17 L.Ed. 886
51 C J p 828 note 69.

56. U.S.—Washington Trust Co. v. Dunaway, Alaska, 169 F. 37, 94 C.C.A. 405.

57. La.—State v. Mexican Gulf R. Co., 2 Rob. 513.

58. U.S.—Randolph v. Scranton, M. & B R. Co, D C Pa., 4 F Supp 861, affirmed, C C A, Miners' Bank of Wilkes-Barre v. Acker, 66 F 2d 850
Accounts receivable, bills receivable, cash, stocks, bonds, or other choses in action may not be mortgaged under a statutory power authorizing a railroad to mortgage its real and personal property, where the term "personal property" is construed as restricted to tangibles.—Randolph v. Scranton, M. & B. R. Co, D.C Pa., 4 F.Supp. 861, affirmed, C.C.A., Miners' Bank of Wilkes-Barre v. Acker, 66 F.2d 850.

59. U.S.—Randolph v. Scranton, M. & B. R. Co., D.C.Pa., 4 F.Supp. 861, affirmed, C.C.A., Miners' Bank of Wilkes-Barre v. Acker, 66 F.2d 850.

60. Pa.—Gloninger v. Pittsburgh, etc., R. Co., 21 A. 211, 139 Pa. 13.
51 C.J. p 828 note 72.

other rights and powers conferred on, or possessed by, the company and necessary to the enjoyment of its road, are ordinarily regarded as subject to be mortgaged with its property, as a part thereof or incidental thereto,[61] on the theory that such franchises are an integral part of the road, without which the securities would be of little value;[62] but there is also some authority to the contrary.[63]

The franchise to be a corporation, or the primary corporate franchise of a railroad company, is not subject to be mortgaged,[64] except where otherwise provided by the constitution or by statute.[65]

Where power to mortgage a franchise is lacking, a mortgage purporting to convey such franchise and the property of the company, while inoperative as to the franchise, is not for that reason invalid or ineffectual as to the property.[66]

c. After-Acquired Property

A general power to mortgage the property or road of a railroad company includes the power to mortgage property thereafter to be acquired.

While at common law a mortgage executed by a railroad company which purports to embrace after-acquired property is ordinarily regarded as inoperative as to such property, on the theory that one cannot grant or convey an effective title to anything to which he has no right,[67] in equity, at least, such a mortgage is upheld,[68] even though the property is not then in existence,[69] either on the theory that the future-acquired property is in the nature of accretions,[70] or on the theory that the company has made an executory contract which in equity will be allowed to become effective when, and as, the property comes into existence,[71] on the equitable principle that what should be done is treated as being done.[72] Subject to statutory restrictions, a general power to mortgage the property or road of a railroad company includes the power to mortgage property thereafter to be acquired.[73] Where a railroad company is expressly authorized by statute or its charter to mortgage after-acquired property, such property is subject to be mortgaged.[74] A mortgage of after-acquired railroad property has been held valid in respect of rolling stock acquired after the mortgage.[75] A mortgage of after-acquired property attaches only to such interest as the railroad company acquires, subject to any liens thereon at the time of acquisition.[76]

Income, rents, and profits. Where a railroad company has power to mortgage after-acquired property, it may execute a mortgage of income, rents, and profits thereafter to be received or to accrue;[77] but, where it has no such power as to after-acquired property, in general it cannot validly mortgage its income, rents, or profits,[78] except where given power by statute so to do.[79] In order that the operation of a railroad will not be hindered or the public inconvenienced, the power to mortgage extends only to the net income of the company, as distinguished from its gross earnings;[80] but the company, in order to make the pledge effectual, may stipulate in the mortgage that, on default of the trustee named therein, the mortgagee may take possession and operate the railroad and receive its earnings.[81]

61. U.S.—Gilnes v. Henwood, C.C.A. Mo., 103 F.2d 226
51 C.J. p. 828 note 75.

62. Ala.—Meyer v. Johnston, 53 Ala. 237.

63. U.S.—Randolph v. Wilmington, etc., R. Co., C.C.Pa., 20 F.Cas.No. 11,563, 11 Phila. 502—Pullan v. Cincinnati, etc., R. Co., C.C.Ind., 20 F.Cas.No.11,461, 4 Biss. 35.

64. Ala.—Meyer v. Johnston, 53 Ala. 237.
51 C.J. p. 828 note 78.

65. Minn.—St. Paul, etc., R. Co. First Div. v. Parcher, 14 Minn. 297.
N.H.—Pierce v. Emery, 32 N.H. 484.

66. Pa.—Gloninger v. Pittsburgh, etc., R. Co., 21 A. 211, 139 Pa. 13.
51 C.J. p. 828 note 80.

67. Me.—Emerson v. European, etc., R. Co., 67 Me. 387, 24 Am.R. 39.
51 C.J. p. 829 note 82.

68. U.S.—Pennock v. Coe, Ohio, 23 How. 117, 16 L.Ed. 436.
51 C.J. p. 829 note 83—11 C.J. p. 442 note 61.

69. Me.—Morrill v. Noyes, 56 Me. 458, 96 Am.D. 486
11 C.J. p. 442 note 62.

70. U.S.—Hodder v. Kentucky, etc., R. Co., C.C.Ky., 7 F. 793, affirmed 6 S.Ct. 697, 117 U.S. 72, 29 L.Ed. 821
51 C.J. p. 829 note 84.

71. U.S.—Hodder v. Kentucky, etc., R. Co., supra.
51 C.J. p. 829 note 85.

72. N.Y.—Seymour v. Canandaigua, etc., R. Co., 25 Barb. 284, 14 How. Pr. 531.
51 C.J. p. 829 note 86.

73. U.S.—In re Central of Ga. Ry. Co., D.C.Ga., 58 F.Supp. 807, applying Alabama law, reversed on other grounds, C.C.A., 150 F.2d 453
51 C.J. p. 829 notes 87, 88.

74. U.S.—Sioux City Terminal R., etc., Co. v. Trust Co. of North America, Iowa, 82 F. 124, 27 C.C.A. 73, affirmed 19 S.Ct. 341, 173 U.S. 99, 43 L.Ed. 628.
51 C.J. p. 829 note 89.

75. U.S.—U. S. v. New Orleans & O. R. Co., Ky., 12 Wall. 362, 20 L.Ed. 434.

76. U.S.—U. S. v. New Orleans & O. R. Co., supra.
11 C.J. p. 442 note 63.

77. Iowa.—Jessup v. Bridge, 11 Iowa 572, 79 Am.D. 513.
51 C.J. p. 829 note 91.

78. Ga.—Georgia Southern, etc., R. Co. v. Barton, 28 S.E. 842, 101 Ga. 466.

79. Minn.—Seibert v. Minneapolis, etc., R. Co., 53 N.W. 1151, 52 Minn. 246.
Ohio.—Welch v. Pittsburgh, etc., R. Co., 2 Ohio Dec., Reprint, 5, 1 West.L.Month. 87.

80. Ohio.—Carey v. Pittsburgh, etc., R. Co., 2 Ohio Dec., Reprint, 85, 1 West.L.R. 338.
Tenn.—Clay v. East Tennessee, etc., R. Co., 6 Heisk. 421.

81. Minn.—Seibert v. Minneapolis, etc., R. Co., 53 N.W. 1151, 52 Minn. 246.

§ 285. —— Authorization by Directors and Consent of Stockholders

a. Authorization by directors
b. Consent of stockholders

a. Authorization by Directors

The general rules relating to the necessity and sufficiency of authorization of corporate mortgages by the board of directors of the mortgagor corporation ordinarily govern in respect of mortgages by railroad companies.

The general rules relating to the necessity and sufficiency of authorization of corporate mortgages by the board of directors of the mortgagor corporation, as discussed in Corporations §§ 1174, 1175, ordinarily govern in respect of mortgages by railroad companies.[82] A statute empowering the directors of railroad companies by unanimous consent to borrow money and mortgage their property applies only to the creation of new obligations,[83] and a mere majority of the directors may validly authorize a mortgage to secure persons to whom the company is already indebted.[84] In the absence of prohibitory statute, the fact that the resolution authorizing the mortgage is adopted by the directors at a meeting held in a state other than that in which the company is incorporated will not invalidate it.[85]

Extent of authorization. A resolution of the board of directors of a railroad company directing the mortgaging of its franchises or property confers on the executive officers of the company authority reasonably incident to, or implied from, that expressly conferred;[86] but no assent to the execution of any other or different mortgage than that authorized will be implied.[87]

Evidence. The delivery by a railroad company of a mortgage signed by its president and secretary and bearing its corporate seal is prima facie evidence that its execution was duly authorized,[88] as is the inclusion in the mortgage of a copy of the resolution of the board of directors authorizing it,[89] or a subsequent admission by the company of the execution of the mortgage;[90] but an erroneous recital in a mortgage of the resolution authorizing it does not prevent the company from showing the extent of the authorization.[91]

Ratification. A mortgage not validly authorized in advance of its execution may be ratified by the subsequent act of the board of directors or the stockholders.[92] Thus, recognition of the existence of an outstanding mortgage in a resolution authorizing the execution of a subsequent mortgage constitutes a ratification equivalent to a prior authorization;[93] and a resolution of the board of directors authorizing a conveyance of the company's property to another railroad company on condition that it assume certain designated mortgages amounts to a ratification of such mortgages so as to cure any defect arising from the fact that the meeting at which their execution was directed was not duly called and held.[94] Similarly, a failure to disaffirm an unauthorized mortgage coupled with the receipt and retention of money or other benefits received thereunder, renders the mortgage valid, although the directors' meeting at which its execution was authorized was not properly held,[95] or the mortgage executed is materially different from that of which execution was directed;[96] and the acceptance by the stockholders of a report of the directors showing execution of a mortgage amounts to a ratification.[97]

On the other hand, a mortgage which is void for fraud or illegality cannot by ratification be given any effectiveness.[98] While ratification may effectuate terms of a mortgage more extensive than those originally authorized,[99] it is inoperative as to provisions not customary in railroad mortgages or expressly or impliedly authorized to be included, and

Tenn.—Clay v. East Tennessee, etc., R. Co., 6 Heisk. 421.

82. Tex.—Waco Tap. R. Co. v. Shirley, 45 Tex. 355.

83. Cal.—McLane v. Placerville, etc., R. Co., 6 P. 748, 66 Cal. 606.

84. Cal.—McLane v. Placerville, etc., R. Co., supra.

85. N.J.—Coe v. New Jersey Midland R. Co., 31 N.J.Eq. 105, modified on other grounds 34 N.J.Eq. 266.

86. U.S.—Southern California Motor-Road Co. v. Union Loan & Trust Co., Cal., 64 F. 450, 12 C.C.A. 215

51 C.J. p 830 note 2.

87. Tex.—Waco Tap. R. Co. v. Shirley, 45 Tex. 355

88. U.S.—Sioux City Terminal R., etc., Co. v. Trust Co. of North America, Iowa, 82 F. 124, 27 C.C.A. 73, affirmed 19 S.Ct. 341, 173 U.S. 99, 43 L.Ed. 628

89. Neb.—Hayden v. Lincoln City Electric R. Co., 62 N.W. 73, 43 Neb. 680

90. Neb.—Hayden v. Lincoln City Electric R. Co., supra.

91. Ohio.—Hatry v. Painesville, etc., R. Co., 1 Ohio Cir.Ct. 426, 1 Ohio Cir.Dec. 238.

92. Vt.—Miller v. Rutland, etc., R. Co., 36 Vt. 452.

93. Vt.—Miller v. Rutland, etc., R. Co., supra.

94. U.S.—Pacific Rolling-Mill v. Dayton, etc., R. Co., C.C.Or., 5 F. 852, 7 Sawy. 61.

95. U.S.—Augusta, etc., R. Co. v. Kittel, Fla., 52 F. 63, 2 C.C.A. 615. N.J.—Coe v. New Jersey Midland R. Co., 31 N.J.Eq. 105, modified on other grounds 34 N.J.Eq. 266.

96. Iowa.—Beach v. Wakefield, 76 N.W. 688, 78 N.W. 197, 107 Iowa 567.

97. Vt.—Miller v. Rutland, etc., R. Co., 36 Vt. 452.

98. Ohio.—Union Trust Co. v. New York, etc., R. Co., 9 Ohio Dec., Reprint, 773, 17 Cinc.L.Bul. 176.

99. N.Y.—Elwell v. Grand St., etc., R. Co., 67 Barb. 83.

of which the directors or stockholders have no actual knowledge at the time of ratification.[1]

b. Consent of Stockholders

Where the charter or a statute confers the management and control of a railroad company on its officers and directors, it is not necessary to secure the consent of stockholders to a mortgage of its property unless a statute so requires.

Where the charter of a railroad company or a statute confers the general power of management and control of the company on its president and board of directors, the consent of the stockholders to the mortgage of its franchises or property is unnecessary in the absence of any provision expressly requiring it.[2] A provision in a statute authorizing the execution of mortgages for particular purposes which requires the consent of stockholders is not applicable to mortgages executed for other purposes,[3] and a statute requiring such consent to mortgages executed by companies organized under its provisions has no application to companies already in existence.[4] It has also been held that such a requirement does not apply to a mortgage executed not to create a new lien, but merely to extend an existing one.[5] Statutes requiring such consent are primarily for the benefit of the stockholders,[6] and the want of such consent cannot be asserted, to defeat a mortgage, by creditors of the company.[7]

Directors owning prescribed majority of stock. The authorization of a mortgage by directors owning the prescribed majority of the stock of the company is, in legal effect, a concurrence of the stockholders and a substantial compliance with a statute requiring their consent.[8]

§ 286. —— Form, Requisites, and Validity

a. In general
b. Consideration
c. Execution and delivery
d. Recording and registration
e. Transfer of possession of personalty
f. Fraud
g. Who may question validity

a. In General

In the absence of statutory restriction, no particular form of instrument is necessary to constitute a mortgage of railroad property, and the mortgage may be in the form of a deed of trust.

In the absence of statutory restriction, no particular form of instrument is necessary to constitute a mortgage of franchises or property of a railroad company, and the real intention of the parties, and not the form of the instrument or the name by which it is called, is the essential factor.[9] So, a deed of trust conveying any such franchises or property, when executed as security for the payment of a debt or obligation, constitutes a mortgage,[10] and has been said to be the usual form thereof.[11] Moreover, where intended as such, an agreement of pledge,[12] or lease,[13] or conditional sale,[14] or a bill of sale,[15] will also constitute a mortgage of the property described therein.

Defective or incomplete instrument. An instrument executed by a railroad company may be treated as a mortgage as against the company and those with knowledge of the nature of the transaction where the design of the parties is manifest, although it is defective or incomplete, as in failing to state the amount of the indebtedness secured,[16] or to fix any time for payment or redemption.[17]

Executory agreement to mortgage property of a railroad company will constitute a valid equitable mortgage thereof,[18] provided it describes the prop-

1. U.S.—Pacific Rolling-Mill v Dayton, etc., R. Co., C.C.Or., 5 F. 852, 7 Sawy. 61.

2. U.S.—Hodder v. Kentucky, etc., R. Co., C.C.Ky., 7 F. 793, affirmed 6 S.Ct. 697, 117 U.S. 72, 29 L.Ed. 821.
Consent of stockholders in respect of corporate mortgages generally see Corporations § 1176.

3. U.S.—Baltimore, etc., R. Co. v. Berkeley Springs, etc., R. Co., C.C. W.Va., 168 F. 770.

4. U.S.—Hervey v. Illinois Midland R. Co., C.C.Ill., 28 F. 169.

5. U.S.—U.S. Mortgage & Trust Co. v. Chicago & A. R. Co., C.C.A.Ill., 40 F.2d 386, certiorari dismissed 57 S.Ct. 756, 296 U.S. 668.
51 C.J. p. 831 note 24.

6. U.S.—Hervey v. Illinois Midland R. Co., C.C.Ill., 28 F. 169.
51 C.J. p. 831 note 25.

7. U.S.—Hervey v. Illinois Midland R. Co., supra.

8. Ill.—Thomas v. Citizens' Horse R. Co., 104 Ill. 462—St. Louis Union Trust Co. v. Wabash, etc., R. Co., 244 Ill.App. 466.

9. U.S.—Heryford v. Davis, Mo., 102 U.S. 235, 26 L.Ed. 160.

10. Wis.—Wisconsin Cent. R. Co. v. Wisconsin River Land Co., 36 N.W. 837, 71 Wis. 94
51 C.J. p. 832 note 52—41 C.J. p. 283 note 45.

11. Cal.—McLane v. Placerville, etc., R. Co., 6 P. 748, 66 Cal. 606.

12. U.S.—King v. Tuscumbia, etc., R. Co., D.C.Ala., 14 F.Cas.No.7,808
51 C.J. p. 832 note 54.

13. U.S.—Frank v. Denver, etc., R. Co., C.C.Colo., 23 F. 123.
51 C.J. p. 832 note 55.

14. U.S.—Fosdick v. Schall, Ill., 99 U.S. 235, 25 L.Ed. 339
Ky.—Barney, etc., Mfg. Co. v. Hart, 1 S.W. 414, 8 Ky.L. 223.

15. Mass.—Potter v. Boston Locomotive Works, 12 Gray 154.
51 C.J. p. 832 note 57.

16. Ala.—Mobile, etc., R. Co. v. Talman, 15 Ala. 472.

17. Ala.—Mobile, etc., R. Co. v. Talman, supra.

18. Vt.—Miller v. Rutland, etc., R. Co., 36 Vt. 452.
51 C.J. p. 832 note 62.

erty,[19] and is such that performance of its terms may be specifically enforced;[20] but, where the giving of the security depends on the discretionary act of a third person, the agreement is not effectual as a mortgage.[21]

Statutory mortgages. Under a statute authorizing the exchange of state bonds for mortgage bonds of a railroad company, railroad bonds when delivered to the state constitute a statutory mortgage on the property of the company without the formal execution of a mortgage,[22] and, similarly, a statutory mortgage comes into existence as soon as the state and a railroad company have assented to a loan provided for by statute in the manner thereby prescribed,[23] since any requirement of further acts on the part of the company constitutes only a condition subsequent which does not postpone the existence of the mortgage.[24] On the other hand, where a statute providing for the making of a loan by the state requires the formal execution of the mortgage by the borrowing company, the mere lending of money to the company will not create a mortgage on its property;[25] and a provision of the charter of a railroad company authorizing the issuance of bonds which shall be binding on the corporate property does not dispense with the execution of a mortgage so as to make such bonds when issued a lien on the property.[26]

b. Consideration

The general rules control with respect to the necessity and sufficiency of the consideration to support a railroad mortgage

The rules relating to the necessity and sufficiency of consideration for mortgages generally, as discussed in Mortgages §§ 87–98, are applicable to mortgages executed by railroad companies.[27] A mortgage given to secure bonds previously issued is supported by a consideration;[28] and the sale of the bonds secured at a discount does not make the mortgage invalid for want of consideration.[29] In view of the rule that there can be no mortgage unless there is a debt to be secured thereby, as discussed in Mortgages § 87, a mortgage made to secure bonds which are invalid is itself invalid and unenforceable.[30] A mortgage executed to secure the purchase price of property granted to the company at the request of another company to which the grantor was obligated to transfer such property is supported by a sufficient consideration, since the grant is not an act which the grantor was already legally bound to do.[31]

c. Execution and Delivery

According to some, but not other, authority a mortgage by a railroad company of its rolling stock and other movable property must comply with general statutes relating to the execution of chattel mortgages. The due execution and recording of a mortgage, and acts by the company recognizing its valid existence, constitute sufficient evidence of its delivery.

According to some authorities, a mortgage by a railroad company of its rolling stock and other movable property must comply with general statutes relating to the execution of chattel mortgages;[32] but there is also authority, to the contrary, that such statutes are inapplicable to ordinary railroad mortgages.[33]

Execution outside state of incorporation. In the absence of prohibitory statute, a railroad mortgage may validly be executed and acknowledged in a state other than that in which the company was incorporated.[34]

Defective execution. An instrument by way of mortgage of franchises or property of a railroad company which is defectively executed nevertheless constitutes, when duly recorded, at least a valid equitable claim superior to the rights of an attaching creditor;[35] and a recital in a subsequent mortgage of the existence, as a valid lien, of a mortgage which was defectively executed establishes the pri-

19. N.Y.—Seymour v. Canandaigua, etc., R. Co., 25 Barb. 284, 14 How. Pr. 531.

20. U.S.—Pennock v. Coe, Ohio, 23 How. 117, 16 L.Ed. 436.
N.J.—Williamson v. New Jersey Southern R. Co., 29 N.J.Eq. 311.

21. U.S.—Augusta Trust Co. v. Federal Trust Co., C.C.Mass., 140 F. 930, affirmed 153 F. 157, 82 C.C.A. 309.
51 C.J. p. 832 note 65.

22. Fla.—State v. Florida Cent. R. Co., 15 Fla. 690.

23. U.S.—Tompkins v. Little Rock, etc., R. Co., C.C.Ark., 15 F. 6.

24. U.S.—Tompkins v. Little Rock, etc., R. Co., supra.

25. La.—State v. Mexican Gulf R. Co., 3 Rob. 513.

26. Ga.—Brunswick, etc., R. Co. v. Hughes, 52 Ga. 557.

27. U.S.—U.S. Mortgage, etc., Co. v. Chicago, etc., R. Co., C.C.A.Ill., 40 F.2d 386.
51 C.J. p. 831 note 33.

28. Md.—Butler v. Rahm, 46 Md. 541.

29. Ohio.—Coe v. Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am.D. 518.

30. Mass.—East Boston Freight R. Co. v. Hubbard, 10 Allen 459—Commonwealth v. Smith, 10 Allen 448, 87 Am.D. 672.

31. Tex.—Texas Western R. Co. v. Gentry, 8 S.W. 98, 69 Tex. 625.

32. Cal.—Bishop v. McKillican, 57 P. 76, 124 Cal. 321, 71 Am.S.R. 68.
51 C.J. p. 833 note 73.

33. U.S.—Southern California Motor-Road Co. v. Union Loan & Trust Co., Cal., 54 F. 450, 12 C.C.A. 215.
51 C.J. p. 833 note 74.

34. U.S.—Galveston, etc., R. Co. v. Cowdrey, Tex., 11 Wall. 459, 20 L.Ed. 199—Hodder v. Kentucky, etc., R. Co., C.C.Ky., 7 F. 793, affirmed 6 S.Ct. 597, 117 U.S. 72, 29 L.Ed. 831.

35. Ohio.—Coe v. Columbus, etc., R. Co., 14 Ohio St. 372, 75 Am.D. 518.

ority of such earlier conveyances over claims under the later one.[36] After a railroad company has received the benefit of a mortgage, it cannot be heard to say that the instrument is invalid because of defective execution.[37]

Delivery. The due execution and recording of a mortgage, and acts by the company recognizing its valid existence, constitute sufficient evidence of its delivery.[38]

d. Recording and Registration

In the absence of statutes particularly applicable to railroad mortgages, the general statutory provisions relative to filing and recording of mortgages govern.

In the absence of statutes particularly applicable to railroad mortgages, general statutory provisions relating to the necessity and sufficiency of filing and recording real estate mortgages govern mortgages of the real property of a railroad company,[39] and those applicable to chattel mortgages control mortgages confined to personal property of the company,[40] except that no record of a statutory mortgage is necessary, since the statute creating it gives constructive notice of its existence and contents,[41] and that a statute requiring mortgages to be filed or recorded does not apply to a mortgage extending or continuing an existing statutory lien.[42] Generally speaking, the recordation or registration of a mortgage is not necessary to its validity as between the parties,[43] or as to others having notice of its existence,[44] unless a statute provides that an unrecorded mortgage shall be invalid as to creditors, in which case it will be held invalid as to a creditor, even though he had actual knowledge thereof.[45] Unless duly filed or recorded, a railroad mortgage is ordinarily ineffectual as against third persons without notice.[46] An instrument which is not only a chattel mortgage but also a contract for the sale of railroad equipment need not be recorded as a chattel mortgage if it is recorded as provided for by a special statute dealing with contracts of its type.[47]

Mortgages of both realty and personalty. Except where otherwise provided by statutes governing railroad mortgages, the recordation, as a real estate mortgage, of a mortgage covering both real and personal property of a railroad company is ordinarily held to be insufficient as to the personalty included if the requirements of the general statutes relating to the registration or recordation of chattel mortgages have not been complied with;[48] but a statute providing that mortgages embracing both real and personal property, when duly recorded as mortgages of real property, need not be recorded as chattel mortgages puts the status of the mortgage lien on the personalty on virtually the same basis and makes it subject to virtually the same rules as a mortgage of realty.[49] Where both a general chattel mortgage act and a special act with respect to railroad mortgages coexist, the fact that the latter merely sets out a method of record without providing any penalties for noncompliance will not cause the penalties prescribed in the chattel mortgage statute to apply to failure to record a railroad mortgage as directed,[50] and only such penalties and effect will follow as would result from a failure to record in the absence of statute.[51] A special statute relating to the recordation or registration of railroad mortgages is not repealed by implication by the mere enactment of a general chattel mortgage statute,[52] or by amendment or alteration of an existing general statute.[53]

Place. A statute requiring chattel mortgages to be filed in the town where the mortgagor resides, if a resident of the state, and if not a resident, where the property mortgaged is situate at the time of the execution of the mortgage, is fully satisfied by filing

36. Ohio—Coe v. Columbus, etc., R. Co., supra.

37. Ala.—Mobile, etc., R. Co. v. Talman, 15 Ala. 472.

38. Pa.—Appeal of McCurdy, 65 Pa. 290.

39. N.Y.—Hoyle v. Plattsburgh, etc., R. Co., 54 N.Y. 314, 15 Am.R. 575.

40. Ky.—Barney, etc., Mfg. Co. v. Hart, 1 S.W. 414, 8 Ky.L. 223.
51 C.J. p. 834 note 98.

41. U.S.—Tompkins v. Little Rock, etc., R. Co., C.C.Ark., 15 F. 6.
Ark.—Memphis, etc., R. Co. v. State, 37 Ark. 632.

42. Tex.—Galveston, etc., R. Co. v. Fontaine, 57 S.W. 872, 23 Tex.Civ. App., 519.

43. U.S.—State Trust Co. v. Kansas City, etc., R. Co., C.C.Mo., 120 F. 398.
51 C.J. p. 834 note 3.

44. U.S.—King v. Tuscumbia, etc., R. Co., D.C.Ala., 14 F.Cas.No.7,808

45. N.Y.—Farmers' Loan & Trust Co. v. Hendrickson, 25 Barb. 484
51 C.J. p. 834 note 4.

46. U.S.—Frank v. Denver, etc., R. Co., C.C.Colo., 23 F. 123.
51 C.J. p. 834 note 6.

47. Ohio—Union Trust Co. v. New York, etc., R. Co., 9 Ohio Dec., Reprint, 773, 17 Cinc.L.Bul. 176

48. Cal.—Bishop v. McKillican, 57 P. 76, 124 Cal. 321, 71 Am.S.R. 68.
51 C.J. p. 834 note 9.

49. N.Y.—Platt v. New York, etc., R. Co., 41 N.Y.S. 42, 9 App.Div. 87, affirmed 48 N.E. 1106, 153 N.Y. 670.

Operation of statute
A statute withdrawing such combination mortgages from the operation of the Chattel Mortgage Act does not act retrospectively to affect private rights acquired before its passage.—Williamson v. New Jersey Southern R. Co., 29 N.J.Eq. 311—51 C.J. p. 834 note 11.

50. Conn.—Washington Trust Co. v. Norwich, etc., Tract. Co., 92 A. 880, 89 Conn. 59.

51. Conn.—Washington Trust Co. v. Norwich, etc., Tract. Co., supra.

52. U.S.—Gilchrist v. Helena, etc., R. Co., C.C.Mont., 47 F. 593

53. U.S.—Metropolitan Trust Co. v. Pennsylvania, etc., R. Co., C.C.N.J., 25 F. 760.

a railroad mortgage in every town through which the railroad runs.[54]

Record or registration as notice. The record or registration in proper manner of a mortgage executed by a railroad company gives notice to all the world of the lien of the mortgage,[55] effective from the time of recordation or registration.[56] Recording a mortgage in full, as distinguished from mere registry, gives constructive notice of its entire contents.[57]

What law governs. The necessity and sufficiency of recordation or registration of a mortgage of personal property of a railroad company are governed by the law of the state where the property is situate,[58] except that a statute giving validity to mortgages only after they are filed for record does not apply to mortgages executed out of the state on property situate outside of the state at the time the mortgage was executed,[59] even though the mortgaged property is subsequently brought within the state for a temporary purpose.[60]

e. Transfer of Possession of Personalty

In the absence of a statute to the contrary, where the parties act in good faith, a mortgage of personal property necessary to carry on the business of the railroad company is valid as against creditors without a transfer of possession of the mortgaged property to the mortgagee. A failure to record a mortgage of railroad personalty may be cured by a transfer of possession of the property to the mortgagee.

The general rule, in the absence of recording acts, is that retention by a railroad company of possession of mortgaged personal property and failure to transfer it to the mortgagee render the mortgage prima facie fraudulent as to creditors;[61] but, where the parties act in good faith, it does not invalidate the mortgage,[62] and so, unless otherwise provided by statute, a mortgage of personal property necessary to carry on the business of the company is valid as against creditors without a transfer of possession of the mortgaged property to the mortgagee.[63] Similarly, a provision in a mortgage of income permitting the company to use as much of the income as necessary for operating and maintaining the road does not invalidate the mortgage.[64] Where a chattel mortgage is filed or recorded, under a statute providing therefor, transfer of possession by the company to the mortgagee has been held unnecessary.[65] Statutory provisions authorizing a railroad company to mortgage cars, engines, and other personal property without delivery of possession, provided the mortgage is recorded, have been construed as applicable only to personal property such as rolling stock,[66] and not to stocks and bonds.[67] Transfer of possession to a receiver appointed to administer the affairs of the company for the benefit of its creditors is tantamount to a transfer to the mortgagee.[68]

In the absence of statute rendering unrecorded chattel mortgages void as to creditors, any invalidity or ineffectiveness, as to third persons, of a mortgage of personal property of a railroad company is cured by a transfer of possession of the mortgaged property to the mortgagee,[69] or his agent,[70] at any time before a levy or seizure has been made in behalf of one as to whom the mortgage was invalid or ineffectual, unless a transfer of possession immediately on the execution of the mortgage is required by statute, in which case a transfer at any later time is ineffectual.[71] Subject to such exception, possession taken by a purchaser at a foreclosure sale under the mortgage is effectual against creditors in whose favor no levy or seizure has then been made.[72]

f. Fraud

A mortgage of railroad property executed and accepted as part of a fraudulent scheme is wholly void,

54. N.Y.—Hoyle v. Plattsburgh, etc., R. Co., 54 N.Y. 314, 15 Am.R. 595.

55. U.S.—Dunham v. Cincinnati, etc., R. Co., Ind., 1 Wall. 254, 17 L.Ed. 584.
N.Y.—Seymour v. Canandaigua, etc., R. Co., 25 Barb. 284, 14 How.Pr. 531.

56. N.Y.—Seymour v. Canandaigua, etc., R. Co., supra.

57. N.J.—Randolph v. New Jersey West Line R. Co., 28 N.J.Eq. 43.
51 C.J. p 834 note 20.

58. Ky.—Barney, etc., Mfg. Co. v. Hart, 1 S.W. 414, 8 Ky.L. 223.

59. N.Y.—Nichols v. Mase, 94 N.Y. 160.
Ohio.—Winslow v. Troy Iron, etc., Factory, 1 Disn. 229, 12 Ohio Dec., Reprint, 591.

60. N.Y.—Nichols v. Mase, 94 N.Y. 160.
Ohio.—Winslow v. Troy Iron, etc., Factory, 1 Disn. 229, 12 Ohio Dec. Reprint, 591.

61. Ohio.—Welch v. Pittsburgh, etc., R. Co., 2 Ohio Dec., Reprint, 5, 1 West L.Month. 87.

62. Ky.—Eckstein v. Meyer, 2 Ky. L. 124, 10 Ky.Op. 124.
Ohio.—Welch v. Pittsburgh, etc., R. Co., 2 Ohio Dec., Reprint, 5, 1 West.L.Month. 87.

63. Ohio.—Welch v. Pittsburgh, etc., R. Co., supra.
51 C.J. p 835 note 27.

64. Ohio.—Welch v. Pittsburgh, etc., R. Co., supra.

65. Ky.—Eckstein v. Meyer, 2 Ky.L. 124, 10 Ky.Op. 942.

66. U.S.—Miners' Bank of Wilkes-Barre v. Acker, C.C.A.Pa., 66 F.2d 850.

67. U.S.—Miners' Bank of Wilkes-Barre v. Acker, supra.

68. Ohio.—Coe v. Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am.D. 518.

69. U.S.—State Trust Co. v. Kansas City, etc., R. Co., C.C.Mo., 120 F. 398.
51 C.J. p 835 note 33.

70. Ill.—Palmer v. Forbes, 23 Ill. 301.
51 C.J. p 835 note 34.

71. N.J.—Williamson v. New Jersey Southern R. Co., 29 N.J.Eq. 311.

72. U.S.—State Trust Co. v. Kansas City, etc., R. Co., C.C.Mo., 120 F. 398.

even in the hands of bona fide holders of obligations secured by it.

A mortgage executed and accepted as part of a fraudulent scheme is wholly void,[73] even in the hands of bona fide holders of obligations secured by it;[74] but one who has been a party to the fraud cannot assert rights against the company in opposition to claims under such a mortgage advanced by good faith holders.[75] Further, it has been held that the principle that, where a part of the consideration for a mortgage is fictitious and fraudulent, the whole instrument is void as against third persons does not, as applied to a mortgage intended to secure advances made by the real owners of the mortgagor corporation, extend to the prejudice of innocent holders of the mortgage notes.[76]

g. Who May Question Validity

The invalidity of a mortgage executed by a railroad company may be asserted only by the state where it arises out of the violation of a restriction imposed for the benefit of the public. A railroad company is ordinarily estopped to deny the validity of a mortgage of which it has received and retained the benefit.

The invalidity of a mortgage executed by a railroad company may be asserted only by the state where it arises out of the violation of a restriction imposed for the benefit of the public;[77] and a general creditor whose claims arose subsequent to the execution of a mortgage ordinarily may not object to it as an unlawful preference.[78] A statute declaring railroad mortgages invalid as against creditors claiming for work done or materials furnished will not invalidate a mortgage as to subcontractors who failed to file notice of their claims with the company, as they were authorized by statute to do, before payment in full to the principal contractor.[79]

Estoppel. A railroad company, notwithstanding its quasi-public character, is ordinarily estopped to deny the validity of a mortgage of which it has received and retained the benefit, or to deny its liability thereunder, on any ground,[80] as, for example, that the indebtedness secured was in excess of that permitted by statute to be incurred,[81] or that the consent of stockholders, as required by a statute, was not had,[82] or that the company is only a corporation de facto and not de jure;[83] and persons standing in the place of the mortgagor company or deriving title through it are similarly estopped where it would be.[84]

§ 287. —— Construction and Operation in General

a. General principles
b. Ambiguities and repugnancies
c. Construction of mortgage and bonds together
d. What law governs

a. General Principles

The construction of mortgages of railroad property is governed largely by the intention of the parties as expressed by them in the instrument.

As in the case of mortgages executed by other corporations, discussed in Corporations §§ 1187-1189, the construction of railroad mortgages is governed largely by the intention of the parties,[85] as expressed by them in the instrument.[86] Words must be taken in their natural import, in the absence of restrictive terms,[87] and the language of a mortgage should be interpreted as it would be by a plain and careful mind,[88] and in the light of the statutory

73. Ohio—Union Trust Co. v. New York, etc, R. Co., 9 Ohio Dec., Reprint, 773, 17 Cinc.L Bul. 176.

74. Ohio—Union Trust Co. v. New York, etc, R. Co, supra.

75. Pa.—Appeal of Reed, 16 A. 100, 122 Pa. 565.
51 C J. p 833 note 83.

76. Ark—Phillips v. Pine Bluff, etc., R Co, 208 S.W. 313, 137 Ark 443.

77. U S.—Sioux City Terminal R, etc, Co. v. Trust Co. of North America, Iowa, 82 F. 124, 27 C C. A. 73, affirmed 19 S.Ct. 341, 173 U. S. 99, 43 L.Ed. 628.
51 C.J p 835 note 38.

78. U.S—Central Trust Co. v. Bridges, Tenn., 57 F. 753, 6 C C. A. 539.

79. U.S.—Central Trust Co. v. Bridges, supra.

80. U.S.—Sioux City Terminal R, etc., Co. v. Trust Co. of North America, Iowa, 82 F 124, 27 C C A 73, affirmed 19 S Ct. 341, 173 U.S 99, 43 L Ed. 628.
Md—Harrison v. Annapolis, etc, R. Co, 50 Md. 490.

81. Pa.—Fidelity Ins., etc., Co. v. West Pennsylvania, etc., R Co., 21 A. 21, 138 Pa. 494, 21 Am S R. 911.
51 C J. p 835 note 44.

82. U S—Baltimore, etc., R. Co. v. Berkeley Springs, etc., R. Co., C C W Va., 168 F. 770.
51 C J. p 835 note 45.

83. Ohio.—Hatry v. Pamesville, etc., R. Co, 1 Ohio Cir.Ct. 426, 1 Ohio Cir Dec. 238—Union Trust Co. v. New York, etc., R. Co., 9 Ohio Dec., Reprint, 773, 17 Cinc.L Bul. 176.

84. Ill.—Thomas v. Citizens' Horse R Co, 104 Ill. 462.
51 C.J. p 836 note 47.

85. N.Y.—McLelland v. Norfolk Southern R. Co, 18 N.E. 237, 110 N Y. 469, 6 Am.S.R. 397, 1 L.R.A. 299
51 C J. p 836 note 50.

86. N.Y.—McLelland v. Norfolk Southern R Co, 18 N.E. 237, 110 N Y. 469, 6 Am S R. 397, 1 L R A. 299
51 C.J. p 836 note 51.
The express terms of a railroad mortgage control the rights of the parties, since draftsman of the mortgage presumably stated the intent of the parties at that time—Empire Trust Co. v. U. S. Trust Co. of N Y., C.C.A.Minn., 165 F.2d 829.

87. Md.—Northern Cent. R. Co. v. State, 17 Md. 8.
51 C.J. p 836 note 52.

88. N.Y.—St. Louis, etc., R. Co. v. Guaranty Trust Co., 99 N.E. 152, 205 N.Y. 609.
51 C.J. p 836 note 53.

or charter provisions by which it was authorized.[89] The mortgage should be construed with other instruments executed at the same time,[90] and should be read as a whole,[91] and provisions cannot be detached from their context and construed independently.[92] A mortgage should be so construed, if possible, that every part thereof will be made operative;[93] a court will not treat as useless any of the words or phrases of the instrument to which a natural meaning can be given,[94] and, if any part of the description is inoperative to convey the property which it attempts to mortgage, the court will nevertheless enforce the mortgage on included property of other descriptions in nature separable from that as to which the mortgage is inoperative.[95] A railroad mortgage speaks as of the time of its execution.[96] Any construction of the mortgage necessary to allow the railroad system to be kept up to date will be made where the language used is capable of such a construction and there is nothing expressly to the contrary.[97]

Provisions defining rights after default. Provisions in a railroad mortgage in the form of a trust deed limiting or defining the rights, after default, of the trustee or the bondholders are to be construed strictly,[98] but according to the fair and reasonable meaning of the language used,[99] taking into consideration the nature of the provision and the character of its object.[1]

Subordination of lien. The language of a railroad mortgage will not be so construed as to subordinate its lien to a subsequent mortgage if susceptible of a different and equally tenable construction.[2]

b. Ambiguities and Repugnancies

Where the language of a railroad mortgage is ambiguous, the court may look to extraneous matters to resolve the ambiguity. In the event of repugnancy between two clauses in the instrument, it has been held that the one first appearing will control.

If the language of a railroad mortgage is ambiguous, the court may look to the situation of the parties at or near the time of execution and the nature and object of their transaction to assist in its construction.[3] Likewise, the interpretation of an ambiguous expression in the mortgage may be controlled by the interpretation which the parties in their course of dealing under it have ratified and adopted;[4] but, where the meaning of a provision is clear, an erroneous construction by them will not control its effect.[5] Where one construction would make the contract illegal and invalid and another legal and valid, preference will be given if possible to the construction which makes it legal.[6] An ambiguity in the terms of a mortgage is ordinarily to be construed against the company,[7] and in favor of the bondholders,[8] although it has been held that provisions with respect to entry or sale by the trustee on default are to be construed in favor of the company in case of doubt.[9]

It has been held that, where two clauses in a railroad mortgage are repugnant and cannot stand together, the one first appearing in the instrument will stand and the later one will be rejected.[10]

c. Construction of Mortgage and Bonds Together

A railroad mortgage and the bonds secured thereby should be construed together.

89. U.S.—Platt v. Union Pac. R. Co., Neb., 99 U.S. 48, 25 L.Ed. 424.
51 C.J. p. 836 note 54.

90. U.S.—McCulloch v. Canadian Pac. Ry. Co., D.C.Minn., 53 F. Supp. 534.

Each instrument recognizing existence of others
U.S.—McCulloch v. Canadian Pac. Ry. Co., supra.

91. U.S.—In re Wisconsin Cent. Ry. Co., D.C.Minn., 68 F.Supp. 320, affirmed, C.C.A., Empire Trust Co. v. U. S. Trust Co. of N. Y., 165 F.2d 829.
51 C.J. p. 837 note 55

92. Mo.—Jackman v. St. Louis, etc., R. Co., 263 S.W. 230, 304 Mo. 319.
51 C.J. p. 837 note 56.

93. W.Va.—Chapman v. Pittsburg, etc., R. Co., 26 W.Va. 328.

94. W.Va.—Chapman v. Pittsburg, etc., R. Co., supra.
51 C.J. p. 837 note 58.

95. U.S.—Pennock v. Coe, Ohio, 23 How. 117, 16 L.Ed. 436.
51 C.J. p. 837 note 59.

96. Vt.—Eldridge v. Smith, 34 Vt. 484.
51 C.J. p. 837 note 60.

97. N.Y.—New York State R. Cos. v. Security Trust Co., 238 N.Y.S. 354, 135 Misc. 456.

98. U.S.—Guaranty Trust, etc., Co. v. Green Cove Springs, etc., R. Co., Fla., 11 S.Ct. 512, 139 U.S. 137, 35 L.Ed. 116.
51 C.J. p. 837 note 63.

99. U.S.—Chicago, etc., R. Co. v. Fosdick, Ill., 1 S.Ct. 10, 106 U.S. 47, 27 L.Ed. 47—Alexander v. Central R. Co., C.C.Iowa, 1 F.Cas.No. 166, 3 Dill. 487.

1. U.S.—Chicago, etc., R. Co. v. Fosdick, Ill., 1 S.Ct. 10, 106 U.S. 47, 27 L.Ed. 47.

2. U.S.—Bankers Trust Co. v. Callaway, C.C.A.Ga., 148 F.2d 629.

3. U.S.—Central Trust Co. v. Kneeland, Ohio, 11 S.Ct. 857, 138 U.S. 414, 34 L.Ed. 1014.
51 C.J. p. 837 note 67.

4. U.S.—Missouri Pac. R. Co. v. Texas, etc., R. Co., C.C.A.La., 282 F. 61.
51 C.J. p. 837 note 68.

5. W.Va.—Chapman v. Pittsburg, etc., R. Co., 26 W.Va. 328.

6. Ohio.—Miller v. Ratterman, 24 N.E. 496, 47 Ohio St. 141

7. N.Y.—Rothschild v. Rio Grande Western R. Co., 32 N.Y.S. 37, 84 Hun 103, affirmed 45 N.Y.S. 1147, 17 App.Div. 635, affirmed 58 N.E. 1092, 164 N.Y. 594, and affirmed 53 N.Y.S. 1113, 31 App.Div. 630, affirmed 58 N.E. 1091, 164 N.Y. 595.

8. N.Y.—St. Louis, etc., R. Co. v. Guaranty Trust Co., 99 N.E. 162, 205 N.Y. 609.

9. U.S.—Chicago, etc., R. Co. v. Fosdick, Ill., 1 S.Ct. 10, 106 U.S. 47, 27 L.Ed. 47.
51 C.J. p. 838 note 73.

10. N.Y.—Pittsburgh, etc., R. Co. v. Central Trust Co., 141 N.Y.S. 66, 156 App.Div. 132.

A mortgage of a railroad is to be construed in connection with bonds secured by it,[11] and, where by reference in the bonds and coupons the mortgage is incorporated with them, the provisions of all the instruments must be examined together to discover the intent and meaning of the contract.[12] Where the terms of the bonds and those of the mortgage are inconsistent, the terms of the bonds will control.[13] There is nothing repugnant or conflicting in the terms of bonds and of a mortgage where the mortgage secures the bonds according to their terms and also by providing additional funds out of which they may be paid.[14]

d. What Law Governs

The construction of a railroad mortgage is ordinarily governed by the law of the state where it was executed and where the property is situated.

The construction of a railroad mortgage is ordinarily governed by the law of the state wherein it was executed and where the property conveyed by it is situate,[15] even though interest coupons attached to the bonds secured are by their terms payable in another state.[16] Where the place of execution does not appear, the court is not bound by principles of comity to follow the construction given to similar mortgages by the courts of one of several states wherein the mortgaged property is situate,[17] but may construe the instrument according to the common law.[18]

§ 288. —— Property and Funds Included

a. In general
b. Real or personal property
c. Appurtenances
d. Franchises
e. Earnings, income, and other funds
f. After-acquired property
g. Estoppel of mortgagor and mortgagee

a. In General

The property included in a mortgage of railroad property is determined by construing the instrument in accordance with the intention of the parties as disclosed by the language used therein.

The general rule that a mortgage executed by a railroad company is to be construed in accordance with the intention of the parties as expressed therein, as discussed supra § 287 a, has been applied in determining what property is included in the mortgage;[19] and the mortgage must be read as a whole.[20] Accordingly, a description in general terms of the property to be conveyed by a railroad mortgage is sufficient, provided the designation is such that the property intended to be conveyed can be identified or ascertained;[21] and for this purpose resort may

11. Ill.—Boley v. Lake St El. R Co, 64 Ill App 305.
N.Y.—Rothschild v. Rio Grande Western R Co, 32 N.Y.S. 37, 84 Hun 103, affirmed 45 N.Y.S. 1147, 17 App.Div. 635, affirmed 58 N.E. 1092, 164 N.Y. 594, and affirmed 53 N.Y.S. 1113, 31 App.Div. 630, affirmed 58 N.E. 1091, 164 N.Y. 595.

12. N.Y.—Neldert v. Chicago, etc., R. Co, 155 N.Y.S. 818, 169 App.Div. 677.

13. N.Y.—Rothschild v. Rio Grande Western R Co, 32 N.Y.S. 37, 84 Hun 103, affirmed 45 N.Y.S. 1147, 17 App.Div. 635, affirmed 58 N.E. 1092, 164 N.Y. 594, and affirmed 53 N.Y.S. 1113, 31 App.Div. 630, affirmed 58 N.E. 1091, 164 N.Y. 595.
51 C.J. p 838 note 76.

14. Minn.—Seibert v. Minneapolis, etc., R. Co., 59 N.W. 822, 58 Minn 39.

15. Pa.—Newman v. Brigantine Beach R Co., 15 Pa.Co. 625.

16. Pa.—Newman v. Brigantine Beach R Co., supra.

17. Ill.—Mississippi Valley, etc., R. Co. v. U. S. Express Co., 81 Ill. 534.

18. Ill.—Mississippi Valley, etc, R Co. v. U. S. Express Co., supra.

19. U.S.—In re Central of Ga. Ry Co., C.C.A.Ga., 150 F.2d 453.

Property not used for transportation purposes

(1) Where railroad mortgage repeatedly specified that all property, railroad or otherwise, formerly owned by railroad's predecessor under which railroad succeeded, was to be subject to the mortgage, property acquired from such predecessor was subject to the mortgage although not used for transportation purposes—Ecker v. Western Pac. R. R. Corp., Cal., 63 S.Ct. 692, 318 U.S. 448, 87 L.Ed. 892, rehearing denied 63 S.Ct. 985, 318 U.S. 803, 87 L.Ed. 1166, Crocker First Nat. Bank of San Francisco v. Western Pac. R., 63 S.Ct. 986, 318 U.S. 803, 87 L.Ed. 1166, Western Pac. R. Co. v. Ecker, 63 S. Ct. 986, 318 U.S. 803, 87 L.Ed. 1166, 63 S.Ct. 986, 318 U.S. 803, 87 L.Ed. 1166, and Irving Trust Co. v. Crocker First Nat. Bank of San Francisco, 63 S.Ct. 988, 318 U.S. 803, 87 L.Ed. 1167.

(2) But system mortgages, including property for use on, or in connection with, or for the purpose of lines of railroad, did not cover railroad's coal lands.—Liberty Nat. Bank & Trust Co. of Savannah v. Bankers Trust Co., C.C.A.Ga., 150 F.2d 453.

Substitution

The provision of a railroad mortgage for substitution of other realty on sale of mortgaged parcels when no default existed in mortgage bonds could not be invoked many years after tracks of mortgaged railroad were relocated and after default in mortgage bonds, especially where original location could not be sold without improvements constructed after relocation of tracks.—In re New York, N. H. & H. R Co, D.C.Conn., 27 F. Supp. 392, affirmed, C.C.A., 104 F.2d 1018

Property owned by subsidiary

A mortgage on railway lines given by parent corporation conveyed by way of mortgage only as much of railway lines as was actually owned by parent corporation, but by hypothecating as collateral the mortgages of subsidiary corporations, all of which mortgages were owned by parent corporation, bondholders of parent corporation were secured pro tanto by liens covering the other parts of railway lines owned by subsidiary corporations.—Carolina, C. & O Ry. of South Carolina v. South Carolina Tax Commission, 15 S.E.2d 764, 197 S.C. 529.

20. U.S.—Cleveland Trust Co v. Consolidated Gas, Electric Light & Power Co of Baltimore, C.C.A.Md., 55 F.2d 211.

21. U.S.—Central Trust Co. v. Bridges, Tenn., 57 F. 753, 6 C.C.A. 539.
51 C.J. p 838 note 84.

be had to oral evidence.[22] Indeed, the description in a mortgage executed by a railroad company covering all its personal property is not required to be as definite and certain as in an ordinary chattel mortgage, by reason of the peculiar nature of the transaction.[23]

General terms in a description are controlled and limited by a subsequent specification or designation of property to be included,[24] and in the construction of the mortgage are not to be detached from those of an explanatory character which immediately follow.[25] Broadly speaking, if the object is to convey a limited interest, general words do not operate to enlarge that interest, but, if the object is to convey a general interest, they operate to include everything that falls within the general words used.[26] On the other hand, while the force of general terms is not to be frittered away by an attempt at more particular description,[27] and a general grant of property "inclusive of" particular articles or items cannot be treated as limited or restricted by such specification,[28] all that can be embraced by the more general terms will not be treated as conveyed unless the intention so to do is apparent.[29] Where a specific enumeration of particular articles of property is followed by general terms, the latter terms are ordinarily construed to refer only to articles of the same nature and kind as those specifically named,[30] and will not be treated as including more or other property than that conveyed by the preceding terms;[31] but this rule yields to the intention to be gathered from the context and general scope of the instrument.[32] A broad general grant among a number of specifically described items is properly limited in effect to an explanation of the other words of the series which are in immediate connection with it.[33]

Exclusion by implication. The doctrine that the expression of one thing is the exclusion of another or others is applicable to railroad mortgages,[34] particularly since it may fairly be assumed that those who draft a railroad mortgage are competent for the purpose and skilled in that branch of the law,[35] so that their omissions cannot be taken to be inadvertent.[36] However, the doctrine is limited by the rule that the omission to specify a thing along with other things which are enumerated does not exclude it if any of the enumerated things could be of no use without it,[37] except where the mortgage speaks clearly for itself as to what is and is not to be included.[38]

Reference to other instruments. A railroad mortgage expressly referring to another instrument for a description of the property conveyed may by such reference sufficiently identify the security, provided the reference is clear;[39] but it will not do so if the instrument thus referred to is not in existence at the time of the execution of the mortgage.[40] A mortgage describing the property conveyed as all that described or referred to in a certain other mortgage, which by its terms covered after-acquired property, conveys property acquired since the execution of such other mortgage.[41]

Nature of interest or title. Where the description is otherwise sufficient, a railroad mortgage passes the equitable interest of the company in property the title of which the company could compel to be conveyed to it,[42] such as lands bought by the company or with its funds but to which title was taken in an-

22. W.Va.—Chapman v. Pittsburg, etc., R. Co., 26 W.Va. 328

23. Conn.—Buck v. Seymour, 46 Conn. 156.

24. N.J.—Koplowitz v. Central Trust Co. of New York, 39 A.2d 452, 135 N.J.Eq. 552
51 C.J. p. 838 note 87.

25. U.S.—Smith v. McCullough, Mo., 104 U.S. 25, 26 L.Ed. 637.

26. Conn.—Raymond v. Clark, 46 Conn. 129.

27. U.S.—Alabama v. Montague, Tenn., 6 S.Ct. 911, 117 U.S. 602, 29 L.Ed. 1000.

28. U.S.—Shaw v. Bill, Ind., 95 U.S. 10, 24 L.Ed. 333.

29. U.S.—Alabama v. Montague, Tenn., 6 S.Ct. 911, 117 U.S. 602, 29 L.Ed. 1000.
Vt.—Eldridge v. Smith, 34 Vt. 484.
51 C.J. p. 838 note 92.

30. Vt.—Brainerd v. Peck, 34 Vt. 496
51 C.J. p. 838 note 93.

31. U.S.—New Orleans Pac. R. Co. v. Parker, La., 12 S.Ct. 364, 143 U.S. 42, 36 L.Ed. 66.
Conn.—Boston, etc., Air Line R. Co. v. Coffin, 50 Conn. 150.

32. U.S.—Calhoun v. Memphis, etc., R. Co., Tenn., 4 F.Cas.No.2,309, 2 Flipp. 442.
51 C.J. p. 839 note 95.

33. U.S.—Alabama v. Montague, Tenn., 6 S.Ct. 911, 117 U.S. 602, 29 L.Ed. 1000.
51 C.J. p. 839 note 96.

34. U.S.—Central Trust Co. v. Denver, etc., R. Co., Colo., 219 F. 110, 135 C.C.A. 12.
51 C.J. p. 839 note 97.

35. U.S.—New York Guaranty Trust Co. v. Minneapolis, etc., R. Co., C.C.A.Minn., 36 F.2d 747, certiorari denied 50 S.Ct. 407, 281 U.S. 756, 74 L.Ed. 1166—Mercantile Trust Co. v. Missouri, etc., R. Co., C.C. Kan., 36 F. 221, 1 L.R.A. 397.

36. U.S.—New York Guaranty Trust Co. v. Minneapolis, etc., R. Co., C.C.A.Minn., 36 F.2d 747, certiorari denied 50 S.Ct. 407, 281 U.S. 756, 74 L.Ed. 1166.

37. Ky.—Phillips v. Winslow, 18 B. Mon. 431, 68 Am.D. 729
51 C.J. p. 839 note 1.

38. U.S.—New York Guaranty Trust Co. v. Minneapolis, etc., R. Co., C.C.A.Minn., 36 F.2d 747, certiorari denied 50 S.Ct. 407, 281 U.S. 756, 74 L.Ed. 1166.

39. Tex.—McIlhenny v. Bing, 13 S.W. 655, 80 Tex. 1, 26 Am.S.R. 705.

40. N.Y.—Bird v. New Jersey, etc., R. Co., 38 N.Y.S. 281, 3 App.Div. 344.

41. Mass.—Henshaw v. Bellows Falls Bank, 10 Gray 568.

42. Conn.—Boston, etc., Air Line R. Co. v. Coffin, 50 Conn. 150.

other's name,[43] or lands occupied by the company under an executory agreement to purchase.[44] On the other hand, an interest which has never become a consummated right in law or equity does not pass by such a mortgage.[45]

Mortgage of "railroad" The extent of the property conveyed by a mortgage of a railroad company's "road" or "railroad" is to be determined largely in the light of the character, condition, and circumstances of the subject matter.[46] In general, no more is included by the term than would be conveyed under a description of the roadway and other lands of the company by metes and bounds, with the appurtenances;[47] and a mortgage of a railroad eo nomine will not be treated as embracing all of the property of the company of every kind merely because it was acquired for railroad purposes.[48] Such a mortgage does not include a subsequent extension of its line which at the time of execution of the mortgage the company was not authorized to make,[49] or any property which it was not then authorized to acquire,[50] but its force or lien is not affected by alterations in plan or deviations in location made without any abandonment of the original project but in pursuance thereof,[51] or construction beyond one of the termini proposed at the time of execution of the mortgage.[52] A mortgage conveying all the property belonging or appertaining to the railroad of the mortgagor company does not include property belonging to the company but not appertaining to its road;[53] but a mortgage of the railroad and property of the company passes not only the road and its appurtenances but also other property and lands not necessary to the road.[54]

b. Real or Personal Property

(1) In general

(2) Particular descriptions of real property

(3) Particular descriptions applicable to personal property

(1) In General

Generally a mortgage of realty includes the railroad itself and articles designed to be attached to the ground or already firmly annexed thereto, while a mortgage of personalty includes articles which may be used for other than railroad purposes or carried away without showing that they were designed for railroad use.

In determining what property passes under a mortgage executed by a railroad company as real estate and what as personal property, it is a general rule that a mortgage of realty includes the railroad itself, both ground and superstructure[55] and depot grounds,[56] buildings,[57] and turntables,[58] as well as rails, ties, spikes, and other articles designed to be attached to the ground[59] or already firmly annexed thereto;[60] but articles which may be used for other than railroad purposes or carried away without showing that they were designed for railroad use are personalty[61] and so a mortgage of personal property will include such things as fuel,[62] oil,[63] office furniture,[64] platform scales,[65] planing mills,[66] loose tools and implements,[67] and all other articles not constituting a part of the roadbed or firmly fixed to the land or to some building which is itself a fixture,[68] including such articles as are usually denominated "chattels," although affixed by a screw or the like to some building where they are removable without detriment to the building.[69] It has been held that rails, ties, spikes, and other materials on hand designed to be attached to the road in running or repairing it are real property, passing under a real estate mortgage,[70] but there is also authority for the contrary view that they are

43. U.S.—Central Trust Co. v. Kneeland, Ohio, 11 S.Ct. 357, 138 U.S. 414, 34 L.Ed. 1014.
51 C.J. p. 839 note 8.

44. Me.—Hamlin v. European, etc., R. Co., 72 Me. 83.
51 C.J. p. 839 note 9.

45. Ill.—Chicago, etc., R. Co. v. Loewenthal, 93 Ill. 433.
51 C.J. p. 839 note 10.

46. Vt.—Miller v. Rutland, etc., R. Co., 36 Vt. 452.
51 C.J. p. 840 note 12.

47. N.Y.—Beardsley v. Ontario Bank, 31 Barb. 619.

48. Wis.—Dinsmore v. Racine, etc., R. Co., 12 Wis. 649.

49. Va.—Alexandria, etc., R. Co. v. Graham, 31 Gratt. 769, 72 Va. 769

50. Ala.—Meyer v. Johnston, 53 Ala. 237.

Pa.—Youngman v. Elmira, etc., R. Co., 65 Pa. 278

51. Ala.—Meyer v. Johnston, 53 Ala. 237
Vt.—Miller v. Rutland, etc., R. Co., 36 Vt. 452.

52. Vt.—Miller v. Rutland, etc., R. Co., supra

53. N.Y.—Parish v. Wheeler, 22 N. Y. 494.

54. Mo.—Whitehead v. Vineyard, 50 Mo. 30.

55. Ill.—Palmer v. Forbes, 23 Ill. 301.

56. Ill.—Palmer v. Forbes, supra.

57. Ill.—Palmer v. Forbes, supra.

58. Ill.—Palmer v. Forbes, supra.

59. Ill.—Palmer v. Forbes, supra.

60. N.Y.—Beardsley v. Ontario Bank, 31 Barb. 619
51 C.J. p. 840 note 39.

61. Ill.—Palmer v. Forbes, 23 Ill. 301.

62. Ill.—Hunt v. Bullock, 23 Ill. 320
—Palmer v. Forbes, 23 Ill. 301.

63. Ill.—Palmer v. Forbes, supra.

64. Ill.—Titus v. Mabee, 25 Ill. 257
—Hunt v. Bullock, 23 Ill. 320

65. N.Y.—Beardsley v. Ontario Bank, 31 Barb. 619.

66. Ill.—Titus v. Mabee, 25 Ill. 257.

67. N.Y.—Beardsley v. Ontario Bank, 31 Barb. 619.

68. N.Y.—Beardsley v. Ontario Bank, supra.

69. N.Y.—Beardsley v. Ontario Bank, supra.

70. Pa.—Palmer v. Forbes, 23 Ill. 301.

personal property and do not pass under a mortgage of the company's realty.[71]

Rolling stock of a railroad company is treated by some authorities as real property, so as to be included in a mortgage thereof,[72] at least if it is located on the company's own property or road;[73] but according to other authorities such property must be included as personal property if it is to pass by the mortgage.[74]

(2) Particular Descriptions of Real Property

Various descriptions of real property mortgaged by railroad companies have been judicially construed as to the property included.

A mortgage of lands and property used or to be used for a railroad or for railroad purposes does not include town lots on which the railroad is not located and which have never been appropriated to railroad purposes,[75] or those designed as the location for a factory for building railroad cars,[76] or lands which the company plans to sell its employees for building purposes,[77] although such parcels are temporarily used for railroad purposes,[78] or dwellings provided for company employees and rented to them by the company;[79] but such a description does cover lands used to store fuel for the railroad.[80] Tracts of land which are not immediately useful or necessary for railroad purposes but which are adapted to, and will probably become necessary for, the future use of the company pass under such a mortgage,[81] even though intended for railroad use only in certain contingencies which have not occurred,[82] and the fact that such use or probability of use subsequently came to an end does not withdraw the land from the operation of the mortgage;[83] but any portions of such tracts not used or useful immediately or in prospect and which can be separated from the used or useful portions are not included in the mortgage.[84]

Necessity and convenience for use and operation. A mortgage of real estate necessary and convenient for the use and operation of a railroad does not cover a dwelling house ordinarily rented as a residence to the officers and employees of the company,[85] although at one time used temporarily for company offices,[86] since the subsequent abandonment is evidence that it was not necessary or convenient for the operation of the road,[87] nor does such a mortgage include land bought in order to obtain a right of way more cheaply and designed to be held temporarily and sold at a profit,[88] or land granted to aid in the construction of the road,[89] or land which the parties have stipulated was not used or necessary to be retained for future use by the railroad for operating its railroads or branches.[90] While it is for the jury to determine whether land was purchased for use in the operation of the road,[91] the judgment of officers of the railroad company as to the quantity necessary for railroad purposes is ordinarily conclusive.[92]

A mortgage of the entire line of railroad from one terminus to another includes the whole of the road, although part of it was unbuilt when the mortgage was executed.[93]

Property connected with a railroad, as so described in a mortgage, includes depots and premises acquired and used for station purposes.[94]

A mortgage of lands acquired for the purposes of the road includes only those acquired for the road and necessary and convenient for the construc-

71. N.Y.—Beardsley v. Ontario Bank, 31 Barb 619.

72. Ill—Titus v. Mabee, 25 Ill. 257
51 C.J. p 840 note 51.

73. Ill.—Titus v. Mabee, supra.

74. N.Y.—Hoyle v. Plattsburgh, etc., R. Co., 54 N.Y. 314, 13 Am.R 595
51 C.J. p 841 note 53.

75. Ohio.—Citizens' Sav., etc., Co. v. Cincinnati, etc., Tract. Co., 140 N. E. 380, 106 Ohio St. 577—Walsh v Barton, 24 Ohio St. 28.

76. Vt.—Eldridge v. Smith, 34 Vt. 484.
51 C.J. p 841 note 56.

77. Tex.—Aldridge v. Pardee, 60 S. W. 789, 24 Tex.Civ.App 254, affirmed Pardee v. Aldridge, 23 S.Ct. 514, 189 U.S. 429, 47 L.Ed. 883.

78. U.S.—Pardee v. Aldridge, Tex., 23 S.Ct. 514, 189 U.S. 429, 47 L.Ed. 883.

79. Vt—Eldridge v. Smith, 34 Vt. 484.

80. Vt.—Eldridge v. Smith, supra.

81. Me.—Hamlin v. European, etc., R. Co., 72 Me. 83.
Ohio—Citizens' Sav., etc., Co. v Cincinnati, etc., Tract Co., 140 N E 380, 106 Ohio St. 577.

82. Ga.—Hawkins v. Mercantile Trust, etc., Co., 23 S.E. 498, 96 Ga 580.

83. Ga.—Hawkins v. Mercantile Trust, etc., Co., supra.
Me.—Hamlin v. European, etc., R. Co., 72 Me. 83.

84. Ohio.—Citizens' Sav., etc., Co. v. Cincinnati, etc., Tract. Co., 140 N. E. 380, 106 Ohio St. 577.

85. Tex.—St. Louis, etc., R. Co. v. Whitaker, 5 S.W. 448, 68 Tex. 630.

86. Tex.—St. Louis, etc., R. Co. v. Whitaker, supra.

87. Tex.—St. Louis, etc., R. Co. v. Whitaker, supra.

88. Conn—Boston, etc., Air Line R. Co. v. Coffin, 50 Conn 150.

89. U.S.—New Orleans Pac. R Co. v. Parker, La., 12 S.Ct. 364, 143 U.S. 42, 36 L.Ed. 66

90. N.J—Koplowitz v Central Trust Co. of New York, 39 A.2d 452, 135 N.J Eq 552.

91. U.S—Pardee v Aldridge, Tex., 23 S.Ct. 514, 189 U.S. 429, 47 L.Ed. 883

92. Vt.—Eldridge v. Smith, 34 Vt. 484.

93. U.S.—Central Trust Co. v. Chattanooga, etc., R. Co., C.C Ga., 89 F. 388, affirmed 94 F. 275, 36 C.C.A. 241.

94. N.J.—Coe v. New Jersey Midland R. Co., 31 N.J Eq. 105, modified on other grounds 34 N.J.Eq. 266.

tion and operation thereof,[95] and those purchased to be sold at a profit, although the profit may be expended on the construction of the road, are not embraced in the mortgage.[96]

A mortgage of the company's rights of way does not include its rights as covenantee in personal covenants contained in a grant of a right of way.[97]

A mortgage on the main line of a railroad does not cover real estate having an actual situs in another state, across the state boundary from the terminal point of the main railroad line.[98]

A mortgage of depots includes not only places provided for the convenience of passengers awaiting the arrival or departure of trains,[99] but also buildings used for the receipt and storage of freight until it is forwarded or delivered.[1]

(3) Particular Descriptions Applicable to Personal Property

Particular descriptions of the property covered by a mortgage executed by a railroad company have been held applicable to the personal property of the company, including choses in action and chattels real.

A mortgage of all the property necessary to the operation of the mortgagor company's railroad includes such personal property of the company as it has deemed best to acquire for the use of its franchises most profitable to itself and most beneficial to the public,[2] although not indispensably required for the operation of the road.[3] A mortgage in general terms of the "property of the company" is sufficient to include such worn-out or broken personal property as the proper management of the road requires to be repaired or recast by the company or others for it or exchanged for new articles,[4] and also includes a tugboat required in the conduct of the company's business of hauling and delivering coal to ships;[5] but boats and wharves not connected with a railroad or intended for its use and acquired only in order to destroy competition do not pass under a mortgage of railroad property owned and used or useful in the operation of the road or in connection therewith.[6] Rails severed from the realty and unfit for further use pass under a mortgage conveying among other things "rails, material, etc.;"[7] and a mortgage of "materials used" on the road passes fuel supplies.[8] A mortgage of the furniture and equipment of a railroad does not convey machinery used in the treatment and preservation of ties.[9]

Choses in action and chattels real. A mortgage of all rights and interests of a railroad company is broad enough to include choses in action.[10] A mortgage expressly including the rights and interests acquired under a certain contract covers traffic rights under such contract.[11] It has been held that unpaid subscriptions to the stock of a railroad company are included in a mortgage covering the company's "evidence of debt,"[12] but not in a mortgage of all its "rights . . . claims and demands whatsoever."[13] The rights of the company as lessee of a connecting road are included in a mortgage of all property and rights connected with, or appurtenant to, its road,[14] but its rights as lessee of a hotel not used in connection with the operation of the road are not included.[15]

Designation of mortgagor company. Where a mortgage of the rolling stock of a certain division of a railroad contains a covenant on the part of the mortgagor railroad company to designate in a prescribed mode, as belonging to that division, a certain proportion of the whole rolling stock owned by the company, the mortgage covers only such rolling stock as is thereafter designated as belonging to the division named,[16] although the whole amount covenanted for is not so designated.[17] The lien of

95. Conn.—Boston, etc., Air Line R. Co. v. Coffin, 50 Conn 150.
96. Conn.—Boston, etc., Air Line R Co. v. Coffin, supra
97. Ohio.—Bosworth v. Pittsburgh, etc, R. Co., 1 Ohio Cir.Ct. 69, 1 Ohio Cir.Dec. 42, affirmed 18 N E. 533, 46 Ohio St. 81, 2 L R.A. 199.
51 C.J. p 841 note 76.
98. Tenn.—Buck v. Memphis, etc., R. Co, 4 Centr.L 430.
99. U.S.—Humphreys v McKissock, Iowa, 11 S.Ct. 779, 140 U.S. 304, 35 L.Ed 473.
1. U S.—Humphreys v. McKissock, supra.
2. Conn.—Buck v. Seymour, 46 Conn 156.
51 C.J. p 841 note 81.
3. Conn.—Buck v Seymour, supra.
4. Ohio.—Coopers v. Wolff, 15 Ohio St 523
5. Ohio.—Hatry v. Painesville, etc, R. Co, 1 Ohio Cir Ct. 426, 1 Ohio Cir.Dec. 238
6. Ala.—Morgan v. Donovan, 58 Ala. 241.
7. Va.—Salem First Nat. Bank v. Anderson, 75 Va. 250
8. Ind.—Coe v. McBrown, 22 Ind. 252.
9. Vt.—Brainerd v. Peck, 34 Vt. 496.
10. N.Y.—Central Trust Co. v. Morton Trust Co., 93 N E. 975, 200 N. Y. 577.
51 C.J. p 842 note 89.
11. U.S.—Ex parte Equitable Trust Co., Cal., 231 F 571, 145 C.C.A. 457.
12. Ky.—Eckstein v. Meyer, 2 Ky. L 124, 10 Ky.Op. 942.
13. N.Y.—Dean v. Biggs, 25 Hun 122, affirmed 93 N.Y. 662.
14. U.S.—Guaranty Trust Co. v. Atlantic Coast Electric R. Co., C.C.N. J, 132 F. 68, modified on other grounds 138 F. 517, 71 C.C.A. 41.
15. U.S.—Guaranty Trust Co v. Atlantic Coast Electric R. Co., supra.
16. U.S.—U. S. Trust Co. v. Wabash Western R. Co., C.C.Iowa, 38 F. 891, appeal dismissed 11 S Ct. 1030, 140 U S. 703, 35 L.Ed. 598.
51 C.J. p 842 note 95.
17. U S.—U. S. Trust Co. v. Wabash Western R. Co., supra.

such mortgage on the rolling stock which has been so designated is not lost, as between the parties or as to others having notice of the existence of the mortgage, by subsequent obliteration of the designating marks where such rolling stock is otherwise traceable.[18]

c. Appurtenances

Within a mortgage of a railroad and its appurtenances, those things only are appurtenances which are incidents to the railroad and are reasonably necessarily connected with its use and enjoyment, as distinguished from things merely convenient thereto.

Within a mortgage of a railroad and its appurtenances or property appertaining to it, those things only are appurtenances which are incidents to the railroad and are necessarily connected with its use and enjoyment,[19] as distinguished from things merely convenient thereto.[20] They need not, however, be necessary in the strictest sense,[21] or indispensable,[22] since all that is required is that they be reasonably necessary for the present operations of the road and held for that purpose.[23] So, the fact that parts of the property of the company could be detached and sold without causing any immediate inconvenience to the railroad or the company does not show that such parts do not appertain to the road;[24] and realty owned and used for roadway purposes at the time of the execution of the mortgage is subject to the lien notwithstanding the tracks were subsequently relocated on other land.[25] While the phrases "connected with" and "appurtenant to" in a railway mortgage are not necessarily synonymous,[26] property not connected with what is ordinarily termed the "plant" or not forming a part of the organic structure of the road is not treated as appurtenant to it;[27] and the mere fact that property is used in a manner beneficial to the income of the road and so as to facilitate traffic on it does not make it appurtenant to the railroad.[28] Nevertheless, the mortgage may manifest an intent that realty physically unconnected with the rails should be deemed appertaining or belonging to the line of railroad;[29] and a mortgage of all land appertaining or belonging to the line of the railroad may include a parcel which was leased to another railroad and which was used for general system purposes by the lessee.[30]

The term "appurtenances" cannot fairly be construed as including equipment[31] or rolling stock,[32] but relates rather to things akin to the line of railroad, such as switchyards, spur tracks, and the like.[33] Although strictly speaking land cannot be appurtenant to other land of the company,[34] it can pass under a mortgage as appurtenant to a railroad,[35] and the true test to ascertain whether any particular parcel of land passes as an appurtenance has been said to be whether it is so connected with, and used by, the company for the railroad that it could have been taken compulsorily therefor from a private owner,[36] although it has also been held to be within the province of the jury to determine whether land has been so appropriated as to become appurtenant to the road.[37] A mortgage on a railroad between two cities named as termini, with property appertaining to it, creates a lien on its terminal facilities as appurtenances, and is not limited to so much of the road as is found between the city limits of those places.[38] A mortgage on the road

18. U.S.—U. S. Trust Co. v. Wabash Western R. Co., supra.

19. U.S.—New Orleans Pac. R. Co. v. Parker, La., 12 S.Ct. 364, 143 U.S. 42, 36 L.Ed. 66—Humphreys v. McKissock, Iowa, 11 S.Ct. 779, 140 U.S. 304, 35 L.Ed. 473.

20. U.S.—Humphreys v. McKissock, supra.
Wis.—Dinsmore v. Racine, etc., R. Co., 12 Wis. 649.
51 C.J. p. 842 note 99.

21. U.S.—Knevals v. Florida Cent., etc., R. Co., Fla., 66 F. 224, 13 C.C.A. 410, certiorari denied 15 S.Ct. 1040, 159 U.S. 257, 40 L.Ed. 147.

22. Ala.—Morgan v. Donovan, 58 Ala. 241.

23. U.S.—In re New York, N. H. & H. R. Co., D.C.Conn., 27 F.Supp. 392, affirmed, C.C.A., 104 F.2d 1018—Knevals v. Florida Cent., etc., R. Co., Fla., 66 F. 224, 13 C.C.A. 410, certiorari denied 15 S.Ct. 1040, 159 U.S. 257, 40 L.Ed. 147.

24. U.S.—Knevals v. Florida Cent., etc., R. Co., supra.

25. U.S.—In re New York, N. H. & H. R. Co., D.C.Conn., 27 F.Supp. 392, affirmed, C.C.A., 104 F.2d 1018.

26. U.S.—Guaranty Trust Co. v. Atlantic Coast Line Electric R. Co., C.C.N.J., 132 F. 68, modified on other grounds 138 F. 517, 71 C.C.A. 41.

27. U.S.—New Orleans Pac. R. Co. v. Parker, La., 12 S.Ct. 364, 143 U.S. 42, 36 L.Ed. 66.
51 C.J. p. 842 note 6.

28. N.Y.—Parish v. Wheeler, 22 N.Y. 494.
51 C.J. p. 842 note 7.

29. U.S.—In re New York, N. H. & H. R. Co., D.C.Conn., 27 F.Supp. 392, affirmed, C.C.A., 104 F.2d 1018.

30. U.S.—In re New York, N. H. & H. R. Co., supra.

31. U.S.—New York Guaranty Trust Co. v. Minneapolis, etc., R. Co., D.C.Minn., 33 F.2d 512, modified on other grounds, C.C.A., 36 F.2d 747.

32. U.S.—New York Guaranty Trust Co. v. Minneapolis, etc., R. Co., supra.

33. U.S.—New York Guaranty Trust Co. v. Minneapolis, etc., R. Co., supra.

34. U.S.—New Orleans Pac. R. Co. v. Parker, La., 12 S.Ct. 364, 143 U.S. 42, 36 L.Ed. 66.
Pa.—Shamokin Valley R. Co. v. Livermore, 47 Pa. 465, 86 Am.D. 552.

35. U.S.—Knevals v. Florida Cent., etc., R. Co., Fla., 66 F. 224, 13 C.C.A. 410, certiorari denied 15 S.Ct. 1040, 159 U.S. 257, 40 L.Ed. 147.
51 C.J. p. 843 note 12.

36. Vt.—Eldridge v. Smith, 34 Vt. 484.

37. Pa.—Shamokin Valley R. Co. v. Livermore, 47 Pa. 465, 86 Am.D. 552.

38. U.S.—Central Trust Co. v. Kneeland, Ohio, 11 S.Ct. 357, 138 U.S. 414, 34 L.Ed. 1014.

and its appurtenances is less inclusive than a mortgage on the road and property of the company.[39]

d. Franchises

A mortgage of the road or property of a railroad company includes the secondary franchises of the company, but not ordinarily the primary franchise to be a corporation or an exemption from taxation, a mortgage of the secondary franchises conveys nothing tangible.

A mortgage of the road or property of a railroad company includes the secondary franchises of the company, as far as necessary to make the other property and effects conveyed by the mortgage productive and profitable;[40] but a mortgage of such franchises conveys nothing tangible,[41] nor does it extend the effect or operation of other terms employed to designate the tangible property intended to be mortgaged,[42] and the mere fact that property is convenient to the exercise of the company's privileges does not cause it to pass under a mortgage of the franchises.[43]

The primary franchise to be a corporation is not ordinarily regarded as included in a mortgage of the "franchises" of a railroad company,[44] especially since it is not, strictly speaking, a franchise of the company, but rather a franchise of the corporators and stockholders of the company;[45] but a mortgage of all its franchises executed by a railroad company under a statute providing that a purchaser at foreclosure sale might continue to operate the railroad under the charter of the mortgagor company passes the corporate franchise of the company.[46]

Exemption from taxation conferred on a railroad company, being a personal privilege, is not covered by a mortgage of the company's franchises.[47]

e. Earnings, Income, and Other Funds

Funds in the hands of a railroad company at the time of the execution of a mortgage of all of its property are embraced therein, but, in the absence of express agreement to the contrary, the subsequent earnings and income of the company do not pass under a mortgage of its property while the company retains possession thereof.

Funds in the hands of a railroad company at the time of the execution of a mortgage of all its property are embraced therein.[48] Rentals falling due under a lease executed by the mortgagor may be assigned in trust to the trustee under the mortgage to the extent necessary to pay interest on the mortgage bonds,[49] and such rentals are not subject to attachment and levy as funds of the mortgagor;[50] but, in the absence of express agreement to the contrary, the subsequent earnings and income of a railroad company do not pass under a mortgage of its property while the company retains possession thereof,[51] but remain the property of the company and subject to its control until the mortgagee or trustee takes possession of the property, or something equivalent is done.[52] When income is mortgaged, the lien of the mortgage extends only to the net income of the company.[53] A mortgage of the income,

39. Mo.—Whitehead v. Vineyard, 50 Mo. 30.

40. Ala.—Meyer v. Johnston, 53 Ala. 237.
Mass.—Chadwick v. Old Colony R. Co., 50 N.E. 629, 171 Mass. 239.
51 C.J. p. 843 note 18.

41. N.Y.—Beardsley v. Ontario Bank, 31 Barb. 619.

42. N.Y.—Beardsley v. Ontario Bank, 31 Barb. 619.

43. Ill.—Hunt v. Bullock, 23 Ill. 320.
51 C.J. p. 843 note 21.

44. Ala.—Meyer v. Johnston, 53 Ala. 237.
51 C.J. p. 843 note 22.
Rights of purchasers at foreclosure sale generally see infra §§ 328–338.

45. U.S.—Memphis, etc., R. Co. v. Railroad Comrs., Ark., 5 S.Ct. 299, 112 U.S. 609, 28 L.Ed. 837.
Ala.—Meyer v. Johnston, 53 Ala. 237.

46. Minn.—St. Paul, etc., R. Co. First Div. v. Parcher, 14 Minn. 297.

47. U.S.—Chesapeake, etc., R. Co. v. Miller, W.Va., 5 S.Ct. 813, 114 U.S. 176, 29 L.Ed. 121.—Morgan v. Louisiana, La., 93 U.S. 217, 23 L.Ed. 860.
51 C.J. p. 843 note 26.

48. Me.—Woodman v. York, etc., R. Co., 45 Me. 207.
Effect of after-acquired property clause see infra subdivision f of this section.
Income, rents, and profits as subject to be mortgaged see supra § 284.
Right of mortgagee to rents and profits of mortgaged property after default see infra § 293 d.

49. N.Y.—Propp v. Atlantic & D. Ry. Co., 83 N.Y.S.2d 328.

50. N.Y.—Propp v. Atlantic & D. Ry. Co., supra.

51. Ga.—Green v. Coast Line R. Co., 24 S.E. 814, 97 Ga. 15, 54 Am.S.R. 379, 33 L.R.A. 806.
51 C.J. p. 843 note 29.
Surplus earnings in hands of receiver
A mortgagee of a railroad has no preference over a judgment creditor, at whose instance a receiver is appointed, to surplus earnings which have accumulated in the hands of the receiver prior to the filing of the bill of foreclosure.—Veatch v. American Loan & Trust Co., Colo., 84 F. 274, 28 C.C.A. 384.

52. N.Y.—Coe v. Beckwith, 31 Barb. 339, 10 Abb.Pr. 296, 19 How.Pr. 398.
51 C.J. p. 843 note 30.
A pledge of income does not become effective as long as the mortgagor is permitted to remain in possession of the mortgaged property and to receive and disburse the earnings. Consequently, although a railroad mortgage may in terms give a lien on the profits and income, until possession of the mortgaged premises is actually taken or some equivalent act done, the earnings belong to the railroad company and are subject to its control.—Van Schaick v. McCarthy, C.C.A.Colo., 116 F.2d 987.

53. U.S.—In re Wisconsin Cent. Ry. Co., D.C.Minn., 68 F.Supp. 320, affirmed, C.C.A., Empire Trust Co. v. U. S. Trust Co. of N. Y., 165 F. 2d 829.
51 C.J. p. 843 note 31.
Implied agreement
Every railroad mortgagee, in accepting its security, impliedly agrees

rents, and profits of the mortgagor company does not include advances made to it by a lessee of its property, under an agreement to advance during the continuance of the lease such sums as should be necessary to pay interest on the mortgage debt if the income of the company should be insufficient therefor.[54]

f. After-Acquired Property

(1) In general
(2) Intention to convey
(3) Description and nature in general
(4) Legal or equitable interests
(5) Lines subsequently constructed or acquired
(6) Rolling stock, track, rails, and other personal property
(7) Earnings, income, and other funds

(1) In General

Where the terms of the mortgage show an intention to embrace after-acquired property, the mortgage will attach as an equitable lien on property embraced in the terms of the mortgage as soon as it is acquired or comes into existence, but such a clause does not give a present lien on nonexistent property, and generally it extends only to property subsequently acquired by the mortgagor company.

It is well settled that, where the terms of the mortgage show an intention to embrace after-acquired property, the mortgage will attach as an equitable lien on all after-acquired property, embraced in the terms of the mortgage, as soon as it is acquired or comes into existence,[55] whether the property is acquired by the company under its old name or under its new name after reorganization.[56] Such a clause does not give a present lien on nonexistent property, but merely creates an obligation on the mortgagor to subject to the lien of the mortgage all after-acquired property of the character described in the clause.[57] Such a mortgage does not cover property which the railroad company had no power to acquire or hold when the mortgage was executed, and the acquisition of which was not in contemplation at that time.[58]

As a general rule an after-acquired property clause extends only to property subsequently acquired by the mortgagor company;[59] hence, it does not cover property acquired by a consolidated company into which the mortgagor company has been merged[60] as against a mortgagee of the consolidated company.[61] However, this is a matter of contract and intention,[62] so, although the word "successors" does not appear in the after-acquired property clause, it has been held that it may apply to property acquired by a company growing out of a consolidation by the mortgagor with other companies under a statute providing for the enforcement of debts and obligations of the old companies against the new.[63] On the other hand, the term "successors" has been held to apply to corporate successors only and not to a vendee who takes title by ordinary purchase.[64]

Property acquired after disposal of bonds. Where the mortgage provides that it shall not attach to property acquired after the bonds secured have been sold or disposed of, a destruction or cancellation of

that all current debts, accruing in the ordinary course of the operation of its business, shall be paid from the current income before he has a claim thereto—Fosdick v. Schall, Ill., 99 U.S. 235, 25 L.Ed. 339—In re Chicago, R. I. & P. Ry. Co., C.C.A.Ill., 90 F.2d 312, 113 A.L.R. 487, certiorari denied Bankers Trust Co. v. Wise, 58 S.Ct. 37, 302 U.S. 717, 82 L.Ed. 554.

54. U.S.—Moran v. Pittsburgh, etc., R. Co., C.C.Ohio, 32 F. 878, appeal dismissed 14 S.Ct. 1149, 154 U.S. 510, 38 L.Ed. 1079.

55. U.S.—U. S. Mortgage & Trust Co. v. Chicago & A. R. Co., C.C.A. Ill., 40 F.2d 386, certiorari dismissed 57 S.Ct. 756, 296 U.S. 668—In re Wisconsin Cent. Ry. Co., D.C.Minn., 68 F.Supp. 320, affirmed, C.C.A., Empire Trust Co. v. U. S. Trust Co. of N. Y., 165 F.2d 829.
51 C.J. p 844 note 35.
After-acquired property as subject to be mortgaged see supra § 284.
Mortgage of after-acquired property generally see Mortgages § 73.
Priority of liens see infra § 297.

56. Ala.—Meyer v. Johnston, 64 Ala. 603—Meyer v. Johnston, 53 Ala. 237.

57. U.S.—In re New York, S. & W. R. Co., C.C.A.N.J., 109 F.2d 988, certiorari denied New York Trust Co. v. New York, S. & W. R. Co., 60 S.Ct. 1075, 310 U.S. 633, 84 L.Ed. 1402, and Woodruff v. New York, S. & W. R. Co., 60 S.Ct. 1075, 310 U.S. 633, 84 L.Ed. 1403.

58. U.S.—Commercial Trust Co. v. Chattanooga R. & Light Co., D.C. Tenn., 281 F. 856.
51 C.J. p 844 note 37.

59. U.S.—New York Guaranty Trust Co. v. Minneapolis & St. L. R. Co., C.C.A.Minn., 36 F.2d 747.
51 C.J. p 844 note 38.

60. U.S.—Irving Bank-Columbia Trust Co. v. New York R. Co., D.C.N.Y., 292 F. 429, affirmed, C.C.A., 292 F. 440, certiorari denied 44 S.Ct. 38, 263 U.S. 713, 68 L.Ed. 520.

61. U.S.—New York Guaranty Trust Co. v. Minneapolis & St. L. R. Co., C.C.A.Minn., 36 F.2d 747.
51 C.J. p 844 note 40.

62. U.S.—In re New York, S. & W. R. Co., C.C.A.N.J., 109 F.2d 988, certiorari denied New York Trust Co. v. New York, S. & W. R. Co., 60 S.Ct. 1075, 310 U.S. 633, 84 L.Ed. 1402, and Woodruff v. New York, S. & W. R. Co., 60 S.Ct. 1075, 310 U.S. 633, 84 L.Ed. 1403—U. S. Mortgage & Trust Co. v. Chicago & A. R. Co., C.C.A.Ill., 40 F.2d 386, certiorari dismissed 57 S.Ct. 756, 296 U.S. 668.
51 C.J. p 844 note 41.

Facts held to show intent that lien should attach to after-acquired property and consolidated property in case of consolidation—U. S. Mortgage & Trust Co. v. Chicago & A. R. Co., C.C.A.Ill., 40 F.2d 386, certiorari dismissed 57 S.Ct. 756, 296 U.S. 668.

63. Ohio.—Citizens' Sav., etc., Co. v. Cincinnati, etc., Tract. Co., 140 N.E. 350, 106 Ohio St. 577.
51 C.J. p 845 note 42.

64. U.S.—Mississippi Valley Trust Co. v. Southern Trust Co., C.C.A. Ark., 261 F. 765.

unissued bonds does not constitute a sale or disposal of them.[65]

(2) Intention to Convey

In order to pass after-acquired property the intention of the parties must clearly appear from the face of the mortgage, and doubts should be resolved against an intention to cover such property.

In order to pass after-acquired property the intention of the parties must clearly appear from the face of the mortgage[66] which should contain either words of futurity[67] or language such as clearly to show an intention to cover such property,[68] and, in the absence thereof, a doubt should be resolved against such intention.[69] It has been held, however, that, where a railroad company is empowered to mortgage all of its property, privileges, and franchises, such a mortgage is a conveyance of the property and franchises as an entire thing, and that, therefore, after-acquired property essential thereto passes as an incident or accession to the franchise to acquire property.[70]

(3) Description and Nature in General

An after-acquired property clause covers all property subsequently acquired by the mortgagor which comes within the description in the mortgage, and only such property, which may be described in general terms; but in order to pass under a general description, the after-acquired property must ordinarily be such as appertains to the road and such as is necessary to the enjoyment of the franchise or the operation of the road.

An after-acquired property clause covers all property subsequently acquired by the mortgagor, which comes within the description in the mortgage,[71] although it is limited to such property.[72] While the property which it is intended to include should be described with reasonable certainty,[73] general terms may be sufficient,[74] and it has been held sufficient

65. U.S.—New York Guaranty Trust Co. v. Minneapolis & St. L. R. Co., C.C.A.Minn., 36 F.2d 747.

66. U.S.—New York Guaranty Trust Co. v. Minneapolis & St. L. R. Co., C.C.A.Minn., 36 F.2d 747.
51 C.J. p. 845 note 45

67. U.S.—New York Guaranty Trust Co. v. Minneapolis & St. L. R. Co., supra.
51 C.J. p. 845 note 46.

68. U.S.—New York Guaranty Trust Co. v. Minneapolis & St. L. R. Co., supra.
51 C.J. p. 845 note 47

69. U.S.—New York Guaranty Trust Co. v. Minneapolis & St. L. R. Co., supra.

70. U.S.—Parker v. New Orleans, B. R. & V. R. Co., C.C.La., 33 F. 693, affirmed 12 S.Ct. 364, 143 U.S. 42, 36 L.Ed. 66
51 C.J. p. 845 note 49

71. U.S.—Central Trust Co. v. Kneeland, Ohio, 11 S.Ct. 357, 138 U.S. 414, 34 L.Ed. 1014—R. E. Duvall Co. v. Washington, B. & A. Electric R. Co., D.C.Md., 51 F.2d 566, modified on other grounds, C.C.A., Cleveland Trust Co. v. Consolidated Gas, Electric Light & Power Co. of Baltimore, 55 F.2d 211
51 C.J. p. 845 note 50

Clause construed with free property clause

(1) Where first general railroad mortgage specified that property then owned or subsequently acquired should be subject to mortgage lien and then dealt with free property, a proviso in free property clause that mortgagor reserved right to own and hold other property, equipment, etc., except by use of such mortgage bonds free from such lien, did not limit the after-acquired property lien to property acquired with proceeds from sale of first general mortgage bonds.—Empire Trust Co. v. U.S. Trust Co. of N.Y., C.C.A.Minn., 165 F.2d 829

(2) Such proviso was in reality a reservation since the mortgagor thereby reserved the right to own and hold free of liens property other than that covered by the mortgage lien.—Empire Trust Co. v. U.S. Trust Co. of N.Y., supra.

Equipment

(1) Where railroad equipment is purchased or paid for with first and refunding bonds as a part of a single transaction, the bondholders possess a prior lien on the equipment so acquired, and whether a single transaction exists depends on the facts and intent of the parties, the test being whether the purchase and payment or the payment and reimbursement were part of one continuous transaction and intended so to be.—In re Wisconsin Cent. Ry. Co., D.C.Minn., 68 F.Supp. 320, affirmed, C.C.A., Empire Trust Co. v. U.S. Trust Co. of N.Y., 165 F.2d 829

(2) Lien of railroad mortgage on after-acquired property attached to equipment, as cash payments were made out of general fund, regardless of augmentation of general fund through sale of other mortgage bonds.—U.S. Mortgage & Trust Co. v. Chicago & A. R. Co., C.C.A.Ill., 40 F.2d 386, certiorari dismissed 57 S.Ct. 756, 296 U.S. 668.

Terminal properties and freight classification yards

Where after-acquired property clause contained in each mortgage executed by predecessors of debtor railroad, which was reorganized, included all property thereafter to be acquired for use in connection with the railroad described in the mortgage, or with any part of it or with its business, the after-acquired property clauses were sufficient in scope to extend to terminal properties and freight classification yards subsequently acquired.—In re New York, S. & W. R. Co., C.C.A.N.J., 109 F.2d 988, certiorari denied New York Trust Co. v. New York, S. & W. R. Co., 60 S.Ct. 1075, 310 U.S. 633, 84 L.Ed. 1402 and Woodruff v. New York, S. & W. R. Co., 60 S.Ct. 1075, 310 U.S. 633, 84 L.Ed. 1403.

72. U.S.—In re New York, S. & W. R. Co., C.C.A.N.J., 109 F.2d 988, certiorari denied New York Trust Co. v. New York, S. & W. R. Co., 60 S.Ct. 1075, 310 U.S. 633, 84 L.Ed. 1402 and Woodruff v. New York, S. & W. R. Co., 60 S.Ct. 1075, 310 U.S. 633, 84 L.Ed. 1403—R. E. Duvall Co. v. Washington, B. & A. Electric R. Co., D.C.Md., 51 F.2d 566, modified on other grounds, C.C.A., Cleveland Trust Co. v. Consolidated Gas, Electric Light & Power Co. of Baltimore, 55 F.2d 211.
51 C.J. p. 845 note 51.

Specific enumeration

In railroad mortgage where paragraph of further assurance clause dealt with property not covered by the mortgage, the word "property" following specific enumeration of properties not subject to mortgage must be construed as referring to property of the same class as that specifically enumerated, or property not covered by the mortgage lien.—Empire Trust Co. v. U.S. Trust Co. of N.Y., C.C.A.Minn., 165 F.2d 829.

73. U.S.—Calhoun v. Memphis, etc., R. Co., C.C.Tenn., 4 F.Cas.No.2,309, 2 Flipp. 442.
N.Y.—Seymour v. Canandaigua, etc., R. Co., 25 Barb. 284, 14 How.Pr. 531.

74. Conn.—Buck v. Seymour, 46 Conn. 156.
51 C.J. p. 846 note 53.

to employ such expressions as "constructed and to be constructed,"[75] "completed or not,"[76] or "all property which may hereafter belong to said company and be used as a part of said road."[77]

In order to pass under a general description, however, the after-acquired property must ordinarily be such as appertains or is appurtenant to the road and is necessary to the enjoyment of the franchise or the operation of the road,[78] or such as is used in connection with the operation of the terminals and lines of the railroad,[79] or, if it is not such property, there must be a special description of it in the mortgage.[80] This does not mean, however, that the property should be property without which the railroad could not be operated; but it means all property reasonably necessary and convenient to the operation of the road, and includes such property as the company may thereafter deem it best to acquire for the most profitable use of the franchises and the greatest benefit to the public.[81]

"Property appertaining to or appurtenant." A general mortgage of a railroad company embracing its road and all after-acquired property appertaining or appurtenant to the road covers only lands which are appurtenant to, and connected with, the actual operation of the road;[82] and, therefore, does not include lands which do not appertain to, or are not so connected with, the road;[83] nor does such mortgage

75. N.Y.—Seymour v. Canandaigua, etc., R. Co., 25 Barb. 284, 14 How. Pr. 531.

76. La.—Bell v. Chicago, etc., R. Co., 34 La.Ann. 785.

77. Conn.—Buck v. Seymour, 46 Conn. 156.

78. U.S.—Cleveland Trust Co. v. Consolidated Gas, Electric Light & Power Co. of Baltimore, C.C.A.Md., 55 F.2d 211—U. S. v. White Sulphur Springs, D.C.W.Va., 57 F. Supp. 48.
51 C.J. p. 846 note 57.

79. U.S.—R. E. Duvall Co. v. Washington, B. & A. Electric R. Co., D.C.Md., 51 F.2d 566, modified on other grounds, C.C.A., Cleveland Trust Co. v. Consolidated Gas, Electric Light & Power Co. of Baltimore, 55 F.2d 211.

Stock or property of corporations owned by railroad

(1) Stock in power company and in terminal company owned by mortgagor railroad was held not covered by mortgage, where it was not used for railroad purposes.—Cleveland Trust Co. v. Consolidated Gas, Electric Light & Power Co. of Baltimore, C.C.A.Md., 55 F.2d 211.

(2) Property of terminal company and realty company entire stock of which railroad owned was held not covered by railroad's mortgage where property was not indispensable to operation of railroad and contrary holding would work hardship on holders of other bonds.—Cleveland Trust Co. v. Consolidated Gas, Electric Light & Power Co. of Baltimore, supra.

80. U.S.—U. S. v. White Sulphur Springs, D.C.W.Va., 57 F.Supp. 48.
51 C.J. p. 846 note 58.

81. Conn.—Buck v. Seymour, 46 Conn. 156.
51 C.J. p. 846 note 59.

82. U.S.—In re Wisconsin Cent. Ry. Co., D.C.Minn., 68 F.Supp. 320, affirmed, C.C.A., Empire Trust Co. v. U. S. Trust Co. of N. Y., 165 F.2d 829—Great Northern Ry. Co. v. Central Hanover Bank & Trust Co., D.C.Wash., 12 F.Supp. 846.
51 C.J. p. 846 note 60.

After-acquired property clause held to include:

(1) Hotel, erected on after-acquired land near a depot on the line of the road, for the purpose of an eating house and to accommodate employees, passengers, and others.
U.S.—U. S. Trust Co. v. Wabash, etc. R. Co., C.C.Iowa, 32 F. 480.
Mo.—Omaha, etc., R. Co. v. Wabash, etc., R. Co., 18 S.W. 1101, 108 Mo. 298.
51 C.J. p. 846 note 62.

(2) Land subsequently acquired for a right of way.—Seymour v. Canandaigua, etc. R. Co., 25 Barb. 284, 14 How. Pr. 531.

(3) Lands purchased with the design of using them for railroad purposes, although they are subsequently found unsuitable for such purposes and not so used.—Hawkins v. Mercantile Trust, etc., Co., 23 S.E. 498, 96 Ga. 530.

(4) Lands included within a subsequent contract for the purpose of acquiring additional facilities for the accommodation of engines and cars.—Hamlin v. European, etc., R. Co., 72 Me. 83.

(5) Lands over which the road is at the time located, although the title thereto or right of way therein is not acquired until subsequently.—Pierce v. Milwaukee, etc., R. Co., 24 Wis. 551, 1 Am.R. 203.

(6) Lands subsequently conveyed for a right of way and railroad stockyards and houses.—St. Joseph, etc., R. Co. v. Smith, 70 S.W. 700, 170 Mo. 327.

(7) Lands acquired for the erection of snowsheds and protection of the line from snowslides.—Great Northern Ry. Co. v. Central Hanover Bank & Trust Co., D.C.Wash., 12 F.Supp. 846.

After-acquired property clause held not to include:

(1) Interest in an elevator constructed jointly with another railroad.—Humphreys v. McKissock, Iowa, 11 S.Ct. 779, 140 U.S. 304, 35 L.Ed. 473.

(2) Lands donated by the government in aid of the construction of the road.
U.S.—New Orleans Pac. R. Co. v. Parker, La., 12 S.Ct. 364, 143 U.S. 42, 36 L.Ed. 66.
Tex.—Shirley v. Waco Tap R. Co., 10 S.W. 543, 78 Tex. 131.

(3) Lands obtained for subdivision and sale.—Pardee v. Aldridge, Tex., 23 S.Ct. 514, 189 U.S. 429, 47 L.Ed. 883.

(4) Lands at a distance from the railroad and not a part of the line of railway, or used in connection therewith.—Great Northern Ry. Co. v. Central Hanover Bank & Trust Co., D.C.Wash., 12 F.Supp. 846.

(5) Lot of woodland lying some distance from the track and used to supply wood and timber on the road.—Dinsmore v. Racine, etc., R. Co., 12 Wis. 649.

(6) Property acquired adjacent to depot grounds and leased for a barber shop, grocery, and other usages entirely foreign to the operation of the road.—Chicago, etc., R. Co. v. McGuire, 65 N.E. 932, 31 Ind.App. 110, 99 Am.S.R. 249.

(7) Property operated as a resort hotel.—U. S. v. White Sulphur Springs, D.C.W.Va., 57 F.Supp. 48—51 C.J. p. 846 note 62.

(8) Tract of land afterward purchased and laid out in town lots.—Calhoun v. Memphis, etc., R. Co., C.C.Tenn., 4 F.Cas.No.2,309, 2 Flipp. 442.

83. U.S.—In re Wisconsin Cent. Ry. Co., D.C.Minn., 68 F.Supp. 320, affirmed, C.C.A., Empire Trust Co. v. U. S. Trust Co. of N. Y., 165 F.2d 829—Great Northern Ry. Co. v. Central Hanover Bank & Trust Co.,

embrace lands which at the time of the execution of the mortgage the company had no right to accept and which are subsequently acquired under the authority of the legislature.[84]

(4) Legal or Equitable Interests

Words of general description convey property to which the mortgagor acquires either equitable or legal title.

Words of general description convey property to which the mortgagor acquires a full equitable title as well as that to which it acquires a legal title.[85]

(5) Lines Subsequently Constructed or Acquired

A mortgage on a railroad and all property thereafter to be acquired will embrace a portion of the road projected or contemplated at the time of the execution of the mortgage but thereafter completed, constructed or purchased, or an addition constructed by a purchaser from the mortgagor, but it does not include a line of road afterward unauthorizedly constructed or purchased

A mortgage on the road and all property, privileges, franchises, etc., acquired and to be acquired, will embrace a portion of the road projected or contemplated at the time of the execution of the mortgage but thereafter completed or constructed,[86] notwithstanding a change in the route if it is in the general direction authorized,[87] and although it is completed by a contractor on the company's failure to do so.[88] Such a mortgage will also embrace a subsequently purchased road or right of way which is within the chartered limits of the mortgagor company, and which it might have constructed if it had not been purchased,[89] or an addition constructed by a purchaser from the mortgagor.[90] Similarly such a mortgage may extend to double tracks substituted for a single track, although under a new franchise,[91] or to a subsequently acquired or constructed branch road or spur track,[92] although not in contemplation at the time of the mortgage;[93] and may be broad enough to embrace a leasehold of another road, subsequently leased to be used in connection with its own road,[94] but it does not include a line of road afterward unauthorizedly constructed[95] or purchased,[96] nor does it cover a lease, of its own road, to which the mortgagee was not a party;[97] or a separate branch road thereafter constructed under a special charter,[98] or amendment of its original charter;[99] or a subsequently purchased road which at the time of its purchase is not connected with the mortgagor's road.[1] A mortgage in terms limited to the road then owned does not cover an after-acquired line or extension,[2] although the extension was acquired through the exercise of the original franchise.[3] A mortgage by one rail-

D.C.Wash., 12 F.Supp. 846—51 C.J. p 846 note 61.

84. Ala.—Meyer v. Johnston, 53 Ala. 237, 64 Ala. 603.

85. U.S.—Wade v. Chicago, etc., R. Co., Ill., 13 S.Ct. 892, 149 U.S. 327, 37 L.Ed. 755
51 C.J. p 847 note 75.

86. Ala.—Meyer v. Johnston, 53 Ala. 237, 64 Ala. 603.
51 C.J. p 847 note 76.

87. Ala.—Meyer v. Johnston, supra.
N.Y.—Elwell v. Grand St., etc., R. Co., 67 Barb. 83.
51 C.J. p 847 note 77.

88. U.S.—Dunham v. Cincinnati, etc., R. Co., Ind., 1 Wall. 254, 17 L.Ed. 584.

89. U.S.—Branch v. Jesup, Ga., 1 S.Ct. 495, 106 U.S. 468, 27 L.Ed. 279.
51 C.J. p 847 note 79.

Clause not limited to appurtenances

Where refunding mortgage contained an after-acquired property clause which was not limited to property appertaining to lines expressly mentioned in the first general mortgage, the refunding mortgage covered another railroad property which became a part of system of mortgagor, subject to purchase money first mortgage on such other property.—In re Wisconsin Cent. Ry. Co., D.C.Minn., 68 F.Supp. 320, affirmed, C.C.A., Empire Trust Co. v. U. S. Trust Co. of N. Y., 165 F.2d 829.

90. Wash.—Hinchman v. Point Defiance R. Co., 44 P. 867, 14 Wash. 349.

91. U.S.—Commercial Trust Co. v. Chattanooga R., etc., Co., D.C. Tenn., 281 F. 856.

92. N.Y.—Seymour v. Canandaigua, etc., R. Co., 25 Barb. 284, 14 How. Pr. 531
51 C.J. p 847 note 82.

Extension acquired by use of bonds or proceeds

Where plan for financing railroad extension contemplated that fifty per cent of necessary moneys be secured through sale of first mortgage bonds, and first mortgage expressly covered extensions acquired by use of bonds or proceeds thereof, lien of such mortgage on the extensions should not be restricted to amount of first mortgage moneys used or proportion of such moneys to total cost, but should be recognized in full.—Ecker v. Western Pac. R. R. Corp., Cal., 63 S.Ct. 692, 318 U.S. 448, 87 L.Ed. 892, rehearing denied 63 S.Ct. 985, 318 U.S. 803, 87 L.Ed. 1166, Crocker First Nat. Bank of San Francisco v. Western Pac. R., 63 S.Ct. 986, 318 U.S. 803, 87 L.Ed. 1166, Western Pac. R. Co. v. Ecker, 63 S.Ct. 986, 318 U.S. 803, 87 L.Ed. 1166, 63 S.Ct. 986, 318 U.S. 803, 87 L.Ed. 1166, and 63 S.Ct. 988, 318 U.S. 803, 87 L.Ed. 1167

93. N.J.—Coe v. Delaware, etc., R. Co., 34 N.J.Eq. 266
51 C.J. p 847 note 83.

94. U.S.—Barnard v. Norwich & W. R. Co., C.C.Mass., 2 F.Cas.No.1,007, 4 Cliff. 351.
51 C.J. p 847 note 84.

95. U.S.—Hodder v. Kentucky, etc., R. Co., C.C.Ky., 7 F. 793, affirmed 6 S.Ct. 697, 117 U.S. 72, 29 L.Ed. 821.

96. U.S.—Hodder v. Kentucky, etc., R. Co., supra.

97. U.S.—Moran v. Pittsburgh, etc., R. Co., C.C.Ohio, 32 F. 878, appeal dismissed 14 S.Ct. 1149, 154 U.S. 510, 38 L.Ed. 1079.

98. Ala.—Meyer v. Johnston, 64 Ala. 603, 53 Ala. 237.

99. Va.—Alexandria, etc., R. Co. v. Graham, 31 Gratt. 769, 72 Va. 769

1. Va.—Murray v. Farmville, etc., R. Co., 43 S.E. 553, 101 Va. 262.

2. U.S.—U. S. Mortgage & Trust Co. v. Chicago & A. R. Co., C.C.A. Ill., 40 F.2d 386, certiorari dismissed 57 S.Ct. 756, 296 U.S. 668
—Louisville Trust Co. v. Cincinnati Inclined-Plane R. Co., C.C. Ohio, 91 F. 699.
51 C.J. p 847 note 91.

3. U.S.—Louisville Trust Co. v. Cin-

road company which built part of the road and then abandoned its operation does not cover that part of the road which is completed by another and separate company,[4] nor does a mortgage of the main line from one terminus to another and the franchises acquired and to be acquired pertaining to that line cover lands and franchises thereafter acquired through an extension of the road beyond one terminus, since the extension is not a part of the main line, or pertaining thereto, although acquired to be used in connection therewith.[5]

Consolidation. The mortgage may cover additions made after a consolidation with other companies[6] and change of name,[7] even though a successor is not mentioned in the mortgage,[8] but the mortgage will not extend to a line of railroad, not within the charter limits of the mortgagor, subsequently acquired by a consolidated company of which it becomes a constituent.[9] New construction by a successor, under a new franchise made possible by the surrender of the mortgagor's franchise, does not pass under the mortgage, even though such surrender might subject the successor to an action by the bondholders for waste.[10]

(6) Rolling Stock, Track, Rails, and Other Personal Property

Where the terms of the mortgage are sufficient to show such intention, a railroad mortgage will attach to after-acquired rolling stock and to other types of personal property, as well as to repairs, replacements, and additions or betterments to the mortgaged property.

Where the terms of the mortgage are sufficient to show such intention, a railroad mortgage will attach, in equity, to after-acquired rolling stock, as soon as it is acquired and placed on the road,[11] and this rule applies to other types of personal property,[12] such as tracks,[13] rails,[14] fuel,[15] office furniture,[16] and other supplies and personalty incident to and indispensable to the use and enjoyment of other property conveyed.[17] Such a mortgage covers repairs,[18] replacements,[19] and additions or better-

cinnati Inclined-Plane R. Co., supra.

4. U.S.—Smythe v. Chicago, etc., R. Co., C.C.Ill., 22 F.Cas.No.13,135
Ill.—Chicago, etc., R. Co. v. Lowenthal, 93 Ill. 433

5. N.J.—Randolph v. New Jersey West Line R. Co., 28 N.J.Eq. 49.

6. Ala.—Meyer v. Johnston, 64 Ala. 603, 53 Ala. 237.
51 C.J. p. 848 note 95.

7. Ala.—Meyer v. Johnston, 64 Ala. 603

8. U.S.—Commercial Trust Co. v. Chattanooga, R., etc., Co., D.C. Tenn., 281 F. 856.
Ohio.—Citizens' Sav., etc., Co. v. Cincinnati, etc., Tract. Co., 140 N.E. 380, 106 Ohio St. 577.

9. U.S.—Commercial Trust Co. v. Chattanooga, R., etc., Co., D.C. Tenn., 281 F. 856.
Ohio.—Citizens' Sav., etc., Co. v. Cincinnati, etc., Tract Co., 140 N.E. 380, 106 Ohio St. 577.
51 C.J. p. 848 note 98.

10. U.S.—Commercial Trust Co. v. Chattanooga R., etc., Co., D.C. Tenn., 281 F. 856.

11. U.S.—New York Guaranty Trust Co. v. Minneapolis & St. L. R. Co., C.C.A.Minn., 36 F.2d 747.
51 C.J. p. 848 note 1.

Rolling stock subject to equipment trust

(1) A railroad first mortgage referring to "after-acquired property" including property acquired for use in and for "maintenance or operation" of property subject to such first mortgage, and referring to rolling stock and equipment appurtenant to or used as part of any lines subject to the mortgage, covered railroad's equity in rolling stock subject to equipment trust which was used on all of railroad's lines.—Ecker v. Western Pac. R. R. Corp., Cal., 63 S.Ct. 692, 318 U.S. 448, 87 L.Ed. 892, rehearing denied 63 S.Ct. 935, 318 U.S. 803, 87 L.Ed. 1166, Crocker First Nat. Bank of San Francisco v. Western Pac. R., 63 S.Ct. 986, 318 U.S. 803, 87 L.Ed. 1166, Western Pac. R. Co. v. Ecker, 63 S.Ct. 986, 318 U.S. 803, 87 L.Ed. 1166, and Irving Trust Co. v. Crocker First Nat. Bank of San Francisco, 63 S.Ct. 988, 318 U.S. 803, 87 L.Ed. 1167.

(2) A railroad mortgage providing that railroad could purchase and acquire equipment "free from the lien hereof" by lease, conditional sale or equipment trust, merely permitted purchase of equipment by equipment trust agreement and did not authorize completely untrammeled acquisition of such equipment free of the mortgage lien.—Ecker v. Western Pac. R. R. Corp., Cal., 63 S.Ct. 692, 318 U.S. 448, 87 L.Ed. 892, rehearing denied 63 S.Ct. 985, 318 U.S. 803, 87 L.Ed. 1166, Crocker First Nat. Bank of San Francisco v. Western Pac. R., 63 S.Ct. 986, 318 U.S. 803, 87 L.Ed. 1166, Western Pac. R. Co. v. Ecker, 63 S.Ct. 986, 318 U.S. 803, 87 L.Ed. 1166, and Irving Trust Co. v. Crocker First Nat. Bank of San Francisco, 63 S.Ct. 988, 318 U.S. 803, 87 L.Ed. 1167.

(3) Where railroad mortgage clearly contemplated that it should be a lien on equipment second only to equipment trust agreements, railroad's equity in rolling stock subject to equipment trusts was subject to the mortgage, notwithstanding mortgage clause permitting acquisition of equipment by equipment trust "free from the lien hereof"—Ecker v. Western Pac. R. R. Corp., Cal., 63 S.Ct. 692, 318 U.S. 448, 87 L.Ed. 892, rehearing denied 63 S.Ct. 985, 318 U.S. 803, 87 L.Ed. 1166, Crocker First Nat. Bank of San Francisco v. Western Pac. R., 63 S.Ct. 986, 318 U.S. 803, 87 L.Ed. 1166, Western Pac. R. Co. v. Ecker, 63 S.Ct. 986, 318 U.S. 803, 87 L.Ed. 1166, 63 S.Ct. 988, 318 U.S. 803, 87 L.Ed. 1166 and Irving Trust Co. v. Crocker First Nat. Bank of San Francisco, 63 S.Ct. 988, 318 U.S. 803, 87 L.Ed. 1167.

12. N.Y.—Platt v. New York, etc., R. Co., 41 N.Y.S. 42, 9 App.Div. 87, affirmed 48 N.E. 1106, 153 N.Y. 670.
51 C.J. p. 848 note 2.

13. U.S.—Mercantile Trust, etc., Co. v. Roanoke, etc., R. Co., C.C.Va., 109 F. 3.
51 C.J. p. 848 note 3.

14. N.Y.—Weetjen v. St. Paul, etc., R. Co., 4 Hun 529.

15. Ky.—Phillips v. Winslow, 18 B. Mon. 431, 68 Am.D. 729.
51 C.J. p. 848 note 5.

16. Ohio.—Ludlow v. Hurd, 1 Disn. 532, 12 Ohio Dec., Reprint, 791.
51 C.J. p. 848 note 6.

17. N.Y.—Platt v. New York, etc., R. Co., 41 N.Y.S. 42, 9 App.Div. 87, affirmed 48 N.E. 1106, 153 N.Y. 670, 43 N.E. 1103, 154 N.Y. 743.
51 C.J. p. 848 note 7.

18. U.S.—Mississippi Valley Trust Co. v. Southern Trust Co., C.C.A. Ark., 261 F. 765.
51 C.J. p. 848 note 8.

19. U.S.—Mississippi Valley Trust

ments to the mortgaged property.[20] It has been held that rolling stock is a fixture and passes regardless of an after-acquired property clause, by the doctrine of accession,[21] but on the other hand it has been held that rolling stock retains its character as personalty and does not pass under a real estate mortgage.[22] A mortgage, although in terms covering after-acquired rolling stock, does not attach to rolling stock temporarily placed on the road under a contract with the company then operating it.[23]

Consolidation. It has been held that the mortgage of the property of one railroad corporation, which was thereafter consolidated with another, did not extend to equipment acquired after the consolidation,[24] although the contrary has been held where the equipment was acquired to replace that mortgaged by one of the constituents.[25]

(7) Earnings, Income, and Other Funds

A mortgage of the future earnings of the road does not embrace the proceeds of a subsequent extension constructed under authority of an amendment to the charter of the company, but ordinarily the security extends to income subsequently accruing, even after default. Where the mortgage specifies the lines from which the income is to be derived, the lines described constitute the income fund pledged

A mortgage of the future earnings of the road does not embrace the proceeds of a subsequent extension constructed under authority of an amendment to the charter of the company, as against attaching creditors of such proceeds,[26] but ordinarily the mortgagee's security extends to income subsequently accruing, even after default.[27] When a railroad mortgage purporting to cover net income or earnings specifies the lines from which such income is to be derived, the lines so described constitute the income fund pledged,[28] and in ascertaining the net income the company cannot charge against the income of such lines the expenses or losses incurred in operating additional after-acquired lines.[29] A grant of the income and power over the income after default does not carry with it any other property,[30] and, where the mortgagor is entitled to the rents and income of the property until default, the interest accruing on an award for damages to the property goes to the mortgagor until default.[31]

Co. v. Southern Trust Co., C.C.A. Ark., 261 F. 765—Strang v Montgomery, etc., R. Co., C.C. Ala., 23 F.Cas. No. 13,523, 3 Woods 613.
51 C.J. p. 848 note 9.

Effect of specific provision in mortgage

(1) A true "replacement clause" exists when the railway is required to keep under the lien of the mortgage the same value or amount of equipment as had existed at the time of the execution of the mortgage.—In re Wisconsin Cent. Ry. Co., D.C.Minn., 68 F.Supp. 320, affirmed, C.C.A., Empire Trust Co. v. U. S. Trust Co. of N. Y., 165 F.2d 829.

(2) Where first general mortgage provided that railroad could dispose of obsolete equipment if railroad replaced it with new equipment which should become subject to the mortgage, bondholders under such mortgage possessed a lien on such new equipment.—In re Wisconsin Cent. Ry. Co., D.C.Minn., 68 F.Supp. 320, affirmed, C.C.A., Empire Trust Co. v. U. S. Trust Co. of N. Y., 165 F.2d 829.

(3) But this provision does not give rise to a lien equal to the original value of the equipment to which the lien originally attached, but bondholders were entitled only to a lien equal to the value of the present equipment which replaced the disposed of equipment which was subject to the lien.—In re Wisconsin Cent. Ry. Co., D.C.Minn., 68 F.Supp. 320, affirmed, C.C.A., Empire Trust Co. v. U. S. Trust Co. of N. Y., 165 F.2d 829.

(4) A refunding mortgage providing that railroad would maintain, preserve, and keep property in thorough working order and repair and would make all needful and proper renewals, replacements, repairs, etc., required railroad to make replacements so that the property could be operated safely and expeditiously, and the lien of the refunding mortgage applied to replacements.—In re Wisconsin Cent. Ry. Co., D.C.Minn., 68 F.Supp. 320, affirmed, C.C.A., Empire Trust Co. v. U. S. Trust Co. of N. Y., 165 F.2d 829.

(5) But such mortgage does not provide for a true replacement lien.—Empire Trust Co. v. U. S. Trust Co. of N. Y., C.C.A. Minn., 165 F.2d 829.

20. U.S.—Peeples v. Georgia Trust Co., Ga., 256 F. 627, 167 C.C.A. 657. Me.—Hamlin v. Jerrard, 72 Me. 62.

21. N.Y.—Farmers' Loan & Trust Co. v. Hendrickson, 25 Barb. 484.
51 C.J. p. 849 note 11.

22. N.Y.—Hoyle v. Plattsburgh, etc., R. Co., 54 N.Y. 314, 15 Am.R. 575
51 C.J. p. 849 note 12.

23. U.S.—Hardesty v. Pyle, C.C.Pa., 15 F. 778, affirmed 122 U.S. 642, 30 L.Ed. 1244.

24. U.S.—Metropolitan Trust Co. v. Chicago, etc., R. Co., Ill., 253 F. 868, 165 C.C.A. 348, certiorari denied 39 S.Ct. 184, 248 U.S. 586, 63 L.Ed. 434.

25. Del.—Wilmington, etc., Nat. Bank v. Wilmington, etc., R. Co., 31 A. 70, 9 Del.Ch. 258.

Me.—Hamlin v. Jerrard, 72 Me. 62
51 C.J. p. 849 note 15.

26. Va.—Alexandria, etc., R. Co. v. Graham, 31 Gratt. 769, 72 Va. 769

27. U.S.—Central Trust Co. v. Chattanooga, etc., R. Co., Ga., 94 F. 275, 36 C.C.A. 241.

Net income

Where railroad mortgages covered rents, issues, profits, etc., and contemplated that the net income to be applied to the mortgage debt was the surplus left over after payment of all usual and customary outlays in the operation of the road, and receivership was instituted for the benefit of all creditors and trustee was subsequently appointed in railroad reorganization proceedings, the net income applicable to interest and bond principal was that remaining after all necessary additions, replacements, improvements, and restorations during the operation of the road after default had been deducted.—In re Wisconsin Cent. Ry. Co., D.C.Minn., 68 F.Supp. 320, affirmed, C.C.A., Empire Trust Co. v. U. S. Trust Co. of N. Y., 165 F.2d 829

28. U.S.—Spies v. Chicago, etc., R. Co., C.C.N.Y., 40 F. 34, 6 L.R.A. 565
51 C.J. p. 849 note 19.

29. U.S.—Spies v. Chicago, etc., R. Co., supra.

30. U.S.—New York Guaranty Trust Co. v. Minneapolis, etc., R. Co., C.C.A. Minn., 36 F.2d 747.

31. N.Y.—Central Trust Co. v. Morton Trust Co., 93 N.E. 975, 200 N.Y. 577.

Municipal bonds issued to aid in the building of the road are not embraced in the general terms of an after-acquired property mortgage,[32] but such a mortgage covers a payment made to a railroad company for damages caused by a city in raising a certain grade.[33]

Consolidation. Where a consolidated company, successor to the mortgagor, sold mortgaged equipment, and placed the money in the general treasury of the company, such funds were held not subject to a lien in favor of the mortgagee.[34]

g. Estoppel of Mortgagor and Mortgagee

The mere fact that a mortgage declares that it is subject to certain prior mortgages which are superior liens on the property therein described does not estop the company to deny that such prior mortgages embraced certain property covered in the subsequent mortgage; and an erroneous recital of the resolution authorizing the execution of a mortgage does not estop the mortgagee to show the correct resolution.

The mere fact that a subsequent mortgage declares that it is subject to certain prior mortgages given by the railroad company and that they are superior liens on the property therein described does not estop the company to deny that such prior mortgages embraced certain property covered in the subsequent mortgage.[35] An erroneous recital of the resolution of the directors authorizing the execution of a mortgage does not estop the mortgagee to show the correct resolution authorizing a mortgage of after-acquired property.[36]

§ 289. —— Title or Interest Conveyed

Unless restricted to some particular interest or estate, a mortgage executed by a railroad company conveys all the title or interest which the company then has in the property therein described; and a mortgage of the lands is a mortgage of the fee.

A mortgage executed by a railroad company, unless restricted to some particular interest or estate, conveys all the title or interest, legal or equitable, which the company then has in the property therein described.[37] A railroad company's mortgage of its lands is a mortgage of the fee, although words of inheritance are lacking,[38] if other circumstances show an intention to mortgage the fee.[39]

§ 290. —— Debts and Obligations Secured

A mortgage given by a railroad company may not be enlarged so as to secure claims not secured by it; and what bonds or bonded indebtedness is secured by, or what bonds may be issued under, a railroad mortgage depends generally on the terms of the mortgage, construed in connection with the charter of the company and the surrounding circumstances.

A mortgage given by a railroad company may not be enlarged so as to secure claims not secured by it.[40] So, where the mortgage in terms secures an indebtedness of a specified class or kind, it may not be made to cover obligations or liabilities not falling within the designated class.[41] Under some statutes a mortgage may secure certificates of indebtedness to be delivered to creditors in exchange for existing debts and obligations to an equal amount as they shall be ascertained and liquidated.[42]

Bonds and coupons. What bonds or bonded indebtedness is secured by,[43] or what bonds may be issued under,[44] a railroad mortgage depends in general on the terms of the mortgage, construed in connection with the charter of the company or governing statutes and the circumstances attending the execution of the mortgage.[45] Thus, where the mortgage purports to secure certain coupons and bonds and substantially describes them, it will secure the debt evidenced thereby,[46] although the coupons and

32. U.S.—Smith v. McCullough, Mo., 104 U.S. 25, 26 L.Ed. 637.
51 C.J. p. 849 note 23.

33. N.Y.—Central Trust Co. v. Morton Trust Co., 93 N.E. 975, 200 N.Y. 577.

34. U.S.—Metropolitan Trust Co. v. Chicago, etc., R. Co., Ill., 253 F. 868, 165 C.C.A. 348, certiorari denied 39 S.Ct. 184, 248 U.S. 586, 63 L.Ed. 434.

35. Wis.—Farmers' Loan & Trust Co. v. Commercial Bank, 15 Wis. 424, 82 Am.D. 689.
Estoppel of company to assert invalidity of mortgage see supra § 286 g

36. Ohio.—Hatry v. Painesville, etc., R. Co., 1 Ohio Cir.Ct. 426, 1 Ohio Cir.Dec. 238.

37. U.S.—Toledo, D. & B. R. Co. v. Hamilton, Ohio, 10 S.Ct. 546, 134 U.S. 296, 33 L.Ed. 905.
Pa.—Hatry v. Painesville, etc., R. Co., 1 Ohio Cir.Ct. 426, 1 Ohio Cir.Dec. 238

38. N.J.—Coe v. New Jersey Midland R. Co., 31 N.J.Eq. 105, modified on other grounds 34 N.J.Eq. 266—Randolph v. New Jersey West Line R. Co., 28 N.J.Eq. 49

39. N.J.—Coe v. New Jersey Midland R. Co., 31 N.J.Eq. 105, modified on other grounds 34 N.J.Eq. 266—Randolph v. New Jersey West Line R. Co., 28 N.J.Eq. 49.
51 C.J. p. 850 note 33.

40. U.S.—Vose v. Bronson, Wis., 6 Wall. 452, 18 L.Ed. 846.
Utah.—Meissner v. Ogden, etc., R. Co., 233 P. 569, 65 Utah 1.
51 C.J. p. 850 note 37.

41. Me.—Mason v. York, etc., R. Co., 52 Me. 82.

42. Me.—Mason v. York, etc., R. Co., supra.
51 C.J. p. 850 note 39.

43. N.Y.—Day v. Ogdensburgh, etc., R. Co., 15 N.E. 765, 107 N.Y. 129.
Va.—Atwood v. Shenandoah Valley R. Co., 9 S.E. 748, 85 Va. 966.
51 C.J. p. 850 note 40

44. N.Y.—St. Louis, etc., R. Co. v. Guaranty Trust Co., 99 N.E. 162, 205 N.Y. 609.
51 C.J. p. 850 note 41.

45. S.C.—Gibbes v. Greenville, etc., R. Co., 13 S.C. 228.
51 C.J. p. 850 note 42.

46. Me.—Mason v. York, etc., R. Co., 52 Me. 82.
Bonds issued by others
A first mortgage, guaranteeing payment of bonds, issued by subsidiary company and third railway company, for benefit of holders of first mortgage certificates, constituted se-

bonds were irregularly issued[47] So bonds dated prior to the date of the mortgage are secured thereby where they are clearly described in the mortgage and there is nothing in the mortgage inconsistent with the fact that they had been executed prior to the mortgage[48] Where a statute authorizes a general mortgage for the benefit of creditors but contains no provision for contingent liabilities, bonds of another company indorsed and guaranteed by the mortgagor company, but not yet due, are not covered by the security of such mortgage.[49] Where a mortgage provides for the retirement of certain bonds without providing for the manner of effecting such retirement, it has been held that the mode of retirement is in the discretion of the company,[50] and in order for a bondholder to participate in the security of the mortgage he must comply with the terms dictated by it.[51]

The general rule applicable to the construction of contracts that the contract will be given a reasonable construction, if that is possible, has been applied in determining what bonds may be issued under a mortgage,[52] and, even in the absence of specific authorization for the issuance of bonds for a certain purpose, such purpose may be found to be included in a general authorization contained in the mortgage.[53]

Where there is doubt or ambiguity as to whether certain bonds are secured by a particular mortgage, parol evidence has been received to remove such doubt,[54] as, for example, evidence that no bonds were executed or issued other than those which it is claimed the mortgage secures[55] If it clearly appears from the evidence that the bonds in question are the ones referred to in the mortgage, ordinarily this is sufficient to show that they are the bonds secured.[56]

A mortgage executed to secure bonds issued for a certain purpose does not secure bonds issued for a different purpose or bonds illegally issued,[57] except as bona fide holders for value and without notice may be entitled to protection in accordance with the rules stated supra § 253

§ 291. —— Control and Disposition of Property by Mortgagor

The mortgagor of a railroad, if left in possession, may lease part of the real property covered by the mortgage; but this authority terminates on the breach of the conditions of the mortgage.

Before condition broken, the mortgagor of a railroad, if permitted to remain in possession and control of the property, may execute a lease of part of the real property covered by the mortgage,[58] but this authority terminates on the breach of the conditions of the mortgage.[59]

§ 292. —— Qualification, Tenure, and Removal of Trustee, and Selection of New Trustee

a In general
b Removal
c. Selection of new trustee

a. In General

In the absence of special provision in the mortgage or deed of trust, a trustee is morally and legally bound to continue in the performance of his duties until discharged by an order of the court or by the unanimous consent of the cestuis que trust, but some mortgages recognize the right of a trustee to resign; and ordinarily on the vacancy of a trusteeship all the trustee's estate, right, interest, power, and control are divested.

In the absence of special provision in the mortgage or deed of trust, a trustee, once having assumed his office, is morally and legally bound to continue in the performance of his duties until discharged by an order of the court of chancery[60] or by the unanimous consent of the cestuis que trust,[61] which, in case a number of the cestuis que trust are under a disability, can be had only through the agency of a court of equity.[62] Some mortgages, however, recognize the right of a trustee to resign.[63] Mortgages or deeds of trust generally contain provisions as to the existence and effect of vacancies in the office of

curity for full payment of interest on all such certificates, not merely on amount of bond secured by mortgage—Glines v. Henwood, C.C.A.Mo., 103 F.2d 226.

47. Me—Mason v. York, etc., R. Co., 52 Me. 82.

48. Md.—Butler v. Rahm, 46 Md. 541.

49. Mass.—Merchants' Nat. Bank v. Eastern R. Co., 124 Mass. 518

50. U.S.—Claflin v South Carolina R. Co., C.C.S.C., 8 F. 118, 4 Hughes 12.

51. U.S.—Claflin v. South Carolina R. Co., supra.

52. U.S.—Denver & R. G. R. Co. v. U. S. Trust Co., C.C.N.Y., 41 F. 720.

53. U.S.—Lusman v Knickerbocker Trust Co., Mich., 211 F. 413, 128 C.C.A. 85.
51 C.J. p 851 note 48.

54. Md.—Butler v. Rahm, 46 Md. 541.

55. Md.—Butler v Rahm, supra.

56. Md.—Butler v. Rahm, supra.

57. U.S.—Central Trust Co. of New York v. California & N. R. Co., C.C. Cal., 110 F. 70, affirmed 128 F. 882, 63 C.C.A. 220.

58. Mass.—Haven v. Adams, 4 Allen 80.

59. Mass.—Haven v. Adams, supra.

60. N.H.—Richards v. Merrimack, etc., R. Co., 44 N.H. 127.
Vt.—Sturges v. Knapp, 31 Vt. 1.

61. N.H.—Richards v. Merrimack, etc., R. Co., 44 N.H. 127.
Vt.—Sturges v. Knapp, 31 Vt. 1.

62. Vt.—Sturges v. Knapp, supra.

63. Pa.—Appeal of Tarbell, 7 Pa.Super. 283.

trustee, and it has been laid down that, since the trustee's duties are personal in their character and incapable of delegation, the office becomes vacant by his voluntarily removing to, and becoming a resident of, a foreign country;[64] but a citizen of the United States may act as trustee in any state in the Union.[65] Ordinarily, under the terms of the mortgage or deed of trust, on the vacancy of a trusteeship all the trustee's estate, right, interest, power, and control are divested and cease,[66] and the trust estate vests in the remaining trustee or trustees.[67]

b. Removal

A court of equity may, for a sufficient reason and on a proper application and notice, remove a trustee; but the power of removal is not absolute and may not be exercised capriciously

A court of equity may, for a sufficient reason and on a proper application and notice, remove a trustee,[68] independently of statutory authority or any directions in the mortgage or deed of trust.[69] The power of removal is not absolute, and a removal may not be made capriciously or except for sufficient causes, which affect the faithfulness and capacity of the trustee,[70] or the interest of the cestuis que trust,[71] or perhaps because of public interest[72] It is also well settled in chancery practice that trustees are not to be removed from part of their trust leaving them burdened and responsible for the remainder,[73] nor will they be discharged until the trust is fully performed where the interests of the cestuis que trust require the continuance of the trust.[74]

c. Selection of New Trustee

In case of a vacancy in the office of trustee, the mode of supplying the vacancy provided in the mortgage, if any, governs the appointment; but a court of equity may appoint a new trustee on due application independently of any statute or of any directions in the mortgage or deed of trust.

Ordinarily an express provision as to the mode of supplying vacancies in the office of trustee will be given effect;[75] and in such case the mode of supplying vacancies provided in the mortgage governs the appointment and not the general law,[76] nor does a statute govern where it makes provision for the method of appointment but by its terms applies only where no other method of filling vacancies is specifically provided for in the original appointment.[77] Thus effect ordinarily is given to provisions for appointment or selection by the remaining trustees,[78] as by appointment from among the bondholders,[79] or to provisions for selection by the bondholders,[80] for appointment by a designated court[81] on application by bondholders[82] or directors,[83] and to provisions for the approval by a designated court of the selection.[84] It has been held that, where the mortgage or deed of trust which provides for the filling of a vacancy by appointment by a particular court contains a specific provision for notice to certain officers of the corporate mortgagor or grantor, the jurisdiction of the court to appoint depends on such notice.[85]

A court of equity may, however, on the occurrence of a vacancy, appoint a new trustee on due application,[86] independently of any statute[87] or of any directions in the mortgage or deed of trust;[88] and to a proceeding in equity for such appointment the mortgagor[89] and surviving trustees[90] should be made parties. It has been held that the power of the court in this respect is not defeated by the formation of a new corporation by a majority of the bondholders,[91] or by a foreclosure promoted by the

64. N.Y.—Farmers' L. & T. Co. v. Hughes, 11 Hun 130—Hughes v. Chicago, etc., R. Co., 47 N.Y.Super 531.
65. U.S.—Farmers' L. & T. Co. v. Chicago & A. R. Co., C.C.Ind., 27 F 146
Who may be mortgagee or trustee see supra § 283
66. Me.—Pillsbury v. Consolidated European, etc., R. Co., 69 Me. 394.
67. Mass.—Ellis v. Boston, etc., R. Co., 107 Mass. 1.
68. U.S.—Ketchum v. Mobile & O. R. Co., Ala., 14 F.Cas.No 7,737, 2 Woods 532.
51 C.J. p 851 note 72.
69. Me.—In re Anson, 26 A. 996, 85 Me. 79
70. N.Y.—Beadleson v. Knapp, 13 Abb.Pr.,N.S., 335.
Vt.—Sturges v. Knapp, 31 Vt. 1.
51 C.J. p 852 note 74.
71. Vt.—Sturges v. Knapp, supra.
72. Vt.—Sturges v. Knapp, supra.
73. Vt.—Sturges v. Knapp, supra.
74. Vt.—Sturges v. Knapp, supra.
75. Me.—Pillsbury v. Consolidated European, etc., R. Co., 69 Me. 394
Pa.—Appeal of Tarbell, 7 Pa.Super. 283.
51 C.J. p 852 note 79.
76. Ga.—Macon, etc., R. Co. v. Georgia R. Co., 63 Ga. 103
77. Me.—Pillsbury v. Consolidated European, etc., R. Co., 69 Me. 394.
78. Mass.—Ellis v. Boston, etc., R. Co., 107 Mass. 1.
N.H.—Richards v. Merrimack, etc., R. Co., 44 N.H. 127.
79. N.H.—Richards v. Merrimack, etc., R. Co., supra.
51 C.J. p 852 note 83.
80. Pa.—Appeal of Tarbell, 7 Pa. Super. 283.
81. Me.—Pillsbury v. Consolidated European, etc., R. Co., 69 Me. 394
82. Me.—Pillsbury v. Consolidated European, etc., R. Co., supra.
83. Me.—Pillsbury v. Consolidated European, etc., R. Co., supra.
84. Ga.—Macon, etc., R. Co. v. Georgia R. Co., 63 Ga. 103.
51 C.J. p 852 note 88.
85. Va.—Washington, etc., R. Co. v Alexandria, etc., R. Co., 19 Gratt 592, 60 Va 592, 100 Am.D. 710.
51 C.J. p 852 note 89.
86. Me.—In re Anson, 26 A. 996, 85 Me. 79.
51 C.J. p 852 note 91.
87. Me.—In re Anson, 26 A. 996, 85 Me. 79.
88. Me.—In re Anson, supra
89. Me.—In re Anson, supra.
90. Me.—In re Anson, supra.
91. Me.—In re Anson, supra.

bondholders, the trustees not being parties thereto, and a sale of the equity of redemption on execution to the new corporation,[92] or by the creation of a new debt by the new corporation secured by a mortgage, for the extension of the road,[93] or by estoppel through laches and because a majority of the bonds was represented at the organization of the new corporation.[94]

Where the mortgage or deed of trust provides that the same title and power shall vest in the new trustees, no additional conveyance to them is necessary,[95] but the court which appoints a new trustee may properly make provision for a conveyance to the trustee so appointed.[96]

§ 293. —— Rights, Duties, and Liabilities of Mortgagees and Trustees

a In general
b. Certification of bonds
c. Protection of security
d. Rights as to income
e. Changing securities
f. Representation of mortgagor and bondholders
g. Sale of property
h. Lease of property
i Bidding on property
j. Possession and operation of road
k Individual interest in transactions
l. Compensation and expenses
m. Actions, remedies, and proceedings by or against mortgagee and trustee

a. In General

In accordance with general rules the authority and duties of a trustee to whom a railroad mortgage is made for the benefit of bondholders are those defined by the instrument creating the trust and such other duties as are imposed on him by the circumstances, and ordinarily until default the trust is largely passive.

General rules as to the nature of the duties of trustees apply in the case of trustees under a mortgage or deed of trust given by a railroad company.[97] The authority[98] and duties[99] of a trustee to whom a railroad mortgage is made for the benefit of bondholders are those which are defined by the instrument creating the trust, and such other duties as are imposed on him by the relation of the parties and the situation and character of the trust property, which duties may change from time to time as circumstances change,[1] and in general the courts have no power to alter, modify, or enlarge the terms of the deed or the powers of the trustees.[2] Where, however, the rights and duties of the trustees are regulated by statute, no provisions need be inserted in the mortgage or trust deed in respect of such rights[3] and duties.[4]

Ordinarily until default the trust is largely passive,[5] or, as sometimes stated, the trust is entirely fiduciary and executory,[6] at least when the mortgage is amply secured,[7] and in practice the duties of the trustee are sometimes performed by the corporation or its officers;[8] but where, at the inception of the mortgage, there is practically no security, the trustee is required to be active in the performance of his duties.[9] The duties of the trustee are active and responsible after a default, either by nonpayment of interest[10] or principal,[11] or both.[12]

Recognition of bondholders. A trustee under a mortgage is bound to recognize the rights of the holders of bonds which are prima facie valid,[13] and,

92. Me.—In re Anson, supra.
93. Me.—In re Anson, supra.
94. Me.—In re Anson, supra.
95. Ill.—Craft v. Indiana, etc, R Co., 46 N E 1132, 166 Ill. 580.
Mass.—Ellis v. Boston, etc, R. Co., 107 Mass. 1.
51 C.J. p 852 note 1.
96. Me.—In re Anson, 26 A 996, 85 Me 79—Pillsbury v. Consolidated European, etc, R. Co, 69 Me. 394.
97. Mass.—First Nat. F. Ins Co. v. Salisbury, 130 Mass. 303.
51 C J p 853 note 10 [a].
Liability for injuries arising from operation of road see infra § 350
Notice of assignment filed with predecessor
Where duplicate original of assignment of coal company stock subject to railroad mortgage was filed with mortgage trustee, successor trustee which was also trustee under subsequent mortgage was charged with notice of such assignment.—Mahoning Inv. Co. v Central Hanover Bank & Trust Co, D C N Y., 30 F Supp 849
98. N.Y.—Colorado & S R Co v. Blair, 108 N E 840, 214 N Y. 497, Ann.Cas 1916D 1177.
51 C J p 853 note 6.
99. N.Y.—Meisel v. Central Trust Co, 167 N Y S. 143, 179 App Div. 795, affirmed 119 N.E. 1059, 223 N. Y. 589.
51 C J p 853 note 7.
1. U S.—Frishmuth v Farmers' L. & T. Co., C C N Y, 95 F 5
Vt.—Sturges v. Knapp, 31 Vt. 1.
2. N Y.—Clark v St. Louis, etc, R. Co., 58 How.Pr. 21.
3. U S.—Mercantile Trust Co. v. Portland, etc, R. Co., C.C.N H., 10 F. 604.
4. U S.—Mercantile Trust Co. v. Portland, etc., R Co., supra.
5. N Y.—Colorado & S. R Co v Blair, 108 N E 840, 214 N Y. 497, Ann.Cas 1916D 1177.
51 C.J p 853 note 13.
6. Vt.—Sturges v. Knapp, 31 Vt. 1
7. U.S.—Frishmuth v. Farmers' L & T. Co, C C.N.Y., 95 F. 5
8. Vt.—Sturges v. Knapp, 31 Vt 1.
9. U.S.—Frishmuth v. Farmers' L & T. Co, C C N Y, 95 F 5
10. Pa.—McDougall v Huntingdon & Broad Top Mountain R & Coal Co, 143 A 574, 294 Pa 108.
51 C.J. p 853 note 18
11. Pa.—McDougall v. Huntingdon & Broad Top Mountain R. & Coal Co., supra.
51 C.J p 853 note 19.
12. Vt.—Sturges v. Knapp, 31 Vt 1.
13. U S.—Central Trust Co. of New York v. Cincinnati, H. & D. R Co., 169 F 466.

on the request of the requisite number of holders of such bonds, to declare maturity for default and to foreclose.[14]

Delegation of duties and performance of duties or enforcement of rights by another. A trustee cannot delegate the performance of his duties to another,[15] nor can anyone but the trustee enforce the covenants and conditions of the mortgage[16] or take proper measures to protect the interests of bondholders in respect of matters not provided for by the terms of the instrument.[17] Under certain circumstances, however, if, on the request of bondholders, a trustee in any case refuses or neglects to act, whatever rights as against the mortgagor are vested in the trustee inure to the benefit of the bondholders and are enforceable by them.[18]

Exercise of discretion. A trustee under a mortgage or deed of trust may exercise his discretion within the scope of his powers,[19] but whatever discretion the trustee may have may not be exercised in an unreasonable or arbitrary manner.[20]

Liability of trustees to bondholders in general. In general a trustee is liable to the bondholders for a breach of duty which, as trustee, he owes to them,[21] but, under certain circumstances, where, although the trustees have been guilty of a breach of trust, there is some excuse for their acts, they may be held liable only as trustees and not personally.[22] Where the trustee, in good faith, exercises discretion conferred by the trust instrument, he may not be held liable for his acts by bondholders,[23] even though it appears that a different course would have resulted more favorably to the bondholders.[24]

Rights with respect to illegal contracts made by mortgagor. A trustee under a mortgage of a railroad company has no greater right than the company itself to the benefit of an illegal traffic contract made prior to the execution of the mortgage.[25]

What law governs. The law of the state where the mortgage is executed and the mortgaged property situated furnishes the rule for determining the rights of mortgagees after condition broken.[26] A mortgage securing bonds of a railroad by a lien on its chattels is governed by the rule concerning chattel mortgages, and on default the mortgagee's title to chattels becomes absolute where the statute with reference to mortgages of chattels generally so provides.[27]

b. Certification of Bonds

A trustee who merely certifies a bond as one of the bonds issued by the mortgagor is not liable in respect of the bond because of the insufficiency of the security.

A trustee under a mortgage who merely certifies a bond as one of the bonds issued by the mortgagor is not liable in respect of the bond because of the insufficiency of the security, on the theory that such trustee was a guarantor[28] or that there was a breach of an inplied warranty.[29]

c. Protection of Security

The trustee must take care that the property is not wasted or depreciated.

The trustee must take care that the property is not wasted or depreciated.[30] Where under provisions of the mortgage, after default in payment of principal or interest, the trustee may take certain action to protect the interests of bondholders on request of holders of a specified amount of the bonds,

14. U.S.—Central Trust Co of New York v. Cincinnati, H. & D. R. Co., supra.
Representation of bondholders by trustee in suit to foreclose mortgage see infra § 315.

15. N.Y.—Merrill v Farmers' L & T. Co., 24 Hun 297.
51 C.J. p 853 note 23.

16. U.S.—Frishmuth v. Farmers' L. & T. Co., C.C.N.Y., 95 F. 5.

17. U.S.—Frishmuth v. Farmers' L. & T. Co., supra.

18. N.Y.—O'Beirne v. Allegheny, etc., R. Co., 45 N.E. 873, 151 N.Y. 372.
51 C.J. p 853 note 26.

19. N.Y.—Meisel v. Central Trust Co., 167 N.Y.S. 143, 179 App Div. 795, affirmed 119 N.E. 1059, 223 N. Y. 589.
51 C.J. p 853 note 27.

20. U.S.—U. S. v Lake Shore & M. S. R. Co., D.C.Ohio, 281 F. 1007
51 C.J. p 853 note 28.

21. U.S.—Riker v. Alsop, C.C.N.Y., 27 F. 251, reversed on other grounds 15 S.Ct. 162, 155 U.S. 448, 39 L.Ed. 218
51 C.J. p 853 note 29.

22. N.Y.—Hollister v. Stewart, 19 N.E. 782, 111 N.Y. 644.

23. N.Y.—Meisel v. Central Trust Co., 167 N.Y.S. 143, 179 App.Div. 795, affirmed 119 N.E. 1059, 223 N. Y. 589.

24. N.Y.—Meisel v. Central Trust Co., supra.

25. U.S.—Central Trust Co. of New York v. Wheeling & L. E. R. Co., 211 F. 515.

26. U.S.—Dow v. Memphis & L. R. R. Co., C.C.Ark., 20 F. 260, modified on other grounds Memphis & L. R. R. Co. v. Dow, Ark., 7 S.Ct. 482, 120 U.S. 287, 30 L.Ed. 595.

27. N.Y.—Stillwater v. Hudson Valley R. Co., 241 N.Y.S. 569, 229 App. Div. 41.

28. Ill.—Knickerbocker v. Ft. Dearborn Trust, etc., Bank, 219 Ill.App. 409.

29. Ill.—Knickerbocker v. Ft. Dearborn Trust, etc., Bank, supra.
51 C.J. p 854 note 37.

30. Mass.—First Nat. F. Ins. Co. v. Salisbury, 130 Mass. 303.
Actions on bonds and coupons in general see infra § 312.
Application of:
Earnings and income see infra § 310.
Proceeds of obligations and securities to purposes of trust see infra § 294.
Enforcement of liability against property of railroad company in general see infra § 313.
Suit to foreclose see infra §§ 314–326.

the trustee may be forced to act under such provisions only on request of holders of such amount of bonds[31] Mortgagees of a railroad which is in the hands of a receiver have an interest giving them the right to object to claims being established against the road and given priority over their lien[32]

d. Rights as to Income

The trustee or mortgagee may claim the rents, earnings, or profits of the mortgaged property after default under the mortgage on duly asserting his right thereto, as by filing a bill for foreclosure or by demanding possession.

As has been noted, supra § 288 e, in the absence of an agreement to the contrary, the subsequent earnings and income of a railroad do not pass under a mortgage of its property while the company retains possession thereof, and in general the mortgagor continues to be entitled to the earnings and profits until the trustee has created a lien thereon, or otherwise established his right thereto, by a proper demand or proceeding.[33] In accordance with general rules and subject to applicable qualifications and exceptions, the trustee or mortgagee may claim the rents, earnings, or profits of the mortgaged property, after default under the mortgage, on making due assertion of his right thereto,[34] but he is not entitled thereto in the absence of a due assertion of his claim,[35] as by asserting his rights under the mortgage to the possession of the road by filing a bill for foreclosure,[36] or, if the road is in the hands of a third person, by demanding possession of such person.[37] So where, under the mortgage or trust deed, the only way in which the trustee can acquire the right to the tolls and income is by taking possession of the road as provided in the mortgage or trust deed, he may not claim, by virtue of the mortgage or trust deed, money voluntarily deposited to the credit of the trustee for the payment of coupons where he has not taken possession or run the road, or taken any action against the company by virtue of the trust deed,[38] but the trustee may acquire the right to a deposit where the mortgagor company in making the deposit expressly appropriates it to the use of the trustee for the purpose of paying coupons.[39]

Mortgage of earnings or profits. A mortgage of the income of a railroad company does not entitle the mortgagee to receive the income as long as the mortgagor company continues in possession of the road[40] unless the parties otherwise agree;[41] and even where the mortgage specifically includes the earnings and profits the necessity for some formal proceeding or demand has been recognized in order that the trustee or mortgagee may entitle himself to such earnings or profits[42] Entry into possession, under a mortgage of the income or a mortgage giving the trustee the right to enter and take the income on default, passes the income to the mortgagees,[43] as does a demand by the trustee that the mortgagor surrender possession according to the terms of the trust deed,[44] which demand may be in the form of a suit to enforce the security.[45] There is no such change of possession as to pass the income under the mortgage where a decree of foreclosure has been sought or granted but where no order has been entered by the court with respect to income or a change of possession.[46]

Effect of receivership. The right to income accruing after the appointment of a receiver ordinarily passes under the mortgage where such appointment is at the instance of the trustees or mortgagees,[47]

31. Pa.—McDougall v. Huntingdon, etc, R, etc, Co, 143 A. 574, 294 Pa. 108

32. Tex.—United States & Mexican Trust Co. v. Western Supply & Mfg. Co, Civ.App., 109 S W 377.

33. U.S.—Galveston, H & H R Co v Cowdrey, Tex, 11 Wall 459, 20 L.Ed 199.
Ala.—Johnston v. Riddle, 70 Ala. 219.

34. U S.—U. S. Trust Co. v. Wabash Western R Co., Mo., 14 S.Ct. 86, 150 U.S. 287, 37 L.Ed 1085.
51 C J. p 854 note 48.
Right of mortgagee to rents and profits under mortgages in general see Mortgages §§ 316-321.

35. U.S.—Sage v. Memphis & L R R. Co., Ark, 8 S Ct. 887, 125 U S. 361, 31 L.Ed. 694.
Ala.—Johnston v. Riddle, 70 Ala. 219

36. U.S.—Seney v. Wabash Western R. Co., Mo, 14 S Ct 94, 150 U. S. 310, 37 L Ed 1092—U. S Trust Co. v Wabash Western R Co, Mo, 14 S Ct. 86, 150 U.S. 287, 37 L Ed. 1085
51 C J p 854 note 50

37. U.S.—U S Trust Co v. Wabash Western R Co, supra.

38. N.Y.—Coe v. Beckwith, 31 Barb. 339, 10 Abb Pr 296, 19 How Pr. 398

39. N.Y.—Coe v. Beckwith, supra.
51 C J. p 854 note 53.

40. Ga.—Green v. Coast Line R. Co., 24 S.E 814, 97 Ga 15.
51 C.J. p 855 note 54.

41. U.S.—Pullan v. Cincinnati & C. Air-Line R. Co., C.C Ind, 20 F. Cas No 11,462, 5 Biss. 237.

42. U.S.—Galveston, H & H. R. Co. v. Cowdrey, Tex., 11 Wall. 459, 20 L Ed. 199.
51 C.J. p 855 note 56.

43. U.S.—Central Trust Co v. Chattanooga, etc, R Co, C C Ga., 89 F. 388, affirmed 94 F. 275, 36 C.C A. 241.
51 C.J. p 855 note 57.

44. U S.—Dow v Memphis & L R. R Co, Ark, 8 S.Ct. 673, 124 U S. 652, 31 L Ed. 565—Galveston, H & H R. Co. v. Cowdrey, Tex, 11 Wall 459, 20 L Ed 199.
51 C J p 855 note 58

45. U.S.—Dow v. Memphis & L. R. R. Co., Ark, 8 S.Ct. 673, 124 U S 652, 31 L Ed 565
51 C J. p 855 note 59.

46. U.S.—Gilman v. Illinois & Mississippi Tel. Co, Iowa, 91 U S. 603, 23 L Ed. 405

47. U S.—Mercantile Trust Co. v. Baltimore & O. R. Co., C.C.Ohio, 94 F. 722.
N Y.—Platt v New York, 71 N Y.S. 913, 63 App Div. 401, reversed on

but not where the receiver is appointed on the application of stockholders,[48] or of individual bondholders suing as judgment creditors and not on the mortgage,[49] or otherwise where a receiver to carry on the business has been appointed by the court independently of action by the trustees to enforce the terms of the security,[50] or even after appointment of a receiver on application by trustees until his qualification by execution of the necessary bond.[51] Even then, the possession of the receiver is not strictly that of the mortgagee,[52] but is that of the court acting through its agent,[53] and the mortgagee's right to the income may be conditional on such disposition thereof as seems equitable to the court.[54]

e. Changing Securities

A trustee under a railroad mortgage has no power to change or compromise the security pending a default where such power is not expressly or impliedly conferred by the instrument creating the trust, although the right of the court to authorize the trustee to make a change has been recognized.

A trustee under a railroad mortgage has no power to change or compromise the security pending a default where such power is not conferred by the instrument creating the trust.[55] The power must be conferred either expressly or by necessary implication.[56] Under a clause in the mortgage providing for the substitution of other property in the event of sales of the mortgaged property on the basis of sale prices, the trustee cannot be compelled to release any mortgaged parcel or to apply the proceeds to the purchase price of substituted property without a showing that the prices were fair and adequate.[57] On the sale of property released from the lien of the mortgage by the trustee pursuant to a provision therein authorizing the release in the event of a sale and requiring the proceeds of such sale to be expended only to acquire permanent additions to the mortgaged railroad, the proceeds of the sale are trust funds in the hands of the trustee not subject to attachment by creditors of the mortgagor.[58] The right of the court to authorize a trustee to make a change in security where the interests of bondholders would be conserved by such change has been recognized or upheld[59] provided, according to some cases, at least some of the bondholders are made parties to the proceeding.[60]

f. Representation of Mortgagor and Bondholders

In matters affecting the enforcement of the security and the administration of the trust property under the terms of the trust, the trustee represents those who may become the holders of the bonds as well as the mortgagor, and is bound to act in good faith and exercise reasonable care and prudence for the protection of their interests.

While a trustee is selected by the mortgagor and represents it,[61] he also represents those who may become the holders of the bonds,[62] and he is bound to act in good faith and exercise reasonable care and prudence for the protection of their interests and must not be guilty of any acts of fraud or collusion.[63] Conversely, the bondholders or beneficiaries are bound by all acts within the scope of the trustee's authority done in good faith by such trustee on their behalf.[64] A trustee is a true rep-

other grounds 63 N.E. 532, 170 N.Y. 451.

48. U.S.—Mercantile Trust Co. v. Baltimore & O. R. Co., C.C.Ohio, 94 F. 722.

49. U.S.—Sage v. Memphis & L. R. R. Co., Ark., 8 S.Ct. 887, 125 U.S. 361, 31 L.Ed. 694

50. U.S.—Sage v. Memphis & L. R. R. Co., supra.
Mass.—Ellis v. Boston, etc., R. Co., 107 Mass. 1.
51 C.J. p. 855 note 64

51. Va.—Frayser v. Richmond, etc., R. Co., 81 Va. 388.

52. Ga.—Green v. Coast Line R. Co., 24 S.E. 814, 97 Ga. 15.

53. Ga.—Green v. Coast Line R. Co., supra.

54. Ga.—Green v. Coast Line R. Co., supra.

55. N.Y.—Colorado, etc., R. Co. v. Blair, 108 N.E. 840, 214 N.Y. 497, Ann.Cas.1916D 1177.
Vt.—Miller v. Rutland, etc., R. Co., 36 Vt. 452.

56. N.Y.—Colorado, etc., R. Co. v. Blair, 108 N.E. 840, 214 N.Y. 497, Ann.Cas.1916D 1177, 109 N.E. 1071, 215 N.Y. 697.
51 C.J. p. 855 note 71.

57. U.S.—In re New York, N. H. & H. R. Co., D.C.Conn., 27 F.Supp. 392, affirmed, C.C.A., 104 F.2d 1018.
Improvements
Where, subsequent to execution of original railroad mortgage, tracks were relocated on property not covered by mortgage and original site of tracks was improved and refunding mortgage was issued, trustee under refunding mortgage could not compel senior mortgagee to pay for improvements on theory that it had made improvements in honest, although mistaken, belief that it had acquired first lien.—In re New York, N. H. & H. R. Co., supra.

58. N.Y.—Propp v. Atlantic & D. Ry. Co., 33 N.Y.S.2d 328.

59. Md.—Baltimore v. United R., etc., Co., 69 A. 436, 108 Md. 64, 16 L.R.A.,N.S., 1006.
N.Y.—Colorado, etc., R. Co. v. Blair, 108 N.E. 840, 214 N.Y. 497, Ann.Cas.1916D 1177, 109 N.E. 1071, 215 N.Y. 697.

60. N.Y.—Colorado, etc., R. Co. v. Blair, supra.
51 C.J. p. 855 note 73.

61. U.S.—Frishmuth v. Farmers' L. & T. Co., C.C.N.Y., 95 F. 5.
51 C.J. p. 855 note 76.

62. N.Y.—Fonda, J. & G. R. Co. v. New York Trust Co., 254 N.Y.S. 266, 233 App.Div. 443.
51 C.J. p. 856 note 77
Trustee as representative of bondholders in legal proceedings see infra subdivision m (1) of this section.

63. U.S.—Bond v. South Carolina R. Co., C.C.S.C., 50 F. 853—Credit Co. of London, England, v. Arkansas Cent. R. Co., C.C.Ark., 15 F. 46, 5 McCrary 23, appeal dismissed 9 S.Ct. 107, 128 U.S. 258, 32 L.Ed. 448.
Individual interest in transaction see infra subdivision k of this section.

64. U.S.—Rospigliosi v. New Orleans, M. & C. R. Co., Ala., 237 F. 341, 150 C.C.A. 355—Credit Co. of

resentative only within the limits of his authority,[65] and in general the trustee represents the bondholders only in matters affecting the enforcement of the security and the administration of the trust property under the terms of the trust,[66] and not in a situation where his power is disputed and the interpretation of the language conferring it is ambiguous.[67]

In the absence of express provisions in the mortgage, the trustee has no power to waive or consent to the destruction of any rights which bondholders have under the mortgage,[68] even with the consent of a majority of the bondholders.[69] So a trustee has no power to waive defaults and release the mortgagor company from its obligations to the bondholders,[70] as, for example, to waive and condone defaults in the payment of principal or interest on the bonds,[71] or to assent to, and recognize the priority of, a later mortgage or lien over the mortgage securing such bondholder,[72] or in general to give effect to a reorganization scheme not authorized by the mortgage.[73] The authority of the trustee to assent to the acquisition by a third person of prior rights in property which otherwise would have come under the lien of the mortgage has been recognized.[74]

Class representation and discrimination. While the trustee owes a duty to the bondholders severally,[75] in general, in the absence of any provision to the contrary in the governing agreement, he represents the bondholders as a class.[76] In any case he may not favor any particular bondholder or group of bondholders or permit discrimination between them,[77] and he is not at liberty blindly to follow the advice or wishes of the majority unless specially authorized.[78] In respect of matters which are within the discretion of the trustee, however, he may properly be governed by the voice of the majority of bondholders secured, acting in good faith, and asking what is not inconsistent with the provisions of the trust.[79]

Estoppel of bondholders. Bondholders are not estopped by delay in taking action to deny the binding effect on them of an ultra vires act of the trustee affecting the interest of such bondholders where they have no knowledge, either actual or constructive, of such act.[80]

Notice to trustee as notice to bondholders. In general, notice to the trustee of matters within the scope of the trustee's duties or authority is notice to the bondholders.[81]

g. Sale of Property

While a trustee may sell the railroad or other trust property when empowered by the mortgage to do so, in the absence of express or implied authorization in the governing agreement he may sell only on authority from the court, and if he sells without authority he is personally liable for damages for his breach of trust.

A trustee may sell the railroad or other trust property where empowered by the mortgage to do so, provided he sells in the manner prescribed thereby.[82] In the absence of express or implied authorization in the governing agreement[83] the trustee may sell only on authority from the court,[84] and if he sells without due authorization it is a breach of trust which renders him personally liable for

London, England, v. Arkansas Cent. R. Co., C.C.Ark., 15 F. 46, 5 McCrary 23, appeal dismissed 9 S Ct 107, 128 U.S. 258, 32 L.Ed 448.

65. N.Y.—Fonda, J. & G. R. Co. v. New York Trust Co., 254 N.Y.S. 266, 233 App Div. 443.
51 C.J. p 856 note 82.

66. U.S.—Baker v. Central Trust Co. of New York, Ohio, 235 F. 17, 148 C.C.A. 511
N.Y.—Fonda, J. & G. R. Co v. New York Trust Co, 254 N.Y.S. 266, 233 App.Div. 443.

67. N.Y.—Fonda, J. & G. R. Co. v. New York Trust Co., 254 N.Y.S 266, 233 App Div. 443

68. N.Y.—Hollister v. Stewart, 19 N.E. 782, 111 N.Y. 644.
51 C.J. p 856 note 84.

69. N.Y.—Hollister v. Stewart, supra.

70. N.Y.—Hollister v. Stewart, supra.

71. N.Y.—Hollister v. Stewart, supra.
51 C.J. p 856 note 87.

72. U.S.—Duncan v. Mobile & O. R Co., C.C.Ala., 8 F.Cas No 4,137, 2 Woods 542.
N.Y.—Hollister v Stewart, 19 N.E 782, 111 N.Y. 644
51 C.J. p 856 note 88.

73. N.Y.—Hollister v. Stewart, supra.

74. N.H.—Pierce v. Emery, 32 N.H. 484.

75. N.Y.—Hollister v. Stewart, 19 N.E. 782, 111 N.Y. 644.

76. U.S.—U S & Mexican Trust Co v. U S. & Mexican Trust Co., Kan., 250 F 377, 162 C.C.A. 447
Pa.—Commonwealth v Susquehanna & D R R Co, 15 A. 448, 122 Pa. 306, 1 L.R.A 225.
51 C.J. p 856 note 92.

77. Pa.—Commonwealth v. Susquehanna & D. R. R Co, supra.
51 C.J. p 856 note 93.

78. U.S.—Toler v. East Tennessee, V. & G. R. Co., C.C.Tenn., 67 F. 168
N.Y.—Hollister v. Stewart, 19 N.E. 782, 111 N.Y. 644.

79. U.S.—Shaw v. Little Rock & F S R. Co., Ark., 100 U.S. 605, 25 L. Ed. 757
51 C.J. p 856 note 95.

80. U.S.—Guaranty Trust Co. of New York v. Minneapolis & St L. R. Co, C.C.A.Minn., 36 F.2d 747.
51 C.J. p 856 note 96.

81. N.H.—Haven v. Emery, 33 N.H. 66.
Vt.—Miller v. Rutland, etc., R Co., 36 Vt. 452.
51 C.J. p 856 note 97.

82. U.S.—Dubuque & S. C R. Co. v. Pierson, Iowa, 70 F. 303, 17 C.C.A. 401, rehearing denied 71 F. 268, 17 C.C.A. 408.
Foreclosure by exercise of power of sale see infra § 317.

83. N.Y.—Colorado, etc., R. Co v. Blair, 108 N.E. 840, 214 N.Y. 497, Ann.Cas.1916D 1177.
51 C.J. p 857 note 1.

84. N.Y.—James v. Cowing, 82 N.Y. 449.

any damage to the bondholders occasioned thereby.[85] Even where the power to sell on a certain contingency is contained in the mortgage, the execution of such trust may be controlled by a court of equity at the suit of cestuis que trust.[86] Where a trustee is empowered to sell on such terms and conditions as he may deem best, he has power to warrant title to the property sold.[87] Where the sale is made by trustees and the company participates in the sale, it is estopped to deny the authority of the trustees to execute the deed conveying the land in question.[88] Likewise a bondholder may be prevented from attacking the sale as a breach of trust by participating in the transaction involving an unauthorized sale.[89] Where trustees convey land covered by the deed of trust, for their own personal benefit, such conveyance is voidable as against the cestui que trust,[90] although it may be valid as to one claiming by title adverse to that held by the railroad company.[91]

Expenditure of proceeds. A provision of the mortgage authorizing the expenditure of the proceeds of property sold, for the benefit of the mortgaged property, authorizes the trustee to expend such proceeds for the improvement of part of the line covered by the mortgage, although such part is subject to a prior mortgage.[92]

h. Lease of Property

After foreclosure and acquisition of possession by the trustees they may lease the road on such terms as they deem best; but the right of a trustee by oral assent to confirm a lease executed by the mortgagor after breach of conditions of the mortgage has been denied.

Although there is authority to the effect that trustees in possession of a mortgaged railroad have no power to lease it unless authorized by statute,[93] it has been held that after foreclosure for breach of conditions in the mortgage, and acquisition of possession by the trustees, they may, in the exercise of their discretion for the best interests of all parties in interest, lease the road[94] on such terms and conditions as the trustees may deem best,[95] particularly where the bondholders are in an unorganized state.[96] The right of a trustee by oral assent to confirm a lease executed by the mortgagor after breach of the conditions of the mortgage has been denied.[97]

i. Bidding on Property

Trustees may be empowered to bid in the property at a foreclosure sale, and it may be their duty to do so in order to protect the interests of the bondholders.

Trustees may be empowered by the mortgage to bid in the property at a foreclosure sale at the request of a majority of the bondholders,[98] or, even where the mortgage contains such provision, the trustee may have the right to purchase as against an assenting bondholder, by virtue of an order of the court on prescribed conditions, even though no request is made by a majority of the bondholders.[99] If necessary in order to protect the interests of the bondholders it may be the duty of the trustees to bid in the property in default of bidders, independently of an order and decree authorizing them to do so.[1]

j. Possession and Operation of Road

(1) Possession
(2) Operation

(1) Possession

Under a mortgage reserving the management and control of the property to the mortgagor until default, the right of possession until such default is in the mortgagor; but generally after default and after foreclosure the right to possession is in the trustees.

Under a mortgage reserving the sole and exclusive management and control of the property to the mortgagor until default, the right of possession until such default is in the mortgagor.[2] Effect may be given to a provision of a railroad mortgage that the trustee may take possession on default by the mortgagor[3] when certain preliminary steps have

85. N.Y.—James v. Cowing, supra.

86. Pa.—Youngman v. Elmira, etc., R. Co., 65 Pa. 278.
51 C.J. p 857 note 4.

87. U.S.—Dubuque & S. C. R. Co. v. Pierson, Iowa, 70 F. 303, 17 C.C.A. 401, rehearing denied 71 F. 268, 17 C.C.A. 408.

88. U.S.—Wood v. Dubuque & S. C. R. Co., C.C.Iowa, 28 F. 910.

89. N.Y.—Butterfield v. Cowing, 20 N.E. 369, 112 N.Y. 486.
51 C.J. p 857 note 7.

90. Iowa.—Miller v. Iowa Land Co., 9 N.W. 316, 56 Iowa 374.

91. Iowa.—Miller v. Iowa Land Co., supra.

92. U.S.—Norfolk Southern R. Co. v. Guaranty Trust Co. of New York, C.C.A.Va., 13 F.2d 979.
51 C.J. p 857 note 10.

93. Tenn.—Briggs v. Clawson Bros., 8 Tenn.App. 251.

94. Vt.—Sturges v. Knapp, 31 Vt. 1.
51 C.J. p 857 note 11.

95. Vt.—Sturges v. Knapp, supra.

96. Vt.—Sturges v. Knapp, supra.

97. Mass.—Haven v. Adams, 4 Allen 80.
Right of mortgagor to lease see supra § 291.

98. N.Y.—James v. Cowing, 82 N.Y. 449.
Who may purchase at foreclosure sale in general see infra § 327.

99. N.Y.—James v. Cowing, supra.
51 C.J. p 857 note 17.

1. N.Y.—Rogers v. Wheeler, 2 Lans. 486, affirmed 43 N.Y. 598

2. U.S.—Southern Pac. R. Co. v. Doyle, C.C.Cal., 11 F. 253, 8 Sawy. 60.
Mass.—First Nat. F. Ins. Co. v. Salisbury, 130 Mass. 303.

3. Minn.—Seibert v. Minneapolis & St. L. R. Co., 53 N.W. 1151, 52 Minn. 246.
51 C.J. p 857 note 21.

been taken,[4] but it has been held that such preliminary steps must be taken in order to give the trustee the right to possession under the mortgage,[5] and that, where the trustee has obtained possession on default and the railroad company has paid all past-due installments and is in a condition to meet future installments, it may be entitled to a return of the possession of the property.[6] Apparently in recognition of the strict doctrine of the common law, it has been asserted that, in the absence of a stipulation in a mortgage giving the mortgagor company the right to retain possession until default, the mortgagee or trustee has the right to take possession at any time;[7] and, according to some cases, where default has occurred, the trustee has the right[8] and duty[9] to take possession for the protection and benefit of the bondholders, even though there is no express provision in the mortgage for taking possession. After a default and before an actual foreclosure of the mortgage the trustees are the only responsible parties with respect to the management of the property;[10] and they cannot be relieved from this responsibility except by a decree of a court of chancery.[11]

After foreclosure, although the contingent interests are mostly cut off and the number and character of the ultimate cestuis que trust very much changed, the duties of the trustees and the necessity of their continuing to act remain much the same.[12] Thus it is the duty of the trustee in possession after foreclosure to manage the property in a reasonably prudent and careful manner so as to keep it in a good state of preservation in order to make it available for the payment of the bonds, both principal and interest.[13] The duty of the trustee in this regard continues at least until some organization of the bondholders and the acquiring of some capacity to act by a majority, or in some such way as to enable them to discharge the new class of duties thrown on them by the breach of the condition of the mortgage and the surrendering of the road with its incidents and fixtures.[14]

The trustees' power to take possession must be exerted on all the property mortgaged.[15]

Conflicting claims to possession. The trustees' right to possession on default under a mortgage giving them such right is superior to that of a contractor who claims possession under a contract with the railroad company, and who holds bonds secured by the mortgage.[16] The view has also been taken that the trustee is entitled to take possession and operate the road, as against a permanent receiver appointed in proceedings to dissolve the company.[17] Since the legal title of the trustees to the property of the railroad company is only for the purpose of executing the trusts, and a court of equity has like power of execution, where such court has obtained possession of the mortgaged property it has been held it will not surrender it unless it is apparent that the trustees can better execute the trust in justice to all parties.[18]

(2) Operation

Trustees in possession have power to keep in repair and operate the road; they may use their own proper names or adopt any other name they may choose.

Trustees in possession have sufficient power to enable them to discharge the duties which the public has a right to demand in keeping in repair and operating the road,[19] at least where the mortgage authorizes the trustees to make such repairs and additions as they may deem expedient.[20] They may use their own proper names or adopt any other name they may choose,[21] and are not bound to do business in the name of the company to whose rights they have succeeded.[22] They may appoint an agent to manage the road without personally going on the premises themselves,[23] at least where the mortgage so provides.[24]

4. Ga.—Macon, etc., R. Co. v. Georgia R. Co., 63 Ga. 103.
5. U.S.—Union Trust Co. of N. Y. v. Missouri, K. & T. Ry. Co., C.C. Kan., 26 F. 485.
51 C.J. p. 857 note 23
6. U.S.—Union Trust Co. of N. Y. v. Missouri, K. & T. Ry. Co., supra.
51 C.J. p. 857 note 24.
7. Mass.—First Nat. F. Ins. Co. v. Salisbury, 130 Mass. 303.
8. U.S.—Dow v. Memphis & L. R. R. Co., 20 F. 260, modified on other grounds 7 S.Ct. 482, 120 U.S. 287, 30 L.Ed. 595.
Mass.—First Nat. F. Ins. Co. v. Salisbury, 130 Mass. 303.
51 C.J. p. 858 note 27.
9. Mass.—First Nat. F. Ins. Co. v. Salisbury, supra.
Vt.—Sturges v. Knapp, 31 Vt. 1.
10. Vt.—Sturges v. Knapp, supra.
11. Vt.—Sturges v. Knapp, supra.
12. Vt.—Sturges v. Knapp, supra.
13. Vt.—Sturges v. Knapp, supra.
14. Vt.—Sturges v. Knapp, supra.
15. Ohio.—Coe v. Peacock, 14 Ohio St. 197.
16. U.S.—Allen v. Dallas & W. R. Co., C.C.Tex., 1 F.Cas.No. 221, 3 Woods 316.
17. N.Y.—In re New Paltz, etc., R. Co., 56 N.Y.S. 1060, 26 Misc. 324.
18. U.S.—Illinois Cent. R. Co. v. Mississippi Cent. R. Co., D.C.Miss., 12 F.Cas.No. 7,008.
19. Ill.—Palmer v. Forbes, 23 Ill. 301.
Liability of mortgagee or trustee in possession for injuries resulting from operation of road see infra § 350.
20. N.Y.—Jones v. Seligman, 81 N.Y. 190.
51 C.J. p. 858 note 40.
21. Ill.—Palmer v. Forbes, 23 Ill. 301.
22. Ill.—Palmer v. Forbes, supra.
23. Ill.—Palmer v. Forbes, supra.
24. Minn.—Rice v. St. Paul, etc., R. Co., 24 Minn. 464.
51 C.J. p. 858 note 44.

Statutory lien of state. Under a statute giving the state a lien for aid granted, certain state officers may take possession and operate the road on default.[25]

Agency as between mortgagor and mortgagee or trustee. There is authority for the view that a trustee in possession under authority of the mortgage is the company's agent in the management of the road and it is liable to third persons for his acts.[26] Where the mortgagee is entitled to the possession of property because of a default by the mortgagor, but permits the mortgagor to retain possession, it has been held that the mortgagor is the agent of the mortgagee in respect of procuring needed repairs of the property.[27]

Contracts. Trustees in possession of and operating a railroad are liable on the contracts of operatives employed on the road to the same extent as the corporation would have been had it continued in possession;[28] but a trustee entering into possession and operating the road is not bound by contracts made by the mortgagor while in possession under the mortgage[29] unless such contracts were expressly authorized by the mortgage.[30]

k. Individual Interest in Transactions

The mere fact of interest on the part of a trustee in a transaction is not sufficient to justify the court in withholding a confirmation of his acts, performed in good faith; but he should not put himself in a position which is antagonistic or hostile to the interests of the bondholders.

Where everything is honestly done by the trustee and the rights of others have not been prejudiced to his advantage, the mere fact of interest on his part in the transaction is not sufficient to justify the court in withholding a confirmation of his acts,[31] but the trustee should not put himself in a position or relation which is antagonistic or hostile to the interests of the bondholders,[32] as by acquiring adverse interests[33] or in any way promoting his own interest to the prejudice of the bondholders.[34] Thus, where he holds the legal title to the trust property for the benefit of its bondholders, he cannot speculate with the trust property.[35] He cannot purchase an outstanding title and hold it for his own use,[36] even though title is acquired by purchase at a judicial sale[37] or is superior to the one conveyed to him in trust.[38] Likewise, a trustee who has acquired such outstanding title may not require the company in an action of ejectment to refund to him the amount paid for such title.[39] The mere fact that some of the trustees were holders of bonds secured by their trust is not sufficient to make them incompetent to consent to a decree of foreclosure embodying a plan of reorganization.[40]

l. Compensation and Expenses

Trustees are entitled to reimbursement for all expenses reasonably and necessarily incurred in the execution of the trust, and to reasonable compensation for their services.

Trustees are entitled to reimbursement for all expenses reasonably and necessarily incurred in the execution of the trust,[41] such as reasonable counsel fees and costs expended in prosecuting and defending proper proceedings to protect the trust property,[42] and are entitled to reasonable compensation for their services,[43] including compensation for services rendered, and fees and costs in foreclosure proceedings,[44] provided such services or expenditures are within the line of the duties imposed on them by the instrument creating the trust.[45] In

25. S.C.—Hand v. Savannah, etc., R. Co., 8 S.C. 207.
51 C.J. p. 858 note 48.

26. Tex.—Rio Grande R. Co. v. Cross, 23 S.W. 529, 1004, 5 Tex.Civ. App. 454
51 C.J. p. 859 note 49.

27. Ind.—Watts v. Sweeney, 26 N.E. 680, 127 Ind. 116, 22 Am.S.R. 615.

28. Vt.—Sprague v. Smith, 29 Vt. 421, 70 Am.D. 424.

29. Mass.—Ellis v. Boston, etc., R. Co., 107 Mass. 1.

30. Mass.—Ellis v. Boston, etc., R. Co., supra.

31. U.S.—Shaw v. Little Rock & F. S. R. Co., Ark., 100 U.S. 605, 25 L. Ed. 757.
Sale of property for personal benefit of trustee see supra subdivision g of this section.

32. Mo.—Baker v. Springfield, etc., R. Co., 86 Mo. 75.

33. Mo.—Baker v. Springfield, etc., R. Co., supra.

34. U.S.—Farmers' L. & T. Co. v. Northern Pac. R. Co., C.C.Wis., 66 F. 169—Bound v. South Carolina R. Co., C.C.S.C., 50 F. 853.

35. Mo.—Baker v. Springfield, etc., R. Co., 86 Mo. 75.

36. Mo.—Baker v. Springfield, etc., R. Co., supra.

37. Mo.—Baker v. Springfield, etc., R. Co., supra.

38. Mo.—Baker v. Springfield, etc., R. Co., supra.

39. Mo.—Baker v. Springfield, etc., R. Co., supra.

40. U.S.—Shaw v. Little Rock & F. S. R. Co., Ark., 100 U.S. 605, 25 L. Ed. 757.

41. U.S.—Guaranty Trust Co. of N. Y. v. Seaboard Air Line Ry. Co., D.C.Fla. & Va., 68 F.Supp. 639.
51 C.J. p. 859 note 66.

42. U.S.—Guaranty Trust Co. of N. Y. v. Seaboard Air Line Ry. Co., supra.
51 C.J. p. 859 note 67.

43. U.S.—Guaranty Trust Co. of N. Y. v. Seaboard Air Line Ry. Co., supra.
Va.—Smith v. Washington City, V. M. & G. S. R. Co., 33 Gratt. 617, 74 Va. 617.
51 C.J. p. 859 note 68.

44. U.S.—Phinizy v. Augusta, etc., R. Co., 98 F. 776—Mercantile Trust Co. v. Missouri, K. & T. R. Co., C.C.Kan., 41 F. 2.
51 C.J. p. 859 note 69
Fees and costs in foreclosure suit in general see infra § 345.

45. Mo.—Tracy v. Gravios R. Co., 12 Mo.App. 295, affirmed 84 Mo. 210.

order that the trustee may be entitled to compensation or expenses, however, the services or expenditures must be reasonably necessary in the performance of his duties.[46] The trustee may be entitled to compensation or reimbursement for expenses under provisions therefor in the mortgage or trust deed,[47] and in general, where the compensation is fixed by the governing agreement, the trustee is entitled to the specified compensation,[48] and only to such compensation.[49] Where the mortgagor railroad company in the trust deed reserves the right to sell land subject to the mortgage and pay the proceeds of the sales thereof to the trustees after deducting expenses incurred in executing the trust, it may retain the proper amount for expenses in making the sales and may also pay the taxes out of the proceeds thereof.[50]

Lien or charge on property or proceeds. The right of a trustee to a lien or charge on the mortgaged property for compensation earned[51] and expenses properly incurred in the administration of the trust[52] has been recognized even in the absence of any provision in the trust agreement as to expenses.[53] It has been held, however, that, where the person claiming compensation and expenses acted in the capacity of mortgagee and not of trustee, he was not entitled to have the amounts claimed made a charge on the mortgaged property or proceeds,[54] and that a provision in the mortgage for compensation to the trustee for services which he may render does not give to such trustee a lien for his services[55]

Mortgagee in possession. A railroad company, as mortgagee in possession of a road, may incur only such expenses as are reasonably essential to the preservation of the mortgaged railroad as a going concern,[56] and if it is desired to make betterments, for the purpose of making the property more serviceable in connection with its other lines, that burden must be borne by the mortgagee.[57]

m. Actions, Remedies, and Proceedings by or against Mortgagee and Trustee

(1) In general
(2) Against trustee in general
(3) By trustee or mortgagee in general
(4) Injunctions
(5) Accounting

(1) In General

In some jurisdictions the courts deal with bondholders only through the trustees, and in proceedings affecting the trust to which the bondholders are not actual parties the trustee represents the bondholders.

In some jurisdictions at least the general rule is that the courts can deal with bondholders only through the trustee,[58] provided it appears that the bondholders can be fully and fairly represented and protected in their rights by the trustee.[59] So, in general, in legal proceedings affecting the trust to which the bondholders are not actual parties the trustee represents the bondholders,[60] and whatever binds the trustee, if he acts in good faith, binds the bondholders.[61] Some courts have stated the rule to be that generally, in defending or executing the trust, the trustee represents the bondholders,[62] but that a trustee who has no authority to consent to a modification of the mortgage has no implied authority to represent the bondholders in a suit for that purpose,[63] and that a trustee does not represent the bondholders in a suit to obtain authority

46. U.S.—Bound v. South Carolina R Co, C.C.S C, 62 F. 536.
51 C.J p 859 note 71.

47. U.S.—Mercantile Trust Co. v. Missouri, K. & T. R. Co., C.C.Kan., 41 F. 8.
Ga.—Central of Georgia R. Co. v. Central Trust Co., 69 S E 708, 135 Ga. 472
51 C.J p 859 note 72.

48. Va.—Maury v. Chesapeake, etc, R Co., 27 Gratt. 698, 68 Va. 698.
51 C.J p 860 note 73.

49. Va—Maury v. Chesapeake, etc., R Co., supra.

50. U.S.—Nickerson v. Atchison, T & S. F. R Co, C.C.Kan, 17 F. 408, 3 McCrary 455.

51. Vt—Rensselaer, etc, R Co v. Miller, 47 Vt. 146
Va.—Smith v. Washington V. M & G. S R. Co., 33 Gratt. 617, 74 Va. 617.

52. Cal.—McLane v. Placerville, etc., R Co, 6 P. 748, 66 Cal. 606
Vt—Rensselaer, etc., R Co. v. Miller, 47 Vt 146

53. Vt.—Rensselaer, etc., R. Co. v. Miller, supra.

54. Ohio.—Coe v. Columbus, etc, R. Co., 10 Ohio St. 372, 75 Am.D. 518.

55. N.C.—Mercantile Trust, etc., Co. v Atlantic, etc., R. Co., 5 S.E. 417, 99 N C 139.

56. U S.—Guaranty Trust Co. of New York v Minneapolis & St L R. Co., C.C.A.Minn., 36 F.2d 747.

57. U S.—Guaranty Trust Co. of New York v. Minneapolis & St. L. R. Co., supra

58. U.S.—Rospigliosi v. New Orleans, M. & C. R Co., Ala., 237 F. 341, 150 C C.A. 355—Farmers' L. & T. Co. v. Northern Pac. R. Co, C. C.Wis., 66 F. 169.
Foreclosure proceedings see infra §§ 314–326.

59. U S.—Farmers' L. & T. Co v. Northern Pac R. Co, supra.
51 C J. p 860 note 85

60. U.S—Beals v. Illinois, M. & T. R. Co, Mo, 10 S.Ct. 314, 133 U.S 290, 33 L.Ed. 608—Shaw v. Little Rock & F. S. R Co, Ark., 100 U.S 605, 25 L Ed. 757.
Trustee as representing bondholders generally see supra subdivision f of this section.

61. U.S—Beals v. Illinois, M. & T. R. Co, Mo, 10 S.Ct. 314, 133 U.S 290, 33 L.Ed. 608—Shaw v. Little Rock & F. S R Co., Ark., 100 U.S. 605, 25 L.Ed. 757.
51 C J. p 860 note 87.

62. N.Y—Colorado, etc., R. Co. v. Blair, 108 N E 840, 214 N.Y. 497, Ann.Cas.1916D 1177—Fonda, J. & G R. Co. v. New York Trust Co., 254 N Y.S. 266, 233 App Div. 443.

63. N.Y.—Colorado, etc., R. Co. v.

not conferred on the trustee by the instrument or deed of trust,[64] as, for example, to authorize the disposition of the property not authorized by the mortgage,[65] or to permit the investment of funds in the hands of the trustee in securities other than those specified in the governing agreement.[66] In some jurisdictions, however, the trustee may represent the bondholders in a suit to authorize a change of securities.[67] Where the trustee under the mortgage is specifically authorized to represent the bondholders in any proceeding on the mortgage which they might deem necessary or expedient for the benefit of the holders of the mortgage, if legal action is necessary to protect the bondholders it is the duty of the trustee to take such action.[68]

Notice to trustee as party. In general a trustee who is a party to a bill in a suit in which a receiver has been appointed must take notice of orders to the receiver affecting the interests of the trustee.[69]

(2) Against Trustee in General

Where a trustee is remiss in the performance of his duties, the bondholders or the mortgagor may take proper action against him.

Where the trustees fail to perform their duties, through willfulness, indifference, or error of judgment, the bondholders or other beneficiaries who are aggrieved by their conduct may obtain relief in equity,[70] as by a bill to compel the trustee to take possession and manage the mortgaged property,[71] to compel him to apply properly moneys received as trustee,[72] or to compel him to take legal action to protect the interests of bondholders where the trust deed or mortgage authorizes the trustee to represent the bondholders.[73] Where the trustees abandon their trust or have been remiss in their duty, the bondholders or other beneficiaries may sue such trustees for damages sustained by reason of their misconduct,[74] and, as discussed supra § 292, may also take proper steps in equity to have them removed and new trustees appointed. Moreover the mortgagor company may, in a proper case, be entitled to relief in equity.[75] It has been held, however, that a holder of overdue interest coupons cannot maintain an action in his own name to compel a trustee to enforce payment of such bonds and interest by a sale of the property covered by the deed of trust, which was executed to secure a series of negotiable bonds with nonnegotiable interest coupons attached.[76] A stranger to the mortgage or deed of trust has no right of action against the trustee for the latter's alleged wrongful failure to cancel the mortgage or deed of trust.[77]

Parties, pleading, and evidence. The rules applicable in civil actions in general with respect to parties,[78] pleading,[79] and evidence[80] have been applied in actions against trustees. When it becomes necessary for a bondholder to reach property held by the trustee, he must proceed against the trustee, not for such bondholder's own separate benefit, but as a bondholder, and on behalf of the bondholders as a class.[81]

Blair, 108 N.E. 840, 214 N.Y. 497, Ann.Cas.1916D 1177.
51 C.J. p 860 note 89.

64. N.Y.—Colorado, etc., R. Co. v. Blair, supra—Fonda, J. & G. R. Co. v. New York Trust Co., 254 N.Y.S. 266, 233 App.Div. 443.

65. N.Y.—Colorado, etc., R. Co. v. Blair, 108 N.E. 840, 214 N.Y. 497, Ann.Cas.1916D 1177.

66. N.Y.—Fonda, J. & G. R. Co. v. New York Trust Co., 254 N.Y.S. 266, 233 App.Div. 443.
51 C.J. p 860 note 92.

67. Md.—Baltimore v. United R., etc., Co., 69 A. 436, 108 Md. 54, 16 L.R.A.,N.S., 1006.

68. Pa.—McDougall v. Huntingdon, etc., R., etc., Co., 143 A. 574, 294 Pa. 108.

69. U.S.—U. S. Trust Co. of New York v. Wabash Western R. Co., Mo., 14 S.Ct. 86, 150 U.S. 287, 37 L.Ed. 1085.
51 C.J. p 860 note 95.

70. Pa.—Commonwealth v. Susquehanna & D. R. R. Co., 15 A. 443, 122 Pa. 306, 1 L.R.A. 225.
51 C.J. p 860 note 96.

71. Mass.—First Nat. F. Ins. Co. v. Salisbury, 130 Mass. 303.
51 C.J. p 861 note 97.

72. U.S.—Dwight v. Smith, C.C.Vt., 13 F. 50.

73. Pa.—McDougall v. Huntingdon, etc., R., etc., Co., 143 A. 574, 294 Pa. 108.

74. N.Y.—James v. Cowing, 17 Hun 256, reversed on other grounds 82 N.Y. 449.
51 C.J. p 861 note 2.

75. N.C.—North Carolina R. Co. v. Wilson, 81 N.C. 223.
51 C.J. p 861 note 3.

76. Ohio.—Wright v. Ohio, etc., R. Co., 1 Disn. 465, 12 Ohio Dec., Reprint, 736.

77. N.Y.—Kaulbach v. Knickerbocker Trust Co., 122 N.Y.S. 256, 136 App.Div. 331.
51 C.J. p 861 note 5.

78. U.S.—Trinkamath v. Farmers' L. & T. Co., C.C.N.Y., 95 F. 5.
51 C.J. p 861 note 7.

Bondholders

(1) Bondholders were necessary parties to proceedings between railroad company and trustee under railroad mortgages, where controversy involved question of trustee's right to purchase railroad's bonds with proceeds of condemnation of portion of mortgaged property.—Fonda, J. & G. R. Co. v. New York Trust Co., 254 N.Y.S. 266, 233 App.Div. 443.

(2) Bondholders were necessary parties in proceedings by railroad for equitable aid to permit trustee under mortgages to purchase railroad's own bonds.—Fonda, J. & G. R. Co. v. New York Trust Co., supra.

79. Mass.—First Nat. F. Ins. Co. v. Salisbury, 130 Mass. 303.
51 C.J. p 861 note 10.

80. U.S.—Biggs v. Pennsylvania & N. H. R. Co., C.C.N.J., 16 F. 804.
51 C.J. p 861 note 12.

81. Pa.—Commonwealth v. Susquehanna, etc., R. Co., 15 A. 443, 122 Pa. 306, 1 L.R.A. 225.

(3) By Trustee or Mortgagee in General

The mortgagee or trustee may institute proper proceedings for the enforcement of his rights under a mortgage of railroad property.

At common law in some jurisdictions if the mortgagor company makes default in payment the mortgagee or trustee, being entitled to the possession of the mortgaged property, may maintain ejectment therefor.[82] In some jurisdictions a court of equity will not take possession and operate a railroad at the instance of a trustee or mortgagee except by an action to foreclose the mortgage,[83] but if the trustee is entitled on default to take possession under the terms of the mortgage, if prevented from doing so, he may, without bringing an action to foreclose, apply to a court of equity to be put into possession,[84] and a bill for the specific enforcement of the mortgagee's or trustee's rights is a proper remedy under such circumstances.[85] So it has been held that the remedy under a provision of the mortgage directing the trustee to take possession and sell on the request of a specified number of bondholders is merely cumulative and does not prevent the enforcement in equity of any rights or remedies in respect of possession which the law gives to the trustee as mortgagee.[86] The right of a trustee under a mortgage given by a railroad to sue to enforce a contract by which another railroad company agreed to furnish funds to pay interest on the mortgage bonds has been recognized where the trustee was a party to such contract.[87] When questions of difficulty arise, the trustee may apply to a court of equity for instructions in the execution of his trust.[88] For the benefit of bondholders a trustee may sue to compel the execution of a conveyance to the railroad company, under a contract of sale.[89] After condition broken the mortgagee may maintain an action for any material injury to the property which would amount to restrainable waste,[90] but the mortgagee cannot maintain an action before condition broken for waste which might have been actionable after condition broken.[91] Where the old trustees have been removed and new ones appointed, the latter are the proper parties to seek redress on behalf of the bondholders against third persons.[92]

(4) Injunctions

In a proper case a suit for an injunction may be brought by the bondholders, mortgagor, or subsequent encumbrancers against the trustees.

Bondholders may in a proper case obtain an injunction to restrain the trustees from giving effect to an agreement by which the rights of the bondholders are substantially affected,[93] or where a trustee incapacitates himself from discharging his duties an injunction will lie to restrain him from acting as trustee,[94] and from further prosecuting an action as such.[95] The mortgagor company may be entitled to an injunction to protect the trust funds.[96] So an injunction will lie at the instance of subsequent encumbrancers to restrain trustees under a prior mortgage from executing the trusts prejudicially to their interests.[97]

Likewise the remedy by injunction may be exercised in favor of a trustee or mortgagee acting under a railroad mortgage on all its property, for the security of bondholders,[98] and a mortgagee or trustee may at any time have an injunction to restrain waste which will impair the bondholders' security.[99] A mortgagee of an insolvent railroad company does not have such an interest in its un-

82. U.S.—Dow v. Memphis & L. R. R. Co, C.C.Ark, 20 F. 260.
51 C.J. p 861 note 15

83. Minn.—Seibert v. Minneapolis, etc., R. Co., 53 N.W. 1151, 52 Minn. 246.

84. Me.—Shepley v. Atlantic, etc., R. Co., 55 Me. 395.
Minn.—Seibert v. Minneapolis, etc., R. Co., 53 N.W. 1151, 52 Minn. 246.

85. Me.—Shepley v. Atlantic, etc., R. Co., 55 Me. 395.

86. U.S.—Dow v. Memphis & L. R. R. Co., C.C.Ark., 20 F. 260.
51 C.J. p 861 note 20.

87. U.S.—Equitable Trust Co. of New York v. Western Pac. R. Co., D.C.N.Y., 244 F. 485, affirmed 250 F. 327, 162 C.C.A. 397, certiorari denied 38 S.Ct. 423, 246 U.S. 672, 62 L.Ed. 932—Ex parte Equitable Trust Co. of New York, Cal., 221 F. 571, 145 C.C.A. 457.

88. N.Y.—Coe v. Beckwith, 31 Barb. 339, 10 Abb.Pr. 296, 19 How.Pr. 398.
51 C.J. p 862 note 22.

89. U.S.—Boston Safe-Deposit & Trust Co. v. Bankers' & Merchants' Tel. Co, C.C.N.Y, 36 F. 288, affirmed 13 S.Ct. 896, 147 U.S. 431, 37 L.Ed. 231.
Wis.—Farmers' L. & T. Co. v. Fisher, 17 Wis. 114.

90. U.S.—Grand Trunk R. Co. v. Central Vermont R. Co., C.C.Vt., 91 F. 696.

91. U.S.—Grand Trunk R. Co. v. Central Vermont R. Co., supra.

92. U.S.—Stevens v. Eldridge, C.C. Mass., 23 F.Cas.No.13,396, 4 Cliff. 348.

93. N.Y.—Reinach v. Meyer, 55 How. Pr. 283.
51 C.J. p 862 note 29.

94. N.Y.—Farmers' L. & T. Co. v. Hughes, 11 Hun 130.

95. N.Y.—Farmers' L. & T. Co. v. Hughes, supra.

96. N.C.—North Carolina R. Co. v. Wilson, 81 N.C. 223.
51 C.J. p 862 note 32

97. U.S.—Illinois Cent. R. Co. v. Mississippi Cent. R. Co, D.C.Miss., 12 F.Cas.No.7,008.

98. Del.—Felton v. Potomac F. Ins. Co., 4 Del.Ch. 573.
51 C.J. p 862 note 34.
Successor trustee to trustee for mortgage bondholders could petition to enjoin interference with mortgagor's property under decree of foreclosure obtained by predecessor extending term of court.—Guaranty Trust Co. of New York v. Broadway & S. A. R. Co., D.C.N.Y., 43 F.2d 130.

99. U.S.—Grand Trunk R. Co. v. Central Vermont R. Co., C.C.Vt., 91 F. 696.

mortgaged property, however, as will support a suit to enjoin a transfer thereof, in the absence of a showing that the mortgaged property was insufficient to pay the mortgage debt.[1] While the authority of a court of equity to enjoin an action at law in another state is generally recognized, as discussed in Injunctions § 49, it has been held that, where mortgage trustees of a railroad company as such have no property subject to sequestration within the state, an injunction will not lie to enjoin such trustees from prosecuting an action in another state, since there would be no means of enforcing the injunction.[2]

(5) Accounting

Trustees or mortgagees are bound to account for all profits or advantages obtained by them through their positions.

Trustees or mortgagees are bound to account for all profits or advantages obtained by them through their positions as mortgagees or trustees.[3] Trustees appointed by the court in pursuance of legislative authority may be ordered at any time on the application of a party interested, to report or account to the court, without any express provision to that effect in the statute or in the order of appointment.[4] The right which bondholders might otherwise have to compel an accounting in respect of a certain transaction may be lost by their repudiation of the transaction.[5]

Tender by plaintiff. The rule that, where a party seeking equitable relief is bound to pay some unascertainable amount before relief can be granted, it is not necessary to pay or tender the amount before bringing suit, but that it will be sufficient if he offers in his complaint to pay or perform whatever obligations rest on him in that respect, applies in a suit against a trustee to compel him to account concerning the trust fund or property,[6] especially where it appears that the trustee repudiated the trust before the action was brought.[7]

Parties and Pleadings. The rules applicable in civil actions generally, including suits for accounting, with respect to parties[8] and pleadings[9] have been applied in suits for accounting in which a trustee is defendant. One who is a sole trustee under a railroad mortgage is a necessary party to a suit against the railroad company for an accounting,[10] and on the failure to join him as such the bill should be dismissed.[11]

§ 294. Payment Over and Application of Subscriptions and Proceeds of Obligations and Securities

Where a mortgage provides for the application of the proceeds of bonds to certain purposes but does not provide how this is to be done, the mortgagor company or its officers have discretion as to the method of procedure.

Where a mortgage provides for the application of the proceeds of bonds to certain purposes but does not provide how this is to be done, it has been held that the mortgagor company or its officers have discretion as to the method of procedure.[12] Certain mortgages impose on the trustee the duty of applying the proceeds of sales of the mortgaged property to the payment of outstanding obligations of the mortgagor company.[13] Under other mortgages the holders of secured bonds are entitled to have the proceeds of sales of the mortgaged property applied in discharge of the bonds,[14] and, where trustees have sold part of the mortgaged property and have invested the proceeds in bonds secured by the mortgage, in general the bonds should be canceled.[15]

Where the charter of a railroad company recites the purposes for which the proceeds of bonds shall be used and a disbursement trust agreement is entered into in accordance with the terms of the charter, the duties of the disbursement trustee are regulated by such trust agreement and not by a prospectus under which the bonds are sold;[16] and

1. U.S.—Central Trust Co of New York v. Denver & R. G. R. Co., Colo., 219 F. 110, 135 C.C.A. 12.
2. Vt.—Bellows Falls Bank v. Rutland, etc., R. Co., 28 Vt. 470.
3. N.Y.—Cram v. Farmers' L. & T. Co., 28 N.Y. Super. 226.
51 C.J. p. 862 note 41.
4. Mass.—In re Eastern R. Co., 120 Mass. 412.
5. N.Y.—Harrison v. Union Trust Co., 38 N.E. 353, 144 N.Y. 326.
51 C.J. p. 863 note 43.
6. N.Y.—Zebley v. Farmers' L. & T. Co., 34 N.E. 1067, 139 N.Y. 461.
7. N.Y.—Zebley v. Farmers' L. & T. Co., supra.
8. N.Y.—Cram v. Farmers' L. & T. Co., 28 N.Y. Super. 226.
51 C.J. p. 863 note 52.
9. N.Y.—Meisel v. Central Trust Co., 167 N.Y.S. 143, 179 App.Div. 795, affirmed 119 N.E. 1059, 223 N.Y. 589.
51 C.J. p. 863 note 49.
10. U.S.—Morgan v. Kansas Pac. R. Co., C.C.N.Y., 15 F. 55, 21 Blatchf. 134.
51 C.J. p. 863 note 53.
11. U.S.—Morgan v. Kansas Pac. R. Co., supra.
12. U.S.—Claflin v. South Carolina R. Co., C.C.S.C., 8 F. 113, 4 Hughes 12.
51 C.J. p. 863 note 54.

Applications of earning, income, and sinking fund see infra § 310
Disposition of proceeds of foreclosure sale see infra § 343.

13. U.S.—Little Rock, etc., R. Co. v. Huntington, Ark., 7 S.Ct. 517, 120 U.S. 160, 30 L.Ed. 591.
14. N.Y.—Hollister v. Stewart, 19 N.E. 783, 111 N.Y. 644.
15. U.S.—Claflin v. South Carolina R. Co., C.C.S.C., 8 F. 113, 4 Hughes 12.
16. U.S.—Banque Franco-Egyptienne v. Brown, C.C.N.Y., 34 F. 162, appeal dismissed 12 S.Ct. 239, 145 U.S. 623, 36 L.Ed. 855.

such trustee is not liable to the bondholders where the proceeds are used in accordance with the trust agreement but not in the manner set out in the prospectus.[17] In such case there is not a fiduciary relation between the railroad company and the bondholder which will permit the bondholder to pursue the money as a trust fund where the company uses the proceeds for a purpose different from the purposes recited in the prospectus.[18]

Holders of bonds secured by a mortgage given by a railroad company may not hold another railroad company liable for the wrongful use of the proceeds of the bonds, although the mortgage provides that such other company should be the custodian of the bonds and the proceeds, where such other company has not assumed the supervision of the work for which the proceeds were used.[19] Holders of the bonds who acquire them with full notice of a misapplication of the proceeds cannot enforce them against the railroad company.[20]

Payment over of subscriptions or proceeds of bonds. A trust company is not liable to subscribers to a proposed issue of bonds to be secured by mortgage for moneys paid over to the railroad company where the receipt and payment over were controlled solely by a provision of the subscription agreement that the subscriptions should be paid to the railroad company at the office of the trust company which should give a receipt for payments,[21] but the trust company may be liable for moneys paid over in violation of the mortgage in which the trust company is named as trustee, after such mortgage has become operative.[22]

Bonds delivered to mortgagor for disposal. According to some cases provisions of the mortgage or trust deed that a specified portion of the bonds shall be delivered to the mortgagor company or to certain of its officers to be applied to certain specified purposes impress an express trust[23] or a lien or an equity in the nature of a trust,[24] in favor of the bondholders.[25] There is a breach of covenant where the company or its officers apply the bonds to other than the designated purpose.[26] While it has been held that an implied covenant of the trustee not to deliver bonds to the mortgagor under circumstances which would result in a violation of an express covenant of the mortgagor as to demand for, and use of, the bonds will not be read into a mortgage under seal where the mortgage contains no affirmative covenant of the trustee in this regard,[27] there is an implied duty or obligation on the trustee in such case arising out of the trust relation between the trustee and the bondholders,[28] and the trustee may be held liable to the bondholders as for a breach of trust where he fails to comply with this duty.[29] So, the view has been expressed that it is the right[30] and duty[31] of the trustee in the mortgage to see that a covenant as to the application of the proceeds is complied with.

A covenant in a mortgage to devote the proceeds of the bonds secured thereby to the improvement of the mortgage property for the benefit of future bondholders cannot, after such bonds are sold under an agreement by which the covenant is in effect abrogated, be enforced in equity by one who subsequently buys some of the bonds, not relying on the mortgage covenant, but on his own judgment, after full inquiry with knowledge of the exact situation, and who shows no actual or prospective loss by the transaction.[32]

§ 295. Priorities of Liens, Mortgages, and Other Claims

As a general rule liens on railroad property have priority according to the order of time at which they attach.

As a general rule liens on railroad property have priority according to the order of time at

17. U.S.—Banque Franco-Egyptienne v. Brown, supra.

18. U.S.—Banque Franco-Egyptienne v. Brown, supra.

19. U.S.—Dows v. Chicago, etc., R. Co., C.C.Iowa, 7 F.Cas.No.4,048, affirmed Muller v. Downs, 94 U.S. 444, 24 L.Ed 207.

20. Ill.—Chicago v. Cameron, 11 N.E. 899, 120 Ill. 447.

21. N.Y.—Elliott v. Guardian Trust Co., 97 N.E. 521, 204 N.Y. 212.

22. N.Y.—Elliott v. Guardian Trust Co., supra.
51 C.J. p 864 note 67.

23. Ohio.—Central Trust Co. v. Burke, 2 Ohio S. & C.P. 96, 1 Ohio N.P. 169.

24. N.Y.—Belden v. Burke, 25 N.Y.S. 601, 72 Hun 51, reversed on other grounds 42 N.E. 261, 147 N.Y. 542.

25. N.Y.—Belden v. Burke, supra.
Ohio.—Central Trust Co. v. Burke, 2 Ohio S. & C.P. 96, 1 Ohio N.P. 169

26. N.Y.—Belden v. Burke, 25 N.Y.S. 601, 72 Hun 51, reversed on other grounds 42 N.E. 261, 147 N.Y. 542.
51 C.J. p 864 note 72.

27. U.S.—Frishmuth v. Farmers' Loan & Trust Co., N.Y., 107 F. 169, 46 C.C.A. 222.
N.Y.—Rhinelander v. Farmers' Loan & Trust Co., 65 N.E. 499, 172 N.Y. 519, 66 N.E. 1115, 173 N.Y. 620.

28. U.S.—Frishmuth v. Farmers' Loan & Trust Co., C.C.N.Y., 95 F. 5, affirmed 107 F. 169, 46 C.C.A. 222
N.Y.—Rhinelander v. Farmers' Loan & Trust Co., 65 N.E. 499, 172 N.Y. 519, 66 N.E. 1115, 173 N.Y. 620.

29. U.S.—Frishmuth v. Farmers' Loan & Trust Co., C.C.N.Y., 95 F. 5, affirmed 107 F. 169, 46 C.C.A. 222.
51 C.J. p 864 note 75.

30. N.Y.—Belden v. Burke, 25 N.Y.S. 601, 72 Hun 51, reversed on other grounds 42 N.E. 261, 147 N.Y. 542.

31. N.Y.—Belden v. Burke, supra.

32. N.Y.—Belden v. Burke, 42 N.E. 261, 147 N.Y. 542.

which they attach.[33] The priority of liens or claims is sometimes regulated by agreement between the parties.[34] In general secured creditors are preferred to unsecured ones.[35] Equitable liens payable solely out of the earnings of the road should be paid out of the corpus of the property only after the mortgage bonds have been satisfied.[36]

Certificates of a receiver of a railroad issued to pay antecedent indebtedness have been held subordinate to a traffic lien.[37]

Concurrent liens. Liens which are concurrent, or which are made equal by the terms of the mortgage, have no preference as between themselves, but each lienor is entitled to his pro rata share of the fund or property to which the liens attach.[38]

Displacement of prior lien. Neither the railroad company[39] nor in general the courts[40] can displace a prior lien by a later one.

What law governs. There is authority for the view that the priorities of liens are determined by the lex fori.[41] Where a line extends through several states, priorities given by local law in a particular state have been given effect in respect of property in such state.[42]

§ 296. —— Necessity and Effect of Record or Registration

A railroad mortgage must ordinarily be registered or recorded in the prescribed manner in order that it may have priority over subsequent claims or liens.

A railroad mortgage must be registered or recorded in the prescribed manner in order that it may have priority over subsequent claims or liens,[43] unless, according to some cases, the subsequent lienor has notice of the prior unrecorded mortgage at the time he acquires his lien.[44] Thus, in order that a railroad mortgage may be effective as against subsequent lienors, it should be recorded in every county in which the road is laid provided the statute requires such filing.[45] An unrecorded or defectively recorded mortgage is inferior to a subsequent judgment,[46] or to a subsequent attachment lien covering the same property;[47] and the mere fact that a prior claim or lien may appear from the company's records does not give it precedence over subsequent liens on the same property.[48] Priority once acquired by the recording of a mortgage is not lost by the subsequent record of another instrument purporting to affect such priority.[49]

An unliquidated claim is inferior to a subsequent mortgage which is recorded before the claim is reduced to judgment.[50] Bona fide holders of over-issued bonds have an equitable lien which, although unrecorded, is superior to the unrecorded lien of income bonds subsequently issued,[51] but inferior to that of a subsequently recorded mortgage.[52] It has been held that the mere recording of a mortgage for which the mortgagor receives no consideration does not give priority over a subsequently attaching lien.[53] A purchase-money mortgage need not be recorded in order to be valid against claims under a prior mortgage covering after-acquired property.[54]

33. U.S.—Smythe v. Chicago, etc., R. Co., C.C.Ill., 22 F.Cas.No.13,135, 8 Rep. 709.
51 C.J. p. 864 note 81.

34. Me.—Mason v. York, etc., R. Co., 52 Me. 82.

After-acquired property
The holder of a railroad lien may lawfully agree to subordinate his lien on property thereafter acquired by railroad.—In re Central of Georgia Ry. Co., D.C.Ga., 56 F.Supp. 10, reversed on other grounds, C.C.A., Bankers Trust Co. v. Callaway, 148 F.3d 629.

35. U.S.—Skiddy v. Atlantic, etc., R. Co., C.C.Va., 22 F.Cas.No.12,922, 3 Hughes 320.

36. U.S.—Blair v. St. Louis, etc., R. Co., C.C.Mo., 25 F. 232.

37. Tex.—International, etc., R. Co. v. Coolidge, 62 S.W. 1097, 26 Tex. Civ.App. 595.
53 C.J. p. 195 note 13 [a].
Traffic lien generally see supra § 266.

38. U.S.—Dunham v. Cincinnati, etc., R. Co., Ind., 1 Wall. 254, 17 L.Ed. 584

39. Ala.—Meyer v. Johnston, 53 Ala. 237.
Ga.—Collins v. Georgia Cent. Bank, 1 Ga. 435.

40. U.S.—Duncan v. Mobile, etc., R. Co., C.C.Ala., 8 F.Cas.No.4,137, 2 Woods 542

41. U.S.—Central Trust Co. v. East Tennessee, etc., R. Co., C.C.Ga., 69 F. 658
51 C.J. p. 865 note 89

42. U.S.—Thomas v. Cincinnati, etc., R. Co., C.C.Ky., Ohio & Tenn., 91 F. 195
51 C.J. p. 865 note 90.

43. Vt.—Miller v. Rutland, etc., R. Co., 36 Vt. 452.
51 C.J. p. 865 note 93.

44. Conn.—Mead v. New York, etc., R. Co., 45 Conn. 199.
51 C.J. p. 865 note 94.

45. U.S.—Ludlow v. Clinton Line R. Co., C.C.Ohio, 15 F.Cas.No.8,590, 1 Flipp. 25.
51 C.J. p. 865 note 95.

46. N.J.—Coe v. New Jersey Midland R. Co., 31 N.J.Eq. 105, modified on other grounds 34 N.J.Eq. 266.
51 C.J. p. 865 note 96.

47. U.S.—Claflin v. South Carolina R. Co., C.C.S.C., 8 F. 118, 4 Hughes 12.

48. U.S.—Blair v. St. Louis, etc., R. Co., 25 F. 654, affirmed 10 S.Ct. 338, 133 U.S. 534, 33 L.Ed. 721 and 11 S.Ct. 476, 139 U.S. 118, 35 L.Ed. 104.

49. U.S.—Guaranty Trust Co. v. Minneapolis, etc., R. Co., C.C.A.Minn., 36 F.2d 747, certiorari denied 50 S.Ct. 407, 281 U.S. 756, 74 L.Ed. 1166.

50. U.S.—Fogg v. Blair, Mo., 10 S.Ct. 338, 133 U.S. 534, 33 L.Ed. 721.
51 C.J. p. 865 note 1.

51. Ky.—Stephens v. Benton, 1 Duv. 112.

52. Ky.—Stephens v. Benton, supra.

53. U.S.—Sanders v. Southern Tract. Co., D.C.Ill., 252 F. 511.

54. U.S.—U. S. v. New Orleans, etc., R. Co., Ky., 12 Wall. 362, 20 L.Ed. 434.

Special statutes applicable to the registration or record of railroad mortgages sometimes apply so as to affect priority.[55] Thus, by virtue of a special statute exempting railroad mortgages from the requirement that mortgages shall be recorded in the town where the mortgaged property lies, a failure to record a railroad mortgage in such town does not affect the priority of such a mortgage as against an attaching creditor.[56] Where a statute provides for filing in a particular office but does not provide any penalty or consequence for failure so to file, the priority as between the mortgage and the claim of an attaching creditor must be determined by the general law applicable to the rights of attaching creditors.[57]

Rolling stock, supplies, etc. Where, under the particular statute, a mortgage purporting to cover rolling stock, supplies, and other personal property, unless recorded in the manner prescribed for chattel mortgages, is invalid as far as such property is concerned, a mortgage which is not so recorded is not entitled to priority over the claims of subsequent levying creditors and encumbrances of the railroad company;[58] but the rule is otherwise where a mortgage which includes both real and personal property need not be recorded as a chattel mortgage.[59] The lien of such a mortgage, although covering after-acquired property, is subject to the lien or rights of one who thereafter conditionally sells or leases cars or other rolling stock to the railroad company with reservation of title or lien, although the agreement or instrument of reservation is not recorded;[60] and this rule is not affected by a statutory provision requiring the reservation in such cases to be in writing and recorded, since such provision is intended only for the benefit of subsequent purchasers and creditors of the vendee.[61] It has been held that, where such lease or conditional sale amounts in fact to a mortgage, unless it is acknowledged and recorded as a mortgage, it will not establish a lien as against attachment and execution creditors,[62] or purchasers from the railroad company[63]

§ 297. —— Priorities between Mortgages and Other Claims in General

a. In general
b. After-acquired property

a. In General

As a general rule, as between a mortgage of railroad property and other claims constituting liens thereon, that which is prior in time is prior in right.

As a general rule, as between a mortgage of railroad property and other claims constituting liens thereon, that which is prior in time is prior in right,[64] except as to certain varieties of liens specially favored by law, as discussed infra §§ 301-304, or as to liens which are given preference by an agreement between the parties.[65] Certain statutory liens are sometimes given priority over the claims of persons holding under a mortgage.[66]

Ordinarily, a railroad mortgage takes precedence over debts due general creditors of the mortgagor company whether created before[67] or after[68] the giving of the mortgage, unless such creditors have a prior equitable right.[69] Likewise, such mortgage has priority over contract obligations of the mortgagor company incurred before[70] or after[71] the giving of the mortgage. In the absence of an agreement otherwise, where certificates of indebtedness secured by a mortgage are exchanged for preferred stock, the holders of such stock are merely stockholders and hold it in subordination to the claims of

55. Mo.—Wilson v. Beckwith, 22 S. W. 639, 117 Mo. 61.
51 C.J. p. 866 note 6

56. Conn.—Washington Trust Co. v. Norwich, etc., Tract. Co., 92 A. 880, 89 Conn. 59.

57. Conn.—*Washington Trust Co.* v. Norwich, etc., Tract. Co., supra.
51 C.J. p. 866 note 8.

58. N.Y.—Stevens v. Buffalo, etc., R. Co., 31 Barb. 590.
51 C.J. p. 866 note 10.

59. U.S.—Metropolitan Trust Co. v. Pennsylvania, etc., R. Co., C.C.N.J., 25 F. 760—Farmers' Loan & Trust Co. v. St. Joseph R. Co., C.C.Kan., 8 F.Cas.No.4,669, 3 Dill. 412

60. U.S.—Myer v. Western Car Co., Iowa, 102 U.S. 1, 26 L.Ed. 59.
51 C.J. p. 866 note 12.

61. U.S.—Central Trust Co. v. Marietta, etc., R. Co., Ga., 48 F. 868, 1 C.C.A. 133.

62. U.S.—Frank v. Denver, etc., R. Co., C.C.Colo., 23 F. 123.
51 C.J. p. 866 note 14.

63. U.S.—Frank v. Denver, etc., R. Co., supra.

64. Ohio.—Miller v. Rattermann, 10 Ohio Dec., Reprint, 555, 22 Cinc.L. Bul. 99, reversed on other grounds 24 N.E. 496, 47 Ohio St. 141.

65. W.Va.—Fidelity Ins., etc., Co. v. Shenandoah Valley R. Co., 9 S.E. 180, 32 W.Va. 244, 11 S.E. 58, 33 W.Va. 761.

66. U.S.—Blair v. St. Louis, etc., R. Co., C.C.Mo., 25 F. 232
Statutory liens for damages see infra § 303.
Statutory liens for material and labor see infra § 301.

67. Ark.—Farmers' Loan & Trust Co. v. Pine Bluff, etc., R. Co., 21 S.W. 652, 57 Ark. 334.
51 C.J. p. 866 note 20.

68. U.S.—Central Trust Co. v. Bridges, Tenn., 57 F. 753, 6 C.C.A. 539
51 C.J. p. 866 note 21.

69. U.S.—Gregg v. Mercantile Trust Co., Ohio, 109 F. 220, 38 C.C.A. 318, certiorari denied 25 S.Ct. 415, 197 U.S. 133, 49 L.Ed. 717.
51 C.J. p. 867 note 22.

70. U.S.—Baker v. Central Trust Co., Ohio, 235 F. 17, 148 C.C.A. 511.
51 C.J. p. 867 note 23

71. Mo.—Poage v. Quincy, etc., R. Co., App., 23 S.W.2d 221.
51 C.J. p. 867 note 24.

the residue of the holders of the certificates of indebtedness, under the mortgage.[72]

A mortgage made to secure bonds to be thereafter issued does not give priority over liens of other creditors which attach to the property before bonds are actually issued under the mortgage to bona fide holders.[73] Where the mortgage covers only the net earnings of the railroad, the right of persons who have claims in respect of current expenses in the operation of the road to a preference over the mortgage, in respect of gross incomes or tolls, has been upheld.[74] Where the mortgagor is entitled to rents and income from the mortgaged property until a receiver is actually appointed, the fact that the income of the railroad is covered by the mortgage has been held not to entitle the mortgagee, at least as against other creditors, to income accruing before the appointment of a receiver.[75]

Lien or claim of judgment creditor. In general, judgment creditors should be postponed to prior mortgages.[76]

Mortgage of consolidated company. The lien created by a mortgage executed by the consolidated company after a consolidation on the consolidated property takes precedence of any unsecured claims of creditors of the constituent companies.[77]

Recognition of priority. A mere recital in a mortgage that certain stock in a terminal company, owned by the mortgagor company, is conveyed by the mortgage subject to the provisions of a prior stock trust agreement under which such terminal stock was deposited with a trustee is not a recognition of a priority of lien on all the property of the mortgagor company under such stock trust agreement which of itself gave no such priority.[78]

b. After-Acquired Property

The lien of a mortgage covering after-acquired property operates on the property only in the condition in which it is at the time it is acquired or attaches only to such interest as the mortgagor company acquires.

The lien of a mortgage covering after-acquired property operates on the property only in the condition in which it is at the time it is acquired, or in other words, attaches only to such interest as the mortgagor company acquires;[79] and, therefore, is subject to any covenant, lien, encumbrance, or other charge existing on the property at that time, although junior in point of time,[80] such as a mechanic's lien[81] or purchase-money mortgage.[82]

Such mortgage, however, may be enforced against the mortgagor company and all persons claiming rights which have accrued after the mortgage attached,[83] and especially as against claimants under a

72. Mass.—Phillips v. Eastern R Co., 138 Mass. 122.

73. U S —Reynolds v. Manhattan Trust Co., Neb., 83 F. 593, 27 C.C. A. 620.
Ala.—Allen v. Montgomery, 11 Ala. 437.

74. Ohio.—Darst v. Pittsburgh, etc., R. Co., 3 Ohio Dec., Reprint, 199, 4 Wkly L.Gaz. 377.
Tenn.—Clay v. East Tennessee, etc., R. Co., 6 Heisk. 421.

75. Ill.—St. Louis Union Trust Co. v. Wabash, C. & W. R Co., 258 Ill. App. 9.

76. Va.—Salem First Nat. Bank v. Anderson, 75 Va. 250.
51 C.J. p 868 note 40.

77. U.S.—Wabash, etc., R. Co. v. Ham, Ind., 5 S.Ct. 1081, 114 U.S. 587, 29 L.Ed. 235.

78. U.S.—Kansas City Terminal R. Co. v. Central Union Trust Co., C. C.A.Mo., 294 F. 32, certiorari denied 44 S.Ct. 402, 264 U.S. 588, 68 L Ed. 863.

79. Ind.—Lake Erie, etc., R. Co. v. Priest, 31 N.E. 77, 131 Ind. 413.
51 C.J. p 867 note 30.

80. U.S.—In re New York, S. & W. R. Co., C.C.A.N.J., 109 F.2d 988, certiorari denied New York Trust Co. v. New York, S. & W. R. Co., 60 S.Ct. 1075, 310 U.S. 633, 84 L.Ed. 1402 and Woodruff v. New York, S. & W. R. Co., 60 S.Ct. 1075, 310 U.S. 633, 84 L.Ed. 1403.
51 C.J. p 867 note 31.

81. N.J.—Williamson v. New Jersey Southern R. Co., 28 N.J.Eq. 277.
51 C.J. p 867 note 32.

82. U.S.—In re New York, S. & W. R. Co., C.C.A.N.J., 109 F.2d 988, certiorari denied New York Trust Co. v. New York, S. & W. R. Co., 60 S.Ct. 1075, 310 U.S. 633, 84 L.Ed. 1402 and Woodruff v. New York, S. & W. R. Co., 60 S.Ct. 1075, 310 U.S. 633, 84 L.Ed. 1403.
51 C.J. p 867 note 33.

Status of purchase-money mortgage

(1) Where bonds issued under railroad mortgage were devoted to reimbursement of railroad for expenditures made in acquisition and construction of terminal and other railroad properties formerly belonging to another company, the mortgage was entitled to status of a purchase-money mortgage, notwithstanding proceeds of bonds were used in reimbursement for prior expenditures and an interval elapsed between acquisition of property and execution of mortgage, since test was whether deed of acquisition and the purchase-money mortgage were part of continuous transaction, regardless of whether they were executed at same instant.—In re New York, S. & W. R. Co., C.C.A.N.J., 109 F.2d 988, certiorari denied New York Trust Co. v. New York, S. & W. R. Co., 60 S.Ct. 1075, 310 U.S. 633, 84 L.Ed. 1402 and Woodruff v. New York, S. & W. R. Co., 60 S.Ct. 1075, 310 U.S. 633, 84 L.Ed. 1403.

(2) The creation of railroad and terminal company, which took title to railroad properties prior to consolidation with debtor railroad which subsequently was reorganized, and covenant in consolidation agreement which provided for execution of a mortgage constituting first lien on property acquired by the debtor through the consolidation, in accordance with terms of an arrangement for a loan which was arranged by the company, was not fraudulent as to debtor's preëxisting creditors who held mortgages covering after-acquired property of debtor.—In re New York, S. & W. R. Co., C.C.A.N.J., 109 F.2d 988, certiorari denied New York Trust Co. v. New York, S. & W. R. Co., 60 S.Ct. 1075, 310 U.S. 633, 84 L.Ed. 1402 and Woodruff v. New York, S. & W. R. Co., 60 S.Ct. 1075, 310 U.S. 633, 84 L.Ed. 1403.

83. U.S.—Scott v. Clinton, etc., R. Co., C.C.Ill., 21 F.Cas.No.12,527, 6 Biss. 529.
51 C.J. p 867 note 34.

junior mortgage which, by its terms, is subject to the prior mortgage,[84] and against junior judgment creditors.[85] This latter rule, however, is subject to the qualification that, although the railroad mortgage is subject to liens and charges existing at the time it is acquired on rolling stock and other loose property susceptible of separate ownership and of separate liens,[86] with respect to rails and other articles which become affixed to, and a part of, the railroad, the lien of a prior mortgage will prevail in favor of bona fide creditors as against any encumbrance thereon in favor of the furnisher of the property,[87] as, for example, a reservation of title in such furnisher or seller.[88]

§ 298. —— Liens or Claims Arising Out of Grant of Public Aid

a. In general
b. Bonds secured by statutory lien and indorsed by state

a. In General

The priority of a lien on railroad property in favor of a state, county, or municipality as security for its issuing or indorsing bonds or subscribing to stock in aid of the company is usually regulated by the statute, or provision of the constitution, authorizing the granting of such aid.

The priority of a lien on railroad property in favor of a state, county or municipality as security for its issuing or indorsing bonds or subscribing to stock in aid of the company is usually regulated by the statute, or provision of the constitution, authorizing the granting of such aid.[89] Some statutes expressly provide that such liens shall be prior and superior to all liens or encumbrances created by the company and all other claims existing or to exist against it.[90] Persons dealing with a railroad company are bound to take notice of a public statute giving a state or a county a lien on railroad property for public aid granted to it,[91] and, therefore, such lien is superior to claims of purchasers of the property of such company,[92] and to its bonds issued under a mortgage subsequently executed,[93] and to the holder of a tax certificate which, by statute, is receivable by the company for freight and passage.[94]

Under such a statute, however, where first mortgage bonds are transferred to the state as security for bonds issued by it in aid of a road, the state as holder of such first mortgage bonds has no priority over other bonds of the same issue held by individuals.[95] The lien or claim under such a statute may be subordinate to the interest and claim of a vendor of railroad property reserved in the deed of conveyance,[96] to the lien of a person who has recovered judgment for the value of his land taken for the road,[97] or to mortgagees who have become such under a subsequent statute authorizing the railroad company to borrow money and mortgage its property.[98] Moreover, where the state has by statute expressly waived its priority, it cannot thereafter repudiate its action so as to affect a lien which arose under such statute.[99]

b. Bonds Secured by Statutory Lien and Indorsed by State

In general, the holders of bonds issued by the railroad company, secured by a statutory lien or mortgage, and indorsed by the state, are entitled to priority over junior encumbrancers.

In general, the holders of bonds issued by the railroad company, secured by a statutory lien or mortgage, and indorsed by the state, are entitled to priority over junior encumbrancers,[1] and this priority cannot be taken away by legislative enactment.[2] Holders of bonds or coupons may, however, by their acts, lose the right to claim priority.[3] Thus, where the holders of coupons of bonds issued under a particular statute accept in payment bonds issued under a later statute giving them a preference over the earlier bonds, and such statute is subsequently declared unconstitutional, in so far as it attempts to

84. N.H.—Pierce v Emery, 32 N.H 484.
N.Y.—Stevens v. Watson, 4 Abb.Dec 302, 45 How Pr 104.

85. N.Y.—Stevens v. Watson, supra.

86. U.S.—Fosdick v. Southwestern Car Co., Ill, 99 U.S. 256, 25 L.Ed. 344.
51 C.J. p 868 note 37.

87. U.S.—Porter v. Pittsburg Bessemer Steel Co., Ind, 7 S.Ct. 1206, 122 U.S. 267, 30 L.Ed. 1210, 7 S. Ct. 741, 120 U.S. 649, 30 L.Ed. 830.
51 C.J. p 868 note 38.

88. U.S.—Porter v. Pittsburg Bessemer Steel Co, supra.
51 C.J. p 868 note 39.

89. Fla.—State v. Jacksonville, etc., R Co., 16 Fla. 708.
51 C.J. p 868 note 43

90. Ala.—Colt v. Barnes, 64 Ala. 108
51 C.J. p 868 note 44.

91. U.S.—Ketchum v. St. Louis, Mo., 101 U.S. 306, 25 L Ed. 999—Tompkins v. Little Rock, etc., R. Co., C. C.Ark., 15 F. 6.

92. U S.—Ketchum v. St. Louis, Mo., 101 U S 306, 25 L.Ed. 999.

93. U.S—Ketchum v. St Louis, supra.

94. Tenn.—State v. Nashville, etc., R. Co., 7 Lea 15.

95. Minn.—Minnesota, etc., R. Co. v. Sibley, 2 Minn. 13.

96. Ala.—Tennessee, etc, R. Co. v. East Alabama R. Co, 73 Ala. 426.

97. Tenn.—White v. Nashville, etc., R. Co., 7 Heisk. 518.

98. Md.—Brown v. State, 62 Md. 439.

99. Ky.—Sinking Fund Comrs. v. Northern Bank, 1 Metc. 174.

1. S.C.—Hand v. Savannah, etc., R. Co., 12 S.C. 314, 17 S.C. 219.

2. S.C.—Gibbes v. Greenville, etc., R. Co, 13 S.C. 228—Hand v. Savannah, etc., R. Co., 12 S.C. 314, 17 S.C. 219.

3. S.C.—Hand v. Savannah, etc., R. Co., supra.
51 C.J. p 869 note 57.

give such preference, the holders of such new bonds are estopped from claiming under the earlier act.[4] This estoppel is purely personal and does not proceed from any supposed relation between the coupons funded and the bonds from which they were taken.[5] In such case there is no presumption of fact that at the time of funding persons owning the coupons also owned the bonds of the earlier issue to which such coupons had been attached,[6] and persons holding such coupons uncanceled are entitled to prove their claims in the same manner as the original holders of unfunded coupons.[7]

Where certain holders of first lien bonds are estopped to assert a preference by reason of their having accepted bonds of another issue, the holders of the first bonds not so estopped are not bound to share their prior lien with the holders of later bonds to the extent that the first lien was removed by the estoppel.[8] New bonds received, pursuant to a statute, for coupons of bonds issued under an earlier statute, by way of substitution for such coupons are entitled to the same rank and priority as the original debt,[9] and are entitled to priority over bonds under a mortgage given intermediate the enactment of the two statutes.[10] A lien under a mortgage to secure the purchase price of part of the right of way is superior to the lien of bonds indorsed by the state under a statute enacted prior to such mortgage when the lien of such bonds was to operate on each separate section of the railroad as it was completed and as the bonds were issued and indorsed.[11] Where the lien of the state is foreclosed, the holders of overdue and unpaid coupons have no right to a preference over the bondholders.[12] Neither the railroad company nor subordinate claimants can successfully object to the grant of priority to holders of such bonds on the ground that such holders have not attempted to obtain payment from the state.[13]

§ 299. —— Liens or Claims for Right of Way or Land Granted

In general, a lien on lands transferred to the railroad company is superior to subsequent liens.

In general, a lien on lands transferred to the railroad company is superior to subsequent liens.[14] So, except where the vendor has waived his right to priority,[15] or the vendor's lien is a secret one of which the mortgage bondholders had no notice,[16] the lien of a vendor of land sold or taken for railroad purposes for the unpaid purchase price thereof or for just compensation, if no price has been fixed, is superior to that of a mortgage on the road,[17] although the mortgage contains an after-acquired property clause,[18] particularly where the mortgage is a subsequent one,[19] and where the sale is a conditional one.[20]

It has been held, however, that, after a sale on foreclosure of a mortgage containing an after-acquired property clause, a vendor's lien in respect of a portion of the right of way acquired by the mortgagor company after the execution of the mortgage may not be enforced.[21]

§ 300. —— Liens or Claims for Rolling Stock Furnished

The lien of a mortgage on a railroad covering after-acquired property is inferior to a valid lien or claim on rolling stock existing when such rolling stock comes into the possession of the mortgagor company.

The lien of a mortgage on railroad property covering after-acquired property is inferior to a valid lien or claim on the rolling stock existing when such rolling stock comes into the possession of the mortgagor company,[22] as, for example, to the rights or lien of a seller of rolling stock under a conditional sale,[23] although in the form of a lease,[24] or to a bona fide lessor of such rolling stock, with reserva-

4. S.C.—Gibbes v. Greenville, etc., R. Co., 13 S.C. 228.
51 C.J. p. 869 note 58.

5. S.C.—Hand v. Savannah, etc., R. Co., 12 S.C. 314, 17 S.C. 219.

6. S.C.—Hand v. Savannah, etc., R. Co., supra.

7. S.C.—Hand v. Savannah, etc., R. Co., supra.
51 C.J. p. 869 note 61.

8. S.C.—Hand v. Savannah, etc., R. Co., supra.

9. S.C.—Gibbes v. Greenville, etc., R. Co., 13 S.C. 228.

10. S.C.—Gibbes v. Greenville, etc., R. Co., supra.

11. S.C.—Hand v. Savannah, etc., R. Co., 12 S.C. 314, 17 S.C. 219.

12. S.C.—State v. Spartanburg, etc., R. Co., 8 S.C. 129

13. S.C.—Hand v. Savannah, etc., R. Co., 12 S.C. 314, 17 S.C. 219.
51 C.J. p. 869 note 67.

14. U.S.—Wright v. Kentucky, etc., R. Co., Ky., 6 S.Ct. 697, 117 U.S. 72, 29 L.Ed. 821.
51 C.J. p. 869 note 69.

15. N.Y.—Fisk v. Potter, 2 Abb.Dec. 138, 2 Keyes 64.

16. N.Y.—Fisk v. Potter, supra.

17. Kan.—Commonwealth Trust Co. v. Scott City Northern R. Co., 144 P. 210, 93 Kan. 340.
51 C.J. p. 869 note 72.

18. U.S.—Central Trust Co. v. Louisville, etc., R. Co., C.C.Ky., 81 F. 772.
51 C.J. p. 870 note 73.

19. U.S.—Central Trust Co. v. Louisville, etc., R. Co., supra.
51 C.J. p. 870 note 74.

20. U.S.—Wright v. Kentucky, etc., R. Co., Ky., 6 S.Ct. 697, 117 U.S. 72, 29 L.Ed. 821.
Ala.—Tennessee, etc., R. Co. v. East Alabama R. Co., 73 Ala. 426.

21. Wis.—Pierce v. Milwaukee, etc., R. Co., 24 Wis. 551, 1 Am.R. 203.

22. U.S.—U. S. v. New Orleans & O. R. Co., Ky., 12 Wall. 362, 20 L.Ed. 434.
51 C.J. p. 870 note 84.

23. U.S.—Metropolitan Trust Co. v. Railroad Equipment Co., Ohio, 108 F. 213, 48 C.C.A. 135.
51 C.J. p. 870 note 85.

24. U.S.—Kentucky Contracting,

tion of title [25]

On the other hand, the lien of such a mortgage is superior to a claim for rolling stock acquired after the mortgage pursuant to a transaction which, while nominally a lease, is actually a purchase by the mortgagor,[26] to a claim of a manufacturer who relies on the credit of the company and on an indorser of notes taken by him from the railroad company in payment,[27] and to the rights of a manufacturer who delivers the rolling stock without any condition or reservation as to payment.[28] So a mortgage covering after-acquired property is superior to a lien or claim on subsequently acquired rolling stock in favor of a lessor of real property under a statute giving a lien to a landlord on personal property of the tenant used on the premises where the lien of the mortgage attaches before the rolling stock comes on the leased premises.[29] Such a mortgage is also superior to a lien or claim on subsequently acquired rolling stock where the transaction under which the rolling stock is acquired is a mere device on the part of persons who are in a position to control the corporation to prevent the property from coming within the operation of the after-acquired property clause.[30]

Where the general funds of the company are employed to discharge equipment liens, bondholders secured by a general mortgage may not claim priority over a first lien mortgage because the proceeds of the bonds purchased by them augmented such general fund.[31]

§ 301. —— Liens or Claims for Construction, Labor, and Supplies

a. In general
b. Statutory provisions

a. In General

Ordinarily, in the absence of a statute to the contrary, the lien of a mortgage or other encumbrance is superior to unsecured claims for material or labor furnished, especially where such claim is subsequent in time to the lien of the mortgage or other encumbrance.

Ordinarily, the lien of a mortgage or other encumbrance is superior to unsecured claims for material or labor furnished,[32] especially where such claim is subsequent in time to the lien of the mortgage or other encumbrance,[33] unless such claims are given priority by statute, as discussed infra subdivision b of this section. The right of persons claiming under a statute giving them a lien on the road built by the railroad company, to claim priority as against a contractor in respect of a part of the road subsequently built by such contractor under an agreement giving him title to the part of the road so built until payment for materials and labor should be made, has been denied.[34]

Where material is sold to the mortgagor company which when attached to the road becomes a fixture, or an integral part of the railroad, in general the lien of a prior mortgage covering after-acquired property is superior,[35] even though there is a reservation of title on behalf of the seller of the material,[36] as, according to some cases, is the lien of a subsequent mortgage taken without notice,[37] but not the lien of a subsequent mortgage taken with notice.[38]

Under equitable principles, however, where the railroad company is insolvent, the priority of claims for materials or labor required in the operation of the road over the lien of mortgage creditors, or other secured debts, in respect of the current income of the road, is sometimes recognized,[39] and, where the current earnings have been used for other purposes, priority may, under certain circumstances, be extended so as to include the corpus of the mortgaged property or its proceeds.[40] In order that this priority may be claimed, in general it must appear

etc., Co. v. Continental Trust Co., Ohio, 108 F. 1, 47 C.C.A. 143.

25. Ohio.—Central Trust Co. v. Ohio Southern R. Co., 17 Ohio Cir.Ct 633, 9 Ohio Cir.Dec. 317.

26. U.S.—McGourkey v. Toledo, etc., R Co., Ohio, 13 S.Ct. 170, 146 U.S. 536, 36 L.Ed. 1079.
51 C.J. p 870 note 79.

27. U.S.—Continental Trust Co. v. Toledo, etc, R. Co., C.C Ohio, 93 F. 532.
51 C J. p 870 note 80.

28. U S.—Coe v. Pennock, C C.Ohio, 5 F.Cas No.2,942, affirmed 23 How. 117, 16 L.Ed. 436.
51 C.J. p 870 note 81.

29. U.S.—Manhattan Trust Co. v. Sioux City, etc., R. Co, C C.Iowa, 68 F. 72, affirmed 77 F. 82, 23 C.C. A. 30, affirmed 19 S Ct. 14, 171 U.S. 474, 43 L Ed. 246

30. U.S.—McGourkey v. Toledo, etc., R. Co., Ohio, 13 S.Ct. 170, 146 U.S. 536, 36 L.Ed. 1079.

31. U.S.—U. S. Mortgage, etc., Co. v. Chicago, etc., R. Co., C.C.Ill., 40 F 2d 386, certiorari dismissed 57 S Ct. 756, 296 U.S. 668.

32. U.S.—Toledo, etc., R. Co. v. Hamilton, Ohio, 10 S.Ct. 546, 134 U S. 296, 33 L.Ed. 905.
51 C.J. p 870 note 92.

33. U.S.—Guaranty Trust Co. of New York v. Pacific & I. N. Ry. Co., D.C.Idaho, 17 F.Supp. 646—Phinizy v. Augusta & K. R. Co., C. C S.C., 62 F. 771.
51 C.J. p 871 note 93.

34. Ga.—Collins v. Georgia Cent. Bank, 1 Ga. 435.

35. N.H.—Pierce v. Emery, 32 N.H. 484.
51 C.J. p 871 note 97.

36. Mich.—Detroit Trust Co. v. Detroit, etc., R Co., 124 N.W. 45, 159 Mich. 442.
51 C.J. p 871 note 98.

37. Mass.—Hunt v. Bay State Iron Co, 97 Mass. 279.
N.H.—Haven v. Emery, 33 N.H. 66.

38. N.H.—Haven v. Emery, supra.

39. Tex.—McIlhenny v. Binz, 13 S. W. 655, 80 Tex. 1, 26 Am S.R. 705.
51 C.J. p 871 note 2.

40. Colo.—Grand Junction First

that the person who furnished the labor or supplies relied on the fact that the current earnings would be applied to the payment of his debts, and that he should not have contracted on the personal responsibility of the railroad company or of another.[41] Moreover, the expectation that the claim shall be paid out of current earnings is not of itself sufficient to make the claim a preferred one.[42]

Equitable rights in respect of original construction and permanent improvements. The equitable principles in question do not in general authorize priority for unsecured debts or claims for original construction,[43] or for repairs so extensive as to amount to permanent improvements.[44] Claims for construction performed after the giving of the mortgage have been given a preference in equity over the lien of the mortgage where the trustee under the mortgage advanced moneys thereunder with the knowledge and intention that such moneys would be used for construction and participated in the disbursement of such moneys.[45]

b. Statutory Provisions

The rights of laborers and materialmen to priority over mortgages and other encumbrances on railroad property are in some jurisdictions expressly regulated by statute.

The rights of laborers and materialmen to priority over mortgages and other encumbrances on railroad property are in some jurisdictions expressly regulated by statute.[46] Under some statutes a person who furnishes labor and materials for constructing a railroad, and who complies with certain statutory requirements, has a lien on the road for the amount due him therefor in preference to mortgages and other encumbrances on the road given after the actual commencement of the work of construction.[47] Some statutes of this description have been construed as giving superiority to a claim or lien based on the furnishing of material or the performance of labor after the mortgage was given where the construction of the road was commenced prior to the giving of the mortgage,[48] and this superiority is operative as to the whole road,[49] even though it is built in sections and the material or labor for which the lien is claimed was furnished or performed only for a particular section;[50] but the superiority does not extend to a lien based on repairs made after the completion of the road, although the mortgage was given in the course of, but after the commencement of, original construction.[51]

Such claims for labor and material are generally not entitled to preference over mortgages or other encumbrances on the road given before the work was commenced,[52] or before the statute took effect.[53] A recorded mortgage held by the trustee before any bonds are issued or any mortgage debt created is held by such trustee merely as the agent of the railroad company, so that mechanics' liens which attached prior to the issuance of any bonds are prior in lien,[54] and the superiority of the claim for labor and material has been upheld where, at the date of the execution and delivery of the mortgage, the proposed railroad had only a nominal existence and possessed no right of way or franchises and the mortgage was given and the money was advanced thereon for the sole purpose of bringing into existence the property on which the mortgage was intended to rest.[55]

Certain statutes applicable to corporations, giving superiority to existing debts and contracts of the corporation over the lien of a mortgage, have been construed as not applicable to railroad companies.[56]

Notice of lien. Under many of the statutes the superiority of the statutory lien depends on the

Nat. Bank v. Wyman, 66 P. 456, 16 Colo.App. 468.
51 C.J. p 871 note 3.

41. U.S.—Virginia, etc., Coal Co. v. Central R., etc., Co., Ga., 18 S.Ct. 657, 170 U.S. 355, 42 L.Ed. 1068.
51 C.J. p 871 note 4.

42. U.S.—Martin Metal Mfg. Co. v. U. S., etc., Trust Co., Kan., 225 F. 961, 141 C.C.A. 85.

43. Okl.—Territorial Trust, etc., Co. v. Missouri Valley Bridge, etc., Co., 200 P. 863, 83 Okl. 82.
51 C.J. p 872 note 6.

44. U.S.—Lackawanna Iron, etc., Co. v. Farmers' Loan & Trust R. Co., Tex., 20 S.Ct. 368, 176 U.S. 228, 40 L.Ed. 475.
51 C.J. p 872 note 7.

45. Kan.—Trocon v. Scott City Northern R. Co., 139 P. 357, 91 Kan. 887.
51 C.J. p 872 note 8.

46. Tex.—Hubbell v. Texas Southern R. Co., 126 S.W. 813, 59 Tex. Civ.App. 185.
51 C.J. p 872 note 10.

47. Iowa.—Beach v. Wakefield, 76 N.W. 688, 78 N.W. 197, 107 Iowa 567.
51 C.J. p 872 note 11.

48. U.S.—Brooks v. Burlington, etc., R. Co., Iowa, 101 U.S. 443, 25 L.Ed. 1057.
Iowa.—Neilson v. Iowa Eastern R. Co., 44 Iowa 71.

49. U.S.—Taylor v. Burlington, etc., R. Co., C.C.Iowa, 23 F.Cas.No.13,753, 4 Dill. 570.
51 C.J. p 872 note 13.

50. U.S.—Meyer v. Hornby, Iowa, 101 U.S. 728, 25 L.Ed. 1073.—Brooks v. Burlington, etc., R. Co., Iowa, 101 U.S. 443, 25 L.Ed. 1057.

51. Iowa.—Bear v. Burlington, etc., R. Co., 48 Iowa 619.

52. Pa.—Appeal of Reed, 16 A. 100, 122 Pa. 565.
51 C.J. p 873 note 16.

53. U.S.—Central Trust Co. v. Louisville, etc., R. Co., C.C.Ky., 70 F. 282.
51 C.J. p 873 note 17.

54. U.S.—Reynolds v. Manhattan Trust Co., Neb., 83 F. 592, 27 C.C.A. 620.

55. Neb.—Kilpatrick v. Kansas City, etc., R. Co., 57 N.W. 664, 38 Neb. 620, 41 Am.S.R. 741.

56. U.S.—Buncombe County v. Tommey, N.C., 5 S.Ct. 626, 1186, 115 U.S. 122, 29 L.Ed. 305.
51 C.J. p 873 note 20.

giving of due notice by claimant,[57] although the prosecution of the work may be sufficient notice[58]

Waiver or estoppel. The view has been taken that the right to claim superiority for a lien or claim for labor or materials is not waived or lost by a provision of the contract reserving a lien to the contractor,[59] by giving credit beyond the statutory time for enforcing the lien,[60] or by taking a note for the claim.[61] The lien claimant is not estopped to claim the superiority of his lien over a mortgage lien merely because he was a stockholder of the construction company which gave a guaranty in respect of the security for the bonds issued under the mortgage, where it is not shown that he was a party to such guaranty.[62]

§ 302. —— Liens or Claims for Loans or Advances or for Incurrence of Liability

In general the lien of a mortgage is superior to the claim of a general or unsecured creditor for advances or loans to the mortgagor.

In general the lien of a mortgage is superior to the claim of a general or unsecured creditor for advances or loans to the mortgagor,[63] and the lien of a prior mortgage covering after-acquired property is superior to the claim of a person who advanced the money to obtain certain property, title to which has vested in the mortgagor company, where the holder of the mortgage bonds took without notice of such claim.[64] However, one who has advanced money to pay for certain railroad property, taking title to himself as security, has a lien thereon superior to the mortgagees of the railroad company with notice,[65] and any change in the form of the obligation to him short of an actual payment does not extinguish his right to priority[66]

Moreover, under equitable principles, in the case of insolvent corporations claims based on obligations incurred or advances made in certain circumstances for keeping the road a going concern,[67] or for discharging liens or charges superior to the mortgage lien,[68] may be given priority over the lien of a mortgage in respect of income[69] and even in respect of the corpus of the mortgaged property where the claim arises out of a transaction which resulted in saving the mortgage security.[70] An equitable lien for money loaned, acquired through a clear intent on the part of the railroad company to give security on the property of the company, is enforceable against third persons who were either volunteers or took the property on which the corporation had agreed to give a lien, with notice of the agreement.[71]

§ 303. —— Liens or Claims for Damages

In the absence of statute a judgment for damages is not entitled to priority over preëxisting liens.

In the absence of statute a judgment for damages is not entitled to priority over preëxisting liens.[72] Under some statutes, however, a judgment for damages in respect of property,[73] or for personal injuries,[74] for which the railroad company is responsible, is superior to the liens of mortgages. Some of the statutes do not create a lien in respect of the enumerated claims,[75] but operate to postpone liens created by the railroad company to the satisfaction of claims of the preferred class.[76] A statute which gives priority to a judgment for personal injuries in respect of any and all other judgments, executions, or attachments except as stated, and which makes no mention of mortgages, has been construed

57. Or.—Coleman v. Oregonian R. Co., 35 P. 656, 25 Or. 286.
51 C.J. p 873 note 21.

58. Pa.—Pittsburg Constr. Co. v. West Side Belt R. Co., 81 A. 884, 232 Pa. 578.
51 C.J. p 873 note 22

59. U.S.—Chicago, etc., R. Co. v. Union Rolling Mill Co., Ill., 3 S.Ct. 594, 109 U.S. 702, 27 L.Ed. 1081.
51 C.J. p 873 note 23.

60. U.S.—Chicago, etc., R. Co. v. Union Rolling Mill Co., supra.
51 C.J. p 873 note 24.

61. Vt.—Poland v. Lamoille Valley R. Co., 52 Vt 144.

62. U.S.—Meyer v. Hornby, Iowa, 101 U.S. 728, 25 L.Ed. 1078.
51 C.J. p 873 note 26.

63. U.S.—Penn v. Calhoun, Ill., 7 S. Ct. 906, 121 U.S. 251, 30 L.Ed. 915.
51 C.J. p 873 note 29.

64. Ill.—Frost v. Galesburg, etc., R. Co., 47 N.E. 357, 167 Ill. 161.

65. U.S.—Appeal of Columbus, etc., R. Co., Ohio, 109 F. 177, 48 C.C.A. 275.

66. U.S.—Appeal of Columbus, etc., R. Co., supra.

67. U.S.—Jones v. Central Trust Co., Tenn., 73 F. 566, 19 C.C.A. 569.
51 C.J. p 874 note 33.

68. U.S.—Farmers' L. & T. Co. v. Stuttgart, etc., R. Co., C.C.Ark., 92 F. 246.
Ill.—Humphreys v. Allen, 100 Ill. 511.

69. U.S.—Farmers' L. & T. Co. v. Vicksburg, etc., R. Co., C.C.Miss., 33 F. 778—Atkins v. Petersburg R. Co., C.C.Va., 1 F.Cas.No 604, 3 Hughes 307.

70. U.S.—Jones v. Central Trust Co., Tenn., 73 F. 566, 19 C.C.A. 569.

Ill.—Humphreys v. Allen, 100 Ill. 511.

71. Okl.—Carter v. Sapulpa, etc., R. Co., 153 P. 853, 49 Okl. 471.

72. U.S.—Farmers' L. & T. Co. v. Longworth, Wash., 83 F. 336, 27 C.C.A. 541.
51 C.J. p 874 note 39.

73. Miss.—New Orleans, etc., R. Co. v. Carter, 64 So. 842, 107 Miss. 1.
51 C.J. p 874 note 40.

74. U.S.—Link v. Receivers of Seaboard Air Line Ry. Co., C.C.A.Va., 73 F.2d 149, applying South Carolina statute.
51 C.J. p 874 note 41.

75. Tenn.—Petition of Walker, 209 S.W. 739, 141 Tenn. 281.
51 C.J. p 875 note 42.

76. Tenn.—Hill v. Southern R. Co., Ch.A., 42 S.W. 888.
51 C.J. p 875 note 43.

as not giving priority in respect of a mortgage given prior to the injury.[77]

The constitutionality of such statutes, applicable to transaction subsequent to the enactment of the statute, has been recognized[78] in respect of injuries occurring after the mortgage was given.[79] Some of these statutes have been construed as not to give a preference over mortgages or liens in existence at the time of the passage of the act.[80] The provision as to reference back of a judgment, in a statute providing that a judgment for personal injury or for injury to property shall relate back to the date when the cause of action arose and shall be a lien as of that date of equal force and effect as certain specified liens and shall take precedence and priority of any mortgage given to secure the payment of bonds, refers to the specified liens other than mortgages,[81] and does not prevent the preference over a mortgage of a judgment for an injury which occurred subsequent to the giving of the mortgage.[82]

Under some statutes claims are not entitled to priority until they have been reduced to judgment, even though an action thereon is pending,[83] but it has been held that the priority may be asserted where the claim has become liquidated by a settlement with the company, although the statute expressly refers to a judgment.[84]

Under equitable principles in the case of an insolvent railroad company a claim for damages to abutting property resulting from the construction and operation of a railroad may be entitled to priority over a mortgage of the road.[85]

Effect of lease. A statute giving priority to a judgment for damages does not, according to some cases, apply to a judgment against a lessee of a railroad so as to render it a lien on the property superior to a mortgage given by the lessor prior to the lease;[86] but it has been held that a judgment against the lessor company may, under the statute, be entitled to a preference over a mortgage given by such company.[87]

Costs. The costs necessarily resulting from the action to procure judgment to which a statute gives priority and to enforce the lien are entitled to like priority.[88]

Contract by purchaser of railroad to pay judgment. The lien of a trustee and bondholders under a mortgage is superior to that of one claiming under an agreement by the mortgagor railroad company to pay as part of the purchase price any judgment that might be recovered in a personal injury action against its vendor, in so far as the trustee and bondholders are purchasers for value without notice.[89]

Waiver or estoppel. Claimant may, by his failure to assert his claim in due time, lose his right to a preference.[90]

§ 304. —— Liens or Claims for Rent of Road, Track, or Terminal Facilities

In general, the lien of a mortgage is superior to an unsecured claim for rent of road, track, or terminal privileges.

In general, the lien of a mortgage is superior to an unsecured claim for rent of road, track, or terminal privileges,[91] but a court of equity has given preference to such a claim in respect of the income of insolvent railroads.[92] A lease reserving payment of rent out of the tolls, fares, and income of the road may constitute a lien thereon in priority to subse-

77. Mich.—Marshall v. Wabash R Co., 167 N.W. 19, 201 Mich. 167.
51 C.J. p 875 note 44.

78. Tenn.—Frazier v. East Tennessee, etc., R. Co., 12 S.W. 537, 88 Tenn 138, affirmed 11 S.Ct. 517, 139 U.S. 288, 35 L.Ed. 196.
51 C.J. p 875 note 45.

79. U.S.—Central Trust Co. v. Charlotte, etc., R. Co., C.C.S.C., 65 F. 257.

80. U.S.—Link v. Receivers of Seaboard Air Line Ry. Co., C.C.A.Va., 73 F.2d 149, construing South Carolina statute.
51 C.J. p 875 note 47.
The use of the future tense in sections of a statute negatives any suggestion that the statute was intended to apply retroactively.—Link v. Receivers of Seaboard Air Line Ry. Co., supra.

81. U.S.—Southern R. Co. v. Bouknight, S.C., 70 F. 442, 17 C.C.A. 181, 30 L.R.A. 823.

82. U.S.—Southern R. Co. v. Bouknight, supra—Phinizy v. Augusta, etc., R. Co., C.C.S.C., 63 F. 922, affirmed 70 F. 451, 17 C.C.A. 236.

83. Iowa.—Burlington, etc., R. Co. v. Verry, 48 Iowa 458.

84. U.S.—Mercantile Trust Co. v. Tennessee Cent. R. Co., D.C.Tenn., 286 F. 425.
Tenn.—Frazier v. East Tennessee, etc., R. Co., 12 S.W. 537, 88 Tenn. 138.

85. Ill.—Penn Mut. L. Ins. Co. v. Heiss, 31 N.E. 138, 141 Ill. 35, 33 Am.R. 273.
51 C.J. p 875 note 55—41 C.J. p 518 note 26 [c].

86. U.S.—Fidelity, Ins., etc., Co. v. Norfolk, etc., R. Co., N.C., 127 F. 662, 62 C.C.A. 388—Fidelity Ins., etc., Co. v. Norfolk, etc., R. Co., C.C.N.C., 90 F. 175

87. U.S.—Central Trust Co. v. Charlotte, etc., R. Co., C.C.S.C., 65 F. 257.

88. U.S.—Central Trust Co. v. Central Iowa R. Co., C.C.Iowa, 38 F. 889.

89. Ky.—Ingram v. Cincinnati, etc., R. Co., 107 S.W. 239, 32 Ky.L. 843.

90. Tenn.—Barnett v. East Tennessee, etc., R. Co., Ch.A., 48 S.W. 817.
51 C.J. p 875 note 57.

91. U.S.—St. Louis Merchants' Bridge Terminal R. Co. v. Continental Trust Co., Ohio, 111 F. 669, 49 C.C.A. 529.
51 C.J. p 876 note 61.

92. U.S.—Savannah, etc., R. Co. v. Jacksonville, etc., R. Co., Fla., 79 F. 35, 24 C.C.A. 437.

quent mortgages.[93] Claims for rent have been regarded as superior in equity to the payment of interest on bonds in the hands of bondholders who had guaranteed the payment of the rent.[94] Where the lessor company covenants to keep up its organization and make all reports required by law, such agreement implies that it is to be done at the expense of the lessor company, and, therefore, such expense is not a lien on the property of the road superior to that of bondholders claiming under a mortgage executed by the lessee company [95]

§ 305. —— Priorities between Different Mortgages

a. In general
b. After-acquired property

a. In General

The order of priority of different railroad mortgages on the same property ordinarily depends on the order in which they have attached as liens on such property.

The order of priority of different railroad mortgages on the same property ordinarily depends on the order in which they have attached as liens on such property.[96] A junior mortgage is, however, sometimes given priority by statute [97]

Retention of priority in hands of purchaser of mortgaged property. A prior mortgage on railroad property may, by agreement between the vendor and purchaser who agrees to assume and to pay the mortgage and the bonds issued thereunder, be kept operative in the hands of the purchaser for its security so as to be superior to subsequent mortgages existing when the purchase was made.[98]

Expenditures by mortgagee in possession. Expenditures by a railroad company in possession as mortgagee for the convenience and improvement of its line as a system which includes lines not covered by the mortgage may not be made the basis of a lien prior to the lien of a mortgage subordinate to the mortgage under which possession was held,[99] but, where the expenditure was one which was necessitated by the character of the mortgaged property and was ordered by the public authorities, the claim therefor is entitled to priority over the lien of the subordinate mortgage.[1]

b. After-Acquired Property

A railroad mortgage covering after-acquired property ordinarily has priority over a subsequent mortgage on the same property.

A railroad mortgage covering after-acquired property ordinarily has priority over a subsequent mortgage on the same property,[2] as, for example, a mortgage executed by a subsequent grantee,[3] or by a consolidated company,[4] and the fact that a certain portion of the road is built with money raised on the later mortgage does not give such mortgage priority over an earlier one.[5] The fact that some of the bonds secured by a mortgage containing an after-acquired property clause are used to pay for certain after-acquired property does not

93. Vt.—Vermont, etc., R. Co. v. Vermont Cent. R. Co., 34 Vt. 1.

94. U.S.—St. Louis, etc., R. Co. v. Indianapolis, etc., R. Co., C.C.Ind., 21 F.Cas.No.12,236, 9 Biss. 99, affirmed 6 S.Ct. 1094, 118 U.S. 290, 30 L.Ed. 83.

95. Vt.—Vermont, etc., R. Co. v. Vermont Cent. R. Co., 34 Vt. 1.

96. U.S.—Bankers Trust Co. v. Callaway, C.C.A.Ga., 148 F.2d 629
51 C.J. p 876 note 70.

Effect of consent

Even if the relied-on provision of the mortgage could be held to be a consent that lien of subsequent refunding and general mortgage should rank its own, such consent merely subrogated refunding and general mortgage to position of priority of lien of the consolidated mortgage, and had no effect on order of priority between that mortgage and an income mortgage which, although senior to refunding and general mortgage, was junior to consolidated mortgage.—Bankers Trust Co. v. Callaway, supra.

Provision for substitution in event of sale

Under provision of first mortgage of railroad property for substitution of other property after sale of mortgaged parcels, trustee under subsequent refunding mortgage could not deprive first mortgagee of improvements made by lessee on original mortgaged site of relocated tracks after merger of mortgagor with lessee, notwithstanding loans made to pay for improvements were discharged with proceeds of loan secured by refunding mortgage and good-faith assumption of trustee under refunding mortgage that original site of tracks had been released and refunding mortgage constituted first lien, in absence of statutory recordation of sale of original site of tracks and of purchase of substituted parcel.—In re New York, N. H. & H. R. Co., D.C.Conn., 27 F.Supp. 392, affirmed, C.C.A., 104 F.2d 1018.

97. U.S.—Campbell v. Texas, etc., R. Co., C.C.Tex., 4 F.Cas.No.2,369, 2 Woods 263
51 C.J. p 876 note 71.

98. U.S.—Guaranty Trust Co. v. Minneapolis, etc., R. Co., C.C.A. Minn., 36 F.2d 747
51 C.J. p 876 note 83.

99. U.S.—Guaranty Trust Co. v. Minneapolis, etc., R. Co., supra.
51 C.J. p 877 note 84

1. U.S.—Guaranty Trust Co. v. Minneapolis, etc., R. Co., supra.
51 C.J. p 877 note 85

2. U.S.—In re New York, S. & W. R. Co., C.C.A.N.J., 109 F.2d 988, certiorari denied New York Trust Co. v. New York, S. & W. R. Co., 60 S.Ct. 1075, 310 U.S. 633, 84 L.Ed. 1402 and Woodruff v. New York, S. & W. R. Co., 60 S.Ct. 1075, 310 U.S. 633, 84 L.Ed. 1403.
51 C.J. p 876 note 74.
Purchase-money mortgage see supra § 297.

3. U.S.—Wade v. Chicago, etc., R. Co., Ill., 13 S.Ct. 892, 149 U.S. 327, 37 L.Ed. 755

4. Del.—Wilmington, etc., Nat. Bank v. Wilmington, etc., R. Co., 31 A. 70, 9 Del.Ch. 258.
51 C.J. p 876 note 76.

5. U.S.—Galveston, etc., R. Co. v. Cowdrey, Tex., 11 Wall. 459, 20 L.Ed. 199.

entitle the mortgage to a prior lien on such property as against earlier mortgages which contained the same clauses, in the absence of an agreement express or implied that the bonds should be so used and a lien should attach,[6] although where property is acquired by moneys raised under a mortgage under circumstances in which it is plain that the later mortgage would not have been created and utilized to acquire such property without the safeguard of a first lien, then property so acquired is not first subject to the lien of a prior mortgage, unless the prior mortgage, by express language, warns subsequent mortgagees that such after-acquired property will be subject to the lien of the prior mortgage.[7]

As between two mortgages covering after-acquired rolling stock given by different companies which were subsequently consolidated, the mortgage of the company which originally owned rolling stock replaced by the purchase of other rolling stock after consolidation has been regarded as superior in respect of the rolling stock so purchased.[8] A mortgage of a branch line under a special act providing that it shall be a first lien thereon takes precedence of a prior mortgage of the railroad as then "made or to be made."[9]

A mortgage existing on a railroad at the time it is purchased by another railroad company is superior to a mortgage of the latter company on its road and which attaches to the newly acquired road,[10] and, similarly, where mortgages given by two railroad companies both contain after-acquired clauses, and thereafter one of the railroads purchases the other, the mortgage given by the purchasing railroad which antedates that given by the absorbed railroad constitutes a prior lien.[11] A mortgage covering after-acquired property is superior to a chattel mortgage given by the contractor for construction, who was also the general manager of the railroad company, to a director and general counsel of the railroad company, who had participated in the transaction resulting in the execution by the railroad company of the after-acquired property mortgage.[12]

§ 306. —— Priorities between Holders of Bonds or Debentures and between Debentures and Other Claims

The priorities of the holders of railroad bonds depend largely on the terms of the contract under which the bonds were acquired, although priority may be affected by the equities of the particular case.

The priorities of the holders of railroad bonds depend largely on the terms of the contract under which the bonds were acquired,[13] although priority may be affected by the equities of the particular case.[14] Ordinarily, outstanding bonds of a prior issue are entitled to priority over a subsequent issue of bonds,[15] particularly where a decree of foreclosure of the mortgage under which the latter bonds are issued declares the outstanding bonds a first lien on the road or the proceeds of its sale,[16] and this preference passes to a bona fide holder of such bonds.[17] The mere fact that unsecured bonds were issued before secured bonds does not make such unsecured bonds a lien on the corporate property superior to such secured bonds, although the statute under which the unsecured bonds were issued provided that bonds issued should be binding on the property of the mortgagor.[18]

Bonds of the same issue and secured by the same mortgage stand on an equal footing, regardless of the time at which the various bonds are negotiated;[19] and the fact that part of an issue of bonds is issued as the purchase price of certain property gives the bonds so used no prior lien on such property over other bonds of the same issue.[20] Income bonds entitled to a preference out of the capital stock and income have no priority over mortgage bonds out of the proceeds of the latter.[21]

6. U.S.—In re New York, S. & W. R. Co., C.C.A.N.J., 109 F.2d 988, certiorari denied New York Trust Co. v. New York, S. & W. R. Co., 60 S.Ct. 1075, 310 U.S. 633, 84 L.Ed. 1402 and Woodruff v. New York, S. & W. R. Co., 60 S.Ct. 1075, 310 U.S. 633, 84 L.Ed. 1403.

7. U.S.—Westinghouse Electric, etc., Co. v. Brooklyn Rapid Transit Co., D.C.N.Y., 276 F. 152.

8. Del.—Wilmington, etc., Nat. Bank v. Wilmington, etc., R. Co., 81 A. 70, 9 Del.Ch. 258.

9. U.S.—Randolph v. Wilmington, etc., R. Co., C.C.Pa., 20 F.Cas.No. 11,563, 11 Phila. 502.

10. U.S.—Branch v. Atlantic, etc., Co., C.C.Ga., 4 F.Cas.No.1,807, 3 Woods 481, affirmed 1 S.Ct. 495, 106 U.S. 468, 27 L.Ed. 279.

11. U.S.—Guaranty Trust Co. of New York v. Minneapolis & St. L. R. Co., C.C.A.Minn., 52 F.2d 418.

12. Or.—Flanagan Bank v. Graham, 71 P. 137, 790, 42 Or. 403.

13. U.S.—Pennsylvania R. Co. v. Allegheny Valley R. Co., C.C.Pa., 42 F. 139.

Debentures

English decisions with respect to priorities between debentures and between debentures and other claims see 51 C.J. p 878 notes 14-21.

14. Ky.—Stephens v. Benton, 1 Duv. 113.

15. U.S.—Kneeland v. Lawrence, Ind., 11 S.Ct. 786, 140 U.S. 209, 35 L.Ed. 492.

S.C.—Gibbes v. Greenville, etc., R. Co., 13 S.C. 228.

16. U.S.—Kneeland v. Lawrence, Ind., 11 S.Ct. 786, 140 U.S. 209, 35 L.Ed. 492.

17. U.S.—Kneeland v. Lawrence, supra.

18. Ga.—Brunswick, etc., R. Co. v. Hughes, 52 Ga. 557.

19. U.S.—Stanton v. Alabama, etc., R. Co., C.C.Ala., 22 F.Cas.No.13,297, 2 Woods 523.

51 C.J. p 877 note 93.

20. Va.—Murray v. Farmville, etc., R. Co., 42 S.E. 553, 101 Va. 262.

21. Md.—Garrett v. May, 19 Md. 177.

A guarantor of railroad bonds secured by mortgage, who has made only a partial payment thereof, is not entitled to an equal footing with the holders of bonds issued under the mortgage on the ground of subrogation.[22] Consent by holders of a portion of first mortgage bonds to the issue of preference bonds of like character to be a lien on the road prior to their bonds is in equity a mortgage or pledge of such holder's interest in the first mortgage to secure the payment of the preference bonds,[23] and does not change the rights under the mortgage of the non-assenting bondholders.[24]

§ 307. —— Priorities in Respect of Interest or Interest Coupons

Where a lien is entitled to priority over another lien, the priority usually extends to the interest to which the preferred lienholder is entitled.

Where a lien is entitled to priority over another lien, the priority usually extends to the interest to which the preferred lienholder is entitled.[25] In the absence of some provision in the mortgage to that effect coupons severed from negotiable bonds secured by a mortgage on railroad property are not entitled to priority of payment over the principal of the bonds[26] or the coupons subsequently maturing,[27] and it has been held that, where bondholders have a remedy for enforcing the payment of interest in case of default and they fail to enforce such remedy, they have no claim for priority in the distribution of the proceeds of foreclosure over other bondholders of the same class who have received interest.[28]

On the other hand, in determining the equities involved, it has been held that unpaid coupons should be paid before the principal of any of the bonds,[29] and before coupons or interest falling due at a later period;[30] and detached coupons in the hands of others than the holders of the bonds from which they were detached should be paid before such bonds.[31] Where a particular transaction amounts to a payment of coupons, the right of the person who takes them up to share equally with the holders of secured bonds or coupons has been denied.[32]

A mere promise or stipulation in notes given for money borrowed to pay interest on bonds that a certain amount of the gross earnings is pledged in liquidation of the new securities does not create a specific lien or equitable assignment so as to give a holder thereof priority over the bonded debt out of such earnings.[33] A provision in income bonds recognizing the priority of other outstanding bonds in respect of interest has been given effect.[34]

Partial priority. Where, under a valid statute a railroad company is authorized to issue bonds bearing a certain rate of interest, which bonds are to have priority over bonds theretofore issued, the priority does not obtain to interest in excess of the statutory amount.[35]

Priority over floating or current debt. Interest on bonds may by agreement be made subordinate to current or floating indebtedness.[36]

§ 308. Interest and Interest Coupons

a. In general
b. Interest coupons
c. Rate of interest

a. In General

The liability of a railroad company for interest under a contract or obligation expressly providing therefor depends solely on the contract, and interest is not recoverable on any other terms or in any other manner than therein specified.

The liability of a railroad company for interest under a contract or obligation expressly providing therefor depends solely on the contract, and interest is not recoverable on any other terms or in any other manner than therein specified.[37] A contract to pay interest may be implied,[38] and, in the ab-

22. U.S.—Columbia Finance, etc., Co. v. Kentucky Union R. Co., Ky., 60 F. 794, 9 C.C.A. 264.
51 C.J. p 877 note 96.

23. Vt.—Poland v. Lamoille Valley R. Co., 52 Vt 144.

24. Vt.—Poland v. Lamoille Valley R. Co., supra.

25. U.S.—Richmond, etc., Constr. Co. v. Richmond, etc., R. Co., Ky., 68 F. 105, 15 C.C.A. 289, 34 L.R.A. 625, certiorari denied 16 S.Ct. 1199, 163 U.S. 679, 41 L.Ed. 310.

26. U.S.—Ketchum v. Duncan, Ala., 96 U.S. 659, 24 L.Ed. 868.

27. U.S.—Ketchum v. Duncan, supra.

28. Ill.—Humphreys v. Morton, 100 Ill. 592.

29. Vt.—Sewall v. Brainerd, 38 Vt. 364.
51 C.J. p 878 note 5.

30. U.S.—Stevens v. New York, etc., R. Co., C.C.N.Y., 23 F.Cas.No.13,406, 13 Blatchf. 412.

31. U.S.—Stevens v. New York, etc., R. Co., supra.

32. N.Y.—Union Trust Co. v. Monticello, etc., R. Co., 68 N.Y. 311, 20 Am.R. 451.
51 C.J. p 878 note 8.

33. Tex.—McIlhenny v. Binz, 13 S.W. 655, 80 Tex. 1, 26 Am.S.R. 705.

34. Miss.—Yazoo, etc., R. Co. v. Martin, 47 So. 667, 48 So. 739, 94 Miss. 700.

35. U.S.—Campbell v. Texas, etc., R. Co., C.C.Tex., 4 F.Cas.No.2,369, 2 Woods 263.

36. N.J.—Lehigh Coal, etc., Co. v. New Jersey Cent. R. Co., 34 N.J.Eq. 88
51 C.J. p 878 note 12.

37. Ga.—Georgia Cent. R. Co. v. New York Cent. Trust Co., 69 S.E. 708, 135 Ga. 472.
51 C.J. p 878 note 24, p 879 notes 26, 27.

38. U.S.—In re Chicago, R. I. & P. Ry. Co., C.C.A.Ill., 155 F.2d 889, applying Pennsylvania law, reversed on other grounds Fleming

sence of contract, interest may be recoverable by way of damages for unreasonable delay in the payment of moneys due from the company.[39]

Unless otherwise provided by statute, the interest on bonds of a railroad company may be made payable at stated intervals during the life of the bond, and the company may not be restricted to the payment of interest only at maturity of the principal.[40]

The fact that, when an installment of interest falls due, the company has no money with which to pay it does not, unless otherwise provided by the obligation, relieve the company from liability therefor.[41]

A demand for interest due on bonds is sufficient if made by the holders of the bonds or coupons at the place where they are payable,[42] and a further demand by the mortgage trustee is not necessary.[43]

Where a temporary bond is issued under a trust indenture, exchangeable for bonds to be issued, and there is no requirement of exchange in the trust indenture or in the temporary bond, the failure of the holder of such temporary bond to exchange does not affect his right to interest paid to a trustee,[44] nor is it his duty to collect each payment of interest as and when it is made to the trustee.[45]

Transfer of obligation. When bonds or other obligations of a railroad company are transferred, they carry with them, unless otherwise agreed, the right to interest accruing thereon;[46] and a bona fide transferee has the same rights with respect to the interest as with respect to the principal.[47] A subsequent sale of a certificate of deposit representing a temporary bond, after the accrual of interest but prior to its collection, has been held not to carry with it the right to the interest on deposit with the trustee.[48]

Effect of receivership or insolvency. After railroad property has passed into the hands of a receiver or of an assignee in insolvency, interest on debts of the railroad company ordinarily is not allowed against funds in the receiver's hands[49] unless there are funds in the hands of the receiver or his privies especially applicable to the payment of the claim and which would not be exhausted by the allowance of interest.[50]

b. Interest Coupons

Interest coupons on railroad mortgage bonds may be negotiable instruments which may be detached from the bonds and reduced to judgment by the holder separately from the bond.

Interest coupons on railroad mortgage bonds may be negotiable instruments which may be detached from the bonds and reduced to judgment by the holder separately from the bond,[51] although where a trust indenture made a part of the coupons by reference vests the sole right of action on the coupons in the trustees named in the indenture the coupons are nonnegotiable.[52] Until detached and separately negotiated, an interest coupon is merely an incident of the bond to which it appertains.

v. Traphagen, 67 S Ct 365, 329 U. S 686, 91 L Ed. 602, rehearing denied 67 S Ct. 500, 329 U.S. 832, 91 L Ed. 705.

39. N Y.—Connecticut Mut. L. Ins. Co v. Cleveland, etc, R. Co., 41 Barb. 9, 26 How Pr. 225.

40. Ohio—Coe v. Columbus, etc, R Co, 10 Ohio St. 372, 75 Am D 518.

41. Ohio—Shoemaker v. Dayton, etc, R. Co, 10 Ohio Dec, Reprint, 12, 18 Cinc L Bul. 43.

42. Ind—Taber v. Cincinnati, etc, R. Co, 15 Ind. 459.

43. Ind—Taber v. Cincinnati, etc, R Co., supra.

44. Pa.—Girard Trust Co. v. Pennsylvania Co. for Insurances on Lives and Granting Annuities, 51 A.2d 623, 356 Pa. 113.

Duty of trustee

Where the mortgage indenture further provides that on deposit by the mortgagor railroad with the trustee of an amount sufficient to pay the semi-annual interest on coupon bonds, to be held and applied by the trustee as a special trust fund for payment of the interest coupons on presentation, the mortgagor shall thereafter be discharged of liability to pay such interest, the trustee thereupon holds such deposits in trust for the benefit of persons who are the owners of the bonds at the time when the instalments of interest fall due, whether the bonds are still in temporary form or have been exchanged for the permanent form with coupons attached—Girard Trust Co v. Pennsylvania Co, 57 Pa Dist & Co. 194, affirmed 51 A.2d 623, 356 Pa. 113.

45. Pa.—Girard Trust Co. v. Pennsylvania Co for Insurances on Lives and Granting Annuities, 51 A 2d 623, 356 Pa 113.

46. Pa.—McElrath v. Pittsburg, etc., R Co., 55 Pa. 189.
51 C J. p 879 note 36.

47. Pa.—McElrath v. Pittsburg, etc., R. Co., supra.

48. Pa.—Girard Trust Co. v. Pennsylvania Co. for Insurances on Lives and Granting Annuities, 51 A.2d 623, 356 Pa. 113.

Indorsement of interest payments

A requirement that interest payments be indorsed on interim certificate exchangeable for railroad bond was made solely for protection of the trustee under the railroad mortgage, and could not affect rights of original holder of interim certificate against purchasers of certificate of deposit issued by such original holder, representing the bond with interest due after specified date—Girard Trust Co. v. Pennsylvania Co. for Insurances on Lives and Granting Annuities, supra

49. U S—Thomas v Western Car Co, Ill, 13 S Ct 824, 149 U S 95, 37 L Ed 663—New England R Co v. Carnegie Steel Co., Mass, 75 F. 54, 21 C.C A. 219.

50. U S—New England R. Co. v. Carnegie Steel Co, supra.

51. U.S—In re Chicago, R. I. & P Ry. Co., C.C.A Ill., 155 F.2d 889, applying Pennsylvania law, reversed on other grounds Fleming v. Traphagan, 67 S.Ct. 365, 329 U. S. 686, 91 L.Ed. 602, rehearing denied 67 S.Ct. 500, 329 U.S. 832, 91 L.Ed. 705.

52. U.S—Mississippi Val Trust Co. v. Oklahoma Ry. Co., C.C.A.Okl, 156 F.2d 283.

tains,[53] and is without greater force than any other promise for the payment of interest.[54] An agreement by the lessee of a railroad to pay interest on bonds issued by the lessor company constitutes a promise to pay the coupons attached to such bonds.[55]

The character of such coupons is not changed by detaching them from the bond,[56] but a holder of detached coupons is bound by the conditions of the bonds to which the coupons were attached, as to the amount payable and the manner of recovering it, the same as though the coupons had not been detached,[57] and, although an action may be maintained on the coupons without production of the bond,[58] a recovery must be based upon the obligations contained in the bond.[59] A provision that detached coupons shall not be entitled to any benefit under the mortgage except after the prior payment in full of the principal of the bonds and of all coupons not detached does not in any manner modify the obligation of the company to pay such coupons or the interest by them represented,[60] but merely subordinates the rights of the holders to participate in the security afforded by the mortgage.[61] The holder of overdue interest coupons ordinarily is entitled to recover interest on the amount thereof from the time they are payable.[62] In some jurisdictions, however, a bondholder may be denied interest on overdue interest coupons,[63] even though an express promise to pay such interest was made when the bonds were issued,[64] and even though the debtor may be able to conduct its business affairs without the aid or benefit of this rule.[65] A nonnegotiable coupon has been held not to bear interest after maturity in the absence of an express provision therein for such payment.[66]

In the absence of other significant circumstances, the right of a holder of a matured coupon to receive interest is determinable by the place where the coupon is payable,[67] and, where there is nothing to evince a contrary intent, it will be presumed that the parties to a coupon contracted with reference to the laws of the place where the coupon was payable.[68]

c. Rate of Interest

Subject to general laws relating to usury, and to any special statutes or regulations applicable to railroad companies, a railroad company may contract as to the rate of interest it shall pay on its indebtedness.

Subject to general laws relating to usury, and to any special statutes or regulations applicable to railroad companies, a railroad company may contract as to the rate of interest it shall pay on its indebtedness.[69] An increase in the rate of interest on outstanding bonds at the time of consolidation of the railroad company by which such bonds were issued with other companies does not constitute a violation of a statute prohibiting the issue of bonds or other evidences of debt in connection

53. N.Y.—Continental Securities Co. v. New York, etc., R. Co, 111 N.E 484, 217 N.Y. 119.

54. N.Y.—Continental Securities Co. v. New York, etc., R. Co, supra.

55. Mo.—Singer v. St. Louis, etc, R. Co., 6 Mo.App. 427.

56. N.Y.—McClelland v. Norfolk Southern R. Co, 18 N.E 237, 110 N.Y. 469, 6 Am.S.R 397, 1 L.R.A. 299.

57. N.Y.—McClelland v. Norfolk Southern R. Co., supra.
51 C.J. p 879 note 45.

58. N.Y.—McClelland v. Norfolk Southern R. Co., supra.

59. N.Y.—McClelland v. Norfolk Southern R. Co., supra.

60. Utah.—Meissner v. Ogden, etc., R. Co., 232 P. 569, 65 Utah 1.

61. Utah.—Meissner v. Ogden, etc, R. Co., supra.

62. U.S.—In re Chicago, R. I. & P. Ry. Co., C.C.A.Ill., 155 F.2d 889, applying Pennsylvania law, reversed on other grounds Fleming v. Traphagen, 67 S.Ct. 365, 329 U.S. 686, 91 L.Ed. 602, rehearing denied 67 S.Ct. 500, 329 U.S. 832, 91 L.Ed 705.
51 C.J. p 879 note 46.

The coupons are promises to pay liquidated interest on a certain definite date. On that date they mature. Thereafter, like other negotiable instruments and other undisputed liquidated demands for money, they bear interest from the date of maturity.—In re Chicago, R. I. & P. Ry. Co, C.C.A.Ill., 155 F.2d 889, reversed on other grounds Fleming v. Traphagen, 67 S.Ct. 365, 329 U.S. 686, 91 L.Ed. 602, rehearing denied 67 S.Ct. 500, 329 U.S. 832, 91 L.Ed. 705

Discharge of undue interest coupons

Where default occurred in payment of railroad bonds to which semi-annual interest coupons were attached and due date of bonds was accelerated in accordance with provision therein, provision in bonds themselves for interest became enforceable obligation for interest after acceleration and undue interest coupons then attached to bonds were discharged.—Mississippi Val. Trust Co. v. Oklahoma Ry. Co., C.C.A.Okl., 156 F.2d 283.

63. U.S.—In re Wisconsin Cent. Ry. Co., D.C.Minn., 63 F.Supp. 151, applying New York law.

64. U.S.—In re Wisconsin Cent. Ry. Co., supra.

65. U.S.—In re Wisconsin Cent. Ry. Co., supra.

66. U.S.—Mississippi Val Trust Co. v. Oklahoma Ry. Co, C.C.A.Okl, 156 F.2d 283

Provision in trust indenture made a part of railroad bonds and semi-annual interest coupons attached thereto by reference, which fix manner of distribution in event of foreclosure sale, would not be construed as express obligation to pay interest on coupons after maturity, where coupons were nonnegotiable.—Mississippi Val. Trust Co. v. Oklahoma Ry. Co., supra.

67. U.S.—In re Chicago, R. I. & P. Ry. Co., C.C.A.Ill., 155 F.2d 889, applying Pennsylvania law, reversed on other grounds Fleming v. Traphagen, 67 S.Ct. 365, 329 U.S. 686, 91 L.Ed. 602, rehearing denied 67 S.Ct. 500, 329 U.S. 832, 91 L.Ed. 705.

68. U.S.—Mississippi Val. Trust Co. v. Oklahoma Ry. Co., C.C.A.Okl., 156 F.2d 283.

69. U.S.—Memphis, etc, R. Co v. Dow, Ark., 7 S.Ct, 482, 120 U.S. 287, 30 L.Ed. 595.

with consolidation.[70] It has been held that the reservation of an illegal rate of interest will not prevent a recovery of the original debt with legal interest.[71]

Where a mortgage provides for a certain interest until maturity, but is silent as to the rate of interest thereafter, the statutory rate will be applicable after maturity,[72] and it will not be implied that the contract rate is to continue.[73]

Special statutes. A statute prescribing a maximum rate of interest on railroad indebtedness but permitting the sale of notes and bonds at a prescribed discount in effect and to that extent exempts railroad companies from the operation of the usury laws,[74] and so a company may contract to pay interest at a rate equivalent to that which would be payable on funds obtained by the issuance at the permitted discount of a note or bond bearing interest at the rate prescribed by statute.[75] Similarly, a provision in the charter of a railroad company authorizing it to borrow money on such terms as may be agreed on by the parties empowers it to contract to pay a rate of interest greater than that established by the general law of the state.[76] A statute prohibiting railroad companies from borrowing money at more than a specified rate of interest has no application to undertakings issued for other purposes, and does not invalidate a promise therein to pay a greater rate of interest than that prescribed by the statute.[77]

§ 309. —— Waiver, Loss, or Bar of Right to Interest

The right to interest on bonds or other obligations of a railroad company may be waived or lost by the acts of the holders or obligees.

The right to interest on bonds or other obligations of a railroad company may be waived or lost by the acts of the holders or obligees,[78] although the right to assert such waiver may itself be lost by conduct inconsistent therewith.[79] Such right to interest may also be lost or barred by the performance or nonperformance of conditions contained in the bond or other obligation or in a mortgage or trust deed under which it was issued,[80] and thus, where the income bonds and mortgages provide that no interest shall be recovered until the board of directors shall have adjudged and awarded an ascertained amount as net earnings, there can be no recovery of interest until such amount is adjudged and awarded[81] unless the directors improperly neglect or refuse to take the necessary action.[82] Where mortgage bonds provide that no more interest shall be payable than shall be certified by a vote of the majority of the board of directors to have been earned by the company during the preceding interest period, and that in default of such certificate no interest shall be payable, interest cannot be recovered on such bonds unless the certificate has been made[83] or unless it has been unreasonably refused after a request therefor.[84] Similarly, where it is covenanted that the principal of bonds selected by drawing lots at stated intervals shall be payable at the option of the holders on the surrender of such bonds, and that interest thereon shall cease at a certain date, interest on bonds so selected ceases at the time specified, whether or not they are surrendered,[85] since the option of the holders applies only to their right to retain possession of the bonds.[86]

§ 310. Application of Earnings and Income; Sinking Fund and Deposits

a. In general
b. Sinking funds
c. Interest payable out of particular fund
d. Diversion of funds
e. Compelling proper application of income

70. N.Y.—Continental Securities Co. v. New York, etc., R. Co., 111 N.E 484, 217 N.Y. 119.
51 C.J. p 879 note 54.

71. Pa.—Philadelphia, etc., R. Co. v. Lewis, 33 Pa. 33, 75 Am.D. 574.

72. U.S.—In re Wisconsin Cent. Ry. Co., D.C.Minn., 93 F.Supp. 579, applying New York law—In re Wisconsin Cent. Ry. Co., D.C.Minn., 63 F.Supp. 151, applying New York law.

73. U.S.—In re Wisconsin Cent. Ry. Co., supra.

74. U.S.—Metropolitan Trust Co. v. Railroad Equipment Co., Ohio, 108 F. 913, 48 C.C.A. 135.
N.J.—Van Riper v. Crooks, 4 N.J. Law J. 154.

75. U.S.—Metropolitan Trust Co. v. Railroad Equipment Co., Ohio, 108 F. 913, 48 C.C.A. 135.

76. Ind.—Morrison v. Eaton, etc., R. Co., 14 Ind. 110.

77. U.S.—Memphis, etc., R. Co. v. Dow, Ark., 7 S.Ct. 482, 120 U.S. 287, 30 L.Ed. 595.
Ark.—Southwestern Arkansas, etc., R. Co. v. Hays, 38 S.W. 665, 63 Ark. 355.

78. U.S.—Pollitz v. Farmers' L. & T. Co., C.C.N.Y., 53 F. 210.
N.Y.—Lyon v. New York, etc., R. Co., 13 N.Y.St. 732, affirmed 14 Daly 489, 15 N.Y.St. 348.

79. U.S.—Pollitz v. Farmers' L. & T. Co., C.C.N.Y., 53 F. 210.
51 C.J. p 880 note 64.

80. U.S.—Spies v. Chicago, etc., R. Co., C.C.N.Y., 40 F. 34, 6 L.R.A 565.

81. U.S.—Spies v. Chicago, etc., R. Co., supra.

82. U.S.—Spies v. Chicago, etc., R. Co., supra.

83. N.Y.—Thomas v. New York, etc., R. Co., 34 N.E. 877, 139 N.Y. 163.

84. N.Y.—Thomas v. New York, etc., R. Co., supra.

85. N.Y.—Henry v. Syracuse, etc., R. Co., 5 N.Y.S. 437, 57 N.Y Super. 59.

86. N.Y.—Henry v. Syracuse, etc., R. Co., supra.

a. In General

The gross earnings and income of a railroad company should be applied first to the payment of the necessary expenses and liabilities incident to the maintenance and operation of the road, then to the payment of interest on obligations, and then to the payment of liens in the order of their priority.

The gross earnings and income of a railroad company constitute a trust fund, in the hands of its officers, for the payment of its debts,[87] since ordinarily this is the only fund to which unsecured creditors may have recourse,[88] and should be applied first to the payment of the necessary expenses and liabilities incident to the maintenance and operation of the road,[89] then to the payment of interest on obligations,[90] and then to the payment of liens in the order of their priority.[91] Accordingly, as long as there are outstanding unliquidated debts which equitably have the right to have the income applied to the satisfaction thereof, a bondholder cannot compel its appropriation to the liquidation of his claim.[92] All the provisions of a bond must be considered in determining what income the holder should receive.[93]

Subject to the rules just stated, and in the absence of contract liens, or rights created by legal proceedings, the officers of a railroad company may exercise a reasonable and proper discretion as to the order in which its debts shall be paid,[94] and this discretion cannot be taken from them by notice to the company that a particular creditor intends to demand a preference.[95] The payment of net income to bondholders may rest in the discretion of the officers,[96] and the retention of net earnings as to a particular class of bondholders, and their application to betterments, may similarly be discretionary with the officers of the railroad.[97] Where a claim is a lien on property of the railroad company, however, the mere fact that it is a claim of a certain class so far as payable out of the earnings of the road does not preclude its payment from the proceeds of a sale of the property on which it is a lien if the earnings are insufficient to pay it.[98] Losses incurred prior or subsequent to a period during which earnings have accrued cannot be set off against or absorbed by such earnings, as against the rights of creditors to payment therefrom.[99]

Trust fund or sinking fund. Where a trust fund is created to secure a particular class of creditors only, creditors of such class may rightfully be paid

87. Ga.—Georgia Cent. R. Co. v. New York Cent. Trust Co., 69 S.E. 708, 135 Ga. 472.
51 C.J. p. 880 note 73.

88. Mo.—Van Frank v. Missouri Pac. R. Co., 89 Mo.App. 460

89. Wis.—Biltchik v. Green Bay & W. R. Co., 26 N.W.2d 633, 250 Wis. 177, certiorari denied 68 S.Ct. 216, 332 U.S. 835, 92 L.Ed. 408
51 C.J. p. 880 note 75

Railroad in possession of court

The net earnings of a railroad in possession of the court and operated by it are not exclusively the property of a mortgagee, but are subject to the payment of claims found to have superior equities, and debts accruing in earning the income must be paid therefrom before any part thereof may be applied to the use of the mortgagee.—In re Chicago, R. I. & P. Ry. Co., C.C.A.Ill., 90 F.2d 312, 113 A.L.R. 487, certiorari denied Bankers Trust Co. v. Wise, 58 S.Ct. 37, 302 U.S. 717, 82 L.Ed. 554.

Accrual of current claims

Although the time within which current claims must have accrued in order to constitute current expenses payable from a railroad's current income before the application thereof to a mortgage depends on the facts and circumstances of each case, a six-month period has long been generally recognized as reasonable in most instances, and this established practice has become largely accepted commercially.—In re Chicago, R. I. & P. Ry. Co., supra.

90. Ga.—Georgia Cent. R. Co. v. New York Cent. Trust Co., 69 S.E. 708, 135 Ga. 472.
Ohio.—Carey v. Pittsburgh, etc., R. Co., 2 Ohio Dec., Reprint, 85, 1 West L. Month. 338.

91. U.S.—Gilman v. Illinois, etc., Tel. Co., Iowa, 91 U.S. 603, 23 L.Ed. 405.
51 C.J. p. 881 note 77.

92. Colo.—Roberts v. Denver, etc., R. Co., 46 P. 880, 8 Colo.App. 504.

93. Wis.—Biltchik v. Green Bay & W. R. Co., 26 N.W.2d 633, 250 Wis. 177, certiorari denied 68 S.Ct. 216, 332 U.S. 834, 92 L.Ed. 408.

94. Ky.—Newport, etc., Bridge Co. v. Douglass, 12 Bush 673.

95. Ky.—Newport, etc., Bridge Co. v. Douglass, supra.

96. U.S.—Williams v. Green Bay & W. R. Co., N.Y., 66 S.Ct. 284, 326 U.S. 549, 90 L.Ed. 311.

Amounts payable out of earnings in lieu of interest

If payment of net income to debentures rested in directors' discretion, the question in determining right of debenture holders to recover amounts payable out of earnings in lieu of interest would normally be whether directors' discretion had been abused, which is the usual rule in suits to compel declaration of dividends.—Williams v. Green Bay & W. R. Co., supra.

97. Wis.—Biltchik v. Green Bay & W. R. Co., 26 N.W.2d 633, 250 Wis. 177, certiorari denied 68 S.Ct. 216, 332 U.S. 834, 92 L.Ed. 408

Where all gross earnings of railroad had been properly applied by directors, in that all not paid as interest, as dividends and as income had been consumed in operating expenses and maintenance of physical properties, holders of debentures could not complain that they should have been paid a larger dividend at the expense of maintenance of railroad.—Biltchik v. Green Bay & W. R. Co., supra.

Provision for determining income payable

Holders of debentures were not prejudiced by fact that railroad directors had not always acted strictly in accordance with provisions of debentures for determining amount of income payable on such debentures where earnings were all in fact applied to proper purposes to advantage of railroad and to advantage of such debenture holders thereby enhancing value of their debentures.—Biltchik v. Green Bay & W. R. Co., supra.

98. Tex.—Vollmer v. San Antonio, etc., R. Co., Civ.App., 47 S.W. 378, appeal dismissed 49 S.W. 579, 92 Tex. 444.

99. Ky.—Schmidt v. Louisville, etc., R. Co., 84 S.W. 314, 119 Ky. 287, 27 Ky.L. 21.

out of such fund without regard to other creditors.[1] As between creditors of the same class, if the fund applicable to their claims is insufficient to pay all, it should be divided among them pro rata.[2]

Mortgagees of stock of lessor railroad company. Bondholders to whom stock of a railroad company has been mortgaged as collateral security cannot in equity charge a lessee of the mortgaged road with earnings derived under the lease where there is no fraud in the lease,[3] nor are the earnings received by the lessee of the road impressed with a trust for the benefit of such mortgagees;[4] and the management controlling the lessor company is not bound to manage it exclusively in the interest of the mortgagees.[5]

b. Sinking Funds

A sinking fund for the payment of bonds of a railroad company, where provided for or required by statute or agreement, ordinarily is to be created and maintained only out of the net income of the company remaining after the payment of operating expenses and interest.

A sinking fund for the payment of bonds of a railroad company, where provided for or required by statute or agreement, ordinarily is to be created and maintained only out of the net income of the company remaining after the payment of operating expenses and interest.[6] Where the net income is insufficient to pay into the sinking fund the sum contemplated by the statute or agreement, the company cannot be required, unless otherwise provided, to make up the deficiency from income subsequently received,[7] although it has been said that the mere fact that the company is unable to make the required payments into the fund does not relieve it of its duty so to do.[8]

A sinking fund is a trust fund for the benefit of holders of the bonds for the payment of which it is created and maintained,[9] and so, when the property of a railroad company by which such a fund has been created is sold under a decree of foreclosure, bondholders are entitled to have the fund applied to the payment of their bonds as against all rights of holders of deficiency judgments entered in the foreclosure suit.[10] Where the statute or agreement providing for a sinking fund requires its investment in designated securities, the court is without authority to authorize a different form of investment without the consent of the bondholders.[11]

Unless otherwise provided, trustees of a sinking fund who use it to purchase outstanding obligations are bound to cancel those so purchased,[12] and they may not exercise any voting rights appurtenant thereto;[13] but where the agreement for the sinking fund provides that obligations so purchased shall remain in force and that interest on them shall be paid by the company and added to the fund, such interest payments must continue until the maturity of the mortgage.[14] A plan for the creation and maintenance of a sinking fund may be altered or abrogated and a different provision therefor made as long as the rights of the bondholders are not injuriously affected.[15]

c. Interest Payable Out of Particular Fund

Where a bond of a railroad company, or the trust deed under which it was issued, provides that interest on such bond shall be paid out of a particular fund, it is the duty of the trustee so to apply such fund.

Where a bond of a railroad company, or the trust deed under which it was issued, provides that interest on such bond shall be paid out of a particular fund, as from the proceeds arising from the sale of certain lands,[16] or the income of the road,[17] it is the duty of the trustee so to apply such fund; and if during a particular interest period the fund is insufficient to pay in full the interest then accruing the deficiency will accumulate and become a charge on such funds subsequently realized[18] unless such cumulation clearly appears to be contrary to the intention of the parties.[19]

1. U.S.—Central Trust Co. v. Chattanooga, etc., R. Co., C.C.Ga., 89 F. 388.
Ohio.—Hatry v. Painesville, etc., R. Co., 1 Ohio Cir.Ct. 426, 1 Ohio Cir. Dec. 238.
2. Ohio.—Hatry v. Painesville, etc., R. Co., supra.
3. U.S.—Gibson v. Richmond, etc., R. Co., C.C.N.Y., 37 F. 743, 2 L.R.A. 467.
4. U.S.—Gibson v. Richmond, etc., R. Co., supra.
5. U.S.—Gibson v. Richmond, etc., R. Co., supra.
6. Mass.—Opinion of Justices, 5 Metc. 596.
7. Mass.—Opinion of Justices, supra.
8. U.S.—New York Trust Co. v. Michigan Tract. Co., D.C.Mich., 193 F. 175.
9. U.S.—Central R., etc., Co. v. Farmers' L. & T. Co., C.C.Ga., 116 F. 700.
10. U.S.—Central R., etc., Co. v. Farmers' L. & T. Co., supra.
11. N.Y.—Clark v. St. Louis, etc., R. Co., 33 How.Pr. 21.
51 C.J. p. 881 note 95.
12. Mass.—New England Mut. L. Ins. Co. v. Phillips, 6 N.E. 534, 141 Mass. 535.
13. Mass.—New England Mut. L. Ins. Co. v. Phillips, supra.
14. N.Y.—Wilds v. St. Louis, etc., R. Co., 7 N.E. 290, 102 N.Y. 410.
15. Mass.—Phillips v. Eastern R. Co., 138 Mass. 122.
16. U.S.—Little Rock, etc., R. Co. v. Huntington, Ark., 7 S.Ct. 517, 120 U.S. 160, 30 L.Ed. 591.
17. Ohio.—Dayton, etc., R. Co. v. Shoemaker, 3 Ohio Cir.Ct. 473, 2 Ohio Cir.Dec. 270.
18. Ohio.—Dayton, etc., R. Co. v. Shoemaker, supra.
51 C.J. p. 882 note 6.
19. Ohio.—Dayton, etc., R. Co. v. Shoemaker, supra.

d. Diversion of Funds

The trustee under a trust deed securing bonds of a railroad company must take care that the company's income applicable to the payment of principal or interest on the mortgage debt is not improperly diverted therefrom.

The trustee under a trust deed securing bonds of a railroad company must take care that the company's income applicable to the payment of principal or interest on the mortgage debt is not improperly diverted therefrom.[20] It is a diversion or misapplication of funds to apply the income of the company to the payment of a debt or obligation while obligations having priority thereof are outstanding, without the consent of the superior obligees,[21] even though such application could be made on favorable terms and would be equitable,[22] and would probably be in the interest of the holders of such superior obligations.[23]

Creditors whose funds have been misapplied are entitled, to the extent of the misappropriation, to priority of payment out of funds otherwise applicable to the claims of the creditors who were improperly paid.[24] The fact, however, that claims not entitled to preference have been improperly paid from funds in the hands of receivers does not entitle a mortgagee to insist that the amount shall be deducted from funds applicable to preferred claims.[25]

e. Compelling Proper Application of Income

A contract creditor of a railroad company may maintain an action to enjoin a diversion or misapplication of the income or earnings of the company or to compel the application thereof to the payment of the proper indebtedness.

A contract creditor of a railroad company may maintain an action to enjoin a diversion or misapplication of the income or earnings of the company[26] or to compel the application thereof to the payment of the proper indebtedness;[27] or, where there has been a failure properly to apply the income or earnings, the creditor may bring a bill in equity for an accounting[28] except where the obligation to such creditor is merely contractual and not fiduciary.[29] Where there has been a misapplication, the creditor may recover in an action at law the amount of the fund which should have been applied to his claim.[30] The income of the road may also be attached by a trustee process for operating expenses.[31]

Right to inspection of balance sheet. Where a railroad mortgage gives bondholders the right to inspect the company's statement of earnings, interest, etc., the extent of their right depends on the reasonable intent of the language of the mortgage;[32] but in the absence of provision therefor bondholders have no right to such an inspection.[33]

§ 311. Maturity, Payment, Satisfaction, Release, or Discharge

a. In general
b. Payment before maturity
c. Payment in medium other than money
d. Surrender of evidence of indebtedness
e Release or discharge

a. In General

Payment of railroad bonds may be made on presentation to the issuing railroad or its fiscal agent.

Payment of railroad bonds may be made on presentation to the issuing railroad or its fiscal agent.[34] Bonds of a railroad company may be paid and discharged by the issuance and acceptance of new bonds[35] and must, as to unsecured creditors, be deemed paid and canceled by such a substitution where the transaction would otherwise operate in fraud of their rights.[36] Payment of railroad bonds must be made in currency which at the time of payment is legal tender.[37]

20. Mass.—First Nat. F. Ins. Co. v. Salisbury, 130 Mass. 303.

21. U.S.—Duncan v. Mobile, etc., R. Co., C.C.Ala., 8 F.Cas.No.4,137, 2 Woods 542.
51 C.J. p 882 note 9.

22. U.S.—Duncan v. Mobile, etc., R. Co., supra.

23. U.S.—Duncan v. Mobile, etc., R. Co., supra.

24. Ohio.—Hatry v. Painesville, etc., R. Co., 1 Ohio Cir.Ct. 426, 1 Ohio Cir.Dec. 238.

25. U.S.—Grand Trunk R. Co. v. Central Vermont R. Co., C.C.Vt., 88 F. 620.

26. U.S.—Barry v. Missouri, etc., R. Co., C.C.N.Y., 36 F. 228.
Ohio—Dayton, etc., R. Co. v. Shoemaker, 3 Ohio Cir.Ct. 473, 2 Ohio Cir.Dec. 270.

27. Ohio—Lane v. Baughman, 17 Ohio St. 642, 93 Am.D. 653.
51 C.J. p 882 note 17.

28. U.S.—New York Trust Co. v. Michigan Tract Co., D.C.Mich., 193 F. 175.
51 C.J. p 883 note 18.

29. N.Y.—Thomas v. New York, etc., R. Co., 34 N.E. 877, 139 N.Y. 163.

30. U.S.—U. S. v. Kansas Pac. R. Co., C.C.Kan., 26 F.Cas.No.15,505, 4 Dill. 367, reversed on other grounds 99 U.S. 455, 24 L.Ed. 289.

31. Mass.—Smith v. Eastern R. Co., 124 Mass. 154.

32. N.Y.—Pronick v. Metropolitan Trust Co., 74 N.Y.S. 577, 67 App.Div. 616.
51 C.J. p 883 note 22.

33. N.Y.—Pronick v. Metropolitan Trust Co., supra.

34. U.S.—Mahoning Inv. Co. v. Central Hanover Bank & Trust Co., D.C.N.Y., 30 F.Supp. 349.

35. U.S.—Canada Southern R. Co. v. Gebhard, N.Y., 3 S.Ct. 363, 109 U.S. 527, 26 L.Ed. 1020.

36. U.S.—Chattanooga, etc., R. Co. v. Evans, Tenn., 66 F. 809, 14 C.C.A. 116.
51 C.J. p 883 note 28.

37. U.S.—In re Missouri Pac. R. Co., D.C.Mo., 7 F.Supp. 1, affirmed 55 S.

Payment of the amount due on an obligation by another than the debtor company, without intent to extinguish the obligation and without any belief on the part of the former holder that it is extinguished, constitutes a purchase and not a payment or extinguishment;[38] and, where trustees under a mortgage executed by a railroad company purchase in their individual right a portion of its property at a foreclosure sale under a prior mortgage, their purchase cannot be treated as a payment of the mortgage on behalf of the company.[39] An officer of a railroad company who advances money with the understanding that he should be subrogated to the rights of the creditor against the railroad will not, in the absence of an express agreement with the debtor or creditor, be entitled to subrogation.[40]

Merger with stock. As a general rule the union in the same person of title to the stock and bonds of a railroad company does not work a merger thereof, when none is intended and the interest of the mortgagee does not require it.[41]

Acceleration, extension, and waiver of default. Although bonds are issued under a trust agreement giving the trustees the option to declare the principal due in case of default in the payment of interest, the holders of such bonds have no right so to accelerate the maturity thereof unless expressly given such power.[42] A provision in a trust deed authorizing bondholders to waive any default under its provisions does not authorize the waiver of payment of interest or interest coupons when due, or an extension of the time of payment thereof,[43] except where expressly otherwise provided,[44] but only a waiver of the power to declare the principal due under an acceleration clause;[45] nor does it authorize the waiver of an anticipated default.[46] Where such power to waive defaults is exercisable by a specified majority of the bondholders, it must be strictly exercised in order to be binding on the minority,[47] and an agreement by the required majority which does not purport to be binding on other bondholders, and which amounts only to an arrangement between the parties, is not effectual as a waiver.[48]

b. Payment before Maturity

Holders of bonds of a railroad company are not required, in the absence of a provision therefor in their bonds or in the trust deed under which such bonds were issued, to accept payment of the amount thereof before maturity.

Holders of bonds of a railroad company are not required, in the absence of a provision therefor in their bonds or in the trust deed under which such bonds were issued, to accept payment of the amount thereof before maturity,[49] and a statute, the effect of which is to make a mortgage debt become due before the time fixed in the mortgage, is unconstitutional and cannot be enforced.[50]

c. Payment in Medium Other than Money

Where a railroad company's promise to pay bonds or their interest is in the alternative, to pay either in money or some other medium of payment, the company has an option when payment falls due to pay money or to pay its equivalent in the other medium specified.

Ct. 407, 294 U.S. 240, 79 L.Ed 885, 95 A.L.R. 1352.

Payment in gold coin

Gold clauses in railroad bonds issued respectively in 1903 and 1930 were not contracts for payment in gold coin as a commodity or in bullion, but were contracts for payment of money intended to afford definite standard or measure of value and thus to protect against depreciation of currency and against discharge of obligations by payment of lesser value than prescribed, and such contracts were not repugnant to federal law when made.—Norman v. Baltimore & O. R. Co., N.Y., 55 S.Ct. 407, 294 U.S. 240, 79 L.Ed. 885, 95 A.L.R. 1352—U. S. v. Bankers' Trust Co., N.Y., 55 S.Ct. 407, 294 U.S. 240, 79 L.Ed. 885, 95 A.L.R. 1352.

38. U.S.—Ketchum v. Duncan, Ala., 96 U.S. 659, 24 L.Ed. 868.

39. Mich.—Griggs v. Detroit, etc., R. Co., 10 Mich. 117.

40. N.J.—Receivers of New Jersey Midland R. Co. v. Wortendyke, 27 N.J.Eq. 658.

Persons acting in representative, fiduciary, or official capacity as entitled to subrogation generally see Subrogation §§ 25–30, also 60 C.J. p. 782 note 98–p. 786 note 80.

41. Mich.—Ten Eyck v. Pontiac, etc., R. Co., 72 N.W. 362, 114 Mich. 494.

42. N.Y.—Watson v. Chicago, etc., R. Co., 153 N.Y.S. 293, 90 Misc. 388, affirmed 155 N.Y.S. 808, 169 App. Div. 663—Neldert v. Chicago, etc., R. Co., 153 N.Y.S. 658, 89 Misc. 282, affirmed 155 N.Y.S. 818, 169 App.Div. 677.

Cumulative power

Where the remedies given the trustees were expressly declared to be cumulative, a bondholder, in the absence of an express provision to the contrary, could declare the bonds due in the event of default, and, under such circumstances, the bondholder was entitled to use the bonds as a set-off against debts owed the railroad.—Lowden v. Iowa-Des Moines Nat. Bank & Trust Co., D.C. Iowa, 10 F.Supp. 430, affirmed, C.C.A., Iowa-Des Moines Nat. Bank & Trust Co. v. Lowden, 84 F.2d 856, certiorari denied 57 S.Ct. 109, 299 U.S. 584, 81 L.Ed. 430, and modification denied, C.C.A., 86 F.2d 378.

43. Utah.—Meissner v. Ogden, etc., R. Co., 233 P. 569, 65 Utah 1.

44. N.Y.—McClelland v. Norfolk Southern R. Co., 18 N.E. 237, 110 N.Y. 469, 6 Am.S.R. 397, 1 L.R.A. 299.

45. Utah.—Meissner v. Ogden, etc., R. Co., 233 P. 569, 65 Utah 1.

46. N.Y.—McClelland v. Norfolk Southern R. Co., 18 N.E. 237, 110 N.Y. 469, 6 Am.S.R. 397, 1 L.R.A. 299.

51 C.J. p. 883 note 35.

47. Utah.—Meissner v. Ogden, etc., R. Co., 233 P. 569, 65 Utah 1.

48. Utah.—Meissner v. Ogden, etc., R. Co., supra.

49. U.S.—Chicago, etc., R. Co. v. Pyne, C.C.N.Y., 30 F. 86.
N.Y.—Missouri, etc., R. Co. v. Union Trust Co., 51 N.E. 309, 156 N.Y. 592.

50. N.J.—Randolph v. Middleton, 26 N.J.Eq. 543.

Where a railroad company's promise to pay bonds or their interest is in the alternative, to pay either in money or in some other medium of payment, such as scrip, the company has an option when payment falls due to pay money or to pay its equivalent in the other medium specified[51] unless its right to exercise such option has been waived.[52] When the time for payment has passed, however, without payment having been made, the company's option is lost and the promisee becomes entitled to receive payment in money;[53] and the fact that he has accepted another medium for past payments does not amount to a waiver of such right.[54]

d. Surrender of Evidence of Indebtedness

Except where otherwise provided by the terms of a bond or other obligation of a railroad company, the surrender and delivery to the company of the evidence of indebtedness is not a prerequisite to the right to receive payment of the amount due thereon.

Except where otherwise provided by the terms of a bond or other obligation of a railroad company, the surrender and delivery to the company of the evidence of indebtedness is not a prerequisite to the right to receive payment of the amount due thereon.[55] So a railroad contractor who has negotiated notes received in part payment of his claim is not first required to take up such notes before obtaining a judgment and lien for his services, but the judgment may provide for their payment out of the sum allowed.[56]

e. Release or Discharge

A claim against a railroad company or a lien on its property may be released or discharged by any subsequent agreement between claimant and the company which shows an intention to adjust all existing controversies between the parties and mutually to release all existing obligations and liabilities.

A claim against a railroad company or a lien on its property may be released or discharged by any subsequent agreement between claimant and the company which shows an intention to adjust all existing controversies between the parties and mutually to release all existing obligations and liabilities;[57] but a mere change in the form of a mortgage debt, such as the substitution of new bonds for those originally secured, does not extinguish or affect the lien.[58] Where a railroad company pledges its own bonds as security for a debt, payment of the debt discharges the bonds.[59] The purchase of its bonds by a railroad company from the trustee before maturity and the pledge of them pursuant to a plan showing an intention to keep them alive will not constitute an extinguishment of such bonds.[60]

A court of equity may compel the trustees under railroad mortgage indentures to release a portion of the track or other property from mortgage liens,[61] as where a radical change in the situation occurred since the trust indentures were executed,[62] or where the liability of the land for taxes might be expanded.[63] The bondholders must be sufficiently represented in such proceeding,[64] as by a protective committee,[65] and the trustees and a single bondholder under each mortgage indenture are insufficient representation.[66] A lien on the property and franchises of a railroad company will not be

51. U.S.—Texas, etc., R. Co. v. Marlor, N.Y., 8 S.Ct. 311, 123 U.S. 687, 31 L.Ed. 303

52. U.S.—Dubuque, etc., R. Co. v. Pierson, Iowa, 70 F. 303, 17 C.C.A. 401.
51 C.J. p. 884 note 44.

53. U.S.—Texas, etc., R. Co. v. Marlor, N.Y., 8 S.Ct. 311, 123 U.S. 687, 31 L.Ed. 303.
Utah.—Meissner v. Ogden, etc., R. Co., 233 P. 569, 65 Utah 1.

54. U.S.—Texas, etc., R. Co. v. Marlor, N.Y., 8 S.Ct. 311, 123 U.S. 687, 31 L.Ed. 303

55. U.S.—Barry v. Missouri, etc., R. Co., C.C.N.Y., 27 F. 1.

56. Tenn.—McDonald v. Charleston, etc., R. Co., 24 S.W. 252, 93 Tenn. 281.

57. U.S.—Stewart v. Hoyt, Wis., 4 S.Ct. 519, 111 U.S. 373, 28 L.Ed. 461.
51 C.J. p. 884 note 51.

Substitution of security

Secretary of the treasury and interstate commerce commission were held authorized to consent to substitution of security for government loan to railroad.—New York Trust Co. v. Virginia Iron, Coal & Coke Co., C.C.A.Ga., 46 F.2d 248.

58. U.S.—Mowry v. Farmers' L. & T. Co., Wis., 76 F. 38, 22 C.C.A. 52.
51 C.J. p. 884 note 52.

59. Ill.—Galena, etc., R. Co. v. Stahl, 103 Ill. 67.

60. Ky.—Fidelity & Columbia Trust Co. v. Louisville Ry. Co., 81 S.W. 2d 896, 258 Ky. 817.

61. U.S.—Central R. Co. of New Jersey v. Central Hanover Bank & Trust Co., D.C.N.Y., 29 F.Supp. 826.—T. J. Moss Tie Co. v. Wabash Ry. Co., D.C.N.Y., 11 F.Supp. 277.

Order of public convenience and necessity

In determining whether trustees should release portion of tracks from mortgage lien, court is not bound by order of public convenience and necessity made by interstate commerce commission authorizing abandonment of tracks in question.—T. J. Moss Tie Co. v. Wabash Ry. Co., supra.

Remedy of trustees

The trustees may at any time apply to the court for further relief by securing a supplemental indenture covering easement which railroad would acquire in lieu of tracks abandoned.—T. J. Moss Tie Co. v. Wabash Ry. Co., supra.

62. U.S.—T. J. Moss Tie Co. v. Wabash Ry. Co., supra.

63. U.S.—Central R. Co. of New Jersey v. Central Hanover Bank & Trust Co., D.C.N.Y., 29 F.Supp. 826.

64. U.S.—Central R. Co. of New Jersey v. Central Hanover Bank & Trust Co., supra.—T. J. Moss Tie Co. v. Wabash Ry. Co., D.C.N.Y., 11 F.Supp. 277.

65. U.S.—T. J. Moss Tie Co. v. Wabash Ry. Co., supra.

66. U.S.—T. J. Moss Tie Co. v. Wabash Ry. Co., supra.

discharged by a judicial sale, in a suit to foreclose a superior lien, unless the junior lienholder has been made a party to the proceeding and a decree entered against him providing that his lien shall be discharged by the sale.[67]

§ 312. Actions on Bonds and Coupons

a. In general
b. Conditions precedent
c. Parties
d. Pleading and evidence

a. In General

The holder of unpaid bonds or interest coupons of a railroad company ordinarily may sue in assumpsit for the amount due thereon.

The holder of unpaid bonds or interest coupons of a railroad company ordinarily may sue in assumpsit for the amount due thereon,[68] notwithstanding a majority in interest of the holders of bonds of the same class have consented to waive their rights under the mortgage securing the bonds,[69] and such right to sue is not affected by remedies provided in the mortgage[70] unless the provisions of the mortgage or of a statute exclude it in express terms or by necessary implication.[71] A holder of unpaid coupons is not estopped to recover on them by mere delay after the making of an agreement by other holders to surrender their coupons on condition that the company use the funds otherwise applicable thereto for improving its road,[72] although he knew that the company was so applying such funds.[73]

The requirements of statutes as to process and notice to defendant must be met.[74] In at least one jurisdiction, in order to render a foreign railroad company amenable to personal service, it must be doing business in the state,[75] and it is not doing business in the state where its lines and properties are located outside the state and it merely maintains an advertising and information agency in the state.[76]

Enforcement of judgment. A judgment rendered in an action against a railroad company on a bond or interest coupon can be enforced only against property of the company not covered by the mortgage securing the bond.[77]

b. Conditions Precedent

A railroad company cannot take advantage of the nonperformance of conditions precedent prescribed by the bonds or by statute where the nonperformance is caused by its own wrong.

While conditions precedent to the right to bring action against a railroad company on its bonds or other obligations are sometimes prescribed thereby or by statute, the company cannot take advantage of a nonperformance of such conditions caused by its own wrong;[78] and it has been held that, where a condition is only for the benefit of the bondholders, a holder of nearly all of the bonds outstanding may bring an action without complying therewith.[79] The indenture may provide that a suit by bondholders cannot be brought unless the holders of a certain per cent of the bonds request the trustee to proceed,[80] and are thereby bound by the judgment of the trustee as to whether to resort to courts unless the specified per cent elect to request the trustee to proceed.[81] If the trustee acts in bad faith or declines to act at all, the bondholders are not bound by the restrictions in the indenture,[82] and may bring a derivative action in the right of the trustee.[83]

67. Pa.—Fidelity Title, etc., Co. v Schenley Park, etc., R. Co, 42 A 140, 189 Pa 363, 69 Am S.R. 815

68. U S—Manning v. Norfolk Southern R. Co, C C Va, 29 F 838. Pa—Ritter v Conshohocken R. Co, 11 Pa.Dist. 703.

69. U S—Manning v. Norfolk Southern R. Co., C C Va, 29 F. 838.

70. U.S.—Manning v. Norfolk Southern R. Co, supra. Pa—Philadelphia, etc., R. Co. v. Johnson, 54 Pa. 127.

71. U.S.—Ex parte New York Equitable Trust Co., Cal., 231 F. 571, 145 C.C.A. 457. 51 C J. p 884 note 59.

72. Utah.—Meissner v. Ogden, etc., R. Co., 233 P. 569, 65 Utah 1.

73. Utah—Meissner v. Ogden, etc., R. Co., supra.

74. Mo—State ex rel. Ferrocarriles Nacionales De Mexico v. Rutledge, 56 S W.2d 28, 331 Mo 1015, 85 A. L R. 1375, certiorari denied Ferrocarriles Nacionales De Mexico v. Rutledge, 53 S.Ct 689, 289 U S. 746, 77 L.Ed 1492.

75. Mo.—State ex rel Ferrocarriles Nacionales De Mexico v. Rutledge, supra.

76. Mo—State ex rel. Ferrocarriles Nacionales De Mexico v. Rutledge, supra.

77. Pa.—McDougall v. Huntingdon, etc., R, etc., Co., 143 A. 574, 294 Pa. 108—Ritter v. Conshohocken R. Co., 11 Pa.Dist. 703.

78. Tex.—Gulf, etc., R. Co. v. Winder, 63 S.W. 1043, 26 Tex.Civ.App 263. 51 C.J. p 885 note 63.

79. N.Y.—Buel v. Baltimore, etc., R. Co., 53 N.Y.S. 749, 24 Misc. 646.

80. N.Y.—Campbell v. Hudson & M. R. Co, 102 N.Y.S 2d 878, 278 App. Div 731, appeal granted 103 N.Y. S.2d 1012, 278 App Div. 696.

81. N.Y.—Campbell v. Hudson & M. R. Co., supra.

82. N.Y.—Campbell v. Hudson & M R. Co., supra.

83. N.Y.—Campbell v. Hudson & M. R. Co, supra.

Trustee urging granting of relief

In minority bondholders' action to compel specific performance of covenants in railroad mortgage indenture, where complaint alleged that trustee had notified railroad that bondholders' committee had demanded that covenants be performed, and trustee in answer alleged that it refrained from demanding dismissal of complaint, pleadings as a whole showed compliance with provision of indenture requiring three months'

Demand. Except where required by the terms of a bond, the mortgage under which it was issued, or a statute,[84] a demand of payment is not a condition precedent to the right to bring action therefor.[85] Where a demand is required to be made on a particular officer of the company, a demand on any other officer is insufficient.[86]

c. Parties

Other creditors or obligees of the company are not necessary parties to an action on a bond or coupon of the railroad company.

Other creditors or obligees of the company are not necessary parties to an action on a bond or coupon of a railroad company,[87] but a creditor not made a party thereto is not bound by any determination therein as to the relative priorities of the respective claims.[88] An assignee of railroad bonds, to whom the bonds have not been delivered, is a proper party to an action on the bonds by the assignor,[89] but not a necessary one,[90] unless the debtor company has some legal defense against the assignee alone.[91]

Interveners. Persons who are not necessary parties may be entitled to intervene in the action,[92] provided, where the right to intervene is governed by statute, such claimants are authorized by the statute to avail themselves of the remedy.[93]

d. Pleading and Evidence

In the absence of a statute providing otherwise, the rules relating to pleadings and evidence in other civil actions apply to actions on obligations of railroad companies.

Except as modified by special statute, the rules relating to pleadings in other civil actions apply to actions on obligations of railroad companies.[94] A petition in an action on a bond issued by a railroad company must set forth facts sufficient to show that the bond was issued for an authorized purpose,[95] but need not allege that the issuance of such bond was necessary.[96] The statement of a mere conclusion of the pleader is insufficient.[97] Where the cause of action is founded on an act of an officer of the company not within his ordinary authority, either express authority conferred by the board of directors to do the act, or ratification thereof, or estoppel to deny his authority, must be pleaded.[98] A petition of intervention must set forth all the facts necessary to show a right to the relief sought.[99] A demurrer to a petition claiming a preference should be overruled where any item on which the claim is founded is entitled to priority.[1]

Evidence and burden of proof. Immaterial and irrelevant evidence is inadmissible in actions against railroad companies on their bonds or other obligations.[2] Where a bond or other obligation is valid on its face, the burden of proving its invalidity is on one asserting it;[3] but where a statute requires the securities of railroad companies, with certain exceptions, to be approved by the railroad commission, the burden is on the company to show that it is one of the class excepted from the operation of the statute.[4]

§ 313. Enforcement of Claims against Property

Where a remedy by the levy of attachment or execution on the property of a railroad company is not available, the proper mode of enforcing payment of a claim

written notice from trustee of default in performance of covenants.—Campbell v. Hudson & M. R. Co., supra.

84. Ga.—Mason v. Cooper, 19 Ga. 543.

85. U.S.—Texas, etc., R. Co. v. Marlor, N.Y., 8 S.Ct. 311, 122 U.S. 687, 31 L.Ed. 303.
Ind.—Ferguson v. Despo, 34 N.E. 575, 8 Ind.App. 523.

86. Ga.—Mason v. Cooper, 19 Ga. 543.

87. Ohio.—Farmers' L. & T. Co v. Cincinnati, etc., R. Co, 10 Ohio Dec., Reprint, 481, 21 Cinc.L.Bul. 275—Carey v. Pittsburg, etc, R. Co., 2 Ohio Dec., Reprint, 85, 1 West.L.Month. 338.

88. Ohio.—Farmers' L. & T. Co. v. Cincinnati, etc., R. Co., 10 Ohio Dec., Reprint, 481, 21 Cinc.L.Bul. 275.

89. Tex.—Texas Western R. Co. v. Gentry, 8 S.W. 98, 69 Tex. 625.

90. Tex.—Texas Western R. Co. v. Gentry, supra.

91. Tex.—Texas Western R. Co. v. Gentry, supra.

92. Ohio.—Carey v. Pittsburgh, etc., R. Co, 2 Ohio Dec., Reprint, 85, 1 West.L.Month 338.
51 C.J. p 885 note 76.

93. Tex.—Gulf, etc., R. Co v. Winder, 63 S.W. 1043, 26 Tex.Civ.App. 263.

94. **Pleadings as a whole held to** show compliance with provision of indenture requiring three months' written notice from trustee of default in performance of covenants—Campbell v. Hudson & M. R. Co., 102 N.Y.S.2d 878, 278 App.Div. 731, appeal granted 103 N.Y.S.2d 1012, 278 App.Div. 696.

95. N.Y.—Miller v. New York, etc., R. Co., 8 Abb.Pr. 431, 18 How.Pr. 374.

96. N.Y.—Miller v. New York, etc, R. Co, supra.

97. U.S.—Veatch v. American L. & T. Co, Colo., 79 F. 471, 25 C.C.A. 39.

98. Tex.—Midland, etc, R. Co. v. Midland Mercantile Co, Civ.App., 216 S.W. 627.

99. U.S.—Grand Trunk R. Co. v. Central Vermont R. Co, C.C.Vt., 91 F. 561.

1. Wash.—Bellingham Bay Impr. Co. v. Fairhaven, etc., R. Co., 49 P. 514, 17 Wash. 371.

2. Ala.—Alabama City, etc., R. Co. v. Avenue Bank, etc., Co., 87 So. 195, 204 Ala. 602—Alabama City, etc., R. Co. v. Kyle, 87 So. 191, 204 Ala. 597.

3. N.Y.—Nichols v. Mase, 94 N.Y. 160.

4. Tex.—Davis v. Watertown Nat. Bank, Civ.App, 178 S.W. 593.

is to bring the company and its creditors into chancery where the funds and earnings of the road may be distributed equitably among the claimants.

Where a remedy by the levy of attachment or execution on the property of a railroad company is not available, the proper mode of enforcing payment of a claim is to bring the company and its creditors into chancery where the funds and earnings of the road may be distributed equitably among the claimants.[5] In such a proceeding a judgment creditor may subject the property of the company, or its interest therein, to the payment of his judgment.[6]

As a general rule a creditor at large or before judgment cannot proceed by a creditor's bill to reach assets of a railroad company, even if there is nothing liable to attachment or execution;[7] but, where a creditor is entitled to payment out of specific property or fund, a petition in the nature of a creditor's bill may be maintained without judgment first obtained,[8] and suit will lie to enjoin a diversion or misapplication of such fund or property.[9] In such a case a creditor may proceed for himself without making other creditors parties to his suit.[10] Where a holder of unpaid coupons which have accumulated by reason of a deficiency of the earnings applicable thereto sues in equity on some of the bonds for an accounting and afterward sues at law to recover on coupons attached to other bonds of the same issue, he is entitled to an accounting in the equity suit not merely for earnings prior to the commencement of such suit, but also for all earnings received thereafter until the accounts are stated,[11] and the law action on the coupons should be stayed as plaintiff's rights can be protected in the equity suit.[12]

B. FORECLOSURE OF LIENS AND MORTGAGES

§ 314. Right to Foreclose

a. In general
b. Default in payment of principal or interest

a. In General

The general rules applicable to the foreclosure of liens and mortgages regulate the right to foreclose a railroad lien or mortgage except to the extent that special statutes may govern.

Except in so far as it may be regulated by special statute,[13] the general rules applicable to the foreclosure of liens and mortgages govern the right to foreclose a railroad lien or a railroad mortgage.[14] Accordingly, in the absence of statutory restrictions, a mortgage or trust deed may be foreclosed on the failure of the railroad to pay at the maturity of the debt.[15] If the right to foreclose exists, the motive of the bondholder in purchasing the bonds and foreclosing is immaterial;[16] and, where a railroad mortgage is indivisible, there can be but one foreclosure.[17]

5. U.S.—Coe v. Pennock, C.C.Ohio, 5 F.Cas.No.2,942, affirmed 23 How. 117, 16 L.Ed. 436.
51 C.J. p. 885 note 98.
Attachment see Attachment § 74.
Enforcement of special assessments see Municipal Corporations § 1584.
Execution see Executions § 35.

6. Miss.—Vicksburg, etc., R. Co. v. McCutchen, 52 Miss. 645.
51 C.J. p. 886 note 99.

7. Ohio.—Darst v. Pittsburgh, etc., R. Co., 3 Ohio Dec., Reprint, 199, 4 Wkly.L.Gaz. 377.

8. Ohio.—Darst v. Pittsburgh, etc., R. Co., supra.

9. N.Y.—Weetjen v. St. Paul, etc., R. Co., 4 Hun 529.

10. Ohio.—Darst v. Pittsburgh, etc., R. Co., 3 Ohio Dec., Reprint, 199, 4 Wkly.L.Gaz. 377.
51 C.J. p. 886 note 5.

11. U.S.—Morgan v. Union Pac. R. Co., C.C.N.Y., 11 F. 692.

12. U.S.—Morgan v. Union Pac. R. Co., supra.

13. Tex.—Austin, etc., R. Co. v. Daniels, 62 Tex. 70.
51 C.J. p. 889 note 66.

14. N.Y.—Hollister v. Stewart, 19 N.E. 782, 111 N.Y. 644.
51 C.J. p. 889 note 67.
Foreclosure of:
Liens generally see Liens §§ 18-22.
Mechanics' liens see Mechanics' Liens §§ 263-354.
Corporate mortgages see Corporations § 1196 et seq.
Mortgages generally see Mortgages § 492 et seq.

15. Utah.—Meissner v. Ogden, etc., R. Co., 233 P. 569, 65 Utah 1.
51 C.J. p. 889 note 70.
Reorganization of railroads in equity and under bankruptcy act see infra § 339 and Bankruptcy §§ 881-962.
Moratorium statutes
(1) Statute imposing a moratorium on right to foreclose mortgage on real property was applicable to a trust indenture mortgage given by railroad corporation covering its realty, franchises, rents, profits, rolling stock and after-acquired property.—Delaware & Hudson Co. v. Utica, C. & B. R. Co., 21 N.Y.S.2d 410, 174 Misc. 403, affirmed 20 N.Y.S.2d 1012, 259 App.Div. 969, appeal granted 21 N.Y.S.2d 393, 259 App.Div. 986.

(2) An indebtedness of a railroad was "contracted for simultaneously with mortgage" within meaning of mortgage moratorium statute prohibiting during emergency actions on indebtedness if indebtedness originated or was originally contracted for simultaneously with the mortgage and is secured solely by the mortgage, where proceeds of mortgage bond issue were used to retire a previous bond issue, but mortgage did not secure former bonds.—Delaware & Hudson Co. v. Utica, C. & B. R. Co., supra.

(3) Moratorium statutes generally see Mortgages §§ 505, 845 b.

16. N.J.—McFadden v. Mays' Landing, etc., R. Co., 22 A. 932, 49 N.J.Eq. 176.
Improper motive as defense see infra § 318.

17. Conn.—Gates v. Boston, etc., R. Co., 5 A. 695, 53 Conn. 333.

The prior foreclosure of a mortgage of railroad property securing railroad bonds also collaterally secured by trust deeds given by various parties is not a prerequisite to the foreclosure of such trust deeds, where it would be useless and nothing would be realized therefrom.[18]

b. Default in Payment of Principal or Interest

A mortgage given to secure the payment of railroad bonds and interest coupons ordinarily may be foreclosed immediately on default in the payment of any installment of principal or interest.

On the mortgagee's compliance with its provision,[19] in the absence of statutory restrictions, a mortgage given to secure the payment of railroad bonds and interest coupons ordinarily may be foreclosed immediately on default in the payment of any installment of principal or interest,[20] to the extent of the installments which are due and unpaid,[21] especially where, by the terms of the mortgage, proceedings for the collection of interest by ordinary judgment and execution at law are forbidden,[22] and although the mortgage fails to provide expressly therefor.[23] This right immediately to institute foreclosure proceedings for the payment of interest is not affected by provisions in the mortgage for cumulative remedies.[24] Where the railroad company is hopelessly insolvent, a railroad mortgage may sometimes be foreclosed before there has been any default.[25]

Where the mortgage provides that the principal shall become due for purposes of foreclosure on a default in interest continuing for a specified time, the trustee may, on the default continuing for such length of time, proceed to the collection of the whole amount of principal and interest by a bill in equity without a formal declaration of the maturity of such principal, unless the mortgage so requires.[26]

Acceleration. Where it is so provided in the mortgage, the entire debt may become due with a consequent right of foreclosure on default in the payment of interest,[27] although such right may be waived,[28] but, where the statute authorizing the issuance of the mortgages definitely prohibits maturity before a fixed time, an acceleration clause in the mortgage is void.[29]

§ 315. Persons Entitled to Foreclose

a. In general
b. Trustee under trust deed
c. Bondholders

a. In General

A railroad mortgage ordinarily may be foreclosed by the legal holder of the mortgage or by the actual creditor.

The right to proceed for the foreclosure of a railroad mortgage is ordinarily in the legal holder of the mortgage, the mortgagee,[30] or trustee, as discussed infra subdivision b of this section, or in the actual creditor, that is, the one who is the real and beneficial owner of the debt or obligation secured, and who is entitled to receive the money due.[31] A pledgee of railroad bonds has a sufficient beneficial interest to ask for a foreclosure of the mortgage,[32] regardless of the wishes of the nominal mortgagee.[33]

A guarantor of railroad mortgage bonds, who by the express terms of the mortgage, is to be subrogated to all the rights of the mortgagees in respect of payments made by him, has a right to fore-

18. Ill.—Chicago, etc., Land Co v. Peck, 112 Ill. 408.

19. U.S.—Pennsylvania Co. for Ins. on Lives, etc., v. Philadelphia, etc., R. Co, C.C.Pa., 69 F. 482.
51 C.J. p 889 note 75.
Foreclosure of mortgage on default in payment of installment of principal or interest generally see Mortgages §§ 495(1)–495(6).

20. N.Y.—Van Benthuysen v. Central New England, etc, R. Co., 17 N.Y.S. 709, 62 Hun 627.
51 C.J. p 889 note 76.
Reorganization under bankruptcy act see Bankruptcy §§ 881–962.

21. N.Y.—Long Island L. & T. Co. v. Long Island City, etc, R. Co., 82 N.Y.S. 644, 85 App.Div. 36, affirmed 70 N.E. 1102, 178 N.Y. 588.
51 C.J. p 889 note 77.

22. U.S.—Pennsylvania L. Ins., etc, Co. v. Philadelphia, ete, R. Co., C.C.Pa., 69 F. 482.

23. U.S.—Central Trust Co. v. Texas, etc, R. Co., C.C.Mo., 23 F. 846.

24. U.S.—State Trust Co. v. Kansas City, etc, R. Co, C.C.Mo., 120 F. 398
51 C.J. p 889 note 80.

25. Tex.—McIlhenny v Binz, 13 S.W. 655, 80 Tex. 1, 26 Am.S.R. 705.
51 C.J. p 890 note 81.

26. U.S.—Morgan's Louisiana, etc, R. etc., Co v. Texas Cent. R. Co, Tex., 11 S.Ct. 61, 137 U.S. 171, 34 L.Ed. 625

27. Pa.—Northampton Trust Co. v. Northampton Tract. Co, 112 A. 871, 270 Pa. 199.
Acceleration in mortgage foreclosures generally see Mortgages §§ 495(3)–495(6).

28. N.Y.—Lyon v. New York, etc., R. Co., 13 N.Y.St. 732, affirmed 14 Daly 489, 15 N.Y.St. 848.
51 C.J. p 890 note 84.

29. U.S.—Howell v Western R. Co., N.C., 94 U.S. 463, 24 L.Ed. 254.

30. Conn.—Boston, etc, Air Line R. Co. v Coffin, 50 Conn. 150.
Persons entitled to foreclose:
Corporate mortgages see Corporations § 1202
Mortgages generally see Mortgages §§ 513–515.
Reorganization under bankruptcy act see Bankruptcy §§ 881–962.

31. Ky.—Sinking Fund Comrs. v. Northern Bank, 1 Metc. 174.
51 C.J. p 890 note 90.
Right of bondholders to foreclose see infra subdivision c of this section.

32. Ky.—Sinking Fund Comrs. v. Northern Bank, supra.
Pa.—Appeal of McCurdy, 65 Pa. 290
Right of pledgee to foreclose mortgage generally see Pledges § 70.

33. Ky.—Sinking Fund Comrs. v. Northern Bank, 1 Metc. 174.

close for interest payments made by him,[34] and this right cannot be denied on the ground that, since he would still remain bound on his guarantee, he would have the right to further foreclosures for future payments.[35]

Mechanics' lien. The right to foreclose a mechanics' lien is in the holder of the legal title or beneficial interest.[36]

b. Trustee under Trust Deed

A trustee under a railroad mortgage ordinarily may institute foreclosure proceedings for a breach of conditions in the mortgage.

A trustee under a railroad mortgage is ordinarily the proper party to institute foreclosure proceedings for a breach of conditions in the mortgage,[37] and in making a foreclosure a large discretion is vested in him,[38] and any limitations on his power to institute foreclosure proceedings should be strictly construed.[39]

Since, as discussed infra § 321, the bondholders are not necessary parties to a foreclosure proceeding by a trustee, they cannot control the action of the trustee as long as he is not guilty of misconduct,[40] does not prove himself incompetent,[41] or does not appear to have an adverse interest.[42] A provision authorizing the trustee to refuse to institute foreclosure proceedings until properly indemnified does not restrict or limit his rights in the matter of instituting suit.[43]

Where a trustee's title has become divested, he has no right to represent the bondholders in foreclosure proceedings;[44] and if some of the trustees refuse to act, a foreclosure suit may be prosecuted by the remaining trustee or trustees,[45] and those refusing to act may be made defendants.[46]

Where one of several trustees dies, the surviving trustee or trustees may maintain the suit,[47] and, although a suit commenced by several trustees does not abate on the death of one, it must be postponed until the vacancy is filled.[48]

Request of bondholders. Frequently the mortgage or trust deed contains provisions making the trustees' right to foreclose dependent on a request by a specified number or percentage of the bondholders,[49] yet, where the mortgagor is permitted to remain in possession, the trustee's right of foreclosure for an unpaid installment of principal or interest is not affected by a further provision that, on default in the payment of interest for a specified time, it should be the duty of the trustee to enforce the rights of the bondholders on the request of a specified number or percentage of the bondholders, although such request has not been made,[50] since such request is necessary only where the trustee wishes to proceed to foreclose or take possession without the intervention of any court,[51] or where the bondholders wish to coerce the trustee to proceed by a foreclosure action.[52] So a provision authorizing a majority of the bondholders on default to notify the trustee to take no further steps to sell the property until another default refers merely to a summary sale by the trustee alone, and

34. U.S.—Dows v. Chicago, etc., R. Co., C.C.Iowa, 7 F.Cas.No.4,048, affirmed Muller v. Downs, 94 U.S. 444, 24 L.Ed. 207.

35. U.S.—Dows v. Chicago, etc., R. Co., C.C.Iowa, 7 F.Cas.No.4,048, affirmed Muller v. Downs, 94 U.S. 444, 24 L.Ed. 207.

36. Wis.—Matzewitz v. Wisconsin Cent. R. Co., 123 N.W. 121, 140 Wis. 643.
51 C.J. p. 890 note 92.
Persons entitled to enforce mechanics' lien generally see Mechanics' Liens § 278.

37. Ohio.—Citizens Sav., etc., Co. v. Cincinnati, etc., Tract Co., 140 N.E. 280, 106 Ohio St. 577.
51 C.J. p. 890 note 99.
Rights, duties, and liabilities of trustees see supra § 293.

38. N.Y.—Farmers' L. & T. Co. v. New York, etc., R. Co., 94 N.Y.S. 928.
51 C.J. p. 890 note 1.
Method of foreclosure see infra § 317.

39. U.S.—Guaranty Trust, etc., Co. v. Green Cove Springs, etc., R. Co., Fla., 11 S.Ct. 512, 139 U.S. 137, 35 L.Ed. 116—Farmers L. & T. Co. v. Chicago, etc., R. Co., C.C.Ill., 61 F. 543

40. U.S.—Investment Registry v. Chicago, etc., R. Co., D.C.Wis., 213 F. 492, appeal dismissed 225 F. 1022, 140 C.C.A. 663.
51 C.J. p. 890 note 4.

41. Ky.—Phillips v. Southern Div., etc., R. Co., 60 S.W. 941, 110 Ky. 33, 22 Ky.L. 1530.

42. U.S.—Investment Registry v. Chicago, etc., Electric R. Co., D.C.Wis., 213 F. 492, appeal dismissed 225 F. 1022, 104 C.C.A. 663.
51 C.J. p. 890 note 6.

43. Ky.—Phillips v. Southern Div. Chesapeake, etc., R. Co., 60 S.W. 941, 110 Ky. 33, 22 Ky.L. 1530.

44. U.S.—Barnes v. Chicago, etc., R. Co., Wis., 7 S.Ct. 1043, 122 U.S. 1, 30 L.Ed. 1128.

45. Ky.—Phillips v. Southern Div. Chesapeake, etc., R. Co., 60 S.W. 941, 110 Ky. 33, 22 Ky.L. 1530.

46. Ky.—Phillips v. Southern Div. Chesapeake, etc., R. Co., supra.

47. Ky.—Phillips v. Southern Div. Chesapeake, etc., R. Co., supra.
51 C.J. p. 891 note 11

48. Mass.—Shaw v. Norfolk County R. Co., 5 Gray 162.
Abatement on death of one of several trustees see Abatement and Revival § 121.

49. Minn.—Seibert v. Minneapolis, etc., R. Co., 53 N.W. 1134, 52 Minn. 148, 38 Am.S.R. 530, 20 L.R.A. 535.
51 C.J. p. 891 note 14.

50. N.Y.—Long Island L. & T. Co. v. Long Island City, etc., R. Co., 82 N.Y.S. 644, 85 App.Div. 36, affirmed 70 N.E. 1102, 178 N.Y. 588.
51 C.J. p. 891 note 15.

51. U.S.—Morgan's Louisiana, etc., R., etc., Co. v. Texas Cent. R. Co., Tex., 11 S.Ct. 61, 137 U.S. 171, 34 L.Ed. 625.

52. N.Y.—Farmers' L. & T. Co. v. New York, etc., R. Co., 28 N.Y.S. 933, 78 Hun 213, reversed on other grounds 44 N.E. 1043, 150 N.Y. 410, 55 Am.S.R. 689, 34 L.R.A. 76.

a suit to foreclose may be maintained notwithstanding the opposition of the majority.[53]

c. Bondholders

Proceedings to foreclose a railroad mortgage may be instituted by a bondholder for himself and others where the trustee unreasonably neglects or refuses to do so or where the trustees are dead.

Bondholders ordinarily may proceed against the mortgaged property of a railroad only through the trustee,[54] and a provision in a railroad mortgage that there shall be a request by a certain number or percentage of the bondholders to the trustee to institute the foreclosure proceedings before a bondholder may institute a foreclosure suit should be strictly complied with,[55] unless it appears that such compliance is impossible[56] or that the trustees' interests are antagonistic.[57]

Nevertheless, foreclosure proceedings may be instituted by a bondholder, or any other beneficiary, for himself and others where the trustee unreasonably neglects or refuses to do so,[58] or where the trustees are dead.[59] Such a bill should ordinarily be filed against the company by one or more of the bondholders on behalf of themselves and all other bondholders similarly situated;[60] but, in the absence of any provision in the mortgage to the contrary, the default may be taken advantage of by the holder of a single bond or coupon[61] without the consent of the others.[62] If there are several successive mortgages, and complainants hold bonds secured by each mortgage, the bill may be filed on behalf of themselves and all the bondholders under each mortgage.[63] Since, a power of sale given to a trustee is only a cumulative remedy, as considered infra § 317, it does not deprive the bondholders of the right to foreclose.[64] If complainants to a bill of foreclosure to which the trustee has been made defendant elect to dismiss the bill as to the trustee, the court has the discretion to allow the trustee to file a bill for the benefit of all the bondholders.[65]

Where a trustee has properly instituted a foreclosure suit, a bondholder cannot prosecute an independent suit of foreclosure, but can only be heard for his individual rights by coming into the trustee's pending suit,[66] and, where some of the bondholders do not wish to foreclose, they may be allowed to purchase the bonds of those desiring a foreclosure and pay all costs, and thereby stay the proceedings.[67]

§ 316. Foreclosure without Action

Where the statute creating a lien or mortgage on railroad property for public aid granted to the railroad so provides, on default or breach of the conditions under which the aid was granted the proper officers may enter and sell the road in the prescribed manner.

The foreclosure of a lien or mortgage on railroad property for public aid granted to the railroad is usually regulated by the statute under which such lien or mortgage is created.[68] Under such statutes it is usually provided that, on default or breach of the conditions under which the aid was granted, the proper officers may enter and sell the road in the prescribed manner,[69] although a court of equity may interfere to restrain a sale of the railroad property where a sale under the circumstances would be inequitable.[70] Under such statutes a sale cannot be made without preserving a

53. U.S.—Toler v. East Tennessee, etc., R. Co., C.C.Tenn., 67 F. 168.

54. Pa.—Commonwealth v. Susquehanna, etc., R. Co., 15 A. 448, 122 Pa. 306, 1 L.R.A. 225—Ritter v. Conshohocken R. Co., 11 Pa.Dist. 703.
Actions on bonds and coupons see supra § 312.
Right of bondholders to foreclose mortgage generally see Mortgages § 513.

55. Utah.—Meissner v. Ogden, etc., R. Co., 233 P. 569, 65 Utah 1.
51 C.J. p. 891 note 21.

56. U.S.—Cochran v. Pittsburgh, etc., R. Co., C.C.N.Y., 150 F. 682.
51 C.J. p. 891 note 22.

57. U.S.—Cochran v. Pittsburgh, etc., R. Co., C.C.N.Y., 150 F. 682—Mercantile Trust Co. v. Lamoille Valley R. Co., C.C.Vt., 17 F.Cas.No. 9,432, 16 Blatchf. 324.

58. U.S.—Lowenthal v. Georgia Coast, etc., R. Co., D.C.Ga., 233 F. 1010.
51 C.J. p. 891 note 24.

59. U.S.—Galveston, etc., R. Co. v. Cowdrey, Tex., 11 Wall. 459, 20 L.Ed. 199.

60. N.J.—McFadden v. Mays' Landing, etc., R. Co., 22 A. 932, 49 N.J.Eq. 176.
51 C.J. p. 892 note 26.

61. Minn.—Seibert v. Minneapolis, etc., R. Co., 53 N.W. 1134, 52 Minn. 148, 38 Am.S.R. 530, 20 L.R.A. 535.
51 C.J. p. 892 note 27.
Improper motive as defense to foreclosure see infra § 318.

62. Ky.—Louisville, etc., R. Co. v. Schmidt, 52 S.W. 835, 21 Ky.L. 556.
N.J.—McFadden v. Mays' Landing, etc., R. Co., 22 A. 932, 49 N.J.Eq. 176.

63. U.S.—Galveston, etc., R. Co. v. Cowdrey, Tex., 11 Wall. 459, 20 L.Ed. 199.

64. U.S.—Alexander v. Iowa Cent. R. Co., C.C.Iowa, 1 F.Cas.No. 166, 3 Dill. 487.
51 C.J. p. 892 note 31.

65. U.S.—Alexander v. Iowa Cent. R. Co., supra.

66. U.S.—Stern v. Wisconsin Cent. R. Co., C.C.Wis., 22 F.Cas.No. 13,378, 8 Reporter 488, 1 F. 555.
Intervention and new parties see infra § 321 c.

67. N.Y.—Tillinghast v. Troy, etc., R. Co., 1 N.Y.S. 243, 48 Hun 420, affirmed 24 N.E. 1091, 121 N.Y. 649.

68. La.—Perry v. Clinton, etc., R. Co., 11 Rob. 412.
51 C.J. p. 892 note 40.
Foreclosure of mortgages without action generally see Mortgages §§ 525-603.

69. U.S.—Johnson v. Atlantic, etc., Transit Co., Fla., 15 S.Ct. 520, 156 U.S. 618, 39 L.Ed. 556.
51 C.J. p. 892 note 41.

70. U.S.—Ralston v. Crittenden, C.C.Mo., 13 F. 508, 3 McCrary 344.
51 C.J. p. 892 note 42.

lien on all the property and franchises sold for the purchase money, if it is not paid at the time of the sale.[71]

§ 317. —— By Exercise of Power of Sale

On breach of the conditions of a mortgage or deed of trust of railroad property the trustees may take possession of and sell the mortgaged property in the manner and on the terms prescribed by the mortgage or deed.

Where so provided in the mortgage or deed of trust of railroad property, the trustees may, when the conditions of the deed are broken, take possession of and sell the mortgaged property in the manner and on the terms prescribed by the deed, without a foreclosure before the courts;[72] and if they proceed to sell in the manner prescribed,[73] after compliance with any conditions in the deed,[74] the sale will divest the title of the railroad company.[75]

If a power of sale is to be executed by the trustee on certain contingencies, he may be controlled, restrained, and directed by a court of equity at the suit of parties standing in the relation of cestuis que trust, the rule for his guidance being derived from the instrument itself.[76]

Necessity of exercise of power. Where the trust deed authorizes a trustee either to sell at public auction or to proceed by suit to foreclose and to sell under the foreclosure decree, the trustee has discretion as to which method shall be used,[77] and such discretion is not subject to question by the bondholders[78] or to review by the court,[79] merely because another person might have exercised the discretion in a manner different from that adopted by the trustee. Foreclosure by the exercise of a power of sale is merely a cumulative remedy,[80] even though the mortgage or deed provides that a sale by the trustee shall be the exclusive method of foreclosure.[81]

A mortgage which authorizes the trustees to take possession for the purpose of operation and also authorizes them to sell the property, on default in payment of principal or interest, has been construed to permit the trustees to take possession and to refuse to sell,[82] or, after they have taken possession, to make a sale.[83]

§ 318. Defenses

In suits to foreclose a mortgage or lien on railroad property various defenses have been sustained, such as payment and the pendency of a prior suit.

In suits for foreclosure of mortgages and liens on railroad property various defenses have been urged.[84] It is a good defense to an action to foreclose a railroad mortgage that the defaulted bonds or coupons have been paid,[85] that a prior suit of foreclosure is pending,[86] or that, because control of the railroad was acquired by a competing road which was behind the foreclosure as a bondholder, the company has misapplied its earnings in order to bring about a default.[87]

On the other hand, it is not a good defense to an action to foreclose a mortgage that the value of the railroad stock is abnormally depressed by unusual financial conditions,[88] or by false reports and harassing suits by complainants,[89] and that

71. Mo.—In re Answers to Questions, 37 Mo. 129.

72. Ga.—Brunswick, etc., R. Co. v. Hughes, 52 Ga. 557.
51 C.J. p. 893 note 45.
Foreclosure of mortgage by exercise of power of sale generally see Mortgages §§ 544-603.
Reorganization under bankruptcy act see Bankruptcy §§ 881-962.

73. Ga.—Brunswick, etc., R. Co. v. Hughes, supra.
51 C.J. p. 893 note 46.

74. Ga.—Macon, etc., R. Co. v. Georgia R. Co., 63 Ga. 103.
Me.—Washington County R. Co. v. Canadian Colored Cotton Mills Co., 72 A. 491, 104 Me. 527.

75. Ga.—Brunswick, etc., R. Co. v. Hughes, 52 Ga. 557.
N.J.—Coe v. New Jersey Midland R. Co., 31 N.J.Eq. 105.

76. Pa.—Bradley v. Chester Valley R. Co., 36 Pa. 141.

77. N.Y.—Meisel v. New York Cent. Trust Co., 167 N.Y.S. 143, 179 App. Div. 795, affirmed 119 N.E. 1159, 223 N.Y. 589.

78. N.Y.—Meisel v. New York Cent. Trust Co., supra.

79. N.Y.—Meisel v. New York Cent. Trust Co., supra.

80. Ind.—Eaton, etc., R. Co. v. Hunt, 20 Ind. 457.

81. U.S.—Guaranty Trust, etc., Co. v. Green Cove, etc., R. Co., Fla., 11 S.Ct. 512, 139 U.S. 137, 35 L.Ed. 116.
51 C.J. p. 893 note 55.

82. Ga.—Macon, etc., R. Co. v. Georgia R. Co., 63 Ga. 103.

83. Ga.—Macon, etc., R. Co. v. Georgia R. Co., supra.

84. **Misconduct of trustee in commencing suit**
Intervening bondholders who are within the protection of the court cannot insist on the alleged misconduct of a trustee in commencing a foreclosure suit, as a ground for denying the foreclosure.—Dows v. Chicago, etc., R. Co., C.C.Iowa, 7 F.Cas. No. 4,048, affirmed Muller v. Downs, 94 U.S. 444, 24 L.Ed. 207.
Defenses in suits to foreclose:
Mechanics' liens generally see Mechanics' Liens § 273 et seq.
Mortgages generally see Mortgages § 618.
Limitations and laches see infra § 320.

85. Conn.—Chamberlain v. Connecticut Cent. R. Co., 9 A. 244, 54 Conn. 472.

86. U.S.—Mercantile Trust Co. v. Atlantic, etc., R. Co., C.C.Cal., 70 F. 518.
51 C.J. p. 893 note 61.

87. N.Y.—Farmers L. & T. Co. v. New York, etc., R. Co., 44 N.E. 1043, 150 N.Y. 410, 55 Am.S.R. 689, 34 L.R.A. 76.
51 C.J. p. 893 note 62.

88. U.S.—Toler v. East Tennessee, etc., R. Co., C.C.Tenn., 67 F. 168.

89. U.S.—Toler v. East Tennessee, etc., R. Co., supra.

there is good ground to anticipate a substantial enhancement of the value;[90] nor is it a defense that the foreclosure suit is actuated by improper motives,[91] as that complainants are bringing the suit in the interests of a rival company in order that it may purchase the railroad while the price is depressed,[92] or that complainant, a purchaser of bonds, purchased them from, and at the request of, the lessee of the mortgaged railroad and that he instituted foreclosure proceedings as a means of relieving the lessee from the inconvenience or loss arising from the operation of the road [93]

A defense may not be founded on rights arising between the mortgagor and a third person,[94] and a statutory remedy given to a state and affording a paramount lien for its indorsement of bonds cannot be set up as a defense by purchasers of the railroad in a contest between them and the holders of indorsed bonds secured also by the corporation's mortgage.[95] Neither a railroad company, its stockholders, nor a purchaser can deny the validity of the company's incorporation in a suit to foreclose a mortgage which it has executed,[96] but the invalidity of the mortgage may be set up as a defense by a purchaser of the railroad's property under an execution sale.[97]

In an action by an assignee, the mortgagor company may ordinarily set up the same defenses as would be available to it if the action was by the original holder,[98] and matters which are available as a defense in a foreclosure action may not be made the basis of a suit to enjoin such action.[99]

Counterclaim and set-off. As a general rule a claim or demand of the defendant against a complainant in a foreclosure suit cannot be set up by way of counterclaim or set-off.[1]

Estoppel to assert defense A defendant may be estopped to set up matters of defense which otherwise would be good.[2]

§ 319. Jurisdiction and Powers of the Court; Venue

A court of equity has jurisdiction to foreclose liens and mortgages on railroad property.

In the absence of special statute providing otherwise, the rules governing the jurisdiction and powers of courts in the foreclosure of liens and mortgages generally apply to actions for the foreclosure of liens and mortgages on railroad property.[3] A court of equity has jurisdiction to foreclose such liens or mortgages,[4] and it has power to decree a sale of the mortgaged railroad property on default in payment of interest, although the terms of the mortgage do not authorize such sale, and the bonds secured by the mortgage have not matured, if it appears that there is an urgent necessity for the sale.[5]

Where the property has been sold and transferred under a foreclosure decree, the court has no further jurisdiction in the suit to entertain a petition to enforce a claim against the property or to require the payment by the purchaser of any claim which has not been filed as required by the decree;[6] but where the court has reserved jurisdiction in the decree, it has power to render its decree effective by determining disputes between persons whose rights are dependent on matters fixed in the decree.[7]

Property in several states. A court of equity having jurisdiction of the parties and of the property as an entire indivisible thing may, in its dis-

90. U.S.—Toler v. East Tennessee, etc., R. Co., supra.

91. U.S.—Toler v. East Tennessee, etc., R. Co., supra.
51 C.J. p 893 note 66

92. U.S.—Toler v. East Tennessee, etc., R. Co., supra.

93. N.J.—McFadden v. Mays Landing, etc., R. Co., 22 A. 932, 49 N.J. Eq. 176.

94. U.S.—Foster v. Mansfield, etc., R. Co, C.C.Ohio, 36 F. 627, affirmed 13 S.Ct. 28, 146 U.S. 88, 36 L.Ed. 899.
51 C.J. p 894 note 69.

95. Ala.—Kelly v. Alabama, etc, R. Co, 58 Ala. 489.

96. U.S.—Farmers L. & T. Co. v. Toledo, etc., R. Co., C.C.Ohio, 67 F. 49.
51 C.J. p 894 note 73.

97. U.S.—Stewart v. Florida, etc., R. Co, Fla., 255 F. 616, 166 C.C.A. 650.

98. Ill.—Chicago, etc., R. Co. v. Loewenthal, 93 Ill. 433

99. Cal.—Waymire v. San Francisco, etc., R Co., 44 P. 1086, 112 Cal. 646
51 C.J. p 894 note 78.

1. N.J.—Ryan v. Anglesea R. Co., Ch, 12 A 539.
51 C.J. p 894 note 79.

2. U.S.—Central Trust Co. v. Washington County R. Co., C.C.Me., 124 F. 813.
51 C.J. p 894 note 75.

3. Mich.—Prather Engineering Co. v. Genesee Cir. Judge, 112 N.W. 502, 149 Mich. 53.
51 C.J. p 894 note 85.
Jurisdiction of courts in foreclosure of:
Liens generally see Liens §§ 18-22.
Mechanics' liens see Mechanics' Liens § 281
Mortgages generally see Mortgages §§ 614-616.

4. Tenn.—Luttrell v. Knoxville, etc., R Co, 105 S.W. 565, 119 Tenn. 492, 123 Am.S.R. 737.
51 C.J. p 894 note 86.
Reorganization of railroads in equity and under Bankruptcy Act see infra § 339 and Bankruptcy §§ 881-962.

5. Cal.—McLane v. Placerville, etc., R. Co., 6 P. 748, 66 Cal. 606.
51 C.J. p 895 note 87.

6. U.S.—Grand Trunk R. Co. v. Central Vermont R. Co., C.C.Vt., 103 F. 740.

7. U.S.—Farmers' L. & T. Co. v. Toledo, etc., R. Co., C.C.A.Ill., 32 F. 2d 11.
51 C.J. p 895 note 89.

cretion, foreclose a mortgage on railroad property, although embracing lands in another state, and may direct a sale thereof, and the execution of a proper conveyance to the purchaser,[8] subject to any liens existing against the property in the other state.[9] However, it has been held that, where a road in one state is consolidated with a road in another state on which a mortgage existed, although the mortgagee can maintain an action in the courts of the state in which the mortgaged road is situated, and have a sale of the road within the limits of such state, no jurisdiction exists in the courts of the former state to foreclose such mortgage.[10]

Conflict of jurisdiction. General rules as to conflict of jurisdiction between courts ordinarily apply in suits or actions to foreclose a railroad mortgage or lien.[11] The pendency in a state court of a suit to foreclose a railroad mortgage is not a bar to a similar suit in a federal court;[12] and similarly, the fact that a receiver has been appointed over the railroad property by a state court will not prevent the institution of foreclosure proceedings in a federal court,[13] although the latter court will not go so far as to interfere in any way with the receiver's possession of the property.[14]

Where the circuit court sitting in one state has assumed jurisdiction of a foreclosure of a mortgage covering a railroad partly in that state and partly in another, the fact that the circuit court for the state wherein the remaining portion of the line is situated entertains a similar bill will not oust the former of jurisdiction.[15] A procedure sometimes followed in foreclosing on a road running through more than one state is the filing of a bill to foreclose in one state supplemented by ancillary suits instituted in the other states through which the road runs.[16]

Venue. In some jurisdictions special statutes have prescribed the venue for actions to foreclose a lien or mortgage on railroad property,[17] such as statutes fixing the venue of actions by subcontractors and laborers to foreclose a lien in the court of the county or district where the work was done.[18]

§ 320. Limitations and Laches

A suit to foreclose a lien or mortgage on railroad property must be brought within such time as is fixed by statute.

A suit to foreclose a lien or mortgage on railroad property must be brought within such time as is fixed by special statutes governing limitations of actions in suits to foreclose such liens or mortgages,[19] and, if not brought within the time speci-

8. S.C.—Fuller v. South Carolina Tax Commission, 121 S.E. 478, 128 S.C. 14
51 C.J. p 895 note 94.
Foreclosure of mortgage on property in several states generally see Mortgages § 615a
Jurisdiction of equity of person or property generally see Equity § 79 et seq
Territorial limits of courts generally see Courts § 91.

9. S.C.—Hand v. Savannah, etc., R. Co., 12 S.C. 314

10. Ind.—Eaton, etc., R. Co. v. Hunt, 20 Ind. 457.

11. U.S.—Beekman v. Hudson River West Shore R. Co., C.C.N.Y., 35 F. 3.
Concurrent and conflicting jurisdiction:
Generally see Courts §§ 486-556.
Foreclosure of mortgages generally see Mortgages § 615a.

12. U.S.—Beekman v. Hudson River West Shore R. Co., supra.
Reorganization of railroads under Bankruptcy Act see Bankruptcy §§ 881-962.

13. U.S.—Mercantile Trust Co. v. Lamoille Valley R. Co., C.C.Vt., 17 F.Cas.No.9,432, 16 Blatchf. 324.

14. U.S.—Mercantile Trust Co. v. Lamoille Valley R. Co., supra.
51 C.J. p 895 note 3

15. U.S.—Atkins v. Wabash, etc., R. Co., C.C.Ill., 29 F. 161.

16. U.S.—Mercantile Trust Co. v. Kanawha, etc., R. Co., C.C.A.Ohio, 50 F. 874, reversed on other grounds 58 F. 6, 7 C.C.A. 3.
51 C.J. p 895 note 5.

17. Tenn.—Williams v. Birmingham, etc., R. Co., 168 S.W. 160, 129 Tenn. 680
Venue in suits to foreclose:
Mechanics' liens generally see Mechanics' Liens § 281.
Mortgages generally see Mortgages § 617 and the C.J.S. title Venue § 28, also 67 C.J. p 55 note 62 et seq

County through which road runs
Where, by foreclosure of a lien, a sale of the railroad's property and right of way in addition to its franchise is sought, the action can be brought only in a county through which the road runs.—Kentucky, etc., R. Constr. Co. v. Kentucky, etc., R. Co., 10 Ky.Op. 556.

18. **Statute as permissive**
Statute giving subcontractors and laborers a lien on railroad which "may" be enforced by suit in the circuit or chancery court of the county or district where the work was done does not limit the venue of suit to enforce liens, and does not prohibit suits in county where principal office of railroad is situated and in which a material part of its line is located although the work was done elsewhere.—Williams v. Birmingham, etc., R. Co., 168 S.W. 160, 129 Tenn. 680

19. U.S.—Birmingham Trust & Savings Co. v. Atlanta, B. & A. Ry. Co., D.C.Ga., 300 F. 173.
51 C.J. p 896 note 17.
Limitation of actions against railroad generally see supra § 24.
Limitations of actions on foreclosure of:
Mechanics' liens generally see Mechanics' Liens § 282
Mortgages generally see Limitations of Actions §§ 39, 53, 99 and Mortgages § 509.

Lien for coal furnished
U.S.—Birmingham Trust & Savings Co. v. Atlanta, B. & A. Ry. Co., supra.

Lien for live stock killed
U.S.—Birmingham Trust & Savings Co. v. Atlanta, B. & A. Ry. Co., D.C.Ga., 287 F. 561.

Effect of appointment of receiver
Appointment of a receiver for a railway does not extend the time

fied, the lien loses its validity.[20] Independently of statute a court of equity may refuse to decree a foreclosure where a complainant has been guilty of unreasonable delay in instituting his proceedings,[21] such as a delay sufficient to raise the presumption that the claim has either been paid or abandoned,[22] although, as a general rule, a delay short of the whole period allowed by the statute of limitations will not have this effect.[23]

§ 321. Parties

a. In general
b. Foreclosure of liens for labor, supplies, etc
c. Interveners and new parties

a. In General

In proceedings to foreclose a mortgage on railroad property the general rules governing parties to civil actions and, particularly, the rules regulating parties in suits to foreclose mortgages ordinarily apply.

General rules relating to parties to civil actions, and especially the rules governing parties in suits to foreclose mortgages, usually are applicable to proceedings to foreclose a mortgage on railroad property.[24] Accordingly, as a general rule all persons interested in the proceedings for the foreclosure of a railroad mortgage should be made parties.[25] There are exceptions to this rule, particularly in foreclosure proceedings in federal courts,[26] and ordinarily it is enough that sufficient parties to represent all the adverse interests of plaintiffs and defendants are brought before the court,[27] nevertheless, where the mortgage is executed directly to all the bondholders, they must all be joined as parties.[28]

In a suit by bondholders or others for the foreclosure of a railroad mortgage, the trustees of the mortgage bondholders should be made parties,[29] except that, under certain circumstances, a court may proceed to determine the issues between parties who are properly before it without the trustee being made a party.[30]

The doctrine also seems to be well settled that a trustee in a mortgage or trust deed speaks and acts for the bondholders and other beneficiaries, and that the latter are neither necessary nor proper parties unless the fitness of the particular trustee or his conduct as such in failing efficiently, honestly, or impartially to discharge his duty is brought in question,[31] particularly where the bondholders are numerous.[32] They may be admitted as parties, however, where the trustee is guilty of misconduct or shows himself incompetent properly to execute the trust or where he is shown to have interests adverse to those of the bondholders.[33]

It may be stated as a general proposition that the only proper parties to a bill to foreclose a railroad mortgage are the mortgagor, the mortgagee, and those who acquired rights under them subsequent to the mortgage.[34] Accordingly, proper but not necessary parties to a suit of foreclosure are the owner of the equity of redemption,[35] a lessee in

within which an owner of live stock previously killed by the railroad must bring action to enforce his lien under statute, even though a modified procedure by intervention in the receivership proceedings would be sufficient compliance with the statute.—Birmingham Trust, etc, Co. v. Atlanta, etc., R. Co., D C.Ga., 287 F. 561.

20. U.S.—Birmingham Trust & Savings Co. v. Atlanta, B & A. Ry. Co, D C Ga., 300 F. 173.
Ga.—Cherry v. North, etc., R. Co, 65 Ga. 633.

21. Ga.—Southern R. Co. v. Lancaster, 100 S E 380, 149 Ga. 434.
51 C J p 896 note 19.
Laches generally see Equity §§ 112–132.

22. U S —Gunnison v Chicago, etc., R. Co., C C.Wis, 117 F. 629, affirmed 130 F. 259, 64 C.C.A. 505, certiorari denied 25 S.Ct. 799, 197 U S. 623, 49 L Ed. 911.
Pa —Woods v. Pittsburgh, etc., R. Co., 99 Pa. 101.

23. Wash.—Bellingham Bay Impr. Co. v. Fairhaven, etc., R. Co., 79 P. 514, 17 Wash. 371.

24. U S.—Bowling Green Trust Co. v. Virginia Pass, etc, Co., C C Va., 132 F. 921.
Parties·
In equity see Equity §§ 133–170.
To actions generally see Parties § 1 et seq
To foreclosure of mortgages generally see Mortgages §§ 624–632.

25. U.S.—Bowling Green Trust Co. v. Virginia Pass., etc., Co., supra.

26. U.S.—Lowenthal v. Georgia Coast, etc, R. Co, D.C.Ga., 233 F. 1016, affirmed 238 F. 795, 151 C C.A. 645, certiorari denied 37 S.Ct. 405, 243 U.S. 644, 61 L.Ed. 944.
51 C.J. p 896 note 24.
Parties in federal courts see Federal Courts § 123.
Reorganization of railroads in bankruptcy see Bankruptcy §§ 881–962.

27. U S—Campbell v. Texas, etc., R. Co., C.C.Tex., 4 F.Cas.No.2,366, 1 Woods 368.
51 C.J. p 896 note 25.

28. U.S.—Nashville, etc., R. Co. v. Orr, Ala, 18 Wall 471, 21 L Ed. 810
51 C J. p 896 note 26.

29. Cal —California Safe Deposit, etc., Co v Sierra Valleys R Co., 112 P. 274, 158 Cal. 690, Ann Cas. 1912A 729.
51 C J. p 896 note 27.

30. U S.—Lowenthal v Georgia Coast, etc, R. Co., D.C.Ga., 233 F. 1010.
51 C J p 897 note 28.

31. U.S.—Central Trust Co. v. Cincinnati, etc., R. Co., C C.Ohio, 169 F. 466.
51 C.J. p 897 note 29

32. U.S.—Campbell v. Texas, etc, R. Co., C.C.Tex., 4 F.Cas No.2,366, 1 Woods 368.
51 C J. p 897 note 30.

33. Ky.—Phillips v. Southern Div. Chesapeake, etc., R Co, 60 S.W. 941, 110 Ky. 33, 22 Ky.L. 1530.

34. Ill.—Whitaker v. Irons, 133 N E. 265, 300 Ill. 254.

35. U.S.—Beekman v. Hudson River West Shore R. Co., C.C.N.Y., 35 F. 3.

possession of the mortgaged premises,[36] junior encumbrancers,[37] and others who are so connected with the subject matter that their presence before the court cannot be objected to as a misjoinder, although a full and complete decree could be made without regard to their rights.[38] On the other hand, one claiming a title adverse and superior to that of the mortgagor is not a proper party.[39]

A general creditor is neither a necessary nor a proper party to such a suit,[40] nor is a receiver, in a creditor's suit, operating the railroad.[41] In an action to foreclose a mortgage on the property of a consolidated railroad, the trustee and bondholders under a mortgage issued by a constituent company prior to the consolidation are neither necessary nor proper parties where the constituent railroad remained in existence for the purpose of discharging its mortgage.[42]

Neither the state nor the holders of state bonds issued in aid of a railroad company and guaranteed by the company, under a statute which does not make the bonds a lien on the road, are necessary parties to a foreclosure of a mortgage on the railroad;[43] nor is a state which is an indorser of bonds secured by a statutory mortgage a necessary party to a suit brought by the holders of the bonds to foreclose the mortgage.[44] Where at the time of commencement of the foreclosure suit an action is pending on behalf of the people to dissolve the railroad company on the ground of insolvency, neither a temporary receiver appointed in that action nor the people are necessary parties to the foreclosure suit,[45] although the court has power in its discretion to allow the people or the receiver to intervene therein.[46]

Foreclosure of one of several mortgages. Where separate mortgages are given on distinct portions of a road at different times to secure the debts of separate creditors, one mortgagee is not a necessary party to a suit which another mortgagee may bring to foreclose his mortgage;[47] and, where it appears that the making of a subsequent mortgagee a party to the foreclosure suit hinders and delays the suit, the bill should be dismissed as to him.[48]

b. Foreclosure of Liens for Labor, Supplies, Etc.

The general rules governing parties in proceedings to foreclose mechanics' liens ordinarily are applicable to proceedings to enforce a lien for work and labor or material furnished to a railroad.

In the absence of a special statutory provision otherwise, the general rules governing parties to a foreclosure of mechanics' liens ordinarily are applicable in a proceeding to enforce a lien for work and labor or material furnished against railroad property.[49] Thus, in such an action the owner of the road is generally a necessary party defendant,[50] although it is not necessary that all the companies interested in the railroad be made parties to the proceedings.[51]

Contractor and subcontractor. It seems to be the well settled rule that, in an action for material and labor furnished under a contract with a contractor or subcontractor, such contractor or subcontractor is a proper party defendant.[52] In some jurisdictions he is held not to be a necessary party,[53] while in others such person must be brought in as a party,[54] except where the contractor's liability to the lienor has been judicially determined by the judgment of a court of competent jurisdiction.[55]

In an action by a subcontractor to foreclose a

36. U.S.—Beekman v. Hudson River West Shore R Co, supra.
Conn.—Chamberlain v. Connecticut Cent. R. Co., 9 A. 244, 54 Conn. 472.

37. Ala.—Forrest v. Luddington, 68 Ala. 1.
51 C.J. p 897 note 37.

38. U.S.—Farmers' L. & T. Co. v. Cape Fear, etc, R. Co, C.C.N.C., 71 F. 38.
51 C.J. p 897 note 38.

39. Ill.—Whitaker v. Irons, 133 N.E. 265, 300 Ill. 254.
51 C.J. p 897 note 39.

40. N.Y.—Herring v. New York, etc., R Co., 12 N.E. 763, 105 N.Y. 340—Farmers' L. & T. Co. v. New Rochelle, etc., R. Co., 10 N.Y.S. 810, 57 Hun 376, affirmed 27 N.E. 410, 126 N.Y. 624.

41. U.S.—Continental Trust Co. v. Toledo, etc, R. Co., C.C.Ohio, 82 F. 642, modified on other grounds 95 F. 497, 36 C.C.A. 155, certiorari denied 20 S.Ct. 383, 176 U.S. 219, 44 L.Ed. 442.

42. N.Y.—Smith v. Pacific Impr. Co., 172 N.Y.S. 65, 104 Misc. 481.

43. U.S.—McKittrick v. Arkansas Cent. R. Co, Ark., 14 S.Ct. 661, 152 U.S. 473, 38 L.Ed. 518.

44. U.S.—Young v. Montgomery, etc., R. Co., C.C.Ala., 30 F.Cas.No. 18,166, 2 Woods 606.

45. N.Y.—Herring v. New York, etc., R. Co., 12 N.E. 763, 105 N.Y. 340.

46. N.Y.—Herring v. New York, etc., R. Co., supra.

47. U.S.—Bronson v. La Crosse, etc., R. Co., Wis., 2 Black 524, 17 L.Ed. 347.
51 C.J. p 897 note 42.

48. U.S.—Richards v. Chesapeake, etc., R. Co., C.C.Va., 20 F.Cas.No. 11,771, 1 Hughes 38.

49. N.Y.—Hilton Bridge Constr. Co. v. New York Cent., etc., R. Co., 40 N.E. 86, 145 N.Y. 390.
51 C.J. p 898 note 50
Parties on foreclosure of mechanics' liens see Mechanics' Liens § 284.

50. Mo.—Little Rock Trust Co. v Southern Missouri, etc, R. Co., 93 S.W. 944, 195 Mo. 669.
51 C.J. p 898 note 52.

51. Mo.—Morgan v. Chicago, etc., R. Co, 76 Mo. 161.

52. Or.—George v. Oregon, etc., R. Co., 247 P. 780, 118 Or. 502.
Tenn.—Williams v. Birmingham, etc, R. Co., 168 S.W. 160, 129 Tenn. 680.

53. Or.—George v. Oregon, etc., R. Co., 247 P. 780, 118 Or. 502.

54. Ala.—Gulf, etc., R. Co. v. Sharpe, 76 So. 856, 200 Ala. 530.
51 C.J. p 898 note 58.

55. Ark.—Robinson v. St. Louis, etc, R. Co., 113 S.W. 1008, 87 Ark. 611.

mechanic's lien based on the claim that the contractor has been fully paid in advance by the terms of his contract, the owner, although admitting that he has paid the contractor and accepted the work when finished, may make the contractor and an assignee of the contractor parties to the suit.[56] It has also been held that the contractor is at least a proper,[57] and perhaps a necessary,[58] party to an action to enforce a lien for a debt owed by a subcontractor; and in an action by an assignee to enforce such a lien for labor performed for a subcontractor both the contractor and the subcontractor are necessary parties.[59] Nevertheless, even though the principal contractor is a necessary party, failure to take timely objection to his omission is a waiver of the defect.[60]

c. Interveners and New Parties

In actions to foreclose railroad liens and mortgages the general rules governing the intervention of parties in actions to foreclose mechanics' liens and mortgages ordinarily are applicable.

The general rules governing the intervention of parties in actions to foreclose mechanics' liens and mortgages ordinarily are applicable to actions to foreclose railroad liens and mortgages.[61] As a general rule, any person having such an interest in, or lien on, the mortgaged premises and in the debt secured that his rights might be compromised by a decree in his absence can be allowed to intervene or be made a new party in the foreclosure, on his own petition[62] or by a supplemental bill,[63] except where he has an adequate remedy at law by an independent suit.[64] This rule may be applied in favor of interventions by individual bondholders seeking to be heard in an action by the mortgagee, trustee, or other bondholders who are not properly protecting their interests,[65] or in favor of the representatives of such bondholders,[66] or of purchasers at the foreclosure sale.[67]

On the other hand, claimants will not be allowed to intervene after a long delay when the whole case is about to be closed,[68] unless they offer to become responsible for what has occurred or what might occur from the delay thereafter,[69] and if claimant having a right of intervention neglects or refuses to come in and entitle himself to the benefit of a decree, equity will not assist him to set aside and annul it.[70]

It is within the discretion of the court[71] to refuse to allow claimants to intervene in respect of matters which are foreign to the litigation in the foreclosure suit,[72] and where the controversy of intervention is beyond the jurisdiction of the court, claimant will not be permitted to intervene.[73]

A railroad stockholder will not be allowed to intervene in a foreclosure suit unless he charges fraud or collusion between plaintiffs and defendant company.[74] Where the state is in some way interested in the subject matter of the suit, it may properly be permitted to intervene.[75]

56. N.Y.—Hilton Bridge Constr. Co v. New York Cent., etc, R Co., 40 N.E. 86, 145 N.Y 390.

57. Tenn.—Williams v Birmingham, etc., R. Co., 168 S.W. 160, 129 Tenn 680.
51 C J. p 898 note 61.

58. Tex.—Jasper, etc., R. Co. v. Peek, Civ.App., 102 S.W. 776.

59. Tex.—Austin, etc., R. Co. v. Rucker, 59 Tex. 587.

60. Tex.—Jasper, etc., R. Co. v. Peek, Civ.App, 102 S W. 776.
51 C J. p 898 note 64.

61. U.S.—Mercantile Trust Co v Atlantic, etc., R. Co., C.C.Cal., 63 F. 513.
51 C J. p 898 note 68.
Intervention:
Enforcement of mechanics' liens generally see Mechanics' Liens § 285.
Foreclosure of mortgages generally see Mortgages § 629.
In equity generally see Equity §§ 160–163.
Parties generally see Parties § 53 et seq.

62. U.S.—Cincinnati, etc., R. Co. v. Indianapolis Union R Co, C C.A Ohio, 279 F. 356, certiorari denied 42 S.Ct. 462, 258 U S 629, 66 L Ed 800, reversed on other grounds 46 S Ct. 221, 270 U.S 107, 70 L Ed. 490
51 C J. p 898 note 70.

63. U S—Mercantile Trust Co. v. Atlantic, etc., R. Co., C.C.Cal., 70 F. 518
51 C J p 899 note 71.

64. Mo—Van Frank v. St. Louis, etc, R. Co., 67 S.W. 688, 93 Mo App. 412
51 C J. p 899 note 72.

65. U.S—In re Schommer, C.C.A. Ill, 112 F.2d 311.
51 C.J. p 899 note 73.
Committee of bondholders was properly refused permission to intervene in mortgage foreclosure suit, where petition did not allege that trustee of mortgage had been guilty of neglect or fraud or represented opposing financial interest—Guaranty Trust Co. of New York v. Minneapolis & St. L. R. Co., C.C.A.Minn., 52 F.2d 418.

66. U S—Farmers L. & T. Co. v. Northern Pac. R. Co., C.C.Wis., 66 F. 169.

67. U.S.—Grand Trunk R. Co. v. Vermont Cent. R Co., C.C.Vt, 91 F. 569—Fitzgerald v. Evans, Ark., 49 F 426, 1 C.C.A. 307.
51 C J p 899 note 75.

68. U S—Trust Co. of America v. Norfolk, etc, R. Co., C.C.Va., 174 F 269
51 C J. p 899 note 76.

69. U S—Central Trust Co v Texas, etc, R. Co, C C Mo, 24 F 153.

70. Ga—Macon, etc., R. Co. v. Parker, 9 Ga. 377.

71. U S.—Credits Commutation Co. v. U S, Neb, 20 S Ct 636, 177 U. S. 311, 44 L.Ed. 782—Lisman v. Knickerbocker Trust Co., Mich, 211 F 413, 128 C C A. 85.

72. U S.—Credits Commutation Co. v. U. S, Neb, 20 S Ct. 636, 177 U.S 311, 44 L Ed. 782.
51 C J. p 900 note 80.

73. U S.—Cutting v. Florida R., etc, Co., C C Fla, 45 F. 444.

74. U S—Guarantee Trust, etc., Co v. Duluth, etc, R Co, C C.Minn, 70 F. 803—New York Cent. Trust Co. v. Marietta, etc., R. Co., C C. Ga., 48 F. 14.

75. Fla.—Hood v. Ocklawaha Valley R. Co, 84 So. 97, 78 Fla. 665.
51 C.J. p 900 note 83.

§ 322. Process and Appearance

A decree in a suit for the foreclosure of a lien or mortgage on railroad property is not binding on parties whose presence is essential unless such parties voluntarily appear or are served with process or notice.

In accordance with the rules governing process and notice or appearance in foreclosure suits generally, in order that a decree in a suit for the foreclosure of a lien or mortgage on railroad property may be binding on parties whose presence is essential thereto, it is necessary that such parties voluntarily appear or be served with process or notice.[76] In a foreclosure suit by junior mortgagees, senior mortgagees can be made parties only by service of process or voluntary appearance,[77] and a general notice calling on them to present their claims is not sufficient,[78] except where they are represented by trustees who are actual parties to the suit, in which case a notice calling on them to present their claims before the master will be effectual.[79]

§ 323. Pleading

a. In general
b. Enforcement of lien for labor, supplies, etc.
c. Plea, answer, and subsequent pleadings
d. Issues, proof, and variance

a. In General

The general rules of pleading in civil actions ordinarily are applicable in suits to foreclose a railroad mortgage.

General rules of pleading in civil actions, and especially the rules of pleading in actions to foreclose mortgages, ordinarily are applicable in suits to foreclose a railroad mortgage.[80] The allegations of a declaration, bill, or complaint in a suit in equity to foreclose a railroad mortgage should be distinct and specific.[81] Generally the bill should contain a proper statement of all the facts essential to complainant's cause of action, and sufficient to connect defendant or defendants with the liability asserted under the mortgage, and an appropriate prayer for relief.[82] It should allege facts showing complainant's ownership of the debt and the right to maintain the action,[83] and the default relied on as the basis of the suit.[84]

A bill in equity by bondholders seeking to foreclose a railroad mortgage, and also to recover bonds claimed by some of plaintiffs and alleged to be wrongfully held by one of the defendants, is not bad for multifariousness.[85]

b. Enforcement of Lien for Labor, Supplies, Etc.

The general rules of pleading in civil actions ordinarily apply in actions to foreclose a lien for labor and work or materials furnished to a railroad company.

General rules of pleading in civil actions and the rules of pleading in suits to enforce mechanics' liens usually apply in proceedings to foreclose a lien for labor and work or materials furnished to a railroad company.[86] Accordingly, the complaint or petition should conform to the requirements of the statute, and should allege all the facts on which such lien arises and which authorize its enforcement under the statute.[87] In the absence of an attachment, the bill must describe the property on which it is sought to enforce the lien with sufficient definiteness to identify and segregate it;[88] it must also set forth that the services or materials furnished were used in or on the road against which the lien is sought.[89]

76. U.S.—Hassall v Wilcox, Tex, 9 S.Ct. 590, 130 U.S. 493, 32 L.Ed 1001.
51 C.J. p 900 note 87.
Appearances generally see Appearances § 1 et seq.
Contractor as necessary party see supra § 321 b.
Process in actions:
Generally see Process § 1 et seq.
Against railroad companies generally see supra § 26.
Foreclosure of:
Mechanics' liens see Mechanics' Liens § 286 et seq.
Mortgages see Mortgages §§ 633, 634.

77. U.S.—Young v Montgomery, etc., R. Co., C.C.Ala., 30 F.Cas.No. 18,166, 2 Woods 606.

78. U.S.—Young v. Montgomery, etc., R. Co., supra.

79. U.S.—Young v. Montgomery, etc., R. Co., supra.

80. U.S.—Toler v East Tennessee, etc, R Co., C.C.Tenn, 67 F. 168.
Pleading:
Generally see Pleading § 1 et seq.
Foreclosure of mortgages generally see Mortgages §§ 635-651.
In equity generally see Equity § 179 et seq.

81. U.S.—Barnes v. Chicago, etc., R. Co., C.C.Wis., 2 F.Cas.No 1,016, 8 Biss. 514, affirmed 7 S.Ct. 1043, 122 U.S 1, 30 L.Ed. 1128.
Ala.—Savannah, etc, R. Co. v. Lancaster, 62 Ala. 555.

82. Ky.—Phillips v. Southern Div. Chesapeake, etc., R. Co., 50 S.W. 941, 110 Ky. 38, 22 Ky.L. 1520.
51 C.J. p 900 note 95.

83. U.S.—Toler v. East Tennessee, etc., R. Co., C.C.Tenn., 67 F. 168
51 C.J. p 900 note 98.

84. Ala.—Savannah, etc., R. Co. v. Lancaster, 62 Ala. 555.
51 C.J. p 900 note 99.

85. N.H.—Hale v. Nashua, etc., R. Co, 60 N.H. 333

86. Tex.—Carr v. Tudor, Civ.App., 265 S.W. 1079.
Pleading:
Generally see Pleading § 1 et seq.
In foreclosure of mechanics' liens generally see Mechanics' Liens §§ 292-307.
In equity generally see Equity § 179 et seq.

87. Tex.—Carr v. Tudor, supra.
51 C.J. p 901 note 4.

88. Tenn.—Williams v. Birmingham, etc., R. Co., 168 S.W. 160, 129 Tenn. 680.
51 C.J. p 901 note 5.

89. Ariz.—Arizona Eastern R. Co. v. Globe Hardware Co., 129 P. 1104, 14 Ariz. 397.
51 C.J. p 901 note 6.

A petition which sets up under one recorded lien claims for amounts due under separate contracts relating to the same undertaking, as to each of which liens are authorized, is not demurrable, where there is also declared the part of the work done under each contract;[90] but a petition in which several subcontractors, having separate and distinct claims, join to enforce their liens is bad as multifarious,[91] which defect is waived by an answer on the merits.[92]

In those jurisdictions in which subcontractors do not come within the lien statutes, a complaint which fails to show any privity of contract between the subcontractor and the railroad company,[93] or that the company is indebted to the contractor, who is not made a party to the proceeding,[94] is demurrable. On the other hand, where a lien claim cannot be assigned before perfection of the lien, a petition showing on its face that the assignment was made before the lien was so perfected is demurrable.[95]

c. Plea, Answer, and Subsequent Pleadings

The answer, plea, or subsequent pleading to a bill to foreclose a railroad mortgage or to enforce a railroad lien ordinarily is governed by the general rules of pleading in civil actions and by the rules governing pleas, answers, and subsequent pleadings in suits to foreclose mortgages and liens generally.

The answer, plea, or subsequent pleading to a bill to foreclose a railroad mortgage or enforce a railroad lien ordinarily is regulated by the general rules of pleading in civil actions and the rules governing pleas, answers, and subsequent pleadings in suits to foreclose mortgages or liens generally.[96] Accordingly, the plea or answer must be responsive to the bill or complaint and controvert all its material allegations.[97] Matters operating to defeat the right of foreclosure may be set up in the pleading,[98] but allegations foreign to matters set forth in the complaint may not be set up in the answer.[99] The answer must be filed within the proper time,[1] although leave to interpose an answer after a delay may be granted in a proper case.[2]

Where one entitled to a statutory lien on the property of an insolvent railroad company intervenes in a suit to foreclose a mortgage on such property for the purpose of having his claim decreed priority over the mortgage debts, since the original suit and the relief claimed by the intervener are both equitable, a plea of an adequate remedy at law is not necessary to entitle defendants to avail themselves of that defense.[3]

Cross bill. Where a bill of foreclosure is filed by one who has no title in the mortgage, there can be no foreclosure unless the trustee in the mortgage files a cross bill for that purpose.[4]

Amendments. The general rules governing the amendments of pleadings in equitable actions, ordinarily apply in actions to foreclose railroad liens and mortgages.[5]

d. Issues, Proof, and Variance

The general rules as to issues, proof, and variance in civil actions ordinarily apply in actions to foreclose railroad mortgages and liens.

The rules as to issues, proof, and variance applicable in civil actions generally, and particularly in actions to foreclose mortgages or mechanics' liens, ordinarily are applicable in actions to foreclose railroad mortgages or liens.[6] Accordingly, only such

90. Ga.—Hawkinsville, etc., R. Co. v. Beckham, 93 S.E. 109, 20 Ga. App. 431.

91. Ill.—Weidle v. Elgin, etc., R. Co., 152 Ill.App. 292.

92. Ill.—Weidle v. Elgin, etc., R. Co., supra.

93. Ark.—Tucker v. St. Louis, etc., R. Co., 26 S.W. 375, 59 Ark. 81.
Subcontractors as entitled to lien see supra § 279.

94. Ark.—Tucker v. St. Louis, etc., R. Co., supra.

95. Mo.—O'Connor v. Current River R. Co., 20 S.W. 16, 111 Mo. 185.
Assignment of lien claim see supra § 279.

96. Conn.—Chamberlain v. Connecticut Cent. R. Co., 9 A. 244, 54 Conn. 472
51 C.J. p 901 note 16.

Plea, answer, and subsequent pleadings:
Generally see Pleading § 99 et seq.
In equity generally see Equity § 258 et seq.
In suits to foreclose:
Mechanics' liens generally see Mechanics' Liens § 300 et seq.
Mortgages generally see Mortgages § 646 et seq.

97. U.S.—Brooks v. Vermont Cent. R. Co., C.C.Vt., 4 F.Cas.No.1,964, 14 Blatchf. 463.
Conn.—Chamberlain v. Connecticut Cent. R. Co., 9 A. 244, 54 Conn. 472.

98. Conn.—Chamberlain v. Connecticut Cent. R. Co., supra.
51 C.J. p 901 note 21.

99. U.S.—Fidelity Trust Co. v. Elverton, etc., R. Co., D.C.Ga., 235 F. 1009.
51 C.J. p 901 note 22.

1. U.S.—Central Trust Co. v. Texas, etc., R. Co., C.C.Mo., 23 F. 846, 24 F. 151.

2. U.S.—Central Trust Co. v. Texas, etc., R. Co., supra.
51 C.J. p 902 note 24.

3. Mo.—Van Frank v. Brooks, 67 S.W. 688, 93 Mo.App. 412.

4. U.S.—American L. & T. Co. v. East, etc., R. Co., C.C.Ala., 37 F. 242.

5. Ill.—Seymour v. Woodstock, etc., Tract. Co., 117 N.E. 729, 281 Ill. 84
51 C.J. p 902 note 29
Amendment of pleadings:
Generally see Pleading § 275 et seq.
In equity generally see Equity § 390 et seq.
In suits to foreclose:
Mechanics' liens generally see Mechanics' Liens § 306.
Mortgages generally see Mortgages § 650

6. Colo.—Barnes v. Colorado Springs, etc., R. Co., 94 P. 570, 42 Colo. 461.

matters as are properly in the case[7] and concern the parties thereto[8] need or may be proved. Questions as to the amounts and validity of the bonds secured will be determined on the hearing,[9] but in a foreclosure suit a question as to an adverse title to part of the mortgaged premises pending between the receiver of the railroad and a third person cannot be litigated,[10] nor can an issue as to the identity of the bondholder be raised where the right of the trustee to foreclose the mortgage is not dependent on a request of the bondholders.[11] The question of ownership of the bonds secured cannot properly be raised in the foreclosure suit, since such question properly comes up for consideration on the distribution of the proceeds.[12]

The petition in a proceeding to enforce a mechanics' lien should substantially agree with the statements contained in the lien which has been filed,[13] except that, where the statutes do not require any statement to be filed, a variance between the petition and the statement is immaterial.[14]

§ 324. Evidence

In suits to foreclose a lien or mortgage on railroad property the general rules of evidence in civil actions ordinarily are applicable.

General rules of evidence in civil actions and the rules of evidence governing suits to foreclose mortgages and mechanics' liens ordinarily apply in a suit to foreclose a lien or mortgage on railroad property[15] with respect to presumptions and burden of proof,[16] and the admissibility[17] and weight and sufficiency[18] of the evidence.

§ 325. Trial or Hearing, and Reference

The general rules governing the trial or hearing of civil actions ordinarily are applicable in actions to foreclose mortgages and liens on railroad property.

General rules relating to trial or hearing in civil actions, and the rules applicable to foreclose mortgages and mechanics' liens, ordinarily govern the trial or hearing of a foreclosure suit against a railroad company.[19] Such rules ordinarily control with respect to instructions[20] and the verdict or findings.[21]

Reference. The question as to the amount due on the lien or mortgage may be referred to a master or referee to find and report on, and exceptions may then be filed to his report and a decree made on the hearing and determination of such exceptions.[22] A reference may also be had to consider the ownership and validity of bonds[23] or to ascertain and fix the priorities of the various encumbrances on the railroad property.[24] Where a reference is made to ascertain the gross earnings and expenses of a certain section of the road covered by a mortgage, and

Issues, proof, and variance:
At law see Pleading §§ 512-516
In equity see Equity §§ 438-446.
In suits to foreclose:
Mortgages generally see Mortgages § 651.
Mechanics' liens generally see Mechanics' Liens § 307.

7. Colo.—Barnes v. Colorado Springs, etc., R. Co., supra.
51 C.J. p. 902 note 34.

8. Colo.—Barnes v. Colorado Springs, etc., R. Co., supra.
51 C.J. p. 902 note 35.

9. U.S.—Guaranty Trust, etc., Co. v. Green Cove Springs, etc., R. Co., Fla., 11 S.Ct. 512, 139 U.S. 137, 35 L.Ed. 116.

10. U.S.—Farmers' L. & T. Co. v. Green Bay, etc., R. Co., C.C.Wis., 6 F. 100, 10 Biss. 203.

11. N.Y.—Knickerbocker Trust Co. v. Oneonta, etc., R. Co., 101 N.Y.S. 241, 116 App.Div. 78, affirmed 80 N.E. 568, 188 N.Y. 38.

12. N.Y.—Knickerbocker Trust Co. v. Oneonta, etc., R. Co., supra.
51 C.J. p. 902 note 39.

13. Mo.—Mackler v. Mississippi River, etc., R. Co., 52 Mo.App. 516.
51 C.J. p. 902 note 40.

14. Iowa.—Nelson v. Iowa Eastern R. Co., 1 N.W. 434, 51 Iowa 184, 33 Am.R. 124.

Filing of statement see supra § 280.

15. U.S.—Tod v. Kentucky Union R. Co., Ky., 52 F. 241, 3 C.C.A. 60, 18 L.R.A. 305.

Evidence:
Generally see Evidence § 1 et seq.
In suits to foreclose:
Mechanics' liens generally see Mechanics' Liens §§ 308-310.
Mortgages generally see Mortgages §§ 652-655.

16. U.S.—Tod v. Kentucky Union R. Co., supra.
51 C.J. p. 902 note 44.

17. Ga.—Hawkinsville, etc., R. Co. v. Beckham, 93 S.E. 109, 20 Ga.App. 431.
51 C.J. p. 902 note 45.

18. Ky.—Simmons v. Fletcher, 170 S.W. 628, 161 Ky. 295.
51 C.J. p. 903 note 46.

19. U.S.—Ex parte New York Equitable Trust Co., Cal., 231 F. 571, 145 C.C.A. 457.
51 C.J. p. 903 note 48.

Trial or hearing:
Generally see Trial § 1 et seq.
In equity generally see Equity § 480 et seq.
In suits to foreclose:
Mechanics' liens see Mechanics' Liens §§ 311-316.
Mortgages see Mortgages §§ 675-683.

20. Ga.—Hawkinsville, etc., R. Co. v. Beckham, 93 S.E. 109, 20 Ga.App. 431.
51 C.J. p. 904 note 55.

21. Conn.—Washington Trust Co. v. Norwich, etc., Tract. Co., 92 A. 880, 89 Conn. 59.
51 C.J. p. 904 note 58.

Amount of recovery
In action to foreclose lien against railroad company, assessment of amount of recovery was not error where amount due plus interest and attorneys' fees fully accounted for sum in which judgment was rendered.—Algiers, Winslow & Western Ry. Co. v. Foulkes Contracting Co., 200 N.E. 438, 101 Ind.App. 632.

22. N.Y.—Central Trust Co. v. Umdilla Valley R. Co., 72 N.Y.S. 189, 35 Misc. 604.
51 C.J. p. 903 note 50.

23. U.S.—Guaranty Trust Co. v. Atlantic Coast Electric R. Co., C.C.N.J., 132 F. 68, modified on other grounds 138 F. 517, 71 C.C.A. 41.
51 C.J. p. 904 note 51.

24. U.S.—Kansas L. & T. Co. v. Sedalia Electric R., etc., Co., C.C.Mo., 103 F. 702.
51 C.J. p. 904 note 52.

it appears that such section has not been operated separately, but as a part of the whole road, and that the railroad company, although under a legal obligation to keep a separate account of the income and expenses of such section, has failed to do so, it is not an erroneous principle for the master to make a pro rata estimate of the earnings and expenses of the whole road.[25]

§ 326. Judgment or Decree

a. In general
b. Conformity to pleadings and proof
c. Nature and extent of property
d. Provisions as to bids and terms of sale
e. Adjudication of claims of interveners or other creditors
f. Payment and discharge
g. Opening, vacating, or modifying
h Operation and effect

a. In General

The judgment or decree in a suit to foreclose a railroad mortgage or lien ordinarily is governed by the rules regulating judgments or decrees in suits to foreclose a mortgage or mechanic's lien.

The rules applicable to judgments or decrees in suits to foreclose a mortgage or mechanic's lien ordinarily govern the judgment or decree in a foreclosure suit of a railroad mortgage or lien.[26] The judgment or decree should declare the fact, nature, and extent of the default which constitutes the breach of the condition of the mortgage[27] and the amount then due;[28] but it need not establish that a particular installment is due to any particular person.[29] The amount of the debt for which a foreclosure decree may be given is only the amount actually due and unpaid to complainant.[30] Such decree is not to be regarded as final as to the debts entitled to share in the distribution, since any other creditor may challenge the debts when the claims are produced in the master's office for ascertainment and classification.[31]

Order of sale In its usual form, a decree of foreclosure should contain an order for the sale of the premises for the satisfaction of the debt,[32] reserving the right to any party to redeem on paying the several amounts found due with costs.[33] In decreeing a sale the court is not bound by a mode of procedure prescribed by the mortgage in case of a sale by the trustee without foreclosure, but should exercise a sound discretion, having due regard to the interests of all parties.[34]

It has been held that, where railroad property is worth much more than the amount of the debt and interest, it should be leased by public auction for the shortest term that will bring the amount due and accruing interest,[35] if the company elects that it shall be so offered,[36] but if no one can be found who will take it for a term of years, it should be sold absolutely.[37]

Personal judgment. Since the proceeding to foreclose is in rem, generally no personal judgment can be rendered in an action to foreclose a mortgage or mechanics' lien against railroad property,[38] and in some jurisdictions statutes have been enacted expressly prohibiting the rendition of personal judgments except under specified conditions.[39] However, it has been held that, where that part of a right of way on which labor was performed was a part of an entire system of a railroad and necessary for the carrying out of the railroad duties to the public so that it could not be sold apart from the entire line to foreclose a laborer's or materialman's lien, it was proper for the court in the exercise of its equity

25. U.S.—Pullan v. Cincinnati, etc., Air-Line R. Co., C.C.Ind., 20 F.Cas. No.11,462, 5 Biss. 237.

26. Mo.—Bethune v. Cleveland, etc., R. Co., 51 S.W. 465, 149 Mo. 587.
51 C.J. p. 904 note 63.
Judgment or decree:
Generally see Judgments § 1 et seq.
Decree in equity generally see Equity § 580 et seq.
In suits to foreclose.
Mechanics' lien see Mechanics' Liens §§ 317-335.
Mortgage see Mortgages §§ 684-708.

27. U.S.—Chicago, etc., R. Co. v. Fosdick, Ill., 1 S.Ct. 10, 106 U.S. 47, 27 L.Ed. 47—Toler v. East Tennessee, etc., R. Co., C.C.Tenn., 67 F. 168.

28. U.S.—Chicago, etc., R. Co. v. Fosdick, Ill., 1 S.Ct. 10, 106 U.S. 47, 27 L.Ed. 47.
51 C.J. p. 904 note 65.

29. U.S.—Toler v. East Tennessee, etc., R. Co., C.C.Tenn., 67 F. 168.

30. U.S.—Union Trust Co. v. St. Louis, etc., R. Co., C.C.Mo., 24 F. Cas. No.14,403, 5 Dill. 1.

31. U.S.—Toler v. East Tennessee, etc., R. Co., C.C.Tenn., 67 F. 168.

32. U.S.—Farmers' L. & T. Co. v. Chicago, etc., R. Co., C.C.Ind., 27 F. 146.
51 C.J. p. 905 note 76.
Description of property
Description of railroad's property as given in judgment foreclosing materialman's statutory lien was sufficient to support order of sale.—Warren Cent. R. Co. v. Texas Creosoting Co., Tex.Civ.App., 62 S.W.2d 691.

33. U.S.—Bound v. South Carolina R. Co., S.C., 58 F. 473, 7 C.C.A. 322.

34. U.S.—Low v. Blackford, C.C.A. N.C., 87 F. 392, 31 C.C.A. 15.
51 C.J. p. 905 note 78.

35. Ky.—Bardstown, etc., R. Co. v. Metcalfe, 4 Metc. 199, 81 Am.D. 541.

36. Ky.—Bardstown, etc., R. Co. v. Metcalfe, supra.

37. Ky.—Bardstown, etc., R. Co. v. Metcalfe, supra.

38. U.S.—Tod v. Kentucky Union R. Co., Ky., 52 F. 241, 3 C.C.A. 60, 18 L.R.A. 305.
Minn.—Welsh v. First Div. St. Paul, etc., R. Co., 25 Minn. 314.

39. Mo.—Bethune v. Cleveland, etc., R. Co., 51 S.W. 465, 149 Mo. 587.
51 C.J. p. 905 note 74.

powers to direct a personal judgment against the railroad company.[40]

b. Conformity to Pleadings and Proof

A judgment or decree in a foreclosure suit against railroad property must conform to the pleadings and proof.

A judgment or decree in a foreclosure suit against railroad property must conform to the pleadings and proof.[41] Accordingly, the relief granted in the decree is limited by the bill or complaint, and ordinarily any relief not prayed for cannot be granted,[42] although a prayer for general relief will authorize any action in complainant's favor, shown by the proofs to be just and equitable and not inconsistent with the pleadings;[43] and, although the specific relief sought is a strict foreclosure, a decree for a sale of the property and for the enforcement of an agreement contained in the mortgage is appropriate under a prayer for general relief.[44]

Where all the claims are before the court with prayers for general affirmative relief, it may decree a sale of the property free from all liens,[45] but, where all the persons in interest are not represented before the court, a decree which directs a sale free of all liens and encumbrances without making provision for other bondholders, subsequent mortgagees, and other creditors is fatally defective.[46]

c. Nature and Extent of Property

In an action to foreclose a mortgage on railroad property the court may determine what property of the railroad is actually subject to the mortgage.

In an action to foreclose a mortgage on railroad property it is within the province of the court to determine what property of the railroad is actually embraced in, or subject to, the mortgage.[47] The foreclosure decree ordinarily can order a sale only of the entire road, as discussed infra § 327 d, and a judgment or decree which attempts to foreclose a lien or mortgage on a specified portion of the road instead of on the whole road is void,[48] except, as considered infra § 327 d, where the property is divisible, in which case a sale should be ordered of as much as will satisfy the amount due. Lands which are not included in the railroad mortgage may be sold under a decree of foreclosure, where the facts shown establish an equitable lien in favor of bondholders secured by the mortgage.[49]

A judgment foreclosing a laborer's lien on the equipment of a railroad need not specify the particular articles on which it is to operate, but it is sufficient to declare the lien foreclosed on the equipment to an extent sufficient to satisfy the judgment;[50] but it has been held that, where a mechanics' lien attaches to all the property of the railroad, the decree should direct the sale of both the real and personal property of the railroad.[51]

Where a railroad company, with the consent of a vendee, has constructed its road over land, and in an action to foreclose the vendor's lien the proceeds of the land outside of the right of way are insufficient to satisfy the lien, the right of way with the improvements thereon should not be sold to satisfy the lien for the balance, but should be condemned, the value thereof being ascertained by taking the value of the land and damages to the rest of the tract caused by the taking, and a judgment with a lien on the roadbed to secure its payment entered against the company for the amount so ascertained.[52]

d. Provisions as to Bids and Terms of Sale

In an action to foreclose a mortgage or lien on railroad property the decree should prescribe the terms and conditions of the sale.

The decree in an action to foreclose a mortgage or lien on railroad property should prescribe the terms and conditions of the sale, and, in the case of a mortgage, these terms may, if equity requires it, be different from the terms stipulated in the mortgage itself.[53] Although the terms of the sale must

40. Ind.—Pere Marquette R. Co. v. Baertz, 74 N.E. 51, 36 Ind.App. 408.
51 C.J. p 905 note 75.

41. Fla.—St. John, etc., R. Co. v. Bartola, 9 So. 853, 28 Fla. 82.

42. Fla.—St. Johns, etc., R. Co. v. Bartola, supra.

43. U.S.—Sage v. Iowa Cent. R. Co., Iowa, 99 U.S. 334, 25 L.Ed. 394.
51 C.J. p 905 note 88.

44. U.S.—Sage v. Iowa Cent. R. Co., supra.

45. U.S.—Bound v. South Carolina R. Co., S.C., 58 F. 473, 7 C.C.A. 322.

46. U.S.—New Orleans Pac. R. Co. v. Parker, La., 12 S.Ct. 864, 143 U.S. 42, 36 L.Ed. 66.

47. Mich.—Gasser v. Garden Bay R. Co., 171 N.W. 791, 205 Mich. 5.
51 C.J. p 905 note 94.
Designation of property or interest to be sold on mortgage foreclosure generally see Mortgages § 689 b.
Property covered by railroad:
Lien see supra § 278.
Mortgage see supra § 288.

48. N.J.—McFadden v. Mays' Landing, etc., R. Co., 22 A. 982, 49 N.J.Eq. 176.
51 C.J. p 905 note 96.

49. Ill.—Chicago, etc., Rapid Transit R. Co. v. Northern Trust Co., 90 Ill.App. 460, affirmed 63 N.E. 136, 195 Ill. 288.

50. Tex.—St. Louis, etc., R. Co. v. Sandal, 3 Tex.A.Civ.Cas. § 379.

51. Or.—George v. Oregon, etc., R. Co., 247 P. 780, 118 Or. 502.
Property subject to lien see supra § 278.

52. Ky.—Finnell v. Louisville Southern R. Co., 36 S.W. 553, 99 Ky. 570, 18 Ky.L. 410.

53. U.S.—Farmers' L. & T. Co. v. Green Bay, etc., R. Co., C.C.Wis., 6 F. 100, 10 Biss. 203.
51 C.J. p 905 note 5.

be reasonable[54] and of such character as to encourage bidding,[55] nevertheless the decree should contain some requirement which will evidence the bona fides of the bidder,[56] as well as secure the payment of the costs.[57]

The decree may prescribe that part of the bid shall be for cash,[58] or that a part may be paid in bonds secured by the foreclosed mortgage,[59] and that the sale shall be made subject to certain outstanding obligations;[60] or, on a subsequent presentation of intervening claims, the court may require as a condition precedent to the confirmation of the sale that the purchaser shall make a larger cash payment to meet all exigencies than that fixed by the terms of the decree.[61] As part of the terms, the purchaser may be required to assume the unpaid claims against the railroad.[62]

The court may, in its discretion,[63] fix an upset or minimum price below which the property may not be sold.[64] The amount of the upset price lies in the discretion of the court.[65] It should not be made too low[66] The upset price to be fixed must afford fair treatment to nonassenting bondholders having due regard to the probable fair value of the property reasonably ascertained.[67] On the other hand, the upset price should not be fixed at a figure so high that it will seriously impair the success of a reorganization which has been determined on to be necessary in the public interest and to be fair and equitable and desired by a large proportion of all of the affected bondholders.[68] It is no objection to a decree that it fails to fix such a minimum sale price, since the adequacy of any price may still be determined on the return of the sale.[69]

e. Adjudication of Claims of Interveners or Other Creditors

When warranted by the pleadings and proof, it is proper for the decree foreclosing a railroad mortgage or lien to settle and determine all claims and questions raised between the parties to the suit.

In an action to foreclose a railroad mortgage or lien, it is proper for the foreclosure decree, when warranted by the pleadings and proof, to settle and determine all claims and questions raised between the parties to the suit,[70] as to the ownership of the debt, the liability for, or exoneration from, it,[71] the proportion in which it should be shared,[72] or of its priority or preference,[73] and it may provide for

54. Del—Philadelphia Real Est. Trust Co. v. Wilmington, etc., Electric R. Co., 77 A. 828, 9 Del.Ch. 99.

55. Del—Philadelphia Real Est. Trust Co. v. Wilmington, etc., Electric R. Co, supra

56. Del—Philadelphia Real Est. Trust Co. v. Wilmington, etc., Electric R. Co., supra.
51 C.J. p 906 note 8.

57. Del—Philadelphia Real Est. Trust Co. v. Wilmington, etc, supra.

58. Iowa.—Sage v. Iowa Cent. R. Co, Iowa, 99 U.S. 334, 25 L.Ed. 394.

59. U.S.—Farmers' L. & T. Co. v. Green Bay, etc., R. Co., C.C.Wis., 6 F. 100, 10 Biss. 203.
51 C.J. p 906 note 11.

60. U.S.—Bound v. South Carolina R. Co., S.C., 58 F. 473, 7 C.C.A. 322.
51 C.J. p 906 note 12.

61. U.S.—Farmers' L. & T. Co. v. Green Bay, etc., R. Co., C.C.Wis, 6 F 100, 10 Biss. 203.

62. U.S.—Southern R. Co. v. Townsend, Ala., 161 F. 310, 88 C.C.A. 390, certiorari denied 29 S.Ct. 682, 212 U.S. 571, 53 L.Ed. 655.
51 C.J. p 906 note 14.

63. U.S.—Palmer v. Bankers' Trust Co., C.C.A.Colo., 12 F.2d 747.

64. U.S.—Guaranty Trust Co. of N. Y. v. Seaboard Air Line Ry. Co., D. C.Va., 60 F.Supp. 607.
51 C.J. p 906 note 17.

Principal function of upset price is a guaranty of at least a minimum cash sum to the nonassenting bondholders which tends also to be a maximum for the purchase price by reorganization committee representing majority assenting bondholders —Guaranty Trust Co of N. Y. v. Seaboard Air Line Ry Co, supra.

65. U.S.—Guaranty Trust Co. of N. Y v. Seaboard Air Line Ry. Co, supra.

Factors to be considered

In determining upset prices for sale of properties of railroad in equitable reorganization, court was not limited to opinions of valuation experts who testified for assenting creditors and could consider in support of higher upset prices, recent experience of railroad, its present and future prospects based on evidence of steadily increasing market price of new securities and continuation of comparatively large net earnings, improved physical condition of equipment during receivership, favorable cash position of receivership, as discounted by post war prospects, increased wages, and taxes —Guaranty Trust Co. of N Y. v. Seaboard Air Line Ry. Co., supra.

66. U.S.—New York Cent. Trust Co. v. Washington County R. Co., C.C. Me., 124 F. 813.
51 C.J. p 906 note 18.

"It should not be too low to be fair to the non-assenters, but also it should not be too high for fairness to the purchaser who must provide the cash for payment to non-assenters."—Guaranty Trust Co. of N. Y. v. Seaboard Air Line Ry. Co., D.C. Va., 60 F.Supp. 607, 616.

67. U.S.—Guaranty Trust Co. of N. Y. v. Seaboard Air Line Ry. Co., supra.

Upset price held fair to nonassenting bondholders

U.S.—Guaranty Trust Co. of N. Y. v. Seaboard Air Line Ry Co., supra.

68. U.S.—Guaranty Trust Co. of N. Y. v. Seaboard Air Line Ry. Co., supra.

69. Del.—Philadelphia Real Est. Trust Co. v. Wilmington, etc, Electric R. Co., 77 A. 828, 9 Del.Ch. 99.

70. U.S.—Toledo, etc., R. Co. v. Continental Trust Co, Ohio, 95 F. 497, 36 C.C.A. 155, certiorari denied 20 S.Ct. 383, 176 U.S. 219, 44 L.Ed. 442.

71. U.S.—Toledo, etc., R. Co. v. Continental Trust Co., supra.
51 C.J. p 906 note 21.

72. Ill.—Penn Mut. L. Ins. Co. v. Heiss, 31 N.E. 138, 141 Ill. 35, 33 Am.S.R. 273.
51 C.J. p 907 note 22.

73. Tex.—Orient Trust Co. v. St. Louis Union Trust Co., 126 S.W. 310, 59 Tex.Civ.App. 193.
51 C.J. p 907 note 23.

an accounting between the parties.[74] However, the decree should save and reserve any rights arising under a hostile and paramount title.[75] The court may pass a final decree as to the ascertained debts and retain the bill for the enforcement of others thereafter to be proved and established.[76]

Where the decree makes adequate provision for the protection of intervening bondholders,[77] the court is not required to determine in advance of the sale the fairness of a reorganization plan[78] or the adequacy of any bid.[79]

f. Payment and Discharge

Provision should be made in the decree foreclosing a railroad mortgage for the payment within a limited time of the amount found due, in default of which the equity of redemption is to be finally foreclosed or the property sold

The decree in a suit to foreclose a railroad mortgage should contain provision for the payment of the amount found due within a limited time, in default of which the equity of redemption is to be finally foreclosed or the property sold,[80] the extent of such time being a matter for the sound discretion of the court.[81] Where only a part of the mortgage debt is due, on payment of such amount the foreclosure decree will be suspended until a default again occurs.[82]

Where the amount due has been passed on and finally fixed by the court and the right of the mortgagor to pay the sum thus settled and fixed is clear, the court then has no discretion to withhold such restoration and refuse to discharge the receiver.[83]

g. Opening, Vacating, or Modifying

A final decree foreclosing a railroad mortgage or lien ordinarily may not be vacated by the court of its own motion after the expiration of the term at which it was granted.

A final decree foreclosing a railroad mortgage or lien ordinarily cannot be vacated by the court of its own motion after the expiration of the term at which it was granted;[84] nor may the court alter or amend its decree after the term with respect to any essential part thereof.[85] Subject to the foregoing, it may subsequently amend, modify, or open the decree of sale as to the mode of its execution,[86] the manner of sale,[87] the time of publication of such sale,[88] and the manner of distributing the proceeds arising therefrom,[89] provided the application therefor is seasonably made,[90] and sufficient ground therefor appears[91]

Where a decree of sale prescribes a limitation within which claims may be presented, the court may, in its discretion, in decreeing a confirmation of the sale, abrogate such limitation.[92]

Default judgment or decree. A proper party[93] in moving to open a default judgment entered in a

74. U.S.—Linder v. Hartwell R. Co., C.C.Ga., 73 F. 320.
51 C.J. p 907 note 24

75. U.S.—Compton v. Jesup, Ohio, 68 F. 263, 15 C.C.A. 397.

76. Vt.—Langdon v. Vermont, etc., R. Co., 54 Vt. 593.

77. U.S.—New York Guaranty Trust Co. v. Chicago, etc., R. Co., D.C.Ill., 15 F.2d 434.
51 C.J. p 907 note 27.

78. U.S.—New York Guaranty Trust Co. v. Chicago, etc., R. Co., supra.

79. U.S.—New York Guaranty Trust Co. v. Chicago, etc., R. Co., supra.

80. U.S.—Farmers' L. & T. Co. v. Chicago, etc., R. Co., C.C.Ind., 27 F. 146.
Ill.—Cairo, etc., R. Co. v. Cauble, 4 Ill.App. 133.

81. U.S.—Columbia Finance, etc., Co. v. Kentucky Union R. Co., Ky., 60 F. 794, 9 C.C.A. 264.
51 C.J. p 907 note 31.

82. U.S.—Chicago, etc., R. Co. v. Fosdick, Ill., 1 S.Ct. 10, 106 U.S. 47, 27 L.Ed. 47—Farmers' L. & T. Co. v. Chicago, etc., R. Co., C.C. Ind., 27 F. 146.

83. U.S.—Milwaukee, etc., R. Co. v. Soutter, Wis., 2 Wall. 510, 17 L.Ed. 900.

84. U.S.—Central Trust Co. v. Grant Locomotive Works, Ohio, 10 S.Ct. 736, 135 U.S. 207, 34 L.Ed. 97—Turner v. Indianapolis, etc., R. Co., C.C.Ind. & Ill., 24 F.Cas.No.14,259, 8 Biss. 380.
Opening and vacating judgment or decree:
Generally see Judgments § 228 et seq.
In equity generally see Equity § 622 et seq.
Judgment foreclosing mortgages generally see Mortgages § 699.
Opening and vacating sale see infra § 327 h.

85. U.S.—Turner v. Indianapolis, etc., R. Co., supra.

86. U.S.—Turner v. Indianapolis, etc., R. Co., supra.

87. Or.—Farmers' Loan Co. v. Oregon Pac. R. Co., 40 P. 1089, 28 Or. 44.
51 C.J. p 907 note 38.
Terminating obligation to operate road
After the court decreed sale of a railroad's property on foreclosure, the judge in vacation could not, by order, terminate the obligation of the purchaser to operate the road, without such issue having been prosecuted in the pleadings, without the parties directly interested having been afforded the opportunity to be present, and in contravention of statutes prescribing the manner of so doing.—State v. Beaton, 178 N.W. 1, 190 Iowa 216.

88. U.S.—Turner v. Indianapolis, etc., R. Co., C.C.Ind. & Ill., 24 F. Cas.No.14,259, 8 Biss. 380.

89. U.S.—Turner v. Indianapolis, etc., R. Co., supra.

90. U.S.—Duncan v. Atlantic, etc., R. Co., C.C.Va., 88 F. 840, 4 Hughes 125.
51 C.J. p 907 note 41.

91. **Grounds held insufficient**
U.S.—Carey v. Houston, etc., R. Co., C.C.Tex., 45 F. 433, 52 F. 671.

92. U.S.—Olcott v. Headrick, Tenn., 12 S.Ct. 81, 141 U.S. 542, 35 L.Ed. 851.
Confirmation of sale see infra § 327 g.

93. Ill.—St. Louis Union Trust Co. v. Wabash, etc., R. Co., 244 Ill. App. 466.
51 C.J. p 908 note 46.
Opening, vacating and modifying default judgments generally see Judgments §§ 333–340.

railroad foreclosure suit must show due diligence[94] and a meritorious defense.[95]

Public utilities commission, believing its jurisdiction was usurped by the court in a foreclosure proceeding, has a right to appear and ask for a modification or vacation of the decree.[96]

h. Operation and Effect

(1) In general
(2) Persons concluded

(1) In General

The general rules governing the operation and effect of judgments and decrees foreclosing liens and mortgages ordinarily are applicable to judgments and decrees foreclosing railroad liens and mortgages.

The general rules governing the operation and effect of judgments and decrees foreclosing liens and mortgages ordinarily apply to judgments and decrees foreclosing liens and mortgages on railroad property.[97] Thus, a decree of foreclosure and sale is a final decree, although further directions may be necessary with respect to its execution,[98] or although it may permit the subsequent assertion and litigation of claims on the proceeds of sale.[99] However, the decree does not of itself merge the debt secured by the mortgage or extinguish its lien.[1]

A foreclosure decree may not be collaterally attacked by a purchaser thereunder in subsequent proceedings against him.[2]

(2) Persons Concluded

All persons properly represented before the court in a proceeding foreclosing a mortgage or lien on railroad property, or who are charged with notice of the proceeding, are bound and concluded by the decree rendered therein.

All persons properly represented before the court in a proceeding to foreclose a mortgage or lien on railroad property, whether as plaintiffs or defendants, or who are charged with notice of such proceeding, are bound and concluded by the decree rendered therein and estopped to dispute the validity of the proceedings or the title of the purchaser.[3] This rule includes persons acquiring interests in the mortgaged premises pending the foreclosure proceedings.[4] A judgment or decree in a foreclosure suit fairly brought and honestly and regularly conducted by a bondholder for the benefit of all the bondholders is conclusive and binding on all the parties represented therein,[5] but, if such suit is not conducted in good faith and is used as an instrument to acquire advantages for plaintiff at the expense of those whom he has assumed to protect, the latter will not be bound thereby.[6] If the trustees of a mortgage on a railroad are parties to the suit, a decree rendered in the case is as binding on the bondholders secured by it, as if they had been made parties, unless they can show some fraud practised on, or connived at, by the trustees themselves.[7]

On the other hand, persons having an interest in, or liens on, the road who are not joined as parties in a foreclosure suit are not bound or in any way affected by the decree therein unless they consent thereto.[8] A party who has intervened in a foreclosure suit to which there are several parties defendant will not, on the rendering of a decree and the dismissal of all the parties save one from whom the intervener claims relief, lose his standing in the action.[9] An action by a bondholder to enforce an equitable lien in his own behalf, as well as in behalf of those in like interest who may come in and contribute to the expenses of, and join in, the prosecution of the suit, is binding only on those who are made or become parties to the suit and bear their proportion of the expenses;[10] and a suit brought by an individual bondholder in which no relief is sought

94. Ill.—St. Louis Union Trust Co. v. Wabash, etc., R. Co., supra.
51 C.J. p 908 note 47.

95. Ill.—St. Louis Union Trust Co. v. Wabash, etc., R. Co., supra.
51 C.J. p 908 note 48.

96. Colo.—People v. Colorado Title, etc., Co., 178 P. 6, 65 Colo. 472.

97. U.S.—St. Louis Southwestern R. Co. v. Jackson, Ark., 95 F. 560, 37 C.C.A. 165.
51 C.J. p 908 note 52.
Operation and effect of:
Foreclosure of:
Mechanics' liens see Mechanics' Liens §§ 334, 335.
Mortgages see Mortgages § 700 et seq.
Sale see infra § 327 i.

98. U.S.—Bronson v. La Crosse, etc., R. Co., Wis., 2 Black 524, 17 L.Ed. 347.

99. U.S.—Central Trust Co. v. Western North Carolina R. Co., C.C.N.C., 89 F. 24, modified on other grounds 93 F. 489, 39 C.C.A. 126.

1. U.S.—St. Louis Southwestern R. Co. v. Jackson, Ark., 95 F. 560, 37 C.C.A. 165.
51 C.J. p 908 note 56.
Sale as merger of debt and extinguishment of lien see infra § 327 i.

2. Iowa.—State v. Beaton, 217 N.W. 255, 205 Iowa 1139.

3. Pa.—Real Est. Trust Co. v. Perry County R. Co., 62 A. 25, 213 Pa. 57
51 C.J. p 908 note 59.

4. Iowa.—Jackson v. Centerville, etc., R. Co., 20 N.W. 442, 64 Iowa 292.

Pa.—Youngman v. Elmira, etc., R. Co., 65 Pa. 278.

5. N.Y.—Stevens v. Union Trust Co., 11 N.Y.S. 268, 57 Hun 498.

6. N.Y.—Stevens v. Union Trust Co., supra.

7. U.S.—Farmers' L. & T. Co. v. Northern Pac. R. Co., C.C.Wis., 94 F. 454
51 C.J. p 909 note 65.

8. U.S.—Hassall v. Wilcox, 9 S.Ct. 590, 130 U.S. 493, 32 L.Ed. 1001.
51 C.J. p 909 note 66.

9. Iowa.—Joliet Iron, etc., Co. v. Chicago, etc., R. Co., 1 N.W. 761, 51 Iowa 300.

10. Ohio.—Adelbert College v. Toledo, etc., R. Co., 5 Ohio S. & C.P. 14, 3 Ohio N.P. 15.
51 C.J. p 909 note 63.

or obtained in behalf of other bondholders and in which they are not permitted to become parties is not a bar to subsequent suits of bondholders of the same class.[11]

§ 327. Sale

a. In general
b. Notice and appraisement
c. Time for sale; postponement
d Nature and extent of property included in sale
e Price and terms of sale
f. Persons entitled to purchase
g. Confirmation of sale
h. Objections to sale, setting aside, and resale
i. Operation and effect

a. In General

Foreclosure sales of railroad property ordinarily are governed by the rules regulating foreclosure sales generally.

The general rules regulating foreclosure sales ordinarily apply to foreclosure sales of railroad property.[12] Thus, a sale must be supported by and within the limits and conditions prescribed by the decree ordering the sale to be made,[13] and, if the officer or master or commissioner in making the sale wrongfully interprets the order of the court, the sale is invalid,[14] even though the court has confirmed the record of the sale, but without its attention being directed to the mistake, or any issue being raised as to what the order really meant.[15]

Public or private sale. As a general rule the sale should be at public auction,[16] but, where the court is fully informed as to the selling value of the property, it may authorize a private sale.[17]

b. Notice and Appraisement

Notice of the foreclosure sale of railroad property must be given where such notice is required by statute or by the decree of foreclosure.

Due notice of the foreclosure sale of railroad property must be given in accordance with the provisions of the decree or statute governing such sales,[18] such as that notice shall be published in certain newspapers,[19] and shall definitely describe the property to be sold;[20] and in the case of a resale after failure of a purchaser to carry out the purchase notice must be given in the same manner.[21] It has been held that the description should be so definite that purchasers may know what they are purchasing.[22]

Appraisement. It is necessary under some statutes that the property shall be appraised in order to determine its actual value as a preliminary to the sale,[23] but a statute requiring an appraisement of the property before sale under powers contained in mortgage and trust deeds does not necessarily apply to a sale under a decree of foreclosure.[24]

c. Time for Sale; Postponement

A foreclosure sale of railroad property is to be held at such time as is fixed by statute, or, in the absence of statutory regulations, at such time as the court, in its discretion, shall designate.

11. Ohio—Adelbert College v. Toledo, etc., R. Co, supra.

12. U.S.—Bound v. South Carolina R. Co, C.C.S.C., 46 F. 315.

Foreclosure sales:
Corporate mortgages generally see Corporations § 1210
Mechanics' liens generally see Mechanics' Liens § 337 et seq.
Mortgages generally see Mortgages § 718 et seq

Inverse order of alienation
In suit to foreclose railroad mortgages, if stock in another corporation was not covered by mortgage, but was covered by another mortgage, doctrine of resort to property in inverse order of alienation could not be applied in connection with the other mortgage, where neither the stock, the owner of equity in the stock, nor the trustee under the other mortgage were within jurisdiction of court, and no default had been made on such other mortgage.—Palmer v. Bankers' Trust Co., C.C.A. Colo., 12 F.2d 747.

Deposit of proceeds of sale
Where trustee under deed of trust of stock, in receiving by way of deposit the proceeds of sale, acted as representative of court, and not in his capacity as trustee for the beneficiaries under the trust deed, his liability was to account to that court, and it should be applied to for relief —Meisel v. Central Trust Co. of New York, 167 N.Y.S. 143, 179 App.Div. 795, affirmed 119 N.E. 1059, 223 N.Y. 589.

13. U.S.—Milwaukee, etc., R. Co. v. Soutter, Wis., 2 Wall. 609, 17 L.Ed. 886.
51 C.J. p 909 note 69.

14. U.S.—Milwaukee, etc., R. Co. v. Soutter, supra.

15. U.S.—Milwaukee, etc., R. Co. v. Soutter, supra.

16. U.S.—Bound v. South Carolina R. Co, C.C.S.C., 46 F. 315.

17. U.S.—Bound v. South Carolina R. Co, supra.
51 C.J. p 909 note 73.

18. Pa.—Trust Co. v. Mauch Chunk, etc., R. Co., 1 Leigh Co.L.J. 84.
Notice of foreclosure sale.
Mechanics' liens see Mechanics' Liens § 341.
Mortgages generally see Mortgages § 724

19. U.S.—Sage v. Central R. Co., Iowa, 99 U.S. 334, 25 L.Ed. 394.
51 C.J. p 910 note 80.

20. Wis.—Milwaukee, etc., R. Co v. Milwaukee, etc, R. Co., 20 Wis. 174, 88 Am.D 740.

21. N.Y.—Matter of Philip, 160 N.Y.S. 49, 95 Misc. 709, affirmed 162 N.Y.S 1140, 176 App.Div. 924.
51 C.J. p 910 note 82.

22. Wis.—Milwaukee, etc., R. Co. v. Milwaukee, etc., R. Co., 20 Wis. 174, 88 Am.D. 740.

23. U.S.—Columbia Finance, etc., Co. v. Kentucky Union R. Co., Ky., 60 F. 794, 9 C.C.A. 264.
51 C.J. p 910 note 85.
Appraisement in mortgage foreclosure sales generally see Mortgages § 722.

24. Ark.—Southwestern Arkansas, etc., R. Co. v. Hays, 88 S.W. 665, 63 Ark. 355.

Plaintiffs in a foreclosure proceeding of railroad property are entitled to have the date of sale fixed after such sale has been decreed.[25] Under some statutes a sale cannot be ordered until after the expiration of a specified time after the decree of foreclosure.[26] In the absence of statutory regulations, the proper time for the sale is within the discretion of the court.[27] Where the rights of the parties have not been established, a sale ordinarily cannot be ordered without the consent of all the parties,[28] or until the rights of the various parties are fully ascertained and determined,[29] and in order to justify such a decree the amount due on the debt should be determined judicially.[30] An immediate sale should not be ordered where there is a reasonable prospect of payment by a faithful application of the profits of the road.[31]

On the other hand, where it is to the interest of all the parties concerned and the existing conditions otherwise require it, the court, in the exercise of its discretion, may order an immediate sale,[32] although all conflicting rights have not been adjudicated,[33] and even pending foreclosure proceedings,[34] or before the determination of the amount and validity of the bonds held.[35] Thus, if the rights of all the parties can be protected,[36] an immediate sale should be decreed where the indebtedness will continue to accumulate during the period of litigation,[37] or the amount of claims depends on a long course of litigation,[38] or where a continued operation by the receivers appears to be undesirable.[39]

Postponement. The court has power to order a postponement of the sale on petition of the parties in interest,[40] and should do so where any good cause is shown,[41] as where a sale on the day originally appointed would be unfair or oppressive or would result in material loss.[42]

Where the relative priorities of the various classes of creditors entitled to participate in the proceeds of the sale are ascertained, and the conditions are such that an early sale is indispensable, the sale will not be postponed until the interests of the individual creditors have been adjusted and the class to which their demands belong has been ascertained;[43] nor will a sale be postponed merely because a road is more prosperous than for some time past, where it would take some years of such prosperity to pay the already overdue installments.[44] It has been held that postponement will not be granted to allow time for the purpose of searching the title,[45] ascertaining the liens,[46] cataloging the property,[47] or forming a new corporation.[48] It is too late two days before the date fixed for the sale to ask for its postponement without a tender of the debt[49] or an equivalent to such tender.[50]

25. U.S.—New York Guaranty Trust Co. v. Chicago, etc., R. Co., D.C.Ill., 15 F.2d 434.
51 C.J. p. 910 note 88.
Time of mortgage foreclosures sale generally see Mortgages § 726.

26. U.S.—Benedict v. St. Joseph, etc., R. Co., C.C.Kan., 19 F. 173.
51 C.J. p. 911 note 4.

27. U.S.—Bowling Green Trust Co. v. Virginia Pass., etc., Co., C.C.Va., 164 F. 753, affirmed Metropolitan Trust Co. v. Central Trust Co., 168 F. 1021, 93 C.C.A. 671, certiorari denied 29 S.Ct. 697, 214 U.S. 516, 53 L.Ed. 1064.
51 C.J. p. 910 note 93.

28. U.S.—Bound v. South Carolina R. Co., C.C.S.C., 46 F. 315.

29. U.S.—Pennsylvania R. Co. v. Allegheny Valley R. Co., C.C.Pa., 42 F. 32.

30. U.S.—North Carolina R. Co. v. Swasey, N.C., 23 Wall. 405, 23 L.Ed. 136.
51 C.J. p. 910 note 1.
Master's report held not sufficient
U.S.—North Carolina R. Co. v. Swasey, supra.

31. U.S.—Coe v. Pennock, C.C.Ohio, 5 F.Cas.No.2,942, affirmed 23 How. 117, 16 L.Ed. 436.

32. U.S.—Cleveland First Nat. Bank v. Shedd, Pa., 7 S.Ct. 807, 121 U.S. 74, 30 L.Ed. 877.
51 C.J. p. 910 note 89.

33. U.S.—Cleveland First Nat. Bank v. Shedd, supra.
51 C.J. p. 910 note 90.

34. N.J.—Middleton v. New Jersey, etc., R. Co., 26 N.J.Eq. 269, reversed on other grounds Randolph v. Larned, 27 N.J.Eq. 557.

35. U.S.—Central Trust Co. v. Cincinnati, etc., R. Co., C.C.Ohio, 169 F. 466.

36. U.S.—Bowling Green Trust Co. v. Virginia Pass., etc., Co., C.C.Va., 164 F. 753, affirmed Metropolitan Trust Co. v. Central Trust Co., 168 F. 1021, 93 C.C.A. 671, certiorari denied 29 S.Ct. 697, 214 U.S. 516, 53 L.Ed. 1064.

37. U.S.—Cleveland First Nat. Bank v. Shedd, Pa., 7 S.Ct. 807, 121 U.S. 74, 30 L.Ed. 877.

38. U.S.—Turner v. Indianapolis, etc., R. Co., C.C.Ill. & Ind., 24 F.Cas.No.14,259, 8 Biss. 380.

39. U.S.—Bowling Green Trust Co. v. Virginia Pass., etc., Co., C.C.Va., 164 F. 753, affirmed Metropolitan Trust Co. v. Central Trust Co., 168 F. 1021, 93 C.C.A. 671, certiorari denied 29 S.Ct. 697, 214 U.S. 516, 53 L.Ed. 1064.

40. Tex.—U.S., etc., Trust Co. v. Young, 101 S.W. 1045, 46 Tex.Civ. App. 117.
Postponement of mortgage foreclosure sale generally see Mortgages § 727.

41. Tex.—U.S., etc., Trust Co. v. Young, supra.

42. Tex.—U.S., etc., Trust Co. v. Young, supra.
51 C.J. p. 911 note 7.

43. S.C.—Hand v. Savannah, etc., R. Co., 13 S.C. 467.

44. U.S.—Duncan v. Atlantic, etc., R. Co., C.C.Va., 88 F. 840, 4 Hughes 125.

45. N.Y.—Matter of Philip, 160 N.Y.S. 49, 95 Misc. 709, affirmed 162 N.Y.S. 1140, 176 App.Div. 924.

46. N.Y.—Matter of Philip, supra.

47. N.Y.—Matter of Philip, supra.

48. N.Y.—Matter of Philip, supra.

49. U.S.—Duncan v. Atlantic, etc., R. Co., C.C.Va., 88 F. 840, 4 Hughes 125.

50. U.S.—Duncan v. Atlantic, etc., R. Co., supra.

d. Nature and Extent of Property Included in Sale

On a foreclosure sale of railroad property, only such property may be sold as is authorized by the decree and a sale under a decree of sale of the road ordinarily must be as an entirety.

A foreclosure sale of railroad property includes only the property which the decree ordered to be sold together with the accompanying rights and franchises necessary to its profitable use, and lawfully included in the mortgage and sale,[51] and a sale of more property than is authorized by the decree to be sold is invalid.[52]

Sale of parcels or in gross. As a general rule the railroad cannot be cut into fragments and separate portions sold at different sales, but a sale under a decree of sale of the road and all property rights and franchises must be as an entirety,[53] with a division of the proceeds,[54] although the road runs through several counties or states.[55] This is because the public interest in having the railroad continue its operation without interruption demands that the road be not sold piecemeal.[56]

Where, however, the property is susceptible of division, the court may order it to be sold separately;[57] if for the benefit of creditors,[58] a road may be offered for sale in its entirety with an alternate offer by parcels.[59] The road is to be sold as an entirety, even where it is covered by divisional mortgages, unless it is shown to be more advantageous to sell it by divisions.[60]

The court may order a sale and division of the proceeds of a central power house,[61] or of the entire rolling stock where it cannot be equitably divided,[62] and on a division sale it is proper, where other lienholders and creditors are protected, to sell, with one of the constituent parcels, equipment used for the operation of that parcel, although it was not subject to the mortgage lien.[63]

In the separation of a railroad into parcels, a court of equity is not bound to fix the division to correspond with the several mortgage grants,[64] but the division should be made so as to leave each parcel, as nearly as may be, in a situation to be operated as railroad.[65]

e. Price and Terms of Sale

In the foreclosure of a mortgage on railroad property, a wide discretion may be exercised as to the details and terms of sale.

In the absence of statutory restrictions, a wide discretion as to the details and terms of sale in view of the nature of the property may be exercised in the foreclosure of a mortgage of all the real estate, fixtures, and franchise right of operation of a railroad.[66] The officer making the sale ordinarily has no authority to sell on credit, particularly where the decree directs a sale for cash,[67] and cannot, therefore, accept preferred stock as such payment.[68]

A conditional bid which does not comply with the decree and order of sale is properly ignored.[69]

51. Pa.—Randolph v. Wilmington, etc., R. Co., 11 Phila. 502.
51 C.J. p 911 note 17.
Nature and extent of property included in:
Foreclosure of mechanics' liens see Mechanics' Liens §§ 338, 339.
Mortgage foreclosure sales generally see Mortgages §§ 730, 759–761.

52. U.S.—Milwaukee, etc., R. Co. v. Soutter, Wis., 2 Wall. 609, 17 L.Ed. 886.

53. U.S.—Connor v. Tennessee Cent. R. Co., Tenn., 109 F. 931, 48 C.C.A. 730, 54 L.R.A. 687.
51 C.J. p 911 note 20.

54. U.S.—Cleveland First Nat. Bank v. Shedd, Pa., 7 S.Ct. 807, 121 U.S. 74, 30 L.Ed. 877.
51 C.J. p 911 note 21.

55. Ga.—Macon, etc., R. Co. v. Parker, 9 Ga. 377.
51 C.J. p 911 note 22.

56. Ill.—Peoria, etc., R. Co. v. Thompson, 103 Ill. 187, 209.
51 C.J. p 911 note 23.

57. U.S.—Guaranty Trust Co. of N.Y. v. Seaboard Air Line Ry. Co., D.C.Va., 60 F.Supp. 607.
51 C.J. p 911 note 24.

Severance for remedy
Although the mortgage treats the property as an entirety, with respect to the remedy, it is to be severed and the realty and personalty is sold according to the rules relating to the disposition of property so situated.—Coe v. Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am.D. 518.

58. U.S.—Metropolitan Trust Co. v. Chicago, etc., R. Co., Ill., 253 F. 868, 165 C.C.A. 348, certiorari denied 39 S.Ct. 184, 248 U.S. 586, 63 L.Ed. 434.
51 C.J. p 912 note 25.

59. Ill.—Equitable Trust Co. v. Chicago, etc., R. Co., 145 N.E. 290, 291, 314 Ill. 96.
51 C.J. p 912 note 26.

60. U.S.—Low v. Blackford, N.C., 87 F. 392, 31 C.C.A. 15.
51 C.J. p 912 note 27.

61. Ohio.—Citizens' Sav., etc., Co. v. Cincinnati, etc., Tract. Co., 140 N.E. 380, 106 Ohio St. 577.
51 C.J. p 912 note 28.

62. Ohio.—Citizens' Sav., etc., Co. v. Cincinnati, etc., Tract. Co., supra.
51 C.J. p 912 note 29.

63. U.S.—Metropolitan Trust Co. v. Chicago, etc., R. Co., Ill., 252 F. 868, 165 C.C.A. 348, certiorari denied 39 S.Ct. 184, 248 U.S. 586, 63 L.Ed. 434.

64. U.S.—Metropolitan Trust Co. v. Chicago, etc., R. Co., supra.

65. U.S.—Metropolitan Trust Co. v. Chicago, etc., R. Co., supra.

66. Ohio.—Coe v. Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am.D. 518
Terms of sale in foreclosure of:
Mechanics' liens see Mechanics' Liens § 341.
Mortgages generally see Mortgages § 732.

67. Pa.—Pindle v. Pennsylvania, etc., R. Co., 1 Lehigh Val.L.R. 201.

68. U.S.—Continental Trust Co. v. Toledo, etc., R. Co., C.C.Ohio, 86 F. 929, modified on other grounds 95 F. 497, 36 C.C.A. 155, certiorari denied 20 S.Ct. 883, 176 U.S. 219, 44 L.Ed. 442.

69. U.S.—Trustees Corp. v. Kansas

Under certain circumstances, as where the railroad is not paying operating expenses and interest on receiver's certificates, a comparatively low bid is acceptable.[70] It is competent to require an immediate deposit by the purchaser of a reasonable part of his bid.[71]

f. Persons Entitled to Purchase

Various persons are entitled to purchase at a foreclosure sale of railroad property, such as another corporation, a reorganization committee, and a trustee.

In the absence of statutory or contractual restriction, an individual may become the purchaser at a foreclosure sale of railroad property,[72] and may transfer the property to another corporation, as discussed infra § 329, and another corporation may be a purchaser,[73] although it already owns a majority of the stock in the foreclosed company.[74] Likewise, a reorganization committee may become the purchaser.[75] In judicial sales of railroads in interstate commerce it is seldom that there will be more than one bidder qualified to purchase the property, because the purchaser of the railroad must first obtain the approval of the interstate commerce commission.[76]

Persons named in mortgage. Who may become the purchasers at a foreclosure sale may be expressly provided for by the mortgage itself.[77]

Persons designated by statute. Such persons may purchase as are designated by statutes,[78] some of which require that the purchaser must be one capable not only of owning the property, but also of exercising the rights and powers and of assuming the duties incident to such ownership.[79]

Persons occupying fiduciary relationship generally. One who occupies a position of trust or confidence toward the mortgagor company, which would make it inequitable for him to acquire the title for himself, cannot become a purchaser.[80] A director of a company being a fiduciary cannot purchase the property of the company at a judicial sale without the consent of the company or permission of the chancellor who decreed the sale,[81] and, where the purchase is made by such a person, the company is entitled to a surrender of the road on placing the purchaser in statu quo,[82] but without such a tender the relief for the stockholders should be by a bill to redeem,[83] and not by an action to enforce a trust on the property in the hands of such director.[84]

Where all persons have an opportunity to bid, the fact that the road is purchased by the president of the company in his individual right will not in itself raise a trust relation between him and a holder of the bonds of the company which will entitle the latter to treat him as a trustee of the property so purchased.[85]

Trustee. A trustee cannot, as such, purchase property in which he has an individual interest,[86] but it has been held that a trustee for bondholders of an insolvent railway may become a purchaser.[87] A purchase by a mortgage trustee has been held to be voidable, although not absolutely void,[88] but junior mortgage creditors can only avoid such sale by tendering reimbursement.[89]

City, etc., R. Co., C.C.A.Kan., 18 F. 2d 765.
Bids in mortgage foreclosure sales generally see Mortgages §§ 734–736.

70. U.S.—Simon v. New Orleans, etc., R. Co., La., 242 F. 62, 155 C. C.A. 6.
51 C.J. p. 913 note 41.

71. S.C.—Hand v. Savannah, etc., R. Co., 13 S.C. 467.
51 C.J. p. 912 note 39.

72. N.Y.—People v. O'Brien, 18 N. E. 692, 111 N.Y. 1, 7 Am.S.R. 684, 2 L.R.A. 255—People v. Brooklyn, etc., R. Co., 89 N.Y. 75.
Persons entitled to purchase at mortgage foreclosure sales generally see Mortgages § 733.

73. N.Y.—Male v. Atchison, etc., R. Co., 129 N.E. 458, 230 N.Y. 158, 15 A.L.R. 1098.

74. N.Y.—Male v. Atchison, etc., R. Co., supra.

75. U.S.—Investment Registry v. Chicago, etc., R. Co., D.C.Wis., 213 F. 492, appeal dismissed 225 F. 1022, 140 C.C.A. 663.
51 C.J. p. 913 note 50.
Reorganization of railroads:
Generally see infra §§ 339–342.
Under bankruptcy act see Bankruptcy §§ 881–962.

76. U.S.—Guaranty Trust Co. of N. Y. v. Seaboard Air Line Ry. Co., D.C.Va., 60 F.Supp. 607.

77. U.S.—Farmers' L. & T. Co. v. Iowa Cent. R. Co., C.C.Iowa, 8 F. Cas.No.4,664, 4 Dill. 546.
51 C.J. p. 913 note 43.

78. U.S.—Rothchild v. Memphis, etc., R. Co., Tenn., 113 F. 476, 51 C.C.A. 310, certiorari denied 23 S. Ct. 848, 188 U.S. 740, 47 L.Ed. 677.
51 C.J. p. 913 note 44.

79. Tex.—Texas Southern R. Co. v. Harle, 105 S.W. 1107, 101 Tex. 170.
51 C.J. p. 913 note 45.

80. N.Y.—Munson v. Syracuse, etc., R. Co., 8 N.E. 355, 103 N.Y. 58.
51 C.J. p. 913 note 52.

81. Ky.—Covington, etc., R. Co. v. Bowler, 9 Bush 468.

82. Ky.—Covington, etc., R. Co. v. Bowler, supra.
51 C.J. p. 913 note 54.

83. N.Y.—Harpending v. Munson, 91 N.Y. 650.

84. N.Y.—Harpending v. Munson, supra.
51 C.J. p. 913 note 56.

85. U.S.—London Credit Co. v. Arkansas Cent. R. Co., C.C.Ark., 15 F. 46, 5 McCrary 23.

86. N.Y.—Munson v. Syracuse, etc., R. Co., 8 N.E. 355, 103 N.Y. 58.

87. U.S.—Trustees Corp. v. Kansas City, etc., R. Co., C.C.A.Kan., 18 F.2d 765.
51 C.J. p. 913 note 59.

88. U.S.—Cunningham v. Macon, etc., R. Co., Ga., 15 S.Ct. 361, 156 U.S. 400, 39 L.Ed. 471.
51 C.J. p. 913 note 60.

89. U.S.—Cunningham v. Macon, etc., R. Co., supra.

g. Confirmation of Sale

The general rules regulating the confirmation of foreclosure sales ordinarily are applicable to foreclosure sales of railroad property.

General rules relating to the confirmation of foreclosure sales ordinarily apply to foreclosure sales of railroad property.[90] Objections based on any substantial irregularity in the proceedings preliminary and leading up to the sale and which are prejudicial to the person objecting should be made to the confirmation of the sale,[91] but questions relating to the validity of the decree cannot ordinarily be so raised.[92] The question of adequacy of price remains for consideration after sale and on motion to confirm.[93] The confirmation of a sale of railroad property without an order nisi has been held to be irregular,[94] but, where such confirmation has resulted in no prejudice, it will not be set aside,[95] and after confirmation of the sale bondholders will not be allowed at a subsequent term to be made parties to the original suit for the purpose of impeaching the confirmation decree, although power to make further orders was reserved.[96]

Pending the ascertainment of preferential claims it is competent for the court to refuse confirmation until the amount to be paid in cash has been fixed and paid in,[97] or to confirm the sale subject to a lien for unpaid purchase money,[98] or to confirm the sale and withhold a conveyance until the purchase money is paid,[99] or to make a conveyance reserving a lien or right to retake and resell in default of payment.[1]

Confirmation of a sale to a reorganization committee will not be denied because of an agreement to forego a deficiency judgment[2] or in order to coerce payment by the reorganization committee to an objecting bondholder.[3] An application for confirmation of a sale may be allowed to be withdrawn where the sale of a portion of the road located in another state has been vacated on objections applicable to the sale which it is sought to confirm.[4]

Confirmation of the sale will not be refused because of inadequacy of the price realized where there is no showing that higher bids will be forthcoming,[5] and the objecting stockholders do not furnish a bond in the sum fixed by the court.[6]

Effect of confirmation. Where property was sold which was not included in the decree, a confirmation of the sale does not validate the sale of such property.[7]

h. Objections to Sale, Setting Aside, and Resale

(1) In general
(2) Grounds for vacating sale
(3) Proceedings to set aside foreclosure sale

(1) In General

Every person whose rights are injuriously affected by a decree of foreclosure of railroad property and a sale thereunder ordinarily has a right, unless estopped, to move to set aside the sale, although he was not a party to the action.

General rules governing objections to, and the setting aside of, foreclosure sales ordinarily are applicable to foreclosure sales of railroad property.[8]

90. U.S.—Beers v New York Equitable Trust Co., C C A Colo, 286 F. 878.

Confirmation of foreclosure sale:
Mechanics' liens generally see Mechanics' Liens § 342.
Mortgages generally see Mortgages §§ 743–746.

91. U S —New York Cent Trust Co v. Peoria, etc, R. Co., Ill, 118 F. 30, 55 C.C A. 52.

92. U.S —New York Cent. Trust Co. v. Peoria, etc, R. Co., supra.
S.D.—Crouch v. Dakota, etc., R. Co, 101 N W. 722, 18 S D. 540.

93. U.S —Guaranty Trust Co. of N. Y. v. Seaboard Air Line Ry. Co., D. C.N.Y., 60 F.Supp. 607.

94. U.S.—Painter v. Union Trust Co., Ohio, 246 F. 240, 158 C.C.A. 400.

95. U.S.—Painter v. Union Trust Co., supra.

96. U.S.—Wetmore v. St. Paul, etc., R. Co., C.C.Minn. 3 F. 177, 1 McCrary, 466.

97. U S —Appeal of Columbus, etc., R. Co, Ohio, 109 F. 177, 48 C.C A 275.

98. U S.—Appeal of Columbus, etc., R. Co, supra.

99. U.S.—Appeal of Columbus, etc., R Co, supra.

1. U S —Appeal of Columbus, etc., R. Co, supra.

2. U S.—Simon v. New Orleans, etc., R. Co, La, 242 F. 62, 155 C C.A. 6.

3. **Compelling payment of par value of bonds**
Where the owners of eighty per cent of the bonds secured by a railroad mortgage had joined in a plan of reorganization, and it was still open to an existing bondholder, who was acting purely in his own interests, and not for other minority bondholders, to join in such plan, a confirmation of a sale to a reorganization committee would not be denied, and a resale ordered, merely for the purpose of coercing the committee, by repeated orders of resale, to pay such bondholder the par value of his bonds.—Simon v New Orleans, etc., R. Co, supra.

4. U S —Investment Registry v Chicago, etc, R Co, D.C Wis, 213 F. 492, appeal dismissed 225 F 1022, 140 C C A. 663.

5. U.S.—Beers v. New York Equitable Trust Co, C C A.Colo., 286 F 878.

6. U.S —Beers v. New York Equitable Trust Co., supra.

7. U.S —Milwaukee, etc, R. Co. v Soutter, Wis., 2 Wall. 509, 17 L Ed. 886
51 C.J. p 911 note 19.

8. U S.—Wenger v. Chicago, etc., R. Co., Ill., 114 F. 34, 51 C.C.A. 660.
Opening, setting aside foreclosure sale, and resale:
Mechanics' liens generally see Mechanics' Liens § 342.
Mortgages generally see Mortgages §§ 747–753.

Accordingly, as a general rule every person whose rights are injuriously affected by a decree of foreclosure and a sale under it has a right to move to set aside the sale, although he was not a party to the action.[9] Such objection may be made by the mortgagor company,[10] or by bondholders,[11] or stockholders,[12] and, where a purchaser makes default, and a private resale is made, the defaulting purchaser does not waive his right to complain of the resale.[13]

It has been held that the attorney general cannot intervene and stop a sale, even assuming that a sale by parcels would necessitate the discontinuance of the road.[14]

Estoppel to assert objections. A party who otherwise would be entitled to raise objections to the validity or irregularity of foreclosure and sale may be prevented from doing so on principles of estoppel,[15] as where he fails to interpose his objections by a proper proceeding and at a proper time.[16] Where the foreclosure suit required claimants to file claims, those failing to do so cannot attack the validity of the sale because of no receipt of money or an interest in the new company.[17]

Complainant who participates in the sale or bids may be estopped to question the validity of the sale.[18]

(2) Grounds for Vacating Sale

A foreclosure sale of railroad property may be set aside on various grounds, such as fraud, mistake, or surprise, or a grossly inadequate consideration.

A foreclosure sale of railroad property may be set aside on various grounds.[19] The validity and sufficiency of the proceedings in the foreclosure suit prior to the sale may not be questioned,[20] nor may other matters which were proper for adjudication in the foreclosure suit.[21] A motion to vacate generally cannot be based on grounds of objection which were or might have been set up in defense to the foreclosure suit or against the confirmation of the sale;[22] nor will a sale be set aside for any defects or irregularities which do not invalidate the title of the purchaser or work substantial or real injury to the rights of any party in interest.[23]

The fact that a minority of the bondholders or stockholders who have been given an opportunity to participate are dissatisfied with the plan of reorganization is not ground for setting aside the sale.[24]

Fraud, mistake, or surprise. A court of equity may vacate or set aside a foreclosure sale which is shown to be tainted with fraud or deceit,[25] as where the purchase has been made in pursuance of a corrupt scheme to gain possession of the railroad property inequitably,[26] as, for example, a transaction which looks toward the stifling of competition among bidders at the sale,[27] unless such agreement only suppressed bidding where there could be none.[28] A sale may also be set aside at the instance of the party injured on the ground of mistake or surprise.[29]

Inadequacy of price. A sale may be vacated where made for such a grossly inadequate consideration as to raise a presumption of fraud,[30] but the

9. U.S.—Wenger v. Chicago, etc., R. Co., supra.
51 C.J. p 914 note 77.

10. N.J.—Delaware, etc., R. Co. v. Scranton, 34 N.J.Eq 429.
Pa.—Youngman v. Elmira, etc., R. Co., 65 Pa. 278.

11. Pa.—Youngman v. Elmira, etc., R. Co., supra.
51 C.J. p 914 note 79.

12. Pa.—Rothschild v. Rochester, etc., R. Co., 1 Pa.Co. 620.
51 C.J. p 914 note 80.

13. N.Y.—Matter of Philip, 160 N.Y.S. 49, 95 Misc. 709, affirmed 162 N.Y.S 1140, 176 App.Div. 924.

14. Ill.—Equitable Trust Co. v. Chicago, etc., R. Co., 145 N.E. 290, 314 Ill. 96
51 C.J. p 914 note 87.

15. U.S.—Union Trust Co. v. Illinois Midland R Co., Ill., 6 S.Ct. 809, 117 U.S. 434, 29 L.Ed. 963.
51 C.J. p 914 note 82.

16. U.S.—Union Trust Co. v. Illinois Midland R. Co., supra.
51 C.J. p 914 note 83.

17. U.S.—North American Co. v St Louis, etc., R. Co., D.C.Mo., 288 F. 612, reversed on other grounds, C.C.A., 14 F.2d 284, affirmed in part and reversed in part on other grounds 47 S.Ct. 635, 274 U.S. 304, 71 L.Ed. 1060, motion denied 48 S.Ct. 96, 275 U.S. 156, 72 L.Ed. 214.

18. U.S.—Blanks v. Farmers' L & T. Co., La., 122 F. 849, 59 C.C.A 59.
51 C.J. p 914 note 86.

19. **Failure to give proper notice is** ground for vacating sale.—Matter of Philip, 160 N.Y.S. 49, 95 Misc. 709, affirmed 162 N.Y.S. 1140, 176 App.Div. 924.

20. U.S.—Robinson v. Iron R. Co., Ohio, 10 S.Ct. 907, 135 U.S. 522, 34 L.Ed. 276.

21. U.S.—Robinson v. Iron R. Co., supra.

22. U.S.—Robinson v. Iron R. Co., supra.
51 C.J. p 915 note 90.

23. N.J.—Walker v. Montpelier, etc., R. Co., 36 N.J.Eq. 525.

24. U.S.—Rospigliosi v. New Orleans, etc., R. Co., Ala., 237 F 341, 150 C.C.A. 355

25. U.S.—McKittrick v. Arkansas Cent. R. Co., Ark., 14 S.Ct. 661, 152 U.S. 473, 38 L.Ed. 518.
51 C.J. p 915 note 92.

26. U.S.—James v. Milwaukee, etc., R. Co., Wis., 6 Wall. 752, 18 L.Ed 885.
Utah.—Price v. Utah, etc., R. Co., 6 P. 528, 4 Utah 72.

27. U.S.—Investment Registry v Chicago, etc., R. Co., D.C.Ill., 206 F. 488, affirmed 212 F. 594, 129 C.C.A. 130.
11 C.J. p 1229 note 86 [a].

28. U.S.—Simon v. New Orleans, etc., R. Co., La., 242 F. 62, 155 C.C.A. 6.

29. N.Y.—Peck v. New Jersey, etc., R. Co., 22 Hun 129, affirmed 85 N.Y. 246.

30. U.S.—Turner v. Indianapolis, etc., R. Co., C.C.Ind. and Ill., 24 F Cas.No.14,259, 8 Biss. 380.
51 C.J. p 915 note 96.

inadequacy must be so gross as to shock the conscience and show that it is not the result of fair dealing.[31]

(3) Proceedings to Set Aside Foreclosure Sale

The proceedings to set aside a foreclosure of railroad property ordinarily are governed by the rules regulating proceedings to set aside foreclosure sales generally.

The general rules applicable to proceedings to set aside foreclosure sales ordinarily govern proceedings to set aside a foreclosure sale of railroad property[32] as, for example, on questions of pleading,[33] or parties.[34] The party objecting must move promptly and act with diligence, and an unreasonable delay in the assertion of his objections, amounting to laches, and not explained or excused, is sufficient to bar him from relief.[35] The practice of some courts has been that in order to set a sale aside for inadequacy of price there must be a showing that some responsible person will make an advance bid.[36]

Relief granted. In ordering the sale to be set aside, the court should also make such orders as may be necessary to place the parties in the position they occupied before the sale, and to protect intervening parties,[37] and the court may, in the exercise of its discretion, accept bids in open court.[38] The decree under a bill to set aside a sale under a power should be no broader than is required by the pleadings.[39]

Resale. Where a lienor is entitled to be paid his lien out of the proceeds of such sale and his claim is not paid within a reasonable time out of such proceeds, a resale of the property may be ordered.[40] A resale will not be ordered after the period of redemption, for holders of liens who were not parties to the proceedings,[41] but such lienholders are entitled to a decree allowing them a reasonable time in which to redeem.[42]

A resale will not be ordered on an offer of a larger bid without the support of some special circumstances in aid of it,[43] particularly where it appears that the expenses of a resale would be large and the creditors would receive only a small additional sum, and that the purchaser desires immediately to equip and operate the railroad, and that the public interest requires that the operation should be begun as soon as possible.[44]

i. Operation and Effect

A sale under a decree of foreclosure of all the property and franchises of a railroad company and a conveyance of such property and franchises to the purchaser as directed by the court operates to divest the company of all its right, title, and interest therein.

A sale under a decree of foreclosure of all the property and franchises of a railroad company and a conveyance of such property and franchises to the purchaser as directed by the court operates to divest the company of all its right, title, and interest therein and leaves to it only its franchise to exist as a corporation.[45] After such sale the company cannot by any act or negligence of its own subject the property so sold, or the franchises of the company to exercise the rights, powers, and privileges of a railroad company in connection therewith, to any liability.[46] The debt secured by the mortgage is merged in the sale and the lien is extinguished by the sale.[47]

31. U.S.—Turner v. Indianapolis, etc., R. Co., supra.
51 C.J. p. 915 note 97.

32. U.S.—Robinson v. Iron R. Co., Ohio, 10 S.Ct. 907, 135 U.S. 522, 34 L.Ed. 276.
51 C.J. p. 915 note 3.
Foreclosure of:
Mechanics' liens generally see Mechanics' Liens § 342
Mortgages generally see Mortgages § 752.

33. U.S.—Rospigliosi v. New Orleans, etc., R. Co., Ala., 237 F. 341, 150 C.C.A. 355.
51 C.J. p. 915 note 4.

34. U.S.—Wenger v. Chicago, etc., R. Co., Ill., 114 F. 34, 51 C.C.A. 660.
51 C.J. p. 915 note 5.

35. U.S.—New York Cent. Trust Co. v. Peoria, etc., R. Co., Ill., 104 F. 418, 43 C.C.A. 513—Foster v. Mansfield, etc., R. Co., C.C.Ohio, 36 F. 627, affirmed 13 S.Ct. 28, 146 U.S. 88, 36 L.Ed. 899.
51 C.J. p. 916 note 6.

36. U.S.—Turner v. Indianapolis, etc., R. Co., C.C.Ill. & Ind., 24 F. Cas.No. 14,259, 8 Biss. 380.

37. U.S.—James v. La Crosse & M. R. Co., Wis., 6 Wall. 752, 18 L.Ed. 885.

38. U.S.—Investment Registry v. Chicago, etc., R. Co., Ill., 212 F. 594, 129 C.C.A. 130.

39. U.S.—Barnes v. Chicago, etc., R. Co., Wis., 7 S.Ct. 1042, 122 U.S. 1, 30 L.Ed. 1128.

40. U.S.—Compton v. Jesup, Ohio, 17 S.Ct. 795, 167 U.S. 1, 42 L.Ed. 55—Farmers' L. & T. Co. v. Newman, Mo., 8 S.Ct. 1364, 127 U.S. 649, 32 L.Ed. 303.
51 C.J. p. 916 note 11.
Effect of redemption see infra § 347 b.

41. S.D.—Crouch v. Dakota, etc., R. Co., 101 N.W. 722, 18 S.D. 540, appeal dismissed 27 S.Ct. 780, 203 U.S. 582, 51 L.Ed. 327

42. S.D.—Crouch v. Dakota, etc., R. Co., supra.

43. N.Y.—Wesson v. Chapman, 28 N.Y.S. 192, 76 Hun 592.

44. N.Y.—Wesson v. Chapman, supra.

45. U.S.—New York Cent. Trust Co. v. Western North Carolina R. Co., C.C.N.C., 112 F. 471.
51 C.J. p. 916 note 17.
Effect of redemption see infra § 347.
Rights acquired by sale in foreclosure of mechanics' lien see Mechanics' Liens §§ 344–346.

46. U.S.—New York Cent. Trust Co. v. Western North Carolina R. Co., C.C.N.C., 112 F. 471.

47. U.S.—Appeal of Columbus, etc., R. Co., Ohio, 109 F. 177, 48 C.C.A. 275.
51 C.J. p. 916 note 20.

A purchase by a reorganization committee bars any proprietary interest on the part of the stockholders,[48] and a purchase by or on behalf of the bondholders changes them from the position of creditors of the company to that of ownership,[49] and all the rights of the stockholders in the railroad are lost and destroyed by the sale.[50]

Title to a judgment not covered by the mortgage does not vest in the purchaser at foreclosure sale.[51]

Franchises. Such sale vests the purchaser not only with the physical property sold, but also with the franchises to operate the property as a railroad.[52]

After-acquired property. The sale on a foreclosure of a railroad mortgage containing a general provision covering after-acquired property conveys title to such, although not mentioned in the decree of sale.[53]

What law governs. The property which will pass by a foreclosure sale is governed by the law of the state where the property is located;[54] so a sale in one state under foreclosure of a mortgage purporting to cover property in that state and another does not pass the property located in the latter in which such mortgage has been held to be invalid as to the property there.[55]

§ 328. Rights and Liabilities of Purchasers

The rights and liabilities of purchasers at foreclosure sales of railroad property are discussed infra §§ 329-338. The rights and liabilities of purchasers at mortgage foreclosure sales generally are considered in Mortgages §§ 586-594, 754-765, and the rights and liabilities of purchasers at sales foreclosing mechanics' liens generally are discussed in Mechanics' Liens §§ 344, 345.

Examine Pocket Parts for later cases.

§ 329. —— Corporate Capacity, Franchises, and Powers of Original Company

Unless authorized by statute, a purchaser at a foreclosure sale under a mortgage of the franchises and property of a railroad company does not, by virtue of his purchase, acquire the franchise of the company to exist as a corporation.

Unless authorized by statute,[56] a purchaser at a foreclosure sale under a mortgage of the franchises and property of a railroad company does not, by virtue of his purchase, acquire the franchise of the company to exist as a corporation,[57] without taking out a new charter.[58]

On the other hand, such purchase and transfer confer a right to reorganize as a new corporation subject to the laws existing at the time of the reorganization,[59] and as such to have possession of the property,[60] and to succeed to all the rights and privileges of the old company appurtenant to the maintenance and operation of the road,[61] such as the right to maintain and operate the road,[62] and receive the rents and profits,[63] except such as accrued before the purchaser became invested with the title and right of possession.[64] The purchaser is not entitled to the earnings of the road after confirmation of a sale if he persistently delays compliance with his bill and has not paid the purchase money.[65]

48. N.Y.—Vatable v. New York, etc., R. Co., 96 N.Y. 49

49. N.Y.—James v. Cowing, 82 N.Y. 449.

50. Miss.—Washington County v. Yazoo, etc., R. Co., 88 So. 284, 125 Miss. 713.

51. Del.—Wilmington, etc., R. Co. v. Downward, 14 A. 720.

52. U.S.—Gunnison v. Chicago, etc., R. Co., C.C.Wis., 117 F. 629, affirmed 130 F. 259, 64 C.C.A. 505, certiorari denied 25 S.Ct. 799, 197 U.S. 623, 49 L.Ed. 911.
51 C.J. p. 916 note 25
Nature and extent of property included in sale see supra subdivision d of this section.
Rights and liabilities of purchasers as to corporate franchises and powers generally see infra § 329.

53. U.S.—Lang v. Choctaw, etc., R. Co., Ark., 198 F. 38, 117 C.C.A. 146, certiorari denied 33 S.Ct. 463, 227 U.S. 680, 57 L.Ed. 701.

54. Pa.—Rothschild v. Rochester, etc., R. Co., 1 Pa. Co. 620
Law governing disposition of property generally see Conflict of Laws §§ 17-19.

55. Pa.—Rothschild v. Rochester, etc., R. Co., supra.

56. La.—Vicksburg, etc., R. Co. v. Elmore, 15 So. 701, 46 La.Ann. 1237.
51 C.J. p. 917 note 31.

57. U.S.—Norfolk, etc., R. Co. v. Pendleton, Va., 15 S.Ct. 413, 156 U.S. 667, 39 L.Ed. 574.
51 C.J. p. 917 note 32.
Operation and effect of foreclosure sale generally see supra § 327 i

58. Tex.—International-Great Northern R. Co. v. Oehler, Civ.App., 262 S.W. 785.

59. U.S.—Norfolk, etc., R. Co. v. Pendleton, Va., 15 S.Ct. 413, 156 U.S. 667, 39 L.Ed. 574.
51 C.J. p. 917 note 34.
Reorganization by purchasers see infra §§ 339-342.

60. U.S.—Central Trust Co. v. Western North Carolina R. Co., C.C.N.C., 89 F. 24, modified on other grounds 98 F. 489, 39 C.C.A. 126.
51 C.J. p. 917 note 35

61. Tex.—Denison, etc., R. Co. v. St. Louis, etc., R. Co., 72 S.W. 161, 96 Tex. 233
51 C.J. p. 917 note 36.

62. U.S.—Memphis, etc., R. Co. v. Berry, Ark., 5 S.Ct. 299, 112 U.S. 609, 28 L.Ed. 837.
N.Y.—People v. First Dist. Public Service Commission, 96 N.E. 1011, 203 N.Y. 299.
51 C.J. p. 917 note 37.

63. U.S.—Downs v. Farmers' L. & T. Co., Tex., 79 F. 215, 24 C.C.A. 500.

64. U.S.—Downs v. Farmers' L. & T. Co., supra.

65. U.S.—Boyle v. Farmers' L. & T. Co., Tex., 88 F. 930, 32 C.C.A. 142.

Although natural persons ordinarily cannot exercise the franchises conferred by the state on railroads, where they bid in the property at foreclosure, they may hold such property, including the franchises, and transmit it intact to a corporation authorized to exercise the franchises.[66]

Special statutory exemptions, privileges, and burdens. In the absence of express direction in the statute to that effect, or of an equivalent implication by necessary construction, a special statutory exemption or privilege granted to a railroad company,[67] such as immunity from taxation,[68] or a right to fix and determine rates of fare,[69] does not accompany the property in its transfer to a purchaser on foreclosure.

On the other hand, it has been held that a right of exemption from taxation passes under the general language of a statute passing "all the rights" of the original company,[70] and that, where the property and franchises of a railroad corporation authorized by special act to charge a certain rate of fare per mile are purchased by individuals and through various consolidations and mesne conveyances become a part of the system of another railroad corporation, the latter corporation, as long as the special act remains unrepealed, is entitled to charge on such portion of its line the rate authorized by the special act.[71] So it has been held that purchasers, not having any right to demand to be incorporated under the laws of the state, but voluntarily accepting the privileges and benefits of an incorporation law, are, as well as the corporation formed, estopped to repudiate the burdens attached by the statute to the privilege of becoming a corporation,[72] and are bound by the provisions of existing laws regulating rates of fare.[73]

Rights and liabilities as to private subscriptions and grants of public aid. The rights and liabilities of purchasers at foreclosure sales in respect of grants of public aid are determined by the terms of the grant, or by statutes relating to the rights and liabilities of such purchasers.[74] Where public aid has been earned by the original company, subsequent purchasers at a foreclosure sale or persons claiming under them are not bound by conditions or stipulations in the grant which do not constitute a charge on the property,[75] although it is otherwise where they constitute a charge on the road or its earnings.[76] Unless a subscription to a railroad has been accepted by the company, a new corporation to which the property and franchises are conveyed after their sale on foreclosure cannot accept or enforce the subscription.[77]

§ 330. —— Grantees or Successors of Purchasers

A grantee or successor of a purchaser at a foreclosure sale of railroad property is entitled to all of the rights of the purchaser.

A grantee or successor of a purchaser at a foreclosure sale of railroad property is entitled to all the rights of the purchaser,[78] and is also charged with infirmities of title arising from illegality in the sale, and with claims or equities which would have been available against the original purchaser,[79] except in so far as he is entitled to protection in the character of a purchaser in good faith without notice,[80] or except in so far as the duty or liability is incurred or imposed on the original purchasers personally.[81]

66. N.Y.—Parker v. Elmira, etc., R. Co., 59 N.E. 81, 165 N.Y. 274.
51 C.J. p. 913 note 47.
Right of natural persons to:
Exercise railroad franchise see supra § 4.
Purchase at foreclosure sale see supra § 327 f.

67. U.S.—St. Louis, etc., R. Co. v. Gill, Ark., 15 S.Ct. 484, 156 U.S. 649, 39 L.Ed. 567.
51 C.J. p. 917 note 43.

68. U.S.—East Tennessee, etc., R. Co. v. Hamblen County, Tenn., 102 U.S. 273, 26 L.Ed. 152.
51 C.J. p. 917 note 44.

69. U.S.—St. Louis, etc., R. Co. v. Gill, Ark., 15 S.Ct. 484, 156 U.S. 649, 39 L.Ed. 567.
51 C.J. p. 917 note 45.

70. Fla.—Atlantic, etc., R. Co. v. Allen, 15 Fla. 637.

71. U.S.—Parker v. Elmira, etc., R. Co., 59 N.E. 81, 165 N.Y. 274.

72. U.S.—Grand Rapids, etc., R. Co. v. Osborn, Mich., 24 S.Ct. 310, 193 U.S. 17, 48 L.Ed. 598.

73. U.S.—Grand Rapids, etc., R. Co. v. Osborn, supra.
51 C.J. p. 918 notes 49-50.

74. Va.—Washington, etc., R. Co. v. Lewis, 2 S.E. 746, 83 Va. 246.
51 C.J. p. 918 note 51.

75. Ill.—People v. Louisville, etc., R. Co., 10 N.E. 657, 120 Ill. 48.
51 C.J. p. 918 note 52.
Rights and liabilities of grantees or successors of purchasers generally see infra § 330.

76. U.S.—Tompkins v. Little Rock, etc., R. Co., Ark., 8 S.Ct. 762, 125 U.S. 109, 31 L.Ed. 615.
51 C.J. p. 918 note 53.
Indebtedness, securities, and liens generally see infra § 335.

77. N.Y.—Dix v. Shaver, 14 Hun 392.

78. Ohio.—Pittsburg, etc., R. Co. v. Bosworth, 18 N.E. 533, 46 Ohio St. 81, 2 L.R.A. 199.
51 C.J. p. 918 note 56.
Rights and liabilities in respect of public aid see supra § 329.
Rights and liabilities of assignee or grantee of purchaser at mortgage foreclosure sale generally see Mortgages § 766.

79. Tenn.—Chesapeake, O. & S. W. R. Co. v. Lauderdale, 1 S.W. 48, 16 Lea 688.
51 C.J. p. 918 note 57.

80. Tenn.—Frazier v. East Tennessee, etc., R. Co., 12 S.W. 537, 88 Tenn. 138.
51 C.J. p. 918 note 58.

81. Md.—Holland v. Lee, 18 A. 661, 71 Md. 338.
51 C.J. p. 918 note 59.

§ 331. —— Construction, Maintenance, and Operation

A purchaser of a railroad at a foreclosure sale ordinarily is bound to perform the duties to the public which are coupled with the enjoyment of the corporate privileges and which the original company owed to the public.

A purchaser of a railroad under foreclosure ordinarily is bound to perform the duties to the public which are coupled with the enjoyment of the corporate privileges and which the original company owed to the public,[82] such as the duty of properly constructing, repairing, equipping, and operating the road.[83] A decree requiring a specific part of a railroad to be maintained and operated is enforceable against a railroad company purchasing the property at foreclosure sale,[84] and the fact that the purchaser has leased a part of the road, and that such part is being operated in connection with the line of the lessee, does not excuse the purchaser from its duty under the decree.[85]

A purchaser's duty to construct is limited, however, to the portion mortgaged and purchased by him, and, where the old company has completed only a part of its road and this part is mortgaged and sold, the purchaser is not bound to complete the whole road.[86]

Right to discontinue operation. Purchasers on foreclosure have the same right as the original company to cease operation of the road when it can be operated only at a loss.[87] Where a road has been dismantled, such purchasers are not bound to restore it to its former condition in order that it may be operated by others as a public highway.[88] Where discontinuance or removal of a railroad is authorized by statute, the statutory provisions must be complied with.[89]

Location of offices and shops A sale under foreclosure does not free the property in the hands of the purchaser from the provisions of the statute forbidding the removal of the general offices, machine shops, and roundhouses from the place where they were originally located,[90] although the purchaser's articles of incorporation fixed the location of its general offices at a different place.[91]

§ 332. —— Contracts in General

A purchaser of railroad property at foreclosure sale is not bound by an obligation of a railroad company which is of a strictly personal character.

A purchaser of railroad property at foreclosure sale is not bound by an obligation of a railroad company which is of a strictly personal character,[92] such as a contract to maintain a depot at a certain place[93] or to give free annual passes over the line of the railroad.[94]

In other words, such purchaser takes the property free from all liability on contracts,[95] except such as are a lien on, or otherwise bind, the property and franchises purchased,[96] and except where the purchaser either expressly or by necessary implication adopts or assumes the contract previously made with the mortgagor company,[97] or liability thereon is provided for in the decree,[98] or created by statute;[99] or unless the contract is one running with

82. Iowa.—Beaton v. Macksburg, 228 N.W. 109, 209 Iowa 1254
51 C.J. p 919 note 60—26 C.J. p 1040 note 26 [a].
Construction and maintenance of railroad generally see supra § 121 et seq.
Operation of railroad generally see infra § 390 et seq.

83. Iowa.—State v. Beaton, 217 N.W. 255, 205 Iowa 1139.
51 C.J. p 919 note 61.

84. Iowa.—State v. Iowa Cent. R. Co., 50 N.W. 280, 83 Iowa 720.

85. Iowa.—State v. Iowa Cent. R. Co., supra.

86. Pa.—Chartiers R. Co. v. Hodgens, 85 Pa. 501.

87. U.S.—Bullock v. Florida, Fla., 41 S.Ct. 193, 254 U.S. 513, 521, 65 L.Ed. 380.
51 C.J. p 919 note 66.
Abandonment or discontinuance by original company see infra § 392.

88. U.S.—State of South Carolina v. Jack, S.C., 145 F. 281, 76 C.C.A. 165.

89. Iowa.—State v. Beaton, 228 N.W. 111, 209 Iowa 1291.
51 C.J. p 919 note 68

90. U.S.—International, etc., R. Co. v. Anderson County, Tex., 38 S.Ct. 370, 246 U.S. 424, 62 L.Ed. 807.
Tex.—International, etc., R. Co. v. Anderson County, 156 S.W. 499, 106 Tex. 60.

91. U.S.—International, etc., R. Co. v. Anderson County, Tex., 38 S.Ct. 370, 246 U.S. 424, 62 L.Ed. 807.

92. N.J.—Schmoele v. Atlantic City R. Co., 160 A. 524, 110 N.J.Eq. 597.
51 C.J. p 919 note 71.
Contracts of railroad generally see supra § 197 et seq.
Liability of reorganized company for obligations of old company see infra § 342 b.
Term "successors" in agreement binding railroad and its "successors" means a corporate successor and not an independent corporation which takes title at foreclosure sale of railroad property.—Schmoele v. Atlantic City R. Co., 160 A. 524, 110 N.J.Eq. 597.

93. Tex.—Gulf, etc., R. Co. v. Newell, 11 S.W. 342, 73 Tex. 334, 15 Am.S.R. 788.

94. N.J.—Schmoele v. Atlantic City R. Co., 160 A. 524, 110 N.J.Eq. 597.

95. U.S.—Hoard v. Chesapeake, etc., R. Co., W.Va., 8 S.Ct. 74, 123 U.S. 222, 31 L.Ed. 130.
51 C.J. p 919 note 73.

96. Tex.—International, etc., R. Co. v. Anderson County, 156 S.W. 499, 106 Tex. 60.
51 C.J. p 920 note 74.

97. U.S.—Detroit, etc., R. Co. v. Detroit, etc., R. Co., C.C.A.Mich., 6 F.2d 845.
51 C.J. p 920 note 75.

98. W.Va.—Brown v. Western Maryland R. Co., 96 S.E. 799, 82 W.Va. 511.
51 C.J. p 920 note 76.

99. Tex.—International-Great Northern R. Co. v. Texas Co., Civ.App., 280 S.W. 282, certiorari dismissed 47 S.Ct. 96, 273 U.S. 702, 71 L.Ed. 884.
51 C.J. p 920 note 77.

the land and which would have passed under a deed of the road [1]

Traffic contracts with other railroad companies do not run with the land or create a lien on the property, and, hence, are not binding on the purchaser at foreclosure sale [2]

Provisions in decree for disclaimer. The decree of foreclosure and sale may expressly provide that the purchaser may be at liberty to adopt or disclaim certain agreements made by the mortgagor company.[3]

Rights of purchaser. Where a decree on foreclosure contemplates that the interest of the mortgagee, the receiver, and the mortgagor company shall pass to the purchaser, and transfers are executed accordingly, the rights of the mortgagor under a contract with a telegraph company for the maintenance of a telegraph line on the railroad right of way are enforceable by the purchaser.[4]

§ 333. —— Right of Way and Other Interests in Land

The purchaser at a foreclosure sale of railroad property acquires all right, title, and interest of the mortgagor company in and to the railroad property covered by the description contained in the mortgage and decree of sale.

The purchaser at a foreclosure sale of railroad property acquires all right, title, and interest of the mortgagor company in and to the railroad property covered by the description contained in the mortgage and decree of sale [5] Thus, a railroad company's interest in the right of way passes to a purchaser under a foreclosure of a mortgage embracing all of the company's right in the property,[6] as does also all other property, rights, and franchises covered by the foreclosed mortgage and adapted to the purchaser's use and substantially described in the deed of conveyance.[7] On the other hand, the purchaser takes no greater rights in the property than those held by the mortgagor.[8] He takes no title to land which had been purchased by the railroad company without power to do so, although the mortgage covered all its property, franchises, etc.,[9] or to land previously conveyed by the mortgagor by deed in which the trustee in the mortgage joined.[10] The sale of a railroad under a mortgage before the damages of the landowner are paid or secured will not divest the right of such landowner to recover compensation for the occupancy of his land from the purchaser of the railroad at the mortgage sale.[11]

Easements, reservations, and restrictions. The purchaser takes the property subject to easements in the adjoining landowners,[12] or in other railroad companies,[13] and subject to any other reservations, conditions, or restrictions imposed by the instrument under which the mortgagor's title vested.[14] Where the right of a railroad company in another person's land constitutes merely an easement rather than title to the land, the purchaser at the foreclosure sale succeeds to no greater right or interest than an easement.[15]

§ 334. —— Leases

A purchaser under a mortgage foreclosure sale of railroad property who enters into possession of and operates a road leased by the mortgagor railroad company is bound by the terms of the lease as long as he remains in possession and use thereof.

Where a purchaser under foreclosure of the property, rights, and franchises of a railroad company which had leased a certain line or a part thereof from another company enters into possession and operates the leased road, such purchaser is bound by the terms of the lease with the mortgagor company as long as he remains in possession and

1. Tex.—Missouri, etc., R. Co. v State, Civ.App., 275 S.W. 673, certiorari vacated 48 S.Ct. 82, 275 U.S. 494, 72 L.Ed. 391.
51 C.J. p 920 note 78.

2. U.S.—Des Moines, etc., R. Co. v Wabash, etc., R. Co., Iowa, 10 S.Ct. 753, 135 U.S. 576, 34 L.Ed. 243.
51 C.J. p 920 note 79.

3. U.S.—Cincinnati, etc., R. Co. v. Indianapolis Union R. Co., C.C.A.Ohio, 279 F. 356, reversed on other grounds 46 S.Ct. 221, 270 U.S. 107, 70 L.Ed. 489.
51 C.J. p 920 note 80.

4. Mich.—Detroit, etc., R. Co. v. Western Union Tel. Co., 166 N.W. 494, 200 Mich. 2, certiorari denied 38 S.Ct. 581, 247 U.S. 517, 62 L.Ed. 1245.

5. Okl.—Cobbs v. Wiedemann, 40 P.2d 1075, 170 Okl. 493.
51 C.J. p 921 note 82
Estate or interest acquired by purchasers under mortgage foreclosures generally see Mortgages § 759.

6. Tex.—Denison, etc., R. Co. v. St. Louis, etc., R. Co., 72 S.W. 161, 96 Tex. 233
51 C.J. p 921 note 83.

7. Neb.—Union Pac. R. Co. v. Lincoln, 149 N.W. 419, 97 Neb. 198.
51 C.J. p 921 note 84.

8. N.Y.—Syracuse Solar Salt Co. v. Rome, etc., R. Co., 22 N.Y.S. 321, 67 Hun 153.
51 C.J. p 921 note 85.

9. Pa.—Youngman v. Elmira, etc., R. Co., 65 Pa. 278.

10. Colo.—Brackett v. McClure, 135 P. 1110, 24 Colo.App. 524.

11. Pa.—Western Pennsylvania R. Co. v. Johnston, 59 Pa. 290.

12. Iowa.—Hunter v. Burlington, etc., R. Co., 51 N.W. 64, 84 Iowa 605
51 C.J. p 921 note 89.

13. U.S.—Joy v. St. Louis, Mo., 11 S.Ct. 243, 138 U.S. 1, 34 L.Ed. 843.
51 C.J. p 921 note 90.

14. N.Y.—Walker v. Marcellus, etc., R. Co., 156 N.Y.S. 354, 179 App.Div. 313, affirmed 123 N.E. 736, 236 N.Y. 347.
51 C.J. p 922 note 91.

15. Va.—Chesapeake, etc., R. Co v Williams Slate Co., 129 S.E. 499, 143 Va. 722.

use thereof,[16] although there has been no formal assignment of the lease,[17] and although the leased line is not included in the property purchased, as in such case, if the purchaser enters into possession and operates it, he must be regarded as an assignee of the lease and liable for the rents which the original lessee had agreed to pay,[18] except in so far as the lease has been modified by an agreement between the lessor and the lessee.[19]

The purchaser, however, may abandon or disclaim a lease made by the mortgagor company pending foreclosure proceedings, particularly where the terms of the decree give the purchaser such right.[20]

§ 335. —— Indebtedness, Securities, Liens, and Mortgages

A purchaser under a foreclosure sale of the property and franchises of a railroad company is not liable merely by reason of its succession for the debts of the old company not secured by prior liens.

A purchaser under foreclosure of the property and franchises of a railroad company is not liable merely by reason of its succession for the debts of the old company not secured by prior liens,[21] unless such purchaser expressly or by necessary implication agrees to pay or assume them,[22] or unless such liability is created by statute,[23] or unless it affirmatively appears that the circumstances attending the creation of the new corporation and its succession to the property and franchises of the mortgagor company are such as to warrant a finding that it is in reality a continuation of the old company,[24] or unless the purchaser's liability for the debts of the old company is provided for in the decree or order of sale,[25] in which case claimant must establish his claim in accordance with the terms of the decree.[26] The mere fact that purchasers knew that certain judgments had been decreed to be first liens on the property does not render a company organized by such company to operate the road liable for the amount of the judgment.[27]

Liens and encumbrances. The purchaser takes his title subject to all prior valid liens and encumbrances of which he had, or ought to have had, notice, and which are not cut off by the foreclosure proceedings,[28] such as a vendor's lien for the unpaid purchase money,[29] or a lien in favor of the state for public aid granted,[30] particularly where the decree of foreclosure and sale so provides.[31] The doctrine of caveat emptor as applied to judicial sales ordinarily operates not only to deprive the purchaser of a railroad sold under foreclosure of any recourse against the proceeds of the property because of existing encumbrances or tax liens on the property, but also of any claim to reimbursement for such liens from a fund in court or in the hands of a receiver, derived from the earnings of the property during the receivership, unless the decree or order of sale, or special equitable considerations, give him a right to such reimbursement.[32]

Subrogation of purchaser. Where a decree requires the purchasers to pay all valid claims outstanding against the receiver growing out of the operation of the road by him, such payments are a part of the purchase price for which the purchasers receive full equivalent in the property conveyed, and they are not entitled to be subrogated

16. U.S.—St Joseph Union Depot Co v. Chicago, etc., R. Co., C.C.A. Mo., 89 F. 648, 32 C.C.A. 284, certiorari denied 19 S.Ct. 883, 172 U. S. 649, 43 L.Ed. 1184.
51 C.J. p 922 note 93

17. Ill.—Jacksonville, etc., R. Co. v. Louisville, etc., R. Co., 37 N.E. 924, 150 Ill. 480.

18. N.Y.—Frank v. New York, etc., R. Co., 25 N.E. 332, 122 N.Y. 197.

19. N.Y.—Frank v. New York, etc., R. Co., supra.

20. U.S.—Farmers' L. & T. Co. v. Chicago, etc., R. Co., C.C.Ind., 44 F. 653.
51 C.J. p 922 note 97.

21. U.S.—McKittrick v. Arkansas Cent R. Co., Ark., 14 S.Ct. 661, 152 U.S. 473, 38 L.Ed. 518.
51 C.J. p 922 note 98.

22. Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Pluto, 156 S.W.2d 265, 138 Tex. 1.
51 C.J. p 922 note 99.

23. U.S.—Missouri-Kansas-Texas R. Co v. Mars, Tex., 49 S.Ct. 103, 278 U.S. 258, 73 L.Ed. 316.
51 C.J. p 922 note 1.

24. Wis.—Pfeifer v. Sheboygan, etc., R. Co., 18 Wis. 155, 86 Am.D. 751—Smith v. Chicago, etc., R. Co., 18 Wis. 17.
Liability of reorganized company for debts of old company see infra § 342 b.

25. Mo.—Riffe v. Wabash R. Co., 207 S.W. 78, 200 Mo.App. 397.
51 C.J. p 923 note 3.
Compliance with decree
Purchaser of railroad at foreclosure sale complied with decree as to government loan secured by receivers' certificates by delivering its first mortgage bonds to government in substitution for the certificates. —New York Trust Co. v. Virginia Iron, Coal & Coke Co., C.C.A.Ga., 46 F.2d 248.

26. Tex.—Houston, etc., R. Co. v. Crawford, 31 S.W. 176, 88 Tex. 277, 53 Am.S.R. 752, 28 L.R.A. 761.
51 C.J. p 923 note 4.

27. Tex.—Houston, etc., R. Co. v. Keller, 28 S.W. 724, 8 Tex.Civ.App. 537.

28. Tex.—International-Great Northern R. Co. v. Oehler, Civ.App., 262 S.W. 785.
51 C.J. p 923 note 6.

29. U.S.—Florida v. Anderson, Fla., 91 U.S. 667, 23 L.Ed. 290.

30. U.S.—Doggett v. Florida R. Co., Fla., 99 U.S. 72, 25 L.Ed. 301—Florida v. Anderson, Fla., 91 U.S. 667, 23 L.Ed. 290.

31. U.S.—U. S. Trust Co. v. New Mexico, N.M., 22 S.Ct. 172, 183 U. S. 535, 46 L.Ed. 315.
51 C.J. p 923 note 9.

32. U.S.—Terre Haute, etc., R. Co v. Harrison, Ind., 96 F. 907, 37 C.C.A. 615.

to the rights of the holders of claims against the receiver so paid, as creditors of the mortgagor company.[33]

Consolidation after sale. Where the purchaser organizes a new company, with legislative authority to receive and exercise the franchise, such purchaser takes the property discharged of all debts which were not prior liens,[34] and, on a subsequent consolidation with another company, the consolidated company does not become liable for the debts of the original company, notwithstanding a statute enacted subsequent to the consolidation provides that on a consolidation the new company shall be liable for all debts of the old.[35] Where one railroad company purchases the property and franchises of another at a sale under a deed of trust, and after such sale the legislature passes an act for the merger of the two companies, which is not passed in contemplation of an agreement between them, but merely in order to authorize the purchasing company to operate the road purchased, the latter company does not thereby subject itself to the liabilities of the purchaser.[36]

§ 336. —— Interveners and Other Claimants

A purchaser at a foreclosure sale of railroad property is chargeable with notice that a particular lien will, or may, be claimed where claimant has intervened in the foreclosure proceedings and obtained leave to proceed in another court to establish his lien.

The purchaser at a foreclosure sale of railroad property is chargeable with notice that a particular lien will, or may, be claimed where claimant has intervened in the foreclosure proceedings and obtained leave to proceed in another court to establish his lien,[37] but such purchaser is not bound to look beyond what appears on the face of the record and anticipate a future claim for a lien,[38] and if claimant fails to bring his claim to the notice of the court, he is without remedy after decree and distribution,[39] unless his claim is one which by the decree is imposed on, and subject to which the purchasers acquire title to, the property.[40] Where the original foreclosure suit is still pending, and the order confirming the sale specifies that any taxes which may finally be adjudged to be a lien on the property should be a liability on the railroad, the purchasers at the sale have sufficient notice of the claim,[41] and, in an intervening petition filed in the original suit to collect the delinquent taxes, the purchasers need not be made parties.[42]

A claimant cannot, by intervention in the foreclosure proceeding, seek to impeach the validity of the decree and sale, as this can only be done by an original suit.[43] Where the purchaser has paid his bid in full according to the decree and the sale is confirmed, he cannot be compelled further to pay a claim which is adjudicated against the receiver after the confirmation of sale.[44]

As against an unforeclosed lien, the purchaser may intervene in a suit to enforce such lien and assert the equities and rights to which he succeeds by virtue of his purchase, and if they are such that a sale under such lien will not convey a good title, but merely cloud the title of the intervener, the sale should not be ordered.[45]

§ 337. —— Vacation or Invalidity of Sale

Purchasers at a foreclosure sale of a railroad are liable as trustees for the full value of the road where they purchase pursuant to an arrangement which constitutes a fraud on creditors.

Where the purchasers at a foreclosure sale of a railroad become such through an arrangement which is a fraud on the creditors, such purchasers are liable as trustees for the full value of the road,[46] and are chargeable with interest on the claims of the complaining creditors from the date of the sale to that of the final decree in the suit to set aside the sale.[47] Although the purchase was in bad faith and the sale is set aside, the purchaser may be entitled to compensation for reconstructing and repairing the road and putting it in working order, where it was in a state of complete dilapidation and ruin when bought.[48] Where a purchaser fails to make good his bid, not for want of funds but because he thinks the price too high, he cannot be

33. U.S.—Morgan's Louisiana, etc., R., etc., Co v. Moran, Tex., 91 F. 22, 33 C.C.A. 313.

34. Ill.—Hatcher v. Toledo, etc., R. Co., 62 Ill. 477.

35. Ill.—Hatcher v. Toledo, etc., R. Co., supra.
51 C.J. p 924 note 13.

36. Tex.—Houston, etc., R. Co. v. Shirley, 54 Tex. 125.

37. U.S.—Loomis v. Davenport, C.C. Iowa, 17 F. 301, 2 McCrary 489.

38. U.S.—Hale v. Burlington, etc., R. Co., C.C.Iowa, 13 F. 203, 2 McCrary 558.

39. U.S.—Anderson v. Condict, Ill., 93 F. 349, 35 C.C.A. 335, 94 F. 716, 36 C.C.A. 437

40. U.S.—Anderson v. Condict, supra.

41. N.M.—U. S. Trust Co. v. Territory, 62 P. 987, 10 N.M. 416, affirmed 22 S.Ct. 172, 183 U.S. 535, 46 L.Ed. 315.

42. N.M.—U. S. Trust Co. v. Territory, supra.

43. U.S.—State Trust Co. v. Kansas City, etc., R. Co., C.C.Mo., 120 F. 398.

44. U.S.—Chicago, etc., R. Co. v. McCammon, Ill., 61 F. 772, 10 C.C.A. 50.

45. U.S.—Connor v. Tennessee Cent. R. Co., Tenn., 109 F. 931, 48 C.C.A. 730, 54 L.R.A. 687.

46. U.S.—Drury v. Cross, Wis., 7 Wall. 299, 19 L.Ed. 40.

47. U.S.—Drury v. Cross, supra.

48. U.S.—Jackson v. Ludeling, La., 99 U.S. 513, 25 L.Ed. 460.
51 C.J. p 924 note 26.

excused on a resale of the property for a less price from making good the difference if the unsecured creditors will be benefited thereby.[49]

§ 338. —— Actions or Proceedings by or against Purchasers

In actions or proceedings by or against a purchaser at a foreclosure sale of railroad property the general rules controlling civil actions ordinarily are applicable.

General rules regulating civil actions ordinarily apply in actions or proceedings by or against a purchaser at a foreclosure sale of railroad property,[50] on questions of parties,[51] pleading,[52] including issues, proof, and variance,[53] and evidence.[54] A purchaser or his assignee may have a writ of assistance to recover possession of the road, or a portion thereof, which is unlawfully withheld;[55] or he may maintain ejectment for the mortgaged premises before condition broken unless there is a stipulation to the contrary.[56]

Under the rule that one having an adequate remedy at law may not resort to equity, where the property of a railroad company is acquired by another railroad company after foreclosure proceedings which are void as against a holder of bonds guaranteed by the mortgagor company, such bondholder is not entitled to sue the purchasing company in equity and apply the assets so transferred to the payment of his bonds until he has exhausted his legal remedies against the mortgagor.[57] However, one having a lien against railroad property sold under foreclosure which is unenforceable at law because it is not within the provisions of a statute giving a legal remedy under specified conditions may enforce his claim in equity.[58] A court of equity which has obtained jurisdiction of a controversy involving the purchase of railroad property in receivership will retain jurisdiction to administer complete relief.[59]

Laches will bar prosecution of a claim against the purchaser of railroad property in receivership.[60]

Judgment. Under a statute requiring purchasers of railroad property at a receiver's sale to file an assumption of existing liabilities before operating the railroad, personal judgment to the amount of the value of the property purchased may be rendered against the purchaser in a suit to collect a claim accruing during the receivership.[61] Where the purchasers of railroad property at a receiver's sale later sell to others for an unauthorized dismantlement of the road, in a suit against both sets of purchasers for claims accruing during receivership, judgment may properly be entered against the original purchasers as well as against the subsequent purchasers.[62]

Damages. Where the purchasers of a railroad at a receiver's sale attempt to dismantle the road without authority, damages in actions against them on claims arising during the receivership may be

49. U.S.—Central Trust Co. v. Cincinnati, etc., R. Co., C.C.Ohio, 58 F. 500.

50. U.S.—Thompson v. Northern Pac. R. Co., Wash., 93 F. 384, 35 C.C.A. 357.

51. U.S.—Boyle v. Farmers' L. & T. Co., Tex., 101 F. 184, 41 C.C.A. 291.
51 C.J. p 925 note 28.

Intervention

(1) Where representative of purchaser of railway properties at foreclosure sale filed petition for money deposited in registry of court and unclaimed by bondholders, permitting United States attorney to intervene and claim fund on behalf of rightful owners was not error.—U. S. v. Cochrane, C.C.A.Ala., 87 F. 2d 3.

(2) Other authority with respect to intervention see 51 C.J. p 925 note 28 [d].

52. Tex.—Mars v. Missouri-Kansas-Texas R. Co., Com.App., 298 S.W. 271, affirmed Missouri-Kansas-Texas R. Co. v. Mars, 49 S.Ct. 103, 278 U.S. 258, 73 L.Ed. 316.
51 C.J. p 925 note 29.

53. Pa.—Collins v. Bellefonte Cent. R. Co., 33 A. 331, 171 Pa. 242.
51 C.J. p 925 note 30.

54. U.S.—U. S. v. Cochrane, C.C.A.Ala., 87 F.2d 3.
51 C.J. p 925 note 31.

Burden of proof

(1) Representative of purchaser of railway properties at foreclosure sale had burden of proving his right to fund deposited in registry of court for payment of mortgage bonds and unclaimed by bondholders for period of more than five years.—U. S. v. Cochrane, supra.

(2) Other decisions with respect to burden of proof see 51 C.J. p 925 note 31 [a].

55. U.S.—Farmers' L. & T. Co. v. Chicago, etc., R. Co., C.C.Ind., 44 F. 653.
51 C.J. p 925 note 32.

Remedies and proceedings for recovery of property by purchaser at mortgage foreclosure sale generally see Mortgages § 770.

56. Pa.—Youngman v. Elmira, etc., R. Co., 65 Pa. 278.
51 C.J. p 925 note 33.

57. U.S.—Sawyer v. Atchison, etc., R. Co., N.Y., 129 F. 100, 63 C.C.A. 602.

58. Pa.—Shamokin Valley, etc., R. Co. v. Malone, 85 Pa. 25.

59. U.S.—Cincinnati, etc., R. Co. v. Indianapolis Union R. Co., C.C.A. Ohio, 279 F. 356, reversed on other grounds 46 S.Ct. 221, 270 U.S. 107, 70 L.Ed. 489.
51 C.J. p 926 note 39.

Granting complete relief in equity generally see Equity § 599.

60. U.S.—North American Co. v. St. Louis, etc., R. Co., D.C.Mo., 288 F. 612, reversed on other grounds, C.C.A., 14 F.2d 284, reversed in part on other grounds and affirmed in part 47 S.Ct. 635, 274 U.S. 304, 71 L.Ed. 1060, motion denied 48 S.Ct. 96, 275 U.S. 156, 72 L.Ed. 214.
51 C.J. p 926 note 42.

61. Tex.—International-Great Northern R. Co. v. Texas Co., Civ.App., 280 S.W. 282, certiorari dismissed 47 S.Ct. 96, 273 U.S. 702, 71 L.Ed. 884—International-Great Northern R. Co. v. Oehler, Civ.App., 262 S.W. 785.

62. Iowa.—State v. Beaton, 228 N.W. 111, 209 Iowa 1291.
51 C.J. p 926 note 45.

recovered in an amount up to the value of the property at the time the dismantlement was begun,[63] the value being fixed as of such time.[64] The price paid by the purchaser at the receiver's sale is not conclusive as to value,[65] but may be considered as evidence thereof.[66] Interest should be allowed only from the date of the decree ascertaining and establishing the amount of the claims.[67]

§ 339. Purchase and Reorganization

a. In general
b. Purchase and reorganization under reorganization agreement
c. Reorganization by purchasers at foreclosure sale
d. Nature and validity of reorganization plan in general

a. In General

The reorganization of railroad companies has been effected through the medium of an equity receivership.

Reorganization of railroad companies has sometimes been effected through the medium of an equity receivership,[68] and prior to the passage of § 77 of the Bankruptcy Act, 11 U.S.C.A. § 205, providing for railroad reorganization under the bankruptcy law, the only juridical mode of railroad reorganization was in equity.[69]

On reorganization of a railroad company through a receivership the court must take cognizance of the entire plan of reorganization and act accordingly.[70] A determination of the fairness of the plan of reorganization is a part of the equity power of the court.[71] The court has and will exercise authority to see that all equitable rights in, or connected with, the property are secured;[72] and has power to administer the property by authorizing its transfer to a reorganized company pursuant to a plan approved by a large majority of the creditors.[73] Questions relating to the inclusion or exclusion of

63. Iowa.—State v. Beaton, supra.

64. Iowa.—State v. Beaton, supra.

65. Iowa.—State v. Beaton, supra.

66. Iowa.—State v. Beaton, supra.

67. Iowa.—State v. Beaton, supra 51 C.J. p 926 note 50.

68. U.S.—Guaranty Trust Co. of New York v. Seaboard Air Line R Co., D.C.Va., 53 F.Supp. 672, affirmed, C.C.A., Badenhausen v. Guaranty Trust Co. of New York, 145 F.2d 40, certiorari denied 65 S.Ct. 440, 323 U.S. 797, 89 L.Ed. 636.

Consolidation of railroad companies see supra §§ 234-242.

Receivership of railroads generally see infra §§ 376-389.

Reorganization of corporation generally see Corporations §§ 1578-1602.

Origin of jurisdiction

U.S.—Chase Nat. Bank of City of New York v. Wabash Ry. Co., D.C. Mo., 40 F.Supp. 859.

69. U.S.—Guaranty Trust Co. of New York v. Seaboard Air Line R. Co., D.C.Va., 53 F.Supp. 672, affirmed, C.C.A., Badenhausen v. Guaranty Trust Co. of New York, 145 F.2d 40, certiorari denied 65 S. Ct. 440, 323 U.S. 797, 89 L.Ed. 636.

"Since railroads could not [formerly] take advantage of the Bankruptcy Act . . . their financial adjustments for years had been carried out in equity receiverships under judicial control. These were cumbersome, costly and privately managed with inadequate consideration for the public interest in a soundly financed transportation system."—Ecker v. Western Pac. R. R. Corporation, Cal., 62 S.Ct. 692, 705, 318 U.S. 448, 87 L.Ed. 892, rehearing denied 63 S.Ct. 985, 318 U.S. 803, 87 L.Ed. 1166, Crocker First Nat. Bank of San Francisco v. Western Pac. R. Corporation, 63 S.Ct. 936, 318 U.S. 803, 87 L.Ed. 1166, Western Pac. R. Co. v. Ecker, 63 S.Ct. 986, 318 U.S. 803, 87 L.Ed. 1166, Reconstruction Finance Corporation v. Western Pac. R. Corporation, 63 S.Ct. 986, 318 U.S. 803, 87 L.Ed. 1166, and Irving Trust Co. v. Crocker First Nat. Bank of San Francisco, 63 S.Ct. 988, 318 U.S. 803, 87 L.Ed. 1167.

70. U.S.—Chase Nat. Bank of City of New York v. Wabash Ry. Co., D.C.Mo., 40 F.Supp. 859.

71. U.S.—Chase Nat. Bank of City of New York v. Wabash Ry. Co., supra.

72. U.S.—Guaranty Trust Co. v. Missouri Pac. R. Co., D.C.Mo., 238 F. 812

Settlement of conflicting claims to res

In receivership proceeding wherein plan for reorganization of railway company was proposed, close questions of interpretations of after-acquired property clauses in mortgages, preferences in stock certificates, divisional mortgages, and the like will give rise to honest doubts as to which security holders have first claim to certain assets, and settlement of such conflicting claims to the res in possession of district court is a normal part of process of reorganization, and the court, in sanctioning settlements by adjustment or compromise, is not bowing to nuisance claims, but is administering the proceedings in an economical and practical manner.—Chase Nat. Bank of City of New York v. Wabash Ry. Co., D.C.Mo., 40 F.Supp. 859.

Retention of jurisdiction

In receivership proceeding wherein plan for reorganization of railway company was proposed, where participation of another railroad company by purchase of capital stock of reorganized company pursuant to Interstate Commerce Act was an integral part of the compromises underlying the plan, district court, for full protection of parties who had made compromises and accepted the plan on such condition, would retain complete jurisdiction of cause, notwithstanding sale and transfer of properties of old company to reorganized company or to any other company, with full power to retake and ultimately to resell the properties and on such retaking to proceed de novo.—Chase Nat. Bank of City of New York v. Wabash Ry. Co., supra.

73. U.S.—Phipps v. Chicago, etc., R. Co., C.C.A.Mo., 284 F. 945, 28 A.L.R. 1184, error dismissed 43 S.Ct. 701, 262 U.S. 762, 67 L.Ed. 1221.

Purchase and reorganization under agreement generally see infra subdivision b of this section.

Necessity for sale

(1) While in railroad and other corporate reorganizations under Bankruptcy Act formal procedure of sale has been dispensed with, in equity sale is still regarded as a necessary procedural step in reorganization to bind interests of nonassenters to the plan.—Guaranty Trust Co. of N. Y. v. Seaboard Air Line Ry. Co., D.C.Va., 60 F.Supp. 607.

(2) However, it has been held that where a judgment creditor in the decree in reorganization was adjudged and secured his equitable

subsidiary lines should be left to the business judgment of those in charge[74] except in case of fraud or a grossly inadequate consideration.[75]

Where in the course of a reorganization of a railroad company in equity receivership proceedings the reorganization managers or committee, as authorized by the court in the reorganization proceedings, purchased with funds held by the receiver of the company certain bonds of another railroad company which prior to the receivership had been leased to the first company and which after disaffirmance of the lease by the receiver was operated by the first company under orders of the interstate commerce commission, such bonds are not held for the account of the other railroad company or its trustee.[76]

Effect of Bankruptcy Act on proceedings in equity. The Bankruptcy Act § 77, 11 U.S.C.A. § 205, enacted March 3, 1933, and since amended, providing for the reorganization of railroad companies, as discussed in Bankruptcy §§ 881–962, has been held not to render equity receivership proceedings unavailable for railroad reorganizations.[77] However, reorganization under the bankruptcy act ordinarily is to be preferred to the equity proceeding[78] and it has been held that it is improper for an equity court to entertain a suit for a railroad reorganization after the passage of the federal statute allowing proceedings for reorganization in bankruptcy and that an equity proceeding should be dismissed if the irregularity is called to the attention of the court, at least where creditors or stockholders may be adversely affected by a failure to have the reorganization conducted under the Bankruptcy Act.[79] On the other hand, where the equity proceeding had been commenced prior to the passage of the federal statute permitting reorganization under the bankruptcy law, the equity proceeding may be continued where all the interested parties prefer its continuation and proceedings under the Bankruptcy Act would result in protracted delay, in view of the fact that the public interest will be protected by the provisions of the federal statute, 49 U.S.C.A. § 20 b, requiring that the approval of the interstate commerce commission to the new capitalization be obtained.[80]

The principles controlling the reorganization of railroads under the Bankruptcy Act are to a great

share of the property which the court administered it was not necessary that the property be transferred to the reorganized company through the medium of a judicial sale.—Phipps v. Chicago, etc., R. Co., C.C.A.Mo., 284 F. 945, 28 A.L.R. 1184, error dismissed 43 S.Ct. 701, 262 U.S. 762, 67 L.Ed. 1221.

74. U.S.—Guaranty Trust Co. v. Missouri Pac. R. Co., D.C.Mo., 288 F. 812.

75. U.S.—Guaranty Trust Co. v. Missouri Pac. R. Co., supra.

76. U.S.—Guaranty Trust Co. of N. Y. v. Seaboard Air Line Ry. Co., D.C.Va., 62 F.Supp. 207, affirmed, C.C.A., Dure v. Glazebrook, 152 F.2d 756, certiorari denied 66 S.Ct. 1346, 328 U.S. 854, 90 L.Ed. 1626.

Bonds not impressed with trust

U.S.—Guaranty Trust Co. of N. Y. v. Seaboard Air Line Ry. Co., D.C.Va., 62 F.Supp. 207, affirmed, C.C.A., Dure v. Glazebrook, 152 F.2d 756, certiorari denied 66 S.Ct. 1346, 328 U.S. 854, 90 L.Ed. 1626.

Continued operation as creating fiduciary relationship

Disaffirmance by reorganization committee of lease, under which railroad in equity reorganization had formerly operated another railroad and continued operation thereof by committee because of lessor's refusal to resume operation and interstate commerce commission's refusal to permit abandonment, created no fiduciary relationship with respect to financing or general affairs of lessor, so as to impress bonds of lessor purchased by reorganization committee with funds belonging to mortgage creditors for account of such creditors with option in favor of lessor to purchase such bonds at price paid therefor by committee plus interest.—Guaranty Trust Co. of N. Y. v. Seaboard Air Line Ry. Co., D.C.Va., 62 F.Supp. 207, affirmed, C.C.A., Dure v. Glazebrook, 152 F.2d 756, certiorari denied 66 S.Ct. 1346, 328 U.S. 854, 90 L.Ed. 1626.

Unsecured claim against railroad for rentals due under lease of another railroad at time of receivership could not affect title to bonds of lessor railroad purchased by reorganization committee with funds belonging to mortgage creditors of lessee railroad for account of such creditors, where lessee railroad had for a long time been operated for benefit of secured creditors only.—Guaranty Trust Co. of N. Y. v. Seaboard Air Line Ry. Co., D.C.Va., 62 F.Supp. 207, affirmed, C.C.A., Dure v. Glazebrook, 152 F.2d 756, certiorari denied 66 S.Ct. 1346, 328 U.S. 854, 90 L.Ed. 1626.

77. U.S.—Guaranty Trust Co. of New York v. Seaboard Air Line R. Co., D.C.Va., 53 F.Supp. 672, affirmed, C.C.A., Badenhausen v. Guaranty Trust Co. of New York, 145 F.2d 40, certiorari denied 65 S.Ct. 440, 323 U.S. 797, 89 L.Ed. 636.

78. U.S.—Guaranty Trust Co. of New York v. Seaboard Air Line R. Co., D.C.Va., 53 F.Supp. 672, affirmed, C.C.A., Badenhausen v. Guaranty Trust Co. of New York, 145 F.2d 40, certiorari denied 65 S.Ct. 440, 323 U.S. 797, 89 L.Ed. 636.

"Since the enactment of section 77 (11 U.S.C.A. § 205) nearly all large railroad reorganizations have been under section 77."—Guaranty Trust Co. of New York v. Seaboard Air Line R. Co., D.C.Va., 53 F.Supp. 672, 697, 698, affirmed, C.C.A., Badenhausen v. Guaranty Trust Co. of New York, 145 F.2d 40, certiorari denied 65 S.Ct. 440, 323 U.S. 797, 89 L.Ed. 636.

79. U.S.—New England Coal & Coke Co. v. Rutland R. Co., C.C.A.Vt., 143 F.2d 179, 190.

"We are not to be understood as holding that a receivership irregularly begun must be dismissed if it is clear beyond all doubt—as it is not in the instant case—that no creditors or stockholders can be adversely affected by a failure to have the reorganization conducted under § 77. Nor do we mean that such a receivership must necessarily be dismissed if its irregularity is not called to the court's attention (by the filing of a § 77 petition or otherwise) until after the plan has been approved by the court and accepted by an overwhelming majority of those legitimately interested."—New England Coal & Coke Co. v. Rutland R. Co., supra.

80. U.S.—Badenhausen v. Guaranty Trust Co. of New York, C.C.A.Va., 145 F.2d 40, certiorari denied 65 S.Ct. 440, 323 U.S. 797, 89 L.Ed. 636.

extent applicable to a reorganization through equity procedure.[81]

Appointment of master. In equity proceedings for the reorganization of a railroad the court may appoint a special master to formulate a plan of reorganization,[82] and a rule of civil procedure providing that in an action tried without a jury the court shall accept findings of fact of a master unless clearly erroneous is especially imperative where the master, for a period of several years, had patiently studied the complex questions involved and had listened with painstaking care in extended hearings to the arguments and proposals of all of the parties who desired to be heard.[83]

Capitalization of new company. A basic requirement of any reorganization of a railroad company in equity receivership proceedings is the determination of a capitalization which makes it possible not only to respect the priorities of the various classes of claimants but also to give the new company a reasonable prospect for survival.[84] In determining the permissible capitalization of the new company the primary test is the earning power of the new company, that is, how much the enterprise in all probabilities will earn.[85] Only a meticulous regard for earning capacity can afford the old security holders protection against a dilution of their priorities and can give the new company some safeguards against the scourge of overcapitalization; disregard of that method of valuation can only bring a harvest of barren regrets.[86] Where the railroad company's temporary large earnings are clearly due to special war-time causes, such earnings may not be made the basis for capitalization of the reorganized company.[87]

The substitution of a simple, conservative capital structure for a highly complicated one may be a primary requirement of any reorganization plan.[88] There is no necessity to construct the new capital structure on the framework of the old.[89] Where unified operations of separate properties are deemed advisable and essential, the elimination of divisional mortgages may be necessary as well as wise.[90]

The proposed capitalization of a reorganized railroad company must receive the approval of the interstate commerce commission.[91]

Allocation of new securities. The problems involved in the plan for allocation of new securities in an equity reorganization proceeding are to a very large extent problems of business interests and are controlled thereby rather than by definite rules of law.[92] What will constitute a fair and equitable allocation is necessarily a matter of judgment to be based on careful consideration of all of the relevant facts.[93] In allocating the new securities among secured creditors, a prior lien must be fully and fairly compensated in value in what is received therefor in the new securities, before subordinate liens may participate.[94] Creditors having claims of prior rank must receive compensation in some way if any portion of their preferred position is surrendered to junior liens.[95]

81. U.S.—Guaranty Trust Co. of New York v. Seaboard Air Line R. Co., D.C.Va., 53 F.Supp. 672, affirmed, C.C.A., Badenhausen v. Guaranty Trust Co. of New York, 145 F.2d 40, certiorari denied 65 S.Ct. 440, 323 U.S. 797, 89 L.Ed. 636.

82. U.S.—Guaranty Trust Co. of New York v. Seaboard Air Line R. Co., D.C.Va., 53 F.Supp. 672, affirmed, C.C.A., Badenhausen v. Guaranty Trust Co. of New York, 145 F.2d 40, certiorari denied 65 S.Ct. 440, 323 U.S. 797, 89 L.Ed. 636.

83. U.S.—Badenhausen v. Guaranty Trust Co. of New York, C.C.A.Va., 145 F.2d 40, certiorari denied 65 S.Ct. 440, 323 U.S. 797, 89 L.Ed. 636.

84. U.S.—Group of Inst. Investors v. Chicago, M., St. P. & P. R. Co., Ill., 63 S.Ct. 727, 318 U.S. 523, 87 L.Ed. 1166—Badenhausen v. Guaranty Trust Co. of New York, C.C.A.Va., 145 F.2d 40, certiorari denied 65 S.Ct. 440, 323 U.S. 797, 89 L.Ed. 636.

85. U.S.—Group of Inst. Investors v. Chicago, M., St. P. & P. R. Co., Ill., 63 S.Ct. 727, 318 U.S. 523, 87 L.Ed. 1166—Badenhausen v. Guaranty Trust Co. of New York, C.C.A.Va., 145 F.2d 40, certiorari denied 65 S.Ct. 440, 323 U.S. 797, 89 L.Ed. 636.

86. U.S.—Badenhausen v. Guaranty Trust Co. of New York, supra.

87. U.S.—Guaranty Trust Co. of New York v. Seaboard Air Line R. Co., D.C.Va., 53 F.Supp. 672, affirmed, C.C.A., Badenhausen v. Guaranty Trust Co. of New York, 145 F.2d 40, certiorari denied 65 S.Ct. 440, 323 U.S. 797, 89 L.Ed. 636.

88. U.S.—Chase Nat. Bank of City of New York v. Wabash Ry. Co., D.C.Mo., 40 F.Supp. 859.

89. U.S.—Chase Nat. Bank of City of New York v. Wabash Ry. Co., supra.

90. U.S.—Chase Nat. Bank of City of New York v. Wabash Ry. Co., supra.

91. U.S.—Guaranty Trust Co. of New York v. Seaboard Air Line R. Co., D.C.Va., 53 F.Supp. 672, affirmed, C.C.A., Badenhausen v. Guaranty Trust Co. of New York, 145 F.2d 40, certiorari denied 65 S.Ct. 440, 323 U.S. 797, 89 L.Ed. 636.

92. U.S.—Guaranty Trust Co. of New York v. Seaboard Air Line R. Co., D.C.Va., 53 F.Supp. 672, affirmed, C.C.A., Badenhausen v. Guaranty Trust Co. of New York, 145 F.2d 40, certiorari denied 65 S.Ct. 440, 323 U.S. 797, 89 L.Ed. 636.

93. U.S.—Guaranty Trust Co. of New York v. Seaboard Air Line R. Co., D.C.Va., 53 F.Supp. 672, affirmed, C.C.A., Badenhausen v. Guaranty Trust Co. of New York, 145 F.3d 40, certiorari denied 65 S.Ct. 440, 323 U.S. 797, 89 L.Ed. 636.

94. U.S.—Guaranty Trust Co. of New York v. Seaboard Air Line R. Co., D.C.Va., 53 F.Supp. 672, affirmed, C.C.A., Badenhausen v. Guaranty Trust Co. of New York, 145 F.2d 40, certiorari denied 65 S.Ct. 440, 323 U.S. 797, 89 L.Ed. 636.

95. U.S.—Guaranty Trust Co. of New York v. Seaboard Air Line R. Co., D.C.Va., 53 F.Supp. 672, af-

Where new system mortgages are substituted for old divisional mortgages it is necessary to fit each into the hierarchy of the new capital structure in such a way that each will retain with relation to the other the same position it formerly had in respect of assets and of earnings at various levels, and, if that is done, each has obtained new securities which are the equitable equivalent of its previous rights and the full priority rule is satisfied.[96] It is sufficient in allotting securities to a mortgage division if compensation is awarded on a fair and equitable basis having regard for the relative value of the divisional property, and, if this is done, it is not required that each class of creditors shall receive securities of equal rank with their former holdings.[97]

Where there are several mortgage divisions of a railroad, for the purpose of allocating the new securities the relative value of each division must be ascertained.[98] The contribution which each division makes to a system is not a mere matter of arithmetical computation, but involves an appraisal of many factors and the exercise of an informed judgment.[99] Earnings are recognized as a most important criterion in determining the value of the several divisions for the purpose of apportionment of the new securities.[1] but it does not follow that earning power must be used to ascertain the values of the several divisions.[2] There is no fixed or inflexible rule for calculating such earnings where a railroad system has been operated as a whole and there has been no need to segregate the earnings of the several parts.[3] What should be done is to determine the earnings of the whole system and then ascertain the relative earning power of each division in relation to all other divisions in the system and not only the individual earnings of the single system, but also the contribution which it makes to the system as a whole should be considered, and the sum total of these factors will represent the earning power of the divisions.[4]

On appeal from a decision of the court allocating the new securities, the burden is on appellants to show that the allocation of securities is inequitable or unfair to them and that the lower court stepped beyond the bounds of his discretion in giving it his approval.[5] The assertions on appeal that the test period selected for determining divisional earnings was unfair to a certain division, and that the allocation of securities approved by the lower court gave such division the poorest treatment of all of the divisions, relate primarily to questions of fact which are

firmed, C.C.A., Badenhausen v. Guaranty Trust Co of New York, 145 F.2d 40, certiorari denied 65 S.Ct. 440, 323 U.S. 797, 89 L.Ed. 636.

96. U.S.—Badenhausen v. Guaranty Trust Co. of New York, C.C.A.Va., 145 F.2d 40, certiorari denied 65 S.Ct. 440, 323 U.S. 797, 89 L.Ed. 636.

97. U.S.—Badenhausen v. Guaranty Trust Co of New York, supra.

98. U.S.—Badenhausen v. Guaranty Trust Co. of New York, supra.

99. U.S.—Badenhausen v. Guaranty Trust Co of New York, supra.

Deduction of rental charge from earnings

In equity reorganization of railroad, subsidaries, and leased lines, subject to underlying divisional and general mortgages, where link of specified division was leased, the annual charge therefor was deducted from the earnings of the division in valuing such division to fix its relative participation in proposed securities of reorganized railroad.—Guaranty Trust Co. of New York v. Seaboard Air Line R. Co., D.C.Va., 53 F.Supp. 672, affirmed, C.C.A., Badenhausen v. Guaranty Trust Co. of New York, 145 F.2d 40, certiorari denied 65 S.Ct. 440, 323 U.S. 797, 89 L.Ed. 636.

Matters not considered in fixing value

(1) In equity reorganization of railroad subject to underlying divisional and general mortgages, evidence did not sustain contention that certain railroad property allegedly valued at about a million dollars was not taken into account in valuing property of deficit subsidiary line in determining allocation of securities of reorganized railroad.—Badenhausen v. Guaranty Trust Co. of New York, C.C.A.Va., 145 F.2d 40, certiorari denied 65 S.Ct. 440, 323 U.S. 797, 89 L.Ed. 636.

(2) In equity reorganization of railroad system subject to underlying divisional and general mortgages, contention of bondholders of deficit line or subsidiary of unfair treatment because no allowance was made to them as to covenant in a lease of railroad and equipment by such deficit line to another railroad which subsequently merged into the system could not be sustained because, even if breach of covenant chargeable to reorganized railroad was disclosed, nothing would have been added to value of bondholders' securities where obligation in such lease was not supported by any security or lien so that a breach of covenant would create only an unsecured claim for which reorganization plan provided no payment.—Badenhausen v. Guaranty Trust Co. of New York, supra.

1. U.S.—Badenhausen v. Guaranty Trust Co. of New York, supra.

Prorating deficits of nonprofit divisions

U.S.—Guaranty Trust Co. of New York v. Seaboard Air Line R. Co., D.C.Va., 53 F.Supp. 672, affirmed, C.C.A., Badenhausen v. Guaranty Trust Co. of New York, 145 F.2d 40, certiorari denied 65 S.Ct. 440, 323 U.S. 797, 89 L.Ed. 636.

2. U.S.—Badenhausen v. Guaranty Trust Co of New York, C.C.A.Va., 145 F.2d 40, certiorari denied 65 S.Ct. 440, 323 U.S. 797, 89 L.Ed. 636.

3. U.S.—Badenhausen v. Guaranty Trust Co. of New York, supra.

Formulae for calculating divisional earnings

U.S.—Badenhausen v. Guaranty Trust Co. of New York, supra.

Selection of years as test period

U.S.—Badenhausen v. Guaranty Trust Co. of New York, supra.

4. U.S.—Badenhausen v. Guaranty Trust Co. of New York, supra.

Division without net earnings during test period

U.S.—Badenhausen v. Guaranty Trust Co. of New York, supra.

5. U.S.—Badenhausen v. Guaranty Trust Co of New York, supra.

for the special master appointed to formulate a plan and the lower court to determine.[6]

Discharge of receiver. Where the reorganization proceedings have progressed so far towards completion as to make it practicable to discharge the receivers, the court may enter an order discharging the receivers from further responsibility but preserving their official status to the extent necessary to enable them to take any action deemed appropriate to perfect or further assure the title of the railroad company to any property or interest to which it may be entitled as an incident of the reorganization.[7]

Expenses of reorganization. Allowances for fees and expenses in an equity reorganization of a railroad must be just and reasonable, but moderate rather than generous.[8]

b. Purchase and Reorganization under Reorganization Agreement

(1) In general
(2) Reorganization committee or trustee

(1) In General

In the absence of statutory restrictions, the stockholders, bondholders, and other creditors of an insolvent railroad company, or a number of them, may enter into an arrangement by which the property shall be sold under foreclosure and purchased by trustees or a committee for their benefit and a new company organized to receive the property and operate the road.

In the absence of statutory restrictions, where a railroad company is in an insolvent condition, its bonded indebtedness being equal to, or in excess of, the value of its property, it is lawful for the stockholders, bondholders, and other creditors of such road, or a number of them, to enter into an arrangement by which the property shall be sold under foreclosure and purchased by trustees or a committee for their benefit and a new company organized to receive the property and operate the road,[9] provided such arrangement is not made in fraud of other creditors[10] or of the stockholders,[11] as where it has the effect of restraining bidding at the foreclosure sale.[12] A contract for reorganization made between bondholders and stockholders, which involves the transfer of the corporate property to a new corporation, is proper and binding as between the parties.[13]

Persons entitled to make agreement. A reorganization agreement may be made between the creditors and bondholders without the concurrence of the stockholders,[14] or between bondholders and stockholders,[15] or between the bondholders themselves,[16] or between bondholders, stockholders, and unsecured creditors.[17]

(2) Reorganization Committee or Trustee

(a) In general
(b) Rights and powers
(c) Duties and liabilities

(a) In General

In the absence of statutory restrictions, the reorganization of a railroad company may be accomplished through the medium of a reorganization committee.

In the absence of statutory restrictions, reorganization of a railroad company may be accomplished through the medium of a reorganization committee representing interested parties.[18] Where, under

6. U.S.—Badenhausen v. Guaranty Trust Co. of New York, supra.

7. U.S.—Chase Nat. Bank of City of New York v. Wabash Ry. Co., D.C.Mo., 52 F.Supp. 359.

8. U.S.—Guaranty Trust Co. of N.Y. v. Seaboard Air Line Ry. Co., D.C.Fla., 68 F.Supp. 639.

Particular allowances

U.S.—Guaranty Trust Co. of N.Y. v. Seaboard Air Line Ry. Co., supra.

Services in compelling reorganization under Bankruptcy Act

(1) Services in defeating reorganization under creditors' suit and compelling railroad to be reorganized under Bankruptcy Act were not rendered in the creditors' suit, and order in creditors' suit making allowances for such services were erroneous.—Lewis v. Navin, C.C.A.Vt., 154 F.2d 76.

(2) Reorganization under Bankruptcy Act see Bankruptcy §§ 881–962.

9. U.S.—Farmers' L. & T. Co. v. Louisville, etc., R. Co., C.C.Ind., 103 F. 110.

51 C.J. p. 927 note 58.

Reorganization of railroads under Bankruptcy Act see Bankruptcy §§ 881–962.

10. U.S.—Louisville Trust Co. v. Louisville, etc., R. Co., Ind., 19 S.Ct. 827, 174 U.S. 674, 43 L.Ed. 1130

51 C.J. p. 927 note 59.

Rights of creditors generally see infra § 340 e.

11. U.S.—Carey v. Houston, C.C. Tex., 45 F. 433, appeal dismissed 14 S.Ct. 63, 150 U.S. 170, 37 L.Ed. 1041, 16 S.Ct. 537, 161 U.S. 115, 40 L.Ed. 638.

51 C.J. p. 927 note 60.

Rights of stockholders generally see infra § 341.

12. U.S.—Investment Registry v. Chicago, etc., R. Co., Ill., 212 F. 594, 129 C.C.A. 130.

13. U.S.—Northern Pac. R. Co. v. Boyd, Wash., 33 S.Ct. 554, 228 U.S. 482, 57 L.Ed. 931.

Claims of nonassenting creditors see infra § 340 e.

14. N.Y.—Taylor v. Atlantic, etc., R. Co., 57 How.Pr. 26.

Who may reorganize corporation generally see Corporations § 1579.

15. U.S.—Kansas City Terminal R. Co. v. Central Union Trust Co., Mo., 46 S.Ct. 549, 271 U.S. 445, 70 L.Ed. 1028.

51 C.J. p. 927 note 66.

16. N.Y.—Moss v. Geddes, 59 N.Y.S. 857, 28 Misc. 291

51 C.J. p. 927 note 67.

17. U.S.—St. Louis-San Francisco R. Co. v. McElvain, D.C.Mo., 252 F. 123.

51 C.J. p. 927 note 68.

18. U.S.—Van Sicien v. Bartol, C.C. Pa., 95 F. 793.

Reorganization:

Committees generally see Corporations § 1583.

Of railroads under Bankruptcy Act see Bankruptcy §§ 881–962.

the terms of the reorganization plan, the reorganization committee and its successors have the power to vote on a certain per cent of the stock to be issued, the fact that a member of such committee has disposed of stock belonging to him individually does not affect his authority as a member of the committee to act as director and to hold and vote on the trust stock.[19] The mere fact that some of the trustees under a mortgage are holders of bonds secured by their trust does not make them incompetent to consent to a decree of foreclosure embodying a plan for reorganization;[20] if everything is honestly done by the trustee, and the courts are satisfied that the rights of others have not been prejudiced to the advantage of the trustees, the mere fact of interest is not sufficient to justify the withholding of a confirmation of his acts.[21]

A reorganization agreement providing for the selection of trustees by the bondholders, and permitting the court to make minor changes in the plan, does not authorize the court to designate as trustee one whose selection has not been assented to by a majority of the bondholders;[22] and under such a plan a trustee need not be a resident of the judicial district within which the designated court has jurisdiction.[23]

(b) Rights and Powers

The rights and powers of a reorganization committee of a railroad company usually are defined and limited by the agreement under which they are appointed and act.

The rights and powers of a reorganization trustee or committee of a railroad company are usually defined and limited by the agreement under which they are appointed and act,[24] and ordinarily they are given large discretionary powers in formulating or carrying out the reorganization plan,[25] and the assenting bondholders may act even further and agree in advance that the bonds may be subjected to any plan of reorganization which the committee may adopt.[26]

If the committee enters into a contract in good faith within the scope of the authority given to it, its action is valid and binding,[27] and cannot be adjudged null and void at the suit of a dissatisfied bondholder in the absence of any allegation of fraud on the part of the persons with whom it contracted or of a participation by them in some fraud of the committee,[28] since the persons so contracting with the committee are independent contractors and stand in no relation of trust and owe no trust duty to the bondholders.[29]

Construction of agreement as to powers. Where the committee is given power to construe the reorganization agreement, as to its powers with respect to the reorganization,[30] it must act in good faith in construing the agreement;[31] and where an agreement giving such power is prepared by the committee, and the language used is wholly its own, it should be construed in this respect most favorably to the bondholders or other parties thereto.[32]

Change of plans. The committee has no power to change or modify the plan of reorganization[33] except to the extent that it is given such power by the reorganization agreement;[34] and, where it is given such power, the terms of the reorganization plan can be changed only by concerted action of the committee or a majority of it in the exercise of its power and for the benefit of the company and not for its own benefit.[35]

Where it is authorized to do anything it deems best for the bondholders' interests, it may, where a plan of reorganization announced by it has proved impracticable, adopt and put in execution a new plan,[36] and cannot be required, at the suit of the

19. N.Y.—Haines v. Kinderhook, etc., R. Co., 53 N.Y.S. 368, 33 App. Div. 154.

20. U.S.—Shaw v. Little Rock, etc., R. Co., Ark., 100 U.S. 605, 25 L. Ed. 757.

21. U.S.—Shaw v. Little Rock, etc., R. Co., supra.

22. U.S.—Baldwin Locomotive Works v. Missouri, etc., R. Co., D. C.Okl., 269 F. 38.

23. U.S.—Baldwin Locomotive Works v. Missouri, etc., R. Co., supra.

24. U.S.—Van Siclen v. Bartol, C.C. Pa., 95 F. 793.
51 C.J. p 928 note 76.
Rights and powers of reorganization committee generally see Corporations § 1583.

25. U.S.—Van Siclen v. Bartol, supra.
51 C.J. p 928 note 77.

26. Cal.—Ginty v. Ocean Shore R. Co., 155 P. 77, 172 Cal. 31.

27. N.Y.—Brooks v. Dick, 32 N.E. 230, 135 N.Y. 652.
51 C.J. p 928 note 79.

28. N.Y.—Brooks v. Dick, supra.
51 C.J. p 928 note 80.

29. N.Y.—Brooks v. Dick, supra.
51 C.J. p 928 note 81.

30. N.Y.—Industrial, etc., Trust v. Tod, 64 N.Y.S. 293, 52 App.Div. 195, reversed on other grounds 63 N.E. 285, 170 N.Y. 233.
51 C.J. p 928 note 82.

31. N.Y.—Industrial, etc., Trust v. Tod, 73 N.E. 7, 180 N.Y. 215—Industrial, etc., Trust v. Tod, 64 N.Y.S. 293, 52 App.Div. 195, reversed on other grounds 63 N.E. 285, 170 N.Y. 233.

32. N.Y.—Industrial, etc., Trust v. Tod, 73 N.E. 7, 180 N.Y. 215.

33. Ill.—Indiana, etc., R. Co. v. Swannell, 41 N.E. 989, 157 Ill. 616, 30 L.R.A. 290.

34. U.S.—Lyman v. Kansas City, etc., R. Co., C.C.Mo., 101 F. 636, appeal dismissed 103 F. 991, 42 C.C.A. 679.
N.J.—Lehigh Coal, etc., R. Co. v. Central R. Co., 34 N.J.Eq. 88.

35. N.Y.—Hoopes v. Corbin, 1 N.Y. St. 212.

36. Cal.—Ginty v. Ocean Shore R. Co., 155 P. 77, 172 Cal. 31.

original bondholders, to execute the original plan as a trust.[37]

Reimbursement. If the committee acts in good faith, it is entitled to reimbursement for expenses incurred or advances made by it personally or on its credit in the execution of its trust,[38] and it is not necessary before bringing an action for an accounting therefor that it turn over to the beneficiaries new securities received under the reorganization scheme.[39] However, the bondholders cannot be charged with the expenses incurred by the committee on a former attempt to reorganize the company to which they did not assent.[40]

(c) Duties and Liabilities

The purchasing committee under a reorganization of a railroad company becomes a trustee at least for such beneficiaries as are parties to the reorganization agreement.

The purchasing trustee or committee under a reorganization of a railroad company becomes a trustee for all the beneficiaries,[41] or at least for such as are parties to the reorganization agreement,[42] and, as such, is accountable to them for the property or its proceeds[43] or for a breach of the reorganization agreement.[44]

The committee should act in good faith in carrying out the powers and duties intrusted to it,[45] and, if it does so, it will not be held liable for its mistakes,[46] such as for the failure of the plan of reorganization, which proved impracticable,[47] especially where the agreement expressly exempts it from personal liability for its acts except in cases of willful malfeasance or gross negligence,[48] and especially as to a bondholder who, by his own negligence, failed to share in the benefits of the plan as finally carried out.[49] The committee may be held liable for a breach of trust in carrying out the scheme,[50] as in bidding in the property at a judicial sale.[51]

Parties to the agreement may not object to acts of the committee which are not injurious to their interests.[52]

Time for formulation of plan. Where the committee has the power and duty of formulating a reorganization plan, it is the better practice for it to formulate such plan before final decree and sale of the property, in order that dissenting bondholders may be heard and granted such relief by the court as may be equitable;[53] and where the agreement requires the committee to report its plan to the bondholders so that any of them may withdraw if the plan is not satisfactory and recover back the bonds deposited by them, the committee impliedly agrees to prepare a plan and submit it to the bondholders before the property is sold under foreclosure.[54]

Notice of plan. The projectors of a plan for the readjustment of the respective interests of the mortgage creditors and stockholders of the railroad are not bound to provide for any notice,[55] and no provision for a notice of such plan can be implied where it is simply left to the discretion of the trustees whether or not to give any notice;[56] and, even where the plan for such readjustment requires the trustee to give notice of the time fixed, notice to stockholders by publication is sufficient.[57]

c. Reorganization by Purchasers at Foreclosure Sale

Some statutes authorize or require the purchasers of railroad property at a foreclosure sale to organize a new company for the purpose of receiving and operating the purchased road.

Some statutes authorize or require the purchasers of a railroad, at a foreclosure sale thereof, to or-

37. Cal.—Ginty v. Ocean Shore R. Co., supra.
51 C.J. p 928 note 89.

38. N.Y.—Coppell v. Hollins, 36 N. Y.S. 500, 91 Hun 570, affirmed 54 N.E. 1089, 159 N.Y. 551.
51 C.J. p 929 note 90.

39. N.Y.—Coppell v. Hollins, supra.

40. U.S.—Van Siclen v. Bartol, C. C.Pa., 95 F. 793.

41. U.S.—Bound v. South Carolina R. Co., S.C., 78 F. 49, 23 C.C.A. 636.
Ill.—Cushman v. Bonfield, 28 N.E. 937, 139 Ill. 219.

42. Ill.—Cushman v. Bonfield, 28 N. E. 937, 139 Ill. 219.

43. N.Y.—Zebley v. Farmers' L. & T. Co., 34 N.E. 1067, 139 N.Y. 461.
51 C.J. p 929 note 95.

44. N.Y.—Industrial, etc., Trust v. Tod, 63 N.E. 285, 170 N.Y. 233.
51 C.J. p 929 note 96.

45. N.Y.—Industrial, etc., Trust v. Tod, 73 N.E. 7, 180 N.Y. 215.

46. U.S.—Van Siclen v. Bartol, C.C. Pa., 95 F. 793.
N.Y.—White v. Wood, 29 N.E. 835, 129 N.Y. 527.

47. U.S.—Van Siclen v. Bartol, C.C. Pa., 95 F. 793.

48. U.S.—Van Siclen v. Bartol, supra.
N.Y.—Industrial, etc., Trust v. Tod, 63 N.E. 285, 170 N.Y. 233.

49. U.S.—Van Siclen v. Bartol, C. C.Pa., 95 F. 793.
51 C.J. p 929 note 2.

50. Ill.—Cushman v. Bonfield, 28 N. E. 937, 139 Ill. 219.
51 C.J. p 929 note 3.

51. U.S.—Trustees Corp. v. Kansas City, etc., R. Co., C.C.A.Kan., 18 F. 2d 765.
51 C.J. p 929 note 4.

52. N.J.—Walker v. Montclair, etc., R. Co., 30 N.J.Eq. 525.

53. U.S.—U. S., etc., Trust Co. v. U. S., etc., Trust Co., Kan., 250 F. 377, 162 C.C.A. 447.

54. N.Y.—Industrial, etc., Trust v. Tod, 73 N.E. 7, 180 N.Y. 215.

55. N.Y.—Vatable v. New York, etc., R. Co., 96 N.Y. 49.

56. N.Y.—Vatable v. New York, etc., R. Co., supra.

57. N.Y.—Vatable v. New York, etc., R. Co., supra.

ganize a new company for the purpose of receiving and operating the purchased road.[58] Under these statutes such purchasers may organize a corporation under any name they may adopt,[59] but in organizing the corporation they must comply with all the statutory requirements.[60] Such a statute does not authorize a transaction which is not in any proper sense an arrangement for the reorganization of an existing railroad,[61] and hence does not apply where the purchasing company does not contemplate operating or maintaining the line of the old company.[62]

Such statutory authority also is intended to meet a case where there is no existing corporation capable of holding the property and exercising the franchises,[63] and hence it does not apply where the purchaser is a corporation already existing and capable of holding the railroad property and exercising the franchise,[64] and does not prevent the purchaser from transferring the property and franchise to such a company,[65] and where there is such a transfer, and the line so acquired is already constructed, it is not essential for the purchasing company to file a map of the line thus acquired.[66]

Under a statutory provision that on conveyance to a purchaser of corporate property under a foreclosure sale the purchaser shall forthwith be a new corporation, a foreign railroad company which buys in railroad property, franchises, etc., at such a sale becomes a new domestic corporation subject to the jurisdiction of the state courts.[67]

Supervision. Under some statutes the public service commission has authority to supervise the carrying out of a purchasers' plan of reorganization,[68] but cannot pass on its propriety.[69]

d. Nature and Validity of Reorganization Plan in General

A plan of reorganization for a railroad company will be approved by the court in equity proceedings where it is fair, equitable, and wise for the parties concerned.

In equity proceedings for the reorganization of a railroad, a plan of reorganization will be approved by the court where it is fair, equitable, and wise from the standpoint of all of the parties.[70] In reorganizing an insolvent railroad company it has been held to be the better practice to reorganize the enterprise on the basis of existing mortgages as stock, or something which is equivalent, and by a new mortgage, with a lien superior to the old, raise the money which is required;[71] and a plan of reorganization by a purchaser at a foreclosure sale will generally be favored by the court when it is based on a conservative estimate of the future and so soundly framed as to withstand the dangers of financial and commercial stress.[72] If the arrange-

58. Mich.—Dester v. Ross, 45 N.W. 530, 85 Mich. 370.
51 C.J. p. 929 notes 12–20
Reorganization of:
Corporation after judicial sale in general see Corporations § 1555
Railroad companies under Bankruptcy Act see Bankruptcy §§ 831–962.
Rights and liabilities of purchaser on foreclosure generally see supra §§ 328–338

59. La.—Vicksburg, etc., R. Co. v. Elmore, 15 So. 701, 46 La.Ann. 1237.

60. U.S.—Mercantile Trust Co. v. Binford, D.C.Tex., 6 F.2d 285.
51 C.J. p. 930 note 14.

61. N.Y.—Munson v. Syracuse, etc., R. Co., 8 N.E. 355, 103 N.Y. 58

62. N.Y.—Munson v. Syracuse, etc., R. Co., supra.
51 C.J. p. 930 note 16.

63. U.S.—Julian v. Central Trust Co., N.C., 24 S.Ct. 399, 193 U.S. 93, 48 L.Ed. 629.
N.Y.—People v. Brooklyn, etc., R. Co., 89 N.Y. 75

64. N.Y.—People v. Brooklyn, etc., R. Co., 89 N.Y. 75

65. U.S.—Julian v. Central Trust Co., N.C., 24 S.Ct. 399, 193 U.S. 93, 48 L.Ed. 629.
N.Y.—People v. Brooklyn, etc., R. Co., 89 N.Y. 75.

66. N.Y.—People v. Brooklyn, etc., R. Co., supra.

67. N.C.—Carolina Coal, etc., Co. v. Southern R. Co., 57 S.E. 444, 144 N.C. 732.

68. N.Y.—People v. Public Service Commission, 130 N.Y.S. 97, 145 App.Div. 318, affirmed 96 N.E. 1011, 203 N.Y. 299.

69. N.Y.—People v. Public Service Commission, supra.
51 C.J. p. 930 note 23.

70. U.S.—Guaranty Trust Co. of New York v. Seaboard Air Line R. Co., D.C.Va., 53 F.Supp. 672, affirmed, C.C.A., Badenhausen v. Guaranty Trust Co. of New York, 145 F.2d 40, certiorari denied 65 S.Ct. 440, 323 U.S. 797, 89 L.Ed. 636—Chase Nat. Bank of City of New York v. Wabash Ry. Co., D.C. Mo., 40 F.Supp. 859.
Reorganization of railroads:
In equity proceedings generally see supra subdivision a of this section.
Under Bankruptcy Act see Bankruptcy §§ 881–962.
Plan held fair and equitable
U.S.—Chase Nat. Bank of City of New York v. Wabash Ry. Co., supra.
Assumption by court in determining fairness of plan
In receivership proceeding wherein plan for reorganization of railway company was proposed, where some of controversial issues related primarily to development of a complete formula for allocation of system earnings to mortgage sections, and controversies were settled by interested parties on allocations of new securities of reorganized company to holders of securities of old company based primarily upon traffic density charts, district court, in determining whether reorganization plan was fair and equitable, would assume that any deviations from charts which could be justified were not overlooked in the negotiations and were reflected in the final adjustments under the proposed plan.—Chase Nat. Bank of City of New York v. Wabash Ry. Co., supra.

71. U.S.—Shaw v. Little Rock, etc., R. Co., Ark., 100 U.S. 605, 25 L.Ed. 757.
Cal.—Ginty v. Ocean Shore R. Co., 155 P. 77, 172 Cal. 31.

72. U.S.—Central Trust Co. v. Missouri, etc., R. Co., D.C.Mo., 246 F. 154.
51 C.J. p. 930 note 25.

ment is made in good faith, it is not rendered invalid by the fact that the purchasers of the property are the same persons as those who comprise the new corporation.[73] The fairness of a plan may properly be determined on a motion to confirm a sale under a bid which includes such plan;[74] and in determining its fairness the fact that the plan has the approval of a great majority of the bondholders is entitled to great weight,[75] but is not controlling.[76]

The fact that a creditor of the railroad company holds money and securities belonging to it may be considered in determining the fairness, as to bondholders, of a plan for settling his claim and releasing such security.[77] A plan which admits bonds secured by a particular division of the railroad to further security on other property does not unfairly favor such bonds as against refunding bonds where the latter are admitted to further security on such division.[78]

Exchange of securities. It may be arranged that the new securities to be issued by the new company shall be exchanged for, and extinguish, the bonds of the old company,[79] where the demand therefor is made in proper time.[80] The fixing of a reasonable time within which bonds must be deposited in order to participate in a reorganization is proper[81] and does not constitute coercion of the bondholders by depriving them of time to attack the reorganization plan.[82]

The bondholders, however, need not always be given securities of the same rank as those theretofore held by them,[83] and so a reorganization plan under which holders of refunding bonds of the old company receive for part of their claims junior bonds is not necessarily unfair.[84]

§ 340. —— Rights of Bondholders and Other Creditors

a. In general
b. Binding effect of agreement; right to withdraw
c. Operation and validity of purchase
d. Rights of nonparticipating bondholders
e. Rights of other creditors

a In General

After a sale and reorganization of a railroad, the rights of bondholders who have come into or assented to such arrangement ordinarily are governed by the terms of the reorganization agreement.

After a sale and reorganization of a railroad, the rights of bondholders who have come into or assented to such arrangement ordinarily are governed by the terms of the reorganization agreement.[85] Where the agreement provides for the issue of stock of the new company, to be divided among bondholders in proportion to the number of bonds deposited by them, on entering into the agreement, a bondholder, regardless of the amount at which the new corporation is capitalized, is entitled to only the proportion of the stock issued to represent property purchased which his bonds bear to the whole amount of bonds secured by the mortgage foreclosed.[86]

Any bondholder who by the terms of the agreement is offered the privilege of coming in has a right to be admitted and participate in the benefits

73. Tex.—Thayer v. Wathen, 44 S.W. 806, 17 Tex.Civ.App. 282.

74. U.S.—Kansas City Terminal R. Co. v. Central Union Trust Co., C.C.A.Mo., 28 F.2d 177, certiorari denied 49 S.Ct. 179, 278 U.S. 655, 73 L.Ed. 564.

75. U.S.—Jameson v. New York Guaranty Trust Co., C.C.A.Ill., 20 F.2d 808, certiorari denied 48 S.Ct. 141, 275 U.S. 569, 72 L.Ed. 431.—Guaranty Trust Co. of N.Y. v. Seaboard Air Line Ry. Co., D.C.Va., 60 F.Supp. 607.

76. U.S.—Jameson v. New York Guaranty Trust Co., C.C.A.Ill., 20 F.2d 808, certiorari denied 48 S.Ct. 141, 275 U.S. 569, 72 L.Ed. 431.

77. U.S.—Jameson v. New York Guaranty Trust Co., supra.

78. U.S.—Jameson v. New York Guaranty Trust Co., supra.

79. Tex.—Houston, etc., R. Co. v. Keller, 37 S.W. 1062, 90 Tex. 214.

Option of nonassenters

Nonassenters to reorganization plan have a double option permitting them to take portion of cash distributable to them respectively, if distributable cash exceeds market price for new securities, or they can, within reasonable limits, assent to plan and receive new securities.—Guaranty Trust Co. of N.Y. v. Seaboard Air Line Ry. Co., D.C.Va., 60 F.Supp. 607.

80. N.Y.—Hoopes v. Corbin, 1 N.Y.St. 212.

81. U.S.—Jameson v. New York Guaranty Trust Co., C.C.A.Ill., 20 F.2d 808, certiorari denied 48 S.Ct. 141, 275 U.S. 569, 72 L.Ed. 431.

82. U.S.—Jameson v. New York Guaranty Trust Co., supra.

83. U.S.—Jameson v. New York Guaranty Trust Co., supra.

84. U.S.—Jameson v. New York Guaranty Trust Co., supra.

85. U.S.—Lyman v. Kansas City, etc., R. Co., C.C.Mo., 101 F. 636, appeal dismissed 103 F. 991, 42 C.C.A. 679.

51 C.J. p. 931 note 39.

Reorganization of railroads under Bankruptcy Act see Bankruptcy §§ 881-962.

Rights of bondholders under reorganization of corporation generally see Corporations § 1587.

Plan held fair and equitable

U.S.—Chase Nat. Bank of City of New York v. Wabash Ry. Co., D.C.Mo., 40 F.Supp. 859.

Priority as to unpaid interest

In receivership proceeding wherein plan for reorganization of railway company was proposed, unpaid interest on bonds was entitled to same priority as the principal.—Chase Nat. Bank of City of New York v. Wabash Ry. Co., supra.

86. N.Y.—White v. Wood, 29 N.E. 525, 129 N.Y. 527.—White v. Wood, 21 N.Y.S. 1124, affirmed 37 N.E. 108, 142 N.Y. 656.

of the reorganization,[87] provided he applies to come in within the time fixed by the agreement[88] and complies or offers to comply with other terms or conditions prescribed by the agreement.[89] Such a bondholder may sue to compel the disclosure to him of the plan of reorganization which is about to be carried into effect[90] or for a specific enforcement of the agreement and other equitable relief.[91] A bondholder may also intervene personally or by committee to object to a plan of reorganization proposed in a foreclosure suit at any time when the matter is before the court for its approval.[92]

Where the lien of certain mortgage bonds is subordinate to the lien of other mortgage bonds and the claim of such other bonds is not fully satisfied by the allocation of new securities, the holders of the subordinate bonds are not entitled to participate in the capitalization of the reorganized company in equity proceedings,[93] and the holders of such subordinate bonds are barred by laches from petitioning, long after approval of the plan of reorganization by the court, for an order directing the receivers to make payment on such bonds.[94]

Statutory protection. Under some statutes, if the mortgage is foreclosed and the property purchased on the application of a number of the bondholders, it inures to the benefit of all the bondholders,[95] and each mortgage bondholder becomes a stockholder in the property covered by the mortgage, in the proportion that his bonds bear to the whole issue covered by the mortgage,[96] and, if the right to participate is denied a bondholder, he may maintain an action to recover the damages sustained by reason of such refusal.[97]

Equities of bondholders of subsidiary lines. On reorganization of a railroad system, first mortgage bondholders of a subsidiary line, whose bonds were assumed by the principal company on its purchase of the line, occupy a dual position, first as mortgagees of the principal line, and second as general creditors of the purchasing company;[98] and their rights should be recognized in both relations by giving them the benefit of their security, its value to be agreed on or determined by foreclosure and sale, and by giving them the status of general creditors as to any deficiency.[99]

b. Binding Effect of Agreement; Right to Withdraw

In the absence of fraud or concealment, bondholders who have come into a railroad reorganization arrangement are bound by a sale and reorganization thereunder.

Bondholders who have come into a railroad reorganization arrangement, in the absence of fraud or concealment, are bound by a sale and reorganization thereunder,[1] and are not entitled to a rescission of the reorganization agreement after it has been executed by the purchase of the property, the cancellation of the old mortgage, and the payment of a large part of the assumed indebtedness.[2]

87. U.S.—Sage v Iowa Cent. R Co., Iowa, 99 U.S 334, 25 L Ed 394
51 C J. p 931 note 41

88. U S.—Duncan v. Mobile, etc., R. Co., C.C A Ala., 8 F.Cas.No 4,139, 3 Woods 597.
51 C J. p 931 note 42.

89. N Y—Carpenter v. Catlin, 44 Barb. 75, 29 How.Pr. 423
Pa—Landis v. Western Pennsylvania R. Co., 19 A. 556, 133 Pa. 579.

90. N J.—Midland R. Co. v. Hitchcock, 34 N.J.Eq. 278.

91. N J.—Hitchcock v. New Jersey Midland R. Co., 33 N J.Eq. 86, affirmed 34 N J Eq 278.
51 C J. p 931 note 45.

92. U S.—Guaranty Trust Co. v. Missouri Pac. R. Co., D C Mo, 238 F. 812.

93. U.S—Guaranty Trust Co of New York v. Seaboard Air Line R. Co, D.C.Va, 53 F.Supp 672, affirmed, C.C A, Badenhausen v Guaranty Trust Co of New York, 145 F.2d 40, certiorari denied 65 S.Ct 440, 323 U.S. 797, 89 L.Ed. 636.

Unfair treatment as basis for participation

(1) In equity reorganization of railroad, subsidiaries, and leased lines, where it was not shown that adjustment mortgage bonds had a lien on property securing subsequently issued bonds, adjustment mortgage bonds were not entitled to participate in proposed capitalization of reorganized railroad on ground that they had been unfairly treated in subsequent bond issues—Guaranty Trust Co. of New York v. Seaboard Air Line R Co., D C Va, 53 F Supp 672, affirmed, C C.A., Badenhausen v. Guaranty Trust Co. of New York, 145 F.2d 40, certiorari denied 65 S.Ct. 440, 323 U S. 797, 89 L Ed 636.

(2) Where, at time of appointing receivers in equity reorganization of railroad, money held by paying agents for payment of coupons on adjustment bonds not previously presented for payment was turned over to receivers, denying holders of such bonds any right to such fund was not improper or discriminatory, although court authorized payment of prereceivership coupons of other mortgages which were to be paid in part under reorganization plan, in view of inferior position of mortgage securing adjustment bonds, which precluded its participation in reorganization plan—Blackford v. Powell, C C.A.Va, 151 F.2d 392, certiorari denied 66 S Ct. 523, 327 U.S. 778, 90 L Ed 1006.

94. U.S—Blackford v. Powell, supra

95. Ky.—Reed v. Schmidt, 72 S.W. 367, 115 Ky. 67, 24 Ky.L. 1889, 61 L R.A. 270.
51 C J. p 931 note 47.

96. Me—Somerset R Co. v. Pierce, 33 A. 772, 88 Me. 86, appeal dismissed 19 S Ct. 64, 171 U.S. 641, 43 L.Ed. 316.

97. Ky—Reed v. Schmidt, 72 S W 367, 115 Ky. 67, 24 Ky L. 1889, 61 L R.A. 270.
51 C.J. p 931 note 49.

98. U S—Guaranty Trust Co v Missouri Pac. R. Co, D.C Mo., 238 F 812.

99. U S—Guaranty Trust Co. v. Missouri Pac. R. Co, supra.

1. U.S—Crawshay v. Soutter, Wis, 6 Wall. 739, 18 L.Ed. 845.

2. U.S.—Appeal of Columbus, etc.,

Where the manner of protecting bondholders is a matter of judgment, a plan devised in good faith and assented to by a majority of the bondholders is binding on the others,[3] provided it is fair and just to the minority bondholders;[4] and a minority bondholder will not be permitted to hold up a fair reorganization plan merely as a means for obtaining for himself more favorable terms than those given by the plan,[5] or unless he can show that his legal rights will be impaired by the proposed reorganization.[6]

Right to withdraw. A bondholder who has, in accordance with the reorganization agreement, deposited his bonds with the committee may withdraw them at any time on becoming dissatisfied with the acts of the committee,[7] unless he has agreed either expressly or by necessary implication not to withdraw his bonds for a stipulated period[8] or until after the preparation of the reorganization plan.[9] A provision in the agreement giving the bondholders a right to withdraw after the plan has been submitted does not prevent a dissatisfied bondholder from withdrawing from the agreement and recovering his bonds before a plan has been prepared, where there is no obligation on the committee to prepare any such plan.[10]

Where, however, an agreement containing such a provision requires the committee to prepare a plan of reorganization and give notice thereof, the bondholder has no power to withdraw his bonds until after the plan has been prepared and such notice given;[11] and, in such a case, if the property is foreclosed and the deposited bonds used to purchase at the foreclosure sale without notice to the bondholder and before submission of a plan of reorganization to him, the action of the committee, although it might not be fraudulent or willfully wrong, is not in good faith, and a bondholder deprived of his right to withdraw his bonds by such act may sue the committee to recover damages sustained thereby,[12] in which action the bondholder's measure of damages is the value of the bonds at the date of the violation of the agreement;[13] and, where the bonds had no market value for years, such value may be approximately established by showing the intrinsic value of the property on which they were a first lien,[14] and, when so established, the value of plaintiff's bond is the proper proportion of that amount not exceeding the face of the bond and the unpaid interest.[15] Nevertheless a bondholder who has deposited his bonds subject to the orders of a reorganization committee pending foreclosure is not entitled to withdraw them after they have been deposited with a court to be used in making payment for the property.[16]

Deposit of bonds and acceptance of new bonds. Where the reorganization agreement provides that assenting bondholders shall deposit their bonds with the committee, a bondholder is bound to deliver his bonds to the committee and accept new ones whenever requested to do so;[17] and, where the provision is for such deposit with a designated trust company, a deposit of his bonds with the reorganization committee instead of with the designated depositary entitles a bondholder to participate in the reorganization, since the depositary is merely the agent of the committee.[18] The consummation of such a plan by the deposit of old bonds and the acceptance of bonds of the new company operates as a payment of the old bonds,[19] since the bondholder thereby surrenders all of his rights in respect thereof against the old corporation, its property, and the proceeds of the sale.[20] He has no claim on the proceeds of the sale as an unsecured creditor, to the amount by which the sum realized falls below the amount of such bonds.[21]

R. Co, Ohio, 109 F. 177, 48 C.C.A. 275.

3. U.S.—Fearon v. Bankers' Trust Co., Pa., 238 F. 83, 151 C.C.A. 159.
51 C.J. p. 932 note 54.

4. U.S.—Palmer v. Bankers' Trust Co., C.C.A.Colo., 12 F.2d 747—Fearon v. Bankers' Trust Co., Pa., 238 F. 83, 151 C.C.A. 159
Rights of nonparticipating bondholders generally see infra subdivision d of this section.

5. U.S.—Palmer v. Bankers' Trust Co., C.C.A.Colo., 12 F.2d 747.

6. N.Y.—Emery v. New York, etc., R. Co, 30 N.Y.S. 306, 9 Misc. 310.
51 C.J. p. 932 note 57.

7. U.S.—Colonial Trust Co. v. Wallace, C.C.N.Y., 183 F. 897.
51 C.J. p. 932 note 63.

8. U.S.—Colonial Trust Co. v. Wallace, supra

9. U.S.—Colonial Trust Co. v. Wallace, supra.

10. U.S.—Colonial Trust Co. v. Wallace, supra.
51 C.J. p. 932 note 66.

11. N.Y.—Industrial, etc., Trust v. Tod, 73 N.E. 7, 180 N.Y. 215.

12. N.Y.—Industrial, etc., Trust v. Tod, supra.

13. N.Y.—Industrial, etc., Trust v. Tod, supra.

14. N.Y.—Industrial, etc., Trust v. Tod, supra.

15. N.Y.—Industrial, etc., Trust v. Tod, supra.

16. U.S.—U. S., etc., Trust Co. v. U. S., etc., Trust Co., Kan., 250 F. 377, 162 C.C.A. 447.

17. U.S.—Pollitz v. Farmers' L. & T. Co., C.C.N.Y., 53 F. 210.
51 C.J. p. 932 note 58.

18. N.J.—Hitchcock v. Midland R. Co., 33 N.J.Eq. 86, affirmed 34 N.J.Eq. 278.

19. U.S.—Central Trust Co. v. Cincinnati, etc., R. Co, C.C.Ohio, 58 F. 500.
51 C.J. p. 932 note 60.

20. U.S.—Appeal of Columbus, etc., R. Co, Ohio, 109 F. 177, 48 C.C.A. 275—Central Trust Co. v. Cincinnati, etc., R. Co, C.C.Ohio, 58 F. 500.

21. U.S.—Central Trust Co. v. Cincinnati, etc., R. Co, supra.
51 C.J. p. 932 note 62.

c. Operation and Validity of Purchase

Where, in pursuance of a reorganization scheme, railroad property is purchased by a trustee for the bondholders, all of the bondholders who were parties to the scheme ordinarily are, in equity, the owners of the property so purchased as tenants in common.

Where, in pursuance of a reorganization scheme, the railroad property is purchased by a trustee for the bondholders, all the bondholders who were parties to the scheme ordinarily are, in equity, the owners of the property so purchased as tenants in common[22] and stockholders in the new corporation without any formal surrender of their bonds,[23] and are entitled to relief in a suit by one of them, for himself and others similarly situated,[24] and their community of right and interest make it permissible in such case for all the other beneficiaries to come into such suit by intervening petitions[25]

Bondholders purchasing under such an agreement have the equitable right, after satisfying the cost and charges of the litigation and trust, to pay the residue of their bid in bonds,[26] but such a bondholder has no interest in a note given by the new corporation to the trustees in payment of advances made by them for the actual expenses of the execution of the trust, and cannot restrain the trustees from collecting it.[27]

Effect on original trust. Such a purchase does not divest the property of the original trust, but the purchaser will hold it in trust for the bondholders secured by the mortgage or trust deed,[28] which trust may be enforced by a bondholder, even though he has failed to pay his share of the costs and expenses and his bond has been returned to him by the trustee.[29] The property may be followed by the bondholders into the hands of a purchaser from the trustee with knowledge of the trust,[30] and the failure of the scheme under which the purchase was made will not divest or extinguish the trust[31] The failure of some of the cestuis que trust to perform their undertakings with the purchaser will not have any effect on the rights of others who comply with their agreement,[32] nor will their equitable rights be affected by the failure of the trustee properly to apply assessments paid by them.[33]

Where, on such purchase by the trustee, one of the bondholders advances the amount of the bid, and has the sale confirmed and seeks to avail himself of the legal title thus obtained, he will take such title, with all the equitable burdens resting on it, in favor of the other bondholders,[34] and, if he sells and conveys the property in fraud of such trust, he will be required to account for the proceeds to the other bondholders.[35] However, where, in such a case, the sale is made in the interest of all the bondholders, he, as one of the bondholders, is entitled to an equitable interest proportionate to the number of bonds he owns,[36] and if he is compelled to pay more than his share of the expense of receiving the title he will be entitled to contribution from the other bondholders[37]

Consideration. Where a new corporation purchases at foreclosure sale the property of a railroad company, the majority of whose stock it owns, the fact that the purchase price paid is inadequate for the property is immaterial, in the absence of fraud or conspiracy, in a collateral action by a holder of other securities of the railroad company against the purchaser.[38]

d. Rights of Nonparticipating Bondholders

In the absence of statute, a bondholder can claim no right to participate in the reorganization of a railroad where he has refused or failed to come into the scheme or has failed to comply with certain conditions until after the expiration of the specified time.

In the absence of statute, a bondholder can claim no right to participate in the reorganization of a railroad where he has refused or failed to come into the scheme[39] or has failed to comply with certain conditions until after the expiration of the specified

22. Ill.—Indiana, etc., R. Co. v. Swannell, 41 N.E. 989, 157 Ill. 616, 30 L.R.A. 290.

23. U.S.—Barnes v. Chicago, etc., R. Co., Wis., 7 S.Ct. 1043, 122 U.S. 1, 30 L.Ed. 1128.
51 C.J. p. 933 note 74.
Deposit of bonds see supra subdivision b of this section

24. Ill.—Indiana, etc., R. Co. v. Swannell, 41 N.E. 989, 157 Ill. 616, 30 L.R.A. 290.

25. Ill.—Indiana, etc., R. Co. v. Swannell, supra

26. U.S.—Duncan v. Mobile, etc., R. Co., C.C.Ala., 8 F.Cas.No. 4,139, 3 Woods 597.

27. N.Y.—White v. Wood, 29 N.E. 835, 129 N.Y. 527—White v. Wood, 21 N.Y.S. 1124, affirmed 37 N.E. 108, 142 N.Y. 656.

28. Ill.—Indiana, etc., R. Co. v. Swannell, 41 N.E. 989, 157 Ill. 616, 30 L.R.A. 290—Cushman v. Bonfield, 28 N.E. 937, 139 Ill. 219.

29. Ill.—Indiana, etc., R. Co. v. Swannell, 41 N.E. 989, 157 Ill. 616, 30 L.R.A. 290.
51 C.J. p. 933 note 80.

30. Ill.—Indiana, etc., R. Co. v. Swannell, supra.
51 C.J. p. 933 note 81.

31. Ill.—Cushman v. Bonfield, 28 N.E. 937, 139 Ill. 219.
51 C.J. p. 933 note 82.

32. Ill.—Indiana, etc., R. Co. v. Swannell, 41 N.E. 989, 157 Ill. 616, 30 L.R.A. 290—Cushman v. Bonfield, 28 N.E. 937, 139 Ill. 219

33. Ill.—Cushman v. Bonfield, supra.

34. Ill.—Cushman v. Bonfield, supra.

35. Ill.—Cushman v. Bonfield, supra.
51 C.J. p. 933 note 86.

36. Ill.—Cushman v. Bonfield, supra.

37. Ill.—Cushman v. Bonfield, supra.

38. N.Y.—Male v. Atchison, etc., R. Co., 129 N.E. 458, 230 N.Y. 158, 15 A.L.R. 1098.

39. U.S.—Appeal of Columbus, etc.,

time, which would entitle him to participate,[40] even though he was ignorant of the agreement until after the expiration of the time fixed, and in such case his only remedy, if any, would be to attack the foreclosure.[41] Where the property is sold under foreclosure proceedings and the title thereto is vested in a trustee who purchases in behalf of the bondholders, a nonparticipating bondholder has no interest in the property,[42] and his only right is to share in the proceeds of the sale,[43] nor can he be forced to come into the new venture, but is entitled to stand on his right to share in the proceeds.[44]

A court of equity will not at the suit of the railroad company compel its minority bondholders to assent to a reorganization scheme which inures solely to the benefit of the stockholders,[45] as where the scheme requires the bondholders to scale their bonds, accepting in lieu thereof new bonds for a smaller amount.[46] However, where, by virtue of statute, a purchase of the road on the application of a number of the bondholders inures to the benefit of all the bondholders, a nonparticipating bondholder has the rights of a tenant in common with the company formed by the other bondholders to the estate and property acquired by the foreclosure, subject to the right of the company to the possession and to receive the income for itself and as trustee for such cotenants.[47] Where a decree of foreclosure directs pro rata payments in cash, by the purchaser, to bondholders who have not elected to join in the purchase, they are not entitled to interest on such payments during the time of delay necessary for determining the amount of the payment.[48]

e. Rights of Other Creditors

(1) In general
(2) As between creditors and stockholders
(3) Securities to creditors

(1) In General

The rights of creditors of a railroad company who have assented to a plan of reorganization are governed by the terms of the plan.

The rights of creditors of a railroad company who have assented to a reorganization plan depend on the terms thereof.[49] Where a court has taken possession of the property in a suit brought in behalf of all the unsecured creditors, and authorized a transfer thereof to a reorganized company pursuant to a plan approved by a large majority of the creditors, the nonassenting minority may be required to accept payment in the same manner as the majority,[50] and a nonassenting creditor may be enjoined from attempting to enforce his claim otherwise than as provided in the decree of reorganization.[51] Where the plan of reorganization offered is insufficient to protect creditors' rights, the court, on an application for confirmation of the foreclosure sale, may make an order protecting such rights.[52]

R Co, Ohio, 109 F. 177, 48 C C A 275—Wetmore v St Paul, etc, R Co, C C Minn, 3 F. 177, 1 McCrary 466, 29 F Cas No 17,469, 5 Dill 531

40. N Y—Carpenter v Catlin, 44 Barb 75, 29 How Pr 423
51 C.J. p 934 note 91.

41. N Y.—Hoopes v. Corbin, 1 N Y. St. 212.

42. Pa.—Landis v. Western Pennsylvania R Co., 19 A. 556, 133 Pa 579.

43. U.S—Bound v. South Carolina R Co, S C., 78 F. 49, 23 C C A. 636.
51 C J. p 934 note 94.
Disposition of proceeds and surplus generally see infra § 343.

44. Me.—Somerset R Co. v. Pierce, 38 A. 772, 88 Me. 86, appeal dismissed 19 S Ct. 64, 171 U S. 641, 43 L.Ed. 316.
Pa.—Landis v. Western Pennsylvania R. Co., 19 A. 556, 133 Pa. 579.

45. U S—Lake St. El. R. Co. v. Ziegler, Ill., 99 F. 114, 39 C C A. 431, certiorari denied 20 S Ct. 1029, 177 U.S. 695, 44 L.Ed. 946.

46. U S—Lake St. El. R Co. v Ziegler, supra.

47. U S—Brooks v. Vermont Cent R. Co, C C.Vt., 22 F. 211

48. U.S—U S, etc, Trust Co v Kansas City, etc, R. Co, D C Kan, 240 F. 521
51 C.J. p 934 note 1.

49. U S—Davidson v Mexican Nat R Co, C C N.Y., 58 F. 653, reversed on other grounds 89 F. 1015, 32 C. C A. 606.
Liability of new company for debts of old company see infra § 342 b
Reorganization under Bankruptcy Act see Bankruptcy §§ 881–962.
Right of other creditors under reorganization of corporation generally see Corporations § 1588.

50. U S—Phipps v. Chicago, etc., R. Co, C.C.A.Mo., 284 F. 945, 28 A.L R. 1184, error dismissed 43 S.Ct. 701, 262 U S. 762, 67 L.Ed. 1221.
Compromise of claims
In receivership proceeding wherein plan for reorganization of railway company was proposed, proposed plan compromising claims of unsecured general creditors on basis of cash payment equal to a certain per cent of principal amount of respective claims was fair and equitable to unsecured creditors, without making any provision for an exchange of new securities in satisfaction of claims of unsecured creditors, in view of finding that railway company was hopelessly insolvent and unable to pay its secured indebtedness, thus leaving no equity in insolvent's estate for benefit of unsecured general creditors, and, where offer had been accepted by all but a few of the creditors, offer would be ordered continued in effect for acceptance by those few creditors who had theretofore declined acceptance or who had failed to respond to offer—Chase Nat. Bank of City of New York v. Wabash Ry. Co., D C.Mo., 46 F.Supp. 859.

51. U S.—Phipps v. Chicago, etc., R. Co., C.C A Mo., 284 F. 945, 28 A. L R. 1184, error dismissed 43 S Ct. 701, 262 U.S 762, 67 L.Ed. 1221.

52. U.S—Trustees Corp v. Kansas City, etc., R. Co, C.C.A.Kan., 18 F. 2d 765.
51 C.J. p 934 note 7.

Where the proceedings and reorganization are had without notice to unsecured creditors and in fraud of their rights,[53] as where the railroad property is acquired for less than its value by the new company, in which the old stockholders continue as stockholders,[54] such creditors are not bound thereby, and may sue in equity to have the transfer of the property set aside[55] and to have the court formulate a new and just plan of reorganization, provided they offer to abide by such plan.[56] So also a nonassenting, unsecured creditor is not bound by a decree on reorganization which does not protect his rights,[57] as where he is offered, as security, stock, the issuance of which has not been approved by the state public utility commission as required by law;[58] nor in such a case is he estopped to assert his claim against the property by reason of an unfruitful discussion of a settlement between his attorney and officers of the reorganized company[59]

One having a claim for damages for breach of contract by the old company is entitled to all the rights of an unsecured creditor on the reorganization[60] Where claims against the company are purchased by the committee, the fact that a larger amount or per cent is paid to some creditors than to others is immaterial as to the rights under the reorganization plan of creditors whose claims were not purchased.[61]

Against committee. Where at a foreclosure sale a reorganization committee is the highest bidder and the sale to it is confirmed, but it fails to make good its bid and the property is resold for a smaller amount, the general creditors, if they would be benefited thereby, may compel such committee to make good the difference.[62]

Against trust fund. Where the reorganization agreement places funds in the hands of the new company for the payment of unsecured creditors of the old company, who have not participated in or accepted the plan, it constitutes such funds a trust fund for such purposes,[63] and such a creditor may maintain an independent suit against the new company in the nature of a creditor's bill,[64] and need not go into the court under the decree of which the reorganization was effected.[65]

Person furnishing money for reconstruction. Where the mortgage bondholders decline to receive the new bonds because they do not comply with the reorganization contract, a person, who has furnished the money for the reconstruction of the road in reliance for security on the performance of the contract, is entitled to equitable relief for specific performance of the contract, the cancellation of unissued bonds, and an injunction restraining the company from issuing any other bonds without the consent of all the bondholders.[66]

(2) As between Creditors and Stockholders

A plan of reorganization of an insolvent railroad company agreed to by the bondholders and stockholders is not binding on unsecured creditors where it fails to recognize and protect their prior rights against all of the property involved over the rights of the stockholders.

In accordance with the general rule that, as between creditors and stockholders, the property of an insolvent corporation is first appropriated to the payment of its creditors, a plan of reorganization of an insolvent railroad company between the bondholders and stockholders in order to bind a creditor must recognize and adequately protect the prior rights of unsecured creditors against all the property involved, over those of the stockholders,[67] and a plan of reorganization which recognizes and preserves the interest of the stockholders at the expense of the rights of such creditors is invalid as to nonassenting creditors and does not defeat their rights,[68] even though the existence of such creditors was unknown at the time of the reorgani-

53. Mich.—Wabash R Co v. Marshall, 195 N.W 134, 224 Mich. 593.

54. U.S.—Northern Pac. R. Co v. Boyd, Wash, 33 S Ct. 554, 228 U.S. 482, 57 L Ed 931.
Mich.—Wabash R. Co. v. Marshall, 195 N.W. 134, 224 Mich. 593.

55. U.S.—St. Louis, etc, R. Co. v. Des Moines, etc, R. Co., C.C.Iowa, 101 F. 632.

56. U.S.—Paton v. Northern Pac R. Co, C C Wis., 85 F. 838.
51 C.J. p 934 note 11.

57. Mich.—Wabash R. Co. v. Marshall, 195 N.W. 134, 224 Mich. 593

58. Mich.—Wabash R. Co. v. Marshall, supra.
Necessity of public utility commission's approval of issuance of stock see Public Utilities § 43

59. Mich.—Wabash R. Co. v. Marshall, supra.

60. U.S.—Kansas City Terminal R Co v. Central Union Trust Co, C C.A.Mo, 28 F 2d 177, certiorari denied 49 S Ct. 179, 278 U.S. 655, 73 L Ed. 564.

61. U.S.—North American Co. v. St Louis, etc., R. Co, D.C Mo., 28 F 2d 174, affirmed, C.C.A., Kansas City Terminal R. Co. v. Central Union Trust Co, 28 F 2d 177, certiorari denied 49 S Ct. 179, 278 U.S. 655, 73 L Ed. 564.

62. U.S.—Central Trust Co v. Cincinnati, etc., R. Co., C.C.Ohio, 58 F. 500.

63. Mich.—Wabash R Co v Marshall, 195 N.W. 134, 224 Mich 593.

64. Mich.—Wabash R. Co v. Marshall, supra.

65. Mich.—Wabash R. Co. v. Marshall, supra.

66. Mich.—Dester v. Ross, 48 N W 530, 85 Mich. 370.

67. U.S.—Temmer v. Denver Tramway Co., C.C A.Colo, 18 F.2d 226.
51 C.J. p 935 note 22.
Priorities as between stockholders and creditors generally see Corporations § 1560.

68. U.S.—Kansas City Terminal R. Co v. Central Union Trust Co., Mo, 46 S.Ct. 549, 271 U.S. 445, 70 L.Ed. 1028.
51 C.J. p 935 note 24.

zation,[69] and whether the reorganization is made by contract or at private sale or consummated by a master's deed under a consent decree.[70] However, this principle does not apply where title to the property of the original company is acquired by purchase on a foreclosure sale, with no agreement or understanding that those interested in the original company are to be benefited directly or indirectly by the reorganization.[71]

Fairness of plan as to creditors. The preservation of creditors' rights is a practical matter,[72] and what constitutes the requisite priority of treatment and fairness of plan depend on the circumstances and necessities of the particular situation,[73] including the amount or character of the insolvent company's outstanding securities, the amount of the unsecured indebtedness, the probable value of the equity in its property beyond secured debts, and the amount of money deemed necessary to insure successful operation of the new company,[74] and can be questioned only by a creditor.[75]

In view of these principles, generally speaking any plan is fair and binding on a creditor which fairly adjudges and secures to him his just and equitable share of the property of the old company,[76] and under which the rights of creditors and stockholders conform to existing practical necessities in such manner as least to disturb the legal priority of the creditors;[77] and creditors who decline a fair offer based on such principles cannot thereafter attack a reorganization as failing to recognize their rights.[78] This does not make it necessary always to pay or offer payment to unsecured creditors in cash before stockholders may retain any interest in the reorganized company;[79] but, when necessary, they may be protected through other arrangements which distinctly recognize their equitable rights to be preferred to stockholders against the full value of all property belonging to the company and which afford each of them the fair opportunity, measured by the existing circumstances, to avail himself of this right.[80]

A plan otherwise fair and valid as to creditors is not rendered invalid by a provision therein that disputed claims of creditors may be litigated;[81] and the mere fact that the plan gives stockholders an interest in the new organization on agreed terms, without including general creditors, or tendering them an opportunity to join therein, does not render it invalid,[82] unless the scheme is one to give to stockholders that which should go to creditors[83] or is one to defraud creditors.[84]

Alternative offers. If a creditor has a free choice of two or more orders under a reorganization plan and either is fair, he cannot complain even if the other or others be patently unfair.[85]

(3) Securities to Creditors

Where the property of a railroad company is in the possession of a court, it is within its power and discretion, in decreeing a reorganization, to adjudge and secure unsecured creditors' interest or shares to them, in the stock, bonds, or other securities of the reorganized company.

Where the property of a railroad company is in the possession of a court, it is within its power and judicial discretion, in decreeing a reorganization, to adjudge and secure unsecured creditors' interest or shares to them, in the stock, bonds, or other securities of the reorganized company,[86] even

69. U.S.—Northern Pac. R. Co. v. Boyd, Wash., 33 S.Ct. 554, 228 U.S. 482, 57 L.Ed. 931.

70. U.S.—Northern Pac. R. Co. v. Boyd, supra.
51 C.J. p. 935 note 26.

71. N.Y.—Male v. Atchison, etc., R. Co., 129 N.E. 458, 230 N.Y. 158, 15 A.L.R. 1098.

72. U.S.—Kansas City Terminal R. Co. v. Central Union Trust Co., C.C.A.Mo., 28 F.2d 177, certiorari denied 49 S.Ct. 179, 278 U.S. 655, 73 L.Ed. 564.

73. U.S.—Kansas City Terminal R. Co. v. Central Union Trust Co., supra.
51 C.J. p. 936 note 29.

74. U.S.—Kansas City Terminal R. Co. v. Central Union Trust Co., supra.
51 C.J. p. 936 note 30.

75. U.S.—Kansas City Terminal R. Co. v. Central Union Trust Co., supra.

76. Mich.—Wabash R. Co. v. Marshall, 195 N.W. 134, 224 Mich. 593.
51 C.J. p. 936 note 31½.

77. U.S.—Kansas City Terminal R. Co. v. Central Union Trust Co., C.C.A.Mo., 28 F.2d 177, certiorari denied 49 S.Ct. 179, 278 U.S. 655, 73 L.Ed. 564.

78. U.S.—Kansas City Terminal R. Co. v. Central Union Trust Co., Mo., 46 S.Ct. 549, 271 U.S. 445, 70 L.Ed. 1028.

79. U.S.—Kansas City Terminal R. Co. v. Central Union Trust Co., Mo., 46 S.Ct. 549, 271 U.S. 445, 70 L.Ed. 1028.
51 C.J. p. 936 note 34.

80. U.S.—Kansas City Terminal R. Co. v. Central Union Trust Co., Mo., 46 S.Ct. 549, 271 U.S. 445, 70 L.Ed. 1028—Paton v. Northern Pac. R. Co., C.C.Wis., 85 F. 838.

81. U.S.—North American Co. v. St. Louis, etc., R. Co., D.C.Mo., 28 F.2d 174, affirmed, C.C.A., Kansas City Terminal R. Co. v. Central Union Trust Co., 28 F.2d 177, certiorari denied 49 S.Ct. 179, 278 U.S. 655, 73 L.Ed. 564.

82. U.S.—Paton v. Northern Pac. R. Co., C.C.Wis., 85 F. 838.
51 C.J. p. 936 note 37.

83. U.S.—Paton v. Northern Pac. R. Co., supra.

84. U.S.—Paton v. Northern Pac. R. Co., supra.

85. U.S.—Kansas City Terminal R. Co. v. Central Union Trust Co., C.C.A.Mo., 28 F.2d 177, certiorari denied 49 S.Ct. 179, 278 U.S. 655, 73 L.Ed. 564.

86. U.S.—Northern Pac. R. Co. v. Boyd, Wash., 33 S.Ct. 554, 228 U.S. 482, 57 L.Ed. 931—Phipps v. Chicago, etc., R. Co., C.C.A.Mo., 284 F. 945, 28 A.L.R. 1184, error

though they do not assent to such reorganization.[87] Where the reorganization plan provides for the distribution of securities to the general creditors, it is not necessary that the securities so offered shall be superior in rank or grade to those which the stockholders may obtain,[88] but it will be sufficient to offer the creditors securities of the same grade as those given to stockholders, but of different amounts, where under the circumstances that is all that may reasonably be expected.[89]

If assessments are demanded, they must be adjusted to the purpose of according to the creditor his full right of priority against the corporate assets, as far as possible in the existing circumstances.[90] A plan by which general creditors are given preferred stock and former stockholders are given common stock is not necessarily unfair or unduly preferential.[91]

§ 341. —— Rights of Stockholders

A foreclosure sale of railroad property and a reorganization extinguishes all of the rights of the stockholders of the old company except as may be secured to them by statute or by the decree of foreclosure or reorganization agreement.

In the absence of a statute to the contrary, the effect of a foreclosure sale of railroad property and reorganization, unless impeached for fraud, is to extinguish all the rights of the stockholders of the old company,[92] and thereafter they have such rights only in the reorganized company as are secured to them by the decree of foreclosure or reorganization agreement[93] or by the governing statutes,[94] as where the statute gives them the right to assent to the reorganization under foreclosure within a specified time.[95]

Where the plan of reorganization is not prohibited by law, a stockholder who takes part therein is estopped, in the absence of fraud, to attack the reorganization as ultra vires,[96] and this rule also applies to a purchaser from such stockholder.[97]

Stockholders not parties to agreement Where, under the terms of a reorganization agreement entered into by the bondholders, without the stockholders being parties thereto, the stockholders in the old company are given the opportunity of acquiring stock in the new company on certain conditions and within a specified time, any privilege of a stockholder in the old company to exchange his stock for stock in the new company does not arise from his original rights as a stockholder, but depends wholly on the provisions of the reorganization agreement under which he is merely a beneficiary,[98] and he must accept or reject the plan as a whole[99] If he refuses or fails to come into the reorganization, or to comply with the conditions within the time specified, he forfeits his rights thereunder,[1] and may not thereafter demand a transfer of new stock on payment of the specified amount[2] or maintain a suit for the modification of the plan[3] Even though he had no notice, he is

dismissed 43 S Ct. 701, 262 U S 762, 67 L Ed 1221.

Where assets are insufficient to satisfy secured creditors in equity proceeding for reorganization, the unsecured creditors are not entitled to beneficial participation in the new securities.—Guaranty Trust Co. of New York v. Seaboard Air Line R Co, D C Va, 53 F.Supp 672, affirmed Badenhausen v. Guaranty Trust Co of New York, 145 F.2d 40, certiorari denied 65 S.Ct. 440, 323 U.S. 797, 89 L Ed. 636.

87. U S—Phipps v. Chicago, etc., R. Co, C C.A.Mo, 284 F. 945, 28 A L. R. 1184, error dismissed 43 S Ct 761, 262 U.S. 762, 67 L.Ed. 1221.

88. U S.—Kansas City Terminal R Co. v Central Union Trust Co, Mo., 46 S.Ct 549, 271 U.S. 445, 70 L Ed 1028

89. U.S—Kansas City Terminal R Co. v. Central Union Trust Co., supra.
51 C.J. p 936 note 44

90. U.S.—Walsh Tie, etc, Co. v Missouri Pac. R. Co, C C A Mo., 280 F. 38, certiorari denied 43 S Ct. 164, 260 U.S. 743, 67 L Ed. 491.

91. U S.—Kansas City Terminal R Co. v. Central Union Trust Co, Mo, 46 S.Ct. 549, 271 U S. 445, 70 L Ed. 1028.

92. U.S—Guaranty Trust Co of New York v. Seaboard Air Line R Co., D.C.Va., 53 F Supp. 672, affirmed, C C A., Badenhausen v Guaranty Trust Co of New York, 145 F 2d 40, certiorari denied 65 S. Ct 440, 323 U S. 797, 89 L.Ed. 636.
51 C J. p 937 note 48.
Reorganization of railroads under Bankruptcy Act see Bankruptcy §§ 881–962.
Rights of stockholders under reorganization of corporation generally see Corporations § 1586.

93. N.Y.—Thornton v. Wabash R Co, 81 N Y. 462.
51 C J. p 937 note 49.
Right to purchase new stock
In receivership proceeding wherein plan for reorganization of railway company was proposed, proposed plan which accorded stockholders of old company primary right to purchase new common stock of reorganized company in order of their respective priorities was not unfair or inequitable to stockholders by reason that it failed to contain any provision for exchange of outstanding stock of old company for securities to be issued by reorganized company—Chase Nat Bank of City of New York v. Wabash Ry Co, D.C Mo., 40 F Supp 859.

94. N.Y.—Vatable v. New York, etc, R Co., 96 N Y. 49

95. N.Y—Vatable v. New York, etc., R. Co., supra.
51 C J. p 937 note 51.

96. N Y—Hollins v. St. Paul, etc., R Co., 9 N.Y S 909.

97. N Y.—Hollins v. St. Paul, etc, R. Co., supra.

98. N.Y.—Dow v. Iowa Cent. R. Co., 39 N E. 398, 144 N.Y. 426.

99. N.Y.—Miller v Dodge, 59 N.Y. S. 1070, 28 Misc. 640.
51 C.J. p 937 note 55.

1. N.Y.—Dow v. Iowa Cent. R. Co., 39 N.E. 398, 144 N Y 426.
51 C.J p 937 note 56

2. N.Y.—Dow v. Iowa Cent. R. Co, supra.

3. N.Y—Miller v. Dodge, 59 N.Y.S. 1070, 28 Misc, 640.

not entitled to damages for the refusal to give him new stock for his old after such time,[4] since, if the foreclosure sale and reorganization are valid, all his legal rights are cut off,[5] and, if they are invalid, his right to attack the plan is not affected by an arrangement to which he is not a party.[6]

Under such a reorganization a holder of common stock in the original company, who pays an installment of the assessments on his stock but fails, with full knowledge of the facts, to pay the remaining installments when they fall due, loses the privilege to exchange his stock,[7] and no right of redemption remains in him,[8] and the stock to which he would otherwise be entitled is held subject to the rights of the other beneficiaries named in the reorganization agreement.[9] A purchaser from such stockholder, after such default and after the rights of the other beneficiaries have intervened, who purchases for a nominal consideration and with knowledge of the situation, has no rights other than those of his transferor, and is not entitled in law or in equity to compel an exchange of his stock on a tender of the unpaid installments and interest.[10]

Reorganization by stockholders Where a reorganization effected by a majority of the stockholders is unfair or oppressive, a nonparticipating minority stockholder may, in equity, enforce his rights with respect to the property of the old company in the hands of the new company,[11] or he may require the majority stockholders to account as trustees.[12]

§ 342. —— Rights and Liabilities of Reorganized Company

a. In general

b. Liability for debts and obligations of old company

a. In General

A reorganized railroad company after a sale on foreclosure ordinarily succeeds to all the rights, franchises, and privileges of the old company.

In accordance with the rules which govern the rights, powers, property, and liabilities of a reorganized corporation in general, a new or reorganized railroad company after a sale on foreclosure succeeds to all the rights, franchises, and privileges of the old company[12] except such as were granted to the latter company by a special statute,[14] and generally takes the corporate capacity of the company against which the foreclosure proceedings were conducted[15] and is bound to exercise the franchises of its predecessor.[16]

The new company may be subject to statutory regulations enacted subsequent to the giving of the foreclosed mortgage, but prior to the reorganization.[17]

Property. The new company succeeds to all the property and assets of the old company[18] except such as were not covered by the mortgage under which the road was sold[19] and may issue bonds for the property bought.[20] Where the new company has come by the property fraudulently, it cannot, when deprived of its possession, recover for repairs or improvements or for encumbrances paid by it while in possession.[21]

Necessity for transfer. It has been held that, where, under the statutes, the reorganized company is a new corporation as to the ownership of property sold on the foreclosure, the property purchased must be transferred to it.[22] On the other hand, it has been held that, where the statute provides that the new corporation, formed by the purchaser and his associates, shall have all the powers conferred by law on private corporations and the

4. N.Y.—Thornton v. Wabash R. Co., 81 N.Y. 462

5. N.Y.—Thornton v. Wabash R. Co., supra.

6. N.Y.—Thornton v. Wabash R. Co., supra.

7. N.Y.—Dow v. Iowa Cent. R. Co., 39 N.E. 398, 144 N.Y. 426.

8. N.Y.—Dow v. Iowa Cent. R. Co., supra.

9. N.Y.—Dow v. Iowa Cent. R. Co., supra.

10. N.Y.—Dow v. Iowa Cent. R. Co., supra.

11. U.S.—Bogert v. Southern Pac. Co., D.C.N.Y., 226 F. 500, affirmed 244 F. 61, 156 C.C.A. 489, modified on other grounds 39 S.Ct. 533, 250 U.S. 483, 63 L.Ed. 1099.

12. U.S.—Southern Pac. Co. v. Bogert, N.Y., 39 S.Ct. 533, 250 U.S. 483, 63 L.Ed. 1099.

13. N.Y.—Paige v. Schenectady R. Co., 70 N.E. 213, 178 N.Y. 102.
51 C.J. p. 937 note 70.
Reorganization of railroads under Bankruptcy Act see Bankruptcy §§ 881-962.
Rights and liabilities of reorganized corporation generally see Corporations §§ 1590-1593.

14. Ark.—Dow v. Beidelman, 5 S.W. 297, 49 Ark. 325.
Rights of purchaser on foreclosure as to corporate capacity, franchises, and powers of original company generally see supra § 329.

15. La.—Vicksburg, etc., R. Co. v. Elmore, 15 So. 701, 46 La.Ann. 1237.

16. N.Y.—Paige v. Schenectady R. Co., 70 N.E. 213, 178 N.Y. 102.

17. Mich.—Railroad Comr. v. Grand Rapids, etc., R. Co., 89 N.W. 967, 130 Mich. 248, affirmed 24 S.Ct. 310, 193 U.S. 17, 48 L.Ed. 598.
51 C.J. p. 938 note 74.

18. Mass.—Gray v. Massachusetts Cent. R. Co., 50 N.E. 549, 171 Mass. 116.
51 C.J. p. 938 note 76.
Bondholders as owners in equity see supra § 340 c.

19. Del.—Wilmington, etc., R. Co. v. Downward, 14 A. 720.

20. Tex.—Thayer v. Wathen, 44 S.W. 906, 17 Tex.Civ.App. 382.

21. U.S.—Milwaukee, etc., R. Co. v. Soutter, Wis., 13 Wall. 517, 20 L.Ed. 543.

22. N.Y.—Frank v. New York, etc., R. Co., 25 N.E. 332, 122 N.Y. 197.
51 C.J. p. 938 note 80.

property be subject to the same liabilities in the hands of the new corporation as in the hands of the purchaser, the new corporation becomes the owner of the property held by its organizers on the filing of its charter,[23] without any conveyance from them,[24] and that such ownership is not affected by the fact that the corporation was organized for the purpose of raising money on bonds which failed of realization, since as soon as organized a corporation acquires a legal existence, owes duties fixed by law, and is no longer subject to the will of the organizer.[25]

b. Liability for Debts and Obligations of Old Company

A reorganized railroad company ordinarily is not bound by the debts or obligations of the old company unless liability is assumed by the new company or is imposed by statute or by the decree of foreclosure and sale.

In accordance with the general rule, a reorganized or new railroad company ordinarily is not bound by the debts or obligations of the old company[26] except where the new company has either in express terms or by reasonable implication assumed such debts and obligations,[27] or where this liability is imposed by the statute under which the reorganization takes place,[28] or by the decree of foreclosure and sale,[29] and except where the circumstances are such as to warrant the conclusion that the new company is not a special and distinct company but merely a continuation of the old company, and hence the same person in law.[30]

The new company, however, takes the property subject to the statutory and common-law duties of the old company to the public,[31] such as the duty to maintain general offices, machine shops, etc., at the place where the old company had contracted to keep them.[32] The new company also is liable to account for the railroad property to a holder of bonds of the old company who has not come into the reorganization,[33] but it is not liable for the operation of the road during the time intervening between the purchase and its organization unless its possession during that time is affirmatively shown.[34]

As trust fund. Since the creditors of the old company are entitled to look to its property and assets for the payment of their debts, such property and assets remain liable in the hands of the new company for the debts of the old company, as to such claims as constitute a paramount lien thereon,[35] or where the circumstances are such as to render the transaction a diversion of corporate property as a trust fund, in fraud of unsecured creditors;[36] and mere assent to a plan of reorganization does not bar a creditor from enforcing his claim against the new company where the reorganization agreement to which he has assented does not indicate that stockholders were to be preferred over creditors, as was in fact done,[37] provided he is not barred by laches.[38]

Unauthorized contracts. In the absence of ratification, the new company is not liable for unauthorized contracts of the reorganization committee.[39]

§ 343. Disposition of Proceeds and Surplus

The proceeds of a foreclosure sale of railroad property ordinarily are distributed according to the general rules governing the distribution of proceeds of foreclosure sales

The general rules which govern the distribution of the proceeds of foreclosure sales ordinarily gov-

23. Tex.—Texas Southern R Co. v Harle, 105 S W. 1107, 101 Tex. 170.

24. Tex.—Texas Southern R. Co. v. Harle, supra
51 C J. p 938 note 82.

25. Tex.—Texas Southern R Co v. Harle, supra

26. U S.—Hoard v. Chesapeake, etc., R. Co, W Va, 8 S Ct. 74, 123 U.S 222, 37 L Ed. 130
51 C J. p 938 note 86.
Liability for debts and obligations of old corporation generally see Corporations § 1593.
Rights and liabilities of purchasers on foreclosure in general.
For indebtedness, securities, liens, and mortgages see supra § 335
On contracts of old company see supra § 332.

27. Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Pluto, 156 S.W.2d 265, 138 Tex 1.
51 C J. p 938 note 87.

28. Va.—Norfolk, etc, R Co. v. Carroll County, 65 S E. 531, 110 Va. 95.
51 C J. p 938 note 88.

29. U S.—Chicago, etc, R. Co v. Farmers' L. & T Co, C.C.Ga., 79 F. 158.
51 C.J. p 939 note 89.

30. Va.—Wilson v Chesapeake, etc, R. Co., 21 Gratt. 654, 62 Va 654.

31. Tex.—International, etc, R. Co v. Anderson County, 156 S.W. 499, 106 Tex. 60.

32. Tex.—International, etc., R Co v. Anderson County, supra.
51 C.J. p 939 note 92.

33. U.S.—Brooks v. Vermont Cent. R. Co., C.C.Vt., 22 F. 211.

34. Pa.—Pittsburgh, etc., R. Co v. Fierst, 96 Pa 144.

35. U S.—Western Div. Western North Carolina R. Co. v. Drew, C. C Fla, 29 F.Cas No.17,434, 3 Woods 691, affirmed 103 U.S. 118, 26 L Ed. 327.
51 C J. p 939 note 96.
Rights of creditors see supra § 340 e.

36. U.S.—Kansas City Southern R. Co. v. Guardian Trust Co., Mo, 36 S Ct 334, 240 U.S. 166, 60 L Ed. 579.
51 C.J. p 939 note 97.

37. U S.—Kansas City Southern R. Co. v Guardian Trust Co., supra.

38. U S.—Kansas City Southern R. Co. v. Guardian Trust Co., supra.
51 C J. p 939 note 99.

39. Pa.—Weil v. Northwestern Pennsylvania R. Co, 101 A. 312, 257 Pa. 88.
51 C.J. p 939 note 1.

ern the distribution of the proceeds of a foreclosure sale of railroad property.[40] In accordance with such rules, ordinarily the proceeds should be distributed first to the payment of all proper costs and expenses attendant on the foreclosure proceedings and sale,[41] then to the payment of any claims allowed by the court or by statute as superior to the lien of the mortgage or lien foreclosed,[42] and then to the foreclosed mortgage debt,[43] and the surplus, if any, to other lienors or creditors according to their legal priorities,[44] and after them to the mortgagor.[45] The fact that a railroad extending into different states cannot be sold on execution at law and can be reached only by proceedings in equity does not render the proceeds of such a road when sold under foreclosure equitable assets which can be administered irrespective of legal priority.[46]

In administering the property in a foreclosure suit, a court of equity, in its distribution of the surplus income, may prefer unpaid claims for current operating expenses to the claims of bondholders secured by a prior mortgage;[47] and may order that as much of the proceeds as is necessary to pay claimants then before the court shall be used for that purpose, and that the remainder be paid out according to the foreclosure decree.[48] Where, in a suit by a junior lienor to foreclose a mortgage of all the lands, franchises, and property of the railroad, a prior mortgagee of part of the lands intervenes, such mortgagee is not entitled to have the amount of his mortgage paid out of the funds in the hands of the receiver or out of the proceeds of a sale made pursuant to the decree of foreclosure, subject to such mortgage, since such sale passes only the equity of redemption.[49]

Persons entitled to participate. The general rules apply with respect to the persons entitled to participate in the distribution.[50] Where the pro rata amount due on each bond has been calculated and is set apart, undistributed funds allocated to bonds which have not been turned in and owned by persons unknown may not be distributed to other bondholders who had appeared and received their pro rata shares,[51] and where the railroad is sold to bondholders, who receive the property in satisfaction of their bonds, the participating bondholders and other bondholders, who have presented their bonds and received moneys apportioned to them, are not entitled to share in accumulated interest on moneys apportioned to nonparticipating bondholders who have not presented bonds for payment of their proportionate share.[52] Further, the assignee of the purchaser at the foreclosure sale, or his trus-

40. U S—Finance Co of Pennsylvania v. Charleston, C. & C. R Co, 62 F. 205, 10 C C A. 323.
51 C J. p 939 note 4.
Distribution of proceeds and surplus
Corporate mortgages generally see Corporations § 1211.
Mechanics' liens generally see Mechanics' Liens § 348.
Mortgages generally see Mortgages §§ 792–802
Priorities of liens, mortgages, and other claims see supra §§ 295–307
Reorganization of railroad companies:
Generally see supra §§ 339–342.
Under Bankruptcy Act see Bankruptcy §§ 881–962.

41. U.S.—Farmers' L & T. Co. v Stuttgart, etc, R. Co, C C Ark., 106 F. 565.

42. U.S—Farmers' L & T Co. v Stuttgart, etc, R Co, supra.
51 C J. p 939 note 6.
Money advanced for taxes
Where deed of trust provides that mortgagor shall pay the taxes, a creditor secured by the trust deed may, as a mortgagee, pay such taxes where the mortgagor fails to pay them, and in such case he will, as to the taxes so paid, have a prior lien in equity on the mortgaged premises or on the fund arising from their sale on foreclosure.—Humphreys v. Allen, 100 Ill. 511.

43. Or—Security Sav, etc, Co. v. Goble, etc, R Co, 75 P 697, 44 Or. 370
51 C J p 939 note 7.

44. U S.—Guaranty Trust Co of New York v. Pacific & I N. Ry. Co, D C Idaho, 17 F Supp. 646
51 C J p 940 note 8.
Priorities generally see supra §§ 295–307.
Claim of United States, based on fine imposed on railroad, against funds in possession of trustee derived from sale of mortgaged property, was subordinate to claims of mortgage bondholders, where mortgage was executed before imposition of fine—Guaranty Trust Co of New York v Pacific & I N Ry. Co, D C Idaho, 17 F Supp. 646.

45. U S—Chicago, D & V R Co. v Fosdick, Ill, 1 S.Ct. 10, 106 U.S 47, 27 L Ed. 47.

46. U.S.—Central Trust Co. of New York v. East Tennessee, V. & G R. Co, C C Ga., 69 F. 658.

47. U.S—Chicago & A. R. Co. v U S. & Mexican Trust Co, Kan, 225 F 940, 141 C.C.A. 64.
Priority of lien for operating expenses generally see supra § 301.

48. Ga.—Clews v. First Mortg. Bondholders, 51 Ga. 131.

49. U.S—Woodworth v. Blair, Ill., 5 S Ct. 6, 112 U S. 8, 28 L Ed 615.

50. Ark—Phillips v. Pine Bluff, etc., R Co, 208 S W. 313, 137 Ark. 443
51 C J. p 940 note 14.
Persons entitled to proceeds of mortgage foreclosure sale generally see Mortgages §§ 792–794.
Cost of reconditioning streets
Where railway tracks were laid on land owned by corporation and subsequently streets were created by dedication and user only, and there was no grant of franchise authorizing railroad which subleased the tracts to occupy the streets, and no contract concerning paving and repair of streets, the railroad was not obliged to pave or maintain streets and crossings or to repair them after foreclosure sale and removal of railroad's property, and hence the commonwealth and borough were not entitled to part of proceeds of foreclosure sale to cover cost of reconditioning streets.—Mauch Chunk Nat. Bank v. Mauch Chunk Switch-Back Ry. Co, 14 A 2d 95, 339 Pa. 317

51. N.J—Guaranty Trust Co of N. Y v. Newark & Hackensack Traction Co, 40 A.2d 649, 136 N.J.Eq. 159.

52. U.S—Equitable Trust Co of New York v. Western Pac R Co, D.C.Cal., 299 F. 304, affirmed, C C. A., 3 F.2d 724.

tee, is not entitled to participate in moneys apportioned to bondholders who have failed to present their bonds for payment.[53] In such cases the federal statute, 28 U.S.C.A. § 852, directs that where the money has remained on deposit in the registry of the court for at least five years unclaimed by any person it is the duty of the court to cause such money to be deposited in the United States treasury where it is to remain as a permanent appropriation available at all times for the payment of the bonds on appropriate petition to the court,[54] and in view of such statute laches may not fairly be chargeable to the bondholders who have failed to present their bonds.[55] However, it has been held, but not without dissent, that while the purchaser of the railroad or its successor is not entitled to the undistributed fund, it may be ordered paid to the holders of bonds and coupons who had not received full payment on earlier distribution and who, in response to notice, file claims to participate in further distribution.[56]

Where the decree confirming a foreclosure sale fixes the priorities of claims payable out of the proceeds, one who makes no claim at the time of the sale and does not attack the decree of distribution cannot afterward obtain an order authorizing the payment of his claim.[57]

Equal and pro rata distribution. Where several debts or claims are equally entitled to be paid out of the proceeds, they are entitled to share ratably therein;[58] and, accordingly, bondholders joining in a reorganization agreement who have received securities of the reorganized company in exchange for their bonds are entitled to participate in the proceeds of the foreclosure equally with bondholders not joining in the reorganization agreement[59] unless the securities taken in exchange are received in full satisfaction of their claims.[60] Where, after the court has ordered a pro rata distribution among those who have proved their claims, and after some of them have received their proportion, others come in, it is unjust to allow the latter the same proportion in the undistributed balance, but the whole account should be recast at a lower rate, each creditor who had been settled with being required to make a pro rata refund.[61] Where claimant's lien covers only a portion of the road, he is entitled to distribution out of only such proportion of the proceeds of the sale of the entire property as the value of the portion on which his lien exists bears to the value of the entire road.[62]

Diversion of funds. Where the current income of the railroad has been diverted from the payment of current expenses to claims not of this preferential class, leaving claims for current expenses unpaid, the court, on foreclosure, may, from the proceeds of the corpus of the mortgaged property, restore and apply to the payment of unpaid current expenses the amount so diverted,[63] but the amount which may be so restored and applied may not exceed the amount of the diversion.[64] Where, however, there is no diversion by the receiver of income derived from operation to betterments of the property, and the entire income goes into operating expenses and taxes, after which there is no net income but a deficit, which is paid from the proceeds of sale, mechanic's lien claimants are not entitled to an equitable lien on money in the receiver's hands from a sale of the mortgaged property, as against liens of prior mortgagees, suing to foreclose.[65]

§ 344. Review of Proceedings

The review of foreclosure proceedings on railroad property ordinarily is controlled by the general rules governing review in civil actions and in foreclosure actions.

The rules governing review in civil actions, and more particularly in foreclosure actions, generally

53. U S.—U. S. v. Cochrane, C.C.A. Ala., 87 F.2d 3.

54. U S.—U. S. v. Cochrane, supra.

Statute was not intended to work escheat, but to establish a trust fund for those persons who have neglected, or for some reason have failed, to collect the amounts due them.—U. S v. Cochrane, supra.

55. U S.—U S v. Cochrane, supra

56. U S.—Louisville & N. R Co. v. Robin, C.C A La., 135 F 2d 704.

57. Ga.—Waycross First Nat. Bank v. Atlantic Coast Line R. Co., 99 S E. 859, 149 Ga. 146.

58. Ala.—Morton v. New Orleans, etc, R, etc, Co, 79 Ala. 590.
51 C.J. p 940 note 17.

59. U S.—Freeman v. Watson, Pa., 215 F. 852, 132 C C A. 194

60. U S.—Freeman v. Watson, supra.

61. Ala.—Pinkard v. Allen, 75 Ala. 73.

62. U.S.—Low v. Blackford, C.C.A. N.C., 87 F. 392, 31 C C.A. 15.
51 C J. p 941 note 21.

63. U.S.—Chicago & A. R. Co v. U. S. & Mexican Trust Co, Kan, 225 F 940, 141 C.C A. 64.
Diversion of funds generally see supra § 310.

Diversion to improvement of property

When current income of a railroad company in the hands of a receiver is diverted to the improvement of the property by the receiver, and debts for operating expenses are not paid, provision should be made, in foreclosing a mortgage on the property, for the payment of such debts out of the proceeds of the sale of the property.
U.S.—Union Trust Co of New York v. Illinois Midland R Co., Ill., 6 S. Ct. 809, 117 U S. 434, 29 L Ed. 963
S C.—Hand v. Savannah, etc, R. Co., 17 S C. 219.

64. U.S.—Chicago & A R Co v. U. S & Mexican Trust Co., Kan., 225 F 940, 141 C.C A. 64.

65. Okl.—Interurban Constr. Co. v. Central State Bank, 184 P. 905, 76 Okl 281.

regulate the review of foreclosure proceedings on railroad property.[66] As a general rule the appeal brings up nothing but errors legally assigned, and the review will be restricted to the specific questions thus pointed out and designated for review.[67] The appellate court will not review decisions on points resting wholly in the discretion of the lower court, unless an abuse of such discretion is shown;[68] nor will it review such errors as have been waived or acquiesced in by the parties concerned.[69] It will not review an alleged error with respect to the property in a railroad foreclosure suit, and the allowance of amounts due to holders of mortgage bonds, if the evidence presented before the master is not brought before it, and if no objection to the proof was taken below.[70]

Where the record on appeal is too meager for the appellate court to determine whether there was error in the decree, such decree must be affirmed[71] or the appeal dismissed.[72] General creditors are not injured by a release of errors by the trustee in an action in which an adjudication that the property had become vested in another corporation was had, where it appears that the company was hopelessly insolvent and that under no circumstances could the general creditors receive anything out of the assets.[73]

A supersedeas will not be granted on an appeal from an order confirming a foreclosure sale, where the main decree was not superseded on appeal therefrom.[74]

§ 345. Fees and Costs

The fees and costs in foreclosure proceedings of railroad property ordinarily are regulated by the rules governing fees and costs in foreclosure proceedings generally.

General rules governing fees and costs in foreclosure proceedings ordinarily apply in foreclosure proceedings of railroad property.[75] Allowances may properly be made from the fund realized on foreclosure to compensate counsel for services rendered for the common benefit in preserving or protecting the railroad property,[76] particularly where provision therefor is made in the foreclosed mortgage.[77] The amount of the allowances is largely within the discretion of the court and its decision will not be reversed unless an abuse of discretion is shown by the allowance of an entirely unwarranted or excessive fee.[78] In determining the amount, consideration is to be given to the nature, extent, and difficulty of the services rendered, the amount involved, and other pertinent circumstances of the case.[79]

Counsel, however, who appear and represent the individual interests of particular parties do not come within this rule,[80] although it is within the

66. U S—Galveston, etc, R. Co. v. House, C C A.Tex, 102 F. 112.
51 C J. p 941 note 28.
Review
Generally see Appeal and Error § 1 et seq.
Mortgage foreclosure proceedings see Mortgages §§ 708-717.
Parties
(1) Nominal and useless parties need not be joined—Norwich, etc., R. Co v Johnson, Conn., 15 Wall. 8, 21 L Ed 118.
(2) Railroad company which was hopelessly insolvent, and practically defunct, and all of whose property, rights, and franchises had been transferred to a purchaser at foreclosure sale, was not a necessary party to an appeal by such purchaser from a decree distributing the proceeds of the sale—Galveston, etc., R. Co. v. House, C C.A.Tex., 102 F. 112.
(3) Where, after confirmation of a foreclosure sale of a railroad, a decree was made declaring certificates issued by a receiver in a former suit a prior lien on the proceeds of the sale and where there was no liability for a deficiency on the part of the stockholders or otherwise, the railroad corporation, being practically defunct by reason of the decree of foreclosure and the sale, and having no interest in the proceeds, need not be joined as an appellant from the decree declaring the prior lien—Mercantile Trust Co v. Kanawha, etc, R Co., C.C A Ohio, 58 F. 6, 7 C.C A. 3.
(4) Other persons as parties see 51 C J. p 941 note 28 [a].

67. U S.—Farmers' L & T. Co. v. Green Bay, etc, R. Co., C C.Wis., 6 F. 100, 10 Biss. 203
51 C J. p 941 note 29.

68. U S—Central Trust Co v Grant Locomotive Works, Ohio, 10 S.Ct. 736, 135 U.S. 207, 34 L Ed. 97.
51 C J. p 941 note 30.

69. U.S—Guion v. Liverpool, etc., Ins. Co, Ind., 3 S Ct. 108, 109 U S. 173, 27 L Ed. 895—Indiana Southern R. Co. v. Liverpool, etc, Ins. Co., Ind., 3 S.Ct. 108, 109 U.S. 168, 27 L.Ed. 895.

70. U.S.—Indiana Southern R. Co. v. Liverpool, etc, Ins. Co., supra.

71. U.S.—Kneeland v. Luce, Ind., 12 S.Ct. 39, 141 U.S. 437, 35 L.Ed. 808.

72. U.S.—Fitzgerald v. Evans, Ark., 49 F. 426, 1 C.C.A. 307.

73. N.Y.—Loeb v. Chur, 6 N.Y.S. 296, 3 Silv.Sup. 147, affirmed 26 N.E. 756, 125 N.Y. 726.

74. U S—Farmers' L. & T. Co v. Iowa Cent R. Co, C C Iowa, 8 F. Cas No 4,664, 4 Dill 516, affirmed 99 U S 334, 25 L Ed. 394

75. U S.—Phinizy v Augusta, etc., R Co, C.C S C, 98 F. 776.
Compensation and expenses of trustee see supra § 293
Costs and fees in foreclosure suits:
Mechanics' liens generally see Mechanics' Liens §§ 350-354
Mortgages generally see Mortgages §§ 803-812
Expenses of reorganization in equity receivership see supra § 339 a.

76. U S—Phinizy v. Augusta, etc., R. Co, supra.
51 C.J. p 941 note 38.

77. U S—Southern California Motor-Road Co. v. Union L. & T. Co, Cal., 64 F 450, 12 C.C.A. 215.
51 C J. p 942 note 39.

78. N.Y.—Meisel v. Central Trust Co., 167 N.Y S. 143, 179 App.Div 795, affirmed 119 N.E. 1059, 223 N Y. 589.
51 C.J. p 942 note 41.

79. Tex—Orient Trust Co. v. St. Louis Union Trust Co., 126 S.W. 310, 59 Tex.Civ.App. 193.

80. U.S—Phinizy v. Augusta, etc., R. Co., C.C.S.C, 98 F. 776.
51 C.J. p 942 note 42.

discretion of the court to allow compensation to attorneys representing a bondholder not participating in a reorganization to be a charge against the entire fund available for the payment of all such nonparticipating bondholders.[81] No allowance can be made for counsel representing the mortgagor where the fund realized is insufficient to pay the mortgages,[82] and, where the foreclosure and sale results in a surplus remaining over and above the mortgage indebtedness, the fees of counsel representing the bondholders will be charged against the latter's share of the proceeds and not against the fund as a whole.[83]

Allowance should, in a proper case, be made for a sheriff's or other officer's fees or compensation,[84] and for reasonable compensation to a master appointed in the foreclosure suit.[85]

§ 346. Operation and Effect

The foreclosure of a railroad mortgage cuts off all the rights and interests of the railroad company in the mortgaged property.

In the absence of statute, providing otherwise, the foreclosure of a railroad mortgage will cut off all the rights and interests of the railroad company in the mortgaged property,[86] and nothing will be left for the general creditors or stockholders except their interest in any surplus after the mortgage is satisfied.[87]

§ 347. Redemption

a. In general
b Rights of creditors
c. Bar or waiver of right
d. Actions for redemption

a. In General

The redemption of mortgaged railroad property ordinarily is governed by the rules regulating the redemption of mortgaged property generally.

General rules governing redemption in the case of mortgages ordinarily are applicable with respect to the redemption of mortgaged railroad property.[88] A mortgagor company and those succeeding to its title, or any person having a title or interest in the mortgaged premises which would be prejudiced by a foreclosure, is entitled to redeem the railroad property from the lien or mortgage existing against it.[89] Although a right of redemption from a foreclosure sale exists while the trustees are in possession of the road and operating it for the benefit of bondholders,[90] or at any time prior to the confirmation of the sale, by bringing into court the amount due and costs,[91] in the absence of a statute to the contrary a valid foreclosure and sale, duly confirmed, extinguishes the equity of redemption[92] except as to persons whose rights have not been adjudicated in the foreclosure proceedings,[93] and the only remedy in such a case, if any, is by a suit to vacate the decree.[94] In some jurisdictions, however, a statutory right to redeem is given under which a specified time is generally allowed for redemption before the decree or sale is made final,[95] although, even in such jurisdictions, a general statute applying to redemption of land in ordinary cases does not apply in case of a railroad foreclosure.[96] A right to redeem from the sale may also be given by the decree of foreclosure,[97] the time allowed for redemption being a matter for the sound discretion of the court.[98]

A right of redemption to which a mortgagor com-

81. U.S.—Equitable Trust Co v Western Pac R. Co, D C Cal, 236 F. 814.

82. U.S.—Mercantile Trust Co v. Missouri, etc, R Co., C.C.Kan, 41 F. 8.

83. U S—Farmers' L & T. Co. v New York R Co, N.Y, 215 F. 712, 132 C.C.A. 574.

84. Iowa.—Gilman v. Des Moines Valley R. Co, 42 Iowa 495.

85. U S—Brown v. King, Fla., 62 F. 529, 10 C.C.A 541.

86. N.Y—Vatable v New York, etc, R. Co, 96 N.Y 49
Operation and effect of:
Decree foreclosing liens and mortgages on railroad see supra § 326 h.
Foreclosure of mortgages generally see Mortgages §§ 518-524
Sale on foreclosure of liens and mortgages on railroad property see supra § 327 i.

87. N Y—Vatable v. New York, etc., R. Co, supra.

88. Conn—Washington Trust Co. v Norwich, etc., Tract Co, 92 A. 880, 89 Conn. 59.
Redemption
Mechanics' liens generally see Mechanics' Liens § 347.
Mortgages generally see Mortgages §§ 813-878

89. U.S—Simmons v. Taylor, C C Iowa, 23 F. 849, appeal dismissed 8 S.Ct 58, 123 U S 52, 31 L Ed 73, reversed on other grounds 16 S Ct 1, 159 U S. 278, 40 L.Ed 150.
51 C J. p 942 note 50

90. N H—Ashuelot R Co. v. Elliot, 52 N.H. 387, 57 N H. 397.

91. U S.—Chicago, etc., R. Co. v. Fosdick, Ill, 1 S.Ct. 10, 106 U.S. 47, 27 L Ed 47.
51 C J. p 942 note 53.

92. U.S.—Turner v. Indianapolis, etc., R. Co, C C.Ind. & Ill., 24 F. Cas No.14,259, 8 Biss. 380.

93. Conn—Washington Trust Co. v. Norwich, etc., Tract. Co, 92 A. 880, 89 Conn 59
51 C J. p 942 note 55.

94. N.J.—Delaware, etc., R. Co. v. Scranton, 34 N J Eq 429.

95. U.S—Porter v. Pittsburg Bessemer Steel Co, Ind., 7 S Ct. 1206, 122 U.S 267, 30 L Ed. 1210.
51 C.J. p 942 note 57.

96. U S—Hammock v. Farmers L & T Co, Ill, 105 U S. 77, 26 L Ed. 1111.
51 C J. p 943 note 58.

97. U S—Simmons v. Taylor, C C. Iowa, 38 F. 682, reversed on other grounds 16 S.Ct. 1, 159 U S 278, 40 L Ed. 150.
Del.—Real Estate Trust Co. v. Wilmington, etc., R. Co., 77 A. 828, 9 Del Ch. 99.

98. Del.—Real Estate Trust Co. v. Wilmington, etc, R. Co., supra.
51 C.J. p 943 note 60.

pany is entitled, after surrender of the property to the state to which it has been mortgaged, cannot be enforced by a suit against the state in its own courts.[99] Where a railroad company, which has the apparent legal title to the equity of redemption of a mortgage on another road, held and operated by the mortgage trustees, has paid off and canceled part of the mortgage and stands ready to pay off the balance, it is entitled to possession pending a suit by stockholders of the mortgagor company to render void such apparent legal title [1]

b. Rights of Creditors

A judgment creditor of the mortgagor or owner of the equity of redemption has a right to redeem, provided he does so in the mode prescribed by statute.

A judgment creditor of the mortgagor or owner of the equity of redemption has a right to redeem, provided he does so in the mode prescribed by statute [2] Where a railroad company owning equities of redemption in the roads of two former companies consolidated to form it is merged by consolidation into another company by proceedings which fix on its property a lien in favor of its creditors, such lien is one on the separate equities of redemption, and the lienors have the same right of separate redemption from the mortgages as the railroad company.[3]

Where a railroad company's right to redemption from a sale on foreclosure of certain liens has become barred, the holders of other outstanding liens who had not been made parties to the first proceedings are not entitled to another sale of the property, but are only entitled to a decree allowing them a reasonable time to redeem.[4] Where the legal title to a railroad has been acquired by the holders of certain liens thereon, they are entitled to maintain a bill of strict foreclosure to cut off the equity and right of junior encumbrancers to redeem.[5]

c. Bar or Waiver of Right

A right to redeem railroad property may be waived or barred by a long and unreasonable delay in asserting the right.

In accordance with the rules regulating the bar or waiver of rights of redemption generally, a right to an equity of redemption may be waived or barred by a long and unreasonable delay in asserting the right, amounting to laches, which is not attributable to ignorance, and which is not explained or sufficiently excused,[6] or by any declarations or conduct on the part of the person entitled to the right, which amounts to a positive and definite relinquishment or surrender of the right;[7] or it may be barred by his failure to redeem within the time limited by the decree of foreclosure.[8]

d. Actions for Redemption

Actions to enforce the right of redemption in foreclosures of railroad property ordinarily are governed by the rules regulating actions to enforce the right of redemption in mortgage foreclosures generally.

The general rules governing actions to enforce the right of redemption in mortgage foreclosures ordinarily are applicable in actions to enforce the right of redemption in foreclosures of railroad property,[9] with respect to the parties to the suit[10] and the pleadings.[11] A bill in equity against a corporation in possession, to redeem the property of the mortgagor corporation from the mortgage, must allege that defendant corporation in possession has some title in the mortgaged property[12] and is not a mere trespasser,[13] or must aver information and belief of such fact.[14] It must also allege a formal offer to pay what may be found due.[15]

99. Mass.—Troy, etc., R. Co. v. Commonwealth, 127 Mass. 43.

1. U.S.—Barnard v. Hartford, etc., R. Co., C.C.Conn., 2 F.Cas.No.1,003

2. Conn.—Washington Trust Co. v. Norwich, etc., Tract. Co., 92 A. 880, 89 Conn. 59.

3. U.S.—Compton v. Jesup, Ohio, 68 F. 263, 15 C.C.A. 397, 17 S.Ct. 795, 167 U.S. 1, 42 L.Ed. 55

4. S.D.—Crouch v. Dakota, etc., R. Co., 101 N.W. 722, 18 S.D. 540.
Right to resale of property see supra § 327 h (3).

5. S.D.—Crouch v. Dakota, etc., R. Co., supra.

6. U.S.—Simmons v. Burlington, etc., R. Co., Iowa, 16 S.Ct. 1, 159 U.S. 278, 40 L.Ed. 150.
51 C.J. p. 943 note 69.
Bar or waiver of right to redeem from mortgage foreclosure generally see Mortgages § 818 et seq.

7. U.S.—Simmons v. Taylor, C.C. Iowa, 38 F. 682, reversed on other grounds 16 S.Ct. 1, 159 U.S. 278, 40 L.Ed. 150.

8. U.S.—Simmons v. Taylor, supra.

9. Conn.—Washington Trust Co. v. Norwich, etc., Tract. Co., 92 A. 880, 89 Conn. 59.
Actions to enforce right of redemption in mortgage foreclosures generally see Mortgages §§ 859-874.

10. Me.—Kennebec, etc., R. Co. v. Portland, etc., R. Co., 54 Me. 173.
51 C.J. p. 943 note 74.

11. Conn.—Washington Trust Co. v. Norwich, etc., Tract. Co., 92 A. 880, 89 Conn. 59
51 C.J. p. 943 note 75.

12. Me.—Kennebec, etc., R. Co. v. Portland, etc., R. Co., 54 Me. 173.

13. Me.—Kennebec, etc., R. Co. v. Portland, etc., R. Co., supra.

14. Me.—Kennebec, etc., R. Co. v. Portland, etc., R. Co., supra.

15. Me.—Kennebec, etc., R. Co. v. Portland, etc., R. Co., supra.
N.Y.—Harpending v. Munson, 91 N.Y. 650.

X. COMPANIES AND PERSONS LIABLE FOR INJURIES

§ 348. In General

A railroad company is liable for wrongful or negligent acts or omissions of its agents or employees within their authority, and for injuries resulting from a breach of statutory duty, and generally cannot, without legislative exemption, terminate its liability by transfer of the operation of the road to another.

It is well settled that a railroad company is liable for the wrongful or negligent acts or omissions of its agents or employees within the scope of their express or implied authority,[16] although its entire capital stock is owned by another company[17] or although the agent is another railroad;[18] and it is equally well settled that as a general rule a railroad company cannot, by a transfer of the operation of its road to another, terminate its further liability unless relieved therefrom by legislative exemption, express or implied.[19]

A railroad which takes possession of and uses a road not constructed by it, while not responsible for defects occasioning injury before such time,[20] is responsible for injuries thereafter occasioned by its defective condition,[21] where it has, or should have had, knowledge thereof.[22]

Continuing statutory duties,[23] such as the duty to restore a public highway to its former condition or to such state as not unnecessarily to have impaired its usefulness,[24] or to maintain a highway crossing,[25] are regarded as inseparable from the franchise to operate the railroad, and a railroad which subsequently becomes vested with the property and privileges of the road is also burdened with the duty and liable for injuries resulting from a breach thereof, and, in order to impose such liability, notice to it of its failure to perform the statutory duty is unnecessary.[26]

Partnership between railroads. The relationship between two railroad companies may be such as to constitute a partnership with the liabilities ordinarily incident to that relationship.[27]

Agency of government; ownership by state. Notwithstanding all of the stock of a railroad corporation is owned by the United States government, which controls its operations, if the intention of the government to preserve the existence of the owner as a private corporation is apparent, it may be liable to suit by a private individual for injury occasioned by the negligence of its employees.[28] By force of statute, the same rules which are applicable to the duty of railroads generally are applicable, by the consent of the state, to a railroad which is the property of the state.[29]

16. Ga.—Frazier v. Southern Ry. Co., 85 S.E.2d 525, 73 Ga.App. 58, reversed on other grounds 87 S.E.2d 774, 200 Ga. 590, conformed to 88 S.E.2d 183, 73 Ga.App. 815.
51 C.J. p. 1088 note 81.

Obligation as to safety of pedestrians
Railroad, in committing to engineer control of movements of train, assumed obligation that he would discharge his duty with regard to safety of pedestrians using streets.—Baltimore & O. R. Co. v. Papa, 133 F.2d 413, 77 U.S.App.D.C. 202.

Effect of contract
(1) Railroad could not contract against its negligence to exclusion of rights accruing in favor of third persons.—Missouri Pac. R. Co. v. Ross, 202 S.W.2d 365, 211 Ark. 784.

(2) Validity of contracts exempting from liability for negligence generally see Contracts § 262.

17. U.S.—New York & Maryland Line R. Co. v. Winans, Pa., 17 How. 31, 15 L.Ed. 27.
Liability of controlling company see infra § 349.

18. Mich.—McWilliams v. Detroit Cent. Mills Co., 31 Mich. 274.

19. Iowa.—Corpus Juris cited in Hawley v. Davenport, R. I. & N. W. Ry. Co., 45 N.W.2d 513, 515.
51 C.J. p. 1088 note 84.
Liability of lessor railroad see infra §§ 351–360.

Operation through independent contractor
(1) Business corporation operating railroad through independent contractor is liable for negligence of contractor at highway crossing.—Engelberg v. J. F. Prettyman & Sons, 156 S.E. 173, 159 S.C. 91.

(2) Railroad was not relieved of liability to owner of lands for damage from diversion of natural flowage of creek as result of construction work done for railroad because it was done by independent contractors, where they were contractually subject to supervision by railroad's engineer.—Missouri Pac. R. Co. v. Williams, 208 S.W.2d 187, 212 Ark. 788.

20. Pa.—Coyle v. Pittsburg, etc., R. Co., 18 Pa.Super. 235.
Purchasing company see infra § 362.

21. Pa.—Coyle v. Pittsburg, etc., R. Co., supra.

22. Ill.—Flennor v. Cleveland, etc., R. Co., 163 Ill.App. 586.

23. N.Y.—Allen v. Buffalo, etc., R. Co., 45 N.E. 845, 151 N.Y. 424.

Erection of warning signs
Statute directing state roads commission, and forbidding others, to erect and maintain warning signs along highways was not intended to prevent a railroad from marking its roadbeds where it makes a crossing above a highway and does not relieve it from obligation to secure erection of suitable warning signs by or with consent of state authorities.—Baltimore & A. R. Co. v. Contino, C.A.Md., 185 F.2d 932, certiorari denied 71 S.Ct. 798, 341 U.S. 927, 95 L.Ed. ——.

24. N.Y.—Allen v. Buffalo, etc., R. Co., 45 N.E. 845, 151 N.Y. 434.—Vaughn v. Buffalo, etc., R. Co., 25 N.Y.S. 246, 72 Hun 471.
Duty to repair and restore highway see supra § 149.

25. Ind.—Seybold v. Terre Haute, etc., R. Co., 46 N.E. 1054, 18 Ind.App. 367.

26. N.Y.—Vaughn v. Buffalo, etc., R. Co., 25 N.Y.S. 246, 72 Hun 471.

27. U.S.—Lehigh Valley R. Co. v. Dupont, N.Y., 128 F. 840, 64 C.C.A. 478.
51 C.J. p. 1089 note 92.

28. U.S.—Panama R. Co. v. Robert, Canal Zone, 256 F. 773, 168 C.C.A. 119.
51 C.J. p. 1089 note 93

29. Ga.—Western & A. R. R. v. Gray, 157 S.E. 482, 172 Ga. 786, appeal dismissed 51 S.Ct. 654, 283 U.S. 811, 75 L.Ed. 1428.

Guaranty of bonds of one railroad by another to aid in the construction of the road of the former does not make the former the servant or agent of the guarantor, rendering the guarantor liable for its negligence or default.[30]

A company having a mere easement over land on which an injury occurred, and no control over the instrumentality involved in the injury, has been held not liable therefor.[31]

Elimination of grade crossing; liability of city. Owners of a building damaged by negligence in excavation in connection with the elimination of a grade crossing have been held not relegated to a claim against the highway commission for damages as for the taking of their property,[32] but to be entitled to sue the company contracting with the commission, as well as the city which employed another contractor,[33] but in particular circumstances the city has been held not liable for injury to property because of the negligence of another company after the contractor employed by the city completed the principal part of his work.[34]

§ 349. Railroad Holding Stock or Bonds of Another Railroad; Control

One railroad company is not liable for the torts of another merely because it controls such other or owns all or a majority of the stock or bonds thereof; but it may be liable if, by stock ownership, it operates and manages such other company.

One railroad company does not become liable for the torts of another merely by reason of its ownership of the stock[35] or bonds[36] thereof, although it may be a connecting line,[37] and even though the former company controls the latter.[38] So, a railroad which holds the majority of the stock of another is not for that reason liable for its torts,[39] even though by such stock ownership it controls the corporate organization thereof[40] and has the same general officers,[41] or because of such ownership has entered into close traffic agreements therewith.[42]

Where, however, by stock ownership, one company actually controls, operates, and manages another railroad, it may be liable for the acts of the servants or agents thereof,[43] and the rule will apply where the relationship between the dominant and subsidiary company constitutes a partnership, or a joint and several agency, even though the general management of each road is retained by the company owning it.[44] On a like principle a lessee of a railroad owning all the stock in a subsidiary company may be liable for the acts or omissions of such subsidiary company where by reason of such lease it controls and operates it.[45]

§ 350. Mortgagees and Trustees in Possession

In the absence of authorizing statute, a railroad company cannot, by voluntarily surrendering its road to a mortgagee or trustee of its own selection, escape liability for negligence in the operation of the road.

It is usually held, in the absence of statute authorizing it, that a railroad company cannot, by the voluntary surrender of its road to a mortgagee or

30. Kan.—Mathews v. Atchison, etc., R. Co., 55 P. 282, 60 Kan. 11—Atchison, etc., R. Co. v. Davis, 8 P. 530, 34 Kan. 209.

31. N.J.—Lee v. Pennsylvania-Reading Seashore Lines, 20 A.2d 71, 129 N.J.Eq. 530.

32. N.C.—Broadhurst v. Blythe Bros. Co., 17 S.E.2d 646, 220 N.C. 464.

33. N.C.—Broadhurst v. Blythe Bros. Co., supra.

34. N.C.—Broadhurst v. Blythe Bros. Co., supra.

City not obligated to foresee negligence of other contractor, working under supervision of highway commission, and guard against it—Broadhurst v. Blythe Bros. Co., supra.

35. Okl.—St. Louis, etc., R. Co. v. Sanford, 153 P. 650, 54 Okl. 185.
51 C.J. p. 1089 note 95.

36. Kan.—Atchison, etc., R. Co. v. Davis, 8 P. 530, 34 Kan. 209.

37. Kan.—Atchison, etc., R. Co. v. Cochran, 23 P. 151, 43 Kan. 225, 19 Am.S.R. 129, 7 L.R.A. 414.
Liability as between connecting lines see infra § 366.

38. Tenn.—Nashville, C. & St. L. Ry. v. Faris, 60 S.W.2d 425, 166 Tenn. 238.

Separate corporation created by state legislature to take lease of railroad line was held not mere tool of another railroad corporation, notwithstanding latter's control and identity of corporate officers, and therefore suit for negligence of lessee corporation could not be maintained against such other.—Nashville, C. & St. L. Ry. v. Faris, supra.

39. Ky.—Evansville R. Co. v. Lignon, 189 S.W. 898, 172 Ky. 631.
Md.—Bethlehem Steel Co. v. Raymond Concrete Pile Co., 118 A. 279, 141 Md. 67.
Liability of sole or majority stockholders for corporate acts and debts generally see Corporations § 581.

40. N.Y.—Stone v. Cleveland, etc., R. Co., 95 N.E. 816, 202 N.Y. 352, 35 L.R.A.,N.S., 770.
Tenn.—**Corpus Juris cited in** Nashville, C. & St. L. Ry. v. Faris, 60 S.W.2d 425, 427, 166 Tenn. 238.

41. Ky.—Louisville R. Co. v. Wiggington, 161 S.W. 209, 156 Ky. 400.
Tenn.—**Corpus Juris cited in** Nashville, C. & St. L. Ry. v. Faris, 60 S.W.2d 425, 427, 166 Tenn. 238.

42. Kan.—Mathews v. Atchison, etc., R. Co., 55 P. 282, 60 Kan. 11—Atchison, etc., R. Co. v. Davis, 8 P. 530, 34 Kan. 209.

43. U.S.—Lehigh Valley R. Co. v. Delachesa, N.Y., 145 F. 617, 76 C.C.A. 307.
51 C.J. p. 1089 note 3
Industrial or logging roads see infra § 369.

44. U.S.—Lehigh Valley R. Co. v. Dupont, N.Y., 128 F. 840, 64 C.C.A. 478.
Okl.—St. Louis, etc., R. Co. v. Sanford, 153 P. 650, 54 Okl. 185.

45. U.S.—The Willem Van Driel, Sr., Md., 252 F. 35, 164 C.C.A. 147, certiorari denied 39 S.Ct. 9, 248 U.S. 566, 63 L.Ed. 424.
51 C.J. p. 1089 note 5.
Liability of lessee of railroad generally see infra §§ 353-360.

trustee of its own selection, under a mortgage deed of trust for the benefit of creditors or bondholders, escape liability for negligence in the operation of the road.[46] In such case the trustee must be deemed to be the agent of the company,[47] and the action may be maintained against the railroad company,[48] or suit may be brought against the trustees in their official capacity,[49] or the trustee may be held personally liable in the same manner as a lessee or other person in possession and control and exercising for the time being the franchises of the company[50]

Where a statute authorizes the surrender of a railroad to mortgagees or trustees for the benefit of creditors,[51] or where the possession of the mortgagee or trustee is adverse to the railroad and the result of proceeding in invitum,[52] it has been held that the property in the hands of such trustees is liable for the negligent management of the road by them resulting in injury, and an action may be maintained against them,[53] and the company will not be liable[54]

Fencing. Trustees or mortgagees in possession of a railroad are subject to a statutory liability for injuries to animals due to the unfenced condition of the road,[55] and this rule applies to a corporation operating a railroad as trustee for another[56] or for bondholders.[57]

Fires. Trustees or mortgagees in possession of and operating a railroad are subject to a statutory liability for fires,[58] unless the liability of the trustee is expressly defined and limited by statute, and does not include such liability.[59]

§ 351. Lessor and Lessee

Joint liability of a lessor railroad company and a lessee company is discussed infra § 372 a.

Examine Pocket Parts for later cases.

§ 352. —— Liability of Lessor in General

a. General rules
b. Where lessor retains control
c. Where road operated in name or interest of lessor
d. Where lessee assumes liability

a. General Rules

Some decisions broadly hold a lessor railroad company liable for the lessee's torts; where the lease is unauthorized, the lessor remains liable for the lessee's torts in operating the road, and where it is authorized the authorities differ as to the lessor's liability.

In a number of cases it has been held broadly, without express reference to whether or not the lease was authorized, that a lessor railroad company is liable for the torts of the lessee in the operation of the road,[60] the decisions being based on the theory

46. U.S.—Pennsylvania R. Co. v. Jones, App. D.C., 15 S.Ct. 136, 155 U.S. 333, 39 L.Ed. 176.
51 C.J. p. 1090 note 6.
Liability of trustee in possession of trust property for negligence generally see Negligence § 91
Railroad mortgages and trust deeds generally see supra §§ 282–293.

47. Ill.—Wisconsin Cent. R. Co. v. Ross, 31 N.E. 412, 142 Ill. 9, 34 Am.S.R. 49
51 C.J. p. 1090 note 7.

48. Va.—Naglee v. Alexandria, etc., R. Co., 3 S.E. 369, 83 Va. 707, 5 Am.S.R. 308.
51 C.J. p. 1090 note 8.

49. N.C.—Wright v. Caney River R. Co., 66 S.E. 588, 151 N.C. 529, 19 Ann.Cas. 384.

50. Vt.—Sprague v. Smith, 29 Vt. 421, 70 Am.D. 424.
Liability of lessee company see infra §§ 351–360.

Where a trustee is not authorized to lease out the property, and is not given power to do so expressly by statute, he may be personally liable for the negligent acts of the lessee. —Briggs v. Clawson Bros., 8 Tenn. App. 251.

51. Conn.—Lamphear v. Buckingham, 33 Conn. 237.

52. Va.—Naglee v. Alexandria, etc., R. Co., 3 S.E. 369, 83 Va. 707, 5 Am.S.R. 308

53. Conn.—Lamphear v. Buckingham, 33 Conn. 237

54. U.S.—Dugan v. Gardner, D.C.N.Y., 68 F.Supp. 709—Detwiler v. Chicago, R. I. & P. Ry. Co., D.C.Minn., 15 F.Supp. 541.
51 C.J. p. 1090 note 14.

55. Kan.—Union Trust Co. v. Kendall, 20 Kan. 515.
Mo.—Farrell v. Union Trust Co., 77 Mo. 475.
Duty to construct and maintain fences see supra § 177

56. Mo.—Farrell v. Union Trust Co., supra.

57. Kan.—Union Trust Co. v. Kendall, 20 Kan. 515.

58. Mass.—Daniels v. Hart, 118 Mass. 543.
Va.—Naglee v. Alexandria, etc., R. Co., 3 S.E. 369, 83 Va. 707, 5 Am.S.R. 308.
Fires generally see infra §§ 484–546.

59. Me.—Stratton v. European, etc., R. Co., 76 Me. 269—Stratton v. European, etc., R. Co., 74 Me. 422.

60. Ill.—Wilson v. Terminal R. Ass'n of St. Louis, 77 N.E.2d 429, 333 Ill.App. 256.
Mo.—**Corpus Juris cited in** State v. Terte, 207 S.W.2d 487, 491, 357 Mo. 229.
Nev.—Los Angeles & S. L. R. Co. v. Umbaugh, 123 P.2d 224, 61 Nev. 214.
S.C.—Engelberg v. J. F. Prettyman & Sons, 156 S.E. 173, 159 S.C. 91.
51 C.J. p. 1090 note 26.
Lease by railroad:
Generally see supra §§ 208–224
Effect of generally see supra § 216
Liability as between lessor and lessee generally see Landlord and Tenant §§ 417–444.
Liability of lessor for injury to:
Passenger by lessee see Carriers § 707 a.
Third persons on leased premises generally see Landlord and Tenant §§ 417–433.
"The general rule of law is that a railroad company is liable for injuries to persons by the wrongful and negligent operation of the cars upon the road, whether operated by itself or by any other corporation, to which it has leased it."—Barnes v. Red River & G. R. R., 128 So. 724, 727, 14 La.App. 188.
Joint duty
The duty of operating railroad with due care for safety of the public is owed jointly by railway lessee and railway lessor.—Hawley v. Davenport, R. I. & N. W. Ry. Co., Iowa, 45 N.W.2d 513—Sorenson v. Chicago, R. I. & P. Ry. Co., 168 N.W. 313, 183 Iowa 1123.

that the lessee is the agent of the lessor.[61] It has been held that the lessor can be relieved of its duty to operate with due care for the safety of the public only by an unequivocal legislative release [62]

Where lease authorized Where there is legislative authority for the execution of the lease, but no express provision as to the subsequent liability of the lessor, there are directly conflicting lines of authority as to the lessor's liability for the torts of the lessee.[63] Some of the decisions hold that the authority to lease implies an exemption from liability on the part of the lessor for the torts of the lessee,[64] especially where the lessor retains no control over the operation of the road,[65] unless the contract itself reserves continuing liability in the lessor.[66] Other decisions hold that the lessor is not relieved from liability unless there is an express provision to this effect in the legislative authority,[67] and even though the lessor has no control over the operation and management of the lines.[68] Still other cases make a distinction between injuries growing out of negligence in the running of trains or the general management of the road over which the lessor could exercise no control and injuries due to the omission of duties owing to the public which are imposed primarily on the lessor,[69] holding that, in the absence of statutory exemption, an authorized lease impliedly relieves the lessor from liability for injuries of the former kind[70] but not for injuries of the latter kind.[71]

Where the lessor is liable for the negligence of the lessee, such liability applies to an injury occurring at a point beyond the limits of the leased road, on the track of another company, where the license to use such track was acquired by the lessor and was derived by the lessee through the lease.[72]

Liability of a lessor for injuries arising from operation of the road by his lessee does not apply where the lessor is obligated by statute to permit a joint use of its tracks with others,[73] especially where the operating agreement provides that each company shall be liable only for the negligence of its own servants.[74]

Where lease unauthorized. If the lease is unauthorized, the lessor company will remain liable for the torts of the lessee in the operation of the road,[75] but not for torts committed by the lessee in carrying on a separate and distinct,[76] even though similar,[77] business.

On expiration of lease, the road reverts to the lessor in the condition in which it then is, and its opera-

Rule recognized by statute

Mo.—State v. Terte, 207 S.W.2d 487, 357 Mo 229.

61. Ill.—Dabrowski v Illinois Cent R. Co., 24 N.E.2d 382, 303 Ill.App 31.

Nev.—Los Angeles & S L. R. Co v. Umbaugh, 123 P.2d 224, 61 Nev 214.

51 C.J. p 1091 note 27

62. Iowa.—Hawley v. Davenport, R. I. & N W. Ry. Co., 45 N.W.2d 513.

Statute held not to release lessor from liability

Iowa.—Hawley v. Davenport, R. I & N W. Ry. Co., supra—Sorenson v. Chicago, R. I. & P. Ry. Co., 168 N.W. 313, 183 Iowa 1123

63. Ark.—Little Rock, etc., R. Co v. Daniels, 56 S.W. 874, 68 Ark. 171.

51 C.J. p 1091 note 29.

64. Miss.—H. Weston Lumber Co v. Hibbens, 182 So. 115, 182 Miss. 669.

51 C.J. p 1091 note 30.

65. Miss.—Estes v. Memphis, etc., R. Co., 119 So. 199, 152 Miss. 814.

51 C.J. p 1091 note 31.

66. Pa.—Pinkerton v. Pennsylvania Tract. Co., 44 A. 284, 193 Pa. 229.

67. Ga.—Bennett v. Western & A. R. R., 157 S.E. 365, 42 Ga.App 821.

Ky.—Illinois Cent. R. Co. v. McGuire's Adm'r, 38 S.W.2d 913, 239 Ky. 1.

51 C.J. p 1091 note 34.

The reasoning is that in the absence of such exemption the lessor is estopped to set up the lease as a defense and so release itself from liability for the negligence of its lessee, since it would be against public policy to allow a railroad corporation to put off the liability incident to its franchise while enjoying the profits that may accrue by the medium of a lease

Iowa.—Sorenson v Chicago, etc., R. Co., 168 N.W. 313, 183 Iowa 1123.

Nev.—Los Angeles & S L. R Co. v. Umbaugh, 123 P.2d 224, 61 Nev. 214.

Lease of state property; sublease

Lease of state railroad property by lessee railroad did not exempt lessee from liability for use of tracks by sublessee, act prohibiting lessee from re-leasing property without governor's consent does not exempt lessee from liability to public from use of tracks by sublessee.—Bennett v. Western & A. R. R., 157 S.E. 365, 42 Ga.App. 821.

Leading case

S.C.—Chester Nat. Bank v. Atlanta, etc., Air Line R. Co., 25 S.C. 216.

68. Ky.—Illinois Cent. R. Co. v. McGuire's Adm'r, 38 S.W.2d 913, 239 Ky. 1.

69. Cal.—Lee v Southern Pac R. Co., 47 P. 932, 116 Cal. 97, 58 Am. S.R. 140, 38 L.R.A. 71.

51 C.J. p 1091 note 35

70. U.S.—Hayes v. Northern Pac R. Co., Ill., 74 F. 279, 20 C.C.A. 52

51 C.J. p 1091 note 37

Statutory liability see infra § 359.

71. Cal.—Lee v. Southern Pac. R. Co., 47 P. 932, 116 Cal. 97, 58 Am. S.R. 140, 38 L.R.A. 71.

Me.—Nugent v. Boston, etc., R. Co., 12 A. 797, 80 Me 62, 6 Am.S.R. 151.

Injuries caused by defective track, roadbed, etc, see infra § 354.

72. S.C.—Bouknight v. Charlotte, etc., R. Co., 19 S.E. 915, 41 S.C. 415.

73. D.C.—Smith v Philadelphia, etc., R. Co., 46 App D.C. 275.

74. D.C.—Smith v. Philadelphia, etc., R. Co., supra.

75. Tex.—Texas Interurban Ry. Co. v. Hughes, Com.App., 53 S.W.2d 448.

51 C.J. p 1090 note 23.

Effect of unauthorized lease generally see supra § 216.

76. N.C.—McCulloch v. Southern R. Co., 62 S.E. 1096, 149 N.C. 305.

51 C.J. p 1090 note 24.

77. N.C.—McCulloch v. Southern R. Co., supra.

tion will be subject to any statutory duty or burden imposed during the time of its operation by the lessee.[78]

Release of lessee as discharging lessor. Where the lessee acknowledges liability and makes settlement for an injury inflicted, the lessor is thereby discharged, since the lessor is responsible only under the doctrine of respondeat superior.[79]

Term "operation of a railway," as used in a lease relieving the lessor railway company of all claims for loss or damage arising from such operation, requires much more than the mere movement of trains or engines,[80] and includes everything necessary to permit trains and engines to move, such as the repair and maintenance of bridges, tracks, and buildings.[81]

b. Where Lessor Retains Control

A lessor railroad company retaining control over the operation of the road is liable for injuries resulting therefrom.

Regardless of the effect of a lease in ordinary cases, as discussed supra subdivision a of this section, if a lessor railroad company retains control over the operation of the road it will be liable for injuries resulting from such operation.[82]

c. Where Road Operated in Name or Interest of Lessor

Where a railroad is being operated by the lessee in the name or interest of the lessor, the latter is liable for injuries occurring in the operation.

The lessor company is liable for injuries occurring in the operation of its railroad by the lessee where the road is being operated in the name,[83] or wholly in the interest,[84] of the lessor company.

d. Where Lessee Assumes Liability

Where the lessor railroad company would otherwise be liable for the acts of the lessee, such liability as to third persons is not affected by any covenant in the lease or contract between the companies by which the lessee agrees to perform the duties and obligations of the lessor, or to indemnify the lessor for any liabilities incurred by reason of the acts of the lessee.

Where the lessor railroad company would otherwise be liable for the acts of the lessee, under the principles discussed supra subdivision a of this section, such liability as to third persons is not affected by any covenant in the lease or contract between the companies by which the lessee agrees to perform the duties and obligations of the lessor, or to indemnify the lessor for any liabilities incurred by reason of the acts of the lessee,[85] unless such provisions have the support of legislative authority.[86] A covenant by a lessee of land from a railroad company to assume all risks of damage or loss to property brought upon or in proximity to the premises has been held valid.[87]

An exemption clause in an industrial track agreement made by a third person with a lessee, who has agreed to indemnify his lessor, has been held to be a bar in an action against the lessor by such third person for injury occasioned by the negligence of the lessee.[88]

§ 353. —— Liability of Lessee in General

The lessee of a railroad is liable for its own negligence in operating the road; and, where a valid lease is regarded as exempting the lessor from liability, the lessee is solely liable. The lessee cannot avoid liability to third persons by any agreement with the lessor.

A lessee railroad company is liable for its own negligence or that of its servants in the operation of the leased railroad,[89] but is not liable for torts com-

78. Conn.—State v. New Haven, etc., R. Co., 37 Conn. 153.
51 C.J. p. 1092 notes 43, 44.

79. Okl.—Hammond v. Kansas, etc., R. Co., 234 P. 731, 109 Okl. 72.
Effect of release of joint tort-feasor see the C.J.S. title Release § 50, also 53 C.J. p. 1254 note 19-p. 1266 note 5.
Judgment in favor of lessee as bar to suit against lessor see Judgments § 801.

80. Wash.—U. S. Fire Ins. Co. v. Northern Pac. Ry. Co., 198 P.2d 868, 30 Wash.2d 732, 2 A.L.R.2d 1065.
Negligent operation of a weed burner along right of way and negligent going away without extinguishing fires, with result that lessee's warehouse and contents on right of way were destroyed by fire, were incident to operation of a railway within such lease.—U. S. Fire Ins. Co. v. Northern Pac. Ry. Co., supra.

81. Wash.—U. S. Fire Ins. Co. v. Northern Pac. Ry. Co., supra.

82. Miss.—**Corpus Juris quoted in** Reed v. New Orleans Great Northern R. Co., 151 So. 553, 555, 170 Miss. 296.
51 C.J. p. 1092 note 48—26 C.J. p. 1038 note 80 [a].

83. Ga.—Singleton v. Southwestern R. Co., 70 Ga. 464, 48 Am.R. 574.
Iowa.—Bower v. Burlington, etc., R. Co., 42 Iowa 546.

84. U.S.—Southern R. Co. v. Bouknight, S.C., 70 F. 442, 17 C.C.A. 181, 30 L.R.A. 823.

85. Me.—Nugent v. Boston, etc., R. Co., 12 A. 797, 80 Me. 62, 6 Am.S.R. 151.
51 C.J. p. 1092 note 53.

86. N.Y.—Philips v. Northern R. Co., 16 N.Y.S. 909, 62 Hun 233, appeal dismissed 35 N.E. 207, 139 N.Y. 650.

87. Wis.—Frederick v. Great Northern Ry. Co., 240 N.W. 387, 207 Wis. 234, 80 A.L.R. 984, modified on other grounds 241 N.W. 363, 207 Wis. 234.
Property affected.
Only property so bought after the execution of the lease is affected by such covenant.—Frederick v. Great Northern Ry. Co., supra.

88. S.C.—Salley Oil Mill v. Southern R.-Carolina Div., 93 S.E. 336, 108 S.C. 131.
51 C.J. p. 1092 note 56.
Contracts for control, operation, or use of railroads or incidental facilities see supra §§ 225-233.

89. Ill.—Wilson v. Terminal R.

mitted by the lessor company prior to the execution of the lease,[90] unless, it has been held, it has assumed such liability under the terms of the lease.[91] Likewise, the lessee is not liable for the negligence of employees of the lessor over whom it exercises no control.[92] Where, under the local law, the lessor is regarded as exempted from liability in case of a duly authorized lease, as discussed supra § 352 a, the lessee is solely liable,[93] and to the same extent as though operating the road as owner.[94]

The lessee cannot avoid its liability as to third persons by any contract or agreement with the lessor,[95] even where under the local law the lessor also is liable,[96] nor can the lessee escape liability by denying the validity of the lease;[97] nor can the lessee claim, as to its operation of the leased road, the benefit of any special exemptions from liability contained in its own charter.[98]

Discrimination as to sidings. Where, after a lease, a person becomes entitled to the construction of a siding, the right of action for damages for unlawful discrimination in refusing the siding is against the lessee[99] and not the lessor.[1]

Negligence of independent contractor. The lessee is also liable for injuries due to the negligence of the servants of an independent contractor, where such contractor is exercising any of the charter powers and franchises of the company with its assent.[2]

§ 354. —— Injuries Due to Defective Roadbeds, Tracks, Etc.

a. Liability of lessor
b. Liability of lessee

a. Liability of Lessor

During operation by a lessee railroad company, the lessor is generally liable for injuries due to the condition of the track, roadbed, or appurtenances thereto, but not for the negligence of the lessee in making repairs or alterations.

The general rule, in the absence of statute providing otherwise, is that the lessor railroad company can be held liable for injuries, during operation by the lessee, due to the condition of its track or its roadbed or appurtenances thereto,[3] even though the lessee may also be liable,[4] and even under circumstances where it is conceded that it would not be liable for negligence of the lessee in the operation of its trains.[5] On the other hand, in the absence of a statute to the contrary, the lessor is not liable for injuries growing out of the negligence of the lessee in making repairs or alterations upon the leased road,[6] notwithstanding the lessor is bound under the terms of the lease to compensate the lessee for the cost of such work,[7] and although it would be liable if such defects existed at the time the lease was executed and possession given,[8] and were continued in such condition even through the fault or negligence of the lessee.[9]

b. Liability of Lessee

A lessee railroad company is liable for injuries from its acts in repairing or altering the leased road, failing to maintain it in proper condition, or continuing, after notice to abate, a nuisance created by the lessor; but authorities are not uniform as to the liability of the lessee for injuries due to the original construction of the road.

A lessee railroad company has been held liable for injuries occurring during its operation of the road

Ass'n of St Louis, 77 N E 2d 429, 333 Ill.App 256
51 C J. p 1095 note 34.
Liability of:
Company using tracks or road of another see infra § 365.
Lessee generally for injuries to third persons see Landlord and Tenant §§ 434-442.

90. Mo —Tate v Missouri, etc., R. Co., 64 Mo. 149.
51 C J. p 1095 note 35.

91. U S.—Dunn v. Clinchfield R Co., C C A Tenn, 19 F 2d 810, certiorari denied 48 S.Ct 117, 275 U S. 557, 72 L Ed. 424.
51 C.J. p 1095 note 36.

92. Mo.—Wills v. Atchison, etc, R Co., 113 S.W. 712, 133 Mo App. 625

93. Miss.—Estes v. Memphis, etc, R. Co, 119 So. 199, 152 Miss. 814
51 C J. p 1095 note 39.

94. Cal.—Barrett v. Southern Pac. Co., 277 P. 481, 207 Cal. 154.
51 C J. p 1095 note 40.

95. Iowa —Clary v. Iowa Midland R Co 37 Iowa 344
Mass —McCluer v Manchester, etc, R Co, 13 Gray 124, 74 Am D. 624

96. Ill.—Offner v. Chicago, etc, R Co, 174 Ill App. 82.
Mass.—Davis v. Providence, etc., R. Co, 121 Mass. 134.

97. D C —Chesapeake, etc, R. Co v. Howard, 14 App.D C. 262, affirmed 20 S Ct. 880, 178 U S. 153, 44 L.Ed 1015.
51 C.J. p 1096 note 43

98. Mich —McMillan v. Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am.D. 208.

99. Pa.—Moser v. Philadelphia, etc., R. Co, 82 A. 362, 233 Pa. 259, 40 L.R.A.,N.S., 519.
Right to siding see supra § 413.

1. Pa.—Moser v. Philadelphia, etc., R. Co., supra.

2. Ill.—Suburban R. Co. v. Balkwill, 63 N.E. 389, 195 Ill. 535.

3. Tex —Houston & T. C. R. Co. v. Adams, Civ App, 32 S W.2d 382
51 C.J. p 1092 note 59.

4. Tex —Houston & T. C. R. Co v. Adams, supra

5. Cal.—Lee v. Southern Pac. R Co., 47 P. 932, 116 Cal. 97, 58 Am S.R. 140, 38 L R.A. 71.

6. Mich.—Ackerman v. Cincinnati, etc, R. Co., 106 N.W 558, 143 Mich. 58, 114 Am.S R 640
51 C.J p 1093 note 62.
Statutory liability see infra § 359.

7. N.Y.—Miller v. New York, etc, R. Co, 26 N.E. 35, 125 N.Y. 118.

8. Mo.—Hahs v. Cape Girardeau, etc., R. Co., 126 S.W. 524, 147 Mo App 262
51 C.J. p 1093 note 64.

9. Mo.—Hahs v. Cape Girardeau, etc., R. Co., supra.
51 C J. p 1093 note 65.

due to the defective condition of the track or roadbed, although such defects were in the original construction or existed at the time of the lease,[10] since it cannot keep and maintain the tracks or roadbed in a dangerous condition and escape liability for injury arising out of such condition[11] on the ground that it is the duty of the lessor to keep the tracks in proper order;[12] but it has also been held that the lessee is not liable for injuries to property due to the original construction of the road by the lessor.[13] The lessee is liable for injuries resulting from its own acts in making repairs or alterations upon the leased road,[14] or its failure to perform its continuing duty to maintain the road in suitable and proper condition.[15]

Under an ordinance requiring railroads to fence their roads, when and as prescribed by the certain municipal officers, a lessee is not liable for an injury resulting from a failure to fence, in the absence of a notice to it to fence the road, where it is not responsible under the lease for the maintenance, repair, and renewal of the property,[16] even though notice had been given its lessor.[17]

Where the lease provides that during the term the lessee will do and perform all acts which in the absence of such lease the law would impose on the lessor, the lessee must construct farm crossings which are required by statute.[18]

Continuing nuisance. Where a lessee continues a nuisance created by its lessor in the construction or maintenance of the road, after notice to abate it, it will be liable for resulting damages,[19] even though the nuisance was created by its lessor in an attempt to abate another nuisance of which complaint was made.[20]

§ 355. —— Injuries to Shippers

A railroad company has been held liable for the negligence or other wrongful conduct of its lessee resulting in loss to a shipper.

It has been held that a railroad company is liable for the negligence of its lessee causing loss or delay in transit of shipments of goods[21] or live stock,[22] and for a refusal of the lessee to transport goods on demand,[23] or to deliver goods to the consignee.[24] The lessor, however, is bound to do no more than its lessee,[25] and, where bound by the contract of shipment, it is protected thereby and is entitled to any proper exemption from, or limitation of, liability provided for therein,[26] and is entitled to the benefit of a stipulation limiting the liability to losses on its own line.[27]

§ 356. —— Injuries to Employees

Authorities differ as to whether a lessor railroad company is liable for injuries to the employees of the lessee arising out of the operation of the road by the latter.

The authorities are not in accord on the question of the liability of a lessor railroad company for injuries to employees arising out of its lessee's operation of the road.[28] Thus in some jurisdictions it has been held that the lessor is liable for the consequences of the negligence of the lessee in the operation of the road to the employees of the lessee,[29] who, as to the lessor, are considered as

10. La.—**Corpus Juris quoted in** Brandon v. Texas & New Orleans R. Co., App., 169 So. 254, 256.
51 C.J. p. 1096 note 49.

11. La.—**Corpus Juris quoted in** Brandon v. Texas & New Orleans R. Co., App., 169 So. 254, 256.
51 C.J. p. 1096 note 50.

12. La.—**Corpus Juris quoted in** Brandon v. Texas & New Orleans R. Co., App., 169 So. 254, 256.
Tex.—Texas, etc., R. Co. v. Ross, 27 S.W. 728, 7 Tex.Civ.App. 653.

13. W.Va.—Gunn v. Ohio River R. Co., 33 S.W. 87, 46 W.Va. 151, 76 Am.S.R. 806.
51 C.J. p. 1096 note 52.

14. La.—**Corpus Juris quoted in** Brandon v. Texas & New Orleans R. Co., App., 169 So. 254, 256.
51 C.J. p. 1096 note 53.

15. La.—**Corpus Juris quoted in** Brandon v. Texas & New Orleans R. Co., App., 169 So. 254, 256.
51 C.J. p. 1096 note 54

16. Ill.—Livak v. Chicago, etc., R. Co., 132 N.E. 524, 299 Ill. 218.

17. Ill.—Livak v. Chicago, etc., R. Co., supra.

18. N.Y.—Buffalo Stone, etc., Co. v. Delaware, etc., R. Co., 29 N.E. 121, 130 N.Y. 152.

19. Mo.—Dickson v. Chicago, etc., R. Co., 71 Mo. 575.
51 C.J. p. 1096 note 59.

20. Ga.—Western, etc., R. Co. v. Cox, 20 S.E. 68, 93 Ga. 561.

21. Tex.—International, etc., R. Co. v. Moody, 9 S.W. 465, 71 Tex. 614
51 C.J. p. 1093 note 68.
Delay of goods in transit generally see Carriers §§ 190-230

22. Ill.—Ohio, etc., R. Co. v. Dunbar, 20 Ill. 623, 71 Am.D. 291.

23. Tex.—Central, etc., R. Co. v. Morris, 3 S.W. 457, 68 Tex. 49.
Duty to receive and transport generally see Carriers §§ 27-34

24. S.C.—Chester Nat. Bank v. Atlanta, etc., Air Line R. Co., 25 S.C. 216.
51 C.J. p. 1093 note 71.
Delivery of goods by carrier generally see Carriers §§ 159-186

25. Tex.—International, etc., R. Co. v. Thornton, 22 S.W. 67, 3 Tex.Civ.App. 197.

26. Tex.—International, etc., R. Co. v. Thornton, supra.
Limitation on common-law liability by contract generally see Carriers §§ 88-118.

27. Tex.—International, etc., R. Co. v. Thornton, supra

28. Ill.—Chicago, etc., R. Co. v. Hart, 70 N.E. 654, 209 Ill. 414, 66 L.R.A. 75.
51 C.J. p. 1093 note 78.
Liability of:
Lessor for injuries to own employees see Master and Servant § 178.
Licensee railroad to employees of licensor see infra § 365 b
Licensor railroad to employees of licensee see infra § 364 b.

29. N.C.—Harden v. North Carolina

part of the general public,[30] especially where the employees had no notice of the lease,[31] and notwithstanding the injury was not due to a defect in the road but solely to negligence in the operation of the trains;[32] but in other jurisdictions it has been held that the lessor is not liable where the injury to such an employee was received in the line of services required of him in operating the road, and were caused solely by the negligence of the lessee[33] in the management of the road[34] or in failure to furnish suitable appliances,[35] and although there is no express statutory exemption from such liability[36] unless its negligence concurred with that of the lessee.[37] There is a similar conflict even under statutes expressly providing that the lessor shall remain liable as though it operated the road itself, it being held under some that the provision applies to injuries to employees of the lessee,[38] and under others that the provision applies only to the duties of the company as a common carrier to the public and not to injuries to employees due to the negligence of the lessee.[39]

The lessee's liability for injuries to its employees is discussed in Master and Servant § 178.

Defects in roadbed or other property. Following the general rule stated supra § 354 a, the lessor is liable for injuries to the lessee's employees due to structural defects in the road as constructed by the lessor or due to its failure properly to maintain it under its public duty to do so,[40] as, for example, injuries resulting from its failure to maintain in a reasonably safe condition its tracks[41] or station houses,[42] especially where the lease is void[43] or without statutory authority.[44]

§ 357. —— Injuries to Animals

a. In general
b. Arising from failure to fence or erect cattle guards

a. In General

Both the lessor railroad company and the lessee have been held liable for injuries to animals caused by the latter's negligence.

Where a railroad lease was unauthorized, the lessor railroad company will be liable for injuries to animals caused by the negligence of its lessee.[45] Even where the lease is authorized, the lessor has been held liable for such injuries.[46]

A lessee company, owing the same degree of care as its lessor to prevent injuries to stock, is similarly liable for failure to exercise such care,[47] including its failure to abate a continuing nuisance.[48]

b. Arising from Failure to Fence or Erect Cattle Guards

A railroad company leasing its road to another remains liable for injuries resulting from its failure to comply with statutory requirements as to fences and cattle guards; and the lessee is liable to the same extent

Where a statute imposes on a railroad company liability for injuries to animals caused by its failure to comply with a statute requiring it to fence its right of way and erect adequate cattle guards, it can-

R Co., 40 S.E 184, 129 N C 354, 85 Am S R. 747, 55 L R.A. 784.
51 C J p 1093 note 80.

30. Ill —Chicago, etc., R Co. v. Hart, 70 N E 654, 209 Ill 414, 66 L R A. 75

31. Kan —Kasper v. Kansas City, etc., R. Co., 207 P. 203, 111 Kan. 267.

32. N.C.—Logan v North Carolina R. Co, 21 S.E 959, 116 N C 940.

33. U.S.—Williard v Spartanburg, U. & C. R. Co., C C.S C, 124 F. 796.
51 C J. p 1093 note 84

34. Cal.—Lee v. Southern Pac. R. Co., 47 P. 932, 116 Cal. 97, 58 Am. S R. 140, 38 L R.A. 71.

35. Tex.—East Line, etc., R. Co. v. Culberson, 10 S.W. 706, 72 Tex. 375, 13 Am.S.R. 805, 3 L.R.A. 567.
51 C J. p 1094 note 86.

36. Ga.—Banks v. Georgia, etc., R. Co., 37 S.E. 992, 112 Ga. 655.

37. Ky.—Hunsaker v. Chesapeake, etc., R. Co., 215 S.W. 552, 185 Ky. 686, 28 A.L.R. 117.

Tex —Schaff v Ellison, Civ App., 265 S W. 680, certiorari dismissed Sumner Sollitt Co. v. Ellison, 45 S.Ct. 10, 266 U S 638, 69 L.Ed. 482.
Concurrent negligence generally see infra § 372 b.

38. S C —Reed v Southern R. Co., 55 S.E. 218, 75 S C. 162.
51 C J. p 1094 note 90.
Statutory liability generally see infra § 359.

39. Ky.—Chesapeake, etc, R Co v Vaughan, 167 S.W. 141, 159 Ky. 433
51 C J. p 1094 note 91.

40. Ky —Raikes v Payne, 249 S W. 1020, 198 Ky. 820.
51 C J. p 1094 note 93.

41. Cal.—Lee v. Southern Pac. R. Co., 47 P. 932, 116 Cal. 97, 58 Am. S.R. 140, 38 L.R A. 71.
51 C.J. p 1094 note 94.

42. Me.—Nugent v. Boston, etc., R. Co., 12 A. 797, 80 Me. 62, 6 Am S.R. 151.

43. U S —Hukill v Maysville & B. S R. Co., C.C.Ky., 72 F. 745.

44. Ind —Baltimore, etc, R. Co. v. Paul, 40 N E. 519, 143 Ind 23, 28 L.R A 216.
Tex.—East Line, etc, R. Co. v. Culberson, 10 S.W 706, 72 Tex 375, 13 Am.S R. 805, 3 L R.A. 567
Liability when lease unauthorized generally see supra § 352 a.

45. Mo.—Brown v. Hannibal, etc., R. Co., 27 Mo.App. 394.
Effect of authorization or lack of authorization on lessor's liability generally see supra § 352 a.
Liability of railroad for injuries to animals generally see infra §§ 547-689

46. S C.—Harmon v. Columbia, etc., R. Co., 5 S E. 835, 28 S.C. 401, 13 Am.S.R. 686.

47. Tex.—International etc., R. Co. v. Dunham, 4 S.W.2d 472, 68 Tex. 231, 2 Am.S.R. 484.
51 C.J p 1096 note 66.

48. Kan.—Martin v Chicago, etc., R. Co., 105 P. 451, 81 Kan. 344, 27 L.R.A.,N.S., 164.
51 C.J. p 1096 note 67.

not escape liability by leasing its road to another company,[49] even though the lease is authorized[50] and by its terms binds the lessee to discharge all statutory liability imposed on the lessor company,[51] and the lessor may also be held liable for injuries due to defects occurring in, or from failure to keep in repair, such fences or cattle guards.[52] Where, however, a lessee goes into possession under a lease before the road is opened for use, and the statute requires fences to be erected prior to such time by every railroad, lessee, or other person in possession, the lessor company will not be liable for injuries to animals arising out of the failure of the lessee to erect such fences.[53]

The lessee is subject to the same liability as the lessor for injuries due to the absence of fences or cattle guards,[54] or a failure to keep those constructed in repair,[55] but only to the same extent.[56] In some instances the statutes imposing the duty or liability apply in terms to lessees.[57] The lessee company cannot avoid its liability by any contract or agreement with the lessor;[58] nor is it material with respect to the lessee whether or not the lease was authorized.[59]

§ 358. —— Fires

a. Liability of lessor
b. Liability of lessee

a. Liability of Lessor

A railroad company which has entered into an unauthorized lease of its property has been held liable for fires caused by the negligence of its lessee, but, in the absence of a statutory liability, the authorities differ as to the liability of the lessor where the lease is authorized.

A railroad company which has entered into an unauthorized lease of its road has been held liable for fires caused by the negligence of its lessee.[60] Where the lease is authorized, it has been held that such authority impliedly exempts the lessor from liability,[61] but it has also been held that the lessor is liable unless there is an express legislative exemption.[62]

Under a statute making a lessor responsible for any cause of action arising out of the operation of the road, it has been held that the lessor is liable for the negligence of its lessee causing fires,[63] but not to the user of an industrial track who has agreed to indemnify the lessee for all damages occasioned by the negligence of lessee's servants and employees.[64] Where a statute imposes a liability for all damages by fire communicated by locomotives, a lessor company making an authorized lease will be liable for fires so communicated by its lessee where the statute authorizing the lease provides that it shall remain liable on all actions growing out of the operation of the road;[65] and the lessor has been held liable where the authority to lease contained no such reservation but did not contain an express exemption.[66] Under statutes providing that every railroad company should be liable for all damages caused by fires communicated by "its" locomotives, it has been held that the lessor is not liable for fire communicated by engines of its lessee,[67] although there is also authority to the contrary.[68]

The lessor, although the lease is authorized, is liable under a statute imposing a liability on all railroads for damages by fire due to a failure to keep their rights of way clear of combustible matter.[69]

49. Tex.—Houston & T. C. R. Co. v. Adams, Civ.App., 32 S.W.2d 382.
51 C.J. p. 1094 note 10.
Duty to construct fences and cattle guards see supra § 177.

50. Kan.—St. Louis, etc., R. Co. v. Curl, 28 Kan. 622.

51. Kan.—St. Louis, etc., R. Co. v. Curl, supra.

52. Tex.—Houston & T. C. R. Co. v. Adams, Civ.App., 32 S.W.2d 382.
51 C.J. p. 1095 note 14.

53. N.Y.—Thorne v. Lehigh Valley R. Co., 34 N.Y.S. 525, 88 Hun 141.

54. Kan.—Missouri Pac. R. Co. v. Morrow, 4 P. 87, 32 Kan. 217.
51 C.J. p. 1097 note 68.

55. Cal.—Johnson v. Southern Pac. Co., 104 P. 713, 11 Cal.App. 278.
Me.—Gould v. Bangor, etc., R. Co., 19 A. 84, 82 Me. 122.

56. Wis.—Cook v. Milwaukee, etc., R. Co., 36 Wis. 45.
51 C.J. p. 1097 note 70.

57. Ark.—St. Louis, etc., R. Co. v. Hale, 100 S.W. 1148, 82 Ark. 175.
51 C.J. p. 1097 note 71.

58. Iowa.—Clary v. Iowa Midland R. Co., 37 Iowa 344.

59. Me.—Gould v. Bangor, etc., R. Co., 19 A. 84, 82 Me. 122.

60. Pa.—Van Steuben v. New Jersey Cent. R. Co., 35 A. 992, 178 Pa. 367, 34 L.R.A. 577.
Effect of authorization or lack of authorization on liability generally see supra § 352 a.
Liability of railroad for fire generally see infra §§ 484-546.

61. Minn.—Heron v. St. Paul, etc., R. Co., 71 N.W. 706, 68 Minn. 542.

62. Ohio.—Fisher v. Baltimore, etc., R. Co., 6 Ohio S. & C. P. 67, 3 Ohio N.P. 283.

63. S.C.—Salley Oil Mill v. Southern R., Carolina Div., 93 S.E. 336, 108 S.C. 131.

64. S.C.—Salley Oil Mill v. Southern R., Carolina Div., supra.
51 C.J. p. 1095 note 25.
Contracts for exemption from liability for fire see infra § 510.

65. Ohio.—Breymann v. Pennsylvania, etc., R. Co., 165 N.E. 863, 30 Ohio App. 490.
51 C.J. p. 1095 note 27.

66. Ill.—Balsley v. St. Louis, etc., R. Co., 8 N.E. 859, 119 Ill. 68, 59 Am.R. 784.

67. S.C.—Lipfeld v. Charlotte, etc., R. Co., 19 S.E. 407, 41 S.C. 285.
51 C.J. p. 1095 note 30.

68. Mass.—Ingersoll v. Stockbridge, etc., R. Co., 8 Allen 438.

69. Ill.—Balsley v. St. Louis, etc., R. Co., 8 N.E. 859, 119 Ill. 68, 59 Am.R. 784.

b. Liability of Lessee

A lessee railroad company is subject to statutory liability for fires, as well as to liability for fires caused by its negligent operation.

In accordance with the general rule that a lessee of a railroad is liable for its own negligence and that of its servants in the operation of the road, as discussed supra § 353, a lessee company will be liable for fires caused by the negligent operation of its locomotives.[70] So, where a railroad leases an elevator and operates it as a facility of its railroad, it will be liable for fire communicated because of negligence in the operation of the elevator.[71]

Under a statute imposing liability for fires communicated by locomotives or engines, without regard to negligence, the lessee is subject to the statutory liability for damage by fire communicated by one of its locomotives used upon the tracks.[72]

§ 359. —— Statutory Liability

Statutory provisions may impose on a lessor railroad company responsibility for the liabilities of the lessee, and vice versa.

Responsibility for the liabilities of the lessee railroad company is expressly imposed on the lessor in some jurisdictions by constitutional[73] or statutory[74] provisions; and statutes so providing are constitutional.[75] On the other hand, responsibility for liabilities of the lessor may by statute be transferred to the lessee,[76] or the lessee may be made liable for the same causes, and in the same manner, as though operating its own road.[77]

Statutes imposing such liability are not broad enough to impose liability for the torts of a stranger who seizes and operates the road against the consent of both lessor and lessee,[78] even though the seizure and operation be by a receiver of the lessee company.[79]

A terminal company created under a statute relating to railroads generally, where there is no special statute providing for its incorporation, has been held to be "a railroad company," and as such liable under a statute imposing liability on a lessor for the acts of its lessee,[80] unless the legislative intent to release it from such responsibility is clearly manifest.[81]

An intra-state railroad which leases its road to one doing an interstate business, if under a local statute it is responsible for the lessor's acts, will be liable for such acts whether they occur in intra-state or interstate commerce.[82]

Where there is statutory authority for a lease, a company acting on such authority is bound by any conditions thereof imposing liability.[83]

§ 360. —— Lease for Other than Railroad Purposes

A railroad company leasing part of its property for a lawful purpose other than railroad use and reserving no supervision or control over the premises is not liable for the negligence of its lessee in maintaining the premises in a defective condition where there is no causal connection between the lease and the injury; but it may be liable to the lessee for negligence.

Where a railroad company leases part of its property for a lawful purpose other than railroad use, and reserves no supervision or control over the premises, it will not be liable for the negligence of its lessee in maintaining the premises in a defective condition[84] where there is no causal connection be-

70. Minn.—Cantlon v. Eastern R. Co., 48 N.W. 22, 45 Minn. 481.
Tex.—Texas, etc., R. Co. v. Ross, 27 S.W. 728, 7 Tex. Civ. App. 653.

71. U.S.—The Willem Van Driel, Sr., Md., 252 F. 35, 164 C.C.A. 147, certiorari denied 39 S.Ct. 9, 248 U.S. 566, 63 L.Ed. 424.

72. R.I.—MacDonald v. New York, etc., R. Co., 51 A. 578, 23 R.I. 558.
51 C.J. p. 1097 note 78.

73. Utah.—Jordon v. Utah R. Co., 156 P. 939, 47 Utah 513.
51 C.J. p. 1097 note 80.

74. Mo.—State v. Terte, 207 S.W.2d 487, 357 Mo. 229.
51 C.J. p. 1097 note 81.
Fires see supra § 358.
Liability of lessor under such statute for injury to employee of lessee see supra § 356.
Failure to record lease.
Act authorizing any person having right of action against railroad lessee, including employee of lessee, to hold lessor liable where lease is not recorded, has been held not to affect right of member of general public to hold lessor liable for lessee's negligence where lease is recorded, but merely to give employee of lessee right to sue lessor for coemployee's negligence where lease is not recorded.—Central of Georgia Ry. Co. v. Leonard, 176 S.E. 137, 49 Ga.App. 689.

75. Mo.—Brown v. Louisiana, etc., R. Co., 165 S.W. 1060, 256 Mo. 522.
51 C.J. p. 1097 note 82.

76. Iowa.—De Lashmutt v. Chicago, etc., R. Co., 126 N.W. 359, 148 Iowa 556.
51 C.J. p. 1097 note 85.

77. Mo.—Flint v. Chicago, B. & Q. R. Co., 207 S.W.2d 474, 357 Mo. 215.

78. Mo.—Hulen v. Wheelock, 300 S.W. 479, 318 Mo. 502.
51 C.J. p. 1097 note 86.

79. Mo.—Hulen v. Wheelock, supra.
Liability for acts of receiver or his servants see infra § 385.

80. Mo.—Clark v. Atchison, etc., R. Co., 6 S.W.2d 954, 319 Mo. 865.
51 C.J. p. 1097 note 88, p. 1098 note 89.
Liability of railroad and terminal company see infra § 367.

81. Mo.—Clark v. Atchison, etc., R. Co., 6 S.W.2d 954, 319 Mo. 865.

82. U.S.—North Carolina R. Co. v. Zachary, N.C., 34 S.Ct. 305, 232 U.S. 248, 58 L.Ed. 591, Ann.Cas.1914C 159.
51 C.J. p. 1098 note 91.

83. Mo.—Markey v. Louisiana, etc., R. Co., 84 S.W. 61, 185 Mo. 348.
51 C.J. p. 1098 note 92.

84. N.Y.—Potter v. New York, O. & W. Ry. Co., 252 N.Y.S. 394, 233 App. Div. 578, affirmed 185 N.E. 708, 261 N.Y. 489.
51 C.J. p. 1098 note 93.
Right of railroad to lease part of

tween the lease and the injury complained of,[85] and even if leasing for such use is unauthorized;[86] nor is there any imposition of liability on such a lessee for any lawful or proper use of the leased premises.[87]

The lessor remains liable for injuries to the lessee caused by negligence of the lessor in the operation of its road,[88] notwithstanding the lease in terms attempts to relieve the lessor from liability for such negligence.[89]

§ 361. Consolidated and Constituent Companies

Where two railroad companies are legally consolidated, the new company ordinarily is liable for the torts of such companies committed before the consolidation, and for injuries occurring thereafter due to the defective condition of the roadbed, etc., constructed by one of such companies or to the continuation of a nuisance originally created by one company.

Ordinarily it is held that, where two railroad companies are legally consolidated, the new company succeeds to all the rights and liabilities of each of the constituent companies, and is liable for the torts of such companies committed prior to the consolidation,[90] notwithstanding the statute authorizing the consolidation preserves the separate identity of the constituent companies with respect to their existing liabilities,[91] and such liability may be enforced directly by an action at law against the new company.[92] So also, the new company will be liable for injuries occurring after the consolidation due to the defective condition of the roadbed, bridges, or culverts constructed by one of the constituent companies[93] or to the continuance of a nuisance originally created by one of the constituent companies,[94] and the succeeding company is alone liable for the injuries resulting from any new work of construction or repair done by it thereafter.[95]

Responsibility for the liabilities of the constituent companies may be imposed by the statutes authorizing the consolidation,[96] or expressly assumed by the articles of consolidation[97] or by the conveyances to it,[98] but exists independently of any express provision to this effect and as a legal result of the consolidation.[99]

The constituent companies cannot by any contract between themselves affect the right of persons who have been injured by their torts;[1] and, where a railroad company has made an ineffectual attempt to consolidate with another, it is liable for an injury due to the negligence of the persons operating the road by virtue of the attempted consolidation.[2]

§ 362. Selling or Purchasing Company

a. Injuries prior to sale
b. Injuries subsequent to sale

a. Injuries Prior to Sale

The purchaser of the property of a railroad company at an authorized and bona fide sale takes it free of pre-existing liabilities growing out of the negligence of, or improper operation by, the vendor, or for injuries caused by the construction or maintenance of the road, unless such liability is expressly assumed or is imposed by statute.

On an authorized and bona fide sale of the property of a railroad company, the purchaser takes the property free from preëxisting liabilities growing out of the negligence of or improper operation of the road by, the vendor,[3] or because of injuries to, or trespasses upon, property occurring prior to the purchase and caused by the construction or

right of way for other than railroad purposes see supra § 101.

85. Ga.—Compton v. Seaboard Air-Line R. Co, 88 S.E. 988, 145 Ga. 255.

86. Ga.—Compton v. Seaboard Air-Line R. Co., supra.

87. U.S.—Hancock v. Missouri-Kansas-Texas R. Co, D.C.Okl., 28 F. 2d 45.
51 C.J. p 1098 note 96.

88. Kan.—Sprague v. Atchison, etc, R. Co, 78 P. 828, 70 Kan. 359.
51 C.J. p 1098 note 97.

89. Vt.—Osgood v. Central Vermont R. Co, 60 A. 137, 77 Vt. 334, 70 L.R.A. 930.
51 C.J. p 1098 note 98.

90. Ind.—Cleveland, etc., R. Co. v. Prewitt, 33 N.E. 367, 134 Ind. 557.
51 C.J. p 1098 note 1.
Consolidation of railroads generally see supra §§ 234-242.

91. Ala.—Warren v. Mobile, etc., R Co., 49 Ala. 582.
S.C.—Pickett v. Carolina Div Southern R. Co, 48 S.E. 466, 69 S.C. 445.

92. Va.—Langhorne v. Richmond R. Co., 22 S.E. 159, 19 S.E. 122, 91 Va. 369.

93. Ill.—Chicago, etc., R. Co v. Moffitt, 75 Ill. 524
51 C.J. p 1098 note 4.

94. Me.—Penley v. Maine Cent. R. Co., 92 Me. 59.
S.C.—Jones v. Seaboard Air Line R. Co, 45 S.E. 188, 67 S.C. 181

95. La.—Day v. New Orleans Pac. R. Co, 37 La.Ann. 131.

96. S.C.—Pickett v. Carolina Div. Southern R. Co., 48 S.E. 466, 69 S.C. 445.
51 C.J. p 1098 note 7.

97. Ark.—St. Louis, etc., R. Co. v. Marker, 41 Ark. 542.
51 C.J. p 1099 note 8.

98. Va.—Langhorne v. Richmond R. Co, 22 S.E. 159, 19 S.E. 122, 91 Va. 369.

99. Kan.—Berry v. Kansas City, etc, R. Co, 34 P. 805, 36 P. 724, 52 Kan. 759, 774, 39 Am.S.R. 371, 381.
51 C.J. p 1099 note 10.

1. Md.—State v. Baltimore, etc, R. Co., 26 A. 865, 77 Md. 489.

2. N.Y.—Latham v. Boston, etc., R. Co., 38 Hun 265.
51 C.J. p 1099 note 12.
Operation and effect of unauthorized or incomplete consolidation see supra § 239.

3. Ky.—Chesapeake, etc., R. Co v. Griest, 4 S.W. 323, 85 Ky. 619, 9 Ky.L. 177.
51 C.J. p 1099 notes 14, 15.
Liability of purchaser at judicial sale see infra § 363.
Sales generally see supra §§ 199-207.

maintenance of the road,[4] unless such liability is expressly assumed[5] or is imposed by statute;[6] but for this result the sale must be a bona fide and valid one and not a mere consolidation or change of name.[7] It has been held that a contract between the companies by which the purchasing company agrees to assume the debts and liabilities of the other does not confer any right on a third person to sue the purchasing company in tort on an unliquidated claim existing against the other company.[8]

The selling road remains liable for injuries occasioned prior to the sale and during its operation of the road.[9]

b. Injuries Subsequent to Sale

After a railroad company validly sells its road and franchise, and surrenders possession and control, it is not liable for subsequent injuries from operation by the purchaser; the latter is liable for injury resulting from its continuation of an improper condition with knowledge thereof, or from omission of a continuing statutory duty.

After an authorized and otherwise valid sale of its road and franchise by a railroad company, it is not liable for subsequent injuries due to the negligent or improper operation of the road by the purchasing company, to which it has surrendered the possession and control;[10] nor is this rule affected by the fact that the sale was not registered or that the property continued to be assessed in the name of the former owner.[11] The succeeding company is liable for injuries resulting after its acquisition of the road due to the manner in which it was constructed by its predecessor, if it continues to use the road in its defective or improper condition,[12] with knowledge thereof,[13] such notice or knowledge ordinarily being regarded as necessary,[14] or where it continues a nuisance created by the vendor[15] unless the nuisance was on other property not belonging to, or under the control of, the railroad company,[16] and also for damages due to any acts on its own part with respect to the construction, alteration, or repair of the road.[17] Accordingly, the purchaser may be liable for fire communicated through combustible material allowed to accumulate on the right of way by its vendor[18] Where the original construction is not improperly or negligently done, no cause of action arises against the purchasing company in favor of a successor in title of the original landlord, through whose land the road was constructed.[19]

Continuing statutory duty. A purchasing company will be liable for injuries occurring after the purchase due to the omission of a general statutory duty of a continuing character, although it should have been performed by its predecessor, such as a failure to restore a highway,[20] to provide culverts and sluices necessary for natural drainage.[21] to erect and maintain fences,[22] or to keep watercourses free from obstruction.[23]

Invalid sale. Where a railroad attempts to sell its road to another company which is not authorized to purchase it, it is not relieved from liability for injuries to third persons occasioned by the operation of the road by such company.[24]

4. Ky.—Buck Creek R. Co. v. Haws, 94 S.W.2d 980, 264 Ky. 436
51 C.J. p. 1099 note 16.

5. Mo.—Karn v. Illinois Southern R. Co., 89 S.W. 346, 114 Mo.App. 162.

6. Mass.—New Bedford R. Co. v. Old Colony R. Co., 120 Mass. 397.
51 C.J. p. 1099 note 18.

7. Ga.—White v. Atlanta, etc., R. Co., 63 S.E. 234, 5 Ga.App. 308.
51 C.J. p. 1099 note 19.
Consolidation of railroads see supra §§ 234–242.

8. Ky.—Chesapeake, etc., R. Co. v. Griest, 4 S.W. 323, 85 Ky. 619, 9 Ky.L. 177.
51 C.J. p. 1100 note 20.

9. S.C.—Henry Mercantile Co. v. Georgetown, etc., R. Co., 89 S.E. 480, 104 S.C. 478.

10. Miss.—H. Weston Lumber Co. v. Hibbens, 182 So. 115, 182 Miss. 669.
51 C.J. p. 1100 note 23.

11. La.—Goodwin v. Bodcaw Lumber Co., 34 So. 74, 109 La. 1050.

12. Iowa.—Willitts v. Chicago, etc., R. Co., 55 N.W. 313, 88 Iowa 281, 21 L.R.A. 608
"Liability springs from the acceptance of the situation and continued operation by the new owner in spite of the obvious danger."—Baltimore & A.R. Co. v. Contino, C.A.Md., 185 F.2d 932, certiorari denied 71 S.Ct. 798, 341 U.S. 927, 95 L.Ed. ——.

13. Iowa.—Willitts v. Chicago, etc., R. Co., 55 N.W. 313, 88 Iowa 281, 21 L.R.A. 608
Mo.—Culver v. Chicago, etc., R. Co., 38 Mo.App. 130.

14. Okl.—Daniels v. St. Louis, etc., R. Co., 128 P. 1088, 36 Okl. 421, 50 L.R.A.,N.S., 929.
51 C.J. p. 1100 note 27.

15. Mo.—Culver v. Chicago, etc., R. Co., 38 Mo.App. 130.
N.Y.—Brown v. Cayuga, etc., R. Co., 12 N.Y. 486.

16. Mo.—Wayland v. St. Louis, etc., R. Co., 75 Mo. 548.

17. Ga.—Southern R. Co. v. Puckett, 48 S.E. 963, 121 Ga. 322.

18. Ill.—Lake Erie, etc., R. Co. v. Cruzen, 29 Ill.App. 212.
51 C.J. p. 1100 note 31.

19. Ga.—Seaboard Air-Line R. Co. v. McMurrain, 63 S.E. 1098, 132 Ga. 181.
51 C.J. p. 1100 note 32.

20. Mich.—Thayer v. Flint, etc., R. Co., 53 N.W. 216, 93 Mich. 150

21. Ill.—Nevois v. St. Louis, etc., R. Co., 147 Ill.App. 113.

22. Ill.—Toledo, etc., R. Co. v. Arnold, 51 Ill. 241.
51 C.J. p. 1100 note 36.
Duty to fence generally see supra § 177.

23. Ind.—Pennsylvania R. Co. v. Watson, 146 N.E. 763, 82 Ind.App. 496.

24. Ky.—Plummer v. Chesapeake, etc., R. Co., 136 S.W. 162, 143 Ky. 102, 33 L.R.A.,N.S., 362.
51 C.J. p. 1100 note 38.

§ 363. Purchaser at Foreclosure or Judicial Sale

The purchaser of the property of a railroad company at a foreclosure sale is not liable for injuries occurring prior thereto while the mortgagor or a receiver was in possession except where a statute or the decree under which the sale is had provides otherwise; but the purchaser is liable for continuing, with notice, a previously created nuisance or failing to perform a continuing duty.

After a judicial sale of its property, a railroad company is not liable for injuries arising from the operation of the road by the purchaser.[25] In the absence of a statutory provision to the contrary,[26] the purchaser at a foreclosure sale is not liable for injuries occurring prior thereto while the road was in the possession of the mortgagor or of a receiver[27] except that liability may be imposed on the purchaser at a foreclosure or other judicial sale by the terms of the decree under which the sale is had,[28] which liability can be enforced only in accordance with the terms and conditions of such order.[29] A decree requiring the purchaser at a foreclosure to pay all liabilities incurred by receivers in operating the road has been held to include such liabilities as for damages recoverable for personal injuries,[30] wrongful death,[31] and liability under a statute for failure to maintain lateral drains.[32]

Where the sale is not made subject to claims against the sold-out road or the receiver, the purchaser will not be liable on a cause of action accruing after the sale, but before confirmation[33] or delivery of the deed.[34]

A purchaser will be liable for damages due to the continuance by it of a nuisance created by the mortgagor company or receiver, of which such purchaser had notice.[35]

Earnings diverted to betterments. Where earnings of a railroad while in the hands of a receiver, which are applicable to contract and tort liabilities incurred by the receiver, are diverted to permanent improvements, the purchaser of the road may be liable to the extent of such improvements,[36] the rule being applicable to liability for torts of the receiver in possession occurring between the time of transfer of title and the final delivery of possession.[37]

Agency of receiver. The purchaser cannot be held liable on the ground that the receiver is his agent for the torts of the receiver, if continued in possession occurring between the time of the transfer of title and the final delivery of possession[38] except, perhaps, where the possession of the receiver is at the instance and for the benefit of the purchaser.[39]

Continuing duties The company purchasing a railroad under a foreclosure sale will be liable for any injury occurring after the purchase due to the nonperformance of any duty of a continuing nature, although it should have been performed by its predecessor.[40]

§ 364. Railroad Allowing Use of Road by Another

a. In general
b. Liability toward employees of licensee
c. Liability for injury due to defective roadbed or tracks
d. Injuries to animals
e. Fires
f. Use under statutory permission

a. In General

A railroad company admitting another company to the joint use of its tracks is liable for the latter's negligent acts in the enjoyment of such use.

25. Ala.—Western R. Co. v. Davis, 66 Ala. 578.
Liability of:
Purchaser at foreclosure or judicial sale generally see supra §§ 328-338.
Selling or purchasing company generally see supra § 362.

26. Tex.—Baker v. Adkins, Civ.App., 278 S.W. 272.
51 C.J. p 1100 note 41.

27. Ark.—Bolton v. Missouri Pac. R. Co., 248 S.W. 552, 157 Ark. 475.
51 C.J. p 1101 note 42.

28. U.S.—Central Trust Co. of New York v. Denver & R. G. R. Co., Colo., 97 F. 239, 38 C.C.A. 143, certiorari denied 20 S.Ct. 1025, 176 U.S. 68, 44 L.Ed. 638.
51 C.J. p 1101 note 43.

29. Tex.—Houston, etc., R. Co. v. Crawford, 31 S.W. 176, 88 Tex. 277, 53 Am.S.R. 752, 28 L.R.A. 761
51 C.J. p 1101 note 44.

30. Neb.—Jones v. Chicago Great Western R. Co., 149 N.W. 813, 97 Neb. 306.

31. Tex.—International-Great Northern R. Co. v. Smith, Civ.App., 269 S.W. 886.

32. Mo.—Riffe v. Wabash R. Co., 207 S.W. 78, 200 Mo.App. 397.

33. N.Y.—Metz v. Buffalo, etc., R. Co., 58 N.Y. 61, 17 Am.R. 201.

34. Iowa.—White v. Keokuk, etc., R. Co., 2 N.W. 1016, 52 Iowa 97.

35. Mo.—George v. Wabash Western R. Co., 40 Mo.App. 433.

36. N.C.—Lassiter v. Norfolk Southern R. Co., 79 S.E. 264, 163 N.C. 19.

37. Tex.—Houston, etc., R. Co. v. Crawford, 31 S.W. 176, 88 Tex. 277, 53 Am.S.R. 752, 28 L.R.A. 761.
51 C.J. p 1101 note 52.

38. Mass.—Archambeau v. New York, etc., R. Co., 49 N.E. 435, 170 Mass. 272.
51 C.J. p 1101 note 53.

39. Tex.—Houston, etc., R. Co. v. Bath, 44 S.W. 595, 17 Tex.Civ.App. 697.

40. Mich.—Gage v. Pontiac, etc., R. Co., 63 N.W. 318, 105 Mich. 335.

It is a well-established principle of law that a railroad company which admits another railroad company to the joint common use of its tracks is liable for the negligent acts of such company in the enjoyment of such use,[41] although it was guilty of no negligence or breach of duty on its own part,[42] and such liability is not affected by the fact that the company using the tracks is also liable,[43] but where liability is predicated not on the negligence of the operating company, but on the negligence of the company owning the road, the circumstances must be such as to give rise to a duty toward the person injured.[44]

Unauthorized use of track. If a train of one company is trespassing on the tracks of another, the company owning the road is not liable for injuries due to the negligence of those in charge of the train.[45]

Use by several. The owner of a road which permits several other railroads to operate trains over it is liable for the whole of the damages arising from the construction of the road and operation of trains.[46]

b. Liability toward Employees of Licensee

Where one railroad company permits the joint or common use of its tracks by another, it is not liable for the negligence of the licensee company toward the employees of such licensee company, but it is liable for injuries to them caused by defects in its equipment or by the negligence of its own servants.

Where one railroad company permits the joint or common use of its tracks by another, it is not liable for the negligence of the licensee company toward the employees of such licensee company;[47] but it is liable for injuries to them caused by defects in the equipment[48] or by some negligence on the part of its own servants;[49] its duty toward the licensee's employees, however, is distinct from that which it owes the general public[50] or to passengers.[51]

The general rule is not affected by the fact that the capacity of the licensee's negligent servant has been investigated and pronounced acceptable to the former company.[52]

c. Liability for Injury Due to Defective Roadbed or Tracks

A railroad company permitting another to use its road is liable for injuries due to the defective condition of the roadbed, track, or bridges, or to the defective condition or negligent management of its switches.

A railroad company permitting another to use its road is liable for injuries due to the defective condition of the roadbed, track, or bridges,[53] or

41. Ill.—Armstrong v. Chicago & W. I. R. Co., 183 N.E. 478, 350 Ill. 426, certiorari denied Chicago & W. I. R. Co. v. Armstrong, 53 S.Ct. 523, 289 U.S. 724, 77 L.Ed. 1475—Wilson v. Terminal R. Ass'n of St. Louis, 77 N.E.2d 429, 333 Ill.App. 256.

Miss.—**Corpus Juris cited in** H. Weston Lumber Co. v. Hibbens, 182 So. 115, 118, 182 Miss. 669.

Tex.—**Corpus Juris cited in** Texas Interurban Ry. Co. v. Hughes, Com. App., 53 S.W.2d 448, 450.

51 C.J. p. 1102 note 57.

Injuries to passengers see Carriers § 705.

"The law imposes upon the owner of a railroad the duty of operating it, and in consequence liability for injuries done by those who are allowed to operate it."—Seay v. Southern Ry. Co., 37 S.E.2d 535, 536, 208 S.C. 171—Jenkins v. Atlantic Coast Line R. Co., 71 S.E. 1010, 1012, 89 S.C. 408.

The reason for the rule is that a railroad company owes the public certain duties, and that it cannot by its own act, without the consent of the legislature, absolve itself from its public obligations.—Willson v. Colorado & S. R. Co., 142 P. 174, 57 Colo. 303.

Continued ownership of right of way

Owner of railroad which sold ties and rails thereof but continued to own right of way would be liable for injuries from negligent operation of engine by itself, by buyer, or by individual operating engine, with buyer's consent, as buyer's servant or as independent contractor.—H. Weston Lumber Co. v. Hibbens, 182 So. 115, 182 Miss. 669.

42. Okl.—Hammond v. Kansas, etc., R. Co., 234 P. 731, 109 Okl. 72.

51 C.J. p. 1102 note 58.

43. Ill.—Pennsylvania Co. v. Ellett, 24 N.E. 559, 132 Ill. 654.

Tex.—**Corpus Juris cited in** Texas Interurban Ry. Co. v. Hughes, Com. App., 53 S.W.2d 448, 450.

"Both the . . . licensor and licensee, are responsible for any damages arising out of the operation of the railroad."—Seay v. Southern Ry. Co., 37 S.E.2d 535, 536, 208 S.C. 171—Miller v. Atlantic C. L. R. Co., 138 S.E. 675, 688, 140 S.C. 123.

Joint and several liability

Ill.—Armstrong v. Chicago & W. I. R. Co., 183 N.E. 478, 350 Ill. 426, certiorari denied Chicago & W. I. R. Co. v. Armstrong, 53 S.Ct. 523, 289 U.S. 724, 77 L.Ed. 1475—Wilson v. Terminal R. Ass'n of St. Louis, 77 N.E.2d 429, 333 Ill.App. 256.

44. La.—Johnson v. Louisiana R., etc., Co., 56 So. 301, 129 La. 332, 36 L.R.A.,N.S., 887.

Va.—Steele v. Colonial Coal, etc., Co., 79 S.E. 346, 115 Va. 385.

45. Ala.—Wormus v. Tennessee Coal, etc., Co., 12 So. 111, 97 Ala. 326.

51 C.J. p. 1102 note 61.

46. Tex.—Trinity, etc., R. Co. v. Johnson, 131 S.W. 1137, 62 Tex.Civ.App. 605.

47. Ky.—Swice v. Maysville, etc., R. Co., 75 S.W. 278, 116 Ky. 253, 25 Ky.L. 436.

51 C.J. p. 1102 note 64—39 C.J. p. 271 notes 81, 91.

Liability of

Lessor or lessee see supra § 356

Licensee toward own employees see Master and Servant § 178.

48. Tex.—Missouri, etc., R. Co. v. Beasley, 155 S.W. 183, 160 S.W. 471, 106 Tex. 160.

39 C.J. p. 271 note 52.

Injury due to defective roadbed or tracks see infra subdivision c of this section.

49. D.C.—Jennings v. Philadelphia, etc., R. Co., 29 App. D.C. 219, 10 Ann.Cas. 761.

51 C.J. p. 1103 note 65—39 C.J. p. 271 note 82.

50. Ga.—Central, etc., R. Co. v. Bessinger, 87 S.E. 920, 17 Ga.App. 617.

51. Ga.—Central of Georgia R. Co. v. Bessinger, supra.

Injuries to passengers see Carriers § 705.

52. Ga.—Central of Georgia R. Co. v. Bessinger, supra.

53. Tex.—Panhandle & S. F. Ry. Co. v. Floyd, Civ.App., 75 S.W.2d 291.

51 C.J. p. 1103 note 71.

to the defective condition or negligent management of its switches,[54] although the injured persons were employees of the latter company,[55] since it is the duty of a railroad to keep its tracks and roadbed in reasonably safe condition for use[56]

Connecting track. One company, by granting permission to another company to run trains over its road, does not become liable for injuries caused by the defective condition of a track constructed and controlled by the latter company for the purpose of connecting the two roads.[57]

d. Injuries to Animals

A railroad company owning a road which it permits another to use will be liable for injuries to animals caused by the negligent operation of the trains of the latter.

A railroad company owning a road which it permits another to use will be liable for injuries to animals caused by the negligent operation of the trains of the latter.[58] Where a statute makes a railroad company liable for injuries to animals resulting from failure to fence its right of way and erect cattle guards, a company owning a road will be liable for such injuries, although the injuries were inflicted by trains of a company using its road by its permission,[59] and the fact that the duty of fencing is imposed by the statute on companies using, as well as those owning, the road does not affect the liability of the company owning it.[60]

e. Fires

A railroad company permitting another to use its road is liable for fire caused by the negligence of the latter in operating locomotives or due to their defective condition, and such liability may be imposed by statute.

A railroad company permitting another to use its road is liable for fire caused by the negligence of that company in the operation of locomotives[61] or due to their defective or improper condition or equipment.[62] It will also be liable for its own negligence contributing to the injury in allowing combustible material to accumulate upon the right of way[63] or in furnishing to the company or person using the road defective or improperly equipped locomotives from which fire is communicated.[64]

Statutory liabilities. Under statutes imposing on railroads liability for fires communicated by locomotives operating over their roads, in some instances, regardless of the question of negligence, a company permitting another to use its road is held to be responsible for fires communicated by the engines of such other company,[65] and such a liability has been held not to be affected by another statute which gives authority to make running arrangements for the joint use of the road.[66]

f. Use under Statutory Permission

Where a statute gives the right to use the tracks of another railroad company for a purpose stated in the statute and without the consent of the owner, the owner company is under no liability for negligence of the user company in such use of the tracks.

Where a statute gives the right to use the tracks of another railroad company for a purpose stated in the statute and without the consent of the owner, the owner company is under no liability for negligence of the user company in such use of the tracks[67] Thus, where a statute specifically commands railroad companies to exchange cars at junction points, a railroad will not be liable for injuries caused by negligence of a connecting carrier

54. Ind.—Chicago Terminal Transfer R. Co v. Vandenberg, 73 N.E. 990, 164 Ind. 470.
51 C.J. p 1103 note 72.
55. Miss.—Reed v. New Orleans Great Northern R. Co., 151 So. 553, 170 Miss 296.
Pa.—Corpus Juris cited in Docheney v. Pennsylvania R. Co., 176 A. 5, 6, 317 Pa. 129.
51 C.J. p 1103 note 73.
Duty as to employees generally see Master and Servant § 212 d
Injuries to employees of licensee generally see supra subdivision b of this section.
56. Miss.—Reed v. New Orleans Great Northern R. Co., 151 So. 553, 170 Miss 296.
Tex.—Panhandle & S. F. Ry. Co. v. Floyd, Civ.App., 75 S.W.2d 291.
51 C.J. p 1103 note 74.
Duty of company using roadbed and tracks of another to keep in repair see infra § 365 c.
57. Ohio.—Gwathney v. Little Miami R. Co., 12 Ohio St. 92.
58. Ala.—Georgia Cent. R. Co v. Wood, 29 So. 775, 129 Ala. 483
Ill.—Illinois Cent. R. Co. v. Finnigan, 21 Ill. 646
Injuries to animals generally see infra §§ 547–689
Liability of company using road of another see infra § 365 d.
59. N.Y.—Haas v. New York Cent., etc., R. Co., 42 N.Y.S. 302, 11 App. Div. 625.
51 C.J. p 1103 note 79.
60. Mich.—Bay City, etc., R. Co. v. Austin, 21 Mich. 390.
51 C.J. p 1104 note 80.
61. Ark.—St. Louis, etc., R. Co v. Chappell, 102 S.W. 893, 83 Ark. 94, 10 L.R.A.,N.S., 1175.
51 C.J. p 1104 note 82
Fires generally see infra §§ 484–546.
Liability of company using road of another see infra § 365 e.
62. Wis.—Jefferson v. Chicago, etc., R. Co., 94 N.W. 289, 117 Wis. 549
51 C.J. p 1104 note 83.
63. Minn.—Heron v. St. Paul, etc., R. Co., 71 N.W. 706, 68 Minn. 542.
51 C.J. p 1104 note 84.
64. La.—Brady v. Jay, 36 So. 132, 111 La. 1071.
65. S.C.—Bellamy v. Conway, etc., R. Co., 67 S.E. 545, 85 S.C. 450.
51 C.J. p 1104 note 88.
Statutory liability of railroad for fires communicated by locomotives or originating on right of way see infra §§ 485–489.
66. Mo.—McFarland v. Missouri, etc., R. Co., 68 S.W. 105, 94 Mo. App. 336.
51 C.J. p 1104 note 89.
67. Fla.—Knickerbocker v. Seaboard Air Line R. Co., 107 So. 251, 91 Fla. 13—Seaboard Air Line R. Co. v. Knickerbocker, 94 So. 501, 84 Fla. 399.

using its exchange track.[68] So, where, a statute gives one railroad the right to connect with another, the road with which the connection is made cannot be held liable for the construction of the connecting track, even though located on part of its right of way.[69]

§ 365. Railroad Using Road of Another

a. In general
b. Liability toward employees of licensor
c. Liability for injury due to defective roadbed or tracks
d. Injuries to animals
e. Fires

a. In General

A company using the road of another is liable for any negligence or misconduct of its own employees while under its control and in the conduct of its business or operation of trains over the road; but it is not liable if its servants or trains are under the control of the owner, or for injuries due to negligence of the servants of the owner.

A railroad company using the road of another is held to the same degree of care in its use as if it owned the road;[70] and it has been broadly held that both the licensor and the licensee are responsible for any damages arising out of the operation of the railroad.[71] The using company is bound, as far as the question of liability for negligence is concerned, by the same law as binds the owner,[72] whether at the time it is rightfully or wrongfully in the occupation and use of the road,[73] and such liability cannot be affected, as to third persons, by an agreement fixing liability as between the two roads.[74] It is liable for any negligence or misconduct on the part of its own employees while under its control and in the conduct of its business,[75] and in the operation of trains over the road of the other company,[76] without regard to whether such company owns the trains which its servants are operating,[77] notwithstanding there was also negligence on the part of the company owning the road,[78] and notwithstanding the trains are operated under, and subject to, the rules and orders of the company owning the road, if its servants are guilty of acts of negligence independent of, and not attributable to, the orders under which they are run.[79]

The using company will not be liable if its servants and trains, and all their movements, are at the time of the injury under the absolute and exclusive control of the company owning the road,[80] since it cannot be charged with negligence in failing to perform an act unless it has both the power and the right to perform it,[81] as where it could not do so without being guilty of an unwarrantable intrusion or trespass on the rights or property of the company owning the road.[82]

A railroad company using the road of another is not liable for injuries due solely to the negligence of the servants of the company owning the road in the operation of the trains of that company,[83] but will be liable for injuries incident to the operation of its own trains due to negligence on the part of servants in the employ of the company owning the road, such as gatemen or flagmen at cross-

68. Tex.—Broughton v Gulf, etc, R Co, Civ.App, 186 S W 354.
51 C J. p 1104 note 92.

69. Ky.—Chesapeake, etc, R Co v Caldwell, 281 S W 176, 213 Ky. 410
51 C.J. p 1104 note 93.

70. Tex.—**Corpus Juris cited in** Texas Interurban Ry Co v Hughes, 53 S W 2d 448, 450, motion granted 58 S W 2d 820.
51 C.J. p 1104 note 95.
Liability for injury to passengers see Carriers § 706.

71. S C.—Seay v Southern Ry. Co., 37 S E.2d 535, 208 S.C. 171—Miller v. Atlantic C L. R. Co., 138 S.E 675, 140 S.C. 123.

Joint and several liability
Ill.—Armstrong v. Chicago & W. I. R. Co., 183 N.E 478, 350 Ill. 426, certiorari denied Chicago & W. I. R. Co. v. Armstrong, 53 S Ct. 523, 289 U.S. 724, 77 L.Ed. 1475—Wilson v. Terminal R. Ass'n of St. Louis, 77 N.E.2d 429, 333 Ill App. 256.

72. Tex.—Missouri, etc, R Co v. McDuffey, 109 S W. 1104, 50 Tex. Civ App 202
51 C.J. p 1104 note 96.

Statutory liability
Mo.—Flint v. Chicago, B. & Q. R. Co, 207 S W.2d 474, 357 Mo. 215

73. Ind.—Cleveland, etc., R. Co. v Berry, 53 N.E. 415, 152 Ind. 607, 46 L R.A. 33
51 C.J. p 1104 note 97.

74. Ill.—Pell v. Joliet, etc., R. Co, 142 Ill App. 362, affirmed 87 N.E. 542, 238 Ill. 510.

75. U.S.—Lockhart v. Little Rock, etc., R. Co., C.C.Tenn, 40 F. 631.
51 C.J. p 1105 note 99.
Liability for acts of joint employee see infra § 372 c.

76. Fla.—Jacksonville, etc, R. Co v Peninsular Land, etc., Co., 9 So 661, 27 Fla. 1, 157, 17 L.R.A. 33, 65.
51 C.J. p 1105 note 1.

77. Mass.—Fletcher v. Boston, etc., R Co, 1 Allen 9, 79 Am D 695

78. Ill.—Chicago, etc, R. Co. v. Mitchell, 70 Ill App 188.

79. U.S.—Atchison, etc, R. Co. v. Hamble, Cal, 177 F. 644, 101 C.C.A 270.
51 C J p 1105 note 4.

80. Tex.—Kirby Lumber Co v. Consolidated Underwriters, Com.App., 294 S.W. 533.
51 C.J. p 1105 note 5.
Liability where trains under control of terminal company see infra § 367.

81. Ill.—Lake Shore, etc., R. Co. v. Kaste, 11 Ill.App 536.
51 C.J. p 1105 note 6.

82. Fla.—Southern R. Co. v. Mann, 108 So. 889, 91 Fla. 948.
51 C.J. p 1105 note 7.

83. Ark.—Memphis, etc., R. Co. v. Richardson, 190 S.W. 434, 126 Ark. 236.
51 C.J. p 1105 note 8.

ings, whose services it adopts and relies on instead of employing others of its own for such duties.[84]

Use by several. Where the owner of a road permits its use by several other railroads, such railroads are each liable for their acts in the operation of trains thereover,[85] but, where their operation is not joint, they are not liable for the acts of the other users.[86]

b. Liability toward Employees of Licensor

A company using the tracks of another is liable for its negligence causing injury to an employee of the owner.

A company using the tracks of another company is liable for its negligence causing injury to an employee of such company,[87] although such liability cannot be predicated on the Federal Employers' Liability Act.[88] Such company may also be liable to one of its own employees for injuries arising from defects in the roadbed or tracks, as discussed in Master and Servant § 212 d.

c. Liability for Injury Due to Defective Roadbed or Tracks

A railroad company using the road of another is liable for injuries occurring in its use and due to a defective or dangerous condition.

A railroad company which uses a defective road belonging to another will be liable for injuries occurring in its own use of the road due to its defective or dangerous condition;[89] and it has been held that such liability extends not only to passengers and employees but also to third persons rightfully on or near the track who may be injured by reason of its unsafe condition.[90] However, it has also been held that a railroad operating trains over a roadbed belonging to another company, under contract, can presume that the owner, in constructing its railroad, had performed its statutory duty in properly constructing sluiceways.[91]

d. Injuries to Animals

A railroad company using the tracks of another company will be liable for injury to animals caused by its own negligence or that of its servants in the operation of trains over such road.

A railroad company using the tracks of another company will be liable for injury to animals caused by its own negligence or that of its servants in the operation of trains over such road.[92] Whether a company using the tracks of another company by its permission will be subject to the statutory liability under statutes requiring railroads, or those in the use or operation of them, to fence such roads and erect cattle guards, and imposing liability, irrespective of the question of negligence, for injury to animals caused by failure to comply therewith, will depend on the particular enactment under consideration,[93] and ordinarily it is held that in order to impose liability on the user company it must come within the terms of the statute;[94] but it has been held that, irrespective of the terms of the statute, the company using the road must, on grounds of public policy, be held subject to the statutory liability for assuming to use the road in an unfenced condition.[95]

Under a statute providing exemption from liability if tracks are fenced, but not requiring the erection of fences, it has been held that, if the tracks are inclosed in accordance with their pro-

84. Colo.—Denver, etc., R. Co. v. Gustafson, 41 P. 505, 21 Colo. 393.
51 C.J. p. 1105 note 9.
Liability for negligence of joint employees see infra § 372 c.

85. Tex.—Trinity, etc., R. Co. v. Johnson, 131 S.W. 1137, 62 Tex.Civ.App. 605.

86. Tex.—Trinity, etc., R. Co. v. Johnson, supra.

87. Colo.—Denver, etc., R. Co. v. Elliott, 148 P. 269, 59 Colo. 29.
51 C.J. p. 1105 note 12.
Liability of.
Lessor or lessee see supra § 356.
Licensor to own employees see Master and Servant § 178.

Quasi employee; effect of statute
An employee of a company whose tracks were being rightfully used, at the time injuries were sustained by him, by another company, and who was at such time engaged in the service of his employer, is not a quasi employee of such latter company so as to preclude him from recovery against it for its negligence, under a statute providing that, when a person is injured while employed about the road of a railroad company, his right of action against it shall be only such as he would have were he its employee, and this is so, even though the track must be considered as the property of the latter company at such time.—Hunt v. Philadelphia, etc., R. Co., 76 A. 13, 227 Pa. 290.—51 C.J. p. 1105 note 12 [d].—39 C.J. p. 272 note 94.

88. Ky.—Kentucky, etc., R. Co. v. Minton, 180 S.W. 831, 167 Ky. 516.
51 C.J. p. 1106 note 13.
Liability of railroad under Federal Employers' Liability Act see Master and Servant § 355 d.

89. Mich.—Lindsay v. Acme Cement Plaster Co., 190 N.W. 275, 220 Mich. 367.
51 C.J. p. 1106 note 16.

90. Ill.—Wabash, etc., R. Co. v. Peyton, 106 Ill. 534, 46 Am.R. 705.
51 C.J. p. 1106 note 17.
Duty as to:
Employees generally see Master and Servant § 212 d.
Passengers see Carriers § 706.

91. Tex.—Panhandle & S. F. Ry. Co. v. Floyd, Civ.App., 75 S.W.2d 291.

92. Ala.—Central of Georgia R. Co. v. Wood, 29 So. 775, 129 Ala. 483.
51 C.J. p. 1106 note 19.
Injuries to animals generally see infra §§ 547–689.
Liability of company permitting use of road see supra § 364 d.

93. N.Y.—Edwards v. Buffalo, etc., R. Co., 40 N.Y.S. 788, 8 App.Div. 390.

94. Okl.—Lusk v. Eddington, 159 P. 491, 60 Okl. 134, L.R.A.1917A 536.
51 C.J. p. 1106 note 22.

95. Ill.—East St. Louis, etc., R. Co. v. Gerber, 82 Ill. 632.
51 C.J. p. 1106 note 23.

visions, no company using the track is liable, in the absence of negligence, for an injury to stock[96]

e. Fires

A railroad company using the road of another is liable for damage by fire caused by its own negligence, but not that of the owner; and the user has been held to be within statutes imposing liability for fires.

A railroad company using the road of another is liable for damages caused by fires due to the negligent operation or defective condition of its locomotives,[97] notwithstanding the fire was communicated directly to combustible material which the company owning the road had permitted to accumulate on its right of way.[98] It will also be liable in the case of fire communicated by its engine and an engine of the company owning the road,[99] but not for fires caused by the negligence of the proprietary company alone[1]

A company using the road of another has been held within the application of a statute imposing liability, without regard to negligence, for fires communicated by locomotives,[2] and to be also liable under a statute imposing liability for fire caused by failure to keep the right of way clear of combustible material.[3]

§ 366. Connecting Roads

Where different companies operate connecting railroad lines, the liability of each is ordinarily limited to its own line, and each is liable only for the negligence of its own servants in the operation of its trains.

Where different companies operate connecting lines of railroad, the liability of each is ordinarily, in the absence of statute or agreement to the contrary, limited to its own line,[4] and each is liable for the negligence of its own servants in the operation of its trains and not for that of the other's servants,[5] although, as is the general rule in the case of master and servant, as discussed in Master and Servant § 566, a servant in the general employ of one railroad may be so hired or loaned to another as to become for a time the latter's servant, with all the legal consequences of the relation,[6] and so as to release the general master from liability.[7] Hence, where under an operating contract a train is turned over to a connecting road by another, and comes under the control and management of the receiving road, which pays a reasonable rental for the equipment and a proportionate share of the operating expenses including the pay of the crew, the delivering road is not liable for injuries to persons while the train is in the control of the receiving company.[8]

The fact that one company is a stockholder in a connecting line does not render it liable for the negligence of the servants of that company.[9]

§ 367. Terminal Company or Railroad Company

A terminal company allowing a railroad company to use its facilities is liable for its own negligence and may be liable for that of the railroad company; but the latter is not liable for acts of the terminal company beyond its control. Both companies may be liable for the negligence of an employee acting for both.

Where a railroad properly and of necessity has entered into a contract with a terminal or union station company, by which its trains, while in the station, are controlled by the terminal company,

96. Tenn.—Illinois Cent. R. Co. v. Light, 4 Tenn.Civ.A. 262.

97. Fla.—Jacksonville, etc., R. Co. v. Peninsular Land, etc., Co., 9 So. 661, 27 Fla. 1, 157, 17 L.R.A. 33, 65.
51 C.J. p. 1106 note 26.
Fires generally see infra §§ 484–546.
Liability of company permitting use of road see supra § 364 e.

98. Iowa.—Slossen v. Burlington, etc., R. Co., 14 N.W. 244, 60 Iowa 214.
N.Y.—Genung v. New York, etc., R. Co., 21 N.Y.S. 97, 66 Hun 632.

99. Ark.—Memphis, etc., R. Co. v. Richardson, 190 S.W. 434, 126 Ark. 236.
51 C.J. p. 1106 note 28.

1. Ark.—Memphis, etc., R. Co. v. Richardson, supra.

2. Ill.—Chicago, etc., R. Co. v. Neilson, 118 Ill.App. 343.
S.C.—Bush v. Southern R. Co., 40 S.E. 1029, 63 S.C. 96.

3. Ill.—Chicago, etc., R. Co. v. Neilson, 118 Ill.App. 343.

4. U.S.—Pennsylvania R. Co. v. Jones, App.D.C., 15 S.Ct. 136, 155 U.S. 333, 39 L.Ed. 176
Ga.—McCaffrey v. Georgia Southern R. Co., 69 Ga. 622.
Joint liability see infra § 372.
Liability for act of joint employee see infra § 372 c.
Liability of connecting carriers as carriers of:
Goods see Carriers §§ 400–450.
Passengers see Carriers § 702.

Damage to shipper's car
In absence of contract, initial carrier was not liable for damage to shipper's freight car on return trip on connecting carrier's line.—Bott Bros. Mfg. Co. v. Chicago, B. & Q. R. Co., 244 N.W. 679, 215 Iowa 16.

5. U.S.—Pennsylvania R. Co. v. Jones, App.D.C., 15 S.Ct. 136, 155 U.S. 333, 39 L.Ed. 176.
Kan.—Atchison, etc., R. Co. v. Cochran, 23 P. 151, 42 Kan. 225, 18 Am.S.R. 139, 7 L.R.A. 414.

Avoidance of liability as "switching agent"
Railroad company, delivering a loaded freight car of another railroad to consignee, could not escape liability for injury to employee of consignee while unloading car on basis that it was merely a "switching agent," or "switching carrier," and not a "delivery carrier."—Spears v. New York Cent. R. Co., 22 N.E.2d 634, 61 Ohio App. 404.

6. U.S.—Delaware, etc., Co. v. Van Derpool, C.C.A.Pa., 232 F. 688.

7. U.S.—Delaware, etc., Co. v. Van Derpool, supra.

8. U.S.—Delaware, etc., Co. v. Van Derpool, supra.
51 C.J. p. 1107 note 39.

9. Kan.—Mathews v. Atchison, etc., R. Co., 55 P. 382, 60 Kan. 11—Atchison, etc., R. Co. v. Cochran, 23 P. 151, 42 Kan. 225, 19 Am.S.R. 139, 7 L.R.A. 414.
Liability by reason of stockholding generally see supra § 349.

it is not liable for the acts of the terminal company which it cannot control,[10] but, where the servants of the railroad company remain in charge of its trains notwithstanding they are under the direction of the terminal company, both the terminal company and the railroad company may be liable for an injury resulting from a negligent act of the employees of the railroad concurring with a negligent act of the terminal company.[11] The terminal company is liable for negligent acts in which it participates,[12] and, where other railroads use its tracks, it may under the rules applicable in the case of a railroad permitting the use of its tracks by others generally, as discussed supra § 364, be liable for their negligence, although not guilty of negligence itself[13]

Where an employee of a terminal company acts in the performance of a particular duty as agent both of the terminal company and of the railroad companies using its facilities, both may be liable for his negligence.[14]

Injuries to employees. The fact that a railroad company is a stockholder in a terminal company, the facilities of which it uses, does not impose liability on it in tort for injury to the employees of the terminal company.[15] It has been held that, while railroad companies may, in contracts to facilitate the movements of trains at terminals, incur liabilities for injuries to the employees of other companies resulting from the negligence of their own employees, such contracts will not by construction be extended to the movements of trains beyond the scope of their terms.[16] The fact that an employee of a union depot company directs, as part of his duties, trains of a railroad company using the station has been held not to make him an employee of the latter company so as to render it liable for injuries to him[17]

Where a terminal association places a car on a receiving track for inspection to determine whether the car is to be accepted by the railroad, the association, and not the railroad, is liable for injuries sustained by the latter's employee, because of a defect in the car, while making the inspection.[18]

§ 368. Companies Owning or Using Cars

a. In general
b. Liability toward employees

a. In General

A railroad company using a car received from another company is subject to the same liability in its use as if it were itself the owner.

A railroad company using for its own purpose a car received from another company must be regarded as having adopted it as part of its own equipment,[19] and it is subject to the same liability in its use as if it were itself the owner of the car,[20] in such case, where the car is used without authority and against the rights of the owner, the owner will not be liable, although the cause of the accident was a secret defect in the car, which might be found to have been known to him.[21] A company which leases a car to another will not be liable for injury to one in loading such car where it is

10. N.Y.—Burns v. Delaware, etc., Co., 101 N.Y.S. 225, 116 App.Div. 111.
51 C.J. p. 1107 note 42.
Liability as to passengers using union station see Carriers § 708.
Liability of terminal railroad company as lessor see supra § 359.

11. Mass.—Hunt v. New York, etc., R. Co., 98 N.E. 787, 212 Mass. 102, 40 L.R.A.,N.S., 778.
51 C.J. p. 1107 note 43.
Joint liability generally see infra § 372.

Care required
Where deceased was crossing a strip of land owned by a terminal company and used by railroad under a so-called side-track agreement when struck by train and there was no express or implied invitation to deceased by terminal company or the railroad to cross the strip, railroad's duty of care to the deceased was no greater than the duty owed by the terminal company.—Belliveau v. New York Cent. R. Co., 75 N.E.2d 645, 321 Mass. 728.

12. D.C.—Washington R., etc., Co. v. Washington Terminal Co., 44 App. D.C. 470

13. Ohio.—Gallup v. Toledo Terminal R. Co., 160 N.E. 493, 26 Ohio App. 447.

14. Mo.—Beal v. Chicago, etc., R. Co., 285 S.W. 482
51 C.J. p. 1107 note 44.

15. U.S.—Friedman v. Vandalia R. Co., Mo., 254 F. 292, 165 C.C.A. 580

16. Ohio.—Ann Arbor R. Co. v. Addison, 95 N.E. 827, 84 Ohio St. 259

17. Ohio.—La Dow v. Baltimore & O. R. Co., 178 N.E. 697, 40 Ohio App. 458, certiorari denied 52 S.Ct. 496, 286 U.S. 544, 76 L.Ed. 1281.

18. U.S.—Brady v. Terminal R. Ass'n of St. Louis, Mo., 58 S.Ct. 426, 303 U.S. 10, 82 L.Ed. 614.

Safety Appliance Act held applicable
U.S.—Brady v. Terminal R. Ass'n of St. Louis, supra.

19. N.Y.—Jetter v. New York, etc., R. Co., 2 Abb.Dec. 458, 2 Keyes 154
51 C.J. p. 1107 note 51
Liability of initial, intermediate, or final carrier as to persons working on or about cars see infra § 924.

20. Mass.—McNamara v. Boston, etc., R. Co., 89 N.E. 131, 202 Mass. 491
51 C.J. p. 1107 note 52.

Duty to inspect
A positive duty rests on the receiving railroad company to inspect cars turned over to it by another company for delivery, and the negligent discharge of such duty breaks the causal connection between the negligence of the initial carrier tendering the defective car and the injury sustained by reason of such defect.—Ruiz v. Midland Valley R. Co., 148 P.2d 734, 158 Kan. 524, 152 A.L.R. 1307.

21. Mass.—McNamara v. Boston, etc., R. Co., 89 N.E. 131, 202 Mass. 491.

not shown that the defect causing the injury existed at the time of the lease.[22]

b. Liability toward Employees

A railroad company which transfers a car of its own to a connecting carrier for use on its line is, according to some but not other authorities, liable for an injury to the servants of the connecting carrier for an injury caused by a defective car negligently transferred by it.

A railroad company which transfers a car of its own to a connecting carrier for use on its line is, according to some authorities, liable for an injury to the servants of the connecting carrier for an injury caused by a defective car negligently transferred by it,[23] notwithstanding the company employing them was also negligent with respect to inspecting and receiving the car;[24] and a railroad which is a member of a railway association permitting members to use the cars of each other has been held liable for a defect in its car causing injury to an employee of another road using such car.[25] According to other authorities, however, the liability of the delivering company ceases as soon as the receiving company has inspected and assumed control of the car,[26] except as to latent or secret defects.[27]

The duty of the railroad toward its own employees with respect to the inspection and discovery of defects in the cars of other companies used by it is considered in Master and Servant §§ 212 b and 236 b.

Use of car for own purpose. In any event, if the receiving company, after the car should have been returned, fails to do so and uses it in its own business, the company owning it will not be liable for injuries to the servants of the other company due to the defects in the car;[28] nor will it be liable where the car, at the time of the injury, was being used solely in the business of the other company.[29]

§ 369. Industrial or Logging Roads

A corporation controlling and operating a railroad merely as an instrumentality of its business, or operating a private railroad for logging purposes, is liable for the negligence or misconduct of its servants.

Corporations other than railroad companies, which control and operate railroads merely as adjuncts or instrumentalities of their business,[30] or operate a private railroad for logging purposes,[31] are liable to the same extent as an ordinary public railroad company for the negligence or misconduct of their servants; but notwithstanding there is a close relationship between the corporations, such liability does not attach where the railroad is operated and managed by a distinct corporation which serves members of the public generally as a common carrier.[32] An "industrial track agreement" between a railroad company and a shipper for the construction and maintenance of a spur track may be such as to make the track a part of the railroad, with respect to liability for injury.[33]

Liability for fires. A company controlling and operating an industrial or logging road will be liable for fires negligently caused by igniting combustible material allowed to accumulate on the right of way.[34]

§ 370. Agents or Employees of Railroad

a. Personal liability in general
b. Negligence of coemployee

22. Ohio.—Rogers v. Lake Shore, etc, R. Co, 26 Ohio Cir Ct ,N S., 207.
23. Minn.—Teal v American Min. Co, 87 N.W. 837, 84 Minn. 320.
51 C.J. p 1108 note 55.
24. U.S.—Hoye v. Great Northern R. Co, C C.Mont, 120 F. 712.
51 C.J. p 1108 note 56
25. Tex.—St. Louis, etc, R. Co. v. Bass, Civ App, 140 S W 860.
51 C.J. p 1108 note 55.
26. Kan.—Missouri, etc., R. Co. v. Merrill, 70 P. 358, 65 Kan. 436, 93 Am.S R. 287, 59 L R.A. 711, overruling Missouri, etc., R. Co. v Merrill, 60 P. 819, 61 Kan. 671.
51 C.J. p 1108 note 57.
Injury to consignee's employee unloading car
Kan.—Ruiz v. Midland Valley R. Co., 148 P.2d 734, 158 Kan 524.
27. Tex.—Leas v Continental Fruit Express Co., 99 S.W. 859, 45 Tex. Civ App 162, 110 S W. 129, 50 Tex. Civ App 584.
51 C.J p 1108 note 58.
28. Minn.—Sawyer v. Minneapolis, etc, R Co, 35 N W. 671, 38 Minn. 103, 8 Am S.R. 648
Tex.—Continental Fruit Express Co v. Leas, 110 S.W. 129, 50 Tex.Civ. App. 584.
29. Miss.—Robirtson v Gulf & S. I. R. Co, 158 So. 350, 171 Miss 628.
30. Fla.—Luster v. Geneva Mill Co., 135 So 854, 102 Fla. 350.
S C.—Engelberg v J. F. Prettyman & Sons, 156 S.E 173, 159 S C. 91.
51 C J. p 1108 note 61.
Operation by independent contractor
Lumber company which maintained spur track on which collision between automobile and railroad's engine occurred was held not liable to motorist, where company had no control over operation of engine and did not employ or have right to give orders to members of crew, who were employees of the railroad which was an independent contractor.—Burroughs v. Southern Pac Co, 56 P.2d 1145, 153 Or. 431.
31. S C.—Engelberg v J. F Prettyman & Sons, 156 S.E. 173, 159 S C. 91.
51 C.J p 1108 note 62.
32. La.—Stephens v. Louisiana Long Leaf Lumber Co., 47 So 887, 122 La. 547.
Md.—Bethlehem Steel Co. v. Raymond Concrete Pile Co., 118 A. 279, 141 Md. 67.
33. Ark.—Missouri Pac R. Co. v. Meyer, 56 S.W 2d 169, 186 Ark. 810.
34. N.C.—Thomas v. Hammer Lumber Co., 69 S E 275, 153 N.C. 351, 32 L.R.A.,N.S., 584.
51 C.J. p 1108 note 64.
Liability for engines operated by independent contractor see Master and Servant § 590 b (1).

a. Personal Liability in General

An agent or employee of a railroad company may be liable, in some jurisdictions, only for misfeasance; in other jurisdictions he is liable for misfeasance or nonfeasance.

In those jurisdictions in which a distinction is drawn between acts of misfeasance and nonfeasance in determining the personal liability of a servant for his acts, as discussed in Master and Servant § 577, the agent or employee of a railroad company is held to personal liability only for his acts of misfeasance;[35] but in other jurisdictions such liability is imposed whether the negligent or wrongful act by which the injury is occasioned is one of misfeasance or of nonfeasance,[36] and the agent or employee cannot escape liability on the ground that he was acting merely as agent for another.[37]

Where the duty of the servant arises only because of the duty imposed on the railroad company, his employer, he can be held liable only where a duty is owing by the railroad to the person injured;[38] and, where a statute restricts liability for failure to give warning signals to the railroad company alone, its employees cannot be held personally liable thereunder.[39]

In order to charge a railroad employee with personal liability, it is insufficient to allege that he "negligently and carelessly maintained" tracks,[40] without a statement of facts showing in what his negligence consisted whereby he committed a breach of, or omitted, a duty to the injured person.[41]

A street-crossing watchman, whose duty is to warn traffic of the approach of trains, has been held not liable for the death of a person struck by a train at a crossing, because of his failure to make an effort to stop the train, in the absence of evidence that he had any control over trains crossing the street;[42] the operator of a railroad signal tower is under no duty to a motorist stalled on a nearby crossing to stop a train which is about to strike the motorist,[43] and, in particular circumstances there has been held to be no cause or right of action against an engineer in the absence of any showing that he had any supervision over the loading or inspection of the train or any control of any part of it other than the engine, or that he was in any way responsible for the alleged negligent act.[44]

Statutory liability for injury to animals. Under statutes making railroads and their agents liable for injury to animals where the road is not fenced, the term "agent" has been held to apply to engineers[45] and firemen[46] engaged in the operation of the trains by which such injuries are inflicted.

Use of defective equipment. Where a railroad company furnishes defective equipment to an employee and directs him to operate it, the servant is not personally liable for injuries occasioned by reason of such defect.[47]

b. Negligence of Coemployee

A railroad employee is not liable for a fellow employee's negligence unless he has some direct control over, or participation in, the wrong complained of.

An employee of a railroad company is not liable for the negligence of a fellow employee unless he has some direct control over, or participation in, the wrong complained of;[48] and it has been held that employees whose negligence contributed to the accident, but whose acts were entirely independent of each other, are not jointly liable for

35. Mo.—McGinnis v. Chicago, etc., R. Co., 98 S.W. 590, 200 Mo. 347, 118 Am.S.R. 661, 9 L.R.A.,N.S., 880, 9 Ann.Cas. 656.
51 C.J. p 1109 note 78
Personal liability of servant generally see Master and Servant §§ 576–578.

Failing to reduce speed
Action of train operator in failing to reduce speed of train as it approached crossing within city limits to that prescribed by ordinance could not be construed as nonfeasance, rather than misfeasance, so as to relieve him from liability for death of trailer-truck occupant in collision.—Brown v. Alton R. Co., 151 S.W.2d 727, 236 Mo.App. 26—Brown v. Alton R. Co., App., 132 S.W.2d 713, record quashed on other grounds State ex rel. Alton R. Co. v. Shain, 143 S.W.2d 233, 346 Mo. 681.

36. Ky.—Haynes v. Cincinnati, etc., R. Co., 140 S.W. 176, 145 Ky. 209, Ann.Cas.1913B 719, 143 S.W. 146, 146 Ky. 739
51 C.J. p 1109 note 79.

37. Iowa—Hough v. Illinois Cent. R. Co., 149 N.W. 885, 169 Iowa 224.
51 C.J. p 1109 note 80.

38. N.J.—Kuchler v. New Jersey, etc., R. Co., 140 A. 329, 104 N.J.Law 333.
51 C.J. p 1109 note 81.

39. Mo.—Lynch v. Missouri-Kansas-Texas R. Co., 61 S.W.2d 918, 333 Mo. 89.

40. Okl.—Chicago, R. I. & P. Ry. Co. v. Witt, 291 P. 59, 144 Okl. 246.

41. Okl.—Chicago, R. I. & P. Ry. Co. v. Witt, supra.

42. Mo.—Lakin v. Chicago, R. I. & P. Ry. Co., 78 S.W.2d 481, 229 Mo. App. 461, rehearing denied 95 S.W. 2d 1245, 229 Mo.App. 461.

43. U.S.—Toadvine v. Cincinnati, N. O. & T. P. Ry. Co., D.C.Ky., 20 F. Supp. 226.

44. La.—Doyle v. Thompson, App., 50 So.2d 505

45. Vt.—St. Johnsbury, etc., R. Co. v. Hunt, 7 A. 277, 59 Vt. 294.
51 C.J. p 1110 note 87.

46. N.Y.—Suydam v. Moore, 8 Barb. 358
51 C.J. p 1110 note 88

47. Ky.—Haynes v. Cincinnati, etc., R. Co., 140 S.W. 176, 145 Ky. 209, Ann.Cas.1913B 719, 143 S.W. 330, 146 Ky. 739.
51 C.J. p 1110 note 85.

48. Kan.—Hisle v. Kansas City Southern R. Co., 138 P. 610, 91 Kan. 572, Ann.Cas.1915C 107.
51 C.J. p 1109 note 82.

each other's acts,[49] although the master may be responsible for the negligence of both.[50]

§ 371. Private Individuals

a Shippers, consignees, or others than railroads moving, loading, or unloading cars
b. Owner of land on which spur track located; owner of private switch track
c. Other persons

a. Shippers, Consignees, or Others than Railroads Moving, Loading, or Unloading Cars

A private individual, such as a shipper or consignee, is liable for his negligent or wrongful acts in moving, handling, or loading railroad cars.

A shipper, consignee, or other private individual will be liable for injuries occasioned by his negligent or wrongful acts, or those of his servants or agents within the scope of their employment, in moving or handling the cars of a railroad.[51] Where a railway company permits third persons to place loaded cars on a spur track, negligence of the servants of such third persons in placing cars so near the main line as to cause a collision is the negligence of the company.[52] As between the ultimate carrier and the consignee, the carrier will be liable for injuries to third persons caused by the car or its contents while in the possession of the railroad awaiting delivery to the consignee.[53]

Negligence in loading cars. A railroad company ordinarily will not be liable for injuries caused by the negligence of a shipper while loading a car furnished him for that purpose;[54] but the shipper will be liable.[55]

b. Owner of Land on Which Spur Track Located; Owner of Private Switch Track

The owner of land on which a spur track is constructed, and the owner of a private switch track, may be liable for injuries occasioned by the use of such facilities by railroads for such owners' benefit or purposes.

The owner of land allowing a spur track to be constructed thereon, which is used by a railroad and himself for their common interest, is liable for injuries occasioned where the railroad is using the spur track for their mutual benefit[56] or for his own benefit,[57] but he is not liable where the injury is occasioned while the railroad is using the track for other purposes.[58]

The owner of a private switch track, and not the railroad, it has been held, is liable for an injury occasioned by a movement of cars thereon by the railroad for his purposes,[59] and, further, it has been held that the railroad is not liable for the negligent operation of its cars upon a private switch by the employees of the switch owner.[60]

c. Other Persons

One who maliciously interferes with railroad cars or machinery is liable for resulting injury, as is one who negligently, although with the consent of the railroad, constructs and maintains an obstruction over or near a track.

One who maliciously interferes with railroad cars or machinery is liable for injury caused by his wrongful act.[61]

One who constructs and maintains an obstruction over or near a railroad track may be liable to a person injured by his negligence in so doing, although the railroad has consented thereto.[62]

Individual defendants who operate a resort open by general invitation to the public and usually

49. Okl.—Atchison, etc., R. Co. v. Bratcher, 225 P. 941, 99 Okl. 74. 51 C.J. p 1109 note 83.

50. Okl.—Atchison, etc., R. Co. v. Bratcher, supra.

51. Ill.—Noble v. Cunningham, 74 Ill. 51.
Liability of railroad to persons working on or about cars see infra § 924.

52. Ala.—Georgia Pac. R. Co. v. Underwood, 8 So. 116, 90 Ala. 49, 24 Am.S.R. 756.

53. Tex.—Gulf, etc., R. Co. v. Fowler, 122 S.W. 593, 57 Tex.Civ.App. 556. 51 C.J. p. 1108 note 68

54. Tex.—Washington v. Texas, etc., R. Co., 54 S.W. 1092, 22 Tex.Civ.App. 189.

55. Ill.—Wintersteen v. National Cooperage & Woodenware Co., 197 N.E. 578, 361 Ill. 95.
Duty to remote and unknown persons
Duty to exercise ordinary care to avoid injury to another does not depend on contract, privity of interest, or proximity of relationship between parties, but extends to remote and unknown persons.—Wintersteen v. National Cooperage & Woodenware Co., supra.
Violation of interstate commerce rules held negligence.—Wintersteen v. National Cooperage & Woodenware Co., supra.
Loading and dunnaging held part of tariff charged for movement of car.—Wintersteen v. National Cooperage & Woodenware Co., supra.
Consignee's duty as to opening of door
With respect to shipper's liability for injuries sustained by consignee's employee when barrel fell from box-car door, consignee, on discovering that door did not open readily, had no duty to request railroad to open it.—Wintersteen v. National Cooperage & Woodenware Co., supra.

56. Conn.—Earley v. Hall, 95 A. 2, 89 Conn. 606.

57. Conn.—Earley v. Hall, supra.

58. Conn.—Earley v. Hall, supra.

59. Mich.—McWilliams v. Detroit Cent. Mills Co., 31 Mich. 274.

60. Tex.—Sauls v. Chicago, etc., R. Co., 81 S.W. 89, 36 Tex.Civ.App. 155.

61. N.Y.—Munger v. Baker, 65 Barb. 539, 1 Thomps. & C. 122.

62. N.Y.—Dukes v. Eastern Distilling Co., 4 N.Y.S. 562, 51 Hun 605, affirmed 25 N.E. 954, 123 N.Y. 652. 51 C.J. p 1109 note 76.

reached over a dangerous grade crossing, and who improve and repair the crossing, have been held not to share with the railroad responsibility for the death of an occupant of an automobile at the crossing.[63]

§ 372. Joint Liability

a. In general
b. Concurrent negligence
c. For acts of joint employees
d. Of railroad and employees

a. In General

Where a railroad company is liable for the acts of another company or person in the operation or management of the road, the liability ordinarily is joint.

The liability of a lessor for the negligence of the lessee ordinarily is joint,[64] as is the liability of a road for the acts of another road which it permits to use it,[65] or of another road which it owns and operates,[66] or in cases of joint operation.[67] However, in the case of a liability of a consolidated company for the acts of a constituent company, because of the consolidation, it has been held that, while the consolidated corporation as well as the constituent company is liable, the liability is not joint.[68]

The existence of a joint liability is not affected by the fact that one company may be entitled to recover over from the other,[69] or by a contract between the companies, or persons liable, fixing as between themselves on one of them only a liability imposed by law[70] or a duty owed to third persons.[71]

A company jointly liable for the acts of others cannot object that it is sued jointly;[72] plaintiff is not obliged to sue all, but may elect to sue either.[73]

b. Concurrent Negligence

Two railroad companies, or a railroad company and another person, whose concurrent negligence contributes to an injury are jointly liable and may be sued jointly, and have also been held to be suable severally.

Where the concurrent negligence of two railroad companies, or of a railroad company and another person, contributes to an injury, they are jointly liable, and may be sued jointly;[74] and

63. N.Y.—Fischer v. New York Cent R Co, 66 N Y S 2d 557, 188 Misc 72, affirmed 77 N.Y S 2d 196. 273 App Div. 135, reargument and appeal denied 78 N Y S.2d 556, 273 App Div. 929, appeal dismissed, In re Hoppe's Estate, 80 N E 2d 351, 297 N.Y. 956

The rule of liability for a "snare" on one's own land was inapplicable to the individual defendants' relation to the crossing.—Fischer v. New York Cent. R. Co., supra.

64. S.C.—Seay v. Southern Ry. Co., 37 S E 2d 535, 208 S C. 171.
Tex.—Texas Interurban Ry Co. v Hughes, Com.App., 53 S.W 2d 448
51 C.J. p 1110 note 91.
Lessor and lessee generally see supra §§ 351-360.

Joint and several liability
Ill.—Wilson v. Terminal R Ass'n of St. Louis, 77 N.E.2d 429, 333 Ill App. 256.
Iowa.—Hawley v. Davenport, R. I. & N. W. Ry. Co., 45 N.W.2d 513.

65. Ill.—Armstrong v Chicago & W. I. R. Co., 183 N.E. 478, 350 Ill. 426, certiorari denied Chicago & W. I. R. Co. v. Armstrong, 53 S.Ct. 523, 289 U.S. 724, 77 L.Ed. 1475—Wilson v. Terminal R. Ass'n of St. Louis, 77 N.E.2d 429, 333 Ill.App. 256.
51 C.J. p 1110 note 92.
Railroad allowing use of road by another generally see supra § 364.

66. La.—Hollins v. New Orleans, etc, R. Co, 44 So. 159, 119 La 418
51 C J p 1110 note 93.

67. Mo.—Morrison v Kansas City, etc, R Co., 145 S.W. 137, 162 Mo App. 662.
51 C J. p 1110 note 94.

Joint depot
(1) Two companies maintaining a joint depot are jointly liable to a person injured while lawfully there under relations raising the obligation with either.—Southern Ry. v. Cantrell, 5 Tenn.App 677.

(2) Carriers using same station facilities generally see Carriers § 708

68. Va.—Langhorne v Richmond R. Co, 22 S E. 159, 91 Va. 369.
Consolidated and constituent companies generally see supra § 361.

69. La.—Taylor v. Louisiana, etc., R. Co., 55 So 732, 129 La. 113.

70. Mich.—Lindsay v Acme Cement Plaster Co., 190 N.W. 275, 220 Mich. 367.
51 C J. p 1110 note 97.

71. Ky.—Louisville, etc., R. Co v. Roth, 114 S.W. 264, 130 Ky. 759.
N C.—McDonald v. Randolph, etc., R. Co., 81 S.E. 1017, 165 N.C. 622.

72. U S.—Chicago, etc., R. Co. v. Willard, Ill., 31 S Ct. 460, 220 U.S. 413, 55 L Ed. 521.

73. U.S.—Thompson v. Moore, C.C.A. Ark., 109 F 2d 372.
51 C.J. p 1110 note 1.

74. U.S.—General Acc., Fire & Life Assur. Corp, Limited, of Perth, Scotland, v Morgan, D C N.Y., 30 F Supp 753—Whatley v Missouri Pac R Co, Travelers Ins. Co, Intervenor, D C La., 27 F Supp 919.
51 C J p 1108 note 56 [a], p 1110 note 3.
Liability arising from concurrent negligence of railroad and employee see infra § 372 d
Terminal company and railroad company see supra § 367.

Sidewalk defect resulting from crossing tracks would make both city and railroad liable for injury to pedestrian, or whichever had or could have had notice of defect long enough to have made repairs.—Louisville Ry. Co. v. Jackey, 35 S W 2d 28, 237 Ky. 125.

Suit by automobile guest against host and railroad
Ga.—McGinnis v. Shaw, 167 S E. 533, 46 Ga.App 248
Tenn.—Morgan v. Tennessee Cent. Ry. Co, 216 S.W 2d 32, 31 Tenn. App. 409.
51 C.J. p 1110 note 3 [a].

Companies delivering ties
Companies which delivered ties on railroad right of way under agreement for sale thereof to railroad were invitees and not trespassers, with same rights thereon as railroad, so that their liability for death of child killed by falling tie was governed by same considerations applicable to railroad.—Anderson v. Peters, 124 S.W.2d 717, 22 Tenn.App. 563.

this is the rule although the negligence was not by preconcert[75] and the parties acted independently of each other,[76] and although there was no neglect of the same common duty;[77] nor is it material that one of defendants owed to plaintiff a higher degree of care than the other.[78]

It has also been held that the parties may be sued severally.[79]

c. For Acts of Joint Employees

Railroad companies are jointly and severally liable for injuries resulting from the negligence of a servant or servants employed by them jointly

Where an injury is caused by a train which at the time is under the joint control of servants of two or more railroad companies,[80] or of servants employed by them jointly,[81] they are jointly and severally liable, and this is the rule where the train is being operated by one company over the tracks of another[82] as well as where the train is jointly operated by the companies.[83] Where an employee performs services for two or more companies, whether at the time of an injury caused by his negligence he was acting jointly for them so as to create a joint liability or for one of them alone will depend on the facts and the inferences to be drawn from them.[84]

Flagman; crossing watchman. Separate railroad companies jointly employing a flagman at a highway crossing which constitutes a point of common interest have been held jointly liable for his negligence,[85] and two companies jointly owning a railroad which crosses a public highway and jointly employing a watchman to guard the crossing have been held jointly and severally liable in an action based on his negligence,[86] notwithstanding any agreement fixing their rights and liabilities as between themselves.[87] Likewise, in case of a flagman at a double crossing, where he is employed by one company and the other companies using the crossing pay a proportionate part of his wages, the company employing him has been held liable for an injury caused by his negligence in performing his duties in connection with the passing of a train of one of the other companies over the crossing on such other company's track,[88] and the company using the crossing at the time and whose engine or train does the damage is likewise liable.[89]

On the other hand, where flagmen of parallel roads watch each other's movements, as well as everything else that is happening in their vicinity, the companies are not jointly liable for an accident at a crossing on one of them where no other connection is shown between them.[90]

d. Of Railroad and Employees

A railroad company and its employees are jointly liable for their concurrent negligence, as well as, under most authorities, for the torts of such employees committed within the scope of their employment.

A railroad company is jointly liable with its employees for their concurrent negligence.[91] In

75. Ala.—Hall v. Seaboard Air Line R. Co, 100 So 890, 211 Ala. 602
Ind.—Chicago, etc., R. Co v Marshall, 75 N.E. 973, 38 Ind App. 217

76. N.D.—Asch v. Washburn Lignite Coal Co., 186 N.W. 757, 48 N.D. 734.

77. N J—Matthews v. Delaware, etc., R. Co, 27 A. 919, 56 N.J Law 34, 22 L.R.A. 261.
51 C J p 1111 note 7.

78. N.D.—Asch v. Washburn Lignite Coal Co., 186 N.W. 757, 48 N.D 734
51 C J. p 1111 note 8.

79. U.S.—Whatley v. Missouri Pac R. Co, Travelers Ins. Co., Intervenor, D.C La., 27 F Supp. 919.
51 C J. p 1111 note 4.
Suit by automobile guest against host or railroad
Tenn—Morgan v. Tennessee Ry. Co., 216 S.W.2d 32, 31 Tenn.App. 409.
Immunity of state commission from suit
Railroad was liable for its negligence with respect to construction of bridge and underpass and failure to guard against accident even though final decision as to type of crossing of tracks to be constructed rested on state roads commission, notwithstanding statute giving exclusive jurisdiction to commission to set up warning signs along highways of state, and notwithstanding immunity of commission from suit.—Contino v Baltimore & A. R. Co., C.A.Md, 178 F.2d 521.

80. Tenn—Nashville, etc, R. Co. v. Carroll, 6 Heisk 347.
Employee of terminal and railroad companies see supra § 367.
Liability in case of joint employment generally see Master and Servant § 567.

81. Mo.—Moling v. Barnard, 65 Mo. App. 600.

82. Tenn.—Nashville, etc., R. Co. v. Carroll, 6 Heisk 347.

83. Mo.—Moling v. Barnard, 65 Mo. App. 600.

84. Ohio.—Toledo, etc., R. Co. v. Hydell, 25 Ohio Cir.Ct. 579.
51 C.J. p 1111 note 14.

85. Fla.—Seaboard Air Line Ry. Co. v. Ebert, 138 So. 4, 102 Fla. 641.

86. U.S—Schaffer v. Pennsylvania R. Co, C C A.Ill., 101 F.2d 369.

87. U.S—Schaffer v. Pennsylvania R. Co, supra
Duty not delegable
Duty of companies to provide proper protection to the public against injury from the operation of cars cannot be delegated so as to relieve either or both from liability—Schaffer v. Pennsylvania R. Co, supra.

88. Iowa.—Buchanan v. Chicago, etc., R. Co., 39 N.W. 663, 75 Iowa 393.
Mass.—Brow v. Boston, etc, R. Co., 32 N.E 362, 157 Mass. 399.

89. Cal.—Taylor v. Western Pac. R Co, 45 Cal. 323.

90. Ill.—Chicago, etc., R. Co. v. Conners, 30 Ill.App 307.

91. U.S—Chesapeake, etc., R. Co. v. Dixon, Ky., 21 S.Ct. 67, 179 U.S. 131, 45 L.Ed. 121.
51 C.J p 1112 note 19.
Concurrent negligence generally see supra subdivision b of this section
Joint liability of master and servant

most jurisdictions it is also held that a railroad company and its employees are jointly liable for the torts of the latter committed within the scope of their employment,[92] and may be sued jointly,[93] although some authorities hold that the liability of the railroad company for the torts of its servants, where there is no concurrent negligence on the part of the railroad, is not joint but several,[94] and that in order to render the company jointly liable there must have been actual participation or negligence on the part of the company concurring with that of the employee, as contradistinguished from imputed negligence of the master concurring with an act negligently committed by the servant.[95]

Joint liability for willful tort. The railroad company has been held jointly liable even for the willful tort of its employee committed in the scope of his employment;[96] but there is also authority to the contrary.[97]

§ 373. Pleading Ownership and Operation

a. Complaint, declaration, or petition

b Plea or answer

c. Issues, proof, and variance

a. Complaint, Declaration, or Petition

In an action for injuries arising out of the operation of a railroad, general rules of pleading govern the complaint, declaration, or petition with respect to the pleading of ownership and operation.

In an action for injuries arising out of the operation of a railroad, it should be alleged directly and positively that defendant or someone for whose acts it is liable caused the injury complained of.[98] A complaint or petition which seeks to charge one railroad company with liability for the tort of another must set forth the manner in which, or the reason for which, the liability attaches.[99]

Where, as discussed supra §§ 351-360, the lessor is liable for the act of its lessee in the operation of the road, according to some authorities the act may be charged in the petition as the act of the lessor;[1] according to other authorities, however, where it is sought to hold the owner of the road liable for its lessee's acts, the relation between the roads must be pleaded with the appropriate facts necessary to create the liability,[2] and the complaint must show by which company the injury was inflicted.[3] Where it is sought to hold a railroad for an act committed while running its trains over the road of another railroad, the facts material to a recovery must be pleaded.[4]

generally see Master and Servant § 579.

92. Kan.—Hisle v Kansas City Southern R. Co., 138 P. 610, 91 Kan. 572, Ann Cas 1915C 107.
51 C.J. p 1112 note 20.

93. Ala.—Louisville & N. R. Co. v. Davis, 181 So. 695, 236 Ala. 191.
51 C.J. p 1113 note 21

Company's negligence resulting from employee's acts
Railway company and its engineer may be jointly sued for negligent homicide where company's negligence results solely from engineer's acts and conduct—Southern Ry. Co. v. Smith, 191 S.E. 181, 55 Ga.App. 689.

94. U.S.—McIntyre v. Southern R. Co., C.C.S.C., 131 F. 985—Warax v. Cincinnati, etc, R. Co., C.C.Ky., 72 F 637.

95. U.S.—Gableman v. Peoria, etc., R. Co., C.C.Ind., 82 F 790, reversed on other grounds 101 F. 1, 41 C.C.A. 150.
51 C.J. p 1113 note 23.

Excessive speed; direction of employer
If tram of defendant employer was, without its express direction, operated by defendant motorneer at an excessive speed, employer would be liable only under rule of respondeat superior, defendants being in no sense joint tort-feasors; but if negligent speed was maintained by defendant employer's express direction, it would be negligent, and its negligence would concur with that of defendant motorneer who obeyed the instruction, and the right to recover against defendants would be joint.—Benson v. Southern Pac. Co., 171 P. 948, 177 Cal. 777.

96. S.C.—Carson v Southern R Co., 46 S.E. 525, 68 S.C 55, affirmed 24 S.Ct. 609, 194 U.S. 136, 48 L.Ed. 907.
51 C.J. p 1112 note 24.

97. U.S.—McIntyre v. Southern R. Co., C.C.S.C., 131 F. 985—Gustafson v Chicago, etc., R Co., C.C.Mo., 128 F. 85.

98. Ind.—Wabash, etc., R. Co. v. Rooker, 90 Ind 581.
51 C.J. p 1112 note 28.

Complaint held sufficient
Ala.—Pollard v. Rogers, 173 So. 881, 234 Ala. 92.
N.Y.—Spooner v. Delaware, etc., R. Co., 21 N.E. 696, 115 N.Y. 22.

"Control" duty to keep in repair
Averment that defendant railroad "owns, operates, or controls" the track to whose defective condition at a crossing plaintiff's injury was attributed is sufficient to show defendant's relation to the track, imposing the duty to keep the crossing in repair, "control" being a synonym of "management."—Southern Ry. Co. v. Flynt, 82 So. 25, 203 Ala. 65.

Agency in operation
Complaint against railroad company and its receiver for injuries received in collision at crossing need not allege agency in operation of railroad.—Pollard v. Rogers, 173 So. 881, 234 Ala. 92.

Existence of receivership
(1) Original and supplemental petition, which stated complete cause of action against receivers of railroad, were sufficient without alleging that receivership existed when cause of action arose, where, on date alleged, railroad was in hands of receivers.—King v Illinois Cent. R Co., 131 So. 68, 15 La.App. 1.

(2) Railroad receivers generally see infra §§ 376-389.

99. Ga.—White v. Atlanta, etc., R. Co., 63 S.E. 234, 5 Ga.App. 308.
51 C.J. p 1113 note 29.

1. Mo.—McCoy v. Kansas City, etc., R. Co., 36 Mo App. 445.
51 C.J. p 1113 note 31.

2. Ind.—Lake Erie, etc., R. Co. v. Rooker, 41 N.E. 470, 13 Ind.App. 600.
51 C.J. p 1113 note 32.

3. Ga.—Georgia R., etc., Co. v. Haas, 56 S.E. 313, 127 Ga. 187, 119 Am.S.R. 327, 9 Ann.Cas. 677.
51 C.J. p 1113 note 33.

4. Ind.—Cincinnati, etc., R. Co. v. Bunnell, 61 Ind 183.

Name in which road operated. In an action against a lessee or any company or person operating the road of another, it is not, in the absence of statutory requirement, necessary to allege in what name the road was operated,[5] but under a statute making a lessee liable for stock killed by reason of the lessor's failure to fence its road, where the lessee operates the road in the corporate name of the lessor, such a fact is material to the right to recover and must be alleged.[6]

Jurisdictional averments. A declaration which names defendant as lessee of a specified railroad and which indicates that defendant is in possession of and operating the road, although no lease is set out or expressly alleged, may be construed as seeking to charge defendant in its character as lessee for the purpose of bringing the action within the provisions of a statute permitting the lessee to be sued in a court or jurisdiction wherein the lessor may be sued.[7]

Assumption of liability by consolidated company. In an action against a consolidated company for a tort of one of the constituent companies, committed prior to the consolidation, it is not necessary to allege an express assumption of such liability by defendant in the articles of consolidation[8] or to set out such articles in the complaint.[9]

Joint liability. In an action against two railroad companies jointly, it is sufficient to charge that the act complained of was done by both defendants, without showing what relation they sustained to each other,[10] and if the existence of a particular relation between them is essential to fix a liability on either this is a matter of proof;[11] but where, by reason of the relation between the companies, a joint liability is created by statute on the arising of an injury out of the operation of the train of one company upon the road of another, the complaint must allege such a relation as to bring the case within the terms of the act.[12] In an action against two railroads for damages for personal injuries, a declaration stating that they jointly maintained a depot, waiting room, etc., has been held to state a joint cause of action against them.[13]

In a joint action against a railroad company and an employee, under a statute creating a presumption of negligence against a railroad company where injury is inflicted by the engines or cars of such company, it is sufficient, as against the company, to charge that the person was injured by the running of the train;[14] but as to such employee, where the statute is not broad enough to include him, it is necessary to allege facts showing in what his negligence consisted.[15]

b. Plea or Answer

In an action for injuries arising out of the operation of a railroad, general rules of pleading govern the plea or answer with respect to defenses involving ownership and operation.

In an action for injuries arising out of the operation of a railroad, where defendant railroad company relies on the defense that it had made an authorized sale and that the road was being operated by its vendee, the answer must show that the circumstances authorizing such sale existed;[16] and a defendant company claiming to have leased its line to another company before the occurrence of the injury complained of has the duty of pleading and proving such lease and approval thereof by the interstate commerce commission, as provided by law.[17] A plea showing that the injury complained of was the act of another and different railroad company presents a sufficient defense and is not demurrable.[18]

Defense that road was being operated by receiver at the time of the negligence complained of and not by a defendant railroad company need not be raised by special plea or answer,[19] since such defense is available under a general denial;[20] nor need the answer set forth a copy of the order of the court appointing the receiver.[21]

5. Ind.—Cincinnati, etc., R. Co. v. Leviston, 97 Ind. 488—Wabash, etc., R. Co. v. Williamson, 29 N.E. 455, 3 Ind.App. 190.

6. Ind.—Cincinnati, etc., R. Co. v. Bunnell, 61 Ind. 183
51 C.J. p 1113 note 37.

7. Ga.—Watson v. Richmond, etc., R. Co., 18 S.E. 306, 91 Ga. 222.

8. Ind.—Cleveland, etc., R. Co. v. Prewitt, 33 N.E. 367, 134 Ind. 557.

9. Ind.—Cleveland, etc., R. Co v. Prewitt, supra.

10. Ind.—Indianapolis, etc., R. Co. v. Warner, 35 Ind. 515.

Neb.—Chicago, etc., R. Co. v. Clark, 42 N.W. 703, 26 Neb. 645.

11. Ind.—Indianapolis, etc., R. Co. v. Warner, 35 Ind. 515.

12. Ind.—Cincinnati, etc., R. Co. v. Paskins, 36 Ind. 380.
51 C.J. p 1113 note 44

13. Tenn.—Southern Ry. Co. v. Cantrell, 5 Tenn.App. 677.

14. U.S.—Stokes v. Great Southern Lumber Co., D.C.Miss., 21 F.2d 185.

15. U.S.—Stokes v. Great Southern Lumber Co., supra.

16. Tex.—East Line, etc., R. Co. v. Rushing, 6 S.W. 334, 69 Tex. 306.
51 C.J. p 1114 note 50.

17. Tex.—Houston & T. C R. Co v. Adams, Civ.App., 32 S.W.2d 382.

18. Miss.—Southern R. Co v Mayes, 87 So. 445, 124 Miss. 890.

19. Ind.—Chicago, etc., R. Co. v. Van Stone, 119 N.E. 874, 68 Ind. App. 47.

20. Ind.—Chicago, etc., R. Co. v. Van Stone, supra.
Tex.—Ft. Worth, etc., R. Co. v. Ballou, Civ.App., 174 S.W. 337.

21. Ind.—Bell v. Indianapolis, etc., R. Co., 53 Ind. 57
51 C.J. p 1114 note 54.

c. Issues, Proof, and Variance

In actions for injuries arising out of the operation of railroads, general rules govern with respect to issues, proof, and variance as affecting the pleading of ownership and operation.

Plaintiff must introduce proof in support of every material allegation of the complaint essential to a recovery[22] unless admitted by the pleadings,[23] or conceded on the trial,[24] or waived.[25]

Under a plea of the general issue or general denial, defendant railroad company may show that the injury complained of occurred upon the road of a different company and through the negligence of the latter's servants,[26] or, if upon its own road, that at the time of the injury the road was in the hands of, and being operated by, a receiver[27] or a lessee of defendant where it would not be liable for the act of such lessee,[28] or that defendant was operating the road as lessee of another company, where such fact would be a defense as to the liability in issue.[29]

The proof must conform to the allegations of the pleadings showing liability, and any material variance is fatal to a recovery,[30] but a variance which could not have surprised or prejudiced the adverse party will not be regarded as material.[31]

A particular petition in an action against the lessor of a railroad has been held sufficiently broad to permit the introduction of evidence that defendant accepted the operation of its road by the lessee's receivers.[32]

§ 374. Evidence as to Ownership and Operation

The general rules of evidence in civil actions have been applied in actions for injuries arising out of the operation of railroads.

In accordance with the general rules of evidence in civil actions, while, in the absence of any presumption arising from statutory provisions,[33] the burden is on plaintiff to show such facts with respect to the ownership, operation, or use of the railroad as are necessary to establish a liability on the part of defendant for the injury complained of,[34] it will be presumed, in the absence of any evidence to the contrary, where it is shown or admitted that defendant owned the road, that it also controlled and operated it,[35] or, if in possession of and operating the road, that it is the owner of the road,[36] that trains operated upon defendant's road were owned and operated by it,[37] that a locomotive operated by defendant

22. Ind.—Lake Erie, etc., R. Co. v. Rooker, 41 N.E. 470, 13 Ind.App. 600.
51 C.J. p 1114 note 56

Proof of ownership not required
Where the declaration alleges that defendant owned, operated, and possessed certain railroad tracks, he is not bound to prove ownership, but proof of possession and operation of the tracks is sufficient.—Chicago Junction R. Co. v. McAnrow, 114 Ill. App. 501.

Introduction of statute not required
Mo.—Palmer v. Chicago & A. R. Co., 121 S.W. 1037, 142 Mo.App. 633.

23. N.Y.—Spooner v. Delaware, etc., R. Co., 21 N.E. 696, 115 N.Y. 22.
51 C.J. p 1114 note 57.

Admission by general issue
Ill.—Jirmalowicz v. Grand Trunk Western Ry. Co., 174 Ill.App. 176.

24. Ill.—Lake Erie, etc., R. Co. v. Wills, 31 N.E. 122, 140 Ill. 614.
51 C.J. p 1114 note 58.

25. Ala.—Bugg v. Green, 110 So. 718, 215 Ala. 343.

26. Ga.—Richmond, etc., R. Co. v. Buice, 14 S.E. 205, 88 Ga. 180.

27. Ind.—Chicago, etc., R. Co. v. Van Stone, 119 N.E. 874, 68 Ind.App. 47.
51 C.J. p 1114 note 61.

28. Tex.—East Line, etc., R. Co. v. Culberson, 10 S.W. 706, 72 Tex. 375, 13 Am.S.R. 805, 3 L.R.A. 567
Liability of lessor and lessee generally see supra §§ 351–360.

29. Ind.—Pittsburgh, etc., R. Co. v. Hunt, 71 Ind. 229
51 C.J. p 1114 note 63.

30. Ind.—Cincinnati, etc., R. Co. v. Wood, 82 Ind. 593
51 C.J. p 1114 note 64.

31. Tex.—Texas, etc., R. Co. v. Wilson, Civ.App., 21 S.W. 373
51 C.J. p 1115 note 65

Variance held not fatal
In an action against a county and a railroad for injuries from a defective sidewalk both on the right of way and the highway, the submission of the case to the jury on the theory that the railroad merely had a statutory right to cross the highway was not a fatal variance, where the complaint alleged that the railroad "owned, controlled, and maintained" the right of way.—Bullock v. Yakima Valley Transp. Co., 184 P. 641, 108 Wash. 412, opinion adhered to 187 Wash. 410, 108 Wash. 413.

32. Mo.—Nickell v. Kansas City, St. L. & C. R. Co., 41 S.W.2d 595, 226 Mo.App. 302.

33. U.S.—Stokes v. Great Southern Lumber Co., D.C.Miss., 21 F.2d 185.
51 C.J. p 1115 note 66.

34. Tex.—Texas, etc., Co. v. Sims, Civ.App., 227 S.W. 694.
51 C.J. p 1115 note 67.

Operation of train within scope of employment
In trespass on case for demolition of plaintiff's truck when struck by train, plaintiff had burden of proof to show to reasonable satisfaction of jury that train which caused damage was operated by agents and servants of defendant acting within scope of their employment.—Louisville & N. R. Co. v. Nolen, 37 So.2d 912, 251 Ala. 445.

Connection with fusee found on right of way
In action against railroad for injuries from burns caused by fusee found on its right of way, it was essential to show railroad's connection with the particular fusee, but possession might justify an inference of ownership.—Dabrowski v. Illinois Cent. R. Co., 24 N.E.2d 382, 303 Ill.App. 31.

35. Or.—Peabody v. Oregon R., etc., Co., 26 P. 1053, 21 Or. 121, 12 L.R.A. 823.
51 C.J. p 1115 note 68.

36. Mo.—Sullivan v. Missouri Pac. R. Co., App., 211 S.W. 903.
51 C.J. p 1115 note 69.

37. Mo.—Brooks v. Missouri Pac. R. Co., 71 S.W. 1083, 98 Mo.App. 166.
51 C.J. p 1115 note 70.

upon its road was its locomotive,[38] or, if attached to one of defendant's regular trains, that it was under its control,[39] and that a locomotive bearing the name or initials of defendant company was owned and operated by it;[40] but it has also been held that proof that an engine had on it the name of defendant railroad, unsupported by any other fact, is insufficient to authorize the inference that, at the time of the injury, it was owned by defendant[41] and was being operated by its employees in its business.[42]

Where two or more companies operate over the same track, there is no presumption as to which inflicted the injury, and the burden is on plaintiff to show this fact;[43] but where a locomotive is operated by an unincorporated association of railroad companies, constituting a switching association, it will be presumed that the company owning the locomotive is a member of the association.[44] Where two railroads, not partners, use only a part of their respective premises jointly, a person suing them jointly must show that his injury occurred at a place covered by the joint use.[45]

Where a defendant railroad sets out in its plea or answer that the injury sued on was caused by the negligence of another company, the burden is on it to establish facts necessary to sustain such defense.[46]

Admissibility. In actions for injuries arising out of the operation of railroads, generally speaking, any evidence is admissible which is relevant to any material question in issue as to the ownership, operation, or use of the railroad.[47]

Weight and sufficiency. In an action for injuries arising out of the operation of a railroad, plaintiff must show by a preponderance of evidence such facts with respect to defendant's ownership or operation of the road or agency causing the injury as are necessary to create a liability therefor,[48] but direct and positive evidence of such facts is not always essential,[49] and, since positive proof of the actual facts of ownership and oper-

38. S C—Bush v. Southern R Co, 40 S E 1029, 63 S.C. 96.

39. R I—Spink v. New York, etc, R. Co, 58 A. 499, 26 R I. 115

40. Mo—**Corpus Juris cited in** Doering v St. Louis & O'Fallon Ry. Co, App, 63 S.W.2d 450, 452
51 C J. p 1115 note 73

41. Ga—Southern Ry. Co. v Hullender, 8 S E 2d 674, 62 Ga.App. 274.

42. Ga—Southern Ry. Co v. Hullender, supra.

43. Ark—St. Louis Southwestern R. Co. v. Heintz, 102 S.W. 221, 82 Ark 459.
51 C.J. p 1115 note 74

44. Ill.—Pittsburgh, etc, R. Co. v Callaghan, 50 Ill App. 676.

45. Tenn.—Southern Ry. v. Cantrell, 5 Tenn.App. 677.

46. Pa—Sanders v. Pennsylvania R. Co., 73 A 1010, 225 Pa. 105, 133 Am.S R. 857.

47. Iowa.—Martin v. Central Iowa R Co., 13 N W. 424, 59 Iowa 411.
51 C.J p 1115 note 79.

Rules of interstate commerce commission

In action against shipper of barrels by consignee's employee who was injured by barrel which fell from boxcar door, evidence of interstate commerce commission rules governing loading and movement of freight shipment at carload freight rates was properly admitted—Wintersteen v National Cooperage & Woodenware Co., 197 N.E. 578, 361 Ill. 95.

Proof of operation by lessee

In absence of legislative authority, or offer of proof thereof, exempting a lessor railroad from responsibility to the public for lessee's torts, trial court did not err in sustaining objections to certified copies of lease between railroad as lessor and another railroad as lessee and of approval of interstate commerce commission of lease, or to other offer of proof that train was being operated by lessee—Los Angeles & S. L R Co. v. Umbaugh, 123 P.2d 224, 61 Nev. 214.

48. Ark—St Louis Southwestern R Co. v. Heintz, 102 S.W. 221, 82 Ark. 459
51 C J. p 1116 note 81.

Liability of lessor or lessee

(1) In death action against lessor of railroad, evidence held to establish lessor's acceptance of operation by lessee's receivers, rendering lessor liable.—Nickell v. Kansas City, St L. & C R. Co., 41 S.W 2d 595, 226 Mo.App. 302

(2) Operation by lessee held shown, so as to render verdict against lessor contrary to law.—New York Cent R Co. v. Kirk, 11 N E 2d 537, 104 Ind.App. 501

Duty of railroad as delivering carrier

In action by forwarding base employee against railroad for injuries sustained when struck by freight car, while reloading car which had been unloaded on tracks of base, evidence sustained finding that defendant railroad was delivering carrier and had duty to furnish car in which it was safe for base employees to work.—Powell v. Pacific Naval Air Base Contractors, 209 P.2d 631, 93 Cal.App 2d 629

Operation by receivers

(1) Vouchers for wages and orders issued in the name of alleged receivers of railroad sufficiently showed that it was being operated by receivers.—McCall v. Pitcairn, 6 N.W. 2d 415, 232 Iowa 867.

(2) In action against receivers of railroad and engineer, testimony of engineer that he was the engineer "of the defendants" and operated train when deceased was killed was sufficient to show that receivers were operating train through their engineer and fireman—March v. Pitcairn, Mo.App., 125 S W.2d 972.

Bringing of lessee's property on premises

Finding that no property of lessee was brought upon or in proximity to premises within clause exempting lessor railroad from liability for loss or damage was held not supported—Frederick v. Great Northern Ry. Co, 240 N W 387, 207 Wis 234, 80 A L R 984, modified on other grounds 241 N.W. 363, 207 Wis. 234

Short-line haul and not switching operation held shown—Spears v. New York Cent. R. Co., 22 N.E.2d 634, 61 Ohio App. 404.

49. Ill.—Chicago, etc, R. Co. v Schmitz, 71 N.E. 1050, 211 Ill. 446.
51 C.J. p 1116 note 82.

Lessor's acceptance of operation by lessee's receivers

Mo.—Nickell v. Kansas City, St L. & C. R. Co., 41 S.W.2d 595, 226 Mo.App. 302.

ation ordinarily is easy for defendant and often difficult or impossible for plaintiff,[50] it is sufficient for plaintiff in the first instance to make a prima facie case by evidence of facts from which defendant's ownership or operation may be presumed,[51] and this, if defendant introduces no evidence to the contrary, will be sufficient to sustain a verdict for plaintiff;[52] but evidence on the part of plaintiff which is inconclusive is not sufficient,[53] nor is evidence sufficient which merely creates a presumption as against direct and positive evidence on the part of defendant to the contrary.[54]

§ 375. Trial

In actions for injuries arising out of the operation of railroads, questions of fact should be submitted to the jury under proper instructions from the court.

As in other civil actions, in actions for injuries arising out of the operation of railroads, questions of fact involving ownership and operation are for the jury,[55] and the case should be submitted to the jury wherever there is any competent evidence with respect to the ownership, operation, or control of the road or agency causing the injury which tends to show a liability on the part of defendant therefor,[56] or where the evidence with respect to such ownership or operation is conflicting or different conclusions might reasonably be drawn therefrom.[57]

The court may, where proper, direct a verdict,[58] and where the facts show that plaintiff has no cause of action it is error not to direct a verdict for defendant where requested.[59] The court may direct a verdict as to one joint defendant.[60] Where there is a material question of fact to be determined, the court should refuse a request for a directed verdict,[61] and where there is no evidence connecting a defendant railroad with the accident a nonsuit is proper.[62]

Instructions. The rules governing the giving of instructions in trials generally are applicable, as, for example, that they should be based on the law and the facts,[63] that they should not be misleading[64] or prejudicial,[65] and that, where essentially

50. Ill.—Pittsburgh, etc., R. Co. v. Knutson, 69 Ill. 103.
51 C.J. p. 1116 note 83.

51. Ill.—Dabrowski v. Illinois Cent. R. Co., 24 N.E.2d 382, 303 Ill.App. 31.
51 C.J. p. 1117 note 84.

52. Mo.—Moore v. Quincy, etc., R. Co., 97 S.W. 607, 121 Mo.App. 674.
51 C.J. p. 1117 note 85.

53. N.Y.—Stone v. Cleveland, etc., R. Co., 95 N.E. 816, 202 N.Y. 352, 35 L.R.A.,N.S., 770.
51 C.J. p. 1117 note 86.

Statement by claim agent held inconclusive
Ga.—Southern Ry. Co. v. Hullender, 8 S.E.2d 674, 62 Ga.App. 274.

54. Tex.—Texas, etc., R. Co. v. Dessommes, 15 S.W. 806.
51 C.J. p. 1117 note 87.

55. **Proximate cause of injury**
Ill.—Wintersteen v. National Cooperage & Woodenware Co., 197 N.E. 578, 361 Ill. 95.

Improper construction of roadbed over bridge
Miss.—Reed v. New Orleans Great Northern R. Co., 151 So. 553, 170 Miss. 296.

Failure to install warning device
Under pleadings and testimony, contract providing that lessee of railroad and lessor should share losses resulting from failure or defect of jointly used facilities raised fact issue regarding lessor's liability for failure to install warning device at crossing, and it was error to hold lessor not liable as matter of law.—Texas Interurban Ry. Co. v. Hughes, Tex.Com.App., 53 S.W.2d 448.

56. Ill.—Pittsburgh, etc., R. Co. v. Callaghan, 41 N.E. 909, 157 Ill. 406.
51 C.J. p. 1117 note 90.

Evidence held sufficient to take case to jury
Fla.—Ellis v. Lewis, 174 So. 417, 128 Fla. 270.
Ill.—Dabrowski v. Illinois Cent. R. Co., 24 N.E.2d 382, 303 Ill.App. 31.
51 C.J. p. 1117 note 90 [b].

57. Kan.—Chicago Great Western R. Co. v. Troup, 76 P. 859, 69 Kan. 854.
Or.—Peabody v. Oregon R., etc., Co., 26 P. 1053, 21 Or. 121, 12 L.R.A. 823.

58. Miss.—H. Weston Lumber Co. v. Hibbens, 182 So. 115, 182 Miss. 669.
51 C.J. p. 1117 note 93.

59. Ala.—Louisville & N. R. Co. v. Nolen, 37 So.2d 912, 251 Ala. 445.
Ill.—Wintersteen v. National Cooperage & Woodenware Co., 197 N.E. 578, 361 Ill. 95.
51 C.J. p. 1117 note 94.

60. Ill.—Humason v. Michigan Cent. R. Co., 102 N.E. 793, 259 Ill. 462.
51 C.J. p. 1117 note 95.

61. Miss.—H. Weston Lumber Co. v. Hibbens, 182 So. 115, 182 Miss. 669.

62. S.C.—Seay v. Southern Ry. Co., 37 S.E.2d 535, 208 S.C. 171.

Ownership of tracks
It has been held error to grant a nonsuit as to a codefendant railroad which owned the tracks on which the train involved in the accident was being operated.—Seay v. Southern Ry. Co., supra.

63. Mo.—Smith v. Thompson, 182 S.W.2d 63.
51 C.J. p. 1117 note 97.

One of two engineers not made party
Where owners of property destroyed by fire allegedly caused by sparks from locomotive brought action against railroad and an engineer, and it appeared at trial that the train had two coal-burning locomotives, and the other engineer was not made a party, court was warranted in instructing the jury to find defendant engineer not guilty.—Colle v. Atlantic Coast Line R. Co., 14 So.2d 422, 153 Fla. 258.

Instruction in nature of demurrer to evidence
In action for wrongful death of pedestrian struck by train, where evidence was insufficient to show that defendant sued as the engineer was in fact the engineer, his instruction in nature of a demurrer to the evidence should have been sustained.—Maddux v. Gardner, 192 S.W.2d 14, 239 Mo.App. 289.

Instructions held erroneous or properly refused
Ga.—Southern Ry. Co. v. Hullender, 8 S.E.2d 674, 62 Ga.App. 274.
Ill.—Wintersteen v. National Cooperage & Woodenware Co., 197 N.E. 578, 361 Ill. 95.
Nev.—Los Angeles & S. L. R. Co. v. Umbaugh, 123 P.2d 224, 61 Nev. 214.

64. Ohio.—Gallup v. Toledo Terminal R. Co., 160 N.E. 493, 26 Ohio App. 447.
51 C.J. p. 1118 note 98.

65. Ky.—Cincinnati, etc., R. Co. v. Prewitt, 262 S.W. 1, 203 Ky. 147.

covered by other instructions, it is not error to refuse to give requested instructions,[66] or to refuse to give them in the exact language of the request.[67]

Verdict. The jury in its verdict may find for one joint defendant and against the other,[68] and the latter cannot complain that a verdict was rendered against it alone,[69] since a verdict in favor of one joint defendant is not a verdict in favor of the other;[70] but the verdict may not apportion an award of damages as between defendants.[71]

Where a joint action is brought against a railroad company and a contractor for injuries due to the condition of a crossing, which the contractor had agreed with the railroad company to keep in repair, the jury may, if they find the injury was due to the negligence of the contractor, render a verdict in favor of plaintiff against both defendants, and in favor of the railroad company over against the contractor, where a demand for such judgment is made in the pleadings of defendant railroad company.[72]

XI. RECEIVERS

§ 376. In General

A court may place a railroad in the hands of a receiver, but it will not do so unless a necessity therefor is shown and there is no other adequate remedy.

In a proper case a court may place a railroad in the hands of a receiver;[73] but, as discussed infra § 377 a, the power is always exercised with reluctance and only in case of manifest necessity in order to preserve the property and protect the rights of those interested therein, and a receiver will not be appointed where such necessity is not shown[74] or there is another adequate remedy at law or in equity.[75] It has been held that in order to justify the appointment there must be a suit pending,[76] the appointment of a receiver being merely ancillary to the relief demanded in the suit.[77] In the absence of a statute expressly providing for the appointment of receivers for railroads, general statutes covering the appointment of receivers are applicable to railroads in a proper case,[78] but, as discussed infra § 378 a, the power of the court to make such appointment is not dependent on statutory enactment unless the appointment is expressly forbidden in cases not falling within the statute.[79]

Collusion and fraud. A receiver will not be appointed where it appears that the suit is collusive and designed to accomplish some fraudulent or improper purpose;[80] but it is not sufficient evidence of a fraudulent collusion that the officers or directors of the company concurred in the application for the appointment[81] or admitted the truth of the allegations of the bill.[82]

§ 377. Grounds of Appointment

a. In general
b. Default in payment of indebtedness
c. Mismanagement of road

a. In General

The appointment of a receiver for a railroad is dependent on the circumstances of the particular case; it rests in the sound discretion of the court and is to be made sparingly and cautiously, but a receiver will be appointed where such relief is necessary to preserve and protect the property and rights of interested parties.

The propriety of appointing a receiver for a railroad is so dependent on the circumstances of each particular case that it is impracticable to attempt definitely to state the grounds which will justify such appointment.[83] The matter ordinarily

66. Ind.—Chicago, etc., R. Co. v Dinius, 103 N.E. 652, 180 Ind 596
67. Ga.—Lamb v. Floyd, 92 S.E. 1010, 20 Ga.App. 254.
68. Ky.—Illinois Cent. R. Co. v. Murphy, 97 S.W. 729, 123 Ky. 787, 30 Ky.L. 93, 11 L.R.A.,N.S., 352
51 C.J. p 1118 note 5.
69. S.C.—Cammer v. Atlantic Coast Line R. Co., 51 S.E.2d 174, 214 S.C. 71.
51 C.J. p 1118 note 6.
70. Cal.—Benson v. Southern Pac. Co., 171 P. 948, 177 Cal. 777.
S.C.—Cammer v. Atlantic Coast Line R. Co., 51 S.E.2d 174, 214 S.C. 71.
71. Tenn.—Tennessee Cent. R. Co. v. Vanhoy, 226 S.W. 225, 142 Tenn. 312.
51 C.J. p 1118 note 8.
72. Tex.—Dallas, etc., R. Co. v. Able, 9 S.W. 871, 72 Tex. 150.
51 C.J. p 1118 note 9.
73. U.S.—Gross v. Missouri & A. Ry. Co., D.C.Ark., 74 F.Supp. 242.
51 C.J. p 944 note 82.
74. Mo.—Merriam v. St. Louis, etc., R. Co., 36 S.W. 630, 136 Mo. 145.
51 C.J. p 944 note 84.
75. N.H.—Boston, etc., R. Co. v. Boston, etc., R. Co., 23 A. 529, 65 N.H. 393
51 C.J. p 944 note 85.
76. Mo.—State v. Ross, 25 S.W. 947, 122 Mo. 435, 23 L.R.A. 534.
77. U.S.—Gross v. Missouri & A. Ry. Co., D.C.Ark., 74 F.Supp. 242.
Mo.—State v. Ross, 25 S.W. 947, 23 L.R.A. 534.
N.C.—Sinclair v. Moore Cent. R. Co., 45 S.E.2d 555, 228 N.C. 389.
78. Cal.—McLane v. Placerville, etc., R. Co., 6 P. 748, 66 Cal. 606
51 C.J. p 944 note 91.
79. N.Y.—Rochester v. Bronson, 41 How.Pr. 78.
80. U.S.—Sage v. Memphis, etc., R. Co., C.C.Ark., 18 F. 571, 5 McCrary 643, reversed on other grounds 8 S.Ct. 887, 125 U.S. 361, 31 L.Ed. 694.
81. U.S.—Brassey v New York, etc., R. Co., C.C.Conn., 19 F. 663.
51 C.J. p 944 note 95.
82. U.S.—Pennsylvania Life Ins., etc., Co v. Jacksonville, etc., R. Co., Fla., 55 F. 131, 5 C.C.A. 53.
83. U.S.—Mercantile Trust Co. v.

is said to rest in the discretion of the court,[84] which, however, is not arbitrary but is to be exercised in accordance with the settled principles governing the appointment of receivers,[85] and always sparingly, cautiously, and with reference to all the circumstances of the particular case.[86] A receiver will not be appointed merely because it would do no harm,[87] or because all the parties consent,[88] or merely because the company is insolvent,[89] or where the appointment is for the sole purpose of operating the railroad, without any limitation as to time, and the receivership is not ancillary to other equitable or legal relief sought,[90] or where it appears that a greater injury would result from the appointment of a receiver than from leaving the road in the hands of the present management,[91] or where it does not appear that the circumstances are such as to make the appointment of a receiver necessary.[92]

On the other hand, a receiver will be appointed where it appears that such relief is necessary to preserve and protect the property and the rights of those interested therein;[93] and a court may, when necessary, intervene by the appointment of a receiver to protect the interests of creditors or stockholders.[94] So, in order to protect the security of the bondholders, a receiver will be appointed with authority to complete the construction of a railroad, where the company is unable to do so, in order to prevent a forfeiture of its charter[95] or of a valuable land grant.[96] A receiver may also be appointed in proceedings by the state to compel the corporation to perform its duty to the public as directed by a mandate of the court[97] or to forfeit its charter.[98] A receiver may be appointed to insure, as far as practicable, the discharge of the public function of the corporation.[99]

b. Default in Payment of Indebtedness

Default in the payment of indebtedness owed by the railroad is not of itself sufficient to necessitate the appointment of a receiver, but such an appointment will be made when additional circumstances show the necessity therefor.

A default in the payment of principal or interest of bonds or mortgages is not of itself sufficient to necessitate the appointment of a receiver,[1] although the claim on the bond has been reduced to a judgment[2] or the company is insolvent;[3] but the matter rests in the discretion of the court,[4] and a receiver will not be appointed in such case where it does not appear to be necessary,[5] as where there is a complete and adequate remedy at law[6] or where it appears that it would do more harm than good.[7]

Missouri, etc., R. Co., C.C.Kan., 36 F. 221, 1 L.R.A. 397.

84. U.S.—Sage v. Memphis & L. R. Co., Ark., 8 S.Ct. 887, 125 U.S. 361, 31 L.Ed. 694—Gross v. Missouri & A. Ry. Co., D.C.Ark., 74 F.Supp. 242.
Mo.—Merriam v. St. Louis, C. G. & Ft. S. Ry. Co., 36 S.W. 630, 136 Mo. 145.
Pa.—McDougal v. Huntingdon & Broad Top Mountain Railroad & Coal Co., 143 A. 574, 294 Pa. 108.
51 C.J. p. 944 note 7.

85. Mo.—Merriam v. St. Louis, etc., R. Co., 36 S.W. 630, 136 Mo. 145.

86. Pa.—McDougal v. Huntingdon, etc., R., etc., Co., 143 A. 574, 294 Pa. 108.
51 C.J. p. 944 note 9.

87. U.S.—Farmers Grain Co. v. Toledo, P. & W. R. R., C.C.A.Ill., 158 F.2d 109, vacated on other grounds Brotherhood of Locomotive Firemen & Enginemen Local Lodge No. 926 v. Toledo P. & W. R. R. Co., 68 S.Ct. 53, 332 U.S. 748, 92 L.Ed. 335, and Farmers Grain Co. v. Brotherhood of Locomotive Firemen & Enginemen Local Lodge No. 926, 68 S.Ct. 53, 332 U.S. 748, 92 L.Ed. 335.
Mo.—Merriam v. St. Louis, etc., R. Co., 36 S.W. 630, 136 Mo. 145.

88. U.S.—Whelpley v. Erie R. Co., C.C.N.Y., 29 F.Cas.No.17,504, 6 Blatchf. 271.

89. Tex.—Houston, etc., R. Co. v. Hughes, Civ.App., 182 S.W. 23.
51 C.J. p. 945 note 12.

90. U.S.—Farmers Grain Co. v. Toledo, P. & W. R. R., C.C.A.Ill., 158 F.2d 109, vacated on other grounds Brotherhood of Locomotive Firemen & Enginemen, Local Lodge No. 926 v. Toledo, P. & W. R. R. Co., 68 S.Ct. 53, 332 U.S. 748, 92 L.Ed. 335, and Farmers Grain Co. v. Brotherhood of Locomotive Firemen & Enginemen Local Lodge No. 926, 68 S.Ct. 53, 332 U.S. 748, 92 L.Ed. 335.

91. U.S.—Tysen v. Wabash R. Co., C.C.Ill. & Ind., 24 F.Cas.No.14,315, 8 Biss. 247.
Pa.—McDougal v. Huntingdon & Broad Top Mountain Railroad & Coal Co., 143 A. 574, 294 Pa. 108.

92. Mo.—Merriam v. St. Louis, etc., R. Co., 36 S.W. 630, 136 Mo. 145.
51 C.J. p. 945 note 15.

93. U.S.—Gross v. Missouri & A. Ry. Co., D.C.Ark., 74 F.Supp. 242.
51 C.J. p. 945 note 16.

94. Ark.—State R. Commission v. Saline River R. Co., 177 S.W. 896, 119 Ark. 239.

95. U.S.—Allen v. Dallas, etc., R. Co., C.C.Tex., 1 F.Cas.No.221, 3 Woods 316.

96. U.S.—Kennedy v. St. Paul, etc., R. Co., C.C.Minn., 14 F.Cas.No.7,706, 2 Dill. 448.
51 C.J. p. 945 note 19.

97. N.J.—McCran v. Public Service R. Co., 122 A. 205, 95 N.J.Eq. 22.

98. U.S.—State of Tennessee, by Wolfenbarger, ex rel. Atchley v. Taylor, C.A.Tenn., 169 F.2d 626.
51 C.J. p. 945 note 21.

99. Ark.—State R. Commission v. Saline River R. Co., 177 S.W. 896, 119 Ark. 239.
51 C.J. p. 945 note 22.

1. Mo.—Merriam v. St. Louis, etc., R. Co., 36 S.W. 630, 136 Mo. 145.
51 C.J. p. 945 note 23.

2. Pa.—McDougal v. Huntingdon, etc., R., etc., Co., 143 A. 574, 294 Pa. 108.
51 C.J. p. 945 note 24.

3. Mo.—Merriam v. St. Louis, etc., R. Co., 36 S.W. 630, 136 Mo. 145.

4. U.S.—Farmers' Loan, etc., Co. v. Winona, etc., R. Co., C.C.Minn., 59 F. 957.
51 C.J. p. 945 note 26.

5. Minn.—Rice v. St. Paul, etc., R. Co., 24 Minn. 464.
51 C.J. p. 946 note 27.

6. Minn.—Rice v. St. Paul, etc., R. Co., supra.
51 C.J. p. 946 note 28.

7. U.S.—Tysen v. Wabash R. Co., C.

Such appointment will, however, be made whenever a necessity therefor is shown,[8] as where, in addition to the default, the company is insolvent and the mortgage security inadequate,[9] particularly if there be other considerations making such appointment proper, as where the officers of the company are acting contrary to the interest of the stockholders,[10] are guilty of gross misconduct,[11] such as appropriation of income to preferential payment of claims,[12] or misapplying[13] or diverting[14] the earnings of the road, or failing to apply the earnings to the payment of interest,[15] or the road is in possession of certain bondholders whose interests are hostile to the other bondholders.[16] Also, it is proper to appoint a receiver where, although the railroad is not insolvent, it is unable to pay its creditors with funds on hand or obtainable, and many of the creditors are threatening to file suits, and the appointment of a receiver is necessary to prevent a threatened multiplicity of suits pending action by the interstate commerce commission on an application to abandon the railroad.[17]

The court may also appoint a receiver where by the terms of a deed of trust it is made the duty of the trustee to take possession on default and he fails to do so,[18] or where the mortgage or deed of trust authorizes the mortgagee or trustee on a default to take possession and operate the road and apply the income to the payment of the indebtedness.[19] So also, where the trustees under a prior mortgage take possession and undertake to execute the trust prejudicially to the subsequent encumbrancers, the court will take the road out of their possession and place it in the hands of a receiver.[20] Circumstances may also exist where a default is imminent which will make the appointment of a receiver proper before the default has actually occurred,[21] but ordinarily a receiver will not be appointed before default.[22]

In a mortgage foreclosure suit a receiver may be appointed temporarily to conserve the property of the road until it can be determined whether anyone will undertake to operate it.[23] Where in a foreclosure suit the bondholders are entitled to take possession by a receiver and manage the property, the fact that it is being properly managed by the company is not ground for refusing to appoint a receiver.[24]

c. Mismanagement and Road

A receiver will not be appointed for a railroad merely because of mismanagement.

A receiver will not be appointed merely because of mismanagement of the road[25] or because of internal dissensions regarding the management of the road;[26] but, where a railroad has been mortgaged and the company is notoriously insolvent and is wasting the property so as to imperil the security, a receiver will be appointed.[27] In the absence of statute the court will not appoint a receiver ex parte to operate a railroad unless immediate necessity for such relief is clearly shown.[28]

§ 378. Appointment, Qualification, and Tenure

a. In general

C Ill. & Ind., 24 F.Cas.No.14,315, 8 Biss. 247

8. U.S.—Putnam v. Jacksonville, etc., R. Co., C.C.Ill., 61 F. 440
51 C.J. p. 946 note 30

9. U.S.—Lowenthal v. Georgia Coast, etc., R. Co., D.C.Ga., 233 F. 1010
51 C.J. p. 946 note 31.

10. U.S.—Farmers' L. & T. Co. v. Winona, etc., R. Co., C.C.Minn., 59 F. 957.

11. Pa.—McDougal v. Huntingdon, etc., R., etc., Co., 143 A. 574, 294 Pa. 108.
51 C.J. p. 946 note 33.

12. U.S.—McDougal v. Huntingdon, etc., R., etc., Co., supra.

13. U.S.—Dow v. Memphis, etc., R. Co., C.C.Ark., 20 F. 260, modified on other grounds 7 S.Ct. 482, 120 U.S. 287, 30 L.Ed. 595
Ala.—Kelly v. Alabama, etc., R. Co., 58 Ala. 489

14. Tex.—U. S., etc., Trust Co. v. Delaware Western Constr. Co., Civ. App., 112 S.W. 447.

15. U.S.—Dow v. Memphis, etc., R. Co., C.C.Ark., 20 F. 260, modified on other grounds 7 S.Ct. 482, 120 U.S. 287, 30 L.Ed. 595—Kerp v. Michigan Lake Shore R. Co., C.C.Mich., 14 F.Cas.No. 7,727.

16. U.S.—Benedict v. St. Joseph, etc., R. Co., C.C.Kan., 19 F. 173

17. U.S.—Gross v. Missouri & A. Ry. Co., D.C.Ark., 74 F.Supp. 242.

18. U.S.—Wilmer v. Atlanta, etc., Air-Line R. Co., C.C.Ga., 30 F.Cas.No.17,775, 2 Woods 409.
51 C.J. p. 946 note 39.

19. Cal.—McLane v. Placerville, etc., R. Co., 6 P. 748, 66 Cal. 606.
51 C.J. p. 946 note 40.

20. U.S.—Illinois Cent. R. Co. v. Mississippi Cent. R. Co., D.C.Miss., 12 F.Cas.No.7,008.

21. U.S.—Wabash, etc., R. Co. v. Central Trust Co., C.C.Ind., 23 F. 513—Brassey v. New York, etc., R. Co., C.C.Conn., 19 F. 663.

22. U.S.—American L. & T. Co. v. Toledo, etc., R. Co., C.C.Ohio, 29 F. 416

23. Mich.—Gasser v. Garden Bay R. Co., 171 N.W. 791, 205 Mich. 5.
51 C.J. p. 947 note 49

24. N.Y.—Van Benthuysen v. Central New England, etc., R. Co., 17 N.Y.S. 709, 63 Hun 627

25. Tex.—Houston, etc., R. Co. v. Hughes, Civ.App., 182 S.W. 23.
51 C.J. p. 946 note 44.

26. U.S.—American L. & T. Co. v. Toledo, etc., R. Co., C.C.Ohio, 29 F. 416—Tysen v. Wabash R. Co., C.C.Ill. & Ind., 24 F.Cas.No.14,315, 8 Biss. 247.

27. U.S.—Western Div. Western North Carolina R. Co. v. Drew, C.C.Fla., 29 F.Cas.No.17,434, 3 Woods 691, affirmed 103 U.S. 118, 26 L.Ed. 327.
51 C.J. p. 946 note 46.

28. Ind.—Chicago, etc., R. Co. v. Cason, 32 N.E. 827, 133 Ind. 49.
51 C.J. p. 946 note 47.

b. Who may make application for appointment
c. Proceedings for appointment
d. Who may be appointed receiver
e. Appointment of more than one receiver
f. Removal of receiver
g. Termination of receivership

a. In General

Courts of equity and courts of general jurisdiction having the powers previously exercised by courts of equity have jurisdiction to appoint receivers for railroads which have some real estate or other property of a fixed nature belonging to the railroad within the territorial jurisdiction of the court.

Courts of equity have inherent jurisdiction, independently of statute, to appoint receivers for railroads,[29] although in some cases statutory provisions regulate the appointment of receivers.[30] In jurisdictions where law and equity are administered by the same court, the power is exercised by courts of general jurisdiction having the powers previously exercised by courts of equity.[31] In order for a court to have jurisdiction to appoint a receiver for a railroad there must be some real estate or other property of a fixed nature belonging to the railroad within the territorial jurisdiction of the court.[32] However, although a court cannot extend its powers beyond its territorial jurisdiction,[33] it has been held that a court having jurisdiction of the person of the corporation may appoint a receiver for an entire line of railroad, although extending beyond the jurisdiction of the court or running through several different states,[34] and may acquire possession of the property by compelling the company to execute assignments to the receiver.[35] The fact that some of the property may be in the hands of third persons so that the receiver may have to invoke the assistance of the courts in other jurisdictions is no ground for refusing to make such appointment, since such assistance will ordinarily be granted through comity;[36] but the usual practice, as appears infra § 389 b, is to institute ancillary proceedings in the different jurisdictions for the appointment of the same person as receiver of the entire property.

In foreclosure proceedings the court properly can appoint a receiver only for that portion of the road or property of the railroad company covered by the mortgage;[37] and in case of several distinct roads operated as a general system, the court cannot, in a suit to foreclose a mortgage on one of such roads, appoint a receiver for the roads of the other companies which are not affected by the mortgage and are not parties to the suit.[38]

In a suit to enforce a contract lien on a mortgaged road the court has jurisdiction, in advance of any application to foreclose the mortgage, to take possession of the property by a receiver and sell it subject to all superior liens, and distribute the proceeds among those entitled thereto.[39]

Appointment of special receiver after discharge of receiver. Where the court in discharging receivers reserves jurisdiction for the purpose of enforcing a requirement of its decree, it has the power under such reserved jurisdiction to appoint a special receiver for such purpose.[40]

b. Who May Make Application for Appointment

Receivers for railroads may be appointed, in a proper case, on the application of stockholders, mortgagees, or other secured creditors or their representatives, and, under some circumstances, on the application of the railroad itself or of the state; ordinarily a receiver will not be appointed at the instance of a simple contract creditor without a lien.

Receivers for railroads may be appointed, in a proper case, on the application of mortgagees[41] or trustees in a deed of trust,[42] bondholders,[43] stock-

29. N.C.—Sinclair v. Moore Cent. R. Co., 45 S.E.2d 555, 228 N.C. 389.
51 C.J. p 947 note 53

30. Ky.—Ball v. Maysville, etc., R. Co., 43 S.W. 731, 102 Ky. 486, 19 Ky.L. 1540, 80 Am.S.R. 362.
51 C.J. p 947 note 52.

31. Tex.—Texas Trunk R. Co. v. State, 18 S.W. 199, 83 Tex. 1.
51 C.J. p 947 note 54

32. U.S.—Gatch, Tennant & Co. v. Mobile & O. R. Co., D.C.Ala., 59 F. 2d 217.

Validity

An order appointing a receiver for a railroad has been held void for want of jurisdiction where the only property owned by the railroad within the district was movable office furniture, equipment, and a bank account.—Gatch Tennant & Co. v. Mobile & O. R. Co., supra.

33. Tex.—Texas, etc., R. Co. v. Gay, 26 S.W. 599, 86 Tex. 571, 25 L.R.A. 52
51 C.J. p 947 note 55.

34. U.S.—Wilmer v. Atlanta, etc., Air-Line R. Co., C.C.Ga., 30 F.Cas. No.17,775, 2 Woods 409
51 C.J. p 947 note 56.

35. U.S.—Wilmer v. Atlanta, etc., Air-Line R. Co., supra.

36. U.S.—Wilmer v. Atlanta, etc., Air-Line R. Co., supra.

37. Mo.—Merriam v. St. Louis, etc., R. Co., 36 S.W. 630, 136 Mo. 145.
51 C.J. p 947 note 60.

38. U.S.—Hook v. Bosworth, Ill., 64 F. 443, 12 C.C.A. 208.

39. U.S.—Park v. New York, etc., R. Co., C.C.N.Y., 70 F. 641.

40. U.S.—Southern R. Co. v. Townsend, Ala., 161 F. 310, 88 C.C.A. 390.
51 C.J. p 948 note 63.

41. U.S.—Illinois Cent. R. Co. v. Mississippi Cent. R. Co., D.C.Miss., 12 F.Cas.No.7,008.
51 C.J. p 948 note 65.

42. Cal.—McLane v. Placerville, etc., R. Co., 6 P. 748, 66 Cal. 606.
51 C.J. p 948 note 66.

43. Pa.—McDougal v. Huntingdon, etc., R., etc., Co., 148 A. 574, 294 Pa. 108.
51 C.J. p 948 note 67.

holders,[44] or creditors,[45] and under statutes providing therefor a receiver may be appointed on the application of a judgment creditor.[46] However, is has been held that ordinarily a receiver should not be appointed for a railroad at the instance of a simple contract creditor without a lien unless he has some peculiar equity or beneficial interest in the property,[47] and users of the railroad asserting unliquidated claims for damages and penalties arising out of the failure of the railroad to accept and transport merchandise have no right to apply in their own names as individual members of the public for the appointment of a receiver.[48]

On application of the company. While it is unusual,[49] and the power to make it has been expressly denied by some courts,[50] it has been held that the appointment of a receiver may under some circumstances be made on the application of the company itself.[51]

On application by state. Under statutes so providing the state district attorney may institute ex rel quo warranto proceedings in the name of the state against a railroad and its owners to procure a receivership.[52]

Also, it has been held that in forfeiture proceedings, the state, although not a creditor of the company, may, in the interest of the public, apply for the appointment of a receiver.[53]

c. Proceedings for Appointment

(1) In general
(2) Hearing, determination, and order

(1) In General

In the absence of a specific statute, the general rules governing the appointment of receivers apply to proceedings for the appointment of a receiver of a railroad.

General rules govern the proceedings for the appointment of a receiver of a railroad company except to the extent that the matter may be otherwise controlled by particular statutory provisions.[54] In cases arising under the codes, where it is not provided otherwise, the usages of courts of equity as to the manner of appointing receivers are applicable.[55]

Notice of application. Ordinarily a receiver for a railroad should not be appointed on an ex parte application,[56] and the court will not appoint a receiver without notice to the adverse party and an opportunity to be heard where it is not shown that a manifest and urgent necessity for such immediate appointment exists[57] or where a temporary injunction will adequately protect the rights of the parties until such notice can be given.[58] Circumstances may arise, however, under which the appointment of a receiver on an ex parte application without notice will be proper.[59] Where not required by statute, in a proceeding to dissolve a railroad corporation, it is not necessary that a valid order to show cause why the corporation should not be dissolved should precede the appointment of a temporary receiver where there is an order to show cause why such receiver should not be appointed.[60]

Sufficiency of application. The bill or petition for a receiver must in all cases allege facts sufficient to justify the appointment,[61] and allegations which simply amount to charges of insolvency and default are not sufficient.[62] The bill should contain a statement of facts such as would show that plaintiff has no adequate remedy at law.[63] However, the fact that the averments were not such as to have made

44. Va.—Stevens v. Davidson, 18 Gratt. 819, 59 Va. 819, 98 Am.D. 692
51 C.J. p 948 note 68.

45. N.J.—Pennsylvania R. Co. v. Pemberton, etc., R. Co., 28 N.J.Eq. 338.
51 C.J. p 948 note 69.

46. Ky.—Ball v. Maysville, etc., R. Co., 43 S.W. 731, 102 Ky. 486, 18 Ky.L. 1540, 80 Am.S.R. 362.
51 C.J. p 948 note 70.

47. N.C.—Sinclair v. Moore Cent. R. Co., 45 S.E.2d 555, 228 N.C. 389.

48. N.C.—Sinclair v. Moore Cent. R. Co., supra.
Proper party
Since the action must be grounded on the public interest, it must be prosecuted by the official or agency whose duty it is to enforce the public right.—Sinclair v. Moore Cent. R. Co., supra.

49. U.S.—Atkins v. Wabash, etc., R. Co., C.C.Ill., 29 F. 161.

50. Mo.—State v. Ross, 25 S.W. 947, 122 Mo. 435, 23 L.R.A. 534.

51. U.S.—Quincy, etc., R. Co. v. Humphreys, Mo., 12 S.Ct. 787, 145 U.S. 82, 36 L.Ed. 632.
51 C.J. p 948 note 74—14A C.J. p 964 note 65

52. U.S.—State of Tennessee, by Wolfenbarger, ex rel. Atchley v. Taylor, C.A.Tenn., 169 F.2d 626.

53. Tex.—Texas Trunk R. Co. v. State, 18 S.W. 199, 83 Tex. 1.

54. U.S.—Skiddy v. Atlantic, etc., R. Co., C.C.Va., 22 F.Cas.No.12,922, 3 Hughes 320.
51 C.J. p 948 note 78.

55. Ohio.—Cincinnati, etc., R. Co. v. Sloan, 31 Ohio St. 1.

56. Ind.—Wabash R. Co. v. Dykeman, 32 N.E. 823, 133 Ind. 56.
51 C.J. p 948 note 82.

57. Mo.—Merriam v. St. Louis, etc., R. Co., 36 S.W. 630, 136 Mo. 145.
51 C.J. p 948 note 83

58. N.Y.—Devoe v. Ithaca, etc., R. Co., 5 Paige 521.

59. Ky.—Louisville, etc., R. Co. v. Schmidt, 52 S.W. 835, 21 Ky.L. 556.
51 C.J. p 949 note 85.

60. N.Y.—Knickerbocker Trust Co. v. Tarrytown, etc., R. Co., 117 N.Y.S. 871, 133 App.Div. 285, motion for reargument and leave to appeal denied 118 N.Y.S. 1118, 134 App.Div. 932.

61. Mo.—Merriam v. St. Louis, etc., R. Co., 36 S.W. 630, 136 Mo. 145.
51 C.J. p 949 note 90.

62. Mo.—Merriam v. St. Louis, etc., R. Co., 36 S.W. 630, 136 Mo. 145.

63. Mo.—Merriam v. St. Louis, etc., R. Co., supra.

it proper to appoint a receiver will not make the order appointing one a nullity.[64] In order to justify an ex parte appointment the bill or petition must allege facts showing it to be necessary,[65] and it is not sufficient merely to allege that such an emergency exists.[66] In a pending cause the court may appoint a receiver on petition in the pending cause without the filing of an original bill.[67]

Defenses and objections to appointment. The fact that a receiver has already been appointed in one action will not prevent the appointment of another receiver in another action by different parties and involving different rights, although affecting the same property;[68] and it is not a valid objection to the appointment of a receiver in a foreclosure suit that the road is in the possession of the lessee, where the lessee is a party before the court.[69] Where a creditor has a statutory right to have a receiver appointed on the return of his execution unsatisfied, it is no defense to an application by such a creditor that the equipment of the road is insufficient to enable a receiver to operate it.[70] Where, under a statute so permitting, an application for the appointment of a receiver of a railroad is refused on the filing of a proper undertaking, which undertaking is a substitute for the appointment of a receiver, the applicant is estopped from a further prosecution of his application, and the court is without authority to revoke its order at a subsequent term over the objection of defendant.[71]

Renewal of application. The refusal of an application for the appointment of a receiver is no bar to a subsequent application by leave of court, even on the same state of facts.[72]

(2) Hearing, Determination, and Order

On an application for the appointment of a receiver for a railroad the issues are limited to questions relating to the appointment of a receiver; the order or decree may stipulate as to the debts and liabilities of the company to be paid by the receiver, and it may impose such terms and conditions as are just and reasonable under the circumstances.

On an application for the appointment of a receiver the case cannot be heard on its merits as at the final hearing,[73] nor will the court take jurisdiction of and decide questions having no relation to the object for which the receiver is appointed.[74] The court may deny the application temporarily and continue the hearing pending negotiations and proceedings which may affect the propriety of making the appointment.[75] Also, on an application for a receiver to operate a railroad which has ceased operation, the court may, where the facts and circumstances warrant it, issue a mandatory injunction compelling the railroad to operate, with leave to petitioner to apply for a receiver in case the injunction is disobeyed.[76]

The court should not appoint a receiver merely on a bill filed without being supported by evidence or affidavits;[77] and, where the facts alleged as grounds for the appointment are positively denied, a receiver ordinarily will not be appointed.[78] However, while this is true where the hearing is on bill and answer only, if there is other evidence in support of the bill it will be considered, and, if on the evidence the court is of the opinion that a case is made for the appointment of a receiver, such appointment will be made notwithstanding the denials of the answer.[79]

Order or decree. It is the better practice for the order appointing the receiver to stipulate as to the debts and liabilities of the company to be paid by the receiver;[80] but it is not essential that the order for the payment of preferred debts should be made

64. U.S.—Hervey v. Illinois Midland R. Co., C.C.Ill., 28 F. 169

65. Ind.—Chicago, etc., R. Co. v. Cason, 32 N.E. 827, 133 Ind. 49.
51 C.J. p. 949 note 94

66. Ind.—Wabash R. Co. v. Dykeman, 32 N.E. 823, 133 Ind. 56.

67. Vt.—Langdon v. Vermont, etc., R. Co., 54 Vt. 593.

68. Minn.—St. Louis Car Co. v. Stillwater St. R. Co., 54 N.W. 1064, 53 Minn. 129
51 C.J. p. 949 note 98

69. U.S.—Kerp v. Michigan, etc., R. Co., C.C.Mich., 14 F.Cas.No.7,727.

70. Ky.—Ball v. Maysville, etc., R. Co., 43 S.W. 731, 102 Ky. 486, 18 Ky.L. 1540, 80 Am.S.R. 362.

71. N.C.—Sinclair v. Moore Cent. R. Co., 45 S.E.2d 555, 228 N.C. 389.

72. N.Y.—Belmont v. Erie R. Co., 52 Barb. 637.

73. U.S.—Kerp v. Michigan, etc., R. Co., C.C.Mich., 14 F.Cas.No.7,727.

74. U.S.—Taylor v. Philadelphia, etc., R. Co., C.C.Pa., 7 F. 331.
51 C.J. p. 949 note 6.

75. U.S.—Central Trust Co. v. Wabash R. Co., C.C.Mo., 25 F. 693.

76. N.J.—In re Public Service R. Co., 122 A. 209, 95 N.J.Eq. 31.

77. Pa.—Appeal of Newcastle, etc., R. Co., 3 Walk. 231.

Appointment held improper

Where on application of simple contract creditors without a lien, and of claimants for unliquidated damages due to past and future inability to ship merchandise over a railroad abandoned because of complete deterioration and insolvency, a permanent operating receiver was appointed to finance, rebuild, and operate the line, the appointment was set aside as improper and the cause retained on the docket for further proceedings with respect to the several claims asserted by creditors.—Sinclair v. Moore Cent. R. Co., 45 S.E.2d 555, 228 N.C. 389

78. N.Y.—Rochester v. Bronson, 41 How.Pr. 78
Wash.—Whitehouse v. Point Defiance, etc., R. Co., 38 P. 152, 9 Wash. 558.

79. U.S.—Allen v. Dallas, etc., R. Co., C.C.Tex., 1 F.Cas.No.221, 3 Woods 316.
Ind.—Chicago, etc., R. Co. v. Kenney, 62 N.E. 26, 159 Ind. 72.

80. U.S.—Farmers' L. & T. Co. v. Kansas City, etc., R. Co., C.C.Kan., 53 F. 182.—Central Trust Co. v. St. Louis, etc., R. Co., C.C.Ark., 41 F. 551.
Collateral attack see infra § 379

at the time and as a condition of the appointment,[81] and, if not then made, it may be made afterward.[82] The order may be modified or changed by the court, from time to time as may be necessary and proper[83] and without the consent of the parties.[84]

The court appointing a receiver for a railroad may impose such terms and conditions thereon as are just and reasonable under the circumstances, and the party asking for and accepting the appointment on the conditions imposed will be bound thereby.[85] Thus the court may impose such terms and conditions with respect to the payment of outstanding debts for labor, supplies, and equipment, as a condition of making the appointment, as it may deem equitable;[86] but the court will not impose a condition which will have the effect of taking the income of a railroad in the hands of a receiver for the benefit of mortgage creditors who have a lien on it under their mortgage and using it to pay the general creditors of the road.[87]

Where a mortgagee is unwilling to agree to the conditions imposed, the foreclosure can proceed without the aid of the receivership.[88]

d. Who May Be Appointed Receiver

The person appointed as receiver for a railroad should be a person of known character and business capacity, and one who is in a position to represent impartially all the interests concerned.

The person appointed as receiver for a railroad should be a person of known character and business capacity,[89] and one who is in a position to represent impartially all the interests concerned,[90] but not necessarily a railroad man.[91] Ordinarily an officer or director,[92] or a stockholder,[93] of the road, or an officer of a parallel or competing road,[94] or a party to the suit,[95] or an attorney of one of the parties,[96] or a person pecuniarily interested in the road or under any obligation to those who are[97] will not be appointed. However, there is no inflexible rule making an officer of the company ineligible to appointment as receiver,[98] and it may not be improper to appoint an officer of the company who was in no way responsible for the condition making the receivership necessary, and whose ability and knowledge of the affairs and needs of the company commend him as a proper person to be appointed,[99] particularly where the parties interested consent to his appointment.[1]

Nonresident. Usually a resident of the jurisdiction should be appointed as receiver,[2] although the court may in its discretion appoint a nonresident[3]

e. Appointment of More than One Receiver

The court, in its discretion, may appoint more than one receiver for a railroad in the same receivership proceeding, and the fact that a receiver has been appointed for one purpose does not preclude the appointment of other receivers for different purposes.

Ordinarily more than one receiver is not appointed for the same purpose;[4] but the court may in its discretion appoint more than one,[5] although if more than one receiver is appointed and they become hostile to each other they should be removed and a single receiver appointed.[6] However, the fact that

81. U.S.—Central Trust Co. v. St. Louis, etc., R. Co, supra—Blair v. St. Louis, etc., R Co, C C Mo, 22 F. 471.

82. U.S.—Central Trust Co. v. St Louis, etc., R Co, C.C.Ark., 41 F. 551.

83. Fla.—Hood v. Ocklawaha Valley R. Co., 84 So 97, 78 Fla. 665.
51 C J. p 950 note 18

84. S.C.—Ex parte Dunn, 8 S C. 207.

85. U.S.—Farmers' L. & T. Co. v. Kansas City, etc, R. Co., C.C.Kan., 53 F. 182.
51 C.J. p 950 note 28.

86. U.S—Fosdick v Schall, Ill., 99 U S. 235, 25 L Ed. 339.
51 C.J. p 950 note 22.

87. U.S.—U. S. Trust Co. v. New York, etc., R. Co., C.C.N.J., 25 F. 800.

88. U.S.—Central Trust Co. v. St. Louis, etc., R Co., C.C.Ark., 41 F. 551.

89. U.S—Farmers' L & T. Co. v. Cape Fear, etc., R. Co, C.C.N.C., 62 F. 675.

90. U S—Atkins v. Wabash, etc., R. Co, C C Ill, 29 F. 161.
51 C.J p 950 note 31.

91. U S.—Farmers' L. & T. Co. v. Cape Fear, etc, R. Co., C.C N.C., 62 F. 675
51 C J. p 950 note 32.

92. U S.—Pennsylvania Finance Co. v. Charleston, etc, R. Co, C C S C., 45 F. 436.
51 C J. p 950 note 35.

93. U S—Atkins v. Wabash, etc., R. Co, C C Ill, 29 F. 161.

94. Mo.—St Louis, etc, R. Co. v. Wear, 36 S.W. 357, 658, 135 Mo. 230, 33 L.R.A. 341.
51 C J. p 950 note 37.

95. U.S.—Pennsylvania Finance Co. v. Charleston, etc., R. Co, C.C S.C., 45 F. 436.

96. U.S.—Pennsylvania Finance Co. v Charleston, etc., R. Co., supra.

97. U.S.—Meier v. Kansas Pac R. Co., C C Kan., 16 F.Cas.No.9,395, 5 Dill. 476.
51 C.J. p 950 note 40.

98. U.S—Ralston v. Washington, etc, R. Co., C C.Wash., 65 F. 557.

99. U.S—Farmers' L & T. Co. v. Northern Pac. R. Co., C.C Wis, 61 F 546.
51 C.J. p 950 note 42.

1. U.S—Farmers' L. & T. Co. v. Northern Pac. R. Co., supra.

2. U.S—Meier v. Kansas Pac R. Co., C.C Kan, 16 F.Cas No 9,395, 5 Dill. 476.
51 C.J. p 950 note 44.

3. U S.—Farmers' L. & T. Co. v. Cape Fear, etc., R. Co., C C.N.C., 62 F. 675.

4. U S.—Meier v. Kansas Pac. R. Co., C.C.Kan., 16 F.Cas.No.9,395, 5 Dill. 476.

5. U.S—Central Trust Co. v. Missouri, etc., R. Co., D.C.Mo, 246 F. 154
51 C J. p 951 note 47.

6. U.S—Meier v. Kansas Pac. R. Co., C C.Kan., 16 F.Cas No.9,395, 5 Dill. 476.

a receiver has been appointed for one purpose does not preclude the appointment of other receivers for different purposes,[7] as, for example, one receiver in foreclosure proceedings[8] and another in proceedings to forfeit the charter,[9] or in proceedings by donors and taxpayers to enforce their claims.[10]

f. Removal of Receiver

The power to remove a receiver of a railroad is vested solely in the court which appointed him and ordinarily is within its discretion

Whenever a receiver takes possession under his appointment, he holds as an officer of the court and cannot be ousted except by its order,[11] but the power to remove is incidental to the power of appointment[12] and ordinarily is a matter within the discretion of the court.[13] The court will remove the receiver for incompetency[14] or misconduct,[15] or where it appears that the appointment was procured through collusion and for a fraudulent or improper purpose;[16] and if more than one receiver is appointed and they become hostile to each other they should be removed.[17] However, the court will not remove a receiver for the reason that he is objectionable to a majority stockholder[18] or because of the misconduct of his agent.[19]

Procedure on application A person petitioning the court to remove a receiver for misconduct or incompetency should be prepared not only to prefer specific charges of wrongdoing, but to accompany them with proof,[20] but the receiver by answering the petition waives the right to object to it on the ground that the charges were not sufficiently definite.[21]

g. Termination of Receivership

A receivership of a railroad will be continued as long as may be necessary to carry out the purposes of the appointment; but the railroad should be restored to its rightful owners as soon as possible, and the receiver should be discharged and the receivership terminated whenever its objects have been accomplished or its continuance is no longer necessary

A receivership of a railroad will be continued as long as may be necessary to carry out the purposes of the appointment,[22] which is a matter within the sound discretion of the court.[23] However, the road should be restored to its rightful owners as soon as possible,[24] and the receiver should be discharged and the receivership terminated whenever its objects have been accomplished or its continuance is no longer necessary,[25] and, where receivers have executed the duty for which they were appointed, it is the right and duty of the party on whose application they were appointed to see to it that they are discharged if he would avoid the consequences of their continuing to act in that capacity,[26] although the court may act on its motion.[27]

Where, at the time of the receivership, one company is operating the road of another, the court will not, on discharging the receiver, determine a controversy between the companies as to the right of possession but will return the road to the company which was in possession at the time of the appointment.[28] So also, where a receiver is appointed for a railroad operating different lines of road, and a road is included under the receivership over which such company has no right of possession or control, but is interested only as a creditor and stockholder, such road will be released and discharged from the custody of the receiver.[29] An appointment will not

7. N.Y.—Herring v. New York, L. E. & W. R. Co., 12 N.E. 763, 105 N.Y. 340, 19 Abb.N.Cas. 340.

8. Iowa.—State v. Beaton, 217 N.W. 255, 205 Iowa 1139.
51 C.J. p. 951 note 51

9. N.Y.—Herring v. New York, L. E. & W. R. Co., 12 N.E. 763, 105 N.Y. 340, 19 Abb.N.Cas. 340
51 C.J. p. 951 note 52.

10. Iowa.—State v. Beaton, 217 N.W. 255, 205 Iowa 1139.
51 C.J. p. 951 note 53.

11. U.S.—Illinois Cent. R. Co. v. Mississippi Cent. R. Co., D.C.Miss., 12 F.Cas.No. 7,008

12. Ohio.—Cincinnati, etc., R. Co. v. Sloan, 31 Ohio St. 1.

13. Fla.—Hood v. Ocklawaha Valley R. Co., 84 So. 97, 78 Fla. 665.
51 C.J. p. 951 note 60.

14. U.S.—Atkins v. Wabash, etc., R. Co., C.C.Ill., 29 F. 161.

15. U.S.—Handy v. Cleveland, etc., R. Co., C.C.Ohio, 31 F. 689.—Atkins v. Wabash, etc., R. Co., C.C.Ill., 29 F. 161.

16. U.S.—Sage v. Memphis, etc., R. Co., C.C.Ark., 18 F. 571, 5 McCrary 643, reversed on other grounds 8 S.Ct. 887, 125 U.S. 361, 31 L.Ed. 694.
51 C.J. p. 951 note 63.

17. U.S.—Meier v. Kansas Pac. Ry. Co., C.C.Kan., 16 F.Cas.No. 9,395, 5 Dill. 476.

18. U.S.—Street v. Maryland Cent. R. Co., C.C.Md., 58 F. 47.
51 C.J. p. 951 note 64.

19. U.S.—Clarke v. Georgia Cent. R., etc., Co., C.C.Ga., 66 F. 16.
51 C.J. p. 951 note 66.

20. U.S.—Farmers' L. & T. R. Co. v. Northern Pac. R. Co., C.C.Wis., 61 F. 546.

21. U.S.—Farmers' L. & T. R. Co. v. Northern Pac. R. Co., supra.

22. N.J.—Sewell v. Cape May, etc., R. Co., Ch., 9 A. 785.
51 C.J. p. 951 note 71

23. U.S.—Milwaukee, etc., R. Co. v. Soutter, Wis., 14 S.Ct. 1158, 154 U.S. 540, 17 L.Ed. 604

24. N.J.—Sewell v. Cape May, etc., R. Co., Ch., 9 A. 785.
51 C.J. p. 951 note 73

25. U.S.—Milwaukee, etc., R. Co. v. Soutter, Wis., 2 Wall. 510, 17 L.Ed. 900.
51 C.J. p. 951 note 74.

26. Vt.—Langdon v. Vermont, etc., R. Co., 53 Vt. 228.

27. U.S.—Platt v. Philadelphia, etc., R. Co., C.C.Pa., 65 F. 872

28. N.J.—Long Branch, etc., R. Co. v. Sneden, 26 N.J.Eq. 539.

29. U.S.—Georgia Cent. R., etc., Co. v. Farmers' L. & T. Co., C.C.Ga., 56 F. 357.

be vacated by the appointment of the same receivers in a subsequent suit[30]

Pending determination of interstate commerce commission. Where the determination of the question whether a railroad in receivership should continue to operate or should be abandoned is within the sole jurisdiction of the interstate commerce commission, it has been held that, pending such decision, the receivership should be continued for the purpose of preserving and keeping intact the property of the railroad, and that the receivers should fulfill this obligation with a minimum of expense in salaries and otherwise,[31] and that if the commission decides the railroad should be abandoned the receivership should be dismissed, but not if the commission determines it should not be abandoned.[32]

§ 379. Effect of Appointment

The appointment of a receiver for a railroad takes the property out of the possession and control of the company and places it in the possession of the receiver, who acts as the agent or representative of the court and not as the agent or servant of the company.

The appointment of a receiver for a railroad ordinarily has the effect of taking the property out of the possession and control of the company and placing it in the hands of the receiver as the representative of the court appointing him.[33] The possession of the receiver is not that of the company, but of the court,[34] which court, in a principal receivership action, has general power and authority over the entire road,[35] even though parts of it are not situated within the district in which the court sits,[36] at least where its receivers have been likewise appointed receivers in ancillary proceedings in such other districts.[37] The receiver, on his appointment and qualification, is entitled to the possession and control of the property,[38] which the court will assist him in obtaining[39] and subsequently protect against outside interference.[40] The receiver, however, is a mere custodian of the property involved for the court.[41]

Status as a representative. The receiver of a railroad is not an agent[42] or servant[43] of the railroad company, nor are his servants its servants.[44] He is not, no matter at whose instance appointed, the agent or representative of either party to the litigation or any special interest represented therein;[45] but he holds the property as the agent or representative of the court[46] for the benefit of all who may be interested therein or ultimately found to be entitled thereto.[47]

Corporate existence of company is not terminated by the appointment of a receiver,[48] nor does such appointment effect a cessation of its franchises.[49]

Appointment of receiver does not affect or supersede company in the exercise of its corporate powers except so far as the property involved is concerned,[50] or its duty to perform any acts required

30. U.S.—Pennsylvania Steel Co v New York City R. Co, N.Y., 225 F. 734, 141 C.C.A. 6, rehearing denied 227 F. 1021, 141 C.C.A. 671, and 228 F. 122, 142 C.C.A. 528.
51 C.J. p 952 note 79.

31. U.S.—Gross v. Missouri & A. Ry. Co., D.C.Ark., 74 F.Supp. 242.

32. U.S.—Gross v. Missouri & A. Ry. Co., supra.

33. S.C.—Echols v Seaboard Air Line Ry. Co., 178 S.E. 139, 174 S.C. 537.
51 C.J. p 952 note 81.
Liability of.
Company:
After receivership see infra § 388.
During receivership see infra § 385.
Receiver
After discharge see infra § 387.
Before discharge see infra §§ 383, 384.

34. U.S.—North Kansas City Bridge & Railroad Co. v. Leness, C.C.A. Mo., 82 F.2d 9.
S.C.—Echols v. Seaboard Air Line Ry. Co., 178 S.E. 139, 174 S.C. 537.

35. U.S.—Dillon v Oregon, S. L. & U. N. Ry. Co., C.C.Or., 66 F. 623.
51 C.J. p 952 note 82.

36. Ill.—Devine v. Delano, 111 N.E. 742, 272 Ill. 166, Ann.Cas.1918A 689
51 C.J. p 952 note 83.

37. Conn.—Guarantee Trust & Safe-Deposit Co v Philadelphia, R. & N. E. R. Co, 38 A. 792, 69 Conn. 709, 38 L.R.A. 804.

38. N.Y.—Smith v. Pacific Impr. Co, 172 N.Y.S. 65, 104 Misc. 481.
51 C.J. p 952 note 85.

39. U.S.—Secor v. Toledo, etc., R. Co., C.C.Ill., 21 F.Cas.No.12,605, 7 Biss. 513.
51 C.J. p 952 note 86.

40. Vt.—Vermont, etc., R. Co. v. Vermont Cent. R. Co, 46 Vt. 792.
51 C.J. p 952 note 87.

41. Mo.—Jennings Sewer Dist. of St. Louis County v. Pitcairn, 187 S.W. 2d 750, 238 Mo.App. 704.

42. S.C.—Echols v. Seaboard Air Line Ry. Co., 178 S.E. 139, 174 S.C. 537.
51 C.J. p 952 note 88.

43. S.C.—Echols v. Seaboard Air Line Ry. Co, supra.
51 C.J. p 953 note 89.

44. S.C.—Echols v. Seaboard Air Line Ry. Co, supra.
51 C.J. p 953 note 90.

45. U.S.—Central Trust Co. v. Wabash, etc., R. Co, C.C.Mo., 23 F. 863.
51 C.J. p 953 note 91.

46. U.S.—North Kansas City Bridge & Railroad Co. v. Leness, C.C.A. Mo, 82 F.2d 9.
Fla.—Cline v Powell, 192 So. 628, 141 Fla. 119.
S.C.—Echols v. Seaboard Air Line Ry. Co., 178 S.E. 139, 174 S.C. 537.
51 C.J. p 953 note 92.

47. U.S.—North Kansas City Bridge & Railroad Co. v. Leness, C.C.A. Mo., 82 F.2d 9.
51 C.J. p 953 note 92.

48. Mo.—Jennings Sewer Dist. of St. Louis County v. Pitcairn, 187 S.W.2d 750, 238 Mo.App. 704.
51 C.J. p 953 note 93.

49. Mo.—Heath v. The Missouri, K. & T. Ry. Co., 83 Mo. 617.

50. Mo.—Jennings Sewer Dist. of St. Louis County v. Pitcairn, 187 S.W.2d 750, 238 Mo.App. 704.
51 C.J. p 953 note 94.

of it by law which can be performed without interfering with the rights of the receiver under the terms of his appointment,[51] or its liability to perform a continuing statutory duty,[52] or its liability to be sued on any cause of action accruing prior to the appointment of the receiver,[53] or subsequently thereto if existing against the company directly and not by reason of any acts of the receiver or his servants in the operation of the road,[54] or in its right to do all things necessary to preserve its legal existence.[55] Moreover, such appointment does not affect existing liens or vested property rights[56] or change the status of unsecured into secured claims.[57] It does not divest the railroad company, that is, the corporate entity, of its title or estate in the property involved and transfer it to the receiver, in the absence of an express order to that effect by the court.[58]

Sale of property free of encumbrances. A court of equity has power, under proper circumstances, to order a receiver of a railroad to sell the property of the railroad, real or personal, free and clear of all encumbrances, and to deny a mortgagee of the railroad the right to foreclose his mortgage.[59]

Appointment cannot be collaterally attacked[60] unless the court was entirely without authority to make it.[61]

Contempt. It has been held that striking employees of a railroad which is in the hands of a receiver, who prevent, or attempt to prevent, the operation of the road, are in contempt.[62] So it has been held that to order a strike on a railroad in the hands of a receiver appointed by the federal courts is a contempt,[63] although not forbidden by any injunctional order.[64]

§ 380. —— On Existing Contracts, Leases, and the Like

a. In general
b. Leases generally
c. Leases and conditional sales of rolling stock

a. In General

A receiver of a railroad is not bound by contracts made by the company prior to his appointment and not constituting a lien on the property; but if the contract is advantageous he may adopt it, and he is entitled to a reasonable time to determine whether or not he should adopt it.

A receiver of a railroad is not bound by a contract made by the company prior to his appointment and not constituting a lien on the property.[65] He is not required to accept the losses thereunder, if any,[66] or obligated to pay out assets or earnings of the company thereon,[67] nor can he be compelled specifically to perform the contract,[68] or be held liable in damages for a refusal to do so,[69] unless the contract has been subsequently ratified or adopted,[70] and the receiver is entitled to a reasonable time to look into the contract and determine whether it is advantageous to adopt it.[71] The court may author-

51. Ill.—Ohio, etc., R. Co. v. Russell, 3 N.E. 561, 115 Ill. 52.
52. Okl.—Lusk v. Eddington, 159 P. 491, 60 Okl. 134, L.R.A.1917A 536.
51 C.J. p. 953 note 96.
Statutory liability for failure to fence see infra § 385 b.
53. N.Y.—Decker v. Gardner, 26 N.E. 814, 124 N.Y. 334, 11 L.R.A. 480.
51 C.J. p. 953 note 97.
54. Mo.—Jennings Sewer Dist. of St. Louis County v. Pitcairn, 187 S.W.2d 750, 238 Mo.App. 704.
51 C.J. p. 953 note 98.
Action for taxes
The bringing of an action against the receiver of a railroad to recover sewer taxes levied and assessed against the land of the railroad while it was in the hands of the receiver is not a compliance with a statute requiring such an action to be brought against the "owner" of the land.—Jennings Sewer Dist. of St. Louis County v. Pitcairn, supra.
55. N.Y.—Decker v. Gardner, 26 N.E. 814, 124 N.Y. 334, 11 L.R.A. 480.
56. N.C.—Moore v. Watauga, etc., R. Co., 92 S.E. 361, 173 N.C. 726.
51 C.J. p. 953 note 1.
57. U.S.—U.S. Trust Co. v. New York, etc., R. Co., C.C.N.J., 25 F. 800.
58. Mo.—Jennings Sewer Dist. of St. Louis County v. Pitcairn, 187 S.W.2d 750, 238 Mo.App. 704.
59. U.S.—Miners' Bank of Wilkes-Barre v. Acker, C.C.A.Pa., 66 F.2d 850.
60. Minn.—Basting v. Ankeny, 66 N.W. 266, 64 Minn. 133.
51 C.J. p. 953 note 4.
61. Mo.—State v. Ross, 25 S.W. 947, 122 Mo. 435, 23 L.R.A. 534.
62. Ohio.—Thomas v. Cincinnati, N.O. & T.P. Ry. Co., C.C.Ohio, 62 F. 803.
13 C.J. p. 22 note 15.
63. U.S.—In re Acker, C.C.Mont., 66 F. 290.
64. U.S.—In re Acker, supra.
65. U.S.—General Finance Corporation v. New York State Rys., C.C.A. N.Y., 54 F.2d 1008.
51 C.J. p. 954 note 6.
Traffic contracts between different roads are not binding on a receiver of one of the roads.—General Finance Corporation v. New York State Rys., supra.—51 C.J. p. 954 note 6 [b] (1).
66. U.S.—General Finance Corporation v. New York State Rys., supra.
67. Mass.—Ellis v. Boston, etc., R. Co., 107 Mass. 1.
51 C.J. p. 954 note 7.
68. U.S.—Southern Express Co. v. Western North Carolina R. Co., N.C., 99 U.S. 191, 25 L.Ed. 319.—Central Trust Co. v. Marietta, etc., R. Co., C.C.Ga., 51 F. 15, 16 L.R.A. 90.
69. Tex.—Brown v. Warner, 14 S.W. 1032, 78 Tex. 543, 22 Am.S.R. 67, 11 L.R.A. 394.
51 C.J. p. 954 note 9.
70. U.S.—Girard Life Ins., etc., Co. v. Cooper, Ind.T., 51 F. 332, 2 C.C.A. 245, affirmed 16 S.Ct. 879, 162 U.S. 529, 40 L.Ed. 1062.
51 C.J. p. 954 note 10.
71. U.S.—Texas Co. v. Chicago & A.R. Co., C.C.A.Ill., 126 F.2d 83.—General Finance Corporation v. New York State Rys., C.C.A.N.Y., 54 F.2d 1008.
51 C.J. p. 954 note 11.
Time held reasonable
Order permitting railroad's receiv-

ize a receiver to adopt and carry out an advantageous contract previously made by the company;[72] and, if necessary to hold the other party to a performance of a continuing contract, may order the receiver to pay amounts due thereunder prior to his appointment as well as those which accrue during the receivership.[73]

A receiver cannot accept the benefits of a contract without carrying out its obligations,[74] and a decree requiring another railroad to make expenditures necessary to the carrying out of a trackage agreement will be set aside where the road in receivership has insufficient assets to pay its obligations under the contract unless the other road may look elsewhere than the receivership estate for payment of the amounts due it under the contract.[75] Where a contract has been adopted, the court will see that it is carried out according to its terms,[76] although it may subsequently appear not to be an advantageous contract.[77]

Contract of prior receiver creates no legal obligation on a subsequent receiver in the same receivership[78] unless ratified by him.[79]

Right of reverter. The purchaser of railroad property at a receiver's sale on cessation of operation of the road does not acquire title to lands conveyed to the railroad to be used only for railroad purposes.[80]

b. Leases Generally

The receiver of a railroad which is operating or using another road or property as lessee is not bound by its terms and conditions; he may adopt it if it is advantageous so to do and is entitled to a reasonable time to determine that question, during which time the lessor is entitled to reasonable compensation based on the net earnings of the property leased.

The receiver of a railroad which is operating another road or using the property of another concern as lessee does not become by reason of his appointment an assignee of the lease and is not bound by its conditions[81] unless the lease is subsequently adopted,[82] but he has an election subject to the direction of the court whether or not he will adopt it.[83] He is entitled, however, to a reasonable time to investigate the conditions and determine which will be more beneficial to the interests which he represents,[84] although he may disaffirm at

ers to disaffirm traffic agreement with another railroad, made within seven months after receivership in foreclosure suit, and eleven months after appointment of receivers, was held within reasonable time—General Finance Corporation v New York State Rys., supra.

72. Minn.—Seibert v Minneapolis, etc, R. Co., 59 N W 879, 58 Minn. 53.
51 C J. p 954 note 12.

73. U.S—Equitable Trust Co. v. Wabash R. Co., Mich, 244 F. 66, 156 C.C.A 494.
51 C J. p 954 note 13.

Adopted cum onere

Railroad's receivers who adopted preexisting contract between railroad and a company did so cum onere, and hence were liable to company for debts incurred prior to adoption of contract by receivers—Guaranty Trust Co of New York v. Seaboard Air Line Ry Co, D C Va., 14 F.Supp 555, affirmed in part, C C. A., Continental Casualty Co v. Powell, 83 F.2d 652 and Union Switch & Signal Co. v. Powell, 84 F 2d 25.

74. N.M.—Taylor v. Santa Fé Northwestern Ry. Co., 34 P.2d 1102, 38 N.M. 457.

75. N.M—Taylor v. Santa Fé Northwestern Ry. Co, supra.

Presumption as to receiver's liability

Where receiver denied that railroad with trackage rights over another railroad was financially unable to perform contract with burdened railroad and obtained decree requiring burdened railroad to make outlays of money and services without disclosing to court facts on which railroad's ability to carry out its part of contract could be determined, presumption obtained that receiver was willing to assume burdens of contract and to pay burdened railroad for outlays required—Taylor v Santa Fé Northwestern Ry. Co., supra.

76. U.S—Wabash, etc, R Co. v. Central Trust Co, C C.Mo, 22 F. 269.

77. U S—Wabash, etc, R. Co. v. Central Trust Co, supra.

78. Colo—Kansas Pac. R. Co. v. Bayles, 35 P. 744, 19 Colo. 348.
N.J—Lehigh Coal, etc, Co v New Jersey Cent R Co., 3 A. 134, 38 N J Eq. 175, 41 N.J.Eq 167, reversed on other grounds Vanderbilt v. Little, 12 A. 188, 43 N.J.Eq. 669.

79. U.S—South Carolina, etc., R Co. v. Carolina, etc., R. Co., S.C., 93 F 543, 35 C C.A. 423.
51 C.J. p 954 note 17.

80. Ga.—Duggan v. Dennard, 156 S E. 315, 171 Ga. 622.

81. U S.—North Kansas City Bridge & Railroad Co v. Leness, C.C.A Mo., 82 F.2d 9.
51 C.J. p 954 note 18.

82. U.S.—Gaston v. Rutland R Co., C.C.A.Vt., 35 F.2d 685, certiorari denied 50 S Ct. 245, 281 U S. 728, 74 L Ed. 1145.
51 C J p 955 note 19.

Facts held not to show adoption

(1) Failure of receivers to list leases as being subject to disaffirmance was held not to establish that they had been impliedly adopted—Texas Co. v. Chicago & A. R. Co, C C.A Ill, 126 F.2d 83.

(2) Fact that a railroad's receivers had always paid dividends on lessor's stock was held not to establish adoption of lease where dividends were paid out of rentals collected from purchaser of railroad's property, and property had been sold because not enough revenue was realized during period of receivership to pay amounts due upon railroad's mortgages—Texas Co. v. Chicago & A. R Co., supra.

83. U.S—North Kansas City Bridge & Railroad Co. v. Leness, C.C.A. Mo, 82 F 2d 9.
51 C.J p 955 note 20

Adoption held not required

Evidence was held not to require the railroad's receivers to adopt leases on the theory that the receivers were bound to preserve the property as an entirety.—Texas Co. v. Chicago & A. R. Co., C.C.A.Ill., 126 F.2d 83.

84. U.S.—Texas Co. v. Chicago & A. R. Co., supra—North Kansas City Bridge & Railroad Co. v. Leness, C.C.A.Mo., 82 F.2d 9.
51 C.J p 955 note 21.

once;[85] and the time for his rejection or adoption of the lease may be extended by the court.[86] The possession and operation of the leased road by the receiver does not make the lease binding on him if they were without any manifestation of an intention to adopt the lease, or opposition to the right of the lessor to resume possession,[87] or where the use of the leased property and payment of rentals thereon were made under court orders expressly reserving the right of the receivers to renounce the lease notwithstanding such use and payment, and expressly providing that such use and payment should not constitute an adoption of the contract.[88]

Generally it is a matter of necessity that the receiver shall take at least a temporary possession of a leased road,[89] and the lessor ordinarily is entitled to compensation for the use of the road while in the hands of the receiver,[90] and certainly where there are net earnings which may be so applied.[91] He is not entitled, however, to the rent stipulated in the lease,[92] the amount and rate of compensation in such case depending on the circumstances under which the receiver took and held possession;[93] and ordinarily the equities of the case will be satisfied by the receiver turning over to the lessor, should the lease be rejected, the net earnings by him during the period of provisional operation.[94]

If no intention was manifested to adopt the lease and no objection or obstacle interposed to the lessor's right to recover possession, the receiver will not be liable for the rents stipulated but only for the fair and reasonable value of the use of the property,[95] and in such case the court ordinarily will limit the amount to be paid according to the net earnings of the road,[96] and refuse the payment of rents where there are no earnings over and above operating expenses.[97] In any event, the lessor may at any time ask the court to direct a return of the road to it, if the receiver does not pay the stipulated rent[98] or if the lessor is not willing to have the receiver operate the road for less.[99]

A receiver will be liable according to the terms of the lease where the lessor was not at the time of the appointment entitled to demand possession, and the court did not order the possession restored but indicated by its orders that the rent would be paid,[1] or where the lessor, being entitled to demand posses-

85. U S—Westinghouse Electric, etc, Co v. Brooklyn Rapid Transit Co., D.C.N Y., 291 F. 836, modified on other grounds, C.C A, 6 F. 2d 547.

86. U.S.—Texas Co. v. Chicago & A. R Co., C.C A Ill., 126 F 2d 83.

General order as applicable to lease

(1) Where court orders extending time within which railroad's receivers could reject or affirm contracts of railroad contained no exceptions, such orders were applicable to lease covering property leased to railroad, notwithstanding lease was made subject of specific order, especially where latter order was made because of expenditures and was definite in reserving to court right thereafter to direct receivers to adopt or disaffirm lease—Texas Co. v. Chicago & A. R. Co, supra.

(2) Decree granting limited time for disavowal of contracts in general was applicable to lease covering property which had been leased to railroad notwithstanding lease was not specifically referred to in decree, since, where all of a class are referred to generally, all are included unless specifically excepted.—Texas Co. v. Chicago & A. R. Co., supra.

Right to object

Stockholders of lessor, who had profited by court orders extending time for railroad's receivers to assume or reject lease, and who, if they had so desired, could have been made parties of record to the orders, which were unappealed, could not complain that the court had granted an unreasonable length of time to receivers in which to reject contracts—Texas Co v. Chicago & A. R. Co, supra.

87. U.S—North Kansas City Bridge & Railroad Co. v. Leness, C C.A. Mo, 82 F.2d 9
51 C J. p 955 note 23.

88. U.S.—Texas Co v. Chicago & A. R Co, C.C.A.Ill, 126 F.2d 83

89. U.S—Farmers' L. & T. Co. v Northern Pac R. Co., C C Wis, 58 F. 257—Central Trust Co v Wabash, etc., R. Co, C C Ind, 46 F. 26.

90. N.C.—Charlotte, etc, R. Co v Chester, etc, R Co., 24 S E 769, 118 N C. 1078.
51 C.J. p 955 note 25.

91. U.S—Clyde v Richmond, etc., R Co., C.C S C, 63 F. 21.

92. U.S—American Brake Shoe, etc, Co. v. New York R. Co., C.C A N.Y., 282 F. 523, appeal dismissed 43 S Ct. 704, 262 U S. 736, 67 L Ed. 1207.

93. U.S.—Miltenberger v Logansport, etc, R Co, Ind., 1 S.Ct. 140, 106 U S. 286, 27 L Ed 117.
51 C J p 955 note 28.

94. U S.—Westinghouse Electric, etc, Co. v Brooklyn Rapid Transit Co., C.C.A N Y., 6 F 2d 547.
53 C.J. p 153 note 34.

95. U.S.—North Kansas City Bridge & Railroad Co. v. Leness, C C A. Mo, 82 F 2d 9—New York, etc, R. Co. v. New York, etc., R. Co, C.C. Ohio, 58 F. 268.

96. U S—Central Trust Co. v. Wabash, etc., R. Co, C C Mo, 23 F. 863.
51 C J. p 955 note 31.

97. U.S.—U. S Trust Co. v. Wabash, etc, R. Co, Mo, 14 S.Ct. 86, 150 U S. 287, 37 L Ed. 1085.
51 C.J. p 955 note 32.

98. U S—Pennsylvania Steel Co. v. New York City R Co., N.Y., 225 F. 734, 141 C C A. 6, rehearing denied 227 F 1021, 141 C C A. 671, and 228 F. 122, 142 C C.A. 528.

99. U.S—American Brake Shoe, etc, Co., v. New York R Co., C.C A.N. Y., 282 F. 523, appeal dismissed 43 S Ct. 704, 262 U S. 736, 67 L Ed. 1207.

Mortgagees of leased line belonging to system which is in hands of receiver appointed by federal court will not be prevented from intervening in such court at any time for purpose of regaining possession of mortgaged property by fact that they have brought suit in state court to foreclose and that receivers have filed general denial thereto—Seney v. Wabash Western R. Co, Mo, 14 S Ct. 94, 150 U S. 310, 37 L.Ed 1092—U. S. Trust Co. v. Wabash Western R. Co., Mo., 14 S Ct. 86, 37 L Ed. 1085.

1. U.S.—Brown v Toledo, etc., R. Co., C.C.Ill., 35 F. 444.

sion, did so and the demand was refused by the court, and the receiver allowed to retain possession,[2] although the lease was not finally adopted.[3] After default by a receiver for a lessee which entitles the lessor to reentry, further operation of the road by the receiver is deemed to be with acquiescence of the lessor and for its account and at its risk,[4] and it will be entitled to the net earnings and liable for any deficit.[5] The court may order or authorize the adoption of a lease,[6] and in such case the receiver will be bound by the covenants and conditions of the lease,[7] and liable for the rents according to the terms stipulated therein,[8] which, in such cases, become a part of the operating expenses and constitute a prior lien to that of a mortgage.[9]

Adoption of lease by purchaser from receiver. A purchaser of a railroad in receivership may adopt or reject leases of such railroad in accordance with the terms of sale as authorized by the receivership court.[10]

2. U S—Farmers' L. & T. Co. v Northern Pac. R. Co, C C Wis, 58 F. 257, distinguishing Quincy, etc, R. Co. v. Humphreys, Mo, 12 S Ct. 787, 145 U S 82, 36 L Ed. 632.

3. U S—Farmers' L & T. Co. v. Northern Pac. R. Co., C.C.Wis, 58 F 257, distinguishing Quincy, etc, R Co. v Humphreys, Mo, 12 S Ct 787, 145 U S. 82, 36 L Ed 632.

4. U S—Westinghouse Electric, etc., Co v. Brooklyn Rapid Transit Co, D C N Y., 291 F. 836, modified on other grounds, C C A., 6 F.2d 547—American Brake Shoe, etc., Co. v. New York R Co., C C A N Y, 282 F. 523, appeal dismissed 43 S Ct. 704, 262 U S 736, 67 L Ed 1207.

5. U S.—Westinghouse Electric, etc, Co v. Brooklyn Rapid Transit Co, D C N.Y., 291 F. 836, modified on other grounds, C C A., 6 F.2d 547.

6. U S.—Mercantile Trust Co. v. Farmers' L. & T. Co, Mo, 81 F. 254, 26 C.C A. 383, certiorari denied 18 S.Ct. 944, 168 U S. 710, 42 L Ed. 1213
51 C J. p 956 note 40.

7. U S—U. S. Trust Co v. Mercantile Trust Co, Cal, 88 F. 140, 31 C C A. 427.
51 C J. p 956 note 41.

8. U.S—Central Trust Co. v. Continental Trust Co, Colo, 86 F. 517, 30 C C A. 235, certiorari denied 18 S Ct 940, 171 U.S 687
51 C J p 956 note 42.

9. U.S.—Central Trust Co. v Continental Trust Co., supra—Mercantile Trust Co v. Farmers' L. & T. Co, Mo., 81 F. 254, 26 C.C.A 383, certiorari denied 18 S Ct. 944, 168 U S. 710, 42 L.Ed. 1213.
Priorities of liens, mortgages, and other claims generally see supra §§ 295–307.

10. U.S.—Texas Co v. Chicago & A. R. Co, C C A.Ill., 126 F.2d 83.

Authorization of interstate commerce commission not required

A purchaser of railroad in receivership was not bound to obtain authority from interstate commerce commission to discontinue operation of property which had been leased to railroad prior to receivership before disaffirming the leases.—Texas Co v Chicago & A R Co, supra.

Facts held not to preclude right to reject lease

(1) Fact that purchaser of railroad in receivership had expended money on the betterment of property which had been leased to railroad before receivership, was held not to preclude purchaser from disaffirming lease as against lessor and its stockholders—Texas Co v. Chicago & A R. Co, C.C.A.Ill, 126 F 2d 83

(2) Fact that holder of stock of purchaser and purchaser, as owner of majority stock of lessor, were chargeable with a fiduciary duty to exercise utmost good faith in dealings affecting lessor, did not preclude purchaser from disaffirming a lease between lessor and the railroad purchased, where acts of receivers, holder of stock, and purchaser were in accordance with decrees of receivership court which had knowledge of all facts, and lessor had delayed several years before objecting to procedure concerning lease—Texas Co. v. Chicago & A. R Co, supra.

Adoption held not shown

(1) Purchaser's application to interstate commerce commission for authority to purchase properties of railroad in receivership and proceedings before commission regarding such application were held not to constitute an "adoption" by purchaser of a lease to the railroad which was in receivership.—Texas Co. v. Chicago & A. R. Co., supra.

(2) Purchaser of railroad in receivership was held not to have impliedly adopted leases to railroad by its acts in operating leased property after its purchase from receivers, with payment of rent pursuant to leases and without renunciation or notice thereof, in view of orders of receivership court with respect to extensions of time within which receivers might affirm or reject contracts of railroad.—Texas Co. v. Chicago & A. R. Co., supra.

Estoppel to deny adoption held not shown

Purchaser of railroad in receivership was held not estopped to deny adoption of leases by its operation of the leased property and full payment of rent pursuant to the leases, as against stockholders of lessor, where stockholders had not been misled and had not altered their positions to their detriment as result of purchaser's acts—Texas Co. v. Chicago & A. R Co., supra.

Amount payable

(1) Where receivers of lessee railroad and purchaser of railroad at foreclosure sale operated properties of lessor railroad for eighteen years and paid dividends on stock of lessor railroad as provided in lease before electing not to assume lease, purchaser was estopped to ask an accounting for difference between net earnings of properties operated and amount paid under lease and from denying liability for unpaid amounts which accrued under lease before election—James Blackstone Memorial Library Ass'n v. Alton R. Co, 43 N E 2d 695, 316 Ill App. 70.

(2) Where purchaser of lessee railroad delayed payment of dividends to stockholders of lessor railroad under terms of lease of railroad property until after stockholders of lessor railroad instituted legal proceedings, in absence of showing that full amount sued for was tendered in full payment or accepted conditioned on release of accrued interest and costs, payment of full amount sued for did not relieve purchasing railroad of obligation to pay interest. —James Blackstone Memorial Library Ass'n v. Alton R Co., supra.

Persons entitled to rent payments

In action to recover dividends payable to stockholders of lessor railroad under terms of lease, which accrued before purchaser elected not to assume lease, record of stock ledger and showing that plaintiffs had received previous dividend payments and admission by purchaser that all dividends actually paid were paid to stockholders of record of lessor railroad, established prima facie that plaintiffs were stockholders of record and entitled to dividends—James Blackstone Memorial Library Ass'n v. Alton R. Co., supra.

c. Leases and Conditional Sales of Rolling Stock

The receiver of a railroad is not an assignee, or bound by the terms, of car-trust leases, conditional sales contracts, and leases with provisions for final purchase of rolling stock unless he subsequently adopts them.

The general rules stated supra subdivisions a, b of this section apply to what are termed car-trust leases,[11] conditional sales contracts,[12] and leases with provisions for final purchase of the property by the railroad,[13] under which rolling stock is delivered to a railroad company. The receiver is not an assignee of such contract or lease and is not bound by its terms—[14] although the company may still be liable thereunder—[15] unless he subsequently adopts it,[16] and he is entitled to a reasonable time in which to decide whether or not it should be adopted.[17]

The owner of the equipment is, however, ordinarily entitled to demand its possession,[18] and to compensation for its use while in the hands of the receiver,[19] which ordinarily is determined not according to the terms of the lease, but according to the fair and reasonable value of such use.[20] The court may authorize the adoption of the lease or contract,[21] and, if adopted, the receiver is bound by its covenants and conditions,[22] and liable for the rent stipulated therein,[23] which becomes a part of the operating expenses and a preferred claim superior to the lien of a mortgage.[24]

§ 381. Operation of Road under Receivership

As a general rule a railroad in the hands of a receiver should be kept up and maintained as a going concern, but he should not continue to operate it where its continued operation will result in the exhaustion of its assets. The cost of operation ordinarily should be paid out of income.

Owing to the peculiar nature of a railroad, both the public convenience and the private interests in the property frequently demand, that, when in the hands of a receiver, it shall be kept up and maintained as a going concern,[25] and in determining whether the continuing operation of a railroad under receivership should be ordered considerations of public interest are controlling on the court.[26] Railroad receivers, however, are generally subject to the rule that a receiver should not continue the operation of a business at a loss where continued operation will result in exhaustion of its assets.[27] Hence, a railroad in the hands of a receiver should not be compelled to operate at a continuing loss because of lack of traffic or the dilapidated condition of its rolling stock and roadbed unless cessation of its operation is contrary to its charter,[28] nor should operation be authorized when the chance of success is nothing more than a gamble.[29]

In the operation of a railroad by a receiver much must be left to the discretion of the court which appointed him where it knows not only what pro-

11. U S—Platt v. Philadelphia, etc., R. Co., Pa., 84 F. 535, 28 C C A. 488.

12. Va.—Fidelity Ins., etc., Co. v Shenandoah Valley R. Co., 9 S E 759, 86 Va. 1, 19 Am S R 858.
51 C J. p 956 note 46

13. Ga.—Lane v Macon, etc., R. Co., 24 S E. 157, 96 Ga 630.

14. U S.—Sunflower Oil Co. v. Wilson, Miss., 12 S Ct. 235, 142 U S 313, 35 L Ed. 1025.
51 C J. p 956 note 49.

15. Tenn.—Southern Iron Car Line v. East Tennessee, etc., R. Co., Ch. A., 42 S W 529.
51 C.J. p 956 note 50.

16. Ala.—Mercantile Trust, etc., Co. v Southern Iron Car Line Co, 21 So. 373, 113 Ala. 543.
51 C J. p 956 note 51.

17. U S—Sunflower Oil Co. v. Wilson, Miss., 12 S Ct 235, 142 U S 313, 35 L Ed 1025—Platt v. Philadelphia, etc, R Co., Pa., 84 F. 535, 28 C C A. 488.

18. Ga.—Lane v. Macon, etc., R. Co., 24 S.E. 157, 96 Ga. 630.
51 C.J. p 956 note 53

19. Ga.—Lane v. Macon, etc., R. Co, supra.
51 C.J. p 956 note 54.

20. U S—Farmers' L & T. Co. v Chicago, etc, R Co., C.C Ind, 42 F 6.
51 C J. p 956 note 55.

21. Ala.—Mercantile Trust, etc, Co v. Southern Iron Car Line, 21 So 373, 113 Ala 543

22. U S—Easton v. Houston, etc, R Co, C C Tex, 38 F 784.
51 C J. p 957 note 57

23. Ala.—Mercantile Trust, etc, Co v. Southern Iron Car Line, 21 So. 373, 113 Ala 543.
51 C.J p 957 note 58

24. Ala.—Mercantile Trust, etc, Co v. Southern Iron Car Line, supra.

25. Iowa.—Continental, etc, Bank v Muscatine, etc, R Co, 210 N. W. 787, 202 Iowa 579.
51 C.J. p 957 note 60—53 C J. p 166 note 72.

To protect all interests

A receiver's operation of a railroad is not in the interest of creditors and stockholders alone, but equally for the purpose of attempting to preserve the service to the public.—Reconstruction Finance Corp. v. Missouri-Kansas-Texas R. Co., C.C.A.Ark., 122 F 2d 326.

Customary situation

Except in cases where it is temporarily financially embarrassed and the temporary stay of creditor pressure is essential to its preservation, the power to appoint operating receivers is most commonly, if not exclusively, exercised in cases of financial embarrassment or impending insolvency of railroads.—Sinclair v Moore Cent. R. Co, 45 S.E 2d 555, 228 N C 389

26. N C—Sinclair v. Moore Cent. R. Co, supra.

27. Iowa.—Continental & Commercial Trust & Savings Bank v. Muscatine, B. & S. R Co, 210 N W 787, 202 Iowa 579.
N M.—Taylor v. Santa Fe Northwestern Ry. Co., 34 P.2d 1102, 38 N.M. 457.
51 C.J. p 957 note 61.

Before decreeing operation of a railroad by a receiver, the court should ascertain whether such operation will pay expenses and will be in the interest of conservation rather than conducive to dissipation of the property.—Sinclair v. Moore Cent. R. Co, 45 S E 2d 555, 228 N.C 389.

28. N.C.—Sinclair v. Moore Cent. R. Co, supra.

29. N.C.—Sinclair v. Moore Cent. R. Co., supra.

ceedings have been had in court, but also what has been done outside of court in the management, maintenance, and operation of the property.[30] Although ordinarily the court should not undertake anything in the nature of a new and distinct enterprise,[31] it is frequently proper for it to authorize something more than the mere operation of the property placed in the hands of the receiver, not as a new enterprise, but as a means of better preserving the property or operating it more profitably, such as the leasing of another road,[32] or even further works of construction.[33] The cost of the operation of a railroad by a receiver ordinarily should be paid out of its income,[34] and should be whenever the net earnings of the road are sufficient,[35] and under some statutes the income of the railroad should be applied to the payment of the incidental expenses necessary to the carrying on of its business.[36]

Where receivers of a lessor railroad operate a lessee railroad under orders which provide for their prospective modification on notice, the bondholders of the lessee railroad have been held not entitled to have the orders modified retrospectively,[37] and the prospective modification of the orders has been held to be within the discretion of the court.[38]

Differences between receiver and his employees. The court may require a receiver to make such contracts or arrangements with respect to rates of wages and conditions of employment as it may deem proper,[39] at least in the absence of a statute providing for the settlement of labor disputes by some other tribunal or method,[40] but statutes must be complied with which preclude wage cuts or changes until after a specified board or tribunal has mediated the matter.[41] A federal statute imposing restrictions

30. U.S.—Smith v. Sprague, C.C.A. Minn., 143 F.2d 647

31. U.S.—Mercantile Trust Co. v. Missouri, etc., R. Co., C.C.Kan., 41 F. 8.

32. N.Y.—Central Trust Co. v. Pittsburg, etc., R. Co., 101 N.Y.S. 837, 52 Misc. 195

51 C.J. p. 957 note 69.

33. Va.—Gibert v. Washington City, etc., R. Co., 33 Gratt. 586, 74 Va. 586

51 C.J. p. 957 note 70.

Needed additions

The duty of a receiver is not limited to the original road, but may justify building a needed addition.—Weaver v. Pacific Improvement Co., 191 N.Y.S. 3, 541, 198 App.Div. 825, affirmed 138 N.E. 42, 234 N.Y. 418, motion denied 142 N.E. 261, 236 N.Y. 506

34. Ala.—Mayer v. Johnston, 53 Ala. 237.

35. U.S.—Taylor v. Philadelphia, etc., R. Co., C.C.Pa., 9 F. 1.

51 C.J. p. 957 note 63.

36. Ga.—Standard Steel Works Co. v. Williams, 116 S.E. 636, 155 Ga. 177.

Business and property of railroad not distinguished

The statute does not distinguish between the business of a railroad corporation and the property or the railroad itself, but it applies to a receivership of the property or of the railroad itself.—Standard Steel Works Co. v. Williams, supra.

37. U.S.—Godfrey v. Powell, C.C.A. Fla., 150 F.2d 486, certiorari denied 66 S.Ct. 272, two cases, 326 U.S. 779, 90 L.Ed. 471.

38. U.S.—Godfrey v. Powell, supra.

Modification held properly refused

Where bondholders of lessee railroad, which had been operated by lessor railroad's receivers under an operating agreement, had received benefit of lessee railroad's earnings by increase in upset price stipulated on mortgage foreclosure sale of lessee railroad's properties, there was no abuse of discretion in denying bondholders' request, based on existence of earnings from operations of lessee railroad, that operating orders be modified.—Godfrey v. Powell, supra.

Modification after sale of lessee road

Where receivers of lessor railroad operated lessee railroad under operating agreement and probable future profits from operation of lessee railroad's property had been considered in fixing upset price on mortgage foreclosure sale of lessee railroad's assets, and order denying motion of bondholders of lessee for modification of operating agreement had been affirmed, the matter was closed up to date of sale, but motion to modify filed after confirmation of sale was not prejudiced by adverse judgment on prior motion.—Godfrey v. Powell, C.C.A. Fla., 155 F.2d 51.

Persons entitled to ask modification

Where receivers of lessor railroad operated lessee railroad under operating agreement, after confirmation of mortgage foreclosure sale of assets of lessee railroad, bondholders of lessee railroad were not entitled to prospective modification of operating agreement so as to enable them to share equitably in earnings, since after the sale and its confirmation the bondholders had no interest in lessee's properties and their operation, but bondholders' rights were altogether against proceeds of sale.—Godfrey v. Powell, C.C.A. Fla., 155 F.2d 51.

39. Ga.—Coffee v. Gray, 122 S.E. 687, 158 Ga. 218

51 C.J. p. 958 note 74.

Restoration of salary cuts

Where the efforts of certain employees of a railroad operating receivership had brought about a financial condition which made it possible for the court to restore salary cuts to such employees, on the basis of equitable grounds, court's refusal to order restoration of salary cut as to an employee who had died prior to the improved financial condition of railroad was held not an abuse of court's discretion.—Smith v. Sprague, C.C.A. Minn., 143 F.2d 647.

40. Ga.—Coffee v. Gray, 122 S.E. 687, 158 Ga. 218

51 C.J. p. 958 note 75

41. U.S.—Grand International Brotherhood of Locomotive Engineers v. Morphy, C.C.A. Vt., 109 F.2d 576, certiorari denied Morphy v. Grand International Brotherhood of Locomotive Engineers, 60 S.Ct. 1078, 310 U.S. 635, 84 L.Ed. 1404

Necessity for federal receivers to comply with state statutes see infra § 382

Validity of statute

Railway Labor Act construed as precluding receivership judge from ordering carrier's receiver to reduce wages until National Mediation Board had given notice that its efforts at mediation had failed is not unconstitutional.—Grand International Brotherhood of Locomotive Engineers v. Morphy, C.C.A. Vt., 109 F.2d 576, certiorari denied Morphy v. Grand International Brotherhood of Locomotive Engineers, 60 S.Ct. 1078, 310 U.S. 635, 84 L.Ed. 1404.

Duty of judge

Although a receivership judge may have the duty of operating a railroad property in his custody, he is not thereby freed from other responsibilities that devolve upon him as a federal court sitting in equity.—Grand International Brotherhood

on any change in agreement affecting wages applies to interstate railroads being operated by a receiver [42]

It has been held under federal legislation providing that no reduction of wages shall be made without authority of the court, and after twenty days notice to the employees, that all persons engaged in operating railroad trains in train service on interstate railroads at the time the receiver takes charge are entitled to such notice,[43] but that no other employees are within its scope.[44] An order for a reduction of wages made without the notice required by such statute is invalid,[45] and if a receiver announces a reduction on the authority of such order the employees may either continue to serve and demand compensation at the former wage[46] or treat the announcement as a breach of the relation and terminate their service;[47] but if they strike they terminate their standing, as employees and lose their right to object.[48] Such statute does not, however, preclude a receiver from making voluntary contracts with the old employees or with new ones for a smaller wage than that theretofore paid.[49] A receiver by adopting a wage scale equivalent to that recommended by the federal labor board does not thereby impliedly contract to continue it until the labor board shall make a different recommendation.[50]

Power of administrative body to control abandonment. Under some statutes the power to order or permit the receiver of a railroad to abandon its operation wholly[51] or in part[52] is vested exclusively in an administrative commission or body other than the court which appointed the receiver.

Sale on condition requiring operation It has been held that the sale of a railroad in the hands of a receiver cannot be required to be on condition that it continue to be operated.[53]

§ 382. —— Powers and Duties of Receiver

a. In general
b. To enter into contracts
c. To make or accept lease

a. In General

A receiver of a railroad has such powers, and only such, as are validly conferred on him by the court appointing him or are prescribed by statute; generally he possesses considerable discretionary power with respect to the ordinary affairs of the road and its operation.

The authority of the receiver of a railroad is limited to such powers as the court appointing him is authorized to confer,[54] and which are in fact

of Locomotive Engineers v. Morphy, C C A.Vt, 109 F.2d 576, certiorari denied Morphy v. Grand International Brotherhood of Locomotive Engineers, 60 S Ct. 1078, 310 U S 635, 84 L Ed 1404.

Pending jurisdiction of board

Under statute precluding carrier from imposing wage cut until after National Mediation Board has given notice that its mediatory efforts have failed, railroad is without power to impose wage cut, and receivership judge is without power to order carrier's receiver to do so, as long as board pretends to retain jurisdiction and refuses to give notice that its efforts have failed—Grand International Brotherhood of Locomotive Engineers v. Morphy, C C.A.Vt., 109 F 2d 576, certiorari denied Morphy v. Grand International Brotherhood of Locomotive Engineers, 60 S Ct. 1078, 310 U.S 635, 84 L Ed. 1404.

Construction of board's decision

Even if letter of National Mediation Board was ambiguous as to whether board had decided to retain jurisdiction or was giving notice of failure of mediation, receivership court to which carrier's receiver applied for authority to reduce wages was not authorized to construe the letter, since the ambiguity was one which could readily have been dissipated by the board itself.—Grand International Brotherhood of Locomotive Engineers v. Morphy, C.C.A. Vt, 109 F 2d 576, certiorari denied Morphy v. Grand International Brotherhood of Locomotive Engineers, 60 S Ct. 1078, 310 U S. 635, 84 L Ed. 1404.

42. U S—Burke v Morphy, C C A. Vt., 109 F 2d 572, certiorari denied Morphy v Burke, 60 S.Ct 1078, 310 U S. 635, 84 L Ed. 1404.

Order withholding proportion of wages

(1) A court order directing the receiver of an interstate railroad to withhold a specified per cent of employees' wages, the amounts withheld to constitute only general claims against the receivership, "affected" wages so as to require compliance with Railway Labor Act imposing restrictions on change in agreement affecting wages; and, since the order was in substance a wage cut, it was unauthorized where Railway Labor Act had not been complied with.—Burke v. Morphy, C. C A.Vt, 109 F.2d 572, certiorari denied Morphy v. Burke, 60 S Ct. 1078, 310 U S. 635, 84 L Ed. 1404.

(2) The action of the receiver, under such an order, is also invalid, and claims for wages withheld like other claims for receivership expenses have precedence over mortgage bonds of the railroad and are required to be paid accordingly—Burke v. Morphy, C.C.A Vt., 109 F 2d 572, certiorari denied Morphy v. Burke, 60 S Ct. 1078, 310 U.S. 635, 84 L Ed 1404.

43. U.S—Birmingham Trust, etc, Co v. Atlanta, etc, R. Co, D.C Ga, 271 F 731

44. U S—Birmingham Trust, etc, Co v. Atlanta, etc, R. Co., supra.

45. U S—Birmingham Trust, etc, Co. v. Atlanta, etc, R. Co., supra

46. U S—Birmingham Trust, etc, Co v. Atlanta, etc., R Co, supra.

47. U S—Birmingham Trust, etc, Co v. Atlanta, etc, R. Co, D C Ga, 271 F. 743.

48. U S—Birmingham Trust, etc, Co v. Atlanta, etc., R Co, D C Ga, 271 F. 743

49. U.S—Birmingham Trust, etc, Co. v. Atlanta, etc, R Co, D C Ga, 271 F 731.

50. Colo—Stone v. Denver, etc, R. Co., 241 P. 532, 78 Colo. 323.

51. Colo.—People v. Colorado Title, etc., Co., 178 P. 6, 65 Colo. 472.
51 C.J. p 958 notes 77, 79.

52. U.S.—Pittsburgh, etc., Coal Co v. Delaware, etc., R. Co., D C.N.Y, 289 F. 133.
51 C.J. p 958 note 78

53. Ind—Union Trust Co. of Indianapolis v. Curtis, 116 N.E. 916, 186 Ind. 516.

54. Tex—International, etc, R. Co. v. Wentworth, 27 S.W. 680, 8 Tex. Civ.App. 5.

conferred by the order appointing him,[55] or such as may be reasonably implied therefrom[56] or such as are prescribed by statute where his powers are so defined,[57] and he cannot, without the direction of the court, incur expenses on account of the property in his hands beyond what are necessary for its preservation, use, and operation as contemplated by his appointment.[58] Generally speaking, the court may order or authorize the receiver to do any acts with respect to the preservation and operation of the road which are within the corporate powers of the company;[59] but the receiver cannot exercise, nor can the court authorize him to exercise, any powers or franchises beyond those of the company to whose possession he succeeds.[60]

A receiver of a railroad, although the extent of his authority independently of any express previous order or authority from the court cannot well be precisely defined,[61] usually is clothed with considerable discretionary power with respect to the ordinary affairs of the road and its operation and is not obliged first to submit all matters to the court,[62] and, where he conforms to the established usages and customs with respect to the operation of railroads,[63] the court will subsequently confirm such of his acts as it would have authorized in the first instance had authority been asked.[64]

The public policy of the jurisdiction in which the railroad is located controls operation of it by a receiver.[65] He is subject, in the same way as the company itself was prior to the receivership, to the provisions of a public utilities statute[66] and to statutes regulating the use and operation of railroads;[67] and federal receivers, especially in view of a federal statute so providing, must operate a railroad according to the laws of the state in which the railroad is situated[68] unless the state statute expressly excludes them from its application.[69] Receivers have been held subject to the penal pro-

55. Mo.—Wheelock v. Cantley, 50 S.W.2d 731, 227 Mo.App. 102.
51 C.J. p. 958 note 83.

56. Okl.—Mills v. Daubenheyer, 222 P. 523, 96 Okl. 268.

57. Tex.—International, etc., R. Co. v. Wentworth, 27 S.W. 680, 8 Tex.Civ.App. 5.

Maturity date of receivership certificates

Under the statute permitting courts to authorize operating railroad receivers to issue certificates having maturity of no more than two years, an order authorizing certificates of a fifteen year maturity is error.—Sinclair v. Moore Cent. R. Co., 45 S.E.2d 555, 228 N.C. 389.

58. U.S.—Cowdrey v. Galveston, etc., R. Co., Tex., 93 U.S. 352, 23 L.Ed. 950.
51 C.J. p. 958 note 87.

59. Ill.—Morrison v. Forman, 53 N.E. 73, 177 Ill. 427.
51 C.J. p. 958 note 71.

Set-off

Order authorizing railroad receivers to collect all outstanding accounts did not defeat right of railway having mutual interline traffic accounts with road in receivership to set off mutual accounts in determining indebtedness of latter road to road in receivership as at beginning of receivership.—Bankers' Trust Co. v. Florida East Coast Ry. Co., D.C.Fla., 9 F.Supp. 258.

60. Pa.—Lewis v. Germantown, etc., R. Co., 16 Phila. 608.
Tenn.—Petition of Walker, 209 S.W. 739, 141 Tenn. 281.

Proceedings before commission

In proceedings instituted by others before the public service commission to obtain a revision of tolls for travel over a bridge of a railroad in receivership the receiver has the rights of the railway.—Lorenz v. Stearns, 161 A. 205, 85 N.H. 494, appeal dismissed and certiorari denied Stearns v. Lorenz, 53 S.Ct. 23, 287 U.S. 565, 77 L.Ed. 498.

61. U.S.—South Carolina, etc., R. Co. v. Carolina, etc., R. Co., S.C., 93 F. 543, 35 C.C.A. 423.

62. Ill.—Devine v. Delano, 111 N.E. 742, 272 Ill. 166, Ann.Cas.1918A 689.
51 C.J. p. 958 note 89
Right of receivers to accept or reject workmen's compensation act see the C.J.S. title Workmen's Compensation Acts § 122, also 71 C.J. p. 520 note 75.

Discretionary powers of receivers

(1) Railroad receivers were held vested with authority to direct manner of remittances of money received by railroad officers along line to receivers as in their discretion was deemed best.—Wheelock v. Cantley, 50 S.W.2d 731, 227 Mo.App. 102.

(2) Other powers held discretionary see 51 C.J. p. 958 note 89 [a].

63. U.S.—Central Trust Co. v. Colorado Midland R. Co., C.C.Colo., 89 F. 560, affirmed 97 F. 239, 38 C.C.A. 143, certiorari denied 20 S.Ct. 1025, 176 U.S. 683, 44 L.Ed. 638.
51 C.J. p. 958 note 90.

64. U.S.—Central Trust Co. v. Colorado Midland R. Co., supra—Phinizy v. Augusta, etc., R. Co., C.C.S.C., 62 F. 771.

65. U.S.—Chapman v. St. Louis & S. W. Ry. Co., D.C.Tex., 71 F.Supp. 1017.

66. Colo.—People v. Colorado Title, etc., Co., 178 P. 6, 65 Colo. 472

67. Ark.—Bush v. State, 194 S.W. 857, 128 Ark. 448
51 C.J. p. 959 note 97.

68. U.S.—Mercantile Trust Co. v. Tennessee Cent. R. Co., D.C.Tenn., 286 F. 425
Ill.—Brotherhood of Locomotive Firemen and Enginemen v. Mobile & O. R. Co., 199 N.E. 283, 362 Ill. 122.
51 C.J. p. 959 note 99.

Particular statutes

(1) State statutes relating to speed of trains, abandonment of lines, liability for negligence, the medium in which wages are paid, and other similar police regulations, must be obeyed by receivers of a railroad.—Webster & Atlas Nat. Bank of Boston v. Palmer, C.C.A.Conn., 111 F.2d 215, reversed on other grounds Palmer v. Webster & Atlas Nat. Bank of Boston, 61 S.Ct. 542, 312 U.S. 156, 85 L.Ed. 642, rehearing denied 61 S.Ct. 728, 312 U.S. 714, 85 L.Ed. 1145.

(2) Where state statutes require railroads to pay wages weekly and in lawful money, an order of receivership court directing interstate railroad receiver to withhold specified per cent of employees' wages, the amounts withheld to constitute only general claims against the receivership, was erroneous, since it violated the statutes.—Burke v. Morphy, C.C.A.Vt., 109 F.2d 572, certiorari denied Morphy v. Burke, 60 S.Ct. 1078, 310 U.S. 635, 84 L.Ed. 1404.

69. U.S.—Mercantile Trust Co. v. Tennessee Cent. R. Co., D.C.Tenn., 286 F. 425.

visions of statutes[70] except, it has been held, where the penalty is by the terms of the statute imposed on the corporation.[71]

Discrimination as to rates and facilities. A receiver has no right unjustly to discriminate as to rates and facilities between different connecting carriers[72] or between different shippers,[73] and the court may make such orders as are necessary to compel the receiver properly to perform his duties as a common carrier and to prevent discrimination,[74] and may compel a receiver to repay amounts exacted by unjust discrimination.[75]

Creation of indebtedness. The court, when necessary, may authorize a receiver to incur an indebtedness for purposes essential to the operation of the railroad,[76] such as necessary repairs[77] or the purchase of rolling stock.[78]

Lien. Indebtedness incurred by the receiver of a railroad in its operation is a lien against the property of the railroad,[79] and it has been held that he may make such indebtedness a first lien on the property.[80] Where expenditures for additions and betterments are made to a lessee railroad by the receiver of the lessor railroad with funds of the receivership, with the intention of claiming a lien for them, it is proper for him to claim such a lien and it should be allowed.[81]

Eminent domain. A receiver cannot exercise the power of eminent domain in behalf of a railroad without authority from the court,[82] and it has been doubted whether the court may authorize a receiver to do so,[83] but it has been held that the court may do so when necessary to complete an undertaking previously commenced by the company and which is essential to the profitable operation of the road.[84]

Authority of receiver's agent. Where the receiver does, as he may and in many cases must, act through an agent,[85] it will be presumed that an agent occupying a certain position under a receiver is invested with the same authority as though he were in the employ of the railroad company.[86]

b. To Enter into Contracts

The court may authorize a receiver of a railroad to make contracts necessary for the preservation and operation of the road which are within the corporate powers of the company, and ordinarily he is invested with a broad discretion as to the making of such contracts.

The court may authorize a receiver to make contracts necessary for the preservation and op-

70. U.S.—U. S. v. Nixon, Mo., 35 S Ct 49, 235 U.S 231, 59 L Ed 207.
Tex.—International, etc., R Co v Dawson, 232 S W. 279, 111 Tex. 247, 15 A.L.R. 1367.

71. Mich.—Robinson v. Harmon, 122 N W. 106, 157 Mich 276.

72. U S.—Cutting v. Florida R., etc., Co., C C Fla., 43 F 747.
51 C J p 959 note 3.

73. U S.—McCoy v Marietta, etc., R. Co., C.C.Ohio, 15 F.Cas No.8,730b
Ohio.—Cincinnati Stock-Yards Co v. United R. Stock-Yards Co., 8 Ohio Dec., Reprint, 395, 7 Cinc L Bul 295

74. U S.—Missouri Pac. R. Co. v. Texas, etc., R. Co., C C La., 30 F. 2.
51 C J. p 959 note 5.

75. U.S.—Cutting v. Florida, etc., R. Co., C.C Fla., 43 F 747.

76. U S.—Union Trust Co v. Illinois Midland R Co., Ill., 6 S.Ct. 809, 117 U S. 434, 29 L Ed. 963.
51 C.J. p 957 note 64.

77. U S.—Central Bank, etc., Co. v. Greenville, etc., R. Co., D C.S.C., 248 F 350.
N.J.—Hoover v. Montclair, etc., R. Co., 29 N J Eq. 4.

78. N Y.—Vilas v. Page, 13 N E. 743, 106 N Y. 439.

79. U S.—In re Waco, B., T. & S Ry. Co., D.C.Tex., 74 F.Supp. 691, affirmed, C C A., 165 F.2d 788, rehearing denied 166 F.2d 419.

80. N Y.—Knickerbocker Trust Co v Oneonta, etc., R. Co., 94 N.E 871, 201 N Y 379.
51 C J p 957 note 67.

81. U.S.—Godfrey v. Powell, C C A. Fla., 150 F.2d 486, certiorari denied 66 S Ct 272, two cases, 326 U S. 779, 90 L Ed 471

Increase of betterment claims

Increase of betterment claims of receivers against lessee railroad, which increase was a lien against proceeds of sale of properties of lessee railroad, did not harm bondholders of lessee railroad where, by terms of sale, increase was to be added to upset price, which purchaser bid at sale.—Godfrey v Powell, C. C.A.Fla., 155 F.2d 51.

Improper basis of claim

Lien awarded receivers of railroad, operating lessee railroad under an operating agreement, on lessee railroad's properties to secure repayment of expenditures for betterments and denial of request for modification of operating agreement could not be justified merely because of addition to upset price stipulated on mortgage foreclosure sale of lessee railroad's properties of an amount equal to allowances for betterments plus an amount on account of earnings of lessee railroad on which request for modification of operating agreement was based.—Godfrey v. Powell, C.C.A.Fla., 150 F 2d 486, certiorari denied 66 S Ct. 272, two cases, 326 U S 779, 90 L Ed 471.

Evidence

Evidence was held insufficient to establish that claim of lien was made merely to defeat claims of some of bondholders of lessee railroad to greater share of proceeds from mortgage foreclosure sale of lessee railroad's properties or that improvements were made out of earnings from lessee railroad's operation.—Godfrey v. Powell, C C A Fla., 150 F 2d 486, certiorari denied 66 S Ct 272, two cases, 326 U S. 779, 90 L Ed 471.

82. Minn.—Minneapolis Western R. Co. v. Minneapolis, etc., R. Co., 63 N.W. 1035, 61 Minn. 502
Exercise of power by railroads see Eminent Domain §§ 24, 36–43.

83. Minn.—Minneapolis Western R Co v. Minneapolis, etc., R. Co., supra.

84. Ill.—Morrison v. Forman, 53 N E. 73, 177 Ill. 427.

85. U S.—South Carolina, etc., R. Co v. Carolina, etc., R. Co., S.C., 93 F. 543, 35 C C A. 423.
Colo.—Kansas Pac. R. Co. v. Bayles, 35 P. 744, 19 Colo. 348.

86. Colo.—Kansas Pac. R. Co. v. Bayles, supra.
51 C.J p 959 note 11.

eration of the road which are within the corporate powers of the company,[87] and ordinarily the receiver is invested with a broad discretion as to the making of such contracts[88] and is not required in all cases first to procure authority from the court.[89] While the court clearly has the right to review the action of the receiver and disapprove and disallow any contract which does not meet with its approval,[90] ordinarily it will recognize and enforce all contracts made in good faith and for a proper purpose, although not previously authorized,[91] even where the contract may seem to be improvident if it has been fully performed in good faith and without notice on the part of the other party as to its improvident character.[92]

The court will decline to sanction the exercise of discretion on the part of receivers in respect of large outlays[93] or contracts extending beyond the receivership,[94] where such contracts are contemplated, previous authority of the court should be sought.[95] Where the contract has not been performed and the court refuses to order it carried out because of its improvident character, it may allow the other party compensation for expenditures made in good faith preparatory to carrying out the contract on its part.[96]

Receiver may contract through agents,[97] but he cannot delegate to an agent any greater powers than he himself possesses.[98]

c. To Make or Accept Leases

The court, in a proper case, may authorize the receiver of a railroad to lease and operate another road, but the receiver has no authority to make a lease without the approval of the court.

The court may, whenever essential to a more profitable operation of the road in the hands of the receiver, authorize the receiver to lease and operate another road;[99] but a receiver has no authority to make any lease without the approval of the court.[1] A statutory receiver appointed by the governor of the state under a statute granting aid to the company and providing for the appointment of a receiver to operate the road in case of a default in the payment on the part of the railroad company cannot, in the absence of statutory authority, lease the road to another company,[2] even with the consent and approval of the governor.[3]

§ 383. —— Liability of Receiver in General

As a general rule the liability of a receiver of a railroad is official rather than personal.

In the absence of any personal or individual misconduct,[4] or assumption of liability on the part of the receiver,[5] and where he does not assume to act otherwise than as an officer of the court in the operation of the road,[6] his liability is official rather than personal,[7] and an action against the receiver as such is in effect a proceeding in rem, affecting only the fund or property held by him by virtue of his office.[8]

After confirmation of a sale of the property in his hands, if the receiver retains possession thereof, not as an officer of the court, but in his indi-

87. U.S.—Piedmont Corp v. Gainesville, etc, R Co., D C Ga., 30 F.2d 525.
51 C J. p 959 note 13.

88. U.S.—Northern Pac R. Co. v. American Trading Co, N.Y., 25 S. Ct 84, 195 U S. 439, 49 L Ed. 269.
51 C J. p 959 note 14.

89. N.J.—Vanderbilt v. Central R. Co, 12 A. 188, 43 N.J Eq. 669.
51 C J. p 959 note 15.

90. U S.—South Carolina v. Port Royal, etc., R. Co., C.C.S.C., 89 F. 565.

91. U S.—South Carolina, etc, R Co. v. Carolina, etc, R. Co, S.C., 93 F. 543, 35 C C.A 423.
51 C.J. p 960 note 17.

92. N J.—Vanderbilt v. Central R. Co, 12 A. 188, 43 N J Eq. 669.

93. U S.—Chicago Deposit Vault Co v. McNulta, Ill., 14 S Ct 915, 153 U S 554, 38 L Ed. 819—South Carolina, etc., R. Co. v. Carolina, etc, R. Co., S C., 93 F. 543, 35 C C.A. 423.

94. U.S.—Chicago Deposit Vault Co. v. McNulta, Ill., 14 S Ct. 915, 153 U S 554, 38 L Ed. 819—South Carolina, etc, R. Co v. Carolina, etc., R. Co., S C, 93 F. 543, 35 C C.A. 423.

95. U.S.—South Carolina, etc., R. Co v. Carolina, etc., R. Co., supra.

96. N.J.—Vanderbilt v. Central R. Co., 12 A. 188, 43 N.J Eq 669.

97. U S.—Northern Pac. R. Co. v. American Trading Co, N Y, 25 S. Ct. 84, 195 U S 439, 49 L.Ed 269.
Colo.—Bayles v. Kansas Pac. R Co, 22 P 341, 13 Colo. 181, 5 L R A. 480

98. Tex.—International, etc, R Co. v. Wentworth, 27 S W. 680, 8 Tex. Civ.App. 65.

99. U.S.—Mercantile Trust Co. v. Missouri, etc., R. Co., C.C.Kan., 41 F. 8.
Va.—Gilbert v. Washington City, etc, R. Co., 33 Gratt. 586, 74 Va. 586.

1. U S.—Chicago Deposit Vault Co v. McNulta, Ill., 14 S.Ct. 915, 153 U.S 554, 38 L Ed. 819.
51 C.J. p 960 note 28.

2. Tenn.—Briggs v. Clawson Bros., 8 Tenn App. 251.
51 C.J. p 960 note 29.

3. Tenn.—State v. McMinnville, etc., R Co., 6 Lea 369.

4. U S.—Rosso v. Freeman, D C. Mass, 30 F.2d 826.
51 C.J. p 960 note 32.

5. N J.—Vanderbilt v. Central R. Co, 12 A. 188, 43 N.J Eq 669
51 C J p 960 note 33.

6. N Y.—Cardot v. Barney, 63 N.Y 281, 20 Am R 533.
51 C J. p 960 note 34.

7. U S.—Texas & P. Ry. Co. v. Cox, Tex., 12 S.Ct 905, 145 U.S. 593, 36 L Ed. 829.
Mass.—Archambeau v. Platt, 53 N E. 816, 173 Mass. 249.
51 C.J. p 960 note 35.
Liability is against the receivership.—Cline v. Powell, 192 So 628, 141 Fla. 119.

8. Ill.—McNulta v. Lockridge, 27 N E. 452, 137 Ill. 270, 31 Am.S.R. 362
51 C.J. p 960 note 36.

vidual capacity, he is personally liable for any injuries occurring in the operation of the road during such period and prior to his delivery of the property to the purchaser.[9]

Actions against receivers. General rules apply to actions against receivers of railroads.[10] In an action against a person as receiver of a railroad, his appointment must be proved;[11] but, where it is shown that he was receiver of the road, it will be presumed that he was discharging the duties imposed on him by that relation and was operating the road,[12] and the same statutory presumption of negligence will arise as in the case of the company itself operating the road.[13] If plaintiff fails to prove facts necessary to charge the receiver with liability, the court should direct a verdict in favor of the receiver.[14] In an action against a receiver, where he is liable only as receiver, the judgment should be entered against him in his official capacity and not personally.[15] Under a federal statute dispensing with the necessity of obtaining leave to sue a receiver appointed by a federal court, permission of the appointing court to sue a federal receiver for a railroad company is not required.[16]

Process and appearance. Statutory rules governing the service of process apply in actions against receivers of railroads.[17] In an action which was erroneously brought against the railroad company instead of against the receivers of the company, service of process on a railroad agent who at the time the summons was served on him was actually an agent of the receivers does not constitute service on the receivers.[18] Where an action is brought against a railroad company on a cause accruing before the appointment of a receiver, and service is made on a local agent of the receiver, the receiver should appear and defend for the company.[19] In a mortgage foreclosure suit in a state court, service of process on the railroad company, or the appearance of attorneys for the company, is not service on, or an appearance for, the company's federal court receivers who were not made parties to the suit.[20]

Garnishment. A receiver of a railroad, including a receiver appointed by a federal court, has been held not subject to garnishment with respect to wages due an employee except by leave of the court which appointed him.[21]

§ 384. —— Liability for Injuries Growing Out of Operation

a. In general
b. Failure to fence and erect cattle guards
c. Fires
d. Prior acts or omissions of company

a. In General

A receiver of a railroad company who is operating the road and exercising its franchise is subject, in his official capacity, to the same liability for injuries and damages caused by its operation as the railway company would be if it were operating the road.

A receiver of a railroad company who is exercising the franchises of such company and operating its road is subject, in his official capacity, to the same rules of liability as the company would be if it were operating the road by virtue of the

9. N.Y.—Larsen v. U. S. Mortgage, etc., Co., 93 N.Y.S. 610, 104 App. Div. 76.

10. Fla.—Cline v. Powell, 192 So. 628, 141 Fla. 119.
Mo.—Riffe v. Wabash Ry. Co., 207 S.W. 78, 200 Mo. App. 397.
51 C.J. p. 961 note 40.

Venue
The receiver of a railroad resides in any county through which the road runs and may be sued in the county where the cause of action originated and the corporation might have been sued.—Ball v. Mabry, 18 S.E. 64, 91 Ga. 781.

11. W.Va.—Hudkins v. Bush, 71 S.E. 106, 69 W.Va. 194, Ann.Cas. 1913A 533.
51 C.J. p. 961 note 41.

12. Ill.—McNulta v. Ensch, 24 N.E. 631, 134 Ill. 46.

13. Ga.—Lamb v. Floyd, 96 S.E. 877, 148 Ga. 357, 1 A.L.R. 1172.
51 C.J. p. 961 note 43.

14. Ala.—Cochrane v. Fuller, 84 So. 400, 17 Ala.App. 230.
51 C.J. p. 961 note 44.

15. Ill.—McNulta v. Ensch, 24 N.E. 631, 134 Ill. 46.
51 C.J. p. 961 note 45.

16. Ga.—Ball v. Mabry, 18 S.E. 64, 91 Ga. 781.

Scope of act
The act of congress was intended to place such receivers of railroad companies on the same plane with the railroad companies, with respect to their liability to be sued for acts done while operating railroads.—Eddy v. Lafayette, Ind.T., 16 S.Ct. 1082, 163 U.S. 456, 41 L.Ed. 225—53 C.J. p. 334 note 93 [a] (1).

17. Minn.—Kading v. Waters, 163 N.W. 521, 137 Minn. 328.

Method prescribed for natural persons
Statutory rules governing the method of service of process on natural persons in state courts have been held to apply to receivers of railroads appointed by federal courts.—Kading v. Waters, supra.

In justice court
In order to sustain summons in justice court suit against receiver, it is not necessary that receiver have office in district wherein suit is brought or that such fact be alleged in summons, but it is sufficient to allege that railroad company has office, on which service can be perfected, in such district.—Pidcock v. Stripling, 19 S.E.2d 178, 66 Ga.App. 692.

18. Ill.—Fitzpatrick v. Pitcairn, 20 N.E.2d 280, 371 Ill. 203.

19. U.S.—In re Seaboard Air Line R. Co., C.C.Fla., 166 F. 376.

20. U.S.—St. Louis-San Francisco Ry. Co. v. McCornack, D.C.Okl., 33 F.Supp. 297.

21. Ga.—Bugg v. Consolidated Grocery Co., 118 S.E. 56, 155 Ga. 550.

same franchises,[22] and he cannot claim exemption from liability in his official character on the ground that he is a public officer or officer of the court[23] or the agent or trustee of persons not directly liable.[24] Thus, in his official character he is liable as a common carrier for injuries to passengers during his control of the road[25] or for loss or delay of goods in transit,[26] and generally for the negligence of his servants in the operation of the road.[27]

Where a receiver of one road leases and operates another as receiver, he is in his official capacity liable for injuries due to the unsafe condition of the track of such road,[28] but a receiver of a company which furnishes cars to another company under a traffic arrangement whereby the latter company is to operate them is not liable for injuries resulting from such operation upon the tracks of the latter company.[29] Since an action against the receiver as such is virtually a proceeding in rem affecting the fund or property in his hands by virtue of his office, as considered supra § 383, it follows that, where one receiver resigns and another is appointed by the court, an action may be maintained against the new receiver for a tort of the servants of his predecessor in the same receivership.[30] However, a federal receiver of a railroad formerly constituting part of a larger system, which larger system was formerly under receivership, is not liable to be sued in another court, without leave of the appointing court, for wrongful acts committed in the operation of the road by receivers of the larger system.[31]

Under statutes. Receivers,[32] including receivers appointed by a federal court,[33] usually are subject in their official capacity to a liability imposed by statute for injuries caused by the negligent operation of railroads or growing out of a failure to comply with statutes governing their operation and for injuries caused by the violation of statutes requiring railroads to maintain suitable drains and ditches to carry off surface water.[34]

Liability for acts of lessee. Where a receiver of a lessor railroad adopts an outstanding lease made by it, he is liable for the tortious acts of the lessee committed after his appointment,[35] and even if such a lease is not expressly adopted he will be liable after a reasonable time for making an election has passed.[36]

b. Failure to Fence and Erect Cattle Guards

Receivers operating railroads have been held subject to a statutory liability for injuries to animals resulting from a failure to fence the road.

Under the statutes imposing liability on railroad companies for injury to animals due to failure to fence the road, receivers in control of, and operating, railroads have been held liable for such injuries,[37] and they have been held liable to the double indemnity provisions of such statutes.[38] Receivers have likewise been held liable for a statutory penalty for failure to maintain cattle guards, recoverable by an owner or tenant of inclosed lands.[39]

c. Fires

A receiver of a railroad is liable as such for damages by fire caused by negligence in the operation of the road during the receivership

22. Ala.—Atlanta, etc., R. Co. v. McGill, 69 So. 874, 194 Ala. 186.
51 C.J. p. 961 note 49

23. Ohio—Murphy v. Holbrook, 20 Ohio St. 137, 5 Am. R. 633.
Vt.—Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. D. 350

24. Ohio—Murphy v. Holbrook, 20 Ohio St. 137, 5 Am. R. 633

25. N.Y.—Kalven v. Pennsylvania R. Co., 76 N.Y.S. 2d 396.
51 C.J. p. 961 note 52
Liability of carrier generally see Carriers §§ 676–773.

26. Mass.—Paige v. Smith, 99 Mass. 395
Vt.—Newell v. Smith, 49 Vt. 255.

27. Fla.—Cline v. Powell, 192 So. 628, 141 Fla. 119.
51 C.J. p. 961 note 54.
Damages for personal injuries
Fla.—Cline v. Powell, supra.

28. Tex.—Dillingham v. Crank, 27 S.W. 93, 87 Tex. 104.

29. La.—Thompson v. Dotterer, 29 So. 483, 105 La. 37.

30. Ill.—McNulta v. Lockridge, 27 N.E. 452, 137 Ill. 270, 11 Am. S.R. 362.
51 C.J. p. 961 note 58.

31. U.S.—Jones v. Schlapback, C.C. Ga., 81 F. 274

32. Mo.—Murphy v. St. Louis-San Francisco R. Co., 226 S.W. 637, 205 Mo. App. 682
51 C.J. p. 961 note 60.
After sale of property
Liability of receiver of railroad for failure to perform statutory duty in operation of road does not terminate until final discharge, and hence he may be sued therefor after the sale of the road.—Riffe v. Wabash Ry. Co., 207 S.W. 78, 200 Mo. App. 397.

33. Fla.—Cline v. Powell, 192 So. 628, 141 Fla. 119.
Mo.—Snow v. Thompson, App., 178 S.W. 2d 796.
Duty of federal receivers to operate railroad according to laws of state in which located see supra § 382 a.

34. Mo.—Snow v. Thompson, App., 178 S.W. 2d 796.—Murphy v. St. Louis-San Francisco R. Co., 226 S.W. 637, 205 Mo. App. 682.—Riffe v. Wabash Ry. Co., 207 S.W. 78, 200 Mo. App. 397

35. Ga.—Atkinson v. Dismuke, 75 S.E. 835, 11 Ga. App. 521.
Liability of lessor road for acts of lessee generally see supra § 352.

36. Ga.—Atkinson v. Dismuke, 75 S.E. 835, 11 Ga. App. 521.

37. Tex.—International, etc., R. Co. v. Bender, 26 S.W. 1047, 87 Tex. 99.
51 C.J. p. 962 note 67.
Liability of company see infra § 385 b

38. U.S.—Central Trust Co. v. Wabash, St. L. & P. R. Co., C.C. Mo., 26 F. 12.

39. Miss.—Memphis, etc., R. Co. v. Glover, 29 So. 89, 78 Miss. 467

A receiver as such is liable for damages by fire caused by negligence in the operation of the road during the receivership,[40] and this notwithstanding a statute creating priorities, as far as funds come into his hands, does not take account of such a claim.[41] Receivers are also subject to the statutory liability for fires, although the statute does not in terms apply to them.[42]

d. Prior Acts or Omissions of Company

A receiver of a railroad is not liable for torts of the company committed before his appointment, even though he is given authority to defend suits against the railroad.

Although it has been held that such an action may be maintained where the permission of the court is first obtained,[43] ordinarily it is held that a receiver is not liable for a tort of the company committed before his appointment,[44] notwithstanding he is given authority by the order appointing him to defend suits against the railroad[45] or to intervene in pending suits;[46] and it is error to substitute a receiver after his appointment as defendant in a suit pending against the company on such prior cause of action.[47] A receiver, however, may be liable for injuries occurring after his appointment from a previously existing defective condition of the track or roadbed,[48] it being his duty, on taking over the road, to use due care in inspecting it for the discovery of defects;[49] and it has been held that it is no defense to such action that he had not been in possession for a sufficient length of time to repair the defect.[50]

§ 385. —— Liability of Company

a. In general
b. For failure to fence and injuries to animals
c. Where railroad leased

a. In General

A railroad company is not liable for the acts of a receiver, or his servants or agents, in the operation of the railroad, where the road is in the full possession and control of the receiver.

Since, as discussed supra § 379, where a railroad has been duly placed by a court of competent jurisdiction in the hands of a receiver who is in full possession and control of the road, the possession of the receiver is the possesion of the court and not that of the railroad company, and the receiver is not the agent or servant of the company, or his servants its servants, the company is not liable for the acts of the receiver,[51] or for those of his servants or agents,[52] in the operation of the road, and the railroad company should be protected from litigation.[53]

It cannot, however, properly be stated without qualification that a railroad company is not liable for the acts of a receiver of its road under any circumstances,[54] for the company will be liable if the receiver is not in exclusive possession and control but jointly with the company,[55] or where the company is permitted to retain the actual control and management of the road, and the functions of the receiver are restricted to the receipt of the net earnings,[56] or if the receiver was appointed at the instance of the company for the purpose of putting its property temporarily beyond the reach of creditors, and enabling it to tide over financial difficulties.[57] However, the fact that a company acquiesces in the action of a court of another state in the appointment of receivers for its lessee and permits them to operate its road does not deprive it of the right to show that at the time of the injury complained of its road was in the exclusive possession and control of the same receivers under an appointment by a court of com-

40. U S —Eddy v Lafayette, Ind.T., 16 S.Ct. 1082, 163 U.S. 456, 41 L. Ed. 225
Tex —Peoples v. Yoakum, 25 S.W 1001, 7 Tex Civ.App. 85.
Liability of company for fires generally see infra §§ 484-546.

41. Tex —Peoples v. Yoakum, 25 S. W. 1001, 7 Tex Civ App 85, distinguishing Turner v. Cross, 18 S W. 578, 83 Tex. 218, 15 L R A. 262
51 C J. p 962 note 73.

42. Mass —Wall v. Platt, 48 N.E 270, 169 Mass 398.
51 C J. p 962 note 75.

43. Mo —Grant v. Omaha, etc, R. Co., 68 S.W. 91, 94 Mo.App. 312.

44. Ark.—Bush v Stephens, 197 S. W 1157, 131 Ark. 133, Ann Cas. 1918E 259, L R A 1918A 1131.
51 C.J. p 962 note 77.

Liability of railroad company see infra § 385 a.

45. Ark —Bush v. Stephens, supra.
51 C.J. p 962 note 78.

46. N Y.—Decker v. Gardner, 26 N E. 814, 124 N Y. 334, 11 L R.A. 480

47. N.Y.—Decker v. Gardner, supra.

48. Kan —Sheat v. Lusk, 159 P. 407, 98 Kan. 614, L R A.1916F 1021.
51 C J. p 962 note 81.

49. Kan —Sheat v. Lusk, supra.

50. Tex —Bonner v. Mayfield, 18 S W. 305, 82 Tex. 234.

51. N.Y.—Kalven v. Pennsylvania R Co., 76 N.Y S 2d 396
S C —Corpus Juris quoted in Echols v. Seaboard Air Line Ry. Co., 178 S E. 139, 140, 174 S.C. 537.
51 C J. p 963 note 89.

52. N Y —Kalven v. Pennsylvania R Co, 76 N Y S 2d 396.
S.C —Corpus Juris quoted in Echols v Seaboard Air Line Ry. Co, 178 S E 139, 140, 174 S.C. 537.
51 C.J. p 963 note 90.

53. U S —Guaranty Trust Co. of New York v Broadway & S A. R. Co, D C.N.Y, 43 F.2d 130.

54. Ohio —Stewart v. Baltimore, etc., R Co, 11 Ohio S. & C P 232, 8 Ohio N P 179

55. U S —Washington, A. & G. R. Co v Brown, D C., 17 Wall. 445, 21 L Ed 675

56. U S —Pennsylvania R. Co. v. Jones, App D C., 15 S.Ct. 136, 155 U.S 333, 39 L Ed. 176.

57. Ohio.—Stewart v. Baltimore, etc, R. Co, 11 Ohio S. & C.P. 232, 8 Ohio N P. 179.

petent jurisdiction in its own state in an action against it.[58] An action may be maintained against a company for an injury sustained prior to the appointment of a receiver, although at the time the suit is brought the road is in the hands of the receiver.[59]

In case of a continuing injury from the operation of the road, the company is liable only for such damages as resulted from acts complained of prior to its being placed in the hands of the receiver.[60]

Where appointment was void or collusive A railroad company is liable for the acts of a receiver whom it permits to take and operate its road under an appointment which is invalid for lack of jurisdiction of the court,[61] or where such appointment was made through fraud or collusion on the part of the company,[62] whether or not the court had jurisdiction,[63] the receiver being regarded in either case as the agent of the company.[64] If in such case an action has been instituted against the receiver alone, the company may by amendment be made a defendant.[65]

b. For Failure to Fence and Injuries to Animals

In some jurisdictions it has been held under statutes imposing liability on railroad companies for injuries to animals due to a failure to fence the road that railroad companies whose roads are in the possession of, and being operated by, receivers are liable for such injuries.

It has been held under some statutes imposing liability on railroad companies for injury to animals due to a failure to fence the road that a company is liable for such injuries although its road at the time was in the possession of, and being operated by, a receiver,[66] while under other statutes a contrary conclusion has been reached.[67] Where the company is held liable notwithstanding the receivership, such action may be brought against the company in a state court although the receivership is a federal one.[68]

c. Where Railroad Leased

The lessor of a railroad operated by receivers of the lessee is liable for wrongs and injuries caused by its operation while in the possession and control of such receivers, in cases where the lessor company would be liable for the acts of its lessee, but a lessee company is not liable for the acts of its own receiver while in the exclusive control and operation of the leased road

The lessor of a railroad operated by receivers of the lessee has been held liable for wrongs and injuries caused by its operation while in the possession and control of such receivers, in cases where the lessor company would be liable for the acts of its lessee,[69] at least where the control of the receiver is not exclusive,[70] although there is authority to support the contrary view where the control of the receivers is exclusive.[71] Under the rule that a company in the hands of a receiver, who is in possession and control of its road, is not liable for the acts of such receiver, as considered supra subdivision a of this section, it has been held that a lessee company is not liable for the acts of its own receiver while in the exclusive control and operation of the leased road.[72]

A railroad which operates the property of another railroad as agent for its receiver is liable for the negligent operation thereof by its own subagents or employees.[73]

§ 386. Liability after Discharge of Receiver

The liability of the receiver and of the railroad company after the discharge of the receiver for

58. Tex.—Trinity, etc, R. Co. v Brown, Civ App, 46 S W 926

59. Ala.—Corpus Juris cited in Parker v. Central of Georgia Ry Co, 170 So. 333, 337, 233 Ala 149.
Ind.—Ohio, etc., R. Co. v. Nickless, 71 Ind 271.

60. Tex.—St Louis, etc, R. Co v. Green, Civ App., 183 S W. 829
Nuisance arising from construction of road see supra § 190.

61. Tex.—Texas, etc., R. Co. v. Gay, 26 S.W. 599, 86 Tex. 571, 25 L.R.A. 52.

62. Tex.—Texas, etc., R. Co v. Gay, 30 S.W. 543, 88 Tex. 111.
51 C J. p 963 note 1.

63. Tex.—Texas, etc., R. Co. v. Gay, 26 S.W. 599, 86 Tex. 571, 25 L.R.A. 52

64. Tex.—Texas, etc., R Co v. Gay, 26 S W. 599, 86 Tex 571, 25 L.R.A. 52.

65. Tex.—Texas, etc, R Co v. Gay, 30 S W 543, 88 Tex. 111.

66. Kan.—Kansas Pac. R. Co. v. Wood, 24 Kan 619.
51 C J. p 963 note 7.

67. Iowa.—Schurr v Omaha, etc, R. Co, 67 N.W 280, 98 Iowa 418.
51 C J. p 963 note 8.

68. Ind.—Louisville, etc, R. Co. v. Cauble, 46 Ind. 277.
51 C J p 963 note 9.

69. S C.—Parr v. Spartanburg, etc, R. Co., 20 S E 1009, 43 S C. 197, 49 Am S R. 826
51 C.J. p 964 note 13.
Liability of lessor in general see supra § 352.

70. U.S.—Washington, A. & G. R Co v Brown, D C, 17 Wall. 445, 21 L Ed. 675
51 C J. p 964 note 14.

71. U S.—Chamberlain v New York, etc, R. Co., C C Ohio, 71 F 636

72. U S.—Chamberlain v New York, etc., R. Co., supra.

73. Wis.—McCaffrey v. Minneapolis, St. P & S S. M Ry. Co, 267 N W. 326, 222 Wis. 311, modified on other grounds 268 N.W. 872, 222 Wis. 311
Receiver not liable
In an action against a railroad and the receiver of another road for injury resulting from negligence of an employee who was the employee solely of the first railroad, in furtherance of its performance of its contract with the receiver to operate for him the railway property used in conducting the receivership business, the complaint against the receiver should be dismissed.—McCaffrey v. Minneapolis, St. P. & S S M. Ry. Co, 268 N W. 872, 222 Wis. 311.

claims arising during the receivership is considered infra sections 387-388.

Examine Pocket Parts for later cases.

§ 387. —— Liability of Receiver

After his final discharge by the court, a receiver of a railroad cannot be held liable for negligence in the operation of the road during the receivership unless he was personally at fault.

After his final discharge by the court, a receiver cannot be held liable for negligence in the operation of the road during the receivership[74] where he was not personally at fault;[75] and an action brought against him to enforce such an alleged liability will be discontinued or dismissed as to him.[76] A state statute providing that receivers may be sued after their discharge does not apply to a federal receiver.[77] However, until finally discharged, the receiver as such is liable and may be sued,[78] notwithstanding he has turned over the possession of the property to the company or persons entitled thereto[79]

If discharged during pendency of action, no judgment can be rendered against the receiver in his official capacity[80] unless otherwise provided by the decree or order of discharge[81] However, if a cause of action exists in favor of plaintiff, the action does not abate, as considered in Abatement and Revival § 110 e, but should be discontinued or dismissed as to the receiver and continued on the substitution of the proper party defendant,[82] and this procedure may be directed by the order discharging the receiver and directing a return of the property.[83] In the case of federal receivers, however, state statutes providing that pending actions shall not abate or be discontinued as to a receiver on his discharge are not applicable.[84]

§ 388. —— Liability of Company

a. In general
b. Where property returned without sale
c. Where property sold
d. Actions

a. In General

A railroad company ordinarily is not liable after the discharge of a receiver of the road for any claims arising against the receiver as such during the receivership.

Since, when a receiver for a railroad has been duly appointed by a court of competent jurisdiction, the property is in the custody of the court, and the receiver is the agent of the court and not of the company, as considered supra § 379, the company ordinarily is not liable after the discharge of the receiver for any claims arising against the receiver as such during the receivership,[85] whether in contract or in tort,[86] although the receivership was only temporary and the property was returned to the company on its termination[87] Thus ordinarily the company is not bound by contracts of the receiver,[88] and it cannot enforce against a third person a contract made by such person with the receiver.[89] However, a railroad company will be liable on a contract made by it, although at the time of the execution of the contract the road was under the control of a receiver duly appointed;[90] and a judgment rendered against the company while the road was in the hands of a receiver operates as a lien on its property, and, if kept alive, may be enforced against the property after the discharge of the receiver and its return to the company.[91]

b. Where Property Returned without Sale

Ordinarily a railroad company, after the termination of the receivership and the return of the property to it, is not liable for injuries from the operation of the road by the receiver unless such liability was assumed by

74. Mo.—Stuart v. Dickinson, 235 S. W. 446, 290 Mo. 516.
51 C J. p 964 note 19.

75. Tex.—Best, etc., Cigar Co v. William Reese Co., Civ.App., 210 S. W. 317.
Personal liability of receiver generally see supra § 383.

76. U.S.—Thompson v. Northern Pac. R. Co., Wash., 93 F. 384, 35 C. C.A. 357.
N.Y.—Herring v. New York, etc., R. Co., 12 N.E 763, 105 N.Y. 340.

77. Tex.—Hovey v Weaver, Civ. App., 175 S W. 1089
51 C.J. p 964 note 23.

78. Mo.—Riffe v. Wabash R Co., 207 S.W. 78, 200 Mo App. 397.
51 C.J. p 964 note 24.

79. Tex.—San Antonio, etc, R. Co. v. Schmidt, Civ.App., 18 S.W.2d 237.
51 C.J. p 964 note 25

80. Ala.—McGhee v. Willis, 32 So. 301, 134 Ala. 281.
51 C.J p 964 note 26.

81. D.C.—Cowen v. Merriman, 17 App D.C. 186.
51 C J. p 964 note 28.

82. Miss.—Bond v. State, 9 So. 353, 68 Miss. 648.
51 C.J. p 964 note 30.

83. N.H.—Watkins v Boston, etc., R Co., 127 A. 701, 81 N.H. 363
51 C.J. p 964 note 31.

84. Tex.—Fordyce v. Du Bose, 26 S. W. 1050, 87 Tex. 78.
51 C.J. p 964 note 34.

85. Mass.—Graves v. Boston, etc., R Co., 141 N.E. 116, 246 Mass 459.
51 C.J. p 965 note 38.

86. Ind.—Godfrey v. Ohio, etc, R. Co., 18 N E 61, 116 Ind. 30.

87. Mass.—Graves v. Boston, etc, R Co., 141 N.E. 116, 246 Mass 459

88. Ohio.—Ellis v. Indianapolis, etc, R Co, 5 Ohio Dec., Reprint, 497, 6 Am.L Rec. 288.

89. Ohio.—Consolidated Coal, etc, Co. v. Cincinnati, etc, R Co, 9 Ohio Dec., Reprint, 15, 10 Cinc.L Bul. 42
51 C.J. p 965 note 45.

90. Tex.—Gulf, etc., R. Co. v. Insurance Co. of North America, Civ. App., 28 S W. 237.

91. Ohio.—Mather v. Cincinnati R Tunnel Co., 8 Ohio Cir.Ct. 284, 2 Ohio Cir.Dec. 161.

it as a condition for the return of the property, or was imposed by statute or the order restoring the property and discharging the receiver, or unless revenues collected by the receiver during his operation of the road have been diverted by placing them in betterments or are turned over to the company without a sale.

Ordinarily a railroad company, after the termination of the receivership and the return of its property to it, is not liable for injuries from the operation of the road by the receiver.[92] However, the company is liable for such injuries, provided no rights of third persons have intervened,[93] where such liability was assumed by it as a condition for the return of the property,[94] or was created by valid conditions imposed by the order restoring the property and discharging the receiver,[95] or was imposed by statutes creating such liability,[96] or where revenues collected by the receiver during his operation of the road have been diverted by him by placing them in betterments or are turned over to the company without a sale.[97]

The court in such cases has no power to make any order on returning the property limiting the liability of the company to claims established by intervention in the suit in which the receiver was appointed,[98] or presented to, and approved by, the court making such order,[99] or limiting the time within which such claims must be established,[1] or to make any decree in a proceeding to which claimant was not a party which would deprive him of the right to seek his remedy in any court of competent jurisdiction,[2] and within the time prescribed by law.[3] The company is not liable in any case on any cause of action which could not have been enforced against the receiver had he remained in possession.[4]

c. Where Property Sold

A railroad company which purchases and pays for its railroad at a receiver's sale is not liable for claims against the receiver growing out of his operation of the road unless such liability was assumed by it as a condition of the purchase or was imposed by statute.

Where a railroad company purchases at a receiver's sale, and pays for, property which it formerly owned, although the purchase may include money on hand and current assets, it will not be liable for a claim against the receiver growing out of his operation of the road,[5] where such liability was not assumed by it as a condition of the purchase[6] or where the sale is not shown to have been collusive.[7] However, under a statute providing that a purchaser of the property and franchise of a railroad company shall take subject to all liabilities, a company which purchased a railroad in receivership has been held liable for damages to goods caused by the negligence of employees of the receiver.[8]

d. Actions

(1) In general
(2) Pleading
(3) Evidence
(4) Trial, verdict, and judgment

(1) In General

Actions against a railroad company after the discharge of a receiver of the road to recover claims that arose during the receivership need not be instituted in the court that appointed the receiver, and the receiver is not a necessary party to the action.

Where the return of its property without sale imposes a liability on the company, the claim need not be adjusted in the court appointing the receiver, but an action may be brought in another court having jurisdiction.[9] The court which appointed the receiver has no right to require that the claim shall be established by intervention in the original suit.[10] The receiver is not a necessary party in such an action against the company after the receivership has been terminated and the receiver discharged.[11]

92. Tex.—Missouri-Kansas-Texas R. Co. v. King, Civ.App., 265 S.W. 761.
51 C.J. p 965 note 50.

93. Miss.—Mobile, etc., R. Co. v. Davis, 62 Miss. 271.

94. Ind.—Vandalia R. Co. v Keys, 91 N.E. 173, 46 Ind.App. 353.
51 C.J. p 965 note 51

95. Okl.—Chicago, etc., R. Co. v. Shahan, 234 P. 751, 109 Okl. 151.
51 C.J. p 965 note 52

96. Tex.—Ft. Worth, etc., R. Co. v. Burleson, Civ.App., 214 S.W. 617.
51 C.J. p 965 note 49.

97. Iowa.—Anderson v. Chicago, etc., R. Co., 175 N.W. 583, 189 Iowa 739.
51 C.J. p 965 note 53.

98. Okl.—Chicago, etc., R. Co. v. Shahan, 234 P. 751, 109 Okl. 151.
51 C.J. p 966 note 55.

99. Mo.—Stuart v. Dickinson, 235 S.W. 446, 290 Mo. 516.
51 C.J. p 966 note 56

1. Mo.—Talbert v Chicago, etc., R. Co., 284 S.W. 499, 314 Mo. 352.
51 C.J. p 966 note 57.

2. Tex.—Texas, etc., R. Co. v. Watts, 18 S.W. 312.
51 C.J. p 966 note 58.

3. Tex.—Texas Pac. R. Co. v. Griffin, 13 S.W. 471, 76 Tex. 441.

4. Tex.—Texas, etc., R. Co. v. Collins, 19 S.W. 865, 84 Tex. 121.
51 C.J. p 966 note 60.

5. Tex.—Hicks v. International, etc., R. Co., 62 Tex. 38.—International, etc., R. Co. v. Perkins, Civ.App., 185 S.W. 657.

6. Tex.—International, etc., R. Co. v Perkins, supra.

7. Tex.—Hicks v International, etc., R. Co., 62 Tex. 38

8. Tex.—Missouri, K. & T. Ry. Co. of Texas v. Gray, Civ.App., 160 S.W. 434

9. Mo.—Stuart v Dickinson, 235 S.W. 446, 290 Mo. 516.
51 C.J. p 967 note 67.

10. Tex.—Texas, etc., R. Co. v. Johnson, 13 S.W. 468, 76 Tex. 421, 18 Am.S.R. 60.
51 C.J. p 967 note 69.

11. Mo.—Stuart v Dickinson, 235 S.W. 446, 290 Mo. 516.
51 C.J. p 967 note 70.

(2) Pleading

In an action against a railroad company after the discharge of a receiver on a claim arising during the receivership, the petition must allege facts showing a liability on the part of the company.

In an action against the company after the discharge of a receiver on a claim arising during the receivership, the general rule is that the petition must allege facts showing a liability on the part of the company,[12] such as that it had assumed liability for obligations of the receiver as a condition of the return of its road to it,[13] or that liability therefor was imposed by the order or decree directing return of the property,[14] or that the receiver invested earnings in betterments or improvements.[15] However, where it is provided by statute without qualification that the company, on the return of its property without sale, shall be liable for all claims against the receiver, it is sufficient merely to allege the return of the road to the company without sale,[16] but the discharge of the receiver should be alleged,[17] and the petition should show that the receivership was not a federal one[18]

Charging liability of purchaser from receiver. Where it is attempted to hold a purchaser at a receiver's sale liable for causes of action arising during the receivership on the ground that by the terms of sale the purchaser assumed such liabilities, the terms of sale must be specifically set forth;[19] and where it attempted to hold a purchaser liable for an injury received while the road remained in the hands of the receiver after the sale and before the delivery, to the extent of betterments made by the receiver during that period, the petition must allege that the improvements were made and paid for out of earnings accruing after the sale[20]

Plea or answer. Where the company relies on the defense that the claims against it for the acts of a receiver are in excess of the value of the betterments made by him, it should be specially pleaded.[21]

(3) Evidence

In actions against a railroad company after the discharge of a receiver of the road to recover for claims arising during the receivership, the rules relating to the burden of proof and the admissibility, weight, and sufficiency of the evidence in civil actions generally apply.

Where the cause of action arose during the receivership, the burden is on plaintiff to show the appointment and discharge of the receiver and that the road was returned to defendant without sale,[22] and with permanent improvements made by the receiver from earnings accruing during the receivership,[23] or that liability for such acts was imposed by the order of the court turning back the railroad[24] or was assumed by defendant when it took back the properties.[25] However, where plaintiff shows that betterments were made by the receiver, the presumption then is that they were made out of net earnings of the road, and the burden is on defendant to show the contrary.[26]

Admissibility, weight, and sufficiency. General rules relating to the competency, relevancy, and materiality of evidence, and its weight and sufficiency, in other civil actions apply.[27]

(4) Trial, Verdict, and Judgment

The verdict and judgment should be for or against the proper parties, and where a special verdict is rendered it should find on all the essential issues of the case.

A special verdict in an action against the company on a cause of action arising during receivership must find on every issue necessary to establish the liability on the part of the company.[28] Where the action is brought against both the receiver and the company, judgment may be entered

12. Tex.—Texas, etc., R. Co. v. Adams, 14 S.W. 666, 78 Tex. 372, 22 Am.S.R. 56.
51 C.J. p. 967 note 71.

13. Tex.—Texas, etc., R. Co. v. Umberson, Civ.App., 288 S.W. 251.
51 C.J. p. 967 note 72.

14. Tex.—Baccaratt v. Beaumont, etc., R. Co., Civ.App., 285 S.W. 354—Kansas City, etc., R. Co. v. Russell, Civ.App., 184 S.W. 299.

15. Tex.—Texas, etc., R. Co. v. Adams, 14 S.W. 666, 78 Tex. 372, 22 Am.S.R. 56—Dayhoff v. International, etc., R. Co., Civ.App., 26 S.W. 517.

16. Tex.—International, etc., R. Co. v. Cook, 41 S.W. 665, 16 Tex.Civ. App. 386—Yoakum v. Kroeger, Civ. App., 27 S.W. 953

17. Tex.—Howe v. St. Clair, 27 So. 800, 8 Tex.Civ.App. 101

18. Tex.—Hovey v. Weaver, Civ. App., 175 S.W. 1089.

19. Tex.—Houston, etc., R. Co. v. Norris, Civ.App., 41 S.W. 768.

20. Tex.—Ray v. Dillingham, Civ. App., 41 S.W. 183.
51 C.J. p. 967 note 80.

21. Tex.—Texas, etc., R. Co. v. Bailey, 18 S.W. 481, 83 Tex. 19.

22. Tex.—Texas, etc., R. Co. v. Umberson, Civ.App., 288 S.W. 251.
51 C.J. p. 967 note 82.

23. Tex.—Texas, etc., R. Co. v. Huffman, 18 S.W. 741, 86 Tex. 286.
51 C.J. p. 967 note 83.

24. Tex.—Baccaratt v. Beaumont, etc., R. Co., Civ.App., 285 S.W. 354

25. Tex.—Texas, etc., R. Co. v. Umberson, Civ.App., 288 S.W. 251—Baccaratt v. Beaumont, etc., R. Co., Civ.App., 285 S.W. 354.

26. Tex.—Missouri, etc., R. Co. v. Chilton, 27 S.W. 272, 7 Tex.Civ. App., 183—Texas, etc., R. Co. v. Barnhart, 23 S.W. 801, 24 S.W. 331, 5 Tex.Civ.App. 601.

27. Tex.—St. Louis, etc., R. Co. v. Broughton, Civ.App., 212 S.W. 664.
51 C.J. p. 967 note 88.

28. Tex.—Texas, etc., R. Co. v. Watson, 36 S.W. 290, 13 Tex.Civ.App. 555.

against the company alone,[29] but in the absence of a statute a judgment cannot be entered against a receiver after his discharge which will bind either the property or the railroad company.[30]

In action against purchaser of the road of an insolvent railroad company for an injury received while the road was operated by the company, it was held that, the receiver being a party to the action and having funds in his hands belonging to the insolvent company, the judgment should be against the purchaser for the full amount of the claim subject to be credited with the sum which the receiver may pay.[31] In an action against the purchaser of a railroad and its prior receivers to enforce a liability of the receivers which the purchaser agreed to pay, the verdict of the jury need not mention the purchaser, since its liability flows as a matter of law from the establishment of the claim against the receivers.[32]

§ 389. Foreign and Ancillary Receivers

a. In general
b. Ancillary receiver
c. Actions against receiver

a. In General

A court cannot extend its jurisdiction by the appointment of a receiver, but ordinarily through comity the authority of a receiver appointed in one jurisdiction will be recognized in many ways by the courts of other jurisdictions.

A court cannot extend its jurisdiction by the appointment of a receiver,[33] and the authority of a receiver as such is limited by the territorial jurisdiction of the court appointing him,[34] and any recognition accorded him beyond such limits rests entirely on comity.[35] He can do no acts by virtue of his office in another state, and therein he stands as an individual personally liable for his acts.[36] However, through comity the authority of a receiver appointed in one jurisdiction will be recognized in many ways by the courts of other jurisdictions[37] whenever to do so would not be contrary to the laws or public policy of the latter jurisdictions or prejudicial to the rights of their citizens.[38] However, such courts will not accord to a foreign receiver rights or powers to which he would not be entitled in the jurisdiction of his appointment.[39]

b. Ancillary Receiver

As a general rule, where a railroad extending through different states or jurisdictions is placed in the hands of a receiver, ancillary proceedings are instituted in the jurisdictions other than that in which the receiver was first appointed, which receiverships, through comity, are generally conducted harmoniously and with the same person appointed as receiver in the different jurisdictions.

Where a railroad extending through different states or jurisdictions is placed in the hands of a receiver, ordinarily it is highly desirable that it should be operated under a single management;[40] and, while it has been held that in such cases a court of one jurisdiction may appoint a receiver for the entire line if it has jurisdiction of the person of the corporation, and may compel the company to execute assignments of property situated in other jurisdictions to the receiver, as considered supra § 378 a, the usual practice is to institute ancillary proceedings in the jurisdictions other than that in which the receiver was first appointed.[41]

Ancillary receiverships of railroads are generally conducted in harmony with the court having original jurisdiction of the primary receivership,[42] and the courts of such jurisdictions, both through comity and in order to secure a harmonious and more profitable management, appoint the same person as receiver.[43] The court of initial proceeding and by which the receiver was first appointed is the court

29. Tex.—Bonner v Blum, Civ.App., 25 S.W. 60.

30. Tex.—Texas, etc., R. Co. v. Watson, Civ.App., 24 S.W. 952

31. N.C.—Howe v. Harper, 37 S.E. 505, 127 N.C. 356.

32. Mo.—Riffe v. Wabash R. Co., 207 S.W. 78, 200 Mo.App. 397

33. U.S.—Atkins v. Wabash, St. L. & P. R. Co., C.C.Ill., 29 F. 161.

34. U.S.—Dillon v. Oregon, S. L. & U. N. R. Co., C.C.Mo., 66 F. 622—Atkins v. Wabash, St. L. & P. R. Co., C.C.Ill., 29 F. 161.

Sale

A railroad lying within fifth circuit constituting a part of a railroad system subject to a primary receivership in fourth circuit could not be sold by virtue of a decree in fourth circuit, but would be sold under decree of proper district court in fifth circuit in which ancillary receivership proceedings were instituted.—Badenhausen v. Glazebrook, C.C.A.Fla., 148 F.2d 450, certiorari denied 66 S.Ct. 42, 326 U.S. 733, 90 L.Ed. 436

35. Pa.—Bagby v. Atlantic, etc., R. Co., 86 Pa. 291.

36. N.Y.—Kain v. Smith, 80 N.Y. 458

37. U.S.—Badenhausen v. Glazebrook, C.C.A.Fla., 148 F.2d 450, certiorari denied 66 S.Ct. 42, 326 U.S. 733, 90 L.Ed. 436

51 C.J. p. 968 note 98.

38. Mo.—Robertson v. Staed, 36 S.W. 610, 135 Mo. 135, 33 L.R.A. 203, 58 Am.S.R. 569

39. Pa.—Bagby v. Atlantic, etc., R. Co., 86 Pa. 291.

40. Ga.—Port Royal, etc., R. Co. v. King, 19 S.E. 809, 93 Ga. 63, 24 L.R.A. 730

51 C.J. p. 968 note 2

41. U.S.—Central Trust Co. of New York v. Wabash, St. L. & P. R. Co., C.C.Mo., 29 F. 618

51 C.J. p. 968 note 4.

42. U.S.—Badenhausen v. Glazebrook, C.C.A.Fla., 148 F.2d 450, certiorari denied 66 S.Ct. 42, 326 U.S. 733, 90 L.Ed. 436.

43. U.S.—**Corpus Juris cited in** Badenhausen v. Glazebrook, C.C.A.Fla., 148 F.2d 450, 451, certiorari denied 66 S.Ct. 42, 326 U.S. 733, 90 L.Ed. 436

51 C.J. p. 968 note 5.

of primary jurisdiction,[44] and should direct and control the receiver with respect to the operation and management of the property as a whole,[45] and through comity the courts of ancillary jurisdiction should recognize and assist in carrying out its orders and directions.[46] This rule does not involve a refusal of jurisdiction or surrender of judicial independence on the part of the courts of ancillary appointment;[47] but, on the contrary, the courts of one jurisdiction cannot, and should not if they had such power, delegate or surrender to the courts of another jurisdiction the powers which the laws of their own states and justice to their own citizens require that they should retain and exercise.[48]

The courts of ancillary appointment still have power with respect to the portion of the road or property within their territorial jurisdictions to make such independent orders affecting the operation of that part of the road as the interests of the property may require or the nature of the proceedings in both courts justify[49] to hear and determine claims[50] and to pass on questions of rights of property in their jurisdictions,[51] and, where they may properly afford relief, will not require their citizens to go into the courts of other jurisdictions for the enforcement of their rights;[52] and comity requires that such acts and orders should be respected by the court of primary jurisdiction.[53]

Where all the accounts are being filed and settled and disbursements made under the direction of the court of primary jurisdiction, that court is the proper forum in which to apply for the payment of claims[54] unless the court of ancillary jurisdiction may administer, and is independently administering, the property in its jurisdiction,[55] in which event the claims should be presented there.[56]

Appointments may be merely concurrent where the same person is appointed receiver by different courts, without one being primary and the other ancillary, jurisdiction and control being alike invoked and conceded by each of the tribunals, and each being competent to enforce the observance of obligations arising under its sanction.[57]

Where original appointment void. If the action of the court of primary jurisdiction in appointing a receiver was without jurisdiction of the subject matter and void, ancillary bills for receiverships in other jurisdictions must also fall.[58]

c. Actions against Receiver

As a general rule the receiver of a railroad is not answerable in a suit in any court other than in the one appointing him.

Ordinarily the receiver of a railroad is not answerable in a suit in any court other than in the one appointing him,[59] and may not be sued in another jurisdiction[60] without leave of such court.[61]

Service of process. In an action against a receiver appointed by a federal court for a foreign railroad corporation on a cause of action arising out of a transaction had with him, service of process on an agent of the receiver within the state has been held insufficient to confer jurisdiction.[62] Where a railroad is not situated in and does no business in the state, except that an office is maintained for the purpose of soliciting passenger and freight traffic, a person employed as traffic representative is not an agent on whom service of process can be made within the meaning of a statute relating to service on receivers and trustees.[63]

Attachment against foreign receiver will be va-

44. U.S.—Dillon v. Oregon, S. L. & U. N. Ry. Co., C.C.Or., 66 F. 622.
51 C.J. p. 968 note 6.

45. Conn.—Guarantee Trust, etc., Co. v. Philadelphia, etc., R. Co., 38 A. 792, 69 Conn. 709, 38 L.R.A. 804.
51 C.J. p. 968 note 7.

46. U.S.—Badenhausen v. Glazebrook, C.C.A.Fla., 148 F.2d 450, certiorari denied 66 S.Ct. 42, 326 U.S. 733, 90 L.Ed. 436.
51 C.J. p. 968 note 8.

47. U.S.—Dillon v. Oregon, S. L. & U. N. R. Co., C.C.Or., 66 F. 622.

48. U.S.—Phinizy v. Augusta & K. R. Co., C.C.S.C., 56 F. 273.
51 C.J. p. 968 note 10.

49. Conn.—Guarantee Trust, etc., Co. v. Philadelphia, etc., R. Co., 38 A. 792, 69 Conn. 709, 38 L.R.A. 804.

50. U.S.—Ames v. Union Pac. R. Co., C.C.Neb., 60 F. 966.

51. U.S.—Chattanooga Terminal R. Co. v. Felton, C.C.Tenn., 69 F. 273.

52. U.S.—Chattanooga Terminal R. Co. v. Felton, supra—Ames v. Union Pac. R. Co., C.C.Neb., 60 F. 966.

53. U.S.—Ames v. Union Pac. R. Co., supra.
Conn.—Guarantee Trust, etc., Co. v. Philadelphia, etc., R. Co., 38 A. 792, 69 Conn. 709, 38 L.R.A. 804.

54. U.S.—Clyde v. Richmond & D. R. Co., C.C.S.C., 56 F. 539—Jennings v. Philadelphia & R. R. Co., C.C.N.J., 23 F. 569.

55. U.S.—Equitable Trust Co. of New York v. Wabash R. Co., Mich., 244 F. 66, 156 C.C.A. 494.

56. U.S.—Equitable Trust Co. of New York v. Wabash R. Co., supra.

57. N.Y.—Matter of U. S. Rolling Stock Co., 55 How.Pr. 286, 57 How. Pr. 16.

58. U.S.—Gatch, Tennant & Co. v. Mobile & O. R. Co., D.C.Ala., 59 F.2d 217.

59. Ga.—De Graffenried v. Brunswick, etc., R. Co., 57 Ga. 22.
Pa.—Anderson v. Buffalo, etc., R. Co., 2 Pa.Co. 402.

60. U.S.—Barton v. Barbour, D.C., 104 U.S. 126, 26 L.Ed. 672.

61. N.Y.—Carrey v. Spencer, 36 N.Y.S. 886.

62. Minn.—Kading v. Waters, 163 N.W. 521, 137 Minn. 328.

63. Ill.—Goldstein v. Pullman Co., 26 N.E.2d 670, 304 Ill.App. 584.
Sufficiency of affidavits
Ill.—Goldstein v. Pullman Co., supra.

cated, since it would take the very property being administered by another court.[64]

In garnishment proceedings, the fact that a receiver is a nonresident is immaterial where he is operating a road within the jurisdiction of the court issuing the garnishee process and where the sum due to the judgment debtor is payable,[65] unless the effect of the judgment would be to disturb the possession of the property or some specific fund placed in the hands of the receiver by the appointing court, and where such property or fund was claimed by different creditors and claimants,[66] or where the receiver was appointed, not to continue the business, but merely to sell the property and apply the proceeds under order of the court.[67]

XII. OPERATION AND REGULATION THEREOF IN GENERAL

A. DUTY TO OPERATE AND FURNISH FACILITIES

§ 390. In General

A railroad retaining its franchise must operate its lines so as adequately to meet all reasonable public requirements, in the manner and for the purposes contemplated by its charter, and it is under a duty to furnish all equipment and facilities essential to such operation.

As a general rule, a railroad retaining its franchise must operate its lines,[68] so as adequately to meet all reasonable public requirements,[69] in the manner and for the purposes contemplated by its charter,[70] and impartially without discrimination for or against persons demanding similar services.[71] So it is the duty of a railroad to serve on reasonable terms all those who desire the service it renders,[72] and it may not choose to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone can give.[73]

The duty of operation exists apart from statute,[74] and arises from acceptance of the franchises, rights, and privileges granted by the state.[75] However, in the absence of contract, charter, constitution or statute providing otherwise, the duty of a railroad company as to operating its road is no greater than the public interests demand and justify,[76] and it is not obliged to waste materials and money on a service which serves no useful purpose.[77] A car-

64. N.Y.—Killmer v. Hobart, 8 Abb N Cas 426, 58 How Pr. 452.

65. Colo.—Phelan v. Ganebin, 5 Colo. 14.
51 C.J. p 969 note 26.

66. Colo.—Phelan v. Ganebin, supra.

67. Colo.—Phelan v. Ganebin, supra

68. Ill.—Gardner v. Commerce Commission, 79 N.E.2d 71, 400 Ill 123.
N.J.—O'Connor v. Board of Public Utility Com'rs, 29 A.2d 390, 129 N.J.Law 263.
N.C.—Sinclair v. Moore Cent. R Co., 45 S.E.2d 555, 228 N.C 389.
Tenn.—Nashville, C & St. L Ry. v. Hannah, 27 S.W.2d 1089, 160 Tenn. 586, 70 A.L.R. 837.
51 C.J. p 969 note 33.

Refusal of permit to abandon

Duty of owners to operate railroad would remain on interstate commerce commission refusing application for a certificate of public convenience and necessity permitting abandonment.—Gross v. Missouri & A. Ry. Co., D.C.Ark., 74 F.Supp. 242.

69. Fla.—**Corpus Juris cited in** State v. Georgia Southern & F. Ry. Co., 190 So. 527, 532, 139 Fla. 115.
51 C.J. p 969 note 34.

Service commensurate with needs

Where a railroad has a franchise from the state to engage in general railroad business within the state, it is a "common carrier" and owes to communities through which it operates its line a duty to furnish service commensurate with needs of communities.—Lowden v. State, 78 P.2d 1059, 182 Okl. 549

Predominant interests

The interests of the public and the duty of a carrier by rail to continue to provide transportation have precedence over the interests of creditors, lessors, bondholders, and stockholders, and the right of the public is preferred to the property rights of all other persons.—Farmers Grain Co. v Toledo, P. & W. R. R., D.C.Ill., 66 F.Supp. 845. Reversed on other grounds, C.C.A., 158 F.2d 109, vacated on other grounds 68 S.Ct. 53, two cases, 332 U.S. 748, 92 L.Ed. 335.

"Convenience" and "necessity"

Anything which tends to cripple seriously or destroy an established system of transportation that is necessary to a community is not a "convenience" and "necessity" for the public.—Application of Chicago, B. & Q. R. Co., 295 N.W. 389, 138 Neb. 767

70. Fla.—State v. Atlantic Coast Line R. Co., 44 So. 213, 53 Fla. 650, 13 L.R.A.,N.S., 320.
51 C.J. p 969 note 35.

71. Vt.—Royalton v. Central Vermont R. Co., 138 A. 782, 100 Vt 443
51 C.J. p 969 note 36.

72. U.S.—Southern Ry. Co. v. South Carolina Public Service Commission, D.C.S.C., 31 F.Supp. 707.
S.C.—Darby v. Southern Ry. Co., 10 S.E.2d 465, 194 S.C. 421.

Individual communities

Railroad enjoying right to eminent domain owes duty of service to each community through which railroad passes.—New York Cent. R. Co. v. Public Service Commission, 7 N.E.2d 957, 212 Ind. 329.

73. U.S.—Southern Ry. Co. v. South Carolina Public Service Commission, D.C.S.C., 31 F.Supp. 707.

74. Or.—Southern Pac. Co. v. State R. Commission, 119 P. 727, 60 Or. 400.
51 C.J. p 970 note 37.

75. Neb.—Application of Chicago, B. & Q. R. Co., 41 N.W.2d 165, 152 Neb. 367.
51 C.J. p 970 note 38.

Public highway

When operation by railroad is pursuant to lawful authority, railroad is treated as a public highway and proprietors as public servants.—McClung v. Louisville & N. R. Co., Ala., 51 So.2d 371.

76. U.S.—Jack v. Williams, C.C.S.C., 113 F. 823, affirmed 145 F. 281, 76 C.C.A. 165.
51 C.J. p 970 notes 39, 40.

77. N.J.—O'Connor v. Board of Public Utility Com'rs, 24 A.2d 411, 128

rier's operation under a charter authorizing the construction of lines through a particular district has been held to create no implied agreement by the carrier to serve the district.[78] Ordinarily, no one has the right to interfere with the operation of railroad trains on schedule while engaged in the performance of their functions as common carriers of freight and passengers.[79]

In connection with the operation of its lines, a railroad is under a duty to furnish all equipment and facilities essential to performance of its duties.[80] Unless otherwise provided by statute, it need not, however, furnish facilities convenient to the public but not essential to transportation.[81] The term "adequate or reasonable facilities" with respect to the service required to be rendered by railroads calls for such facilities as may be fairly demanded with regard to the size of the place served, the extent of the demand for transportation, the cost of furnishing additional accommodations, and to all other facts which would have a bearing on the questions of convenience and cost;[82] the term does not mean that the same facilities must be provided at every point, regardless of public patronage or the incidental cost of the facilities,[83] and the circumstances of the business of a railroad in each particular community govern the nature of the service and facilities required to be furnished by the railroad.[84] A railroad is under no duty to provide facilities for possible future business which may never materialize.[85]

The duties of a railroad with respect to service and facilities have been classified as absolute and for additional convenience only, and it has been held with respect to such classification that in the performance of an absolute duty, the question of expense is not to be considered, but that where the duty sought to be enforced is one of additional convenience rather than necessity, the question of expense to the company and relative benefit to the public is the deciding factor and may not be disregarded.[86] It has been held, however, that while the division of duties into these two classes is useful in analyzing a given situation, it does not have any controlling significance,[87] and that it is subordinate to the rule that the railroad must furnish facilities and services which are adequate and reasonable.[88]

N.J.Law 35, reversed on other grounds 29 A.2d 390, 129 N.J.Law 263.

Duty to reduce expenses

In view of curtailment of business previously done by railroad companies, and in view of large amount of railroad mileage in bankruptcy, railroad companies are not only justified in reducing their expenses, where it is practicable to do so with reasonable regard to efficiency and without impairment of their absolute obligations, but it is their duty to do so in the public interest—Southern Ry Co. v Public Service Commission, 10 S.E.2d 769, 195 S.C. 247.

78. U.S.—Interstate Commerce Commission v. Oregon-Washington R. & Nav. Co., Or., 53 S.Ct 266, 288 U.S. 14, 77 L.Ed. 588.

79. Mich.—Northern Assur. Co. v. New York Cent R. Co., 260 N.W. 763, 271 Mich. 569.

80. U.S.—Southern Ry Co. v. South Carolina Public Service Commission, D.C.S.C., 31 F.Supp. 707.
Fla.—**Corpus Juris cited in** State v. Georgia Southern & F. Ry. Co., 190 So. 527, 532, 139 Fla. 115.
Okl.—Lowden v. State, 113 P.2d 991, 189 Okl. 76
S.C.—Southern Ry. Co. v. Public Service Commission, 10 S.E.2d 769, 195 S.C. 247.
51 C.J. p 970 note 41.

81. Okl. Atchison, etc., R. Co. v. State, 100 P. 16, 23 Okl. 231, 18 Ann Cas. 102.
51 C.J. p 970 note 43.

82. Mich.—Chicago & N. W. Ry Co. v. Michigan Public Service Commission, 45 N.W.2d 520, 329 Mich. 432.
Okl.—Missouri-Kansas-Texas R. Co. v State, 119 P.2d 835, 189 Okl. 685—Lowden v State, 113 P.2d 991, 189 Okl. 76—Kurn v. State, 52 P.2d 841, 175 Okl. 379
S.C.—Southern Ry. Co. v. Public Service Commission, 10 S.E.2d 769, 195 S.C. 247
51 C.J. p 1013 note 54 [a].

Rights of railroad and the public must be considered in determining in any particular case what constitutes "adequate, efficient, just and reasonable service", since a particular service by a railroad may be reasonable in a small noncommercial community which would be wholly inadequate and inefficient in a commercial or manufacturing community.—Application of Union Pac. R. Co., 142 P.2d 575, 65 Idaho 221.

Kind of transportation service

Adequacy of rail service transportation facilities for one kind of transportation service may not be same when applied to different service.—Atchison, T. & S. F. Ry Co. v. Public Service Commission of Kansas, 288 P. 755, 130 Kan. 777.

83. S.C.—Southern Ry. Co. v. Public Service Commission, 10 S.E.2d 769, 195 S.C. 247.

84. Okl.—Lowden v. State, 78 P.2d 1059, 182 Okl. 549.

Other statement of rule

A railroad's facilities must be commensurate with the business done and the progress of the community—State ex rel. Taylor v. Union Pac. R. Co., 89 P.2d 1005, 60 Idaho 185.

85. Ill.—People v. Illinois Central R. Co., 89 N.E. 744, 241 Ill. 471.
51 C.J. p 970 note 44.

86. U.S.—Atlantic Coast Line R. Co. v. Public Service Commission of S. C., D.C.S.C., 77 F.Supp. 675.
Neb.—Application of Thomson, 8 N.W.2d 552, 143 Neb. 52.
Okl.—St. Louis-San Francisco Ry. Co. v. State, 155 P.2d 718, 195 Okl. 41—Atchison, T. & S. F. Ry. Co. v. State, 119 P.2d 840, 190 Okl. 18—Missouri-Kansas-Texas R. Co. v. State, 119 P.2d 835, 189 Okl. 685—Lowden v. State, 118 P.2d 238, 189 Okl. 491—Atchison, T. & S. F. R. Co. v. State, 118 P.2d 202, 189 Okl. 485—Lowden v. State, 100 P.2d 890, 186 Okl. 654—Kurn v. State, 66 P.2d 52, 179 Okl. 440—Kurn v. State, 52 P.2d 841, 175 Okl. 379.
S.C.—Southern Ry. Co. v. Public Service Commission, 10 S.E.2d 769, 195 S.C. 247.

87. Okl.—Lowden v. State, 113 P.2d 991, 189 Okl. 76.

88. Okl.—Lowden v. State, supra.

§ 391. Relief from Performance of Duty

A railroad is not relieved from its paramount duty to furnish facilities essential to transportation by the fact that performance will involve pecuniary loss, and a railroad cannot by contract relieve itself of its public duty to operate.

A railroad is not relieved from its paramount duty to furnish facilities essential to transportation by the fact that performance will involve pecuniary loss.[89] So, if a railroad is solvent and prosperous, it cannot escape performance of its duty of furnishing transportation over one portion of its road by showing that such portion does not pay, when all parts of the system are so interwoven that an accurate ascertainment of the profits of any one portion of the road is impracticable.[90] It has been held, however, that a railroad company has the duty to seek, and regulatory agencies have the duty to permit, elimination of those services and facilities which are no longer needed or used by the public to any substantial extent.[91] While a railroad cannot be forced to operate in the face of unlawful conduct and acts of violence on the part of striking employees, especially where such conduct approaches the magnitude of civil war,[92] it may be compelled to resume its duties as a common carrier of freight and passengers which it has virtually suspended owing to a controversy with its employees as to the rate of wages where no sufficient excuse is shown for not providing other employees sufficient to do the work.[93]

A railroad cannot by contract relieve itself of its public duty to operate.[94]

§ 392. Abandonment or Discontinuance

a. As to whole road
b. As to part of road
c. Consent of state
d. Proceedings to discontinue operation

a. As to Whole Road

A railroad intending to give up its franchise may, in the absence of a contract or statute providing otherwise, abandon operation of its entire road if it can be operated only at a loss and there is no reasonable prospect of future profitable operation.

While under a statute which is merely permissive a railroad company cannot be compelled to construct its railroad, as discussed supra § 121, a railroad intending to give up its franchise may, in the absence of a controlling contract or statute providing otherwise,[95] abandon operation of its entire road if it can be operated only at a loss and there is no reasonable prospect of future profitable operation.[96] To deny the road the right of abandonment under such circumstances would be to deprive it of its property without due process of law in violation of constitutional provisions.[97] The rule that a railroad continuing to exercise its charter privileges must provide reasonably safe, and adequate facilities even if this involves pecuniary loss, as discussed supra § 391, does not militate against the principle that the company may abandon its road entirely.[98] The fact that striking employees were unlawfully interfering with the operation of a railroad, and that connecting lines had unlawfully refused to interchange traffic with the railroad, has been held not to show that the railroad had been abandoned[99]

89. Fla.—State v Georgia Southern & F. Ry Co, 190 So. 527, 139 Fla 115, 123 A.L.R. 914
51 C.J. p 971 note 47
Loss as justifying abandonment of all or part of road see infra § 392
Expense as factor for consideration in requiring performance of absolute duty or for additional convenience only see supra § 390.

90. Idaho.—In re Application of Union Pac. R Co to Abandon Certain Train Service Between Cache Junction, Utah, and Preston, Idaho, and Between Ogden, Utah, and Malad, Idaho, 134 P.2d 1073, 64 Idaho 597.

91. Neb.—Application of Chicago, B & Q. R. Co, 41 N.W.2d 157, 152 Neb. 352.

92. U.S.—Farmers Grain Co v. Toledo, P & W. R. R., C.C.A.Ill., 158 F.2d 109, vacated on other grounds Brotherhood of Locomotive Firemen & Enginemen Local Lodge No. 926 v Toledo, P & W. R R Co., 68 S.Ct. 53, 332 U.S. 748, 92 L.Ed. 335, and Farmers Grain Co v. Brotherhood of Locomotive Firemen & Enginemen Local Lodge No 926, 68 S.Ct 53, 332 U.S. 748, 92 L.Ed. 335.

93. N.Y.—People v. New York Cent., etc, R. Co, 28 Hun 543, 3 N.Y.Civ. Proc. 11, 63 How.Pr. 291.

94. Ga.—Hearn v. Central of Georgia R. Co., 95 S.E. 368, 22 Ga.App. 1.
51 C.J. p 971 note 49.

95. Ohio.—Fort Loraine v. Cress, 21 Ohio N.P.,N.S., 81.
51 C.J. p 971 note 53

96. Minn.—Minneapolis & St. P. S R. Co. v. Village of Birchwood, 244 N.W. 57, 186 Minn. 563.
51 C.J. p 971 note 54.
Abandonment of
Location see supra § 67.
Stations see supra § 68.
No implied obligation
The fact that others made improvements along railroad in expectation of its continued operation does not burden railroad with implied obligation to operate.

U.S.—Brownwood North, etc., R. Co. v Texas R. Commission, D.C.Tex., 16 F.2d 297.
Mont.—Briggs v Great Northern Ry Co., 15 P.2d 840, 92 Mont. 463.

97. U.S.—Texas R. Commission v Eastern Texas R Co, Tex, 44 S Ct 247, 264 U.S 79, 68 L.Ed 569.
51 C.J. p 971 note 56.

98. U.S.—Texas R. Commission v. Eastern Texas R Co, supra.
51 C.J. p 971 note 58.

99. U.S.—Farmers Grain Co. v. Toledo, P. & W. R. R., C.C.A.Ill., 158 F.2d 109, vacated on other grounds Brotherhood of Locomotive Firemen & Enginemen Local Lodge No 926 v Toledo, P & W R. R. Co, 68 S.Ct 53, 332 U.S 748, 92 L.Ed 335, and Farmers Grain Co v Brotherhood of Locomotive Firemen & Enginemen Local Lodge No 926, 68 S.Ct. 53, 332 U.S. 748, 92 L.Ed. 335.

Contract. No contract to continue operation of a road at a loss will be implied from acceptance of a charter[1] or permission to exercise the power of eminent domain.[2]

Subsequent statute. The right of abandonment has been held not impaired by subsequent legislation.[3]

b. As to Part of Road

Where the road as a whole is profitable, the company may be obligated to operate the whole, including an unprofitable portion if bound to do so by charter or statutory provisions or under the terms of a land grant; but in the absence of such positive duty, whether it will be obligated to continue the operation of an unprofitable portion depends on the circumstances of the particular case.

Where the road as a whole is profitable, the company may be obligated to operate the whole, including an unprofitable portion if bound to do so by charter[4] or statutory[5] provisions or under the terms of a land grant.[6] In the absence of such positive duty, however, whether it will be obligated to continue the operation of an unprofitable portion depends on the circumstances of the case;[7] thus, where public requirements demand continued operation of an unprofitable line, the road may be under a duty to operate despite a loss sustained as to such line;[8] but, on the other hand, where the loss to the road outweighs any public benefit, there is no duty to continue operation of an unprofitable portion,[9] as where there is a duplication of facilities,[10] or where continued operation of the unprofitable portion would be at a loss so great as to endanger the financial welfare of the whole.[11]

In the absence of a contract between a property owner and the railroad, or a statute forbidding the removal of a line of the railroad, there is no right in any such property owner in an area served by the line of the railroad to require its continued maintenance and operation.[12] Moreover, it has been held that a person contracting with a railroad must contemplate that when public necessity and convenience require abandonment of a particular part of its line, the railroad may not be bound by a provision of the contract to operate that line in perpetuity.[13]

Resumption of service. A railroad is under no duty to resume operation of an abandoned line where the expense to the road is disproportionate to the prospective public benefit[14] or where it has been abandoned for so long a time that the right to operate it has been lost.[15]

c. Consent of State

While a railroad may not be permitted to abandon operation of a portion of its road without consent of the state, a railroad whose whole line is operated at a loss has the right, in the absence of statutory, or charter, or contractual provision to the contrary, to stop operations without consent by the state.

While a railroad may not be permitted to abandon operation of a portion of its road without consent of the state,[16] a railroad whose whole line is operated at a loss has the right, in the absence of statutory or charter or contractual provision to the contrary, to stop operations without consent of the state.[17]

Under statutes permitting abandonment on express authorization, the railroad cannot abandon a line in the absence of the prescribed authoriza-

1. U.S.—Texas R. Commission v. Eastern Texas R. Co., Tex., 44 S.Ct. 247, 264 U.S. 79, 85, 68 L.Ed. 569.
51 C.J. p. 971 note 59

2. U.S.—Bullock v. Florida, Fla., 41 S.Ct. 193, 254 U.S. 513, 520, 65 L.Ed. 380
51 C.J. p. 972 note 60.

3. U.S.—Pittsburgh, etc., Coal Co. v. Delaware, etc., R. Co., D.C.N.Y., 289 F. 133.
51 C.J. p. 972 note 62.

4. Ark.—State R. Commission v. Saline River R. Co., 177 S.W. 896, 119 Ark. 239, 243.
51 C.J. p. 972 note 63.

5. Mass.—Brownell v. Old Colony R. Co., 41 N.E. 107, 164 Mass. 29, 49 Am.S.R. 442, 29 L.R.A. 169
51 C.J. p. 972 note 64.

6. Neb.—State v. Sioux City, etc., R. Co., 7 Neb. 357.
51 C.J. p. 972 note 65.

7. U.S.—State v. Old Colony Trust Co., Iowa, 215 F. 307, 131 C.C.A. 581, L.R.A. 1915A 549
51 C.J. p. 972 notes 67–71.

8. Colo.—Colorado, etc., R. Co. v. State R. Commission, 129 P. 506, 54 Colo. 64.
51 C.J. p. 972 note 67.

Corpus Juris has been cited in a case involving an obligation to continue operation of particular train service furnished at a loss.—Alabama Public Service Commission v. Atlantic Coast Line R. Co., 45 So.2d 449, 450, 253 Ala. 559.

9. Miss.—Yazoo & M. V. R. Co. v. Mississippi R. Commission, 146 So. 430, 166 Miss. 359.
51 C.J. p. 972 note 68.

10. Wash.—Day v. Tacoma R., etc., Co., 141 P. 347, 80 Wash. 161, L.R.A. 1915B 547.
51 C.J. p. 972 note 70.

11. U.S.—State v. Old Colony Trust Co., Iowa, 215 F. 307, 131 C.C.A. 581, L.R.A. 1915A 549.
51 C.J. p. 972 note 71.

12. Neb.—Scully v. Central Nebraska Public Power & Irrigation Dist., 9 N.W.2d 207, 143 Neb. 184

13. Ky.—Meacham v. Louisville & N. R. Co., 169 S.W.2d 830, 293 Ky. 642.

14. Miss.—State v. Leland Southwestern R. Co., 91 So. 7, 128 Miss. 312.
51 C.J. p. 973 note 73.

15. Cal.—Atchison, etc., R. Co. v. State R. Commission, 160 P. 828, 173 Cal. 577, 2 A.L.R. 975.
51 C.J. p. 973 note 74.

16. Ky.—Kentucky Southern R. Co. v. Hatchett, 192 S.W. 694, 174 Ky. 463, L.R.A. 1917D 1105.
51 C.J. p. 973 note 76.

17. U.S.—Bullock v. Florida, Fla., 41 S.Ct. 193, 254 U.S. 513, 65 L.Ed. 380.
51 C.J. p. 973 note 78.

tion,[18] which will not be implied from a certificate authorizing an extension duplicating service.[19]

Destruction. Railroads cannot be destroyed without the consent of the state.[20]

d. Proceedings to Discontinue Operation

Boards or commissions sometimes have jurisdiction to allow a railroad company to abandon, or to prevent it from abandoning its road or a portion thereof, but the enforcement of their orders by the court will depend on whether they are equitable and just.

In some jurisdictions boards or commissions have jurisdiction to allow a railroad company to abandon,[21] or to prevent it from abandoning,[22] its road or a portion thereof, but the enforcement of their orders by the court will depend on whether under the circumstances they are equitable and just.[23] In determining whether a company should be permitted to abandon a portion of its road, the commission should consider the ability of the road from its earnings to meet operating expenses.[24] Under some provisions, the commission may authorize abandonment of a line only when it is shown that the abandonment will not result in substantial injury to the public, and it is without power to act solely on the ground that the line proposed to be abandoned can be operated only at a loss.[25]

Necessary parties to a proceeding for discontinuance or abandonment of a railroad include the proper representatives of the public interest,[26] and the railroad.[27] Railroad patrons affected by the proposed abandonment of the line may be heard in the proceeding.[28]

Pleading. Under statutes expressly providing for initiation of proceedings before a commission to compel establishment of facilities at stations by petition, and containing no express provision for petition to discontinue existing facilities, the filing of a petition is not essential to its jurisdiction to discontinue such facilities.[29]

Review by courts. The determination of the commission with respect to an application for abandonment or discontinuance of a railroad line is subject

18. Fla.—State v. Atlantic Coast Line R. Co., 122 So. 256, 97 Fla. 816
51 C.J. p. 973 note 80

19. Fla.—State v. Atlantic Coast Line R. Co., supra
51 C.J. p. 973 note 81.

20. Fla.—State v. Bullock, 82 So. 866, 78 Fla. 321, 8 A.L.R. 232, affirmed 41 S.Ct. 193, 254 U.S. 513, 65 L.Ed. 380
51 C.J. p. 973 note 82.

21. Minn.—Minneapolis & St. P. S. R. Co. v. Village of Excelsior, 244 N.W. 61, 186 Minn. 573
51 C.J. p. 973 note 85.
Extent of power to permit abandonment see infra § 396 b.
Penalty for discontinuance without proceedings see infra § 437.

Particular part of lines
Commission's jurisdiction to authorize discontinuance of intrastate railroad passenger service attaches, where entire discontinuance over particular part of lines is proposed.—Nashville, C. & St. L. Ry. v. Hannah, 27 S.W.2d 1089, 160 Tenn. 586, 70 A.L.R. 837

Abandonment held properly allowed
Pa.—Crown Products Co. v. Pennsylvania Public Utility Commission, 31 A.2d 913, 32 A.2d 305, 152 Pa. Super. 345.

Effect of certificate
Certificate of commission approving railroad's application to abandon a portion of its right of way on plaintiff's land, on condition that all grade crossings be abolished and authorizing railroad to take up tracks on abandoned line, signified an intention on part of railroad to terminate use of branch line for rail purposes but commission's certificate did not, in itself, without more, constitute an abandonment, and did not attempt to and could not determine or adjudicate property or contractual rights of railroad or plaintiff, as owner of reversionary interest and at most proceedings before commission constituted only expression of railroad's intention to abandon its right of way, commission's conditional approval of plan of abandonment and consent of commonwealth thereto.—Lacy v. East Broad Top R. & Coal Co., Pa.Super., 77 A.2d 706.

22. La.—Railroad Comrs. v. Kansas City Southern R. Co., 35 So. 487, 111 La. 133.
51 C.J. p. 973 note 86.

23. Colo.—In re Denver, etc., R. Co., 194 P. 617, 69 Colo. 309.
51 C.J. p. 973 note 87.

24. Md.—Benson v. Public Service Commission, 118 A. 852, 141 Md. 398
51 C.J. p. 974 note 88.

25. Minn.—Minneapolis & St. P. S. R. Co. v. Village of Excelsior, 244 N.W. 61, 186 Minn. 573.

26. Fla.—Anderson v. Dent, 85 So. 151, 79 Fla. 851, 855
51 C.J. p. 974 note 90.

Appearance de bene esse
A city which appeared and obtained an order permitting railroad to abandon a branch line remained within jurisdiction of public utility commission until proceedings were finally concluded, and its attempt to appear de bene esse, to contest commission's jurisdiction to rehear on patron's petition for modification, was a nullity.—Crown Products Co. v. Pennsylvania Public Utility Commission, 31 A.2d 913, 32 A.2d 305, 152 Pa. Super. 345

27. Ohio.—Cincinnati v. Westinghouse Electric, etc., Co., 9 Ohio App., 132, 29 O.C.A. 42.

28. Pa.—Crown Products Co. v. Pennsylvania Public Utility Commission, 31 A.2d 913, 32 A.2d 305, 152 Pa. Super. 345

A railroad patron was not deprived of right to be heard in proceeding for permission to railroad to abandon a branch line where commission reopened and reheard the case on patron's petition for modification of order granting the permission.—Crown Products Co. v. Pennsylvania Public Utility Commission, supra.

Notice to counsel
In proceeding for grant of permission to railroad to abandon service and facilities on a branch line, where counsel for objecting railroad patron did not enter appearance, the commission could not be expected to notify counsel and was not responsible for patron's failure to give counsel notice of hearing, until day before the date fixed.—Crown Products Co. v. Pennsylvania Public Utility Commission, supra.

29. Ark.—Kansas City Southern R. Co. v. State R. Commission, 299 S.W. 761, 175 Ark. 425.
51 C.J. p. 974 note 93.

to review in the courts.[30] The findings of the commission will be considered by the court as prima facie evidence of the facts,[31] and the order of the commission will be regarded by the court as prima facie reasonable,[32] and the court ordinarily will not substitute its judgment for that of the commission.[33]

Authorization by court of equity With respect to the rights of a mortgagee of railroad property, a court of equity may authorize the abandonment of portions of the railway system covered by the mortgage, where it appears that such portions constitute a small part of the entire system and have been and will be operated at a substantial loss which cannot be prevented by any other course.[34]

B. REGULATION IN GENERAL

§ 393. By Railroad Company

Every railroad has broad discretionary powers relative to operation; but such discretion is not absolute and it must be exercised with due regard for the public welfare, and is subject to governmental control and regulation.

As a general rule every railroad has broad discretionary powers relative to operation,[35] and the owners of a railroad will not be interfered with in the management of their property if there is no competent evidence of any patron being deprived of reasonable facilities.[36] However, the railroad's discretion is not absolute,[37] it must be exercised with due regard for public welfare,[38] and is subject to governmental control and regulation.[39] So it has been held that the duty of a railroad to the public is regulated by law, and not by rules promulgated by the railroad itself applicable to its personnel.[40] A railroad company in the process of reorganization under the Bankruptcy Act and operating with a trustee, and whose increased business is due to a war still in progress, is under an obligation to the public generally to effect all reasonable economies so long as reasonably adequate and satisfactory service is still rendered.[41]

§ 394. Public Regulation

All services of a public nature performed by a railroad are subject to duly authorized and properly exercised governmental regulation.

As a general rule, all services of a public nature performed by a railroad are subject to duly authorized and properly exercised governmental regulation, in order to correct abuses and to prevent unjust discrimination.[42] The regulation of railroad traffic falls within the police power.[43]

30. Minn.—Minneapolis & St. P. S R. Co. v. Village of Excelsior, 244 N.W 61, 186 Minn. 573.

Pleadings

In suit by railroad against public service commission for review of commission's order denying railroad's request for leave to discontinue two passenger trains operating daily between two communities, refusal to allow railroad to amend bill of complaint and to present evidence to show that if permission should be granted to discontinue the two trains, railroad would make arrangements to put on additional passenger bus to operate between the two communities making connections with railroad's interstate streamliner, rested in sound discretion of trial court—Chicago & N. W Ry. Co v. Michigan Public Service Commission, 45 N W.2d 520, 329 Mich. 432.

Admissibility of evidence

On appeal from order of commission granting suburban railroad leave to abandon and close for traffic a part of right of way, refusing to permit villages affected to offer evidence before introduction of record before commission, or unless they offered all testimony taken before commission, held error.—Minneapolis & St. P. S. R. Co v. Village of Excelsior, 244 N.W. 61, 186 Minn 573.

31. Minn.—Minneapolis & St. P. S. R. Co. v. Village of Birchwood, 244 N W. 57, 186 Minn. 563.

Statement in order

On appeal from order refusing to modify grant of permission to railroad to abandon branch line, record did not refute statement in such order that no protest was filed and no representative of objecting patron appeared at the hearing—Crown Products Co. v. Pennsylvania Public Utility Commission, 32 A.2d 305, 152 Pa Super 345—Crown Products Co. v. Pennsylvania Public Utility Commission, 31 A.2d 913, 152 Pa Super 345

32. Minn.—Minneapolis & St P. S. R. Co. v. Village of Birchwood, 244 N.W. 57, 186 Minn 563

33. Ohio—Village of Glouster v. Public Utilities Commission, 97 N.E 2d 658, 155 Ohio St 162.

Only question for determination is whether order is arbitrary and unreasonable.—Chicago & N. W. Ry. Co v. Michigan Public Service Commission, 45 N.W.2d 520, 329 Mich. 432.

34. N.Y.—New York State R Cos v Security Trust Co., 238 N.Y.S. 354, 135 Misc 456.

35. Fla.—State v Atlantic Coast Line R Co, 54 So 394, 60 Fla. 465 51 C J p 974 note 97

36. Iowa—Lowden v. Iowa State Commerce Commission, 294 N W 749, 229 Iowa 526—State v. D M & K. C Ry Co, 54 N.W. 461, 87 Iowa 644

37. Colo—Colorado, etc., R Co v State R Commission, 129 P 506, 54 Colo 64

Ill—People v Chicago, etc, R. Co, 22 N E 857, 130 Ill. 175.

38. Fla—Taylor v Florida East Coast R Co, 45 So 574, 54 Fla 635, 644, 127 Am S.R 155, 16 L R A,N S, 307, 14 Ann Cas 472 51 C J. p 975 note 99

39. Fla—State v. Atlantic Coast Line R. Co, 54 So. 394, 60 Fla 465 51 C J. p 975 note 1.

40. U S—Waider v. Chicago, R I & P R. Co, D C Iowa, 10 F R D 376.

41. Neb.—Application of Thomson, 8 N W 2d 552, 143 Neb 52

42. Fla—State v Georgia Southern & F. Ry. Co, 190 So 527, 139 Fla. 115, 123 A.L R 914

43. Ind—Southern Ry. Co v. Harpe, 58 N.E 2d 346, 223 Ind. 124.

§ 395. —— By State or Municipaliy

a. By state
b. By municipality

a. By State

The state may regulate and control the operation of railroads, and the furnishing of facilities by them, subject to the requirement that it act reasonably, and not arbitrarily, and it may exercise this power directly, or degelate it to municipalities or to a board or commission.

Under its general police power and the reserved power to amend, alter, or repeal railroad charters, the state may regulate and control the operation of railroads,[44] and the furnishing of facilities by them[45] This power may be exercised either directly,[46] or through a municipality, as discussed infra subdivision b of this section, or a board or commission, infra § 396, since the state may, within constitutional limitations, delegate its power of regulation to municipalities[47] or to a board or commission;[48] but a regulative power which in its varying local applications would render the functioning of the railroad under its state charter impracticable cannot be delegated.[49]

It has been said that the power of a state to regulate operation of railroads is inherent[50] Obligations placed on a railroad by a statute requiring the railroad to be equipped with ample accommodations for all passenger travel and freight transportation are for the benefit of the public, and no individual or community enjoys any special interest or contractual right exclusive of, or paramount to, that of the state.[51] Where a statute dealing with a railroad refers to "public convenience and necessity," it does not mean one or more persons that may be benefited at a particular locality but it means the public generally, and in determining the true public convenience the effect of the order on the whole public instead of a small part of the public should be taken into consideration.[52]

Extent and limits of power. The right to regulate operation of a railroad extends to matters affecting the public convenience as well as the public safety.[53] The state must exercise its power of regulation reasonably and not arbitrarily,[54] and within constitutional limitations[55] Loss to the railroad will be considered in determining the reasonableness of a regulation,[56] but is not necessarily conclusive as to unreasonableness.[57] There is authority to the effect that a railroad operating under a permissive, as distinguished from a mandatory, charter or franchise cannot be compelled to continue operation at a loss.[58] It is within the state's police power to require a permit from a board or commission as prerequisite to abandonment of service over a railroad line.[59]

Surrender of power. In the absence of positive language to that effect, statutory or constitutional provisions reserving rights to railroads will not be construed as a surrender of the state's power to regulate operation.[60]

44. N Y —Delaware & H. R. Corporation v. Public Service Commission, 281 N Y S 155, 245 App Div 66, affirmed 200 N E 298, 270 N Y 519.
51 C J. p 975 note 5

45. U S.—Great Northern Ry Co v Nagle, D C Mont, 28 F Supp 812
N Y —Delaware & H R Corporation v Public Service Commission, 281 N Y S 155, 245 App Div 66, affirmed 200 N E. 298, 270 N Y 519
51 C J. p 975 note 6

46. U S —Norfolk, etc, R Co v. Public Service Commission, W Va., 44 S Ct 439, 265 U S 70, 68 L Ed 904
51 C J. p 975 note 7

47. Ohio —Cincinnati, etc, R Co v Bowling Green, 49 N E 121, 57 Ohio St 336, 41 L R A. 422—Cincinnati, etc, R. Co. v Sullivan, 32 Ohio St 152

48. Or —Southern Pac. Co v State R. Commission, 119 P. 727, 60 Or 400, 403
51 C J p 975 note 16.

49. N.J.—Board of Health of Weehawken Tp, Hudson County v New York Cent. R. Co., 72 A.2d 511, 4 N J 293.

50. Fla —State v Atlantic Coast Line R Co, 44 So. 213, 53 Fla. 650, 677, 13 L R A, N S, 320, 12 Ann. Cas 359
51 C J p 975 note 11.

51. Va —Lynchburg Traffic Bureau v Commonwealth, 54 S E 2d 66, 189 Va 612

52. Ill —Illinois Cent. R. Co. v. Illinois Commerce Commission, 74 N. E 2d 526, 397 Ill. 387.

53. Tex —International, etc, R Co. v Anderson County, Civ.App, 174 S W 305, affirmed 38 S Ct. 370, 246 U S 424, 62 L Ed. 807—Davidson v. State, 4 Tex App. 545, 30 Am R. 166.

54. U S —Norfolk, etc, R. Co v. Public Service Commission, W Va, 44 S Ct 439, 265 U S 70, 68 L Ed 904.
51 C J p 976 note 18.

55. N.Y —Delaware & H. R. Corporation v Public Service Commission, 281 N Y.S 155, 245 App Div. 66, affirmed 200 N E. 298, 270 N.Y 519.

56. U.S —Atlantic Coast Line R Co. v. North Carolina Corp. Commission, N C, 27 S Ct 585, 206 U S. 1, 51 L.Ed 933, 11 Ann Cas. 398
51 C J p 976 note 20

57. U S —Southern Ry Co v South Carolina Public Service Commission, D C S C, 31 F Supp 707.
51 C J. p 976 note 21

A carrier's primal duty to furnish adequate facilities to the public may be compelled although some pecuniary loss from rendering service compelled may result —Atlantic Coast Line R Co v. North Carolina Corp Commission, N C, 27 S Ct 585, 206 U.S 1, 51 L Ed 933, 11 Ann Cas 398 —Southern Ry. Co. v South Carolina Public Service Commission, D C S C, 31 F Supp. 707

58. Md —Public Service Commission v Philadelphia, etc, R Co, 89 A. 726, 122 Md 438.
51 C J. p 976 note 22

59. U.S —St. Louis-San Francisco R Co v Alabama Public Service Commission, D C.Ala, 27 F 2d 893, vacated on other grounds 49 S Ct 383, 279 U S 560, 73 L.Ed. 843.

60. Colo —Colorado, etc, R. Co v. State R. Commission, 129 P. 506, 54 Colo 64
51 C J. p 977 note 24.

b. By Municipality

The operation of a railroad within its municipal boundaries may be a proper subject of regulation by a municipal corporation, but the power must be exercised within its scope, without conflicting with statutory provisions, and the regulation must be reasonable.

The operation of a railroad within its municipal boundaries may be a proper subject of regulation by a municipal corporation [61] While the power to enact certain regulations with respect to railroads has been referred to as an inherent power,[62] and many such regulations have been sustained as valid without express legislative authority for their enactment under the general police powers usually conferred on or possessed by such bodies,[63] generally the power must be expressly granted or arise by necessary implication.[64] The regulation must be reasonable,[65] at least in its application to the particular case.[66]

The power must be exercised within its scope,[67] without conflicting with statutory provisions,[68] and without unreasonably invading private rights [69] The regulation must not be arbitrary[70] or discriminatory.[71] It must be certain and definite,[72] but it may be enforced if sufficiently definite and certain in its terms to inform the railroad company what it is required to do.[73] It has been held that in the operation of its road and in the running of its cars the judgment of the board of directors of a railroad company, in the absence of statutory provisions, is supreme and exclusive,[74] and that a municipal corporation has no power to interfere therewith.[75]

Surrender of power. A municipality does not surrender its power of regulation because of a grant to use its streets for railroad purposes.[76]

§ 396. —— By Board or Commission

a. In general
b Extent and limits of power

a. In General

The power of a board or commission to regulate the operation of a railroad and the furnishing of facilities by it is such as may have been granted it by the state.

The power of a board or commission to regulate the operation of a railroad and the furnishing of facilities by it is such as may have been granted it by the state.[77] The acts of a board or commission

61. U S.—Atlantic, etc., R Co. v. City of Goldsboro, N.C., 34 S.Ct. 364, 232 U S. 548, 58 L Ed 721.
Ill —Chicago Great Western R Co v. People, 79 Ill.App. 529, affirmed Chicago Great Western R. Co v. People ex rel. Bennett, 53 N.E 986, 179 Ill. 441.
Ky.—City of Versailles v Kentucky Highland R. Co, 154 S W. 388, 153 Ky 83.
Ohio —City of Cincinnati v Luckey, 91 N.E.2d 477, 153 Ohio St. 247.
43 C.J. p 430 note 47.

62. Mo.—Seibert v. Missouri Pac. R Co, 87 S W. 995, 188 Mo 657, 70 L.R A. 72.

63. Ind —Baltimore, etc., R. Co v Whiting, 68 N.E. 266, 161 Ind. 228 —Whitson v. Franklin, 34 Ind 392.
Mo.—Seibert v. Missouri Pac. R Co., 87 S.W. 995, 188 Mo. 657, 70 L R.A. 72—Jackson v. Kansas City, etc., R. Co., 58 S.W 32, 157 Mo. 621, 80 Am.S.R. 650—Robertson v. Wabash, etc., R. Co., 84 Mo. 119.

64. Ind —Pittsburgh, etc., R. Co. v. Crown Point, 45 N.E. 587, 146 Ind. 421, 35 L R.A. 684.
43 C J. p 430 note 50

65. Del —McCoy v Philadelphia, etc, R. Co, 10 Del 599
Me —Newport Municipal Officers v Maine Cent. R. Co, 123 A. 172, 123 Me. 383
Mo —White v. St. Louis & S. F. Ry. Co, 44 Mo.App. 540.
Neb —Davison v. Chicago, etc, R. Co., 160 N W 877, 100 Neb. 462.
N.J —New Jersey Cent. R. Co v Elizabeth, 57 A 404, 70 N.J Law 578.
N.Y.—Village of Jamaica v. Long Island R. Co, 37 How Pr 379
Tenn —Hines v Partridge, 231 S W. 16, 144 Tenn 219
43 C J. p 430 note 51.

66. Minn.—Evison v. Chicago, etc., R. Co., 48 N.W 6, 45 Minn. 370, 11 L.R.A. 434.
43 C J. p 430 note 52

67. Ind.—Pittsburg, etc, R. Co v. Crown Point, 45 N E 587, 146 Ind 421, 35 L R.A 684.
43 C.J. p 430 note 53.

68. N.Y.—Village of Jamaica v. Long Island R. Co, 37 How Pr. 379.
43 C.J. p 430 note 54.

69. Ill —Chicago y Pittsburg, etc., R Co, 91 N.E. 422, 244 Ill. 220, 135 Am S.R 316

70. Ill.—Chicago v. Pittsburg, etc., R. Co, supra.

71. Ill —Chicago v. Pittsburg, etc., R. Co., supra—Lake View v. Tate, 22 N E 791, 130 Ill 247, 6 L R.A. 268

72. N J —New Jersey Cent. R Co. v. Elizabeth, 57 A. 404, 70 N.J Law 578.
43 C.J p 430 note 58.

73. Ohio —Cincinnati, etc, R Co. v. Bowling Green, 49 N.E. 121, 57 Ohio St. 336, 41 L.R.A. 422.
43 C.J. p 430 note 59.

74. Pa.—In re Pennsylvania R. Co., 62 A 986, 213 Pa. 373, 3 L.R A.,N. S., 140, 5 Ann.Cas. 299.

75. Pa.—In re Pennsylvania R. Co, supra
43 C J p 430 note 61.

76. N C.—State v. Atlantic, etc, R Co, 53 S E. 290, 141 N C. 736.

77. U S —Northern Pacific Ry. Co v. Weinberg, D C Minn., 53 F.Supp 133.
Ohio —Erie R. Co v. Public Utilities Commission, 179 N.E. 924, 124 Ohio St 573.
Pa.—Lehigh Nav. Coal Co. v. Pennsylvania Public Utility Commission, 1 A.2d 540, 133 Pa Super. 67 —Steward v. Public Service Commission of Pennsylvania, 181 A. 329, 119 Pa.Super. 353.
51 C.J p 977 note 28.
Property used for profit
A statutory provision authorizing the commission to direct additions, extensions, repairs, improvements, and changes in the facilities of public utilities after hearing and a finding that such additions, etc., are necessary is broad enough to impose a duty on a railroad to maintain property which it uses for profit as well as that which it owns and gives commission authority to enforce duty.—Alton R. Co v. Illinois Commerce Commission ex rel. Moulding-Brownell Corp., 15 N.E 2d 508, 368 Ill 584, affirmed Alton R. Co. v. Illinois Commerce Commission, 59 S.Ct. 340, 305 U.S. 548, 83 L Ed. 344.

under a statute cannot be valid unless the statute itself is valid.[78] The board or commission may ordinarily exercise some, without exercising all, of its delegated powers.[79] The obligations of a railroad to maintain transportation reasonably adequate to meet the public convenience and necessity should ultimately be measured by the terms of the constitutional provision giving the commission the power and duty of supervising, regulating, and controlling railroads, rather than by the railroad's charter.[80]

Judicial review. The actions of a board or commission in regulating the operation of railroads generally are subject to review in the courts.[81] Under some statutes, an appeal may be taken only from a final order.[82]

b. Extent and Limits of Power

The extent and limits of the delegated power of a board or commission are measured by the instrument of delegation, and by the requirement that its acts be reasonable. The reasonableness of an order will depend on the particular facts involved.

The extent and limits of the delegated power of a board or commission are measured by the instrument of delegation, within constitutional limitations.[83] Under a statute delegating to a commission the power to compel a railroad to furnish reasonably adequate service, equipment and facilities, the commission may have power to order the furnishing of new facilities.[84] Under a statute empowering a board or commission to require a railroad to conform to state laws and to the commission's lawful regulations, and to prevent discontinuance of facilities without prior permission, the board or commission may require a railroad to establish[85] and maintain[86] such suitable facilities and conveniences as may be just and reasonable. However, under a statute requiring the commission to recommend steps to be taken to prevent railroad accidents, and to make the recommendations public unless the railroad shall carry them out within a reasonable time, the commission is not authorized to require railroads to adopt safety measures.[87]

The power of a board or commission to regulate the operation of railroads is subject to the limitation that its orders or regulations be reasonable.[88] In this respect, the reasonableness of an order will depend on the particular facts involved.[89] In determining whether a regulation governing the operation

78. Pa.—Pennsylvania R. Co. v. Driscoll, 9 A.2d 621, 336 Pa. 310
Wis.—Union Lime Co. v. State R. Commission, 129 N.W. 605, 144 Wis. 523.

79. Wis.—Union Lime Co. v. State R. Commission, supra.
51 C.J. p. 977 note 30.

80. Va.—Lynchburg Traffic Bureau v. Commonwealth, 54 S.E.2d 66, 189 Va. 612.

Conflict

Constitutional provision defining the measure of duty resting on public service corporations and bestowing power on a commission to insure performance thereof, and code section putting into operation constitutional provision, do not conflict with contractual or franchise obligation imposed on railroad to be a railroad of the first class, equipped with ample accommodations for all passenger travel and freight transportation.—Lynchburg Traffic Bureau v. Commonwealth, supra.

81. Mo.—State ex rel. St. Paul & Kansas City Short Line R. Co. v. Public Service Commission, 98 S.W.2d 699, 339 Mo. 641

Statute held inapplicable

Review of an order of the public service commission relating to railroads is not provided for by statute which provides for review by court of common pleas, with right of appeal, of orders of the commission relating to public utilities, but which does not include railroads in its definition of the term "public utilities".—Southern Ry. Co. v. Public Service Commission, 10 S.E.2d 769, 195 S.C. 247.

Burden of proof

In proceeding to review order of public service commission dismissing railroad's application for permission to maintain bridge constructed improperly and without commission's permission, railroad had burden to show order was unreasonable and unlawful.—State ex rel. St. Paul & Kansas City Short Line R. Co. v. Public Service Commission, 98 S.W.2d 699, 339 Mo. 641

82. Ohio.—Co-operative Legislative Committee of Transp. Broth. v. Public Utilities Commission, 80 N.E.2d 841, 150 Ohio St. 277.

Order held not final

In proceeding before commission for elimination of claimed unsafe condition of tracks in railroad yards, order of commission not only retaining jurisdiction of citation pending report by railroad but for further hearings and orders was not final appealable order.—Co-operative Legislative Committee of Transp. Broth. v. Public Utilities Commission, supra.

83. Ind.—Chicago & E. I. R. Co. v. Public Service Commission, 49 N.E.2d 841, 221 Ind. 592.
Tex.—Railroad Commission v. Fort Worth & D. C. Ry. Co., Civ.App., 161 S.W.2d 560, error refused.
51 C.J. p. 977 note 31.

84. Or.—Southern Pac. Co. v. State R. Commission, 119 P. 727, 60 Or. 400
51 C.J. p. 977 note 36.

85. W.Va.—Norfolk, etc., R. Co. v. Public Service Commission, 113 S.E. 247, 91 W.Va. 414, affirmed 44 S.Ct. 439, 265 U.S. 70, 68 L.Ed. 904

86. W.Va.—Norfolk, etc., R. Co. v. Public Service Commission, supra.

87. Ind.—Chicago & E. I. R. Co. v. Public Service Commission, 49 N.E.2d 841, 221 Ind. 592

88. U.S.—Atchison, T. & S. F. Ry. Co. v. Railroad Commission of State of California, Cal., 51 S.Ct. 553, 283 U.S. 380, 75 L.Ed. 1128

89. Okl.—Gulf, etc., R. Co. v. State, 125 P. 1103, 33 Okl. 378.
51 C.J. p. 978 note 54.

Order held not unreasonable

Commission's order dismissing railroad's application for permission to maintain bridge constructed without permission of commission and with less horizontal clearance than required by commission held not unreasonable, under evidence showing that failure to construct proper bridge was due principally to neglect in planning, and that, although construction of bridge with proper clearance would have been more expensive and expedient, it would not have been impractical or have required prohibitive expense.—State ex rel. St. Paul & Kansas City Short Line R. Co. v. Public Service Commission, 98 S.W.2d 699, 339 Mo. 641.

of a railroad is reasonable, the matter of expense is important criteria to be considered,[90] and where the inquiry concerns the reasonableness of an order of the commission to compel a railroad to furnish a facility not included within its absolute duties, the court must consider all the facts, such as the places and persons interested, the volume of business to be affected, and the saving in time and expense to the shipper as against the cost and loss to the railroad.[91] The facilities required of a railroad by the commission must be consistent with and restrained by economy of operation within the realm of business-like principles of income and expenditures.[92]

Power to regulate operation and facilities cannot be used merely for the purpose of creating traffic.[93] A state commission is without power to prevent the operation of a purely interstate route, where the railroad obeys all rules and regulations of the commission, the terms and conditions of the interstate certificate, and all state laws and municipal ordinances.[94] A judicial question is beyond the jurisdiction of an administrative board or commission.[95] The commission may have jurisdiction to establish rules governing the traffic relations between two intersecting railroads.[96]

The order of the commission regulating the operation of a railroad must be sufficiently explicit to inform the railroad what conduct on its part will render it liable to penalties, and an order which is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application lacks that certainty essential to validity.[97] Severable requirements of a single order of the commission will be treated as separate orders, if one is invalid as unreasonable or unjust.[98]

Abandonment of road. Under statutes empowering a board or commission to permit abandonment of a railroad line under specified conditions, it lacks the power to authorize abandonment in the absence of such condition,[99] or on a ground not specified in the enabling statute.[1]

Resumption of service. Under statutes empowering a commission finding any element of a railroad's service inadequate and reasonably possible to be furnished, to order the road to do so, the commission has power to direct a railroad to resume traffic over an abandoned portion of its line,[2] with respect to both passenger[3] and freight[4] service. Ordinarily a board or commission lacks power to compel resumption of operation of a line of railroad abandoned prior to enactment of the statute creating the board or commission.[5]

Specification as to time. Under statutes giving a board or commission power to determine a railroad's duty with respect to operation and to enforce performance under penalty, the board or commission has implied power to fix the time within which the duty must be performed.[6]

Health measures. Under statutes enumerating specific health measures which a board or commission may order with respect to railroad operation, it lacks power to order an unspecified health measure.[7]

§ 397. —— By Courts

In the absence of a statutory grant of authority, the courts have no power to prescribe regulations affecting the operation of railroads.

The rule that, in the absence of a statutory grant of authority, the courts have no power to prescribe regulations for the control of railroads, discussed supra § 28, applies to regulations affecting operation.[8] A fortiori a court order for additional operating facilities is unwarranted where the road as

90. U.S.—Atchison, T & S F. Ry. Co. v. Railroad Commission of State of California, Cal., 51 S.Ct. 553, 283 U.S 380, 75 L.Ed. 1128.

91. S.C.—Southern Ry. Co. v. Public Service Commission, 10 S E.2d 769, 195 S.C. 247.

92. Idaho.—State ex rel. Taylor v. Union Pac. R. Co., 89 P.2d 1005, 60 Idaho 185.

93. Or.—Southern Pac. Co. v. State R Commission, 119 P. 727, 60 Or. 400.
51 C.J. p 977 note 34.

94. Ohio—Erie R. Co. v Public Utilities Commission of Ohio, 177 N E. 766, 123 Ohio St. 682

95. Wis.—Union Lime Co v. State R. Commission, 129 N.W. 605, 144 Wis. 523.
51 C J. p 978 note 51.

96. Va.—Louisville & N. R. Co. v. Interstate R. Commission, 57 S E 654, 107 Va. 225.

97. U S.—Southern Pac Co. v. Railroad Commission of California, D. C.Cal., 10 F.Supp. 918

98. N M.—San Juan Coal & Coke Co v. Santa Fe, S. J & N. R. R., 298 P. 663, 35 N.M. 336.

99. Minn.—In re Duluth, etc, R. Co., 184 N W. 186, 150 Minn. 30.
51 C.J p 977 note 42.
Proceedings for abandonment see supra § 392 d.

1. U.S.—Hill City R. Co. v. Youngquist, D C Minn., 32 F.2d 819.
51 C J. p 978 note 43.

2. Colo.—Colorado, etc., R. Co. v. State R Commission, 129 P. 506, 54 Colo 64.

3. Colo.—Colorada, etc, R. Co. v. State R Commission, supra.
51 C J p 978 note 46

4. Colo.—Colorado, etc, R. Co. v State R. Commission, supra.
51 C.J. p 978 note 47.

5. Md.—Public Service Commission v. Philadelphia, etc, R. Co, 89 A 726, 122 Md. 438.
51 C.J. p 978 note 48.

6. Wash.—State v. Great Northern R. Co, 123 P. 8, 68 Wash. 257.

7. Miss.—Mississippi R. Commission v. Illinois Cent. R. Co., 74 So. 676, 113 Miss 828.

8. La.—Ellis v. Illinois Cent. R. Co., 10 La.App. 131.
51 C.J p 978 note 56.

operated is unable to pay expenses,[9] or where it is not shown that the facilities furnished are not reasonably adequate and the increase demanded would impose an undue hardship on the company.[10] Where by statutory or constitutional provisions the power to prescribe operating regulations is vested in a board or commission, the power of the court is limited to review of the latter's orders[11]

§ 398. —— Companies, Roads, Persons, and Operations Subject to Regulation

a. In general
b. Companies organized under special charters
c. Effect of time of incorporation or construction
d. Ownership of line

a. In General

In the absence of any provision to the contrary in the statute imposing the regulation or in the charter of the company, statutory regulations with respect to railroads apply to all companies doing business within the jurisdiction imposing the regulation, whether chartered or unchartered.

In the absence of any provision to the contrary in the statute imposing the regulation or in the charter of the company, statutory regulations with respect to railroads apply to all companies doing business within the jurisdiction imposing the regulation,[12] whether chartered or unchartered,[13] and without regard to the time of their incorporation or construction or whether incorporated under general laws or special charters, as discussed infra subdivisions b and c of this section. A statute in terms applicable to railroads of over a certain length applies to a road of over that length, although not all of the prescribed length is within the state imposing the regulation.[14]

Receiver. Regulatory statutes have been held applicable to railroads run by receivers.[15]

What constitutes a "railroad" Within the application of the statutes regulating operation the term "railroad" applies to "dummy" lines,[16] "belt" lines maintained by connecting roads for the purpose of transferring freight,[17] lateral railroads,[18] and to roads using electricity as a motive power as well as steam railroads,[19] except where the statute is not reasonably applicable to electric roads.[20]

What constitutes "operation." A company will be held to be "operating" a railroad within the application of the statutes if running trains thereon for any purpose,[21] including the operation of trains for construction purposes on incompleted portions[22]

Where statutes relative to abandonment of a road are phrased in broad and general language, they will be construed as applicable to all forms of railroad service[23]

Common carrier or private line. Some regulatory statutes have been held applicable only to railroads doing business as common carriers.[24] Accordingly, regulatory statutes have been held inapplicable to private lines on private property used by the proprietors exclusively for their private purposes,[25] such as private logging roads,[26] although there is

9. U S —Delaware, etc., R. Co. v. Van Santwood, D C N Y, 216 F 252, 256
Ohio —Ohio, etc, R. Co. v People, 11 N.E. 347, 120 Ill 200

10. U S —Delaware, etc, R Co v. Van Santwood, D C.N Y, 216 F. 252.
N.Y —People v. Long Island R Co, 31 Hun 125

11. La —Vicksburg, etc, R Co. v State R. Commission, 96 So 832, 153 La. 983
51 C J. p 978 note 60

12. Minn.—Gillam v. Sioux City, etc, R. Co, 3 N.W. 353, 26 Minn 268.
51 C J. p 979 note 64.

13. Mont —Diamond v. Northern Pac R. Co, 13 P. 367, 6 Mont 580

14. N Y —People v. New York, etc, R. Co., 8 N.Y S. 672, 55 Hun 409, affirmed 25 N E. 953, 123 N Y 635
51 C J p 979 note 67.

15. Ga.—Lamb v. Davis, 96 S E. 881, 148 Ga 367—Lamb v Floyd, 96 S E. 877, 148 Ga, 357, 1 A.L.R. 1172.

16. Tenn —Illinois Cent R. Co v. Hudson, 188 S W 589, 136 Tenn 1, 2 A L R 147
51 C J p 979 note 70.
"Railroad" defined generally see supra § 1

17. Ind —Toledo, etc, R Co. v. Bond, 72 N E 647, 35 Ind App. 142

18. Ind —Westport Stove Co v. Thomas, 94 N E 406, 175 Ind 319, 35 L R A, N S, 646.

19. Ala —Louisville, etc, R Co. v. Anchors, 22 So 279, 114 Ala. 492, 62 Am.S R. 116
51 C J p 979 note 73.

20. Mo —Hudson v Southwest Missouri R Co, 159 S W. 9, 173 Mo App 611
51 C J. p 979 note 74.

21. Iowa —Glandon v. Chicago, etc., R Co, 27 N W. 457, 68 Iowa 457.
Mo —Webb v. Southern Missouri, etc, R. Co, 92 Mo App. 53
Public service
Railroad, having filed tariff for transportation of miners and others in special miners' trains will be considered as performing public service and not private transportation contract; such tariffs cover public, even though railroad recognized those using train might nearly all be employees of one company —Erie R Co v Public Service Commission, 99 Pa Super 443.

22. Iowa —Glandon v Chicago, etc, R Co, 27 N W. 457, 68 Iowa 457.
Kan —Chicago, etc, R Co v Totten, 42 P. 269, 1 Kan App 558

23. Ohio —Cincinnati Northern R. Co v Public Utilities Commission, 165 N E 38, 119 Ohio St 568.
51 C J p 979 note 79.

24. Ohio —Cooperative Legislative Committee of R R Brotherhoods v Public Utilities Commission, 80 N.E 2d 159, 149 Ohio St 511.

25. Ohio —Cooperative Legislative Committee of R. R. Brotherhoods v Public Utilities Commission, supra
51 C J. p 980 note 96.

26. Fla —Ray Arnold Lumber Co v Carter, 108 So 815, 91 Fla. 548, 559, 46 A L R. 1068.
51 C.J. p 980 note 97.

authority to the contrary.[27]

b. Companies Organized under Special Charters

Statutory regulations with respect to railroad companies apply to those incorporated under special charters as well as under general laws, unless the statute imposing the regulations shows a contrary intention.

Statutory regulations with respect to railroad companies apply to those incorporated under special charters as well as under general laws,[28] unless the statute imposing the regulation shows an intention, to the contrary, either expressly,[29] or by implication from the character of its provisions,[30] or there is some provision in the charter which prevents its application.[31] The mere fact that the charter makes provision as to certain duties and how they shall be performed does not affect the right of the state in the exercise of its police power to impose other and further regulations in respect of the same duties,[32] or affect the application of existing general statutes not inconsistent with the provisions of the charter.[33]

c. Effect of Time of Incorporation or Construction

General statutory regulations affecting the operation of railroads are ordinarily applicable to those incorporated or constructed before as well as after the passage of the act, unless the statute provides otherwise.

General statutory regulations affecting the operation of railroads are ordinarily applicable to those incorporated or constructed before as well as after the passage of the act,[34] unless the statute provides otherwise.[35] This rule applies in all cases where the regulation is a proper exercise of the police power,[36] or the right to alter or amend the charter is reserved.[37] Conversely, a statute in terms relating to "all existing railroad corporations" extends to companies incorporated after as well as before its passage unless exception is provided in their charters.[38]

d. Ownership of Line

Regulatory statutes have been held applicable to lines operated by a railroad irrespective of whether the company owns the land on which its road is built or has merely a right of way over it.

Regulatory statutes have been held applicable to lines operated by a railroad irrespective of whether the company owns the land on which its road is built or has merely a right of way over it.[39] It has been said that a company operating a road will be deemed the owner thereof within the application of the statutes.[40] However, a railroad having neither ownership nor lease of a particular line cannot be compelled to acquire and operate it,[41] nor will the lessee of a railroad company under a lease which all parties admit to be void be compelled to operate the road.[42]

§ 399. —— Construction of Statutes

a. In general
b. Penal provisions

a. In General

Statutes regulating the operation of a railroad should be construed so as to effectuate the reasonable intention of the legislature. In the case of successive statutes imposing different or additional regulations, the latter will not be construed as impliedly repealing or superseding the former unless the provisions are so inconsistent that they cannot stand together.

Statutes regulating the operation of a railroad should be construed so as to effectuate the reasonable intention of the legislature.[43] Regulatory statutes will in general be given a liberal construction to carry out their purpose.[44] Regulatory statutes of an ambiguous character will ordinarily be

27. S.C.—Crawford v. Mullins Lumber Co., 96 S.E. 494, 110 S.C. 318.
51 C.J. p. 980 note 98.

28. Minn.—Gillam v. Sioux City, etc., R. Co., 8 N.W. 353, 26 Minn. 268.
51 C.J. p. 979 note 80.

29. N.J.—Vandorn v. New Jersey Southern R. Co., 8 A. 99, 42 N.J.Eq. 463
51 C.J. p. 979 note 81.

30. Minn.—Winger v. St. Paul, etc., R. Co., First Div., 22 Minn. 11—Devine v. St. Paul, etc., R. Co., 22 Minn. 8

31. U.S.—Central Trust Co. v. Wabash, etc., R. Co., C.C.Mo., 30 F. 344.
51 C.J. p. 979 note 83.

32. Ill.—Illinois Cent. R. Co. v. Slatter, 21 N.E. 575, 129 Ill. 91, 16 Am. S.R. 242, 6 L.R.A. 418.
51 C.J. p. 979 note 84.

33. Me.—Pratt v. Atlantic, etc., R. Co., 42 Me. 579.

34. Wash.—Alberg v. Campbell Lumber Co., 119 P. 6, 66 Wash. 84, 87.
51 C.J. p. 980 note 86

35. Mass.—Stearns v. Old Colony, etc., R. Co., 1 Allen 493.
51 C.J. p. 980 note 87

36. Ill.—Ohio, etc., R. Co. v. McClelland, 25 Ill. 123.
51 C.J. p. 980 note 88.

37. Conn.—Bulkley v. New York, etc., R. Co., 27 Conn. 479.
51 C.J. p. 980 note 89.

38. Ill.—Indianapolis, etc., R. Co. v. Blackman, 63 Ill. 117.

39. Ohio—Baltimore, etc., R. Co. v. Kreager, 56 N.E. 203, 61 Ohio St. 312.
51 C.J. p. 980 note 92.

40. Mo.—State v. Missouri Pac. R. Co., 50 S.W. 278, 149 Mo. 104.
51 C.J. p. 980 note 93.

41. Ark.—State R. Commission v. Graysonia, etc., R. Co., 272 S.W. 850, 169 Ark. 13.
51 C.J. p. 980 note 94.

42. U.S.—People v. Colorado Cent. R. Co., C.C.Colo., 42 F. 638.

43. Ala.—Spenny v. Mobile, etc., R. Co., 68 So. 870, 192 Ala. 483.

44. Mo.—Lusk v. Public Service Commission, 210 S.W. 72, 277 Mo. 264.
51 C.J. p. 980 note 8.

construed so as to be valid rather than invalid.[45] Under a statute providing in one section that, if a commission shall find it necessary to the rendering of sufficient service, it may, after hearing, make an order requiring a railroad to furnish facilities, and in another section that, under specified conditions, the commission may compel a road to furnish private switch connections, the first section should be construed as referring to public and not to private facilities.[46]

Repeal by implication. In the case of successive statutes imposing different or additional regulations, the latter will not be construed as impliedly repealing or entirely superseding the former unless the provisions are so inconsistent that they cannot stand together.[47]

b. Penal Provisions

Regulatory statutes imposing penalties are subject to the rule of strict construction, and they will not be extended by implication to cases not clearly within their application; but such a statute should not be construed so strictly as to defeat its obvious purpose.

Regulatory statutes imposing penalties are subject to the usual rule of strict construction.[48] They will not be extended by implication to cases not clearly within their application,[49] or so as to impose a cumulative penalty for successive violations, as discussed infra § 444, or a liability on,[50] or a right of recovery by or for the use of,[51] persons not clearly within the application of the statute; and where the penal clause of a statute is less comprehensive than the body of the statute, the liability for the penalty will be restricted to the matters and persons specified in the penal clause.[52]

The rule of strict construction is not, however, violated by the court taking a common sense view of the statute as a whole and adopting the sense of the words which best harmonizes with the clear intent and object of the legislature;[53] and the statute should not be construed so strictly as to defeat its obvious purpose.[54] Courts cannot read into a penal statute any language excusing offenders any more than they can read into it language increasing liability.[55]

Criminal statute construction. In a civil action to recover a penalty, the safety appliance acts are not to be construed by the rules which govern the construction of criminal statutes.[56]

C. PARTICULAR REGULATIONS AND DUTIES

§ 400. Railroad Employees

The state may adopt reasonable regulations affecting railroad employees, and a regulatory commission may be granted plenary power to promulgate and enforce orders relating to the protection, welfare, and safety of such employees.

The general power of the state to regulate the operation of railroads extends to the adoption of reasonable regulations affecting railroad employees,[57] and a regulatory commission may be granted plenary power to promulgate and enforce orders relating to the protection, welfare, and safety of such employees.[58] So a commission may

45. Wis.—Union Lime Co. v. State R. Commission, 129 N.W. 605, 144 Wis. 523
51 C.J. p. 981 note 5.

46. Pa.—Pennsylvania R. Co. v. Public Service Commission, 64 Pa.Super. 586.

47. Ala.—Mobile, etc., R. Co. v. Steiner, 61 Ala. 559.
51 C.J. p. 981 note 9.
Inconsistent statutes
Mo.—Public Service Commission v. Missouri Pac. R. Co., 197 S.W.2d 665, 355 Mo. 679
51 C.J. p. 981 note 9 [b].

48. Tex.—Railroad Commission v. Fort Worth & D. C. Ry. Co., Civ. App., 161 S.W.2d 560, error refused
51 C.J. p. 981 note 12.

49. Conn.—Tracy v. New York, etc., R. Co., 72 A. 156, 82 Conn. 1.
51 C.J. p. 981 note 13.

50. U.S.—U. S. v. Harris, D.C.Pa., 78 F. 290, affirmed 20 S.Ct. 609, 177 U.S. 305, 44 L.Ed. 788.

51. Miss.—Kansas City, etc., R. Co. v. Jones, 18 So. 684, 73 Miss. 397

52. Ind.—State v. Cleveland, etc., R. Co., 61 N.E. 669, 157 Ind. 288.
51 C.J. p. 981 note 17.

53. U.S.—U. S. v. Southern R. Co., D.C.Ill., 135 F. 122.
51 C.J. p. 981 note 18.

54. Tex.—Houston, etc., R. Co. v. State, Civ.App., 103 S.W. 449.

55. U.S.—U. S. v. Southern R. Co., D.C.Ill., 135 F. 122.

56. U.S.—U. S. v. Great Northern R. Co., Wash., 229 F. 927, 144 C.C.A. 209—St. Louis Southwestern R. Co. v. U. S., Tex., 183 F. 770, 106 C.C.A. 136

57. Mass.—McQuade v. New York Cent. R. Co., 68 N.E.2d 135, 320 Mass. 35

58. Ill.—Chicago Great Western Ry. Co. v. Illinois Commerce Commission ex rel. Brotherhood of R.R. Trainmen, 75 N.E.2d 318, 398 Ill. 190.
Ohio.—Akron & B. B. R. Co. v. Public Utilities Commission, 74 N.E.2d 256, 148 Ohio St. 282—New York Cent. R. Co. v. Public Utilities Commission of Ohio, 200 N.E. 759, 130 Ohio St. 548
"Police power"
Commission has power under "police power" delegated to it by the general assembly to make reasonable regulations protecting health, safety and welfare of those engaged in railroad's switching business, so long as such regulations do not constitute an attempt to regulate, or do not directly burden interstate commerce, or run counter to federal regulations on the subject.—Brotherhood of Railroad Trainmen v. Terminal Railroad Ass'n of St. Louis, 41 N.E.2d 481, 379 Ill. 403, affirmed Terminal R. Ass'n of St. Louis v. Brotherhood of Railroad Trainmen, Ill., 63 S.Ct. 420, 318 U.S. 1, 87 L.Ed. 571.

have power to order a railroad to desist from the practice of permitting a yardmaster to act as a member of the crew of trains operating within the yard,[59] or of permitting the yardmaster to depart from his supervisory and administrative duties in order to operate signals to govern the switching of cars;[60] and where the evidence is in conflict, the court reviewing the order of the commission will not substitute its judgment for that of the commission by holding erroneous the order of the commission.[61]

Qualifications. Regulations imposing reasonable tests of capacity and restricting employment to those able to pass such tests are valid,[62] but regulations imposing arbitrary tests as to qualification are invalid.[63] A statute requiring railroad employees to pass a physical examination for defects of vision is reasonable and valid,[64] and has been held applicable to employment of persons within the state under contracts made outside the state.[65] It has also been held that a doctor appointed under such statute to examine applicants is under a mandatory duty to do so.[66]

Transportation for employees. Statutes have been held valid which authorize the commission to require railroad companies to provide necessary transportation for employees engaged in the operation of trains in getting to outlying terminals.[67] The commission may, however, act only within the scope of the powers conferred and under the conditions specified by the statute,[68] and its order must not be arbitrary or discriminatory.[69]

Uniforms, caps, and badges. Under a statute so providing, railroads may be required to provide uniform caps for certain employees, without charge.[70] Such a statute has been held valid,[71] notwithstanding a similar duty is not imposed on transportation companies other than railroads;[72] but it has also been held that a statute requiring railroads to provide uniforms, hats, and distinguishing badges to be worn by certain employees is invalid.[73]

Weather sheds. Under a statute requiring railroads to provide weather sheds where construction and repair work is permanently done, at all division points, for use of employees permanently engaged in such work, the terminus of a small branch line has been held not a division point;[74] and "permanently" means "constantly" as applied to the

59. Ohio—Erie R. Co v Public Utilities Commission, 179 N.E 924, 124 Ohio St. 573.

60. Ohio—New York Cent. R Co. v. Public Utilities Commission, 40 N. E 2d 429, 139 Ohio St. 373

61. Ohio.—New York Cent. R. Co. v. Public Utilities Commission, supra.

62. U S—Nashville, etc, R. Co. v. Alabama, Ala, 9 S Ct 28, 128 U S. 96, 32 L Ed. 352.
51 C J. p 982 note 25.

63. N.D.—Northern Pac Ry. Co. v. Warner, 45 N W 2d 196
51 C.J. p 982 note 26.

64. **Color blindness and other defects of vision**
U.S—Nashville, etc, R. Co v. Alabama, Ala, 9 S Ct. 28, 128 U S. 96, 32 L Ed 352.
Ala.—Nashville, etc, R. Co. v. State, 3 So. 702, 83 Ala. 71.

65. Ala—Nashville, etc, R Co. v. State, supra.

66. Ala.—Baldwin v. Kouns, 2 So. 638, 81 Ala. 272
51 C J. p 982 note 30.

67. Ill—Wabash R. Co v. Order of Ry. Conductors of America, 84 N.E. 2d 406, 402 Ill 548

Use of phrase "outlying terminals" implies that the whole terminal itself is located beyond the city and not partly within and partly without.—Wabash R Co v. Order of Ry. Conductors of America, supra.

"Necessary"
Under the statute providing that the commission may when "necessary," require railroads to provide necessary transportation for employees, quoted word means a general necessity for transportation of all operating employees during all working hours to conduct railroad operations for convenience of general public, and not for personal convenience of some of employees for part of the time.—Wabash R. Co v Order of Ry Conductors of America, supra

68. Ill—Wabash R Co v Order of Ry Conductors of America, supra.

Order held invalid
Order requiring railroad to provide daily transportation for employees after midnight from city depot to yard office outside city limits was invalid as unlawful and unreasonable in absence of substantial evidence that yards constituted an outlying terminal and that such transportation was necessary to conduct railroad operations for convenience of the general public.—Wabash R. Co v. Order of Ry. Conductors of America, supra.

69. Ill—Wabash R. Co. v. Order of Ry. Conductors of America, supra.

70. Mass—McQuade v New York Cent. R. Co, 68 N.E.2d 185, 320 Mass. 35.

Intent
The statute requiring railroad company to provide uniform cap for employees whose duties relate immediately to transportation of passengers or their baggage, was intended primarily for benefit and protection of traveling public.—McQuade v. New York Cent. R Co., supra.

The word "provide" in statute requiring railroad company to provide uniform cap for employees whose duties relate immediately to transportation of passengers or their baggage is synonymous with "prescribe and furnish."—McQuade v. New York Cent. R. Co, supra.

71. Mass.—McQuade v. New York Cent. R. Co, supra

Effect of federal act
State statute requiring railroad company to provide uniform cap for employees whose duties relate immediately to transportation of passengers or their baggage is not invalidated by Federal Railway Labor Act, notwithstanding supplying caps might give rise to dispute about working conditions over which National Railroad Adjustment Board might have jurisdiction—McQuade v New York Cent. R. Co., supra.

72. Mass—McQuade v. New York Cent R. Co, supra.

73. Mich.—Woodward v. Pere Marquette Ry. Co., 19 N.W.2d 489, 312 Mich 67.

74. Ark.—St. Louis, etc., R. Co v State, 143 S W. 913, 102 Ark. 205.
51 C J. p 985 note 87.

work done,[75] but "regularly" as applied to the employees engaged therein[76]

§ 401. —— Full Crew Regulations

a In general
b. Construction and operation

a. In General

The so-called "full crew" statutes requiring a specified number and kind of employees on certain trains or cars are valid and enforceable, if sufficiently reasonable and definite, and a regulatory commission may promulgate reasonable requirements as to the number and kind of crew members under its power to adopt regulations relating to the protection, welfare, and safety of railroad employees and the public.

Under the so-called "full crew" statutes a specified number and kind of employees may be required on certain trains or cars.[77] These statutes are designed to promote the safety of passengers and employees,[78] and, when they do not otherwise infringe constitutional provisions, are valid and enforceable,[79] if sufficiently reasonable[80] and definite.[81] Likewise, a commission may promulgate reasonable requirements as to the number of crew members under its power to adopt regulations relating to the protection, welfare, and safety of railroad employees and the public,[82] provided it acts within the scope of its powers;[83] but, where a statute fixes the necessary members of a train crew, the commission may be without authority to require additional crew members.[84] Ordinarily a commission has no authority, by rule or otherwise, to relieve a railroad corporation from penalties that it would otherwise incur under a "full crew" statute; nor may it make those penalties applicable to situations which do not fall within the statute[85]

In some jurisdictions municipalities have the power to determine the number or qualifications

75. Ark.—St. Louis, etc., R. Co. v. State, 112 S.W. 150, 86 Ark. 518.
51 C.J. p. 985 note 88

76. Ark.—St. Louis, etc., R. Co. v. State, supra.

77. N.D.—Northern Pac. Ry. Co. v. Warner, 45 N.W.2d 196.
Wis.—State v. Chicago & N.W. Ry. Co., 237 N.W. 132, 205 Wis. 252.

78. Neb.—Bressler v. Chicago & N.W. Ry. Co., 42 N.W.2d 617, 152 Neb. 732
Pa.—Brotherhood of Railroad Trainmen v. Public Service Commission, 73 Pa. Super. 523.

Particular employee or class
Full train crew law is designed to promote safety of passengers and employees of railroad, and is not primarily in interests of any particular employee or class of employees.—Beal v. Missouri Pac. R. Corp. in Nebraska, C.C.A.Neb., 108 F.2d 897, reversed on other grounds 61 S.Ct. 418, 312 U.S. 45, 85 L.Ed. 577.

Presumption
The purpose of the full-crew law is to protect safety of employees and passengers on railroads, and presumptively at least the legislature, in enacting the law, was thinking about dangers incident to railroad operations in state and not in adjoining states.—Union Pac. R. Co. v. Anderson, 120 P.2d 578, 167 Or. 687.

79. U.S.—Missouri Pac. Ry. Co. v. Norwood, Ark., 51 S.Ct. 458, 283 U.S. 249, 75 L.Ed. 1010, modified on other grounds 51 S.Ct. 652, 283 U.S. 809, 75 L.Ed. 1428.
51 C.J. p. 982 note 34.

Allegations of complaint in suit to enjoin enforcement of state full-crew laws held insufficient to show unconstitutionality.—Missouri Pac. Ry. Co. v. Norwood, supra.

80. Pa.—Pennsylvania R. Co. v. Driscoll, 9 A.2d 621, 336 Pa. 310.—Pennsylvania R. Co. v. Driscoll, Com.Pl., 47 Dauph. Co. 108
51 C.J. p. 982 note 35

The penalty provision of the Full Crew Act requiring that railroad, its officers and agents, should pay one hundred dollars for each violation, clearly caused persons affected thereby to come within the protection of the Bill of Rights of the state constitution.—Pennsylvania R. Co. v. Driscoll, 198 A. 130, 330 Pa. 97.

Unreasonable financial burden
Where compliance with both regulatory statute and rule of a railroad governing operation of its maintenance of way crews causes duplication of effort on part of employees which results in unreasonable financial burden on railroad, court will not for that reason declare statute unconstitutional and void.—Northern Pac. Ry. Co. v. Warner, N.D., 45 N.W.2d 196.

81. Ind.—Pittsburgh, etc., R. Co. v. State, 87 N.E. 1034, 172 Ind. 147, 157, affirmed 32 S.Ct. 520, 223 U.S. 713, 56 L.Ed. 626.
51 C.J. p. 982 note 36.

82. Ill.—Chicago Great Western Ry. Co. v. Illinois Commerce Commission ex rel. Brotherhood of R. R. Trainmen, 75 N.E.2d 318, 398 Ill. 190.

Order held unreasonable
(1) Order of commission requiring an additional flagman on passenger trains of five cars or more on a railroad protected by automatic signals was unreasonable, since a train of less than five cars requires equal flag protection.—Chicago Great Western Ry. Co. v. Illinois Commerce Commission ex rel. Brotherhood of R. R. Trainmen, supra.

(2) Where testimony in support of order by commission requiring an additional brakeman was chiefly opinions and conclusions, and record was undisputed that at no time had there been an accident on run in question resulting in either damage to property or injury to any person, order of commission was properly vacated under statute on ground that it was "unreasonable, inequitable and unjust".—Lowden v. Iowa State Commerce Commission, 294 N.W. 749, 229 Iowa 526.

83. Ill.—Chicago Great Western Ry. Co. v. Illinois Commerce Commission ex rel. Brotherhood of R. R. Trainmen, 75 N.E.2d 318, 398 Ill. 190.

Necessity of finding
Order of commission requiring railroad protected by automatic signals to employ an additional crew member on passenger trains containing five or more cars to perform flagman duties was invalid for failure to find that the health or safety of railroad employees, passengers, customers, or the public demanded that continuous rear-end flagman service be performed by the operating train crew.—Chicago Great Western Ry. Co. v. Illinois Commerce Commission ex rel. Brotherhood of R. R. Trainmen, supra.

84. U.S.—Pullman Co. v. Railroad Commission of Texas, D.C.Tex., 33 F.Supp. 675, reversed on other grounds Railroad Commission of Texas v. Pullman Co., 61 S.Ct. 643, 312 U.S. 496, 85 L.Ed. 971.

85. N.D.—Northern Pac. Ry. Co. v. Warner, 45 N.W.2d 196.

of persons who must serve on a train within the corporate limits,[86] but it has been held that a municipal ordinance requiring railroads to keep certain crewmen on all engines and trains operating across city streets is invalid in the absence of any statutory authority for such regulation by a city.[87]

b. Construction and Operation

(1) In general
(2) Railroads or railroad lines within regulations
(3) Nature and composition of car or train
(4) Train and switching movements
(5) Character and location of crew

(1) In General

Provisions of the "full crew" statutes, being penal, are subject to the rule of strict construction, but they should not be interpreted so as to defeat the obvious purpose of the legislature. Such statutes are applicable only to cases within their terms.

The provisions of the "full crew" statutes, being penal, are subject to the usual rule of strict construction,[88] but they should not be interpreted so as to defeat the obvious purpose of the legislature.[89] Such statutes may by their terms be limited in their operation to certain railroads or lines, to trains or cars of a certain nature or composition, and to certain train movements or operations, as discussed infra subdivisions b (2)–(4) of this section, and, hence, they are applicable only to cases within their terms,[90] but where they apply, the running of a train with less than the prescribed number of employees constitutes a violation.[91]

(2) Railroads or Railroad Lines within Regulations

"Full crew" statutes have been construed to apply to common carriers only, and not to private railroads not doing business as common carriers. A single track branch, irrespective of its length, is a railroad to which such a statute is applicable.

"Full crew" statutes have been construed to apply to common carriers only, and not to private railroads not doing business as common carriers.[92] Under a statute requiring a specified crew on certain trains operated over a road or part of it, a single track branch is a railroad irrespective of its length,[93] or the fact that it is used exclusively for freight,[94] and despite the existence of numerous private sidings along the line.[95]

Under a statute applicable to railroads operating lines of over a specified number of miles, ownership alone is not the only test of whether the railroad is a short independent line not within the statute or part of the overall system of a trunk line within the statute, but the issue is whether the railroad company operates the line as a part of its system.[96] While a statute requiring a specified crew

86. U.S.—Northern Pacific Ry. Co. v. Weinberg, D.C.Minn., 53 F.Supp. 133

Relationship to safety

The validity of city ordinance making it unlawful to operate a railroad locomotive within corporate limits unless manned by at least one engineer or operator and one fireman or helper must be sustained, if at all, on basis of its relationship to safety of the public and railroad employees, since city is not concerned with the convenience of operations in railroad yards within city.—Northern Pacific Ry. Co. v. Weinberg, supra.

87. Ky.—Louisville & N. R. Co. v. City of Hazard, 200 S.W.2d 917, 304 Ky. 370.

Partial invalidity held to render entire ordinance unenforceable.

U.S.—Northern Pacific Ry. Co. v. Weinberg, D.C.Minn., 53 F.Supp. 133.

Ky.—Louisville & N. R. Co. v. City of Hazard, 200 S.W.2d 917, 304 Ky. 370.

88. Nev.—State v. Nevada Northern R. Co., 233 P. 531, 48 Nev. 436

Ohio—Erie R. Co. v. Public Utilities Commission, 48 N.E.2d 100, 141 Ohio St. 342.

Tex.—Railroad Commission of Texas v. Texas & N. O. R. Co., Civ.App., 42 S.W.2d 1091, error refused.

Wis.—State v. Chicago & N. W. Ry. Co., 237 N.W. 132, 205 Wis. 252

89. Or.—Union Pac. R. Co. v. Anderson, 120 P.2d 578, 167 Or. 687.
51 C.J. p. 983 note 39.

90. Ark.—Missouri Pac. R. Co. v. Moore, 197 S.W.2d 284, 210 Ark. 643

91. Ohio—New York, C. & St. L. R. Co. v. Public Utilities Commission of Ohio, 176 N.E. 71, 123 Ohio St. 524.
51 C.J. p. 983 note 40.

92. Ohio.—Cooperative Legislative Committee of R. R. Brotherhoods v. Public Utilities Commission, 80 N.E.2d 159, 149 Ohio St. 511.

Switching locomotives

Railroad was not engaged in an operation as a "common carrier" with respect to operations within limits of steel manufacturing plant pursuant to contract by which railroad furnished to manufacturer, which had established a private intra-plant railroad, crews to operate switching locomotives, which crews were under supervision of manufacturer and were paid by it through railroad, and, hence, was not required to furnish statutory five man crew in connection with operation as common carrier.—Cooperative Legislative Committee of R. R. Brotherhoods v. Public Utilities Commission, supra.

93. Pa.—Pennsylvania R. Co. v. Public Service Commission, 74 Pa.Super. 131, 135.

94. Pa.—Pennsylvania R. Co. v. Public Service Commission, supra.

95. Pa.—Pennsylvania R. Co. v. Public Service Commission, supra.
51 C.J. p. 983 note 45.

96. Ark.—Kansas City Southern Ry. Co. v. State, 214 S.W.2d 79, 213 Ark. 906.

Leased tracks

Where railroad operated trunk line not less than one hundred miles in length and also branch line about twenty-eight miles long over tracks leased from another road, on which switching operations were conducted across streets of city of first class, although branch equipment and train crew were used only on branch line for which separate books were kept, branch could not be deemed a "railroad less than one hundred miles in

on trains operated on a road over a certain number of miles in length is not designed to be extraterritorial in effect,[97] it does apply to a road if its total line within and outside the state exceeds the specified distance.[98] A full-crew statute in terms applicable to trains "sent out" on a railroad within the state has been construed as applicable to trains starting from a different state and passing through the local state to points beyond the borders of the latter[99]

Number of trains. Under a statutory provision excepting from the full crew requirement "any line of railroad in this state on which but one train a day is operated each way," the roads excepted are those with traffic limited exclusively to one daily train each way.[1]

(3) Nature and Composition of Car or Train

Under the terms of the "full crew" statutes, the number of the crew required may depend on the kind of car or train which is being operated, and the requirements of such statutes do not apply to trains composed of less than the specified number of cars.

Under the terms of the "full crew" statutes, the number of the crew required may depend on the kind of car or train which is being operated.[2] Under statutes prescribing different and specified crews for freight, passenger, or "other" trains, and failing to define the specified classes of trains, it will be presumed that the legislature used the terms in their ordinary or popular signification,[3] and a freight train will be defined as one carrying freight only,[4] a passenger train one carrying passengers and no freight,[5] and mixed trains will fall within the category of "other" trains.[6] Under statutes requiring specified crews for passenger trains and for freight trains, a mixed passenger and freight train is not covered.[7] A statute relative to employees on trains transporting passengers and merchandise is inapplicable to trains carrying passengers only.[8] A statute applicable to a locomotive handling "cars" does not apply to a locomotive moving an auxiliary tender.[9]

The requirements of a "full crew" statute directed to trains of more than a certain number of cars do not apply to trains composed of less than the specified number of cars.[10] Under a statute requiring any train, carrying passengers, consisting of a certain number of passenger coaches and one baggage car, to carry a specified crew, a combination car in fact used for baggage is a "baggage car" notwithstanding the absence of a baggageman[11] or the locking of the aforesaid car.[12] Un-

length" so as to exclude it from provision of full switching crew law requiring crews of at least six men during switching operations in cities of first class—Kansas City Southern Ry. Co v State, supra.

97. Ark.—Kansas City Southern R. Co. v State, 174 S W. 223, 116 Ark. 455, 459.
51 C J. p 983 note 47.

98. Ark—Kansas City Southern R Co v State, supra
51 C.J. p 983 note 48

99. Ind—Pittsburgh, etc, R Co. v State, 87 N.E. 1034, 172 Ind 147, affirmed 32 S Ct. 520, 223 U S 713, 56 L Ed 626.
51 C J. p 983 note 50.

1. Nev.—State v. Nevada Northern R. Co, 233 P. 531, 48 Nev. 436, 439.
51 C.J. p 984 note 72.

2. Neb.—Bressler v. Chicago & N. W Ry. Co, 42 N.W 2d 617, 152 Neb. 732.

The term "train," as used in full-crew law in describing the crews required for different kinds of trains named in the statute, means a series of cars drawn by a locomotive engine over the tracks of the railroad, and it indicates a transportation agency, one of the principal purposes of which is mobility of action over and on the tracks of the railroad.—Missouri-Kansas-Texas R. Co. v State, Tex Civ App., 131 S.W.2d 702, error refused.

"Construction train"

A wrecking crane, used in repairing track, which was operated by steam power and was mounted on flat car with the engine geared to the truck wheels so as to enable it to move slowly over the track, together with flat car on which crane rested while being transported to and from work zone, a water car, and coal car loaded with heavy stone for riprap purposes on right of way, did not constitute a "construction train" within full-crew law.—Missouri-Kansas-Texas R. Co v. State, supra.

Power as standard

Under statute stating what self-propelled vehicles not used for transportation of passengers and freight or property for hire shall be manned by a full crew, the legislature made "sufficient power to draw or propel itself and one or more standard railroad cars" the standard for determining to which self-propelled vehicles operating on or over railroad tracks the statute applies, and in view of the relationship of power to size and weight, the standard is reasonable.—Northern Pac. Ry. Co. v. Warner, N. D., 45 N.W.2d 196.

3. Ariz.—Arizona Eastern R Co. v. State, 242 P. 870, 29 Ariz 446.

4. Ariz—Arizona Eastern R. Co. v. State, supra
51 C J p 983 note 58.

5. Ariz.—Arizona Eastern R. Co v State, supra

6. Ariz.—Arizona Eastern R. Co v. State, supra.
51 C J. p 983 note 60.

7. Neb—State v Chicago, etc, R Co, 212 N.W. 535, 115 Neb. 306.
51 C.J. p 984 note 62.

8. Tex—State v. International, etc, R. Co, 68 S.W. 534, 29 Tex Civ.App 149.
51 C.J. p 984 note 64.

9. Ohio.—Erie R. Co. v Public Utilities Commission, 48 N E 2d 100, 141 Ohio St 342.

10. Wis—State v. Chicago & N. W Ry. Co., 237 N.W. 132, 205 Wis. 252.

"Picking up" cars

Regular detaching of two passenger cars from five-car westbound train and adding two cars to three-car eastbound train held not "picking up" cars between terminals, within exception in statute fixing minimum crew on passenger trains composed of more than three cars.—State v. Chicago & N. W. Ry. Co., supra

11. Pa.—Pennsylvania R. Co. v. Public Service Commission, 67 Pa. Super 569, 574.
51 C.J. p 984 note 66.

12. Pa—Pennsylvania R. Co. v. Public Service Commission, supra

der a statute requiring two brakemen on passenger trains carrying four or more passenger coaches or cars, a train of less than four passenger cars but of more than four cars is not within the requirement.[13] Pullman sleepers are passenger coaches within the meaning of the statute relative to full-crew requirements of passenger trains[14]

The term "passenger train" within a "full crew" statute has been held to refer only to a steam-operated train,[15] so that the statute is inapplicable to modern gasoline, electric, and gasoline-electric motor cars or trains, carrying passengers over steam railroads.[16] So a statute in terms applicable to passenger trains of five cars or less has been held inapplicable to motor cars where the legislature recognized a railway motor car as one classification of trains.[17] The fact, however, that a particular type of engine or machine came into existence after the enactment of the statute stating what self-propelled vehicle shall be manned by a full crew, does not preclude the statute from applying to such type of engine or machine.[18] Some statutes by their terms are inapplicable to cars propelled by electricity.[19]

Provisions have been construed which require full crews for "main line local freight trains."[20] Such provisions do not apply to trains properly classified as through trains,[21] or which operate over branch lines.[22]

(4) Train and Switching Movements

Unless the statute otherwise provides, "full crew" acts apply to train movements, but not to switching operations.

Unless the statute otherwise provides, "full crew" acts apply to train movements,[23] but not to switching operations,[24] the rules in this respect being similar to those obtaining under the air-brake provisions of the Federal Safety Appliance Act.[25] A train does not lose its character as such because it hauls only empty cars,[26] or because the engine is located in an unusual position,[27] or because in the course of the run it performs incidental switching operations.[28] Under some statutes, full-crew requirements are specifically applied to switching operations.[29] Under a statute requiring a specified

13. Cal.—Ex parte Galivan, 122 P 961, 162 Cal 331
51 C J. p 984 note 69.

14. Pa.—Pennsylvania R Co v Public Service Commission, 67 Pa Super 569.
51 C J. p 984 note 70.

15. Tex.—Railroad Commission of Texas v. Texas & N. O. R Co., Civ App., 42 S W 2d 1091, error refused.

16. Tex.—Railroad Commission of Texas v. Texas & N. O. R. Co., supra.

17. Neb.—Bressler v. Chicago & N. W. Ry. Co, 42 N.W.2d 617, 152 Neb 732—Meredick v. Chicago & N. W. Ry. Co, 252 N.W. 459, 125 Neb 864

18. N.D.—Northern Pac Ry. Co. v. Warner, 45 N W 2d 196.

A self-propelled power ballaster designed for tamping ballast under railroad ties, which had sufficient power to push or pull a railroad freight car, was within statute stating what self-propelled vehicles not used for transportation of passenger and freight or property for hire shall be manned by a full crew, notwithstanding it operated over tracks in a limited way, and removed itself from tracks under its own power without clearing through a switch, and was not equipped to pull or push a standard car and was not used to do so, and notwithstanding such ballaster was invented after passage of statute.—Northern Pac. Ry. Co. v. Warner, supra

19. Ohio.—Brotherhood of Locomotive Firemen and Enginemen v Public Utilities Commission, 175 N E. 454, 123 Ohio St. 336

Motorcar and attached passenger car, to which electricity was transmitted by generator connected with gasoline motor, were "propelled by electricity" within exception from full crew law.—Brotherhood of Locomotive Firemen and Enginemen v Public Utilities Commission, supra.

20. Or.—Oregon, C. & E Ry Co. v Blackmer, 59 P 2d 694, 154 Or. 338

Train held not within statute

Freight train, usually consisting of about thirty-five cars and making daily round trip between city and terminal about sixty-five miles distant, loading and unloading freight at any depot or siding where such freight is offered or to which it is destined, held not "main line local freight train" within statute providing that all main line local freight trains shall have full crew.—Oregon, C. & E. Ry. Co. v. Blackmer, supra.

Rule as fixing character of train

Rule of railroad company for conversion of rate of pay for pool freight crews to local rates under certain circumstances is merely a recognition that employees are entitled to receive local freight train rates of pay for such local work as they are called on to do, and rule cannot of itself fix character of trains as "main line local freight trains", within full-crew statute.—Union Pac. R. Co v Anderson, 120 P 2d 578, 167 Or. 687.

21. Or.—Union Pac. R. Co. v. Anderson, supra.

Acquiescence by employees as affecting classification

Or.—Union Pac. R. Co. v. Anderson, supra.

22. Or.—Union Pac R Co. v. Anderson, supra.

Operation of more than one train

The lines of plaintiff railroad, which branch off main line, could not be converted into "main lines" for purpose of full-crew law by fact that traffic which they carried necessitated operation of more than one train at a time over their tracks.—Union Pac R. Co v. Anderson, supra.

23. Pa.—Pennsylvania R. Co. v Public Service Commission, 74 Pa Super. 131.
51 C.J. p 984 note 74.

24. Pa.—Pennsylvania R. Co v. Public Service Commission, supra.
51 C.J. p 985 note 81.

25. Pa.—Brotherhood of Railroad Trainmen v. Public Service Commission, 73 Pa.Super. 523
Rule under federal air-brake provision see infra § 425.

26. Pa.—Pennsylvania R Co. v. Public Service Commission, 74 Pa Super 131
51 C.J. p 984 note 77.

27. Pa.—Pennsylvania R. Co. v Public Service Commission, supra.
51 C.J p 984 note 78.

28. Pa.—Pennsylvania R Co. v. Public Service Commission, supra.
51 C.J. p 984 note 79.

29. Ark.—Kansas City Southern Ry.

crew on an engine or locomotive used to switch cars, a locomotive crane used for switching purposes is within the full-crew requirement.[30]

Some statutes are by their terms applicable only to trains operated over any part of the road in excess of a specified number of continuous miles, with certain exceptions,[31] and under such a statute a railroad operation outside of the state will not be added to one within the state in order to make up the number of miles of operation rendering the statute applicable.[32]

Splitting a train with two engines so that neither section has a full crew is a violation of the statutes.[33]

(5) Character and Location of Crew

A statute requiring that trains be manned and operated by a certain number of employees classified by the duties performed, such as brakeman or flagman, refers to duties generally associated with the specified positions by custom and practice; and, while the required employees may perform duties other than those to which they are assigned, having an employee primarily engaged in other duties but subject to call to fill the position specified by the statute does not fulfill the statutory duty.

Where the statute requires that trains be manned and operated by a certain number of employees classified by the duties performed, such as brakeman or flagman, it refers to duties generally associated with the specified positions by custom and practice.[34] The statute does not mean that employees cannot perform duties other than those to which they are assigned, and if employees are qualified to perform duties of the position to which they are assigned and are at all times available to perform them when the need therefor arises and they actually do perform them, the requirement of the statute is met even though the employees are assigned to, and do perform, other duties.[35] So, where a statute requires a brakeman on a train, and a person is primarily employed as a brakeman and only performs other duties if and when his duties as brakeman permit, compliance with the statute is shown.[36] On the other hand, having an employee engaged in other duties but subject to call as a brakeman or flagman does not fulfill the statutory duty to provide a brakeman or flagman,[37] although there is some authority apparently to the contrary.[38] Under a statute requiring the posting of a brakeman between every two cars of a passenger train, it is not necessary that there should be a brakeman at each end of each car.[39] An ordinance requiring brakemen on trains moved within city limits to be so stationed as to

Co v. State, 106 S.W.2d 163, 194 Ark. 80.
51 C.J. p 985 note 83.

Time and place
Statute does not require presence of six members of switching crew at same place at same time—Missouri Pac. R. Co. v. Moore, 197 S.W.2d 284, 210 Ark. 643

Applicability to train crews
The statute respecting number of men on switching crew applies only to crews engaged in switching in the cities and not to train crews, in view of fact that the statute does not mention conductors but does mention "foremen" who are part of switching crews and not of train crews—Missouri Pac. R. Co. v. Moore, supra.

"Yard"
Where railroad switch tracks in city consisted of seventeen spur, team and house tracks, totaled more than three miles in length, served eleven industries, and crossed four streets and railroad maintained switch engine and crew for purpose of switching cars from arriving trains to various industries and collecting outgoing freight for departing trains as prescribed by signals, rules and instructions prescribed from time to time, tracks constituted a "yard" within meaning of quoted word in full switching crew statute—St Louis-San Francisco Ry. Co. v. State, 223 S.W.2d 186, 215 Ark. 714.

30. Ohio—New York Cent. R. Co. v. Public Utilities Commission, 169 N.E. 299, 121 Ohio St. 383.
51 C.J. p 985 note 85

31. Or.—Union Pac. R. Co. v. Anderson, 120 P.2d 578, 167 Or. 687

Proviso as to "main line local freight trains"
The clause "provided, however, that all main line local freight trains shall have a full crew consisting of six men, etc.," following portion of full-crew law making it unlawful for any railroad to operate over any part of its road in excess of fifteen continuous miles any freight train consisting of forty or more cars with less than a full crew, extends the legislation and intends that all main line local freight trains are required to be manned with a full crew irrespective of number of cars in the train or of the number of miles operated—Union Pac. R. Co. v. Anderson, supra.

32. Or.—Union Pac. R. Co. v. Anderson, supra.

33. Pa.—Pennsylvania R. Co. v. Public Service Commission, 74 Pa. Super. 131
51 C.J. p 984 note 80.

34. Neb.—Bressler v. Chicago & N.W. Ry. Co., 42 N.W.2d 617, 152 Neb. 732.

35. Neb.—Bressler v. Chicago & N.W. Ry. Co., supra.

36. U.S.—Beal v. Missouri Pac. R. Corp. in Nebraska, C.C.A.Neb., 108 F.2d 897, reversed on other grounds 61 S.Ct. 418, 312 U.S. 45, 85 L.Ed. 577.

37. Neb.—Bressler v. Chicago & N.W. Ry. Co., 42 N.W.2d 617, 152 Neb. 732.
Ohio.—New York, C. & St. L. R. Co. v. Public Utilities Commission of Ohio, 176 N.E. 71, 123 Ohio St. 524.
51 C.J. p 983 note 52

38. Tex.—Missouri-Kansas-Texas R. Co. v. State, Civ.App., 131 S.W.2d 702, error refused

Men qualified and available
Even if wrecking crane together with flat car on which crane rested while being transported to and from working zone, a water car, and coal car loaded with heavy stone for riprap purposes on right of way constituted a "construction train," railroad did not violate full-crew law by failing to have two regular brakemen, where there were more than two men on crew who were fully qualified and available to discharge duties of regular brakemen.—Missouri-Kansas-Texas R. Co. v. State, supra

39. Mass.—Renaud v. New York, etc., R. Co., 92 N.E. 710, 206 Mass. 557.

see and hear signals has been construed as also requiring the stationing of brakemen where they can relay the signals to employees running the train.[40]

§ 402. —— Station Agents

a. Regulation in general
b. Duty of railroad
c. Discontinuance of agency

a. Regulation in General

Subject to constitutional and statutory restrictions, a board or commission may, in the reasonable exercise of its regulatory powers, require the presence of agents at stations; but it may not arbitrarily impose such a requirement regardless of the expense entailed on the railroad or benefit to be derived by the public.

Subject to constitutional and statutory restrictions, a board or commission may, under its general power to regulate the operation of railroads, in the reasonable exercise of its regulatory powers, require the presence of agents at stations,[41] who, when the circumstances demand it, may be required to be capable of rendering routine telegraph service.[42] The power to require the presence of agents at stations may be derived from express statutory provision,[43] or, under a statute empowering a commission to compel adequate heating and lighting of depots, the commission may have implied power to compel maintenance of station agents.[44] However, under a statute granting a board or commission power to regulate the location of stations and the establishment of freight and passenger buildings, it lacks implied power to regulate the selection of station employees.[45] In any event, orders of a board or commission relative to agents at stations must be reasonable.[46] So the commission may not arbitrarily require the employment of a station agent regardless of the expense entailed on the railroad or benefit to be derived by the public, but the commission is only authorized to make such an order in that regard as the public interests demand and as may be reasonable and just.[47] In accordance with the circumstances involved, particular orders have been held reasonable[48] or unreasonable.[49]

b. Duty of Railroad

A railroad is ordinarily under a duty to provide and maintain agents at stations, where reasonably necessary, but apart from statute, such duty is at most incidental to the railroad's primary and absolute duty of furnishing transportation services, and it is not obligated to maintain an agent at every one of its stations, as at a station where the volume of business is not sufficient reasonably to demand the services of such an employee.

While it has been said that unless a statute provides otherwise, a railroad has plenary power to determine whether or not it should keep an agent at any station,[50] railroads are ordinarily under a duty to provide and maintain agents at stations,[51] where reasonably necessary.[52] However such duty, apart from statute, is at most incidental to the railroad's primary and absolute duty of furnishing transportation services,[53] and it is not obligated to maintain an agent at every one of its stations,[54] as at a station where the volume of business is not sufficient reasonably to demand the services of such an employee.[55] The employees which a rail-

40. Mo.—Harper v. St Louis Merchants' Bridge Terminal R. Co., 86 S.W. 99, 187 Mo. 575.
51 C.J. p. 983 note 55.

41. N.D.—Petition of Patrons of Great Northern Ry. Co. of Nash, 267 N.W. 723, 66 N.D. 541.
51 C.J. p. 985 note 94.

Constitutional provision vesting power in commission to require railway to provide adequate agents held mandatory, and to vest exclusive power in commission.—In re Atchison, T. & S. F. Ry. Co., 20 P.2d 918, 37 N.M. 194.

42. Okl.—St. Louis-San Francisco R. Co. v. State, 242 P. 248, 115 Okl. 152, 153
51 C.J. p. 985 note 95.

43. N.D.—Petition of Patrons of Great Northern Ry. Co. of Nash, 267 N.W. 723, 66 N.D. 541.

44. Tex.—Angelina, etc., R. Co. v. Railroad Commission, Civ.App., 212 S.W. 703.

45. Tenn.—Nashville, etc., R. Co. v. Railroad, etc., Commission, 15 S.W. 2d 751, 159 Tenn. 43.
51 C.J. p. 985 note 3.

46. Ill.—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 74 N.E.2d 885, 397 Ill. 406—Illinois Cent. R. Co. v. Illinois Commerce Commission, 32 N.E.2d 146, 375 Ill. 585.
Okl.—Lowden v. State, 118 P.2d 238, 189 Okl. 491.
51 C.J. p. 986 note 7.

47. N.M.—Village and Citizens of Grenville v. State Corp. Commission, 206 P.2d 259, 53 N.M. 259.

Necessity of proof
Ordinarily commission's requirement for establishment of railroad agency is unenforceable if cost of establishment and maintenance has not been shown.—San Juan Coal & Coke Co. v. Santa Fé, S. J. & N. R. R., 298 P. 663, 35 N.M. 336

48. Ind.—New York Cent. R. Co. v. Public Service Commission, 7 N.E. 2d 957, 212 Ind. 329.
51 C.J. p. 986 note 8.

49. N.M.—San Juan Coal & Coke Co. v. Santa Fé, S. J. & N. R. R., 298 P. 663, 35 N.M. 336
51 C.J. p. 986 notes 9, 13 [c].

50. Ark.—Kansas City Southern R. Co. v. State R. Commission, 299 S.W. 761, 175 Ark. 425.

51. Or.—State v. Corvallis, etc., R. Co., 117 P. 980, 59 Or. 450, 468
51 C.J. p. 986 note 12.

52. S.C.—Southern Ry. Co. v. Public Service Commission, 10 S.E.2d 769, 195 S.C. 247

53. S.C.—Southern Ry. Co. v. Public Service Commission, supra.

54. Ill.—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 74 N.E.2d 885, 397 Ill. 406
S.C.—Southern Ry. Co. v. Public Service Commission, 10 S.E.2d 769, 195 S.C. 247.

55. Ill.—Illinois Cent. R. Co. v. Illinois Commerce Commission, 74 N.E.2d 893, 397 Ill. 399—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 74 N.E.2d 885, 397 Ill. 406.
Minn.—State v. Chicago & N. W. Ry. Co., 297 N.W. 715, 210 Minn. 147.
Neb.—Application of Union Pac. R. Co., 31 N.W.2d 552, 149 Neb. 575—Application of Thomson, 8 N.W.2d 552, 143 Neb. 52—In re Thomson, 4 N.W.2d 756, 141 Neb. 697.

road must maintain at a station need only be adequate for requirements of the station, and should be in a measure commensurate with the patronage and receipts from that portion of the public for whom services are rendered[56]

The duty to provide an agent may sometimes be implied from statutory provisions relative to depots generally,[57] but such provisions have also been construed as not imposing a mandatory requirement to maintain an agency station rather than a nonagency station in charge of a caretaker[58] Under a statute providing in one section that every railroad shall provide at all villages and cities suitable freight and passenger depots, and in a succeeding section that, where the annual business "at any station" exceeds a specified amount, the railroad shall keep an agent there, the road must keep an agent at a station with the requisite amount of business irrespective of whether such station is in an incorporated or unincorporated village.[59] Under a statute requiring an agent at any station where the annual business exceeds a specified sum, such sum is to be measured by the volume of business at the station,[60] irrespective of the particular railroad ultimately securing the business,[61] and irrespective of the question of profit[62]

c. Discontinuance of Agency

(1) Power and proceedings of commission

(2) When discontinuance proper

(1) Power and Proceedings of Commission

Under various statutes, a railroad may not discontinue the services of agents at stations without securing the permission of the appropriate board or commission, but such board or commission must act reasonably in the matter and its determination must be supported by sufficient evidence, and its order is subject to judicial review

Under various statutes and administrative regulations, a railroad may not discontinue the services of agents at stations without securing the permission of the board or commission charged with the regulation of railroads,[63] but such board or commission generally has the power to direct or to authorize the discontinuance of a station agency,[64]

N M —Village and Citizens of Grenville v. State Corp. Commission, 206 P.2d 259, 53 N M 259—Petition of Town of Grenville, 119 P 2d 632, 46 N.M. 3

Okl.—Atchison, T & S. F Ry Co v. State, 119 P.2d 840, 190 Okl 18—Lowden v. State, 118 P 2d 242, 189 Okl 495—Lowden v. State, 118 P. 2d 238, 189 Okl. 491—Atchison, T & S. F Ry. Co. v State, 118 P 2d 202, 189 Okl. 485—Lowden v State, 106 P 2d 801, 188 Okl. 106

S C.—Southern Ry. Co. v Public Service Commission, 10 S E 2d 777, 195 S C 265

51 C.J. p 502 note 18 [a], p 986 note 13

Disproportionate cost

A railroad should not be required to maintain an agency station instead of being permitted to substitute a prepay station therefor when cost of service involved in maintaining agency station is out of proportion to revenue derived from that portion of public benefited thereby, especially where a substitute service may be provided which will afford the same essential service but which is less convenient —Illinois Cent. R Co v Illinois Commerce Commission, 32 N E.2d 146, 375 Ill 585

56. Okl —Missouri-Kansas-Texas R Co v. State, 76 P.2d 884, 182 Okl 134

Custodian held required

N M.—Village and Citizens of Grenville v. State Corp. Commission, 206 P.2d 259, 53 N M 259.

57. Tex.—Angelina, etc, R. Co v Railroad Commission, Civ App, 212 S W 703.

51 C.J. p 986 note 15.

58. Ill —Illinois Cent R. Co. v. Illinois Commerce Commission, 74 N E 2d 526, 397 Ill 387

Public convenience and necessity

The statute requiring railroads carrying passengers or freight to maintain depots where railroad receives and delivers passengers and freight at all towns and villages having population of two hundred or more does not mandatorily require an agency station at such places, but requires that the manner of operating railroad depots in such communities must be conformable with public convenience and necessity —Illinois Cent. R. Co. v. Illinois Commerce Commission, 74 N E.2d 893, 397 Ill 399—Atchison, T. & S F Ry. Co. v Illinois Commerce Commission, 74 N E 2d 885, 397 Ill 406—Illinois Cent R Co v Illinois Commerce Commission, 74 N E 2d 545, 397 Ill. 323—Illinois Cent. R. Co v Illinois Commerce Commission, 74 N E 2d 526, 397 Ill. 387

59. Minn.—Hines v. Minnesota, etc, R Co, 186 N W. 797, 151 Minn. 402.

60. Minn —Abrahamson v. Canadian Northern R Co, 225 N W. 94, 177 Minn 136

51 C J p 987 note 19.

31. Minn.—Abrahamson v. Canadian Northern R. Co, supra.

51 C J. p 987 note 20.

62. Minn.—Abrahamson v Canadian Northern R Co, supra

51 C J p 987 note 21

63. N M —In re Southern Pac Co., 16 P 2d 402, 37 N M 11

S.C —Southern Ry Co v Public Service Commission, 10 S E 2d 769, 195 S C. 247.

64. Ill —Atchison, T. & S F Ry. Co. v. Illinois Commerce Commission, 74 N E.2d 885, 397 Ill 406.

Power not impaired by statute

The Public Utilities Act, creating the commerce commission, is complete in itself, covers the entire subject of public utilities, and vests in the commission general supervision over all public utilities, including the power to determine whether a station agency may be discontinued, which power is not impaired by the requirements of the Railroad and Warehouse Act providing that railroad shall build and maintain depots in all towns and villages with a population of two hundred or more and requiring certain services in connection with such depots.—Illinois Cent. R. Co v. Illinois Commerce Commission, 74 N.E.2d 545, 397 Ill 323.

Commission has jurisdiction to hear and grant or deny, as public interest requires, railway company's application for leave to discontinue agency and withdraw station agent at certain point.—Denver & S. L Ry. Co. v. St. Clair, 28 P.2d 340, 94 Colo. 67.

Burden on protestants

The fact that railroad, instead of closing its agency station at speci-

even in the case of a station agency created by special act of the legislature.[65] A contract between a railroad and some of its employees regulating the terms and conditions of employment may not control or affect the power of the commission in passing on the railroad's application for authority to withdraw full-time agents from certain stations and to substitute caretaker service in lieu thereof[66]

The commission in determining whether an agency station should be discontinued must act reasonably,[67] and its determination must be supported by sufficient evidence.[68] So an order of the commission granting or denying a railroad company permission to substitute a caretaker for an agent is unreasonable and arbitrary unless its findings and conclusions conform to the law and are supported by the evidence.[69] In a proper case, the commission should on denying the railroad's application grant a rehearing to consider additional matters affecting the situation.[70]

fied point, applied to commission for affirmative authority to close it, did not alter necessity of protestants making affirmative case against proposed discontinuance—In re Denver & R. G. W. R. Co., 24 P.2d 727, 37 N.M. 472.

Discontinuance for certain months

Application to discontinue station as agency station for certain months held properly denied on original hearing, where original application did not request such suspension—Los Angeles & S. L. R. Co. v. Public Utilities Commission of Utah, 15 P.2d 358, 80 Utah 455.

65. Ark.—Kansas City Southern R. Co. v. State R. Commission, 299 S.W. 761, 175 Ark. 425

66. Okl.—Missouri-Kansas-Texas R. Co. v. State, 76 P.2d 884, 182 Okl. 134.

Mediation of dispute

Where commission had not been requested to mediate dispute between railroad and its employees, fact that constitution required commission on request to effect by mediation a settlement of controversies between transportation companies and their employees did not justify commission's dismissal of railroad's applications for authority to change type of service at three stations because of railroad's failure to give notice required by contract between it and some of its employees, where that contract could in no way affect commission's jurisdiction over applications—Missouri-Kansas-Texas R. Co. v. State, supra.

67. Okl.—Lowden v. State, 118 P.2d 238, 189 Okl. 491.
51 C.J. p. 986 note 7.

Denial of application for discontinuance held reasonable

Idaho.—Application of Union Pac. R. Co., 142 P.2d 575, 65 Idaho 221.
Ind.—New York Cent. R. Co. v. Public Service Commission, 7 N.E.2d 957, 212 Ind. 329
51 C.J. p. 986 note 8.

Denial of application for discontinuance held unreasonable

Ill.—Illinois Cent. R. Co. v. Illinois Commerce Commission, 77 N.E.2d 180, 399 Ill. 67—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 74 N.E.2d 885, 397 Ill. 406—Illinois Cent. R. Co. v. Illinois Commerce Commission, 32 N.E.2d 146, 375 Ill. 585
Minn.—State v. Chicago & N. W. Ry. Co., 297 N.W. 715, 210 Minn. 147
Neb.—Application of Union Pac. R. Co., 31 N.W.2d 552, 149 Neb. 575—Application of Thomson, 8 N.W.2d 552, 143 Neb. 52—Application of Thomson, 6 N.W.2d 607, 142 Neb. 477—In re Thomson, 4 N.W.2d 756, 141 Neb. 697.
N.M.—Petition of Town of Grenville, 119 P.2d 632, 46 N.M. 3—In re Southern Pac. Co., 16 P.2d 402, 37 N.M. 11—In re Denver & R. G. W. R. Co., 9 P.2d 139, 36 N.M. 106.
Okl.—St. Louis-San Francisco Ry. Co. v. State, 155 P.2d 718, 195 Okl. 41—Lowden v. State, 118 P.2d 242, 189 Okl. 495—Atchison, T. & S. F. Ry. Co. v. State, 118 P.2d 202, 189 Okl. 485—Lowden v. State, 100 P.2d 890, 186 Okl. 654—Lowden v. State, 78 P.2d 1059, 182 Okl. 549—Kurn v. State, 66 P.2d 52, 179 Okl. 440—Kurn v. State, 52 P.2d 841, 175 Okl. 379.
S.C.—Southern Ry. Co. v. Public Service Commission, 10 S.E.2d 777, 195 S.C. 265.
Va.—Atlantic Coast Line R. Co. v. Commonwealth ex rel. State Corp. Commission, 61 S.E.2d 5, 191 Va. 241
51 C.J. p. 986 note 9.

68. Ill.—Illinois Cent. R. Co. v. Illinois Commerce Commission, 74 N.E.2d 545, 397 Ill. 323.

Evidence in another proceeding

In proceeding to discontinue railroad station as agency station, evidence in another similar proceeding relating to another station could not be considered.—Los Angeles & S. L. R. Co. v. Public Utilities Commission, 17 P.2d 287, 81 Utah 286.

Evidence held sufficient

(1) To support commission's determination denying discontinuance of agency service.
Idaho.—Application of Union Pac. R. Co., 142 P.2d 575, 65 Idaho 221.
Ind.—New York Cent. R. Co. v. Public Service Commission, 7 N.E.2d 957, 212 Ind. 329.

(2) To sustain commission's finding that nonagency station would not give reasonable and adequate service, at least during heavy months of shipping—Los Angeles & S. L. R. Co. v. Public Utilities Commission of Utah, 15 P.2d 358, 80 Utah 455.

Evidence held insufficient

(1) In general—Chicago, R. I. & P. Ry. Co. v. Illinois Commerce Commission, 179 N.E. 126, 346 Ill. 412.

(2) To sustain commission's finding that nonagency station would not give reasonable and adequate service—Los Angeles & S. L. R. Co. v. Public Utilities Commission, 17 P.2d 287, 81 Utah 286

(3) To support finding of commission that there was no agency station "near" community—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 74 N.E.2d 885, 397 Ill. 406

Isolated instances of the usefulness of a station agent furnish little support for commission's order denying application to change agency station to a prepay station.—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, supra.

69. Ill.—Illinois Cent. R. Co. v. Illinois Commerce Commission, 74 N.E.2d 893, 397 Ill. 399—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 74 N.E.2d 885, 397 Ill. 406
Neb.—Application of Union Pac. R. Co., 31 N.W.2d 552, 149 Neb. 575—Application of Thomson, 8 N.W.2d 552, 143 Neb. 52.

Finding held insufficient

Ill.—Chicago, R. I. & P. Ry. Co. v. Illinois Commerce Commission, 179 N.E. 126, 346 Ill. 412.

70. Utah.—Los Angeles & S. L. R. Co. v. Public Utilities Commission of Utah, 15 P.2d 358, 80 Utah 455

Telephone

Commission's denial of railroad's application for rehearing, after denying application to discontinue station as agency station, to consider railroad's offer to install telephone in station would be erroneous.—Los Angeles & S. L. R. Co. v. Public Utilities Commission, 17 P.2d 287, 81 Utah 286—Los Angeles & S. L. R. Co. v. Public Utilities Commission of Utah, 15 P.2d 358, 80 Utah 455.

Suspension for limited time

Denial of railroad's application for

As a general rule, the action of the commission in granting or denying an application to discontinue agency service at a station is subject to review in the courts [71] In such a judicial proceeding, the findings and order of the commission are presumed to be valid and supported by sufficient evidence.[72] and the burden is on the railroad attacking the order to show its invalidity [73] In other words, the findings and order of the commission, if supported by competent evidence, will be binding on the court,[74] and the commission's determination will be disturbed only when it is shown that the commission abused its discretion or failed to follow the law [75] On review of a board or commission's order relative to station agents, the courts will consider neither a private agreement relative to maintenance of a station agency,[76] except as it may bear on the question of reasonableness,[77] nor the circumstances connected with discontinuance of an agency previously maintained at the station in question [78] If the findings and conclusions of the commission do not conform to the law and are not supported by the evidence, so that the order of the commission is unreasonable, the court may reverse or vacate such order [79] In such case, it has been held, the judgment of the court should sion for further proceedings, since only the commission has authority to grant the relief requested by the railroad [80] The judgment of the court may be subject to further appellate review [81]

rehearing for purpose of passing on question whether agency could not be suspended during certain months in which there was little shipping held error—Los Angeles & S L R Co v. Public Utilities Commission of Utah, supra.

71. Ill—Atchison, T & S F. Ry Co v. Illinois Commerce Commission, 74 N E 2d 885, 397 Ill 406.
Neb—In re Thomson, 4 N W 2d 756, 141 Neb 697
N M—In re Southern Pac Co, 16 P 2d 402, 37 N M 11
S C—Southern Ry. Co. v. Public Service Commission, 10 S E 2d 777, 195 S C. 265.

Notwithstanding rule of commission stipulates that no discontinuance by railroad of agency should be allowed without permission of the commission, the action of the commission in such a case is subject to review by court—Southern Ry Co v Public Service Commission, 10 S E 2d 769, 195 S C 247.

72. Ind—New York Cent. R Co v Public Service Commission, 7 N E 2d 957, 212 Ind 329.
Okl—Atchison, T & S F. Ry Co. v State, 118 P 2d 202, 189 Okl. 485
S C—Southern Ry. Co. v Public Service Commission, 10 S.E 2d 769, 195 S.C. 247.

Rebuttal by evidence
The "prima facie" effect of corporation commission's action in denying railway company's petition to discontinue regular station agent's services under constitutional provision requiring court to consider such action as "prima facie just, reasonable, and correct" constitutes mere presumption, which may disappear or be overthrown by evidence in record on appeal from commission's order, but to overcome presumption of correctness, contrary evidence must be strong and persuasive—Atchison, T & S F. Ry. Co. v. State, 118 P 2d 202, 189 Okl. 485.

73. Ind.—New York Cent. R. Co. v Public Service Commission, 7 N E 2d 957, 212 Ind 329
S C—Southern Ry Co v Public Service Commission, 10 S E 2d 769, 195 S C 247

Burden not met
Okl—Lowden v. State, 113 P.2d 991, 189 Okl. 76.

74. Colo—Public Utilities Commission v Town of Erie, 18 P 2d 906, 92 Colo 151.
Idaho—Application of Union Pac R Co, 142 P 2d 575, 65 Idaho 221
Utah—Los Angeles & S L R Co v Public Utilities Commission, 17 P 2d 287, 81 Utah 286—Los Angeles & S L R Co v Public Utilities Commission of Utah, 15 P.2d 358, 80 Utah 455

Findings of fact
On judicial review of an order of the commission relating to railroad companies, such as an order refusing the proposed discontinuance by railroad of its agency at a particular station, the commission's findings of fact are prima facie correct and should not be set aside unless clearly against the weight of the evidence—Southern Ry. Co v Public Service Commission, 10 S.E 2d 769, 195 S C. 247.

Order held improperly set aside
Colo—Public Utilities Commission v. Town of Erie, 18 P.2d 906, 92 Colo 151.

75. Idaho—Application of Union Pac R Co., 142 P 2d 575, 65 Idaho 22.

Substitution of judgment
Trial court cannot substitute its judgment for that of commission denying railroad's application to change agency station to nonagency and prepay station, if commission's order is supported by substantial evidence, or if railway fails to show by preponderance of evidence facts establishing necessity of change—New York Cent R. Co. v. Public Service Commission, 7 N.E 2d 957, 212 Ind. 329.

76. La.—Louisiana R, etc, Co. v State R Commission, 83 So 849, 146 La 609

77. La—Louisiana R, etc. Co v. State R Commission, supra
51 C J p 974 note 95.

78. N M.—Denton v Atchison, etc, R Co, 277 P 34, 34 N.M 53.
51 C J. p 974 note 96.

79. Ill—Illinois Cent R Co v. Illinois Commerce Commission, 74 N E 2d 893, 397 Ill 399—Atchison T & S F Ry Co v. Illinois Commerce Commission, 74 N.E.2d 885, 397 Ill 406
Neb—Application of Union Pac R. Co., 31 N W 2d 552, 149 Neb 575—Application of Thomson, 8 N W.2d 552, 143 Neb 52—In re Thomson, 4 N W 2d 756, 141 Neb 697.
Okl—Lowden v State, 118 P 2d 242, 189 Okl 495—Lowden v. State, 118 P 2d 238, 189 Okl 491—Atchison, T & S F Ry Co v. State, 118 P.2d 202, 189 Okl 485

80. Ill—Illinois Cent. R. Co. v. Illinois Commerce Commission, 32 N E 2d 146, 375 Ill 585

81. S C—Southern Ry Co. v Public Service Commission, 10 S E 2d 769, 195 S C 247.

Waiver of error
S C—Southern Ry Co v. Public Service Commission, supra

Conclusiveness of findings
(1) Finding by commission that a railroad was unable to furnish a modified substituted service at a station by employing a part-time employee, without breaching its contract with a labor union, was binding on appellate court—Atlantic Coast Line R. Co. v. Commonwealth ex rel State Corp. Commission, 61 S E 2d 5, 191 Va. 241.

(2) On appeal from judgment refusing to enjoin enforcement of commission's order denying railroad's application to change agency station to nonagency and prepay station, appellate court would not weigh the evidence or substitute its judgment

The ruling of the commission[82] or of the court[83] on the question of discontinuance of an agency at any given time does not amount to an adjudication for the future, but is only a judgment on the conditions presented by the application and relates only to the time and conditions presented. So where the commission denied an application by a railroad to discontinue a station agency, but at a later time the circumstances changed, the order of the commission is not res judiciata and the railroad at the later time may present a new application.[84] So also, railroad agency service discontinued with permission of the commission may be ordered restored whenever changed conditions justify such an order,[85] but restoration of agency service is not justified under evidence that there was only some increase in the business of the station covering the period from the date when the court authorized discontinuance of agency service.[86]

(2) When Discontinuance Proper

Whether or not a railroad may properly be entitled to discontinue an agency at a station generally depends on the facts of the particular case and ordinarily the test employed in determining the matter, where an absolutely necessary service is not involved, is whether the public good derived from maintenance of the agency station outweighs the expense to the railroad in continuing such agency.

Whether or not a railroad may properly be entitled to change a station for an agency to a nonagency or prepay station generally depends on the facts of the particular case.[87] The test generally applied in determining the matter, where an absolutely necessary service is not involved, is whether the public good derived from maintenance of the agency station outweighs the expense to the railroad in continuing such agency,[88] that is, whether the economic waste caused by the operation of the agency outweighs the benefits and conveniences to the public.[89] In this respect, the "public convenience and necessity" involved are those of the public generally and not of an individual or number of individuals.[90] The circumstances to be taken into consideration are the volume of busi-

for that of commission—New York Cent R Co v. Public Service Commission, 7 N E 2d 957, 212 Ind 329.

82. Neb—Application of Union Pac. R Co, 31 N.W.2d 552, 149 Neb 575—Application of Thomson, 8 N W. 2d 552, 143 Neb. 52—Application of Thomson, 6 N.W 2d 607, 142 Neb. 477.

83. Neb.—Application of Union Pac R. Co., 31 N.W 2d 552, 149 Neb. 575—Application of Thomson, 8 N W 2d 552, 143 Neb. 52—Application of Thomson, 6 N.W.2d 607, 142 Neb. 477.

84. Va—Atlantic Coast Line R. Co. v. Commonwealth ex rel. State Corp Commission, 61 S.E.2d 5, 191 Va. 241.

85. Idaho—In re Application of Union Pac. R Co, for Leave to Discontinue Agency at Montour, Idaho, 134 P.2d 599, 64 Idaho 529.

86. Neb.—Cole v. Chicago & N. W. Ry. Co., 13 N.W.2d 884, 144 Neb. 558

87. Ill.—Illinois Cent. R. Co. v. Illinois Commerce Commission, 74 N. E.2d 893, 397 Ill. 399—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 74 N.E.2d 885, 397 Ill. 406.
Neb—Application of Union Pac. R. Co, 31 N W.2d 552, 149 Neb. 575—Application of Thomson, 8 N W. 2d 552, 143 Neb. 52—In re Thomson, 4 N.W.2d 756, 141 Neb 697.
Ohio.—New York Cent R Co. v. Public Utilities Commission, 176 N.E. 219, 123 Ohio St. 560.
S C—Southern Ry. Co v Public Service Commission, 10 S.E 2d 769, 195 S.C. 247.

Right to discontinue agency held shown

Idaho.—In re Application of Union Pac R. Co. for Leave to Discontinue Agency at Montour, Idaho, 134 P.2d 599, 64 Idaho 529.
S C—Southern Ry. Co v. Public Service Commission, 10 S.E.2d 769, 195 S.C. 247.

88. Idaho—Application of Union Pac R Co, 142 P.2d 575, 65 Idaho 221.
Ill—Illinois Cent R. Co. v. Illinois Commerce Commission, 77 N E 2d 180, 399 Ill 67—Illinois Cent R. Co. v Illinois Commerce Commission, 74 N E 2d 893, 397 Ill 399—Atchison, T & S F Ry Co v. Illinois Commerce Commission, 74 N. E 2d 885, 397 Ill 406—Illinois Cent R. Co v Illinois Commerce Commission, 74 N E 2d 545, 397 Ill. 323—Illinois Cent R. Co. v Illinois Commerce Commission, 74 N E 2d 526, 397 Ill. 387—Illinois Cent. R. Co. v. Illinois Commerce Commission, 32 N E 2d 146, 375 Ill. 585.
Neb.—Application of Union Pac. R. Co, 31 N.W.2d 552, 149 Neb 575—Application of Thomson, 8 N.W.2d 552, 143 Neb. 52—In re Thomson, 4 N.W.2d 756, 141 Neb 697.
Ohio—New York Cent. R Co. v Public Utilities Commission, 176 N.E. 219, 123 Ohio St. 560.
Okl—Lowden v. State, 118 P.2d 242, 189 Okl. 495—Lowden v. State, 118 P.2d 238, 189 Okl. 491—Atchison, T. & S. F. Ry Co. v. State, 118 P. 2d 202, 189 Okl. 485.
S.C.—Southern Ry. Co. v. Public Service Commission, 10 S E 2d 769, 195 S.C. 247.
Utah.—Los Angeles & S. L. R. Co. v. Public Utilities Commission of Utah, 15 P 2d 358, 80 Utah 455.

Fact questions

Whether public is making use of railroad agency station, and whether the discontinuance of the agency will result in material inconvenience and loss to the public sufficient to require continuation of the agency, are fact questions—Illinois Cent R Co v. Illinois Commerce Commission, 74 N. E 2d 893, 397 Ill. 399.

Inconvenience

In determining whether railroad could discontinue maintenance of a station agent, it is just that public should bear some inconvenience rather than to impose upon railroad unnecessary expenses—Petition of Town of Grenville, 119 P.2d 632, 46 N M. 3.

89. Ill—Illinois Cent. R. Co. v Illinois Commerce Commission, 77 N. E 2d 180, 399 Ill. 67.

Financial condition

Fact that financial condition of railroad is excellent does not justify continuation of economic waste occasioned by retention of agency station when not in interest of public necessity and convenience—Atchison, T. & S. F Ry Co. v Illinois Commerce Commission, 74 N.E 2d 885, 397 Ill. 406.

90. Ill.—Illinois Cent R. Co. v. Illinois Commerce Commission, 77 N.E 2d 180, 399 Ill. 67—Illinois Cent. R. Co. v. Illinois Commerce Commission, 74 N E 2d 893, 397 Ill 399—Atchison, T. & S F. Ry Co. v. Illinois Commerce Commission, 74 N.E 2d 885, 397 Ill. 406.

ness done at the station, its proximity to other stations, the accessibility thereof, the cost of maintaining such agency station, the financial loss, if any, to the railroad company, due regard for the welfare of the public, and the probabilities of future development.[91] On a petition for permission to abandon agency service at a station, the board or commission has power to consider only the question of public needs,[92] and the effect of a private contract cannot be considered.[93]

Broadly speaking, the railroad is under no duty to provide an agent at a station where the volume of business is not sufficient reasonably to demand the services of such an employee, as discussed supra subdivision b of this section, and in connection with an application for discontinuance it is unreasonable to require the maintenance of an agency station where the cost of the service is out of proportion to the revenue derived from the portion of the public benefited thereby,[94] particularly where a substitute service may be provided affording the same essential, although less convenient, service.[95] The question of loss to the railroad as a result of the agency ordinarily is an important factor to be considered,[96] but a loss[97] amounting to confiscation[98] need not be proved before the railroad is entitled to abandon the agency. Under some circumstances, operation of the agency station at a loss may warrant its discontinuance although the railroad as a whole is operated at a profit;[99] but it has also been held that the incidental loss at the station may not be of paramount importance if the entire operation of the railroad is profitable or if the operation throughout the state is profitable.[1]

91. Idaho—Application of Union Pac R Co, 142 P 2d 575, 65 Idaho 221.
Ill—Illinois Cent R Co v. Illinois Commerce Commission, 77 N E 2d 180, 399 Ill. 67—Atchison, T. & S F. Ry Co. v. Illinois Commerce Commission, 74 N E 2d 885, 397 Ill 406—Illinois Cent R Co v Illinois Commerce Commission, 32 N E 2d 146, 375 Ill. 585
Neb—Application of Union Pac R. Co, 31 N W 2d 552, 149 Neb 575—Application of Thomson, 8 N W 2d 552, 143 Neb. 52—In re Thomson, 4 N W.2d 756, 141 Neb. 697
N M—Petition of Town of Grenville, 119 P.2d 632, 46 N.M. 3
Ohio—New York Cent R Co. v Public Utilities Commission, 176 N E. 219, 123 Ohio St 560.
S C—Southern Ry. Co v. Public Service Commission, 10 S E 2d 777, 195 S C. 265.

Carload freight is not to be considered in determining railroad's application for agency discontinuance, since principal need of an agent is occasioned by less than carload business—In re Application of Union Pac R. Co, for Leave to Discontinue Agency at Montour, Idaho, 134 P 2d 599, 64 Idaho 529

Financial condition not only factor
In determining whether public convenience and necessity require abandonment of railroad and railway express agency service at particular station, financial condition of entire system is but one of factors to be taken into consideration, other factors being volume of business done at station, number of people to be accommodated, present facilities, proximity to other agency stations, and cost of furnishing such services—Illinois Cent R. Co. v. Illinois Commerce Commission, 74 N.E.2d 545, 397 Ill. 323.

Time necessary for performance of duties by railroad agent is important in determining whether railway commission acted arbitrarily and unreasonably in denying application for discontinuance of agency—Application of Union Pac R Co, 31 N W 2d 552, 149 Neb 575—Application of Thomson, 6 N W 2d 607, 142 Neb. 477.

Erroneous calculation
On application by railroad for discontinuance of regular agent's services at certain station, commission erred in including in its calculation of company's revenue from business handled at such station free shipments of materials and equipment used by construction company in revising grade on portion of railway company's roadbed under contract with such company, in view of undisputed testimony that such shipments were not recurring and did not comprise portion of such business during average period—Lowden v. State, 118 P 2d 242, 189 Okl. 495.

92. Va—Norfolk, etc., R Co. v Commonwealth, 129 S E 324, 143 Va 106

93. Va—Norfolk, etc, R. Co. v. Commonwealth, supra.

94. Ill.—Illinois Cent. R. Co. v Illinois Commerce Commission, 77 N E 2d 180, 399 Ill 67.

95. Ill—Atchison, T. & S F Ry. Co. v. Illinois Commerce Commission, 74 N E 2d 885, 397 Ill 406.
Neb—Application of Union Pac R. Co, 31 N W.2d 552, 149 Neb 575—Application of Thomson, 8 N.W 2d 552, 143 Neb 52—In re Thomson, 4 N.W.2d 756, 141 Neb. 697.
Okl—Atchison, T. & S. F. Ry Co. v. State, 119 P.2d 840, 190 Okl. 18—Lowden v. State, 118 P 2d 238, 189 Okl 491—Atchison, T. & S F. Ry Co. v. State, 118 P 2d 202, 189 Okl. 485—Lowden v. State, 100 P 2d 890, 186 Okl. 654

96. S C—Southern Ry Co v Public Service Commission, 10 S E 2d 769, 195 S C. 247.

Where absolute duty not involved
In determining whether railroad should be allowed to discontinue its agency at a particular station, the question of loss to railroad as result of the agency is of greater importance than in case involving an absolute duty of railroad to render a service.—Southern Ry. Co v. Public Service Commission, supra.

97. Ill—Illinois Cent R. Co v Illinois Commerce Commission, 77 N E 2d 180, 399 Ill 67.

98. Ill—Illinois Cent. R. Co. v. Illinois Commerce Commission, 74 N. E 2d 893, 397 Ill. 399.

Income not major consideration
(1) Income from business done at village station on great transportation system is not entitled to major consideration in passing on application for discontinuance of station agency—Application of Union Pac. R Co, 142 P 2d 575, 65 Idaho 221—In re Application of Union Pac R Co, for Leave to Discontinue Agency at Montour, Idaho, 134 P.2d 599, 64 Idaho 529.

(2) While income of a railroad station is an element to be considered in determining whether an agency shall be discontinued, it is not in itself controlling but must be considered with all other elements bearing on reasonableness under the circumstances—Application of Thomson, 6 N.W.2d 607, 142 Neb. 477.

99. Ill.—Illinois Cent. R. Co v. Illinois Commerce Commission, 74 N.E 2d 526, 397 Ill. 387.

1. S C—Southern Ry. Co v. Public Service Commission, 10 S.E.2d 769, 195 S.C 247.

In any event, the matter of profits and loss to the railroad may not be conclusive in every case, since the proposed change in the character of the service rendered must be considered in relation to the public convenience and necessity,[2] although the public convenience or necessity which would require continuance of the agency even though a loss were sustained must be shown to be unusual in kind or degree.[3] The need for agency service should not be measured by financial results alone, but also by the agent's usefulness to the company as well as to the public,[4] and a high per cent of station costs as compared with the revenue creditable to that station is not alone sufficient to justify the discontinuance of the agency at such station.[5]

A contemplated future increase in railroad transportation and the resulting increase in station business is a factor which should be given consideration in determining the need for retention of agency service at a station,[6] but it is unreasonable to deny permission to substitute a caretaker for an agent on that premise unless well-defined business prospects are established by the evidence with reasonable certainty.[7] Future business which may arise because of a state of war has been held too speculative to be considered.[8] A railroad will not be required to maintain an agency simply to carry on the pay roll unnecessary employees during an industrial depression.[9]

§ 403. Stations and Station Facilities

A railroad company generally is required to maintain a sufficient number of stations. Unless otherwise provided by statutory or constitutional provision, a railroad has the primary right to name its own stations

In pursuance of its duty to provide adequate facilities for the transportation of passengers and freight, discussed supra § 390, a railroad company is required to maintain a sufficient number of stations,[10] and to provide reasonably adequate accommodations and facilities at such stations, as discussed infra § 406. A statute regulating the maintenance of stations and facilities at certain places is applicable only to stations at the designated places.[11] Ordinarily a railroad has complete discretion as to which nearby station shall handle the business of a shipper, in the absence of objection by the shipper.[12] A railroad will not be required to establish new or additional stations where the cost of maintaining them would exceed the profits to the company and the public is already reasonably provided for by the stations established.[13]

Name of station. In the absence of statutory or constitutional provisions providing otherwise, a railroad has the primary right to name its own stations[14] except in cases where a name so chosen materially detracts from the efficiency of the service which the company must furnish to the public.[15] Under a statute requiring a railroad station in an incorporated village to have the same name as such village, a station which is half in one village and half in another village cannot be changed to the name of the second village against the railroad's dissent.[16] Under constitutional provisions granting to a board or commission broad power to control and regulate the operation of a railroad, it may require a railroad to change the name of a station where reasonably necessary for public convenience.[17]

§ 404. —— Regulation by State or by Board or Commission in General

a. Regulation by state in general
b. Regulation by board or commission in general

2. S.C.—Southern Ry. Co. v. Public Service Commission, supra.

Revenue exceeding wages paid

Mere fact that gross revenue at railroad agency station, furnishing freight service only exceeded the wages paid the station agent was not decisive as to whether public convenience and necessity required railroad to continue to maintain the agency station where eighty-three per cent of gross revenue received at station was contributed by a single company the shipping needs of which would be satisfied by another station less than six miles away.—Illinois Cent. R. Co. v. Illinois Commerce Commission, 77 N.E.2d 180, 399 Ill. 67.

3. S.C.—Southern Ry. Co. v. Public Service Commission, 10 S.E.2d 769, 195 S.C. 247.

4. Neb.—Application of Thomson, 8 N.W.2d 552, 143 Neb. 52.

5. Utah.—Los Angeles & S. L. R. Co. v. Public Utilities Commission, 17 P.2d 287, 81 Utah 286.

6. Neb.—Application of Thomson, 8 N.W.2d 552, 143 Neb. 52.

7. Neb.—Application of Thomson, supra.

8. Neb.—In re Thomson, 4 N.W.2d 756, 141 Neb. 697.

9. N.M.—In re Southern Pac. Co., 16 P.2d 402, 37 N.M. 11.

10. S.C.—Southern Ry. Co. v. Public Service Commission, 10 S.E.2d 769, 195 S.C. 247.

Location of stations see supra § 57.

11. Ill.—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 74 N.E.2d 885, 397 Ill. 406.

12. Okl.—Lowden v. State, 78 P.2d 1059, 182 Okl. 549.

13. Ill.—Chicago, etc., R. Co. v. People, 38 N.E. 562, 152 Ill. 230, 26 L.R.A. 224.

14. Wash.—State v. State R. Commission, 125 P. 953, 69 Wash. 523, Ann. Cas. 1914A 830.

51 C.J. p. 999 note 48.

15. Wash.—State v. State R. Commission, supra.

16. N.Y.—People v. New York, etc., R. Co., 110 N.Y.S. 2, 125 App. Div. 641.

17. Okl.—Missouri, etc., R. Co. v. State, 106 P. 858, 25 Okl. 437.

Order held justified

Wash.—State v. Department of Public Works, 3 P.2d 999, 164 Wash. 563.

a. Regulation by State in General

In the exercise of its regulatory power, a state may require the maintenance of adequate stations at certain places and may control and regulate the furnishing of necessary and proper accommodations and facilities thereat.

In the exercise of its regulatory power, a state may require the maintenance of adequate stations at certain places[18] and may control and regulate the furnishing of necessary and proper accommodations and facilities thereat[19] The power of the state to regulate the furnishing of accommodations and facilities at stations must be exercised in accordance with constitutional limitations and cannot be used to compel the railroad to furnish facilities for purposes foreign to transportation[20] Uncertainty[21] or unreasonableness[22] will invalidate the statute.

b. Regulation by Board or Commission in General

The legislature may delegate to a board or commission its power to regulate accommodations and facilities at stations. The regulatory power of the board or commission is derived from, and coextensive with, the constitutional and statutory provisions creating it, and the exercise of such power must be reasonable

The legislature may delegate to a board or commission its power to regulate accommodations and facilities at stations[23] The power of a board or commission to regulate accommodations and facilities at stations is derived from, and coextensive with, the constitutional and statutory provisions creating it.[24] Under statutes empowering a board or commission to regulate the general operation of railroads, it may regulate the furnishing of facilities at stations,[25] although it has been said that the railroad should be accorded primary discretion in such matters.[26] Subject to, and in accordance with, constitutional or statutory provisions, a board or commission may not only be empowered to direct, but may be under a duty to direct the furnishing of adequate facilities at stations.[27] Under some statutes a service established at a station by voluntary action of a railroad or by order of the commission may not be abandoned except by order of the commission after a hearing.[28]

Exercise of power. Generally speaking, rules, regulations, and orders of a board or commission relative to stations and accommodations and facilities thereat must be reasonable[29] except, it has been held, where the statute is mandatory.[30] The reasonableness of a general rule or regulation should not, however, be tested by a single application there-

18. Fla.—State v. Florida East Coast R Co., 64 So. 443, 67 Fla 83
51 C.J. p 987 notes 29 [a], 31.
Regulation as affected by interstate character of traffic see Commerce § 78.

19. Ala.—State R. Commission v Alabama Great Southern R Co, 64 So. 13, 185 Ala. 354, L.R.A 1915D 98.
51 C J. p 987 note 31.

20. U S—Great Northern R. Co. v Cahill, S D, 40 S Ct. 457, 253 U S 71, 64 L.Ed. 787—Great Northern R Co v. Minnesota, 35 S Ct 753, 238 U S 340, 59 L Ed. 1337.

21. Tex—State v. Texas, etc, R. Co., Civ App., 103 S W. 653.
51 C.J. p 987 note 34.

22. Tex—Houston, etc, R. Co. v. State, 107 S W. 525, 101 Tex 333—Missouri, etc., R. Co. v State, 100 S.W. 766, 100 Tex. 420.

23. Ark.—Kansas City Southern R. Co. v. State R. Commission, 299 S. W. 761, 175 Ark. 425.

24. Utah—Union Pac R. Co. v. Public Service Commission, 211 P 2d 851.
51 C J. p 987 note 39.

Exclusive power

Constitutional provision vesting power in commission to require railroad to provide adequate facilities for passengers and freight has been held mandatory, and to vest exclusive power in commission—In re Atchison, T & S. F. Ry Co, 20 P 2d 918, 37 N M 194

25. Utah—Union Pac R Co. v Public Service Commission, 211 P 2d 851
51 C J. p 987 note 41.

26. Fla—Louisville, etc, R Co. v Railroad Comrs, 58 So 543, 63 Fla 491, 44 L R A,N S, 189.
51 C J p 987 note 42

27. Tex—Angelina, etc., R Co v Railroad Commission, Civ App, 212 S W. 703
51 C J p 988 note 54

28. Minn—Minnesota Transfer Ry. Co v. Railroad and Warehouse Commission, 274 N.W. 408, 200 Minn. 422

29. Ill.—Atchison, T & S F Ry. Co. v. Illinois Commerce Commission, 74 N.E 2d 885, 397 Ill 406
N.D—Petition of Patrons of Great Northern Ry Co. of Nash, 267 N. W. 723, 66 N D. 541.
51 C J p 988 note 43.

The constitution does not confer on the commission the right to arbitrarily establish a railroad station regardless of expense entailed on railroad or benefit to be derived by public, but commission is only authorized to make such an order in that regard as public interests demand and as may be reasonable and just.—Village and Citizens of Grenville v State Corp Commission, 206 P 2d 259, 53 N M. 259

Transfer of business

Where railroad desired to transfer refining company's business from one nearby station to another, and refining company made no objection, the commission was without authority to prevent transfer, merely as device to enhance railroad's revenues at station from which railroad desired to have business transferred and use enhancement as a reason for refusing to abolish the agency at that station as desired by railroad.—Lowden v. State, 78 P 2d 1059, 182 Okl. 549

Evidence sustained finding of commission that means of ingress and egress supplied at railroad station by railroad to shippers of live stock located on north side of tracks was unreasonable and unsafe because of difficulty in getting live stock across double tracks on which there was heavy traffic, to loading facilities on south side of tracks, justifying order requiring railroad to construct loading facilities on north side of tracks. —Union Pac R. Co. v Public Service Commission, Utah, 211 P.2d 851

30. Tex—Angelina, etc., R. Co v. Railroad Commission, Civ App., 212 S.W. 703.

of [31]

A board or commission may require the furnishing of essential accommodations and facilities at stations even though a loss will be sustained by the road in connection therewith [32] If, however, enforcement entails a loss to the road on its entire operation, the regulation will be held unreasonable [33] Where accommodations or facilities are merely convenient rather than essential to public welfare, the reasonableness of orders to furnish them will be determined by balancing the relative expense to the road against the relative convenience to the public,[34] and such orders will not be enforced if the burden on the road is disproportionate to the public benefit.[35] Commissioners may properly consider prospective public business at stations in determining what facilities may be required [36]

§ 405. —— Depots and Waiting Rooms

a. Regulations
b. Duty of company to provide
c. Maintenance and care of depots

a. Regulations

(1) In general
(2) Union depots

(1) In General

A state or regulatory commission may require a railroad to build or provide depots and waiting rooms, and may prescribe the kind, capacity, and construction materials of the buildings; but orders, regulations, and requirements of this nature generally must be reasonable.

Among the regulatory powers of a state or of a board or commission may be included the power to require a railroad to build or provide suitable depots and waiting rooms.[37] Such power includes by implication power to prescribe the kind,[38] capacity,[39] and construction materials[40] of the buildings, and to order the enlargement of an existing depot [41] However, orders, regulations, and requirements in the exercise of this power must be reasonable,[42] although, under a mandatory statute requiring erection of depots at stations, a commission's order for the erection of a depot is not subject to a test of reasonableness.[43] An arbitrary rejection of a railroad's counterplan for improvements applied for has been held to be unreasonable.[44] A statute requiring railroads to furnish "convenient and suitable" waiting rooms is not void for uncertainty.[45]

Powers under particular statutes. Under a statute providing that railroad commissioners shall have general supervision of all railroads, and shall, whenever in their judgment reasonable and expedient, institute proceedings respecting additions to, or change of, station houses, commissioners may require erection of a depot at an existing station.[46] Under a statute authorizing a commission to direct a railroad to provide depots at regular stations, the commission may direct erection of depots at established stations.[47] Under a statute authorizing a commission to direct a railroad to provide depots at points where the revenue is sufficient to justify it, the commission may direct erection of depots at points along the railroad which are not established stations.[48] Under statutes authorizing a board or commission to order a railroad to make any reasonable

31. Ga.—Smith v. Seaboard Air-Line R. Co, 73 S.E. 523, 10 Ga.App. 227.
51 C.J. p 988 note 47.

32. Neb.—**Corpus Juris cited in** Application of Thomson, 8 N.W.2d 552, 555, 143 Neb 52.
51 C.J. p 988 note 48.

33. Fla.—State v. Seaboard Air Line R. Co., 111 So. 281, 735, 92 Fla. 1139, certiorari dismissed 48 S.Ct. 17, 275 U.S. 574, 72 L.Ed. 434.
51 C.J. p 988 note 49.

34. Fla.—State v. Atlantic Coast Line R. Co., 81 So. 498, 77 Fla. 366.
51 C.J. p 988 note 50

35. Fla.—State v. Atlantic Coast Line R. Co., supra.
51 C.J. p 988 note 51.

36. Fla.—State v. Atlantic Coast Line R. Co., 81 So. 498, 77 Fla. 366, 379.
51 C.J. p 988 note 45.

37. Idaho—State ex rel. Taylor v. Union Pac. R. Co., 89 P.2d 1005, 60 Idaho 185.
51 C.J. p 989 note 57.

38. Ark.—St. Louis Southwestern R. Co. v. Stewart, 235 S.W. 1003, 150 Ark. 586.
Minn.—State v. Great Northern R. Co., 159 N.W. 1089, 135 Minn. 19.

39. Ark.—St. Louis Southwestern R. Co. v. Stewart, 235 S.W. 1003, 150 Ark. 586.

40. Ark.—St. Louis Southwestern R. Co. v. Stewart, supra.
51 C.J. p 989 note 61.

41. Minn.—Hines v. Minnesota, etc., R. Co., 186 N.W. 797, 151 Minn. 402.
51 C.J. p 989 note 62.

42. Idaho—State ex rel. Taylor v. Union Pac. R. Co., 89 P.2d 1005, 60 Idaho 185.
N.D.—Petition of Patrons of Great Northern Ry. Co. of Nash, 267 N.W. 723, 66 N.D. 541.
51 C.J. p 989 note 64.
Held unreasonable
N.D.—Petition of Patrons of Great Northern Ry. Co. of Nash, 267 N.W. 723, 66 N.D. 541.
51 C.J. p 989 note 64 [b].

43. Tex.—Angelina, etc., R. Co. v. Railroad Commission, Civ.App., 212 S.W. 703
51 C.J. p 989 note 66.

44. Okl.—Chicago, etc., R. Co. v. State, 245 P. 656, 117 Okl. 175.
51 C.J. p 989 note 67

45. Ky.—Louisville, etc., R. Co. v. Commonwealth, 45 S.W. 880, 46 S.W. 697, 103 Ky. 605, 20 Ky.L. 366.
51 C.J. p 989 note 69

46. S.D.—State v. Chicago, etc., R. Co., 81 N.W. 503, 12 S.D. 305, 47 L.R.A. 569.
51 C.J. p 989 note 71.

47. Ala.—Alabama Great Southern R. Co. v. Alabama Public Service Commission, 97 So. 226, 210 Ala. 151, 153.
51 C.J. p 990 note 73.

48. Ala.—Alabama Great Southern R. Co. v. Alabama Public Service Commission, supra.
51 C.J. p 990 note 75.

addition to, or change of, its stations and station houses, whenever necessary for the security or convenience of the public, it has power to order replacement of existing and inadequate depots[49] Under statutes empowering a railroad commission to direct, after hearing, any addition to, or change of, stations or station houses, the commission may, at an established station, require the furnishing of a freight depot as well as one for passengers.[50]

On the other hand, under statutes requiring a railroad to provide adequate passenger depot buildings at its regular stations, and, where required by order of a commission, to provide adequate depot buildings for passengers and freight where public necessity demands and traffic revenue justifies it, the commission lacks authority to compel the construction of an entirely new building to replace an existing depot[51] Also, under a statute authorizing a board or commission to order the erection of a new station to replace one "burned or otherwise destroyed," the board lacks power to order construction of a new station to replace an existing station of inadequate character.[52]

Under constitutional provisions expressly empowering a commission to compel a railroad to comply with requirements as to adequate facilities at stations, the only limitation on the commission's power to order erection of depots is that its action shall be reasonable and just.[53] Under constitutional provisions authorizing a board or commission to require a railroad to provide adequate, comfortable, and clean depots, it has power to prescribe the materials of which a new depot shall be built.[54]

(2) Union Depots

A state or board or commission may direct or order the establishment of union depots by two or more railroads entering the same town or city, but such directions or orders must be reasonable.

The legislature of a state may require railroad companies to establish and use union depots,[55] and it may impose the costs of construction and operation of the station on the railroads concerned, as long as the expense is not so great as to be confiscatory when considered in relation to the importance of the interests to be affected and to be served.[56] Moreover, the state may delegate to a board or commission the power to determine the necessity for establishment of a union depot,[57] and accordingly, under statutes conferring on a board or commission power to require two or more railroads entering the same town or city to erect, operate, and maintain a joint passenger terminal, or union depot, the board or commission has power to compel such railroads to erect, operate, and maintain a union depot.[58]

The commission is authorized to do whatever is reasonably necessary in order to carry out its power,[59] and it can compel the railroads jointly to purchase or condemn the lands needed and to construct thereon a union depot.[60] The commission is limited, however, to the power conferred by the statute,[61]

49. Minn.—State v. Great Northern R Co, 159 N.W. 1089, 135 Minn 19.
51 C J p 990 note 77.

50. N Y.—People v Delaware, etc, Canal Co., 52 N.Y S 850, 32 App Div. 120, affirmed 59 N E 158, 165 N Y 362

51. Ala.—Alabama Great Southern R. Co v. Alabama Public Service Commission, 97 So. 226, 210 Ala 151

52. Ky.—Louisville, etc., R. Co. v Commonwealth, 226 S.W. 113, 190 Ky 78
51 C J. p 990 note 83.

53. Okl.—Chicago, etc, R. Co. v State, 168 P. 239, 67 Okl. 10, L R A 1918C 492

54. Okl.—Chicago, etc, R. Co. v State, supra.

55. U S.—Webster & Atlas Nat Bank of Boston v. Palmer, C.C A. Conn, 111 F 2d 215, reversed on other grounds Palmer v Webster & Atlas Nat. Bank of Boston, 61 S Ct. 542, 312 U.S. 156, 85 L Ed 642, rehearing denied 61 S Ct. 728, 312 U.S. 714, 85 L Ed. 1145.
Cal.—Atchison, T. & S. F. Ry. Co. v. Railroad Commission of California, 288 P. 775, 209 Cal 460, affirmed 51 S Ct 553, 283 U S. 380, 75 L Ed 1128.
51 C J p 487 note 81, p 990 note 90.
State power as not taken away by federal statutes see Commerce § 78 c (2)
Location of union depots see supra § 57

56. U.S.—Webster & Atlas Nat. Bank of Boston v. Palmer, C C A. Conn, 111 F 2d 215, reversed on other grounds Palmer v. Webster & Atlas Nat Bank of Boston, 61 S.Ct. 542, 312 U S 156, 85 L Ed. 642, rehearing denied 61 S Ct. 728, 312 U S 714, 85 L Ed. 1145.

57. Tex.—State v. St. Louis Southwestern R. Co, Civ App, 165 S W. 491
51 C J p 487 note 82, p 990 note 90
Interstate commerce commission·
Lack of power to require construction of union station see Commerce § 142 b
Necessity of approval by see Commerce § 78 c (2).

58. Fla.—State v. Atlantic Coast Line R. Co., 63 So 729, 67 Fla. 441
51 C.J p 990 note 92.

59. N C.—Griffin v Southern R Co, 64 S E 16, 150 N.C 312.

60. Ala.—State R. Commission v. Alabama Great Southern R Co, 64 So 13, 185 Ala. 354, L R A 1915D 98.

61. Fla.—State v. Jacksonville Terminal Co, 71 So. 474, 71 Fla. 295
Penalties
A statute authorizing railroad commissioners to impose a penalty on any railroad doing business in the state for violation of any "rule" or "regulation" does not authorize their imposition of a penalty on railroad companies failing to comply with an "order" to erect a union depot on or by a fixed date.—Atlantic Coast Line R. Co v. State, 74 So. 595, 73 Fla. 609.
Validity of contract
Whether contract by the carrier for facilities of a union depot was improvident, or the action unlawful, was within the exclusive jurisdiction of the interstate commerce commission and not within the jurisdic-

and it may lack power to compel a terminal company to erect a new union depot[62] or to compel railroads to erect a union depot to furnish general terminal facilities and connections for interchange of traffic by any and all railroads.[63] The order of the commission is not rendered invalid by its failure to require the building to be erected according to plans and specifications furnished by the commission.[64] The directions or orders of a commission with respect to the establishment of a union depot must be reasonable.[65] There is a presumption in favor of an order of a commission which requires the establishment of a union depot,[66] and unless it is shown to be unjust, unreasonable, or otherwise improper it will be upheld.[67]

A commission may be created for the purpose of enabling a city to solve problems created by the entrance into its limits of many great railroad systems,[68] with power to contract on behalf of the city with the railroads so as to procure more adequate and convenient terminal and station facilities.[69] The action of the commission in making the contract will be upheld unless the contract is so utterly unjustified by any fair reason and results in such unmitigated and overwhelming disadvantage to the city as to bear on its face evidence which is conclusive of fraud, corruption, or bad faith.[70]

b. Duty of Company to Provide

Apart from statute or constitutional provision, a railroad company need not provide depot structures for passengers or freight, but under constitutional or statutory provisions as to such matters a railroad may have the duty to provide such structures, regardless of expense, although the duty may be limited to specified locations by the terms of the statute.

In the absence of some mandatory regulation requiring it, a railroad need not provide depot structures for passengers[71] or freight.[72] On the other hand, under constitutional or statutory provisions expressly requiring a railroad to provide stations or depots for passengers and freight, the duty to do so is mandatory.[73] Such statutory requirements are not affected by subsequent laws creating a regulatory board and providing that no act of such board shall impair the legal duties of a railroad.[74] Statutes merely empowering railroad to erect passenger and freight depots do not impose a duty to do so.[75]

Construction of order of board or commission. A statute empowering a board or commission to require the provision of a depot does not impose on the railroad the duty to do so in the absence of an order to that effect by such board or commission.[76] Where, however, the order has been made, existence of leased facilities will not excuse noncompliance.[77] The existence of a state of war may be sufficient to excuse noncompliance with an order theretofore made for construction of a new depot.[78]

Statutes relative to "accommodations" and "facilities." Under a statute providing that every railroad shall furnish reasonably adequate service, equipment, and facilities, a railroad is under a duty to provide reasonably adequate depots for passengers[79] and freight.[80] On the other hand, under statutes requiring a railroad to furnish "sufficient accommodation for the transportation" of passengers and property, it has been held that a road is not obligated to provide a depot.[81]

Duty as affected by expense. Under statutes or constitutions imposing the mandatory duty to pro-

tion of the public utilities commission.—Pittsburgh, etc., R. Co v. Public Utilities Commission, 166 N. E. 372, 120 Ohio St 434.

62. Fla.—State v. Jacksonville Terminal Co., 71 So 474, 71 Fla. 295.

63. Fla.—State v. Jacksonville Terminal Co, supra.

64. Ala.—State R. Commission v. Alabama Great Southern R. Co., 64 So 13, 185 Ala. 354, L.R.A.1915D 98

65. Minn.—Palmerlee v. Chicago Great Western R. Co., 188 N.W. 328, 152 Minn 291.
51 C.J. p 990 note 96.

66. Ala.—State R. Commission v. Alabama Great Southern R. Co., 64 So. 13, 185 Ala. 354, L.R.A.1915D 98.
51 C.J. p 488 note 88.

67. Ala.—State R. Commission v. Alabama Great Southern R. Co., supra.
51 C.J. p 488 note 89.

68. N.Y.—McCutcheon v. Buffalo Terminal Station Commission, 111 N.E. 661, 217 N.Y. 127.

69. N.Y.—McCutcheon v. Buffalo Terminal Station Commission, supra.

70. N.Y.—McCutcheon v. Buffalo Terminal Station Commission, supra.
51 C.J. p 488 note 94.

71. Or.—State v. Corvallis, etc., R. Co, 117 P. 980, 59 Or 450.
51 C.J. p 991 note 99.

72. Ala.—Nashville, etc, R. Co. v. State, 34 So 401, 137 Ala. 439.
51 C.J. p 991 note 1.

73. Tex.—Angelina, etc, R. Co. v. Railroad Commission, Civ.App., 212 S.W. 703.
51 C.J. p 991 notes 4–6.
Requirements as to location of depots see supra § 57.

74. N.H.—Boothby v. Grand Trunk R. Co, 34 A. 157, 66 N.H. 342
51 C.J. p 991 note 7.

75. N.Y.—People v. New York, etc, R. Co, 9 N.E. 856, 104 N.Y. 58, 58 Am.R. 484.

76. Ala.—Page v. Louisville, etc., R. Co., 29 So. 676, 129 Ala. 232

77. N.C.—North Carolina Corp. Commission v. Southern R. Co., 117 S.E. 563, 185 N.C. 435.
51 C.J. p 992 note 18.

78. Okl.—St. Louis-San Francisco R. Co. v. State, 170 P. 1146, 67 Okl 274.
51 C.J. p 992 note 36.

79. Or.—State v Corvallis, etc, R. Co., 117 P. 980, 59 Or. 450, 467.

80. Or.—State v. Corvallis, etc., R. Co., supra.
51 C.J. p 992 note 21.

81. Okl.—Chaddick v. Lindsay, 49 P. 940, 5 Okl. 616.

vide depots, the road cannot escape its obligation on the plea of expense.[82] However, when the duty to provide depots is one which may or may not be imposed by a board or commission, the duty to provide a depot is merely incidental to the prime duty to furnish transportation,[83] and questions of relative expense and public convenience may properly be considered in determining the road's obligation to provide a depot.[84]

Waiting rooms. Under statutes so providing, a railroad may be required to provide waiting rooms at stations.[85] Under statutes requiring waiting rooms at all stations, a railroad need not provide a waiting room at a stopping place which is not a station[86] or at all places where tickets are sold.[87] A statute requiring railroads to provide waiting rooms at all villages has been held to refer to incorporated villages, and not to every isolated hamlet at which a railroad may have a flag station.[88] Under statutes requiring railroads to furnish "convenient and suitable" waiting rooms, the room must be reasonably adequate for public requirements,[89] the question of what constitutes such a waiting room being primarily one of fact.[90] A statute requiring separate waiting-room accommodations for white and African races does not require railroad companies to erect depot buildings at places where they have none,[91] and is not applicable to a mere flag station without any building belonging to, or used by, the company as a depot.[92]

c. Maintenance and Care of Depots

A railroad generally has the duty to maintain depots in a safe condition, to light, heat, and ventilate them adequately, and to keep them open a reasonable time both before arrival and after departure of trains.

If a railroad not under a duty to provide depots voluntarily erects them, thereby inviting persons having business with the road to enter and use them, they must be maintained in a safe condition,[93] this duty existing apart from statute.[94]

Duty to keep open. A railroad ordinarily is under a duty to keep its ticket offices open a reasonable time before departure of trains[95] and to keep its waiting rooms open a reasonable time both before arrival and after departure of trains.[96] These duties may be imposed by statute[97] or by a rule or order of a board or commission to which the authority has been delegated,[98] but the duty to keep open the waiting rooms of established depots a reasonable period before and after train time exists independently of statute.[99] Permission to close a depot during a portion of the year may be granted in proper and reasonable circumstances.[1]

Particular statutory provisions. A statute requiring railroads to keep ticket offices open a specified time before the scheduled departure of passenger trains from "every regular passenger depot" does not apply to flag stations from which only the regular fare is charged cash passengers.[2] Statutes requiring waiting rooms to be kept open for trains at all regular stations require the road to keep open waiting rooms at all stations where the train awaited is scheduled to stop,[3] but does not apply to flag stations as respects trains not regularly scheduled to stop there,[4] or to places not at a station.[5]

Statutes requiring railroads to keep waiting rooms

82. Tex.—Angelina, etc., R. Co. v. Railroad Commission, Civ.App., 212 S.W. 703.
51 C.J. p. 992 note 25.

83. N.M.—Seward v. Denver, etc., R. Co., 131 P. 980, 17 N.M. 557, 46 L.R.A.,N.S., 242.
51 C.J. p. 992 note 27.

84. N.M.—Seward v. Denver, etc., R. Co., supra.
51 C.J. p. 992 note 28.

85. Ky.—Louisville, H. & St. L. R. Co. v. Commonwealth, 139 S.W. 776, 144 Ky. 541.
Room at nearby hotel held not "waiting room" within statute—Louisville, H. & St. L. R. Co. v. Commonwealth, supra.

86. Ky.—Commonwealth v. Chesapeake, etc., R. Co., 162 S.W. 783, 157 Ky. 140.
51 C.J. p. 992 note 31.

87. Ky.—Commonwealth v. Chesapeake, etc., R. Co., supra.
51 C.J. p. 992 note 32.

88. W.Va.—State v. Baltimore & O. R. Co., 56 S.E. 518, 61 W.Va. 367

89. Ky.—Louisville, etc., R. Co. v. Commonwealth, 139 S.W. 756, 144 Ky. 525
51 C.J. p. 992 note 34.

90. Ky.—Illinois Cent. R. Co. v. Commonwealth, 90 S.W. 602, 28 Ky. L. 802
51 C.J. p. 992 note 35.

91. Ark.—St. Louis, etc., R. Co. v. State, 31 S.W. 570, 61 Ark. 9

92. Ark.—St. Louis, etc., R. Co. v. State, supra.

93. Tex.—Texas, etc., R. Co. v. Mayes, App., 15 S.W. 43.
51 C.J. p. 992 note 38

94. Tex.—Texas, etc., R. Co. v. Mayes, supra.

95. Tex.—International, etc., R. Co. v. Lister, Civ.App., 72 S.W. 107.
51 C.J. p. 993 note 40.

96. Ind.—Draper v. Evansville, etc., R. Co., 74 N.E. 889, 165 Ind. 117.

97. Ky.—Chesapeake, etc., R. Co. v. Lauhorn, 167 S.W. 132, 159 Ky. 325

98. Ga.—Smith v. Seaboard Air-Line R. Co., 73 S.E. 523, 10 Ga.App. 227
51 C.J. p. 993 note 44.

99. Miss.—Williams v. Southern R. Co., 59 So. 850, 102 Miss. 617.
51 C.J. p. 993 note 46.

1. Wash.—Dryden Commercial Club v. Public Works Dept., 252 P. 911, 142 Wash. 317.
51 C.J. p. 993 note 58.

2. Ky.—Louisville, etc., R. Co. v. Commonwealth, 43 S.W. 458, 102 Ky. 300, 19 Ky.L. 1462, 53 L.R.A. 149

3. Ky.—Chesapeake, etc., R. Co. v. Lauhorn, 167 S.W. 132, 159 Ky. 325.

4. Ky.—Sandifer v. Louisville, etc., R. Co., 89 S.W. 528, 28 Ky.L. 464.
51 C.J. p. 993 note 51.

5. Ky.—Louisville, etc., R. Co. v. Commonwealth, 139 S.W. 776, 144 Ky. 541.
51 C.J. p. 993 note 52.

open a specified time before and after arrival of trains have been construed as inapplicable to through passengers stopping over at junction points,[6] and as not requiring the road to keep its waiting room open an unreasonable length of time.[7] Under a statute requiring railroads to provide "crossings, stations, and other facilities," a road has been held under an implied duty to keep its waiting rooms open at the time advertised for departure of trains.[8]

Duty to light, heat, and ventilate. As a general rule, a railroad maintaining a depot must keep it adequately lighted[9] and heated,[10] when necessary for use of its patrons. A statute expressly requiring railroads to keep their depots heated for a specified period before and after arrival of trains does not relieve the road of its general duty to keep depots heated at other times when they are properly in use by passengers.[11] Even though included in a statute requiring construction and maintenance of depots at specified places, a provision as to heating depots, if general in its language, will be applied to all depots and not restricted to those of the statutory description.[12] Under statutes requiring waiting rooms to be kept open for specified periods, the railroad is under no obligation to heat[13] or ventilate[14] its waiting rooms at any other time.

§ 406. —— Station Accommodations and Facilities in General

A railroad is obligated to provide reasonably adequate accommodations and facilities at its stations.

As a general rule a railroad is obligated to provide reasonably adequate accommodations and facilities at its stations.[15] In so far as a station accommodation or facility is essential to performance of the primary duty of transportation, the road is obligated to provide it regardless of remuneration;[16] but, in so far as such accommodation or facility is not essential, the duty to furnish it will depend on relative expense and public benefit.[17] In other words, the facilities to be furnished at any station need only be adequate to the requirement of the station, and should be in a measure commensurate with the patronage and receipts from that portion of the public to which the service is rendered.[18] The fact, however, that the cost of rendering certain service would be more than the revenue received at the station would not alone be sufficient to permit the railroad to discontinue the service.[19]

Prospective needs should be anticipated by the railroad in providing adequate station facilities.[20]

Effect of contract. Where a railroad has contracted with the state relative to station facilities, the contract governs its obligations.[21]

§ 407. —— Train Bulletins

Statutes requiring railroad companies to maintain blackboards at stations and to register data thereon respecting the time of arrival of trains have been held valid and enforceable.

Statutes requiring railroad companies to maintain blackboards at stations and to register data thereon respecting the time of arrival of trains have been

6. Tex.—St. Louis Southwestern R. Co. v Foster, Civ App, 112 S W. 797.
51 C J. p 993 note 54.

7. Tex —International, etc, R. Co. v Pevey, 70 S W. 778, 30 Tex.Civ. App. 460.
51 C J. p 993 note 55

8. N.H.—Boothby v. Grand Trunk R. Co., 34 A. 157, 66 N.H. 342.
51 C.J. p 993 note 57.

9. Ala.—Alabama Great Southern R. Co. v. Arnold, 4 So. 359, 84 Ala. 159, 5 Am S.R. 354.
51 C.J p 993 note 62.

10. Minn.—Barnett v. Minneapolis, etc., R. Co., 143 N.W. 263, 123 Minn. 153, 48 L.R.A.,N.S., 262.
51 C.J. p 993 note 63.

11. Tex.—Texas, etc., R. Co. v. Cornelius, 30 S W. 720, 10 Tex Civ. App. 125—Texas, etc., R. Co. v. Mayes, App, 15 S.W. 43.

12. Tex.—Texas, etc, R. Co. v. Mayes, supra.
51 C.J. p 994 note 67.

13. Ky.—Illinois Cent. R. Co. v. Commonwealth, 200 S W. 17, 179 Ky. 28.

14. Ky.—Illinois Cent. R. Co. v. Commonwealth, supra.

15. Wis —Hartwig v. Chicago, etc, R Co, 5 N W. 865, 49 Wis. 358
51 C.J. p 994 note 72.

16. Fla —State v. Seaboard Air Line R. Co, 111 So. 281, 735, 92 Fla. 1139, certiorari dismissed 48 S Ct. 17, 275 U.S. 574, 72 L Ed 434.
Neb —**Corpus Juris cited in** Application of Thomson, 8 N W.2d 552, 555, 143 Neb. 52.

17. Neb —**Corpus Juris cited in** Application of Thomson, supra.
51 C J. p 994 note 74.

18. Neb.—Application of Union Pac. R. Co., 31 N W 2d 552, 149 Neb 575 —Application of Thomson, 8 N.W. 2d 552, 143 Neb 52—In re Thomson, 4 N W.2d 756, 141 Neb. 697.
Okl —St. Louis-San Francisco Ry. Co. v. State, 155 P.2d 718, 195 Okl. 41—Atchison, T. & S. F. Ry. Co. v. State, 119 P.2d 840, 190 Okl. 18—Atchison, T. & S. F. Ry. Co. v. State, 118 P.2d 202, 189 Okl. 485—Lowden v. State, 113 P 2d 991, 189 Okl. 76—Lowden v. State, 106 P 2d 801, 188 Okl 106—Lowden v State, 100 P 2d 890, 186 Okl. 654—Missouri-Kansas-Texas R. Co v. State, 76 P.2d 884, 182 Okl 134—Kurn v. State, 66 P.2d 52, 179 Okl. 440—Kurn v. State, 52 P 2d 841, 175 Okl. 379.
Revenue as factor
Revenue creditable to railroad station, although one of main factors in determining services or facilities to be provided, is not sole factor, but all circumstances must be considered —Los Angeles & S L. R. Co v. Public Utilities Commission of Utah, 15 P 2d 358, 80 Utah 455.

19. Utah.—Los Angeles & S. L. R. Co. v. Public Utilities Commission of Utah, supra.

20. Fla.—State v. Seaboard Air Line R. Co., 111 So. 281, 735, 92 Fla. 1139, certiorari dismissed 48 S.Ct 17, 275 U.S. 574, 72 L.Ed. 434
51 C.J. p 994 note 75.

21. Minn.—State v. Northern Pac. R. Co, 95 N.W. 297, 89 Minn. 363.
51 C.J. p 994 note 76.

held valid and enforceable [22] Such statutes have been held inapplicable to a short-haul suburban road.[23] They do not require establishment of a telegraph office at a station lacking telegraphic facilities[24] or prevent the abandonment of a telegraph office already established [25] Where a board or commission has power under constitution or statute to order installation of telegraphic service to bulletin trains, such order must be reasonable to be enforceable [26]

Repeal of statute requiring train bulletins is a good defense to an action for a penalty brought under such statute.[27]

§ 408. —— Other Facilities

a. In general
b. Telephone and telegraph facilities
c. Toilets

a. In General

A railroad may be required, in a proper case, to construct and maintain industrial sidings or sidetracks, track scales, and umbrella sheds.

The general duty of a railroad to provide reasonably adequate accommodations and facilities at its stations has been enforced with respect to particular facilities[28] other than those discussed supra §§ 405-407. Within its powers to regulate the operation of railroads, a state or a board or commission under authority delegated to it may direct and regulate the installment of industrial sidings or sidetracks at stations for the benefit of the public in loading and unloading,[29] and also the relocation of rails near a station in order to provide additional platform space,[30] but such regulations and requirements must be reasonable [31] A statute providing that under specified conditions a shipper may apply to a railroad for private sidetracks and switches, and, on failure or refusal of the road to grant the application the district court may compel it to do so, does not deprive a public commission of authority under a prior statute to order the construction of suitable and adequate sidetracks for public use at a station.[32] Sidings should, where required by traffic, be constructed and operated as a public, and not a private, convenience.[33]

Track scales. While it has been held that a state may have power to require a railroad to install track scales at its stations where the railroad business may justify it,[34] and may delegate the power to a commission,[35] it has also been held by the supreme court of the United States that a state cannot compel a railroad to install cattle scales at a station as a means for building up a private business,[36] however much the public would be benefited thereby.[37] Whether hoof stock scales are a necessary facility for receiving and delivering freight, which a commission may be authorized to require a railroad to install and maintain, depends on whether such scales are required or are reasonably necessary for such purpose,[38] and the burden rests on him who asserts the necessity to prove it.[39]

Where a statute imposing the duty of furnishing track scales at all stations of a specified character has been followed by a later statute authorizing a board or commission to order such scales when in its judgment this is necessary, the board or commission lacks power to order track scales under the first statute.[40] Where a statute authorizing a com-

22. Ind.—Pennsylvania Co. v. State, 41 N.E. 937, 142 Ind. 428.
51 C.J. p. 995 note 91.

23. Ind.—State v. Kentucky, etc., Bridge Co., 35 N.E. 991, 136 Ind. 195.
51 C.J. p. 995 note 92.

24. Ind.—Terre Haute, etc., R. Co. v. State, 41 N.E. 952, 13 Ind. App. 529.
51 C.J. p. 995 note 93
Telephone and telegraph facilities generally see infra § 408.

25. Ind.—Terre Haute, etc., R. Co. v. State, supra

26. Okl.—Kansas City Southern R. Co. v. State, 117 P. 207, 27 Okl. 806.
51 C.J. p. 995 note 96.

27. La.—State v. Chicago, etc., R. Co., 62 So. 934, 133 La. 804.
51 C.J. p. 996 note 97.

28. Ark.—St. Louis-San Francisco R. Co. v. Albright, 4 S.W.2d 910, 176 Ark. 761.

29. Colo.—Chicago, etc., R. Co. v. Public Utilities Commission, 190 P. 539, 68 Colo. 475.
51 C.J. p. 999 note 57
Switches, spurs, and sidings generally see infra §§ 410-414

30. Vt.—Bacon v. Boston, etc., R. Co., 76 A. 128, 83 Vt. 421.

31. Colo.—Chicago, etc., R. Co. v. Public Utilities Commission, 190 P. 539, 68 Colo. 475.
51 C.J. p. 999 note 60.

32. Neb.—Loup Valley Land Co. v. Union Pac. R. Co., 145 N.W. 631, 95 Neb. 331.
51 C.J. p. 1000 note 62.

33. Va.—Chesapeake, etc., R. Co. v. Ricks, 135 S.E. 685, 146 Va. 10.
51 C.J. p. 1000 note 63.

34. N.C.—Corporation Commission v. Atlantic Coast Line R. Co., 51 S.E. 793, 139 N.C. 126
51 C.J. p. 998 note 38.

35. N.C.—Corporation Commission v. Atlantic Coast Line R. Co., supra.
51 C.J. p. 998 note 39.

36. U.S.—Great Northern R. Co. v. Cahill, S.D., 40 S.Ct. 457, 253 U.S. 71, 64 L.Ed. 787.
51 C.J. p. 998 note 40.

37. U.S.—Great Northern R. Co. v. Cahill, supra.

38. U.S.—Washington v. Fairchild, Wash., 32 S.Ct. 535, 224 U.S. 510, 56 L.Ed. 863
N.M.—New Mexico Wool Growers' Assoc. v. Atchison, etc., R. Co., 145 P. 1077, 20 N.M. 33.

39. U.S.—Washington v. Fairchild, Wash., 32 S.Ct. 535, 224 U.S. 510, 56 L.Ed. 863.
N.M.—New Mexico Wool Growers' Assoc. v. Atchison, etc., R. Co., 145 P. 1077, 20 N.M. 33.

40. Mo.—State v. Public Service

mission to order a railroad to install track scales for weighing of cars and freight at stations of specified size on demand of a shipper has been followed by enactment of a later statute empowering the commission to enforce reasonable regulations for the weighing of cars and freight, the commission lacks power to order installation of track scales under the former statute.[41]

Umbrella sheds. Under statutes giving a board or commission general power to regulate operation of railroads, it may require the furnishing of umbrella sheds.[42] Under statutes empowering railroad commissioners to require the establishment of stations and the erection of freight and passenger depots, houses, and platforms, and to regulate all matters affecting the safety, comfort, convenience, and accommodation of passengers, the commissioners may direct the erection of umbrella sheds[43] However, under such statutory provisions, there is no power to require union umbrella sheds to be erected by intersecting roads with separate tracks.[44]

b. Telephone and Telegraph Facilities

A board or commission may have the power to regulate the furnishing of telephones and telegraph service at stations. A railroad is under a duty to supply telephone and telegraph facilities of an adequate character where reasonably necessary in connection with its primary service of public transportation.

Under constitutional or statutory provisions granting a board or commission general power to regulate the furnishing of facilities and conveniences at stations, it may regulate the furnishing of telephones[45] and telegraph service.[46]

Duty of company. Under constitutional provisions requiring a railroad to provide and maintain adequate depots, agents, and facilities for the accommodation of passengers and freight, a road is under a duty to supply telephone[47] and telegraph[48] facilities of an adequate character[49] where reasonably necessary in connection with its primary service of public transportation. The railroad cannot, however, be compelled to furnish such facilities beyond the reasonable requirements of such service;[50] nor is it under a duty to provide facilities of this character for general public use aside from transportation[51] or in its capacity as a private corporation.[52] Under a statute providing that every railroad corporation shall grant to specified kinds of telephone concerns equal and reasonable terms, arrangements, and facilities for installation of telephones in its depots, the railroad is not obligated to grant installation to one company on the same terms theretofore granted another if conditions affecting the two companies are dissimilar.[53]

c. Toilets

(1) In general
(2) Location, character, and condition

(1) In General

A state or a board or commission may be authorized to require toilets at depots or stations and to regulate them, and a railroad company may have the duty to provide such facilities at depots or stations.

Within its powers to regulate the operation of railroads and particularly railroad depots and waiting rooms, a state or a board or commission may be authorized to require toilets at depots or stations

Commission, 204 S.W. 395, 275 Mo. 60.
51 C.J. p 999 note 45

41. Ill.—State Public Utilities Commission v Cleveland, etc., R. Co., 119 N.E. 310, 283 Ill. 374.
51 C.J. p 999 note 47.

42. Ark.—St. Louis-San Francisco R. Co. v Albright, 4 S.W.2d 910, 176 Ark. 761.
51 C.J. p 996 note 2.

43. Fla.—State v. Seaboard Air Line R. Co., 104 So. 602, 89 Fla. 419, 39 A.L.R. 1362.
51 C.J. p 996 note 4.

44. Fla.—State v. Seaboard Air Line R. Co., supra.
51 C.J. p 996 note 5.

45. Okl.—Atchison, etc., R. Co. v State, 100 P. 11, 23 Okl. 210, 21 L.R.A.,N.S., 908
51 C.J. p 994 note 78.

46. Kan.—Chicago, B. & Q. R. Co. v. Reed, 217 P. 322, 114 Kan. 190.
Time when office open
An order requiring a railway company and a telegraph company to keep open the telegraph office daily for a reasonable number of hours according to central time as used by the public in the locality did not unlawfully or unreasonably interfere with the railway company's duty to operate its train service on mountain time as required by an order of the interstate commerce commission.—Chicago, B. & Q. R. Co v. Reed, supra.

47. Okl.—Atchison, etc., R. Co. v. State, 100 P. 11, 23 Okl. 210, 21 L.R.A.,N.S., 908
51 C.J. p 995 note 82.

48. N.M.—Woody v. Denver, etc., R. Co., 132 P. 250, 17 N.M. 686, 47 L.R.A.,N.S., 974.

49. Okl.—Atchison, etc., R. Co. v. State, 100 P. 11, 23 Okl. 210, 21 L.R.A.,N.S., 908
51 C.J. p 995 note 84.

50. N.M.—Seward v. Denver, etc., R. Co., 131 P. 980, 17 N.M. 557, 46 L.R.A.,N.S., 242.
Telegraph operator
A railroad company cannot be required to maintain a telegraph operator at a station unless reasonably necessary for the safety and expedition of train service, both freight and passenger, or either, and the convenience of the public in the conduct of its freight and passenger service, or either.—Chicago, R. I. & P. Ry. Co. v. State, 103 P. 617, 24 Okl. 370, 24 L.R.A.,N.S., 393

51. Okl.—Atchison, etc., R. Co v. State, 100 P. 16, 23 Okl. 231, 18 Ann.Cas. 102.
51 C.J. p 995 note 86.

52. Okl.—Atchison, etc., R. Co. v. State, supra.
51 C.J. p 995 note 87.

53. Vt.—State v. Boston, etc., R. Co., 71 A. 1044, 82 Vt. 121.
51 C.J. p 995 note 89.

and to regulate them,[54] but such requirements and regulations must be reasonable.[55]

Duty of company to provide. As a general rule, a railroad may be required to provide privies at all depots or stations,[56] and under the terms of some statutes the road must provide one even at a depot of a temporary character,[57] but not at flag stations without depots.[58] Under a statute requiring water-closets or privies to be constructed at each passenger station either within the depot, or in connection therewith, or at a reasonable distance therefrom, a railroad is not obligated to provide a toilet at a station where there is no depot,[59] and this is true even though the road's failure to provide a depot is a violation of another statute.[60] The absence of a waterworks in the municipality does not relieve a railroad from its statutory duty to provide a toilet at a station.[61]

Companies within statutes. Under a statute requiring toilets to be provided at stations by any railroad company "operating a line of railway" within the state, a company operating a line as lessee is obligated to provide toilets at its stations.[62]

(2) Location, Character, and Condition

A station toilet should be located at a point reasonably convenient and accessible to the depot, should be maintained in good condition, and should be of a character suitable under the circumstances existing in the vicinity.

A station toilet should be located at a point reasonably convenient and accessible to the depot[63] in view of prevailing conditions.[64] If the railroad provides separate toilets for the sexes, each must be conveniently located.[65]

Station toilets should be suitable for women and children as well as men,[66] maintained in proper condition,[67] and, generally speaking, should be such as to meet the requirements of normal traffic conditions[68] and of a character suitable under circumstances existing in the vicinity.[69] Under a statute requiring every railroad to provide at all depots in towns and cities "water-closet or privies," the word "privy" is synonymous with "water-closet,"[70] the purpose of the statute being merely to require adequate toilet facilities of some description.[71]

Lighting. Under a statute requiring railroads to keep water-closets lighted for specified periods at all stations where they receive and discharge passengers in the nighttime, the road must light water-closets at stations where passengers are received or discharged on flagging of the train.[72] The existence of moonlight cannot relieve the road of its duty to supply artificial light under such statute.[73]

Locking. The toilet may be kept locked when necessary,[74] provided the key is available[75] when reasonably required.[76]

§ 409. —— Abandonment or Discontinuance of Station

Where a rule of a railroad commission requires the

54. Tex.—State v. Texas, etc., R Co., 154 S.W. 1159, 106 Tex. 18. 51 C.J. p. 996 note 9

55. Wash.—State v. State R. Commission, 110 P. 1075, 60 Wash. 218. 51 C.J. p. 996 note 10

56. Tenn.—Southern Ry. v. Cantrell, 5 Tenn. App. 677.

For employees and passengers

Railroad is required to furnish toilet facilities for its employees and passengers but not for mere licensee upon its property.—Southern Ry. v. Cantrell, supra.

57. Ky.—Louisville, etc., R. Co. v. Commonwealth, 159 S.W. 701, 155 Ky. 187.

58. W.Va.—State v. Baltimore, etc., R. Co., 56 S.E. 518, 61 W.Va. 67. 51 C.J. p. 997 note 13.

59. Tex.—State v. Jasper, etc., R. Co., Civ.App., 154 S.W. 331. 51 C.J. p. 997 note 15.

60. Tex.—State v. Jasper, etc., R. Co., Civ.App., 154 S.W. 331, followed in State v. Gulf, etc., R. Co., Civ.App., 154 S.W. 335.

61. Ky.—Louisville, etc., R. Co. v. Commonwealth, 33 S.W. 939, 17 Ky. L. 1136.

62. Tex.—State v. Southern Kansas R. Co., Civ.App., 99 S.W. 167.

63. Ky.—Louisville, etc., R. Co. v. Commonwealth, 194 S.W. 346, 175 Ky. 315. 51 C.J. p. 997 note 21

64. Ky.—Louisville, etc., R. Co. v. Commonwealth, 114 S.W. 1192, 131 Ky. 268. 51 C.J. p. 997 note 22.

65. Ky.—Louisville, etc., R. Co. v. Commonwealth, 200 S.W. 464, 179 Ky. 279.

66. Ky.—Louisville, etc., R. Co. v. Commonwealth, 45 S.W. 880, 46 S.W. 697, 103 Ky. 605, 20 Ky.L. 366.

67. Ky.—Louisville, etc., R. Co. v. Commonwealth, 194 S.W. 313, 175 Ky. 282. 51 C.J. p. 997 note 25.

68. Ky.—Louisville, etc., R. Co. v. Commonwealth, 127 S.W. 152, 137 Ky. 802. 51 C.J. p. 998 note 26.

69. Ky.—Chesapeake, etc., R. Co. v. Commonwealth, 210 S.W. 793, 184 Ky. 1. 51 C.J. p. 998 note 27.

70. Ky.—Louisville, etc., R. Co. v. Commonwealth, 194 S.W. 313, 175 Ky. 282. 51 C.J. p. 998 note 29

71. Ky.—Louisville, etc., R. Co. v. Commonwealth, 194 S.W. 313, 175 Ky. 282. 51 C.J. p. 998 note 30

72. Tex.—San Antonio, etc., R. Co. v. State, 120 S.W. 1077, 55 Tex. Civ. App. 452. 51 C.J. p. 998 note 32.

73. Tex.—Missouri, etc., R. Co. v. State, Civ.App., 163 S.W. 338. 51 C.J. p. 998 note 33.

74. Ky.—Louisville, etc., R. Co. v. Commonwealth, 45 S.W. 362, 20 Ky. L. 100. 51 C.J. p. 998 note 34.

75. Ky.—Commonwealth v. Louisville, etc., R. Co., 226 S.W. 105, 190 Ky. 39. 51 C.J. p. 998 note 35

76. Ky.—Louisville, etc., R. Co. v. Commonwealth, 127 S.W. 152, 137 Ky. 802. 51 C.J. p. 998 note 36.

approval of such commission before a railroad may discontinue a depot, flag stop, station, or office, the action of the commission in approving or disapproving discontinuance of the facility is subject to review in the courts

Where a rule of a railroad commission requires the approval of such commission before a railroad may discontinue a depot, flag stop, station, or office, the action of the commission in approving or disapproving discontinuance of the facility is subject to review in the courts.[77] A rule of railroad commissioners forbidding a road to close, remove, suspend, or abolish an existing station without prior authority from the commission is not violated by a mere change in the nature of the structure.[78]

§ 410. Switches, Spurs, and Sidings

Sidetracks constituting part of a transportation system are among the works and appendages usual in the convenient operation of a railroad and are "facilities" of the railroad, even though privately owned.

Sidetracks constituting part of a transportation system are among the works and appendages usual in the convenient operation of a railroad and are "facilities" of the railroad, even though privately owned.[79] So it has been held that a segment of a spur track owned by a private company not a carrier is nevertheless subject to the provisions of the Interstate Commerce Act because of its use by an interstate rail carrier under trackage agreements.[80] A spur track constructed by a railroad at its own expense and maintained by it constitutes a "public spur" and a "public highway" within a constitutional provision that all railroads are declared to be public highways so that a person owning property abutting the right of way on which the spur is situated has a right to request service over such spur.[81] A railroad constructing a spur track can by contract with the persons over whose property the track is located protect itself from fire hazards resulting from operation of such track in the absence of a statute making such a contract unlawful.[82] The owner and operator of a spur track over which adjoining owners receive rail service may, in his discretion, dismantle and abandon such track where he is under no contractual or statutory obligation to maintain the track.[83]

§ 411. —— Regulation by State or Municipality

Within its power to regulate the operation of railroads, the state may have power to regulate switches, spurs, and sidings, as by requiring railroads to construct public spur tracks or preventing discontinuance of them

Within its powers to regulate the operation of railroads, the state may have power to regulate switches, spurs, and sidings,[84] as by requiring railroads to construct public spur tracks,[85] or preventing discontinuance of them,[86] or by ordering restoration of a switch connection.[87] Although it is beyond the police power of the state to compel a railroad to install switches, spurs, or sidings for private use at its own expense,[88] statutes or other regulations requiring construction of private switches, spurs, or sidings with adequate provision for apportionment of expense are valid.[89]

77. S.C.—Southern Ry. Co. v. Public Service Commission, 10 S.E.2d 769, 195 S.C. 247.

78. Fla.—Atlantic Coast Line R. Co. v. State, 113 So. 665, 114 So. 456, 94 Fla. 120.
51 C.J. p. 1000 note 65.

79. Pa.—Lehigh Nav. Coal Co. v. Pennsylvania Public Utility Commission, 1 A.2d 540, 133 Pa.Super. 67.

Private sidetrack built by coal company when connected to railroad by switch constituted part of the railroad's transportation "facilities" and was subject to regulation as such.—Lehigh Nav. Coal Co. v. Pennsylvania Public Utility Commission, supra.

80. U.S.—U. S. v. Baltimore & O. R. Co., Ohio, 68 S.Ct. 494, 333 U.S. 169, 92 L.Ed. 618.

81. La.—Burke v. Louisiana Public Service Commission, 40 So.2d 916, 215 La. 451.

82. U.S.—Ætna Ins. Co. v. Atlantic Coast Line R. Co., C.C.A.Va., 79 F.2d 463, certiorari denied 56 S.Ct. 442, 297 U.S. 704, 80 L.Ed. 992.

83. Ga.—Tift v. Golden Hardware Co., 51 S.E.2d 435, 204 Ga. 654.

Tender to court of amount for which defendants allegedly had offered to sell portion of spur track alongside plaintiff's building availed plaintiff nothing, where offer had already been withdrawn and tender was not unconditional but for more track and land than was included in the offer.—Tift v. Golden Hardware Co., supra.

84. Ill.—Alton R. Co. v. Illinois Commerce Commission ex rel. Moulding Brownell Corp., 15 N.E.2d 508, 368 Ill. 584, affirmed Alton R. Co. v. Illinois Commerce Commission, 59 S.Ct. 340, 305 U.S. 548, 83 L.Ed. 344.—Von Oven v. Chicago, B. & Q. R. Co., 148 N.E. 32, 317 Ill. 334.
51 C.J. p. 1000 note 68.

"Public highways".

Sidetracks constituting part of a transportation system and connected with the line of a railroad are "public highways" subject to regulation by the state, even though privately owned.—Lehigh Nav. Coal Co. v. Pennsylvania Public Utility Commission, 1 A.2d 540, 133 Pa.Super. 67.

Operation of trains

Where railroad operates trains over sidetrack leading to private industry, statutory regulation which imposes on it responsibility for public safety incident to risk of its operation is not unreasonable exercise of police power.—Pennsylvania R. Co. v. Pennsylvania Public Utility Commission, 35 A.2d 584, 154 Pa.Super. 272.

85. Mont.—Chicago, etc., R. Co. v. Railroad Comrs., 247 P. 162, 76 Mont. 305.
51 C.J. p. 1000 note 69.

86. U.S.—Western, etc., R. Co. v. Georgia Public Service Commission, Ga., 45 S.Ct. 409, 267 U.S. 493, 69 L.Ed. 753.
51 C.J. p. 1000 note 70.

87. Ill.—Chicago, etc., R. Co. v. Suffern, 21 N.E. 824, 129 Ill. 274.

88. U.S.—Missouri Pac. R. Co. v. Nebraska, Neb., 30 S.Ct. 461, 217 U.S. 196, 54 L.Ed. 727.
51 C.J. p. 1000 note 72.

89. U.S.—Alton R. Co. v. Illinois

Regulation by municipality. Local freight service of a railroad between points within the switching limits of yards located in a city, or industrial switching, is subject to the control of the city and not of a state board [90]

§ 412. —— Regulation by Board or Commission

a. Existence and extent of power
b. Exercise of power

a. Existence and Extent of Power

(1) In general
(2) Under particular statutory or constitutional provisions

(1) In General

The power of a board or commission to regulate a railroad with respect to the construction, maintenance, and operation of switches, spurs, and sidings is founded on constitution or statute, and measured in extent and limits by the provisions creating the power.

The power of a board or commission to regulate a railroad with respect to the construction, maintenance, and operation of switches, spurs, and sidings is founded on constitution or statute,[91] and measured in extent and limits by the provisions creating the power.[92] Within constitutional limitations as applied to this particular matter,[93] the state may delegate to a board or commission the regulation of switches, spurs, and sidings.[94] The regulatory power of a board ordinarily includes portions of a road operated but not owned by the road.[95] So a private spur track is subject to control and regulation of a board or commission under statutes providing for public use thereof.[96]

Charter. Even if a commission has power to compel a road to construct a spur not within its charter authority when public convenience so demands, the commission lacks power so to compel the road to construct the spur on an erroneous conclusion that its charter required such construction.[97]

Leased railroad land. A commission may have power to order a switch connection across railroad land leased to a private shipper[98] and to order payment by the shipper seeking the switch connection of compensation based on the expense to the lessee.[99]

(2) Under Particular Statutory or Constitutional Provisions

Particular statutory provisions have been construed with respect to the existence and extent of power conferred thereby on a board or commission to regulate the construction, maintenance, operation, and use of switches, spurs, and sidings.

Under a statute authorizing a commission to require a railroad to construct a switch for an abutting owner, the commission lacks power to require construction of a switch for a nonabutting owner.[1] Under a statute authorizing a commission to require construction of a siding to a point within a specified distance from the railroad, the commission cannot require construction of a siding to a point beyond the distance specified.[2] Under a statute requiring every railroad to furnish reasonably ade-

Commerce Commission, Ill., 59 S. Ct. 340, 305 U.S 548, 83 L.Ed. 344 —Chicago & N W. Ry Co. v. Ochs, Minn., 39 S Ct. 343, 249 U S. 416, 63 L.Ed. 679.
51 C.J. p 1000 note 74.

90. Colo.—Atchison, etc., R. Co. v. Public Utilities Commission, 188 P. 747, 68 Colo. 92.

91. Wis—Chicago, etc, R. Co. v. Railroad Commission, 193 N.W. 981, 181 Wis. 91.
51 C.J. p 1000 note 76.

92. Ohio.—City of Toledo v. Public Utilities Commission of Ohio, 19 N E.2d 162, 135 Ohio St. 57.
51 C.J. p 1000 note 77.

Abandonment

Under statute giving commission jurisdiction to allow abandonment of any part of "main track or tracks," commission did not have jurisdiction to grant application for abandonment of portion of spur track—City of Toledo v. Public Utilities Commission of Ohio, supra.

"Facility"

Where railroad operated trains over sidetrack to industrial plant, sidetrack was a "facility" within statute giving commission exclusive power to regulate highway crossings. —Pennsylvania R. Co. v. Pennsylvania Public Utility Commission, 35 A. 2d 584, 154 Pa Super. 272.

93. Mont.—Chicago, etc., R. Co. v. Railroad Comrs, 247 P. 162, 76 Mont. 305.
51 C J. p 1001 note 79.

94. Wis—Union Lime Co v. State R. Commission, 129 N W. 605, 144 Wis 523

95. Minn—Minneapolis Civic etc., Assoc v. Great Northern R. Co, 162 N.W. 689, 163 N.W. 294, 137 Minn. 10.
51 C.J. p 1001 note 81.

96. Ill.—Public Utilities Commission v. Smith, 131 N.E. 371, 298 Ill. 151.
51 C.J. p 1001 note 82.

Provision of Interstate Commerce Act that "transportation" shall include locomotives and all instrumentalities and facilities of shipment or carriage irrespective of ownership or of any contract, express or implied, for the use thereof, is definitional only, but those definitions by their unambiguous language make all trackage in use by any common carrier subject to regulatory provisions of act, even though not owned by carrier, but only used by it under contract—U. S. v. Baltimore & O. R Co, Ohio, 68 S.Ct. 494, 333 U.S. 169, 92 L Ed. 618.

97. S D—Chicago, etc, R. Co v. Murphy, 209 N.W. 353, 50 S.D. 221
51 C.J. p 1001 note 83.

98. N.J—Robert W. Kennedy Co. v Public Utility Comrs, 132 A. 113, 102 N J.Law 326.
51 C J p 1001 note 84.

99. N.J—Robert W. Kennedy Co v. Public Utility Comrs., supra.
51 C J. p 1001 note 85.

1. Ind.—Chicago, etc., R. Co. v. Public Service Commission, 114 N E 414, 185 Ind. 678
51 C J. p 1001 note 89.

2. Kan—Chicago, etc., R. Co. Public Utilities Commission, 208 P. 576, 111 Kan. 805.
51 C.J. p 1001 note 91.

quate service, equipment, and facilities, and authorizing a commission, if it finds a service inadequate, to direct one which is adequate, it is within the power of the commission to order construction of a public spur track.[3]

Under a statute providing that the commission shall have authority to prescribe rules with reference to the use, construction, removal, or change of spur or sidetracks, with due power to compel service to be furnished to manufacturing plants, warehouses, and similar places of business along the line where applicable, and where, in the judgment of the commission, business is sufficient to justify exercise of its authority, the commission is authorized to require railroad companies to construct spur and sidetracks within constitutional limitations,[4] which may be construed as restricting the power to requirement of spur or sidetracks for public use.[5]

Incidental powers. Under a statute providing that, on ordering a separation of the grades of a railway and street or highway, the commission may order restoration of an industrial spur track and shall, by order, direct apportionment of the costs of restoring such spur, the power of the commission to apportion costs is incidental to its power to require restoration of the spur[6] and cannot be exercised apart from the exercise of the primary power to order restoration.[7]

Operation and use. Under a statute authorizing a commission to require a railroad to provide a sidetrack, the commission cannot compel operation of the sidetrack.[8] Under a constitutional provision authorizing a public commission to compel a railroad to furnish switch connections, the commission cannot authorize one shipper to use existing spur tracks of a second shipper without consent of the latter.[9] However, under a statute requiring a person who builds a private sidetrack and secures a switch connection with a railroad to permit others to connect with such sidetrack or to use it on payment of a reasonable proportion of the cost of construction and maintenance, the commission may order the owner of the private sidetrack to allow its use by others even though the order would authorize a violation of the terms of a contract between the owner of the track and the persons seeking to use it.[10]

b. Exercise of Power

Rules, regulations, and orders of a board or commission relative to switches, spurs, and sidings must be reasonable and not arbitrary.

Rules, regulations, and orders of a board or commission relative to switches, spurs, and sidings must be reasonable and not arbitrary.[11] Particular orders held reasonable under prevailing conditions include orders authorizing[12] or compelling[13] a railroad to extend a spur track, not to discontinue existing facilities without consent of the board or commission,[14] to furnish a siding,[15] and to operate a sidetrack constructed by the shipper.[16] Particular orders held unreasonable under prevailing conditions include requirements compelling a railroad to construct a spur track within a period in-

3. Or.—Southern Pac. Co. v State R Commission, 119 P. 727, 60 Or 400.

4. Ga.—State R. Commission v. Louisville, etc, R Co, 96 S.E. 855, 148 Ga. 442.
51 C.J. p 1002 note 95

5. Ga.—State R. Commission v. Louisville, etc, R. Co, supra.
51 C.J. p 1002 note 96

6. Wis.—Wisconsin Gas, etc, Co. v. State R. Commission, 227 N.W. 8, 199 Wis 511.
51 C.J. p 1002 note 98.

7. Wis.—Wisconsin Gas, etc., Co. v. State R Commission, supra.
51 C J p 1002 note 99.

8. N.Y.—People v. Second Dist. Public Service Commission, 162 N.Y.S. 520, 176 App Div. 28, affirmed 116 N.E. 1066, 220 N.Y. 674.
51 C.J. p 1002 note 3.

9. Okl.—Bromide Crushed Rock Co. v. Dolese Bros. Co., 247 P. 74, 121 Okl. 40.
51 C.J. p 1002 note 7.

10. Pa.—Lehigh Nav. Coal Co v. Pennsylvania Public Utility Commission, 1 A.2d 540, 133 Pa.Super. 67.

11. Ark.—St. Louis, etc., R. Co. v. State, 136 S.W. 938, 99 Ark. 1.
51 C J p 1002 note 9.

Order held not discriminatory

Order of commission requiring railroad to maintain switch track serving five industries was not unconstitutional as discriminating against other industries in area which were required to maintain connecting spur tracks where spur tracks did not correspond to switch track, but to tracks leading to industries along switch track which were maintained by each industry respectively.—Alton R. Co. v. Illinois Commerce Commission ex rel. Moulding-Brownell Corp, 15 N.E.2d 508, 368 Ill 584, affirmed Alton R Co v. Illinois Commerce Commission, 59 S.Ct. 340, 305 U.S. 548, 83 L.Ed. 344.

12. S.D.—Illinois Cent. R. Co v Wisconsin Granite Co., 19 N.W.2d 753, 70 S.D. 558.

"Necessity" with respect to public convenience and necessity in granting railroad permit to construct a spur track, does not mean indispensable, but means a public need without which the public is inconvenienced to the extent of being handicapped in the pursuit of business or wholesome pleasure, or both, without which the people generally of the community are denied to their detriment that which is enjoyed by other people, generally, similarly situated.—Illinois Cent R. Co. v. Wisconsin Granite Co, supra

13. Wash.—State v. State R. Commission, 110 P. 1075, 60 Wash. 218.
51 C.J p 1002 note 10.

14. U.S.—Western, etc, R. Co. v. Georgia Public Service Commission, Ga., 45 S.Ct. 409, 267 U.S. 493, 69 L.Ed 753.
51 C J. p 1003 note 11.

15. S.D.—Nedved v. Chicago, etc, R Co., 153 N.W. 886, 36 S.D. 1.
51 C.J. p 1003 note 12.

16. N.Y.—People v Second Dist Public Service Commission, 159 N.Y.S. 997, 173 App Div. 407, affirmed 114 N.E. 1078, 219 N.Y. 584.
51 C.J. p 1003 note 13.

sufficient to allow performance,[17] to construct a private spur for one shipper along the property of a different shipper,[18] or an extension of a spur to an adjoining landowner.[19]

Under statutes imposing an absolute duty on railroads to maintain and operate sidetracks, a commission cannot, in advance of a hearing, lay down a general rule as to what contracts relative to such sidetracks shall or shall not contain.[20]

Certificate. A statute requiring a certificate of necessity for the building of an extension does not make such certificate necessary for the building of a spur track,[21] and a refusal of the commission to grant a certificate for the building of an extension does not prevent it from requiring the building of a spur track.[22]

§ 413. —— Duty of Railroad

a. In general
b. Abandonment and restoration

a. In General

A railroad may have the duty to operate necessary switches, spurs, and sidings in accordance with the terms of constitutional and statutory provisions regulating the construction, maintenance, and operation of such facilities, but such duty is measured in extent and limits by the provisions imposing it.

A railroad may have the duty to operate necessary switches, spurs, and sidings in accordance with the terms of constitutional and statutory provisions regulating the construction, maintenance, and operation of such facilities.[23] Such duty, however, is measured in extent and limits by the statute imposing it,[24] and, accordingly, under a statute providing that every railroad shall construct, connect, maintain, and operate a reasonably adequate spur track whenever not necessarily exceeding three miles in length and when practically indispensable to an existing or proposed enterprise or industry, a railroad need not take over and operate an existing spur track where the element of indispensability is missing.[25] Under statutes requiring a railroad to construct and operate side tracks when reasonably necessary for established or prospective industries, and reasonably remunerative to the road, the railroad's duty to operate side tracks is subordinate to the paramount rights of the public,[26] and the police power of municipalities,[27] with respect to separation of street and railroad grades, as by depression of the railroad.[28] Under some statutes requiring railroads to furnish switch connections to a private track, the railroad need not carry freight over the privately owned portion of the track.[29]

Where a statute authorizes individuals to attach cars to the motive power of a state railroad, the right may be denied by the commissioners in charge of the road as to any car which has been condemned as unfit for service.[30] Under statutes requiring railroads to operate cars over switches, spurs, and sidings which it may own, control, or operate, it cannot be required to operate over tracks which it has no right to use,[31] or to operate in anticipation of prospective business.[32] Under a statute requiring railroads to operate over side tracks constructed by the shipper at his own expense, there is no duty to operate unless the track was so constructed,[33] or if it is in an unsafe condition.[34] Where the statute specifies the purposes

17. Wis.—Union Lime Co. v State R. Commission, 129 N.W. 605, 144 Wis. 523.
51 C.J. p. 1003 note 14.

18. Ala.—Alabama Cent. R. Co. v Alabama Public Service Commission, 76 So. 862, 200 Ala. 536, L.R.A. 1918C 293.
51 C.J. p. 1003 note 15.

19. N.J.—Rahway Valley R. Co. v. Public Utility Comrs., 136 A. 494, 5 N.J. Misc. 338.
51 C.J. p. 1003 note 16.

20. Mich.—Grand Rapids, etc., R. Co. v. Michigan R. Commission, 150 N.W. 154, 183 Mich. 383, 397.
51 C.J. p. 1003 note 18.

21. Wis.—Menasha Woodenware Co. v. State R. Commission, 166 N.W. 435, 167 Wis. 19.
51 C.J. p. 1003 note 19.

22. Wis.—Menasha Woodenware Co. v. State R. Commission, supra.
51 C.J. p. 1003 note 20.

23. Wis.—New Dells Lumber Co. v. Chicago, St. P., M. & O. Ry. Co., 276 N.W. 632, 226 Wis. 614. Rehearing denied 277 N.W. 673, 226 Wis. 614.
Duty of railroad to construct and maintain switches, spurs, and sidings see supra § 121.

24. Wis.—Chicago, etc., R. Co. v Railroad Commission, 225 N.W. 402, 199 Wis. 252.

25. Wis.—Chicago, etc., R. Co. v. Railroad Commission, supra.
51 C.J. p. 1007 note 77.

26. Minn.—State v. Chicago, etc., R. Co., 131 N.W. 859, 115 Minn. 51.

27. Minn.—Twin City Separator Co. v. Chicago, etc., R. Co., 137 N.W. 193, 118 Minn. 491.
51 C.J. p. 1006 note 69.

28. Minn.—Twin City Separator Co. v Chicago, etc., R. Co., supra.
51 C.J. p. 1006 notes 70, 71.

29. N.Y.—New York Cent., etc., R. Co. v General Electric Co., 146 N.Y.S. 322, 83 Misc. 529, reversed on other grounds 153 N.Y.S. 478, 167 App. Div. 726, reversed on other grounds 114 N.E. 115, 219 N.Y. 227.
51 C.J. p. 1005 note 56.

30. Pa.—Miller v. Canal Com'rs, 21 Pa. 23.

31. Ill.—Hoyt v. Chicago, etc., R. Co., 93 Ill. 601.
51 C.J. p. 1007 note 82.

32. Ill.—People v. Illinois Cent. R. Co., 89 N.E. 744, 241 Ill. 471.
51 C.J. p. 1007 note 83.

33. Wis.—Bartlett v. Chicago, etc., R. Co., 71 N.W. 598, 96 Wis. 335.
51 C.J. p. 1007 note 85.

34. Wis.—Stetler v. Chicago, etc., R. Co., 6 N.W. 303, 49 Wis. 609.

for which operation may be compelled, there is no duty to operate for an unspecified purpose[35]

Rights and duties under contract. A private agreement as to operation between the owner of an industry who builds a connecting switch, and the railroad company, which in no way affects its use by the public, is valid and enforceable,[36] and the respective rights of shippers and railroads as to operation of private side tracks rest entirely on the contract made.[37] In other words, their rights will be determined by the particular contract provisions relative to the nature and extent of use.[38] The provisions of such a contract may be waived.[39] A stranger to the contract has no rights thereunder.[40]

A spur-track agreement between a railroad and a landowner, whereby the railroad retained ownership of the tracks and other movables is legal,[41] and under a provision whereby the railroad could take up the tracks and other movables, should the track be abandoned or its use discontinued for the business contemplated, the railroad has the right to remove the movables, when the property is sold under mortgage foreclosure,[42] notwithstanding the land belongs to another,[43] and such right may be asserted against one purchasing from the purchaser at the mortgage foreclosure sale.[44]

Public use. The term "railroad" includes all side tracks necessary or convenient for the transaction of the company's business, as discussed supra § 1, and if a railroad company controls and operates a switch or side track as a part of its system, although primarily for the benefit of a particular shipper, it may be compelled to transport freight for others at points along the line where such persons have a right to ship or receive it[45] A railroad cannot, however, be required to receive the freight of others on or along a private switch of which it has not the management or control,[46] except where it is otherwise provided by statute[47] Where a switch is constructed for the benefit of a particular shipper, on his land, and subsequently, under rights expressly reserved in the contract, the railroad company cancels its agreement and sells the switch to the landowner, he has the exclusive right to the use of the switch.[48] Where the right of public user exists, it is paramount to contrary contractual provisions.[49]

b. Abandonment and Restoration

(1) In general
(2) Under contract

(1) In General

Except where it is otherwise provided by constitutional or statutory provisions, a railroad cannot be compelled to continue existing spur-track facilities or to

35. Wis.—Stetler v. Chicago, etc., R. Co., supra.
51 C.J. p. 1007 note 88.

36. Ill.—Von Oven v. Chicago, etc., R. Co., 148 N.E. 32, 317 Ill. 334.
51 C.J. p. 1011 note 30.

37. Mich.—Grand Rapids, etc., R. Co. v. Michigan Railroad Commission, 150 N.W. 154, 183 Mich. 383.
51 C.J. p. 1007 note 91.

38. Ill.—Sholl v. Peoria, etc., R. Co., 114 N.E. 529, 276 Ill. 267.
51 C.J. p. 1008 note 92.

Use of private property
Railroad was held without right under contract to use sidings for storage of cars, switching yard, or other purpose disconnected with service of business of industrial plant or other persons served by sidings.—William Danzer & Co. v. Western Maryland Ry. Co., 165 A. 463, 164 Md. 448.

39. Ark.—Harbottle-Bailey Coal Co. v. Bolton-Hale Coal Co., 234 S.W. 476, 150 Ark. 473
51 C.J. p. 1008 note 95.

40. Tex.—Beaumont, etc., R. Co. v. Moore, Civ.App., 174 S.W. 844.
51 C.J. p. 1008 note 94.

41. La.—Louisiana Ry. & Nav. Co. v. Cash Grocery & Sales Co., App., 150 So. 57.

Necessity of recording
Railroad's right to remove spur track under contract with landowner held not lost as against purchaser at mortgage foreclosure sale because contract was not recorded; recording not being necessary.—Louisiana Ry. & Nav. Co. v. Cash Grocery & Sales Co., supra.

42. La.—Louisiana Ry. & Nav. Co. v. Cash Grocery & Sales Co., supra.

43. La.—Louisiana Ry. & Nav. Co. v. Cash Grocery & Sales Co., supra

44. La.—Louisiana Ry. & Nav. Co. v. Cash Grocery & Sales Co., supra

Defense
Fact that business of one purchasing land from purchaser at mortgage foreclosure was of public service character and spur tracks were needed was held no defense to railroad's action to enforce right to remove spur tracks under contract with mortgagor.—Louisiana Ry. & Nav. Co. v. Cash Grocery & Sales Co., supra.

Estoppel
Railroad, not knowing spur track had been mortgaged and sold at sheriff's sale, held not estopped to assert against subsequent purchaser railroad's ownership of steel under contract with landowner.—Louisiana Ry. & Nav. Co. v. Cash Grocery & Sales Co., supra.

45. Ill.—Von Oven v. Chicago, etc., R. Co., 148 N.E. 32, 317 Ill. 334, 344
51 C.J. p. 1010 note 26.

46. Ill.—Sholl v. Peoria, etc., R. Co., 196 Ill.App. 306, 318, affirmed 114 N.E. 529, 276 Ill. 267.
51 C.J. p. 1011 note 27.

47. Wis.—New Dells Lumber Co. v. Chicago, St. P., M. & O. Ry. Co., 277 N.W. 673, 226 Wis. 614.

Privately constructed track
Under statute, a railroad cannot be released from serving owner of industry acquiring and paying for right to use privately constructed spur track, except on order of commission.—New Dells Lumber Co. v. Chicago, St. P., M. & O. Ry. Co., 276 N.W. 632, 226 Wis. 614, rehearing denied 277 N.W. 673, 226 Wis. 614

48. U.S.—Oman v. Bedford-Bowling Green Stone Co., Ky., 134 F. 64, 67 C.C.A. 190.
Ark.—Conway Oil, etc., Co. v. Gibson Oil Co., 1 S.W.2d 60, 175 Ark. 905.

49. Wis.—Menasha Woodenware Co. v. State R. Commission, 166 N.W. 435, 167 Wis. 19.
51 C.J. p. 1011 note 29.

restore those abandoned; but it should give reasonable notice of removal of facilities previously furnished

In the absence of constitutional, statutory, or contract provisions providing otherwise, a railroad cannot be compelled to continue existing spur-track facilities[50] or to restore those abandoned.[51] The railroad should, however, give reasonable notice of removal of facilities previously furnished.[52] Nonpayment of demurrage is not a valid ground for discontinuance of switching services which the road is otherwise under a duty to continue.[53]

Railroad incidental to other business Where a company is chartered primarily for the conduct of a particular business with the incidental privilege of constructing a railroad for the transportation of its product, which, however, must also transport the produce of others at certain specified rates, the company may, in the absence of any provision to the contrary, discontinue the road whenever its own interests require it, and it is not obliged to continue its operation for the benefit of others.[54]

Under constitutional or statutory provisions. Where the duty to maintain and operate a private spur or siding, or switch connection therewith, is imposed by constitutional or statutory provisions, the railroad cannot lawfully discontinue it,[55] and if it has done so unlawfully, it may be compelled to restore such facilities.[56] Under statutes providing a complete system for the regulation and control of railroads by the commission, and expressly including spur or side tracks, a railroad cannot abandon an industrial spur track without permission of the commission,[57] and an order for continuance of the spur facilities may be valid despite financial loss resulting to the road from continued operation.[58]

(2) Under Contract

When a contract governing spur or side-track facilities specifies no particular time for continuance, the railroad may discontinue such facilities only where the public welfare so requires; but the railroad may discontinue facilities in accordance with contract provisions expressly giving it such right.

When a contract governing spur or sidetrack facilities specifies no particular time for continuance, it has been held that the railroad cannot discontinue such facilities in the absence of a controlling public necessity,[59] but it may do so at its election where public welfare so requires.[60] Aside from questions of public convenience, a railroad may be under a duty to continue facilities for a reasonable time where the spur or sidetrack was constructed at the shipper's expense.[61] The railroad may, of course, discontinue facilities in accordance with contract provisions expressly giving it such right.[62] Where continuance of private facilities would interfere with public rights, a contract for such continuance will not be enforced.[63]

A contract providing that a spur track shall be maintained as long as the business of the shipper is operated is not too indefinite to be enforced,[64] and will not be construed as void because contemplating interference with public interests through indefinite continuance.[65] Subject to the foregoing considerations, the rights of the parties as to continuance of such facilities will, in the last analysis, depend on the provisions of the particular contract involved.[66]

50 Ark.—Thomas-Bowman Cooperage Co. v. Missouri, etc., R. Co., 237 S.W. 101, 151 Ark. 589.
51 C.J. p. 1008 note 98.

Damages not authorized
In absence of controlling constitutional provision or statute, removal of switch constructed and operated under license from city does not authorize recovery of damages for loss in value of abutting or adjacent property.—Montgomery v. Atchison, T. & S. F. Ry. Co., C.C.A.Okl., 89 F.2d 94.

51. Wis.—Chicago, etc., R. Co. v. Railroad Commission, 193 N.W. 981, 181 Wis. 91.
51 C.J. p. 1008 note 99.

52. Ga.—Durden v. Southern R. Co., 58 S.E. 299, 2 Ga.App. 66.
51 C.J. p. 1008 note 1.

53. Tenn.—Dunlap Lumber Co. v. Nashville, etc., R. Co., 165 S.W. 224, 129 Tenn. 163.
51 C.J. p. 1009 note 2.

54. Md.—Montell v. Consolidation Coal Co., 45 Md. 16.

55. Ill.—Chicago, etc., R. Co. v. Suffern, 21 N.E. 824, 129 Ill. 274.
51 C.J. p. 1009 note 7.

56. Ill.—Chicago, etc., R. Co. v. Suffern, supra.

57. Mo.—State v. Missouri Southern R. Co., 214 S.W. 381, 279 Mo. 455.
Wis.—New Dells Lumber Co. v. Chicago, St. P., M. & O. Ry. Co., 277 N.W. 673, 226 Wis. 614.

58. Mo.—State v. Missouri Southern R. Co., 214 S.W. 381, 279 Mo. 455.
51 C.J. p. 1009 note 11.

59. Tex.—Payne v. Mt. Franklin Fuel, etc., Co., Civ.App., 234 S.W. 595.
51 C.J. p. 1009 note 13.

60. N.Y.—New York Cent., etc., R. Co. v. General Electric Co., 146 N.Y.S. 322, 83 Misc. 529, 540, reversed on other grounds 153 N.Y.S. 478, 167 App.Div. 726, reversed on other grounds 114 N.E. 115, 219 N.Y. 227.
51 C.J. p. 1009 note 14.

61. N.Y.—Adikes v. Long Island R. Co., 151 N.Y.S. 49, 165 App.Div. 221, 223.
51 C.J. p. 1009 note 15.

62. Ga.—Southern R. Co. v. Byrum, 69 S.E. 550, 135 Ga. 426.
51 C.J. p. 1009 note 16.

63. N.J.—Swift v. Delaware, etc., R. Co., 57 A. 456, 66 N.J.Eq. 34, affirmed 58 A. 939, 66 N.J.Eq. 452.
51 C.J. p. 1009 note 17.

64. Ark.—Graham v. Jonesboro, etc., R. Co., 164 S.W. 729, 111 Ark. 598.
51 C.J. p. 1010 note 18.

65. Ark.—Graham v. Jonesboro, etc., R. Co., supra.
51 C.J. p. 1010 note 19.

66. Particular contracts construed
U.S.—Brown v. Southern R. Co., Tenn., 187 F. 481, 109 C.C.A. 338.
51 C.J. p. 1010 note 21 [a].

A stranger to the contract cannot take advantage of contract provisions to enforce restoration of an abandoned siding.[67]

Shipper's license to third party to use the private spur or siding is revocable.[68]

Operation at loss It has been held that, if a spur or switch track cannot be operated except at a loss, a contract not to remove it will not prevent its abandonment.[69]

§ 414. —— Cost of Furnishing and Charge for Use

Where such authority is conferred by statute, a railroad commission may determine who shall bear the cost of switches or side tracks. A shipper owning spur-track facilities cannot ordinarily charge the railroad for the latter's use of them.

Where such authority is conferred by statute, a railroad commission may determine who shall bear the cost of switches or side tracks.[70] So it may construe a contract between the railroad and shippers to determine the party liable for the cost of electrification of side tracks.[71] Under a statute providing that a railroad may require those to be served by an industrial spur track built by the railroad to pay the cost of acquiring rights of way and of construction, as may be determined by a commission in separate items, a railroad which has constructed such a spur cannot maintain an action for the cost prior to the specified determination of the commission.[72]

In the absence of fraud, a shipper who has contracted with a railroad to pay an estimated cost of construction of a spur track, and has paid it in advance, cannot recover from the railroad the difference between the estimated and the lower, actual cost;[73] and statutes empowering a shipper to build a spur and compel the railroad to connect by switch,[74] or under specified conditions to secure from the commission an order compelling the railroad to construct the spur at its real cost, to be charged to the shipper,[75] do not change this rule.

Charge for use. A shipper owning spur track facilities cannot ordinarily charge the railroad for the latter's use of them.[76] An owner of a plant has the absolute right to be served by an existing privately constructed spur track without paying for the right, where the owner had acquired the right to such service by deed, and payment for the right had been comprised in the consideration for the deed.[77]

§ 415. Elevators and Warehouses

The legislature cannot require a railroad company to permit a private person or corporation to erect a grain elevator or warehouse on its right of way; nor may such requirement be imposed by a railroad commission.

The legislature cannot require a railroad company to permit a private person or corporation to erect a grain elevator or warehouse on its right of way.[78] A statute authorizing a railroad commission to order a railroad to furnish sites along its right of way for private elevators or warehouses is void;[79] nor can railroad commissioners, under the powers vested in them to require the furnishing of adequate facilities, require a railroad company to furnish to a private individual a site on its right of way for the erection of a grain elevator,[80] even though the railroad company may previously have voluntarily granted such a privilege to some other individual, and the statutes prohibit any unjust discrimination.[81]

§ 416. Train Service and Accommodations

The requirements for adequate train service must be reasonable for public needs and not unduly burdensome to the railroad. Separate trains for freight and passengers should be run if there is a demand for each class of traffic and the business of the road is sufficiently large and profitable to warrant it.

The requirements for adequate train service

67. Pa.—Pennsylvania R. Co. v Public Service Commission, 64 Pa.Super. 586
51 C.J. p 1010 note 22

68. Ark.—Harbottle-Bailey Coal Co v. Bolton-Hale Coal Co., 234 S.W. 476, 150 Ark. 473
51 C.J. p 1010 note 23.

69. U.S.—Mercantile Trust Co. v. Columbus, etc., R. Co, C.C.Ohio, 90 F. 148.
51 C.J. p 1010 note 24.

70. N.Y.—George Adams Lumber Co. v. Long Island R. Co., 243 N.Y.S. 489, 230 App.Div. 260.

71. N.Y.—George Adams Lumber Co. v. Long Island R. Co., supra.

72. Wis.—Chicago, etc., R. Co v. Wisconsin Zinc Co., 179 N.W. 588, 172 Wis. 407.

73. Wash.—Skagit Mill Co. v. Great Northern R. Co., 190 P. 901, 111 Wash. 378.
51 C.J. p 1011 note 32.

74. Wash.—Skagit Mill Co. v. Great Northern R. Co, supra.

75. Wash.—Skagit Mill Co v. Great Northern R. Co, supra.

76. Mich.—Grand Rapids Terminal Belt R. Co v Waters, 164 N.W. 410, 198 Mich. 285.
51 C.J. p 1011 note 41.

77. Wis.—New Dells Lumber Co v. Chicago, St. P., M. & O. Ry. Co., 276 N.W. 632, 226 Wis. 614, rehearing denied 277 N.W. 673, 226 Wis. 614.

78. Minn.—State v. Chicago, etc., R. Co., 31 N.W. 365, 36 Minn. 402.
51 C.J. p 1012 note 42.

79. Wis.—Chicago, etc., R. Co v State R. Commission, 221 N.W. 399, 197 Wis. 59.

80. U.S.—Missouri Pac. R. Co. v. Nebraska, Neb., 17 S.Ct. 130, 164 U.S. 403, 41 L.Ed. 489.
Neb.—Chicago, etc., R. Co. v. State, 69 N.W. 955, 50 Neb. 399.

81. U.S.—Missouri Pac. R. Co. v. Nebraska, Neb., 17 S.Ct. 130, 164 U.S. 403, 41 L.Ed. 489.

must be reasonable for public needs and not unduly burdensome to the railroad.[82] Such requirements are subject to judicial determination.[83] The convenience and necessity which determine whether a railroad may abandon a specified service are those of the public and not of individuals.[84]

Mixed trains. As a general rule, a railroad does not discharge its duty to the public of furnishing transportation to passengers by the running of a mixed train consisting of freight and passenger cars,[85] and separate trains for freight and passengers should be run if there is a demand for each class of traffic and the business of the road is sufficiently large and profitable to warrant it.[86] On the other hand, where the business of the road is not sufficiently large and remunerative to require the operation of separate trains, mixed trains may be operated,[87] as where the loss involved in running separate trains is confiscatory.[88]

It has been held that no fixed rule can be applied in determining whether a railroad is entitled to discontinue passenger trains on certain lines and to substitute in lieu thereof mixed trains, and each case must be considered in the light of all the facts.[89] Under a statute providing that both a daily passenger and a daily freight train shall be run each way, excepting that if the road shall prove to a commission that the business on any line will not justify operation of separate trains, the road, on order of the commission, may run one mixed train each way, and the question of relief under the statutory exception should be decided on the basis of the revenues from the particular branch line involved and not from the whole road.[90] Under statutes requiring roads to run a "regular passenger train" every day each way over all lines, the words "regular passenger train" include a train composed of both passenger coaches and freight cars.[91]

§ 417. —— Regulation by State or Municipality

The state may regulate matters relating to train service and accommodations, but it must exercise its power within constitutional limitations, and its regulations must be reasonable and not arbitrary.

Under its power to regulate the operation of railroads, the state may regulate matters relating to train service and accommodations.[92] Thus, the state may designate the location of stations, as discussed supra § 57, the trains that shall stop thereat,[93] and the length of the stop;[94] facilities and accommodations on trains,[95] and may require passenger service between points within the state,[96] and separate trains for passengers and freight.[97] The validity of statutes requiring separate and equal passenger coach accommodations for white and colored persons has also been upheld.[98] The right of a municipality to regulate

82. Fla.—State v. Georgia Southern & F. Ry. Co., 190 So. 527, 139 Fla. 115, 123 A.L.R. 914.

83. Fla.—State v. Georgia Southern & F. Ry. Co., supra.

84. Ill.—Illinois Cent. R. Co. v. Illinois Commerce Commission, 74 N.E.2d 545, 397 Ill. 323.

85. Idaho.—In re Application of Union Pac. R. Co. to Abandon Certain Train Service Between Cache Junction, Utah, and Preston, Idaho, and Between Ogden, Utah, and Malad, Idaho, 134 P.2d 1073, 64 Idaho 597.

86. Idaho.—In re Application of Union Pac. R. Co. to Abandon Certain Train Service Between Cache Junction, Utah, and Preston, Idaho, and Between Ogden, Utah, and Malad, Idaho, supra.

S.C.—**Corpus Juris quoted in** Darby v. Southern Ry. Co., 10 S.E.2d 465, 469, 194 S.C. 421.

51 C.J. p. 1022 note 20.

87. Idaho.—In re Application of Union Pac. R. Co. to Abandon Certain Train Service Between Cache Junction, Utah, and Preston, Idaho, and Between Ogden, Utah, and Malad, Idaho, 134 P.2d 1073, 64 Idaho 597.

S.C.—**Corpus Juris quoted in** Darby v. Southern Ry. Co., 10 S.E.2d 465, 469, 194 S.C. 421.

51 C.J. p. 1022 note 21.

88. S.C.—**Corpus Juris quoted in** Darby v. Southern Ry. Co., 10 S.E.2d 465, 469, 194 S.C. 421.

51 C.J. p. 1022 note 22.

In determining whether patronage justifies expense of operation of passenger trains on railroad's branch line, it is proper to consider expense of furnishing passenger service, but that is not the most important question, and the controlling question is the necessity and reasonableness of the service to the public.—In re Application of Union Pac. R. Co. to Abandon Certain Train Service Between Cache Junction, Utah, and Preston, Idaho, and Between Ogden, Utah, and Malad, Idaho, 134 P.2d 1073, 64 Idaho 597.

89. Idaho.—In re Application of Union Pac. R. Co. to Abandon Certain Train Service Between Cache Junction, Utah, and Preston, Idaho, and Between Ogden, Utah, and Malad, Idaho, supra.

90. N.D.—In re Minneapolis, etc., R. Co., 152 N.W. 513, 30 N.D. 221, Ann. Cas.1917B 1205.

51 C.J. p. 1022 note 24.

91. S.C.—**Corpus Juris quoted in** Darby v. Southern Ry. Co., 10 S.E.2d 465, 469, 194 S.C. 421.

51 C.J. p. 1022 note 26.

92. Okl.—Missouri-Kansas-Texas R. Co. v. Williamson, D.C.Okl., 36 F. Supp. 607.

Tenn.—Louisville & N. R. Co. v. Hammer, 236 S.W.2d 971.

51 C.J. p. 1012 note 50.

93. U.S.—Lake Shore, etc., R. Co. v. Ohio, Ohio, 19 S.Ct. 465, 173 U.S. 285, 43 L.Ed. 702.

51 C.J. p. 1012 note 52.

94. Tex.—Davidson v. State, 4 Tex. App. 545, 30 Am. R. 166.

51 C.J. p. 1012 note 53.

95. N.J.—Delaware, etc., R. Co. v. Public Utility Comrs., 84 A. 702, 83 N.J.Law 212.

51 C.J. p. 1012 note 54.

96. U.S.—Missouri Pac. R. Co. v. Kansas, Kan., 30 S.Ct. 330, 216 U.S. 262, 54 L.Ed. 472.

51 C.J. p. 1012 note 55.

97. Fla.—State v. Louisville, etc., R. Co., 57 So. 673, 63 Fla. 274.

98. Ky.—South Covington, etc., R. Co. v. Commonwealth, 205 S.W. 603, 181 Ky. 449.

51 C.J. p. 1013 note 78.

train service by ordinance may be abrogated by state statute.[99]

Exercise of power. The power of the state to control and regulate train service must be exercised within constitutional limitations[1] In the exercise of its power to regulate train service, the state cannot add provisions to contracts between railroads.[2] Statutes passed in the exercise of the state's power to regulate train service must be reasonable and not arbitrary,[3] and cannot compel service involving a loss on the whole road[4]

Particular statutes held valid include those requiring the running of passenger trains on Sunday[5] or restricting the running of freight trains on Sunday;[6] requiring all regular passenger trains to stop at all county seat stations on their route,[7] requiring fenders on cars of an interurban railroad,[8] requiring drinking water on passenger cars;[9] regulating the size and construction of cabooses;[10] requiring a heating apparatus so constructed that the fire will be extinguished if the car is overturned,[11] or prohibiting the heating of cars by a stove or furnace kept inside.[12]

Particular statutes held invalid include those arbitrarily requiring all passenger trains to stop at all stations where penitentiaries are located,[13] or at all county seats;[14] requiring a specified number of trains per day irrespective of loss;[15] or requiring a specified number of trains run to be stopped at stations with a specified number of inhabitants,[16] or making it mandatory for a commission to require railroads to stop all passenger trains at or near the state line[17]

§ 418. —— Regulation by Board or Commission

a. Power and duty of board or commission

b. Exercise of power

a. Power and Duty of Board or Commission

(1) In general

(2) Under particular statutory provisions

(1) In General

The power of a board or commission to regulate train service is such as may have been duly delegated to it by constitutional or statutory provisions, and the board or commission may be under a positive duty to undertake such regulation.

The power of a board or commission to regulate train service is such as may have been duly delegated to it by constitutional or statutory provisions,[18] and ordinarily does not extend to actual

99. Ill.—Lustfield v. Chicago Transit Authority, 97 N.E.2d 347, 408 Ill. 404

1. Fla.—State v. Georgia Southern & F. Ry. Co., 190 So. 527, 139 Fla. 115, 123 A.L.R. 914.
Limitations respecting interstate commerce see Commerce § 78.

2. Tex.—State v. Trinity, etc., R. Co., 120 S.W. 1123, 56 Tex. Civ. App. 424.
51 C.J. p. 1012 note 58.

3. U.S.—Atchison, T. & S. F. Ry. Co. v. La Prade, D.C.Ariz., 2 F. Supp. 855
51 C.J. p. 1013 note 62.

Retroactivity

Where under statute authorizing discontinuance of any passenger train when it shall be made to appear that for a period of twelve months or more, the direct operating costs of such train have exceeded the aggregate gross revenues therefrom by more than a specified percentage, common carriers were privileged to avail themselves of statutory provisions immediately on passage of the statute, and reliance could be had on loss of revenue and cost of operation during the twelve months period next preceding passage of the statute, and such retroactivity did not render statute unconstitutional.—Louisville & N. R. Co. v. Hammer, Tenn., 236 S.W.2d 971.

In making judicial determination of whether enforced continuance of statutory minimum train service would result in deprivation of property rights of railroad, nature of service that railroad had been and was performing, financial burden of continuing service, its effect on rights and reasonable needs of public to be served and operating features including earnings of railroad's entire system, and its duty to render commanded service, could be considered.—State v. Georgia Southern & F. Ry. Co., 190 So. 527, 139 Fla. 115, 123 A.L.R. 914.

4. U.S.—Washington, etc., R. Co. v. Magruder, D.C.Md., 198 F. 218.
51 C.J. p. 1013 note 63.

5. Mo.—State v. Chicago, etc., R. Co., 143 S.W. 785, 239 Mo. 196.

6. U.S.—Hennington v. Georgia, Ga., 16 S.Ct. 1086, 163 U.S. 299, 41 L.Ed. 166.
51 C.J. p. 1013 note 65.

7. U.S.—Gladson v. Minnesota, Minn., 17 S.Ct. 627, 166 U.S. 427, 41 L.Ed. 1064.
51 C.J. p. 1013 note 66.

8. S.C.—Thomas v. Spartanburg R., etc., Co., 85 S.E. 50, 100 S.C. 478.

9. Ga.—Southern R. Co. v. State, 54 S.E. 160, 125 Ga. 287, 114 Am.S.R. 203.

10. Ind.—Pittsburgh, etc., R. Co. v. State, 102 N.E. 25, 180 Ind. 245, L.R.A.1915D 458.

11. Ohio.—Gause v. Lake Shore, etc., R. Co., 4 Ohio Dec. (Reprint) 369, 2 Clev.L.Rep. 44.

12. U.S.—New York, etc., R. Co. v. New York, 17 S.Ct. 418, 165 U.S. 628, 41 L.Ed. 853.
N.Y.—People v. New York, etc., R. Co., 8 N.Y.S. 672, 55 Hun 409, affirmed 25 N.E. 953, 123 N.Y. 635.

13. Ky.—Illinois Cent. R. Co. v. Commonwealth, 157 S.W. 687, 154 Ky. 332
51 C.J. p. 1013 note 72.

14. U.S.—Illinois Cent. R. Co. v. Illinois, Ill., 16 S.Ct. 1096, 163 U.S. 142, 41 L.Ed. 107.

15. U.S.—Washington, etc., R. Co. v. Magruder, D.C.Md., 198 F. 218.
51 C.J. p. 1013 note 74.

16. U.S.—Chicago, etc., R. Co. v. Wisconsin R. Commission, Wis., 35 S.Ct. 560, 237 U.S. 220, 59 L.Ed. 926.
51 C.J. p. 1013 note 75

17. Kan.—State v. Dickinson, 168 P. 838, 101 Kan. 660.

18. N.H.—State v. Wilton R. Co., 192 A. 623, 89 N.H. 59, 111 A.L.R. 52.

management of the railroad[19] Generally, such a commission has authority to specify what type of service is required of a railroad company,[20] and is vested with wide discretion in requiring service of a railroad.[21]

Within the requirements of constitutional and statutory provisions, boards or commissions may not only have power to regulate train service, but may be under a positive duty to do so.[22] A statute making it mandatory for a commission to require the running of at least one daily passenger train over all lines of passenger roads has been declared inapplicable to a road having mere trackage rights over lines owned by a different road[23]

(2) Under Particular Statutory Provisions
(a) In general
(b) Discontinuance of service

(a) In General

The power to regulate train service with respect to coach screens, sleeping car service, and train stops may be derived from particular statutory provisions which may in some instances limit the power

Under statutes empowering a commission on finding that any service is inadequate to order a service that will be adequate, the commission may regulate passenger service[24] Under a statute providing that every railroad may be required by a board or commission to establish and maintain such suitable public service facilities as may be reasonable and just, it may require adequate facilities for transportation on both main and lateral lines.[25] A statute empowering the commission to require railroads to run at least one unmixed daily passenger train each way over their lines vests discretion in the commission with respect to prescribing what service shall be a sufficient discharge of a railroad's statutory duty to furnish passenger service[26]

Coach screens. Under statutes empowering a board or commission to compel the railroad to furnish a sufficient number of passenger cars comfortably to accommodate its passengers, it has no power to order the screening of passenger coaches as a health measure.[27]

Sleeping car service. Under statutes empowering a commission to regulate all matters with respect to the comfort or convenience of passengers, it has power to order sleeping car service.[28]

Train stops. Under statutes granting a commission general power as to regulation of service and specifically empowering the commission to order a railroad to increase the number of its trains, the commission may order specified trains to stop at a specified station,[29] but not when this would involve an unreasonable rerouting of the trains[30]

N J.—O'Connor v. Board of Public Utility Com'rs, 29 A 2d 390, 129 N J Law 263
R I—Trustees of New York, N H & H. R Co. v Division of Public Utilities, 1 A 2d 191, 61 R I 449.
Tex.—Railroad Commission of Tex. v. Texas & N. O. R Co, 200 S.W.2d 626, 145 Tex. 541
51 C.J. p 1013 note 82

Action under repealed statute

Where the statute forbidding railroads from carrying baggage cars at the rear of passenger trains has been impliedly repealed by provisions with respect to the jurisdiction of public service commission to order stopped unsafe practices of railroads in the transportation of persons or property, commission's action in ordering a railroad to stop such practice under the prior statute without any finding as to whether the practice was safe or not, was unauthorized—Public Service Commission v. Missouri Pac. R Co, 197 S W 2d 665, 355 Mo. 679

Not limited by ordinances

Transit authority is not bound by terms of franchise ordinances of city and town dealing with electric train service, because of the fact that the authority acquired properties of original grantee under the ordinances—Lustfield v. Chicago Transit Authority, 97 N.E 2d 347, 408 Ill. 404.

19. Md—Northern Cent R. Co. v. Laird, 91 A 768, 124 Md 141, Ann. Cas 1916D 1030.
51 C J. p 1014 note 83.

20. S C—Darby v Southern Ry. Co., 10 S E 2d 465, 194 S C 421.

Restoring operation of trains

Where railroad did not appeal from judgment which affirmed ruling of public service commission which had denied railroad's petition for order permitting discontinuance of trains, and trains were kept in service until effective date of order of office of defense transportation which ordered discontinuance of trains during the war, on rescission of such order railroad was properly required by commission to restore operation of the trains—Illinois Cent R. Co v. Public Service Commission, 75 N E 2d 900, 225 Ind. 643.

21. Ind—Chicago, M, St. P. & Pac R. Co v. Public Service Commission, 46 N.E.2d 230, 221 Ind. 1.

22. Fla—State v. Atlantic Coast Line R. Co., 54 So. 900, 61 Fla 799.
51 C J. p 1017 note 43.

23. Tex—State v. Trinity, etc, R. Co., 120 S W. 1123, 56 Tex.Civ App. 424.
51 C J. p 1017 note 45.

24. Ohio—Adena R Co v. State Public Service Commission, 110 N E 631, 92 Ohio St 1
51 C J. p 1014 note 85

25. W Va—Chesapeake, etc, R Co v. Public Service Commission, 121 S E. 924, 75 W Va 100, affirmed 37 S Ct 234, 242 U S. 603, 61 L Ed 520

26. U S—Southern Ry. Co v South Carolina Public Service Commission, D C S.C., 31 F.Supp 707.

27. Miss—State R. Commission v Illinois Cent R Co, 74 So. 676, 113 Miss. 828
51 C J. p 1014 note 89.

28. Mo.—State v Atkinson, 192 S W. 86, 269 Mo. 634, L.R.A 1918A 46, Ann Cas 1917E 987.

29. Mo.—Lusk v. Public Service Commission, 210 S W. 72, 277 Mo 264, 285, reversed on other grounds 41 S Ct. 192, 254 U.S. 535, 65 L Ed. 389
Utah—State v. Ogden Rapid Transit Co, 112 P. 120, 38 Utah 242.

30. U.S.—St Louis, etc., R. Co. v. Public Service Commission, Mo, 41 S Ct 192, 254 U.S. 535, 65 L. Ed 389.

Under statutes empowering a commission to regulate time schedules of trains, it cannot require stoppage of trains at other than regular stations.[31] Under statutes empowering a commission to require a railroad to stop trains at regular stations or at other places within a city, it cannot compel a railroad to stop trains at points which are neither regular stations nor within a city.[32] Enactment of a statute requiring certain passenger trains to stop at all villages of a specified population does not deprive a board or commission of its power to regulate stopping of passenger trains at other places.[33]

(b) Discontinuance of Service

Under various constitutional or statutory provisions conferring regulatory powers on a commission, it may have power to determine whether a railroad should be permitted to discontinue train service and accommodations previously afforded by it, but under some statutes the commission is without power to permit discontinuance of service.

Under various constitutional or statutory provisions conferring regulatory powers on a commission, it may have power to determine whether a railroad should be permitted to discontinue train service and accommodations previously afforded by it,[34] and a railroad may not voluntarily abandon certain train service without securing the approval of the commission.[35] So under a statute granting a railway commission jurisdiction over the service, facilities, and equipment of all railroads, and empowering it to order such changes in, or additions to, them as may seem necessary to render them sufficient, efficient, and safe, the commission may make a general order requiring its permission to discontinue train service,[36] and under statutes giving a board or commission general power to require railroads to operate and to control all matters relating to operation and pertaining to the public good, the board or commission may require its written consent to discontinuance of regular intrastate passenger trains.[37]

Under general powers conferred by statute to adopt necessary rules and regulations governing train service and accommodations, the commission may promulgate rules requiring a railroad desiring to discontinue certain service to file a petition with the commission setting out necessary details and providing for a public hearing on such petition.[38] Under a statute forbidding discontinuance of train service without permission from a board or commission[39] or authorizing the commission to relax a requirement that the railroad maintain daily passenger service,[40] it has power to permit discontinuance; and the terms of the

31. Miss.—Gulf, etc., R. Co. v State R Commission, 49 So 118, 94 Miss 124
51 C.J p 1014 note 98.

32. Miss.—Gulf, etc., R. Co. v. State R Commission, supra
51 C.J. p 1014 note 1.

33. Wis.—Chicago, etc., R. Co. v State R. Commission, 146 N.W. 1129, 157 Wis 287
51 C.J. p 1017 note 40.

34. Neb.—Application of Chicago, B & Q. R. Co, 41 N.W.2d 165, 152 Neb. 367—Application of Chicago, B. & Q R. Co, 41 N.W 2d 157, 152 Neb. 352—Application of Chicago, B. & Q. R. Co., 295 N W. 389, 138 Neb. 767.

Broad police powers

When railroad seeks to discontinue operation of trains, power to determine whether operation of trains is reasonably necessary to serve the public adequately under the terms of franchise is conferred on the commission in the broad police powers contained in the constitution.—Lynchburg Traffic Bureau v. Commonwealth, 54 S.E.2d 66, 189 Va 612.

Where the public does not use the facilities furnished to a sufficient extent to compensate the company therefor, it is a matter for the commission to determine, after a hearing, whether or not more than a minimum of service should be supplied by the company.—Darby v Southern Ry. Co, 10 S E 2d 465, 194 S.C. 421.

In New Jersey

(1) It was held that the board of public utility commissioners could not, by granting application for discontinuance or abandonment of passenger services because resulting in great loss to carrier while continuing freight services, waive railroad's cessation of carriage of passengers which breached carrier's statutory duty to carry both freight and passengers in consideration of franchise —O'Connor v. Board of Public Utility Com'rs, 29 A 2d 390, 129 N J.Law 263.

(2) In a later case, the decision of O'Connor v. Board of Public Utility Com'rs, supra was expressly disapproved so far as it held that the board was without power to authorize discontinuance of train service not required by public convenience and necessity, and it was held that the board has the power and the duty, in a proper case, to authorize discontinuance of particular service no longer needed.—Pennsylvania-Reading Seashore Lines v Board of Public Utility Com'rs, 74 A 2d 265, 5 N J. 114, certiorari denied Brotherhood of R. R. Trainmen v. Pennsylvania-Reading Seashore Lines, 71 S.Ct. 122, 340 U.S. 876, 95 L.Ed. ——.

35. Ill.—Illinois Cent. R. Co. v. Illinois Commerce Commission, 75 N. E 2d 23, 398 Ill. 19.

36. Neb.—State v. Chicago, etc, R. Co, 198 N W. 670, 112 Neb 176.

37. Fla.—State v. Atlantic Coast Line R Co, 54 So 394, 60 Fla. 465.
51 C J. p 1015 note 6

38. Ind.—Illinois Cent. R. Co. v. Public Service Commission, 75 N E. 2d 900, 225 Ind 643.

39. W.Va.—Collins v Public Service Commission, 119 S E. 288, 94 W.Va. 455.
51 C J. p 1015 note 8.

40. Tex.—Texas & N. O. R. Co. v. Railroad Commission, 200 S W 2d 626, 145 Tex 541.

The purpose of the statute requiring daily passenger service, Sundays excepted, but authorizing relaxation of such requirement by the railroad commission, is to avert imminent abandonment of railroads under authority of the interstate commerce commission and to preserve, for the communities affected, at least the advantage of a continued rail-freight transportation.—Texas & N. O. R. Co. v. Railroad Commission, supra.

"Relaxation"

The meaning of the word "relaxation" must be gauged in light of the statute's legislative history, the circumstances obtaining at the time of its passage, and the evils it sought to

statute may be such as to vest in the commission a discretion as to the degree of relaxation of the statutory requirement of train service required to stop an operating loss arising from the operation of unprofitable passenger train service.[41] The commission may be vested with discretionary power in acting on a railroad's application to discontinue passenger trains on branch lines and to substitute in lieu thereof mixed trains consisting of passenger cars and baggage cars on existing freight trains.[42]

Under other statutes, however, the commission is without power to permit discontinuance of railroad service,[43] at least where the service sought to be discontinued is one provided by charter provision.[44] So under a statute authorizing the commission, where service is inadequate, to fix and prescribe the service thereafter to be provided, the commission has no authority to authorize or permit abandonment of service,[45] but, if the cessation or curtailment of train service by the railroad is unreasonable, the commission has power to order the restoration thereof.[46] Under some provisions, the commission has no authority to require a railroad to obtain permission of the commission before discontinuing certain train service,[47] and, in the absence of a valid requirement imposed by law that the company obtain such permission, it need not do so before discontinuing passenger trains and substituting therefor mixed trains,[48] but the commission has authority in a judicial way, after a hearing, to require the railroad company to restore the passenger trains which it has discontinued, and to apply for a writ of mandamus to enforce such order.[49]

b. Exercise of Power

(1) In general
(2) Proceedings
(3) Matters affecting validity of regulation

(1) In General

Rules, regulations, and orders made by boards or commissions in the exercise of their power to regulate train service must be within the scope of the power conferred by the statute, and must be definite, certain, and reasonable.

Rules, regulations, and orders made by boards or commissions in the exercise of their power to regulate train service must be within the scope of the power conferred by the statute,[50] and must

correct.—Texas & N. O. R. Co. v. Railroad Commission, supra

Specified conditions

Under statute requiring daily passenger service, Sundays excepted, but authorizing relaxation of such requirement under three specified conditions, all three conditions need not exist before relief may be granted.—Railroad Commission of Tex. v. Texas & N. O. R. Co., Civ. App., 197 S.W.2d 176, reversed on other grounds 200 S.W.2d 626, 145 Tex. 541.

41. Tex.—Texas & N. O. R. Co. v. Railroad Commission, 200 S.W.2d 626, 145 Tex. 541.

42. Idaho.—In re Application of Union Pac. R. Co. to Abandon Certain Train Service Between Cache Junction, Utah, and Preston, Idaho, and Between Ogden, Utah, and Malad, Idaho, 134 P.2d 1073, 64 Idaho 597

Jurisdiction

Where commission issued order which was duly served on railroad to appear and show cause, and offer testimony as to which passenger trains should not be continued on branch lines, and pursuant to such order railroad appeared, a hearing was duly had, and testimony was taken without objections on part of the state or protestants, and controversy was decided by commission as effectively as if railroad had instituted proceedings under statute, commission had jurisdiction to grant railroad relief notwithstanding railroad's failure to comply with statute.—In re Application of Union Pac. R. Co. to Abandon Certain Train Service Between Cache Junction, Utah, and Preston, Idaho, and Between Ogden, Utah, and Malad, Idaho, supra.

43. N.H.—State v. Wilton R. Co., 192 A. 623, 89 N.H. 59, 111 A.L.R. 52

Entire discontinuance of passenger service

R.I.—Trustees of New York, N. H. & H. R. Co. v. Division of Public Utilities, 1 A.2d 191, 61 R.I. 449

44. N.H.—State v. Wilton R. Co., 192 A. 623, 89 N.H. 59, 111 A.L.R. 52.

45. N.H.—Thompson v. Boston & M. R. R., 166 A. 249, 86 N.H. 204

46. N.H.—Thompson v. Boston & M. R. R., supra.

Jurisdiction

Where railroad had posted notice of intention to discontinue passenger train service between certain points, withdrawal of petitioners praying that commission order continuance of service held not to deprive commission of jurisdiction to investigate matter and order restoration of service if discontinuance was unreasonable.—Thompson v. Boston & M. R. R., supra.

47. Mo.—Public Service Commission of Missouri v. St. Louis-San Francisco Ry. Co., 256 S.W. 226, 301 Mo. 157.

48. S.C.—Darby v. Southern Ry. Co., 10 S.E.2d 465, 194 S.C. 421

Notice of change

The rule of public service commission requiring railroad to publish notice of proposed change in passenger schedules or time-tables eight days before change is made, and to give commission notice in writing for an equal period of time, requires railroad company to do no more than give notice, and does not require company to secure permission from commission before making change.—Darby v. Southern Ry. Co., supra

49. S.C.—Darby v. Southern Ry. Co., supra.

50. Tex.—Railroad Commission v. Fort Worth & D. C. Ry. Co., Civ. App., 161 S.W.2d 560, error refused

Operation of doubleheader trains

Under statutes authorizing railroad commission to regulate or prohibit use of doubleheader trains, but requiring commission's order to designate railroad or part of railroad on which such practice is forbidden or regulated, order prohibiting operation of doubleheader trains on any railroad in the state except on steep grades or where locomotive became temporarily disabled was invalid for want of authority.—Railroad Com-

be definite and certain.[51] It is also required that rules or orders regulating train service must be just and reasonable;[52] and the mere fact that the railroad is given an opportunity to be heard prior to the entry of the order is not sufficient to establish its validity in this respect.[53] An order respecting train service may be invalid without necessarily being also unconstitutional.[54]

Held reasonable. Rules, regulations, or orders held reasonable include requirements compelling a railroad to continue interurban service to serve people settling along the line in reliance upon continuance of such service,[55] to continue train service generally,[56] to maintain regular biweekly train service;[57] to stop trains with sleepers at stations lacking and requiring such service;[58] and to stop trains on signal at stations where they stopped occasionally[59] or at a junction point.[60] Other regulations have been held reasonable which require railroads to stop morning trains at a milk station;[61] to supply sanitary cups on trains where drinking water is furnished;[62] to stop additional trains at stations lacking adequate service,[63] to add trains on a line lacking adequate service;[64] and to run separate passenger and freight trains.[65]

Held unreasonable. Rules, regulations, or orders held unreasonable, in particular circumstances, include requirements compelling a railroad to stop additional trains at a station already having adequate service,[66] to continue the operation of certain trains,[67] to continue service by separate passenger and freight trains rather than by mixed trains;[68] to add new trains on a line already having a sufficient number,[69] to furnish drinking water on trains having a half hour run;[70] to attach sleepers to additional trains operating between cities already having adequate sleeper service;[71] to delay express trains an excessive time to accommodate locals;[72] and to rearrange train schedules contrary to convenience of general service so as

mission v Fort Worth & D. C Ry. Co., supra.

51. Tex.—Railroad Commission v. Fort Worth & D. C Ry. Co., supra.

52. Mich.—Chicago & N. W Ry. Co v. Michigan Public Service Commission, 45 N.W.2d 520, 329 Mich. 432.

Neb.—Application of Chicago, B & Q R. Co., 295 N.W. 389, 138 Neb. 767.

Tex.—Texas & N. O. R. Co. v. Railroad Commission, 200 S.W.2d 626, 145 Tex. 541—Railroad Commission v. Fort Worth & D. C. Ry. Co., Civ. App., 161 S.W.2d 560, error refused.

51 C.J. p. 1015 note 13.

Particular matters affecting reasonableness of regulation see infra subdivision b (3) of this section.

53. N.J.—Pennsylvania-Reading Seashore Lines v. Board of Public Utility Com'rs, 74 A.2d 265, 5 N.J. 114, certiorari denied Brotherhood of R. R. Trainmen v. Pennsylvania-Reading Seashore Lines, 71 S.Ct. 122, 340 U.S. 876, 95 L.Ed. —.

54. La.—Texas, etc., R. Co. v. State R. Commission, 53 So. 660, 127 La. 387.

51 C.J. p. 1015 note 11.

55. Ohio.—Hocking Valley R. Co. v. State Public Utilities Commission, 110 N.E. 521, 92 Ohio St. 9, L.R.A. 1918A 267, Ann.Cas 1917B 1154, stay of execution denied 110 N.E. 1061, 91 Ohio St. 365.

56. Ohio.—New York Cent. R. Co. v. Public Utilities Commission of Ohio, 195 N.E. 566, 129 Ohio St. 381.

Minimum passenger service

U.S.—Southern Ry. Co. v. South Carolina Public Service Commission, D.C.S.C., 31 F.Supp. 707.

57. N.M.—San Juan Coal & Coke Co. v. Sante Fe, S. J. & N. R. R., 298 P. 663, 35 N.M. 336.

58. Tex.—Gulf, etc., R. Co. v. State, Civ.App., 169 S.W. 385, error denied 181 S.W. 685, 107 Tex. 544, affirmed 38 S.Ct. 236, 246 U.S. 58, 62 L.Ed. 574.

51 C.J. p. 1015 note 15.

59. La.—Vicksburg, etc., R. Co. v. State R. Commission, 96 So. 832, 153 La. 983.

51 C.J. p. 1015 note 16.

60. Okl.—St. Louis, etc., R. Co. v. Langer, 119 P. 126, 29 Okl. 691, 44 L.R.A.,N.S., 478.

51 C.J. p. 1015 notes 17, 18.

61. Wis.—Chicago, etc., R. Co. v. State R. Commission, 146 N.W. 1129, 157 Wis. 287.

51 C.J. p. 1015 note 19.

62. N.J.—Delaware, etc., R. Co. v. Public Utility Comrs., 84 A. 702, 83 N.J.Law 212.

51 C.J. p. 1015 note 20.

63. Okl.—Missouri, etc., R. Co. v. Witcher, 106 P. 852, 25 Okl. 586.

51 C.J. p. 1015 note 21.

64. Wash.—State v. State R. Commission, 110 P. 1075, 60 Wash. 218.

51 C.J. p. 1016 note 22.

65. Idaho.—In re Application of Union Pac. R. Co. to Abandon Certain Train Service Between Cache Junction, Utah, and Preston, Idaho, and Between Ogden, Utah, and Malad, Idaho, 134 P.2d 1073, 64 Idaho 597.

51 C.J. p. 1016 note 23.

66. N.Y.—Delaware & H. R. Corporation v. Public Service Commission, 281 N.Y.S. 155, 245 App.Div. 66, affirmed 200 N.E. 298, 270 N.Y. 519.

51 C.J. p. 1016 note 24.

67. Okl.—Missouri-Kansas-Texas R. Co. v. State, 119 P.2d 835, 189 Okl. 685.

Finding not supported by evidence

Where a final order of the commission denying railroad permission to discontinue motor passenger trains is based on finding without support in evidence, the order is "unreasonable," "arbitrary" and reversible on appeal; commission did not show public "necessity" for the motor passenger trains in view of other available services of railroad and of other common carriers.—Application of Chicago, B. & Q. R. Co., 295 N.W. 389, 138 Neb. 767.

68. Idaho.—In re Application of Union Pac. R. Co. to Abandon Certain Train Service Between Cache Junction, Utah, and Preston, Idaho, and Between Ogden, Utah, and Malad, Idaho, 134 P.2d 1073, 64 Idaho 597.

69. Ala.—State R. Commission v. St. Louis, etc., R. Co., 70 So. 645, 195 Ala. 527.

51 C.J. p. 1016 note 25.

70. N.J.—Erie R. Co. v. Public Utility Comrs., 89 A. 1001, 85 N.J.Law 420.

51 C.J. p. 1016 note 26.

71. W.Va.—Chesapeake, etc., R. Co. v. Public Service Commission, 89 S.E. 844, 78 W.Va. 667.

72. Md.—Northern Cent. R. Co. v. Lafrd, 91 A. 768, 124 Md. 141, Ann. Cas 1916D 1030.

51 C.J. p. 1016 note 28.

to afford a small place on a branch line better connections with the main line than its population justifies.[73]

Sunday service. An order requiring the maintenance of Sunday train service on a branch line may be unreasonable where such service could be afforded only at considerable net loss to the railroad.[74] An order requiring trains which are run on Sunday to stop at a specified station does not violate a statute forbidding the running of more than one train a day on Sunday.[75]

(2) Proceedings

Matters affecting the train service to be provided by a railroad must be presented to the commission for determination in an orderly way and in conformity with the commission's rules. The action of the commission is subject to review in the courts to determine whether it is lawful and reasonable under the evidence.

Matters affecting the train service to be provided by a railroad must be presented to the commission for determination in an orderly way and in conformity with the commission's rules.[76] Ordinarily, a proceeding before the commission is instituted by the filing of a petition by an interested party such as the railroad whose service is in question.[77] A railroad seeking to discontinue certain service must allege and prove by competent evidence sufficient facts which would justify abandonment thereof in the light of the public convenience and necessity;[78] and the burden rests on it to establish that public convenience and necessity do not warrant continuance of the service sought to be discontinued,[79] that such service is being furnished at a loss,[80] and that the proposed substitute for the service to be discontinued is adequate, efficient, just and reasonable.[81] The commission, before exercising its discretion in such matter, is bound to have a hearing on the merits of the case,[82] and such a hearing must be conducted fairly and expeditiously.[83]

An order of the commission denying permission to a railroad to discontinue the operation of certain trains is not a purely "administrative order" of the commission, but is "judicial" in character.[84] Severable requirements of a single order of the commission regulating service will be treated as separate orders if one is unreasonable or unjust.[85] An order requiring restoration of certain discontinued trains as a condition precedent to a hearing on the railroad's application to discontinue such trains has been held invalid where there was no public necessity for the restoration of the trains and their operation entailed substantial operating losses on the railroad.[86] The board or commission may have authority to grant a rehearing, notwithstanding a change in membership of the board, where the petition for rehearing was filed before conditions in the board's order had been fulfilled.[87]

Judicial review of orders. As a general rule,

73. La.—Yazoo, etc., R. Co. v. State R. Commission, 58 So. 862, 130 La. 1012

74. N.M.—In re Southern Pac. Co., 32 P.2d 814, 38 N.M. 325

75. N.J.—Ocean Grove Camp Meeting Assoc. v. Public Utility Comrs., 82 A. 306, 82 N.J.Law 309.
51 C.J. p. 1016 note 30.

76. Ind.—Illinois Cent. R. Co. v. Public Service Commission, 75 N.E.2d 900, 225 Ind. 643.

Statute providing rules of procedure for hearings by commission on discontinuance of railway agency held invalid under constitutional provision defining jurisdiction and authority of commission.—In re Atchison, T. & S. F. Ry. Co., 20 P.2d 918, 37 N.M. 194

Order as to rates

An order of the commission relating to rates should not incorporate a provision relating to facilities for the accommodation of passengers, where the complaint raises no question as to such service.—Jones v. Delaware, L. & W. R. Co., 69 Pa.Super. 568.

77. Ill.—Gardner v. Commerce Commission, 79 N.E.2d 71, 400 Ill. 123.

78. Ill.—Gardner v. Commerce Commission, supra

Sufficiency of evidence as to matters affecting validity of order of commission see infra subdivision b (3) of this section

79. Ill.—Gardner v. Commerce Commission, supra.

Burden not sustained

Ill.—Gardner v. Commerce Commission, supra.

80. Tex.—Railroad Commission of Texas v. Texas & N. O. R. Co., Civ. App., 197 S.W.2d 176, reversed on other grounds 200 S.W.2d 626, 145 Tex. 541.

Burden of proof held met

Tex.—Railroad Commission of Texas v. Texas & N. O. R. Co., supra.

81. Idaho.—In re Application of Union Pac. R. Co. to Abandon Certain Train Service Between Cache Junction, Utah, and Preston, Idaho, and Between Ogden, Utah, and Malad, Idaho, 134 P.2d 1073, 64 Idaho 597.

82. S.C.—Darby v. Southern Ry. Co., 10 S.E.2d 465, 194 S.C. 421.

83. U.S.—Chicago, B. & Q. R. Co. v. Illinois Commerce Commission, D.C.Ill., 82 F.Supp. 368

84. Kan.—Union Pac. R. Co. v. State Corp. Commission, 194 P.2d 939, 165 Kan. 368.

85. N.M.—San Juan Coal & Coke Co. v. Santa Fé, S. J. & N. R. R., 298 P. 663, 35 N.M. 336

86. U.S.—Chicago, B. & Q. R. Co. v. Illinois Commerce Commission, D.C.Ill., 82 F.Supp. 368.

Failure to take action

Where application of railroad for permission to discontinue passenger trains had been before the Alabama public service commission for some time without any action, action of the commission in declaring that it would not hear or consider the application until restoration of the trains irrespective of great loss to the railroad was invalid.—Southern Ry. Co. v. Alabama Public Service Commission, D.C.Ala., 88 F.Supp. 441, reversed on other grounds Alabama Public Service Commission v. Southern Ry. Co., 71 S.Ct. 775, 341 U.S. 341, 95 L.Ed. ——.

87. U.S.—Northern Pac. Ry. Co. v. Board of Railroad Com'rs of Montana, D.C.Mont., 13 F.Supp. 529.

the action of the commission with respect to requiring a railroad to furnish certain train service or permitting the railroad to discontinue or change particular service is subject to review in the courts,[88] but the right to prosecute an appeal, and the requisite interest in the commission's order must be disclosed.[89] Ordinarily, the question for determination on such judicial review of the commission's order is whether such order is lawful and reasonable under the evidence.[90] In this respect, the order of the commission is presumed to be just, reasonable, and correct,[91] and the burden is on one appealing from the order of the commission to show that the order is unreasonable.[92] If there is any evidence reasonably tending to support the order, one attacking the order must establish its unreasonableness by evidence so strong and conclusive as to overcome all presumptions in its favor.[93] Moreover, the findings and order of the commission will not be disturbed unless it appears from the record that they are manifestly against the weight of the evidence and are so clearly unsupported by evidence as to show misapprehension or mistake, or willful disregard of duty.[94]

88. S.C.—Darby v Southern Ry. Co., 10 S.E.2d 465, 194 S.C. 421
Tex.—Railroad Commission of Texas v. Texas & N. O. R. Co., 200 S.W. 2d 626, 145 Tex. 541

Federal or state courts

(1) It has been held that where adequate state court review of the commission's order based on predominantly local factors is available to the party objecting to such order, and the intervention of a federal court is not necessary for the protection of federal rights, the federal court, in its discretion, should decline jurisdiction of a suit brought to review the order and to obtain the extraordinary relief of an injunction, where the moving party did not first seek the remedy open to him in the state courts.—Alabama Public Service Commission v Southern Ry Co., Ala., 71 S.Ct. 775, 341 U.S. 363, 95 L.Ed. ——.—Alabama Public Service Commission v Southern Ry. Co., Ala., 71 S.Ct. 762, 341 U.S. 341, 95 L. Ed. ——, followed in Alabama Public Service Commission v. Atlantic Coast Line R. Co., 71 S.Ct. 1012, 341 U.S. 943, 95 L.Ed. ——, and Alabama Public Service Commission v. Louisville & N. R. Co., 71 S.Ct. 1014, 341 U.S. 943, 95 L.Ed. ——.

(2) It was held, however, in an earlier case, that where there was no absolute right to a rehearing under state statute from order of state commission directing railroad company to operate one passenger train daily in each direction between certain points and procedures provided by the state statutes for review of the commission's order were judicial and not administrative remedies, railroad company could immediately seek relief from commission's order in the federal courts without first taking advantage of available state court remedies.—Ann Arbor R. Co v. Michigan Public Service Commission, D.C.Mich., 91 F.Supp. 668.

Jurisdiction of regulatory body

Where the division of public utilities of the state had no power to grant petition of trustees of two railroads to discontinue all passenger service on the lines of one of the railroads, the contention that the division had no jurisdiction over the subject matter of the case could properly be raised for the first time on appeal to the supreme court.—Trustees of New York, N.H. & H.R. Co v. Division of Public Utilities, 1 A.2d 191, 61 R.I. 449.

89. N.C.—North Carolina Utilities Commission v. City of Kinston, 20 S.E.2d 322, 221 N.C. 359.

Record

Whether protestants opposing railroad's petition for discontinuance of certain train service filed with the utilities commission had the right to appeal to the superior court from commission's order allowing petition on condition was a matter concerning which the supreme court could know judicially only what appeared on the record, and neither that court nor the court below could refer to matters not stated in the record.—North Carolina Utilities Commission v. City of Kinston, supra.

90. Kan.—Union Pac R. Co. v. State Corp. Commission, 194 P.2d 939, 165 Kan. 368
Minn.—Schain v. Great Northern Ry Co., 162 N.W. 1079, 137 Minn. 157.
Neb.—Application of Chicago, B. & Q. R. Co., 41 N.W.2d 165, 152 Neb. 367.—Application of Chicago, B. & Q. R. Co., 41 N.W.2d 157, 152 Neb. 352

Sufficiency of evidence

The only question for determination on appeal to the court from an order of the commission denying an application for permission to discontinue motor passenger trains is the sufficiency of evidence to prove that the order is not unreasonable or arbitrary.—Application of Chicago, B. & Q. R. Co., 295 N.W. 389, 138 Neb. 767.

Particular matters considered

(1) In reviewing order of the commission denying application of railroad to discontinue passenger trains on branch line and to substitute in lieu thereof mixed trains consisting of a passenger car and a baggage car on its existing freight trains, it was necessary to consider whether operation of passenger trains at a loss justified discontinuance thereof when earnings of entire system reflected no deficit.—In re Application of Union Pac. R. Co. to Abandon Certain Train Service Between Cache Junction, Utah, and Preston, Idaho, and Between Ogden, Utah, and Malad, Idaho, 134 P.2d 1073, 64 Idaho 597.

(2) In determining whether commissioners would be enjoined from enforcing order requiring railroad to continue operation of certain trains, the court would consider whether the public interest demanded a continuance of the operation of the trains.—Northern Pac. Ry. Co. v. Board of Railroad Com'rs of State of Montana, D.C.Mont., 28 F. Supp. 810.

(3) General allegations in petition to commission for rehearing, by those opposing application of railroad to discontinue operation of passenger train, that order of the commission was unreasonable and unlawful were insufficient to authorize court on appeal to consider contention that order of commission was contrary to a prior order and was based on the same facts and therefore contrary to law.—Granite City v. Illinois Commerce Commission, 95 N.E.2d 371, 407 Ill. 245

91. Okl.—Lowden v. State, 113 P.2d 991, 189 Okl. 76.

92. Minn.—Schain v Great Northern Ry Co., 162 N.W. 1079, 137 Minn. 157.

93. Okl.—Lowden v. State, 113 P.2d 991, 189 Okl. 76.

94. Ohio.—City of Delphos v. Public Utilities Commission of Ohio, 80 N.E.2d 688, 137 Ohio St. 422

Where proofs support the findings of the commission with respect to discontinuance by a railroad of a passenger service which was little used, those findings cannot be disturbed in the court.—O'Connor v. Board of Public Utility Com'rs, 24 A.2d 411, 128 N.J.Law 35, reversed on other grounds 29 A.2d 390, 129 N.J.Law 263.

As a general rule, the court reviewing the order of the commission must weigh the evidence, review the entire record and base its decision on all facts to be gleaned from the record, and it is not limited to a consideration of whether the record discloses any evidence to sustain the order[95] In some proceedings, the court may receive and consider evidence other than that offered before the commission,[96] and it may try the case de novo, exercising its own independent judgment as to both the law and the facts on the evidence presented to, and the record made before, such court[97]

Where it appears from the evidence that the order of the commission is unlawful or unreasonable, it may be set aside,[98] or its enforcement enjoined,[99] but, in the absence of abuse of its powers by the commission, a court is not justified in setting aside the order of the commission,[1] as where the evidence is insufficient to justify judicial interference therewith.[2] Where the court has set aside an order of the commission denying the application of a railroad for leave to discontinue certain service on the ground that such service was unprofitable, the commission has continuing jurisdiction to require, if warranted by the facts, a resumption of the service whenever it appears that the service is needed and may be rendered at a profit.[3]

(3) Matters Affecting Validity of Regulation

A board or commission in deciding what train service shall be provided by a railroad must be guided in its determination by the public convenience and necessity in relation to such service, and where it is sought to discontinue certain service, the controlling criteria are the character and population of the territory served, public patronage or lack thereof, the remaining transportation facilities, the expense of operation as compared with the revenue therefrom, and the financial condition of the railroad as a whole.

As a general rule, a board or commission in deciding what train service shall be provided by a

95. Kan.—Union Pac. R. Co. v. State Corp. Commission, 194 P.2d 939, 165 Kan. 368.

Public convenience

In suit by railroad for review of commission's order denying railroad's request for leave to discontinue two intra-state passenger trains operating between two communities, record established that public convenience and necessity did not require a continuation of train movements.—Chicago & N. W. Ry. Co. v. Michigan Public Service Commission, 45 N.W.2d 520, 329 Mich. 432.

96. U.S.—Atlantic Coast Line R. Co. v. Public Service Commission of S. C., D.C.S.C., 77 F.Supp. 675.

97. U.S.—Atlantic Coast Line R. Co. v. Public Service Commission of S. C., supra.

Relevancy of evidence before commission

In action before three-judge federal district court to enjoin enforcement of an order of commission requiring continued operation of two intra-state passenger trains, evidence before the commission was relevant and competent but was not necessary.—Atlantic Coast Line R. Co. v. Public Service Commission of S. C., supra.

98. Mich.—Chicago & N. W. Ry. Co. v. Michigan Public Service Commission, 45 N.W.2d 520, 329 Mich. 432.

Finding unsupported by evidence

Where a final order of the commission denying railroad permission to discontinue motor passenger trains is based on finding without support in evidence, the order is "unreasonable," "arbitrary" and reversible on appeal.—Application of Chicago, B. & Q. R. Co., 295 N.W. 389, 138 Neb. 767.

Scope of decree

Where public convenience and necessity did not require a continuation of two daily intra-state passenger trains serving two communities, a decree would be entered granting railroad permission to discontinue operation of such trains but without prejudice to further consideration by commission, if requested, as to whether public convenience would be served by additional bus passenger transportation facilities, furnished by railroad.—Chicago & N. W. Ry. Co. v. Michigan Public Service Commission, 45 N.W.2d 520, 329 Mich. 432.

99. U.S.—Atlantic Coast Line R. Co. v. Alabama Public Service Commission, D.C.Ala., 92 F.Supp. 579.

Sufficiency of evidence

(1) In suit by railroad to enjoin commission and other state officials from proceeding against plaintiff by reason of its failure to restore operation of certain passenger trains, evidence established that plaintiff would suffer irreparable damage unless court permanently enjoined defendants from imposing sanctions.—Louisville & N. R. Co. v. Alabama Public Service Commission, D.C.Ala., 93 F.Supp. 544, reversed on other grounds Alabama Public Service Commission v. Louisville & N. R. Co., 71 S.Ct. 1014, 341 U.S. 943, 95 L.Ed. ——.

(2) Evidence required granting of injunction restraining enforcement of order denying application of railroad for permission to discontinue service of certain passenger trains on ground that public necessity and convenience did not require operation of the trains which had been operated at a loss to the railroad.—Northern Pac. Ry. Co. v. Board of Railroad Com'rs of State of Montana, D.C.Mont., 28 F.Supp. 810.

1. Idaho.—In re Application of Union Pac. R. Co. to Abandon Certain Train Service Between Cache Junction, Utah, and Preston, Idaho, and Between Ogden, Utah, and Malad, Idaho, 134 P.2d 1073, 64 Idaho 597.

N.Y.—New York Cent. R. Co. v. Public Service Commission, 103 N.Y.S.2d 217, 278 App.Div. 725.

Trial court held warranted in finding that order of commission directing certain changes in passenger and freight service on a branch of its system was not unreasonable or unlawful.—Schain v. Great Northern Ry. Co., 162 N.W. 1079, 137 Minn. 157.

2. U.S.—Great Northern Ry. Co. v. Nagle, D.C.Mont., 16 F.Supp. 532.

Ohio.—Village of Paulding v. Public Utilities Commission of Ohio, 4 N.E.2d 694, 132 Ohio St. 33.

Pa.—Erie R. Co. v. Public Service Commission, 99 Pa.Super. 443.

Public necessity and convenience

Where commission determined on substantial evidence that public necessity and convenience required continued operation of trains, the court had no power to interfere with such determination.—New York Cent. R. Co. v. Public Service Commission, 103 N.Y.S.2d 217, 278 App.Div. 725.

3. Tex.—Texas & N. O. R. Co. v. Railroad Commission, 200 S.W.2d 626, 145 Tex. 541.

railroad must be guided in its determination by the public convenience and necessity in relation to such service.[4] Whether public convenience and necessity require a given service to be performed or dispensed with is a question to be determined by a separate consideration of the facts in each case, the doctrine of convenience and necessity being a relative or elastic theory rather than an abstract or absolute rule.[5] The controlling criteria with respect to whether a railroad may discontinue certain service are the character and population of the territory served thereby, public patronage or lack thereof, the remaining transportation facilities, the expense of operation as compared with the revenue therefrom, and the financial condition of the railroad as a whole,[6] but any alleged inconvenience to the public with respect to the collection, transportation, or delivery of the United States mail is not a material consideration.[7]

It follows that the expense of the particular train service and the loss resulting therefrom are an important element which may and should be considered by the commission,[8] and the commission's order to furnish service, or refusal of permission

4. Ill.—Gardner v Commerce Commission, 79 N E 2d 71, 400 Ill. 123.
Neb.—Application of Chicago, B & Q. R. Co., 41 N.W 2d 165, 152 Neb. 367.

Consideration by court

In determining whether commissioners should be enjoined from enforcing order requiring railroad to continue operation of passenger trains between certain cities, court would consider whether public convenience and necessity required continued operation of such trains—Northern Pac. Ry. Co v. Board of *Railroad Com'rs of State of Montana*, D C Mont., 46 F Supp. 340.

Partial or total discontinuance

Public convenience and necessity are the criteria against which any discontinuance of railroad service is to be measured, regardless of whether there is partial or total discontinuance of a particular service.

Mich.—Chicago & N W. Ry. Co. v. Michigan Public Service Commission, 45 N W.2d 520, 329 Mich. 432.
N J —Pennsylvania-Reading Seashore Lines v. Board of Public Utility Com'rs, 74 A.2d 265, 5 N J 114, certiorari denied Brotherhood of R R. Trainmen v Pennsylvania-Reading Seashore Lines, 71 S Ct. 122, 340 U S. 876, 95 L Ed ——.

5. Ill—Gardner v. Commerce Commission, 79 N.E.2d 71, 400 Ill. 123.

Inconvenience to few persons and businesses

Fact that discontinuance of two motor passenger trains on branch line of railroad would cause inconvenience to a few persons and businesses was not a criterion to be considered by the commission on application of railroad company for permission to discontinue the trains, where other forms of transportation were available and were preferred by the public—Application of Chicago, B & Q. R. Co., 41 N.W 2d 165, 152 Neb. 367.

6. U.S.—Louisville & N. R. Co. v. Alabama Public Service Commission, D C.Ala., 93 F.Supp. 544, reversed on other grounds Alabama Public Service Commission v. Louisville & N R Co, 71 S Ct. 1014, 341 U S. 943, 95 L Ed —— —Southern Ry. Co. v Alabama Public Service Commission, D C.Ala., 91 F Supp 980, reversed on other grounds Alabama Public Service Commission v. Southern Ry Co, 71 S Ct 762, 341 U S 341, 95 L Ed —— —Atlantic Coast Line R. Co v. Public Service Commission of S. C, D C S C, 77 F Supp 675.
Mich—Chicago & N W Ry. Co v. Michigan Public Service Commission, 45 N W 2d 520, 329 Mich. 432.

Particular matters to be considered

(1) On application by railroad to abandon passenger service on branch line and to substitute in lieu thereof mixed trains consisting of passenger and baggage cars on existing freight trains, it was necessary to consider limited public use of passenger service, expense and net loss to railroad in operation of passenger trains, available passenger service furnished by another railroad paralleling the railroad on which passenger trains were sought to be discontinued, bus service, and paved highways—In re Application of Union Pac. R Co. to Abandon Certain Train Service Between Cache Junction, Utah, and Preston, Idaho, and Between Ogden, Utah, and Malad, Idaho, 134 P.2d 1073, 64 Idaho 597.

(2) The commission was justified and had the duty to consider the inconvenience the public would suffer by reason of change in service by transmitting mail, express, and baggage, as well as passengers on the same train.—In re Application of Union Pac. R. Co. to Abandon Certain Train Service Between Cache Junction, Utah, and Preston, Idaho, and Between Ogden, Utah, and Malad, Idaho, supra.

(3) The loss of railroad transportation because of operation of motor vehicles on highways constructed and improved at public expense may properly be considered on a contested application to discontinue motor passenger trains operated at a loss on a branch line of railroad.—Application of Chicago, B. & Q. R. Co., 41 N W.2d 157, 152 Neb. 352—Application of Chicago, B & Q R Co, 295 N.W. 389, 138 Neb 767.

Proposed substitute service

In determining application to discontinue railroad service, commission need not, but may, consider proposed substitute service—New York Cent R Co v. Public Utilities Commission of Ohio, 195 N E 566, 129 Ohio St 381.

7. U S—Chicago, B. & Q R. Co v Illinois Commerce Commission, D C.Ill., 82 F Supp. 368
Neb—Application of Chicago, B & Q R. Co., 41 N W 2d 157, 152 Neb 352.

Duty to postal department

The alleged fact that mail service of communities located on branch lines of railroad would be adversely affected by discontinuance of passenger service on the lines and substitution of mixed train service, in connection with freight service provided, would not require denial of application for authority to make the change in service, since arrangement for carrying and distribution of mail is solely the province of United States postal department, and any duty owed by railroad with respect to carriage of mail was a duty to the postal department, and not to the public—Union Pac. R. Co v Public Service Commission, 132 P.2d 128, 102 Utah 465.

Finding otherwise justified

The fact, however, that the commission considered public inconvenience which would result with respect to mail service on a discontinuance of trains, although commission had no control over the mail, was not error where finding was also justified with respect to inconvenience in the handling of baggage and milk.—Gardner v Commerce Commission, 79 N E.2d 71, 400 Ill. 123.

8. Mich.—Chicago & N. W. Ry. Co v Michigan Public Service Commission, 45 N.W.2d 520, 329 Mich 432.
Neb.—Application of Chicago, B & Q R. Co., 41 N.W 2d 165, 152 Neb. 367
N.Y.—New York Cent. R. Co. v. Pub-

to discontinue service, will be held unreasonable if the expense involved is out of proportion to the public benefit conferred,[9] notwithstanding the railroad as a whole operates at a profit.[10] Conversely, an order permitting discontinuance of service will be upheld if the public benefit is too small to justify the loss to the railroad resulting from continuance.[11] Where it is so provided by stat-

lic Service Commission, 13 N Y S 2d 614, 257 App Div 558
51 C J p 1016 note 32.

Actual loss in dollars and not book loss, unless book loss reflects actual loss, must be considered in determining application to discontinue railroad service —New York Cent R Co. v Public Utilities Commission of Ohio, 195 N E 566, 129 Ohio St 381.

On question of economic waste raised in petition of railroad for leave to abandon passenger service on a branch line, disposition of case does not necessarily depend on use of a formula, but evidence presented by railroad cost accountants, although consisting of various formulas, is to be heard by commission along with other evidence —Gardner v Commerce Commission, 79 N E 2d 71, 400 Ill. 123.

Period of time involved

Where conditions of railroad transportation had changed since 1886 when branch line was constructed and during years 1937, 1938, and 1939 motor passenger trains were operated at a loss, the revenues during entire period of operation of branch line were not proper measures of earnings and expenses for purpose of determining railroad's application to discontinue motor passenger trains, earnings and expenses since 1932 were not proper measure of present or future profits and losses since railroad was required to reckon with conditions resulting in present losses.—Application of Chicago, B. & Q R. Co, 295 N W. 389, 138 Neb. 767.

Consideration by court

In determining whether decision of commission in denying application to change type of service provided by railroad can be justified under any reasonable view of the evidence, the court will consider question of relationship between cost of rendering the service and revenue received therefrom, and question of what constitutes reasonable service to the public.—Union Pac. R. Co. v. Public Service Commission, 132 P.2d 128, 102 Utah 465.

9. U.S.—Louisville & N. R. Co. v. Alabama Public Service Commission, D.C.Ala., 94 F.Supp. 892—Louisville & N R Co v Alabama Public Service Commission, 94 F. Supp 893—Louisville & N. R. Co. v. Alabama Public Service Commission, D.C.Ala., 93 F Supp. 544, reversed on other grounds Alabama Public Service Commission v. Louisville & N. R. Co., 71 S.Ct. 1014, 341 U S 943, 95 L.Ed. —— —Atlantic Coast Line R. Co. v. Alabama Public Service Commission, D C Ala., 92 F Supp. 579, reversed on other grounds Alabama Public Service Commission v. Atlantic Coast Line R Co., 71 S Ct 1012, 341 U S 943, 95 L Ed —— —Southern Ry Co v Alabama Public Service Commission, D C Ala., 91 F Supp 980, reversed on other grounds Alabama Public Service Commission v Southern Ry Co, 71 S Ct 762, 341 U S 341, 95 L Ed. —— —Ann Arbor R. Co. v. Michigan Public Service Commission, D C Mich, 91 F Supp 668—Great Northern Ry. Co v Nagle, D C Mont, 16 F Supp 532
Fla —Atlantic Coast Line R Co. v. King, 49 So 2d 89
Mich —Chicago & N W. Ry Co. v. Michigan Public Service Commission, 45 N W 2d 520, 329 Mich 432
Neb —Application of Chicago, B & Q R Co, 41 N W 2d 165, 152 Neb 367—Application of Chicago, B & Q R Co, 295 N W 389, 138 Neb 767.
N.M —In re Southern Pac Co, 32 P. 2d 814, 38 N M 325
N Y.—New York Cent R Co v. Public Service Commission, 22 N Y.S 2d 10, 260 App Div 235—New York Cent R Co v. Public Service Commission, 13 N.Y.S 2d 614, 257 App. Div 558
Tex.—Texas & N O. R Co v Railroad Commission, 200 S W 2d 626, 145 Tex 541.
Utah —Union Pac. R Co. v Public Service Commission, 132 P 2d 128, 102 Utah 465
51 C.J. p 1016 note 33.

Evidence

(1) Evidence established that order of commission requiring railroad to continue daily operation of two intra-state trains between two communities was unreasonable and confiscatory and economic loss resulting from railroad's operation of such trains overbalanced whatever convenience public derived from those trains —Chicago & N W Ry Co v Michigan Public Service Commission, 45 N W.2d 520, 329 Mich. 432

(2) Evidence established that there was no public necessity for passenger trains ordered restored by commission between certain points because the communities involved had a system of improved highways with much motor vehicle transportation.—Chicago, B. & Q. R. Co. v. Illinois Commerce Commission, D.C. Ill., 82 F.Supp. 368.

(3) Where some inconvenience would result to small number of public by discontinuance of service on branch line of railroad, but other services existent and prospective could handle all the business handled by the railroad with comparatively little extra trouble and additional expense to the public, evidence sustained implied finding that loss in revenue by continuance of service on branch line overbalanced inconvenience to the public from discontinuance thereof, and that it was unreasonable for commission to deny an application of railroad to discontinue branch line service —Corporation Commission v. Southern Pac Co., 99 P.2d 702, 55 Ariz 173.

Pending hearing

An order of commission compelling the restoration of passenger trains operated at a substantial loss pending a hearing on the railroad's application to discontinue the trains was invalid as not only compelling the doing of an idle act for purpose of inflicting irreparable injury on the railroad but as involving an injury to the larger public interest and a disregard of the railroad policy of economy laid down in the Transportation Act —Chicago, B & Q R Co. v Illinois Commerce Commission, D C Ill, 82 F Supp 368

10. U S —Atlantic Coast Line R. Co. v Public Service Commission of S. C, D C S C, 77 F Supp 675.
Neb —Application of Chicago, B & Q. R Co, 41 N W 2d 157, 152 Neb. 352.

Restoration of trains

An interstate railroad could not be compelled to restore local passenger trains operated between local points whose operation entailed substantial operating losses notwithstanding railroad's system-wide railroad earnings were sufficient to have absorbed the loss where there was no public necessity for the restoration of the trains —Chicago, B & Q R Co v. Illinois Commerce Commission, D C. Ill, 82 F Supp 368.

11. Neb —Application of Chicago, B. & Q. R Co, 41 N W.2d 157, 152 Neb 352.
Ohio —City of Delphos v Public Utilities Commission of Ohio, 80 N E 2d 688, 137 Ohio St. 422.
Va.—Lynchburg Traffic Bureau v. Commonwealth, 54 S.E 2d 66, 189 Va. 612.
51 C.J. p 1017 note 34.

Finding sustained by evidence

(1) On application by railroad to discontinue operation of a passenger train, evidence sustained finding of the commission on which order authorizing discontinuance was based. —Granite City v. Illinois Commerce

ute, the consideration of loss to the railroad resulting from certain train service is conclusive with respect to the right of the railroad to discontinue such service,[12] and in such case consideration of public convenience or necessity is not required,[13] and the commission has no alternative other than to authorize discontinuance of train service when the railroad establishes such a loss as brings it within the provisions of the statute.[14]

Ordinarily, however, the question of expense or loss is not necessarily conclusive,[15] and it must be considered in the light of the public need for the service which is an element that should receive paramount consideration.[16] Accordingly, an order for adequate train service may be reasonable even though it entails some pecuniary loss in relation to the service ordered,[17] and an order permitting discontinuance of service shown to be

Commission, 95 N.E.2d 371, 407 Ill. 245.

(2) Evidence sustained finding of commission that there was insufficient passenger traffic or possibility of such traffic to justify continuance of daily and Sunday passenger service on a portion of railroad line—Fleming v. Commonwealth ex rel. Clinchfield R. Co., 61 S.E.2d 1, 191 Va. 288.

Profitable line

Motor passenger trains operated on a branch line of a railroad at a substantial loss may properly be discontinued by the commission, where adequate public transportation is otherwise furnished, although both such branch line and main line are operated at a profit—Application of Chicago, B. & Q. R. Co., 41 N.W.2d 157, 152 Neb. 352.

12. Tex.—Texas & N. O. R. Co. v. Railroad Commission, 200 S.W.2d 626, 145 Tex. 541.

Mandatory provision

The statute providing that on application by carrier, the commission "shall" authorize the discontinuance of any passenger train when it shall be made to appear that for a period of twelve months or more, the direct operating cost of such train has exceeded the aggregate gross revenues therefrom by more than a specified percentage should be construed as being mandatory, and not as directory, in so far as commission is concerned; the fact that the statute was intended to be mandatory carried with it the implication that common carriers were privileged to avail themselves of the statutory provisions immediately on passage of the statute and reliance could be had on loss of revenue and cost of operation during the twelve months period next preceding passage of the statute.—Louisville & N. R. Co. v. Hammer, Tenn., 236 S.W.2d 971.

Evidence sustained railroad's burden of proving that with passenger traffic between certain points, offered and reasonably to be expected, operation of daily passenger train between such points did not and would not pay cost of service plus a reasonable return on property employed in rendering service, so as to entitle railroad to permission to discontinue daily service.—Texas & N. O. R. Co. v. Railroad Commission of Texas, Tex.Civ.App., 220 S.W.2d 273, error refused.

Necessity of expenditures

Railroad management has a duty to its stock and bondholders as well as a duty to the public, and would not be compelled to spend large sums of money for such things as advertising, air-conditioned cars, and better equipment in general, in proving, what it already knew, that daily passenger service between specified points in state did not and could not be made to pay, in order to be entitled under statute to permission to discontinue daily passenger service between the specified points on ground that it did not and could not be made to pay—Texas & N. O. R. Co. v. Railroad Commission of Texas, supra.

13. Tex.—Texas & N. O. R. Co. v. Railroad Commission of Texas, supra.

14. Tenn.—Louisville & N. R. Co. v. Hammer, 236 S.W.2d 971.

Where method of accounting used by railroad seeking permission to discontinue certain passenger trains under statute authorizing such discontinuance on proof that direct operating costs of trains have exceeded the aggregate gross revenues therefrom by more than a specified percentage was entirely proper and one that was recognized by other major railroad companies, and showed a deficit far in excess of statutory requirement, commission was required to grant railroad's petition for permission to discontinue the trains.—Louisville & N. R. Co. v. Hammer, supra.

15. U.S.—Great Northern Ry. Co. v. Nagle, D.C.Mont., 28 F.Supp. 812.
Ind.—Illinois Cent. R. Co. v. Public Service Commission, 75 N.E.2d 900, 225 Ind. 643—Chicago, M., St. P. & Pac. R. Co. v. Public Service Commision, 46 N.E.2d 230, 221 Ind. 1.
Mo.—State ex rel. Missouri Pac. Ry. Co. v. Atkinson, 192 S.W. 86, 269 Mo. 634, L.R.A.1918A. 46, Ann.Cas. 1917E 987.
Neb.—Application of Chicago, B. & Q. R. Co., 41 N.W.2d 165, 152 Neb. 367.
N.Y.—New York Cent. R. Co. v. Public Service Commission, 103 N.Y.S.2d 217, 278 App.Div. 725.
Ohio—Village of Millersburg v. Public Utilities Commission, 27 N.E.2d 1020, 137 Ohio St. 75.
51 C.J. p. 1017 note 35.

Loss caused by inadequate service

A railroad which allows its equipment to become so depleted and its schedules on its branch lines to be so irregular as to make use of its facilities uncomfortable and distasteful, which causes public to seek other modes of travel, is not giving service to the public under the rule of convenience and necessity, and railroad cannot justify an abandonment by using as a factor the loss of business caused by reason of such inadequate service—Gardner v. Commerce Commission, 79 N.E.2d 71, 400 Ill. 123.

Increase of rates as remedy

In proceeding by railroad to discontinue daily train service and substitute tri-weekly service, where railroad was losing profits from operation due to increased cost, and not to decrease of patronage in service, amount of return was not controlling, and remedy of railroad to recoup its diminishing returns from service on that branch was more directly in field of an increased rate structure rather than reduction of service—Alabama Public Service Commission v. Atlantic Coast Line R. Co., 45 So.2d 449, 253 Ala. 559.

16. Ohio—Village of Millersburg v. Public Utilities Commission, 27 N.E.2d 1020, 137 Ohio St. 75.

Requirements of population

In determining whether public convenience and necessity required continuation of daily passenger service provided by two intra-state trains, consideration was required to be given to requirements of population of cities, villages and territories served, as well as to financial loss sustained by railroad in operating such trains—Chicago & N. W. Ry. Co. v. Michigan Public Service Commission, 45 N.W.2d 520, 329 Mich. 432.

17. U.S.—Southern Ry. Co. v. South Carolina Public Service Commission, D.C.S.C., 31 F.Supp. 707—Great Northern Ry. Co. v. Nagle, D.C.Mont., 28 F.Supp. 812.
Ariz.—Corporation Commission v.

needed by the public may be unreasonable notwithstanding loss resulting from the operation of such service.[18] The earnings of the entire system of the railroad may be considered by the commission as a factor in weighing the question of public necessity and convenience,[19] and, where the operation of the entire system of the railroad yields a net profit, the loss resulting from the maintenance of a certain service must be of sufficient importance to outweigh the inconvenience which the public will suffer as a result of its discontinuance in order to justify the discontinuance of that service.[20] Under some statutes, the commission may relax a requirement that the railroad furnish certain train service, where it is not necessary in the rendition of adequate service to the public, whether or not such train service is being furnished at a loss.[21] Where the duty of a railroad to maintain daily railroad service is not imperative under statute, but is relative, the railroad, in order to obtain a reduction in service is not required to show that the rate of return on the system requires a reduction of service or that it would impede interstate commerce, but that the reduced plan would supply public necessities.[22]

A railroad's income from sources other than its own railroad operations should not be taken into account in considering the confiscatory effect of an order of the commission requiring the continued operation of certain trains.[23] A particular year which is not typical in railroad operation should not be used as a standard by which to gauge the amount of traffic necessary to retain service.[24] The cost of operation should not be figured merely on the basis of immediate cash outlay.[25] In determining expenses relative to a branch line, an apportionment of expenses between the branch and main lines is proper,[26] and claims for damages may be included in the apportionment.[27]

§ 419. —— Duty of Railroad in General

A railroad company must provide such train service and accommodations as will meet the necessities of the general public, and not serve merely private interests; but the extent of the duty to furnish train service varies as the exigencies of the traffic and its remunerative character demand and justify, and ordinarily rests in the sound discretion of the railroad.

A railroad company authorized to condemn land and act as a common carrier must provide such train service and accommodations as will meet the necessities of the general public,[28] and not serve

Southern Pac. Co., 99 P 2d 702, 55 Ariz 173.

Fla —State v. Georgia Southern & F Ry. Co, 190 So 527, 139 Fla. 115, 123 A.L R. 914.

Idaho —In re Application of Union Pac R Co to Abandon Certain Train Service Between Cache Junction, Utah, and Preston, Idaho, and Between Ogden, Utah, and Malad, Idaho, 134 P.2d 1073, 64 Idaho 597.

Ind —Chicago, M, St P & Pac R Co. v. Public Service Commission, 46 N E 2d 230, 221 Ind 1.

Ohio —New York Cent. R. Co. v Public Utilities Commission of Ohio, 195 N E 566, 129 Ohio St 381.

51 C J p 1017 note 36.

Evidence

(1) Evidence sustained finding by commission that present and future public convenience and necessity indicated that inconvenience and injury occasioned by granting of application for discontinuance of certain service would off-set any burden existing in present operations imposed on railroad.—Alabama Public Service Commission v. Atlantic Coast Line R. Co., 45 So.2d 449, 253 Ala. 559.

(2) Evidence sustained order denying railroad's petition, on ground that miners had adequate means of transportation to mine without miners' train, for authority to discontinue miners' train serving a specified route —Chicago, M., St P. & Pac. R Co. v Public Service Commission, 46 N E 2d 230, 221 Ind 1

Postponement of discontinuance of service

Communities served by unprofitable passenger trains held entitled to about eleven months to make line self-sustaining before railroad could again petition for discontinuing service —New York Cent. R Co v Public Utilities Commission, 179 N.E 739, 124 Ohio St. 549.

18. Ohio —Village of Millersburg v. Public Utilities Commission, 27 N. E 2d 1020, 137 Ohio St. 75

19. Ill —Gardner v. Commerce Commission, 79 N E 2d 71, 400 Ill. 123.
Va —Fleming v. Commonwealth ex rel. Clinchfield R Co, 61 S E 2d 1, 191 Va 288.

20. Ala —Alabama Public Service Commission v. Atlantic Coast Line R. Co, 45 So.2d 449, 253 Ala. 559.

21. Tex.—Railroad Commission of Texas v. Texas & N. O. R. Co., Civ. App., 197 S.W 2d 176, reversed on other grounds 200 S.W.2d 626, 145 Tex 541.

22. Ala.—Alabama Public Service Commission v. Atlantic Coast Line R Co, 45 So 2d 449, 253 Ala. 559.

23. U.S —Atlantic Coast Line R Co. v. Public Service Commission of S C., D.C S C., 77 F Supp. 675.

24. Ohio —New York Cent R Co. v. Public Utilities Commission, 179 N E 739, 124 Ohio St 549

25. U S —Mississippi River Commission v Mobile, etc, R. Co, Miss, 37 S Ct 602, 244 U.S 388, 61 L.Ed 1216
51 C J. p 1017 note 37

26. La —Yazoo, etc, R Co v. State R Commission, 58 So 862, 130 La. 1012.
51 C.J. p 1017 note 38.

27. La —Yazoo, etc, R. Co. v. State R. Commission, supra.
51 C J. p 1017 note 39.

28. U.S.—Southern Ry. Co. v. South Carolina Public Service Commission, D C S C, 31 F Supp 707.
Neb —Application of Chicago, B. & Q. R Co, 41 N.W 2d 165, 152 Neb 367
N.J —O'Connor v Board of Public Utility Com'rs, 29 A 2d 390, 129 N J Law 263
51 C.J. p 1017 note 47.

Imperative duty

The duty to furnish reasonably adequate train service to local communities served by railroad is essentially among the imperative duties that are by law imposed on railroads in consideration of privileges conferred on them by state for benefit of public —State v Georgia Southern & F Ry Co, 190 So. 527, 139 Fla. 115, 123 A L.R. 914.

merely private interests.[29] Fulfillment of its duty, of course, requires the furnishing of suitable cars and locomotives.[30] Apart from contract,[31] a railroad is under no duty to supply train service for individual interests,[32] although it may do so within limitations not adversely affecting its public duties.[33]

The extent of a railroad's duty to furnish train service varies as the exigencies of the traffic and its remunerative character demand and justify,[34] and ordinarily rests in the sound discretion of the railroad.[35] A railroad may, if it so chooses, and no statutory or constitutional inhibitions exist, exercise only those provisions of its charter permitting carriage of passengers.[36] It has been held, however, that where a railroad corporation is authorized by its charter and the underlying statute to carry both passengers and property, it is under a duty to carry freight as well as passengers where public convenience so requires,[37] and that the fact that it was granted a certificate of convenience and necessity on testimony concerning merely the carriage of passengers does not affect such duty.[38] If the duty to run trains between designated points exists, the road will not be excused from performance of its duty by the fact that there are other and inadequate transport facilities between the same points.[39]

Train service, once established, should not be discontinued unless and until some good and sufficient reason is shown therefor,[40] and a railroad may not at will abandon lines or trains or even particular types of service that railroads customarily perform.[41] The fact that a train served only employees of an industry working at a particular place did not preclude the service from being a "public service" so as to authorize the railroad to discontinue the train on the ground that the train did not serve the general public, where the train had been operated for a long period of years under a public franchise.[42] On the other hand, a railroad is not required to continue offering service to the public which the public would not use, where the offer is a financial burden and demanding its continuance is unreasonable,[43] and, under

29. Ohio—State v Hazelton, etc., R Co., 40 Ohio St. 504.
51 C J p 1018 note 48

30. Tex—Gulf, etc, R Co. v. State, 120 S W. 1028, 56 Tex Civ.App. 353
51 C J. p 1018 note 49.

31. U S—Atchison, etc., R. Co. v. Tiedt, Ill., 196 F. 348, 116 C.C.A. 168, 40 L.R.A.,N S., 848, certiorari denied 32 S.Ct. 836, 225 U S. 702, 56 L Ed. 1264.
51 C J. p 1018 note 50.

32. U S—Atchison, etc., R. Co. v. Tiedt, supra.
51 C J. p 1018 note 51.

33. U.S.—Atchison, etc., R Co. v. Tiedt, supra.
51 C.J. p 1018 note 52.

34. U S.—Alabama Public Service Commission v. Southern Ry Co, Ala., 71 S Ct. 762, 341 U S. 341, 95 L.Ed. ——.
Mich.—Chicago & N. W. Ry. Co. v. Michigan Public Service Commission, 45 N.W.2d 520, 329 Mich. 432
N.H—Thompson v. Boston & M. R. R., 166 A. 249, 86 N.H. 204.
51 C J. p 1018 note 54.

Extent of "absolute duty"

With respect to right of railway company to discontinue operation of two trains, the operation of which was allegedly in excess of company's absolute duty and resulted in annual loss to company, the "absolute duty" of company required only that reasonably adequate mail and express facilities along the line of road in question be furnished.—Missouri-Kansas-Texas R. Co. v. State, 119 P.2d 835, 189 Okl. 685.

A proviso or obligation, imposed on railroad by franchise and legislative act that railroad should maintain a railroad of the first class along route equipped with ample accommodations for all passenger travel and freight transportation, is relative and subject to the criterion of whether public convenience and necessity demands continued operation of passenger trains which railroad sought to discontinue on such route. —Lynchburg Traffic Bureau v. Commonwealth, 54 S E.2d 66, 189 Va 612.

35. Tenn.—Nashville, etc, R. Co v. Hannah, 27 S W.2d 1089, 160 Tenn 586, 70 A L R. 837.
51 C.J. p 1018 notes 55, 56

36. Ill.—Metropolitan West Side Electric R. Co. v. Chicago, 104 N E. 165, 261 Ill. 624
51 C J. p 1019 note 58.

37. N.Y—People ex rel. New York Cent. R Co. v. Public Service Commission, Second Dist, 183 N.Y.S. 930, 193 App.Div. 322.

38. N.Y.—People ex rel New York Cent. R. Co v. Public Service Commission, Second Dist., supra.

39. Ky—Southern R. Co. v. Hatchett, 192 S.W. 694, 174 Ky. 463, L.R. A 1917D 1105.
51 C J. p 1018 note 53.

40. Ohio—New York Cent R. Co. v. Public Utilities Commission of Ohio, 195 N.E. 566, 129 Ohio St. 381.
Matters affecting validity of determination by commission of railroad's right to discontinue service see supra § 418 b (3).

Consideration of public

In determining the necessity for continued operation of motor passenger trains on branch line of railroad, consideration should be given to the public rather than to individuals.—Application of Chicago, B & Q. R Co., 295 N.W. 389, 138 Neb 767.

Only service on particular line

When particular railroad service sought to be discontinued is only service along particular line serving number of communities, discontinuance should not be authorized unless reasonable, in view of public welfare and cost of operating service.—New York Cent. R Co v Public Utilities Commission of Ohio, 195 N E 566, 129 Ohio St. 381.

41. Neb—Application of Chicago, B. & Q. R. Co, 41 N.W 2d 165, 152 Neb 367.
Necessity of obtaining approval of commission see supra § 418 a (2) (b)

A railroad company, under charter, cannot abandon its service in part and continue to exercise its charter rights in other respects, but it is bound to serve public adequately as long as it continues to function as a corporation under its charter, but it has not violated its charter if it furnishes adequate and reasonable service.—Darby v. Southern Ry. Co., 10 S E.2d 465, 194 S C 421.

42. Ind.—Chicago, M., St. P. & Pac. R. Co. v. Public Service Commission, 46 N.E.2d 230, 221 Ind. 1.

43. U.S.—Louisville & N. R. Co. v. Alabama Public Service Commis-

some statutes, a railroad has the right to discontinue train service between certain points when the traffic does not pay the cost of service plus a reasonable return, without consideration of public convenience or necessity[44] In considering the question whether a railroad is obliged to continue the furnishing of certain train service, the entire revenues of the system are to be taken into account, and not merely the direct return of the service sought to be discontinued,[45] but the fact that the entire system operates at a profit is not conclusive of the railroad's duty to furnish service,[46] and particular train service operated at a loss may properly be discontinued where adequate transportation is otherwise furnished although the entire system operates at a profit[47]

Governmental regulations as to train service must be obeyed[48] Under a statute empowering a board or commission to authorize a railroad, under specified conditions, entirely to discontinue particular intra-state passenger service, there is no implied necessity for a railroad to secure permission of the board or commission before merely changing its train schedule.[49] A railroad's statutory duty to maintain appropriate train service to meet public needs must be performed, even though its cost exceeds the receipts from rendering the particular service, when the burden of such service does not unduly impair the total revenue receipts of the railroad from all sources on its entire system.[50]

§ 420. —— Number of Trains, Cars, and Engines

Subject to proper regulation, the number of cars and engines or trains to be used rests primarily in the discretion of the operating railroad. A road may be obligated under statutory or charter provisions to run trains on Sunday.

Subject to proper regulation, discussed supra §§

sion, D C Ala, 93 F Supp 544, reversed on other grounds Alabama Public Service Commission v. Louisville & N. R. Co, 71 S Ct. 1014, 341 U S. 943, 95 L Ed ——.

Neb —Application of Chicago, B & Q R Co., 41 N.W 2d 165, 152 Neb 367.

N H —Thompson v. Boston & M. R. R, 166 A. 249, 86 N.H. 204.

Unnecessary and useless expenditures

If passenger service furnished by railroad is in all respects adequate, efficient, just and reasonable as required by statute, it is neither just nor reasonable to impose an unreasonable and unjust economic loss on the railroad, and, indirectly, on the public, to require unnecessary and useless expenditures —In re Application of Union Pac. R. Co. to Abandon Certain Train Service Between Cache Junction, Utah, and Preston, Idaho, and Between Ogden, Utah, and Malad, Idaho, 134 P.2d 1073, 64 Idaho 597.

What receipts considered

In determining whether primary duty of railroad to render minimum statutory train service would be so burdensome, if continued, as to warrant proposed reduction in local service, receipts from interstate freight, passenger and other service over railroad's line and from through interstate passenger train service operating over railroad's line could be considered.—State v. Georgia Southern & F. Ry. Co., 190 So. 527, 139 Fla. 115, 123 A.L.R. 914.

44. Tex —Texas & N. O. R. Co. v. Railroad Commission of Texas, Civ.App., 220 S.W.2d 273, error refused.

Statute held valid

The Constitution in declaring railroads to be public highways and railroad companies to be common carriers does not preclude enactment of a statute contrary to common-law rule, which required railroad to furnish adequate service, under which statute railroad could discontinue daily passenger service between intra-state points when traffic did not and would not pay cost of service plus reasonable return, without consideration of public convenience or necessity —Texas & N. O R. Co. v. Railroad Commission of Texas, supra.

45. Idaho.—In re Application of Union Pac R. Co. to Abandon Certain Train Service Between Cache Junction, Utah, and Preston, Idaho, and Between Ogden, Utah, and Malad, Idaho, 134 P.2d 1073, 64 Idaho 597.

46. Idaho —In re Application of Union Pac. R. Co. to Abandon Certain Train Service Between Cache Junction, Utah, and Preston, Idaho, and Between Ogden, Utah, and Malad, Idaho, supra.

47. Neb.—Application of Chicago, B. & Q. R. Co., 295 N.W. 389, 138 Neb. 767.

Mere inconvenience to public

In determining the financial loss of railway company as warranting discontinuance of operation of certain trains, where decreased facilities would afford same essential service as presently performed with mere inconvenience resulting to the public, the inquiry should be limited to the revenue and expense arising from the particular service sought to be discontinued and company should not be required to show financial loss after considering all revenues from entire system.—Missouri-Kansas-Texas R. Co. v. State, 119 P 2d 835, 189 Okl 685

48. U S —Southern Ry Co. v. South Carolina Public Service Commission, D.C S C., 31 F Supp. 707.
51 C.J p 1019 note 60.

Carriage of both freight and passengers

N.J —O'Connor v. Board of Public Utility Com'rs, 29 A 2d 390, 129 N J.Law 263.

Contractual obligation

Where, in accepting and operating line of railroad in state, railway obligated itself not to be relieved from any of duties or burdens placed on it by laws of state, the obligation was contractual in nature and extended to the statutory duty relative to train service —State v. Georgia Southern & F. Ry. Co., 190 So. 527, 139 Fla. 115, 123 A.L.R. 914.

Service rendered at loss

The service of one mixed passenger and freight train each way every day except Sundays is imperative statutory duty which should be rendered by railroad in interest of public necessity for adequate local service, even though particular service is rendered at relatively small financial loss when railroad's entire system has substantial net earnings over all operating expenses, and loss in rendering particular local service is not so out of proportion to reasonable public necessities as to operate as an unlawful deprivation of property rights of railroad.—State v. Georgia Southern & F. Ry Co., supra.

49. Tenn.—Nashville, C. & St. L Ry. Co. v. Hannah, 27 S.W 2d 1089, 160 Tenn. 586, 70 A.L R. 837.
51 C.J. p 1019 note 62.

50. Fla.—State v. Georgia Southern & F. Ry. Co, 190 So. 527, 139 Fla 115, 123 A.L R. 914.

417, 418, the number of cars and engines[51] or trains[52] to be used rests primarily in the discretion of the operating railroad. Whether the number of cars, engines, and trains is sufficient or insufficient will depend on the relative public necessity and expense of operation.[53] So, where a railroad seeks to reduce the number of daily trains operated on its line, each case must be determined by a fair consideration of all the pertinent facts affecting the rights of the public, the duty of the carrier, the burden to it, and the reasonable needs of the public.[54] The number of trains required to be operated by a railroad may, however, be fixed by its charter,[55] and, where the charter requires the railroad to run "at least" one daily train in each direction, the fact that such requirement is not adapted to existing conditions does not authorize disuse of the formula since its wisdom is not a legal issue.[56]

Particular statutory provisions. Under a statute requiring operation of one train a day each way over all lines exceeding five miles in length, the distance between scheduled stopping places is the rule of measurement to be applied.[57] It has been held that operation of a through train not stopping at way stations is insufficient compliance with such a statute.[58] Under a state statute prohibiting a railroad from abandoning any portion of its service to the public unless and until it shall first have obtained from a state board or commission a permit allowing such abandonment, a railroad should apply to the state board or commission for such permit before discontinuing interstate trains rendering intra-state service.[59]

Sunday trains. A road may be obligated under statutory[60] or charter[61] provisions to run trains on Sunday. Under a statute requiring every railroad to run at least one passenger train each way over all lines "every day," the phrase "every day" includes Sundays as well as week days.[62] Under a statute requiring railroads to operate regular passenger trains on Sunday, it has been held that a road is not under a duty to do so where, without its fault, the roadbed is unsafe for use by regular passenger trains.[63]

§ 421. —— Stopping at Stations or Other Places

A railroad company is bound on common-law principles to stop a sufficient number of its trains at stations to meet the demands of public convenience and business necessity, and, under statutory provisions designating places at which trains shall stop, the duty of the road to stop trains at places so designated is mandatory; but within such limitations imposed by law, a railroad may, in its discretion, control by reasonable regulations the stations or other places at which particular trains shall stop.

A railroad company is bound on common-law principles to stop a sufficient number of its trains at stations to meet the demands of public convenience and business necessity,[64] and, under statutory provisions designating places at which trains shall stop, the duty of the road to stop trains at places so designated is mandatory.[65] Within the limitations so imposed by law, a railroad may, in its discretion, control by reasonable regulations

51. Fla.—State v. Atlantic Coast Line R. Co., 44 So. 213, 53 Fla. 650, 13 L.R.A.,N.S., 320, 12 Ann.Cas. 359.
51 C.J. p. 1019 note 65.

52. Tenn.—Nashville, etc., R. Co. v. Hannah, 27 S.W.2d 1089, 160 Tenn. 586.

53. Okl.—Missouri-Kansas-Texas R. Co. v. State, 119 P.2d 835, 189 Okl. 685.
51 C.J. p. 1019 note 67.
"Absolute duty" not involved
Whether railway company should be permitted to discontinue operation of two day trains between certain points while continuing operation of two night trains, so as to give same character of service as discontinued trains, did not involve the "absolute duty" of railway company, and, hence, only raised question whether decreased facilities would be adequate and reasonable under the circumstances, such facilities being required only to be reasonably commensurate with patronage and receipts from the public to whom service was rendered.—Missouri-Kansas-Texas R. Co. v. State, supra.

54. Fla.—State v. Georgia Southern & F. Ry. Co., 190 So. 527, 139 Fla. 115, 123 A.L.R. 914.

55. N.H.—State v. Wilton R. Co., 192 A. 623, 89 N.H. 59, 111 A.L.R. 52
Provision not repealed
The charter provision requiring railroad to run "at least" one daily train each way was not repealed by act creating public service commission.—State v. Wilton R. Co., supra.

56. N.H.—State v. Wilton R. Co., supra.

57. Ky.—Southern R. Co. v. Hatchett, 192 S.W. 694, 174 Ky. 463, L.R.A.1917D 1105.
51 C.J. p. 1019 note 69.

58. Ky.—Commonwealth v. Louisville, etc., R. Co., 85 S.W. 712, 120 Ky. 91, 27 Ky.L. 497.—Contra Commonwealth v. Louisville, etc., R. Co., 66 S.W. 753, 23 Ky.L. 1986.

59. U.S.—St. Louis-San Francisco R. Co. v. Alabama Public Service Commission, Ala., 49 S.Ct. 383, 279 U.S. 560, 73 L.Ed. 843.

60. Mo.—State v. Chicago, etc., R. Co., 143 S.W. 785, 239 Mo. 196.

61. Okl.—Atchison, etc., R. Co. v. Miller, 114 P. 1104, 28 Okl. 109.
51 C.J. p. 1020 note 75.

62. Mo.—State v. Chicago, etc., R. Co., 143 S.W. 785, 239 Mo. 196.

63. Ky.—Louisville, etc., R. Co. v. Commonwealth, 194 S.W. 315, 175 Ky. 372, 377
51 C.J. p. 1020 note 80.

64. U.S.—Delaware, etc., R. Co. v. Van Santwood, D.C.N.Y., 216 F. 252.
Ill.—People v. Louisville, etc., R. Co., 10 N.E. 657, 120 Ill. 48.

65. Ill.—Illinois Cent. R. Co. v. People, 33 N.E. 173, 143 Ill. 434.
51 C.J. p. 1021 note 92.

the stations[66] or other places[67] at which particular trains shall stop. It must, however, stop trains at stations scheduled for their stoppage,[68] or on flag at nonscheduled stations reasonably requiring such service.[69] The time of stoppage should be of reasonable duration,[70] or, where the matter is regulated by statute, for the time therein specified.[71]

Particular statutory provisions. A statute providing that every railroad shall furnish sufficient accommodations for the transportation of all persons and property offered at any established station, siding, or stopping place, and shall take and transport and discharge passengers at, from, and to such places, requires railroads to stop cars at established places,[72] but does not require the road to stop cars at any particular and nonestablished place.[73] Statutory provisions relative to the number of passenger trains a day to be stopped at stations of a specified character have been construed as not including mixed trains.[74]

Repealed statutes. Where a statute requiring trains to stop at designated stations has been followed by a later enactment leaving the matter of train stops to the discretion of a board or commission, there is no duty to obey the train stop provisions of the first statute,[75] since the later has impliedly repealed the earlier.[76]

§ 422. —— Accommodations on Trains

A railroad must provide its trains with such accommodations and facilities as are reasonably necessary under prevailing conditions.

Both under its common-law duty and under some governmental regulations, a railroad must provide its trains with such accommodations and facilities as are reasonably necessary under prevailing conditions,[77] such as drinking water,[78] food,[79] seats, as discussed in Carriers § 645, heat[80] safe heating arrangements,[81] light,[82] and toilets.[83] A railroad making suitable provisions for day coach passengers on other trains may run all-Pullman trains from which passengers lacking such accommodations are excluded.[84]

§ 423. —— Separate Accommodations for Races

Compliance must be had with statutes requiring a railroad to furnish separate accommodations for the white and colored races on passenger trains, and the duty exists to provide the separate accommodations irrespective of whether or not persons of both races are in fact present on a train, and despite difficulties of compliance arising from press of business.

A railroad company must comply with statutes requiring it to furnish separate accommodations for the white and colored races on passenger trains.[85] Such statutes are ordinarily construed as imposing the duty to provide the separate accommodations irrespective of whether or not persons of both races are in fact present on a train,[86] and despite difficulties of compliance arising from

66. Okl.—Chicago, etc., R. Co. v. Sheets, 154 P. 550, 54 Okl. 586.
51 C.J. p. 1020 note 83

Interstate passenger trains may not be required to service local stations when it is shown that passenger facilities furnished by the carrier are adequate and reasonable.—Atlantic Coast Line R. Co. v. King, Fla., 49 So.2d 89

67. Or.—Schanen-Blair Co. v. Southern Pac. Co., 136 P. 886, 68 Or. 106
51 C.J. p. 1020 note 84

68. Ark.—Chicago, etc., R. Co. v. Claunts, 138 S.W. 332, 99 Ark. 248.
Ill.—Ohio, etc., R. Co. v. People, 29 Ill.App. 561.
51 C.J. p. 1020 note 85

69. Okl.—Stepp v. Wichita Falls, etc., R. Co., 115 P. 1012, 29 Okl. 71.
51 C.J. p. 1020 note 86.

70. Ark.—Chicago, etc., R. Co. v. Claunts, 138 S.W. 332, 99 Ark. 248.
51 C.J. p. 1020 note 87.

71. Tex.—Davidson v. State, 4 Tex. App. 545, 30 Am.R. 166.
51 C.J. p. 1020 note 89

72. Utah.—State v. Ogden Rapid Transit Co., 112 P. 120, 38 Utah 242.

73. Utah.—State v. Ogden Rapid Transit Co., supra.
51 C.J. p. 1021 note 97.

74. Wis.—Chicago, etc., R. Co. v. State R. Commission, 140 N.W. 296, 152 Wis. 654, 662, reversed on other grounds 35 S.Ct. 560, 237 U.S. 220, 59 L.Ed. 926
51 C.J. p. 1021 note 3.

75. Kan.—State v. Atchison, etc., R. Co., 230 P. 333, 117 Kan. 86.

76. Kan.—State v. Atchison, etc., R. Co., supra.

77. Ky.—Louisville, etc., R. Co. v. Commonwealth, 170 S.W. 162, 160 Ky. 769
51 C.J. p. 1021 notes 8, 11–17

78. N.J.—Erie R. Co. v. Public Utility Comrs., 89 A. 1001, 85 N.J.Law 420
51 C.J. p. 1021 note 11.

79. Okl.—Harvey v. State Corp. Commission, 229 P. 428, 102 Okl. 266, 36 A.L.R. 1445
51 C.J. p. 1021 notes 8, 11–17.
Duty of carrier to afford opportunity to procure food see Carriers § 645.

80. Ky.—Louisville, etc., R. Co. v. Commonwealth, 170 S.W. 162, 160 Ky. 769

81. N.Y.—People v. Clark, 14 N.Y.S. 642, 8 N.Y.Cr. 169, 179
Ohio.—Gause v. Lake Shore, etc., R. Co., 4 Ohio Dec., Reprint, 369, 2 Clev.L.Rep. 44.

82. Ky.—Louisville, etc., R. Co. v. Commonwealth, 170 S.W. 162, 160 Ky. 769.

83. Ky.—Louisville, etc., R. Co. v. Commonwealth, supra.
51 C.J. p. 1021 note 17.

84. Mont.—Doherty v. Northern Pac. R. Co., 115 P. 401, 43 Mont. 294, 36 L.R.A.,N.S., 1139.
51 C.J. p. 1022 note 18.

85. Miss.—Ammons v. Murphree, 2 So.2d 555, 191 Miss. 238, suggestion of error overruled 2 So.2d 830, 191 Miss. 238.
10 C.J. p. 804 note 59 [b].
Validity of statute see supra § 417.
Like effect
Separate coach law applies with like effect to both white and colored passengers using railroads for travel.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.

86. Ky.—Louisville, etc., R. Co. v.

press of business.[87] Such statutes are for the protection of those who are to receive the accommodations,[88] and when an employee of the railroad is himself receiving the accommodations, he is as much within the statute and its purposes as if he were during that time a passenger.[89] In other words, the statute applies without regard to whether those receiving the accommodations while riding on the train are passengers or employees of different races.[90] The term "accommodations" in the statute is used in the same sense as is understood by its analogous use in connection with accommodations at hotels or inns.[91]

Character of railroad and train. Under a statute requiring every railroad operating passenger cars or coaches over a track or line within the state to provide separate and equal coach accommodations for white and colored persons, an interstate train doing any intra-state business is within the requirement.[92] Under a separate coach statute providing that the separation requirement shall not apply to transportation of passengers carried in a caboose car attached to a freight train, a mixed freight and passenger train is without the exception and subject to the separation requirements.[93] Where, however, passengers are in fact carried in a caboose car attached to a freight train, there is no duty to separate the races,[94] even though no other train is provided for passenger carriage.[95]

Character of accommodations. Under some statutes requiring separate accommodations for the white and colored races, the character of the accommodations must be equal,[96] but it has been held that identical accommodations need not be provided in order to secure equality.[97]

Pullmans Under a statute requiring every railroad operating railroad cars or coaches on a line within the state to provide separate and equal accommodations for white and colored people, it has been held that a railroad fulfills its duty by furnishing separate day coaches and is not liable for penalty because a sleeper owned and operated by the Pullman Company and attached to its train lacks separate compartments for the different races.[98]

Posting sign. Under a separate coach statute requiring railroads to furnish separate coaches for white and colored passengers and to post in a conspicuous place a sign indicating the race for which designated, the railroad does not fulfill its duty by merely furnishing separate coaches without posting a sign in a conspicuous place.[99]

§ 424. Operating Equipment

The state, or a duly authorized board or commission, may regulate the operating equipment of a railroad; but such regulations should be certain and definite.

Under its power to regulate the operation of railroads, a state or a board or commission, under authority delegated to it, may regulate the operating equipment of railroad rolling stock;[1] and a railroad's violation of an order of a commission prescribing such equipment may constitute negligence per se.[2] Under statutes conferring on a board or commission general powers relative to regulation of rates, service, and discrimination, it cannot regulate operating equipment.[3] Under a statute authorizing a board or commission to require cab curtains for locomotives, it has implied power to prescribe the general specifications of the curtains.[4]

Commonwealth, 188 S.W 394, 171 Ky. 355, L.R.A.1917B 544.
51 C.J. p 1022 note 29.

87. Tex.—Southern Kansas R. Co. v State, 99 S.W. 166, 44 Tex.Civ.App. 218.

88. Miss.—Ammons v. Murphree, 2 So.2d 555, 191 Miss. 238, suggestion of error overruled 2 So 2d 830, 191 Miss. 238.

89. Miss.—Ammons v. Murphree, supra.

90. Miss.—Ammons v Murphree, 2 So 2d 830, 191 Miss. 238.

91. Miss.—Ammons v. Murphree, 2 So 2d 555, 191 Miss. 238, suggestion of error overruled 2 So.2d 830, 191 Miss. 238.

92. Ky.—Louisville, etc., R. Co. v. Commonwealth, 188 S W 394, 171 Ky. 355, L.R.A.1917B 544.

93. Ky.—Mammoth Cave R. Co. v. Commonwealth, 197 S W. 406, 176 Ky. 747
51 C J. p 1023 note 35.

94. Ky.—Southern R. Co. v. Commonwealth, 110 S.W. 372, 129 Ky 87, 33 Ky.L. 430.
10 C.J. p 804 note 59 [d].

95. Ky.—Southern R Co. v Commonwealth, supra.
51 C.J. p 1023 note 37.

96. Miss.—Illinois Cent. R. Co. v. Redmond, 81 So. 115, 119 Miss. 765

Toilet facilities and smoking compartments

Miss.—Illinois Cent. R. Co. v. Redmond, supra.

97. Ky.—Louisville, etc., R. Co. v. Commonwealth, 170 S W. 162, 160 Ky 769.
51 C.J. p 1023 note 40.

Substantial similarity in accommodations held sufficient

Ky.—Louisville, etc., R. Co. v. Commonwealth, supra.

98. Ky.—Commonwealth v. Illinois Cent. R Co, 133 S.W 1158, 141 Ky. 502, 32 L R A,N.S, 801.
51 C J. p 1023 note 42.

99. Ky.—Chesapeake, etc., R Co. v. Commonwealth, 149 S W. 826, 149 Ky. 386.
51 C.J. p 1023 note 44.

1. U.S.—U S v Western, etc., R. Co., D C.Ga., 297 F. 482.
51 C.J. p 1023 note 49.

2. Ohio.—Pennsylvania R. Co. v. Moses, 182 N.E. 40, 42 Ohio App. 220.

3. Ohio.—State v. New York Cent. R Co., 154 N.E. 790, 115 Ohio St. 477.
51 C.J. p 1023 note 51.

4. Wis.—Chicago, etc., R. Co. v. State R. Commission, 205 N.W. 932, 188 Wis. 232.

Certainty and definiteness. Rules, regulations, or orders of a board or commission relative to operating equipment must be certain and definite[5]

Push cars. The mere fact that a statute requiring clearance before moving trains or speeders on a logging railroad's right of way is silent as to push cars cannot be construed as a complete inhibition against the use of push cars on such railroads.[6]

§ 425. —— Federal Safety Appliance Act

a. In general
b. Automatic coupling
c. Brakes
d. Repair of defective cars

a. In General

The Federal Safety Appliance Act imposes an absolute duty on railroads to equip their cars properly; and the act, being remedial, is liberally construed to accomplish its intent.

The federal statutes and amendments known as the Safety Appliance Act were designed to protect the lives and safety of trainmen and travelers[7] and impose on railroads subject to the act the duty to equip cars properly.[8] The validity of this act has been upheld[9] notwithstanding it imposes an absolute duty of compliance[10] Rules adopted by the interstate commerce commission in the exercise of its authority under the act to set standards of equipment are an integral part of the act and have the force of statute.[11] The act is remedial,[12] and its provisions, as well as orders of the interstate commerce commission promulgated thereunder, should be construed liberally[13] and in such manner as to give effect to the intention of the act.[14]

The duty of a railroad to observe the requirements of the Federal Safety Appliance Act has been variously stated to be absolute,[15] imperative,[16] positive,[17] mandatory,[18] unqualified,[19] and unconditional.[20] The courts should not countenance the interpolation of exceptions not contained in the act,[21] or be moved by considerations of convenience or practicability to whittle away and eventually nullify the protection afforded thereby;[22] they should not by their decisions enable railroads to eliminate safety appliances where hazards exist to some substantial degree and where the use of such appliances would insure increased protection.[23]

5. U S —Baltimore, etc, R. Co. v Indiana R. Commission, C.C Ind, 196 F. 690.

6. Or —Varley v. Consolidated Timber Co, 139 P.2d 584, 172 Or 157

Push car as "train" or "speeder"

A "push car" constructed of four wheels and a platform and weighing about one hundred seventy-five pounds, operated by manpower on logging railroad, did not constitute a "train" or "speeder" within safety code authorizing train or speeder to be moved on right of way only after obtaining clearance —Varley v Consolidated Timber Co, supra.

7. U S —U S. v. State of California, 56 S Ct. 421, 297 U S. 175, 80 L Ed. 567—U S. v. New York Cent. R Co., D C N Y., 70 F.Supp. 761
51 C.J. p 1024 note 57.
Federal Safety Appliance Act as affecting railroad's liability to employees see Master and Servant § 228 b (2).

8. U S —U. S. v. Southern Pac. Co, D C Cal., 167 F. 699—U S. v Erie R. Co., D C N Y., 166 F. 352.

9. U S —U. S. v. Western, etc, R Co., D C Ga., 297 F. 482
51 C.J. p 1024 note 58.

10. U S.—U. S. v. Western, etc., R. Co., supra.
51 C.J. p 1024 note 59.

11. Ill —Williams v. New York Cent R. Co., 84 N.E.2d 399, 402 Ill. 494.

12. U S —U. S v. State of California, 56 S Ct. 421, 297 U S. 175, 80 L Ed 567—U S v. Northern Pac Ry. Co., D C Minn, 72 F Supp 528

13. U S.—U S v Chicago, St. P., M. & O. Ry Co, C C.A.Minn, 43 F 2d 300, 71 A L R 507.

14. U S.—U. S v. Chicago, St. P, M & O Ry. Co, supra—U S v. Northern Pac. Ry. Co, D.C Minn, 72 F Supp 528.
51 C J p 1024 note 57.

Scope of benefits

The benefits of Federal Safety Appliance Act extend to all whose duties or exercise of whose rights cause them to come in contact with cars which the act requires to be properly equipped, and are not limited merely to travelers on railroads and railroad employees as manifested by title of the act.—Callahan v. New York Cent. R Co, 8 Ohio Supp 45

15. U S.—Brady v. Terminal R. R Ass'n, Mo, 58 S Ct. 426, 303 U.S. 10, 82 L.Ed. 614—Chesapeake & O. Ry. Co v. Rich, C C A.Ohio, 81 F 2d 584, certiorari denied 56 S Ct 955, 298 U S. 684, 80 L Ed. 1404—U. S. v. Chicago, St P, M. & O Ry. Co., C.C.A.Minn., 43 F.2d 300, 71 A.L R. 507—U. S. v. South Buffalo Ry. Co., D C.N.Y., 71 F.Supp 461, reversed on other grounds, C. C.A., 168 F 2d 948, certiorari denied 69 S Ct. 165, 335 U.S. 870, 93 L Ed 414—U. S. v New York Cent. R Co, D.C.N.Y, 70 F.Supp. 761.

Ohio —Callahan v New York Cent. R Co, 8 Ohio Supp. 45.
51 C J. p 1025 notes 69, 70

16. U.S —U S v. Baltimore, etc., R. Co, D C Pa, 170 F 456.

17. U S —U S. v. Trinity, etc, R Co, Tex., 211 F. 448, 452, 128 C.C. A 120.
51 C J. p 1025 note 72.

18. U.S —U. S. v. Elgin, J. & E. Ry. Co, C A Ind., 182 F.2d 1—U. S v. Chicago, St. P., M & O Ry. Co., C. C A.Minn, 43 F 2d 300, 71 A.L.R. 507.
Ill.—Anderson v. Chesapeake & O. Ry. Co., 186 N.E. 185, 352 Ill. 561, certiorari denied Chesapeake & O. Ry. Co v Anderson, 54 S Ct 93, 290 U S 675, 78 L Ed 583.
W. Va —Crotty v Virginian Ry Co, 177 S E. 609, 115 W Va. 558.
51 C.J p 1025 note 73.

19. U S —Didinger v. Pennsylvania R. Co, C C.A Ohio, 39 F.2d 798
51 C J. p 1025 note 74.

20. U S —Chesapeake, etc., R. Co v. U. S., Va., 226 F. 683, 141 C C A. 439.
51 C.J. p 1025 note 75.

21. U.S —U. S. v. Atchison, T. & S. F Ry. Co., C.C.A.Cal., 156 F 2d 457.

22. U.S.—U S v. Atchison, T & S. F. Ry. Co, C.C.A.Cal, supra.

23. U.S —U. S. v. South Buffalo R. Co, C C.A N.Y, 168 F 2d 948, certiorari denied 69 S Ct. 165, 335 U. S. 870, 93 L Ed 414.

Considerations of convenience, utility, or added expense caused in the handling of the railroad's business by complying with the act cannot change the application of the act to situations falling within it.[24] The carrier is not excused from compliance therewith by any showing of care, however assiduous,[25] nor can the obligation of the railroad under the act be contracted away,[26] as, for example, by the intricacies of an operating contract.[27] A custom of the railroads cannot justify a violation of the act,[28] although such custom, where it has the acquiescence of the interstate commerce commission, is persuasive of the meaning of the act.[29] The act is applicable to a railroad operated as a common carrier in interstate commerce by a state, notwithstanding the act does not specifically mention state-owned railroads.[30] In determining whether a railroad is subject to the provisions of the act, the method of fixing the charge is unimportant where the service involves the transportation of cars and their contents.[31]

Locomotive or tender as "car." Whether or not the word "car" includes locomotives in a particular provision of the act is a matter of congressional intent.[32] Generally, locomotives and tenders are included within the term "cars" in those cases where the act or an order of the interstate commerce commission is such that, as applied to the appliance and the equipment, no sufficient practical distinction can be made between cars and locomotives;[33] in other words, where the same reasons for requiring the installation and maintenance of the appliance on an engine or a tender exist as for requiring it on a car, and there is no separate provision with respect to the equipment required on the locomotive, then the locomotive is construed to be a car.[34] However, a locomotive and a car are not the same for all the purposes of the act.[35]

Defective cars and engines. Defective car provisions of the Safety Appliance Act apply to empty cars,[36] to foreign cars,[37] and to car movements as well as to train movements.[38] Under the statutory provision forbidding a railroad to haul, use, or permit to be used, a defective car, on its lines, a railroad is liable for permitting the hauling of defective cars over its road by an independent contractor,[39] for hauling a car received from another road in a defective condition,[40] or for hauling its own defective cars over the lines of another railroad.[41] The provision applies to cars which are "used" without being "hauled,"[42] and to cars loaded with materials or property belonging to the railroad company for which it receives no compensation for transportation,[43] or being transferred by a terminal company from one road to another.[44] The

24. U.S.—U. S. v. Southern Pac. Co., C.C.A.Cal., 60 F.2d 864, certiorari denied Southern Pac. Co. v. U. S., 53 S.Ct. 291, 287 U.S. 667, 77 L.Ed. 575—U. S. v. Chicago, St. P., M. & O. Ry. Co., C.C.A.Minn., 43 F.2d 300, 71 A.L.R. 507.

25. U.S.—Brady v. Terminal R. R. Ass'n, Mo., 58 S.Ct. 426, 303 U.S. 10, 82 L.Ed. 614.
Mo.—Brady v. Wabash Ry. Co., 49 S.W.2d 24, certiorari denied 53 S.Ct. 20, 287 U.S. 619, 77 L.Ed. 538.
Ohio.—Callahan v. New York Cent. R. Co., 8 Ohio Supp. 45.

26. U.S.—U. S. v. New York Cent. R. Co., D.C.N.Y., 70 F.Supp. 761.

27. U.S.—U. S. v. New York Cent. R. Co., D.C.N.Y., 70 F.Supp. 761.

28. U.S.—Pennell v. Philadelphia & R. R. R. Co., Pa., 34 S.Ct. 220, 231 U.S. 675, 58 L.Ed. 430—U. S. v. Chicago, St. P., M. & O. Ry. Co., C.C.A.Minn., 43 F.2d 300, 71 A.L.R. 507.

29. U.S.—Pennell v. Philadelphia & R. R. R. Co., Pa., 34 S.Ct. 220, 231 U.S. 675, 58 L.Ed. 430—U. S. v. Chicago, St. P., M. & O. Ry. Co., C.C.A.Minn., 43 F.2d 300, 71 A.L.R. 507.

30. U.S.—U. S. v. State of California, Cal., 56 S.Ct. 421, 297 U.S. 175, 80 L.Ed. 567.

31. U.S.—U. S. v. State of California, supra.
Flat rate
The fact that the railroad charges a flat rate instead of a charge per hundred pounds of freight is unimportant.—U. S. v. State of California, supra.

32. U.S.—U. S. v. Chicago, St. P., M. & O. Ry. Co., D.C.Wis., 42 F.2d 248
Locomotive as "car" within
Automatic coupling provisions see infra subdivision b of this section.
Power brake provisions see infra subdivision c of this section.

33. U.S.—U. S. v. Chicago, St. P., M. & O. Ry. Co., C.C.A.Minn., 43 F.2d 300, 71 A.L.R. 507—U. S. v. Chicago, St. P., M. & O. Ry. Co., D.C.Wis., 42 F.2d 248.

34. U.S.—U. S. v. Chicago, St. P., M. & O. Ry. Co., C.C.A.Minn., 43 F.2d 300, 71 A.L.R. 507.

35. U.S.—U. S. v. Chicago, St. P., M. & O. Ry. Co., supra—Lehigh Valley R. Co. v. Beltz, C.C.A.N.Y., 10 F.2d 74, certiorari denied 46 S.Ct. 205, 270 U.S. 641, 70 L.Ed. 775.

36. U.S.—U. S. v. Wheeling, etc., R. Co., D.C.Ohio, 167 F. 198, 201.
51 C.J. p. 1027 note 91.
Empty cars as within automatic coupler provision see infra subdivision b of this section.

37. U.S.—U. S. v. Chicago, etc., R. Co., D.C.Iowa, 149 F. 486.
51 C.J. p. 1027 note 92.

38. U.S.—U. S. v. Erie R. Co., N.J., 35 S.Ct. 621, 237 U.S. 402, 59 L.Ed. 1019.
51 C.J. p. 1027 note 93.
Power-brake provision as applicable only to train movements see infra subdivision c of this section.

39. U.S.—U. S. v. Southern R. Co., D.C.Tenn., 285 F. 766.
51 C.J. p. 1027 note 95.

40. U.S.—U. S. v. Southern Pac. Co., D.C.Cal., 167 F. 699.
51 C.J. p. 1027 note 96.
Rule under repair amendment see infra subdivision d of this section.

41. U.S.—Philadelphia, etc., R. Co. v. U. S., N.J., 191 F. 1, 111 C.C.A. 661.
51 C.J. p. 1027 note 97.

42. U.S.—U. S. v. St. Louis Southwestern R. Co., Tex., 184 F. 28, 106 C.C.A. 230.
51 C.J. p. 1027 note 98.

43. U.S.—U. S. v. Chicago, etc., R. Co., D.C.Iowa, 149 F. 486.
51 C.J. p. 1027 note 99.

44. U.S.—U. S. v. Northern Pac. Terminal Co., D.C.Or., 144 F. 861.
51 C.J. p. 1027 note 1.

length of the haul is immaterial.[45]

Under a provision of the Safety Appliance Act to the effect that nothing in the act shall apply to trains composed of four wheel cars or to trains composed of eight wheel standard logging cars where the height of such cars from top of rail to center of coupling does not exceed a specified number of inches, or locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs, standard flat cars having a height in the respect mentioned in excess of the specified number of inches are not within the exception,[46] even though used exclusively for the transportation of logs[47]

Under an interstate commerce commission regulation to the effect that carriers are not required to change the brakes from the right to left side on cars of a specified description, or to change the end ladders on such cars, except when such appliances are renewed, at which time they must be made to comply with the ordinary standards, a road renewing either appliance must comply with such ordinary standards, even though the other appliance is not required to be renewed at the same time.[48]

Grab irons or handholds. The requirement that cars should be equipped with proper grab irons or handholds is violated if adequate grab irons are not provided,[49] unless a suitable substitute is furnished[50] The requirement applies to both the ends and the sides of cars,[51] and end grab irons should be located at that point in the ends of cars where they will afford train men greater security for coupling operations.[52] Passenger cars,[53] as well as freight cars,[54] are within the statute. The grab iron provision is applicable to car, as well as train, movements.[55]

b. Automatic Coupling

Cars subject to the requirements of the Federal Safety Appliance Act must be so equipped as to be capable of being coupled or uncoupled automatically without anyone being required to go between the ends of the cars.

Under the Federal Safety Appliance Act, the cars used must be equipped with couplers that couple automatically by impact and which can be uncoupled without the necessity of anyone going between the ends of the cars;[56] and these provisions apply both to the act of coupling[57] and to that of uncoupling.[58] The act is violated if the couplers, by reason of their defective condition or other cause, cannot be operated in the usual manner without operatives going between the cars.[59] Thus violation may arise from failure to furnish the original equipment,[60] from a deliberate act making the coupling apparatus inoperative,[61] or because the coupling apparatus has got out of order,[62] been disconnected,[63] been rendered inoperative by defects in,[64] or disconnection of,[65] other apparatus, or for any other reason has become unavailable for use.[66] The presence of a defective uncoupling lever may violate the act, even though another and operative lever is available.[67] However, it has been held that the ab-

45. U S—U S. v. Southern Pac. Co., D C Cal, 167 F. 699.
51 C.J p 1027 note 2.

46. U S.—U S. v. Northwestern Pac R Co, D C Cal, 235 F. 965, 967.

47. U.S—U. S. v. Northwestern Pac R Co, supra
51 C J. p 1028 note 5

48. U S.—Pennsylvania R Co. v. U. S, C C A Ill, 283 F. 31.
51 C.J. p 1028 note 6.

49. U.S—U S. v. Southern R. Co, D C N C, 170 F. 1014.
51 C.J. p 1030 note 36.

50. U S—U S. v. Boston, etc, R. Co., D C.Mass, 168 F. 148, 151.
51 C.J. p 1030 notes 37, 38.

51. U S.—U. S v Baltimore, etc, R. Co, D C.Va, 184 F. 94.
51 C J. p 1030 note 39.

52. U S—U. S v. Boston, etc., R. Co., D.C.Mass., 168 F. 148.

53. U.S.—U. S. v. Norfolk, etc, R. Co., D.C Va., 184 F. 99—Norfolk, etc., R. Co v. U S., Va., 177 F. 623, 101 C.C.A. 249.

54. U S—Norfolk, etc., R. Co. v. U S, supra.

55. U S—U S v. Erie R Co, N J., 35 S Ct 621, 237 U.S. 402, 59 L Ed 1919.

56. Ky—**Corpus Juris cited in** Elcomb Coal Co v Coffman, 113 S. W.2d 847, 848, 272 Ky. 93.
Tex—Texas & N. O R. Co. v. McGinnis, 109 S.W 2d 160, 130 Tex. 338.
51 C J p 1028 note 8.

57. U S—U S v. Philadelphia, etc., R. Co, D C Pa, 223 F 215—U S. v Central of Georgia R. Co., D.C. Ala, 157 F. 893.

58. U S—U. S. v Chicago, etc., R. Co, D.C Iowa, 149 F 486.
51 C J p 1028 note 10.

59. U.S.—U. S. v. Nevada County Narrow Gauge R. Co., D C.Cal., 167 F 695
51 C.J. p 1028 note 11.

60. U S.—U. S. v Atchison, etc., R. Co, D C.Cal., 167 F 696—U. S v. Nevada County Narrow Gauge R. Co., D C Cal., 167 F. 695.

61. U.S.—U S. v. Southern Pac. Co, D.C Cal, 167 F. 699

62. Tex—Texas & N O R. Co v. McGinnis, 109 S.W 2d 160, 130 Tex. 338.
51 C J. p 1028 note 14.

63. U.S—U S. v. Atchison, etc, R. Co, D.C Cal, 167 F 696.

64. U.S.—U S. v. Southern R. Co,, D.C N C, 170 F 1014
51 C J p 1028 note 16.

65. U S.—U. S v. Great Northern R Co, D.C Wash, 150 F. 229.
51 C J p 1028 note 17

Absence of knuckle pin
Coupler was defective as matter of law within Safety Appliance Act where knuckle did not have knuckle pin.—Chicago, M., St. P. & P. R Co. v Goldhammer, C.C.A.Minn., 79 F 2d 272, certiorari denied 56 S Ct 382, 296 U S. 655, 80 L.Ed. 467.

66. U.S—U. S. v. Illinois Cent R. Co, Tenn, 177 F. 801, 101 C.C.A. 15.
51 C.J. p 1028 note 18

67. U.S.—Norfolk, etc., R Co. v.

sence of an uncoupling lever is not a violation of the act if uncoupling can nevertheless be managed without operatives going between the cars[68]

Each end of every car. The statute ordinarily requires the designated coupling and uncoupling apparatus at each end of every car.[69]

Locomotive is a "car" within the meaning of the statute,[70] and, if intended in its use to be coupled at either end, must have automatic couplers, in working order, at each end.[71] If both ends of the locomotive are not intended for coupling use, it need not have automatic couplings at each end.[72] The view has been expressed that the automatic coupler is not required between a locomotive and its tender.[73]

Empties. The automatic coupling requirement applies to empty cars.[74]

Twin load. The automatic coupler requirement has been held inapplicable as between cars carrying a twin load.[75]

Requirement as to drawbars applies to any use of a defective bar.[76]

Switching movements. The automatic coupler requirement has been held applicable to cars used in switching operations.[77]

c. Brakes

(1) In general

(2) Train or switching movements

(1) In General

The Federal Safety Appliance Act, requires that trains be equipped with power or air brakes operated automatically from the engine and employed on a specified percentage of the cars; and such brakes must be properly maintained for use.

The Federal Safety Appliance Act requires an efficient braking system on railroad trains.[78] Under the statute and regulations pursuant thereto, every train must be equipped and operated with power or air brakes operated automatically from the engine and used on a specified percentage of the cars, and a railroad company is liable for running a train in violation of these provisions.[79] The power brake requirements apply to movements of a train as distinguished from movements of individual cars not operating as trains.[80] A train in the statutory sense is an engine and cars assembled, coupled and running or ready to run along the railroad,[81] and includes transfer trains,[82] and trains operated to their destination by a switching crew.[83]

Hand brakes. The Safety Appliance Act requires cars to be equipped with efficient hand brakes.[84]

Number of cars necessary to be braked. Under the Safety Appliance Act and the orders of the interstate commerce commission a specified percentage of the cars in the train must have their brakes operated by the engineer of the locomotive, and all power-braked cars in the train which are associated together with the specified percentage must have their brakes so operated[85] "Associat-

U. S., Va., 177 F. 623, 101 C.C.A. 249.
51 C.J. p. 1028 note 19.

68. U.S.—U. S. v. Montpelier, etc., R. Co., D.C.Vt., 175 F. 874.
51 C.J. p. 1028 note 20.

69. U.S.—U. S. v. Southern Pac. Co., D.C.Cal., 167 F. 699.
51 C.J. p. 1028 note 21.

70. U.S.—U. S. v. Philadelphia, etc., R. Co., D.C.Pa., 223 F. 215.
Locomotive as car within:
Federal Safety Appliance Act generally see supra subdivision a of this section.
Brake provisions see infra subdivision c of this section.

71. U.S.—U. S. v. Philadelphia, etc., R. Co., supra.
51 C.J. p. 1029 note 23.

72. U.S.—Wabash R. Co. v. U. S., Ill., 172 F. 864, 97 C.C.A. 284.

73. U.S.—Pennell v. Philadelphia, etc., R. Co., Pa., 34 S.Ct. 220, 231 U.S. 675, 58 L.Ed. 430.

74. U.S.—U. S. v. St. Louis, etc., R. Co., D.C.Tenn., 154 F. 516.
51 C.J. p. 1029 note 26.

75. U.S.—U. S. v. International Great Northern R. Co., D.C.Tex., 9 F.2d 142, 143.
51 C.J. p. 1029 note 27.

76. U.S.—Chicago, etc., R. Co. v. U. S., C.C.A.Mont., 196 F. 882, 116 C.C.A. 444
51 C.J. p. 1029 note 28.

77. U.S.—U. S. v. Chesapeake, etc., R. Co., Va., 213 F. 748, 751, 130 C.C.A. 262.
51 C.J. p. 1029 note 30.

78. W.Va.—Crotty v. Virginian Ry. Co., 177 S.E. 609, 115 W.Va. 558.
"Train brakes"
In the Safety Appliance Act requiring safety equipment on railroad trains and locomotives, the term "train brakes" is not confined to any narrow or technical meaning, but includes power-driving wheel brakes, and refers to same kind of brakes as are mentioned elsewhere in same statutes.—U. S. v. Fort Worth & D. C. Ry. Co., D.C.Tex., 21 F.Supp. 916.

79. U.S.—U. S. v. Elgin, J. & E. Ry. Co., C.A.Ind., 182 F.2d 1.—U. S. v. Chicago Great Western R. Co., D.C.Iowa, 162 F. 775.

80. U.S.—U. S. v. Erie R. Co., N.J., 35 S.Ct. 621, 237 U.S. 402, 407, 59 L.Ed. 1019.
51 C.J. p. 1033 note 79

81. U.S.—U. S. v. Fort Worth & D. C. Ry. Co., D.C.Tex., 21 F.Supp. 916.
51 C.J. p. 1033 note 80

82. U.S.—U. S. v. Northern Pac. R. Co., Minn., 41 S.Ct. 101, 254 U.S. 251, 65 L.Ed. 249.
51 C.J. p. 1033 note 81.

83. U.S.—Atchison, etc., R. Co. v. U. S., Ill., 198 F. 637, 117 C.C.A. 341.
51 C.J. p. 1064 note 82
Train or switching movements see infra subdivision c (2) of this section.

84. Ill.—Anderson v. Chesapeake & O. Ry. Co., 186 N.E. 185, 352 Ill. 561, certiorari denied Chesapeake & O. Ry. Co. v. Anderson, 54 S.Ct. 93, 290 U.S. 675, 78 L.Ed. 583.
51 C.J. p. 1025 note 70 [b].

85. U.S.—U. S. v. Panhandle & S. F. Ry. Co., D.C.Tex., 21 F.Supp. 919.

ed together with," as used in the statute, means connected on the air line of the train,[86] and a car may be a power-braked car within the statute, even though its brakes have been cut out.[87] Thus a power-braked car, the brakes of which are defective, cannot be put into the middle of the other cars but must be put at the end; if in the middle, it is associated with the others and must be subject to the control of the engineer.[88] A helper or pusher engine and its tender, situated at the end of the train and outside the air line, are not associated with the other cars so as to require that their brakes be operated by the engineer of the locomotive drawing the train;[89] when so situated they are not "cars,"[90] or at least are not "power-braked cars,"[91] within the air brake provisions of the act.

The statute is satisfied if the required percentage of cars is equipped and operated with power or air brakes,[92] cars not so equipped or operated being placed at the rear end of the train.[93] It is equally lawful for the permissible percentage of nonpower-braked cars to be those equipped only with hand brakes or those equipped with power brakes cut out.[94]

Maintenance and use. The requirement that a train shall be equipped with power brakes[95] or that a car shall be equipped with efficient hand brakes[96] contemplates that such brakes shall be maintained for use. Failure to use existing power brakes is as much a violation of the act as failure to supply such brakes,[97] and the statutory requirement for hand brakes does not make the use of power brakes in train movements optional.[98] It is a violation of the statute to use both power and hand brakes,[99] as the object of the power-brake requirement is to relieve trainmen from the necessity of using the hand brakes in train movements.[1]

A "locomotive," within the meaning of the provisions of the Federal Safety Appliance Act dealing with power-driving wheel brakes, means an engine constructed and used for traction purposes on a railroad track,[2] and the mere fact that an engine is self-propelling does not make it a "locomotive."[3] Conversely, where an engine is being used for traction purposes on a railroad track, it is a locomotive regardless of whatever else it might also be.[4]

Repair of defective power brakes. There is authority to the effect that a train properly equipped with air brakes may, where they become defective in transit, be moved to the nearest place for repairs.[5] However, the statutory exception permitting movement for the repair of brakes is applicable only to cases where the repairs cannot be made on the spot,[6] and the movement is for the purpose of reaching the nearest repair point.[7]

(2) Train or Switching Movements

The power-brake requirements of the Federal Safety Appliance Act apply to train movements, but not to mere switching movements; and the determination of whether a movement is one or the other is not controlled by the kind of track, the distance of the move-

86. U S —U S v. Northern Pac Ry Co., D C.Mont, 6 F Supp 278, affirmed, C C.A, 77 F 2d 587.

87. U.S —U. S. v. Northern Pac Ry Co, supra.

88. U S —U S v Panhandle & S. F. Ry Co., D C Tex, 21 F Supp 919
51 C J. p 1035 note 99 [a].

89. U.S —U S v Chicago, St P., M & O. Ry Co, C C A.Wis, 41 F.2d 927.
51 C J. p 1035 note 96.

90. U.S —U S v. Chicago, St P., M & O Ry Co, C C A Minn, 43 F 2d 300, 71 A L R. 507—U. S. v. Chicago, St P, M. & O. Ry Co, C.C A. Wis, 41 F 2d 927

91. U S —U S. v. Chicago, St. P., M & O. Ry. Co., D C Wis., 42 F 2d 248.

92. U S.—U. S. v. Chesapeake, etc, R Co, Va., 247 F. 49, 159 C.C.A. 267.
51 C J. p 1035 note 98.

93. U.S.—New York Cent. R. Co v U. S, Pa., 44 S.Ct. 436, 265 U.S. 41, 68 L.Ed. 892.
51 C.J. p 1035 note 99.

94. U S —New York Cent. R. Co. v. U. S, supra
51 C J p 1035 note 1.

95. U S.—Fairport, P & E. R Co v Meredith, Ohio, 54 S Ct. 826, 292 U S. 589, 78 L Ed 1446.

96. Ill.—Anderson v. Chesapeake & O Ry. Co, 186 N E 185, 352 Ill 561, certiorari denied Cheasapeake & O Ry Co. v. Anderson, 54 S.Ct 93, 290 U.S. 675, 78 L Ed. 583.

97. U S —U S v. Great Northern R. Co, Wash, 229 F. 927, 930, 144 C C A 209
51 C.J. p 1035 note 2.

98. U S —U. S. v Great Northern R Co, supra
51 C.J. p 1036 notes 3, 4.

99. U S —Virginian R Co. v. U. S., Va., 223 F 748, 752, 139 C C.A. 278.
51 C J. p 1036 note 5.

1. U S —Grand Rapids, etc., R. Co. v U. S, Mich., 249 F. 650, 161 C. C A. 560
51 C J. p 1036 note 6.

2. U S —U. S v. Fort Worth & Denver City Ry. Co., D C Tex., 21 F Supp 916.

3. U S.—U. S v. Fort Worth & Denver City Ry. Co, supra.

4. U S —U. S. v. Fort Worth & Denver City Ry Co, supra

A locomotive crane used to convey materials loaded on cars to scene of construction work was a "locomotive" used in train movements within statute requiring locomotives to be equipped with power-driving wheel brakes, since crane was used for traction.—U S. v. Fort Worth & Denver City Ry Co., supra.

5. U.S —U. S v. Northern Pac. Ry. Co., C C A.Mont, 77 F.2d 587.
51 C J p 1036 note 7.
Repair of defective cars generally see infra subdivision d of this section

6. U S —U S. v. Pennsylvania Co, D.C Ohio, 237 F. 471, affirmed 241 F. 824, 154 C C.A. 526.
51 C J p 1036 note 9

7. U S.—U. S. v. Pennsylvania Co, supra.
51 C.J. p 1036 note 10.

ment, the number of cars, or the name given to the train crew, but depends rather on the essential nature of the operation.

It is settled law that the power-brake requirements relate to train movements[8] and not to switching operations or movements.[9] Between these two types of movement lies a legal "No man's land,"[10] concerning which no exact rule can be laid down,[11] and in connection with which the decision as to whether the case falls within or without the statutory requirement must depend on the particular facts involved.[12]

The test of whether the movement of an engine and cars is a train movement, so as to subject the railroad to penalty for not having air-brake connections with the engine, or is a mere switching movement, lies in the essential nature of the operation or the work done.[13] While the court will consider the character of the tracks used,[14] and similar facts,[15] nevertheless such factors as the kind of track,[16] the distance of the movement,[17] and the number of cars[18] are not controlling. The

8. U.S.—U. S. v. Elgin, J. & E. Ry. Co., C.A.Ind., 182 F.2d 1—U. S. v. South Buffalo R. Co., C.C.A.N.Y., 168 F.2d 948, certiorari denied 69 S.Ct. 165, 335 U.S. 870, 93 L.Ed. 414.
51 C.J. p. 1034 note 83.

9. U.S.—U. S. v. Elgin, J. & E. Ry. Co., C.A.Ind., 182 F.2d 1—U. S. v. South Buffalo R. Co., C.C.A.N.Y., 168 F.2d 948, certiorari denied 69 S.Ct. 165, 335 U.S. 870, 93 L.Ed. 414.
51 C.J. p. 1034 note 84.

Reason for rule

The reason why the act has not been applied to situations characterized as switching is that they do not ordinarily fall within the meaning of the word "train" and involve a frequent coupling and uncoupling of cars within very limited areas which have been thought to render the use of air brakes impracticable and unnecessary to achieve the purposes of the act.—U. S. v. South Buffalo R. Co., supra.

10. U.S.—U. S. v. Texas, etc., R. Co., D.C.Tex., 13 F.2d 429.
51 C.J. p. 1034 note 85.

11. U.S.—Chicago, etc., R. Co. v. U. S., C.C.A.Ind., 22 F.2d 729, 730.
51 C.J. p. 1034 note 86.

12. U.S.—Illinois Cent. R. Co. v. U. S., C.C.A.Neb., 14 F.2d 747, certiorari denied 47 S.Ct. 466, 273 U.S. 752, 71 L.Ed. 874.
51 C.J. p. 1035 note 89.

Segregation of particular movement

Government is not entitled to have movement in question selected and segregated from preceding and following switching movements and have movement considered without regard to customary work ordinarily and generally done in the yard.—U. S. v. Great Northern R. Co., C.C.A.Wash., 73 F.2d 736, certiorari denied 55 S.Ct. 833, 295 U.S. 752, 79 L.Ed. 1696.

Held train movements

(1) In general.—U. S. v. South Buffalo R. Co., C.C.A.N.Y., 168 F.2d 948, certiorari denied 69 S.Ct. 165, 335 U.S. 870, 93 L.Ed. 414—U. S. v. Northern Pac. R. Co., C.C.A.Wash., 54 F.2d 573—U. S. v. Northern Pac. Ry. Co., D.C.Minn., 72 F.Supp. 528—51 C.J. p. 1034 note 87 [a].

(2) Hauling sixteen cars more than mile, crossing streets and other railroad tracks.—Chicago, St. P., M. & O. Ry. Co. v. U. S., C.C.A.Neb., 36 F.2d 670.

(3) Interyard movement of about two miles, one-half mile of which was on main line track, of switching engine and nine cars.—U. S. v. Southern Pac. Co., C.C.A.Cal., 100 F.2d 984, certiorari denied Southern Pac. Co. v. U. S., 59 S.Ct. 836, 307 U.S. 633, 83 L.Ed. 1515.

(4) Car movements by switch engine between separate sections of terminal yards connected by mile-long track crossing eight streets.—U. S. v. Southern Pac. Co., C.C.A.Cal., 60 F.2d 864, certiorari denied Southern Pac. Co. v. U. S., 53 S.Ct. 291, 287 U.S. 667, 77 L.Ed. 575.

Held switching operations

(1) In general.—U. S. v. Northern Pac. Ry. Co., C.C.A.Minn., 255 F. 655—51 C.J. p. 1035 note 88 [a].

(2) Transfer of cuts of forty-seven to eighty-four freight cars without interruption a distance of two and one tenth miles within terminal yard which serviced two industrial plants and was not crossed by tracks of any other railroad or any public street or highway at grade.—U. S. v. Elgin, J. & E. Ry. Co., C.A.Ind., 182 F.2d 1.

(3) Movements of thirteen cars entirely within single yard devoted exclusively to movement of freight cars, and on side tracks, except for crossing main track at one point.—U. S. v. New York, C. & St. L. Ry. Co., C.C.A.Ind., 77 F.2d 215.

(4) Movement by yard crew of cars over yard and secondary tracks a distance of one and nine-tenths miles from one part of terminal yard switching limits to another.—U. S. v. Pennsylvania R. Co., D.C.Md., 80 F.Supp. 965.

13. U.S.—U. S. v. Great Northern R. Co., C.C.A.Wash., 73 F.2d 736, certiorari denied 55 S.Ct. 833, 295 U.S. 752, 79 L.Ed. 1696—U. S. v. Pennsylvania R. Co., D.C.Md., 80 F.Supp. 965—U. S. v. South Buffalo Ry. Co., D.C.N.Y., 71 F.Supp. 461, reversed on other grounds, C.C.A., 168 F.2d 948, certiorari denied 69 S.Ct. 165, 335 U.S. 870, 93 L.Ed. 414.
51 C.J. p. 1035 note 90.

Absence of switching operations between transfer points

A transfer operation is a train movement when it is unaccompanied by switching operations between transfer points.—U. S. v. Southern Pac. Co., C.C.A.Cal., 60 F.2d 864, certiorari denied Southern Pac. Co. v. U. S., 53 S.Ct. 291, 287 U.S. 667, 77 L.Ed. 575.

14. U.S.—Great Northern R. Co. v. U. S., C.C.A.Wash., 297 F. 692.
51 C.J. p. 1035 note 91.

Use of main line

In the transfer of cars from railroad yards to near-by points or to other yards, where the main line is traversed for substantial distances, the railroad company is not authorized to claim that the movement is merely one of switching which will fall without the provisions of the act.—U. S. v. Northern Pac. Ry. Co., C.C.A.Wash., 54 F.2d 573.

15. U.S.—U. S. v. Texas, etc., R. Co., D.C.Tex., 13 F.2d 429.
51 C.J. p. 1035 note 92.

16. U.S.—U. S. v. Great Northern R. Co., C.C.A.Wash., 73 F.2d 736, certiorari denied 55 S.Ct. 833, 295 U.S. 752, 79 L.Ed. 1696—U. S. v. Pennsylvania R. Co., D.C.Md., 80 F. Supp. 965.

17. U.S.—U. S. v. Elgin, J. & E. Ry. Co., C.A.Ind., 182 F.2d 1—U. S. v. Great Northern R. Co., C.C.A. Wash., 73 F.2d 736, certiorari denied 55 S.Ct. 833, 295 U.S. 752, 79 L.Ed. 1696—U. S. v. South Buffalo Ry. Co., D.C.N.Y., 71 F.Supp. 461, reversed on other grounds, C.C.A., 168 F.2d 948, certiorari denied 69 S.Ct. 165, 335 U.S. 870, 93 L.Ed. 414.

18. U.S.—U. S. v. Elgin, J. & E. Ry. Co., C.A.Ind., 182 F.2d 1—U. S. v. Great Northern R. Co., C.C.A. Wash., 73 F.2d 736, certiorari denied 55 S.Ct. 833, 295 U.S. 752, 79 L.Ed. 1696—U. S. v. Pennsylvania R. Co., D.C.Md., 80 F.Supp. 965.

name given to the train crew is not controlling, and, hence, the question is not determined by whether the operation is by a switch engine and switch crew, or by a regular engine and crew.[19] Likewise, the name given to the place of operation[20] or the designation of yard limits[21] by the railroad cannot, standing alone, determine the character of the movement.

With respect to the existence of accompanying hazards on the route, such as crossings, there is not necessarily an essential difference between a public crossing and a private way;[22] nor is the existence of more than one crossing necessary in order to create sufficient hazards to render the act applicable.[23] The minimizing of the element of danger to employees or to members of the public using the streets which are crossed, by posting signalmen at intersections, or by traveling at slow speeds, cannot affect the question[24]

Classification for accounting purposes. The classification by the interstate commerce commission of particular railroad operations as "switching" for accounting purposes has little, if any, weight, in determining whether movements in question are "train movements" within the application of the Safety Appliance Act.[25]

Mixed train movement and switching operation are within the act as to that part which constitutes a train movement.[26]

d. Repair of Defective Cars

Railroads must keep their appliances in repair. Under the repair amendment, they are permitted, within the limitations and for the purposes specified, to haul a defective car to the nearest available repair point; but the amendment will not be extended beyond its express terms.

The railroad is under a duty to keep its appliances in repair,[27] and government inspectors are not obligated to advise a railroad company of defects discovered by them, and their failure to do so does not relieve the company of its obligation to repair[28]

Under the repair amendment to the Federal Safety Appliance Act a defective car can, within the limitations imposed, be hauled to the nearest available repair point without subjecting the railroad to a penalty.[29] This amendment has been construed as relaxing the rigid rule theretofore obtaining,[30] and to permit the defective car to be hauled in connection with cars commercially used,[31] or in revenue trains.[32] However, the exception granted by the amendment must be given a strict construction to preserve the integrity of the act.[33] The amendment will not be extended beyond its express terms,[34] and has been held not to permit hauling a defective car before discovery of the defect,[35] or for purposes other than repair,[36] nor if the defect can be repaired on the spot:[37] nor if the defect originated on a connecting pri-

19. U S—U S v. Great Northern R Co, C C A.Wash, 73 F 2d 736, certiorari denied 55 S Ct 833, 295 U.S. 752, 79 L Ed 1696—U S. v Pennsylvania R. Co, D C Md, 80 F Supp 965
51 C J. p 1035 notes 90 [a], 93.

Factor to be considered

The fact that assemblage of cars is transferred by operation without timetables or block signals with a switching engine and yard crew is a fact to be considered in determining whether the movement constitutes a train movement but is not controlling.—U. S v. South Buffalo Ry Co, D.C N.Y, 71 F Supp. 461, reversed on other grounds, C C A, 168 F.2d 948, certiorari denied 69 S.Ct 165, 335 U.S. 870, 93 L.Ed. 414.

20. U S—U. S v. South Buffalo Ry Co., supra.
51 C J. p 1035 note 94.

21. U S—U S v. Southern Pac. Co, C.C A.Cal., 60 F.2d 864, certiorari denied Southern Pac. Co. v. U. S, 53 S.Ct. 291, 287 U.S. 667, 77 L.Ed 575.

22. U.S—U. S. v South Buffalo R Co, C C.A.N.Y, 168 F.2d 948, certiorari denied 69 S Ct. 165, 335 U S. 870, 93 L Ed. 414.

23. U S.—U. S v. South Buffalo R Co, supra.

24. U S—U. S. v Southern Pac. Co, C C A.Cal, 60 F 2d 864, certiorari denied Southern Pac Co v. U S, 53 S Ct 291, 287 U.S. 667, 77 L.Ed 575

25. U.S—U. S v South Buffalo R. Co, C C A.N Y., 168 F 2d 948, certiorari denied 69 S Ct 165, 335 U.S. 870, 93 L Ed. 414.

26. U S—U S v Texas, etc., R Co, D C Tex, 13 F 2d 429.
51 C J p 1035 note 95.

27. U S—Chesapeake, etc., R Co. v U S., Ky, 249 F. 805, 162 C.C A. 39, certiorari denied 39 S Ct. 67, 248 U S 580, 63 L Ed 431
51 C J. p 1030 note 46.
Repair of defective power brakes see supra subdivision c of this section

28. U S—Chesapeake, etc., R. Co. v. U S, supra
51 C J p 1030 note 47.

29. U S—Brady v. Terminal R Ass'n of St. Louis, Mo, 58 S Ct 426, 303 U.S. 10, 82 L Ed. 614—U. S v. Atchison, T. & S F Ry Co., C.C.A Cal, 156 F.2d 457—U S. v. Northern Pac Ry. Co, C C.A Mont, 77 F 2d 587.
51 C J p 1031 note 56.

30. U.S—U S v. Atchison, T. & S. F. Ry. Co, C C A Cal., 156 F.2d 457
51 C J p 1031 note 55

31. U S.—Baltimore, etc., R. Co v. U. S., Ohio, 242 F. 420, 423, 155 C C A 196, error dismissed 39 S.Ct. 133, 248 U.S 540, 63 L.Ed 411.
51 C J p 1031 note 57.

32. U.S.—Erie R Co. v U S, Ohio, 240 F. 28, 153 C C A 64
51 C J p 1031 note 58

33. U S—U. S v Atchison, T & S F Ry. Co., C.C A Cal, 156 F 2d 457.

34. U S—U S v Atchison, T. & S F. Ry Co., C C A Cal, 156 F.2d 457.
51 C J p 1031 note 59.

35. U.S—Chesapeake, etc., R Co v. U. S, Ky, 249 F. 805, 162 C.C A. 39, certiorari denied 39 S.Ct. 67, 248 U.S 580, 63 L Ed 431.
51 C J. p 1031 note 60.

36. U S.—Denver, etc, R. Co v. U. S., Utah, 249 F. 822, 162 C C.A. 56.
51 C J. p 1032 note 62.

37. U S—U. S. v. Chesapeake, etc.,

vate[38] or public[39] railroad, unless the movement is purely incidental.[40] In order to be within the amendment, it must appear that the car was originally equipped in proper fashion and became defective during use,[41] except that the repair proviso applies to cars built without safety appliances where an extension period for properly equipping such cars has not yet expired.[42]

The nearest available point for repair is to be determined with respect not only to distance, but also to all other factors.[43] Mere congestion of work at the nearest repair point has been held insufficient to justify hauling a defective car to a more distant point.[44]

Where the defect lies in the automatic coupling device, and the car is hauled in connection with cars commercially used[45] or in revenue trains,[46] the hauling should be done by using drawbars instead of chains for coupling purposes,[47] unless the car contains perishable freight or live stock, in which case chains are permissible.[48] In other words, if the car is defective to the extent that it must be coupled with chains, it must not be hauled "as is" or in trains unless it is loaded with live stock or perishable freight.[49] Cars may be hauled with chains if not in connection with cars commercially used or in revenue trains.[50]

Prior to repair amendment. Under the statute prior to the repair amendment a defective car capable of repair without moving to a repair point had to be repaired on the spot.[51] If the defect was such that it could not be repaired on the spot, some authorities considered it permissible for the railroad to haul the defective car to a repair point,[52] provided it was taken to the nearest place.[53] Other decisions denied the power to haul the car even to a repair point,[54] unless the car was moved by itself and not in connection with revenue cars or trains.[55] A railroad was under a duty to inspect cars delivered to it by other connecting railroads and refuse to transport them if not properly equipped.[56]

§ 426. —— State Safety Appliance Acts

The validity of state statutes requiring safety appliances on railroad rolling stock used in intra-state traffic has been upheld, the primary purpose of such statutes being the protection of railroad employees.

The primary purpose of state statutes requiring safety appliances on railroad rolling stock used in intra-state traffic is the protection of railroad employees,[57] and the validity of such statutes has been upheld.[58] It has been said that the duty of the railroad to the state under a penal statute of this character is satisfied by the exercise of a high degree of care.[59]

Intra-state traffic. A state statute imposing a penalty for moving defective cars in intra-state traffic applies to a car actually carrying intra-state traffic, even though the defective car was generally used for interstate traffic,[60] or was at the time part of a train carrying interstate traffic.[61] The fact that the railroad was an interstate road does

R Co, Va., 213 F. 748, 752, 130 C.C.A. 262.
51 C.J. p 1032 note 61.

38. U.S.—U. S. v Northern Pac. R Co, C.C.A.Wash, 287 F. 780.
51 C.J. p 1032 note 63.

39. U.S.—U. S. v. Spokane International R. Co., D.C.Idaho, 30 F.2d 150.
51 C.J. p 1032 note 64.

40. U.S.—U. S. v. Louisville, etc., Bridge, etc., R. Co., C.C.A.Ky., 1 F. 2d 646.
51 C.J. p 1032 note 65.

41. U.S.—Baltimore, etc., R. Co. v. U. S., Ohio, 242 F. 420, 424, 155 C.C.A. 196, error dismissed 39 S.Ct. 133, 248 U.S. 540, 63 L.Ed 411.
51 C.J. p 1032 note 66.

42. U.S.—U. S. v. Pennsylvania Co., D.C.Ohio, 237 F. 471, affirmed 241 F. 824, 154 C.C.A. 526
51 C.J. p 1032 note 67.

43. U.S.—U. S. v. Boston, etc., R. Co, D.C.Mass., 243 F. 795
51 C.J. p 1032 note 68

44. U.S.—U. S. v. Pennsylvania Co, D.C.Ohio, 237 F. 471, 477, affirmed 241 F. 824, 154 C.C.A. 526.
51 C.J. p 1033 note 69.

45. U.S.—Denver, etc., R. Co. v. U. S., Utah, 249 F. 822, 162 C.C.A. 56.
51 C.J. p 1033 note 70

46. U.S.—Denver, etc., R. Co v. U. S, supra.
51 C.J. p 1033 note 71.

47. U.S.—Erie R. Co v. U. S., Ohio, 240 F. 28, 32, 153 C.C.A. 64.
51 C.J. p 1033 note 72.

48. U.S.—U. S. v. Erie R. Co., N.J., 35 S.Ct. 621, 237 U.S. 402, 59 L.Ed 1019.

49. U.S.—U. S. v. Northern Pac. Ry. Co., D.C.Mont., 6 F.Supp. 278, affirmed, C.C.A., 77 F.2d 587.

50. U.S.—Erie R. Co v. U. S., Ohio, 240 F. 28, 153 C.C.A. 64.
51 C.J. p 1033 note 74.

51. U.S.—U. S. v Southern Pac. R. Co., D.C.Or., 154 F. 897.
51 C.J. p 1031 note 48.

52. U.S.—U. S. v. Southern Pac. Co., D.C.Cal., 167 F. 699.
51 C.J. p 1031 note 49.

53. U.S.—U. S. v Chicago, etc, R Co., D.C.Iowa, 149 F. 486.
51 C.J. p 1031 note 50

54. U.S.—Chicago, etc., R. Co. v. U. S, Neb., 168 F. 236, 93 C.C.A. 450, 21 L.R.A.,N.S., 690—U. S. v. St Louis, etc., R. Co, D.C.Tenn, 154 F. 516.

55. U.S.—Chicago, etc, R. Co. v. U. S, Neb., 168 F. 236, 238, 93 C.C.A. 450, 21 L.R.A.,N.S., 690.
51 C.J. p 1031 note 52

56. U.S.—U. S. v. Chicago, etc., R. Co., D.C.Iowa, 149 F. 486.

57. Ohio.—State v. Pittsburgh, etc, R Co., 13 Ohio N.P.,N.S., 145.

58. Ohio.—Detroit, etc., R. Co. v State, 91 N.E. 869, 82 Ohio St. 60, 137 Am.S.R. 758
51 C.J. p 1036 note 14.

59. Ohio.—Lake Terminal R. Co v State, 17 Ohio Cir.Ct.,N.S., 124.
51 C.J. p 1036 note 16.

60. Ohio.—Detroit, etc, R. Co. v. State, 91 N.E. 869, 82 Ohio St. 60, 137 Am.S.R. 758.

61. Ohio.—Detroit, etc., R. Co. v. State, supra.

not relieve it from liability for state penalties as to cars used in intra-state traffic.[62]

Repair of defective equipment. Under state statutes it has been held that the road may haul a defective car to a repair point.[63]

Automatic couplers. Under a state statute providing that it shall be unlawful for any common carrier to haul, or permit to be hauled or used on its line, any locomotive, car, tender, or similar vehicle used in moving state traffic, not equipped with automatic couplers, the car and not the train is the unit as to which penalty is imposed,[64] and every car must be equipped with automatic couplers.[65] Automatic coupler requirements of state statutes have been held inapplicable to electric cars,[66] cars used on a railroad in the process of construction,[67] and locomotive tenders,[68] and not to forbid the continued use of old cars not so equipped before enactment of the statute.[69] It has been held that a state statute imposing a penalty for using cars not equipped with automatic couplers applies only to cars completely lacking such couplers, and not to cars with inoperative couplers,[70] and that the use of cars having automatic couplers, but in a defective condition, is penalized under a different statute relating specifically to the use of cars with couplers out of repair.[71]

Braking. A state statute requiring a brake and brakeman on the rear car of a freight train not operated by power brakes from the engine has been held applicable to train movements,[72] but not to switching operations.[73] A statute requiring a brake and brakeman on the hindmost car of all trains transporting passengers and merchandise applies only to trains carrying both.[74] A statute requiring brakes on every freight car except four-wheeled cars applies to every type of freight car except those specifically exempted.[75]

Lumber cars. Under a statute requiring every railway company to supply all proper equipment and appliances on flat cars furnished for transporting lumber, and providing that a shipper compelled to furnish such equipment and appliances himself may collect from the road a specified penalty per car, a railroad is under no duty so to equip cars supplied to the shipper by other railroads for use on its line.[76]

§ 427. —— Miscellaneous Regulations as to Equipment

The operating equipment of railroads must conform to regulations pertaining to such matters as locomotive signal devices, headlights, rear end equipment, automatic train control, and cabooses.

Among the powers of a state to regulate the operating equipment of trains may be included the power to require and regulate locomotive signal devices.[77] Whether or not a signal equipment statute is sufficiently certain and definite to be enforceable will depend on the particular language employed.[78] A statute requiring locomotives to be equipped with an automatic bell ringing device is valid.[79]

Headlight statutes or rules. Within its powers to regulate the operating equipment of railroads, a state may make provision for and regulate locomotive headlights,[80] and may make a reasonable classification as to locomotives subject thereto.[81] Under a statute requiring railroads to equip every locomotive with an adequate headlight, a gasoline propelled car is a "locomo-

62. Ohio.—Detroit, etc., R. Co. v. State, supra.

63. Mass.—Taylor v. Boston, etc., R. Co., 74 N.E. 591, 188 Mass. 390.
51 C.J. p 1037 note 28.

64. Ohio.—Detroit, etc., R. Co. v. State, 31 Ohio Cir.Ct. 20

65. Ohio.—Detroit, etc., R. Co. v. State, supra.

66. Ohio.—Cleveland, etc., R. Co. v. Somers, 24 Ohio Cir.Ct. 67.

67. Ohio.—Cleveland, etc., R. Co. v. Somers, supra.
51 C.J. p 1037 note 29.

68. Mich.—Blanchard v. Detroit, etc., R. Co., 103 N.W. 170, 139 Mich. 694.
51 C.J. p 1037 note 30.

69. Neb.—Thompson v. Missouri Pac. R. Co., 71 N.W. 61, 51 Neb. 527.
51 C.J. p 1037 note 31.

70. Ohio.—State v. Pittsburgh, etc., R. Co., 13 Ohio N.P.,N.S., 145.
51 C.J. p 1037 note 32.

71. Ohio.—State v. Pittsburgh, etc., R. Co., supra.

72. Ill.—Chicago, etc., R. Co. v. Maloney, 77 Ill.App. 191.

73. Ill.—Chicago, etc., R. Co. v. Maloney, supra.
51 C.J. p 1038 note 37.

74. Tex.—State v. International, etc., R. Co., 68 S.W. 534, 29 Tex.Civ.App. 149.
51 C.J. p 1038 note 39.

75. S.C.—Mew v. Charleston, etc., R. Co., 32 S.E. 828, 55 S.C. 90.
51 C.J. p 1038 note 41.

76. Fla.—Florida R. Co. v. Adams, 47 So. 921, 56 Fla. 294.

77. S.C.—Ford v. Atlantic Coast Line R. Co., 168 S.E. 143, 169 S.C. 41, affirmed Atlantic Coast Line R. Co. v. Ford, 53 S.Ct. 249, 287 U.S. 502, 77 L.Ed. 457.
51 C.J. p 1038 note 47.
Use of signals see infra § 428.

78. Ind.—State v. Louisville, etc., R. Co., 96 N.E. 340, 177 Ind. 553, Ann.Cas.1914D 1284.
51 C.J. p 1038 note 49.

79. Ind.—Pittsburgh, etc., R. Co. v. State, 99 N.E. 801, 178 Ind. 498.
51 C.J. p 1038 note 52

80. Ind.—Vandalia R. Co. v. State R. Commission, 101 N.E. 85, 182 Ind. 382, affirmed 37 S.Ct. 93, 242 U.S. 255, 61 L.Ed. 276.
51 C.J. p 1039 note 60.
Lookout statutes see infra § 429

81. Wis.—Randall v. Minneapolis, etc., R. Co., 156 N.W. 629, 162 Wis. 507.
51 C.J. p 1039 note 61.

tive" which must be so equipped.[82] A locomotive passing through a yard does not necessarily come within statutory exceptions relative to switching service.[83] It has been stated that the duty to obey a headlight statute is mandatory.[84]

The rule of the interstate commerce commission requiring a rear headlight applies to a locomotive which makes regular trips with a train from one point to another over the road and which is from necessity required to run backward for some portion of such trips;[85] and the use of a rear headlight is excused only in terminal movements or where a portion of the train becomes detached and the engine is proceeding to pick it up.[86]

Rear end equipment. Among its regulatory powers as to operating equipment, a state or commission may regulate the construction of the rear platform of the rear car of a train.[87] A state statute providing that it shall be unlawful for any railroad to operate any train consisting of United States mail or express cars without the rear end of the rear car being equipped with an exit free from obstruction, a platform of a specified width, a guardrail, and steps, is violated by running a train without the specified rear car equipment notwithstanding the rear car complied with federal specifications as to mail cars;[88] and the state commission may order the rear end of the rear car to comply with such a state statute even though a mail car so constructed would violate federal regulations as to mail cars, since there is no necessity that a mail car of federal specifications be the end car of the train.[89]

Automatic train control. The validity of regulations requiring the installation of automatic train control devices has been upheld.[90] However, the road should be afforded a reasonable time for compliance.[91]

Cabooses. Where empowered by statute, a commission may promulgate and enforce an order for the operation of a caboose as a component part of a freight train, if such equipment and operation are essential to the protection, welfare, and safety of railroad employees and the traveling public;[92] and a statute requiring a door and outside platform at each end of a caboose car, instead of at one end only, is within the police power of the state.[93] However, a commission cannot require a railroad to furnish a caboose car for its train crews where the statutes do not grant the commission power to impose such a requirement,[94] as, for example, where the authority with respect to caboose cars granted to the commission is limited to making exceptions.[95] An order of a commission pertaining to the necessity of an extra caboose must not be so vague and indefinite as really to furnish no rule or standard at all.[96]

§ 428. Signals

a. In general
b. Regulation by municipality
c. Places to which signal requirements apply

a. In General

The state or a duly authorized board or commission may require the use of prescribed signal devices to warn of the approach of a train at crossings or other places, in which event the signal should be given at a proper distance and by the type of device specified.

Aside from statute, there is no absolute duty to sound signals when a train approaches a highway crossing,[97] but a railroad is under a duty to give such signals as are required by the exercise of due care under the circumstances involved.[98] Under its general power to regulate the operation of railroads, a state or a board or commission may

82. Ark.—Chicago etc., R. Co. v. Bryant, 162 S.W. 51, 110 Ark. 444. 51 C.J. p 1039 note 63.

83. Wis.—Randall v. Minneapolis, etc., R. Co., 156 N.W. 629, 162 Wis. 507. 51 C.J. p 1039 note 64

84. Miss.—Illinois Cent. R. Co. v. Reed, 74 So. 423, 113 Miss. 545.

85. U.S.—Chesapeake & O. Ry. Co. v. Wood, C.C.A.Ohio, 59 F.2d 1017, certiorari denied 53 S.Ct. 92, 287 U.S. 646, 77 L.Ed. 559.

86. U.S.—Chesapeake & O. Ry. Co v. Wood, supra

"Terminal movement" within commission's rule as to rear headlights means movement at terminals to and from service, without other immediate duties, and engine switching in yards is not engaged in such movement, but in "yard service."—Chesapeake & O. Ry. Co v. Wood, supra.

87. Pa.—Pennsylvania R. Co. v. Ewing, 88 A. 775, 241 Pa. 581, 49 L.R.A.,N.S., 977, Ann.Cas.1915B 157. 51 C.J. p 1039 note 68.

88. Pa.—Pennsylvania R. Co. v. Public Service Commission, 67 Pa. Super. 575, reversed on other grounds 40 S.Ct. 36, 250 U.S. 566, 63 L.Ed. 1142.

89. Miss.—Illinois Cent. R. Co v. Reed, 74 So. 423, 113 Miss. 545.

90. U.S.—Delaware, etc., Co. v. U. S., D.C.N.Y., 5 F.2d 831. 51 C.J. p 1039 note 72.

91. U.S.—Delaware, etc., Co. v. U. S., supra. 51 C.J. p 1040 note 73.

92. Ohio.—Akron & B. B. R. Co. v. Public Utilities Commission, 74 N.E.2d 256, 148 Ohio St. 282.

93. Iowa.—Fleming v. Richardson, 24 N.W.2d 280, 237 Iowa 808.

94. Ind.—Chicago & E. I. R. Co. v. Public Service Commission, 49 N.E.2d 341, 221 Ind. 592.

95. Ind.—Chicago & E. I. R. Co. v. Public Service Commission, supra.

96. U.S.—Southern Pac. Co. v. Railroad Commission of California, D.C.Cal., 10 F.Supp. 918.

97. Tenn.—Steele v. Louisville, etc., R. Co., 285 S.W. 582, 154 Tenn. 208.

98. Tenn.—Hurt v. Yazoo, etc., R. Co., 205 S.W. 437, 140 Tenn. 623. 51 C.J. p 1041 note 99.

require signal devices, to be used to warn of the approach of a locomotive or train when nearing highway crossings or certain other places,[99] and after repeal of a signal statute, the legislature may again regulate the matter by a second statute reimposing the requirements on a railroad in existence at the time of the repeal.[1] The purpose of signal statutes is to require warning of the approach of the train,[2] and such statutes should be liberally construed.[3] General statutes regulating the giving of signals must be complied with irrespective of charter provisions defining the railroad's duty in this respect.[4]

The particular requirements of signal statutes are a matter of legislative discretion.[5] The validity of a statute creating a rebuttable presumption that failure of a railroad to give a crossing signal was the proximate cause of a collision at such crossing has been upheld.[6] It would seem that a statutory obligation to signal on sighting a person on the track does not apply where the person sighted is near the track but not within striking distance of the train.[7]

Switch lights. Railroads may be required by statute to maintain proper lights on switch stands.[8] Under some statutes the light required is an electric or combustion light,[9] and a reflectorized lamp is insufficient.[10] A belt line railroad operated in a city for transferring freight from one railroad to another is a main track of a railroad so as to be within the switch light requirement of a statute requiring switches on the main tracks of railroads to be indicated by a signal light so attached as to indicate safety when the switch is closed and danger when it is open.

Distance at which signal should be sounded. Under a statute requiring a whistle to be blown before passing a point at a specified distance from a crossing, there is no obligation to blow the whistle after passing such point,[12] but it must be blown sufficiently in advance of such point to give adequate warning.[13] Under a statute requiring signals to be given at a specified distance from a town, the duty to give the signal at the distance specified is imperative,[14] and giving signals at shorter distances does not excuse failure to signal at the specified distance;[15] and the distance at which the signal should be given under such a statute is measured from the corporate limits,[16] and not from the station.[17]

Nature of signal. If the statute requires a signal by sounding the bell "or" whistle, either is sufficient;[18] but, if both are required, neither is sufficient without the other.[19] Under a statute requiring signals at intervals until a crossing is passed, the signals must be sufficient in number

99. Ark.—Missouri Pac. R. Co. v. Dennis, 166 S.W.2d 886, 205 Ark. 28.
S.C.—Ford v. Atlantic Coast Line R. Co., 168 S.E. 143, 169 S.C. 41, affirmed, Atlantic Coast Line R. Co. v. Ford, 53 S.Ct. 249, 287 U.S. 502, 77 L.Ed. 457.
51 C.J. p. 1040 note 79.

1. Ill.—Galena, etc., R. Co. v. Appleby, 28 Ill. 283.

2. N.Y.—People v. New York Cent. R. Co., 13 N.Y. 78.
51 C.J. p. 1041 note 3.

3. Tenn.—Stem v. Nashville Interurban R. Co., 221 S.W. 192, 142 Tenn. 494.
51 C.J. p. 1041 note 6.

4. Ill.—Illinois Cent. R. Co. v. Slater, 21 N.E. 575, 129 Ill. 91, 16 Am. S.R. 242, 6 L.R.A. 418.

5. Wis.—Gordon v. Illinois Cent. R. Co., 169 N.W. 570, 168 Wis. 244.
51 C.J. p. 1040 note 81.

6. S.C.—Ford v. Atlantic Coast Line R. Co., 168 S.E. 143, 169 S.C. 41, affirmed Atlantic Coast Line R. Co. v. Ford, 53 S.Ct. 249, 287 U.S. 502, 77 L.Ed. 457.

7. U.S.—Rogers v. Cincinnati, etc., R. Co., Tenn., 136 F. 573, 69 C.C.A. 321.
51 C.J. p. 1041 note 4.

8. Neb.—State v. Chicago & N. W. Ry. Co., 25 N.W.2d 824, 147 Neb. 970.

Statute held sufficiently definite

The use of the words "proper lights" does not render the statute so indefinite as to render it void as a penal statute on the ground that it does not fix a standard of guilt on which a penalty can be assessed.—State v. Chicago & N. W. Ry. Co., supra.

9. Neb.—State v. Chicago & N. W. Ry. Co., supra.

10. Neb.—State v. Chicago & N. W. Ry. Co., supra.

Provision held reasonable

Such a statute has been held not arbitrary, and unreasonable, as against the contention that reflectorized lamps are as good as oil burning lights, since there are many differences in the two types of lamps in so far as they relate to the safety of railroad employees and the public.—State v. Chicago & N. W. Ry. Co., supra.

Authority of commission to allow reflectorized lamps

Where the legislature has occupied the field by statute in effect prohibiting the use of reflectorized lamps, a state commission has no power to permit the use of such lamps.—State v. Chicago & N. W. Ry. Co., supra.

11. Ind.—Toledo, etc., R. Co. v. Bond, 72 N.E. 647, 35 Ind. App. 142.

12. Tex.—Houston, etc., R. Co. v. O'Neal, 47 S.W. 95, 91 Tex. 671.
51 C.J. p. 1041 note 9.

13. Iowa.—Kinyon v. Chicago, etc., R. Co., 92 N.W. 40, 118 Iowa 349, 96 Am. S.R. 382.
51 C.J. p. 1041 note 10.

14. Tenn.—Illinois Cent. R. Co. v. Davis, 58 S.W. 296, 104 Tenn. 442.

15. Tenn.—Illinois Cent. R. Co. v. Davis, supra.

16. Tenn.—Illinois Cent. R. Co. v. Davis, supra.—Webb v. East Tennessee, etc., R. Co., 12 S.W. 428, 88 Tenn. 119.

17. Tenn.—Illinois Cent. R. Co. v. Davis, 58 S.W. 296, 104 Tenn. 442.—Webb v. East Tennessee, etc., R. Co., 12 S.W. 428, 88 Tenn. 119.

18. N.J.—Kosher Dairy Co. v. New York, etc., R. Co., 78 A. 1052, 81 N.J. Law 145.
51 C.J. p. 1041 note 18.

19. Ga.—Atlanta, etc., R. Co. v. Pope, 72 S.E. 63, 9 Ga. App. 647.
51 C.J. p. 1041 note 20.

and volume to give adequate warning.[20] Under a statute requiring signals to be sounded at "short intervals" on approaching a town, and at "intervals" on leaving and while still within the corporate limits, signaling at "short" intervals is required on leaving as well as on approaching a town.[21] Where the statute requires a continuous signal under specified conditions, nothing short of this will suffice.[22]

Position and movement of train. Under statutes requiring signals a specified distance before reaching a crossing, it has been held that the signal must be given, although the train starts from a point less than the distance from the crossing,[23] but not where a train is pulling away from a crossing which at the time of starting it is entirely obstructing,[24] unless the statute also requires a signal to be given on starting the train.[25] Under a statute requiring signals to be sounded continuously for a specified distance before reaching a highway crossing, the signal must be sounded before cars are kicked over a crossing.[26] Under ordinances requiring a locomotive bell to be rung continuously while a train is in motion within the municipal boundaries, the requirement applies to all portions of the municipality,[27] including private railroad switchyards located within the municipality.[28] It has been both affirmed[29] and denied[30] that signal regulations apply to a backward movement of trains. A statute requiring the sounding of a signal on sighting any person or obstruction on the track has been held inapplicable to switching movements.[31]

Railroads and vehicles within statutes or ordinances. The company operating a railroad is ordinarily subject to signal requirements, even though it does not own the railroad.[32] Railroads incorporated or constructed before as well as after passage of signal statutes are subject thereto.[33] Signal regulations are ordinarily inapplicable to private railroads.[34] An inspection car run by steam is a locomotive within signal statute requirements.[35] A statute requiring that locomotives be equipped with a bell or a whistle has been held not to apply to a railroad gas motor car.[36]

b. Regulation by Municipality

A municipality duly empowered by statutory or charter provision may make reasonable regulations as to the signals which must be given in connection with the operation of trains within the municipal limits.

Under its general power to regulate the operation of railroads within municipal boundaries, a municipal corporation may make reasonable regulations respecting the signals to be operated and maintained in connection with the operation of trains running within the corporate limits.[37] A municipality may have the power to restrict the blowing of engine whistles or the ringing of bells within the corporate limits.[38]

Under particular charter or statutory provisions. Under a charter provision empowering a munici-

20. Mo.—Underwood v St. Louis, etc., R. Co., 177 S.W. 724, 190 Mo. App. 407.
51 C J p 1042 note 22.

21. Tenn.—Louisville, etc., R. Co. v. Gardner, 1 Lea 638.

22. Tex.—Galveston, etc., R Co. v Duelm, Civ.App., 23 S W. 596
51 C.J. p 1042 note 26.

23. Mo.—Spiller v. St. Louis, etc., R. Co., 87 S.W. 43, 112 Mo.App. 491.
51 C J. p 1042 note 28.

24. Mo.—Stillson v. Hannibal, etc, R. Co., 67 Mo. 671.

25. S.C.—Brown v. Southern R. Co., 43 S E. 794, 65 S C. 260.
51 C.J. p 1042 note 30.

26. Ill.—Baltimore, etc, R. Co. v. Wheeler, 63 Ill.App. 193.
51 C J. p 1042 note 32.

27. Tex.—Galveston, etc., R. Co. v. Levy, 79 S W. 879, 35 Tex.Civ.App. 107.
51 C.J. p 1042 note 34.

28. Tex.—Gulf, etc., R Co v. Melville, Civ.App., 87 S W. 868.
51 C.J. p 1042 note 35.

29. Ala.—Southern R. Co. v. Shipp, 53 So. 150, 169 Ala 327, 335.
51 C.J. p 1042 note 36.

30. Tenn.—King v Tennessee Cent. R. Co., 164 S.W. 1181, 129 Tenn. 44, 51 L R A ,N S., 618.

31. U.S.—Payne v. Illinois Cent R. Co, Tenn., 155 F. 73, 83 C.C.A. 589.
Tenn.—Louisville, etc,. R. Co. v. Jones, 1 Tenn.Civ App., 305.
Lookout requirements see infra § 429.

32. Mo.—State v. Missouri, Pac. R. Co., 50 S.W. 278, 149 Mo. 104.
51 C.J. p 1044 note 76.

33. Ill.—Galena, etc., R. Co. v. Loomis, 13 Ill. 548, 56 Am.D. 471.

34. Ill.—Western Steel Car, etc., Co. v. Nowalaniak, 135 Ill.App. 137.
51 C.J. p 1044 note 78.

35. Mo.—Mudd v. Missouri, etc., R. Co., 124 S.W. 59, 146 Mo.App. 388.

36. Minn.—Lee v. Molter, 35 N.W.2d 801, 227 Minn. 557.

37. Ind.—Pennsylvania R. Co. v. Hemmer, 186 N.E. 285, 206 Ind. 311, rehearing denied 189 N.E. 137, 206 Ind. 311.
Minn.—Larson v. Lowden, 282 N W. 669, 204 Minn. 80.
Ohio.—Howard v. Pennsylvania R. Co, 69 N E 2d 541, 79 Ohio App. 184, appeal dismissed 70 N.E 2d 373, 147 Ohio St. 248.
S.C.—McAbee v. Southern Ry. Co, 164 S E 444, 166 S.C. 166.
51 C.J. p 1040 note 87.
Flagmen and safety devices stationed at crossings see infra § 433

Repeal of ordinance

A city ordinance, adopting and codifying certain enumerated ordinances, and repealing all ordinances not enumerated or mentioned in saving clause, was held to repeal ordinance requiring railroads to erect and maintain electric gongs and signals at all street crossings in city.—City of Harrodsburg v. Southern Ry. Co. in Kentucky, 128 S.W.2d 233, 278 Ky. 10.

38. Ind.—Pennsylvania R. Co. v. Hemmer, 186 N E. 285, 206 Ind. 311, rehearing denied 189 N.E. 137, 206 Ind. 311.
Minn.—Larson v. Lowden, 282 N.W. 669, 204 Minn. 80.
S.C.—McAbee v. Southern Ry. Co., 164 S.E. 444, 166 S.C. 166.

pal council to direct the use and regulate the speed of locomotive engines within the city, the municipality may impose a signal requirement.[39] Under a statute authorizing municipalities to provide protection against injury to persons and property in the use of a railroad, a municipality may impose signal requirements.[40] Under a statute requiring railroads to give such signals within cities as the legislative authorities thereof may require, the municipality has exclusive power to prescribe signal requirements within its borders.[41] An ordinance prohibiting the sounding of an engine whistle except in cases required by statute law and also except in cases of extreme danger does not relieve a railroad from a statutory requirement to sound a whistle,[42] and, furthermore, imposes the duty on a railroad of sounding a whistle immediately before entering a crossing if the circumstances attending the presence of a person on the track present a situation of extreme danger.[43]

Reasonableness of particular regulations will depend on the circumstances involved.[44]

Conflict with state laws. In so far as a municipal signal regulation conflicts with state laws, the latter control.[45]

c. Places to Which Signal Requirements Apply

The determination of whether signal requirements apply not only to public crossings, but also to other places such as private crossings or railroad yards, depends on the terms of the regulation.

Statutes in general language requiring signals at crossings apply to all public highway crossings,[46] including streets,[47] without reference to how such thoroughfares become public roads.[48] However, the requirement is inapplicable to places not public roads,[49] such as private crossings.[50] Under a statute requiring signals when trains approach crossings, there is no obligation to signal when not approaching a crossing,[51] and a part of the right of way used by public pedestrians is not a "crossing" within the meaning of a statute requiring signals at crossings.[52]

Particular statutory provisions. Under a statute requiring railroads to give signals at crossings over "public roads or private ways established pursuant to law," the obligation exists with respect to public roads not established by law,[53] but there is no duty to sound a signal before crossing a private way not established by law;[54] and it has been held that the road must not only be used but must also be maintained as a public highway.[55] Under statutes requiring signals where a railroad crosses a "traveled" public road, there is no obligation to sound the signal before a public road not "traveled."[56] Under statutes requiring signals to be sounded before crossing any "traveled place," whether or not any particular place is "traveled" within the meaning of the statute will depend on the facts and circumstances involved.[57] A statute requiring signals where a railroad crosses a "road or street" refers to a public way, and not a private one, such as a private farm crossing.[58]

Grade or raised crossings. Under statutes requiring signals to be sounded before crossing a public road, without specification as to grade, it is ordinarily held that the statutory duty applies only to grade crossings,[59] although there is authority to the contrary.[60]

39. Tex.—Texas, etc., R. Co. v. Nelson, 29 S.W. 78, 9 Tex.Civ.App. 156.
51 C.J. p 1040 note 88

40. Ill.—Illinois Cent. R. Co. v. Gilbert, 41 N.E. 724, 157 Ill. 354.
51 C.J. p 1040 note 90.

41. Ky.—Cincinnati, etc., R. Co. v. Commonwealth, 104 S.W. 771, 126 Ky. 712, 31 Ky.L. 1113, 17 L.R.A., N.S., 561
51 C.J. p 1040 note 92.

42. Ind.—Pennsylvania R. Co. v. Hemmer, 186 N.E. 285, 206 Ind. 311, rehearing denied 189 N.E. 137, 206 Ind. 311

43. Ind.—Pennsylvania R. Co. v. Hemmer, supra.

44. Minn.—Larson v. Lowden, 282 N.W. 669, 204 Minn. 80
51 C.J. p 1040 note 94.

45. Ga.—Atlantic Coast Line R. Co. v. Adams, 66 S.E. 494, 7 Ga.App. 146
Ohio.—Howard v. Pennsylvania R. Co., 69 N.E.2d 541, 79 Ohio App. 184, appeal dismissed 70 N.E.2d 373, 147 Ohio St. 248.

46. Ga.—McCoy v. Central of Georgia R. Co., 62 S.E. 297, 131 Ga. 378.
51 C.J. p 1042 note 41.

47. Ill.—Mobile, etc., R. Co. v. Davis, 22 N.E. 850, 130 Ill. 146.
51 C.J. p 1042 note 42.

48. Ga.—McCoy v. Central of Georgia R. Co., 62 S.E. 297, 131 Ga. 378.
51 C.J. p 1043 note 43.

49. Ga.—McCoy v. Central of Georgia R. Co., supra
51 C.J. p 1043 note 44.

50. Iowa.—Nichols v. Chicago, etc., R. Co., 100 N.W. 1115, 125 Iowa 236
51 C.J. p 1043 note 45.

51. Tex.—Houston, etc., R. Co. v. Garcia, Civ.App., 90 S.W. 713.
51 C.J. p 1043 note 60.

52. S.C.—Ringstaff v. Lancaster, etc., R. Co., 43 S.E. 22, 64 S.C. 546.
51 C.J. p 1043 note 46.

53. Ga.—Southern R. Co. v. Combs, 53 S.E. 508, 124 Ga. 1004.
51 C.J. p 1043 note 48

54. Ga.—Willingham v. Macon, etc., R. Co., 38 S.E. 843, 113 Ga. 374

55. Ga.—Atlantic Coast Line R. Co. v. Bunn, 58 S.E. 538, 2 Ga.App. 305

56. Mo.—State v. Quincy, etc., R. Co., 131 S.W. 161, 150 Mo.App. 566.

57. S.C.—Kirby v. Southern R. Co., 41 S.E. 765, 63 S.C. 494.
51 C.J. p 1043 note 54.

58. Mass.—Follett v. Boston & M. R. R., 33 N.E.2d 269, 308 Mass. 553.

59. Wis.—Jenson v. Chicago, etc., R. Co., 57 N.W. 359, 86 Wis. 589, 22 L.R.A. 680.
51 C.J. p 1043 notes 56, 57.

60. Cal.—Johnson v. Southern Pac. R. Co., 82 P. 306, 147 Cal. 624, 1 L.R.A.,N.S., 307
51 C.J. p 1043 note 58.

Railroad yards. Statutes requiring signals to be sounded at a "public crossing" do not apply to places within the railroad yard where people have been accustomed to cross solely by sufferance of the company.[61]

Station or stopping place. Under a statute requiring signals of a train's approach to be given a specified distance from "any regular station or stopping place," a railroad junction at which passengers change trains is a "stopping place," even though there is no depot or platform there.[62] A place which is not a public road, and at which a railroad company was in the habit of stopping only for the purpose of taking on or putting off passengers on the latters' request, has been held not to be a "regular depot or stopping place" within the contemplation of a statute requiring a signal within a specified distance thereof.[63]

Cities, towns, and villages. Under a statute providing that on approaching a city or town the bell or whistle shall be sounded when the train is at a specified distance, and, at short intervals, until it reaches the depot or station, and, on leaving, shall be sounded when the train starts and at intervals until it has left the corporate limits, the obligation to signal applies with respect to an incorporated town irrespective of the location of its station,[64] and the obligation also exists with respect to that portion of the track between the corporate limits and the specified point outside such limits;[65] but such a statute has been held not to apply with respect to an unincorporated town.[66] A statute requiring signals at a specified distance from crossings outside of incorporated cities or towns has been held applicable to a crossing within the corporate limits but outside of the settled portion of the municipality,[67] and the obligation to signal arises when the train is within the specified distance irrespective of whether the train itself is within or without the corporate limits.[68] Under a statute requiring specified signals at crossings, but providing that the statutory requirement shall not interfere with contrary requirements of any city or incorporated town, in the absence of a conflicting ordinance the statutory requirements apply to crossings within such a municipality.[69] Under statutory provisions requiring signals at crossings generally, but excusing the giving of signals within town or city limits unless required by ordinance, signals should be sounded at a crossing within a village.[70] A statute providing for the giving of signals when a train is at a distance of one mile and is approaching a city or town has been held not intended to protect persons crossing the railroad outside the corporate limits, although within one mile thereof.[71]

§ 429. Lookouts

The state or a duly empowered municipality may require lookouts in connection with the operation of trains in which event a lookout must be maintained in the places specified by the regulations.

Within its powers to regulate the operation of railroads, a state may provide for and regulate lookouts on, or in connection with the running of, trains.[72] A municipal corporation, under its power to regulate the operation of railroads within municipal boundaries, may make reasonable regulations respecting lookouts[73] Municipal power to regulate lookouts kept on trains may arise from express statutory provision, or may be implied from the general welfare clause of a municipal charter.[74]

Lookout statutes are satisfied if one member of the train crew keeps an effective lookout.[75] Under a regulation requiring a watchman on the rear of a backing locomotive, the watchman must be stationed on the rear of the tender.[76] An engine[77] or motor car run on railroad tracks[78] may

61. Mo—Gurley v. Missouri Pac. R. Co., 16 S.W. 11, 104 Mo. 211.

62. Ala—Ensley R. Co. v. Chewning, 9 So. 458, 93 Ala. 24

63. Ala.—Cook v. Central R., etc., Co., 67 Ala. 533.

64. Tenn—Illinois Cent R Co v. Davis, 58 S W. 296, 104 Tenn. 442. 51 C.J. p 1044 note 66.

65. Tenn—Illinois Cent. R Co. v. Adams, 2 Tenn.Civ.App. 118.

66. Tenn—Louisville, etc, R. Co. v. Collier, 54 S.W. 980, 104 Tenn. 189 —Webb v. East Tennessee, etc., R. Co., 12 S.W. 428, 88 Tenn. 119.

67. Ky—Louisville, etc, R. Co. v. Molloy, 91 S W 685, 28 Ky L. 1113 51 C J. p 1044 note 70.

68. Ky.—Illinois Cent R. Co. v. Commonwealth, 56 S W. 409, 108 Ky. 348, 21 Ky L. 1779 51 C J. p 1044 note 71.

69. Ind—Lake Shore, etc., R. Co. v. Myers, 98 N.E 654, 100 N E. 313, 52 Ind App 59.

70. Iowa—Bruggeman v. Illinois Cent. R. Co, 123 N.W 1007, 147 Iowa 187, Ann Cas.1912B 876.

71. Tenn—Stricklin v. Louisville & N. R. Co, 2 Tenn App. 141.

72. Ark.—St Louis Southwestern R. Co. v. Cone, 163 S W. 1170, 111 Ark. 309. 51 C J. p 1045 note 90.

73. U S—Atlantic Coast Line R. Co. v. Goldsboro, N C, 34 S.Ct. 364, 232 U.S. 548, 58 L Ed. 721. 51 C.J p 1045 note 92

74. Ind—Wabash R. Co. v McDoniels, 107 N E 291, 183 Ind. 104. 51 C.J. p 1045 note 94.

75. Ark—St. Louis Southwestern R. Co. v Cone, 163 S.W. 1170, 111 Ark. 309.

76. Ind—Harmon v. Foran, 94 N E 1050, 95 N.E. 597, 48 Ind.App. 262 51 C.J. p 1045 note 96

77. Ark.—Ft Smith, etc, R. Co. v. Messek, 131 S W. 966, 96 Ark. 243 51 C.J. p 1046 note 8.

78. Ark.—Central R. Co. v. Lindley, 151 S.W. 246, 105 Ark. 294.

constitute a "train" within the meaning of lookout statutes

Place and nature of movement. Statutes requiring a constant lookout to be kept by train crews for persons and property on railroad tracks apply to cars and engines run in railroad yards,[79] as do also statutes or ordinances requiring a lookout on the rear end of a backward moving train,[80] which latter also apply to coupling movements.[81] However, there is authority to the effect that a statute requiring a lookout and efforts to stop the train on sighting any person or obstruction on the track is inapplicable to mere switching movements[82] Under a statute requiring a backing passenger train to be preceded by a man on foot to warn of its approach to a station, the distance of the track and train from the station necessary to raise the statutory duty will depend on the provisions of the statute[83] A railroad rule requiring a flagman to go to the rear of the train to protect it when a train stops under circumstances in which it may be overtaken by another train has been held to relate to unusual stops not contemplated or provided for,[84] such as may be caused by accident or mechanical failure between stations and the like,[85] and not station stops or other operations where the train is adequately protected by block signals and yard-limit rules.[86]

§ 430. Lighting Tracks

The state may regulate the lighting of tracks in the streets, or may delegate its power in this respect to municipalities. Regulations with respect to the lighting of tracks should be reasonable and must be sufficiently definite and certain to inform the railroad of what must be done.

While a state under its power to regulate the operation of railroads may provide for and regulate the lighting of tracks in streets,[87] it may, as a proper exercise of the police power, delegate this power to municipalities,[88] as where it authorizes municipal corporations to require railroads to light their tracks at crossings within the municipality[89] An ordinance requiring the lighting of tracks is not a tax measure.[90]

Under a statute authorizing municipalities to require railroads to "maintain" lights at track and street intersections, the municipality may require "installation" of lights at intersections theretofore unlighted.[91] Under a statute authorizing the municipality to require railroads to maintain lights similar to, and of equal power with, those used by the city in lighting the streets, the municipality cannot require maintenance of lights superior to those used by the city for lighting the streets.[92] It has been held that a railroad operating in compliance with a later statute eliminating street grade tracks cannot be compelled to light its tracks, under a prior statute, passed when tracks were on the street grade, requiring lighting of tracks.[93]

The ordinance should be sufficiently definite and certain to inform the company of what it is required to do,[94] as by specifying the time within which it must be complied with,[95] and fixing the time or times at which the tracks shall be kept lighted[96] Under some provisions, railroads can be required to light their crossings only at such

79. Ark—Ft Smith, etc, R. Co. v Messek, 131 S.W 966, 96 Ark. 243
51 C.J. p 1045 note 98

80. Ind—Baltimore, etc, R. Co. v Peterson, 59 N.E. 1044, 156 Ind. 364.
51 C J. p 1045 note 99.

81. Ind—Pittsburgh, etc, R Co v McNeil, 69 N E 471, 34 Ind App 310.
51 C J. p 1045 note 1.

82. U.S—Payne v Illinois Cent R Co, Tenn., 155 F 73, 83 C C A 589
51 C J. p 1045 note 3.

83. Miss—Yazoo, etc, R. Co. v Metcalf, 36 So 259, 84 Miss 242.
51 C.J. p 1046 note 7.

84. Ill.—Chicago Great Western Ry Co. v. Illinois Commerce Commission ex rel. Brotherhood of R. R Trainmen, 75 N.E 2d 318, 398 Ill. 190.

85. Ill.—Chicago Great Western Ry Co. v. Illinois Commerce Commission ex rel. Brotherhood of R. R Trainmen, supra.

86. Ill—Chicago Great Western Ry. Co v Illinois Commerce Commission ex rel Brotherhood of R. R Trainmen, supra

87. D C—Washington Terminal Co v. District of Columbia, 36 App D C 186
Ohio—St. Mary's v. Lake Erie, etc, R Co, 53 N E 795, 60 Ohio St. 136.

88. Ind—Public Service Co of Indiana v City of New Castle, 8 N. E 2d 821, 212 Ind 229.
51 C J. p 1046 note 19

89. Ohio—Cincinnati, etc., R Co. v Bowling Green, 49 N E 121, 57 Ohio St 336, 41 L R A. 422.
51 C J. p 1046 note 19.
Governmental function
A municipality exercising its power, under statute, to require that railroads light their tracks at street intersections, was exercising its police power and was functioning governmentally—Public Service Co. of Indiana v City of New Castle, 8 N E 2d 821, 212 Ind. 229.

90. La.—State v St. Louis, etc, R. Co, 70 So 621, 138 La 714, error dismissed 38 S Ct 8, 245 U.S. 674, 62 L Ed 541

91. La—State v St Louis, etc, R. Co., supra.
51 C.J. p 1046 note 21.

92. La—State v. St Louis, etc., R. Co, supra
51 C J. p 1046 note 23

93. D C—District of Columbia v. Philadelphia, etc, R Co, 38 App D C 143—Washington Terminal Co. v. District of Columbia, 36 App D C. 186.

94. Ind—Pittsburgh, etc., R Co v. Hartford City, 82 N E 787, 85 N E 362, 170 Ind. 674, 30 L.R.A.,N S, 461
51 C.J. p 1047 note 31

95. Ohio—Lake Erie, etc, R. Co. v St Mary's, 14 Ohio Cir.Ct. 202, 7 Ohio Cir.Dec. 661.
51 C.J. p 1047 note 32.

96. Ind—Shelbyville v Cleveland, etc, R. Co., 44 N.E. 929, 146 Ind 66.
51 C J. p 1047 note 33.

times as they are used for the crossing of trains, and at reasonable times before and after such crossing.[97]

Reasonableness of regulation. Under statutes delgating to a municipality the power to regulate the lighting of railroad tracks within its corporate limits, the municipality may, by ordinance, prescribe any reasonable regulation governing the matter;[98] but this power of regulation must be reasonably exercised according to what may be necessary for the safety of the public at the crossing,[99] and not as a means of compelling the railroad company to light the city streets.[1]

Expense of lighting. Statutes may properly provide that, if the railroad company does not light its tracks as required by the statute, the municipality may do so at the company's expense.[2] However, in the absence of charter or statutory authorization, a municipality lacks power to require a railroad to light its tracks at its own expense,[3] and such power will not be inferred from general authorization to protect the public welfare,[4] or from specific authorization to regulate and control the lighting of streets.[5]

§ 431. Speed

a. In general
b. Power of municipality to regulate

a. In General

The state or a duly authorized board or commission may regulate the speed of railroad trains. Such regulations must be reasonable, and they apply to the trains, companies, and places specified.

A state has the power to regulate the speed of railroad cars, trains, and locomotives,[6] and may delegate such power to a board or commission;[7] and a grant of charter power to a railroad to regulate the speed of its trains does not deprive the state of its reserved power to control such matter.[8] However, such regulations are subject to constitutional restrictions[9] and must be reasonable in their nature and effect.[10] The courts, in the absence of statute or ordinance so authorizing, cannot fix the rate of speed at which trains should be operated within municipalities.[11]

In the absence of statute, railroads may run trains at any speed that is safe for their passengers and freight.[12] The duty of a railroad to use due diligence and care in the operation of its trains may obligate it to run trains at a slower rate than that permitted by statute.[13] As far as concerns speed, the operators of trains running on schedules are not required to heed everyone who makes a motion or attempts to communicate with them by signal, where the signals are not those in usual and ordinary use.[14] Regulations governing the speed of railroads must be construed as a whole.[15]

97. Ind.—Public Service Co. of Indiana v City of New Castle, 8 N E.2d 821, 212 Ind. 229.

98. Ind.—Chicago, etc, R. Co. v Salem, 82 N.E. 913, 170 Ind. 153.
51 C.J. p 1046 note 27.

99. Ind.—Shelbyville v. Cleveland, etc., R. Co., 44 N E. 929, 146 Ind 66.
51 C J. p 1046 note 29.

1. Ind.—Cleveland, etc., R. Co. v. Connersville, 46 N E. 579, 147 Ind 277, 62 Am.S R. 418, 37 L.R.A. 175.
51 C J. p 1047 note 30.

2. Ohio—St. Mary's v. Lake Erie, etc., R. Co., 53 N.E. 795, 60 Ohio St. 186.
51 C J. p 1047 note 36.

3. Pa—Hazleton v. Lehigh Valley R. Co, 11 Pa Dist. 644, 10 Kulp 571.

4. Pa.—Hazleton v. Lehigh Valley R. Co., supra.

5. Pa—Hazleton v. Lehigh Valley R. Co, supra.

6. Neb—Davison v. Chicago, etc, R. Co., 160 N.W 877, 100 Neb. 462, L.R.A.1917C 135
51 C.J. p 1047 note 43.

7. Miss—Hines v. Andrews, 86 So. 801, 124 Miss. 292.
51 C.J. p 1050 note 1.

8. Ind—Cleveland, etc, R. Co v. Harrington, 30 N.E. 37, 131 Ind 426.
51 C J. p 1047 note 46.

9. Neb.—Davison v. Chicago, etc, R. Co, 160 N W 877, 100 Neb. 462, L.R.A.1917C 135

10. Neb.—Davison v. Chicago, etc, R Co, supra.
51 C.J. p 1047 note 45.

11. Ky.—Cincinnati, etc, R. Co. v. Commonwealth, 104 S W. 771, 126 Ky. 712, 31 Ky.L. 1113, 17 L.R A., N S., 561.
Mo.—**Corpus Juris cited in** Thompson v. St Louis-San Francisco Ry. Co., 69 S W.2d 936, 941, 334 Mo. 958.

12. Ala.—Cannon v. Louisville & N. R. Co., 42 So.2d 340, 252 Ala. 571.
La.—Friedman's Estate v. Texas & P. Ry Co, App., 24 So 2d 167, reversed on other grounds 25 So.2d 88, 209 La 540, 163 A.L R. 1228.
"Under control," in respect of a train, means to be able to stop within the distance within which the track is seen to be clear.—Fuller v. Oregon-Washington R. & Nav. Co., 181 P. 338, 341, 93 Or. 160—65 C.J. p 1293 note 99

Speed in open country
High rate of speed of a train in open country, where no particular conditions exist which make it dangerous, does not constitute actionable negligence—Chicago, R I & P. R. Co. v. Consumers Co-op Ass'n, C. A.Kan., 180 F.2d 900, certiorari denied 71 S Ct. 42, 340 U S. 813, 95 L. Ed. ——.

13. Utah—Smith v. San Pedro, etc., R. Co, 100 P. 673, 35 Utah 390.
51 C.J. p 1051 note 8.

14. Mo.—Cottonwood Fibre Co v. Thompson, 225 S.W.2d 702, 359 Mo. 1062.

15. Mo.—Brown v. Alton R. Co., 151 S.W 2d 727, 236 Mo App 26—Brown v. Alton R. Co., App, 132 S.W.2d 713, record quashed on other grounds State ex rel. Alton R. Co. v. Shain, 143 S.W.2d 233, 346 Mo 681

Speed limit "between" streets
An ordinance fixing speed limit for trains between named streets did not by the use of the word "between" exclude crossing on one of such named streets.—Smith v. Atlantic Coast Line R. Co., C.C.A.Fla., 127 F. 2d 798.

Trains and vehicles within regulations. When a regulation prescribes different speed limits for freight and passenger trains, the fact that a regular freight train is carrying passengers does not authorize it to proceed at the higher rate of speed[16] Speed regulations ordinarily apply to detached locomotives not hauling cars[17] Under a regulation restricting the speed of any through train along a specified street, an engine and tender engaged in dropping cars from the train prior to proceeding with it are subject to the regulation.[18] The word "vehicle," as used in a speed regulation ordinarily will not include locomotives or cars which run and are operated only over and on a permanent track or fixed way, unless the context of the regulation clearly indicates an intention to include them.[19]

Companies and persons within regulations. Statutes or ordinances applying in terms to any person running or causing trains to be run contrary to speed regulations apply to companies owning or operating the road,[20] as well as to the persons operating the trains.[21]

Territorial application in general. Ordinances limiting the rate of speed of trains within the corporate limits apply to all places within those limits,[22] including the unplatted and unsettled portions thereof,[23] the railroad switchyards,[24] and lands belonging to the railroad company,[25] and are not limited to movement of trains on the streets.[26] The prescribed speed limit should be observed as soon as the train starts across the city line.[27] Some provisions regulating the speed of locomotives and cars passing through towns, cities, and villages apply to organized, incorporated towns, cities, and villages, including the territory embraced in their limits as fixed by law,[28] and are not limited to the improved and inhabited portions of such localities.[29]

Under an ordinance restricting speed through traveled streets, places other than traveled streets are not within the speed regulation.[30] Under an ordinance restricting speed "over or across the surface of any public place, at any place" between designated streets, it has been held that the speed restriction applies to a public place, even though not between the designated streets[31] The question whether a municipal ordinance regulating the speed of trains is applicable to a particular locality may be for the jury under all the circumstances.[32]

Speed at crossings. Under regulations requiring trains to slow up on approaching public crossings, the requirement has been held applicable only to public[33] grade[34] crossings, and not to apply where compliance is an operating impossibility.[35] Under an ordinance limiting the speed of trains to a specified rate until specified safety devices are provided and put in operation at street intersections, the restriction ceases to be in force when the devices are constructed and put in operation,[36] and is not revived by the railroad's subsequent failure to operate them.[37] An ordinance permitting a higher rate of speed than that allowed by a prior ordinance on the condition that gates are constructed at crossings will

16. Ill.—Chicago, etc, R. Co. v Thorson, 68 Ill App. 288

17. Ill—See *Christmann* v Illinois Cent R. Co., 199 Ill.App. 139, 143.
Mo—Campbell v. Chicago, B. & Q R. Co., 245 S.W. 58, 211 Mo App. 331.
51 C J. p 1051 note 11.

18. N.C.—Dorsett v. Atlantic Coast Line R. Co, 87 S E. 961, 171 N.C. 109.

19. Ga—Georgia Power Co. v Clark, 25 S E 2d 91, 69 Ga.App 273.

20. Ind.—Southern R. Co. v. Jones, 71 N.E. 275, 33 Ind.App. 333.
Tex.—Missouri, etc., R. Co. v Owens, Civ.App, 75 S.W. 579.
Natural persons and corporations
An ordinance prohibiting any railroad, engine, car or cars from running in excess of a certain speed was broad enough to cover both natural persons and corporations, notwithstanding that part of ordinance prescribing the penalty referred only to "any person or persons," since "persons" may be either natural or artificial.—Brown v. Alton R. Co, 151 S.W.2d 727, 236 Mo App. 26—Brown v Alton R. Co, App, 132 S W 2d 73, record quashed on other grounds State ex rel. Alton R Co v. Shain, 143 S W.2d 233, 346 Mo. 681.

21. Ind—Southern R Co. v. Jones, 71 N E. 275, 33 Ind App 333.
Tex—Missouri, etc R. Co. v. Owens, Civ App, 75 S W. 579

22. Mo—Campbell v. Chicago, B. & Q. R. Co., 245 S.W. 58, 211 Mo. App 331
51 C J. p 1051 note 15.

23. Ind—Whitson v. Franklin, 34 Ind 392.

24. Mo—Kidd v Chicago, etc, R. Co., 274 S.W. 1079, 310 Mo. 1, certiorari denied 46 S Ct. 119, 269 U S. 582, 70 L Ed 424
51 C.J. p 1051 note 17.

25. Ind—Whitson v. Franklin, 34 Ind. 392.

26. Mo—Kidd v. Chicago, etc., R. Co, 274 S W. 1079, 310 Mo 1, certiorari denied 46 S.Ct. 119, 269 U.S. 582, 70 L.Ed. 424.

27. Ga.—Atlantic Coast Line R. Co v. Adams, 66 S.E, 494, 7 Ga App. 146
51 C.J. p 1051 note 20.

28. Miss—Illinois Cent. R Co. v. Jordan, 63 Miss 458.

29. Miss—Illinois Cent. R. Co. v. Jordan, supra.
Wis—Nolan v. Milwaukee, etc., R Co, 64 N W. 319, 91 Wis. 16.

30. Fla.—Seaboard Air Line R. Co v Tomberlin, 70 So 435, 70 Fla 437—Seaboard Air Line R. Co. v. Smith, 43 So 235, 53 Fla. 375.

31. Wash—Gillum v Pacific Coast R Co, 279 P 114, 152 Wash 657.
51 C J. p 1051 note 24.

32. Ga.—Jackson v. Seaboard Air Line Ry, 78 S E 1059, 140 Ga. 277.

33. Ga.—Comer v. Shaw, 25 S E. 733, 98 Ga 543.
51 C J. p 1051 note 27.

34. Ga.—McElroy v. Georgia, etc., R. Co, 25 S E. 439, 98 Ga. 257.

35. Ga—Central of Georgia R. Co. v. Harper, 53 S.E. 391, 124 Ga. 836.
51 C J. p 1051 note 29.

36. Ill.—Hecker v. Illinois Cent. R. Co., 83 N.E. 456, 231 Ill. 574.
51 C J. p 1052 note 34.

37. Ill.—Hecker v. Illinois Cent. R. Co., supra.

not be construed as repealing the prior ordinance as to places where the condition has not been complied with.[38] The word "highway," as used in an ordinance restricting speed at a highway crossing unless specified safety devices are provided, is not limited to highways formally established by the authorities,[39] but also includes highways becoming such by prescription.[40]

Speed at stations. Under a penal statute forbidding trains or detached locomotives to run "into" or "through" a passenger station in excess of a specified speed, it is permissible to exceed such speed when running past a station wholly on one side of the track.[41]

b. Power of Municipality to Regulate

(1) In general
(2) Reasonableness and discrimination

(1) In General

It is generally considered that a municipality has only such power to regulate the speed of railroads as has been delegated to it, although its power in this respect may be implied from other powers expressly granted. A municipal speed regulation is invalid in so far as it may conflict with state laws.

While there is authority to the effect that municipal power to regulate the speed of railroad trains within the municipality exists independently of statute[42] or constitution,[43] the general rule is that a municipality has only such power in this respect as has been delegated to it expressly or impliedly by statute or constitution.[44] The power may be derived from express charter or statutory provisions,[45] or may be implied from other powers expressly granted,[46] such as the "general welfare" clause of a municipal charter.[47] Ordinarily, under its general powers to regulate the operation of a railroad within its limits, and to regulate the use of its streets by public utilities, a municipal corporation has the power to regulate and restrict the rate of speed of trains and locomotives while running within its corporate limits,[48] as a proper municipal police regulation.[49] Under a statute empowering a municipality to enact and enforce within its limits all local police, sanitary, and other regulations not conflicting with general laws, and in the absence of any state statute as to speed of trains, a municipality may require a railroad to observe such reasonable precautions as to speed of trains passing through the municipality as may be needful to public safety.[50] Statutes giving a board or commission general supervision of the regulation of operation of railroads do not deprive a municipality of its power to regulate the speed of trains within its corporate limits,[51] although there is authority to the contrary.[52]

The power of a municipality to regulate the speed of railroad trains and locomotives ordinarily extends to all places within the corporate limits,[53] even though outside of the limits of public streets and thoroughfares.[54] Under a statute providing that, when a railroad track is laid in a municipality, the council may regulate the speed of all locomotives and railroad cars within the corporate limits, the municipality may regulate speed at places other than street crossings.[55]

Boroughs. Under a statute authorizing a borough

38. Mo—Graney v St. Louis, etc., R. Co, 38 S.W. 969.

39. Me—Moore v Maine Cent. R. Co, 76 A. 871, 106 Me. 297.

40. Me—Moore v. Maine Cent. R. Co, supra.

41. Vt.—Flint v Central Vermont R Co, 73 A 590, 82 Vt. 269
51 C J. p 1052 note 43.

42. Ind.—Whitson v. Franklin, 34 Ind 392.

43. Utah—Shortino v. Salt Lake, etc., R. Co., 174 P. 860, 52 Utah 476
51 C J. p 1047 note 49.

44. U S.—Erb v. Morasch, Kan., 20 S Ct. 819, 177 U S. 584, 44 L.Ed 897.

Power limited to highway crossings
Where, at time of passage of ordinance regulating speed of railroad trains through town, there was no statute authorizing town to enact such ordinances, and power of towns was limited to protection of highway crossings, town ordinance affected only speed of trains crossing public highways and protected only persons using or intending to use highway crossings—Southern Ry Co. v. Harpe, 58 N.E 2d 346, 223 Ind 124.

45. Ill—Chicago, etc., R Co v. Carlinville, 65 N E 730, 200 Ill. 314, 93 Am.S.R 190, 60 L R A. 391.
51 C J. p 1048 note 56.

46. Ind.—Baltimore, etc., R. Co. v. Whiting, 68 N E 266, 161 Ind. 228.
51 C J p 1048 note 57.

47. Ga.—Nashville, etc, R Co v. Peavler, 68 S.E 432, 134 Ga. 618
51 C J. p 1048 note 58.

48. Mo—Harvey v. Gardner, 223 S. W.2d 428, 359 Mo. 730—Thompson v. St. Louis-San Francisco Ry. Co., 69 S W.2d 936, 334 Mo 958.
51 C J. p 1048 note 54.

49. Minn.—Lang v. Chicago & N. W. Ry. Co., 295 N.W. 57, 208 Minn. 487.
51 C.J. p 1048 note 55.

50. Ky—Cincinnati, etc, R Co., v. Commonwealth, 104 S W. 771, 126 Ky. 712, 31 Ky.L. 1113, 17 L R.A., N.S, 561.

51. Okl—St. Louis-San Francisco R. Co v. Bryan, 237 P. 613, 113 Okl. 39.
S.C—Boggero v. Southern R Co., 41 S.E. 819, 64 S C. 104.

Absence of action by commission
Fact that legislature had given power to commission to regulate speed of railway trains did not prevent city from doing so in absence of showing that commission had taken action—Frazier v. Northern Pac. Ry. Co., D.C.Idaho, 28 F Supp. 20.

52. Ill.—Witt v Cleveland, etc., R. Co., 155 N E 325, 324 Ill 494.
51 C J. p 1048 note 72.

53. N Y—Green v. Delaware, etc, Canal Co, 38 Hun 51.

54. N Y—Green v. Delaware, etc., Canal Co, supra.
51 C.J. p 1048 note 61.

55. Ohio—Blancke v. New York Cent. R Co., 133 N.E. 484, 102 Ohio St. 178.

to make such ordinances as are deemed necessary for the good order and government of the borough, it has been held that it lacks power to regulate the speed of trains within its limits.[56]

A police jury lacks power to regulate the speed of trains within municipalities.[57]

Conflict with state and federal laws. In accordance with general rules, a municipal regulation of the speed of trains is invalid in so far as it conflicts with state laws.[58] Under a statute empowering municipalities to make speed regulations and providing a specified penalty for violation, a regulatory ordinance providing a different remedy for violation is void.[59] A speed regulation is not invalid as a restriction on interstate commerce,[60] nor, under a federal statute forbidding obstruction of United States mails, is a municipal restriction of the speed of trains invalid as an obstruction of mail trains.[61]

Presumption of validity and reasonableness. A municipal speed regulation passed pursuant to legislative authority is prima facie valid,[62] and, while the presumption of validity is rebuttable,[63] the ordinance should not be declared invalid as unreasonable unless clearly of the latter character.[64] Mere restriction to a low speed is not in itself conclusive as to the unreasonable character of the regulation.[65]

(2) Reasonableness and Discrimination

Municipal regulations as to the speed of trains must be reasonable and must not be unlawfully discriminatory. The reasonableness of any given ordinance depends, in the final analysis, on the particular circumstances.

Municipal regulations as to the speed of trains must be reasonable,[66] and the courts ordinarily have power to declare a municipal regulation governing speed of trains invalid because unreasonable, even though the power to regulate speed has been expressly conferred on the municipality.[67] However, if the regulation is satisfactory in other respects, and also reasonable, it will be enforced,[68] and there is authority to the effect that an ordinance fixing the speed of trains within the limits or details prescribed by statute cannot be declared void as unreasonable.[69] The reasonable or unreasonable character of particular ordinances will, in the final analysis, depend on the particular circumstances involved.[70]

Discrimination. A municipal ordinance regulating the speed of railroad trains will be held invalid if it makes an unnecessary or unwarranted discrimination between competing roads.[71]

Full stop. An ordinance requiring trains to come to a full stop before crossing specified streets may be upheld as reasonable.[72]

Time. The reasonableness of municipal speed regulations should be determined as of the time of their application rather than as of the time of the enactment of the ordinance.[73]

56. Pa.—Pittsburgh, etc., R. Co. v. Crafton Borough, 17 Pa. Dist. 204
51 C.J. p. 1048 note 67.

57. La.—State v. Miller, 5 So. 258, 7 So. 672, 41 La. Ann. 53

58. Fla.—Seaboard Air Line R. Co. v. Smith, 43 So. 235, 53 Fla. 375.
51 C.J. p. 1049 note 75.

59. Ohio.—Caskey v. Bell Center, 8 Ohio N.P., N.S., 153
51 C.J. p. 1049 note 77.

60. Ill.—Chicago, etc., R. Co. v. Carlinville, 65 N.E. 730, 200 Ill. 314, 93 Am. St. R. 190, 60 L.R.A. 391.
51 C.J. p. 1049 note 78.

61. Ill.—Chicago, etc., R. Co. v. Carlinville, 65 N.E. 730, 200 Ill. 314, 93 Am. St. R. 190, 60 L.R.A. 391
51 C.J. p. 1049 note 80

62. Mo.—Thompson v. St. Louis-San Francisco Ry. Co., 69 S.W.2d 936, 334 Mo. 958.
51 C.J. p. 1050 note 94

63. Ohio.—Cleveland, etc., R. Co. v. Grambo, 134 N.E. 648, 103 Ohio St. 471, 20 A.L.R. 1214.
51 C.J. p. 1050 note 95.

64. Ohio.—Blancke v. New York Cent. R. Co., 133 N.E. 484, 102 Ohio St. 178.
51 C.J. p. 1050 note 96.

65. Tenn.—Hines v. Partridge, 231 S.W. 16, 144 Tenn. 219.
51 C.J. p. 1050 note 97.

66. Minn.—Evison v. Chicago, etc., R. Co., 48 N.W. 6, 45 Minn. 370, 11 L.R.A. 434.
51 C.J. p. 1049 note 83.

67. Ill.—Chicago, etc., R. Co. v. Carlinville, 65 N.E. 730, 200 Ill. 314, 93 Am. St. R. 190, 60 L.R.A. 391.
51 C.J. p. 1051 note 4.

68. U.S.—Frazier v. Northern Pac. Ry. Co., D.C. Idaho, 28 F. Supp. 20
Minn.—Lang v. Chicago & N.W. Ry. Co., 295 N.W. 57, 208 Minn. 487.
Mo.—Thompson v. St. Louis-San Francisco Ry. Co., 69 S.W.2d 936, 334 Mo. 958.
51 C.J. p. 1049 note 86.

Local body as primary judge of reasonableness

Legislative body of municipality is primary judge of necessity or reasonableness of speed regulation of railroad trains operating through city.—Thompson v. St. Louis-San Francisco Ry. Co., supra.

69. Ill.—Gibbons v. Aurora, etc., R. Co., 104 N.E. 1063, 263 Ill. 266.
51 C.J. p. 1049 note 84, p. 1051 note 5

70. Mo.—**Corpus Juris cited in** Thompson v. St. Louis-San Francisco Ry. Co., 69 S.W.2d 936, 941, 334 Mo. 958
51 C.J. p. 1049 note 87, p. 1050 note 89

Held reasonable

(1) Five miles per hour.—Irwin v. St. Louis-San Francisco Ry. Co., 30 S.W.2d 56, 325 Mo. 1019

(2) Eight miles per hour.—Frazier v. Northern Pac. Ry. Co., D.C. Idaho, 28 F. Supp. 20.

(3) Ten miles per hour.—Thompson v. St. Louis-San Francisco Ry. Co., 69 S.W.2d 936, 334 Mo. 958

(4) Fifteen miles per hour.—Brown v. Alton R. Co., 151 S.W.2d 727, 236 Mo. App. 26.—Brown v. Alton R. Co., App., 132 S.W.2d 713, record quashed on other grounds State ex rel. Alton R. Co. v. Shain, 143 S.W.2d 233, 346 Mo. 681.

71. Ill.—Lake View v. Tate, 22 N.E. 791, 130 Ill. 247, 6 L.R.A. 268.
51 C.J. p. 1049 note 73

Discrimination held not shown

U.S.—Frazier v. Northern Pac. Ry. Co., D.C. Idaho, 28 F. Supp. 20.

72. N.Y.—Buffalo v. New York, etc., R. Co., 46 N.E. 496, 152 N.Y. 276
Stopping before crossing other railroads see infra § 432.

73. Ohio.—Cleveland, etc., R. Co. v.

Questions of law and fact. The question of the reasonableness of a municipal speed regulation is for the court[74] unless disputed questions of fact occur for submission to the jury.[75]

§ 432. Precautions on Crossing Other Railroads

The state or a duly authorized board or commission may require reasonable precautions to be taken in the operation of trains at track intersections with other railroads.

Under its powers to regulate the operation of railroads, the state may require reasonable precautions in the operation of trains at track intersections with other railroads.[76] Under some provisions, when the tracks of two railroads cross each other, the engineers and conductors must stop their trains within a specified distance of such crossing and not proceed until they know the way to be clear.[77] Under a statute providing that whenever railroads cross each other the trains shall be brought to a full stop a specified distance before the crossing, in the absence of specified safety devices or precautions thereat, a railroad leasing two intersecting roads and operating all trains thereon has been held obligated to comply with the statutory requirement.[78] Where a statute requires railroad trains to stop before crossing other railroads, and imposes penalties on both the engineer and the company for violation, it is no defense to an action against the railroad that the engineer in violating the statute acted against a company regulation requiring trains to stop.[79]

Regulation by municipality. Under charter authorization to regulate the speed and running of locomotive engines and railroad cars, a municipality lacks power to compel a steam railroad to stop trains before crossing a street railroad.[80]

Regulation by board or commission. Under a statute imposing the mandatory duty to stop trains before crossing other railroads, a public department granting permission to construct such a crossing cannot by regulation permit the railroad to reduce the speed of its trains before crossing instead of bringing them to the required full stop.[81] Under a statute requiring railroads to bring trains to a full stop before crossing other railroads at intersections not equipped with an interlocking device, a regulatory board, on proof that the railroad has been violating the statute at a particular junction, may properly order it to bring its trains to a full stop at such junction.[82]

In the District of Columbia the commissioners of the District have authority to make such requirements under the police powers delegated to them by congress.[83]

§ 433. Safety Devices and Flagman at Highway and Private Crossings

a. In general
b. Regulation by municipality
c. Regulation by board or commission

a. In General

The state may require railroads to maintain special precautions at crossings, such as flagmen, gates, or signboards, and the duty of the railroad to obey such regulations is imperative. Statutes of this nature should be liberally construed.

Under its powers to regulate the operation of railroads, the state may require the maintenance and operation of adequate safety devices at railroad and highway crossings,[84] such as flagmen,[85] gates,[86] and signboards;[87] and the validity of particular statutes regulating safety provisions at crossings

Grambo, 134 N.E. 648, 103 Ohio St. 471, 482, 20 A.L.R. 1214.
51 C.J. p 1050 note 91.

74. Ga.—Jackson v. Seaboard Air-Line R. Co., 78 S.E. 1059, 140 Ga. 277.
51 C.J. p 1050 note 92.

75. Ga.—Nashville, etc., R. Co. v. Peavler, 68 S.E. 432, 134 Ga. 618.
51 C.J. p 1050 note 93.

76. Ohio—Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co., 30 Ohio St. 604
51 C.J. p 1052 note 49.

77. Ala.—Southern Ry. Co. v. Bryan, 28 So. 445, 125 Ala. 297.

Freedom from immediate or expected obstruction

A statutory provision, that engineers, after stopping and before proceeding to run a train over a railway crossing, must "know the way to be clear," requires not only that the crossing be free from immediate obstruction but free from danger of such obstruction as ought reasonably to be expected, but it does not require knowledge that the way will certainly remain clear against all after occurring or extraordinary happenings.—Southern R. Co. v. Bonner, 37 So. 702, 141 Ala. 517.

78. Ky.—Chesapeake, etc., R. Co. v. Commonwealth, 35 S.W. 266, 99 Ky. 175, 18 Ky.L. 54.
51 C.J. p 1053 note 60.

79. Ill.—Indianapolis, etc., R. Co. v. People, 91 Ill. 452.
Company regulations as defense generally see infra § 439

80. N.J.—New Jersey Cent. R. Co. v. Elizabeth, 57 A. 404, 70 N.J.Law 578.

81. Wash.—State v. Kuykendall, 222 P. 211, 128 Wash. 88.

82. Minn.—Railroad, etc., Commission v. Great Northern Ry. Co., 144 N.W. 771, 124 Minn. 533.
51 C.J. p 1052 note 54.

83. D.C.—Baltimore, etc., R. Co. v. District of Columbia, 10 App.D.C. 111

84. U.S.—Contino v. Baltimore & A. R. Co., C.A.Md., 178 F.2d 521.
51 C.J. p 1053 note 66.

85. W.Va.—Welch v. Norfolk, etc., R. Co., 140 S.E. 839, 104 W.Va. 660.
51 C.J. p 1053 note 67.

86. Wis.—Jorgenson v. Chicago, etc., R. Co., 140 N.W. 1088, 153 Wis. 108.
51 C.J. p 1053 note 68.

87. Tenn.—Steele v. Louisville, etc., R. Co., 285 S.W. 582, 154 Tenn. 208.
Wis.—Chicago, etc., R. Co. v. Milwaukee, 72 N.W. 1118, 97 Wis. 418.

will depend on the application of general principles to the statutory provisions involved.[88] The power of the legislature to require railroad companies to provide safeguards at crossings is not affected by the fact that the intersecting highway was laid out after the construction of the railroad.[89] The duty to obey regulations relative to safety provisions at crossings is generally mandatory and imperative.[90] However, a substantial compliance with such a statute has been held sufficient;[91] and, under a regulation requiring a specified safety provision, there is no duty to furnish a different and unspecified safety provision.[92]

The proper authorities have the power, in case they think a crossing is particularly dangerous, to require special precaution to be taken by the railroad.[93] Under a statute requiring a railroad to furnish "suitable guards or signals" at highway crossings, the road may do either,[94] and, within limitations of statutory suitability, what the guards or signals shall be is for the railroad to determine.[95] A statute requiring railroads to maintain railroad crossing boards at highway crossings has been held to require the erection of customarily used crossing signals in the form of an "X" or a cross.[96] Chains, gates, or bars at crossings must be set in place an appreciable length of time in advance of an approaching locomotive,[97] and must be adequately lighted at night, notwithstanding the silence of the statutes on the subject, since otherwise they would constitute hazards in themselves.[98] A regulation requiring railroads to supply specified facilities at places where operated "lines of railroad" cross specified streets applies to crossing by both main[99] and spur[1] tracks.

Some statutes requiring railroads to erect signs at places where the railroad crosses a public road have been held not to require signs within the corporate limits of a municipality.[2] A regulation requiring the "proprietors" of railroads to maintain specified safety provisions at all crossings does not apply to a company having only a temporary right to run trains over the track of another company subject to its control.[3] Where a statute dealing with the proceedings and conditions to be complied with by a railroad in order to entitle it to construct its line across a road at grade makes no reference to warning signals, these being specifically dealt with by other sections, the statute will be considered as directed to safety measures other than highway warning lights and signs.[4]

Construction of statutes. Statutes requiring safety provisions at crosings should be construed liberally[5] and in such manner as to accomplish the legislative purpose of promoting safety and avoiding crossing accidents.[6]

Regulation by courts. Under statutes authorizing courts to regulate safety provisions at crossings, it is not essential to the power of the court to act that an existing hazardous condition should have

Purpose of statute imposing duty on railroad of maintaining crossing signs was not to prevent vehicles from running into railroad cars while standing on or passing over railroad at crossing, but was to give notice to persons approaching crossing of proximity of railroad.—Wichita Valley Ry Co. v. Fite, Tex.Civ. App., 78 S.W.2d 714.

Necessity of signs on both sides

Some statutes imposing the duty on railroads of maintaining crossing signs have been held not to require that signs be placed on both sides of the crossing.

S C.—Myers v. Atlantic Coast Line R. Co., 168 S.E. 730, 169 S C 310.

Tex.—Wichita Valley Ry. Co. v. Fite, Civ.App., 78 S.W 2d 714.

88. Md.—State for Use of Emerson v. Poe, 190 A 231, 171 Md. 584.
51 C J. p 1053 note 71.

89. U.S.—Contino v. Baltimore & A. R. Co., C.A.Md., 178 F.2d 521.

90. U.S.—Baltimore & O. R. Co. v. Green, C.C.A.W Va., 136 F.2d 88.—Garcia v. American R. Co. of Porto Rico, C.C.A.Puerto Rico, 127 F. 2d 433.

Tenn.—Steele v. Louisville, etc., R Co, 285 S W. 582, 154 Tenn 208

91. Miss.—State Board of Education v. Mobile, etc., R. Co., 16 So 489, 72 Miss 236
51 C.J p 1057 note 48.

92. Iowa.—Council Bluffs v. Illinois Cent. R. Co., 138 N.W 891, 158 Iowa 679.
51 C.J. p 1057 note 49.

93. Ariz.—Canion v. Southern Pac Co., 80 P.2d 397, 52 Ariz. 245.

94. N Y.—Long Island City v. Long Island R. Co, 79 N Y. 561.

95. N.Y.—Long Island City v. Long Island R. Co., supra.

96. Va.—John F. Ivory Storage Co v. Atlantic Coast Line R. Co., 48 S.E.2d 242, 187 Va. 857.

Exclusive use of form of sign

By the enactment of a statute making it an offense for any unauthorized person to erect on or near a highway any device or sign which is in the form of a railway crossing sign board, the state appropriates that form of sign for this exclusive use so that travelers on the highways may not be misled but may rely on it as a true warning of the proximity of a railroad crossing.—John F. Ivory Storage Co. v. Atlantic Coast Line R. Co., supra

97. U.S.—Garcia v. American R. Co. of Porto Rico, C.C.A.Puerto Rico, 127 F 2d 433.

98. U.S.—Garcia v. American R. Co of Porto Rico, supra

99. Okl.—St. Louis, etc., R. Co. v Hart, 146 P. 436, 45 Okl 659

1. Okl.—St. Louis, etc., R. Co. v Hart, supra.
51 C.J. p 1058 note 57.

2. Ala.—Sloss-Sheffield Steel & Iron Co. v. Peinhardt, 199 So. 33, 240 Ala. 207.

3. Ill.—Lake Shore, etc., R. Co. v. Kaste, 11 Ill App 536.
51 C.J. p 1058 note 64.

4. Va.—John F Ivory Storage Co. v Atlantic Coast Line R. Co., 48 S E 2d 242, 187 Va. 857.

5. Tenn.—Stem v. Nashville Interurban R. Co., 221 S.W. 192, 142 Tenn 494.
51 C.J. p 1053 note 73.

6. Wis.—Clark v. Chicago, M., St. P. & P. R. Co., 252 N.W. 685, 214 Wis. 295.

been caused by the railroad.[7] Under a statute authorizing a county court to make an order requiring a flagman or gates at a crossing, or such other order as may be deemed proper, the court may order the installation of an automatic signal.[8] Under a statute authorizing a court to compel provision of a flagman or gates at a crossing on application of "local authorities," the court may act on application of the authorities particularly charged with the care of the highway involved,[9] such as the highway commissioners,[10] or the superintendent of highways.[11]

Expense of providing safety devices. The matter of expense of installation of safety devices at crossings is ordinarily governed by statute.[12] Under statutes fixing the proportion of expense to be borne by two or more railroads in providing safety devices used by each, a regulatory board or commission is without power to vary the proportions.[13] However, under statutes not fixing the proportions, apportionment of expenses rests largely in the sound discretion of the board or commission regulating the installation of the safety devices.[14] A railroad having a statutory right to use the track of another road at a fixed compensation is not obligated to contribute as a "proprietor" of such road to the expense of maintaining safety devices at its intersection with highways.[15]

b. Regulation by Municipality

(1) In general
(2) Reasonableness

(1) In General

A municipality may be granted power to require railroads to have safety devices or flagmen at crossings in the municipality, and the exercise of such municipal power is not necessarily inconsistent with the existence of other regulatory powers over railroads vested in a board or commission.

Subject to constitutional restrictions, the state may delegate its power with respect to safety devices and flagmen at crossings to municipalities,[16] and an ordinance adopted under statutory authority, requiring flagmen to be maintained at crossings, comes into effect on its enactment virtually as a state statute.[17] According to one view a municipality may, under its general police and welfare powers, regulate safety devices at street and railroad intersections within the corporate limits,[18] but, even under this doctrine, if the general power is expressly restricted so as to exclude regulation of steam railroads, there is no power to regulate safety devices at the street crossings of such roads.[19] In other jurisdictions it has been held that, in the absence of express authorization, a municipality lacks power to regulate safety devices at street and railroad crossings.[20] According to the latter view, authority expressly granted to regulate safety devices at crossings will not be extended by implication to include nonenumerated powers.[21]

A statute empowering a municipality to require railroads to maintain safety devices at crossings within the municipal limits should not be given a strained construction for the purpose of defeating an ordinance which is within the spirit of the statute.[22] Under charters or statutes expressly authorizing a municipality to require provision of specified safety devices at street and railroad crossings, the municipal power to require safety devices of the kind specified is clear.[23] An ordinance prohibiting pass-

7. N.J.—Eckert v. Perth Amboy, etc., R. Co., 57 A. 438, 66 N.J.Eq. 437.

8. N.Y.—Matter of Patchogue St. Crossings, 26 N.Y.S. 293, 74 Hun 46.
51 C.J. p 1056 note 22

9. N.Y.—Pawling v. New York, etc., R. Co., 129 N.Y.S. 643, 144 App.Div. 791—In re Niagara Highway Comrs., 25 N.Y.S. 231, 72 Hun 575.

10. N.Y.—In re Niagara Highway Comrs., supra.
51 C.J. p 1056 note 25.

11. N.Y.—Pawling v. New York, etc., R. Co., 129 N.Y.S. 643, 144 App.Div. 791.

12. Mich.—Wabash R. Co. v. Commissioner of Railroads, 79 N.W. 910, 120 Mich. 697.
51 C.J. p 1058 note 58.

13. Mich.—Wabash R. Co. v. Commissioner of Railroads, supra.
51 C.J. p 1058 note 60.

14. Pa.—Johnstown v. Johnstown, etc., R. Co., 75 Pa.Super. 540.
51 C.J. p 1058 note 62.

15. N.H.—Easton R. Co. v. Portsmouth, 62 N.H. 344.
51 C.J. p 1058 note 66.

16. Ky.—Illinois Cent. R. Co. v. McGuire's Adm'r, 38 S.W.2d 913, 239 Ky. 1.
51 C.J. p 1053 note 77.

17. Wis.—Thomson v. City of Racine, 9 N.W.2d 91, 242 Wis. 591.

18. Mo.—Seibert v. Missouri Pac. R. Co., 87 S.W. 995, 188 Mo. 657, 70 L.R.A. 72.
51 C.J. p 1053 note 78.

19. N.Y.—Long Island City v. Long Island R. Co., 79 N.Y. 561.
51 C.J. p 1053 note 79.

20. Pa.—In re Pennsylvania R. Co., 62 A. 986, 213 Pa. 373, 3 L.R.A.,N.S., 140, 5 Ann.Cas. 299.
51 C.J. p 1054 note 81.

21. N.J.—West Jersey, etc., R. Co. v. Bridgeton, 44 A. 848, 64 N.J.Law 189.
51 C.J. p 1054 note 82.

22. Ind.—Town of Walkerton v. New York, C. & St. L. R. Co., 200 N.E. 243, 210 Ind. 175

Construction of provisions in pari materia

A municipal code provision forbidding motorists to cross a railroad when a signal of danger is given by a flagman, or when no signal is given by such flagman, must be construed in pari materia with a provision requiring the flagman in charge at the crossing to remain at all times in full view of persons approaching the railroad and street crossing.—Alabama Great Southern R. Co. v. Goodwin, 131 So. 12, 222 Ala. 53.

23. Ky.—Chesapeake, etc., R. Co. v. Maysville, 69 S.W. 728, 24 Ky.L. 615.
51 C.J. p 1054 note 84.

age of a train over a street crossing until travelers detained by a preceding train have had time to cross has been held valid as a municipal police regulation.[24] Under a statute authorizing municipalities to require railroads to provide flagmen at any place where the railroad crosses a street or highway, a municipality may require a flagman at a place where a railroad crosses a footway,[25] and it is immaterial by what process the footway became a highway.[26] A statute expressly authorizing municipalities to require gates at street and railroad crossings has been held applicable to the crossing of a railroad with an interurban road over a street.[27] A statute permitting a municipality to require electric gong or alarm signals at crossings authorizes an ordinance requiring the erection of electric flashlight alarm signals.[28]

Where a municipal regulation as to safety provisions at crossings is invalid, the railroad is under no obligation to obey it.[29] Invalidity of an ordinance with respect to one crossing, however, does not necessarily render it invalid as to other crossings.[30]

Effect of authority or action of board or commission. A statute conferring on a board or commission exclusive powers to regulate operation of railroads deprives municipalities of the power to require railroads to provide flagmen or safety devices at street crossings.[31] However, where statutes granting regulatory power to boards or commissions are not inconsistent with other statutes granting power to municipalities to control safety provisions at crossings, municipalities retain such regulatory power.[32]

Where there is a conflict between an order of the commission specifying the type of protection required to be furnished at crossings, and a subsequently adopted municipal ordinance requiring the railroad to maintain flagmen at the crossings, the commission's order is controlling[33]

A village may not abrogate or nullify the order of a state board or commission relative to installation of safety devices at a village crossing.[34] Notwithstanding the right of a railroad to appeal to a commission from action taken by the municipal authorities, a resolution of the municipal authorities, if within the scope of statutory authority, is conclusive where no appeal has in fact been taken.[35]

Exercise of power by ordinance or resolution. Municipal regulation of safety devices at crossings should ordinarily be made by ordinance.[36] It may, however, be effected by resolution where the statute empowers the municipal authorities to act in such manner and they have substantially complied with the statute.[37]

(2) Reasonableness

Municipal regulations with respect to safety devices at street and railroad crossings should be reasonable, especially where promulgated under a general municipal power.

Municipal regulations of safety devices at street and railroad crossings ordinarily must be reasonable to be enforceable,[38] especially where passed under general, as distinguished from express, powers.[39]

24. Ohio—Gallup v. Toledo Terminal R Co, 160 N E 493, 26 Ohio App 447.

25. Va—Norfolk, etc, R. Co v. Bristol, 83 S E 421, 116 Va 955.
51 C J p 1054 note 92.

26. Va.—Norfolk, etc., R Co. v. Bristol, supra.
51 C J p 1054 note 93.

27. Iowa—Council Bluffs v Illinois Cent R Co, 138 N W. 891, 158 Iowa 679.
51 C J p 1055 note 95.

28. Ind—Town of Walkerton v New York, C. & St L R. Co, 200 N E 243, 210 Ind. 175.

29. R I.—McGoran v New York, etc, R Co, 55 A 929, 25 R I 387.
51 C.J. p 1057 note 51

30. Ill—Franklin Grove v. Chicago, etc., R Co, 196 Ill App. 167.
51 C.J p 1055 note 97.

31. Ill.—City of Altamont v. Baltimore & O. R. Co, 180 N E 809, 348 Ill. 339.
51 C J. p 1054 note 88

32. Ind.—Town of Walkerton v. New York, C & St. L R Co., 200 N E 243, 210 Ind 175
Wis—Thomson v City of Racine, 9 N W.2d 91, 242 Wis. 591—Clark v. Chicago, M, St. P & P. R Co., 252 N W 685, 214 Wis 295.
51 C J. p 1054 notes 89, 90.

33. Wis—Thomson v City of Racine, 9 N.W 2d 91, 242 Wis 591.

34. N Y.—Elmira Heights v Erie R. Co., 211 N.Y S. 893, 125 Misc 586, affirmed 213 N.Y S. 929, 215 App Div 825.
51 C.J. p 1055 note 98.

35. Ind—Town of Walkerton v. New York, C & St. L. R. Co, 200 N.E. 243, 210 Ind. 175.

36. Ill—Altamont v. Baltimore, etc, R Co, 56 N E. 340, 184 Ill. 47.
51 C J. p 1055 note 96—43 C.J. p 251 note 96 [c].

37. Ind.—Town of Walkerton v New York, C. & St. L R. Co, 18 N E 2d 799, 215 Ind 206, certiorari denied 60 S Ct 75, 308 U.S. 556, 84 L Ed 467.

Dual nature of resolutions
Resolutions adopted by board of town trustees requiring railroad to install electric signals at crossings and imposing penalty for failure so to do were held "resolutions" within statute authorizing board so to act and "ordinances" as respects imposition of penalties.—Town of Walkerton v. New York, C. & St. L R. Co., supra.

38. Ind—Southern Indiana R Co v Bedford, 75 N.E. 268, 165 Ind. 272, 6 Ann Cas 509.
51 C J. p 1055 note 1.

Regulations held reasonable
Tenn—Gaines v. Tennessee Cent Ry. Co., 135 S.W.2d 441, 175 Tenn. 389.
51 C.J. p 1055 note 6.

Regulations held unreasonable
N J.—New York, etc., R. Co v. Bloomfield Tp., 35 A. 158, 59 N J. Law 109
51 C J. p 1055 note 7.

39. Ga—Acworth v Western, etc, R. Co., 126 S.E. 454, 159 Ga. 610.

Such regulations are presumptively reasonable,[40] and, where passed pursuant to express statutory authorization, will rarely be held invalid as unreasonable.[41]

Substitute devices. Use of an automatic warning device at crossings may[42] or may not[43] render it unreasonable to require humanly operated safety provisions, according to the circumstances involved.

Time of operation. Regulations requiring the operation of humanly run safety devices at times when there is practically no railroad[44] or street[45] traffic are ordinarily held unreasonable. On the other hand it has been held that ordinances requiring continuous operation of safety provisions are at least presumptively reasonable,[46] and there is also authority to the effect that such regulations are valid as designed to cover unlikely but possible use of the crossing.[47] If the ordinance is ambiguous as to the time of observing safety provisions, it will be so construed as to render it valid.[48]

c. Regulation by Board or Commission

In general, the state may delegate power over safety devices and flagmen at crossings to a board or commission, vesting discretion in such board or commission as to the kind of safeguards to be required; but the regulatory body may not exceed the powers granted to it by statute.

Subject to constitutional restrictions, the state may delegate its power with respect to safety devices and flagmen at crossings to boards or commissions.[49] Under constitutional provisions conferring on a board or commission general power to regulate all transportation companies in all matters relating to their public duties, it has power to regulate safety provisions at street crossings within a municipality.[50] The kind of safeguards to be required ordinarily rests in the discretion of the board or commission,[51] and a determination of the commission, acting within its authority, as to whether certain signals should be placed at railroad crossings will not be interfered with in the absence of an abuse of discretion.[52] Under a statute authorizing a board or commission to require maintenance of flagmen at highway crossings with tracks used for "switching" purposes, the board or commission may order a flagman at a highway crossing with tracks used for sidetracking one train to permit another to pass on the main line.[53] Under statutes authorizing a board or commission to regulate the operation of railroads generally, with particular respect to stations, and in a different section authorizing it to require safety provisions at crossings within municipalities, the board or commission may require safety provisions at a crossing without a municipality where such crossing is near a station.[54]

On the other hand, the power of a board or commission to regulate safety provisions at crossings is limited to that granted by statute;[55] and rules, regulations, and orders of a board or commission relative to safety devices at crossings must be reasonable.[56] Under some statutes the authority of a commission to require a railroad to station a flagman at crossings is confined to public crossings.[57] Where a statute authorizing a board or commission to regulate safety

40. Ill.—Chicago, etc., R. Co. v. Averill, 79 N.E. 654, 224 Ill. 516.
51 C.J. p 1055 note 3.

41. Ky.—Chesapeake, etc., R. Co v. Maysville, 69 S.W. 728, 24 Ky.L. 615.
51 C.J. p 1055 note 4.

42. Ga.—Acworth v. Western, etc., R. Co., 126 S.E. 454, 159 Ga. 610.
51 C.J. p 1055 note 8.

43. U.S.—Nashville, etc, R. Co. v. White, Tenn, 49 S.Ct. 189, 278 U. S. 456, 73 L.Ed. 452.
51 C.J. p 1055 note 9.

44. Tex.—Texas, etc, R. Co. v. Hargrave, Civ.App., 1 S.W.2d 740, affirmed, Com.App., 12 S.W.2d 1009.
51 C.J. p 1055 note 10.

45. N.J.—McCullough v. Franklin Tp., 34 A. 1088, 59 N.J.Law 106.
51 C.J. p 1056 note 11.

46. Ill.—Chicago, etc., R. Co. v. Averill, 79 N.E. 654, 224 Ill. 516.
51 C.J. p 1056 note 12.

47. Iowa.—Council Bluffs v. Illinois Cent. R. Co., 138 N.W. 891, 158 Iowa 679.
51 C.J. p 1056 note 13.

48. Tex.—Hargrave v. Texas, etc, R. Co, Com.App., 12 S.W.2d 1009.
51 C.J. p 1056 note 14.

49. Cal.—Black v. Southern Pac. Co, 12 P.2d 981, 124 Cal.App. 321.
Mo.—State ex rel. St. Louis-San Francisco Ry. Co v. Public Service Commission, 53 S.W.2d 868, 331 Mo. 438.
Pa.—City of Erie v. Public Service Commission of Pennsylvania, 176 A. 530, 116 Pa.Super. 244.
51 C.J. p 1056 note 29

50. Okl.—St. Louis, etc., R. Co. v. Lewis, 114 P. 702, 28 Okl. 453.
51 C.J. p 1057 note 43.

51. Mich.—Perch v. New York Cent. R. Co., 293 N.W. 778, 294 Mich. 227, followed in Balicki v. New York Cent. R. Co., 293 N.W. 892, 294 Mich. 639.
S.C.—Railroad Comrs. v Seaboard Air Line R. Co., 81 S.E. 314, 97 S.C. 77.

52. Pa.—City of Erie v. Public Service Commission of Pennsylvania, 176 A. 530, 116 Pa.Super. 244.

53. Ind.—Pennsylvania Co. v. Mosher, 94 N.E. 1033, 47 Ind.App. 556.
51 C.J. p 1057 note 39.

54. Vt.—Sabre v. Rutland R. Co., 85 A. 693, 86 Vt. 347, Ann.Cas.1915C 1269.
51 C.J. p 1057 note 41.

55. S.C.—Railroad Comrs. v. Seaboard Air Line R. Co., 81 S.E. 314, 97 S.C. 77.
51 C.J. p 1056 note 30.

56. N.J.—Erie R. Co v. Public Utility Comrs. Board, 95 A. 177, 87 N.J.Law 438, reversed on other grounds 100 A. 346, 90 N.J.Law 271.
51 C.J. p 1057 note 46.

57. N.Y.—New York Cent. R. Co. v. Public Service Commission, 194 N.E. 761, 266 N.Y. 294.

Farm crossing

Town authorities were not authorized to turn farm crossing into public railroad crossing at grade, without authority of public service commission and against will of railroad, either by formal action or by working traveled way so as to make it

provisions at crossings is not retroactive, it confers no power to regulate crossings constructed before its enactment,[58] but in a proper case, an order of the commission may cover devices at crossings, irrespective of the date of their installation, including those installed prior to the order as well as those installed subsequent thereto.[59] Under statutes providing that, where tracks crossing a public highway are used for switching purposes, county commissioners may require maintenance of a flagman at a crossing, and other statutes providing that trustees of incorporated towns shall have "exclusive power over the streets," county commissioners have no power to require flagmen at street crossings.[60] Under statutes committing to a board or commission power to prescribe precautions to be used at highway crossings, exclusive of those specifically required by statute, the board or commission is not authorized to make a negative order prohibiting certain safety provisions.[61] Where a statute requires certain devices to be placed and maintained by railroads at crossings when ordered to do so by a commission, no duty is imposed on the railroad as a matter of law except when so ordered.[62]

Repeal of statute. A statute prescribing a uniform system of railway crossing signals is not impliedly repealed by a subsequent statute which, in effect, merely empowers a commission to require additional warning signals for the public safety.[63]

Necessity of protection for public safety. Under some statutes the commission has authority to require the installation of new and additional grade crossing protection which is necessary to the public safety.[64] While the commission, under such statutes, possesses a wide discretion and may determine what the public interests require, and also what measures are necessary for the protection and promotion of those interests,[65] nevertheless it can order a grade crossing improvement only when necessary to preserve or promote public safety,[66] and it not enough for the commission merely to find that the public safety will be thereby preserved and promoted.[67]

Expense. The regulatory power of a board or commission as to safety devices at highway crossings may be exercised despite the expense thereby caused the railroad.[68]

§ 434. Obstruction by Trains

a. In general
b. What constitutes obstruction

a. In General

A railroad may not obstruct a crossing for a greater period of time than permitted by statute or ordinance; but a municipal regulation as to the obstruction of streets by trains must be reasonable.

Under some statutes a railroad may not stop its train across a public road or street crossing for more than a specified time.[69] However, a statute making it an offense for a railroad to block any public crossing for more than a specified time except in municipalities having more than a stated population has been held invalid as making an act an offense if committed in one locality but not if committed in another.[70]

In accordance with its general power to regulate the operation of railroads within its borders, and to control the use of its streets by public utilities, a municipality ordinarily has power to regulate obstruction of its streets by trains, cars, or engines,[71] as by restricting the time that engines or cars may block a crossing,[72] or stand in specified streets,[73] or by specifying the particular time of the day during

highway by user.—New York Cent. R Co v. Public Service Commission, supra.

58. S C.—Railroad Comrs. v. Seaboard Air Line R. Co., 81 S E. 314, 315, 97 S C 77.
51 C J. p 1056 note 31.

59. Mo —Cox v. Terminal Railroad Ass'n of St. Louis, App., 43 S.W 2d 571, affirmed 55 S.W.2d 685, 331 Mo. 910.

60. Ind —State v. Chicago, etc., R. Co., 51 N.E 914, 151 Ind. 474.

61. Conn —Pratt, etc., Co. v. New York, etc., R Co., 131 A. 895, 103 Conn. 508.
51 C.J. p 1057 note 27.

62. Va.—John F. Ivory Storage Co v. Atlantic Coast Line R Co., 48 S.E.2d 242, 187 Va. 857.

63. Okl.—Kansas City Southern Ry Co. v. State, 158 P 2d 699, 195 Okl. 424.

64. Ill —Illinois Commerce Commission v. New York Cent. R. Co., 75 N.E.2d 411, 398 Ill. 11.

65. Ill.—Illinois Commerce Commission v. New York Cent. R. Co., supra.

66. Ill —Illinois Commerce Commission v. New York Cent R. Co., supra.

67. Ill.—Illinois Commerce Commission v New York Cent R. Co., supra.

68. Okl —St. Louis, etc., R. Co. v. Lewis, 114 P. 702, 28 Okl. 453.
51 C.J. p 1057 note 44.

69. Minn —Mlenek v Fleming, 27 N W.2d 800, 224 Minn 38.

Obstruction for less than specified time

A statute prohibiting railroads from obstructing a street for more than a specified time has been held to have the effect of making legal such obstruction for less than the specified time.—Mlenek v. Fleming, supra.

70. Mo —Carson v. Baldwin, 144 S. W.2d 134, 346 Mo 984.

71. U.S —Atlantic Coast Line R. Co v Goldsboro, N C, 34 S Ct. 364, 232 U S. 548, 58 L Ed. 721.
51 C J. p 1058 note 73—44 C.J. p 1010 note 37.

72. La —Cuccia v. Gulf, M. & N. R. Co, App., 180 So. 513.
51 C.J. p 1058 note 74.

73. U.S —Atlantic Coast Line R. Co. v Goldsboro, N C, 34 S.Ct. 364, 232 U S 548, 58 L.Ed. 721.

which trains may be operated along streets,[74] or during which switching and shifting of cars may take place on a street.[75] Statutes restricting the time during which engines or cars may stand on streets do not prevent municipalities from imposing greater restrictions.[76]

Reasonableness. A municipal regulation as to obstruction of streets by trains ordinarily must be reasonable[77] with respect to the rights of both the railroad company[78] and the general public.[79] An ordinance absolutely prohibiting a railroad company from blocking a city street by a train for a period of more than ten minutes, irrespective of contingencies wholly beyond the company's control, is arbitrary and unreasonable, and hence invalid.[80]

Rights and duties of railroad. A railroad is entitled to a reasonable use of streets where essential to the operation of its trains, but such right must be exercised with due regard to the rights and convenience of the general public.[81] No railway possesses the right to use a highway for the storage of cars,[82] and even a temporary deposit of cars in the highway is unlawful[83] in the absence of a proved emergency excusing it.[84] Statutes authorizing the construction of railroads on or across streets and highways do not authorize a railroad to obstruct the same by the operation of trains.[85] Under an ordinance forbidding the obstruction of streets by trains, it is nevertheless permissible to stop a train over a crossing for a reasonable time.[86] Under a statute prohibiting the blocking of highway crossings for over a specified period, if a train blocking a crossing is not ready to continue its journey at the end of such period, nevertheless some method must be found to clear the crossing.[87]

Railroads within regulatory requirements. Railroads incorporated or constructed before as well as after enactment of a statute prohibiting obstruction of public highway crossings are subject thereto.[88] Regulations prohibiting obstructions of highways are ordinarily applicable to companies operating the road irrespective of ownership.[89]

b. What Constitutes Obstruction

An unlawful obstruction of a crossing by a railroad may exist, although no one was actually prevented from using the crossing, and although the crossing was only partially blocked.

To constitute the obstruction of a highway crossing within the application of a statute or ordinance prohibiting the same, it is not necessary that there should have been any person present at the time who was actually prevented from using the crossing.[90] A statute forbidding the placing of any obstruction in a passway has been held inapplicable to obstruction thereof by a railroad train.[91]

Physical extent of obstruction. A partial obstruction is unlawful if of sufficient extent to constitute a substantial interference with the use of the crossing.[92] Some authorities hold that the obstruction must have been of such a character as to obstruct travel and interfere with the use of the highway,[93] and that, if not of this character, the mere fact that a train or car is left standing so as to project slightly within the limits of a crossing does not constitute an obstruction,[94] but there is authority to the effect that any degree of projection

74. Ohio—Cincinnati Southern R Co v. Hurd, 20 Ohio N P,N.S, 10.

75. U S—Atlantic Coast Line R Co v. Goldsboro, N.C., 34 S Ct. 364, 232 U.S 548, 58 L.Ed 721.

76. Kan.—Walker v. Missouri Pac. R. Co., 149 P. 677, 95 Kan. 702.

77. La.—New Orleans v. Lenfant, 52 So 575, 126 La. 455, 29 L R.A., N.S, 642.
51 C J. p 1058 note 81.
Regulations held reasonable
Ordinances prohibiting obstruction of street in populous community by leaving railroad cars on crossing for longer than five minutes have been held not unreasonable as applied to busy crossing.—Central of Georgia Ry. Co. v. Mann, 173 S.E. 180, 48 Ga. App. 668.

78. Ala.—Birmingham v Alabama Great Southern R. Co., 13 So. 141, 98 Ala. 134.
51 C.J p 1059 note 82.

79. Iowa—Gilcrest v. Des Moines, 102 N W. 831, 128 Iowa 49
51 C J. p 1059 note 83.

80. Ohio.—City of Cincinnati v. Luckey, 91 N E.2d 477, 153 Ohio St 247.

81. Ga.—**Corpus Juris cited in** Louisville & N. R Co. v Ellis, 189 S.E. 559, 561, 54 Ga.App 783.
N.Y.—Globe Malleable Iron, etc., Co. v. New York Cent, etc., R. Co, 124 N E 109, 227 N.Y 58, 5 A L R. 1648.

82. Ind—Ohio, etc., R Co. v Trowbridge, 26 N E. 64, 126 Ind 391

83. Ind—Ohio, etc., R. Co. v. Trowbridge, supra.
51 C.J. p 1059 note 86.

84. Ind.—Ohio, etc., R. Co v. Trowbridge, supra.

85. Ky.—Trent v. Norfolk, etc, R. Co, 180 S.W 792, 167 Ky. 319.

86. Wis—Depow v. Chicago, etc, R. Co, 138 N W. 42, 151 Wis. 109.
51 C.J. p 1059 note 90.

87. Ky—Harvey v. Illinois Cent R. Co., 167 S.W. 875, 159 Ky. 492

88. Pa—Pennsylvania R Co. v. Kelly, 31 Pa. 372.

89. Ill.—Indianapolis, etc., R. Co v People, 32 Ill.App. 286.

90. Ill—Chicago, etc, R Co v. People, 82 Ill App. 679, distinguishing Illinois Cent. R Co. v. People, 49 Ill.App 538.

91. Ky.—Zweigart v. Chesapeake, etc, R. Co., 170 S.W. 1194, 161 Ky. 463.
51 C J. p 1059 note 97.

92. Ill.—Great Western R. Co. v. Decatur, 33 Ill. 381.
51 C.J p 1059 note 98.

93. Ill.—Illinois Cent. R. Co. v. People, 59 Ill.App. 256—Illinois Cent. R. Co. v. People, 49 Ill.App. 538.

94. Mich—Hinchman v. Pere Marquette R. Co, 99 N W. 277, 136 Mich 341, 63 L R A. 552.
51 C.J p 1059 note 1.

by a car or engine into the street, however slight, constitutes an obstruction.[95]

Nature of way obstructed. The term "highway" in statutes prohibiting their obstruction applies to all kinds of public ways,[96] but not to a private way.[97] There is authority to the effect that highway obstruction statutes are inapplicable to permissive crossings.[98]

§ 435. Fires

A railroad and its employees may be required to adopt prescribed precautions against fire, particularly on passing through a forest preserve.

The intention of the legislature in enacting a statute setting up requirements as to spark arresters and smokestacks on engines has been held to be to prevent large cinders from escaping from the smokestacks of engines, as a protection to adjacent property from the hazard of fire,[99] and not to protect persons from sustaining injuries caused by cinders small enough to enter the human eye.[1]

Forest fires. Under a statute requiring railroads to remove from such parts of the road as pass through forests or lands subject to fire from any cause, all grass, brush, and other inflammable materials, twice a year, and where they pass through counties containing a forest preserve to remove such materials at more frequent intervals, the twice-a-year provision applies to lands in counties outside the forest preserve.[2] However, under statutory provisions preceded by the condition precedent that, "where the railroad runs through forest lands in counties containing part of the forest preserve," it shall observe specified fire precautions, the latter requirements apply only to counties containing part of the forest preserve,[3] and, under provisions that, where a road runs "near such lands," referring to forest preserves in a preceding section, it shall not deposit fire coals or ashes on the track, the prohibition extends only to counties contained in the forest preserve.[4] A provision, in such a statute, standing alone and requiring the road to put out fires on its own and neighboring lands refers only to counties containing forest preserve.[5]

§ 436. Miscellaneous

Miscellaneous regulations to which railroads may be subjected include, among others, regulations with respect to the location of operation structures, the arrangement and composition of trains, motive power, smoke, and noise.

A railroad is required to exercise all statutory precautions for the prevention of accidents where the particular train involved is not engaged in switching operations.[6] A commission cannot order a railway company to maintain a private crossing where no power to make such an order has ever been given to the commission.[7]

Location of operation structures. The state's power to regulate the operation of railroads includes the power to designate the location of structures used in the operation of the road, such as general offices,[8] machine shops,[9] and roundhouses.[10] Under some statutes a commission has power to permit the maintenance of a structure which has been constructed without prior authority and with less than standard clearance,[11] particularly where the commission finds excusable neglect on the part of the company in its failure to apply for and obtain permission before the installations were made.[12]

Safety provisions as to arrangement and composition of trains. Provisions of a state constitution granting to a board or commission general, but not exclusive, power to regulate the operation of railroads, do not deprive the legislature of power to regulate the number of cars to be operated in one train.[13] So far as interstate commerce is con-

95. Ky.—Harvey v Illinois Cent R Co, 167 S.W 875, 159 Ky. 492.
51 C J p 1060 note 2.

96. Ill.—Ohio, etc, R. Co. v. People, 39 Ill App. 473
51 C J. p 1060 note 4.

97. Mass.—Commonwealth v. Boston, etc., R Co, 135 Mass 550.
51 C J. p 1060 note 5.

98. Pa.—Charlton v Baltimore, etc, R Co, 97 A 126, 252 Pa 107

99. Ky.—Louisville & N R Co v. Sloan, 155 S W 2d 23, 287 Ky. 663.
Liability of railroad in damages for fires see infra § 484 et seq.

1. Ky.—Louisville & N R. Co. v. Sloan, supra.

2. N.Y.—People v. Long Island R Co., 87 N.E 79, 194 N.Y. 130.

3. N Y.—People v. Long Island R Co, supra
51 C J p 1060 note 23.

4. N Y.—People v. Long Island R Co, supra

5. N Y.—People v Long Island R Co, supra
51 C J p 1060 note 25.

6. Tenn.—Harrell v. Alabama Great Southern R, 5 Tenn App 471.
Applicability of Federal Safety Appliance Act to switching operations see supra § 425.

7. Okl.—Chicago, R I. & P Ry Co. v. State, 12 P.2d 494, 158 Okl. 57.

8. Tex.—International, etc, R. Co. v Anderson County, Civ App, 174 S W 305, affirmed 38 S.Ct 370, 246 U.S 424, 62 L Ed 807.
Accommodations and facilities at stations see supra §§ 403–409
Location of stations see supra § 57

9. Tex.—International, etc, R. Co. v Anderson County, supra

10. Tex.—International, etc., R Co v Anderson County, supra.

11. Mo.—State ex rel Dail v Public Service Commission, 203 S W 2d 491, 240 Mo App. 250.

12. Mo.—State ex rel Dail v Public Service Commission, supra.

13. Ariz.—Arizona Eastern R Co. v. State, 171 P. 906, 19 Ariz. 409
51 C.J p 1060 note 8
Number of trains, cars, and engines as affecting adequacy of service rendered see supra § 420.

cerned, however, some state statutes which arbitrarily limit the length of, or the number of cars in, a train have been held invalid,[14] but other statutes have been held not invalid[15]

A regulation requiring the engine to be placed in front of all occupied cabooses and cabin cars is not unreasonable where it is found that the use of a pusher engine in the rear is dangerous to life and limb.[16] A statute requiring the locomotive to be at the head of the train is designed to protect not only passengers,[17] but also travelers on the streets and highways.[18] Such a statute is not violated by operating an engine at the head of a train but running backward with the tender in front.[19]

Under statutes regulating the arrangement of mixed passenger and freight trains, a railroad operating such trains may be under a duty to place the baggage and freight cars in front of passenger coaches.[20]

Motive power. The state has power to regulate the motive power to be used by railroads;[21] and any restrictions in the charter or statute under which the company was incorporated or the road constructed as to the motive power to be used are binding on the company.[22] Where the charter permits the company to select the motive power but prohibits it from constructing its road through a municipality without the consent of the municipal authorities, such a consent may be granted on condition that the municipality shall retain the right to regulate the motive power to be used,[23] and in such case another railroad authorized by statute to operate trains over the tracks of the road so located is subject to the same control of the municipality.[24] So, also, it seems that a right conferred on a municipality to regulate the "manner of using" a railroad is broad enough to cover the kind of motive power to be used,[25] and that a municipality which has granted a franchise to a railroad to lay its tracks in the street may subsequently prohibit the use of steam in propelling cars along the street[26] In accordance with its general power to regulate the operation of railroads within its borders, a municipal corporation may regulate the use of steam as a motive power in the operation of railroads within its corporate limits.[27] A valid ordinance prohibiting the use of steam as motive power is binding on the purchaser of a company affected by the ordinance.[28]

Smoke. While it has been held to be beyond the province of local authorities to proscribe smoke in the operation of locomotives under a railroad charter, unless its escape be attributable to negligence or want of care,[29] this principle has no bearing on the functioning of terminal facilities and fixed installations, such as engine houses and repair shops.[30] Nevertheless, an ordinance declaring the emission of dense smoke from the chimney of any building to be a nuisance which might be summarily abated by a building inspector has been held void as unreasonable and arbitrary in its operation on the business of a railroad company maintaining a roundhouse within the municipality,[31] and also as delegating to the inspector authority and discretion to exercise summary power

14. U.S.—Atchison, T. & S. F. Ry. Co v. La Prade, D C Ariz., 2 F. Supp 855, reversed on other grounds 53 S.Ct. 682, 289 U.S. 444, 77 L Ed. 1311.
Ariz.—Southern Pac Co. v. State ex rel. Sullivan, 65 S Ct 1515, 325 U.S. 761, 89 L Ed. 1915.

15. U.S.—Missouri-Kansas-Texas R. Co. v. Williamson, D.C.Okl., 36 F. Supp. 607.

16. Ohio—New York Cent. R. Co. v. Public Utilities Commission of Ohio, 200 N.E. 759, 130 Ohio St. 548.
Due process
Railroad which was accorded reasonable opportunity to be heard before commission, which required railroad to place pusher engine in front, could not claim that it was denied due process—New York Cent. R Co. v Public Utilities Commission of Ohio, supra.

17. Mich—Morgan v Pere Marquette R. Co., 127 N.W. 683, 162 Mich 573, 578.

18. Mich—Morgan v. Pere Marquette R. Co., supra.
51 C.J p 1060 note 11.

19. Mich—Morgan v. Pere Marquette R. Co, supra

20. Ark—Arkansas Midland R. Co. v Canman, 13 S.W. 280, 52 Ark. 517.

21. N Y.—People v. Brooklyn, etc, R. Co., 89 N Y. 75.
51 C J. p 1061 note 29.
Soft coal
Railroad may be prohibited from burning soft coal anywhere in a municipality.—People, on Complaint of Greene v. Long Island R. Co., 31 N Y. S 2d 537

22. S C.—State v Tupper, 23 S C.L. 135.
51 C.J p 1061 note 30.

23. U.S.—New York, etc, R Co. v. New York, C C N Y., 18 F.Cas.No. 10,199, 4 Blatchf. 193.
51 C.J p 1061 note 31

24. U.S—New York, etc., R. Co. v. New York, supra.

25. U S—New York, etc., R Co. v. New York, supra.

26. Ind—Grand Trunk, etc, R. Co. v. South Bend, 89 N.E 885, 91 N.E. 809, 174 Ind. 203, 36 L R.A., N.S, 850.

27. U S—Richmond, etc., R. Co v. Richmond, Va, 96 U.S. 521, 24 L. Ed. 734
51 C.J p 1061 note 36.

28. Minn—St. Louis Park v Minneapolis, etc, R. Co., 194 N.W. 327, 156 Minn 164.

29. N J—Board of Health of Weehawken Tp., Hudson County v. New York Cent. R. Co., 72 A.2d 511, 4 N.J. 293.
43 C.J. p 432 note 94 [a].

30. N J.—Board of Health of Weehawken Tp., Hudson County v. New York Cent. R. Co., supra.

31. Ill.—City of Kankakee v. New York Cent. R. Co., 55 N.E 2d 87, 387 Ill. 109.

without defining the terms and conditions under which such discretion could be exercised.[32]

Noise. In the reasonable exercise of its general powers to regulate the operation of railroads within its borders, a municipality may regulate the noise made by railroads operating within its borders.[33] However, in so far as a municipal regulation forbidding the blowing of a steam whistle within the municipal limits interferes with general state laws requiring the giving of specified signals, the municipal regulation is void.[34]

Crossings. The state may regulate railway crossings,[35] and, in the exercise of its police power, may prescribe regulations designed to prevent injuries thereat.[36] The legislature may by statute confer on a commission exclusive jurisdiction over all questions relating to the matter of railroad crossings.[37] Statutes relating to the duty of railroad companies to maintain public crossings in a proper condition for travel, and defining the extent of such crossings, were held not superseded or repealed by an act creating a state highway department and establishing a state system of public roads.[38]

D. PENALTIES FOR VIOLATION OF REGULATIONS

§ 437. Power to Impose

Railroads may be subjected to a penalty for violation of state regulations or regulations promulgated by a municipality pursuant to statutory authority.

In order to enforce its power to regulate the operation and facilities of railroads, the state has the power to affix a penalty for the violation of its regulations,[39] provided a reasonable time is allowed for compliance with the regulation,[40] and provided the penalty imposed is not unreasonably large.[41] A railroad may be liable for a penalty for violation of municipal regulations promulgated pursuant to statutory authority.[42] Since corporations in operating railroads can act only through their agents, the company may be made subject to a penalty for defaults on the part of its servants.[43] Piles and pieces of scrap iron left for short periods of time near the center line of a railroad track do not constitute a permanent or fixed structure or obstruction within the meaning of a statute imposing a penalty for maintaining such a structure or obstruction within a specified distance of the track.[44]

Discontinuance of service or facilities. It has been held that discontinuance of service without prior application to a commission for permission, as required by statute, does not justify subjection of the road and its employees to statutory penalties in advance of a hearing on the merits as to discontinuance;[45] and the imposition of a penalty for the discontinuance of a depot without the consent of the commission has also been held not warranted where the depot had been operated at a loss so that the commission could not have compelled its continued operation.[46] A statute pre-

32. Ill.—City of Kankakee v. New York Cent. R. Co., supra

33. Ill.—Chicago, etc., R. Co. v. Steckman, 79 N.E. 602, 224 Ill. 500.
51 C.J. p. 1061 note 44.

34. Tenn.—Katzenberger v. Lawo, 16 S.W. 611, 90 Tenn. 235, 25 Am.S.R. 681, 13 L.R.A. 185.
Tex.—Curtis v. Gulf, etc., R. Co., 63 S.W. 149, 26 Tex.Civ.App. 304.

35. Pa.—Starovetsky v. Pennsylvania R. Co., 195 A. 871, 328 Pa. 583.
Safety devices and flagman at highway and private crossings see supra § 433.

36. U.S.—Chicago, M., St. P. & P. R. Co. v. Slowik, C.A.Minn., 184 F.2d 920.

37. Minn.—Olson v. Chicago, Great Western Ry. Co., 259 N.W. 70, 193 Minn. 533.

38. Ga.—Atlantic Coast Line R. Co. v. Spearman, 156 S.E. 824, 42 Ga.App. 536.

39. U.S.—State v. Kansas City, etc., R. Co., C.C.Mo., 32 F. 722.
51 C.J. p. 1061 note 49.
Power driving wheel brakes
Failure of a railroad to equip a locomotive with power driving wheel brakes as required by a safety appliance act renders it subject to a penalty.—U.S. v. Fort Worth & Denver City Ry. Co., D.C.Tex., 21 F. Supp. 916.

40. Tex.—Houston, etc., R. Co. v. State, 107 S.W. 525, 101 Tex. 333.—Missouri, etc., R. Co. v. State, 100 S.W. 766, 100 Tex. 420.

41. Ill.—Franklin Grove v. Chicago, etc., R. Co., 196 Ill.App. 167.
51 C.J. p. 1062 note 51.

42. Ind.—Town of Walkerton v. New York, C. & St. L. R. Co., 200 N.E. 243, 210 Ind. 175.
Double penalty
Railroad could not escape liability for penalties under town board's resolutions requiring railroad to maintain electric flashlight alarm signals at street intersections, on ground that there was double penalty, in that statute also provided a penalty, where penalty provided by statute was for failure to comply with order of commission made on appeal and had nothing to do with failure to comply with unappealed from resolution of town board.—Town of Walkerton v. New York, C. & St. L. R. Co., supra.

43. Iowa.—State v. Chicago, etc., R. Co., 96 N.W. 904, 122 Iowa 22, 101 Am.S.R. 254.
51 C.J. p. 1062 note 52.

44. Minn.—State v. Minneapolis, St. P. & S. S. M. Ry. Co., 286 N.W. 303, 205 Minn. 394.

45. U.S.—St. Louis-San Francisco R. Co. v. Alabama Public Service Commission, Ala., 49 S.Ct. 383, 279 U.S. 560, 73 L.Ed. 843.
51 C.J. p. 1062 note 54.
Proceedings to discontinue see supra § 392.

46. Miss.—Yazoo & M. V. R. Co. v. Mississippi R. Commission, 146 So. 430, 166 Miss. 359.

scribing a specified penalty per day for failure to operate a railway has been held inapplicable to a railway company which discontinues its service under a claim of right.[47]

§ 438. Willfulness as Element

Willfulness is not an essential element to liability of a railroad for a penalty unless the statute requires the existence thereof.

Under statutes requiring a willful violation to subject the road or its employees to penalty, no penalty will be imposed in the absence of this element.[48] However, where the penalty is imposed for "refusal or neglect" to perform the duty, willfulness is not essential to liability.[49]

§ 439. Defenses

Invalidity of the statute or order violated is a defense to an action for a penalty; but such matters as the absence of actual damage, or a violation by servants of the rules of the company, or an absence of knowledge of the acts of its employees do not constitute a defense.

Invalidity of the statute[50] or order[51] violated by a railroad is a valid defense to an action for a penalty. It is no defense that no actual damage has resulted from such violation,[52] or that the act constituting such violation was done by the servants of the railroad contrary to the rules of the company,[53] or without its knowledge and in violation of express instructions.[54] Where a statute imposes a duty to which a penalty is attached, the penalty cannot be avoided by failing to do some other act necessary to the performance of the duty commanded.[55] Under a statute prescribing a penalty for the death of any person from the negligence of "any officer, agent, servant or employee" while operating a locomotive, car, or train, it is no defense that the negligence was not that of the superior in charge.[56]

It has been said that the only possible defenses to a penalty proceeding under the Federal Safety Appliance Act for using a defective car are nonuse of a defective car and use permissible in accordance with the provisions of the repair amendment.[57] The amendment of the Federal Safety Appliance Act permitting the hauling of defective cars to the nearest available repair point is not retroactive so as to relieve a railroad from penalty for a violation before its passage.[58] Liability of a railroad for a penalty for failure to comply with such act will not be excused by want of knowledge of the operating defect,[59] since knowledge on the part of the company of the defect or condition is not a necessary element of the offense,[60] and government inspectors are not obligated to reveal a defect which they discover,[61] nor will the railroad be excused by the absence of intentional violation,[62] by the exercise of reasonable care,[63] by the putting of a warning on a defective car,[64] or by the use of other precautions equivalent[65] or actually superior[66] to the requirements specified by statute; nor will it be excused by the existence of circumstances making it difficult[67] or impossible[68] to operate and comply, as in the latter case the

47. S C—State v. Broad River Power Co., 162 S.E 93

48. Tex—State v. St Louis Southwestern R. Co., Civ App, 165 S W 491.
51 C.J p 1062 note 56.

49. Wash.—State v. Great Northern R. Co, 123 P. 8, 68 Wash. 257, 267.
51 C.J. p 1062 note 58.

50. Tex—Houston, etc, R. Co. v. State, Civ.App, 103 S.W. 449.
51 C.J. p 1062 note 59

51. Miss—State v. Alabama, etc., R Co., 7 So 502, 67 Miss. 647.
51 C.J. p 1062 note 60.

52. Tex—Houston, etc., R. Co. v State, 61 Tex. 342.
51 C.J p 1062 note 61.

53. Ill—Indianapolis, etc., R. Co. v. People, 91 Ill 452.
51 C J. p 1063 note 62.

54. Ind.—Hammond v. New York, etc, R. Co, 31 N.E. 817, 5 Ind App. 526.
N.Y.—Buffalo v. New York, etc., R. Co, 23 N.Y.S. 303, reheard 27 N.Y S. 297, 6 Misc 630, affirmed 46 N E. 496, 152 N Y 276

55. Ind—State v Indiana, etc., R. Co, 32 N.E 817, 133 Ind. 69, 18 L.R A. 502.
51 C J. p 1063 note 64.

56. Mo—Rine v Chicago, etc, R. Co, 12 S W. 640, 100 Mo 228

57. U.S—U. S. v. Northern Pac. R. Co., C.C.A.Wash, 293 F. 657.
51 C.J. p 1027 note 87.

58. U S—U. S v Colorado Midland R. Co., Colo, 202 F. 732, 121 C.C.A 194.
Repair amendment see supra § 425

59. U S.—Chesapeake, etc, R. Co v U. S., Va, 226 F. 683, 141 C.C.A. 439.
51 C.J p 1025 note 76.

60. U.S.—Chesapeake, etc., R. Co. v U. S., Ky., 249 F. 805, 162 C.C A 39, certiorari denied 39 S Ct. 67, 248 U S. 580, 63 L Ed. 431.
51 C.J. p 1025 note 77.

61. U.S.—U. S. v. Chicago Great Western R Co., D C.Iowa, 162 F 775.
51 C.J. p 1026 note 78.

62. U S—Norfolk, etc, R Co v. U. S, Va, 177 F. 623, 101 C C A 249.
51 C J. p 1026 note 79.

63. U S.—Chesapeake, etc, R Co. v. U. S, Va., 226 F 683, 686, 141 C.C. A. 439.
51 C J. p 1026 note 80.

64. U.S.—U S. v Chicago, etc, R. Co., D.C.Mo., 173 F. 684.
51 C.J. p 1026 note 81.

65. U S—Louisville, etc, Bridge Co. v. U S, 39 S Ct 355, 249 U.S 534, 63 L Ed 757
51 C J p 1026 note 82.

66. U.S.—U. S. v. Grand Rapids, etc., R. Co, D C.Mich, 244 F. 609, affirmed 249 F. 650, 161 C C.A. 560.
51 C.J. p 1026 note 83.

67. U S—Spokane, etc, R. Co. v. U. S, Wash, 36 S Ct. 668, 241 U.S. 344, 350, 60 L Ed. 1037.
51 C.J. p 1026 note 84.

68. U.S—U. S. v. Northern Pac. R. Co, C.C.A.Wash., 293 F. 657.
51 C.J. p 1026 note 85.

railroad can and should refrain from operating the defective rolling stock [69]

Contributory negligence on the part of the person aggrieved is no defense to an action in the name of the state to recover the penalty prescribed for failing to give crossing signals [70]

Notice. A statute prescribing a penalty for failing to remove obstructions from a private road or crossing place after notice of "at least" a certain length does not fix the limit of time for removal, but merely prescribes the minimum notice under which the company might be held liable, leaving the maximum to be determined by the circumstances of the particular case.[71]

Statute of limitations applicable will depend on the facts and the language of the statutes involved.[72]

§ 440. Persons Entitled to Sue

Suit to recover a penalty from a railroad may be maintained by the state or, under some statutes, by a private person.

Under a statute providing that the penalty shall be sued for in the name of the state, and having no other provision as to who may sue, the right to sue is vested solely in the state,[73] and the action cannot be brought by a private person in the name of the state.[74] Under a statute allowing a traveler on the street to recover a penalty for the obstruction of a street by a railroad, a passenger in a street car on the street obstructed may recover.[75] Under statutes permitting recovery by the "person aggrieved," one damaged as the proximate result of the violation of the statute is entitled to sue for the penalty.[76] Under a statute permitting suit by the prosecuting witness, it is not essential to the right to maintain the action that the prosecuting witness should actually have testified in the case.[77]

§ 441. Persons Liable

The operating railroad may be liable for penalties even though it does not own the road; and liability is sometimes imposed on a particular officer or agent.

A company operating a railroad may be liable for penalties imposed for violation of regulations affecting operation, even though it does not own the road,[78] and it has been held that the operating railroad is the owning railroad so as to be liable to penalty for violation of a statute of this character.[79] However, under a statute imposing a penalty on any company "operating" a railroad for violation of certain statutory regulations, a lessor company is not liable for a penalty incurred by the lessee in the operation of the leased road.[80]

Statute imposing liability on a particular officer or agent is inapplicable to any other officer or agent not acting in the capacity named.[81]

Under the Federal Safety Appliance Act each interstate railroad involved in a violation thereof is liable for the penalty imposed [82] State officers charged with the administration of a state owned railroad are not personally liable for penalties for breaches of the Federal Safety Appliance Act, where they had no knowledge of the alleged violation, the immediate supervision being the duty of an inspector appointed by them and his subordinates being civil service employees [83] In determining whether a railroad is liable where it operates a train by its crew over the tracks of another railroad, the court should avoid an interpretation of the statute which would exonerate a carrier from liability where it has the actual physical control of the defective car on a line over which it may lawfully pass.[84]

69. U.S.—U. S. v Western, etc., R Co, D.C.Ga., 297 F. 482.
51 C.J. p 1026 note 86

70. Ill.—Mobile, etc., R Co. v. People, 24 Ill. App. 250

71. Pa.—Simon v. Baltimore, etc., R Co., 34 A. 221, 173 Pa. 517

72. S.C.—Sturkie v Southern R Co., 50 S.E. 782, 71 S.C. 208
51 C.J. p 1063 note 70

73. N.C.—State v Marietta, etc., R. Co., 12 S.E. 1041, 108 N.C. 24.

74. N.C.—State v Marietta, etc., R Co., supra.

75. Conn.—Tracy v. New York, etc., R. Co., 72 A. 156, 82 Conn. 1, 8
51 C.J. p 1063 note 76.

76. Ill.—Chicago, etc., R Co v. People, 12 N.E. 207, 120 Ill. 667.
51 C.J. p 1063 note 78.

77. Ill.—Illinois Cent R. Co v Herr, 54 Ill. 356.
51 C.J. p 1063 note 80.

78. Mo.—State v Missouri Pac R Co., 50 S.W. 278, 149 Mo. 104.
51 C.J. p 1063 note 82.

79. Ark.—Chicago, etc., R. Co. v. State, 106 S.W. 199, 84 Ark. 409
51 C.J. p 1038 note 50

80. Ind.—State v. Pittsburgh, etc., R Co., 35 N.E. 700, 135 Ind. 578.

81. Ga.—Vaughan v. State, 48 S.E. 249, 116 Ga. 841.
51 C.J. p 1063 note 86.

82. U.S.—U. S. v. Chicago, B & Q. R. Co., C.A.Ill., 183 F.2d 369
51 C.J. p 1063 note 88.

83. U.S.—Sherman v. U. S., Cal., 51 S.Ct. 41, 282 U.S. 25, 75 L.Ed. 143

84. U.S.—U. S. v New York Cent R Co., D.C.N.Y., 70 F.Supp. 761

Effect of contract

Where defendant operated its trains to a designated point over connecting carrier's tracks, and a box-car with a defective running board was discovered in defendant's train on connecting carrier's track, defendant was liable for statutory penalty for hauling "on its lines" a car improperly equipped, notwithstanding contract with connecting carrier providing that as between carriers, defendant's trains should be considered as belonging to connecting carrier while on connecting carrier's tracks and notwithstanding that connecting carrier might also be liable for penalty.—U. S. v. New York Cent. R. Co., supra.

Separate coach statutes. Under statutes requiring railroads to provide separate coach accommodations for white and colored passengers, a railroad providing such accommodations is not subject to penalty because a train employee directs[85] or permits[86] a passenger of one race to ride in a coach designated for the other. Under a statute imposing a penalty on a railroad conductor for failure to enforce separation of whites and blacks in railroad coaches, it would seem that a conductor is not liable for failure to compel separation of the races in a Pullman attached to his train, but owned and operated by a separate company and its employees.[87]

§ 442. —— Effect of Operation by Receiver

The receiver of a railroad is not liable for a statutory penalty unless clearly within the provisions of the statute.

A railroad company is not liable for a statutory penalty incurred while the road is being operated by a receiver;[88] nor is the receiver liable for such penalty,[89] unless clearly within the provisions of the statute.[90]

§ 443. Actions

a. In general
b. Pleadings
c. Evidence
d. Trial and review

a. In General

The provisions of the particular statute determine whether proceedings against a railroad to recover a penalty should be instituted by civil action rather than by indictment.

Proceedings to recover a penalty against a railroad should ordinarily be instituted by an appropriate form of civil action and not by indictment,[91] the action being regarded as civil rather than criminal in nature.[92] However, under statutes providing for criminal procedure in the recovery of penalties, the proceeding may be instituted by indictment[93] or information.[94] Under a statute failing to specify whether penalties shall be recovered in a civil or criminal proceeding, it has been held that the penalty should be recovered in a criminal proceeding.[95] Under a statute empowering municipalities to regulate the speed of trains within their limits and to enforce such regulations by penalties to be collected by civil action, a municipality cannot provide by ordinance for collection of penalties by criminal proceedings.[96]

Action of debt. In jurisdictions where a civil suit is brought to recover a penalty against a railroad, it has been held that the proceeding may be an action of debt,[97] but not an action on the case.[98]

Name in which action brought. Under statutes so permitting, an action against a railroad for a penalty may be brought in the name of the person entitled thereto.[99] Under a statute providing for payment of a penalty to a specified political subdivision of a state, the action cannot be brought in behalf of the state.[1]

b. Pleadings

The complaint in an action against a railroad for a penalty should allege facts bringing the case within the statute, and should be sufficient to apprise defendant of the charge made and the court of the issues to be tried. The answer should plead facts, rather than mere legal conclusions, and should set forth any matters relied on by way of avoidance.

The complaint in an action against a railroad for a penalty must allege every fact necessary to bring the case strictly within the statute creating the liability;[2] and when based on a violation of a statute after its amendment, the complaint must state facts bringing the case within the terms of the amendment.[3] The sufficiency of particular com-

85. N.C.—Merritt v. Atlantic Coast Line R. Co, 67 S.E. 579, 152 N.C. 281.
51 C.J. p 1064 note 91.

86. Tex.—State v. Galveston, etc, R. Co., Civ App., 184 S.W. 227.
51 C.J. p 1064 note 92.

87. Ky.—Commonwealth v Illinois Cent R Co, 133 S.W 1158, 141 Ky. 502, 32 L.R.A.,N.S, 801.

88. Ark.—Arkansas Cent R. Co. v. State, 79 S.W. 773, 72 Ark. 250.
51 C.J. p 1064 note 96.

89. Mich.—People v. Blair, 149 N.W. 1039, 183 Mich 130.
51 C.J. p 1064 note 97.

90. U.S.—U. S. v. Ramsey, Okl., 197 F. 144, 116 C.C.A. 568, 42 L.R.A., N.S., 1031.
51 C.J. p 1064 notes 98, 99.

91. Ark.—Louisiana, etc., R. Co. v. State, 116 S.W 193, 89 Ark. 136.
51 C J. p 1064 note 4

92. Iowa—State v. Chicago, etc., R. Co, 96 N.W. 904, 122 Iowa 22, 25, 101 Am.S R. 254.
51 C J. p 1064 note 5.

93. Me.—State v. Grand Trunk R. Co., 59 Me. 189.
Mo.—State v. Wabash, etc, R. Co., 1 S.W. 130, 89 Mo 562.

94. Mo.—State v. Wabash, etc., R. Co., supra.
51 C.J. p 1064 note 8.

95. Me.—State v. Grand Trunk R. Co, 59 Me. 189.
51 C J. p 1064 note 10.

96. Ohio—Caskey v Belle Center, 8 Ohio N.P.,N.S., 153.

97. Mich.—Owosso v. State Cent R. Co, 150 N.W. 323, 183 Mich 688.
51 C.J. p 1065 note 15.

98. Va—Russell v. Louisville, etc., R. Co., 25 S.E. 99, 93 Va. 322.

99. Mo—Scott v. Missouri Pac R. Co., 38 Mo App. 523.
51 C.J. p 1065 note 19.

1. Okl.—Chicago, etc., R. Co. v. State, 153 P. 625, 52 Okl. 614.
51 C.J. p 1065 note 21.

2. N.J.—New Jersey Cent. R. Co v. Elizabeth, 79 A. 1037, 81 N.J. Law 310
51 C.J. p 1065 note 24.

3. Ill.—Mobile, etc., R. Co. v. People, 29 Ill.App. 428
51 C.J. p 1065 note 25.

plaints may depend on the particular statute or ordinance and the circumstances involved.[4] Under the general rule in some jurisdictions, the complaint must show the statute under which the penalty is claimed,[5] and aver that the act complained of was contrary to the form of the statute.[6]

A complaint alleging the facts need not allege legal conclusions therefrom.[7] Although in the form of an indictment, a pleading may be sustained as a complaint if it contains the necessary allegations.[8] Under the Federal Safety Appliance Act allegations that defendant acted knowingly or negligently are not necessary.[9] Under a statute declaring the orders of a railroad commission prima facie reasonable, the complaint need not aver facts showing the reasonableness of an order alleged to have been violated.[10] Where statutes relating in terms to owners of railroads are construed as applying to the companies operating them, an allegation that defendant was operating the railroad in question at the time of the violation complained of is a sufficient allegation of ownership.[11] Under a statute impliedly defining a regular station as one with an agent, an allegation that a station is a regular station impliedly includes the allegation that it is an agency station.[12]

Definiteness and certainty. Complying with general rules, the complaint must be sufficiently definite and certain to apprise defendant of the exact charge against him and the court of the issue to be tried.[13] An allegation that the violation occurred on or about a certain date has been held sufficiently definite.[14] In an action for a penalty for failing to give crossing signals the complaint to be sufficiently certain must designate the particular highway crossings where the signal was not given,[15] and should state the time of day when the train crossed the highway, its direction and the kind of train, whether freight or passenger.[16]

Separate counts. A complaint may properly contain separate counts for separate violations of a penal statute.[17]

Answer. A plea specifically stating a particular defense to the merits is good as against demurrer.[18] The general rule that facts, and not mere legal conclusions, should be pleaded in an answer applies to an answer in a suit against a railroad for a penalty.[19] Matter in avoidance should be pleaded;[20] and in an action against a railroad to recover penalties under the Federal Safety Appliance Act the railroad must plead facts bringing it within the statutory exceptions from liability.[21]

Issues, proof, and variance. In compliance with general rules, the proof must conform to the allegations of the complaint, any material variance being fatal to a recovery.[22]

c. Evidence

The burden of proof is on the plaintiff to make out a case, but the burden is on the railroad to bring itself within an exception in the statute. The usual rules prevail with respect to the admissibility of evidence, and the weight and sufficiency thereof.

In accordance with the general rule, plaintiff in a penalty action against a railroad has the burden of proof,[23] and must establish every fact necessary to bring the case strictly within the statute.[24] If

4. **Allegations held sufficient**
(1) In general—Chicago, etc., R Co. v. Adler, 56 Ill. 344—51 C.J. p 1065 note 29 [a]
(2) As against demurrer—Town of Walkerton v New York, C. & St. L R Co, 200 N.E. 243, 210 Ind 175

5. N.J.—Crawford v. New Jersey R., etc., Co., 28 N.J.Law 479.

6. N.J.—Crawford v. New Jersey R., etc., Co, supra
51 C.J. p 1066 note 37.

7. Wis.—Janesville v. Milwaukee, etc., R. Co., 7 Wis. 484.
51 C.J. p 1065 note 26.

8. Ark.—St. Louis, etc., R. Co. v. State, 60 S.W. 654, 68 Ark. 561.
51 C.J. p 1065 note 27.

9. U.S.—U. S. v. Oregon Short Line R. Co., D.C.Idaho, 180 F. 483.
51 C.J. p 1066 note 43.

10. Or.—State v. Corvallis, etc., R Co, 117 P. 980, 59 Or. 450.
51 C.J. p 1066 note 41.

11. Mo.—State v St Joseph, etc, R. Co, 46 Mo App 466
51 C.J. p 1066 note 45.

12. Or.—State v. Corvallis, etc., R Co, 117 P. 980, 59 Or. 450.
51 C.J. p 1066 note 47.

13. Mo.—State v. Missouri Pac. R. Co, 168 S.W. 767, 260 Mo. 157.
51 C.J. p 1066 note 31

14. U.S.—Atlantic Coast Line R. Co v. U. S, N.C, 168 F. 175, 94 C.C.A. 35
51 C.J. p 1066 note 32.

15. Ill.—Chicago, etc., R Co. v. Howard, 38 Ill. 414.
51 C.J. p 1066 note 33.

16. Ark.—Choctaw, etc, R. Co. v. State, 87 S.W. 631, 75 Ark. 369.
51 C.J. p 1066 note 34.

17. U.S.—U. S. v. St. Louis Southwestern R. Co., Tex, 184 F. 28, 106 C.C.A. 230.
51 C.J. p 1066 note 38.

18. Fla.—Atlantic Coast Line R Co v. State, 113 So 665, 94 Fla. 120, rehearing denied 114 So 456, 94 Fla. 120.

19. Ind.—Cleveland, etc, R Co v. Newpoint, 112 N.E. 993, 185 Ind 517.
51 C.J. p 1066 note 51.

20. Tex.—Missouri, etc., R. Co v. State, Civ.App., 163 S.W. 338.
51 C.J. p 1066 note 52.

21. U.S.—U. S v. Panhandle & S. F. Ry. Co., D.C.Tex, 21 F.Supp. 919.

22. Conn.—Tracy v New York, etc., R Co, 72 A. 156, 82 Conn. 1.
51 C.J. p 1066 note 54.

23. U.S.—U. S. v Montpelier, etc., R. Co., D.C.Vt., 175 F. 874.
51 C.J. p 1067 note 57.

24. Minn.—State v. Minneapolis, St. P. & S.S.M. Ry. Co., 286 N.W. 303, 205 Minn. 394.
51 C.J. p 1067 note 58.

the railroad admits violation of a regulation[25] or if facts sufficient to show a prima facie violation are proved,[26] the burden shifts to the railroad to show other facts rendering its action lawful. The burden rests on the railroad to bring itself within the provisions of an exception to a penal statute[27] Under statutes imposing penalties for violation of separate requirements, it is not essential to prove violation of all requirements in order to recover.[28]

Admissibility. The usual rules respecting the admissibility of evidence in penal actions apply in actions for penalties brought against a railroad.[29]

Weight and sufficiency In a civil action against a railroad for a penalty, the courts ordinarily refuse to apply the rule of criminal law requiring proof against defendant beyond a reasonable doubt,[30] and hold that a preponderance of evidence is sufficient to establish liability.[31] It is, however, necessary to establish a violation of the statute by at least a preponderance of the evidence.[32] In determining whether there has been a violation of a penal statute the court will consider all the evidence,[33] and, in the last analysis, questions involving the sufficiency or insufficiency of evidence will depend on all the facts and circumstances involved.[34]

d. Trial and Review

The trial and review of an action against a railroad to recover a penalty are governed by the usual rules.

The usual rules of procedure relating to trials apply in actions to recover penalties for violation of regulations,[35] as, for example, with respect to instructions[36] Under the view that the proceedings are civil in their nature, it has been held proper to direct a verdict for plaintiff where the undisputed evidence shows the railroad's liability.[37] A summary instruction for defendant is properly refused where the evidence is insufficient to support it.[38] The verdict must be responsive to the issues.[39]

Review. The usual rule that a judgment will not be reversed on appeal for harmless error applies on review of a penalty action against a railroad.[40]

§ 444. Amount and Extent of Penalty

The amount of the penalty, within statutory limitations, rests in the sound discretion of the court; and under some statutes an accumulation of penalties may be recovered for each and every violation of a successive or continuing nature.

Within statutory limitations the amount of the penalty rests in the sound discretion of the court.[41] However, under a statute prescribing a fixed penalty for each violation of the act, the court has no discretion as to the amount of the penalty and must impose the amount called for by the statute.[42] An excessive penalty may not be imposed.[43] A statute making the servant violating certain regulations liable to a penalty within certain limits and the company also liable for "the like sum" subjects the company to a like degree of liability[44] and does not contemplate either a sum certain ascertained by a judgment against the offending servant[45] or

25. La.—State v. Louisiana R., etc., Co., 59 So. 39, 131 La. 130.
51 C.J. p. 1067 note 59.

26. U.S.—U. S. v. Illinois Cent. R. Co., Ky., 170 F. 542, 95 C.C.A. 628.
51 C.J. p. 1067 note 60.

27. U.S.—U. S. v. Panhandle & S. F. Ry. Co., D.C.Tex., 21 F.Supp. 919.
51 C.J. p. 1067 note 61.

28. Tex.—Ft. Worth, etc., R. Co. v. State, Civ.App., 275 S.W. 111, appeal dismissed 47 S.Ct. 589, 274 U.S. 718, 71 L.Ed. 1323.
51 C.J. p. 1067 note 63.

29. U.S.—U. S. v. Great Northern Ry. Co., C.C.A.Wash., 68 F.2d 610.
51 C.J. p. 1067 note 65.

30. U.S.—U. S. v. Chicago Great Western R. Co., D.C.Iowa, 162 F. 775.
51 C.J. p. 1068 note 69.

31. U.S.—St. Louis Southwestern R. Co. v. U. S., Tex., 183 F. 770, 106 C.C.A. 136
51 C.J. p. 1068 note 70.

32. U.S.—U. S. v. Boston, etc., R. Co., D.C.Mass., 168 F. 148.
51 C.J. p. 1068 note 71.

33. La.—State v. Yazoo, etc., R. Co., 59 So. 41, 131 La. 136.
51 C.J. p. 1068 note 72.

34. U.S.—U. S. v. South Buffalo R. Co., C.C.A.N.Y., 168 F.2d 948, certiorari denied 69 S.Ct. 165, 335 U.S. 870, 93 L.Ed. 414.
Minn.—State v. Minneapolis, St. P. & S. S. M. Ry. Co., 286 N.W. 303, 205 Minn. 394.
51 C.J. p. 1068 notes 73, 74.

35. Questions for jury
On conflicting evidence questions of fact are for the jury.—U. S. v. Great Northern R. Co., C.C.A.Wash., 73 F.2d 736, certiorari denied 55 S.Ct. 333, 295 U.S. 752, 79 L.Ed. 1696.
51 C.J. p. 1068 note 77.

36. U.S.—U. S. v. Great Northern R. Co., supra.
51 C.J. p. 1068 note 79.

37. U.S.—U. S. v. Atlantic Coast Line R. Co., D.C.Ga., 182 F. 284.
51 C.J. p. 1069 note 81.

38. Tex.—Missouri, etc., R. Co. v. State, Civ.App., 163 S.W. 338

39. Tex.—Galveston, etc., R. Co. v. State, 216 S.W. 393, 218 S.W. 361, 110 Tex. 128.
51 C.J. p. 1069 note 83.

40. Tex.—Ft. Worth, etc., R. Co. v. State, Civ.App., 275 S.W. 111, appeal dismissed 47 S.Ct. 589, 274 U.S. 718, 71 L.Ed. 1323.

41. Tex.—Missouri, etc., R. Co. v. State, Civ.App., 109 S.W. 867, reversed on other grounds 113 S.W. 916, 102 Tex. 153.
51 C.J. p. 1069 note 89.

42. U.S.—U. S. v. Hartford Eastern R. Co., D.C.Wash., 34 F.2d 523.

43. Ind.—Town of Walkerton v. New York, C. & St. L. R. Co., 18 N.E.2d 799, 215 Ind. 206, certiorari denied 60 S.Ct. 75, 308 U.S. 556, 84 L.Ed. 467.

44. U.S.—Toledo, etc., R. Co. v. People, 81 Ill. 141.
51 C.J. p. 1069 note 93.

45. Ill.—Toledo, etc., R. Co. v. People, supra.

the sum prescribed by the statute as a penalty for a single violation.[46]

Successive or continuing offenses In accordance with the rule of strict construction, it is held that, in the absence of a clear statutory intent to the contrary, successive violations of the statute render a railroad subject to only one penalty for acts prior to institution of the suit.[47] However, where the statute clearly so provides, an accumulation of penalties may be recovered for each and every violation.[48] Under a statute forbidding the use of a locomotive with a defective boiler, and imposing a specified penalty for each violation of the statute, each trip of a locomotive with the defective boiler constitutes a separate violation involving a separate penalty.[49] Where a statute provides that certain servants of the company shall be liable for a certain penalty "for each offense" and the corporation "for the like sum," the company is also liable for a penalty for each offense and not for the sum prescribed for a single violation.[50] Where a statute requiring certain accommodations and facilities at stations prescribes a penalty of a certain amount for each week the company fails to comply therewith, to be sued for by the county attorney, the company is liable for a cumulative penalty for each week but not for a separate penalty for each station within a county.[51]

Under the Federal Safety Appliance Act, any failure to comply with the requirements of the act subjects the railroad to penalty.[52] The hauling of each separate car without the prescribed appliances constitutes a separate violation of the act.[53] Two different movements of a defective car in the same train constitute one violation of the act.[54]

§ 445. Recovery of Penalty and Damages

The fact that a railroad is subject to a penalty ordinarily does not preclude an action for damages against it by the person injured as a result of the violation, but some statutes have been construed to require an election of remedies.

The fact that a wrongful act on the part of a railroad company is made the subject of a penalty does not prevent a person injured thereby from maintaining an action in tort for the damages sustained.[55] Where the statute imposes a penalty for the benefit of the "person aggrieved," any person sustaining an injury proximately due to the act prohibited may recover the penalty even though there was no actual collision.[56] Some statutes of this nature have been held to provide an election of remedies,[57] so that a judgment in an action for damages is a bar to an action for the penalty based on the same act of the railroad company whether the judgment be in favor of plaintiff,[58] or against him.[59] Under a statute providing that every railroad failing to remove dried vegetation from its right of way, in accordance with its statutory duty, shall incur a specified penalty "and be liable for all damages done," a person damaged by fire resulting from violation of the statute cannot recover the penalty.[60]

§ 446. Disposition of Proceeds

In the absence of constitutional restriction, the legislature may provide the disposition to be made of the penalty.

In the absence of constitutional restriction, the legislature may make whatever disposition of the penalty it may deem proper,[61] as by giving the entire penalty to the person injured,[62] or providing that a part shall go to the informer[63] or to the prosecuting attorney.[64]

46. Ill—Indianapolis, etc, R Co v People, 32 Ill App 286.
51 C J p 1069 note 95

47. Tenn—Parks v Nashville, etc, R So, 13 Lea 1, 49 Am R 655
51 C J. p 1069 note 97.

48. U S—Gulf, etc, R. Co. v State, Tex, 38 S Ct. 236, 246 U S 53, 62 L Ed 574
51 C J p 1069 note 99.

49. U S—U S v. Long Island R Co., D C N.Y, 4 F 2d 750
51 C J p 1070 note 2

50. Ill—Indianapolis, etc., R Co v. People, 32 Ill App 286

51. Tex—Missouri, etc, R Co v State, Civ App, 97 S W. 724
51 C J p 1070 note 6

52. U S—Atlantic Coast Line R Co v U. S, N C, 168 F 175, 94 C C A 35.

53. U S—St Louis Southwestern R Co v U. S, Tex, 183 F 770, 106 C C A 136.
51 C J p 1070 note 9

54. U.S—U S v Boston, etc., R. Co, D C Mass, 168 F 148
51 C J p 1070 note 10

55. Pa—Pennsylvania R Co v. Kelly, 31 Pa 372.

56. Ill—Chicago, etc., R Co v. People, 12 N E 207, 120 Ill. 667.
Persons entitled to sue see supra § 440

57. Ill—Illinois Cent R Co v People, 81 Ill.App 176
51 C J. p 1070 note 15.

58. Ill.—Illinois Cent R Co v People, supra—Wabash R Co v People, 78 Ill App 268

59. Ill—Terre Haute, etc., R Co. v People, 41 Ill App 513.
51 C J. p 1070 note 17

60. Mo—Skinner v St Louis, etc, R Co, 162 S W 237, 254 Mo. 228
51 C J p 1070 note 19

61. Ind—State v Indiana, etc, R Co, 32 N E 817, 133 Ind 69, 18 L R A 502
51 C J p 1071 note 22

62. Mo—Scott v Missouri Pac R Co, 38 Mo.App 523
51 C J p 1071 note 23

63. Mo—State v. Wabash, etc, R. Co., 1 S W 130, 89 Mo 562
51 C J. p 1071 note 24

64. Ind—State v. Indiana, etc, R. Co., 32 N E 817, 133 Ind 69, 18 L R A 502

E. DAMAGES FOR VIOLATION OF REGULATIONS

§ 447. In General

Damages may be recovered in a proper case for a railroad's violation of regulations, and where an absolute statutory liability is imposed plaintiff need not establish negligence on the part of the railroad or his own freedom from contributory negligence.

A statute imposing both a criminal liability and liability in damages for violation by a railroad of the statutory duties as to operation ordinarily does not make conviction under the criminal provision prerequisite to recovery under the damage provision.[65] Where the statute imposes an absolute liability in damages for violation of its provisions, neither the railroad's negligence[66] nor plaintiff's freedom from contributory negligence[67] is essential to recovery. Provisions imposing liability for treble damages sustained in consequence of a violation of statute have been held to apply only to willful breaches of duty.[68]

§ 448. Delay Caused by Obstruction of Crossing

Recovery may be had in a proper case for damages suffered by delay proximately resulting from the unlawful obstruction of a crossing by railroad rolling stock, and such an action is governed by the usual rules with respect to pleading, evidence, and other rules of procedure.

A right of action lies for personal injuries sustained as the result of unlawful obstruction of a public crossing by railroad rolling stock,[69] as where a patient was injured by the delayed arrival of his physician,[70] or where a patient was injured by reason of delay in reaching his physician.[71] To entitle plaintiff to recover, it must appear that the road obstructed was a public one,[72] that it was obstructed for the length of time prohibited by regulation,[73] that the damages were the proximate result of the obstruction,[74] and that plaintiff was not guilty of contributory negligence.[75]

Accidental obstruction. In actions for damages for delay, obstruction statutes have been held inapplicable to an accidental obstruction.[76]

Pleading and evidence. The usual rules govern with respect to pleading in an action for damages for personal injury arising from delay caused by obstruction of a public crossing.[77] The burden of proof is on plaintiff to prove facts entitling him to punitive damages.[78] The usual rules control with respect to the weight and sufficiency of the evidence.[79]

Peremptory instruction. In accordance with general rules, the court should not give a peremptory instruction for defendant if there is sufficient evidence to support a verdict for plaintiff.[80]

Damages. The legislature may impose a fixed sum as damages for an obstruction delaying a traveler at a public crossing,[81] irrespective of actual damages suffered by the traveler,[82] provided it is not unreasonably great.[83] In accordance with general rules, punitive damages for injuries resulting from delay caused by obstruction of a crossing cannot be recovered in the absence of a willful or intentional act.[84] The usual rules govern with respect to the amount of damages.[85]

65. Wis.—Randall v. Minneapolis, etc., R. Co., 156 N.W. 629, 162 Wis. 507.
51 C.J. p. 1071 note 29.

66. Mo.—Brady v. Wabash Ry. Co., 49 S.W.2d 24, 329 Mo. 1123, certiorari denied 53 S.Ct. 20, 287 U.S. 619, 77 L.Ed. 538.
51 C.J. p. 1071 note 31.

67. Wis.—Randall v. Minneapolis, etc., R. Co., 156 N.W. 629, 162 Wis. 507.
51 C.J. p. 1071 note 32.

68. Wis.—Reuling v. Chicago, St. P., M. & O. Ry. Co., 44 N.W.2d 253, 257 Wis. 485.
Willfulness as element of liability for penalty see supra § 438.

69. Ky.—Louisville, etc., R. Co. v. Cooper, 175 S.W. 1034, 164 Ky. 489, L.R.A.1915E 336.
51 C.J. p. 1071 note 34.

70. Miss.—Terry v. New Orleans Great Northern R. Co., 60 So. 729, 103 Miss. 679, 44 L.R.A.,N.S., 1069.
51 C.J. p. 1071 note 35.

71. Miss.—Illinois Cent. R. Co. v. Engle, 60 So. 1, 102 Miss. 878.
51 C.J. p. 1071 note 36.

72. Miss.—Anderson v. Alabama, etc., R. Co., 33 So. 840, 81 Miss. 587.

73. Miss.—Anderson v. Alabama, etc., R. Co., supra.

74. Ky.—Louisville, etc., R. Co. v. Cooper, 175 S.W. 1034, 164 Ky. 489, L.R.A.1915E 336.
51 C.J. p. 1071 note 39.

75. Ky.—Louisville, etc., R. Co. v. Cooper, supra.
51 C.J. p. 1071 note 40.

76. Miss.—Alabama, etc., R. Co. v. Cox, 63 So. 334, 106 Miss. 33.
51 C.J. p. 1072 note 42.

77. Ala.—Southern R. Co. v. Jarvis, 66 So. 936, 11 Ala.App. 635.
51 C.J. p. 1072 note 44.

78. Ala.—Southern R. Co. v. Jarvis, supra.
51 C.J. p. 1072 note 45.

79. Ala.—Southern R. Co. v. Jarvis, supra.
51 C.J. p. 1072 note 47.

80. Miss.—Parker v. Southern R. Co., 71 So. 912, 111 Miss. 669.
51 C.J. p. 1072 note 49.

81. Conn.—Tracy v. New York, etc., R. Co., 72 A. 156, 82 Conn. 1.
51 C.J. p. 1072 note 50.

82. Conn.—Tracy v. New York, etc., R. Co., supra.

83. Conn.—Tracy v. New York, etc., R. Co., supra.

84. Ala.—Southern R. Co. v. Jarvis, 66 So. 936, 11 Ala.App. 635.

85. Miss.—Illinois Cent. R. Co. v. Engle, 60 So. 1, 102 Miss. 878.
51 C.J. p. 1072 note 56.

F. PROCEEDINGS TO COMPEL OPERATION AND FURNISHING FACILITIES

§ 449. In General

A railroad may be compelled by proper proceedings to perform its duties with respect to the operation of trains and the furnishing of facilities.

The performance of a railroad's duty to operate or furnish facilities may be compelled by proper proceedings instituted by the proper person or persons.[86] In general, the right to compel operation of a railroad lies in the state alone.[87] However, under statutory or constitutional provisions, a private person may have the right to institute proceedings through the state or a commission to compel the furnishing of facilities.[88] Under some statutes the commission can exercise its jurisdiction on its own motion.[89] Under statutes providing for enforcement of the orders of a board or commission relative to railroad operation by the courts on institution of proceedings at its request, no other person can maintain a suit to enforce such order.[90] Under some statutes the commission cannot authorize or require anything to be done with respect to repairs or equipment, its highest authority being to commence an action in court to require compliance with recommendations and suggestions.[91]

Nature and form of remedy. Remedies available against a railroad failing to operate or to furnish facilities include mandamus, as discussed in Mandamus § 231 d, injunction against discontinuance or decrease of service,[92] which is more readily granted than mandamus;[93] other suit in equity,[94] quo warranto,[95] receivership proceedings, as discussed supra § 377; proceedings by the state for forfeiture of the charter, as discussed supra § 18; prosecutions under criminal statutes, as discussed infra §§ 456-464, or under penal statutes, as discussed supra §§ 437-446; and, where such an action is authorized, an action for damages, as discussed supra §§ 447, 448. Specific performance will not lie to enforce a railroad's public duty to operate its road.[96] The court will not interfere to prevent a proposed discontinuance of train service where a commission is vested with exclusive jurisdiction over the matter in the first instance and is in the process of exercising such jurisdiction.[97]

§ 450. Proceedings Instituted in Court

General rules with respect to parties, questions of law and fact, judgment, and other matters govern court proceedings instituted to compel a railroad to operate and furnish facilities.

General rules govern court proceedings instituted to compel a railroad to comply with its duties to operate and furnish facilities, depending on the particular remedy available and chosen for the purpose.[98] On the issue of right to abandon a portion of a railroad because of alleged losses, the courts will not consider nonoperating items which would be no larger under operation than under abandonment.[99]

86. Ill.—Illinois Cent. R. Co. v. Illinois Commerce Commission, 75 N.E.2d 23, 398 Ill. 19.
51 C.J. p. 1072 note 60.

87. Mich.—Henry v. Ann Arbor R. Co., 75 N.W. 886, 116 Mich. 314.
51 C.J. p. 1072 note 63.

88. N.D.—Petition of Village Board of Wheatland, 42 N.W.2d 321.

A patron of the railroad was held to have the right to invoke the jurisdiction of the commission to require the railroad to maintain a switch track at its own expense and to fix a reasonable rent for his use of part of the railway property.—Tjardes v. New York, C. & St. L. R. Co., 191 N.E. 805, 357 Ill. 162.

89. N.D.—Petition of Village Board of Wheatland, 42 N.W.2d 321.
Wis.—Thomson v. City of Racine, 9 N.W.2d 91, 242 Wis. 591.

Proceedings tantamount to determination on commission's motion
Where railroad filed petition with commission for authority to maintain certain devices at crossing in municipality and commission had authority to proceed on its own motion in respect of subject matter presented by railroad's petition, commission's proceedings including order granting desired authority were tantamount to determination of the subject matter on the commission's own motion.—Thomson v. City of Racine, supra.

90. Ohio.—Chillicothe Electric R., etc., Co. v. Norfolk, etc., R. Co., 5 Ohio App. 151.
51 C.J. p. 1073 note 67.

91. Ind.—Chicago & E. I. R. Co. v. Public Service Commission, 49 N.E.2d 341, 221 Ind. 592

92. Fla.—State v. Georgia Southern & F. Ry. Co., 190 So. 527, 139 Fla. 115, 123 A.L.R. 914
51 C.J. p. 1073 note 69.
Injunction to compel performance of duty by public service corporation generally see Injunctions § 101.

93. Ky.—Southern R. Co. v. Hatchett, 192 S.W. 694, 174 Ky. 463, L.R.A.1917D 1105.
51 C.J. p. 1073 note 70.

94. Iowa.—Northern Gravel Co. v. Muscatine North, etc., R. Co., 171 N.W. 787, 185 Iowa 1259.

95. Ill.—Ohio, etc., R. Co. v. People, 11 N.E. 347, 120 Ill. 200.
51 C.J. p. 1073 note 73

96. N.Y.—People v. Albany, etc., R. Co., 24 N.Y. 261, 267, 82 Am.D. 295.
51 C.J. p. 1073 note 81.

97. Tex.—Missouri K. & T. R. Co. of Tex. v. City of Whitney, Civ.App., 222 S.W.2d 1009.

98. U.S.—Farmers Grain Co. v. Toledo, P. & W. R. R., C.C.A.Ill., 158 F.2d 109, vacated on other grounds Brotherhood of Locomotive Firemen & Enginemen Local Lodge No. 926 v. Toledo, P. & W. R. R. Co., 68 S.Ct. 53, 332 U.S. 748, 92 L.Ed. 335, and Farmers Grain Co. v. Brotherhood of Locomotive Firemen & Enginemen, Local Lodge No. 926, 68 S.Ct. 53, 332 U.S. 748, 92 L.Ed. 335.
Ill.—Illinois Cent. R. Co. v. Public Service Commission, 75 N.E.2d 900, 225 Ind. 643.

99. Colo.—Colorado, etc., R. Co. v. State R. Commission, 129 P. 506, 54 Colo. 64.
51 C.J. p. 1073 note 88.

Parties. The usual rules apply with respect to parties in proceedings to compel a railroad to operate or to furnish facilities.[1] Under statutes giving a commission power over the operation and abandonment of railroads, and providing for action by the attorney general on a complaint by the commission, users of a railroad who have been damaged by its unauthorized abandonment have been held not proper parties plaintiff to a remedial proceeding.[2]

Questions of law. The reasonableness of a regulation of a board or commission has been held a question of law.[3]

Judgment or decree. The usual rules apply with respect to judgments and decrees in court proceedings to compel a railroad to operate or to furnish facilities.[4]

§ 451. Proceedings before Board or Commission

a In general
b Appeal from, or review of, order

a. In General

Proceedings before a board or commission to compel a railroad to comply with its duties to operate and furnish facilities are governed by general rules, as for example with respect to pleading, the trial or hearing, and the order or findings.

General rules apply in proceedings before a board or commission to compel a railroad to comply with its duties to operate and furnish facilities.[5] Under statutes empowering a board or commission to investigate failure of a railroad to perform its duties on its own motion or on complaint of an aggrieved party, the board or commission may proceed as to matters of operation and the furnishing of facilities with[6] or without[7] a formal complaint. Under statutes expressly providing for initiation of proceedings before a board or commission, to compel establishment of facilities at stations by petition, a petition is essential to jurisdiction of the commission to establish such facilities.[8] It is essential to review of its order by the courts that there be in the record either a sufficient complaint[9] or a sufficient statement of the facts on which a board or commission's order was based.[10]

Under some statutes, in proceedings instituted by a statement or complaint filed with the commission by an applicant, the statement or complaint should set forth the claims or charges on which the applicant relies and the relief sought,[11] and it should be served on the railroad company.[12] Likewise, where the commission institutes an investigation and on its own motion determines to conduct a hearing to ascertain and determine whether the railway company should be required to furnish devices or to change the grade at a railroad crossing, the commission may be required by statute to prepare and file a written specification of the issues which are to be considered and determined,[13] and may also be required to serve such writing on the railway company.[14] A motion before the board or commission to dismiss a petition for facilities, made by the railroad at the close of petitioner's

1. Ill.—Parrish v. Pennsylvania R. Co., 74 N.E.2d 237, 332 Ill.App. 160. 51 C.J. p. 1073 note 86.

2. N.C.—Sinclair v. Moore Cent. R. Co., 45 S.E.2d 555, 228 N.C. 389.

3. Ga.—Smith v. Seaboard Air-Line R. Co., 73 S.E. 523, 10 Ga.App. 227.

4. U.S.—Farmers Grain Co. v. Toledo, P. & W. R. R., C.C.A.Ill., 158 F.2d 109, vacated on other grounds Brotherhood of Locomotive Firemen & Enginemen Local Lodge No. 926 v. Toledo P. & W. R. R. Co., 68 S.Ct. 53, 332 U.S. 748, 92 L.Ed. 335, and Farmers Grain Co. v. Brotherhood of Locomotive Firemen & Enginemen Local Lodge No. 926, 68 S.Ct. 53, 332 U.S. 748, 92 L.Ed. 335. 51 C.J. p. 1073 note 90.

5. **Waiver of special appearance**
Special appearance of attorney for railroad company in proceeding before commission was not waived where president of commission, who was the only member present at hearing, referred to the special appearance, stated that objection would be filed, and that they would proceed to take testimony, witnesses were called to testify in favor of the application, and attorney for railroad cross-examined such witnesses and thereafter called certain witnesses to testify in opposition to application.—Petition of Village Board of Wheatland, N.D., 42 N.W.2d 321.

6. N.D.—Petition of Village Board of Wheatland, supra.
51 C.J. p. 1074 note 94.

7. Iowa.—State v. Chicago, etc., R. Co., 53 N.W. 323, 86 Iowa 641.
N.C.—Corporation Commission v. Southern R. Co., 145 S.E. 19, 196 N.C. 190.

8. Ark.—Kansas City Southern R. Co. v. Arkansas R. Commission, 299 S.W. 761, 175 Ark. 425.

9. Iowa.—State v. Chicago, etc., R. Co., 53 N.W. 323, 86 Iowa 641.
51 C.J. p. 1074 note 99.

10. Iowa.—State v. Chicago, etc., R. Co., supra.

11. N.D.—Petition of Village Board of Wheatland, 42 N.W.2d 321.

Variance
In proceeding to require restoration of switch lamps along main track of railroad, variance between complaint charging railroad with removal of switch lamps and proof that lamps were removed by receiver was held not to preclude order requiring receiver to restore lamps, since receiver had duty to operate road in accordance with requirements of valid state laws, and removal of lights by receiver was removal by railroad.—Brotherhood of Locomotive Firemen and Enginemen v. Mobile & O. R. Co., 199 N.E. 283, 362 Ill. 122.

12. N.D.—Petition of Village Board of Wheatland, 42 N.W.2d 321.

13. N.D.—Petition of Village Board of Wheatland, supra.

14. N.D.—Petition of Village Board of Wheatland, supra.

case, may, on review by the courts, be treated as a demurrer to the pleading[15] and to the evidence[16]

Trial or hearing The railroad may be entitled to be heard before an order is made by board or commission directing it to furnish facilities[17] A notice of hearing must be served on the railway company where required by statute;[18] but a railroad which has appeared at a hearing as to the furnishing of facilities cannot complain of lack of notice.[19] Questions not within the scope of the particular proceeding will not be determined on a hearing before a board or commission.[20] Commissioners may properly make a personal investigation of physical conditions in order to understand the evidence submitted.[21]

Order and findings The order of a board or commission relative to operation or facilities should be sufficiently definite to indicate what is required.[22] An order is not necessarily invalidated by failure to put the report of experts into the record.[23] Failure of a board or commission's order to provide for review by the courts does not invalidate the order,[24] because the right of review exists apart from such provision.[25] The findings of the commission should be sufficient to constitute a basis for the order made by it,[26] but the use of particular words ordinarily is not required.[27] Where statutory provisions relative to notice are not violated, an order may be effective even though the commission's findings have not been filed[28]

b. Appeal from, or Review of, Order

In a proper case an appeal may be taken to the courts from an order of a board or commission relative to railroad operation and facilities On such an appeal the court will not consider matters outside the record or disturb an order which is not clearly erroneous.

In so far as an order of a board or commission relative to railroad operation and facilities violates the rights of the railroad, there is a right of appeal to the courts.[29] The right of appeal is limited to a party to the proceeding[30] and restricted to those portions of the order affecting appellant[31] On review the courts will not consider matters which are dehors the record[32] or which need not be determined[33] Where only one order of the commission, and on it only one issue, is presented for re-

15. Ohio—Halliday v Public Utilities Commission, 160 N E 713, 118 Ohio St 269

16. Ohio—Halliday v Public Utilities Commission, supra
51 C J p 1074 note 3

17. Fla—State v. Atlantic Coast Line R. Co, 70 So 941, 71 Fla 102.
51 C J. p 1074 note 4

18. N D—Petition of Village Board of Wheatland, 42 N W 2d 321.

Sufficiency of notice
Where notice to railroad of hearing before commission stated that petition for adequate warning signals at a certain crossing would be considered, but commission entered an order as to two crossings and required decrease of grades as well as signals, court ordered commission to set aside order and dismiss proceedings for failure to comply with law —Petition of Village Board of Wheatland, supra.

19. W Va—Baltimore, etc, R Co v Public Service Commission, 110 S.E. 475, 90 W Va. 1.
51 C.J. p 1074 note 5.

20. Ohio—Zanesville Terminal R Co. v. Public Utilities Commission, 126 N.E 56, 100 Ohio St 225.
51 C.J p 1074 note 6.

21. Ark—St Louis Southwestern R Co. v Stewart, 235 S W 1003, 150 Ark 586
51 C J. p 1074 note 8.

22. Pa.—Jones v. Delaware, etc, R Co., 69 Pa.Super 568

23. Ark.—St. Louis Southwestern R Co v Stewart, 235 S W. 1003, 150 Ark 586
51 C.J p 1074 note 11

24. S C—Blease v Charleston, etc., R Co, 144 S E 233, 146 S C. 496

25. S C—Blease v Charleston, etc, R Co, supra

26. Ill—Illinois Commerce Commission v New York Cent. R. Co., 75 N E 2d 411, 398 Ill 11

Mere conclusion held insufficient
Commission's finding that public convenience and necessity required maintenance of agency station was held mere conclusion and insufficient to support order that agency station be maintained—Louisville & N R Co v Illinois Commerce Commission ex rel Village of Belle Rive, 187 N E 449, 353 Ill 375.

Findings held sufficient
Ill—Brotherhood of Locomotive Firemen and Enginemen v. Mobile & O R Co, 199 N E 283, 362 Ill. 122

27. Ill—Missouri Pac R Co. v. Illinois Commerce Commission ex rel Broth of R R Trainmen, 81 N E 2d 871, 401 Ill. 241.

"Demand"
Under statute authorizing commission to require the performance by public utility of any act which health or safety of employees, passengers, customers or the public may "demand," findings of commission need not use the word "demand"—Missouri Pac R Co v Illinois Commerce Commission ex rel Broth of R R. Trainmen, supra.

28. Ark—St Louis-San Francisco R Co v State, 20 S W.2d 878, 179 Ark. 1128.
51 C J. p 1074 note 15

29. S.C—Blease v. Charleston, etc, R Co, 144 S E 233, 146 S C. 496.
51 C J. p 1075 note 18

30. N C—Corporation Commission v Southern R Co, 145 S E 19, 196 N C 190
51 C J p 1075 note 20

31. Ala—Railroad Commission v. Alabama Northern R. Co., 62 So. 749, 182 Ala 357.
51 C J. p 1075 note 21.

32. Ark—St Louis Southwestern R. Co v Stewart, 235 S W 1003, 150 Ark 586, 592
51 C J p 1075 note 22.

33. Ill.—Alton R. Co. v. Illinois Commerce Commission ex rel Moulding-Brownell Corp, 15 N E 2d 508, 368 Ill. 584, affirmed Alton R Co. v. Illinois Commerce Commission, 59 S Ct. 340, 305 U S 548, 83 L Ed. 344

Charge for maintenance of track
Where the power of a municipality to impose a charge for maintenance of track on the streets was not before it and, hence, made no order on that point, court was not required to pass on that issue—Alton R Co. v. Illinois Commerce Commission ex rel. Moulding-Brownell Corp., 15 N.E.2d 508, 368 Ill 584, affirmed Alton R. Co v. Illinois Commerce Commission, 59 S Ct 340, 305 U.S 548, 83 L.Ed. 344.

view, the jurisdiction of the court under some statutes does not extend to a determination of its separate divisions, but only to the decision of the commission as an integrated entity.[34]

In reviewing an order of public convenience and necessity the function of the court is to determine whether or not the order is arbitrary or unreasonable.[35] An order setting aside a railroad regulation is reviewable as to the reasonableness[36] and discriminatory character[37] of the regulation set aside. On review of an order to spend a specified sum in connection with erection of a depot, the issue of the reasonableness of such sum involves not only the depot, but also sidings and spur tracks.[38] Under statutes making construction of depots mandatory at all stations, the only issue on review of the reasonableness of the order of a board or commission for construction of a depot at a station is as to the amount directed to be expended.[39]

Waiver and estoppel. The railroad may, by waiver or estoppel, lose the right to urge certain objections on appeal.[40] A railroad has been held not precluded from appealing to the court from an order of the commission requiring the railroad to construct certain devices and to decrease the grade of a crossing because of the fact that the railroad did not apply for a continuance to obtain time to enable it to prepare its defense,[41] or because of a failure to request a rehearing after a decision was made[42] It has been held, in a proceeding to compel restoration of trains, that failure of people along the line to appear at a commission hearing and object to discontinuance of trains will be construed on review by the courts as an acquiescence therein.[43]

Determination. The order of a board or commission will not be disturbed by the courts on review unless clearly erroneous,[44] and the court will not substitute its judgment for that of the commission where there is any substantial basis in the evidence for the commission's findings.[45] Unless the action of the commission is beyond its jurisdiction, it findings are binding on the court in certiorari proceedings.[46] However, an order will be set aside on appeal, or its enforcement enjoined, if not supported by the record[47] In the absence of evidence that existing facilities are inadequate, a board or commission order for new and different facilities will not be sustained on review.[48]

§ 452. Evidence

The usual rules as to the admissibility of evidence, and the weight and sufficiency thereof, apply in proceedings to compel a railroad to operate or to furnish facilities. Orders of a board are presumed reasonable and the burden is on the railroad to show that an order is unreasonable.

In proceedings to compel operation and the furnishing of facilities, rules, regulations, or orders of a board or commission relative to operation and facilities ordinarily are presumed reasonable,[49] or at

Method and reasoning of commission

When the commission gives a fair hearing to railroad ordering it to restore discontinued passenger trains, receives and considers competent evidence that is offered, affords opportunity through evidence and argument to challenge the result, and makes its determination on evidence and not arbitrarily, the question for a federal court is not as to the mere correctness of the method and reasoning adopted by the commission but whether the order will result in confiscation.—Southern Ry. Co. v. Alabama Public Service Commission, D.C.Ala., 88 F.Supp. 441, reversed on other grounds Alabama Public Service Commission v. Southern Ry. Co., 71 S.Ct. 775, 341 U.S. 363, 95 L.Ed.

34. Ill.—Brotherhood of Railroad Trainmen v. Elgin, J. & E. Ry. Co., 28 N.E.2d 97, 374 Ill. 60

35. S.D.—Illinois Cent. R. Co. v. Wisconsin Granite Co., 19 N.W.2d 753, 70 S.D. 558.

36. W.Va.—Baltimore, etc., R. Co. v. Public Service Commission, 94 S.E. 545, 81 W.Va. 457, L.R.A.1918D 268.
51 C.J. p 1075 note 24.

37. W.Va.—Baltimore, etc., R. Co. v. Public Service Commission, supra

38. Tex.—State R. Commission v. Pecos, etc., R. Co., Civ.App., 212 S.W. 535.
51 C.J. p 1075 note 26.

39. Tex.—State R. Commission v. Pecos, etc., R. Co., supra.
51 C.J. p 1075 note 28.

40. Wash.—State v. Public Service Commission, 137 P. 1057, 77 Wash. 529, L.R.A.1918B 786, Ann.Cas. 1915D 202.
51 C.J. p 1075 note 29.

41. N.D.—Petition of Village Board of Wheatland, 42 N.W.2d 321

42. N.D.—Petition of Village Board of Wheatland, supra.

43. S.C.—Blease v. Charleston, etc., R. Co., 144 S.E. 233, 146 S.C. 496.

44. Wash.—Dryden Commercial Club v. Public Works Dept., 252 P. 911, 142 Wash. 317, 320.
51 C.J. p 1075 note 31.

Use of spur

In the absence of a showing that order of commission denying applicant use of railroad spur was unreasonable, arbitrary or discriminatory, such order must stand.—Burke v. Louisiana Public Service Commission, 40 So.2d 916, 215 La. 451.

45. S.D.—Illinois Cent. R. Co. v. Wisconsin Granite Co., 19 N.W.2d 753, 70 S.D. 558.

46. Cal.—Atchison, T. & S. F. Ry. Co. v. Railroad Commission of California, 288 P. 775, 209 Cal. 460, affirmed 51 S.Ct. 553, 283 U.S. 380, 75 L.Ed. 1128.

47. U.S.—Chicago, B. & Q. R. Co. v. Illinois Commerce Commission, D.C.Ill., 82 F.Supp. 368.
51 C.J. p 1076 note 32

Nonappearance; perfunctory defense

Where at hearing before commission to require certain railroads to operate as common carriers, railroads either made no appearance or only a perfunctory defense because of injunction restraining commission from proceeding, proceedings should be set aside and a new hearing had.—Crowell & Spencer Lumber Co. v. Louisiana Public Service Commission, 102 So. 866, 157 La. 676.

48. Wash.—State v. State R. Commission, 110 P. 1075, 60 Wash. 218.
51 C.J. p 1076 note 33.

49. S.C.—**Corpus Juris** quoted in Southern Ry. Co. v. Public Service

least not prima facie unreasonable,[50] and the burden rests on the railroad to show data proving the rule or order unreasonable.[51] Under statutes providing that the order of a board or commission shall be prima facie reasonable, the order of the board or commission as to furnishing of facilities is entitled to the same presumptive correctness as would attach to the findings of any other experts.[52] The burden of proof rests on a railroad to show a state of facts justifying discontinuance of operations.[53] A railroad company complaining of the constitutional invalidity of an order of the commission requiring certain service has the burden of showing that invalidity by convincing proof.[54]

Admissibility. The usual rules respecting admissibility of evidence apply in proceedings to compel operation of a railroad or the furnishing of facilities.[55]

Weight and sufficiency. General rules govern respecting the weight and sufficiency of evidence,[56] and, in accordance therewith, evidence has been held sufficient or insufficient to sustain an order or finding of a board or commission,[57] or the verdict or findings of a jury[58] or trial court,[59] to entitle a railroad to abandon operations,[60] or to establish other matters.[61] Evidence that over a period of years there has been no accident or death resulting from

Commission, 10 S E 2d 769, 773, 195 S C 247
51 C.J p 1076 note 37

50. Neb —Marshall v Bush, 167 N. W 59, 102 Neb. 279, L R A 1918E 385.
S C.—**Corpus Juris quoted in** Southern Ry Co v Public Service Commission, 10 S E 2d 769, 773, 195 S C 247

51. S C —**Corpus Juris cited in** Southern Ry Co v Public Service Commission, 10 S E 2d 769, 773, 195 S C 247
51 C J p 1076 note 40.

52. Or —Southern Pac Co v. State R Commission, 119 P 727, 60 Or 400
51 C J p 1076 note 42

53. Ohio —Hocking Valley R Co v. Public Utilities Commission, 110 N E. 521, 92 Ohio St 9, L R.A 1918A 267, Ann.Cas 1917B 1154, application denied 110 N E 1061, 91 Ohio St 365
51 C J. p 1076 note 34

54. U S —Southern Ry Co v. Alabama Public Service Commission, D C Ala, 88 F Supp 441, reversed on other grounds Alabama Public Service Commission v Southern Ry Co, 71 S Ct 775, 341 U S 363, 95 L Ed. ——.

55. Ohio —Co-operative Legislative Committee of Transp. Broth v Public Utilities Commission, 80 N E 2d 846, 150 Ohio St. 270.
51 C J. p 1076 note 44.

Evidence held admissible
Ill.—Brotherhood of Railroad Trainmen v. Terminal Railroad Ass'n of St Louis, 41 N.E.2d 481, 379 Ill 403, affirmed Terminal R Ass'n of St. Louis v. Brotherhood of Railroad Trainmen, 63 S Ct. 420, 318 U S. 1, 87 L.Ed. 571.

Evidence held inadmissible
U.S —Chicago, B. & Q R Co v. Board of R. R Com'rs of Mont, D C Mont, 78 F.Supp 1010.
Ill —Illinois Cent. R. Co v. Illinois Commerce Commission, 75 N.E.2d 23, 398 Ill. 19.

56. Mo —State v Missouri Public Service Commission, 201 S W 1143, 273 Mo 632
51 C J. p 1076 note 46

57. **Evidence held sufficient**
(1) In general —Brotherhood of Locomotive Firemen and Enginemen v. Mobile & O. R Co, 199 N E. 283, 362 Ill. 122—51 C J. p 1076 note 47 [a]

(2) To justify commission in dismissing complaint or show cause order for correction of allegedly unsafe conditions in yard.—Co-operative Legislative Committee of Transp Brotherhoods v. Public Utilities Commission, 85 N.E 2d 554, 151 Ohio St 325—Co-operative Legislative Committee of Transp. Broth. v. Public Utilities Commission, 80 N. E 2d 846, 150 Ohio St. 270

(3) To restrain enforcement of order of commission requiring continuance of operation of certain trains —Chicago, B & Q R Co v. Board of R R Com'rs of Mont, D C. Mont, 78 F Supp. 1010—Atlantic Coast Line R. Co v Public Service Commission of S C, D.C S C, 77 F. Supp 675—Northern Pac Ry Co. v. Board of Railroad Com'rs of State of Montana, D C Mont., 46 F.Supp. 340

(4) To support order that, because of congested railway traffic, watchman should be provided by railroad at particular crossing on school days at certain hours.—Chicago, R. I. & P Ry Co. v Vogel, 156 P 2d 620, 195 Okl. 194

(5) To sustain order requiring restoration of service for a year — State ex rel Missouri Pac R Co. v. Atkinson, 192 S W. 86, 269 Mo 634, L.R.A.1918A 46, Ann.Cas.1917E 987.

(6) To sustain finding of commission that conductor and baggage expressman had no time to give trains rear-end flag protection, that a hazardous condition resulted in that lives of employees and passengers were imperiled, that public safety required rear-end flag protection, and to justify order requiring railroad to maintain rear-end flag protection — Missouri Pac R. Co v. Illinois Commerce Commission ex rel Broth of R R. Trainmen, 81 N E 2d 871, 401 Ill 241.

Evidence held insufficient
(1) To establish that commission's order requiring railroad, at own expense, to install safety signal at street crossing, was unreasonable — State ex rel St Louis-San Francisco Ry. Co. v Public Service Commission, 53 S W 2d 868, 331 Mo. 488.

(2) To support finding that railroad violated order which denied it permission to substitute a caretaker and abandon maintenance of a non-telegraph agency.—Dixon v Pitcairn, 199 N E. 299, 362 Ill. 213

(3) To show other matters as to an order or finding of a board or commission.
Idaho —State ex rel. Taylor v. Union Pac. R Co, 89 P.2d 1005, 60 Idaho 185.
Ill —Brotherhood of Railroad Trainmen v. Terminal Railroad Ass'n of St. Louis, 41 N.E 2d 481, 379 Ill. 403, affirmed Terminal R Ass'n of St. Louis v Brotherhood of Railroad Trainmen, 63 S Ct. 420, 318 U S 1, 87 L Ed. 571
N Y.—New York Cent R Co v. Public Service Commission, 194 N E 761, 266 N Y. 294
51 C J. p 1076 note 47 [b].

58. Tex.—State R Commission v. Pecos, etc, R. Co, Civ.App., 212 S W. 535.
51 C.J. p 1077 note 48.

59. Minn —State v. Chicago, etc, R. Co, 131 N.W 859, 115 Minn 51
51 C.J. p 1077 note 49.

60. U S.—Brownwood North, etc, R. Co. v. Texas R. Commission, D C Tex., 16 F 2d 297
51 C J. p 1077 note 50.

61. Mich —Gasser v. Garden Bay R. Co, 171 N.W 791, 205 Mich. 5.
51 C J p 1077 note 51.

a particular condition alleged to be unsafe because of close clearances between tracks is not conclusive that the condition is not dangerous.[62] The fact that at the time of the hearing before the commission no accidents had occurred as a result of the removal of switch lamps is not of itself proof that danger does not exist in the operation of trains without such lamps.[63]

G. DAMAGES FOR FAILURE TO OPERATE OR TO FURNISH FACILITIES

§ 453. Right of Action and Conditions Precedent

An action for damages may lie for a railroad's breach of a statutory or contractual duty to provide facilities, or for unlawful discrimination in the furnishing of facilities.

In the absence of statutory, constitutional, or contract provisions, no action for damages lies against a railroad for a mere failure to operate[64] or for a mere failure to furnish facilities;[65] at least no private individual may complain because of consequential damages from the refusal of a railroad to perform public or quasi-public duties unless the damages which he sustains are peculiar and different from those of other members of the public.[66] However, an action for damages may lie for a railroad's breach of a statutory duty to provide facilities.[67] In jurisdictions where a railroad is under a duty to give reasonable notice of intention to remove existing facilities, an action for damages lies for removal without such notice.[68] An action for damages for failure to furnish facilities will not lie in favor of one as to whom the road was not obligated to furnish the facility.[69]

Discrimination. An action may lie for unlawful discrimination in the furnishing of facilities;[70] and in such an action, where based on a refusal to furnish a siding connection, plaintiffs need not show what proportion of their shipments would have been sold within the state.[71]

Breach of contractual duty An action lies for damages occasioned by a railroad's breach of a contractual duty to provide facilities,[72] provided the contract[73] and its breach[74] are shown.

§ 454. Proceedings for Recovery

Actions for damages against a railroad for failure to furnish facilities are governed by the usual rules with respect to pleadings, evidence, and the like.

Proceedings for the recovery of damages for failure of a railroad to operate or to furnish facilities are governed by general rules.[75] A complaint for damages for failure to furnish facilities must set forth the facts necessary to show the existence of a cause of action[76] and resultant damage.[77] The usual rules govern as to admissibility[78] and sufficiency[79] of evidence in actions of the character under consideration. The usual rule that questions of fact are for the jury is applicable in actions

62. Ohio—Co-operative Legislative Committee of Transp Broth. v. Public Utilities Commission, 80 N E 2d 846, 150 Ohio St 270

63. Ill.—Brotherhood of Locomotive Firemen and Enginemen v. Mobile & O. R. Co., 199 N E 283, 362 Ill 122

64. U S.—Brownwood North, etc., R Co. v. Texas R Commission, D.C Tex., 16 F.2d 297.
51 C J. p 1077 note 55.

65. Okl.—Chaddick v. Lindsay, 49 P. 940, 5 Okl. 616
51 C J. p 1077 note 56.

66. N.C.—Sinclair v. Moore Cent R Co., 45 S E 2d 555, 228 N.C. 389

67. N.H.—Boothby v. Grand Trunk R Co, 34 A. 157, 66 N.H. 342.
51 C.J. p 1077 note 58.

68. Ga.—Durden v Southern R Co., 58 S E 299, 2 Ga App 66.
51 C J p 1077 note 61.

69. Miss.—Gulf, etc., R Co. v. Eaton, 115 So 726, 149 Miss. 572.
51 C.J. p 1078 note 61½.

70. Pa.—Cox v Pennsylvania R. Co, 87 A. 581, 240 Pa. 27.
51 C.J p 1078 note 62.

71. Pa.—Cox v. Pennsylvania R Co, supra.

72. N C.—Barrow v Norfolk-Southern R Co, 113 S E 785, 184 N.C. 202.
51 C J p 1078 note 63

73. Mich.—Detroit v State Cent. R. Co., 120 N.W. 592, 156 Mich. 121.
51 C J. p 1078 note 64.

74. Mo.—Stolle Stone Co v. Missouri Pac. R. Co., 175 S.W. 250, 189 Mo App 683.
51 C.J. p 1078 note 65.

Abandonment of mining operations
Where contract between railroad and coal company gave railroad right to take up and remove sidings if shipments therefrom in any one year were less than a specified number of cars, and mining operations were wholly abandoned for a period of years, railroad was authorized to take up siding and successor to coal company had no cause of action by reason thereof.—Harris Stanley Coal & Land Co v. Chesapeake & O Ry Co., C.C.A.Ky, 154 F.2d 450, certiorari denied 67 S.Ct. 111, 329 U.S. 761, 91 L.Ed. 656.

75. **Leave to sue receivers**
In proceeding for appointment of receivers to take charge of railroad's property, petition of shippers along right of way of railroad for leave to sue receivers appointed therein for damages as a result of cessation of operations by railroad was denied pending determination by commission of railroad's application for certificate of public convenience and necessity permitting abandonment.—Gross v Missouri & A Ry. Co, D C. Ark, 74 F Supp 242.

76. Wis.—Bartlett v. Chicago, etc, R Co, 71 N W 598, 96 Wis. 335
51 C J. p 1078 note 72.

77. Tex.—Payne v. Mt. Franklin Fuel, etc, Co., Civ.App., 234 S W. 595.
51 C J. p 1078 note 73.

78. Tex.—Payne v. Mt Franklin Fuel, etc, Co, supra.
51 C J. p 1078 note 75.

79. Ark.—Graham v. Jonesboro, etc, R. Co, 164 S W 729, 111 Ark. 598.
51 C J. p 1078 note 76.

against a railroad for damages arising from failure to operate or to furnish facilities.[80]

§ 455. —— Amount and Extent of Recovery

The amount and extent of the recovery in an action against a railroad for failure to furnish facilities depend on the particular circumstances involved.

A shipper entitled to notice of removal of existing facilities may recover damages for removal without notice to the extent that he was injured by the lack of notice [81] In an action for unlawful discrimination in the furnishing of siding facilities, the measure of damages is the difference between the market price actually received for goods after the discrimination ceased and the price which would have been received for such goods as could reasonably have been produced and shipped during the period of the discrimination [82]

In action for treble damages for failure to furnish a siding connection, damages should be computed on the number of cars to which plaintiff would have been entitled under defendant railroad's allotment of cars then in use,[83] and not on the basis of defendant's capacity as a shipper [84]

Damages recoverable for breach of contract to furnish facilities are such as could reasonably have been within the contemplation of the parties.[85]

H. CRIMINAL OFFENSES OF RAILROAD AND ITS AGENTS

§ 456. In General

a. In general
b. Wrongful death

a. In General

A railroad may be subject to criminal prosecution for violating its duties as to operation, and the validity of statutes making such violation an offense has been upheld.

Both at common law[86] and under statute[87] a railroad may be subject to criminal prosecution for violation of its duties respecting operation. A railroad may be indicted for the nonperformance of a statutory duty for which no punishment is specially provided under a general statute providing that in such cases the willful omission of any duty enjoined by law on any person holding a public trust or employment shall be punishable as a misdemeanor.[88] In some jurisdictions, by statute, a railroad company is guilty of a misdemeanor and subject to a fine if it fails to provide suitable station facilities as required by the statute [89]

Validity of statutes imposing criminal liability on railroad companies for failure to perform duties incident to operation has been upheld,[90] as where a railroad is made criminally responsible for the misfeasance or nonfeasance of its agents [91] However, a criminal statute depriving defendant of the presumption of innocence,[92] or discriminatory in character,[93] has been held invalid. A statute making it an offense for a railroad company to fail to light its track in any city, but which fixes no standard as to the places for, or the kind of, lights, has been held void for uncertainty.[94]

Smoke Provisions making it an offense for a railroad to allow dense smoke to be discharged from its locomotives or buildings are aimed at preventing the continuous discharge or interval discharges of large volumes of smoke,[95] and they must be applied and construed reasonably [96] A municipality, by a penal provision prohibiting the discharge of dense

80. N.H.—Boothby v. Grand Trunk R Co, 34 A. 157, 66 N H 342
51 C J. p 1079 note 78

81. Ga.—Durden v Southern R. Co, 58 S E 299, 2 Ga App 66
51 C J. p 1079 note 84

82. Pa.—Cox v Pennsylvania R Co, 87 A 581, 240 Pa 27.
51 C J. p 1079 note 86

83. Pa.—Cox v Pennsylvania R. Co, 95 A 725, 250 Pa 600

84. Pa.—Cox v Pennsylvania R Co, supra
51 C J p 1079 note 89

85. Tex.—Payne v Mt. Franklin Fuel, etc, Co, Civ.App, 234 S W 595
51 C J p 1079 note 90.

86. Ky.—Louisville, etc, R Co v Commonwealth, 13 Bush 388, 26 Am R 205
51 C J p 1079 note 92.

87. N Y.—People, on Complaint of Greene v Long Island R Co, 31 N Y S 2d 537
51 C J p 1079 note 93.

Offenses
Against operation of property of railroad see infra §§ 1005–1013.
As carrier of
Goods and their agents see Carriers §§ 514–522.
Passengers at excessive fares see Carriers §§ 587–589.
Penalties for violation of regulations see supra §§ 437–446.

88. N Y.—People v Long Island R Co, 31 N E 873, 134 N Y 506.
51 C.J. p 1079 note 95.

89. Ky.—Illinois Cent. R Co. v. Commonwealth, 90 S.W. 602, 28 Ky L 802.
10 C J p 923 note 98

90. Ark.—State v St Louis, etc, R Co, 103 S W 623, 83 Ark 249
51 C J. p 1079 note 97.

91. Ark.—State v St Louis, etc, R Co, 122 S W 627, 92 Ark. 74.
N H.—Boston, etc., R. Co. v State, 32 N H 215.
51 C J p 1079 note 98.

92. N C.—State v. Divine, 4 S E 477, 98 N C 778

93. N C.—State v Divine, supra
51 C J p 1080 note 1

94. Mont.—Jarvella v Northern Pac Ry. Co, 53 P 2d 446, 101 Mont 102

95. N Y.—People, on Complaint of Greene, v Long Island R Co, 31 N Y S 2d 537

96. N Y.—People, on Complaint of Greene, v. Long Island R Co, supra.

smoke, cannot so restrict the use by a railroad of its locomotives as substantially to prevent the exercise of authority granted to the railroad by the legislature of the state.[97]

Willfulness. Under a statute making it a misdemeanor for a railroad employee willfully to violate or omit performance of his duty so as to endanger human life, defendant cannot be convicted if the element of willfulness is absent.[98] Under a statute making it a misdemeanor for any railroad employee to "refuse or neglect" to obey any railroad company rule whereby injury or death may result to any person, it is not necessary that the refusal or neglect be willful or intentional.[99]

Defenses. In general, defendant is entitled to show the facts and circumstances surrounding the alleged violation which might nullify a finding of guilt beyond a reasonable doubt.[1] An intention to provide a facility or accommodation required by statute is no defense to a prosecution for failure to provide it.[2] Under a statute requiring railroads to provide privies at all depots, it is no defense to a prosecution for failure to do so that the depot was furnished voluntarily by the railroad[3] or that it lacked a reasonable time in which to comply with the statutory obligation.[4] Under statutes requiring provision of convenient and suitable waiting rooms,[5] or requiring station toilets to be kept in a sanitary condition,[6] the exercise of reasonable care has been held a valid defense to a prosecution for an alleged violation. Lack of authority to operate a railroad is no defense to a prosecution for violation of regulations affecting operation.[7]

b. Wrongful Death

(1) Manslaughter

In some jurisdictions a railroad corporation wrongfully causing the death of an individual may be criminally liable for manslaughter.

Under the view that a corporation may be guilty of manslaughter, a railroad corporation may be criminally liable therefor.[8] However, a road which has used due care in the selection and retention of employees is not criminally responsible for manslaughter resulting from their negligence,[9] nor can a manslaughter conviction be predicated on negligence deduced from the failure of the road to formulate rules for the guidance of employees in an unusual emergency.[10]

(2) Criminal Statutes Redressing Private Wrong

Under some statutes railroad companies are liable to indictment and fine for negligent injuries resulting in death, such an action, although criminal in form, being in effect a civil action for damages.

In some jurisdictions railroad companies are by statute made liable to indictment and fine for negligent injuries resulting in death, and the validity of such statutes has been upheld.[11] The purpose of such statutes is to obviate the common-law doctrine that no recovery lies for loss of a human life.[12] In order to sustain the action it must appear that the person for whose benefit the fine may be imposed is in existence,[13] that the railroad company was negligent,[14] and that such negligence was the proximate cause of the fatal injury.[15]

Nature of action. The action, although criminal in form, is in effect a civil action for damages.[16]

97. N.Y.—People v. New York Cent. & H. R. R. Co., 144 N.Y.S. 699, 159 App.Div. 329.

98. N.Y.—People v. Miller, 234 N.Y. S. 341, 226 App.Div. 773.
51 C.J. p 1082 note 66.
Willfulness as element of liability for penalty for violation of regulations see supra § 438.

99. Pa.—Commonwealth v. Griffin, 7 Phila. 679.
51 C.J. p 1082 note 68.

1. N.Y.—People, on Complaint of Greene, v. Long Island R. Co., 31 N.Y.S.2d 537

2. Ky.—Louisville, etc., R. Co. v. Commonwealth, 139 S.W. 756, 144 Ky. 525
51 C.J. p 1083 note 73.

3. Ky.—Louisville, etc., R. Co. v. Commonwealth, 159 S.W. 701, 155 Ky. 187.
51 C.J. p 1083 note 75.

4. Ky.—Louisville, etc., R. Co. v. Commonwealth, 159 S.W. 701, 155 Ky. 187
51 C.J. p 1083 note 76.

5. Ky.—Louisville, etc., R. Co. v. Commonwealth, 139 S.W. 776, 144 Ky. 541.

6. Ky.—Louisville, etc., R. Co. v. Commonwealth, 127 S.W. 152, 137 Ky. 802
51 C.J. p 1083 note 78.

7. Ky.—Louisville R. Co. v. Commonwealth, 114 S.W. 343, 130 Ky. 738, 132 Am.S.R. 408
51 C.J. p 1083 note 79.

8. N.J.—State v. Lehigh Valley R. Co., 103 A. 685, 90 N.J.Law 372.
51 C.J. p 1080 note 5.
Criminal liability of corporation for homicide see Corporations § 1364 b.

9. N.J.—State v. New Jersey Cent. R. Co., 133 A. 68, 102 N.J.Law 475.
51 C.J. p. 1080 note 6.

10. N.J.—State v. Pennsylvania R. Co., 129 A. 479, 3 N.J.Misc. 687.
51 C.J. p 1080 note 7.

11. N.H.—Boston, etc., R. Co. v. State, 32 N.H. 215.
51 C.J. p 1080 note 9.

12. Me.—State v. Grand Trunk R. Co., 58 Me. 176, 4 Am.R. 258

13. Mass.—Commonwealth v. Boston, etc., R. Co., 121 Mass. 36.
51 C.J. p 1080 note 14

14. Me.—State v. Maine Cent. R. Co., 1 A. 673, 77 Me. 538.
51 C.J. p 1080 note 15.

15. Me.—State v. Maine Cent. R. Co., supra.

16. Me.—State v. Grand Trunk R. Co., 58 Me. 176, 4 Am.R. 258.
51 C.J. p 1080 note 13.

Contributory negligence on the part of decedent will defeat the action[17] unless too remote as a causative factor.[18]

Persons liable. Under a statute making "the proprietors of any railroad" subject to indictment for negligence causing death, the proprietor in fact may be indicted[19] The term "proprietor" as used in such statutes refers only to a railroad corporation,[20] and does not include individual stockholders thereof.[21] A road may be liable for death caused by trains operated by it, even though at the time running over private tracks of a third person[22]

Pleading and evidence. Prosecutions under such statutes are governed by rules applicable to criminal prosecutions as to pleading[23] and by rules applicable to civil actions as to evidence.[24]

§ 457. Obstructing Public Highways

Under some statutes it is an offense for a railroad to obstruct highways for more than a prescribed period of time except for specified purposes; and, even aside from statute, a railroad may be subject to indictment for maintaining a public nuisance by unreaonably obstructing a public highway.

Aside from statute, a railroad company is subject to indictment on the ground of creating and maintaining a public nuisance by unreasonably or unnecessarily obstructing a public highway,[25] although the obstruction be outside its right of way.[26] The frequent and rapid running of trains over a highway does not constitute a criminal nuisance.[27] However, the habitual running of trains across a highway at an unreasonable rate of speed and without giving reasonable signals of approach is a nuisance for which an indictment will lie.[28] In a common-law action for nuisance it is a good defense to show that the obstruction was necessarily incident to the proper operation of the road, and was not maintained for an unnecessary or unreasonable length of time.[29]

Abrogation of common-law remedy by statute. A statute imposing a penalty on railroad agents who obstruct a highway has been held to supersede the common-law remedy by indictment[30] Notwithstanding statutes defining the rights and duties of railroads whose tracks cross a public road with respect to the nature and extent of the physical structure built, but not undertaking to define or prescribe what shall constitute a proper use thereof, the road may be prosecuted for a common-law nuisance in connection with a use obstructing the public road.[31]

Under statute. In some jurisdictions, by virtue of statute, it is an indictable offense for a railroad company to obstruct streets or highways, or to do so for over a certain length of time, except for specified purposes[32] Under a statute prohibiting a railroad from negligently or unnecessarily obstructing "a highway, town way or street," a railroad cannot be convicted for obstruction of a private way.[33] A statute making it an offense to put obstructions in a passway has been held not to apply to a railroad's obstruction of a private crossing, in the exercise of its corporate franchise, by permitting cars to stand on the track over the crossing.[34] Where a statute and ordinance prescribe different periods of time as rendering the company liable for the obstruction of a highway, the ordinance is void in so far as it conflicts with the statute,[35] and the company will be liable for obstructing a crossing for the time prescribed by the statute, although it is a period shorter than that prescribed by the ordi-

17. N H—State v Grand Trunk R. Co, 23 A 525, 65 N.H. 663
51 C J p 1080 note 17—17 C J. p 1306 note 83 [b].

18. N H—State v Manchester, etc., R Co, 52 N H. 528
51 C J p 1080 note 18.

19. N.H—State v. Boston, etc., R. Co, 58 N H 410
51 C.J. p 1080 note 21.

20. Mass.—Commonwealth v. Boston, etc., R. Co, 11 Cush 512.
N H.—State v. Gilmore, 24 N H. 461.

21. N H.—State v. Gilmore, supra

22. Mass.—Commonwealth v. Boston, etc., R. Corp., 126 Mass. 61.
51 C J. p 1081 note 24.

23. N.H.—State v Manchester, etc., R. Co., 52 N.H. 528.

24. Me—State v. Grand Trunk R. Co., 58 Me. 176, 4 Am.R. 258.

25. Mo—Carson v. Baldwin, 144 S. W 2d 134, 346 Mo 984.
51 C.J p 1081 note 30.

26. Ky—Commonwealth v. Cincinnati, etc, R Co, 7 Ky L 305

27. Pa—Commonwealth v Baltimore, etc, R. Co, 72 A 278, 223 Pa. 23, 132 Am S R 723.

28. Pa—Commonwealth v. Baltimore, etc, R Co., supra.
51 C.J. p 1081 note 33.

29. Ind—State v. Louisville, etc., R. Co, 86 Ind. 114.

30. Pa—Commonwealth v. Capp, 48 Pa 53
51 C J. p 1081 note 36.

31. Pa—Commonwealth v. Baltimore, etc, R. Co., 35 Pa.Super. 474, reversed on other grounds 72 A. 278, 223 Pa. 23, 132 Am S.R. 723.
51 C J. p 1081 note 38.

32. Minn.—Flaherty v. Great Northern Ry Co., 16 N.W 2d 553, 218 Minn 488

Enlargement of common-law offense
A statute making it a misdemeanor for a railroad to block a public crossing for more than a specified time except in cities and towns having more than a prescribed population has been held not to create a new offense but merely to enlarge an offense at common law—Carson v. Baldwin, 144 S.W.2d 134, 346 Mo 984.

33. Mass—Commonwealth v. Boston, etc., R. Co., 135 Mass. 550

34. Ky—Zweigart v. Chesapeake & O Ry. Co., 170 S W. 1194, 161 Ky. 463.

35. Ky.—Louisville, etc, R Co. v. Commonwealth, 78 S W. 124, 79 S. W. 275, 117 Ky. 350, 25 Ky L. 1452, 2050.

nance.[36] Under a statute imposing criminal liability on a railroad for obstruction of a street for a period longer than prescribed by an ordinance of the municipality in which located, the railroad is guilty of no offense in obstructing a street within a municipality lacking an obstruction ordinance.[37]

Intent or accident; violation of instructions. Under a statute absolutely prohibiting the obstruction of a highway for over a specified length of time, defendant may be convicted for an accidental obstruction[38] which could not have been avoided by the use of reasonable care,[39] or for an obstruction due to the malicious but preventable interference of strangers,[40] and despite the absence of a guilty intent.[41] Neither at common law nor under statute is it any defense that the railroad's servants or agents, in causing the obstruction, acted contrary to the rules or instructions of the company, provided they were acting within the scope of their employment,[42] although there is authority to the contrary with respect to a single instance of disobedience.[43] A railroad executive cannot be held liable for obstruction of the highway by subordinates in violation of his instructions.[44]

§ 458. Intoxication of Employee While on Duty

It is sometimes made an offense for a railroad employee having to do with the movement of trains to be intoxicated while on duty.

Under a statute making it a criminal offense for a railroad employee "having to do with the movement of trains" to be intoxicated while on duty, an employee reporting for and attempting to work is on duty within the meaning of the statute.[45] The test of whether a given employee is within the statute is the nature of the duties he might be called on to perform.[46]

§ 459. Persons Liable

The determination of which railroad, officer, or agent is criminally responsible for a violation of regulations depends on the terms of the statutes and the particular circumstances of the case.

A railroad company is not liable for criminal offenses committed by a second railroad company while operating the lines of the first as an independent agency.[47] Under a statute expressly making both the railroad company and a participating agent guilty of a misdemeanor for violation of its provisions, the railroad cannot escape liability on the plea that the agent alone is responsible.[48] Under a statute expressly subjecting a railroad employee to fine for violating its provisions, and silent as to the liability of the railroad, the road cannot be prosecuted for a violation.[49] Under statutes making particular officers or agents subject to indictment for certain acts or omissions, an indictment will lie only against the particular officer or agent specified.[50]

Under a statute in one section making it a misdemeanor for any "person" to set fire to forests, and in a different section making it a crime for a railroad to neglect fire regulations therein prescribed, a railroad company cannot be indicted as a "person" under the first section.[51] Under a statute forbidding the heating of cars by stones kept inside the car, and providing that violation of the statute shall be a misdemeanor, any corporation[52] or person[53] participating in a violation of the act may be indicted.

§ 460. —— Operation by Receiver

A railroad ordinarily is not criminally responsible for an offense committed while the road is under the control of a receiver; but the receiver may be responsible, at least in his individual capacity.

A railroad company cannot be convicted for of-

36. Ky.—Louisville, etc, R Co. v. Commonwealth, supra.

37. Miss.—Illinois Cent. R Co. v State, 14 So 459, 71 Miss 253.
51 C.J p 1081 note 46.

38. Mass.—Commonwealth v. New York, etc, R. Co., 112 Mass 412
51 C J p 1082 note 51.

39. Mass.—Commonwealth v. New York, etc, R Co, supra.
51 C J p 1082 note 52.

40. Mass.—Commonwealth v. New York Cent, etc, R Co, 88 N E 764, 202 Mass 394, 132 Am S R 507, 23 L R.A.,N.S, 350, 16 Ann.Cas 587.
51 C J. p 1082 note 53.

41. Mass.—Commonwealth v. New York, etc., R Co, 112 Mass. 412.
51 C.J. p 1082 note 54.

42. Mass.—Commonwealth v New York, etc, R Co., 112 Mass. 412.
Tenn.—State v. Louisville, etc, R Co, 19 S W. 229, 91 Tenn 445

43. W Va.—State v. Baltimore, etc, R Co., 69 S E 703, 68 W.Va. 193.
51 C J. p 1082 note 58

44. Ala.—Gude v. State, 76 Ala. 100.

45. Canada.—Rex v. Lang, 34 Que. K B 541, 40 Can Cr Cas. 207
51 C J. p 1082 note 61.

46. Canada.—Rex v. Lang, supra.
51 C J p 1082 note 63.

47. Ky.—Louisville R Co v Commonwealth, 114 S.W. 343, 130 Ky 738, 132 Am.S.R. 408.
51 C J. p 1083 note 82.

48. Ark.—State v. St. Louis, etc, R. Co., 122 S.W 627, 92 Ark. 74.
51 C.J. p 1083 note 85.

49. N C.—State v. Norfolk Southern R. Co., 82 S E. 963, 168 N.C. 103, L R A 1915B 329.
51 C.J. p 1083 note 87.

50. Ga.—Vaughan v. State, 43 S E 249, 116 Ga 841—Craven v State, 34 S E 561, 109 Ga 266.
Liability of railroad executive for obstruction of highway see supra § 457.
Persons liable for causing death see supra § 456 b (2).

51. Pa.—Commonwealth v. Pennsylvania R. Co, 88 Pa Super 321.
51 C J p 1083 note 90.

52. N.Y.—People v. Clark, 14 N Y.S. 642, 8 N Y.Cr. 169

53. N Y.—People v. Clark, supra.

fenses incident to the operation of its road occurring while the road is being controlled and operated by a receiver,[54] except, according to some authority, in a case where the statutory duty could have been performed by the company without interfering with the receiver[55] A railroad company may be convicted of offenses occurring prior to the time when the receiver went into possession[56]

Liability of receiver. There is authority to the effect that a receiver may be indicted for offenses incident to the operation of the road occurring during his control thereof,[57] at least in his individual capacity.[58]

§ 461. Prosecution and Punishment

The rules governing the indictment, information, or complaint in a prosecution against a railroad company are considered infra § 462, evidence, trial, and review infra § 463, and punishment infra § 464

Examine Pocket Parts for later cases.

§ 462. —— Indictment, Information, or Complaint

The indictment, information, or complaint in a prosecution against a railroad company must allege facts sufficient to constitute the offense charged and should be sufficiently certain; but mere surplusage does not render it defective.

The form of the prosecution's initial pleading will depend on statutory or constitutional provisions as interpreted in the light of general rules[59] An indictment, information, or complaint against a railroad company must allege every fact necessary to constitute the offense charged[60] and to show the liability of defendant.[61] Where the duty of the railroad to perform an act is predicated on some prior affirmative action of the public authorities, the indictment should allege the taking of such action[62]

Certainty. The indictment, information, or complaint must be sufficiently certain to enable defendant to prepare his defense and to make a judgment rendered thereon available as a bar to another prosecution;[63] but if it meets the foregoing requirement the pleading is sufficient as to certainty[64] In an indictment for failing to give the statutory crossing signals, it is sufficient to describe the place of such omission as the crossing of a public highway without alleging when or by what authority it was established;[65] but the indictment should specify which of defendant's trains committed the alleged offense where different trains were operated at the place on the day specified[66] An indictment charging discrimination in the accommodations provided must allege wherein the discrimination existed[67]

Description of defendant. In an indictment against a railroad company it is a sufficient allegation of defendant's corporate existence to state the name of the company, and that it is a corporation existing under and by virtue of the laws of the state, duly organized and doing business.[68] Where the indictment is against a receiver, an averment that he is the receiver of, and as such is operating a certain railroad is a sufficient averment of authority from the court appointing him to operate the road[69] Where the statute makes only a particular officer or agent liable to indictment, the indictment must show that defendant is the officer or agent specified by the statute.[70]

54. N.C.—State v Norfolk, etc, R. Co, 67 S.E. 42, 152 N.C. 785, 26 L. R.A.,N.S., 710, 21 Ann.Cas 692.
51 C.J. p 1083 note 98.

55. Ark.—Arkansas Cent R. Co v State, 79 S.W. 772, 72 Ark. 252.
51 C.J. p 1084 note 99.

56. Iowa.—State v Minneapolis, etc., R. Co., 56 N.W. 400, 88 Iowa 689.

57. Ky.—Commonwealth v. Felton, 53 S.W. 1046, 107 Ky. 330, 21 Ky. L. 1039.
51 C.J. p 1084 note 3.

58. N.C.—State v Norfolk, etc, R Co, 67 S.E. 42, 152 N.C. 785, 26 L.R.A.,N.S., 710, 21 Ann.Cas. 692
51 C.J. p 1084 note 4.

59. Ark.—Texas, etc., R. Co. v State, 41 Ark 488
51 C.J. p 1084 note 7.

60. Ark.—State v Kansas City, etc, R. Co, 16 S.W. 567 54 Ark. 546, 549
51 C.J. p 1084 note 10.

Allegations held sufficient

Ky.—Cincinnati, etc, R Co. v. Commonwealth, 104 S.W. 771, 31 Ky.L. 1113
51 C.J. p 1085 note 32

Allegations held insufficient

Ky.—Commonwealth v. Louisville, etc, R. Co., 231 S.W. 236, 191 Ky. 634.
51 C.J. p 1085 note 33

61. Ky.—Commonwealth v. Illinois Cent R. Co, 55 S.W. 10, 21 Ky.L. 1342.
51 C.J. p 1084 note 11.

62. Ky.—Commonwealth v. Illinois Cent R. Co, 86 S.W. 542, 27 Ky. L. 763.
51 C.J. p 1084 note 12.

63. Ind.—State v. Cleveland, etc., R. Co, 36 N.E. 713, 137 Ind 75.
51 C.J. p 1084 note 13.

64. Ky.—Commonwealth v. Chesapeake, etc, R. Co, 29 S.W. 136, 16 Ky.L. 481
51 C.J. p 1084 note 14

65. Ky.—Chesapeake, etc, R. Co v Commonwealth, 43 S.W. 445, 19 Ky.L. 1345

66. Ark.—Choctaw, etc, R Co v State, 85 S.W. 85, 74 Ark 159
51 C.J. p 1084 note 16

67. Ark.—Choctaw, etc, Co v State, 87 S.W. 426, 75 Ark. 279
11 C.J. p 814 note 79.

68. Vt.—State v. Vermont Cent R Co, 28 Vt. 583.
51 C.J. p 1084 note 17.

69. Ky.—Commonwealth v. Felton, 53 S.W. 1046, 107 Ky 330, 21 Ky L. 1039.

70. Ga.—Vaughan v. State, 43 S.E 249, 116 Ga. 841.

Language of statute. In accordance with general rules, an indictment against a railroad or its employees which substantially follows the language of the statute creating the offense is sufficient,[71] although not using the exact statutory language,[72] unless the statute fails completely to define the crime, in which case the necessary additional facts to show the offense must be set forth.[73] Where the statute requires either the ringing of a bell "or" the blowing of a whistle, an indictment alleging in the conjunctive that it failed to do the one "and" the other does not show the commission of an offense.[74] An indictment for failure to provide separate coaches for the transportation of white and colored passengers is sufficient if it sets out the facts constituting the offense in the words of the statute and contains sufficient averments as to time, place, persons, and other circumstances to identify the particular transaction.[75]

Surplusage does not render an indictment defective.[76]

Bill of particulars cannot cure an indictment so defective that it charges no offense.[77]

Issues, proof, and variance. Each material allegation of the indictment, information, or complaint must be supported by proof,[78] and any material variance is fatal to a recovery.[79] The state need not prove an allegation supported by an uncontradicted presumption.[80] Under an indictment for one offense defendant cannot be convicted of a different offense.[81] Where time is not of the essence of the offense, it need not be proved as alleged,[82] but the offense may be proved to have been committed at any time prior to the finding of the indictment and within the period prescribed by the statute of limitations.[83]

§ 463. —— Evidence, Trial, and Review

a. Evidence
b. Trial and review

a. Evidence

As in other prosecutions, the railroad is entitled to the presumption of innocence and the state has the burden of proof. The usual rules govern with respect to the admissibility of evidence and the weight and sufficiency thereof.

In accordance with general rules, a railroad company being prosecuted for a criminal offense is entitled to the presumption of innocence,[84] and the burden of proof rests on the state.[85] Criminal intent may be presumed from habitual violation of a regulatory statute.[86]

Admissibility. In accordance with general principles, evidence in a criminal prosecution against a railroad or its employees must be competent, material, and relevant,[87] and have some legitimate bearing on the question of defendant's guilt or innocence of the offense charged;[88] and under the circumstances of particular cases evidence has been held admissible[89] or inadmissible,[90] depending on the application of such principles. On an indictment for obstructing a highway, where each obstruction constitutes a separate offense, the prosecution should be required to elect which offense it will prosecute for, and the evidence should be limited to that offense.[91]

71. Ark.—Kansas City Southern Ry. Co. v. State, 106 S.W.2d 163, 194 Ark. 80.
Ky.—Commonwealth v. Louisville & N. R. Co., 258 S.W. 101, 201 Ky. 670.
51 C.J. p 1085 note 23—81 C.J. p 720 note 55 [a] (3)

72. Ky.—Louisville, etc., R. Co v. Commonwealth, 33 S.W. 939, 17 Ky L. 1136.
51 C.J. p 1085 note 24.

73. Miss —State v. Southern R. Co., 72 So. 837, 112 Miss. 23.

74. Ark —State v. Kansas City, etc., R. Co, 16 S.W. 567, 54 Ark. 546.

75. Ky.—Chesapeake, etc., R. Co. v. Commonwealth, 84 S.W. 566, 119 Ky. 519, 27 Ky L. 176.

76. Ky—Illinois Cent R Co. v. Commonwealth, 45 S.W. 367, 20 Ky. L. 115.
51 C J. p 1085 note 28.

77. Pa.—Commonwealth v. Baltimore, etc., R. Co., 72 A. 278, 223 Pa. 23, 132 Am S R. 723.

78. Ky —Cincinnati, etc., R Co v. Commonwealth, 104 S W. 771, 126 Ky 712, 31 Ky.L. 1113, 17 L R.A., N.S, 561.
51 C.J. p 1086 note 43.

79. Ky —Illinois Cent R Co v. Commonwealth, 47 S.W. 255, 104 Ky 362, 20 Ky.L 748, 990.
51 C.J. p 1086 note 44.

80. Ky —Illinois Cent R Co v. Commonwealth, 200 S.W. 17, 179 Ky. 28
51 C J. p 1086 note 45.

81. Ky —Southern R. Co. v. Commonwealth, 110 S.W. 372, 129 Ky. 87, 33 Ky L. 430
51 C J. p 1086 note 46.

82. Ky.—Cincinnati R Co. v. Commonwealth, 80 Ky. 137.

83. Ky.—Cincinnati R Co. v. Commonwealth, supra.
51 C.J p 1086 note 48.

84. Pa —Commonwealth v. Baltimore, etc., R. Co., 72 A. 278, 223 Pa. 23, 132 Am.S R. 723.
51 C J. p 1086 note 56.

85. Me.—State v Maine Cent. R. Co., 76 Me 357, 49 Am R 622.
Pa —Commonwealth v. Baltimore, etc, R Co, 72 A. 278, 223 Pa. 23, 132 Am S.R. 723.

86. Ky.—Louisville R. Co. v Commonwealth, 114 S W. 343, 130 Ky. 738, 132 Am.S R 408.
51 C.J. p 1087 note 53

87. Ky.—Illinois Cent. R. Co v Commonwealth, 200 S W. 17, 179 Ky. 28.
51 C J. p 1087 note 55

88. Ky.—Louisville, etc, R. Co. v Commonwealth, 80 Ky. 143, 3 Ky L 644, 44 Am.R 468
51 C.J. p 1087 note 56.

89. Ky.—Louisville, etc, R. Co. v Commonwealth, 194 S W. 346, 175 Ky. 315.
51 C.J. p 1087 note 59

90. Ky.—Chesapeake, etc., R Co v. Commonwealth, 210 S.W 793, 184 Ky. 1.
51 C.J. p 1087 note 60.

91. Ky.—Louisville, etc., R. Co v.

Weight and sufficiency. General rules govern questions of weight and sufficiency of evidence in criminal prosecution of a railroad or its employees for offenses incident to the operation of the road.[92]

b. Trial and Review

The usual rules of criminal law are applicable to the trial and review of prosecutions of railroads or their employees for offenses relative to the operation of the road.

In the trial of railroads or their employees for offenses relative to operation of the road, the usual rules of criminal law are applicable.[93] In accordance with general rules, questions of fact are for the jury on conflicting evidence.[94] The validity of a statute under which a railroad is prosecuted is a question of law for the court.[95]

Instructions are satisfactory if they present the law and the facts properly when considered as a whole.[96] Inconsistent or contradictory instructions are improper.[97]

Review. General rules govern the review of criminal prosecutions against a railroad or its employees for offenses relative to operation of the road.[98]

§ 464. —— Punishment

A statute subjecting a railroad to imprisonment and fine may be valid as to the fine and inoperative as to the imprisonment feature.

A statute in terms imposing imprisonment and fine as punishment for violation has been held inoperative as to railroads with respect to the imprisonment feature,[99] but nevertheless valid as to the fine.[1]

III. INJURIES TO PROPERTY IN GENERAL

A. INJURIES FROM CONSTRUCTION OR MAINTENANCE

§ 465. Existence and Extent of Liability in General

The fact that a railroad company owns its right of way absolutely does not affect its liability for damages to the property of others caused by the negligent or improper manner of constructing its road or by improper encroachments upon the land outside the limits of its right of way.

The fact that a railroad company owns its right of way absolutely does not affect its liability for damages to the property of others caused by the negligent or improper manner of constructing its road[2] or by improper encroachments upon the land outside the limits of its right of way.[3]

Effect of assessment of damages in condemnation proceedings. Where land has been condemned for the construction of a railroad and damages have been assessed in the condemnation proceeding, the landowner may not thereafter recover damages for injuries merely incidental to the construction of the road if done in a lawful and proper manner,[4] since, as discussed in Eminent Domain § 149, the damages assessed in the condemnation proceeding include whatever of injury results to the landowner from the structure itself and such as is incidental to its use. On the other hand, the damages are assessed on the theory that the road will be constructed in a skillful and proper manner,[5] and, since so limited, the landowner may subsequently recover damages

Commonwealth, 78 S.W. 124, 79 S.W. 275, 117 Ky. 350, 25 Ky.L. 1452, 2050.

92. Mass.—Commonwealth v. Boston & L. R. Corporation, 126 Mass. 61
51 C.J. p. 1087 note 62.
Evidence held sufficient
Ark.—St. Louis-San Francisco Ry. Co. v. State, 223 S.W.2d 186, 215 Ark. 714.
N.Y.—People, on Complaint of Greene v. Long Island R. Co., 31 N.Y.S.2d 537.
51 C.J. p. 1087 note 62 [a]
Evidence held insufficient
Ark.—Chicago, R. I. & P. Ry. Co. v. State, 60 S.W.2d 924, 187 Ark. 1162.
N.Y.—People v. Bennett, 299 N.Y.S. 41, 252 App.Div. 770.
51 C.J. p. 1087 note 62 [b].

93. **Special verdict** must find defendant guilty or not guilty, subject to the opinion of the court on the law as applicable to the facts ascertained therein.—State v. Divine, 43 S.E. 477, 98 N.C. 778.

94. Ky.—Chesapeake, etc., R. Co. v. Commonwealth, 210 S.W. 793, 184 Ky. 1.—Louisville, etc. R. Co. v. Commonwealth, 200 S.W. 464, 179 Ky. 279.
51 C.J. p. 1087 note 66

95. Ark.—Louisiana, etc., R. Co. v. State, 106 S.W. 960, 85 Ark. 12.
51 C.J. p. 1088 note 67.

96. Iowa.—State v. Chicago, etc., R. Co., 42 N.W. 365, 77 Iowa 442, 4 L.R.A. 298.
51 C.J. p. 1088 note 69.

97. N.J.—State v. Erie R. Co., 87 A. 141, 84 N.J.Law 661, 46 L.R.A.,N.S., 117
51 C.J. p. 1088 note 70

98. W.Va.—State v. Baltimore, etc., R. Co., 57 S.E. 44, 61 W.Va. 634.
51 C.J. p. 1088 note 73.

99. Ga.—Southern R. Co. v. State, 54 S.E. 160, 125 Ga. 287, 114 Am.S.R. 203

1. Ga.—Southern R. Co. v. State, supra.
51 C.J. p. 1088 note 77.

2. Ind.—Roushlange v. Chicago, etc., R. Co., 17 N.E. 198, 115 Ind. 106.
51 C.J. p. 1119 note 28.
Effect of conveyance of right of way see supra § 81.

3. Ind.—Roushlange v. Chicago, etc., R. Co., supra
51 C.J. p. 1119 note 29.

4. N.H.—Clark v. Boston, etc., R. Co., 24 N.H. 114.
51 C.J. p. 1119 note 31.

5. Neb.—Chicago, etc., R. Co. v. Andreesen, 87 N.W. 167, 62 Neb. 456
51 C.J. p. 1120 note 32.
Recovery of compensation in condemnation proceedings for antici-

for any injury due to a negligent or improper construction of the road,[6] or improper encroachment upon his lands outside of the right of way,[7] or failure to comply with a statutory requirement, such as the construction of fences or cattle guards,[8] even though the injury results from some new use made by plaintiff of his property after the construction of the road, provided such use is a reasonable and customary one,[9] and although plaintiff was not the owner of the land at the time the railroad was built.[10]

§ 466. —— Effect of Authorization or Consent to Construction

The constitutional right of a person whose property is taken or injured without his consent for public purposes to compensation therefor is not affected by legislative authority given to a railroad company to construct a road or by municipal consent given to such a company to construct a road within the corporate limits.

The constitutional right of a person whose property is taken or injured without his consent for public purposes to compensation therefor is not affected by legislative authority given to a railroad company to construct a road[11] or by municipal consent given to such a company to construct a road within the corporate limits.[12] On the other hand, where a railroad company in constructing its road has proceeded under legislative authority and in a lawful and proper manner, with due care, there may be no recovery as for a tort for any incidental or consequential damages,[13] although the legislative authority which protects the company against such liability for merely incidental damages does not authorize any direct invasion of private rights,[14] so that a railroad company may be held liable for damages caused by unauthorized acts[15] or by any encroachment upon lands by it outside of the limits of its right of way.[16]

Inasmuch as a railroad company, in constructing or maintaining its road, must exercise ordinary care for the protection of the rights of property owners,[17] such a company may be held liable for any injuries to property caused by the negligent or improper manner of constructing or maintaining its road,[18] and the general rule applies that it must so use its property as not unnecessarily to injure another.[19] However, this rule does not require that where the company has acquired a right of way it must construct its road thereon in such manner as to occasion the least possible injury to the owners of adjacent lands, regardless of its own interests and the requirements of a properly constructed roadbed.[20]

§ 467. —— Release, Waiver, or Estoppel

A valid contract executed by a landowner releasing a railroad company from all damages which will result from the construction and maintenance of its road ordinarily is binding on the landowner and on those claiming under him. A landowner may, by reason of estoppel, be prevented from recovering damages for the taking of his property for the construction of a railroad.

A valid contract executed by a landowner releasing a railroad company from all damages which will result from the construction and maintenance of its road ordinarily is binding on the landowner[21] and on those claiming under him,[22] such as a subsequent purchaser of the property with knowledge or notice

pated negligence generally see Eminent Domain § 161.

6. Ind.—Roushlange v. Chicago, etc, R Co, 17 N.E. 198, 115 Ind 106.
51 C.J. p 1120 note 33.
Condemnation proceedings as bar to action for subsequent damages generally see Eminent Domain § 328.
Recovery for injuries not covered by condemnation proceedings generally see Eminent Domain § 400

7. Ind.—Roushlange v. Chicago, etc, R Co., supra.

8. Tex.—Houston, etc., R Co v. Meador, 50 Tex 77.

9. N.H.—Perley v. Boston, etc., R. Co, 57 N.H. 212.

10. Tenn.—Carriger v. East Tennessee, etc, R. Co., 7 Lea 388.

11. N.J.—Costigan v. Pennsylvania R Co, 23 A. 810, 54 N.J.Law 233.
51 C.J. p 1118 note 12.

12. Ill.—Shrader v. Cleveland, etc, R. Co, 89 N.E 997, 242 Ill 227, 26 L.R.A.,N.S., 226.
51 C.J. p 1118 note 13.

13. Neb.—Conn v Chicago, etc, R. Co, 130 N.W. 563, 88 Neb 732
51 C.J. p 1118 note 17.
Right to excavate
Generally, a railroad has the right to use its right of way to secure dirt by excavation to build, strengthen, or maintain its roadbed, without responding in damages to an adjoining landowner.—Miller v Ervin, 6 So.2d 910, 192 Miss 712—New Orleans, B R., V. & M. R. Co v. Brown, 1 So. 637, 64 Miss 479.

14. Or.—Sandstrom v. Oregon-Washington R, etc., Co., 146 P. 803, 75 Or. 159.
51 C.J. p 1119 note 19

15. Me.—Rogers v. Kennebec, etc, R Co., 35 Me. 319
51 C.J. p 1119 note 20.

16. Ky.—Louisville, etc., R. Co v Craft, 233 S.W 741, 192 Ky 314.
51 C.J. p 1119 note 22.

17. Tex.—International-Great Northern R Co. v. Reagan, Civ App, 36 S.W 2d 564, affirmed 49 S W 2d 414, 121 Tex 233.

18. Tex.—International-Great Northern R Co v. Reagan, 49 S W 2d 414, 121 Tex 233.
51 C.J. p 1119 note 24.

19. La.—Kirk v. Kansas City, etc, R Co, 25 So 457, 51 La.Ann 667.
51 C.J. p 1119 note 25.

20. Tex.—International, etc, R. Co v. Pape, 62 Tex 313.
51 C.J. p 1119 note 26.

21. Okl.—Gulf, C & S F. Ry Co v Rutledge, 47 P 2d 83, 173 Okl 245
Pa.—Updegrove v. Pennsylvania, etc, R Co, 19 A. 283, 132 Pa. 540, 2 L.R.A 213—Hoffeditz v South Pennsylvania R, etc., Co., 18 A 125, 129 Pa. 264.
Tex.—Gulf, C. & S. F. Ry Co v. Thornton, Civ App, 109 S.W 220.
Conveyance of right of way as waiver of damages see supra § 81.

22. Okl.—Gulf, C & S. F. Ry. Co. v Rutledge, 47 P 2d 83, 173 Okl 245

of the contract[23] However, a contract of this nature should be construed and given effect according to the intent of the parties as revealed by the terms thereof,[24] and a release of all damages caused by the construction and maintenance of a railroad does not contemplate or prevent a recovery for injuries resulting from a negligent or improper construction or maintenance.[25] Furthermore, a contract seeking to exempt a railroad company from liability for all subsequent and future risk and damages of every kind resulting from the negligent maintenance of the road has been held void.[26]

A mere parol license given to a railroad company by a landowner to divert water upon his lands may be revoked by a subsequent grantee and damages may be recovered for injuries accruing subsequent to such revocation.[27] Also the consent of a landowner to the construction of a railroad through his premises has been held not to constitute a waiver of a statutory duty of the company to construct fences or cattle guards.[28]

Estoppel. In a proper case, a landowner may, by reason of his acts or conduct, be estopped to recover damages for the taking of his property by a railroad company for the construction of its road,[29] as where he verbally agrees to convey a right of way without charge, and the railroad company relying on his promise and without objection on his part constructs its road,[30] or where he permits a railroad company to excavate a tunnel on his land without objection until after the tunnel is completed and the railroad is constructed through it.[31] However, in order that a landowner may be prevented by reason of estoppel from recovering damages to his property caused by the construction of a railroad, all the elements necessary to constitute an estoppel must be present.[32] Thus mere silence on the part of a landowner, not inducing action or misleading the railroad company, does not estop him to claim damages resulting from a construction of the road in a manner different from that contemplated by a waiver of damages which the landowner has entered into.[33]

A lot owner in a city is not estopped to recover damages to his property caused by the negligent or improper manner of constructing a railroad in a street by having signed a petition to the city authorities to grant the company a right of way through the street,[34] or by having been a member of the city council and voted in favor of granting the right of way,[35] or by having consented to the construction of a new sidewalk to take the place of one removed to make room for the alterations in the street made necessary by the railroad.[36]

§ 468. Particular Injuries

The liability of a railroad company for various injuries to property occurring in connection with the construction and maintenance of its road is discussed infra §§ 469–472.

Examine Pocket Parts for later cases.

§ 469. —— Occupation or Obstruction of Streets and Highways Generally

An abutting property owner may be entitled to sue for and recover damages sustained to his property where the use of a street or a highway for railroad purposes is regarded to be such as to entitle him to compensation, or where the particular use or acts done by a railroad company constitute an injury to his property for which he is entitled to be compensated and there has been no condemnation or compensation made, without proof of negligence in the manner of doing the work.

An abutting property owner may be entitled to sue for and recover damages sustained to his property where the use of a street or highway for railroad purposes is regarded as such as to entitle him to compensation, or where the particular use or acts done by a railroad company constitute an injury to his property for which he is entitled to be compensated, and there has been no condemnation or compensation made,[37] without proof of negligence in

Tex.—Gulf, C & S F Ry Co. v Thornton, Civ App, 109 S W 220

23. Ohio—Root v Pennsylvania Co, 5 Ohio S. & C.P 315, 7 Ohio N P 337.
51 C J p 1120 note 41.

24. Pa.—Hoffeditz v. South Pennsylvania R, etc, Co., 18 A 125, 129 Pa 264.
Tex.—Gulf, C & S. F Ry. Co. v Thornton, Civ.App, 109 S W. 220
51 C J. p 1120 note 40 [a]—53 C J. p 1268 note 17 [a].

25. Okl.—Gulf, C & S F. Ry Co v Rutledge, 47 P 2d 83, 173 Okl 245
51 C.J p 1120 note 42.

26. Okl.—Gulf, C & S F. Ry Co v. Anderson, 250 P. 500, 120 Okl. 60.

27. Conn.—Foot v. New Haven, etc, Co., 23 Conn 214.

28. Tex.—Houston, etc., R. Co. v. Meador, 50 Tex 77.

29. Tex.—Evans v Gulf, etc, R. Co., 28 S W 903, 9 Tex Civ.App. 124.

30. Tex.—Evans v Gulf, etc, R. Co, supra

31. W Va.—Norfolk, etc., R. Co. v. Perdue, 21 S E 755, 40 W Va. 442

32. Ark.—Cook v. St. Louis, etc., R Co, 146 S W 851, 103 Ark. 326.

33. Ark.—Cook v St. Louis, etc., R. Co, supra.
51 C J p 1120 note 45.

34. Ky.—Louisville, etc., R Co v. Hall, 13 Ky L 174.

35. Minn.—Lamm v Chicago, etc, R. Co, 47 N.W 455, 45 Minn. 71, 10 L R A. 268

36. Ill.—Atchison, etc., R Co. v. Pratt, 53 Ill App. 263.

37. Wis.—Buchner v Chicago, etc, R Co, 19 N W. 56, 60 Wis 264
51 C.J. p 1121 note 54.
Rights in and use of streets and ways see supra §§ 102–113.

the manner of doing the work.[38] On the other hand, the right to recover damages may depend on the manner in which the road is constructed, as where the construction of the road does not of itself entitle an abutting property owner to compensation,[39] so that, in such a case, if the work done has been duly authorized and the railroad company has proceeded in a legal and proper manner, there can be no recovery for merely incidental or consequential damages suffered by an abutting property owner.[40]

A railroad company may be held liable for all damages sustained by an abutting property owner where it has constructed its road in a street or highway without authority,[41] or where it has constructed its road in an unauthorized manner,[42] and generally for injuries resulting from a negligent or improper mode of construction,[43] or for injuries resulting from a failure to comply with statutory requirements;[44] but a railroad company may not be held liable for damages resulting from works of construction, although incidental to the construction of a railroad, which were done by municipal or other public authorities, and over which the railroad company had no control.[45]

Where a municipality grants a railroad company a right of way through its streets on the express condition that the company shall pay all damages to property owners which shall result from the construction of the road, the company may be held liable therefor,[46] and a property owner may be entitled to recover for damages done during the process of construction as well as for that caused by the construction of the road when completed.[47] So also, where a charter provision requires a railroad company to pay "all damages that may arise to any person," from the construction of the road, the company may be held liable for damages so caused, although there is not a taking of plaintiff's property within the application of the constitutional provision relating to the making of compensation in such cases.[48]

§ 470. —— Failure to Construct Fences and Cattle Guards

As a rule, in the absence of a duty to fence its track or to construct cattle guards, a railroad company may not be held liable for injuries to adjoining lands occasioned by their absence, and if such a company has voluntarily constructed fences and cattle guards it may not be held liable for injuries to property resulting from a failure to maintain or keep them in repair.

As a rule, in the absence of a duty to fence its track or to construct cattle guards, a railroad company may not be held liable for injuries to adjoining lands occasioned by their absence,[49] such as injuries to crops or pastures by trespassing animals,[50] and if such a company has voluntarily constructed fences and cattle guards it may not be held liable for injuries to property resulting from a failure to maintain or keep them in repair.[51] Moreover, under a statute expressly requiring railroad companies to construct fences or cattle guards, the right to recover for damages to property occasioned by their failure to do so depends on the purpose of the requirement;[52] and if the design of such a statute is not to protect an adjacent landowner but merely to protect the railroad and insure the safety of passengers and trains thereon, or to prevent animals from coming upon the track and being injured, a railroad company may not be held liable for injuries to crops or pastures by trespassing animals.[53] So also, where a statute imposing the duty expressly provides the liability

38. Md.—Baltimore, etc., R. Co. v. Reaney, 42 Md. 117.
Tex.—Schier v. Cane Belt R. Co., 100 S.W. 360, 45 Tex.Civ.App. 295.
39. Ky.—Fulton v. Short Route R. Transfer Co., 4 S.W. 332, 85 Ky. 640, 9 Ky.L. 291, 7 Am.S.R. 619
40. Mo.—Foudry v. St. Louis, etc., R. Co., 109 S.W. 80, 130 Mo.App. 104.
51 C.J. p 1121 note 57.
41. Mich.—Grand Rapids, etc., R. Co. v. Heisel, 11 N.W. 212, 47 Mich. 393.
51 C.J. p 1121 note 58.
42. N.J.—United New Jersey R., etc., Co. v. Lewis, 59 A. 227, 68 N. J.Eq. 437.
51 C.J. p 1121 note 59.
43. Iowa.—Cadle v. Muscatine Western R. Co., 44 Iowa 11.
51 C.J. p 1121 note 60.
44. Tex.—Missouri Pac. R. Co. v. Speed, 22 S.W. 527, 3 Tex.Civ.App. 454.
51 C.J. p 1121 note 61.
45. N.Y.—Foster v. New York Cent., etc., R. Co., 103 N.Y.S. 531, 118 App.Div. 143.
51 C.J. p 1121 note 62.
46. Ill.—St. Louis, etc., R. Co. v. Haller, 82 Ill. 208.
51 C.J. p 1122 note 66.
47. Ill.—St. Louis, etc., R. Co. v. Capps, 72 Ill. 188.
48. Conn.—Bradley v. New York, etc., R. Co., 21 Conn. 294
51 C.J. p 1122 note 68.
49. U.S.—Ward v. Paducah, etc., R. Co., C.C.Tenn., 4 F. 862.
51 C.J. p 1122 note 79
Duty to construct and maintain fences and cattle guards see supra §§ 176-181.
Liability for injuries to animals resulting from failure to erect and maintain fences and cattle guards see infra §§ 558-581
50. U.S.—Ward v. Paducah, etc., R. Co., supra.
Ark.—Caststeel v. St. Louis, etc., R. Co., 99 S.W. 540, 81 Ark. 364.
51. Ga.—Rossignoll v. Northeastern R. Co., 75 Ga. 354.
51 C.J. p 1123 note 81.
52. Mo.—Clark v. Hannibal, etc., R. Co., 36 Mo. 202.
51 C.J. p 1123 note 82.
53. Okl.—Missouri, etc., R. Co. v. Brown, 142 P. 1040, 46 Okl. 735.
51 C.J. p 1123 note 83.

for its nonperformance, the right of recovery is limited accordingly [54]

Where, on the other hand, the statute is for the benefit of adjoining landowners and its application is not restricted to particular injuries, such a landowner may be entitled to recover for any injury which is a natural and proximate result of the omission of such duty,[55] or of a failure subsequently to keep the fences or cattle guards in repair,[56] such as for the destruction of, or injury to, his crops[57] or to his pastures [58] Under such a statute a landowner may also be entitled to recover damages for the diminution of the value of the use of his land owing to the absence of fences or cattle guards[59] or for the deprivation of the use of a pasture.[60]

Under a statute imposing liability for double damages for all damage done by reason of any animals escaping from, or coming upon, land by reason of the failure of a railroad company to construct and maintain fences and cattle guards, a property owner may be entitled to recover double damages from a railroad company for the failure of the company to fence, if his land is not separated from the land which adjoins the railroad company's right of way by a lawful fence, or if there is no lawful fence between his land and the right of way,[61] and, under such a statute, a railroad company may be held liable for damages done by stock escaping from its right of way upon adjoining lands, whether the latter are inclosed or unin-closed.[62] Where the statute requires a railroad company, whose road passes through a field, to maintain a cattle guard at the points of entering such field, the road is required to place cattle guards at cross fences, although both sides are in use by the same person,[63] and hence a person may be entitled to recover damages to crops caused by his own cattle escaping from one inclosure to another over a defective guard.[64]

§ 471. —— Obstruction or Diversion of, or Interference with, Waters and Watercourses

Under some statutory provisions a railroad company may be held liable for property damages resulting from the obstruction or diversion of, or interference with, waters and watercourses by the construction and maintenance of its embankments, bridges, and other works.

Under the provisions of a statute requiring a railroad company to construct and maintain suitable openings and drains to afford a sufficient outlet to drain and carry off the water of watercourses and surface water, a railroad company may be held liable for an injury to land from an overflowing caused by its obstruction of the channel of a watercourse.[65] Liability for property damages, under such statutory provisions, may be predicated on the maintenance by a railroad company of an inadequate bridge across a watercourse,[66] as well as on the original construction of an inadequate bridge,[67] but, under such provisions, a railroad company may not be held liable for damages resulting from an unprecedented and overwhelming flood.[68]

By virtue of some statutory provisions, a railroad company may be held liable for property damages resulting from its failure properly to construct and maintain lateral ditches along the road-

54. Mo.—Mangold v. St. Louis, etc., R Co., 92 S.W. 753, 116 Mo.App 606.
51 C.J p 1123 note 84.

55. N.Y.—Leggett v. Rome, etc., R. Co, 41 Hun 80, 2 N.Y.St. 312.

56. Ky.—Fortune v. Chesapeake, etc, R. Co, 58 S W. 711, 22 Ky.L. 749.

57. Miss.—Kansas City, etc., R. Co. v. Spencer, 17 So 168, 72 Miss 491.
51 C.J. p 1123 note 87.

58. Mo.—Buttles v Chicago, etc., R. Co, 43 Mo.App. 280—Shotwell v. St. Joseph, etc., R. Co., 37 Mo.App. 654.

59. Minn.—Nelson v. Minneapolis, etc., R. Co., 42 N.W. 788, 41 Minn. 131.
51 C.J. p 1123 note 89.

60. N.Y.—Leggett v. Rome, etc., R. Co, 41 Hun 80, 2 N.Y.St. 312.
Tenn.—Louisville, etc., R. Co. v. Timmons, 91 S.W. 1116, 116 Tenn. 29.

61. Mo.—Phillips v. St. Louis, etc., R Co, 80 S W. 926, 107 Mo.App. 203.

62. Mo.—Kelley v. St. Louis, etc., R Co., 163 S.W. 871, 180 Mo.App. 637.

63. Tex.—St. Louis, etc., R. Co. v. Blackwell, Civ.App., 40 S W. 860.

64. Tex.—St. Louis, etc, R. Co. v. Blackwell, supra.

65. Mo.—Smithpeter v. Wabash R. Co., 231 S.W.2d 135, 360 Mo 835.
51 C J. p 1124 note 11.
Right and duty to construct and maintain railroad over or near waters and watercourses see supra §§ 185-187.
It is no defense to action for injuries to property resulting from breach of duty under such statute:
(1) That outlets which had been wrongfully shut off by railroad embankment were no longer watercourses within statute, and that railroad was no longer under duty to maintain outlets at such points.—Jones v. Chicago, B. & Q. R. Co, 125 S.W 2d 5, 343 Mo. 1104.
(2) That drain no longer existed, due to wrongful act of defendant—Grimes v. St. Louis & S. W Ry. Co., 168 S W. 317, 184 Mo.App. 117.
(3) That land was flooded at time levee above bridge broke, where railroad company failed to provide sufficient outlets for water through its embankment—Smithpeter v. Wabash R. Co., 231 S.W.2d 135, 360 Mo 835.

66. Mo.—Jones v Chicago, B. & Q. R. Co., 125 S W.2d 5, 343 Mo. 1104.

67. Mo.—Jones v. Chicago, B. & Q R. Co., supra.

68. Mo.—Sherwood v. St Louis S. W. Ry. Co., App., 137 S.W. 260
Even though it violated statutory duty with respect to openings in roadbed and was negligent, railroad company could not be held liable for unprecedented flood.—Harris v. St Louis-San Francisco Ry Co., 27 S.W 2d 1072, 224 Mo.App. 455.

bed in order to accommodate and dispose of the water of watercourses and surface waters.[69] Under such statutory provisions, a railroad company may be held liable to a landowner for damages resulting from its failure properly to maintain and clean a ditch even though, if it did so, the water would be directed onto the land of another.[70] Moreover, the fact that a railroad company lacks a sufficient right of way to build a drainage ditch, as required by statute, has been held not to excuse its failure to do so.[71]

Under statutes expressly requiring that a railroad company, in the construction of its road, provide for the accommodation and disposal of the water of watercourses and surface waters, a railroad company may be held liable for damages to landowners occasioned by its failure to make such provision,[72] as, for example, by its failure to construct sufficient culverts and sluices for drainage purposes.[73] Under such a statute a railroad company may not be held liable for property damage caused by an unprecedented flood which a person of ordinary care could not have anticipated, provided the structure placed by it over the stream does not obstruct the natural and ordinary flow of the stream,[74] although it may be held liable for damages resulting from its negligence in constructing and maintaining a structure over a stream where such negligence concurs with a flood, notwithstanding the flood is extraordinary and unprecedented.[75]

Statutes requiring railroad companies to construct their roads across watercourses so as not to interfere with the free use thereof and requiring that the company shall restore the stream or watercourse to its former state, or in a manner sufficient not unnecessarily to impair its usefulness, have been construed as merely declaratory of the common-law duty.[76] Thus, under such a statute, a railroad company may not be held liable to landowners for property damages in the absence of negligence,[77] but it may be held liable for damages resulting from its negligence,[78] or from its failure to comply with the statute,[79] and, under such a statute, the mere fact that a flood is unprecedented in volume and extent may not relieve the railroad company from the dam-

69. Mo.—Brown v. Thompson, App., 108 S.W.2d 423
51 C.J. p. 1124 note 14.

"Surface water" under such statute includes that overflowing from a stream or watercourse and spreading over the surrounding country.—Jones v. Chicago, B. & Q. R. Co., 125 S.W.2d 5, 343 Mo. 1104—Wells v. Payne, Mo.App., 235 S.W. 488.

Organization of drainage district in locality, after construction and operation of railroad and after expiration of time allowed by statute for construction of drainage ditches by railroad company, did not absolve company from consequences of its failure to obey statute in constructing required ditches.—Boggs v. Missouri-Kansas-Texas Ry. Co., 80 S.W.2d 141, 336 Mo. 528—Pearson Elevator Co. v. Missouri-Kansas-Texas Ry. Co., 80 S.W.2d 137, 336 Mo. 583.

70. Mo.—Brown v. Thompson, App., 108 S.W.2d 423.

71. Mo.—Cottier v. Chicago, B. & Q. R. Co., App., 33 S.W.2d 173.

Reason for rule
Railroad company was empowered to obtain all right of way necessary for purpose of making sufficient drainage.—Cottier v. Chicago, B. & Q. R. Co., supra.

72. Tex.—Pence v. Galveston, etc., R. Co., Civ.App., 190 S.W. 538.
51 C.J. p. 1124 note 12

73. Tex.—Austin, etc., R. Co. v. Anderson, 15 S.W. 484, 79 Tex. 427, 23 Am.S.R. 350.
51 C.J. p. 1124 note 13.

Improperly constructed wall
Mere fact that plaintiff's wall may have been improperly constructed would afford no defense for wrongful act of defendant in damaging it by reason of breach of statutory duty.—Fort Worth & D. C. Ry. Co. v. Kiel, Civ.App., 185 S.W.2d 144, reversed on other grounds 187 S.W.2d 371, 143 Tex. 601.

74. Tex.—Fort Worth & D. C. Ry. Co. v. Kiel, 187 S.W.2d 371, 143 Tex. 601.

No breach of legal duty shown
Where a railroad company was not legally liable for damages to land and prospective crops because of unprecedented floodwaters overflowing company's tracks and embankment, it was not guilty of breach of any legal duty in failing to remove rails, crossties and large rocks washed onto such land in time to plant crop thereon, so that such failure did not constitute negligence rendering company liable for damages sustained.—Lewis v. Texas & N. O. R. Co., Tex.Civ.App., 199 S.W.2d 185, refused no reversible error.

75. Tex.—Fort Worth & D. C. Ry. Co. v. Kiel, 187 S.W.2d 371, 143 Tex. 601—Lewis v. Texas & N. O. R. Co., Civ.App., 199 S.W.2d 185, refused no reversible error—Galveston, H. & S. A. Ry. Co. v. Riggs, Civ.App., 107 S.W. 589.

76. Ind.—Watts v. Evansville, etc., R. Co., 129 N.E. 315, 191 Ind. 27—Shoemaker v. Indiana R., etc., Co., 133 N.E. 591, 77 Ind.App. 261.

77. Mont.—Heckaman v. Northern Pac. Ry. Co., 20 P.2d 258, 93 Mont. 363.
51 C.J. p. 1125 note 18.

78. U.S.—Northern Pac. Ry. Co. v. Wagner, C.C.A.Mont., 86 F.2d 63.
51 C.J. p. 1125 note 19.

Syphon
Where a syphon was substituted by a railroad company in lieu of a water box used to convey waters of an irrigation ditch across the right of way, the company was bound to properly construct the syphon.—Chicago, B. & Q. R. Co. v. McPhillamey, 118 P. 682, 19 Wyo. 425, Ann.Cas. 1913E 101.

What constitutes negligence
(1) Railroad embankment, if so constructed and maintained as not to constitute nuisance per se, was not negligently constructed.—Heckaman v. Northern Pac. Ry. Co., 20 P.2d 258, 93 Mont. 363.

(2) Railroad existing by authority of law and crossing natural watercourse was not nuisance per se, and fact that railroad had grade and maintained culverts across channel was not negligence if constructed and maintained in conformity with statutory requirements.—Peel v. Chicago, M., St. P. & P. R. Co., 22 P.2d 617, 94 Mont. 334, followed in Spreitzer v. Chicago, M., St. P. & P. R. Co., 22 P.2d 620, 94 Mont. 344.

79. Mont.—Peel v. Chicago, M., St. P. & P. R. Co., 22 P.2d 617, 94 Mont. 334, followed in Spreitzer v. Chicago, M., St. P. & P. R. Co., 22 P.2d 620, 94 Mont. 344.
51 C.J. p. 1125 note 20.

ages resulting from its breach of duty,[80] although if such a company fully discharges its statutory duty it may not be held liable for damages resulting from the insufficiency of openings to carry away the waters of an unprecedented flood.[81]

Under some statutory provisions the failure of a railroad company to restore a stream crossed by its road to its original usefulness has been held to constitute actionable negligence.[82] So, where a railroad company constructs and maintains culverts and bridges which are, in fact, insufficient properly to provide for the passage of waters reasonably to be expected, it violates the statute, and may be held liable for the damages resulting from such violation as for negligence per se,[83] but if the culverts are reasonably sufficient for a reasonably expected flow the company may not be held liable for failure to reinforce them.[84] Such a statute, it has been held, does not in itself impose any liability to an adjoining landowner for the obstruction of the flow of surface waters,[85] and it has further been held that a railroad company is not liable for the flooding of lands where it constructs its embankment and bridge in accordance with the specifications of a drainage district, to the control of which it was subject.[86]

The common-law liability of a railroad company for injuries resulting from the obstruction of natural watercourses by the construction of embankments, bridges, and other works, and by the obstruction of the natural flow or drainage of surface waters is considered in the C.J.S. Title Waters § 20, also 67 C.J. p 704 note 66-p 709 note 11.

§ 472. —— Miscellaneous Injuries

a. In general
b. Destruction of fences
c. Injuries from blasting

a. In General

The courts have passed on the liability of a railroad company for various injuries to property occurring in connection with the construction or maintenance of its road.

The courts have passed on the liability of a railroad company for various injuries to property occurring in connection with the construction or maintenance of its road.[87] Thus a railroad company may be held liable for resulting property damages where it negligently so constructs its road that soil or other waste material is cast upon adjoining land to its injury.[88] Also, where a railroad enters upon property without right and injures it by the deposit of material, it may become liable as a trespasser.[89] While a property owner may be entitled to recover from a railroad company for special or peculiar injuries to his property resulting from the change of the grade of a highway or street through the construction of a railroad,[90] under circumstances wherein the change of grade might have been made by the public authorities without an attendant right of the property owners to compensation, it has been held that a railroad company may, without liability, make such a change where it proceeds without negligence and under proper authorization.[91]

Loss of railroad facilities. Where a railroad company has relocated its tracks under a power and au-

80. U.S.—Northern Pac. Ry. Co. v. Wagner, C.C.A. Mont., 86 F.2d 63
Ind.—Zollman v. Baltimore, etc., R. Co., 121 N.E. 135, 70 Ind. App. 395.

81. Mont.—Heckaman v. Northern Pac. Ry. Co., 20 P.2d 258, 93 Mont. 363.

Reason for rule

In action against railroad for flood damage caused by allegedly insufficient openings in fill across watercourse, results of rainstorm of extraordinary and unprecedented violence were, in contemplation of law, act of God, with respect to liability.—Peel v. Chicago, M., St. P. & P. R. Co., 22 P.2d 617, 94 Mont. 334, followed in Spreitzer v. Chicago, M., St. P. & P. R. Co., 22 P.2d 620, 94 Mont. 344.

82. Mont.—Heckaman v. Northern Pac. Ry. Co., 20 P.2d 258, 93 Mont. 363.

83. Mont.—Peel v. Chicago, M., St. P. & P. R. Co., 22 P.2d 617, 94 Mont. 334, followed in Spreitzer v. Chicago, M., St. P. & P. R. Co., 22 P.2d 620, 94 Mont. 344.

84. Mont.—Peel v. Chicago, M., St. P. & P. R. Co., 22 P.2d 617, 94 Mont. 334, followed in Spreitzer v. Chicago, M., St. P. & P. R. Co., 22 P.2d 620, 94 Mont. 344.

History of particular watershed, not watersheds in general, should be guide in determining sufficiency of railroad's culverts to accommodate reasonably expected flow.—Peel v. Chicago, M., St. P. & P. R. Co., 22 P.2d 617, 94 Mont. 334, followed in Spreitzer v. Chicago, M., St. P. & P. R. Co., 22 P.2d 620, 94 Mont. 344.

85. Mont.—Le Munyon v. Gallatin Valley R. Co., 199 P. 915, 60 Mont. 517.

86. Iowa.—Hunter v. Chicago, etc., R. Co., 221 N.W. 360, 206 Iowa 655.

87. S.C.—Sims v. Ohio River, etc., R. Co., 33 S.E. 746, 56 S.C. 30.

Obstruction of access

(1) An abutting owner may recover for resulting damages where railroad is so constructed in front of his property as improperly to obstruct his right of ingress and egress.—Ashley, etc., R. Co. v. Gulledge, 180 S.W. 222, 121 Ark. 143—51 C.J. p. 1122 note 74.

(2) However, where railroad company builds sidetrack on its own right of way, it has been held that it is not liable for depreciation in value of property of adjoining landowner resulting from obstruction of access by such track.—Southern Ry. Co. v. Moore, 7 Tenn. App. 319.

88. S.C.—Sims v. Ohio River, etc., R. Co., 33 S.E. 746, 56 S.C. 30
51 C.J. p. 1124 note 6.

89. Ky.—Lexington, etc., R. Co. v. Breathitt County Board of Education, 195 S.W. 1094, 176 Ky. 541.

90. Ill.—Fleming v. Elgin, etc., R. Co., 114 N.E. 187, 275 Ill. 486
51 C.J. p. 1122 note 70.

91. N.Y.—Conklin v. New York, etc., R. Co., 6 N.E. 663, 102 N.Y. 107.—Uline v. New York Cent., etc., R. Co., 4 N.E. 536, 101 N.Y. 98, 54 Am. R. 661.

thority conferred by the general law, no right of action may arise in favor of an abutting property owner who, in consequence of the relocation, has suffered a diminution or loss of his ability to connect his property by switches or otherwise with the railroad tracks as theretofore existing.[92] Moreover, the fact that a railroad company has fenced its right of way, thereby rendering a certain sidetrack inaccessible from plaintiff's property has been held not to support an action for the diminution of the value of his property because of the loss of such facilities where such company has left ample depot facilities at its station.[93]

Removal of lateral support. Where a railroad company has rightfully acquired a right of way, it may not be held liable where an excavation made by it, without negligence in the proper construction of its road, deprives adjacent land of lateral support,[94] and it has been held not incumbent on it to build walls to prevent the falling of the banks of the cut.[95] However, where the construction of the road by the removal of lateral support creates a direct and physical injury to adjoining property, for which compensation has not been made, it has been held that a recovery of damages may be had therefor.[96]

b. Destruction of Fences

While a railroad company has been held to have the right to make openings in existing fences which intersect its right of way for the purpose of constructing its road, it has also been held that, where a railroad company is required to fence or construct cattle guards, if it does not do so at the time it opens up its right of way through the inclosures of the landowner, it must provide other adequate means of protection.

In determining whether or not a railroad company is liable for injuries to property occurring in connection with the construction or maintenance of its road, it has been held that a railroad company has a right to make openings in existing fences which intersect its right of way for the purpose of constructing its road,[97] but that, where a railroad company is required to fence or construct cattle guards, if it does not do so at the time it opens up its right of way through the inclosures of the landowner, it must provide other adequate means of protection,[98] and that if it does not it may be held liable for a resulting injury to crops.[99]

Where a railroad company has acquired the right to construct its road through certain lands, it has been held not liable for the acts of a contractor for construction or his servants in tearing down fences[1] or leaving open gates or bars.[2] However, the rule has been held to be otherwise where such acts are done before the railroad company has acquired the right to enter and construct its road upon such lands,[3] and it has further been held that a railroad company may not delegate to a contractor its statutory duty of fencing so as to escape liability for the nonperformance of such duty.[4] If a landowner constructs his fences upon the railroad right of way the company may, when necessary, remove them, provided it does no unnecessary damage in so doing.[5]

c. Injuries from Blasting

A railroad company may be held liable for injuries to lands, buildings, or property of an adjacent landowner resulting from negligence in the manner of blasting done by the company in connection with the construction or maintenance of its road.

With respect to the liability of a railroad company for injuries to property occurring in connection with the construction or maintenance of its road, although a railroad company in constructing its road may have a lawful right to excavate by means of blasting whenever necessary to do so,[6] such a company may be held liable for injuries to the lands, buildings, or property of an adjacent landowner resulting from negligence in the manner of blasting.[7] Although it has been held that a railroad company is liable for all injuries caused by its blasting regardless of the degree of care employed in doing the work,[8] it has also been held that such a

92. U.S.—Pratt v. Cleveland, C C. Ohio, 191 F. 65.
Pa.—Ridgeway v. Philadelphia, etc., R. Co., 90 A. 652, 244 Pa. 282.

93. Miss.—Yazoo, etc., R. Co. v. Adams, 52 So. 794, 97 Miss. 62.

94. Miss.—Alabama, etc., R Co. v. Stingily, 71 So 376, 111 Miss. 237
Pa.—White v Philadelphia, etc., R. Co, 15 Pa Dist. 976.

95. Ky.—Hortsman v. Covington, etc, R. Co, 18 B Mon. 218.

96. Kan.—Kansas City Northwestern R. Co v Schwake, 78 P. 431, 70 Kan. 141, 68 L R A 673.
51 C.J. p 1125 note 26.

97. Ark.—Caststeel v St. Louis, etc., R. Co., 99 S.W. 540, 81 Ark. 364
51 C.J. p 1123 note 96.

98. Mo.—Comings v. Hannibal, etc., R. Co., 48 Mo 512.
51 C.J. p 1123 note 97.

99. Mo.—Comings v. Hannibal, etc., R. Co, supra.
Vt.—Clark v. Vermont, etc, R. Co., 28 Vt. 103.

1. Mo.—Clark v. Hannibal, etc, R. Co., 36 Mo 202.

2. Vt.—Clark v. Vermont, etc., R. Co., 28 Vt. 103.

3. Okl.—Missouri, etc., R. Co. v. Brown, 136 P. 1117, 41 Okl. 70, 50 L.R.A.,N S, 1124.
51 C J. p 1124 note 2.

4. Mo.—Silver v Kansas City, etc, R. Co., 78 Mo. 528, 47 Am.R. 118.

5. Tex.—Texas Cent. R. Co. v Wills, Civ.App., 41 S.W 848.

6. Ark.—St. Louis, etc., R. Co. v. Hanks, 97 S W. 666, 80 Ark. 417.
51 C.J p 1125 note 30.

7. Ga.—Georgia Cent., R. Co. v. Bernstein, 38 S.E. 394, 113 Ga. 175.
51 C J. p 1125 note 32.

8. Wash.—B. Schade Brewing Co. v.

company is not liable in the absence of negligence,[9] but that the degree of care should be proportionate to the danger of injury[10] and that whether due care under the circumstances has been exercised ordinarily is a question of fact for the jury[11]

While a railroad company has been held not liable in the absence of negligence for the mere throwing of rock by blasting upon adjacent lands,[12] it has been held liable for the resulting damage if it fails to remove such rock within a reasonable time.[13] A railroad company may also be liable for using a blast where injury is likely to result, and it is practicable to remove the rock without blasting,[14] or for using blasts of unnecessary power[15]

§ 473. Proximate Cause

In order to impose liability on a railroad company for an injury to property occurring in connection with the construction or maintenance of its road, the alleged wrongful act of the company must have been the proximate cause of the injury.

In order to impose liability on a railroad company for an injury to property occurring in connection with the construction or maintenance of its road, the alleged wrongful act of the company must have been the proximate cause of the injury.[16] While it is sufficient that the injury occasioned by the wrongful act is one which might reasonably have been anticipated as the natural and probable result thereof,[17] it is not necessary that the particular injury suffered should have been foreseen,[18] since it is only required that a reasonably prudent person should have foreseen that injury was likely to flow from the wrongful act.[19]

The act or omission causing the injury must be one for which the railroad company and not some third person or entity is responsible,[20] but the mere fact that it is difficult to determine what part of the damage complained of was occasioned by the act of defendant and what part by another agency has been held not fatal to plaintiff's case.[21] Where an act of God alone would not produce the injury, but, assuming there has been an act of God, the loss is made possible by reason of a prior, coincident, or subsequent negligent act on the part of a railroad company, the company may be held liable therefor.[22] So, where the failure of a railroad company to comply with a statute is an efficient or proximate cause of an injury, the company may be held liable therefor although there is also another concurring and efficient cause, such as an act of God, for which it is not responsible.[23]

§ 474. Contributory Negligence

In actions to recover for injuries to property based on the negligence or omission of a statutory duty by a railroad company with respect to the construction or maintenance of its road, a recovery may be precluded by the contributory negligence of the person injured or damaged.

In actions to recover for injuries to property based on the negligence or omission of a statutory duty by a railroad company with respect to the construction or maintenance of its road, a recovery may, as in other cases, be precluded by the contributory negligence of the person injured or damaged,[24] since it is the duty of a person to exercise ordinary care in protecting his property against injury from such causes if he can do so with moderate or slight

Chicago, etc., R. Co., 140 P. 897, 79 Wash. 651.
51 C J p 1125 note 33

9. N Y.—Booth v. Rome, etc, R Co, 35 N E 592, 140 N.Y 267, 37 Am S R. 552, 24 L R.A 105.
51 C J p 1125 note 34.

10. N.Y.—Booth v Rome, etc., R. Co, 35 N E. 592, 140 N.Y 267, 37 Am S R. 552, 24 L.R A. 105.

11. Ga —Georgia Cent. R. Co. v. Bernstein, 38 S E 394, 113 Ga. 175.
N C —Blackwell v. Lynchburg, etc, R Co, 16 S E 12, 111 N C 151, 32 Am S.R. 786, 17 L R.A. 729.

12. Ark.—St Louis, etc, R Co. v Hanks, 97 S W 666, 80 Ark. 417.
Vt —Sabin v Vermont Cent. R. Co, 25 Vt. 363.

13. Tenn.—Hord v. Holston River R. Co, 123 S.W 637, 122 Tenn 398, 135 Am.S R. 878, 19 Ann Cas 331.
51 C J. p 1126 note 38.

14. N Y.—Wheeler v. Norton, 86 N Y.S. 1095, 92 App Div. 368.

15. N.Y —Booth v. Rome, etc., R Co, 35 N.E 592, 140 N Y. 267, 37 Am.S R 552, 24 L R A. 105.

16. Mo —**Corpus Juris quoted in** Jones v. Chicago, B & Q R Co, App., 100 S W.2d 617, reversed on other grounds 125 S.W 2d 5, 343 Mo. 1104.
51 C J p 1126 note 42

17. Ind.—Zollman v. Baltimore, etc., R Co., 121 N E 135, 70 Ind App. 395.
51 C J. p 1126 note 43.

18. Mont.—Heckaman v. Northern Pac Ry. Co, 20 P.2d 258, 93 Mont. 363.

19. Mont —Heckaman v. Northern Pac Ry Co, supra.

20. Tex —Gulf, etc., R. Co. v. Tucker, 85 S W. 461, 38 Tex.Civ App 224
51 C.J p 1126 note 44.
Reconstruction work by public board Where railroad company was compelled to operate its trains on certain temporary structures in street during certain reconstruction work conducted by public board of improvement, which had entire charge of work, railroad company was not liable to adjoining property owner for acts of board while railroad structure was in board's possession for purpose of construction —Foster v. New York Cent. & H R. R Co, 103 N.Y.S 531, 118 App Div 143

21. Mont —Heckaman v. Northern Pac. Ry. Co., 20 P.2d 258, 93 Mont. 363.

22. Mont —Heckaman v. Northern Pac Ry. Co., supra—Lyon v. Chicago, etc, Ry. Co., 121 P. 886, 45 Mont. 33.

23. Mo.—Jones v. Chicago, B & Q. R, Co, 125 S.W 2d 5, 343 Mo 1104
51 C J p 1126 note 45

24. U.S —Ward v. Paducah, etc., R. Co, C.C Tenn, 4 F 862.

trouble or expense[25] On the other hand, one may not be required to incur any large amount of trouble or expense for such purpose,[26] nor may one be required to abandon or forgo the ordinary and proper uses of his property because of the negligent acts or omissions of a railroad company.[27] Moreover, one may not be required to anticipate, in planning a particular use of his property, that a railroad company will not, at the proper time, perform its duty.[28]

It has been held not to constitute contributory negligence, where a railroad company has failed to construct fences or cattle guards, for a landowner to turn his stock into a pasture from which they may escape to his cultivated lands and injure his crops, by reason of the absence of such fences or cattle guards,[29] or to plant a crop which, because of the absence of such fences or cattle guards, would be exposed to depredations of stock,[30] particularly where he has reason to believe that the railroad company will perform such duty by the time the protection to be afforded thereby will be needed.[31] So, also, the failure of a landowner to avail himself of a statutory authority to construct fences or cattle guards, on failure of a railroad company to do so, and recover their cost, has been held not contributory negligence which will bar his right to recover for injuries occasioned by the failure of the railroad company to do so,[32] and the same rule has been held to apply under similar statutes relating to the construction of private or farm crossings.[33]

§ 475. Persons Entitled to Sue

In order to be entitled to sue for injuries to property occurring in connection with the construction or maintenance of a railroad, the plaintiff must have title to the property sufficient to sustain the action.

In order to be entitled to sue for injuries to property occurring in connection with the construction or maintenance of a railroad, plaintiff must have title to the property sufficient to sustain the action[34] However, the title of plaintiff may be sufficient to sustain an action for damages, although it is not such as is required to be shown to sustain trespass to try title.[35] While a right of action for damages to property where the damage accrues directly from, and immediately on, the construction of the road may not pass to a grantee of the land,[36] where the damage accrues after the construction as a consequence of the negligent or improper mode of construction, a person owning the property at the time of the injury may be entitled to recover therefor, although he did not own it when the road was constructed,[37] and even though he bought the property with knowledge of the existing conditions[38]

If a statute imposing a duty or liability on a railroad company limits such duty or liability to a particular class of persons, only such persons as are within the application of the statute may sue[39] However, under a statute providing that a railroad company shall be liable for all damages caused by its failure to provide for drainage, it has been held that the right of action for damages is not limited to adjoining landowners,[40] and that one not an adjoining landowner may be entitled to bring an action,[41] so that one whose lands lie upstream and across the river from the embankment of a railroad company may be entitled to sue under such statute.[42]

A person may not be entitled to maintain a private action for a mere obstruction of a street or high-

25. Tex—Gulf, etc, R Co. v. Simonton, 22 S.W. 285, 2 Tex.Civ. App. 558.
51 C.J p 1126 note 47.

26. Iowa—Smith v. Chicago, etc., R Co., 38 Iowa 518.
51 C.J. p 1126 note 48.

27. Tex.—Gulf, etc, R. Co. v. Clay, 66 S.W 1115, 28 Tex.Civ.App. 176.
51 C.J. p 1126 note 49.

28. Iowa.—Raridan v. Iowa Cent. R. Co, 29 N.W. 599, 69 Iowa 527.
51 C J p 1126 note 50.

29. Mo.—Kirkpatrick v. Illinois Southern R. Co., 96 S.W. 1036, 120 Mo App. 416.

30. Iowa—Smith v. Chicago, etc., R. Co., 38 Iowa 518.
Mo—Deal v St. Louis, etc., R. Co., 129 S.W. 52, 144 Mo App. 691.

31. Iowa.—Smith v. Chicago, etc., R. Co., 38 Iowa 518.

32. Tex—San Antonio, etc, R. Co v Knoepfli, 17 S.W 1052, 82 Tex 270.
51 C J p 1127 note 54

33. Mo—Sheridan v. Atchison, etc, R. Co, 56 Mo App. 68.
N.J.—Green v Morris, etc, R Co, 24 N.J Law 486.

34. Tex—Beaumont, etc, R Co. v Yarbrough, Civ.App, 156 S W. 252
Necessity of possession
In an action for trespass, plaintiff must have been in actual or constructive possession at the time of the trespass—Buck v Louisville, etc., R Co, 53 So 1008, 169 Ala. 29—51 C J. p 1127 note 63

35. Tex—Beaumont, etc, R Co v. Yarbrough, Civ App., 156 S W 252
51 C.J. p 1127 note 62

36. Tex—Timpson, etc, R Co. v Smith, Civ.App., 165 S W. 86.
51 C J. p 1127 note 57.

37. W Va—Richards v Ohio River R. Co, 49 S E 385, 56 W.Va 592
51 C J. p 1127 note 58

38. W Va—Richards v. Ohio River R. Co, supra.

39. Ala—Georgia Cent. R. Co v. Sturgis, 43 So. 96, 149 Ala 573.
51 C J. p 1127 note 56.

40. Mo.—Jones v. Chicago, B & Q R. Co, 125 S W.2d 5, 343 Mo. 1104—Murphy v. St. Louis-San Francisco R Co, 226 S W 637, 205 Mo. App. 682.

41. Mo—Jones v. Chicago, B & Q. R. Co, 125 S W 2d 5, 343 Mo 1104—Murphy v. St. Louis-San Francisco R Co., 226 S W. 637, 205 Mo. App. 682

42. Mo—Jones v. Chicago, B & Q. R. Co., 125 S W 2d 5, 343 Mo. 1104.

way by which he is injured only as a member of the public generally,[43] as where, although he may be an abutting landowner, the damage he suffers is the same in kind as others sustain,[44] and he is not affected as to his right of ingress to, and egress from, his property, but only as to his use of the street or highway in common with the rest of the public,[45] in that he is able to use other streets which are less convenient.[46] On the other hand, if he sustains a special injury different from that of the public generally he may be entitled to recover therefor.[47] Also, an abutting owner may be entitled to maintain an action for damages for a violation of the conditions, made for his benefit, in an ordinance under which the railroad company occupies the street.[48]

§ 476. Actions

a. In general
b. Time to sue and limitations
c. Jurisdiction and venue
d. Pleading
e. Evidence
f. Trial
g. Damages
h. Review

a. In General

The general rules governing civil actions apply to an action against a railroad company to recover damages arising from negligent or improper construction or maintenance of the road. Where the lawful construction of a railroad causes an injury to property of a permanent character, the entire damage, past, present, and future, resulting therefrom should be sued for and recovered in one action, although, if the injury results from a negligent or improper construction, the plaintiff may be entitled to sue for the damages already sustained and maintain successive actions as often as a new injury occurs.

In accordance with the general rules governing civil actions, where property has been injured by the reason of the negligent or improper construction of a railroad, the proper remedy has been held to be an action at law for damages and not by proceedings for an assessment of damages under the statutes relating to condemnation.[49] Also, where property has not been entered upon but has been injured by the construction of a railroad, and no remedy is provided by statute, an action at law to recover the damages sustained has been held to be the proper remedy.[50] It has further been held that the proper form of action is case and not trespass, where stones have been thrown upon adjacent lands by blasting and not removed within a reasonable time,[51] and that an action on the case for tort is the proper remedy to recover damages occasioned by a failure of a railroad company to construct farm crossings as required by statute.[52]

For invasion of possession. An action for damages by an abutting owner whose fence has been broken and close entered by the servants of a railroad company, which claims that by virtue of a right of way deed it has title to a portion of the land which abuts on the street, is an action for invasion of possession and not for determination of title,[53] and hence the direction of a verdict for defendant on the theory that it has established title to a portion of the property is error.[54]

For usurping private right of way. A private person, to whom a right of way through a street has been granted, cannot maintain an action for rent against a railroad company which has usurped his right of way;[55] but his remedy is in tort for damages,[56] in which case he may recover damages based on the rental value of the property.[57]

Successive actions. Where the lawful construction of a railroad causes an injury to property of a permanent character, the entire damage, past, present, and future, resulting therefrom should be

43. Minn.—Locascio v. Northern Pac. Ry. Co., 240 N.W. 661, 185 Minn. 281
51 C.J. p 1122 note 63.

44. Minn.—Locascio v. Northern Pac. Ry. Co., supra—Rochette v. Chicago, etc., R. Co., 20 N.W. 140, 32 Minn. 201—Shaubut v. St. Paul, etc., R. Co., 21 Minn. 502.

45. Mo.—Stephenson v. Missouri Pac. R. Co., 68 Mo. App. 642
51 C.J. p 1122 note 64.

46. Minn.—Rochette v. Chicago, etc., R. Co., 20 N.W. 140, 32 Minn. 201.
Cul-de-sac in other street
Fact that there was cul-de-sac in another street which plaintiffs could use did not entitle them as abutting owners, to damages from railroad obstructing street.—Locascio v. Northern Pac. Ry. Co., 240 N.W. 661, 185 Minn. 281

47. Wash.—Patton v. Olympia Door, etc., Co., 46 P. 237, 15 Wash. 210.
51 C.J. p 1122 note 65.

48. Ky.—Stein v. Chesapeake, etc., R. Co., 116 S.W. 733, 132 Ky. 322.
51 C.J. p 1127 note 64.

49. Mass.—Estabrooks v. Peterborough, etc., R. Co., 12 Cush. 224
51 C.J. p 1127 note 66.

50. Ill.—Hill v. St. Louis, etc., R. Co., 90 N.E. 676, 243 Ill. 344.
51 C.J. p 1127 note 67.

51. Vt.—Sabin v. Vermont Cent. R. Co., 25 Vt. 363.

52. N.J.—Green v. Morris, etc., R. Co., 24 N.J. Law 486.
51 C.J. p 1128 note 69.

53. S.C.—Day v. Atlanta, etc., R. Co., 108 S.E. 140, 116 S.C. 353

54. S.C.—Day v. Atlanta, etc., R. Co., supra.

55. La.—Standard Chemical Co. v. Illinois Cent. R. Co., 57 So. 782, 130 La. 148.

56. La.—Standard Chemical Co. v. Illinois Cent. R. Co., supra.

57. La.—Standard Chemical Co. v. Illinois Cent. R. Co., supra.

sued for and recovered in one action,[58] and a judgment in one action has been held to bar any subsequent action for the same cause.[59] On the other hand, if the injury results from a negligent or improper construction, plaintiff may not be required to treat the injury as of a permanent character, but he may be entitled to sue for the damages already sustained and maintain successive actions as often as a new injury occurs,[60] as for each overflow and damage to lands or crops caused by a defective or improperly constructed bridge or culvert,[61] although if plaintiff treats the negligent or defective structure as a permanent source of injury, and recovers the full amount of damages both present and prospective, he cannot afterward maintain a second action for damages.[62]

Where successive injuries have resulted from the same breach of duty, as from a failure of a railroad company to fence its tracks, it has been held that they constitute a single cause of action which may be sued for in one complaint, and that plaintiff may not be compelled to elect as to which he will proceed on,[63] but that, on the contrary, if plaintiff splits up such single cause of action and sues for one item of the damages, the judgment will be a bar to any subsequent action for a different item which might have been included in the first complaint.[64]

Parties. In an action against a railroad company for the rental value of land flooded because of the failure of the company to construct statutory ditches along its right of way, it has been held that one who is at most a cropper and is not in possession or entitled thereto, is not a necessary party plaintiff.[65] One injured by the joint trespass of a railroad company and another may elect to bring an action against the railroad only.[66]

b. Time to Sue and Limitations

The time within which an action may be brought against a railroad company for damage to property occasioned by the construction or maintenance of its road may be controlled by statutory provisions which prescribe a special period of limitations for such actions.

The time within which an action may be brought against a railroad company for damage to property occasioned by the construction or maintenance of its road may be controlled by statutory provisions which prescribe a special period of limitations for such actions.[67] It has been held that such an action may be brought at any time within the period fixed by statute,[68] and that, where the construction of a railroad results in damage to property from trespass, such damage is at once recoverable, so that a cause of action therefor arises immediately.[69]

Under a statute providing that no action shall be maintained against a railroad for damages occasioned by its construction unless commenced within a specified period after the cause of action accrues, the cause of action has been held to accrue, not necessarily at the time when the road is constructed, but when the first injury is sustained.[70] It has further been held that the right of action for damages for constructing an insufficient culvert across a stream does not accrue at the time of construction but at the time when a resulting injury from an overflow occurs,[71] but that each overflow caused by such negligent construction creates a new cause of action.[72] A statute reducing the time for bringing an action against a railroad company for a permanent injury to land caused by the construction or repair of the road has been held not to apply to suits begun before its enactment.[73]

c. Jurisdiction and Venue

Where land situated in one county is damaged by reason of the construction of a railroad embankment in

58. Ky.—Golden v. Louisville, etc., R. Co., 14 S.W.2d 379, 228 Ky. 134
51 C.J. p 1128 note 75.

59. Ill.—Chicago, etc., R. Co. v. Loeb, 8 N.E. 460, 118 Ill. 203, 59 Am.R. 341.
Mass.—Fowle v. New Haven, etc., R. Co., 107 Mass. 352.

60. Ill.—Chicago, etc., R. Co. v. Schaffer, 16 N.E. 239, 124 Ill. 112.
51 C.J. p 1128 note 77.

61. Ill.—Chicago, etc., R. Co. v. Schaffer, supra.
51 C.J. p 1128 note 78.

62. Ill.—Chicago, etc., R. Co. v. Schaffer, supra.

63. Mo.—Darby v. Missouri, etc., R. Co., 57 S.W. 550, 156 Mo. 391.—Ray v. St. Louis, etc., R. Co., 25 Mo. App. 104.

64. Mo.—Steiglider v. Missouri Pac. R. Co., 38 Mo.App. 511.

65. Mo.—Boggs v. Missouri-Kansas-Texas Ry. Co., 80 S.W.2d 141, 336 Mo. 528.

66. Ky.—Lexington, etc., R. Co. v. Breathitt County Bd. of Education, 195 S.W. 1094, 176 Ky. 541.

67. N.C.—Cardwell v. Norfolk, etc., R. Co., 88 S.E. 495, 171 N.C. 365.
51 C.J. p 1128 note 89.
Limitations of actions for injuries to property generally see Limitations of Actions §§ 78, 88.

68. Neb.—Chicago, etc., R. Co. v. O'Neill, 78 N.W. 521, 58 Neb. 239.

69. Mo.—Kent v. City of Trenton, App., 48 S.W.2d 571.

70. N.C.—Cardwell v. Norfolk, etc., R. Co., 88 S.E. 495, 171 N.C. 365.
51 C.J. p 1128 note 92.

71. Neb.—Chicago, etc., R. Co. v. Andreesen, 87 N.W. 167, 62 Neb. 456.
51 C.J. p 1129 note 95

72. Ill.—Chicago, etc., R. Co. v. Willi, 53 Ill.App. 603

73. N.C.—Nichols v. Norfolk & C. R. Co., 26 S.E. 643, 120 N.C. 495.
Reason for rule
While the legislature has the power to extend or reduce the time within which an action may be brought, this is subject to the restriction that, when the limitation is shortened, a reasonable time must be given for the commencement of an action before the statute works a bar.—Nichols v. Norfolk & C. R. Co., supra.

another county, it has been held that the action may be brought in either county.

Where land situated in one county is damaged by reason of the construction of a railroad embankment in another county, it has been held that the action may be brought in either county[74] Under some statutory provisions actions for damages to land by reason of the construction of a railroad are not local but transitory, and need not be brought in the county where the land lies,[75] but may be brought in any county through which the road runs,[76] or in any county where service may be had on defendant as provided by statute.[77] The provision of a statute that actions against railroad companies for killing or injuring stock shall be brought before a justice in the township in which the injury occurred or in an adjoining township has been held not to apply to actions for injuries to crops.[78]

Where the suit is for damages and no ground of equity jurisdiction is disclosed by the pleadings, it has been held error to transfer the case to the equity docket.[79]

d. Pleading

(1) In general
(2) Plea or answer
(3) Issues, proof, and variance

(1) In General

In actions for injuries to property resulting from the construction or maintenance of a railroad, the petition or complaint must allege facts sufficient to constitute a cause of action and with sufficient particularity to inform the defendant of the acts or omissions relied on.

In actions for injuries to property resulting from the construction or maintenance of a railroad, as in other civil actions, the petition or complaint must allege facts sufficient to constitute a cause of action[80] and with sufficient particularity to inform defendant of the acts or omissions relied on.[81] Thus plaintiff must show his right to maintain the action,[82] as well as a breach of duty on the part of the railroad company[83] Plaintiff must also show that the railroad company was guilty of negligence in doing the act alleged[84] or was under a legal obligation to perform the act alleged to have been omitted.[85] Where the complaint is based on a failure to perform an act, the facts out of which the duty to perform such act arose should be pleaded,[86] so that, where the duty imposed is dependent on the existence of certain conditions, the complaint must allege the existence of such conditions,[87] and under a statute allowing a certain time for the performance of the duty the lapse of such time must be alleged.[88]

A direct and express allegation of negligence is not essential where it is a necessary deduction from the facts alleged[89] or where the complaint alleges a failure to perform a statutory duty and damages resulting therefrom.[90] On the other hand, a general allegation of negligence in the construction of a road has been held not sufficient without allegations showing wherein the road was negligently or defectively constructed.[91] Inasmuch as the complaint need not anticipate and negative matters of affirmative defense,[92] in an action for injuries to crops

74. Ill.—Ohio, etc, R Co v Combs, 43 Ill App 119, affirmed 31 N E 598, 142 Ill 187
Venue in actions for injuries to real property generally see the C J.S title Venue § 29, also 67 C J. p 57 note 19–p 61 note 5.

75. Miss.—Archibald v. Mississippi, etc., R Co, 6 So. 238, 66 Miss 424.
Neb—Omaha, etc., R Co v Brown, 46 N W. 39, 29 Neb. 492

76. Miss—Archibald v. Mississippi, etc, R. Co, 6 So. 238, 66 Miss. 424.

77. Neb—Omaha, etc., R. Co v. Brown, 46 N.W 39, 29 Neb. 492.

78. Mo—Rosentingle v. Illinois Southern R Co, 99 S W. 788, 122 Mo App 492.
51 C J p 1128 note 86.

79. Ark—Hughes v Arkansas, etc, R Co, 85 S W 773, 74 Ark. 194.

80. Ky.—Thacker v. Chesapeake & O. Ry Co, 77 S W 2d 787, 257 Ky 191.
51 C J. p 1129 note 99.

Petition or complaint held sufficient
Ky.—Thacker v Chesapeake & O. Ry. Co., 77 S W 2d 787, 257 Ky. 191.
Tex—International-Great Northern R. Co v Reagan, Civ.App, 36 S W. 2d 564, 49 S.W.2d 414, 121 Tex. 233.
51 C J. p 1129 note 99 [b].

Allegation as to venue
(1) A complaint may be sufficient, although it does not specifically allege that the railroad is located in, or runs through, county where action is brought, if it alleges injury located territorially within such county.
Ga—East Georgia, etc, R. Co. v. King, 17 S E 939, 91 Ga 519.
Mich—Grand Rapids, etc, R. Co. v. Southwick, 30 Mich. 444.

(2) This is true, at least unless the complaint is objected to specifically on this ground.—East Georgia, etc., R Co v. King, 17 S E. 939, 91 Ga. 519.

81. Tex—Gulf, etc, R. Co. v. Koch, Civ App, 144 S W. 1035
51 C.J. p 1129 note 1.

82. Ala—Central of Georgia R Co v Sturgis, 43 So 96, 149 Ala. 573.
51 C.J. p 1129 note 2.

83. Tex.—Missouri, etc, R. Co v. Riverhead Farm, 117 S.W. 1049, 53 Tex.Civ.App 643
51 C J. p 1130 note 3.

84. S.C—Wallace v. Columbia, etc, R. Co, 12 S E. 815, 34 S C 62.
51 C.J. p 1130 note 4.

85. Mo—Field v. Chicago, etc, R. Co., 76 Mo 614.

86. Mo—Field v. Chicago, etc, R. Co, supra.

87. Mo.—Graves v. Kansas City, etc, R. Co., 69 Mo App. 574
51 C.J p 1130 note 7.

88. Ill.—Cannon v. Louisville, etc, R Co, 34 Ill.App. 640
51 C.J. p 1130 note 8.

89. Tex.—Clark v. Dyer, 16 S.W. 1061, 81 Tex. 339—Sabine, etc, R. Co. v. Hadnot, 4 S W. 138, 67 Tex 503.

90. Tex.—Clark v. Dyer, 16 S.W. 1061, 81 Tex. 339.

91. Tex.—Missouri Pac. R. Co. v. Johnson, 3 Tex A Civ Cas § 275.

92. Tex—St Louis Southwestern R. Co. v. Rollins, Civ.App., 89 S.W. 1099.

by stock due to a failure to fence where the road passes through inclosed lands, it is not necessary to negative the possibility that they entered upon plaintiff's lands at the crossing of a public highway.[93]

Notwithstanding plaintiff alleges a contract by which he conveyed a right of way to defendant, if his petition sets up a cause of action based on a breach by defendant of statutory requirements the action may be regarded as on the statute and not on the contract of conveyance of the right of way.[94] Where a complaint states a good cause of action at common law it has been held not demurrable because it contains a prayer for double damages and does not allege facts sufficient to constitute a cause of action under the statute allowing such damages.[95]

Damages. Plaintiff should allege the amount of damage sustained;[96] but, in an action for injury to plaintiff's lands, if the complaint alleges the amount of the damage sustained it need not state the value of the lands before and after the injury complained of.[97] Although, as a rule, the allegation of damage should not be general but should point out the specific injury sustained,[98] general allegations of the continuous operation of the road and a continuous neglect to fence it and that damages resulted therefrom may be sufficient to authorize a recovery for such damages as invariably follow the exposure of lands by the absence of fences and which cannot easily be itemized.[99]

(2) Plea or Answer

In an action for injuries to property arising from the construction or maintenance of a railroad, the defendant must plead affirmative defenses.

The general rules applicable to the plea or answer in civil actions ordinarily apply to the plea or answer in an action for injuries to property by reason of the construction or maintenance of a railroad.[1] Accordingly, defendant must plead affirmative defenses.[2] It has been held that a plea by defendant that the structure causing the injury was constructed under authority of a city ordinance for the city and not for defendant, and denying that it was negligently constructed, states a defense to the action and should not be stricken.[3] However, a plea by defendant which neither traverses nor confesses and avoids the averments of the complaint has been held bad on demurrer.[4]

(3) Issues, Proof, and Variance

Only such matters may be considered as are put in issue by the pleadings and supported by evidence on the trial, and there can be no recovery on a cause of action not alleged, nor may a failure to state a cause of action be remedied by evidence on the trial.

Only such matters may be considered as are put in issue by the pleadings[5] and supported by evidence on the trial,[6] and there can be no recovery on a cause of action not alleged,[7] nor may a failure to state a cause of action be remedied by evidence on the trial.[8] Plaintiff must, on the trial, support by proof the material allegations of the complaint or a nonsuit may properly be granted,[9] and the case should be proved as alleged, any material variance being fatal to a recovery.[10] In an action for injury to crops by trespassing animals, due to alleged defects in fences or cattle guards, where defendant answers that plaintiff's fence was down in various places and that the animals entered through such fence, it has been held not necessary for defendant to prove that such fence was down in more than one place.[11]

e. Evidence

(1) In general
(2) Admissibility
(3) Weight and sufficiency

(1) In General

The general rules of evidence applicable in civil actions ordinarily apply in actions to recover for injuries to property resulting from the construction or maintenance of a railroad.

93. Mo.—Clare v. Chicago, etc., R. Co, 79 Mo. 39.

94. Tex.—Missouri, etc., R. Co v. Riverhead Farm, 117 S.W. 1049, 53 Tex.Civ App. 643.

95. Mo.—Comings v. Hannibal, etc., R. Co., 48 Mo. 512.

96. Tex.—Missouri Pac. R. Co. v. Johnson, 3 Tex A.Civ.Cas. § 275. 51 C.J. p 1130 note 19

97. Tex.—International, etc., R. Co v Glover, Civ App, 84 S.W. 604.

98. Mich.—Grand Rapids, etc., R. Co v. Southwick, 30 Mich. 444. 51 C.J. p 1130 note 21.

99. Mich.—Grand Rapids, etc, R. Co. v. Southwick, supra.

1. N.Y.—Ramme v. Long Island R. Co., 123 N.E 747, 226 N.Y. 327.

2. N.Y.—Ramme v. Long Island R. Co, supra.
51 C.J. p 1131 note 23.

3. Cal.—De Baker v. Southern California R Co., 39 P. 610, 106 Cal. 257, 46 Am.S.R. 237.

4. Ala.—Seaboard Air Line R Co. v. Wright, 41 So. 461, 148 Ala 27. 51 C.J. p 1131 note 26.

5. La.—Lewis v. Colorado Southern, etc., R. Co., 47 So. 906, 122 La. 572. 51 C.J. p 1131 note 27.

6. Ill.—Chicago, etc, R. Co v. Harper, 19 N.E. 31.

7. N.Y.—Gordon v. Ellenville, etc., R Co, 88 N.E 14, 195 N.Y. 137, 47 L.R.A.,N.S., 462.
51 C.J. p 1131 note 29.

8. Mo.—Field v Chicago, etc, R. Co, 76 Mo 614

9. Ga.—Lee v. Savannah, etc., R. Co., 41 S.E 246, 115 Ga. 64.
51 C.J. p 1131 note 31.

10. Ill.—Wisconsin Cent. R. Co. v. Wieczorek, 88 N.E. 678, 151 Ill 579.
51 C.J. p 1131 note 32.

11. Tex.—Kansas City, etc, R. Co. v. Mayfield, Civ.App., 107 S.W 940

The general rules of evidence applicable in civil actions ordinarily apply in actions to recover for injuries to property resulting from the construction or maintenance of a railroad.[12] Accordingly, it may be presumed that all incidental and consequential damages were properly included in an assessment of damages in condemnation proceedings.[13] Likewise, the burden of proving those facts which are essential to a recovery is on plaintiff.[14] Thus the burden is on plaintiff to prove negligence or a breach of duty on the part of the railroad company,[15] and he must also show a causal connection between the injury to his property and the acts of omission or commission on the part of the company of which he complains,[16] as well as that such acts were the efficient and proximate cause of the injuries sustained.[17] On the other hand, the burden of proving affirmative defenses is on the railroad company,[18] and in a jurisdiction in which defendant has the burden of proving contributory negligence the company must prove contributory negligence on the part of plaintiff when relied on as a defense.[19]

(2) Admissibility

In an action to recover for injuries to property resulting from the construction or maintenance of a railroad, evidence, in order to be admissible, must be competent and have some direct and legitimate bearing on the issues.

General rules as to the admissibility of evidence ordinarily apply with respect to the admissibility of evidence in an action to recover for injuries to property resulting from the construction or maintenance of a railroad,[20] and, in order to be admissible, the proffered evidence must be competent[21] and it must have some direct and legitimate bearing on the issues.[22] Thus it has been held that evidence of injuries to property other than that alleged to have been injured is inadmissible.[23] Also, evidence of repairs made subsequent to the injury complained of has been held not admissible on the question of the condition of the property at the time of the injury,[24] although such evidence may be admissible in behalf of defendant in mitigation of damages.[25] So too, evidence as to what plaintiff originally paid for the property,[26] or as to the principle on which damages were assessed in the condemnation proceedings,[27] has been held inadmissible. It has further been held, where the action is based on the negligent manner of constructing the road, that evidence as to the value of plaintiff's land before and after its construction is not admissible, since it does not present a proper measure of damages.[28]

In an action for injury to crops, where a railroad company is not required to construct cattle guards, evidence that the company promised to construct them has been held not admissible, in the absence of evidence that the award of damages in the condemnation proceedings was affected thereby.[29] On the other hand, in an action based on a failure to construct cattle guards as required by statute, evidence that, because of the absence of such equipment, plaintiff was compelled to employ additional help in driving his stock across the right of way has been held admissible as tending to show the damages sustained.[30]

In an action for damages to crops by flooding lands, evidence of the cultivation of crops prior to the time for which a recovery is sought, and the effect of water thereon, has been held admissible

12. Ky.—Levisa River R. Co. v. Phillips, 227 S.W.2d 922, 312 Ky. 367.
Mo.—Jones v. Chicago, B. & Q. R. Co., App., 100 S.W.2d 617, reversed on other grounds 125 S.W.2d 5, 343 Mo. 1104.
Tex.—Evans v. Missouri-Kansas-Texas R. R. of Texas, Civ.App., 132 S.W.2d 915.

13. Miss.—Fairchild v. New Orleans, etc., R. Co., 62 Miss. 177.

14. Tex.—Evans v. Missouri-Kansas-Texas R. R. of Texas, Civ.App., 132 S.W.2d 915.

15. Mont.—Lyon v. Chicago, etc., R. Co., 148 P. 386, 50 Mont. 532.
51 C.J. p. 1131 note 35.

16. Mo.—Jones v. Chicago, B. & Q. R. Co., App., 100 S.W.2d 617, reversed on other grounds 125 S.W.2d 5, 343 Mo. 1104.

17. Mo.—Jones v. Chicago, B. & Q. R. Co., supra.

18. Mo.—Robinson v. Chicago, etc., R. Co., 288 S.W. 109, 221 Mo.App. 881.
51 C.J. p. 1132 note 38.

19. Iowa.—See v. Wabash R. Co., 99 N.W. 106, 123 Iowa 443.

20. Ky.—Levisa River R. Co. v. Phillips, 227 S.W.2d 922, 312 Ky. 367.
Mo.—Boggs v. Missouri-Kansas-Texas R. Co., App., 50 S.W.2d 164, affirmed 80 S.W.2d 141, 336 Mo. 528.
51 C.J. p. 1132 note 39.

21. Ky.—Levisa River R. Co. v. Phillips, 227 S.W.2d 922, 312 Ky. 367.
Evidence held competent
Ky.—Levisa River R. Co. v. Phillips, supra.
N.C.—Broadhurst v. Blythe Bros. Co., 17 S.E.2d 646, 220 N.C. 464.

22. Mo.—Boggs v. Missouri-Kansas-Texas R. Co., App., 50 S.W.2d 164, affirmed 80 S.W.2d 141, 336 Mo. 528.
51 C.J. p. 1132 note 39.

23. Ky.—Jeffersonville, etc., R. Co. v. Esterle, 13 Bush 667.

24. Iowa.—See v. Wabash R. Co., 99 N.W. 106, 123 Iowa 443.
51 C.J. p. 1132 note 43.

25. Ala.—Alabama Midland R. Co. v. Coskry, 9 So. 202, 92 Ala. 254.
51 C.J. p. 1132 note 50.

26. Tex.—Denison, etc., R. Co. v. Cummins, Civ.App., 42 S.W. 588.

27. N.C.—Fleming v. Wilmington, etc., R. Co., 20 S.E. 714, 115 N.C. 676.

28. Iowa.—Cadle v. Muscatine Western R. Co., 44 Iowa 11.
51 C.J. p. 1132 note 45.

29. Miss.—Fairchild v. New Orleans, etc., R. Co., 62 Miss. 177.

30. Tex.—Missouri, etc., R. Co. v. Wetz, 87 S.W. 373, 38 Tex.Civ.App. 563.

as tending to show the effect of similar conditions during the period for which a recovery is sought if properly limited for such purpose,[31] and evidence of a person who testifies from actual observation as to the insufficiency of a bridge properly to admit the passage of the water of a stream may be admissible, although he is not an expert.[32] However, in an action for flooding lands resulting from the breaking of a railroad embankment alleged to have been negligently constructed, where defendant alleges that it was properly constructed and that the injury was caused by an unprecedented flood, evidence that certain city and county bridges were washed away has been held not admissible on the part of defendant in the absence of evidence that they were properly constructed.[33]

(3) Weight and Sufficiency

In actions for injuries to property resulting from the construction or maintenance of a railroad, the general rules applicable to the weight and sufficiency of the evidence in civil actions ordinarily apply.

In actions for injuries to property resulting from the construction or maintenance of a railroad, the general rules applicable to the weight and sufficiency of the evidence in civil actions ordinarily apply,[34] and, under such rules, particular evidence has been held sufficient[35] or insufficient[36] to establish various issues, sufficient to support or warrant certain findings,[37] or sufficient to support a verdict for plaintiff[38] or for defendant.[39] In an action for injuries due to defects in a highway bridge across a railroad which it was defendant's duty to keep in repair, a failure to prove that defendant constructed the bridge has been held not fatal to a recovery.[40] However, where the action is for a nuisance in constructing a railroad in a street and the road was constructed by lawful authority, there can be no recovery in the absence of evidence that the road was constructed in a negligent or improper manner.[41]

f. Trial

In an action for injury to property resulting from the construction or maintenance of a railroad, disputed questions of fact should be submitted to the jury under proper instructions from the court.

In actions for injuries to property resulting from the construction or maintenance of a railroad, the conduct of the trial is controlled by the principles relating to the conduct of the trial of civil actions generally.[42] Accordingly, disputed questions of fact should be submitted to the jury,[43] who are the

31. Iowa—Willitts v. Chicago, etc., R. Co., 55 N.W. 313, 88 Iowa 281, 21 L.R.A. 603.

32. Iowa—Willitts v. Chicago, etc., R. Co., supra.

33. Tex.—Missouri, etc., R. Co. v. McGregor, Civ.App., 68 S.W. 711.

34. U.S.—Atchison, T. & S. F. Ry. Co. v. Taylor, D.C.Mo., 87 F.Supp. 313.
N.D.—Ferderer v. Northern Pac. Ry. Co., 42 N.W.2d 216.
Tex.—Texas & P. Ry. Co. v. Mercer, Civ.App., 58 S.W.2d 896, reversed on other grounds 90 S.W.2d 557, 127 Tex. 220, 106 A.L.R. 1299.
51 C.J. p. 1132 note 51.

35. U.S.—Whitmer v. Atchison, T. & S. F. Ry. Co., D.C.Mo., 90 F.Supp. 253—Atchison, T. & S. F. Ry. Co. v. Taylor, D.C.Mo., 87 F.Supp. 313.
Ky.—Levisa River R. Co. v. Phillips, 227 S.W.2d 922, 312 Ky. 367.
Mo.—Jones v. Chicago, B. & Q. R. Co., 125 S.W.2d 5, 343 Mo. 1104—Boggs v. Missouri-Kansas-Texas R. Co., App., 50 S.W.2d 164, affirmed 80 S.W.2d 141, 336 Mo. 528—Cottier v. Chicago, B. & Q. R. Co., App., 33 S.W.2d 173—Harris v. St. Louis-San Francisco Ry. Co., 27 S.W.2d 1072, 224 Mo.App. 455.
Tex.—Lewis v. Texas & N. O. R. Co., Civ.App., 199 S.W.2d 185, refused no reversible error.
51 C.J. p. 1132 note 51 [a] (3)–(13), (15).

36. Mo.—Boggs v. Missouri-Kansas-Texas R. Co., App., 50 S.W.2d 164, affirmed 80 S.W.2d 141, 336 Mo. 528.
Okl.—Gulf, C. & S. F. Ry. Co. v. Rutledge, 47 P.2d 83, 173 Okl. 245.
51 C.J. p. 1132 note 51 [b].

37. N.D.—Ferderer v. Northern Pac. Ry. Co., 42 N.W.2d 216.
Findings held authorized
(1) Generally.
Mo.—Brown v. Thompson, App., 108 S.W.2d 423.
Mont.—Heckaman v. Northern Pac. Ry. Co., 20 P.2d 258, 93 Mont. 363.
N.D.—Ferderer v. Northern Pac. Ry. Co., 42 N.W.2d 216.
Tex.—Burlington-Rock Island R. Co. v. Newsom, Civ.App., 219 S.W.2d 129.
51 C.J. p. 1132 note 51 [a] (14), (16), (17).

(2) That flood was not extraordinary and unprecedented—Ferderer v. Northern Pac. Ry. Co., supra.

(3) That obstruction in shutting off some outlets and in narrowing remaining outlet caused tenant's lands to be flooded.—Jones v. Chicago, B. & Q. R. Co., 125 S.W.2d 5, 343 Mo. 1104.

38. La.—Lastrapes v. Colorado Southern, etc., R. Co., 50 So. 791, 124 La. 906.
Mo.—Smithpeter v. Wabash R. Co., 231 S.W.2d 135, 360 Mo. 835.

39. Ky.—Husbands v. Paducah, etc., R. Co., 195 S.W. 831, 176 Ky. 290.

40. Ala.—Southern R. Co. v. Taylor, 42 So. 625, 148 Ala. 52.

41. Mo.—Randle v. Pacific R. Co., 65 Mo. 325.

42. Ky.—Levisa River R. Co. v. Phillips, 227 S.W.2d 922, 312 Ky. 367.
Mo.—Smithpeter v. Wabash R. Co., 231 S.W.2d 135, 360 Mo. 835—Jones v. Chicago, B. & Q. R. Co., 125 S.W.2d 5, 343 Mo. 1104—Brown v. Thompson, App., 108 S.W.2d 423.
Mont.—Peel v. Chicago, M., St. P. & P. R. Co., 22 P.2d 617, 94 Mont. 334, followed in Spreitzer v. Chicago, M., St. P. & P. R. Co., 22 P.2d 620, 94 Mont. 344.
Tex.—Fort Worth & D. C. Ry. Co. v. Kiel, Civ.App., 185 S.W.2d 144, reversed on other grounds 187 S.W.2d 371, 143 Tex. 601.

43. Mo.—Smithpeter v. Wabash R. Co., 231 S.W.2d 135, 360 Mo. 835.
51 C.J. p. 1133 note 55
Questions held for jury
(1) Whether railroad company was negligent in failing to maintain proper bridge in anticipation of flood—Northern Pac. Ry. Co. v. Wagner, C.C.A.Mont., 86 F.2d 63.

(2) Whether railroad company was negligent in failing to provide sufficient opening through embankment to afford proper drainage to adjoining

sole judges of the weight of the evidence[44] and of the credibility of witnesses.[45] The court should instruct the jury correctly as to the law of the case,[46] and should not submit issues or grounds of liability not raised by the pleadings[47] or not supported by the evidence.[48] Where both a failure to erect and a failure to maintain a fence are charged, a judgment may be sustained by proof of either allegation.[49]

Verdict and findings. The general rules applicable to the verdict and findings in civil actions apply,[50] and the findings should not be conflicting or inconsistent with each other.[51] Where the evidence on an issue is not contradicted or is legally insufficient to raise a question of fact, the court may properly give a mandatory instruction thereon,[52] but the court should not direct a verdict where the evidence is legally sufficient to raise a question of fact as to defendant's liability.[53]

g. Damages

Where property is injured by reason of the construction or maintenance of a railroad, the measure of damages is that of just compensation for the actionable injury sustained.

Where property is injured by reason of the construction or maintenance of a railroad, the meas-

property—Wabash R Co. v. Lewis, C C A Mo, 48 F 2d 519

(3) Whether opening under railroad bridge was insufficient for proper drainage—Smithpeter v Wabash R. Co, 231 S W.2d 135, 360 Mo 835

(4) Whether railroad company provided ditch adequate to carry off water—Cottier v Chicago, B & Q R Co, Mo App., 33 S W 2d 173

(5) Whether plaintiff's land was flooded because of failure of railroad to construct statutory ditches along its right of way—Boggs v Missouri-Kansas-Texas Ry. Co, 80 S W.2d 141, 336 Mo 528.

(6) Whether there was a drain or watercourse with which to connect statutory ditches or drains along railway roadbed—Brown v Thompson, Mo App, 108 S W 2d 423—Cottier v Chicago, B & Q R. Co, supra.

(7) Whether negligence of railroad company was proximate cause of plaintiff's damages
U S—Northern Pac. Ry. Co. v. Wagner, supra
Mo—Smithpeter v. Wabash R. Co., supra.

(8) Whether damage to property from water backing up from railroad embankment resulted from overflows caused by unprecedented rainfall—Wabash R Co. v Lewis, supra

(9) Whether railroad company should have anticipated rainfall, or whether it was an act of God—Ribello v. Chicago, B & Q. R. Co, 176 S W.2d 670, 237 Mo App. 587.

(10) Other questions held for jury
Ky.—Levisa River R. Co. v Phillips, 227 S W.2d 922, 312 Ky 367.
Mo—Snow v Thompson, App, 178 S W 2d 796—Brown v Thompson, App, 108 S W 2d 423.
N C—Broadhurst v. Blythe Bros. Co., 17 S E 2d 646, 220 N C 464
Tex.—Fort Worth & D C Ry. Co. v Kiel, Civ.App, 185 S.W 2d 144, reversed on other grounds 187 S.W 2d 371, 143 Tex 601
51 C.J p 1133 note 55 [a].

Evidence held insufficient to submit to jury
Mo—Brown v. Thompson, App, 108 S.W 2d 423
Mont—Peel v. Chicago, M., St. P. & P. R. Co, 22 P.2d 617, 94 Mont. 334, followed in Spreitzer v Chicago, M, St P & P. R. Co, 22 P.2d 620, 94 Mont 344
Tex—Lewis v Texas & N O. R Co., Civ App, 199 S W.2d 185, refused no reversible error—Ford v. Wichita Falls, etc, R Co, Civ App., 253 S W. 932
51 C.J p 1133 note 55 [c] (2)

44. Mo—Brown v Thompson, App, 108 S W.2d 423.

45. Mo.—Brown v. Thompson, supra.

46. Kan—Atchison, etc, R. Co. v Anderson, 50 P. 603, 6 Kan App. 923
Mo.—Smithpeter v Wabash R Co., 231 S.W 2d 135, 360 Mo. 835.
51 C J. p 1133 note 56

Instructions covered by other instructions
(1) In general—Ft. Worth, etc, R. Co. v. Suter, 118 S.W. 215, 54 Tex Civ.App. 238.

(2) Where matter of affirmative defense not incorporated in plaintiff's instructions are covered at defendant's request, defendant may not complain.—Jones v. Chicago, B & Q R Co, 125 S W 2d 5, 343 Mo. 1104—Cottier v. Chicago, B. & Q. R. Co, Mo App, 33 S W 2d 173—Carson v. Missouri, K & T. R. Co., Mo.App., 292 S W 1069.

Instructions held proper or not erroneous
U S—Wabash R. Co. v. Lewis, C.C.A. Mo, 48 F 2d 519.
Mo—Smithpeter v. Wabash R. Co, 231 S.W 2d 135, 360 Mo 835—Jones v Chicago, B. & Q. R Co, 125 S.W. 2d 5, 343 Mo 1104—Snow v. Thompson, App., 178 S W.2d 796—Boggs v Missouri-Kansas-Texas R Co, App, 50 S.W.2d 164, affirmed 80 S W.2d 141, 336 Mo. 528.
N.C.—Mordecai v. Norfolk Southern Ry Co, 58 S E.2d 721, 231 N C 733—Broadhurst v Blythe Bros Co, 17 S E 2d 646, 220 N C. 464.
51 C J p 1133 note 56 [a].

Instructions held erroneous or properly refused
Ky.—Levisa River R Co. v. Phillips, 227 S W.2d 922, 312 Ky. 367.
Mo—Smithpeter v. Wabash R. Co., 231 S W 2d 135, 360 Mo. 835—Ribello v Chicago, B & Q. R. Co., 176 S W.2d 670, 237 Mo App. 587—Cooper v St Louis, etc, R. Co., 100 S W 494, 123 Mo App 141.
Mont—Heckaman v. Northern Pac. Ry. Co, 20 P 2d 258, 93 Mont 368.
51 C.J. p 1133 note 56 [b]

47. Mo—Smithpeter v Wabash R. Co, 231 S.W 2d 135, 360 Mo 835.
51 C.J. p 1134 note 57.

48. Mo—Smithpeter v. Wabash R. Co., supra—Ribello v Chicago, B & Q R Co, 176 S.W 2d 670, 237 Mo App 587
Tex—Evans v. Missouri-Kansas-Texas R R. of Texas, Civ App, 132 S W 2d 915.
51 C.J. p 1134 note 58

49. Mo—Deal v. St. Louis, etc, R. Co., 129 S W. 52, 144 Mo App 691.

50. Tex.—Fort Worth & D. C. Ry. Co. v Kiel, 187 S.W 2d 371, 143 Tex. 601

Findings construed
A general verdict for defendant construed to be in effect a special finding that the construction of a railroad's spur track in a street was not injurious to plaintiff's property.—Lloyd v Missouri, etc., R. Co., Tex. Civ App, 145 S W. 266

Awards held not excessive
Mo—Cottier v. Chicago, B. & Q. R. Co, App, 33 S W 2d 173.
Tex.—Burlington-Rock Island R. Co. v Newsom, Civ App, 219 S.W.2d 129.

51. Tex.—Fort Worth & D C. Ry. Co v. Kiel, 187 S W.2d 371, 143 Tex 601.

52. Mo.—Coggins v. Atchison, etc., R Co., 256 S.W 824, 215 Mo App. 506.
51 C J. p 1133 note 55 [d], [e].

53. Tex—Fort Worth & D C Ry. Co. v Kiel, Civ App., 195 S W.2d 405, refused no reversible error.

ure of damages is that of just compensation for the actionable injury sustained,[54] and the damages should be limited to those resulting from the particular acts or injuries alleged in the complaint[55] and shown by the evidence,[56] and plaintiff cannot recover a larger amount than he alleges he has sustained.[57]

If the injury is of a permanent character the measure of damages usually is the diminution in the value of the property[58] or the difference between the value of the property before and after the injury.[59] However, if the injury is caused by a structure or condition of a temporary character or which can and should be remedied, and for the continuance of which successive actions for resulting injuries may be maintained, plaintiff may not be entitled to recover as for a permanent injury to his property,[60] but only for the injury sustained prior to the action;[61] and, in such a case, the measure of damages to the property is the depreciation in the rental value during the continuance of such condition,[62] and not the difference in the market value of the property.[63]

Where the injury results merely from the negligent or improper manner of constructing the railroad, it has been held that the measure of damages is not the difference in the value of the property before and after the construction of the railroad,[64] but that the proper measure of damages is the difference in the value of the property with the road constructed as it is and what its value would be with the road properly constructed,[65] or the difference between the rental value of the property with the road constructed as it is and the rental value of the property if the road were properly constructed.[66] Where, in the construction of the road, the contractors of the railroad company commit wanton or willful trespasses on the land of another the company may be held liable for exemplary damages.[67]

Obstruction of access. Where, by reason of the construction or maintenance of a railroad, a street or highway is blocked so as to obstruct access to plaintiff's place of business, the measure of damages ordinarily is the loss of profits in the business,[68] based on the price which his products would have brought in the available market[69] during the period of the temporary interruption of his business,[70] in addition to the value of the good will lost by him as a result of such obstruction,[71] and not the depreciation in the rental value of the property.[72] However, since such damages are considered special damages, it has been held that defendant must have received notice thereof in order that plaintiff may be entitled thereto.[73]

Obstruction of crossing. For the obstruction of a private crossing the measure of damages ordinarily is such amount as will fairly compensate plaintiff for the deprivation of its use during the period of obstruction,[74] and punitive damages may not be

54. Ark.—Railroad Co. v. Cook, 21 S.W. 1066, 57 Ark. 387.
Tex.—Houston Belt & Terminal Ry. Co. v. Daidone, Civ.App., 62 S.W.2d 524, error dismissed.
51 C.J. p. 1134 note 61.

55. Ohio.—Yackee v. Village of Napoleon, 21 N.E.2d 111, 135 Ohio St. 344—Baltimore, etc., R. Co. v. Lersch, 51 N.E. 543, 58 Ohio St. 639

56. Mo.—Smithpeter v. Wabash R. Co., 231 S.W.2d 135, 360 Mo. 835
Tex.—Texas Cent. R. Co. v. Wills, Civ.App., 41 S.W. 848.

57. Tex.—Gulf, etc., R. Co. v. Simonton, 22 S.W. 285, 2 Tex.Civ.App. 558.

58. Ky.—Louisville, etc., R. Co. v. Roberts, 139 S.W. 1073, 144 Ky. 820.
51 C.J. p. 1134 note 65.

59. N.C.—Broadhurst v. Blythe Bros. Co., 17 S.E.2d 646, 220 N.C. 464.

60. Ark.—Railroad Co. v. Cook, 21 S.W. 1066, 57 Ark. 387.
Tenn.—Louisville, etc., R. Co. v. Lellylett, 85 S.W. 881, 114 Tenn. 368, 1 L.R.A.,N.S., 49.

61. Ark.—Kansas City, Ft. S. & M. R. Co. v. Cook, 21 S.W. 1066, 57 Ark. 387.

D.C.—Washington R., etc., Co. v. Washington Terminal Co., 44 App. D.C. 470.

62. Tenn.—Louisville, etc., R. Co. v. Lellylett, 85 S.W. 881, 114 Tenn. 368, 1 L.R.A.,N.S., 49.
51 C.J. p. 1134 note 68

63. Ark.—Kansas City, Ft. S. & M. R. Co. v. Cook, 21 S.W. 1066, 57 Ark. 387.

64. N.C.—Carson v. Norfolk, etc., R. Co., 38 S.E. 287, 128 N.C. 95.
51 C.J. p. 1134 note 70.

65. N.C.—Ridley v. Seaboard, etc., R. Co., 24 S.E. 730, 118 N.C. 996, 32 L.R.A. 708.
51 C.J. p. 1134 note 71.

66. Iowa.—O'Connor v. St. Louis, etc., R. Co., 10 N.W. 263, 56 Iowa 735.

67. Ill.—Rockford, etc., R. Co. v. Wells, 66 Ill. 321.

68. Tex.—Texas & P. Ry. Co. v. Mercer, 90 S.W.2d 557, 127 Tex. 220, 106 A.L.R. 1299, motion overruled 93 S.W.2d 376, 127 Tex. 220—International, etc., R. Co. v. Capers, 77 S.W. 39, 33 Tex.Civ.App. 283.

69. Tex.—Texas & P. Ry. Co. v. Mercer, 90 S.W.2d 557, 127 Tex. 220, 106 A.L.R. 1299, motion overruled 93 S.W.2d 376, 127 Tex. 220

70. Tex.—Texas & P. Ry. Co. v. Mercer, supra

71. Texas.—Texas & P. Ry. Co. v. Mercer, supra.

72. Tex.—International, etc., R. Co. v. Capers, 77 S.W. 39, 33 Tex.Civ. App. 283.

73. Tex.—Texas & P. Ry. Co. v. Mercer, Civ.App., 58 S.W.2d 896, reversed on other grounds, Com. App., 90 S.W.2d 557, 127 Tex. 220, 106 A.L.R. 1299, motion overruled 93 S.W.2d 376, 127 Tex. 220.

What constitutes notice

Railroad, having placed person in position of supervising construction work and clothing him with at least apparent authority, could not claim that notice to him of special damages which would result to dairyman from blocking highway was not notice to railroad.—Texas & P. Ry. Co. v. Mercer, Civ.App., 58 S.W.2d 896, reversed on other grounds, Com. App., 90 S.W.2d 557, 127 Tex. 220, 106 A.L.R. 1299, motion overruled 93 S.W.2d 376, 127 Tex. 220.

74. Ky.—Louisville, etc., R. Co. v. Carter, 66 S.W. 617, 23 Ky.L. 2104.

recovered if the railroad company did not act wantonly or maliciously but under a mistake as to its legal rights.[75]

Failure to construct fences or cattle guards Where a railroad company fails to construct fences or cattle guards, the measure of the landowner's damages is the amount of the loss or injury directly resulting,[76] and the measure of damages for the general injury to his property is the diminution in its rental value, caused by the absence of the fences or cattle guards,[77] and not merely what it would cost to construct them.[78]

Failure to construct private or farm crossings. For failure to construct private or farm crossings as required by statute, the measure of damages is the actual loss and inconvenience suffered by plaintiff in the use of his premises by reason of their absence.[79] However, where a railroad company is required by statute to leave openings in its right-of-way fences, where the road passes through an inclosure, and the company, although constructing them for others, refuses to do so for plaintiff, after a demand therefor, exemplary damages may be awarded.[80]

Flooding land. Ordinarily, where lands are flooded by reason of the negligent or improper construction of a railroad, the measure of damages is the value of property destroyed together with the injury to the land,[81] provided there is an injury to the land itself,[82] and the damage for such injury is measured by the difference in the value of the land before and after the flooding,[83] taking into consideration its condition with respect to crops.[84]

On the other hand, where there is no permanent injury to realty, it has been held that the rule permitting a recovery of the difference between the reasonable market value of the land before the injury and such value after the injury does not apply.[85] So it has been held that if there is no physical injury to the land itself but it is merely rendered subject to overflow, the measure of damages is the injury resulting from each overflow,[86] and that if the cause is one which may be remedied, the damage to the land is not the difference in its value but the depreciation in the rental value during the continuance of such condition,[87] or the fair cash rental value of the land during the time for which the owners are deprived of its use,[88] or the reasonable rental value of the land withheld from crop production because of the deprivation of the use of the land.[89]

Destruction of crops. The measure of damages for the destruction of crops is not the value of the crop at the date of maturity,[90] or the rental value of the land,[91] or the difference in the value of the land before and after the destruction,[92] but the proper measure of damages has been held to be the value of the crop at the time of maturity less the cost of cultivation and marketing,[93] or the value of the crop at the time of the injury,[94] although

75. Ky.—Louisville, etc., R. Co. v. Carter, supra

76. Kan.—Nelson v. St. Louis, etc., R. Co., 30 P. 178, 49 Kan. 165
51 C.J. p. 1135 note 76

77. Minn.—Nelson v. Minneapolis, etc., R. Co., 42 N.W. 788, 41 Minn. 131.
51 C.J. p. 1135 note 77.

78. Minn.—Emmons v. Minneapolis, etc., R. Co., 36 N.W. 788, 41 Minn. 215

79. Pa.—Port v. Huntingdon, etc., R. Co., 31 A. 950, 168 Pa. 19
51 C.J. p. 1135 note 79.

80. Tex.—San Antonio, etc., R. Co. v. Grier, 49 S.W. 148, 20 Tex. Civ. App. 138
51 C.J. p. 1135 note 80

81. Fla.—**Corpus Juris cited in** Atlantic Coast Line R. Co. v. Saffold, 178 So. 288, 130 Fla. 598
Tex.—Gulf, etc., R. Co. v. Pool, 8 S.W. 535, 70 Tex. 713

82. Tex.—Green v. Taylor, etc., R. Co., 15 S.W. 685, 79 Tex. 604—Gulf, etc., R. Co. v. Haskell, 23 S.W. 546, 4 Tex. Civ. App. 550.

83. Fla.—Atlantic Coast Line R. Co. v. Saffold, 178 So. 288, 130 Fla. 598
51 C.J. p. 1135 note 83

84. Iowa.—Drake v. Chicago, etc., Co., 19 N.W. 215, 63 Iowa 302, 50 Am. R. 746
51 C.J. p. 1135 note 84.

85. Tex.—Fort Worth & D. C. Ry. Co. v. Kiel, Civ. App., 195 S.W. 2d 405, refused no reversible error

Damage to swimming pool
Action for damage to swimming pool when wall thereof was caved in by flood waters allegedly backed up by defendant's embankment across nearby creek was not an action for permanent damage to real estate, so as to render applicable, as measure of damages, rule permitting recovery of difference between reasonable market value of plaintiff's land and such value immediately after injury occurred.—Fort Worth & D. C. Ry. Co. v. Kiel, supra

86. Tex.—Gulf, etc., R. Co. v. Helsley, 62 Tex. 593—Gulf, etc., R. Co. v. Haskell, 23 S.W. 546, 4 Tex. Civ. App. 550

87. Ark.—Kansas City, etc., R. Co. v. Cook, 21 S.W. 1066, 57 Ark. 387
Ind.—Vandalia R. Co. v. Yeager, 110 N.E. 230, 60 Ind. App. 118

88. Ill.—Fincher v. Baltimore, etc., R. Co., 179 Ill. App. 622.
51 C.J. p. 1135 note 87

89. U.S.—Atchison, T. & S. F. Ry. Co. v. Ross, D.C. Mo., 88 F. Supp. 451.
Mo.—Boggs v. Missouri-Kansas-Texas Ry. Co., 80 S.W. 2d 141, 336 Mo. 528

90. Tenn.—L. & N. R. Co. v. Channell, 2 Tenn. Civ. App. 154.
Tex.—Texas, etc., R. Co. v. Young, 60 Tex. 201

91. Iowa.—Donald v. St. Louis, etc., R. Co., 44 Iowa 157.
51 C.J. p. 1135 note 89.

92. Ala.—Altanta, etc., Air Line R. Co. v. Brown, 48 So. 73, 158 Ala. 607.

93. Iowa.—Smith v. Chicago, etc., R. Co., 38 Iowa 518

94. U.S.—Atchison, T. & S. F. Ry. Co. v. Ross, D.C. Mo., 88 F. Supp. 451
Mo.—Brown v. Thompson, App., 108 S.W. 2d 423
51 C.J. p. 1135 note 92.

such value should not be estimated according to the intrinsic value of an immature crop,[95] but according to the probable yield and value at maturity and the cost of cultivation and marketing.[96] In case of damage to crops, the proper measure of damages has been held to be the difference between the market value of the crops which would have been raised and the market value of the crop actually raised, less what would have been the reasonable cost of gathering and marketing that part of the crop which was destroyed.[97]

While plaintiff may be entitled to recover for the permanent injury to his land and the past damages to his crops in one action,[98] he is not entitled to recover the value of land rendered unfit for cultivation and also damages to crops not planted.[99] A tenant in common owning only an undivided part of the land, but owning the entire crop being cultivated thereon, has been held entitled to recover the entire amount of the damages to such crop.[1]

h. Review

An appellate court ordinarily will not disturb the verdict or findings of the jury when based on conflicting evidence and there is evidence legally sufficient to support them.

In accordance with the rules applicable to review in civil actions generally, as discussed in Appeal and Error §§ 1453–1834, an appellate court ordinarily will not disturb the verdict or findings of the jury when based on conflicting evidence and there is evidence legally sufficient to support them,[2] and a verdict will not be set aside on the ground that the damages are excessive where the amount was variously estimated by different witnesses and the verdict is fairly within the estimates given,[3] or is not so great as clearly to indicate that the jury acted corruptly or disregarded the instructions of the court.[4] Also, judgment will not be reversed for an error which was not prejudicial to appellant in the admission of evidence[5] or in the instructions to the jury,[6] or for a refusal to give a special charge requested which, although correct, is covered by the general charge given.[7]

B. INJURIES FROM OPERATION

§ 477. Existence and Extent of Liability

Ordinarily an adjoining landowner may not, where a railroad is constructed by lawful authority, recover for injury or inconvenience caused by the smoke, noise, vibration, or other incidents necessary to its operation where it is not operated in a negligent or unlawful manner; but a railroad company may be held liable for any injury to property caused by the negligent or improper operation of its trains.

Except as an abutting or adjacent property owner is, under constitutional restrictions against the "taking" or "damaging" or "injuring" of property for public use without compensation, entitled to compensation for consequential damages generally, as discussed in Eminent Domain §§ 110–135, and more particularly to damages from smoke, ashes, foul odors, noise, vibration, etc., incident to the operation of a railroad, as considered in Eminent Domain § 171, ordinarily an adjoining landowner may not, where a railroad is constructed by lawful authority, recover for injury or inconvenience caused by the smoke, noise, vibration, or other incidents necessary to its operation where it is not operated in a negligent or unlawful manner,[8] although it may be located in the streets of a town or city,[9] since the act of operation, being authorized by law, cannot confer any right of action as long as it is exercised

95. Ill.—Chicago, etc., R. Co. v. Schaffer, 26 Ill. App. 280, affirmed 16 N.E. 239, 124 Ill. 112.

96. Ark.—St. Louis, etc., R. Co. v. Lyman, 22 S.W. 170, 57 Ark. 512.
51 C.J. p. 1136 note 94.

97. Ala.—Central of Georgia R. Co. v. Carroll, 50 So. 235, 163 Ala. 84.

98. N.C.—Ridley v. Seaboard, etc., R. Co., 32 S.E. 325, 124 N.C. 34.
51 C.J. p. 1136 note 97.

99. Miss.—Yazoo, etc., R. Co. v. Darden, 34 So. 386.

1. Ala.—Central of Georgia R. Co. v. Carroll, 50 So. 235, 163 Ala. 84.

2. Iowa.—Olver v. Burlington, etc., R. Co., 82 N.W. 609, 111 Iowa 221.
51 C.J. p. 1136 note 1.

3. Conn.—Nicholson v. New York, etc., R. Co., 22 Conn. 74, 56 Am. D. 390.
Ill.—St. Louis, etc., R. Co. v. Capps, 72 Ill. 188.

4. Va.—Southern R. Co. v. Clarke, 56 N.E. 274, 106 Va. 496.
51 C.J. p. 1136 note 3.

5. Iowa.—Olver v. Burlington, etc., R. Co., 82 N.W. 609, 111 Iowa 221—Willitts v. Chicago, etc., R. Co., 55 N.W. 313, 88 Iowa 281, 21 L.R.A. 608.

6. Conn.—Nicholson v. New York, etc., R. Co., 22 Conn. 74, 56 Am. D. 390.
Tex.—Dallas, etc., R. Co. v. Able, 9 S.W. 871, 72 Tex. 150.

7. Tex.—Gulf, etc., R. Co. v. Wynne, Civ.App., 91 S.W. 823.

8. Ill.—Wiener v. Pennsylvania R. Co., 10 N.E.2d 981, 292 Ill.App. 303
Mo.—Corpus Juris cited in Harris v. St. Louis-San Francisco Ry. Co., App., 60 S.W.2d 652, 654.
N.Y.—Frank v. City of New York, 43 N.Y.S.2d 177, 179 Misc. 895.
51 C.J. p. 1136 note 10.
Injuries:
From:
Construction or maintenance see supra §§ 465–476.
Fires see infra §§ 484–511
To animals see infra §§ 547–689
Operation as constituting nuisance see Nuisances § 67.

9. Kan.—Atchison, etc., R. Co. v. Armstrong, 80 P. 978, 71 Kan. 366, 114 Am.S.R. 474, 1 L.R.A.,N.S., 113.
51 C.J. p. 1137 note 11.

in a lawful and proper manner;[10] and the same rule applies under similar circumstances to the injury or inconvenience due to the location, maintenance, and use of structures and appliances necessarily incident to the operation of the road, such as terminal yards, turntables, engine houses, and the like.[11] Moreover, with respect to personal property of third persons upon the private right of way of a railroad, the railroad company may not be held liable for injury caused by the operation of its trains without negligence,[12] and the operators of a train are not required to exercise a greater duty to discover the presence of a vehicle on the track at a point other than a crossing than is accorded a trespasser or licensee.[13]

On the other hand, in the absence of contributory negligence on the part of the one claiming damages,[14] and, under some statutory provisions, even where claimant was contributorily negligent,[15] a railroad company may be held liable for any injury to property caused by the negligent or improper operation of its trains,[16] or resulting from the negligent or improper manner of locating, using, or maintaining structures and appurtenances incident to the operation of the road,[17] although they are necessary to its operation,[18] provided the negligence of the company is the proximate cause of the injury,[19] inasmuch as the right of a railroad company to run its engines and trains over its tracks is coupled with the duty so to operate them as not to injure the property of others near the track.[20] So, where a railroad is operated along a street which is also used by the public, the company may be held liable for an injury to personal property lawfully on such street resulting from a failure on its part to exercise ordinary care.[21] Where plaintiff undertakes to show what has been done by other railroad companies as a test or standard of duty for defendant railroad company, it must appear that what is proposed is not only scientifically practicable, but also economically and financially so.[22]

Private rights. A railroad company may not exercise its private rights to the prejudice of others without compensation for the injury occasioned,[23] and where the right exercised is a mere adjunct or incident to the power conferred, but is not necessary to the performance of the duty imposed, it is a private right.[24] Thus, the erection and maintenance of a coal chute is not for the public benefit but for the private convenience of the railroad and is done in the private capacity of the company.[25]

§ 478. —— Occupation or Obstruction of Streets or Highways

a. In general

10. N.J.—Beseman v. Pennsylvania R. Co., 13 A. 164, 50 N.J.Law 235, affirmed 20 A. 169, 52 N.J.Law 221
51 C.J. p. 1137 note 12.

11. Tex.—St. Louis, etc., R. Co. v. Shaw, 92 S.W. 30, 99 Tex. 559, 122 Am.S.R. 663, 6 L.R.A.,N.S., 245.
51 C.J. p. 1137 note 13.

12. Pa.—Buxton v. Baltimore, etc., R. Co., 81 Pa.Super. 490.

Automobile driven by owner's wife
Automobile owner was not entitled to recover for damages to automobile driven by wife and demolished in railroad crossing accident on ground that wife was not husband's agent in driving automobile, where evidence showed no fault on part of railroad. —Martin v. New Orleans, T. & M. Ry. Co., La.App., 158 So. 837

13. W.Va.—Jones v. Virginian Ry. Co., 179 S.E. 71, 116 W.Va. 201.

14. Tenn.—St. Louis & San Francisco Ry. Co., v. Young & Son, 4 Tenn. App. 152.
Tex.—Sisti v. Thompson, 229 S.W.2d 610.
51 C.J. p. 1138 note 23.

15. Fla.—Loftin v. Crowley's Inc., 8 So.2d 909, 150 Fla. 836, 142 A.L.R. 626, certiorari denied 63 S.Ct. 60, 317 U.S. 661, 87 L.Ed. 531.

Statute held valid
Fla.—Loftin v. Crowley's Inc., supra.

16. Pa.—Naugle v. Reading Co., 21 A.2d 109, 145 Pa.Super. 341.
51 C.J. p. 1137 note 14

Ringing bell or sounding whistle
did not necessarily relieve railroad company from negligence for injury to dray used in connection with unloading car, where circumstances were such that signals might not have been heard.—Pittsburgh, etc., R. Co. v. Ives, 40 N.E. 923, 12 Ind.App. 602

17. N.C.—Sarah Good Hosiery Mills v. Carolina, C. & O. Ry., 10 S.E.2d 817, 218 N.C. 277.
51 C.J. p. 1138 note 15.

18. Ky.—Louisville, etc., R. Co. v. Walton, 67 S.W. 988, 24 Ky.L. 9.
51 C.J. p. 1138 note 16.

19. Ark.—Garner v. Missouri Pac. Ry. Co., 195 S.W.2d 39, 210 Ark. 214.

20. Fla.—Benedict Pineapple Co. v. Atlantic Coast Line R. Co., 46 So. 732, 55 Fla. 514, 20 L.R.A.,N.S., 92

21. Neb.—Watson Bros. Transp. Co. v. Chicago, St. P., M. & O. Ry. Co., 25 N.W.2d 396, 147 Neb. 880.

Knowledge of railroad company
(1) Where railroad track was laid out in public street and cars being switched collided with trucks which were lawfully using street, railroad was chargeable with knowledge that vehicular traffic might be using street at point where accident occurred.—Watson Bros. Transp. Co. v. Chicago, St. P., M. & O. Ry. Co., supra

(2) Where street was used by public as a public street with knowledge of local officers and agents of railroad, with respect to personal property railroad owed degree of care suggested by particular circumstances, regardless of whether street was in fact public either by dedication or user, since where railroad, by its conduct, has induced the public to use a way in the belief that it is a street or a public way which all have a right to use and where they suppose they will be safe, railroad owes to public same duty as though such way were in fact a public street; and the liability is coextensive with the inducement or implied invitation.—Southern Ry. Co. v. Liley, 43 S.E.2d 576, 75 Ga.App. 439.

22. U.S.—Bunting v. Pennsylvania R. Co., Pa., 203 F. 193, 121 C.C.A. 399

23. Va.—Chesapeake, etc., R. Co. v. Ricks, 135 S.E. 685, 146 Va. 10

24. Va.—Chesapeake, etc., R. Co. v. Ricks, supra.

25. Va.—Chesapeake, etc., R. Co. v. Ricks, supra.

b. Blocking or delaying work of extinguishing fire

a. In General

Where a railroad is located by lawful authority upon or across a street or highway, the right to operate the road confers no authority to use the street in an unauthorized or improper manner, and private persons may be entitled to recover for any special property damages sustained by reason of such improper use.

Although where a railroad company is authorized to construct and operate a railroad in a street a court may not have authority to restrict the number of trains which may be operated thereon as a condition precedent to the construction of the track,[26] where a railroad is located by lawful authority upon or across a street or highway the right to operate the road confers no authority to use the street in an unauthorized or improper manner,[27] such as converting it into a freight yard, switch yard, or place for storing cars or making up trains,[28] or allowing cars loaded with offensive substances to remain in the streets for an unnecessary and unreasonable length of time,[29] and private persons may be entitled to recover for any special property damages sustained by reason of such improper use.[30] While a private individual may not be entitled to recover where a railroad company wrongfully allows its cars to stand so as to obstruct a public crossing and he has sustained no damage other than the mere delay occasioned to the public generally,[31] a private person may be entitled to recover any special damages sustained by him by reason of the obstruction.[32] Moreover, a railroad company may be held liable for rendering impassable a crossing necessary to a landowner's access to a public road, which access was cut off by the railroad,[33] even though the destruction of the crossing resulted from necessary additions to, or changes in, the track.[34]

Although it has been held that a railroad company is not liable for obstructing a private crossing with its trains unless such obstruction was negligent or unnecessary,[35] it has also been held that the right of a railroad company extends only to the reasonable necessity of the prudent operation of the road, and if it goes beyond this and willfully or negligently obstructs a private crossing, the court may grant the landowner adequate relief.[36] Moreover, one whose private crossing is blocked may not be guilty of contributory negligence in failing to prepare a crossing by which to go around the obstruction, where he was justified in expecting that the obstruction would be removed on notice within a reasonable time or at any time.[37] On the violation of a statute making it a misdemeanor to permit a train to remain standing upon a crossing, a railroad company may be held liable for the injury and damage flowing directly from a breach of such duty as a natural and probable result.[38]

b. Blocking or Delaying Work of Extinguishing Fire

A railroad company may be held liable for injuries to property caused by the negligent interference by its servants with the fire department, if its servants have knowledge of the fire and of the efforts being made to control it, or in the exercise of due care should have had such knowledge.

With respect to the liability of a railroad company for injuries to property caused by the operation of its road, it has been held that such a company has a duty to operate its trains with reasonable regard for the rights of public firemen and private citizens to use the public crossings and streets in order to reach a fire and extinguish it,[39] and also that the exclusive control of a railroad of its right of way is subject to the exigencies of public safety caused by fire and conflagration,[40] so that a railroad company may be held liable for the consequences of the

26. Ky.—Kentucky, etc., Bridge Co. v. Kreiger, 19 S.W. 738, 93 Ky. 243, 14 Ky L 151
51 C.J. p 1138 note 26.

27. W.Va.—Mason v. Ohio River R. Co., 41 S.E. 413, 51 W.Va. 183.
51 C J p 1138 note 27.
Negligent operation of railroad as constituting nuisance see Nuisances § 67.

28. Tenn.—Harmon v. Louisville, etc., R. Co., 11 S.W. 703, 87 Tenn 614.
51 C J. p 1138 note 28.

29. Ind.—Pittsburgh, etc., R. Co v. Welch, 40 N E 650, 12 Ind.App. 433
N.Y.—Colgate v New York Cent., etc., R. Co., 100 N.Y.S. 650, 51 Misc. 503, modified on other grounds 107 N.Y S. 1123, 122 App.Div. 908.

30. D.C.—Neitzey v. Baltimore, etc., R. Co., 16 D.C. 34.
Kan.—Hawks v. Atchison, etc., R. Co., 173 P. 922, 103 Kan. 390, L.R.A.1918F 671.

31. Ky.—Shields v. Louisville, etc., R. Co., 29 S W. 978, 97 Ky. 103, 16 Ky.L. 849, 27 L R.A. 680.

32. Colo.—Jackson v. Kiel, 22 P. 504, 13 Colo. 378, 16 Am S R. 207, 6 L.R.A. 254.
51 C.J p 1138 note 32.

33. Ky.—Chesapeake & O Ry. Co. v. Castle, 56 S W 2d 993, 247 Ky. 203.

34. Ky.—Chesapeake & O. Ry. Co. v. Castle, supra.

35. Ky.—Louisville, etc., R. Co. v. Scomp, 98 S.W. 1024, 30 Ky L 487.

36. Ky.—Zweigart v. Chesapeake, etc., R. Co., 170 S W. 1194, 161 Ky. 463.

37. Tex.—Chicago, etc., R. Co v. Nicholson, Civ.App., 191 S W. 167.

38. Ind.—Cleveland, etc., R. Co v. Tauer, 96 N.E 753, 176 Ind 621, 39 L R A.,N.S, 20.

39. U S.—Felter v. Delaware & H R. Corp., D.C.Pa., 19 F Supp. 852, affirmed, C C A., Delaware & H R. Corp v. Felter, 98 F 2d 868
Mo.—Cottonwood Fibre Co. v. Thompson, 225 S W.2d 702, 359 Mo. 1062.

40. Mich.—Northern Assur. Co. v. New York Cent. R. Co., 260 N.W 763, 271 Mich. 569.

negligent interference by its servants with the fire department, if its servants have knowledge of the fire and of the efforts being made to control it, or in the exercise of due care should have had such knowledge.[41] Thus, where the servants of a railroad company have sufficient knowledge of the facts, the company is under a duty to do that which is reasonably necessary to avoid or mitigate its interference with the extinguishment of a fire and may be held liable for such injuries to property as result from its failure to do so,[42] even though the failure to act on its part does not amount to a refusal to act.[43]

On the other hand, knowledge or notice on the part of the company ordinarily is regarded as essential to liability,[44] since, if any liability is to be imposed on the railroad company, such liability must arise from something done or left undone after those operating the train have knowledge of the existence of the fire,[45] and the persons in charge of the train must have knowledge of the fire and of the fact that by running the train past the crossing or by stopping the train at the crossing the work of extinguishing the fire will be hampered.[46] Although it has been held that the unexplained blocking of a street crossing, resulting in injury from failure of a fire department to reach a fire, in itself establishes negligence,[47] ordinarily a railroad company may not be rendered liable for resulting damages by the mere fact that its blocking of a railroad crossing occasions a delay to fire apparatus.[48]

Violation of state or municipal regulation. Where the violation by a railroad company of a statutory regulation[49] or of a municipal ordinance[50] occasions injury to property through the prevention of the fire department from promptly reaching a fire, the company may be held liable for such injury, although it has been held that a stop at a place prohibited by ordinance, occasioned by the necessity of repairing a broken brake appliance, would not impose liability[51] where the trainmen did not know of the fire[52] and the repair was necessary to avoid the danger of derailment.[53]

Proximate cause. In order that a railroad company may be held liable for injuries to property because it wrongfully blocked or delayed the work of extinguishing a fire, the violation of the statute,[54] or other act of the railroad company complained of,[55] must have been the proximate cause of the injuries sustained.

Contributory negligence. If negligence on the part of the person injured contributes to the injury, he is not entitled to recovery therefor.[56] So, where plaintiff is negligent in failing to have his fire-extinguishing equipment in proper condition for use, it may be sufficient to prevent his recovery.[57]

§ 479. —— Interference with, or Cutting of, Fire Hose

Where a railroad company has actual or imputed notice or warning of the probable presence of a hose across its track, which hose is being employed in the extinguishment of a fire, it must exercise ordinary care in stopping its trains in order to avoid cutting the hose, and it may be held liable for a property loss occurring as a direct result of its interference with the hose.

Where a railroad company has actual or imputed notice or warning of the probable presence of a hose across its track, which hose is being employed in the extinguishment of a fire, it must exercise ordinary care in stopping its trains in order to avoid cutting the hose.[58] Thus it may not run a train

41. Mo.—**Corpus Juris** cited in Cottonwood Fibre Co v. Thompson, 225 S W 2d 702, 705, 359 Mo. 1062.
Neb.—Luedeke v Chicago & N W. Ry Co, 231 N W. 695, 120 Neb. 124, 71 A L R 912
51 C J p 1139 note 38

42. U S.—Felter v Delaware & H R Corp., D C Pa., 19 F Supp 852, affirmed, C.C.A., Delaware & H R Corp v. Felter, 98 F 2d 868

43. U S.—Felter v Delaware & H R. Corporation, D C.Pa., 19 F Supp 852, affirmed, C C.A., Delaware & H R Corp. v. Felter, 98 F 2d 868

44. Mich.—Northern Assur Co v New York Cent R. Co, 260 N.W 763, 271 Mich 569.
Mo.—Cottonwood Fibre Co v Thompson, 225 S W 2d 702, 359 Mo. 1062.
51 C.J. p 1139 note 39.

45. Mo.—Cottonwood Fibre Co. v. Thompson, supra.

46. U S.—Felter v Delaware & H. R Corp, D.C Pa., 19 F.Supp. 852, affirmed, C C A., Delaware & H R. Corp v. Felter, 98 F.2d 868.

47. Cal.—Hanlon Drydock, etc, Co v. Southern Pac. Co., 268 P. 385, 92 Cal.App 230.

48. La.—Boutte v. Morgan's Louisiana, etc., R, etc, Co., 103 So 158, 157 La. 799
51 C J. p 1139 note 40.

49. Ill.—Houren v. Chicago, etc, R. Co, 86 N E. 611, 236 Ill. 620, 127 Am S R 309, 20 L R A ,N.S., 1110.
Ind.—Cleveland, etc., R Co v. Tauer, 96 N.E 758, 176 Ind 621, 39 L R A., N S, 20.

50. Ill.—Houren v. Chicago, etc, R. Co., 86 N E 611, 236 Ill. 620, 127 Am.S R. 309, 20 L.R.A ,N.S., 1110.

51. Kan.—Walker v Missouri Pac R Co, 149 P. 677, 95 Kan 702.

52. Kan.—Walker v. Missouri Pac. R Co, supra.

53. Kan.—Walker v. Missouri Pac R. Co., supra.

54. Ill.—Houren v. Chicago, etc, R Co, 86 N E 611, 236 Ill. 620, 127 Am.S.R 309, 20 L R.A.,N S, 1110.
51 C J. p 1139 note 47.

55. Iowa.—Hartford F Ins. Co. v Mellon, 220 N W. 331, 206 Iowa 182.
51 C J. p 1139 note 48.

56. Tex.—Alexander v. Missouri, etc, R. Co., Civ.App., 287 S.W. 153.
51 C.J p 1139 note 49.

57. Tex.—Alexander v. Missouri, etc., R Co, supra.

58. Md.—McAdoo v. Hanway, 109 A. 446, 135 Md. 656.
51 C.J. p 1140 note 51.
Knowledge may be imputed from

across such a hose if the hose has been, or should have been, observed by the operators of the train,[59] and a railroad company may be held liable for a property loss occurring as a direct result of its interference with the hose either carelessly[60] or willfully.[61] This is true inasmuch as firemen and other persons lawfully engaged in seeking to control or extinguish a fire on property adjoining a railroad right of way have the right to enter upon the right of way and lay a fire hose across the railroad tracks in order to do so,[62] and they are not required to exhaust the possibility of obtaining water on the side of the railroad track nearer the fire before laying a hose across the track.[63]

On the other hand, it has been held that a railroad company may not be charged with negligence in not looking for and discovering a hose laid across its tracks to carry water to extinguish a fire,[64] and a railroad company, in the regular operation of its road, may not be held liable for a property loss resulting from its use of its right of way and tracks across which a fire hose has been laid unless those in charge know or should know of the existence of the fire and that the fire hose is across the tracks.[65]

§ 480. —— Derailment or Loss of Control of Cars

Where a railroad company is guilty of negligence in allowing a locomotive or cars to escape from its control, or to be derailed, it may be held liable for injuries proximately caused thereby to property on adjacent premises, at least where the owner has not been guilty of contributory negligence.

Where a railroad company is guilty of negligence in allowing a locomotive[66] or cars[67] to escape from its control or to be derailed,[68] or where it negligently allows its cars to run off a spur track,[69] it may be held liable for injuries proximately caused thereby to property on adjacent premises, at least where the owner has not been guilty of contributory negligence,[70] even though the property is not legally situated when injured, provided the wrongful act of the owner is not the proximate cause of the injury.[71]

Notwithstanding an agreement between the railroad and the owner of the property exempting the railroad from negligence, as discussed infra § 481, a railroad company may be held liable for an injury which is the result of willful and wanton negligence,[72] or of gross negligence,[73] or of wanton disregard of plaintiff's rights.[74]

§ 481. —— Release from Liability

Where a switch track is constructed for the convenience of the owner of private property, a valid agreement under which the owner of such property releases the railroad company from all liability for damage for injury occasioned to his property by the railroad, while operating locomotives and cars upon such track, will be sustained.

Where a switch track is constructed for the convenience of the owner of private property, a valid agreement under which the owner of such property releases the railroad company from all liability for

knowledge of facts, from which persons of the experience and intelligence of the trainmen would have realized the probable presence of hose lines.—Pennsylvania Co. v. Zahner Metal Sash, etc., Co., C.C.A. Ohio, 273 F. 993—51 C.J. p 1140 note 54.

59. Mich.—Northern Assur. Co. v. New York Cent. R. Co., 260 N.W. 763, 271 Mich. 569.

60. Minn.—Erickson v. Great Northern R. Co., 135 N.W. 1129, 117 Minn 348, 39 L.R.A.,N.S., 237, Ann. Cas 1913D 763.
51 C.J. p 1140 note 52.

61. Md.—McAdoo v. Hanway, 109 A. 446, 135 Md. 656.
Mo.—Hurley v. Missouri, etc., R. Co., 156 S.W. 57, 170 Mo.App. 235.

62. Mich.—Northern Assur. Co. v. New York Cent. R. Co., 260 N.W. 763, 271 Mich. 569.

63. Md.—McAdoo v. Hanway, 109 A. 446, 135 Md. 656.
51 C.J. p 1140 note 56.

64. Mich.—Clark v. Grand Trunk Western R. Co., 112 N.W. 1121, 149 Mich. 400, 12 Ann.Cas. 559.

65. Mich.—Northern Assur. Co. v. New York Cent. R. Co., 260 N.W. 763, 271 Mich. 569.

Signals

Operators of trains running on schedules are not required to heed every one who attempts to communicate with them by signals or otherwise, and signals which are not in usual and ordinary use and convey no message are not notice of anything.—Northern Assur. Co. v. New York Cent. R. Co., supra.

66. Ark.—Missouri Pac. R. Co. v. Geren, 242 S.W. 828, 154 Ark. 369, 24 A.L.R. 122.
51 C.J. p 1140 note 57.

67. N.C.—Southern Mirror Co. v. Norfolk, etc., R. Co., 97 S.E. 47, 176 N.C. 397.
51 C.J. p 1140 note 58.

Statutory limitation of liability

A statute limiting liability of a landowner to a licensee to a willful and wanton injury had reference only to liability of an owner or occupier to one injured because of failure to keep premises in proper repair, and did not apply to an action for damage to an automobile arising out of railroad's negligence in kicking a car into a siding with such force that car jumped bumper block, crashed through loading platform, crossed street, and ran into side of plaintiff's parked automobile.—Southern Ry. Co. v. Liley, 43 S.E.2d 576, 75 Ga.App. 489.

68. La.—Lane v. Illinois Cent. R. Co., 9 So. 560, 43 La.Ann. 833.

69. N.C.—Thomason v. Seaboard Air Line R. Co., 55 S.E. 198, 142 N.C. 300.
51 C.J. p 1140 note 60.

70. Mo.—Kupferle Fdy. Co. v. St. Louis, etc., R. Co., 205 S.W. 57, 275 Mo. 451.
51 C.J. p 1140 note 61.

71. Mo.—Kupferle Fdy. Co. v. St. Louis, etc., R. Co., supra.
51 C.J. p 1140 note 62.

72. U.S.—Westre v. Chicago, etc., R. Co., C.C.A.S.D., 2 F.2d 227.

73. Mich.—Muller v. Hines, 185 N.W. 738, 216 Mich. 664.

74. Mich.—Heppenstall Steel Co. v. Wabash R. Co., 219 N.W. 717, 242 Mich. 464.

damage for injury occasioned to his property by the railroad, while operating locomotives and cars upon such track, will be sustained;[75] and such an agreement, where not ambiguous, will not be construed more strongly against the railroad company where the railroad company is the party making the contract.[76]

§ 482. Actions

a. In general
b. Pleading
c. Evidence
d. Trial

a. In General

The form of action for injury to property by reason of the operation of a railroad in a public street has been held to be an action on the case, notwithstanding the fee to the center of the street may be in the adjoining owners.

The form of action for injury to property by reason of the operation of a railroad in a public street has been held not to be an action of trespass but an action on the case, notwithstanding the fee to the center of the street may be in the adjoining owners.[77]

Time to sue and limitations. While it has been held that any cause of action for damages to adjoining property incident to the mere operation of a railroad arises as soon as the road is put in operation and that the statute of limitations begins to run from that date,[78] it has also been held that, as to injuries resulting from an improper or negligent operation, the cause of action does not accrue until the wrongful act is done and the limitation runs only from that time.[79]

b. Pleading

In an action for injury to property caused by the operation of a railroad, the plaintiff must allege with reasonable definiteness and certainty every fact necessary to constitute a cause of action.

The general rules applicable to the pleadings in civil actions ordinarily apply to the pleadings in an action for injury to property caused by the operation of a railroad.[80] Thus plaintiff must allege with reasonable definiteness and certainty every fact necessary to constitute a cause of action,[81] as, for example, in actions for damages for blocking a crossing so as to delay a fire department,[82] or for interfering with a fire hose laid across the track,[83] or for injury from a car leaving the tracks,[84] or by reason of injury from noise, vibration, smoke, and similar matters.[85]

In an action for a nuisance, if the acts alleged as constituting the nuisance are acts which the company has a right under its charter to do, if done in a legal and proper manner, the complaint must show that such acts were done in a negligent, unlawful, or improper manner;[86] and a complaint which alleges negligence in a general way without setting forth with a reasonable degree of particularity the things done or omitted, so as to show a breach of duty, has been held defective and subject to demurrer.[87] In an action for injury to property where the circumstances under which it occurred impose no duty on plaintiff other than to remain passive, an express allegation that it occurred without any contributory negligence on his part has been held unnecessary.[88]

75. Mo.—Bates Coal, Min., etc., Co. v. Missouri Pac. R. Co., 296 S.W. 1049, 222 Mo.App. 221.

76. Mo.—Bates Coal, Min., etc., Co. v. Missouri Pac. R. Co., supra.

77. Ky.—Jeffersonville, etc., R. Co. v. Esterle, 13 Bush 667.

78. Ky.—Louisville, etc., R. Co. v. Orr, 15 S.W. 8, 91 Ky. 109, 12 Ky. L. 756.
Limitations in actions for injuries to property generally see Limitations of Actions §§ 78, 88.

79. Tex.—Schueller v. San Antonio, etc., R. Co., 102 S.W. 922, 46 Tex. Civ.App. 444.
51 C.J. p. 1141 note 72.

80. Ga.—Southern Ry. Co. v. Liley, 43 S.E.2d 576, 75 Ga.App. 489—Lentz v. E. T. Allen Co., 31 S.E.2d 610, 71 Ga.App. 599.
La.—Louisiana Farms Co. v. Yazoo & M. V. R. Co., 134 So. 747, 172 La. 569.
Wash.—Coleman v. Hammond Lumber Co., 294 P. 968, 160 Wash. 170.
Amendment of answer held proper.
Wash.—Coleman v. Hammond Lumber Co., 294 P. 968, 160 Wash. 170.

81. Ga.—Lentz v. E. T. Allen Co., 31 S.E.2d 610, 71 Ga.App. 599—Callaway v. Zittrouer, 25 S.E.2d 311, 69 Ga.App. 338.

82. Ind.—Cleveland, etc., R. Co. v. Tauer, 96 N.E. 758, 176 Ind. 621, 39 L.R.A.,N.S., 20.
51 C.J. p. 1141 note 76.

83. Mo.—Hurley v. Missouri, etc., R. Co., 156 S.W. 57, 170 Mo.App. 235.
51 C.J. p. 1141 note 77.

84. Ga.—Southern Ry. Co. v. Liley, 43 S.E.2d 576, 75 Ga.App. 489.
51 C.J. p. 1141 note 78.
Allegations held sufficient.
(1) Generally.—Compton v. Missouri Pac. R. Co., 182 S.W. 1055, 194 Mo.App. 35—51 C.J. p. 1141 note 78 [a].
(2) As against special demurrer.—Southern Ry. Co. v. Liley, 43 S.E.2d 576, 75 Ga.App. 489.

85. Tex.—Dallas Terminal R., etc., Co. v. Ardrey, Civ.App., 146 S.W. 616.
51 C.J. p. 1141 note 79.

86. N.C.—Taylor v. Seaboard Air Line R. Co., 59 S.E. 129, 145 N.C. 400, 122 Am.S.R. 455.
Pleadings in actions to recover damages resulting from nuisance generally see Nuisances § 147.

87. Ill.—Detroit v. Wabash Refining Co., 223 Ill.App. 246.
N.C.—Thomason v. Seaboard Air Line R. Co., 55 S.E. 205, 142 N.C. 318.

88. Ind.—Pittsburgh, etc., R. Co. v. Welch, 40 N.E. 650, 12 Ind.App. 433.

c. Evidence

In an action for injury to property resulting from the operation of a railroad, the plaintiff must establish his case by a preponderance of the evidence.

The general rules applicable to the evidence in civil actions apply to the evidence in an action for injury to property resulting from the operation of a railroad,[89] and plaintiff has the burden of proving those facts which are essential to recovery.[90] Although under the doctrine of res ipsa loquitur there is a presumption that an injury to property was due to the negligence of a railroad company if it was caused by an instrumentality solely under the control of the company,[91] such presumption may be satisfactorily met by a showing that defendant company exercised all reasonable care and caution to prevent the damage.[92] Moreover, in a suit for damages caused by smoke, soot, and oil, the rule of res ipsa loquitur has been held not applicable where the evidence shows that the emitting of smoke, soot, and oil happened in the usual course of things, even though proper care was used.[93]

Under some statutory provisions, where property is damaged by the running of the locomotives, cars, or other machinery of a railroad company, there is a presumption of negligence on the part of the company[94] unless the company shows that its agents exercised all ordinary and reasonable care and diligence,[95] but such a statutory inference of negligence has been held to be at an end where the railroad company has introduced some material evidence tending to show reasonable care on its part.[96]

In an action against a railroad company for blocking a fire department crossing, the burden is on plaintiff to establish the extent of his injury attributable to the negligence of the company;[97] and in jurisdictions which require plaintiff to prove his freedom from contributory negligence plaintiff must prove freedom from contributory negligence.[98] However, it has also been held that where the crossing has been obstructed by the railroad for an unreasonable length of time, the burden is shifted to the railroad company to satisfy the jury that the obstruction could not have been avoided by the exercise of proper care and diligence,[99] inasmuch as a failure or refusal on the part of the employees of a railroad company to take any action to remove the obstruction within an extended period of time, in the absence of an explanation, has been held to raise a presumption of negligence.[1]

Admissibility. In order to be admissible, the proffered evidence must be competent, material, and relevant to the issues.[2] Thus evidence of similar injuries to the property of other persons[3] or of personal injuries due to the negligent operation of the trains of the railroad company[4] has been held not admissible in such an action. Also, evidence that plaintiff's buildings projected upon the sidewalk of the street so that they were themselves a nuisance has been held irrelevant.[5] In an action based on the negligent construction of an engine house, it has been held that evidence that the defect complained of was remedied after suit was instituted is not competent as an admission of negligence, but that it is competent as tending to show that such defect was the cause of the injury complained of.[6]

Weight and sufficiency. The general rules relative to the weight and sufficiency of the evidence in civil actions apply.[7] Thus plaintiff must properly establish the essential elements of his case in an action against a railroad company for injuries to his property arising from the blocking of a fire

89. Miss.—New Orleans & Northeastern R. Co. v. Bryant, 46 So. 2d 433, 209 Miss. 193.

90. Ga.—Parrish v. Southwestern R. Co., 197 S.E. 66, 57 Ga. App. 847.

91. Mo.—Compton v. Missouri Pac. R. Co., 182 S.W. 1055, 194 Mo. App. 35.
51 C. J. p. 1141 note 88.

92. Ga.—Central of Georgia R. Co. v. Cox, 122 S.E. 647, 32 Ga. App. 49.

93. Tex.—Texas & N. O. R. Co. v. Schreiber, Civ. App., 104 S.W. 2d 929.

94. Fla.—Loftin v. Crowley's, Inc., 8 So. 2d 909, 150 Fla. 836, 142 A.L.R. 626, certiorari denied 63 S.Ct. 60, 317 U.S. 661, 87 L.Ed. 531.
Ga.—Parrish v. Southwestern R. Co., 197 S.E. 66, 57 Ga. App. 847.
Statute held valid
Fla.—Loftin v. Crowley's Inc., 8 So. 2d 909, 150 Fla. 836, 142 A.L.R. 626, certiorari denied 63 S.Ct. 60, 317 U.S. 661, 87 L.Ed. 531.—Atlantic Coast Line R. Co. v. Voss, 186 So. 199, 136 Fla. 32.

95. Fla.—Loftin v. Crowley's Inc., 8 So. 2d 909, 150 Fla. 836, 142 A.L.R. 626, certiorari denied 63 S.Ct. 60, 317 U.S. 661, 87 L.Ed. 531.

96. Fla.—Atlantic Coast Line R. Co. v. Voss, 186 So. 199, 136 Fla. 32.
Reason for rule
The statute has served its purpose when it compels the railroad to explain how the injury occurred.—Parrish v. Southwestern R. Co., 197 S.E. 66, 57 Ga. App. 847.

97. Tex.—Gulf, etc., R. Co. v. Saunders, Civ. App., 295 S.W. 283.

98. Iowa.—Eclipse Lumber Co. v. Davis, 207 N.W. 238, 201 Iowa 1283, opinion corrected and rehearing denied 209 N.W. 307.

99. U.S.—Felter v. Delaware & H. R. Corp., D.C.Pa., 19 F.Supp. 852, affirmed, C.C.A., Delaware & H. R. Corp. v. Felter, 98 F.2d 868.

1. U.S.—Felter v. Delaware & H. R. Corp., D.C.Pa., 19 F.Supp. 852, affirmed, C.C.A., Delaware & H. R. Corp. v. Felter, 98 F.2d 868.

2. Md.—McAdoo v. Hanway, 109 A. 446, 135 Md. 656.
51 C. J. p. 1141 note 91.

3. Ill.—Kuhn v. Illinois Cent. R. Co., 111 Ill. App. 323.
Ky.—Jeffersonville, etc., R. Co. v. Esterle, 13 Bush 667.

4. Ky.—Jeffersonville, etc., R. Co. v. Esterle, supra.

5. Ga.—Macon v. Harris, 75 Ga. 761.

6. Ill.—Kuhn v. Illinois Cent. R. Co., 111 Ill. App. 323.

7. Miss.—New Orleans & Northeastern R. Co. v. Bryant, 46 So. 2d 433, 209 Miss. 193.
Tex.—Texas & N. O. R. Co. v. Schreiber, Civ. App., 104 S.W. 2d 929.

department crossing,[8] or from the cutting of a fire hose laid across the tracks of the railroad,[9] or for damages from the obstruction of a private crossing,[10] or for damages caused by the cars of a railroad company leaving the tracks[11] or escaping from control.[12] The same rule also applies in an action against a railroad company for injuries to property resulting from the company permitting oil to escape from its premises and flow near plaintiff's home,[13] as well as in an action against a railroad company for damages caused by noises, vibrations, smoke, cinders and other matters.[14]

d. Trial

The general rules applicable to the trial of civil actions apply to the trial of an action for injury to property resulting from the operation of a railroad.

The general rules applicable to the trial of civil actions apply to the trial of an action for injury to property resulting from the operation of a railroad.[15] Accordingly, in such an action, questions of law should be determined by the court,[16] and questions of facts should be submitted to the jury.[17]

This rule has been applied in actions for damages for blocking a crossing so as to delay a fire department,[18] or for running over, or interfering with, a fire hose laid across the track,[19] or from derailment or loss of control of cars,[20] or from failure to stop a flow of oil from a wrecked train

8. Iowa—Eclipse Lumber Co v. Davis, 195 N.W. 337, 196 Iowa 1349
51 C J p 1142 note 97.

Evidence held sufficient

(1) Generally—New Orleans & Northeastern R Co v Bryant, 46 So 2d 433, 209 Miss 193—51 C.J. p 1142 note 97 [a].

(2) To justify finding that large part of house and its contents could have been saved if fire engines had not been delayed for unreasonable length of time by train obstructing crossing—Felter v Delaware & H R Corp, D C Pa, 19 F Supp 852, affirmed, C C A., Delaware & H R. Corp v Felter, 98 F.2d 868

(3) To sustain finding that crossing was blocked longer than five minutes after fire trucks approached the crossing—New Orleans & Northeastern R. Co. v Bryant, 46 So 2d 433, 209 Miss 193

(4) To sustain finding that train crew knew that there was a fire and that it was holding up the fire trucks—New Orleans & Northeastern R Co. v Bryant, supra

9. Minn—Bodkin v Great Northern R Co, 144 N W 937, 124 Minn 219, Ann Cas 1915B 705.
51 C J p 1142 note 98.

10. Cal.—Matoza v Southern Pac. Co, 211 P 252, 59 Cal App. 636.
51 C J p 1142 note 99

11. Mich—Muller v Hines, 185 N W 738, 216 Mich 664.
51 C J. p 1142 note 1.

12. N C—Southern Mirror Co v. Norfolk, etc, R Co, 97 S E 47, 176 N C 397.
51 C.J. p 1142 note 2.

13. Tex—Houston, etc, R Co v. Crook, 120 S W. 594, 56 Tex Civ. App 28.
51 C J. p 1142 note 3

14. Tex.—Texas & N O R. Co v. Schreiber, Civ App, 104 S W 2d 929.
51 C J p 1142 note 4.

Evidence held insufficient

(1) Generally—Chesapeake, etc., R Co v. Scott, 247 S W. 735, 197 Ky 636.

(2) To support finding that smoke, soot, and oil were emitted from engine while it remained idle on track—Texas & N. O R Co. v Schreiber, Tex Civ App, 104 S W.2d 929

(3) To show that emitting of smoke, soot, and oil was caused by negligence of employees in charge of engine.—Texas & N. O R. Co. v Schreiber, supra

15. Mo—Cottonwood Fibre Co. v. Thompson, 225 S.W 2d 702, 359 Mo 1062
Pa—Cusatis v. Lehigh Valley R. Co, Com.Pl, 36 Luz Leg Reg 417, affirmed 31 A.2d 572, 152 Pa Super. 193.

16. Mo—Cottonwood Fibre Co. v. Thompson, 225 S W 2d 702, 359 Mo 1062.

17. U S—Delaware & H R Corp. v Felter, C C A Pa, 98 F 2d 868
Ark—Missouri Pac R Co v. Hopper, 185 S W 2d 88, 208 Ark 128.
Pa—Cusatis v. Lehigh Valley R Co, Com Pl, 36 Luz.Leg Reg 417, affirmed 31 A 2d 572, 152 Pa Super 193

Questions held for jury

(1) Negligence of defendant—Hancock v. Union Pac. R. Co, Mo App, 231 S W 2d 225

(2) Contributory negligence of claimant
Ark—Missouri Pac R Co v Hopper, 185 S W 2d 88, 208 Ark 128.
Mo—Hancock v Union Pac R Co. supra
Neb—Watson Bros Transp. Co v. Chicago, St P, M & O Ry. Co., 25 N W 2d 396, 147 Neb 880

(3) Amount of damages suffered—Chesapeake, etc, R Co v Ricks, 135 S E 685, 146 Va. 10—51 C J. p 1143 note 12

18. Miss—New Orleans & Northeastern R Co v Bryant, 46 So 2d 433, 209 Miss. 193.
Mo—Cottonwood Fibre Co. v. Thompson, 225 S W 2d 702, 359 Mo. 1062
51 C J p 1142 note 7.

Questions held for jury

(1) Whether railroad company was guilty of negligence in blocking crossing—Delaware & H R Corp. v. Felter, C.C A Pa., 98 F.2d 868

(2) Whether there was a causal connection between the negligence of the railroad company and damage sustained—New Orleans & Northeastern R Co v Bryant, 46 So 2d 433, 209 Miss. 193

(3) Question of, or extent of, damages resulting from negligence of railroad company
U S—Felter v. Delaware & H. R Corp., D C Pa., 19 F.Supp 852, affirmed, C C A., Delaware & H. R Corp. v. Felter, 98 F 2d 868
Miss—New Orleans & Northeastern R. Co v. Bryant, supra

(4) Other questions held for jury—Globe Malleable Iron, etc, Co. v New York Cent, etc, R Co, 124 N. E 109, 227 N.Y. 58, 5 A L.R. 1648—51 C.J p 1142 note 7 [a].

Evidence held insufficient for jury

Mo—Cottonwood Fibre Co v Thompson, 225 S.W.2d 702, 359 Mo 1062.

19. Mich—Northern Assur Co v New York Cent R. Co, 260 N W 763, 271 Mich 569
51 C.J. p 1142 note 8.

Evidence held insufficient for jury

Evidence that engineer, who did not know of existence of fire or that fire hose was laid across tracks, failed to stop after man waved something—Northern Assur. Co v New York Cent R. Co, supra

20. Mo—Kupferle Foundry Co v St Louis, etc, R. Co, 205 S W 57, 275 Mo 451
51 C J p 1142 note 9.

carrying petroleum,[21] or from soot, smoke, cinders, water and noise.[22]

Instructions. The general rules applicable to the instructions in civil actions apply to the instructions in actions for injury to property resulting from the operation of a railroad.[23] So the instructions should conform and be confined to the issues made by the pleadings and evidence, and on which the case has been tried.[24]

Verdict and findings. The rules applicable to the verdict and findings in civil actions generally apply to the verdict and findings in an action for injury to property resulting from the operation of a railroad.[25]

§ 483. —— Damages

A person is entitled to just compensation for any property loss he may sustain from the unlawful or negligent operation of a railroad.

A person is entitled to just compensation for any property loss he may sustain from the unlawful or negligent operation of a railroad.[26] While damages which are remote, problematical, and speculative may not be recovered,[27] the mere fact that their extent cannot be accurately measured will not relieve the railroad company from liability.[28] Where the wrongful acts complained of are of a temporary nature, the railroad company may not be held liable in damages for the cost of a permanent change in the premises to accommodate them to the conditions temporarily created.[29] In case of temporary injury, the measure of damages is the diminished rental value of the premises,[30] and where, as a direct result of the wrongful acts of a railroad company in the emission of smoke, the walls of plaintiff's premises are blackened the damage occasioned thereby may be considered apart from the diminution of the rental value of the premises.[31]

XIV. FIRES

A. DUTIES AND LIABILITIES

§ 484. In Absence of Statute

a. Duties and liabilities in general
b. Degree of care required

a. Duties and Liabilities in General

Railroad companies are liable in damages for injury caused by fire resulting from the negligent operation of their roads.

In the absence of statutory regulation of the subject, railroad companies are liable in damages for destruction or injury caused by fire resulting from the negligent operation of their roads.[32] However, railroad companies are not insurers against loss by fire;[33] negligence is an essential element of liabil-

Question of negligence may be ruled on by court as one of law where the evidence of facts raising a presumption of negligence is undisputed and no effort is made to rebut the presumption.—Texas, etc, R. Co. v. Corr, Tex.Civ.App., 130 S.W. 185—51 C J. p 1143 note 13 [a].

21. Tex.—Houston, etc., R. Co. v. Anderson, 98 S.W. 440, 44 Tex.Civ. App. 394.
51 C.J. p 1143 note 10.

22. Ky.—Cincinnati, etc, R Co. v. McQuaid, 189 S W. 423, 172 Ky. 495
51 C.J. p 1143 note 11.

23. Ga.—Parrish v. Southwestern R. Co, 197 S.E. 66, 57 Ga App. 847. Miss.—New Orleans & Northeastern R. Co v. Bryant, 46 So.2d 433, 209 Miss 193.
51 C J. p 1143 note 15.

Instructions held proper or not misleading
Ga.—Parrish v. Southwestern R. Co, 197 S E 66, 57 Ga App. 847.
Miss.—New Orleans & Northeastern R Co. v. Bryant, 46 So.2d 433, 209 Miss. 193.
51 C.J. p 1143 note 15 [a].

Instructions held improper or properly refused
Ala.—Newsome v. Louisville & N. R. Co., 110 So 53, 21 Ala App. 555.
51 C.J. p 1143 note 15 [b].

24. Mo.—Hancock v Union Pac. R. Co., App., 231 S.W.2d 225

Instruction held not broader than pleadings or evidence
Mo.—Hancock v. Union Pac. R. Co., supra

25. Iowa.—Eclipse Lumber Co v. Davis, 207 N W 238, 201 Iowa 1283, opinion corrected, rehearing denied 209 N.W. 307.
51 C J p 1143 note 16.

26. Va.—Chesapeake, etc., R. Co. v. Ricks, 135 S.E 685, 146 Va. 10.
51 C J. p 1143 note 18.

Tractor and trailer
(1) Where at the time trailer was destroyed it had been used for only a few days and had been driven only a few miles, and there was nothing to indicate that value of trailer was less than cost, owner was entitled to recover entire cost of trailer without reference to use that had been made of it.—Chesapeake & O. Ry Co. v. Elk Refining Co., C.A.W Va, 186 F.2d 30

(2) In action for destruction of trailer and damage to tractor, owner was entitled to recover for expense of hiring another tractor-trailer unit to take place of that which was damaged until tractor could be repaired and another trailer could be obtained.—Chesapeake & O. Ry. Co. v. Elk Refining Co., supra.

27. Iowa.—Eclipse Lumber Co. v. Davis, 195 N W. 337, 196 Iowa 1349.

28. Cal.—Hanlon Drydock, etc, Co v Southern Pac Co, 268 P. 385, 92 Cal App 230
51 C J p 1143 note 20.

29. Mass.—Matthews v. New York Cent, etc, R. Co, 120 N E 185, 231 Mass. 10.
51 C J. p 1143 note 22.

30. Mass.—Matthews v New York Cent, etc, R. Co, supra.

31. Mass.—Matthews v. New York Cent., etc., R. Co., supra.

32. Ga.—Pollard v. Walton, 190 S. E 396, 55 Ga.App 353.
51 C.J. p 1144 note 26.

33. Ga.—Pollard v. Walton, supra.
51 C.J. p 1145 note 38.

ity[34] and is the gist of the action,[35] and without negligence the injury is damnum absque injuria.[36] Where the injury is not due to the negligence of the company, the loss must be borne by the owners as one of the incidents of the operation of railroads.[37]

A railroad is not liable for injury from fire caused by licensees on its property unless their acts constitute a nuisance which the railroad knowingly suffers to remain.[38]

b. Degree of Care Required

The degree of care to be exercised by a railroad company to avoid injury to persons or property by fires is ordinary or reasonable care, which is dependent on the circumstances of the particular case

The degree of care to be exercised by a railroad company to avoid injury to persons or property by fires is ordinary or reasonable care,[39] that is to say, such care and caution as an ordinarily prudent person would have exercised under the same or similar circumstances.[40] However, "ordinary care" being a relative term,[41] the degree of care to be exercised depends on the circumstances of the particular case,[42] and must be commensurate with, or in proportion to, the danger to be apprehended of inflicting injury on the person or property of another.[43] What is care in one case may be negligence in another, where the danger is greater and more care is required.[44] In proportion as the hazards increase, there should be a corresponding increase in the care exercised.[45] It has also been held that the necessities of the railway service and the duty of the company to its patrons and the public must be taken into consideration in determining what is reasonable care.[46]

Keeping in view these principles in order to determine whether reasonable care has been exercised, due regard must be had to the dryness of the season,[47] the strength and direction of the wind,[48] the nature[49] and proximity of the property liable to be damaged,[50] and the character of the vegetation of the territory through which the road runs, and its combustible nature.[51]

§ 485. Under Statutes

In many jurisdictions the doctrine that negligence is an indispensable element of liability of a railroad for injuries by fires has been abrogated either wholly or in part by statute

The rule of liability for injuries by fires set out by railroad companies prevailing in the absence of statutory regulation discussed supra § 484, has been recognized by statute in some jurisdictions.[52] However, in other jurisdictions, the doctrine that negligence is an indispensable element of liability has been abrogated either wholly or in part by statute,[53] and absolute liability is imposed on railroad companies for injuries to property from fires result-

34. Ga.—Pollard v. Walton, supra
Ky.—Withers v Illinois Cent. R. Co., 207 S.W.2d 33, 306 Ky. 487—Illinois Cent. R. Co. v. Roark's Adm'r, 58 S.W.2d 648, 248 Ky. 398.
Pa.—Ruby v. Pennsylvania R. Co., Com. Pl., 61 York Leg. Rec. 17.
Tenn.—Yearwood, for Use of Am. Ins. Co. of Newark, N. J., v. Louisville & N. R. Co., 222 S.W.2d 33, 32 Tenn. App. 115
51 C.J. p. 1144 note 35.

35. Ga.—Pollard v. Walton, 190 S.E. 396, 55 Ga. App. 353.
51 C.J. p. 1145 note 37.

36. N.C.—Deppe v. Atlantic Coast Line R. Co., 70 S.E. 622, 154 N.C. 523

37. S.D.—White v. Chicago, etc., R. Co., 47 N.W. 146, 1 S.D. 326, 9 L.R.A. 824
51 C.J. p. 1145 note 39.

38. Or.—Aune v. Oregon Trunk Ry., 51 P.2d 663, 151 Or. 622.
Hoboes in freight cars
Mere presence of hobos in freight cars standing on siding at time fire started in cars and destroyed plaintiff's property was insufficient to constitute nuisance rendering railroad liable for acts of such persons.
—Aune v. Oregon Trunk Ry., supra.

39. Ga.—Pollard v. Walton, 190 S.E. 396, 55 Ga. App. 353
51 C.J. p. 1145 note 42.

40. Ga.—Pollard v. Walton, supra.
51 C.J. p. 1145 note 43.

41. Minn.—Riley v. Chicago, etc., R. Co., 74 N.W. 171, 71 Minn. 425.
51 C.J. p. 1146 note 44

42. Ga.—Pollard v. Walton, 190 S.E. 396, 55 Ga. App. 353
51 C.J. p. 1146 note 45.

43. Ga.—Pollard v. Walton, supra
51 C.J. p. 1146 note 46.

44. Va.—Brighthope R. Co. v. Rogers, 76 Va. 443, 450
51 C.J. p. 1146 note 47

45. Ga.—Pollard v. Walton, 190 S.E. 396, 55 Ga. App. 353.
51 C.J. p. 1146 note 48
Dry season and high wind
When the fire occurs at a very dry time and when there is a high wind, greater vigilance is demanded than might ordinarily have been required.
—Grand Trunk R. Co. v. Richardson, Vt., 91 U.S. 454, 23 L.Ed. 356—51 C.J. p. 1146 notes 49, 50.

46. Minn.—Riley v. Chicago, etc., R. Co., 74 N.W. 171, 71 Minn. 425.

47. Ga.—Pollard v. Walton, 190 S.E. 396, 55 Ga. App. 353.
51 C.J. p. 1146 note 49.

48. Ga.—Pollard v. Walton, supra.
51 C.J. p. 1146 note 50

49. Nev.—Longabaugh v. Virginia City, etc., R. Co., 9 Nev. 271

50. Ga.—Pollard v. Walton, 190 S.E. 396, 55 Ga. App. 353.

51. Minn.—Riley v. Chicago, etc., R. Co., 74 N.W. 171, 71 Minn. 425
51 C.J. p. 1146 note 53.

52. Kan.—St. Louis, etc., R. Co. v. Madden, 93 P. 586, 77 Kan. 80.
51 C.J. p. 1146 note 58.

53. U.S.—Kansas City Southern Ry. Co. v. New England Fire Ins. Co., C.C.A.-Ark., 133 F.2d 973—Frazer-Patterson Lumber Co. v. Southern Ry. Co., D.C.S.C., 79 F.Supp. 424.
Mass.—Young v. New York, N. H. & H. R. Co., 174 N.E. 318, 273 Mass. 567
Mo.—Gaddy v. Kurn, App., 187 S.W.2d 858.
Okl.—Midland Valley R. Co. v. Barton, 129 P.2d 1007, 191 Okl. 359.
S.C.—Mellette v. Atlantic Coast Line R. Co., 186 S.E. 545, 181 S.C. 62.
Va.—Southern Ry. Co. v. Barker, 4 S.E.2d 395, 173 Va. 313—Southern Ry. Co. v. American Peanut Corporation, 164 S.E. 261, 158 Va. 359
51 C.J. p. 1147 note 59.
The legislature may make railroads absolutely liable for damages

ing from the operation of their roads, however they may be caused,[54] or absolute liability is imposed for injuries from fires communicated by locomotives,[55] or for injuries from fires originating on the railroad's lands caused by operating their roads,[56] or for injuries by fire communicated by locomotives or originating within the limits of the right of way in consequence of the act of its authorized agents or employees.[57]

A statute making a company liable for injuries to property by fire communicated by a locomotive unless due diligence is used and suitable expedients employed to prevent such injury does not make a railroad company liable if it is not in fault.[58] It has been held that a statute providing for absolute liability irrespective of negligence of a person setting a fire in woods, marshes, or prairies contemplates a direct "setting on fire" not the result of accident that cannot be avoided, and does not render liable a railroad company from whose engine fire escaped in the absence of any defect in the construction of the engine or lack of care or skill in operating it.[59]

§ 486. —— Validity of Statutes

Statutes which eliminate negligence as an indispensable element of liability of a railroad for injuries from fires have been upheld as a valid exercise of the police power.

Statutes eliminating negligence as an indispensable element of liability have been frequently assailed as in violation of the organic law of the state and federal government, but their validity has been uniformly upheld.[60]

Thus, it has been held that these statutes do not impair the obligation of contracts,[61] or abridge the privileges or immunities of citizens of the United States,[62] or violate a state constitutional provision which prohibits discrimination and unequal restraints and disqualifications.[63] These statutes have been sustained on the ground that their enactment is a valid exercise of the police power,[64] although this has been denied in a decision in which such a statute was nevertheless upheld on other grounds.[65] Also, these statutes have been held not to contravene a state constitutional provision declaring private property only subservient to the public welfare and aside from that inviolate.[66]

§ 487. —— Nature, Construction, and Operation of Statutes in General

Statutes which eliminate negligence as an essential element of liability of a railroad for injuries from fires are generally held to be remedial and are liberally construed.

Although there is some authority to the effect that statutes which eliminate negligence as an essential element of liability are to be strictly construed because of the fact that they create a special and exceptional liability,[67] the weight of authority is that such statutes are not penal but remedial in their nature,[68] and, as such, are to be construed

from fire originating from the operation of the road.—Sunlight Carbon Co. v. St. Louis & S. F. R. Co., C.C.A. Okl., 15 F.2d 802.

54. U.S.—Kansas City Southern Ry. Co. v. New England Fire Ins. Co., C.C.A. Ark., 133 F.2d 973.
Okl.—Midland Valley R. Co. v. Barton, 129 P.2d 1007, 191 Okl. 359.
51 C.J. p. 1147 note 60, p. 1148 note 71.

55. U.S.—Fraser-Patterson Lumber Co. v. Southern Ry. Co., D.C.S.C., 79 F.Supp. 424.
Mass.—Young v. New York, N. H. & H. R. Co., 174 N.E. 318, 273 Mass. 567.
Mo.—Gaddy v. Kurn, App., 187 S.W.2d 858.
Pa.—Commonwealth by Dept. of Justice for and on behalf of Dept. of Forests and Waters v. Schwalm, 45 Sch.Leg.Rec. 200, 71 Pa.Dist. & Co., 113, 12 Monroe L.R. 65.
S.C.—Mellette v. Atlantic Coast Line R. Co., 186 S.E. 545, 181 S.C. 62.
Va.—Southern Ry. Co. v. American Peanut Corporation, 164 S.E. 261, 158 Va. 359.
51 C.J. p. 1147 notes 62–65, p. 1148 notes 66–70, 72–74.

56. Ohio.—Lake Erie, etc., R. Co. v. Falk, 56 N.E. 1020, 62 Ohio St. 297.
51 C.J. p. 1148 note 76.

Defective tank car
U.S.—Dickelman Mfg. Co. v. Pennsylvania R. Co., D.C.Ohio, 34 F.2d 70.

57. U.S.—Fraser-Patterson Lumber Co. v. Southern Ry. Co., D.C.S.C., 79 F.Supp. 424.
S.C.—Mellette v. Atlantic Coast Line R. Co., 186 S.E. 545, 181 S.C. 62.
51 C.J. p. 1148 note 77.

58. Vt.—Ide v. Boston, etc., R. Co., 74 A. 401, 83 Vt. 66.

59. Kan.—Missouri, etc., R. Co. v. Davidson, 14 Kan. 349.

60. U.S.—Dickelman Mfg. Co. v. Pennsylvania R. Co., D.C.Ohio, 34 F.2d 70.
Okl.—Schaff v. Coyle, 249 P. 947, 121 Okl. 228.
Pa.—Commonwealth by Dept. of Justice for and on behalf of Dept. of Forests and Waters v. Schwalm, 45 Sch.Leg.Rec. 200, 71 Pa.Dist. & Co., 113, 12 Monroe L.R. 65.
51 C.J. p. 1148 note 84.

Statutes as violating equal protection clause see Constitutional Law § 555.

61. Conn.—Grissell v. Housatonic R. Co., 9 A. 137, 54 Conn. 447, 1 Am.S.R. 138, error dismissed 11 S.Ct. 1022, 140 U.S. 684, 35 L.Ed. 595.
51 C.J. p. 1148 note 85.

62. S.C.—McCandless v. Richmond, etc., R. Co., 16 S.E. 429, 38 S.C. 103, 18 L.R.A. 440.

63. S.C.—McCandless v. Richmond, etc., R. Co., supra.

64. Ind.—Pittsburgh, etc., R. Co. v. Chappell, 106 N.E. 403, 183 Ind. 141, Ann.Cas.1918A 627.
51 C.J. p. 1149 note 92.

65. S.C.—McCandless v. Richmond, etc., R. Co., 16 S.E. 429, 38 S.C. 103, 18 L.R.A. 440.

66. Ohio.—Lake Erie, etc., R. Co. v. Falk, 16 Ohio Cir.Ct. 125, 8 Ohio Cir.Dec. 765.

67. S.C.—Hunter v. Columbia, etc., R. Co., 19 S.E. 197, 41 S.C. 86.

68. U.S.—Dickelman Mfg. Co. v. Pennsylvania R. Co., D.C.Ohio, 34 F.2d 70.
51 C.J. p. 1149 note 96.

liberally,[69] so as to secure to the parties injured an indemnity from those who reap the advantages and profits arising from the dangerous mode of locomotion, by means of which buildings and other property are destroyed.[70]

The liability imposed by these statutes has been described as a liability without fault,[71] and their effect is to make railroad companies insurers against damages caused by fire originating in the manner therein designated,[72] which liability is not affected by the fact that the owner of the property burned has collected insurance on it.[73]

In some jurisdictions these statutes are held not to supersede the right to bring an action at common law against railroad companies for injuries to property by fires caused by their negligence,[74] the statutes, it is said, merely supplementing the common-law liability by making the liability not dependent on the negligence of the companies;[75] but there are decisions in other jurisdictions at variance with this rule.[76]

A statute imposing absolute liability on railroad companies for property injured by fires communicated by a railroad is limited to liability for property destroyed, and does not authorize a recovery for personal injuries or death resulting from a fire started by a locomotive without proof of negligence.[77]

Property owners, within a statute providing that a railroad company shall be liable to pay property owners for all damages by fire from its engines, include not only those whose lands are traversed by the roadbed, but also those whose lands are sufficiently near thereto to be damaged by such fire.[78]

Railroads within statutes. The statutes apply to railroad companies which obtain their charters before, as well as after, their passage,[79] and when the right of way of the company was acquired by deed, as well as when acquired by eminent domain.[80] They also apply to companies which have leased their roads to other companies with stipulations that the whole transportation of passengers and freight on the railroads leased shall be done by the lessees.[81] Where the statute imposes absolute liability on all railroad corporations and provides that the term "railroad corporations" shall be deemed to mean all railroad corporations, companies, and individuals, owning or operating railroads, railroads operated by partnerships are within its terms.[82] According to some decisions, the term "railroad corporations" as used in the statute means only such companies as are common carriers,[83] while other decisions hold that the statute applies with equal force to all railroads operated by steam power whether or not common carriers,[84] and, hence, applies to logging railroads.[85]

§ 488. —— To What Property Applicable

Statutes imposing liability on railroad companies for damage caused by fire without regard to negligence apply to damage to both real and personal property.

Statutes imposing liability on railroad companies for injury or loss caused by fire even in the absence of negligence have very generally been held to apply to injury or loss to both real and personal property.[86] With respect to personal property, it has been held that the statutes are applicable although

69. U.S.—Dickelman Mfg Co. v. Pennsylvania R. Co., supra.
Mo.—Fritz v. St. Louis, etc., R. Co., 148 S.W. 74, 243 Mo. 62.
51 C.J. p. 1149 note 97.

70. Mass.—Ross v. Boston, etc., R. Co., 6 Allen 87.

71. Mass.—Boston, etc., R. Co. v. Hartford F. Ins. Co., 147 N.E. 904, 252 Mass. 432.

72. U.S.—Kansas City Southern Ry. Co. v. New England Fire Ins. Co., C.C.A.Ark., 133 F.2d 973.
Mass.—Young v. New York, N. H. & H. R. Co., 174 N.E. 318, 273 Mass. 567.
51 C.J. p. 1149 note 3.

73. Mo.—Matthews v. Missouri Pac. R. Co., 44 S.W. 802, 142 Mo. 645—Price v. St. Louis, etc., R. Co., 170 S.W. 925, 185 Mo.App. 432.

74. Mo.—Blackmore v. Missouri Pac. R. Co., 62 S.W. 893, 162 Mo. 455.
51 C.J. p. 1149 note 3.

75. S.C.—Bultman v. Atlantic Coast Line R. Co., 88 S.E. 279, 103 S.C. 512.

76. Colo.—Rhinehart v. Denver, etc., R. Co., 158 P. 149, 61 Colo. 369.
51 C.J. p. 1150 note 10.

77. Ark.—Hayes v. Missouri Pac. R. Co., 186 S.W.2d 780, 208 Ark. 370.
Miss.—Yazoo, etc., R. Co. v. Washington, 73 So. 879, 113 Miss. 105.

78. R.I.—MacDonald v. New York, etc., R. Co., 51 A. 578, 23 R.I. 558.

79. Ohio.—Baltimore, etc., R. Co. v. Kreager, 56 N.E. 203, 61 Ohio St. 312.
51 C.J. p. 1150 note 12.

80. Ohio.—Baltimore, etc., R. Co. v. Kreager, supra.

81. Mass.—Ingersoll v. Stockbridge, etc., R. Co., 8 Allen 438.
51 C.J. p. 1150 note 14.

82. Ind.—Pittsburgh, etc., R. Co. v. Chappell, 106 N.E. 403, 183 Ind. 141, Ann.Cas.1918A 627.

83. U.S.—Sisk v. White Oak Lumber Co., D.C.Va., 14 F.2d 552.
Ark.—Valley Lumber Co. v. Westmoreland, 252 S.W. 609, 159 Ark. 484.

Hauling for one customer only
It has been held that a railroad corporation organized under the statutes as a common carrier is liable as such, although it only hauls logs for a particular customer, since it can be compelled to carry freight to all who offer it for shipment over its lines.—Helena Southwestern R. Co. v. Coolidge, 275 S.W. 896, 169 Ark. 552.

84. S.C.—Law v. Prettyman, 146 S.E. 815, 149 S.C. 178.—Crawford v. Mullins Lumber Co., 96 S.E. 494, 110 S.C. 318.

85. S.C.—Law v. Prettyman, 146 S.E. 815, 149 S.C. 178, 183.
51 C.J. p. 1150 note 18.

86. Mass.—New England Box Co. v. New York Cent., etc., R. Co., 97 N.E. 140, 210 Mass. 465.
51 C.J. p. 1150 note 23.

the company has no knowledge, or reason, or cause to believe that such property was situated where it might be so injured.[87] They have also been held to apply to wood, coal, and other personal property situated on adjoining lands and there used by a dealer as his stock in trade,[88] and to trees,[89] shrubs, and flowers,[90] and to fences by the side of the track.[91]

It is very generally held that the fact that personal property destroyed is of a movable character will not affect the liability of the railroad under statutes imposing liability without negligence.[92] A limitation has been placed on this rule to the effect that, in order to bring a case for destruction of personal property within the statute, some permanency of location is requisite;[93] but this limitation has been repudiated and severely criticised.[94]

The statutes, of course, apply to buildings along the route of the road so near thereto as to be exposed to danger of fire from the locomotives,[95] and in general are held to extend to the contents of such structures.[96] Where a statute provides that a company shall be liable for injury to property "along its route" by fire communicated by its locomotives, it is liable for injuries to property along its route whether the property is outside of the lines of its roadway or lawfully within those lines.[97] In construing such phrases as "along the route" or "along the line of the railroad," in determining the limits of distance on the liability of the railroad company with respect to the property destroyed, it has generally been held that no arbitrary rule as to distance can be formulated,[98] and that the definition of these phrases must be determined by whether the property destroyed was so near to the route of the railroad as to be exposed to the danger of fire from locomotives.[99] Applying this principle, it has been held that it is not necessary that the property injured or destroyed should abut on or adjoin the right of way.[1]

The statutes have no application to property delivered to a railroad company as a common carrier and in its custody as warehouseman at the time the fire destroyed it.[2]

§ 489. —— Insurable Interest Conferred on Companies

Statutes imposing liability on railroad companies for damages caused by fire even in the absence of negligence may be limited to property permanently located on or near the railroad so as to be insurable.

Statutes imposing liability on railroad companies for damages caused by fire in the absence of negligence often confer on railroad companies an insurable interest coextensive with the property for which they may be responsible,[3] and under such a provision, in some states, it is held that the company's liability extends to all kinds of property and is not limited to such property as is usually regarded as insurable[4] or dependent on the question whether an insurer can be found to take the risk.[5] In other states, however, it is held that the company's liability under such a provision is limited to property

87. Mass.—Ross v. Boston, etc., R. Co., 6 Allen 87.

88. N.H.—Haseltine v. Concord R. Co., 15 A. 143, 64 N.H. 545.

89. Mo.—Campbell v. Missouri Pac. R. Co., 25 S.W. 936, 121 Mo. 340, 42 Am.S.R. 530, 25 L.R.A. 175.
51 C.J. p. 1151 note 37.

90. Mo.—Campbell v. Missouri Pac. R. Co., supra—Mathews v. St. Louis, etc., R. Co., 24 S.W. 591, 121 Mo. 298, 25 L.R.A. 161, affirmed 17 S. Ct. 243, 165 U.S. 1, 41 L.Ed. 611.

91. Conn.—Grissell v. Housatonic R. Co., 9 A. 137, 54 Conn. 447, 1 Am.S.R. 138, error dismissed 11 S.Ct. 1022, 140 U.S. 684, 35 L.Ed. 595.
Mass.—Trask v. Hartford, etc., R. Co., 16 Gray 71.

92. Me.—Thatcher v. Maine Cent. R. Co., 27 A. 519, 85 Me. 502.
51 C.J. p. 1151 note 32.

93. Me.—Bangor & A. R. Co. v. Hand, 174 A. 380, 133 Me. 99.
51 C.J. p. 1151 note 34.
Permanent location so as to be insurable see infra § 489.

94. Mass.—Ross v. Boston, etc., R. Co., 6 Allen 87.
51 C.J. p. 1151 note 35.

95. Me.—Pratt v. Atlantic, etc., R. Co., 42 Me. 579.
51 C.J. p. 1150 note 25.

96. **Materials used in manufacturing**
Me.—Stearns v. Atlantic, etc., R. Co., 46 Me. 95.
Mass.—Trask v. Hartford, etc., R. Co., 16 Gray 71.
Stock of goods
Me.—Bean v. Atlantic, etc., R. Co., 63 Me. 293.
N.H.—Laird v. Connecticut, etc., R. Co., 62 N.H. 254, 13 Am.S.R. 564.

97. U.S.—Grand Trunk R. Co. v. Richardson, Vt., 91 U.S. 454, 23 L.Ed. 356.
Warehouse on railway land
In absence of contract providing otherwise, a railway is liable by statute for injury arising out of a fire caused by railway's locomotive which destroyed warehouse erected and maintained on railway land.—Bangor & A. R. Co. v. Hand, 174 A. 380, 133 Me. 99.

98. Me.—Pratt v. Atlantic, etc., R. Co., 42 Me. 579.
Mass.—Hart v. Western R. Corp., 13 Metc. 99, 46 Am.D. 719.

99. Me.—Martin v. Grand Trunk R. Co. of Canada, 32 A. 976, 87 Me. 411, 413.
51 C.J. p. 1151 note 44.

1. Mo.—Lumberman's Mut. Ins. Co. v. Kansas City, etc., R. Co., 50 S.W. 281, 149 Mo. 165.
51 C.J. p. 1151 note 45.

2. Mo.—Blackmore v. Missouri Pac. R. Co., 62 S.W. 993, 162 Mo. 455.
51 C.J. p. 1151 note 41.

3. Me.—Boston Excelsior Co. v. Bangor, etc., R. Co., 44 A. 133, 93 Me. 52, 47 L.R.A. 82.
51 C.J. p. 1152 note 47.

4. Conn.—Grissell v. Housatonic R. Co., 9 A. 137, 54 Conn. 447, 468, 1 Am.S.R. 138, error dismissed 11 S.Ct. 1022, 140 U.S. 684, 35 L.Ed. 595.
51 C.J. p. 1152 note 48.

5. Conn.—Grissell v. Housatonic R. Co., supra.
51 C.J. p. 1152 note 49.

permanently located on or near the railroad so as to be insurable.[6]

§ 490. Construction and Equipment of Locomotives

a. In general
b. Adoption of new or untried appliances

a. In General

A railroad company is not required to provide locomotives so constructed and equipped as absolutely to prevent the communication of fire to property along its line, although it must use ordinary and reasonable care in constructing and equipping its locomotives.

Since a railroad company is neither an insurer against injury from fire to property from the operation of its road as considered supra § 484, nor of the safety or perfection of the devices and appliances adopted by it to prevent fire,[7] a company is not required to provide locomotives so constructed and equipped as absolutely to prevent the communication of fire to property along its line.[8] However, railroad companies are not permitted to establish their own standard of duty in the matter of the equipment of their locomotives.[9] While they are only required to exercise reasonable or ordinary care,[10] which is such care as a man of ordinary prudence would exercise under like circumstances,[11] it is their duty to use ordinary or reasonable care to provide locomotives so constructed and equipped as to avoid the unnecessary communication of fire to premises adjoining their roads, otherwise they will be guilty of negligence and liable for the resulting damages[12] A failure of judgment honestly exercised in an attempt to discharge this duty will not render the company liable;[13] nor can it be held to unreasonable and ruinous efforts to prevent injury[14] In determining whether ordinary or reasonable care has been exercised in providing appliances for the prevention of fire, regard must be had to the time and place, since certain appliances, whose use at certain times and places would be negligence, might be properly used in other seasons and localities.[15]

The law does not require that a company shall adopt any particular kind of appliance.[16] It will be sufficient if the appliance adopted is of approved construction and in common use,[17] or is reasonably suitable and reasonably calculated to prevent the emission of sparks,[18] or emits sparks too small to be dangerous.[19] However, it has been required by statute that locomotives be equipped with the most effectual spark arresters in practical use,[20] and it has variously been stated that companies must use ordinary or reasonable care and diligence to provide their locomotives with the best and most approved appliances for preventing the escape of fire known to them and in general practical use,[21] with such approved appliances as are in general use,[22] with the best well-known practical appliances,[23] with appliances so constructed as to give the best practicable protection against the escape of fire and sparks,[24] with appliances which are reasonably fit and safe for the purposes intended,[25] with such appliances and contrivances as are in practical use by well regulated companies and which have

6. Me.—Bangor & A. R. Co. v. Hand, 174 A. 380, 133 Me. 99.
51 C.J. p. 1152 note 50.

Fertilizer in warehouse
The fact that fertilizer was temporarily stored in a warehouse erected on railway property did not lessen the railway's statutory liability to compensate for its destruction by fire, since the contents of the warehouse were insurable.—Bangor & A. R. Co. v. Hand, supra.

7. U.S.—Lesser Cotton Co. v. St. Louis, etc., R. Co., Ark., 114 F. 133, 52 C.C.A. 95.

8. Ky.—Withers v. Illinois Cent. R. Co., 207 S.W.2d 33, 306 Ky. 487—Illinois Cent. R. Co. v. Roark's Adm'r, 58 S.W.2d 648, 248 Ky. 398. Tenn.—Louisville, etc., R. Co. v. Fort, 80 S.W. 429, 112 Tenn. 432—Yearwood for Use of Am. Ins. Co. of Newark, N. J., v. Louisville & N. R. Co., 222 S.W.2d 33, 32 Tenn. App. 115.
51 C.J. p. 1153 note 67.

9. Kan.—Brey v. St. Louis-San Francisco R. Co., 205 P. 1112, 111 Kan. 60

10. Tex.—Payne v. Shirley, Civ.App., 243 S.W. 285.
51 C.J. p. 1154 note 69.

11. Tex.—Missouri, etc., R. Co. v. Carter, 68 S.W. 159, 95 Tex. 461—St. Louis Southwestern R. Co. v. Goodnight, 74 S.W. 533, 32 Tex. Civ. App. 256.

12. Pa.—Ruby v. Pennsylvania R. Co., Com.Pl., 58 York Leg.Rec. 45.
51 C.J. p. 1152 note 52.

13. Tex.—Missouri, etc., R. Co. v. Carter, 68 S.W. 159, 95 Tex. 461.
51 C.J. p. 1154 note 71

14. Ill.—Toledo, etc., R. Co. v. Corn, 71 Ill. 493.

15. Iowa.—Metzgar v. Chicago, etc., R. Co., 41 N.W. 49, 76 Iowa 387, 14 Am.S.R. 224.
Tex.—Quanah, etc., R. Co. v. Stearns, Civ.App., 206 S.W. 857

16. Del.—Green v. Philadelphia, etc., R. Co., 119 A. 837, 32 Del. 72
51 C.J. p. 1154 note 76.

17. U.S.—Seaboard Refractories Co. v. Lehigh Valley R. Co., C.C.A.N.J., 51 F.2d 918.
51 C.J. p. 1154 note 77.

18. Del.—Green v. Philadelphia, etc., R. Co., 119 A. 837, 32 Del. 72.

19. La.—Givens v. Yazoo & M. V. R. Co., 146 So. 751, 176 La. 796.

20. Ky.—Louisville & N. R. Co. v. Bean, 116 S.W.2d 939, 273 Ky. 454.

21. Tex.—Progressive Lumber Co. v. Marshall, etc., R. Co., 155 S.W. 175, 106 Tex. 12.
51 C.J. p. 1152 note 53.

22. N.C.—Bottoms v. Seaboard Air Line R. Co., 49 S.E. 348, 136 N.C. 472.
51 C.J. p. 1153 note 54.

23. Mass.—Wallace v. New York, etc., R. Co., 94 N.E. 306, 208 Mass. 16.

24. W.Va.—McLaughlin v. Baltimore, etc., R. Co., 83 S.E. 999, 75 W.Va. 287
51 C.J. p. 1153 note 56

25. Del.—Green v. Philadelphia, etc., R. Co., 119 A. 837, 32 Del. 72.
51 C.J. p. 1153 note 57.

been proved by experience to be adapted to the purpose,[26] with appliances in common use of approved pattern and in reasonably good repair,[27] with the most effective modern practical appliances for preventing the escape of sparks of fire,[28] with appliances for the prevention of the escape of fire according to the latest and most approved state of the art,[29] or with the best appliances in general use, the use of which is consistent with the practical operation of their locomotives.[30]

Effect of adoption of appliances required by law. If a railroad company has adopted and put into use on its locomotives appliances for the prevention of fire such as are required by law, it will not be liable for injury caused by fire communicated by its locomotives,[31] unless it is guilty of negligence in some other respect,[32] such for instance, as the negligent management of the locomotive and train,[33] or negligence in allowing combustible matter to accumulate on the right of way,[34] or a negligent failure to prevent the spread of a fire kindled by one of its locomotives properly equipped and managed.[35] It has been held that noncompliance with a statute making it a misdemeanor for companies to fail to equip their locomotives with suitable spark arrester, with consequent damage, amounts to negligence per se.[36]

b. Adoption of New or Untried Appliances

Railroad companies do not have the unqualified duty to adopt new appliances before their efficiency has been demonstrated by actual use.

While it has been said that railroad companies are bound to avail themselves of all the discoveries which science has put within reach for that purpose, in constructing their locomotives, provided they are such as under the circumstances it is reasonable to require them to adopt,[37] this does not impose on them the unqualified duty of adopting new appliances.[38] Before a company can be held liable for failure to adopt appliances other than those in use by it, their efficacy must have been demonstrated by actual use.[39] It is under no duty to devise some appliance better than any known appliance in practical use,[40] nor is it bound to purchase the patent for every invention claimed to be an improvement,[41] or to test[42] or to adopt[43] new and untried devices, or to adopt appliances which are mere experiments.[44] On the contrary, it has been said that the introduction of untried devices may of itself be negligence since the efficiency of appliances can only be demonstrated by actual experience and since adoption and use are the real tests of approval.[45] However, where an invention has been tested and has been approved as better than those a railroad company is using, it is required to adopt and use the better machinery.[46] In any event a company is not bound at once to introduce a new appliance which it is claimed will have the effect to make its locomotive safe in the respect mentioned. It is entitled to a reasonable time for trial and experiment, and to make the necessary changes.[47]

§ 491. Keeping Locomotives in Proper State of Repair

A railroad company must use ordinary and reasonable care to keep its locomotives and appliances in a condition of good repair, and it will be liable for any damages which result from a breach of that duty.

26. Ala.—Tombigbee Valley R. Co. v. Howard, 64 So. 338, 185 Ala. 612.—Louisville, etc., R. Co. v. Reese, 5 So. 283, 85 Ala. 497, 7 Am.S.R. 66.

27. Miss.—Clisby v. Mobile, etc., R. Co., 29 So. 913, 78 Miss. 937.
51 C.J. p. 1153 note 59.

28. La.—Meyer v. Vicksburg, etc., R. Co., 6 So. 218, 41 La.Ann. 639, 17 Am.S.R. 408.

29. Tenn.—Louisville, etc., R. Co. v. Fort, 80 S.W. 429, 112 Tenn. 432.—Yearwood for Use of Am. Ins. Co. of Newark, N. J. v. Louisville & N. R. Co., 222 S.W.2d 33, 32 Tenn. App. 115.

30. Ga.—Seaboard Air-Line R. Co. v. Gnann, 82 S.E. 1066, 142 Ga. 381.
51 C.J. p. 1153 note 62

31. U.S.—Seaboard Refractories Co. v. Lehigh Valley R. Co., C.C.A.N.J., 51 F.2d 918.
51 C.J. p. 1155 note 90.

32. Ky.—Morgan v. Louisville, etc., R. Co., 263 S.W. 35, 203 Ky. 640.
51 C.J. p. 1155 note 91.

33. Ky.—Louisville & N. R. Co. v. Bean, 116 S.W.2d 989, 273 Ky. 454.—Illinois Cent. R. Co. v. Bell Union Coal & Mining Co., 38 S.W.2d 707, 238 Ky. 630.
51 C.J. p. 1155 note 92.

34. N.C.—Moore v. Wilmington, etc., R. Co., 32 S.E. 710, 124 N.C. 338.

35. Tex.—Missouri Pac. R. Co. v. Platzer, 11 S.W. 160, 73 Tex. 117, 15 Am.S.R. 771, 3 L.R.A. 639.

36. Mont.—Missoula Trust, etc., Bank v. Northern Pac. R. Co., 245 P. 949, 76 Mont. 201.

37. Wis.—Spaulding v. Chicago, etc., R. Co., 30 Wis. 110, 11 Am.R. 550.
51 C.J. p. 1154 note 79.

38. Ala.—Tombigbee Valley R. Co. v. Howard, 64 So. 338, 185 Ala. 612.
51 C.J. p. 1154 note 80.

39. Mich.—Hagan v. Chicago, etc., R. Co., 49 N.W. 509, 86 Mich. 615.
51 C.J. p. 1154 note 81.

40. Vt.—Farrington v. Rutland R. Co., 47 A. 171, 72 Vt. 24.

41. Ill.—Toledo, etc., R. Co. v. Corn, 71 Ill. 493.

42. Ill.—Toledo, etc., R. Co. v. Corn, supra.—Chicago, etc., R. Co. v. American Strawboard Co., 91 Ill. App. 635, affirmed 60 N.E. 518, 190 Ill. 268.

43. Mich.—Hagan v. Chicago, etc., R. Co., 49 N.W. 509, 86 Mich. 615.
51 C.J. p. 1154 note 85.

44. Ill.—Chicago, etc., R. Co. v. American Strawboard Co., 91 Ill. App. 635, affirmed 60 N.E. 518, 190 Ill. 268.

45. Mich.—Hagan v. Chicago, etc., R. Co., 49 N.W. 509, 86 Mich. 615.

46. Ill.—Toledo, etc., R. Co. v. Corn, 71 Ill. 493.

47. N.Y.—Flinn v. New York Cent., etc., R. Co., 36 N.E. 1046, 142 N.Y. 11.
51 C.J. p. 1155 note 89.

Railroad locomotives and their equipment must be kept in good order,[48] and a railroad company must use ordinary or reasonable care to keep its locomotives and appliances in a condition of good repair, and if it fails in this duty, and by reason thereof fire is communicated to property by sparks from its locomotives, it will be liable for the resulting damage.[49] However, the duty to keep locomotives and appliances in good repair does not require the highest degree of care,[50] it being sufficient if it uses ordinary care in that regard.[51] It will not be sufficient to relieve a company from liability for injuries by fire set out by its locomotive that it had employed a competent inspector,[52] or even that the locomotive and appliances had been inspected before sending them out on the road.[53] The fact that an engine became out of repair at a point on the line where there were no facilities for repairing will not justify the action of the engineer in running the engine with increased danger to the next repair shop instead of stopping at the next station.[54]

§ 492. Employment of Competent Servants to Operate Trains and Locomotives

A railroad company must employ competent and skillful engineers, firemen, or other servants to operate and manage its trains in order to relieve itself from liability for injuries caused by fire communicated from its locomotives.

In order to relieve itself from liability for injuries caused by fire communicated by its locomotives, a railroad company must employ competent and skillful engineers, firemen, or other servants to operate and manage its trains and locomotives,[55] but only such care in performing this duty is required as would be exercised by an ordinarily prudent person under all the surrounding circumstances.[56]

§ 493. Management and Operation of Locomotives and Trains

a. In general
b. Degree of care required
c. Fuel used
d Speed of trains

a. In General

A railroad company and its employees must use care in the management and operation of locomotives and trains, and the company is liable for damage caused by fire because of a failure to observe this requirement.

A railroad company, its engineers, firemen, and other servants must use ordinary care in the management and operation of locomotives and trains, and if property is injured or destroyed by the escape of fire by reason of their failure to observe this requirement, the railroad company will be liable for the resulting damages.[57] This is true although the railroad exercised due care in equipping the engine,[58] the locomotive was equipped with the most approved appliances for preventing the escape of sparks,[59] and although such appliances were in good order.[60] The rule applies with equal force to private steam railroads constructed for logging purposes.[61]

b. Degree of Care Required

The ordinary care required in the management and operation of locomotives and trains is the care which an ordinarily prudent person would exercise, and must be in proportion to the danger of inflicting injury.

48. Ky—Louisville & N. R Co. v. Bean, 116 S W 2d 989, 273 Ky 454.
Pa—Ruby v Pennsylvania R. Co., 58 York Leg Rec. 45
Tenn—Yearwood for Use of Am. Ins Co of Newark, N. J. v. Louisville & N. R. Co, 222 S W 2d 33, 32 Tenn App 115

49. Ga—Seaboard Air-Line R Co. v Ghann, 82 S E. 1066, 142 Ga 381.
51 C J. p 1155 note 97

50. Tex—Texas Cent R Co v Qualls, 124 S.W 140, 58 Tex Civ. App 120.
51 C J p 1156 note 2.

51. Tex—Payne v. Shirley, Civ.App., 243 S.W 285.
51 C.J. p 1156 note 3.

52. Ind—Cleveland, etc, R Co. v. Hayes, 79 N E 448, 167 Ind. 454, 459
51 C J p 1156 note 98

53. Ohio—Cleveland, etc., R Co. v Fredenbur, 3 Ohio Cir Ct 23, 2 Ohio Cir Dec 15
51 C J. p 1156 note 99.

54. Tex—Texas, etc., R. Co. v. Tankersley, 63 Tex. 57

55. Kan—St Louis, etc., R. Co. v Hoover, 43 P. 854, 3 Kan.App. 577
51 C J. p 1156 note 4.

56. Kan—St Louis, etc., R. Co. v. Hoover, supra.

57. Pa—Ruby v Pennsylvania R. Co, 58 York Leg Rec 45
Tenn—Yearwood, for Use of Am Ins. Co of Newark, N J. v. Louisville & N. R Co., 222 S W.2d 33, 32 Tenn App 115
51 C J. p 1156 note 6.
Particular acts held negligent
(1) Leaving ash pans open—Cantlon v. Minnesota Eastern R. Co., 48 N W 22, 45 Minn 481—51 C J. p 1159 note 52 [a].
(2) Overloading locomotive—Toledo, etc, R Co v Pindar, 53 Ill. 447, 5 Am R 57—51 C.J. p 1159 note 52 [b].
(3) Other acts held negligent—St. Louis, etc., R Co. v. Hecht, 38 Ark. 357—51 C.J p 1159 notes 52 [d], [e], [f] (3), [g].
Particular acts held not negligent
(1) Permitting sparks to escape.—Texas, etc, R. Co. v Medaris, 64 Tex 92—51 C J. p 1159 note 52 [c].
(2) Other acts held not negligent.—Mississippi Home Ins. Co v Louisville, etc, R. Co., 12 So. 156, 70 Miss 119—51 C.J. p 1159 note 52 [f] (1) (2).

58. Tex.—Texas & N. O. R. Co v. Glass, Civ.App., 107 S.W.2d 924, error refused.

59. Ky—Louisville, etc., R. Co. v. Guttman, 146 S.W. 731, 148 Ky. 235.
51 C.J. p 1156 note 7.

60. Ky.—Louisville, etc., R. Co. v. Dalton, 43 S.W. 431, 102 Ky. 290, 19 Ky.L 1318.

61. N C—Thomas v Hammer Lumber Co, 69 S E 275, 153 N.C. 351, 32 L R.A.,N.S., 584.

The ordinary care required in the management and operation of locomotives and trains, which, as has been well said, is the only rule that can be stated by the court,[62] is the care which an ordinarily prudent person would exercise under the same or similar circumstances.[63] It has been said to be a relative term,[64] and the care required necessarily depends on the circumstances of each particular case,[65] and must be commensurate with, or in proportion to, the danger to be apprehended of inflicting injury on the person or property of another.[66] What is care in one case may be negligence in another, where the danger is greater and more care is required.[67] Where the circumstances are such that the usual or customary way of operating locomotives is not a sufficient compliance with the duty to exercise due care to protect property, the company must exercise increased care accordingly.[68] However, even in times of excessive drought a company is not required to operate its trains so as absolutely to prevent all escape of fire from its locomotives,[69] and due consideration must also be given to the necessities of the railway service, and the duty of the company to its patrons and the public.[70]

In order to determine whether ordinary care has been exercised in the operation of a locomotive or train, the conditions prevailing at the time, such as the dryness of the weather,[71] the speed and direction of the wind,[72] the condition of the track and the nature of the freight carried,[73] the presence of combustibles on the right of way,[74] the dryness of the grasses, stubble, and other vegetation near the track,[75] the place at which the locomotive or train is being operated,[76] the proximity of buildings to the track,[77] especially when the buildings are of an inflammable nature,[78] and the inflammable character of other property near the track[79] must be considered.

c. Fuel Used

The law requires the exercise of ordinary or reasonable care by a railroad in providing proper fuel for use in its locomotives in order to avoid liability for damage from fires.

The law requires the exercise of ordinary or reasonable care by a railroad in providing proper fuel for use in its locomotives;[80] and this means such care in the selection and use of its fuel as a man of ordinary prudence, dealing with his own affairs and having a due regard for the rights and safety of others, would use.[81] However, a company is not bound to exercise more than ordinary care in the selection of fuel.[82] While the character of the fuel used may be considered in determining whether ordinary care has been exercised in the operation of a locomotive,[83] the law does not require railroad companies to use any particular kind of fuel in the operation of their loco-

62. Pa.—Frankford, etc., Turnp Co. v. Philadelphia, etc, R. Co, 54 Pa. 345, 350, 93 Am D. 708.

63. Tex.—St Louis Southwestern R Co. v. Connally, Civ.App., 93 S W 206.
51 C.J. p 1156 note 12.

64. Ga.—Western, etc., R. Co. v. Maynard, 77 S E 399, 139 Ga. 407
Minn.—Riley v. Chicago, etc., R. Co., 74 N.W. 171, 71 Minn. 425.

65. Tenn.—Louisville, etc., R. Co. v. Fort, 80 S W. 429, 112 Tenn. 432—Yearwood for Use of Am. Ins. Co. of Newark, N. J. v. Louisville & N. R. Co, 222 S.W 2d 33, 32 Tenn. App 115.
51 C.J p 1157 note 14.

66. Tenn.—Yearwood for Use of Am Ins. Co. of Newark, N. J. v. Louisville & N. R. Co., supra.
51 C J. p 1157 note 15.

67. Tenn.—Louisville, etc., R. Co v. Fort, 80 S W. 429, 112 Tenn. 432—Yearwood for Use of Am. Ins. Co of Newark, N. J. v. Louisville & N. R. Co., 222 S.W.2d 33, 32 Tenn App. 115.
51 C J. p 1157 note 16.

68. Vt.—Van Dyke v. Grand Trunk R Co., 78 A 958, 84 Vt. 212, Ann. Cas 1913A 640
51 C J. p 1157 note 17.

69. N J.—West Jersey R Co v. Abbott, 37 A. 1104, 60 N.J.Law 150
51 C.J p 1158 note 28.

70. Minn.—Riley v. Chicago, etc., R. Co., 74 N.W. 171, 71 Minn. 425, 429
51 C J. p 1158 note 29.

71. Tenn.—Yearwood for Use of Am Ins. Co. of Newark, N. J. v. Louisville & N R. Co., 222 S.W 2d 33, 32 Tenn.App. 115.
51 C J. p 1157 note 18.

72. Minn.—Riley v. Chicago, etc., R. Co., 74 N.W. 171, 71 Minn. 425
51 C.J. p 1157 note 19.

73. Ind.—Lake Erie, etc., R. Co. v. Lowder, 34 N E. 447, 747, 7 Ind. App. 537.

74. Minn.—Cantlon v. Minnesota Easton R. Co., 48 N.W. 22, 45 Minn. 481.
N.Y.—Webb v. Rome, etc., R. Co., 49 N.Y. 420, 10 Am R. 389.

75. Minn.—Riley v. Chicago, etc., R. Co., 74 N W. 171, 71 Minn. 425.

76. Tenn.—Louisville, etc., R. Co. v. Fort, 80 S.W. 429, 112 Tenn. 432—Yearwood for Use of Am. Ins Co. of Newark, N. J. v Louisville & N. R. Co., 222 S W 2d 33, 32 Tenn App. 115.
51 C.J p 1157 note 23

77. Pa.—Frankford, etc., Turnp Co. v. Philadelphia, etc, R Co., 54 Pa 345, 93 Am D 708.
W.Va.—McLaughlin v Baltimore, etc, R. Co., 83 S.E 999, 75 W.Va. 287.

78. La.—Haas v. Hines, 91 So 58, 150 La. 599.
51 C J. p 1157 note 25.

79. Ga.—Western, etc., R. Co v. Maynard, 77 S.E. 399, 139 Ga. 407.
Nev.—Longabaugh v. Virginia City, etc., R. Co, 9 Nev. 271.
51 C J. p 1158 note 26.

80. Tex.—Loeb Compress Co. v. Bromberg, Civ.App., 140 S W. 475.
51 C.J. p 1158 note 30.

81. N C.—Raleigh Hosiery Co v. Raleigh, etc, R Co, 42 S E. 602, 131 N C. 238.
Tex.—Loeb Compress Co. v. Bromberg, Civ.App., 140 S.W. 475.

82. Tex.—Missouri, etc., R. Co. v. Morgan, Civ App., 146 S.W 336, affirmed 193 S.W. 134, 108 Tex. 331.

83. Ga.—Western, etc, R. Co. v. Maynard, 77 S.E 399, 139 Ga. 407.

motives.[84] It has, accordingly, been held that they may use coal,[85] whether anthracite[86] or bituminous,[87] wood,[88] or any other ordinary fuel,[89] unless such fuel is of a dangerous or hazardous quality,[90] subject to the limitation that the latest improvements in the management of the locomotives in practical use be used.[91]

Wood in coal-burning locomotive. While it has been held not negligent as a matter of law to use wood for fuel in a locomotive built to burn coal,[92] it has been held that if it is shown that the use of wood in a coal-burning locomotive materially increases the danger in setting fire to and burning adjacent property, the use of it constitutes negligence,[93] or at least that this is a fact to be considered in determining the question of negligence in the management of the locomotive.[94] It has also been held that the use of wood for fuel in a coal-burning locomotive, in which the meshes of the spark arrester are made much larger than where other fuel is used, is gross negligence where a high wind is prevailing at the time.[95]

d. Speed of Trains

The speed of the train is a factor to be considered in determining whether ordinary care has been exercised in the operation of a locomotive

While the speed of the train may be considered in determining whether ordinary care has been exercised in the operation of a locomotive,[96] where it becomes necessary to make up time between two points, the running of a train at a high rate of speed is not in itself negligence.[97] A railroad company is under no obligation to diminish the usual speed of its trains when passing isolated buildings near its track on dry and windy days since this is incompatible with the proper discharge of its duties as a common carrier.[98] However, it has been held that operating a locomotive at twice the rate of speed of its schedule may constitute negligence where the season was very dry and a strong wind was blowing directly toward the building to which the fire was communicated by the locomotive, and it did not appear that the speed adopted was a necessity to the railway service or a duty owing by the company to its patrons or the public.[99]

Speed in excess of that limited by statute or ordinance. Where companies run their trains through cities, towns, or villages at a speed greater than that limited by statute or ordinance, and by reason of such excessive speed fires are communicated by the locomotive to adjoining property which is injured or destroyed, the company is liable.[1]

§ 494. Combustibles on Track, Right of Way, or Other Property

It is the duty of a railroad to use ordinary or reasonable care and diligence to keep its track and right of way or other contiguous property reasonably free from combustible matter, and a railroad is liable for damage caused by fire as a result of a breach of this duty.

Independently of statute, it is the duty of a railroad company to use ordinary or reasonable care and diligence to keep its track and right of way or other contiguous property reasonably free from combustible matter likely to be ignited from sparks from passing locomotives and likely to communicate fire to the premises of others;[2] and this common-law rule has in some jurisdictions been either expressly affirmed or modified in some respects by statute.[3] If, in consequence of a company's neg-

84. Tex.—Chicago, etc., R. Co. v. Myers, 285 S.W. 1058, 115 Tex. 565. 51 C.J. p. 1158 note 33.

85. Tex.—Chicago, etc., R. Co. v. Myers, supra. 51 C.J. p. 1158 note 34.

86. Pa.—Lackawanna, etc., R. Co. v. Doak, 52 Pa. 379, 91 Am.D. 166.

87. N.C.—Raleigh Hosiery Co. v. Raleigh, etc., R. Co., 42 S.E. 602, 131 N.C. 238.
Pa.—Lackawanna, etc., R. Co. v. Doak, 52 Pa. 379, 91 Am.D. 166.

88. Ark.—Monte Ne R. Co. v. Phillips, 96 S.W. 1060, 80 Ark. 292. 51 C.J. p. 1158 note 37

89. Tex.—Chicago, etc., R. Co. v. Myers, 285 S.W. 1058, 115 Tex. 565. 51 C.J. p. 1158 note 38.

90. N.Y.—Collins v. New York, Cent., etc., R. Co., 5 Hun 499.

91. Pa.—Lackawanna, etc., R. Co. v. Doak, 52 Pa. 379, 91 Am.D. 166. 51 C.J. p. 1158 note 40.

92. Ill.—Chicago, etc., R. Co. v. Pennell, 94 Ill. 448

93. Ind.—Chicago, etc., R. Co. v. Ostrander, 15 N.E. 227, 19 N.E. 110, 116 Ind. 259.

94. Kan.—St. Joseph, etc., R. Co. v. Chase, 11 Kan. 47.

95. Ill.—Chicago, etc., R. Co. v. Quaintance, 58 Ill. 389.

96. Ga.—Western, etc., R. Co. v. Maynard, 77 S.E. 399, 139 Ga. 407.

97. Mich.—Hagan v. Chicago, etc., R. Co., 49 N.W. 509, 86 Mich. 615.

98. U.S.—Woodward v. Chicago, etc., R. Co., Minn., 145 F. 577, 75 C.C.A. 591.

99. Va.—Norfolk, etc., R. Co. v. Fritts, 49 S.E. 971, 103 Va. 687, 106 Am.S.R. 911, 68 L.R.A. 864.

1. Wis.—Martin v. Western Union R. Co., 23 Wis. 437, 440, 99 Am.D. 189
51 C.J. p. 1159 note 48.

2. Ga.—Pollard v. Walton, 190 S.E. 396, 55 Ga.App. 353—Central of Georgia Ry. Co. v. Reese, 158 S.E. 774, 43 Ga.App. 335
Tex.—Texas & P. Ry. Co. v. Brandon, Civ.App., 183 S.W.2d 212, error refused.
51 C.J. p. 1159 note 53
Travelers on public highway
Railroad does not owe to travelers on public highway duty to keep its right of way free of inflammable vegetation.—Thompson v. Erisman, Civ.App., 157 S.W.2d 439, affirmed Erisman v. Thompson, 167 S.W.2d 731, 140 Tex. 361.

3. U.S.—Spokane International Ry. Co. v. U.S., C.C.A.Idaho, 72 F.2d 440.

ligent failure to comply with the common-law or statutory requirements, a fire occurs on its track, right of way, or other contiguous property, which is communicated to the property of another, it is liable for the resulting damages.[4]

A railroad company is not required to keep its right of way absolutely clear of combustible matter,[5] and it cannot be held liable if the quantity of combustibles was not sufficient to indicate danger from fire to common prudence and ordinary care.[6] The degree of care required of railroad companies in keeping their tracks, right of way, and other property reasonably free from combustible matter is ordinary or reasonable care,[7] which must be commensurate with, or in proportion to, the danger to be apprehended.[8] A company is required to use the same diligence in removing dry grass and weeds and other combustible materials from exposure to ignition by its locomotives that a cautious, prudent man would use with respect to combustible materials on his own property if exposed to the same hazard from such material,[9] and the degree of care in keeping the right of way free from combustibles is not to be measured by the usual conduct of other railroads.[10] If this required degree of care is used, the company is not guilty of negligence.[11]

The reason generally assigned for the rule requiring railroad companies to use ordinary or reasonable care and diligence to keep their tracks, right of way, or other contiguous property reasonably free from combustible matter is that it is impossible to operate a railroad without danger from fire,[12] even though locomotives of the most approved construction and with the best known appliances are in use and managed by the most skillful engineers and firemen,[13] and that the removal of the combustible substances is as much a means of preventing communication of fires to adjoining lands as the employment of the most approved and best constructed locomotives and appliances.[14] It has further been said that, inasmuch as railroad grants are to be strictly construed and not extended further than is properly required for the purposes for which the grant is sanctioned, no reason exists for conferring a privilege on railroad companies to the detriment of the owners of land along a railroad track to run their locomotives surrounded on their own premises by materials so combustible as to be in constant danger of being fired by such locomotives when running under ordinary conditions.[15]

Negligence per se. While it has very generally been held that it is not negligence per se for a railroad company to permit combustible matter, such as grass, weeds, etc, to grow or accumulate on its right of way,[16] it has also been held negligence per se to allow such material on the right of way where the duty to keep the right of way clear of such matter has been imposed on the railroad by statute.[17]

Effect of precautions in construction and management of locomotives. The fact that a company has used the proper precautions in constructing, equipping with proper appliances, and in managing its locomotives is immaterial and does not relieve it from liability if a fire started on its right of way by such a locomotive is communicated to adjoining property by reason of its negligence in permitting combustible material to accumulate

Mass.—Carbone v. Trustees of New York, N. H. & H. R. Co., 71 N.E. 2d 403, 320 Mass. 710.
51 C.J. p. 1160 note 54.

Injuries to person
Under a statute requiring companies to cut and remove and destroy all dead grass and vegetation on their right of way and making them "liable for all damages done by said neglected duty," such companies are liable for injuries to the person as well as to property.—Greer v. St. Louis, etc., R. Co., 158 S.W. 740, 173 Mo.App. 276.

4. U.S.—Spokane International Ry. Co. v. U. S., C.C.A.Idaho, 72 F.2d 440.
Tenn.—Harriman & N. E. R. Co. v. James, 1 Tenn.App. 207.
Tex.—Texas & P. Ry. Co. v. Brandon, Civ.App., 183 S.W.2d 212, error refused.
51 C.J. p. 1160 note 55.

5. N.C.—Denny v. Atlantic Coast Line R. Co., 103 S.E. 24, 179 N.C. 529.
51 C.J. p. 1161 note 56.

6. Mont.—Spencer v. Montana Cent. R. Co., 27 P. 681, 11 Mont. 164.—Diamond v. Northern Pac. R. Co., 13 P. 367, 6 Mont. 580.

7. Tex.—Gulf, etc., R. Co. v. Reagan, Civ.App., 32 S.W. 846.
51 C.J. p. 1161 note 65.

8. Fla.—St. Johns, etc., R. Co. v. Ransom, 14 So. 892, 33 Fla. 406.

9. Tenn.—Corpus Juris cited in Nashville, C. & St. L. Ry. v. Nants, 65 S.W.2d 189, 190, 167 Tenn. 1.
51 C.J. p. 1161 note 67.

10. W.Va.—Snyder v. Pittsburgh, etc., R. Co., 11 W.Va. 14.
51 C.J. p. 1161 note 69.

11. Okl.—Missouri Pac. R. Co. v. Gentry, 122 P. 537, 31 Okl. 579.
51 C.J. p. 1161 note 68.

12. Ind.—Ohio, etc., R. Co. v. Trapp, 30 N.E. 812, 4 Ind.App. 69.

13. Fla.—Dowling Lumber Co. v. King, 57 So. 337, 62 Fla. 151.
51 C.J. p. 1161 note 59.

14. Ala.—Southern R. Co. v. Dickens, 49 So. 766, 161 Ala. 144, 150.
51 C.J. p. 1161 note 60.

15. N.J.—Salmon v. Delaware, etc., R. Co., 38 N.J.Law 5, 20 Am.R. 336.

16. N.D.—Gram v. Northern Pac. R. Co., 46 N.W. 972, 1 N.D. 252.
Tex.—Gulf C. & S. F. R. Co. v. Cusenberry, 26 S.W. 43, 86 Tex. 525.—Texas & P. Ry. Co. v. Brandon, Civ.App., 183 S.W.2d 212, error refused.
51 C.J. p. 1161 note 63.

17. Ill.—Chicago, etc., R. Co. v. Goyette, 24 N.E. 549, 133 Ill. 21.—Baltimore, etc., R. Co. v. Perryman, 95 Ill.App. 199.

along its roadway,[18] since two acts of negligence are not required in order to constitute a wrong,[19] and due care in one direction cannot excuse negligence in another.[20]

Combustibles placed on property by other agency In the absence of any statutory provision regulating the matter, it has been held that a railroad company is not liable because of an accumulation of combustible matter on its right of way likely to be the cause of injury if there through some other agency than its own and for so short a time that it had no notice of its presence, express or imputed from length of time, and no opportunity to remove it.[21]

Cause of fire. Dependent on the various statutes and the interpretations which have been made by the courts, a railroad has been held not to be liable for damage by fire because it failed to keep its right of way clear of combustible material unless the fire resulted from the operation of the railroad;[22] but, on the other hand, it has been stated that if the fire originates on the railroad's right of way in inflammable material, which has been allowed to accumulate there in violation of a statute, it is immaterial whether a spark from a railroad engine,[23] the act of a third person outside the railroad's right of way,[24] or any other cause started the fire.[25]

§ 495. Preventing Spread and Extinguishment of Fires

a. In general

b. Fires originating in conduct of business

c. Fires not originated by railroad

a. In General

A railroad is not relieved from liability for fires negligently started by it because the railroad uses proper or ordinary care in trying to extinguish the fire; but no matter how a fire starts, a railroad is liable if it negligently allows it to escape from the right of way.

The general rule is that a railroad is answerable for any injury sustained by a fire started by the negligence of the railroad even though it uses proper,[26] or ordinary care to quench the fire,[27] and no matter what efforts the servants of the railroad may use to extinguish the fire.[28] Where the fire originates on the right of way of a railroad and the railroad negligently allows the fire to escape, the railroad is liable,[29] independently of how the fire started, whether negligently or otherwise.[30]

The question of what would constitute such negligence as would render the railroad company liable for injuries by fire set out on its right of way depends on the circumstances as they existed at the time of the injury,[31] such as the distance of the property injured from the right of way,[32] the direction[33] and velocity of the wind,[34] the condition of the weather as to dryness or moisture,[35] and, in short, every circumstance attending the injury to the property.[36] The degree of care to be exercised by a railroad company in preventing the spread of fire or extinguishing it is ordinary or reasonable care, which is such care as would be

18. Ga.—Central of Georgia Ry. Co. v. Reese, 158 S.E. 774, 43 Ga.App. 335
Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Snow, 143 S.W.2d 863, 284 Ky. 58
Tex.—Texas & P. Ry. Co. v. Brandon, Civ.App., 183 S.W.2d 212, error refused
51 C.J. p. 1162 note 74.

19. N.C.—Hardy v. Hines Bros. Lumber Co., 75 S.E. 855, 160 N.C. 113, 42 L.R.A.,N.S., 759

20. N.J.—Delaware, etc., R. Co. v. Salmon, 39 N.J.Law 299, 23 Am.R. 214.
N.D.—Gram v. Northern Pac. R. Co., 46 N.W. 972, 1 N.D. 252

21. N.C.—Denny v. Atlantic Coast Line R. Co., 103 S.E. 24, 179 N.C. 529—Phillips v. Durham, etc., R. Co., 50 S.E. 462, 138 N.C. 12, 3 Ann.Cas. 384.

22. Ill.—Sycamore Preserve Works v. Chicago & N. W. Ry. Co., 7 N.E.2d 740, 366 Ill. 11, 111 A.L.R. 1133, conformed to 12 N.E.2d 42, 293 Ill.App. 20
51 C.J. p. 1162 note 71

23. U.S.—Spokane International Ry. Co. v. U. S., C.C.A.Idaho, 72 F.2d 440.

24. U.S.—Spokane International Ry. Co. v. U. S., supra.

25. Del.—Chorman v. Maryland, etc., R. Co., 93 A. 559, 28 Del. 339.

26. Ky.—Louisville, etc., R. Co. v. Haggard, 170 S.W. 956, 161 Ky. 317.

27. Wis.—Austin v. Chicago, etc., R. Co., 67 N.W. 1129, 93 Wis. 496

28. Tex.—Gulf, etc., R. Co. v. Price, Civ.App., 236 S.W. 776—Galveston, etc., R. Co. v. Chittim, 71 S.W. 294, 31 Tex.Civ.App. 40.

29. Ind.—Pittsburgh, etc., R. Co. v. Brough, 81 N.E. 57, 168 Ind. 378, 12 L.R.A.,N.S., 401—Chicago, etc., R. Co. v. Burden, 43 N.E. 155, 14 Ind.App. 512—Terre Haute, etc., R. Co. v. Walsh, 38 N.E. 534, 11 Ind.App. 13.

Tex.—International, etc., R. Co. v. McIver, Civ.App., 40 S.W. 438.

30. Ind.—Pittsburgh, etc., R. Co. v. Brough, 81 N.E. 57, 168 Ind. 378, 12 L.R.A.,N.S., 401—Terre Haute, etc., R. Co. v. Walsh, 38 N.E. 534, 11 Ind.App. 13
Tex.—International, etc., R. Co. v. McIver, Civ.App., 40 S.W. 438

31. U.S.—Clark v. Kansas City, etc., R. Co., Tenn., 129 F. 341, 64 C.C.A. 19.
51 C.J. p. 1163 note 84.

32. U.S.—Clark v. Kansas City, etc., R. Co., supra.

33. U.S.—Clark v. Kansas City, etc., R. Co., supra.

34. Mo.—Grant v. Omaha, etc., R. Co., 68 S.W. 91, 94 Mo.App. 312
51 C.J. p. 1163 note 87.

35. Mo.—Grant v. Omaha, etc., R. Co., supra.
51 C.J. p. 1163 note 88.

36. Ga.—Corpus Juris cited in Pollard v. Walton, 190 S.E. 396, 401, 55 Ga.App. 353.
51 C.J. p. 1163 note 89.

exercised by a prudent person under like circumstances.[37] It has been held that a company is not obliged to keep men stationed along its right of way either to guard against or extinguish fires which may occur.[38] On the other hand, there is authority apparently to the effect that, in excessively dry seasons, it is the duty of the company to employ extra men to watch the right of way and assist in putting out fires.[39]

Liability of a company for failure of its employees to prevent the spread of or to extinguish fire exists only where the employees are not at the time engaged by the company in some duty from the company to the public,[40] and it has generally been held that, in the exercise of ordinary care to prevent the spread of fires or to extinguish them, it is not incumbent on the crews of passenger or freight trains to stop the trains and attempt to prevent the spread of or extinguish fires set out by the trains or otherwise, and that their failure to do so will not render the company liable for injuries to, or destruction of, property caused by such fires,[41] since this action would endanger the lives of passengers whose safety depends on trains complying with their schedules.[42] A different rule, however, has been laid down in respect of crews of gravel trains; and it has been held that, where a gravel train on which there is a large number of men starts a fire along the company's right of way and the servants in charge of the train know of the existence of the fire and fail to leave men to extinguish the flames, there is such negligence as renders the company liable for damages caused by the fire.[43]

b. Fires Originating in Conduct of Business

(1) On railroad's premises
(2) Off right of way

(1) On Railroad's Premises

If a railroad is negligent either in starting a fire on its premises or in preventing its escape it will be liable for injuries resulting from such negligence.

Since a railroad company has imposed on it a duty to use a reasonable degree of care and diligence to keep its right of way free from inflammable matter where fire from sparks may be communicated to the property of others, it has the right to keep its right of way clear of combustible material,[44] and it is not liable for damages resulting from the spread of fire from its property to adjacent property where it sets out the fire on its own premises for the purpose of cleaning its right of way from weeds, grass, etc., provided it uses reasonable care and prudence in setting it out and preventing its escape.[45] On the other hand, if the company is negligent either in setting out the fire, or in preventing its escape, or in both respects, it will be liable for injuries to property resulting from such negligence;[46] and, a fortiori, it is liable where the setting out of the fire is something more than culpable negligence and amounts to a positive wrong by reason of the surrounding circumstances.[47] Where, on account of the velocity of the wind, it is dangerous to attempt to burn off a right of way, it is the duty of the company, and not of the owner of adjacent property, to plough or burn fire guards to protect such adjacent property.[48]

Where a fire is started on a right of way or other premises of a railroad company by reason of its negligence in the operation of its trains,[49] or through other agencies used in the furtherance of

37. Tex.—Missouri Pac. R. Co. v. Platzer, 11 S.W. 160, 73 Tex. 117, 15 Am.S.R. 771, 3 L.R.A. 639
Vt.—Van Dyke v. Grand Trunk R. Co., 78 A. 958, 84 Vt. 212, Ann.Cas. 1913A 640.
Standard as to preservation of property not applicable
The statute providing that ordinary care or diligence, as applied to the preservation of property, means that care which every prudent man takes of his own property of a similar nature, was not applicable in action against receivers of railroad for damages to trees and fence from a fire which agents of receivers allegedly permitted to spread from right of way—Powell v. Blackstock, 13 S.E.2d 503, 64 Ga.App. 442.

38. Md.—Baltimore, etc., R. Co. v. Shipley, 39 Md. 251.
51 C.J. p 1165 note 9.

39. Vt.—Van Dyke v. Grand Trunk R. Co. of Canada, 78 A. 958, 84 Vt. 212, Ann.Cas. 1913A 640.

40. Tex.—Missouri Pac. R. Co. v. Donaldson, 11 S.W. 163, 73 Tex. 124—Galveston, etc., R. Co. v. Chittim, 71 S.W. 294, 31 Tex.Civ.App. 40.

41. Ind.—Pittsburgh, etc., R. Co. v. Brough, 81 N.E. 57, 168 Ind. 378, 12 L.R.A.,N.S., 401.
51 C.J. p 1165 note 11.

42. Mo.—Excelsior Products Mfg. Co. v. Kansas City Southern R. Co., 172 S.W. 359, 263 Mo. 142.

43. Wis.—Rolke v. Chicago, etc., R. Co., 26 Wis. 537.

44. Ga.—Pollard v. Walton, 190 S.E. 396, 55 Ga.App. 353.
Ind.—Louisville, etc., R. Co. v. Nitsche, 26 N.E. 51, 126 Ind. 229, 22 Am.S.R. 582, 9 L.R.A. 750.
Pa.—Nicholson v. Buffalo, R. & P. Ry. Co., 153 A. 128, 302 Pa. 41.

45. Ga.—Pollard v. Walton, 190 S.E. 396, 55 Ga.App. 353.
Pa.—Nicholson v. Buffalo R. & P. Ry. Co., 153 A. 128, 302 Pa. 41.
51 C.J. p 1162 note 81.

46. Ga.—Pollard v. Walton, 190 S.E. 396, 55 Ga.App. 353.
Mass.—Deerfoot Farms v. New York, N. H. & H. R. Co., 96 N.E.2d 872.
51 C.J. p 1163 note 82.

47. Ind.—Louisville, etc., R. Co. v. Nitsche, 26 N.E. 51, 126 Ind. 229, 22 Am.S.R. 582, 9 L.R.A. 750.
51 C.J. p 1163 note 83.

48. Tex.—Quanah, etc., R. Co. v. Stearns, Civ.App., 206 S.W. 357.

49. Cal.—Clark v. San Francisco, etc., R. Co., 76 P. 507, 142 Cal. 614.
51 C.J. p 1163 note 91.

its business,[50] and the fire spreads to adjoining property and injures it, the company is, of course, liable if it has failed to use ordinary care and diligence to prevent the spread of the fire to the adjoining property. It has also been held that it is liable, although it may have used ordinary care and diligence[51] to prevent the spread of the fire thus negligently started, the view being taken that negligent failure of the company to put out the fire when it could have done so adds nothing to its liability if it negligently started the fire.[52] However, there are decisions holding that, although a company negligently sets fire to its right of way and the fire spreads to adjacent lands injuring them, the company is not liable unless it was negligent in suffering the fire to so spread,[53] but the fact that the railroad men did all in their power to arrest the fire after it had spread beyond the railroad's right of way does not relieve the railroad of liability.[54]

Where a fire originates on a right of way, without negligence on the part of the company, through the operation of its trains,[55] or through other agencies used in the furtherance of its business,[56] reasonable care must be used to prevent the spread of the fire to adjoining property or to extinguish it if it reaches the property, and if it is injured or destroyed by reason of failure to exercise such care, the company will be liable for the damages sustained. Prior to a statute which makes a railroad liable for fire caused by its engines regardless of negligence, it was held that where a fire originating on a right of way was not caused by the company's negligence, failure of its servants, even though they had knowledge of the fire, to prevent its spread to adjoining premises would not render the company liable for the injury sustained.[57]

(2) Off Right of Way

It has been held to be the duty of a railroad company to use ordinary care to extinguish fires started without negligence on contiguous lands, although it has also been held that the company is under no such duty unless the fire was caused by the railroad's negligence.

According to some decisions, it is the duty of a railroad company to use ordinary care to extinguish fires started without any negligence on its part on contiguous lands, and a failure to exercise such care gives a right of action for any resulting injury.[58] On the other hand, it has been held that, where property near a railroad is set on fire by sparks from a locomotive, the company is under no duty to extinguish the fire if it was not caused by negligence.[59]

c. Fires Not Originated by Railroad

Where a fire for which the railroad is not responsible originates along its right of way, the railroad, if it knows, or is chargeable with knowledge, of the fire, must use reasonable care to prevent the spread thereof.

Where a fire is started on, or along, a right of way from no cause for which the company is responsible, if it knows, or is chargeable with knowledge, of its existence, it must use reasonable care to prevent the spread of the fire, and if it fails to do so, it will be liable for the resulting damages.[60] It has been held that a company is negligent where it knowingly permits hoboes to build camp fires along its right of way, and that it is liable for injuries caused by the spread of the fire to adjoining premises.[61]

§ 496. Proximate Cause of Injury

a. Injuries to property
b. Injuries to person

a. Injuries to Property

(1) In general

50. Tex.—Chicago, etc, R. Co. v. Trinity Valley Produce Co, Civ. App, 269 S.W. 1109—St Louis Southwestern R Co v Anderson, Civ App, 173 S.W. 908.

51. Ky.—Louisville, etc, R. Co. v. Haggard, 170 S.W. 956, 161 Ky. 317.
51 C.J p 1163 note 93

52. Ky.—Louisville, etc., R. Co. v. Haggard, supra.

53. Ind.—Indiana, etc, R. Co v. Adamson, 90 Ind 60.
51 C.J. p 1163 note 96.

54. Ind.—Chicago, etc., R Co. v. Luddington, 38 N.E. 342, 10 Ind App 636.

55. Wash.—Jordan v. Spokane, etc., R. Co., 186 P. 875, 109 Wash. 476
51 C J. p 1164 note 97.

56. Tex.—San Antonio, etc, R. Co. v Moerbe, Civ App, 189 S.W. 128.
51 C J p 1164 note 98.

57. Mo.—Kenney v. Hannibal, etc., R Co., 70 Mo. 252.
51 C J. p 1164 notes 98 [b], 99.

58. Tex.—Missouri Pac R. Co. v. Platzer, 11 S.W. 160, 73 Tex 117, 15 Am.S.R. 771, 3 L.R.A. 639.
51 C J p 1164 note 1.

59. Fla.—Atlantic Coast Line R. Co. v Benedict Pineapple Co, 42 So. 529, 52 Fla. 165.

60. U S.—American Sheet, etc., Co v Pittsburgh, etc, R. Co., Pa., 143 F 789, 75 C C A 47, 12 L.R.A., N S, 382, 6 Ann Cas. 626.
51 C.J. p 1165 note 3

Ordinary care

Mo.—Excelsior Products Mfg Co v Kansas City Southern R. Co., 172 S.W 359, 263 Mo. 142, Ann.Cas 1917B 1047.

Damaged viaduct blocking firemen

A railroad is not liable for damage caused by fire which fire department could not reach to extinguish because a portion of a viaduct over its track was unrepaired, when the railroad had no duty to make the repairs because the damaged portion was outside its right of way.—Hays v. Texarkana & Fort Smith Ry Co, Tex.Civ.App., 87 S.W 2d 1106, error dismissed.

61. Ark.—St Louis, etc, R Co. v. Ballard, 287 S.W. 738, 172 Ark 151.

(2) Intervening agencies
(3) Concurring negligence of third person
(4) Fire started by railroad uniting with fire of other origin

(1) In General

A railroad company is liable for damages caused by fire only where its fire or negligence is the proximate cause of the injury.

While it has been stated that proximate and remote cause is eliminated under statutes making railroads liable, regardless of negligence, for damage to property injured by fire communicated by engines or originating on the right of way,[62] a railroad company is liable for damages to property caused by fire only where its fire is the proximate cause of the injury; or in other words, where the injury is a consequence so natural that a reasonable person might or should have foreseen that it was likely to result.[63] The acts of the railroad, where negligent, must contribute to the injury which results from the fire,[64] and must not be too remote from the injury.[65] Merely furnishing a condition by which injury is made possible does not necessarily constitute the proximate cause of the injury.[66] It is sufficient if, at the time of the negligence, the wrongdoer might, by the exercise of ordinary care, have foreseen that some injury might result from his negligence.[67] It is not necessary that the particular injury and the particular manner of its occurrence could have reasonably been foreseen;[68] nor is it essential to liability that the injury inflicted should have been so certain to result from the company's negligence that a reasonable person could have foreseen that it would result, or that it would probably result;[69] it is enough if it be a consequence so natural and direct that a reasonable person might, and naturally would, see that it was liable to result from such negligence, that is, that it might follow.[70]

Where the progress of a fire negligently set out by a railroad company is continuous and the spread of it is not occasioned by any intervening cause, neither the distance traversed by the fire before it reached the property destroyed, and for which a recovery is sought, nor the time elapsing between the commencement of the fire and the destruction of the property, will prevent a recovery.[71] The word "proximate," it is said, as used in the term "proximate cause," means closeness of causal connection, and not nearness in time or distance.[72]

Where the use of backfires is reasonable and proper under the circumstances, the original fires started by the railroad become the direct, efficient, and proximate cause of all the fires, and, if the backfires cause the damage, the predominant cause of the damage is the original fire.[73] If the fire on the railroad's right of way escapes without negligence on the part of either the railroad or the landowner, the landowner's loss is the result of an unavoidable accident for which the railroad is not liable.[74]

62. U.S.—Fraser-Patterson Lumber Co. v. Southern Ry. Co., D.C.S.C., 79 F.Supp. 424
S.C.—Thompson v. Richmond, etc., R. Co., 24 S.C. 366.

63. Or.—Aune v. Oregon Trunk Ry., 51 P.2d 663, 151 Or. 622.
51 C.J. p. 1166 note 16.
Contributory negligence as proximate cause see infra § 508.

Proximate result

Under statute concerning liability of railroads for destruction of property by fire, if the burning of plaintiff's warehouse was the proximate result of a fire started by railroad's employees along the right of way, railroad was liable, regardless of negligence.—Lowden v. Shoffner Mercantile Co., C.C.A.Ark., 109 F.2d 956.

Fire started by third person

A railroad was not liable for personal injuries and property damage resulting from collision of automobile with rear of another automobile proceeding in the same direction, as alleged result of smoke caused by fire on right of way, if fire was started by act of another and not in connection with operation of railroad.—Edits v. Illinois Cent. R. Co., 24 N.E.2d 252, 303 Ill.App. 25.

64. U.S.—Spokane International Ry. Co. v. U. S., C.C.A.Idaho, 72 F.2d 440.

65. Or.—Aune v. Oregon Trunk Ry., 51 P.2d 663, 151 Or. 622.

66. Ill.—Sycamore Preserve Works v. Chicago & N. W. R. Co., 1 N.E.2d 522, 284 Ill.App. 445, reversed on other grounds 7 N.E.2d 740, 366 Ill. 11, 111 A.L.R. 1133, conformed to 12 N.E.2d 42, 293 Ill.App. 20.

Combustibles on right of way

Railroad is not liable for destruction of warehouse adjoining right of way because fire started on right of way, which railroad negligently failed to keep clear of combustible material as required by statute, where presence of combustible material was not proximate cause of destruction, but merely furnished condition by which destruction was made possible.—Sycamore Preserve Works v. Chicago & N. W. R. Co., supra.

Leaving freight cars unlocked

In action for damages resulting from burning of plaintiff's buildings by fire started by hobos in railroad's freight cars standing on siding, act of leaving doors of cars unlocked is not proximate cause of fire.—Aune v. Oregon Trunk Ry., 51 P.2d 663, 151 Or. 622.

67. Ill.—Illinois Cent. R. Co. v. Siler, 82 N.E. 362, 229 Ill. 390, 15 L.R.A.,N.S., 819, 11 Ann.Cas. 368

68. Mo.—Greer v. St. Louis, etc., R. Co., 158 S.W. 740, 173 Mo.App. 276
51 C.J. p. 1166 note 17.

69. Ill.—Chicago, etc., R. Co. v. Pennell, 110 Ill. 435.

70. Ill.—Chicago, etc., R. Co. v. Pennell, supra

71. N.C.—Hardy v. Hines Bros. Lumber Co., 75 S.E. 855, 160 N.C. 113, 42 L.R.A.,N.S., 759.
51 C.J. p. 1170 note 51

72. N.J.—Kuhn v. Jewett, 32 N.J. Eq. 647.

73. U.S.—Lowden v. Shoffner Mercantile Co., C.C.A.Ark., 109 F.2d 956.

74. Tex.—St. Louis Southwestern Ry. Co. of Texas v. Jones, Civ.App., 138 S.W.2d 577.

Under statutes or ordinances regulating the speed at which trains may be run through cities, towns, or villages, the unlawful rate of speed must be the proximate cause of the injury, and a company is not liable for damages by reason of running its train at an unlawful rate of speed unless the fire would not have occurred except for such speed;[75] and also the failure to observe a statutory requirement with respect to checking the speed of a train at a public road crossing, while it is negligence as to injuries occurring on the crossing, is irrelevant in a suit for setting fire to adjoining property unless it is shown that the proximate cause of the fire was failure to check the train.[76]

(2) Intervening Agencies
- (a) In general
- (b) Spread of fire

(a) In General

If there is an efficient intervening agency between the act of the railroad and the final injurious result, the railroad will not be liable for damage to property by fire

If there is an efficient intervening agency between the act of the railroad company and the final injurious result, the company will not be liable.[77] If some new cause intervenes which is not the consequence of the first wrongful cause or under the control of the railroad,[78] and of such a character that it could not have been foreseen by the exercise of reasonable diligence by the company,[79] and except for which the final injurious consequence could not have happened,[80] the railroad will not be liable. A railroad is not liable for a fire started by some one else on its right of way merely because it could have foreseen that danger would result from such a fire because of the condition of the right of way,[81] but in order to render the railroad liable it must be able to foresee that such independent forces will probably, or are likely to, concur or intervene.[82]

(b) Spread of Fire
- aa. In general
- bb. Natural forces or agencies

aa. In General

In order to recover for injuries to property by fire set out by a railroad, it is not necessary that the fire should be directly communicated by the railroad to the property injured.

The general rule is well settled by the great weight of authority that in order to recover for injuries to, or destruction of, property by fire set out by a railroad company, it is not necessary that the fire should be directly communicated by the company to the property injured or destroyed.[83] A recovery may be had for the destruction of property by fire set out by a company on its own property and thence escaping to the property of an adjoining owner.[84] Generally, if the injury is one which might reasonably have been anticipated from the act of the company in permitting the fire to start or escape, and the fire burns as one continuous fire without a break in the line of causation, and without the aid of any independent agency, the injury, if traceable to the first fire, is a proximate consequence of the fire notwithstanding the fire has passed through the land or property of others before causing such injury.[85] It has been held that the propriety of the rule cannot be affected by considerations as to the extent of liability to which the railroads might be thereby subjected, even if the rule results in bankruptcy and compels them to suspend their operation.[86] If, however, the fire spreads beyond its natural limits by means of a new and independent agency, the loss is a remote consequence for which the railroad company is not responsible.[87] However, the view has also been taken that where a railroad negligently sets out a fire on its own premises, and the fire spreads to the land of an abutting owner, and is thence communicated to the lands of third persons which do not abut on the premises of the

75. Tex.—Bennett v Missouri, etc., R Co, 32 S.W. 834, 11 Tex Civ. App. 423.
51 C.J. p 1159 note 50

76. Ga.—Western, etc., R. Co. v Maynard, 77 S.E 399, 139 Ga 407.

77. Minn.—Johnson v. Chicago, etc., R Co, 16 N.W. 488, 31 Minn. 57, 61
51 C.J. p 1166 note 22

78. Kan.—Atchison, etc, R. Co. v. Bales, 16 Kan. 252—Atchison, etc, R Co. v. Stanford, 12 Kan 354, 15 Am R. 362.

79. Ill.—Illinois Cent R. Co. v. Siler, 82 N.E 362, 229 Ill 390, 15 L.R.A.,N.S., 819, 11 Ann Cas. 368.
51 C.J p 1167 note 25.

80. Ill.—Illinois Cent R. Co. v. Siler, supra
Kan.—Atchison, etc., R. Co. v. Stanford, 12 Kan. 354.

81. Ill.—Sycamore Preserve Works v Chicago & N. W. Ry Co, 7 N.E 2d 740, 366 Ill. 11, 111 A.L.R 1133, conformed to 12 N.E 2d 42, 293 Ill. App 20

82. Ill.—Sycamore Preserve Works v Chicago & N W. Ry. Co., supra.

83. Tex.—St Louis Southwestern R Co. v Gentry, Civ App., 80 S.W 844
51 C.J. p 1167 note 27.

84. Iowa.—Knight v. Chicago, etc., R. Co, 46 N.W 1112, 81 Iowa 310
51 C.J. p 1167 note 28.

85. Ind.—Chicago, etc., R Co v. Ross, 56 N.E. 451, 24 Ind App 222
51 C.J. p 1167 note 29

86. Ill.—Fent v Toledo, etc., R. Co, 59 Ill 349, 14 Am.R. 13

87. Tex.—St Louis Southwestern R Co v. Gentry, Civ App., 80 S.W. 844
51 C.J. p 1168 note 31.

railroad, the railroad is not liable for damages to the property of such third persons, the view being taken that the injury is not the proximate result of the original fire.[88]

bb. Natural Forces or Agencies

The intervention of natural forces or agencies between the negligent act of a railroad in starting the fire and the injury to the property is not necessarily such an intervening cause as will relieve the railroad of liability.

The general rule is well settled that the intervention of natural forces or agencies between the negligent act of a railroad company in starting the fire and the injury to, or destruction of, property by fire so started is not such an intervening cause as will relieve the company of liability.[89] This principle applies although the force or agency is the law of gravitation,[90] and the fact that the fire which destroys the property is first set out in combustible matter in a state of nature on the property of the railroad company, or of plaintiff, or of a third person, and thence communicated to the property destroyed, is not such an intervening agency as to affect the liability of the company.[91]

Wind. The general rule is well settled that the wind is not to be regarded as an independent intervening agency so as to relieve a railroad company from its liability on the ground that its negligence is not a proximate cause of the injury.[92] The principle has been applied not only to winds of ordinary velocity,[93] but also to high winds which are not extraordinary or unusual at the time and place of the injury and might reasonably have been anticipated,[94] the view being taken that it is only strong winds which are unusual or extraordinary that may be regarded as an intervening cause.[95] Nevertheless, it has been generally held or said that, if the wind is of such an unusual or extraordinary character that the company could not have reasonably anticipated it, it must be considered an intervening cause, exempting the company from liability for the injury.[96] There are, however, decisions in which it is either held[97] or said[98] that the fact that the wind was of an unusual or extraordinary nature does not exempt the company from liability.

A change in the direction of the wind which was blowing at the time the fire was set cannot be considered as an intervening agency, so as to exempt the railroad company from liability if it was negligent in setting out the fire,[99] although it may have carried the result of the negligence further than it would otherwise have gone.[1] So, also, an increase in the velocity of the wind after the fire was set, if not of an extraordinary character, is not an intervening cause that will prevent recovery.[2]

Running water. While there is authority to the contrary,[3] the better view is that running water is not an independent intervening agency for carrying combustible matter, such as burning oil, which will relieve the company from liability,[4] the view being taken that, as an agency for the transmission of burning oil, it is just as certain and effectual in its operations as the wind in carrying flame, or a spark, or combustible matter in spreading a fire.[5]

(3) Concurring Negligence of Third Person

The fact that the negligence of a third person may have contributed to the injury to property is not a defense to an action against a railroad for injury to

88. N.Y.—Davies v. Delaware, etc., R. Co., 109 N.E. 95, 215 N.Y. 181.
51 C.J. p 1167 note 29 [c].

Under a conservation statute a landowner whose woodlands were burned by forest fire originating on railroad right of way could recover damages, although fire was communicated indirectly.—Nicoll v Long Island R Co, 250 N.Y.S. 366, 232 App Div. 435.

89. N.J.—Kuhn v. Jewett, 32 N.J.Eq. 647.
51 C.J. p 1168 note 32.

90. N.J.—Kuhn v. Jewett, supra.
51 C.J. p 1168 note 34.

91. Tex.—St Louis Southwestern R Co v. Gentry, Civ App, 80 S.W. 844.
51 C.J. p 1169 note 50.

92. Ga.—Albany, etc., R. Co. v. Wheeler, 64 S.E. 1114, 6 Ga App. 270.
51 C.J. p 1168 note 37.

Tendency to rekindle
Tendency of wind to rekindle or spread smoldering fire must be anticipated.—Nicholson v. Buffalo, R. & P. Ry. Co., 153 A. 128, 302 Pa. 41

93. Ind.—Chicago, etc, R Co v. Lesh, 63 N.E. 794, 158 Ind 423.
51 C.J. p 1168 note 38.

94. Tex.—Ft Worth, etc, R Co. v. Arthur, 124 S.W. 213, 58 Tex Civ. App. 163
51 C.J. p 1168 note 39.

95. Kan.—Union Pac R. Co v. McCollum, 43 P. 97, 2 Kan App 319.

96. Ind.—Louisville, etc, R. Co. v. Nitsche, 26 N.E. 51, 126 Ind 229, 235, 22 Am S.R. 582, 9 L.R.A. 750.
51 C.J. p 1169 note 41.

97. Minn.—Anderson v. Minneapolis, etc., R. Co., 179 N.W. 45, 146 Minn. 430.
51 C.J. p 1169 note 42.

98. Va.—Tyler v. Ricamore, 12 S.E. 799, 87 Va. 466.

99. Fla.—Florida East Coast R Co. v. Welch, 44 So 250, 53 Fla 145, 12 Ann Cas 210.
51 C.J. p 1169 note 47.

1. Vt.—Ide v Boston, etc, R. Co., 74 A. 401, 83 Vt 66.

2. Fla.—Florida East Coast R Co. v Welch, 44 So 250, 53 Fla 145, 12 Ann Cas 210
Ga.—**Corpus Juris cited in** Pollard v. Walton, 190 S.E. 356, 399, 55 Ga. App 353

3. Pa.—Hoag v. Lake Shore, etc, R. Co., 85 Pa 293, 27 Am R. 653.

4. N.J.—Kuhn v. Jewett, 32 N.J.Eq. 647.
51 C.J. p 1169 note 45.

5. N.J.—Kuhn v. Jewett, supra.

property caused by a fire negligently set out by the railroad.

In accordance with well settled principles, it is not a defense to an action against a railroad company for injury to, or destruction of, property by fire negligently set out by it that the negligence of one for whose acts the owner of the property injured or destroyed was not responsible may have contributed to the injury complained of;[6] and the fact that both the company and such stranger are each, on account of his own negligence, liable to plaintiff, is no defense to either the company or the stranger.[7] All of the legal consequences of being joint wrongdoers must follow, one being that each is liable to the full extent of the damages growing out of the wrongful acts.[8]

(4) Fire Started by Railroad Uniting with Fire of Other Origin

A railroad which negligently sets a fire is responsible for the damage done by it, although the fire is joined by a fire set by a third person, and the two concurrently do the damage, if it appears that the first fire would have done the damage alone.

A railroad company which negligently sets a fire is responsible for the damage done by it, although the fire is joined by a fire set by a third person, and the two concurrently do the damage, if it appears that the first fire would have done the damage without the assistance of the second fire.[9] So, also, where a company sets a fire and is negligent in failing to extinguish another fire not started by it, and allows it to escape and join the fire started by it, it is liable for the damages caused by the two fires, after they had joined.[10] Where a company is responsible for the origin of a fire which unites with another fire of equal rank and of unknown origin, but which it is morally certain was set by some human agency, and the combined fires destroyed plaintiff's property, the company is liable for the entire damages.[11] It has also been held that a company cannot escape liability for a fire negligently started by it by showing that the fire united with another of no responsible origin and that plaintiff's property was destroyed by the combined fires, if it appears that the fire started by the company was a material element entering into the destruction of the property,[12] but as to this a contrary view has been taken.[13]

b. Injuries to Person

(1) In general
(2) In attempt to save property

(1) In General

In order that there may be a recovery for personal injuries caused by the negligent setting out of a fire by a railroad, it must appear that the negligence of the railroad was the proximate cause of the injury.

In order that there may be a recovery for personal injuries caused by the setting out of a fire by a railroad company, it must appear that the negligence of the company was the proximate cause of the injury,[14] and if there is an independent intervening agency between the negligent act of the company and the final injurious result, the railroad will not be liable.[15]

(2) In Attempt to Save Property

(a) Injury to owner
(b) Injury to third persons

6. Tex.—Freeman v. Peacock, Civ. App., 149 S.W. 259.
51 C.J. p. 1170 note 54.

7. Fla.—Jacksonville, etc., R. Co. v. Peninsular Land, etc., Co., 9 So. 661, 27 Fla. 1, 157, 17 L.R.A. 33, 65.

8. Minn.—McClellan v. St. Paul, etc., R. Co., 59 N.W. 978, 58 Minn. 104.
51 C.J. p. 1170 note 56.

9. Idaho.—Miller v. Northern Pac. R. Co., 135 P. 845, 24 Idaho 567, 48 L.R.A.,N.S., 700, Ann.Cas.1915C 1214.

10. Minn.—Farrell v. Minneapolis, etc., R. Co., 141 N.W. 491, 121 Minn. 357, 360, 45 L.R.A.,N.S., 215.
51 C.J. p. 1171 note 58.

11. Wis.—Kingston v. Chicago, etc., R. Co., 211 N.W. 913, 191 Wis. 610, 617.
51 C.J. p. 1171 note 59.

12. Minn.—Anderson v. Minneapolis, etc., R. Co., 179 N.W. 45, 146 Minn. 430, disapproving Cook v. Minneapolis, etc., R. Co., 74 N.W. 561, 98 Wis. 624, 67 Am.S.R. 830, 40 L.R.A. 457.

13. Wis.—Cook v. Minneapolis, etc., R. Co., 74 N.W. 561, 98 Wis. 624, 643, 67 Am.S.R. 830, 40 L.R.A. 457.
51 C.J. p. 1171 note 61.

14. Tex.—Allison v. St. Louis Southwestern R. Co., Civ.App., 257 S.W. 959, error dismissed, Com.App., 282 S.W. 1117.
51 C.J. p. 1171 note 67.

Injury to infant

Where a railroad company sets fire to combustibles negligently left on its right of way and fire spreads to the front yard of a house adjoining the right of way and burns a child two years old playing in the yard, the negligence of the company is the proximate cause of the injury.—Greer v. St. Louis, etc., R. Co., 158 S.W. 740, 173 Mo.App. 276.

Ill person injured by smoke

The fact that smoke and fumes caused by fire would have done no substantial harm to a person who was not ill does not preclude recovery for a railroad's negligence in allowing a fire to spread to a locality where the railroad should have anticipated that there were homes, some of which foreseeably contained ill persons.—Missouri Pac. R. Co. v. Johnson, 133 S.W.2d 33, 198 Ark. 1134.

15. Ill.—Ehlts v. Illinois Cent. R. Co., 24 N.E.2d 252, 303 Ill.App. 25.
Ind.—Shubert v. Thompson, 32 N.E. 2d 120, 109 Ind.App. 34.

Fusee left on right of way

Where small boys found a fusee on railroad's right of way and took it home, and smaller boy subsequently obtained the fusee and set it afire, with the result that it set his sister's dress afire, alleged negligence of railroad was not the "proximate cause" of the sister's injury and railroad was not liable.—Dabrowski v. Illinois Cent. R. Co., 24 N.E.2d 382, 303 Ill.App. 31.

(a) Injury to Owner

Generally a person who acts with reasonable care and prudence may recover for personal injuries received in an attempt to save his property from a fire negligently caused by a railroad.

It has generally been held that a recovery may be had by reason of personal injuries or death sustained by persons attempting to put out fires communicated to their property through the negligence of railroad companies, where they have acted with reasonable care and prudence,[16] whether the injury resulted from actual contact with the fire[17] or from overexertion,[18] the view being taken that the negligence of the company is the proximate cause of the injury.[19] However, it has also been held that the act of the owner in attempting to save the property, and not the negligence of the company in setting out the fire, is the proximate cause of the injury,[20] and this is so whether or not the owner of the property is, himself, guilty of negligence.[21]

(b) Injury to Third Persons

While it has been held that a person may recover for personal injuries received in attempting to save the property of another from a fire negligently caused by the railroad, there is authority to the contrary.

While it has been held that a person may recover damages for personal injuries received in attempting to save the property of another from a fire caused by a railroad,[22] it has also been stated that a person who has no connection with the property is a volunteer, and cannot recover for injuries sustained while attempting to save the property of another from such a fire,[23] the person's voluntary act being the proximate cause of the injury.[24] It has also been held that no one should be permitted to recover for injuries sustained in attempting to save property of another from fire in the face of obvious dangers such as no reasonably prudent man would, under the circumstances, incur[25] A person who is not the owner of the property which he was attempting to save when he received a personal injury may recover if he were a resident on the property,[26] enjoyed some authority with respect to it,[27] was under a responsibility for the property,[28] or was an employee of the person whose property was endangered by the fire[29]

Fireman. A railroad company is not liable to a fireman extinguishing a fire set out by the railroad where his injury was not a proximate result of the fire,[30] and a railroad company has also been held not liable for personal injuries incurred by a fireman in extinguishing a fire negligently caused by the railroad because the railroad owes no duty to the fireman.[31]

§ 497. Contributory Negligence and Assumption of Risk

a. In general
b. Effect of statutory provisions

a. In General

Contributory negligence by an owner of property may constitute a complete bar to recovery for loss of, or

16. Ill.—Illinois Cent. R Co. v. Siler, 82 N E 362, 229 Ill. 390, 15 L.R.A.,N.S., 819.
51 C J p 1191 note 15.
Contributory negligence in extinguishing fire as bar to recovery for personal injury see infra § 497 et seq.

17. Iowa.—Glanz v. Chicago, etc, R Co., 93 N.W. 575, 119 Iowa 611.
51 C.J. p 1191 note 15.

18. Iowa.—Glanz v. Chicago, etc., R. Co, supra.

19. Cal.—**Corpus Juris quoted in** Haverstick v. Southern Pac. Co., 37 P 2d 146, 150, 1 Cal App 2d 605
Iowa.—Glanz v. Chicago, etc., R. Co, 93 N.W. 575, 119 Iowa 611.
51 C J. p 1172 note 70, p 1191 notes 15, 18.

20. Ala.—Braden v. St. Louis-San Francisco R. Co., 137 So. 663, 223 Ala 659.
Ark.—Missouri Pac. R. Co. v. Benham, 89 S W.2d 928, 192 Ark. 35.
51 C.J. p 1171 note 68, p 1191 note 19.

21. Tex.—Seale v. Gulf, etc., R. Co., 65 Tex 274, 57 Am R. 602.

22. Iowa.—Liming v. Illinois Cent R. Co, 47 N W 66, 81 Iowa 246.

23. U.S.—Pike v Grand Trunk R Co, C C N H, 39 F 255.
N H.—Glines v. Maine Cent. R. R, 52 A 2d 298, 94 N.H 299
Statutes relating to liability of railroads for damages from fire caused by locomotives would not apply to a party who allegedly sustained injuries while attempting to extinguish a fire, although such fire resulted from railroad's negligence in the operation of its railroad.—Glines v. Maine Cent. R R, supra—Clark v. Boston & M. Railroad Co, 101 A. 795, 78 N.H. 428, L R.A.1918A 518.

24. U S.—Pike v. Grand Trunk R Co., C.C N H, 39 F. 255.
51 C J. p 1172 note 72.

25. N C.—Pegram v. Seaboard Air Line R Co., 51 S.E. 975, 139 N.C 303, 4 Am S R. 214.

26. N.H.—Glines v. Maine Cent R R., 52 A.2d 298, 94 N.H. 299.

27. N.H.—Glines v. Maine Cent. R R, supra.

28. N H.—Glines v. Maine Cent. R R., supra.

29. N C.—Pegram v Seaboard Air Line R Co, 51 S E 975, 139 N C. 303, 4 Ann Cas 214.

30. Ga.—Georgia R, etc, Co. v. Konkle, 137 S E 113, 36 Ga.App. 569.
51 C J. p 1172 note 73.
Floor caved-in
Where fire was negligently set out by a railroad company in a building and a city fireman was injured by a cave-in of a floor from an unobserved defect therein, the falling of the floor was an independent and intervening agency which the company could not have reasonably anticipated, and the defective condition of the floor and not the negligence of the company was the proximate cause of the injury.—Georgia R., etc, Co. v. Konkle, 137 S E. 113, 36 Ga.App. 569, 570.

31. N.H.—Clark v. Boston, etc., R Co., 101 A 795, 78 N.H. 428, 430, L R A 1918A 518
51 C.J. p 1191 note 23.

injury to, such property by fire negligently set out by a railroad company, if it is the proximate cause of the injury.

In the absence of statutes providing otherwise, contributory negligence constitutes a complete bar to a recovery for loss of, or injury to, property by fire negligently set out by a railroad company, if it is the proximate cause of the injury.[32] It has been held, however, that, where plaintiff's negligence increased the loss, he may still recover for the damage done, up to the time when the contributory negligence began to affect the result.[33] One whose property was burned in a warehouse in which he had stored it is not chargeable with the contributory negligence of the warehousemen in leaving highly inflammable property exposed on an uncovered platform which caught fire from the sparks of defendant's locomotive and in turn communicated the fire to plaintiff's property, destroying it.[34]

Assumption of risk. In the absence of a statute imposing liability on a railroad company for injury to property from fire set out by the railroad, even in the absence of negligence, as discussed supra § 485 et seq, the owner of property near a railroad assumes the risk of injury or destruction by fire incident to the position of his property, and cannot recover for losses sustained by fire being communicated to his property by the company due to unavoidable accident and without negligence on its part;[35] but he does not assume the risk of injury or destruction by fire caused by the negligence of the company or its servants.[36]

Injuries to person. As in the case of injuries to property, one who has sustained personal injuries in attempting to save his property from destruction by fire negligently set out by a railroad company cannot recover if he has been guilty of contributory negligence which is the proximate cause of the injury,[37] except where the rule has been changed by special statutory provision.[38]

b. Effect of Statutory Provisions

A railroad's liability under statutes imposing absolute liability on it for damages caused by fire started by its locomotives is generally not affected by contributory negligence on the part of the injured property owner unless his negligence is gross or such as amounts to fraud

A railroad company's liability under statutes imposing absolute liability on it for damages caused by fire started by its locomotives, as considered supra § 485 et seq, is generally not affected by contributory negligence on the part of the injured property owner.[39] However, an exception to this rule is very generally recognized where the contributory negligence is gross or such as amounts to fraud,[40] and the statutes of some jurisdictions make an express exception where the owner is guilty of contributory negligence in its ordinary meaning.[41] In other jurisdictions by express provision, contributory negligence is not a defense, but the damages recoverable are affected by the negligence attributable to plaintiffs.[42] Under statutes which go no further than to make the occurrence of fire prima facie evidence of negligence on the part of the company, the defense of contributory negligence may be available to the railroad company.[43]

§ 498. —— What Constitutes Contributory Negligence in General

Generally, one who owns property near a railroad has the right to use it in the usual and ordinary way, although he is bound to use such care for its protection as a man of ordinary prudence would employ under like circumstances.

It is very generally held that one who owns property near a railroad has the right to use it in the usual and ordinary way, and in so doing is not chargeable with contributory negligence because he fails to anticipate and take unusual precautions to guard against negligence of the railroad company.[44] An owner of property is not limited in its use by its proximity to a railroad,[45] but may cultivate, build on, or use his land, or leave it in a state of

32. Tenn.—Nashville, C & St L. Ry. v Nants, 65 S W 2d 189, 167 Tenn. 1.
51 C J p 1172 note 78.

33. Vt.—Stebbins v. Central Vermont R. Co., 54 Vt 464, 41 Am.R 855.

34. Ala.—Alabama Great Southern R. Co v. Clarke, 39 So. 816, 145 Ala. 459.

35. Ga.—Albany, etc, R Co v Wheeler, 64 S E 1114, 6 Ga App. 270.
51 C J p 1172 note 82.

36. Ga.—Albany, etc, R. Co v Wheeler, 64 S.E. 1114, 6 Ga App 270.
Or.—La Salle v Oregon Cent. R Co, 144 P. 414, 73 Or. 203.

37. Iowa.—Glanz v. Chicago, etc, R. Co, 93 N W. 575, 119 Iowa 611.
51 C J p 1173 note 85.

38. Miss.—Illinois Cent R Co. v Thomas, 68 So 773, 109 Miss. 536
51 C J p 1173 note 86

39. U S.—Fraser-Patterson Lumber Co v Southern Ry. Co., D.C S C., 79 F.Supp 424.
51 C J. p 1173 note 89.

40. Ark.—Union Seed, etc., Co. v. St Louis, etc., R. Co., 181 S.W. 898, 121 Ark 585
51 C J p 1173 note 90.

41. Conn.—Hubbard v. New York, etc, R. Co, 43 A 550, 72 Conn. 24.—Martin v New York, etc, R. Co, 25 A. 239, 62 Conn 331

42. Fla.—Benedict Pineapple Co. v. Atlantic Coast Line R Co, 46 So. 732, 55 Fla. 514, 20 L R A.,N.S, 92.—Florida Cent R Co v. Williams, 20 So. 558, 37 Fla. 406.

43. Kan.—Ft. Scott, etc, R. Co. v. Tubbs, 28 P 612, 47 Kan 630.

44. Tenn.—Nashville, C & St. L. Ry. v. Nants, 65 S W.2d 189, 167 Tenn 1.
51 C J p 1173 note 96.

45. U.S.—Le Roy Fibre Co. v. Chi-

nature, as he may see proper,[46] and, in so doing, will subject himself to no risks other than those which come from the careful operation of the road,[47] or unavoidable accident.[48] However, this rule does not protect a landowner who, with knowledge of negligently maintained menacing conditions on the railroad right of way, is guilty of identical, mutual, and concurring negligence;[49] the owner of the property is bound to use such care for its protection as a man of ordinary prudence would employ under like circumstances, but this is the limit of his duty,[50] and he will not be chargeable with contributory negligence for not doing an act which, if done, would have afforded no protection to his property from the fire.[51]

§ 499. —— Erecting Buildings or Other Structures on Land of Owner near Track

Although a landowner has the right to erect buildings near a railroad track for purposes for which they are suitable, he cannot, by the erection of such buildings, abridge the railroad's rights in the lawful use of its property.

In the exercise of his right to use his land in the ordinary and usual way the owner of land has the right to erect and maintain buildings and structures thereon near a railroad track for the purposes for which they are suitable, and in so doing is not guilty of contributory negligence,[52] although the danger of injury to his property by fire is thereby increased,[53] and he is aware of this fact,[54] but he cannot, by erecting buildings near the track, abridge the company's rights in the lawful use of its property.[55] He is not chargeable with negligence for failure to tear down or remove buildings erected before the railroad track was laid.[56]

Where one erects his building at a reasonably safe distance from the track, he cannot be held guilty of negligence because his building is so situated as to be liable to be set on fire by another subsequently erected in dangerous proximity to the track.[57]

§ 500. —— Care of Buildings on Owner's Property near Track

An owner of buildings near a railroad must exercise such care in the protection thereof as a man of ordinary prudence would employ under the same circumstances. A higher degree of care may be required of him than in the case of a person whose property is in a less exposed position.

While an owner of land has the right to erect buildings thereon near a railroad, he is nevertheless bound to exercise care in protecting such buildings as a man of ordinary prudence would employ under the same circumstances,[58] and it has been said that this would require a higher degree of care than in the case of a person whose property was in a less exposed position.[59]

The owner of a building in close proximity to a track is under no duty to keep watchmen to guard against fires negligently set out by a railroad company,[60] although the building is of wood,[61] or contains inflammable matter,[62] and although he knows that there is combustible matter on the right of way.[63] He has the right to assume that the company will perform the legal duties resting on it.[64] The owner of a warehouse near a track is not required to keep a fire hose in the warehouse to guard against fires set by sparks from the locomotives of passing trains.[65]

cago, etc, R. Co, Minn, 34 S.Ct. 415, 232 U.S. 340, 58 L.Ed. 631.
51 C.J. p 1174 note 97.

46. N.J.—Delaware, etc., R. Co v. Salmon, 39 N.J.Law 299, 23 Am.R 214.

47. U.S.—Le Roy Fibre Co. v. Chicago, etc., R. Co, Minn, 34 S.Ct. 415, 232 U.S 340, 58 L.Ed. 631.
N.J.—Delaware, etc., R. Co. v. Salmon, 39 N.J.Law 299, 23 Am.R 214

48. U.S.—Le Roy Fibre Co. v. Chicago, etc, R. Co, Minn., 34 S.Ct. 415, 232 U.S 340, 58 L.Ed. 631.

49. Tenn.—Nashville, C. & St. L. Ry. v. Nants, 65 S.W.2d 189, 167 Tenn. 1.

50. Tex.—St. Louis Southwestern R. Co. v. Crabb, Civ.App., 80 S.W. 408.
51 C.J. p 1174 note 2.

51. Iowa.—Lewis v. Chicago, etc., R. Co., 10 N.W. 336, 57 Iowa 127.
51 C.J. p 1174 note 3.

52. Ala.—McCary v. Alabama Great Southern R. Co, 62 So. 18, 182 Ala. 597.
51 C.J. p 1175 note 6.

53. Ala.—McCary v. Alabama Great Southern R. Co, supra.
51 C.J. p 1175 note 7.

54. Ala.—McCary v. Alabama Great Southern R Co, supra.
51 C.J. p 1175 note 8.

55. Va.—Southern R. Co. v. Patterson, 52 S.E. 694, 105 Va. 6, 8 Ann. Cas. 440.

56. Tex.—Freeman v Nathan, Civ. App., 149 S.W. 248.
51 C.J. p 1175 note 9.

57. Ill.—Toledo, etc., R. Co. v. Maxfield, 72 Ill. 95.
51 C.J. p 1175 note 10.

58. Tex.—St. Louis Southwestern R. Co. v. Crabb, Civ.App., 80 S.W. 408.
51 C.J. p 1175 note 13.

59. Ill.—Chicago, etc., R. Co v. Pennell, 94 Ill. 448.
51 C.J. p 1175 note 14.

60. Ala.—Southern R. Co. v. Darwin, 47 So. 314, 156 Ala. 311, 130 Am.S.R. 94
51 C.J. p 1175 note 15.

61. Ind.—Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co., 56 N.E. 766, 154 Ind. 322.

62. Ala.—Southern R. Co. v. Darwin, 47 So. 314, 156 Ala. 311, 130 Am.S.R. 94.
Ind.—Cleveland, etc, R. Co v Scantland, 51 N.E. 1068, 151 Ind. 488.

63. Ind.—Pittsburgh, etc., R Co. v. Indiana Horseshoe Co, 56 N.E. 766, 154 Ind. 322.
Mich.—Briant v. Detroit, etc., R. Co, 62 N.W. 365, 104 Mich. 307.

64. Ind.—Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co., 56 N.E. 766, 154 Ind. 322.

65. Ala.—Alabama Great Southern

The mere failure to repair buildings or to put them in such shape as better to guard them against fire or to make them less liable to catch on fire does not constitute contributory negligence on the part of their owner.[66] It is not negligence for the owner of a residence near a railroad track to keep the windows thereof open when convenience or comfort requires it,[67] and, this being so, he is not chargeable with negligence in failing to mend a broken pane of glass in a window.[68]

With regard to unfinished buildings, barns, warehouses, and the like, containing combustible matter, it has been held that the owner of such buildings in close proximity to a track in which combustible material is stored in front of a window is not negligent in failing to guard against the communication of fires by keeping the window closed so as to exclude sparks.[69] However, it has been held that, where the owner of a warehouse located near a track and containing combustible matter leaves windows open so that fire from locomotives can be blown into the building, he is guilty of negligence.[70]

Permitting accumulations of combustible matter on, or around, buildings. While it has been held that one, who in building a house in close proximity to a track, permits shavings to lie around the house while it is being built is guilty of negligence,[71] it has also been held that carrying on the business of a cooper in a wooden building erected near a railroad and permitting shavings and other combustible materials to collect around them are not necessarily such negligence as will prevent a recovery for destruction by fire communicated by a locomotive.[72] The owner of a house near a track is not guilty of contributory negligence in allowing dry leaves to accumulate in a depression in the roof of the house.[73] One who allows combustible material to accumulate around his mill in close proximity to a track laid after his mill was erected is not guilty of contributory negligence.[74] In an action against a railroad by an abutting property owner for injury to his building by a fire allegedly set out by sparks from a locomotive of the railroad, the failure of plaintiff to remove combustible matter from his building may constitute contributory negligence.[75]

§ 501. —— Failure to Remove Combustibles from Owner's Land near Track

An owner of land near a railroad right of way is under no duty to remove from his land such combustible matter as dry grass, leaves, weeds, and the like, and is not chargeable with contributory negligence for failure to do so However, a land owner who is under a contractual duty to exercise care may not recover if he is guilty of contributory negligence.

The owner of land lying near or contiguous to a railroad right of way, in the exercise of his right to use his land in the natural and ordinary way for purposes to which it is suited, is under no duty to remove from his land such combustible material as dry grass, leaves, weeds, stubble, shucks, corn stalks, broom sedge, or brush, or the like, and hence is not chargeable with contributory negligence for failure to do so,[76] although his property may be extremely liable to take fire in case of negligent management of railroad trains.[77] He is not required to remove or destroy combustible matter in order to avoid the consequences of the possible, or even probable, negligence of the company.[78] It has similarly been held that allowing hay to lie on land used for growing it in windrows is only using the land in the ordinary manner and that the owner cannot be held guilty of contributory negligence in so doing because the land was near a railroad track.[79]

A plaintiff who is under a contractual duty to exercise care may not recover where he is guilty of contributory negligence,[80] but there can be no contributory negligence when no duty is placed on plaintiff to exercise care.[81] The owner of land ad-

R Co. v. Planters' Warehouse, etc., Co, 45 So 82, 153 Ala. 241.

66. Ga.—**Corpus Juris cited in** Pollard v. Walton, 190 S.E. 396, 401, 55 Ga.App 353.
51 C J. p 1176 note 21.

67. Wis.—Martin v. Western Union R Co, 28 Wis. 437, 99 Am.D. 189.

68. Wis.—Martin v. Western Union R Co, supra.
51 C J. p 1176 note 23.

69. Tex.—Texas, etc, R Co. v New Boston Hardware Co, Civ App., 157 S W. 1188.

70. Ill.—Great Western R Co. v. Haworth, 39 Ill. 346

71. Mo.—Coates v Missouri, etc., R. Co., 61 Mo. 38.

72. Va.—Kimball v. Borden, 34 S E 45, 97 Va. 477.

73. Ala.—Louisville, etc., R. Co. v Malone, 22 So 897, 116 Ala 600.

74. Mich.—Kendrick v. Towle, 27 N W 567, 60 Mich. 363, 1 Am.S.R. 526.
51 C J p 1177 note 36.

75. Tenn.—Nashville, C. & St. L. Ry. v Nants, 65 S.W.2d 189, 167 Tenn. 1.

76. Wyo.—**Corpus Juris quoted in** J J. Mayou Mfg. Co. v. Consumers Oil & Refining Co., 146 P.2d 738, 748, 60 Wyo. 75.
51 C.J. p 1177 note 39.

77. Ky.—Louisville, etc., R Co. v Beeler, 103 S W. 300, 126 Ky. 328, 31 Ky L 750, 128 Am S R. 291, 11 L R A.,N S, 930, 15 Ann Cas. 913

Wyo.—**Corpus Juris quoted in** J J. Mayou Mfg Co. v Consumers Oil & Refining Co, 146 P 2d 738, 748, 60 Wyo 75

78. N.C.—Jeffress v Norfolk Southern R Co, 73 S E 1013, 158 N C. 215.
51 C.J p 1178 note 42

79. Neb.—Union Pac. R. Co v. Ray, 65 N.W. 773, 46 Neb 750.

80. Ky.—Thurmond v. Nashville, C & St. L. Ry., 170 S.W.2d 7, 293 Ky. 716.

81. Ky.—Louisville, etc., R Co. v Beeler, 103 S.W. 300, 126 Ky 328, 31 Ky L 750, 128 Am S R. 291, 11 L.R.A.,N.S, 930, 15 Ann.Cas. 913.

joining a right of way is under no obligation to keep the grass cut on the right of way or to remove rubbish or other combustible material therefrom, although he owns the fee in the right of way.[82] Nevertheless, such an owner assumes the risk of fires set out by the company which are not due to negligence on its part, and for losses so sustained there can be no recovery.[83]

§ 502. —— Placing Combustibles on Land near Track

One whose premises adjoin a railroad is not chargeable with contributory negligence where he took out of doors and used on his premises an inflammable article necessarily used in his business on the premises. The piling of baled cotton by a landowner on his land near a track is not necessarily contributory negligence.

One whose premises adjoin a railroad is not chargeable with contributory negligence simply because he took out of doors and used on his premises an inflammable article necessary to be used in the business carried on on the premises,[84] or because he placed a canvas cover over plants growing on the land, although the cover was within reach of sparks from locomotives passing on the track.[85]

Cotton. It has been held that piling of baled cotton by a landowner on his land near a track is not contributory negligence,[86] although the cotton may be destroyed by fire caused by sparks emitted by a locomotive defectively constructed or improperly managed.[87] Where the owner of baled cotton in a gin spread out highly inflammable matter, such as lint cotton, on the gin platform, forty to fifty feet from a railroad track, he was held guilty of contributory negligence which would bar a recovery for the destruction of the baled cotton by reason of fire originally communicated to the lint cotton by a locomotive,[88] although the railroad employees were negligent in the operation of the locomotive.[89]

Stacks of grain, straw, or the like. In some decisions it has been said[90] or held[91] that a landowner who stacks grain, straw, or the like on his land near a track is not guilty of contributory negligence in so doing, although there is some authority to the contrary.[92] It has been held that it is not negligence per se to stack hay in an exposed position near a track.[93]

§ 503. —— Placing Property on Premises of Company

One who places property on the premises of a railroad company with the permission of the company assumes the risk of injury from fire due to accident, but in so doing he is not guilty of contributory negligence and may recover where the company is negligent in setting out the fire.

Where personal property is placed by its owner on the right of way or other premises of a railroad company with the express or implied permission of the company,[94] the owner assumes the risk of its being burned by unavoidable accident to which the nature of the placing renders it liable.[95] In such a case, it has been held that the owner was guilty of contributory negligence,[96] but in the majority of decisions it was held that the owner was not guilty of contributory negligence and was entitled to recover for injury to, or destruction of, the property by fire negligently set out by the company,[97] the measure of the company's obligation to avoid a negligent fire causing destruction of the property being precisely the same as it would have been if the owner of the property had placed it near to, but off, its premises.[98] These principles have been applied in cases involving specific types of property such as cordwood,[99]

82. Ind.—Pittsburgh, etc., R. Co. v. Jones, 86 Ind. 496, 44 Am. R. 334.

83. Pa.—Philadelphia, etc., R. Co. v. Schultz, 93 Pa. 341.

84. N.Y.—Kalbfleisch v. Long Island R. Co., 7 N.E. 557, 102 N.Y. 520, 55 Am.R. 832

85. Fla.—Benedict Pineapple Co. v. Atlantic Coast Line R. Co., 46 So. 732, 55 Fla. 514, 20 L.R.A.,N.S., 92

86. Tenn.—Louisville, etc., R. Co. v. Short, 77 S.W. 936, 110 Tenn. 713.
51 C.J. p. 1178 note 51.

87. Ala.—Louisville, etc., R. Co. v. Marbury Lumber Co., 28 So. 438, 125 Ala. 237, 50 L.R.A. 620

88. La.—Haas v. Hines, 91 So. 58, 150 La. 599.
51 C.J. p. 1178 note 56.

89. La.—Haas v. Hines, supra.

90. N.J.—Salmon v. Delaware, etc., R. Co., 38 N.J. Law 5, 13, 20 Am. R. 356.
51 C.J. p. 1178 note 60.

91. U.S.—Le Roy Fibre Co. v. Chicago, etc., R. Co., Minn., 34 S.Ct. 415, 232 U.S. 340, 350, 58 L.Ed. 631.
51 C.J. p. 1178 note 61.

92. Tex.—Ft. Worth, etc., R. Co. v. Dial, 85 S.W. 22, 38 Tex. Civ. App. 260.
51 C.J. p. 1179 note 62.

93. Kan.—St. Joseph, etc., R. Co. v. Chase, 11 Kan. 47.

94. Minn.—Martin Timber Co. v. Great Northern R. Co., 144 N.W. 145, 123 Minn. 423, Ann.Cas.1915A 496.
51 C.J. p. 1179 note 64.

95. Ind.—Indianapolis, etc., R. Co. v. Paramore, 31 Ind. 143.

96. N.Y.—Connelly v. Erie R. Co., 74 N.Y.S. 277, 68 App.Div. 542
Pa.—Post v. Buffalo, etc., R. Co., 108 Pa. 585.

97. N.C.—Herring v. Atlantic Coast Line R. Co., 127 S.E. 8, 189 N.C. 285.
51 C.J. p. 1179 notes 67, 69.

98. Minn.—Martin Timber Co. v. Great Northern R. Co., 144 N.W. 145, 123 Minn. 423, Ann.Cas.1915A 496.
51 C.J. p. 1179 note 70.

99. Me.—Boston Excelsior Co. v. Bangor, etc., R. Co., 44 A. 138, 93 Me. 52, 47 L.R.A. 82
51 C.J. p. 1179 note 72 [a].

lumber, timber, or crossties,[1] cotton,[2] and cotton seed.[3]

Buildings or structures. One who erects buildings or structures, wholly or partially, on a right of way or other property of a railroad with its consent, express or implied, is not chargeable with contributory negligence in so doing, and may recover for injury thereto, or destruction thereof, by fire negligently set out by the company,[4] unless the latter has contracted for exemption from liability for injury to the property as a condition of granting permission to erect and maintain such buildings or structures on its property.[5] However, even though there is a contract of this character, where buildings on the right of way are negligently set on fire by the company, and the fire extends to, and burns, other and adjoining property, it will not deprive the owner of his remedy for the negligent burning of the adjoining property.[6] It has been held, however, that the owner is bound to use reasonable care considering his relation to the company to protect his property in order to relieve himself from liability for contributory negligence[7]

Without permission of company. One who places property on the right of way or other premises of a railroad company without permission is a trespasser and is guilty of contributory negligence which will bar a recovery for its destruction by fire negligently set out by the company,[8] since one owes no duty to a trespasser, except not willfully or maliciously to injure him or his property,[9] and especially is this true where the owner of the property has been requested to remove it,[10] or where he is warned that if it remains it will be at his own risk.[11] This rule is not affected by a statute making railroad companies absolutely liable for property destroyed by fire caused by its locomotive.[12]

§ 504. —— Placing Combustible Property on Premises of Another Adjacent to Track

An owner of combustible property who placed it in proximity to a track on a platform which did not belong to the railroad assumed the risk of its destruction by sparks from a locomotive properly managed and equipped.

Where the owner of cotton without any agency of the railroad company placed it in proximity to the track on a platform which did not belong to the company, but to the municipal authorities of the town,[13] or to a compress company whose building was adjacent to the right of way,[14] the owner assumed the risk of its destruction by sparks from a locomotive properly equipped and managed, and the company was under no obligation to provide a watchman for the platform.[15] The negligence, if any, of a compress company in placing and leaving cotton on its platform near a railroad track as bailee of the owner of the cotton must be imputed to the owner thereof who placed it in charge of the compress company.[16] It was further held that, even though the cotton was placed on the platform of the compress company with the consent, acquiescence, or invitation, of the railway company, this fact did not relieve the owners of the duty to use proper care to protect it from fire,[17] or estop the railroad company to set out contributory negligence as a defense,[18] but a contrary view has been taken.[19]

§ 505. —— Failure to Construct Fire Breaks

Where a statute makes railroads liable for loss to property by fire set out by them irrespective of contributory negligence by the owner thereof, the owner of com-

1. Minn—Martin Timber Co v Great Northern R Co, 144 N W 145, 123 Minn 423, Ann Cas 1915A 496
51 C J p 1179 note 72 [b]

2. U S—Texas, etc, R Co v Rosborough, Tex, 35 S Ct 117, 235 U S 429, 59 L Ed 299
51 C J p 1179 note 72 [c].

3. Tex—Abbott Gin Co v Missouri, etc, R Co, 122 S.W 284, 57 Tex. Civ.App. 263.
51 C J. p 1179 note 72 [d].

4. Ala—Alabama Great Southern R. Co v Demoville, 52 So 406, 167 Ala 292
51 C J. p 1180 note 79.

5. Ala—Alabama Great Southern R. Co v Demoville, 52 So 406, 167 Ala. 292
51 C J p 1180 note 81.

6. Kan—Kansas City, etc, R. Co v. Blaker, 75 P. 71, 68 Kan 244, 64 L R A. 81.

7. Ky—Louisville, etc, R Co v. Samuels, 57 S W 235, 22 Ky L. 803

8. Ala—Alabama Great Southern R Co v. Demoville, 52 So. 406, 167 Ala. 292.
Wyo—**Corpus Juris cited in** J. J Mayou Mfg Co v. Consumers Oil & Refining Co., 146 P 2d 738, 748, 60 Wyo 75.
51 C J. p 1180 note 73.

9. Tex—Spring Garden Ins Co. v. International, etc, R. Co., Civ.App, 131 S W. 1147

10. Tex—Spring Garden Ins. Co. v. International, etc, R Co, supra

11. Ark—St Louis, etc, R Co v. Cooper, 130 S W. 203, 120 Ark 595

12. Ark—St Louis, etc., R Co. v Cooper, supra
51 C J. p 1180 note 77.

13. S C—Brown v. Atlanta, etc., Air Line R Co, 19 S C 39

14. U S—Svea Ins. Co v. Vicksburg, etc., R. Co, C C La, 153 F 774
Tex—Wolfe v St Louis Southwestern R Co., Civ App, 144 S W. 347

15. S C—Brown v Atlanta, etc, Air Line R. Co, 19 S C 39

16. U S—Svea Ins Co v. Vicksburg, etc, R Co., C C La, 153 F. 774
51 C.J. p 1181 note 88

17. Tex—Martin v. Texas, etc, R. Co, 26 S.W 1052, 87 Tex 117

18. Tex.—Martin v. Texas, etc, R. Co, supra

19. Ala.—Louisville, etc, R Co. v. Smith, 50 So 241, 163 Ala 141.
51 C J p 1181 note 91.

bustible property placed on his own land is under no duty to construct a fire guard around it. Where there is no statute of this type, the failure to construct fire guards is not necessarily contributory negligence.

Where a statute makes railroad companies liable for loss or injury to property by fire set out by them irrespective of contributory negligence on the part of the owner, the owner of combustible property placed on his own land near a track, such as haystacks and the like, is under no duty to construct a fire guard around it by burning, plowing, or otherwise [20] Where there are no statutes of this character, it has been held that failure to construct such fire guards is not contributory negligence,[21] at least in the absence of any custom or usage to do so in the locality where the fire occurred,[22] and it has been held that the failure to plow fire breaks around land adjacent to the railway on which cut hay is lying in windrows is not per se contributory negligence.[23] It is not negligence per se to fail to make fire guards around a field of shocked wheat one and one-half miles from the railroad.[24] The property owner has no duty to permit a railroad company to plough fire guards on his property.[25]

It has been held that refusal of the owner of land adjacent to a railroad of permission to the company to burn fire guards on his land, where it offered to pay for the grass burned as a fire guard as soon as the area of the same could be measured and the number of acres burned ascertained, except on an unreasonable condition that the company pay for damage in advance, is contributory negligence barring a recovery against the railroad for injuries to his land by fire set out by the railroad company.[26]

§ 506. —— Failure to Take Precautions after Commission of Negligent Act

An owner of property adjacent to a railroad, who knows of the commission of a negligent act by the railroad which may endanger his property, must take steps to avert the injurious consequence of such negligence or he will be guilty of contributory negligence which will bar a recovery for damages to his property by fire proximately flowing therefrom.

If the owner of property adjacent to a railroad right of way knows of the commission of a negligent act by the railroad company which may endanger his property, he must take steps to avert the injurious consequence of such negligence, or he will himself be guilty of contributory negligence which will preclude a recovery for damages to his property by fire proximately flowing therefrom.[27] Thus, where property is set on fire by the negligence of a railroad company, or is in danger of being set on fire by the spread of fire negligently set out by the company, the owner of the property, or his agents or servants engaged with respect to the care and management of the property, must, if they have knowledge of the fire, exercise ordinary care and diligence to extinguish it, and, if no effort is made to do so, the right to recover for loss or injury to the property is barred by contributory negligence.[28]

Measure of owner's duty; degree of care. The measure of duty imposed in attempting to extinguish fires is ordinary care and diligence,[29] that is to say, such precautions as a reasonably prudent man would be expected to take under the circumstances to protect his property from destruction.[30] The owner is not bound to adopt means to extinguish or prevent the spread of fire which are unreasonable or of extreme difficulty[31] or extraordinarily hazardous;[32] nor is he negligent in failing to attempt to extinguish the fire if his efforts would have been unavailing,[33] or if he makes a mistake of judgment as to the best method of extinguishing the fire,[34] or if he uses reasonable and bona fide efforts to stay the fire, which under the circumstances are ineffectual.[35] It has been held that the owner is not guilty of neglience in failing to extinguish a fire on the right

20. Colo.—Union Pac. R. Co. v. Arthur, 29 P. 1031, 2 Colo App. 159
21. Ga.—Ellis v. New Orleans Great Northern R. Co., 126 So. 64, 169 Ga. 797.
51 C J. p 1181 note 94.
22. U S.—Gulf, etc., R. Co. v. Johnson, Ind T., 54 F. 474, 4 C.C.A. 447.
23. Neb.—Union Pac. R. Co. v. Ray, 65 N.W. 773, 46 Neb. 750.
24. Kan.—Padgett v Atchison, etc., R. Co., 52 P. 578, 7 Kan App. 736.
25. La.—Ellis v. New Orleans, etc., R. Co., 126 So. 64, 169 La. 797.
51 C.J. p 1181 note 96.
26. Tex.—Ft. Worth, etc., R. Co. v. Hapgood, Civ.App., 184 S W. 1075.
51 C.J. p 1181 note 98.
27. Ala.—Sullivan Timber Co. v. Louisville, etc., R. Co., 50 So. 941, 163 Ala. 125.
51 C.J. p 1181 note 99.
28. Miss.—Corpus Juris cited in Yazoo & M. V. R. Co. v. Fields, 195 So 489, 490, 188 Miss 725, suggestion of error overruled 196 So. 503, 188 Miss 725
Tenn.—Nashville, C. & St. L Ry. v. Nants, 65 S W.2d 189, 167 Tenn. 1.
51 C.J. p 1181 note 1
29. Pa.—Nicholson v. Buffalo, R. & P. Ry. Co., 153 A. 128, 302 Pa. 41.—Haverly v. State Line, etc., R. Co, 19 A. 1013, 135 Pa. 50, 20 Am. S.R. 848.
30. U.S.—Clark v Kansas City, etc., R Co, Tenn., 129 F. 341, 64 C.C.A. 19
51 C J. p 1182 note 3.
31. Fla.—Florida East Coast R. Co v. Smith, 55 So. 871, 61 Fla. 218.
51 C J p 1182 note 4.
32. Ind.—Wabash R Co. v. Miller, 48 N E 663, 18 Ind App. 549
Or.—Hawley v. Sumpter R. Co., 90 P. 1106, 49 Or. 509, 12 L.R.A.,N S., 526.
33. N Y.—Sugarman v. Manhattan El. R. Co, 16 N Y S. 533.
51 C.J. p 1182 note 6.
34. Ala.—Alabama Great Southern R. Co. v. Planters' Warehouse, etc, Co., 45 So 82, 153 Ala. 241.
35. Iowa.—Connable v. Chicago, etc, R. Co., 145 N.W. 304, 165 Iowa 230.
51 C J. p 1182 note 8.

of way where the fire was not of such a character as to impress a man of ordinary prudence with the belief that the danger to his property was immediate and pressing,[36] and that one, who spends his time in seeking to save a portion of his property from destruction by fire and in attempting to prevent the spread of such fire, is not, by reason of such conduct, guilty of contributory negligence in not having herded his cattle and placed them in a position of safety.[37]

Damages occurring before discovery of fire. Negligence of a property owner in failing to make an attempt to extinguish a fire negligently set out by a railroad company on his property will not defeat his right to recover for injury occurring before discovery of the fire.[38]

§ 507. —— Miscellaneous

The questions of contributory negligence and assumption of risk have been considered in various court decisions involving loss or injury to persons or property by a fire caused by a railroad in the operation of its locomotives.

Various decisions involving loss or injury to person or property by fires caused by the operation of locomotives in which the questions of contributory negligence and assumption of risk are considered have been handed down by the courts, as in the case where a landowner invited a railroad to operate one of its locomotives over tracks on his land for his benefit,[39] where a shipper failed to remove refuse or litter after loading railroad cars,[40] where the owner of land left combustible matter on land of another between his land and a railroad track,[41] where a child, while in its parents' home, was injured by fire escaping from a passing locomotive,[42] and where a special contract between the owner of a building and a railroad which built a siding thereto required the owner to exercise the greatest care in the management of the siding.[43]

§ 508. —— Contributory Negligence as Proximate Cause of Injury

Although a property owner is guilty of contributory negligence in respect of a fire caused by a railroad, he may recover for such injury as may have resulted unless his negligence was the proximate cause thereof.

The mere fact that a property owner is guilty of negligence in respect of the fire which causes his injury does not necessarily preclude him from recovering therefor on the ground of contributory negligence, but it must also appear that such negligence is the proximate cause of the injury, or in other words, that he has done some act or omitted some duty which is the proximate cause of the injury, either by contributing to the setting of the fire or to the damages resulting therefrom.[44] Nevertheless, in the absence of a statute providing otherwise, if negligence of the owner is the proximate cause of the injury, the owner cannot recover, although the company may have been guilty of negligence in a greater degree.[45]

§ 509. —— Injury Avoidable notwithstanding Contributory Negligence

A railroad may be liable for injury to property notwithstanding the owner thereof negligently placed it in a position where it was in danger of catching fire from sparks of locomotives if the railroad discovered that the danger was imminent and could have avoided the injury.

Although an owner of property is guilty of negligence in placing it in a position where it is in danger of being set on fire by sparks from locomotives, the railroad company will nevertheless be liable for its destruction if it appears that it discovered the danger or could have done so by the exercise of ordinary diligence, that the danger was imminent, and that in the exercise of ordinary diligence in the circumstances it could have avoided injuring the property.[46] Nevertheless, this principle is applicable only where the danger is imminent, is discovered by the railroad company, and could have been avoided by it.[47]

36. Tex.—Texas Pac. R. Co v. Leon & H Blum Land Co, Civ App, 49 S W. 253.
51 C J p 1182 note 9.

37. Ill.—Chicago, etc, R. Co. v. Willard, 111 Ill.App 225.

38. Vt.—Stebbins v. Central Vermont R. Co, 54 Vt. 464, 41 Am R. 855.
Wis—Beebe v. Minneapolis, etc., R Co, 182 N W. 743, 185 N.W 177, 175 Wis. 284.

39. Mich.—Mann v. Pere Marquette R Co, 97 N.W. 721, 135 Mich. 210.
51 C J. p 1183 note 12 [a].

40. U.S.—Erickson v. Pennsylvania R. Co., N.J., 170 F. 572, 95 C C.A. 652.
51 C.J. p 1183 note 12 [b].

41. Neb.—Omaha Fair, etc., Assoc v. Missouri Pac. R. Co., 60 N W. 330, 42 Neb. 105
51 C.J. p 1183 note 12 [c].

42. Tex.—Gulf, etc, R. Co v. Johnson, Civ.App., 51 S.W. 531, reversed on other grounds 53 S.W. 374, 94 Tex. 649
51 C.J. p 1183 note 12 [d].

43. Ind.—Pittsburgh, etc, R. Co. v. Indiana Horseshoe Co., 56 N.E. 766, 154 Ind. 322.
51 C.J. p 1183 note 12 [e].

44. Or—Hartford F Ins Co. v. Central R. Co, 144 P 417, 74 Or 144.
Pa—Ruby v. Pennsylvania R. Co, Com Pl, 61 York Leg Rec. 17.
51 C J. p 1183 note 14

45. Kan—Missouri Pac. R. Co. v. Haynes, 42 P 259, 1 Kan.App. 586
51 C.J. p 1183 note 16.

46. Tex.—Morgan v. Missouri, etc, R. Co., 193 S.W. 134, 108 Tex 331.
51 C J. p 1171 note 64.

47. Tex—Morgan v. Missouri, etc., R. Co., supra
51 C.J p 1171 note 65.

§ 510. Contracts for Exemption from Liability

a. Validity
b. Construction, operation, and effect
c. Termination or renewal of contract

a. Validity

(1) In general
(2) Effect of statutory and constitutional provisions

(1) In General

A railroad company in its private capacity as owner of property may by a valid contract be relieved from damages by fire caused by its negligence.

While a railroad company may not contract for exemption, wholly or partially, from liability for damages caused by fire, in derogation of its duty to the public as common carrier,[48] the strict rule of liability for loss while acting as a common carrier is not applicable to all its activities,[49] and, in its private capacity as owner of property, it may, by a valid contract,[50] be relieved from liability for damages by fire caused by its negligence,[51] or for damages resulting from fire set by locomotives.[52] Accordingly, a railroad company may provide for such exemption as a consideration of permitting another to erect and use buildings[53] or store property[54] on its right of way, depot grounds, or other lands owned by it, provided the contract does not embrace property for the injury or destruction of which the company is liable as a common carrier; and this doctrine applies with equal force to similar contracts of a company leasing buildings owned by it adjacent to its track.[55] So, contracts under which companies construct industrial switches, spurs, or sidetracks, to serve industrial plants situated on property owned by others in consideration of exemptions therein contained from liability for loss by fires negligently caused by the companies, have likewise been held valid.[56] Inasmuch as a property owner may agree with a railroad, as an inducement to furnish him service over a spur track through his property, to refrain from acts which would make the operation unsafe,[57] a contract under which a property owner obtained such a spur track through his property and under which he agreed to permit no trash to accumulate on his track or premises is valid.[58]

Contract between owner of property and third person. A railroad company cannot take advantage of a contract of exemption entered into between the person whose goods are injured or destroyed and a third person whose warehouse is on the company's property, and in which the goods were stored at the time of injury.[59]

(2) Effect of Statutory and Constitutional Provisions

Contracts exempting a railroad company from liability for damages to buildings on its right of way from fire caused by its negligence are not invalidated by laws making carriers liable for damages irrespective of negligence, or generally prohibiting contracts by them in exemption of liability.

Contracts exempting a railroad company from liability for damages to buildings on its right of way from fire caused by its negligence are not invalidated by laws making carriers liable for damages irrespective of negligence[60] or prohibiting con-

48. Pa.—Rundell v. Lehigh Valley R. Co., 98 A. 1054, 254 Pa. 529
Limitation of liability of common carrier generally in case of loss by fire see Carriers § 100.

49. U.S.—Michigan Millers Mut. Fire Ins. Co. v. Canadian Northern Ry. Co., C.C.A.Minn., 152 F.2d 292.
Burning over railroad's right of way constituted "maintenance" and railroad was not acting as "common carrier" so as to be subject to strict rule of liability for damages from fire to near-by warehouse.—Michigan Millers Mut. Fire Ins. Co. v. Canadian Northern Ry. Co., supra.

50. U.S.—Michigan Millers Mut. Fire Ins. Co. v. Canadian Northern Ry. Co., supra
51 C.J. p. 1183 note 19
Public has no interest in which of the contracting parties shall suffer for any loss.—Michigan Millers Mut. Fire Ins. Co. v. Canadian Northern Ry. Co., supra.

51. U.S.—Spiritwood Grain Co. v. Northern Pac. Ry. Co., C.A.N.D., 179 F.2d 338.—Michigan Millers Mut. Fire Ins. Co. v. Canadian Northern Ry. Co., C.C.A.Minn., 152 F.2d 292.—**Corpus Juris quoted in** Rhinehart v. Southern Pac. Co., D.C.Cal., 38 F.Supp. 76, 78.
Me.—**Corpus Juris quoted in** E. L. Cleveland Co. v. Bangor & A. R. Co., 173 A. 813, 814, 133 Me. 62
51 C.J. p. 1184 note 20

52. U.S.—Southern R. Co. v. Stearns, C.C.A.N.C., 28 F.2d 560, certiorari denied 49 S.Ct. 252, 279 U.S. 838, 73 L.Ed. 985
51 C.J. p. 579 note 89.

53. U.S.—Michigan Millers Mut. Fire Ins. Co. v. Canadian Northern Ry. Co., C.C.A.Minn., 152 F.2d 292.—**Corpus Juris quoted in** Rhinehart v. Southern Pac. Co., D.C.Cal., 38 F.Supp. 76, 78.
Me.—Bangor & A. R. Co. v. Hand, 174 A. 380, 133 Me. 99
Minn.—Pettit Grain & Potato Co. v. Northern Pac. Ry. Co., 35 N.W.2d 127, 227 Minn. 225
Tex.—Eastern States Petroleum Co. v. Port Terminal R. Ass'n, Civ. App., 161 S.W.2d 539.
51 C.J. p. 1184 note 21.

54. Ill.—Bartee Tie Co. v. Jackson, 117 N.E. 1007, 281 Ill. 452.
51 C.J. p. 1184 note 22.

55. Del.—Marshall v. Maryland, etc., R. Co., 112 A. 526, 31 Del. 170

56. S.C.—Williams v. Hines, 121 S.E. 600, 128 S.C. 102
51 C.J. p. 1184 note 24

57. Ky.—Thurmond v. Nashville, C. & St. L. Ry., 170 S.W.2d 7, 293 Ky. 716

58. Ky.—Thurmond v. Nashville, C. & St. L. Ry., supra.

59. Tex.—Edwards v. Bonner, 33 S.W. 761, 12 Tex.Civ.App. 236

60. Me.—**Corpus Juris quoted in** E. L. Cleveland Co. v. Bangor & A. R. Co., 173 A. 813, 814, 133 Me. 62.
51 C.J. p. 1185 note 25.

tracts by them in exemption of liability.[61] It has been held that such contracts are not in violation of a constitutional provision that "no common carrier shall be permitted to contract for relief from its common law liabilities"[62] Such contracts are valid where the railroad's duty as a common carrier is not involved.[63]

A railroad company may, when acting in its private capacity, relieve itself from an absolute liability imposed by statute for setting fire to property as well as from liability resulting from negligence,[64] and a statute requiring railroad operators to keep their rights of way free from combustible materials and imposing a liability for damages resulting from fire from operation of the road has no application to tenants on the right of way whose leases exempt the company from liability for damages for injury or destruction by fire or other causes incident to the operation of the railroad.[65] So, a contract between a railroad company and a private corporation whereby, in consideration of the latter's release of the railroad company from liability for fire, the company agreed to build and maintain a private sidetrack over its right of way and adjoining land for the private use of the corporation, is not invalidated by a statute imposing certain duties on railroad companies in respect of removing combustibles from their rights of way and putting out fires thereon and on adjoining lands, and providing a penalty, for any violation of its provisions[66] A provision in a lease of a railroad right of way which exempts the railroad as lessor from liability for damage by fire to the lessee's property on the leased premises is valid notwithstanding statutes imposing criminal liability on a railroad for failure to use safety appliances and absolute liability for fires set by locomotives.[67]

Expressly avoiding contracts for exemption Statutes making railroads liable for the negligent burning of buildings on their rights of way, notwithstanding provisions to the contrary in leases executed by them, have been upheld as a valid exercise of the police power.[68] Such a statute has been held to apply in a case where the lease was executed before the enactment thereof but the fire occurred thereafter.[69] It has been held also that the statute does not necessarily render the lease void in toto and that a clause in the lease, providing that, if the exemption therein provided for legally failed, the lessor should have the full benefit of any insurance effected by the lessee on structures erected on the premises, is valid and enforceable.[70]

b. Construction, Operation, and Effect

(1) In general
(2) Who bound by contract
(3) Property subject to exemption
(4) Origin of fire as affecting exemption

(1) In General

Contracts providing for exemption from liability for fires caused by the railroad are construed against the party granting the contract. Such contracts operate as an absolute bar to the recovery of any damages included within their terms.

Contracts or leases providing for exemption from liability will be construed strongly against the lessor or party granting the contract,[71] although it will be construed in the light of the circumstances surrounding its execution[72] Such contracts operate as an absolute bar to the recovery of any damages included within their terms.[73] Thus a lease wherein the lessee covenanted to save the lessor-railroad harmless from claims for damages caused by fire from locomotives or from any other cause whatsoever did not, under the "ejusdem generis" rule, ex-

61. U.S.—Fraser-Patterson Lumber Co v Southern Ry Co, D C S C, 79 F Supp. 424.
51 C J. p 1185 note 26.

62. Ky.—Greenwich Ins. Co. v Louisville, etc, R Co, 66 S W. 411, 67 S W 16, 112 Ky 598, 23 Ky.L 2014, 99 Am S R 313, 56 L R A 477.
Me.—**Corpus Juris quoted in** E L. Cleveland Co v. Bangor & A R Co, 173 A 813, 814, 133 Me 62.

63. U S.—Michigan Millers Mut Fire Ins. Co. v. Canadian Northern Ry. Co, D C Minn, 53 F Supp 326, affirmed, C.C A., 152 F.2d 292.

64. U S.—**Corpus Juris quoted in** Ætna Ins Co v. Atlantic Coast Line R. Co., C.C A.Va, 79 F.2d 463, 465, certiorari denied 56 S Ct. 442, 297 U S 704, 80 L Ed. 992.
51 C J p 1185 note 28

65. U S.—Cooper v Northern Pac R Co, D C.Mont, 212 F 533.

66. W Va.—Keystone Mfg Co v Hines, 102 S E 106, 85 W.Va. 405
51 C J. p 1185 note 30

67. Minn.—Pettit Grain & Potato Co v Northern Pac Ry Co, 35 N W.2d 127, 227 Minn. 225.

68. Iowa.—Ætna Ins Co. v Chicago Great Western R. Co., 180 N W 649, 190 Iowa 487, 16 A L R 249, followed in Retail Lumberman's Assoc v Chicago Great Western R Co, 180 N.W 652

69. Iowa.—Ætna Ins Co. v. Chicago Great Western R Co, 180 N.W. 649, 190 Iowa 487, 16 A.L R 249, followed in Retail Lumberman's Assoc v Chicago Great Western R Co, 180 N W 652

70. Iowa.—Queens Ins Co v. Chicago, etc., R Co, 206 N W. 804, 201 Iowa 1072.
51 C J p 1185 note 34.

71. Vt.—Manchester Marble Co v. Rutland R Co, 136 A 394, 100 Vt. 232, 51 A.L R. 628.

72. U S.—Rhinehart v. Southern Pac Co, D.C Cal, 38 F Supp. 76.

73. N.C.—Singleton v Atlantic Coast Line R Co, 166 S E 305, 203 N C 462
51 C J p 1185 note 37.

empt the lessor from liability for fire damages caused by locomotives only, but covered all fire damages.[74] A property owner who negligently permits an accumulation of rubbish about a spur track on his property in violation of a contract with the railroad will be barred from recovery for fire damages caused by the negligence of the railroad but originating in such rubbish accumulation.[75] A covenant for quiet enjoyment in such a lease is subject to the provision saving the lessor harmless from all claims for damages caused by fire.[76] A recovery against the railroad was denied notwithstanding an additional clause in the agreement permitting the railroad to use the spur track for its business but not to the detriment of the lessee's business.[77]

Contracts or leases of this type, however, do not absolve from liability for gross, willful, and wanton negligence in failing to extinguish fires negligently set out,[78] or where the railroad willfully refused to unlock a railroad crossing so as to permit fire apparatus to pass thereby preventing such fire apparatus from reaching the leased property which was on fire.[79] Also the contract has been held not to release the railroad from liability for loss by fire resulting from tortious use of the tracks covered in the contract.[80] Where a statute makes railroads liable for damage resulting from fire caused by acts of any of their employees engaged in the course of their employment, a contract wherein the lessee agrees to indemnify the railroad against damage to property of the lessee arising from fire caused by locomotives of the railroad does not relieve the railroad from liability for loss from a fire started by its employees.[81] A contract between a railroad and its tenant leasing a right of way for warehouse purposes does not operate to relieve another railroad which is a joint tort-feasor with the lessor railroad with respect to a fire in the warehouse.[82]

(2) Who Bound by Contract

A provision for exemption from liability for loss by fire caused by negligence of the railroad is a covenant running with the land, and an assignee of a lease containing such a provision is bound thereby. Generally, provisions for exemption from liability for loss by fire due to negligence of the railroad companies embodied in contracts or leases are not binding on third persons who store goods on premises which are the subject of such contract or lease, but an assignee of the lease has generally been held bound thereby.

While there is some authority to the contrary,[83] generally provisions for exemption from liability for loss by fire due to the negligence of railroad companies embodied in contracts or leases are not binding on third persons whose property was stored on the premises which were the subject of the lease or contract, and do not prevent a recovery for injury to, or destruction of, such property by fire.[84] This is so whether they had notice of such provisions[85] or not,[86] the question of notice of the exemption being immaterial as a matter in which third persons have no interest.[87] It is likewise of no importance that the company had no notice that the property of the third person was stored on the premises,[88] or that he was a stockholder in the corporation which had leased the premises.[89]

Mortgagee of goods in building on leased premises. Where the lessee of railroad property under a lease exempting a railroad company from liability for injuries caused by fire due to its negligence erected a building on the demised premises and gave a chattel mortgage on its stock of goods therein and the mortgagee had no notice either actual or constructive of the lease of the exemption, it was held that the exemption should be construed merely as a contract of indemnity whereby the lessee was to protect the company from all claims, and, therefore, the mortgagee, not knowing of the covenant, might recover, where the mortgaged property was burned through the negligence of the company.[90]

74. U.S.—Franklin Fire Ins. Co. v. Chesapeake & O Ry Co, C.C.A. Ky, 140 F.2d 898.

75. Ky.—Thurmond v. Nashville, C & St. L Ry., 170 S.W.2d 7, 293 Ky 716.

76. U.S.—Franklin Fire Ins. Co. v. Chesapeake & O. Ry. Co., C.C.A. Ky, 140 F.2d 898.

77. U.S.—Rhinehart v. Southern Pac. Co, D.C.Cal, 38 F.Supp. 76

78. S.C.—Palmetto Lumber Co. v. Southern R. Co., 151 S.E. 279, 154 S.C. 129.
W.Va.—Keystone Mfg. Co. v. Hines, 102 S.E. 106, 85 W.Va. 405.

79. U.S.—Columbia Ins. Co. v. Texas & P Ry. Co., D.C.La., 74 F.Supp 714.

80. Md.—William Danzer & Co. v. Western Maryland Ry. Co, 165 A. 463, 164 Md. 448.

81. U.S.—Kansas City Southern Ry Co v. New England Fire Ins. Co., C.C.A.Ark., 133 F.2d 973.

82. Wash.—Michigan Millers Mut Fire Ins. Co v. Oregon-Washington R. & Nav. Co., 201 P.2d 207, 32 Wash.2d 256.

83. Iowa.—City of New York Ins Co v Chicago, etc, R. Co., 140 N.W. 373, 159 Iowa 129.

84. Ark.—St. Louis-San Francisco Ry. Co. v. Travis Insulation Co., 223 S.W.2d 765, 215 Ark. 868.
51 C.J. p 1186 note 41.

85. Cal.—King v. Southern Pac. Co., 41 P. 786, 109 Cal. 96, 29 L.R.A. 755.
Tex.—McAdams v. Missouri, etc, R. Co, 45 S.W. 936, 19 Tex.Civ.App. 82.

86. U.S.—Reeder v. Northern Pac. R. Co, D.C.Or, 283 F. 786.
51 C.J. p 1186 note 43

87. Cal.—King v. Southern Pac Co., 41 P. 786, 109 Cal 96, 29 L.R.A. 755.

88. Ala.—Alabama Great Southern R. Co. v. Demoville, 52 So. 406, 167 Ala. 292.

89. Mont.—Orient Ins. Co. v. Northern Pac R. Co., 78 P. 1036, 31 Mont. 502.

90. U.S.—Milton Mfg Co. v. Chica-

Assignee or subtenant. It has been held that an assignee is not bound by a contract or lease provision for exemption from liability, the view being taken that it is a personal covenant and not a covenant running with the land,[91] but it is generally considered that the exemption is a covenant running with the land and that the assignee of the lease is bound thereby,[92] although the assignee had no actual notice of the provision for exemption.[93] Where an assignee of a lease in which the original lessee assumed the risk of damages because of fire from railroad operations assumes the liabilities of the lessee, such assignee will be barred from recovering for fire damages.[94] An assignment of a lease with the consent of the railroad is not a new lease as affecting the validity of the provision exempting the railroad from liability for damages to buildings on the leased premises.[95]

Where a lease of a warehouse on a right of way which exonerated the railroad from damages for fires, and gave the tenant, his successors or assigns, an option to continue the lease for another term of ten years on giving notice sixty days prior to its termination, was assigned to another, who continued in possession after the expiration of the term, and four months thereafter notified the company that, as assignee of the lease, he held possession under the terms of the lease for another period of ten years, the assignee was bound by the covenant of exoneration, even though that covenant was, prior to the expiration, merely personal, and not binding on the assignee, since he had not exercised his option of renewal in the time limited, and the consent of the railroad to another term thereafter was sufficient consideration for his agreement to hold under the terms of the lease.[96] It has been held, however, that, where one who purchased a building on ground leased from a railroad under a lease which exempted the company from liability for fire and provided against assignment without consent of the lessor was informed that a new lease was necessary and to have the old lease canceled, which was done, and where the company notified him that he was occupying without lease, he did not become a tenant under the lease and the company was liable for destruction of the property by fire caused by sparks from its locomotive.[97]

Subtenant. Since there is privity neither of contract nor of estate between the lessor and the sublessee unless the sublessee attorns to the original lessor, as discussed in Landlord and Tenant § 48, it has accordingly been held that a subtenant of a lessee of a railroad company under a lease exempting the company from liability for injuries for fire caused by its negligence is not bound by such exemption.[98] However, a contrary view has been taken holding that the subtenant is bound by the exemption,[99] whether or not he had actual notice of it.[1]

(3) Property Subject to Exemption

Whether or not the exemption extends to property outside the demised premises depends on the provisions of the particular lease and the construction placed thereon by the courts.

Whether or not the exemption extends to property outside the demised premises depends on the provisions of the particular lease and the construction placed thereon by the courts, so that it has been held that particular provisions exempt the railroad from liability for damage to property outside of the premises,[2] while it has also been held that particular provisions in other leases do not exempt the railroad company from liability for loss by fire communicated by locomotives except as to property situated on the right of way.[3] The word "buildings" in a lease refers to any buildings on the leased premises no matter when they were constructed.[4] The exemption does not extend to property of the lessee which, although on the leased premises when destroyed by fire, had passed into the custody and control of the railroad company.[5]

go, etc, R Co, D C Iowa, 237 F 118
51 C.J p 1186 note 47.

91. Ill —Atwood v Chicago, etc, R Co., 144 N E 351, 313 Ill 59.

92. W Va —Keystone Mfg Co. v Hines, 102 S E 106, 85 W.Va. 405
51 C.J p 1186 note 50

93. W Va.—Keystone Mfg. Co v Hines, supra.

94. Neb.—O-N-L Mills, Inc v Union Pac R Co, 39 N.W 2d 501, 151 Neb. 692

95. U.S —Michigan Millers Mut Fire Ins. Co v. Canadian Northern Ry. Co, C.C.A Minn, 152 F.2d 292.

96. Ala —Adler v Western R Co, 68 So. 361, 192 Ala. 507.

97. Ind —Pittsburgh, etc., R Co v Mexico, El., etc, Co, 149 N.E 573, 85 Ind App. 42

98. Tex.—Wooldridge v. Ft Worth, etc., R. Co, 86 S W. 942, 38 Tex Civ App. 551.

99. W.Va.—Keystone Mfg. Co. v. Hines, 102 S.E 106, 85 W.Va 406.
51 C J p 1187 note 56.

1. W.Va —Keystone Mfg. Co. v. Hines, supra.

2. Ohio —Mansfield Mut Ins. Co v. Cleveland, etc, R. Co., 77 N E 269, 74 Ohio St. 30, 37, 6 Ann Cas. 782
51 C.J. p 1187 note 61 [a].

3. Vt —Manchester Marble Co v. Rutland R. Co., 136 A. 394, 100 Vt 232, 51 A L R 628.
51 C J. p 1187 note 61 [b]

4. U.S —Spiritwood Grain Co v. Northern Pac Ry. Co, C.A N D, 179 F.2d 338
Minn —Pettit Grain & Potato Co v Northern Pac Ry. Co, 35 N.W.2d 127, 227 Minn. 225.

5. Ill —Samuel v. Wabash R Co, 193 Ill.App. 521.
Liability for damages to property of third persons stored on leased premises see supra subdivision b (2) of this section.

(4) Origin of Fire as Affecting Exemption

Whether or not a fire causing the loss complained of is of such origin as will confer exemption from liability on the railroad depends on the particular terms of the contract.

Whether or not the fire causing the loss or injury complained of is of such origin as will confer exemption from liability on the company whose negligence started the fire depends on the terms of the particular contract or lease.[6] Since the exemption is frequently contained in contracts for the construction of side tracks or spur tracks to serve industrial plants situated near the railroad, it often becomes necessary to determine whether the exemption extends to loss or injury by fire started on the main track as well as by fire started on the side track or spur track, and, as in other cases, whether or not the exemption extends to fire started on the main track depends on the wording of, and the construction put on, the particular contract creating the exemption.[7]

c. Termination or Renewal of Contract

Where a contract under which exemption from liability is claimed has expired, it ceases to be available in favor of the railroad company. A lease of this type, with no fixed date for termination, is a continuing contract.

Where the contract under which exemption from liability is claimed has expired, it ceases to be available in favor of the railroad company.[8] However, where the lessee, after terminating the lease by serving notice in accordance with its provisions, continues to occupy the leased property, he is bound by a provision in the lease that the company shall not be liable for fires caused by its locomotives,[9] and, where a lessee who is notified by the railroad to move a building off its premises does not do so and continues to pay the annual rent as provided for in the lease, the provision in such lease exempting the railroad for liability from loss due to fire is not canceled,[10] but it has been held, under an expired lease for a spur track not seasonably renewed, that the company cannot claim exemption from liability,[11] especially where the lessee has not used the spur track since the expiration of the lease.[12]

Where a lease creates a year-to-year tenancy, with no fixed date for termination, it is a continuing contract and a new lease does not come into existence at the beginning of each year.[13]

§ 511. Persons Entitled to Damages

a For injuries to person
b. For injuries to property

a. For Injuries to Person

A person injured by a fire caused by the negligent operation of a railroad generally may recover damages from the railroad A trespasser cannot recover for injuries from such a fire.

Generally, a person injured by fire caused by negligent operation of a railroad may recover damages from the railroad[14] A person cannot recover for personal injuries sustained from a fire caused by a railroad where such person is a trespasser on railroad land and where his presence was not known to servants of the railroad.[15]

b. For Injuries to Property

(1) In general
(2) Holders of legal or equitable title
(3) Persons having possession
(4) Landlord and tenant
(5) Licensees

(1) In General

General or special ownership of property is essential to authorize a recovery for its negligent destruction by fire by a railroad company.

Either general or special ownership of property is essential to authorize a recovery for its negligent destruction by fire by a railroad company.[16] Separate actions for damages caused by a railway fire cannot be maintained by both the owner and an insurance company which paid part of the loss.[17]

6. U S—Cooper v. Northern Pac R Co, D C Mont, 212 F. 533.
51 C J. p 1187 note 62.

7. **Extending exemption**
U S—Fraser-Patterson Lumber Co v. Southern Ry. Co., D C S C, 79 F. Supp. 424
51 C.J. p 1188 note 66 [a].

Not extending exemption
U S.—Sunlight Carbon Co. v. St. Louis, etc., R Co., C C A Okl., 15 F 2d 802
51 C J. p 1188 note 66 [b].

8. S.C.—Rittenberg v. Atlantic Coast Line R. Co., 83 S E 600, 99 S.C 488.
51 C J. p 1188 notes 68–70

9. U S—Milton Mfg. Co v Chicago, etc, R Co, D C Iowa, 237 F 118
51 C J. p 1188 note 71.

10. Ark—Missouri Pac R Co v. Barnes, 121 S W 2d 896, 197 Ark 199

11. S C—Rittenberg v. Atlantic Coast Line R. Co., 83 S E 600, 99 S.C. 488.

12. S C—Rittenberg v. Atlantic Coast Line R Co, supra.
51 C.J. p 1188 note 73.

13. U S—Spiritwood Grain Co v Northern Pac Ry. Co., C A N D, 179 F 2d 338

14. Ga.—Hines v Bellah, 106 S E 559, 26 Ga App 361.
51 C.J. p 1190 note 13.

15. N H—Madden v Boston, etc, R Co., 83 A. 129, 76 N.H. 379, 39 L R A.,N S, 1058

16. Ark—St. Louis, etc, R. Co v Hecht, 38 Ark. 357
Or—Strang v. Oregon-Washington R, etc., Co., 163 P. 1181, 83 Or 644

17. Pa—Post v Buffalo, etc, R. Co, 2 Walk. 464.

One who willfully permits a fire started by a railroad locomotive to destroy his property may not recover against the railroad[18] An owner of real or personal property damaged by fire caused by locomotive sparks cannot recover for damage to that part of such property which encroached on railroad lands.[19]

Assignor or assignee of claim for damages One who has assigned his claim for loss by fire from a locomotive to his insurer on receiving full insurance cannot maintain an action for such damages against the railroad company,[20] but he may recover for loss or injury to uninsured property[21] and for another's claim assigned to him under a statute empowering the court to give judgment for or against one or more of several claimants of defendant when justice requires it and to determine the parties' rights as between themselves.[22]

(2) Holders of Legal or Equitable Title

The holder of the legal title to land, as well as a holder of equitable title, may sue for injury to his land by fire caused by negligence of a railroad.

One who has absolute title to land may sue for injury thereto by fire negligently set out by a railroad company,[23] but one who has conveyed land has no right of action for injuries of the character under consideration.[24] One who has the equitable title to land[25] or personal property[26] may maintain an action for the negligent injury or destruction thereof by fire due to the negligence of a railroad company, and such right of action exists independently of an assignment to him of the right of action by the holder of the legal title at the time of the fire.[27]

(3) Persons Having Possession

Constructive, as well as actual, possession of property is sufficient to sustain a suit for a recovery for injury to such property by fire caused by negligence of a railroad. One who has neither title nor possession may not maintain such a suit.

Persons having actual possession of property, real or personal, under claim of title, are prima facie entitled to recover for injury to, or destruction of, such property by fire caused by the negligence of a railroad company, and, in the absence of evidence showing an outstanding adverse title to the property, may recover the resulting damage.[28] Such possession will authorize a recovery not only of damages to the land itself, but also damages for injury or destruction of crops, fences, etc.[29] One who has possession of personal property and a lien for work and labor expended on it has such an interest in the property as will entitle him to maintain an action for its negligent destruction by fire.[30] One who has possession as a bailee with license to use the property as long as he desires to do so may recover for injury to the property.[31]

Persons having constructive possession. In order to authorize a recovery for injury to land by fire negligently set out by a railroad company, actual possession of the land by plaintiff, otherwise entitled to recover, is not necessary, constructive possession being sufficient[32]

Persons having neither title nor possession of the property injured or destroyed have no right of action for damages for the destruction or injury of the property[33]

(4) Landlord and Tenant

A landlord whose property is in the possession of a tenant may sue for injury thereto by fire caused by negligence by a railroad. A lessee, as well as a sublessee, may recover for injuries to his property caused by fire due to negligence by the railroad.

Within the rule permitting one in constructive possession of land to recover for injury thereto, or destruction thereof, by fire, possession of a tenant is constructive possession of his landlord.[34] Accord-

18. Ark.—Missouri Pac R Co v Fowler, 34 S W 2d 1071, 183 Ark 86.

19. Wis —Frederick v Great Northern Ry Co, 241 N W 363, 207 Wis 234

20. Or —Strang v. Oregon-Washington R., etc, Co, 163 P 1181, 83 Or 644

21. Or —Strang v. Oregon-Washington R, etc., Co, supra.

22. Or.—Strang v. Oregon-Washington R, etc., Co, supra

23. Ga —**Corpus Juris cited in** Pollard v. Walton, 190 S E 396, 400, 55 Ga App. 353
51 C.J. p 1189 note 81.

24. N D —Woodward v. Northern Pac. R Co, 111 N.W 627, 16 N D 38

25. N C —Mull v. Louisville, etc., R Co, 96 S E 27, 175 N C. 593
51 C J. p 1189 note 83.

26. Ala —Alabama Great Southern R Co v. Clark, 34 So. 917, 136 Ala 450
N Y —Ridell v New York Cent., etc, R. Co, 73 N Y. 618.

27. S C —Bultman v Atlantic Coast Line R. Co, 88 S E. 279, 103 S C. 512.

28. Wash —Spurlock v. Port Townsend Southern R. Co, 42 P. 520, 13 Wash 29.
51 C J. p 1189 note 86.

29. Tex —International, etc, R Co. v Timmermann, 61 Tex 660.
Wis —McNarra v. Chicago, etc., R Co, 41 Wis 69

30. Pa —Haverly v State Line, etc, R Co, 17 A 224, 125 Pa 116

31. Mo —Jasper v. Wabash R Co., App, 24 S.W 2d 243

32. Miss —Gilchrist-Fordney Co. v. Parker, 69 So 290, 109 Miss 445
51 C J. p 1189 note 91

33. U S.—Northern Pac. R Co. v. Lewis, Mont, 16 S Ct. 831, 162 U S 366, 40 L Ed 1002
51 C J p 1189 note 92

34. Miss.—Gilchrist-Fordney Co v. Parker, 69 So. 290, 109 Miss 445.
51 C J p 1190 note 94.

ingly, it has been held that an owner of cars leased to a railroad company may maintain an action for their negligent destruction by fire.[35] However, in the absence of exceptional circumstances,[36] a landlord cannot sue for the destruction of grass growing on the leased premises[37] or for destruction of a building on the leased premises owned by the lessee and not by himself.[38]

A tenant occupying under a lease may recover the value of grass on the leased land negligently destroyed by fire,[39] even though the lease is a verbal lease for more than a year and consequently invalid.[40] A lessee may recover for injury to, or destruction of, a building[41] or nursery stock[42] placed on leased land by the lessee under an agreement that it may be removed by him It has been held that, where by the terms of the lease the lessee is bound to rebuild buildings which have been burned, the lessee of property on which the buildings burned are situated is entitled to recover full damages for the destruction of the buildings.[43] A tenant from year to year has the right to recover for the destruction by fire of growing crops.[44] A tenant at sufferance may recover for injuries by fire negligently set out to the extent of the damage to his possessory interest.[45]

Right of sublessee. Where a lumber company owning houses occupied by its employees permitted an employee to sublet the house, the sublessee was not a trespasser and she may recover for the destruction of her household goods by fire negligently communicated by defendant's locomotive.[46] It has been held that, although parties are sublessees of a building, contrary to the terms of a lease held by the lessee from a railroad company, the company will nevertheless be liable to them for goods consumed by fire communicated to the building by the company.[47]

(5) Licensees

One who acquires property under a license may sue for its destruction by fire negligently set out by a railroad

One who under license, express or implied, cuts hay on the land of another,[48] or on public lands of the United States,[49] is the owner thereof, and may maintain an action for its destruction by fire negligently set out by a railroad company.

B. ACTIONS

§ 512. In General

a. In general
b. What law governs
c. Defenses
d. Parties

a. In General

Jurisdiction, venue, and limitations in actions to recover for injuries by fires set out by railroad companies may be, and frequently are, regulated by statute.

Where a statute so provides, a railroad company may be sued in an action of debt for injuries to property caused by fire communicated from its locomotives, cars, or other vehicles.[50] An action for damages resulting from the burning of buildings by fire started by hobos in a railroad's freight cars standing on a siding has been held to be a tort action based on negligence or want of due care.[51] Jurisdiction and venue in such actions may be, and frequently are, regulated by local statutes.[52] Statutes of limitations specially applicable to such actions have been enacted in some jurisdictions[53]

In the absence of a statute specially providing for the service of process on a railroad company, the

35. Ill.—Peoria, etc, R. Co. v. U. S Rolling Stock Co., 28 Ill App. 79.
36. Ill.—Toledo, etc., R. Co. v. Farris, 117 Ill.App. 108.
51 C J. p 1190 note 96.
37. Tex.—Gulf, etc., R Co. v. Smith, 23 S.W. 89, 3 Tex.Civ.App. 483.
51 C J. p 1190 note 97.
38. La.—Dougherty v. Yazoo, etc, R. Co, 119 So. 548, 9 La.App. 295.
39. Tex.—Gulf, etc., R Co. v Smith, 23 S.W. 89, 3 Tex Civ App 483.
40. Tex.—International, etc., R Co v. Searight, 28 S W. 39, 8 Tex Civ. App 593.
51 C J p 1190 note 1.
41. Mo.—Adams v. St Louis, etc., R. Co, 28 S.W. 496, 29 S.W. 836, 138 Mo. 242.
42. N H.—Laird v Connecticut, etc., R Co., 62 N H 254, 13 Am S R 564.
43. Mass.—Anthony v New York, etc., R. Co, 37 N E 780, 162 Mass 60.
51 C J p 1190 note 4
44. Ind.—Ohio, etc, R Co v. Trapp, 30 N E. 812, 4 Ind App 69
45. Tex.—Texas, etc., R Co. v Torrey, 16 S W. 547, 4 Tex A.Civ Cas § 256.
46. Tex.—Blount-Decker Lumber Co. v. Martin, Civ.App, 190 S W 232.
47. Mo.—England v Wabash R. Co., 90 S W. 111, 114 Mo App 546.
51 C J. p 1190 note 8.
48. Iowa.—Bullis v Chicago, etc., R Co., 39 N W. 245, 76 Iowa 680.
51 C.J. p 1190 note 9.
49. N D.—Mathews v. Great Northern R Co, 72 N W 1085, 7 N.D. 81
51 C J. p 1190 note 10.
50. R I.—MacDonald v. New York, etc, R Co., 51 A 578, 23 R.I 558
51 C J. p 1191 note 26 [a].
51. Or.—Aune v Oregon Trunk Ry, 51 P 2d 663, 151 Or. 622.
52. Ind.—Du Breuil v. Pennsylvania Co, 29 N E 909, 130 Ind. 137.
Tenn.—Nashville, etc., R. Co v Weaks, 13 Lea 148
51 C.J. p 1192 note 36.
53. N.J.—Martin v. Lehigh Valley R. Co, 100 A 345, 90 N.J.Law 258.
51 C J. p 1192 note 38.

general rules or statutes governing service of process on corporations usually apply in actions against a railroad company for damages by fire.[54] In actions based on statutes to recover for injuries to property by fire communicated by locomotives, no prior notice of claim for damages and demand for payment is necessary[55] except where the statutes contain requirements to that effect.[56]

b. What Law Governs

Where the fire which originated from the operation of the railroad and caused the damage occurred in another state, liability therefor is governed by the law of that state and not by the law of the state where the action is brought.

In accordance with general principles, where the fire which originated from the operation of the railroad and caused the damage occurred in another state, liability therefor is governed by the law of that state and not by the statute of the state where the action is brought,[57] and, it not appearing that there is any statute in that state affecting the question, the rights of the parties must be determined by the common law of that state,[58] which, in the absence of proof to the contrary, must be assumed to be the same as that of the state where the suit is brought.[59] Where property located in one state is burned by reason of a negligent act committed in another state or country, the cause of action is governed by the laws of the state where the property was situated,[60] but, while the railroad company may be liable under the common law as administered in the state where the property destroyed was located,[61] it is not liable under a statute in such a state where the legislature did not intend the statute to apply to such a situation;[62] nor does the fact that the company is authorized by the legislature to operate a railroad in the state and does so operate one change the result, since at the time of the fire it was not exercising its corporate authority under the laws of the state, but under the laws of a foreign jurisdiction.[63]

c. Defenses

Various matters have been held to constitute or not to constitute valid defenses to actions to recover for damages from fires caused by railroad companies.

A conveyance of lands to a railroad company for railroad purposes,[64] or their condemnation for that purpose,[65] does not bar the right to recover damages for injuries to the remainder of the land caused by fire negligently communicated to it from defendant's locomotives. A railroad company cannot set up against the claim of plaintiff for the injury done to him an alleged assignment to a third person who does not appear and has given no notice of claim of ownership of the cause of action.[66] A railroad company cannot avoid liability, because a section foreman paid no rent, for negligently burning his goods in a section house, if the company was benefited by his occupying it to board section hands.[67] Where a company has allowed inflammable houses occupied by its tenants to be constructed and maintained on its own land adjoining its track, the fact that at the time of the fire it had served them with notice to quit is not a valid defense to an action for injuries from the fire caused by the negligence of the company in the operation of its locomotives.[68]

The fact that the property was insured and that plaintiff has been paid the insurance is generally no defense to a railroad company in an action against it for negligently burning it;[69] but a contrary view has also been taken.[70] A statute of limitations, applicable to the action, is a good defense.[71] However, where there are separate causes of action arising at different times, the fact that one of them is

54. Mo.—Jordan v. Missouri, etc., R. Co., 61 Mo. 52.
51 C.J. p 1193 note 64
Process and notice to corporations generally see Corporations §§ 1305–1322.

55. Me.—Stearns v. Atlantic, etc., R. Co., 46 Me. 95.
Mass.—New England Box Co. v. New York Cent., etc., R. Co., 97 N.E. 140, 210 Mass. 465.

56. Wis.—Theresa Village Mut. Fire Ins. Co. v. Wisconsin Cent. R. Co., 128 N.W. 103, 144 Wis. 321.
51 C.J. p 1192 note 41.

57. Mass.—Wallace v. New York, etc., R. Co., 94 N.E. 306, 208 Mass. 16.

58. Mass.—Wallace v. New York, etc., R. Co., supra.

59. Mass.—Wallace v. New York, etc., R. Co., supra.

60. N.H.—Connecticut Valley Lumber Co. v. Maine Cent. R. Co., 103 A. 263, 78 N.H. 553.
51 C.J. p 1192 note 32.

61. N.H.—Connecticut Valley Lumber Co. v. Maine Cent. R. Co., supra.

62. N.H.—Connecticut Valley Lumber Co. v. Maine Cent. R. Co., supra.
51 C.J. p 1192 note 34.

63. N.H.—Connecticut Valley Lumber Co. v. Maine Cent. R. Co., supra.

64. N.J.—Delaware, etc., R. Co. v. Salmon, 39 N.J.Law 299, 23 Am.R. 214.

65. Mo.—Mathews v. St. Louis, etc., R. Co., 24 S.W. 591, 121 Mo. 298, 25 L.R.A. 161, affirmed 17 S.Ct. 243, 165 U.S. 1, 41 L.Ed. 611.
51 C.J. p 1192 note 44

66. Pa.—Florence v. Delaware, etc., R. Co., 102 A. 133, 258 Pa. 456

67. Tex.—St. Louis Southwestern R. Co. v. Sharp, 131 S.W. 614, 62 Tex. Civ.App. 340.

68. Philippine.—Rallos v. Philippine R. Co., 45 Philippine 99.

69. Colo.—Rhinehart v. Denver, etc., R. Co., 158 P. 149, 61 Colo. 369
51 C.J. p 1193 note 51.

70. Wis.—Allen v. Chicago, etc., R. Co., 68 N.W. 873, 94 Wis. 93.
51 C.J. p 1193 note 52.

71. Ill.—Peoria, etc., R. Co. v. U. S. Rolling Stock Co., 28 Ill.App. 79.

barred by the statute of limitations does not affect plaintiff's right as to the others.[72]

d. Parties

All persons having an interest in the property may join in a suit to recover for the injury resulting from a fire caused by a railroad.

All persons having an interest in the property may join in a suit to recover for the injury or destruction resulting from a fire caused by a railroad.[73] If the property was insured and the insurance has been paid, but the value of the property destroyed exceeds the amount paid, insured may, and should, sue the railroad company in his own name for the full amount of the loss,[74] but the insurance company, if it has taken an assignment of the insured's cause of action, may be properly joined as plaintiff.[75] Under a statute requiring all actions to be prosecuted in the name of the real party in interest, the bailee of property destroyed by fire, who merely claims that the owner is looking to him for the price of the property, has no such interest as will authorize an action for damages in his name alone.[76] A lessee of part of a right of way is not a necessary party to an action by his subtenant, who did not assume the lessee's covenants, to recover from the company damages sustained by fire set out by the company.[77] In an action by the holder of the equitable title to land injured by fire set by defendant's locomotive, the making of the holder of the legal title a party defendant is not objectionable for misjoinder of parties.[78]

§ 513. Declaration, Petition, or Complaint

a. In general
b. Negligence or breach of duty
c. Negativing matters of defense
d. Amendments

a. In General

The declaration, petition, or complaint in an action to recover for injuries resulting from fire set out by a railroad need not specify the particular train or engine which started the fire, but it should allege the time of the occurrence of the fire, give a description of the property injured, aver the plaintiff's ownership, and describe the nature and character of the injury and damages sustained.

In an action to recover for injuries resulting from fire set out by a railroad company, the complaint or statement need not specify the particular train or engine which started the fire,[79] but plaintiff should, if possible, identify in his pleading the train which caused the injury,[80] so that defendant may be able to identify the engine and investigate its condition and the conduct of its agents and servants at the time of the injury.[81] However, the identification of the train is not always necessary.[82]

The declaration, petition, or complaint should allege the time of the occurrence of the fire which caused the injury complained of,[83] in order to enable defendant to prepare his defense.[84] With respect to particularity of averment, it has been held that the particular date on which the fire occurred should be alleged,[85] and that it is not sufficient to allege that the fire occurred in a designated month,[86] or "on or about" a designated date,[87] although there is also authority to the contrary of this last proposition.[88]

The complaint should describe the property injured or destroyed[89] and aver plaintiff's owner-

72. Ill.—Peoria, etc., R. Co. v. U. S Rolling Stock Co., supra.

73. Tex.—Foster v. Gulf, C. & S. F. R. Co., 45 S.W. 376, 91 Tex. 631.
51 C.J. p 1193 note 54.

74. Kan.—Kansas City, etc., R. Co. v Blaker, 75 P. 71, 68 Kan. 244, 64 L.R.A. 81.
51 C J. p 1193 note 55.
Effect of assignment
Fact that party whose property had been destroyed by fire through negligence of railroad had received part payment from insurer and had given assignment did not preclude party from bringing action against railroad.—Nelson v Northern Pac. R. Co., 290 P 432, 158 Wash 52.

75. N.Y.—Jacobs v. New York Cent etc., R. Co., 94 N.Y.S. 954, 107 App Div 134, affirmed 79 N.E. 1108, 186 N Y 586

76. Ky.—Sandy Valley, etc., R. Co. v. Bentley, 194 S.W. 906, 175 Ky. 736.

77. Tex.—Missouri, etc., R. Co. v. Keahy, 83 S.W. 1102, 37 Tex Civ. App 330.

78. N C.—Mull v. Louisville, etc., R. Co., 96 S.E. 27, 175 N.C 593.

79. Ind.—Chicago, etc., R Co v. Kreig, 53 N E 1033, 22 Ind App. 393
51 C J p 1194 note 79.

80. Va.—Norfolk & W. R. Co. v. Richmond Cedar Works, 170 S E 5, 160 Va 790
51 C J. p 1194 note 80
Petition held sufficient
Ga.—Southern Ry Co v Taylor, 47 S.E 2d 77, 76 Ga.App. 745.

81. Or.—Koontz v Oregon R., etc., Co., 23 P. 820, 20 Or 3.

82. Va.—Norfolk & W. R. Co v. Richmond Cedar Works, 170 S.E. 5, 160 Va. 790.

83. Mich.—Malloy v Grand Trunk R Co., 158 N W 854, 192 Mich 344
51 C J. p 1194 note 73.

84. Mich.—Hewitt v Pere Marquette R. Co., 137 N.W 66, 171 Mich 211, 41 L R A.,N S., 635.
Mo.—Melvin v St Louis, etc., R. Co., 1 S W. 286, 89 Mo. 106

85. Mich.—Hewitt v Pere Marquette R Co., 137 N.W 66, 171 Mich. 211, 41 L.R A.,N.S., 635.
51 C.J p 1194 note 75.

86. Mo.—Melvin v. St. Louis, etc., R Co., 1 S.W. 286, 89 Mo. 106

87. Pa.—Badman v. Pennsylvania R Co., 17 Pa Dist. 983, affirmed 42 Pa Super. 531.

88. Ala.—Seaboard Air Line R. Co. v. Savage, 109 So. 748, 215 Ala. 96

89. Tex.—Gulf, etc., R. Co. v. Jagoe, Civ.App., 32 S.W 1061.
51 C.J p 1194 note 69.

ship.[90] It must describe the nature and character of the injury and damages sustained with a reasonable degree of definiteness and certainty.[91] It has been held, however, that it is not necessary to allege the value of each particular item destroyed if the injuries done and the damages sustained are substantially shown.[92]

In an action to recover for injuries by fire set out by a railroad company based on a statute making all railroad companies liable for such injuries, whether or not common carriers, it is not essential to allege that defendant is a common carrier.[93]

A declaration is defective which fails to allege with requisite precision the facts which will place the action outside the terms of a contract for exemption from liability.[94]

Where the common-law right of action for injuries by fire negligently set out by a railroad company is not abrogated by statutes making such companies liable for injuries of this character irrespective of negligence, it has been held that it is not permissible to join in one count a common-law cause of action for negligence with a cause of action based on the statute.[95]

b. Negligence or Breach of Duty

(1) In general
(2) Defects in, or mismanagement of, locomotives
(3) Combustible matter on right of way
(4) Spread of fire

(1) In General

The declaration, petition, or complaint in an action for injuries resulting from fire set out by a railroad must allege a legal duty on the part of the railroad company, a breach of that duty which was the proximate cause of the injury complained of, and the particular act or omission relied on as a ground for recovery.

In accordance with general principles, the declaration, petition, or complaint in an action for injuries resulting from fire set out by a railroad must show the existence of a legal duty on the part of the railroad company to exercise care as to the property injured,[96] and, in the absence of a statute abrogating the common-law rule making negligence an element of liability of railroad companies for injuries resulting from fire set out by them, the declaration, petition, or complaint must allege that the injury was the result of the negligence or breach of duty of the company.[97] However, it has also been held, under statutes making injuries by fire set out by a railroad company prima facie proof of negligence, that it will be sufficient to allege facts making out a prima facie case without expressly alleging negligence[98] on the theory that in these circumstances negligence will be presumed until the contrary is shown.[99]

Under statutes which impose an absolute liability on railroad companies for all damages by fire set out by them, discussed supra § 485, it is unnecessary in actions to recover for injuries so sustained to allege that defendant was guilty of negligence,[1] although it is still necessary to allege that the fire was caused by the company.[2] An allegation of negligence will be treated as surplusage and disregarded,[3] and a recovery may be had on a complaint otherwise sufficient although no negligence is shown.[4]

The declaration, petition, or complaint must show that the locomotive was owned or operated by de-

90. Ga.—Powell v Blackstock, 13 S E 2d 503, 64 Ga App 442.
51 C J p 1194 note 70

Time for exception

Exception because plaintiff suing railroad did not own burned building was not one of no cause of action, and was properly made at the trial. —Dougherty v. Yazoo & M V. R. Co., 119 So 543, 9 La App 295

91. Ga.—Louisville, etc, R Co. v Moreland, 85 S.E. 341, 143 Ga 414
51 C.J p 1198 note 37.

92. Pa.—Bilger v. Pennsylvania R Co, 5 Pa Dist & Co 762

93. S C.—Law v. Prettyman, 146 S E 815, 149 S C 178.

94. Md.—William Danzer & Co v Western Maryland Ry. Co, 165 A 463, 164 Md 448
Contracts for exemption from liability see supra § 510.

95. Mo.—Blackmore v Missouri Pac R. Co., 62 S W. 993, 162 Mo 455.

96. Or.—Aune v Oregon Trunk Ry., 51 P 2d 663, 151 Or. 622.
51 C J p 1194 note 85.

Complaints held sufficient generally

Ind.—Pittsburgh, etc, R. Co v. Indiana Horseshoe Co, 56 N.E. 766, 154 Ind. 322—Railroad Co. v. Hart, 21 N.E 753, 119 Ind. 273, 4 L.R.A. 549.
51 C J. p 1193 note 67½.

97. Or.—Aune v Oregon Trunk Ry, 51 P 2d 663, 151 Or 622.
51 C J p 1195 note 88.

Unlocked cars on siding

Complaint for damages resulting from burning of plaintiff's warehouse and blacksmith shop by fire started by hobos in railroad's freight cars standing on siding, which failed to allege facts showing that defendant's act of leaving empty cars on siding over night near plaintiff's warehouse violated plaintiff's rights, or that it was customary usage of railroads to lock doors of empty freight cars or place them in charge of watchman when not in use on siding, was held demurrable.—Aune v. Oregon Trunk Ry., supra.

98. Iowa.—Seska v. Chicago, etc., R. Co, 41 N.W. 596, 77 Iowa 137.
51 C.J. p 1195 note 94.

99. Iowa.—Seska v Chicago, etc, R Co., 41 N.W 596, 77 Iowa 137

1. Mo.—Smith v. St. Louis-San Francisco Ry Co, App., 214 S.W 2d 443.
51 C.J. p 1195 note 90.

2. Mo.—Fritz v. St. Louis, etc., R. Co, 148 S W. 74, 243 Mo 62.

3. Mo.—Niswonger v. Thompson, App, 124 S W 2d 669.
51 C.J p 1195 note 92

4. Ark.—Cairo, etc, R Co v Brooks, 166 S W 167, 112 Ark. 293.
51 C.J. p 1195 note 93.

fendant,[5] and it must also show that the act or negligence of defendant was the proximate cause of the injury complained of,[6] whether the injury was to plaintiff's property[7] or to his person.[8] A person will not be entitled to recover where he alleges a new, independent, intervening cause which was not produced by the acts or omissions on which the action is predicated.[9] Although there is authority to the contrary,[10] according to some decisions it is not sufficient to allege the negligence as that of the company's agents or employees unless it is also alleged that they were engaged in the line of their employment.[11] It is sufficient to charge the act causing the injury as that of the railroad company;[12] and this is so although the action is based on a statute making the company liable for damages to property by fire communicated by its locomotives or originating on its right of way "in consequence of the act of any of its authorized agents or employees."[13]

While there is some authority to the contrary,[14] in accordance with general principles the particular act or omission constituting the negligence relied on as a ground for recovery must be stated,[15] and any generalization in respect of negligence which is not coupled with an averment concerning some act or omission will be disregarded.[16] However, no further particularity than that herein mentioned in stating the negligence relied on is necessary;[17] and it is not essential that all the facts and circumstances from which negligence could be inferred should be alleged[18] or that the particular employee to whose negligence the injury was traceable should be specified.[19] It has been said that, where the facts alleged disclose a duty on the part of defendant, the allegation of negligence takes on a technical significance, and that a very general averment relative to what was negligently done or omitted ordinarily will be a sufficient averment of negligence as against a demurrer.[20] A complaint alleging negligence in the alternative has been held not demurrable.[21]

(2) Defects in, or Mismanagement of, Locomotives

Where defects in the construction or equipment of locomotives or negligence in the management thereof constitute the negligence relied on as a ground for recovery, it is necessary to allege that the railroad company has been negligent in the construction, equipment, or management of its locomotives whereby the fire escaped and the injury was caused.

Where the conduct constituting negligence must be alleged, if defects in the construction or equipment of locomotives or negligence in the management thereof are the negligence relied on as a ground for recovery, it is necessary to allege that the railroad company has been negligent in the construction, equipment, or management of its locomotives whereby the fire escaped and the injury was caused.[22] However, a statement of these grounds in general terms ordinarily is sufficient.[23] It is not necessary to specify the particular defects in the locomotive or the mismanagement thereof,[24] because its condition and management are matters peculiarly within the knowledge of defendant.[25]

(3) Combustible Matter on Right of Way

The plaintiff must allege the negligent accumulation of combustible matter on the railroad's right of way or

5. Ala.—Louisville, etc., R. Co. v. Stanley, 65 So. 39, 186 Ala. 95.
51 C.J. p 1194 note 72.

6. Ky.—Withers v. Illinois Cent. R. Co., 207 S.W.2d 33, 306 Ky. 487—Illinois Cent. R. Co. v. Roark's Adm'r, 58 S.W.2d 648, 248 Ky. 398.
Or.—Aune v. Oregon Trunk Ry., 51 P.2d 662, 151 Or. 622.
51 C.J. p 1198 note 41.

7. Or.—Aune v. Oregon Trunk Ry., supra.
51 C.J. p 1199 note 42.

8. Ill.—Illinois Cent R. Co. v Siler, 82 N.E. 362, 229 Ill. 390, 15 L.R.A., N.S., 819, 11 Ann Cas. 368.
51 C.J. p 1199 note 43

9. Or.—Aune v. Oregon Trunk Ry., 51 P.2d 663, 151 Or 622

10. Ky.—Louisville, etc., R. Co. v. Spring Water Distillery Co, 53 S.W 275, 21 Ky.L. 769.
51 C.J. p 1198 note 35.

11. Ala.—Western R Co. v. Irwin, 56 So. 768, 2 Ala.App 577.
51 C.J. p 1198 notes 33, 34.

12. S.C.—Brown v. Carolina Midland R. Co, 46 S.E. 283, 67 S.C 481, 100 Am S R. 756.
51 C.J p 1198 note 31.

13. S.C.—Brown v. Carolina Midland R. Co, supra.

14. Mo.—Wise v. Joplin R. Co, 85 Mo. 178.
51 C.J. p 1195 notes 99, 2 [a].

15. Ga.—Atlanta, etc., R Co. v. Whitehead, 119 S.E 539, 31 Ga App. 89.
51 C.J. p 1195 note 2.

16. Ind.—Lake Erie, etc, R. Co. v. McFall, 76 N.E. 400, 165 Ind 574.

17. Ga.—Georgia Cent. R. v Jeffers, 128 S.E. 202, 34 Ga.App. 35.
51 C.J. p 1196 note 8.

18. Tex.—Houston, etc., R. Co. v. Washington, 127 S.W. 1126, 60 Tex. Civ.App. 391.
51 C.J. p 1196 note 8.

19. Ga.—Flint River, etc., R. Co. v. Maples, 73 S.E. 957, 10 Ga.App. 573.

20. Ind.—Lake Erie, etc., R. Co. v McFall, 76 N.E 400, 165 Ind. 574, 579.

21. Ala.—Louisville & N. R. Co. v. Smith, 133 So 905, 222 Ala. 618.

22. Ga.—Atlanta, etc., R. Co. v. Whitehead, 119 S.E. 539, 31 Ga.App 89.
51 C.J. p 1196 note 12.

23. Ind.—Lake Erie, etc., R. Co v McFall, 76 N.E 400, 72 N.E. 552, 165 Ind. 574.
Pa.—Ruby v. Pennsylvania R. Co., 58 York Leg Rec 45
51 C.J. p 1196 note 13.

24. Ind.—Louisville, etc., R. Co. v. Krinning, 87 Ind 351.
Tex.—Houston, etc., R Co v Washington, 127 S.W. 1126, 60 Tex.Civ. App. 391.

25. Tex.—Houston, etc., R. Co v. Washington, supra.

there can be no recovery on that ground for damage done by fire.

Plaintiff must allege the negligent accumulation of combustible matter on the railroad's right of way or there can be no recovery on that ground for damage done by fire.[26] It has been held that a complaint alleging that defendant managed its trains negligently and failed to employ suitable means to prevent the escape of fire from the locomotive, and also negligently permitted combustible materials to remain on the right of way, and that by reason of its negligence fire escaped from the locomotive and set fire to the combustibles, and by reason of a continuous body of combustible material the fire was communicated to plaintiff's premises, sufficiently alleges the negligent accumulation of combustible materials on the right of way as a cause of the fire.[27] On the other hand, it has been held that an allegation that defendant carelessly permitted fire from the engine of a train to be thrown out, whereby the litter which said company had permitted to accumulate on said right of way was ignited, and the fire spread therefrom and burned and destroyed plaintiff's property, did not amount to an averment that the railroad company negligently permitted combustible matter to accumulate upon its right of way.[28]

(4) Spread of Fire

Where the gist of the action is negligence in permitting the escape of fire to the plaintiff's land from the railroad's right of way, the complaint must allege that the railroad negligently permitted the escape of the fire, although it need not allege that the fire was negligently started.

A complaint which alleges negligence of a railroad both in setting fires to combustibles on its right of way and in failing to prevent the spread of the fire so started to adjoining land resulting in injury thereto is sufficient to show a cause of action.[29] Where the gist of the action is negligence in permitting the escape of fire to plaintiff's land from defendant's right of way, the complaint need not show that the fire was negligently started,[30] but it is indispensable that the complaint should allege that defendant negligently permitted the escape of fire to plaintiff's land from defendant's right of way.[31] In jurisdictions where it is held that a company negligently setting out a fire on its right of way which spreads to adjoining lands, injuring them, is not liable unless it was negligent in suffering the fire so to spread, the complaint must allege that the company was negligent in permitting the fire so started to escape therefrom to the adjoining premises[32] or contain averments from which such negligence is necessarily implied;[33] and a mere averment that the fire was negligently started on the right of way will not dispense with, or supply the place of, such allegation.[34]

From adjoining owner's premises. Where the complaint alleges that fire was negligently set out on its right of way and on the land of an adjoining owner by defendant, and that the fire spread to plaintiff's lands whereby his property was destroyed, and that the fire was wholly the result of the negligence of defendant, it is not necessary further to aver the negligence of defendant in preventing the fire escaping from its right of way.[35] A complaint alleging that defendant negligently permitted fire on its right of way to escape to adjoining land, igniting it, and thence to plaintiff's land, is sufficient, without alleging negligence in permitting the fire to escape from the adjoining land to that of plaintiff.[36] A complaint alleging that defendant negligently and willfully set fire to combustibles upon the land of an adjoining owner, that the fire spread to and upon plaintiff's land, which act was the natural and probable result of defendant's wrongful act, has been held to state a good cause of action.[37]

c. Negativing Matters of Defense

The declaration, petition, or complaint need not anticipate and negative matters of defense.

In accordance with elementary rules, the declaration or complaint need not, by its averments, anticipate and negative matters of defense.[38] In ju-

26. Ga.—Southern R. Co. v. Horine, 42 S.E. 52, 115 Ga. 664.

27. Kan.—Buck v. Union Pac. R. Co., 52 P. 866, 59 Kan. 328.

28. Ga.—Southern R. Co. v. Horine, 42 S.E. 52, 115 Ga. 664.

29. Cal.—Clark v. San Francisco, etc., R. Co., 76 P. 507, 142 Cal. 614.

30. Ga.—Pollard v. Walton, 190 S.E. 396, 55 Ga. App. 353.
51 C.J. p. 1197 note 21.

31. Ga.—Central of Georgia R. Co. v. Jeffers, 128 S.E. 202, 34 Ga. App. 35.
Tex.—Rost v. Missouri Pac. R. Co., 12 S.W. 1131, 76 Tex. 168.

32. Ind.—Louisville, etc., R. Co. v. Roberts, 42 N.E. 247, 13 Ind. App. 692.
51 C.J. p. 1197 note 25.

33. Ind.—Pittsburgh, etc., R. Co. v. Iddings, 62 N.E. 112, 28 Ind. App. 504.
51 C.J. p. 1198 note 26.

34. Ind.—Indiana, etc., R. Co. v. McBroom, 91 Ind. 111.
51 C.J. p. 1198 note 27.

35. Ind.—Louisville, etc., R. Co. v. Hanmann, 87 Ind. 422.
S.D.—Haugan v. Chicago, etc., R. Co., 53 N.W. 769, 3 S.D. 394.

36. Ind.—Wabash, etc., R. Co. v. Lackey, 67 N.E. 278, 31 Ind. App. 103.
51 C.J. p. 1198 note 29.

37. N.Y.—Phelps v. New York Cent., etc., R. Co., 96 N.Y.S. 72, 48 Misc. 27.

38. Ga.—Powell v. Blackstock, 13 S.E.2d 503, 64 Ga. App. 442.
51 C.J. p. 1199 note 45.

risdictions where contributory negligence is considered a matter of defense to be pleaded by defendant, it is not necessary that the complaint should negative the fact of plaintiff's contributory negligence.[39] In jurisdictions where contributory negligence must be negatived in the complaint, except in cases where the rule has been abrogated by statute,[40] it has generally been held necessary for the complaint in actions of this character to negative contributory negligence.[41]

d. Amendments

The allowance of amendments of the declaration, petition, or complaint in an action against a railroad company for damages caused by fire is within the discretion of the court, although generally amendments which set up a new and distinct cause of action will not be permitted.

The allowance of amendments of the declaration, petition, or complaint in an action against a railroad company for damages caused by fire is within the discretion of the court.[42] Generally amendments which set up a new and distinct cause of action will not be permitted.[43] It is permissible to amend by adding a more specific description of the property burned,[44] or an amplification of the facts constituting defendant's negligence,[45] or by changing the date on which the injury is alleged to have occurred,[46] or the identity of the locomotive alleged to have caused the injury,[47] or by correctly stating the name of the defendant railroad.[48]

§ 514. Plea or Answer

The plea or answer in an action against a railroad company for injuries by fire set out by it should allege matters which constitute an affirmative defense.

The plea or answer in an action against a railroad company for injuries by fire set out by it need not allege mere matters of evidence.[49] Ordinarily, under the general rule, contributory negligence must be specially pleaded in order to be available as a defense,[50] and it has been held that, if defendant wishes to avail himself of the defense that plaintiff was a trespasser in placing the property destroyed on defendant's right of way, it is necessary to plead that fact since it is an affirmative defense.[51] The defense that defendant was exempt by contract from liability for fire is an affirmative one not admissible under the general denial.[52] If defendant admits that the fire was caused by sparks from its locomotive and pleads facts indicating lack of negligence, its plea is in effect a plea of confession and avoidance.[53] The sufficiency of a plea should be tested by demurrer[54] except where another mode is provided by statute.[55]

§ 515. Issues, Proof, and Variance

a. In general
b. Conformity of pleadings and proof
c. Variance

a. In General

While allegations of facts immaterial to the cause of action or which constitute mere surplusage need not be proved, the specific negligence alleged must be proved in order to authorize a recovery for damages by fire caused by a railroad.

While allegations of facts immaterial to the cause of action or which constitute mere surplusage need not be proved,[56] the specific negligence alleged must be proved in order to authorize a recovery for damage by fire caused by a railroad.[57] If several acts of negligence are charged, each of which would constitute a cause of action, proof of any one of them will sustain a recovery.[58] If the complaint alleges the burning of several articles, plaintiff will be entitled to recover on showing that any of the

39. Ala.—Birmingham R., etc., Co. v. Hinton, 87 So. 635, 141 Ala. 606.
51 C.J. p 1199 note 47.

40. Ind.—Pittsburgh, etc., R. Co. v. Home Ins. Co., 108 N.E. 525, 183 Ind. 355, Ann.Cas.1918A 828.
51 C.J. p 1199 note 49 [a] (2).

41. Ind.—Wabash, etc., R. Co. v. Johnson, 96 Ind. 40.
51 C.J. p 1199 note 49.

42. Mass.—Fay v. Boston, etc., R. Co., 82 N.E. 7, 196 Mass. 329.
51 C.J. p 1200 note 59 [a].

43. Ga.—Wrightsville, etc., R. Co. v. Barrett, 147 S.E. 916, 39 Ga.App. 612
51 C.J. p 1200 note 60

44. Ga.—Georgia Cent. R. Co. v. Inman, 59 S.E. 786, 129 Ga. 656—Georgia Cent. R. Co. v. Inman, 59 S.E. 784, 129 Ga. 652.

45. Ga.—Georgia Cent. R. Co. v. Inman, 59 S.E. 784, 129 Ga. 652
51 C.J. p 1200 note 62

46. Ga.—Wrightsville, etc., R. Co. v. Barrett, 147 S.E. 916, 39 Ga.App. 612

47. Ga.—Wrightsville, etc., R. Co. v. Barrett, supra.

48. Cal.—Haverstick v. Southern Pac. Co., 37 P.2d 146, 1 Cal.App.2d 605.

49. Ky.—Louisville, etc., R. Co. v. Beeler, 103 S.W. 300, 126 Ky. 328, 31 Ky.L. 750, 128 Am.S.R. 291, 11 L.R.A.,N.S., 930, 15 Ann.Cas. 913.
51 C.J. p 1200 note 67.

50. Tex.—St. Louis Southwestern R. Co. v. Sharp, 131 S.W. 614, 62 Tex.Civ.App. 340.
51 C.J. p 1200 note 69.

51. Ark.—St. Louis, etc., R. Co. v. Cooper, 180 S.W. 203, 120 Ark. 595.

52. Mo.—Sager v. Illinois Cent. R. Co., 176 S.W. 232, 190 Mo.App. 524.

53. Ky.—Illinois Cent. R. Co. v. Barrett, 66 S.W. 9, 23 Ky.L. 1755

54. Ala.—Alabama Great Southern R. Co. v. Clark, 34 So. 917, 136 Ala. 450.

55. Ala.—Alabama Great Southern R. Co. v. Clark, supra.

56. Ark.—Cairo, etc., R. Co. v. Brooks, 166 S.W. 167, 112 Ark. 298.
51 C.J. p 1200 note 74.

57. Ky.—Louisville, etc., R. Co. v. Haggard, 170 S.W. 956, 161 Ky. 317
51 C.J. p 1200 note 77

58. Minn.—Reishus v. Willmar, etc., R. Co., 100 N.W. 1, 92 Minn. 371.
51 C.J. p 1201 note 78.

articles mentioned were burned.[59] Where plaintiff alleges ownership of the property destroyed by the fire, he must prove title to the property.[60] Where negligence is charged in permitting combustibles to accumulate on the right of way which were ignited by sparks from a locomotive, thus causing the fire occasioning the damages, it will be sufficient for plaintiff to show that defendant was using the ground as a part of its right of way, and he need not prove title or ownership of the locus in quo in defendant, since, the use being shown, the law will presume that the right to use had been properly acquired.[61]

b. Conformity of Pleadings and Proof

The evidence in actions for injuries by fire set out by a railroad must correspond with, and be confined to, the issues raised by the pleading.

In accordance with elementary principles, the evidence in actions for injuries by fire set out by a railroad company must correspond with, and be confined to, the issues raised by the pleading[62] or tend to elucidate the issues.[63] Evidence of one kind of negligence not alleged is not admissible under an allegation of negligence of a different kind.[64]

Allegations that the locomotive was improperly constructed and negligently managed by defendant, by reason whereof large quantities of sparks were emitted, are sufficiently broad to admit proof of the character of care and caution exercised by defendant's employees in operating the locomotive, and as to whether they were negligent in the performance of their duties.[65] Where the negligence alleged is in the operation of the locomotive, evidence is admissible to show that fire escaped through the spark arrester and was communicated from the smokestack of the locomotive.[66]

Evidence of defective construction or equipment of a locomotive is admissible under an averment that in operating it defendant negligently permitted it to emit sparks which fell on plaintiff's property and set fire thereto,[67] or under an averment that defendant so negligently and carelessly managed a fire which it intentionally kindled and maintained in a certain locomotive that the fire came into and upon plaintiff's premises.[68] The charge that the train was so negligently operated as to set fire to plaintiff's barn has been held sufficient to permit plaintiff to show that the fire was caused by sparks from an engine with a defective spark arrester.[69] It has been held that, if defendant tries the case on the assumption that the existence of defects in the locomotive is an issuable fact, he cannot object to the admission of evidence to show such defects although the petition did not allege their existence.[70] However, it has been declared that where the complaint charges only negligence in the operation of an engine, and not in its construction or equipment, evidence of the character and quality of the construction or equipment of the engine, with a view to arresting the escape of sparks therefrom, is inadmissible.[71]

Evidence as to the condition of the grates of the locomotive on the day of the fire is admissible under an averment that the locomotive was defective and dangerous.[72] In some jurisdictions where, contrary to the prevailing doctrine, the view has been taken that it is not necessary to specify the particular negligent acts or omissions relied on, negligence in the construction, equipment, or operation of locomotives is admissible under a general averment of negligence in causing the injury complained of by fire.[73]

c. Variance

A material variance between the pleading and the evidence is fatal to a recovery for injuries by fire set out by a railroad.

In accordance with the rule that the proofs must correspond substantially with the allegations of the pleadings, a material variance between the declaration, petition, or complaint, and the evidence to sustain it, is fatal to a recovery for injuries by fire

59. Ind.—Chicago, etc., R. Co. v. Smith, 33 N.E. 241, 6 Ind.App. 262.
60. S.C.—Elliott v. Wilson, 187 S.E. 825, 181 S.C. 406.
61. N.D.—McTavish v. Great Northern R. Co., 79 N.W. 443, 8 N.D. 333.
62. N.M.—Chicago, R. I. & E. P. Ry. Co. v. Wertheim, 110 P. 573, 15 N.M. 505, 30 L.R.A.,N.S., 771, Ann.Cas.1912C 148.
51 C.J. p. 1201 note 82.
63. Ky.—Cincinnati, etc., R. Co. v. Barker, 21 S.W. 347, 94 Ky. 71, 14 Ky.L. 750.
51 C.J. p. 1202 note 83.
64. Ala.—Payne v. Hargrove, 89 So. 166, 206 Ala. 69.
51 C.J. p. 1197 note 23, p. 1202 note 84.
65. Or.—Norwich Ins. Soc. v. Oregon R. Co., 78 P. 1025, 46 Or. 123.
66. Kan.—Kansas City, etc., R. Co. v. Chamberlin, 60 P. 15, 61 Kan. 859.
51 C.J. p. 1202 note 89.
67. N.C.—Wyatt v. Seaboard Air Line R. Co., 72 S.E. 383, 156 N.C. 307.
68. N.Y.—Brush v. Long Island R. Co., 42 N.Y.S. 103, 10 App.Div. 535, affirmed 53 N.E. 1123, 158 N.Y. 742.
69. Ky.—Louisville, etc., R. Co. v. Feeney, 179 S.W. 826, 166 Ky. 699.
70. Kan.—Kansas City, etc., R. Co. v. Chamberlin, 60 P. 15, 61 Kan. 859.
71. Ala.—Payne v. Hargrove, 89 So. 166, 206 Ala. 69.
72. Ga.—Brown v. Benson, 29 S.E. 215, 101 Ga. 753.
73. Ala.—Alabama Great Southern R. Co. v. Stewart, 73 So. 827, 15 Ala.App. 466.
51 C.J. p. 1202 note 92.

set out by a railroad.[74] On the other hand, if the substance of the issue be proved, a recovery is authorized and a variance merely in form or with respect to a matter which is immaterial or which is nonprejudicial will be disregarded.[75]

§ 516. Presumptions and Burden of Proof

a. In general
b. Negligence in construction, equipment, or operation of locomotive

a. In General

In the absence of a statute providing otherwise, negligence of a railroad company is never presumed in an action to recover for injuries by fire set out by a railroad, and the burden of proof is on the plaintiff to show that the railroad company was negligent.

In the absence of a statute providing otherwise, negligence of a railroad company, being the gist of an action to recover for injuries to property by fire set out by a railroad is never presumed.[76] Except where statutes have eliminated negligence as an element of liability for injuries to property by fires set out by railroad companies,[77] the burden of proof is on plaintiff to show that defendant was negligent[78] and that such negligence was the proximate cause of the injury.[79] Where plaintiff's evidence makes out a prima facie case of negligence on defendant's part, the burden is then cast on defendant to show that it has not been guilty of negligence.[80] However, a fire along a railroad right of way does not result in a prima facie case of negligence until it is established that the railroad set out the fire.[81]

It has generally been held that, in the absence of any statutory provision to the contrary, in an action for injuries to property by fire set out to clear the right of way, the burden of proof is on plaintiff to show that defendant was negligent in setting out the fire or in preventing its escape,[82] although there is some authority to the contrary.[83] It has also been held that a fire set out to clear a right of way of combustible material is not set out or caused by operating the railway within a statute providing that in an action for damages from a fire so set out it shall only be necessary to prove injury to, or destruction of, plaintiff's property;[84] but there is also authority directly to the contrary.[85]

Fire originating in combustible matter on right of way. If it is sought to charge a company with liability for a fire communicated from combustibles on its right of way, the burden is on plaintiff to show that there was an accumulation of combustible matter on the right of way[86] and that the fire was set out on the right of way by defendant;[87] and, in the absence of a statute providing otherwise, the burden is also on plaintiff to show that

74. Ky.—Louisville, etc., R. Co. v. Haggard, 170 S.W. 956, 161 Ky. 317.
51 C.J. p. 1202 note 95

75. Ind.—Chicago & Erie R. Co. v. Monesmith, 37 N.E.2d 724, 110 Ind. App. 281.
51 C.J. p. 1202 note 96.
"Adjacent" land half mile away
In action for damages to land of plaintiff caused by fire allegedly ignited by railroad locomotive, complaint alleging that plaintiff's land was "adjacent" to defendant's right of way was supported by proof that the land was about a half mile distant from the right of way, and that the land was in an area of large tracts of woodland and interspersing cultivated tracts.—Alabama Great Southern R. Co. v. Russell, App., 48 So. 2d 239, reversed on other grounds 48 So. 2d 249, 254 Ala. 701

76. Del.—Green v. Philadelphia, etc., R. Co., 119 A. 837, 32 Del. 72.
51 C.J. p. 1204 note 21.
Prima facie evidence
Statute making railroad's failure to keep right of way free from combustible material prima facie evidence of negligence refers only to common carriers transporting passengers and freight for hire, and is inapplicable to logging railroad used in connection with industrial enterprise of its owner.—Crowley v. Polleys Lumber Co., 9 P.2d 1068, 92 Mont. 27.

77. Ark.—Missouri Pac. R. Co. v. Fowler, 34 S.W.2d 1071, 183 Ark. 86.
Miss.—Kurn v. Fondren, 198 So. 727, 189 Miss. 739
Mo.—Smith v. St. Louis-San Francisco Ry. Co., App., 214 S.W.2d 443.
Va.—Norfolk & W. Ry. Co. v. Richmond Cedar Works, 170 S.E. 5, 160 Va. 790.
Wis.—Frederick v. Great Northern Ry. Co., 240 N.W. 387, 207 Wis. 234, 80 A.L.R. 984, modified on other grounds 241 N.W. 363, 207 Wis. 234
51 C.J. p. 1204 note 22
Statutes imposing liability irrespective of negligence see supra § 485.

78. Cal.—Jno. L. Witney, Inc., v. Sierra Ry. Co. of California, 11 P.2d 415, 123 Cal. App. 430
Iowa.—Stickling v. Chicago, R. I. & P. Ry. Co., 232 N.W. 677, 212 Iowa 149.
N.C.—Star Mfg. Co. v. Atlantic Coast Line R. Co., 23 S.E.2d 32, 222 N.C. 330
51 C.J. p. 1204 note 23

79. Ky.—Withers v. Illinois Cent. R. Co., 207 S.W.2d 33, 306 Ky. 487—Illinois Cent. R. Co. v. Roark's Adm'r, 58 S.W.2d 648, 248 Ky. 393.
S.C.—Mellette v. Atlantic Coast Line R. Co., 186 S.E. 545, 181 S.C. 62.
51 C.J. p. 1205 note 25
Proximate cause see supra § 496.

80. Ark.—Missouri Pac. R. Co. v. Johnson, 133 S.W.2d 33, 198 Ark. 1134.
51 C.J. p. 1205 note 26

81. Iowa.—Beck v. Chicago, B. & Q. R. Co., 243 N.W. 154, 214 Iowa 628

82. Tex.—Galveston, etc., R. Co. v. Jensen, Civ.App., 283 S.W. 598
51 C.J. p. 1213 note 21.

83. N.C.—Stemmler v. Randolph, etc., R. Co., 85 S.E. 21, 169 N.C. 46.
51 C.J. p. 1213 note 20

84. Iowa.—Connors v. Chicago, etc., R. Co., 82 N.W. 953, 111 Iowa 384.

85. Kan.—Clark v. Ellithorpe, 51 P. 940, 7 Kan. App. 337, 59 P. 286, 9 Kan. App. 503.

86. Ill.—Indiana, etc., R. Co. v. Hawkins, 84 Ill. App. 39
N.C.—McBee v. Seaboard Air Line R. Co., 87 S.E. 985, 171 N.C. 111

87. N.C.—McBee v. Seaboard Air Line R. Co., supra
51 C.J. p. 1214 note 25.

defendant was negligent in leaving combustible matter on the right of way;[88] and it has been held that this rule is not changed by a statute providing that companies shall be responsible for destruction of property by fire communicated directly or indirectly by locomotives.[89] However, the statutes of some jurisdictions have been construed as imposing on a railroad company the burden of showing that a fire originating in combustibles on its right of way was not due to its negligence in leaving the right of way in an unsafe condition.[90]

Fire communicated from burning building or car on right of way. In the absence of a statute providing otherwise, it has been held that the mere fact that fire was communicated to plaintiff's property from a burning car or building on defendant's right of way does not make out a prima facie case of negligence.[91] The same rules of evidence as to the burden of proof, it has been said, seem to prevail as in other cases of fire communicated from one building to another or from one premises to another.[92] However, under a statute, a presumption of negligence arises where it is shown that damage to the property of another was caused by fire spreading from a burning car belonging to a railroad company and located on a sidetrack.[93]

Contractual exemption. Plaintiff has the burden of proving the illegality of a contract exempting a railroad from liability for damages where the contract is not void on its face.[94] The fact that defendant leased plaintiff the right to construct certain buildings on station grounds, subject to freedom from liability for loss by fire, does not raise an inference that other buildings of plaintiff destroyed by fire and partially standing on defendant's ground were subject to the same exemption.[95] Where defendant seeks to avoid responsibility under a contract exempting it from any and all liability for property destroyed by fire communicated from locomotives operating on a spur track on its property adjoining plaintiff's mill, and it is shown that the fire by which plaintiff's property was destroyed was caused by sparks emitted from one of defendant's locomotives then on the main line, the burden of proof is on defendant to show that the locomotive was then engaged in work connected with the use of the spur track.[96]

b. Negligence in Construction, Equipment, or Operation of Locomotive

(1) In general
(2) After proof that locomotive started fire

(1) In General

In an action seeking damages for fire caused by a railroad engine, the plaintiff must prove that the engine was either improperly equipped or negligently operated.

Plaintiff seeking damages for fire caused by sparks from a railroad engine is required to prove that the engine was improperly equipped for arresting sparks or that, although the engine was properly equipped, it was negligently operated so as to cause the fire,[97] because a railroad which has complied with the law with respect to equipment cannot be held liable for such a fire unless there is proof of negligent operation.[98] However, if the railroad company admits that the fire was caused by sparks from its locomotive and pleads facts indicating lack of negligence, it assumes the burden of proof.[99] Where it is shown that the appliances used by a railroad have been in use for many years and found sufficient to protect its own and other property, the burden of proof is on plaintiff to show that the appliances were defective or were improperly or negligently used.[1] Where a fire is set out by sparks from a locomotive which is admittedly in perfect condition, plaintiff has the burden of proving that the engine was less safe in the matter of sparks than a newer pattern of engine known and in use at the time.[2] Where, in an action for injuries from fire set out by a locomotive, a duty on the part of the company to use fuel oil in its locomotives is alleged, the burden of showing that it

88. Ala.—Southern R. Co. v. Everett, 99 So. 82, 211 Ala. 61. 51 C.J. p. 1214 note 26.

89. Minn.—Bowen v. St. Paul, etc., R. Co., 32 N.W. 751, 36 Minn. 522. 51 C.J. p. 1214 note 27.

90. Mich.—Jones v. Michigan Cent. R. Co., 26 N.W. 662, 59 Mich. 437. 51 C.J. p. 1214 note 28.

91. Ala.—Poe v. Southern R. Co., 71 So. 997, 196 Ala. 103. 51 C.J. p. 1214 note 29.

92. Ala.—Poe v. Southern R. Co., supra.

93. Ga.—Wilkes Lumber Co. v. Seaboard Air-Line R. Co., 121 S.E. 694, 31 Ga.App. 699.

94. U.S.—Michigan Millers Mut. Fire Ins. Co. v. Canadian Northern Ry. Co., C.C.A.Minn., 152 F.2d 292.

95. Iowa.—Petty v. Minneapolis, etc., R. Co., 136 N.W. 1044.

96. La.—Thomason v. Kansas City Southern R. Co., 48 So. 432, 122 La. 995.

97. Ky.—Louisville & N. R. Co. v. Bean, 116 S.W.2d 989, 273 Ky. 454—Clemons v. Dawkins Log & Mill Co., 98 S.W.2d 472, 266 Ky. 157.

98. Ky.—Louisville & N. R. Co. v. Bean, 116 S.W.2d 989, 273 Ky. 454—Illinois Cent. R. Co. v. Bell Union Coal & Mining Co., 38 S.W.2d 707, 238 Ky. 630.

99. Ky.—Illinois Cent. R. Co. v. Barrett, 66 S.W. 9, 23 Ky.L. 1755.

1. La.—Gumbel v. Illinois Cent. R. Co., 20 So. 703, 48 La.Ann. 1180—Meyer v. Vicksburg, etc., R. Co., 6 So. 218, 41 La.Ann. 639, 17 Am.S.R. 408.

2. N.Y.—Babcock v. Fitchburg R. Co., 35 N.E. 596, 140 N.Y. 308.

was negligent in using coal instead of oil is on plaintiff[3] The burden does not rest on the company to prove that it was using the best fuel commonly used by the best-equipped railway companies.[4]

A presumption of ordinary care will be indulged in favor of the railroad company where there is an entire absence of evidence that the fire causing the damage was caused by sparks from its locomotive.[5] Negligence in the equipment, repair, or operation of an engine may be inferred from the fact that the engine habitually scatters sparks to such an extent as to endanger combustible material all along the line of the road,[6] or that it emits a stream of sparks along its way, setting fire to many things,[7] or that it emits sparks unusual in quantity or character,[8] but it cannot be inferred from the fact that some time after the fire the appliances for arresting sparks were out of repair;[9] nor is there a presumption of law that an engine inspected before starting on its trip and found in good condition remained in such condition during the trip[10] It is also a legitimate conclusion that a heavily loaded train laboring up a grade will throw out sparks.[11] No presumption of negligence arises from the mere fact that sparks are generated from the use of coal in a locomotive.[12]

(2) After Proof That Locomotive Started Fire

(a) Majority rule

(b) Minority rule

(a) Majority Rule

aa. In general

bb. Rebuttal of presumption

aa. In General

Generally, in an action to recover for injuries by fire set out by a railroad, a prima facie case is made out when the plaintiff shows that the fire was caused by a locomotive belonging to the railroad company, and the defendant then has the burden of showing that it was free from negligence in the construction, equipment, or management of the locomotive.

As a general rule, sometimes by virtue of statute, where plaintiff has shown that the fire resulting in the injury complained of was caused by sparks or cinders from a locomotive belonging to defendant railroad company, a prima facie case of negligence is thereby made out which places the burden on defendant to show that it was free from negligence in the construction, equipment, or management of the locomotive[13] or that the damage was caused by some agency over which defendant had no control.[14] The reason usually assigned for the rule is that matters connected with the construction, equipment, and operation of locomotives lie peculiarly within the knowledge of the agents and employees of the railroad company and outside that of plaintiff, and that the rule is one of necessity.[15] A further reason deducible from other decisions is that it has been fully demonstrated that, where locomotives are properly constructed and have the proper appliances for preventing the escape of fire and are managed with care, they rarely occasion damage by setting out fire, and that if fire is set out by a locomotive it is an inference of reason that the company has been guilty of negligence.[16]

The rule does not shift the burden of proof on the whole case to defendant[17] and does not modify the general rule which makes it incumbent on plaintiff in the first instance to establish a prima facie

3. Tex—Missouri, etc., R. Co. v Morgan, Civ App., 146 S W. 336, affirmed 193 S W. 134, 108 Tex. 331

4. Tex.—Missouri, etc., R. Co. v. Morgan, supra.

5. U.S.—General Ins. Co. v. Northern Pac. R. Co, Wash, 50 S.Ct. 44, 280 U.S. 72, 74 L Ed 172.

6. Md—Green Ridge R Co. v Brinkman, 20 A. 1024, 64 Md 52, 54 Am R 755.

7. Pa.—Pennsylvania Co. v. Watson, 81 Pa.St. 293
51 C.J p 1205 note 28.

8. Ala—Pollard v. Treadwell, 176 So 452, 234 Ala. 615.
N Y—Peck v New York Cent, etc, R Co., 59 N.E. 206, 165 N Y. 347.
Pa.—Ruby v. Pennsylvania R. Co, Com.Pl., 61 York Leg.Rec. 17

9. N.Y.—Peck v. New York Cent, etc., R Co., 55 N.Y S. 1121, 37 App. Div. 110, reversed on other grounds 59 N.E. 206, 165 N.Y. 347.

10. Ala—Louisville, etc, R Co v. Malone, 20 So 33, 109 Ala 509.

11. Mo—Brooks v. Missouri Pac R. Co, 71 S W. 1083, 98 Mo App 166.

12. Tex—Chicago, etc, R. Co v Myers, 285 S W. 1058, 115 Tex 565.
51 C.J. p 1205 note 36.

13. U.S.—Atlanta & St. A. B Ry. Co v. Register, C C.A Fla, 69 F.2d 323.
Ark.—Missouri Pac. R. Co. v. Johnson, 133 S W.2d 33, 198 Ark 1134.
Fla—Colle v. Atlantic Coast Line R. Co, 14 So 2d 422, 153 Fla 258
Iowa—Stickling v. Chicago, R I. & P. Ry Co, 247 N W. 642, 215 Iowa 1312—Small v Chicago, etc., R. Co, 50 Iowa 338.
N.C—Star Mfg Co. v. Atlantic Coast Line R. Co., 23 S E 2d 32, 222 N C 330.
Tenn—Yearwood, for Use of Am Ins. Co. of Newark, N. J., v. Louisville & N. R. Co, 222 S.W 2d 33, 32 Tenn. App. 115—Tennessee Cent. Ry. Co. v. McCowan, 188 S.W 2d 931, 28 Tenn.App 225—Harriman & Northeastern R. Co. v. McCartt, 15 Tenn App. 109
51 C J. p 1205 note 38½, p 1207 note 40

Statute not applicable to private railroads

Ill.—Williams v T J Moss Tie Co., 30 N.E 2d 430, 307 Ill App 233

14. N C.—Raleigh Hosiery Co v. Raleigh, etc., R Co., 42 S E 602, 131 N.C. 238.
51 C.J. p 1206 note 39, p 1207 note 40.

15. Me—Dyer v. Maine Cent R. Co, 58 A. 994, 99 Me. 195, 67 L R A. 416, 2 Ann Cas. 457
51 C.J. p 1207 note 42.

16. Neb.—Burlington, etc., R. Co. v. Westover, 4 Neb 268.
51 C J. p 1208 note 43.

17. Tex.—Trinity, etc, R. Co v. Gregory, Civ.App, 142 S.W. 656
51 C.J. p 1208 note 62.

case or devolve on defendant the burden of doing more than disproving the prima facie case shown by plaintiff.[18] It is generally held that, in order to overcome the prima facie case made by plaintiff, it is only necessary that defendant should produce enough evidence to counterbalance that by which the prima facie case was made out,[19] and defendant is not required to rebut the prima facie case by a preponderance of the evidence that it was not negligent,[20] although a contrary view has also been taken [21]

The presumption of negligence which arises on proof that the fire was ignited by sparks from a railroad engine is an alternative presumption that the railroad was negligent either in operating the locomotive or in constructing and equipping it.[22] So, where only one of these forms of negligence is alleged, the presumption cannot be utilized.[23]

The presumption is, of course, not operative until it is established that the fire causing the injury complained of was communicated by a locomotive.[24] In order to support the presumption, the evidence must be such as reasonably to satisfy a jury that the fire was so caused.[25] Evidence which merely tends to show that the fire originated by sparks from a railroad locomotive is insufficient.[26] Nevertheless, the rule applies, although the evidence to establish the origin of the fire is controverted or in dispute[27] or although the evidence in support of, and in denial of, the allegation that the fire was caused by sparks from a locomotive is such that the issue might be decided either way.[28] Plaintiff is entitled to the benefit of the rule, whether or not defendant admits the origin of the fire [29] The rule is not rendered inapplicable by the fact that the evidence that the fire originated from sparks from a locomotive was purely circumstantial.[30]

bb. Rebuttal of Presumption

In an action against a railroad company for damages caused by fire, the presumption arising from evidence that the injury was caused by fire set out by defendant's locomotive is not conclusive and may be rebutted.

In an action against a railroad company for damages caused by fire, the presumption arising from evidence that the injury complained of was caused by fire set out by defendant's locomotive is not a conclusive, but is a rebuttable, presumption [31] The presumption may be rebutted by evidence introduced by plaintiff as well as evidence introduced by defendant.[32] Where the prima facie case made out by evidence showing that the injury complained of was caused by fire from defendant's locomotive is rebutted, the presumption becomes inoperative,[33] and evidence of negligence other than the bare fact that the fire was set out by the locomotive must be produced by plaintiff in order to authorize a recovery.[34] On the other hand, if the company fails to rebut the prima facie case so made, plaintiff is entitled to recover[35] unless it proves that plaintiff himself was guilty of contributory negligence.[36]

The presumption may be rebutted by showing that the injury resulted from some cause or agen-

18. Ala.—Louisville, etc, R Co. v Marbury Lumber Co, 28 So 488, 125 Ala. 237, 50 L R A 620—Louisville, etc., R Co v. Reese, 5 So 283, 85 Ala 497, 7 Am S R. 66

19. Ohio—Klunk v Hocking Valley R Co, 77 N E. 752, 74 Ohio St. 125.
51 C J. p 1208 note 68.

20. N C—Star Mfg Co v. Atlantic Coast Line R Co, 23 S E 2d 32, 222 N C 330
51 C J. p 1208 note 68.

21. Iowa—Howard v. Chicago, etc., R Co, 195 N.W. 153, 196 Iowa 1378
51 C.J p 1208 note 66.

22. Ala.—Tinney v. Central of Georgia Ry. Co, 30 So. 623, 129 Ala. 523

23. Ala.—Payne v. Hargrove, 89 So. 166, 206 Ala 69—Tinney v Central of Georgia Ry. Co, 30 So. 623, 129 Ala 523

Negligence in operation

Where the only negligence alleged is in the operation of the locomotive and not in its construction or equipment, plaintiff cannot be aided by the presumption that sparks were emitted because of improper operation or want of proper condition or equipment, and is obliged initially and throughout the case to deduce evidence showing negligence in the operation of the locomotive—Payne v Hargrove, 89 So. 166, 206 Ala. 69

24. U S.—General Ins Co. v. Northern Pac R Co, Wash, 50 S Ct 44, 280 U S 72, 74 L.Ed 172
51 C.J. p 1208 note 46

Direct communication unnecessary

Md.—Carter v Maryland, etc., R Co., 77 A. 301, 112 Md 599
51 C J p 1208 note 59.

25. Ala.—Louisville, etc, R Co. v. Malone, 20 So. 33, 109 Ala 509.
Ill.—Illinois Cent. R Co. v Bailey, 78 N.E. 833, 222 Ill 480.

26. Ala.—Southern R. Co v. Stonewall Ins Co, 58 So 313, 177 Ala. 327, Ann Cas 1915A 987.
51 C J p 1208 note 48

27. U.S.—McCullen v Chicago, etc., R Co, S D, 101 F. 66, 41 C C.A 365, 49 L R A. 642
Ill.—Illinois Cent R. Co v. Bailey, 78 N E 833, 222 Ill 480

28. Tex.—Scott v Texas, etc, R Co, 57 S W 801, 93 Tex. 625.

29. Ill.—Illinois Cent R Co v. Bailey, 78 N E 833, 222 Ill 480.

30. Idaho—Osburn v Oregon R, etc., Co, 98 P. 627, 15 Idaho 478, 19 L R A.,N S, 742, 16 Ann.Cas. 879
51 C.J. p 1208 note 56.

31. Ala.—McCary v. Alabama Great Southern R Co, 62 So 18, 182 Ala. 597
51 C J p 1209 note 70.

32. Ga.—Southern R Co v. Thompson, 58 S E 1044, 129 Ga 367.

33. Ga.—Southern R. Co. v. Taylor, 47 S.E 2d 77, 76 Ga App. 745.

34. Ala.—Tombigbee Valley R. Co. v Howard, 64 So. 338, 185 Ala 612.
51 C J. p 1211 note 86.

35. Iowa.—Howard v. Chicago, etc, R. Co., 195 N W. 153, 196 Iowa 1378
51 C J p 1211 note 87.

36. U S.—Niskern v. Chicago, etc, R Co., C.C Minn., 22 F. 811.

cy over which defendant had no control,[37] or by showing freedom from negligence on the part of the company,[38] or by proof of matters required by law to be observed,[39] as where it is shown that the locomotive which caused the fire was properly constructed and equipped with approved devices and appliances to prevent the escape of fire and sparks and that it was in good repair and efficiently managed and controlled.[40] Nevertheless, for the purpose of rebutting the presumption, the evidence introduced must be as broad as the presumption to which it is opposed,[41] and must satisfactorily rebut every negligent act or omission which might under the circumstances of the case reasonably or naturally have caused the fire.[42]

It must be shown not only that the locomotive was properly constructed and equipped with the most approved appliances and that they were in good repair,[43] or that ordinary care had been exercised to keep them in repair,[44] but also that the locomotive was properly managed and operated by competent servants.[45] The presumption is not rebutted by showing that the locomotive was properly constructed and equipped and that it was in good condition at the time of the injury without further showing that it was carefully managed and controlled by competent servants at the time of the injury,[46] or by showing that the locomotive was carefully managed and controlled without further showing that it was properly constructed and equipped.[47]

Proof that the company used the most approved appliances to prevent the escape of fire and had careful and competent men in charge thereof[48] or that the locomotive was operated at the time of the fire by servants generally competent[49] will not rebut the presumption of negligence unless the railroad shows that its agents employed proper skill and care at the time of the fire. Evidence that the locomotive was supplied with a proper spark arrester is insufficient to rebut the presumption of negligence without proof that such appliance was in good condition and repair at the time of the fire.[50]

(b) Minority Rule

The rule in some jurisdictions is that a presumption of negligence on the part of the railroad company does not arise from the mere fact that the fire was set by one of its locomotives, and that it is incumbent on the plaintiff to prove some act of negligence in the construction, equipment, or management of the locomotive.

The rule in some jurisdictions is that a presumption of negligence on the part of the railroad company does not arise from the mere fact that the fire was set by sparks or cinders from one of its locomotives, and that it is incumbent on plaintiff to prove some act of negligence in the construction, equipment, or management of the locomotive.[51] However, even where this rule obtains, it is not necessary that plaintiff should prove either the specific defect in the locomotive or the particular act of misconduct in its management or operation constituting the negligence,[52] but it is sufficient if he proves facts and circumstances from which the jury might fairly infer that the locomotive was either defective or negligently operated.[53]

37. N.C.—Raleigh Hosiery Co. v. Raleigh, etc., R. Co., 42 S.E. 602, 131 N.C. 238.
51 C.J. p. 1209 note 72

38. Ala.—Southern R. Co. v. Slade, 68 So. 867, 192 Ala. 568.
51 C.J. p. 1209 note 73.

39. Iowa.—Strickling v. Chicago, R. I. & P. Ry. Co., 247 N.W. 642, 215 Iowa 1312.

40. Tex.—Chicago, etc., R. Co. v. Myers, 285 S.W. 1058, 115 Tex. 565.
51 C.J. p. 1209 note 74.

41. Tex.—Gulf, etc., R. Co. v. Blakeney-Stevens-Jackson Co., 106 S.W. 1140, 48 Tex.Civ.App. 443.
51 C.J. p. 1209 note 75.

42. Minn.—Karsen v. Milwaukee, etc., R. Co., 11 N.W. 122, 29 Minn. 12.

43. W.Va.—Aglionby v. Norfolk, etc., R. Co., 93 S.E. 812, 80 W.Va. 687
51 C.J. p. 1210 note 77.

44. Tex.—Nussbaum v. Trinity, etc., R. Co., 194 S.W. 1099, 108 Tex. 407—Ross v. St. Louis Southwestern R. Co., 103 S.W. 708, 47 Tex. Civ.App. 24.

45. W.Va.—Aglionby v. Norfolk, etc., R. Co., 93 S.E. 812, 80 W.Va. 687
51 C.J. p. 1210 note 79.

46. Or.—Taffe v. Oregon R., etc., Co., 117 P. 989, 60 Or. 177.
51 C.J. p. 1210 note 80.

47. Tex.—Texas, etc., R. Co. v. Gains, Civ.App., 26 S.W. 873

48. Mo.—Palmer v. Missouri Pac. R. Co., 76 Mo. 217—Crews v. Kansas City, etc., R. Co., 19 Mo.App. 302.

49. Ark.—St. Louis, etc., R. Co. v. Ayres, 55 S.W. 159, 67 Ark. 371.
51 C.J. p. 1210 notes 82, 84

50. Ill.—Toledo, etc., R. Co. v. Kingman, 49 Ill.App. 43.

51. Pa.—Sollenberger v. Pennsylvania R. Co., 131 A. 661, 285 Pa. 85.
51 C.J. p. 1213 note 15.

In Kentucky

(1) There must be some probative testimony showing defective equipment or improper operation offered by plaintiff and the mere fact of a fire, even though produced by sparks from an engine, is not in itself sufficient to create a presumption of negligence.—Louisville & N. R. Co. v. Bean, 116 S.W.2d 989, 273 Ky. 454—Clemons v. Dawkins Log & Mill Co., 98 S.W.2d 472, 266 Ky. 157.

(2) Where plaintiff establishes the origin of the fire as sparks from the railroad's engine, and that the sparks must have been of considerable size, the railroad must show that the locomotive was equipped as required by statute—Louisville, etc., R. Co. v. Deaton, 294 S.W. 149, 219 Ky. 715.

(3) It has also been held that, when plaintiff proves that the fire was caused by sparks escaping from a railroad locomotive, it is incumbent on the railroad to show to the satisfaction of the jury that its locomotives were equipped as the statute requires.—Cincinnati, etc., R. Co. v. Falconer, 97 S.W. 727, 30 Ky.L. 152.

52. N.Y.—Field v. New York Cent., etc., R. Co., 32 N.Y. 339.
51 C.J. p. 1213 note 17.

53. N.Y.—Peck v. New York Cent.,

§ 517. —— Title or Interest in Property

In an action for injuries by fire caused by a railroad, the burden of proof is on the plaintiff to show such title or interest in the property destroyed as will authorize him to recover damages for its destruction.

In an action for injuries by fire caused by a railroad, the burden of proof is on plaintiff to show such title or interest in the property destroyed as will authorize him to recover damages for its destruction.[54] When he has made out a prima facie case, the burden of proof is then cast on defendant to show that the right of recovery for the destruction was in some person other than plaintiff.[55]

§ 518. —— Origin of Fire or Cause of Injury

In an action against a railroad company for damages caused by fire, the burden is on those seeking recovery to show the cause of the fire, and it is not incumbent on the railroad to show how the fire started in order to escape liability.

In an action against a railroad company for damages caused by fire, the burden of proof is on those seeking recovery to show the cause of the fire,[56] and it is not incumbent on the railroad to show how a fire started in order to escape liability[57] The burden of proof is on plaintiff to show that the fire alleged to have caused the injury was started by the railroad's employees, or was communicated to his property by sparks or fire from its locomotives or trains, or by the spread of fire to plaintiff's premises from fire set out on the right of way or other premises of the company, or on lands of others adjacent to its right of way;[58] this fact can never be presumed,[59] and the rule is not affected by statutes which make companies liable for injuries by fires set out by them in the absence of negligence.[60]

It is not necessary, however, to show that any particular locomotive was at fault, but it will be sufficient if the fire is proved to have been set by any locomotive passing over defendant's road[61] The fact that fire springs up on, or in close proximity to, a track soon after the passing of a locomotive, taken in connection with other circumstances, may be sufficient to raise a presumption that the fire was set out by the locomotive,[62] and it has been similarly so held, where the additional circumstances are shown, that there was no other apparent cause for the fire;[63] that there was no other apparent cause for the fire and no fire on the premises or in the vicinity before the passing of the locomotive;[64] that there was no other agency to which the fire could be attributed and that the train was going up grade at the point where the fire was discovered,[65] that the weather was dry and that a wind was blowing from the track toward the

etc, R. Co, 59 N.E. 206, 165 N.Y. 347

51 C.J. p 1213 note 17.

54. Wis.—Reed v. Chicago, etc., R. Co, 37 N.W. 225, 71 Wis. 399.
51 C.J. p 1203 note 3

55. Wis.—Reed v. Chicago, etc., R. Co, supra

56. Ark.—Blanton v. Missouri Pac. R. Co., 31 S.W.2d 947, 182 Ark. 543.

57. La.—Austin v. Missouri Pac. R. Co, App, 200 So. 484.

58. U.S.—Missouri, K. & T. Ry. Co. v. Jackson, C.A. Okl., 174 F.2d 297.
Ark.—Missouri Pac. R. Co. v. Fowler, 34 S.W.2d 1071, 183 Ark. 86
Fla.—Colle v. Atlantic Coast Line R. Co, 14 So.2d 422, 153 Fla. 258
Ill.—Hilts v. Illinois Cent. R. Co., 24 N.E.2d 252, 303 Ill.App. 25.
Iowa.—Beck v. Chicago, B. & Q. R. Co, 243 N.W. 154, 214 Iowa 628.
Ky.—Louisville & N. R. Co. v. Bean, 116 S.W.2d 989, 273 Ky. 454—Clemons v. Dawkins Log & Mill Co., 98 S.W.2d 472, 266 Ky. 157.
La.—Duncan v. Texas & P. Ry. Co., App., 144 So. 180.
N.C.—Star Mfg. Co. v. Atlantic Coast Line R. Co., 23 S.E.2d 32, 222 N.C. 330.
N.D.—**Corpus Juris quoted in** James Turner & Sons v. Great Northern Ry. Co, 272 N.W. 489, 494, 67 N.D. 347.
S.C.—Blakely v. Atlantic Coast Line R. Co, 174 S.E. 15, 172 S.C. 343.
Va.—Norfolk & W. Ry. Co. v. Richmond Cedar Works, 170 S.E. 5, 160 Va. 790
51 C.J. p 1203 note 5.

Locomotive as cause

In order to prove case in action against railway company for damage by fire, alleged to have been set by locomotive, plaintiff must show that fire originated within reasonable distance from railroad track, that grass or other material on or reasonably near right of way was sufficiently dry to be set on fire by live spark or coal, and that fire occurred within reasonable time after locomotive passed.—Hicks v. Chicago & N. W. Ry. Co., 255 N.W. 73, 215 Wis. 462.

Ignitable temperature of cinders

In action against railroad for fire loss allegedly caused by blowing of cinders, property owner need not prove that cinders were of ignitable temperature at time of their trespass, but only that cinders came from a nearby offender guilty of some imprudent act, in unusual quantity or sizes, and fell on inflammable material, and must present a believable theory of causation after negation of other theories.—Louisville & N. R. Co. v. Ray, 209 S.W.2d 714, 306 Ky. 857.

59. N.D.—**Corpus Juris quoted in** James Turner & Sons v. Great Northern Ry. Co., 272 N.W. 489, 494, 67 N.D. 347.
51 C.J. p 1203 note 6.

60. U.S.—Missouri, K. & T. Ry. Co. v. Jackson, C.A. Okl., 174 F.2d 297.
N.D.—**Corpus Juris quoted in** James Turner & Sons v. Great Northern Ry. Co, 272 N.W. 489, 494, 67 N.D. 347.
51 C.J. p 1203 note 7.

61. Pa.—Byers v. Baltimore, etc, R. Co, 72 A. 245, 222 Pa. 547.
51 C.J. p 1203 note 8.

62. Wis.—Hicks v. Chicago & N. W. Ry. Co, 255 N.W. 73, 215 Wis. 462.
51 C.J. p 1204 note 9.

63. Ark.—St. Louis, etc, R. Co. v. Dawson, 92 S.W. 27, 77 Ark. 434—St. Louis, etc., R. Co v. Coombs, 88 S.W. 595, 76 Ark. 132, 6 Ann.Cas. 151.

64. Tenn.—Harriman & Northeastern R. Co v. McCartt, 15 Tenn. App. 109—Briggs v. Clawson, 8 Tenn. App. 251.
51 C.J. p 1204 note 11.

65. Ala.—Southern R. Co v. Johnson, 37 So. 919, 141 Ala. 575.

point where the fire was discovered;[66] that the weather was dry, that a strong wind was blowing from the track to the house burned, that the roof of the house was easy to ignite, that the fire originated in the roof, and that there had been no fire in, or about, the house for twelve hours or more;[67] or that the company had negligently left along its track combustible material which was discovered to be on fire soon after the passing of the train.[68]

On the other hand, it has been held that the mere passing of a locomotive and the discovery of the fire near the track shortly thereafter is not of itself sufficient to support a presumption that it was caused by fire escaping from the locomotive[69] Also the fact that employees of the company aided in putting out the fire raises no presumption that the company set out the fire.[70]

§ 519. —— Breach of Duty

In an action against a railroad company for damages caused by fire, the plaintiff must show that the act resulting in the injury constituted a breach of duty which, under the circumstances, was due to him.

In an action against a railroad company for damages caused by fire, plaintiff must show that the act resulting in the injury complained of constituted a breach of some duty which, under the circumstances, was due to him.[71] Where a railroad seeks to avoid liability for damage to property by fire caused by a railroad on the ground that the owner of the property is a trespasser, the railroad has the burden of proving that affirmative defense.[72]

§ 520. —— Contributory Negligence

Generally the burden of proof to establish contributory negligence in actions for injuries caused by fire set out by railroads is on defendant.

In most jurisdictions the burden of proof to establish contributory negligence in actions for injuries caused by fire set out by railroads is on defendant[73] unless such negligence appears from plaintiff's own evidence[74] or may be fairly inferred from the circumstances;[75] and, where there is no evidence on the subject, it is the duty of the court to assume that plaintiff was not guilty of contributory negligence and to instruct the jury to that effect[76] However, in some jurisdictions, the burden of proof is on plaintiff in an action for injuries by fire set out by a railroad company to show that he was free from contributory negligence.[77]

§ 521. Admissibility of Evidence

a. In general
b. Ownership or location of property injured or destroyed
c. Physical possibility of sparks setting out fire
d. Fires not shown to have been caused by locomotives or trains
e. Combustibles on property of railroad
f. Rules, customs, and usages
g. Contributory negligence

a. In General

The general rules governing the relevancy, materiality, and competency of evidence are applicable in actions against railroad companies to recover for injuries caused by fire set out by them

Rules governing the relevancy, materiality, and competency of evidence in actions generally, considered in Evidence §§ 158–189, and more particularly actions based on negligence, as discussed in Negligence § 221 et seq, apply in actions against railroad companies to recover for injuries caused by fire set out by them.[78] Subject to these rules, in the absence of direct evidence, circumstantial evi-

66. Mich—Union Ice Co. v. Detroit, etc., R Co, 144 N.W. 1038, 178 Mich. 346.

67. Ala.—Deason v. Alabama Great Southern R. Co, 65 So. 172, 186 Ala 100.

68. Or—Richmond v. McNeill, 49 P. 879, 31 Or 242.
Wis—Gibbons v. Wisconsin Valley R Co, 28 N.W. 170, 66 Wis. 161.

69. Iowa—Stickling v. Chicago, R I & P Ry. Co, 232 N.W. 677, 212 Iowa 149
S C.—Blakely v Atlantic Coast Line R Co, 174 S E 15, 172 S C. 343.
51 C J p 1204 note 16

70. Mass—Carpenter v. Boston & Maine R R., 3 N E 2d 184, 295 Mass. 103.

R.I—Clarke v. New York, etc., R Co, 58 A. 245, 26 R I 59.

71. U S.—Cincinnati, etc, R Co v. South Fork Coal Co, Tenn., 139 F 528, 71 C C.A. 316, 1 L.R A,N S., 533.

72. Ark.—St. Louis-San Francisco Ry Co. v. Travis Insulation Co., 223 S.W 2d 765, 215 Ark. 868.

73. Tex—Furst-Edwards v St Louis, etc, R Co, Civ App, 146 S W. 1024
51 C J. p 1214 note 37.

74. S.D.—Smith v. Chicago, etc., R Co, 55 N.W. 717, 4 S.D. 71.
51 C.J. p 1214 note 38.

75. Va.—Southern R. Co. v. Patterson, 52 S.E. 694, 105 Va. 6, 8 Ann Cas. 440

76. S D.—Smith v. Chicago, etc., R. Co, 55 N.W 717, 4 S.D. 71.

77. Ind—Pittsburgh, etc, R Co. v German Ins Co, 87 N E. 995, 44 Ind App. 268.
51 C.J. p 1215 note 42.

78. U S—Lehigh Valley R. Co. v. State of Russia, C.C A N Y, 21 F. 2d 406, error denied 48 S Ct. 159, 275 U.S 571, 72 L.Ed 432.
51 C J. p 1215 note 48.

Contract to maintain fire line
Evidence to establish a contractual obligation on the part of the railroad to maintain a fire line has been held not admissible where such a contractual obligation was not pleaded, and where the owner of the land damaged had no recollection of such a contract—Bellevue Properties v Pennsylvania-Reading Seashore Lines, 54 A.2d 193, 136 N.J.Law 42.

dence is admissible for the purpose of showing[79] or refuting[80] negligence on the part of defendant, or to show the origin of the fire[81] and its extent[82] On these questions, evidence is admissible as to the dryness of the season,[83] the inflammable character of the surface of the intervening country,[84] its connection with plaintiff's land,[85] the strength and direction of the wind,[86] the use at the time of the injury of an excessive amount of steam,[87] the repeated and unusual dropping of coals or excessive and continued emission of sparks,[88] and whether the train was a light or heavy train[89]

Damages. In an action against a railroad for the burning of trees, proof of the value of such trees as a measure of damages may be admissible[90] Where timber which is burned by a fire set out by a railway is immature, evidence that the fire destroyed a certain number of acres of such timber is admissible,[91] and defendant railway may not prove that such timber had no value where the correct measure of damages is the cost of restoring the land.[92]

Settlement of claims for other losses by fire On the issue whether defendant's locomotive caused the fire complained of, evidence that defendant had caused a prior loss to plaintiff's property which it had adjusted is immaterial and irrelevant.[93] The admissibility of evidence with respect to settlements or compromises with third persons is discussed in Evidence § 292.

b. Ownership or Location of Property Injured or Destroyed

In an action for damages caused by a fire set out by a railroad company, competent and relevant evidence is admissible to show the ownership or location of the property injured or destroyed.

In an action for damages caused by a fire set out by a railroad company, competent and relevant evidence is admissible to show the ownership of the property injured or destroyed.[94] Accordingly, in an action for destruction of buildings by fire, parol evidence is competent to show that a deed to the premises by plaintiff, although containing no reservation, did not include the buildings in question.[95] In an action for grain destroyed by fire, evidence that plaintiff raised it on rented land on shares is admissible to show ownership of the grain and that he did not own it all[96] In an action to recover for fencing destroyed by fire, a written agreement between plaintiff and another company to which the

79. Okl.—St. Louis, etc., R. Co. v. Mobley, 174 P. 510, 70 Okl. 297
51 C.J. p. 1216 note 49

80. Iowa.—German Ins. Co. v. Chicago, etc., R. Co., 104 N.W. 361, 128 Iowa 386.
Pa.—Philadelphia, etc., R. Co. v. Yeiser, 8 Pa. 366

81. Tex.—Team v. Texas & P. Ry. Co., Civ.App., 199 S.W.2d 274, refused no reversible error
51 C.J. p. 1216 note 51

Evidence held admissible

(1) That on several occasions persons had been seen loitering about plaintiff's premises striking matches, that plaintiff's foreman had been seen after the fire in question in possession of certain metal cans which had been exploded, and that plaintiff had in use on its premises an oil stove used to heat a glue pot.—Star Mfg. Co. v. Atlantic Coast Line R. Co., 23 S.E.2d 32, 222 N.C. 330.

(2) That there was found near railroad track cinders and coals of a character which could only have been emitted from engines of defendant, and that the ground near the track was black, when properly connected with other evidence tending to show that a particular engine emitted sparks as claimed.—Louisville & N. R. Co. v. Pounds, 179 S.E. 235, 50 Ga.App. 611

(3) Habitual use of property by persons who had been observed smoking.—St. Paul Fire & Marine Ins. Co. v. Baltimore & O. R. Co., 195 N.E. 861, 129 Ohio St. 401

Fires lighted by others

Evidence by defendant that at times preceding the fire in question other persons had lighted fires near the damaged property has been held inadmissible.—Breymann v. Pennsylvania, O. & D. R. Co., 183 N.E. 771, 43 Ohio App. 473.

82. Ind.—Cleveland, etc., R. Co. v. Hayes, 79 N.E. 448, 167 Ind. 454
51 C.J. p. 1216 note 52

83. N.J.—Johnson v. Central R. Co. of New Jersey, 166 A. 180, 111 N.J.Law 93
51 C.J. p. 1216 note 53.

84. Wis.—Marvin v. Chicago, etc., R. Co., 47 N.W. 1123, 79 Wis. 140, 11 L.R.A. 506.

85. Wis.—Marvin v. Chicago, etc., R. Co., supra.

86. Pa.—Oakdale Baking Co. v. Philadelphia, etc., R. Co., 91 A. 358, 244 Pa. 463
51 C.J. p. 1216 note 56.

87. Iowa.—Gandy v. Chicago, etc., R. Co., 30 Iowa 420, 6 Am.R. 682

88. Iowa.—Gandy v. Chicago, etc., R. Co., supra

89. Ga.—Southern Ry. Co. v. Richardson, 172 S.E. 79, 48 Ga.App. 25
51 C.J. p. 1216 note 59

90. N.Y.—Rensselaer County Mut. Fire Ins. Co. v. Rutland R. Co., 276 N.Y.S. 513, 243 App.Div. 642, affirmed 198 N.E. 402, 268 N.Y. 556

91. U.S.—Spokane International Ry. Co. v. U. S., C.C.A.Idaho, 72 F.2d 440

92. U.S.—Spokane International Ry. Co. v. U. S., supra

93. Mass.—Bradford v. Boston, etc., R. Co., 113 N.E. 1042, 225 Mass. 129

94. **Evidence of possession to prove title**

Evidence of possession of property which was injured by a fire communicated from a railroad right of way was admissible where title to such property was alleged in the complaint.—Elliott v. Wilson, 187 S.E. 825, 181 S.C. 406.

Receipts given agent

Where goods had been purchased by an agent for plaintiff, the fact that the agent took receipts in his own name and delivered them to plaintiff without indorsement did not make such receipts inadmissible as showing title in another than plaintiff.—Alabama Great Southern R. Co. v. Clark, 34 So. 917, 136 Ala. 450

95. Utah.—Olmstead v. Oregon Short Line R. Co., 76 P. 557, 27 Utah 515.
51 C.J. p. 1216 note 60.

96. Iowa.—Ormond v. Central Iowa R. Co., 13 N.W. 54, 58 Iowa 742

evidence tends to show that defendant succeeded, containing statements inconsistent with plaintiff's testimony both as to the ownership and location of the fencing, is admissible.[97] On the other hand, in an action for the destruction by fire of timber on land claimed by plaintiff where defendant did not offer evidence that title to a part of the land was in a third person at the time of the fire, deeds of a prior owner of the land conveying a part of it to a third person are inadmissible in the absence of proof of what land was conveyed by other deeds referred to as sources of the grantor's title in the deed to plaintiff.[98]

Location. In an action for the destruction by fire of timberland claimed by plaintiff, a plat made by a witness, together with his testimony in determining the true location on the ground of the boundary of plaintiff's land, was proper for consideration by the jury, although the plat and evidence did not constitute a bar to plaintiff's right to recover.[99]

c. Physical Possibility of Sparks Setting Out Fire

Where an issue is raised as to whether it was physically possible for sparks or cinders to have been carried far enough to cause the fire in question, evidence as to how high and how far other locomotives of the railroad had been seen to throw other cinders or sparks is admissible.

Where an issue is raised as to whether it was physically possible for sparks or cinders to have been carried far enough to cause the fire in question, evidence as to how high and how far other locomotives of defendant had been seen to throw cinders or sparks,[1] or that other locomotives of defendant had emitted sparks which were carried to a greater distance than those claimed to have destroyed plaintiff's property,[2] is admissible. The limitations as to time of the occurrences, applicable to evidence tending to prove negligence in the operation or equipment of a locomotive, as considered infra § 523, do not apply to evidence offered for this purpose.[3]

d. Fires Not Shown to Have Been Caused by Locomotives or Trains

Evidence of other fires on the line of the defendant railroad is not admissible where it is not shown that such fires were caused by the defendant's locomotives or by the operation of its trains

Evidence that fires had occurred on the line of defendant's road other than the one which destroyed plaintiff's property is not admissible for any purpose where it is not shown that these fires were caused by defendant's locomotives,[4] or that they occurred from the operation of defendant's trains.[5] Evidence of other fires is admissible only by showing them to have seasonably followed in the wake of a locomotive from whose stacks sparks were being emitted.[6]

e. Combustibles on Property of Railroad

Where the defendant railroad is charged with negligence in failing to use ordinary care to keep its right of way free from combustible matter, evidence is admissible to show that the defendant allowed combustible matter to accumulate at the place where the fire in question started.

Inasmuch as it is the duty of a company to use ordinary or reasonable care and diligence to keep its track and right of way reasonably free from combustible matter likely to be ignited from sparks from passing locomotives and communicate fire to the premises of others, as discussed supra § 494, where a defendant is charged with negligence in failing to perform this duty, evidence is admissible to show that defendant allowed combustible material to accumulate on its right of way or other property at the place where the fire causing the injury started,[7] except where there is uncontradicted evidence that the fire was set out on plaintiff's land and not on the right of way.[8] Evidence that the right of way and track at points other than that at which the fire in question was set out, but in the same locality, were encumbered with combustible material, is admissible as tending to show negligence in failing to keep the track and right of way clear of such materials at the point where the fire started.[9] So, evidence that

97. Ala.—Southern R. Co. v. Dickens, 44 So. 402, 152 Ala. 210.

98. Md.—Carter v. Maryland, etc., R. Co., 77 A. 301, 112 Md. 599.

99. Md.—Carter v. Maryland, etc., R. Co., supra.

1. Ky.—Cincinnati, etc., R. Co. v. Winkle, 147 S.W. 746, 148 Ky. 726

2. Mich.—Budd v. Ann Arbor R. Co., 166 N.W. 927, 200 Mich. 250.
51 C.J. p. 1227 note 59.

3. Mo.—Corpus Juris cited in Butcher v. St. Louis-San Francisco Ry. Co., 39 S.W.2d 1066, 1069, 225 Mo. App. 749.
51 C.J. p. 1227 note 61.

4. Va.—Southern Ry. Co. v. Barker, 4 S.E.2d 395, 173 Va. 313.
51 C.J. p. 1227 note 62.

5. Ark.—St. Louis, etc., R. Co. v. Jones, 26 S.W. 595, 59 Ark. 105.
Or.—Hawley v. Sumpter R. Co., 90 P. 1106, 49 Or. 509, 12 L.R.A.,N.S., 526.

6. Or.—Mt. Emily Timber Co. v. Oregon-Washington R., etc., Co., 161 P. 398, 82 Or. 185.
51 C.J. p. 1227 note 64.

7. Colo.—Crissey, etc., Lumber Co. v. Denver, etc., R. Co., 68 P. 670, 17 Colo. App. 275
51 C.J. p. 1227 note 66.

8. Tex.—Missouri, etc., R. Co. v. Stafford, Civ. App., 31 S.W. 319.

9. U.S.—Spokane International Ry. Co. v. U. S., C.C.A. Idaho, 72 F.2d 440.
51 C.J. p. 1227 note 68.

there was combustible material on the right of way may be shown as bearing on the degree of care necessary in operating the locomotive.[10]

Other fires. It has generally been held that, where defendant is charged with negligence in permitting combustible matter to accumulate on its right of way, evidence of other fires at the same place,[11] or at other times before or after, but near the time of the fire in question and at other places in the vicinity of the fire in question,[12] is admissible to prove this fact, but there is some authority to the contrary of the last proposition.[13] So it has been held that evidence of fires near the place in question and about a month before is admissible to show negligence in failing to use proper appliances to prevent the escape of fire.[14]

Escape of fire set out to clear right of way. Where negligence is charged in failing to prevent the escape of fire properly set out to clear the right of way of combustible material, evidence of other fires from the same cause within a few days of the fire in question is proper.[15]

f. Rules, Customs, and Usages

In actions to recover for loss or injury to property by fire set out by a railroad company, evidence of rules adopted by the company for the government of its employees in the train service, and of custom or usage of the defendant, has been held inadmissible.

In actions to recover for loss or injury to property by fire set out by a railroad company, evidence of rules adopted by the company for the government of its employees in the train service has been held not admissible against defendant as not tending to fix the standard of duty to others.[16] Such rules are especially inadmissible where they require the exercise of a greater degree of care from their employees than is required by law.[17]

According to some decisions, evidence of custom or usage of defendant is inadmissible in actions of the character under consideration,[18] and it has been held that evidence of custom or usage of defendant with respect to the construction and condition of its locomotives[19] or the operation of its trains[20] is not admissible, and in a close case the admission of such evidence is ground for reversal.[21] It is not permissible to introduce evidence of usages and customs of other companies as to the equipment of their locomotives,[22] or precautions taken or omitted by them to prevent the escape of fires from their roadbeds.[23] Likewise, it is not permissible for defendant to show, as tending to prove that the fire did not originate from sparks from its locomotive, that it had been the custom for years among farmers in the vicinity to set fire to the underbrush about that season.[24] On the other hand, it has been held that evidence of a general custom of inspecting locomotives and reporting their condition if in bad order and that no report had been made on the locomotive causing the fire for the purpose of showing that it was in good repair is admissible,[25] and that evidence that for a number of years the firemen had been required, and it had been their custom, to inspect the dampers, ash pans, and dump grates of the locomotives before they started on their trips, and had been required to report what, if anything, was needed, is competent on the question of negligence of the company because it has a direct tendency to prove the degree of care used,[26] as well as that testimony of a former engineer that he kept both dampers of the ash pan open except when going over a bridge, and that other engineers for whom he had fired did the same, is admissible to show the habit on defendant's road of running the locomotive

10. Minn.—Cantlon v. Eastern R. Co., 48 N.W. 22, 45 Minn. 481.

11. W.Va.—Snyder v. Pittsburgh, etc., R. Co., 11 W.Va. 17.

12. Mont.—Pure Oil Co. v. Chicago, etc., R. Co., 185 P. 150, 56 Mont. 266.
51 C.J. p. 1227 note 71.

13. Ind.—Lake Erie, etc., R. Co. v. Miller, 57 N.E. 596, 24 Ind. App. 662.
Va.—Abernathy v. Emporia Mfg. Co., 95 S.E. 418, 122 Va. 406.

14. Tex.—Texas, etc., R. Co. v. Rutherford, 68 S.W. 825, 28 Tex. Civ. App. 590.

15. Cal.—Kennedy v. Minarets, etc., R. Co., 266 P. 353, 90 Cal. App. 563.
51 C.J. p. 1227 note 74.

16. Minn.—Continental Ins. Co. v. Chicago, etc., R. Co., 107 N.W. 548, 97 Minn. 467, 5 L.R.A.,N.S., 99.

17. Ala.—Alabama Great Southern R. Co. v. Clark, 34 So. 917, 136 Ala. 450.
51 C.J. p. 1228 note 81.
Admissibility of rules and custom of employer:
In actions for injuries from negligence of employees generally see Master and Servant § 513.
In actions for negligence generally see Negligence § 238.

18. Ga.—Southern R. Co. v. Farmers' Union Warehouse Co., 90 S.E. 860, 146 Ga. 141.
51 C.J. p. 1228 note 82.

19. Md.—Baltimore, etc., R. Co. v. Shipley, 39 Md. 251.
51 C.J. p. 1228 note 83.

20. Ga.—Southern R. Co. v. Farmers' Union Warehouse Co., 90 S.E. 860, 146 Ga. 141.
51 C.J. p. 1228 note 84.

21. Ga.—Southern R. Co. v. Farmers' Union Warehouse Co., supra.

22. Iowa.—Metzgar v. Chicago, etc., R. Co., 41 N.W. 49, 76 Iowa 387, 14 Am.S.R. 224.
51 C.J. p. 1228 note 86.

23. U.S.—Grand Trunk R. Co. v. Richardson, Vt., 91 U.S. 454, 23 L. Ed. 356.
51 C.J. p. 1228 note 88.

24. Md.—Green Ridge R. Co. v. Brinkman, 20 A. 1024, 64 Md. 52, 54 Am.R. 755.

25. Ill.—Chicago, etc., R. Co. v. Quaintance, 58 Ill. 389.

26. U.S.—Woodward v. Chicago, etc., R. Co., Minn., 145 F. 577, 75 C.C.A. 591.

with both dampers open.[27] It has been held that evidence that defendant habitually burned wood in its coal-burning locomotives, and that to burn wood in such a locomotive is more dangerous than to burn coal, is admissible, since such evidence would tend to show that defendant was burning wood in the locomotive that caused the injury.[28] Even if a custom of a railroad company can be shown in order to establish the origin of the fire complained of, it would first be necessary to establish the uniformity of the custom.[29]

g. Contributory Negligence

The plaintiff, in order to refute a charge of contributory negligence, may show that the site selected for a building which was burned was reasonably suitable and safe, and that similar property of other persons placed in similar proximity to the track had not been set on fire.

In order to refute a charge of contributory negligence, plaintiff may show that the site selected for the building burned was reasonably suitable and safe[30] and that he acted with prudence and due care to protect his property,[31] or, if he has failed to perform a certain act, that performance would not have afforded him adequate protection in the particular case.[32] Where the property destroyed had been placed on the right of way and defendant sets up a rule forbidding the placing of that kind of property on the right of way, evidence is admissible to show that defendant had waived the rule.[33] As tending to show or refute contributory negligence it is not permissible to introduce evidence of the custom of other persons in the neighborhood,[34] but it is permissible to show that similar property of other persons placed in similar proximity to the track had not been set on fire.[35]

§ 522. —— Construction, Equipment, and Management of Locomotives in General

a. In general
b. Emission of sparks of unusual size or quantity
c. Rate of speed of locomotives
d. Character of fuel used

a. In General

The plaintiff, in order to show negligence in the construction or management of a locomotive, may introduce evidence tending to show that it was in bad condition or improperly handled at the time of the fire. The defendant may show that for some time before and after the fire the locomotive was in good condition.

As tending to show negligence in the construction, equipment, repair, or management of the locomotive causing the fire, plaintiff may introduce evidence tending to show that it was in bad condition or improperly handled at the time of the fire.[36] Within reasonable limits as to time, he may show that before or after the time of the fire complained of the locomotive was defectively constructed or equipped.[37] Where the locomotive which set out the fire causing the injury complained of is not identified, evidence as to the condition generally of the locomotives used by defendant on its roads is admissible.[38] It has also been held that, where all of the engines of a railroad were substantially alike, evidence of the condition of the locomotive involved, and of what the other engines would do in respect of emitting sparks, is admissible.[39] In order to show that defendant had been negligent in not providing the best appliances for arresting sparks, it is not error to admit evidence of an expert in the employ of another company that at the time of the fires in question a certain device to prevent the emission of sparks was in use on his road and that with proper use and handling he had never known of a fire caused by a locomotive so equipped.[40]

On the other hand, plaintiff should not be permitted to exhibit to the jury a defective spark arrester found on defendant's road where it passed through plaintiff's premises some weeks before the fire complained of, where the evidence conclusively showed

27. Nev.—Watt v. Nevada Cent R Co., 44 P. 423, 46 P. 52, 726, 23 Nev 154, 62 Am S R. 772

28. Kan—St Joseph, etc., R. Co. v. Chase, 11 Kan. 47.

29. Ky—Cincinnati, etc, R Co v. Sadieville Milling Co., 126 S W. 118, 137 Ky. 568.

30. Ill—Toledo, etc, R Co v. Oswald, 41 Ill.App. 590.

31. N.D—Gram v. Northern Pac. R Co., 46 N.W 972, 1 N.D 252.
51 C J. p 1229 note 13.

32. Iowa—Lewis v Chicago, etc, R. Co., 10 N W. 336, 57 Iowa 127
51 C J p 1229 note 14.

33. N C—Herring v. Atlantic Coast Line R. Co, 127 S E. 8, 189 N C 285.
51 C J. p 1229 note 15.

34. Iowa—Slossen v. Burlington, etc, R Co, 14 N.W 244, 60 Iowa 215
51 C J. p 1229 note 16.

35. Tex—Bennett v. Missouri, etc, R Co, 32 S.W. 834, 11 Tex.Civ App 423
51 C.J. p 1230 note 17.

36. Iowa—Dumbarton Realty Co v. L G Everist, Inc., 174 N W. 269
51 C J p 1217 note 65

37. U.S—Corvallis, etc, R Co. v U. S, Or, 191 F. 310, 112 C C.A. 54
51 C J. p 1217 note 66.

38. Tex.—Missouri, etc, R. Co. v. Carter, 68 S W 159, 95 Tex 461.
51 C J p 1217 note 67

39. Tex—Team v. Texas & P. Ry Co, Civ App, 199 S W 2d 274, refused no reversible error.

40. Ind—Evansville, etc, R Co. v. Keith, 35 N.E 296, 8 Ind App. 57

that it could not have been used on that occasion.[41] Specimens of wire netting used on spark arresters and procured from defendant's shops are inadmissible where there is no proof that this kind was used on the locomotives at the time, and the wire netting was procured two or three years after the fire[42] So, on the question whether the spark arresters used by defendant were of the required standard, it is not permissible to show that defendant was in the habit of refusing to adopt certain appliances to modify the discharge of smoke from its locomotives, because of the cost, until after the patents on them had expired[43]

In order to refute negligence in the construction and equipment of the locomotive charged to have caused the fire, evidence is admissible that for some time before[44] or for some time before and after the fire[45] the locomotive was in good condition, on the theory that a condition once shown is presumed to exist for a reasonable time in the absence of evidence to the contrary.[46] Defendant may show the character of the netting used on its locomotives for arresting sparks,[47] or may compare it with another type,[48] and show that a netting finer than the one actually used on the spark arrester could not be used without interfering with the working capacity of the locomotive.[49] Where there is evidence already in the case that a locomotive on another road with a different spark arrester from that in use on defendant's road had passed near the property destroyed a short time before the fire, and defendant claimed that such locomotive set out the fire, defendant's engineer, after testifying that he was acquainted with the kind of spark arrester used by the other road, should be permitted to testify which of the two locomotives he had observed emitted the largest and most sparks.[50]

b. Emission of Sparks of Unusual Size or Quantity

It may be shown in evidence that at the time of the fire sparks of unusual size were observed to escape from the locomotive as an indication of negligence in the equipment or handling of the locomotive.

In order to show negligence in the equipment or handling of the locomotive which set out the fire causing the injury complained of, it may be shown that at the time of the fire sparks of unusual size or quantity were observed to escape from the locomotive,[51] and, for this purpose, a witness may testify that the locomotive threw out more sparks than he had ever seen thrown out by other locomotives generally,[52] or that he had observed other locomotives of defendant just prior to the fire and that they did not emit as many sparks as the locomotive in question[53] Evidence of the size of cinders found near the place of fire has been held admissible to show that they were comparative in size to those seen emitted from a passing locomotive on the day of the fire.[54] In order to authorize the admission of evidence that the locomotive claimed to have set out the fire emitted sparks of unusual size several months after the fire in question, it is necessary to show either that sparks of that size could be emitted through faults of construction in the locomotive[55] or that the locomotive was in the same condition of repair as when the fire in question occurred.[56]

Where it is alleged that the spark arrester of the locomotive setting out the fire was out of repair, evidence that other locomotives of defendant equipped with similar spark arresters emitted sparks of unusual size is inadmissible to show that the spark arrester of the locomotive in question was out of repair.[57] Where no particular locomotive is identified as having set out the fire, evidence that

41. Mo.—Kenney v. Hannibal, etc., R. Co., 70 Mo. 243.
51 C.J. p. 1217 note 69

42. Ohio.—Cleveland, etc., R. Co. v. McKelvey, 12 Ohio Cir. Ct. 426, 5 Ohio Cir. Dec. 561.

43. Pa.—Pennsylvania R. Co. v. Page, 12 A. 662, 9 Pa. Cas. 445.

44. U.S.—Woodward v. Chicago, etc., R. Co., Minn., 145 F. 577, 75 C.C.A. 591.
51 C.J. p. 1218 note 72

45. Iowa.—Hockstedler v. Dubuque, etc., R. Co., 55 N.W. 74, 88 Iowa 286

46. U.S.—Woodward v. Chicago, etc., R. Co., Minn., 145 F. 577, 75 C.C.A. 591.

47. Ill.—R. A. Watson Orchards, Inc., v. New York, C. & St. L. R. Co., 263 Ill.App. 397

48. Ill.—R. A. Watson Orchards, Inc., v. New York, C. & St. L. R. Co., supra.

49. Iowa.—Carter v. Kansas City, etc., R. Co., 21 N.W. 607, 65 Iowa 287.

50. N.Y.—Collins v. New York Cent., etc., R. Co., 16 N.E. 50, 109 N.Y. 243.

51. Ga.—Southern Ry. Co. v. Richardson, 172 S.E. 79, 48 Ga. App. 25
Iowa.—Stickling v. Chicago, R. I. & P. Ry. Co., 232 N.W. 677, 212 Iowa 149
Ky.—Withers v. Illinois Cent. R. Co., 207 S.W. 2d 33, 306 Ky. 487—Illinois Cent. R. Co. v. Roark's Adm'r, 58 S.W. 2d 648, 248 Ky. 398.
51 C.J. p. 1226 note 38.

52. Ala.—Louisville, etc., R. Co. v. Sherrill, 44 So. 631, 152 Ala. 213
51 C.J. p. 1226 note 39.

53. Ala.—Louisville, etc., R. Co. v. Sherrill, supra—Sherrill v. Louisville, etc., R. Co., 44 So. 153, 148 Ala. 1.

54. Ga.—Southern R. Co. v. Taylor, 47 S.E. 2d 77, 76 Ga. App. 745

55. N.Y.—Collins v. New York Cent., etc., R. Co., 16 N.E. 50, 109 N.Y. 243.

56. N.Y.—Collins v. New York Cent., etc., R. Co., supra.

57. N.Y.—Chandler v. Rutland R. Co., 124 N.Y.S. 1046, 140 App. Div. 68.

a few days before the fire a designated locomotive passing plaintiff's premises cast out sparks of unusual size and that a few days thereafter large holes were found in the screen of the spark arrester is admissible.[58] So, also, where the locomotive setting out the fire is not identified, evidence that for several months before and after the fire defendant's locomotives emitted sparks in unusual quantity and size is admissible, where admittedly competent evidence connected such remote conditions to, and tended to establish defendant's negligence with, the fire in question.[59]

In order to refute a charge of negligence based on the emission of sparks of unusual size or in unusual quantities, defendant may show that at the place where the fire occurred the grade was steep and that by reason thereof the locomotive necessarily emitted sparks of unusual size and quantity.[60]

c. Rate of Speed of Locomotives

Evidence of the rapid speed of the locomotive setting out the fire at the time and place of the fire is admissible as tending to show that more fire than usual was being used and that its escape was more probable. Where a statute makes a company liable for injuries sustained by running its trains in excess of a prescribed limit, the statute is admissible on the question of negligence in the running of the train.

Evidence of the rapid speed of the locomotive setting out the fire at the time and place of the fire is admissible as tending to show that more fire than usual was being used and that its escape was more probable,[61] although it has been held that evidence of the speed of such locomotive at a point a mile and a half or two miles from the scene of the fire is irrelevant and inadmissible.[62] Where it is shown that, at the time of the fire, the train was running several miles in excess of the rate fixed by the company's timetable several years later, and there is no evidence to show that there was any change in the condition of the roadbed and the traffic between the two dates that would affect the speed of its trains, and no apparent reason why a greater speed was permissible at one time than at another, the timetable is admissible as tending to show what defendant regarded as a reasonable rate of speed at the time of the fire and that the rate of speed of the train was unreasonable and excessive.[63]

Rate in excess of prescribed limit. Where a statute makes a company liable for injuries sustained by running its trains in excess of a prescribed limit, the statute is admissible on the question of negligence in the running of the train[64] It has been held that evidence that defendant's trains were usually run past the place where the fire originated at a greater rate of speed than allowed by ordinance is admissible,[65] and that an ordinance regulating the speed of locomotives in a city is admissible on the issue of whether defendant negligently exceeded the speed limit, thus causing a greater volume of sparks to be emitted by the greater exhaust occasioned,[66] but there is also authority to the effect that, in actions of the character under consideration, a municipal ordinance is not admissible for any purpose.[67]

d. Character of Fuel Used

On the question of whether the defendant was negligent in not using oil instead of coal for fuel, it may be shown that other railroads had reduced the number of their oil-burning locomotives and increased the number burning coal.

On an issue as to whether defendant was negligent in not using oil as a fuel instead of coal, evidence that two other railroad lines had from year to year reduced the number of their oil-burning locomotives and increased the number burning coal has been held admissible where it is shown that such roads, with defendant, formed a portion of one system of railways and have but one fuel agent for the entire system.[68] It has been held that evidence that the coal used in defendant's locomotives burned slowly and retained fire for a considerable length of time is relevant and material.[69]

§ 523. —— Setting Out Other Fires or Emission of Sparks or Coals on Other Occasions

a. Evidence offered in chief

58. Pa.—Knickerbocker Ice Co. v. Pennsylvania R. Co., 97 A. 1051, 253 Pa. 54.

59. Ky.—Cincinnati, etc., R. Co. v. Alexander, 272 S.W. 886, 209 Ky. 338

60. N.Y.—Flinn v. New York Cent., etc., R. Co., 36 N.E. 1046, 142 N.Y. 11.
51 C.J. p. 1226 note 46.

61. Tex.—Missouri, etc., R. Co. v. McCall, Civ.App., 143 S.W. 188.
51 C.J. p. 1226 note 47.

62. Va.—Norfolk, etc., R. Co. v. Briggs, 48 S.E. 521, 103 Va. 105.

63. Va.—Norfolk, etc., R. Co. v. Thomas, 66 S.E. 817, 110 Va. 622

64. Ill.—Craig v. Yazoo, etc., R. Co., 209 Ill.App. 599.
51 C.J. p. 1226 note 50.

65. Tex.—Bennett v. Missouri, etc., R. Co., 32 S.W. 834, 11 Tex.Civ.App. 423.

66. Ala.—Southern R. Co. v. Stonewall Ins. Co., 58 So. 313, 177 Ala. 327, Ann.Cas.1915A 987
51 C.J. p. 1226 note 52.

67. Ky.—Louisville, etc., R. Co. v. Dalton, 43 S.W. 431, 102 Ky. 290, 19 Ky.L. 1318.
51 C.J. p. 1226 note 53.

68. Tex.—Nacogdoches Compress Co. v. Texas, etc., R. Co., Civ.App., 143 S.W. 302.

69. Neb.—Abbott v. Chicago, etc., R. Co., 130 N.W. 438, 88 Neb. 727.

b. Evidence offered in rebuttal
c. Limitations on admissibility of evidence

a. Evidence Offered in Chief

(1) Where locomotive causing injury is not identified
(2) Where locomotive causing injury is identified

(1) Where Locomotive Causing Injury Is Not Identified

Where the identity of the locomotive which set out the fire causing the injury complained of is not established, evidence that the defendant's locomotives had set out fires or had emitted sparks or coals capable of setting out fires may be admissible The defendant may show that all the locomotives which passed the plaintiff's place at the time of the fire were in good order, and well supplied with proper appliances.

Where the identity of the locomotive which set out the fire causing the injury complained of is not established, evidence that defendant's locomotives had set out fires or had emitted sparks or coals capable of setting out fires may be admissible, as tending to show the possibility, and consequent probability, that the fire causing the injury complained of was set out by a locomotive of defendant,[70] and for the purpose of showing a negligent habit on the part of defendant in respect of the construction, equipment, and management of its locomotives, and, therefore, as tending to show negligence in that respect in the particular case causing the injury.[71] This class of evidence, it has been said, "is exceptional in character at the best,"[72] and not satisfactory in many ways,[73] and is admissible as a matter of necessity because of the failure of direct proof,[74] and as the best[75] and only[76] evidence that the nature of the case admits of. It has also been held that the fact that one of two or more locomotives caused the fire does not constitute an identification of the locomotive setting out the fire so as to take the case out of the foregoing rule.[77] The mere fact that a locomotive was attached to a particular train on a certain occasion has been held not to constitute specific identification of the locomotive,[78] and a mere allegation that the property was fired by a locomotive which passed at a time specified does not so identify the locomotive as to take the case out of the rule.[79] Nevertheless, evidence that defendant's locomotives emitted hot cinders of ordinary size is not admissible where there is no evidence to show that such cinders either caused or could have caused any fires.[80]

Where there is no evidence of the emission of sparks by locomotives at or near the time of the fire, it is not permissible to show acts of a similar character before and after the fire for the purpose of establishing the cause of the fire resulting in the injury complained of[81] It has also been held that evidence is not admissible that a locomotive of the company shortly before or after the day on which the particular fire occurred had set out other fires, where there is no evidence to show that the locomotive was run on the day when the fire in question was set out.[82] Evidence that locomotives operated on another railroad running through the same county threw sparks sufficient to fire rubbish and other inflammable materials can throw no light on the question whether the fire complained of was caused by defendant's locomotives or to show negligence on defendant's part.[83]

Where the locomotive causing the injury is not identified, it is permissible for defendant to show that all the locomotives which passed plaintiff's place at the time of the fire were in good order and well supplied with proper appliances,[84] and properly operated,[85] but it is not admissible for defendant to show, although it is shown that the type of spark arrester with which the locomotive was equipped was

70. U S —Atlanta & St. A. B Ry. Co v Register, C C.A Fla., 69 F 2d 328
Miss —Kurn v. Fondren, 198 So 727, 189 Miss. 739.
Va —Southern Ry. Co v. Barker, 4 S E 2d 395, 173 Va 313
51 C.J. p 1218 note 78

71. Tenn —Yearwood, for Use of American Ins Co of Newark, N J. v. Louisville & N R Co, 222 S W. 2d 33, 32 Tenn.App. 115
51 C J. p 1218 note 79

72. Pa —Henderson v. Philadelphia, etc., R. Co, 22 A. 851, 144 Pa. 461, 487, 27 Am.S R. 652, 16 L.R A 299.
51 C.J. p 1219 note 80.

73. Del.—Philadelphia, etc, R. Co. v. Green, 119 A. 840, 32 Del. 78

74. Pa —Shelly v Philadelphia, etc., R. Co., 60 A. 581, 211 Pa. 160

75. Del.—Philadelphia, etc., R. Co. v. Green, 119 A. 840, 32 Del. 78.
Pa —Shelly v. Philadelphia, etc., R. Co., 60 A. 581, 211 Pa. 160.

76. Pa —Shelly v. Philadelphia, etc., R. Co., supra.

77. Okl.—Schaff v Coyle, 249 P. 947, 121 Okl 228
51 C J p 1219 note 85.

78. Ind —Evansville, etc, R. Co v Keith, 35 N E. 296, 8 Ind App 57.

79. Or.—Koontz v. Oregon R, etc, Co., 23 P. 820, 20 Or. 3

80. Ky —Akers v. Illinois Cent. R. Co, 269 S.W. 311, 207 Ky. 379.
51 C J. p 1219 note 88.

81. Pa —American Ice Co. v. Pennsylvania R. Co, 73 A 873, 224 Pa. 439.

82. Ga —Akins v. Georgia R, etc., Co, 35 S.E 671, 111 Ga 815.

83. Md.—Sims v American Ice Co, 71 A. 522, 109 Md. 68.
51 C J. p 1219 note 91

84. Va —Norfolk, etc, R. Co v. Thomas, 66 S E 817, 110 Va 622
51 C J p 1219 note 92.

85. Tex —Biering v Gulf, etc., R. Co, 15 S W 576, 79 Tex. 584.

in general use and approved by experience, that on another railroad using the same kind of appliances at the same time fires occurred from sparks emitted from the smokestack [86]

(2) Where Locomotive Causing Injury Is Identified

(a) Fires set out or emission of coal or sparks by locomotive identified

(b) Fires set out or emission of coal or sparks by other locomotives

(a) Fires Set Out or Emission of Coal or Sparks by Locomotive Identified

Where a fire was caused by a locomotive which is known and identified, evidence may be admissible that the locomotive had at other times and places set out other fires or had emitted sparks or coals capable of causing fires for the purpose of establishing that the fire was caused by such locomotive, or for the purpose of showing that at the time of the injury it was improperly constructed, equipped, or operated.

Where it is claimed and in the nature of the case the fire could only have been caused by a locomotive which is known and identified, evidence is admissible, within reasonable limits as to time and place, that the locomotive had at other times and places set out other fires or had emitted sparks or coals capable of causing fires, for the purpose of establishing the fact that the fire was caused by such locomotive.[87]

Where the fire is shown to have been caused, or in the nature of the case could only have been caused, by a locomotive which is known and identified, evidence is admissible, within reasonable limits as to time and place, to show that the locomotive had at other times and places, before or after the fire complained of, set out other fires,[88] or emitted sparks or coals capable of causing fire,[89] or to show that it was in a defective condition prior to, and at the time of, the fire,[90] for the purpose of showing that at the time of the injury it was improperly constructed, equipped, or operated. It has also been held that evidence is admissible that the locomotive in question emitted sparks when it was running upgrade, although the grade along which the property was burned was substantially level.[91]

In behalf of defendant, it may be shown by relevant testimony that the fire originated from other independent causes,[92] even if the circumstantial evidence introduced by plaintiff seems to be clear that the cause of the fire must have been sparks emitted by the locomotive.[93] Defendant may show that the locomotive alleged to have caused the fire had been examined seventeen days before the fire by an expert machinist and found to be in proper condition, properly equipped, etc,[94] but for the purpose of overcoming evidence that the fire was caused by defendant's locomotive, it is not permissible to show that plaintiff's son, who was at home when the fire occurred, had, when a boy, acquired a disposition to set incendiary fires, and had done so.[95]

(b) Fires Set Out or Emission of Coal or Sparks by Other Locomotives

In some, but not other, jurisdictions where the locomotive which set out the fire is known and identified, evidence in actions to recover for such injury should be confined to the condition of that particular locomotive.

In a number of jurisdictions, where the locomotive which set out the fire causing the injury is known or identified, evidence in actions to recover for such injury should be confined to the condition, management, and operation of that particular locomotive,[96] and evidence that other locomotives of the company at other times and places had set out fires or emitted sparks or coals capable of setting fires is not admissible either to show negligence of the company in the construction, equipment, or management of the locomotive which caused the fire or to show the possibility and consequent probability that the fire was set by such locomotive.[97] This rule has been followed, even though such other lo-

86. Ohio—Cincinnati, etc, R Co v. Fredenlin, 3 Ohio Cir.Ct. 23, 2 Ohio Cir.Dec. 15.

87. Ky.—Louisville, etc., R. Co v. Neal, 139 S.W. 1060, 145 Ky. 42.
51 C.J. p 1219 note 96.

88. Ark.—Missouri Pac. R Co. v. Wells, 156 S.W.2d 216, 203 Ark 227.
51 C.J. p 1220 note 98.

Several fires on same trip
Ark.—Missouri Pac. R. Co v Wells, supra
Iowa.—Stickling v. Chicago, R I & P. Ry Co., 247 N.W. 642, 215 Iowa 1312—Stickling v. Chicago, R. I. & P Ry. Co., 232 N.W 677, 212 Iowa 149.
51 C.J. p 1220 note 98 [b]

89. Iowa—Stickling v Chicago, R I. & P Ry. Co., 232 N.W 677, 212 Iowa 149
51 C.J. p 1221 note 99

90. U.S.—Corvallis, etc, R Co v. U S, Or, 191 F 310, 112 C.C.A. 54

91. Pa.—Sollenberger v. Pennsylvania R. Co., 139 A 127, 290 Pa 415
51 C.J. p 1221 note 2.

92. Ala.—Douglass v. Central of Georgia R. Co, 78 So 457, 201 Ala 395.
51 C.J. p 1221 note 3.

93. Mass.—Noyes v. Boston, etc, R Co, 99 N.E. 457, 213 Mass. 9.

94. Ala.—Horton v. Louisville, etc, R Co, 49 So 423, 161 Ala. 107
51 C.J. p 1221 note 5

95. Mass.—Noyes v. Boston, etc., R. Co, 99 N.E 457, 213 Mass 9.
51 C.J. p 1221 note 6.

96. Pa.—Henderson v. Philadelphia, etc, R Co., 22 A 851, 144 Pa 461, 27 Am.S.R 652, 16 L.R.A 299
Tex.—Morgan v. Missouri, etc., R. Co, 110 S.W 978, 50 Tex.Civ.App 420

97. Iowa.—Stickling v Chicago, R I. & P Ry. Co, 232 N.W. 677, 212 Iowa 149.

comotives had the same kind of appliances as the locomotive in question,[98] but it has also been held that, where all of a railroad's engines were substantially alike, evidence that other engines had been seen to emit sparks is admissible as evidence,[99] and, where the identified engine is not differentiated from other engines of defendant but is similar to them in equipment, inspection, and operation, proof of fires from such other engines may be admissible.[1] Evidence of other fires set out by locomotives of the railroad has been held admissible to show the possible distance burning substances thrown off a locomotive may be carried and a fire set thereby.[2]

In some jurisdictions, where the common-law rule of liability for fires set out by locomotives still prevails, apparently no distinction is made between identified and unidentified locomotives in respect of the admissibility of this class of evidence; in other words, if the evidence would be admissible in case of an identified locomotive, it would also be admissible in case of an unidentified locomotive, both to show negligence and the possibility, and consequent probability, that the fire was set out by the identified locomotive.[3] Where the common-law liability is changed by statute making railroad companies liable for injuries by fire set out by their locomotives, although not negligent, as considered supra §§ 485–489, it is held that, even though the locomotive causing the fire is identified, it is permissible to show for the purpose of establishing the fact that the fire causing the injury was set out by such locomotive that other locomotives of the company at other occasions had set out fires or emitted sparks or coals capable of setting out fires.[4]

b. Evidence Offered in Rebuttal

Where the defendant introduces evidence that its locomotives were properly equipped to prevent the escape of sparks and coals, and that a fire could not have originated therefrom, the plaintiff may introduce evidence to show that on other occasions locomotives of the defendant had set out fires or thrown out coals and sparks capable of setting fires.

Whether or not the locomotive alleged to have caused the fire was identified, where defendant introduces evidence that a designated locomotive was, or that all its locomotives were, properly equipped to prevent the escape of sparks and coals, and that a fire could not have originated from its locomotives, plaintiff may introduce in rebuttal evidence to show that on other occasions a particular locomotive or that other locomotives of defendant had set out fires or had thrown out sparks and coals capable of setting fires.[5] There is, it is said, no other practical way to rebut evidence of this character.[6] It has been held that, where defendant introduced expert evidence that its locomotives as equipped could not throw sparks as far as the property claimed to have been set on fire by defendant's locomotive, evidence is admissible in rebuttal to show that its locomotives had set out fires at even greater distances, although such fires were remote in point of time and place, and an objection to the evidence on this ground goes to its weight and not to its admissibility.[7] Where a defendant railroad introduced expert testimony that particular engines would not cause fire, evidence consisting of testimony of laymen that they had seen engines of the type involved set out fires has been held admissible.[8]

c. Limitations on Admissibility of Evidence

(1) As to time and place
(2) As to similarity of construction, equipment, repair, and management
(3) Other limitations

(1) As to Time and Place

Evidence tending to show that the defendant's locomotives set out fires or emitted sparks or coals capable of setting out fires but which does not fix a definite time is inadmissible. Generally, evidence of other fires should be confined to instances at or near the place of the fire in question.

Although, as discussed supra this section, evidence

N C—Nufer v Atlantic Coast Line R Co, 178 S E 857, 208 N.C 55.
51 C J p 1221 note 8

98. U S—Lesser Cotton Co v St Louis, etc., R. Co, Ark, 114 F 133, 52 C C A 95
Ill.—Hoopeston First Nat Bank v Lake Erie, etc, R Co, 50 N E 1023, 174 Ill 36

99. Tex—Team v Texas & P Ry Co, Civ App, 199 S W 2d 274, refused no reversible error.

1. U.S—Atlanta & St. A B Ry Co v. Register, C C.A Fla., 69 F 2d 323

2. Iowa—Stickling v. Chicago, R. I. & P Rv Co, 232 N.W 677, 212 Iowa 149

3. U S—Spokane International Ry Co v. U S, C C A Idaho, 72 F 2d 440
51 C J p 1222 note 10
To show negligent habit or custom
Ky.—Louisville & N. R Co. v. Bean, 116 S.W 2d 989, 273 Ky 454—Illinois Cent R Co. v. Bell Union Coal & Mining Co, 38 S W.2d 707, 238 Ky 630.

4. Va.—Virginian R Co v. London, 139 S E 328, 148 Va 699
51 C J p 1222 note 12.

5. Ark.—Missouri Pac. R. Co. v Campbell, National Liberty Fire Ins Co, Intervener, 177 S W 2d 174, 206 Ark 657—Missouri Pac R Co. v. Wells, 156 S W 2d 216, 203 Ark. 227
Tex.—**Corpus Juris cited in** Texas & N. O. R Co v Glass, Civ App, 107 S W.2d 924, 926, error dismissed.
51 C.J. p 1223 note 14.

6. Ga—Tallulah Falls R Co v. Stribling, 93 S E 161, 20 Ga App. 353

7. Me—Jones v Maine Cent R Co., 76 A. 710, 106 Me 442

8. Tex—Texas & N O R Co. v. Glass, Civ App, 107 S W.2d 924, error dismissed.

is admissible to show that defendant's locomotives set out fires or emitted sparks or coals capable of setting out fires either before or after the fire complained of, evidence which does not fix a definite time is inadmissible.[9] Although no exact standard can be laid down as to the period of time it will be proper to embrace in the inquiry,[10] and reasonable latitude must be allowed because the purpose of such proofs would be defeated if they were confined to the precise or exact time of the occurrence,[11] the evidence should be limited in point of time to facts having some probative value,[12] and it has very generally been declared that evidence that locomotives of defendant had on other occasions set out fires or emitted sparks or coals capable of setting out fires must be limited to occurrences "at or about", or "at or near",[13] or "shortly before or after",[14] the time when the fire complained of occurred, or within a "reasonable time" thereof.[15] In accordance with the particular facts and circumstances, it has been held that evidence of fires or the emission of sparks capable of setting out fires[16] at other times is or is not[17] admissible. It has been held that no exception is warranted because the evidence shows a continuous series of similar acts and occurrences for years before the fire complained of, thus indicating a perpetuation of faulty conditions originally existing;[18] but a contrary view has also been taken[19]

Place. It has generally been held that evidence of the character under consideration should be confined to other fires or emissions of sparks and coals at or near the place of the fire causing the injury complained of,[20] and that evidence that defendant's locomotives emitted sparks at other places not definitely located is inadmissible.[21]

(2) As to Similarity of Construction, Equipment, Repair, and Management

According to some, but not other, decisions, in order to render applicable the rule authorizing the admission of evidence of the setting out of fires or the emission of sparks by the defendant's locomotives on other occasions, it is not essential to show that the locomotives were of the same or similar construction as the locomotive in question.

According to some decisions, in order to render applicable the rule authorizing the admission of evidence of the setting out of fires or the emission of sparks or cinders capable of setting out fires by defendant's locomotives on other occasions, it is not essential to show that the locomotives were of the same or similar construction, equipment, state of repair, and management as those supposed to have set out the fire or in use at the time of the fire complained of.[22] However, many decisions hold directly to the contrary[23]

(3) Other Limitations

It has been held that evidence that on other occasions the defendant's locomotives had set out fires or emitted sparks capable of setting fires is not admissible unless it is shown that conditions were the same as at the time of the fire in question.

According to some decisions, evidence that defendant's locomotives had on other occasions set out fires or emitted sparks or coals capable of setting out fires is not admissible unless it is shown that conditions were the same as at the time of the fire in question.[24] On the other hand, other decisions hold that, in order to render this evidence admissible, it is not essential to show that the condition of the weather or the direction of the wind was the same;[25] and any difference merely affects the pro-

9. Mass.—Carpenter v. Boston & Maine R. R., 3 N.E.2d 184, 295 Mass. 103.
51 C.J. p. 1224 note 18

10. Ky.—Louisville, etc., R. Co. v. Home Ins. Co., 142 S.W. 398, 146 Ky. 281.
Tenn.—Louisville, etc., R. Co. v. Fort, 80 S.W. 429, 112 Tenn. 432

11. Ga.—Brown v. Benson, 29 S.E. 215, 101 Ga. 753.
Pa.—Henderson v. Philadelphia, etc., R. Co., 22 A. 851, 144 Pa. 461, 27 Am. St. R. 652, 16 L.R.A. 299

12. Conn.—Gra. Rock Spring Water Co. v. Central New England R. Co., 105 A. 350, 93 Conn. 77.

13. S.C.—Laney v. Atlantic Coast Line R. Co., 45 S.E.2d 184, 211 S.C. 328.
51 C.J. p. 1224 note 22.

14. Ky.—Chesapeake, etc., R. Co. v. Meak, 185 S.W. 160, 169 Ky. 775
51 C.J. p. 1224 note 23.

15. Mass.—Carpenter v. Boston & Maine R. R., 3 N.E.2d 184, 295 Mass. 103.
Miss.—Kurn v. Fondren, 198 So. 727, 189 Miss. 739.
51 C.J. p. 1224 note 24.

16. S.C.—Laney v. Atlantic Coast Line R. Co., 45 S.E.2d 184, 211 S.C. 328.
51 C.J. p. 1224 note 25.

17. Mo.—Farmers' El., etc., Co. v. Hines, 243 S.W. 140, 294 Mo. 639
51 C.J. p. 1224 note 26.

18. Ala.—Southern R. Co. v. Stonewall Ins. Co., 58 So. 313, 177 Ala. 327, Ann. Cas. 1915A 987.
Pa.—Henderson v. Philadelphia, etc., R. Co., 22 A. 851, 144 Pa. 461, 27 Am. St. R. 652, 16 L.R.A. 299.

19. Del.—Philadelphia, etc., R. Co. v. Green, 119 A. 840, 32 Del. 78.
51 C.J. p. 1225 note 28.

20. Okl.—Schaff v. Coyle, 249 P. 947, 121 Okl. 228.
51 C.J. p. 1225 note 30

21. Tex.—Nussbaum v. Trinity, etc., R. Co., 194 S.W. 1099, 108 Tex. 407.

22. Tenn.—Yearwood, for Use of American Ins. Co. of Newark, N.J., v. Louisville & N. R. Co., 222 S.W.2d 33, 32 Tenn. App. 115.
51 C.J. p. 1225 note 33

23. Ala.—Payne v. Hargrove, 89 So. 166, 206 Ala. 69
51 C.J. p. 1225 note 34.

24. S.C.—Laney v. Atlantic Coast Line R. Co., 45 S.E.2d 184, 211 S.C. 328.
51 C.J. p. 1225 note 35.

25. Mo.—Matthews v. Missouri Pac. R. Co., 44 S.W. 802, 142 Mo. 645.
51 C.J. p. 1225 note 36.

bative force of the evidence and not its admissibility.[26]

A witness need not have seen sparks fall from an engine of the railroad in order to be qualified to testify as to the origin of other fires, but his testimony is admissible if he states circumstances tending to show with reasonable certainty that the railroad was responsible for other fires in the same locality.[27] Evidence which only creates an inference that defendant set out a prior fire cannot be used as evidence that defendant set out the fire in question.[28]

§ 524. —— Competency and Qualification of Employees

As tending to show that the defendant's locomotive was operated carefully at the time of the fire, evidence that the fireman and engineer in charge of the locomotive which allegedly caused the fire were careful men may be admissible.

As tending to show that defendant's locomotive was operated in a careful and prudent manner at the time of the fire, evidence is admissible to show that defendant's fireman and engineer in charge of the locomotive alleged to have caused the fire were careful and prudent men,[29] for which purpose testimony of a member of the board of examiners may be material and relevant.[30] However, it has been held that expert testimony as to the character of defendant's employees for care and prudence is inadmissible.[31] Where the competency of the engineer is not in issue, evidence that he was in the habit of exercising care and caution in operating his locomotive is inadmissible to show that on the occasion in question he managed and controlled his locomotive prudently.[32]

§ 525. —— Subsequent Repairs or Precautions

Evidence of subsequent repairs or precautions by the defendant railroad company has been held admissible on the question of its antecedent negligence with respect to a fire allegedly caused by its locomotives, but there is also authority to the contrary.

In some jurisdictions it has been held that evidence of subsequent repairs to a locomotive which is alleged to have caused the injury,[33] or to the right of way,[34] or of additional precautions, as in the employment of more men,[35] is admissible on the question of antecedent negligence of defendant. In other jurisdictions, however, it has been held that since acts which follow the injury cannot be proved to establish antecedent negligence,[36] the mere fact that a locomotive alleged to have set a fire is subsequently repaired cannot be considered in determining whether or not it was defective at the time the fire was set.[37] The fact that employees of the railroad company materially assisted in putting out the fire will not be considered.[38]

§ 526. —— Insurance of Property Injured or Destroyed

Generally, evidence that property destroyed by a fire set out by a railroad locomotive had been insured is inadmissible. Evidence of a subrogation or an indemnity agreement between the owner of such property and an insurer is inadmissible.

Where the fact that the property had been insured or that the insurance had been paid constitutes no defense to an action for the destruction of property by fire set out by a railroad company, as considered supra § 512, evidence to show that the property destroyed had been insured is generally not admissible,[39] although such evidence may be admissible in support of the defense that plaintiff burnt the property himself.[40] Evidence of a subrogation agreement between the owner of the property and an insurance company transferring to the latter the owner's right of action to the extent of the amount insured,[41] or of an agreement between the owner and insurer that the latter would pay the costs in the event that plaintiff fails in the suit,[42] is not admissible.

26. Mo.—Young v. Hines, App., 229 S.W. 417.

27. Va.—Southern Ry. Co v. Barker, 4 S.E 2d 395, 173 Va. 313.

28. Tex.—Team v Texas & P. Ry. Co, Civ.App., 199 S.W.2d 274, refused no reversible error

29. Mo.—Patton v. St. Louis, etc, R. Co., 87 Mo. 117, 56 Am R. 446
51 C.J. p 1228 note 75.

30. N.Y.—Flynn v Manhattan R Co., 20 N.Y.S. 652, 1 Misc. 188.

31. Vt.—Bryant v. Central Vermont R Co., 56 Vt. 710.
51 C.J. p 1228 note 77.

32. Tex.—McFarland v. Gulf, etc, R Co., Civ App, 88 S W. 450

33. Pa.—Byers v. Baltimore, etc, R. Co, 72 A 245, 222 Pa. 547.
51 C J. p 1229 note 95

34. N.D.—Young v. Great Northern R Co., 79 N W. 448, 8 N.D. 345.
51 C.J. p 1229 note 96.

35. N.Y.—Westfall v. Erie R. Co., 5 Hun 75
51 C J. p 1229 note 97.

36. Colo.—Denver, etc, R Co v Morton, 32 P. 345, 3 Colo App. 155

37. Ala.—Louisville, etc., R. Co v. Malone, 20 So. 33, 109 Ala. 509.

Ill.—Stewart v Illinois Cent. R. Co, 184 Ill App 412.

38. Colo.—Denver, etc, R Co v. Morton, 32 P. 345, 3 Colo App 155.

39. Ala.—Atlanta, etc., R. Co v Spivey, 100 So. 759, 211 Ala 520
51 C J. p 1229 note 8.

40. Ill.—Carlyle Canning Co. v Baltimore, etc, R Co., 77 Ill.App. 396.

41. Ala.—Coffman v Louisville, etc, R. Co, 63 So 527, 184 Ala 474

42. Ala.—Coffman v Louisville, etc., R. Co, supra
51 C.J p 1229 note 11.

§ 527. Weight and Sufficiency of Evidence

a In general
b. Origin or cause of fire
c. Negligence

a. In General

General rules of evidence apply to the weight and sufficiency of evidence in actions against railroad companies for destruction of, or injury to, property by fire set out by them.

Rules applicable to the weight and sufficiency of evidence in civil actions generally, as considered in Evidence §§ 1016–1050, and actions based on negligence, as discussed in Negligence §§ 243–250, apply in actions against railroad companies for destruction of, or injury to, property by fire set out by them.[43]

Title or right to sue. General rules governing the weight and sufficiency of evidence apply in determining whether plaintiff has such title or interest in the property injured or destroyed by fire as will entitle him to maintain an action for the resulting damages.[44] Plaintiff need not produce written evidence of title, but possession under claim of ownership either by himself[45] or by a tenant[46] is sufficient proof of title to authorize him to maintain an action for damages in the absence of evidence showing ownership in another. However, a mere oral statement of plaintiff that he claimed the property in question is insufficient to establish title thereto.[47]

b. Origin or Cause of Fire

(1) In general
(2) Degree of proof

(1) In General

Under general rules of evidence which apply with respect to the weight and sufficiency of the proof of the origin of fires, circumstantial evidence to show that a fire was set out by a railroad may be sufficient, although evidence which raises a mere conjecture that the railroad set out the fire is insufficient.

General rules governing the weight and sufficiency of evidence apply with respect to the proof of the origin or cause of fires.[48] In order to show that the fire causing the injury was originated or caused by

43. Mich.—Malloy v. Grand Trunk R. Co of Canada, 158 N.W. 854, 192 Mich. 344.
51 C.J. p 1230 note 20.

Dispatcher's train sheets
A train dispatcher's train sheets showing that no train passed a certain point at a certain time are not conclusive evidence when witnesses testify to the contrary.—R. A. Watson Orchards, Inc., v. New York, C. & St. L. R. Co., 263 Ill.App. 397.

Evidence held sufficient
(1) To sustain verdict for plaintiff
Ga.—Powell v. Blackstock, 13 S.E.2d 503, 64 Ga.App. 442
Wis.—Hicks v. Chicago & N. W. Ry. Co., 255 N.W. 73, 215 Wis. 462
51 C.J. p 1230 note 20 [a] (1)

(2) To sustain verdict for defendant.
Ill.—Williams v. T. J. Moss Tie Co., 30 N.E.2d 430, 307 Ill.App. 233.
Mass.—Carpenter v. Boston & Maine R. R., 3 N.E.2d 184, 295 Mass. 103.
Ohio—Breymann v. Pennsylvania, O. S. D. R. Co., 183 N.E. 771, 43 Ohio App. 473
51 C.J. p 1230 note 20 [a] (2)

44. **Evidence held sufficient to show that plaintiff owned premises**
Ga.—Pollard v. Walton, 190 S.E. 396, 55 Ga.App. 353.
51 C.J. p 1230 note 23.

45. Ala.—Southern R. Co. v. Slade, 68 So. 867, 192 Ala. 568—Alabama, etc., R. Co. v. Johnston, 29 So. 771, 128 Ala. 283.

46. Miss.—Gilchrist-Fordney Co. v. Parker, 69 So. 290, 109 Miss. 445

47. S.C.—Elliott v. Wilson, 187 S.E. 825, 181 S.C. 406.

48. **Evidence held sufficient to show**
(1) That fire destroying property originated on right of way
La.—Davis v. Chicago, R. I. & P. Ry. Co., App., 13 So.2d 389.
Tenn.—Mobile & O. R. Co. v. Keith, 6 Tenn.App. 18
Wash.—Michigan Millers Mut. Fire Ins. Co. v. Oregon-Washington R. & Nav. Co., 201 P.2d 207, 32 Wash. 2d 256.
51 C.J. p 1230 note 28 [b] (1).

(2) That property was set on fire by sparks from locomotive
U.S.—Atlanta & St. A. B. Ry. Co. v. Register, C.C.A.Fla., 69 F.2d 323.
Ark.—Missouri & A. Ry. Co. v. Treece, 194 S.W.2d 203, 210 Ark. 63—Missouri Pac. R. Co. v. Campbell, National Liberty Fire Ins. Co., Intervener, 177 S.W.2d 174, 206 Ark. 657—Missouri Pac. R. Co. v. Fowler, 34 S.W.2d 1071, 183 Ark. 86
Ga.—Southern Ry. Co. v. Richardson, 172 S.E. 79, 48 Ga.App. 25
Iowa—Stickling v. Chicago, R. I. & P. Ry. Co., 247 N.W. 642, 215 Iowa 1312.
La.—Easterly v. Natalbany Lumber Co., 131 So. 298, 171 La. 459
Me.—Goodwin v. Boston & M. R. R., 186 A. 603, 134 Me. 282
Mo.—Smith v. St. Louis-San Francisco Ry. Co., App., 214 S.W.2d 443—Gaddy v. Kurn, App., 187 S.W.2d 858.
Okl.—Thompson v. Vanpool, 210 P.2d 370, 202 Okl. 92.
Wash.—Nelson v. Northern Pac. Ry. Co., 290 P. 432, 158 Wash. 52.
Wis.—Frederick v. Great Northern Ry. Co., 240 N.W. 387, 207 Wis. 234, 80 A.L.R. 984, modified on other grounds 241 N.W. 363, 207 Wis. 234—Suts v. Chicago & N. W. Ry. Co., 234 N.W. 715, 203 Wis. 532
51 C.J. p 1230 note 28 [b] (3).

(3) That property was not set on fire by sparks from locomotive—Bowie Lumber Co. v. Morgan's Louisiana, etc., R., etc., Co., 97 So. 591, 154 La. 407—51 C.J. p 1230 note 28 [b] (4).

(4) Other matters pertaining to origin of fire—Deerfoot Farms v. New York, N. H. & H. R. Co., Mass., 96 N.E.2d 872

Evidence held insufficient to show
(1) That fire destroying property originated on right of way.
La.—Austin v. Missouri Pac. R. Co., App., 200 So. 484.
N.C.—Star Mfg. Co. v. Atlantic Coast Line R. Co., 23 S.E.2d 32, 222 N.C. 330.
51 C.J. p 1230 note 28 [d] (1).

(2) That property was set on fire by sparks from locomotive.
La.—Givens v. Yazoo & M. V. R. Co., 146 So. 751, 176 La. 796
Mass.—Carpenter v. Boston & Maine R. R., 3 N.E.2d 184, 295 Mass. 103
Mo.—Motley v. Wabash R. Co., App., 234 S.W.2d 321
Va.—Southern Ry. Co. v. American Peanut Corporation, 164 S.E. 261, 158 Va. 359
51 C.J. p 1230 note 28 [d] (2).

(3) That property was not set on fire by locomotive.—Brooks v. Missouri Pac. R. Co., 71 S.W. 1083, 98 Mo.App. 166.

defendant, circumstantial, as well as direct, evidence showing that it was communicated from a fire set out by defendant on its right of way or other premises or was communicated from one of defendant's locomotives may be sufficient,[49] because in cases of this character it is ordinarily difficult or even impossible to furnish anything but evidence of a circumstantial nature to show this fact.[50] Thus, such evidence may be sufficient where it shows that there was no probable cause or reasonable explanation for the fire except the company's locomotive,[51] as where it is established by proof that the fire started immediately or soon after one of defendant's locomotives had passed and that there was no other apparent cause for the fire,[52] especially when taken together with other circumstances tending to strengthen the probability that the fire so originated,[53] such as evidence of other fires from defendant's locomotives at about the same place and time,[54] the scattering of sparks or coals on the same or other occasions,[55] combustible material on the right of way,[56] the direction of the wind at the time from the locomotive toward the property burned,[57] that the property burned was located near the railroad track,[58] and that there was no fire in the building at the time.[59]

Where the evidence as to the origin of the fire is circumstantial, a recovery cannot be based on proof of a mere possibility that the fire was originated or caused by defendant or on proof that it raises a mere conjecture, guess, or suspicion that the fire was so caused.[60] Circumstantial evidence to establish the origin or cause of a fire claimed to have been set out by a railroad company should be sufficient to establish a reasonable and well grounded inference that the fire was so set out,[61] and should be

(4) That employees of defendant started fire on right of way—Duncan v Texas & P. Ry Co, La App., 144 So 180

49. U S—Missouri, K & T. Ry. Co. v Jackson, C.A Okl, 174 F.2d 297—Lowden v. Shoffner Mercantile Co, C C.A Ark, 109 F 2d 956—Turner Simplicity Mfg. Co. v. Bremner, C C.A.Iowa, 40 F 2d 368.
Fla—Colle v Atlantic Coast Line R. Co, 14 So.2d 422, 153 Fla 258.
Iowa—Stickling v. Chicago, R I. & P. Ry. Co, 247 N W. 642, 215 Iowa 1312—Stickling v. Chicago, R I. & P Ry Co, 232 N.W. 677, 212 Iowa 149.
Ky—Louisville & N R Co. v Bean, 116 S W.2d 989, 273 Ky 454—Illinois Cent. R Co. v. Bell Union Coal & Mining Co., 38 S W.2d 707, 238 Ky. 630.
Mo—Gaddy v Kurn, App, 187 S W 2d 858—Niswonger v Thompson, App, 124 S W 2d 669—Butcher v St Louis-San Francisco Ry Co, 39 S W 2d 1066, 225 Mo App 749.
Okl—Thompson v. Vanpool, 210 P.2d 370, 202 Okl. 92—Midland Valley R Co v Barton, 129 P 2d 1007, 191 Okl. 359.
Tex—Team v Texas & P Ry. Co, Civ App, 199 S W 2d 274, refused no reversible error
Va—Southern Ry. Co v Barker, 4 S E 2d 395, 173 Va 313—Norfolk & W. R Co v. Richmond Cedar Works, 170 S E. 5, 160 Va 790
Wis—Hicks v Chicago & N. W. Ry. Co, 255 N W 73, 215 Wis. 462—Suts v Chicago & N. W Ry Co., 234 N W 715, 203 Wis 532.
51 C J p 1231 note 29.

"Circumstantial evidence" in respect of liability of railroad for fire damage is evidence of facts warranting inference of negligence in operation or failure to provide statutory spark arrester and in addition that fire originated as consequence—Illinois Cent. R Co v. Bell Union Coal & Mining Co, 38 S W.2d 707, 238 Ky 630

Eyewitness

Property owner need not, in order to recover from railroad for value of property destroyed by fire, prove that sparks were seen to leave locomotive and fall on property destroyed by fire
Ky.—Withers v. Illinois Cent. R. Co, 207 S W 2d 33, 306 Ky. 487—Illinois Cent. R Co v. Roark's Adm'r, 58 S.W.2d 648, 248 Ky 398
S C.—Epps v Atlantic Coast Line R Co, 180 S E. 559, 177 S C. 32.
51 C J p 1231 note 29 [a].

50. Okl.—Midland Valley R. Co. v. Rupe, 210 P 1038, 87 Okl 286.
51 C J p 1232 note 30

51. Mo—Butcher v. St Louis-San Francisco Ry Co, 39 S W 2d 1066, 225 Mo.App 749
51 C J p 1232 note 31.

52. Ark.—Missouri Pac R Co v Campbell, National Liberty Fire Ins. Co, Intervener, 177 S W.2d 174, 206 Ark. 657—Missouri Pac R Co v Wells, 156 S W 2d 216, 203 Ark. 227—Missouri Pac R Co v Johnson, 133 S W 2d 33, 198 Ark 1134—Missouri Pac. R. Co v. Fowler, 34 S.W.2d 1071, 183 Ark 86.
Fla—Colle v. Atlantic Coast Line R. Co, 14 So 2d 422, 153 Fla 258
Okl.—Midland Valley R Co. v. Barton, 129 P 2d 1007, 191 Okl. 359.
S.C—McLeod v. Atlantic Coast Line R Co, 9 S E 2d 210, 194 S.C 87.
Va—Norfolk & W. R. Co. v Richmond Cedar Works, 170 S E 5, 160 Va. 790
51 C J p 1232 note 32

53. Wis—Beggs v Chicago, etc., R Co, 44 N W. 633, 75 Wis. 444.

54. Okl.—Schaff v Coyle, 249 P. 947, 121 Okl. 228
51 C.J p 1233 note 34.

55. Mont—Marron v. Great Northern R. Co., 129 P. 1055, 46 Mont 593.
51 C J. p 1233 note 35.

56. Or.—Hawley v. Sumpter R Co., 90 P 1106, 49 Or 509, 12 L.R A ,N S., 526
51 C J. p 1233 note 36.

57. Ark.—Missouri Pac R. Co. v Fowler, 34 S.W 2d 1071, 183 Ark. 86
Okl.—Midland Valley R Co. v. Barton, 129 P 2d 1007, 191 Okl. 359.
51 C.J p 1233 note 37.

58. Ark.—Missouri Pac. R Co. v. Fowler, 34 S W 2d 1071, 183 Ark 86.
Ga—Southern R. Co v. Williams, 38 S E 744, 113 Ga 335.

59. Ark—Missouri Pac R. Co v Fowler, 34 S.W 2d 1071, 183 Ark 86.

60. U S—Hynds v. Schaff, C C.A. Okl, 46 F 2d 275.
Fla.—Colle v. Atlantic Coast Line R. Co, 14 So.2d 422, 153 Fla 258.
Iowa—Beck v. Chicago, B. & Q. R Co., 243 N W 154, 214 Iowa 628.
Mass—Deerfoot Farms v New York, N. H. & H R. Co., 96 N.E 2d 872.
Mo—Butcher v St. Louis-San Francisco Ry. Co, 39 S.W.2d 1066, 225 Mo App. 749
51 C.J p 1234 note 39

61. U S—Kansas City Southern Ry. Co. v New England Fire Ins. Co, C.C A,Ark, 133 F.2d 973.
Ky.—Withers v. Illinois Cent R Co, 207 S W 2d 33, 306 Ky. 487—Illinois Cent. R Co v. Roark's Adm'r, 58 S W 2d 648, 248 Ky 398
Mo.—Smith v St Louis-San Francisco Ry Co, App., 214 S W 2d 443
N D—James Turner & Sons v. Great

such as to rebut the probability of the fire having originated in any other manner.[62]

Where the evidence is insufficient to establish a direct causal connection between the fire resulting in the injury complained of and the operation of the road, it is insufficient to sustain a finding that the property was fired by defendant's locomotive,[63] and a judgment awarding damages for the property burned will be reversed.[64] It is not necessary, however, that the evidence to establish the fact that defendants set out the fire should be uncontradicted.[65]

Effect of uncontradicted evidence in rebuttal. Circumstantial evidence that a locomotive set out the fire causing the injury complained of will not be sufficient to authorize a recovery where there is other positive and uncontradicted evidence tending to exclude the probability that the fire was caused by such locomotive [66]

(2) Degree of Proof

It is essential to a recovery that the plaintiff show by the preponderance of the evidence that the defendant caused the fire resulting in the injury complained of; it is not necessary to show absolute certainty that the defendant originated the fire.

It is essential to a recovery that plaintiff should show by a preponderance of the evidence that defendant caused the fire resulting in the injury complained of.[67] If the evidence preponderates against the claim that defendant caused the fire[68] or is equally balanced,[69] there can be no recovery. Nevertheless, a preponderance of evidence is sufficient; the law does not require demonstration or absolute certainty that the fire was originated by defendant[70] or that this fact should be proved beyond a reasonable doubt,[71] or that the evidence should be of such weight as to exclude all possibility of another origin of the fire.[72]

c. Negligence

(1) In general
(2) Construction, equipment, and operation of locomotives
(3) Allowing accumulation of combustible matter on railroad property
(4) Setting out and preventing spread of fire
(5) Contributory negligence

(1) In General

Where negligence is the basis of the action, it is necessary for the plaintiff to establish negligence on the part of the defendant by a preponderance of the evidence in order to authorize a recovery. This evidence of the defendant's negligence may be circumstantial

Except in jurisdictions where negligence has been eliminated as an element of the cause of action by statute, as considered supra §§ 485–489, where negligence is the basis of the action,[73] it is necessary for plaintiff to establish negligence on the part of defendant by a preponderance of the evidence in order to authorize a recovery,[74] and a judgment for plaintiff is not authorized where the evidence is evenly balanced[75] or is sufficient only to raise a mere conjecture or surmise that the fire which destroyed plaintiff's property was due to defendant's negli-

Northern Ry. Co., 272 N.W. 489, 67 N.D. 347.
51 C.J. p. 1234 note 40.

62. Mo.—Smith v. St Louis-San Francisco Ry. Co., App., 214 S.W. 2d 443.
51 C.J. p. 1234 note 41.

Possibility of other cause

Evidence merely suggesting a possibility that the fire originated from a cause independent of a locomotive engine without more was not evidence showing that the fire was caused by an independent agency.—Young v. New York, N. H. & H. R. Co., 174 N.E. 318, 273 Mass. 567.

63. Ala.—Knowlton v. Georgia Cent. R. Co., 68 So. 281, 192 Ala. 456.
51 C.J. p. 1235 note 42.

64. Fla.—Seaboard Air Line R. Co. v. Charpia, 107 So. 173, 90 Fla. 576.
51 C.J. p. 1235 note 43.

65. Ark.—Chicago, etc., R. Co. v. National Fire Ins. Co., 235 S.W. 1006, 151 Ark. 218.
51 C.J. p. 1235 note 44.

66. Tenn.—Carolina, etc., R. Co. v. Unaka Springs Lumber Co., 170 S.W. 591, 130 Tenn. 354.
51 C.J. p. 1235 note 52.

67. Mo.—Niswonger v. Thompson, App., 124 S.W.2d 669.
N.D.—James Turner & Sons v. Great Northern Ry. Co., 272 N.W. 489, 67 N.D. 347.
Va.—Southern Ry. Co. v. American Peanut Corporation, 164 S.E. 261, 158 Va. 359.
51 C.J. p. 1235 note 46.

Legal certainty

In order, to recover against railroad for fire allegedly caused by passing train, it must be legally certain that fire was thus caused.—Givens v. Yazoo & M. V. R. Co., 146 So. 751, 176 La. 796.

68. Ark.—Monte Ne R. Co. v. Phillips, 96 S.W. 1060, 80 Ark. 292.

69. N.Y.—Warner v. New York, etc., R. Co., 204 N.Y.S. 607, 209 App. Div. 211, appeal dismissed 147 N.E. 172, 239 N.Y. 507.
51 C.J. p. 1235 note 48.

70. Wash.—Slaton v. Chicago, etc., R. Co., 166 P. 644, 97 Wash. 441.
51 C.J. p. 1235 note 49.

71. Mass.—Young v. New York, N. H. & H. R. Co., 174 N.E. 318, 273 Mass. 567.
51 C.J. p. 1235 note 50.

72. U.S.—Kansas City Southern Ry. Co. v. New England Fire Ins. Co., C.C.A.Ark., 133 F.2d 973.—Lowden v. Shaffner Mercantile Co., C.C.A.Ark., 109 F.2d 956.
Mass.—Young v. New York, N. H. & H. R. Co., 174 N.E. 318, 273 Mass. 567.
Tex.—Texas & P. Ry. Co. v. Brandon, Civ.App., 133 S.W.2d 212, error refused.
51 C.J. p. 1235 note 51.

73. U.S.—Spokane International Ry. Co. v. U.S., C.C.A.Idaho, 72 F.2d 440.

74. Md.—Sims v. American Ice Co., 71 A. 522, 109 Md. 68.
51 C.J. p. 1235 note 55.

75. Tex.—Chicago, etc., R. Co. v. Myers, Civ.App., 264 S.W. 151.
51 C.J. p. 1235 note 56.

gence,[76] although, in accordance with well settled principles, as considered in Evidence § 1020, it is not necessary to prove negligence beyond a reasonable doubt.[77] This evidence of defendant's negligence may be either direct or circumstantial, or both,[78] whether the evidence is produced in making out the case in chief or offered by way of rebuttal.[79] Likewise, it is not essential to the sufficiency of circumstantial evidence to authorize a recovery that it should be undisputed.[80] In accordance with the foregoing principles, evidence of defendant's negligence has been held sufficient[81] or insufficient.[82]

(2) Construction, Equipment, and Operation of Locomotives

It may be shown by circumstantial evidence that the defendant was negligent in equipping or operating its locomotives. In order to authorize a recovery on evidence of such negligence, it is not necessary that the evidence be undisputed.

The fact that defendant was negligent in causing the fire by reason of its negligently constructing, equipping, repairing,[83] or operating[84] its locomotives may be shown wholly by circumstantial evidence offered either in chief or in rebuttal.[85] Such negligence may be sufficiently proved, at least to warrant an inference that the fire was caused by such negligence, by evidence, together with other circumstances, that about or soon before the time at which the fire occurred passing locomotives emitted sparks or coals of an unusual quantity or size,[86] or to an unusual height or distance,[87] or that the locomotive alleged to have caused the fire had cast sparks prior to the time of the fire in question,[88] or had emitted fire for a considerable time,[89] or had started other fires,[90] and that a locomotive in good repair and equipment would not have caused fire in the manner, or at the place, in which the one in question was caused.[91]

In order to authorize a recovery on evidence of this character, it not necessary that it should be un-

76. Mass.—Gates v. Boston, etc., R. Co., 151 N.E. 320, 255 Mass. 297.
51 C.J. p. 1235 note 57

77. Md.—Baltimore, etc., R. Co. v. Shipley, 39 Md. 251.

78. Cal.—Jno. L. Witney, Inc., v. Sierra Ry. Co. of California, 11 P.2d 415, 123 Cal. App. 430.
Tex.—Team v. Texas & P. Ry. Co., Civ. App., 199 S.W.2d 274, refused no reversible error.
51 C.J. p. 1235 note 60.

79. Ga.—Western, etc., R. Co. v. Cummings, 119 S.E. 224, 30 Ga. App. 713.
51 C.J. p. 1236 note 61.

80. Ga.—Western, etc., R. Co. v. Cummings, 119 S.E. 224, 30 Ga. App. 713.
51 C.J. p. 1236 note 62.

81. **To show negligence**
U.S.—Lowden v. Shoffner Mercantile Co., C.C.A.Ark., 109 F.2d 956.
Ark.—Ft. Smith, S. & R. R. Co. v. Humphrey, 42 S.W.2d 776, 184 Ark. 428.—Chicago, R. I. & P. Ry. Co. v. Malvern Lumber Co., 33 S.W.2d 363, 182 Ark. 1184.
Cal.—Haverstick v. Southern Pac. Co., 37 P.2d 146, 1 Cal. App.2d 605.
Ga.—Pollard v. Walton, 190 S.E. 396, 55 Ga. App. 353.
La.—Davis v. Chicago, R. I. & P. Ry. Co., App., 13 So.2d 389.
51 C.J. p. 1236 note 63 [a].

To show that negligence was proximate cause of injury
Ga.—Atlantic Coast Line R. Co. v. Knight, 188 S.E. 258, 54 Ga. App. 492.
Wash.—Michigan Millers Mut. Fire Ins. Co. v. Oregon-Washington R. & Nav. Co., 201 P.2d 207, 32 Wash.2d 256.
51 C.J. p. 1236 note 63 [b].

To make out prima facie case
Iowa.—Stickling v. Chicago, R. I. & P. Ry. Co., 232 N.W. 677, 212 Iowa 149.
51 C.J. p. 1236 note 63 [c].

To show that companies' section crews were acting in concert according to general plan in burning rights of way, so as to make the companies joint tort-feasors.—Michigan Millers Mut. Fire Ins. Co. v. Oregon-Washington R. & Nav. Co., 201 P.2d 207, 32 Wash.2d 256.

82. **To show negligence**
La.—United Lands Co. v. Louisiana Ry. & Nav. Co., 131 So. 664, 171 La. 542.
51 C.J. p. 1236 note 64 [a].

To make out prima facie case
Ky.—Louisville & N. R. Co. v. Bean, 116 S.W.2d 989, 273 Ky. 454.—Illinois Cent. R. Co. v. Roark's Adm'r, 58 S.W.2d 648, 248 Ky. 398.—Illinois Cent. R. Co. v. Bell Union Coal & Mining Co., 38 S.W.2d 707, 238 Ky. 630.

83. Ky.—Louisville & N. R. Co. v. Bean, 116 S.W.2d 989, 273 Ky. 454.
Tex.—Team v. Texas & P. Ry. Co., Civ. App., 199 S.W.2d 274, refused no reversible error.
51 C.J. p. 1236 note 65

Evidence held sufficient to show negligence
Ga.—Atlantic Coast Line R. Co. v. Knight, 188 S.E. 258, 54 Ga. App. 492.
51 C.J. p. 1236 note 65 [a] (1).

Evidence held insufficient to show negligence
Ga.—Louisville & N. R. Co. v. Pounds, 179 S.E. 235, 50 Ga. App. 611.
51 C.J. p. 1236 note 65 [b] (1).

84. Tex.—Team v. Texas & P. Ry. Co., Civ. App., 199 S.W.2d 274, refused no reversible error.
51 C.J. p. 1236 note 66.

Evidence held sufficient to show negligence
Ga.—Atlantic Coast Line R. Co. v. Knight, 188 S.E. 258, 54 Ga. App. 492.
51 C.J. p. 1236 note 66 [a] (1).

Evidence held insufficient to show negligence
Miss.—Yazoo, etc., R. Co. v. Washington, 73 So. 879, 113 Miss. 105.
Pa.—Ruby v. Pennsylvania R. Co., Com. Pl., 61 York Leg. Rec. 17.
51 C.J. p. 1236 note 66 [b] (1).

85. Ga.—Western, etc., R. Co. v. Cummings, 119 S.E. 224, 30 Ga. App. 713.
Ky.—Central City Fdy., etc., Co. v. Illinois Cent. R. Co., 162 S.W. 81, 156 Ky. 759.

86. Miss.—Gilchrist-Fordney Co. v. Parker, 69 So. 290, 109 Miss. 445.
51 C.J. p. 1237 note 69.

87. Minn.—Continental Ins. Co. v. Chicago, etc., R. Co., 107 N.W. 548, 97 Minn. 467, 5 L.R.A.,N.S., 99.
51 C.J. p. 1237 note 70

88. Ga.—Southern Ry. Co. v. Richardson, 172 S.E. 79, 48 Ga.App. 25.
N.C.—Matthis v. Johnson, 104 S.E. 366, 180 N.C. 130.

89. Ind.—Louisville, etc., R. Co. v. McCorkle, 40 N.E. 26, 12 Ind.App. 691.

90. Pa.—Thomas v. New York, etc., R. Co., 38 A. 413, 182 Pa. 538.
51 C.J. p. 1237 note 73

91. Ky.—Southern R. Co. v. Hanna, 53 S.W. 1, 21 Ky.L. 850.
51 C.J. p. 1237 note 74.

disputed, and the jury may find a verdict for plaintiff, although there is direct and positive testimony in behalf of defendant that the locomotive was properly constructed, equipped, and in good repair,[92] that the engineer was competent,[93] and that the locomotive was carefully and skillfully operated at the time of the fire,[94] even though there was no direct testimony contradicting evidence of this character.[95] Where it is shown that the appliances used by the company have been in use many years and found sufficient to protect its own and other property, evidence introduced by plaintiff to show that the appliances were defective or were improperly or negligently used must be positive, strong, and convincing.[96] The jury have the undoubted right to weigh both the circumstantial evidence of plaintiff and the direct testimony in behalf of defendant and determine the value of each,[97] and have the right to say that the circumstantial evidence tending to prove negligence outweighs the direct evidence for defendant to the contrary.[98] However, it has been held that, where defendant relies on the fact that its locomotive was in good condition, it is not necessary to sustain a verdict for defendant that the evidence by which it proves that fact be undisputed.[99] Even though direct testimony that the locomotive was in good order and carefully operated is not contradicted, the jury need not accept such evidence as conclusive, but may consider all the evidence bearing on the condition of the locomotive and the mode of operating it and the circumstances under which the fire occurred[1]

(3) Allowing Accumulation of Combustible Matter on Railroad Property

The fact that a fire was caused by the defendant's negligence may be shown by evidence that it permitted combustible material to accumulate on its right of way together with other circumstances.

The fact that the fire was caused by defendant's negligence may be shown by evidence that it permitted dry grass, weeds, or other combustible material to accumulate on its right of way, in which the fire started, together with other circumstances,[2] such as, that there was a steep grade at the place of the fire so that defendant's locomotives in passing put on steam and emitted sparks and coals which frequently ignited the rubbish on the right of way,[3] that at the time of the fire the weather was very dry,[4] that a strong wind was blowing toward the property destroyed,[5] that fires had previously been set out in the property destroyed by passing locomotives,[6] or that the fire in question was communicated through the agency of the combustible material to the property destroyed[7] These facts may be established by circumstantial evidence[8] since it is seldom possible to produce eyewitnesses to testify to such facts directly.[9]

(4) Setting Out and Preventing Spread of Fire

Where the fire is shown to have been set out on

92. Ky.—Central City Fdy., etc., Co. v. Illinois Cent. R. Co., 162 S.W. 81, 166 Ky. 759.
51 C.J. p. 1237 note 76.

93. Iowa.—Swanson v. Keokuk, etc., R. Co., 89 N.W. 1088, 116 Iowa 304
Kan.—Atchison, etc., R. Co. v. Campbell, 16 Kan. 200.

94. Ga.—Western, etc., R. Co. v. Cummings, 119 S.E. 224, 30 Ga. App. 713.
51 C.J. p. 1238 note 78.

95. Kan.—Atchison, etc., R. Co. v. Campbell, 16 Kan. 200.

96. La.—Meyer v. Vicksburg, etc., R. Co., 6 So. 218, 41 La. Ann. 639, 17 Am.S.R. 408.

97. Kan.—Atchison, etc., R. Co. v. Bales, 16 Kan. 252.

98. Kan.—Atchison, etc., R. Co. v. Bales, supra.
51 C.J. p. 1238 note 81.

99. Tex.—St. Louis, etc., R. Co. v. Lindley, Civ. App., 29 S.W. 1101.

1. Ark.—St. Louis, etc., R. Co. v. Coombs, 88 S.W. 595, 76 Ark. 132.

2. Mont.—Pure Oil Co. v. Chicago, etc., R. Co., 185 P. 150, 56 Mont. 266.
51 C.J. p. 1238 note 84.

Violation of statute requiring corporation operating steam railroad between the first of April and December to keep full width of its locations over which engines are operated clear of inflammable material to a point a designated number of feet distant from center line is evidence of negligence as to all consequences intended to be prevented, which includes protection of other property against damage by fire, notwithstanding no penalty is prescribed for its violation.—Carbone v. Trustees of New York, N.H. & H.R. Co., 71 N.E. 2d 403, 320 Mass. 710.

Evidence held sufficient

(1) To show that railroad negligently permitted combustible matter to remain on its right of way.—Texas & P. Ry. Co. v. Brandon, Tex. Civ. App., 183 S.W. 2d 212, error refused.—51 C.J. p. 1238 note 84 [a] (1).

(2) To show that negligence in failing to keep right of way free from combustible matter caused injury complained of.—Cole v. Pennsylvania R. Co., D.C.N.Y., 34 F. 2d 171, reversed on other grounds, C.C.A., 43 F.2d 953, 71 A.L.R. 1096.—51 C.J. p. 1238 note 84 [a] (2).

(3) To make prima facie case of negligence.—Missouri Pac. R. Co. v. Johnson, 133 S.W. 2d 33, 198 Ark. 1134.

(4) To sustain verdict for plaintiff in actions based on negligence in allowing combustible matter to accumulate on right of way.—Pure Oil Co. v. Chicago, etc., R. Co., 185 P. 150, 56 Mont. 266.—51 C.J. p. 1238 note 84 [a] (4).

3. Ind.—Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co., 56 N.E. 766, 154 Ind. 322.

4. Ind.—New York, etc., R. Co. v. Grossman, 46 N.E. 546, 17 Ind. App. 652.

5. Ind.—Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co., 56 N.E. 766, 154 Ind. 322.—New York, etc., R. Co. v. Grossman, 46 N.E. 546, 17 Ind. App. 652.

6. Wis.—Moore v. Chicago, etc., R. Co., 47 N.W. 273, 78 Wis. 120.

7. Mont.—Pure Oil Co. v. Chicago, etc., R. Co., 185 P. 150, 56 Mont. 266.

8. Mont.—Pure Oil Co. v. Chicago, etc., R. Co., supra.

9. Mont.—Pure Oil Co. v. Chicago, etc., R. Co., supra.

the defendant's right of way, evidence that its employees did not use proper precautionary means in setting out and guarding the fire may be sufficient to sustain a verdict for the plaintiff.

While negligence on the part of defendant in setting out and allowing the fire to escape from its right of way cannot be inferred from the mere fact that a fire broke out on adjacent property,[10] or from the fact that at the time of the fire the employees whose duty it was to keep the road where the fire occurred in repair were absent,[11] where the fire is shown to have been set out on defendant's right of way, evidence that its employees did not use proper precautions in setting out and guarding the fire may be sufficient to sustain a verdict for plaintiff.[12] Evidence of such negligence has been held to be sufficient to justify the inference that men burning off right of way were defendant's servants,[13] to show negligence in failure to prevent the spread of fire set out on the right of way to clear off combustibles,[14] to show negligence both in setting out fire on, and preventing the spread of fire from, combustible matter on the right of way,[15] and to show that negligence in burning combustibles on the right of way caused the destruction of plaintiff's property by fire;[16] and to be insufficient to show negligence in preventing the spread of fire from combustible matter on the right of way,[17] to show negligence in failing to prevent the spread of fire set out on the right of way to clear off combustibles,[18] and to show negligence in starting a fire on the right of way to burn off combustibles.[19]

(5) Contributory Negligence

General rules applicable to the weight and sufficiency of evidence apply on the question of contributory negligence in actions against railroads for destruction of, or injury to, property by fire.

General rules applicable to the weight and sufficiency of evidence apply in actions against railroad companies for destruction of, or injury to, property by fire set out by them on the question of contributory negligence.[20]

§ 528. Questions of Law and Fact

In an action for injuries from fire caused by a railroad, the case should be submitted to the jury where the plaintiff has proved a prima facie cause of action.

In an action for injuries from a fire caused by a railroad, the case should be submitted to the jury where plaintiff has proved a prima facie cause of action,[21] since the right of plaintiff to a submission of his case to the jury depends basically on the strength and substance of the evidence, together with all reasonable inferences, produced by his own side, regardless of the contrasting strength and substance of the evidence produced by the railroad.[22] A directed verdict should not be granted where the evidence shows a conflict as to whether the cause of action pleaded has been

10. Mass—Deerfoot Farms v New York, N. H. & H R. Co, 96 N E 2d 872

Reasonable anticipation of spread of fire

An action to recover for burning of warehouse, allegedly caused by negligence of railroad crew burning grass from adjacent area was not a case where inference of negligence necessarily arose from event, but negligence would have to be predicated on reasonable anticipation by railroad employees that burning grass in circumstances might result in spread of fire to other property—Deerfoot Farms v New York, N H & H R Co, supra

11. Md—Baltimore, etc, R Co v Shipley, 39 Md 251

12. N.Y—Townley v. Fall Brook Coal Co, 12 N Y S 649, 59 Hun 616
Wis—Clune v Milwaukee, etc., R Co, 44 N W 843, 75 Wis. 532

13. Ark—Kansas City Southern R Co v. Wilson, 171 S W 484, 119 Ark 143
51 C J p 1238 note 95 [a] (1)

14. Ark—Kansas City Southern R Co v Cecil, 283 S W. 1, 171 Ark 34
51 C J p 1238 note 95 [a] (2).

15. Mass—Gates v. Boston, etc, R Co, 151 N E 320, 255 Mass 297.

16. Ark—St Louis, etc., R Co v Clements, 99 S W 1106, 82 Ark 3.

17. Kan—Woulfe v Arkansas Valley Interurban R Co, 223 P. 817, 115 Kan 640

18. Minn—Kalz v Winona, etc, R Co, 79 N W 310, 76 Minn 351—Baxter v. Great Northern R Co., 75 N W. 1114, 73 Minn. 189

19. Tex—Galveston, etc, R Co v Jensen, Civ.App, 283 S W 598

20. **Evidence held sufficient to show**
(1) Contributory negligence in failing to watch and protect the property destroyed
Ark—St Louis, etc, R Co v. Clements, 99 S.W. 1106, 82 Ark 3.
Or—Hawley v. Sumpter R. Co, 90 P 1106, 49 Or. 509, 12 L R A.,N S., 526

(2) Contributory negligence of plaintiffs in unreasonably or recklessly exposing themselves to danger—Berg v. Great Northern R. Co, 73 N W. 648, 70 Minn 272, 68 Am S R 524

(3) That plaintiff or his employees did not use due diligence to put out the fire which destroyed his property.
Utah—Smith v Ogden, etc, Co, 93 P 185, 33 Utah 129
Wis—Brunner v. Minneapolis, etc, R Co, 143 N W 305, 144 N W. 986, 155 Wis 253, 49 L R.A.,N S, 166, 181

(4) That plaintiff was not contributorily negligent—Lowden v Shoffner Mercantile Co., C C A Ark, 109 F.2d 956

(5) That plaintiff was not contributorily negligent in fighting the fire.—Missouri Pac R Co v. Cunningham, 217 S W 2d 240, 214 Ark 468—Missouri Pac R Co v Fowler, 34 S W 2d 1071, 183 Ark. 86

(6) That plaintiff's property destroyed by fire had been placed on defendant's right of way with its implied consent—Green Brabham Co v Atlantic Coast Line R Co., 69 S E 290, 87 S C 258.

21. U.S—Turner Simplicity Mfg Co v Bremner, C C A Iowa, 40 F 2d 368

Evidence held insufficient to go to jury
S C—Elliott v. Wilson, 187 S E 825, 181 S C 406

22. Ky—Louisville & N R Co v Ray, 209 S.W 2d 714, 306 Ky 857.

proved[23] or where the testimony that the parties have been permitted to introduce leaves any fact material to an issue in substantial dispute,[24] and it is erroneous to direct a verdict in favor of defendant where the evidence and inferences properly deducible therefrom are sufficient to authorize a verdict for plaintiff.[25] However, where the countervailing facts and circumstances are so clear and convincing that no reasonable person could doubt their verity and effectiveness, the case should not be submitted to the jury.[26]

On an issue as to the physical possibility for a locomotive to have set out a fire, the question is one for the determination of the jury,[27] and ordinarily the question as to the amount of damages to be awarded is one for the jury.[28] However if there is an entire absence of evidence that plaintiff sustained any damage, it is error to submit the question to the jury.[29] Also, whether the railroad was absolved from liability for fire damage by reason of notices restricting liability, in the face of evidence of a custom to the contrary, has been held to be properly an issue for the jury.[30]

Construction of contracts. The construction of contracts exempting railroad companies from liability for injuries by fires set out by them is a question of law for the court and should not be left to the jury,[31] and accordingly the court should determine as a matter of law whether the property injured is within the terms of the contract.[32]

§ 529. —— Origin of Fire

Ordinarily, in actions for injury by fire alleged to have been caused by a railroad company, the origin of the fire is a question of fact to be determined by the triers of fact from all the evidence in the case.

Ordinarily, in actions for injury by fire alleged to have been caused or originated by a railroad company, the origin of the fire is a question of fact to be determined by the jury,[33] or the trial court

23. N.D.—Higgs v Minneapolis, etc., R. Co., 114 N.W. 722, 16 N.D. 446, 15 L.R.A.,N.S., 1162, 15 Ann.Cas. 97.

24. N.J.—More-Jonas Glass Co. v. West Jersey & S. R. Co., 72 A. 65, 76 N.J.Law 708.

25. Ga.—Moss & Co. v. Georgia R. & Banking Co., 86 S.E. 550, 144 Ga. 173.

26. U.S.—Turner Simplicity Mfg. Co. v. Bremner, C.C.A.Iowa, 40 F. 2d 368.

27. Ark.—Missouri Pac. R. Co. v. Fowler, 34 S.W.2d 1071, 183 Ark. 86.
Miss.—Kurn v. Fondren, 198 So. 727, 189 Miss. 739.
Mo.—Butcher v. St. Louis-San Francisco Ry. Co., 39 S.W.2d 1066, 225 Mo.App. 749.
51 C.J. p. 1240 note 25

28. Iowa.—Ferber v. Great Northern R. Co., 217 N.W. 880, 205 Iowa 291.
51 C.J. p. 1244 note 65.

Attorney's fees
The question of the allowance of an attorney's fees as damages and the amount thereof is to be determined by the jury.—Gray v. Missouri Pac. R. Co., 131 P. 555, 89 Kan. 325.
51 C.J. p. 1255 note 32 [d].

29. N.D.—Spicer v. Northern Pac. R. Co., 128 N.W. 302, 21 N.D. 61.
51 C.J. p. 1244 note 66

30. S.C.—Little v. Atlantic Coast Line R. Co., 46 S.E.2d 59, 211 S.C. 462.

31. Mich.—Mann v. Pere Marquette R. Co., 97 N.W. 721, 135 Mich. 210.

32. Mich.—Mann v. Pere Marquette R. Co., supra.
Neb.—O-N-L Mills, Inc. v. Union Pac. R. Co., 39 N.W.2d 501, 151 Neb. 692.

33. Minn.—Dumbeck v. Chicago Great Western R. Co., 225 N.W. 111, 177 Minn. 261.
51 C.J. p. 1239 note 99

Particular questions held for jury
(1) Whether fire originated from sparks from railroad locomotive.
Ala.—Louisville & N. R. Co. v. Smith, 133 So. 905, 222 Ala. 618.
Ark.—Missouri Pac. R. Co. v. Sims, 120 S.W.2d 1009, 196 Ark. 1042—Blanton v. Missouri Pac. R. Co., 31 S.W.2d 947, 182 Ark. 543.
Mo.—Niswonger v. Thompson, App., 124 S.W.2d 669.
N.C.—Nufer v. Atlantic Coast Line R. Co., 178 S.E. 857, 208 N.C. 55.
Tenn.—Yearwood, for Use of Am. Ins. Co. of Newark, N.J., v. Louisville & N. R. Co., 222 S.W.2d 33, 32 Tenn.App. 115.
Tex.—Texas & N.O.R. Co. v. Glass, Civ.App., 107 S.W.2d 924, error dismissed.

(2) Whether fire was set by employees of railroad.—Sycamore Preserve Works v. Chicago & N.W. Ry. Co., 7 N.E.2d 740, 366 Ill. 11, 111 A.L.R. 1133, conformed to 12 N.E.2d 42, 293 Ill.App. 20.

(3) Whether injuries resulted from fire with which railroad had no connection.—Alabama Great Southern R. Co. v. Russell, App., 48 So.2d 239, reversed on other grounds 48 So.2d 249, 254 Ala. 701.

(4) Other questions held for jury.
U.S.—Kansas City Southern Ry. Co. v. New England Fire Ins. Co., C.C.A.Ark., 133 F.2d 973.
Ala.—Southern Ry. Co. v. Thomas, 142 So. 98, 225 Ala. 127.

Evidence held sufficient to go to jury
U.S.—Southern Ry. Co. v. Birch, C.A.Ga., 185 F.2d 44—Missouri, K. & T. Ry. Co. v. Jackson, C.A.Okl., 174 F.2d 297—Spokane International Ry. Co. v. U.S., C.C.A.Idaho, 72 F.2d 440—Turner Simplicity Mfg. Co. v. Bremner, C.C.A.Iowa, 40 F.2d 368.
Cal.—Jno. L. Witney, Inc., v. Sierra Ry. Co. of California, 11 P.2d 415, 123 Cal.App. 430.
Ill.—Calzavara v. Scandrett, 30 N.E.2d 763, 307 Ill.App. 547.
Ky.—Withers v. Illinois Cent. R. Co., 207 S.W.2d 33, 306 Ky. 487—Cincinnati, N.O. & T.P. Ry. Co. v. Snow, 143 S.W.2d 863, 284 Ky. 58.
Miss.—Kurn v. Fondren, 198 So. 727, 189 Miss. 739.
Mo.—Smith v. St. Louis-San Francisco Ry. Co., App., 214 S.W.2d 443—Butcher v. St. Louis-San Francisco Ry. Co., 39 S.W.2d 1066, 225 Mo.App. 749.
N.H.—Glines v. Maine Cent. R. R., 52 A.2d 298, 94 N.H. 299.
N.C.—Betts v. Southern Ry., 55 S.E.2d 76, 230 N.C. 609.
N.D.—Taylor v. Minneapolis, St. P. & S.S.M. Ry. Co., 248 N.W. 268, 63 N.D. 332.
Okl.—Thompson v. Vanpool, 210 P.2d 370, 202 Okl. 92.
S.C.—Laney v. Atlantic Coast Line R. Co., 45 S.E.2d 184, 211 S.C. 328—McLeod v. Atlantic Coast Line R. Co., 9 S.E.2d 210, 194 S.C. 87—Mellette v. Atlantic Coast Line R. Co., 186 S.E. 545, 181 S.C. 62—Epps v. Atlantic Coast Line R. Co., 180 S.E. 559, 177 S.C. 32.
Tenn.—Tennessee Cent. Ry. Co. v. McCowan, 183 S.W.2d 931, 28 Tenn.App. 225—Harriman & Northeastern R. Co. v. McCartt, 15 Tenn.App. 109.

sitting without a jury,[34] from all the evidence in the case. Thus it has been held that the question of the origin of the fire is for the determination of the jury where the evidence on this question is conflicting;[35] where different inferences can be drawn from the evidence;[36] where the evidence is sufficient to support an inference that the fire originated on defendant's right of way,[37] or by sparks from defendant's locomotive,[38] and was communicated to the property destroyed or injured; where the only reasonable inference to be drawn from the evidence is that the fire complained of was communicated by fire from defendant's locomotive;[39] where the evidence tends to show a probability that the fire causing the injury was communicated from a fire started on defendant's right of way,[40] or from one of its locomotives,[41] and that there was no other probable cause for the fire;[42] where the evidence shows that fire communicated from defendant's locomotive was the most probable and reasonable source of the origin of the fire complained of;[43] where the evidence has a fair tendency to justify the conclusion that the fire causing the injury was set by a locomotive,[44] or where the evidence that the fire was started by locomotive sparks fairly negatives any other source from which the fire could have come.[45]

Plaintiff is not required to introduce direct evidence that the fire originated on the railroad right of way in order to take the question of the responsibility of the railroad for the fire to the jury.[46] Where no eyewitnesses were present, plaintiff, in order to raise the question for the jury as to whether the fire causing the damage was set by sparks from a locomotive, must show circumstantial evidence sufficiently strong to make sparks from an engine the probable origin of the fire, and reasonably eliminate the probability of any other origin.[47] Moreover, the circumstantial evidence must be sufficient to induce in the minds of reasonable men the conclusion that the fire did so originate,[48] and must have sufficient probative force to justify a finding that the fire originated from the engine[49] before the issue can be submitted to the jury.

On the other hand, the case should not be submitted to the jury where the evidence is such that the origin of the fire is wholly a matter of conjecture,[50] or where at most it shows a bare possibility that the fire might have been caused by defendant's locomotive,[51] and is insufficient to show

Wash.—Svea Fire & Life Ins. Co. v. Spokane P. & S. Ry. Co., 28 P.2d 266, 175 Wash. 622.
Wis.—Hicks v. Chicago & N. W. Ry. Co., 255 N.W. 73, 215 Wis. 462.
51 C.J. p. 1230 note 28 [a].

Evidence held insufficient to go to jury

U.S.—Dayton Veneer & Lumber Mills v. Cincinnati, N. O. & T. P. Ry. Co., 132 F.2d 222—Kentwood Lumber Co. v. Illinois Cent. R. Co., 65 F.2d 663
Ill.—Eilts v. Illinois Cent. R. Co., 24 N.E.2d 252, 303 Ill. App. 25
Mo.—Motley v. Wabash R. Co., App., 234 S.W.2d 321.
N.J.—Bellevue Properties v. Pennsylvania-Reading Seashore Lines, 54 A.2d 193, 136 N.J.Law 42
S.C.—Blakely v. Atlantic Coast Line R. Co., 174 S.E. 15, 172 S.C. 343.
51 C.J. p. 1230 note 28 [c].

34. N.J.—Busche v. New York, S. & W. R. Co., 159 A. 789, 10 N.J. Misc. 511.

35. N.D.—Higgs v. Minneapolis, St. P. & S. S. M. Ry. Co., 114 N.W. 722, 16 N.D. 446, 15 L.R.A.,N.S., 1162, 15 Ann. Cas. 97.
Tex.—Texas & P. Ry. Co. v. Brandon, Civ. App., 183 S.W.2d 212, error refused.
51 C.J. p. 1239 note 1.

36. Wash.—Sound Timber Co. v. Danaher Lumber Co., 192 P. 941, 112 Wash. 314.

37. Ala.—Southern R. Co. v. Kendall, 69 So. 328, 14 Ala. App. 242, certiorari denied 69 So. 1021, 193 Ala. 681.

38. N.C.—Reid v. Carolina, etc., R. Co., 105 S.E. 169, 180 N.C. 511.
51 C.J. p. 1239 note 4.

39. Mo.—Holt v. St. Louis-San Francisco R. Co., 245 S.W. 1054

40. S.C.—Brown v. Carolina Midland R. Co., 42 S.E. 178, 64 S.C. 365.
51 C.J. p. 1239 note 6.

41. Mo.—Markt v. Chicago, etc., R. Co., 122 S.W. 1142, 139 Mo. App. 456
51 C.J. p. 1239 note 7.

42. Pa.—Mitchell v. Northern Cent. R. Co., 98 A. 616, 253 Pa. 375—Knickerbocker Ice Co. v. Pennsylvania R. Co., 97 A. 1051, 253 Pa. 54.

43. U.S.—Louisville & N. R. Co. v. Bell, Tenn., 206 F. 395, 124 C.C.A. 277
Miss.—Kurn v. Fondren, 198 So. 727, 189 Miss. 739.
51 C.J. p. 1240 note 9.

44. Ill.—Atwood v. Chicago, etc., R. Co., 144 N.E. 351, 313 Ill. 59.

45. Ky.—Frankfort & C. R. Co. v. Marshall, 33 S.W.2d 353, 236 Ky. 404.

46. Wash.—Svea Fire & Life Ins. Co. v. Spokane P. & S. R. Co., 28 P.2d 266, 175 Wash. 622.

47. Mo.—Motley v. Wabash R. Co., App., 234 S.W.2d 321

Circumstances which must be shown

In order to make submissible case for jury on question whether sparks from locomotive were origin of fire causing property loss for which owner sued railroad company, plaintiff must show direction in which wind was blowing when fire started, condition of weather at such time, whether sparks were seen coming from engine on particular occasion or from any engine in vicinity on any occasion, whether engine was laboring, whether train was loaded, grade, if any, of track at point involved, and whether fire was burning before engine passed.—Motley v. Wabash R. Co., supra.

48. Mo.—Motley v. Wabash R. Co., supra.

49. N.C.—Wilson v. Tilghman Lumber Co., 139 S.E. 760, 194 N.C. 374.
51 C.J. p. 1240 note 14.

50. U.S.—Louisville & N. R. Co. v. Bell, Tenn., 206 F. 395, 124 C.C.A. 277.
Ky.—Clemons v. Dawkins Log & Mill Co., 98 S.W.2d 472, 266 Ky. 157
N.D.—James Turner & Sons v. Great Northern Ry. Co., 272 N.W. 489, 67 N.D. 347
51 C.J. p. 1240 note 11.

51. Mo.—Motley v. Wabash R. Co., App., 234 S.W.2d 321.
51 C.J. p. 1240 note 12.

that there is any probability that it was so caused,[52] or where the evidence as to the origin of the fire is such that only one conclusion can be drawn therefrom by reasonable minds[53]

Where the evidence wholly fails to connect the railroad with the fire which destroyed plaintiff's property, a verdict for defendant should be directed,[54] and defendant is entitled to a peremptory charge[55] Also, the court may properly direct a verdict for defendant where the evidence is such that the origin of the fire is a mere matter of conjecture or speculation as to whether or not defendant's locomotive caused the fire,[56] or where, at most, it shows a bare possibility that the fire might have been so caused.[57] On the other hand, the case should not be withdrawn from the jury where there is substantial evidence that the fire was caused by defendant's locomotive;[58] and where the evidence is sufficient to afford an inference that defendant caused the fire in question an affirmative charge in favor of defendant should not be given.[59]

Motion for nonsuit should be denied where the evidence, although circumstantial, authorizes a finding that the fire was communicated by defendant's locomotive,[60] or where there is evidence from which the jury could find that sparks fell on the right of way and that the fire was thence communicated to plaintiff's property.[61] However, there is no error in awarding a nonsuit where the evidence, at most, merely raises a suspicion or conjecture that the fire was caused by sparks from an engine which had passed, and does not authorize a reasonable inference that the fire was set out by the railroad's engine,[62] and a nonsuit should be granted where no connection is shown between the fire and the passing of the locomotive except that of sequence[63]

Demurrer to the evidence should be sustained where there is no evidence showing how the fire originated.[64] However, if the evidence tends to prove a probability that the fire was communicated by a locomotive, it is sufficient as against a demurrer to the evidence.[65]

§ 530. —— Negligence in General

In actions for injuries by fire set out by a railroad, the question of negligence ordinarily is one of fact to be determined by the jury, where there is a conflict in the evidence.

In actions for injuries by fire set out by a railroad company, the question of negligence is ordinarily one of fact to be determined by the jury[66]

52. N.H.—Russell v. Boston, etc., R Co., 141 A 227, 83 N.H 246

53. Tex.—Texas & P Ry Co. v. Brandon, Civ App, 183 S W 2d 212, error refused

54. Ky—Cincinnati, etc, R Co. v. Sadieville Milling Co., 126 S.W 118, 137 Ky 568

Tex—Moose v. Missouri, etc., R. Co, Civ.App., 179 S.W. 75, reversed on other grounds, Com App, 212 S.W 645.

55. Ky.—Illinois Cent. R. Co. v. Day, 173 S W. 809, 163 Ky 357

56. Minn.—Lares v. Chicago, etc., R. Co, 174 N.W 834, 144 Minn. 170
51 C.J. p 1240 note 16.

57. U.S—General Ins. Co. v Northern Pac R. Co, Wash, 50 S Ct. 44, 280 U.S 72, 74 L Ed 97

Minn.—Minneapolis Sash, etc, Co v. Great Northern R Co., 86 N.W. 451, 83 Minn. 370

58. U.S—Canadian Northern R Co. v. Olson, Minn, 201 F 859, 120 C.C.A. 197.

59. Ala—Southern R. Co. v. Kendall, 69 So 328, 14 Ala App. 242, certiorari denied 69 So. 1020, 193 Ala. 681.
51 C.J. p 1240 note 19.

60. Ga—Swindell v. Alabama Midland R. Co., 51 S.E. 386, 128 Ga. 311.

61. N.C—Bailey v. Atlantic Coast Line R Co., 95 S E. 490, 175 N.C. 699.

62. Ga.—Carter v. Georgia Cent. R. Co, 59 S E. 603, 3 Ga.App 222.

63. U.S.—General Ins Co. v Northern Pac. R. Co, Wash, 50 S.Ct. 44, 280 U.S. 72, 74 L Ed 97.
51 C J. p 1240 note 22.

64. Mo—Alexander v. Missouri Pac R. Co., 37 Mo App. 609.

65. Mo.—Tapley v. St. Louis, etc, R. Co, 107 S W. 470, 129 Mo App. 88.

66. Ark.—Missouri Pac. R. Co. v. Cunningham, 217 S.W 2d 240, 214 Ark. 468

Ga—Pollard v. Walton, 190 S E 396, 55 Ga App 353.

Ill.—Sycamore Preserve Works v. Chicago & N W Ry. Co., 7 N E 2d 740, 366 Ill. 11, 111 A L R 1133, conformed to 12 N E.2d 42, 293 Ill. App. 20.

Pa.—Nicholson v. Buffalo, R. & P. Ry. Co., 153 A. 128, 302 Pa. 41.
51 C J. p 1240 note 26.

Particular questions held for jury

(1) Whether an employee of the company was negligent in attempting to extinguish a fire.—Haverstick v. Southern Pac. Co., 37 P.2d 146, 1 Cal App 2d 605.

(2) Whether train crew was negligent in leaving the scene of a fire.—Haverstick v. Southern Pac. Co., supra.

(3) Whether negligence of the railroad amounted to a reckless disregard of the rights of others so as to entitle them to punitive damages.—Anderson v. Atlantic Coast Line R Co, 184 S.E. 164, 179 S.C. 367, 104 A.L.R. 406

(4) Whether a fire guard was sufficient to prevent the escape of fire from passing locomotives—Buck v Union Pac. R Co, 52 P. 866, 59 Kan 328—51 C J. p 1243 note 49.

(5) Other questions held for jury—Nicholson v. Buffalo, R. & P. Ry Co., 153 A. 128, 302 Pa. 41.

Evidence held sufficient to go to jury

U S—Turner Simplicity Mfg Co. v Bremner, C C A.Iowa, 40 F.2d 368

Ga—Fussell v Atlantic Coast Line R. Co, 48 S E.2d 556, 72 Ga App 302

Tenn—Tennessee Cent. Ry. Co. v McCowan, 188 S.W.2d 931, 28 Tenn App. 225.

Tex.—St Louis Southwestern Ry. Co of Texas v. Jones, Civ.App, 138 S W 2d 577.
51 C J. p 1236 note 63 [d] (1).

Evidence held insufficient to go to jury

Ky.—Louisville & N R. Co. v Bean, 116 S W.2d 989, 273 Ky. 454—Louisville, etc, R. Co. v. Hamburg-Bremen F. Ins. Co., 153 S.W. 745, 152 Ky 510.

where the evidence on the question is conflicting,[67] where the facts proved are such that reasonable men may fairly differ on the question whether or not there was negligence,[68] or where there is evidence from which negligence may be legitimately inferred,[69] and, in these circumstances, the question must be submitted to the jury whose duty it is to determine what weight or credit shall be given to the evidence.[70]

On the other hand, where the evidence is such that only one conclusion can be drawn therefrom by reasonable minds,[71] or where the facts are undisputed and only one conclusion can be drawn therefrom on the question of negligence,[72] or where there is no evidence from which negligence can be inferred,[73] the question of negligence is one of law for the court and should not be submitted to the jury.

§ 531. —— Construction, Equipment, and Management of Locomotive

a. In general
b. Rebuttal of presumption of negligence

a. In General

Ordinarily, in actions for injury by fire alleged to have been caused by a railroad, the question whether the defendant has been negligent in the construction, equipment, or operation of its locomotive is a question of fact to be determined by the jury on a consideration of all the evidence in the case.

Ordinarily, in actions for injury by fire alleged to have been caused or originated by a railroad, the question whether defendant has been negligent in the construction, equipment, or operation of its locomotive is a question of fact to be determined by the jury on a consideration of all the evidence in the case;[74] and this rule is always applicable where the evidence bearing on the question is conflicting[75] or where different persons may form different conclusions from the evidence.[76] On the other hand, where there is nothing to justify an inference of negligence in the management, equipment, or operation of a locomotive, the question should not be submitted to the jury,[77] and a verdict should be directed for defendant,[78] but a motion by the railroad to direct a verdict should be denied where, although it showed freedom from negligence in the construction and condition of its locomotives, it introduced no evidence tending to show that the locomotive causing the injury was managed and operated in a skillful and approved manner.[79]

67. Tex.—Texas & P. Ry. Co. v. Brandon, Civ.App., 183 S.W.2d 212, error refused
51 C.J. p. 1241 note 27

68. Ind.—Toledo, etc., R. Co. v. Home Ins. Co., 101 N.E. 1035, 53 Ind.App. 459
51 C.J. p. 1241 note 28.

69. Mass.—Gates v. Boston, etc., R. Co., 151 N.E. 320, 255 Mass. 297
51 C.J. p. 1241 note 29

70. Me.—Dunning v. Maine Cent. R. Co., 39 A. 352, 91 Me. 87, 64 Am.S.R. 208
Pa.—Van Steuben v. New Jersey Cent. R. Co., 35 A. 992, 178 Pa. 367, 34 L.R.A. 577.

71. Tex.—Texas & P. Ry. Co. v. Brandon, Civ.App., 183 S.W.2d 212, error refused.

72. Kan.—Union Pac. R. Co. v. Lipprand, 47 P. 625, 5 Kan.App. 484.

73. N.Y.—Frace v. New York, etc., R. Co., 38 N.E. 102, 143 N.Y. 182.
51 C.J. p. 1241 note 32

74. Ala.—Pollard v. Treadwell, 176 So. 452, 234 Ala. 615.
51 C.J. p. 1241 note 34.

Particular questions held for jury

(1) Whether locomotives were properly equipped with appliances to prevent the escape of sparks.

Ga.—Southern Ry. Co. v. Richardson, 172 S.E. 79, 48 Ga.App. 25
Tenn.—Yearwood, for Use of Am. Ins. Co. of Newark, N. J., v. Louisville & N. R. Co., 222 S.W.2d 33, 32 Tenn. App. 115.

(2) Whether railroad employees were negligent in sanding flues of an engine boiler at a place opposite plaintiff's barn while there was a strong wind blowing in that direction.
—Texas & N. O. R. Co. v. Glass, Tex. Civ.App., 107 S.W.2d 924, error dismissed.

Evidence held sufficient to go to jury

U.S.—Seaboard Refractories Co. v. Lehigh Valley R. Co., C.C.A.N.J., 51 F.2d 918
Ala.—Pollard v. Treadwell, 176 So. 452, 234 Ala. 615—Louisville & N. R. Co. v. Smith, 133 So. 905, 222 Ala. 618.
Ky.—Louisville & N. R. Co. v. Ray, 209 S.W.2d 714, 306 Ky. 857—Illinois Cent. R. Co. v. Roark's Adm'r, 58 S.W.2d 648, 248 Ky. 398—Illinois Cent. R. Co. v. Bell Union Coal & Mining Co., 38 S.W.2d 707, 238 Ky. 630—Frankfort & C. R. Co. v. Marshall, 33 S.W.2d 353, 236 Ky. 404.
Wash.—Nelson v. Northern Pac. Ry. Co., 290 P. 432, 158 Wash. 52.
51 C.J. p. 1236 notes 65 [a] (2), 66 [a] (2).

75. Ala.—Pollard v. Treadwell, 176 So. 452, 234 Ala. 615
51 C.J. p. 1241 note 35.

76. Idaho.—Fodey v. Northern Pac. R. Co., 123 P. 835, 21 Idaho 713

77. N.Y.—Frace v. New York, etc., R. Co., 38 N.E. 102, 143 N.Y. 182.
51 C.J. p. 1242 note 37

Evidence held insufficient to go to jury

Ky.—Home Ins. Co. v. Cincinnati, etc., R. Co., 207 S.W. 487, 182 Ky. 778.
N.D.—Smith v. Northern Pac. R. Co., 53 N.W. 173, 3 N.D. 17

Fires by other engines

Evidence of fires ignited by other engines, admitted as rebutting the claim that the equipment satisfied the statute and that there was no negligent operation, does not alone justify the submission of the case to the jury.—Louisville & N. R. Co. v. Bean, 116 S.W.2d 989, 273 Ky. 454—Illinois Cent. R. Co. v. Bell Union Coal & Mining Co., 38 S.W.2d 707, 238 Ky. 630

78. Pa.—Philadelphia, etc., R. Co. v. Yerger, 73 Pa. 121
Wis.—Brusberg v. Milwaukee, etc., R. Co., 6 N.W. 821, 50 Wis. 231

79. Vt.—Cano v. Central Vermont R. Co., 147 A. 276, 102 Vt. 161

b. Rebuttal of Presumption of Negligence

Many decisions hold that where the defendant introduces evidence that its locomotive was properly equipped, in good repair, and carefully operated, the jury should determine whether the presumption of negligence which arises from proof that the fire was started by a locomotive has been rebutted; but some decisions hold that under such circumstances the presumption is overcome as a matter of law.

In determining whether the presumption of negligence which arises after proof that the fire was set out by a locomotive, discussed supra § 516 b (2), has been overcome by rebutting evidence, many decisions hold that, although defendant introduces evidence that the locomotive was equipped with proper appliances and was in good repair and carefully operated by competent employees, and although such evidence is not contradicted by evidence other than that creating the presumption of negligence, it is the duty of the court to submit to the jury the question whether this presumption is overcome by such rebutting evidence.[80] The reasons assigned are that proof of the communication of the fire to the property injured or destroyed by the locomotive establishes a prima facie case of negligence which must be regarded as a fact until contradictory evidence requires a different conclusion;[81] that such proof has the force of substantive evidence,[82] which, after proof of due care on the part of the railroad, gives rise to a conflict of evidence on the issue of negligence which is to be determined by the jury,[83] the prima facie case of negligence made by plaintiff standing on one side of the issue, and the direct evidence of defendant as to its care and diligence upon the other;[84] and that there is no theory on which a statement of defendant's witnesses must be accepted by a court as conclusive;[85] but the credibility of the witnesses and the weight to be given to their evidence[86] and the decision as to where the preponderance lies[87] are matters to be decided by the jury.

Some decisions have placed limitations on the foregoing rule and hold that it is for the jury to determine whether the presumption has been overcome by the rebutting evidence unless such evidence is so clear and circumstantial that no reasonable person could doubt its verity,[88] or so complete and irrefutable as to free the mind from all doubt and hesitation,[89] or unless such evidence is conclusive as to both the facts and the inferences reasonably to be drawn from them,[90] or is so conclusive that an opposite verdict might not be sustained.[91] The fact that there is no conflict in the testimony does not make the case one for the court instead of the jury where different conclusions may reasonably be drawn from the evidence or where its credibility is doubtful.[92]

On the other hand, other decisions have held that, where there is satisfactory evidence that the locomotive which caused the fire was properly equipped, in good order, and carefully managed by competent employees at the time of the fire, and there is no other evidence of negligence than that on which the prima facie presumption of negligence is based, the presumption is overcome as a matter of law and it is error to submit the question to the jury,[93] that on this showing the court should direct a verdict for defendant,[94] and that if the case is submitted to the jury and a verdict rendered in plaintiff's favor it should be set aside.[95] In support of this view, it has been said that the presumption under consideration is not a presumption of fact but a disputable presumption of law,[96] the office of which is merely to determine on whom the onus probandi is laid,[97] and that, where there is satisfactory evidence rebutting the pre-

80. Okl—St Louis, etc., R. Co. v Weldon, 135 P. 8, 39 Okl. 869
51 C J. p 1211 note 90.

81. Iowa—Stewart v. Iowa Cent R Co, 113 N.W. 764, 136 Iowa 182—Babcock v. Chicago & N. W. R. Co., 17 N W. 909, 62 Iowa 593.

82. Iowa—Stewart v Iowa Cent. R. Co, 113 N W. 764, 136 Iowa 182—West Side Mut F. Ins Co. v. Chicago, etc, R Co, 95 N W. 193.

83. Iowa—Hemmi v. Chicago Great Western R Co, 70 N.W. 746, 102 Iowa 25
51 C J. p 1211 note 93.

84. Iowa—Hemmi v. Chicago Great Western R. Co., supra.
Kan—Atchison, etc, R Co v. Geiser, 75 P. 68, 68 Kan. 281, 1 Ann Cas 812.

85. U.S—Great Northern R Co v. Coats, S.D, 115 F. 452, 53 C C A. 382.
51 C J. p 1211 note 95

86. Okl.—St. Louis, etc., R Co. v. Marlin, 128 P. 108, 33 Okl. 510
51 C J. p 1212 note 96.

87. Ill—Illinois Cent R Co. v. Bailey, 78 N E. 833, 222 Ill 480

88. U.S—McCullen v Chicago & N W. R. Co., S.D, 101 F 66, 41 C C A. 365, 49 L.R A. 642.

89. Or—Chenoweth v Southern Pac. Co, 99 P. 86, 53 Or. 111.

90. Minn—Continental Ins Co. v. Chicago, etc., R. Co., 107 N W 548, 97 Minn. 467, 5 L.R.A.,N.S., 99.
51 C.J. p 1212 note 2.

91. Or—Chenoweth v Southern Pac. Co., 99 P. 86, 53 Or 111.

92. Minn—Burud v Great Northern R. Co, 64 N W. 562, 62 Minn 243.

93. Ala—Southern R Co. v. Slade, 68 So. 867, 192 Ala 568.
51 C J p 1212 note 5

94. N.D—Smith v Northern Pac. R Co, 53 N W. 173, 3 N D 17.
51 C J. p 1212 note 6

95. Wis.—Menominee River Sash, etc, Co v Milwaukee, etc., R. Co, 65 N.W. 176, 91 Wis 447.

96. Ala—Louisville, etc, R Co. v. Marbury Lumber Co., 28 So. 438, 125 Ala. 237, 50 L.R.A. 620.
51 C.J. p 1212 note 9.

97. Wis.—Spaulding v. Chicago, etc., R. Co., 33 Wis. 582.

sumption, the presumption cannot be considered for the purpose of making an issue for the jury.[98]

Additional evidence of negligence. Where the presumption of negligence arising from the fact that plaintiff's property was set on fire by defendant's locomotive is strengthened by additional evidence of negligence, the question whether this presumption is overcome by rebutting evidence that the locomotive was equipped with proper appliances and was in good repair and carefully operated at the time of the fire is in all instances a question for the jury;[99] and it is erroneous to direct a verdict for defendant[1]

§ 532. —— Combustibles on Railroad Property

In an action for the destruction of, or injury to, property by a fire set out by a railroad, the question whether the company was negligent in permitting combustible matter to grow or accumulate on its right of way usually is one of fact which should be submitted to the jury.

In an action for the destruction of, or injury to, property by a fire set out by a railroad, the question whether the company was negligent in permitting combustible matter to grow or accumulate on its right of way usually is one of fact which should be submitted to the jury, who may or may not infer negligence from such conduct.[2] In determining whether the company was negligent in permitting combustibles to remain on its property, the jury may consider all the attending circumstances affecting the probability of fire[3] which might render the presence of such materials a cause of damage to others,[4] such as the extent to which combustibles had been permitted to accumulate on the right of way,[5] the season of the year,[6] the prevalence of a drought,[7] the velocity of the wind at the time of the fire,[8] and the fact that fire was communicated from a locomotive while laboring to ascend a heavy grade.[9]

§ 533. —— Contributory Negligence

In an action for the destruction of, or injury to, property by fire set out by a railroad, the question of the contributory negligence of the plaintiff is one for the jury if the evidence is conflicting or if there is any evidence to support a finding of contributory negligence.

In an action for the destruction of, or injury to, property by fire set out by a railroad, the question of the contributory negligence of plaintiff is one for the jury if the evidence is conflicting or if there is any evidence to support a finding of contributory negligence,[10] or where the proof is such

98. ND—Smith v Northern Pac. R Co, 53 N W. 173, 3 N D. 17.
51 C J p 1212 note 11

99. Ala.—McCary v Alabama Great Southern R Co, 62 So. 18, 182 Ala 597
51 C J p 1212 note 12

1. U S—Norris v Baltimore & O. S W. R Co, Ill, 109 F. 591, 48 C C A 561

2. Ala—Southern R. Co v Everett, 99 So 82, 211 Ala 61.
51 C J p 1242 note 41.

Evidence held sufficient to go to jury
U S—Spokane International Ry Co. v U S., C C A Idaho, 72 F 2d 440
N H—Glines v Maine Cent. R. R, 52 A 2d 298, 94 N H 299.
Pa.—Stafford v New York Cent R Co, 80 Pa Super 408.
Tenn—Nashville, C & St. L Ry v Nants, 65 S.W 2d 189, 167 Tenn 1.

3. Kan—White v Missouri Pac. R. Co, 1 P. 611, 31 Kan 280
51 C J p 1243 note 42.

4. Fla—St. Johns, etc., R. Co. v. Ransom, 14 So 892, 33 Fla. 406.

5. Okl—Missouri, etc, R Co v. Gentry, 122 P 537, 31 Okl. 579.
51 C J. p 1243 note 44

6. Ill—Ohio, etc., R Co v Shanefelt, 47 Ill. 497, 95 Am.D. 504—Illinois Cent. R. Co. v. Mills, 42 Ill 407.

7. N.Y.—Brown v. Buffalo, etc., R. Co, 38 N Y S 655, 4 App Div. 465.
51 C.J. p 1243 note 46

8. N.Y—Webb v Rome, etc., R. Co., 49 N.Y 420, 10 Am R. 389.

9. Ill—Rockford, etc, R. Co. v. Rogers, 62 Ill 346.

10. Pa—Nicholson v Buffalo, R. & P Ry Co, 153 A. 128, 302 Pa. 41.
Tenn—Nashville, C. & St. L. Ry. v. Nants, 65 S W 2d 189, 167 Tenn 1
51 C J p 1243 note 54.

Particular questions held for jury
(1) Whether a person was negligent in having combustible matter on his land near a railroad track—Marshall, etc, R. Co. v Killingsworth, Tex Civ App., 162 S W. 1181.

(2) Whether a landowner was guilty of negligence in stacking hay, fodder, or beans in an exposed position near a railroad track—Ft. Worth, etc., R Co. v Thompson, Tex Civ App, 222 S.W. 289—51 C.J. p 1179 note 63

(3) Whether the owner of lumber was guilty of contributory negligence in piling it near and upon the railroad's right of way, and in failing to employ a person to watch it.—Gibbons v. Wisconsin Valley R. Co., 28 N.W 170, 66 Wis 161.

(4) Whether it was negligence to store baled cotton on a lot adjacent to a track—Alabama, etc, R. Co v. Fried, 33 So. 74, 81 Miss. 314—51 C J. p 1178 note 53.

(5) Whether a compress company was guilty of negligence in placing and leaving baled cotton on its platform near a railroad track—Martin v. Texas, etc., R. Co, 26 S.W. 1052, 87 Tex. 117.

(6) Whether a person was negligent in keeping cotton which was badly baled, or on which the baling had been cut, on his property near a railroad—Texas, etc, R. Co. v. Levi, 59 Tex. 674.

(7) Whether the owner of buildings in close proximity to a railroad track was guilty of negligence in failing to keep doors or windows shut.—St. Louis Southwestern R Co v. Arey, 179 S.W. 860, 107 Tex. 366, L R A 1916B 1065—51 C J. p 1176 notes 25, 28

(8) Whether the owner of buildings in close proximity to a railroad track was guilty of negligence in suffering a window to remain broken.—Wild v. Boston, etc., R. Co., 50 N.E 533, 171 Mass. 245

(9) Whether a person who placed personal property on the premises of the railroad with the railroad's permission was guilty of negligence.—Abbott Gin Co. v. Missouri, etc, R Co, 122 S.W. 284, 57 Tex.Civ App. 263—51 C J. p 1179 note 67.

(10) Whether the owner of property destroyed by fire set out by a railroad was guilty of contributory negligence in failing to take steps to

that different minds might reasonably draw different conclusions from it.[11]

§ 534. —— Proximate Cause of Injury

Ordinarily it is a question of fact for the jury to determine whether an injury caused by a fire started by a railroad, was the direct and natural consequence of the original negligence or firing or whether it was the direct result of another and independent cause

Ordinarily it is a question of fact for the jury to determine whether an injury caused by a fire started by a railroad was the direct and natural consequence of the original negligence or firing or whether it was the direct result of another and independent cause.[12]

§ 535. Instructions

In an action for injury from fire set out by a railroad, the instructions should correctly state the law applicable to the case, but in giving instructions the court should not invade the province of the jury.

In an action for injury from fire set out by a railroad, the instructions should correctly state the law applicable to the case,[13] and should not be contradictory,[14] indefinite,[15] argumentative,[16] abstract,[17] misleading,[18] or authorize a determination of questions from a mere conjecture or surmise on the part of the jury.[19] The instructions should properly inform the jury concerning the damage recoverable.[20]

An instruction should not assume the existence of facts which are in issue.[21] Accordingly it is erroneous for the court to invade the province of the jury by assuming that a certain specified state of facts exists, and instructing that they do or do not constitute negligence on the part of defendant[22] or contributory negligence on the part of plaintiff.[23] However, where the facts are shown by the evidence, and are so unequivocal as to allow no conclusion but that they do or do not constitute negligence, the court may so instruct.[24] It is not erroneous for the court to refer to the existence of certain facts if it leaves the question of their sufficiency to the jury.[25] Where the evidence is insufficient to establish a certain fact, proof of which is necessary to support a verdict, the court should take the case from the jury by peremptory instruction,[26] although it is not required to give such an instruction where the insufficiency of the evidence is on an immaterial matter.[27]

An instruction which covers the case generally, and fairly submits the question in issue, ordinari-

extinguish the fire—Baltimore, etc, R Co v Peck, 114 N E 475, 68 Ind App. 269—51 C J p 1243 note 56.

(11) Whether the owner of the injured property used due and reasonable care in the efforts made to extinguish the fire—Marshall, etc, R Co. v. Killingsworth, Tex Civ App, 162 S W 1181—51 C J p 1243 note 57.

Evidence held sufficient to go to jury

Wis—Austin v Chicago, etc, R. Co, 67 N W 1129, 93 Wis 496

51 C J. p 1176 notes 31-33, p 1181 note 97, p 1239 note 98 [b].

Evidence held insufficient to go to jury

Tex—McFarland v. Gulf, etc, R. Co, Civ App, 88 S.W 450.

11. Kan.—St. Paul F. & M Ins Co v. Hines, 202 P 582, 110 Kan. 4.
51 C J p 1243 note 55.

12. Ga.—Southern Ry. Co v. Richardson, 172 S.E 79, 48 Ga App. 25
Pa.—Nicholson v. Buffalo, R & P Ry Co., 153 A 128, 302 Pa 41.
51 C J. p 1244 note 58.

Evidence held sufficient to go to jury

Miss—Baldwin v Alabama, etc, R Co, 52 So. 358, 95 Miss 52.
N.Y.—Warner v. New York, etc, R. Co, 204 N.Y S 607, 209 App Div. 211, appeal dismissed 147 N.E 172, 239 N.Y 507.

13. Ark—Missouri Pac. R Co. v. Fowler, 34 S W 2d 1071, 183 Ark 86.
N C—Star Mfg. Co. v Atlantic Coast Line R. Co, 23 S E 2d 32, 222 N C 330
51 C.J p 1244 note 69

Instructions held proper

Ark—Missouri Pac R Co v Fowler, 34 S.W.2d 1071, 183 Ark. 86
N.C—Star Mfg Co. v Atlantic Coast Line R Co, 23 S E 2d 32, 222 N.C 330

Instructions held erroneous

Mich—Mann v. Pere Marquette R Co, 97 N.W 721, 135 Mich 210

14. Va—Abernathy v. Emporia Mfg Co, 95 S E 418, 122 Va 406.
51 C J p 1244 note 70

15. Md.—Baltimore Belt R Co v. Sattler, 62 A. 1125, 64 A 507, 102 Md 595.

16. Ala—Alabama Great Southern R Co v. Sanders, 40 So 402, 145 Ala 449.
51 C J. p 1244 note 72

17. Ark.—Monte Ne R Co v Phillips, 96 S W. 1060, 80 Ark. 292
51 C J p 1245 note 73

18. Va—Abernathy v Emporia Mfg Co., 95 S E 418, 122 Va 406
51 C.J. p 1245 note 74.

Singling out items of evidence

An instruction which selects one item of evidence, or one fact disclosed by the evidence, and states that a certain conclusion does not follow as a matter of law from that fact, is calculated to mislead and confuse a jury—M H Boals Planing Mills Co. v Cleveland, etc, R. Co, 211 Ill App 125

19. Cal.—Liverpool, etc, Ins. Co v Southern Pac. Co., 58 P. 55, 125 Cal. 434.

20. Miss—Wilson v Yazoo & M V R. Co, 6 So 2d 313, 192 Miss 424
Mo—Farmers' El, etc, Co v. Davis, 267 S.W 393
51 C.J p 1251 note 65.

21. Tex.—Texas, etc, R Co v Wooldridge, 126 S W. 603, 59 Tex Civ App 384.
51 C J p 1245 note 75

22. Ala—Louisville, etc, R Co v Sullivan Timber Co, 35 So 327, 138 Ala 379
51 C J p 1246 note 87.

23. N Y—Bevier v Delaware, etc, Canal Co, 13 Hun 254.
Tex—Texas, etc, R Co v Levi, 59 Tex 674

24. U S—Woodward v. Chicago, M & St. P R Co, Minn, 145 F 577, 75 C C A 591.
51 C J p 1246 note 89.

25. Cal—Liverpool, etc, Ins Co v Southern Pac. R. Co., 58 P. 55, 125 Cal 434
51 C J p 1246 note 92.

26. Ind T—St Louis, etc, R. Co v Lawrence, 76 S W 254, 4 Ind T. 611

27. Ind T—St. Louis, etc, R. Co v Lawrence, supra.

ly is sufficient in the absence of a request for further instructions in detail[28] It is proper to refuse a requested instruction on matters fully covered by instructions already given[29] or on immaterial matters,[30] but it is error to refuse a requested instruction on a material issue not covered by other instructions given.[31]

Construction. The instructions are to be construed as a whole, and the fact that one portion considered separately might be open to objection does not constitute error if the charge is correct in its entirety.[32] However, a correct instruction does not necessarily cure the error in another instruction unless as a whole the instructions state the law correctly.[33]

Degree of proof. General rules apply to instructions on degree of proof in actions for injuries by fires set out by railroads.[34] Instructions which place too low[35] or too high[36] a degree of proof on one of the parties are erroneous. It is erroneous to charge that plaintiff is entitled to recover if the evidence is evenly balanced on the question of defendant's negligence,[37] or that if a prima facie showing of negligence is made it can be overcome only by a preponderance of evidence showing that defendant was not negligent[38] It has also been held erroneous to charge that the burden of proof is on plaintiff to establish his right to recover by a preponderance of the evidence, but that it need not be shown beyond a reasonable doubt.[39]

§ 536. —— Applicability to Pleadings and Evidence

Instructions in actions for injury caused by fire set out by railroads must be in conformity with the issues and theories presented by the pleadings and the evidence.

Instructions in actions for injury caused by fire set out by railroads must be in conformity with the issues and theories presented by the pleadings[40] and the evidence.[41] An instruction is proper where it charges on issues which are supported by the evidence,[42] but an instruction is erroneous if given, or properly refused if asked, where it charges on issues or theories not raised by the pleadings[43] or the evidence.[44] A requested instruction which does not completely conform to the evidence may be modified by the court so as to conform to it.[45] On the other hand, instructions are equally erroneous which ignore material and competent evidence,[46] or which have a tendency to cause the jury to reject such evidence,[47] or which ignore or exclude from the consideration of the jury issues, theories, or defenses which are supported by the pleadings and evidence,[48] and such a requested instruction may be properly refused.[49]

§ 537. —— Presumptions and Burden of Proof

In an action for injury from fire set out by a railroad, the instructions on presumptions and burden of proof should not be misleading

In an action for injury from fire set out by a

28. Ga.—Atlantic Coast Line R Co v Williams, 63 S E 671, 5 Ga App 647.
51 C J p 1247 note 16.

29. Ind.—New York, C. & St L. Ry Co v Roper, 96 N E. 468, 176 Ind. 497, 36 L R A,N S, 952
Or.—La Salle v. Central R R of Oregon, 144 P 414, 73 Or 203
Tex.—Nussbaum & Scharff v Trinity & B V. Ry Co, Civ App, 149 S W. 1083, reversed on other grounds 194 S W. 1099, 108 Tex 407
51 C J. p 1247 note 17.

30. Ga.—Georgia Cent. R Co. v. Trammell, 40 S E 259, 114 Ga 312.
Ill.—American Strawboard Co v. Chicago, etc., R. Co., 53 N E. 97, 177 Ill 513.
Instructions held properly refused
N Y.—Rensselaer County Mut. Fire Ins. Co v Rutland R. Co, 276 N.Y S. 513, 243 App Div 642, affirmed 198 N.E. 402, 268 N Y 556

31. Or.—Chenoweth v. Southern Pac Co., 99 P. 86, 53 Or. 111.
51 C.J. p 1247 note 19.

32. N.C.—Herring v. Atlantic Coast Line R Co, 127 S.E 8, 189 N.C 285
51 C J p 1247 note 13

33. Ill.—American Strawboard Co v. Chicago, etc, R Co., 53 N E 97, 177 Ill 513

34. Va.—Abernathy v. Emporia Mfg Co., 95 S E 418, 122 Va. 406.
51 C J. p 1247 note 6.

35. Mo.—Missouri Egg, etc, R. Co v Missouri Pac. R. Co., 257 S.W 477.
51 C J. p 1247 note 7.

36. Tex.—Chicago, etc, R. Co. v Myers, Civ.App, 264 S.W. 151.
51 C.J. p 1247 note 8.

37. Neb.—Shipman v Chicago, etc, R. Co, 110 N.W. 535, 78 Neb 43.

38. Tex.—Chicago, etc, R Co. v. Myers, Civ App, 264 S.W. 151.
51 C J. p 1247 note 10.

39. Tex.—Missouri, etc., R. Co. v. Morgan, Civ App, 146 S W. 336, affirmed 193 S W 134, 108 Tex 331.
51 C J. p 1247 note 11.

40. Ala.—Louisville & N. R. Co. v. Steverson, 124 So. 205, 220 Ala 86
51 C J p 1245 note 80.

41. Miss.—Firm Lumber Co v Davis, 92 So 65, 129 Miss. 259
51 C J p 1245 note 81.

42. Okl.—Midland Valley R. Co. v. Barton, 129 P.2d 1007, 191 Okl. 359.

43. Ga.—Seaboard Air-Line R Co v Gnann, 75 S E. 611, 138 Ga. 536
51 C J p 1245 note 82.

44. Tex.—Missouri, etc, R Co. v McCall, Civ App, 143 S W. 188
51 C J p 1246 note 83.

45. Ark.—Blanton v Missouri Pac R. Co, 31 S.W 2d 947, 182 Ark. 543.

46. Ala.—Alabama Great Southern R. Co. v. Clarke, 39 So. 816, 145 Ala. 459.
51 C.J. p 1246 note 84.

47. Ill.—Vaughn v Director Gen. of Railroads, 218 Ill.App. 595

48. Tex.—Missouri, etc, R Co v Couch, Civ.App, 122 S W 67.
51 C J. p 1246 note 86

49. S.C.—Little v Atlantic Coast Line R. Co, 46 S E 2d 59, 211 S.C 462.

railroad, the instructions on presumptions and burden of proof should not be misleading.[50] Incorrect instructions on presumptions are erroneous if given, and properly refused if requested.[51] An instruction which places the burden on plaintiff to establish the affirmative of such issues as are relied on by him, and which places the burden on defendant to establish the affirmative of such issues as are relied on by it, is not erroneous[52] Where a party who is entitled to a charge on the burden of proof requests such an instruction, the court errs in refusing it,[53] but instructions placing the burden of proof on the wrong party are properly refused,[54] and the giving of such instructions constitutes reversible error.[55]

§ 538. —— Origin of Fire

Instructions on the origin of the fire should be confined to the issues raised by the pleadings and evidence.

Instructions on the origin of the fire should be confined to the issues raised by the pleadings and evidence,[56] and, where there is no evidence that the fire originated on the right of way of the railroad, the court is justified in so charging the jury.[57] The instruction should not invade the province of the jury,[58] be argumentative[59] or misleading,[60] or authorize a determination of the origin of a fire from speculation or conjecture on the part of the jury,[61] and should not direct the jury to find that the fire was set out by defendant's locomotive if the evidence fails satisfactorily to account for its origin in some other way.[62] However, instructions on the origin of the fire are not vitiated by the fact that one of the instructions considered separately might be open to objection, when the instructions construed as a whole are correct.[63] The instructions should properly state the degree of proof as to the cause of the fire, and an instruction which places either too high[64] or too low[65] a degree of proof on plaintiff is erroneous. An instruction which states that proof that a fire was set out by a locomotive may be circumstantial[66] or direct[67] is proper, and it is not erroneous to charge that it would be sufficient in law to fix the source of the fire on the railroad, if the evidence, in the opinion of the jury, makes a prima facie case that the fire originated from defendant's locomotive[68]

50. Ala.—McCary v. Alabama Great Southern R. Co., 62 So. 18, 182 Ala. 597.
Ga.—Western, etc., R. Co. v. Maynard, 77 S.E. 399, 139 Ga. 407

Instructions held not misleading

(1) Where there was but one contention made by plaintiff, and that was that his house had been destroyed by fire communicated to his property by the negligent operation of a locomotive, a charge that the burden of proof is on plaintiff to show that his property was destroyed by fire, as he contends, and that, when this is made to appear, the presumption of negligence is against defendant, is not open to the criticism of being understood by the jury to mean that, on proof of burning, without more, plaintiff could recover.—Western, etc., R. Co. v. Maynard, supra.

(2) Other instructions held not misleading.—Stickling v. Chicago, R. I. & P. Ry. Co., 247 N.W. 642, 215 Iowa 1312.

51. W.Va.—Mills v. Norfolk, etc., R. Co., 79 S.E. 1090, 73 W.Va. 93
51 C.J. p. 1246 note 94 [a].

Instructions held incorrect

Ga.—Wadley Southern Ry. Co. v. Faglee, 161 S.E. 847, 173 Ga. 814, conformed to 161 S.E. 848, 44 Ga. App. 350.
51 C.J. p. 1246 note 94 [a].

52. Tex.—Ft. Worth, etc., R. Co. v. Amason, Civ.App., 260 S.W. 204, affirmed, Com.App., 276 S.W. 162.

Instructions held correct

Ark.—Blanton v. Missouri Pac. R. Co., 31 S.W.2d 947, 182 Ark. 543

53. Tex.—Texas Midland R. Co. v. Ray, Civ.App., 168 S.W. 1013.—East Line, etc., R. Co. v. Hart, 2 Tex.A. Civ.Cas. § 419

54. Ala.—Georgia Cent. R. Co. v. Wilson, 111 So. 901, 215 Ala. 612.
Tex.—St. Louis Southwestern R. Co. v. Miller, 66 S.W. 139, 27 Tex.Civ.App. 344.

55. Ala.—Wilson v. Mobile, etc., R. Co., 92 So. 246, 207 Ala. 171.
51 C.J. p. 1246 note 4.

Instructions held not erroneous as misplacing burden of proof

Ga.—Atlantic Coast Line R. Co. v. Knight, 188 S.E. 258, 54 Ga.App. 492.
51 C.J. p. 1246 note 4 [b].

56. Mo.—Shartzer v. Atchison, etc., R. Co., App., 250 S.W. 950
51 C.J. p. 1248 note 22.

Instructions held authorized by evidence

N.C.—Star Mfg. Co. v. Atlantic Coast Line R. Co., 23 S.E.2d 32, 222 N.C. 330
51 C.J. p. 1248 note 22 [b].

57. N.C.—Star Mfg. Co. v. Atlantic Coast Line R. Co., supra.

58. Cal.—Liverpool, etc., Ins. Co. v. Southern Pac. Co., 58 P. 55, 125 Cal. 434.
51 C.J. p. 1248 note 23.

59. Cal.—Liverpool, etc., Ins. Co. v. Southern Pac. Co., 58 P. 55, 125 Cal. 434
51 C.J. p. 1248 note 23.

60. Ala.—Birmingham R., etc., Co. v. Hinton, 48 So. 546, 158 Ala. 470

Correct proposition of law

An instruction on the origin of the fire, even though asserting a correct proposition of law, should not be given if it would have a tendency to mislead.—Birmingham R., etc., Co. v. Hinton, supra.—51 C.J. p. 1248 note 27

61. Minn.—Carr v. Davis, 199 N.W. 237, 159 Minn. 485.
51 C.J. p. 1247 note 21.

62. Minn.—Flanaghan v. Chicago, etc., R. Co., 67 N.W. 794, 65 Minn. 112.

63. Iowa.—Fish v. Chicago, etc., R. Co., 46 N.W. 998, 81 Iowa 280.

64. Mich.—Worden Lumber, etc., Co. v. Minneapolis, etc., R. Co., 133 N.W. 949, 168 Mich. 74.
51 C.J. p. 1248 note 25

65. Mo.—Missouri Egg, etc., Co. v. Missouri Pac. R. Co., 257 S.W. 477
51 C.J. p. 1248 note 26.

66. Ark.—Missouri Pac. R. Co. v. Fowler, 34 S.W.2d 1071, 183 Ark. 86.
Ga.—Southern Ry. Co. v. Richardson, 172 S.E. 79, 48 Ga.App. 25

67. Ga.—Southern Ry. Co. v. Richardson, supra

68. Ga.—Southern Ry. Co. v. Richardson, supra.

§ 539. —— Construction, Equipment, and Operation of Locomotives

In an action for injury from fire set out by a railroad, an instruction which ignores the duty of the railroad company with respect to the construction, equipment, and operation of its locomotives in one or more particulars is erroneous; but the instruction should not charge on issues not raised by the pleadings or evidence.

In an action for injury from fire set out by a railroad, an instruction which ignores the duty of the railroad company with respect to the construction, equipment, and operation of its locomotives in one or more particulars is erroneous [69] The court should state correctly the degree of care required in the construction, equipment, and operation of locomotives,[70] and instructions which impose on the company too high[71] or too low[72] a degree of care are erroneous, and the giving of them constitutes a ground for reversal. The instructions should present the issues so as to guide the jury in their decision of the facts,[73] but instructions are erroneous when given, and properly refused when asked, where they charge on issues or theories not raised by the pleadings[74] or by the evidence.[75] Where the evidence is conflicting and will support an inference that the locomotive was improperly equipped and handled, the court is correct in refusing to charge that the evidence does not authorize a recovery [76] Where a recovery is sought on the ground that fire escaped from defendant's locomotive through negligence in the management of the train and failure to employ suitable means to prevent the escape of fire from a locomotive, it is error to refuse an instruction that a recovery cannot be had if the locomotive was of approved construction and was handled in a competent and skillful manner at the time of the fire.[77] Where negligence in the construction, equipment, or operation of the locomotive is essential to a recovery by plaintiff, the giving of an instruction that defendant will be liable merely because its locomotive set fire to the property in suit is erroneous[78] and the refusal of such an instruction is proper.[79] A charge which by reason of a clerical error affirms the nonliability of defendant, although the locomotive was defective, is erroneous.[80]

§ 540. —— Combustibles on Right of Way

In an action against a railroad company for injury from fire, where negligence with respect to combustibles on the right of way is an issue in the case, it should be submitted to the jury by appropriate instructions

In an action against a railroad company for injury from fire, where negligence with respect to combustibles on the right of way is an issue in the case, under the pleadings and evidence, it should be submitted to the jury by appropriate instructions,[81] and a refusal to give such instructions is reversible error.[82] On the other hand, where no charge of negligence in permitting combustible matter to accumulate on the right of way is made by the declaration or complaint, it is erroneous to give instructions on that issue.[83] If an instruction on the subject of negligence in leaving combustible material on the right of way is correct when taken as a whole, the fact that one part of it considered separately might be open to objection will not render the instruction erroneous [84] An instruction that defendant should use ordinary care to keep its right of way clear of combustible matter, but that the law does not require a railroad company to keep its right of way absolutely clean, is not objectionable as requiring the company to exercise ordinary care to keep its right of way absolutely clean,[85] but a charge that a company is

69. Va.—Abernathy v Emporia Mfg. Co, 95 S E 418, 122 Va 406
51 C J. p 1249 note 36

70. Ga —Southern Ry. Co. v. Richardson, 172 S E 79, 48 Ga App. 25
Ky —Frankfort & C. R Co v. Marshall, 33 S W 2d 353, 236 Ky. 404
N C —Star Mfg Co. v. Atlantic Coast Line R Co, 23 S E.2d 32, 222 N C. 330

71. Utah —McCullough v Oregon Short Line R. Co, 140 P. 767, 44 Utah 337.
51 C J. p 1248 note 30.

72. Kan.—Bray v. St. Louis-San Francisco R. Co., 205 P. 1112, 111 Kan. 60.
51 C J p 1249 note 31.

73. **General negligence**
Since certain facts establish prima facie negligence by a railroad in causing a fire, the court should submit the defense of proper equipment and operation of the engine setting out the fire, notwithstanding it had already submitted generally the issues of negligence and contributory negligence —Ft Worth & D C. Ry Co. v. Thompson, Tex Civ.App, 222 S.W 289.

74. Ga —Seaboard Air-Line R Co. v. Gnann, 75 S E 611, 138 Ga. 536.
51 C J. p 1249 note 39.

75. N.C —Reid v. Carolina, etc., R Co, 105 S.E. 169, 180 N.C. 511.
51 C J. p 1250 note 40.

76. Ala —Southern R. Co. v. Darwin, 47 So 314, 156 Ala. 311, 130 Am.S.R. 94

77. Kan.—Union Pac. R Co. v. Motzner, 43 P. 785, 2 Kan.App 342.

78. Mich —Gorgol v. Michigan Cent R. Co, 211 N.W. 50, 236 Mich. 646

79. Ala —Bessemer Feed Mills v Alabama Great Southern R. Co, 116 So. 796, 217 Ala 446

80. Ala —Horton v. Louisville, etc, R. Co, 49 So. 423, 161 Ala 107
51 C J. p 1249 note 37.

81. Tex —Missouri, etc., R Co v. Neiser, 118 S.W 167, 54 Tex Civ. App 460.
51 C J. p 1250 note 44.

82. Ky.—Terhune v. Louisville, etc, R Co., 212 S W. 915, 184 Ky. 670.

83. Ala.—Louisville, etc., R Co. v. Sullivan Timber Co, 35 So. 327, 138 Ala 379.
51 C J. p 1250 note 46.

84. N C —Herring v. Atlantic Coast Line R Co, 127 S E 8, 189 N.C. 285.
51 C J. p 1250 note 47.

85. Ga —Western, etc., R. Co v Tate, 59 S E 266, 129 Ga 526.

not negligent if it exercised ordinary prudence in keeping its right of way in proper condition, without explaining the duty imposed on it as to its right of way and what was meant by proper condition, is misleading.[86]

§ 541. —— Contributory Negligence

In an action for injury from fire set out by a railroad, instructions on contributory negligence are properly refused where there is no evidence on which they can be based; but where such evidence does exist it is proper to instruct on the question of contributory negligence.

In an action for injury from fire set out by a railroad, instructions on contributory negligence are properly refused where there is no evidence on which they can be based.[87] Where there is evidence tending to show the absence of contributory negligence, the giving of an instruction which assumes that plaintiff is guilty of contributory negligence is erroneous,[88] and is properly refused.[89] It is proper to instruct on the question of contributory negligence where there is evidence tending to establish it;[90] and in such a case the giving of an instruction which entirely ignores the question of contributory negligence,[91] or the refusal of such an instruction when requested by defendant,[92] constitutes error. An instruction is not objectionable because it states that precautions were used by plaintiff, where there is undisputed evidence that plaintiff took some precautions against the risk of fire, and the instruction leaves the sufficiency of such precautions to the determination of the jury.[93]

Instructions given on the subject of contributory negligence should state correctly the law relating thereto,[94] and hence an instruction is erroneous which makes the wanton and intentional failure of plaintiff to use due care to put out the fire the test of his contributory negligence.[95] Instructions which require a verdict for defendant if plaintiff is guilty of contributory negligence without requiring the contributory negligence to be the proximate cause of the injury are erroneous,[96] and hence an instruction that plaintiff could not recover if he knew of the fire and made no attempt to put it out, without any reference to whether or not his efforts would have been unavailing, is erroneous.[97]

§ 542. —— Proximate Cause of Injury

In an action for injury alleged to have been caused by fire set out by a railroad, the court should charge the jury that the negligent act complained of must have been the proximate cause of the injury.

In an action for injury alleged to have been caused by fire set out by a railroad, the court should charge the jury that, in order to entitle plaintiff to recover, the negligent act complained of must have been the proximate cause of the injury.[98]

§ 543. Verdict and Findings

In an action for injury from fire set out by a railroad, special findings must be responsive to the issues made by the pleadings, be supported by the evidence, and find and state all facts essential to a recovery under the issues.

In an action for injury from fire set out by a railroad, special findings must be responsive to the issues made by the pleadings,[99] be supported by the evidence,[1] find and state all facts essential to a recovery under the issues,[2] and must not state

86. N.C.—Denny v. Atlantic Coast Line R. Co, 103 S.E. 24, 179 N.C. 529, 533.
51 C.J. p 1250 note 49.

87. Ark.—Missouri Pac R. Co. v. Fowler, 34 S.W.2d 1071, 183 Ark 86.
51 C.J. p 1250 note 51.

88. Miss.—Brister v. Illinois Cent. R. Co, 36 So. 142, 84 Miss. 33.

89. U.S.—Eddy v. Lafayette, Ind.T., 49 F. 807, 1 C.C.A. 441, affirmed 16 S.Ct. 1082, 163 U.S. 456, 41 L.Ed 225.

90. Wyo.—Chicago, etc., R. Co v. Cook, 102 P. 657, 18 Wyo. 43.

91. Ill.—Chicago, etc, R. Co. v. Simonson, 54 Ill. 504, 5 Am.R. 155—Great Western R. Co v. Haworth, 39 Ill. 346.

92. Kan.—Kansas City, etc, R. Co. v. Owen, 25 Kan. 419—Central Branch Union R. Co. v. Hotham, 22 Kan. 41.

93. Cal.—Liverpool, etc, Ins. Co v. Southern Pac. Co, 58 P. 55, 125 Cal. 434.

94. Fla.—Florida East Coast R. Co v. Smith, 55 So. 871, 61 Fla. 218
51 C.J. p 1251 note 58.

Failure to repair roof

In action against railroad for destruction of house adjoining right of way by fire originating on right of way, instruction that mere failure of owners of house to repair roof and make roof less liable to catch fire would not constitute contributory negligence, relieving railroad from liability for its negligence, was not error.—Pollard v. Walton, 190 S.E. 396, 55 Ga.App. 353.

95. Fla.—Florida East Coast R. Co. v. Smith, 55 So. 871, 61 Fla. 218.
51 C.J. p 1251 note 60.

96. Miss.—Brister v. Illinois Cent R. Co, 36 So. 142, 84 Miss. 33.
51 C.J. p 1251 note 61.

97. Ark.—Tilley v. St. Louis, etc, R. Co, 6 S.W. 8, 49 Ark 535
Fla.—Florida East Coast R. Co v. Smith, 55 So. 871, 61 Fla. 218.

98. Pa.—Nicholson v. Buffalo, R. & P. Ry. Co, 153 A. 128, 302 Pa. 41.
51 C.J. p 1251 note 62.
Contributory negligence as proximate cause of injury see supra § 541.

99. Kan.—McVeigh v. Missouri, etc, R. Co, 124 P. 898, 87 Kan 527, rehearing denied 127 P. 624, 88 Kan 13.
51 C.J. p 1251 note 69.

1. Mass.—Young v New York, N.H. & H. R. Co., 174 N.E. 318, 273 Mass 567
51 C.J. p 1251 note 70.

2. Ind.—Pennsylvania Co. v Mandeville, 53 N.E. 489, 22 Ind.App. 679
51 C.J. p 1251 note 71.

conclusions of law.[3] The findings must be consistent with each other, otherwise a judgment cannot be based thereon.[4] Where special findings are so inconsistent with the general verdict as to be wholly irreconcilable with it, the special findings are controlling;[5] but unless the conflict between them is irreconcilable it will not be sufficient to override the general verdict, and entitle defendant to a judgment on the special finding notwithstanding the verdict.[6] Special findings must be considered together, and if correct as a whole are sufficient, although some particular finding taken separately might be objectionable.[7]

§ 544. Judgment

A judgment in an action to recover for an injury from a fire set out by a railroad must be supported by the pleadings and the evidence

A judgment in an action for injury from a fire set out by a railroad must be supported by the pleadings[8] and the evidence.[9]

§ 545. Appeal and Error

The rules with respect to appeal and error in actions against railroad companies for injuries caused by fires set out by such companies are discussed in Appeal and Error.

Examine Pocket Parts for later cases.

§ 546. Damages

In an action for injury from fire set out by a railroad, the railroad company is liable for all damages which are the direct, natural, and proximate result of its negligence, and, although under some circumstances punitive damages may be given, the damages are generally compensatory in nature.

In an action for injury from fire set out by a railroad, the railroad company is liable for all damages which are the direct, natural, and proximate result of its negligence.[10] The damages recoverable in an action against a railroad for injury from fire are generally compensatory in nature;[11] but punitive damages have been allowed under certain circumstances,[12] and some statutes provide for the award of double or treble damages under certain circumstances.[13]

Where trees, either growing or matured, are destroyed by fire as the result of the wrongful act of another, the owner may bring his action either for the value of the trees so destroyed[14] or for the injury to the real estate or his interest in it,[15] and the proper measure of damages in the former action is the market value of the trees destroyed independent of the real estate,[16] and the measure of damages in the latter action is the diminished value of the real estate.[17]

3. Ind—Wabash R. Co v Miller, 48 N E 663, 18 Ind App 549
51 C J p 1252 note 72.

4. Kan—Bray v. St Louis-San Francisco R. Co, 205 P 1112, 111 Kan 60
51 C J. p 1252 note 73

5. Ind—Shubert v Thompson, 32 N E.2d 120, 109 Ind App 34
51 C J p 1252 note 74

6. Ind.—Pittsburgh, etc, R Co v. Brough, 81 N E 57, 168 Ind. 378, 12 L.R A ,N S , 401
51 C J. p 1252 note 75.

7. Kan—Kansas City, etc, R Co v. Chamberlin, 60 P. 15, 61 Kan 859
51 C J p 1252 note 77.

8. **Amount of recovery**
A judgment which allows a greater recovery than that requested in the pleadings is erroneous—Gulf, etc, R Co. v Thompson, Tex Civ App, 16 S W 174.

9. **Judgment held supported by evidence**
Ohio—Pittsburgh, etc, R Co v. Applegate, 1 Ohio App. 350, 17 Ohio Cir Ct ,N.S., 256, 34 Ohio Cir Ct 338, affirmed 108 N E. 1129, 90 Ohio St. 445.
51 C J p 1252 note 79

10. N.Y—Snook v. New York Cent, etc, R Co, 152 N Y S. 564, 90 Misc 69.
Proximate cause generally supra § 496

11. U S—Cooper v. Northern Pac R Co, D C.Mont., 212 F 533.
Pa—Ruby v Pennsylvania R Co, Com Pl., 61 York Leg.Rec 17.
51 C J p 1253 notes 95, 96, 98, 3

Elements of damage held proper
(1) Cost of bringing men to fight fire.—Spokane International Ry. Co. v U. S, C C.A Idaho, 72 F.2d 440

(2) Expenses incurred and wages earned by plaintiff's employees in fighting the fire to prevent it from spreading to plaintiff's land—Chesapeake & O Ry. Co v. U S, C.C.A.Va, 139 F 2d 632.

(3) Charge for slash disposal as element in market price of mature timber, destroyed by fire—Spokane International Ry. Co v. U S, supra.

12. Miss—Wilson v. Yazoo & M V. R. Co., 6 So 2d 313, 192 Miss. 424
51 C J. p 1254 note 16.

13. Mich—Mink v. Grand Rapids, etc., R. Co., 160 N.W. 535, 194 Mich 324
51 C.J p 1254 note 18.

Double damages not allowed
Statute imposing liability on railroad for all damages sustained by fire from operation of its road, being a special statute and in effect at time of enactment of the statute authorizing award of double damages against person or corporation starting or being responsible for fire which occasions damage to another, is not repealed by the later statute, and hence railroad is not liable in double damages for fire accidentally started by its locomotive which destroys or damages property of another—Missouri, K & T Ry Co. v Jackson, C A Okl, 174 F.2d 297.

14. S D—Bailey v Chicago, etc, R Co, 54 N W 596, 3 S D 531, 19 L R.A 653.

15. S D—Bailey v Chicago, etc, R Co, supra

16. S D—Bailey v. Chicago, etc, R Co, supra.

17. S D—Bailey v. Chicago, etc., R Co, supra
51 C J. p 1254 note 14

Immature timber
Where immature timber which was destroyed by fire had no market value, the correct measure of damages is the cost of restoring the land to the condition in which it was before the fire—Spokane International Ry Co. v. U. S, C C.A Idaho, 72 F 2d 440.

Insurance. Generally, a railroad company which causes damages to another's property by fire is not entitled to a reduction of damages to the extent of insurance on the property paid by an insurance company to plaintiff,[18] and this rule has been held to apply under a statute imposing liability on the railroad company regardless of negligence.[19] Under some statutes, however, imposing absolute liability on the railroad regardless of negligence for injuries to property by fire, the liability of the railroad is limited to the excess of the damages suffered over the net amount of the insurance recovered by the property owner,[20] and, if the insurance is not recovered, the policy is assigned to the railroad, which may sue thereon.[21] Such a statute does not apply to a loss sustained before it became operative,[22] and such a statute must be construed, if possible, so as to harmonize with, and not be repugnant to, the standard policy provision entitling the insurer on payment of the loss to an assignment by the insured of his rights.[23] Where the railroad is held liable under such a statute, its right of action against the insurer becomes fixed, subject only to such ordinary defenses as would be open between the insured and the insurer.[24]

Attorney's fees. Some statutes authorize plaintiff to recover, in addition to damages, reasonable attorney's fees,[25] and the constitutionality of these statutes has been upheld.[26] Such a statute should be strictly construed[27] so not more than one attorney's fee may be allowed.[28] While it has been held that, in order to authorize an allowance of an attorney's fee, a demand for the fee must be made in the petition,[29] it has also been held that an attorney's fee may be granted even though there is no prayer for an attorney's fee in the complaint.[30] While it has been held error for the court to render judgment for an attorney's fee where no proof has been offered on that subject, and no agreement made as to what is a reasonable attorney's fee,[31] it has also been held that it is proper practice to file a motion asking that a reasonable attorney's fee be allowed after the jury has returned its verdict, and that, on hearing the motion, the court may fix the attorney's fee.[32]

XV. INJURIES TO ANIMALS

A. IN GENERAL

§ 547. Care Required and Liability in General

In the absence of statute the liability of railroad companies for injuries to animals is governed by common-law principles of negligence; such companies are ordinarily held bound to exercise ordinary care under the circumstances.

In the absence of statute the liability of railroad companies for injuries to animals depends on the common-law principles governing the liability of natural persons for their negligent acts under similar circumstances.[33] Although entitled to the exclusive and unobstructed use of their roads, as discussed supra § 100, railroads are subject to the

18. Ala.—Long v Kansas City, etc., R. Co, 54 So 62, 170 Ala. 635.
51 C J. p 1255 note 26.
Receipt of insurance money as defense see supra § 512.

19. Conn.—Regan v. New York, etc., R. Co., 22 A. 503, 60 Conn. 124, 25 Am.S R. 306.

20. Me—Boston Excelsior Co. v. Bangor, etc., R Co, 44 A. 138, 93 Me 52, 47 L.R.A. 82.
51 C J. p 1254 note 24.

21. Mass.—Boston & M. R. R v. Hartford Fire Ins. Co., 147 N E. 904, 252 Mass 432.
51 C J. p 1254 note 24 [a].

22. Mass.—Wild v. Boston, etc., R. Co, 50 N E. 533, 171 Mass 245.

23. Mass—Boston & M. R. R v Hartford Fire Ins. Co., 147 N E. 904, 252 Mass. 432.

24. Mass—Boston & M R. R v. Hartford Fire Ins. Co, supra

25. U.S—Kansas City Southern Ry. Co. v. New England Fire Ins Co., C C.A Ark, 133 F 2d 973
51 C.J p 1255 note 32.
Allowance held proper
Ark—Missouri Pac R. Co v. Campbell, National Liberty Fire Ins Co, Intervener, 177 S.W 2d 174, 206 Ark. 657.

26. Ill—Cleveland, etc, R. Co v. Sellers, 60 Ill App. 81.
Kan—Chicago, etc, R Co. v Spring Hill Cemetery Assoc, 57 P. 252, 9 Kan App. 882.

27. Ark.—Missouri Pac. R Co. v Campbell, National Liberty Fire Ins. Co, Intervener, 177 S W 2d 174, 206 Ark 657.

28. Ark.—Missouri Pac. R Co. v. Campbell, National Liberty Fire Ins Co., Intervener, supra.
51 C J. p 1255 note 32 [f].
Attorney for insurance company
An insurance company as subrogee of plaintiff to whom it had paid fire insurance for destruction of plaintiff's property by fire allegedly set by a railroad company was not entitled to an award of attorney's fees against the railroad company where the owner prevailed and was awarded attorney's fees—Missouri Pac. R Co. v. Campbell, National Liberty Fire Ins. Co, Intervener, supra.

29. Kan—Fort Scott, etc, R Co. v Tubbs, 28 P. 612, 47 Kan 630.
51 C.J. p 1255 note 32 [b].

30. Ark.—Missouri Pac R. Co. v Campbell, National Liberty Fire Ins. Co., Intervener, 177 S.W.2d 174, 206 Ark 657.

31. Kan.—Atchison, etc, R. Co. v. Scrafford, 43 P. 308, 2 Kan App 73.

32. Ark—Missouri Pac R Co. v. Campbell, National Liberty Fire Ins Co., Intervener, 177 S.W 2d 174, 206 Ark. 657.

33. Miss—New Orleans, etc., R Co v. Bourgeois, 5 So. 629, 66 Miss. 3, 14 Am S R 534.
52 C.J. p 20 note 3.

general rule that every person must so use his own property as not unnecessarily to injure another;[34] but since the running of trains is in itself a lawful act, they are not liable for injuries resulting therefrom unless the right is exercised in an improper or unlawful manner,[35] and they will not, in the absence of statute, be liable for injuries to animals unless due to the negligence or misconduct of their employees.[36] In so far as liability for injuries to animals is in issue, these rules are equally applicable to a lumber company while operating railroad cars for its private use.[37]

Degree of care. With respect to injuries to animals, railroad companies are not held to the highest degree of care[38] or skill,[39] but only to the exercise of ordinary care.[40] On the other hand, it is not necessary in order to render them liable that there should be gross negligence or wanton or willful injury,[41] although, as discussed infra § 550, the rule is sometimes held to be otherwise in the case of trespassing animals. Accordingly, railroad companies are liable for injuries to animals resulting from failure to procure and use good and safe premises, machinery, and appliances,[42] employ competent servants,[43] or, in operating their trains, to exercise ordinary or reasonable care,[44] such as an ordinarily prudent man would use under the circumstances,[45] considering the dangerous character of the agency employed,[46] and having a proper regard both for the safety of the train and its passengers, and that of the animal,[47] the duty as to the train and passengers being paramount to that of avoiding injury to animals.[48]

Circumstances of the particular case must, as a general rule, determine what will constitute ordinary or reasonable care.[49] The care required in avoiding such injuries varies materially according to whether the animal was at the time of the injury rightfully or wrongfully on the track.[50] Where such duty is not imposed by statute, railroads are not liable for failure to provide places where stock wandering on the track might leave it if overtaken by trains;[51] or to keep a canal near the right of way, but on land of an adjoining proprietor, guarded,[52] or to keep their rights of way clear of obstructions so that animals can pass over and across the tracks freely;[53] or to keep the necessary ditches or excavations along the sides of its track free from accumulations of water or ice,[54] or at a public crossing to cover such ditches for the full width of the highway;[55] or to prevent stock from falling into ditches while driving them off the railroad right of way,[56] or to keep flagmen at crossings;[57] or to prevent stock from drinking oil escaping a tank car in a wrecked train.[58] On the other hand, it has been held that a railroad will be liable for injury to stock occasioned by its negligence in maintaining a barbed wire fence on or along its right of way in so defective or improper condition as to be a source

34. Fla.—Atlantic Coast Line R. Co. v. Ivey, 5 So. 2d 244, 148 Fla. 680, 139 A.L.R. 973.
Tex.—Texas & P. Ry. Co. v. Heathington, Civ.App., 115 S.W.2d 495.
52 C.J. p. 21 note 5.

35. Mich.—Williams v. Michigan Cent. R. Co., 2 Mich. 259, 55 Am.D. 59.
Minn.—Mathews v. St. Paul, etc., R. Co., 18 Minn. 434.
52 C.J. p. 21 note 6.

36. Ill.—Mailloux v. Cleveland, C. C. & St. L. R. Co., 164 Ill.App. 628.
52 C.J. p. 21 note 7.

37. N.C.—Stewart v. Cary Lumber Co., 59 S.E. 545, 146 N.C. 47.

38. Ark.—Hodge-Downey Constr. Co. v. Carson, 140 S.W. 708, 100 Ark. 433.
52 C.J. p. 21 note 10.

39. Ala.—Tombigbee Valley R. Co. v. Morris, 65 So. 207, 10 Ala.App. 322.

40. Tex.—Texas & P. Ry. Co. v. Heathington, Civ.App., 115 S.W.2d 495—Panhandle & S. F. Ry. Co. v. Williams, Civ.App., 38 S.W.2d 880.
52 C.J. p. 21 note 12.

41. Ga.—Powell v. Nelson, 183 S.E. 348, 52 Ga.App. 351.
52 C.J. p. 21 note 14.

42. Ga.—Weatherington v. Georgia Southern, etc., R. Co., 87 S.E. 844, 17 Ga.App. 584.
52 C.J. p. 21 note 15.

43. Miss.—New Orleans, etc., R. Co. v. Field, 46 Miss. 573—Vicksburg, etc., R. Co. v. Patton, 31 Miss. 156, 66 Am.D. 552.

44. U.S.—Gulf, etc., R. Co. v. Washington, Ind.T., 49 F. 347, 1 C.C.A. 286.
52 C.J. p. 21 note 17.

45. Tex.—Texas Cent. R. Co. v. Mallard, Civ.App., 158 S.W. 1183.
52 C.J. p. 21 note 18.

46. Mo.—Gorman v. Pacific R. Co., 26 Mo. 441, 72 Am.D. 220.

47. Minn.—Witherell v. Milwaukee, etc., R. Co., 24 Minn. 410.
Miss.—New Orleans, etc., R. Co. v. Field, 46 Miss. 573.

48. Ohio.—Kerwhaker v. Cleveland, etc., R. Co., 3 Ohio St. 172, 198, 62 Am.D. 246.
52 C.J. p. 21 note 21.

49. Ark.—St. Louis, etc., R. Co. v. Kimberlain, 88 S.W. 599, 76 Ark. 100.
52 C.J. p. 22 note 23.

50. Ill.—Mailloux v. Cleveland, etc., R. Co., 164 Ill.App. 628.
52 C.J. p. 22 note 24.
Care required as to trespassing animals see infra § 550.

51. Iowa.—Gilman v. Sioux City, etc., R. Co., 17 N.W. 520, 62 Iowa 299.
Statutes imposing liability see infra § 548.

52. S.C.—O'Dell v. Southern R. Co., 121 S.E. 599, 127 S.C. 553.

53. Ark.—Arkansas, etc., R. Co. v. Sanders, 65 S.W. 428, 69 Ark. 619.

54. Ill.—Peoria, etc., R. Co. v. McClenahan, 74 Ill. 435.

55. Mich.—Whitsky v. Chicago, etc., R. Co., 28 N.W. 811, 62 Mich. 245.

56. Ark.—St. Louis Southwestern R. Co. v. Green, 168 S.W. 146, 113 Ark. 599.

57. N.Y.—Martin v. New York Cent., etc., R. Co., 45 N.Y.S. 925, 20 Misc. 363.

58. Tex.—St. Louis Southwestern R. Co. v. Bailey, Civ.App., 168 S.W. 406.

of danger to stock,[59] or, having or being chargeable with knowledge that cattle were on the right of way and making no effort to keep them off, in spreading poison to kill the grass and weeds,[60] or, having knowledge that poison is escaping from one of its cars and collecting in a pool at a point accessible to domestic animals, in failing to exercise ordinary care to keep such animals away from the pool;[61] or, having knowledge of an uncovered well in a lot of land belonging to the railroad off its right of way, in failing to cover it;[62] or in burning plaintiff's pasture fence,[63] even when it had no notice of animals being within the inclosure.[64]

§ 548. —— Statutes Imposing Liability

Statutes imposing specific duties on railroads and increasing their common-law liabilities for injuries to animals provide a cumulative liability and do not restrict liability to the statutory grounds to the exclusion of liability for negligence generally.

The common-law duties and liabilities of railroad companies with respect to injuries to animals are not affected by statutes imposing liability on railroads in general terms for their negligent acts resulting in injuries to animals where the words used in the statute are construed to mean ordinary negligence.[65] In many jurisdictions, however, their common-law liability has been changed materially or added to by statutes, such as statutes requiring railroads to fence their tracks and construct cattle guards, as discussed infra §§ 558–581, to maintain a lookout for stock on the track, infra § 596, to maintain gates or bars at private or farm crossings, infra § 583, and to exercise certain precautions as to the giving of signals, infra § 595, and also by statutes regulating the speed of trains in certain localities, infra § 601. A statute requiring specific precautions to be taken by the railroad provides a cumulative liability with respect to injuries to animals and does not displace the common law in cases to which it applies,[66] nor does it restrict the railroad's liability to the statutory grounds to the exclusion of liability for other forms of negligence.[67] The company will be liable for injuries due to a failure to comply with the requirements of the statutes, although not otherwise negligent,[68] or if negligent, although the statutory requirements were complied with;[69] but the company cannot be held liable where there has been neither negligence nor misconduct on the part of its employees, nor a failure to comply with any duty imposed by statute.[70] A contract between a landowner and a railroad purporting to absolve the railroad from liability for the consequences of neglect of its statutory duty in the operation of its trains is against public policy, and is void.[71]

For failure to keep record of animals killed. Statutes requiring a railroad to keep a record of all animals killed, and providing that, for failure to make a record of an animal killed, the railroad shall be liable to the owner for twice the value thereof, do not impose liability for the killing of animals independently of negligence or nonperformance of some statutory duty related to the cause of such injuries.[72] In other jurisdictions the statutes impose a penalty absolute in its terms, and under these statutes, which have been held to be constitutional,[73] liability attaches for failure to record independently of whether or not the railroad is otherwise at fault,[74] and independently of the owner's knowledge of the killing.[75]

§ 549. —— What Law Governs

The liability of a railroad company for injuries to animals is governed by the law of the state in which the injury occurred.

The law of the state in which the injury occurred ordinarily governs the question of the railroad's liability;[76] and statutory provisions in the juris-

59. N C.—Winkler v. Carolina, etc, R. Co, 35 S E 621, 126 N C. 370, 78 Am S.R. 663.
Liability as dependent on character of fences constructed where railroads are required to fence see infra §§ 575–580.

60. Ark —St. Louis-San Francisco R Co v. Fletcher, 253 S.W 12, 159 Ark 344, 33 A L R 445.
Tex —Texas & N O R Co. v Kaderli, Civ.App, 33 S W 2d 832, error dismissed

61. Okl —Missouri, etc, R Co v Rose, 160 P 734, 61 Okl 156.

62. Ga —Nelson v Central R, etc, Co, 48 Ga 152.

63. Tex —St Louis, etc, R Co v McKinsey, 14 S W. 645, 78 Tex 398, 22 Am S.R 54.

64. Tex —St. Louis, etc, R. Co. v McKinsey, supra.

65. Kan —Atchison, etc, R Co. v. Shaft, 6 P. 908, 33 Kan 521

66. Ark.—Missouri Pac. R Co v. Miller, 50 S W 2d 618, 185 Ark 937
Mo —Hill v. Missouri Pac R Co, 49 Mo App. 520, affirmed 26 S W 576, 121 Mo. 477.

67. Tex.—Missouri, etc, R Co v Attaway, Civ.App, 180 S W 1151

68. Tex —International, etc, R Co v. Leuders, 1 Tex A Civ Cas § 314. 52 C J. p 22 note 49.

69. Ala —Nashville, etc, R Co v. Comans, 45 Ala 437.
Tex —Austin, etc, R Co. v Saunders, Civ App, 26 S W 128.

70. Tex.—Texas & N O R. Co v. Kaderli, Civ App, 33 S W 2d 832, error dismissed.
52 C J. p 22 note 51.

71. Ala —Central of Georgia R. Co, 99 So 74, 210 Ala. 687.

72. Idaho —Bliss v. Oregon Short Line R Co, 200 P. 721, 34 Idaho 351—Wilson v. Oregon Short Line R Co, 152 P. 1062, 28 Idaho 54

73. Mont —Foster v. Oregon Short Line R Co, 204 P. 375, 62 Mont 230.

74. Mont —Dewell v. Northern Pac R Co, 170 P. 753, 54 Mont 350

75. Mont.—Dewell v. Northern Pac R. Co, supra.

76. Ark.—Missouri Pac. R. Co. v. Hayes, 122 S.W.2d 945, 197 Ark 356.

diction where the action is instituted have no application to cases where the cause of action occurred in another jurisdiction.[77]

§ 550. —— Trespassing Animals

Some authorities hold a railroad liable for injuries to trespassing animals only where the injuries are willfully or wantonly inflicted; others hold it liable for such injuries only where they are brought about by gross negligence; still others hold the railroad liable for such injuries resulting from ordinary negligence.

Subject always to the paramount duty of the railroad to exercise the highest degree of care to secure the safety of passengers on its trains, as discussed supra § 547, there are three conflicting views as to the common-law liability of a railroad to owners of animals wrongfully on its track. The view held in a majority of the jurisdictions is that the railroad is liable for gross, wanton, or willful negligence only.[78] The second view holds the railroad liable only for injuries recklessly, wantonly, willfully, or intentionally inflicted, exempting it from injuries due to negligence, ordinary or gross,[79] and, since this is the rule at common law, it applies to cases not within the terms of a modifying statute,[80] but not to cases within the terms of such a statute.[81] The third view goes to the opposite extreme, holding the railroad liable for failure to use ordinary or reasonable care.[82]

It has been held that domestic animals, being irresponsible creatures, a railroad's liability for injuries to them when trespassing on the right of way is on the same footing as liability for injuries to trespassing children of tender years,[83] namely, that while the railroad is not liable for injuries resulting from the presence on the right of way of a dangerous condition known by the railroad to exist, where the railroad does not know and cannot be charged with notice of the presence of the animals on the right of way,[84] or where it cannot be held liable under the attractive nuisance doctrine,[85] it is liable where it maintains a dangerous condition knowing, or being chargeable with notice of, the probable presence of the animals.[86]

§ 551. —— Species of Animals Injured

A railroad's duty to exercise ordinary care to prevent injuries to animals extends to dogs.

A railroad must exercise ordinary care to prevent injuries to dogs and will be liable for an injury due to negligence as well as where the injury was willful.[87] The engineer is under no duty to use care in discovering a dog trespassing on the track,[88] but the company will be liable if the injury could, by the exercise of ordinary care, have been avoided after discovery.[89] The railroad is not liable if the proper signals were given and due care was exer-

77. Colo.—Atchison, etc., R. Co. v. Betts, 15 P. 821, 10 Colo. 431

78. Wis.—Stucke v. Milwaukee, etc., R. Co., 9 Wis. 202
52 C.J. p. 23 note 63.
Liability for injuries to trespassing animals as affected by:
Duty to fence see infra § 566
Duty to keep lookout for animals see infra § 596
Duty to take precautions as to animals seen on or near tracks see infra § 606.

79. N.Y.—Bell v. Erie R. Co., 117 N.Y.S. 341, 133 App. Div. 608.
52 C.J. p. 23 note 64.

80. N.Y.—Bateman v. Rutland R. Co., 110 N.Y.S. 506, 126 App. Div. 511.
52 C.J. p. 23 note 65

81. N.Y.—Spinner v. New York Cent., etc., R. Co., 67 N.Y. 153.

82. Ark.—St. Louis-San Francisco Ry. Co. v. Grant, 46 S.W.2d 640, 185 Ark. 222
Ohio.—McKinney v. Cleveland, C., C. & St. L. R. Co., 177 N.E. 511, 39 Ohio App. 346
52 C.J. p. 23 note 67

83. La.—Friedman's Estate v. Texas & P. Ry. Co., 25 So.2d 88, 209 La. 540, 163 A.L.R. 1228

84. La.—Friedman's Estate v. Texas & P. Ry. Co., supra.

Poisoned grass

(1) Railroad was not liable for death of cattle killed by eating chemically sprayed grass on railroad company's fenced right of way, where spraying of grass did not result in maintenance of an attractive nuisance and there was no showing that railroad knew that cattle got through fence or left fence open.—Louisville & N. R. Co. v. Gillespie, 172 S.W.2d 1015, 26 Tenn. App. 390

(2) Failure of a railroad to notify an owner of fenced in cattle that it was going to place poison on its right of way was not actionable negligence, where cattle entered because a third person opened a gate.—Ft. Worth & R. G. Ry. Co. v. Brown, Tex. Civ. App., 173 S.W. 943.

85. **Attractive nuisance doctrine inapplicable**

(1) Tempting odors and flavor of vegetation which was on railroad right of way and which railroad had sprayed with poison deadly to animals did not render such right of way an "attractive nuisance," the maintenance of which would render railroad liable for death of trespassing animals eating such vegetation after breaking through an insufficient fence.—McKenzie v. Powell, 22 S.E.2d 735, 68 Ga. App. 285

(2) Where railroad company sprayed grass on right of way with a poisonous chemical so that grass turned white, owners of cattle killed by eating grass could not recover for death of cattle on theory that railroad was liable for maintaining "attractive nuisance."—Louisville & N. R. Co. v. Gillespie, 172 S.W.2d 1015, 26 Tenn. App. 390.

86. La.—Friedman's Estate v. Texas & P. Ry. Co., 25 So.2d 88, 209 La. 540, 163 A.L.R. 1228

87. Ala.—Louisville & N. R. Co. v. Fitzpatrick, 29 So. 859, 129 Ala. 322, 87 Am.S.R. 64.—Selma Street & Suburban Ry. Co. v. Martin, 56 So. 601, 2 Ala. App. 537
52 C.J. p. 24 note 71.

Former rule in Georgia

Prior to 1912, when the rule was changed by statute, it was held that there could be no recovery for the killing of a dog unless the killing was reckless and wanton.—**Corpus Juris cited in** Powell v. Nelson, 183 S.E. 348, 349, 52 Ga. App. 351.—52 C.J. p. 24 note 71.[a] (1).

88. Ala.—**Corpus Juris cited in** Owen v. Southern Ry. Co., 133 So. 33, 34, 222 Ala. 499.
52 C.J. p. 24 note 72.

89. Ala.—Georgia Cent. R. Co. v. Martin, 43 So. 563, 150 Ala. 388.
Tex.—St. Louis, etc., R. Co. v. Hauks,

cised to avoid injury after the dog was discovered.[90] The application of statutes making proof of injury to an animal by a railroad prima facie evidence of negligence to dogs, geese, turkeys, etc, is discussed infra § 641, and the species of animals included, where liability arises from failure to fence, infra § 565.

§ 552. —— Effect of Stock Laws

Stock laws permitting stock to run at large generally have the effect of imposing liability on the railroad for ordinary negligence; stock laws prohibiting stock from running at large place such stock in the category of trespassing animals with respect to the railroad's liability.

It has been held that, where there is a municipal ordinance permitting stock to run at large, trains must be operated with reference to the right of the owner to do so and that the company must exercise at least ordinary care to avoid injuries;[91] and the same rule applies where the common-law rule which prohibits an owner from permitting his animals to run at large is not in force and there is no local stock law requiring animals to be restrained.[92] Where, however, the common-law rule as to stock running at large prevails, it has been held that the local regulations of a town or county cannot authorize a trespass on a railroad right of way[93] or impose any additional obligations on the company,[94] and that, although stock were at large pursuant to such a regulation, the company will not be liable in the absence of gross negligence or willful misconduct.[95]

Prohibiting animals from running at large. In localities where there are statutes or ordinances prohibiting stock from running at large, railroad companies have a right to presume that such animals will not be on the track,[96] even though the track is not fenced,[97] and are not required to exercise the same degree of care as in localities where it is lawful for stock to run at large.[98] As discussed infra § 566, however, such statutes or ordinances do not have the effect of releasing a railroad from its statutory obligation to maintain fences and cattle guards or from its liability under the statute if it fails to do so. Stock running at large in violation of prohibiting statutes or ordinances are trespassers,[99] and, under the majority rule as to liability of railroads for injuries to trespassing animals generally, discussed supra § 550, the railroad will not be liable except for gross negligence or injuries wantonly or willfully inflicted,[1] although the rule is otherwise in jurisdictions holding the view that a railroad must use ordinary or reasonable care with respect to trespassing animals on its tracks.[2] However, in jurisdictions where the statute provides that the degree of care must in all cases be ordinary and reasonable, it has been held that what constitutes this degree of care depends on the circumstances, including the application of stock laws in the particular locality, and that in such locations the requirement of reasonable care may be met, although less vigilance and watchfulness are used than would be required in others[3] The rule requiring ordinary care of a railroad engineer after he discovers a trespassing animal on the track, discussed infra § 606, applies to animals at large in violation of stock laws.[4]

An animal is not at large where it is shown that the injury was sustained in plaintiff's inclosure, used by him as a pasture, and through which the railroad has merely a right of way,[5] but where the animal was killed at a point where the railroad crosses a public highway along which the animal was roaming at will, the fact that the highway was on plaintiff's premises does not alter the fact that the animal was at large in violation of the stock law;[6] and an animal is at large within the meaning of the statute, even though it has escaped from a

14 S.W. 691, 78 Tex. 300, 11 L.R.A. 383.

90. Tenn.—Fink v. Evans, 32 S.W. 307, 95 Tenn. 413.
Liability as affected by duty to give signals generally see infra § 595

91. Minn.—Fritz v. First Div. St. Paul, etc., R. Co., 22 Minn. 404.

92. Tex.—Houston, etc., R. Co. v. Garrett, Civ.App., 160 S.W. 111.

93. Mich.—Williams v. Michigan Cent. R. Co., 2 Mich. 259, 55 Am.D. 59.
N.Y.—Tonawanda R. Co. v. Munger, 5 Den. 255, 49 Am.D. 239, affirmed 4 N.Y. 349, 53 Am.D. 384.

94. Ind.—Hanna v. Terre Haute, etc., R. Co., 21 N.E. 903, 119 Ind. 316.
52 C.J. p 24 note 87.

95. Ind.—Hanna v. Terre Haute, etc., R. Co., supra.
N.Y.—Tonawanda R. Co. v. Munger, 5 Den. 255, 49 Am.D. 239, affirmed 4 N.Y. 349, 53 Am.D. 384.

96. Tex.—International, etc., R. Co. v. Dunham, 4 S.W. 472, 68 Tex. 231, 2 Am.S.R. 484.
52 C.J. p 24 note 90.

97. Tex.—Evans v. Sherman, etc., R. Co., 37 S.W. 93, 14 Tex.Civ.App. 437.

98. S.C.—Griffith v. Atlantic Coast Line R. Co., 64 S.E. 222, 82 S.C. 252.
52 C.J. p 25 note 92.

99. Tex.—Missouri, etc., R. Co. v. Scofield, Civ.App., 98 S.W. 435.
52 C.J. p 25 note 94.

1. Tex.—Texas & N. O. R. Co. v. Kaderli, Civ.App., 33 S.W.2d 832, error dismissed
52 C.J. p 25 note 95.

2. N.C.—Roberts v. Richmond, etc., R. Co., 88 N.C. 560.
S.C.—Simkins v. Columbia, etc., R. Co., 20 S.C. 258.

3. Ga.—Aycock v. Callaway, 51 S.E.2d 53, 78 Ga.App. 219.
52 C.J. p 25 note 98

4. N.D.—Cumming v. Great Northern R. Co., 108 N.W. 798, 15 N.D. 611.
52 C.J. p 25 note 1.

5. S.C.—Simkins v. Columbia, etc., R. Co., 20 S.C. 258.

6. Minn.—Johnson v. Minneapolis, etc., R. Co., 45 N.W. 152, 43 Minn. 207.

good inclosure without the fault of the owner.[7] A local law purporting to prohibit animals at large, which does not conform to statutory requirements, does not affect the liability of a railroad company for injuries to animals.[8] A statute providing that, where a bull is allowed to run at large, any person may castrate the animal after notice to the owner does not have the effect of prohibiting the animal to be at large so as to affect the liability of a railroad for injuries to such animal.[9]

§ 553. Frightening or Attracting Animals

A railroad company is not liable for injuries to animals resulting from their fright, unless the company was negligent in doing the thing which caused the fright or failed to exercise due care to avoid injury to the animals after discovering their fright; the company is liable for injuries proximately resulting from its negligence in the placing or maintaining of attractive substances on its tracks without taking due precautions to protect animals from passing trains.

A railroad company is not liable for injuries to animals due to fright caused by the noises necessarily incident to the operation of trains, such as the escape of smoke and steam and the use of whistles and bells as signals,[10] except where such noises were made negligently or wantonly,[11] in which case the company will be liable not only for injuries to the animals but also for injuries done by them in flight to other animals,[12] or, as discussed infra § 989, to persons and property.

So if the acts are not done in an unusual or improper manner the railroad company will not be liable for injuries caused by animals being frightened by noises merely because they were made unnecessarily,[13] or designedly to frighten animals away from the track and prevent their being injured by the train,[14] or by the crossing signals which it is the duty of the company to give,[15] especially at points where such signals are expressly required by statute,[16] and even at points expressly excepted from the statutory requirement, if the giving of the signal was proper under the particular circumstances.[17]

Where animals are frightened merely by the approach of trains, the company will not be liable in the absence of any negligence in the operation of the train or failure to exercise ordinary care to avoid the injury,[18] or in the case of proved negligence not shown to have been the proximate cause of the injury;[19] but it will be liable if the fright of the animal was due to the train being operated in a negligent manner,[20] or if after discovering the fright and danger of the animal the injury could, by the exercise of ordinary care, have been avoided.[21] There is no absolute obligation on the railroad in such cases to stop[22] or to use the greatest degree of care, ordinary care being all that is required.[23] If, after discovering the danger, the engineer did all that could be done reasonably to avoid the injury, the railroad is not liable.[24] It is also the duty of the railroad, in arranging its depot grounds,[25] and team tracks in its freight yards,[26] to take into consideration the liability of teams to be frightened by passing trains and to use reasonable care in guarding against this danger.

Attracting animals. It is negligence on the part of a railroad company to leave on its tracks anything, such as salt, hay, or grain, calculated to attract animals to the track, without taking reasonable precautions against any resulting injury to the animals from passing trains,[27] or if it fails to exer-

7. Tex.—Missouri, etc., R Co v. Tolbert, Civ.App., 90 S W 508

8. Tex.—Missouri, etc., R Co v Tolbert, 101 S W. 206, 100 Tex 483

9. Mo.—Mumpower v Hannibal, etc, R Co, 59 Mo. 245.
52 C J p 25 note 5.

10. U S.—Buster v. Humphreys, C. C Mo., 34 F 507.
52 C J p 25 note 11.

11. Tex.—Panhandle & S F. Ry Co v. Williams, Civ App, 38 S W.2d 880.
52 C J p 25 note 12.

12. Ind.—Billman v. Indianapolis, etc, R. Co., 76 Ind. 166, 40 Am R 230

13. Okl.—Chicago, etc, R Co. v. Hine, 158 P 597, 59 Okl 143.
52 C J. p 25 note 15.

14. Ark.—St Louis, etc, R. Co v. Conger, 105 S W. 1177, 84 Ark 421.

Ga.—Southern R Co. v. Puryear, 58 S E 306, 2 Ga App. 75.

15. Ga.—Louisville, etc, R. Co. v. Roberts, 67 S E 690, 7 Ga.App. 562
52 C J. p 25 note 17

16. Kan.—Manhattan, etc., R. Co v. Stewart, 2 P. 151, 30 Kan. 226.

17. N Y.—Mayer v. New York Cent, etc, R. Co, 8 N Y S 461, 55 Hun 608, affirmed 30 N.E 867, 132 N. Y. 579

18. Ark.—St Louis Southwestern R Co. v. Conger, 105 S.W. 1177, 84 Ark 421.
52 C J p 26 note 20.

19. Ark.—St. Louis Southwestern R Co v. Conger, supra.

20. Tex.—Texas, etc, R Co v. Anderson, 2 Tex.A Civ.Cas § 203

21. Tenn.—Nashville, etc, R. Co v Ford, 201 S W. 755, 139 Tenn 505.
52 C J p 26 note 23.

22. Miss.—Mobile, etc, R Co v. Kea, 66 So. 735, 108 Miss. 389

23. Ala.—Garth v Nashville, etc, R Co, 65 So 166, 186 Ala 145.
52 C J. p 26 note 25.

24. Ala.—Nashville, etc., R. Co v Garth, 59 So 640, 179 Ala 162, 46 L R.A ,N S, 430
Miss.—Mobile, etc, R Co v Kea, 66 So. 735, 108 Miss. 389.

25. N Y.—Rill v Rome, etc., R. Co, 23 N Y Wkly Dig 416.
52 C.J. p 26 note 27.

26. Mo.—Duncan v. Missouri, etc., R Co, 133 S W. 369, 152 Mo App. 284
52 C J. p 26 note 28

27. Ga.—**Corpus Juris cited in** Savannah & Atlanta Ry Co. v De Busk, 23 S E 2d 529, 531, 68 Ga. App. 529
52 C J. p 26 note 29.

cise ordinary care in discovering and thereafter removing within a reasonable time such substances if left on the track by persons not connected with the railroad company.[28] The existence of the attracting substance on the track constitutes a prima facie case of the railroad's negligence,[29] and the burden is on the railroad to show that it used reasonable care to avoid the injury.[30]

A railroad will not be liable, however, merely for leaving cars loaded with such substances for shipment standing on its tracks if they are not left for an unreasonable time,[31] or because it leases a portion of its right of way to be used for the purpose of a grain elevator,[32] or uses salt as a solvent for thawing out snow and ice from its switches,[33] or plants attractive vegetation on the roadbed, where the roadbed is on a dirt fill and the vegetation is intended to make the fill more secure,[34] or where animals are attracted to the track by salt or foodstuffs left exposed by third persons at buildings on the right of way which are not used by, or under the control of, the railroad company.[35]

§ 554. Place of Accident

Generally speaking, a railroad company is liable for injuries to animals resulting from its failure to use due care wherever they may occur; the care to be exercised at particular places must be commensurate with the danger reasonably to be apprehended.

A railroad company is liable for injuries to stock due to the negligence of its servants or agents wherever they may occur,[36] and the care to be exercised at particular places must be commensurate with the danger reasonably to be apprehended.[37] A railroad will be liable for injuries to animals due to a failure to keep its stations and grounds about them safe for the approach and use of persons doing business at such places,[38] but not for injuries to animals caused by the owner driving them over a portion of the grounds not designated for that purpose.[39] A railroad will be liable for injuries to animals caused by a failure to provide a safe and proper place for the delivery of freight,[40] or, where its tracks are laid in the streets of a town or city, for injuries due to negligence in the operation of its trains.[41] So, also, where a person stands a team at a place designated by its agent, for the purpose of transacting business with the railroad, the company will be liable for injury to the team by trains under its control;[42] but if the person had no right or authority to be at the place at the time of the injury and was there without the knowledge of the company, it owes him no duty to use due care unless and until the dangerous position of his team is discovered.[43]

§ 555. —— Accidents at Public Crossings

A railroad company is liable for injuries to animals occurring at public crossings resulting from the company's failure to use due care commensurate with the danger at such crossing.

In operating a railroad across a public highway the company must exercise ordinary care and diligence to prevent injury to animals rightfully on the highway,[44] and if the company by the mode of constructing its tracks or adjacent buildings unnecessarily makes a crossing particularly dangerous it must adopt corresponding precautions to prevent injuries.[45] It is not necessary to prove the railroad guilty of gross negligence to establish its liability, failure to use ordinary care under the circumstances being sufficient.[46] Where recovery is sought under a statute or charter restricting liability to particular crossings, liability is established only by bringing the case fully within the statutory terms and conditions.[47] Under a statute requiring

28. Mo.—Morrow v. Hannibal, etc., R. Co., 29 Mo App. 432—Brown v. Hannibal, etc., R. Co., 27 Mo App 394.

29. Ark.—Little Rock, etc., R. Co. v Dick, 12 S W. 785, 52 Ark. 402, 20 Am.S R. 190

30. Ark.—Little Rock, etc., R. Co. v. Dick, supra.

31. Mo.—Schooling v. St Louis, etc., R. Co., 75 Mo. 518—Harlan v. Wabash, etc., R. Co., 18 Mo.App. 483

32. Mo.—Gilliland v. Chicago, etc., R. Co., 19 Mo.App. 411.

33. Miss.—Louisville, etc., R. Co v. Phillips, 12 So. 825.
W.Va.—Kirk v. Norfolk, etc., R Co, 24 S E. 639, 41 W Va 722, 56 Am S.R 899, 32 L R A. 416.

34. Ga.—Savannah & Atlanta Ry. Co. v. De Busk, 23 S E 2d 529, 68 Ga App. 529.

35. Mo.—Burger v. St. Louis, etc, R Co, 27 S W. 393, 123 Mo. 679—Whitsides v. St. Louis, etc., R. Co., 58 Mo App 655.

36. Ala.—Mobile, etc., R. Co. v. Williams, 53 Ala. 595.

37. N.H.—Dowse v. Maine Cent. R. R, 20 A 2d 629, 91 N.H 419.
N.D.—Bishop v. Chicago, etc, R. Co, 62 N.W. 605, 4 N D. 536.

38. Ga.—Central R. Co. v. Gleason, 72 Ga. 742.
52 C J. p 27 note 41.

39. Ga.—Central R. Co. v Gleason, 69 Ga 200
Tex.—St Louis Southwestern R Co v, Rea, Civ App., 202 S.W. 812.
Liability with respect to trespassing animals see supra § 550.

40. Mass.—Bachant v. Boston, etc, R Co, 73 N.E 642, 187 Mass. 392, 105 Am S.R. 408.

41. Utah.—Smith v. San Pedro, etc, R. Co, 100 P. 673, 35 Utah 390.

42. Mass.—Bachant v. Boston, etc., R Co., 73 N E 642, 187 Mass. 392, 105 Am S.R. 408

43. Ala.—Brown v. Central of Georgia R. Co., 64 So 581, 185 Ala 659
52 C J p 27 note 47.

44. Kan.—Lane v. Kansas City, etc, R Co, 3 P 341, 31 Kan. 525.
52 C J. p 27 note 49
Duties and liabilities with respect to private crossings see infra §§ 582–592

45. N J.—Pennsylvania R. Co. v. Matthews, 36 N J Law 531.

46. Kan.—Lane v. Kansas City, etc, R. Co, 3 P. 341, 31 Kan. 525.
52 C.J. p 27 note 51.

47. N C.—Coon v. North Carolina R. Co, 65 N.C. 507.
52 C.J. p 27 note 52.

a railroad to restore a highway to its former state after constructing the railroad, it is liable for injuries caused by its failure to do so,[48] but not liable for injuries caused by a ditch at a crossing not shown to be constructed or caused by the railroad in building its road.[49] In the absence of evidence of negligence or failure in the performance of statutory duties, the railroad is not liable [50]

Failure to maintain gates or flagman. If a railroad company is required by a city ordinance to construct gates at street crossings and keep them closed when trains are passing, a failure to do so is negligence which will render the company liable for any injuries to animals occasioned thereby,[51] but, in the absence of statute or an order made pursuant to statutory authority, a railroad is not liable for failure to maintain gates or a flagman at a crossing.[52]

Defective crossings. Where a railroad crosses a public highway, it is the duty of the company to make and maintain a good and sufficient crossing, so constructed that the public can cross with teams and vehicles with reasonable safety and convenience,[53] and in case of failure to do so it will be liable for injuries to animals due to defects in the crossing itself,[54] or injuries done by its trains at crossings owing to the improper construction or condition of the crossing,[55] and, where it is the duty of a railroad to maintain bridges that carry a highway over the track, it is liable for injuries caused by defects in a bridge,[56] regardless of whether or not it built the bridge [57] In the absence of a statutory requirement to repair, however, a railroad is not liable for injuries due to defects in a culvert at a point where one highway terminates in but does not cross another highway along which the railroad runs.[58]

Obstructions and standing cars. A railway company will be liable for injuries to animals due to its wrongfully obstructing the crossing of a public highway,[59] as by leaving its trains standing on a crossing for an unreasonable length of time;[60] but an obstruction of a highway crossing for a reasonable length of time incidental to the necessary operation of its trains does not make the railroad liable [61] Where cars are left standing near a crossing but not so as in any way to obstruct it, the company will not be liable for injury to an animal struck by a moving train in the absence of negligence in the operation of the train.[62] It is not necessary that the particular injury should have been foreseen in order to render the railroad liable for wrongfully obstructing a public highway, it being sufficient if it was reasonably to be expected that an injury might result.[63]

§ 556. Willful, Wanton, or Unauthorized Acts of Railroad Employees

Railroad companies may be held liable for injuries to animals caused by willful or wanton conduct of their employees if within the general scope of their employment.

Following the general rules as to liability of a master for injuries to third persons resulting from willful or malicious acts of his servant, discussed in Master and Servant § 572, railroad companies are liable for injuries to animals caused by the willful, wanton, or reckless conduct of their employees if within the general scope of their employment,[64] although the specific act is not authorized,[65] or is done at a time or in a manner contrary to an express order of the company;[66] but the company will not be liable where the servant was not engaged about the business of the company at the time of the injury but was on business of his own or another entirely disconnected from the service which he had engaged to render,[67] or where, although at

48. Okl.—Atchison, etc, R Co. v Wooley, 189 P 180, 78 Okl 109

49. Wis—Sutton v Chicago, etc, R Co, 73 N W 993, 98 Wis 157

50. Tenn—Southern R Co v Owen, 215 S W 270, 142 Tenn 1
Tex—Houston, etc, R Co. v Peterson, Civ App., 227 S.W. 747

51. Kan—Missouri Pac R Co v. Hackett, 38 P 294, 54 Kan 316, 28 L R A. 696.
52 C.J. p 27 note 57.

52. N Y—Martin v. New York Cent, etc, R Co., 45 N.Y.S 925, 20 Misc 363.

53. Ill.—Peoria, etc, R Co v Miller, 11 Ill App 375
Iowa—Meeker v Chicago, etc, R. Co, 21 N W 120, 64 Iowa 641

54. Ind—Evansville, etc, R. Co v. Carevener, 14 N E 738, 113 Ind 51.
52 C.J p 27 note 61

55. Kan—Atchison, etc, R Co. v Miller, 18 P 486, 39 Kan 419.
52 C J. p 27 note 62

56. Ala—Southern R. Co. v Taylor, 42 So 625, 148 Ala 52
Ark—Payne v. Stockton, 229 S W 44, 147 Ark 598.

57. Ala—Southern R. Co. v Taylor, 42 So 625, 148 Ala 52

58. Mo—Ott v. Kansas City, etc., R Co, 58 Mo App 502.

59. Ala—Alabama Great Southern R Co v. Clark, 27 So 916, 126 Ala 141.
S C—Murray v. South Carolina R Co, 44 S C L 227, 70 Am D 219

60. Ind—Grimes v Louisville, etc, R. Co, 30 N E 200, 3 Ind App. 573.
S.C—Murray v. South Carolina R. Co, 44 S C.L 227, 70 Am.D. 219.

61. Mo—Fife v Chicago, etc, R. Co, 161 S.W 300, 174 Mo App 655.

62. U S.—Hyer v. Chamberlain, C C. S C, 46 F 341.

63. Ind.—Grimes v Louisville, etc., R. Co., 30 N E 200, 3 Ind App. 573.

64. Ga—Louisville, etc, R. Co. v. Harris, 91 S E 928, 19 Ga.App. 502.
52 C.J. p 74 note 45.

65. Ind.—Banister v. Pennsylvania Co, 98 Ind 220
Pa—Philadelphia, etc., R Co, v. Brannen, 2 A. 429, 1 Pa Cas. 369.

66. Pa—Philadelphia, etc., R. Co. v. Brannen, supra.

67. Mo.—Cousins v Hannibal, etc., R Co, 66 Mo 572.
52 C.J. p 74 note 48.

the time of the injury the servant was engaged in the performance of the services which he had engaged to render, the act which occasioned the injury did not pertain to the duties of that employment.[68] The railroad is liable where an employee after hours, while on business of his own entirely disconnected from the service, does an act and in connection therewith omits to perform a duty owed to the railroad.[69]

§ 557. Persons Entitled to Damages

A person who is not the absolute owner of an injured animal may nevertheless have such a special property therein as to entitle him to damages.

A person, although not the absolute owner of an animal, may have a special property therein which will entitle him to damages for its injury by a railroad company,[70] notwithstanding a statute in terms gives the right of action to the owner;[71] and, in some states, recovery for injuries to stock is extended by the express terms of the statute to any person owning the stock in his own right or who has a "special ownership" therein.[72]

B. FENCES AND CATTLE GUARDS

§ 558. Liability as Dependent on Duty to Erect and Construct

The liability of a railroad company for injuries to animals frequently depends on whether, in the circumstances under which the accident occurred, the company was under a duty to have erected and maintained fences and cattle guards, and is discussed infra §§ 559–574.

Examine Pocket Parts for later cases.

§ 559. —— At Common Law

In the absence of a charter or statutory provision requiring it to construct and maintain fences and cattle guards, a railroad company is not liable for injuries to animals resulting from its mere failure to do so; but the failure to fence, even when not required by statute, may constitute negligence in a particular case.

Where not required by the terms of its charter or express statutory provision to construct and maintain fences and cattle guards, a failure to erect and maintain fences and cattle guards will not of itself render a railroad liable for injuries to animals.[73] However, even where railroads are not required by law to construct any fences, they must exercise ordinary care to avoid injury to animals which, while lawfully at large, may wander on the track;[74] and while the failure to fence is not necessarily a want of ordinary care,[75] it may constitute negligence in a particular case.[76] The railroad may at any time remove structures voluntarily constructed without incurring liability, independently of negligence, for injuries resulting therefrom.[77]

§ 560. —— When Required by Statute

Compliance with a fencing statute does not relieve a railroad company from liability for injuries resulting from negligence in the operation of its trains; noncompliance may subject the railroad company to liability under the terms of the statute regardless of negligence, and such noncompliance may also constitute negligence so as to support a recovery on the basis of common-law negligence.

Where a railroad constructs and maintains sufficient fences and cattle guards as required by law, it is not liable for injuries to animals in the absence of proof of negligence;[78] but the fact that fences and cattle guards are maintained does not relieve the company from liability on the ground of negligence in the operation of its trains,[79] although in some states the railroad company is not liable in

68. Mo.—Cousins v. Hannibal, etc., R. Co., supra
S.C.—Cobb v. Columbia, etc., R. Co., 15 S.E. 878, 37 S.C. 194.

69. N.Y.—Chapman v. New York Cent. R. Co., 88 N.Y. 369, 88 Am.D. 392
52 C.J. p. 74 notes 50, 51.

70. Neb.—Union Pac. R. Co. v. Meyer, 107 N.W. 793, 76 Neb. 549
52 C.J. p. 88 note 41
Parties in actions for injuries to animals see infra § 634

71. Ind.—New York, etc., R. Co. v. Auer, 6 N.E. 330, 106 Ind. 219, 55 Am.R. 734.
52 C.J. p. 88 note 44.

72. Ark.—St. Louis, etc., R. Co. v. Norton, 73 S.W. 1095, 71 Ark. 314.

73. La.—Friedman's Estate v. Texas & Pac. Ry. Co., 25 So.2d 88, 209 La. 540—Edwards v. Thompson, App., 2 So.2d 493.
52 C.J. p. 28 note 73.

74. U.S.—Gulf, etc., R. Co. v. Washington, Ind.T., 49 F. 347, 1 C.C.A. 286.
52 C.J. p. 28 note 75.

75. La.—Friedman's Estate v. Texas & Pac. Ry. Co., 25 So.2d 88, 209 La. 540, 160 A.L.R. 1223—Moody v. Texas & P. Ry. Co., App., 37 So.2d 346—Smith v. Thompson, App., 185 So. 71
N.M.—Hittson v. Chicago, R. I. & P. Ry. Co., 86 P.2d 1037, 43 N.M. 122.
52 C.J. p. 28 note 76.

76. La.—Friedman's Estate v. Texas & Pac. Ry. Co., 25 So.2d 88, 209 La. 540.
Tex.—Bigham v. Hines, Civ.App., 226 S.W. 512.
52 C.J. p. 28 note 74.

77. Ky.—McKee v. Cincinnati, etc., R. Co., 43 S.W. 241, 102 Ky. 253, 19 Ky.L. 1270.
52 C.J. p. 28 note 79.
Failure to repair fence voluntarily erected see infra § 577.

78. Tex.—St. Louis Southwestern R. Co. v. Cox, Civ.App., 248 S.W. 1101.
52 C.J. p. 29 note 90.
Duty to construct and maintain fences and cattle guards see supra §§ 176–181.

79. Ky.—Louisville, etc., R. Co. v.

the absence of gross negligence or intentionally inflicted injury[80] or unless the injury was wantonly or willfully inflicted.[81] Compliance with the fencing statute can in no way justify an injury wantonly inflicted.[82] Where a statute does not require the railroad to fence its line of tracks but relieves a company whose tracks are fenced of the burden, resting on a company whose tracks are unfenced, of proving its freedom from negligence, adequate fencing does not affect the liability of the railroad.[83]

Noncompliance with statute Where animals go on a railroad right of way by reason of the failure of the company to maintain fences or cattle guards as required by law, and are injured, the company is liable regardless of any question of negligence in the operation of its trains,[84] this being the rule where the statutes so provide,[85] and likewise where there is no express provision to that effect in the statute.[86] Liability in such case does not depend on a showing of negligence,[87] unless common-law negligence rather than the violation of a statutory duty is made the basis of the recovery sought.[88] Conversely, defendant cannot avoid liability by proof of the absence of negligence,[89] or proof that, with respect to the management of the train, the accident was unavoidable[90]

The same rule of absolute liability for injuries to animals due to failure properly to fence attaches under a statute which does not in express terms require the railroad to fence but which merely subjects the railroad to liability for injuries to stock on unfenced portions of its line,[91] although the rule is otherwise under a statute which merely provides that if the right of way is not adequately fenced the railroad company must prove its operatives free from negligence.[92] Moreover, the violation of the statutory duty to fence may be in itself an act of negligence sufficient to support a recovery at common law,[93] although it has been held that where a statute does not require a railroad to fence its right of way, but merely imposes liability for injuries in the absence thereof, the absence of a fence cannot of itself support a recovery on the

Simmons, 3 S W. 10, 85 Ky. 151, 8 Ky L 896.
52 C J p 29 note 91

80. Tenn —Greer v Nashville, etc, R Co, 56 S.W 850, 104 Tenn 242

81. N Y —Bell v. Erie R Co, 171 N.Y S. 341, 183 App Div. 608.
52 C J. p 29 note 94.

82. Ind.—New Albany, etc, R. Co v McNamara, 11 Ind 543

83. La —Friedman's Estate v Texas & P. Ry. Co, 25 So 2d 88, 209 La 540, 163 A L R. 1228.

Statute "encourages" fencing

The statute relative to a railroad's fencing its right of way encourages railroads to adequately and properly fence their rights of way, which are their private property, by offering freedom from responsibility for the killing of stock thereon when so fenced —Smith v. Thompson, LaApp., 185 So. 71.

84. Tenn.—Southern Ry. Co v. Lewis, 196 S W.2d 321, 29 Tenn App 261.
51 C J p 718 note 54 [a]—52 C.J. p 29 note 96.

Statute limited to crop damage

Statute providing for damages for railroad's failure to fence tracks held to relate to loss suffered by landowners whose crops are injured by trespassing animals that pass into inclosure over insufficient cattle guards and not to relate to damages for injury to trespassing animals or injury animals receive in attempt to pass over cattle guards.—Southern Ry. Co. v. Morrell, 89 S.W.2d 161, 169 Tenn. 463.

85. N Y —Foster v Erie R Co, 299 N.Y S 617, 164 Misc 709.
Tex —Fort Worth & D C Ry Co v. Welch, Civ App, 183 S W 2d 730, error refused

Validity of statute

The development of transportation by motor carriers, since enactment of statute making railroads liable for stock killed by trains on unfenced right of way, has not rendered statute unconstitutional by depriving railroad of "equal protection of law" and "due process of law" because of discrimination between railroads and other carriers on which no such liability is imposed —Fort Worth & D C Ry. Co. v. Welch, Tex.Civ App, 183 S W 2d 730, error refused.

Construction of statute

Statute imposing liability on railroad corporation for injury to cattle, horses, sheep, and hogs, inflicted by its agents, engines, or cars, as result of failure to provide a proper fence against such stock, must be strictly construed and cannot be extended.—Foster v. Erie R Co, 299 N.Y.S 617, 164 Misc 709.

86. N.M —Hittson v. Chicago, R. I & P. Ry. Co, 86 P.2d 1037, 43 N.M. 122.
52 C J. p 29 note 97.

87. Ill.—Toledo, etc., R. Co. v. Logan, 71 Ill 191.
Mo —Nall v St Louis, etc, R. Co, 59 Mo. 112.

88. Ill.—Terre Haute, etc., R. Co. v. Augustus, 21 Ill 186.
Ind —Campbell v. Indianapolis, etc., Tract. Co, 79 N.E. 223, 39 Ind App 66
Common-law liability see supra § 559

89. Va —Norfolk, etc, R Co v. Johnson, 22 S E 505, 91 Va 661
52 C.J p 29 note 3

90. Tenn —Cincinnati, etc, R Co v. Stonecipher, 32 S W 208, 95 Tenn 311
52 C J p 30 note 4.

91. Tenn —Louisville & N. R Co v. Gillespie, 172 S W 2d 1015, 26 Tenn App 390.
52 C.J p 30 note 6

Designation of railroad's conduct as negligence

The railroad's liability grows out of its negligence in failing to reframe, in the absence of a sufficient fence, from killing or injuring plaintiff's livestock by locomotive or cars on any portion of the line which it is lawful to fence; but if the killing or injury occurs in any other way or on parts of the line which it is unlawful to fence, liability must be based on a showing of negligence generally — Payne v. Clifford, 211 P. 566, 24 Ariz 489.

92. La —Friedman's Estate v Texas & P. Ry Co, 24 So 2d 167, reversed on other grounds 25 So 2d 88, 209 La 540, 163 A L R 1228— Daughdrill v. Texas & N O R Co, App., 20 So 2d 644—Smith v Thompson, App, 185 So 71—Jeter v Texas & P Ry. Co, App, 149 So 144.

93. Kan —Roman v. St Louis-San Francisco R Co., 245 P. 115, 120 Kan 585.
Mo.—Scott v. Atchison, T. & S F R. Co, App., 32 S W.2d 139—Shell v. Missouri Pac R Co., 112 S.W. 39, 132 Mo.App 528.

ground of negligence.[94] Liability of the railroad cannot be grounded on its violation of a fencing statute held to be unconstitutional.[95]

Railroad corporations which are not within the terms of the fencing statute cannot be held liable thereunder.[96] Particular statutes have been held to impose liability on corporations operating lines within the state,[97] on railroads operated by mining and lumber companies,[98] and on railroads incorporated or constructed before the enactment of the fencing statute,[99] unless exempted therefrom by the terms of their charters[1] or by the terms of the general law.[2] However, a special charter in terms protecting it from interference which would detract from its profits does not constitute an exemption from the operation of the fencing statute.[3] Some statutes,[4] but not others,[5] have been held to impose liability for noncompliance with fencing requirements on railroads operated by electricity.

Places not required by statute to be fenced. Where animals go on a railroad track at places where the railroad company is not obliged to fence or construct cattle guards, within the rules discussed infra §§ 569–574, and are killed or injured, the case must be decided on common-law principles as if no statute on the subject of fencing existed,[6] and there can be no recovery against the railroad in the absence of proof that the injury was caused by its negligence,[7] as where the accident occurs on the station grounds,[8] or, as discussed infra § 573, at the crossing of a public highway. The degree of care required and consequent common-law liability vary according to whether the animal injured was rightfully or wrongfully on the track,[9] the company being liable for injuries due to a failure to exercise ordinary care and diligence,[10] unless the animal was unlawfully at large or a trespasser on the track, in which case, as discussed infra § 566, the company will be liable only for gross negligence or injuries wantonly or willfully inflicted

§ 561. —— Effect of Agreement or Waiver

A railroad company agreeing with an adjoining landowner to fence its tracks is liable for injuries to animals occasioned by its failure to carry out the agreement; an adjoining landowner who has agreed to construct fences or cattle guards or who has otherwise waived his rights to recover cannot maintain an action against the railroad company for injuries to animals due to the absence of fences or guards.

Where a railroad company in consideration of the grant of a right of way or other valuable consideration contracts with an adjoining landowner to fence its tracks, it is liable to such owner for injury to animals occasioned by its failure to construct or maintain such fences in accordance with the terms of its agreement.[11] Liability follows breach of the agreement regardless of the railroad's compliance with its statutory obligations to fence.[12]

Waiver or agreement of adjoining landowner. An adjoining owner cannot maintain an action against the railroad company for injuries to animals due to the absence of fences or cattle guards which he has agreed to construct and maintain or where he has otherwise waived his rights to recover,[13] and the railroad has not been negligent in its operations;[14] but a railroad company cannot by contract or agreement with an adjoining landowner with respect to the building of a fence by the latter relieve itself of liability for the killing or injuring of livestock resulting from the company's negligence, since such a contract is void[15]

94. Tex.—Chicago, R. I. & G. Ry. Co. v. Rhone, Civ.App., 105 S.W.2d 707, error dismissed

95. Colo.—Denver, etc., R. Co. v. Shaw, 136 P. 1052, 56 Colo. 103—Colorado, etc., R. Co. v. King, 116 P. 142, 51 Colo. 181.

96. N.J.—Vandorn v. New Jersey, etc., R. Co., 8 A. 99, 42 N.J.Eq. 463.
52 C.J. p. 30 note 9.

97. N.Y.—Purdy v. New York, etc., R. Co., 61 N.Y. 353.

98. Mo.—Webb v. Southern Missouri, etc., R. Co., 92 Mo.App. 53

99. Pa.—Shurley v. New York, etc., R. Co., 15 A. 567, 121 Pa. 511.
52 C.J. p. 30 note 14.

1. Minn.—Whittier v. Chicago, etc., R. Co., 24 Minn. 394.

2. Mont.—Menard v. Montana Cent. R. Co., 56 P. 592, 22 Mont. 340
52 C.J. p. 30 note 16.

3. Ind.—Indianapolis, etc., R. Co. v. Kercheval, 16 Ind. 84.

4. Mo.—Morrison v. Kansas City, etc., R. Co., 145 S.W. 137, 162 Mo.App. 662
52 C.J. p. 30 note 12.

5. Ohio.—Brindle v. Cleveland, etc., R. Co., 4 Ohio App. 135.

6. Neb.—Clary v. Burlington, etc., R. Co., 15 N.W. 220, 14 Neb. 232
52 C.J. p. 28 note 81.

7. La.—Edwards v. Thompson, App., 2 So.2d 493.
52 C.J. p. 28 note 82.

8. Neb.—Cox v. Chicago, etc., R. Co., 126 N.W. 99, 87 Neb. 136.
52 C.J. p. 29 note 83.

9. Tex.—International, etc., R. Co. v. Cocke, 64 Tex. 151.

10. Iowa.—Whitbeck v. Dubuque, etc., R. Co., 21 Iowa 103.
Kan.—Prickett v. Atchison, etc., R. Co., 7 P. 611, 33 Kan. 748.

11. U.S.—Gulf, etc., R. Co. v. Washington, Ind.T., 49 F. 347, 1 C.C.A. 286
52 C.J. p. 30 note 20.

12. N.Y.—Thompson v. New York, etc., R. Co., 1 Thomps. & C. 411.

13. Cal.—Enright v. San Francisco, etc., R. Co., 33 Cal. 230.
52 C.J. p. 30 note 22.

Default beyond limitation period
The landowner does not acquire the right to maintain such an action by continuing his own default beyond the period of the statute of limitations.—Talmadge v. Rensselaer, etc., R. Co., 13 Barb., N.Y., 493.

14. Tex.—Evans v. Missouri-Kansas-Texas R. R. of Texas, Civ.App., 132 S.W.2d 915.

15. Ala.—Gulf, M. & O. R. Co. v. Scott, 27 So.2d 150, 32 Ala.App. 326, certiorari denied 27 So.2d 152, 248 Ala. 250.

Agreements releasing a railroad from liabilities to adjoining landowners for failure to fence are not binding on persons not parties to the contract or assenting thereto,[16] except under and to the extent of conditions imposed by statute;[17] nor are such agreements available as a defense to a second railroad not party or privy to the contract.[18] The waiver of one of several owners entitled to the statutory protection does not affect the rights of the other owners.[19] It is held by some authorities that a tenant is bound by his landlord's waiver or agreement,[20] although other authorities hold that a tenant, who has no notice and is not chargeable with notice of the waiver or agreement, is not bound thereby.[21]

A covenant in a deed of a right of way by which the landowner agrees to maintain the necessary fences runs with the land and estops all persons holding through or under him to maintain such actions to the same extent as the grantor himself;[22] but a personal agreement of the grantor does not run with the land or bind a subsequent owner;[23] nor does a conveyance of the right of way to the railroad with a release of its obligation to fence, but containing no covenant by the grantor to fence, affect the rights of a tenant of the grantor as against the railroad.[24] Covenants in a deed with respect to the maintenance of fences do not bind persons who are strangers thereto.[25] While an agreement between a railroad and a landowner does not affect the rights of third persons, a third person cannot recover where a lawful fence has been constructed and maintained by the landowner as he agreed to do,[26] and this is so regardless of whether the agreement was made before or after the enactment of the fencing statute.[27]

§ 562. —— Delegation of Duty to Third Persons

A railroad company ordinarily cannot avoid its liability resulting from failure to fence adequately by showing its agreement with a third person, imposing on the latter the duty to construct and maintain the fences.

A railroad company cannot avoid its liability for injuries to animals occasioned by the absence or defective condition of fences or cattle guards by showing that it had contracted with some third person to construct or maintain them and that the injury was due to a failure of such person to comply with his agreement,[28] unless, as discussed supra § 561, the owner of the injured animal is the same person who assumed the duty of maintaining the fences or is a party to, or otherwise bound by, his agreement.

§ 563. —— Prior Award of Damages or Compensation to Landowner

Under a statute to such effect, a railroad is relieved from liability for failure to fence as to owners who have been paid compensation for fencing; and in some jurisdictions, but not in others, this is the rule even in the absence of a statute specifically so providing.

Even in the absence of statute specifically so providing, it has been held that a railroad company is relieved from any liability for failing to maintain fences to a landowner who in the award of damages for the taking of his land is allowed compensation for this purpose,[29] especially where he received compensation therefor prior to the statute requiring railroads to fence,[30] although the road was not completed at the time of the enactment of the statute.[31] In other jurisdictions, however, it is held that a landowner who has been allowed compensation for building fences, but has failed to do so, may nevertheless recover for injuries to his stock.[32]

Under statutes in some jurisdictions, a railroad is relieved from liability for failure to fence as to owners who have been paid compensation for fencing,[33] but this statutory defense is not available to a railroad in an action grounded on its negligence independently of its liability for failure to fence.[34]

16. Iowa—Warren v K & D M R Co, 41 Iowa 484
52 C J p 30 note 25

17. Ill—Lynch v. Baltimore, etc, R Co, 88 N E 1034, 240 Ill. 567.
52 C J p 31 note 26

18. N Y—Shepard v. Buffalo, etc., R. Co, 35 N Y 641.

19. Mo—Parks v. Hannibal, etc., R Co, 20 Mo App. 440.
52 C.J p 31 note 28.

20. Ind—Indianapolis, etc, R Co v Petty, 25 Ind 413

21. Mo—Thomas v Hannibal, etc, R Co, 82 Mo 538.

22. N.Y.—Bell v Erie R Co, 171 N Y S. 341, 183 App Div. 608.
52 C.J. p 31 note 33.

23. Mo—Hawkins v St Louis, etc, R Co, App, 202 S W 1060
52 C J p 31 note 34

24. Ind—Cincinnati, etc, R Co. v. Hildreth, 77 Ind. 504

25. Ind—Cincinnati, etc, R Co v Ridge, 54 Ind 39
N Y—Corwin v. New York, etc, R Co, 13 N.Y 42

26. N.Y—Bell v Erie R Co, 171 N Y S. 341, 183 App Div 608

27. N.Y—Bell v Erie R Co, supra

28. Kan—Chicago, etc, R Co v. Hutchinson, 25 P. 576, 45 Kan 186
52 C J. p 31 note 40

29. Ill—Rockford, etc., R Co v Lynch, 67 Ill 149
52 C J. p 31 note 43

30. Wis—Johnson v. Milwaukee, etc., R Co, 19 Wis. 137.
52 C J p 31 note 44.

31. Mass—Baxter v. Boston, etc, R Co, 102 Mass 383

32. Ind.—Baltimore, etc, R Co v. Johnson, 59 Ind 188
52 C J p 31 note 46

33. Ky—Louisville, etc, R Co v. Belcher, 12 S W 195, 89 Ky 193, 11 Ky L 393
52 C J p 32 note 47

34. Ky—Louisville, etc, R Co v. Wilson, 204 S W. 72, 181 Ky. 322.

§ 564. —— Time for Construction

Where a statute expressly allows a certain time for construction of fences, a railroad company cannot ordinarily be held liable for injuries resulting from the absence of fences before the expiration of such time.

Where a statute expressly allows a certain time for construction of fences after the road is open for use or after the passage of the act creating the liability, it is necessary for plaintiff to show that this time had elapsed at the time of the injury complained of, if he bases his right to recover on the statute,[35] except in jurisdictions where the statute allowing a fixed term for construction is interpreted as merely providing an additional remedy, and as not taking away by repeal the rights of stock owners under other existing statutes to hold the railroad liable for failure to fence at any time without regard to the time when the road should be completed or put into operation.[36] Generally, however, if the statutory period has not elapsed, there can be no recovery unless actionable negligence in the operation of the train is shown;[37] nor will the fact that the railroad voluntarily constructed the fence and failed to keep it in repair before the lapse of the statutory period add to its obligation.[38] Where the statute provides that the time for construction shall be determined for each railroad by public authorities named therein after hearing, a railroad is not liable for failure to fence in the absence of the statutory determination.[39]

When statutory period begins to run. Under statutes requiring railroad companies to fence their tracks within a fixed period after the road is "open for use" without further qualification, the statutory period begins to run from the time when the railroad begins to operate its trains over it for construction purposes,[40] at the point where the animal entered.[41] The fact that the road is still under the control of the contractors does not change the liability of the railroad in that respect.[42]

§ 565. —— Species of Animal Injured

The species of animals, for injuries to which railroad companies are liable where such injuries result from failure to fence, depend on the language and provisions of the particular fencing statute.

Statutes requiring railroad companies to maintain fences or rendering them liable for injuries to animals where no fences are maintained are designed for the protection of all domestic animals and will be liberally construed to this effect and not restricted to the particular animals mentioned,[43] nor will a statute making a railroad liable for injuries to "animals" killed or injured, without specifying the kind or size of such animals, be limited to those of such size as would endanger the safety of trains in case of a collision.[44] So a statute requiring railroads to maintain fences sufficient to exclude "cattle, horses, sheep, and hogs" will be construed to include asses[45] and mules;[46] the words "horses, cattle, mules or other animals" will be construed to include hogs;[47] and the term "stock" will be applied to any live stock, including hogs as well as cattle and horses,[48] but not dogs.[49] Under a statute making railroads liable for all animals killed or injured except where the road is "enclosed by a good and lawful fence," the company will be liable for injuries to all animals as to which a good and lawful fence would be any protection,[50] including hogs which such a fence would exclude,[51] but not for injuries to animals which a good and lawful fence as defined by the general fence laws would not exclude,[52] the burden, however, being on defendant to show that the animal injured was within the exception.[53] Under a statute requiring the construction of hog-tight fences, the railroad

35. Colo.—Colorado, etc., R. Co. v. Neville, 92 P. 956, 41 Colo. 393
52 C.J. p. 32 note 53.

36. Ind.—Terre Haute, etc., Tract Co. v. Phillips, 97 N.E. 1014, 49 Ind. App. 643.

37. Ill.—Gilman, etc., R. Co. v. Spencer, 76 Ill. 192.

38. Ill.—Toledo, etc., R. Co. v. Miller, 45 Ill. 42.
52 C.J. p. 32 note 56.

39. Philippine.—Nate v. Manila R. Co., 36 Philippine 531.

40. Ill.—Rockford, etc., R. Co. v. Heflin, 65 Ill. 366.
52 C.J. p. 32 note 61.

41. Ill.—Toledo, etc., R. Co. v. Darst, 51 Ill. 365.

42. Ill.—Rockford, etc., R. Co. v. Heflin, 65 Ill. 366

43. Ill.—Ohio, etc., R. Co. v. Brubaker, 47 Ill. 462.
Mo.—Henderson v. Wabash, etc., R. Co., 81 Mo. 605.

44. Ind.—Indianapolis, etc., R. Co. v. Marshall, 27 Ind. 300
52 C.J. p. 32 note 66.

45. Ill.—Ohio, etc., R. Co. v. Brubaker, 47 Ill. 462

46. Ill.—Toledo, etc., R. Co. v. Cole, 50 Ill. 184.

47. Mo.—Henderson v. Wabash, etc., R. Co., 81 Mo. 605.

48. Iowa.—Lee v. Minneapolis, etc., R. Co., 23 N.W. 299, 66 Iowa 131.

49. Tenn.—Howard v. Nashville, etc., R. Co., 284 S.W. 894, 153 Tenn. 649, 46 A.L.R. 1530
52 C.J. p. 33 note 72.

50. Kan.—Missouri Pac. R. Co. v. Bradshaw, 6 P. 917, 33 Kan. 533.
Minn.—Halverson v. Minneapolis, etc., R. Co., 19 N.W. 392, 32 Minn. 88.

51. Iowa.—Lee v. Minneapolis, etc., R. Co., 23 N.W. 299, 66 Iowa 131
52 C.J. p. 33 note 74.

52. Kan.—Atchison, etc., R. Co. v. Yates, 21 Kan. 613.
52 C.J. p. 33 note 75.

53. Kan.—Missouri Pac. R. Co. v. Bradshaw, 6 P. 917, 33 Kan. 533.
Minn.—Halverson v. Minneapolis, etc., R. Co., 19 N.W. 392, 32 Minn. 88.

is liable for injuries to hogs escaping on to the track through an insufficient fence.[54]

Under statutes in other jurisdictions, the railroad is liable for injuries to "live stock running at large" if it does not fence,[55] and under these statutes, recovery has been allowed for injuries to a horse which had escaped from the control of the owner, although having on a halter and a bridle;[56] for injuries to a young colt which had wandered away from its mother, although the mother was under the owner's control,[57] for injuries to a steer which had strayed away from the rest of the herd and had been left behind without the herdsman's knowledge,[58] for injuries to a team of horses harnessed to a wagon which had broken away from where it had been hitched and escaped from the owner;[59] but not for injuries to a team of horses where the driver had fallen asleep from intoxication and the horses had wandered away from the road.[60]

§ 566. —— Trespassing Animals and Effect of Stock Laws

The fact that an animal was straying or trespassing when it was injured does not relieve a railroad company from liability for failure to fence as required by statute, nor does a stock law prohibiting the running of animals at large have such effect; but where a railroad is not required to fence, it is not liable for injuries to an animal at large in violation of a stock law in the absence of acts of negligence other than the failure to fence or, according to some authorities, in the absence of gross negligence or willfulness.

Provided the owner of the injured animal is entitled to the benefit of the fencing statute, under the rules discussed infra § 581, and provided the animal entered on the railroad right of way at a place where the statute applies, under the rules discussed infra §§ 569–574, the fact that the animal was straying or trespassing when it was injured does not release the railroad from its liability for failure to fence when the statute requires it.[61] Stock laws prohibiting the running at large of domestic animals do not relieve railroads from their statutory duty to maintain fences and cattle guards, or their liability for injuries due to their failure to do so,[62] although under the circumstances of some cases it has been held that, where stock is allowed to run at large in violation of law and the railroad has neglected its statutory duty to fence its tracks but is not guilty of any other negligence, plaintiff cannot recover.[63] However, where railroads are not required to fence and animals are unlawfully at large in violation of such laws, the company will not be liable except for gross negligence or injuries wantonly or willfully inflicted,[64] or, under a statute so stipulating, for negligence in the operation of its trains,[65] or where, although the animals are trespassers, the duty of the railroad company with respect to them is to exercise ordinary care;[66] but the rule is otherwise where the animals are not unlawfully at large in violation of such laws.[67] Where the statute does not require the railroad to fence but provides for its absolute liability for the killing of stock if it does not, and for its liability for negligent operation of its trains only, if it fences, a railroad which has not fenced is held absolutely liable for stock killed, even where the stock law prohibiting animals at large is in force.[68] Under statutes making a railroad liable if its road is not fenced "unless the injury complained of is occasioned by the willful act of the owner or his agent," it is held that recovery can be had, even though the animal was unlawfully at large when injured,[69] and even though the owner was guilty of negligence resulting in the animal's being at large,[70] and even though he permitted it to run at large in proximity to defendant's unfenced railroad track.[71]

§ 567. —— Place of Entry of Animal on Track

Ordinarily, it is the place of the animal's entry on the tracks rather than the place of the accident which fixes the railroad company's liability for failure to maintain adequate fences; the liability of the railroad for injuries to animals entering on its tracks from the high-

54. Kan.—Abbey v. Schaff, 194 P 190, 108 Kan. 85

55. Iowa.—Inman v. Chicago, etc., R Co., 15 N.W. 286, 60 Iowa 459.
52 C.J. p 33 note 80.

56. Iowa.—Welsh v. Chicago, etc., R Co., 6 N.W. 13, 53 Iowa 632

57. Iowa.—Smith v. Kansas City, etc., R. Co., 12 N.W. 619, 58 Iowa 622.

58. Iowa.—Valleau v. Chicago, etc., R. Co. 36 N.W. 760, 73 Iowa 723.

59. Iowa.—Inman v. Chicago, etc., R Co., 15 N.W. 286, 60 Iowa 459.

60. Iowa.—Grove v. Burlington, etc., R. Co., 39 N.W. 248, 75 Iowa 163.

61. Mo.—Kitsock v. Chicago, etc., R. Co., App., 226 S.W. 269.
52 C.J. p 33 note 89

62. Kan.—Atchison, etc., R Co v. Riggs, 3 P. 305, 31 Kan 622
52 C.J. p 33 note 91

63. Ill.—Peoria, etc., R. Co. v. Champ, 75 Ill 577.
52 C.J. p 33 note 92

64. Ind.—Indianapolis, etc., R Co v. McClure, 26 Ind. 370, 89 Am.D. 467
52 C.J. p 33 note 94

65. Tex.—Houston, etc., R. Co. v. Nussbaum, 94 S.W. 1101, 43 Tex Civ.App. 410
52 C.J. p 33 note 95.

66. Ohio.—McKiney v. Cleveland, C., C. & St. L. R Co., 177 N.E. 511, 39 Ohio App 346

67. Mo.—Gorman v. Pacific R Co., 26 Mo 441, 72 Am.D 220
52 C.J. p 34 note 96.

68. Tex.—Ft. Worth, etc., R. Co v. Polson, Civ.App., 106 S.W 429.
52 C.J. p 34 note 99.

69. Iowa.—Krebs v. Minneapolis, etc., R. Co., 21 N.W. 131, 64 Iowa 670

70. Iowa.—Krebs v. Minneapolis, etc., R. Co., supra.

71. Iowa.—Lee v. Minneapolis, etc., R Co., 23 N.W. 299, 66 Iowa 131.

way or from lands on which they have been trespassing depends on the particular statutes involved.

In an action against a railroad company for injury to animals due to a failure to maintain fences, it is the place where the animal entered on the track and not the place of the accident which fixes the liability;[72] and, similarly, it is the fenced or unfenced condition at the place where the animal entered on the track that determines who has the burden of proof as to negligence, where the fencing statute affects only the burden of proof,[73] as discussed generally supra § 560 If the entry was at a place where there should have been a fence but there was not the company is liable,[74] although the accident occurred at a point where no fencing was required;[75] or where a sufficient fence was maintained;[76] while, on the other hand, the company is not liable if the animal entered at a place where there was a sufficient cattle guard,[77] or where the company was not required to fence,[78] although the accident occurred where the company should have maintained a fence but failed to do so,[79] unless the passage of the animal along the track from the place of entry, which was not a place required to be fenced, to the place of injury was due to the absence of a cattle guard at an intermediate place which it was the duty of the company to close with a cattle guard.[80] The fact that there were openings in the fence, made for the use and convenience of plaintiff which it was not the railroad's duty to keep closed, through which the animals might have gone on to the track, will not affect the liability of defendant railroad if the animals entered the right of way at some other opening which it was the railroad's duty to keep closed.[81]

Entry from highway. Where railroad companies are required by law to maintain fences and cattle guards, the company will be liable for injuries to animals which go on the track from a highway running parallel therewith, where no fence is maintained,[82] even though the railroad's right of way occupies a part of the public highway,[83] or for injuries to animals which enter at the intersection of a highway owing to the absence, or defective condition, of cattle guards[84] or end or wing fence connecting therewith[85] If a cattle guard sufficient to turn ordinary stock is maintained, the company is not liable for an injury to an animal which enters from a highway by jumping over such cattle guard.[86]

Under statutes requiring fences and cattle guards and providing that "until such fences and cattle guards shall be duly made, the corporation shall be liable for all damages which shall be done by their engines to animals" on their tracks, the company is liable without regard to whether at the time of entry the animals were rightfully or wrongfully on the highway;[87] but, under later statutes in some of these jurisdictions omitting this "absolute liability" clause, as it is called, with respect to cattle guards, but retaining it as to fences, it is held that there is no statutory liability on a railroad for injuries to a trespassing animal which entered from the highway over a cattle guard which was not sufficient to turn cattle.[88] In jurisdictions where the statute requiring railroads to build fences and cattle guards is construed as designed to protect only the owner or custodian of animals rightfully on the adjoining land or in the highway, as discussed infra § 581, it is held that if the animal injured was unlawfully at large and wrongfully on the highway at the time of entry, the company is not liable, al-

72. Mo.—Humphreys v Chicago, M, St P & P R. Co, App, 83 S W.2d 586—Best v Atchison, T & S. F. Ry. Co, App, 76 S W 2d 442
Okl.—**Corpus Juris quoted in** Missouri, K. & T. Ry Co. v Beatty, 32 P.2d 892, 893, 168 Okl. 254
52 C J. p 34 note 9.

73. La.—Holley v. Louisiana & A. Ry. Co, App., 155 So. 790.

74. Kan.—Atchison, etc R. Co. v. Jones, 20 Kan 527.
52 C.J p 34 note 10, p 114 note 54.
Place of first entry
Where, under uncontradicted evidence, mules escaped from pasture through defect in fence along right of way of railroad, although, before they were killed by train, they might first have left the right of way and returned thereto at public crossing or station grounds, issue whether mules entered right of way at public crossing or station grounds was not in case, since first entry onto tracks was controlling.—Best v Atchison, T & S. F. Ry Co., Mo App, 76 S W 2d 442.

75. Kan.—Kansas City, etc, R Co v Burge, 21 P 589, 40 Kan 736.
52 C J. p 34 note 11.

76. Minn.—Green v. St Paul, etc., R. Co., 61 N.W. 1130, 60 Minn. 134
52 C.J. p 34 note 12.

77. Ill.—Chicago, etc, R Co v. Farrelly, 3 Ill App 60.

78. Okl.—St. Louis, etc, R Co. v. Smith, 137 P. 357, 41 Okl. 314.
52 C.J p 34 note 14

79. Okl.—**Corpus Juris quoted in** Missouri, K & T Ry. Co v Beatty, 32 P.2d 892, 893, 168 Okl. 254.
52 C.J. p 34 note 15.

80. Mo.—Sampson v. Atchison, etc., R Co, 281 S W 52, 312 Mo. 666.
52 C.J. p 34 note 16.

81. Iowa.—Accola v. Chicago, etc, R. Co, 30 N.W 503, 70 Iowa 185.

82. Mo.—Emmerson v. St Louis, etc, R Co, 35 Mo App. 621

83. Mo.—Emmerson v. St. Louis, etc, R. Co, supra

84. Mo.—Adams v. St. Louis, etc, R Co, 116 S.W. 1119, 136 Mo App 157
52 C.J p 35 note 27.

85. Ind.—Jeffersonville, etc., R Co. v Avery, 31 Ind. 277

86. Ill.—Chicago, etc., R. Co v Farrelly, 3 Ill App. 60.

87. Vt.—Quimby v. Boston, etc., R. Co., 45 A. 223, 71 Vt. 301.
52 C J. p 35 note 31.

88. N.Y.—Bateman v. Rutland R. Co, 105 N.Y.S. 970, 54 Misc. 312, affirmed 110 N.Y.S. 506, 126 App. Div. 511.

though sufficient fences or cattle guards were not maintained,[89] unless, as at common law, the injury was wantonly, recklessly, or willfully inflicted.[90] Where the statute exempts the railroad from absolute liability if proper cattle guards are constructed, the railroad will not be liable for injuries to cattle coming on to the track over a properly constructed cattle guard unless the injury was willfully or recklessly inflicted.[91] In the absence of a statute requiring hog-proof cattle guards, the railroad is not liable for trespassing hogs getting on to the track at a public crossing, in the absence of willful or intentional injury.[92]

Entry from lands where trespassing. The liability of railroad companies for injuries to animals due to the absence of, or defects in, fences, where the animals are wrongfully on the premises from which they enter on the railroad track, depends on the application of the particular statute under which the action is brought, and particularly on whether such statutes are, under the rules discussed infra § 581, construed as being for the benefit of adjoining owners only or for the benefit of the public generally. Under statutes held to be only for the benefit of adjoining owners or those whose animals are rightfully on the premises from which they enter, the owner of an animal which enters on the right of way from lands where trespassing cannot recover from the railroad because of its failure to fence as required by statute,[93] unless the animals escaped to such premises through a defect in some other fence which it was the duty of the company to maintain.[94] In jurisdictions where the statutes are held to be in the nature of police regulations for the benefit of the public generally, the owner of an animal which enters on the right of way from adjoining lands may recover from the railroad on the ground of its failure to fence, regardless of whether the animal was rightfully or wrongfully on the land from which it entered.[95] Under the former rule, if the railroad company itself owns the adjoining lands it is not obliged to fence against itself, and will not be liable for injuries to animals which, while trespassing on its lands, go on the track,[96] but under the latter rule, the fact that the entry was from lands belonging to the railroad company is immaterial.[97]

§ 568. —— Place, Nature, and Cause of Injury

The liability of a railroad for failure to construct and maintain adequate fences is limited to injuries proximately resulting from such omission on the part of the railroad, and liability attaches only where the accident occurred at a place and in a manner contemplated by the statute.

In order to entitle plaintiff to recover under statutes making railroad companies liable for injuries to animals occasioned by a failure to construct or maintain fences or cattle guards, it must appear that the failure to do so caused or directly contributed to the injury complained of.[98] The company is not liable for all injuries which would not have occurred had the road been fenced but only such as are the proximate or direct and natural consequence of the failure to do so,[99] although the company will be liable if the failure to fence in connection with other acts of the company was the cause of the injury.[1]

The absence of a fence,[2] or wing fence,[3] or cattle guard[4] at the place of the injury is not the proximate cause of the injury if the animal did not enter there but came on the track at some other point where the road was properly fenced or was not required to be fenced, or through an open gate which it was the duty of the landowner to keep closed;[5] or if the animals were prevented from leaving the track by precipitous slopes on both sides;[6] or if a fence such as the company is required to construct would not have excluded the animal injured;[7] or if the fence if constructed would inevitably have

89. N H—Flint v Boston, etc, R Co., 59 A 938, 73 N H 141
52 C J. p 35 note 35.

90. Mass—Darling v Boston, etc., R Co., 121 Mass 118
N.Y.—Bateman v. Rutland R Co., 105 N Y S 970, 54 Misc 312, affirmed 110 N Y.S. 506, 126 App.Div. 511

91. N.Y—Bateman v Rutland R Co., supra

92. Okl—Schaff v. Tinkle, 221 P 17, 96 Okl. 204.

93. Me—Russell v. Maine Cent. R Co, 61 A 899, 100 Me. 406.
52 C.J. p 35 note 45

94. Me.—Gilman v. European, etc, R Co, 60 Me. 235.
Mass—Kelliher v. Connecticut River R Co., 107 Mass. 411.

95. Kan—Missouri Pac R. Co v Roads, 7 P 213, 33 Kan. 640.
52 C J p 36 note 48

96. N H.—Cornwall v. Sullivan R. Co, 28 N H. 161.

97. Ind—Bellefontaine R Co v. Reed, 33 Ind 476

98. Mo—Theener v Kurn, 146 S W 2d 647, 235 Mo App 823
Tex—**Corpus Juris quoted in** St Louis, B & M Ry Co v Blair, 39 S W 2d 826, 827, 120 Tex. 586.
52 C J p 76 note 76.

99. Mo—Scott v. Atchison, T. & S F. R Co, App 32 S.W.2d 139.
52 C J. p 77 note 88.

1. Iowa—Mikesell v Wabash R. Co, 112 N W. 201, 134 Iowa 736.
52 C J p 77 note 89.

2. Tex—**Corpus Juris quoted in** St. Louis, B & M Ry Co v Blair, 39 S W 2d 826, 827, 120 Tex 586.
52 C J p 76 note 77.

3. Mo—Scott v. Missouri-Kansas-Texas R Co, 22 S W.2d 654, 224 Mo App. 1.

4. Idaho—Bliss v. Oregon Short Line R Co., 200 P. 721, 34 Idaho 351

5. Tex—Ft Worth, etc., R Co. v. Worsham, Civ App., 105 S W. 853.

6. Cal.—Brenot v. Southern Pac R. Co, 262 P 732, 202 Cal 630

7. Kan—Leavenworth, etc, R. Co. v.

been destroyed by a fire so recently before the accident that it could not have been restored in time to prevent the injury;[8] or if the railroad was not required to fence at the point where the animal came on to the track.[9]

On the other hand, a failure to fence is the proximate cause if the animal got on the track at the point where the railroad should have fenced, although injured at a point where no such breach of duty is shown to exist,[10] or after passing over a point in the track where there should have been a cattle guard and there was not.[11] A defective fence is not the proximate cause where the animal got on the track through an open gate;[12] nor is insufficiency of a gate[13] or the failure of the railroad to keep a gate closed[14] the proximate cause of the injury where the animal came on the track by reason of a third person leaving the gate open; but it is the proximate cause where the gate was left open by the company.[15] A defective latch is the proximate cause of the injury where the gate was opened and closed without lifting it by a person who relied on its being caught and kept closed by the latch.[16] Where two railroads run parallel, and neither is properly fenced, and stock passes over one to the other and is there injured, the proximate cause of the injury is the failure to fence on the part of the company on whose track the stock is injured, and the company on whose track it first entered will not be liable.[17]

Injury not on right of way. Ordinarily the injury to the animal, for which recovery under the fencing statute is sought, must have happened on defendant's right of way;[18] and no liability rests on a railroad for injuries to livestock which entered the right of way through a defective fence and left the railroad's right of way through another defective fence and was injured elsewhere by an instrumentality other than the railroad's operations.[19]

Nature and cause of injury generally. A statute requiring railroads to maintain fences on the rights of way, and imposing liability, where such requirement is not complied with, for damages to livestock by "agents, engines or trains," cannot be applied so as to impose liability for damages due to causes other than the railroad's mechanical or other agents.[20]

Where collision with train necessary. Collision with the train has been held essential under statutes providing that the railroad shall be liable on failure to fence for animals killed or injured by the engines or cars of the railroad,[21] or by its agents, engines, or cars,[22] or by its agents, employees, engineers, or cars,[23] or killed or injured by any train, engine, or cars,[24] or if its engines or cars shall kill or maim any domestic animals,[25] or under a section of a statute providing that a railroad shall be liable for all damages to stock from failure to fence where the title of the act restricts it to stock injured by railway trains.[26]

Under these statutes, there can be no recovery where animals on the right of way are frightened by approaching trains and are injured in jumping from the track,[27] or by running on bridges or trestles,[28] or against wire fences,[29] or in an at-

Forbes, 15 P. 595, 37 Kan. 445—Atchison, etc, R. Co v Yates, 21 Kan. 613.

8. Wis.—Cook v. Minneapolis, etc., R. Co, 74 N.W. 561, 98 Wis 624, 67 Am S R. 830, 40 L.R.A. 457.

9. Ill.—Mobile, etc., R. Co. v. Moore, 34 Ill.App. 519.
Wash.—Benn v. Chicago, etc, R. Co., 154 P. 1082, 89 Wash. 522.

10. Tex.—**Corpus Juris quoted in** St. Louis, B. & M. Ry Co. v. Blair, 39 S.W.2d 826, 827, 120 Tex. 586.
52 C.J. p 76 note 85.

11. Mo.—Kirkpatrick v. Illinois Southern R. Co, 96 S.W. 1036, 120 Mo App. 416
Tex.—**Corpus Juris quoted in** St. Louis, B & M. Ry. Co. v. Blair, 39 S.W 2d 826, 827, 120 Tex. 586.

12. Utah.—Knight v. Southern Pac. Co., 172 P. 689, 52 Utah 42.

13. Mo.—Rowen v. Chicago Great Western R. Co., 96 S.W. 1009, 198 Mo. 654.

14. Tex.—International, etc, R. Co. v. Russell, 106 S.W. 438, 48 Tex.Civ App. 155.

15. Mo.—Jeffries v Chicago, etc, R. Co, App., 182 S.W 1082.

16. Tex.—Texas, etc., R. Co. v. Corn, Civ.App, 110 S.W. 485, affirmed 114 S.W. 103, 102 Tex. 194.

17. Ill.—Livak v. Chicago, etc., R. Co, 220 Ill App. 394, reversed on other grounds 132 N.E. 524, 299 Ill. 218.
Minn.—Frisch v. Chicago Great Western R. Co, 104 N.W. 228, 95 Minn. 398.

18. Okl.—**Corpus Juris cited in** Kurn v. Immel, 89 P 2d 308, 184 Okl 571
52 C J p 36 note 54.

19. Mo.—Theener v. Kurn, 146 S.W. 2d 647, 235 Mo App. 823.
52 C J. p 36 note 54a.

20. Neb.—Brei v. Chicago, B. & Q R. Co., 265 N.W. 539, 130 Neb 496

21. Tex.—Chicago, R. I. & G Ry. Co v. Rhone, Civ App., 105 S.W.2d 707, error dismissed.
52 C.J p 36 note 58.

22. N.Y.—Jimerson v. Erie R Co., 97 N.E. 48, 203 N.Y. 518, 37 L.R.A., N.S, 1181.
52 C.J. p 36 note 59.

23. Ind.—Jeffersonville, etc, R Co v. Dunlap, 13 N.E. 403, 112 Ind. 93
52 C J p 36 note 60

24. Fla.—Seaboard Air Line R. Co v. Coxetter, 90 So. 469, 82 Fla. 414.

25. Mont.—Hunt v White Sulphur Springs, etc, R. Co, 208 P. 917, 63 Mont. 508.

26. Wash.—Thayer v. Snohomish Logging Co., 172 P. 552, 102 Wash. 458.

27. Ind.—Peru, etc, R. Co. v. Hasket, 10 Ind. 409, 71 Am D 335.
Mo.—Lafferty v Hannibal, etc, R. Co., 44 Mo. 291

28. N.Y.—Jimerson v. Erie R. Co, 97 N.E 48, 203 N.Y. 518, 37 L.R.A., N.S., 1181.
52 C J. p 36 note 65.
Liability for injuries to animals running on bridges or trestles generally see infra § 593.

29. Ill.—Schertz v. Indianapolis, etc., R. Co., 107 Ill. 577.

tempt to jump a cattle guard;[30] or go on the right of way and are injured by falling into a cut, pit, or well,[31] or eating poison grass,[32] or drinking cottonseed oil escaping from a wrecked car;[33] or are injured by the employees of the railroad in extricating them from a bridge or trestle.[34] These statutes are construed so strictly as to exclude recovery for an animal not struck by the train, even though tied to another animal which was struck.[35] Nevertheless, even in these jurisdictions a recovery may be had for injuries to an animal resulting from a cause other than collision with a train, where it is sought not on the ground of the railroad's statutory liability but on the ground of the railroad's negligence in failing to perform its statutory duty to fence,[36] and the restrictive words in the statute are held not to apply to recovery for injuries caused by the willful or wanton acts of the railroad's employees.[37]

Where collision with train unnecessary. Collision with the train has been held not to be essential under statutes imposing liability for stock injured when the injury results from want of a fence;[38] or for animals killed or wounded "by the engine or cars . . . or in any other manner whatever in operating such railway,"[39] or for animals killed or injured by negligence, "and a failure to build and maintain . . . fences as above provided shall be deemed an act of negligence on the part of such companies;"[40] or "for reasonable damages for any injury—whenever such killing or injury is caused by any moving train or engine or cars upon such track,"[41] or "for any and all damages which shall be done by the agents, engines or trains to any cattle" on defendant's road;[42] or where a statute imposing liability for damages done by agents and engines is supplemented by other legislation making it mandatory on railroads to build fences.[43]

In these jurisdictions, even in the absence of collision with a train, the company is liable whenever the injury is the natural and proximate result of its neglect of its duty with respect to fencing,[44] and the injury is due to the want of a fence, within the meaning of this rule, whenever the want of a fence in connection with the acts of defendant is the proximate cause of the injury.[45] A recovery is allowed under these statutes where animals on the right of way are injured by being frightened by approaching trains and running on bridges or trestles,[46] or into wire fences,[47] or are injured by the negligence of the servants of the company in extricating them when caught in bridges or trestles.[48]

Where fences are constructed the company will be liable for injuries to animals not caused by the operation of its trains but by the fence itself owing to its dangerous or defective structure or condition.[49] Where the statute in express terms specifies the causes of injury for which recovery is allowed, recovery may be had for injuries resulting from the causes named[50] provided the losses are the proximate consequence of the railroad's default.[51]

Tex.—Texas, etc., R. Co. v. Mitchell, App., 17 S.W. 1079.

30. Ill.—Schertz v. Indianapolis, etc., R. Co., 107 Ill. 577
Ind.—Ohio, etc., R. Co. v. Cole, 41 Ind. 331

31. Tenn.—Jones v. Nashville, etc., R. Co., 56 S.W. 852, 104 Tenn. 119
52 C.J. p. 37 note 68.

32. Tex.—Ft. Worth, etc., R. Co. v. Brown, Civ.App., 173 S.W. 943

33. Tex.—St. Louis Southwestern R. Co. v. Bailey, Civ.App., 168 S.W. 406.

34. Mo.—Seibert v. Missouri, etc., R. Co., 72 Mo. 565.
Negligence in extricating animals generally see infra § 594.

35. Ind.—Jeffersonville, etc., R. Co. v. Downey, 61 Ind. 287.

36. Mo.—Scott v. Atchison, T. & S. F. Ry. Co., App., 32 S.W.2d 139.
52 C.J. p. 37 note 73.

37. Ind.—Chicago, etc., R. Co. v. Leiter, 109 N.E. 213, 59 Ind.App. 212.

38. Iowa.—Liston v. Central Iowa R. Co., 29 N.W. 445, 70 Iowa 714—Kraus v. Burlington, etc., R. Co., 7 N.W. 598, 55 Iowa 338.

39. Kan.—Atchison, etc., R. Co. v. Jones, 20 Kan. 527.

40. Minn.—Nelson v. Chicago, etc., R. Co., 14 N.W. 360, 30 Minn. 74.

41. Or.—Meier v. Northern Pac. R. Co., 93 P. 691, 51 Or. 69—Meeker v. Northern Pac. R. Co., 28 P. 639, 21 Or. 513, 28 Am.S.R. 758, 14 L.R.A. 841

42. Neb.—Middaugh v. Chicago, etc., R. Co., 208 N.W. 139, 114 Neb. 438.
52 C.J. p. 37 note 81

43. Vt.—Davis v. Central Vermont R. Co., 92 A. 973, 88 Vt. 460.
52 C.J. p. 37 note 82.

44. Iowa.—Mikesell v. Wabash R. Co., 112 N.W. 201, 134 Iowa 736
52 C.J. p. 37 note 83.

45. Iowa.—Young v. St. Louis, etc., R. Co., 44 Iowa 172.
Or.—Meier v. Northern Pac. R. Co., 93 P. 691, 51 Or. 69.

46. Iowa.—Mikesell v. Wabash R. Co., 112 N.W. 201, 134 Iowa 736
52 C.J. p. 37 note 85.
Liability for injuries to animals running on bridges or trestles generally see infra § 593.

47. Kan.—Missouri Pac. R. Co. v. Eckel, 31 P. 693, 49 Kan. 794—Missouri Pac. R. Co. v. Gill, 30 P. 414, 49 Kan. 441.

48. Kan.—Atchison, etc., R. Co. v. Edwards, 20 Kan. 531
Liability for injuries to animals by negligence in extricating them when caught in bridges or trestles generally see infra § 594.

49. N.Y.—Rehler v. Western New York, etc., R. Co., 8 N.Y.S. 286, 55 Hun 604
52 C.J. p. 37 note 88

50. Mo.—Boggs v. Missouri, etc., R. Co., 57 S.W. 550, 156 Mo. 389.
52 C.J. p. 37 note 90

51. Mo.—Gordon v. Chicago, etc., R. Co., 44 Mo.App. 201.

§ 569. Particular Places Where Fence or Cattle Guard Required or Not Required

Generally speaking, a railroad company is not liable for injuries to animals resulting from the absence of a fence or cattle guard at the place of injury, where the statute does not require the company to maintain a fence or cattle guard at such place; whether or not a fence or cattle guard is required at a particular place depends on the language and construction of the statutes

Except as and to the extent that the circumstances may create a common-law liability, as discussed in general terms supra § 559, the rules of liability for injuries to animals arising from failure to erect a fence or construct cattle guards do not apply where the statute does not require any fence to be built or cattle guard to be constructed at the particular place where the animal entered on the right of way.[52] In the absence of express exceptions as to places where fences or cattle guards are required, in determining whether a particular place is an exception the statutes will be given a reasonable construction according to their object and intention,[53] and an exception will be implied wherever the maintenance of a fence or cattle guard would be unreasonable or improper,[54] would be unlawful,[55] would interfere with the necessities and convenience of the public in travel or in transacting business with the railroad,[56] would unreasonably interfere with the railroad in the proper use of its own property or in transacting its business with the public,[57] would endanger the lives of its employees engaged in switching or operating its trains,[58] or would entrap straying animals and put them in the way of passing trains without possibility of escape.[59]

The interest and convenience of the public, however, and not that of the railroad company[60] or of a private business enterprise,[61] is the controlling consideration; and an exception based on interference with the business of the railroad can be sustained only on the ground that it promotes the public good by conserving the ability of the railroad to discharge its duties to the public.[62] In order that a place may be within the meaning of the exception, express or implied, it must be shown to be such by the use made of it rather than by the name given to it,[63] and by a continued, regular use at that point as distinguished from an occasional use depending on the convenience of the railroad,[64] and, if the issue is raised, it must be shown not to be the result of a condition wrongfully or unlawfully created by the railroad's act.[65]

General rules as applied to fences. In applying the general rule as to nonliability for injuries at places where fences or cattle guards are not required, it has been held that a railroad is not required to fence such places as are expressly excepted from the operation of the statute.[66] Where, however, railroads are required by law to fence their roads, it is not the province or policy of the courts to create exceptions to the rule,[67] and they will not do so except in view of some paramount public interest or paramount duty on the part of the company which would render the maintenance of fences improper,[68] and in the absence of such considerations if the company has a right to fence and fails to do so it will be liable for any injury to animals occasioned thereby.[69]

A railroad will not be relieved from fencing merely on the ground that it would be inconvenient to the company,[70] or that the construction of a fence would be difficult[71] or expensive,[72] or, if

52. Fla.—Seaboard Air Line Ry. Co. v Maige, 147 So. 215, 109 Fla. 229.
Place of entry of animal on track as fixing liability see supra § 567.

53. Conn.—Gallagher v New York, etc, R. Co., 18 A. 786, 57 Conn. 442, 5 L R A. 737.
52 C J. p 39 note 20.

54. Mich —McDonald v. Minneapolis, etc., R. Co., 71 N.W. 859, 113 Mich. 484.
52 C.J p 39 note 21

55. Ind —Lafayette, etc, R Co. v. Shriner, 6 Ind 141

56. Mo.—Hillman v. Grays Point Terminal R Co, 73 S.W. 220, 99 Mo App. 271
52 C.J. p 39 note 23.

57. Fla.—Seaboard Air Line Ry Co v. Maige, 147 So. 215, 109 Fla. 229.
52 C J p 39 note 24.

58. Fla.—Seaboard Air Line Ry Co v Maige, supra.
52 C J. p 39 note 25.

59. Mo.—Corcoran v Wabash R. Co., 122 S W. 743, 138 Mo.App. 408

60. Minn —Greeley v St Paul, etc., R Co., 22 N W. 179, 33 Minn. 136, 53 Am S.R. 16
52 C J p 39 note 27.

61. Mo —Schoonover v St Louis, etc, R Co., 233 S W. 489, 207 Mo. App 489.

62. Ind —Wabash, etc, R. Co. v Tretts, 96 Ind 450

63. Ind —Chicago, etc, R Co v. Ness, 105 N E 250, 56 Ind App 285
Tex.—International, etc, R Co v. Schram, Civ App., 138 S W 195.

64. Mo —Little v. Butler County R. Co, 120 S.W. 695, 139 Mo App. 50

65. N Y —Kelver v. New York, etc., R. Co., 27 N.E. 553, 126 N.Y. 365.

66. N Y —Schermerhorn v. Hudson River R Co, 38 N.Y. 103.
52 C J. p 38 note 99.

67. Kan.—Atchison, etc, R. Co. v. Shaft, 6 P 908, 33 Kan. 521
52 C J. p 38 note 1.

68. Kan —Atchison, etc, R. Co. v. Shaft, supra—Chicago, etc., R Co. v Green, 46 P 200, 4 Kan App 133

69. Minn —Hurt v. St. Paul, etc., R. Co, 40 N.W 613, 39 Minn. 485.
52 C.J p 38 note 3.

70. Minn.—Greeley v. St Paul, etc, R. Co, 22 N W 179, 33 Minn 136, 53 Am.S.R 16.
52 C.J p 38 note 4.

71. Ind —Louisville, etc, R. Co v Zink, 85 Ind. 219
52 C J p 38 note 5.

72. Ind.—Ft Wayne, etc., R. Co. v. Herbold, 99 Ind. 91.

built in the only possible place, would exclude part of the railroad right of way.[73] The fact that its charter provides that a railroad shall maintain fences at certain places does not prevent the application of a general statute requiring fencing at all places where the road can be fenced.[74] Under some statutes making a distinction between places where a railroad is required to fence and places where it may fence if no inconvenience to the operation of the road or public access thereto is involved, the liability for failure to fence at one of these places differs from liability for failure to fence at the other: liability for failure to fence at one of these places cannot be established by proof of liability for failure to fence at the other.[75]

Where a railroad crosses a watercourse, it is sufficient if the fences are constructed upon either side up to, and connected with, the bridge, trestle, or culvert, so as to prevent animals from going upon the track, and it is not necessary to fence across the stream so as to prevent their escape under the track from an adjoining inclosure.[76]

General rules as applied to cattle guards. In applying the general rule as to the nonliability for injuries to animals at places where fences or cattle guards are not required, it has been held that a railroad is not required to maintain cattle guards where to do so would interfere with the public interest and convenience[77] or would endanger the lives of its employees,[78] or at points not proved to be within the statutory description of places requiring them.[79] However, the fact that the railroad is not required by statute to fence does not by implication relieve it from an obligation to construct cattle guards where the statute in express terms requires them.[80]

The fact that animals entered the right of way at a place where it could not fence or construct cattle guards does not relieve it from liability for failure to construct cattle guards at intermediate points between the place of entry and the place of collision,[81] especially where it is shown that the animals strayed along the track for a long distance and beyond other places where a cattle guard would have turned them off the track.[82] Under the statutes generally, cattle guards must be placed at the limits of places where the duty of fencing begins, to prevent animals from passing from unfenced places upon the tracks beyond.[83]

§ 570. —— Cities, Towns, and Villages

A railroad is not liable for injuries to animals resulting from the absence of a fence or cattle guard in a city, village, or town, or a particular place therein, where it is not required or permitted to maintain a fence or cattle guard at such place.

Under statutes requiring railroads to fence but expressly excepting "within the limits of towns, cities and villages," there can be no recovery for injuries to animals based solely on the failure to fence, where the failure to fence relied on is within the limits of a town, city, or village.[84] A "town" in these statutes means a collection of houses larger than a village and smaller than a city, having no reference to territory incorporated as a town under the township organization laws.[85] A "village" is a small group of houses for dwellings or business, or both, in the country, regardless of whether or not they are situated upon regularly laid out streets and alleys.[86]

Except in particular situations, railroads are not relieved from liability for failure to fence merely because the road is within the limits of a city, town, or village, where such places are not excepted from the operation of the fencing statute; and this is the rule where the statute makes it obligatory on railroads to build fences in terms broad enough to include cities, towns, and villages,[87] and where there is no statute compelling railroads to construct fences, but where there is a statute placing liability for injuries to animals on them if they do not.[88] In jurisdictions having two statutes in force, one making it obligatory on the rail-

73. Ind.—Lake Erie, etc., R. Co. v. Rooker, 41 N.E. 470, 13 Ind.App. 600

74. Minn.—Gillam v. Sioux City, etc., R. Co., 3 N.W. 353, 26 Minn. 268

75. Mo.—Stout v. St. Louis, etc., R. Co., 125 S.W. 230, 142 Mo.App. 1.
52 C.J. p. 38 note 10

76. Iowa.—Cagwin v. Chicago, etc., R. Co., 84 N.W. 1032, 113 Iowa 175.
52 C.J. p. 38 note 11

77. Mo.—Robertson v. Atlantic, etc., R. Co., 64 Mo. 412.

78. Neb.—De Graw v. Chicago, etc., R. Co., 164 N.W. 706, 101 Neb. 724.

79. Mich.—Stern v. Michigan Cent. R. Co., 43 N.W. 587, 76 Mich. 591

80. Idaho.—Brown v. Oregon Short Line R. Co., 118 P. 768, 20 Idaho 364

81. Neb.—De Graw v. Chicago, etc., R. Co., 164 N.W. 706, 101 Neb. 724

82. Neb.—De Graw v. Chicago, etc., R. Co., supra.

83. Mich.—Fuller v. Lake Shore, etc., R. Co., 66 N.W. 593, 108 Mich. 690
52 C.J. p. 39 note 19.

84. Neb.—Chicago, etc., R. Co. v. Hogan, 43 N.W. 1148, 27 Neb. 801
52 C.J. p. 39 note 31

85. Ill.—Cleveland, etc., R. Co. v. Green, 65 Ill.App. 414
52 C.J. p. 39 note 32

86. Ill.—Toledo, etc., R. Co. v. Spangler, 71 Ill. 568
52 C.J. p. 39 note 33

87. Utah.—Edmunds v. Salt Lake, etc., R. Co., 196 P. 1019, 58 Utah 30, 16 A.L.R. 928
52 C.J. p. 39 note 36

88. Tex.—Panhandle, etc., R. Co. v. Jackson, Civ.App., 8 S.W.2d 256
52 C.J. p. 40 note 37.

road to fence where it passes along cultivated fields or uninclosed prairie lands, sometimes called the "double-damage act," the other relieving the owner of an injured animal from proving the railroad's negligence in cases where it might have lawfully fenced but did not, sometimes called the "single-damage act," it has been held that the latter statute is applicable to cases where the animals are injured in cities, towns, and villages, unless at street crossings where the railroad could not lawfully fence,[89] but the same kind of an action could not be maintained under the statute making it obligatory to fence where the injuries were inflicted in cities, towns, and villages to which that statute does not apply,[90] although it may be maintained under the fencing statute if the road where the injuries were inflicted is located along the edge of a town and neither the streets nor limits of the town extend beyond it,[91] or in the territory of a formerly existing town which has ceased functioning as a town, so that it is no longer even a corporation de facto, the statute applying to such places.[92]

Places within corporate limits. Where the statute requires the railroad to fence in cities, towns, and villages, it must fence within such limits at all places where the maintenance of a fence would not be unlawful or an unreasonable or improper interference with the operation of the road or the necessities and convenience of the public.[93] It has been held that railroads need not fence in portions of towns, or cities platted into blocks or lots where their tracks are intersected and crossed by streets and alleys,[94] especially where the statute expressly declares that no railroad need be fenced "when not necessary to prevent horses, cattle, sheep, and hogs from going upon its track from adjoining land," and the platted portion of the city falls within this exception.[95]

The fact that the town is not incorporated is immaterial if it is regularly laid out and the track is crossed by streets and alleys.[96] It has been held, however, that, where the road runs along or across vacant lots, the railroad company must fence between the streets,[97] and it is uniformly held that they must fence at places within the city, town, or village limits where there are no intersecting streets and alleys,[98] or at places which are used for agricultural purposes,[99] or are located on the outskirts of the town where the land is open and not occupied with buildings.[1]

Streets and crossings. A railroad company is not permitted to fence its tracks at the crossing of a street,[2] and this rule applies although the street has not been opened to public travel[3] or is not in a condition to be used except by persons on foot.[4] Neither is a railroad permitted to fence its tracks where they run along instead of across a street, and are subject to the public easement;[5] but the rights of the public extend no further than the street, and the fact that streets or alleys abut on and terminate at a railroad track is no objection to fencing.[6] The rule requiring the construction of cattle guards at public crossings applies to street crossings[7] except where the crossing is within an open space, such as the depot grounds, which is not required to be fenced,[8] or where the track runs along one street which is crossed by other streets so that cattle guards would form an obstruction to travel.[9] An objection that numerous cattle guards would weaken the roadbed and thus increase the damage is not available in the absence of proof that such would be the case.[10]

89. Mo.—Wymore v. Hannibal, etc., R. Co, 79 Mo. 247.
52 C.J. p 40 note 39.

90. Mo.—Rhea v. St. Louis, etc., R. Co., 84 Mo. 345.
52 C.J. p 40 note 40.

91. Mo.—Kirkland v. Missouri, etc., R. Co., 82 Mo. 466—Brandenburg v. St. Louis, etc, R. Co., 44 Mo.App. 224.

92. Mo.—Holdaway v. St. Louis, etc, R. Co., App., 269 S.W. 641.

93. Ind—Toledo, etc, R. Co v. Cupp, 36 N.E. 445, 9 Ind.App. 244
52 C J p 40 note 43.

94. Iowa.—Gibson v. Iowa Cent. R. Co, 113 N.W 927, 136 Iowa 415.
52 C J. p 40 note 44.

95. N Y.—Lee v. Brooklyn Heights R. Co, 89 N.Y S. 652, 97 App Div 111.

96. Mo—Gerren v. Hannibal, etc., R. Co, 60 Mo. 405, distinguishing Iba v. Hannibal, etc, R. Co, 45 Mo. 469—Vanderworker v. Missouri Pac R. Co., 48 Mo App. 654

97. Ind—Pittsburgh, etc, R. Co. v. Laufman, 78 Ind. 319.
52 C.J. p 40 note 47.

98. Minn—Nelson v. Great Northern R Co., 53 N W. 1129, 52 Minn. 276.
52 C.J. p 40 note 49.

99. Ind.—Toledo, etc, R. Co. v. Owen, 43 Ind 405.
Kan.—Iola Electric R Co. v. Jackson, 79 P. 662, 70 Kan. 791

1. N.Y.—Brady v. Rensselaer, etc., R. Co, 1 Hun 378, 3 Thomps. & C. 537.

2. Iowa—Long v. Central Iowa R. Co., 21 N W. 122, 64 Iowa 657.
52 C.J p 40 note 53.

3. Ind.—Jeffersonville, etc, R Co. v. Dougherty, 10 Ind. 549.
Iowa—Long v. Cent. Iowa R. Co, 21 N.W. 122, 64 Iowa 657.

4. Iowa.—Lathrop v. Central Iowa R. Co, 28 N W. 465, 69 Iowa 105.

5. Minn—Rippe v. Chicago, etc, R. Co, 43 N.W. 652, 42 Minn. 34, 5 L R A. 864.
52 C J. p 40 note 56.

6. Ind.—Toledo, etc, R. Co. v. Cary, 37 Ind. 172.

7. Minn—Greeley v St. Paul, etc, R Co., 22 N W. 179, 33 Minn 136, 53 Am R. 16
52 C J p 40 note 58.

8. Mich.—Stern v. Michigan Cent. R. Co., 43 N.W. 587, 76 Mich. 591

9. N.Y.—Brace v. New York Cent R. Co., 27 N.Y. 269.

10. Ind—Pittsburgh, etc, R. Co. v. Laufman, 78 Ind. 319.

§ 571. —— Stations, Switchyards, and Depot Grounds

A railroad company is not liable for injuries resulting from failure to maintain fences at or about stations, switchyards, and depot grounds, where it is not permitted or required to maintain a fence at such places.

A railroad company is not liable for failure to fence such grounds at its depots or stations as the necessities or convenience of the public and the proper conduct of the business or the road at such places require to be left open and unobstructed;[11] and this is the rule equally where expressed in the statute[12] or implied from the necessities of the case.[13] With respect to its liability for failure to construct and maintain fences at station grounds, the company is not obliged to build a fence between the station grounds and the land of an adjoining owner, where the fence would obstruct access of the public to the depot grounds,[14] but it may be required to do so where the fence does not in any manner interfere with the use of the station by the public or could not in any wise inconvenience the railroad in the operation of its trains or endanger its employees in the discharge of their duties,[15] unless it would not serve to inclose any part of the railroad between the station grounds and the land of the adjoining owner.[16]

Character of place and business transacted. In considering the exemption from the duty to fence which exists with respect to stations and depots, it is immaterial whether there is a depot or station agent at the place,[17] how many passengers or how much freight is actually received or delivered there,[18] or whether the station is located within or without the corporate limits of a city, town, or village;[19] and hence the exception to the fencing statute has been held to apply to a mere flag station,[20] notwithstanding the railroad did not have a building or keep an agent at such station.[21]

The exemption from the duty of fencing at depots and station grounds applies also to approaches to such grounds which could not be fenced without inconvenience to the public;[22] to switches, sidings, and platforms where freight or passengers are received and discharged;[23] to grounds necessary for access by the public and convenience of shipment about an adjacent mill,[24] hay press,[25] storage house or grain elevator;[26] to lots used for storing, loading, and unloading lumber;[27] and to grounds in the immediate vicinity of the company's engine house or machine shops,[28] or its coal or wood yards,[29] or tracks where cars are stored and inspected.[30] The exception also applies to such switches and switch limits as the public convenience and proper handling of trains require to be left unfenced,[31] but no further than is necessary for such purposes.[32]

Ordinarily it is held that no fence need be constructed within the switch limits where to make the fence effective would also require the construction of cattle guards which would endanger the lives of the company's employees,[33] but a fence which would be effective without the cattle guard must be constructed and maintained even though

11. Utah—J. Nebeker & Son v. Los Angeles & S. L. R. Co., 104 P.2d 230, 99 Utah 226
52 C.J. p. 41 note 62.

12. Wis.—Peters v. Stewart, 39 N.W. 380, 72 Wis. 133—Bennett v. Chicago, etc., R. Co., 19 Wis. 145.

13. Or.—Moses v. Southern Pac. R. Co., 23 P. 498, 18 Or. 385, 8 L.R.A. 135
52 C.J. p. 41 note 64.

14. Utah.—Reid v. San Pedro, etc., R. Co., 132 P. 253, 42 Utah 431.

15. Mo.—Francis v. Bush, App., 226 S.W. 57.

16. Minn.—Smith v. Minneapolis, etc., R. Co., 33 N.W. 316, 37 Minn. 103.
52 C.J. p. 41 note 67.

17. Mo.—Acord v. St. Louis Southwestern R. Co., 87 S.W. 537, 113 Mo.App. 84—McGuire v. St. Louis, etc., R. Co., 87 S.W. 564, 113 Mo. App. 79.

18. Ind.—Stewart v. Pennsylvania Co., 28 N.E. 211, 2 Ind.App. 142, 50 Am.S.R. 231.

19. Mo.—Dorsey v. Chicago, etc., R. Co., 157 S.W. 1065, 176 Mo.App. 150.
52 C.J. p. 41 note 73

20. Mich.—Schneekloth v. Chicago, etc., R. Co., 65 N.W. 663, 108 Mich. 1.
52 C.J. p. 41 note 74

21. Mich.—Schneekloth v. Chicago, etc., R. Co., supra

22. Ill.—Chicago, etc., R. Co. v. Hans, 111 Ill. 114.
Mich.—Chicago, etc., R. Co. v. Campbell, 11 N.W. 152, 47 Mich. 265

23. Ind.—Bechdolt v. Grand Rapids, etc., R. Co., 15 N.E. 686, 113 Ind. 343.
52 C.J. p. 41 note 77.

"Switch limits," "depot grounds," and "yard limits" have the same meaning as "station grounds," within statute, exempting a railroad from requirement to fence its track in such grounds.—Atchison, etc., R. Co. v. McCall, 150 P. 173, 48 Okl. 602.

24. N.Y.—Dolan v. Newburgh, etc., R. Co., 24 N.E. 824, 120 N.Y. 571.
52 C.J. p. 41 note 78.

25. Ind.—Ohio, etc., R. Co. v. Rowland, 50 Ind. 349.

26. Ind.—Wabash, etc., R. Co. v. Nice, 99 Ind. 152

27. N.Y.—Hyatt v. New York, etc., R. Co., 19 N.Y.S. 461, 64 Hun 542.
52 C.J. p. 42 note 81.

28. Ind.—Indianapolis, etc., R. Co. v. Oestel, 20 Ind. 231.

29. Mich.—Grondin v. Duluth, etc., R. Co., 59 N.W. 229, 100 Mich. 598.
52 C.J. p. 42 note 83

30. Mich.—Bird v. Michigan Cent. R. Co., 108 N.W. 1100, 145 Mich. 706

31. Ind.—Jeffersonville, etc., R. Co. v. Peters, 27 N.E. 299, 1 Ind.App. 69.
52 C.J. p. 42 note 85.

32. Ill.—Toledo, etc., R. Co. v. Franklin, 42 N.E. 319, 159 Ill. 99.
52 C.J. p. 42 note 86.

33. Neb.—Chicago, etc., R. Co. v. Sevcek, 101 N.W. 981, 110 N.W. 639, 72 Neb. 793.
52 C.J. p. 42 note 87.

the cattle guard is itself impracticable.[34] Where a switch is crossed by a public road so that the entire switch cannot be fenced, and the construction of wing fences and cattle guards would endanger the lives of employees, the company need not fence any part of the switch.[35]

The exception has been held not to apply to a place formerly used as depot grounds but since abandoned,[36] or to a "flag station" so called, at which little or no business was done;[37] or to a passing track outside station grounds;[38] or to a point where passengers are permitted to get on and off, and at which freight is sometimes thrown off, but from which and to which no tickets are sold;[39] or to a siding used merely for the loading of ties, wood, and piling purchased by the company, the amount of business done at the siding not appearing;[40] or to a sidetrack used for loading a single commodity and only occasionally used and not located at a station or depot;[41] or to stockyards with necessary sidetracks and switches which the railroad used only for its own accommodation;[42] or to a switch maintained only for the accommodation of a mill, mine, or quarry,[43] or used for storing cars and maintained only for the convenience of the railroad,[44] or to a switch where the public use and transaction of business are not shown.[45]

Extent and limits of grounds. It is not necessary that a railroad company should make any formal separation or dedication of its station grounds or put up notices as to their limits,[46] nor, on the other hand, can the company, by purchasing or appropriating any particular amount of ground, acquire the right to leave unfenced any more than may be necessary for the purposes of the public and the business there transacted.[47] The exemption from the duty of fencing extends to whatever limits the public necessities and convenience and the proper conduct of the business there transacted require,[48] taking into consideration the reasonably anticipated growth of business at that point,[49] but this necessity is also the limit of the exception,[50] and is not affected by the mere convenience of the company,[51] nor is it conclusively determined by its arbitrary judgment as to the needs of the company and the public at that point,[52] although fencing near a station will be taken as an admission that the place is outside the yard limits.[53] So if a greater amount of ground than necessary is left unfenced and animals are injured thereon, the company will be liable,[54] notwithstanding such grounds were in fact used by the company.[55]

Cattle guards. The same principle that excuses a railroad company from fencing at stations and depot grounds applies to the maintenance of cattle guards.[56] So it is not necessary to construct cattle guards where a street or highway crosses the track within such grounds,[57] where they would inconvenience the public in reaching the station or transacting business with the railroad,[58] or where they would endanger the lives of the company's employees engaged in switching, coupling, or operating its trains,[59] unless the company has created the necessity for a cattle guard at a particular place by failing to fence at some other place where it

34. Minn.—Nelson v. Northern R. Co., 53 N.W. 1129, 52 Minn. 276

35. Mo.—Wright v. Atchison, etc., R. Co., 56 Mo. App. 367.

36. Wis.—McDonough v. Milwaukee, etc., R. Co., 40 N.W. 806, 73 Wis. 223.

37. Mo.—Hutsell v. Wabash R. Co., App., 209 S.W. 560
52 C.J. p. 42 note 91

38. Mo.—Bridges v. Missouri, etc., R. Co., 112 S.W. 37, 132 Mo. App. 576.

39. Mo.—Duncan v. St. Louis, etc., R. Co., 85 S.W. 661, 111 Mo. App. 193

40. Minn.—Hurt v. St. Paul, etc., R. Co., 40 N.W. 613, 39 Minn. 485.

41. Wis.—Jaeger v. Chicago, etc., R. Co., 43 N.W. 732, 75 Wis. 130.

42. Tex.—Southern Kansas R. Co. v. McKay, Civ.App., 47 S.W. 479.

43. Mo.—Foster v. Kansas City Southern R. Co., 87 S.W. 57, 112 Mo. App. 61.

44. Mo.—Choteau v. Hannibal, etc., R. Co., 28 Mo. App. 556.—Russell v. Hannibal, etc., R. Co., 26 Mo. App. 368

45. Mo.—Vanderworker v. Missouri Pac. R. Co., 51 Mo. App. 166

46. Colo.—Denver, etc., R. Co. v. Bird, 152 P. 911, 60 Colo. 259
Mich.—Grondin v. Duluth, etc., R. Co., 59 N.W. 229, 100 Mich. 598.

47. Minn.—Cox v. Minneapolis, etc., R. Co., 42 N.W. 924, 41 Minn. 101.
Wis.—Fowler v. Farmers' L. & T. Co., 21 Wis. 73.

48. Colo.—Denver, etc., R. Co. v. Simmoe, 173 P. 541, 65 Colo. 73.
52 C.J. p. 42 note 3

49. Mich.—McGrath v. Detroit, etc., R. Co., 24 N.W. 854, 57 Mich. 555
52 C.J. p. 42 note 4

50. Mo.—Acord v. St. Louis Southwestern R. Co., 87 S.W. 537, 113 Mo. App. 84.
52 C.J. p. 42 note 5.

51. Iowa.—Peyton v. Chicago, etc., R. Co., 30 N.W. 877, 70 Iowa 522, 524.
52 C.J. p. 43 note 6.

52. Mo.—Dorsey v. Chicago, etc., R. Co., 157 S.W. 1065, 175 Mo. App. 150
52 C.J. p. 43 note 7.

53. Mich.—Stewart v. Grand Rapids, etc., R. Co., 110 N.W. 126, 147 Mich. 48

54. N.Y.—Dixon v. New York Cent., etc., R. Co., 4 N.Y.S. 296, 51 Hun 644.
52 C.J. p. 43 note 9.

55. Kan.—Atchison, etc., R. Co. v. Shaft, 6 P. 908, 33 Kan. 521

56. Mo.—Robertson v. Atlantic, etc., R. Co., 64 Mo. 412.

57. Mich.—Stern v. Michigan Cent. R. Co., 43 N.W. 587, 76 Mich. 591.

58. Mo.—Robertson v. Atlantic, etc., R. Co., 64 Mo. 412.

59. Tex.—Gulf, etc., R. Co. v. Blankenbeckler, 35 S.W. 331, 13 Tex. Civ. App. 249.
52 C.J. p. 43 note 16.

should have done so, in which case it is bound to construct the cattle guard at the risk of endangering its employees.[60]

The company must, however, maintain cattle guards where the station grounds end and the duty of fencing begins,[61] and along its side tracks or switches where the considerations of safety and public convenience do not apply,[62] mere inconvenience to the company being insufficient to excuse the omission.[63] It has been held, however, under a statute making it obligatory to construct cattle guards at all crossings, that proximity of the crossing to a station of defendant, and the inconvenience to the public if a cattle guard should be placed there, will not relieve the railroad of its obligation under the statute.[64]

§ 572. —— Improved, Inclosed, Unimproved, and Uninclosed Lands

The extent to which the railroad company's liability is affected by whether the land through which the road passes at the place of injury is improved, unimproved, inclosed, or uninclosed depends largely on the language of the statute.

Under statutes merely requiring in general terms that railroad companies must fence their tracks, it has been held that they must fence along their tracks where the road passes through inclosed as well as uninclosed land.[65] The obligation to fence railroads passing through inclosed lands rests on them where the statute in terms so stipulates, as, for example, under statutes expressly requiring railroads to fence where the road passes through "enclosed or improved land,"[66] "inclosed or cultivated fields or inclosed lands,"[67] "lands owned and settled or occupied by private owners,"[68] "lands owned and improved by private owners,"[69] "private property or enclosed land in the actual possession of another,"[70] or through, along, or adjoining "inclosed or cultivated fields, or uninclosed prairie lands."[71] "Improved" land, within the meaning of these statutes, is occupied land, even though it is not cultivated,[72] as, for example, an uncultivated village lot appurtenant to a dwelling house and barn[73] or land used partly as a mill yard and which is also mowed and occasionally used for grazing,[74] but it does not include uninclosed commons.[75]

Under a statute requiring railroads to fence where the road passes through private property or inclosed land, it is not necessary that the private property should be fenced by the owner in order to make it the duty of the railroad to fence.[76] "Inclosed or cultivated fields, or uninclosed prairie lands," used in some statutes, applies to timber lands if inclosed as well as other inclosed lands,[77] to land uninclosed which is also prairie land,[78] but not to uninclosed land which is not prairie land.[79] Uninclosed timber land from which the timber has been cleared off is not prairie land within the application of the statute.[80]

Under these statutes, the fact that an adjoining owner fails to fence up to his line does not affect the duty of the railroad to fence its road where it

60. Ill.—Toledo, etc., R. Co. v. Thompson, 48 Ill. App. 36.

61. Mich.—Stewart v. Grand Rapids, etc., R. Co., 110 N.W. 126, 147 Mich. 48.
52 C.J. p. 43 note 18.

62. Mo.—Grant v. Atchison, etc., R. Co., 56 Mo. App. 65.
52 C.J. p. 43 note 19.

63. N.Y.—Bradley v. Buffalo, etc., R. Co., 34 N.Y. 427.

64. N.Y.—Bradley v. Buffalo, etc., R. Co., supra.

65. Tenn.—Louisville, etc., R. Co. v. Patton, 54 S.W. 984, 104 Tenn. 40.

66. Me.—Osborne v. Canadian Pac. R. Co., 32 A. 902, 87 Me. 303.
52 C.J. p. 43 note 26.

67. Idaho.—Monical v. Northern Pac. R. Co., 112 P. 764, 19 Idaho 150.

68. Utah.—Stimpson v. Union Pac. R. Co., 33 P. 369, 9 Utah 123.
52 C.J. p. 43 note 28.

69. Utah.—Wilde v. Union Pac. R. Co., 84 P.2d 1085, 96 Utah 164.

The purpose of the statute was to require a fence where the railroad, either by dividing private lands or breaking the owner's close by taking a portion thereof, created a risk to live stock which did not otherwise exist within the boundaries of the private owner's close.—Wilde v. Union Pac. R. Co., supra.

"Passes through"

Phrase "passes through" as used in statute requiring railroad to fence right of way where it passes through privately owned and improved lands may mean more than dividing lands privately owned so that the same owner will have lands on both sides of the right of way, and may apply where railroad is laid out along the dividing line between two owners or where it takes a strip of privately owned land along one side and where the other side of the right of way abuts on publicly owned lands, but it does not apply where railroad right of way goes alongside of but not through or over lands which are or have been privately owned.—Wilde v. Union Pac. R. Co., supra.

70. Idaho.—Johnson v. Oregon Short Line R. Co., 63 P. 112, 7 Idaho 355, 53 L.R.A. 744.
52 C.J. p. 43 note 29.

71. Mo.—Cary v. St. Louis, etc., R. Co., 60 Mo. 209.—Tiarks v. St. Louis, etc., R. Co., 58 Mo. 45.

72. Me.—Osborne v. Canadian Pac. R. Co., 32 A. 902, 87 Me. 303.

73. Me.—Osborne v. Canadian Pac. R. Co., supra.

74. Me.—Wilder v. Maine Cent. R. Co., 65 Me. 332, 20 Am. R. 698.

75. Me.—Perkins v. Eastern R. Co., 29 Me. 307, 50 Am. D. 589.

76. Idaho.—Patrie v. Oregon Short Line R. Co., 56 P. 82, 6 Idaho 448.

77. Mo.—Sparr v. St. Louis, etc., R. Co., 57 Mo. 152.
52 C.J. p. 44 note 38.

78. Mo.—Shelton v. St. Louis, etc., R. Co., 60 Mo. 412.

79. Mo.—Cary v. St. Louis, etc., R. Co., 60 Mo. 209.

80. Mo.—Schable v. Hannibal, etc., R. Co., 69 Mo. 91.
52 C.J. p. 44 note 41.

passes through uninclosed prairie land,[81] and a statute requiring fencing of railroads "adjoining" inclosed or cultivated lands requires fencing where the road runs through or along such lands.[82] Lands, in order to be "inclosed," need not be inclosed by lawful fences.[83] Under a statute requiring the erection of cattle guards where a railroad "enters or leaves any improved or fenced land," a railroad constructed across unimproved and uninclosed lands, which are afterward improved and inclosed, must, after such change in the character of the land, be provided with cattle guards where the road enters and leaves such land.[84]

Land inclosed on three sides. Under some of the statutes it is only where the adjoining lands have been inclosed on the other three sides that the railroad is required to complete the inclosure by fencing along its right of way[85] In some of the states, this rule applies to unimproved land.[86] Where this rule prevails, an owner of the injured animals who has done nothing toward inclosing his lands, or given the statutory notice to the railroad of his intention to do so, cannot recover under the statute for the railroad's failure to fence.[87]

§ 573. —— Highways

Unless required to do so by statute, the failure of a railroad company to maintain a fence where its road crosses a public highway does not subject it to liability for injuries to animals resulting from the absence of such fence; but a railroad company ordinarily will be liable for injuries resulting from the absence of adequate cattle guards at public highway crossings.

A railroad company is not required or permitted, and hence is not liable for failure, to fence its road where it crosses a public highway,[88] or to construct gates or other obstructions at such crossings to prevent animals from going upon the crossing.[89] However, a railroad, while it may not be required to fence, must construct and maintain suitable cattle guards and wing fences at public highway crossings,[90] and these must be located at the point of intersection and as near as practicable to the highway,[91] and if located unnecessarily distant from the highway the company will be liable for animals injured while in the intervening space.[92] Nevertheless, if an animal goes upon the track at the crossing and is injured upon the crossing itself, the absence of cattle guards cannot affect the case and will not render the company liable.[93] In order to avoid pockets or traps at oblique crossings where the railroad and the highway form an acute angle, lateral fences must be continued beyond the point of intersection between the highway and the boundary line of the right of way over a part of the highway to the point where the highway intersects the tracks, and a cattle guard put in at that point, and a railroad failing to do this is liable for injuries to animals caught in the trap[94]

Character and establishment. The rule that railroad companies are not liable for injuries resulting from failure to fence their roads at public crossings applies to highways de facto as well as to highways de jure,[95] but not to alleged highways which have no existence at all,[96] especially where the railroad now relying on its existence had previously denied it.[97] With respect to the railroad company's liability for injuries occurring there, if a crossing is used and traveled by the public generally as a highway the company need not fence at the crossing, although it is not a regularly laid out and established highway,[98] and not worked or improved by the county,[99] or the route traveled is outside the survey or line of the highway as established by the county authorities;[1] nor, on the other hand, need the railroad maintain fences where

81. Mo.—Hamilton v. Missouri Pac. R. Co., 87 Mo 85.

82. Mo.—Walton v. St. Louis, etc., R. Co, 67 Mo. 56.

83. Mo —Biggerstaff v. St. Louis, etc., R. Co, 60 Mo. 567.
Va.—Kimball v. Carter, 27 S.E. 823, 95 Va. 77, 38 L.R.A. 570.

84. Iowa —Heskett v. Wabash, etc., R. Co, 16 N.W 525, 61 Iowa 467.

85. Okl.—McCook v. Bryan, 46 P. 506, 4 Okl. 488
S D.—Crary v Louisville, etc, R. Co, 100 N.W. 18, 18 S D. 237.

86. Ky.—Parrish v. Louisville, etc., R. Co., 104 S.W. 690, 31 Ky L. 1020

87. Okl —St Louis, etc., R. Co. v. Higgs, 141 P. 10, 42 Okl 171.

88. Ariz —Payne v. Clifford, 211 P. 566, 24 Ariz. 489
52 C.J. p 44 note 56.

89. N Y —Martin v. New York Cent., etc., R. Co., 45 N.Y.S 925, 20 Misc. 363.

90. Iowa.—Sarver v. Chicago, etc., R. Co., 73 N.W. 498, 104 Iowa 59.
52 C.J. p 44 note 63.

91. Ind.—Jeffersonville, etc, R. Co v. Morgan, 38 Ind. 190.
Mich.—Parker v. Lake Shore, etc., R. Co., 53 N.W 834, 93 Mich. 607.

92. Ind.—Jeffersonville, etc, R. Co v. Morgan, 38 Ind. 190.
52 C.J. p 45 note 65.

93. Ill.—Mobile, etc., R. Co. v. Moore, 34 Ill App. 519.

94. Okl —Missouri, etc., R. Co. v Bandy, 181 P 313, 75 Okl. 57.
52 C J p 45 note 67.

95. Mo —Jackson v. Kansas City, etc, R. Co, 66 Mo App. 506.
52 C.J. p 45 note 69.

96. Wis —Hunter v Chicago, etc., R Co, 75 N.W. 977, 99 Wis. 613.

97. Wis.—Hunter v. Chicago, etc., R Co, supra

98. Kan.—Missouri Pac. R. Co. v Kocher, 26 P. 731, 46 Kan. 272.
52 C.J. p 45 note 72.

99. Mo —Sikes v. St. Louis, etc., R. Co., 105 S W. 700, 127 Mo.App. 326.
52 C.J. p 45 note 73.

1. Iowa.—Soward v. Chicago, etc., R. Co, 33 Iowa 386.
Mo —Luckie v. Chicago, etc., R. Co, 76 Mo. 639.

the road crosses a strip of land which has been legally dedicated to the public as a highway, although it has not been reduced to actual use by the public.[2]

"Private roads" which by statute are free to be traveled by all persons as public roads and are so termed by the statute merely to distinguish them from public roads which are maintained at public expense need not be fenced by railroads where they intersect the railroad.[3] Wherever the crossing is such that it is not required to be fenced, the company must construct cattle guards to prevent animals from passing from the intersecting highway on either side along the tracks,[4] and whenever a crossing is abandoned and ceases to be a public highway the company must then construct fences at that point,[5] but nonuser for a period of time not amounting to abandonment will not have this effect.[6]

Highways parallel with railroad. In the absence of statutory requirement, a railroad, in order to avoid liability for injuries occurring there, is under no obligation to fence between its tracks and a highway parallel with and in close proximity thereto,[7] and failure to do so does not constitute negligence.[8] Where, however, the railroad company is required to fence in such situations, the fact that its right of way runs parallel with and adjoins a public highway does not exempt the company from its statutory duty and corresponding liability,[9] and the fact that the right of way overlaps the highway does not affect this duty and liability if there is sufficient room for constructing a fence upon the right of way between the highway and the tracks,[10] and in such case, where the railroad permits the public to use part of its right of way as a public road, it is under duty to fence between such road and its tracks[11]

So also, if the track occupies a part of the public highway by permission of the highway authorities, the railroad must fence between its tracks and the remainder of the highway which is used by the public[12] The railroad, however, is not obliged to fence if the location of the railroad with respect to the highway is such that a fence cannot be constructed without obstructing the highway[13] unless the use of the highway as such has been abandoned by the public[14]

§ 574. —— Other Places

The liability of a railroad company for injuries to animals resulting from the absence of fences or cattle guards at various particular places has been judicially determined by the courts.

It has been held that a railroad company which fails to fence its tracks as required by law is liable for stock killed upon the road, although a good and sufficient fence is maintained by the adjoining landowner;[15] but, on the contrary, it has been held that it is immaterial who constructs the fences as long as they are sufficient,[16] and that if an adjoining owner voluntarily constructs and maintains such a fence the company is not liable because it did not construct another fence along the same line[17] Even under the latter view, however, it is the duty of the company to see that the fence is kept in repair and to restore it if removed by the owner,[18] and the company will be liable in the absence of any evidence as to the character and sufficiency of the fences maintained by the adjoining owners.[19]

Fences on both sides of track Ordinarily where railroads are required to be fenced they must be fenced on both sides of the track,[20] even under a statute requiring fencing where the road passes along or adjoins lands of a certain description and the railroad adjoins land of the character men-

2. Mo —Meyer v North Missouri R. Co, 35 Mo 352

3. Mo —Walton v. St. Louis, etc, R Co, 67 Mo 56.

4. Ind —Louisville, etc, R Co. v. Etzler, 39 N.E 32, 3 Ind App. 562
Mo —Brown v. Kansas City, etc, R Co, 20 Mo App 427

5. Ind —Louisville, etc., R. Co. v. Shanklin, 94 Ind. 297.
52 C J p 45 note 80

6. Ind.—Indiana Cent R Co. v. Gapen, 10 Ind 292.

7. Ga.—Collier v. Georgia R. Co, 76 Ga. 611.

8. Ga —Collier v. Georgia R. Co, supra.
N.Y —Coy v. Utica, etc, R. Co., 23 Barb. 643, overruling Moshier v. Utica, etc, R. Co, 8 Barb. 427.

9. Mo.—Morris v Hannibal, etc, R. Co, 79 Mo 367, distinguishing Walton v. St Louis, etc., R. Co., 67 Mo. 56.
52 C J p 45 note 84.

10. Tex —Ft Worth, etc, R. Co. v Roberts, 69 S W. 985, 29 Tex Civ App 566
52 C J. p 46 note 86.

11. Mo —Jones v St. Louis Southwestern R Co, 65 Mo App. 442.

12. Ill —Illinois Cent R Co. v. Trowbridge, 31 Ill App 190.

13. Ind —Louisville, etc,. R Co v. Hurst, 98 Ind. 330—Louisville, etc., R. Co v. Francis, 58 Ind 389.

14. Ind.—Louisville, etc, R. Co. v Shanklin, 94 Ind. 297.
52 C J p 46 note 90

15. Va —Norfolk, etc., R. Co v McGavock, 18 S E 909, 90 Va 507

16. Minn —Hovorka v. Minneapolis, etc., R. Co., 17 N.W. 376, 31 Minn 221.

17. Minn —Hovorka v. Minneapolis, etc., R Co., supra.
Ohio.—Haxton v Pittsburgh, etc, R. Co, 26 Ohio St. 214

18. Minn —Hovorka v. Minneapolis, etc., R. Co., 17 N.W 376, 31 Minn 221.

19. Ind —Louisville, etc, R. Co. v White, 94 Ind. 257

20. Mo —Walther v. Pacific, etc, R. Co., 55 Mo 271
52 C.J. p 46 note 97.

tioned only on one side.[21] However, if from the character or use of the adjoining premises on one side the company is not required to fence on that side, it has been held by some authorities that it need not fence on the opposite side;[22] but other authorities have held that it must.[23] A statute requiring railroads to fence "either or both" sides of their property does not contemplate that the matter shall be optional with the railroad company but means either or both sides as the circumstances may demand;[24] and under such statute, where it is for the benefit of adjoining landowners only, the railroad need fence only on the side next to the private owner where the land on the other side is unoccupied and unclaimed public land.[25]

Adjoining lands of defendant railroad. Where fencing statutes are regarded as police measures, under the rules discussed infra § 581, a railroad company owning land adjoining its road must fence between its own land and the track[26] unless a partition fence along the exterior line of the adjoining land completely incloses the track.[27] On the other hand, where the statute is construed as being for the benefit of adjoining owners only, a railroad owning adjoining land is not required to fence between its own land and the track.[28]

Adjoining lands or tracks of other railroads. Where two railroads run parallel with each other, neither can rely on the duty of the other but each must see that its own road is properly fenced;[29] and, where no fence is constructed between the tracks, the company upon whose road an animal is injured cannot avoid liability on the ground that the animal got upon its road by crossing the unfenced tracks of the other road,[30] although there is also authority to the contrary.[31] Where, however, the rights of way and tracks of two railroads adjoin and run parallel to each other, a fence between the rights of way is unnecessary if private property on either side of the combined rights of way is properly protected by a railroad fence.[32] In jurisdictions in which a railroad must fence between its track and a parallel railroad, the company over whose tracks the animal first entered will not be liable for the injury occurring upon the other road.[33] The fact that the tracks are too close together to permit the construction of a fence between them without endangering the safety of passengers or railroad employees does not relieve the railroad of its statutory liability.[34] Where two railroads intersect, and one of the companies neglects to maintain proper lateral fences, the other company must construct cattle guards and wing fences at the crossing;[35] but this is not necessary where both railroads perform their statutory duties.[36]

§ 575. Sufficiency, Defects, and Repairs

The sufficiency of fences and cattle guards as affecting the liability of the railroad company for injuries to animals is discussed infra § 576; and the extent to which such liability is affected by defects and repairs infra §§ 577–580.

Examine Pocket Parts for later cases.

§ 576. —— Sufficiency

Generally speaking, railroad fences and cattle guards are sufficient if they are reasonably adequate to prevent animals of ordinary habits and disposition from going on the track or where they substantially conform to statutory requirements.

Generally speaking, railroad fences are held to conform to legal requirements if they are reasonably sufficient to prevent animals of ordinary habits and disposition from going upon the track.[37] It is not necessary that they should be built to meet extraordinary conditions[38] or that they should constitute an impassable barrier to all stock without regard to how breachy or vicious they may be.[39] If, however,

21. Mo.—Walther v. Pacific R. Co., supra.

22. Ind.—Indiana, etc., R. Co. v. Leak, 89 Ind. 596.
52 C.J. p. 46 note 99.

23. Ill.—Cleveland, etc., R. Co. v. Capoot, 69 Ill. App. 163
52 C.J. p. 46 note 1

24. Nev.—Walsh v. Virginia, etc., R. Co., 8 Nev. 110

25. Nev.—Walsh v. Virginia, etc., R. Co., supra

26. Ind.—Bellefontaine R. Co. v. Reed, 33 Ind. 476.
52 C.J. p. 46 note 5.

27. Ill.—Chicago, etc., R. Co. v. Tice, 111 Ill. App. 161.

28. N.H.—Cornwall v. Sullivan R. Co., 28 N.H. 161.

29. N.Y.—Shepard v. Buffalo, etc., R. Co., 35 N.Y. 641

30. N.Y.—Kelver v. New York, etc., R. Co., 27 N.E. 553, 126 N.Y. 365
52 C.J. p. 47 note 10

31. Conn.—Gallagher v. New York, etc., R. Co., 18 A. 786, 57 Conn. 442, 5 L.R.A. 737

32. N.Y.—Davison v. Delaware, etc., R. Co., 119 N.Y.S. 369, 134 App. Div. 872

33. U.S.—Bear v. Chicago, etc., R. Co., Minn., 141 F. 25, 72 C.C.A. 513.
Minn.—Frisch v. Chicago Great Western R. Co., 104 N.W. 228, 95 Minn. 398.

34. N.Y.—Kelver v. New York, etc., R. Co., 27 N.E. 553, 126 N.Y. 365
52 C.J. p. 47 note 17.

35. Ill.—Illinois Cent. R. Co. v. Davidson, 80 N.E. 250, 225 Ill. 618

36. Ill.—Illinois Cent. R. Co. v. Davidson, supra.

37. Iowa.—Shellabarger v. Chicago, etc., R. Co., 23 N.W. 158, 66 Iowa 18
52 C.J. p. 47 note 21.

38. Cal.—Jesus Maria Rancho v. Southern Pac. Co., 172 P. 183, 36 Cal. App. 375.
52 C.J. p. 47 note 23.

39. Iowa.—Shellabarger v. Chicago, etc., R. Co., 23 N.W. 158, 66 Iowa 18
52 C.J. p. 47 note 24.

the fence is not reasonably sufficient to keep out stock,[40] sufficiency having reference to the strength as well as to the height of the fence,[41] to be determined by an examination of the fence itself and not by the previous conduct of animals which have been pastured on ground which it in part incloses,[42] or if it is constructed in such a negligent or improper manner as to constitute a nuisance or source of danger,[43] the company will be liable for animals injured in consequence thereof. A deviation in the course of the fence from the line of the railroad right of way,[44] and the inclusion of gates,[45] will not subject the railroad to liability if fence and gates are otherwise sufficient and acquiesced in by the adjoining owner

Statutes. A statute requiring construction of fences suitable and sufficient to prevent cattle, horses, sheep, and hogs from getting upon the railroad sets up a practical standard which is not met if the fact of cattle, horses, sheep, or hogs getting through the fence and on to the track is the natural consequence of existing conditions[46] A statute requiring the construction of "legal and sufficient" fences is construed as requiring fences along an adjoining inclosure reasonably sufficient to keep out the kind of domestic animals kept in that particular inclosure.[47]

Where a prior statute established standards of sufficiency, a later statute requiring railroad companies to make and maintain a good and sufficient fence, but not itself prescribing any standard or test of sufficiency, has been held to adopt the standards established by the prior statute.[48] Under a statute compelling railroads which have not built fences to do so, and prescribing the height and character of the fence to be built, and providing that railroads which have built fences shall conform to these specifications whenever they rebuild or repair, it has been held that the obligation to conform to the later specifications is not imposed on a railroad on making slight repairs of a fence already built, but only when the repairs are substantial, amounting practically to a rebuilding of a portion of a fence[49]

Conformity to division fences. A statute requiring a railroad to construct "suitable" fences, without referring to any standard, does not require that they should conform to division fences.[50] This is especially so where the railroad fencing statute sets up a standard of its own,[51] as, for example, a fence suitable and sufficient to prevent cattle, horses, sheep, and hogs from getting upon the railroad,[52] or where it provides in express terms that no law of the state with respect to the fences of farmers or landowners shall be applicable to railroad fences unless specifically so stated in the regulation[53] It has been held, however, that a statute requiring construction of a "lawful" fence does refer to the standard set up in the statute on inclosures.[54] A statute prescribing that railroad fences shall be of the height and strength of division fences, but nowhere fixing what that height shall be, either by its own terms or the provisions of the division fence statute, has been construed as requiring fences of sufficient height and strength to prevent cattle and other animals from getting on the railroad.[55]

Wire fences. A wire fence properly constructed[56] and complying substantially with statutory requirements[57] is sufficient; but, although sufficient to turn stock, the fence must not be of such a character as of itself to be a source of danger,[58] and a barbed wire fence may or may not be a proper fence according to the character and use of the lands inclosed[59]

40. N Y—Leyden v New York Cent, etc, R. Co, 8 N.Y S 187, 55 Hun 114
52 C J p 47 note 25.

41. Mo—Colyer v. Missouri Pac. R Co, 93 Mo App. 147.

42. Ill—Chicago, etc, R Co v. Umphenour, 69 Ill. 198.

43. N C—Winkler v Carolina, etc, R Co, 35 S E 621, 126 N.C 370, 78 Am S R. 663.
52 C J p 47 note 28.

44. Kan—Stovall v. Atchison, etc, R. Co., 112 P. 740, 83 Kan 735

45. Kan—Stovall v. Atchison, etc, R Co., supra.

46. N.Y—Connolly v Central Vermont R. Co, 38 N Y S. 587, 4 App Div 221, affirmed 57 N E. 1124, 158 N.Y 675.
52 C.J. p 47 note 33.

47 Me.—Cotton v Wiscasset, etc, R. Co, 57 A 785, 98 Me. 511
52 C.J p 47 note 35.

48. Cal.—Enright v. San Francisco, etc., R. Co, 33 Cal 230.

49. Iowa.—Moeckley v. Chicago, etc, R. Co, 61 N W. 227, 92 Iowa 748
52 C J p 48 note 39.

Under former statute providing that a railroad was not compelled to fence but was held liable for injuries to animals resulting from its failure to do so, liability would depend on maintenance of a fence reasonably sufficient to turn stock—Moeckley v Chicago, etc, R. Co., supra

50. Mass—Eames v Salem, etc., R. Co, 98 Mass. 560, 96 Am.D. 676.

51. Neb.—Chicago, etc, R. Co v. James, 41 N W. 992, 26 Neb. 188.

52. Neb—Chicago, etc., R. Co. v. James, supra.

53. Iowa—Lee v Minneapolis, etc, R Co, 23 N W. 299, 66 Iowa 131.

54. Mo—Russell v Hannibal, etc, R Co, 83 Mo 507.
52 C J p 48 note 47.

55. N Y—Tallman v. Syracuse, etc, R Co, 4 Abb.Dec. 351, 4 Keyes 128.

56. Minn—Halverson v. Minneapolis, etc., R. Co., 19 N W. 392, 32 Minn. 88

57. Mo—Sharp v. Quincy, etc, R. Co, 123 S W. 507, 139 Mo App 525.
52 C J. p 48 note 50.

58. N.Y—Rehler v. Western New York R. Co, 8 N Y S. 286, 55 Hun 204.
52 C J. p 48 note 51

59. N.Y.—Gulfoos v. New York

A statute prohibiting the use of barbed wire has been held not to apply to fences already existing;[60] and buckthorn wire, consisting of flat iron twisted ribbons with teeth, has been held not to be a barbed wire fence within the prohibition of the statute[61]

Natural barriers. A steep bluff, hedge, ditch, wall, or the like may constitute a lawful fence if of equal security with a lawful fence as defined by statute,[62] but such natural obstructions must be sufficient to serve the purposes of a fence,[63] and when they cease to afford that measure of security a fence of posts and boards or wire must be constructed.[64] Natural barriers serving as fences must be properly connected with the railroad fences where they begin and terminate.[65]

Cattle guards and wing fences. Where railroad corporations are required to construct cattle guards, a railroad will be liable for injuries to animals due to a failure to construct cattle guards reasonably sufficient to exclude ordinary stock[66] or to maintain them in a proper state of repair,[67] or where they are located in the wrong place,[68] or are used as a substitute for the statutory fence,[69] or are so constructed as to be a trap or snare for stock;[70] or where the adjacent fences do not extend up so as to prevent the passage of stock between the fence and the cattle guards;[71] or where a section of the cattle guard is missing, admitting cattle through the unguarded space on to the track.[72] However, cattle guards, in order to be sufficient, need not be so constructed as to constitute an impassable barrier so that under no circumstances could an animal cross them,[73] or so as to turn hogs unless the statutory conditions precedent to the requirements of hog-proof cattle guards are complied with,[74] or so as to turn stock which is wild, breachy, or in the habit of fence jumping,[75] or stock when under fright or excitement,[76] but need only be such as are reasonably sufficient to turn ordinary stock[77]

In the absence of any statutory plan or specification for cattle guards, they should be constructed in such manner as an ordinarily prudent man would construct them with a view to prevent injury to his stock and at the same time to prevent the depredations of stock upon his inclosure.[78] The mere fact that an animal goes upon the track by jumping over such a cattle guard and is injured does not render the company liable in the absence of negligence,[79] nor is the fact that an animal passed or jumped over a cattle guard of itself evidence of its improper construction or insufficiency.[80] If, however, there is other evidence as to the character or insufficiency of the cattle guard, the jury may consider this fact in connection with such other evidence.[81] The mere fact that an animal is injured by the dangerous character of a cattle guard such as is in ordinary use does not subject the railroad company to liability, since such danger is a necessary attribute of a cattle guard.[82]

Where the statute requires a cattle guard sufficient

Cent, etc, R. Co., 23 N.Y.S. 925, 69 Hun 593.

60. N.Y.—Stisser v New York Cent, etc, R. Co, 52 N.Y.S. 861, 32 App. Div. 98

61. N.Y.—Stisser v. New York Cent, etc, R Co., supra.
52 C.J. p 48 note 55.

62. Iowa.—Hilliard v. Chicago, etc, R. Co, 37 Iowa 442.

63. Ill.—Toledo, etc., R Co. v. Sweeney, 41 Ill. 226.
Wash.—Taylor v. Spokane Falls, etc, R Co., 73 P. 499, 32 Wash. 450.

64. Ill.—Chicago, etc., R. Co. v. Hand, 113 Ill.App. 144.
52 C J. p 48 note 58

65. Wash.—Taylor v. Spokane Falls, etc, R. Co., 73 P. 499, 32 Wash. 450.

66. Ind.—Pennsylvania Co. v. Newby, 72 N.E 1043, 164 Ind. 109.
52 C J. p 49 note 61.

67. Minn.—Miller v. Northern Pac. R. Co., 30 N.W. 892, 36 Minn. 296.
52 C.J. p 49 note 62.

68. Ind.—Ft. Wayne, etc., R. Co. v Herbold, 99 Ind. 91.
52 C.J. p 49 note 63.

69. Mo.—Berkbigler v. Cape Girardeau, etc., R. Co, 133 S.W. 1170, 152 Mo.App. 543, 144 S.W. 1105, 164 Mo.App. 441.

70. Ala.—Alabama Great Southern R. Co. v. Clark, 130 So. 318, 221 Ala. 616.
52 C.J. p 49 note 65.

Use of attractive guard as negligence
The use of a guard so made as to invite the passage of stock is negligence for which recovery may be had for injuries resulting therefrom. —Carrollton Short Line R. Co v. Lipsey, 43 So. 836, 150 Ala. 570.

71. Mich.—Johnson v. Detroit, etc., R. Co, 102 N.W. 744, 139 Mich. 287.

72. Mo.—Scott v. Missouri-Kansas-Texas R. Co., 22 S.W.2d 654, 224 Mo.App. 1.

73. Mich.—Clement v. Pere Marquette R. Co., 100 N.W. 999, 138 Mich. 57.
52 C.J. p 49 note 68.

74. Okl.—Schaff v. Tinkle, 221 P. 17, 96 Okl 204.
52 C J p 49 note 69.

75. Mich.—Smead v. Lake Shore, etc., R. Co., 24 N.W. 761, 58 Mich. 200.
52 C.J. p 49 note 70

76. Vt.—Wait v Bennington, etc., R. Co., 17 A 284, 61 Vt 268

77. Mo.—Sappington v. Chicago & A. R. Co, 69 S.W. 32, 34, 95 Mo App. 387
52 C.J p 49 note 72.

78. Tex.—Horan v Taylor, etc., R. Co, 3 Tex.A.Civ.Cas, § 435.

79. Ill.—Chicago, etc, R. Co v. Farrelly, 3 Ill App. 60.
Mo.—Cole v. Chicago, etc., R. Co, 47 Mo.App. 624

80. Iowa.—Barnhart v. Chicago, etc., R. Co, 66 N.W. 902, 97 Iowa 654.
Mo.—Miller v. Chicago, etc., R Co., 167 S.W. 1160, 180 Mo.App. 209.

81. Iowa.—Timms v. Chicago, etc., R Co, 33 N.W. 379, 72 Iowa 94.
Mo.—Miller v. Chicago, etc., R. Co, 33 N.W. 379, 72 Iowa 94.
Mo.—Miller v. Chicago, etc., R. Co, 167 S.W. 1160, 180 Mo.App. 209.

82. Iowa.—Harsch v. Chicago, R. I & P. Ry. Co., 232 N.W 144, 211 Iowa 1377, 75 A.L.R. 927.
Tenn.—Southern Ry. Co. v. Morrell, 89 S.W.2d 161, 169 Tenn. 463.

to turn cattle from the road, it requires by implication the wing fences necessary for the sufficiency of the guard,[83] a fence across the road with gates is not a proper substitute therefor;[84] and under such statute a cattle guard in general use by first-class railroads does not meet the requirements if it is not reasonably sufficient to turn cattle from the road.[85] A statute requiring approval of cattle guards by commissioners does not require approval of each cattle guard constructed, but merely an approval of the type of construction.[86]

Waiver and estoppel. With respect to the railroad company's liability for injuries to animals, the insufficiency of a fence may be waived by an adjoining owner, when the fencing statute is construed as being for his benefit only.[87] Where a statute prescribes that railroad fences shall be of the height and strength of division fences, but nowhere fixes what that height shall be either by its own terms or the provisions of the division fence statute, a railroad building and maintaining over a long period of years a fence of a particular height cannot afterward be heard to say, in the absence of evidence of local regulation or local custom, that a lower fence would be sufficient.[88]

§ 577. —— Defects and Repairs in General

Where a railroad company is required by law to construct fences and cattle guards it is liable for injuries to animals resulting from failure to keep the fences and cattle guards which have been constructed in good repair if, according to most authorities, such failure is attributable to a lack of due care on the part of the railroad.

Generally speaking, with respect to the liability of a railroad company for injuries to animals, the consequences of its failure to fence its right of way attach to its failure to keep its fences in good repair.[89] So, where the fencing statute imposes no liability for failure of a railroad company to have its right of way adequately fenced, but merely places on the company the burden of proving its freedom from negligence, the company is not liable for injuries to animals entering the right of way through a defective fence, in the absence of negligence on the part its employees;[90] and a mere failure to keep cattle guards in good order does not constitute such negligence.[91]

Where a railroad is required by law to construct fences and cattle guards, it will be held liable for injuries to animal occasioned by its failure to repair them[92] or to replace them when destroyed,[93] and this rule applies regardless of how or by whom the fence was originally built,[94] as in the case of fences already constructed by adjoining owners and adopted by the railroad company,[95] and notwithstanding the adjoining owner has been accustomed voluntarily to keep the fences in repair,[96] but, under statutes in some states, slight repairs, if they can be made without considerable labor or expense, are for the adjoining owner to make.[97]

The railroad's liability for failure to repair is unaffected by the fact that the accident happened in the winter season when cattle are not accustomed to run at large and when openings in the fence are left for convenience in hauling wood to the railroad;[98] or by the fact that the fence had been torn down with intent to rebuild, and that the railroad had notified the landowner of its intent to do so;[99] or by the fact that the abutting landowner had relocated and reconstructed the fence with the consent of the railroad,[1] or by the fact that the railroad waived the statutory notice from the landlord to build, and voluntarily constructed the fence in advance of the time when under the statute it was required to build,[2] or by the fact that the adjoining owner joined his fences to the railroad fence, thereby making use of it to inclose his land and still did not

83. Vt.—Aldrich v. Boston, etc., R. Co., 100 A. 765, 91 Vt. 379.

84. Mo.—Winter v. Hines, 229 S.W. 281, 207 Mo.App. 412.

85. Ind.—Pittsburgh, etc., R. Co. v. Newsom, 74 N.E. 21, 35 Ind.App. 299.
52 C.J. p. 49 note 80.

86. Mich.—La Flamme v. Detroit, etc., R. Co., 67 N.W. 556, 109 Mich. 509.

87. Cal.—Enright v. San Francisco, etc., R. Co., 33 Cal. 230.

88. N.Y.—Leyden v. New York Cent. R. Co., 8 N.Y.S. 187, 55 Hun 114.

89. La.—Smith v. Thompson, App., 185 So. 71.

90. La.—Moody v. Texas & P. Ry. Co., App., 37 So.2d 346—Daughdrill v. Texas & N. O. R. Co., App., 20 So.2d 644—Smith v. Thompson, App., 185 So. 71.

91. La.—Luke v. Morgan's Louisiana & T. R. & S. S., etc., Co., 10 La. A., Orleans, 239.

92. Minn.—Coe v. Northern Pac. R. Co., 111 N.W. 651, 101 Minn. 12, 11 L.R.A.,N.S., 228.
52 C.J. p. 50 note 88.

93. Iowa.—Mikesell v. Wabash R. Co., 112 N.W. 201, 134 Iowa 736.
Tex.—Missouri, etc., R. Co. v. Tolbert, 101 S.W. 206, 100 Tex. 483.

94. Ind.—New Albany, etc., R. Co. v. Pace, 13 Ind. 411.
Me.—Norris v. Androscoggin R. Co., 39 Me. 273, 63 Am.D. 621.

95. Ind.—Jeffersonville, etc., R. Co. v. Sullivan, 38 Ind. 262.
Minn.—Hovorka v. Minneapolis, etc., R. Co., 25 N.W. 595, 34 Minn. 281.

96. Ind.—Jeffersonville, etc., R. Co. v. Nichols, 30 Ind. 321.

97. Tex.—Missouri, etc., R. Co. v. Dunnaway, 95 S.W. 760, 43 Tex. Civ.App. 350.

98. Wis.—Laude v. Chicago, etc., R. Co., 33 Wis. 640.

99. Ill.—Toledo, etc., R. Co. v. Varner, 137 Ill.App. 563.

1. Mo.—White v. Sligo, etc., R. Co., 170 S.W. 923, 185 Mo.App. 425.

2. Okl.—Choctaw, etc., R. Co. v. Deparade, 71 P. 629, 12 Okl. 367.
S.D.—Wold v. South Dakota Cent. R. Co., 122 N.W. 583, 23 S.D. 521.

contribute anything to keep the railroad fence in repair, in the absence of contract or statute obligating him to do so,[3] or by the fact that the railroad constructed the fence entirely on the land of the adjoining owner;[4] or by the fact that the railroad had made an agreement with an adjoining owner not to maintain the fence, when the benefit of the fencing statute is not restricted to adjoining owners and plaintiff was some person other than the contracting landowner.[5]

The liability of the railroad to repair has reference to the fence nearest the railroad track, where the railroad maintains two parallel fences on the same side of its road.[6] As discussed supra § 559, independently of statute, a railroad is liable for injuries to animals caused by its negligent act, and in at least one jurisdiction the statutes have been construed to give the owner of injured animals a remedy under the statute against the railroad for failure to repair fences, but only a remedy at common law for injuries due to defective cattle guards.[7] In jurisdictions having in force a statute compelling railroads to fence for violation of which double damages are recoverable and a statute fixing liability for compensatory damages for injuries to animals caused by failure to fence, recovery of compensatory damages for injuries caused by a defective cattle guard may be had, even though an action for double damages will not lie, the injuries not being caused by collision with a train.[8] A railroad company may be relieved of its liability to repair by an agreement placing the obligation on the landowner, where the fencing statute excepts such contracts from its operation.[9]

Voluntary erection or construction by railroad. Where there is no law requiring railroads to fence, it has been held in some jurisdictions that they will not, in the absence of circumstances creating a common-law liability, be liable for failing to repair fences[10] or cattle guards[11] which they may have voluntarily constructed, and that, if there is a gap in such fence through which animals enter, no greater degree of care is required to avoid injury to such animals than would otherwise be necessary to avoid liability;[12] but in other jurisdictions it has been held that if the railroad voluntarily constructs fences or cattle guards it is liable if it fails to keep them in a proper state of repair,[13] as, for example, where it constructs fences in station grounds,[14] and in such jurisdictions there must be evidence of construction and maintenance of the fence by the railroad in order to subject it to liability for failure to repair.[15]

Care required and extent of liability. While there is some authority to the contrary,[16] the general rule is that, where fences such as the law requires have been constructed, railroads are only bound to use reasonable care and diligence in maintaining them and in discovering and repairing defects subsequently occurring,[17] the liability for failure to repair being different in this respect from the liability for failure to erect;[18] and they are not absolute insurers of the fences which they are required to build[19] or absolutely liable for injuries to animals occasioned by defects occurring therein,[20] and the rule has been applied even where a statute provides that the company shall be liable for injuries to stock "when [the fences are] not in good repair."[21] The term "ordinary care" or "reasonable care" is to be applied in view of the extra hazard and the public duty involved,[22] and means a higher degree of care

3. Mo.—Busby v. St. Louis, etc., R. Co, 81 Mo 43.
52 C J. p 50 note 99.

4. Ill.—Chicago, etc, R. Co. v. Guertin, 4 N.E. 507, 115 Ill. 466.

5. Mo—Rinehart v. Kansas City Southern R. Co, 102 S W. 958, 204 Mo. 269—White v. Sligo, etc, R. Co, 170 S.W 923, 185 Mo App 425.

6. Iowa.—Dailey v. Chicago, etc., R. Co., 96 N.W. 778, 121 Iowa 254.

7. N Y—Bateman v. Rutland R. Co, 110 N Y.S. 506, 126 App.Div. 511.

8. Mo.—Scott v. Missouri-Kansas-Texas R. Co., 22 S W.2d 654, 224 Mo App. 1.

9. Ind.—Ponsler v Union Tract. Co, 132 N E 708, 76 Ind App. 616—Union Tract Co v Thompson, 111 N.E 648, 61 Ind App. 183

10. Ark.—St Louis, etc, R Co. v. Ferguson, 20 S W 545, 57 Ark. 16, 38 Am S.R. 217, 18 L.R A. 110.
52 C.J. p 50 note 12.

11. Ala.—St. Louis, etc, R. Co v. Douglass, 44 So. 677, 152 Ala 197
Tex.—Chicago, R. I & G. Ry Co v. Rhone, Civ.App, 105 S.W 2d 707, error dismissed.

12. Miss.—Illinois Cent. R Co v Walker, 63 Miss. 13

13. Colo—Denver, etc, R. Co v Robinson, 40 P. 840, 6 Colo App 432
52 C J p 51 note 15.

14. Ill—Chicago, etc, R. Co v Guertin, 4 N E. 507, 115 Ill. 466—Chicago, etc., R Co. v Reid, 24 Ill 144.

15. Colo—Denver, etc, R. Co v Robinson, 40 P. 840, 6 Colo.App. 432.
Mich—Hathaway v Detroit, etc, R Co, 83 N W. 598, 124 Mich. 610.

16. Tex—St Louis, B & M Ry. Co v Blair, 39 S W 2d 826, 120 Tex. 586
52 C J. p 51 note 20

17. Minn—Coe v. Northern Pac. R. Co, 111 N.W. 651, 101 Minn. 12, 11 L.R A,N.S, 228, 11 Ann Cas. 429.
52 C J p 51 note 24.

18. Minn.—Coe v. Northern Pac. R Co, supra.

19. Mo—Rutledge v Hannibal, etc, R. Co., 78 Mo. 286—Case v. St Louis, etc, R. Co, 75 Mo. 668

20. Mich.—Grand Rapids, etc, R Co v Monroe, 10 N.W. 179, 47 Mich. 152.
52 C J. p 51 note 27.

21. N Y.—Murray v. New York Cent R. Co, 3 Abb Dec. 339, 4 Keyes 274
52 C.J. p 51 note 28.

22. Mo—Rutledge v. Hannibal, etc, R Co., 78 Mo. 286.

than an ordinarily careful landowner would be expected to exercise in keeping up his own fences.[23] The rule obligates the railroad to use proper care to guard against animals coming on to the track while the fence is temporarily down during reconstruction or repairs.[24]

The frequency with which fences should be inspected depends on the circumstances bearing on the probability of the fences being thrown down or destroyed, and the consequences which might naturally ensue.[25] It is not necessary that a patrol should at all times be maintained along the road to see the condition of the fences.[26]

§ 578. —— Knowledge of Defect and Opportunity to Repair

Except in jurisdictions where there is absolute liability for failure to repair, the railroad company is entitled to a reasonable time to discover a defect in a fence or cattle guard and to make the necessary repairs before liability attaches.

Although where, under the statute, a railroad company is absolutely liable for failure to repair regardless of whether or not it exercised due care in discovering defects, as discussed supra § 577, the question of the railroad's knowledge of the defect does not arise,[27] the general rule is that, where fences such as the law requires have been constructed, the railroad company will not be liable for injuries to animals due to defects subsequently occurring therein unless it had either actual or constructive notice of the defect and an opportunity to repair it.[28]

The company is entitled to a reasonable time to discover the defect[29] and to make the necessary repairs.[30] The notice of the defect, however, may be either actual or constructive,[31] and the company will be liable where it is requested by the landowner to make repairs,[32] or where by the exercise of reasonable care and diligence it could have known of the defect,[33] or if the defect has existed for such a length of time prior to the accident that it ought to have been discovered.[34] If the special defect which caused the injury was due to a generally defective condition of the fence which had existed for a considerable length of time, the company will be liable, although without notice of the special defect.[35] If the fence as originally constructed was defective it is not necessary to show any knowledge on the part of the company of the defect in order to render the company liable.[36]

If the necessary repairs are not made within a reasonable time after notice of the defect,[37] or after the company should, by the exercise of reasonable care and diligence, have known of it,[38] the company is liable. In computing the reasonable time, Sunday must be counted as a day on which repairs may be made if trains are run on that day.[39]

§ 579. —— Defects Caused by Third Persons

A railroad company ordinarily is not liable for injuries to animals resulting from a defect in a fence or cattle guard caused by the act of a third person, in the absence of negligence on the company's part in failing to discover and repair the defect within a reasonable time.

Where a railroad company has constructed sufficient fences, and animals are injured by reason of a breach therein, made by persons not in the employ or under the control of the company and without its knowledge or authority, the company will not be liable in the absence of any negligence in failing to discover and repair the defect within a reasonable time;[40] but, although the defect was so caused, the company will be liable if it is not repaired within a reasonable time,[41] or, where the fence is being repeatedly broken down by third persons, to the knowledge of the railroad, if the railroad does not

23. Mo—Rutledge v. Hannibal, etc, R Co, supra
Wis—Antisdel v. Chicago, etc, R Co, 26 Wis 145, 7 Am R 44

24. Mo—Creson v Missouri, etc, R Co, 133 S W 57, 152 Mo App 197—Harper v Missouri, etc, R Co, 70 Mo App 604.

25. Minn—Evans v St Paul, etc, R Co, 16 N W. 271, 30 Minn 489

26. Cal—Jesus Maria Rancho v Southern Pac Co, 172 P. 183, 36 Cal App 375.
52 C J p 51 note 32

27. Tex—Fort Worth, etc, R. Co v. Jenkins, Civ App., 252 S W. 189.

28. Mo—Townsley v Missouri Pac R Co, 1 S W. 15, 89 Mo. 31.
52 C J p 52 note 37.

29. Ill—Iddings v. Pennsylvania R Co, 256 Ill App 189.
52 C J p 52 note 38.

30. Ill—Illinois Cent R Co. v. Swearingen, 33 Ill 289.
52 C J p 52 note 39.

31. N.Y—Wheeler v. Erie R Co, 2 Thomps & C 634

32. Okl—Davis v. G W. Connelly Ranch Co, 229 P 492, 103 Okl. 94.

33. Mo—Lainiger v Kansas City, etc, R Co., 41 Mo App. 165.
Tex—Galveston, etc, R Co. v Walter, Civ App., 25 S W 163.

34. Mo—Peery v. Quincy, etc, R Co, 99 S W 14, 122 Mo App. 177
52 C J p 52 note 43

35. Ohio.—Baltimore, etc, R Co v Schultz, 1 N E 324, 43 Ohio St. 270

36. Iowa—Morrison v Burlington, etc, R Co, 51 N.W 75, 84 Iowa 663

37. Iowa—Fritz v. Kansas City, etc, R Co, 16 N.W 144, 61 Iowa 323
52 C J p 52 note 46

38. Mo—Maberry v Missouri Pac. R. Co, 83 Mo 667.

39. Ind—Toledo, etc, R Co v. Cohen, 44 Ind 444

40. Mo.—Walthers v. Missouri Pac. R Co, 78 Mo 617
52 C J p 52 note 50.

41. Mo—Peery v Quincy, etc, R. Co, 99 S W 14, 122 Mo App. 177.
52 C.J p 52 note 51.

take steps to prevent it.[42] If the person leaving the opening in the fence did so under direction of agents of the railroad, duly authorized, the railroad is liable.[43]

As discussed infra § 587, under the statutes in some jurisdictions, railroads are expressly relieved of liability for gates left open by adjoining owners or by trespassers.

§ 580. —— Defects Caused by Fire, Wind, or Storms

Generally speaking, a railroad is not liable for injuries to animals resulting from defects in a fence caused by fire or windstorm in the absence of negligence in failing to discover and repair such defects within a reasonable time; its liability for injuries resulting from snow and ice on a fence or cattle guard depends on whether it has been negligent in failing to remove such accumulations within a reasonable time.

Where a proper fence is constructed, a railroad company will not be liable if not negligent in discovering and repairing the defect for injuries due to defects therein caused by fire[44] or windstorm;[45] but it will be liable if the defect is not repaired within a reasonable time[46] unless it was the duty of the adjoining landowner to repair it.[47] Railroad companies are not required to build their fences so high that the fall or drift of snow will never cover them;[48] nor are they required to remove the snow and drifts from their fences so as to prevent animals passing over them,[49] although it has also been held that they must use reasonable diligence in doing so, if they own the land on both sides of the fence.[50]

Cattle guards. It is held in some jurisdictions that railroad companies must exercise reasonable care and diligence to keep their cattle guards free from accumulations of ice and snow which would render them ineffective,[51] and that they will be liable for injuries to animals due to a failure to remove such accumulations within a reasonable time,[52] but if it uses due diligence, and animals are injured before the snow can be cleared away, the railroad is not liable.[53] Liability for failure to clear cattle guards of snow is grounded on negligence,[54] which, as discussed infra § 673, is usually a question of fact for the jury, depending on circumstances of location of the road, position and condition of the cattle guard, prevailing storms, weather conditions, and other relevant facts. However, because of the severity of the winters, it has been held that, except under exceptional and extraordinary circumstances, reasonable care and diligence do not require a railroad company to remove the natural accumulations of snow and ice from its cattle guards[55]

§ 581. Persons Entitled to Benefits of Statute

With respect to the liability of a railroad company for injuries to animals resulting from failure to comply with the provisions of fencing statutes, some statutes are construed as being only for the benefit of adjoining landowners while others are held to be in the nature of police regulations for the benefit of the general public.

The statutes requiring railroad companies to maintain fences and cattle guards are in some jurisdictions construed as being only for the benefit of adjoining landowners.[56] These statutes include within their protection occupiers, tenants, or lessees of such landowners,[57] and animals rightfully upon such lands with the express or implied consent of the landowner;[58] and if the owner of the land has entered into an agreement with the railroad, under the terms of which one who pastures cattle on the adjoining land with the owner's permission has no rights as against the railroad, the licensee and owner of the injured animal cannot by assignment of his right of action to the owner recover in the latter's name.[59] In these jurisdictions plaintiff must show, in order to entitle himself to the benefit of

42. Ill.—Awe v Chicago, etc., R. Co, 175 Ill.App. 144.

43. Mo.—Missouri, etc., R. Co. v. Armstrong, Civ.App., 99 S.W. 431.

44. Ind.—Indianapolis, etc., R. Co. v. Truitt, 24 Ind. 162.
52 C J. p 52 note 57.

45. Mich.—Robinson v. Grand Trunk R. Co, 32 Mich. 322.

46. Ind.—Cleveland, etc., R. Co. v. Brown, 45 Ind. 90.

47. N.Y.—Terry v. New York Cent. R Co, 22 Barb 574.
52 C.J. p 52 note 60.

48. Iowa.—Patten v. Chicago, etc, R. Co, 39 N.W. 708, 75 Iowa 459

49. Iowa.—Patten v. Chicago, etc, R. Co, supra.

50. Kan.—Toothaker v. Director-Gen. of Railroads, 210 P 1110, 112 Kan. 304.

51. Iowa.—Paul v. Chicago, etc, R. Co., 94 N.W. 498, 120 Iowa 224.
52 C J. p 53 note 64.

52. Kan.—Martin v. Atchison, etc, R Co, 141 P. 599, 92 Kan. 595, L R A.1915B 134.
52 C.J. p 53 note 65.

53. Ill.—Chicago, etc., R. Co. v. Kennedy, 22 Ill.App. 308.

54. Vt.—Walt v. Bennington, etc, R. Co., 17 A. 284, 61 Vt. 268.

55. Minn.—Stacey v. Winona, etc, R. Co, 43 N W. 905, 42 Minn 158—Blais v. Minneapolis, etc., R Co., 24 N W. 558, 34 Minn. 57, 57 Am R. 36.

56. Mass.—Gerry v. New York, etc., R. Co, 79 N E 783, 194 Mass 35.
52 C J. p 53 note 72.

Common-law liability

Nonowner of inclosure could sue railroad for damages to mule becoming entangled in cattle guard without giving ten days' written notice to repair.—Missouri Pac R Co v. Miller, 50 S W.2d 618, 135 Ark 937.

57. Cal.—Walther v Sierra R. Co., 74 P. 340, 141 Cal 288.
52 C.J. p 53 note 74.

58. Cal.—McCoy v. Southern Pac. Co, 26 P. 629, 3 Cal Unrep.Cas. 398.
52 C.J. p 53 note 76.

59. Utah.—Knight v. Southern Pac. Co., 172 P. 689, 52 Utah 42.

the statute, his title or interest in, or right to occupancy of, the adjoining land [60]

General public. In another group of states, the statutes are held to be in the nature of police regulations for the benefit of the public generally,[61] although particular statutes even in these jurisdictions may restrict the protection to a particular class.[62] Also, it has been held, under such a statute that a railroad, being under no obligation to the public to fence off its own land from the track, is not liable to a tenant occupying land of the railroad adjoining the track for injuries to his animals due to a failure to fence between its own land and the track [63]

In Missouri the statute requiring railroad companies to fence their tracks where they pass through unınclosed lands or along a highway has been held to operate for the benefit of the general public and not for adjoining owners only,[64] and, while the provisions requiring fencing where the road passes through inclosed or cultivated fields has been held to be only for the benefit of adjoining owners[65] and tenants,[66] this construction of the statute has been expressly limited and modified,[67] and it is now well settled that the requirement inures to the benefit of any person whose animals are on the adjoining premises by permission or with the consent of the landowner[68] or which stray upon the adjoining lands if such lands are not inclosed by a lawful fence;[69] but, if such lands are inclosed by a lawful fence on all sides except next to the railroad track, that is all the protection which persons other than the landowner are entitled to;[70] and if the animals of third persons break over such lawful fences and go over the track and are injured there can be no recovery although the railroad company failed to fence along the track.[71]

C. PRIVATE CROSSINGS, GATES, AND BARS

§ 582. In General

Where a landowner's premises are divided by a railroad right of way, and there is no ordinary passway, he has a right to cross the railroad with his animals, but the right must be reasonably exercised, and he cannot pasture the animals or allow them to stray or loiter on the right of way; and if he crosses the track at a place other than at a crossing the railroad company is required to maintain, he must take it as he finds it.

Where a landowner's premises are divided by a railroad right of way and there is no highway or ordinary passway to enable him to get from one portion to the other, he has a right to cross the railroad with his animals,[72] but he has no right to a private crossing from a road parallel to the right of way to a private lane closed by a gate and having no outlet.[73] His right to cross must be reasonably exercised.[74] He cannot pasture the animals, or allow them to stray or loiter on the right of way.[75] Where a person who is a mere licensee crosses a railroad track at a place other than such crossings as the railroad company is required to maintain, he must take it as he finds it and cannot recover for injuries to his animals due to the condition at that place.[76]

Where gates have already been constructed at a private crossing in compliance with statutory requirement, it cannot be held negligence on the part of the railroad company to continue them merely because a way under a trestle at that point rendered a way over the tracks unnecessary.[77]

§ 583. Duty to Construct and Protect

In the absence of statutory exception, private ways

60. Cal.—Wills v. Southern Pac Co, 161 P. 501, 31 Cal.App. 723
Ill.—Ohio, etc., R Co v. Saxton, 27 Ill 426.

61. Ga.—Elberton & E R Co v. Campbell, 167 S E 215, 46 Ga App 203
52 C.J. p 54 note 91.

62. Kan.—Wood v. Union Pac R Co, 129 P 193, 88 Kan. 477.
52 C J. p 54 note 92.

63. N Y.—Potter v. New York Cent, etc, R Co., 15 N.Y.S 12, 60 Hun 313.

64. Mo.—McClaskey v. Quincy, etc, R Co, 161 S.W. 277, 174 Mo.App. 724.
52 C.J. p 54 note 93 [a].

65. Mo.—Peddicord v. Missouri Pac. R Co, 85 Mo 160.
52 C.J. p 54 note 84.

66. Mo.—Huss v. Wabash R. Co., 84 Mo.App. 111.

67. Mo.—Rinehart v. Kansas City Southern R. Co., 80 S W. 910, 126 Mo App. 446, affirmed 102 S.W 958, 204 Mo 269

68. Mo.—Kitsock v. Chicago, etc., R. Co, App, 226 S W. 269
52 C J. p 54 note 87.

69. Mo.—Rinehart v. Kansas City Southern R. Co, 102 S.W. 958, 204 Mo 269.
52 C J. p 54 note 88.

70. Mo.—Johnson v. Missouri Pac. R Co, 80 Mo 620.

71. Mo.—Peddicord v. Missouri Pac. R Co, 85 Mo. 160.
52 C J p 54 note 90.

72. Conn.—Housatonic R Co v. Waterbury, 23 Conn. 101.
52 C J. p 54 note 97
Crossing private lands generally see supra §§ 168–175.

73. Tex.—International, etc, R Co v. Williams, Civ.App., 175 S W 486

74. Conn.—Housatonic R Co v. Waterbury, 23 Conn 101.

75. Conn.—Housatonic R Co. v. Waterbury, supra

76. Ala.—Pratt Coal, etc, Co. v Davis, 79 Ala. 308
Wis.—Truax v. Chicago, etc, R Co., 53 N W 842, 83 Wis. 547.

77. Tex.—Penshorn v International, etc., R. Co, Civ App., 186 S.W. 868.

and farm crossings must be fenced or otherwise adequately protected

The exemption from the duty of fencing at the crossing of public highways which is discussed supra § 573 does not apply to private ways and farm crossings,[78] and such places, in the absence of statutory exception, must be fenced or otherwise adequately protected.[79] Where, however, there are statutes prohibiting the obstruction of private ways, fences, gates, or bars cannot be constructed across them.[80] Under a fencing statute, general in its terms, which makes no express reference to private crossings, it has been said that the company may determine whether this protection shall consist of gates or other structures provided the protection afforded is reasonable;[81] but under similar statutes other authorities have held that cattle guards are not sufficient and that the obligation, absolute except as to public crossings and station grounds, is to "fence," using gates or bars as part of the fence.[82] Where the statute provides for private crossings but does not expressly require gates or bars, it has been held that such a requirement is implied from the necessities of the situation,[83] but only to the extent that it is necessary for the use, convenience, and safety of the public.[84] Under statutes expressly requiring gates or bars at private crossings, failure to erect and maintain such gates or bars subjects the railroad to liability for injuries to animals coming on to the track at the unprotected crossing,[85] although it has been held that cattle guards may be substituted therefor where gates or bars would seriously interfere with the use of a particular crossing,[86] and such substitution may be made at certain private crossings more important than farm crossings.[87] The railroad is not relieved of this duty and liability by the fact that the deed to it of the right of way from the owner of the land through which the way passes binds it to maintain fences but says nothing as to gates.[88]

§ 584. Sufficiency, Defects, and Repairs

Gates or bars at private or farm crossings constitute a part of the fence, and must be sufficient to serve the purpose of such a fence as the railroad company is required to construct and maintain.

As affecting the duties and liabilities of railroad companies with respect to fencing, the gates or bars at private or farm crossings constitute a part of the fence,[89] and must be sufficient to serve the purposes of such a fence as they are required to construct and maintain.[90]

Mode of construction, if not prescribed by statute, is not material, provided it is sufficient to turn ordinary stock.[91] If the mode of construction is prescribed by statute, but is not itself designed to turn small animals passing under it, the fact that the fence as constructed did not conform to the statutory requirements will not subject the railroad to liability for injuring such animals.[92] The gates must be provided with suitable and sufficient fastenings to keep them securely closed,[93] reasonably, not absolutely, proof against opening by stock,[94] particular kinds of fastening being used if specified in the statute.[95] Bars must not only be of sufficient strength but so arranged as not easily to be displaced or thrown down by stock.[96] A gate is not necessarily improperly constructed because hung so as to open toward the right of way,[97] or constructed as a slid-

78. Mo.—Jenkins v. Chicago, etc., R. Co., 27 Mo. App. 578.
52 C.J. p. 55 note 7.

79. Tenn.—Union Tract. Co. v. Anderson, 242 S.W. 876, 146 Tenn. 476, 25 A.L.R. 1496.
52 C.J. p. 55 note 9—51 C.J. p. 718 note 54 [b].

80. Tenn.—Mobile, etc., R. Co. v. Thompson, 47 S.W. 151, 101 Tenn. 197, distinguished in Union Tract. Co. v. Anderson, 242 S.W. 876, 146 Tenn. 476, 25 A.L.R. 1496.

81. Ohio.—Pittsburgh, etc., R. Co. v. Cunnington, 39 Ohio St. 327, 329.
52 C.J. p. 55 note 13.
Railroad held to have right to insert proper gate in fence so as to give owner of land on both sides of right of way a farm crossing.—Hildebrand v. Chicago, B. & Q. R. R., 17 P.2d 651, 45 Wyo. 175.

82. Ind.—Indianapolis, etc., R. Co. v. Thomas, 84 Ind. 194.—Indiana Cent. R. Co. v. Leamon, 18 Ind. 173.

83. Iowa.—McKinley v. Chicago, etc., R. Co., 47 Iowa 76.
52 C.J. p. 55 note 16.

84. Iowa.—Fowbel v. Wabash, etc., R. Co., 100 N.W. 1121, 125 Iowa 215.
52 C.J. p. 55 note 17.

85. Neb.—Fremont, E. & M. V. R. Co. v. Pounder, 54 N.W. 509, 36 Neb. 247.
52 C.J. p. 55 note 19.

86. Wis.—Caldon v. Chicago, etc., R. Co., 55 N.W. 955, 85 Wis. 527.

87. Mass.—Eames v. Worcester, etc., R. Co., 105 Mass. 193.

88. N.Y.—Poler v. New York Cent. R. Co., 16 N.Y. 476. See also supra § 190.

89. Kan.—Schulman v. Atchison, T. & S. F. Ry. Co., 86 P.2d 590, 149 Kan. 114.
52 C.J. p. 55 note 24.

90. Neb.—Fremont, E. & M. V. R. Co. v. Pounder, 54 N.W. 509, 36 Neb. 247.
52 C.J. p. 55 note 25.

91. Iowa.—Payne v. Kansas City, etc., R. Co., 33 N.W. 633, 72 Iowa 214.

92. Kan.—Leebrick v. Republican Valley, etc., R. Co., 21 P. 796, 41 Kan. 756.

93. Neb.—Fremont, E. & M. V. R. Co. v. Pounder, 54 N.W. 509, 36 Neb. 247.
52 C.J. p. 56 note 28.

94. Ill.—Smith v. Baltimore, etc., R. Co., 184 Ill. App. 80.—Chicago, etc., R. Co. v. Buck, 14 Ill. App. 394.

95. Mo.—Duncan v. St. Louis, etc., R. Co., 3 S.W. 835, 91 Mo. 67.
52 C.J. p. 56 note 30.

96. Mich.—Davidson v. Michigan Cent. R. Co., 13 N.W. 804, 49 Mich. 428.

97. Iowa.—Payne v. Kansas City,

ing gate instead of being hung on hinges,[98] or because the hook or fastening is on the inside, next to the pasture or land inclosed,[99] although this fact may have a bearing on whether or not the gate was negligently constructed.[1] The fastening is not sufficient, however, if the gate will open by mere pressure against it,[2] nor is a sliding gate sufficient if it is too short to close the opening.[3]

§ 585. —— Maintenance and Repair in General

It is the duty of a railroad company to keep a private crossing constructed by itself in a safe and proper state of repair, but it is not liable for injuries due to defects in a crossing constructed and maintained by third persons, although it must exercise reasonable care to keep private crossings clear of obstructions dangerous to animals.

It is the duty of a railroad company to keep a private crossing constructed by itself in a safe and proper state of repair,[4] but it is not liable for injuries due to defects in a crossing constructed and maintained by third persons,[5] even though the railroad knows of the crossing and permits its use,[6] or in an opening under a railroad bridge built by the railroad for its own use only, but privately used by plaintiff as licensee for the passage of stock.[7] The railroad must exercise reasonable care and diligence to keep private crossings clear of obstructions dangerous to animals,[8] and the gates or bars in repair;[9] but it is not an insurer of owners of animals against their getting through the gates.[10]

The duty to use reasonable care in the maintenance of gates exists whether the duty of constructing them is imposed on the company by statute or agreement[11] or whether it has constructed them voluntarily,[12] and, where the statute imposes a duty to construct and maintain gates at farm crossings, the duty exists if the farm crossing exists, independently of the question whether a duty is laid on the railroad to build and maintain the crossing,[13] nor does this duty shift to the landowner merely because the latter occasionally takes it on himself to repair the gates;[14] but a landowner who has taken on himself the closing of an opening left in a fence by the railroad cannot thereafter hold the railroad liable in the absence of notice to the railroad to assume the responsibility.[15] Under statutes requiring the landowner to make repairs, subject to existing contract rights between the company and landowner which the statute does not change,[16] the railroad is not liable for the landowner's default.[17]

§ 586. —— Notice of Defects; Duty to Inspect

Except where the defects were in the original construction, the railroad company ordinarily will not be liable for failing to repair defects of which it has no knowledge, but it will be liable where it has notice thereof.

Except where the defects were in the original construction,[18] the railroad company ordinarily will not be liable for failing to repair defects of which it has no knowledge,[19] but it will be liable where it has notice,[20] or where the defect has existed for such a length of time that it should by reasonable care and diligence have been discovered, and a sufficient time has elapsed within which to repair it.[21]

§ 587. Duty to Keep Gates and Bars Closed

a. Duty of railroad

b. Duty of landowner

etc., R. Co., 33 N.W. 633, 72 Iowa 214.

98. Iowa—Mears v. Chicago, etc., R Co, 72 N.W. 509, 103 Iowa 203. Mo—Kavanaugh v. Atchison, etc., R. Co., 75 Mo.App. 78. 52 C J p 56 note 33

99. Iowa—Payne v. Kansas City, etc, R Co, 33 N W 633, 72 Iowa 214—Butler v Chicago, etc, R. Co., 32 N W. 262, 71 Iowa 206.

1. Iowa—Butler v. Chicago, etc., R. Co, supra.

2. Iowa.—Payne v. Kansas City, etc, R. Co., 33 N W 633, 72 Iowa 214.

3. Ill—Kreeb v. Lake Erie, etc., R. Co, 211 Ill App 630.

4. Iowa.—Hemphill v. Cedar Rapids, etc, R, etc, Co., 151 N W 449, 169 Iowa 498 S C—Miller v. Seaboard Air Line R. Co, 77 S E. 748, 94 S.C 105.

5. Ala—Pratt Coal, etc, Co. v. Davis, 79 Ala 308.

6. Ala—Pratt Coal, etc, Co. v. Davis, supra

7. Wis—Truax v. Chicago, etc, R. Co., 53 N W. 842, 83 Wis 547.

8. Mo—Stewart v. Quincy, etc., R. Co., 125 S W. 1003, 142 Mo.App. 322.

9. Kan—Missouri Pac R Co. v. Pfrang, 51 P. 911, 7 Kan App 1. 52 C J. p 56 note 44.

10. Ill—Smith v. Baltimore, etc., R. Co., 137 Ill App 80. 52 C J p 56 note 45.

11. Ind—Toledo, etc, R. Co. v. Burgan, 37 N E 31, 9 Ind App. 604.

12. Iowa—Miller v. Chicago, etc, R. Co, 24 N W. 36, 66 Iowa 546. 52 C J. p 56 note 47.

13. Ont—Murphy v Grand Trunk R Co, 1 Ont. 619

14. Ill—Peoria, etc, R. Co. v. Babbs, 23 Ill App 454

15. Ill.—Swisher v. Carpenter, 164 Ill App. 155

16. Ind—Toledo, etc., R Co. v. Burgan, 37 N E 31, 9 Ind App. 604 52 C J. p 57 note 52.

17. Ind—Indianapolis, etc., R Co v. Shimer, 17 Ind 295. 52 C J p 57 note 53

18. Mo.—Duncan v. St Louis, etc., R Co, 3 S W. 835, 91 Mo 67—McMillan v. Chicago, etc., R. Co., 70 Mo App. 568.

19. Mo.—Laney v. Kansas City, etc., R. Co., 83 Mo. 466—Fitterling v Missouri Pac. R. Co., 79 Mo 504

20. Cal.—Johnson v. Southern Pac Co., 104 P 713, 11 Cal App 278. Okl.—Davis v. G W. Connelly Ranch Co., 229 P. 492, 103 Okl. 94

21. Minn—Chisholm v. Northern Pac. R. Co, 54 N.W. 1061, 53 Minn. 122 52 C J p 57 note 58.

a. Duty of Railroad

Generally a railroad company must exercise reasonable care to see that the gates or bars at private or farm crossing are kept closed, but if the gates or bars are properly constructed and are left open by the landowner or by strangers without the knowledge of the company it will not be liable unless they have remained open for such length of time that it should in the exercise of reasonable care have discovered their condition.

Under statutes expressly so providing or construed to have that effect, railroads have been held liable for injuries to animals coming on to the right of way through open gates at private crossings independently of their negligence or of their knowledge of the conditions.[22] The general rule, however, under statutes requiring a sufficient fence or establishing liability of the railroad for failure to construct and maintain a sufficient fence, is that the railroad must exercise reasonable care to see that the gates or bars at private or farm crossings are kept closed,[23] the duty being included in that of maintaining a sufficient fence of which the gates or bars constitute a part,[24] but that only reasonable care on the part of the railroad is required,[25] and that, in the absence of evidence showing that such care was not used, the company is not liable.[26] It is not required to keep a patrol along the line of the railroad,[27] or to station watchmen at farm crossings to see that gates or bars are kept closed,[28] even though the gates are frequently and habitually left open by persons passing through, and the railroad company knows it.[29]

If the crossing is also used by the railroad or its customers the company will be liable for injuries due to the gate being left open through the negligence of its servants[30] or persons transacting business with the company.[31] If a railroad constructs gates at points where they are not required or permitted, the burden is on the company to see that they are kept closed.[32] If the gates or bars are properly constructed and are left open by the landowner or by strangers without the knowledge of the company, ordinarily it will not be liable,[33] the company being entitled to a reasonable time to discover that they are open and to close them,[34] but the company will be liable if they have remained open for such length of time that it should in the exercise of reasonable care have discovered their condition.[35] The condition of the fastening is immaterial[36] unless it is so bad and has existed for so long a time as to charge the railroad with knowledge that leaving the gate open is the natural and probable consequence of the defective condition.[37]

b. Duty of Landowner

As between the railroad company and the person for whose benefit the crossing is maintained, the duty of keeping the gates closed rests primarily on the owner of the crossing and he cannot recover for injury to animals if he or someone using the crossing with his permission left the gate open.

As between the railroad company and the person for whose benefit the crossing is maintained, the duty of keeping the gates closed rests primarily on the owner of the crossing[38] or upon his tenant.[39]

22. Mont.—Scheffer v. Chicago, etc., R. Co., 163 P. 565, 53 Mont. 302.
52 C.J. p. 57 note 60.

23. Kan.—**Corpus Juris cited in** Schulman v. Atchison, T. & S. F. Ry. Co., 86 P.2d 590, 592, 149 Kan. 114.
Mo.—West v. Missouri Pac. R. Co., 26 Mo. App. 344.
Okl.—Missouri-Kansas-Texas R. Co. v. Stephens, 16 P.2d 117, 160 Okl. 143.
52 C.J. p. 57 note 62.

24. Okl.—Missouri-Kansas-Texas R. Co. v. Stephens, supra—St. Louis & S. F. R. Co. v. Williams, 122 P. 152, 31 Okl. 450.
52 C.J. p. 57 note 63.

25. Kan.—**Corpus Juris cited in** Schulman v. Atchison, T. & S. F. Ry. Co., 86 P.2d 590, 592, 149 Kan. 114.
52 C.J. p. 57 note 64.

26. N.Y.—Davison v. Delaware, etc., R. Co., 119 N.Y.S. 369, 134 App. Div. 872.

27. Ill.—Illinois Cent. R. Co. v. McKee, 43 Ill. 119—Chicago, etc., R. Co. v. Sierer, 13 Ill. App. 261.

28. Iowa.—Henderson v. Chicago, etc., R. Co., 43 Iowa 620.
Tex.—Texas, etc., R. Co. v. Corn, 114 S.W. 103, 102 Tex. 194.

29. Iowa.—Henderson v. Chicago, etc., R. Co., 43 Iowa 620.

30. Ind.—Baltimore, etc., R. Co. v. Zollman, 80 N.E. 40, 40 Ind. App. 233.
52 C.J. p. 57 note 70.

31. N.Y.—Spinner v. New York Cent., etc., R. Co., 67 N.Y. 153.

32. Wyo.—**Corpus Juris quoted in** Hildebrand v. Chicago, B. & Q. R. R., 13 P.2d 1081, 1083, 44 Wyo. 488, affirmed 17 P.2d 651, 45 Wyo. 175.
52 C.J. p. 58 note 72.

33. Kan.—**Corpus Juris cited in** Schulman v. Atchison, T. & S. F. Ry. Co., 86 P.2d 590, 592, 149 Kan. 114.
Okl.—Missouri-Kansas-Texas R. Co. v. Stephens, 16 P.2d 117, 160 Okl. 143—St. Louis & S. F. R. Co. v. Williams, 122 P. 152, 31 Okl. 450.
52 C.J. p. 58 note 73.

34. Okl.—Missouri-Kansas-Texas R. Co. v. Stephens, 16 P.2d 117, 160 Okl. 143—St. Louis & S. F. R. Co. v. Williams, 122 P. 152, 31 Okl. 450.
52 C.J. p. 58 note 74.

35. Kan.—**Corpus Juris cited in** Schulman v. Atchison, T. & S. F. Ry. Co., 86 P.2d 590, 592, 149 Kan. 114.
Okl.—Missouri-Kansas-Texas R. Co. v. Stephens, 16 P.2d 117, 160 Okl. 143—St. Louis & S. F. R. Co. v. Williams, 122 P. 152, 31 Okl. 450.
52 C.J. p. 58 note 75.

36. Mo.—Binicker v. Hannibal, etc., R. Co., 83 Mo. 660.

37. Minn.—Chisholm v. Northern Pac. R. Co., 54 N.W. 1061, 53 Minn. 122.
52 C.J. p. 58 note 77.

38. La.—Hower v. Missouri Pac. R. Co., App., 144 So. 780.
Wyo.—**Corpus Juris cited in** Hildebrand v. Chicago, B. & Q. R. R., 13 P.2d 1081, 1082, 44 Wyo. 488, affirmed 17 P.2d 651, 45 Wyo. 175.
52 C.J. p. 58 note 78.

39. Tex.—Missouri, etc., R. Co. v. Davis, 118 S.W. 234, 54 Tex. Civ. App. 516—Missouri, etc., R. Co. v. Hanacik, 56 S.W. 938, 23 Tex. Civ. App. 394.

Such person cannot recover for injury to animals if he himself left the gates open,[40] or if they were left open by persons using the crossing and gates with his permission,[41] or by a trespasser,[42] although the company knew of it and failed to close them.[43] Also where the gates are left open by the landowner the company is not liable for animals which at the time of entry were pastured on the owner's land[44] or were trespassing thereon,[45] and it has been held even that third persons cannot recover on the theory that as to them the railroad's duty was to keep such gates closed,[46] although there is some authority to the contrary.[47]

Under statutes requiring that all gates and bars at farm crossings must be kept closed by the owner of the crossing, the company is not liable to third persons for injuries due to the failure of the owner of the crossing to do so,[48] even though a prior, separate entry of the animal on the railroad's right of way was due to the railroad's failure to fence as required by statute;[49] but the railroad is liable if the animal did not enter through the owner's gate, but at some other point which the railroad is bound to protect,[50] or if it entered at the owner's gate, but the gate had been left open by the railroad's servants.[51]

Statutes stipulating that it is the duty of the owner to keep gates closed apply to farm crossings constructed prior to the enactment of the statute,[52] but not to openings other than farm crossings.[53] Under statutes requiring crossings for the owner's exclusive benefit where a railroad passes through inclosures, and making it the duty of the owner to keep the gates closed, a crossing ceases to be for the exclusive benefit of the owner within the meaning of the statute when a lane is opened connecting it directly with the public highway and without gates at the intersection with the highway.[54] Where a contract between a railroad and a landowner provided that gates at a private crossing might be kept open at the landowner's risk, the landowner did not assume the risk of injury to his animals passing through the open gates and entering the railroad right of way at some other point which it had failed to fence in accordance with the statutory requirements.[55]

§ 588. Cattle Guards and Wing Fences

In the absence of an express requirement, railroad companies are not obliged to construct cattle guards at private or farm crossings.

In the absence of an express requirement, railroad companies are not obliged to construct cattle guards at private or farm crossings,[56] the gates or bars required at such crossings being held to be a sufficient protection to prevent animals from going upon the tracks at such places.[57] Where a statute in express terms requires it, cattle guards must be placed at farm crossings,[58] or at private passways used by the public where there are terminal points of the railroad fences,[59] and, where the statute requires their construction on notice from the landowner, a voluntary construction of them by the railroad without notice obligates the company to build proper and effective ones[60] and to keep them in good repair.[61]

Where the statute requires cattle guards at such crossings and makes no provision for gates, a fence with gates but without cattle guards is not a proper fence.[62] Statutes are construed as applying only to public crossings, and not to private ways or farm

40. N Y —Diamond Brick Co v. New York Cent. & H. R. R. Co, 12 N Y S 22, 58 Hun 396.
52 C.J p 58 note 80.

41. Mo —Box v. Atchison, etc., R Co, 58 Mo App. 359.

42. Iowa —Weaver v Chicago, etc., R Co., 124 N W. 1088, 146 Iowa 149

43. N Y —Diamond Brick Co v. New York Cent., etc, R. Co, 12 N Y S 22, 58 Hun 396.

44. N Y —Diamond Brick Co v New York Cent, etc, R Co, 7 N Y.S 868, 5 Silv Sup. 321.

45. Kan —Fritzel v Kansas City, K V & W. R. Co, 235 P. 852, 118 Kan 447.
52 C J. p 58 note 85.

46. Tex —Missouri, etc., R Co v. Butler, Civ.App., 121 S W 176.

47. Tenn —Louisville, etc, R Co. v. Hobbs, 5 Tenn.Civ.App. 282.

48. Ind —Chicago, etc., R. Co. v. Ramsey, 81 N E 79, 168 Ind 390.
52 C.J p 58 note 89

49. Ind.—Chicago, etc, R. Co. v. Ramsey, supra.

50. Ind —Louisville, etc, R. Co v. Consolidated Tank Line Co, 30 N E 159, 4 Ind.App. 40

51. Ind.—Baltimore, etc, R Co. v Zollman, 80 N E. 40, 40 Ind App 233.

52. Ind —Hunt v Lake Shore, etc, R Co., 13 N E 263, 112 Ind. 69.

53. Ind —Wabash R Co. v. Williamson, 29 N E. 455, 3 Ind App. 190—Louisville, etc, R. Co v. Hughes, 28 N E 158, 2 Ind App. 68

54. Tex.—Chicago, etc., R Co v. Wilson, 124 S.W. 132, 58 Tex.Civ. App 136

55. Wash —Snodgrass v. Spokane, etc., R Co, 151 P. 815, 87 Wash 308

56. Minn.—Sather v. Chicago, M. & St P. R. Co., 41 N.W. 458, 40 Minn. 91.
52 C.J p 59 note 2.

57. Minn —Sather v. Chicago, M. & St. P. R. Co, supra.
52 C J. p 59 note 3.

58. N.H —Chapin v. Sullivan R Co., 39 N.H. 564, 75 Am D. 237
Vt.—Aldrich v Boston, etc, R. Co., 100 A 765, 91 Vt 379.

59. Ky —Mansfield v. Frankfort, etc, R. Co, 234 S.W. 956, 193 Ky. 95

60. Ga —Savannah, etc, R Co v. Hart, 110 S.E. 410, 27 Ga App. 743.

61. Ga —Savannah, etc, R. Co. v. Hart, supra

62. Ariz.—Arizona Eastern R Co v. Matthews, 237 P. 384, 28 Ariz. 443.

crossings, which in terms require the construction of cattle guards at "all wagon crossings,"[63] at "all railroad crossings,"[64] or at "all road crossings"[65] No obligation to construct cattle guards at farm crossings rests on the railroad merely because a statute relieves the railroad from all responsibility for keeping the gate closed.[66]

Where, however, the statute requires cattle guards to be placed at the point where the railroad enters an "inclosure," a fenced lane, being an "inclosure," crossing the tracks must be protected by properly constructed and maintained cattle guards at the point where the railroad enters it.[67] The voluntary construction of wing fences where the crossing is already sufficiently protected by gates in conformity with statutory requirements does not impose on the railroad a duty to maintain them for all time.[68]

§ 589. Gates or Openings at Places Other than Farm Crossings

If a railroad company constructs or permits the use of gates or bars at places other than farm crossings, they must be so constructed and maintained as to serve the purposes of a fence, and the company must see that they are kept closed, and will be liable for injuries to animals resulting from its breach of duty therein.

A railroad company has a right to permit the use of gates or bars at places other than farm crossings or to construct them itself if it shall deem it advisable to do so;[69] but they must be so constructed and maintained as to serve the purposes of a fence,[70] and the company must see that they are kept closed.[71] Railroads are not liable, however, for failure to close gates in fences off the right of way.[72] If the railroad for its own purposes makes an opening in the fence through which animals enter and are injured, it will be liable,[73] and if it knowingly permits others to make or use openings it will be liable to third persons whose animals enter through such openings and are injured,[74] but not to the person by whom or for whose use and convenience the opening was made or permitted,[75] unless the railroad had expressly agreed to construct a gate at such opening and failed to do so within a reasonable time.[76]

§ 590. Liability of Owner of Crossing to Owner of Animal Injured

In the absence of any fault on the part of the railroad company, the owner of a private crossing is liable for injuries to animals of a third person entering the right of way through a properly constructed gate willfully left open by the owner of the crossing, provided the animal is not a trespasser upon the premises of the owner of the crossing.

Independently of the liability of the railroad for injuries to animals of third persons entering the right of way through open gates at private crossings, which has been considered supra § 587, the owner of the crossing will be liable to the owner of the animal injured, if the gates are properly constructed and, without any fault on the part of the railroad, the owner of the crossing willfully leaves them open, provided the animal is not a trespasser upon the premises of the owner of the crossing.[77] The landowner is not liable to the owner of animals which were wrongfully upon his premises,[78] even under a statute expressly requiring the owner of the crossing to maintain the gates or bars and relieving the railroad company from any liability by reason of his failure to do so[79] Under a statute providing that "any person who shall willfully take down, open or remove any such fence, cattle guard or crossing, or any portion thereof, or allow the same to be taken down, opened or removed, or who, having lawfully taken down bars or opened gates in such fences for the purpose of passing through the same, shall not immediately replace or close the same," shall be

63. Minn.—Sather v. Chicago, etc., R. Co, 41 N.W. 458, 40 Minn 91.

64. Neb.—Omaha, etc., R. Co. v. Severin, 46 N.W. 842, 30 Neb. 318.

65. N.Y.—Brooks v. New York, etc., R. Co., 13 Barb. 594—Cross v. New York Cent, etc., R. Co., 123 N.Y.S 908.

66. Ind.—Pennsylvania Co. v. Spaulding, 13 N.E. 268, 112 Ind 47.

67. Tex.—Missouri, etc., R. Co. v. Attaway, Civ.App, 180 S.W. 1151.

68. Utah.—Knight v. Southern Pac Co., 172 P. 689, 52 Utah 42.
Maintenance of gates voluntarily constructed see supra § 585.

69. Mich.—Detroit, etc, R. Co v. Hayt, 21 N.W 367, 911, 55 Mich 347.

Wyo.—**Corpus Juris quoted in** Hildebrand v. Chicago, B. & Q R R, 13 P 2d 1081, 1083, 44 Wyo. 488, affirmed 17 P 2d 651, 45 Wyo 175.

70. Wyo.—**Corpus Juris quoted in** Hildebrand v Chicago, B & Q R R, 13 P.2d 1081, 1083, 44 Wyo. 488, affirmed 17 P.2d 651, 45 Wyo 175.
52 C.J. p 59 note 21.

71. Wyo.—**Corpus Juris quoted in** Hildebrand v. Chicago, B & Q. R R, 13 P.2d 1081, 1083, 44 Wyo. 488, affirmed 17 P 2d 651, 45 Wyo. 175
52 C.J. p 59 note 22.

72. Mo.—Davis v. Wabash R. Co, 46 Mo App 477.
52 C J p 59 note 23.

73. Tex.—Missouri, K. & T. R. Co. v Armstrong, Civ.App, 99 S.W. 431.
52 C J. p 59 note 24.

74. Tex.—International & G N. R. Co v Richmond, 67 S.W. 1029, 28 Tex Civ.App 513
52 C.J. p 59 note 25

75. Cal.—McCoy v. Southern Pac Co., 29 P 1110, 94 Cal 568.
Mich.—Clark v. Chicago, etc, R Co, 28 N.W. 914, 62 Mich 358.

76. Cal.—McCoy v. Southern Pac. Co., 29 P. 1110, 94 Cal. 568.

77. Iowa.—Russell v. Hanley, 20 Iowa 219, 89 Am D. 535.

78. Ind.—Crum v Conover, 40 N.E 644, 42 N.E 1029, 14 Ind.App. 264

79. Ind.—Crum v. Conover, supra.

fined and in addition be liable to the party injured for all damages resulting therefrom, it has been held that the failure of the owner of a crossing to reconstruct gates, originally erected by the railroad, after they had been broken down by his runaway horses, driven by his employee, is not a "willful" act or omission making the owner of the crossing liable under the statute to the owner of an animal which goes from the former's land through the broken down gates on to the railroad track and is killed.[80]

§ 591. Care and Liability as to Animals on or near Crossing

In approaching a private or farm crossing those in charge of a train must keep a lookout to avoid injury to animals lawfully upon the crossing, but in the absence of statute or agreement the railroad company is not required to give warning of the approach of the train or to slow up or stop the train.

In approaching private or farm crossings those in charge of the train must keep a lookout to avoid injury to animals which might be lawfully upon the crossing;[81] but the railroad company is not required, in the absence of statute, to give any warning of the approach of its train,[82] or, in the absence of agreement with the landowner to do so, to slow up or stop its trains in order to ascertain whether animals are upon or near the crossing.[83]

§ 592. To Whom Liable, and Estoppel

The right to recover against a railroad company for failure to fence or to provide and maintain gates or bars extends to owners of injured animals who are not owners of the adjoining land; but the railroad is not liable as to any landowner who forbids the construction of gates or bars, or who requests or consents to an open crossing, or agrees to construct the gates himself.

Under some statutes it has been held that the right to recover against a railroad company for injuries to animals resulting from failure to fence or to provide and maintain gates or bars is extended to owners of injured animals who are not owners of the adjoining land.[84] A railroad will not be liable, however, for failing to construct gates or bars as to any landowner who forbids their construction,[85] or who requests or consents to an open crossing,[86] or who agrees to construct the gates himself;[87] but it has been held that the landowner's acquiescence does not excuse the railroad from exercising ordinary care to keep the gate and fastening in reasonably good repair.[88]

Liability to third persons. The liability of the railroad to third persons remains unaffected by the landowner's request or agreement,[89] but, where the statute expressly makes it the duty of the owner of a farm crossing to construct and maintain the gates or bars, the railroad is not liable to third persons for his failure to do so,[90] the statute, however, not applying to crossings other than farm crossings.[91]

D. INJURY BY RUNNING ON ROADBED, BRIDGES, OR TRESTLES

§ 593. In General

In the absence of statute, a railroad company is not liable for injuries due to animals going upon bridges or trestles or falling into pitfalls upon its right of way.

In the absence of statute a railroad company is not required to floor bridges or trestles[92] or to erect railings or other safeguards at dangerous places to prevent accidents to animals which may wander upon the right of way,[93] and, apart from any liability imposed by statutes requiring fencing, will not, in the absence of negligence in the operation of its trains or on the part of its servants, be liable for

80. Wis.—Oeflein v. Zautcke, 66 N. W 108, 92 Wis. 176.
52 C J. p 60 note 33.

81. Kan —Atchison, etc., R. Co v. Conlon, 57 P. 1068, 9 Kan App 116.
N D —Bishop v Chicago, etc, R Co, 62 N W. 605, 4 N.D. 536.
52 C J p 60 note 35.

Knowledge of facts
Where plaintiff, during each fall for many years, had been pasturing his cows in meadow adjoining railroad's tracks, and trainmen passing plaintiff's farm each day must have seen cows in meadow and understood that they would be driven back across tracks to barn before nightfall, railroad was charged with knowledge of such facts —Dowse v. Maine Cent. R. R., 20 A 2d 629, 91 N. H 419.

82. N.Y —Cross v. New York Cent, etc., R Co., 123 N.Y.S 908.

83. Minn —Whittier v Chicago, etc, R Co, 5 N.W. 372, 26 Minn. 484, 486
52 C.J. p 60 note 37.

84. N.Y.—Dayton v New York, etc., R Co, 30 N Y S 783, 81 Hun 284.

85. Vt —Hurd v. Rutland, etc, R. Co., 25 Vt. 116.

86. Iowa.—Tyson v. K. & D. M. R Co., 43 Iowa 207.
52 C.J. p 60 note 45

87. Tex.—Texas, etc, R. Co. v Smith, Civ.App, 41 S.W. 83

88. Mo —Brown v. St. Louis-San Francisco R Co, App, 281 S.W 452, distinguishing Francis v Quincy, etc., R Co, 93 S.W 876, 118 Mo App. 435, and Harrington v. Chicago, etc., R. Co, 71 Mo 384.

89. Ind —Indianapolis, etc, R. Co. v. Thomas, 84 Ind 194.
Tenn.—Louisville, etc., R. Co v. Hobbs, 5 Tenn Civ App 282.

90. Ind —Louisville, etc., R Co. v Etzler, 21 N E 466, 19 N E 615, 119 Ind. 39—Crum v. Conover, 40 N E. 644, 42 N E 1029, 14 Ind App. 264

91. Ind —Louisville, etc., R Co. v. Consolidated Tank Line Co, 30 N. E 159, 4 Ind App 40

92. Tex —Chicago, R I & G Ry. Co. v. Rhone, Civ App, 105 S W 2d 707, error dismissed
52 C.J. p 61 note 53

93. Tenn —Sinard v. Southern R Co, 48 S.W 227, 101 Tenn 473.
52 C.J. p 61 note 54.

injuries due to animals going upon bridges or trestles[94] or falling into pitfalls upon its right of way.[95]

Duty to extricate. It is the duty of a train crew to liberate an animal whose legs are caught between the ties of a railroad trestle if this can reasonably be done,[96] and the fact that it would have required time and would have delayed the train is no excuse for failure to do so.[97]

§ 594. Negligence in Extricating Animals

In the absence of a statute making liability depend on an actual collision between the train and the animal, the plaintiff may recover if the injury was due to negligence on the part of the railroad company's servants in extricating an animal from a bridge or a trestle.

Where animals are injured in being extricated from bridges and trestles, if the action is based on the neglect of the railroad company to fence its track, the liability will depend on whether under the particular statute an actual collision between the train and animal is necessary to render the company liable, as discussed supra § 568, but in an action not based on such a statute plaintiff may recover if the injury was due to negligence on the part of the company's servants;[98] although the company will not be liable if reasonable care and diligence was used, although by extraordinary diligence and the use of different means it might have been possible to extricate the animal without injury.[99]

E. NEGLIGENCE IN OPERATION OF TRAINS

§ 595. Signals

Ordinary care may, under some circumstances, require the blowing of a whistle or the ringing of a bell as a warning to animals, particularly where the duty to give such signals is imposed by statute.

In the absence of statutory requirements, or independently of them, ordinary care may, under some circumstances, require that the engineer should blow the whistle or ring the bell as a warning at crossings,[1] or if required by statute that the warning should be given at a greater distance from the crossing than the statute provides.[2] So also, a failure to give signals as a warning of the approach of trains at a place where men and teams are known to be at work about the track, while not negligence per se, may be negligence as matter of fact,[3] or under the circumstances of the particular case it may be negligence to back a train without giving a warning signal.[4]

It has been held in a few jurisdictions that statutes requiring the giving of signals by blowing a whistle or ringing a bell on approaching crossings are intended only as a warning to persons and have no application to unattended animals;[5] and that a railroad will not be liable for injuries to animals if the signals are not given.[6] However, it is generally held that these signals are intended as a protection to animals as well as to persons,[7] and if not given the railroad will be liable for any injuries to animals occasioned thereby,[8] without regard to the care exercised to discover the animal on the track[9] or to prevent the injury after the animal was discovered.[10] The rule has no application when the injuries are done by cars other than those drawn by an engine and under the control of an engineer,[11] as, for example, by the escape of a detached car which had been left standing upon a sidetrack.[12] If the statute requires the ringing of the bell "or"

94. Ark.—Missouri Pac. R. Co. v. Hayes, 122 S.W.2d 945, 197 Ark 356.
52 C.J. p 61 note 57.
Negligence in operation of trains see infra §§ 595–610.

95. Ill.—Illinois Cent. R. Co. v. Carraher, 47 Ill. 333.
Tex.—Missouri, etc., R. Co. v. Meyer, Civ App., 161 S.W. 12.
52 C.J. p 61 note 58.

96. Ark.—Chicago, R I & P. Ry. Co. v. Boyles, 187 S.W.2d 719, 208 Ark 774, 159 A.L.R 150.
Negligence in extricating see infra § 594.

97. Ark.—Chicago, R I. & P Ry. Co. v. Boyles, supra.

98. Ark.—Corpus Juris quoted in Chicago, R I & P Ry. Co. v. Boyles, 187 S.W.2d 719, 720, 208 Ark 774, 159 A.L.R 150.
52 C.J. p 61 note 61.

99. Ark.—Corpus Juris quoted in Chicago, R. I & P. Ry Co v. Boyles, 187 S.W.2d 719, 720, 208 Ark. 774, 159 A.L.R 150.
Ga.—Richmond, etc, R. Co. v. Buice, 14 S.E. 205, 88 Ga 180.

1. N.H.—Dowse v Maine Cent. R. R, 20 A.2d 629, 91 N.H 419.
52 C.J. p 61 note 65.

2. Iowa.—Kinyon v. Chicago, etc., R. Co., 92 N.W. 40, 118 Iowa 349, 96 Am S.R. 382.

3. Iowa.—O'Leary v. Chicago, etc, R. Co., 103 N.W. 362.

4. Tex.—Texarkana, etc., R. Co. v. Bell, Civ.App., 101 S.W. 1167.

5. Pa.—Fisher v. Pennsylvania R Co, 17 A. 607, 126 Pa. 293, 297.
52 C.J. p 61 note 70.

6. Pa.—Fisher v. Pennsylvania R Co., supra.
Contra Rehman v. Railroad Co, 5 Phila. 450.

7. Kan.—Davis v. Atchison, T & S F. Ry Co, 9 P.2d 990, 135 Kan. 96.
52 C.J. p 61 note 72.

8. Minn.—Fritz v. First Div. St. Paul, etc., R. Co, 22 Minn. 404.
52 C.J. p 62 note 73.

9. Mo.—Martin v. Butler County R. Co., 161 S.W. 631, 175 Mo.App. 464

10. Mo.—Milligan v Chicago, etc, R. Co, 79 Mo.App. 393.
Precautions as to animals seen on or near tracks see infra §§ 603–610

11. Ala.—Montgomery, etc, R. Co v. Perryman, 8 So. 699, 91 Ala. 413.

12. Ala.—Montgomery, etc, R. Co. v. Perryman, supra.

blowing of the whistle, either is sufficient, and the company will not be liable unless it is shown that both were omitted.[13] A statutory requirement that the whistle shall be blown at a stated distance from a highway crossing only requires that the signal shall be given at such a point beyond the distance stated as would give reasonable notice of the train's approach.[14]

The statutes requiring crossing signals are intended only for the protection of persons and property at the crossing or about to use it, and a failure to give a crossing signal will not render the company liable for animals injured if not at the crossing[15] or about to use it;[16] but it is not necessary that the animal shall be on the actual intersection of the railroad and highway, and the company will be liable if the animal is on the track and so close to the highway that the accident may be fairly attributed to the neglect to give the signal.[17] Also the crossing signal statutes do not apply to private or farm crossings[18] unless they so provide,[19] or unless a private crossing is used as a public crossing during a temporary obstruction of traffic at the regular crossing.[20] Furthermore, the rule has no reference to a failure to give signals at some crossing other than the crossing where the accident happened.[21]

Dogs are within the application of statutes requiring that the whistle shall be sounded when animals are seen upon the track,[22] but the statutes do not apply to trespassing animals.[23] An animal is not a trespasser, however, within the application of this rule, although it is not lawful for stock to be at large, if it has escaped without any fault on the part of the owner and is upon the crossing where the right of the railroad company is not exclusive,[24] or merely because in crossing it has deviated slightly outside of the line of the highway.[25]

§ 596. Lookout

As a general rule, both at common law and under statutes, those in charge of a train must keep a lookout for stock on or near the track, and if they fail to do so and injury to animals results, the railroad company will be liable, the law requiring reasonable diligence and caution, taking into consideration the other duties of those in charge of the train.

As a general rule those in charge of a train must keep a lookout for stock on or near the track, and if they fail to do so, and animals are injured which could have been discovered in time to avoid the injury, the company will be liable,[26] without regard to whether or not they were actually seen,[27] or to the efforts subsequently made to avoid the injury,[28] or the impossibility of avoiding it after discovering the danger.[29] A failure to discover animals at a point on the track where discovery in time to avoid collision was impossible is not negligence[30] Especially must a lookout be maintained in approaching crossings,[31] including private or farm crossings,[32] or after receiving notice from a landowner that his animals have escaped and are possibly on the track;[33] but a knowledge that there might be animals on the track at a particular place cannot be implied or presumed from an occasional crossing.[34] A railroad does not relieve itself of

13. N J—Kosher Dairy Co v. New York, S & W. R. Co., 78 A. 1052, 81 N J Law 145
52 C J. p 62 note 90

14. Tex—Edwards v. St Louis Southwestern R Co, 151 S.W. 289, 105 Tex 404

15. Ala.—Alabama Great Southern R. Co. v. Smelley, 187 So. 630, 237 Ala. 471.
Kan.—Davis v. Atchison, T. & S. F. Ry. Co, 9 P 2d 990, 135 Kan. 96
52 C J. p 62 note 77.

16. Tex.—St. Louis, etc, R Co v Knowles, Civ.App, 180 S.W. 1146
52 C J p 62 note 78

17. Ill—Toledo, etc, R. Co. v. Furgusson, 42 Ill 449.

18. Ala—Gulf, M. & O. R. Co. v Phifer, 42 So.2d 44, 34 Ala App 588
52 C.J. p 62 note 80.

19. Ga—Willingham v Macon, etc., R. Co, 38 S E 843, 118 Ga 374.
52 C J. p 62 note 81

20. Iowa.—Hartman v. Chicago Great Western R. Co, 110 N.W 10, 132 Iowa 582.

21. Ark—St. Louis Southwestern R. Co v. O'Hare, 115 S W. 942, 89 Ark. 120
Kan—Davis v Atchison, T. & S. F Ry. Co, 9 P.2d 990, 135 Kan. 96.

22. Tenn.—Fink v. Evans, 32 S.W 307, 95 Tenn. 413.

23. Minn—Locke v. First Div St. Paul, etc., R Co., 15 Minn. 350.

24. Ind—Louisville, etc, R Co v. Ousler, 36 N E 290, 15 Ind App 232—Chicago, etc, R. Co v Fenn, 29 N E 790, 3 Ind App. 250.

25. Ill—Toledo, etc, R. Co. v. Furgusson, 42 Ill. 449.

26. Ala.—Owen v Southern Ry. Co., 133 So 33, 222 Ala 499—Gulf, M & O R Co v. Phifer, 42 So 2d 44, 34 Ala App. 588
Ga—Savannah & Atlanta Ry. Co v. De Busk, 23 S E 2d 529, 68 Ga App 529—Powell v Nelson, 183 S.E. 348, 52 Ga.App 351.
Pa—Bailey v. Reading Co., Com Pl., 39 Berks Co. 255.
52 C J p 63 note 95

27. Ala—Louisville & N. R. Co v. Sellers, 134 So 8, 222 Ala. 615.
Ga—Savannah & Atlantic Ry Co. v De Busk, 22 S E 2d 529, 68 Ga App 529
W Va—Robbins v Baltimore, etc, R. Co., 59 S E 512, 62 W Va 535.

28. Ala—East Tennessee, etc, R. Co. v. Watson, 7 So. 813, 90 Ala 41.

29. Mo.—Brooks v Hannibal, etc., R Co, 35 Mo App. 571
Neb—Stading v Chicago, etc, R Co, 111 N W. 460, 78 Neb 566.

30. La—Cockrell v. Thompson, App., 185 So. 681
52 C J. p 63 note 99

31. Ark.—Missouri Pac R. Co v Green, 6 S W 2d 26, 172 Ark 423.
52 C.J p 63 note 1.

32. Mo—Alexander v Missouri Pac. R. Co, 165 S.W. 1156, 178 Mo App. 184.
52 C.J. p 63 note 2.

33. Ind—Vandalia R. Co v Duling, 109 N E. 70, 60 Ind App. 332.

34. Tex—Irving v Texas, etc., R Co, Civ App., 164 S W. 910, 157 S.W. 752.

the duty of lookout by paying the landowner for fencing, in states where the statute allows that to be done.[35] In the absence of special circumstances, a railroad is under no duty to keep a lookout for animals in fields adjoining the track in order to avoid frightening them with unnecessary noises.[36]

Statutes. In some jurisdictions under the express terms of a statute, a lookout must be maintained.[37] Where the statute does not impose the duty on any particular person in express terms, it is construed as requiring a lookout to be kept by either the engineer or fireman, but not both,[38] except at places where the engineer cannot see the track from his side of the engine, in which case the fireman must keep a lookout from the other side.[39] Lookout by the brakeman if he is in a position to see is a sufficient compliance with the statute.[40] A lookout must be kept for animals near, as well as directly on, the track,[41] notwithstanding the statute in terms relates to persons and property "upon the track;"[42] and the statute is construed as requiring the maintenance of a lookout for dogs,[43] although there is authority for the view that a statute in terms applicable to stock does not apply to dogs.[44] A statutory obligation on the engineer to be "always on the lookout ahead" will not be construed as placing an absolute liability for injuries on the railroad if it operates its engine backward with tender in front as it passes over a public crossing.[45] A statute requiring persons running trains to keep a lookout does not apply to railroad motorcars generally,[46] although it applies to employees of a railroad company running a motorcar for passengers.[47]

Degree of care. The law requires reasonable diligence and caution in keeping a lookout ahead, taking into consideration the other duties of those in charge of the train.[48] It is not necessary that the engineer should keep his eyes constantly on the track in front of him,[49] but the lookout must be as nearly continuous as such other duties will permit,[50] imposing on the persons charged with the duty the burden of satisfactorily explaining any failure on their part in its performance.[51] Reasonable care may, however, require a high degree of care at particular places,[52] as where the train emerges from a deep cut a very short distance before it crosses a highway,[53] or under particular conditions or circumstances,[54] as where stock is accustomed to graze on or about the tracks at a particular place, and that fact is known to the trainmen.[55] It is not

35. Ky.—Louisville, etc., R. Co. v. Wilson, 204 S.W. 72, 181 Ky. 322.

36. Okl.—Chicago, etc., R. Co. v. Hine, 158 P. 597, 59 Okl. 143
Tex.—St. Louis Southwestern R. Co. v. Reynolds, Civ.App., 209 S.W. 184.

37. Ark.—St. Louis Southwestern R. Co. v. Russell, 34 S.W. 1059, 62 Ark. 182.
52 C.J. p. 63 note 9.

Construction of statute

(1) Statutes requiring railroads to keep engineer or fireman on locomotive on lookout ahead to stop train so as to avoid injury to animals on track are remedial as well as penal, and should be so construed as to effectuate true intent of legislature. —Gordon v. Tennessee Cent. Ry. Co., 69 S.W.2d 611, 167 Tenn. 302.

(2) Such statute was not intended to apply where application would be unreasonable, impossible, or impracticable.—Gordon v. Tennessee Cent. Ry. Co., supra.

38. Ark.—St. Louis Southwestern R. Co. v. Russell, 34 S.W. 1059, 62 Ark. 182.
52 C.J. p. 63 note 10.

Duty of engineer and fireman

Consistent with performance of his other duties incident to operation of train, engineer had duty to keep constant lookout for obstructions on tracks, and fireman had like duty, in the absence of evidence that engineer alone was charged with duty of keeping vigilant lookout.—Perry v. Atlantic Coast Line R. Co., 42 So.2d 837, 34 Ala.App. 644

39. Ark.—Missouri Pac. R. Co. v. Edwards, 14 S.W.2d 230, 178 Ark. 732.
52 C.J. p. 63 note 11.

40. Ark.—St. Louis Southwestern R. Co. v. Cone, 163 S.W. 1170, 111 Ark. 309.

41. Ark.—Missouri Pac. R. Co. v. Mobley, 91 S.W.2d 611, 192 Ark. 396—St. Louis Southwestern R. Co. v. Russell, 41 S.W. 807, 64 Ark. 236.

42. Ark.—St. Louis, etc., R. Co. v. Russell, supra.

43. Ark.—St. Louis, I. M. & S. R. Co. v. Fuller, 165 S.W. 949, 112 Ark. 608.
52 C.J. p. 63 note 15.

44. Ala.—Owen v. Southern Ry. Co., 133 So. 33, 222 Ala. 499—Alabama Great Southern R. Co. v. Hill, 43 So.2d 136, 34 Ala.App. 466, certiorari denied 43 So.2d 139, 253 Ala. 124—Gulf, M. & O. R. Co. v. Phifer, 42 So.2d 44, 34 Ala.App. 588.

45. Tenn.—Southern R. Co. v. Owen, 215 S.W. 270, 142 Tenn. 1.

46. Ark.—Missouri Pac. R. Co. v. Jones, 31 S.W.2d 524, 182 Ark. 405.
Tenn.—Gordon v. Tennessee Cent. Ry. Co., 69 S.W.2d 611, 167 Tenn. 302.

47. Ark.—Central R. Co. v. Lindley, 151 S.W. 246, 105 Ark. 294.

48. Ala.—Louisville & N. R. Co. v. Sellers, 134 So. 8, 222 Ala. 615—Owen v. Southern Ry. Co., 133 So. 33, 222 Ala. 499—Perry v. Atlantic Coast Line R. Co., 42 So.2d 837, 34 Ala.App. 644.
Ga.—Savannah & Atlantic Ry. Co. v. De Busk, 22 S.E.2d 529, 68 Ga.App. 529.
52 C.J. p. 64 note 19

49. Miss.—Fore v. Illinois Cent. R. Co., 159 So. 557, 172 Miss. 451, suggestion of error overruled 160 So. 903, 172 Miss. 451.
52 C.J. p. 64 note 19.

50. Ala.—Mobile & B. R. Co. v. Kimbrough, 11 So. 307, 96 Ala. 127.
52 C.J. p. 64 note 21.

51. Ala.—Kansas City, etc., R. Co. v. Wagand, 32 So. 744, 134 Ala. 388.
Ga.—Georgia, etc., R. Co. v. Hatcher, 138 S.E. 249, 36 Ga.App. 781.
52 C.J. p. 64 note 22.

52. Colo.—Denver, etc., R. Co. v. Beer, 152 P. 898, 60 Colo. 147.

53. Colo.—Denver, etc., R. Co. v. Beer, supra.

54. Tex.—Houston, etc., R. Co. v. Holbert, Civ.App., 182 S.W. 1180.

55. Tex.—Houston, etc., R. Co. v. Holbert, supra.

Probable presence of horses on trestle

(1) A railroad whose right of way was unfenced was chargeable with knowledge of the probable presence of horses on trestle in the open country, as respects railroad's liability for death of such horses when

sufficient that the engineer was on the lookout at the time of the accident, if by proper care the animal could have been discovered sooner and in time to avoid the injury,[56] but a failure to keep a constant lookout even under a statute so requiring will not render the company liable if a proper lookout was maintained during the time affecting the particular injury complained of.[57]

Trespassing animals. The rule, generally adopted, is that a railroad owes no duty to the owner to keep a lookout for trespassing animals.[58] There is some authority to the contrary,[59] the rule in these jurisdictions requiring, however, only a reasonably careful, not a constant, lookout[60] The owner of a trespassing animal may not claim any benefit from the duty owed by the railroad to its passengers in this respect,[61] or from the fact that the injury occurs upon the crossing of a public highway if the animal was wrongfully upon the highway,[62] or from the duty owed to owners of animals rightfully on the public highway.[63]

§ 597. —— Effect of Stock Laws

According to some authorities, but not others, a lookout for animals on or near the track is not necessary in localities where it is unlawful for them to run at large

Some authorities hold that a lookout for animals on or near the track is not necessary in localities where it is unlawful for them to run at large.[64] Others hold that the duty exists,[65] although it has been held to be less accentuated[66] In other jurisdictions the existence of a stock law is held to be merely a circumstance to be considered by the jury in determining whether ordinary care was or was not used by the railroad[67] Where the stock law has been suspended, the duty to keep a lookout exists.[68]

§ 598. —— Effect of Fenced Track

In some jurisdictions the railroad is under no duty to keep a lookout for animals where its road is properly fenced as required by law, but in others it is held that whether the engineer should exercise diligence to keep such a lookout depends on the facts of the particular case.

Where its road is properly fenced as required by law, a railroad is under no legal obligation in some states to keep a lookout for animals which have broken through on to the track[69] In others it is held that whether the engineer should exercise diligence to keep a lookout for animals on a fenced track to a great extent depends on the facts of the particular case; at places not required to be fenced, such as public crossings and station grounds, the duty to keep a lookout exists,[70] but the duty is not absolute, ordinary care being all that is required.[71]

§ 599. —— Obstructions of View

A railroad company will be liable for injury to animals which it could have discovered in time to avoid the injury but for obstructions of view which it was the duty of the railroad to remove.

struck by passenger train —Friedman's Estate v Texas & Pac Ry Co., 25 So 2d 88, 209 La 540

(2) Railroad's failure by cattle guards or otherwise to protect live stock, which it knew usually grazed on or near unfenced right of way in vicinity of trestle from being trapped on floored portion at either end of trestle, the center section of which was not floored, constitutes negligence and hence railroad was liable to owner for value of horses killed — Friedman's Estate v Texas & Pac Ry Co, supra.

Turkeys

(1) Whether trainmen had an imperative duty to keep a lookout for turkeys, not prohibited to run at large at a place where turkeys were killed on the right of way, depended on the knowledge of such trainmen as to the probability of encountering such fowls at that place —Texas & P. Ry Co v Heathington, Tex Civ App, 115 S W 2d 495

(2) Where a railroad permitted a rank growth of vegetation along the right of way which made the place attractive for turkeys in search of food so as to constitute an implied invitation to turkeys to frequent the place, and which prevented the escape of the turkeys from an approaching train, the employees of the railroad were charged with the duty to use a degree of care that a reasonably prudent person would use under such circumstances to discover and to prevent injury to the turkeys —Texas & P Ry Co v Heathington, supra.

56. Ala —East Tennessee, etc, R. Co. v Baker, 10 So. 211, 94 Ala. 632

57. Tenn —Louisville, etc, R. Co. v Stone, 7 Heisk 468

58. Miss —Fore v Illinois Cent R Co, 159 So 557, 172 Miss. 451, suggestion of error overruled 160 So 903, 172 Miss 451
52 C J p 64 note 30.
Duty to avoid injuring animals seen on or near tracks see infra § 603
Trespassing animals generally see supra § 550.

59. Neb —Stading v. Chicago, etc, R. Co, 111 N W 460, 78 Neb 566
52 C.J p 64 note 32.

60. W Va —Ellison v. Norfolk, etc., R Co, 98 S E 257, 83 W.Va 316

61. Minn —Locke v St. Paul, etc., R. Co., 15 Minn 350.

62. Minn —Palmer v Northern Pac R Co, 33 N W. 707, 37 Minn 223, 5 Am S.R 839

63. Minn —Palmer v. Northern Pac. R. Co, supra.

64. Okl —St. Louis, etc, R Co v. Brown, 122 P. 136, 32 Okl 483
52 C J. p 64 note 38

65. S.C —Davis v Southern R Co, 47 S E 723, 68 S C 446
W.Va —Warden v Hines, 106 S E. 130, 87 W Va 756

66. S C —Davis v Southern R Co, 47 S E 723, 68 S C 446

67. Ga —Seaboard Air-Line R Co v. Collier, 45 S E 300, 118 Ga 463

68. Okl.—Missouri Pac. R Co. v. Johnson, 222 P 234, 101 Okl. 4

69. Ind —Indianapolis & E R Co v. Goar, 86 N E 968, 43 Ind App 89
52 C J p 65 note 43.

70. Ind —Chicago, etc, R. Co. v. Nash, 24 N E 884.
Tenn —Mobile, etc, R. Co v House, 35 S.W. 561, 96 Tenn. 552

71. Tex —Houston, etc, R Co. v. Van Ness, 101 S W 265, 45 Tex Civ App 633.

While it has been held negligence not to keep the right of way free from weeds, bushes, or anything which would conceal from those in charge of the train the presence of animals on or near the track, and the company will be liable for injury to animals which but for such obstructions of view could have been discovered in time to avoid the injury,[72] there is authority for the view that the railroad owes no such duty to the owners of stock.[73] Even though the obstructions to the view are placed on the right of way or owned by third persons, it is the right and duty of the railroad to remove them.[74] The clearing away of obstructions of view must extend to the outer bank of the side ditches which drain the track,[75] but not beyond those limits.[76] The railroad will not be liable if the train was equipped with proper lights and its servants were proceeding with a proper degree of care, where an injury is occasioned by an obstruction of view due to natural causes over which the company has no control,[77] or to the leaving of standing cars or other material near the track for legitimate railroad purposes,[78] or where, even without the obstruction, the locomotive lights would not have disclosed the animals.[79]

§ 600. Lights

A railroad company operating trains at night must carry a good and sufficient headlight for the purpose of discovering stock upon the track, but it is not liable for injuries to animals due to a sufficient headlight being obscured by natural causes if a proper degree of care under the circumstances is exercised.

A railroad company has an unqualified right to carry a headlight on its locomotives whenever necessary or even conducive to the safety of the train and its passengers, although its effect may be to increase rather than diminish the danger to animals on the track;[80] and the company must in operating trains at night carry a good and sufficient headlight for the purpose of discovering stock upon the track,[81] its sufficiency to be determined by its utility as demonstrated by use, and not by the mere fact of its adoption by other railroads.[82] The liability for failure to have a sufficient headlight at night depends on whether, if there had been a sufficient headlight, the animal could have been seen in time to avoid the collision, if the engineer had been keeping a lookout[83] It is also negligence for a railroad to back trains at night without lights upon the rear of the train[84] or to operate a locomotive with its headlight obstructed by a box car or caboose which is being pushed by the engine.[85] If the headlight is sufficient and the injury is due to its light being obscured by natural causes, such as fog or snow, the company will not be liable if a proper degree of care under the circumstances is exercised.[86]

§ 601. Speed

a. In general
b. Statutes, ordinances, or other regulations
c. At crossings
d. In cities, towns, and villages
e. Effect of stock laws
f. Increasing speed where collision unavoidable

a. In General

With respect to animals on or near a railroad, in the absence of statutory or municipal regulation, railroad companies ordinarily may adopt whatever rate of speed they may deem advisable, provided it is reasonably safe, and they will not be liable for injuries to animals because of the rate of speed adopted if the company is not otherwise at fault.

With respect to animals on or near a railroad, the general rule is that in the absence of statutory or municipal regulation railroad companies ordinarily may adopt whatever rate of speed they may deem advisable provided it is reasonably safe and consistent with the safety of the passengers and

72. Ala.—Curry v. Southern R. Co., 42 So 447, 148 Ala. 57.
52 C J. p 65 note 46

73. Ark.—Kansas City, etc., R. Co. v. Kirksey, 3 S W. 190, 48 Ark 366
52 C.J p 65 note 47.

74. Ky.—Chesapeake, etc., R Co v Mason, 185 S.W. 71, 169 Ky. 699, L.R.A.1916F 127.
52 C.J. p 65 note 48.

75. N C.—Ward v. Wilmington, etc., R Co., 18 S E. 211, 113 N C. 566.

76. N C.—Ward v. Wilmington, etc., R Co., 13 S E 926, 109 N.C. 358, 361.
52 C.J. p 65 note 50.

77. Ala.—Alabama Great Southern R. Co v McAlpine, 75 Ala. 113—Alabama Great Southern R Co v. Jones, 71 Ala. 487.

78. Tex.—Houston, etc, R Co. v. Hall, Civ.App, 219 S.W. 526.
52 C.J. p 65 note 52.

79. La.—Daughdrill v. Texas & N. O. R Co, App., 20 So 2d 644.

80. Ohio.—Bellefontaine, etc, R. Co. v. Schruyhart, 10 Ohio St. 116.
52 C.J p 65 note 54.

81. Ala.—Alabama Great Southern R Co v. Moody, 9 So. 238, 92 Ala 279.
Ark.—Jonesboro, etc, R Co. v. Guest, 99 S W. 71, 81 Ark. 267.

82. Ala.—Alabama Great Southern R. Co. v. Moody, 9 So. 238, 92 Ala 279, explaining Alabama Great Southern R. Co v Jones, 71 Ala 487

83. Idaho.—Wallace v. Oregon Short Line R. Co, 100 P. 904, 16 Idaho 103
52 C.J. p 65 note 57.

84. N.Y.—Hollender v. New York Cent., etc., R. Co, 14 Daly 219, 6 N.Y St. 352, 19 Abb.N Cas 18.
W Va.—Hanger v. Chesapeake, etc., R. Co., 73 S E. 713, 70 W.Va 212.

85. Ohio.—Cincinnati, etc., R. Co. v Shurts, 10 Ohio App 226.

86. Ala.—Alabama Great Southern R. Co. v. Jones, 71 Ala. 487.
Tenn.—Louisville, etc., R. Co. v. Melton, 2 Lea 262.

property intrusted to their care[87] If the convenience and business of the public demand rapid transportation, railroad companies are not restrained from meeting this requirement because of the increased danger to animals which might be upon the track,[88] and will not be liable for such injuries because of the rate of speed adopted if not otherwise at fault,[89] even though the train was running on schedule time through fog or rain,[90] or even though the train was running faster than schedule in an effort to make up time,[91] a railroad not being required to operate a train at a speed which will enable it to be stopped within the distance that the engineer can see[92]

Subject to the rule of nonliability as to animals trespassing on its track and not seen by the engineer,[93] whatever rate of speed is adopted the company must exercise a proper degree of care to avoid injuries to animals,[94] which varies according to the danger of injury at a given place,[95] and existing conditions making it easy or difficult to perceive obstructions upon the track.[96] So, in the absence of statute or municipal regulation, no particular rate of speed is negligence per se,[97] but depends on the facts and circumstances of the particular case,[98] and therefore may be considered as an element of negligence in connection with other circumstances.[99]

In operating trains at night the rule in some states is that it is negligence to run trains at such a rate of speed that they could not be stopped by the use of the ordinary means and appliances within the distance that the engineer can see stock upon the track by the aid of the headlight,[1] unless from unknown causes the machinery and appliances have in the course of travel become defective,[2] or the intervention of natural causes has rendered them inefficient,[3] as where the light cast from a proper headlight is obscured by fog, rain, or snow;[4] and intervening natural conditions, such as fog or rain, will not constitute an excuse where the train is running at so great speed that it could not be stopped within the headlight limit, even though the night had been clear.[5] In other jurisdictions the rule making this distinction between day and night operation of trains has been expressly disapproved.[6]

b. Statutes, Ordinances, or Other Regulations

A violation of statutes or ordinances limiting the speed at which trains may be operated at different places

87. Ga.—Atlantic Coast Line R. Co v Hodges, 54 S.E.2d 500, 79 Ga App 563.
La.—Moody v. Texas & P. Ry Co, App, 37 So 2d 346—Friedman's Estate v. Texas & P. Ry Co, App, 24 So 2d 167, reversed on other grounds 25 So 2d 88, 209 La 540, 163 A.L.R 1228—Smith v Thompson, App, 185 So 71—Campbell & Co v. Texas & P. Ry. Co, App, 152 So 351, amended on other grounds 155 So 786—Jeter v Texas & P Ry Co, App., 149 So 144
52 C.J. p 66 note 63.

88. La.—Sanders v. Illinois Cent R Co, 54 So. 147, 127 La 917, 919
52 C J. p 66 note 65.

89. Ga.—Atlantic Coast Line R Co v. Sears, 36 S E.2d 129, 80 Ga App 338
52 C.J. p 66 note 66.

90. Ga.—Atlantic Coast Line R Co v. Sears, 56 S E 2d 129, 80 Ga App 338—Atlantic Coast Line R Co v Thomas, 72 S.E 514, 10 Ga App 45
La.—Edwards v. Thompson, App, 2 So 2d 493—Smith v. Thompson, App, 185 So 71—Jeter v. Texas & P. Ry. Co., App., 149 So 144

91. Tex.—St. Louis, etc, R Co v. Felton, App., 14 S.W. 1072.

92. La.—Moody v. Texas & P Ry Co, App, 37 So 2d 346—Jeter v Texas & P. Ry. Co., App., 149 So 144—Boyd v. Kansas City, S & G Ry. Co., App, 147 So. 100.

93. Ala.—Brown v. Central of Georgia R. Co, 64 So 581, 185 Ala 659.
Duty to keep lookout for trespassing animals see supra § 596.

94. Mo.—Campbell v Missouri, etc, R. Co, 59 Mo App. 151.
52 C J. p 66 note 70.

95. Mo.—Campbell v Missouri, etc., R. Co, 59 Mo App. 151.
52 C.J p 66 note 71.

96. Ala.—Western R Co v Mitchell, 41 So 472, 148 Ala 35.
52 C.J. p 66 note 72.

97. Colo.—Chicago, B & Q. R. Co. v. Campbell, 83 P 138, 34 Colo. 380.
52 C J p 66 note 73
Speed held not negligent
(1) Fifty miles per hour outside city limits.—Powell v. McClung, 36 S E 2d 820, 73 Ga.App. 388.

(2) Fifty-five miles per hour past station, consisting of cotton gin, section house, and half dozen residences—Campbell & Co. v Texas & P. Ry Co, La.App, 152 So 351, amended on other grounds 155 So. 786.

(3) Sixty miles per hour in open country.—Friedman's Estate v. Texas & P. Ry. Co, App, 24 So 2d 167, reversed on other grounds 25 So.2d 88, 209 La. 540, 163 A.L.R. 1228

(4) Seventy-five or eighty-five miles per hour on a straight, level, stretch of track ten miles long.—Atlantic Coast Line R. Co. v. Hodges, 54 S E 2d 500, 79 Ga App. 563.

98. Neb.—Burlington, & M. R. R, Co. v Wendt, 10 N W. 456, 12 Neb. 76.
52 C.J p 67 note 74.

99. Ark.—Ford v. St Louis, I. M & S R Co., 50 S W. 864, 66 Ark. 363
52 C.J p 67 note 75.

1. Ala.—Louisville & N R. Co v. Christian Moerlein Brewing Co, 43 So 723, 150 Ala 390.
52 C J p 67 note 76.

2. Ala.—Alabama Great Southern R. Co. v. Jones, 71 Ala 487

3. Ala.—Alabama Great Southern R. Co v. Jones, supra

4. Ala.—Alabama Great Southern R. Co. v Jones, supra.

5. Ala.—Louisville, etc, R Co v. Fox, 65 So. 917, 11 Ala App. 253.

6. La.—Moody v Texas & P. Ry. Co., 37 So 2d 346—Edwards v. Thompson, App, 2 So.2d 493.
52 C J. p 67 note 81.
Rounding curve at night
Where mules which entered railroad's right of way through a defective fence were killed by train at night on a curve, railroad, in order to avoid liability, was not required to reduce speed of train to a speed which would permit train's being stopped within distance an object could have been seen on track—Smith v. Thompson, La.App., 185 So. 71.

is generally regarded as negligence and renders the railroad liable for injuries to stock occurring within the limits to which the statutes or ordinances apply and which are directly due to such excessive speed.

A violation of statutes and ordinances limiting the speed at which trains may be operated at different places is generally regarded as negligence per se,[7] regardless of whether the statute so provides[8] or does not so provide[9] and independently of provisions for a fine therein,[10] and renders the railroad liable for injuries to stock occurring within the limits to which the statutes or ordinances apply and which are directly due to such excessive speed[11] In some jurisdictions this is the rule only where the action is based on the statute and it is so pleaded, a violation of the regulation being regarded in other cases merely as evidence of negligence;[12] in others a violation has been regarded as establishing merely a prima facie case of negligence;[13] and in others a violation has been regarded as having no probative force whatever on the issue of negligence which must be established independently of the regulation and its violation.[14]

There is a violation of the regulation within the meaning of the rule imposing liability therefor, if just previously to the collision the speed limit was exceeded and the accident was due to this fact,[15] even though at the instant of collision the train had been slowed down to the prescribed limit.[16] Where the limit fixed by regulation is not exceeded, there is no liability in the absence of other evidence of negligence.[17]

Territorial limitations and effect thereof. If the injury occurs outside the territory to which the speed regulations apply, the company is not liable unless otherwise negligent,[18] although just before inflicting the injury the train had been running within such limits in excess of the statutory speed.[19] An exception to this rule is made where the injury, although occurring outside the limits to which the statute or ordinance applies, is the proximate result of a violation of the speed regulations within such limits.[20]

Regulations of railroad commissioners do not govern in determining the liability of railroads for injuries to animals[21] except where the statute under which the commissioners act expressly so provides.[22]

c. At Crossings

While trains must be operated at crossings with greater care to avoid injury to animals which may rightfully be upon the track, even at crossings no particular rate of speed can be held to be negligence per se in the absence of specific statutory requirements.

At crossings trains must be operated with greater care to avoid injury to animals which may rightfully be upon the track;[23] but even at crossings no particular rate of speed can be held to be negligence per se, the question depending on the locality of the crossing and the amount of travel[24] In the absence of specific statutory requirements,[25] it is not negligence not to reduce the customary rate of speed at the crossing of an ordinary public highway in the absence of any special circumstances charging knowledge that an obstruction at such crossing was likely to be encountered,[26] and a statute requiring reduction of speed at certain crossings has no application to crossings not within the statutory description[27]

d. In Cities, Towns, and Villages

As bearing on the liability for injuring animals, trains should be run at a less rate of speed in cities, towns, and villages, and, while the limit of speed in such

7. Iowa.—Strever v. Chicago & N. W. R. Co, 76 N.W. 513, 106 Iowa 137.
52 C.J. p 67 note 86.

8. Iowa.—Strever v. Chicago & N. W R. Co, supra.
52 C.J. p 67 note 87

9. Mo.—Bowman v. Chicago & Alton R Co, 85 Mo 533
52 C J. p 67 note 88

10. Mo.—Backenstoe v. Wabash, etc., R Co, 23 Mo.App. 148, affirmed 86 Mo. 492.

11. Ala.—Louisville & N. R. Co v. Christian Moerlein Brewing Co., 43 So. 723, 150 Ala. 390.
Tex.—Houston, etc, R. Co. v. Terry, 42 Tex. 451—Texas, etc., R Co v. Cockrell, 2 Tex.A.Civ.Cas. § 717.
52 C.J. p 67 note 90.

12. Mo.—Windsor v. Hannibal, etc, R Co., 45 Mo.App. 123.

13. Ill.—Ohio, etc, R. Co. v. O'Donnell, 26 Ill.App 348.

14. Ky.—Southern R. Co. v. Wood, 52 S.W. 796, 21 Ky.L 575.

15. Miss.—Illinois Cent. R. Co. v Jordan, 63 Miss. 458—New Orleans, etc, R. Co v. Toulmé, 59 Miss 284

16. Miss.—Illinois Cent. R Co. v. Jordan, 63 Miss 458—New Orleans etc, R. Co. v Toulmé, 59 Miss 284

17. Miss.—Hines v. Andrews, 86 So 801, 124 Miss 292

18. Miss.—New Orleans, etc, R Co v Martin, 89 So. 621, 126 Miss. 765
52 C J. p 67 note 99

19. Miss.—New Orleans, etc., R. Co v. Martin, supra.

20. Iowa.—Story v Chicago, etc, R. Co, 44 N.W. 690, 79 Iowa 402.
52 C J. p 68 note 2.

21. Mass.—Gerry v. New York, etc, R. Co., 79 N.E. 783, 194 Mass. 35.
52 C.J. p 67 note 84.

22. Miss.—Hines v. Andrews, 86 So. 801, 124 Miss. 292.
52 C.J. p 67 note 85.

23. Ill.—Chicago, etc., R. Co. v. Cauffman, 38 Ill. 424.

24. Ala.—East Tennessee, etc, R. Co. v. Deaver, 79 Ala. 216.

25. Ga.—Charleston, etc., R. Co v. Camp, 59 S.E. 710, 3 Ga.App. 232

26. S.C.—Zeigler v. Northeastern R. Co., 7 S.C. 402.
Tex.—Missouri, etc., R. Co. v Morris, Civ.App, 63 S.W. 888.

27. Ala.—East Tennessee, etc., R. Co. v Deaver, 79 Ala. 216.
52 C.J. p 68 note 8.

places may properly be fixed by statutory regulation, in the absence thereof no arbitrary rule can be laid down as to the rate of speed which would apply to all parts of a town.

As bearing on liability for injuring animals, trains should be run with a greater degree of care and at a less rate of speed in cities, towns, and villages,[28] but no arbitrary rule can be laid down as to the rate of speed which would apply to all parts of a town regardless of density of population and other local conditions.[29] The mere fact of a train passing a small station at which it was not required to stop without slackening its speed is not sufficient to show negligence.[30] It has been held to be negligence to run a train at a dangerous rate of speed through a village where animals are permitted to run at large and are liable to be upon the track.[31]

A statute prohibiting the running of trains over a certain speed "through any town, city, or village" applies to every municipality regardless of its size, number of families within its limits, or scope of its activities,[32] and to the entire city, town, or village within its legal or corporate limits without regard to the irregular and variable lines of settlement and improvement.[33] Whether or not there is a violation of the regulation within the territorial limits is determined by the speed at the point of entering the territory,[34] even though the train was being slowed down at that point and later the speed was within the prescribed limit.[35] Where the prohibition of the statute is expressly limited to the "running of cars and locomotives by steam," trains propelled by electricity are exempt.[36]

e. Effect of Stock Laws

If an animal is suffered by its owner to run at large in violation of law and is injured while unlawfully upon a railroad track, the fact that the train was being run at a high rate of speed will not necessarily render the company liable, but if the animal had been confined and escaped without the owner's knowledge or consent the railroad may be liable if the train was running in excess of the lawful speed limit.

If an animal is suffered by its owner to run at large in violation of law and is killed or injured while unlawfully upon a railroad track, the fact that the train was being run at a high rate of speed or without proper care in other respects will not render the company liable unless its servants, after discovering the animal, could by the exercise of proper care have avoided the injury,[37] but if the animal had been confined and escaped without the owner's knowledge or consent, then, even though it is running at large in violation of law, a railroad will be liable to the owner for injuring or killing it if the train at the time of the accident was running at a speed in excess of the lawful limit.[38]

f. Increasing Speed Where Collision Unavoidable

If a collision between a train and animals upon the track is inevitable, the company is not liable because the engineer increases the speed in order to diminish the danger to the train.

If animals appear upon the track at a point so near a train as to make a collision inevitable, the company is not liable because the engineer increases the speed in order to diminish the danger to the train,[39] especially where there is evidence in the case to support the engineer's contention that it is safer for the train to come in contact with any moveable obstruction on the track at a high than at a low rate of speed.[40] If it is done for this purpose the fact that the speed is increased beyond the limit fixed by statute does not render the company liable for injuries caused while so running.[41]

§ 602. Control and Means of Control

It is the duty of railroad companies to equip their trains with sufficient brakes to stop the train within a reasonable time and distance, and to employ a sufficient number of brakemen properly to operate them, and they will be liable for injuries to animals resulting from neglect in this respect.

In order to guard against injuries to animals it is the duty of railroad companies to equip their trains with sufficient brakes to stop the train within a reasonable time and distance,[42] and to employ a sufficient number of brakemen properly to oper-

28. Ind.—Lafayette, etc., R. Co. v. Shriner, 6 Ind. 141.

29. Neb.—Burlington, etc., R. Co. v. Wendt, 10 N.W. 456, 12 Neb. 76.

30. Tex.—Texas, etc., R. Co. v. Langham, Civ. App., 95 S.W. 686.

31. Ill.—Chicago, etc., R. Co. v. Engle, 84 Ill. 397.

32. Miss.—Bell v. Kansas City, etc., R. Co., 9 So. 289.
52 C.J. p. 68 note 14.

33. Miss.—Illinois Cent. R. Co. v. Jordan, 63 Miss. 458.

34. Ill.—Lake Erie, etc., R. Co. v. Norris, 60 Ill. App. 112.

35. Ill.—Lake Erie, etc., R. Co. v. Norris, supra.

36. Miss.—Calvert v. Mobile, etc., R. Co., 121 So. 855, 153 Miss. 866.

37. Ill.—Toledo, etc., R. Co. v. Barlow, 71 Ill. 640.
Effect of stock laws generally see supra §§ 552, 566.

38. Mo.—Bowman v. Chicago, etc., R. Co., 85 Mo. 533.

39. Ohio.—Cranston v. Cincinnati, etc., R. Co., 1 Handy 193, 12 Ohio Dec. (Reprint) 97.
52 C.J. p. 68 note 25.

40. Ohio.—Cranston v. Cincinnati, etc., R. Co., supra.

41. Miss.—Chicago, etc., R. Co. v. Jones, 59 Miss. 465.

42. Miss.—Vicksburg, etc., R. Co. v. Patton, 31 Miss. 156, 66 Am.D. 552.
N.C.—Forbes v. Atlantic, etc., R. Co., 76 N.C. 454.

ate them,[43] and they will be liable for injuries to animals which in the absence of such neglect could have been prevented;[44] but railroads are not obliged to procure the best appliances regardless of cost for the management of their trains but only such as are usually and reasonably sufficient.[45] It is also negligent to leave cars standing on a descending grade without being securely fastened, and the company will be liable for injuries to stock caused by such cars escaping and running down the grade.[46]

§ 603. Precautions as to Animals Seen on or near Tracks

When animals are seen on or near railroad tracks, it is the duty of those in charge of the train to exercise ordinary care to avoid injuring them, and a failure to do so will render the company liable for injuries occasioned thereby, notwithstanding compliance with a statute requiring certain precautions to be taken.

When animals are seen on, or in dangerous proximity to, a railroad track, it is the duty of those in charge of the train to exercise ordinary care to avoid injuring them, taking into consideration the safety of the train and those on board, and a failure to do so will render the company liable for any injuries occasioned thereby;[47] and compliance with a statute requiring certain precautions to be taken will not relieve the company from its common-law duty to exercise such ordinary care.[48] What will amount to such care depends on the circumstances of the particular case,[49] and those in charge of the train are required to do only what an ordinarily prudent and skillful person would be expected to do under the circumstances[50]

It is not necessary, when animals are seen, to guard against every possible contingency which might result in injury to them;[51] and so, if animals on the track are not prevented by fences or embankments from leaving it, an engineer may assume that on blowing the whistle they will get off the track until he sees that they are not getting off and are in danger,[52] or that animals crossing the track in front of a train will not change their course and will come again on to the track;[53] but he has no right to assume, independently of the whistle being blown or of the animal's seeing the train, that an animal on the track knows that it is in a dangerous place and will get off before it is struck[54]

The requirement of ordinary care to avoid injuring animals seen on the track is conditioned on a reasonable apprehension by the engineer of a contingency endangering the safety of animals on the track,[55] and is subject to the paramount duty of caring for the safety of persons and property on the train.[56] If the safety of passengers is not involved and if there is opportunity to do so, it is clearly negligence, where animals are seen upon the track, for the engineer to proceed without giving any alarm or attempting to stop or check the speed of the train.[57] The doctrine of discovered peril has no application in the absence of evidence that the company's employees in charge of the train saw the animals on the track and realized their peril.[58]

43. Ill.—Toledo, etc., R. Co. v. McGinnis, 71 Ill. 346.
Mich.—McDonald v. Chicago & N. W. R. Co., 17 N.W. 210, 51 Mich. 628.

44. Mich.—McDonald v. Chicago & N. W. R. Co., supra
52 C.J. p. 69 note 31.

45. Ala.—Central of Georgia R. Co. v. Williams, 75 So. 401, 200 Ala. 73
52 C.J. p. 69 note 32.

46. N.C.—Battle v. Wilmington, etc., R. Co., 66 N.C. 343.

47. Ala.—Alabama Great Southern R. Co. v. Smelley, 187 So. 630, 237 Ala. 471
Ark.—Missouri Pac. R. Co. v. Hayes, 122 S.W.2d 945, 197 Ark. 356—St. Louis-San Francisco Ry. Co. v. Grant, 46 S.W.2d 640, 185 Ark. 222.
Ga.—Savannah & Atlanta Ry. Co. v. De Busk, 23 S.E.2d 529, 68 Ga. App. 529—Powell v. Nelson, 183 S.E. 348, 52 Ga. App. 351
Tex.—Beaumont, S. L. & W. Ry. Co. v. Stubblefield, Civ.App., 37 S.W.2d 403.
52 C.J. p. 69 note 35.
Lookout after receiving notice that animals have escaped and may be on tracks see supra § 596.
Rule held applicable to operator of railroad motorcar
Mo.—Lloyd v. Alton R. Co., 159 S.W. 2d 267, 348 Mo. 1222.

48. Mo.—Wilkinson v. St. Louis Southwestern R. Co., 125 S.W. 544, 146 Mo. App. 711
Utah.—Smith v. San Pedro, etc., R. Co., 100 P. 673, 35 Utah 390.

49. Ga.—Savannah & Atlanta Ry. Co. v. De Busk, 23 S.E.2d 529, 68 Ga. App. 529.
52 C.J. p. 69 note 38.

50. Ala.—Owen v. Southern Ry. Co., 133 So. 33, 222 Ala. 499.
Ark.—St. Louis-San Francisco R. Co. v. Cole, 27 S.W.2d 992, 181 Ark. 780.
Ga.—Savannah & Atlanta Ry. Co. v. De Busk, 23 S.E.2d 529, 68 Ga. App. 529.
52 C.J. p. 69 note 39.

51. Mo.—Cornett v. Chicago, etc., R. Co., 171 S.W. 15, 184 Mo.App. 463.
52 C.J. p. 69 note 40.

52. Mo.—Cornett v. Chicago, etc., R. Co., supra
52 C.J. p. 69 note 41.

53. Mo.—Judd v. Wabash, etc., R. Co., 23 Mo. App. 56
Pa.—Watson v. Philadelphia, etc., R. Co., 2 Walk. 456.

54. Ark.—Kansas City Southern R. Co. v. Simmons, 215 S.W. 167, 140 Ark. 80—Kansas City Southern R. Co. v. McCrossen, 215 S.W. 161, 140 Ark. 68, 73.
52 C.J. p. 70 note 43.

55. Iowa.—Grimmell v. Chicago, etc., R. Co., 34 N.W. 758, 73 Iowa 93.
52 C.J. p. 70 note 45.

56. La.—Smith v. Thompson, App., 185 So. 71.
52 C.J. p. 70 note 46.

57. Ill.—Chicago & A. R. Co. v. Kellam, 92 Ill. 245, 34 Am. R. 128
52 C.J. p. 70 note 47.
Duty to stop or slacken speed in general see infra § 607.
Stock alarms see infra § 609.

58. Ill.—Borah v. Southern R. Co., 206 Ill.App. 313.
Tex.—Irving v. Texas, etc., R. Co.,

Reversal of engine is not required if it would endanger the safety of persons on the train,[59] but a failure to reverse cannot be excused merely on the ground that reversal would injure the engine.[60]

Where the case involves the exercise of judgment and discretion on the part of the engineer, negligence cannot be predicated on a mistake of judgment merely,[61] but a mistake of judgment by the engineer will not relieve the company from liability if it is shown that the engineer did not possess reasonable skill and judgment and that the company was negligent in employing him.[62]

§ 604. —— Statutory Requirements

Where a statute specifically requires certain precautions to be taken when animals are seen upon the track, the railroad is liable if these precautions could have been safely taken under the circumstances and were not.

Where the statute specifically requires certain precautions to be taken when animals are seen upon the track, the railroad is liable if these precautions were not taken,[63] except where such precautions were impossible under the circumstances[64] or would endanger the safety of the train,[65] or where there was not sufficient time within which to observe all the precautions.[66] Where these statutes so provide, they apply only to injuries due to direct collision with the train,[67] and only when animals are actually on the track.[68] While the doctrine of discovered peril has no application in the absence of evidence that the railroad's trainmen saw the animals and realized their peril, evidence that the animals were on the track before the accident is sufficient to justify an inference that they were seen by the trainmen.[69]

§ 605. —— Species of Animal Injured

The rule requiring an engineer to take precautions against injuring animals seen on or near the track applies to dogs and turkeys, but with its rigor somewhat relaxed in the case of dogs in view of their superior intelligence and agility.

The rule making it the duty of the engineer to take precautions against injuring animals seen on or near the track has been held to be applicable to dogs[70] and turkeys,[71] but with its rigor relaxed somewhat in the case of dogs in view of their superior intelligence,[72] unless the dog is caught in a trap where his intelligence or agility will not serve him,[73] or unless the dog appears to be helpless or indifferent to his peril,[74] which is not, however, of itself established by the fact that the dog was chasing a fox.[75] It has been held not necessary to stop the train as a precaution against injury to a dog[76] or a goose.[77]

A statute requiring the alarm whistle to be sounded where "any person, animal, or other obstruction" appears upon the track applies to dogs,[78] but does not require a separate blast for each one of a pack of dogs.[79] Where a statute declares an un-

Civ App, 164 S.W 910, 157 S.W 752

59. Tenn —Nashville, etc., R Co v Troxlee, 1 Lea 520.

60. Tenn —East Tennessee, etc, R Co. v Selcer, 7 Lea 557

61. Ala —Mobile & G R. Co v Caldwell, 3 So 445, 83 Ala 196.
52 C J p 70 note 52.

62. Iowa.—Parker v Dubuque Southwestern R. Co., 34 Iowa 399

63. Ala —Mobile, etc., R Co v. Malone, 46 Ala 391.

64. Tenn —Mobile & O. R Co v Thompson, 47 S W 151, 101 Tenn 197
52 C.J p 70 note 56
Collision unavoidable see infra § 610

65. Ala —East Tennessee, etc, R Co v Deaver, 79 Ala. 216.
Tenn.—Nashville, etc, R Co v Troxlee, 69 Tenn. 520, 1 Lea 520

66. Tenn —Memphis, etc, R Co v Scott, 11 S.W 317, 87 Tenn 494
52 C.J. p 70 note 58.

67. Tenn.—Holder v. Chicago, etc, R. Co, 11 Lea 176.

68. Ala —East Tennessee, etc, R Co v Bayliss, 77 Ala. 429, 54 Am R. 69.
Tenn —Louisville, etc, R. Co. v. Reidmond, 11 Lea 205.

69. Ala —Southern R. Co v. Wyley. 75 So 326, 200 Ala. 14.

70. Ala —Hines v Schrimscher, 88 So. 661, 205 Ala 550
52 C J. p 70 note 66.

71. N.C —Lewis v. Norfolk Southern R. Co, 79 S E. 283, 163 N C 33, 47 L R A.,N S., 1125, Ann Cas. 1915B 461.
Tex —Texas & P. Ry. Co. v. Heathington, Civ App, 115 S.W 2d 495.

72. U S —Jones v. Bond, C.C.Miss, 40 F. 281
Ala —Owen v Southern Ry. Co, 133 So 33, 222 Ala 499—Gulf, M. & O R. Co v. Phifer, 42 So.2d 44, 34 Ala App. 588.
52 C J. p 70 note 68.

Reliance on presumption that dog would avoid peril

Engineer had right to act or refrain from acting on presumption that because of natural instinct of dog it would avoid moving into path of fast-moving railroad train.—Alabama Great Southern R Co. v. Hill, 43 So 2d 136, 34 Ala App 466, certiorari denied 43 So 2d 139, 253 Ala 124.

73. Ala —Tennessee, etc., R. Co. v. Daniel, 76 So. 958, 200 Ala. 600.
52 C.J p 71 note 69.

74. Ala —Owen v. Southern Ry Co, 133 So 33, 222 Ala 499—Alabama Great Southern R Co v Hill, 43 So 2d 136, 34 Ala App 466, certiorari denied 43 So.2d 139, 253 Ala. 124—Gulf, M. & O R. Co v Phifer, 42 So.2d 44, 34 Ala.App. 588

75. Ala.—Alabama Great Southern R. Co. v. Hill, 43 So 2d 136, 34 Ala App. 466, certiorari denied 43 So 2d 139, 253 Ala. 124.

76. U S —Cheek v Thompson, D C. La., 28 F.Supp 391, affirmed, C C A., 140 F.2d 186
Ark —St Louis-San Francisco Ry. Co. v. Matlock, 132 S.W 2d 657, 198 Ark 1187.
52 C J p 71 note 70
Duty to stop generally see infra §§ 607, 608.

77. Tenn —Nashville, etc, R. Co v. Davis, 78 S.W 1050
52 C J. p 71 note 71.

78. Tenn —Fink v. Evans, 32 S.W. 307, 95 Tenn 413.
Stock alarms generally see infra § 609.

79. Tenn —Fink v Evans, supra.
52 C J. p 71 note 74.

registered female dog to be a public nuisance, it has been held that statutes prescribing the duties of railroads on perceiving animals on the tracks can have no application thereto.[80]

§ 606. —— Trespassing Animals

A failure to exercise ordinary care, after their discovery, to prevent injury to animals trespassing upon the track subjects the railroad to liability.

While, as shown supra § 550, there are conflicting views as to the liability of railroads for injuries to trespassing animals generally, there is no conflict as to the care required after their discovery, and a failure then to exercise ordinary care to prevent the injury, consistent with the safety of passengers or property on the train, subjects the railroad to liability.[81] What acts of the engineer or fireman constitute ordinary care or the absence of it in a particular case depends on the circumstances existing at the time; and it has been held that the engineer on seeing trespassing animals on the track need not slacken the speed of his train,[82] especially where alarm signals have been given;[83] but it has been held that the engineer, if the safety of passengers will justify it, must use ordinary care to bring his train to a stop if necessary to avoid injury to the trespassing animal.[84]

§ 607. —— Duty to Stop or Slacken Speed in General

It is not the duty of an engineer to stop his train or slacken speed where animals are discovered on the track if they are in no present danger, or if such action would endanger the safety of the train and its passengers; but, if and when it becomes necessary to do so in order to avoid striking an animal, and it can be done with safety to the train, the engineer should stop or slacken speed.

It is not always the duty of an engineer to stop his train or slacken speed immediately where animals are discovered on the track,[85] as where the animals are in no present danger of injury,[86] or are in charge of a person apparently capable of looking after them;[87] and it is his duty not to stop or reduce speed if stopping or reducing speed would endanger the safety of the train and its passengers.[88] If and when it becomes necessary to do so in order to avoid striking an animal, however, the engineer should stop or slacken speed if it can be done with safety to the train,[89] as where the animal is approaching a trestle,[90] or is on a track inclosed by fences,[91] or on an embankment,[92] or whenever it becomes obvious to the engineer that collision cannot be avoided by merely blowing the alarm whistle.[93]

The engineer may not assume that animals will exhibit the same intelligence as persons in responding to such warning signals.[94] Checking the speed of the train will not of itself relieve the railroad from liability for injuries to animals, which might have been avoided by the exercise of reasonable care in taking other omitted precautions.[95]

§ 608. —— Animals near or Approaching Track

There is no duty to slacken speed or stop if there is no reasonable ground for apprehension on the part of an engineer that an animal discovered near the track will sustain injuries because of the failure to do so; but a failure to slacken speed, or stop if consistent with safety to the train, is negligence where the animal, when seen, is approaching the track or in dangerous proximity thereto.

The same degree of care to avoid collision is not generally required when the animal is near the track as when it is on the track,[96] and there is no duty to slacken speed or stop if there is no reason-

80. Tenn.—Cincinnati, etc., R. Co. v. Ford, 202 S.W. 72, 139 Tenn. 291. Contra Southern R. Co. v. Oliver, 3 Tenn.Civ.A. 408.

81. Ark.—Missouri Pac. R. Co. v. Jones, 31 S.W.2d 524, 182 Ark. 405.
Miss.—Fore v. Illinois Cent. R. Co., 159 So. 557, 172 Miss. 451, suggestion of error overruled 160 So. 903, 172 Miss. 451.
52 C.J. p. 71 note 78.

82. N.Y.—Magilton v. New York Cent., etc., R. Co., 31 N.Y.S. 241, 82 Hun 308—Boyle v. New York, etc., R. Co., 39 Hun 171, affirmed 21 N.E. 724, 115 N.Y. 636.
Duty to slacken speed generally see infra § 607.

83. N.Y.—Boyle v. New York, etc., R. Co., supra.

84. Ill.—Toledo, etc., R. Co. v. Bray, 57 Ill. 514.

85. U.S.—Cheek v. Thompson, D.C. La., 28 F.Supp. 391, affirmed, C.C.A., 140 F.2d 186.
52 C.J. p. 71 note 84.
Duty to stop or slacken speed where animals are discovered near or approaching track see infra § 608.
Where collision unavoidable see infra § 610.

86. Neb.—Briegel v. Union Pac. R. Co., 199 N.W. 555, 112 Neb. 398.

87. Ill.—Wabash, etc., R. Co. v. Krough, 13 Ill.App. 431.
52 C.J. p. 71 note 86.

88. Utah.—Bunnell v. Rio Grande Western R. Co., 44 P. 927, 13 Utah 314.
52 C.J. p. 72 note 87.

89. Pa.—Bailey v. Reading Co., Com. Pl., 39 Berks Co. 255.
52 C.J. p. 72 note 88.
Frightening animals see supra § 553.

90. Ala.—Alabama Great Southern R. Co. v. Hall, 32 So. 259, 133 Ala. 362.
52 C.J. p. 72 notes 90, 93 [a].

91. Mo.—Nicholson v. Chicago, etc., R. Co., 137 S.W. 69, 155 Mo. 359.

92. Ala.—Atlanta, etc., R. Co. v. Ballard, 82 So. 470, 203 Ala. 220.

93. Ala.—Alabama Great Southern, etc., R. Co. v. Hall, 32 So. 259, 133 Ala. 362.
52 C.J. p. 72 note 93.

94. Ala.—Alabama Great Southern R. Co. v. Powers, 73 Ala. 244.

95. La.—Herndon v. Texas, etc., R. Co., 120 So. 699, 10 La.App. 588.

96. Fla.—Savannah, etc., R. Co. v. Rice, 3 So. 170, 23 Fla. 575.
52 C.J. p. 72 note 99.

able ground for apprehension on the part of the engineer that the animal will sustain injuries because of his failure to do so,[97] as where it is grazing or standing quietly and manifesting no indication of coming on the track,[98] or where it is in harness and left standing in proximity thereto[99]

The rule is not affected by the circumstances that the animal is near a highway crossing,[1] or by a statute requiring engineers on discovering obstructions on the track to use all means within their power to stop the train, the statute having no application to animals near the track but not on it;[2] nor is a statute requiring trains to be stopped at a place where two railroads cross applicable where an animal was killed in the open country at a private crossing;[3] but a failure to slacken speed, or stop if consistent with safety to the train, is negligence where the animal, when seen, is approaching the track,[4] or in dangerous proximity thereto,[5] or is frightened and runs about wildly, and is as likely, in its fright, to run onto the track as from it.[6] No recovery against the railroad can be had if, when the animal is first seen, without any fault on the part of the company, collision has already occurred,[7] or, as shown infra § 610, where the collision is unavoidable.

Duty as dependent on subsequent movements of animal. Even if the circumstances when the animal is first seen do not require slowing down or stopping, such circumstances do not relieve those in charge of the train from the duty of maintaining a careful lookout as to their subsequent movements;[8] and if it can safely be done the train should be slowed down or stopped whenever there is apparent danger of injury,[9] as where the animal is in dangerous proximity to the track,[10] or is seen moving toward the track,[11] or running along the side of the track under circumstances making it probable that it will come on it,[12] or the circumstances are such as to make it probable that the animal will run on a bridge, trestle, or culvert and be injured,[13] or its escape from the immediate vicinity of the track would be difficult or impossible because of fences, embankments, or other obstructions[14] If, however, the animal, although on the track when first seen, moves off with no apparent indication of going on again, it is not negligence for the engineer not to slacken speed.[15]

§ 609. —— Stock Alarms

Whether a failure to blow a whistle or ring a bell so as to frighten animals away from the track is negligence depends on the circumstances of the particular case, but ordinarily it is the duty of the engineer to use such precautions to warn animals as soon as they are discovered on, in dangerous proximity to, or approaching, the track

Whether a failure to blow the whistle or ring the bell to frighten animals away from a railroad track is negligence depends on the circumstances of the particular case.[16] Ordinarily it is the duty of the engineer to use such precautions to warn animals as soon as they are discovered on the

97. Ark—St Louis-San Francisco Ry Co v Matlock, 132 S W 2d 657, 198 Ark 1187
Ga—Atlantic Coast Line R Co. v Sears, 56 S E 2d 130, 80 Ga App 338, followed in 56 S E 2d 131, 80 Ga App 339—Atlantic Coast Line R Co v Hodges, 54 S E.2d 500, 79 Ga App 563.
La—Moody v Texas & P. Ry. Co., App, 37 So 2d 346
52 C J p 72 note 1.

98. Ark—St Louis-San Francisco Ry. Co. v. Matlock, 132 S W 2d 657, 198 Ark 1187
52 C J p 72 note 2.

99. Ark—Geren v St Louis, etc, R. Co, 137 S.W 1100, 99 Ark. 226
Okl—Atchison, etc, R Co v Huston, 239 P 472, 111 Okl 274.

1. Colo—Chicago, etc, R Co. v. Church, 114 P. 299, 49 Colo 582

2. Ala—Western R Co. v. Lazarus, 6 So 877, 88 Ala. 453.
Tenn.—Louisville, etc, R Co v Reidmond, 11 Lea 205
52 C J. p 72 note 5

3. Ala—Gulf, M & O R Co v Phifer, 42 So 2d 44, 34 Ala App 588.

4. Ark—St. Louis-San Francisco Ry Co. v. Cole, 27 S.W.2d 992, 181 Ark 780
Ga—Atlantic Coast Line R. Co v. Sears, 56 S E.2d 130, 80 Ga App 338, followed in 56 S E 2d 131, 80 Ga App 339—Atlantic Coast Line R Co v Hodges, 54 S E 2d 500, 79 Ga App. 563.
52 C J. p 72 note 6.

5. Ala—Alabama Great Southern R. Co v Smelley, 187 So 630, 237 Ala. 471.
Ga—Atlantic Coast Line R Co v. Sears, 56 S.E 2d 130, 80 Ga App. 338, followed in 56 S E 2d 131, 80 Ga App. 339.
La—Armond v. Texas, etc, R Co, 6 La App 280.

6. Mo—Rhinehart v. St Louis, etc, R Co, 108 S W. 103, 129 Mo App. 168
N C—Wilson v Norfolk, etc, R Co, 90 N C 69.

7. Ark—Davis v Porter, 240 S W. 1077, 153 Ark 375

8. Ala—Louisville, etc, R Co v Rice, 1 So 639, 101 Ala 676
Kan.—Missouri Pac R Co v Reynolds, 1 P 150, 31 Kan 132

9. Ark—Paragould Southeastern R Co. v. Crunk, 98 S.W 682, 81 Ark 35.
52 C J. p 73 note 14.

10. N C—Snowden v Norfolk Southern R Co, 95 N C 93
W.Va—Testerman v. Hines, 107 S E 201, 88 W.Va. 547.
52 C J p 73 note 15.

11. Miss—Illinois Cent R Co v Person, 3 So. 375, 65 Miss 319
52 C J. p 73 note 16.

12. Ala—South Alabama, etc, R Co v Jones, 56 Ala 507
Ind—Toledo, etc, R Co v Milligan, 52 Ind. 505

13. Ark—Paragould Southeastern R Co v Crunk, 98 S W. 682, 81 Ark 35.

14. Colo—Denver, etc, R. Co v Nye, 47 P. 654, 9 Colo.App 94.
52 C J p 73 note 19

15. Miss—New Orleans & N. E R Co v Martin, 89 So 621, 126 Miss. 765
52 C.J p 73 note 20

16. Iowa—Flattes v Chicago, etc, R Co, 35 Iowa 191.

track,[17] or in dangerous proximity to it,[18] or approaching it,[19] and a failure to do so is at least some evidence of negligence.[20] No alarm is necessary if the animal is in no apparent danger,[21] or where the animal suddenly comes onto the track at a point so close to the train that the sounding of an alarm would be futile,[22] or was impossible,[23] or where the animal apparently saw the train and was getting out of its way as quickly as it could,[24] or where the sounding of the alarm might reasonably have increased rather than diminished the danger;[25] and even a statutory requirement to sound the alarm does not make a failure to comply negligence, where it is impossible for the engineer to do it in time to avoid the collision.[26]

§ 610. —— Where Collision Is Unavoidable

Railroad companies are not liable for unavoidable injuries to animals, and are not required to take useless precautions after discovering their peril too late to avoid a collision with them.

If animals come suddenly and unexpectedly on a railroad track so near to the train, or without any fault on the part of the company are not discovered until so near, that the accident cannot be avoided, the company will not be liable,[27] although no efforts were made to prevent it,[28] particularly if by attempting the impossible the chances of injury to the train and its passengers would have been increased.[29] In such cases it is not necessary after seeing the animals on or near the track to attempt to stop or slacken the speed of the train,[30] but on the contrary, as considered supra § 601 f, the speed may be increased if the danger of injury to the train would thereby be lessened. The fact that the train could not be stopped after the animal actually got on the track will not relieve the company from liability if reasonable care demanded that other precautions should have been previously taken;[31] it is otherwise if the circumstances up to that time did not require such precautions to be taken and recovery is sought on the theory of discovered peril,[32] or if, as soon as circumstances did require it, such precautions were taken.[33]

F. PROXIMATE CAUSE

§ 611. In General

In order to render a railroad company liable for injuries to animals, it must appear that its negligent act or omission was the proximate cause of the injury or one of several concurring efficient causes other than negligence of the plaintiff.

It must affirmatively appear, in order to render a railroad company liable for injury to animals, that

17. La.—Alcock v. Texas & P. Ry Co., App., 149 So. 132.
Tex.—Beaumont, S L & W Ry. Co v. Stubblefield, Civ.App., 37 S.W.2d 403.
52 C.J. p 73 note 23.

18. Ala.—East Tennessee, etc., R Co. v. Watson, 7 So 813, 90 Ala 41.
La.—Alcock v. Texas & P. Ry. Co., App., 149 So. 132.

19. La.—Alcock v. Texas & P. Ry Co., supra.
52 C.J. p 73 note 25.

20. La.—Alcock v. Texas & P. Ry Co., supra.
52 C.J. p 73 notes 23-25.

21. Ill.—Chicago, B. & Q. R. Co. v Bradfield, 63 Ill. 220.
52 C.J. p 73 note 27.

22. Ill.—Chicago, B. & Q. R. Co. v. Bradfield, supra.
Miss.—Yazoo, etc., R. Co. v. Wright, 28 So. 806, 78 Miss 125.

23. Tenn.—Memphis, etc., R Co v. Scott, 11 S.W. 317, 87 Tenn 494.

24. Iowa.—Mears v. Chicago, etc., R. Co., 72 N.W. 509, 103 Iowa 203—Flattes v Chicago, etc., R Co., 35 Iowa 191.

25. Ill.—Chicago, etc, R. Co. v. Bradfield, 63 Ill. 220.

26. Tenn.—Memphis, etc., R Co. v. Scott, 11 S.W. 317, 87 Tenn 494.

27. Ala.—Owen v. Southern Ry. Co., 133 So 33, 222 Ala 499
Ark.—Chicago, R I & P. R Co. v. Reeves, 231 S W 2d 103
Ga.—Atlantic Coast Line R. Co v. Carver, 57 S E 2d 692, 81 Ga App 26—Atlantic Coast Line R Co v Sears, 56 S E 2d 130, 80 Ga App. 338, followed in 56 S E 2d 131, 80 Ga.App. 339—Atlantic Coast Line R Co v. Hodges, 54 S E 2d 500, 79 Ga.App. 563—Southern Ry. Co. v. Russell, 169 S E. 245, 46 Ga App. 772.
La.—Moody v. Texas & P. Ry Co., App., 37 So.2d 346—Edwards v. Thompson, App, 2 So.2d 493—Cockrell v. Thompson, App, 185 So. 681—Dumas v. Thompson, App, 185 So. 307—Boyd v. Kansas City, S & G Ry. Co., App., 147 So 100.
52 C J p 73 note 35
Impossibility of observance of statutory precautions see supra § 604.

28. La.—Edwards v. Thompson, App, 2 So 2d 493.
52 C.J. p 74 note 36.

29. Ark.—Chicago, R I. & P. R Co. v. Reeves, 231 S.W.2d 103.
Ga.—Atlantic Coast Line R. Co. v. Hodges, 54 S.E.2d 500, 79 Ga App 563.
52 C.J. p 74 note 37.

30. Ala.—L & N R Co. v. Holmes, 27 So.2d 878, 32 Ala App. 551.
Ark.—Chicago, R I & P. R. Co v Reeves, 231 S W 2d 103.
Ga.—Atlantic Coast Line R Co v. Hodges, 54 S E 2d 500, 79 Ga.App 563.
La.—Edwards v. Thompson, App, 2 So.2d 493.
52 C J p 74 note 38.
Duty to stop or slacken speed in general see supra §§ 607, 608.

31. Ala.—South Alabama, etc., R. Co v Jones, 56 Ala. 507
Tenn.—East Tennessee, etc., R Co v. Selcer, 7 Lea 557.

32. Colo.—Denver, etc, R Co v Bird, 152 P. 911, 60 Colo 259
Tex.—Hines v Pennington, Civ App., 240 S W 703.

33. Ark.—Chicago, R I. & P. R Co v Reeves, 231 S.W 2d 103
Ga.—Atlantic Coast Line R. Co v Carver, 57 S E 2d 692, 81 Ga App. 26.
La.—Moody v. Texas & P. Ry. Co., App, 37 So.2d 346—Cockrell v Thompson, App, 185 So 681—Boyd v. Kansas City, S. & G. Ry. Co., App, 147 So. 100
52 C J. p 73 note 35.

its negligent act or omission or its violation of statutory duty was the proximate cause of the injury,[34] or one of several concurring efficient causes, other than negligence on the part of plaintiff.[35] In order to establish proximate cause, a direct causal connection must be established between defendant's negligence or misconduct and the injury complained of.[36] The liability extends only to injuries which are the direct and natural consequences of the negligent act, not necessarily including injuries which would not have occurred but for defendant's act.[37]

The company will not be liable, although negligent, where the immediate cause of the injury is an independent intervening agency;[38] but it will be liable for all damages which follow in the natural and ordinary course of events as the result of its negligence where the intervening agency is not itself an efficient cause,[39] or where it is set in motion by the original wrong of the company,[40] and the test is not whether the particular injury might have been foreseen but whether it is the natural and proximate result of the negligent act or omission complained of.[41]

Two theories of accident. The fact that there are two theories as to how the accident happened does not reduce the cause to a speculative basis when both theories are grounded on the same cause and both are supported by evidence.[42]

§ 612. Unavoidable Accident

Railroad companies are not liable merely because an animal is killed or injured by its trains where the injury is the result of unavoidable accident.

Railroad companies cannot be held liable merely because an animal is killed or injured by its trains where the injury is the result of unavoidable accident.[43] So, if animals suddenly come on the track in front of a train which is properly equipped and operated in a lawful and proper manner, or, without any fault on the part of those in charge of the train, are not seen until too late to stop the train or otherwise avoid the injury, the company will not be liable;[44] nor can a failure to make any effort to avoid the injury be held a proximate cause thereof if it appears that nothing which might have been done would under the circumstances of the case have been successful.[45]

§ 613. Frightening Animals

Where injuries result from the fright of an animal caused by the negligent operation of a train, the negligence will be held to be the proximate cause of the injuries.

Where animals are frightened by the negligent operation of a train, this negligence will be held to be the proximate cause of resulting injuries sustained either by the frightened animal,[46] or inflicted by it on other animals in the course of its flight;[47] but the company will not be liable for

34. Mo—Theener v Kurn, 146 S W 2d 647, 235 Mo App 823
Neb—Brei v. Chicago, B & Q R. Co., 265 N W 539, 130 Neb 496
N J—Cole v Pennsylvania R Co., 64 A 2d 96, 1 N J Super 254.
Okl—Kurn v Immel, 89 P.2d 308, 184 Okl 571—Chicago, R. I & P Ry Co v. Jones, 27 P 2d 593, 166 Okl 291
Tex—International-Great Northern R Co v Coulter, Civ App., 27 S W 2d 272.
52 C.J p 74 note 53

Cattle trapped on trestle

Railroad's failure by cattle guards or otherwise to protect livestock, which it knew usually grazed on or near unfenced right of way in vicinity of trestle spanning bayou, from being trapped on floored portion at either end of trestle, the center section of which was not floored, constitutes a contributing cause of death of horses struck by passenger train rounding curve at night at such speed it could not be stopped after horses could be seen on trestle.—Friedman's Estate v. Texas & Pac Ry. Co., 25 So 2d 88, 209 La. 540.

Permitting growth of vegetation frequented by grasshoppers attractive to turkeys

Although a railroad would not be required to eradicate insects from vegetation along the right of way, the railroad would be liable for negligence in permitting a growth of vegetation along the right of way which was frequented by grasshoppers so as to become attractive to turkeys in search of food if such act was the proximate cause of the loss of turkeys which were run over by a train—Texas & P Ry Co v Heathington, Tex Civ App., 115 S W.2d 495

35. Ala—Western R Co v. Sistrunk, 5 So 79, 85 Ala. 352.
52 C J p 75 note 54
Contributory negligence as proximate cause see infra § 617.

36. Neb—Brei v. Chicago, B & Q. R Co, 265 N W 539, 130 Neb 496
Tex.—International-Great Northern R. Co v Coulter, Civ.App, 27 S. W 2d 272.
52 C.J p 75 note 55.

37. Minn—Nelson v. Chicago, etc., R Co, 14 N W 360, 30 Minn. 74
Vt.—Holden v. Rutland, etc., R Co., 30 Vt 297.

38. Neb.—Brei v. Chicago, B & Q. R. Co, 265 N.W. 539, 130 Neb 496.
Okl—Kurn v. Immel, 89 P.2d 308, 184 Okl 571.
52 C J. p 75 note 58.

39. Ala—Louisville, etc, R Co v Fox, 65 So 917, 11 Ala.App 253.
52 C J p 75 note 59

40. Tex—Texarkana & Ft S. Ry Co v. Harrist, Civ.App., 52 S.W 2d 1117.
52 C.J. p 75 note 60.

41. Iowa—Mikesell v. Wabash R Co, 112 N W. 201, 134 Iowa 736.

42. Mo—Boucher v Wabash R Co, Mo App, 199 S W. 742.
52 C J. p 75 note 63.

43. Tex—Texas & P Ry Co. v Edwards, Com App, 36 S W 2d 477.
52 C.J p 75 note 66.

44. Tex—Texas & P. Ry. Co v. Edwards, supra.
52 C.J. p 75 note 67.

45. Ala—Nashville, etc., R Co. v. Hembree, 5 So. 173, 85 Ala. 481—East Tennessee, etc, R Co. v. Bayliss, 75 Ala 466.

46. Ark—Jonesboro, etc, R. Co v. Kilgore, 211 S W. 167, 138 Ark. 308
Tex—Texas, etc, R Co. v. Anderson, 2 Tex A Civ Cas § 203.
Liability for frightening animal generally see supra § 553.

47. Ind.—Billman v. Indianapolis, etc., R. Co., 76 Ind. 166, 40 Am.R. 230.

injuries sustained by frightened animals where the fright was not due to any negligence on the part of its servants in the operation of the train,[48] unless it can be said to be due to some other concurrent negligent act for which the railroad is responsible.[49] It is immaterial whether the animal was struck by the train and thrown onto a fence and was injured, or whether it was so frightened that it jumped on the fence in an effort to escape from the train.[50]

§ 614. Signals, Alarms, and Lookouts

Negligence in failing to give required signals or maintain a proper lookout will not render a railroad company liable for an injury to an animal caused by a train unless such negligence was the proximate cause of the injury.

In order to render a railroad company liable for injuries to animals on the ground that signals on approaching public crossings were not given as required by statute, it must affirmatively appear that the omission was the cause of the injury complained of;[51] and the railroad is not liable if there is no evidence that the accident would have been avoided had the signals been given,[52] or given earlier.[53] A failure to blow the alarm whistle as required by statute to frighten animals from the track is not the proximate cause of the injury where the animal was already caught in a cattle guard,[54] or was already frightened by the train and running away from it and was not hit by the train but injured itself in its flight.[55] So, also, negligence on the part of the engineer as to keeping a lookout for stock must have caused or contributed directly to the injury complained of.[56]

§ 615. Rate of Speed and Means of Control

Unless such negligence was the cause of the injury, a railroad company is not liable merely because at the time of the accident the train was running at a prohibited or dangerous rate of speed or was not under proper control.

Unless such negligence is shown to have been the cause of the injury complained of, a railroad company will not be liable merely because at the time of the accident the train was running at a prohibited[57] or dangerous[58] rate of speed, or the speed was not checked as required by statute on approaching a public crossing;[59] or the brakemen were not at their posts.[60] Where there is testimony that the cattle could have been driven from the track in time to save them, if the train had not been going so fast, however, a recovery by plaintiff cannot be denied on the theory that the railroad's violation of the speed ordinance was not the proximate cause of the injury.[61]

G. CONTRIBUTORY NEGLIGENCE OF OWNER

§ 616. Availability and Effect as Defense

The owner of animals must exercise ordinary care to prevent their injury by railroad companies, and, if he fails to do so, and his failure contributes directly to the injury, he cannot recover.

The owner of animals must exercise ordinary care to prevent their injury by railroad companies,[62] and, if he fails to do so, and his failure contributes directly to the injury complained of, he cannot recover.[63] Contributory negligence is available as a defense, even though it consists merely of plaintiff's violation of a statutory duty,[64] provided it contributes directly to the injury.[65] It has been held that the availability of this defense is

48. Mo.—Lowry v. St. Louis, etc., R. Co., 40 Mo. App. 554.
Wis.—Lynch v. Northern Pac. R. Co., 54 N.W. 610, 84 Wis. 348.
Speed; whistle
Alleged excessive speed of train through town did not constitute actionable negligence so as to render railroad liable for injuries and damage caused by runaway team where it was shown that the whistle and not speed caused team to lunge or run away.—Garner v. Missouri Pac. Ry. Co., 195 S.W.2d 39, 210 Ark. 214.

49. Mo.—Duncan v. Missouri, etc., R. Co., 133 S.W. 369, 152 Mo. App. 284.
52 C.J. p. 76 note 73.

50. Or.—Meier v. Northern Pac. R. Co., 93 P. 691, 51 Or. 69.

51. N.D.—West v. Northern Pac. R. Co., 100 N.W. 254, 13 N.D. 221.
52 C.J. p. 77 note 93.

52. S.D.—Miller v. Chicago, etc., R. Co., 111 N.W. 553, 21 S.D. 242.

53. Miss.—Hines v. McGhee, 83 So. 402, 121 Miss. 57.

54. Tex.—Hines v. Collins, Civ. App., 221 S.W. 1108.

55. Ky.—Sublett v. Mobile, etc., R. Co., 141 S.W. 50, 145 Ky. 707, 38 L.R.A.,N.S., 1153.
Tenn.—Holder v. Chicago, etc., R. Co., 11 Lea 176.

56. S.D.—Hebron v. Chicago, etc., R. Co., 57 N.W. 494, 4 S.D. 538.
52 C.J. p. 77 note 7.

57. Miss.—Louisville, N. O. & T. R. Co. v. Caster, 5 So. 388.
52 C.J. p. 77 note 9.

58. Ark.—Ford v. St. Louis, etc., R. Co., 50 S.W. 864, 66 Ark. 363.
Tex.—International-Great Northern R. Co. v. Coulter, Civ.App., 27 S.W. 2d 272.

59. Ga.—Georgia Cent. R. Co. v. Duggan, 52 S.E. 768, 124 Ga. 493.
52 C.J. p. 77 note 11.

60. Miss.—Vicksburg, etc., R. Co. v. Hart, 61 Miss. 468.

61. Tex.—Galveston, etc., R. Co. v. Liuzza, Civ.App., 201 S.W. 1043.

62. Ala.—Fuqua v. Southern R. Co., 77 So. 690, 201 Ala. 164.
52 C.J. p. 78 notes 15, 18.

63. Ala.—Fuqua v. Southern R. Co., supra.
52 C.J. p. 78 note 18.

64. Ohio.—Pittsburgh, etc., R. Co. v. Methven, 21 Ohio St. 586.

65. Ala.—Alabama Great Southern R. Co. v. McAlpine, 71 Ala. 545.

in no way affected by the statute making railroads liable for injuries to live stock unless the railroad can prove that the injury was committed without any negligence on its part.[66] Where injuries to an animal resulted solely from its being caught between crossties in a railroad bridge, necessary efforts of the owner in extricating the animal do not militate against his right of recovery from the railroad,[67] even though in his attempts to extricate the animal it was so injured that it had to be killed.[68]

§ 617. —— Proximate Cause

In order to preclude recovery, the plaintiff's negligence must be a proximate cause of the injury.

In order to preclude recovery, plaintiff's negligence must be a proximate cause of the injury.[69] A plaintiff not entirely without fault may recover if his negligence is remote, and the railroad's negligence is the proximate cause of the injury.[70]

§ 618. —— Injury Avoidable notwithstanding Contributory Negligence

Notwithstanding plaintiff's negligence, he may recover if at the time of the injury it might have been avoided by defendant in the exercise of ordinary care.

Although plaintiff was negligent, he may recover if at the time the injury occurred it might have been avoided by defendant in the exercise of ordinary care,[71] or if, although the animal was a trespasser, the injury might have been avoided by such care after the animal was discovered.[72] The doctrine does not apply, however, if plaintiff is guilty of a continuing negligence up to the time of the accident and might have himself avoided the collision if he had been in the exercise of due care.[73]

§ 619. —— In Actions Based on Statutory Liability

Contributory negligence is ordinarily a good defense in an action for injury to animals based on statutory grounds, although in some jurisdictions it is held that contributory negligence is no defense to an action based on a statute requiring railroads to construct and maintain fences and imposing liability for injuries to animals caused by their failure to do so.

Contributory negligence is a good defense to an action for injury to animals whether the action is based on common-law or statutory grounds.[74] So it is held that contributory negligence is a defense under statutes in terms making a railroad liable for all damages to stock done by its cars or locomotives,[75] or damages due to a failure to give signals,[76] or making proof of the injury prima facie evidence of negligence and placing the burden of proof on the company to show that the injury was not due to its negligence.[77]

Under fencing statutes. In some jurisdictions, where the action is based on a statute requiring railroads to construct and maintain fences and imposing liability for injuries to animals caused by their failure to do so, it is held that contributory negligence on the part of the owner is no defense,[78] in actions based on either a total failure to fence or a failure to keep the fences in a proper state of repair,[79] but the rule does not apply where the accident occurred at a place not required to be fenced,[80] and, as considered infra § 621, it does not permit a recovery where a person willfully abandons an animal to destruction or voluntarily exposes it to a known danger.

In other jurisdictions requiring fencing and imposing liability for failure to fence, contributory negligence has been held to be a defense even in case of a total failure to fence.[81] Where the statute expressly provides that every railroad company failing to fence its tracks against stock running at large shall be liable for all injuries unless occasioned by the willful act of the owner or his agent, the same rule of absolute liability of the railroad except for injuries caused by plaintiff's willful acts

66. Md.—Northern Cent. R. Co. v. Green, 76 A. 90, 112 Md. 487.

67. Tex.—Chicago, R. I. & G. Ry. Co. v. Rhone, Civ. App., 105 S.W.2d 707, error dismissed.

68. Tex.—Chicago, R. I. & G. Ry. Co. v. Rhone, supra.

69. Neb.—Sullwald v. Union Pac. R. Co., 166 N.W. 190, 102 Neb. 126.
52 C.J. p. 78 note 24.

70. Cal.—Orcutt v. Pacific Coast R. Co., 24 P. 661, 85 Cal. 291.
52 C.J. p. 78 note 25
Railroad's negligence as proximate cause see supra §§ 611–615.

71. Iowa.—Barnard v. Chicago, M. & St. P. R. Co., 110 N.W. 439, 133 Iowa 185.
52 C.J. p. 78 note 28.

72. Tex.—Missouri, K. & T. R. Co. v. Byrd, 124 S.W. 993, 58 Tex. Civ. App. 612.
52 C.J. p. 78 note 30.
Duty to trespassing animal generally see supra § 606

73. Kan.—Dunlap v. Chicago, etc., R. Co., 123 P. 754, 87 Kan. 197.

74. Wis.—Curry v. Chicago & N. W. R. Co., 43 Wis. 665.
52 C.J. p. 79 note 32.

75. Ga.—Macon, etc., R. Co. v. Davis, 13 Ga. 68.

76. Ind.—Cincinnati, etc., R. Co. v. Hiltzhauer, 99 Ind. 486.

77. Md.—Norfolk & W. R. Co. v. Smith, 64 A. 317, 104 Md. 72.
52 C.J. p. 79 note 36.

78. Mich.—Flint, etc., R. Co. v. Lull, 28 Mich. 510.
52 C.J. p. 79 note 42.

79. Vt.—Harwood v. Bennington, etc., R. Co., 32 A. 721, 67 Vt. 664.—Congdon v. Central Vermont R. Co., 56 Vt. 390, 48 Am.R. 793
52 C.J. p. 79 note 43.

80. Ind.—Lafayette, etc., R. Co. v. Shriner, 6 Ind. 141.

81. Mo.—Gee v. St. Louis & G. R. Co., 99 S.W. 506, 122 Mo. App. 358.
52 C.J. p. 79 notes 46, 47.

is followed;[82] but this absolute liability, in the absence of a willful act, applies only to stock running at large and not when under the control of the owner.[83] Where a fencing statute expressly provides that contributory negligence may be set up as a defense, such defense is available.[84]

§ 620. —— Where Negligence of Railroad Is Willful, Wanton, or Gross

If animals are injured through the wanton or willful misconduct of railroad employees, the company will be liable notwithstanding the owner may have been negligent or permitted his animals to be unlawfully at large.

If animals are injured through the wanton or willful misconduct of the railroad company's employees, the company will be liable therefor notwithstanding the owner may have been negligent,[85] or permitted his animals to be unlawfully at large.[86] Where the killing is due to the operation of a train, willful negligence can be predicated only on the fact that the men in charge of the train saw the animals in their place of danger in time to avoid injuring them.[87]

§ 621. —— Willful and Intentional Acts of Owner

A person cannot recover for injuries to an animal which he willingly abandons to destruction or voluntarily exposes to a known danger, even under fencing statutes where ordinary contributory negligence is not a defense.

A person cannot recover for injuries to an animal which he willingly abandons to destruction or voluntarily exposes to a known danger.[88] The rule applies to cases under the fencing statutes where ordinary contributory negligence on the part of plaintiff is not a defense,[89] especially where the statute in express terms provides for liability of the railroad unless the injuries are occasioned by the willful act of the owner or his agent.[90]

To constitute a willful act, there must be something more than mere negligence; there must be a positive act in some way connected with the injury,[91] as where the owner turns out stock directly on a railroad right of way,[92] or permits a blind animal to run at large in the vicinity of a railroad track,[93] or stands by and willfully refuses to drive an animal from the track out of the way of an approaching train where he has ample time and opportunity to do so.[94] It has been held not to be a willful act to turn an animal out in a highway for the purpose of driving it across a railway track to a pasture,[95] or to leave stock on land adjoining a railroad track knowing that a gate in the railroad fence is defective;[96] or to allow stock to run at large on the owner's premises in close proximity to a railroad track;[97] or to permit stock to be at large in violation of stock laws.[98]

§ 622. Driving Animals over or along Tracks

If a person in charge of animals, when attempting to drive them across a railroad track, fails to exercise ordinary care, and thereby contributes to the injury, the owner cannot recover.

If a person in charge of animals, when attempting to drive them across a railroad track, fails to exercise ordinary care and thereby contributes to the injury complained of, the owner cannot recover,[99] the forfeiture of his right to recover depending on the acts of the driver, independently of his age,[1] or the extent to which intoxication had deprived him of the control of his actions.[2] Subject to the qualification that he take all reasonable pre-

82. Iowa—Enix v. Iowa Cent. R Co, 87 N.W 417, 114 Iowa 508.
52 C.J. p 79 note 49.

83. Iowa.—Smith v. Chicago, etc., R. Co., 34 Iowa 96.

84. Tenn.—Nashville, etc., R. Co. v. Spence, 41 S.W. 934, 99 Tenn. 218.
52 C J. p 79 note 40.

85. Mich—McDonald v. Chicago & N. W R Co., 17 N.W. 210, 51 Mich. 628.
52 C.J p 80 note 56.

86. Ind.—Lafayette & I. R. Co. v. Shriner, 6 Ind. 141.
52 C J p 80 note 57.

87. Minn.—Lindemann v. Chicago, etc., R. Co, 191 N W. 825, 154 Minn 363.

88. Ind.—Welty v. Indianapolis, etc, R. Co., 4 N E. 410, 105 Ind. 55.
52 C J. p 80 note 59.

89. Ind—Welty v. Indianapolis, etc, R. Co, supra—Knight v. Toledo, etc, R Co, 24 Ind 402
Contributory negligence as defense in actions brought under fencing statutes see supra § 619.

90. Iowa—Enix v. Iowa Cent. R Co., 87 N W. 417, 114 Iowa 508
52 C J. p 80 note 62.

91. Idaho—McDonald v. Great Northern R. Co, 46 P. 766, 5 Idaho 8.
52 C J. p 80 note 64.

92. Idaho.—McDonald v. Great Northern R. Co, supra.

93. Ind—Knight v. Toledo, etc., R. Co., 24 Ind. 402.

94. Iowa.—Moody v Minneapolis & St. L R. Co., 41 N.W. 477, 77 Iowa 29.
52 C.J p 80 note 67.

95. Iowa.—Smith v. Kansas City, etc, R. Co., 12 N W. 619, 58 Iowa 622.

96. Iowa.—Enix v. Iowa Cent R Co, 87 N W 417, 114 Iowa 508
N Y—Tator v. Rutland R. Co, 224 N Y S. 731, 221 App Div. 675.

97. Iowa—Lee v. Minneapolis, etc, R. Co., 23 N W 299, 66 Iowa 131

98. Iowa—Krebs v. Minneapolis, etc, R Co, 21 N W 131, 64 Iowa 670—Spence v Chicago, etc, R Co, 25 Iowa 139

99. Ill.—Chicago Board of Underwriters v. Chicago, etc, R. Co, 44 Ill.App. 253.
52 C.J p 81 note 76

1. Iowa—McGill v. Minneapolis, etc, R. Co., 85 N.W. 620, 113 Iowa 358.

2. Ohio—Balser v. Chicago, etc., R. Co, 9 Ohio S. & C.P. 523, 7 Ohio N.P. 482.

cautions,[3] the owner has a right to presume that the railroad will operate its trains in a lawful and proper manner[4] and that at public crossings the crossing itself will be in a safe condition.[5] He is not obliged to ascertain definitely that the daily train has passed.[6] What constitutes ordinary care on the part of the driver depends on the circumstances of the particular case.[7]

Duty to stop, look, and listen. Before going onto the track, a person must look and listen for approaching trains,[8] even though the regular train has just passed.[9] There is no particular distance from the crossing at which a person must look and listen, each case depending on its own circumstances,[10] but extra precautions must be observed where there are other noises which would interfere with such person's hearing approaching trains,[11] or where the view of the track in either direction is obstructed before reaching the point of danger;[12] and, where the view of the track is so obstructed, it is the duty of a person driving a drove of animals along the road before him to go forward and look for approaching trains before attempting to cross.[13]

§ 623. Use of Own Premises Adjoining or near Track notwithstanding Absence of, or Defect in, Fence

Where a railroad company is required by law to fence its tracks, it is not contributory negligence for an adjoining landowner, knowing the road to be unfenced, to turn stock into his inclosure or to pasture them on his own fields through or along which the railroad runs.

Where a railroad company is required by law to fence its tracks, it is not contributory negligence on the part of an adjoining landowner, although knowing the road to be unfenced, to turn stock into his inclosure or to pasture them on his own fields through or along which the railroad runs,[14] or in which it has constructed a farm crossing without gates,[15] or to allow his stock to graze on a highway if the highway is on his own land.[16] In the absence of any statute or agreement as to fences, it is ordinarily held not to be contributory negligence for a landowner to allow his stock to run on his own land through which an unfenced railroad runs,[17] although there may be other circumstances in the case precluding a recovery.[18]

Although there are decisions to the contrary,[19] it is generally held that it is not contributory negligence for an adjoining landowner to turn his stock on his own premises adjacent or accessible to fences, which it is the duty of the railroad to keep in repair either under statute[20] or by contract with the landowner,[21] although he knows that they are out of repair,[22] or knows that the cattle guards are defective,[23] or that the gates or bars in such fences which it is the duty of the company to maintain are defective or insecure,[24] or that his animals had previously escaped from the inclosure because of the same defects;[25] and it is not contributory negligence for another to pasture his cattle in a field adjacent to the track with knowl-

3. U S—Wabash, St. L. & P. R Co v Central Trust Co, C C.Ind., 23 F. 738
52 C J. p 81 note 80

4. Pa—Reeves v Delaware, etc, R. Co, 30 Pa 454, 72 Am D 713

Inapplicability of doctrine of assumed risk
The doctrine of assumption of risk is applicable only to a master and servant relation and did not apply so as to bar recovery where plaintiff's cows were killed at a private crossing by a train while cows were being driven across crossing by plaintiff's son.—Dowse v. Maine Cent R. R., 20 A 2d 629, 91 N.H. 419.

5. N C—Tankard v. Roanoke R., etc, Co, 23 S E. 46, 117 N.C. 558.
52 C J. p 81 note 82.

6. N.H.—Dowse v. Maine Cent. R. R, 20 A 2d 629, 91 N H. 419.

7. Minn.—Tuthill v. Northern Pac R Co., 52 N W. 384, 50 Minn. 113.
52 C.J p 81 note 83.

8. Iowa.—McGill v Minneapolis, etc, R. Co, 85 N.W. 620, 113 Iowa 358.

Pa—Bailey v. Reading Co., Com Pl, 39 Berks Co. 255
52 C J. p 81 note 85.

9. Iowa—McGill v. Minneapolis, etc, R. Co, 85 N.W. 620, 113 Iowa 358.

10. N Y—Thompson v. New York, etc, R Co, 17 N E. 690, 110 N.Y. 636.

11. Cal.—Flemming v. Western Pac R Co, 49 Cal. 253.

12. N D.—West v. Northern Pac R Co, 100 N.W 254, 13 N D. 221.

13. Minn—Snell v Minneapolis, etc., R. Co., 91 N W. 1108, 87 Minn 253

14. Me—Wilder v. Maine Cent. R Co., 65 Me. 332, 20 Am R 698.
52 C J. p 81 note 91.

15. N H—Horn v. Atlantic, etc, R Co, 35 N H 169—White v. Concord R Co, 30 N H. 188

16. N H—Cressey v. Northern R Co, 59 N.H. 564, 47 Am R 227.

17. Ill.—St. Louis, etc., R. Co. v Todd, 36 Ill 409
52 C J. p 81 note 94.

18. Tex.—Galveston, etc, R Co. v. Grace, Civ.App, 164 S W. 413.
52 C J. p 81 note 95.

19. Pa—Scowden v. Erie R Co., 26 Pa Super. 15.
Wis.—Petersen v. Northern Pac. R Co., 56 N W. 689, 86 Wis. 206.
52 C.J. p 82 note 96.

20. Ohio—Cleveland, etc, R. Co v Scudder, 40 Ohio St. 173
52 C J. p 82 note 97.

21. Ind.—Toledo, etc., R Co. v Burgan, 37 N.E 31, 9 Ind App 604

22. Ohio.—Cleveland, etc., R. Co v. Scudder, 40 Ohio St 173.
52 C J p 82 note 99.

23. Tex—Texas, etc, R. Co. v Sproles, 105 S.W. 521, 47 Tex.Civ App. 294.

24. Ind—Toledo, etc., R. Co. v Burgan, 37 N E 31, 9 Ind App 604
Iowa—Enix v. Iowa Cent. R. Co., 87 N.W 417, 114 Iowa 508.

25. Mass.—Rogers v. Newburyport R Co, 1 Allen 16.
Minn—Johnson v Chicago, etc., R Co., 13 N.W 673, 29 Minn. 425

edge of the defective condition of the fence or gate[26] The existence of a stock law does not affect the right of a landowner to permit his stock to run on his own inclosed premises[27]

§ 624. Conduct with Respect to Fences, Gates, and Bars

a. Failure to construct and maintain
b. Knowledge of defects and failure to notify railroad
c. Constituting cause of defect or of failure to repair
d. Failure to keep gate or bars closed

a. Failure to Construct and Maintain

In the absence of any statute or agreement requiring him to do so, it is not contributory negligence in a landowner not to fence against a railroad which runs through or along his own land, but the general rule is otherwise if the landowner has expressly agreed to construct, maintain, or repair the fence or gates.

In the absence of any statute or agreement requiring him to do so, it is not contributory negligence in a landowner not to fence against a railroad which runs through or along his own land,[28] even though the railroad is required by law to fence its tracks and has failed to do so[29] The fact that the statute provides that in such cases the landowner may construct the fences and recover the value thereof from the railroad does not change the rule.[30] In the absence of statute or agreement, it is not contributory negligence for a landowner to fail to maintain or to keep in repair the fences or gates dividing his land from the railroad right of way,[31] even though the statute allows him to do so if the railroad does not,[32] unless the defect is easily repaired without any considerable cost or labor and a failure to do so would probably result in an injury to his stock.[33]

Under statute or agreement. If the landowner has expressly agreed to construct, maintain, or repair the fences or gates, he cannot recover for injuries to his animals due to a failure to comply with his agreement,[34] even where the railroad is required by statute to fence,[35] except in jurisdictions where it is held that the landowner's breach is not a proximate cause of the injury,[36] and, where the agreement is a covenant running with the land, a failure by a subsequent owner of the land to comply with its terms is contributory negligence barring his recovery.[37] So, also, where by statute it is the duty of the landowner to assist in constructing and maintaining the railroad fences as division fences, he cannot recover where his neglect in this respect has contributed to the injury[38]

If the landowner, having agreed to build the fence, accepts without objection a fence built for him by the railroad, he cannot recover for injuries to his stock due to failure to keep the fence in repair under the terms of his agreement.[39] If the landowner builds a defective fence as agent for the railroad and the railroad adopts it, the defective construction is not regarded as his contributory negligence barring his recovery against the railroad,[40] although there is authority to the contrary.[41] The rule barring the landowner's recovery for injuries to his stock, occasioned by defects which under the terms of a statute or agreement it is his duty to remedy, is not affected by the fact that the defect was due to accident or casualty without any fault on his part,[42] even though due to fire communicated from the locomotives of the railroad company.[43]

b. Knowledge of Defects and Failure to Notify Railroad

It is not contributory negligence for a landowner, knowing of the defect in the fence, to pasture his cattle in his adjoining land without notifying the company thereof or requesting it to repair the fence, unless the landowner is under a duty to give such notice or to repair the fence himself.

It is not contributory negligence for a landowner, knowing of the defect in the fence, to pasture his

26. Kan.—Missouri Pac. R. Co. v. Pfrang, 51 P. 911, 7 Kan.App. 1.
27. Kan.—Iola Electric R Co. v. Jackson, 79 P. 662, 70 Kan. 791
52 C J. p 82 note 5.
28. Mo.—Donovan v Hannibal, etc., R. Co, 1 S.W 232, 89 Mo. 147.
52 C J. p 82 note 7.
29. Mo.—Donovan v. Hannibal, etc., R Co, supra.
N.Y.—Shepard v. Buffalo, etc., R. Co, 35 N.Y. 641.
30. Mo.—Donovan v. Hannibal, etc., R. Co, 1 S.W. 232, 89 Mo 147.
31. Ill.—Terre Haute, etc., R. Co v McCord, 56 Ill App. 173.
52 C J p 82 note 10.
32. Ill.—Terre Haute, etc., R Co v McCord, supra.
33. Utah.—Knight v. Southern Pac Co, 172 P 689, 52 Utah 42.
52 C J. p 82 note 12.
34. N.Y.—Talmadge v. Rensselaer R Co, 13 Barb 493
52 C J. p 82 note 14.
35. Mo.—Ells v Pacific R. Co, 48 Mo 231.
36. Ala.—Southern R Co v. Dickens, 45 So 215, 153 Ala 283
37. N Y.—Satterly v. Erie R Co, 99 N Y S. 309, 113 App Div. 462
38. Ind.—Pittsburgh, etc., R Co v James, 114 N E 833, 64 Ind App 456.
52 C J p 83 note 20.
39. Ohio.—Pittsburg, etc., R Co v Heiskell, 38 Ohio St 666
40. Me.—Norris v. Androscoggin, etc., R. Co, 39 Me 273, 63 Am D 621.
41. Ill.—Robbermann v. Pierce, 77 Ill App. 405
42. Ohio.—Pittsburgh, etc., R. Co v. Smith, 26 Ohio St 124.
43. N Y.—Terry v. New York Cent R Co, 22 Barb 574.
52 C J p 83 note 25.

cattle in his land adjoining without requesting the company to repair the fence,[44] or without notifying the company of its existence where the circumstances are such as to charge the railroad with notice,[45] but failure of a landowner to notify the railroad of the defect is contributory negligence where the requirement of notice is a reasonable one under the circumstances,[46] or where the landowner was required by statute to assist in keeping the fence in repair as a division fence,[47] or had expressly agreed with the railroad that he would keep it in repair,[48] or had voluntarily undertaken to repair it without notice to the railroad and did so in such a manner as to conceal without effectively remedying the defect[49]

c. Constituting Cause of Defect or of Failure to Repair

It is contributory negligence barring recovery if the defect which occasioned the injury was caused by the plaintiff himself.

It is contributory negligence barring recovery if the defect which occasioned the injury was caused by plaintiff himself,[50] or if the failure of the railroad to remedy the defect was due to plaintiff's act,[51] or if the defect resulted from plaintiff's failure to exercise reasonable care in the use of the fence,[52] or, if he is using a field belonging to another, from the owner's failure to use such care.[53] Plaintiff's acts are not contributory negligence, however, in the absence of proof that they were the cause of the injury.[54]

d. Failure to Keep Gates or Bars Closed

If the plaintiff's animals are injured by reason of his failure to keep gates or bars closed, it is generally held that he is guilty of contributory negligence barring his recovery therefor

If a landowner fails to keep the gates closed at a farm crossing maintained for his convenience, and his animals escape and are injured by reason of his neglect, it is generally held that he is guilty of contributory negligence barring his recovery therefor,[55] unless the gate is out of repair and its being left open is due to difficulty in closing and plaintiff is not chargeable with lack of due care in using it.[56] In some states, if the railroad has not provided a gate up to the standard required by statute, a failure by plaintiff to close the gate will not bar his recovery unless it is willfully done[57]

The general rule applies not only to the landowner but to any person using a gate in a railroad fence, whose animals are injured by reason of his own neglect to close it.[58] Plaintiff's failure to close it is not negligence contributing to the injury if, between the time of his failure to close it and the accident, others have used the gate and left it open,[59] but if, before he used the gate, someone else had passed through and left it open, that fact will not excuse his failure to close it after passing through himself.[60] Where herders driving cattle along a highway turned the cattle into a pasture along a railroad right of way without attempting to contact the owner of the pasture and without making sufficient examination to discover that a gate at a private crossing was open and that the fence on either side was broken, the herders were guilty of gross negligence, precluding recovery of damages for cattle killed by a train,[61] the position of the railroad track, of which the herders were fully advised, being of itself notice of danger, as regards the question whether they were guilty of contributory negligence.[62]

44. Ill.—Terre Haute, etc., R. Co. v. McCord, 56 Ill.App. 173.
Mass.—Taft v. New York, etc., R. Co., 32 N.E. 168, 157 Mass. 297.

45. Wyo.—Hildebrand v. Chicago, B. & Q. R. R., 13 P.2d 1081, 44 Wyo. 488, reheard 17 P.2d 651, 45 Wyo. 175.
52 C.J. p. 83 note 28.

46. N.Y.—Poler v. New York Cent. R. Co., 16 N.Y. 476.
52 C.J. p. 83 note 30.

47. Ohio.—Dayton, etc., R. Co. v. Miami County Infirmary, 32 Ohio St. 566.—Sandusky, etc., R. Co. v. Sloan, 27 Ohio St. 341.

48. Tex.—Texas, etc., R. Co. v. Owens, 81 S.W. 62, 36 Tex.Civ.App. 54.

49. Ill.—Chicago, etc., R. Co. v. Seirer, 60 Ill. 295.
N.Y.—Poler v. New York Cent. R. Co., 16 N.Y. 476.
52 C.J. p. 83 note 33.

50. Idaho.—Mole v. Mellon, 268 P. 1048, 46 Idaho 450.
52 C.J. p. 83 note 34.

51. Ohio.—Baltimore, etc., R. Co. v. McIlyar, 83 N.E. 497, 77 Ohio St. 391.

52. N.Y.—Magilton v. New York Cent. R. Co., 42 N.Y.S. 231, 11 App. Div. 373.

53. N.Y.—Best v. Ulster, etc., R. Co., 54 N.Y.S. 305, 35 App.Div. 623.

54. Fla.—Atlantic Coast Line R. Co. v. Peeples, 47 So. 392, 56 Fla. 145

55. Wis.—Richardson v. Chicago & N.W. R. Co., 14 N.W. 176, 56 Wis. 347.
52 C.J. p. 83 note 40.
Duty to keep gates or bars closed in general see supra § 587.

56. Mass.—Taft v. New York, etc., R. Co., 32 N.E. 168, 157 Mass. 297.

57. Iowa.—Claus v. Chicago Great Western R. Co., 111 N.W. 15, 136 Iowa 7.
Willful acts of owner see supra § 621

58. Mo.—Dickinson v. Wabash R. Co., 77 S.W. 88, 103 Mo.App. 332.

59. Wis.—Atkinson v. Chicago, etc., R. Co., 96 N.W. 529, 119 Wis. 176.

60. Mo.—Dickinson v. Wabash R. Co., 77 S.W. 88, 103 Mo.App. 332.

61. Wash.—Jones v. Northern Pac. Ry. Co., 100 P.2d 20, 3 Wash.2d 134.

62. Wash.—Jones v. Northern Pac. Ry. Co., supra.

§ 625. Allowing Animals to Go at Large

a. General rules
b. Near crossings, stations, and other places not required to be fenced
c. Effect of local stock laws

a. General Rules

(1) Where common-law rule adopted
(2) Where common-law rule not adopted

(1) Where Common-Law Rule Adopted

Where the common-law rule requiring owners to keep their animals on their own grounds is in force, it is ordinarily held that allowing stock to run at large is such contributory negligence as will preclude a recovery, although the rule is subject to some qualifications.

Where the common-law rule requiring owners to keep their animals on their own grounds is in force, it is ordinarily held that allowing stock to run at large is such negligence on the part of the owner as will preclude a recovery,[63] in the absence of wanton or willful injury or such gross negligence as is equivalent thereto on the part of the railroad company.[64] In some jurisdictions the rule is modified to the extent of holding that the mere fact that an animal is unlawfully at large does not, as between the owner and the railroad, constitute contributory negligence per se,[65] and that plaintiff will not be precluded from recovery unless the animal is allowed to run at large under such circumstances that the injury complained of was the natural and proximate result of so doing.[66] Where contributory negligence is not available as a defense under the fencing statutes, under the rules discussed supra § 619, the rule precluding recovery for animals allowed to be at large is not operative.[67]

(2) Where Common-Law Rule Not Adopted

Where the common-law rule requiring owners of animals to keep them on their own lands does not prevail, permitting them to run at large is not ordinarily contributory negligence, although they stray on a railroad track and are injured through the negligence of a railroad company, but recovery may be denied if cattle are allowed to run at large in extrahazardous places

Where the common-law rule requiring owners of animals to keep them on their own lands does not prevail, it is ordinarily held that the owner of stock in permitting them to run at large is not chargeable with contributory negligence if they stray on a railroad track and are injured through a want of ordinary care on the part of the railroad company.[68] The rule that the owner letting his stock run at large is not chargeable with contributory negligence applies as well to landowners living near the railroad as to those living in more remote localities,[69] and is not affected by the fact that the animal got at large through the owner's act,[70] even though he knew that cattle guards were defective[71] or that salt or other attracting substance was on the track.[72] Also the rule is not affected by the fact that, knowing that the animal was at large, he did not recapture and confine it.[73] A statute in terms providing that allowing stock to run at large on the common unfenced range or on inclosed land of the owner shall not be deemed to be contributory negligence has been held not to apply to stock not running loose but in charge of some person.[74] Even where animals are allowed at large, recovery is denied if cattle are allowed to run at large in extrahazardous places and ordinary care is not used to protect them,[75] or where the statute permitting owners to let their cattle go at large is construed as still requiring them to use care to keep them within reasonable confines, and such care is not used.[76] A statute providing that allowing stock to go at large may be set up as a defense does not apply to stock allowed the run of an inclosed pasture adjoining the track, but not permitted to go at large,[77] or to animals allowed to

63. N.J.—Cole v. Pennsylvania R. Co., 64 A.2d 96, 1 N.J.Super. 254.
52 C.J. p. 84 note 48.
Common-law rule requiring owners of domestic animals to keep them on their own premises see Animals § 185 a.
Liability of railroad as to trespassing animals in general see supra § 550.

64. Vt.—Jackson v. Rutland & B. R. Co., 25 Vt. 150, 60 Am.D. 246.
52 C.J. p. 84 note 49
Wanton or willful injuries see supra § 556.

65. Minn.—Green v. St. Paul, etc., R. Co., 56 N.W. 752, 55 Minn. 192.

66. Minn.—Sarja v. Great Northern R. Co., 109 N.W. 600, 99 Minn. 332.—Ericson v. Duluth, etc., R. Co., 58 N.W. 822, 57 Minn. 26, distinguishing Moser v. St. Paul, etc., R. Co., 44 N.W. 530, 42 Minn. 480.

67. Mich.—Geerds v. Ann Arbor R. Co., 147 N.W. 505, 181 Mich. 12.
52 C.J. p. 84 note 53.

68. **Trespassing animals**
Ala.—Bugg v. Mitchell, 103 So. 713, 20 Ala.App. 555.
52 C.J. p. 84 note 55.
Rejection and modification of common-law rule requiring owners of domestic animals to keep them on their own premises see Animals § 185 b.

69. Mo.—Turner v. Kansas City, St. J. & C. B. R. Co., 78 Mo. 578.
52 C.J. p. 84 note 57.

70. Ala.—South Alabama, etc., R. Co. v. Williams, 65 Ala. 74.

71. Ala.—St. Louis, etc., R. Co. v. Douglass, 44 So. 677, 152 Ala. 197

72. Mo.—Crafton v. Hannibal, etc., R. Co., 55 Mo. 580.—Brown v. Hannibal, etc., R. Co., 27 Mo.App. 394

73. Ala.—Louisville, etc., R. Co. v. Williams, 16 So. 795, 105 Ala. 379.

74. Or.—Keeney v. Oregon R., etc., Co., 24 P. 233, 19 Or. 391.
Tenn.—Nashville, etc., R. Co. v. Spence, 41 S.W. 934, 99 Tenn. 218.

75. Dak.—Williams v. Northern Pac. R. Co., 14 N.W. 97, 3 Dak. 168
52 C.J. p. 85 note 64.

76. Or.—Hindman v. Oregon R., etc., Co., 22 P. 116, 17 Or. 614

77. Tex.—Gulf, etc., R. Co. v. Coffin, Civ.App., 97 S.W. 1066.

go at large within limits outside the statutory prohibition [78]

b. Near Crossings, Stations, and Other Places Not Required to Be Fenced

Although the rule has been modified in some jurisdictions, it is generally held to be contributory negligence for an owner of an animal to permit it to go at large near public crossings, station grounds, and other places where the railroad company is not required to fence its tracks.

Independently of the stock laws, or of whether or not the common-law rule as to animals running at large is followed, it is generally held to be contributory negligence for an owner of an animal to permit it to go at large near public crossings, station grounds, and other places where the railroad company is not required to fence its tracks.[79] A fortiori, wherever the common-law rule is in force, and it is held to be contributory negligence to permit stock to run at large anywhere, it is contributory negligence to permit stock to run at large at public crossings and other places which cannot be fenced under the law.[80] In some jurisdictions, however, where stock may lawfully run at large, it is held, in modification of the general rule, that it is not necessarily contributory negligence to allow animals to run at large even in the vicinity of station grounds and public crossings,[81] but that it is a question of whether plaintiff's conduct shows a want of ordinary care under the circumstances, which has contributed directly to the injury complained of [82]

c. Effect of Local Stock Laws

The rules existing in the various jurisdictions as to permitting animals to run at large, and as to contributory negligence in so doing, are not affected by municipal regulations or by state laws having a local application only which set up a different rule as to animals running at large.

The rules existing in the various jurisdictions as to permitting animals to run at large, and as to contributory negligence in so doing, are not affected by municipal regulations[83] or by state laws having a local application only which set up a different rule as to animals running at large [84] In jurisdictions following the common-law rule, allowing animals at large is still contributory negligence as a matter of law,[85] or as a question of fact,[86] notwithstanding a local rule permitting animals to go at large. In jurisdictions rejecting the common-law rule, allowing animals at large is not contributory negligence, notwithstanding a local rule restraining them [87] Independently of whether violation of a stock law is in itself contributory negligence, conduct of the owner of the stock in connection therewith will make it so when it contributes proximately to the injury.[88]

§ 626. Escape of Animals from Inclosure or Control

- a. In general
- b. Leaving horses unhitched or unattended
- c. Effect of stock laws
- d. Defects in fence around inclosure

a. In General

If animals escape from the owner's inclosure or control without any fault on his part, generally he is not chargeable with contributory negligence, but in some jurisdictions where the rule requiring owners to keep their animals on their own premises is in force, he cannot recover for injuries to them, even though they escaped without his fault, in the absence of gross negligence or intentional injury on the part of the railroad company.

It has been held in some cases, independently of the law as to animals running at large, that, if animals escape from the owner's inclosure or control without any fault on his part, he is not chargeable with contributory negligence.[89] Where it is lawful for stock to run at large, a failure to keep animals confined is not contributory negligence,[90] and neither is allowing animals to escape and mak-

Escape of animals from inclosure or control see infra § 626.

78. Utah—Edmunds v Salt Lake, etc, R. Co., 196 P. 1019, 58 Utah 80.

79. Mich.—Niemann v. Michigan Cent R Co., 44 N.W 1049, 80 Mich. 197.
52 C.J. p 86 note 86.

80. Mich.—Robinson v. Flint & P. M, etc, R. Co., 44 N W. 779, 79 Mich 323, 19 Am S.R. 174.
52 C.J. p 86 note 88.

81. Or—Moses v. Southern Pac. R Co, 23 P. 498, 18 Or 385, 8 L R A. 135
52 C.J p 86 note 91.

82. Iowa.—Miller v Chicago, etc., R Co., 13 N W 859, 59 Iowa 707.
Or—Moses v. Southern Pac. R Co, 23 P 498, 18 Or. 385, 8 L R A. 135

83. Ind—Hanna v Terre Haute, etc, R Co, 21 N.E. 903, 119 Ind 316.
52 C J. p 86 note 99.

84. Ala.—Alabama Great Southern R Co v. McAlpine, 71 Ala 545.

85. Ind—Hanna v Terre Haute, etc, R. Co., 21 N E. 903, 119 Ind 316.
52 C J p 86 note 3

86. Minn.—Fritz v. St. Paul, etc, R Co, 22 Minn. 404.

87. Ala.—Central of Georgia R. Co v. Burkett, 124 So. 404, 23 Ala App 294.
52 C.J. p 86 note 6.

88. N.D.—Wright v. Minneapolis, etc, R. Co., 96 N.W. 324, 12 N D 159.
52 C.J. p 86 note 7.

89. Tex—Texas Electric R. Co v. Reese, Com App, 280 S W. 179
52 C.J. p 86 note 9

90. Tex.—Fort Worth, etc, R Co v. Jenkins, Civ.App., 252 S.W. 189

ing no effort to reclaim and confine them.[91] In jurisdictions where the common-law rule as to animals at large prevails, there is a conflict, some courts holding that an escape without the owner's fault will not preclude a recovery,[92] unless the owner knows that they have escaped and makes no effort to secure them;[93] other courts holding that the owner must see at his peril that the animals are kept on his own premises and that he cannot recover for injuries to them, even though they escaped without his fault,[94] in the absence of gross negligence or intentional injury on the part of the railroad company.[95]

A distinction has, however, been made between the escape of animals from the owner's inclosure and escape from his control when they were being driven along a highway,[96] it being held that, while the owner cannot recover in the former case,[97] unless the escape is due to the fault of the railroad,[98] he may in the latter case, if not at fault.[99] The fact that the escaped animals are injured on a public crossing does not change the law, a recovery being allowed if the escape is not due to plaintiff's fault in jurisdictions allowing recovery for injuries to animals on the track in such cases,[1] and denied in jurisdictions holding that the owner must keep his animals confined at his peril.[2]

b. Leaving Horses Unhitched or Unattended

Leaving horses unhitched or unattended in the immediate vicinity of a railroad track is ordinarily held to be contributory negligence, but the rule is otherwise if the horse is accustomed to be left in this way and is not afraid of trains.

To leave horses or teams unhitched or unattended in the immediate vicinity of a railroad track is ordinarily held to be such contributory negligence as will defeat a recovery, although the railroad company was negligent,[3] or its track was not fenced as required by law;[4] but it has been held that, where the horse is accustomed to be left in this way and is not afraid of trains, leaving him insecurely hitched is not contributory negligence as a matter of law.[5]

c. Effect of Stock Laws

Notwithstanding stock laws making it unlawful for stock to run at large, the owner is generally held not guilty of contributory negligence precluding recovery if without his knowledge or fault the stock escapes from his inclosure or control and is injured through the negligence of a railroad company.

Stock laws making it unlawful for stock to run at large do not impose an absolute requirement that the owner must keep stock on his own premises, but only require that his fences shall be reasonably sufficient to restrain it and that he shall exercise reasonable precautions to prevent its being at large,[6] and, if without the knowledge or fault of the owner the stock escapes from his inclosure or control, he is not chargeable with contributory negligence which will preclude a recovery where the railroad company has been negligent in the operation of its trains,[7] or has failed to fence its tracks as required by law,[8] or failed to keep its fences in repair or the gates therein closed,[9] the rule requiring only ordinary care from the owner, applying even where animals are breachy.[10] An owner whose animals have escaped without his fault cannot recover, however, against a railroad on the ground of its noncompliance with the fencing statute where as to those to whom the duty is owed the railroad has fully performed its duty to fence;[11] and it has been held that the owner of escaped cattle which has died from eating poisoned vegetation on the railroad right of way has no right to recover from the railroad company.[12]

91. Ala.—Louisville, etc., R. Co. v. Williams, 16 So. 795, 105 Ala. 379.

92. Minn.—Hohl v. Chicago, M & St P R. Co., 63 N.W. 742, 61 Minn 321, 52 Am.S.R. 598.
52 C.J. p. 87 note 14.
Allowing animals to go at large as contributory negligence generally see supra § 625.

93. Ind.—Cincinnati, etc., R. Co. v. Street, 50 Ind. 225.

94. N.J.—Cole v. Pennsylvania R. Co., 64 A.2d 96, 1 N.J.Super. 254.
52 C.J. p. 87 note 16.

95. Pa.—North Pennsylvania R. Co. v. Rehman, 49 Pa. 101, 88 Am.D. 491.
52 C.J. p. 87 note 17.

96. Mass.—Amstein v. Gardner, 132 Mass. 28, 42 Am.R. 421.

97. Mass.—Darling v. Boston, etc., R. Co., 121 Mass. 118.

98. Mass.—Taft v. New York, etc., R. Co., 32 N.E. 168, 157 Mass. 297

99. Mass.—Amstein v. Gardner, 132 Mass. 28, 42 Am.R. 421
Ind.—Lake Erie, etc., R. Co. v. Voliva, 101 N.E. 338, 53 Ind.App. 170.

1. Ind.—Louisville, etc., R. Co. v. Ousler, 36 N.E. 290, 15 Ind.App. 232
52 C.J. p. 87 note 24.

2. Pa.—Northern Pennsylvania R. Co. v. Rehman, 49 Pa. 101, 88 Am.D. 491

3. N.D.—Ferm v. Great Northern R. Co., 207 N.W. 39, 53 N.D. 543
52 C.J. p. 87 note 26.

4. Kan.—Chicago, etc., R. Co. v. Totten, 42 P. 269, 1 Kan.App. 558.

5. Mass.—Southworth v. Old Colony, etc., R. Co., 105 Mass. 342, 7 Am.R. 528.

6. Iowa.—Story v. Chicago, M & St P R. Co., 44 N.W. 690, 79 Iowa 402
52 C.J. p. 87 note 30.

7. Iowa.—Story v. Chicago,, M & St. P. R. Co., supra
52 C.J. p. 87 note 31

8. Neb.—Union Pac. R. Co. v. High, 14 N.W. 547, 14 Neb. 14.
52 C.J. p. 87 note 32.

9. Ill.—Chicago, etc., R. Co. v. Harris, 54 Ill. 528.

10. Ohio.—Pittsburgh, etc., R. Co. v. Howard, 40 Ohio St. 6

11. Tex.—Texas, etc., R. Co. v. Huffman, Civ.App., 71 S.W. 779.

12. Ga.—McKenzie v. Powell, 22 S.E.2d 735, 68 Ga.App. 285.
Tex.—Texas & N. O. R. Co. v. Kader-

It will be presumed, where animals are at large in violation of a stock law, that they are at large with the consent of the owner.[13]

d. Defects in Fence around Inclosure

If plaintiff's animals escape by reason of his failure to keep his fence in repair, and his neglect in this respect contributed to the injury, he cannot recover.

If plaintiff's animals escape from his inclosure by reason of his failure to keep his fence in repair and his neglect in this respect contributed to the injury complained of, he cannot recover;[14] but, if the animals had to break through other fences of other landowners before reaching the railroad track, the fact that plaintiff's fences were not in good repair is not sufficient to show such contributory negligence on his part as to defeat a recovery.[15] If there is a stock law in force and plaintiff puts animals in an inclosure, the fence of which is known to be insufficient, animals escaping therefrom are wrongfully at large and trespassers if they go on the railroad track.[16]

H. PROCEEDINGS FOR RECOVERY OF DAMAGES

1. In General

§ 627. Notice of Claim or Demand for Payment

a. In general
b. Form and sufficiency
c. Service or presentation

a. In General

Where required by statute a notice of the injury or demand for payment of the claim therefor must be made on the railroad company within a certain time after the injury is sustained or prior to the action to recover therefor.

Under some statutes a notice of the injury or demand for payment of the claim therefor must be made on the railroad company within a certain time after the injury is sustained[17] or prior to the action to recover therefor,[18] regardless of knowledge of the injury on the part of the company's officers or agents.[19] Under other statutes the claim or demand is not necessary if suit is commenced within the limit of time fixed by statute,[20] but the right to recover is barred if neither claim is made nor suit commenced within the statutory time.[21] Where by statute giving notice or beginning action by plaintiff is not required until the railroad has made report to a state board of inspection and notice to accept a proposed settlement or to arbitrate has been sent to the owner, if the railroad fails to act, it cannot later defend on the ground of failure of the owner to give notice or to start action within the statutory limit.[22]

The object of the statutes requiring a notice or demand is to inform the company of the injury and afford it an opportunity to investigate the circumstances and to settle the claim without litigation or prepare its defense.[23]

As condition precedent to action. Under some of the statutes, the notice or demand is a condition precedent to a right to maintain an action.[24] Under other statutes, it is a condition precedent to maintenance of an action under the statute, and the right to maintain a common-law action is not affected by a failure to give notice.[25] Under still other statutes it is merely a condition precedent to the right to recover double damages where the claim is not paid within a certain time after demand.[26]

Double damages and attorney's fees. Under some statutes, if the damages are not paid within a certain time after the notice or demand, plaintiff may recover double the actual damages sustained,[27] or

13. Kan.—Kansas City, etc., R. Co. v. McHenry, 24 Kan. 501—Atchison, etc., R. Co. v. Hegwir, 21 Kan. 622.

14. Vt.—Jackson v. Rutland & B. R. Co., 25 Vt. 150, 60 Am. D. 246.
52 C.J. p. 87 note 37.

15. Ill.—Wabash R. Co. v. Perbex, 57 Ill. App. 62.

16. Ga.—McKenzie v. Powell, 22 S.E. 2d 735, 68 Ga. App. 285.
Tex.—Houston, etc., R. Co. v. Hollingsworth, 68 S.W. 724, 29 Tex. Civ. App. 306.

17. Ga.—Jones v. Central R., etc., Co., 18 Ga. 247.
Wis.—Weed, etc., Mfg. Co. v. Whitcomb, 77 N.W. 175, 101 Wis. 226.

18. Kan.—St. Louis, etc., R. Co. v. Kinman, 31 P. 126, 49 Kan. 627.
52 C.J. p. 88 note 51.

19. Wis.—Ryan v. Chicago, etc., R. Co., 77 N.W. 894, 101 Wis. 506.

20. Ala.—South Alabama, etc., R. Co. v. Bees, 2 So. 782, 82 Ala. 340.—South Alabama, etc., R. Co. v. Morris, 65 Ala. 193.

21. Ala.—Alabama Great Southern R. Co. v. Killian, 69 Ala. 277.—South Alabama, etc., R. Co. v. Reid, 66 Ala. 250.

22. Colo.—Chicago, etc., R. Co. v. Eyster, 169 P. 1181, 69 Colo. 168.
52 C.J. p. 88 note 57

23. Wis.—Weed, etc., Mfg. Co. v. Whitcomb, 77 N.W. 175, 101 Wis. 226.
52 C.J. p. 88 note 58

24. Kan.—St. Louis, etc., R. Co. v. Kinman, 31 P. 126, 49 Kan. 627.
52 C.J. p. 88 note 60.

25. Ga.—Wallace v. Cason, 42 Ga. 435.

26. Iowa.—Campbell v. Chicago, etc., R. Co., 35 Iowa 334.

27. Iowa.—Boyer v. Chicago, etc., R. Co., 98 N.W. 764, 123 Iowa 248.—

reasonable attorney's fees,[28] or such attorney's fees together with a certain rate of interest on the amount of actual damages from the date of presentment of the claim,[29] or both double damages and attorney's fees,[30] and the validity of such provisions has been upheld.[31] Defendant cannot avoid liability for double damages on the ground that it had always been willing to settle the claim, unless an actual tender was made and refused or plaintiff was otherwise legally in fault for the nonpayment;[32] nor will an actual tender of less than the full amount of actual damage found by the jury affect the right of plaintiff to recover double damages.[33]

b. Form and Sufficiency

(1) In general
(2) Necessity and form of affidavit
(3) Amount of claim; excessive claim

(1) In General

In the absence of an express requirement in the statute that the notice or demand must be in writing, an oral demand is sufficient. The notice should as far as practicable inform the company of such material facts as will enable it to investigate the claim and decide on its course of action.

Where the statute requires it, the notice or demand must be in writing,[34] but in the absence of such express requirement an oral demand is sufficient.[35] Where the statute prescribes a form of notice requiring certain essential allegations, there must be a compliance with its provisions,[36] and if it requires the "time and place" of the injury to be stated the notice should do so with reasonable definiteness and certainty.[37] Although not required by the letter of the statute, the notice should as far as practicable inform the company of such material facts as will enable it to investigate the claim and decide on its course of action;[38] but ordinarily in the absence of express requirements the notice will be held good if reasonably sufficient to serve the purpose for which it is required to be given.[39] It is not necessary for claimant to specify the particular breach of duty on which plaintiff relies as fixing the liability.[40] Where issue is made on whether the demand served was a demand, it must be proved by offering in evidence the original demand if in writing, and secondary evidence is not admissible unless the nonproduction of the original is properly accounted for.[41]

Variance between notice and proof. Where defendant was not misled thereby, the right of recovery is not affected by a variance between the notice and the complaint or proof as to the description of the animal,[42] or the cause of injury,[43] or a slight inaccuracy in the designation of the company.[44]

(2) Necessity and Form of Affidavit

Where the statute requires it, the notice or demand must be accompanied by an affidavit of the injury, which may be embodied in the same paper with the notice, and need not contain anything more than the statement of the claim and the fact of injury.

Where the statute requires it, the notice or demand must be accompanied by an affidavit of the injury.[45] It need not be separate but may be embodied in the same paper with the notice,[46] but a copy of the affidavit instead of the original is not sufficient.[47] In the absence of express provision to the contrary the affidavit need not be made by plaintiff himself but may be made by some other person cognizant of the facts,[48] and need not contain anything more than the statement of the claim and the fact of injury.[49]

Hammans v. Chicago, etc., R. Co., 48 N.W. 978, 83 Iowa 287.

28. Kan.—Missouri Pac. R Co v. Abney, 1 P 385, 30 Kan. 41—Kansas Pac. R. Co. v. Ball, 19 Kan 535.

29. Fla.—Jacksonville, etc., R. Co. v. Harris, 14 So. 726, 33 Fla. 217, 39 Am S R. 127.

30. Ark.—Lusk v. Blevins, 197 S.W. 854, 130 Ark. 378.

31. Iowa.—Mackie v. Iowa Cent. R Co, 6 N W. 723, 54 Iowa 540—Welsh v. Chicago, etc., R. Co., 6 N. W. 13, 53 Iowa 632

32. Iowa.—Hammans v Chicago, etc., R. Co., 48 N W. 978, 83 Iowa 287.

33. Iowa.—Brandt v. Chicago, etc, R Co, 26 Iowa 114

34. Fla.—Jacksonville, etc, R Co v Harris, 14 So 726, 33 Fla. 217, 39 Am S R 127
52 C J. p 89 note 75.

35. Kan.—Missouri, etc, R Co v. Russell, 67 P. 451, 64 Kan 884.
52 C.J. p 89 note 76.

36. Ga.—Jones v. Central R., etc, Co., 18 Ga. 247
Wis.—Ryan v. Chicago, etc, R Co, 77 N.W. 894, 101 Wis 506.

37. Wis.—May v Chicago, etc, R. Co., 79 N.W. 31, 102 Wis. 673.
52 C.J. p 89 note 78.

38. Iowa.—Manwell v. Burlington, etc., R. Co., 45 N.W. 568, 80 Iowa 662

39. Iowa.—Boyer v. Chicago, etc., R. Co., 98 N.W. 764, 123 Iowa 248.
52 C J p 89 note 80.

40. Kan.—Wichita, etc., R Co v. Hart, 51 P. 933, 7 Kan App. 550.

41. Kan.—Central Branch Union Pac. R Co. v. Walters, 24 Kan. 504

42. Iowa.—Brammer v. Wabash R Co, 83 N.W 1048, 112 Iowa 375.
Issues, proof, and variance generally see infra § 638

43. Iowa.—Boyer v. Chicago, etc, R. Co, 98 N.W 764, 123 Iowa 248.
52 C J. p 89 note 97.

44. Iowa.—Black v. Minneapolis, etc., R Co, 96 N.W 984, 122 Iowa 32—Martin v. Central Iowa R. Co., 13 N W 424, 59 Iowa 411.

45. Iowa.—McNaught v. Chicago, etc, R. Co., 30 Iowa 336

46. Iowa.—Mendell v Chicago, etc., R. Co., 20 Iowa 9.

47. Iowa.—McNaught v. Chicago, etc., R. Co., 30 Iowa 336.

48. Iowa.—Henderson v. St. Louis, etc., R Co., 36 Iowa 387.

49. Iowa.—Mundhenk v. Central Iowa R. Co., 11 N.W. 656, 57 Iowa 718—Mackie v. Iowa Cent. R. Co., 6 N.W. 723, 54 Iowa 540.

(3) Amount of Claim; Excessive Claim

Damages will be limited to the amount stated in the affidavit or to double that amount in case of double damages The making of an excessive claim may work a forfeiture of the right to double damages, but does not bar the right to recover actual damages.

Damages will be limited to the amount stated in the notice and affidavit[50] or to double that amount in the case of double damages[51] A notice or demand is not invalid because it states the value of the animal at more than it is actually worth,[52] but if the amount claimed in the notice or demand is clearly excessive, the notice or demand is null and void[53] However, where the statute requires that a notice or demand be served on the railroad company in order to entitle plaintiff to double damages, the effect of an excessive claim, when established, is to work a forfeiture of the right to double damages under the statute,[54] but not to bar plaintiff's right to recover actual damages independently of the statute.[55]

c. Service or Presentation

In the absence of express statutory provision to the contrary, it is not material by whom the notice is served or the claim presented, provided it is proper in form and within the time prescribed. The notice must be served on the person and in the manner designated by statute.

In the absence of express provision in the statute to the contrary, it is not material by whom the notice is served or the claim presented, provided it is in proper form and within the time prescribed.[56] The notice may be served by plaintiff himself,[57] or the claim may be stated to an employee of the railroad company and by him taken down and forwarded to the company.[58] Where the statute designates the officers or agents of the railroad on whom the notice or demand shall or may be served, the notice or demand must be shown to have been made on the designated officer or agent,[59] or on the person acting temporarily as such officer or agent with the sanction of the company.[60] However, a statute providing that demand "may" be made on any ticket or station agent is not mandatory,[61] and does not preclude a valid demand on a general officer of the company,[62] or on an agent expressly authorized to settle such claims;[63] but it is not sufficient where the only evidence is that the demand was made on a person representing himself as an agent of the company without showing what kind of an agent,[64] or without any further proof that he was in fact an agent of the company[65] Where the statute authorizes service on any officer, or station or ticket agent "employed in the management of the business of the corporation," it is sufficient where it is shown that service was made on a certain station agent without further proof that he was employed in the management of the business of the corporation.[66]

Manner and proof of service. The notice may, in the absence of express provision, be served simply by delivering the notice without reading it,[67] or by reading the original and delivering a copy,[68] or delivering the original;[69] but the affidavit accompanying the notice must be the original and not a copy.[70] Proof of service may be made by a copy of the notice served accompanied by the oath of the person who made the service,[71] or by an officer's indorsement on the notice or by affidavit,[72] or, it seems, by oral evidence upon the trial.[73]

§ 628. Appraisal of Damages

a. In general
b. Mode of appraisal

50. Iowa—Manwell v. Burlington, etc, R Co, 45 N.W. 568, 80 Iowa 662
51. Iowa—Manwell v. Burlington, etc., R. Co, supra.
52. Kan—Missouri Pac. R. Co. v. Abney, 1 P. 385, 30 Kan. 41.
53. Iowa—Lister v. Chicago, etc, R Co, 186 N.W. 8, 192 Iowa 1068. 52 C.J. p 89 note 92.
54. Iowa—Binder v Chicago, etc, R. Co, 144 N.W 358, 162 Iowa 550.
55. Iowa—Binder v. Chicago, etc, R. Co, supra
56. Ala—South Alabama, etc., R Co. v. Brown, 53 Ala 651
Iowa.—Mundhenk v. Central Iowa R. Co, 11 N W 656, 57 Iowa 718.
57. Iowa—Mundhenk v. Central Iowa R. Co., supra
58. Ala.—South Alabama, etc., R. Co. v. Brown, 53 Ala. 651.
59. Fla—Jacksonville, etc, R. Co v. Harris, 14 So 726, 33 Fla. 217, 39 Am S R. 127.
52 C J p 89 note 4.
60. Ala—Mobile, etc, R. Co. v. Malone, 46 Ala 391.
61. Kan—Central Branch R. Co v. Ingram, 20 Kan 66—Union Trust Co. v. Kendall, 20 Kan. 515.
62. Kan—Central Branch R. Co. v. Ingram, 20 Kan. 66
52 C J p 90 note 7
63. Kan—Union Trust Co. v. Kendall, 20 Kan 515.
64. Kan—St Louis, etc, R Co. v. Kinman, 31 P. 126, 49 Kan 627—Chicago, etc, R. Co. v Totten, 42 P. 269, 1 Kan.App. 558.
65. Kan—St. Louis, etc, R Co. v. Kinman, 31 P 126, 49 Kan 627.
66. Iowa—Schlengener v. Chicago, etc, R. Co., 16 N W 103, 61 Iowa 235
52 C J. p 90 note 11
67. Iowa.—Brentner v. Chicago, etc, R. Co., 23 N.W. 245, 27 N W. 605, 68 Iowa 530.
68. Iowa.—Van Slyke v Chicago, etc, R. Co, 45 N W. 396, 80 Iowa 620—McNaught v. Chicago, etc, R Co., 30 Iowa 336.
69. Iowa—Mendell v. Chicago, etc, R Co., 20 Iowa 9.
70. Iowa—Campbell v. Chicago, etc, R. Co, 35 Iowa 334—McNaught v Chicago, etc., R. Co, 30 Iowa 336.
71. Iowa.—McLenon v. Kansas City, etc, R. Co., 28 N.W. 619, 69 Iowa 320.
72. Iowa.—Brandt v. Chicago, etc., R. Co, 26 Iowa 114
73. Iowa—Mendell v. Chicago, etc., R Co, 20 Iowa 9.

a. In General

An appraisal of damages is a condition precedent to the maintenance of an action under some statutes, but it is not necessary where an action is brought at common law grounded on the defendant's negligence Under other statutes, it is not a condition precedent to the maintenance of an action under the statute, but merely to the recovery of attorney's fees.

An appraisal of damages is a condition precedent to the maintenance of an action under some statutes,[74] which, however, may be waived by the railroad,[75] and is waived by failure to object or to file a plea in abatement on the ground of its omission.[76] The appraisal is prima facie evidence of the damage[77] and places on the railroad a further liability for attorney's fees if it does not pay the owner the amount of the appraisal within a limit of time fixed by the statute.[78] However, even where appraisal is a condition precedent to recovery under the statute, it is not necessary where an action is brought at common law grounded on defendant's negligence[79]

Under other statutes, an appraisal is not a condition precedent to the maintenance of an action under the statute[80] but merely to the recovery of attorney's fees,[81] and under these statutes a defective appraisement, inadmissible in evidence for that reason, will not defeat plaintiff's recovery under the statute of the actual value of the animal killed minus attorney's fees where there is other evidence of the value independent of the appraisal.[82]

b. Mode of Appraisal

Notice of intention to apply for appointment of appraisers must be in writing, and must state when and where such application will be made It must be served by the plaintiff on the officer or agent designated in the statute by leaving with him a copy or the original.

Notice of intention to apply for appointment of appraisers must be in writing,[83] and must state when[84] and where[85] such application will be made An appointment of appraisers made at some place other than that designated is invalid[86] The notice must be served by plaintiff[87] on the officer or agent designated in the statute,[88] by leaving with him a copy or the original.[89]

Report of appraisers, in order to be admissible in evidence, must show that the proceedings before the appraisers have been in strict conformity with the statutory requirements.[90] It must show, for example, that the appraisers were disinterested householders of the county,[91] that they were sworn before undertaking the duties of their office,[92] and that they examined the stock killed or injured.[93]

§ 629. Summary Proceedings

Under some statutes where the damages claimed do not exceed a designated amount, a summary proceeding to recover for injuries to stock may be had on written notice to the railroad company.

Under some statutes, where the damages claimed do not exceed a designated amount, a summary proceeding to recover for injuries to stock may be had before a justice of the peace on written notice to the railroad company;[94] and double damages which bring the total claim to an amount in excess of the statutory limit may be recovered, but only by bringing a separate proceeding and on a different notice.[95]

2. Actions

§ 630. Nature and Form of Remedy

Where a railroad company, which failed to fence its tracks as required by law, negligently injures an animal, the plaintiff may elect to base his action on the statute or on common-law grounds, but where, in the absence

74. Colo.—Union Pac. R. Co. v. Sternberg, 21 P. 1021, 13 Colo. 141

75. Colo.—Atchison, etc., R. Co. v. Lujan, 6 Colo 338.

76. Colo.—Atchison, etc., R. Co. v. Lujan, supra.

77. Tenn.—Cincinnati, etc., R Co. v. Russell, 20 S.W. 784, 92 Tenn 108.

78. Tenn.—Cincinnati, etc., R. Co. v. Russell, supra.

79. Colo.—Denver, etc., R. Co v. Henderson, 13 P 910, 10 Colo 1 Dak.—Volkman v. Chicago, etc., R. Co., 37 N.W. 731, 5 Dak. 69

80. Tenn.—Cincinnati, etc., R Co. v. Russell, 20 S.W. 784, 92 Tenn 108.

81. Tenn.—Cincinnati, etc., R. Co. v. Russell, supra.

82. Tenn.—Tennessee Cent. R. Co. v Smith, 1 Tenn.Civ.A. 208

83. Tenn.—Tennessee Cent. R Co. v. Smith, 1 Tenn.Civ.A. 208.

84. Ky.—Newport News, etc., R. Co v. Thomas, 29 S.W. 437, 96 Ky. 613, 16 Ky.L. 706

85. Tenn.—Tennessee Cent. R. Co. v. Smith, 1 Tenn.Civ.A 208.

86. Tenn.—Tennessee Cent R Co. v. Smith, supra.

87. Ky.—Newport News, etc., R. Co v. Thomas, 29 S.W. 437, 96 Ky. 613, 16 Ky L. 706.

88. Tenn.—Illinois Cent. R. Co. v Tilman, 41 S.W 937, 98 Tenn. 573 52 C.J p 90 note 33.

89. Tenn.—Tennessee Cent. R. Co v. Smith, 1 Tenn.Civ.A. 208. 52 C.J. p 90 note 34.

90. Tenn.—Campbell v. Louisville, etc., R Co., 38 S.W. 732, 98 Tenn 148

91. Tenn.—Campbell v. Louisville, etc., R. Co., supra.

92. Tenn.—Campbell v. Louisville, etc., R Co., supra.

93. Tenn.—Campbell v. Louisville, etc., R. Co., supra

94. Ga.—Jones v. Americus, etc., R Co., 7 S.E. 117, 80 Ga. 803

95. Ga.—Jones v. Americus, etc., R Co., supra.

of statute, there is no duty owing from the railroad to the public, the remedy provided by the statute creating the duty is exclusive.

In a common-law action against a railroad company for injury to animals the proper form of action is an action on the case and not trespass,[96] or an action for damages for breach of contract if the railroad's duty to fence was imposed by agreement.[97] Where a railroad company which failed to fence its tracks as required by law, discussed supra § 560, negligently injures an animal, plaintiff may elect according to the facts of his case to base his action on the statute or on common-law grounds,[98] since an action at common law will lie for injuries to animals from defendant's failure to perform a statutory duty,[99] even in the absence of a prescribed remedy.[1] Likewise, where there are two statutes, one expressly requiring fencing at certain places and allowing double damages, and the other merely making the company liable for actual damages without proof of negligence where its road is not fenced, if the injury occurred at a place unfenced and within the application of the former statute, plaintiff may bring his action under either statute[2] or at common law.[3] Where in the absence of statute there is no duty owing from the railroad to the public, the remedy provided by a statute creating the duty is exclusive.[4] A statute prescribing a particular form of action before a justice but authorizing the action to be brought in a circuit court, without designating the form of action, does not require the same form of action in that court.[5]

§ 631. Defenses

It is no defense to an action for injury to an animal that it was abandoned and not turned over to the railroad company, or that the company acted in good faith in failing to fence its tracks, believing the locality in question to be depot grounds, or that it was prevented by the plaintiff from erecting a fence on his land outside the right of way.

It is no defense to an action for injury to an animal that it was abandoned and not turned over to the railroad company,[6] or that the company acted in good faith in failing to fence its tracks, believing the locality in question to be depot grounds,[7] or that it was prevented by plaintiff from erecting a fence on his land outside the right of way.[8]

Counterclaim. While there is some authority to the contrary,[9] the weight of authority favors the view that, in the absence of a statute providing otherwise, in an action against a railroad company for injury to animals the company cannot set up a counterclaim for damages to the train caused by the collision based on the wrongful presence of the animal on the track.[10]

§ 632. Jurisdiction and Venue

a. Jurisdiction
b. Venue

a. Jurisdiction

In the absence of a statute providing otherwise, actions for injuries to animals may be maintained in any court which has jurisdiction of the subject matter of the action and can obtain jurisdiction of the parties. Under some statutes jurisdiction is determined by the amount of the claim.

In the absence of a statute providing otherwise, actions for injuries to animals may be maintained in any court which has jurisdiction of the subject matter of the action and can obtain jurisdiction of the parties,[11] and a statutory action which is maintainable only by an adjoining landowner may be brought in a court not having jurisdiction of actions involving title to land.[12] Where the statutes so provide, jurisdiction is determined by the amount of the claim, justices of the peace having exclusive jurisdiction of claims not exceeding a certain amount,[13] and the county courts having jurisdiction of claims exceeding that amount.[14] Where

96. N J—Price v New Jersey R, etc, Co, 31 N J Law 229.
52 C J p 90 note 46

97. Pa—Drake v Philadelphia, etc., R Co, 51 Pa 240
52 C J 91 note 47

98. Ill—Rockford, etc, R. Co. v. Phillips, 66 Ill 548

99. N M.—Hittson v Chicago, R. I. & P Ry Co, 86 P.2d 1037, 43 N M 122
52 C J p 91 note 50.

1. N M—Hittson v Chicago, R I. & P. Ry. Co, supra.

2. Mo—Radcliffe v St Louis, etc, R Co., 2 S W 277, 90 Mo. 127
52 C J p 91 note 52

3. Mo—Ingalsbe v St Louis-San Francisco R Co, App, 219 S.W 1005, reversed on other grounds 243 S W. 323, 295 Mo 177, 24 A.L R 1051.

4. N M—Hittson v. Chicago, R I & P. Ry. Co, 86 P.2d 1037, 43 N.M 122.
52 C J p 91 note 56.

5. Ill—Chicago, etc, R Co v. Reidy, 60 Ill. 43.
52 C J. p 91 note 54

6. Mo—Jackson v St Louis, etc, R Co, 74 Mo 526
Contributory negligence see supra §§ 616–626

7. Wis—Cole v. Duluth, etc, R Co, 80 N W 736, 104 Wis 460.

8. Mo—Blankenship v. St. Louis, etc, R Co., 115 S W. 1027, 135 Mo App 338.

9. Kan.—Central Branch Union Pac. R Co. v. Walters, 24 Kan 504
Pleading counterclaim see infra § 636.

10. Ky.—Chesapeake, etc, R Co. v Roe, 54 S W 1, 21 Ky L 1145.
52 C J. p 91 note 64

11. Iowa.—Boyce v. Wabash R Co, 18 N W. 673, 63 Iowa 70, 50 Am S R. 730

12. Okl—Choctaw, etc, R. Co. v Deperade, 71 P 629, 12 Okl 367
52 C J. p 91 note 67.

13. Ind—Chicago, etc., R Co. v. Spencer, 55 N E 882, 23 Ind App 605.
52 C J p 91 note 69

14. Ind—Evansville, etc., R. Co. v. Roos, 12 Ind 446.
52 C J p 92 note 70.

animals are killed at different times, the causes of action are separate and distinct, and if separately they are within the exclusive jurisdiction of a justice of the peace they cannot be combined so as to give a higher court jurisdiction.[15]

b. Venue

In the absence of a statutory provision to the contrary, an action against a railroad company for injury to animals may be brought in any county through which the road runs or wherever jurisdiction may be had of the defendant company.

In the absence of a statutory provision to the contrary, an action against a railroad company for injury to animals is transitory,[16] and may be brought in any county through which the road runs[17] or wherever jurisdiction may be had of defendant company,[18] and this is the rule in some states by virtue of the express provisions of the statute.[19] However, where the statute requires it, the action must be brought in the county where the injury occurred,[20] subject to such restrictions as the statute contains relating to the animal injured,[21] and the steps to be taken by the railroad for adjustment of the loss.[22] In some jurisdictions, an action based on the statutory liability for failure to fence must be brought in the county where the injury occurred, while an action on the common-law liability for negligence may be brought in any county through which the road runs.[23] Provisions governing venue in "actions of trespass" against a railroad have been held applicable to this class of cases, although technically they are actions of trespass on the case.[24]

Before justice of peace. Where the action may be brought before a justice of the peace it must, where the statute so provides, be brought in the township in which the injury occurred[25] or in an adjoining township,[26] if in the same county.[27] In the absence of such express requirement, the action may be brought before a justice of any township within the county where the injury occurred.[28] If the injury occurred in another state, since the action is transitory it may be brought before a justice of the peace,[29] subject only to the statutory limitation as to amount.[30]

§ 633. Time to Sue and Limitations

In some jurisdictions there are special statutes of limitation for actions against railroad companies for injuries to animals, and actions not commenced until after the expiration of the statutory period are barred, except where the statutory provision for filing a claim within the statutory period as an alternative has been complied with.

In some jurisdictions there are special statutes of limitation for actions against railroad companies for injuries to animals,[31] and actions not commenced until after the expiration of the statutory period are barred,[32] except where the statutory provision for filing a claim within the statutory period as an alternative has been complied with.[33] However, some special statutory limitations are held to apply only to actions to recover for injuries caused by actual contact or collision with trains.[34] The special limitations statute does not bar the bringing of an action under the statute where the railroad is in default for failure to comply with its duty under the statute to secure an appraisal and notify the owner, as discussed supra § 627; nor does the statute have any application to an action to recover for injuries to animals based, not on the statute, but on the common-law ground of negligence.[35]

Limitations in charter. The defense that the action is barred by limitation is available to a rail-

15. Ind.—Indianapolis, etc., R. Co. v. Elliott, 20 Ind. 430.
52 C.J. p. 92 note 71.

16. Iowa—Boyce v. Wabash R. Co., 18 N.W. 673, 63 Iowa 70, 50 Am. R. 730.
52 C.J. p. 92 note 73.
Presumption as to venue see infra § 639

17. Ind.—Toledo, etc., R. Co. v. Milligan, 52 Ind. 505.

18. Ark.—Kansas City Southern R. Co. v. Ingram, 97 S.W. 55, 80 Ark. 269.
52 C.J. p. 92 note 75.

19. Miss.—Louisville, etc., R. Co. v. Saucier, 1 So. 511.
52 C.J. p. 92 note 76

20. Ind.—Chicago, etc., R. Co. v. Spencer, 55 N.E. 882, 23 Ind.App. 605
52 C.J. p. 92 note 78.

21. Ark.—El Dorado, etc., R. Co. v. Knox, 117 S.W. 779, 90 Ark. 1, 134 Am.S.R. 17.
52 C.J. p. 92 note 79.

22. Colo.—Adams v. Chicago, etc., R. Co., 185 P. 271, 67 Colo. 2.
52 C.J. p. 92 note 80.

23. Ind.—Toledo, etc., R. Co. v. Milligan, 52 Ind. 505.

24. La.—State v. Judge Twenty-Sixth Judicial Dist. Ct., 33 La.Ann. 954.
52 C.J. p. 92 note 82.

25. Mo.—Haggard v. Atlantic, etc., R. Co., 63 Mo. 302—Hansberger v. Pacific R. Co., 43 Mo. 196.

26. Mo.—Briggs v. St. Louis, etc., R. Co., 20 S.W. 32, 111 Mo. 168.
52 C.J. p. 92 note 86.

27. Mo.—Creason v. Wabash, etc., R. Co., 17 Mo.App. 111

28. Ind.—Cincinnati, etc., R. Co. v. Parker, 9 N.E. 787, 109 Ind. 235

29. Mo.—Heiter v. East St. Louis Connecting R. Co., 53 Mo.App. 331.

30. Mo.—Heiter v. East St. Louis Connecting R. Co., supra.

31. Ala.—Alabama, etc., R. Co. v. Killian, 69 Ala. 277.

32. Ala.—Alabama, etc., R. Co. v. Killian, supra—South Alabama, etc., R. Co. v. Reid, 66 Ala. 250.

33. Ala.—East Tennessee, etc., R. Co. v. Bayliss, 74 Ala. 150.

34. Ark.—Earl v. St. Louis, etc., R. Co., 106 S.W. 675, 84 Ark. 507.

35. Mo.—Hill v. Missouri Pac. R. Co., 66 Mo.App. 184.

road where the provision therefor is contained in its charter,[36] and such a limitation on the railroad's liability is within the power of the legislature to create,[37] and to amend or repeal.[38] However, the charter limitation is not repealed by a subsequent general revision of the statutes excepting from its repealing provision the "powers, privileges and franchises of any corporation,"[39] or by a subsequent statute providing for a recovery of an additional sum if an assessed valuation is not paid within a stated time, since such provision is cumulative.[40] Where a railroad has been operated by several companies in succession, the availability of the defense of limitations to the last in succession will presumably be determined by the charter provisions of the company which constructed the road, in the absence of controlling evidence to the contrary.[41]

§ 634. Parties and Process

a. Parties
b. Process

a. Parties

A person, although not the absolute owner of an animal, may have a special property therein which will entitle him to sue for its injury by a railroad company, without making the real owner a party.

A person, although not the absolute owner of an animal, may have a special property therein which will entitle him to sue for its injury by a railroad company,[42] without making the real owner a party.[43] In an action to subject a railroad operated by a lessee to seizure and sale to satisfy a judgment for damages for injury to animals, both the lessor and lessee, having interests to be affected by the sale, should be made parties defendant.[44]

Actions for double damages. An action for injury to an animal brought under a statute allowing plaintiff to recover double damages where the road is not fenced is not an action for a penalty which must be brought in the name of the state, but is properly brought in the name of the owner of the animal.[45]

b. Process

In the absence of a statute specially providing for service of process on a railroad in actions to recover for injuries to animals, the general rules or statutes governing service of process on railroads apply.

In some jurisdictions special statutes have been enacted providing for service of process on a railroad in actions to recover for injuries to animals.[46] Under such statutes service on the company may be made by copy on any conductor of any train passing through the county where the animal was killed,[47] but the statute is not exclusive, and service may be made on any other officer or agent of the company properly served under general law.[48] Service on the conductor is sufficient against the railroad, even though the conductor is employed and controlled by the receiver of the road,[49] but will not authorize a judgment, where there is no appearance, against an individual operating the road as a lessee.[50] A return is sufficient which states that service was made on a certain conductor without stating that he was conductor of a train passing through the county,[51] or which states that it was served on defendant by handing a copy to the station agent at a certain station without stating that he was an agent of defendant.[52] The fact that the summons describes the animal as the property of plaintiff is immaterial if he was in the actual and exclusive possession thereof and entitled to maintain the action.[53]

In the absence of statute specially providing for service of process on a railroad in actions to recover for injuries to animals, the general rules or statutes governing service of process on railroads apply.[54]

36. Ky.—Louisville, etc., R. Co v. Williams, 45 S.W. 229, 103 Ky. 375, 20 Ky.L. 77.

37. Ky.—Lucas v. Kentucky Cent R. Co., 14 S.W. 965, 12 Ky.L. 652.
52 C.J. p. 93 note 4.

38. Ky.—Louisville, etc., R. Co. v. Williams, 45 S.W. 229, 103 Ky. 375, 20 Ky.L. 77.

39. Ky.—Stuart v. Louisville, etc., R. Co., 10 Ky.L. 542.

40. Ky.—Mortimer v. Louisville, etc., R. Co., 10 Bush 485.

41. Ky.—Kentucky Cent R. Co. v. Kenney, 8 S.W. 201, 10 Ky.L. 251

42. Ga.—Bugg v. Daley, 141 S.E. 323, 37 Ga.App. 645.
52 C.J. p. 88 note 41.
Parties generally see Negligence § 182.
Persons entitled to damages see supra § 557

43. Ark.—St. Louis, etc., R. Co. v. Biggs, 6 S.W. 724, 50 Ark. 169

44. Ark.—Little Rock, etc., R. Co. v. Daniels, 56 S.W. 874, 68 Ark. 171.

45. Mo.—Seaton v. Chicago, etc., R. Co., 55 Mo. 416.
52 C.J. p. 93 note 11.

46. Ind.—Louisville, etc., R. Co. v. Cauble, 46 Ind. 277.

47. Ind.—Louisville, etc., R. Co. v. Cauble, supra.

48. Ind.—Jeffersonville, etc., R. Co. v. Dunlap, 29 Ind. 426.

49. Ind.—Louisville, etc., R. Co. v. Cauble, 46 Ind. 277

50. Ind.—Wright v. Gossett, 15 Ind. 119.

51. Ind.—Ohio, etc., R. Co. v. Quier, 16 Ind. 440—New Albany, etc., R. Co. v. Powell, 13 Ind. 373.

52. Mich.—Talbot v. Minneapolis, etc., R. Co., 45 N.W. 1113, 82 Mich. 66

53. Tenn.—Southern R. Co. v. Hall, 64 S.W. 481, 107 Tenn. 512.

54. Okl.—Kansas, Oklahoma & Gulf Ry. Co. v. Horath, 118 P.2d 660, 189 Okl. 555.
Service of process on corporations see Corporations §§ 1305–1322.

§ 635. Declaration, Complaint, or Petition

a. In general
b. Negligence or tortious act
c. Acts or omissions of agents or employees
d. Willful or intentional injury
e. Time and place of injury
f. Nature and extent of injury or damage
g. Ownership of animal injured
h. Ownership, direction, and kind of train
i. In actions based on failure to construct or maintain fences and cattle guards
j. Negativing contributory negligence
k. Amendment

a. In General

General rules govern as to the necessity and sufficiency of allegations in the declaration, complaint, or petition, in actions for injuries to animals by railroad companies.

General rules govern as to the necessity and sufficiency of allegations in the declaration, complaint, or petition, in actions for injuries to animals by railroad companies.[55] Where the action is based on a statute of another state, the statute must be pleaded.[56]

Separate causes of action for injuries to animals at different times may be joined in the same complaint,[57] but each injury should be stated in a separate paragraph,[58] although allegations applicable to the different counts need not be repeated in each but may be stated with respect to such counts.[59]

b. Negligence or Tortious Act

(1) In general
(2) Sufficiency of allegations in general
(3) Where action may be either at common law or under statute

(1) In General

In accordance with general rules an owner seeking recovery for injuries to his animal must first allege the tortious act of the defendant or its agents or employees, and if the action is at common law, he must allege negligence on the part of the defendant.

In accordance with general rules, an owner seeking recovery for injuries to his animal must first allege the tortious act to be the act of defendant or its agents or employees,[60] and, if the action is at common law, he must allege negligence on the part of defendant,[61] and that the alleged negligence was the proximate cause of the injury;[62] but he need not allege defendant's breach of its statutory duty where it is not a part of the negligence relied on,[63] although a breach of a statutory duty may be made the basis of an action at common law by including in the declaration an averment of the railroad's negligence, as discussed infra subdivision i of this section. A statutory provision requiring the keeping of records of animals killed and penalizing a delinquent railroad by an award of double damages does not make an allegation of negligence any the less necessary.[64] Where the statute makes proof of the injury prima facie evidence of negligence and places the burden of proof on defendant in some,[65] but not other, jurisdictions,

Order overruling motion to quash held erroneous

Where railroad's special appearance and motion to quash summons for lack of proper service had attached to it an affidavit of party served denying that he was resident of county in which suit was brought, denying that he was local superintendent of repairs of the railroad, and denying that he had charge or custody of any station or place of business of the railroad in the county, and stating that at the time purported summons was served, he was not within the county, and the affidavit was not controverted, order overruling motion to quash was erroneous and judgment based on the service attacked was required to be vacated.—Kansas, Oklahoma & Gulf Ry. Co. v. Horath, supra.

55. Ga.—Atlantic Coast Line R Co. v. Mercer, 60 S.E.2d 649, 82 Ga. App. 312.

Declaration, petition, complaint, or statement:
Generally see Pleading §§ 63–98
In justice's court see Justices of the Peace § 81.
In negligence actions generally see Negligence §§ 133–195

Pleadings held not demurrable

Ga.—Atlantic Coast Line R Co v. Mercer, supra—Savannah & Atlanta Ry. Co. v. De Busk, 23 S.E.2d 529, 68 Ga App. 529—Georgia Northern Ry. Co v Rollins, 8 S.E.2d 114, 62 Ga.App 138.

Petition held sufficient

Tex.—Texas & P Ry. Co v. Heathington, Civ.App., 115 S.W.2d 495

56. Mont.—McKnight v. Oregon Short Line R. Co., 82 P. 661, 33 Mont 40.

57. Mo.—Bricker v. Missouri Pac. R Co., 83 Mo. 391.

58. Ind.—Jeffersonville, etc., R. Co. v. Brevoort, 30 Ind. 324.

59. Mo.—Bricker v. Missouri Pac. R. Co., 83 Mo 391.

60. Ala.—Louisville, etc., R. Co. v Miller, 96 So 322, 209 Ala 378
Ga.—Central of Georgia R Co. v. Skandamis, 149 S.E. 60, 40 Ga. App. 78.

61. Colo.—Denver, etc., R. Co. v. Thompson, 54 P. 402, 12 Colo.App 1
52 C.J. p 94 note 36

62. Ind.—Chicago, etc., R. Co. v. Chaney, 97 N.E 181, 50 Ind.App 106.

63. Ill.—Rockford, etc., R. Co. v. Phillips, 66 Ill. 548.

64. Idaho—Wilson v. Oregon Short Line R. Co., 152 P. 1062, 28 Idaho 54
52 C J. p 94 note 41.

65. Ala.—Mobile, etc., R Co. v. Williams, 53 Ala. 595.
Colo.—Burlington, etc., R. Co v Campbell, 59 P. 424, 14 Colo.App 141.

plaintiff must still allege negligence in his complaint

Proximate cause. The complaint need not allege in express terms that defendant's negligence was the proximate cause of the injury, if it alleges that the injury occurred by reason of the negligence of defendant in the manner specified,[66] nor need it in express terms allege facts in the chain of causation necessarily implied from other facts which are stated.[67] A statement of facts of the nature of res gestæ is properly a part of the declaration even though no causal connection between them and the injury is alleged or proved.[68]

(2) Sufficiency of Allegations in General

A general allegation of negligence in the operation of trains is usually sufficient without setting forth the specific acts constituting such negligence.

Although there is some authority to the contrary,[69] in most jurisdictions it is held that a general allegation of negligence in the operation of trains is sufficient without setting forth the specific acts constituting such negligence,[70] although the facts giving rise to the duty owed by the railroad to plaintiff, the railroad's breach of that duty, and the resulting injury and damage to plaintiff must be alleged.[71] Plaintiff may, if he chooses, set out and describe the particular acts complained of and then allege that they were negligently done,[72] but, as discussed infra § 638, by stating specific acts of negligence he will be confined in his evidence and right of recovery to the issues thus tendered.

(3) Where Action May Be Either at Common Law or under Statute

Where an action may be maintained either at common law or under statute, the complaint must allege either negligence or facts making such allegations unnecessary.

The complaint must allege either negligence or facts making such allegations unnecessary,[73] and where it alleges neither negligence nor a failure to fence, it does not state a cause of action either at common law or under the statute;[74] and, if the company is not required to fence, a complaint alleging only a failure to fence, and not alleging any negligence in the operation of the train by which the animal was killed or injured, does not state a cause of action.[75] The complaint should be so worded that it can be ascertained therefrom whether plaintiff's cause of action is founded on defendant's negligence in the operation of its trains or on the statutory liability for failure to fence;[76] but, since there is no inconsistency, plaintiff may allege in the same complaint both negligence and a failure to fence, and, if the facts warrant it, may recover on either ground,[77] without being compelled to elect on which theory he will proceed,[78] subject, however, to the qualification that, if the statute limits the liability of the railroad in such cases, the bringing of a common-law action will not have the effect of extending that liability beyond the statutory limit in a case where, in the absence of statute, there would be no liability whatever.[79] Where the complaint contains allegations both of negligence and a failure to fence, but the allegations are not sufficient as to one of these grounds, plaintiff may still recover if the allegations constitute a good statement of a cause of action either at common law[80] or under the statute,[81] and the other allegations may be stricken or disregarded as surplusage.[82]

La.—Jackson v. Missouri Pac. R. Co., App., 141 So. 770.
52 C.J. p. 94 note 44.

66. Ala.—Bugg v. Mitchell, 103 So. 713, 20 Ala. App. 555.
52 C.J. p. 95 note 61.

67. Ind.—Chicago, etc., R. Co. v. Nash, 27 N.E. 564, 1 Ind. App. 298.
52 C.J. p. 95 note 62.

68. Ga.—Southern R. Co. v. Pope, 60 S.E. 157, 129 Ga. 842.
52 C.J. p. 95 note 63.

69. Ga.—Southern R. Co. v. Frix, 73 S.E. 1057, 137 Ga. 607.
52 C.J. p. 94 note 45.

70. Ala.—Alabama Great Southern R. Co. v. Clark, 130 So. 318, 221 Ala. 616—Carrolton Short Line Ry. Co. v. Lipsay, 43 So. 836, 150 Ala. 570.
52 C.J. p. 94 note 46.

Subject to special exceptions.
In action against a railroad for loss of turkeys which were run over by a train, a petition alleging that the railroad was negligent in permitting its right of way to grow up in weeds at the place where the turkeys were killed so as to form a trap, and that because of the vegetation the place was made attractive for turkeys in search of food could have been required to be made more definite by special exceptions.—Texas & P. Ry. Co. v. Heathington, Tex. Civ.App., 115 S.W.2d 495.

71. Ala.—Alabama Great Southern R. Co. v. Moore, 95 So. 207, 19 Ala. App. 73.

72. Mo.—Hill v. Missouri Pac. R. Co., 49 Mo.App. 520.

73. Mo.—West v. Hannibal, etc., R. Co., 34 Mo. 177.
52 C.J. p. 94 note 51.

74. Ind.—Baltimore, etc., R. Co. v. Anderson, 58 Ind. 413.
52 C.J. p. 94 note 52.

75. Wyo.—Martin v. Chicago, etc., R. Co., 89 P. 1025, 15 Wyo. 493.

76. Cal.—Baker v. Southern California R. Co., 58 P. 1055, 126 Cal. 516.

77. Mo.—McCaskey v. Quincy, etc., R. Co., 161 S.W. 277, 174 Mo.App. 724.
52 C.J. p. 94 note 55.

78. Mo.—Atterberry v. Wabash R. Co., 85 S.W. 114, 110 Mo.App. 608.

79. Ind.—Leary v. Cleveland, etc., R. Co., 123 N.E. 808, 74 Ind.App. 281.

80. Mo.—Garner v. Hannibal, etc., R. Co., 34 Mo. 235.
52 C.J. p. 95 note 58.

81. Ind.—Jeffersonville, etc., R. Co. v. Lyon, 55 Ind. 477—Cleveland, etc., R. Co. v. De Bolt, 37 N.E. 737, 10 Ind.App. 174.

82. Mo.—Garner v. Hannibal, etc., R. Co., 34 Mo. 235.
52 C.J. p. 95 note 60.

c. Acts or Omissions of Agents or Employees

In order to render a railroad company liable for injuries to animals done by an employee, the complaint must allege that such employee was acting in the line of his employment or under the direction of the company.

In accordance with the general rule, discussed in Master and Servant § 614, in order to render a railroad company liable for injuries to animals done by an employee, the complaint must allege that such employee was acting in the line of his employment or under the direction of the company,[83] but it need not be directly alleged if it is inferable from other facts well pleaded.[84] It is not necessary to allege the names[85] or positions[86] of the employees in charge of the train by which the animal was injured. However, where the action is brought against both the railroad and the negligent employee, the complaint is insufficient against the latter if it fails to state the nature of his employment or that he was present at the time of the injury complained of.[87]

d. Willful or Intentional Injury

A complaint states a good cause of action if the facts alleged show that the injury was purposely and intentionally inflicted, or if it alleges without setting out the facts connected with the injury that the injurious act was purposely done with intent to inflict the injury complained of.

In compliance with the general rule, discussed in Negligence § 190, a complaint states a good cause of action if the facts alleged show that the injury was purposely and intentionally inflicted,[88] or if it alleges without setting out the facts connected with the injury that the injurious act was purposely done with intent to inflict the injury complained of,[89] and the term "willful" is sufficient to characterize the act in connection with which it is used as intentionally and tortiously done.[90] However, where the averment of willfulness is supplemented by other allegations that the train was run "without seeing or endeavoring to see" the animals before injuring them, the complaint is converted into one based on negligence and is insufficient to charge a willful injury.[91] Where the complaint is based on a violation of the statutory duty to fence, and the only allegations of negligence and willfulness relate to the question of fencing and not to the management of the train, they may be disregarded as surplusage.[92] Where, as discussed supra § 550, an owner can recover for injuries to animals trespassing on the track only by showing wantonness in the operation of the train, a declaration which charges merely negligence in operation of the train in such case is demurrable.[93]

e. Time and Place of Injury

The rule generally adopted is that allegations of the time and place of the injury are necessary both in actions at common law and under the statute, and should state the time and place of the injury to the animals with as much definiteness and certainty as possible.

The rule generally adopted is that allegations of the time and place of the injury are necessary both in actions at common law and under the statute,[94] although in some jurisdictions, where the statute requires such allegations, it is held that the requirement is restricted to the statutory actions to recover for injuries to animals from collisions with trains.[95] The allegations, when required, should state the time and place of the injury with as much definiteness and certainty as possible[96] to the end that defendant may be enabled to prepare its defense[97] and avoid the necessity of subpoenaing an unnecessary number of witnesses.[98] Allegations have been held insufficient which state merely the month[99] or year,[1] or which do not state the date[2]

83. Ind.—Campbell v. Indianapolis, etc., Tract. Co., 79 N.E. 223, 39 Ind.App. 66.
52 C.J. p 95 note 65

84. Ind.—Terre Haute, etc., Tract. Co. v. Phillips, 97 N.E. 1014, 49 Ind.App. 643.
52 C.J. p 95 note 66.

85. Ala.—Western R. Co. v. Turner, 54 So. 527, 170 Ala. 643.
52 C.J. p 95 note 67.

86. Ala.—Western R. Co. v. Turner, supra.

87. Ga.—Louisville, etc., R. Co. v. Peeples, 71 S.E. 805, 136 Ga. 448.
Ky.—Young v. Vanmeter, 33 S.W. 941, 17 Ky.L. 1144.

88. Ind.—Indiana, etc., R. Co. v. Overton, 20 N.E. 147, 117 Ind. 253.
52 C.J. p 95 note 72
Liability for willful, wanton, or unauthorized acts of railroad employees see supra § 556.

89. Ind.—Louisville, etc., R. Co. v. Hart, 28 N.E. 218, 2 Ind.App. 130

90. Ind.—Chicago, etc., R. Co. v. Nash, 27 N.E. 564, 24 N.E. 884, 1 Ind.App. 298

91. Ind.—Vandalia R. Co. v. Clem, 96 N.E. 789, 49 Ind.App. 94.

92. Ind.—Cleveland, etc., R. Co. v. De Bolt, 37 N.E. 737, 10 Ind.App. 174.

93. Pa.—Staab v. Baltimore, etc., R. Co., 25 Pa.Dist. 357, 44 Pa.Co. 206

94. Cal.—Baker v. Southern California R. Co., 46 P. 604, 114 Cal. 501.
Kan.—Hadley v. Central Branch Union Pac. R. Co., 23 Kan. 359.

95. Ala.—South Alabama, etc., R. Co. v. Schafner, 78 Ala. 567.

96. Ark.—Missouri Pac. R. Co. v. Burrow, 115 S.W.2d 262, 195 Ark. 980, 115 A.L.R. 1071—Little Rock, etc., R. Co. v. Smith, 50 S.W. 502, 66 Ark. 278.

97. Ark.—Missouri Pac. R. Co. v. Burrow, 115 S.W.2d 262, 195 Ark. 980, 115 A.L.R. 1071—Little Rock, etc., R. Co. v. Smith, 50 S.W. 502, 66 Ark. 278.

98. Ark.—Missouri Pac. R. Co. v. Burrow, 115 S.W.2d 262, 195 Ark. 980, 115 A.L.R. 1071—Little Rock, etc., R. Co. v. Smith, 50 S.W. 502, 66 Ark. 278.

99. Ark.—Little Rock, etc., R. Co. v. Smith, supra.

1. Ark.—Little Rock, etc., R. Co. v. Smith, supra.

2. Ark.—Little Rock, etc., R. Co. v. Smith, supra.

or the county.[3] However, a complaint has been held reasonably definite and certain which alleges the day[4] and a place on the track related to some known point, as a city[5] or a public crossing.[6]

An allegation of the fact that the injury was incurred in a particular county has been held sufficient,[7] but where a statute expressly requires that the complaint shall specify the time and place of the injury, it has been held not to be sufficient merely to state the county[8] or city near or through which the railroad ran,[9] although statements that the injury was suffered "on or about" a certain day,[10] and near,[11] or an approximate distance[12] or a stated direction[13] from a certain station have been held to be sufficient allegations, and matter descriptive of the locality will not be stricken on motion.[14] If the action is based on a statute of the state where it is instituted the complaint must show that the railroad is located within that state.[15]

Where the statutes expressly restrict the venue according to the county or township where the injury occurred, as discussed supra § 632 b, such facts are jurisdictional,[16] and the complaint must allege in conformity with such provisions that the injury occurred in the county in which the action is brought,[17] or in the township,[18] or either in that or an adjoining township;[19] but a township allegation is not required where, under the statute, the action may be brought before any justice in the county.[20] It is not necessary that the county or township allegations for jurisdictional purposes should be made in express terms, it being sufficient if it appears by necessary implication from the averments of the complaint that the injury occurred in such county[21] or township.[22]

f. Nature and Extent of Injury or Damage

Where the plaintiff only seeks to recover for the damages naturally resulting from negligent acts general in their nature, such as failure to fence, the particulars in respect of which the plaintiff has been damaged need not be stated; but in order to recover for damages resulting from particular negligent acts, such as running over an animal, an allegation of special damage for which recovery is sought is necessary.

Where plaintiff only seeks to recover for the damages naturally resulting from negligent acts general in their nature, such as failure to fence, the particulars in respect of which plaintiff has been damaged need not be stated;[23] but in order to recover for damages resulting from particular negligent acts, such as running over an animal, an allegation of the special damage for which recovery is sought is necessary.[24] Plaintiff need not allege that the injured animal was a chattel of value.[25] A complaint is sufficient which alleges that plaintiff's animal was "killed or disabled" without showing which,[26] or which alleges that the animal was killed and was of a certain value without a direct allegation that the injury was to plaintiff's damage,[27] or which alleges that the animal was killed and that plaintiff was damaged in a specified sum without directly alleging the value,[28] or which states the number and character of the animals killed and their value,[29] or which states their average value without stating the value of each animal separately.[30] When the statute allows plaintiff to recover a reasonable attorney's fee it is not necessary to allege that the employment of an attorney

3. Ark.—Little Rock, etc, R. Co. v. Smith, supra.
4. Ill.—St. Louis, etc., R. Co. v. Kilpatrick, 61 Ill. 457.
Ind.—Louisville, etc., R. Co. v Consolidated Tank Line Co, 30 N.E 159, 4 Ind App. 40.
5. Ind.—Louisville, etc, R. Co. v. Consolidated Tank Line Co., supra
6. Ala.—Western R. Co. v McPherson, 40 So. 934, 146 Ala. 427.
7. Ill.—St. Louis, etc., R. Co. v. Kilpatrick, 61 Ill 457.
8. Ala.—East Tennessee, etc., R. Co v. Carloss, 77 Ala. 443.
9. Ala.—Louisville, etc, R. Co v. Whitley, 105 So 661, 213 Ala 525—Alabama Great Southern R Co v Sheffield, 100 So 125, 211 Ala. 250
10. Ala.—Western R. Co. v. Sistrunk, 5 So. 79, 85 Ala 352.
11. Ala.—Bugg v. Green, 110 So. 718, 215 Ala. 343
12. Ala.—Western R. Co v. Sistrunk, 5 So. 79, 85 Ala. 352.
13. Ala.—Nashville, etc., R. Co v Bingham, 62 So. 111, 182 Ala. 640—Southern R Co. v. Hoge, 37 So. 439, 141 Ala. 351.
14. Ala.—Tombigbee Valley R. Co v. Morris, 65 So 207, 10 Ala.App 322.
15. Ill.—Toledo, etc., R. Co. v. Bookless, 55 Ill. 230.
16. Mo.—Cook v. Kurn, App, 124 S.W.2d 673.
52 C J. p 96 note 3.
17. Ind.—Chicago, etc, R. Co. v. Wheeler, 42 N.E 489, 14 Ind.App 62.
52 C.J. p 96 note 4.
18. Mo.—Haggard v. Atlantic, etc, R Co, 63 Mo 302
19. Mo.—Cook v. Kurn, App, 124 S.W.2d 673
52 C J. p 96 note 6.
20. Ind.—Cincinnati, etc, R Co v. Parker, 9 N.E 787, 109 Ind 235
21. Ind.—Pittsburg, etc., R. Co. v. Newsom, 74 N.E 21, 35 Ind.App. 299.
52 C J p 96 note 8
22. Mo.—Cummings v. St. Louis, etc, R. Co, 70 Mo. 570—Young v. Kansas City, etc, R. Co., 39 Mo. App. 52
23. Mo.—Dooley v. Missouri Pac. R. Co, 36 Mo App 381
52 C J. p 96 note 10.
24. Mich.—Grand Rapids, etc., R. Co. v. Southwick, 30 Mich. 444.
52 C J. p 96 note 11
25. Ala.—Nashville, etc., R. Co. v. Bingham, 62 So 111, 182 Ala 640.
26. Ala.—Southern R. Co. v. Hoge, 37 So. 439, 141 Ala. 351.
27. Ind.—Louisville, etc, R. Co. v. Argenbright, 98 Ind. 254.
28. Tex.—Ft. Worth, etc., R. Co. v. Hickox, Civ.App, 103 S.W. 202.
29. Ga.—Southern R Co. v Sheffield, 56 S.E 838, 127 Ga 569
30. Ga.—Southern R. Co. v. Sheffield, supra.

in the case was necessary.[31] Since the action is in tort it is not necessary to allege that plaintiff's claim is due and unpaid,[32] nor may defendant demand a bill of particulars.[33]

g. Ownership of Animal Injured

The complaint must allege the plaintiff's ownership of the animal injured.

The complaint must allege plaintiff's ownership of the animal injured,[34] but not specifically the character of the ownership.[35]

h. Ownership, Direction, and Kind of Train

The declaration, complaint, or petition must allege that the train by which the animal was injured belonged to the defendant or was being operated over its road and should state with as much definiteness and certainty as possible the direction and kind of train.

Following the general rule of pleading in negligence cases, discussed in Negligence § 184, the declaration, complaint, or petition must allege that the train by which the animal was injured belonged to defendant or was being operated over its road,[36] but it need not name the particular train which did the damage,[37] although some courts have held that defendant is entitled to this information from plaintiff.[38]

Plaintiff should state with as much definiteness and certainty as possible the direction,[39] and kind of train,[40] in order to enable defendant to prepare its defense,[41] and avoid the necessity of subpoenaing an unnecessary number of witnesses[42]

i. In Actions Based on Failure to Construct or Maintain Fences and Cattle Guards

(1) In general
(2) Under contract
(3) Cause of injury
(4) Lapse of time for construction
(5) Places of entry and injury
(6) Defects in fences and cattle guards

(1) In General

In actions based on the statutory liability of a railroad company for failure to fence its tracks no allegation of negligence is necessary, but the complaint must allege facts sufficient to bring the case within the terms of the statute.

In actions based on the statutory liability of a railroad company for failure to fence its tracks no allegation of negligence is necessary,[43] except where the animal was injured at a place not required to be fenced,[44] or where the action is brought in a court which can have jurisdiction of it only as an action at common law.[45] Where the action is brought before a court having jurisdiction of it as an action under the statute, the complaint must allege facts sufficient to bring the case within its terms,[46] subject to the qualification applicable to pleading generally, discussed in Pleading § 54, favoring a strict[47] or liberal[48] construction of the averments in particular cases. Accordingly, a declaration in an action under the statute must allege the facts from which the duty of the railroad to fence arises,[49] that defendant did not fence;[50] that the animal got on the track at a point where the railroad was required by the statute to erect and maintain fences, as discussed infra subdivision i (5) of this section; that the injury resulted from the railroad's failure to fence, and from actual collision with the train in states where the operation of the statute is so restricted, as discussed infra subdivision i (3) of this section; and that plaintiff owned or was in possession of land through which

31. Kan.—Kansas City, etc., R Co. v. Burge, 21 P. 589, 40 Kan. 736
32. Ind—Louisville, etc., R. Co. v. Argenbright, 90 Ind. 254.
33. Mo—Dooley v. Missouri Pac. R. Co, 36 Mo App 381.
34. Ga.—Williams v. Central of Georgia R. Co, 96 S.E. 13, 22 Ga. App. 386.
52 C J p 96 note 23.
35. Ga—Georgia Cent. R. Co. v. Bagley, 49 S.E. 780, 121 Ga. 781.
52 C J p 97 note 24.
36. Mont—McKnight v. Oregon Short Line R Co, 82 P. 661, 33 Mont 40.
52 C J p 97 note 26
37. Ga—Hines v. Fowlstown Tobacco Co, 105 S E. 728, 26 Ga App. 162.
38. Tex.—Ft. Worth, etc., R Co. v. Chisholm, Civ App., 146 S W. 988.
39. Ark—Missouri Pac. R. Co. v. Burrow, 115 S W 2d 262, 195 Ark. 980, 115 A L R. 1071—Little Rock, etc., R Co v. Smith, 50 S.W.2d 502, 66 Ark. 278
40. Ark.—Missouri Pac. R. Co. v. Burrow, 115 S.W 2d 262, 195 Ark. 980, 115 A.L R. 1071—Little Rock, etc., R. Co. v Smith, 50 S W 2d 502, 66 Ark 278
41. Ark.—Missouri Pac. R Co v. Burrow, 115 S W 2d 262, 195 Ark. 980, 115 A.L R 1071—Little Rock, etc, R Co v Smith, 50 S W 2d 502, 66 Ark 278.
42. Ark—Missouri Pac. R. Co. v. Burrow, 115 S W 2d 262, 195 Ark 980, 115 A L R. 1071—Little Rock, etc, R. Co. v Smith, 50 S.W 2d 502, 66 Ark. 278.
43. Mont.—Beaudin v Oregon Short Line R. Co., 78 P. 303, 31 Mont 238
52 C.J. p 97 note 31.
44. Ill—Peoria, etc., R. Co. v. Barton, 80 Ill. 72.
Ky.—Gibson v. Louisville, etc, R. Co., 106 S W. 838, 32 Ky L. 769.
45. Ind—Evansville, etc, R. Co. v. Ross, 12 Ind. 446.
52 C.J. p 97 note 33.
46. Idaho.—Mole v. Payne, 227 P 23, 39 Idaho 247.
52 C J. p 97 note 34.
47. Mo.—Manz v St. Louis, etc, R Co., 87 Mo 278.
52 C J. p 97 note 36
48. Mo.—Wardell v R Co, 146 S. W. 813, 163 Mo App. 303.
52 C.J. p 97 note 37
49. Idaho.—Mole v. Payne, 227 P. 23, 39 Idaho 247.
52 C J. p 97 note 38.
50. Ind.—Lake Erie, etc., R. Co. v. Voliva, 101 N.E. 333, 53 Ind.App. 170.
52 C J. p 97 note 39.

the railroad runs,[51] or had permission to pasture his animals therein,[52] or that his animals had strayed thereon without his fault,[53] although allegations of straying without the owner's fault have been held not necessary before a justice of the peace,[54] or where lands are unenclosed[55]

It is not necessary for the complaint to set out or define what constitutes a lawful fence within the application of the statute,[56] or to state in what particular respect the fence in question was unlawful.[57] Ordinarily it is sufficient if the complaint follows the language of the statute,[58] but it is not necessary that the declaration should expressly refer to the statute, if the facts alleged show a liability thereunder,[59] or that allegations should be in the exact words of the statute if words of equivalent import and meaning are used,[60] or that facts should be alleged in express terms if they are necessarily or reasonably to be implied from facts stated.[61]

Negativing exceptions. The complaint must negative any exceptions as to the liability of the railroad contained in the enacting clause of the statute,[62] but it need not negative exceptions in other parts of the statute,[63] or in a subsequent statute,[64] or which are not expressly contained in the statute but might exist from the fact that the road could not lawfully or properly be fenced at certain places.[65] It is not necessary that exceptions in the enacting clause should be specifically negatived if the facts alleged clearly do so by inference[66]

(2) Under Contract

Where the plaintiff relies on a failure of the railroad company to fence its tracks according to contract, that fact and the fact that the breach of the contract was the cause of the animal's injuries, should be alleged in the complaint.

Where plaintiff relies on a failure of the railroad company to fence its tracks according to contract that fact[67] and the fact that the breach of the contract was the cause of the animal's injuries[68] should be alleged in the complaint; but it is not necessary that the contract or a copy thereof,[69] or that the deed of the right of way to the railroad embodying its terms,[70] should be filed with the pleading. Likewise, it is not necessary that the complaint should state when the contract was first broken[71] In an action for failure on the part of a railroad to maintain fences already constructed by its predecessor under a written contract to construct and maintain them, it is not necessary that the complaint should allege that defendant had knowledge of such contract.[72] Where the contract relied on was made between the railroad and some one other than plaintiff, plaintiff must allege his title and right to sue thereunder.[73] Where the statute relieves the railroad from liability where the landowner has agreed to maintain the fence or received pay for so doing when the right of way was acquired, it is not necessary to negative these exceptions if they are not contained in the enacting clause of the statute[74]

(3) Cause of Injury

Where the statute provides that the company shall be liable for damages caused or occasioned by, or which may result from, the failure to fence, the complaint must allege or show that the injury was so caused.

Where the statute provides that the company

51. Mont—Metlen v Oregon Short Line R Co., 81 P 737, 33 Mont. 45 —Beaudin v Oregon Short Line R Co, 78 P 303, 31 Mont 238

52. Mo—Wages v. Quincy, etc, R. Co, 85 S.W 104, 110 Mo App 230— Farmers' Bank v. Chicago, etc., R Co, 83 S W 76, 109 Mo App 165

53. Mo—Farmers' Bank v. Chicago, etc, R Co, supra.

54. Mo—Wages v. Quincy, etc, R Co, 85 S.W 104, 110 Mo App 230

55. Mo.—Board v St Louis, etc, R Co., 36 Mo App. 151.

56. Mo—Marion v St. Louis, etc., R Co, 104 S W 1125, 127 Mo App 129

57. Mo—Till v St Louis, etc, R Co, 101 S W 624, 124 Mo App 281

58. Mo—Kitsock v Chicago, etc, R. Co, App, 226 S W 269
52 C J p 97 note 50

59. Iowa—Morrison v. Burlington, etc, R Co, 51 N W 75, 84 Iowa 663
52 C J p 97 note 51.

60. Ind—Terre Haute, etc., R Co. v. Penn, 90 Ind 284.
52 C J p 98 note 52

61. Mo—Ringo v St Louis, etc, R Co, 4 S W 396, 91 Mo 667
52 C J p 98 note 53

62. Ill.—Galena, etc, R. Co. v Sumner, 24 Ill 631.
Mo—Russell v Hannibal, etc, R. Co, 83 Mo 507.

63. Fla—Seaboard Air Line R. v. Nims, 54 So 779, 61 Fla 420
52 C J p 98 note 58

64. Ind.—Central Indiana R. Co. v. Smith, 85 N E. 26, 42 Ind App 365.

65. Ind—Jeffersonville, etc, R. Co v. Brevoort, 30 Ind 324.
Kan—Missouri Pac R. Co. v Borrer, 45 P 133, 3 Kan App. 284

66. Okl—Midland Valley R. Co. v Hardesty, 134 P 400, 38 Okl 559.

67. U S.—Gulf, etc, R Co v. Washington, Ind.T, 49 F 347, 1 C C A 286.
52 C J p 98 note 63

68. Ind—Indianapolis, etc, Tract Co v Smith, 86 N E 498, 42 Ind App. 605

69. Ind—Toledo, etc, R Co v Fenstemaker, 29 N.E 440, 3 Ind App 151

70. Ind—Indianapolis Northern Tract Co v. Harbaugh, 78 N E 80, 38 Ind App 115.

71. Ala—Evans v Southern R Co, 32 So 138, 133 Ala 482

72. Ind—Toledo, etc, R Co. v Fenstemaker, 29 N E 440, 3 Ind App 151

73. Ind—Grand Trunk Western R Co v Porter, 97 N.E. 1040, 49 Ind App 692

74. Ill—Toledo, etc., R Co. v. Lavery, 71 Ill 522
Ill—Great Western R. Co. v. Hanks, 36 Ill 281.

shall be liable for damages caused or occasioned by, or which may result from, the failure to fence, the complaint must allege or show that the injury was so caused;[75] but it is not necessary to employ the exact term used in the statute,[76] or that it should be in the form of an express allegation,[77] it being sufficient if it appears by necessary or reasonable implication from the facts stated;[78] and, in the absence of such a provision in the statute, an allegation to this effect is not necessary.[79] If action is brought under a statute construed as authorizing a recovery for failure to fence only where injury is caused by collision of an animal with the train, the complaint must allege that the injury was caused by collision.[80]

(4) Lapse of Time for Construction

As a general rule, where the statute allows a certain time after the road or a part thereof is completed or put in operation within which the fence required may be constructed, the complaint must state that such time had elapsed at the time of the injury alleged.

Although there is some authority to the contrary,[81] the general rule is that, where the statute allows a certain time after the road or a part thereof is completed or put in operation within which the fence required may be constructed, the complaint must allege that such time had elapsed at the time of the injury complained of,[82] and such allegation must be made with express reference to the place where the animal came on the track.[83]

(5) Places of Entry and Injury

Although generally in an action under a fencing statute to recover for injuries to an animal, an allegation that the track was not fenced at the place where the animal entered on it is necessary, under some statutes such an allegation is not necessary and an allegation that the track was not fenced at the place where the animal was injured is sufficient.

In an action under a fencing statute to recover for injuries to an animal, an allegation that the track was not fenced at the place where the animal came on it is necessary;[84] but it need not be alleged directly if the fact appears by necessary inference from the other allegations.[85] It is not necessary that the complaint should allege that the track was not fenced at the place where the animal was injured,[86] nor is such an allegation alone, if made, sufficient,[87] except where it may be reasonably inferred from the allegations that the animal entered at the place where it was injured,[88] and except, as held in some states, where the action is before a justice of the peace.[89] However, under some statutes making railroad companies liable for killing or injuring livestock on an unfenced track, it is not necessary to allege the point at which the animal entered on the track of the railroad,[90] except where the animal is struck at a point where the railroad is not required to fence,[91] such as a public highway.[92] Thus, under such statutes, it has been held that an allegation that the track was not fenced at the place where the animal was injured is sufficient,[93] and it will be presumed, as discussed infra § 642, that the animal entered at the point where it was injured.

Where the statute expressly requires the road to be fenced at certain designated places, as discussed supra §§ 569–574, it is not necessary that plaintiff allege the exact place of entry,[94] but it is necessary for him to allege sufficient facts to bring himself within the provisions of the statute.[95] Accordingly, the complaint must show either by direct allegation or necessary implication that the place of entry

75. Mont.—Menard v Montana Cent. R. Co., 56 P. 592, 22 Mont. 340.
52 C.J. p 98 note 73.

76. Mo.—Williams v. Missouri Pac. R. Co., 74 Mo. 453.

77. Ind.—Ohio, etc., R. Co v. Neady, 32 N.E 213, 5 Ind App. 328.
Mo.—Bowen v. Hannibal, etc., R. Co., 75 Mo. 426.

78. Ind.—Ohio, etc., R. Co v Neady, 32 N E 213, 5 Ind App. 328.
52 C.J. p 98 note 76.

79. Mo.—Radcliffe v. St Louis, etc., R Co, 2 S W 277, 90 Mo. 127.
52 C.J. p 99 note 77.

80. Mo.—Colbert v. Missouri Pac. R. Co, 78 Mo App. 176—Geiser v. St. Louis, etc., R. Co, 61 Mo App. 459.

81. Ind.—Pittsburgh, etc., R Co. v. Newsom, 74 N E. 21, 35 Ind App. 299.
52 C J p 99 note 80.

82. Ill.—Great Western R. Co. v. Hanks, 36 Ill. 281.
52 C.J. p 99 note 82

83. Ill.—Toledo, etc., R. Co. v Darst, 51 Ill. 365.

84. Ill.—Toledo, etc, R. Co v Darst, 51 Ill 365.
52 C.J. p 99 note 85.
Place of entry as determining liability see supra § 567.

85. Ind.—Wabash R Co. v. Ferris, 32 N E. 112, 6 Ind App 30
52 C J. p 99 note 86.

86. Ind.—Wabash R Co v Forshee, 77 Ind. 158.

87. Ill.—Toledo, etc, R. Co v. Darst, 51 Ill. 365.
52 C.J. p 99 note 88

88. Ind.—Jeffersonville, etc, R. Co v Chenoweth, 30 Ind. 366—Indianapolis, etc., R. Co. v. Adkins, 23 Ind. 340.

89. Ind.—Louisville, etc., R. Co. v. Argenbright, 98 Ind. 254.
52 C J. p 99 note 91.

90. Or.—Meier v. Northern Pac. R Co, 93 P. 691, 51 Or. 69—Eaton v. Oregon R, etc, Co, 24 P. 413, 19 Or 371—Sullivan v Oregon R., etc., Co, 24 P 408, 19 Or. 319.

91. Or.—Meier v. Northern Pac R. Co, 93 P 691, 51 Or. 69—Eaton v. Oregon R, etc, Co., 24 P. 413, 19 Or 371

92. Or.—Meier v. Northern Pac. R Co, 93 P 691, 51 Or. 69—Eaton v Oregon R, etc, Co, 24 P 413, 19 Or. 371

93. Or.—Eaton v. Oregon R, etc., Co, supra.

94. Utah.—Wilde v. Union Pac R. Co, 84 P.2d 1085, 96 Utah 164

95. Utah.—Wilde v. Union Pac. R. Co., supra.

was one which the statute required to be fenced;[96] and this may be done either by an affirmative allegation expressly designating the place as one within the provisions of the statute,[97] or by negativing that it was at any of the places, specifying them, which are not within its application;[98] but it is not sufficient if it omits the necessary affirmative allegation and does not negative all of the places not included[99]

If the statute expressly excepts certain places, the complaint must show that the place of entry was not within the exception;[1] but the allegation need not be in express terms if this fact sufficiently appears from the facts stated,[2] or in strictly accurate terms if the inaccuracy is shown not to have prejudiced the rights of the railroad.[3] It is only as to the place of entry that the rule as to stating exceptions applies, and it is not necessary to allege that the place of injury was not one of the places not required to be fenced.[4] If the statute does not contain any express exception but merely makes the company liable without regard to negligence for all damages to stock where its road is not fenced, it is sufficient merely to allege that the animal came on the track where the road was not fenced and was injured without alleging that the place was one which should have been fenced,[5] and if the place was in fact one which the company could not lawfully or properly have fenced, such as a public crossing or depot grounds, this is a matter of defense which need not be negatived in the complaint.[6] If the action is at common law and failure to erect and maintain fences is alleged as the negligence relied on, it is not necessary to allege further as to the duty of the railroad to fence at particular places.[7]

(6) Defects in Fences and Cattle Guards

In an action for injuries due to defects in fences and cattle guards, a complaint is sufficient which alleges that the stock gap or cattle guard was dangerous and was so constructed as to be inviting to ordinary stock, or that the injury was due to a failure to maintain a good and sufficient fence, or that the road was not securely fenced.

In an action for injuries due to defects in fences and cattle guards, a complaint is sufficient which alleges that the stock gap or cattle guard was dangerous and was so constructed as to be inviting to ordinary stock,[8] or that the injury was due to a failure to maintain a good and sufficient fence,[9] or that the road was not securely fenced,[10] without any more specific reference to the particular defect,[11] or which alleges circumstances from which the necessary implication is that the railroad fence was not properly maintained[12] and that the injury complained of was occasioned thereby.[13] The complaint need not allege that plaintiff had not agreed to maintain the fence or received pay for so doing,[14] or that the defect had been permitted to exist for an unnecessary length of time[15] Where, however, a railroad is only required to put in cattle guards at particular places, a complaint based on a failure to keep a cattle guard in repair must allege that it was one which it was the duty of defendant to maintain,[16] or which was located at one of the places where the statute required it to be maintained.[17]

96. Mo—Ward v. St. Louis, etc., R Co, 3 S W. 481, 91 Mo 168
52 C J p 99 note 93.

Place of entry unknown

In action against railroad to recover for loss of cattle killed on right of way, which action was based on failure to fence right of way as required by statute where right of way passes through lands privately owned and improved, plaintiff's allegation that cattle entered onto the track at a place to plaintiff unknown, was insufficient to show violation of statutory duty, since railroad need not fence right of way where it does not pass through privately owned and improved lands—Wilde v Union Pac R. Co., 84 P.2d 1085, 96 Utah 164.

97. Mo—Mayfield v. St. Louis, etc., R. Co, 3 S W. 201, 91 Mo 296.
52 C.J. p 99 note 94

Use of statutory language held sufficient

Mo—Ringo v. St. Louis, etc., R. Co., 4 S.W. 396, 91 Mo. 667.
52 C.J. p 99 note 95.

98. Mo.—Fraysher v. Mississippi River, etc, R. Co, 66 Mo App 573—McGuire v St Louis, etc, R Co, 43 Mo App 354.

99. Mo—Summers v Hannibal, etc, R Co, 29 Mo App. 41.
52 C J p 99 note 97.

1. Ill.—Galena, etc., R. Co v. Sumner, 24 Ill 631
52 C J p 99 note 99.

2. Mo—Radcliffe v. St. Louis, etc, R Co, 2 S W 277, 90 Mo 127—Meadows v. Chicago, etc, R. Co, 82 Mo App 83

3. Ill—Illinois Cent. R. Co. v. Wade, 46 Ill 115

4. Ill—Great Western R. Co. v. Hanks, 36 Ill. 281.

5. Fla—Atlantic Coast Line R. Co v. Manning, 152 So. 735, 114 Fla 8.
52 C.J. p 100 note 4.

6. Ind—Chicago, etc, R. Co v. Brannegan, 32 N.E. 790, 5 Ind App 540.
52 C J. p 100 note 5.

7. Ill.—Baltimore, etc, R. Co. v. Seitzinger, 116 Ill.App. 55

8. Ala.—Alabama Great Southern R Co. v. Clark, 130 So. 318, 221 Ala. 616—Carrolton Short Line Ry. Co v Lipsey, 43 So 836, 150 Ala. 570

9. Cal—McCoy v Southern Pac. Co., 26 P. 629, 3 Cal Unrep Cas. 398.
52 C.J p 100 note 7.

10. Kan—Missouri Pac R. Co. v. Morrow, 13 P. 789, 36 Kan. 495

11. Cal.—McCoy v. Southern Pac. Co, 26 P 629, 3 Cal Unrep Cas. 398.
52 C.J p 100 note 9

12. N.Y—Downs v Central Vermont R Co, 14 N Y S 572, 60 Hun 580.
52 C J p 100 note 10

13. Iowa—Morrison v. Burlington, etc, R. Co, 51 N.W. 75, 84 Iowa 663.
52 C J. p 100 note 11.

14. Ill—Toledo, etc., R Co. v. Lavery, 71 Ill 522

15. Mo.—Chubbuck v. Hannibal, etc, R. Co., 77 Mo 591.

16. Ga—Southern R Co. v. Harrell, 30 S E. 821, 104 Ga. 602

17. Ky—Gibson v. Louisville, etc., R. Co., 106 S W 838, 32 Ky L. 769.

j. Negativing Contributory Negligence

Although where the action is founded on negligence, the authorities are in conflict as to the necessity of negativing contributory negligence on the part of the plaintiff, an allegation negativing contributory negligence is not necessary where the action is based on the statutory liability for failure on the part of the railroad to fence its tracks, or on breach of its agreement to fence, or where it is alleged that the injury was willfully inflicted.

Following the general rule of the particular jurisdiction, as discussed in Negligence § 194, in some jurisdictions, where the action is founded on negligence, it is not necessary for the complaint to negative contributory negligence on the part of plaintiff,[18] in the absence of allegations from which it can be inferred that the injuries were due to the inherent viciousness of the animal or to failure of the owner to exercise due care under the circumstances;[19] but in other jurisdictions it is necessary to negative contributory negligence,[20] even where the action originated before a justice of the peace.[21] An allegation negativing contributory negligence has been held not necessary where the action is based on the statutory liability for failure on the part of the railroad to fence its tracks,[22] or on breach of its agreement to fence,[23] or where it is alleged that the injury was willfully inflicted.[24]

k. Amendment

The complaint, if defective, may be amended if the amendment does not change or introduce a different cause of action, and this rule has been applied to the allowance of amendments in a court of general jurisdiction on appeal from an action originally brought before a justice of the peace.

General rules govern amendments of declarations or complaints in actions against railroad companies for injuries to animals.[25] Accordingly, the complaint, if defective, may be amended if the amendment does not change or introduce a different cause of action,[26] and is no more than a particularization of the more general allegations of the original statement.[27] Where the action is originally brought before a justice, such amendment may be made on appeal in a court of general jurisdiction,[28] but no new item or cause of action not embraced or intended to be included in the original statement shall be added by the amendment.[29] Thus a common-law action for negligence cannot be changed by amendment to a statutory action for damages[30] or double damages.[31]

Offer of compromise by defendant. In an action to recover for death of an animal, it has been held proper to allow an amendment of the petition by allegations setting up offer of compromise by defendant, plaintiff's acceptance thereof, and defendant's refusal to comply therewith, which required plaintiff to file suit seeking recovery.[32]

§ 636. Plea or Answer

The general rules of pleading in civil actions apply to pleas and answers in actions against railroad companies for injuries to animals.

The general rules of pleading in civil actions, discussed in Pleading §§ 103–109, and particularly those applicable to actions based on negligence, considered in Negligence §§ 196–198, apply to pleas and answers in actions against railroad companies for injuries to animals.[33] Accordingly, the answer must be framed with such clearness and certainty as to show whether defendant intends to deny the complaint or to confess and avoid it.[34] A plea which merely contains a narrative of how the accident happened but does not expressly or by necessary implication from the facts stated deny that defendant's acts were negligent or were the proximate cause of the injuries,[35] or affirm plaintiff's negligence and that it was the proximate cause of the injuries,[36] is not sufficient. An answer that plaintiff is not the owner of the animal is good as against a

18. N.H.—Smith v. Eastern R. Co., 35 N.H. 356.

19. Ga.—Weatherington v. Georgia Southern, etc., R. Co., 87 S.E. 844, 17 Ga.App. 584—Charleston, etc., R. Co. v. Camp, 59 S.E. 710, 3 Ga.App. 232.

20. Ind.—Grand Trunk Western R. Co. v. Porter, 97 N.E. 1040, 49 Ind.App. 692.
52 C.J. p. 100 note 20.

21. Ind.—Cincinnati, etc., R. Co. v. Stanley, 30 N.E. 1103, 4 Ind.App. 364.

22. Ind.—Jeffersonville, etc., R. Co. v. Underhill, 40 Ind. 229—Michigan Cent. R. Co. v. Farrell, 99 N.E. 1026, 52 Ind.App. 603.

23. Iowa.—Livingston v. Chicago, etc., R. Co., 120 N.W. 1040, 142 Iowa 404.

24. Ind.—Chicago, etc., R. Co. v. Leiter, 109 N.E. 213, 59 Ind.App. 212—Chicago, etc., R. Co. v. Nash, 27 N.E. 564, 1 Ind.App. 298.

25. Colo.—Union Pac. R. Co. v. Brower, 155 P. 312, 60 Colo. 579.
After introduction of evidence see infra § 638.

26. Ky.—Louisville, etc., R. Co. v. Beauchamp, 55 S.W. 716, 108 Ky. 47, 21 Ky.L. 1476.
52 C.J. p. 100 note 28.

27. Mo.—Peery v. Quincy, etc., R. Co., 99 S.W. 14, 122 Mo.App. 177.

28. Mo.—Rowland v. St. Louis, etc., R. Co., 73 Mo. 619.
52 C.J. p. 101 note 33.

29. Mo.—Mitchell v. Missouri Pac. R. Co., 82 Mo. 106—Hansberger v. Pacific R. Co., 43 Mo. 196—Gregory v. Wabash, etc., R. Co., 20 Mo.App. 448.

30. Mo.—Minter v. Hannibal, etc., R. Co., 82 Mo. 128—Hansburger v. Pacific R. Co., 43 Mo. 196.

31. Mo.—Gregory v. Wabash, etc., R. Co., 20 Mo.App. 448.

32. Ga.—Western & A. R. Co. v. Smith, 82 S.E. 906, 15 Ga.App. 289.

33. Ind.—Jeffersonville, etc., R. Co. v. Dunlap, 29 Ind. 426.

34. Ind.—Jeffersonville, etc., R. Co. v. Dunlap, supra.

35. Ala.—Bugg v. Mitchell, 103 So. 713, 20 Ala.App. 555.

36. Ala.—Central of Georgia R. Co. v. Boswell, 75 So. 410, 200 Ala. 58.

general demurrer when the action is brought under a statute allowing recovery to the person having the general or special property in such animal.[37] An answer alleging that plaintiff was a servant of defendant whose duty it was to keep animals off the track must allege that such duty applied to the place where the animal in question came on it.[38]

Plea of avoidance must allege facts and not merely matters of evidence.[39]

Answer relying on compliance with fencing law must allege that the statutory procedural steps were taken and that the fence was constructed and was being maintained in compliance therewith.[40]

Special agreements with, or acquiescence of, landowner, as relieving defendant of obligation to maintain gates at private crossings, must be specially pleaded.[41]

Where complaint in separate paragraphs alleges different grounds of liability, an answer which assumes to answer the entire complaint is bad if it contains nothing which would constitute a defense to one of the grounds of liability charged.[42]

Contributory negligence. General rules apply to answers or pleas setting up the defense of contributory negligence.[43] Accordingly, the defense of contributory negligence is not raised by an answer which fails to identify the animals referred to therein as the animals injured,[44] or which assumes to characterize as contributory negligence an act of plaintiff which, as stated, is not negligence,[45] or which may or may not have been negligent when measured by the legal standard of reasonable care under the circumstances.[46] If the answer alleges that the injury was due to the gross negligence of plaintiff himself, it must state in what such gross negligence consisted;[47] and if it alleges that plaintiff negligently turned his animal out in the vicinity of a station, it must further allege that the animal went on the track at such place where it was not the duty of the company to fence.[48]

Counterclaim. Where defendant denies plaintiff's allegation of negligence and sets up a counterclaim for injury to the train, it is not necessary affirmatively to allege that defendant was free from all fault or negligence,[49] and a statement of facts from which plaintiff's negligence and defendant's freedom from negligence are inferable is sufficient.[50]

§ 637. Replication or Reply

General rules govern replications and replies in actions against railroad companies for injuries to animals.

General rules discussed in Pleading §§ 184-206 and Negligence § 199, govern replications and replies in actions against railroad companies for injuries to animals.[51] A replication alleging insufficiency of a cattle guard must allege its insufficiency to turn cattle generally,[52] not merely its insufficiency to turn the particular animal which was injured.[53] Matters of defense cannot be held to be admitted in a reply in the face of the denial contained therein,[54] even though the denial is qualified by an exception where it is possible to construe the exception as not having that effect.[55]

§ 638. Issues, Proof, and Variance

a. In general
b. Matters to be proved
c. Evidence admissible under pleadings
d. Variance

a. In General

In actions against railroad companies for injuries to animals, only such matters may be adjudicated or made a basis of recovery as are put in issue by the pleadings.

In actions against railroad companies for injuries to animals, only such matters may be adjudicated or made a basis of recovery as are put in issue by the pleadings,[56] and, while an immaterial variance between the allegations and the proof may be disregarded, as discussed infra subdivision d of this section, plaintiff cannot state a particular cause of

37. Fla.—Louisville, etc., R. Co. v. Wang, 55 So. 73, 61 Fla. 299

38. Ind.—Louisville, etc., R. Co. v. Skelton, 94 Ind. 222.

39. Ind.—Pennsylvania Co. v. Zwick, 27 N.E. 508, 1 Ind. App. 280.
52 C.J. p. 101 note 44

40. Ala.—Hines v. McMillan, 87 So. 696, 17 Ala. App. 509, certiorari granted Ex parte Hines, 87 So. 691, 205 Ala. 17.

41. Tex.—St. Louis Southwestern R. Co. v. Gilbert, 246 S.W. 347, 112 Tex. 288.

42. Ind.—Louisville, etc., R. Co. v. Hart, 28 N.E. 218, 2 Ind. App. 130.

43. Or.—Jackson v. Sumpter Valley R. Co., 93 P. 356, 50 Or. 455.

44. Or.—Jackson v. Sumpter Valley R. Co., supra

45. Ala.—Alabama Great Southern R. Co. v. Sheffield, 104 So. 222, 213 Ala. 15.

46. Ala.—Fuqua v. Southern R. Co., 77 So. 690, 201 Ala. 164.

47. Ind.—Jeffersonville, etc., R. Co. v. Dunlap, 29 Ind. 426

48. Ind.—Louisville, etc., R. Co. v. Skelton, 94 Ind. 222

49. Kan.—Central Branch Union Pac. R. Co. v. Walters, 24 Kan. 504. Right to counterclaim see supra § 631

50. Ohio.—Bagley v. Cincinnati, etc., R. Co., 13 Ohio N.P., N.S., 679

51. Ala.—Ex parte Hines, 87 So. 691, 205 Ala. 17

52. Ala.—Ex parte Hines, supra.

53. Ala.—Ex parte Hines, supra.

54. Or.—Jackson v. Sumpter Valley R. Co., 93 P. 356, 50 Or. 455

55. Or.—Jackson v. Sumpter Valley R. Co., supra.
52 C.J. p. 101 note 64.

56. Ark.—Lusk v. Blevins, 197 S.W. 854, 130 Ark. 378
52 C.J. p. 102 note 67.

action and recover on an entirely different ground of liability,[57] or set out particular acts of negligence and recover on proof of negligence in respects other than those alleged.[58] Thus, where the complaint charges only a willful and intentional injury, plaintiff cannot, without further pleadings, recover on the ground of negligence;[59] or if the complaint alleges only a failure to fence, plaintiff cannot recover on the ground of negligence in the operation of the train,[60] or in the manner of constructing a bridge or trestle on which an animal is injured,[61] or on the ground of negligence in allowing a gate in the fence to be open;[62] but, where the evidence as to a gate being left open is admitted without objection and the question is treated by both parties as an essential issue under the pleadings, plaintiff may recover on that ground.[63] If the complaint alleges only a failure to construct cattle guards, plaintiff cannot recover on the ground of a failure to fence,[64] but, where the statute requires the maintenance of both fences and cattle guards, a complaint alleging a failure as to both states but a single cause of action, and proof of either with proof of the other necessary allegations will entitle plaintiff to recover.[65]

Where there are two fencing statutes, one expressly requiring fencing at certain places and allowing double damages for injuries due to the failure to comply, and the other merely making the company liable for actual damages without proof of negligence where its track is not fenced, if the action is based on the former statute and the place unfenced is not within the application of that statute, there can be no recovery under the latter;[66] but, if it does not clearly appear that the action is based on the former statute, the mere fact that the complaint prays for double damages will not prevent the recovery of actual damages if it states a good cause of action under the latter statute,[67] or at common law,[68] and, if an animal is killed in a town or city at a place where the railroad has not but might lawfully have fenced, plaintiff cannot sue under the former statute, but must bring his action under the latter statute or at common law.[69]

An allegation of negligence generally raises the issue of the engineer's care in keeping a lookout as the train approached a public crossing as well as his observance of his duty under the statute to give warnings.[70] However, an allegation of failure to give statutory warnings at a particular crossing raises no issue of a similar failure at other crossings.[71] Plaintiff is, however, entitled to go to the jury on every act of negligence alleged in his complaint and denied by the answer in so far at least as evidence has been produced tending to sustain them.[72] The issue of defendant's ownership or operation of the railroad at the time of the accident is not raised by an answer admitting defendant "is now operating" the road, and not denying ownership or operation at the time of the accident.[73]

b. Matters to Be Proved

The plaintiff, in order to recover, must prove each and every allegation of the complaint which is not admitted and which is necessary to establish the cause of action alleged

Plaintiff, in order to recover, must prove each and every allegation of the complaint which is not admitted and which is necessary to establish the cause of action alleged,[74] but not an allegation which is mere surplusage and not essential to his case.[75] Since the allegation of plaintiff's ownership of the injured stock is a necessary one, as discussed supra § 635 g, it must be supported by proof.[76] There must be proof of defendant's operation of the train at the time of the accident to support an allegation of negligent operation of

57. Ga.—Georgia R. Co. v. Henderson, 120 S.E. 638, 31 Ga.App. 278.
52 C.J. p. 102 note 69.

58. Ala.—Mobile, etc., R. Co. v. Ladd, 9 So. 169, 92 Ala. 287.
52 C.J. p. 102 note 70.

59. Ind.—Indiana, etc., R. Co. v. Overton, 20 N.E. 147, 117 Ind. 253.

60. Ill.—Ohio, etc., R. Co. v. Brown, 23 Ill. 94.
52 C.J. p. 102 note 72.

61. Iowa.—Ashbach v. Chicago, etc., R. Co., 37 N.W. 183, 74 Iowa 248.

62. Ill.—Illinois Cent. R. Co. v. McKee, 43 Ill. 119.
Mo.—Stonebraker v. Chicago, etc., R. Co., 85 S.W. 631, 110 Mo.App. 497.

63. Mo.—Litton v. Chicago, etc., R. Co., 85 S.W. 978, 111 Mo.App. 140.

64. N.Y.—Parker v. Rensselaer, etc., R. Co., 16 Barb. 315.

65. Mo.—Duncan v. St. Louis, etc., R. Co., 3 S.W. 835, 91 Mo. 67.—Woods v. Missouri, etc., R. Co., 51 Mo.App. 500.

66. Mo.—Edwards v. Hannibal, etc., R. Co., 66 Mo. 567.—Stout v. St. Louis, etc., R. Co., 125 S.W. 230, 142 Mo.App. 1.

67. Mo.—Scott v. St. Louis, etc., R. Co., 75 Mo. 136.—Geiser v. St. Louis, etc., R. Co., 61 Mo.App. 459.

68. Mo.—Scott v. St. Louis, etc., R. Co., 75 Mo. 136.

69. Mo.—Elliott v. Hannibal, etc., R. Co., 66 Mo. 683.

70. Mo.—Wilkinson v. St. Louis Southwestern R. Co., 125 S.W. 544, 146 Mo.App. 711.

71. Iowa.—Heise v. Chicago Great Western R. Co., 119 N.W. 371, 141 Iowa 88.

72. Iowa.—Kinyon v. Chicago, etc., R. Co., 92 N.W. 40, 118 Iowa 349, 96 Am.S.R. 382.

73. Neb.—Kinney v. Chicago, etc., R. Co., 138 N.W. 577, 92 Neb. 383.

74. Ala.—Hayes v. Atlanta, etc., R. Co., 84 So. 556, 17 Ala.App. 220.
52 C.J. p. 104 note 52.

75. Mo.—Radcliffe v. St. Louis, etc., R. Co., 2 S.W. 277, 90 Mo. 127.
52 C.J. p. 105 note 53.

76. Ga.—Williams v. Central of Georgia R. Co., 96 S.E. 13, 22 Ga.App. 386.

cars,[77] of negligence to support a charge of negligent killing,[78] but not of actual participation by defendant company, since proof of negligence of its employees is sufficient.[79] An allegation as to the place of injury, if not a material part of the cause of action, being made merely to locate where the injury occurred, need not be proved strictly as alleged.[80] In a common-law action the allegation of negligence is material and must be proved.[81] Where the complaint alleges several negligent acts, any one of which would be sufficient ground for recovery, proof in support of one of the stated grounds is all that is required for a recovery.[82]

In an action under the statute plaintiff must prove the allegation that the road was not fenced,[83] and such other allegations as are necessary to bring the case within the provisions of the particular statute sued on,[84] such as that the place was one which the statute required to be fenced,[85] or was not one of the places excepted,[86] that the time allowed by statute for the construction of the fences had elapsed,[87] and that the failure to fence occasioned the injury complained of.[88] However, in an action under the statute an allegation of negligence is unnecessary, and, if made, need not be proved,[89] unless under the terms of the statute defendant was under no obligation to fence at the place where the accident occurred.[90] Where the statute merely allows the landowner to construct the fences if not erected by the railroad company within a certain time after completion of the road, it does not affect the liability of the company for failure sooner to construct them, and it is not necessary for plaintiff to show that such time had elapsed at the time of the injury.[91]

c. Evidence Admissible under Pleadings

(1) In general
(2) Under allegations of negligence
(3) Under general issue or general denial

(1) In General

The evidence must correspond with the allegations and be restricted to the issues.

In compliance with general rules, as discussed in Negligence § 201 and Pleading §§ 524, 525, the evidence must correspond with the allegations and be restricted to the issues.[92] An allegation of the killing of the animals and their value made against a railroad whose track is fenced does not afford a basis for admitting evidence that animals were killed while on the track in the absence of a further averment of negligence.[93] An allegation that plaintiff's animal was killed by collision with defendant's train is sufficiently broad to admit evidence that it was so injured by the collision as to necessitate its being killed;[94] but since where animals are killed at different times the causes of action are separate and distinct, if the complaint charges only one occurrence, evidence is not admissible of injuries to animals at a time different from that alleged in the complaint.[95] An allegation that plaintiff sustained damages in a specific sum is tantamount to an allegation of value, and in the absence of demurrer is sufficient to permit evidence of the market value of the animals killed.[96] Evidence of a particular defect is admissible under an allegation in general terms of a defective fence without specifying the defect.[97]

(2) Under Allegations of Negligence
(a) In general
(b) Specific acts of negligence
(c) In operation of train

77. Ala.—Hayes v. Atlanta, etc., R Co., 84 So. 556, 17 Ala App 220.

78. Colo.—Chicago, etc., R. Co. v. Rhodes, 121 P. 769, 21 Colo App. 229.

79. Ala.—Southern R. Co. v. Hobson, 58 So 751, 4 Ala App. 408—Central of Georgia R Co. v. Thomas, 55 So 443, 1 Ala.App. 267.

80. Ala.—Western R. Co v. McPherson, 40 So 934, 146 Ala 427—Central of Georgia R Co. v Thomas, 55 So. 443, 1 Ala.App. 267.

81. Ill.—Terre Haute, etc., R. Co. v. Augustus, 21 Ill. 186
Mo.—Calvert v. Hannibal, etc., R. Co., 34 Mo. 242.

82. Tex.—International, etc., R. Co v. Schram, Civ.App., 138 S.W. 195. 52 C.J. p 105 note 61.

83. Ind.—Pittsburgh, etc., R. Co v. Hackney, 53 Ind 488—Indianapolis, etc., R. Co v. Wharton, 13 Ind 509.

84. Ill.—Ohio, etc., R Co. v. Brown, 23 Ill. 94
Utah.—Wilde v Union Pac R. Co., 84 P.2d 1085, 96 Utah 164.

85. Mo.—Cary v. St. Louis, etc., R. Co., 60 Mo 209.

86. Ill.—Ohio, etc., R Co. v. Brown, 23 Ill. 94

87. Ill.—Chicago, etc., R. Co. v Taylor, 40 Ill. 280—Ohio, etc., R. Co. v. Brown, 23 Ill. 94.

88. Iowa.—Schmitt v Chicago, etc., R Co., 68 N.W. 715, 99 Iowa 425.
Mo.—Montgomery v. Wabash, etc., R. Co., 2 S.W. 409, 90 Mo. 446.

89. Mo.—Radcliffe v St Louis, etc., R Co., 2 S.W. 277, 90 Mo 127. 52 C.J. p 105 note 68.

90. Tex.—Ft Worth, etc., R. Co v. Hodge, 125 S.W. 350, 58 Tex.Civ. App 540.

91. Mo.—Blewett v. Wyandotte, etc., R Co., 72 Mo 583.

92. Ark.—St Louis, etc., R. Co. v. Kimmons, 32 S.W. 505, 61 Ark. 200 52 C.J. p 102 note 87.

93. Tex.—Texas, etc., R. Co v. Lovett, Civ.App., 199 S.W. 498

94. Mo.—Shepard v. Kansas City, etc., R. Co., 65 Mo.App. 353.

95. Ind.—Indianapolis, etc., R Co. v. Sims, 92 Ind. 496.

96. Tex.—Ft Worth v. Hickox, Civ App., 103 S.W. 202

97. Mo.—Smith v Chicago, etc., R Co., 105 S.W. 10, 127 Mo.App. 160.

(a) In General

Where negligence is alleged in general terms without specifying the particular acts constituting such negligence, evidence is admissible of any act or omission which tends to support the pleading.

Where negligence is alleged in general terms without specifying the particular acts constituting such negligence, evidence is admissible of any act or omission which tends to support the pleading,[98] or of any degree of negligence necessary to entitle plaintiff to recover.[99] Under such allegation if the action is at common law and not based on the statute, evidence is admissible of statutory negligence,[1] such as a failure to give crossing signals,[2] or running at a prohibited rate of speed,[3] and, if it merely alleges negligent killing or injury and the form of allegation is not objected to, the evidence is not limited to negligence in the operation of the train,[4] but plaintiff may show negligence on the part of the company consisting in the obstruction of a crossing,[5] or failure to fence its tracks.[6]

(b) Specific Acts of Negligence

If the plaintiff voluntarily limits his allegation of negligence to specific acts, evidence of the alleged acts or other acts of negligence necessarily implied therefrom is admissible, but evidence of negligence with respect to other acts is inadmissible.

If plaintiff voluntarily limits his allegation of negligence to specific acts, evidence of the alleged acts or other acts of negligence necessarily implied therefrom is admissible,[7] but evidence of negligence with respect to other than those alleged or necessarily implied therefrom is not admissible.[8] Thus, if the complaint charges a failure to fence, evidence is not admissible of negligence in the operation of the train,[9] or a defective condition of a crossing,[10] or a failure to give crossing signals as required by statute.[11] Under allegations of failure to erect and maintain fences, evidence that defendant's track was not fenced at the time and place of the accident is admissible.[12] An allegation of failure to erect and maintain fences and gates permits admission of evidence that the fences were down,[13] but not evidence of a gate being left open;[14] nor is such evidence admissible under an allegation of failure to keep a fence in repair.[15] Where the complaint charges a failure to maintain sufficient cattle guards at a public crossing as required by law, evidence of negligent delay in removing snow from the cattle guards is admissible.[16] An allegation that a gate fastening was out of repair will not admit evidence of want of fastening.[17]

Where the complaint contains a general allegation of negligence followed by allegations of specific acts, plaintiff is restricted to the specific acts if the words qualifying the general allegations are words of limitation;[18] and not restricted if they are words of enlargement.[19] If an allegation of a specific act of negligence is in somewhat general terms, evidence of particular facts having a tendency to prove the specific act alleged is admissible.[20]

(c) In Operation of Train

Under a general allegation of negligence in the operation of the train, which does not specify the particular acts constituting such negligence, the plaintiff may introduce evidence of any negligence connected with the operation of the train.

Under a general allegation of negligence in the operation of the train, which does not specify the

98. Neb.—Omaha, etc., R. Co. v. Wright, 68 N.W. 618, 49 Neb. 456.
52 C.J. p. 103 note 94

99. Ill.—Rockford, etc., R. Co. v. Phillips, 66 Ill. 548
52 C.J. p. 103 note 95.

1. Ala.—Alabama Great Southern R. Co. v. McDaniel, 69 So. 60, 192 Ala. 639
Mo.—Barr v. Hannibal, etc., R. Co., 30 Mo. App. 248

2. Mo.—Braxton v. Hannibal, etc., R. Co., 77 Mo. 455
52 C.J. p. 103 note 97.

3. Ala.—Alabama Great Southern R. Co. v. McDaniel, 69 So. 60, 192 Ala. 639
52 C.J. p. 103 note 98

4. Mo.—Mack v. St. Louis, etc., R. Co., 77 Mo. 232.

5. Mo.—Mack v. St. Louis, etc., R. Co., 77 Mo. 232.

6. Mo.—Minter v. Hannibal, etc., R. Co., 82 Mo. 128.—Calvert v. Hannibal, etc., R. Co., 38 Mo. 467.

7. Ind.—Lake Erie, etc., R. Co. v. Voliva, 101 N.E. 338, 53 Ind. App. 170.
52 C.J. p. 103 note 6.

Failure to give signal

Where the declaration charges failure to give signals, evidence relating to the speed of the train is admissible, since such speed is a circumstance to be considered in determining the necessity for signals.—Dowse v. Maine Cent. R. R., 20 A.2d 629, 91 N.H. 419.

8. Neb.—Omaha, etc., R. Co. v. Wright, 68 N.W. 618, 49 Neb. 456
52 C.J. p. 103 note 7.

9. Mo.—Collins v. Atlantic, etc., R. Co., 65 Mo. 230.—Cary v. St. Louis, etc., R. Co., 60 Mo. 209

10. Iowa.—Davidson v. Central Iowa R. Co., 39 N.W. 163, 75 Iowa 22

11. Mo.—Collins v. Atlantic, etc., R. Co., 65 Mo. 230.

12. Fla.—Seaboard Air Line R. Co. v. Harby, 46 So. 590, 55 Fla. 555.

13. Mo.—Brown v. St. Louis-San Francisco R. Co., App., 281 S.W. 452.

14. Mo.—Murphy v. St. Louis Southwestern R. Co., 129 S.W. 1033, 149 Mo. App. 255
Or.—High v. Southern Pac. Co., 88 P. 961, 49 Or. 98

15. Ill.—Illinois Cent. R. Co. v. McKee, 13 Ill. 119.
Ohio.—Megrue v. Lennox, 52 N.E. 1022, 59 Ohio St. 479

16. Ind.—Lake Erie, etc., R. Co. v. Voliva, 101 N.E. 338, 53 Ind. App. 170.

17. Tex.—Texas Electric R. Co. v. Simmons, Civ. App., 214 S.W. 563

18. Kan.—Chicago, etc., R. Co. v. Wheeler, 79 P. 673, 70 Kan. 755.
52 C.J. p. 103 note 17.

19. Mo.—Edwards v. Chicago, etc., R. Co., 76 Mo. 399
52 C.J. p. 103 note 18

20. Okl.—Ft. Smith, etc., R. Co. v. McCormick, 108 P. 377, 25 Okl. 782
52 C.J. p. 103 note 19.

particular acts constituting such negligence, plaintiff may introduce evidence of any negligence connected with the operation of the train,[21] and evidence is admissible of negligence in failing to keep a proper lookout for animals,[22] or in failing to use due care to avoid the injury after they were discovered;[23] or in operating the train at a prohibited or excessive rate of speed,[24] or in failing to give signals at crossings,[25] although there is also some authority to the contrary,[26] or in failing to ring a bell while running through city limits as required by an ordinance,[27] provided the action is at common law and not based specifically on the statute or ordinance prescribing the regulation[28]

On the other hand, under a general allegation of negligence in the operation of the train, the evidence must be confined to acts connected with the operation of the train,[29] and evidence is not admissible of a failure to fence,[30] although there is also some authority to the contrary,[31] or of a defective condition of a crossing,[32] or of the right of way,[33] or of the equipment of the train;[34] or failure to post notices of the injury as required by law;[35] or that a gate in the fence was left open,[36] or that the company had allowed the view of the track to become obstructed by bushes growing on the right of way;[37] or allowed substances calculated to attract animals to remain on the track[38] An allegation of failure to keep a proper lookout does not afford the basis for admitting evidence as to the nature of the headlight[39]

(3) Under General Issue or General Denial

Under the general issue or general denial, the defendant may not only put the plaintiff on proof of the whole charge contained in the complaint, but may give in evidence any evidence which contradicts or tends to contradict the material allegations of the complaint which the plaintiff must prove, and, under the broader general issue, subject to certain exceptions, evidence of any new matter of defense or avoidance which will defeat the plaintiff's claim is also admissible

In a common-law action on the case pursuant to the general rule, as discussed in Negligence § 201 b, defendant under a plea of general issue may not only put plaintiff on proof of the whole charge contained in the complaint,[40] but may give in evidence, subject to certain exceptions, evidence of any new matter of defense or avoidance which will defeat plaintiff's claim.[41] Under a plea of not guilty which puts in issue merely the breach of duty or wrongful act alleged to have been committed by defendant, evidence denying defendant's ownership or operation of the train causing the injury is not admissible thereunder.[42] Since, under a general denial, while proof of new matter is not authorized, facts independent of those alleged by plaintiff may be proved if they are inconsistent with the facts which he is bound to establish, as discussed in Pleading § 529, it has been held that, in a statutory action based on a failure to fence, defendant may show under a general denial that at the point where the animal came on the track it could not lawfully have maintained a fence,[43] even though in another count in the same action defendant has made a tender of single damages as a distinct defense to plaintiff's claim for double damages and has thereby admitted for the purpose of trial of that particular count that it ought to have fenced;[44] but the general denial puts in

21. Ark.—Missouri Pac. R Co v Edwards, 14 S W 2d 230, 178 Ark 732
52 C J. p 103 note 20

22. Ark—Missouri Pac R Co v Edwards, supra
52 C J p 104 note 21

23. Okl—Kansas City Southern R Co v Sheffield, 188 P 682, 77 Okl 308
Tex—Galveston, etc, R Co v Dyer, Civ App, 38 S W 218

24. N H—Dowse v Maine Cent R R, 20 A 2d 629, 91 N H 419
52 C J p 104 note 23

25. Mo—Mapes v Chicago, etc, R Co, 76 Mo 367, distinguishing Collins v. Atlantic, etc., R Co, 65 Mo 230—Barr v Hannibal, etc., R. Co, 30 Mo.App 248

26. Idaho—Haner v Northern Pac R Co, 62 P 1028, 7 Idaho 305

27. S D—Borneman v. Chicago, etc, R Co, 104 N W. 208, 19 S D 459

28. Mo—Robertson v Wabash, etc, R Co, 84 Mo 119
52 C J. p 104 note 26

29. Idaho—Haner v Northern Pac R Co, 62 P 1028, 7 Idaho 305.
52 C J. p 104 note 27

30. Idaho—Haner v. Northern Pac R Co, supra
52 C.J p 104 note 28.

31. Mo—Hurley v. Missouri Pac R Co, 57 Mo.App 675—Boone v. Wabash, etc., R Co, 20 Mo App 232

32. Iowa—Davidson v. Central Iowa R Co, 39 N.W 163, 75 Iowa 22

33. N D—Corbett v Great Northern R. Co., 125 N W 1054, 19 N D 450

34. Ala—Northern Alabama R. Co v Hawkins, 81 So 574, 202 Ala 632—Western R Co v Stone, 39 So 723, 145 Ala 663

35. Ark—St Louis, etc, R. Co. v Kimmons, 32 S.W 505, 61 Ark. 200

36. Cal—Jahant v Central Pac R Co, 15 P. 362, 74 Cal. 9.

37. Ala—Choate v. Southern R. Co., 24 So 373, 119 Ala. 611—Central of Georgia R Co v Pittman, 80 So 141, 16 Ala App 567.

38. Mo—Ravenscroft v Missouri Pac R. Co, 27 Mo App 617—Milburn v Hannibal, etc, R. Co, 21 Mo App. 426

39. Tex—Chicago, etc, R Co. v Latham, 115 S W. 890, 53 Tex Civ App 210

40. Ala—Hayes v. Atlanta, etc, R Co, 84 So 556, 17 Ala 220

41. Iowa—Weaver v Chicago, etc, R Co., 124 N.W 1088, 146 Iowa 149
52 C.J. p 104 note 41

42. Fla—Dowling-Shands Lumber Co v Hogarth, 77 So 614, 74 Fla 605.

43. Ind—Jeffersonville, etc., R Co. v. Lyon, 55 Ind. 477
Iowa—Taylor v Chicago, etc, R Co, 40 N W 84, 76 Iowa 753

44. Iowa—Taylor v. Chicago, etc., R Co, supra.

issue only defendant's right to fence at the place in question,[45] and, unless such affirmative defense is specially pleaded, defendant cannot show a limitation or release of liability growing out of a provision of its charter,[46] or conduct on the part of plaintiff amounting to an estoppel.[47]

Contributory negligence on the part of plaintiff, in order to be available as a defense, must be especially pleaded[48] unless the complaint alleges that plaintiff was without fault or negligence.[49]

d. Variance

In accordance with general rules, the proof must correspond substantially with the allegations of the pleadings. A material variance is generally fatal to a recovery, but an immaterial variance is not

In accordance with the general rules of pleading, proof must correspond substantially with the allegations of the pleadings.[50] Any material variance is fatal to a recovery;[51] but a variance as to matters not materially affecting the cause of action and by which defendant has not been misled to his prejudice may be disregarded as immaterial[52] or in such cases the complaint may be amended after the introduction of evidence so as to make it correspond with the facts as proved.[53]

§ 639. Presumptions and Burden of Proof

a. In general
b. Recovery of attorney's fees

a. In General

Where the statutes restrict the venue of actions for injury to animals to the place of injury, the burden of proof to bring the case within the provisions of the statutes is on the plaintiff.

Where the statutes restrict the venue of actions for injury to animals to the place of injury, the burden is on plaintiff to show according to the provision of the particular statute that the injury occurred in the county where the action is instituted,[54] or in the township or an adjoining township,[55] as the case may be.

Existence of local stock regulations. Where the general law of the state prohibits animals running at large, unless allowed to do so by local regulation, a person relying on an exemption from the general law has the burden of proving such exemption,[56] and the presumption, in the absence of evidence of local regulation, is that, in the county where the injury occurred, the general law is in force.[57]

b. Recovery of Attorney's Fees

Where recovery is sought under a statute allowing attorney's fees to the plaintiff on proof of certain facts, the burden is on the plaintiff to prove the facts authorizing recovery of attorney's fees, and as to what would be a reasonable fee under the circumstances.

Where recovery is sought under a statute allowing attorney's fees to plaintiff on proof of certain facts, the burden is on plaintiff to prove the facts authorizing recovery of attorney's fees,[58] and as to what would be a reasonable fee under the circumstances.[59] Accordingly, where the statute allows recovery of attorney's fees for failure to post notice of the injury or for failure or refusal to pay within the time fixed by statute after demand, the burden is on plaintiff to prove defendant's default in these respects to entitle him to recovery of attorney's fees.[60]

§ 640. —— Liability Generally

a. In general
b. Finding dead or injured animal on or near track
c. Ownership or possession of animals
d. Ownership or operation of train

45. Iowa.—Kingsbury v. Chicago, etc., R. Co, 73 N.W 477, 104 Iowa 63.

46. Mo.—Kirby v. Wabash R. Co., 85 Mo App. 345.

47. Iowa.—Kingsbury v. Chicago, etc., R Co., 73 N.W. 477, 104 Iowa 63

48. Ark.—St Louis, etc., R. Co. v Philpot, 77 S.W. 901, 72 Ark 23 Ga.—Georgia R, etc., Co. v Wheeler, 65 S E. 719, 6 Ga App 746

49. S.C.—Long v Southern R Co, 27 S.E 531, 50 S C. 49.

50. Tex.—Southern Kansas R. Co v. Graham, Civ App, 155 S W. 653.
52 C.J. p 105 note 74
Variance between notice and proof see supra § 627 b.

51. Tex.—Southern Kansas R Co. v. Graham, supra.
52 C J p 105 note 75.
Time of injury
A variance between the allegation that the injury took place on a designated date and proof that it took place on a different date has been held material.—Atlantic Coast Line R Co v. Manning, 152 So. 735, 114 Fla. 8—52 C J p 105 note 75 [f].

52. Ala.—Southern R. Co. v. Pogue, 40 So. 565, 145 Ala. 444.
52 C J. p 105 note 76.

53. Ind.—Louisville, etc., R. Co. v. Overman, 88 Ind. 115.

54. Kan.—Kansas City, etc, R Co v. Burge, 19 P 791, 40 Kan. 734.
52 C.J. p 116 note 18.

55. Mo.—Theener v. Kurn, App., 132 S W.2d 707—Cook v. Kurn, App, 124 S W.2d 673
52 C J. p 116 note 19.

56. Okl.—Dickinson v. Stewart, 174 P 233, 70 Okl 271—Missouri, K & T Ry. Co. v. Savage, 122 P. 656, 32 Okl. 376—St. Louis & S. F. R Co v. Brown, 122 P. 136, 32 Okl 483.

57. Okl.—St Louis, etc., R. Co. v. Hardesty, 129 P. 739, 36 Okl. 682.
Effect of stock laws
Generally see supra §§ 552, 556.
On statutory presumption of negligence see infra § 641 b

58. Tex.—Quanah, etc, R. Co. v. Price, Civ.App, 192 S W. 805.

59. Tex.—Quanah, etc., R. Co. v. Price, supra

60. Ark.—Lusk v. Cooper, 197 S.W. 9, 130 Ark 241.

a. In General

In actions against railroad companies for injuries to animals, the burden is on the plaintiff to show every fact necessary to establish his cause of action, and, in the absence of statute, negligence on the part of the defendant will not be presumed.

In actions against railroad companies for injuries to animals, as in other actions, the burden is on plaintiff to show every fact necessary to establish his cause of action,[61] and he must show that the injury complained of was done by defendant.[62] In the absence of statute, negligence on the part of the company will not be presumed,[63] but on the contrary it will be presumed that the train was operated with ordinary care and diligence,[64] particularly where the animal injured was a trespasser,[65] and the burden is on plaintiff to show negligence on the part of the railroad or its employees[66] and that such negligence was the cause of the injury complained of,[67] even where the negligence consists in the omission of some statutory duty.[68] So, also, in jurisdictions where railroads are required to fence their tracks, if the animal came on the track at a place not required to be fenced, no presumption of negligence arises from the absence of a fence at such place,[69] and the burden is on plaintiff to show negligence,[70] and that such negligence was the cause of the injury.[71] Likewise, the same rule applies in cases where the animal came on the track by breaking over a sufficient fence or properly constructed cattle guard.[72]

b. Finding Dead or Injured Animal on or near Track

The mere fact that an animal is found dead or injured in the vicinity of a railroad track raises no legal presumption that it was killed or injured by a train, and the burden is on the plaintiff to establish by other evidence that it was so killed or injured.

The mere fact that an animal is found dead or injured in the vicinity of a railroad track raises no legal presumption that it was killed or injured by a train, and the burden is on plaintiff to establish by other evidence that it was so killed or injured.[73] Likewise, statutes establishing a presumption of negligence from the fact of injury or killing do not create any presumption of killing by the railroad from the fact of finding the carcass on or near the track.[74] Accordingly, where the body of an animal is found outside the right of way fence, the owner thereof has the burden of establishing that the animal was killed by the train before the statutory presumption of negligence may apply.[75]

c. Ownership or Possession of Animals

The burden is on the plaintiff to show either ownership or possession of the animal injured.

The burden is on plaintiff to show either ownership or possession of the animal injured,[76] and to prove joint ownership where it is claimed.[77] However, proof of plaintiff's possession is prima facie evidence of his ownership.[78]

d. Ownership or Operation of Train

The burden is on the plaintiff to prove the defendant's ownership or operation of the road where the injury occurred; but maintenance and ownership of the right of way create a presumption of operation of the trains running thereon.

The burden is on plaintiff to prove defendant's ownership or operation of the road where the injury occurred;[79] but maintenance and ownership

61. Ariz.—Musgrave v. Southern Pac. Co., 68 P.2d 202, 49 Ariz. 512.
52 C.J. p. 106 note 79.

62. Ala.—Miller-Brent Lumber Co. v. Thompson, 85 So. 379, 204 Ala. 202.
52 C.J. p. 106 note 80

63. Neb.—Starke v. Chicago, etc., R. Co., 118 N.W. 1066, 82 Neb. 800.
52 C.J. p. 106 note 82

64. U.S.—Campbell v. Receivers, C. C.Va., 4 F.Cas.No. 2,367, 4 Hughes 170.
Mo.—Jewett v. Kansas City, etc., R. Co., 50 Mo.App. 547.

65. U.S.—Campbell v. Receivers, C. C.Va., 4 F.Cas.No. 2,367, 4 Hughes 170

66. Ala.—Mobile, etc., R. Co. v. Glover, 43 So. 719, 150 Ala. 386.
Ga.—Atlantic Coast Line R. Co. v. Willis, 157 S.E. 254, 42 Ga.App. 768.
S.C.—Johnson v. Atlantic Coast Line R. Co., 60 S.E.2d 226, 217 S.C. 190.

Tenn.—Briggs v. Clawson Bros., 8 Tenn.App. 251
Tex.—Chicago, R. I. & G. Ry. Co. v. Rhone, Civ.App., 105 S.W.2d 707, error dismissed
52 C.J. p. 106 note 85.

67. Mont.—Fabert v. Northern Pac. R. Co., 251 P. 546, 77 Mont. 446
52 C.J. p. 106 note 86

68. Mo.—Holman v. Chicago, etc., R. Co., 62 Mo. 562
Ohio.—Didman v. Michigan Cent. R. Co., 5 Ohio S. & C.P. 140, 7 Ohio N.P. 380

69. Mo.—Wier v. St. Louis, etc., R. Co., 48 Mo. 558.

70. Tex.—International-Great Northern R. Co. v. Allen, Civ.App., 7 S.W.2d 900
51 C.J. p. 107 note 91.

71. Tex.—Houston, etc., R. Co. v. Barr, Civ.App., 18 S.W.2d 697.

72. Ill.—Chicago, etc., R. Co. v. Utley, 38 Ill. 410.

73. Ala.—Central of Georgia R. Co. v. Williams, 80 So. 880, 202 Ala. 496
52 C.J. p. 111 note 84.
Direct or circumstantial evidence is sufficient.—Missouri Pac. R. Co. v. Hull, 33 S.W.2d 406, 182 Ark. 873.

74. La.—Derrick v. Thompson, App., 11 So.2d 86
52 C.J. p. 111 note 86.

75. Ark.—Missouri Pac. R. Co. v. Briner, 209 S.W.2d 106, 213 Ark. 18.

76. Iowa.—Welsh v. Chicago, etc., R. Co., 6 N.W. 13, 53 Iowa 632
52 C.J. p. 111 note 91
Persons entitled to damages see supra § 557.

77. Ill.—Illinois Cent. R. Co. v. Finnigan, 21 Ill. 646.

78. Ind.—Toledo, etc., R. Co. v. Stevens, 63 Ind. 337

79. Ill.—Ohio, etc., R. Co. v. Taylor, 27 Ill. 207.

of the right of way create a presumption of operation of the trains running thereon;[80] and a defendant in possession of tracks, and bridges is presumed to be the owner of the land on which they are built, in the absence of evidence to the contrary.[81] Where railroad tracks are being used by two or more different railroads, the presumption, in the absence of rebutting evidence, is that the railroad owning the right of way is the company operating the train which injured the animal,[82] and, if the action is brought against a company not owning the track, the burden is on plaintiff to prove that the injury was caused by one of defendant's trains.[83] Where defendant's operation of the railroad is established, the operation of the particular car or train responsible for the injury is presumed to be with defendant's authority and consent.[84]

§ 641. —— Fact of Killing or Injury

a. In general
b Statutory provisions
c. Existence or absence of lawful fence

a. In General

Although there is some authority to the contrary, in most jurisdictions, in the absence of statute, the mere fact that an animal is killed or injured by a train raises no presumption of negligence on the part of the railroad company or its servants, and the burden is on the plaintiff to show the existence of such negligence.

The rule followed in a majority of the jurisdictions is that, in the absence of statute, the mere fact that an animal is killed or injured by a train raises no presumption of negligence on the part of the railroad company or its servants,[85] and the burden is on plaintiff to show the existence of such negligence;[86] and this rule has been applied where the killing was at a place on the track which is not required to be fenced under the fencing statutes.[87]

In some jurisdictions, however, even in the absence of statute, although the burden of showing negligence on the part of the railroad company rests throughout the case on the owner of the livestock killed by the railroad train,[88] proof of the injury is prima facie evidence of negligence and the burden then shifts to the railroad company to go forward with the evidence to show that due care was exercised.[89] Where this latter rule is followed, it is not limited in its application to cases where defendant introduces no testimony,[90] but there is no longer a presumption of negligence whenever it is satisfactorily shown that those in charge of the train used all ordinary and reasonable care to avoid the injury.[91] Under this rule the existence of a stock law prohibiting animals from running at large does not destroy the presumption,[92] but is a material fact bearing on the effort of defendant to overcome the presumption.[93]

Still another view is that proof of the injury makes a prima facie case of negligence,[94] but that, where the animal was wrongfully at large, plaintiff's negligence in permitting the animal to be at large counterbalances the presumption of negligence arising from the fact of injury, and that the burden is on plaintiff to show such gross negligence or willful misconduct as will entitle him to recover under such circumstances.[95]

b. Statutory Provisions

(1) In general
(2) Constitutionality of statutes
(3) Evidence in rebuttal

80. Ala.—Southern R. Co v. Blankenship, 70 So. 132, 194 Ala. 368.

81. Or.—Todd v. Pacific R., etc., Co., 110 P. 391, 117 P. 300, 59 Or. 249.

82. Ala.—Southern R. Co v. Blankenship, 70 So. 132, 194 Ala. 368.

83. Ala.—Mobile, etc., R. Co v. Borden Coal Co., 98 So. 315, 19 Ala. App. 481

84. Tex.—Quanah, etc., R. Co. v. Price, Civ. App., 192 S.W. 805.

85. Colo.—Chicago, etc., R. Co v. Rhodes, 121 P. 769, 21 Colo. App. 229.
52 C.J. p. 107 note 94.
Instructions as to presumptions and burden of proof see infra § 681.

86. Colo.—Atchison, T. & S. F. Ry. Co v. Gumaer, 125 P. 589, 22 Colo. App. 495
52 C.J. p. 107 note 94.

87. Mo.—Swearingen v. Missouri, etc., R. Co., 64 Mo. 73.

88. S.C.—Johnson v. Atlantic Coast Line R. Co., 60 S.E.2d 226, 217 S.C. 190

89. S.C.—Johnson v. Atlantic Coast Line R. Co., supra.
52 C.J. p. 107 note 97.
Rule held inapplicable to dogs
S.C.—Fowles v. Seaboard Air Line R. Co., 53 S.E. 534, 73 S.C. 306—Wilson v. Wilmington, etc., R. Co., 44 S.C.L. 52.
52 C.J. p. 24 note 76 [a].

90. S.C.—Johnson v. Atlantic Coast Line R. Co., 60 S.E.2d 226, 217 S.C. 190—Joyner v. South Carolina R. Co., 1 S.E. 52, 26 S.C. 49.

91. S.C.—Johnson v. Atlantic Coast Line R. Co., 60 S.E.2d 226, 217 S.C. 190.
Weight and sufficiency of evidence generally see infra §§ 655–666.

92. S.C.—Davis v. Florida Cent., etc., R. Co., 25 S.E. 224, 47 S.C. 390—Joyner v. South Carolina R. Co., 1 S.E. 52, 26 S.C. 49—Jones v. Columbia, etc., R. Co., 20 S.E. 249.

93. S.C.—Davis v. Florida Cent., etc., R. Co., 25 S.E. 224, 47 S.C. 390.
52 C.J. p. 110 note 76
Questions of law and fact generally see infra §§ 668–678

94. Wis.—Galpin v. Chicago, etc., R. Co., 19 Wis. 604.

95. Wis.—Galpin v. Chicago, etc., R. Co., supra.

(4) Effect of failure to construct or maintain fence
(5) Effect of stock laws

(1) In General

In a number of jurisdictions the common-law rule as to the burden of proof has been changed by statute, and, under these statutes, it has been held that proof of the injury to an animal by a railroad train is prima facie evidence of negligence, placing the burden on the company to rebut the presumption of negligence

Although it has been stated in some decisions that a statute in terms stating that the killing is "prima facie evidence of negligence" means no more than evidence sufficient to carry the case to the jury and to justify, but not compel, a verdict as for a negligent wrong,[96] and does not place the burden on the railroad company to rebut the presumption of negligence,[97] in a number of jurisdictions the common-law rule as to the burden of proof has been changed by statute, and, under these statutes, proof of the injury to an animal by a railroad train is prima facie evidence of negligence placing the burden on the company to rebut the presumption of negligence,[98] and entitling plaintiff to recover in the absence of evidence in rebuttal.[99] Accordingly, where the statutes prescribe certain duties and precautions to be taken by the railroad, the burden is on the railroad to show that there was a compliance with the statutory requirements,[1] or legal excuse or justification for its noncompliance,[2] and the presumption is restricted, under some statutes, to cases of failure or violation of

96. N C—Ferrell v Norfolk Southern R. Co., 129 S E 155, 190 N C 126—Hanford v Southern R Co., 83 S E 470, 167 N C 277

Sufficiency of evidence to overcome presumption of negligence as question for jury generally see infra § 672.

97. N C—Ferrell v. Norfolk Southern R. Co., 129 S E 155, 190 N C 126.

98. Ala—Alabama Great Southern R Co. v Smelley, 187 So 630, 237 Ala 471—Louisville & N R. Co v Martin, 137 So. 25, 223 Ala 410—Louisville & N R. Co v Sellers, 134 So 8, 222 Ala 615—Louisville & N. R. Co. v Green, 133 So. 294, 222 Ala 557—Alabama Great Southern R. Co v. Hill, 43 So 2d 136, 34 Ala App 466, certiorari denied 43 So 2d 139, 253 Ala 124—Perry v Atlantic Coast Line R. Co., 42 So 2d 837, 34 Ala App 644—Gulf, M. & O R Co. v Phifer, 42 So.2d 44, 34 Ala.App 588—L & N R Co v Holmes, 27 So 2d 878, 32 Ala.App. 551—Gulf, M & O. R Co. v Scott, 27 So 2d 150, 32 Ala. App 326, certiorari denied 27 So 2d 152, 248 Ala. 250—Alabama Great Southern R Co. v. Christian, 163 So. 466, 26 Ala.App 555—Central of Georgia Ry Co. v Gholston, 129 So 705, 24 Ala App. 18

Ark—Chicago, R. I. & P R Co v. Reeves, 231 S W 2d 103—Missouri Pac. R. Co. v. Briner, 209 S.W 2d 106, 213 Ark 18—St Louis-San Francisco R. Co. v. Call, 122 S W 2d 178, 197 Ark 225—Missouri Pac R Co v Mobley, 91 S W 2d 611, 192 Ark 396—Chicago, R I & P. Ry. Co v Fowler, 55 S.W 2d 75, 186 Ark 682—Missouri Pac R Co v. Hull, 33 S.W 2d 406, 182 Ark 873—Missouri Pac. R. Co v Foltz, 33 S W.2d 51, 182 Ark 941—St Louis-San Francisco Ry Co. v Cole, 27 S W 2d 992, 181 Ark. 780

Fla.—Seaboard Air Line Ry. Co v Watson, 137 So 719, 103 Fla. 477, appeal dismissed 53 S Ct 32, 287 U S 86, 77 L Ed 180, 86 A L R 174

Ga—Atlantic Coast Line R. Co v. Rowe, 64 S E 2d 216, 83 Ga App 540—Atlantic Coast Line R Co v. Mercer, 60 S E 2d 649, 82 Ga App. 312—Atlantic Coast Line R Co v Carver, 57 S E 2d 692, 81 Ga App 26—Atlantic Coast Line R Co v. Hodges, 54 S E 2d 500, 79 Ga App 563—Atlantic Coast Line R Co. v. Martin, 53 S E.2d 176, 79 Ga App 194—Powell v Rogers, 42 S E 2d 573, 75 Ga App 165—Jones v Powell, 30 S E 2d 446, 71 Ga App 202—Savannah & A. Ry Co. v. De Busk, 23 S E 2d 529, 68 Ga App 529—Pidcock v Stripling, 19 S E 2d 178, 66 Ga.App. 692—Macon, D & S R Co v Stephens, 19 S E 2d 32, 66 Ga App 636—Powell v. Anderson, 193 S E 450, 56 Ga App 592—Alabama Great Southern R. Co. v. Forester, 157 S E. 924, 43 Ga.App. 66.

La—Moody v. Texas & P. Ry. Co., App, 37 So 2d 346—Cathey v. Louisiana & A Ry. Co., App, 30 So.2d 763—Derrick v. Thompson, App, 11 So 2d 86—Edwards v Thompson, App, 2 So.2d 493—Dumas v. Thompson, App, 185 So 307—Holley v Louisiana & A Ry Co, App, 155 So 790—Campbell & Co v Texas & P Ry Co., App, 152 So. 351, amended on other grounds 155 So 786—Boyd v. Kansas City, S & G. Ry Co, App, 147 So 100—Duke v Missouri Pac R. Co, App, 142 So 333—Jackson v. Missouri Pac R Co, App, 141 So 770—Gallaspy v. Louisiana Ry & Nav Co, 133 So 506, 16 La App 153.

N D—Snyder v. Northern Pac. Ry Co, 285 N W 450, 69 N D. 266

52 C J p 107 note 6

Purpose of statute

The purpose of statutes creating a presumption that the servants of the railroad company were negligent in the operation of the train which caused the injury is to put the burden on the party to reveal the truth who is most nearly in a position to know the facts A train is a large and complex vehicle and naturally its crew members are in better position to know what, if anything, was wrong when an accident occurred For that reason the legislature saw fit to require in such cases that the company go forward with the evidence and show that its servants exercised all ordinary and reasonable care and diligence in operating the train—Powell v American Sumatra Tobacco Co., 17 So 2d 391, 154 Fla 227.

Kind of crossing

Owner of cattle having made prima facie case under statute against railroad injuring them, railroad, having duty to produce evidence of ordinary care, had burden of showing what kind of crossings were involved.—Hildebrand v. Chicago, B & Q R R, 17 P 2d 651, 45 Wyo. 175.

99. Ala—Gulf, M. & O. R. Co. v Scott, 27 So 2d 150, 32 Ala App 326, certiorari denied 27 So 2d 152, 248 Ala. 250

Ark—Missouri Pac R Co v Mobley, 91 S W 2d 611, 192 Ark. 396—Missouri Pac R. Co. v. Foltz, 33 S W 2d 51, 182 Ark 941

La—Holley v. Louisiana & A Ry Co, App, 155 So. 790—Gallaspy v Louisiana Ry & Nav Co, 133 So. 506, 16 La.App. 153.

Wyo—Hildebrand v Chicago, B. & Q R. R, 17 P 2d 651, 45 Wyo 175.

52 C J. p 108 note 7.

1. Ala.—Alabama Great Southern R Co v. Smelley, 187 So. 630, 237 Ala. 471

52 C J. p 108 note 9.

2. Ala.—Louisville, etc., R Co v Posey, 11 So 423, 96 Ala. 262

Tenn—Buford v Louisville, etc, R Co, 240 S W 759, 146 Tenn. 262.

the statutory duty[3]

The statutes, however, as discussed supra § 640 b, raise no presumption that the railroad company did the killing or caused injury, which fact must be affirmatively shown by plaintiff; nor do they raise any presumption of wantonness or willful injury in cases where plaintiff's own evidence shows circumstances which would prevent his recovering merely on the ground of negligence;[4] and, if the complaint specifies the particular acts of negligence relied on, the presumption extends only to the particular negligence alleged;[5] but, where the suit is in a justice's court and there is no petition alleging negligence, the presumption will apply to any theory of negligence deducible from the facts as brought out by the evidence at the trial.[6]

Application of statutes. The statutory presumption has been held to apply to cases of injury as well as where the animal was killed,[7] and without regard to whether the injury was mortal or otherwise.[8] The statutory presumption has been applied to cases of injury to animals in the custody or under the control of the owner or some other person as well as to animals running at large,[9] and, in some jurisdictions, to injuries occasioned by trains, although not by collision with them,[10] but a larger number of statutes have been construed as restricting their application to injuries inflicted directly by the cars or engine[11] Under some of the statutes the presumption applies to injuries inflicted at certain places,[12] and only when the action is instituted within a certain time after the injury.[13] The statute applies to injuries inflicted by logging railroads.[14]

If the case, by reason of the circumstances of the injury or the time of instituting the action, is not within the application of the statute, the burden is on plaintiff to show negligence on the part of the railroad or its servants[15] The statute does not apply where the action is brought before the statute goes into effect,[16] unless the clause excepting existing rights, remedies, or defenses expressly states that the exception shall not apply to rules of evidence.[17]

Statutes making proof of the injury by a railroad train to "any cattle or other live stock" prima facie evidence of negligence, have no application to dogs,[18] geese,[19] or turkeys,[20] but, where the statute fixing the burden of proof on defendant railroad in terms applies to "property," dogs are held to be property, and to be within the statute.[21]

(2) Constitutionality of Statutes

Statutes placing the burden of proof on the railroad company to negative negligence on its part, when sued for injuries to animals, have been held valid.

Following the general constitutional doctrine limiting the power of the legislature in changing rules of evidence in civil cases to the making of rules which do not preclude a party from presenting the facts supporting his theory of the case, as discussed in Constitutional Law § 621, statutes placing the burden of proof on the railroad company to negative negligence on its part, when sued for injuries to animals, have been held valid[22] Accordingly, in order to uphold its constitutionality, a statute providing that a railroad company "shall be liable in law for any damage done to live stock or other property by the running of the cars or

3. Colo—Davis v Holly Sugar Corp, 221 P. 1091, 74 Colo 331
4. Ark—St Louis, etc., R. Co. v Taylor, 20 S W. 1083, 57 Ark. 136
La—Mongogna v Illinois Cent. R. Co, 2 La.A., Orleans, 379
5. Ga.—Georgia Cent R Co. v. Weathers, 47 S E 956, 120 Ga. 475
6. Ga.—Georgia Southern, etc., R Co. v. Converse, 116 S.E. 20, 29 Ga. App. 411.
7. Ark.—St Louis, etc, R. Co. v. Hagan, 42 Ark. 122.
8. Ark—St Louis, etc, R. Co. v. Hagan, supra.
9. Ark—St Louis, etc, R. Co. v. Taylor, 20 S.W 1083, 57 Ark. 136.
52 C J. p 109 note 33.
10. Ark—St Louis, etc., R. Co. v. Bragg, 50 S W. 273, 66 Ark. 248—Little Rock, etc., R Co v. Payne, 33 Ark 816, 34 Am.R. 55.
11. Ala.—Northern Alabama R. Co. v. Foster, 76 So. 979, 200 Ala. 621.
52 C.J. p 109 note 35.
12. Ala—Central of Georgia R. Co v Vaughan, 92 So. 552, 207 Ala 381.
52 C.J. p 109 note 38.
13. N C—Coburn v Atlantic Coast Line R. Co., 44 S E 2d 200, 227 N C. 695.
52 C.J. p 109 note 40.
14. Ala—O'Rear v. Manchester Lumber Co, 60 So. 462, 6 Ala.App. 461.
15. Ala.—Kansas City, etc., R Co v Henson, 31 So. 590, 132 Ala. 528
52 C.J. p 109 note 42.
16. Colo.—Burlington, etc, R. Co. v Shelter, 40 P. 157, 6 Colo.App. 246
17. Ala—Southern R Co. v. Penney, 51 So 392, 164 Ala. 188.
18. N.C—Moore v. Charlotte Electric R, etc, Co, 48 S E. 822, 136 N C. 554, 67 L.R A. 470.
52 C.J. p 24 note 76.
19. N.C.—James v Atlantic Coast Line R Co, 82 S E 1026, 166 N C. 572, L R A 1915B 163, Ann Cas 1915B 470.
20. N C—Addison v Norfolk Southern R. Co., 129 S E. 156, 190 N.C. 849
21. Ala—Louisville & N. R Co. v. Martin, 137 So 25, 223 Ala. 410—Louisville & N. R Co v. Green, 133 So. 294, 222 Ala 557—Alabama Great Southern R. Co v. Hill, 43 So 2d 136, 34 Ala App 466, certiorari denied 43 So 2d 139, 253 Ala. 124—Gulf, M & O R. Co v Phifer, 42 So 2d 44, 34 Ala App 588.
Ark—Missouri Pac. R. Co v Hull, 83 S W 2d 406, 182 Ark. 873.
52 C.J. p 24 note 80.
22. Ala.—Louisville & N. R Co. v Martin, 137 So 25, 223 Ala. 410—Louisville & N. R. Co. v. Green, 133 So. 294, 222 Ala. 557
Fla—Seaboard Air Line Ry. Co. v Watson, 137 So 719, 103 Fla 477, appeal dismissed 53 S Ct. 32, 287 U.S. 86, 77 L Ed. 180, 86 A.L.R. 174.

locomotives," although broad and positive in its terms, has been construed as imposing merely a prima facie liability and the burden of proof to show freedom from fault on the railroad company, but not depriving it of the opportunity to establish its nonliability by evidence in rebuttal.[23] A fortiori, a statute which in terms provides that the killing of animals by engines or cars shall be prima facie evidence of negligence on the part of defendant railroad is within the power of the legislature to enact.[24] However, following another rule of constitutional law, deduced from the general doctrine already stated, to the effect that the legislature may not arbitrarily provide that proof of one fact shall constitute even prima facie evidence of another fact that it has no reasonable tendency to establish, it has been held that a statute creating a presumption of the railroad's negligence from its killing of an animal on its track which is to prevail as against opposing testimony unless such testimony is found by the jury to preponderate, as distinguished from a presumption which merely supplies an inference of liability in the absence of evidence, is unconstitutional.[25]

(3) Evidence in Rebuttal

The statutory presumption of negligence or default in performance of a statutory duty arising from proof of killing or injury of an animal by a railroad train is not conclusive but may be rebutted and overcome by evidence.

The statutory presumption of negligence or default in performance of a statutory duty arising from proof of killing or injury of an animal by a railroad train is not conclusive but may be rebutted and overcome by evidence.[26] In order to rebut the presumption, defendant must show affirmatively that there was no negligence[27] or default in performance of a statutory duty,[28] directing[29] and confining[30] its proof to the particular acts of negligence or statutory default charged in plaintiff's pleading. The statutory presumption, it has been held, is merely a rule of evidence,[31] and it is effectually overcome, whenever it is satisfactorily shown that those in charge of the train used all ordinary and reasonable care to avoid the injury,[32] and that all the statutory requirements were com-

23. Ark.—St. Louis, etc., R. Co. v. Taylor, 20 S.W. 1083, 57 Ark. 136—Little Rock, etc., R. Co. v. Payne, 33 Ark. 816, 34 Am. R. 55

24. Ariz.—Southern Pac. Co. v. Nelson, 180 P. 987, 20 Ariz. 344

25. U.S.—Western, etc., R. Co. v. Henderson, Ga., 49 S.Ct. 445, 279 U.S. 639, 73 L.Ed. 884

Ga.—Louisville, etc., R. Co. v. Campbell, 148 S.E. 920, 40 Ga.App. 130

26. Ark.—Chicago, R. I. & P. R. Co. v. Reeves, 231 S.W.2d 103—Missouri Pac. R. Co. v. Briner, 209 S.W.2d 106, 213 Ark. 18

Ga.—Powell v. Rogers, 42 S.E.2d 573, 75 Ga.App. 165—Savannah & A. Ry. Co. v. De Busk, 23 S.E.2d 529, 68 Ga.App. 529—Pidcock v. Stripling, 19 S.E.2d 178, 66 Ga.App. 692.

52 C.J. p. 109 note 47.

27. Ala.—Louisville & N. R. Co. v. Martin, 137 So. 25, 223 Ala. 410—Louisville & N. R. Co. v. Sellers, 134 So. 8, 222 Ala. 615—Louisville & N. R. Co. v. Green, 133 So. 294, 222 Ala. 557—Alabama Great Southern R. Co. v. Hill, 43 So.2d 136, 34 Ala.App. 466, certiorari denied 43 So.2d 139, 253 Ala. 124—Gulf, M. & O. R. Co. v. Phifer, 42 So.2d 44, 34 Ala.App. 588—Gulf, M. & O. R. Co. v. Scott, 27 So.2d 150, 32 Ala.App. 326, certiorari denied 27 So.2d 152, 248 Ala. 250—Alabama Great Southern R. Co. v. Christian, 163 So. 466, 26 Ala.App. 555—Central of Georgia Ry. Co. v. Gholston, 129 So. 705, 24 Ala.App. 18.

Ark.—Missouri Pac. R. Co. v. Mobley, 91 S.W.2d 611, 192 Ark. 396.

Wyo.—**Corpus Juris quoted in** Hildebrand v. Chicago, B. & Q. R. R., 17 P.2d 651, 652, 45 Wyo. 175.

52 C.J. p. 109 note 48.

28. Tex.—International, etc., R. Co. v. Schram, Civ.App., 138 S.W. 195

Wyo.—**Corpus Juris quoted in** Hildebrand v. Chicago, B. & Q. R. R., 17 P.2d 651, 652, 45 Wyo. 175.

29. Miss.—Columbus, etc., R. Co. v. Nye, 104 So. 90, 139 Miss. 295

Wyo.—**Corpus Juris quoted in** Hildebrand v. Chicago, B. & Q. R. R., 17 P.2d 651, 652, 45 Wyo. 175.

30. Ga.—Georgia Cent. R. Co. v. Bagley, 49 S.E. 780, 121 Ga. 781.

Wyo.—**Corpus Juris quoted in** Hildebrand v. Chicago, B. & Q. R. R., 17 P.2d 651, 652, 45 Wyo. 175

31. Ga.—Atlantic Coast Line R. Co. v. Rowe, 64 S.E.2d 216, 83 Ga.App. 540—Atlantic Coast Line R. Co. v. Mercer, 60 S.E.2d 649, 82 Ga.App. 312—Atlantic Coast Line R. Co. v. Hodges, 54 S.E.2d 500, 79 Ga.App. 563—Powell v. Anderson, 193 S.E. 450, 56 Ga.App. 592.

32. Ark.—Chicago, R. I. & P. R. Co. v. Reeves, 231 S.W.2d 103—Chicago, R. I. & P. Ry. Co. v. Fowler, 55 S.W.2d 75, 186 Ark. 682—Missouri Pac. R. Co. v. Foltz, 33 S.W.2d 51, 182 Ark. 941—St. Louis-San Francisco Ry. Co. v. Cole, 27 S.W.2d 992, 181 Ark. 780

Fla.—Seaboard Air Line Ry. Co. v. Watson, 137 So. 719, 103 Fla. 477, appeal dismissed 53 S.Ct. 32, 287 U.S. 86, 77 L.Ed. 180, 86 A.L.R. 174

Ga.—Atlantic Coast Line R. Co. v. Mercer, 60 S.E.2d 649, 82 Ga.App. 312—Atlantic Coast Line R. Co. v. Carver, 57 S.E.2d 692, 81 Ga.App. 26—Atlantic Coast Line R. Co. v. Hodges, 54 S.E.2d 500, 79 Ga.App. 563—Atlantic Coast Line R. Co. v. Martin, 53 S.E.2d 176, 79 Ga.App. 194—Jones v. Powell, 30 S.E.2d 446, 71 Ga.App. 202

52 C.J. p. 110 note 58.

Weight and sufficiency of evidence where statutory presumption of negligence is rebutted generally see infra § 656.

"Ordinary care" defined

Prima facie case made by statute where railroad injured cattle could be met only by evidence showing "ordinary care," namely, that degree of care which under same or similar circumstances might reasonably be expected of ordinarily prudent person.—Hildebrand v. Chicago, B. & Q. R. R., 17 P.2d 651, 45 Wyo. 175

Evidence held sufficient to rebut statutory presumption

(1) In general.—Powell v. Rogers, 42 S.E.2d 573, 75 Ga.App. 165

(2) In action to recover damages for killing of plaintiff's mule by operation of defendant railroad company's train, defendant's evidence that visibility at time of accident was bad, that train was not being operated at over thirty-five miles per hour, that defendant's servants kept vigilant lookout ahead and rang locomotive bell, blew whistle, applied brakes, and did everything within their power to avoid striking mule after discovering it on track, was sufficient, as matter of law, to rebut

plied with,[33] or that compliance was impossible or would have been unavailing,[34] or that there was no negligence as to keeping a lookout and after the animal was discovered all possible precautions were taken,[35] or that under the circumstances nothing which might have been done could have avoided the accident.[36]

In some jurisdictions when the railroad company introduces some evidence of the exercise of reasonable care and skill, the presumption vanishes,[37] while in others it has been held that merely some evidence is not sufficient to cause the presumption to vanish,[38] but it must be adequate to meet or balance the prima facie case,[39] which can be done only by evidence which shows the contrary or opposite of the negligence presumed.[40] In still other jurisdictions, it has been held that in view of the fact that the statutory presumption of negligence arises without any evidence of negligence, less evidence is required to rebut it than would be necessary if plaintiff made proof of actual negligence,[41] and, where the facts as to the killing are all put in evidence, the statute has no application.[42]

Subject to the above rules, it has been held that it is not sufficient to show merely that there was probably no negligence [43] or that those in charge of the train knew nothing of the occurrence of the injury,[44] or to show the exercise of due care in one respect only,[45] as that all efforts were made to avoid the injury after discovery of the animal without showing that a proper lookout was maintained,[46] or the crossing signals given,[47] or where negligence might be imputed to the company from the acts or omissions of two or more of its servants to show the exercise of due care on the part of only one of them.[48]

In any event, when satisfactory evidence of reasonable care has been introduced in rebuttal by the railroad company, such evidence is controlling, if not discredited or contradicted,[49] and cannot arbitrarily be disregarded,[50] and the burden then shifts to plaintiff to establish defendant's negligence

statutory prima facie presumption of their want of reasonable skill and care —Atlantic Coast Line R Co v Rowe, 64 S E 2d 216, 83 Ga App 540

(3) Evidence that locomotive headlights were adjusted to shine on roadbed and that engineer was looking ahead constantly but could not see cow approaching track up a slight incline until it was within eight feet of track, fifty feet from locomotive, and that he immediately gave cattle alarm and applied brakes but could not stop train in time to avoid striking cow, overcame statutory presumption of negligence —Atlantic Coast Line R Co v Martin, 53 S E 2d 176, 79 Ga App 194

(4) In action against railroad for damages for killing of cattle, presumption of negligence created by proof that cattle were killed by train was rebutted when railroad introduced testimony of engineer and fireman which clearly explained every material fact connected with the killing.—Macon, D. & S R. Co v Stephens, 19 S.E 2d 32, 66 Ga App. 636.

Evidence held insufficient to rebut statutory presumption

Ga —Pidcock v. Stripling, 19 S E 2d 178, 66 Ga App 692

La —Cathey v. Louisiana & A. Ry. Co, App., 30 So 2d 763.

33. Ala —Alabama Great Southern R Co v. McAlpine, 80 Ala 73.

34. Ala —Mobile, etc, R. Co v. Caldwell, 3 So 445, 83 Ala 196

35. Ga —Atlantic Coast Line R Co v. Martin, 53 S E 2d 176, 79 Ga App 194

52 C.J. p 110 note 61.

36. Ga —Powell v. Rogers, 42 S E 2d 573, 75 Ga.App 165.

52 C J p 110 note 62

37. Ga —Atlantic Coast Line R Co v Rowe, 64 S E 2d 216, 83 Ga App 540—Atlantic Coast Line R Co v. Carver, 57 S.E.2d 692, 81 Ga App 26—Jones v Powell, 30 S E 2d 446, 71 Ga App 202

38. Wyo —Hildebrand v Chicago, B & Q R R, 17 P 2d 651, 45 Wyo 175

39. Wyo —Hildebrand v Chicago, B & Q R R, 17 P 2d 651, 45 Wyo 175

Sufficient weight to overcome

Under statute, where owner proved that his mules were killed by train, a case in owner's favor was made out, and it then devolved on railroad company, if it would exculpate itself from inference of negligence arising from owner's proof, to adduce proof of sufficient weight to overcome it —Edwards v Thompson, La App, 2 So 2d 493.

40. Ark —Chicago, R. I & P Ry Co v Fowler, 55 S W 2d 75, 186 Ark. 682

Wyo —Hildebrand v. Chicago, B & Q R R, 17 P 2d 651, 45 Wyo 175

41. N D —Snyder v. Northern Pac. Ry Co, 285 N W 450, 69 N D 266 —Stoeber v Minneapolis, etc, R Co, 168 N.W 562, 40 N D 121

42. Fla —Powell v. American Sumatra Tobacco Co., 17 So.2d 391, 154 Fla 227.

N.D —Snyder v Northern Pac. Ry Co, 285 N W 450, 69 N D 266

Wyo —**Corpus Juris cited in** Hildebrand v. Chicago, B & Q R R, 17 P 2d 651, 654, 45 Wyo 175

52 C J p 108 note 12

43. N C —Clark v Western North Carolina R Co, 60 N C 109

52 C J p 110 note 52

44. Ky —Louisville, etc, R Co v Montgomery, 32 S W 738, 14 Ky L 807

45. Ark —St Louis Southwestern R Co v Costello, 56 S W 270, 68 Ark 32

52 C J. p 110 note 54.

46. Ark —St Louis, etc, R Co. v Costello, 56 S W. 270, 68 Ark 32

52 C J p 110 note 55.

47. Ark —St Louis, etc, R Co. v. Hendricks, 13 S W 699, 53 Ark 201

48. Ark —St Louis Southwestern R Co v Ledbetter, 20 S W.2d 632, 180 Ark 114.

52 C J p 110 note 57.

49. Ga —Atlantic Coast Line R. Co v. Mercer, 60 S E 2d 649, 82 Ga App 312—Atlantic Coast Line R Co v Hodges, 54 S E 2d 500, 79 Ga App. 563—Atlantic Coast Line R Co v Martin, 53 S.E 2d 176, 79 Ga App 194—Savannah & A Ry Co v De Busk, 23 S E 2d 529, 68 Ga App. 529—Alabama Great Southern R Co v Forester, 157 S. E. 924, 43 Ga App 66.

50. Ark —St Louis-San Francisco R Co v Cole, 27 S W 2d 992, 181 Ark 780

Ga —Atlantic Coast Line R Co v Hodges, 54 S.E.2d 500, 79 Ga App 563.

by a preponderance of the evidence, without any aid from the statutory presumption of negligence,[51] although in some jurisdictions under similar statutes it has been held that, even though the presumption disappears with the introduction of contrary evidence by defendant, the burden still remains on defendant to overcome with his evidence the inferences naturally deducible from the facts presented by plaintiff in support of his charge of negligence or violation of a statutory duty.[52]

(4) Effect of Failure to Construct or Maintain Fence

In the absence of a statutory obligation to fence, a statutory presumption of negligence arising from the killing of animals casts on a railroad company, which has failed to fence its tracks, the burden of proving that the injuries to stock on its track were not caused by its negligence

In the absence of a statutory obligation to fence, a statutory presumption arising from the killing of animals casts on a railroad company, which has failed to fence its tracks, the burden of proving that the injuries to stock on its track were not caused by its negligence[53] Where there is a statutory obligation to fence, and where the provisions creating a presumption of negligence from the killing are construed to be applicable only when animals are killed or injured at places where the statute makes it the duty of the railroad to fence, the presumption does not apply where the injuries are inflicted at places where, under the statute, the railroad is not required to fence[54] However, where the statutory provisions creating the presumption against the railroad are in general terms and contain no exceptions in favor of railroads as to accidents occurring in places where fencing is not required, it has been held that the presumption does apply with respect to the killing of animals at such places.[55]

(5) Effect of Stock Laws

Although there is authority to the contrary, generally in jurisdictions where proof of injury raises a presumption of negligence which must be rebutted by the railroad company, the existence of stock laws prohibiting animals from running at large does not destroy the presumption.

In jurisdictions where proof of injury raises a presumption of negligence which must be rebutted by the railroad company, the existence of stock laws prohibiting animals from running at large does not destroy the presumption.[56] However, in some jurisdictions, where animals are permitted to run at large in violation of a local regulation, the presumption of negligence has been held inapplicable,[57] and plaintiff has the burden of showing negligence on the part of the railroad company.[58]

c. Existence or Absence of Lawful Fence

In the absence of a statute providing otherwise, where a railroad company has properly fenced its tracks, no presumption of negligence arises from the mere fact that an animal was injured thereon, and the burden is on the plaintiff to show that there was negligence on the part of the company which caused the injury.

Where a railroad company has properly fenced its tracks, no presumption of negligence, except where, and to the extent that, the matter may be affected by statutory provisions, arises from the mere fact that an animal was injured thereon,[59] and the burden is on plaintiff to show that there

51. Ga —Atlantic Coast Line R Co v Rowe, 64 S E 2d 216, 83 Ga App. 540—Atlantic Coast Line R Co. v. Mercer, 60 S.E 2d 649, 82 Ga App. 312—Atlantic Coast Line R. Co. v. Carver, 57 S E 2d 692, 81 Ga App 26—Atlantic Coast Line R. Co v Martin, 53 S.E 2d 176, 79 Ga App 194—Jones v Powell, 30 S E.2d 446, 71 Ga App 202—Macon, D & S R Co v Stephens, 19 S E 2d 32, 66 Ga App. 636
Wyo —Hildebrand v. Chicago, B & Q R R, 17 P 2d 651, 45 Wyo 175

Dog's

(1) In action by owner of dog against railroad to recover for killing of dog by train, evidence by railroad that no member of train crew saw dog, shifted burden on owner of dog to produce evidence tending to show that train crew saw dog and should reasonably have known, that it was helpless or indifferent, and failure to do so required an affirmative charge for railroad —Gulf, M. & O R. Co v Phifer, 42 So 2d 44, 34 Ala App 588.

(2) In order for owner to recover for death of dogs struck by train some proof of negligence in operation of train was required —Chicago, R I & P R Co v Reeves, Ark, 231 S W 2d 103.

52. S D —True v Chicago, etc., R Co., 173 N W 642, 42 S D. 35
52 C.J. p 108 note 15.

53. La —Friedman's Estate v. Texas & Pac Ry Co, 25 So.2d 88, 209 La 540—Wise v Texas & P Ry. Co, App, 45 So 2d 368—Moody v. Texas & P. Ry Co, App, 37 So. 2d 346—Abraham v Texas & P Ry. Co, App, 24 So 2d 886—Daughdrill v Texas & N O R Co, App, 20 So 2d 644—Friedman v Texas & P. R Co, App, 18 So 2d 845—Smith v Thompson, App., 185 So 71—Jeter v. Texas & P. Ry. Co, App, 149 So 144—Boyd v Kansas City, S. & G Ry. Co, App, 147 So 100—Pendleton v Missouri Pac. R. Co, App, 145 So 689—Duke v Missouri Pac. R Co, App, 142 So 333.
52 C J. p 110 note 67.

Railroad held not insurer of safety of animals

Ark —Missouri Pac R. Co. v. Briner, 209 S W 2d 106, 213 Ark. 18

54. Colo —Denver, etc, R Co v Dunn, 103 P. 387, 46 Colo. 150
Idaho.—Yates v. Camas Prairie R. Co, 128 P. 545, 22 Idaho 802

55. Mont —Knop v. Chicago, etc., R Co, 187 P 1020, 57 Mont. 288

56. N C —Roberts v. Richmond, etc., R Co, 88 N C 560
52 C.J. p 110 note 75.
Existence of local stock regulations generally see supra § 639.

57. Tex —Porter v El Paso, etc. R Co, Civ App, 124 S.W 708.

58. Tex —Porter v. El Paso, etc. R Co, supra

59. Mo —Warren v Chicago, etc, R Co, 59 Mo App 367.

was negligence on the part of the company which caused the injury complained of,[60] and that there was such negligence after the animal was discovered on the track.[61] Likewise, there is no presumption of negligence from the killing at places unfenced where, under the fencing statute, the railroad is under no obligation to fence,[62] and the burden is on plaintiff in such cases to establish the negligence of the railroad and that it caused the death of plaintiff's animal.[63]

§ 642. —— Fences and Cattle Guards

a. In general
b. Places required to be fenced
c. Place of entry
d. Defects

a. In General

In an action based on a fencing statute, as a general rule a prima facie case for the plaintiff is made by proof of plaintiff's ownership of the stock, the injury, and a failure to fence at the place in question.

In an action based on a fencing statute, as a general rule a prima facie case for plaintiff is made by proof of plaintiff's ownership of the stock, the injury, and a failure to fence at the place in question,[64] and the burden is on defendant to show any facts or circumstances relieving it from this duty,[65] unless such facts appear from plaintiff's evidence.[66] Likewise, it is generally held that the burden is on plaintiff to show that the road was not fenced[67] at the place where the animal came on the track, as discussed infra subdivision c of this section, although some statutes are construed as placing the burden on defendant to show that the road was fenced.[68] The general rule applied to actions under the various statutes is that plaintiff has the burden of proving every fact necessary to bring the case within the application of the particular statute on which the action is based,[69] as, for example, that the railroad's failure to fence was at a place where it was required to fence, as considered infra subdivision b of this section, or that he is a person entitled to the benefit of the statute,[70] or that the facts entitling him to the recovery of double damages existed.[71] In an action under the statute to recover damages occasioned by the railroad's failure to fence, the burden is on plaintiff to show that the injury was a consequence of the absence of the fence,[72] or of a sufficient cattle guard;[73] but, where the injury and failure to fence are shown, plaintiff will be aided by a presumption that one was occasioned by the other in the absence of evidence on that point.[74]

Where defendant admits its failure to fence but seeks to avoid liability therefor on the ground of plaintiff's agreement to maintain the fence and his receipt of compensation therefor,[75] or on the ground that, even if a lawful fence had been constructed and maintained, it could not have restrained the particular animal that was injured,[76] the burden is on it to establish these affirmative defenses by proof, there being in the latter case a presumption that a good and lawful fence such as the company is required to construct will exclude all domestic animals.[77]

Effect of failure to construct and maintain fence as related to statutory presumption of negligence see supra subdivision b (4) of this section.

60. La.—Moody v. Texas & P. Ry. Co., App., 37 So.2d 346—Duke v. Missouri Pac. R. Co., App., 142 So. 333.
52 C.J. p 111 note 80.

61. Mo.—Perse v. Atchison, etc., R. Co., 51 Mo.App. 171.

62. Neb.—Cox v. Chicago, etc., R. Co., 126 N.W. 999, 87 Neb. 136.
52 C.J. p 111 note 82.

63. Tex.—Davis v. Wilson, Civ.App., 241 S.W. 562.
52 C.J. p 111 note 83.

64. Mo.—Collins v. St. Louis, etc., R. Co., App., 181 S.W. 591.
52 C.J. p 112 note 21
Effect of failure to construct and maintain fence as related to statutory presumption of negligence see supra § 641 b
Failure to fence as negligence in actions based on negligence see supra § 559
Weight and sufficiency of evidence as to fences and cattle guards see infra § 661.

Statute held inapplicable
Statute, requiring railroad to fence right of way, and making prima facie case on proof of injury alone, was inapplicable to action for injury to horses caused by cattle guards at private crossing.—Harsch v. Chicago, R. I. & P. Ry. Co., 232 N.W. 144, 211 Iowa 1377, 75 A.L.R. 927.

65. Tex.—Missouri, etc., R. Co. v. Willis, Civ.App., 52 S.W. 625.
52 C.J. p 112 note 22

66. Mo.—Gilpin v. Missouri, etc., R. Co., 94 S.W. 869, 197 Mo. 319—Spooner v. St. Louis Southwestern R. Co., 66 Mo.App. 32.

67. Tenn.—Briggs v. Clawson Bros., 8 Tenn.App. 251.
52 C.J. p 112 note 24

68. Tex.—Ft. Worth, etc., R. Co. v. Jenkins, Civ.App., 252 S.W. 189.
52 C.J. p 112 note 26

69. Cal.—Wills v. Southern Pac. Co., 161 P. 501, 31 Cal.App. 723
52 C.J. p 112 note 27.

70. Cal.—Wills v. Southern Pac. Co., supra
Mo.—Summers v. Hannibal, etc., R. Co., 29 Mo.App. 41

71. Mo.—Johnson v. Kansas City Southern R. Co., App., 200 S.W. 685.
52 C.J. p 113 note 30

72. Wis.—Lawrence v. Milwaukee, etc., R. Co., 42 Wis. 322.

73. Mo.—Miller v. Chicago, etc., R. Co., 167 S.W. 1160, 180 Mo.App. 209

74. Mo.—Walther v. Pacific R. Co., 55 Mo. 271
52 C.J. p 113 note 33.

75. Ohio.—Cincinnati, etc., R. Co. v. Hoffhines, 22 N.E. 871, 46 Ohio St. 643.
52 C.J. p 113 note 34

76. Kan.—Missouri Pac. R. Co. v. Baxter, 26 P. 49, 45 Kan. 520
52 C.J. p 113 note 35

77. Kan.—Missouri Pac. R. Co. v. Baxter, supra.

Contractual liability. In an action to recover for injuries to plaintiff's animals based on defendant railroad's failure to fence its track in accordance with its agreement to do so, a presumption of the existence of such agreement is raised by proof of the maintenance of such a fence for the prescriptive period of twenty years.[78]

b. Places Required to Be Fenced

If the statute by express terms requires fencing only at certain places or excepts certain places, the burden is on the plaintiff to show that the place in question was one which the company was required to fence, or was not one of the places excepted. If the place is one impliedly excepted, the burden is on the defendant to show that it was one which could not lawfully or properly have been fenced.

If the statute by express terms requires fencing only at certain places or excepts certain places, the burden is on plaintiff to show that the place in question was one which the company was required to fence,[79] or was not one of the places excepted,[80] although in proving that the place of injury was not in a village or town plaintiff need only show that it was beyond the group of houses composing the village or town,[81] and the burden is on defendant to show that the village or town extended beyond the houses if such was the fact.[82] If the place is one impliedly excepted, as distinguished from the places expressly excepted, the burden is on defendant to show that it was one which could not lawfully or properly have been fenced,[83] as, for example, where maintenance of fences or cattle guards would endanger the lives or safety of the company's employees,[84] or would obstruct the public highway,[85] unless such facts appear from plaintiff's own evidence.[86] If defendant bases its claim of immunity from obligation to fence on the fact that the accident happened on station grounds, the burden rests on it to show the extent of space necessary to be kept open for station purposes.[87] The mere fact that the railroad has fenced a part of its track at a place where it was not obliged by law to fence does not furnish any ground for a presumption that the railroad has made a trap by so doing.[88]

c. Place of Entry

In order to recover against a railroad company for injuries to animals on the ground of failure to fence, the plaintiff must prove that the animal entered on the right of way at a place where the defendant was under a duty to fence, and that the defendant had failed to discharge that duty; but, if there is no evidence as to where the animal came on the track, it will be presumed that it came on the track at the place where it was killed or injured.

Since the place of entry governs the liability, as discussed supra § 567, in order to recover against a railroad company for injuries to animals on the ground of failure to fence, plaintiff must prove that the animal entered on the right of way at a place where defendant was under a duty to fence, and that defendant had failed to discharge that duty,[89] and circumstantial evidence from which the fact can be legitimately inferred is sufficient for that purpose.[90] However, if there is no evidence as to where the animal came on the track, it will be presumed that it came on the track at the place where it was killed or injured.[91] Where there are two or more openings in the fence, which it was the railroad's duty to keep closed, it is not necessary to prove through which opening the animal went onto the track where it appears in the evidence that it went through one of them,[92] and it has been held that it is not necessary to prove entry on the track at a place where the railroad should have fenced but had not, except where the animal is struck at a point where the railroad is not required to fence.[93] On the other hand, if there is no evidence as to the place of entry and it is shown that the place of injury was one not required to be fenced, it is also presumed that the company was not required to fence where the an-

78. N J —Titus v Pennsylvania R Co., 92 A 944, 87 N J Law 157, Ann Cas 1917B 1251

79. Idaho —Montgomery v Chicago, etc, R Co, 217 P. 601, 37 Idaho 657
Mo —Clardy v. St. Louis, etc, R. Co., 73 Mo. 576.

80. Iowa —Kyser v. Kansas City, etc, R. Co, 9 N W. 133, 56 Iowa 207
52 C J p 113 note 39.

81. Ill —Ohio, etc., R. Co. v. Irvin, 27 Ill 178.

82. Ill —Ohio, etc., R. Co v. Irvin, supra.

83. Fla —Seaboard Air Line Ry. Co. v Maige, 147 So. 215, 109 Fla. 229.
52 C J p 113 note 43

84. Ind.—Toledo, etc, R Co v. Jackson, 32 N E. 793, 5 Ind.App 547
52 C J p 113 note 44

85. Ind —Cincinnati, etc, R Co v Jones, 12 N E 113, 111 Ind. 259.
52 C.J. p 113 note 45.

86. Mo —Spooner v. St Louis Southwestern R. Co., 66 Mo App 32.

87. Okl —Dickinson v. Stewart, 174 P 233, 70 Okl 271
Utah —Roberts v Salt Lake, etc, R. Co, 176 P 856, 53 Utah 30.

88. Mont —Bowers v. Chicago, etc, R Co, 201 P. 825, 61 Mont. 200

89. Ind —Pittsburgh, etc, R. Co v Staton, 145 N.E. 556, 82 Ind App. 211
52 C J p 35 note 18, p 113 note 51.

90. Ind —Evansville, etc., R Co v Mosier, 1 N E. 197, 101 Ind 597

91. Mo.—Corcoran v. Wabash R Co., 122 S W. 743, 138 Mo.App 408
52 C J. p 113 notes 53, 54.

92. Okl.—Davis v. G W. Connelly Ranch Co, 229 P. 492, 103 Okl. 94.

93. Or —Meier v. Northern Pac R Co, 93 P. 691, 51 Or. 69—Sullivan v Oregon R., etc, Co., 24 P. 408, 19 Or. 319.

imal entered.[94] The presumption that the place of injury was also the place of entry is a rebuttable one,[95] and, where there is proof of the place of entry, there is no occasion for indulging in any presumption.[96]

d. Defects

In an action based on a failure of the railroad company to maintain fences and cattle guards in a proper state of repair, the burden is on the plaintiff to show that they are not sufficient for the purposes for which they were intended.

A statute requiring railroads to erect fences and cattle guards does not raise a conclusive presumption as a matter of law that they do not comply with the statute when for any reason stock get on the right of way and are injured,[97] and the burden is on plaintiff to show that they are not sufficient for the purposes for which they were intended and constructed,[98] that the animal came on the track through or over such defective fence or cattle guard,[99] and that the place where the animal came on the track by reason of such defect was one which the company was required to fence.[1] Where this is shown, a prima facie case of negligence on the part of the railroad company is made,[2] and the burden is on defendant to show its freedom from negligence.[3] Where it is shown that an animal escaped from an adjoining inclosure through a fence which defendant was bound to maintain and which at some places was defective and at others sufficient, it will be presumed in the absence of evidence to the contrary that the animal escaped at the place where the fence was insufficient.[4]

Where liability is limited to cases of collision between the animal and the train after the animal came on the track through a defective fence, the burden is on plaintiff to prove not merely the defect, but also the negligence of the railroad company beyond the matter of a defective fence where the injuries were received in some way other than in a collision with the train.[5] Accordingly, it has been held that plaintiff has the burden of further showing that defendant should reasonably have foreseen the possible presence of animals in an inclosure from which they might escape and wander on the right of way through the defective fence.[6]

Knowledge of defect on the part of the railroad necessary to charge it with neglect in maintenance of a fence or cattle guard will be presumed without proof of actual notice, where the defect is shown to have existed for an unreasonable length of time.[7]

§ 643. —— Crossings, Gates, and Bars

In an action for injury to an animal based on the defective condition of a crossing, the burden is on the plaintiff to show that the injury occurred at the crossing and by reason of its defective condition; and, where the animal is injured by passing through a gate or bars in a railroad fence, the burden of proof is on the plaintiff to show that the gate or bars were open through the defendant's fault.

In an action for injury to an animal based on the defective condition of a crossing, the burden is on plaintiff to show that the injury occurred at the crossing and by reason of its defective condition;[8] and plaintiff is not relieved of that burden by a statute requiring railroads to erect and maintain fences with farm crossings and gates wherever reasonably necessary and imposing liability on them for failure to do so;[9] but, where the defective condition and the railroad's knowledge of it for a time long enough to have remedied it are shown, the burden is on the railroad to show that the defective condition was not the cause of the injury.[10] Where a statute requiring an opening in a railroad fence for the convenience of the owner of land through which the railroad passes makes no provision as to the nature or kind of opening but leaves that detail to be determined by the landowner and railroad, there is a presumption of the adequacy and sufficiency of the opening in the absence of evidence to the contrary;[11] but, where a gate is shown to have been

94. Ind.—Lake Erie, etc., R. Co. v. Kneadle, 94 Ind. 454.

95. Mo.—Sowders v. St. Louis, etc., R. Co., 104 S.W. 1122, 127 Mo.App. 119.

96. Mo.—McCullough v. Wabash R. Co., 142 S.W. 357, 160 Mo.App. 342. 52 C.J. p. 114 note 57.

97. Ariz.—Musgrave v. Southern Pac. Co., 68 P.2d 202, 49 Ariz. 512.

98. Ariz.—Musgrave v. Southern Pac. Co., supra. 52 C.J. p. 114 note 59.

Unnecessary danger

Burden was on owner to prove that cattle guard at private crossing which injured horses was unnecessarily dangerous.—Harsch v. Chicago, R. I. & P. Ry. Co., 232 N.W. 144, 211 Iowa 1377, 75 A.L.R. 927.

99. N.Y.—Morrison v. New York, etc., R. Co., 32 Barb. 568.

1. Mo.—Clardy v. St. Louis, etc., R. Co., 73 Mo. 576.

2. Iowa.—Harper v. Chicago, etc., R. Co., 143 N.W. 529, 161 Iowa 592, explaining Latta v. Illinois Cent. R. Co., 130 N.W. 1059, 151 Iowa 244.

3. Iowa.—Harper v. Chicago, etc., R. Co., 143 N.W. 529, 161 Iowa 592. 52 C.J. p. 114 note 62.

4. N.Y.—Leyden v. New York Cent. R. Co., 8 N.Y.S. 187, 55 Hun 114.

5. Tex.—Missouri, etc., R. Co. v. Orr, Civ.App., 272 S.W. 343.

6. Tex.—Chicago, R. I. & G. Ry. Co. v. Rhone, Civ.App., 105 S.W.2d 707, error dismissed.

7. Minn.—Varco v. Chicago, etc., R. Co., 13 N.W. 921, 30 Minn. 18.

8. Iowa.—Harsch v. Chicago, R. I. & P. Ry. Co., 232 N.W. 144, 211 Iowa 1377, 75 A.L.R. 927.—Croddy v. Chicago, etc., R. Co., 60 N.W. 214, 91 Iowa 598.

9. N.Y.—Cross v. New York Cent., etc., R. Co., 123 N.Y.S. 908.

10. Cal.—Johnson v. Southern Pac. Co., 104 P. 713, 11 Cal.App. 278.

11. Tex.—St. Louis Southwestern

below the standard required by statute, and that the animal broke down the gate and went onto the track and was killed, plaintiff is relieved of the burden of showing that the negligence of the railroad company caused the injury,[12] especially where the statute itself provides that proof of damage and violation of the statute shall constitute a prima facie case[13]

Open gates or bars. In an action for injury to animals which went on the track through a gate or bars in the railroad fence, the burden of proof is on plaintiff to show that the gate or bars were open through defendant's fault,[14] either by being left open by defendant,[15] or by being open because of a defective condition which was known or should have been known to defendant.[16] If the railroad does show that the gate, although equipped with defective fastenings, was shut and securely fastened a short time before the accident, there is no presumption that the defective condition was the proximate cause of the injury.[17] The burden of showing that the gates were left open by the landowner or third person is on the railroad.[18] However, where it appears that the gates had been left open,[19] or the bars had been left down by some third person,[20] the burden is on plaintiff to show that the condition had existed for such a length of time after the company knew or should have known of it as to charge it with negligence in not remedying the situation.

§ 644. —— Rate of Speed

Where it is shown that an animal was injured by a train which was running at a prohibited rate of speed, a presumption arises that the injury was the result of the negligence of the railroad company, and the burden is on the company to rebut it.

In an action to recover for injury to an animal on the ground of negligence in running a train at a rate of speed in violation of an ordinance, plaintiff has the burden of proving that the ordinance was in force at the time of the injury,[21] and, where it is shown that an animal was injured by a train which was running at a prohibited rate of speed, a presumption arises that the injury was the result of the negligence of the company,[22] and the burden is on the company to rebut it[23] On the other hand, in the absence of statute, plaintiff has the burden of proving that the injury was directly due to such excessive rate of speed[24]

Curve crossed by public highway. Under some statutes where any curve is crossed by a public highway, the railroad company has the burden of proving that the train approached and passed the crossing at such speed as to prevent an accident in the event of an obstruction at the crossing[25]

§ 645. —— Signals and Lookouts

a. In general
b. Precautions as to animals seen on or near track

a. In General

In an action based on a failure to give crossing signals as required by statute, the burden is on the plaintiff to show that the signal was not given, and also that such omission was the cause of the injury complained of, unless the statute places the burden on the defendant, but, under statutes making proof of injury prima facie evidence of negligence, the burden is on the railroad company to show that signals were given, and that a proper lookout was maintained.

In an action based on a failure to give crossing signals as required by statute, the burden is on plaintiff to show that the signal was not given,[26] and also that such omission was the cause of the injury complained of,[27] and the burden of establishing his case remains on plaintiff throughout, notwithstanding the burden of going ahead with the evidence shifts after establishment of a prima facie case.[28] However, where the statute so provides, the burden is on defendant to show that the omission was not the cause of the injury[29]

R Co v Gilbert, 246 S W. 347, 112 Tex 288

12. Kan —Roman v. St Louis-San Francisco R. Co., 245 P. 115, 120 Kan. 585

13. Kan —Roman v. St Louis-San Francisco R Co, supra.

14. Iowa —Johnson v. Chicago, etc., R Co, 8 N W. 664, 55 Iowa 707.
52 C J. p 114 note 76

15. Mo —Ridenore v. Wabash, etc, R Co, 81 Mo 227.

16. Iowa —Johnson v. Chicago, etc., R Co, 8 N W. 664, 55 Iowa 707.

17. Iowa —Johnson v Chicago, etc, R Co, supra

18. Ind.—Chicago, etc, R Co v Barnes, 18 N E. 459, 116 Ind 126

19. Mo —Ridenore v. Wabash, etc., R Co, 81 Mo 227.

20. Iowa —Perry v Dubuque Southwestern R Co, 36 Iowa 102.

21. Ill —Chicago, etc, R Co v Engle, 76 Ill 317

22. Neb —Union Pac R Co v. Rassmussen, 41 N W. 778, 25 Neb 810, 13 Am S R. 527
52 C J p 115 note 86.

23. Ill —Chicago, etc, R Co v. Smedley, 65 Ill App 644.
52 C J. p 115 note 87.

24. Mo —Decker v. Chicago, etc, R Co, 172 S W 1168, 187 Mo App 207
Ohio.—Didman v Michigan, Cent R Co, 5 Ohio S & C P. 140, 7 Ohio N P 380.

25. Ala —Alabama Great Southern R. Co v. Smelley, 187 So 630, 237 Ala 471.

26. Mo —Summerville v Hannibal, etc, R Co, 29 Mo App 48
52 C J p 115 note 90

27. Tex —Texas, etc, R Co v. Bailey, Civ App, 150 S W 962
52 C J. p 115 note 91.

28. Idaho —Kerby v Oregon Short Line R Co., 264 P. 377, 45 Idaho 636

29. Cal —Orcutt v Pacific Coast R. Co, 24 P 661, 85 Cal 291.
52 C J. p 115 note 94.

Under statutes making proof of the injury prima facie evidence of negligence and placing the burden of proof on the company to show that all the statutory requirements were complied with, the burden is on the company to show that the signals were given,[30] and that a proper lookout was maintained,[31] or that a failure to give signals was not the cause of the injury,[32] and, in the absence of statute, it has been held sufficient to constitute a prima facie case to show that the animal was on the track where it could have been seen, if a proper lookout had been maintained, for a distance within which the train might have been stopped.[33] On the other hand, no presumption of negligent operation in failure to keep a lookout for stock arises from uncontradicted proof of the necessary attention of train employees to performance of their paramount duty to protect property intrusted to them[34]

Under a statute requiring crossing signals in towns and villages but not in cities, a place of village size will be presumed to be a village in the absence of evidence of its incorporation as a city.[35]

b. Precautions as to Animals Seen on or near Track

In the absence of statute, if the animal injured was wrongfully on the track, the burden is on the plaintiff to show that the defendant's servants saw the animal in peril in time to have avoided the injury, and negligence on the part of the railroad company after the animal was discovered.

In the absence of statute, if the animal injured was wrongfully on the track, the burden is on plaintiff to show that defendant's servants saw the animal in peril in time to have avoided the injury,[36] and negligence on the part of the railroad company after the animal was discovered;[37] and in such case no presumption that the servants saw the trespassing animal in time to save him arises from the fact that the track was straight and the view unobstructed[38] Likewise, there is no presumption of defendant's knowledge of plaintiff's crossing the track with his animals from a few instances of the crossing of other herds of cattle[39] However, the fact of the collision of the train and animal and the speed of the train may furnish ground for the presumption that the animal was on or near the track a time long enough before being struck to give the railroad employees opportunity to avoid the accident[40] Ordinarily, in any case where the question is whether defendant was negligent in failing to stop the train after discovering the animal on the track, the burden of proof is on plaintiff,[41] but it has been held that, where the evidence shows that an animal ran along the track in front of the train for a distance within which a train could ordinarily be stopped, if there were any circumstances in the particular case making it unsafe or impracticable to stop the train, the burden is on defendant to show this fact.[42]

§ 646. —— Contributory Negligence

In most jurisdictions, in actions for injuries to animals, the burden of proving the owner's contributory negligence is on the railroad company.

In most jurisdictions, in actions for injuries to animals, the burden of proving the owner's contributory negligence is on the railroad company[43] Even in jurisdictions where the burden is on plaintiff to prove freedom from contributory negligence, the burden is on defendant to prove the willfulness of plaintiff's act wherever defendant has made that a part of his defense.[44]

On the other hand, in some jurisdictions, the burden is on plaintiff to show that he was not guilty of contributory negligence.[45] Accordingly, it has been held that, where the animal injured was in

30. Ala.—Alabama Great Southern R. Co. v. Malpin, 80 Ala. 73
Ark.—Missouri Pac. R. Co. v. Mobley, 91 S.W.2d 611, 192 Ark. 396.
Evidence in rebuttal of statutory presumption of negligence see supra § 641 b (3).

Curve crossed by public highway
In action for destruction of mule killed at public road crossing located in the center of a sharp curve in railroad, burden of showing compliance with statutory duty to sound signals was on the railroad.—Alabama Great Southern R. Co. v. Smelley, 187 So. 630, 237 Ala. 471.

31. Ala.—Louisville & N. R. Co. v. Sellers, 134 So. 8, 222 Ala. 615
Ark.—Missouri Pac. R. Co. v. Mobley, 91 S.W.2d 611, 192 Ark. 396.
52 C.J. p. 115 note 97.

32. Mo.—Weltch v. St. Louis, etc., R. Co., 176 S.W. 261, 190 Mo.App. 213

33. Idaho.—Kelly v. Oregon Short Line, etc., R. Co., 38 P. 404, 4 Idaho 190
52 C.J. p. 115 note 99.

34. W.Va.—Starks v. Baltimore, etc., R. Co., 87 S.E. 88, 77 W.Va. 93.

35. Mo.—Bledsoe v. Missouri, etc., R. Co., 164 S.W. 183, 177 Mo.App. 153.

36. Tex.—Irving v. Texas, etc., R. Co., Civ.App., 164 S.W. 910—Missouri, etc., R. Co. v. Byrd, 124 S.W. 738, 58 Tex.Civ.App. 609.

37. Minn.—Locke v. First Div. St. Paul, etc., R. Co., 15 Minn. 350.

38. Tex.—Missouri, etc., R. Co. v. Byrd, 124 S.W. 738, 58 Tex.Civ. App. 609.

39. Tex.—Irving v. Texas, etc., R. Co., Civ.App., 164 S.W. 910

40. Utah.—Preece v. Oregon Short Line R. Co., 161 P. 40, 48 Utah 551.

41. Miss.—Illinois Cent. R. Co. v. Weathersby, 63 Miss. 581.

42. U.S.—Gulf, etc., R. Co. v. Ellis, Ind.T., 54 F. 481, 4 C.C.A. 454

43. Ark.—St. Louis-San Francisco R. Co. v. Call, 122 S.W.2d 178, 197 Ark. 225
52 C.J. p. 111 note 4.

44. Iowa.—Stewart v. Burlington, etc., R. Co., 32 Iowa 561

45. Ill.—Illinois Cent. R. Co. v. Trowbridge, 31 Ill.App. 190.
52 C.J. p. 112 note 12.

charge of or under the control of the owner or some person representing him, the burden is on plaintiff to show the absence of contributory negligence[46] However, also in this group, in states following the common-law rule as to animals running at large but modifying it to the extent of holding that the mere fact that an animal is unlawfully at large does not, as between the owner and the railroad company, constitute contributory negligence unless done under circumstances making the injuries the natural and proximate result of the act, it has been held that the burden of proving the circumstances that make the allowing of animals to run at large contributory negligence in a particular case is on the railroad company.[47] Where the animal injured was at large, which, under the general law, was unlawful unless authorized by the town where the injury occurred, the burden of showing such an exemption from the operation of the general law is on plaintiff[48]

§ 647. Admissibility of Evidence

General rules as to the admissibility of evidence apply in actions against railroad companies for injury to animals.

General rules as to the admissibility of evidence apply in actions against railroad companies for injury to animals.[49] Ordinarily evidence is admissible of all facts and circumstances which reasonably tend to establish or disprove the matters in issue,[50] but evidence which is irrelevant and can throw no light on the subject under investigation is inadmissible.[51] It is also proper to exclude evidence as to general matters which are sufficiently within the knowledge of the jury[52] or as to facts which, being conceded, would not affect defendant's liability in the particular case.[53]

Subsequent repairs. In actions for injuries to animals, it is generally held that evidence of repairs made subsequent to the injury complained of is not admissible as an admission on the part of defendant of prior insufficiency or for the purpose of showing past negligence.[54]

Effect of failure to permit examination of injured animals Evidence as to the nature and extent of injuries to plaintiff's animals caused by defendant's train will be excluded where plaintiff refuses to permit an examination of such animals[55] However, in order for defendant to avail itself of this rule, its request for examination must be made at a time when, if granted, plaintiff will have an opportunity to prepare to meet or offset the testimony of the veterinarian of defendant's choice.[56]

§ 648. —— Customary Methods and Acts

As a general rule evidence of customary or habitual conduct of the defendant railroad company is not admissible to show the existence or absence of negligence at the time of the accident.

As a general rule evidence of customary or habitual conduct of defendant railroad company is not admissible to show the existence or absence of negligence at the time of the accident.[57] Accordingly, evidence of the usual speed of defendant's train at the place of injury before and after the injury complained of is not admissible as evidence of negligence at the time of the injury.[58] However, evidence of instructions given by the station agent to other consignees of freight as to the place for stopping teams is admissible to show that plaintiff's conduct was in accordance with the railroad's general course of business with others and should therefore have been anticipated by defendant.[59]

46. Ill.—Illinois Cent. R. Co. v. Trowbridge, supra.

47. Ill.—Cairo, etc., R. Co. v. Woosley, 85 Ill. 370

48. Me.—Perkins v Eastern R. Co., 29 Me. 307, 50 Am D 589.

49. N D—Reinke v Minneapolis, etc., R Co., 135 N.W. 779, 23 N D 182

Offer of compromise

In suit against railroad for death of animals struck by train, where plaintiff sought to recover expenses of litigation because of failure of railroad to carry out compromise agreement, there was no error in admission of testimony that agent of railroad had offered to settle claim for animals, that plaintiff had accepted the offer, but that railroad failed to make payment, although plaintiff had tried to effect settlement several times.—Savannah & Atlanta Ry Co. v. De Busk, 23 S E 2d 529, 68 Ga.App 529.

50. N D—Reinke v Minneapolis, etc., R. Co., 135 N.W. 779, 23 N.D. 182
52 C J. p 116 note 23.

51. Ala.—Bugg v. Mitchell, 103 So. 713, 20 Ala.App 555.
52 C J p 116 note 24.

52. Iowa—Clark v. Kansas City, etc., R Co., 8 N W. 328, 55 Iowa 455.
52 C J p 116 note 25.

53. Iowa—Grimmell v Chicago, etc., R. Co., 34 N.W. 758, 73 Iowa 93
52 C J. p 116 note 26.

54. Ga.—Georgia Southern, etc., R Co v. Cartledge, 42 S E 405, 116 Ga 164, 59 L.R.A. 118, overruling Central R. Co. v. Gleason, 69 Ga. 200.

Subsequent repair of:
Crossings see infra § 651.
Fences see supra § 650 b.

55. La.—Holley v. Louisiana & A Ry Co., App., 155 So 790.

56. La.—Holley v. Louisiana & A. Ry. Co., supra.

Twenty-four hours before trial

Where a request for examination was made within twenty-four hours of the beginning of the trial, evidence regarding the nature and extent of the injuries was not inadmissible on the ground that plaintiff refused permission for examination of the injured animals.—Holley v Louisiana & A Ry Co., supra.

57. Tex.—Houston, etc., R Co v Jones, 40 S W. 745, 16 Tex Civ App 179.

58. Tex.—Houston, etc., R. Co v Jones, supra

59. Mass.—Bachant v. Boston, etc.,

§ 649. —— Similar Facts or Transactions

a. In general
b. Experiments

a. In General

The evidence ordinarily must be limited to the facts and circumstances of the particular injury complained of, and evidence of negligence in the operation of other trains at other times or places is not admissible to prove negligence at the time and place of the injury.

Following general rules, the evidence ordinarily must be limited to the facts and circumstances of the particular injury complained of,[60] and evidence of negligence in the operation of other trains at other times or places is not admissible to prove negligence at the time and place of the injury,[61] although it may be admissible on cross-examination to discredit a witness.[62] Likewise, evidence of injuries to other animals at the same place at different times,[63] or even at the same time,[64] is inadmissible to prove negligence at a particular time, except, as discussed infra § 652, for the restricted purpose of showing that defendant had knowledge that animals were running at large at that place, and as bearing on the duty of its employees to keep a lookout for them.

b. Experiments

The general rule governing the admissibility of experiments applies in actions to recover damages for animals injured by railroads.

The general rule governing the admissibility of experiments applies in actions to recover damages for animals injured by railroads.[65] Where conditions are substantially similar, evidence of experiments to determine whether a slat holding a gate shut would work out is admissible,[66] and so testimony as to experiments made by witnesses with the gate shortly after the injury is admissible to show its condition.[67] Evidence of experiments to determine the extent of view at a railroad crossing,[68] the distance at which an animal could be seen,[69] or as to the existence or effect of any obstruction of view,[70] is admissible, provided such experiments were made at the place and under conditions similar to those existing at the time of the injury.[71]

§ 650. —— Fences and Cattle Guards

a. In general
b. Condition

a. In General

Evidence of negligence in the operation of the train has been held irrelevant and inadmissible in an action based on a statutory liability for failure to fence; but, in an action based on negligence in the operation of the train, evidence of the absence of fences or cattle guards is admissible as bearing on the degree of care to be exercised.

Evidence of negligence in the operation of the train has been held irrelevant and inadmissible in an action based on a statutory liability for failure to fence[72] unless the action, although brought under the statute, is for frightening animals.[73] However, in an action based on negligence in the operation of the train, evidence of the absence of fences or cattle guards is admissible as bearing on the degree of care to be exercised;[74] and evidence that the owner of the animal had been paid for constructing and maintaining the fence at the place where the animal came upon the track is admissible to rebut any inference of negligence on the part of the railroad arising from the absence of a fence.[75] Irrelevant evidence on the issue of negligence in maintaining fences or cattle guards is not admissible.[76] In an action based on a failure to fence where it is claimed that the injury occurred upon defendant's depot

R. Co, 73 N E 642, 187 Mass. 392, 105 Am.S R. 408

60. Tex—St. Louis, etc, R Co v Terry, 54 S W. 431, 22 Tex Civ App 176.
52 C J. p 116 note 37.

61. Kan—Davis v. Atchison, T & S F Ry Co., 9 P 2d 990, 135 Kan. 96

Failure to give signals
(1) In action to recover value of cows killed at railroad crossing, admitting evidence showing failure to give signals at more distant crossings was error—Davis v. Atchison, T & S F. Ry Co, supra.

(2) Other evidence with respect to failure to give signal see 52 C J p 117 note 38 [a] (1)-(3).

62. Tex—Anson v Gulf, etc, R Co, 94 S W 94, 42 Tex Civ App. 437.

63. Ga—Georgia Cent R. Co. v. Ross, 32 S E. 904, 107 Ga. 73.
52 C.J p 117 note 40.

64. Ala—Hogue v Southern R Co, 41 So 425, 146 Ala 384

65. N J—Kosher Dairy Co. v. New York, etc, R Co, 83 A. 498, 83 N J Law 270.
Admissibility of evidence of experiments in general see Evidence § 587

66. Mo—Brown v. Quincy, etc, R Co, 106 S.W 551, 127 Mo App 614

67. Mo—Brown v Quincy, etc, R. Co., supra.

68. N J—Kosher Dairy Co. v. New York, etc, R. Co, 83 A. 498, 83 N. J Law 270

69. Ill.—Elgin, etc, R. Co v Reese, 70 Ill App 463

70. Ill—Chicago, etc., R. Co. v Legg, 32 Ill App. 218

71. Ill.—Chicago, etc., R Co v Crose, 73 N E. 865, 214 Ill 602, 105 Am S R 135.

72. Mo—Collins v Atlantic, etc., R Co, 65 Mo 230

73. Mo—Briggs v. St. Louis, etc., R. Co, 20 S.W. 32, 111 Mo. 168.

74. Wash—Rafferty v. Portland, etc, R. Co, 73 P 382, 32 Wash 259
52 C J p 117 note 54.

75. Ga—Georgia R, etc., Co v Anderson, 33 Ga 110

76. Tex—Gulf, etc, R. Co. v Messer, Civ App, 208 S.W. 232.
52 C.J. p 117 note 57.

grounds, a deed of the land purchased for such ground is inadmissible,[77] and, where the railroad tracks do not intersect the streets of platted ground, the plat is not admissible.[78]

b. Condition

(1) In general
(2) At time of injury and prior and subsequent thereto
(3) At place of entry and elsewhere
(4) Other accidents, injuries, or defects
(5) Subsequent repairs

(1) In General

In an action based on the alleged insufficiency of fences or cattle guards, evidence which has a tendency to prove the sufficiency or insufficiency of such fences or cattle guards is admissible.

In an action based on the alleged insufficiency of fences or cattle guards, it has been held that evidence is not admissible that the cattle guard in question was the same as those in general use on defendant's road,[79] but it has also been held that evidence that the same make of cattle guard was in general use among well-equipped railroads and was regarded as the best known make is admissible as tending to show the sufficiency of the cattle guard in question.[80] Evidence which has a tendency to prove the defective condition of fences or cattle guards is admissible,[81] while evidence having no relation to the issue is inadmissible.[82] Evidence of the length of time that a fence had been out of repair,[83] or of notice by plaintiff to defendant of the defective condition,[84] is admissible to show defendant's knowledge of it if the notice appears to have been given prior to the time of the accident. Evidence of a condition offered by plaintiff in rebuttal of the condition alleged and proved by defendant's evidence is admissible, even though properly a part of plaintiff's evidence on direct examination but not offered by plaintiff at that time.[85]

(2) At Time of Injury and Prior and Subsequent Thereto

In an action for injuries to animals based on the defective condition of fences and cattle guards, only such evidence is admissible as tends to show the condition of the fences and cattle guards at the time of the injury.

Since the liability of a railroad company for a defective condition of its fences or cattle guards depends on their condition at the time of the injury alleged to have resulted therefrom, only such evidence is admissible as tends to show the condition at that time,[86] but whether evidence of their condition at other times is admissible for this purpose depends on the circumstances.[87] Evidence is admissible of a defective condition at a time prior to the injury if accompanied by evidence that such condition had continued up to the time of the injury.[88] Evidence of their condition at a time subsequent to the injury ordinarily is not admissible in the absence of other evidence showing that there had been no change of condition in the meanwhile;[89] but where it is shown directly or by inference that no change has occurred it is competent, and admissible, if relevant.[90] Likewise, it has also been held that evidence is admissible as to the condition very shortly after the injury[91] unless there is evidence tending to show a change of condition.[92]

(3) At Place of Entry and Elsewhere

Since the liability of the railroad company depends on the condition of the fence at the place where the animal came upon the tracks, evidence ordinarily should be limited to the condition at the place of entry.

Since the liability of the railroad company depends on the condition of the fence at the place where the animal came upon the track, evidence ordinarily should be limited to the condition at the

77. Wis.—Fowler v. Farmers' L & T Co., 21 Wis. 77
52 C.J. p. 117 note 58

78. Mo.—Prather v. Kansas City, etc., Connecting R. Co., 84 Mo.App. 86.

79. Ill.—Chicago, etc., R. Co. v. Bryant, 29 Ill.App. 17.
N.Y.—Schuyler v. Fitchburgh, etc., R. Co., 20 N.Y.S. 287.

80. Ky.—Nashville, etc., R. Co. v. Russell, 110 S.W. 317, 129 Ky. 14, 33 Ky.L. 447.
52 C.J. p. 118 note 69.

81. Tex.—Houston, etc., R. Co. v. Kujawa, Civ.App., 265 S.W. 186.
52 C.J. p. 118 note 70.

82. Mich.—Geerds v. Ann Arbor R. Co., 147 N.W. 505, 181 Mich. 12.
Failure to turn cattle
Evidence that cattle will pass over railroad cattle guards when in proper repair is inadmissible in an action for killing plaintiff's cow, alleged to have passed over defendant's cattle guard because it was in disrepair.—Geerds v. Ann Arbor R. Co., supra.

83. Wis.—Jones v. Chicago, etc., R. Co., 5 N.W. 854, 49 Wis. 352

84. Iowa.—Latta v. Illinois Cent. R. Co., 130 N.W. 1059, 151 Iowa 244

85. Mich.—Chapin v. Ann Arbor R. Co., 133 N.W. 512, 167 Mich. 648.
52 C.J. p. 118 note 74

86. Ill.—Wabash R. Co. v. Kime, 42 Ill.App. 272
Iowa.—Brentner v. Chicago, etc., R. Co., 12 N.W. 615, 58 Iowa 625.

87. Minn.—Miller v. Northern Pac. R. Co., 30 N.W. 892, 36 Minn. 296.

88. Ill.—Walker v. Cleveland, etc., R. Co., 162 Ill.App. 151.—Chicago, etc., R. Co. v. Chipman, 87 Ill.App. 292

89. Iowa.—Brentner v. Chicago, etc., R. Co., 12 N.W. 315, 58 Iowa 625
Mo.—Colyer v. Missouri Pac. R. Co., 93 Mo.App. 147.

90. Tex.—Houston, etc., R. Co. v. Kujawa, Civ.App., 265 S.W. 186.
52 C.J. p. 118 note 79.

91. Iowa.—Mackie v. Iowa Cent. R. Co., 6 N.W. 723, 54 Iowa 540
52 C.J. p. 118 note 81.

92. Mo.—Colyer v. Missouri Pac. R. Co., 93 Mo.App. 147.
52 C.J. p. 118 note 82.

place of entry,[93] although evidence of the condition at other places may sometimes be admissible for purposes of rebuttal.[94] Where it appears in evidence that the animal entered at a place other than where it was injured, evidence is not admissible as to the condition of the fence at the place of injury,[95] except to show by way of corroboration the defective condition at the place of entry[96] or to charge defendant with knowledge thereof.[97]

(4) Other Accidents, Injuries, or Defects

For the purpose of showing the insufficiency of a fence or cattle guard, it has been held that evidence is admissible that other animals had previously got over the fence or cattle guard at the same place, or over a different cattle guard if it is shown to be of the same kind and character as the one in question, and that there was a similarity of conditions.

For the purpose of showing the insufficiency of a fence or cattle guard, it has been held that evidence is admissible that other animals had previously got over the fence[98] or cattle guard[99] at the same place, or over a different cattle guard if it is shown to be of the same kind and character as the one in question.[1] However, in the absence of evidence of similarity of conditions, evidence having reference to other cattle guards is inadmissible;[2] nor is similarity of conditions sufficiently established by showing merely that cattle guards are of similar construction.[3]

(5) Subsequent Repairs

In an action based on the defective condition of fences, evidence of repairs made subsequently to the injury complained of is not admissible as an admission on the part of the defendant of prior insufficiency or for the purpose of showing past negligence, but such evidence may be admissible on other issues.

In an action based on the defective condition of fences, evidence of repairs made subsequently to the injury complained of is not admissible as an admission on the part of defendant of prior insufficiency or for the purpose of showing past negligence.[4] On other issues, however, evidence of subsequent repairs has been held admissible,[5] as, for example, to show that the defect was one which it was defendant's duty to repair,[6] or that the railroad regarded the place in question as one which might lawfully be fenced,[7] or to show the place[8] or the conditions at the place[9] where the animal entered the right of way.

§ 651. —— Crossings, Gates, and Bars

In actions based on defective or insufficient crossings, gates, or bars, evidence having a bearing on the disputed issues involved is admissible, while evidence having no bearing on the issues involved is not admissible.

Evidence tending to establish the insufficiency of a gate or its fastenings and having a bearing on the disputed issues of whether or not a gate was open, and, if open, what caused it to be so, is admissible,[10] while evidence having no bearing on the issues involved is not admissible.[11] Where the action is based on a failure to maintain a gate at a crossing, evidence offered on the part of defendant tending to show that it was not required to maintain cattle guards also is irrelevant.[12]

Similar facts and transactions. In an action based on the defective condition of a crossing, evidence that other animals had been injured on the same crossing is not admissible[13] except for the restricted purpose of showing that the crossing was unsafe[14] or that the railroad had notice of the defect.[15] For

93. Tex.—Galveston, etc., R Co v Dyer, Civ.App., 46 S.W. 841.
52 C.J. p 118 note 84.

94. Tex.—Texas, etc, R Co v. Seay, Civ App., 69 S W 177.
52 C J p 118 note 85

95. Ill.—Chicago, etc., R. Co v. Farelly, 3 Ill App 60
52 C J. p 118 note 87.

96. Mo —Mayberry v. Missouri Pac R Co., 83 Mo 664.

97. N.Y —McGuire v Ogdensburgh, etc., R Co, 18 N Y.S 313

98. Mich —Bowen v. Flint, etc, R. Co, 68 N W 230, 110 Mich 445
52 C J p 119 note 95

99. Iowa.—O'Mara v. Newton, etc, R. Co, 118 N W 377, 140 Iowa 190

Stock gap

In action against railroad for injury to mule by negligently constructed stock gap, testimony that other similar animals crossed stock gap was admissible.—Alabama Great Southern R. Co v Clark, 130 So 318, 221 Ala 616.

1. Ind —New York, etc, R. Co v. Zumbaugh, 38 N E 531, 11 Ind App 107.
52 C J. p 119 note 97.

2. Okl.—Midland Valley R. Co v. Bryant, 131 P. 678, 37 Okl 206

3. Iowa —Downing v Chicago, etc, R Co., 43 Iowa 96.
52 C J. p 119 note 2.

4. Ill.—Wabash R Co v. Kime, 42 Ill App 272
Mo —Woods v Missouri, etc., R Co., 51 Mo App 500.

5. Mo —Woods v. Missouri, etc., R. Co, supra.

6. Mo —Woods v Missouri, etc, R Co, supra
52 C J. p 119 note 7.

7. Ind —Toledo, etc., R. Co v Owen, 43 Ind. 405.

8. Wash —Townsend v. Northern Pac R Co., 69 P 750, 29 Wash. 185.
52 C J p 119 note 9

9. Ill —Wabash R Co v. Kime, 42 Ill.App 272.

10. Tex.—Ft. Worth, etc, R Co v Scheer, Civ.App, 169 S W. 1069
52 C J p 119 note 12

11. Ill —Chicago, etc, R. Co. v. O'Brien, 34 Ill App 155
52 C J p 119 note 13.

12. Mass —Taft v New York, etc, R. Co, 32 N E 168, 157 Mass 297

13. Iowa —Croddy v. Chicago, etc, R Co, 60 N.W 214, 91 Iowa 598—Hudson v Chicago, etc, R Co., 13 N W. 735, 59 Iowa 581, 44 Am R 692.

14. Minn —Kelly v. Southern Minnesota, R. Co., 9 N.W 588, 28 Minn 98.

15. Ind —Toledo, etc, R Co v. Milligan, 28 N.E. 1019, 2 Ind App 578

the purpose of showing the insufficiency of a gate, it has been held that evidence is admissible that similar fastenings for gates had proved insufficient where the court instructed the jury that before such evidence could be considered it must be shown not only that the fastenings were similar but that the manner in which they were put on and the gates hung were in all respects alike,[16] but evidence is not admissible that the fastenings on the gate in question were like those in general use in the absence of evidence of the sufficiency of those in general use and of similarity of conditions of use between the particular fastener and those in general use.[17] Likewise, it has been held that in the absence of similarity of conditions, evidence having reference to other gates is inadmissible.[18]

Where there is evidence that bars were improperly constructed, evidence that they had frequently been down and defendant's servants had somtimes put them up is admissible to show knowledge on the part of the company of the defect.[19]

Condition at time of injury. In an action based on negligence of the railroad company in leaving open a gate in the railroad fence, evidence is not admissible that on a former occasion defendant's agent was seen to pass through the gate without closing it.[20] However, where it is alleged that animals strayed on the track through a gate and were injured, evidence as to the position of the gate on the morning following the accident has been held admissible where there is no evidence that the gate had been moved.[21]

Subsequent repairs In an action based on the defective condition of gates[22] or crossings,[23] it is generally held that evidence of repairs made subsequently to the injury complained of is not admissible as an admission on the part of the defendant of prior insufficiency or for the purpose of showing past negligence. However, it has been held that evidence of subsequent repairs to gates is admissible on other issues,[24] as, for example, to show that the defect was one which it was defendant's duty to repair.[25]

§ 652. —— Operation of Trains

General rules as to the admissibility of evidence apply in an action for injury to animals due to negligence in the operation of a train.

General rules as to the admissibility of evidence apply in an action for injury to animals due to negligence in the operation of a train [26] Accordingly, evidence is admissible as to the character and equipment of the locomotive,[27] and, if the injury occurred at night, the character of headlight carried[28] and its condition;[29] the character of the place of the injury with respect to the custom of animals to be there in large numbers;[30] the distance of an animal from the tracks when first seen by the engineer;[31] the distance an animal could be seen at the time and place of the injury;[32] the distance an animal was dragged along the track;[33] and the existence and validity of stock laws.[34] Likewise, evidence has been held admissible as to the failure to give signals[35] unless the accident happened at a place where the railroad was not bound to give them,[36] a failure to hear them,[37]

16. Iowa —Payne v Kansas City, etc, R. Co, 33 N W. 633, 72 Iowa 214

17. Iowa —Payne v. Kansas City, etc, R Co., supra.

18. Ill.—Kreeb v Lake Erie, etc, R Co., 211 Ill App 630

19. Mich —Neversorry v Duluth, etc, R. Co, 73 N W. 125, 115 Mich 146

20. Ill —Chicago, etc, R. Co. v. Hodge, 55 Ill App 166

21. Mo —Humphreys v. Chicago, M, St P & P. R Co, App., 83 S. W 2d 586

22. Mo —Woods v Missouri, etc., R. Co, 51 Mo App 500.

23. Iowa —Hudson v. Chicago, etc, R Co., 13 N W. 735, 59 Iowa 581, 44 Am R 692

Minn —Morse v Minneapolis, etc., R Co, 16 N W 358, 30 Minn. 465, overruling Kelly v Southern Minnesota R Co, 9 N.W 588, 28 Minn. 98

24. Mo —Woods v Missouri, etc., R Co, 51 Mo.App. 500.

Clarification

Where animals were alleged to have escaped from plaintiff's pasture to railroad tracks through poorly maintained gate, testimony that gate between pasture and another field, through which animals might have escaped, had been repaired since accident, was admissible, where it was shown that witness in prior testimony regarding condition of gate was alluding to repaired gate and not to one in use at time of accident.—Humphreys v. Chicago, M, St P & P R. Co, Mo App., 83 S W 2d 586

25. Mo —Woods v Missouri, etc, R. Co, 51 Mo App. 500

26. Ga —Atlantic Coast Line R. Co. v. Mercer, 60 S E 2d 649, 82 Ga App 312.

27. Ga —Georgia Cent R. Co. v. Hardin, 40 S E 738, 114 Ga 548—Dean v. Hilton, etc, Lumber Co, 65 S E. 300, 6 Ga App 480.

28. Ga —Georgia Cent R Co v Hardin, 40 S.E 738, 114 Ga. 548.

29. Ga —Georgia Cent R. Co v. Hughes, 56 S E 770, 127 Ga 593
52 C.J p 120 note 26.

30. Utah —Smith v. San Pedro, etc, R. Co., 100 P 673, 35 Utah 390

31. Ala.—Louisville, etc., R. Co. v. Mertz, Ala., 40 So 60.

32. Ga —Southern Ry. Co. v Freeman, 198 S.E 717, 58 Ga App. 403.
52 C.J. p 120 note 29
Admissibility of evidence of experiments see supra § 649 b

33. Ala —Louisville, etc, R Co v. Pearce, 39 So. 72, 142 Ala 680

34. Tex —Missouri, etc., R Co v. Tolbert, 101 S W. 1014, 44 Tex Civ. App 8.

35. Tex.—Texarkana, etc., R Co v. Bell, Civ.App, 101 S W. 1167.
52 C J. p 120 note 32

36. Mo —Alexander v. Missouri Pac R Co., 165 S.W. 1156, 178 Mo App. 184
52 C J p 120 note 33.

37. Tex —Texarkana, etc, R. Co v. Bell, Civ App, 101 S.W. 1167.

and the ability of the witness to hear them,[38] if they had been given; also evidence whether the view of the track was obstructed[39] or the attention of the motorman distracted is admissible.[40]

Where the engineer testifies that it was a very dark night, plaintiff may introduce in rebuttal evidence of the phase of the moon and the hour at which it rose.[41] Testimony of the engineer that after the animal was seen he could not have stopped the train without endangering its safety and that of the passengers is admissible,[42] and, as an expert, an engineer or conductor may testify that he did all that could be done to avert the injury,[43] but the testimony of other witnesses as to whether the engineer could have done anything more than he did to avoid the injury has been held inadmissible.[44] Evidence that after the injury complained of signboards were erected and signals given at the crossing where the injury occurred is not admissible.[45]

Evidence having no bearing on the question of negligence in the operation of the train is not admissible.[46]

Speed of train. Evidence is admissible as to the speed of the train,[47] although, where there is no statute to control the rate of speed at which a train may run, evidence of speed has been held inadmissible in an action by the owner of animals injured while trespassing.[48] Evidence that the engineer did not decrease the speed of the train has been held admissible in support of an allegation to that effect.[49]

Evidence of injuries to other animals at the same place at different times is admissible for the restricted purpose of showing that the railroad had knowledge that animals were running at large at that place and as bearing on the duty of its employees to keep a lookout for them.[50]

§ 653. —— Violation of Statutes and Ordinances

Where statutes requiring crossing signals are intended for the benefit of animals as well as persons, in an action for injury to an animal rightfully upon, or in the immediate vicinity of, a highway crossing, evidence of a failure to give such signals is admissible on the question of the defendant's negligence.

In jurisdictions where it is held that statutes requiring crossing signals are intended for the benefit of animals as well as persons, in an action for injury to an animal rightfully upon, or in the immediate vicinity of, a highway crossing, evidence of a failure to give such signals is admissible on the question of defendant's negligence,[51] but where such signals are held as intended as a warning to persons only such evidence is not admissible.[52] In jurisdictions where failure to give the statutory signals at crossings is admissible, evidence as to whether the animal would probably have been frightened away if they had been given is not admissible.[53] In actions for negligent injury to animals in a town or city, an ordinance is admissible which limits the rate of speed within the corporate limits[54] unless the ordinance applies only to a particular railroad other than defendant, and defendant is not the lessee of, and does not use the tracks of, the affected railroad,[55] but there is also some authority for excluding an ordinance limiting the rate of speed within town or city limits.[56] An ordinance requiring a bell to be continuously rung on all engines while passing through town limits is admissible.[57]

38. Ill.—Elgin, etc, R Co. v. Reese, 70 Ill App 463

39. Ark.—Kansas City Southern R. Co. v. Lewis, 97 S.W. 56, 80 Ark. 396.
Ill.—Chicago, etc, R Co. v Legg, 32 Ill App. 218

40. Ark.—Central R. Co v. Lindley, 151 S W 246, 105 Ark. 294
52 C J. p 120 note 39

41. Ala.—Mobile, etc, R. Co. v Ladd, 9 So 169, 92 Ala. 287

42. Ill.—Chicago, etc, R. Co. v. Bunker, 81 Ill App 616

43. Ala.—Choate v Southern R. Co, 24 So 373, 119 Ala. 611

44. Utah—Johnson v. Rio Grande Western R. Co, 26 P. 926, 7 Utah 346.

45. Ky.—Louisville, etc, R Co v. Bowen, 39 S W. 31, 18 Ky L 1099.

46. Mo.—Howard v Payne, App., 230 S W 651.
52 C.J p 120 note 46.

47. Ga.—Southern R. Co. v Puryear, 56 S E 73, 127 Ga 88.
52 C J p 120 note 36

48. Wis.—Mills, etc, Lumber Co v Chicago, etc, R Co, 68 N.W 996, 94 Wis 336.

49. Ga.—Atlantic Coast Line R Co. v Mercer, 60 S E 2d 649, 82 Ga. App 312.

50. Tex.—Jefferson County Tract. Co v Giles, Civ App, 206 S W. 224
Evidence of similar facts or transactions generally see supra § 649.

51. Minn.—Hohl v. Chicago, etc, R. Co., 63 N.W. 742, 61 Minn. 321, 52 Am S.R. 598
52 C.J. p 120 note 50.

Animals running at large see infra § 654
Negligence in operation of trains as affected by statutes requiring giving of signals see supra § 595

52. Wis.—Mills, etc, Lumber Co v Chicago, etc, R Co., 68 N.W 996, 94 Wis. 336.

53. Mo.—Kendrick v. Chicago, etc, R Co, 81 Mo 521

54. Neb.—Chicago, etc, R Co v Richardson, 44 N W 103, 28 Neb. 118.
52 C J. p 121 note 56.
Rate of speed generally as evidence see supra § 652

55. Iowa—Fell v Burlington, etc, R. Co, 43 Iowa 177.

56. Ky.—Southern R Co v. Wood, 52 S W 796, 21 Ky L 575

57. S D.—Borneman v Chicago, etc, R. Co, 104 N.W. 208, 19 S D. 459

§ 654. —— Contributory Negligence of Owner

In an action for injury to animals, any competent evidence having a logical and material tendency to prove contributory negligence or the lack thereof on the part of the plaintiff is admissible.

Where the animal injured escaped from plaintiff's field through a defective railroad fence which it was defendant's duty to maintain, evidence of notice to the owner that the animal had on previous occasions escaped and been upon the track is immaterial,[58] nor is it competent for defendant to show that plaintiff had said that he had driven the animals loose along the highway many times before and had never had an accident,[59] or that plaintiff's servant had driven plaintiff's cattle on the railroad on several previous occasions, in the absence of evidence that such servant drove them onto the railroad at the time they were injured,[60] or that plaintiff's cattle had previously escaped from his pasture onto the highway without reference to the time it happened or to any defect in plaintiff's fence through which the escape was made.[61] However, evidence of prior escapes is admissible to prove a breachy habit requiring more than the usual care from plaintiff, after evidence that plaintiff did not allow the animals at large on the highway has been put into the case.[62]

Where the defense is contributory negligence in allowing stock to run at large in a city, an ordinance prohibiting stock from running at large is admissible on the part of defendant,[63] and evidence is admissible on the part of plaintiff which would tend to establish that the stock was at large without his fault.[64] In an action for injury to animals while being driven over a crossing, evidence is admissible, as bearing on the issue of plaintiff's due care, of the speed of the train,[65] of experiments as to the extent of view from the crossing,[66] that plaintiff knew the time the train was due to pass, and that it had not passed,[67] and that signals were given at preceding crossings which plaintiff heard or might have heard in time to have kept the animals out of danger.[68]

§ 655. Weight and Sufficiency of Evidence

In an action against a railroad company to recover for injury to an animal, the plaintiff must prove each and every essential element of his case by a preponderance of the evidence, and a preponderance of the evidence is sufficient

In an action against a railroad company to recover for injury to an animal, plaintiff must prove each and every essential element of his case by a preponderance of the evidence, and a preponderance of the evidence is sufficient.[69] Thus, there must be a preponderance of evidence to show that plaintiff was the owner of the animal injured,[70] to connect defendant with the injury complained of;[71] to show that defendant operated the road on which the injury occurred;[72] and to show that the servant of defendant whose act caused the injury was acting within the scope of his authority.[73]

In order to warrant a recovery by plaintiff there must be sufficient evidence to show that defendant was guilty of negligence, where the action is based on negligence,[74] and, ordinarily, it is not sufficient

58. Mass.—Rogers v. Newburyport R. Co., 1 Allen 16
Contributory negligence as defense see supra §§ 616–626

59. Utah.—Smith v. Utah-Idaho Cent. R. Co., 209 P. 235, 60 Utah 563.

60. Ala.—Fuqua v. Southern R. Co., 77 So. 690, 201 Ala. 164

61. Mich.—Bowen v. Flint, etc., R. Co., 68 N.W. 230, 110 Mich. 445.

62. Wis.—Evans v. Chicago, etc., R. Co., 145 N.W. 229, 156 Wis. 36

63. Iowa.—Van Horn v. Burlington, etc., R. Co., 12 N.W. 752, 59 Iowa 33.
Neb.—Chicago, etc., R. Co. v. Richardson, 44 N.W. 103, 28 Neb. 118.
Evidence of railroad's violation of ordinance or statute see supra § 653.

64. Ga.—Louisville, etc., R. Co. v. Hall, 32 S.E. 860, 106 Ga. 786.

65. Mo.—Frazier v. Wabash, etc., R. Co., 75 Mo.App. 253

66. N.J.—Kosher Dairy Co. v. New York, etc., R. Co., 83 A. 498, 83 N.J.Law 270
Evidence of experiments see supra § 649

67. Mo.—Alexander v. Missouri Pac. R. Co., 165 S.W. 1156, 178 Mo.App. 184

68. Iowa.—Heise v. Chicago Great Western R. Co., 119 N.W. 371, 141 Iowa 88.

69. Ga.—Atlantic Coast Line R. Co. v. Rowe, 64 S.E.2d 216, 83 Ga.App. 540.
Evidence held sufficient to authorize or warrant recovery by plaintiff
Ark.—Missouri Pac. R. Co. v. Bolden, 46 S.W.2d 637, 185 Ark. 1139.
Ga.—Atlantic Coast Line R. Co. v. Mercer, 60 S.E.2d 649, 82 Ga.App. 312—Powell v. Camp, 37 S.E.2d 170, 73 Ga.App. 470—Georgia Northern Ry. Co. v. Rollins, 8 S.E.2d 114, 62 Ga.App. 138—Fountain v. Louisville & N. R. Co., 6 S.E.2d 105, 61 Ga.App. 180—Southern Ry. Co. v. Grizzle, 165 S.E. 149, 45 Ga.App. 428
La.—Holley v. Louisiana & A. Ry. Co., App., 155 So. 790—Campbell & Co. v. Texas & P. Ry. Co., App., 152 So. 351, amended 155 So. 786.
Tex.—Panhandle & S. F. Ry. Co. v. Williams, Civ.App., 38 S.W.2d 880.

70. Tex.—Texas & N. O. R. Co. v. Davis, Civ.App., 26 S.W.2d 1106
52 C.J. p. 121 note 83
In absence of positive testimony by plaintiff that animals killed by train were his, plaintiff could not recover where another testified that they were his.—Texas & N. O. R. Co. v. Davis, supra

71. Mo.—Shaw v. St. Louis, etc., R. Co., 85 S.W. 611, 110 Mo.App. 561.
52 C.J. p. 121 note 84.
Cause of injury see infra § 658

72. Colo.—Burlington, etc., R. Co. v. Campbell, 59 P. 424, 14 Colo.App. 141
52 C.J. p. 121 note 85.

73. Ga.—Louisville, etc., R. Co. v. Peeples, 71 S.E. 805, 136 Ga. 448

74. Ga.—Greenway v. Macon, D. & S. R. Co., 162 S.E. 168, 41 Ga.App. 541.

for plaintiff merely to show the fact of injury,[75] or the fact of injury and also the omission of some statutory duty without any evidence tending to show that such omission was the cause of the injury.[76] However, where the facts raise a presumption of negligence and there is no rebuttal offered by defendant,[77] or where the rebuttal offered is not sufficient,[78] plaintiff may establish his right to recover by proof of ownership and value of the animal and of its being injured or killed by act of defendant without offering further evidence of negligence.

Experiments. In the absence of evidence that conditions surrounding the accident and conditions at the making of a test or experiment were the same, the testimony as to the making of the test, if competent at all, is without substantial weight or effect.[79]

§ 656. —— Where Statutory Presumption of Negligence Rebutted

The rule requiring a preponderance of the evidence establishing the negligence of the defendant applies especially where the defendant by its evidence has temporarily rebutted the presumption of negligence which, under some statutes, follows from the fact of killing of, or injury to, an animal.

The rule requiring a preponderance of the evidence establishing the negligence of defendant applies especially where defendant by its evidence has temporarily rebutted the presumption of negligence which, under some statutes, follows from the fact of killing of, or injury to, an animal,[80] or where the facts with respect to the killing are all put in evidence.[81] However, circumstantial evidence of defendant's negligence in support of the presumption may be sufficient to sustain a judgment for plaintiff,[82] especially where the presumption has not been fully rebutted by defendant's evidence,[83] or where evidence in rebuttal contradicts itself.[84]

§ 657. —— Direct and Circumstantial Evidence

The facts necessary to sustain a recovery in an action against a railroad company for injury to an animal may be established by proof of circumstances from which they may be reasonably inferred by the jury as well as by direct testimony.

The facts necessary to sustain a recovery in an action against a railroad company for injury to an animal may be established by proof of circumstances from which they may be reasonably inferred by the jury as well as by direct testimony,[85] and plaintiff's case may be strongly fortified by the failure of defendant to introduce the testimony of its servants who were present at the accident.[86] However, in order to sustain a verdict on circumstantial evidence, there must be some connection between the facts proved and the fact at issue,[87] and the circumstances must be sufficiently strong and connected to create more than a mere conjecture or suspicion.[88] While it has been held that the circumstances shown must negative every other reasonable hypothesis save that of the negligence of defendant,[89] it has also been held that proof of the more probable hypothesis is all that is required.[90]

La.—Wallace v. Missouri Pac R Co., App., 151 So 103
Mo.—Scott v Atchison, T & S. F. R. Co, App, 32 S.W 2d 139.
52 C.J p 121 note 89.
Evidence held sufficient
La.—Duke v Missouri Pac R Co, App, 142 So 333
N.H.—Dowse v Maine Cent R R., 20 A 2d 629, 91 N.H. 419
Tex.—Texas & N. O R. Co. v. Mills, Civ App, 30 S.W.2d 350.
52 C J. p 122 note 89 [a]

75. W.Va.—Kirk v. Norfolk, etc, R. Co, 24 S.E. 639, 41 W.Va 722, 56 Am S R 899, 32 L R A. 416.
52 C J. p 122 note 92
Presumption of negligence from fact of killing or injury see supra § 641

76. Ill.—Peoria, etc, R Co. v. Aten, 43 Ill.App. 68

77. Ala.—Gulf, M & O R. Co v Scott, 27 So 2d 150, 32 Ala App. 326, certiorari denied 27 So 2d 152, 248 Ala 250
52 C J p 123 note 5.

78. La.—Jackson v. Texas, etc, R Co, 117 So. 805, 166 La. 718.
52 C.J. p 123 note 6.

79. Ky.—Byrd v. Central Kentucky Tract. Co, 125 S.W. 174, 136 Ky 766.

80. Ala.—Alabama Great Southern R Co v. Hill, 43 So.2d 136, 34 Ala App 466, certiorari denied 43 So 2d 139, 253 Ala 124
Ark.—St Louis-San Francisco Ry Co v Cole, 27 S.W 2d 992, 181 Ark 780.
Ga.—Atlantic Coast Line R Co v Rowe, 64 S.E.2d 216, 83 Ga App. 540.
Wyo.—Hildebrand v Chicago, B & Q R R, 17 P 2d 651, 45 Wyo. 175.
52 C J. p 122 note 99.

81. N.D.—Snyder v. Northern Pac. Ry. Co, 285 N.W. 450, 69 N.D. 266 —Stoeber v. Minneapolis, etc., R. Co, 168 N.W 562, 40 N.D 121

82. Ga.—Central of Georgia R. Co. v. Francis, 149 S.E. 806, 40 Ga.App. 383.
52 C J. p 122 note 2.

83. Ga.—Davis v. Carter, 108 S.E. 837, 27 Ga.App. 494—Southern R. Co. v Chunn, 69 S.E 225, 8 Ga App 400.

84. Ark.—Kansas City Southern R Co. v. Griffin, 217 S.W 801, 141 Ark 625
Ga.—Central of Georgia R Co v Francis, 149 S.E 806, 40 Ga App 383

85. Ky.—Cincinnati, etc, R. Co. v Graves, 176 S.W 974, 165 Ky. 148
Okl.—Missouri, etc, R Co v. Simerly, 180 P 551, 72 Okl 251.

86. La.—Day v New Orleans Pac R Co., 35 La.Ann. 694
Okl.—St. Louis, etc, R Co v Smith, 127 P. 479, 36 Okl 28

87. Mo.—Shaw v St Louis, etc, R Co, 85 S.W. 611, 110 Mo App. 561

88. Iowa.—Gibson v Iowa Cent R. Co., 113 N.W 927, 136 Iowa 415.
52 C J p 123 note 12.

89. Iowa.—Gibson v. Iowa Cent. R. Co, supra

90. Okl.—Missouri, etc., R Co v Simerly, 180 P 551, 72 Okl 251
Or.—Meier v Northern Pac R Co., 93 P. 691, 51 Or. 69.

Although, where the only direct testimony as to the circumstances of the injury is that of defendant's servants who testify positively that there was no negligence, and they are not in any way contradicted or discredited, a verdict for plaintiff may not be sustained,[91] where there is evidence contradicting the testimony of defendant's servants, a verdict for plaintiff may stand,[92] even where the contradicting evidence is circumstantial and the evidence of the servants is direct.[93]

The rules as to the sufficiency of circumstantial evidence to support a recovery by plaintiff against a railroad company for injury to an animal have been applied to proof of the ownership of the animal injured,[94] the giving of notice of the injury to defendant,[95] the failure of defendant to post notices of the killing,[96] and the fact of negligence on the part of defendant[97]

§ 658. —— Cause of Injury

Ordinarily, in an action against a railroad company to recover for injury to an animal, there must be a preponderance of evidence on behalf of the plaintiff to show that the injury complained of was caused by an instrumentality of the defendant, that it was the negligent act of the defendant which caused the injury and not an unavoidable accident, and that the defendant could have reasonably foreseen the injury.

Ordinarily, in an action against a railroad company to recover for injury to an animal, there must be a preponderance of evidence on behalf of plaintiff to show that the injury complained of was caused by an instrumentality of defendant,[98] that it was the negligent act of defendant which caused the injury[99] and not an unavoidable accident,[1] and that defendant could have reasonably foreseen the injury[2] On the other hand, under a statute creating a presumption of negligence on the part of a railroad company for the killing or injuring of stock by it, in order that defendant may prevail the evidence must be sufficient to show that the injury complained of was not the result of the negligence of defendant.[3]

The fact that an animal was killed or injured by being struck by defendant's cars or locomotives may be proved by circumstantial evidence without the direct testimony of any eyewitness,[4] and it is sufficient to show circumstances from which this fact may be fairly and justly inferred,[5] such as the position of the animal,[6] the character of the injury,[7] the presence of blood or hair on the road[8] or locomotive,[9] hoofprints of the animal,[10] and any marks on the track or roadbed indicating that an animal had been struck or dragged by the train[11] Moreover, these circumstances may be of such a character as to warrant the jury, without any direct evidence on the part of plaintiff, in disregarding the positive testimony of defendant's servants that the animal was not injured by the train.[12]

91. Ky—Crawford v Southern R Co, 150 S W 990, 150 Ky 741
52 C J. p 123 note 15

92. Ark—St Louis, etc, R Co v Minor, 107 S W 171, 85 Ark 121
52 C J p 123 note 16

93. Ky—Cincinnati, etc, R Co. v Graves, 176 S W. 974, 165 Ky. 148

94. Ark.—St Louis, etc, R Co. v. Miller, 106 S W 484, 84 Ark. 495.
52 C J. p 123 note 19

95. Colo—Rio Grande Western R Co v Boyd, 96 P. 781, 44 Colo 119
Iowa—Kost v Chicago, etc, R Co, 149 N.W 851, 167 Iowa 622.

96. Ark—St. Louis Southwestern R Co v Castleberry, 136 S.W. 284, 98 Ark 441—St Louis, etc., R Co v Ewing, 107 S W. 191, 85 Ark 53.

97. Ga—Atlantic Coast Line R Co v. Willis, 157 S E 254, 42 Ga.App 768
N.H—Dowse v. Maine Cent R. R., 20 A 2d 629, 91 N H 419
Tex—Texas & N O R Co. v. Mills, Civ App, 30 S W 2d 350
52 C.J p 123 note 24.

98. La.—Derrick v. Thompson, App, 11 So 2d 86

Evidence held sufficient

(1) To establish fact that instrumentality of defendant killed animal in question—Gulf, M & O R. Co. v Scott, 27 So 2d 150, 32 Ala App. 326, certiorari denied 27 So 2d 152, 248 Ala 250

(2) To support or authorize verdict or finding that instrumentality of defendant killed animal in question
Ark—Louisiana & A. Ry Co v Ambrose, 47 S W 2d 1, 185 Ark 1189—Missouri Pac. R Co v. Hull, 33 S W 2d 406, 182 Ark 873.
Ga—Atlantic Coast Line R Co v. Willis, 157 S E 254, 42 Ga App 768.

99. Kan—Holland v Schaff, 187 P 682, 106 Kan. 236
52 C J p 123 note 27

1. La—Metoyer v. Texas & P. Ry. Co, App, 175 So 490

Unavoidable accident held shown

La.—Metoyer v Texas & P Ry. Co, supra

2. Miss.—Wright v Illinois Cent. R Co, 16 So 2d 381, 196 Miss 150.

3. La—Morgan v Missouri Pac R. Co, App, 151 So. 110—Jackson v. Missouri Pac. R. Co., App, 141 So. 770

Evidence held sufficient

To warrant finding that injury complained of was not caused by operators of train—Edwards v. Thompson, La App, 2 So 2d 493

4. Ark—Missouri Pac R Co. v. Hull, 33 S W 2d 406, 182 Ark 873
52 C J. p 124 note 30

5. Ind—Chicago, etc, R Co v. Schipper, 131 N E 232, 75 Ind.App. 669.
Iowa—Lister v Chicago, etc, R. Co, 186 N W 8, 192 Iowa 1068

6. Iowa—Lister v. Chicago, etc., R. Co, supra
52 C J p 124 note 32.

7. Okl—Missouri, etc, R Co v Simerly, 180 P 551, 72 Okl 251.
52 C J p 124 note 33.

8. Tex—Davis v. Etter, Civ App., 243 S W. 603.
52 C J p 124 note 34

9. Tex—International, etc, R. Co. v Hughes, 16 S.W 875, 81 Tex 184.

10. N D—Anderson v. Minneapolis, etc, R. Co., 123 N.W. 281, 18 N.D. 462.
52 C J p 124 note 36.

11. Mo—Nelson v. St. Louis, etc, R Co, 116 S W 1118, 136 Mo App. 160
52 C.J. p 124 note 37.

12. Tex—International, etc, R. Co.

On the other hand, there is no preponderance of evidence for plaintiff where the circumstances shown are equally consistent with some other cause of injury for which the railroad is not responsible,[13] and, where defendant's servants testify positively that no animal was struck and their testimony is not contradicted and the circumstantial evidence is not inconsistent therewith, the jury may not disregard their testimony.[14] Collision with a train is not sufficiently proved by merely showing that the animal was found dead or injured near the track without any signs of violence or indications of having been struck by a train,[15] since there must be substantial facts shown from which it may be reasonably inferred that the animal was killed by the train.[16]

§ 659. —— Nature and Extent of Injury or Damage

In order to sustain a recovery for the killing of an animal by a railroad company, there must be some evidence of its value, which must be of its actual or market value and not merely what the plaintiff considers it worth to him.

In order to sustain a recovery for the killing of an animal by a railroad company, there must be some evidence of its value,[17] which must be of its actual or market value and not merely what plaintiff considers it worth to him.[18] However, a verdict for the amount testified to by a single witness, if competent to testify as to the value of the animal killed, has been held justified.[19] Also, the fact that a dog killed by defendant's train was not assessed has been held not to prove that it was of no value,[20] especially where the undisputed evidence shows that the dog was valuable.[21]

Ordinarily, where an animal is merely injured, there must be evidence of its value after as well as before the injury,[22] and the evidence should be directed to a time immediately after the injury.[23] Although where the evidence merely shows that an animal was injured and there is no evidence as to whether it subsequently died, a judgment for its full value may not be sustained,[24] evidence that an employee, authorized by defendant to do so, took charge of the injured animal and subsequently killed it, may justify a verdict for the full value of the animal killed,[25] and plaintiff may not be required further to prove in dollars and cents the extent of the injury inflicted by the train.[26]

§ 660. —— Place of Injury; Venue

Under some statutory provisions, in order that the plaintiff may recover from a railroad company for killing or injuring an animal, the evidence must be sufficient to show that the accident occurred in the township where the action is brought or in an adjoining township.

Under some statutory provisions, in order that plaintiff may recover from a railroad company for killing or injuring an animal, the evidence must be sufficient to show that the accident occurred in the township where the action is brought or in an adjoining township,[27] and conflicting testimony of two witnesses placing the point of injury in different townships may not be sufficient to support a recovery, in the absence of evidence that the two townships named are adjoining.[28] Moreover, proof that the accident occurred in a well-known incorporated town, from which it is argued that the township in which the animal was killed may be inferred or judicially known, has been held insufficient, under such a statute.[29]

Although it has been held that a verdict for defendant is required where the evidence fails to show the county where the injury complained of occurred,[30] a verdict or finding that the injury oc-

v. Hughes, 16 S.W. 875, 81 Tex. 184.
52 C.J. p. 124 note 38.

13. Tex.—Paris & M. P. R. Co. v. Russell, Civ. App., 104 S.W. 2d 650.
52 C.J. p. 123 note 28.

14. Ga.—Wrightsville, etc., R. Co. v. Walker, 33 S.E. 978, 108 Ga. 262.
52 C.J. p. 123 note 29.

15. Tex.—Galveston, etc., R. Co. v. Blau, 73 S.W. 1074, 31 Tex.Civ.App. 644.
52 C.J. p. 124 note 39.

16. Ga.—Alabama Great Southern R. Co. v. Raines, 183 S.E. 926, 52 Ga.App. 589.
52 C.J. p. 124 note 40.

17. Ga.—Southern R. Co. v. Varn, 29 S.E. 822, 102 Ga. 764.

18. Tex.—Galveston, etc., R. Co. v. Schrader, 1 Tex.A.Civ.Cas. § 1147.
52 C.J. p. 124 note 42.

19. Miss.—Mississippi Cent. R. Co. v. Walden, 58 So. 538, 101 Miss. 781.

20. Ark.—Missouri Pac. R. Co. v. Green, 288 S.W. 908, 172 Ark. 423—El Dorado, etc., R. Co. v. Knox, 117 S.W. 779, 90 Ark. 1, 134 Am.St.R. 17.

21. Ark.—El Dorado, etc., R. Co. v. Knox, supra.

22. Mo.—Dietrich v. Hannibal, etc., R. Co., 89 Mo.App. 36—Smith v. Kansas City, etc., R. Co., 60 Mo.App. 591.

23. Mo.—Dietrich v. Hannibal, etc., R. Co., 89 Mo.App. 36.
52 C.J. p. 125 note 47.

24. Tex.—St. Louis, etc., R. Co. v. Evans, 14 S.W. 798, 78 Tex. 369.

25. Ala.—Tombigbee Valley R. Co. v. Still, 60 So. 546, 6 Ala.App. 470.

26. Ala.—Tombigbee Valley R. Co. v. Still, supra.

27. Mo.—Cook v. Kurn, App., 124 S.W.2d 673.

28. Mo.—Severn v. St. Louis, etc., R. Co., 129 S.W. 477, 149 Mo.App. 631.

29. Mo.—Cook v. Kurn, App., 124 S.W.2d 673—Lash v. Southwest Missouri R. Co., App., 180 S.W. 11—Severn v. St. Louis & S.F. R. Co., 129 S.W. 477, 149 Mo.App. 631.

30. Ga.—Greenway v. Macon, D. & S. R. Co., 162 S.E. 168, 41 Ga.App. 541.

curred in the county in which the action to recover therefor is brought may be sufficiently supported by evidence that the injury was received in a town which a railroad map places within that county,[31] or within the statutory limits of a town which the statute places in that county,[32] or at a point located as being a certain distance and direction from a town and which point the court, by taking judicial notice of the geographical lines of the county, can place therein.[33]

§ 661. —— Fences and Cattle Guards

a. In general
b. Nature and cause of injury
c. Place of entry on track

a. In General

In an action against a railroad company to recover for injury to an animal resulting from a violation by the company of a statute requiring such a company to fence its tracks, the plaintiff must prove each and every element of his case by a preponderance of the evidence, and this rule applies to an action to recover for an injury resulting from the defective condition of a fence or cattle guard maintained by a railroad company.

In an action against a railroad company to recover for injury to an animal resulting from a violation by the company of a statute requiring such a company to fence its tracks, plaintiff must prove each and every element of his case by a preponderance of the evidence,[34] and this rule applies to an action to recover for an injury resulting from the defective condition of a fence or cattle guard maintained by a railroad company.[35] Thus, in order to sustain a recovery by plaintiff, it has been held that there must be sufficient evidence to show that the road was not fenced as required by statute,[36] and that, if the statute only requires fencing or cattle guards at certain places or excepts certain places, the evidence must be sufficient to show that the place in question was one required to be fenced,[37] or to be protected by cattle guards,[38] or that the place in question was not one of the places excepted by statute.[39]

Under a statute allowing a certain time after the road is in operation for the construction of fences, the evidence must be sufficient to show that such road was in operation,[40] and that the statutory time had elapsed[41] at the time of the injury complained of. Under some statutory provisions, a prima facie case for plaintiff may be made out by proof of plaintiff's ownership of the animal in question, the injury, and a failure to fence at the place in question, as discussed supra § 642, and an imputation of negligence made under such a statute may be strengthened by other evidence adduced in the case.[42] Where plaintiff has made out a prima facie case under such a statute, the railroad company may be required to prove lack of negligence on its part by a preponderance of the evidence in order to escape liability.[43]

31. Ark.—Louisiana & A. Ry. Co. v. Ambrose, 47 S.W.2d 1, 185 Ark. 1189—St. Louis, etc., R. Co. v. Weatherly, 124 S.W. 1031, 93 Ark. 269.

32. Ga.—Macon, etc., R. Co. v. Barfield, 72 S.E. 936, 10 Ga.App. 104.

33. Ind.—Cleveland, etc., R. Co. v. Miller, 81 N.E. 517, 40 Ind.App. 165.

34. Fla.—Seaboard Air Line Ry. Co. v. Maige, 147 So. 215, 109 Fla. 229.

Right to sue

Where the fencing statute is held to be enforceable by the owner of adjoining lands or his lessee or licensee only, plaintiff must bring forward evidence sufficient to establish his right to sue under the statute.

Mo.—Summers v. Hannibal, etc., R. Co., 29 Mo.App. 41.

Utah.—Stimpson v. Union Pac. R. Co., 31 P. 449, 8 Utah 349.

Evidence held sufficient

(1) To support verdict for plaintiff.—Seaboard Air Line Ry. Co. v. Maige, 147 So. 215, 109 Fla. 229.

(2) To show waiver by defendant of statutory requirement that owner of animals in question file affidavit of ownership and injury to livestock with nearest station agent.—Hittson v. Chicago, R. I. & P. Ry. Co., 86 P. 2d 1037, 43 N.M. 122.

(3) Where the issue of the effectiveness of a legal fence to turn plaintiff's animals is raised, a finding for plaintiff will be sustained by evidence tending to show that the injured animals might have been turned by a legal fence, if one had existed.—Schimmele v. Chicago, etc., R. Co., 25 N.W. 347, 34 Minn. 216.

35. Ga.—Elberton & E. R. Co. v. Campbell, 167 S.E. 215, 46 Ga.App. 203.

Ill.—Iddings v. Pennsylvania R. Co., 256 Ill.App. 189.

La.—Hower v. Missouri Pac. R. Co., App., 144 So. 780.

Tenn.—Southern Ry. Co. v. Morrell, 89 S.W.2d 161, 169 Tenn. 463.

36. Ind.—Indianapolis, etc., R. Co. v. Means, 14 Ind. 30.
52 C.J. p. 125 note 59.

37. Idaho.—Bernardi v. Northern Pac. R. Co., 108 P. 542, 18 Idaho 76, 27 L.R.A.,N.S., 796.
52 C.J. p. 125 note 61.

38. Minn.—Yates v. Chicago, etc., R. Co., 132 N.W. 994, 115 Minn. 496, 36 L.R.A.,N.S., 997.

39. Tex.—Missouri-Kansas-Texas Ry. Co. v. Wimberly, Civ.App., 28 S.W. 2d 832.
52 C.J. p. 125 note 63.

40. Colo.—Denver, etc., R. Co. v. Kelso, 90 P. 65, 40 Colo. 84.
52 C.J. p. 125 note 65.

41. Colo.—Colorado, etc., R. Co. v. Neville, 92 P. 956, 41 Colo. 393.
52 C.J. p. 125 note 66.

42. La.—Cathey v. Louisiana & A. Ry. Co., App., 30 So.2d 763.

Strong prima facie case

Evidence indicating that plaintiff's mules entered on defendant's unfenced track in plain sight of train crew and traveled down track a certain number of feet before being struck and killed by train and that train crew made no effort to slow or stop train went beyond imputation of negligence flowing from proof of killing of livestock by train and made out a strong prima facie case against defendant.—Cathey v. Louisiana & A. Ry. Co., supra.

43. La.—Cathey v. Louisiana & A. Ry. Co., supra.—Abraham v. Texas & P. Ry. Co., App., 24 So.2d 886.—Thomas v. Missouri Pac. R. Co., App., 153 So. 544.—Alcock v. Texas & P. Ry. Co., App., 149 So. 132.

Defective condition; notice of defect. In order that plaintiff may recover for injury to an animal resulting from the defective condition of railroad fences or cattle guards, the evidence must be sufficient to show the defective condition of the fence[44] or cattle guard,[45] that such condition existed at the time of the injury,[46] that the animal came on the track at the defective place, as discussed infra subdivision c of this section, and, where the defect is not in the original construction, that the company had either actual or constructive notice thereof,[47] although proof of actual notice may not be necessary where facts are shown from which it appears that the defect had existed for such time or under such circumstances as to charge the company with constructive notice thereof[48]

b. Nature and Cause of Injury

In order to justify a recovery under a fencing statute, there must be sufficient evidence to show that the cause of the injury to the plaintiff's animal was the breach by the defendant of its statutory duty with respect to fences or cattle guards.

In order to justify a recovery under a fencing statute, there must be sufficient evidence to show that the cause of the injury to plaintiff's animal was the breach by defendant of its statutory duty with respect to fences[49] or cattle guards,[50] and, where the evidence shows that the injury complained of was caused by an unavoidable accident, there can be no recovery.[51]

While it may be shown by circumstantial as well as by direct evidence that the animal in question was injured by a direct collision with,[52] or by being frightened by,[53] the locomotive or train of defendant, in order to sustain a verdict for plaintiff on circumstantial evidence alone, the circumstances shown must have some connection with the facts in issue, and must not be equally consistent with some other theory as to the cause of the injury complained of, under which defendant would not be liable,[54] as where the evidence discloses merely that the animal was injured,[55] or that it had been injured on a cattle guard,[56] or that it was found tangled in a wire fence,[57] or that it had fallen from a bridge[58] or into a hole.[59]

c. Place of Entry on Track

In actions based on the statutory liability of a railroad company for its failure properly to fence, in order that the plaintiff may succeed there must be sufficient evidence to show that the animal in question came on the track at a place where the railroad company was required to fence or to maintain cattle guards, or at a place where the fence or cattle guard was defective.

In actions based on the statutory liability of a railroad company for its failure properly to fence, in order that plaintiff may succeed there must be sufficient evidence to show that the animal in question came on the track at a place where the railroad company was required to fence or to maintain cattle

Evidence held sufficient
To sustain burden of railroad company of establishing that it was not negligent.—Wise v. Texas & P. Ry Co., La App., 45 So 2d 368—Abraham v. Texas & P Ry. Co, La App, 24 So 2d 886—Friedman v. Texas & P R. Co, La App, 18 So 2d 845—Smith v. Thompson, La App, 185 So 71.

44. Tenn.—Southern Ry. Co v. Morrell, 89 S.W 2d 161, 169 Tenn. 463. 52 C J. p 127 note 99.

Prima facie case
In action against railroad for death of animal, plaintiff made out prima facie case by proving that right of way fence was so defective that the animal could have walked over it without difficulty and that the rest of the fence around the pasture was in good state of repair —Fleming v. Hodgson, 185 P.2d 181, 199 Okl. 261.

45. Iowa.—Harsch v. Chicago, R. I. & P. Ry. Co, 232 N.W. 144, 211 Iowa 1377, 75 A.L.R. 927
52 C.J. p 127 note 1.

Evidence held insufficient
(1) To show defect, where no reason was given why cattle guard in use was not safe.—Strong v. Chicago, etc, R. Co, 63 N.W 699, 95 Iowa 278.

(2) To show that cattle guard was unnecessarily dangerous.—Harsch v Chicago, R. I. & P. Ry Co, 232 N.W. 144, 211 Iowa 1377, 75 A.L.R 927

46. Ill.—Illinois Cent. R Co v. Whalen, 42 Ill 396.
52 C J p 127 note 2

47. Mo.—Townsley v Missouri Pac. R. Co., 1 S W. 15, 89 Mo 31

48. Cal.—Jesus Maria Rancho v. Southern Pac. Co, 172 P. 183, 36 Cal App 375
52 C.J. p 127 note 5.

49. Okl.—Fort Smith & W. Ry. Co. v. Bartell, 36 P.2d 934, 169 Okl. 308. 52 C.J. p 125 note 73.

Evidence held sufficient
(1) To sustain finding that defendant railroad's failure to fence part of right of way was proximate cause of death of animal struck by train —Fort Smith & W. Ry. Co. v. Bartell, supra.

(2) To justify judgment against railroad for value of animals killed by train on ground that failure of railroad to comply with statute by not erecting and maintaining on its right of way a wing fence at some point between certain depots was cause of injury.—J. Nebeker & Son v Los Angeles & S L. R. Co, 104 P. 2d 230, 99 Utah 226.

50. Tex.—Gulf, etc, R. Co v. Messer, Civ App, 208 S W. 232
Utah.—J. Nebeker & Son v. Los Angeles & S L. R. Co, 104 P.2d 230, 99 Utah 226.

51. La.—Wise v Texas & P. Ry. Co., App, 45 So 2d 368.

52. Iowa.—Kennedy v. Chicago, etc., R Co, 57 N W. 862, 90 Iowa 754.
52 C J p 126 note 75.

53. Iowa.—Van Slyke v. Chicago, etc., R. Co., 45 N.W. 396, 80 Iowa 620.
52 C.J p 126 note 76.

54. Iowa.—Asbach v. Chicago, etc, R Co., 37 N W 182, 74 Iowa 248

55. Mo.—Hesse v St Louis, etc., R. Co., 36 Mo App 163

56. Iowa.—Moore v Burlington, etc, R. Co, 33 N W. 371, 72 Iowa 75.

57. Mo.—Perkins v St. Louis, etc, R Co, 15 S W. 320, 103 Mo. 52, 11 L R A. 426

58. Iowa.—Asbach v Chicago, etc, R Co., 37 N.W. 182, 74 Iowa 248.

59. Mo.—Eggleston v. Kansas City Southern R. Co., 164 S.W. 169, 177 Mo.App. 346.

guards,[60] or at a place where the fence or cattle guard was defective.[61] This need not be shown by direct testimony but may be established by circumstantial evidence,[62] such as by the condition of the fence[63] or of the cattle guard,[64] or by hoofprints,[65] or other marks or circumstances indicating that the animal entered at such place,[66] and proof that an animal which was not breachy entered on the track over a fence that was generally insecure may obviate the necessity of showing that it was insecure at the particular point where the animal entered.[67]

The circumstantial evidence may be sufficiently strong to sustain a finding that the animal came on the track at a place where the railroad company was required to fence or to maintain cattle guards notwithstanding the positive testimony of defendant's servants that it was at a public crossing or other place not required to be fenced,[68] as, for example, the hoofprints or position of the animal at a distance from the public crossing,[69] particularly where other facts are shown discrediting their testimony in other respects as to the circumstances of the injury.[70]

On the other hand, a verdict for plaintiff may not be sustained in the absence of all evidence as to whether the animal came on the track through a break in the fence or from a neighboring crossing,[71] or through an open gate for which defendant was not responsible,[72] or where defendant's servants testify positively that the animal came on the track at a public crossing or depot and their testimony is not impeached or contradicted by plaintiff's witnesses or by circumstantial evidence.[73]

§ 662. —— Crossings, Gates, and Bars

In order to sustain a recovery for injury to an animal on the ground of the defective condition of a railroad crossing, there must be sufficient evidence, either direct or circumstantial, to show the existence of a defective condition in the crossing.

In order to sustain a recovery for injury to an animal on the ground of the defective condition of a railroad crossing, there must be sufficient evidence, either direct or circumstantial, to show the existence of a defective condition in the crossing.[74] Where an animal is injured by coming on a railroad through a defective or open gate, a verdict for plaintiff may be supported by evidence, direct or circumstantial, that the gate was defective[75] or not up to the statutory standard,[76] or that the gate had been opened by servants or agents of defendant,[77] or that it had been open for a sufficient length of time before the accident to charge the railroad with notice.[78] However, a verdict for plaintiff may not be sustained where there is no evidence as to the defectiveness of the gate,[79] or as to how it came to be open,[80] or, where it is not claimed that defendant's servants opened the gate or had actual notice of its condition, that it had been open for such length of time as to charge the company with notice.[81] So, too, a verdict for plaintiff may not be sustained on proof of the defective condition of a gate where there is no evidence that the animal injured passed through the gate.[82]

§ 663. —— Rate of Speed

Ordinarily, in the absence of a statutory or municipal regulation otherwise providing, it is not sufficient to

60. Colo.—Colorado, etc., R. Co. v. Neville, 92 P. 956, 41 Colo. 393.
Tex.—Missouri-Kansas-Texas R. Co. v. Wimberly, Civ.App., 28 S.W.2d 832.

61. Okl.—Missouri, K. & T. Ry. Co. v. Beatty, 32 P.2d 892, 168 Okl. 254.
52 C.J. p. 126 note 85

62. Wis.—Herrell v. Chicago, etc., R. Co., 90 N.W. 1071, 114 Wis. 605.
52 C.J. p. 126 note 86.

63. Iowa.—Mikesell v. Wabash R. Co., 112 N.W. 201, 134 Iowa 736.
52 C.J. p. 126 note 87.

64. Minn.—Green v. St. Paul, etc., R. Co., 61 N.W. 1130, 60 Minn. 134.
Wis.—Herrell v. Chicago, etc., R. Co., 90 N.W. 1071, 114 Wis. 605.

65. Neb.—Sands v. Chicago, etc., R. Co., 110 N.W. 855, 78 Neb. 299.
52 C.J. p. 126 note 89.

66. Iowa.—Daugherty v. Chicago, etc., R. Co., 54 N.W. 219, 87 Iowa 276.
52 C.J. p. 126 note 90.

67. Ind.—Louisville, etc., R. Co. v. Spain, 61 Ind. 460.
N.Y.—Leyden v. New York Cent., etc., R. Co., 8 N.Y.S. 187, 55 Hun 114.

68. Iowa.—Klay v. Chicago, etc., R. Co., 102 N.W. 526, 126 Iowa 671.

69. Iowa.—Bacus v. Chicago, etc., R. Co., 118 N.W. 751.
52 C.J. p. 126 note 92.

70. Mo.—Vincent v. Current River R. Co., 53 Mo. App. 616.
52 C.J. p. 126 note 93.

71. Iowa.—Rhines v. Chicago, etc., R. Co., 39 N.W. 912, 75 Iowa 597.
Wyo.—Tisthammer v. Union Pac. R. Co., 286 P. 377, 41 Wyo. 382.

72. Tex.—Missouri, etc., R. Co. v. Johnson, Civ.App., 39 S.W. 323.
Utah.—Reid v. San Pedro, etc., R. Co., 118 P. 1009, 39 Utah 617.

73. Or.—Eaton v. McNeil, 49 P. 875, 31 Or. 128.
52 C.J. p. 126 note 97.

74. Iowa.—Criss v. Chicago, etc., R. Co., 55 N.W. 523, 88 Iowa 741.
52 C.J. p. 127 note 8.

75. Mo.—Smith v. St. Louis, etc., R. Co., 112 S.W. 32, 132 Mo.App. 612.
52 C.J. p. 127 note 9

76. Kan.—Roman v. St. Louis-San Francisco R. Co., 245 P. 115, 120 Kan. 585.
Mo.—Rinehart v. Kansas City Southern R. Co., 102 S.W. 958, 204 Mo. 269.

77. Mo.—Jeffries v. Chicago, etc., R. Co., App., 182 S.W. 1082.

78. Mo.—Rinehart v. Kansas City Southern R. Co., 102 S.W. 958, 204 Mo. 269.

79. Kan.—Bertrand v. Kansas City, etc., R. Co., 114 P. 214, 84 Kan. 343.

80. Idaho.—Wallace v. Oregon Short Line R. Co., 100 P. 904, 16 Idaho 103.
52 C.J. p. 127 note 14

81. Ill.—Chicago, etc., R. Co. v. Sierer, 13 Ill.App. 261.

82. Iowa.—Koenigs v. Chicago, etc., R. Co., 65 N.W. 314, 67 N.W. 399, 98 Iowa 569.

support a finding of negligence on the part of a railroad company to show merely the speed of the train at the time of the injury complained of, or to show merely that the train was running faster than its usual rate of speed, or to show that the usual rate of speed was not reduced on approaching an ordinary public crossing in open country.

Ordinarily, in the absence of a statutory or municipal regulation otherwise providing, it is not sufficient to support a finding of negligence on the part of a railroad company to show merely the speed of the train at the time of the injury complained of,[83] or to show merely that the train was running faster than its usual rate of speed,[84] or to show that the usual rate of speed was not reduced on approaching an ordinary public crossing in open country.[85]

On the other hand, proof that the train was running at a high rate of speed under circumstances known to defendant's servants, making a greater degree of precaution necessary, may justify a finding of negligence on the part of the railroad company,[86] and the evidence may be sufficient to show that due care under the circumstances required a relatively slow and careful operation of the train at the time of the accident,[87] and that the running of the train at an unusual rate of speed and without warning of its approach constituted negligence.[88] Also, where the issue is merely as to whether the speed of the train was in excess of that allowed by a statute or ordinance, evidence that the train was running "very fast" may justify a finding that it was running at a greater rate of speed than the statutory rate where the statutory rate may reasonably be held not fast,[89] especially where such evidence is strongly corroborated by the physical circumstances of the case.[90]

§ 664. —— Precautions; Signals and Lookouts

a. In general

b. Lookout

c. Signals

a. In General

In order to sustain a recovery by the plaintiff on the ground that the defendant failed to take proper precautions to avoid injuring the animal or animals in question, the evidence must be sufficient to show a failure of duty on the part of the defendant in this respect.

In order to sustain a recovery by plaintiff on the ground that defendant failed to take proper precautions to avoid injuring the animal or animals in question, the evidence must be sufficient to show a failure of duty on the part of defendant in this respect,[91] such as a failure of the servants of defendant to exercise proper care to avoid injuring such animals where they saw the animals or knew them to be on or near the track,[92] and evidence that a train running rapidly was heard to give stock signals has been held insufficient of itself to show that the animals in question were on the track a sufficient length of time to enable the servants of defendant to avoid the accident.[93] Also, where there is no evidence as to when the animal came on the track, the mere fact that at the place where it was killed an animal could have been seen for a sufficient distance to stop the train has been held not sufficient to show negligence on the part of the servants of defendant.[94]

The evidence, on the other hand, may be sufficient to sustain a finding that the servants of defendant took all possible steps to avoid the accident,[95] and defendant may be absolved from the charge of negligence where the evidence is sufficient to show that the train, despite the efforts of the operator, could not be stopped before hitting the animal in question.[96] Thus, while a verdict for plaintiff may be warranted, even though defendant's engineer testifies that everything possible was done to avoid the accident, if there are facts admitted by him or testified to by others which

83. Tex.—Southern Kansas R. Co v. Graham, Civ App, 155 S.W. 653.
52 C.J. p 127 note 18

84. Iowa—Plaster v. Illinois Cent. R. Co, 35 Iowa 449.

85. Iowa.—Connyers v. Sioux City, etc, R. Co., 43 N.W. 267, 78 Iowa 410

86. Iowa—Baker v Chicago, etc, R. Co, 35 N.W. 460, 73 Iowa 389
52 C.J. p 127 note 21

87. N.H.—Dowse v Maine Cent. R. R, 20 A.2d 629, 91 N.H. 419

88. N.H.—Dowse v. Maine Cent. R. R., supra.

89. Ill.—Indianapolis, etc., R. Co v. Peyton, 76 Ill. 340.

90. Iowa.—Story v Chicago, etc, R. Co., 44 N.W. 690, 79 Iowa 402.
52 C.J. p 128 note 23.

91. La.—Hower v. Missouri Pac. R. Co, App, 144 So. 780
Miss.—Gulf, M. & O. R. Co v. Scarborough, 28 So.2d 849, 201 Miss. 199

Evidence held sufficient
Ga.—Atlantic Coast Line R. Co. v Mercer, 60 S.E.2d 649, 82 Ga. App. 312

92. Ga.—Atlantic Coast Line R. Co v. Mercer, supra.

La.—Hower v. Missouri Pac. R. Co, App, 144 So. 780
52 C.J. p 128 note 31

93. Tex.—Gulf, etc., R. Co v. Anson, 105 S.W. 989, 101 Tex. 198.

94. Kan.—Kansas City, etc, R. Co v. Bolson, 14 P. 5, 36 Kan. 534.
Utah.—Richards v. Oregon Short Line R. Co, 123 P. 933, 41 Utah 99.

95. Ala.—Smith v. Bugg, 100 So. 503, 211 Ala. 341.
Wash.—Jones v Northern Pac. Ry. Co, 100 P.2d 20, 3 Wash.2d 134.

96. Ga.—Florence v. Seaboard Air Line Ry. Co., 157 S.E. 891, 43 Ga. App. 18.

make the correctness of his opinion fairly disputable,[97] where the servants of defendant testify positively that there was no negligence or that under the circumstances the injury was unavoidable and they are not impeached or contradicted by plaintiff's witness or by the circumstances of the case, a judgment for plaintiff may not be sustained.[98]

Headlight. Evidence of a failure on the part of defendant to provide a proper headlight in good condition, and that the animal in question could have been seen in time to avoid the accident if there had been a proper headlight, may be sufficient to support a verdict against defendant,[99] but not where it appears that the accident would have been unavoidable even with a headlight in good condition.[1]

b. Lookout

In order that the plaintiff may recover on the ground that the servants of the defendant failed to maintain a proper lookout, the evidence must be sufficient to show a breach of duty on their part with respect to maintaining a proper lookout, as well as that such breach of duty was the cause of the accident in question.

In order that plaintiff may recover on the ground that the servants of defendant failed to maintain a proper lookout, the evidence must be sufficient to show a breach of duty on their part with respect to maintaining a proper lookout,[2] as well as that such breach of duty was the cause of the accident in question,[3] and evidence of weather conditions at the time of the accident may be such as to warrant a finding that the servants of defendant were prevented from discovering the animal on the track in time to avoid hitting it.[4] A finding of negligence on the part of defendant in failing to maintain a proper lookout may, on the other hand, be sustained by evidence sufficient to show that the servants of defendant, in the exercise of ordinary care, could have discovered the animal in question on the tracks in time to avoid injuring it,[5] as in a case where it is shown that the animal could have been seen for a sufficient distance within which to stop the train, provided it is also shown that the animal was on the track for the time required for the train to go that distance,[6] and where, if the evidence of conditions of light and weather are conflicting, there is evidence sufficient to support a finding that conditions were such as not to obstruct the engineer's sight.[7]

c. Signals

In determining whether or not a proper signal was given by the servants of the defendant, purely negative testimony of witnesses that they did not hear a signal is entitled to little weight if the witnesses were not paying attention to the train or were a considerable distance away at the time

In determining whether or not a proper signal was given by the servants of defendant, purely negative testimony of witnesses that they did not hear a signal is entitled to little weight, particularly if the witnesses were not paying any attention to the train or were a considerable distance away at the time,[8] and such evidence is entitled to much less weight than positive testimony of competent witnesses for defendant that such signals were given.[9] However, where the attention of a witness was directed to the train at the time or the circumstances were such that he would naturally have heard the signal, his negative testimony may be entitled to greater weight and, in the absence of contradictory testimony of the servants of defendant, may be sufficient to sustain a finding of negligence in this regard.[10] If plaintiff's witnesses testify positively that a signal was not given, a finding to this effect may be sustained, although defendant's servants in charge of the train testify

97. Iowa—Heise v Chicago Great Western R. Co, 114 N W 180, reheard 119 N W. 371, 141 Iowa 88
52 C.J p 128 note 28

98. Okl—Oklahoma Union R Co v. Feebeck, 212 P. 414, 88 Okl 212
Tex—Hines v Pennington, Civ App, 240 S W. 703.
52 C J. p 128 note 27.

99. Ark.—Jonesboro, etc, R. Co. v Guest, 99 S W. 71, 81 Ark 267.
Miss—Illinois Cent. R. Co. v Reed, 74 So. 423, 113 Miss 545.

1. Ark.—Milham v Pine Bluff, etc, R Co, 110 S.W 595, 86 Ark. 190.
Miss—Illinois Cent R. Co. v. Calhoun, 68 So. 443.

2. Ark—Mahor v Kansas City Southern R Co., 223 S.W. 388, 145 Ark 111
52 C J p 128 note 30.

3. Colo—Denver, etc, R Co v Dunn, 103 P 387, 46 Colo 150.
52 C J p 128 note 32.

4. La—Pendleton v. Missouri Pac R. Co., App., 145 So 689—McLemore v Louisiana Ry. & Nav Co, 135 So 244, 17 La App. 74

Evidence sufficient to rebut presumption of negligence

Where the killing of an animal is fully explained by the uncontradicted and undiscredited evidence of a servant of defendant, showing that it was impossible to see the animal in time to save it, the presumption of negligence arising from the accident is rebutted.—Georgia Railroad & Banking Co. v. Wall, 7 S E. 639, 80 Ga. 202—Atlantic Coast Line R Co. v. Sears, 56 S E 2d 129, 80 Ga App 338—Savannah & Atlanta Ry Co v De Busk, 23 S.E.2d 529, 68 Ga App 529.

5. Ga—Atlantic Coast Line R. Co v. Willis, 157 S E. 254, 42 Ga App 768.
La—Marston's Estate v. Louisiana Ry & Nav Co, 135 So 113, 16 La App 610

6. Kan—Union Pac. R Co. v. Thisler, 103 P 999, 80 Kan 583
52 C J p 128 note 33.

7. Fla—Jacksonville, etc, R Co. v Hunter, 8 So 450, 26 Fla 308.

8. Mo—Summerville v. Hannibal, etc, R. Co, 29 Mo App. 48—Cathcart v. Hannibal, etc., R Co., 19 Mo App 113.

9. Kan—Missouri Pac R. Co. v. Pierce, 18 P. 305, 39 Kan 391.
52 C J p 129 note 40

10. Mo—Severn v St. Louis, etc, R Co, 129 S W. 477, 149 Mo App 631—Lockhart v Missouri, etc., R Co., 89 Mo.App 100.

to the contrary,[11] and, a fortiori, where defendant's servants testify as to the duty to signal and their failure to recall whether or not it was done,[12] or where they testify that it was not done[13]

In order to justify a recovery by plaintiff on the ground of a failure on the part of defendant to give a required signal the evidence must be sufficient to show that such failure of duty on the part of defendant was the cause of the injury complained of.[14] However, under some statutory provisions the burden is on defendant to show by sufficient evidence that its failure to signal did not cause the injury complained of,[15] and, by virtue of some statutes, evidence that signals were not given may be sufficient to warrant an inference that, if they had been given, the animals would not have been struck.[16] Moreover, it has been held that in order to entitle plaintiff to recover because of a failure to signal on the part of defendant an affirmative showing that the servants of defendant discovered the animal in question on the track in time to avoid the injury complained of is not essential to establish the proximate cause of the accident.[17]

§ 665. —— Contributory Negligence

In an action against a railroad company for injuries to animals, the party who has the burden of proof as to contributory negligence must adduce sufficient evidence to meet such burden.

In actions against railroad companies to recover for injuries to animals, the party who has the burden of proof as to contributory negligence, must adduce sufficient evidence to meet such burden.[18] Thus contributory negligence of the owner barring his right to recover for injury to his animal may be sufficiently shown by evidence that plaintiff, or his servant, failed to stop, look, and listen before driving his animals on the crossing,[19] or was in the habit of doing so, notwithstanding warnings, at the time a train usually passed,[20] or was using his horses in work on the track at a time when he knew a train was scheduled to pass[21]

On the other hand, evidence of a failure to look and listen in driving a horse over a crossing may not justify direction of verdict for defendant where it is shown that the crossing was passed in safety, and that the injury to the horse resulted from its backing into the train afterward against the efforts of its owner to prevent it[22] Moreover, evidence that plaintiff did look and listen before driving cattle over the crossing has been held sufficient to support a finding for him on that issue.[23] Also, contributory negligence has been held not conclusively proved by the fact that plaintiff left his horse or team unhitched and unattended in the vicinity of a railroad track,[24] or by the fact that plaintiff placed a carload of cattle overnight in a pasture, closing the gate and fastening it with a hook but not using a slide board with which he was unfamiliar.[25]

§ 666. —— Willful, Wanton, or Gross Negligence

Willful, wanton, or gross negligence, when it is an element of the case against a railroad company for injuries to animals, must be established by a preponderance of the evidence.

Willful, wanton, or gross negligence, when it is an element of the case against a railroad company for injuries to animals, must be established by a preponderance of the evidence.[26] While evidence that no effort whatever was made by the engineer to avoid injuring the animal in question under

11. Minn.—Croft v. Chicago Great Western R. Co., 74 N.W. 898, 80 N.W. 628, 72 Minn. 47.
52 C.J. p. 129 note 42.

12. Ark.—Missouri, etc., R. Co. v. Foresee, 26 S.W.2d 108, 181 Ark. 471.

13. Ky.—Chesapeake, etc., R. Co. v. Turley, 234 S.W. 188, 192 Ky. 568.

14. N.H.—Dowse v. Maine Cent. R. R., 20 A.2d 629, 91 N.H. 419.
52 C.J. p. 129 note 45.
Evidence held sufficient
(1) In general—Southern Kansas R. Co. v. Schmidt, 24 P. 496, 44 Kan. 374.
(2) To justify finding that, if signals had been given, plaintiff's son, who was near cows, could have kept cows from track long enough for train to pass—Dowse v. Maine Cent. R. R., 20 A.2d 629, 91 N.H. 419.

15. Mo.—Weltch v. St. Louis, etc., R. Co., 176 S.W. 261, 190 Mo.App. 213.

16. Mo.—Bledsoe v. Missouri, etc., R. Co., 164 S.W. 183, 177 Mo.App. 153.
Tex.—Houston, etc., R. Co. v. Hall, Civ.App., 219 S.W. 526.

17. Tex.—Beaumont, S. L. & W. Ry. Co. v. Stubblefield, Civ.App., 37 S.W.2d 403

18. N.Y.—Cross v. New York Cent., etc. R. Co., 123 N.Y.S. 908
N.C.—Mesic v. Atlantic, etc., R. Co., 26 S.E. 633, 120 N.C. 489

19. N.C.—Mesic v. Atlantic, etc., R. Co., supra
52 C.J. p. 129 note 50.

20. Ohio.—Cranston v. Cincinnati, etc., R. Co., 1 Handy, 193, 12 Ohio Dec. (Reprint) 97.

21. N.Y.—Good v. New York, etc., R. Co., 2 N.Y.S. 419, 50 Hun 601.
52 C.J. p. 129 note 52

22. N.C.—Hines v. Norfolk Southern R. Co., 72 S.E. 325, 156 N.C. 222

23. Ky.—Chesapeake, etc., R. Co. v. Mason, 185 S.W. 71, 169 Ky. 699, L.R.A.1916F 127

24. Iowa.—O'Leary v. Chicago, etc., R. Co., 103 N.W. 362
52 C.J. p. 129 note 55

25. Ill.—Edwards v. Chicago, etc., R. Co., 238 Ill.App. 170

26. Ind.—Vandalia R. Co. v. Clem, 96 N.E. 789, 49 Ind.App. 94
Me.—Russell v. Maine Cent. R. Co., 61 A. 899, 100 Me. 406
Tex.—Texas & N. O. R. Co. v. Kaderli, Civ.App., 33 S.W.2d 832, error dismissed.

circumstances indicating that the injury was avoidable may justify a finding of wanton and gross negligence against a railroad company,[27] testimony of the engineer, uncontradicted by direct testimony or circumstances, that he did not willfully intend to injure the animal is not sufficient to support a verdict based on willful injury.[28] Moreover, evidence that the engineer gave no particular attention to animals in an adjoining pasture is not sufficient to support a verdict based on a charge of gross negligence, where it appears that on first realizing the danger to the animals he made reasonable efforts to avoid collision,[29] or where it is shown that, when danger was first apparent, collision was unavoidable.[30]

A judgment for recovery of damages for injury to a trespassing animal is not supported by the uncontradicted testimony of the engineer that he did not see the animal before striking it,[31] or by evidence of negligent operation of a train in the absence of further evidence of willful injury or reckless disregard for the safety of others.[32] Likewise, evidence of a straight track for a considerable distance and excessive speed will not support a verdict for the owner of an animal pastured on the railroad right of way under a contract exempting the railroad from liability for negligent injury.[33]

§ 667. Conduct of Trial in General

With respect to actions against railroad companies for injuries to animals, questions of law and fact are discussed infra §§ 668–678; instructions, infra §§ 679–685; and the verdict, findings, and judgment infra § 686.

Examine Pocket Parts for later cases.

§ 668. Questions of Law and Fact

In an action against a railroad company for injury to animals, questions of law should be determined by the court and issues of fact by the jury.

In an action against a railroad company to recover for injury to animals, questions of law should be determined by the court[34] and issues of fact by the jury.[35] Thus, the case should be submitted to the jury whenever there is any evidence from which they might justifiably find the existence of a material fact in issue,[36] or where the evidence is conflicting or of such a character that different conclusions as to a fact in issue may reasonably be drawn therefrom.[37] However, whether there is any competent evidence is a question for the court,[38] and an issue should not be submitted to the jury where there is no evidence to support it,[39] or where there is insufficient evidence to support it,[40] or where the evidence is legally insufficient to sustain a verdict if rendered,[41] and, if the evidence is not conflicting and is of such a character that only one inference may be drawn therefrom, the court should, and it is not error when it

27. Ga.—Georgia Northern R Co v. Winchester, 91 S.E 929, 19 Ga.App 539.
52 C J p 130 note 58

28. Ind.—Indiana, etc, R Co. v. Overton, 20 N E 147, 117 Ind 253

29. Wis.—Lynch v. Northern Pac R Co, 54 N.W 610, 84 Wis. 348.

30. Wis.—Jones v. Chicago, etc., R Co, 46 N W 884, 77 Wis. 585

31. Me.—Russell v. Maine Cent. R Co, 61 A. 899, 100 Me. 406.

32. Ind.—Vandalia R. Co. v. Clem, 96 N E. 789, 49 Ind App 94.
52 C.J. p 130 note 63

33. Ga.—Hearn v. Central of Georgia R Co., 95 S E 368, 22 Ga. App 1.

34. W.Va.—Starks v Baltimore, etc, R. Co., 87 S.E 88, 77 W.Va 93.

35. Ala.—Alabama Great Southern R. Co v. Christian, 163 So. 466, 26 Ala App 555.
Wash.—Murray v Oregon-Washington R & Nav. Co., 27 P.2d 574, 175 Wash. 320

36. Ark.—St. Louis Southwestern Ry Co. v. Byars, 120 S.W.2d 713, 196 Ark 1179.
Ga.—Lowry v. Central of Georgia Ry Co, 167 S.E 786, 46 Ga App. 356.
Wyo.—Hildebrand v Chicago, B & Q. R R, 17 P 2d 651, 45 Wyo. 175.
52 C J. p 134 note 89

37. Ark.—Missouri Pac. R. Co. v. Bennings, 53 S W.2d 599, 186 Ark. 303
Wash.—Murray v. Oregon-Washington R & Nav Co, 27 P.2d 574, 175 Wash 320.
52 C.J. p 134 note 90.

Extrication from trestle

(1) In general.—Bugg v. Mitchell, 103 So 718, 20 Ala App. 555—52 C J. p 134 note 90 [c].

(2) Where all four legs of a mule were down between ties of a railroad trestle, whether an attempt to remove mule would have been so dangerous as to entitle railroad without liability to shoot mule without attempting to remove it, and whether failure to attempt to extricate mule was negligence, were questions for jury.—Chicago, R. I. & P. Ry. Co v Boyles, 187 S.W.2d 719, 208 Ark. 774, 159 A.L.R. 150.

Presentation or notice of claim

(1) In general.—Binder v. Chicago, etc, R. Co., 144 N W. 358, 162 Iowa 550—52 C.J. p 134 note 90 [j].

(2) Whether notice of claim required by statute was given to railroad, as basis for recovery of double damages for delay in paying claim for death or injuries to stock, was a question of fact.—St Louis-San Francisco Ry. Co v Cartwright, 162 S W 2d 896, 204 Ark XVIII.

Condition of right of way

(1) In general.—Hutsell v Wabash R. Co., Mo.App, 209 S W. 560—52 C.J. p 134 note 90 [b].

(2) The question of liability of railroad company on the ground of negligence in failure to keep the right of way clear was for the jury.—Texas & P. Ry. Co. v. Heathington, Tex Civ. App., 115 S W.2d 495.

38. N C.—Boing v. Raleigh, etc, R Co., 87 N C. 360.

39. Okl.—St Louis & S F. R. Co. v. Smith, 137 P 357, 41 Okl. 314.
52 C.J. p 135 note 92.

40. Ark.—Chicago, R I & P. Ry. Co v Fowler, 55 S W.2d 75, 186 Ark. 682.

41. W.Va.—Starks v. Baltimore, etc, R. Co, 87 S E 88, 77 W.Va. 93.
52 C.J. p 135 note 93.

does, affirmatively instruct the jury in accordance with such inference.[42]

§ 669. —— Fact of Killing or Injury by Train

If there is any evidence reasonably tending to show that the animal in question was killed or injured by one of the defendant's trains, that issue should be submitted to the jury wherever the evidence is conflicting or affords reasonable ground for conflicting opinions.

If there is any evidence reasonably tending to show that the animal in question was killed or injured by one of defendant's trains, that issue should be submitted to the jury wherever the evidence is conflicting or affords reasonable ground for conflicting opinions.[43] This rule has been applied to the determination of whether the death or injury was caused by defendant's train on some evidence of the animal's being seen near the track at the time the train passed,[44] of the animal's physical condition before the injury[45] or the nature of the injury considered separately or in connection with the finding of the animal afterward near the track,[46] the condition of near-by fences,[47] footprints,[48] hair or blood on track,[49] or other physical signs or conditions,[50] or by an absence of evidence of other possible causes.[51] In a jurisdiction where proof of the killing or injuring of the animals in question by defendant's train raises a presumption of negligence on the part of defendant, it has been held that, where defendant introduces evidence which clearly and undisputedly shows that it exercised due care and took every precaution to avoid the accident, the presumption does not authorize the submission of the issue of defendant's negligence to the jury.[52]

§ 670. —— Character and Condition of Public Crossing

In an action against a railroad company for injury to an animal at a public crossing, where the evidence is conflicting or different conclusions may reasonably be drawn therefrom, it is a question for the jury whether the crossing was constructed and maintained by defendant in a safe and proper condition, or whether a particular plan of construction is safe.

In an action against a railroad company for injury to an animal occurring at a public crossing, where the evidence is conflicting or different conclusions may reasonably be drawn therefrom, it is a question for the jury whether the crossing was constructed and maintained by defendant in a safe and proper condition,[53] or whether a particular plan of construction is safe.[54] However where there is no evidence of a defective condition, the issue is one for the court to determine.[55]

§ 671. —— Operation of Train

Whether defendant was guilty of negligence in the operation of its trains causing the injury to plaintiff's animals is ordinarily a question of fact for the jury.

Whether defendant was guilty of negligence in the operation of its train causing the injury to plaintiff's animals is ordinarily a question of fact for the jury.[56] The issue should be submitted to the jury if there is any evidence reasonably tending to show negligence,[57] or where the evidence relating thereto is conflicting,[58] or is of such a

42. W Va—Daniels v. Chesapeake, etc., R. Co, 117 S.E. 695, 94 W Va. 56.
52 C.J. p 135 note 94.

43. Ark—Kansas City Southern Ry. Co. v. Boyd, 146 S.W.2d 535, 201 Ark 696—Missouri Pac. R. Co v Burrow, 133 S.W.2d 13, 199 Ark. 185.
Miss.—Adams-Newell Lumber Co v Jones, 139 So 315, 162 Miss 517.

44. Ark.—Midland Valley R Co v Skinner, 138 S.W. 969, 99 Ark. 370.
N.C.—Boing v. Raleigh, etc, R. Co., 87 N.C. 360.

45. Ala.—Louisville, etc., R Co. v. Carter, 104 So. 754, 213 Ala 393.

46. Iowa.—Lister v. Chicago, etc, R Co, 186 N.W. 8, 192 Iowa 1068
52 C J. p 135 note 99.

47. Ga—Central R., etc., Co. v. Bryant, 15 S.E 537, 89 Ga 457.

48. Ala.—Nashville, etc, R. Co v. Bingham, 62 So 111, 182 Ala 640.
52 C.J p 135 note 2.

49. Miss—Johnson v. Illinois Cent. R. Co, 39 So 780.

50. Okl—Missouri Pac. R. Co. v. Johnson, 222 P. 234, 101 Okl. 4.
52 C.J. p 135 note 4.

51. Ala—Southern R Co v. Penney, 51 So 392, 164 Ala 188—Louisville, etc, R. Co v. Lancaster, 25 So 733, 121 Ala. 471.

52. S.C—Johnson v. Atlantic Coast Line R. Co., 60 S.E.2d 226, 217 S.C. 190.
Rebuttal of statutory presumption of negligence see infra § 672.

53. Ark.—St. Louis-San Francisco R. Co v. Call, 122 S.W.2d 178, 197 Ark. 225.
52 C.J. p 135 note 6.

54. Iowa—Meeker v. Chicago, etc, R Co, 21 N.W 120, 64 Iowa 641.
52 C J. p 135 note 7.

55. Okl.—Atchison, etc, R Co. v. Wooley, 189 P. 180, 78 Okl. 109.
52 C.J. p 135 note 8.

56. Ala.—Alabama Great Southern R Co v. Smelley, 187 So. 630, 237 Ala. 471—Perry v. Atlantic Coast Line R Co., 42 So.2d 837, 34 Ala App. 644.
Ark.—St. Louis-San Francisco R Co v. Call, 122 S.W 2d 178, 197 Ark 225.
Ga—Aycock v Callaway, 51 S.E 2d 53, 78 Ga App 219—Powell v Nelson, 183 S.E 348, 52 Ga App 351—Southern Ry Co. v Abercrombie, 165 S.E. 901, 45 Ga.App. 623.
Miss—Gulf, M. & N. R Co. v. Pool, 186 So. 648.
52 C J p 135 note 10.

57. Ala.—Central of Georgia Ry. Co v Jessie, 128 So. 116, 23 Ala App 513.
Okl—Mills v. Stewart, 209 P. 770, 87 Okl 189.
52 C J. p 136 note 11.

58. Ark—Missouri Pac. R. Co v. Johnson, 56 S.W 2d 576, 186 Ark 887—Missouri Pac. R Co v Womack, 47 S.W.2d 30, 185 Ark 299—Lee v Missouri Pac R. Co, 47 S.W 2d 29, 185 Ark 1189.
Ga—Aycock v. Callaway, 51 S.E 2d 53, 78 Ga App. 219—Southern Ry. Co. v. Freeman, 198 S.E 717, 58 Ga App 403.
Miss.—Fore v. Illinois Cent. R. Co.,

character that different conclusions or inferences might reasonably be drawn therefrom,[59] and the weight of such evidence is a matter for their consideration.[60] Plaintiff is entitled to go to the jury on every element of negligence charged which there is evidence tending to support.[61]

On the other hand, the case should not be submitted to the jury if there is no evidence of negligence,[62] or if there is insufficient evidence of negligence to warrant a submission to the jury,[63] even though the evidence does tend to show that the injury was caused by the train,[64] or where the evidence is of such a character that a verdict if rendered would be set aside by the court and a new trial granted on the ground of the insufficiency of the evidence to support the verdict,[65] or where the facts are undisputed and the deductions or inferences to be drawn therefrom are undisputable.[66]

§ 672. —— Rebuttal of Statutory Presumption of Negligence

Where by statute proof of the injury raises a presumption of negligence which must be rebutted by the defendant, it is ordinarily a question for the jury, or for the trial court sitting without a jury, whether the defendant's evidence is sufficient to overcome the statutory presumption.

Where by statute proof of the injury raises a presumption of negligence which must be rebutted by defendant, it is ordinarily a question for the jury,[67] or for the trial court sitting without a jury,[68] whether defendant's evidence is sufficient to overcome the statutory presumption. While there is some authority to the contrary,[69] the rule followed in a majority of the states is that, where defendant introduces evidence which, if true, satisfactorily overcomes the presumption of negligence, and the evidence is uncontradicted by facts or testimony and the witnesses are unimpeached, the statutory presumption does not warrant the submission of the issue of negligence to the jury,[70] and, if the issue is submitted, a verdict for plaintiff is improper and will not be sustained,[71] even though the only witnesses for defendant are its employees,[72] and not all of them are called to testify,[73] and testimony of defendant's witnesses contradicted only by a mere expression of opinion on the part of plaintiff's witnesses may be regarded as uncontradicted testimony within the meaning of this rule.[74] However, the unexplained absence from the trial of either the engineer or fireman may be a consideration against any interference with a verdict for plaintiff.[75]

It becomes a question for the jury if the testimony of defendant's own witnesses fails to show that everything was done which might have been to avoid the accident.[76] Also, if the testimony of defendant's employees is inconsistent or improbable,[77] or is contradicted by the circumstances of the case,[78] or by testimony of the witnesses of plaintiff in rebuttal,[79] or if it discloses facts relat-

159 So 557, 172 Miss 451, suggestion of error overruled 160 So 903, 172 Miss. 451—Moore v Mobile, etc., R Co, 24 So 964.
Wyo.—Hildebrand v. Chicago, B & Q. R R, 17 P.2d 651, 45 Wyo. 175.
52 C J. p 136 note 12.

59. Tex.—Anson v Gulf, etc, R Co, 94 S W. 94, 42 Tex Civ App. 437.
52 C J. p 136 note 13

60. Kan —Missouri Pac R Co. v McCullough, 70 P. 364, 65 Kan. 860.

61. Iowa.—Kinyon v. Chicago, etc, R Co., 92 N W. 40, 118 Iowa 349, 96 Am S.R 382.

62. Ga —Jones v Powell, 30 S.E.2d 446, 71 Ga App 202.
Miss —Gulf, M & O. R Co v. Scarborough, 28 So 2d 849, 201 Miss. 199.
52 C.J p 136 note 16.

63. Tex —Texas & P. Ry. Co. v Williams, Civ.App, 32 S W.2d 682

64. Mo.—Flannery v. Kansas City, etc, R Co, 23 Mo App 120, affirmed 10 S.W. 894, 97 Mo 192

65. Tex.—International, etc, R. Co v Hall, 33 S.W. 127, 12 Tex.Civ. App. 11.

66. Ala —Alabama Great Southern R Co v Jones, 71 Ala. 487.

67. Ark.—Missouri Pac R. Co v. Tyler, 125 S W 2d 480, 197 Ark 1176—St Louis-San Francisco Ry Co. v Grant, 46 S.W 2d 640, 185 Ark 222
52 C.J p 136 note 22.

68. La —Jackson v Missouri Pac R Co., App, 141 So 770.

69. Mont —Knop v Chicago, etc, R Co, 187 P 1020, 57 Mont 288
52 C.J. p 136 note 23.

70. Ala —Gulf, M. & O. R. Co. v Phifer, 42 So 2d 44, 34 Ala App. 588.
Ark —Chicago, R I. & P Ry. Co. v. Fowler, 55 S W 2d 75, 186 Ark. 682 —St Louis-San Francisco Ry. Co. v. Cole, 27 S.W.2d 992, 181 Ark 780.
Miss —Columbus & G Ry Co v. Dunlap, 145 So 646, 164 Miss 709.
Wyo —Hildebrand v. Chicago, B. & Q R R, 17 P 2d 651, 45 Wyo. 175.
In absence of statute see supra § 669.

71. Ga —Powell v. Rogers, 42 S E. 2d 573, 75 Ga.App. 165—Savannah & Atlanta Ry Co. v De Busk, 23 S E 2d 529, 68 Ga App. 529—Alabama Great Southern R. Co v Forester, 157 S E 924, 43 Ga App 66
52 C J. p 136 note 24

72. Ga —Western, etc., R Co. v Robinson, 39 S E. 950, 114 Ga 159.
52 C J p 136 note 25.

73. Ga —Savannah, etc, R. Co. v. Gray, 3 S E 158, 77 Ga. 440
52 C J. p 137 note 26

74. Ga —Western, etc, R Co. v. Clark, 49 S E. 290, 121 Ga 419—Atlantic Coast Line R Co. v. Paulk, 125 S E 865, 33 Ga App. 293.

75. Ga.—East Tennessee, etc, R Co v Culler, 75 Ga 704
52 C J p 137 note 27.

76. Ark.—St. Louis-San Francisco R Co v. Gray, 250 S W. 37, 158 Ark 369.
52 C J p 137 note 29

77. Ark.—Kansas City Southern R Co v Whitley, 213 S W 369, 139 Ark. 255.
52 C J. p 137 note 30.

78. Ga —Central of Georgia R Co. v. Pitts, 145 S.E. 518, 38 Ga App 780.
52 C.J. p 137 note 31.

79. Ky.—Chesapeake, etc, R Co v Burton, 161 S.W. 1116, 156 Ky. 736
52 C.J. p 137 note 32.

ing thereto from which the existence of the negligence alleged might reasonably be inferred,[80] or if, on the facts as established by undisputed testimony, there could reasonably be a difference of opinion as to the liability of defendant under the law,[81] the question is for the jury, and a verdict for plaintiff based on such conflicting evidence will not ordinarily be interfered with,[82] although plaintiff's evidence is entirely circumstantial,[83] small in amount,[84] and in itself, independently of the inference of negligence to be drawn from the killing, of weak probative value.[85] Where plaintiff's evidence overcomes the effect of a statutory inference of negligence on the part of defendant, an affirmative charge in favor of plaintiff is improper.[86]

§ 673. —— Fences and Cattle Guards

a. In general
b. At what places required
c. At what place animal entered
d. Sufficiency, defects, and repairs
e. Cause of injury under statute

a. In General

Particular issues involved in the determination of the liability of a railroad company for injury to animals under a fencing statute are for the jury to decide where the evidence thereon is conflicting or where the opinions as to inferences to be drawn therefrom may reasonably conflict.

Particular issues involved in the determination of the liability of a railroad company for injury to animals under a fencing statute are for the jury to decide where the evidence thereon is conflicting or where the opinions as to inferences to be drawn therefrom may reasonably conflict,[87] as, for example, whether the animal at the time it was killed was at a place which defendant was under legal obligation to fence,[88] or whether the animal was trespassing on adjoining land or on a highway when it entered defendant's right of way,[89] or whether it was running at large.[90] On the other hand, the liability of defendant under a fencing statute may, under the circumstances, be a question of law for the court,[91] as where the evidence is undisputed that the fence or cattle guard was required at the place of injury, that it was defective, and that because of the defect the animals came on the track and were injured.[92]

b. At What Places Required

Ordinarily the existence of conditions or surroundings justifying a failure on the part of a railroad company to erect and maintain a fence at a certain place is a question of fact for the jury.

Ordinarily the existence of conditions or surroundings justifying a failure on the part of a railroad company to erect and maintain a fence at a certain place is a question of fact for the jury.[93] Thus, where there is conflicting evidence or evidence reasonably affording ground for opposing opinions, it is for the jury to determine whether a railroad company could have placed cattle guards[94] or fences[95] at the place in question without endangering the lives of its employees engaged in switching and operating its trains, as, for example, at a way station infrequently used,[96] or whether, without endangering the safety of its employees, it could have located its cattle guards nearer to the head of its switch limits than was done.[97]

On the other hand, where the evidence shows without contradiction that the animal was killed

80. Miss.—Mobile, etc., R. Co. v. Holt, 62 Miss. 170
52 C J. p 137 note 33.

81. Ga.—Atlanta, etc., R Co. v. Poncell, 97 S E 103, 22 Ga App 713.

82. Ark.—Kansas City Southern R. Co v. Dickerson, 165 S W. 272, 112 Ark. 607.
52 C J. p 137 note 35.

83. Ky—Cincinnati, etc., R Co. v. Graves, 176 S W. 974, 165 Ky. 148.
52 C.J. p 137 note 36.

84. Ga.—Southern R. Co. v. Carter, 77 S.E. 21, 139 Ga. 236—Georgia R., etc., Co. v Phillips, 3 S.E. 449, 78 Ga. 619.

85. Ala.—Louisville, etc., R. Co. v. Davis, 16 So 10, 103 Ala. 661.
Ga.—Georgia Cent R. Co. v. Dozier, 45 S E. 67, 117 Ga. 793.

86. Ala.—Louisville & N. R Co v. Coxe, 117 So 293, 218 Ala. 25.

87. Fla.—Seaboard Air Line Ry Co v Maige, 147 So 215, 109 Fla 229
Okl.—Chicago, etc., R Co v. Goldman, 214 P 129, 89 Okl 85
Tex.—Missouri-Kansas-Texas Ry. Co v Wimberly, Civ App., 28 S.W 2d 832.

88. Mo.—Bloomfield v. St Louis, etc., R Co., 109 S.W 824, 130 Mo. App. 373.
52 C.J. p 138 note 40.

89. N.H.—Deming v. Boston, etc., R. Co., 100 A. 979, 78 N H 410.

90. Iowa.—Morris v Chicago Great Western R Co, 110 N.W. 154, 133 Iowa 28.

91. Wash.—Byrne v. Spokane, etc., R. Co., 106 P 191, 56 Wash 667.
Direction of verdict for defendant
The position of the injured animal near a public crossing with hoofprints on adjoining land up to the crossing, but not beyond, justifies a directed verdict for defendant—Byrne v. Spokane, etc., R Co., supra

92. Tex.—Baker v Schroeder, Civ App., 198 S W 394

93. Fla.—Seaboard Air Line Ry. Co v Maige, 147 So 215, 109 Fla 229
Tex.—International-Great Northern R Co. v. Miner, Civ App., 54 S W.2d 216.

94. Mo.—Kaiser v Butler County R. Co., App., 217 S W. 535
52 C.J. p 138 note 49

95. Ind.—Baltimore, etc., R Co. v. Dickey, 87 N E 1047, 43 Ind App. 509.
52 C.J. p 138 note 50.

96. Fla.—Atlantic Coast Line R Co. v. Perry, 67 So 639, 69 Fla 133.
52 C.J. p 138 note 51.

97. Mich.—Goretski v. Au Sable etc., R. Co., 138 N W. 658, 172 Mich. 623.
52 C.J. p 138 note 52.

on grounds used for depot or switching purposes and that the limits of such grounds were reasonable, and that they could not have been fenced at the place of injury without interfering with the public convenience, the proper operation of the trains, or the safety of the employees of the company, the question as to the extent of such grounds should not be submitted to the jury,[98] and, if only one conclusion may be drawn, as where the evidence shows that the accident was so close to the station house that there is no question that it was included within the proper limits of defendant's station grounds, the court may properly direct a verdict for defendant.[99]

Where the company relies for its failure to fence on the existence of natural obstructions making a fence unnecessary, the question whether the obstructions are of such a character as to relieve the company from the duty of fencing ordinarily is one of fact for the jury.[1] Where the company is relieved from constructing cattle guards at a public crossing by reason of the fact that it is within its station grounds, it usually is a question for the jury whether the company has constructed them at the nearest point that would not interfere with the proper operation of the road and the convenience of the public;[2] and, where the place of the accident brings into controversy whether a particular area was used by the railroad as station grounds,[3] or by the public as a highway,[4] or the proper extent or limits of such places,[5] it is a question of fact for the jury whether the company has left unfenced more than the proper conduct of its business and the public use and convenience require However, where the law designates certain places to be fenced and other places not to be fenced, the obligation of a railroad company to fence its tracks at a particular point is a question of law for the court.[6]

c. At What Place Animal Entered

Where from the evidence it is uncertain where the animal injured came on the track, it is a question for the jury whether the place of entry was at a point where the defendant was obliged by law to fence.

Where from the evidence it is uncertain where the animal injured came on the track, it is a question for the jury whether the place of entry was at a point where defendant was obliged by law to fence,[7] or had failed to construct or properly maintain its fences or cattle guards,[8] or whether the animal entered through a gate or bars which it was the duty of defendant to keep closed[9] In order to warrant the submission of the case to the jury it is not necessary that there should be any direct evidence that the animal entered at such place, but it is sufficient if there are circumstances reasonably tending to show this fact,[10] as where the animal was killed or injured at a place where the company had neglected its duty to fence,[11] unless there is evidence uncontradicted that it entered at another place and through circumstances for which defendant was not responsible.[12]

d. Sufficiency, Defects, and Repairs

Where the undisputed evidence shows that the fence in question would not turn stock, the sufficiency of the fence is a question of law for the court, but ordinarily it is a question of fact for the jury whether a fence or cattle guard as constructed is reasonably sufficient for the purpose intended or whether a natural barrier serves that purpose

Where the undisputed evidence shows that the fence in question would not turn stock, the sufficiency of the fence is a question of law for the court,[13] but ordinarily it is a question of fact for the jury whether a fence or cattle guard as constructed is reasonably sufficient for the purposes intended,[14] or whether a natural barrier serves that purpose[15] It is also, as a rule, a question of fact whether a fence or cattle guard is so constructed as to be in

98. Mich.—Rinear v. Grand Rapids, etc., R. Co., 38 N.W. 599, 70 Mich 620.
52 C.J. p 138 note 53

99. Neb.—Burnham v. Chicago, etc., R. Co., 119 N.W. 235, 83 Neb 183
Or.—Harvey v. Southern Pac. Co., 80 P. 1061, 46 Or. 505

1. N.Y.—Klock v. New York Cent., etc., R. Co., 17 N.Y.S. 120, 62 Hun 291.
Or.—Meier v. Northern Pac. R. Co., 93 P. 691, 51 Or. 69.

2. Ohio.—Railroad Co. v. Newbrander, 40 Ohio St. 15.

3. Ind.—Cleveland, etc., R. Co. v. Vincent, 109 N.E. 810, 60 Ind.App. 476.

4. Mich.—Goretski v. Au Sable, etc., R. Co., 138 N.W. 658, 172 Mich 623.
52 C.J. p 138 note 47

5. Tex.—Missouri-Kansas-Texas R. Co. v. Wimberly, Civ.App., 28 S.W. 2d 332
52 C.J. p 138 note 48.

6. Or.—Harvey v. Southern Pac. Co., 80 P. 1061, 46 Or. 505.
52 C.J. p 138 note 45.

7. Or.—Jackson v. Sumpter Valley R. Co., 93 P. 356, 50 Or. 455.
52 C.J. p 139 note 57

8. Mich.—Agnew v. Michigan Cent. R. Co., 22 N.W. 108, 56 Mich 56.
52 C.J. p 139 note 58.

9. Mich.—McDonald v. Minneapolis, etc., R. Co., 63 N.W. 966, 105 Mich 659.
Tex.—Eastern Texas Electric Co. v. Byrd, Civ.App., 252 S.W. 870

10. Wis.—Dinwoodie v. Chicago, etc., R. Co., 35 N.W. 296, 70 Wis 160.
52 C.J. p 139 note 60

11. Mo.—Lepp v. St. Louis, etc., R. Co., 87 Mo. 139.

12. Mo.—Walton v. Wabash Western R. Co., 32 Mo.App. 634.
52 C.J. p 139 note 62.

13. Mo.—Morrison v. Kansas City, etc., R. Co., 145 S.W. 137, 162 Mo. App. 662

14. Mich.—Goretski v. Au Sable, etc., R. Co., 138 N.W. 658, 172 Mich 623.
52 C.J. p 139 note 64.

15. Or.—Meier v. Northern Pac. R. Co., 93 P. 691, 51 Or. 69.

itself a source of danger,[16] as in the case of a barbed wire fence,[17] or a cattle guard so constructed as to attract rather than to turn cattle.[18]

Ordinarily, it is for the jury to determine whether a railroad company has exercised reasonable care in maintaining fences and cattle guards in a proper state of repair,[19] or whether or not the repairs needed were slight, placing liability therefor, under some statutory provisions, on the landowner.[20] Usually it is a question for the jury whether the company has been negligent in failing to discover defects,[21] or in failing sooner to repair the defects after discovery.[22] Also, what is a reasonable time sufficient to charge a railroad company with knowledge of defects,[23] or whether it is chargeable with notice by reason of its failure to complete a construction job within a reasonable time necessitating an opening in a fence,[24] usually is a question for the jury However, where there is no evidence of defendant's knowledge, actual or constructive, that a fence was out of repair,[25] or where the evidence is such that only a single inference on the issue involved may reasonably be drawn,[26] the question is for the court.

Removal of snow and ice. Negligence of a railroad company in the removal of snow and ice from cattle guards is usually a question of fact for the jury depending on circumstances of location of the road, the position and condition of the cattle guard, prevailing storms, weather conditions, and other relevant facts.[27] Even in jurisdictions where it is held that, because of the severity of the winters, reasonable care and diligence do not require a railroad company to remove the natural accumulations of snow and ice from its cattle guards, the conditions may be such as to make the question of negligence one of fact for the jury.[28]

e. Cause of Injury under Statute

Ordinarily, it is for the jury to decide whether the killing or injury of the animal in question was caused either by defendant's failure to fence as required by statute or by the insufficiency of the fence.

Ordinarily, it is for the jury to decide whether the killing or injury of the animal in question was caused either by defendant's failure to fence as required by statute,[29] or by the insufficiency of the fence[30] Under statutes making a railroad company liable for failure to fence only in case of injuries due to actual collision with a train, it is for the court to decide whether there is no evidence that the injury was caused by collision,[31] or by negligence other than the failure to fence[32] However, where there is any circumstantial evidence from which a collision may reasonably be inferred, it is for the jury to decide whether the injury was so caused.[33]

§ 674. —— Private Crossings, Gates, and Bars

It is generally a question for the jury whether the gates or bars in a railroad fence are sufficient, whether the railroad company has exercised proper care in keeping them in repair and in keeping them closed, and, where the injury is caused by their being left open, whether they had been open for sufficient time to charge the company with notice of their condition.

It is generally a question for the jury whether the gates or bars in a railroad fence are sufficient,[34] whether the railroad company has exercised proper care in keeping them in repair[35] and in keeping

16. Ala.—Alabama Great Southern R. Co. v. Clark, 130 So. 318, 221 Ala. 616.

17. N.Y.—Rehler v. Western New York, etc., R. Co., 8 N.Y.S. 286, 55 Hun 604.

18. Ala.—Alabama Great Southern R. Co. v. Clark, 130 So. 318, 221 Ala. 616—Carrollton Short Line R. Co. v. Lipsey, 43 So. 836, 150 Ala. 570.

19. Kan.—Barker v. Missouri-Kansas-Texas R. Co., 5 P.2d 811, 134 Kan. 256
52 C.J. p. 139 note 69.

20. Tex.—Missouri, etc., R. Co. v. Dunnaway, 95 S.W. 760, 43 Tex. Civ.App. 350.

21. Iowa.—Morris v. Chicago Great Western R. Co., 110 N.W. 154, 133 Iowa 28.
52 C.J. p. 139 note 72.

22. Mich.—Crosby v. Detroit, etc., R. Co., 25 N.W. 463, 58 Mich. 458
52 C.J. p. 139 note 73.

23. Mo.—Best v. Atchison, T. & S. F. Ry. Co., App., 76 S.W. 2d 442.
52 C.J. p. 139 notes 74, 76.

24. Mo.—Whiteman v. Atchison, etc., R. Co., 146 S.W. 97, 163 Mo.App. 228.

25. Ark.—St. Louis, etc., R. Co. v. Wilson, 171 S.W. 471, 116 Ark. 163.

26. Wis.—Goddard v. Chicago, etc., R. Co., 11 N.W. 593, 54 Wis. 548.
52 C.J. p. 139 note 78.

27. Kan.—Martin v. Atchison, etc., R. Co., 141 P. 599, 92 Kan. 595, L.R.A. 1915B 134.
Vt.—Wait v. Bennington, etc., R. Co., 17 A. 284, 61 Vt. 268

28. Minn.—Yates v. Chicago, etc., R. Co., 132 N.W. 994, 115 Minn. 496, 36 L.R.A.,N.S., 997.

29. Iowa.—Sell v. Chicago, etc., R. Co., 202 N.W. 785, 199 Iowa 808
52 C.J. p. 140 note 82.

30. Okl.—Fleming v. Hodgson, 185 P.2d 181, 199 Okl. 261.
Tex.—St. Louis, B. & M. Ry. Co. v. Blair, 39 S.W.2d 826, 120 Tex. 586
52 C.J. p. 140 note 83

31. Mo.—Hesse v. St. Louis, etc., R. Co., 36 Mo.App. 163.
Tex.—Schaff v. Page, Civ.App., 203 S.W. 807.

32. Tex.—Missouri, etc., R. Co. v. Orr., Civ.App., 272 S.W. 343.

33. Mo.—Payne v. Quincy, etc., R. Co., 88 S.W. 164, 113 Mo.App. 609.
52 C.J. p. 140 note 87.

34. Iowa.—Titus v. Chicago, etc., R. Co., 103 N.W. 343, 128 Iowa 194.
52 C.J. p. 140 note 89

35. Kan.—Plummer v. Atchison, etc., R. Co., 109 P. 792, 83 Kan. 801.
52 C.J. p. 140 note 90.

them closed,[36] and, where the injury is caused by their being left open, whether they had been open for sufficient time to charge the company with notice of their condition.[37] So, where a railroad company has knowledge that its gate is left open customarily and it fails to take steps to correct the situation, a verdict for plaintiff may be authorized.[38]

On the other hand, where there is no evidence that the gate in question was unchained for a sufficient time before the accident for the railroad company to discover the situation and remedy it, the question of the negligence of the company in this respect should not be submitted to the jury,[39] and, where the time intervening between leaving the gate open and the escape of the animal through it is so short as to admit of only one opinion on the issue, the court must declare as matter of law that there was no negligence in failing to discover it.[40] Also evidence concerning the inadequacy of the fastening devices of the gate may be insufficient to warrant a submission of the negligence of defendant with respect thereto to the jury.[41]

§ 675. —— Signals, Lookouts, and Precautions

Whether the defendant was negligent with respect to giving the proper signals, keeping a proper lookout, or taking the proper precautions to avoid injuries to animals ordinarily is a question for the jury.

It is ordinarily a question for the jury whether, under the circumstances, defendant was negligent with respect to keeping a proper lookout for animals,[42] and the case should be submitted to the jury whenever there is any evidence from which it might reasonably be inferred that, if a proper lookout had been maintained, the animal could have been seen in time to avoid the injury.[43] Usually it is a question for the jury whether, under the circumstances, defendant was negligent in failing to take proper precautions to avoid the injury after the animal was discovered on or near the track,[44] or whether or not there was opportunity to take such precautions.[45] However, the issue is one for the court where the evidence is such as clearly to show that all proper precautions were taken by defendant,[46] or where the undisputed evidence conclusively proves that the collision could not have been avoided.[47]

Ordinarily, the necessity for the sounding of warning signals by defendant,[48] the point at which, if reasonably required, they should have been initiated,[49] and their efficacy, if given,[50] are questions for the jury. It is usually a question for the jury whether or not defendant's servants sounded the alarm whistle when an animal was seen on or near the track,[51] or whether under the circumstances they were negligent in failing to sound the alarm whistle at such time,[52] or whether the failure to do so is sufficiently excused;[53] or whether defendant's servants were negligent in sounding the alarm whistle under the circumstances;[54] or whether they were negligent in failing to stop or slacken the speed of a train;[55] or in not attempting to stop sooner than was done,[56] or in increasing speed to avoid a rear end collision with another train.[57]

Whether defendant complied with the requirements of the law with respect to giving proper

36. Neb.—Birdsall v. Chicago, etc., R. Co., 144 N.W. 163, 94 Neb. 691. 52 C.J. p. 140 note 91.

37. Iowa.—Wait v. Burlington, etc., R. Co., 37 N.W. 159, 74 Iowa 207. 52 C.J. p. 140 note 92.

38. Wyo.—Hildebrand v. Chicago, B. & Q. R. R., 17 P.2d 651, 45 Wyo. 175.

39. Mo.—Humphreys v. Chicago, M., St. P. & P. R. Co., App., 83 S.W.2d 586.

40. Mo.—Box v. Atchison, etc., R. Co., 58 Mo.App. 359.

41. Iowa.—Hughes v. Chicago, B. & Q. R. Co., 246 N.W. 769, 215 Iowa 741.

42. Ala.—Perry v. Atlantic Coast Line R. Co., 42 So.2d 837, 34 Ala. App. 644.
Ark.—Missouri Pac. R. Co. v. Mobley, 91 S.W.2d 611, 192 Ark. 396.

Tex.—Texas & P. Ry. Co. v. Heathington, Civ.App., 115 S.W.2d 495. 52 C.J. p. 140 note 95.

43. S.D.—Borneman v. Chicago, etc., R. Co., 104 N.W. 208, 19 S.D. 459. 52 C.J. p. 141 note 99.

44. Ala.—Alabama Great Southern R. Co. v. Smelley, 187 So. 630, 237 Ala. 471.—L. & N. R. Co. v. Holmes, 27 So.2d 878, 32 Ala.App. 551. 52 C.J. p. 140 note 96.

45. Ala.—Louisville, etc., R. Co. v. Rice, 14 So. 639, 101 Ala. 676. 52 C.J. p. 141 note 97.

46. Ark.—Missouri Pac. R. Co. v. Hayes, 122 S.W.2d 945, 197 Ark. 356.

47. Ky.—Campbell v. Mobile, etc., R. Co., 157 S.W. 931, 154 Ky. 582, 46 L.R.A.,N.S., 881, Ann.Cas.1915B 472. 52 C.J. p. 141 note 98.

48. N.H.—Dowse v. Maine Cent. R. R., 20 A.2d 629, 91 N.H. 419.

49. N.H.—Dowse v. Maine Cent. R. R., supra.

50. N.H.—Dowse v. Maine Cent. R. R., supra.

51. Ga.—Atlantic Coast Line R. Co. v. Mercer, 60 S.E.2d 649, 82 Ga. App. 312.

52. Ga.—Atlantic Coast Line R. Co. v. Mercer, supra. 52 C.J. p. 141 note 1.

53. Ala.—Mobile, etc., R. Co. v. Caldwell, 3 S.W. 445, 83 Ala. 196. 52 C.J. p. 141 note 2.

54. N.C.—Brinkley v. Wilmington, etc., R. Co., 35 S.E. 238, 126 N.C. 88.

55. Wash.—Benn v. Chicago, etc., R. Co., 154 P. 1082, 89 Wash. 522. 52 C.J. p. 141 note 4.

56. Utah.—Johnson v. Rio Grande Western R. Co., 26 P. 926, 7 Utah 346.

57. Okl.—St. Louis, etc., R. Co. v. Loftis, 106 P. 824, 25 Okl. 496.

crossing signals is ordinarily a question for the jury.[58] So, where the evidence is conflicting, it is a question for the jury whether the crossing signals were given,[59] or the alarm whistle sounded,[60] although plaintiff's evidence is of a negative character, provided plaintiff's witness was in a position to have heard the signal if it had been given.[61]

§ 676. —— Rate of Speed

While the evidence may be such as not to warrant the submission to the jury of the question whether the defendant was operating its train at the time of the injury complained of at a speed which was so excessive or reckless as to constitute negligence, ordinarily whether defendant was negligent in this respect is a question of fact for the jury.

While the evidence may be such as not to warrant the submission to the jury of the question whether defendant was operating its train at the time of the injury complained of at a speed which was so excessive or reckless as to constitute negligence,[62] ordinarily whether defendant was negligent in this respect is a question of fact for the jury.[63] Thus, whether defendant was negligent in operating at a high speed in rounding a curve,[64] or while traveling through a town,[65] or over a stretch of track where animals were in the habit of grazing on the right of way,[66] usually is for the jury to determine. Also, whether defendant was negligent in operating its train in violation of a speed ordinance is for the jury,[67] especially where it is in evidence that such an ordinance has been violated and it is held that such violation is prima facie evidence of negligence.[68]

§ 677. —— Contributory Negligence of Owner

Whether the owner of the animal injured has been guilty of contributory negligence is ordinarily a question of fact for the jury, and it becomes a question of law where, and only where, the evidence is undisputed and so clear that only one conclusion may reasonably be drawn therefrom.

Whether the owner of the animal injured has been guilty of contributory negligence is ordinarily a question of fact for the jury,[69] and it becomes a question of law where, and only where, the evidence on the issue is undisputed and so clear that only one conclusion may reasonably be drawn therefrom.[70] So, the owner's due care is a question for the jury where the evidence is conflicting,[71] or where reasonable minds may arrive at different conclusions as to that issue.[72]

It usually is a question for the jury whether, under the circumstances, plaintiff was guilty of contributory negligence in leaving a team unhitched and unattended near a railroad track,[73] in driving animals over a railroad crossing,[74] in failing to stop, look, and listen for trains before driving animals on a railroad crossing,[75] or in driving a team and leading a horse while crossing the track.[76] It is also, as a rule, for the jury to determine whether plaintiff was guilty of contributory negligence in driving horses loose along a road near a railroad track;[77] in turning an animal loose in the vicinity of a railroad track where it is unfenced,[78] or where the railroad fence was known to be defective and without notifying the

58. Ala.—Alabama Great Southern R Co v. Smelley, 187 So. 630, 237 Ala. 471
Ark.—St Louis-San Francisco R. Co v. Call, 122 S.W.2d 178, 197 Ark 225—Missouri Pac. R Co v Mobley, 91 S.W.2d 611, 192 Ark 396
Tex.—Burlington-Rock Island R Co v. Whitmire, Civ App., 186 S.W.2d 296.

59. Pa.—Gibson v Bessemer, etc, R Co., 75 A. 194, 226 Pa. 198, 27 L.R.A.,N.S., 689, 18 Ann Cas. 535.
52 C.J. p 141 note 7.

60. Mo.—Roberts v. Wabash R. Co., 87 S.W. 601, 113 Mo.App 6.
52 C.J. p 141 note 8.

61. Mo.—Roberts v Wabash R Co., 87 S.W 601, 113 Mo.App. 6.

62. Ga.—Atlantic Coast Line R Co. v. Hodges, 54 S.E.2d 500, 79 Ga. App. 563.

63. Ala.—Alabama Great Southern R Co v. Smelley, 187 So 630, 237 Ala 471
Ark.—St Louis-San Francisco R Co v. Call, 122 S.W.2d 178, 197 Ark 225.

Tex.—Burlington-Rock Island R Co v Whitmire, Civ App., 186 S W 2d 296
52 C J p 141 note 11

64. R.I.—Hill v. Rhode Island Co, 108 A. 65

65. Tex.—St Louis Southwestern R. Co v. Cox, Civ App., 248 S W. 1101.

66. Tex.—Houston, etc., R. Co. v Garrett, Civ.App., 160 S.W 111.

67. Ga.—Powell v. DeLoach, 39 S.E. 2d 759, 74 Ga.App. 397.

68. Ala.—Alabama Great Southern R Co. v. McDaniel, 69 So. 60, 192 Ala. 639.
52 C J. p 142 note 15.

69. Ark.—St Louis-San Francisco R. Co. v. Call, 122 S.W 2d 178, 197 Ark. 225—Missouri Pac. R. Co. v. Jones, 31 S.W 2d 524, 182 Ark. 405.
N.H.—Dowse v. Maine Cent. R. R., 20 A 2d 629, 91 N.H. 419.
Pa.—Bailey v Reading Co., Com Pl., 39 Berks Co 255.
52 C J. p 142 note 18.

70. Mich.—Otto v. Ann Arbor R. Co, 155 N.W. 457, 189 Mich. 463.
52 C.J p 142 note 19.

71. Ill.—Chicago, etc., R Co v Crose, 73 N.E 865, 214 Ill. 602, 105 Am S R 135.
52 C.J. p 142 note 20.

72. N.H.—Dowse v Maine Cent R. R., 20 A 2d 629, 91 N H 419.
52 C.J p 142 note 21.

73. Mich.—Bankman v Pere Marquette R Co., 105 N.W. 154, 142 Mich 202
52 C.J. p 142 note 22

74. Ark.—St. Louis-San Francisco R. Co. v. Call, 122 S W 2d 178, 197 Ark 225
52 C.J. p 142 note 23.

75. S D.—True v. Chicago, etc., R Co, 173 N W. 642, 42 S D. 35.
52 C.J. p 142 note 24.

76. Mass.—Towne v Nashua, etc., R Co, 124 Mass. 101—Egan v. Fitchburg, etc., R. Co, 101 Mass. 315.

77. Tex.—International, etc, R. Co. v. Vogel, Civ App., 184 S W. 229

78. N.D.—Carr v Minneapolis, etc., R. Co, 112 N.W. 972, 16 N.D. 217.
52 C J. p 142 note 27.

railroad company of the existence of such defect,[79] or into an inclosure near a railroad track where the fence about the inclosure is defective,[80] or in turning animals loose near station grounds which the company is not required to fence.[81]

Whether plaintiff was guilty of contributory negligence in failing to prevent animals from straying on the railroad track, where allowing animals to stray at large does not constitute a violation of a statute or ordinance,[82] in permitting animals to run at large in violation of law,[83] or in particularly dangerous places;[84] and where that issue is raised, whether the owner knew of the danger,[85] usually is for the jury to determine. Moreover, where, by statute, a railroad company is liable, in case of a failure to fence, unless the injury was occasioned by the "willful act" of the owner himself, it is ordinarily a question for the jury whether a given act is willful or otherwise.[86]

§ 678. —— Proximate Cause

Although a railroad company may have been negligent in the operation of its trains or in doing or omitting some act prohibited or required by statute, ordinarily it is a question for the jury whether such negligent act or omission was the proximate cause of the injury complained of.

Although a railroad company may have been negligent in the operation of its trains or in doing or omitting some act prohibited or required by statute, ordinarily it is a question for the jury whether such negligent act or omission was the proximate cause of the injury complained of.[87] So it generally is a question for the jury whether the injury was caused by a train being operated at a high or unusual rate of speed[88] or at a speed in violation of a statute or ordinance,[89] or whether the injury was caused by a failure on the part of defendant to give warning signals[90] or to sound an alarm signal,[91] or to give crossing signals.[92]

It is, as a rule, a question for the jury whether the injury was caused by a failure on the part of defendant to keep a proper lookout,[93] by a failure to apply the brakes[94] or to stop the train sooner,[95] or by a failure to construct fences or cattle guards as required by law[96] or to maintain them in a proper state of repair.[97] Usually it is for the jury to determine whether the injury was caused by the negligent construction on the part of defendant of a highway crossing[98] or of a bridge at the crossing,[99] or by an unprotected and dangerous wall on the right of way of defendant.[1] Where the injury resulted from the animal getting to the track through an open gate, the cause of the gate being open is usually, on the evidence, a question of fact for the jury.[2]

On the other hand, it has been held that, where an action is brought to recover for the death of an animal which was merely injured by the negligent act of a railroad company, the question whether the act was the proximate cause of the death is one of law for the court in the absence of proof that the injury received was the cause of the death.[3]

79. N Y —Poler v. New York Cent R Co, 16 N Y. 476.

80. Ky —Louisville, etc., R Co v. Calloway, 280 S W. 966, 213 Ky 235
52 C.J. p 142 note 29

81. Or —Wilmot v. Oregon R. Co, 87 P. 528, 48 Or. 494, 7 L.R A ,N S , 202

82. Tex —Texas & N O. R. Co v Nolen, Civ App , 107 S.W 2d 1116
52 C.J p 142 note 31.

83. Ga —Aycock v. Callaway, 51 S E 2d 53, 78 Ga App 219

84. Dak —Williams v Northern Pac R Co, 14 N W 97, 3 Dak 168

85. Iowa.—Hemphill v Cedar Rapids, etc, R. Co., 151 N.W 449, 169 Iowa 498

86. Iowa —Claus v Chicago Great Western R Co., 111 N.W 15, 136 Iowa 7.

87. Ga —Atlantic Coast Line R. Co. v Mercer, 60 S E 2d 649, 82 Ga App. 312—Powell v. De Loach, 39 S.E 2d 759, 74 Ga.App. 397.
52 C.J. p 143 note 37.

88. Ark —Ford v St Louis, etc, R Co, 50 S W 864, 66 Ark. 363
Me —Radski v Androscoggin, etc, R Co, 120 A. 542, 122 Me 480

89. Ga —Powell v De Loach, 39 S E 2d 759, 74 Ga App. 397
52 C J. p 143 note 39

90. Ga —Atlantic Coast Line R Co v Mercer, 60 S E.2d 649, 82 Ga App 312
Tex —Beaumont, S L & W Ry. Co v Stubblefield, Civ.App , 37 S W 2d 403

91. N.C —Lewis v. Norfolk Southern R Co, 79 S E 283, 163 N C 83, 47 L R A.,N.S , 1125, Ann Cas 1915B 461
Tex —Texarkana, etc., R Co v. Bell, Civ App , 101 S.W. 1167

92. Idaho —Kerby v Oregon Short Line R Co, 264 P. 377, 45 Idaho 636.
52 C J p 143 note 40

93. Ala —Kansas City, etc, R. Co v Watson, 8 So. 793, 91 Ala 483.

94. Ga —Atlantic Coast Line R Co v. Hodges, 54 S E 2d 500, 79 Ga App 563

95. Ala —Central of Georgia R. Co v. Simons, 50 So 50, 161 Ala. 337

96. Minn —Savage v. Chicago, etc, R. Co, 18 N W 272, 31 Minn. 419
52 C.J p 143 note 44.

97. Vt —Dodge v Central Vermont R Co, 104 A. 873, 92 Vt. 454.
52 C.J. p 143 note 45.

98. N C —Needham v. Southern R Co., 88 S.E 495, 171 N.C. 763.

99. S C.—Thompson v Seaboard Air Line R Co, 58 S.E. 1094, 78 S C 384, overruling Brown v Spartanburg, etc., R. Co., 35 S E. 731, 57 S C 433

1. Ga.—Seaboard Air-Line R. Co v Parish, 85 S.E 950, 16 Ga.App 632.

2. Mo —Brown v. St. Louis-San Francisco R. Co, App, 281 S W. 452

3. Ark —Lozier v St Louis Southwestern R Co., 238 S.W. 599, 152 Ark 256.

§ 679. Instructions

a. In general
b. Invading province of jury

a. In General

The general rules applicable to instructions in civil actions apply to instructions in actions against railroad companies for injuries to animals.

The general rules applicable to instructions in civil actions apply to instructions in actions against railroad companies for injuries to animals.[4] So the instructions must be sufficiently full and specific properly to serve as a guide to the jury in determining the case,[5] must state the law correctly,[6] must apply the law to the facts,[7] and must be based on all the evidence.[8] Also the instructions must not be confusing or misleading,[9] argumentative,[10] or contradictory.[11] Moreover, the instructions must not assume the existence of facts not in evidence,[12] intimate an opinion on the merits of the case,[13] or submit to the jury the determination of questions of law.[14]

The instructions must not impose on defendant a higher degree of care and diligence than the rule of ordinary care which the law requires[15] or restrict defendant's right to defenses open to it under the law.[16] In stating the conditions authorizing a recovery, the instructions should not omit any essential element necessary to establish plaintiff's cause of action,[17] such as that the negligence shown must have been the proximate cause of the injury,[18] unless, in view of the evidence, if defendant was in fact negligent, there is no question that such negligence was the proximate cause of the injury.[19] The instructions should not, on the other hand, authorize a verdict for defendant on a finding that certain duties were properly performed to the exclusion of other grounds of liability involved in the case.[20]

Requested instructions which state the law correctly as to material issues which there is evidence tending to support should be given,[21] but the refusal of such instructions is not error where they are covered by the general charge given,[22] or are confusing and misleading,[23] or do not state a correct proposition of law,[24] or are bad in form.[25] Instructions which have no purpose other than to aid the jury in weighing the evidence are largely discretionary with the court, and, where the court may rightfully consider such instructions unnecessary, it will not be held error to refuse them.[26]

Inexactness of phrasing will not invalidate an instruction provided, as given and when considered with the evidence, it states a correct rule of law, and is in a form to be correctly understood by the jury,[27] but if the inexactness results in an inaccurate statement of the rule the instruction will be held erroneous in law.[28]

Damages. Where there is evidence as to the value of the animal at different times, it is error if the instructions fail to restrict the damages to its

4. Ga.—Powell v Nelson, 183 S E 348, 52 Ga App 351.

5. Ky.—Louisville, etc., R Co v. Calloway, 280 S W. 966, 213 Ky 235
52 C.J. p 143 note 54.

6. Tex.—St. Louis, etc, R Co. v Rea, Civ.App., 202 S W 812.

7. Mo—Martin v. Butler County R. Co., 161 S.W. 631, 175 Mo.App. 464.

8. Iowa.—Kinyon v Chicago, etc, R. Co., 92 N W. 40, 118 Iowa 349, 96 Am.S R. 382
52 C.J p 143 note 58.

9. Utah.—Bunnell v. Rio Grande Western R. Co., 44 P. 927, 13 Utah 314.
52 C.J p 143 note 59.

Speed of train

Where it was not negligence to run train at certain speed in so far as animal not on or approaching public crossing was concerned and injury complained of occurred at substantial distance from public crossing between crossing and statutory blowpost, charge that speed of train was to be considered by jury in determining whether railroad had been negligent was erroneous.—Powell v. McClung, 36 S E.2d 820, 73 Ga App. 388

10. Mo.—Johnson v. Atchison, etc, R Co, 93 S W. 866, 117 Mo App. 308

11. Kan.—Roman v. St Louis-San Francisco R. Co., 245 P. 115, 120 Kan. 585.
52 C.J. p 143 note 61.

12. Ga.—Louisville, etc, R. Co. v. Peeples, 71 S E 805, 136 Ga 448
52 C J. p 143 note 62.

13. Tex.—Texas, etc., R. Co v. Kirby, 1 Tex.A Civ.Cas. § 564

14. S C—Neely v. Charlotte, etc., R. Co, 11 S E. 636, 33 S.C. 186.
52 C J. p 143 note 64.

15. Ga—Atlantic Coast Line R. Co. v White, 59 S E. 898, 129 Ga 668
52 C.J. p 144 note 66.

16. Ga.—Central of Georgia R. Co v. Stiles, 76 S.E. 570, 139 Ga. 49.

17. Iowa.—Brentner v. Chicago, etc, R Co, 23 N W. 245, 27 N.W. 605, 68 Iowa 530.
52 C J. p 144 note 68.

18. Ala.—Louisville, etc, R. Co. v Christian Moerlein Brewing Co., 43 So. 723, 150 Ala. 390.
52 C J. p 144 note 69.

19. Ga.—Atlantic Coast Line R. Co. v. Willis, 157 S.E. 254, 42 Ga.App. 768

20. Miss—Louisville, etc., R. Co v. Suddith, 12 So. 205, 70 Miss. 265.
52 C J. p 144 note 70.

21. Mo—Midgett v. St Louis, etc, R. Co, 102 S W 56, 124 Mo App. 540.
52 C J. p 144 note 72.

22. Mo—Buckman v. Missouri, etc., R. Co, 73 S.W 270, 100 Mo.App. 30.
52 C J. p 144 note 73.

23. Ala—Southern R Co. v. Hobson, 58 So. 751, 4 Ala App. 408

24. Ala.—Louisville & N. R. Co v. Watson, 94 So. 551, 208 Ala. 319.

25. Ala.—Louisville & N. R. Co v. Watson, supra.

26. Iowa—Taylor v. Chicago, etc, R. Co, 40 N.W. 84, 76 Iowa 753

27. Mo—Dorsey v. Chicago, etc., R. Co, 157 S W. 1065, 175 Mo.App. 150.
52 C.J. p 144 note 79.

28. Vt.—Holden v. Rutland, etc., R. Co, 30 Vt. 297.
52 C.J. p 144 note 80.

value at the time of the injury[29] or if they permit the jury to include improper elements of damage[30]

b. Invading Province of Jury

The instructions of the court must not invade the province of the jury.

The instructions of the court must not invade the province of the jury,[31] as by telling them that certain acts do or do not constitute negligence[32] Thus instructions must not assume the existence of material facts in issue[33] unless established by undisputed evidence.[34] Instructions must not draw inferences of fact from the evidence[35] or pass on the credibility of witnesses or the weight of evidence[36]

§ 680. —— Conformity to Issues and Evidence

The instructions must conform to, and be limited by, the issues made by the pleadings and the evidence

The instructions must conform to, and be limited by, the issues made by the pleadings and the evidence,[37] and it is error to submit to the jury issues not presented by the pleadings[38] or not supported by the evidence[39] Although an issue of fact not in dispute between the parties need not be presented to the jury,[40] material matter properly presented by the pleadings and the evidence should be submitted to the jury,[41] and it is error for the court to withdraw it from them,[42] and a request for an instruction having that effect is properly refused.[43] On the other hand, it is error for the court to refuse to instruct the jury, if requested, that, where particular acts of negligence or a particular ground of liability is alleged, there can be no recovery on other grounds.[44]

§ 681. —— Presumptions and Burden of Proof

a. In general
b. From proof of injury under statute

a. In General

The court should correctly instruct the jury on the law as to presumptions and burden of proof and in terms which will not confuse or mislead them.

The court should correctly instruct the jury on the law as to presumptions and burden of proof[45] and in terms which will not confuse or mislead them[46] The instruction need not refer in express terms to the burden of proof if it is so worded that the jury cannot fail to understand the law on the subject,[47] as where the instruction states the rule in terms referring to the credibility of plaintiff's and defendant's witnesses.[48]

b. From Proof of Injury under Statute

Where, by statute, proof of the injury is prima facie evidence of negligence on the part of a railroad company, it is proper to instruct the jury that, if they are satisfied by a preponderance of the evidence of the fact of injury by the defendant's train, the defendant is prima facie negligent, and that the burden is on the defendant to show facts exculpating it from liability.

Where, by statute, proof of the injury is prima facie evidence of negligence on the part of a railroad company, it is proper to instruct the jury that, if they are satisfied by a preponderance of the evidence of the fact of injury by defendant's train, defendant is prima facie negligent,[49] and that the

29. Tex—Texas, etc, R Co. v. Billingsley, Civ App, 37 S W 27.

30. Tex—Quanah, etc, R Co. v Price, Civ.App, 192 S W 805—Ft Worth, etc, R Co v Chisholm, Civ.App, 146 S.W 988

31. Iowa—Kinyon v. Chicago, etc, R. Co, 92 N W. 40, 118 Iowa 349, 96 Am S R 382
52 C J p 145 note 91.

32. Ga—Louisville, etc., R Co v. Biggs, 81 S.E 900, 141 Ga 562.
52 C J. p 145 note 92

33. Ala—Louisville, etc, R. Co. v. Christian Moerlein Brewing Co., 43 So 723, 150 Ala 390.
52 C J p 145 note 93.

34. Tex—Ludtke v Texas, etc., R Co., Civ App, 132 S W 377.

35. Ala—Memphis, etc., R. Co. v. Bibb, 37 Ala. 699

36. Ind—Louisville, etc, R Co. v. Stommel, 25 N E 863, 126 Ind. 35
52 C J. p 145 note 96.

37. Mo—Humphreys v Chicago, M, St P & P. R Co, App, 83 S.W.2d 586
52 C J p 144 note 82.

38. Ark—Missouri Pac R Co. v. Mitchell, 280 S W. 627, 170 Ark. 689
52 C J p 144 note 83.

39. Iowa—Croddy v Chicago, etc, R Co, 60 N W 214, 91 Iowa 598.
52 C J p 144 note 84

40. Iowa—Scott v Chicago, etc, R Co, 42 N W. 645, 78 Iowa 199.
52 C J. p 145 note 88

41. Ark—St Louis-San Francisco R Co. v Call, 122 S W 2d 178, 197 Ark 225.
52 C J. p 145 note 85.

42. N.D—Reinke v. Minneapolis, etc., R Co. 135 N.W. 779, 23 N D 182.
52 C.J. p 145 note 86.

43. Mich.—Jebb v. Chicago, etc, R. Co, 34 N W. 538, 67 Mich. 160.
52 C J. p 145 note 87.

44. Ala—Mobile, etc, R. Co v Ladd, 9 So 169, 92 Ala 287
N.Y.—White v. Utica, etc, R Co, 15 Hun 333

45. Iowa.—Croddy v. Chicago, etc, R Co, 60 N W 214, 91 Iowa 598.
52 C J. p 145 note 99.

46. Tex—Missouri, etc, R. Co v Kennedy, 76 S W. 943, 33 Tex Civ. App. 445.
52 C J. p 145 note 1.

47. Iowa—Scott v Chicago, etc, R. Co, 42 N W. 645, 78 Iowa 199—Dunn v Chicago, etc., R. Co., 12 N W. 734, 58 Iowa 674.

48. Ala—Alabama Great Southern R Co. v. Moody, 9 So. 238, 92 Ala 279
52 C J. p 146 note 3.

49. Miss—Southern R Co. v. Murray, 44 So. 785, 91 Miss 546
S C—Goode v. Southern R Co., 111 S.E. 876, 118 S C 453.

burden is on defendant to show facts exculpating it from liability,[50] qualifying such instruction, whenever the terms of the statute make it necessary to do so, by enumerating the places at some one of which the injury must have occurred in order to make the presumption operative.[51] Under such a statute, an instruction that, if defendant's train injured plaintiff's cattle, a verdict for plaintiff should be given has been held not erroneous where defendant offered no proof in rebuttal of the presumption.[52] Moreover, where a statutory presumption of negligence on the part of defendant is operative, an instruction is erroneous which places the burden of proving negligence on plaintiff,[53] and a request for an instruction to that effect is properly refused.[54]

On the other hand, where all the facts and circumstances surrounding the injury are in evidence, it has been held proper to instruct, after stating the law as to the burden of proof, that the jury will determine the case from the evidence and not on the statutory presumption of negligence,[55] and that the burden then rests on plaintiff to establish defendant's negligence by a preponderance of proof,[56] although, as discussed supra § 641, it has been held in some jurisdictions that the burden still rests on defendant to overcome inferences of negligence arising from the fact of killing which the statute warrants. Where the evidence raises a question for the jury as to whether the presumption of negligence has been rebutted, an instruction that if the animal was killed without negligence on the part of defendant, plaintiff may not recover, has been held proper.[57]

It has been held that the court should not instruct on the statutory presumption of negligence where the evidence with respect to negligence on the part of defendant is conflicting,[58] or where the evidence sufficiently explains every material fact connected with the infliction of the injury,[59] and that an instruction which invokes the statutory presumption is erroneous where defendant has introduced evidence rebutting the presumption,[60] or where plaintiff's evidence discloses the facts and circumstances of the injury in detail,[61] inasmuch as the statutory presumption may not be appealed to as a deciding witness for plaintiff[62]

Where the evidence discloses a possible killing by any one of several trains but plaintiff does not submit proof as to which train caused the death, it has been held that the court should, in its instruction, apply the law to the evidence relating to each train,[63] and that an instruction permitting a recovery for the killing of the stock by trains as to which the statutory presumption of negligence has been overcome is erroneous,[64] and that a refusal of a request for an instruction to find for defendant if the stock was killed by the train which is shown to have been operated with due care is also erroneous.[65] In the absence of a request to do so, a failure of the court to specify the manner and means of overcoming the presumption has been held not error[66]

§ 682. —— Fences and Cattle Guards

a. In general
b. Sufficiency, defects, and repairs

a. In General

In actions based on a failure of a railroad company to construct or maintain fences or cattle guards, the instructions must conform to the issues and evidence, and be based on all the evidence. They must not be misleading or confusing, or conflicting, and they must not invade the province of the jury.

50. Ark.—Arkansas, etc., R. Co. v. Morse, 187 S.W. 169, 124 Ark. 376 52 C.J. p 146 note 8.

51. Ala.—Western R. Co. v McPherson, 57 So. 396, 3 Ala.App 380.

52. Ala.—Central of Georgia R Co. v Williams, 75 So. 401, 200 Ala. 73.

53. Ky.—Troutwine v. Louisville, etc., R. Co., 105 S.W. 142, 32 Ky.L. 5

54. Ala.—Southern R. Co. v Freeman, 81 So 135, 16 Ala.App 687.

55. Miss.—Hamlin v Yazoo, etc, R Co., 16 So 877, 72 Miss. 39

56. N.C.—McNair v Norfolk, etc, R. Co, 129 S.E 410, 190 N.C. 853—Ferrell v. Norfolk Southern R. Co, 129 S.E 155, 190 N.C. 126.

57. Ark.—Midland Valley R. Co v. Skinner, 138 S.W. 969, 99 Ark. 370.

58. Fla.—Powell v American Sumatra Tobacco Co, 17 So.2d 391, 154 Fla 227.

59. Ga.—Macon, D. & S. R Co. v Stephens, 19 S.E.2d 32, 66 Ga.App. 636

60. Ga.—Atlantic Coast Line R. Co v. Rowe, 64 S.E.2d 216, 83 Ga.App 540—Macon, D & S. R Co, v Stephens, 19 S.E.2d 32, 66 Ga.App. 636

Miss.—Columbus & G. Ry. Co. v. Dunlap, 145 So 646, 164 Miss 709

Where plaintiff relied entirely on statutory presumption and defendant introduced evidence which jury would be authorized to find exonerated defendant, it was error to charge jury that burden was on defendant to show that its servants exercised all due and ordinary care and diligence.—Atlantic Coast Line R. Co. v Sears, 56 S.E.2d 130, 80 Ga.App. 338, followed in 56 S.E.2d 131, 80 Ga.App 339—Atlantic Coast Line R. Co. v. Sears, 56 S.E.2d 129, 80 Ga. App. 338

61. Miss.—Adams-Newell Lumber Co. v. Jones, 139 So 315, 162 Miss. 517

62. Miss.—Columbus & G Ry Co v. Dunlap, 145 So. 646, 164 Miss 709.

63. N.D.—Reinke v Minneapolis, etc, R. Co, 135 N.W 779, 23 N.D. 182.

64. N.D.—Reinke v. Minneapolis, etc., R. Co., supra.

65. Miss.—Columbus, etc, R Co v. Nye, 104 So. 90, 139 Miss. 295

66. Ga.—Atlantic Coast Line R Co v. Paulk, 125 S.E 865, 33 Ga.App. 293.

In actions based on a failure of a railroad company to construct or maintain fences or cattle guards, the instructions must conform to the issues and evidence,[67] and be based on all the evidence [68] They must not be confusing or misleading,[69] or conflicting,[70] and they must not invade the province of the jury.[71]

An instruction has been held erroneous where it lays down a rule of liability different from that prescribed by a fencing statute,[72] or where, in stating what must be found to authorize a recovery, it omits any essential element necessary to establish plaintiff's cause of action under the statute,[73] such as the duty of defendant to fence at the place in question,[74] the necessity that the animal shall have come upon the track at a place where the company should have fenced and had neglected to do so[75] or at the place where the company had permitted its fence to become defective,[76] that the animal must have been running at large where the statute so provides,[77] that the injury was caused by collision with the train, where the statute so provides,[78] and that the failure to fence must have been the cause of the injury.[79]

Where it is alleged that the road was not properly fenced and there is evidence tending to support the allegations, it has been held proper to charge that to entitle plaintiff to recover it is not necessary to find negligence in the operation of the train.[80] Where the undisputed evidence shows that the cattle guard where the animal was injured was located at the place required by law, an instruction allowing the jury to take into consideration the location of the cattle guard in determining whether or not defendant is liable has been held erroneous.[81]

Where there is no statute requiring railroad companies to fence, it has been held that the court should, if requested, instruct the jury that it is not the duty of the railroad to do so.[82]

b. Sufficiency, Defects, and Repairs

An instruction which imposes on a railroad company the duty of maintaining fences and cattle guards sufficient to exclude stock from the track without qualifying the term "sufficient" to mean reasonably sufficient or sufficient under ordinary circumstances has been held erroneous.

An instruction which imposes on a railroad company the duty of maintaining fences and cattle guards sufficient to exclude stock from the track without qualifying the term "sufficient" to mean reasonably sufficient or sufficient to turn ordinary stock under ordinary circumstances has been held erroneous;[83] but an instruction which does not violate the rule that cattle guards should be reasonably sufficient to restrain ordinary stock has been held not erroneous.[84] It has been held not error to charge in the words of the statute that sufficient fences or cattle guards are required, if the qualifying terms are added in another instruction,[85] or that "lawful fences" are required, if the term is defined,[86] although an instruction may be erroneous where it states that a lawful fence is required but fails to define a "lawful fence,"[87] unless the evidence is such as not to require the definition.[88]

An instruction may be erroneous where it makes the duty of keeping a fence in repair absolute instead of merely requiring the exercise of ordinary care in this respect,[89] or where it excludes the question whether the alleged defect was due to a want of repair,[90] or the question whether the com-

67. Mo.—Brown v. Quincy, etc., R. Co., 106 S.W. 551, 127 Mo.App. 614.
52 C.J. p. 147 note 34.

68. Mo.—Schlotzhauer v. Missouri, etc., R. Co., 89 Mo.App. 65

69. Mo.—Best v. Atchison, T. & S. F. Ry. Co., App., 76 S.W.2d 442.
52 C.J. p. 147 note 36

70. Tex.—Saine v. Missouri, etc., R. Co., Civ.App., 85 S.W. 487.

71. Cal.—Boyd v. Southern California R. Co., 58 P. 1046, 126 Cal. 571.
52 C.J. p. 147 note 38.

72. Iowa.—Brentner v. Chicago, etc., R. Co., 23 N.W. 245, 27 N.W. 605, 68 Iowa 530.

73. Iowa.—Brentner v. Chicago, etc., R. Co., supra.
Mo.—Montgomery v. Wabash R. Co., 2 S.W. 409, 90 Mo. 446

74. Iowa.—Smith v. Kansas City, etc., R. Co., 12 N.W. 619, 58 Iowa 622.
52 C.J. p. 146 note 22

75. Tex.—International, etc., R. Co. v. Erwin, Civ.App., 67 S.W. 466.
52 C.J. p. 146 note 23.

76. Tex.—Ft. Worth, etc., R. Co. v. Worsham, 105 S.W. 853, 47 Tex. Civ.App. 350

77. Iowa.—Brentner v. Chicago, etc., R. Co., 23 N.W. 245, 27 N.W. 605, 68 Iowa 530

78. Tex.—Texas, etc., R. Co. v. Pate, Civ.App., 113 S.W. 994.

79. Mo.—Montgomery v. Wabash R. Co., 2 S.W. 409, 90 Mo. 446—Ridenore v. Wabash, etc., R. Co., 81 Mo. 227

80. Tex.—Galveston, etc., R. Co. v. Walter, Civ.App., 25 S.W. 163.

81. Tex.—Houston, etc., R. Co. v. White, 108 S.W. 971, 49 Tex.Civ.App. 582.

82. U.S.—Gulf, etc., R. Co. v. Elldge, Ind.T., 49 F. 356, 1 C.C.A. 295

83. Mo.—Jones v. Chicago, etc., R. Co., 59 Mo.App. 137.
52 C.J. p. 147 note 40.

84. Ala.—Alabama Great Southern R. Co. v. Clark, 130 So. 318, 221 Ala. 616.

85. Ill.—Baltimore, etc., R. Co. v. Abbott, 59 Ill.App. 609

86. Mo.—Hax v. Quincy, etc., R. Co., 100 S.W. 693, 123 Mo.App. 172.
52 C.J. p. 147 note 42.

87. Mo.—Clem v. Quincy, etc., R. Co., 96 S.W. 226, 119 Mo.App. 245.

88. Mo.—Rucker v. Lusk, App., 221 S.W. 393.

89. Tex.—Missouri, etc., R. Co. v. Bradshaw, Civ.App., 83 S.W. 897.

90. Iowa.—Brentner v. Chicago, etc., R. Co., 12 N.W. 615, 58 Iowa 625.

pany had either actual or constructive notice of the defect[91] or a reasonable time thereafter in which to make the necessary repairs,[92] or the question whether the animal came upon the track and was injured by reason of such defects.[93]

An instruction that defendant would not be liable unless it caused or knew of the defect has been held erroneous in that it would relieve the company of the duty of exercising ordinary care to discover defects.[94] Where there is evidence that some of the animals injured passed over a portion of a cattle guard which was not defective, it has been held error to refuse to charge that under such circumstances defendant would not be liable for such animals.[95] A charge that cattle guards are intended to secure the safety of passengers as well as animals has been held not erroneous as misleading.[96]

§ 683. —— Private Crossings, Gates, and Bars

In actions brought under statutes requiring the construction and maintenance of gates at farm crossings, the instructions must conform to, and be limited by, the issues presented by the pleadings and evidence, and cover each element of the liability involved, and must not be contradictory or present an abstract proposition of law to the jury.

In actions brought under statutes requiring the construction and maintenance of gates at farm crossings, the instructions must conform to, and be limited by, the issues presented by the pleadings and evidence,[97] and cover each element of the liability involved,[98] and must not be contradictory[99] or present an abstract proposition of law to the jury.[1] Where the statute requires the construction of gates at "necessary" farm crossings, the court should instruct the jury as to the circumstances constituting such necessity[2] unless the necessity for the crossing is not put in issue by defendant.[3]

§ 684. —— Signals, Lookouts, and Precautions

a. In general
b. Crossing signals
c. Precautions

a. In General

An instruction on the duty of the servants of the defendant railroad company to keep a lookout is proper if there is evidence of their failure to do so, but the instruction must be in terms which will not mislead the jury.

An instruction on the duty of the servants of defendant railroad company to keep a lookout is proper if there is evidence of their failure to do so,[4] but the instruction must be in terms which will not mislead the jury.[5] An instruction is erroneous which would authorize a verdict for defendant on a finding that proper care was exercised at the time of the injury without reference to any preceding negligence having a causal connection therewith,[6] as where the instruction ignores the duty of properly equipping the train,[7] or maintaining a lookout for stock,[8] or limiting such duty to the engineer alone,[9] or to the fireman alone,[10] or to crossings,

91. Iowa.—Brentner v Chicago, etc., R. Co., supra
52 C J. p 148 note 47.

92. Iowa.—Brentner v Chicago, etc., R. Co., supra
52 C.J. p 148 note 48.

93. Tex.—Missouri, etc., R Co. v. Bradshaw, Civ App., 83 S.W. 897.
52 C J. p 148 note 49.

94. Tex.—Galveston, etc., R. Co. v. Walter, Civ App., 25 S.W. 163.

95. Mich.—Johnson v Detroit, etc., R Co., 97 N.W. 760, 135 Mich. 353.

96. Vt.—Wait v Bennington, etc., R. Co., 17 A. 284, 61 Vt. 268.

97. Mo.—Humphreys v. Chicago, M., St. P. & P. R. Co., App., 83 S.W. 2d 586—Peery v Quincy, O & K. C. R. Co., 99 S W. 14, 122 Mo.App. 177
N H.—Dowse v. Maine Cent. R. R., 20 A.2d 629, 91 N H. 419.
52 C.J. p 148 note 59.

98. Mo.—Rowen v Chicago Great Western R. Co., 82 Mo App. 24.
52 C J p 149 note 60.

Sufficiency of gates

(1) Instructions as to sufficiency of gates held proper or not erroneous.—Payne v Kansas City, etc., R Co., 33 N W. 633, 72 Iowa 214—52 C. J p 148 note 56 [a], [b]

(2) An instruction is erroneous which leaves the jury to infer that the duty of maintaining sufficient gates is absolute instead of indicating that defendant should exercise reasonable care in this respect.—Wirstlin v Chicago, etc., R. Co., 99 N W 697, 124 Iowa 170.

99. Kan.—Roman v St Louis-San Francisco R. Co., 245 P. 115, 120 Kan. 585.
52 C J p 149 note 61.

1. Mo.—Humphreys v. Chicago, M., St. P. & P R Co., App., 83 S W.2d 586.

2. Mo.—Rowen v. Chicago Great Western R Co., 82 Mo App. 24—Miller v. Quincy, etc., R. Co., 56 Mo.App. 72.

3. Mo.—Roberts v. Chicago, etc., R Co., 94 S.W. 838, 119 Mo.App. 372—Kavanaugh v. Atchison, etc., R. Co., 75 Mo App. 78.

4. Ark.—St. Louis-San Francisco R. Co. v. Call, 122 S W 2d 178, 197 Ark 225
Ga.—Powell v Nelson, 183 S E 348, 52 Ga.App 351
52 C J. p 149 note 63.

5. Ark.—St Louis, etc., R. Co v. Ewing, 107 S W 191, 85 Ark 53
52 C.J. p 149 note 64

6. Kan.—Kansas City, etc., R Co. v. Lane, 7 P 587, 33 Kan. 702
52 C.J p 149 note 65.

7. Ala.—Southern R. Co v. Pogue, 40 So 565, 145 Ala 444
52 C J p 149 note 66.

8. Ala.—Bugg v Green, 110 So 718, 215 Ala 343.
52 C J. p 149 note 67.

9. Ala.—Southern R Co v. Riddle, 28 So 422, 126 Ala 244
N.D.—Brookings v Northern Pac. R. Co., 180 N.W. 972, 47 N D. 111.

10. Ala.—McAdoo v Booker, 88 So. 196, 17 Ala App 623.

streets, and highways without regard to the engineer's duty to keep a lookout at any place where he might reasonably anticipate that stock would be on the track,[11] or to the time of the accident without reference to whether the animal might have been discovered sooner,[12] or to animals seen actually upon the track without reference to those in dangerous proximity thereto[13]

It has been held that an instruction is erroneous which would relieve defendant if a lookout was being maintained and the accident could not have been avoided after the animal was seen without reference to whether the train was being operated at a negligent rate of speed or without a proper headlight,[14] or which bases plaintiff's right to recover on the mere fact that defendant failed to keep a lookout without regard to whether such failure was negligent under the particular circumstances,[15] or on the mere fact that defendant was negligent as to keeping a lookout, without requiring that such negligence must have been the cause of the injury,[16] or which, in cases where the animal was a trespasser or the owner guilty of contributory negligence, imposes on the company the same duty as to discovering the animal as in other cases instead of limiting its liability to the question of whether due care was exercised to avoid the injury after the danger was discovered.[17]

b. Crossing Signals

An instruction as to the liability of the defendant railroad company for failure to give statutory crossing signals should not omit the requirement that the injury must have occurred at a public crossing and as a result of the omission of the signals.

An instruction as to the liability of defendant railroad company for failure to give statutory crossing signals should not omit the requirement that the injury must have occurred at a public crossing[18] and as a result of the omission of the signals[19] Such an instruction should state defendant's duty as to blowing the whistle and ringing the bell in the alternative and not the conjunctive when the statute follows the alternative form[20] It must conform to the issues made by the pleadings and evidence,[21] and must not invade the province of the jury.[22]

c. Precautions

An instruction that a railroad company is obliged to use all ordinary and reasonable care to prevent injury has been held not misleading as making prevention of the injury the test of negligence.

An instruction that a railroad company is obliged to use all ordinary and reasonable care to prevent injury has been held not misleading as making prevention of the injury the test of negligence,[23] nor is an instruction as to the efforts to be exercised to prevent injuries to animals misleading in fixing the standard of care as the using of all diligence in the engineer's power, where it is explained in other instructions to mean "ordinary and reasonable care and diligence."[24] However, an instruction invades the province of the jury where it states that it is the engineer's duty, after seeing the animal on the track, to stop his train if possible to do so with safety to his train,[25] unless the statute in terms requires particular acts by the engineer and the instruction merely follows the words of the statute.[26]

An instruction on the care required is erroneous which relieves defendant of liability if its servants acted in good faith without regard to whether their conduct was in fact negligent,[27] or which, in grouping the failures or omissions to act, any one of which would tend to establish defendant's negligence, omits any failure to act brought out in the evidence,[28] unless modified in general terms to direct the attention of the jury to failures or omissions other than the one specifically referred to[29]

11. Tex.—Houston, etc., R. Co. v. King, Civ.App., 160 S.W. 647.

12. Ala.—East Tennessee, etc., R. Co. v. Baker, 10 So. 211, 94 Ala. 632.

13. Ala.—Georgia Cent. R. Co. v. Sport, 37 So. 344, 141 Ala. 369.

14. Ala.—Western R. Co. v. Stone, 39 So. 723, 145 Ala. 663—Central of Georgia R. Co. v. Main, 42 So. 108, 143 Ala. 149.

15. N.D.—Brookings v. Northern Pac. R. Co., 180 N.W. 972, 47 N.D. 111.

16. Ala.—Alabama Great Southern R. Co. v. Moody, 9 So. 238, 92 Ala. 279—Kansas City, etc., R. Co. v. Watson, 8 So. 793, 91 Ala. 483.

17. Tex.—Houston, etc., R. Co. v. Rippetoe, Civ.App., 64 S.W. 1016.

18. Mo.—Morris v. Missouri, etc., R. Co., 73 S.W. 1004, 99 Mo.App. 455

19. Ala.—Louisville, etc., R. Co. v. Christian Moerlein Brewing Co., 43 So. 723, 150 Ala. 390.
52 C.J. p. 149 note 79

20. Mo.—Tate v. Wabash R. Co., 134 S.W. 14, 153 Mo.App. 533.

21. Ga.—Atlantic Coast Line R. Co. v. Waycross Electric Light, etc., Co., 51 S.E. 621, 123 Ga. 613.
52 C.J. p. 149 note 81.

22. S.C.—Griffith v. Atlantic Coast Line R. Co., 64 S.E. 222, 82 S.C. 252.
52 C.J. p. 149 note 82.

23. Ga.—Southern R. Co. v. Rundle, 139 S.E. 830, 37 Ga.App. 272

24. Ga.—Atlantic, etc., R. Co. v. Smith, 58 S.E. 542, 2 Ga.App. 294

25. Ind.—Chicago, etc., R. Co. v. Shedrow, 129 N.E. 406, 74 Ind.App. 623.

26. Ala.—Atlanta, etc., R. Co. v. Hodges, 94 So. 252, 19 Ala.App. 42.
Idaho.—Kerby v. Oregon Short Line R. Co., 264 P. 377, 45 Idaho 636.

27. Ark.—Arkansas, etc., R. Co. v. Sanders, 99 S.W. 1109, 81 Ark. 604.

28. Tex.—St. Louis, etc., R. Co. v. Droddy, Civ.App., 114 S.W. 902
52 C.J. p. 150 note 89

29. Ark.—St. Louis, etc., R. Co. v. Ledbetter, 20 S.W.2d 632, 180 Ark. 114.

An instruction may be erroneous where it limits defendant's duty to the careful operation of the train with the appliances as they actually were without regard to whether defective appliances might not be in themselves evidence of defendant's negligence,[30] or where it ignores the duty to exercise due care as to animals in dangerous proximity to, as well as upon, the track,[31] or where it, on the other hand, tends to make the liability of defendant for failing to stop the train absolute, if it were possible to do so, without reference to whether ordinary care under the circumstances demanded such a precaution,[32] or where the evidence does not show that the animal was injured by a train,[33] or where it informs the jury that defendant would be liable if the train could not have been stopped in time to avoid the injury by reason of the speed at which it was operated, since it ignores the question whether the rate of speed was unreasonable or dangerous or was the proximate cause of the injury.[34]

An instruction has been held erroneous where it states that a dog is an animal of superior intelligence and that an engineer would be justified in believing that the dog would leave the track before being struck,[35] or that the engineer was not required to use the same degree of care on observing a dog on or near the track as he would be on observing a horse, cow, or hog.[36] However, an instruction has been held not erroneous as being incomplete where it states that when an engineer sees a dog on or near the track ahead he is entitled to act or refrain from acting on the presumption that the dog will get out of the way to avoid danger, provided there is nothing in the circumstances to indicate to a reasonably prudent man that the dog is helpless to extricate himself from danger,[37] even though the instruction does not include the alternative "that it is indifferent to its surroundings."[38]

Where there is evidence tending to show certain facts which indicate that the ordinary precautions were or were not taken, the court may instruct the jury hypothetically in case they should so find from the evidence,[39] and where there is evidence suggestive of such a theory the court may instruct the jury that if the whistle was blown for the purpose of wrongfully frightening an animal, and not to keep it from the track, this fact may be considered.[40] Where the precautionary measures to prevent injuries to animals are prescribed by statute, it has been held that an instruction is erroneous which adds to them and imposes a higher degree of care,[41] or which ignores the principle that, although some required precaution was omitted, the company would not be liable if under the circumstances the injury was unavoidable and could not, even by the exercise of such precaution, have been prevented,[42] or which states that a failure to sound the alarm signal is not negligence if due to the engineer being otherwise engaged in the operation of the train without regard to the reasonableness of the engineer's conduct,[43] or which states that the engineer was not negligent in failing to see, if in the darkness it was impossible to see, the animal on the track by reason of the light from the headlight going in a straight line, "or other reason," the latter words referring to the darkness and a curve the existence of which was established by the evidence.[44]

§ 685. —— Contributory Negligence of Owner

Ordinarily, where there is evidence of a want of ordinary care on the part of the plaintiff, it is proper to instruct the jury that there may be no recovery if the injury complained of was the result of the plaintiff's negligence or the negligence of both the plaintiff and the defendant and without any intentional wrong on the part of the defendant.

Ordinarily, where there is evidence of a want of ordinary care on the part of plaintiff, it is proper to instruct the jury that there may be no recovery if the injury complained of was the result of plaintiff's negligence or the negligence of both plaintiff and defendant and without any intentional wrong

30. Iowa.—Barnard v. Chicago, etc., R Co, 110 N.W. 439, 133 Iowa 185

31. Mo.—Rhinehart v. St. Louis, etc., R. Co, 108 S.W. 103, 129 Mo. App 168
52 C.J. p 150 note 92.

32. Neb.—Briegel v. Union Pac R. Co, 199 N.W. 555, 112 Neb. 398
52 C.J. p 150 note 93.

33. Miss.—Richmond, etc, R. Co v. Chandler, 13 So. 267.

34. Iowa.—Fullerton v. Grand Rapids, etc., R. Co, 70 N.W. 106, 101 Iowa 156.

35. Ark.—St. Louis, etc, R. Co. v. Rhoden, 123 S.W. 798, 93 Ark. 29, 137 Am.S.R. 73, 20 Ann.Cas. 915

36. Ala.—Tennessee, etc., R. Co v. Daniel, 76 So. 958, 200 Ala. 600

37. Ala.—Owen v. Southern Ry. Co, 133 So. 33, 222 Ala. 499

38. Ala.—Owen v. Southern Ry. Co., supra
Reason for rule
A dog may be said to be helpless if he is indifferent to his surroundings.—Owen v. Southern Ry. Co., supra.

39. Ala.—Bugg v. Meredith, 107 So. 805, 214 Ala. 264.
52 C.J. p 150 note 98.

40. Ga.—Central R., etc., Co. v. Hollinshead, 7 S.E. 172, 81 Ga. 208

41. Ala.—Alabama Great Southern R. Co. v. Chapman, 2 So. 738, 80 Ala. 615.
52 C.J. p 150 note 1.

42. Ala.—Alabama Great Southern R. Co. v. Smith, 3 So. 795, 85 Ala. 208.

43. Ga.—Atlantic Coast Line R. Co. v. Waycross Electric Light, etc, Co., 57 S.E. 1017, 1 Ga.App. 488

44. Ark.—Mahor v. Kansas City Southern R. Co., 223 S.W. 388, 145 Ark. 111.

on the part of defendant,[45] unless the action is brought under the fencing statutes in jurisdictions where contributory negligence is not a defense to such an action.[46] While it may be error for the court not to submit the issue of contributory negligence to the jury where the question is put in issue by the pleadings and there is evidence tending to show negligence on the part of plaintiff,[47] the rule is otherwise where there is no evidence of any negligence on the part of plaintiff.[48]

The instructions as to contributory negligence must conform to the issues presented by the pleadings and evidence,[49] must not be misleading[50] or assume the existence of facts not in evidence,[51] and must be based on all the evidence and not single out a particular fact and instruct the jury, without reference to the other circumstances in evidence, that it constitutes such negligence on the part of plaintiff as to preclude recovery.[52]

It has been held that an instruction is erroneous which would authorize a recovery by plaintiff notwithstanding the jury might find the issue of contributory negligence to be established by the evidence,[53] which makes the question of contributory negligence dependent on any degree of comparison with the negligence of defendant[54] except where the doctrine of comparative negligence is recognized,[55] or which omits the essential element that plaintiff's negligence, in order to preclude a recovery, must have contributed to the injury complained of,[56] or which informs the jury, without reference to plaintiff's negligence in the particular case, that he may not recover if he was habitually negligent in a certain respect,[57] or which would authorize a recovery on a finding that plaintiff was not negligent regardless of the question of defendant's negligence.[58]

On the other hand, an instruction has been held not erroneous which holds the railroad liable for stock killed or injured from its own negligence provided plaintiff's negligence does not "materially" contribute to such injury,[59] especially where such instruction is considered with other instructions correctly stating the law and omitting the word "materially."[60]

§ 686. Verdict, Findings, and Judgment

a. In general
b. Enforcement of judgment

a. In General

General rules apply with respect to the verdict, findings, and judgment in actions against railroad companies for injuries to animals.

General rules apply with respect to the verdict,[61] findings,[62] and judgment[63] in actions against railroad companies for injuries to animals. Thus a verdict is not invalid for informality if its meaning is sufficiently clear to be the basis of a legal judgment.[64] Where a complaint is in several counts and plaintiff has a verdict on one and is not entitled to recover on the others, judgment may properly be entered for plaintiff on the one count and for defendant on the others.[65] In an action brought under a statute allowing double damages, where plaintiff alleges that he has been damaged in a certain amount for which he asks judgment and for all other and proper relief according to the statute, the court may render judgment for double the actual damages assessed by the jury, although there is no formal prayer in the complaint for double dam-

45. Ill.—Aurora Branch R. Co. v. Grimes, 13 Ill. 585

46. Mich.—Hathaway v. Detroit, etc., R. Co., 83 N.W. 598, 124 Mich. 610.
Contributory negligence as defense in actions based on statutory liability see supra § 619

47. Mo.—Johnston v. Atchison, etc., R. Co., 93 S.W. 866, 117 Mo. App. 308.
Wis.—Habenicht v. Chicago, etc., R. Co., 105 N.W. 910, 126 Wis. 521.

48. Ark.—St. Louis, etc., R. Co. v. Scott, 104 S.W. 1103, 84 Ark. 623.
Colo.—Colorado, etc., R. Co. v. Webb, 85 P. 683, 36 Colo. 224

49. Neb.—Union Pac. R. Co. v. Ogilvy, 26 N.W. 464, 18 Neb. 638.
52 C.J. p. 151 note 11.

50. Utah.—Bunnell v. Rio Grande Western R. Co., 44 P. 927, 13 Utah 314.
52 C.J. p. 151 note 12.

51. Neb.—Union Pac. R. Co. v. Ogilvy, 26 N.W. 464, 18 Neb. 638

52. Ga.—Central R. Co. v. Hamilton, 71 Ga. 461
Iowa.—Kinyon v. Chicago, etc., R. Co., 92 N.W. 40, 118 Iowa 349, 96 Am. S. R. 382.

53. Tex.—Houston, etc., R. Co. v. Rippetoe, Civ. App., 64 S.W. 1016.

54. Ind.—Jeffersonville, etc., R. Co. v. Foster, 63 Ind. 342

55. Ga.—Central R. Co. v. Gleason, 69 Ga. 200.

56. Iowa.—Kinyon v. Chicago, etc., R. Co., 92 N.W. 40, 118 Iowa 349, 96 Am. S. R. 382.

57. Ind.—Jeffersonville, etc., R. Co. v. Foster, 63 Ind. 342—Ohio, etc., R. Co. v. Craycraft, 32 N.E. 297, 5 Ind. App. 335.

58. N.Y.—Altreuter v. Hudson River R. Co., 2 E.D. Smith 151.

59. Kan.—Simpson v. Chicago, etc., R. Co., 106 P. 283, 81 Kan. 133

60. Kan.—Simpson v. Chicago, etc., R. Co., supra.

61. Mo.—Wages v. Quincy, etc., R. Co., 85 S.W. 104, 110 Mo. App. 230

62. Ala.—Louisville & N. R. Co. v. Sellers, 134 So. 8, 222 Ala. 615
Finding as to waiver
Finding that filing of affidavit by owner of live stock showing ownership and injury to live stock had been waived was finding of mixed law and fact.—Hittson v. Chicago, R. I. & P. Ry. Co., 86 P.2d 1037, 43 N.M. 122.

63. Mo.—Buckman v. Missouri, etc. R. Co., 73 S.W. 270, 100 Mo. App. 30

64. Mo.—Wages v. Quincy, etc., R. Co., 85 S.W. 104, 110 Mo. App. 230.
52 C.J. p. 151 note 25.

65. Mo.—Buckman v. Missouri, etc. R. Co., 73 S.W. 270, 100 Mo. App. 30.

ages.[66] Under some statutory provisions judgment may not be entered before the expiration of a given time after the filing with defendant's station agent of an affidavit of ownership and injury to live stock,[67] but the filing of such affidavit is for the benefit of defendant and may be waived by it.[68]

Special verdicts and findings. In order to sustain a judgment for plaintiff, a special verdict should find facts which support the theory of the complaint;[69] it should contain every fact essential to entitle plaintiff to recover,[70] and if it is silent on any material point it may be held, as to that point, to be against the party on whom is the burden of proof.[71] So a special verdict will not sustain a judgment for plaintiff where it merely finds that the crossing signals were not given and does not also find that the omission was the cause of the injury,[72] or, in case the track was fenced so that there was no duty to keep a lookout for stock, where it fails to find that the animal injured was seen by those in charge of the train,[73] or where it finds merely that the railroad fence was out of repair without any finding that defendant was negligent in failing to repair it within a reasonable time,[74] or, if the complaint alleges that the animal was injured at a crossing by reason of a failure to give crossing signals, where it does not state where the injury occurred.[75] Where the burden is on plaintiff to show freedom from contributory negligence, a special verdict which does not find that plaintiff was free from contributory negligence has been held not to support a judgment in his favor.[76]

In the case of a general verdict with special findings of fact, it is only where the findings are so inconsistent with the general verdict or with each other that the two cannot stand that the general verdict will be set aside[77] and, if they can by any hypothesis be reconciled with the general verdict, the latter will control and the court should render judgment thereon,[78] but the verdict should be set aside where the special findings show that the case was decided solely on an erroneous theory induced by misleading instructions and not supported by the evidence,[79] or where the special findings show a palpable bias in the minds of the jury against the unsuccessful party,[80] or that the jury disregarded the instructions of the court.[81]

In an action for the entire damage for injury to several of plaintiff's animals by separate trains of defendant, there need be no special findings as to the number and value of animals injured by each train unless the jury find that there was negligence in the operation of one but not in the other.[82] Where the complaint contains allegations which, if proved, would authorize a verdict for double damages on the ground of a failure to fence or actual damages for negligence in the operation of the train, a special finding of negligence in the latter respect will sustain a verdict for full damages apart from the question of sufficient fences.[83]

b. Enforcement of Judgment

Special statutory provisions may control with respect to the enforcement of a judgment obtained in an action against a railroad company for injuries to animals by its locomotives, cars, or other carriages.

Under a special statutory provision that if an action against a railroad company for injuries to animals by its locomotives, cars, or other carriages is brought in the circuit court of the county where the injury occurred the court may, on motion and notice to the company, order any agent to appear and answer as to the amount of money in his hands belonging to the company, and order him to make payment therefrom in satisfaction of the judgment and costs, it has been held that, where the action is brought before a justice, plaintiff, on filing a certified transcript of the judgment rendered with the clerk of the circuit court, shall on motion and notice be entitled under this statute to the same order

66. Mo.—Carpenter v. Chicago, etc. R. Co., 95 S.W. 985, 119 Mo.App. 30

67. N.M.—Hittson v. Chicago, R. I. & P. Ry. Co., 86 P.2d 1037, 43 N.M. 122.

68. N.M.—Hittson v. Chicago, R. I. & P. Ry. Co., supra.

69. Ind.—Cleveland, etc., R. Co. v. Dugan, 48 N.E. 238, 18 Ind.App. 435
N.J.—Butler v. Easton, etc., R. Co., 60 A. 218, 72 N.J.Law 27.

70. Tenn.—Buford v. Louisville, etc., R. Co., 240 S.W. 759, 146 Tenn. 262
52 C.J. p. 151 note 26.

71. Ind.—Louisville, etc., R. Co. v. Green, 22 N.E. 327, 120 Ind. 367.
52 C.J. p. 151 note 27.

72. Ind.—Louisville, etc., R. Co. v. Green, supra—Louisville, etc., R. Co. v. Ousler, 36 N.E. 290, 15 Ind.App. 232

73. Ind.—Dennis v. Louisville, etc., R. Co., 18 N.E. 179, 116 Ind. 42, 1 L.R.A. 448.

74. Ind.—Cleveland, etc., R. Co. v. Dugan, 48 N.E. 238, 18 Ind.App. 435.

75. Ind.—Lake Shore, etc., R. Co. v. Van Auken, 27 N.E. 119, 1 Ind.App. 492.

76. Ind.—Hartzell v. Louisville, etc., R. Co., 44 N.E. 315, 15 Ind.App. 417.

77. Kan.—Ratliff v. Union Pac. R. Co., 122 P. 1023, 86 Kan. 938.
52 C.J. p. 152 note 34.

78. Ind.—Chicago, etc., R. Co. v. Ness, 105 N.E. 250, 56 Ind.App. 285.
52 C.J. p. 152 note 35.

79. Kan.—Atchison, etc., R. Co. v. Hawkins, 22 P. 322, 42 Kan. 355.

80. Mo.—Damrill v. St. Louis, etc., R. Co., 27 Mo.App. 202

81. Colo.—Chicago, etc., R. Co. v. Campbell, 83 P. 138, 34 Colo. 380.

82. Iowa.—Lawson v. Chicago, etc., R. Co., 11 N.W. 633, 57 Iowa 672.

83. Iowa.—Baker v. Chicago, etc., R. Co., 35 N.W. 460, 73 Iowa 389.

and proceedings [84] Under such a statute the proceeding has been held to be in the nature of an original action,[85] wherein an answer may be filed and issues formed as in civil actions,[86] so that the motion is in effect a complaint, the sufficiency of which may be tested by a demurrer,[87] and must therefore allege every material fact necessary to entitle plaintiff to the benefit of the statutory proceeding [88]

The motion or complaint, under such a statute, must show that the judgment was entered of record[89] and that the certified transcript was properly filed with the clerk,[90] although a motion requesting an order to the agent to pay the judgment has been held to be a sufficient notice to the railroad of the purpose of the motion,[91] especially in the absence of an objection to its sufficiency [92] The motion must also allege facts showing the jurisdiction of the justice,[93] or else, as is permissible under the statute, allege that the judgment or decision of the justice "was duly given or made "[94]

Where the case is instituted in the circuit court of the county of the injury and the venue is changed, the proceedings may be brought in the court where the judgment was rendered [95] The notice to the company need not be served on the particular agent whom plaintiff moves to be required to appear and answer, but may be served in the manner provided by statute for the service of a summons on a railroad company,[96] and where the action is in the circuit court and the motion is made at the time the judgment is rendered, the parties all being present, no notice to the company has been held necessary.[97]

§ 687. Appeal and Error

The rules relating to appeals and proceedings in error in civil actions generally apply to appeals and proceedings in error in actions against railroad companies for injuries to animals and are discussed in Appeal and Error

Examine Pocket Parts for later cases.

§ 688. Costs

a. In general
b. Where liability based on failure to pay after demand
c. Recovery and proceedings therefor

a. In General

A statute imposing liability for attorney's fees on railroad companies in actions to recover for stock killed or injured where the plaintiff succeeds, and not imposing a correlative liability on the plaintiff if he fails, is unconstitutional if it is designed merely to compel payment for indebtedness; but statutes authorizing attorney's fees have been held constitutional where enacted to enforce a special duty to fence on railroad companies by reason of the business in which they are engaged.

A statute imposing liability for attorney's fees on railroad companies in actions to recover for stock killed or injured where plaintiff succeeds, and not imposing a correlative liability on plaintiff if he fails, is unconstitutional if it is designed merely to compel payment of indebtedness [98] However, statutes authorizing attorney's fees, when not designed merely to compel payment of indebtedness, but enacted in the exercise of the police power to enforce a special duty to fence on railroad companies by reason of the business in which they are engaged, have been held to be constitutional,[99] although such a statute may be unconstitutional where it is general in its terms extending in its operation beyond the enforcement of the special duty to fence.[1]

Under statutes allowing a recovery of attorney's fees in actions based on a failure properly to fence on the part of a railroad company, recovery of such

84. Ind.—Chicago, etc., R. Co. v. Browers, 61 N.E. 958, 27 Ind.App. 628
52 C.J. p. 153 note 48
Enforcement of judgments generally see Judgments §§ 585–591

85. Ind.—Chicago, etc., R. Co. v. Summers, 14 N.E. 733, 113 Ind. 10, 3 Am.S.R. 616.
52 C.J. p. 153 note 49.

86. Ind.—Chicago, etc., R. Co. v. Summers, 14 N.E. 733, 113 Ind. 10, 3 Am.S.R. 616

87. Ind.—Chicago, etc., R. Co. v. Browers, 61 N.E. 958, 27 Ind.App. 628—Chicago, etc., R. Co. v. Adams, 59 N.E. 1087, 26 Ind.App. 443

88. Ind.—Chicago, etc., R. Co. v. Harris, 46 N.E. 1010, 19 Ind.App. 137.
52 C.J. p. 153 note 52

89. Ind.—Chicago, etc., R. Co. v. Adams, 39 N.E. 877, 12 Ind.App. 317.

90. Ind.—Chicago, etc., R. Co. v. Browers, 61 N.E. 958, 27 Ind.App. 628.

91. Ind.—Logansport, etc., R. Co. v. Byrd, 51 Ind. 525.

92. Ind.—Logansport, etc., R. Co. v. Byrd, supra.

93. Ind.—Chicago, etc., R. Co. v. Browers, 61 N.E. 958, 27 Ind.App. 628.
52 C.J. p. 153 note 57.

94. Ind.—Chicago, etc., R. Co. v. Adams, 59 N.E. 1087, 26 Ind.App. 443.

95. Ind.—Chicago, etc., R. Co. v. Coulter, 48 N.E. 388, 18 Ind.App. 512

96. Ind.—Louisville, etc., R. Co. v. Thompson, 62 Ind. 87.

97. Ind.—Chicago, etc., R. Co. v. Coulter, 48 N.E. 388, 18 Ind.App. 512

98. U.S.—Gulf, etc., R. Co. v. Ellis, Tex., 17 S.Ct. 255, 165 U.S. 150, 41 L.Ed. 666.
52 C.J. p. 132 note 30.

99. Idaho.—Hindman v. Oregon Short Line R. Co., 178 P. 837, 32 Idaho 133.
52 C.J. p. 132 note 34.

1. Mont.—Dewell v. Northern Pac. R. Co., 170 P. 753, 54 Mont. 350.
52 C.J. p. 132 note 35.

fees may be had if the action is based on that ground,[2] but not where the action is based on common-law negligence,[3] although a plaintiff who bases his action entirely on defendant's failure to fence may not be deprived of his right to the fee merely because there is in the case some evidence of defendant's negligence in operation of the train.[4] In the absence of evidence of noncompliance by defendant with a fencing statute,[5] or where the evidence shows that the road is fenced,[6] it has been held that attorney's fees may not be recovered. It has also been held that such fees may not be included in a general verdict based on a declaration containing several counts, only a part of which charge a failure to fence,[7] and that where an action is brought to recover for the killing of several animals, only a part of which were killed because of a failure to fence, a verdict including attorney's fees, applying to all the animals killed, may not be sustained.[8]

b. Where Liability Based on Failure to Pay after Demand

Statutes allowing attorney's fees to be recovered from a railroad company refusing to pay for killing stock within a specified time after demand have been held constitutional.

While statutes allowing attorney's fees to be recovered from a railroad company refusing to pay for killing stock within a specified time after demand have been held constitutional,[9] such statutes may not be constitutionally applied where plaintiff's claim is in excess of the actual value of the injured animal as later determined by the jury[10] unless it appears that the necessity for the action was produced by the denial of liability by the railroad company and was not occasioned by an honest difference in the valuation of the animal.[11]

Where a fencing statute further provides that defendant's liability for attorney's fees and costs shall depend on plaintiff having made a demand or claim on the railroad company and the failure on the part of the company to pay within a certain time after presentation, plaintiff may be entitled to attorney's fees on proof of demand and defendant's failure to pay.[12] Also, where recovery of attorney's fees is provided for in the stock laws, in actions to recover for animals injured by the operation of a railroad brought after demand made on the railroad company, plaintiff whose demand was in excess of the amount recovered does not thereby forfeit his right to attorney's fees,[13] especially where defendant's refusal to comply with the demand was based on the ground of nonliability and not on the ground that the demand was excessive.[14]

c. Recovery and Proceedings Therefor

Attorney's fees may, in a proper case, be recovered in the action for damages without bringing a separate action therefor.

Attorney's fees may, in a proper case, be recovered in the action for damages without bringing a separate action therefor,[15] and it has been held unnecessary that the verdict find the amount of damages and attorney's fees separately.[16] However, an excess of claim over the amount awarded in the verdict bars recovery of attorney's fees where the statute expressly so provides,[17] even though the verdict in form exceeds the claim, where it is shown to include attorney's fees and the amount of the award for damages is really less than the amount claimed.[18]

Amount recoverable. There must be evidence of the reasonableness of the fee awarded,[19] and the amount should be determined by the jury instead of by the court unless a jury is waived.[20] Where the statute allowing attorney's fees is by its terms applicable only to claims under a stated amount,

2. Kan.—Schulman v Atchison, T. & S F. Ry. Co, 86 P 2d 590, 149 Kan. 114.
52 C.J p 132 note 37.
3. Kan.—Martin v. Atchison, etc, R. Co, 141 P. 599, 92 Kan 595, L.R.A 1915B 134.
52 C.J. p 132 note 38.
4. Kan.—Central Branch Union Pac. R. Co v Nichols, 24 Kan 242
5. Ill.—Wabash, etc, R. Co. v Crews, 65 Ill App 442—Wabash, etc, R Co. v Lavieux, 14 Ill App 469.
6. Fla.—Florida Cent. R Co v Seymour, 33 So. 424, 44 Fla. 557.
7. Ill.—Chicago, etc, R Co v. Truitt, 68 Ill App 76
8. Ill.—Wabash, etc, R. Co. v. Neikirk, 13 Ill.App. 387.
9. U.S.—Kansas City Southern R Co v. Anderson, Ark, 34 S Ct. 599, 233 U S. 325, 58 L Ed 983
10. U S.—St Louis, etc., R. Co. v. Wynne, Ark, 32 S Ct 493, 224 U S 354, 56 L Ed. 799, 42 L R A,N S, 102.
11. Fla.—Atlantic Coast Line R Co v Perry, 67 So 639, 69 Fla 133—Pensacola, etc, R Co v. Braxton, 16 So 317, 34 Fla. 471.
12. Ark.—Kansas City Southern R. Co v Dyer, 234 S.W 50, 149 Ark 670
13. Kan.—Missouri Pac. R Co v. Abney, 1 P. 385, 30 Kan 41—Missouri Pac R. Co v. Borrer, 45 P. 133, 3 Kan App. 284.
14. Kan.—Dannenburg v Missouri Pac. R Co., 153 P. 504, 96 Kan 708.
15. Ill.—Wabash, etc, R. Co. v. Lavieux, 14 Ill App 469
16. Ill.—Brandt v Joliet, etc, Tract. Co, 213 Ill App 512
17. Ark.—Missouri Pac R., Co v Johnson, 56 S W 2d 576, 186 Ark. 887
52 C.J. p 133 note 53.
18. Tex.—Ft. Worth, etc, R Co v Lowrie, Civ App., 271 S W 263.
19. Tex.—Wichita Valley R. Co v Wood, Civ.App., 284 S W 301—St Louis Southwestern R Co v Claybon, Civ.App, 199 S W. 488
20. Mo.—Kauffman v. Kansas City, etc, R Co., 67 Mo App. 156.
52 C.J p 133 note 56.

such a fee has been held not recoverable on a claim over the amount specified by statute,[21] even though it represents the consolidated claims for several injured cattle, each one of which was for less than the statutory limit.[22] Where the case is tried a second time on appeal, plaintiff may be entitled to recover for the services of his attorney at both trials,[23] provided at the subsequent trial he succeeds in securing a judgment for damages against defendant.[24]

Double costs. Under some statutes plaintiff may recover double costs unless prior to the institution of an action defendant makes a tender of the damages sustained, provided the action is not instituted before the expiration of the statutory period allowed the railroad company for making its investigation and tender.[25]

§ 689. Damages

a. In general
b. Disposition of carcass
c. Exemplary damages
d. Double damages
e. Interest

a. In General

Ordinarily, in the absence of statute providing otherwise or of any circumstances of aggravation or mitigation, the measure of damages in an action to recover compensation from a railroad company for animals killed or lost to the owner is the actual market value of the animals at the time of the killing or loss.

Ordinarily, in the absence of statute providing otherwise or of any circumstances of aggravation or mitigation, the measure of damages in an action to recover compensation from a railroad company for animals killed or lost to the owner is the actual market value of the animals at the time of the killing or loss.[26] The owner may also be entitled to the value of the animal where it is so badly injured as to necessitate its being killed,[27] or where the wounded animals are taken over and disposed of and the proceeds appropriated by the railroad company,[28] but not where the animal is merely wounded and is abandoned by its owner without notice to the railroad company.[29]

Where the evidence of value is in conflict, a verdict for an amount between the highest and lowest sums named may be sustained[30] even though no witness has testified to the exact amount found.[31] Where no market quotations can be had, the damages may be fixed at the intrinsic worth of the animal to be determined by its character, qualities, uses to which it is put, value of its services, and prices offered for it.[32]

Wounded animals. With respect to wounded animals, it has been held that the measure of damages is the difference in the market value of the animal immediately before and after the injury.[33] While it has been held that the owner is not entitled to recover for the expense of curing the animal,[34] or for the care and attention of injured stock which afterward dies,[35] or for the value of time lost in replacing the lost or injured animal,[36] it has also been held that, in addition to the difference in the market value of the animal immediately before and after the injury, the owner may recover for the expense of curing the animal,[37] or, if it dies, compensation for its care during its illness,[38] provided his efforts were in good faith and there was

21. Tex.—St. Louis, etc., R. Co. v. Dawson, Civ.App., 174 S.W. 850

22. Tex.—St. Louis, etc., R. Co. v. Dawson, Civ.App., 174 S.W. 850

23. Kan.—Abbey v. Schaff, 194 P. 190, 108 Kan. 85
52 C.J. p. 133 note 60

24. Ill.—Rabbermann v. Pierce, 77 Ill.App. 405.

25. Minn.—Hooper v. Chicago, etc., R. Co., 33 N.W. 314, 37 Minn. 52
52 C.J. p. 133 note 63.

26. Ark.—St. Louis, I. M. & S. Ry. Co. v. Biggs, 6 S.W. 724, 50 Ark. 169.
52 C.J. p. 130 note 71.

One not absolute owner, under some statutory provisions, may be entitled to recover not only his special interest but the full value of the animal killed.—St. Louis, etc., R. Co. v. Norton, 73 S.W. 1095, 71 Ark. 314.—52 C.J. p. 88 note 43.

Breach of contractual duty

In action to recover for killing of animals resulting from breach of defendant's contract to erect and maintain cattle guards, the measure of damages is the value of the animals and not the cost of erecting and maintaining cattle guards.—Chicago, etc., R. Co. v. Barnes, 18 N.E. 459, 116 Ind. 126

Award held not excessive

One hundred dollars for dog killed by train.—Missouri Pac. R. Co. v. Burrow, 133 S.W.2d 13, 199 Ark. 185

27. Ind.—Indianapolis, etc., R. Co. v. Mustard, 34 Ind. 50.
Kan.—Atchison, etc., R. Co. v. Ireland, 19 Kan. 405

28. Ala.—Tombigbee Valley R. Co. v. Still, 60 So. 546, 6 Ala.App. 470
Ill.—Brandt v. Joliet, etc., Tract Co., 213 Ill.App. 512

29. Mo.—Jackson v. St. Louis, etc., R. Co., 74 Mo. 526.

30. Ga.—Western, etc., R. Co. v. Brown, 58 Ga. 534
Ind.—Madison, etc., R. Co. v. Herod, 10 Ind. 2

31. Ga.—Western, etc., R. Co. v. Brown, 58 Ga. 534

32. Tex.—Galveston, etc., R. Co. v. Davis, 1 Tex.A.Civ.Cas. § 147

33. Ark.—St. Louis, etc., R. Co. v. Biggs, 6 S.W. 724, 50 Ark. 169
52 C.J. p. 130 note 79

34. Ky.—Louisville, etc., R. Co. v. Schweitzer, 11 Ky.L. 310.

35. Ky.—Cully v. Louisville, etc., R. Co., 41 S.W. 21, 101 Ky. 319, 19 Ky.L. 490.

36. Ky.—Louisville, etc., R. Co. v. Schweitzer, 11 Ky.L. 310

37. Mo.—Smith v. Chicago, etc., R. Co., 105 S.W. 10, 127 Mo.App. 160.
52 C.J. p. 130 note 83.

38. Tex.—St. Louis Southwestern R. Co. v. Chambliss, Civ.App., 54 S.W. 401.

reasonable ground to believe that the animal could be cured or restored to usefulness.[39]

In some jurisdictions the rule of market value immediately before and after the injury has been disapproved,[40] and it has been held that plaintiff should recover the diminution in market value after the animal was cured or restored to usefulness as far as a cure was effected,[41] and in addition thereto the amount reasonably expended in caring for the animal and attempting to cure the injury,[42] as well as the value of the use of the animal during such period as the owner was deprived thereof,[43] provided the whole damages do not exceed the original value of the animal.[44] It has further been held that, although the owner's efforts are unsuccessful and the animal dies, he may still recover, in addition to the value of the animal, the amount expended in caring therefor,[45] and compensation for the loss of its services during its illness.[46]

Circumstances affecting value In determining the value of an animal, the jury may consider all of its qualities and all the circumstances that would affect its actual or market value,[47] without limiting the inquiry to its value for special purposes.[48] On the other hand, it has been held that the inquiry should not include matters peculiar to plaintiff growing out of the character of his business,[49] as, for example, injuries to plaintiff's dairy business from the loss of an injured cow.[50]

b. Disposition of Carcass

Under a statute declaring that a railroad wrongfully killing an animal shall be liable to the owner for its value, an owner has been held to have the right to abandon the animal and recover its full value from the company without deduction of the value of the carcass

Under a statute declaring that a railroad wrongfully killing an animal shall be liable to the owner for its value, an owner has been held to have a right to abandon the animal and recover its full value from the company without deduction of the value of the carcass.[51] Where damages for the killing of stock by a railroad are determined by a statute declaring in substance that the company is liable "for all damages," as distinguished from "the value of the stock if killed," the measure of damages for animals killed is not necessarily the value of the animal when alive, but the difference in value between the living animal and the carcass;[52] and although plaintiff may abandon the carcass where, from its location or condition when found, it would be impracticable to dispose of it, and recover the full value,[53] yet, if he converts it to his own use or otherwise disposes of it,[54] or if he might realize appreciable value for it by the exercise of reasonable diligence,[55] the net amount of such value should be deducted; but only the net value should be deducted, and plaintiff is entitled to reasonable compensation for his time and expenses.[56] Plaintiff must also be allowed a reasonable time to dispose of the carcass.[57]

c. Exemplary Damages

While it has been held that exemplary damages may be awarded where the injury is due to gross negligence or wanton or willful misconduct on the part of the employees of the railroad company, irrespective of the company's authorization or ratification, it has also been held that such damages may not be allowed in the absence of evidence that the company authorized or approved the act complained of.

While it has been held that exemplary damages may be awarded where the injury is due to gross negligence or wanton or willful misconduct on the part of the employees of the railroad company, irrespective of the company's authorization or ratification,[58] it has also been held that such damages may not be allowed in the absence of evidence that

39. Tex.—St. Louis Southwestern R Co v. Chambliss, supra.

40. Minn.—Keyes v Minneapolis, etc., R. Co, 30 N.W. 888, 36 Minn 290.
52 C.J. p 130 note 86

41. Minn.—Keyes v. Minneapolis, etc, R. Co, 30 N.W. 888, 36 Minn 290.
52 C J p 130 note 87.

42. Minn.—Keyes v. Minneapolis, etc, R. Co, supra.
52 C.J p 131 note 88.

43. Minn.—Keyes v. Minneapolis, etc, R Co., supra
52 C.J. p 131 note 89.

44. Mass.—Gillett v. Western R. Corp, 8 Allen 560.
Minn.—Keyes v Minneapolis, etc., R Co., 30 N.W. 888, 36 Minn. 290.

45. Iowa.—Finch v. Iowa Cent. R Co, 42 Iowa 304.
La.—Jones v Texas, etc, R. Co, 51 So 582, 125 La 542, 136 Am S.R 339.

46. La.—Jones v. Texas, etc, R Co, supra.

47. Iowa.—Boyer v. Chicago, etc., R. Co, 98 N W. 764, 123 Iowa 248
52 C.J p 131 note 93

48. Kan.—Central Branch Union Pac. R. Co. v. Nichols, 24 Kan 242
52 C.J p 131 note 94.

49. Mont.—Parrin v. Montana Cent R Co, 56 P. 315, 22 Mont. 290.

50. Mont.—Parrin v Montana Cent. R Co, supra

51. Ind.—Ohio, etc, R. Co. v Hays, 35 Ind 173—Indianapolis, etc, R Co. v. Mustard, 34 Ind. 50.

52. Ala.—Georgia Pac R Co. v. Fullerton, 79 Ala. 298.
52 C.J p 134 note 76

53. Ill.—Rockford, etc, R Co v Lynch, 67 Ill. 149—Toledo, etc, R Co. v. Sweeney, 41 Ill 226.

54. Mo.—Case v St. Louis, etc, R Co, 75 Mo. 668.

55. Ala.—Georgia Pac R Co. v. Fullerton, 79 Ala 298.
52 C J p 134 note 79.

56. Ala.—Georgia Pac R. Co. v. Fullerton, supra
Wis.—Dean v. Chicago, etc, R. Co, 43 Wis. 305

57. Ill.—Toledo, etc, R Co. v Parker, 49 Ill. 385.

58. Miss.—Vicksburg, etc, R Co v. Patton, 31 Miss. 156, 66 Am D. 552.

the railroad company authorized or approved the act complained of[59] If wantonness or willfulness is not shown, but only ordinary negligence[60] or a failure of the railroad to fence its tracks[61] is indicated, compensatory damages only may be allowed

d. Double Damages

Where valid statutes so provide, the plaintiff may recover double damages for injuries to animals occasioned by a failure of a railroad company to fence its tracks, or where the claim is not paid within a certain time after presentation, or where the company fails to post notices of the injury as required by law

Where valid statutes so provide, plaintiff may recover double damages for injuries to animals occasioned by a failure of the railroad company to fence its tracks,[62] or where the claim is not paid within a certain time after presentation,[63] or where the company fails to post notices of the injury as required by law.[64] While there is some authority holding that statutes allowing double damages for failure of the railroad company to give notice to the owner,[65] and for failure to pay a claim within a certain time of the presentation,[66] are unconstitutional, the constitutionality of statutes allowing double damages for injuries to animals where the company has breached a statutory duty, such as a duty to fence,[67] or where the owner's claim against the railroad company is not paid within a certain time after presentation,[68] have been upheld, although it has also been held that such a statute may not be constitutionally applied where plaintiff's claim is in excess of the actual value of the injured animal as later determined by the jury[69]

A statute authorizing the recovery of double damages, under certain circumstances, for injuries to animals by a railroad should be strictly construed,[70] and in order to procure its benefits plaintiff must comply strictly with its terms[71] Such statutes are highly penal in character,[72] and where a statute allows double damages for failure to fence it is so far penal that it may not be construed as applicable to cases not clearly within its scope and intent,[73] as, for example, to injuries due to causes other than defendant's failure to fence,[74] or to causes other than an actual collision with a train,[75] or to causes not proved by sufficient evidence to be within its scope or intent.[76] Also such a statute may be inapplicable where the animal is killed at a point where the railroad company is not required to fence,[77] or where the owner does not recover the entire amount sued for.[78] However, the inapplicability of double damage provisions will not affect plaintiff's right to recover compensatory damages where such right exists.[79]

59. Tex—Galveston, etc, R Co v Davis, 1 Tex A Civ Cas. § 147.

60. Ala—Nashville, etc, R Co v Garth, 46 So 583, 155 Ala 311.
52 C.J p 134 note 85

61. Ariz—Musgrave v Southern Pac Co, 68 P 2d 202, 49 Ariz 512
52 C J p 134 note 86

62. Mo.—Raindge v Wabash R. Co, App, 206 S W 395
52 C J. p 131 note 99

63. Iowa—Boyer v. Chicago, etc, R Co., 98 N W. 764, 123 Iowa 248
52 C.J. p 131 note 1

64. Ark.—St Louis, etc, R Co v. Wright, 21 S W 476, 57 Ark 327—Memphis, etc, R. Co. v. Carlley, 39 Ark 246

65. Wyo—Schenck v Union Pac R Co, 40 P. 840, 5 Wyo 430
52 C.J p 131 note 7

66. Neb—Atchison, etc, R Co v Baty, 6 Neb 37, 29 Am R 356.
Wash—Jolliffe v Brown, 44 P 149, 14 Wash 155, 53 Am S.R 868

In Florida

(1) Statutes authorizing recovery of double damages for animals killed or injured on unfenced railroad right of way, without proof of negligence, where company fails to pay claim therefor in stated time after presentation have been held invalid, as being improper exercise of police power, in view of changed conditions since their enactment, under which competitive motor carriers are not subjected to similar liability even though creating greater hazards—Atlantic Coast Line R Co v Ivey, 5 So 2d 244, 148 Fla 680, 139 A L R 973

(2) Under earlier decision it was held that such statute was not invalid in its application where the verdict was rendered for the amount agreed to have been demanded and to be the value of the animals killed—Seaboard Air Line R. Co v Robinson, 67 So 139, 68 Fla 407

67. U S—Minneapolis, etc, R. Co v. Beckwith, Iowa, 9 S Ct 207, 129 U. S 26, 32 L Ed 585
52 C J p 131 note 3

68. U S—Kansas City Southern R. Co v Anderson, Ark, 34 S Ct 599, 233 U S 325, 58 L Ed 983.
52 C J p 131 note 4.

69. U S—St Louis, etc, R Co. v Wynne, Ark, 32 S Ct. 493, 224 U.S 354, 56 L Ed 799, 49 L R A.,N S., 102
Iowa—Pierce v. Chicago, etc, R. Co., 164 N.W 182, 180 Iowa 1385

70. Ark—St. Louis-San Francisco Ry. Co v Cartwright, 162 S W 2d 896, 204 Ark XVIII.

Statute construed

A statute requiring overseers or track menders to file with station agents a list of the different marks and brands of stock killed on their respective sections within the preceding week, and giving the owners of such stock double damages in case of noncompliance with such requirement, refers only to such marks as are placed upon stock by artificial means for purposes of identification—Churchill v Georgia R, etc., Co, 33 S E 972, 108 Ga 265

71. Ark—St Louis-San Francisco Ry. Co v. Cartwright, 162 S W 2d 896, 204 Ark XVIII.

72. Ark—St Louis-San Francisco Ry. Co v Cartwright, supra.

73. Mo—Scott v Atchison, T & S. F. Ry. Co, App, 32 S.W 2d 139

74. Iowa—Moriarty v. Central Iowa R Co, 21 N W 143, 64 Iowa 696
52 C J. p 131 note 10.

75. Mo—Scott v. Atchison, T & S. F Ry. Co, App., 32 S W 2d 139—Scott v Missouri-Kansas-Texas R. Co, 22 S W.2d 654, 224 Mo App 1.
52 C J. p 131 note 11

76. Mo—Hires v St Louis, etc, R. Co., 137 S W 60, 157 Mo App. 46.
52 C J. p 131 note 12.

77. Fla—Atlantic Coast Line R Co v Manning, 152 So 735, 114 Fla. 8.

78. Ark—Missouri Pac R. Co v. Johnson, 56 S W 2d 576, 186 Ark. 887.

79. Mo—Scott v. Missouri-Kansas-

Under a statute allowing double damages where the claim is not paid within a certain time after presentation, the liability of defendant for double damages will not be affected by failure of the claim to state the county in which the accident happened,[80] or by a tender of damages by defendant unless the full value as subsequently found by the jury is tendered.[81] Likewise, under a statute authorizing the recovery of double damages, if notice of the injury is not posted by the company, defendant's liability for failure to post is not affected by the fact that the owner had actual knowledge of the injury,[82] although double damages may not be recovered, under such a statute, if defendant proves a posting of notice at the nearest station house.[83] The burden is on plaintiff to prove defendant's failure to post,[84] but he establishes a prima facie case of such failure by showing that, on several examinations of defendant's station, no notice was found either at the usual place of posting or in front of the building,[85] although it is not enough to show a single examination made a considerable time before the expiration of the time allowed for posting.[86]

Where double damages are recoverable under the statute, either the court or the jury may double the actual damages found to have been sustained,[87] and the owner may recover not only double the depreciation in value of his animal because of the injury, but also double damages for the care, attention, medicine, and other expenses directly resulting therefrom where damages for such expenses are recoverable,[88] but it has been held that he is not entitled to recover double damages for loss of, or injury to, a buggy,[89] or for loss of a harness, even though lost or injured by the act of killing the animal wearing it at the time.[90] It has further been held that plaintiff may not recover more than the amount of damages as stated in his notice of the injury.[91]

e. Interest

In some jurisdictions interest may be recovered on the amount of damages from the date of injury; in others, from the commencement of the action, although this right has been held restricted to cases of willful injury. It has also been held that no interest prior to the rendition of judgment may be allowed

In some jurisdictions interest may be recovered on the amount of damages from the date of the injury,[92] in others, from the commencement of the action,[93] although this right has been held restricted to cases of willful injury.[94] It has also been held that no interest prior to the rendition of judgment may be allowed.[95] Under some statutory provisions, interest at the special rate designated by the statute and computed from the date of the demand may be recovered,[96] and by virtue of some statutory provisions the allowance of interest is discretionary with the jury.[97]

XVI. ACCIDENTS TO TRAINS

§ 690. Management of Trains in General

It is the duty of a railroad company to exercise proper care in the management of its trains to prevent collisions or accidents which might result in injury, the degree of care required varying according to the relations between the parties

The duty of a railroad company to exercise proper care in the management of its trains to prevent collisions or accidents to trains which might result in injury, and its liability for such injuries, exist at common law independently of, and concurrently with, its duties under statutes[98] or rules.[99]

The duty of a railroad to prevent collisions or accidents to trains which might result in injury to its passengers, and its liability for such injuries, are

Texas R. Co., 22 S.W.2d 654, 224 Mo.App. 1

80. Iowa.—Latta v. Illinois Cent. R. Co., 130 N.W. 1059, 151 Iowa 244.

81. Iowa.—Brandt v. Chicago, etc., R. Co., 26 Iowa 114.

82. Ark.—Louisiana & A. Ry. Co. v. Ambrose, 47 S.W.2d 1, 185 Ark. 1189
52 C.J. p. 132 note 18

83. Ark.—St. Louis, etc., R. Co. v. Wright, 21 S.W. 476, 57 Ark. 327.

84. Ark.—Kansas, etc., R. Co. v. Summers, 45 Ark. 295

85. Ark.—St. Louis, etc., R. Co. v. Wright, 21 S.W. 476, 57 Ark. 327

86. Ark.—St. Louis, etc., R. Co. v. Markham, 50 S.W. 516, 66 Ark. 297.

87. Mo.—Wood v. St. Louis, etc., R. Co., 58 Mo. 109.
52 C.J. p. 132 note 24.

88. Iowa.—Manwell v. Burlington, etc., R. Co., 45 N.W. 568, 80 Iowa 662

89. Mo.—Whiteman v. Atchison, etc., R. Co., 146 S.W. 97, 163 Mo.App. 228.

90. Mo.—Huss v. Wabash, etc., R. Co., 84 Mo.App. 111.

91. Iowa.—Manwell v. Burlington, etc., R. Co., 45 N.W. 568, 80 Iowa 662

92. Ark.—St. Louis, etc., R. Co. v. Biggs, 6 S.W. 724, 50 Ark. 169.
52 C.J. p. 133 note 65

93. Utah.—Woodland v. Union Pac. R. Co., 26 P. 298, 27 Utah 543
52 C.J. p. 133 note 66

94. Ind.—Chicago, etc., R. Co. v. Leiter, 109 N.E. 213, 59 Ind.App. 212

95. Tex.—Texas & N. O. R. Co. v. Davis, Civ.App., 54 S.W.2d 583.
52 C.J. p. 133 note 68.

96. Fla.—Pensacola, etc., R. Co. v. Braxton, 16 So. 317, 34 Fla. 471

97. Ga.—Western, etc., R. Co. v. Calhoun, 30 S.E. 868, 104 Ga. 384

98. N.Y.—Grippen v. New York Cent. R. Co., 40 N.Y. 34.
52 C.J. p. 154 note 91

99. Minn.—Smithson v. Chicago, etc., R. Co., 73 N.W. 853, 71 Minn. 216.
52 C.J. p. 154 note 92.

treated in Carriers §§ 746–748; and the corresponding duty and liability of a railroad as to its employees are discussed in Master and Servant §§ 171–554. Such duty and liability, with respect to the passengers, employees, and trains of another company using the same tracks, are considered infra § 692, and with respect to the passengers, employees, and trains of another company using intersecting tracks, infra § 693

The standard and degree of care required of a railroad in the management of its trains so as to prevent collisions or accidents vary according to the relations between the parties,[1] and are proportioned to the capacity of the railroad for inflicting injury[2] and to the danger existing under the particular situation.[3] As to persons on trains of other companies to whom defendant owes a duty of care, such as passengers[4] or employees[5] of another railroad, the rule requiring the exercise of ordinary care generally applies; and the rule applies also as to employees of other companies running their own cars on defendant's tracks by arrangement with defendant[6] So also the rule applies as to the property of another railroad[7] To trespassers on its own trains a railroad company owes no duty beyond that of not willfully injuring them,[8] but to invitees on its own trains it owes a duty of ordinary care,[9] as it does also to a stranger riding in the engine of the other railroad with permission of the engineer, but contrary to the rules of the other railroad.[10] In the extraordinary case of a train of one company being wrongfully upon the track of another, the latter owes the former no higher degree of care than to any other trespasser under the same circumstances,[11] while the former's act of trespass amounting to wanton or reckless conduct under the circumstances subjects it to the assessment of punitive damages for injuries resulting therefrom[12]

Duty to warn of obvious danger. A railroad has no duty to warn persons of a danger in connection with its management of trains where such danger is apparent and obvious and a warning would serve no useful purpose[13]

§ 691. Rate of Speed

Except where prescribed by statute, no particular rate of speed in running a train is negligence per se

In the absence of any statute or ordinance on the subject, no particular rate of speed in running a train is negligence per se,[14] although the rate of speed may be considered in connection with other circumstances in determining the issue of negligence[15] When the rate of speed is expressly limited by statute or ordinance, as discussed supra § 431, the operation of trains at a speed exceeding the rate prescribed is negligence per se,[16] and renders the company liable for injuries due to such excessive rate of speed,[17] independently of notice or actual knowledge of such statute or ordinance on the part of the railroad.[18] Such regulations are not intended merely for the protection of the gener-

1. U S —Louisville & N. R Co v East Tennessee, V. & G R Co, Tenn, 60 F 993, 9 C C A 314
52 C J. p 155 note 95

2. N Y —Grippen v. New York Cent R Co, 40 N Y 34.
52 C J p 154 note 93.

3. Miss —New Orleans & N. E. R. Co v Watson, 128 So 105, 157 Miss. 243
52 C J. p 155 note 94

4. N Y —Reid v Long Island R Co, 128 N Y S. 1074, 144 App Div 267.
52 C J p 155 note 98

5. Mo —Pasternak v. Chicago, etc, R Co, 157 S.W. 109, 170 Mo App. 663
52 C.J p 155 note 99.

6. La —Strickland v Louisiana R., etc, Co, 63 So 888, 134 La 238
52 C J p 155 note 1

7. U.S.—Louisville & N R Co. v East Tennessee, V & G R. Co, Tenn, 60 F 993, 9 C C.A. 314
52 C J p 155 note 2

8. N.H —Garland v Boston, etc, R Co, 86 A. 141, 76 N H 556, 46 L.R A,N.S, 338, Ann Cas 1913E 924.

9. Or —Varley v Consolidated Timber Co, 139 P 2d 584, 172 Or 157.

10. N Y —Grimshaw v. Lake Shore, etc, R Co, 98 N E. 762, 205 N Y 371, 40 L R A,N.S., 563, Ann Cas 1913E 571

11. Mo —Chicago, etc, R. Co v. Kansas City, etc., R. Co., 78 Mo. App 245

12. Ky —Chesapeake, etc., R. Co. v. John, 159 S W 822, 155 Ky. 264, 50 L R A,N S, 853

13. Minn —Wiseman v. Northern Pac Ry Co, 7 N W 2d 672, 214 Minn. 101.

Danger of explosion in fire

Railroad had no duty to warn spectator who proceeded to scene of fire caused by wreck when noise of wreck awakened her, and was observing fire, of danger that tank car which was engulfed in flames was full of gasoline which might explode, and was not liable for injuries to spectator in fall caused by stampede which followed explosion of gasoline, since danger was apparent and warning would have served no useful purpose —Wiseman v. Northern Pac Ry Co, supra

14. Ind —Southern Indiana R Co v. Messick, 74 N E 1097, 35 Ind App. 676
52 C J. p 155 note 9.

Rate of speed with respect to:
- Animals on or near railroad see supra § 601
- Crossings generally see infra §§ 744–749
- Passengers of railroad see Carriers § 749.
- Persons on railroad premises see infra § 911

15. Ind —Southern Indiana R. Co v Messick, 74 N E 1097, 35 Ind App 676
52 C J p 155 note 10

16. Ill —Chicago, etc., R Co v Mochell, 61 N E 1028, 193 Ill. 208, 86 Am S.R 318
52 C.J. p 155 note 12.

17. Ill —Chicago, etc., R Co. v. Mochell, supra.
Tex —Gulf, etc, R Co. v. Pendery, 36 S W 793, 14 Tex Civ.App 60.

18. Ga —Central R, etc., Co v Brunswick, etc, R Co, 13 S.E. 520, 87 Ga 386.

al public in crossing railroad tracks, but apply to cases of collision between trains resulting in personal injuries to employees thereon[19] or damage to the train.[20]

§ 692. Collision on Same Track

A railroad must exercise due care to avoid collisions between its own trains on the same track, and, where two railroads use the same track, each must exercise due care to avoid injury to the trains and property of the other or to persons rightfully thereon.

A railroad company is conclusively presumed to know the whereabouts of all of its own trains,[21] and must exercise due care to avoid collisions between its trains on the same track.[22] Thus its servants must exercise due care in the observance of schedule time and all rules and orders designed for this purpose,[23] and in the choice of a course of conduct in case of emergency.[24] So an employee upon one train may in the absence of contributory negligence recover for injuries caused by a collision due to the negligence of those in charge of another of defendant's trains,[25] or due to the negligence of its train dispatcher in sending out trains upon the same section of track without proper orders to prevent collisions,[26] and a person riding upon an engine by invitation of the engineer who had authority to issue such invitation may recover for injuries resulting from a collision due to the negligence of the engineer of the other train.[27] However, statutes controlling the management of trains at junctions or crossings of tracks belonging to two different companies do not apply to junctions or unions of tracks belonging to the same railroad,[28] and hence a failure to stop before reaching a junction, which would have imposed liability on the company if the junction had been with another company's tracks, will not have that effect, independently of common-law negligence, where the junction is between tracks of a single company.[29]

Trains of different companies. Where two railroad companies by agreement or otherwise are rightfully entitled to the use of the same track, each company is under the duty of exercising due care to avoid injury to the trains and property of the other or to persons rightfully on such trains.[30] So, in case of collision or accident to trains where there is a joint use of the same track, the employees of one company may, in the absence of contributory negligence, recover against the other company for injuries due to negligence on the part of that company's servants in the operation of its trains,[31] or in violating rules and orders,[32] as in failing to send out flagmen or otherwise to warn other trains where a train is delayed,[33] or stopped at an unusual place,[34] or run backward,[35] or due to negligence on the part of its switchmen in the operation of switches controlling the use of such tracks,[36] or to negligence on the part of the company in failing to issue proper orders to its trainmen for the prevention of collisions with other trains,[37] or in failing to notify others entitled to use its track of a change in schedules or orders.[38] The company guilty of such negligence will also be liable for injury to the trains of the other railroad company[39] or to passengers thereon;[40] and it will be liable to the other company for liabilities incurred by it to third persons growing out of the collision.[41]

Where both companies were negligent, a person

19. Ind.—Pittsburgh, etc., R. Co. v. Martin, 61 N.E. 229, 157 Ind. 216

20. Ga.—Central R., etc., Co. v. Brunswick, etc., R. Co., 13 S.E. 520, 87 Ga. 386.

21. Ind.—Louisville, etc., R. Co. v. Heck, 50 N.E. 988, 151 Ind. 292.

22. U.S.—Great Northern R. Co. v. Hooker, N.D., 170 F. 154, 95 C.C.A. 410

23. U.S.—Great Northern R. Co. v. Hooker, supra.
52 C.J. p. 155 note 20

24. Ky.—Chesapeake, etc., R. Co. v. McMichael, 15 S.W. 878, 13 Ky.L. 758
52 C.J. p. 155 note 21

25. Neb.—Fitzpatrick v. Hines, 179 N.W. 410, 105 Neb. 134.
52 C.J. p. 156 note 23

26. Ind.—Louisville, etc., R. Co. v. Heck, 50 N.E. 988, 151 Ind. 292.
52 C.J. p. 156 note 24

27. U.S.—Whitehouse v. Grand Trunk R. Co., C.C.Me., 29 F.Cas.No. 17,565, 2 Hask. 189.

28. U.S.—Chicago Great Western R. Co. v. Minneapolis, St. P. & S. S. M. R. Co., Minn., 176 F. 237, 100 C.C.A. 41, 20 Ann.Cas. 1200

29. U.S.—Chicago Great Western R. Co. v. Minneapolis, St. P. & S. S. M. R. Co., supra

30. N.C.—Aberdeen, etc., R. Co. v. Seaboard Air Line R. Co., 72 S.E. 1047, 157 N.C. 369.
52 C.J. p. 156 note 26.

31. La.—Strickland v. Louisiana R., etc., Co., 63 So. 888, 134 La. 238
52 C.J. p. 156 note 28.

32. Wis.—Phillips v. Chicago, etc., R. Co., 25 N.W. 544, 64 Wis. 475.
52 C.J. p. 156 note 29

33. Minn.—Smithson v. Chicago, etc., R. Co., 73 N.W. 853, 71 Minn. 216.
Wis.—Phillips v. Chicago, etc., R. Co., 25 N.W. 544, 64 Wis. 475

34. Ala.—Georgia Cent. R. Co. v. Martin, 36 So. 426, 138 Ala. 531.

Minn.—Smithson v. Chicago, etc., R. Co., 73 N.W. 853, 71 Minn. 216

35. Wis.—Phillips v. Chicago, etc., R. Co., 25 N.W. 544, 64 Wis. 475.

36. Vt.—In re Merrill, 54 Vt. 200
52 C.J. p. 156 note 33.

37. U.S.—Union R. Co. v. Tate, Pa., 151 F. 550, 81 C.C.A. 66
52 C.J. p. 156 note 34.

38. Ga.—Massee, etc., Lumber Co. v. Georgia, etc., R., 77 S.E. 366, 12 Ga.App. 436.

39. Vt.—In re Merrill, 54 Vt. 200.

40. U.S.—Eddy v. Letcher, Mo., 57 F. 115, 6 C.C.A. 276, appeal dismissed 15 S.Ct. 266, 156 U.S. 47, 39 L.Ed. 341.
La.—Rabalais v. Orleans-Kenner Tract. Co., 128 So. 341, 10 La.App. 790

41. U.S.—Central Trust Co. of New York v. Colorado Midland R. Co., C.C.Colo., 89 F. 560, affirmed 97 F. 239, 38 C.C.A. 143.

injured by the collision may sue either, and the company sued cannot urge as a defense that the negligence of the other company exceeded its own,[42] or the action may be maintained against both notwithstanding there was no breach of any joint duty.[43]

§ 693. Collision Where Roads Cross

a. In general
b. Right of way
c. Duty to stop before crossing
d. Lights, signals, and other warnings

a. In General

Those in control of trains approaching or passing an intersection with another railroad or street railroad must exercise due care commensurate with the danger of the situation, and must comply with statutes relating thereto. Where both companies are negligent a person injured, including a passenger of one of the lines, can recover against either or both.

It is the duty of those in control of trains moving upon intersecting lines of railway when approaching or passing the place of intersection to exercise due care commensurate with the danger of the situation to prevent collisions.[44] Due care must also be used to avoid collisions with streetcars at the intersection of a street railroad,[45] especially where the conditions are such as to obstruct a view of the crossing.[46] However, those in control of trains have the right to assume that the operator of a streetcar will exercise due care.[47]

In the performance of this duty, those in charge of the train must keep a proper lookout for trains upon the intersecting track,[48] especially if the train is being backed across the intersection,[49] and must have their train under proper control so that if the necessity arises it can be promptly stopped,[50] and, as appears infra subdivision c of this section, the train must, before reaching the crossing, be brought to a full stop if a statute so requires. The generally accepted rule that violation of a duty imposed by statute or ordinance constitutes negligence per se has been applied with respect to statutes covering the operation of railroad trains where tracks of different railroads cross each other.[51]

Liability of companies. In case of collision between trains of different companies, if only one company was negligent there can be no recovery against the other,[52] but if both were negligent they are both liable,[53] and persons injured thereby may recover against either the full amount of the damages sustained regardless of the negligence of the other.[54] A passenger of one railroad may recover against another railroad whose negligence contributes to cause a collision by which he was injured,[55] even though the company carrying him was also negligent;[56] and a passenger on a streetcar may recover against a railroad whose negligence contributed to produce the injury,[57] even though those in charge of the streetcar were also negligent[58] or were acting in violation of a contract between the companies as to the precautions to be taken by the employees of the streetcar company in the use of the crossing.[59] In an action by a passenger against both companies for injuries due to a negligent collision at a crossing, it is no defense for one of defendants to show merely that the negligence of the other exceeded its own.[60]

Where an intersection is near a station on one of the roads, the other road will be held to a knowledge of the publicly scheduled stops at the station,

42. Ill.—Union R., etc., Co. v. Schacklet, 10 N.E. 896, 119 Ill. 232
43. Ark.—St. Louis, etc., R. Co. v. Kendall, 169 S.W. 822, 114 Ark. 224, L.R.A.1915F 9.
44. Mo.—Richmond v. Missouri Pac. R. Co., 113 S.W. 708, 133 Mo. App. 463
52 C.J. p. 156 note 45
45. Ky.—Louisville, etc., R. Co. v. Galloway, 294 S.W. 135, 219 Ky. 595
52 C.J. p. 156 note 46.
46. Ill.—Wabash R. Co. v. Barrett, 117 Ill. App. 315
52 C.J. p. 156 note 47.
47. Cal.—McNeil v. East Bay St. Rys., 32 P.2d 598, 220 Cal. 591.
Attempt to cross in front of train
Railroad fireman exercising due care had right to assume that streetcar motorman would not attempt to cross track ahead of oncoming train.
—McNeil v. East Bay St. Rys., supra
48. Iowa.—Grace v. Minneapolis, etc., R. Co., 133 N.W. 672, 153 Iowa 418
52 C.J. p. 157 note 49
49. Ala.—Kansas City, etc., R. Co. v. Lackey, 21 So. 444, 114 Ala. 152
52 C.J. p. 157 note 50.
50. U.S.—Kansas City, Ft. S. & M. R. Co. v. Stoner, Ark., 51 F. 649, 2 C.C.A. 437, motion denied 60 F. 522, 9 C.C.A. 129.
51. Mo.—Berry v. Kansas City Public Service Co., 108 S.W.2d 98, 341 Mo. 658
45 C.J. p. 722 note 90.
52. Ky.—Chesapeake, etc., R. Co. v. McMichael, 15 S.W. 878, 13 Ky.L. 758.
Pa.—Bunting v. Pennsylvania R. Co., 12 A. 448, 118 Pa. 204.
53. Ind.—Cincinnati, etc., R. Co. v. Acrea, 81 N.E. 213, 82 N.E. 1009, 40 Ind. App. 150
52 C.J. p. 157 note 54
54. U.S.—Kansas City, Ft. S. & M. R. Co. v. Stoner, Ark., 51 F. 649, 2 C.C.A. 437, motion denied 60 F. 522, 9 C.C.A. 129.
55. Pa.—Bunting v. Hogsett, 21 A. 31, 33, 34, 139 Pa. 363, 23 Am.S.R. 192, 12 L.R.A. 268.
52 C.J. p. 157 note 56.
56. Pa.—Bunting v. Hogsett, supra
52 C.J. p. 157 note 56.
57. Ark.—Little Rock, etc., R. Co. v. Harrell, 25 S.W. 117, 58 Ark. 454
52 C.J. p. 157 note 58.
58. Ark.—Little Rock, etc., R. Co. v. Harrell, supra.
52 C.J. p. 157 note 58.
59. U.S.—Baltimore & O. R. Co. v. Friel, Pa., 77 F. 126, 23 C.C.A. 77.
60. Kan.—Chicago, etc., R. Co. v. Ransom, 44 P. 6, 56 Kan. 559
Ohio.—Pittsburgh, etc., R. Co. v. Pritz, 1 Ohio A. 119, 17 Ohio Cir. Ct. N.S. 96, 34 Ohio Cir. Ct. 411.

and to a duty to govern the movement of its own trains accordingly.[61]

Cars obstructing crossings. A railroad company negligently leaving cars standing so as to obstruct a railroad crossing will, in case of a collision therewith and in the absence of contributory negligence, be liable for injuries to the employees upon the train of the intersecting road,[62] and also for the damage done to the train of that company.[63] If its action in placing cars on the crossing is not a legitimate use of the tracks at that point, the fact that it had no notice of the train which collided with the cars will not affect its liability.[64]

b. Right of Way

It is negligence to attempt to drive a train past a crossing over which another train has the right of way. Subject to various exceptions, the train which first stops at the crossing has precedence; but an engineer cannot rely absolutely on his right of way.

It is negligence to attempt to drive a train past a railroad crossing over which another company has the right of way when a train of that company is approaching,[65] the rule applying also to crossings in railroad yards where switch engines are operating.[66]

Who has right of way generally. While a railroad has the right of way where its tracks intersect those of a street railway,[67] the rule as between two roads, neither of which is a street railway, is, in the absence of a statute or agreement providing otherwise, that each railroad has an equal right to the use of the crossing,[68] and the train which first reaches the stopping place and stops has the right of precedence.[69] The fact that a train on one road is scheduled to pass at a particular time does not affect the equal right of both to the use of the crossing,[70] although it may have a bearing on the question whether or not it was negligent for the other road to exercise its right under particular circumstances,[71] each railroad being held to a knowledge of the other's published train schedules.[72]

Right of way under statute or agreement. The right of way may be made the subject of regulation by statute or agreement, in which case the terms of statute or agreement control, as, for example, that the train on the road first built shall have precedence,[73] that a passenger train shall have the right of way over a freight train,[74] that regular trains on time shall take precedence over trains of the same grade not on time or having no schedule time,[75] or that a train signaled to pass shall have the right of way over a train against which the signal is set.[76]

Limitation on exercise of right. An engineer of a train having the right of way cannot rely absolutely on a recognition and observance of his prior right by the engineer of the other train;[77] and it is negligence on his part to attempt to pass the crossing without keeping a lookout for trains upon the other road,[78] or, if such a train is approaching, not to ascertain whether it is going to stop.[79] However, if the other train has stopped as it was its duty to do, the engineer having the right of way may reasonably assume that it will remain at its place until he shall have passed the crossing;[80] and an engineer in moving his train over a crossing may indulge the presumption that an approaching train on the intersecting track will stop in obedience to the statutory requirements.[81] This presumption, however, will not protect the railroad from liability for want of care in proceeding when it becomes apparent, or reasonably so,

61. Mo.—Missouri Pac. R. Co. v. Chicago Great Western R. Co., 71 S.W. 1081, 98 Mo.App. 214

62. N.Y.—Albert v. Sweet, 22 N.E. 762, 116 N.Y. 363.

63. Mo.—Chicago, etc., R. Co. v. Kansas City, etc., R. Co., 78 Mo. App. 245.

64. N.Y.—Albert v. Sweet, 22 N.E. 762, 116 N.Y. 363

65. Wis.—Foulkes v. Chicago, St. P., M. & O. Ry. Co., 40 N.W.2d 507, 256 Wis. 146.
52 C.J. p. 157 note 63

66. Tex.—El Paso, etc., R. Co. v. Murtle, 108 S.W. 998, 49 Tex.Civ. App. 273

67. Ind.—Baltimore & O. S. W. R. Co. v. Cincinnati L. & A. Electric St. R. Co., 99 N.E. 1018, 52 Ind. App. 639
2 C.J. p. 157 note 65.

68. Mo.—Missouri Pac. R. Co. v. Chicago Great Western R. Co., 71 S.W. 1081, 98 Mo.App. 214

69. Wis.—Foulkes v. Chicago, St. P., M. & O. Ry. Co., 40 N.W.2d 507, 256 Wis. 146
52 C.J. p. 157 note 68.

70. Mo.—Missouri Pac. R. Co. v. Chicago Great Western R. Co., 71 S.W. 1081, 98 Mo.App. 214

71. Mo.—Missouri Pac. R. Co. v. Chicago Great Western R. Co., supra.

72. Mo.—Missouri Pac. R. Co. v. Chicago Great Western R. Co., supra.

73. Ohio.—Moulder v. Cleveland, etc., R. Co., 5 Ohio S. & C.P. 664, 1 Ohio N.P. 361.

74. Ohio.—Moulder v. Cleveland, etc., R. Co., supra.

75. Ohio.—Moulder v. Cleveland, etc., R. Co., supra.

76. Ohio.—Moulder v. Cleveland, etc., R. Co., supra.

77. Wis.—Foulkes v. Chicago, St. P., M. & O. Ry. Co., 40 N.W.2d 507, 256 Wis. 146.
52 C.J. p. 157 note 77.

78. Iowa.—Grace v. Minneapolis, etc., R. Co., 133 N.W. 672, 153 Iowa 418.
Minn.—Pratt v. Chicago, etc., R. Co., 38 N.W. 356, 38 Minn. 455

79. Kan.—Chicago, etc., R. Co. v. Ransom, 44 P. 6, 56 Kan. 559

80. U.S.—Chicago, St. P. & K. C. R. Co. v. Chambers, Minn., 68 F. 148, 15 C.C.A. 327.

81. Ala.—Young v. Woodward Iron Co., 113 So. 223, 217 Ala. 330.
Wis.—Foulkes v. Chicago, St. P., M. & O. Ry. Co., 40 N.W.2d 507, 256 Wis. 146.

that the engineer of the other train is negligent or disobedient,[82] and the engineer entitled to the right of way cannot exercise it under conditions where to do so would result inevitably in a collision, and where, by not exercising the right, it would be reasonably possible to avoid the collision,[83] as where the train not having the right of way is already on the crossing[84] or is indicating its intention to cross[85] A train which otherwise would have the right of way cannot exercise it as against a train signaled to cross, provided it knew, or by the exercise of reasonable care could have known, that the signal had been set against it.[86]

c. Duty to Stop before Crossing

In general, one in charge of a train must stop and ascertain whether a crossing with another railroad can be made in safety, and if stopping is required by statute the failure to comply is negligence per se.

Except where other means are provided to prevent collisions,[87] it is the duty of a person in charge of a train, before crossing another railroad, to stop, look, and listen for other trains and ascertain whether the crossing can be made in safety;[88] and the duty at common law continues even though a statute penalizes the failure to stop.[89] Moreover, if required by statute, the failure of a railroad to bring its trains to a full stop before crossing the tracks of another railroad is negligence per se,[90] whether or not there be any visible necessity for so doing.[91] However, while the statute applies also to crossings in railroad yards where switch engines are operated,[92] unless so required by statute[93] the train need not stop before crossing intersecting tracks of a switchyard belonging to itself[94] Moreover, except where the statute expressly requires it,[95] a statute requiring stops before crossing tracks of another railroad does not require a railroad to stop its trains before crossing tracks of a street railroad[96] Where the rules of the company require its engineers to stop before crossing another railroad, it is their duty to obey such instructions[97] even though signaled by another employee that the crossing is clear[98]

Distance from crossing. Where the statute merely requires trains to be stopped before crossing another railroad, but does not prescribe the distance from the crossing, they should be stopped at such a distance as under the circumstances common prudence would dictate as necessary to avoid a collision.[99] However, where a statute prescribes the distance within which the train must stop, such statute must be complied with,[1] although if the statute prescribes the distance and requires the stop to be made "within" that distance a stop at any point between the named limit and the track satisfies the statutory requirements;[2] but the stop must be made somewhere within the statutory limit, even though by so doing the rear end of the train overlaps the tracks of another railroad at another intersecting point.[3]

Brakes and other equipment. The use of air brakes to bring the train to a stop before crossings, independently of any statutory requirements, may be a part of a railroad's common-law duty at crossings,[4] the question whether it is or not depending on whether its use was reasonably necessary in the exercise of its duty to use ordinary care[5] A sudden unexpected failure of air brakes to work will not excuse the railroad in not stopping its train if there were other appliances which could have been used and were not.[6] If the engineer cannot stop

82. Wis.—Foulkes v. Chicago, St P, M & O. Ry. Co., supra.

83. Ill.—Chicago, etc, R Co. v Rockford, etc., R Co., 72 Ill. 34
Mo.—Missouri Pac R Co v. Chicago Great Western R Co., 71 S W 1081, 98 Mo App 214

84. Mo.—Missouri Pac R. Co v Chicago Great Western R. Co, supra

85. Minn.—Pratt v. Chicago, etc, R. Co., 38 N.W. 356, 38 Minn 455.

86. Ohio.—Moulder v. Cleveland, etc, R. Co., 5 Ohio S. & C P. 664, 1 Ohio N.P 361.

87. Ohio.—Toledo, etc, R. Co. v. Hydell, 25 Ohio Cir Ct 579.
52 C.J. p 158 note 87.

88. Ind.—Cleveland, etc, R Co v. Gray, 46 N.E. 675, 148 Ind. 266, 277
52 C J. p 158 note 88.

89. Ind.—Cleveland, etc, R. Co. v. Gray, supra

90. Ind.—Louisville, etc, R, etc, Co v Hynes, 91 N.E 962, 47 Ind App 507.
52 C J p 158 note 92

91. Tex.—San Antonio, etc, R Co v. Bowles, 32 S W 880, 88 Tex 634.

92. Tex.—El Paso, etc., R Co v Murtle, 108 S.W 998, 49 Tex.Civ. App. 273.

93. Tex.—El Paso, etc, R. Co. v. Murtle, supra.

94. Ill.—St Louis Nat Stock Yards v. Godfrey, 65 N.E. 90, 198 Ill. 288

95. Ala.—Western R. Co. v. Wallace, 54 So. 533, 170 Ala. 534.
52 C J p 159 note 6.

96. Ill.—Jeneary v. Chicago & Interurban Traction Co, 225 Ill App 122, affirmed 138 N E. 203, 306 Ill 392.
52 C.J. p 159 note 7

97. N Y.—Wood v. New York Cent, etc, R Co, 70 N.Y. 195.

98. N Y.—Wood v. New York Cent., etc, R Co., supra

99. Tex.—Ft. Worth, etc., R. Co. v. Mackney, 18 S W 949, 83 Tex 410.

1. Wis.—Foulkes v. Chicago, St. P, M. & O. Ry. Co, 40 N.W.2d 507, 256 Wis 146

2. Wis.—Lockwood v. Chicago, etc., R. Co, 12 N.W 401, 55 Wis. 50.

3. Ala.—Birmingham Mineral R. Co v. Jacobs, 9 So. 320, 92 Ala. 187, 12 L R A. 830.

4. Ind.—Evansville, etc, R. Co. v. Hoffman, 118 N.E. 151, 67 Ind App. 571.

5. Ind.—Evansville, etc., R. Co. v Hoffman, supra.

6. Tex.—Missouri, etc, R. Co. v. Ransom, 41 S.W. 826, 15 Tex.Civ. App. 689.

his train because of failure of the brakes to work, he must give warning of his approach to the crossing, and failure to do so is negligence.[7] A statute permitting trains to cross without stopping, provided they maintain an interlocking device on switches at the crossing, cannot be relied on as a defense in an action for injuries resulting from a collision, when it appears that the interlocking device was not in working order.[8]

Duty after stopping. Merely stopping the train is not a sufficient precaution, but those in charge of the train must ascertain whether the way is clear and proceed with due caution, keeping a careful lookout and with the train under proper control;[9] but where they have taken these precautions they may proceed on the assumption that an approaching train on the other track, but not in close proximity to the crossing, will stop before reaching the crossing.[10] After stopping at the intersection with a street railway, the engineer should give warning of his intention to start his train again.[11]

Persons protected by the statute. The statute requiring trains to be stopped before crossing another railroad is not intended solely for the protection of trains using the crossing and of persons, employees, and others rightfully on such trains, but for the protection of all persons rightfully within the region of danger created by noncompliance with its requirements.[12]

What company liable. In the absence of contributory negligence, discussed infra § 700, the failure to stop renders the offending company,[13] or, where both companies fail to stop, either,[14] or both,[15] of the offending companies, liable for any damages directly caused by such omission.

d. Lights, Signals, and Other Warnings

A railroad company is liable for injuries resulting from its engineer's failure to heed the warning of, or to observe, lights or other signal devices at a crossing, and it is also liable for negligence as to its duty to give such signals.

A railroad company will be liable for injuries due to a collision caused by an engineer's disregarding the warning of lights or signal devices at a crossing indicating that the crossing is occupied or that a train on the intersecting track has the right of way,[16] or by his failure to observe such lights or signals and ascertain thereby whether he can cross with safety,[17] or for negligence on the part of its servants charged with the duty of giving the signals to trains at the crossing.[18] No duty rests on the engineer to sound the whistle or ring the bell after discovering a train on the intersecting road in a dangerous position, where it appears that the collision would not have been averted if he had done it and he resorted to every means known to skillful engineers to avert the collision.[19]

Where railroad crosses track of street railway, it is negligence to permit a train to approach the crossing without giving a signal of its approach or other warning of danger,[20] and all statutory requirements as to the ringing of bells and the blowing of whistles at such crossings must be complied with,[21] particularly if it is dark or foggy so that the view of the train is obscured.[22] Moreover, the violation of a statute requiring a train to have its headlight lighted as it approaches such a crossing has been held to be negligence per se.[23]

7. Tex.—Missouri, etc, R. Co. v. Settle, 47 S.W 825, 19 Tex.Civ. App. 357.

8. Miss.—Gulf, etc, R. Co. v. Barnes, 48 So. 823, 94 Miss. 484

9. Ala.—Southern R. Co. v. Bonner, 37 So. 703, 141 Ala. 517.
52 C.J. p 158 note 97.

10. Ala.—Vessel v. Seaboard Air-Line R Co, 62 So. 180, 182 Ala. 589.

11. Ohio.—Lake Erie, etc, R. Co v. Northern Ohio Tract, etc., Co, 20 Ohio Cir Ct,N S, 345.

12. Ala.—Southern R Co. v. Williams, 38 So. 1013, 143 Ala. 212
52 C.J. p 158 note 1.

13. Tex.—San Antonio, etc, R. Co v. Bowles, 32 S.W 880, 88 Tex. 634.
52 C J. p 158 note 3

14. Ind.—Grand Rapids, etc, R. Co. v. Ellison, 20 N E 135, 117 Ind 234.
52 C J. p 158 note 4

15. Tex.—San Antonio, etc, R. Co. v. Bowles, 32 S.W. 880, 88 Tex 634
52 C J. p 158 note 5.

16. Ind.—Baltimore, etc, R. Co. v. Kleespies, 76 N.E 1015, 78 N E 252, 39 Ind App 151.
Kan.—Missouri, etc, R. Co. v. Missouri Pac. R. Co, 175 P. 97, 103 Kan. 1.

17. Ind.—Cleveland, etc., R. Co. v. Gray, 46 N E. 675, 148 Ind. 266.
52 C.J p 159 note 22.

18. Ohio.—Hydell v. Toledo, etc., R. Co, 77 N E. 1066, 74 Ohio St. 138.
52 C J. p 159 note 23.

19. Ala.—Alabama Great Southern R Co. v. Hanbury, 49 So. 467, 161 Ala. 358.

20. U S.—Hales v. Michigan Cent. R. Co, Ohio, 200 F. 533, 118 C.C A. 627
52 C.J p 159 note 25.

21. Ala.—Western R Co. v. Wallace, 54 So. 533, 170 Ala. 584.
La.—Burke v. New Orleans R, etc, Co., 63 So. 51, 133 La. 369

Statute as to public crossing held not violated

Under statute relating to duty of railroad to sound warning before crossing public road or street, failure of railroad to ring bell, sound whistle, or slacken speed while crossing private crossing of street-car tracks and railroad track was not violation of statute.—Berry v. Kansas City Public Service Co, 108 S.W.2d 98, 341 Mo. 658.

22. Ill.—Wabash R Co. v. Barrett, 11 Ill App. 315.

23. Mo.—Berry v. Kansas City Public Service Co., 108 S.W.2d 98, 341 Mo. 658.

At a crossing in a city which is much used and where streetcars pass frequently it is negligence not to maintain gates or a flagman to prevent collisions therewith,[24] but in the absence of evidence that the crossing is more than ordinarily dangerous no such duty exists.[25] If gates are maintained, the railroad will be liable for injuries resulting from collisions with streetcars due to a failure to keep a servant to operate the gates,[26] or due to the negligence of its gatemen in not keeping a proper lookout for trains and cars and failing to lower the gates,[27] or operating the gates in a negligent or improper manner.[28] However, it is not negligent for a gatekeeper to raise a gate already down for an approaching train in order to permit a person who is caught between the gates to escape.[29]

Where two intersecting roads establish signal system for use at a crossing and each agrees to conform thereto, the company violating such agreement will be liable for any resulting injuries to the trains of the other, even though the agreement contains no provision for indemnity in case of its violation.[30] If a signal tower is maintained under joint agreement of all the railroad companies using the intersection, the negligence of the servant in charge of the tower is properly chargeable against all the companies jointly, so that any one or any number of them may be sued separately or jointly to recover damages for injuries resulting therefrom.[31]

§ 694. Defects in Roadbed or Tracks

A railroad will be liable for injuries occasioned by accidents to trains due to its negligence in the construction, maintenance, or inspection of its roadbed.

A railroad company will be liable for injuries occasioned by the wrecking or derailing of trains due to negligence on the part of the company in the construction of its roadbed,[32] or in failing to keep it in a safe and proper state of repair,[33] or to inspect it with sufficient care and frequency for the purpose of discovering defects therein.[34] At times or places of particular peril, greater promptness and vigilance in inspecting a roadbed is required,[35] as in the case of severe storms, and particularly at places most likely to be affected thereby.[36] In the case of injuries due to the washing away of culverts and embankments by floods and storms the company will be liable if negligent as to their original construction,[37] but it will not be liable if they are so constructed as to withstand any dangers of this character reasonably to be apprehended[38] and they are destroyed by floods or storms of unusual and unprecedented violence and there was no negligence in the operation of the train,[39] unless the company was negligent in failing to inspect the roadbed within a proper time after such floods or storms.[40]

§ 695. Obstructions on Tracks

A railroad company is liable for injuries resulting from negligence in the operation of a train running into an obstruction on the track; and it is liable if it puts or permits obstructions on the track so as to be struck by passing trains without warning.

A railroad company will be liable for personal injuries to persons rightfully upon its trains due to its trains running into obstructions upon the track, where there was negligence in the operation of the train;[41] and the railroad will be liable if guilty of negligence in putting such obstruction on or so near the track as to be struck by passing

24. Ky.—Central Pass R Co v Kuhn, 6 S W 441, 86 Ky 578, 9 Ky L 725, 9 Am S R. 309
Ohio—Kopp v. Baltimore, etc, R. Co, 25 Ohio Cir Ct 546

25. Mont—Norton v Great Northern R Co, 254 P. 165, 78 Mont 273

26. Ill.—Chicago, etc, R Co. v Averill, 79 N E 654, 224 Ill. 516.

27. D.C—Washington, etc, R. Co v Hickey, 5 App D C 436.
52 C.J p 159 note 31.

28. Ohio—Kopp v Baltimore, etc, R Co, 25 Ohio Cir Ct 546
52 C.J p 160 note 32.

29. Mich—Renders v. Grand Trunk R. Co, 108 N.W. 368, 144 Mich 387

30. Ind—New York, etc, R Co v Grand Rapids, etc, R. Co, 18 N E 182, 116 Ind 60
Kan—Missouri, etc., R. Co. v Missouri Pac. R Co., 175 P. 97, 103 Kan 1.

31. N Y.—Gorman v. New York, etc, R Co, 87 N E 682, 194 N.Y. 488

32. Fla—Florida R, etc, Co v. Webster, 5 So. 714, 25 Fla. 394
52 C J p 160 note 42
Duty and liability of railroad to its passengers as to care of roadbed and tracks generally see Carriers § 739.

33. Fla—Florida R., etc, Co v Webster, supra
52 C J. p 160 note 43.

34. Me—Libby v. Maine Cent. R Co, 26 A. 943, 85 Me. 34, 20 L R A. 812
52 C J p 160 note 44.

35. Me—Libby v. Maine Cent. R Co, supra
N C—Hardy v North Carolina Cent R Co, 74 N C. 734.

36. Me.—Libby v Maine Cent R Co., 26 A. 943, 85 Me. 34, 20 L.R A 812
N.C—Hardy v North Carolina Cent R Co, 74 N C. 734.

37. Mo.—McPherson v St. Louis, etc, R. Co, 10 S.W. 846, 97 Mo 253.
52 C J. p 160 note 47

38. U.S—St. Louis & S. F. R. Co v. Bishard, Kan, 147 F. 496, 78 C C.A 62
52 C J. p 160 note 48

39. Me—Libby v. Maine Cent R Co, 26 A. 943, 85 Me 34, 20 L.R A 812
52 C J. p 160 note 49.

40. Me—Libby v. Maine Cent R Co, supra
52 C J p 160 note 49.

41. La—Kird v New Orleans, etc, R. Co, 29 So 729, 105 La 226.
52 C.J. p 160 note 52.

trains without warning thereof.[42] The railroad must exercise particular caution where the engineer has had warning of the possibility of obstruction at a particular place.[43]

Cars on track. Independently of a violation of rules, a railroad is liable if it permits a train to stand on a track without warning to other trains of the obstruction, under circumstances making such warning necessary for their protection.[44] Accordingly, if it permits cars to stand on its tracks at night without lights to warn, or guards to give notice to, other trains which may be using the tracks, it is liable to anyone on the other train injured thereby.[45]

Duty to discover. A railroad charged with the duty of inspection is liable if, because of its negligent acts or omissions, it fails to discover and remove the obstruction if put there by others[46] However, ordinarily it is not bound to anticipate the placing of obstructions on the track by others, and to guard against their doing it;[47] and if its failure to discover the obstruction is due to no negligent act or omission of its own it will not be held liable.[48]

§ 696. —— Animals

A railroad company will be liable for injuries to persons rightfully on its train caused by collisions with animals on the track, where the railroad was guilty of negligence in connection therewith.

A railroad company will be liable for injuries to persons rightfully on its train caused by collisions with animals on the track where there was negligence either in the operation of the train,[49] or in allowing bushes to grow upon the right of way so as to conceal the presence of animals thereon,[50] or in failing to construct or maintain fences and cattle guards,[51] or in failing to remove from the track an animal killed or wounded by another of defendant's trains[52] Where the railroad is not required to fence its tracks, its liability for injuries due to collisions with animals must be grounded on other negligent acts or omissions[53] The railroad's liability for injuries to persons rightfully on its trains negligently caused by collisions with animals upon the track is not affected by the fact that the animal is a trespasser on the track[54]

§ 697. —— Persons Liable

One who wrongfully or negligently obstructs a railroad track may be liable for injury done to the railroad's trains and property injured by collision with such obstruction; the owner of animals may be similarly liable where he permits the animals to run at large in violation of law or in a dangerous area.

A person who wrongfully or negligently obstructs a railroad track will, in the absence of contributory negligence on the part of the railroad company, be liable for injury done to its trains and property by collision with such obstruction.[55] However, the owner of private cars placed on a siding by permission of, and at a place designated by, the agent of the company will not be liable merely because of its ownership of the cars for an injury to another employee of the company caused by a train colliding with such cars.[56]

Owner of animal. In jurisdictions where it is lawful for stock to run at large, the mere fact of permitting it to do so is not such negligence as to render the owner liable to a railroad company in case the stock wanders upon an unfenced track and a collision occurs resulting in injury to the train,[57] although even where it is lawful for stock to run at large the owner may permit it to do so under such circumstances as to render him liable to the railroad on the ground of negligence[58] The railroad may recover for injuries to its trains against the owner of animals which are negligently

42. La.—Kird v New Orleans, etc, R Co, 29 So. 729, 105 La. 226
Mo —Martin v. Kansas City Southern R Co., App, 180 S W. 1005.

43. Tenn —Louisville, etc., R. Co. v. McKenna, 13 Lea 280.
52 C J. p 160 note 54.

44. Mo —Martin v. Kansas City Southern R. Co, App, 180 S W 1005
Cars obstructing crossings see supra § 693 a.

45. La —Strickland v. Louisiana R., etc., Co, 63 So. 888, 134 La. 238

46. Va.—Virginia Cent. R Co v. Sanger, 15 Gratt 230, 56 Va 230

47. N.Y —New York, etc, R. Co. v. Atlantic Refining Co, 29 N.E. 829, 129 N.Y 597.
52 C J. p 161 note 58.

48. Md.—Baltimore, etc., R. Co v. Walsh, 120 A. 715, 142 Md. 230.
52 C J p 161 note 59.

49. Ill.—Atchison, etc, R Co v. Elder, 36 N E. 565, 149 Ill. 173.
52 C.J p 161 note 64.

50. Ky —Louisville, etc., R. Co. v. Ritter, 2 Ky L. 385.
Tex —Eames v. Texas, etc, R. Co, 63 Tex 660

51. Ill —Atchison, etc, R. Co. v. Elder, 36 N.E. 565, 149 Ill. 173
Wis —Blair v Milwaukee, etc, R. Co., 20 Wis. 254.

52. Tex.—Mexican Cent. R. Co. v. Lauricella, 28 S W 277, 87 Tex. 277, 47 Am.S R. 103

53. La.—Tillotson v. Texas, etc, R. Co., 10 So 400, 44 La.Ann. 95.

54. Pa.—Lackawanna, etc, R. Co. v Chenewith, 52 Pa 382, 91 Am D 168.

55. N.Y —New York, etc, R Co v. Atlantic Refining Co, 29 N.E. 829, 129 N Y. 597.
52 C.J. p 161 note 73.

56. Pa.—Keeney v. Campbell, 64 A. 687, 215 Pa. 530.

57. La.—Jenkins v. New Orleans, etc., R. Co., 15 La Ann. 118.

58. Mo —Hannibal, etc., R Co. v. Kenney, 41 Mo. 271.

allowed to run at large in violation of law[59] or in the immediate vicinity of a dangerous crossing where it was probable that they would go upon the track.[60] However, the owner of the animal, even though negligent, is not liable if the railroad was also negligent in the operation of the train[61] or had failed in its statutory duty to fence the track.[62]

§ 698. Incompetency, Negligence, or Misconduct of Employees

A railroad company is liable, in cases of injuries resulting from accidents to trains, for the incompetency of its employees, and for all acts, negligent or willful, if performed within the scope of their employment

In cases of injuries resulting from collisions or accidents to trains, a railroad company is liable for the incompetency of its employees,[63] and for all acts done by them, whether negligent,[64] or willful or malicious,[65] if performed within the scope of their employment,[66] and even though the particular act or means employed may have been unauthorized.[67] However, the railroad will not be liable for injuries resulting from unauthorized acts not within the scope of the servant's employment.[68]

§ 699. Negligence or Wrongful Acts of Third Persons

A railroad company is not liable for accidents to trains caused by the negligent or wrongful acts of third persons not in its employ and done without its knowledge or consent.

A railroad company is not liable for injuries due to collisions or accidents to its trains caused by the negligent or wrongful acts of third persons not in the employ of the company and done without its knowledge or consent,[69] even where such third persons are discharged employees[70] and the injury is an indirect result of the discharge.[71] However, where such third persons are acting in a particular transaction related to the railroad's business under the direction of the servants of the railroad, the railroad is responsible for the injury resulting therefrom.[72]

§ 700. Contributory Negligence

The plaintiff, prosecuting an action to recover for injury in connection with an accident to a train, ordinarily cannot recover if his own negligence or wrongful act contributed directly to produce the injury complained of

In accordance with general rules as to contributory negligence, plaintiff, prosecuting an action to recover for injury in connection with an accident to a train, cannot recover if his own negligence or wrongful act contributed directly to produce the injury complained of.[73] This rule applies to actions by one railroad company against another railroad, or street railroad, company,[74] or against a consignee to whom it has delivered goods,[75] for damages to its trains; to actions by passengers[76] or employees[77] of one company against the other

59. Md.—Annapolis, etc, R Co v Baldwin, 60 Md 88, 45 Am R 711

60. Ind.—Sinram v Pittsburgh, etc, R Co, 28 Ind 244

61. Conn—Housatonic R Co v Knowles, 30 Conn 313

62. Kan—Sherman v Anderson, 27 Kan. 333, 41 Am R 414.

63. Ind—Grand Rapids, etc, R Co v Ellison, 20 N.E 135, 117 Ind 234.

64. Ind—Pittsburgh, etc, R Co v. Kirk, 1 N E 849, 102 Ind 399.
52 C J. p 162 note 87.

65. Miss—New Orleans, etc., R. Co v Allbritton, 38 Miss 242, 75 Am. D 98

66. Ind—Pittsburgh, etc., R Co v Kirk, 1 N.E. 849, 102 Ind 399, 52 Am.R. 675.
52 C J p 162 note 87

67. Canal Zone—Fitzpatrick v. Panama R. Co, 2 Canal Zone 111
52 C.J. p 162 note 91.

68. Cal—Stephenson v. Southern Pac Co, 29 P. 234, 93 Cal. 558, 27 Am S R 223, 15 L.R A. 475.
52 C J. p 162 note 92.

69. Ala—Williams v. Woodward Iron Co, 17 So 517, 106 Ala. 254.
52 C.J. p 162 note 93.

70. Ga—East Tennessee, etc, R Co v. Kane, 18 S E 18, 92 Ga 187, 22 L R A 315

71. Ga—East Tennessee, etc., R Co v. Kane, supra.
52 C J p 162 note 95

72. Ala—Georgia Pac R Co v Underwood, 8 So. 116, 90 Ala 49, 24 Am S R 756.
52 C.J. p 162 note 96

73. Mo—Tate v. Missouri-Kansas-Texas Ry Co, 93 S W.2d 873.
Wis—Foulkes v. Chicago, St. P, M & O Ry Co, 40 N W.2d 507, 256 Wis 146
52 C J. p 162 note 98.
Negligence of railroad company precluding recovery by railroad for injury to train against owner of animal see supra § 697.

74. N J—New York, etc., R Co v. New Jersey Electric R. Co, 37 A 627, 60 N J Law 52, 38 L.R.A. 516.
52 C J p 162 note 99

75. N Y.—New York, etc, R. Co. v Atlantic Refining Co, 29 N E 829, 129 N Y 597
52 C J. p 162 note 1

76. Ind—Cincinnati, etc, R. Co. v. Acrea, 82 N E. 1009, 42 Ind App 127
52 C J p 162 note 2

77. Ky—Mitchell v Chesapeake, etc, R Co, 9 S W 2d 217, 225 Ky. 465.
52 C J p 163 note 3

Contributory negligence shown

(1) Where plaintiff engineer failed to stop within four hundred feet from crossing as required by statute. —Foulkes v Chicago, St. P., M & O Ry. Co., 40 N.W 2d 507, 256 Wis 146

(2) Where engineer of an engine operating on his employer's industrial tracks failed to look out for engines of defendant's railroad which engaged in switching operations on such tracks—Nashville, C & St. L Ry. Co. v. Skelton, 173 S.W.2d 943, 26 Tenn App 525.

(3) Where plaintiff engineer in exercise of ordinary care must have observed that defendant's engineer was not going to perform his statutory duty at time when at plaintiff's slow speed there was still time to have avoided collision.—Foulkes v Chicago, St. P., M & O. Ry. Co, supra

(4) Other cases see 52 C J. p 163 note 3 [a].

Contributory negligence not shown

(1) Where the engineer of an industrial train colliding with a rail-

company; to actions by motormen or drivers of street cars against railroad companies;[78] to actions by railroad employees against third persons for injuries due to obstructing the tracks,[79] and to actions by licensees on tracks or engines.[80] Contributory negligence barring plaintiff's recovery is based on the standard of ordinary care,[81] even in the case of employees on passenger trains,[82] as applied to plaintiff's acts at the time and place of the accident.[83]

Negligence of fellow servant. An employee of one company who was not himself negligent is not precluded from recovering against another company for its negligence by the fact that the negligence of a coemployee contributed to produce the injury,[84] the fellow-servant doctrine, discussed in Master and Servant §§ 321–333, having no application to actions for personal injuries not brought against the common master.[85] Of course, where the coemployee's negligence is the sole contributing cause, the employee cannot recover, defendant in such case not being guilty of negligence causing the injury.[86]

Contributory negligence as proximate cause. Contributory negligence, in order to bar recovery, must contribute directly as a proximate cause of the injury.[87] However, mere negligence on the part of plaintiff, even though contributing to the injury, will not preclude a recovery for wanton or willful misconduct on the part of defendant,[88] or for failure of defendant to stop in time to avoid the collision, when it could have done so after it had discovered, or should have discovered, that plaintiff was in danger,[89] or for negligence under the circumstances specified in a statute allowing recovery by plaintiff notwithstanding his contributory negligence.[90]

§ 701. Proximate Cause

In actions for damages or injuries due to train accidents, there can be no recovery unless defendant's negligence was a proximate cause of the injury complained of.

In actions for damages or personal injuries due to collisions or accidents to trains, there can be no recovery, although defendant was negligent, unless such negligence was a proximate cause of the injury complained of,[91] and, where the injury is caused by the intervening wrongful act of an outsider, defendant, although negligent, is not liable.[92] However, defendant's negligence will be held a proximate cause of any resulting injury occurring without the intervention of any independent agency which was the natural and probable result of such negligence.[93] It is not necessary that the particular injury which in fact occurred should have been foreseen,[94] nor is it necessary that de-

road train on a track jointly used by both railroads attempted to apply brakes of his train in an improper manner when confronted with an emergency arising from approach of railroad's train on the same track, and where he was proceeding at a speed of six miles an hour—Alford v. Louisiana & A. Ry. Co., La.App., 38 So.2d 258.

(2) Other cases.—Jeneary v. Chicago & Interurban Traction Co., 225 Ill.App. 122, affirmed 138 N.E. 203, 306 Ill. 392—52 C.J. p. 163 note 3 [b]

78. Wash.—North Coast Power Co. v. Cowlitz, etc., R. Co., 185 P. 615, 108 Wash. 591.
52 C.J. p. 163 note 4.

Plaintiff's duty of care

Motorman of trolley car approaching railroad grade crossing was bound to use care and caution of reasonably prudent man under circumstances to ascertain whether train was approaching, and was not justified in relying wholly on fact that gates were up, but was required to make reasonable use of his faculties to ascertain whether train was approaching.—Lane v. Boston & M. R. R., 192 N.E. 597, 288 Mass. 277.

Contributory negligence shown

Where street car motorman had a clear view down railroad track and, had he looked, would have seen rapidly approaching train and could have stopped slowly moving street car in place of safety; and fact that street car was stopped across railroad side track did not require motorman to attempt to cross in front of rapidly approaching train, where there was no danger while on side track, so as to relieve motorman of contributory negligence.—Tate v. Missouri-Kansas-Texas Ry. Co., Mo., 93 S.W.2d 873.

79. Mich.—Glover v. Scotten, 46 N.W. 936, 82 Mich. 369.
52 C.J. p. 163 note 5.

80. U.S.—Hart v. Northern Pac. R. Co., N.D., 196 F. 180, 116 C.C.A. 12, certiorari denied 33 S.Ct. 114, 226 U.S. 609, 57 L.Ed. 380.
52 C.J. p. 163 note 6.

81. Ill.—Coulter v. Illinois Cent. R. Co., 106 N.E. 258, 264 Ill. 414.
Minn.—Thompson v. Chicago, etc., R. Co., 73 N.W. 707, 71 Minn. 89.

82. Minn.—Thompson v. Chicago, etc., R. Co., supra.
52 C.J. p. 163 note 8.

83. Mo.—Martin v. Kansas City Southern R. Co., App., 180 S.W. 1005.
52 C.J. p. 163 note 9.

84. Ill.—Chicago, etc., R. Co. v. Vipond, 72 N.E. 22, 212 Ill. 199.
52 C.J. p. 163 note 10.

85. Ill.—Chicago, etc., R. Co. v. Raidy, 67 N.E. 783, 203 Ill. 310.

86. Ill.—Chicago, etc., R. Co. v. McKittrick, 78 Ill. 619.

87. La.—Strickland v. Louisiana, R., etc., Co., 63 So. 888, 134 La. 238.
52 C.J. p. 164 note 16.

88. Mo.—Clark v. St. Joseph Terminal R. Co., 148 S.W. 472, 242 Mo. 570.
52 C.J. p. 164 note 17.

89. Ark.—Chicago, etc., R. Co. v. Scott, 184 S.W. 65, 123 Ark. 94.
52 C.J. p. 164 note 18.
"Last clear chance" doctrine generally see Negligence §§ 136–139.

90. Miss.—Mobile, etc., R. Co. v. Campbell, 75 So. 554, 114 Miss. 803.

91. Kan.—Chicago, etc., R. Co. v. Lacy, 97 P. 1025, 78 Kan. 622.
52 C.J. p. 164 note 22.

92. N.Y.—Mars v. Delaware, etc., Canal Co., 8 N.Y.S. 107.
52 C.J. p. 164 note 24.

93. Ala.—Kansas City, etc., R. Co. v. Lackey, 21 So. 444, 114 Ala. 152.
52 C.J. p. 164 note 23.

94. Ind.—Cincinnati, etc., R. Co. v.

fendant's negligence, in order to be a proximate cause, should be the sole cause of the injury, a person being injured by the concurring negligence of two railroad companies being entitled to recover against either,[95] and the contributing negligence of plaintiff not barring recovery against a defendant who, notwithstanding plaintiff's fault, could have prevented the collision and negligently failed to do so.[96]

§ 702. Actions

Rules governing proceedings in civil actions generally have been applied in actions growing out of collisions or accidents to trains, with respect to pleadings, as discussed infra § 703, evidence infra § 704, trial infra §§ 705–707, and damages infra § 709.

Examine Pocket Parts for later cases.

§ 703. —— Pleading

a. In general
b. Plea or answer and subsequent pleadings
c. Issues, proof, and variance

a. In General

In actions for damage or injury growing out of collisions or accidents to trains, the complaint must allege sufficient facts to show a cause of action.

Rules as to the sufficiency of declarations and complaints in civil actions generally have been applied in actions for damage to property or personal injuries growing out of collisions or accidents to trains[97] Accordingly, the complaint must allege sufficient facts to show a cause of action in favor of plaintiff against defendant,[98] and it must allege facts showing a wanton or intentional injury,[99] or failure to use due care to prevent a collision after discovering the danger,[1] as the case may be, where such is the theory of recovery relied on The complaint must allege facts and not mere inferences or arguments,[2] and must not be uncertain or repugnant in its allegations.[3] While there must be an allegation of negligence on the part of defendant,[4] a general allegation that the act which caused the injury was negligently done or omitted is sufficient without setting out the details of the negligence.[5] However, the act complained of must be stated,[6] and, if the complaint undertakes to set out the details of the negligence causing the injury, its sufficiency must be tested by these special allegations.[7] If the negligent act and defendant's responsibility therefor are sufficiently set forth, it is not necessary to set out specifically defendant's duty in the premises,[8] or the authority of the servants whose acts resulted in the injury,[9] or that the servants of defendant were acting within the line or scope of their authority.[10]

Violation of statute, ordinance, or rules. Where the negligence relied on is the violation of a statute or ordinance, the allegation must follow the words of,[11] but need not negative the exceptions made by,[12] the statute. An allegation of the existence of the ordinance is sufficient, and the filing of a copy with the complaint is not necessary.[13]

Contributory negligence. In most jurisdictions the complaint need not negative contributory negligence on the part of plaintiff;[14] but, where such allegation is made or necessary, a general allegation that the injury occurred without any fault or negligence on the part of plaintiff is sufficient[15]

Acrea, 81 N.E. 213, 82 N.E. 1009, 40 Ind.App. 150.

95. Ill.—Chicago, etc., R. Co. v. Averill, 79 N.E. 654, 224 Ill. 516
52 C.J. p. 165 note 28

96. Mo.—Missouri Pac. R. Co. v. Chicago Great Western R. Co., 71 S.W. 1081, 98 Mo.App. 214

97. Ind.—Chicago, etc., R. Co. v. Marshall, 75 N.E. 973, 38 Ind.App. 217.

98. Ind.—Chicago, etc., R. Co. v. Marshall, supra.
52 C.J. p. 165 note 33.

99. Ala.—Alabama Great Southern R. Co. v. Hanbury, 49 So. 467, 161 Ala. 358

1. Mo.—Clark v. St. Joseph Terminal R. Co., 148 S.W. 472, 242 Mo. 570

2. Ind.—Evansville, etc., R. Co. v. Krapf, 36 N.E. 901, 143 Ind. 647.

3. Ala.—Highland Ave., etc., R. Co. v. South, 20 So. 1003, 112 Ala. 642

4. Ind.—Evansville, etc., R. Co. v. Krapf, 36 N.E. 901, 143 Ind. 647.

5. Ind.—Evansville, etc., R. Co. v. Krapf, supra.
52 C.J. p. 165 note 39.

6. Cal.—Stephenson v. Southern Pac. Co., 34 P. 618, 36 P. 407, 102 Cal. 143.
Ind.—Ohio, etc., R. Co. v. Selby, 47 Ind. 471, 17 Am.R. 719.

7. Ala.—Highland Ave., etc., R. Co. v. South, 20 So. 1003, 112 Ala. 642
Ind.—Baltimore, etc., R. Co. v. Kleespies, 76 N.E. 1015, 78 N.E. 252, 39 Ind.App. 151

8. Ind.—Chicago Terminal Transfer R. Co. v. Vandenberg, 73 N.E. 990, 164 Ind. 470
52 C.J. p. 165 note 42.

9. D.C.—Washington, etc., R. Co. v. Hickey, 5 App.D.C. 436

10. Ala.—Alabama Great Southern R. Co. v. Hanbury, 49 So. 467, 161 Ala. 358
52 C.J. p. 165 note 44

11. Ala.—Highland Ave., etc., R. Co. v. South, 20 So. 1003, 112 Ala. 642
52 C.J. p. 165 note 45.

12. Ind.—Cleveland, etc., R. Co. v. Gray, 46 N.E. 675, 148 Ind. 266
52 C.J. p. 165 note 46

13. Ind.—Madison, etc., R. Co. v. Taffe, 37 Ind. 361.

14. Ind.—Southern Indiana R. Co. v. Peyton, 61 N.E. 722, 157 Ind. 690.
52 C.J. p. 166 note 48.

15. Ind.—Pittsburgh, etc., R. Co. v. Martin, 61 N.E. 229, 157 Ind. 216—Evansville, etc., R. Co. v. Krapf, 36 N.E. 901, 143 Ind. 647.

unless the inference of negligence arises as a necessary legal conclusion from the facts stated.[16] However, no such negligence on the part of plaintiff is disclosed by his allegations that he proceeded over a railroad crossing in front of an approaching train where the declaration also states that there was a dense fog.[17] In an action by a passenger of one railroad company against another for injuries caused by a collision, it is not necessary to allege that the company carrying plaintiff was without fault.[18]

Action against several defendants. Where an action is brought against several defendants, the complaint must charge the negligent acts specifically against the particular defendant or defendants alleged to be guilty thereof;[19] and whether the negligent acts of several defendants are declared on as joint or several depends on the form of the allegations.[20]

b. Plea or Answer and Subsequent Pleadings

General rules as to the sufficiency of pleas or answers and subsequent pleadings apply in actions for damage or injury growing out of collisions or accidents to trains.

Rules governing the sufficiency of pleas or answers and subsequent pleadings in civil actions generally have been held to apply to such pleadings in actions for damage to property or personal injuries growing out of collisions or accidents to trains,[21] and to demurrers thereto.[22]

Violation of rules by plaintiff. Where defendant sets up in defense a violation of rules by plaintiff, defendant must set out in his plea, if the rules alleged to have been violated are the rules of plaintiff's employer, that they were made for defendant's benefit, or that defendant was in some way connected therewith,[23] or, if they are defendant's rules, that plaintiff, employed by another road, was subject to them.[24]

c. Issues, Proof, and Variance

In order to authorize a recovery in actions for damage to property or personal injuries growing out of collisions or accidents to trains there must be proof in support of all the material allegations of the complaint.

In accordance with rules governing issues, proof, and variance in civil actions generally, and particularly in negligence actions, in order to authorize a recovery in actions for damage to property or personal injuries growing out of collisions or accidents to trains there must be proof in support of all the material allegations of the complaint;[25] but an immaterial allegation not essential to establish the cause of action need not be proved.[26] The allegations and proof must correspond and any material variance is fatal to a recovery,[27] so that there can be no recovery on a cause of action different from that alleged in the complaint,[28] and if the complaint sets out the particular acts of negligence constituting such cause of action the issues must be restricted to the acts specified.[29] However, no variance should be regarded as material where the allegations and proof substantially correspond or the variance was not such as to mislead or prejudice the other party.[30]

Under a complaint alleging "wrongful, wanton, or intentional negligence" on the part of defendant's employees, plaintiff may recover on proof of wantonness or willfulness not amounting to intentional wrongdoing;[31] and, under a petition charging that defendant's trainmen neglected to

16. Ind.—Evansville, etc., R. Co. v. Krapf, supra.

17. Minn.—St. Paul Southern Electric R. Co. v. Flanagan, 164 N.W. 534, 138 Minn. 123.

18. Ind.—Pittsburgh, etc., R. Co. v. Spencer, 98 Ind. 186.

19. Ind.—Chicago, etc., R. Co. v. Marshall, 75 N.E. 973, 38 Ind.App. 217.

20. N.C.—Hough v. Southern R. Co., 57 S.E. 469, 144 N.C. 692.
52 C.J. p. 166 note 55.

21. Ala.—Southern R. Co. v. Harrison, 67 So. 597, 191 Ala. 436.
52 C.J. p. 166 note 57.

Plea held bad as mere conclusion

In a suit for death of a conductor on another railroad in a collision at a grade crossing of defendant's road, a plea that the accident would not have happened but for decedent's negligence, while crossing defendant's track, which proximately contributed to his death, was bad as stating a mere conclusion.—Alabama Great Southern R. Co. v. Hanbury, 49 So. 467, 161 Ala. 358.

22. Ala.—Alabama Great Southern R. Co. v. Hanbury, supra.

Sufficiency of demurrer to raise objection

In a suit for death of a conductor on a train, where a defense was that it was caused by the engineer's negligence, which was imputable to the conductor, a demurrer to the plea that it set out no defense, failed to show decedent's negligence, and did not sufficiently state facts constituting contributory negligence, etc., was sufficient to raise objection that the plea did not allege that the negligence charged proximately contributed to the death.—Alabama Great Southern R. Co. v. Hanbury, supra.

23. Ala.—Southern R. Co. v. Harrison, 67 So. 597, 191 Ala. 436.

24. Ala.—Southern R. Co. v. Harrison, supra.

25. Ga.—Heins v. Savannah, etc., R. Co., 40 S.E. 710, 114 Ga. 678.

26. Ill.—Chicago, etc., R. Co. v. Vipond, 72 N.E. 22, 212 Ill. 199.

27. Ala.—Alabama Great Southern R. Co. v. Hall, 17 So. 176, 105 Ala. 599.
52 C.J. p. 166 note 63.

28. Mo.—Ely v. St. Louis, etc., R. Co., 77 Mo. 34.

29. Mo.—Garven v. Chicago, etc., R. Co., 75 S.W. 193, 100 Mo.App. 617.

30. Tex.—Texas, etc., R. Co. v. Barron, 23 S.W. 537, 4 Tex.Civ.App. 546.
52 C.J. p. 166 note 66.

31. Ala.—Southern R. Co. v. Bonner, 37 So. 702, 141 Ala. 517.

stop until the collision causing the injury, plaintiff may recover on the basis of the issue of last fair chance being in the case.[32] In jurisdictions where contributory negligence is matter of defense, it is for defendant to establish plaintiff's contributory negligence by proof, as appears infra § 704 a, but plaintiff's own evidence may be considered in determining this question and may be sufficient to show contributory negligence.[33]

Evidence admissible under pleadings Evidence, in order to be admissible, must conform to the allegations of the complaint, and, if the complaint specifies the acts of negligence relied on, evidence of negligence in other respects is not admissible;[34] but evidence of defects in the roadbed other than that alleged to have been the immediate cause of the injury complained of is admissible in support of an allegation of gross negligence as to the condition of the roadbed and a claim for exemplary damages,[35] and evidence not admissible to prove negligence not charged against one defendant may still be admissible as tending to show that the other defendant was free from blame.[36] Under a complaint alleging negligence of defendant's employees operating and in charge of its train, evidence of negligence on the part of any one of the employees is admissible, the complaint not charging joint negligence of them all.[37] An ordinance is not admissible in evidence unless specially pleaded if the action is based on the ordinance, but is admissible in a common-law action as evidence of negligence, where the ordinance does not itself give the right of action but merely prescribes a duty to be performed.[38]

§ 704. —— Evidence

a. Presumptions and burden of proof
b Admissibility
c. Weight and sufficiency

a. Presumptions and Burden of Proof

The burden of proof on particular issues is on the person setting up the affirmative and seeking a benefit therefrom. Generally no presumption of the defendant's negligence arises from the fact of collision, but there is a presumption that the plaintiff performed his duty and used due care.

In accordance with rules governing presumptions and burden of proof in civil actions, the burden of proof on particular issues in actions for damage to property or personal injuries growing out of collisions or accidents to trains is on the person setting up the affirmative and seeking a benefit therefrom,[39] as, for example, on plaintiff, who has alleged subsequent negligence, to show that defendant's trainmen discovered the peril in time to have averted the collision,[40] but on a defendant, who has alleged that a crossing is equipped with interlocking switches and so within the exception to the statutory rule requiring stopping before crossing, to prove the facts bringing the crossing within the exception.[41]

As to defendant's negligence. While, as between a passenger and the railroad carrying him, a presumption of negligence arises from the fact of collision, as discussed in Carriers § 764 f (2), the rule, except in so far as a statute provides otherwise,[42] is that as between a passenger on one road and another railroad,[43] or an employee of one road during the course of his employment and another railroad,[44] a presumption of negligence on the part of the second railroad does not arise from the fact of collision In such cases the burden is on plaintiff, unaided by any presumption, to establish defendant's negligence,[45] and that it was the proximate cause of the injury.[46] However, where the cause of the collision is shown to have been some agency within the control of defendant railroad, a presumption of negligence, not from the collision but from the proved cause of the collision, does arise which defendant must meet,[47] but defendant cannot in such case claim as against an employee of another railroad the benefit of a presumption, available to it as against its own employees, discussed in Master and Servant § 501 a

32. Iowa—Cahill v. Chicago, etc, R. Co, 121 N W 553, 143 Iowa 152

33. Wis.—Waterman v. Chicago, etc, R Co, 52 N.W. 247, 1136, 82 Wis 613.

34. Mo.—Garven v. Chicago, etc, R Co, 75 S W 193, 100 Mo App 617
52 C J. p 166 note 72.

35. Tex.—Texas, etc, R Co. v De Milley, 60 Tex. 194

36. Mo—Knox v. Missouri, etc., R Co, 203 S W 225, 199 Mo.App. 64.

37. Ala.—Southern R Co. v Stollenwerck, 52 So 204, 166 Ala. 556.

38. Ind.—Madison, etc, R. Co v Taffe, 37 Ind 361
Mo—Mulderig v St. Louis, etc, R Co, 94 S W 801, 116 Mo App 655

39. Ala—Young v. Woodward Iron Co, 113 So 223, 217 Ala. 330

40. Ala—Young v. Woodward Iron Co., supra.

41. Ala—Young v. Woodward Iron Co, supra.

42. Miss—Mobile, etc, R Co. v Campbell, 75 So 554, 114 Miss. 803
52 C.J. p 167 note 80.

43. Ky—Central Pass R. Co. v. Kuhn, 6 S W. 441, 86 Ky. 578, 9 Ky L. 725, 9 Am S R. 309
52 C J. p 167 note 81.

44. Ill.—Brimmer v Illinois Cent R Co, 101 Ill App 198

45. Pa—Koller v Pennsylvania R. Co, 40 A 2d 89, 351 Pa. 60.
52 C J. p 167 note 83

46. Mont—Norton v. Great Northern R. Co, 278 P. 521, 78 Mont 273.

47. S D—Sioux Falls Tract. System v. Great Northern R. Co, 162 N. W 740, 39 S D 17
52 C.J. p 167 note 85.

(4), that the car was properly equipped with brakes [48]

As to contributory negligence. Where the question of performance of duty by plaintiff is involved in an issue of contributory negligence, there is a presumption of performance of duty and of due care,[49] which is strengthened wherever there is evidence in the case supporting the presumption,[50] and under the proper circumstances various other presumptions may be indulged [51] In jurisdictions where contributory negligence is matter of defense, the burden is on defendant to establish it [52]

b. Admissibility

General rules as to the admissibility of evidence apply in actions growing out of collisions or accidents to trains.

Rules governing the admissibility of evidence in civil actions generally, and particularly in negligence actions, have been applied in actions growing out of collisions or accidents to trains.[53] Evidence, in order to be admissible, must consist of statements of fact as distinguished from expressions of opinion,[54] unless in the form of expert testimony from one qualified to give it;[55] and it must be relevant to the matters in issue.[56] However, evidence not admissible to establish grounds of recovery may still be admissible to show conditions at the time, and in explanation or rebuttal of other evidence.[57] Thus, while evidence of other distinct acts of negligence not contributing to the injury is not admissible as tending to prove the negligence causing the injury,[58] it may be admissible for other purposes,[59] such as to test the memory of a witness.[60] Evidence of other wrecks or accidents occurring at other places is not admissible,[61] but, in case of accidents alleged to be due to defects in the track or switches, evidence is admissible of other accidents at the same place from the same cause if accompanied by proof that the condition existing at such times was substantially the same [62]

While generally speaking the evidence should be limited to the time, place, and circumstances of the particular accident complained of,[63] this rule cannot be applied with absolute strictness.[64] So in actions based on a defective condition of the track, roadbed, switches, or signal devices, evidence as to their condition shortly before or after the accident is admissible as tending to show their condition at that time;[65] but the evidence is not admissible if it relates to a time too remote to permit a just and fair inference that the condition was substantially the same at the time of the accident[66] unless it is accompanied by other direct evidence to this effect.[67] It is also ordinarily held that evidence is not admissible as to defects in the track or roadbed at places other than that where the accident occurred and which it is not shown could have contributed to the injury complained of,[68] even though they are in the same vicinity.[69] On the other hand, such evidence has been admitted to rebut evidence as to condition at other places introduced by the adverse party,[70] or where the ad-

48. Mo.—Moudy v St. Louis Dressed Beef, etc., Co, 130 S.W. 476, 149 Mo App. 413.

49. Minn.—St. Paul Southern Electric R Co. v. Flanagan, 164 N.W. 584, 138 Minn. 123.
52 C.J. p 167 note 91

50. Ill.—Coulter v. Illinois Cent. R Co, 106 N.E. 258, 264 Ill. 414.

51. Tenn.—Nashville, C. & St L Ry. Co. v. Skelton, 173 S.W 2d 948, 26 Tenn.App. 525

Plaintiff's knowledge of custom

An engineer who had been operating an engine on industrial tracks for several years was presumed to have known of the custom that there was no right of way between his engine and a railroad locomotive while doing switching operation upon the industrial line owned by his employer and located within employer's plant and that each crew had to look out for itself.—Nashville, C & St. L Ry. Co. v. Skelton, supra

52. Mass.—Lane v. Boston & M. R. R., 192 N.E. 597, 288 Mass. 277.
52 C.J. p 167 note 94.

53. Ark.—Little Rock, etc, R Co v Harrell, 25 S.W 117, 58 Ark. 454

54. Ill.—Chicago, etc, R. Co v. Vipond, 72 N.E 22, 212 Ill 199.
52 C.J. p 168 note 1

55. Ark.—St Louis, etc, R Co. v Dysart, 116 S.W. 224, 89 Ark. 261.
52 C.J. p 168 note 2.

56. Pa.—Bunting v Pennsylvania R. Co., 12 A. 448, 118 Pa. 204.
52 C.J p 168 note 3

57. Ohio.—Louisville, etc, R. Co v. Greene, 160 N.E. 495, 26 Ohio App. 392
52 C.J. p 168 note 4

58. Ark.—Little Rock, etc, R. Co v Harrell, 25 S.W. 117, 58 Ark 454
Ky.—Louisville, etc, R. Co v. Fox, 11 Bush 495.

59. N.Y.—Stodder v. New York, etc., R. Co., 2 N.Y.S. 780, 50 Hun 221, affirmed 24 N.E 1092, 121 N.Y. 655.

60. N.Y.—Stodder v. New York, etc., R Co., supra.
52 C.J. p 168 note 7.

61. Tex.—Missouri Pac. R Co. v Mitchell, 12 S.W. 810, 75 Tex. 77—Fordyce v Withers, 20 S.W 766, 1 Tex Civ App 540

62. Ind.—Cleveland, etc, R Co v. Newell, 3 N.E 836, 104 Ind. 264, 54 Am R 312
52 C.J. p 168 note 9

63. Tex.—Missouri Pac R Co. v Mitchell, 12 S.W. 810, 75 Tex 77

64. Mo.—Stoher v St Louis, etc, R. Co., 4 S.W. 389, 91 Mo 509
52 C.J. p 168 note 11.

65. Wis.—Stewart v Everts, 44 N W. 1092, 76 Wis. 35, 20 Am S R. 17.
52 C.J. p 168 note 12.

66. Mo.—Stoher v St Louis, etc, R Co, 4 S.W 389, 91 Mo. 509.
52 C.J. p 169 note 13

67. Ill.—Jacksonville Southeastern R. Co. v. Southworth, 25 N.E. 1093, 135 Ill 250
52 C.J. p 169 note 14.

68. Minn.—Morse v. Minneapolis, etc, R. Co., 16 N.W 358, 30 Minn. 465.
52 C.J. p 169 note 15.

69. Minn.—Morse v. Minneapolis, etc, R. Co, supra.

70. Ky.—Ohio Valley R. Co. v. Wat-

verse party by immediate repairs at the place of the accident has made evidence of condition at the time and place of the accident impossible,[71] or where it is charged that defendant permitted its road to become wholly unsafe for travel over it and both actual and exemplary damages are claimed,[72] or when the negligence alleged is in operating a train at a rapid speed over a defective track[73]

Ordinances. A municipal ordinance limiting the rate of speed of trains is admissible on the issue of defendant's negligence in the operation of the train,[74] and also on the question of contributory negligence on the part of a person in charge of a street car in using a railroad crossing,[75] but such an ordinance is not admissible to charge an employee on a train with contributory negligence where he had nothing to do with its operation[76]

Rules. Rules of the railroad with respect to the operation of trains under conditions similar to those at the time the accident occurred are admissible[77] in the absence of evidence of annulment and notice of annulment to plaintiff employee who was governed thereby.[78] However, evidence is not admissible of rules adopted after the accident requiring certain precautions under similar conditions.[79] Rules made by a board of railroad commissioners governing the movement of trains at crossings are not admissible unless it is shown that they have been served on, or in some manner brought to the knowledge of, the company against which they are offered in evidence,[80] and the printed rules of the railroad are not admissible to show contributory negligence on the part of an engineer in the absence of evidence that such rules were in force at the time of the injury and applied to the place where it occurred.[81]

Contracts between railroads governing the operation of their trains, if relevant to the issue, are admissible,[82] as, for example, a contract between a steam railroad and a street railway governing operations at crossings providing that the streetcars should be stopped and the way ascertained to be clear before crossing,[83] or a contract exempting the railroad from any duty to protect the cars and employees of the street railway company,[84] or a contract between two railroad companies that one of them shall stop its trains before crossing and give the other company the right of way[85]

Custom or usage. Evidence as to prevailing customs or usages in the operation of trains has been held to be admissible.[86] Thus, in case of a collision between the trains of two companies in a switch yard, evidence of the environment and usual manner of conducting the business involved at the place of injury is competent as bearing on the acts and conduct of the parties;[87] but evidence of the use of interlocking switches and signal devices at other crossings is not admissible to show negligence for failure to install them at the crossing where the accident happened, in the absence of evidence showing similarity of conditions and operating requirements at this and other crossings[88]

Repairs after collision Evidence of repairs or alterations made after the accident complained of is not admissible as evidence of a defective or insufficient condition existing at that time or an admission of negligence on the part of the company,[89] although there is some authority to the contrary;[90]

son, 21 S.W. 244, 93 Ky 654, 14 Ky L 611, 40 Am S R 211, 9 L.R. A. 310.
52 C J p 169 note 17.

71. N Y.—Murphy v New York Cent. R. Co, 66 Barb 125.

72. Tex.—Texas Trunk R Co v. Johnson, 25 S W. 417, 86 Tex 421, disapproving in part, Civ App, 25 S.W. 740—Texas, etc, R Co v. De Milley, 60 Tex 194

73. Ill.—Jacksonville Southeastern R Co. v Southworth, 25 N E 1093, 135 Ill. 250.

74. Ind.—Madison, etc., R. Co. v. Taffe, 37 Ind. 361.

75. Ind.—Madison, etc., R. Co. v. Taffe, supra.

76. Ill.—Chicago, etc, R. Co v Vipond, 72 N E 22, 212 Ill. 199.

77. Tex.—St. Louis, etc, R. Co v Andrews, 99 S W. 871, 44 Tex Civ. App 426.
52 C.J. p 169 note 26.

78. Mo.—Martin v Kansas City Southern R Co, App, 180 S W 1005

79. Tex.—St Louis, etc, R Co. v Andrews, 99 S W 871, 44 Tex Civ. App 426,

80. Kan.—Chicago, etc, R. Co v. Ransom, 44 P. 6, 56 Kan 559

81. Ind.—Pittsburgh, etc, R. Co v. Martin, 61 N E 229, 157 Ind 216.

82. N Y.—Connolly v New York Cent., etc, R Co, 55 N Y S 118, 35 App Div 609

83. N Y.—Connolly v. New York Cent, etc, R Co., supra

84. N Y.—Cox v Delaware, etc, Co, 112 N Y S 443, 128 App.Div. 363.

85. N Y.—Wood v New York Cent, etc, R Co, 70 N.Y. 195

86. Ill.—Gourley v. Chicago & E. I. R Co, 14 N.E 2d 842, 295 Ill App 160.

Stopping at less than prescribed distance
Evidence of custom of engineers to stop at signs erected closer than eight hundred feet from crossing was admissible on issue of negligence, notwithstanding statute requiring engineer to stop eight hundred feet from crossing.—Gourley v Chicago & E. I. R Co, supra.

87. Ill.—St Louis Nat Stock Yards v. Godfrey, 65 N E. 90, 198 Ill. 288
52 C.J. p 169 note 38.

88. N Y.—Cox v Delaware, etc., Co, 112 N.Y.S. 443, 122 App Div. 363
52 C J. p 169 note 39.

89. N.H.—Aldrich v Concord, etc, R. Co, 29 A 408, 67 N.H 250.
52 C J p 170 note 40

90. Kan.—St Louis, etc, R. Co v. Weaver, 11 P 408, 35 Kan. 412, 57 Am.R. 176.

nor is evidence of reconstruction in a different manner admissible as an admission of original negligent construction.[91] However, such evidence if properly limited to the purpose for which it is introduced is admissible to rebut evidence on the part of defendant that no repairs or alterations had been made after the accident,[92] or that the conditions causing the accident could not have been prevented,[93] or for the purpose of explaining other evidence.[94]

c. Weight and Sufficiency

General rules as to the weight and sufficiency of evidence apply in actions growing out of collisions or accidents to trains.

Rules governing the weight and sufficiency of evidence in civil actions generally, and particularly in negligence actions, have been applied in actions for property damage or personal injuries growing out of collisions or accidents to trains.[95] Accordingly, in order to authorize a verdict for plaintiff there must be some evidence tending to show negligence on the part of defendant and that such negligence was the cause of the injury complained of,[96] and freedom from negligence on the part of plaintiff contributing thereto, where that issue has been made.[97]

§ 705. —— Questions of Law and Fact

It is ordinarily for the jury to determine questions of fact where the evidence is conflicting or subject to different conclusions, such as questions as to defendant's negligence, plaintiff's contributory negligence, and proximate cause.

Questions of fact in actions for property damage or personal injuries growing out of collisions or accidents to trains are ordinarily for the jury to determine where there is any evidence reasonably tending to support the issues made by the pleadings,[98] or where the evidence is conflicting or different conclusions might reasonably be drawn therefrom.[99] On the other hand, if there is no evidence reasonably tending to support the issues,[1] or if the evidence is undisputed and of a character to admit of only one conclusion therefrom,[2] the question is one of law for the court to determine without the intervention of a jury. Thus, where there is no evidence produced to sustain the material allegations of the complaint, a nonsuit is properly granted,[3] or the court may direct a verdict for defendant;[4] but the failure to prove an immaterial averment is not ground for directing a verdict.[5]

Negligence. It is ordinarily a question for the jury whether, under all the facts and circumstances shown, defendant was guilty of negligence[6] or of noncompliance with statutory requirements.[7]

91. Colo.—Kansas Pac. R. Co. v. Miller, 2 Colo. 442.
52 C.J. p. 170 note 41.

92. Tex.—Fordyce v. Moore, Civ. App., 22 S.W. 235—Fordyce v. Withers, 20 S.W. 766, 1 Tex.Civ. App. 540.

93. Tex.—St. Louis, etc., R. Co. v. Johnston, 15 S.W. 104, 78 Tex. 536.

94. Tex.—St. Louis, etc., R. Co. v. Johnston, supra.
52 C.J. p. 170 note 44.

95. Ind.—Southern Indiana R. Co. v. Messick, 74 N.E. 1097, 35 Ind.App. 676.

Evidence held sufficient
To show that plaintiff was an invitee on defendant's pushcar.—Varley v. Consolidated Timber Co., 139 P.2d 584, 172 Or. 157.

96. Ind.—Southern Indiana R. Co. v. Messick, 74 N.E. 1097, 35 Ind. App. 676.
52 C.J. p. 170 note 47.

Evidence held sufficient
(1) In general.—Sweet v. Terminal R. Ass'n of St. Louis, Mo., 111 S.W. 2d 1000.

(2) To show negligence.
Ill.—Gourley v. Chicago & E. I. R. Co., 14 N.E.2d 842, 295 Ill.App. 160.
La.—Alford v. Louisiana & A. Ry. Co., App., 38 So.2d 258.
Mass.—Lane v. Boston & M. R. R., 192 N.E. 597, 288 Mass. 277.
Minn.—O'Connor v. Chicago, M., St. P. & P. Ry. Co., 251 N.W. 674, 190 Minn. 277, followed in 253 N.W. 670, 190 Minn. 290, certiorari denied Chicago, M., St. P. & P. R. Co. v. O'Connor, 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500.
Or.—Varley v. Consolidated Timber Co., 139 P.2d 584, 172 Or. 157.
52 C.J. p. 170 note 47 [a].

Evidence held insufficient
Mo.—Sweet v. Terminal R. Ass'n of St. Louis, App., 111 S.W.2d 1000.
N.C.—Brittain v. Atlantic & Y. Ry. Co., 9 S.E.2d 416, 217 N.C. 737.

97. N.Y.—Albert v. Sweet, 22 N.E. 762, 116 N.Y. 363.

Contributory negligence proved
Tenn.—Nashville, C. & St. L. Ry. Co. v. Skelton, 173 S.W.2d 948, 26 Tenn.App. 525.
52 C.J. p. 170 note 48 [b].

Contributory negligence disproved or not proved
Ill.—Gourley v. Chicago & E. I. R. Co., 14 N.E.2d 842, 295 Ill.App. 160.
La.—Alford v. Louisiana & A. Ry. Co., App., 38 So.2d 258.
Or.—Varley v. Consolidated Timber Co., 139 P.2d 584, 172 Or. 157.
52 C.J. p. 170 note 48 [a].

98. Mass.—Robertson v. Boston, etc., R. Co., 35 N.E. 775, 160 Mass. 191.
52 C.J. p. 171 note 61.

99. Ind.—Chicago Terminal Transfer R. Co. v. Vandenberg, 73 N.E. 990, 164 Ind. 470.
52 C.J. p. 171 note 62.

1. Pa.—Smith v. Philadelphia, etc., R. Co., 81 A. 297, 232 Pa. 323.

2. Ala.—Hines v. Wimbish, 85 So. 765, 204 Ala. 350.

3. Ga.—Heins v. Savannah, etc., R. Co., 40 S.E. 710, 114 Ga. 678.

4. U.S.—Pennsylvania R. Co. v. Martin, N.J., 111 F. 586, 49 C.C.A. 474, 55 L.R.A. 361.
Ill.—Brimmer v. Illinois Cent. R. Co., 101 Ill.App. 198.

5. Ill.—Chicago, etc., R. Co. v. Vipond, 112 Ill.App. 558, affirmed 72 N.E. 22, 212 Ill. 199.
52 C.J. p. 171 note 65.

6. Ind.—Evansville & T. H. R. Co. v. Hoffman, 105 N.E. 788, 56 Ind. App. 530.
Mass.—Lane v. Boston & M. R. R., 192 N.E. 597, 288 Mass. 277.
Mo.—Eubank v. Kansas City Terminal Ry. Co., 142 S.W.2d 19, 346 Mo. 426—Berry v. Kansas City Public Service Co., 108 S.W.2d 98, 341 Mo. 658.
52 C.J. p. 171 note 67.

7. Or.—Varley v. Consolidated Timber Co., 139 P.2d 584, 172 Or. 157.

Whether the negligence of defendant was wanton[8] or continued after he saw the peril, when in the exercise of reasonable care he might have avoided the collision,[9] is generally a question of fact for the jury However, the question of negligence should not be submitted to the jury where the evidence thereon is legally insufficient.[10]

Contributory negligence It is ordinarily a question for the jury whether plaintiff was guilty of a failure to exercise due care under the circumstances,[11] which contributed to the injury complained of;[12] nor will the fact that plaintiff's testimony is the only testimony in the case negativing contributory negligence affect the operation of this rule[13] Also for the jury is the question whether plaintiff, admittedly in the exercise of due care up to the time of discovering the danger, used due care thereafter in avoiding the collision[14] As between an employee of one railroad or street railroad and another railroad, it is generally a question of fact for the jury whether the employee observed rules and regulations,[15] and whether the employee's nonobservance of rules was a want of due care,[16] especially where the rule places no absolute duty on the engineer but makes the operation of the train under conditions stated a matter of his judgment and discretion.[17] Even where the violation of the rule constitutes a want of due care on the part of plaintiff, the question whether or not it contributed to the injury may be, and ordinarily is, a question of fact for the jury[18] The existence of facts and conditions bearing on the issue of plaintiff's due care is a question of fact for the jury where the evidence is conflicting[19]

Proximate cause. Whether defendant's negligence was the proximate cause of the injury complained of is ordinarily a question of fact for the jury.[20]

§ 706. —— Instructions

General rules as to instructions apply in actions growing out of collisions or accidents to trains.

Rules governing instructions in actions generally, have been applied in actions to recover for injuries received in a collision or accident to trains.[21] Thus, they have been applied to instructions as to the liability of a railroad company to a passenger on a car of a street railway company injured in a collision,[22] or to a passenger of an-

8. Ala.—Southern R Co v Harrison, 67 So 597, 191 Ala 436
52 C J p 171 note 68.

9. Ala.—Alabama Great Southern R Co v Hanbury, 49 So 467, 161 Ala 358
52 C J p 171 note 69.

10. Cal.—McNeil v East Bay St Rys, 32 P 2d 598, 220 Cal 591
52 C.J p 171 note 70.

11. Ill.—Chicago, etc., R Co. v Raidy, 67 N.E. 783, 203 Ill 310.
52 C J. p 171 note 72.

Contributory negligence held for jury

(1) Where question was whether employee on train acted as a man of ordinary prudence would have acted in jumping from the train under the circumstances.—Goolsbee v Texas & N. O R Co, Tex, 234 S W 2d 407

(2) Where question was whether motorman properly looked for train at crossing.—Lane v Boston & M R. R, 192 N E 597, 288 Mass 277

(3) Where there was evidence that motorman stopped as required by law before proceeding across crossing, and that locomotive appeared to be stopped and that if it was moving at all, it was moving slowly without warning by bell or whistle or otherwise.—Eubank v Kansas City Terminal Ry. Co., 142 S W 2d 19, 346 Mo 436

(4) Other cases see 52 C.J. p 171 note 72 [a–k].

12. Ala.—Southern R Co v. Jones, 39 So 118, 143 Ala 328.
52 C.J p 172 note 73.

13. Ky.—Louisville, etc, R Co. v. Galloway, 294 S W 135, 219 Ky 595

14. Kan.—King v. Missouri Pac R. Co, 156 P. 728, 97 Kan. 769

15. Mass.—Lane v. Boston & M R R, 192 N E 597, 288 Mass. 277.

Stopping of trolley car

Question whether motorman observed regulation of department of public utilities by stopping car within required distance from crossing and again at point clear of railroad track before crossing was held for jury in his action for injuries.—Lane v Boston & M. R. R., supra.

16. Ill.—Gourley v. Chicago & E. I R Co, 14 N.E.2d 842, 295 Ill.App. 160
52 C J p 172 note 76

17. Ill.—Lake Shore, etc, R. Co. v. Parker, 23 N E. 237, 131 Ill 557

18. Ill.—Lake Shore, etc., R. Co v. Parker, supra
S.C.—Edwards v Atlantic Coast Line R Co, 146 S E 97, 148 S.C. 266.

Last clear chance

Question whether engineer could have stopped after he saw or should have seen the street car on the railroad track in apparently inextricable danger, and should have done so, was for jury.—Eubank v. Kansas City Terminal Ry Co, 142 S.W.2d 19, 346 Mo 436.

19. U S.—Chicago, etc, R. Co. v Chambers, Minn., 68 F. 148, 15 C. C A 327
52 C J. p 172 note 80

Whether motorman was sufficiently warned by flasher lights at crossing, notwithstanding engineer's failure to give warning of intention to cross intersection, was question for jury.—Eubank v. Kansas City Terminal Ry. Co, 142 S W 2d 19, 346 Mo. 436

20. Mo.—Clifford v Pitcairn, 131 S W 2d 508, 345 Mo. 60
Tex.—Goolsbee v. Texas & N. O. R Co, 234 S.W.2d 407.
52 C J. p 172 note 82

21. Mo.—Berry v. Kansas City Public Service Co, 108 S.W 2d 98, 341 Mo. 658.

22. Mont.—Norton v. Great Northern R Co, 254 P. 165, 78 Mont. 273
52 C J. p 172 note 86

Instruction held erroneous

That verdict must be in favor of railroad if accident was caused by failure of street car motorman to observe statute requiring him to stop street car and go forward on foot to track to ascertain if train was approaching.—Berry v. Kansas City Public Service Co., 108 S.W 2d 98, 341 Mo 658.

other railroad waiting at a station and injured in a panic resulting from a collision,[23] or to an employee of another railroad,[24] or to the separate liability of two railroads responsible for the collision.[25] So also, these rules have been applied in the giving of instructions on various issues in such cases,[26] as, for example, the degree of care required to be exercised under certain conditions;[27] the alleged failure of the engineer to use ordinary care in approaching a crossing,[28] or after seeing a street car,[29] or other train,[30] in danger; his failure to run his train within the proper speed limit[31] or to stop it before crossing;[32] his failure to give warning while backing his train[33] or to have the headlight lit at night,[34] and his failure to observe rules and warnings.[35]

§ 707. —— Verdict and Findings

General rules as to verdicts and findings apply in actions for injuries resulting from collisions and accidents to trains.

General rules relating to verdicts and findings have been applied in actions to recover for injuries resulting from railroad collisions and accidents to trains.[36] As in cases of a general verdict with special findings, ordinarily all the presumptions are in favor of the general verdict, and if the two can be reconciled judgment must follow the general verdict.[37]

§ 708. —— Appeal and Error

The rules governing appellate review of actions to recover for property damage or personal injuries received in collisions or accidents to trains, as well as of other actions, are discussed in Appeal and Error.

Examine Pocket Parts for later cases.

§ 709. —— Damages

In actions for damages arising out of collisions or accidents to trains, the amount recoverable ordinarily is limited to compensation for injuries or loss which is the natural and probable consequence of the negligence alleged.

In actions to recover damages for injuries received in collisions or accidents to trains, the amount recoverable ordinarily is limited to compensation for injuries or loss which is the natural and probable consequence of the negligence alleged.[38]

Exemplary damages may be allowed in case of gross negligence or wanton or willful injury,[39] but not for error in judgment[40] or mere negligence.[41]

23. Ind.—Cincinnati, etc., R. Co. v. Acrea, 82 N.E. 1009, 42 Ind.App. 127.
52 C.J. p. 173 note 87.

24. Tex.—El Paso, etc., R. Co. v. Murtle, 108 S.W. 998, 49 Tex.Civ.App. 278.
52 C.J. p. 173 note 88.

Instruction held not erroneous
Mo.—Eubank v. Kansas City Terminal Ry. Co., 142 S.W.2d 19, 346 Mo. 436.

25. Tex.—Houston R. Co. v. Ross, Civ.App., 28 S.W. 254.
52 C.J. p. 173 note 89.

26. Mo.—Clifford v. Pitcairn, 131 S.W.2d 508, 345 Mo. 60.

Particular issues
(1) Application of humanitarian doctrine.—Clifford v. Pitcairn, supra.

(2) Alleged failure of trainmen to set warnings when making an unscheduled stop on the main track.—Smithson v. Chicago, etc., R. Co., 73 N.W. 853, 71 Minn. 216—52 C.J. p. 174 note 99.

(3) Failure of motorman to use due care before going on a railroad crossing.—Baltimore, etc., R. Co. v. State, 64 A. 304, 104 Md. 76—52 C.J. p. 174 note 1.

(4) Agency of the towerman at a crossing.—Chicago, etc., R. Co. v. Snyder, 21 N.E. 520, 128 Ill. 655—52 C.J. p. 174 note 2.

(5) Duties of towerman in time of emergency.—Sandberg v. Great Northern R. Co., 220 N.W. 949, 175 Minn. 280, 283—52 C.J. p. 174 note 3.

(6) Elements of damages recoverable.—Duke v. Missouri Pac. R. Co., 12 S.W. 636, 99 Mo. 347—52 C.J. p. 174 note 4.

27. Ill.—Gourley v. Chicago & E. I. R. Co., 14 N.E.2d 842, 295 Ill.App. 160.

Instructions held not erroneous
Ill.—Gourley v. Chicago & E. I. R. Co., supra.

28. Kan.—Missouri, etc., R. Co. v. Missouri Pac. R. Co., 175 P. 97, 103 Kan. 1.
52 C.J. p. 173 note 91.

Instruction held misleading
Mo.—Berry v. Kansas City Public Service Co., 108 S.W.2d 98, 341 Mo. 658.

29. Ala.—Billingsley v. Nashville, etc., R. Co., 58 So. 433, 177 Ala. 342.
52 C.J. p. 173 note 92.

30. Ala.—Alabama Great Southern R. Co. v. Hanbury, 49 So. 467, 161 Ala. 358.
52 C.J. p. 173 note 93.

31. U.S.—Philadelphia, etc., R. Co. v. Baker, Pa., 155 F. 407, 84 C.C.A. 86.
52 C.J. p. 173 note 94.

32. Ala.—Birmingham Mineral R. Co. v. Jacobs, 13 So. 408, 101 Ala. 149.
52 C.J. p. 173 note 95.

33. Tex.—Gulf, etc., R. Co. v. Pendry, 29 S.W. 1038, 87 Tex. 553, 47 Am.S.R. 125.
52 C.J. p. 173 note 96.

34. Ala.—Southern R. Co. v. Bonner, 37 So. 702, 141 Ala. 517.
52 C.J. p. 173 note 97.

35. Utah.—Gilbourne v. Oregon Short Line R. Co., 114 P. 532, 39 Utah 80.
52 C.J. p. 174 note 98.

36. Ind.—Pittsburgh, etc., R. Co. v. Spencer, 98 Ind. 186.
Pa.—Lewis v. New York Cent. R. Co., Com.Pl., 21 Erie Co. 24.
52 C.J. p. 174 note 7.

37. Iowa.—Cahill v. Chicago, etc., R. Co., 121 N.W. 553, 143 Iowa 152.
52 C.J. p. 174 note 9.

38. Ark.—St. Louis Southwestern R. Co. v. Henson, 32 S.W. 1079, 61 Ark. 302.
52 C.J. p. 170 note 53.
Compensatory damages generally see Damages §§ 17–100.

39. Ky.—Chesapeake, etc., R. Co. v. John, 159 S.W. 822, 155 Ky. 264, 50 L.R.A.,N.S., 853.
52 C.J. p. 170 note 55.
Exemplary damages generally see Damages §§ 117–127.

40. Colo.—Kansas Pac. R. Co. v. Miller, 2 Colo. 442.

41. Ark.—St. Louis, etc., R. Co. v. Dysart, 116 S.W. 224, 89 Ark. 261.

The estimate of exemplary damages, when allowed, may be based on not only the particular acts of negligence which directly produced the injury,[42] but also on the prior negligence which led up to and produced the occasion for the negligence which directly caused the injury complained of.[43]

XVII. ACCIDENTS AT CROSSINGS

A. CARE REQUIRED AND LIABILITY IN GENERAL

§ 710. Rights and Duties at Crossings Generally

In general, the liability of a railroad company for injuries resulting from an accident at a crossing depends on whether there was negligence authorizing a recovery, or contributory negligence preventing a recovery, in the light of the particular facts and circumstances.

It has been said that crossing accidents are sui generis in the field of negligence, bringing into sharp focus the reciprocal duties of those seeking to use the intersection, nonobservance of which may result in disaster.[44] Railroad grade crossings in particular, it has been judicially observed, are more or less dangerous.[45] Each grade crossing case depends on its own facts and circumstances,[46] and, in the case of a collision between a train and a motor vehicle, liability must be determined not on the basis of whether the train struck the vehicle, or whether the vehicle struck the train,[47] but on the basis of whether, under all the facts, there was negligence authorizing recovery or contributory negligence preventing recovery.[48] The legal principles applicable to a crossing accident between a railway car or train and a traveler are not determined by the motive power involved, but by the physical surroundings.[49] The railroad company is not responsible for the inherent danger arising from the existence of a railroad grade crossing unless it unnecessarily causes or increases it by some unlawful act or willful or negligent omission of duty.[50] On the other hand, the railroad does not necessarily escape liability by the fact that the accident was unforeseen and that many persons have passed over the same spot without injury.[51]

Failure to attend injured person. Failure of the railroad employees to stop the train and attend to a person struck thereby at a crossing authorizes no recovery against the railroad, unless the employees were aware of such person's presence on the track before or after the accident.[52]

§ 711. —— Care Required of Railroad in General

The railroad must exercise care commensurate with the danger involved at a crossing, and must comply with statutory and municipal regulations; but it is not an insurer of the safety of persons approaching the tracks.

While railroads are not insurers of the safety of persons approaching their tracks,[53] a railroad company's employees in charge of a train should use all ordinary and reasonable care to avoid injury to a traveler on the highway desiring to cross the track;[54] and a railroad company is under a duty

La.—Rutherford v. Shreveport, etc., R. Co., 6 So. 644, 41 La. Ann. 793.

42. Ala.—Kansas City, etc., R. Co. v. Sanders, 13 So. 57, 98 Ala. 293.

43. Ala.—Kansas City, etc., R. Co. v. Sanders, supra.

44. N.C.—Henderson v. Powell, 19 S.E.2d 876, 221 N.C. 239.

Duties of automobile and train operators.

Where train and automobile approached public crossing at approximately the same time, certain duties were imposed on operators of automobile and train, and the resulting rights, duties, and obligations were required to be ascertained on the basis of that primary fact.—Truelove v. Durham & S. Ry. Co., 24 S.E.2d 537, 222 N.C. 704.

45. N.C.—K. B. Johnson & Sons v. Southern Ry. Co., 199 S.E. 704, 214 N.C. 484.

46. U.S.—Pennsylvania R. Co. v. Ackerson, C.A.Mich., 183 F.2d 662.

47. Ind.—New York Cent. R. Co. v. Pinnell, 40 N.E.2d 988, 112 Ind. App. 116.

48. Ind.—New York Cent. R. Co. v. Pinnell, supra.

Negligence per se.

(1) The violation of a duty required of a railroad at a public crossing is negligence per se.—Callaway v. Cox, 40 S.E.2d 578, 74 Ga. App. 555.

(2) In action against railroad company to recover damages for personal injuries sustained by guest passenger in automobile as result of collision between automobile and train, where no statute or city ordinance had been violated, railroad was not guilty of negligence per se.—Watson v. Northern Pac. R. Co., Wash., 223 P.2d 1057.

49. W.Va.—Casto v. Charleston Transit Co., 200 S.E. 841, 120 W. Va. 676.

50. N.C.—K. B. Johnson & Sons v. Southern Ry. Co., 199 S.E. 704, 214 N.C. 484.

51. La.—Tharpe v. Sibley Lake Bisteneau & S. Ry. Co., App., 144 So. 274.

52. Ga.—Southern Ry. Co. v. Kelley, 182 S.E. 631, 52 Ga. App. 137.

53. Ind.—New York Cent. R. Co. v. Casey, 14 N.E.2d 714, 214 Ind. 464, followed in Dyer v. New York Cent. R. Co., 14 N.E.2d 719, 214 Ind. 695, rehearing denied 17 N.E.2d 839, 214 Ind. 695.

Fact of collision.

Although the evidence would indicate with reasonable certainty that death was caused by a collision with a train, even at a railroad crossing, this fact alone does not authorize a recovery from railroad.—Louisville & N. R. Co. v. Adams' Adm'x, 190 S.W.2d 690, 301 Ky. 7.

54. Fla.—Roberts v. Powell, 187 So. 766, 137 Fla. 159.

Care required in running or operating at crossings see infra § 732.

to take adequate measures for the safety of the traveling public at a railroad crossing, although no particular safety device has been specified by statute or by official order of a governmental agency.[55] The speed of modern transportation carries with it concomitant perils and corresponding obligations to the public to exercise the higher degree of care necessary for the protection of persons and property on, or in dangerous proximity to, the railroad tracks.[56] The measure of duty owed by the railroad company is fixed by the law of the land,[57] and the private rules of the company cannot be set up by an injured person for the purpose of founding a substantive cause of action based on a breach thereof.[58]

The care and precautions taken by a railroad at a crossing must be commensurate with the danger involved.[59] Where a crossing is unusually dangerous, the railroad must exercise such reasonable care as common prudence dictates,[60] and may be under a duty to use exceptional means to warn and avoid injuring travelers,[61] the character of the means depending on what would be reasonably necessary under the facts of the particular situation.[62] The test of whether a railroad crossing is unusually dangerous has been said to be the ability of the traveler to observe the approach of a train from the direction in which it is coming;[63] and the fact that the amount of travel over a crossing at the time of an accident was extremely light does not, in itself, necessarily remove the crossing from the category of unusually hazardous crossings.[64]

Statutory or other governmental regulations. The duties of a railroad company with respect to crossings are frequently made the subject of statutory or other regulation,[65] and some regulations prescribing the duty of a railroad at a crossing are applicable alike to public roads or private ways.[66] While precautions in addition to statutory requirements may be required at extrahazardous or peculiarly and unusually dangerous crossings,[67] there is no hard and fast rule in railroad crossing cases for determining whether statutory minima satisfy the requirements of due care or whether additional precautions are required,[68] and each case should be determined with respect to its own facts and circumstances.[69] Thus, in some situations due care has been held not to require the railroad to exercise any precautions at the crossing in addition to those prescribed by the regulations,[70] whereas in other situations such regulations have been held not to be the sole standard for determining the question of whether due care has been observed by the railroad.[71] Persons crossing the track of a railroad company at a public crossing are entitled to the protection of the statutes regulating the approach of trains to such a crossing, without regard to the manner in which the road or highway was established,[72] but it is essential that the public character of the crossing be established.[73]

§ 712. —— Care Required at Public Crossings

Railroads are required to exercise reasonable or ordinary care at public crossings in the light of the surroundings and the extent of user, and commensurate with the danger involved.

Railroad companies must exercise due care at

55. Kan.—Johnson v. Union Pac. R. Co., 143 P.2d 630, 157 Kan. 633.

56. Ark.—Missouri Pac. R. Co. v. Nelson, 115 S.W.2d 872, 195 Ark. 883.

57. Ga.—Foster v. Southern Ry. Co., 157 S.E. 371, 42 Ga. App. 830.

58. Ga.—Foster v. Southern Ry. Co., supra.

59. Ill.—W. C. Norris Mfg. v. Baltimore & O. R. Co., 77 N.E.2d 434, 333 Ill. App. 247.
Me.—Johnson v. Maine Cent. R. Co., 38 A.2d 884, 141 Me. 38.

60. Okl.—Kansas City Southern Ry. Co. v. Ware, 117 P.2d 123, 189 Okl. 345.

61. Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Hare's Adm'x, 178 S.W.2d 835, 297 Ky. 5.

Protection during rush hours
A railroad had duty to employ extraordinary means to protect crossing at rush hours occurring at change of shifts of workmen, but was not obligated to do so after rush hours were over.—Domite v. Thompson, La.App., 9 So.2d 55.

62. Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Hare's Adm'x, 178 S.W.2d 835, 297 Ky. 5.

63. Ky.—Southern Ry. Co. v. Stanaford Adm'x, 120 S.W.2d 768, 275 Ky. 78.

64. Or.—Doty v. Southern Pac. Co., 207 P.2d 131, 186 Or. 308.

65. U.S.—Lowry v. Seaboard Air-line R. Co., C.A.Fla., 171 F.2d 625.
Tenn.—Southern Ry. Co. v. Noah, 176 S.W.2d 826, 180 Tenn. 532.
52 C.J. p. 178 notes 61, 62.

66. Ga.—Western & A. R. R. v. Gray, 157 S.E. 482, 172 Ga. 286, appeal dismissed 51 S.Ct. 654, 283 U.S. 811, 75 L.Ed. 1428.

67. Minn.—Leisy v. Northern Pac. Ry. Co., 40 N.W.2d 626, 230 Minn. 61.

68. Minn.—Leisy v. Northern Pac. Ry. Co., supra.

69. Minn.—Leisy v. Northern Pac. Ry. Co., supra.

70. Minn.—Leisy v. Northern Pac. Ry. Co., supra.
52 C.J. p. 178 note 61.

Rural crossing
Compliance by railroad with statutory requirements satisfies the requirements of due care with respect to a grade crossing in the country which is used by few persons each day and at which there is no interference with hearing and sight.—Leisy v. Northern Pac. Ry. Co., supra.

71. Minn.—**Corpus Juris cited in** Licha v. Northern Pac. Ry. Co., 276 N.W. 813, 815, 201 Minn. 427.
52 C.J. p. 178 note 60.

72. Ga.—Atkinson v. Fountain, 73 S.E. 534, 10 Ga. App. 307.
52 C.J. p. 178 note 62.

73. N.J.—Olsen v. Erie R. Co., 124 A. 367, 99 N.J. Law 485.
52 C.J. p. 178 note 63.

public crossings,[74] and are bound, even in the absence of specific statutory requirements, to exercise reasonable[75] or ordinary[76] care, dependent on the situation and surroundings of the crossing and the extent of user[77] and commensurate with the danger involved.[78] A different case is made on a claim of primary negligence if the accident occurs at a public crossing rather than at a private one,[79] and the character of a crossing as a public or a private crossing is to be determined by the nature of its use rather than the quantum.[80] The mere fact that a number of persons are in the habit of using a certain place as a crossing where there is no public right of passage does not constitute such place a public crossing,[81] even though the railroad company acquiesces in such use.[82]

A railroad has no right to expect a clear track at a public crossing,[83] it is bound to take notice that the public uses the crossing and that a failure to exercise care for the safety of travelers may place them in great danger.[84] Where there is a path open to, and adversely used by, the public for such a period of time as will vest in members of the public the right to use it as a public way by prescription, one on such way is entitled to the same care from the railroad as in the case of one on a highway.[85]

Operator of private railroad running across the thoroughfares of a city must, it has been held, employ extraordinary care.[86]

74. U.S.—Contino v. Baltimore & A.R. Co., C.A.Md., 178 F.2d 521.
Minn.—Leisy v. Northern Pac. Ry. Co., 40 N.W.2d 626, 230 Minn. 61.

One of the highest obligations of railroad operators is to protect the public at highway crossings.—Inkret v. Chicago, M., St. P. & P. R. Co., 86 P.2d 12, 107 Mont. 394.

75. Cal.—Peri v. Los Angeles Junction Ry., 137 P.2d 441, 22 Cal.2d 111.
Fla.—Loftin v. Dagley, 13 So.2d 311, 152 Fla. 831.
Ga.—**Corpus Juris quoted in** Thompson v. Powell, 5 S.E.2d 260, 264, 60 Ga.App. 796.—**Corpus Juris quoted in** Pollard v. Savage, 190 S.E. 423, 425, 55 Ga.App. 470.
Utah.—Olson v. Denver & R.G.W.R. Co., 98 P.2d 944, 98 Utah 208.
52 C.J. p. 175 note 28.

76. Cal.—Peri v. Los Angeles Junction Ry., 137 P.2d 441, 22 Cal.2d 111.
Fla.—Loftin v. Dagley, 13 So.2d 311, 152 Fla. 831.
Ga.—**Corpus Juris quoted in** Thompson v. Powell, 5 S.E.2d 260, 264, 60 Ga.App. 796.—**Corpus Juris quoted in** Pollard v. Savage, 190 S.E. 423, 425, 55 Ga.App. 470.—**Corpus Juris cited in** Seaboard Air Line Ry. Co. v. Benton, 159 S.E. 717, 719, 43 Ga.App. 495, reversed on other grounds 165 S.E. 593, 175 Ga. 491, conformed to 166 S.E. 219, 45 Ga.App. 832.
Miss.—Bon Homie & H.S.R. Co. v. Ferguson, 134 So. 146, 160 Miss. 433.
Mo.—Crockett v. City of Mexico, 77 S.W.2d 464, 336 Mo. 145.
Va.—Chesapeake & O. R. Co. v. Jacobs, 183 S.E. 221, 166 Va. 11.
52 C.J. p. 175 note 29.

77. Ga.—**Corpus Juris quoted in** Thompson v. Powell, 5 S.E.2d 260, 264, 60 Ga.App. 769.—**Corpus Juris quoted in** Pollard v. Savage, 190 S.E. 423, 425, 55 Ga.App. 470.
52 C.J. p. 175 note 30.

Ordinary use

Evidence that railroad permitted sand and gravel which were being used in construction to become spread over street, so that child's roller skates became caught therein and child fell under approaching train, did not authorize finding of actionable negligence rendering railroad liable for injuries to child, since railroad was bound only to keep streets safe for ordinary use.—Halpin v. New York Rys. Corp., 294 N.Y.S. 946, 250 App.Div. 613, affirmed 12 N.E.2d 568, 276 N.Y. 545.

Sufficient opportunity to observe train

If an oncoming train may be observed for a distance of a thousand feet by an approaching automobile when it is one hundred feet from known crossing, motorist as matter of law is afforded ample opportunity to observe ordinary care in approaching the crossing to bring his automobile safely to a stop before reaching crossing.—Jollay v. Pennsylvania R. Co., Ohio App., 38 N.E.2d 204.

78. Ga.—**Corpus Juris quoted in** Thompson v. Powell, 5 S.E.2d 260, 264, 60 Ga.App. 769.—**Corpus Juris quoted in** Pollard v. Savage, 190 S.E. 423, 425, 55 Ga.App. 470.
Okl.—St. Louis-San Francisco R. Co. v. Simmons, 242 P. 151, 116 Okl. 126.

Motorist stopping on track

Fact that motorist, in order to allow fire truck to pass, stopped on tracks did not increase duty of railroad company to him or his guest.—Haller v. Pennsylvania R. Co., 159 A. 10, 306 Pa. 98.

79. Ala.—Central of Georgia Ry. Co. v. Hardman, 147 So. 670, 226 Ala. 515.
Wis.—Langer v. Chicago, M., St. P. & P. Ry. Co., 265 N.W. 851, 220 Wis. 571.

80. Ala.—Southern R. Co. v. Williams, 10 So.2d 273, 243 Ala. 429.—Model City Lumber Co. v. Southern Ry. Co., 34 So.2d 862, 33 Ala. App. 425, certiorari denied 34 So.2d 865, 250 Ala. 444.—Alabama Great Southern R. Co. v. Campbell, 26 So.2d 124, 32 Ala.App. 348.

Turnpike road was held to be a public highway with respect to liability of railroad to minor who was injured at turnpike railroad crossing.—Miller v. Pennsylvania Seashore Lines, 187 A. 332, 117 N.J.Law 152.

Country road used by few families

A railroad crossing on a narrow country road which was used by a few families but was not used regularly by the public was held to be a private crossing.—Deitch v. Boston & M.R.R., 6 A.2d 767, 90 N.H. 276.

81. R.I.—Boday v. New York, N.H. & H.R. Co., 165 A. 448, 53 R.I. 207.
52 C.J. p. 177 note 56.

Road entirely within right of way

Road which was entirely within right of way lines and which was used by farmers with permission of railroad in connection with depot was held not public highway.—Langer v. Chicago, M., St. P. & P. Ry. Co., 265 N.W. 851, 220 Wis. 571.

82. N.Y.—Edwards v. New York Cent., etc., R. Co., 155 N.Y.S. 176, 169 App.Div. 686, affirmed 115 N.E. 1038, 220 N.Y. 611.
52 C.J. p. 178 note 57.
Care required at crossings by recognition or invitation see infra § 714.

83. Mo.—Hoops v. Thompson, 212 S.W.2d 730, 357 Mo. 1160.

84. Ill.—Chapman v. Baltimore & O.R. Co., 92 N.E.2d 466, 340 Ill.App. 475.

85. N.J.—Drelich v. Erie R. Co., 103 A. 189, 91 N.J.Law 600.

86. Cal.—Wilson v. Cunningham, 3 Cal. 241, 58 Am.D. 407.

§ 713. —— Care Required at Private Crossings

A railroad company must exercise reasonable or ordinary care at a private crossing, at least with respect to persons authorized to use the crossing; but there has been held to be no obligation on the company to protect such a crossing for the benefit of the general public.

With respect to persons rightfully using a private crossing,[87] as where they are within the number or class authorized to use it,[88] the duty of the railroad company is similar to its duty as to users of public crossings, and as to them, it must exercise reasonable[89] or ordinary[90] care, commensurate with the danger of the particular situation.[91] Thus, a railroad which has negligently constructed a private crossing may be liable for injuries sustained where an ordinarily prudent person would have apprehended that the probable result of its negligent construction would be injury to persons lawfully using it.[92]

According to some cases the liability of the railroad for failure to exercise reasonable care at a private crossing does not extend to instances in which the injury is sustained by one not entitled or invited to use such crossing,[93] notwithstanding the use is permitted by the railroad company,[94] and, thus, it has been held that a railroad owes no duty to repair a defective farm crossing over a railroad to anyone but the owner of the farm, his family, and servants.[95] Inasmuch as private crossings are constructed for the accommodation of individuals, there is ordinarily no obligation on a railroad to protect such crossings for the benefit of the public,[96] or to afford special crossing protection at such place.[97]

A landowner for whose benefit a private crossing is maintained cannot, by granting to another permission to use it for such other's benefit or business, impose a liability on the railroad company in respect of such use;[98] nor in such case does the invitation of the railroad company include user not contemplated when the right to such crossing was reserved.[99] Where the right of the person injured to be on a private crossing is derived through the right of a business concern with which he is doing business or by which he is employed, the duty of the railroad to the injured person ordinarily is measured by its obligation to the concern,[1] at least where there is nothing in the contract under which the crossing was established and maintained whereby any relationship of principal and agent was created as between the railroad and the concern.[2]

Mutual advantage to the railroad company and to the person for whom the crossing is constructed and maintained is not necessary, according to some cases, in order that an invitation may be implied,[3]

87. Ga.—Western & A. R. R. v. Michael, 162 S E 294, 44 Ga App 503. 52 C J p 175 note 34.

Use by general public unnecessary

In order to impose a duty of care on the railroad, it is not essential that the use of a private way or crossing be by the general public but it is sufficient if the use is by the people of a certain neighborhood or community or certain designated persons.—Louisville & N R Co. v. Patterson, 42 S E 2d 163, 75 Ga.App. 1.

88. N.J.—Gifford v. Pennsylvania R. Co., 196 A. 679, 119 N.J Law 397. 52 C.J. p 175 note 35.

Subcontractor

Permission given road contractor to use private crossing extended to subcontractor, with respect to question of negligence of railroad in crossing accident—Erie R. Co. v. Firth, C.C.A N.J., 42 F.2d 35, certiorari denied 51 S Ct. 78, 282 U.S. 872, 75 L Ed 771.

89. N.Y.—Dandino v. New York Cent R Co, 288 N.Y.S. 129, 247 App Div. 570, reversed on other grounds 6 N.E 2d 397, 273 N.Y. 111. 52 C J. p 175 note 36

90. Ga.—Vaughn v. Louisville & N R. Co, 185 S E 145, 53 Ga App 135—Western & A. R. R. v. Michael, 162 S E 294, 44 Ga.App. 503 52 C J. p 175 note 37.

91. Pa.—Tomlinson v. Northwestern Electric Service Co. of Pennsylvania, 151 A. 680, 301 Pa 72.

Negligence not shown

A private railroad crossing ten feet in width was sufficient to enable an automobile to traverse it if properly driven and maintenance of the crossing did not constitute negligence.—Alabama Great Southern R Co v. Martin, 39 So.2d 501, 205 Miss 851.

92. N.Y.—Harriman v. New York, C & St L R. Co., 171 N.E. 686, 253 N Y 398.

93. Mo.—**Corpus Juris cited in** English v. Wabash Ry Co., 108 S.W. 2d 51, 58, 341 Mo. 550.

Va.—Chesapeake & O. Ry. Co v. Faison, 52 S E 2d 865, 189 Va 341.

52 C.J p 175 note 38.

94. Ill.—Cunningham v. Toledo, etc, R. Co., 103 N.E 594, 260 Ill. 589—Atchison, etc, R. Co v. Parsons, 42 Ill.App. 93.

95. Mo.—Bryant v. Missouri Pac R Co, 168 S.W. 228, 181 Mo.App. 189, 194.

45 C J. p 802 note 20.

96. N.H.—Peppin v. Boston & M R. R., 169 A. 877, 86 N.H. 395.

97. N H.—Deitch v. Boston & M. R R, 6 A 2d 767, 90 N H. 276

98. Mass.—Neofotistos v. Trustees of N. Y, N. H & H. R Co, 96 N E 2d 167—Sypher v. Director Gen of Railroads, 137 N.E 916, 243 Mass 568

99. Mass.—Berube v New York, etc, R Co, 125 N E. 629, 234 Mass. 415. 52 C J p 176 note 41

Waiver of lease provision

Where railroad leased premises adjacent to private crossing to lessee, and lease provided that "lessee agrees to use said premises only for the location of a camp and not to place or allow to be placed on any part of the demised premises any advertisements, signs or posters without written consent of lessor," provision restricting use of premises including right to travel over crossing was for benefit of railroad which could waive it—O'Brien v Boston & M R. R, 91 N E.2d 218, 325 Mass. 451.

1. Mass.—O'Brien v. Boston, & M. R. R, supra.

N H.—Peppin v. Boston & M. R. R, 169 A. 877, 86 N.H 395

2. N.H.—Peppin v. Boston & M. R. R, supra.

3. Ind.—Lake Erie, etc., R. Co v. Fleming, 109 N E. 753, 183 Ind. 511.

but the invitation may be implied from the fact of advantage alone to such person[4] However, there is authority for the view that some invitation on the part of the railroad company is necessary,[5] and that a private crossing cannot be created except by contract, express or implied, between the railroad and some one on whom a right to cross the tracks is conferred[6] It has been held that the railroad company is not liable as it might be in respect of a public crossing where the accident occurred at a private crossing constructed without the consent of the railroad company.[7]

§ 714. —— Care Required at Crossings by Recognition or Invitation

Trainmen are under a duty to use reasonable or ordinary care for the safety of persons crossing the tracks at a place which the railroad company has recognized as a public crossing or has invited or permitted the public to use as such for an extended period.

Where acts on the part of the railroad company amount to a recognition of the place as a public crossing, or to an invitation to the public to use it as such,[8] or where with the railroad's consent the public has used the place as a crossing for an extended period,[9] the duty of the railroad is controlled by rules analogous to those applicable to public crossings Thus, the train operator is usually required to anticipate the presence of persons and vehicles on such a crossing[10] and to use reasonable[11] or ordinary[12] care for the safety of persons using such a crossing.

In the absence of an express invitation to use a crossing it must appear that the travelers were impliedly invited to use the crossing by some allurement or inducement held out by the railroad,[13] and

4 Ind —Lake Erie, etc., R Co. v Fleming, supra.

5. Ark —Chicago, R I & P Ry Co v McCauley, 112 S W 2d 625, 196 Ark 1177
Mass —Murphy v Avery Chemical Co, 133 N E. 92, 240 Mass. 150

6. Ky —Chesapeake & O. R Co v Cole, 136 S W 2d 5, 281 Ky 381.

7. N J —Staub v Public Service R Co, 117 A 48, 97 N.J Law 297

8. Ala —**Corpus Juris cited in** Southern Ry Co v Williams, 10 So 2d 273, 275, 243 Ala 429
R I —Lemieux v Leonard Const Co, 56 A 2d 189, 73 R I 338, reargument denied 58 A.2d 625, 73 R I 338.
W Va —**Corpus Juris cited in** Stike v Virginian Ry Co, 174 S E. 418, 419, 114 W Va 832.
52 C.J. p 176 note 46.

Crossing maintained by railroad for public convenience is an invitation to the public having occasion to use it.—Southern Ry Co v. Williams, 10 So 2d 273, 243 Ala 429

Statutes held not to prohibit permissive crossing

Statutes forbidding public from walking along railway tracks not laid in streets do not prohibit company from permitting public to cross tracks at a place which is not a street but which becomes a way open to public use by virtue of such permission, in which event the company must exercise reasonable care to protect safety of public —Zambardi v. South Brooklyn Ry Co, 24 N E 2d 312, 281 N.Y. 516.

9. U S —Tompkins v. Erie R. Co, C C.A.N.Y., 98 F 2d 49.
Ga —Louisville & N R Co v Patterson, 42 S E 2d 163, 75 Ga App 1 —Southern Ry. Co v Slaton, 154 S E 718, 41 Ga.App 759.
Okl —Midland Valley R Co v Townes, 64 P 2d 712, 179 Okl 136
Or —Powers v Spokane, P. & S Ry Co, 187 P.2d 960, 182 Or 468
Pa —Echon v. Pennsylvania R Co, 76 A 2d 175, 365 Pa 529—Figard v Pennsylvania R. Co, 65 A 2d 411, 361 Pa 380
Va —Chesapeake & O. Ry Co v Faison, 52 S E 2d 865, 189 Va 341
52 C J p 177 note 47

10. Ga —Central of Ga Ry Co v Sharpe, 62 S E 2d 427, 83 Ga App 12—Louisville & N R Co v Patterson, 42 S E 2d 163, 75 Ga App 1—Wise v Atlanta & W. P. R Co, 6 S E 2d 135, 61 Ga App 372, affirmed Atlanta & W P R. Co v. Wise, 9 S E 2d 63, 190 Ga 254—Southern Ry Co v Parkman, 5 S E 2d 685, 61 Ga App 62
Mich —Burt v Detroit, G H & M. Ry Co., 247 N W 157, 262 Mich 204
S C —Hayes v Atlantic Coast Line R Co., 13 S E 2d 921, 196 S C 386
52 C J p 177 note 49

11. U S —Spevak v. Pennsylvania R Co, C.A Pa., 173 F 2d 962
Mich —Burt v Detroit, G. H. & M. Ry Co, 247 N W 157, 262 Mich 204
N Y —Zambardi v South Brooklyn Ry Co, 24 N E 2d 312, 281 N Y. 516
Pa —Echon v Pennsylvania R. Co, 76 A 2d 175, 365 Pa. 529—Figard v Pennsylvania R. Co, 65 A 2d 411, 361 Pa 380
52 C J. p 177 note 50.

12. Ga —Western & A. R Co. v Michael, 165 S.E 37, 175 Ga 1—Louisville & N R Co. v Patterson, 42 S E 2d 163, 75 Ga App 1—Wise v Atlanta & W P. R Co, 6 S E 2d 135, 61 Ga.App 372, affirmed Atlanta & W P R. Co. v. Wise, 9 S E 2d 63, 190 Ga 254—Southern Ry Co v Parkman, 5 S E 2d 685, 61 Ga App 62.
Mo —Hopkins v Kurn, App, 164 S W 2d 207, reversed on other grounds 171 S W 2d 625, 351 Mo 41, 149 A L R 762
S C —Smiley v Southern R. Co, 191 S E 895, 184 S C 130
Va —Chesapeake & O Ry Co v. Faison, 52 S E 2d 865, 189 Va 341
52 C J. p 177 note 51

Rule unchanged by statute

The rule set forth in the text was held not repealed by the statute defining a "licensee" and providing that owner of premises is liable to a licensee only for wilful or wanton injuries —Wise v Atlanta & W. P. R. Co, 6 S E 2d 135, 61 Ga App 372, affirmed Atlanta & W P. R Co v. Wise, 9 S E 2d 63, 190 Ga 254

13. Mass —McCarthy v. Boston & M R. R, 66 N E 2d 561, 319 Mass 470, 167 A L R 1250

Special equipment

Where special equipment is maintained on right of way of railroad with its knowledge and express consent to facilitate crossing tracks at place not public crossing, and equipment induces public in considerable numbers to use place as crossing, equipment may be taken as implying invitation to public to make use thereof —Stike v. Virginian Ry. Co, 174 S E. 418, 144 W Va 832.

Permissive crossing or way held not shown

(1) In general —Miller v. Pennsylvania R Co, 39 A 2d 576, 350 Pa 424.

(2) Path across vacant lands between coal car storage yards, leading up to but without definite way across yards, was held not permissive way so as to render railroad liable for injuries to person crossing yards —Koontz v Baltimore & O. R. Co, 163 A. 212, 309 Pa. 122.

mere passive acquiescence in, or absence of objection by the railroad company to, the use made of the crossing by the public is not equivalent to an invitation or inducement[14] Proof of open, notorious, and frequent use is only a part of what is required to show that a crossing is permissive,[15] it is also necessary to prove that the circumstances indicate acquiescence by the railroad[16] It is not essential to the doctrine of implied invitation that the use cover the period of years necessary for the acquirement of a prescriptive right;[17] the invitation once extended, whether implied or express, gives right to an immediate use which continues until withdrawn[18] or until the user, if he can prove the necessary elements of prescription, obtains such a right[19]

Lines or limits. Generally speaking, a permissive right of way over a railroad track must be confined within definite lines and not spread out over open ground in many divergent directions,[20] but if, at a given point, there is a defined and limited area of crossing which has been habitually used for many years, the rights of those using it cannot be impaired by the mere fact that other crossings, not so well defined or limited, may exist at other places along the track.[21]

Effect of closing crossing.. The company may relieve itself from liability on the theory of inducement or invitation to the public by removing the crossing and fencing the way leading to it.[22]

§ 715. —— Status and Rights of Persons Using Crossings

The liability of a railroad company for injury resulting from an accident at a crossing may depend on whether the traveler was using the crossing as an invitee or as a mere licensee or trespasser, since the only duties the railroad owes to mere licensees or trespassers are to use due care after knowledge of the impending danger and to avoid inflicting willful or wanton injury.

While a railroad company owes a duty of exercising reasonable care with respect to a person traversing a railroad crossing as an invitee,[23] the duty of care owed by a railroad company to rightful users of a highway does not extend to trespassers or bare licensees, or at least the degree of care is different,[24] and, hence, the liability of the railroad for injury resulting from an accident at a crossing may depend on whether the traveler was using the crossing as an invitee or as a bare licensee or trespasser[25] Where the crossing is such that a person thereon is a trespasser or a mere licensee without invitation, as a general rule the only duties the railroad company owes to such person are to use due care to avoid injury after knowledge of the impending danger,[26] and not to inflict willful or wanton injury.[27] However, if the presence of a trespasser on the track at

(3) Facts were held not to show railroad had established crossing for use of traveling public, constituting invitation to motorist struck by train, even though approaches were of same material and on same level as public street—Lennon v. Atlantic City R Co., 151 A. 747, 107 N.J. Law 297

14. Me.—Collins v. Maine Cent. R. Co, 4 A.2d 100, 136 Me 149.
Mass.—McCarthy v. Boston & M. R. R., 66 N.E.2d 561, 319 Mass. 470, 167 A.L.R. 1250.

15. U.S.—Spevak v. Pennsylvania R. Co., D.C.Pa., 80 F.Supp. 1, reversed on other grounds, C.A., 173 F.2d 962

16. U.S.—Spevak v. Pennsylvania R. Co., supra.

17. Me.—Collins v. Maine Cent. R Co., 4 A.2d 100, 136 Me. 149

18. Me.—Collins v. Maine Cent. R Co, supra

19. Me.—Collins v. Maine Cent. R Co., supra.

20. Pa.—Figard v. Pennsylvania R. Co., 65 A.2d 411, 361 Pa 380.

21. Pa.—Figard v. Pennsylvania R. Co., supra.

22. Iowa.—Wensel v. Chicago, etc., R Co, 170 N.W. 409, 185 Iowa 680

23. Mass.—Davis v. New York, N. H. & H R Co, 172 N.E. 214, 272 Mass 217

24. Md.—Pennsylvania R Co. v. State, 53 A.2d 562, 188 Md 646

Sleeping on tracks

(1) Railroad and employees had no duty to anticipate presence of inebriate asleep between rails of track—Barry v Southern Pac. Co, 166 P.2d 825, 64 Ariz 116.

(2) A license to cross railroad tracks at place where pedestrian was injured did not include privilege of sleeping on the tracks, and if it was established that pedestrian was asleep on tracks at time of injury he was a trespasser—Texas & N O R. Co v. Daft, Tex.Civ.App., 120 S.W.2d 481

25. Mass.—Cooley v. Boston & M. R. R, 21 N.E.2d 953, 303 Mass. 371, 122 A.L.R. 1166.

26. Ariz.—Barry v. Southern Pac. Co, 166 P.2d 825, 64 Ariz 116
Ga.—Southern Ry. Co. v. Kelley, 182 S.E 631, 52 Ga.App 137.
Ky.—Happy Coal Co. v. Garrison, 111 S.W.2d 596, 271 Ky. 151.
52 C.J. p 177 note 54.

Other statements as to duty

(1) Company operating switch track owed licensee no duty except to refrain from any positive act of negligence which would suddenly create hazard to licensee—Happy Coal Co v. Garrison, supra

(2) Railway company owed to bare licensee no duty to keep private grade crossing in reasonably safe condition, free of obstruction, or to give him warning of the presence of gate which required licensee to back his automobile after having started to cross tracks—Chesapeake & O Ry. Co. v. Faison, 52 S.E.2d 865, 189 Va 341.

27. Ariz.—Barry v Southern Pac Co., 166 P.2d 825, 64 Ariz 116
Ga.—Atlantic Coast Line R Co v Sweatman, 58 S.E.2d 553, 81 Ga App 269
Md.—**Corpus Juris cited in** Jackson v. Pennsylvania R Co, 3 A.2d 719, 724, 176 Md. 1.
Mass.—O'Brien v. Boston & M R R, 91 N.E.2d 218, 325 Mass 451—Couto v Palmer, 42 N.E.2d 802, 312 Mass 23—Cooly v Boston & M. R R, 21 N.E.2d 953, 303 Mass 371, 122 A.L.R 1166—Kenney v Boston & M R. R, 17 N.E.2d 103, 301 Mass. 271—Gravelle v New York, N. H & H R Co, 184 N.E 717, 282 Mass 262—Davis v. New York, N. H & H R Co., 172 N.E 214, 272 Mass. 217.
Or.—Powers v Spokane, P. & S Ry Co., 187 P.2d 960, 182 Or. 468
52 C.J. p 177 note 55.

the time and place of the injury is brought about by peculiar facts and circumstances which relieve him from the guilt of a lack of ordinary care, the company may be liable for a lack of ordinary care on its part in failing to anticipate his presence and in thereafter failing to take such proper precautions for his safety as might seem reasonably necessary.[28] A duty to anticipate the presence of, and danger to, trespassers devolves on those operating the train where, from the locality, circumstances, and known habits of the public generally, there is reason to apprehend that the track in front of the locomotive may not be clear of human beings.[29] The railroad is sometimes held to be under a duty to exercise ordinary care towards a licensee.[30]

A person rightfully using a public crossing cannot be regarded as a trespasser[31] or a mere licensee.[32] Where the crossing is not a public crossing, one is not a trespasser who uses it either because of the railroad's inducement or invitation,[33] or because of its permission or implied license,[34] or, according to some cases, because of its long acquiescence in such use;[35] but according to other cases the mere fact that a number of persons are in the habit of using a certain place as a crossing where there is no public right of passage in general does not confer on a person so using it a status other than that of a trespasser[36] or bare licensee.[37] In any event, the extent of use by the public of a railroad crossing necessary to form the basis of legal liability toward one who otherwise would be a trespasser cannot be defined with exactitude,[38] and the mere use of a railroad crossing by the public does not convert the users thereof from trespassers to licensees, unless occurring at a place habitually used by the public in such large numbers that the presence of persons on the track at that place should be anticipated.[39] A person is not a trespasser in being on a track at a private crossing made by the company under a contract with the owner of the surrounding land when the road was built, and through whom such person acquires land near the track.[40] An employee who comes within the terms of an invitation extended by the railroad to his employer to come to a freight house is an invitee,[41] whereas if he does not come within the invitation, he is a mere licensee.[42]

Prior trespass or intention to trespass. The fact that one has shortly before been a trespasser on railroad property does not affect his right to use a public crossing or the duty of the railroad toward him,[43] nor, according to some cases, is the fact that the traveler intends subsequently to become a trespasser material in this connection.[44]

Particular applications. In applying the foregoing rules, various persons sustaining injury at crossing have been held to be licensees,[45] have been held

28. Ga.—Southern Ry Co v Kelley, 182 S.E 631, 52 Ga App 137

29. Ga.—Southern Ry Co v. Kelley, supra

30. S C.—Hayes v Atlantic Coast Line R Co, 13 S E 2d 921, 196 S C 386
Tex.—Panhandle & S F Ry Co v. Sutton, 81 S W 2d 1005, 125 Tex. 401

31. Fla.—Loftin v Dagley, 13 So 2d 311, 152 Fla. 831.
Mich.—Fish v. Grand Trunk Western Ry, 269 N W 568, 275 Mich 718.
N.J.—Miller v Pennsylvania-Reading Seashore Lines, 187 A 332, 117 N J Law 152
Tex.—Panhandle & S F Ry Co v Sutton, 81 S W 2d 1005, 125 Tex. 401.
52 C J. p 178 note 65
Status of person on right of way at highway as trespasser generally see infra § 899.

32. Tex.—Panhandle & S F. Ry. Co. v. Sutton, supra.

33. Ga.—Western Union Tel. Co. v Spencer, 101 S E 198, 24 Ga.App 471
Ill.—St Louis Nat Stock Yards v Brennan, 126 Ill App 601.

34. Iowa.—Johnston v Delano, 154 N W 1013, 175 Iowa 498.
52 C J. p 178 note 67.

35. Ala.—Louisville & Nashville R Co v Sullivan, 13 So 2d 877, 244 Ala 485.
S C.—Hayes v Atlantic Coast Line R Co, 13 S E 2d 921, 196 S.C 386
52 C J p 178 note 68

36. R I.—Boday v New York, N H & H. R. Co., 165 A 448, 53 R I 207.
52 C.J. p 178 note 69
Mere inaction by railroad
A person who crosses tracks, not at a public crossing, or at a private crossing established by law, or at a crossing which railroad keeps up or helps to keep up, but at a place where people are accustomed to cross and where the railroad has done nothing in an affirmative way and has merely taken no action to prevent such customary crossing, is a trespasser with respect to railroad's liability for injuries.—Lassiter v. Atlanta & W P. R. Co, 5 S E 2d 603, 61 Ga App. 23.

37. Mass.—Berube v New York, etc., R Co, 135 N E. 629, 234 Mass 415.
N Y.—Matze v New York, etc, R. Co, 1 Hun 417, 3 Thomps & C 513.

38. Or.—Powers v Spokane, P. & S Ry Co, 187 P 2d 960, 182 Or. 468

39. Or.—Powers v Spokane, P. & S Ry Co, supra

40. Ky.—Hovius v Cincinnati, etc, R Co, 107 S W 214, 32 Ky L. 786

41. Mass.—Davis v New York, N H & H. R. Co, 172 N E 214, 272 Mass 217

42. Mass.—Davis v New York, N. H & H R Co, supra

43. Ky.—Illinois Cent R Co v Henry, 74 S W 2d 689, 255 Ky 434.
52 C J. p 179 note 74

44. Mo.—Torrance v Pryor, 210 S W. 430

45. Ala.—Alabama Great Southern R Co. v. Campbell, 26 So 2d 124, 32 Ala App 348
Ark.—Chicago, R I & P Ry Co. v. McCauley, 112 S W 2d 625, 196 Ark 1177
Ky.—Happy Coal Co v Garrison, 111 S W 2d 596, 271 Ky 151.
La.—Shamburg v. Thompson, App., 186 So 616.
Mass.—Couto v. Palmer, 42 N E 2d 802, 312 Mass 23.—Cooly v Boston & M R R, 21 N E.2d 953, 303 Mass 371, 122 A L R. 1166.—Gravelle v New York, N. H. & H R. Co, 184 N E 717, 282 Mass 262
Tex.—Texas & N O. R Co. v Cortez, Civ App, 85 S.W 2d 310, error refused
Va.—Chesapeake & O Ry Co. v. Faison, 52 S E 2d 865, 189 Va. 341.
45 C J. p 791 note 88 [a].

to be trespassers,[46] or have been held to be either a trespasser or at most a bare licensee;[47] or persons so injured have been held not to be invitees,[48] licensees,[49] or trespassers[50]

Extent of right to use crossing The right of a member of the public to use a public crossing extends to every part of the crossing[51]

§ 716. —— Mutual Rights and Duties

The rights and duties of the public and the railroad company at a public crossing are mutual, reciprocal, and correlative, and each is charged with the duty of due care to avoid injury. The railroad, however, is generally entitled to the right of way.

As a general rule the rights and duties of the public and a railroad company at a public crossing are mutual and reciprocal,[52] correlative,[53] and coextensive[54] Each must have due regard for the rights of the other,[55] and is charged with the mutual duty of exercising due care to avoid inflicting or receiving injury,[56] including the maintenance of a

Licensee by implied invitation
Where very young child was struck by train while on path in city which was used constantly by both children and adults in crossing tracks, child was a licensee by implied invitation and employees of railroad were bound to expect his presence, to keep a lookout for him, and to exercise reasonable and ordinary care in operation of train to protect him from injury —Chicago Great Western Ry Co v Beecher, C C A.Minn, 150 F 2d 394, certiorari denied 66 S Ct. 339, 326 U S. 781, 90 L Ed. 473.

46. Ariz —Barry v Southern Pac Co, 166 P 2d 825, 64 Ariz. 116
Ga —Lassiter v Atlanta & W P R. Co., 5 S E 2d 603, 61 Ga App. 23.
Ohio —Pennsylvania R. Co v Milleson, 2 N E.2d 17, 51 Ohio App 528.

47. Ind.—Calvert v. New York Cent R. Co, 199 N.E. 239, 210 Ind 32.
Me.—Willey v. Maine Cent R. Co., 18 A 2d 316, 137 Me. 223, certiorari denied 62 S.Ct 85, 314 U S 612, 86 L Ed 492.

48. Colo —Welsh v. Union Pac. R Co, 156 P.2d 844, 113 Colo 312.
Ky —Happy Coal Co. v. Garrison, 111 S W 2d 596, 271 Ky. 151.
Mass —Couto v. Palmer, 42 N E 2d 802, 312 Mass 23—Cooly v Boston & M. R. R., 21 N.E.2d 953, 303 Mass. 371, 122 A L R. 1166—Gravelle v New York, N. H. & H R. Co, 184 N E 717, 282 Mass. 262.

49. Ariz.—Barry v. Southern Pac. Co, 166 P.2d 825, 64 Ariz. 825.
Ark —St Louis-San Francisco Ry Co v Brunner, 104 S.W 2d 214, 193 Ark. 937.

50. U.S.—Heatherly v. Southern Ry. Co, C.C A Ga, 106 F.2d 894.
Ala —Louisville & N. R Co v. Sunday, 48 So 2d 216, 254 Ala 299.
Ark.—St. Louis-San Francisco Ry Co. v. Brunner, 104 S W 2d 214, 193 Ark 937.
Fla.—Loftin v. Dagley, 13 So 2d 311, 152 Fla. 831.
La.—Shamburg v. Thompson, App., 186 So 616.
Mich —Fish v Grand Trunk Western Ry., 266 N.W. 349, 275 Mich 273, reheard 269 N W 568, 275 Mich. 718
45 C J p 791 note 88 [a]

Motorist permitting vehicle to slip partially off planking at railroad crossing is not trespasser as long as vehicle remains within lines of highway —Ruggiero v. Central R Co, 170 A 57, 112 N J Law 163

51. U S —Baltimore, etc, R. Co. v. Anderson, Ohio, 85 F 413, 29 C C.A 235.
52 C J p 178 note 73.

52. U S —Interstate Motor Lines v Great Western Ry Co, C C A Colo, 161 F 2d 968—Chicago & N W Ry Co v Golay, C C A.Wyo, 155 F 2d 842—Foster v St Louis-San Francisco Ry Co, D.C.Fla, 75 F Supp 809.
Fla —St Louis-San Francisco Ry Co v Earl, 49 So 2d 324—Seaboard Air Line Ry. Co v Watson, 137 So 719, 103 Fla 477, appeal dismissed 53 S Ct 32, 287 U S 86, 77 L Ed 180, 86 A L R 174.
Ga —Atlantic Coast Line R Co v. Dickson, 28 S E 2d 879, 70 Ga App 590, followed in 28 S E 2d 883, 70 Ga App 596
Ill.—W C. Norris Mfg v. Baltimore & O. R. Co, 77 N.E 2d 434, 333 Ill App 247—Shaw v Chicago & E I. R Co., 75 N.E.2d 51, 332 Ill App 285—Humbert v. Lowden, 56 N.E. 2d 323, 323 Ill.App. 557.
Iowa.—Meier v. Chicago, R. I. & P. Ry Co, 275 N.W. 139, 224 Iowa 295.
La —Gates v. Arkansas & L M. Ry. Co, App, 180 So 835.
Me.—Richard v Maine Cent. R Co, 168 A. 811, 132 Me. 197.
Mich.—Fish v Grand Trunk Western Ry., 269 N W. 568, 275 Mich. 718.
Nev —**Corpus Juris cited in** Los Angeles & S. L. R. Co. v. Umbaugh, 123 P.2d 224, 233, 61 Nev. 214.
N C —Henderson v. Powell, 19 S E.2d 876, 221 N.C 239.
Ohio —City of Cincinnati v. Luckey, 91 N.E 2d 477, 153 Ohio St. 247.
Or —Finn v Spokane, P & S Ry. Co., 214 P 2d 354, opinion adhered to, 218 P.2d 720.
Utah —Pippy v. Oregon Short Line R Co, 11 P.2d 305, 79 Utah. 439.
Wash —Hendrickson v. Union Pac. R. Co, 136 P 2d 438, 17 Wash 2d 548, 161 A L R 96
52 C J. p 179 note 76.

Elements considered
The interest of the public in transportation between cities, the size, weight, and speed of trains, force of inertia of trains, and controllability thereof relative to that of vehicular traffic ordinarily using public highways are elements taken into consideration in evolvement of rules of law pertaining to reciprocal rights and duties of railroads and public in their joint use of crossing areas — Lund v Pacific Elec Ry Co, 153 P 2d 705, 25 Cal 2d 287

53. S C —Taylor v Atlantic Coast Line R Co, 60 S E 2d 889, 217 S C 435
Utah —Earle v Salt Lake & Utah R Corp, 165 P 2d 877, 107 Utah 111.

54. Utah —Pippy v Oregon Short Line R Co, 11 P 2d 305, 79 Utah 439.

Traveler must use at least as much care to avoid injury as trainmen should use to avoid hitting him — Roberts v Powell, 187 So 766, 137 Fla 159—52 C J. p 180 note 80 [a]

55. Ill —Shaw v. Chicago & E I R Co, 75 N E 2d 51, 332 Ill App 285
Mich —Fish v Grand Trunk Western Ry, 269 N W 568, 275 Mich 718—Kelly v. Michigan Central R Co, 31 N W. 904, 65 Mich 186.
Or —Finn v Spokane, P & S Ry. Co, 214 P 2d 354, opinion adhered to, 218 P.2d 720.

56. Ky.—Franklin v Louisville & N R. Co, 102 S W 2d 1010, 267 Ky 577.
Nev —**Corpus Juris cited in** Los Angeles & S L R. Co v. Umbaugh, 123 P.2d 224, 233, 61 Nev. 214.
N.C —Godwin v Atlantic Coast Line R. Co, 17 S E 2d 137, 220 N.C. 281—Moore v Atlantic Coast Line R. Co, 158 S E 556, 201 N.C 26.
Ohio —City of Cincinnati v Luckey, 91 N.E.2d 477, 153 Ohio St 247.
Tex.—Texas & N. O. R. Co. v. Stratton, Civ.App., 74 S.W 2d 746, error refused, followed in Texas & N. O R. Co. v. Berry, 74 S W.2d 750, error refused.
Utah —Pippy v Oregon Short Line R. Co., 11 P.2d 305, 79 Utah 439.
52 C.J. p 179 note 77.

careful lookout for danger.[57] As sometimes stated, it is as much the duty of a person traveling on the public highway, who is about to cross a railroad track, to use ordinary care and prudence to ascertain if a train is approaching as it is the duty of the railroad company to cause warnings to be given of an approaching train to persons who may be on the public highway.[58]

The degree of diligence to be used on either side is such as a prudent person would exercise under the circumstances at the particular time and crossing in endeavoring to perform his duty,[59] and in general no greater care is required of one than of the other.[60] The duty of each is to use reasonable[61] or ordinary[62] care commensurate with the risk and danger involved,[63] as where the situation is more than ordinarily dangerous.[64]

Superior right of railroad company. While it has been laid down that the rights of the public and the rights of the railroad company are equal[65] and that neither has an exclusive right to occupy the crossing,[66] these rules are subject to the qualification that, by reason of the character and momentum of a railroad train and the requirements of public travel by means thereof, a moving train or railroad car is entitled to the preference and right of way.[67]

57. Mass.—Copithorn v. Boston & M. R. R., 17 N.E.2d 713, 301 Mass. 510.
N.H.—Huntress v. Boston & M. R. R., 34 A. 154, 66 N.H. 185.
N.C.—Coltrain v. Atlantic Coast Line R. Co., 4 S.E.2d 853, 216 N.C. 263—Moore v. Atlantic Coast Line R. Co., 158 S.E. 556, 201 N.C. 26.
S.C.—Moore v. Atlantic Coast Line R. Co., 7 S.E.2d 4, 192 S.C. 406.
52 C.J. p. 180 note 78.

58. U.S.—Foster v. St. Louis-San Francisco Ry. Co., D.C.Fla., 75 F. Supp. 809.
Fla.—St. Louis-San Francisco Ry. Co. v. Earl, 49 So.2d 324—Powell v. Gary, 200 So. 854, 146 Fla. 334—Roberts v. Powell, 187 So. 766, 137 Fla. 159—Seaboard Air Line Ry. Co. v. Watson, 137 So. 719, 103 Fla. 477, appeal dismissed 53 S.Ct. 32, 287 U.S. 86, 77 L.Ed. 180, 86 A.L.R. 174—Atlantic Coast Line R. Co. v. Watkins, 121 So. 95, 97 Fla. 350.

59. Iowa.—Meier v. Chicago, R. I. & P. Ry. Co., 275 N.W. 139, 224 Iowa 295.
Mass.—Copithorn v. Boston & M. R. R., 17 N.E.2d 713, 301 Mass. 510.
N.H.—Huntress v. Boston & M. R. R., 34 A. 154, 66 N.H. 185.
N.C.—Godwin v. Atlantic Coast Line R. Co., 17 S.E.2d 137, 220 N.C. 281—Moore v. Atlantic Coast Line R. Co., 158 S.E. 556, 201 N.C. 26.
52 C.J. p. 180 note 79.

60. S.C.—Truett v. Atlantic Coast Line R. Co., 33 S.E.2d 396, 206 S.C. 144.
52 C.J. p. 180 note 80.

61. Iowa.—Dombrenos v. Chicago, etc., R. Co., 174 N.W. 596.
La.—Stelly v. Texas & N. O. R. Co., App., 49 So.2d 640.
Or.—Fish v. Southern Pac. Co., 143 P.2d 917, 173 Or. 294, rehearing denied 145 P.2d 991, 173 Or. 294.
Utah.—Pippy v. Oregon Short Line R. Co., 11 P.2d 305, 79 Utah 439.

62. Tenn.—Hurt v. Yazoo, etc., R. Co., 205 S.W. 437, 140 Tenn. 623.
52 C.J. p. 180 note 82.

At least average care

Both railroad company and highway traveler must exercise at least average care and prudence at a grade crossing.—Taylor v. Atlantic Coast Line R. Co., 60 S.E.2d 889, 217 S.C. 435.

63. Mont.—Inkret v. Chicago, M., St. P. & P. R. Co., 86 P.2d 12, 107 Mont. 394.
N.C.—Coltrain v. Atlantic Coast Line R. Co., 4 S.E.2d 853, 216 N.C. 263.
S.C.—Truett v. Atlantic Coast Line R. Co., 33 S.E.2d 396, 206 S.C. 144—Moore v. Atlantic Coast Line R. Co., 7 S.E.2d 4, 192 S.C. 406.
52 C.J. p. 180 note 83.

Frequented municipal crossing

Where railroad crossing in municipality was much frequented, the degree of care imposed on the public and railroad company to avoid accidents was much greater than at a country crossing.—Kenan v. Austin, 1 So.2d 174, 146 Fla. 389.

64. Cal.—Thuet v. Southern Pac. Co., 27 P.2d 910, 135 Cal.App. 527.
52 C.J. p. 180 note 84.

65. Ark.—Missouri Pac. R. Co. v. Nelson, 115 S.W.2d 872, 195 Ark. 883.
Ind.—New York Cent. R. Co. v. De Leury, 192 N.E. 125, 100 Ind.App. 140.
Ky.—Illinois Central R. Co. v. Maxwell, 167 S.W.2d 841, 292 Ky. 660.
N.C.—Coltrain v. Atlantic Coast Line R. Co., 4 S.E.2d 853, 216 N.C. 263.
52 C.J. p. 180 note 86.

66. Or.—Finn v. Spokane, P. & S. Ry. Co., 214 P.2d 354, opinion adhered to 218 P.2d 720.
52 C.J. p. 180 note 87.

67. U.S.—Plough v. Baltimore & O. R. Co., C.A.N.Y., 172 F.2d 396, certiorari denied 69 S.Ct. 1518, 337 U.S. 940, 93 L.Ed. 1745, Hanson v. Baltimore & O. R. Co., 69 S.Ct. 1518, 337 U.S. 940, 93 L.Ed. 1745, Van Slyke v. Baltimore & O. R. Co., 69 S.Ct. 1518, 337 U.S. 941, 93 L.Ed. 1745, and Lynch v. Baltimore & O. R. Co., 69 S.Ct. 1518, 337 U.S. 941, 93 L.Ed. 1745—State of N. D., for and on Behalf of N. D. Workmen's Compensation Bureau v. Northern Pac. Ry. Co., C.A.N.D., 171 F.2d 506—Interstate Motor Lines v. Great Western Ry. Co., C.C.A.Colo., 161 F.2d 968—Chicago & N. W. Ry. Co. v. Golay, C.C.A.Wyo., 155 F.2d 842—Haase v. Chicago, M., St. P. & P. R. Co., D.C.Minn., 76 F. Supp. 393—Foster v. St. Louis-San Francisco Ry. Co., D.C.Fla., 75 F. Supp. 809.
Ariz.—Humphrey v. Atchison, T. & S. F. Ry. Co., 70 P.2d 319, 50 Ariz. 167.
D.C.—Sisson v. Southern Ry. Co., 68 F.2d 403, 62 App.D.C. 356.
Fla.—Roberts v. Powell, 187 So. 766, 137 Fla. 159—Seaboard Air Line Ry. Co. v. Watson, 137 So. 719, 103 Fla. 477, appeal dismissed 53 S.Ct. 32, 287 U.S. 86, 77 L.Ed. 180, 86 A.L.R. 174.
Idaho.—Whiffin v. Union Pac. R. Co., 89 P.2d 540, 60 Idaho 141.
Ill.—Robertson v. New York Cent. R. Co., 58 N.E.2d 527, 388 Ill. 530.
Ind.—New York Cent. R. Co. v. De Leury, 192 N.E. 125, 100 Ind.App. 140.
Iowa.—Meier v. Chicago, R. I. & P. Ry. Co., 275 N.W. 139, 224 Iowa 295.
Kan.—Ross v. Fleming, 194 P.2d 491, 165 Kan. 491, 165 Kan. 279.
La.—Winfiele v. Texas & P. Ry. Co., App., 150 So. 43—Pearce v. Missouri Pac. R. Co., App., 143 So. 547.
Md.—Baltimore Transit Co. v. Bramble, 2 A.2d 416, 175 Md. 334.
Mass.—Copithorn v. Boston & M. R. R., 17 N.E.2d 713, 301 Mass. 510.
Mo.—Gorman v. Franklin, 117 S.W.2d 289—Marshall v. St. Louis-San Francisco Ry. Co., App., 229 S.W.2d 724, affirmed, Sup., 234 S.W.2d 524.
Mont.—Inkret v. Chicago, M., St. P. & P. R. Co., 86 P.2d 12, 107 Mont. 394.
N.H.—Gates v. Boston & Maine R. R., 37 A.2d 474, 93 N.H. 179.
N.Y.—McKelvey v. Delaware, L. & W. R. Co., 300 N.Y.S. 1263, 253 App.Div. 109—Lee v. Pennsylvania R. Co., 280 N.Y.S. 285, 244 App.Div. 558, reversed on other grounds 198 N.E. 629, 269 N.Y. 53, reargument

As has been said, when a railroad train and a person traveling on a highway each approaches a railroad crossing at the same time, it is not the duty of the company to stop its train, but it is instead the duty of the traveler, in obedience to the known custom of the country, to stop and not pass in front of the advancing train.[68]

The railroad's right of way is not absolute,[69] and does not impose on travelers the whole duty of avoiding collisions;[70] such right is dependent on, or at least does not absolve the railroad from, the giving of reasonable and timely warning of its approach[71] and the use of reasonable care to avoid a collision.[72] The right to priority must yield to the convenience of travelers when in the operation of a train it is not necessary that the operator should use the crossing[73] or when it becomes the operator's duty to clear the crossing.[74] A standing train at a public crossing has no precedence over an ordinary traveler,[75] and, in such case, the operator of the railroad and the traveler are each bound to act with due regard for the other.[76]

Reliance on other's precautions. In the first instance, both the operator of the train and the person on or approaching a crossing in regulating their conduct may be governed by the belief or expectation that the other will exercise due care[77] to a limited or reasonable extent,[78] and the operator of a train is not required to anticipate or foresee that a motorist will disregard the duties the law places on him.[79] However, neither is relieved from the duty of watching the crossing to avoid accidents by the assumption that the other is doing his or its whole duty,[80] and a failure of either to use due care

denied 200 N.E. 52, 269 N.Y. 674, amendment of remittitur denied 1 N.E.2d 364, 270 N.Y. 629
N.C.—Coltrain v. Atlantic Coast Line R. Co., 4 S.E.2d 853, 216 N.C. 263
N.D.—Schnell v. Northern Pac. Ry. Co., 1 N.W.2d 56, 71 N.D. 369
Or.—Finn v. Spokane, P. & S. R. Co., 214 P.2d 354, opinion adhered to 218 P.2d 720—Fish v. Southern Pac. Co., 143 P.2d 917, 173 Or. 294, rehearing denied 145 P.2d 991, 173 Or. 294
Pa.—Venchik v. Pennsylvania R. Co., 18 A.2d 118, 143 Pa. Super. 438.
S.C.—Bingham v. Powell, 11 S.E.2d 275, 195 S.C. 233—Robison v. Atlantic Coast Line R. Co., 184 S.E. 96, 179 S.C. 493.
Tex.—Texas & N. O. R. Co. v. Blake, Civ. App., 175 S.W.2d 683, error refused
Utah.—Pippy v. Oregon Short Line R. Co., 11 P.2d 305, 79 Utah 439.
Va.—Southern Ry. Co. v. Berry, 1 S.E.2d 261, 172 Va. 266—Virginia Electric & Power Co. v. Vellines, 175 S.E. 35, 162 Va. 671—Norfolk & W. Ry. Co. v. Benton, 169 S.E. 560, 160 Va. 633—Franklin & P. Ry. Co. v. Shoemaker's Committee, 159 S.E. 100, 156 Va. 619.
Wash.—Hendrickson v. Union Pac. R. Co., 136 P.2d 438, 17 Wash.2d 548, 161 A.L.R. 96—Spokane County v. Great Northern Ry. Co., 35 P.2d 1, 178 Wash. 389—Haaga v. Saginaw Logging Co., 14 P.2d 55, 169 Wash. 547, affirming 5 P.2d 505, 165 Wash. 367, petition granted 15 P.2d 655, 170 Wash. 93.
W.Va.—Parsons v. New York Cent. R. Co., 34 S.E.2d 334, 127 W.Va. 619.
52 C.J. p. 181 note 88.

Only superior right

The right of passage has been said to be the only superior right of the railroad.—Richard v. Maine Cent. R. Co., 168 A. 811, 132 Me. 197.

68. Ill.—Robertson v. New York Cent. R. Co., 58 N.E.2d 527, 388 Ill. 580—Carrell v. New York Cent. R. Co., 52 N.E.2d 201, 384 Ill. 599—Purdy v. Sprague, 2 N.E.2d 743, 286 Ill.App. 17—Franks v. Baltimore & O. S.W. R. Co., 269 Ill.App. 129
Md.—Western Maryland Ry. Co. v. Myers, 163 A. 700, 163 Md. 534.

69. N.H.—Morrison v. Boston & M. R. R., 164 A. 553, 86 N.H. 176

70. Minn.—Gowan v. McAdoo, 173 N.W. 440, 143 Minn. 227.
Utah.—Pippy v. Oregon Short Line R. Co., 11 P.2d 305, 79 Utah 439.

71. U.S.—Plough v. Baltimore & O. R. Co., C.A.N.Y., 172 F.2d 396, certiorari denied 69 S.Ct. 1518, 337 U.S. 940, 93 L.Ed. 1745, Hanson v. Baltimore & O. R. Co., 69 S.Ct. 1518, 337 U.S. 940, 93 L.Ed. 1745, Van Slyke v. Baltimore & O. R. Co., 69 S.Ct. 1518, 337 U.S. 941, 93 L.Ed. 1745, and Lynch v. Baltimore & O. R. Co., 69 S.Ct. 1518, 337 U.S. 941, 93 L.Ed. 1745—Interstate Motor Lines v. Great Western Ry. Co., C.C.A.Colo., 161 F.2d 968—Chicago & N.W. Ry. Co. v. Golay, C.C.A.Wyo., 155 F.2d 842.
N.C.—Coltrain v. Atlantic Coast Line R. Co., 4 S.E.2d 853, 216 N.C. 263
Pa.—Anstine v. Pennsylvania R. Co., 20 A.2d 774, 342 Pa. 423.
Wash.—Byerley v. Northern Pac. Ry. Co., 120 P.2d 453, 11 Wash.2d 604
52 C.J. p. 181 note 89.

72. U.S.—Plough v. Baltimore & O. R. Co., C.A.N.Y., 172 F.2d 396, certiorari denied 69 S.Ct. 1518, 337 U.S. 940, 93 L.Ed. 1745, Hanson v. Baltimore & O. R. Co., 69 S.Ct. 1518, 337 U.S. 940, 93 L.Ed. 1745, Van Slyke v. Baltimore & O. R. Co., 69 S.Ct. 1518, 337 U.S. 941, 93 L.Ed. 1745, and Lynch v. Baltimore & O. R. Co., 69 S.Ct. 1518, 337 U.S. 941, 93 L.Ed. 1745.
S.C.—Robison v. Atlantic Coast Line R. Co., 184 S.E. 96, 179 S.C. 493
52 C.J. p. 181 note 90

73. Ky.—Harvey v. Illinois Cent. R. Co., 167 S.W. 875, 159 Ky. 492

74. Ky.—Harvey v. Illinois Cent. R. Co., supra

75. Me.—Allen v. Boston, etc., R. Co., 47 A. 917, 94 Me. 402.
Neb.—Williams v. Chicago, etc., R. Co., 111 N.W. 596, 113 N.W. 791, 78 Neb. 695, 701, 14 L.R.A.,N.S., 1224

76. Me.—Allen v. Boston, etc., R. Co., 47 A. 917, 94 Me. 402.
Neb.—Williams v. Chicago, etc., R. Co., 111 N.W. 596, 113 N.W. 791, 78 Neb. 695, 4 L.R.A.,N.S., 1224

77. Ariz.—Doty v. Southern Pac. Co., 129 P.2d 991, 59 Ariz. 449
Cal.—Lambert v. Southern Pac. Co., 79 P. 873, 146 Cal. 231
Fla.—Atlantic Coast Line R. Co. v. Timmons, 36 So.2d 430, 160 Fla. 754—Clark v. Atlantic Coast Line R. Co., 192 So. 621, 141 Fla. 155.
Tex.—Texas City Terminal Ry. Co. v. Allen, Civ. App., 181 S.W.2d 727, error refused
Utah.—Olson v. Denver & R. G. W. R. Co., 98 P.2d 944, 98 Utah 208
52 C.J. p. 182 note 98.

Reduction of speed in mist or fog

Railroad company can assume that, in case of mist or fog on highway at crossing, driver of automobile will reduce his speed so as to enable him to stop within range of his vision.—Dolan v. Bremner, 263 N.W. 798, 220 Iowa 1143.

78. Ala.—Weatherly v. Nashville, etc., R. Co., 51 So. 959, 166 Ala. 575.

79. Ariz.—Doty v. Southern Pac. Co., 129 P.2d 991, 59 Ariz. 449
Okl.—Thompson v. Carter, 137 P.2d 956, 192 Okl. 579—Kurn v. Jones, 101 P.2d 242, 187 Okl. 94.

80. U.S.—Baltimore, etc., R. Co. v.

will not justify the other in taking unnecessary risks or relieve such other of the duty of exercising reasonable care to avoid injury.[81]

At places not public crossings Where a crossing at a place other than a public street or highway is treated as a public crossing, the rights and duties of the railroad company and the public thereat are substantially the same as at a public crossing.[82] Thus, there is the mutual duty of exercising care to avoid an accident.[83] Each is required to use the same degree of care,[84] and the care of each increases with the danger of the situation.[85] The care required is ordinary care.[86] So, in respect of a private crossing maintained for a particular purpose, the rights and duties of the railroad and of a person authorized to use the crossing are similar to those of the railroad and the public at a public crossing.[87] Thus, in general, their rights are regarded as equal[88] subject to the right of precedence to which a moving train or car is entitled,[89] and in general the rights of each must be exercised with reasonable regard to the consistent rights of the other.[90] However, there is authority for the view that the rights of the public in a crossing in which it has only a qualified privilege are subordinate to the rights of the railroad company.[91]

§ 717. —— What Law Governs

The substantive rights and duties of the railroad company and the person who sustains injury as a result of an accident at a railroad crossing are governed by the law of the place where the accident occurs, whereas the law of the forum governs as to procedural matters.

In accordance with general rules, the substantive rights and duties of the railroad company and the person who sustains injury as a result of an accident at a crossing are determined by the laws of the place where the injury occurs,[92] whereas the law of

Anderson, Ohio, 85 F. 413, 29 C C.A. 235.

Analogy to right of way
Doctrine that railroad's servant may assume that vehicle intends to stop instead of crossing before approaching train is subject to same qualifications as equivalent doctrine that railroad has right of way—Tawney v. Kirkhart, 44 S E.2d 634, 130 W.Va 550

81. Del.—Owens v Wilmington, etc., Tract. Co., 117 A. 454, 31 Del 475

82. Ky.—Southern R Co v. Barbour, 51 S.W 159, 21 Ky L. 226
Puerto Rico—Marrero v American R. Co, 33 Puerto Rico 201
Care required at crossings by recognition or invitation see supra § 714.

83. Miss—Illinois Cent. R Co. v Dillon, 71 So 809, 111 Miss 520
Puerto Rico—Marrero v. American R Co., 33 Puerto Rico 201

84. Ky—Southern R. Co v Barbour, 51 S W. 159, 21 Ky L. 226.
52 C.J. p 182 note 6.

85. Miss—Illinois Cent R. Co v. Dillon, 71 So. 809, 111 Miss. 520

86. Ky—Southern R. Co v Barbour, 51 S W. 159, 21 Ky L 226.

87. U S—Thomas v. Delaware, etc, R Co, C C N Y., 8 F 729, 19 Blatchf, 538.
N H.—Gahagan v. Boston, etc, R. Co, 50 A. 146, 70 N H. 441, 55 L R A. 426

88. N.H.—Gahagan v. Boston, etc, R. Co, supra.
52 C J. p 182 note 10.

89. N.H.—Rideout v. Boston & M. R. R. Co., 30 A.2d 488, 92 N.H 340.
52 C J. p 182 note 11.

Assumption as to motorist's conduct
Railroad engineer had right to assume that motorist approaching crossing would do so with care and at reasonable speed so that if train were approaching he could stop in time to avoid collision—Rideout v Boston & M R. R, supra.

90. Iowa—Ressler v Wabash R Co., 132 N W 827, 152 Iowa 449.
N H—Gahagan v Boston, etc., R Co, 50 A. 146, 70 N H. 441, 55 L R A 426

Surroundings requiring watchfulness
Particular surroundings may call for great watchfulness by both motorist and motorman at point where track crossed private road—Tomlinson v. Northwestern Electric Service Co of Pennsylvania, 151 A 680, 301 Pa. 72.

91. U S.—Garrett v Illinois Cent R Co, C C Tenn, 126 F. 406
52 C J p 182 note 13.

Greater obligation on motorist
At a private road, the obligation of caution imposed on motorist in crossing tracks was greater, and that imposed on railroad company was less, than at a public crossing—Welsh v Union Pac R Co, 156 P 2d 844, 113 Colo 312—Union Pac. R Co. v. Siemann, 145 P 2d 986, 112 Colo 70.

92. U S—Dommer v. Pennsylvania R. Co, C.C A Ind, 156 F 2d 716—Thomson v. Stevens, C.C A Iowa, 106 F 2d 739—Chicago G. W. R Co v. Robinson, C C A Neb, 101 F 2d 994, certiorari denied 59 S Ct 1038, 307 U S 640, 83 L Ed 1520—Schaffer v. Pennsylvania R Co, C C.A Ill, 101 F.2d 369—Curtiss v New York Cent. R. Co.., C.C A N Y., 79 F 2d 91
Ark—Missouri Pac. R. Co v. Diffee, 205 S W.2d 458, 212 Ark. 55—Missouri Pac. R Co. v. Reed, 165 S W 2d 364, 204 Ark. 846—Missouri Pac R. Co v. Holmes, 124 S W 2d 14, 197 Ark. 576—Texas & Pac. Ry. Co. v. Stephens, 90 S W 2d 978, 192 Ark 115—Missouri Pac R Co v Miller, 41 S W 2d 971, 184 Ark. 61, certiorari denied 52 S Ct. 210, 284 U S 688, 76 L Ed 580
Ill—Jensen v Baltimore & O R Co, 69 N E 2d 740, 330 Ill App 134
Ind—Louisville & N R. Co v Revlett, 65 N E 2d 731, 224 Ind 313—Revlett v Louisville & N R Co, 51 N E 2d 95, 114 Ind App. 187, rehearing denied 51 N E 2d 500, 114 Ind App 187—Morley v Cleveland, C., C & St. L R Co, 194 N E. 806, 100 Ind App. 515.
Ky—Cincinnati, N O & T. P. Ry Co v Wilson's Adm'r, 172 S W 2d 585, 294 Ky 698—Norfolk & W Ry Co v Barney, 90 S W 2d 14, 262 Ky. 228
Mass—Peterson v. Boston & M R. R, 36 N E 2d 701, 310 Mass 45
Mich—Pere Marquette Ry Co. v. Slutz, 256 N W 458, 268 Mich. 388.
Miss—Mississippi Cent R Co. v Smith, 154 So 533, 173 Miss 507, modified on other grounds 159 So 562, 173 Miss 507, appeal dismissed 55 S Ct 830, 295 U S 718, 79 L Ed. 1673.
Mo—Murphy v. Atchison, T. & S F Ry. Co., 197 S W 2d 632, 355 Mo 643—State, ex rel Thompson v Shain, 173 S W 2d 406, 351 Mo 530—Draper v Louisville & N R. Co, 156 S.W.2d 626, 348 Mo 886—Connole v. East St Louis & S Ry. Co, 102 S W 2d 581, 340 Mo. 690—Saba v. Illinois Cent R Co., 85 S W 2d 429, 337 Mo 105—Haton v. Illinois Cent. R. Co, 76 S W 2d 127, 335 Mo 1186—Hutchison v. St. Louis-San Francisco Ry Co., 72 S W 2d 87, 335 Mo 82—Sing v. St. Louis-San Francisco Ry. Co., 30 S W.2d 37—Teitsort v Illinois Cent R. Co, 15 S W 2d 779, 322 Mo 640—Busker v. New York Cent.

the forum governs as to procedural matters.[93]

§ 718. Defects in, and Obstructions at, Crossings

a. In general
b. Extent of care required

a. In General

A railroad company charged with the duty to maintain a crossing in safe condition is liable for its negligence in failing so to do; but there is no liability in the absence of any violation of duty, as where the defects were created by others and resulted from conditions over which the railroad company had no control.

In general, sometimes by virtue of statute or ordinance, a railroad company charged with the duty of constructing or maintaining and repairing a highway crossing is liable for injuries sustained by one making a proper use of such crossing through its negligence in failing to construct or maintain the crossing in such a manner as to render it reasonably safe and convenient for the usual and ordinary purposes of the public;[94] and a failure of the railroad company to comply with the duty imposed on it by law with respect to the maintenance of a highway crossing and the approaches thereto may be negligence per se or as a matter of law.[95] The

R Co, App., 149 S W 2d 449—Kuba v New York Cent. R Co, App, 143 S W.2d 332—Chapman v. Terminal R. R Ass'n of St. Louis, App, 137 S W 2d 612—Philippi v. New York, C & St. L. R Co., App, 136 S W. 2d 339—Holman v Terminal R. Ass'n of St. Louis, App, 125 S W 2d 527—Weeks v Atchison, T & S. F Ry. Co, 109 S W 2d 374, 232 Mo App 429—Cox v Terminal Railroad Ass'n of St Louis, App, 43 S W 2d 571, affirmed 55 S W.2d 685, 331 Mo 910

N.J.—Sammak v. Lehigh Valley R. Co, 172 A. 60, 112 N.J Law 540

N C—Russ v. Atlantic Coast Line R Co, 18 S E 2d 130, 220 N C. 715

Pa.—Limes v Keller, Com Pl, 60 Dauph Co 62

52 C.J p 182 note 15.

Lex loci as applicable in:

Tort actions generally see Conflict of Laws § 12.

Negligence actions generally see Negligence § 177.

Substantive law held involved

(1) The rule that the negligence of a motorist driving his automobile onto a grade crossing ahead of an approaching train is imputed to guests in the automobile is a rule of "substantive law" rather than a "rule of evidence," and hence was applicable in action brought in one state against railroad for death of guest in automobile who was killed when automobile was struck by train in another state.—Shaffer v. New York Cent R. Co, 34 N.E 2d 792, 66 Ohio App. 417

(2) Statute of state where accident occurred, as construed by courts of that state to mean that occurrence of railroad crossing collision raises inference of negligence, is substantive law, not rule of practice and evidence—Ramey v Missouri Pac. R Co, 21 S W.2d 873, 323 Mo 662, certiorari denied Missouri Pac R Co v Ramey, 50 S Ct. 162, 280 U.S 614, 74 L Ed. 655.

93. Ark.—Missouri Pac R Co. v. Diffee, 205 S W 2d 458, 212 Ark. 55—Texas & Pac Ry. Co. v. Stephens, 90 S W 2d 978, 192 Ark 115.
Ill.—Jensen v Baltimore & O. R. Co, 69 N.E 2d 740, 330 Ill App 134.
N C—Russ v Atlantic Coast Line R Co., 18 S E 2d 130, 220 N C 715
Application of lex fori as to matters of procedure in negligence cases generally see Negligence § 177 b.

Particular matters of procedure

(1) Law of the forum governed the rules of evidence, burden of proof, competency of witnesses, weight of evidence, and other matters relating to the remedy—Connole v. East St. Louis & S. Ry. Co, 102 S W 2d 581, 340 Mo 690.

(2) What inferences were permissible from evidence was a matter of procedure and not of substantive law and was to be determined by the law of the forum—Peterson v Boston & M. R. R, 36 N E 2d 701, 310 Mass 45.

(3) Court applied law of forum in ruling on contention that motorist was guilty of contributory negligence as a matter of law, and gave to plaintiff the benefit of the favorable evidence rule—Hopkins v Kurn, 171 S.W 2d 625, 351 Mo 41, 149 A.L. R 762.

Sufficiency of evidence for jury

Where law of place where accident occurred lays down only a general standard of care, the court in which the action is brought, while bound to observe that standard, would be required to determine in accordance with its own law of procedure whether there was sufficient evidence to take case to jury on question whether railroad conformed to the standard—Peterson v. Boston & M. R. R, 36 N E 2d 701, 310 Mass. 45

94. U.S.—Contino v. Baltimore & A. R. Co, C A.Md., 178 F.2d 521.
Ala.—Alabama Power Co v McGehee, 154 So 105, 228 Ala. 505.
Ark.—Missouri Pac R Co v. Binkley, 188 S W 2d 291, 208 Ark 933—Missouri Pac. R Co v. Kagy, 143 S.W.2d 1095, 201 Ark 150—Missouri Pac. R. Co v. Sorrells, 136 S W 2d 1035, 199 Ark 971—Missouri P. R Co v. Howell, 132 S W 2d 176, 198 Ark 956—Payne v Stockton, 229 S W. 44, 147 Ark 598
Cal.—Black v Southern Pac. Co, 12 P 2d 981, 124 Cal App 321.
Fla.—Loftin v. Dagley, 13 So 2d 311, 152 Fla. 831
La.—**Corpus Juris cited in** Homeland Ins Co. v Thompson, App, 12 So 2d 63, 65—Dantone v Standard Mach Co, App, 195 So 39—**Corpus Juris cited in** Brandon v Texas & N O R Co, App, 169 So 254, 257—Vandevender v. New Iberia & N. R. Co, App, 162 So 601
Mo.—Jackson v St Louis-San Francisco Ry Co, 31 S W 2d 250, 224 Mo App 601.
N C—Parrish v. Atlantic Coast Line R Co, 20 S E 2d 299, 221 N C 292—Campbell v High Point, T & D R Co., 159 S E 327, 201 N C 102.
Pa.—Reed v Allegheny County, 199 A. 187, 330 Pa 300
S C.—Bell v. Atlantic Coast Line R Co, 24 S E.2d 177, 202 S C 160
Tex.—James v. Missouri-Kansas-Texas R Co of Texas, Civ App, 182 S W.2d 921
52 C.J p 182 note 19, p 183 note 20

Absence of previous accident

Where railroad failed to perform statutory duty to provide safe crossing, the fact that pedestrian was first to stumble because of height of rails did not preclude recovery for injury to pedestrian when he fell while attempting to cross tracks—Crawford v. Atlantic Coast Line R Co, 184 S E 569, 179 S C 264

95. Ga.—Pollard v. Boatwright, 196 S E 215, 57 Ga.App. 565—Central of Georgia Ry Co. v. Dumas, 160 S.E 814, 44 Ga App. 152
Tex.—Miller v Panhandle & S F. Ry. Co, Civ.App, 35 S W.2d 194, error dismissed
52 C J. p 182 note 19 [a]

Grading and planking or graveling

Violation of a statute dealing with the grading and planking or graveling of railroad tracks across sidewalks has been held to constitute negligence per se.—Pittsburgh, etc,

duty of a railroad to exercise care with respect to crossings and their approaches may be violated either through defective or improper construction, or through a failure to remedy an unsafe condition arising after a proper and safe construction,[96] it may be through an act of commission or one of omission.[97]

Where a statute imposes the general requirement on railroads to keep their crossings safe and in repair, negligence is the basis of liability thereunder.[98] The duty imposed by some statutes on the railroad to keep crossings in proper repair and in a reasonably safe condition is absolute and nondelegable.[99] Where a statute requiring railroads to maintain crossings in good order was passed for the benefit of persons using the highway, any person injured while traveling on the highway may recover for a violation thereof.[1] The duty imposed by statute to provide suitable crossings and to maintain them in good order has been held to include crossings where the grades are separated,[2] as well as crossings at grade.[3]

The railroad company is not relieved of liability by the fact that the person injured may also have a remedy against certain county or municipal authorities,[4] or because the crossing was authorized or required by municipal ordinance,[5] or because control and supervision over the roads of the state have been vested in a highway commission,[6] or because the construction or repair was intrusted to an independent contractor,[7] or was performed by,[8] or on the authority of,[9] state or municipal authorities. Where the duty to maintain a crossing is imposed on a railroad by statute, neither a municipality[10] nor a commission[11] can relieve the railroad from its statutory duty. The determination of liability as between the railroad and the public authorities may depend on whether the crossing was constructed under statutory authority prescribing the obligations of the parties or under a contract between the railroad company and the public authorities fixing their respective duties of maintenance.[12] It has been held that if the practical equivalent of a title in fee is in the railroad company, and the easement of a right of way across the railroad in the public, the duty of maintenance, in the absence of other facts or circumstances, rests on the county;[13] whereas if the public owns title to the bed of the highway at the crossing, and the railroad company has an easement of passage across it, the duty is correspondingly reversed.[14]

In the absence of any violation of duty on the part of the railroad company, there is no basis of liability,[15] as where the defects were created by

R Co v. Reed, 88 N E 1080, 44 Ind App 635.

96. Ky.—Louisville & N. R Co v Bell, 125 S W 2d 239, 276 Ky 778

Washing away of dirt or gravel

Liability for personal injuries caused by defect in crossing was held not affected by fact that dirt or gravel was washed from crossing in absence of showing that washing was caused by unprecedented flood, and that railroad had exercised due care.—Mississippi Cent R Co v Alexander, 152 So 653, 169 Miss 620.

97. Ky.—Louisville & N. R. Co v. Bell, 125 S.W.2d 239, 276 Ky 778.

98. Ohio—Porter v Toledo Terminal R Co, 90 N E 2d 142, 152 Ohio St. 463

Establishment of standard

Statutes requiring railroads to construct and maintain safe grade crossings merely establish a fixed standard by which the fact of negligence of railroad in such respect may be determined.—Bell v Atlantic Coast Line R. Co., 24 S E 2d 177, 202 S C. 160.

99. W.Va.—Humphrey v Virginian Ry. Co., 54 S E 2d 204

1. Miss.—Mississippi Cent R Co. v. Alexander, 152 So. 653, 169 Miss 620.

2. La—McCarty v Illinois Cent R Co, App, 194 So 96
N H—Shea v Boston & M R R, 191 A 650, 88 N H 462.

3. Miss—Mississippi Cent R Co. v Alexander, 152 So 653, 169 Miss 620
N H—Shea v Boston & M R. R., 191 A 650, 88 N H 462

Requirement of safe and easy passage

Where a railroad crosses a public way at the same level, the railroad corporation is required to guard its rails by plank, timber, or otherwise so as to secure a safe and easy passage across them.—Longley v. City of Worcester, 24 N E 2d 533, 304 Mass. 580

4. Ark—Missouri Pac R Co v Riley, 49 S W 2d 397, 185 Ark 699
52 C.J p 184 note 23

5. N J—Lumley v West Jersey & Seashore R Co, 191 A. 792, 118 N J Law 140.
52 C J p 184 note 24

6. La.—Brandon v Texas & N O. R. Co, App, 169 So 254

7. Okl—Choctaw, etc, R Co. v Wilker, 84 P 1086, 16 Okl 384, 3 L R.A.,N S., 595
52 C J. p 184 note 25.

8. Ga—Georgia Power Co v Bell, 159 S E 589, 43 Ga App 559.
52 C J p 184 note 26.

9. Ark—Missouri Pac R Co v Riley, 49 S W 2d 397, 185 Ark 699

10. Miss—Mississippi Cent R Co. v Alexander, 152 So 653, 169 Miss 620

11. La—Brandon v. Texas & N O R. Co, App, 169 So. 254

12. Pa.—Reed v. Allegheny County, 199 A. 187, 330 Pa 300

Primary responsibility in absence of agreement

In absence of agreement as to maintenance, railroad is not primarily responsible for surface of public highway at crossing but primary liability for accident arising from defective maintenance is ordinarily on municipality, county, or other agency of government in control of the highway.—Reed v Allegheny County, supra—Jozefski v. City of Erie, Com. Pl, 23 Erie Co. 304.

13. Pa—Reed v. Allegheny County, 199 A. 187, 330 Pa 300.

14. Pa.—Reed v. Allegheny County, supra

15. Cal.—Black v Southern Pac Co, 12 P 2d 981, 124 Cal App. 321
Miss—Gordon v Illinois Cent. R. Co, 1 So 2d 772, 190 Miss. 789.
52 C J p 184 note 27.

others and resulted from conditions over which the railroad company had no control,[16] or where a change is made by the county authorities without proper notice to the railroad company.[17] It has been held that the railroad company is not liable as for the violation of a duty imposed by statute where the road is not a public road within the meaning of the statute involved.[18] Recovery cannot be had on the theory of nuisance where the facts do not show a nuisance.[19] A statute requiring railroads to keep in repair the streets between its rails, and for a prescribed distance on each side in such manner as municipalities may prescribe, does not impose any greater duty than would otherwise exist, unless the municipality so prescribes [20]

Private crossing or driveway. The railroad company is liable to one making a rightful use of a private or farm crossing who is injured by the negligent failure of the railroad to comply with the duty, if any, imposed on it to construct and repair such a crossing.[21] However, the railroad is not liable for an injury sustained by one who is not entitled to the benefit of the crossing,[22] and, if there is no existing duty on the part of the railroad company to construct or to maintain in proper repair a private crossing, it is not liable for failing to do so [23] A railroad which constructs a private driveway in such fashion as might reasonably mislead a traveler into a belief that it is but a continuation of the public street is obliged to use reasonable and ordinary care in keeping the premises and approaches safe.[24]

Priority in time between railroad and highway. At common law a railroad company in constructing its road was under an obligation to provide safe and convenient crossings at highways then existing.[25] With respect to public road in existence before the railroad was built, the railroad has been held required not only to keep up the roadbed, but also to construct and maintain suitable and convenient approaches to the crossing [26] There is authority for the view that the liability of a railroad company for injuries resulting from defects in crossings may extend to injuries sustained at public crossings, whether established before or after the railroad was built,[27] particularly under statutes in effect requiring railroads to maintain crossings safely regardless of the question of priority of existence.[28] Where existing railroad lines are crossed by new highways established by government authority, the railroad must adjust itself to the new conditions and facilities provided in the public interest, and may not ignore the dangers incident to its own use of the crossing merely because it was first on the ground [29] A statute expressly imposing liability on railroad companies for injuries resulting from a noncompliance with duties in respect of crossings has been construed to apply to a situation in which the railroad was constructed before the intersecting highway was laid out.[30] The liability of the railroad company has been denied, however, where a turnpike was constructed at the same time as the railroad and the turnpike company assumed the duty of maintaining the road.[31]

Establishment of crossing. In general the railroad company is not liable for a failure to maintain in good repair or safe condition a place which is not an established crossing.[32] However, the rail-

16. N.C.—Long v. Norfolk & W. Ry. Co., 23 S.E.2d 849, 222 N.C. 523.
Tex.—Shahan v. Northern Texas Tract. Co., Civ.App., 266 S.W. 850.

Lights controlled by others

(1) Railroad was not chargeable with negligence because of interference with vision of motorist at night resulting from maintenance of flood lights on buildings of a manufacturing company located near railroad right of way.—Woodworth v. New York Cent., R. Co., 80 N.E.2d 142, 149 Ohio St. 543.

(2) Where motorist alleged that the railroad was negligent in permitting large arc light to blind and injure view of person approaching track in automobile, the railroad could not be held negligent in permitting the arc light to be situated at public intersection where it appeared that the city alone controlled location and operation of the light.—Nabrotzky v. Salt Lake & Utah R. Co., 135 P.2d 115, 103 Utah 274.

17. S.C.—Hill v. Port Royal, etc., R. Co., 10 S.E. 91, 31 S.C. 393, 5 L.R.A. 349
52 C.J. p. 184 note 29.

18. Va.—Washington-Virginia R. Co. v. Fisher, 92 S.E. 809, 121 Va. 229
52 C.J. p. 184 note 30.

19. N.J.—Lennon v. Atlantic City R. Co., 151 A. 747, 107 N.J.Law 297.

20. Ala.—Southern Ry. Co. v. Quillen, 35 So.2d 193, 250 Ala. 536.

21. Ky.—Louisville, etc., R. Co. v. Sweet, 134 S.W. 204, 142 Ky. 337.
52 C.J. p. 183 note 21.

22. Minn.—Johnson v. Chicago, etc., R. Co., 104 N.W. 961, 96 Minn. 316.
52 C.J. p. 184 note 22

23. Kan.—Atchison, etc., R. Co. v. Fuller, 84 P. 140, 72 Kan. 527.
52 C.J. p. 185 note 31.

24. Ga.—Williamson v. Southern Ry. Co., 155 S.E. 113, 42 Ga.App. 9.

25. Ill.—Bossert v. Wabash R. Co., 87 N.E.2d 859, 338 Ill.App. 488.—Carr v. Chicago & N.W. Ry. Co., 77 N.E.2d 857, 333 Ill.App. 567

26. S.C.—Collum v. Southern Ry. Co., 1 S.E.2d 234, 189 S.C. 336

27. N.Y.—Spooner v. Delaware, etc., R. Co., 1 N.Y.St. 558, affirmed 21 N.E. 696, 115 N.Y. 22

28. Ill.—Carr v. Chicago & N.W. Ry. Co., 77 N.E.2d 857, 333 Ill.App. 567.
Miss.—Mississippi Cent. R. Co. v. Alexander, 152 So. 653, 169 Miss. 620.
52 C.J. p. 185 note 36

29. U.S.—Contino v. Baltimore & A. R. Co., C.A.Md., 178 F.2d 521.

30. Conn.—Allen v. New Haven, etc., Co., 50 Conn. 215
52 C.J. p. 185 note 37.

31. Tenn.—Zuccarello v. Nashville, etc., R. Co., 3 Baxt. 364.

32. Tenn.—Pedigo v. City of Chat-

road company may be liable in respect of defects at a crossing which has become a public crossing or in the nature of a public crossing by invitation or custom,[33] as where the railroad company has assumed the duty of constructing and maintaining a proper crossing thereat, although it was not obliged to do so[34]

Failure to provide for changed conditions For injuries resulting from a failure to comply with its duty to make such changes and to take such precautions as changed conditions require, the railroad company may be liable[35]

Continuing nature of duty The duty of the railroad company to keep the crossings in proper condition is a continuing duty to be discharged whenever a crossing is in need of repair in order that it may be safe and convenient for the traveling public[36]

b. Extent of Care Required

In general, it is necessary and sufficient that the railroad company maintain crossings in a reasonably safe condition. A foolproof crossing, or one that will be safe under any and all circumstances, is not required.

There is no hard and fast rule to determine whether a railroad company has been guilty of negligence with respect to its alleged failure to so maintain a crossing as to be safe for people who wish to use it,[37] and the question depends on the facts and circumstances of the particular case[38] In general a railroad company is not an insurer of the safety of travelers,[39] and it is not obliged to anticipate and provide against extraordinary occurrences or dangers[40] The duty of the railroad is not absolute,[41] and it is not required to maintain a foolproof crossing[42] or a crossing whereat no injury is possible,[43] nor is it required to keep the surface of the road at the crossing so smooth as to prevent any jar or jolt to a vehicle passing over it.[44] In the absence of the imposition of an absolute duty as to the method or means to be used, it is usually sufficient for the railroad company to exercise reasonable or ordinary care, and to maintain crossings in a reasonably safe condition.[45] It is not the duty of the railroad company to maintain the crossing safe and easy under all circumstances;[46] but its duty is fulfilled if it maintains the crossing so as to permit safe and convenient passage over it by persons exercising reasonable care in the use thereof.[47]

tanooga, 64 S.W.2d 207, 16 Tenn App 264.
52 C.J. p 185 note 32

33. Minn.—Lillstrom v. Northern Pac. R. Co., 55 N.W. 624, 53 Minn 464, 20 L.R.A. 587
52 C.J. p 185 note 33

34. N.C.—Stone v. Seaboard Air Line R. Co., 149 S.E. 399, 197 N.C. 429
52 C.J. p 185 note 34.

35. Va.—Virginian R. Co. v. Farr, 136 S.E. 668, 147 Va. 217.
52 C.J. p 186 note 52.

36. Ark.—Missouri Pac. R. Co. v. Wright, 126 S.W.2d 609, 197 Ark 933
La.—Homeland Ins. Co. v. Thompson, App., 12 So.2d 62—Jones v. Yazoo & M.V.R. Co., App., 5 So.2d 185—Dantone v. Standard Mach. Co., App., 195 So. 39—Brandon v. Texas & N.O.R. Co., App., 169 So. 254.
52 C.J. p. 184 note 23 [a]

37. Tex.—Missouri, K. & T. R. Co. of Texas v. Young, Civ.App., 127 S.W.2d 489, error dismissed, judgment correct.

38. Tex.—Missouri, K. & T. R. Co. of Texas v. Young, supra.

Conditions of public travel

What is reasonably safe is determined in light of conditions of public travel to which highways are subject.—Alabama Power Co. v. McGehee, 154 So. 105, 228 Ala. 505.

Lighted barricade at railroad crossing under repair afforded pedestrians due notice of fact that crossing was not open for indiscriminate use as formerly, and that one leaving the route or path provided for pedestrians would do so at his peril after passing the lighted barricade across the street along which pedestrian was walking.—Gordon v. Illinois Cent. R. Co., 1 So.2d 772, 190 Miss 789.

39. U.S.—Chicago, M., St. P. & P. R. Co. v. Slowik, C.A.Minn., 184 F.2d 920
Ark.—Missouri Pac. R. Co. v. Riley, 49 S.W.2d 397, 185 Ark. 699.
Miss.—Bentz v. Louisville & N. R. Co., 184 So. 448, 183 Miss. 563
Tenn.—Louisville & N. R. Co. v. Evins, 13 Tenn. App. 57
W.Va.—Humphrey v. Virginian Ry. Co., 54 S.E.2d 204
52 C.J. p 186 note 40

40. Cal.—Black v. Southern Pac. Co., 12 P.2d 981, 124 Cal.App. 321
52 C.J. p 186 note 41.

41. N.H.—Shea v. Boston & M. R. R., 191 A. 650, 88 N.H. 462

42. La.—Wallace v. Louisiana & A. Ry. Co., App., 6 So.2d 63—Dantone v. Standard Mach. Co., App., 195 So. 39.

43. Miss.—Buffington v. Gulf & S.I. R. Co., 188 So. 563, 186 Miss. 132.

44. La.—Dantone v. Standard Mach. Co., App., 195 So. 39

45. Cal.—Peri v. Los Angeles Junction Ry., 137 P.2d 441, 22 Cal.2d 111
Ky.—Louisville & N. R. Co. v. Jackson's Adm'r, 47 S.W.2d 941, 243 Ky. 59
La.—Bahry v. Illinois Cent. Ry. Co., App., 13 So.2d 78—Wallace v. Louisiana & A. Ry. Co., App., 6 So.2d 63—Dantone v. Standard Mach. Co., App., 195 So. 39
Miss.—Gordon v. Illinois Cent. R. Co., 1 So.2d 772, 190 Miss. 789—Buffington v. Gulf & S.I. R. Co., 188 So. 563, 186 Miss. 132—Bentz v. Louisville & N. R. Co., 184 So. 448, 183 Miss. 563
N.H.—Shea v. Boston & M. R. R., 191 A. 650, 88 N.H. 462.
Tenn.—Louisville & N. R. Co. v. Evins, 13 Tenn. App. 57
52 C.J. p 186 notes 42, 45.

Statute embodying common-law duty

If statute requiring railroad to maintain safe crossing is mere affirmation of common-law duty, standard of care continues to be conduct of reasonably prudent person under like circumstances.—Crawford v. Atlantic Coast Line R. Co., 184 S.E. 569, 179 S.C. 264

46. La.—Homeland Ins. Co. v. Thompson, App., 12 So.2d 62—Dantone v. Standard Mach. Co., App., 195 So. 39.

47. La.—Homeland Ins. Co. v. Thompson, App., 12 So.2d 62—Dantone v. Standard Mach. Co., App., 195 So. 39.

On the other hand, it is necessary that the railroad maintain crossings in a reasonably safe condition, and the exercise of less than reasonable or ordinary care will not satisfy its duty in this respect.[48] The railroad does not have the right to set a trap or snare in the crossing which might reasonably be expected to cause injury to a traveler.[49] Where the railroad company has the duty of restoring the highway, it is bound to make it reasonably safe.[50] Where the statute imposes an absolute duty to furnish a safe crossing, it seems that the mere fact that the railroad company exercised reasonable care will not relieve it from liability.[51]

Crossings by invitation or custom. In respect of crossings which as a result of invitation or custom have a status similar to public crossings, the railroad company must use reasonable[52] or ordinary[53] care to maintain it in safe condition, although the railroad company is not an insurer of the safety of persons using the crossing.[54]

Private crossings In respect of persons lawfully using private crossings, the railroad company is bound to exercise reasonable care in constructing and maintaining such crossings.[55]

§ 719. —— Nature and Location of Defect

a. Nature
b. Location

a. Nature

In general a railroad company is liable only for a defect which is caused by its negligence, and not for a condition which is not unnecessarily dangerous under ordinary circumstances or which is not due to improper construction or maintenance.

In general a railroad company is liable for a defect or condition which is caused by its negligence,[56] and which makes the crossing unnecessarily unsafe and dangerous to persons having occasion to use the crossing, while in the exercise of ordinary care.[57] The railroad company is not liable, however, for a condition which is not caused by its negligence or other fault,[58] or which is not unnecessarily dangerous or unsafe under ordinary circumstances,[59] or which is not due to improper construction or maintenance although it may be an obstacle to travel,[60] nor is the railroad company liable on the

48. U.S.—Chicago, M., St. P. & P. R. Co. v. Slowik, C.A.Minn., 184 F.2d 920
Ark.—Missouri Pac. R. Co. v. Wright, 126 S.W.2d 609, 197 Ark. 933—Missouri Pac. R. Co. v. Cox, 58 S.W.2d 421, 187 Ark. 104.
Ky.—Louisville & N. R. Co. v. Bell, 125 S.W.2d 239, 276 Ky. 778—Tennessee Cent. Ry. Co. v. Hancock's Adm'x, 53 S.W.2d 708, 245 Ky. 426
N.J.—Lumley v. West Jersey & Seashore R. Co., 191 A. 792, 118 N.J.L. 140
N.Y.—Harriman v. New York, C. & St. L. R. Co., 171 N.E. 686, 253 N.Y. 398.
N.C.—Moore v. Atlantic Coast Line R. Co., 158 S.E. 556, 201 N.C. 26.
Ohio—Lent v. New York, C. & St. L. Ry. Co., 44 N.E.2d 295, 69 Ohio App. 514
Okl.—St. Louis-San Francisco Ry. Co. v. Prince, 291 P. 973, 145 Okl. 194, 71 A.L.R. 357
52 C.J. p. 186 notes 43, 46.

49. Ark.—Missouri Pac. R. Co. v. Cox, 58 S.W.2d 421, 187 Ark. 104
Crossing held not to constitute trap
Wash.—Watson v. Northern Pac. R. Co., 223 P.2d 1057.

50. Wis.—Washburn v. Chicago, etc., R. Co., 32 N.W. 234, 68 Wis. 474
52 C.J. p. 186 note 44
Primary duty of city to reconstruct street
Fact that railroad in making excavation in street complied with city traffic rules did not relieve it of duty to protect travelers, notwithstanding it may have been primarily the duty of the city to reconstruct street—Baldwin v. Compton, 92 S.W.2d 845, 192 Ark. 503.

51. Tex.—Missouri, etc., R. Co. v. Davis, 116 S.W. 423, 53 Tex. Civ. App. 547.
52 C.J. p. 186 note 47.

52. Mo.—Lee v. St. Louis, etc., R. Co., 129 S.W. 773, 150 Mo. App. 175

53. Tex.—Waco, etc., R. Co. v. Simmons, Civ. App., 292 S.W. 636
52 C.J. p. 186 note 49

54. N.C.—Stone v. Seaboard Air Line R. Co., 149 S.E. 399, 197 N.C. 429

55. N.Y.—Harriman v. New York, etc., R. Co., 171 N.E. 686, 253 N.Y. 398

56. Okl.—Chicago, etc., R. Co. v. Taylor, 192 P. 349, 79 Okl. 142.
52 C.J. p. 186 note 54

57. La.—Tharpe v. Sibley Lake Bisteneau & S. Ry. Co., App., 144 So. 274
52 C.J. p. 187 note 55.
Defects constituting basis of liability
(1) Large and deep hole—Miller v. Panhandle & S. F. Ry. Co., Tex. Civ. App., 35 S.W.2d 194, error dismissed
(2) Defect in culvert—Tharpe v. Sibley Lake Bisteneau & S. Ry. Co., La. App., 144 So. 274
(3) Flying piece of planking—Bell v. Atlantic Coast Line R. Co., 24 S.E.2d 177, 202 S.C. 160.
(4) Bond wire for signals—Missouri Pac. R. Co. v. Cox, 58 S.W.2d 421, 187 Ark. 104
(5) Temporary crossing—Mazyck v. Pennsylvania R. R., 172 S.W.2d 614, 295 Ky. 1
(6) Other defects—Niedner v. Wabash R. Co., Mo. App., 219 S.W.2d 886—52 C.J. p. 187 note 55 [a]

58. Cal.—Black v. Southern Pac. Co., 12 P.2d 981, 124 Cal. App. 321
La.—Brandon v. Texas & N. O. R. Co., App., 169 So. 254
Mo.—Liddle v. Thompson, 162 S.W.2d 614, 236 Mo. App. 1071
N.C.—Eller v. North Carolina R. Co., 157 S.E. 800, 200 N.C. 527
52 C.J. p. 187 note 56

59. Ill.—Taylor v. Megan, 25 N.E.2d 125, 303 Ill. App. 228
La.—Homeland Ins. Co. v. Thompson, App., 12 So.2d 62
Mich.—Mallory v. Pitcairn, 11 N.W.2d 318, 307 Mich. 40.
Mo.—McGrew v. Thompson, 184 S.W.2d 994, 353 Mo. 856.
52 C.J. p. 187 note 57
Failure to use plank
Where a statute providing that plank may be used when any pavement or sidewalk is laid on or across a crossing or intersection is by its terms permissive, and not mandatory, a failure to use plank is not negligence as a matter of law.—Arons v. Detroit, G. H. & M. Ry. Co., 239 N.W. 257, 256 Mich. 241.

60. Mass.—Harris v. Boston, etc., R. Co., 98 N.E. 578, 211 Mass. 573.

theory that it has not restored, as nearly as possible, an intersected highway to its former state merely because the angle of approach was slightly altered.[61] The mere fact that a crossing is dangerous does not necessarily impute negligence to the railroad company,[62] and the fact that a railroad crosses a street or highway at grade is not of itself sufficient to impose liability on the railroad company for an injury sustained at the crossing.[63]

Snow, ice, or rain. There has been held to be no general obligation on the part of a railroad to remove all snow from a crossing,[64] or to remove an icy condition of a crossing located in a municipality,[65] or an icy condition of the highway leading up to its tracks at a crossing.[66] Railroads have been held under a duty to keep crossings in such condition that they can be used with convenience and safety during or following a rain.[67]

Signal tower. Liability of the railroad for injuries resulting from the maintenance of a signal tower in the public highway at a railroad crossing does not depend on whether the structure was erected pursuant to mandatory order by a public service commission or pursuant to permission granted to the railroad at its request, but on whether or not the structure was lawfully in the highway.[68] If the structure is a legalized one, that is one for which definite and specific legislative authority exists, it is immaterial whether it was erected by permit or mandate.[69] On the other hand, where no authority has been conferred on a public service commission or the authorities of a municipality to order or permit the erection of the structure in the public highway, its presence there, without lights and endangering ordinary travel by night, constitutes a nuisance.[70]

b. Location

The liability of the railroad company ordinarily exists only with respect to a defect on that part of the crossing which it is under a duty to maintain. Where its duty of maintenance extends to the approaches to the crossing, it is liable for a defect therein resulting from its negligence.

The liability of the railroad company depends on whether the defect was on that part of the crossing which the company was under a duty to maintain.[71] In general the railroad company is not responsible for a defect that is beyond the limits of the street or highway.[72] However, notwithstanding the railroad company is under no duty to maintain and care for the street beyond its right of way, nevertheless, where it has undertaken to make use of it, the railroad may be liable for negligence in its performance.[73] The duty of the railroad company to furnish a suitable crossing implies the incidental duty to maintain its premises on both of the highway side lines in such manner as will not produce an unsafe condition of the crossing.[74]

A railroad company is not liable for injuries sustained in a collision between two motor vehicles because of the alleged dangerous condition of a public highway located on the railroad's right of way where sole control over the place of the collision was in the public authorities, and the railroad had no control or discretion as to the location, construction or maintenance thereof.[75] A railroad company required to maintain only that part of the crossing structure made necessary by the existence of the railroad tracks and roadbed proper has been held not liable for any defect outside the part of the

61. U S —Atchison, etc, R. Co v Spencer, C.C.A.Ariz., 20 F.2d 714.

62. N C —Edwards v Atlantic Coast Line R Co, 39 S E 730, 129 N C 78.
52 C J. p 188 note 60.

63. Conn —Allen v New Haven, etc, R Co, 50 Conn. 215
Ill.—Chicago, etc, R. Co v. White, 46 Ill App. 446

64. Mass —Mericantante v. Boston & M R R., 197 N.E 46, 291 Mass 261.

65. U.S —Adams v. Pennsylvania R. Co, C C A.Ind., 117 F.2d 649

66. U S.—Hart v Wabash R. Co., C A.Ind, 177 F 2d 492

67. La —Vandevender v. New Iberia & N. R. Co, App., 162 So 601.

68. N J.—Sammak v. Lehigh Valley R. Co, 172 A. 60, 112 N J.Law 540.

69. N.J.—Sammak v. Lehigh Valley R. Co, supra

70. N.J —Sammak v. Lehigh Valley R Co, supra

Statutory authority to erect signboards
Statutes requiring railroads to erect signboards at crossings did not authorize railroad to erect concrete tower in highway so as to relieve railroad of liability to colliding motorist —Sammak v. Lehigh Valley R. Co, supra.

71. Iowa —Gable v. Kriege, 267 N W. 86, 221 Iowa 852, 105 A L R 539

Privately owned guardrail
Railroad had no duty to maintain a privately owned guardrail along public road crossing tracks which was not a trap, menace, or hazard to traffic, and to which state department of highways had registered no objection —Cruse v Thompson, La App., 36 So 2d 735

Defects not creating liability
(1) Defect which was in highway near crossing but which was outside plank adjoining outer rail —Gable v Kriege, 267 N W 86, 221 Iowa 852, 105 A L R 539

(2) Defect occasioned by hole in highway beyond crossing constructed by railroad —Jones v. Yazoo & M V R. Co., La.App, 5 So 2d 185

72. Tex —San Antonio, etc, R Co v Belt, Civ App, 46 S W 374.
52 C J. p 188 note 65

73. Pa —Cochran v. Pittsburgh, C, C. & St L R. Co, 169 A 10, 110 Pa.Super 411.

74. N H.—Shea v Boston & M R R, 191 A 650, 88 N H 462

75. S C —Dunbar v Charleston & W C Ry. Co., 44 S E 2d 314, 211 S C. 209.

highway which crosses the permanent roadbed, ties, and rails of the company.[76]

Approaches. Where the duty of the railroad company in respect of construction, restoration, or maintenance extends to the approaches to the crossing, it is liable for injuries resulting from noncompliance with such duty,[77] even though the defects are outside the railroad company's right of way.[78] An embankment constructed as a necessary approach to a railroad track is in legal contemplation a part of the crossing and should comply with the provisions regulating crossings in general.[79] On the other hand, where the duty of the railroad company does not extend to such places, it is not liable for an injury occurring on the approaches,[80] or at least on such approaches as are not made necessary by the presence of the permanent roadbed and structures thereon.[81] Even as to defects in approaches of a public road to a railroad track within the right of way, the view has been taken that the railroad company is not liable where the statute does not impose any duty on it in respect of such approaches.[82]

Width of crossing. Liability may be based on a failure of the railroad company to comply with its duty to construct a crossing of adequate width.[83] However, in the absence of statutory requirement, a railroad company is not under a duty to construct a crossing of any particular width[84] or to maintain the highway for the full width of the public highway right of way,[85] and, hence, in general, liability cannot be predicated on a failure to maintain a crossing of a greater width than the traveled portion of the intersecting highway.[86] A railroad company is not liable for a failure to keep the roadway, throughout its whole width, in a reasonably safe condition for pedestrians where it has provided a sidewalk which is reasonably safe.[87]

Sidewalk. The railroad company may be under a duty to construct or repair that part of a sidewalk crossed by its tracks, and to keep such sidewalk in a reasonably safe condition for pedestrians,[88] particularly under a statute requiring a railroad company by reason of its servitude to construct and maintain street or road crossings in such way as to make them reasonably safe for travelers,[89] but the duty of the railroad company has been held to be confined solely to defects in the sidewalk resulting from its servitude thereon.[90]

Within municipalities. A statute requiring railroads to construct and maintain crossings in good order has been held applicable to streets in a municipality;[91] but outside the crossing and the approaches thereto, the railroad company occupies the same relationship to city streets over which its right of way crosses as any fronting or abutting property owner.[92]

§ 720. —— Obstruction of Passage

The railroad company may incur liability for injuries sustained at a crossing as a result of allowing a train

76. Iowa—Gable v Kriege, 267 N W 86, 221 Iowa 852, 105 A L R 539

77. Ga.—Atlantic Coast Line R Co v Spearman, 156 S E 824, 42 Ga App. 536.
La—Wallace v Louisiana & A. Ry Co, App., 6 So 2d 63—McCarty v Illinois Cent R Co., App, 194 So 96.
Mo—Liddle v. Thompson, 162 S.W. 2d 614, 236 Mo App. 1071.
52 C J. p 188 note 67.

An "approach" to railroad crossing is simply the prepared or made condition on highway necessary to make a safe, easy, and convenient way across railroad tracks—Albright v. Louisiana & M. R R. Co., App, 189 S W.2d 665, affirmed 195 S W 2d 648, 355 Mo. 211.

78. Ala—Gulf, etc, R. Co. v. Havard, 117 So. 223, 217 Ala. 639.

79. Ark—Missouri Pac. R. Co v. Binkley, 188 S.W 2d 291, 208 Ark. 933—St Louis, Iron Mountain & Southern R Co v. Smith, 175 S W 415, 118 Ark. 72.

80. Tex.—Galveston, etc., R. Co v Rodriguez, Com.App., 288 S W. 151.
52 C.J p 188 note 69.

81. Iowa—Gable v Kriege, 267 N W 86, 221 Iowa [illegible], 105 A L R 539.

82. U.S—Illinois Cent. R. Co v. Leichner, C C A.La., 19 F 2d 118.
52 C J. p 188 note 70

83. Va—Norfolk & W Ry. Co v Faris, 157 S E 819, 156 Va 205
52 C J. p 188 note 62.

84. Mo—Jackson v St Louis-San Francisco Ry. Co., 31 S W 2d 250, 224 Mo App. 601

85. Ind—Dyer v New York Cent. R. Co, 17 N E.2d 839, 214 Ind 695—New York Cent. R. Co. v. Casey, 14 N.E 2d 714, 214 Ind 464, followed in Dyer v. New York Cent R. Co., 14 N.E 2d 719, 214 Ind. 695, rehearing denied 17 N E 2d 839, 214 Ind. 695.

86. Ala—Southern Ry. Co. v Quillen, 35 So 2d 193, 250 Ala. 536.
Ind—New York Cent. R. Co. v. Casey, 14 N E 2d 714, 214 Ind. 464, followed in Dyer v. New York Cent. R. Co, 14 N E.2d 719, 214 Ind. 695, rehearing denied 17 N.E. 2d 839, 214 Ind. 695
Wis.—Schuenemann v. Director Gen. of Railroads, 187 N.W. 983, 177 Wis 218.

87. Ill—Waterbury v Chicago, etc, R. Co., 207 Ill App 375.

88. Ky.—Chesapeake & O. Ry Co v. Pope, 176 S W 2d 876, 296 Ky. 254
Mo—Crockett v City of Mexico, 77 S W 2d 464, 336 Mo 145
52 C J p 187 note 55 [a] (17).

89. Ky—Chesapeake & O Ry Co v. Pope, 176 S W.2d 876, 296 Ky. 254

90. Ky—Louisville Ry. Co v Jackey, 35 S W 2d 28, 237 Ky. 125

91. Miss—Mississippi Cent R. Co v. Alexander, 152 So. 653, 169 Miss 620

Approaches in cities
Statutory requirement that railroad must keep approaches in good order for as many feet beyond crossing as may be necessary to get on and off crossing conveniently applies to crossings within cities—Central of Georgia Ry. Co. v. Dumas, 160 S.E 814, 44 Ga App 152.

92. Mo—Albright v. Louisiana & M R R. Co, App., 189 S W.2d 665, affirmed 195 S W.2d 648, 355 Mo 211.

to remain on the crossing for an unreasonable or unlawful length of time; but generally the railroad company will not be held liable where it has not been guilty of negligence in obstructing passage over the crossing

In general the railroad company owes the duty to the public not to obstruct a crossing unnecessarily or for an unreasonable period,[93] and it may incur liability where it allows its train or cars to remain on the crossing unnecessarily, or for an unreasonable or unlawful length of time, by reason of which injuries are received by one who attempts, with due care, to cross,[94] or by one who is precluded by the obstruction from attempting to cross.[95] A railroad company may be liable for injuries caused by the erection or maintenance of an obstruction without legal authority,[96] or in such manner as to amount to negligence,[97] or where the obstruction causes delay with a resultant collision.[98] The duty of the railroad to keep the crossing clear and unobstructed is nonassignable.[99] Statutory powers of a railroad with respect to the maintenance of an obstruction in a highway must be exercised with reasonable judgment and precaution to prevent injury to others.[1]

Negligence is usually the basis of recovery, and if there is no negligence there can be no recovery.[2] The question of whether the obstruction of a highway by a standing train is negligent is determined by whether, under all the circumstances it is reasonable.[3] In the event that the railroad company has violated no duty to persons using a public crossing, in respect of the existence of an obstacle or obstruction, it is not liable for injuries sustained as the result of such obstacle or obstruction.[4] In general a railroad company has the right to stop its train or leave its cars at a public crossing for a reasonable time and for a proper purpose;[5] it is

93. U S —**Corpus Juris quoted in** Mabray v. Union Pac R Co, D C. Colo., 5 F.Supp 397, 399.
52 C.J. p 189 note 72.
Obstruction of view or hearing see infra § 732

94. U S.—**Corpus Juris quoted in** Mabray v Union Pac R Co, D. C.Colo., 5 F Supp 397, 400
Ga —Shelley v. Pollard, 189 S E 570, 55 Ga.App. 88
Ind —Cleveland, C, C. & St. L. Ry. Co. v Gillespie, 173 N E. 708, 96 Ind App 535.
Miss.—**Corpus Juris cited in** Magers v Okolona, Houston & Calhoun City R Co., 165 So. 416, 418, 174 Miss 860.
Nev.—Cox v Los Angeles & S L. R Co., 56 P.2d 149, 56 Nev. 472, rehearing denied 58 P 2d 373, 56 Nev 510—Los Angeles & S. L. R Co. v. Lytle, 47 P 2d 934, 56 Nev 192, rehearing denied 52 P 2d 464, 56 Nev. 192
52 C J. p 189 note 77.
Duty to give warning as to presence of obstruction of crossing see infra § 725 b.

95. U S.—**Corpus Juris quoted in** Mabray v. Union Pac R. Co., D C Colo, 5 F Supp 397, 400.
52 C.J. p 189 note 78.

96. U S —**Corpus Juris quoted in** Mabray v Union Pac. R Co., D.C Colo., 5 F.Supp. 397, 400
N J.—Howard v. Lehigh Valley R Co., 150 A. 356, 106 N.J.Law 466.
52 C.J p 189 note 74.

97. U.S.—**Corpus Juris quoted in** Mabray v. Union Pac R. Co., D.C Colo., 5 F.Supp. 397, 400.
Minn.—Munkel v. Chicago, M., St P & P. R. Co, 278 N.W. 41, 202 Minn 264.
Pa.—Blaskey v. Pennsylvania R Co, 10 A.2d 891, 138 Pa Super. 465.
52 C.J. p 189 note 75.

Reasonable care
The railroad, while it has the crossing obstructed, should use reasonable care to see that the obstruction does not injure travelers on the street —Driskell v. Powell, C.C A Ga, 67 F 2d 484.

98. U.S —**Corpus Juris quoted in** Mabray v Union Pac R. Co, D C. Colo., 5 F Supp 397, 400.
52 C J. p 189 note 76.

99. U S —**Corpus Juris quoted in** Mabray v Union Pac R Co, D C. Colo, 5 F Supp 397, 400
S C —Phillips v Seaboard Air Line R Co, 122 S E 309, 127 S.C 541

1. N.Y —McGettigan v New York Cent R Co, 196 N E 745, 268 N Y 66, 99 A L R 283—Whalen v New York Central R. Co, 196 N E 745, 268 N.Y. 66, 99 A L.R 283—Canfield v. New York Central R Co, 196 N E 745, 268 N Y 66, 99 A L R. 283—Haslam v State, 4 N.Y.S 2d 59, 167 Misc. 455

2. Mo —Hicks v. Chicago, M, St. P & P. R Co, App., 233 S W 2d 787

Failure to look
In determining question of primary negligence of railroad in connection with crossing accident wherein automobile in which plaintiff was a passenger ran into freight train at night, the circumstances that occupants of automobile did not look to right or left before attempting to cross tracks and were not conscious of danger until it was too late to avoid impact could be considered.—Holt v Thompson, C C A Okl, 115 F 2d 1013.

3. Me —Witherly v. Bangor & A. R Co., 158 A 362, 131 Me 4
N D —Bowers v. Great Northern Ry Co, 259 N W 99, 65 N D 384, 99 A L R. 1443

Careful movement of trains over tracks does not constitute "obstruction," with respect to liability for crossing collision —Moore v. Atlantic Coast Line R Co, 165 S E 708, 203 N C. 275

4. U S —**Corpus Juris quoted in** Mabray v. Union Pac R Co., D C Colo, 5 F Supp. 397, 400
Cal —**Corpus Juris cited in** Dunlap v Pacific Electric Ry. Co, 55 P 2d 894, 895, 12 Cal App 2d 473.
Ill —Briske v. Village of Burnham, 32 N E 2d 349, 308 Ill App 531, affirmed 39 N E 2d 976, 379 Ill. 193
52 C.J p 189 note 79

5. U S —Holt v Thompson, C C A Okl, 115 F 2d 1013—Thomson v Stevens, C C A.Iowa, 106 F 2d 739—Driskell v Powell, C.C A Ga, 67 F 2d 484—**Corpus Juris quoted in** Mabray v Union Pac. R. Co, D C. Colo, 5 F.Supp 397, 400
Ala.—Southern Ry Co. v Lambert, 160 So 262, 230 Ala 162
Ill —**Corpus Juris quoted in** Miles v American Steel Foundries, 23 N.E 2d 754, 756, 302 Ill.App 262
Minn.—Munkel v. Chicago, M., St. P. & P R. Co, 278 N.W 41, 202 Minn 264.
Miss —Mississippi Export R Co v Summers, 11 So 2d 429, 194 Miss 179, suggestion of error overruled 11 So 2d 905, 194 Miss. 179—Gulf, M. & N. R Co. v Kennard, 145 So. 110, 164 Miss 380
Neb —Sailors v. Lowden, 299 N W. 510, 140 Neb. 206
Or.—Irwin v Southern Pac. Co, 95 P 2d 62, 163 Or. 72.
Utah.—Olson v Denver & R. G W. R Co, 98 P.2d 944, 98 Utah 208
Wash —Hendrickson v Union Pac. R. Co, 136 P 2d 438, 17 Wash 2d 548, 161 A.L.R 96.
52 C.J. p 189 note 80.

not chargeable with negligence for so doing,[6] and is not liable for injuries caused by such obstruction.[7]

Aside from statutory requirements, the care and diligence required of a railroad company in the lawful occupation of grade crossings with its trains are to be measured by the care and diligence which it has the right to assume will be exercised by travelers on the highway.[8] In general, the trainmen have a right to assume that the operator of the vehicle will act in a reasonable way to avoid a collision,[9] and are not bound to anticipate that a person will drive a vehicle into the standing train or cars[10] They have a right to assume, under ordinary conditions, that the driver of a motor vehicle on the highway, properly equipped, will see the train in time to stop,[11] and will maintain such control and speed as will enable him to stop his car within the distance within which he can plainly see the train[12]

6. U S—**Corpus Juris quoted in** Mabray v. Union Pac R Co, D C Colo, 5 F Supp. 397, 400.
Ala—Southern Ry Co. v. Lambert, 160 So 262, 230 Ala 162
Cal.—Mallett v. Southern Pac Co., 68 P 2d 281, 20 Cal App 2d 500
Ga.—Bassett v Callaway, 33 S.E 2d 112, 72 Ga App 97.
Ill.—**Corpus Juris quoted in** Miles v. American Steel Foundries, 23 N E 2d 754, 756, 302 Ill App 262.
Ky.—Louisville & N. R. Co v Reynolds, 202 S.W 2d 997, 305 Ky 54
La.—Jones v Texas & P. Ry. Co, App, 154 So 768
Me.—Witherly v Bangor & A. R. Co, 158 A. 362, 131 Me 4.
Md—Buczkowski v Canton R. Co., 30 A.2d 257, 181 Md. 377
Minn—Munkel v Chicago, M., St. P & P R. Co, 278 N.W. 41, 202 Minn. 264—Crosby v Great Northern Ry. Co., 245 N W 31, 187 Minn 263.
Miss—Illinois Cent. R. Co v McNeil, 39 So 2d 490, 205 Miss 807.
Mo—State ex rel. Thompson v. Cave, 215 S.W 2d 435, 358 Mo 414—Hicks v. Chicago, M, St. P & P. R. Co, App, 233 S W.2d 787.
Mont—Jarvella v. Northern Pac Ry Co, 53 P 2d 446, 101 Mont 102
Neb—Sailors v Lowden, 299 N W. 510, 140 Neb 206
Nev—Los Angeles & S L R. Co v. Lytle, 47 P 2d 934, 56 Nev 192, rehearing denied 52 P 2d 464, 56 Nev 192
N D—Bowers v. Great Northern Ry. Co, 259 N W 99, 65 N.D. 384, 99 A L.R. 1443.
Or—Finn v Spokane, P & S. Ry. Co., 214 P 2d 354, opinion adhered to 218 P.2d 720—Irwin v Southern Pac Co, 95 P 2d 62, 163 Or. 72.
S D—Backer v Chicago & N. W. Ry Co., 4 N W 2d 853, 68 S.D. 531.
Tenn—Tennessee Cent Ry. Co. v Schutt, 2 Tenn App 514
Utah—Olson v. Denver & R. G. W. R Co, 98 P.2d 944, 98 Utah 208
Wash—Hendrickson v Union Pac R. Co, 136 P.2d 438, 17 Wash 2d 548, 161 A L R 96
52 C.J. p 190 note 81.

7. U S—O'Keefe v Wabash R Co, C A Ill, 185 F.2d 241, certiorari denied 71 S.Ct 743, 341 U S 921, 95 L Ed. —— —**Corpus Juris quoted in** Mabray v Union Pac R Co, D C Colo, 5 F Supp 397, 400
Ala—Southern Ry Co v Lambert, 160 So 262, 230 Ala 162
Ariz—Malin v Southern Pac Co, 154 P 2d 790, 62 Ariz 126—Doty v Southern Pac Co, 129 P.2d 991, 59 Ariz 449
Ill—**Corpus Juris quoted in** Miles v American Steel Foundries, 23 N. E 2d 754, 756, 302 Ill App. 262
La—Jones v. Texas & P Ry Co, App, 154 So. 768—Plummer v. Gulf, M. & N. R Co, App, 153 So 322
Miss.—Mississippi Export R Co v Summers, 11 So 2d 429, 194 Miss 179, suggestion of error overruled 11 So 2d 905, 194 Miss 179.
N.Y.—Bertrand v Delaware & Hudson R R Corp, 46 N Y S 2d 78, 267 App Div. 228—Pascal v Pascal, 4 N.Y S 2d 781, 254 App Div. 807, reargument denied 6 N Y S 2d 651, 254 App Div. 934
N C—Dove v Atlantic Coast Line R Co, 23 S E 2d 328, 222 N C 756—Blackwell v Hawkins, 178 S E 554, 207 N C 874
Or—Irwin v Southern Pac Co, 95 P 2d 62, 163 Or 72
Pa—Cella v. Pennsylvania R. Co., 65 Dist & Co, 527.
Tenn—Tennessee Cent Ry Co v Schutt, 2 Tenn App 514
Utah—Olson v Denver & R G W R Co, 98 P.2d 944, 98 Utah 208
52 C.J. p 190 note 82.

8. Vt—Yardley v Rutland R. Co., 153 A. 195, 103 Vt. 182.

9. U S—**Corpus Juris quoted in** Mabray v. Union Pac. R Co, D C Colo, 5 F Supp 397, 400
Cal—Martindale v Atchison, T. & S. F Ry. Co., 201 P 2d 48, 89 Cal App 2d 400
Del.—Philadelphia, etc, R. Co. v. Dillon, 114 A. 62, 31 Del. 247, 15 A.L R 894.
Ill—**Corpus Juris quoted in** Coleman v. Chicago, B. & Q. R. Co., 5 N E. 2d 103, 105, 287 Ill App 483.
La—**Corpus Juris quoted in** Squyres v. Baldwin, 185 So. 14, 17, 191 La. 249
Or—Finn v. Spokane, P & S. Ry Co, 214 P 2d 354, opinion adhered to 218 P 2d 720.

10. Ind—Pennsylvania R. Co. v. Huss, 180 N E 919, 96 Ind App 71.
Okl—Fleming v. Loch, 195 P 2d 942, 200 Okl. 448.

Statutory duties of motorist

The statute governing a motorist's duties while driving on a highway should be considered on the question of primary negligence in cases where an automobile has run into the side of a train blocking a crossing, not merely as an element of contributory negligence, but as a circumstance from which to determine the question of the degree of care and caution demanded of trainmen with respect to warning traveling public of the presence of cars—Kurn v. Jones, 101 P.2d 242, 187 Okl 94.

11. Ind—Cleveland, C, C. & St L Ry. Co. v Gillespie, 173 N E. 708, 96 Ind App 535
Ky—Louisville & N. R. Co v. Reynolds, 202 S W 2d 997, 305 Ky 54—Illinois Central R Co v Maxwell, 167 S.W 2d 841, 292 Ky. 660—Louisville & N R. Co. v. Mischel's Adm'x, 114 S W 2d 115, 272 Ky 295
Miss—Gulf, M. & N. R. Co. v. Kennard, 145 So 110, 164 Miss 380.

12. U S—Chicago, M, St P & P. R Co v. Slowik, C A Minn, 184 F 2d 920—Wm A Smith Const Co. v Brumley, C C A Okl, 88 F 2d 803.
Del—Philadelphia, etc., R Co v. Dillon, 114 A. 62, 31 Del 247, 15 A L R. 894.
D C—Sisson v Southern Ry Co, 68 F 2d 403, 62 App D C 356
Neb—Sailors v Lowden, 299 N.W. 510, 140 Neb 206.
Tex—Texas & N O R Co v. Stratton, Civ App, 74 S W 2d 746, error refused, followed in Texas & N O. R Co. v Berry, 74 S W 2d 750, error refused
Vt—Yardley v Rutland R. Co, 153 A. 195, 103 Vt. 182

Fog or mist

Railroad was not required to anticipate that fog or mist would make yellow refrigerator car difficult to see while train was on country crossing, but railroad was justified in assuming that if there was a mist or fog on the highway, driver of automobile would reduce his speed so that he would not travel into or

Purpose, construction, and effect of regulations The purpose of statutes, ordinances, or railroad company rules prohibiting the blocking of crossings by railroads, or limiting the time that a train should stand on a crossing, is to prevent delay to traffic,[13] and to keep the ways of communication open in order that any person desiring to use them may do so without unreasonable interference.[14] Such regulations have been held not designed to prevent vehicles from being driven against the sides of trains[15] or to impose on the railroads a greater degree of care than that required by existing law.[16] They must be construed reasonably[17] and in such manner that a railroad will not be deprived of the use of its tracks.[18] A passenger in a motor vehicle which collided with a standing car has been held to be within the class of persons for whose benefit a law was enacted prohibiting the blocking of crossings by a railroad.[19]

According to some cases, the violation of a municipal ordinance[20] or of a statute,[21] including a penal statute,[22] aimed at the undue blocking of a crossing by trains or cars, is negligence per se, for which the railroad company may be liable,[23] even though the statute is in terms directed to employees in charge of a train.[24] It has also been asserted broadly that a railroad company is civilly liable to any person sustaining a harm separate and distinct from interference with the public right of travel caused by its intentional obstruction of a street in violation of statute, regardless of whether it was guilty of common-law negligence.[25] On the other hand, according to some cases, a penal statute of this description in terms directed to employees of a railroad company does not impose a duty on the company itself,[26] therefore, negligence may not be predicated on a mere violation of such statute,[27] but depends in each case on whether or not the obstruction was reasonable.[28] The fact that the company has obstructed a crossing by one of its cars beyond the time fixed by law has been held not of itself negligence,[29] but merely a matter to be considered on the question of whether there was negligence in the operation of a train at the crossing.[30] Liability may not be predicated on an alleged violation of a statute or ordinance aimed at the undue or improper blocking of a crossing by a train or cars where the conditions are not such as to bring the case within the provisions of the statute or ordinance in question.[31] A railroad company rule limiting the time that a train should stand on a crossing does not have the force and effect of a statute and, hence, proof of a failure by the trainmen to comply with it, where nothing else is shown, is not evidence of negligence.[32]

At place other than public crossing. Some penal statutes restricting the blocking of crossings by trains or cars do not apply to permissive crossings,

through such mist or fog at any greater rate of speed than would enable him to stop within the distance within which he could see objects ahead of him.—Dillner v Joyce, 6 N W 2d 275, 233 Iowa 279.

13. Ind.—Pennsylvania R Co. v Huss, 180 N E 919, 96 Ind App. 71.
La.—Cuccia v Gulf, M & N R Co., App., 180 So 513.
Mich.—Simpson v Pere Marquette Ry. Co., 268 N W. 769, 276 Mich 653.
Ohio.—Capelle v. Baltimore & O R Co., 24 N E 2d 822, 136 Ohio St 203.
Or.—Irwin v Southern Pac Co, 95 P 2d 62, 163 Or 72.

14. Ind.—Pennsylvania R Co. v Huss, 180 N E 919, 96 Ind App. 71.

15. Ind.—Pennsylvania R. Co. v Huss, 180 N E. 919, 96 Ind App 71.
Ohio.—Capelle v. Baltimore & O. R Co, 24 N.E.2d 822, 136 Ohio St 203.
Or.—Irwin v. Southern Pac. Co, 95 P 2d 62, 163 Or 72.

16. La.—Cuccia v Gulf, M. & N. R Co, App, 180 So 513.

17. U S.—Probert v Chicago, I & L. Ry Co, C C A Ill, 93 F 2d 259.

18. U S.—Probert v. Chicago, I. & L Ry. Co, supra.

19. Ohio.—Short v Pennsylvania R Co, 187 N.E. 737, 46 Ohio App. 77.

20. Cal.—Hofstedt v Southern Pac. Co, App, 1 P.2d 470.
52 C J p 190 note 83.

21. Ind.—Pennsylvania R Co v Huss, 180 N E 919, 96 Ind App 71.
Miss.—Jarrell v New Orleans, etc., R Co, 67 So 659, 109 Miss 49.
Tex.—Missouri-Kansas-Texas R. Co of Texas v. McLain, Civ App., 74 S W 2d 166, reversed on other grounds, Com App, 105 S W 2d 206, set aside and affirmed 126 S W 2d 474, 133 Tex 484.

22. Ind.—Central Indiana R Co v. Wishard, 114 N E. 970, 186 Ind. 262.
52 C J p 190 note 85.

23. Ind.—Cleveland, etc, R Co v. Gillespie, 173 N.E. 708, 96 Ind App. 535.—Chicago, etc, R Co v Hunter, 113 N E 772, 65 Ind App. 158.

24. Ind.—Chicago, etc, R. Co. v. Hunter, supra.

25. Minn.—Flaherty v Great Northern Ry Co, 16 N.W 2d 553, 218 Minn 488.

26. N Y.—Killen v New York Cent R Co, 232 N.Y S 76, 225 App Div 8.

27. N Y.—Burns v Delaware, etc., Co, 96 N.Y S 509, 110 App Div 592, 101 N.Y.S. 225, 116 App Div 111.
52 C J. p 190 note 89.

28. N Y.—Killen v New York Cent R. Co, 232 N.Y S 76, 225 App Div 8.

29. Tex.—Texas & P Ry Co v Boyle, Civ App., 29 S W 2d 927, error dismissed.

30. Tex.—Texas & P. Ry Co v Boyle, supra.
Evidence of negligence
Violation of law prohibiting locomotive standing on public way without lights during a period from one half hour after sunset to one half hour before sunrise is evidence of negligence.—Hoban v. Trustees of New York, N. H. & H. R. Co, Mass, 95 N.E 2d 651.

31. U S.—Probert v. Chicago, I. & L Ry Co, C C A Ill, 93 F.2d 259.
Ind.—Cleveland, C, C & St. L Ry Co v Gillespie, 173 N.E 708, 96 Ind App. 535.
52 C J p 190 note 91.

32. Or.—Irwin v Southern Pac. Co, 95 P 2d 62, 163 Or. 72.

and so negligence cannot be predicated of a violation of such statute where a train blocks a permissive crossing[33] It has been held, however, that, where a way across the track is constantly used by the public with the knowledge of the railroad company's employees without objection, the railroad company has the duty of exercising reasonable care to meet and avoid dangers which should be anticipated.[34] A railroad company has been held not liable for an injury to a person who crosses, under an implied invitation from the company, at a place other than a public crossing, where the injury resulted from the maintenance of an implement in the path which was necessary in the operation of the railroad[35]

Trespass. According to some cases, a railroad company which allows its train or cars to block a crossing for an unreasonable time, or for a longer time than the law permits, unless it is without fault, is a trespasser.[36]

During repairs. A railroad engaged in repairing a crossing, which requires temporary obstruction of part of the highway, is required to use ordinary care to prevent injury to others[37] It should provide a reasonably safe detour or temporary way, or direct travelers to cross by another way, or warn persons approaching the crossing of the dangers[38]

§ 721. —— Bridges or Tunnels

A railroad company is liable for a failure to comply with its duty to construct and maintain a bridge, trestle, or tunnel in a reasonably safe manner, but is not liable in the absence of a violation of a duty imposed on it.

The liability of a railroad where a public highway is led across the tracks by means of a bridge or underpass depends on the existence of a duty on its part to protect users of the crossing from injury[39] Where, at a crossing, a railroad company is bound to construct or maintain a bridge or viaduct over its track,[40] approaches to a bridge over its track,[41] a bridge, viaduct, or trestle over a highway which the railroad crosses,[42] a street, underpass, or tunnel under its track,[43] or a bridge which is an approach to, and a necessary part of, the

33. Ark.—St Louis Southwestern R Co v Christian, 261 S W 297, 262 S W 29, 164 Ark. 65
52 C J. p 190 note 93.

34. Wis.—Carmer v. Chicago, etc, R. Co, 70 N.W 560, 95 Wis 513

35. Kan.—Atchison, etc, R Co. v. Fuller, 84 P 140, 72 Kan. 527.
52 C.J. p 190 note 95.

36. S.C.—Walker v Southern R Co Carolina Div, 57 S.E 764, 77 S.C 161, 12 Ann Cas 591.
52 C J. p 190 note 96.

37. Neb.—Benes v Chicago, St. P., M. & O. Ry Co., 3 N.W.2d 909, 141 Neb. 479.

38. Tex.—James v. Missouri-Kansas-Texas R. Co. of Texas, Civ App., 182 S.W 2d 921.

39. U S.—Contino v. Baltimore & A. R. Co., C A Md., 178 F 2d 521.

Duty of maintenance at place of injury

Railroad was not liable for injury caused by defect in street carried over tracks, where injury occurred on a part of the street which the railroad was not required to maintain.—Seide v. Great Northern Ry Co., 223 N W 152, 176 Minn 252.

Right of way outside crossing

Statute requiring railroad to construct a sufficient crossing and approaches at a public road or street had no application in action by pedestrian against railroad for injuries sustained by pedestrian in fall from footbridge on right of way outside crossings and approaches.—Albright v. Louisiana & M R R. Co., 195 S W.2d 648, 355 Mo 211

Duty of adjoining landowner

Common-law duty of railroad in manner of maintaining overpass at highway crossing, with respect to users of highway, is that of an adjoining landowner.—Shea v Boston & M. R. R., 191 A. 650, 88 N H. 462

40. U.S.—Contino v. Baltimore & A. R. Co, C.A.Md, 178 F 2d 521—Holder v. St Louis-San Francisco Ry Co., C.A.Tenn., 172 F 2d 217.
Conn.—Korzen v Town of Southbury, 2 A 2d 218, 124 Conn 674
Ga.—Central of Georgia Ry Co. v. Keating, 165 S E. 873, 45 Ga App 811, reversed on other grounds 170 S.E 493, 177 Ga 345, mandate conformed to 170 S.E. 497, 47 Ga App 336
Mo.—Clark v. Mississippi River & B. T. Ry., 23 S.W.2d 174, 324 Mo. 406.
N H.—Pierce v. Boston & M. R. R, 143 A. 903, 83 N H. 466
Tenn.—Louisville & N. R. Co. v. Evins, 13 Tenn App. 57.
Va.—Southern Ry. Co. v. Magagna, 177 S E 112, 163 Va. 762.
52 C J p 191 note 7.

Bridge as part of crossing

(1) A highway bridge, constructed by railroad over its tracks, was a "railroad crossing," which it was its duty to keep in reasonably safe condition for public use.—Calley v Boston & Maine R. R., 33 A 2d 227, 92 N.H. 455

(2) A railroad "crossing" within act requiring railroad to maintain crossings safely includes railroad viaduct over road, but such act does not apply to road beneath viaduct.—Carr v. Chicago & N W Ry Co., 77 N E 2d 857, 333 Ill App 567

Bridge over railroad is part of railroad, not highway, and must be kept in suitable repair by railroad.—Pierce v Boston & M R. R, 143 A. 903, 83 N H. 466.

41. U S.—Holder v. St. Louis-San Francisco Ry Co, C.A Tenn, 172 F 2d 217
Tenn.—Louisville & N. R. Co v. Evins, 13 Tenn App 57
Va.—Virginian Ry Co v Underwood, 146 S E 277, 152 Va 264
52 C J p 191 note 8.

Washout

Railroad maintaining bridge spanning cut on right of way is responsible for continuance of washout on approach thereto.—Chicago, R. I & P Ry Co. v. Fanning, C C A Colo, 42 F.2d 799.

42. Ky.—Tennessee Cent Ry Co. v. Hancock's Adm'x, 53 S W 2d 708, 243 Ky 426.
Mo.—McFetridge v. Kurn, App, 125 S.W 2d 912.
N.Y.—Taylor v City of Albany, 267 N.Y.S. 903, 239 App Div. 217, affirmed 191 N E. 554, 264 N.Y. 539
52 C J. p 191 note 9.

43. U S.—Baltimore & A R Co v. Contino, C A Md, 185 F 2d 932, certiorari denied 71 S.Ct 798, 341 U S 927, 95 L Ed ——.—Contino v Baltimore & A. R. Co., C.A.Md, 178 F 2d 521.
52 C J. p 191 note 10.

crossing,[44] in general it will be liable if it fails to comply with its duty to construct or to maintain such bridge, trestle, tunnel, or street in a condition reasonably safe for persons using it for the purpose of crossing in the ordinary way. A like rule imposing liability applies where the company, although not obligated so to do, nevertheless undertakes to construct a bridge over a track[45] or on the approach to its track.[46]

On the other hand where there is nothing to show a violation of a duty imposed on it or which it has voluntarily assumed, liability of the railroad company cannot be predicated on claimed defects in a bridge or viaduct carrying the highway over the railroad,[47] in a bridge, trestle, or viaduct carrying the railroad over a street or highway,[48] in a tunnel carrying the highway or street under the railroad,[49] or in a bridge which is connected with, or a part of, the approach to the crossing.[50] Moreover, no liability is imposed on the company in respect of construction or maintenance where a bridge over the railroad track is safe for the ordinary needs of travel,[51] or where a bridge over railroad tracks or a railroad bridge over a street is lawfully constructed and maintained in accordance with a plan approved by municipal or other governmental authorities and the plan is not obviously unsafe or dangerous;[52] and, in this connection, the authorities can ratify the structure of a completed railroad bridge even though the bridge was not constructed as provided by the original authorizing ordinance.[53] However, an informal preliminary approval of the bridge by the highway department, followed by a formal and final order of the public service commission merely requiring the railroad to construct a bridge which shall be "safe and suitable" does not relieve the railroad from liability for negligent construction.[54] Notwithstanding statutes giving a commission power to order the construction or repair of a bridge and the terms of the installation and maintenance, the duty and obligation of the railroad remain undisturbed until the commission has assumed jurisdiction with respect to the particular crossing.[55]

In general, the duty of the railroad with respect to a bridge or viaduct is to use ordinary care to keep it in a reasonably safe condition[56] for persons

44. Pa.—Cochran v Pittsburgh, C., C & St L. R Co., 169 A. 10, 110 Pa Super 411
52 C J p 192 note 11

Continuance of duty

Duty to place proper bridge over trench for pedestrians crossing tracks continued until railroad finally abandoned use of trench, so as to render it liable for injuries to pedestrian because of rotten condition of bridge due to elements, although in good condition when placed—Cochran v. Pittsburgh, C., C. & St L. R. Co., supra.

45. U S—Holder v. St Louis-San Francisco Ry. Co., C A Tenn 172 F 2d 217.
52 C J p 192 note 12.

46. Tex.—Missouri Pac R Co. v Bridges, 12 S W. 210, 74 Tex. 520, 15 Am S.R. 856.

47. U S.—Delaware, L. & W R Co. v Chiara, C C A.N.J., 95 F 2d 663, certiorari denied Chiara v Delaware, L. & W R Co., 59 S Ct 68, 305 U.S. 609, 83 L Ed 387.
Ill.—Shenk v Scandrett, 42 N E 2d 353, 314 Ill App. 582.
Ky.—Cincinnati, N. O & T P. Ry. Co. v. Falconbury, 119 S.W 2d 563, 274 Ky 518
Miss.—Alabama & V. Ry. Co v. Graham, 157 So 241, 171 Miss 695—Illinois Cent. R. Co. v. Bloodworth, 145 So. 333, 166 Miss. 602
Mo.—Albright v. Louisiana & M R. R Co., 195 S.W 2d 648, 355 Mo 211.
Wis.—Kitter v. Lenard, 291 N W 814, 235 Wis 411
52 C.J. p 192 note 14.

48. Ill.—Carr v Chicago & N. W Ry Co., 77 N E 2d 857, 333 Ill App 567
Minn.—Willoughby v Duluth, M. & I R Ry Co., 38 N W 2d 186, 229 Minn 160—Nickelsen v. Minneapolis, N. & S. Ry., 209 N.W 646, 168 Minn 118.
Pa.—McHugh v Reading Co., 30 A 2d 122, 346 Pa 266, 145 A L R. 319—Yoder v City of Philadelphia, 173 A. 275, 315 Pa. 586
52 C J. p 192 note 15.

49. Mo.—Shaw v. St. Louis-San Francisco R Co., 9 S W 2d 835, 223 Mo App 1008

50. Ala.—Gulf, etc., R Co v. Pistole, 120 So 159, 218 Ala 695
Tex.—Gulf, etc., R Co v. Woods, Civ App., 262 S W. 229.

51. U S.—Medema v Hines, C.C.A. Iowa, 273 F 52.
52 C J p 192 note 18.

52. Ga.—Shedd v Pollard, 191 S E. 492, 55 Ga App 828—Callaway v Georgia Railroad & Banking Co., 187 S E 399, 53 Ga App 785
N Y.—Weis v Long Island R Co., 186 N E 861, 262 N Y 352—Pierce v. New York Cent. R. Co., 21 N.Y. S 2d 57, 260 App Div 295, affirmed 31 N E 2d 512, 284 N.Y. 754.
52 C.J. p 192 note 19.

Municipal authorization pursuant to statute

Where empowered by statute, a municipality may authorize or legalize the location of a railroad bridge within the wagonway of a public street or high road in a position which, unauthorized, would constitute a nuisance—Delaware, L & W R Co. v. Chiara, C C.A N J, 95 F 2d 663, certiorari denied Chiara v. Delaware, L & W. R. Co., 59 S Ct 68, 305 U S 609, 83 L Ed. 387.

53. U S.—Delaware, L. & W. R. Co. v Chiara, C C A N J, 95 F.2d 663, certiorari denied Chiara v Delaware, L. & W R Co., 59 S.Ct. 68, 305 U S 609, 83 L Ed 387

54. N H.—Calley v Boston & Maine R. R., 33 A 2d 227, 92 N H. 455.

55. Mo.—Clark v Mississippi River & B. T. Ry., 23 S W.2d 174, 324 Mo 406.

56. Iowa.—Harris v Chicago, M., St. P & P R. Co., 278 N.W 338, 224 Iowa 1319
Miss.—Illinois Cent R Co v. Bloodworth, 145 So. 333, 166 Miss. 602
N.H.—Calley v. Boston & Maine R R., 33 A 2d 227, 92 N.H. 455
Tex.—Paschall v. Gulf, C & S F. Ry Co., Civ App., 100 S W.2d 183, modified on other grounds Campbell v Paschall, 121 S W.2d 593, 132 Tex 226

Lights

The law does not impose a duty on the railroad to maintain lights on a bridge or in its vicinity—Louisville & N R. Co. v. Evins, 13 Tenn.App 57

Obscuring of signs

Mining company, which maintained an overpass bridge over which it operated cars from which liquid dropped onto highway and onto signs erected and maintained to warn motorists of center pier, so that

using ordinary care and prudence,[57] or, where its duties are prescribed by statute, to maintain the structure as specified by the statute.[58] In determining whether the railroad company has exercised due care in the maintenance of a bridge in a condition safe for travelers, consideration should be given to the physical surroundings and the condition of the roadway approaching the bridge,[59] and also to the conditions of public travel and the character of the bridge.[60] Reasonable care includes vigilance to see that a dangerous hole does not develop in the floor of a bridge by defective or decaying timbers, as well as to discover and remedy the defect after it develops.[61] Where the duty resting on the railroad is limited to keeping a bridge in repair from a structural standpoint, it is not liable for alleged defects arising from the existence of foreign objects thereon, such as ice, peelings, or other accumulations not inherently a part of the structure;[62] but the liability of railroads for the improper maintenance of bridges is not always restricted to defects of structure, and it may be the duty of the railroad to exercise reasonable care to see that the bridge is free from unsafe accumulations,[63] unless relieved of that duty by statute.[64]

Barriers or guard. A railroad company is not liable in respect of an insufficient guard rail or other barrier where the duty of maintaining such guard rail or other barrier is not imposed on it,[65] nor is it necessarily liable for an injury resulting from the giving way of a guard rail, fence, or other barrier on a bridge over the railroad tracks or on the approach to such a bridge.[66] It may, however, be liable for failure to comply with its duties to provide a sufficient guard rail or other barrier on the bridge[67] or the approach to it;[68] and the test of the sufficiency of barriers erected in connection with the maintenance of a viaduct is whether the barriers are such as a reasonably prudent person would have erected.[69]

Clearance space. While the mere fact that an accident might not have occurred if the passageway under the railroad tracks were larger is not a ground for holding the railroad company liable,[70] a railroad company may be liable for the violation of its duty to provide sufficient elevation between the highway or street and the railroad bridge or trestle crossing such streets.[71] This liability has been held to extend to cases in which the elevation is changed by others than the railroad company by raising the grade of the street,[72] but there is also authority to the contrary.[73] The railroad ordinarily cannot be charged with negligence where the clearance has been approved by the proper governmental authorities and is not manifestly dangerous to travelers making the usual use of the highway,[74]

signs were materially obscured, was liable for injuries and for death of occupants of automobile which collided with the pier.—Robinson v Duluth, M. & I. R Ry. Co., 38 N.W.2d 183, 229 Minn. 155.

57. Miss.—Illinois Cent. R. Co. v. Bloodworth, 145 So. 333, 166 Miss. 602

Reliance on lawful use

Railroad had right to presume that its bridge over tracks would be used in lawful manner.—Illinois Cent. R. Co. v. Bloodworth, supra.

58. Ga.—Central of Georgia Ry. Co. v. Keating, 170 S.E. 493, 177 Ga. 345, mandate conformed to 170 S. E. 497, 47 Ga.App. 336

Dangerous obstruction not contemplated

Statute authorizing railroad to cross streets did not contemplate obstruction dangerous to those making ordinary use of highways.—Krause v. Southern Pac. Co., 295 P. 966, 135 Or. 310.

59. Ga.—Central of Georgia Ry. Co. v. Keating, 165 S.E. 873, 45 Ga.App. 811, reversed on other grounds 170 S.E. 493, 177 Ga. 345, mandate conformed to 170 S.E. 497, 47 Ga.App. 336.
52 C.J. p. 193 note 31.

60. Ala.—Southern Ry. Co. v. McCourry, 130 So. 216, 221 Ala. 600

61. Ala.—Southern Ry. Co. v. McCourry, supra.

62. Ala.—Louisville & N. R. Co. v. Stanley, 167 So. 745, 232 Ala. 273.

63. N.H.—Calley v. Boston & Maine R. R., 33 A.2d 227, 92 N.H. 455

64. N.H.—Calley v. Boston & Maine R. R., supra.

65. Wash.—Pridmore v. Northern Pac. R. Co., 186 P. 862, 109 Wash. 305.

Duty as to protection of cut

Where the railroad owned land on each side of a cut and there was a bridge over the cut, it was held that the same duty to protect the cut by a fence or guard rail did not apply along the land of the railroad as applied to the bridge and its approach.—Louisville & N. R. Co. v. Evins, 13 Tenn.App. 57.

66. Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Falconbury, 119 S.W.2d 563, 274 Ky. 518.
Va.—Southern Ry. Co. v. Magagna, 177 S.E. 112, 163 Va. 762.
52 C.J. p. 192 note 22.

67. N.H.—Pierce v. Boston & M. R. R., 143 A. 903, 83 N.H. 466
N.C.—Hoggard v. Atlantic Coast Line R. Co., 139 S.E. 372, 194 N.C. 256.
52 C.J. p. 193 note 23.

68. Va.—Norfolk, etc., R. Co. v. James, 136 S.E. 660, 147 Va. 178.
52 C.J. p. 193 note 24.

69. Conn.—Trasacco v. New York, N. H. & H. R. Co., 155 A. 493, 113 Conn. 355

Insurmountable barriers

Railroad, repairing viaduct walkway, was not required to erect insurmountable barriers between roadway and walkway for protection of pedestrians.—Trasacco v. New York, N. H. & H. R. Co., supra.

70. Ga.—Echols v. Atlanta, B. & C. R. Co., 165 S.E. 484, 45 Ga.App. 609
52 C.J. p. 193 note 25

71. U.S.—Baltimore & A. R. Co. v. Contino, C.A.Md., 185 F.2d 932, certiorari denied 71 S.Ct. 798, 341 U.S. 927, 95 L.Ed. —
Or.—Krause v. Southern Pac. Co., 295 P. 966, 135 Or. 310.
52 C.J. p. 193 note 26

72. S.C.—Brown v. Southern R. Co., 96 S.E. 701, 111 S.C. 140.

73. Ga.—Shedd v. Pollard, 191 S.E. 492, 55 Ga.App. 828
Ill.—Carr v. Chicago & N. W. Ry. Co., 77 N.E.2d 857, 333 Ill.App. 567
52 C.J. p. 193 note 28

74. Ga.—Shedd v. Pollard, 191 S.E. 492, 55 Ga.App. 828
N.J.—Hill Const. Co. v. Central R.

provided there is a compliance with other related statutes specifying steps to be taken for the safety of the traveling public.[75] The failure to post a clearance sign does not necessarily establish negligence on the part of the railroad in the absence of a statutory requirement in this respect;[76] but there should be a compliance with a statute requiring such a sign,[77] and, while the violation of such a statutory direction may not be negligence per se,[78] it is an incident from which negligence may be legitimately inferred.[79]

Changed conditions. The railroad company may be liable for injuries resulting from failure to make changes required by an increased or new use of the crossing in the case of a bridge or trestle across a highway,[80] or of a bridge or viaduct carrying the highway over the railroad tracks.[81] The acquiescence of a municipality in the maintenance by a railroad company of a railroad bridge over one of its streets does not give the railroad company the right perpetually to maintain the bridge as originally constructed.[82] However, a railroad owes no duty at common law to relocate the abutment walls of an underpass merely because the public has made an increased and new use of the highway.[83]

Effect of duty imposed on, or assumed by, or under contract with, another than railroad company. While, where the duty of maintenance in respect of crossings at separate grades is imposed solely on the municipality, the railroad company is not liable for defects due to want of proper maintenance,[84] it is generally held that, when the railroad company has the duty of construction or maintenance in respect of crossings at separate grades, it is not relieved from liability for noncompliance with such duty by the fact that another has assumed to construct or to maintain,[85] or by the fact that the duty of construction or maintenance is imposed also on another.[86] The fact that the municipality has failed to comply with its duty as to the maintenance of guards or barriers on some part of the road other than that at a highway bridge over the railroad tracks does not affect the liability of the railroad company in respect of providing guards or barriers at such bridge or its approaches.[87]

In general, the liability of a railroad company to third persons, who have suffered injury as a direct and proximate result of its failure to perform its contract with a municipality to construct and maintain a bridge over its tracks within such municipality, depends on the terms of the particular contract as affected by any ordinance or statute in force within the municipality relating to the construction and maintenance of such bridge.[88] It has been held that where a railroad has constructed and maintained a bridge across its tracks under contract with a municipality, the liability of the railroad for injuries depends on whether the municipality would be liable if it had constructed and maintained the bridge and whether the railroad has assumed such liability which otherwise would be on the municipality.[89] Where by virtue of statute a state high-

Co of New Jersey, 167 A. 757, 11 N.J.Misc. 622.

75. N J—Hill Const Co v Central R Co of New Jersey, supra

76. Ill—Carr v Chicago & N W Ry. Co., 77 N E 2d 857, 333 Ill App 567

77. N.J—Hill Const. Co v. Central R. Co. of New Jersey, 167 A. 757, 11 N J Misc 622.

Consent of state authorities

Statute directing state roads commission and forbidding others to erect and maintain warning signs along public highways was not intended to prevent a railroad from marking its road beds where it makes a crossing above a public highway and does not relieve railroad from obligation to secure erection of suitable warning signs by or with consent of state authorities—Baltimore & A R Co. v. Contino, C A Md., 185 F 2d 932, certiorari denied 71 S Ct 798, 341 U.S. 927, 95 L. Ed. —.

78. N J—Hill Const. Co. v Central R Co of New Jersey, 167 A 757, 11 N J Misc 622.

79. N J—Hill Const Co. v. Central R. Co. of New Jersey, supra.

80. Mass—Cooke v Boston, etc, R Co, 133 Mass. 185.
Ohio.—Yackee v. Village of Napoleon, 21 N E 2d 111, 135 Ohio St. 344

81. Iowa—Harris v Chicago, M., St. P. & P R Co., 278 N W. 338, 224 Iowa 1319.
Miss—Illinois Cent R. Co. v. Bloodworth, 145 So 333, 166 Miss. 602
52 C J p 193 note 30

82. Ohio—Yackee v Village of Napoleon, 21 N.E 2d 111, 135 Ohio St. 344

83. N H—Shea v. Boston & M. R. R, 191 A. 650, 88 N H 462.

84. Ohio.—Larson v. Cleveland Ry Co, 50 N E 2d 163, 142 Ohio St. 20
52 C J. p 193 note 32

85. Minn—Crist v Minneapolis, etc., R. Co, 202 N W. 57, 162 Minn. 1.
52 C J. p 193 note 33.

86. Ky—Louisville, etc., R. Co v Muncey, 17 S W 2d 422, 229 Ky. 538
52 C J p 193 note 34.

87. Va—Virginian R. Co. v Farr, 136 S E. 668, 147 Va 217—Norfolk, etc, R Co v. James, 136 S E. 660, 147 Va 178.

88. Ohio—Larson v. Cleveland Ry. Co, 50 N E 2d 163, 142 Ohio St. 20

Absence of request to repair or repave

Where ordinance defining obligation of railroad to maintain bridge over railroad provided that repairs should be made when necessary, on request of city council, and there was no claim that city council ever requested railroad to repair or repave part of bridge on which occupant of automobile was injured, no liability accrued against railroad company—Larson v Cleveland Ry. Co, supra.

89. Ky—Louisville & N. R. Co. v Hadler's Adm'r, 106 S W 2d 106, 269 Ky 115.

Warning of dangerous situation

Municipality, if it had erected and maintained bridge across railroad tracks, would have been required to give warning of the dangerous situation arising from sharp curve in bridge, with respect to liability of railroads which erected and maintained bridge under contract with

way department has assumed the work of removing snow from a bridge and the railroad has been freed from all duties pertaining to snow removal, it cannot be held liable for negligence on the part of the highway department in the performance of the work.[90] The responsibility of a railroad for keeping a bridge safe and secure may arise by virtue of an agreement between it and a landowner.[91]

Approaches. The obligation of the railroad company sometimes extends not only to the bridge or structure over its right of way, but to the necessary and proper approaches thereto,[92] and, in such case, a railroad cannot relieve itself of such obligation by contract with a municipality, unless there is statutory authority therefor.[93] The approach to a bridge includes only the embankment, or other made or prepared structure, necessary to reach the bridge proper from the original level of the street.[94]

Pillars or piers in road A railroad is not necessarily negligent in constructing a railroad bridge or trestle over a highway with a pier located in the highway[95] or with a pillar located on the sidewalk;[96] nor is it necessarily guilty of negligence in maintaining such a supporting pier or post without lights.[97] However, a railroad maintaining supporting pillars in the street owes a duty of due care.[98] The "wagonway," as used in a statute permitting piers for the support of a railroad bridge running over a highway to be located at the outer edge of the wagonway, is that part of a street ordinarily used for the passage of vehicles within the curb lines.[99] Under provisions casting the maintenance of a highway on the commissioner of highways, a railroad company which constructs an overhead bridge with a center pier, which is approved by the highway commissioner, has been held not to have the duty of caring for a reflector placed on the pier to warn a traveler on the highway.[1]

§ 722. —— Obstruction of View or Hearing

The maintenance of necessary structures near a crossing which interfere with the view does not always impose liability on the railroad company for a resulting accident, but liability is sometimes imposed where the company negligently permits unnecessary obstructions, either of view or hearing.

It is not ordinarily regarded as negligence per se for a railroad company to have or permit at or near a railroad crossing structures or other obstructions reasonably necessary to the conduct of its business, although they interfere with the view,[2] as, for example, to allow cars or engines to remain on a sidetrack,[3] or to allow cars or engines to

the municipality for injuries and deaths resulting allegedly from railroads' failure to give adequate warning of the situation.—Louisville & N. R. Co. v Hadler's Adm'r, supra

90. N H.—Calley v Boston & Maine R R, 33 A.2d 227, 92 N H 455

91. Mass.—Miles v. Boston, R. B. & L. R Co., 174 N.E. 200, 274 Mass. 87.

92. N J —Fehrenbach v. Pennsylvania R. Co., 144 A. 792, 105 N J.Law 455.

93. N J.—Fehrenbach v. Pennsylvania R. Co., supra

94. Tenn.—Louisville & N. R. Co. v. Evins, 13 Tenn.App 57.

95. La.—Becker v. Illinois Cent. R. Co, App., 147 So. 378.
Ohio —Beal v. Erie R. Co., 1 N E.2d 328, 51 Ohio App. 397.
Tex —Paschall v. Gulf, C. & S. F. Ry. Co., Civ.App., 100 S.W.2d 183, modified on other grounds Campbell v Paschall, 121 S W 2d 593, 132 Tex 226

Title to land not acquired by public authorities

The railroad company cannot be held liable merely because it has constructed and maintains in a street a pier supporting its tracks on land which is a part of its original right of way, title to which was not acquired by the public authorities on opening the street under the tracks.—Collins v. Southern R Co, 132 S E 595, 191 N.C. 623

96. N Y —Sadlier v Delaware, L & W R Co, 284 N Y S. 644, 246 App Div 826

97. Ill —Elliott v. City of Chicago, 89 N E.2d 738, 339 Ill App 273
Ohio —Beal v. Erie R. Co., 1 N E 2d 328, 51 Ohio App. 397

Word "maintain," in statute providing that when a public way passes under railroad tracks cost of maintaining bridges and abutments shall be borne by railroad, was held used in sense of to keep in repair or in substantially same condition in which it was constructed, and not to require railroad to keep lights on, or to maintain any guard near, such construction.—Beal v. Erie R. Co, supra.

98. N C —Montgomery v. Blades, 12 S.E.2d 217, 218 N.C 680.

99. U.S.—Delaware, L. & W. R Co. v. Chiara, C C A.N.J, 95 F 2d 663, certiorari denied Chiara v. Delaware, L. & W. R. Co., 59 S Ct 68, 305 U.S. 609, 83 L.Ed. 387.

1. Minn —Murphy v Great Northern Ry Co., 248 N.W. 715, 189 Minn. 109.

2. N C.—Parrish v. Atlantic Coast Line R. Co, 20 S.E 2d 299, 221 N. C. 292
Okl.—Midland Val. R. Co v. Pettie, 162 P 2d 543, 196 Okl 52.
Tenn —Louisville & N. R. Co v Frakes, 11 Tenn App. 593—Louisville & N. R Co v. Ross, 2 Tenn App 384
Tex —Wichita Falls & S R Co v Hesson, Civ App, 151 S W.2d 270, error dismissed, judgment correct —Wichita Falls & Southern R. Co v. Anderson, Civ.App, 144 S W 2d 441, error dismissed, judgment correct—St. Louis Southwestern Ry. Co of Texas v. Larkin, Civ App, 34 S W 2d 693, error dismissed—Texas & N. O Ry Co v Adams, Civ App., 27 S W 2d 331, error dismissed.
52 C J. p 194 note 37.

Embankment obstructing motorist's view of railroad tracks from highway crossing was held not violation of any statute or rule of law —Purdy v. Sprague, 2 N E 2d 743, 286 Ill App 17—52 C J. p 194 note 37 [e]

3. Kan.—Richards v Chicago, R. I & P Ry. Co, 139 P 2d 427, 157 Kan. 378.
Md.—Western Maryland Ry. Co. v Myers, 163 A. 700, 163 Md 534
Mo —Wright v. St Louis-San Francisco Ry. Co., 37 S W 2d 591, 327 Mo. 557.
S.C.—**Corpus Juris cited in** Melton v. Atlantic Coast Line R Co., 27 S E 2d 490, 492, 206 S C 251
Tex.—Texas & P Ry Co. v Boyle, Civ.App., 29 S.W.2d 927, error dismissed.

remain near or in the vicinity of crossings,[4] or to maintain telegraph poles on its right of way.[5] However, according to some cases, permitting cars to encroach on a highway, so as to obstruct the view of travelers, may be actionable negligence.[6] The existence of an obstruction to the view connected with the operation of the road may be considered in determining whether or not there was negligence on the part of the railroad company, under all the circumstances, either in permitting the obstruction or in operating the train which caused the accident.[7]

The duty of exercising a degree of care in approaching the crossing commensurate with the increased danger is imposed on the railroad company by the existence of obstructions which are connected with the operation of the road,[8] or which the railroad company has authorized a third person to maintain;[9] but it has been asserted that an obstruction of view which may tend to increase the hazards and make a crossing more dangerous does not require the railroad to do more than exercise ordinary care, that is, ordinary care commensurate with the circumstances.[10] While railroads are not obliged to accommodate the speed of their trains to smoke that lingers for brief intervals over railroad crossings,[11] a railroad which allows smoke and steam to obstruct the view of a highway across which a train is standing may be found negligent.[12]

Unnecessary obstructions. According to some cases, it is actionable negligence on the part of a railroad company to permit unnecessary obstructions on its right of way at or near a railroad crossing so as to obstruct the view thereat either of its servants approaching on a train or of persons on the highway,[13] as where it allows the right of way to become overgrown with trees, bushes, weeds, grass, etc., so as to obstruct such view.[14] However, in other cases the view is taken that the mere maintenance of an unnecessary obstruction to the view of persons approaching the crossing does not in itself constitute actionable negligence[15] in the absence of a statute requiring railroad companies to keep their rights of way free from such obstructions.[16] Under some statutes a railroad is required to clear its right of way of trees and shrubs for a specified distance on either side of a crossing,[17] and if it is derelict in performing such duty, and such dereliction is the proximate cause of injury, the railroad company is liable.[18] Violation of a

Wis.—Lang v. Chicago & N. W. Ry. Co., 40 N.W.2d 548, 256 Wis. 131.
52 C.J. p. 194 note 38.

4. Kan.—Johnson v. Union Pac. R. Co., 143 P.2d 630, 157 Kan. 633.
Neb.—McIntosh v. Union Pac. R. Co., 22 N.W.2d 179, 146 Neb. 844.
52 C.J. p. 194 note 39.

5. Ill.—Chicago, etc., R. Co. v. Pearson, 56 N.E. 633, 184 Ill. 386.
52 C.J. p. 194 note 40.

6. Mo.—Wright v. St. Louis-San Francisco Ry. Co., 37 S.W.2d 591, 327 Mo. 557.
52 C.J. p. 194 note 41.

7. La.—Hebert v. Texas & Pac. Ry. Co., App., 28 So.2d 151.
Md.—Western Maryland Ry. Co. v. Myers, 163 A. 700, 163 Md. 534.
Minn.—Munkel v. Chicago, M., St. P. & P. R. Co., 278 N.W. 41, 202 Minn. 264.
N.C.—Parrish v. Atlantic Coast Line R. Co., 20 S.E.2d 299, 221 N.C. 292.—Coltrain v. Atlantic Coast Line R. Co., 4 S.E.2d 853, 216 N.C. 263.
Okl.—Midland Val. R. Co. v. Pettie, 162 P.2d 543, 196 Okl. 52.
S.C.—Bishop v. Atlantic Coast Line R. Co., 48 S.E.2d 620, 213 S.C. 125.—Melton v. Atlantic Coast Line R. Co., 27 S.E.2d 490, 206 S.C. 251.
52 C.J. p. 195 notes 44, 45.

8. Ky.—Spalding v. Louisville & N. R. Co., 136 S.W.2d 1, 281 Ky. 357.
Neb.—McIntosh v. Union Pac. R. Co., 22 N.W.2d 179, 146 Neb. 844.
N.C.—**Corpus Juris cited in** Parrish v. Atlantic Coast Line R. Co., 20 S.E.2d 299, 304, 221 N.C. 292.
Okl.—Thompson v. Cooper, 135 P.2d 49, 192 Okl. 237.—Thompson v. Cooper, 135 P.2d 52, 192 Okl. 240.
Pa.—Minella v. Pennsylvania R. Co., 164 A. 520, 309 Pa. 479, followed in 164 A. 522, 309 Pa. 486.
S.C.—Gleaton v. Southern Ry. Co., 38 S.E.2d 710, 208 S.C. 507.—Melton v. Atlantic Coast Line R. Co., 27 S.E.2d 490, 206 S.C. 251.
Tenn.—Louisville & N. R. Co. v. Ross, 2 Tenn. App. 384.
52 C.J. p. 194 note 42.

9. La.—Smith v. Texas & Pac. Ry. Co., App., 189 So. 316.
52 C.J. p. 194 note 43.

10. Mo.—State ex rel. Kurn v. Hughes, 153 S.W.2d 46, 348 Mo. 177, conformed to, App., 154 S.W.2d 397.

Ability to see smokestack and wheels
Fact that cars were standing on side track near crossing did not make the crossing so exceptionally dangerous as to require extraordinary precautions by railroad to avoid injury, where motorist could see smokestack of approaching train and wheels of coaches despite the standing cars.—Louisville & N. R. Co. v. Marshall's Adm'x, 158 S.W.2d 137, 289 Ky. 129.

11. U.S.—Ouzts v. Powell, C.C.A. Fla., 125 F.2d 768.
Pa.—Minella v. Pennsylvania R. Co., 164 A. 520, 309 Pa. 479, followed in 164 A. 522, 309 Pa. 486.

Assumption as to motorist's conduct
Engineer may assume that motorist unable to see because of smoke will not enter crossing.—Minella v. Pennsylvania R. Co., supra.

12. Minn.—Munkel v. Chicago, M., St. P. & P. R. Co., 278 N.W. 41, 202 Minn. 264.

13. Kan.—Corley v. Atchison, etc., Ry. Co., 133 P. 555, 90 Kan. 70, Ann. Cas. 1915B 764.
52 C.J. p. 195 note 46.

14. Ky.—Spalding v. Louisville & N. R. Co., 136 S.W.2d 1, 281 Ky. 357.
52 C.J. p. 195 note 47.

15. Ind.—Childress v. Lake Erie, etc., R. Co., 105 N.E. 467, 182 Ind. 251.
52 C.J. p. 195 note 48.

Not independent ground of negligence
The presence of weeds or vegetation obstructing view of railroad crossing is not an independent ground of negligence.—Mast v. Illinois Cent. R. Co., D.C. Iowa, 79 F. Supp. 149, affirmed 176 F.2d 157.

16. Conn.—Cowles v. New York, etc., R. Co., 66 A. 1020, 80 Conn. 48, 12 L.R.A.,N.S., 1067, 10 Ann. Cas. 481.

17. Ill.—Sprague v. Goodrich, 32 N.E.2d 897, 376 Ill. 80.—Shaw v. Chicago & E. I. R. Co., 75 N.E.2d 51, 332 Ill. App. 285.—Goodrich v. Sprague, 42 N.E.2d 337, 314 Ill. App. 671.

18. Ill.—Shaw v. Chicago & E. I.

statute requiring railroads to keep their rights of way clear of brush or trees for a specified distance does not give rise to a cause of action unless the interest invaded is one which the enactment was intended to protect;[19] and such interest, it has been held, is that of the travelers on an intersecting highway.[20]

While it has been held that the mere fact that there exist trees, brush, weeds, and the like which might obstruct a traveler's view of an approaching train is not of itself enough to charge the railroad company with the duty of adopting extraordinary safeguards at the crossing,[21] the view generally taken is that the railroad company must operate its trains with reference to unnecessary obstructions,[22] and, if necessary to protect the traveler, must use precautions in addition to those ordinarily used;[23] and, in any event, the maintenance of such obstruction may be considered with other circumstances in determining whether the company exercised due care.[24]

Obstructions not on right of way. A railroad company is not chargeable with negligence in respect of obstructions of view not on the right of way and not under its control,[25] as, for example, trees and shrubs, weeds, and the like.[26] According to some cases the duty of the operators of a train to use ordinary care to avoid injuring persons about to use a railroad crossing requires such operators to take into consideration obstructions of view off the right of way which render the crossing more dangerous than it otherwise would be,[27] but there is also authority to the contrary [28]

At other than public crossings. In general, the existence of obstructions on the railroad right of way at other than public crossings is not in itself actionable negligence,[29] at least as to persons who have no right to use the crossing,[30] or in the absence of contract or other obligation imposed on the railroad in connection with the creating of such a crossing [31] While there is authority for the view that the presence of obstructions to the view on the railroad right of way at a private crossing does not affect the duty of the railroad company,[32] there is also authority to the effect that such obstructions may be considered in determining the negligence of the railroad company in operating the train which caused the accident.[33]

Obstruction of hearing. If through the fault of the railroad company a traveler is prevented from hearing an approaching train, and the servants of the company fail to warn him of its approach, and induced by this failure of duty, which has lulled him into security, he attempts to cross the track and is injured, having used his faculties as best he could under the circumstances to ascertain if there is any danger ahead, negligence will be imputed to the company.[34] The fact that, because of noises

R. Co, 75 N E 2d 51, 332 Ill App. 285—Feggett v Chicago & E I R Co, 48 N.E 2d 215, 318 Ill App. 389

Absence of material obstruction

Where brush and trees did not materially obstruct view of one approaching railroad crossing, railroad was not guilty of negligence proximately contributing to collision with automobile on crossing—Shaw v. Chicago & E. I. R. Co, 75 N.E 2d 51, 332 Ill.App. 285.

19. Wis—Wilmet v. Chicago & N. W Ry. Co, 289 N.W. 815, 233 Wis. 335

20. Wis.—Wilmet v. Chicago & N. W. Ry. Co., supra.

Unobstructed view on reaching intersecting highway

Where occupants of automobile struck by train were not within class protected by statute requiring railroads to keep right of way clear of brush or trees near intersections until they reached intersecting highway, and when they reached such highway they had unobstructed view of railway tracks for a considerable distance, violation of statute could not be assigned as ground of negligence—Wilmet v. Chicago & N. W Ry. Co., supra.

21. N.J.—Danskin v. Pennsylvania R Co, 72 A. 32, 76 N J.Law 660, 22 L R A,N S, 232
Tex—Galveston, etc, R Co v. McCrorey, Com App, 23 S.W 2d 691

22. Kan—Schaefer v Arkansas Valley Interurban R Co, 179 P. 323, 104 Kan 394, rehearing denied 181 P 118, 104 Kan 740—Chicago, etc, R Co. v. Hinds, 44 P. 993, 56 Kan 758.

23. Ind—Childress v. Lake Erie, etc, R Co, 105 N E. 467, 182 Ind 251.
Me.—Ham v. Maine Cent R. Co., 116 A. 261, 121 Me. 171

24. U.S—Mast v. Illinois Cent. R Co., D C.Iowa, 79 F Supp. 149, affirmed 176 F 2d 157.
52 C.J. p 195 note 53.

25. Ark.—St Louis-San Francisco Ry Co v. Hovley, 120 S W 2d 14, 196 Ark 775.
52 C J. p 195 note 54.

26. Mich.—Mulvaney v. New York Cent. R. Co, 206 N W. 536, 233 Mich 350
52 C J. p 195 note 55.

27. Ark—Missouri Pac. R Co. v Yelldell, 133 S W 2d 642, 199 Ark 343
52 C.J p 195 note 57.

28. Ohio.—New York, etc, R Co. v Kistler, 64 N E 130, 66 Ohio St 326, 342
52 C J. p 195 note 58.

29. N.Y—Cordell v. New York Cent, etc, R Co, 70 N.Y. 119, 26 Am R. 550
52 C J p 195 note 59

30. Ill—Atchison, etc, R Co. v Parsons, 42 Ill App 93
52 C J p 195 note 60

31. Ky—Spalding v Louisville & N. R Co., 136 S W 2d 1, 281 Ky 357.

32. Ala—Atlantic Coast Line R. Co v Carter, 117 So 213, 214 Ala 252.
52 C J. p 196 note 61.

Fog

Where a train while proceeding through heavy fog at night struck a truck at a private crossing, no negligence could be attributed to railroad until trainmen discovered truck on tracks—Louisville & N. R Co v. Engle, 129 S W 2d 133, 278 Ky 576.

33. N Y—Cordell v. New York Cent, etc, R. Co, 70 N Y. 119, 26 Am R 550

34. N C—Coltrain v. Atlantic Coast

made by trains, a traveler is prevented from hearing signals on another train which is approaching the crossing may be considered in determining whether there was negligence in operating such other train.[35] However, the engineer of a train has a right to assume that no person will risk his life by entering on a railroad track in the dark where he is unable to hear because of noise,[36] and the fact that engines are permitted to stand near a crossing under steam pressure, and that some noise is made by the escape of steam through automatic valves in the ordinary way, has been held not of itself to constitute actionable negligence although the noise prevents a traveler from hearing an approaching train.[37]

§ 723. —— Knowledge of, or Notice to, Railroad Company

Ordinarily a railroad company is not liable for injuries resulting from a claimed defect or obstruction at a crossing unless it had, or in the exercise of due care should have had, notice thereof, but under some statutes liability may arise without notice.

In order to charge a railroad company with negligence for defects or obstructions at a crossing which it is bound to keep in proper condition and repair, it must appear that the railroad company had notice of the defect or obstruction,[38] or should, under the circumstances, have had notice thereof,[39] especially where the defect or obstruction is caused by a third person;[40] and it must also appear that the company failed within a reasonable time thereafter to repair or remove it.[41] The railroad company is, however, chargeable with knowledge of defects or obstructions which by the exercise of due care it could discover,[42] and may be liable for a defective condition which has been allowed to remain for an unreasonable time after notice or after such time as would imply notice;[43] and it may, therefore, be liable in respect of such defects or obstructions even in the absence of actual knowledge.[44]

Under some statutes the railroad is under a duty to keep its crossings and approaches in good and sufficient repair with or without notice.[45] Thus, according to some cases, a statute imposing the duty on a railroad company to keep its crossings in repair requires such companies to take notice of the condition of the crossing and at all times to be informed as to any defects therein.[46] However, in respect of injuries at crossings to which a statute does not apply, the railroad company is not liable if it did not have knowledge of the defect, and could not have known of it in the exercise of ordinary care.[47]

Sufficiency of original construction. If an accident was caused by an originally defective or improper construction, the company will not be heard to say that it did not know of the unreasonably un-

Line R. Co., 4 S.E.2d 853, 216 N.C. 263

35. Ind.—Lake Erie, etc., R. Co. v. Douglas, 125 N.E. 474, 71 Ind.App. 567.

36. Pa.—Minella v. Pennsylvania R. Co., 164 A. 520, 309 Pa. 479, followed in 164 A. 522, 309 Pa. 486.

37. U.S.—San Pedro, etc., R. Co. v. Matthews, Utah, 260 F. 55, 171 C.C.A. 91.

38. La.—**Corpus Juris quoted in** Brandon v. Texas & N.O. R. Co., App., 169 So. 254, 258
Mo.—McGrew v. Thompson, 184 S.W.2d 994, 353 Mo. 856.
52 C.J. p. 196 note 65

39. La.—**Corpus Juris quoted in** Brandon v. Texas & N.O. R. Co., App., 169 So. 254, 258
52 C.J. p. 196 note 66

Knowledge in time to remedy defect
The railroad must have knowledge, actual or constructive, of the defect in time to have remedied it.—McGrew v. Thompson, 184 S.W.2d 994, 353 Mo. 856

Vision obscured by glare
Trainmen blocking crossing near lighted bridge were not chargeable with knowledge that automobile driver's vision would be obscured by glare without any evidence to that effect.—Cleveland, C., C. & St. L. Ry. Co. v. Gillespie, 173 N.E. 708, 96 Ind.App. 535.

40. Ill.—Peoria, etc., R. Co. v. Lyons, 9 Ill.App. 350
La.—**Corpus Juris quoted in** Brandon v. Texas & N.O. R. Co., App., 169 So. 254, 258

41. La.—**Corpus Juris quoted in** Brandon v. Texas & N.O. R. Co., App., 169 So. 254, 258
Mo.—Nixon v. Hannibal, etc., R. Co., 42 S.W. 942, 141 Mo. 425

42. La.—**Corpus Juris quoted in** Brandon v. Texas & N.O. R. Co., App., 169 So. 254, 258
52 C.J. p. 196 note 69

Frequency of inspection
Railroad owed duty to inspect wooden culverts at crossing often enough to insure repair or replacement before any one could fall through rotten top thereof.—Tharpe v. Sibley Lake Bisteneau & S. Ry. Co., La.App., 144 So. 274

Trap
Railroad was bound to know that short wire looped above rails at crossing was trap for unwary pedestrian, and was likely to cause fall and consequent injury.—Missouri Pac. R. Co. v. Cox, 58 S.W.2d 421, 187 Ark. 104.

Permissible height of vehicles
Statute making it unlawful to operate a vehicle of more than a specified height was constructive notice to railroad company that a railroad trestle of a smaller height would not accommodate all trucks of lawful height.—Yackee v. Village of Napoleon, 21 N.E.2d 111, 135 Ohio St. 344.

43. Ala.—Louisville & N. R. Co. v. Stanley, 167 So. 741, 27 Ala.App. 168, reversed on other grounds 167 So. 745, 232 Ala. 273.

44. La.—**Corpus Juris quoted in** Brandon v. Texas & N.O. R. Co., App., 169 So. 254, 258.
52 C.J. p. 196 note 70.

45. Ohio.—Smith v. Pennsylvania R. Co., App., 40 N.E.2d 445

46. La.—**Corpus Juris quoted in** Brandon v. Texas & N.O. R. Co., App., 169 So. 254, 258.
Tex.—St. Louis, etc., R. Co. v. Houze, Civ.App., 28 S.W.2d 865

47. Tex.—Stephenson v. St. Louis Southwestern R. Co., Civ.App., 164 S.W. 1125.

safe condition,[48] but, in the case of a failure to remedy an unsafe condition arising after a proper and safe construction, the railroad is not liable unless through its proper agents it knew of the defective condition or by the exercise of ordinary care should have known of it.[49]

Statutory notice of defect or obstruction as condition precedent to liability. Where, by statutory provisions, a notice to the railroad company by a public officer is a condition precedent to its duty to repair or to remove a defect,[50] or to the liability expressly imposed by statute for failure to remove an obstruction on its right of way,[51] liability does not arise in the absence of such notice. However, the notice of a defective condition, required under a statute permitting the county to recover the cost of construction if the railroad fails to maintain a crossing in good order after notice from the board of supervisors of the county, has been held to relate only to the right of the board to sue thereunder, and not to that of private individuals for whose benefit the crossing must at all times be maintained.[52] Where a statute imposes the duty on the railroad company to repair farm crossings regardless of the written notice by the landowner, which is provided for in order to permit the landowner to repair and to recover the expense thereof and a penalty, the railroad company may be liable for an injury resulting from the defective condition of such a crossing even in the absence of such notice.[53]

§ 724. —— Status of, and Care Required as to, Persons Passing around, over, between, or under Trains or Cars

a. Passing around

b. Passing over, between, or under

a. Passing Around

The railroad company may be liable where a train obstructs a crossing for an unreasonable or unlawful period of time and fails to exercise due care as to one who attempts to pass around it; but where such a person crosses outside the limits of the highway and is regarded as a trespasser, the company is not liable in the absence of willful or wanton conduct.

According to some cases, a person who leaves the highway and, on the land of the railroad, attempts to pass around a train or cars obstructing a crossing is not a trespasser,[54] at least where the crossing has been obstructed for an unreasonable or unlawful period.[55] The railroad company is under the duty of exercising due care to avoid injury to such person,[56] and for a violation of such duty it may become liable.[57] So the view has been taken that, where the railroad company has blocked a crossing for an excessive time by its train or cars, it is liable for an injury sustained by a person who, while exercising due care, attempts to go around the train or cars[58] on the land of the railroad company[59] or on the property of an adjacent landowner.[60] There is, however, authority for the view that the railroad company may not be regarded as negligent where the injured person attempts to cross at a point where there is only a small opening between trains and such point is not a customary place to cross.[61]

Even though the obstruction is a lawful one, according to some cases a traveler is not obliged to wait until the train is removed, and if he is obliged to cross at points other than within the line of the street on account of such obstruction, the railroad company should use ordinary care and diligence to prevent injury to him.[62] According to other cases, however, even though the crossing has been blocked for an unreasonable time, a person who attempts to cross outside the limits of the highway is a tres-

48. Ky.—Louisville & N. R Co. v v. Bell, 125 S.W.2d 239, 276 Ky 778

Construction of sidewalk by railroad

Notice to railroad of defective condition of planks constituting part of the sidewalk between the tracks was not required in order to entitle pedestrian to recover for injuries sustained when his foot slipped between rail and defective plank, where railroad had constructed the sidewalk between the tracks—Brown v. Pitcairn, Mo.App, 116 S W 2d 175

49. Ky—Louisville v. N. R. Co v Bell, 125 S.W.2d 239, 276 Ky. 778.

50. U S.—Cahill v. Mayflower Bus Lines, C C.A N.Y, 77 F 2d 838, certiorari denied 56 S Ct 156, 296 U. S. 629, 80 L Ed 447.
52 C.J. p 196 note 73.

51. Vt—Howe v Central Vermont R Co, 101 A. 45, 91 Vt 485.
52 C J. p 196 note 74

52. Miss—Mississippi Cent R Co v Alexander, 152 So 653, 169 Miss 620.

53. Ill—Baltimore, etc., R Co v. Keck, 57 N.E. 197, 185 Ill 400.

54. Ill.—Balsewicz v. Chicago, etc, R Co, 88 N.E 734, 240 Ill 238
45 C.J. p 753 note 76 [a]—52 C J p 197 note 77.
Contributory negligence in crossing near standing train or cars see infra § 802.

55. Ga—Yarbrough v Georgia R & Banking Co., 172 S.E. 808, 48 Ga App. 314
52 C J p 197 note 78.

56. Pa—Golden v Pennsylvania R. Co, 41 A 302, 187 Pa 635.
52 C J p 197 note 79.

57. Tex—Texas, etc, R Co v. Brouillette, 130 S W. 886, 61 Tex Civ App. 619.
52 C J p 197 note 80

58. Pa—Golden v Pennsylvania R. Co, 41 A. 302, 187 Pa 635

59. Ga.—Georgia Cent R Co. v Owen, 48 S E 916, 121 Ga. 220.
52 C J. p 197 note 82.

60. Ga.—Georgia Cent. R. Co. v Owen, supra.

61. Mo—Stillson v. Hannibal, etc., R. Co, 67 Mo 671.

62. Mo—Brown v. Hannibal, etc, R Co, 50 Mo. 461, 11 Am R. 420.
52 C J p 197 note 85.

passer,[63] and where a person is regarded as a trespasser, the railroad company is not liable in the absence of willful, reckless, or wanton conduct on its part.[64] In any event, if the employees of a railroad company in charge of the train are aware of the presence of a person who is passing around the train, they are under the duty of using reasonable care to avoid injuring such person.[65]

b. Passing Over, Between, or Under

A railroad company may be liable to one who suffers injury as a result of its failure to exercise reasonable care towards one who attempts to pass over, between, or under standing cars which obstruct a crossing; but where such a person is regarded as a trespasser, the only duties of the company are to use due care after discovering him in a dangerous position, and not to injure him willfully or wantonly.

According to some cases, if a train or car has obstructed the crossing only for a reasonable time, a person who attempts to pass through, under or over the train or a car is regarded as a trespasser,[66] and the only duties which the railroad company owes are to use due care after it has discovered that such person is in a dangerous position,[67] and not to injure him willfully or wantonly.[68] In some decisions the view has been expressed, apparently without regard to the unlawfulness or unreasonableness of the blocking that a person who attempts to cross through, under, or over an obstructing train or car is a trespasser,[69] and that the railroad company is not responsible for failing to look out for such a traveler or for failing to give him warning, before moving the train or cars, in the absence of knowledge on the part of the trainmen of an attempt so to cross by the injured person or other persons, or of the trainmen's having reason to anticipate the presence of a person or persons thereon who might be injured by the movement of the train,[70] but, according to other authorities, where the train has obstructed the crossing for an unreasonable or unlawful period, a person who attempts to cross through, under, or over the train or a car is not a trespasser,[71] and the railroad company is under the duty to use reasonable or ordinary care to protect such persons[72] and to give proper warnings before moving the train or cars.[73]

According to some decisions, a person who, because of an obstruction, attempts to cross at a distance from the crossing is a trespasser,[74] and the railroad company is liable only for wanton or willful injury,[75] and not for a failure to give warning before moving the train where its trainmen had no notice of the presence of the injured person.[76] It has been held, however, that the mere fact that a person attempted to cross between the cars a short distance from, but as near as possible to, the highway, did not make such person a trespasser;[77] and where a crossing was blocked in violation of a statute and no warning was given before the train was moved, it has been held that the railroad company was liable for an injury sustained by one who crossed under a car at some distance from the crossing.[78]

In general, if trainmen saw and knew that people were crossing at the time of moving, and were in danger of being hurt,[79] or otherwise had reason to anticipate the presence of persons who might be injured by the movements of the train,[80] as where persons, with the knowledge of the company, have been in the habit of crossing trains or cars

63. Ky.—Sweat v. Louisville, etc, R Co, 300 S W 14, 178 Ky 825
52 C.J p 197 note 86

64. Mass.—Lynch v. Boston, etc, R Co., 116 N E 248, 226 Mass 522, L.R.A.1917E 819.

65. Md.—Baltimore, etc, R Co. v Harris, 88 A 282, 121 Md. 254.
52 C.J p 197 note 88

66. Wis.—Shea v Chicago, M., St. P. & P R Co., 10 N W 2d 135, 243 Wis 253
52 C J. p 198 note 90.
Passing over, between, or under standing trains or cars as contributory negligence see infra § 803

67. Ark.—Cato v. St. Louis Southwestern Ry. Co., 79 S W 2d 62, 190 Ark 231
52 C.J p 198 note 91.

68. Ark.—Cato v St Louis Southwestern Ry. Co, supra
Wis.—Shea v. Chicago, M, St P. & P R Co, 10 N.W 2d 135, 243 Wis 253.

69. Del.—Braderman v Baltimore, etc., R Co, 134 A 56, 33 Del 206

70. Ky.—Louisville & N. R. Co. v. Reynolds' Adm'r, 42 S W 2d 911, 240 Ky 662
52 C J. p 198 note 97.
Reliance on pedestrian's conduct
Railroad having train over path leading across tracks could presume that deceased pedestrian would not interfere while tracks were occupied by train.—Louisville & N. R. Co. v. Reynolds' Adm'r, supra.

71. Tex.—Texas & N O. R. Co. v. Owens, Civ App, 54 S.W 2d 848, error refused
52 C.J. p 198 note 92

72. Tex.—Freeman v. Terry, Civ. App., 144 S W 1016

73. Ky.—Illinois Cent R Co v. Thomason, 156 S W 2d 192, 288 Ky 386
52 C.J. p 198 note 94.

74. Mo.—Dahlstrom v. St. Louis, etc, R. Co, 8 S W. 777, 96 Mo 99
52 C.J. p 199 note 98.

75. U S.—Hasting v. Southern R Co, S C, 143 F 260, 74 C C.A 398, 5 L R A,N S, 775, certiorari denied 26 S Ct 762, 201 U S 649, 50 L Ed 905.

76. Mo.—Israel v. Wabash R Co., App, 218 S W. 916.
52 C.J p 199 note 1.

77. Md.—Baltimore, etc, R. Co. v. State, 119 A 244, 141 Md 520.

78. Miss.—Jarrell v New Orleans, etc, R Co, 67 So 659, 109 Miss. 49

79. Utah.—Gesas v. Oregon Short Line R Co, 93 P 274, 33 Utah 156, 13 L R A,N.S, 1074
52 C J. p 199 note 4.

80. Utah.—Gesas v Oregon Short Line R Co, supra.
52 C J. p 199 note 5.

at that place,[81] they are bound to use due care to protect from injury persons so crossing, and the railroad company may be liable for injuries sustained as a result of the violation of such duty. One who crosses over between the engine and a car at the invitation of the engineer in charge of the movement of the train is not a trespasser;[82] and, in such case, the engineer is bound to exercise reasonable care to avoid doing any act to injure the pedestrian.[83]

At places other than public crossings. The railroad company has been held not to owe the duty to give warning where the crossing is merely a permissive one;[84] but the view has also been taken that, where a way across the track is constantly used by the public with the knowledge of the employees of the company without objection, the duty of exercising reasonable care toward one crossing over or between cars exists.[85]

§ 725. Safeguards at Crossings

a. In general
b. Warning as to presence of obstruction

a. In General

It is the duty of a railroad company to exercise ordinary care at a crossing by adopting a reasonably safe and effective mode, commensurate with the danger at the particular crossing, of warning travelers of the approach of trains, and what constitutes reasonable and timely warning depends on the circumstances and surroundings, taking into consideration the amount and character of travel over the crossing, the extent of train movements, the operation, control, and speed of trains, and the character of the highway.

Although the track of a railroad is of itself a warning of danger to a person approaching it,[86] it is the duty of the railroad company to exercise ordinary care at a crossing[87] by adopting a reasonably safe and effective mode, commensurate with the danger at the particular crossing, of warning travelers of the approach of trains,[88] especially

81. Kan.—Atchison, etc., R. Co. v. Cross, 49 P. 599, 58 Kan. 424.
52 C.J. p. 199 note 6

Police regulation against trespass

Where it was common practice for pedestrians, with consent of employees of railroad, to cross over train blocking crossing, it was duty of railroad employees to exercise reasonable care in operation of train to avoid injury to pedestrians, and police regulation prohibiting unauthorized persons from trespassing on locomotives or cars on railroad track did not preclude operation of such principle.—Baltimore & O. R. Co. v. Papa, 133 F.2d 413, 77 U.S. App. D.C. 202

82. D.C.—Baltimore & O. R. Co. v. Papa, supra.

83. D.C.—Baltimore & O. R. Co. v. Papa, supra.

84. Iowa.—Papich v. C., M. & St. P. R. Co., 167 N.W. 686, 183 Iowa 601
52 C.J. p. 199 note 8

85. Pa.—Smith v. Philadelphia, etc., R. Co., 117 A. 786, 274 Pa. 97.
Wis.—Carmer v. Chicago, etc., R. Co., 70 N.W. 560, 95 Wis. 513

86. Ind.—**Corpus Juris quoted in** Watson v. Brady, 185 N.E. 516, 520, 205 Ind. 1.
Pa.—Cella v. Pennsylvania R. Co., 70 A.2d 638, 364 Pa. 82.
52 C.J. p. 199 note 13

87. U.S.—Rothe v. Pennsylvania Co., Ohio, 195 F. 21, 114 C.C.A. 627.
Cal.—Peri v. Los Angeles Ry. Corp., 137 P.2d 441, 22 Cal.2d 111.
Ind.—**Corpus Juris quoted in** Watson v. Brady, 185 N.E. 516, 520, 205 Ind. 1.
N.C.—Caldwell v. Southern Ry. Co., 10 S.E.2d 680, 218 N.C. 63.
52 C.J. p. 199 note 15.

Ordinary prudence

Duty of railroad in warning of approach of trains at crossing is to provide such means and take such steps as ordinarily prudent man would in the same or similar circumstances.

Ky.—Louisville & N. R. Co. v. Marshall's Adm'x, 158 S.W.2d 137, 289 Ky. 129.
Tex.—Southwest Stone Co. v. Symons, Civ.App., 237 S.W.2d 380, error refused no reversible error.

88. U.S.—Lowry v. Seaboard Airline R. Co., C.A.Fla., 171 F.2d 625—Chicago & N. W. Ry. Co. v. Golay, C.C.A.Wyo., 155 F.2d 842—Stephenson v. Grand Trunk Western R. Co., C.C.A.Ill., 110 F.2d 401, 132 A.L.R. 455, certiorari granted Grand Trunk Western R. Co. v. Stephenson 60 S.Ct. 1101, 310 U.S. 623, 84 L.Ed. 1395 and 60 S.Ct. 1102, 310 U.S. 623, 84 L.Ed. 1395, certiorari dismissed 60 S.Ct. 1107, two cases, 311 U.S. 720, 85 L.Ed. 469—Ranstrom v. Oregon Short Line R. Co., D.C.Idaho, 18 F.Supp. 256.
Idaho.—Whiffin v. Union Pac. R. Co., 89 P.2d 540, 60 Idaho 141.
Ill.—Lauer v. Elgin, J. & E. Ry. Co., 27 N.E.2d 315, 305 Ill.App. 200.
Ind.—**Corpus Juris quoted in** Watson v. Brady, 185 N.E. 516, 520, 205 Ind. 1.
Ky.—Fryrear v. Kentucky & Indiana Terminal R. Co., 220 S.W.2d 546, 310 Ky. 250, followed in 220 S.W.2d 551, 310 Ky. 258, Musick's Adm'r v. Kentucky & Indiana Terminal R. Co., 220 S.W.2d 551, and 220 S.W.2d 552, 310 Ky. 259.
Mich.—McParlan v. Grand Trunk Western R. Co., 263 N.W. 734, 273 Mich. 527.
Minn.—Koop v. Great Northern Ry. Co., 28 N.W.2d 687, 224 Minn. 286.
Mo.—Carson v. Baldwin, 144 S.W.2d 134, 346 Mo. 984—Scott v. Missouri Pac. R. Co., 62 S.W.2d 834, 333 Mo. 374.
N.H.—Dahar v. Boston & M. R.R., 66 A.2d 707, 95 N.H. 464—Carbone v. Boston & Maine R.R., 192 A. 858, 89 N.H. 12—Stocker v. Boston, etc., R. Co., 143 A. 68, 83 N.H. 401
N.C.—Caldwell v. Southern Ry. Co., 10 S.E.2d 680, 218 N.C. 63.
Ohio.—Thomas v. Pennsylvania R. Co., 45 N.E.2d 776, 70 Ohio App. 191.
Okl.—St. Louis-San Francisco Ry. Co. v. Prince, 291 P. 973, 145 Okl. 194, 71 A.L.R. 357.
52 C.J. p. 199 note 15.

Traveler exercising due care

Whether railroad was negligent in failing to take adequate precautions to warn motorists of a grade crossing depended on whether the admonitory signals provided were sufficient to warn a traveler exercising due care for his own protection.—Johnson v. Maine Cent. R. Co., 38 A.2d 884, 141 Me. 38

Continuance

Fact that railroad has voluntarily assumed to maintain particular safeguard at crossing or has customarily performed particular act of warning, so that public has become acquainted with safeguard or the practice, raises question of duty of railroad to continue the safeguard or practice, or to give adequate notice of its discontinuance, and discontinuance may be considered in determining negli-

where the extraordinary character of the crossing is caused by the railroad company itself.[89] Moreover, when a railroad company has created at a crossing a place of extra danger, it is bound to use extra precautions,[90] but it has also been held that this rule applies only when the situation has been created by some act of the company.[91] The duty to give reasonable and timely warning of the approach of trains to crossings has been held to exist under the common law independently of any statutory requirement,[92] and, where a statute relating to safeguards at crossings is inapplicable to a particular crossing, the railroad may or should provide at such crossing such warning as is required by the common law.[93]

A railroad has no duty to give warning in any particular manner of the approach of its train to a crossing, but its duty is fulfilled if it gives such warning by any reasonably adequate means.[94] What constitutes reasonable and timely warning depends on the circumstances and surroundings.[95] The protection the railroad company should give at a crossing may depend on the special features and facts connected with it,[96] such as the amount and character of travel, the extent of train movements, the operation, control, and speed of trains, and the character of the highway.[97] Thus the protection rendered at a crossing in a populous city

gence of railroad—Case v Northern Pac Terminal Co, 160 P 2d 313, 176 Or 643

Warning held adequate

La—Cuccia v Gulf, M & N R. Co, App, 180 So 513—Hughes v Missouri Pac. R. Co, App, 153 So 574

Md—State, for Use of Emerson, v Poe, 190 A 231, 171 Md 584

N H—Peppin v Boston & M R. R, 169 A 877, 86 N H 395

Wash—Watson v Northern Pac R Co., 223 P 2d 1057.

89. N.J.—Hires v. Atlantic City R. Co, 48 A. 1002, 66 N J Law 30.

90. Cal—Peri v. Los Angeles Ry Corp, 137 P 2d 441, 22 Cal 2d 111.

N J.—Horandt v. New Jersey Cent. R Co, 73 A. 93, 78 N J Law 190

Ohio—Thomas v. Pennsylvania R Co, 45 N E.2d 776, 70 Ohio App. 190

Tex—McMahan v Texas & N O R Co, 161 S W 2d 70, 138 Tex. 626.

Railroad crossing not generally or ordinarily dangerous to traveling public may become more than ordinarily dangerous by conduct of train operators by use they make of it, or the manner in which they conduct themselves thereat, and in such event they may be held liable for failure to exercise extraordinary care or proper means to warn traveling public against the extraordinary hazard or danger—St Louis, B & M Ry Co v. Brack, Tex Civ App, 102 S.W.2d 261

A railroad crossing is more than ordinarily dangerous if it is so peculiarly dangerous that prudent persons cannot use it with safety unless extraordinary means are used to approach such place—Hopp v Northern Pac. Ry. Co., 147 P.2d 950, 20 Wash 2d 439

91. N J—Horandt v. New Jersey Cent. R. Co., 73 A. 93, 78 N J.Law 190

52 C.J. p 200 note 18.

92. Ill.—Applegate v. Chicago & N W Ry Co, 78 N E 2d 793, 334 Ill App 141.

Ky—Louisville & N. R Co v Craig, 219 S W.2d 954, 310 Ky. 43.

Va—John F Ivory Storage Co v Atlantic Coast Line R. Co, 48 S E 2d 242, 187 Va 857

93. Ky—Louisville & N. R Co v Craig, 219 S W 2d 954, 310 Ky 43

94. Or—Fish v. Southern Pac Co, 143 P 2d 917, 173 Or 294, rehearing denied 145 P 2d 991, 173 Or 294.

95. U S—Interstate Motor Lines v Great Western Ry Co, C C A.Colo, 161 F 2d 968—Chicago & N W. Ry Co v. Golay, C C A.Wyo, 155 F 2d 842—Stephenson v. Grand Trunk Western R. Co, C C A Ill., 110 F.2d 401, 132 A L R 455, certiorari granted Grand Trunk Western R. Co. v Stephenson, 60 S Ct 1101, 310 U S 623, 84 L Ed 1395 and 60 S Ct. 1102, 310 U S 623, 84 L Ed 1395, certiorari dismissed 60 S Ct. 1107, two cases, 311 U S. 720, 85 L Ed 469

N C—Caldwell v Southern Ry. Co, 10 S E 2d 680, 218 N C 63

Sufficiency of wigwag or flash signal

(1) Providing and maintaining in working condition electrically illuminated flash signal at customary distance from grade crossing almost eight feet above level of highway, to warn travelers of trains' approach to crossing, was a sufficient compliance with common-law rule requiring railroad to give reasonable and timely warning of approach of train, although approaching motorist's view of signal might be obstructed by intervening traffic—Fryrear v. Kentucky & Indiana Terminal R Co, 220 S.W 2d 546, 310 Ky. 250, followed in 220 S.W.2d 551, 310 Ky. 258, Musick's Adm'r v. Kentucky & Indiana Terminal R. Co, 220 S W.2d 551, and 220 S W 2d 552, 310 Ky. 259

(2) It has been held, however, that operation of wigwag signal at street crossing may not be full measure of duty to give customary warning—Hough v Atchison, T. & S. F Ry Co, 3 P 2d 499, 133 Kan. 757

96. U S.—Chicago & N W Ry. Co v. Golay, C C A Wyo, 155 F 2d 842

Del—Leedom v. Pennsylvania R. Co, 29 A 2d 171, 3 Terry 186

Ill—Applegate v Chicago & N W Ry Co, 78 N E 2d 793, 334 Ill App 141

La—Eggleston v Louisiana & A. Ry Co, App, 192 So 774.

N H—Gillingham v Boston & M R R., 21 A 2d 174, 91 N H 433—Carbone v Boston & Maine R R, 192 A 858, 89 N H 12—Stocker v Boston, etc, R. Co, 143 A. 68, 83 N H 401

Nighttime travel

Where railroad crossing is more than ordinarily dangerous to nighttime travelers, railroad must take more than ordinary measure to apprise travelers approaching crossing that such dangers exist—Texas City Terminal Ry. Co. v. Allen, Tex.Civ. App, 181 S.W 2d 727, error refused.

97. La—Eggleston v Louisiana & A. Ry. Co, App, 192 So 774

Mo—Dimond v Terminal R Ass'n of St Louis, 141 S W.2d 789, 346 Mo 333

N H—Carbone v Boston & Maine R. R, 192 A. 858, 89 N.H. 12—Cyr v Boston & M. R. R, 188 A. 3, 88 N.H 278—Despres v. Boston & M R. R, 181 A 420, 87 N H 427—Stocker v. Boston, etc, R. Co, 143 A. 68, 83 N H 401.

Knowledge of increased traffic

(1) Fact that traffic of one of main trunk highways of state had been diverted for three weeks over country highway ordinarily carrying light traffic was sufficient to justify inference that railroad had knowledge of increase of traffic over crossing, with respect to duty of providing for special protection at crossing.—Carbone v. Boston & Maine R. R., 192 A. 858, 89 N H. 12.

(2) Knowledge of fireman and brakeman of train crew as to increased highway traffic was knowledge of railroad, with respect to duty

should be greater than at ordinary crossings in the country,[98] and at private crossings little protection may be necessary;[99] but the circumstance, without more, that a crossing is greatly frequented by travelers is insufficient as a basis on which to predicate negligence of the railroad from failure to maintain safety devices there,[1] and an increase in vehicular traffic over a highway does not necessarily compel an increase in the warning devices maintained at a railroad crossing on the highway.[2] Other circumstances to be considered may be such as the inability of travelers upon the highway to see or hear the train until a collision is unavoidable,[3] the absence of a light at the crossing after dark,[4] or the use of the crossing by a large number of school children.[5]

The test is the peculiar danger of the crossing even though it be in a small village[6] or in the country,[7] and the general character of the crossing is to be considered rather than its character at the time of the accident.[8] So the mere fact that a railroad crossing is in the country does not necessarily, in all circumstances, relieve the railroad of any duty to maintain special safeguards.[9] In considering the need of safeguards at a crossing, those provided at other crossings are not to be considered.[10]

It has been held that the common law does not require the provision of special safeguards or warning facilities at a railroad crossing[11] unless such precautions are reasonably necessary to the protection of travelers,[12] but the absence of such safeguards affects the diligence to be required in the operation of the trains over such crossing.[13] On the other hand, special safeguards have been held necessary at unusually dangerous crossings even in the absence of statutory requirement[14] or order

of providing for special protection at railroad crossing—Carbone v Boston & Maine R R, supra.

Number of trains and people

The protection the railroad company should give at a crossing may depend on the number of trains and people using such crossing.

Ind—**Corpus Juris quoted in** Watson v Brady, 185 N E 516, 520, 205 Ind 1

N.H—Gillingham v. Boston & M R R., 21 A 2d 174, 91 N.H 433

52 C.J. p 200 note 19.

98. U.S.—Interstate Motor Lines v. Great Western Ry. Co, C C A Colo, 161 F.2d 968—Chicago & N W Ry. Co v. Golay, C C.A Wyo, 155 F.2d 842.

Ind—**Corpus Juris quoted in** Watson v. Brady, 185 N.E 516, 520, 205 Ind. 1

52 C J. p 200 note 20.

Ordinary care

Standard of care required of railroad in providing special protection for country crossing in sparsely settled district was that of ordinary care under circumstances.—Peterson v. Boston & M R. R., 36 N E 2d 701, 310 Mass. 45.

99. Iowa—Graves v Chicago, etc, R Co, 222 N.W 344, 207 Iowa 30.

N H—Collette v Boston, etc., R. Co, 140 A 176, 83 N.H. 210.

1. La—Eggleston v Louisiana & A. Ry. Co, App, 192 So. 774.

2. Conn—Trombly v. New York, N H. & H. R Co., 78 A 2d 689, 137 Conn. 465

3. N Y.—Richardson v. New York Cent R Co., 45 N.Y. 846

52 C.J. p 200 note 22

4. U.S.—Texas & P. R. Co v. Cody, Tex, 17 S Ct 703, 166 U S 606, 41 L Ed. 1132

52 C J p 200 note 23.

5. Ky—Louisville, etc, R Co. v Allnutt, 151 S W. 14, 150 Ky 831

6. U.S—Northern Pac R Co v Moe, C.C A Minn, 13 F 2d 377

7. U.S—Interstate Motor Lines v Great Western Ry Co, C C A Colo, 161 F 2d 968

8. U S.—Northern Pac. R Co v. Moe, C C A Minn, 13 F.2d 377

Arterial street

Where railroad's backing of car in switching operation over street occurred over an arterial street in populous city generally having heavy traffic, fact that travel was extremely light at time accident occurred did not remove the crossing from category of unusually hazardous crossings, since duty of railroad depended rather on general traffic conditions of the street—Case v. Northern Pac Terminal Co, 160 P 2d 313, 176 Or 643.

9. U S—Interstate Motor Lines v. Great Western Ry Co., C C A Colo, 161 F.2d 968

10. Or—**Corpus Juris quoted in** Case v. Northern Pac. Terminal Co, 160 P.2d 313, 317, 176 Or. 643.

52 C.J. p 200 note 27.

11. U.S—Interstate Motor Lines v Great Western Ry. Co., C C A Colo, 161 F.2d 968—Chicago & N. W. Ry. v Golay, C.C.A.Wyo, 155 F 2d 842

Mo—Hein v Terminal R. R Ass'n of St. Louis, 224 S.W 2d 963, 359 Mo. 946.

Pa—Yolton v Pennsylvania R. Co, Com Pl., 29 Wash Co. 218.

Tex.—Texas & N O R Co v. Compton, 136 S W 2d 1113, 135 Tex 7.

52 C J. p 200 note 28

Fog

A railroad company owes no duty to warn highway travelers of danger, arising because of fog, at railroad crossing—Walker v Texas & N. O R Co, Tex Civ App, 150 S W.2d 853, error dismissed, judgment correct

12. Mo—Dimond v. Terminal R Ass'n of St Louis, 141 S.W 2d 789, 346 Mo 333

It is not every crossing of highway, under common law, independently of statute or ordinance, at which railroad is required to have gate or flagman, or maintain signals and lights, but only those crossings at which precautions of such character are reasonably necessary to the protection of travelers, and the duty arises only when demanded by ordinary prudence to protect travelers exercising ordinary care against dangers resulting from prudent and usual operation of trains—Eggleston v. Louisiana & A. Ry. Co, La App, 192 So 774

Peculiar danger

Duty to provide signals or warnings at public highway crossing arises only when situation or surroundings of crossing render it peculiarly or more than ordinarily dangerous, or when particular place is so peculiarly dangerous that prudent persons cannot use public road in safety unless company employs extraordinary means to signal approach of trains.—Walker v Texas & N. O. R. Co, Tex Civ App, 150 S W 2d 853, error dismissed, judgment correct.

13. Ind—Chicago, etc., R. Co. v. Blankenship, 154 N E 44, 85 Ind. App. 332

14. Ill.—Applegate v. Chicago & N.

of a railroad commission,[15] and notwithstanding specific statutory regulations as to such crossings.[16] In determining whether a railroad is negligent for failure to take special precautions at a crossing, in the absence of a statute or order of the commission prescribing such precautions each case turns on its own facts,[17] and liability may be imposed on the railroad failing to take such precautions only where the location and surrounding conditions and the manner of running trains are such as to render the crossing unusually dangerous.[18] So the inquiry in such cases is concerned with the adequacy of the warning given by the railroad at the crossing, and not whether the traveler on the highway was aware of the warning, since the traveler must be deemed to have been aware of an adequate warning.[19]

If the means adopted are such as an ordinarily prudent person would adopt under similar circumstances, it is not required that the means shall prove effective.[20] Where the particular safeguards are not prescribed by law, the railroad company has the right of selection.[21] A railroad is not obliged to have its night warnings at crossings visible by day or its day warnings visible by night.[22] The object of signals and warnings at a railroad crossing is to impart notice to a person endangered of the approach of a train,[23] and, where such person is shown to possess such notice, the failure of the railroad to provide a signal or other warning will not support a charge of negligence based on such failure.[24]

Barriers. A duty to erect barriers at a crossing arises only where the embankment is not otherwise reasonably safe for travelers,[25] and a railroad company is not negligent in not constructing barriers at a crossing reasonably safe without barriers although the roadway crossing the track is not as wide as required by statute.[26]

To whom applicable. The rules regarding safeguards at crossings apply to all types of railroads, as, for example, a logging railroad,[27] whether the crossing be over the main track,[28] a spur track,[29] a passing track,[30] or an industrial track.[31] The above rules are not changed by the fact that the

W Ry. Co, 78 N E 2d 793, 334 Ill App 141—Leif v Fleming, 52 N E 2d 606, 321 Ill App 297

Ind.—**Corpus Juris cited in** Watson v Brady, 185 N E 516, 519, 205 Ind 1.

Okl.—St. Louis-San Francisco Ry Co v Prince, 291 P 973, 145 Okl 194, 71 A L R. 357

Tex.—Texas Interurban Ry Co v Hughes, Com App, 53 S W 2d 448

52 C J. p 200 note 30.

Railroad company is not ipso facto relieved from duty of providing safety devices at dangerous crossings because no statute exists requiring safety devices.—Jarvella v Northern Pac. Ry. Co., 53 P.2d 446, 101 Mont 102.

Spur track crossing

Fact that railroad was not required to maintain stop signs at public highway crossing on which accident occurred because crossing was a spur track crossing did not relieve railroad of responsibility of protecting crossing commensurate with dangers involved.—Aaron v Martin, La App, 167 So. 106

15. Ill.—Karlock v. New York Cent R. Co, 78 N.E 2d 122, 333 Ill.App. 655.

Mont.—Jarvella v Northern Pac Ry Co., 53 P.2d 446, 101 Mont 102

52 C.J p 200 note 31.

16. U.S.—Duluth, W & P Ry. Co v. Zuck, C.C A Minn., 119 F 2d 74

Minn.—Licha v Northern Pac. Ry Co., 276 N.W. 813, 201 Minn 427

Okl.—St. Louis-San Francisco Ry. Co. v Prince, 291 P. 973, 145 Okl 194, 71 A L R 357.

52 C J p 200 note 32

Common-law duty

Maintenance of safeguards and signals required by statute does not relieve railroad of common-law duty to maintain such other protection to travelers on highway as ordinary care demands.—McParlan v. Grand Trunk Western R Co, 263 N.W. 734, 273 Mich. 527.

17. U S.—Constantine v Pennsylvania R. Co, C.C A.Ind, 114 F 2d 271

Custom

In order for a custom on the part of the railroad to light flares at a crossing to have the force of law, it must be uniform, certain, and known, or so notorious that a person of ordinary prudence in the exercise of reasonable care, dealing with its subject, would have been aware of it.—Rhine v. Duluth, M & I R Ry Co., 297 N W. 852, 210 Minn. 281

18. La.—Eggleston v Louisiana & A. Ry. Co., App, 192 So. 774

A railroad crossing is extra hazardous if conditions surrounding it are so peculiarly dangerous that a person of ordinary prudence could not use it with safety unless railroad employed extraordinary means to give warning of presence of its trains standing across highway and, unless conditions surrounding crossing render it more than ordinarily hazardous, railroad is not required to take extraordinary means in protecting it.—Lundberg v. Missouri-Kansas-Texas R. Co. of Tex., Tex.Civ App, 232 S W 2d 879, error refused no reversible error.

19. Wash.—Watson v. Northern Pac R Co, 223 P 2d 1057.

20. Ky.—Chesapeake, etc, R Co v. Gunter, 56 S W 527, 108 Ky. 362, 21 Ky L 1803—Cincinnati, etc, R Co v. Champ, 104 S.W. 988, 31 Ky L 1054.

21. D C.—Conger v Baltimore, etc, R. Co, 31 App.D C. 139

22. D C.—Hopkins v Baltimore & O. R Co, 81 F 2d 894, 65 App D C 167

23. Ky.—Cincinnati, N O. & T P. Ry Co. v. Wallace's Adm'r, 103 S W 2d 91, 267 Ky 661.

Tex.—McMahan v Texas & N O R Co, 161 S W 2d 70, 138 Tex 626

24. Ky.—Cincinnati, N. O. & T P Ry Co. v. Wallace's Adm'r, 103 S W 2d 91, 267 Ky. 661

Tex.—McMahan v. Texas & N O R Co., 161 S W.2d 70, 138 Tex. 626.

25. Va.—Norfolk & W. Ry Co v Faris, 157 S.E. 819, 156 Va. 205.

26. Va.—Norfolk & W. Ry Co v Faris, supra.

27. Wis.—Weitzman v. Bissel Lumber Co, 214 N W. 353, 193 Wis 561

28. Okl.—St Louis, etc, R. Co. v Hart, 146 P 436, 45 Okl 659.

29. Okl.—St. Louis, etc, R Co v Hart, supra.

30. Okl.—St. Louis, etc., R. Co v Hart, supra.

31. Okl.—St Louis, etc, R Co v. Hart, supra.

railroad belongs to a company other than the one operating the train[32] or that the servant in charge of safeguards is employed and paid by the other company.[33]

b. Warning as to Presence of Obstruction

Generally, where a railroad is making a reasonable and legitimate use of a crossing, the presence of a train on the crossing is sufficient warning to persons using the highway, and special safeguards need not be employed where there is no statute in effect requiring additional signals or warnings; but additional warnings may be necessary where special conditions create an unusual hazard.

The view generally taken is that under ordinary conditions, where the railroad is making a reasonable and legitimate use of a crossing, the presence of a train or cars at the crossing is sufficient notice or warning of obstruction and of danger,[34] and the railroad company is not bound to give any further warning as to the presence of such obstruction[35] or to employ special safeguards where there

32. NY—McGrath v. New York Cent, etc, R. Co, 63 N.Y 526.

33. Ill—Jirmalowicz v. Grand Trunk Western R. Co, 174 Ill App. 176.

34. US—Flagg v. Chicago Great Western Ry. Co, C.C.A Minn, 143 F.2d 90—Good v. Atlantic Coast Line R. Co, C.C.A Fla., 142 F 2d 46—Holt v Thompson, C C A.Okl., 115 F.2d 1013—**Corpus Juris quoted in** Mabray v. Union Pac R. Co., D.C Colo., 5 F.Supp. 397, 400

Ark—Lloyd v St. Louis Southwestern Ry Co, 179 S W.2d 651, 207 Ark. 154—Missouri Pac R Co. v Powell, 120 S W.2d 349, 196 Ark 834

Cal.—Mallett v Southern Pac Co, 68 P 2d 281, 20 Cal App 2d 500.

Ill—Harper v Thompson, 47 N E 2d 501, 318 Ill App. 226—**Corpus Juris quoted in** Coleman v. Chicago, B & Q. R. Co, 5 N E 2d 103, 105, 287 Ill App 483.

Iowa—Dillner v Joyce, 6 N W 2d 275, 233 Iowa 279—Dolan v Bremner, 263 N W. 798, 220 Iowa 1143.

Ky—Louisville & N. R. Co v Reynolds, 202 S W 2d 997, 305 Ky. 54—Illinois Central R Co. v Maxwell, 167 S.W 2d 841, 292 Ky 660—Chesapeake & O. Ry. Co. v Switzer, 122 S.W.2d 967, 275 Ky. 834.

La—**Corpus Juris quoted in** Squyres v. Baldwin, 185 So 14, 17, 191 La. 249—Domite v. Thompson, App, 9 So 2d 55—Gates v Arkansas & L M. Ry Co, App., 180 So 835

Md.—Buczkowski v. Canton R Co., 30 A 2d 257, 181 Md. 377

Miss—Mississippi Export R Co. v. Summers, 11 So 2d 429, 194 Miss. 179, suggestion of error overruled 11 So 2d 905, 194 Miss 179

Mo—**Corpus Juris cited in** Rowe v. Henwood, App, 207 S.W.2d 829, 833.

Mont—Broberg v. Northern Pac. Ry. Co, 182 P 2d 851, 120 Mont 280.

N Y.—Bertrand v Delaware & Hudson R R. Corp, 46 N.Y.S 2d 78, 267 App.Div 228.

Ohio—Capelle v Baltimore & O. R Co, 24 N E.2d 822, 136 Ohio St. 203—Reed v Erie R. Co., 15 N.E 2d 637, 134 Ohio St 31.

Okl.—Raley v. Thompson, 225 P.2d 171—Thompson v Carter, 137 P 2d 956, 192 Okl 579

Or—Rogers v. Southern Pac. Co., 227 P 2d 979—Finn v. Spokane, P & S Ry Co, 214 P 2d 354, opinion adhered to 218 P.2d 720—Fish v Southern Pac Co, 143 P 2d 917, 173 Or 294, rehearing denied 145 P 2d 991, 173 Or 294—Irwin v Southern Pac Co, 95 P.2d 62, 163 Or. 72

Pa—Cella v. Pennsylvania R. Co, 70 A 2d 638, 364 Pa 82.

Utah.—Olson v. Denver & R G W R Co, 98 P.2d 944, 98 Utah 208.

Wash—Cox v. Polson Logging Co, 138 P 2d 169, 18 Wash 2d 49—Webb v. Oregon, Washington R. & Nav. Co, 80 P.2d 409, 195 Wash. 155—Reines v. Chicago, M, St P & P R Co, 80 P 2d 406, 195 Wash. 146—Ullrich v Columbia & Cowlitz R Co, 66 P.2d 853, 189 Wash 668 52 C.J p 190 note 97.

Greater duty than to observe approaching train

The duty of a driver to see a train which is approaching a crossing but not in the intersection is not as great as it is to see a train which is on the crossing all the time while he travels an ample distance to see and stop—Earle v Salt Lake & Utah R Corp, 165 P. 2d 877, 109 Utah 111.

Warning as to location of crossing

Where railroad has used due care to warn traveling public of location of crossing, train or other obstruction on crossing is in itself notice of danger without any additional warning, but where there has been a negligent failure to warn of location of crossing, presence of train across intersection may not be sufficient warning of danger.—Southern Pac Co v. Haight, C C A.Cal, 126 F 2d 900, certiorari denied 63 S.Ct. 154, 317 U.S 676, 87 L Ed. 542.

35. U.S.—Chicago, M., St. P & P. R Co. v. Slowik, C A Minn., 184 F.2d 920—Good v. Atlantic Coast Line R Co, C.C A Fla, 142 F 2d 46—Holt v. Thompson, C.C.A.Okl, 115 F 2d 1013—Thomson v. Stevens, C C A.Iowa, 106 F 2d 739—**Corpus Juris quoted in** Mabray v. Union Pac R Co., D C Colo., 5 F.Supp 397, 400

Ala—Johnson v. Louisville & N. R. Co, 148 So. 822, 227 Ala. 103.

Ill—Harper v Thompson, 47 N.E.2d 501, 318 Ill App. 226—**Corpus Juris quoted in** Coleman v Chicago, B & Q R Co, 5 N E 2d 103, 105, 287 Ill App. 483

Ky—Louisville & N R Co v Reynolds, 202 S W 2d 997, 305 Ky 54—Illinois Central R Co. v Maxwell, 167 S W 2d 841, 292 Ky 660

La—**Corpus Juris quoted in** Squyres v Baldwin, 185 So 14, 17, 191 La 249—Domite v Thompson, App, 9 So 2d 55

Minn—Ausen v Minneapolis, St P. & S S M Ry Co, 258 N W. 511, 193 Minn 316

Miss—Illinois Cent R Co v. McNeil, 39 So 2d 490, 205 Miss 807—Mississippi Export R Co v Summers, 11 So 2d 429, 194 Miss 179, suggestion of error overruled 11 So 2d 905, 194 Miss. 179—Gulf, M & N R Co v. Addkison, 194 So 593, 189 Miss 301

Mo.—State ex rel Thompson v. Cave, 215 S W 2d 435, 358 Mo 414

Mont—Broberg v. Northern Pac Ry Co., 182 P 2d 851, 120 Mont. 280

Neb—Sailors v Lowden, 299 N W 510, 140 Neb. 206.

Ohio—Capelle v Baltimore & O R Co, 24 N E 2d 822, 136 Ohio St 203—Reed v Erie R Co, 15 N.E 2d 637, 134 Ohio St. 31

Okl.—Raley v Thompson, 225 P 2d 171—Thompson v Carter, 137 P 2d 956, 192 Okl. 579

Or—Rogers v. Southern Pac. Co, Or, 227 P 2d 979—Irwin v. Southern Pac. Co, 95 P.2d 62, 163 Or 72.

Pa—Cella v. Pennsylvania R. Co, 70 A 2d 638, 364 Pa 82

Utah—Olson v. Denver & R G W. R Co., 98 P.2d 944, 98 Utah 208 52 C J. p 190 note 98

Train as best warning

Presence of train on public crossing is best evidence and warning to drivers of automobiles approaching crossing on highway.—Chicago, M, St. P & P R Co. v. Slowik, C A Minn, 184 F 2d 920

Moving or stationary train

Ordinarily presence of a train or railway cars on a crossing, whether moving or stationary, is sufficient notice to a driver of a vehicle on highway of such obstruction, and in absence of unusual circumstances, operating railway company is not under any duty to provide any other notice or warning.

is no statute in effect requiring additional precautionary measures.[36] Such rule has been followed on the theory that the purpose of warnings and signals at crossings is to give notice of approaching trains and not of trains already occupying the crossing,[37] but it has also been held that the purpose of statutes dealing with the safe construction and maintenance of railroad crossings and the maintenance of appropriate safety devices is the general protection of the public at railroad crossings, not only as to trains approaching the crossing, but also as to trains obstructing the crossing,[38] and that, where the warnings required by the statute are customarily given, a traveler on a highway has a right to rely on them as to passing as well as approaching trains.[39]

The general rule that no special warning need be given, or safeguard taken, in the case of a train obstructing a crossing, applies where the crossing is not a particularly dangerous one,[40] and physical conditions afford no reason for anticipating injury to travelers in the exercise of due care.[41] Even when it is dark the mere failure to give warning

Okl—Raley v. Thompson, 225 P.2d 171

Pa—Cella v Pennsylvania R. Co., 70 A.2d 638, 364 Pa. 82.

36. U S—O'Keefe v Wabash R Co., C A Ill., 185 F.2d 241, certiorari denied 71 S Ct 743, 341 U S 921, 95 L Ed. ——; —Flagg v Chicago Great Western Ry Co., C C.A Minn., 143 F 2d 90—Good v. Atlantic Coast Line R Co., C C A Fla., 142 F 2d 46

Ark—Fleming v Missouri & A Ry. Co., 128 S W 2d 986, 198 Ark 290

Cal.—Dunlap v. Pacific Electric Ry Co., 55 P 2d 894, 12 Cal.App 2d 473

Ill—Cash v New York Cent. R Co., 13 N E.2d 1012, 294 Ill App 389—Coleman v. Chicago, B & Q R Co., 5 N E.2d 103, 287 Ill App. 483

Ind—New York Cent R Co v. Casey, 14 N E 2d 714, 214 Ind 464, followed in Dyer v New York Cent R Co., 14 N E 2d 719, 214 Ind 695, rehearing denied 17 N.E 2d 839, 214 Ind 695.

Iowa—Dolan v Bremner, 263 N.W. 798, 220 Iowa 1143.

Ky—Louisville & N. R Co v. Mischel's Adm'x, 114 S W 2d 115, 272 Ky. 295

La—Aaron v Martin, App., 167 So. 106

Mich—Esterline v Kennicott, 268 N W. 835, 277 Mich. 130

Mont—Jarvella v. Northern Pac. Ry. Co., 53 P 2d 446, 101 Mont. 102.

N Y—Pascal v. Pascal, 4 N.Y S 2d 781, 254 App Div 807, reargument denied 6 N.Y S 2d 651, 254 App Div 934.

N D—Bowers v Great Northern Ry Co., 259 N W. 99, 65 N D 384, 99 A.L.R. 1443.

Ohio—Reed v Erie R. Co., 15 N E 2d 637, 134 Ohio St 31—Kramers v Chesapeake & O. Ry. Co., 22 N.E.2d 227, 60 Ohio App. 556.

Okl—Thompson v. Carter, 137 P.2d 956, 192 Okl. 579

Or—Rogers v Southern Pac. Co., 227 P 2d 979—Finn v. Spokane, P. & S. Ry Co., 214 P.2d 354, opinion adhered to 218 P 2d 720—Fish v. Southern Pac. Co., 143 P 2d 917, 173 Or 294, rehearing denied 145 P 2d 991, 173 Or. 294.

Pa—Hale v Pennsylvania R Co., Com Pl., 53 York Leg Rec 45

Tex—Texas & N. O R Co v Davis, Civ.App., 210 S W 2d 195, refused no reversible error—Texas & N. O R Co v Stratton, Civ.App., 74 S W.2d 741, error refused Followed in Texas & N O. R Co. v. Berry, 74 S W.2d 750, error refused

Vt—Yardley v Rutland R. Co., 153 A 195, 103 Vt. 182

Wash.—Schofield v Northern Pac Ry Co., 104 P 2d 324, 4 Wash 2d 512—Webb v. Oregon, Washington R. & Nav. Co., 80 P 2d 409, 195 Wash 155

Necessity of particular safeguards where train blocks crossing

Automatic signals see infra § 727

Flagmen see infra § 728.

Lights and signals on train or car see infra §§ 734–736

Signs see infra § 726.

Common experience dictates that an object as large as a freight car is, of itself, sufficient notice of its presence to warn any person using the highway with ordinary care, and in the absence of a special statute, a railroad company ordinarily will not be found negligent because it failed to station guards or light the car, or otherwise give warning of its presence in the highway—Cella v Pennsylvania R Co., 70 A 2d 638, 364 Pa 82

Knowledge of other collisions

Railroad's knowledge that other collisions had occurred between automobiles and trains occupying crossing did not of itself obligate railroad to maintain additional safeguards, since railroad need not provide greater warning to negligent than to careful drivers—McParlan v Grand Trunk Western R. Co., 263 N.W. 734, 273 Mich 527.

37. U S—Mabray v. Union Pac. R. Co., D C Colo., 5 F Supp 397

Ill—Coleman v Chicago, B. & Q. R Co., 5 N E 2d 103, 287 Ill App. 483.

Ind—Louisville & N R Co. v Revlett, 65 N E 2d 731, 224 Ind. 313—Morley v Cleveland, C., C. & St. L. R Co., 194 N E. 806, 100 Ind App. 515—Pennsylvania R. Co. v Huss, 180 N E 919, 96 Ind.App. 71.

Kan—Corkill v Thompson, 217 P 2d 273, 169 Kan 38—Shepard v Thompson, 109 P 2d 126, 153 Kan 68.

Mont—Inkret v. Chicago, M., St. P. & P. R. Co., 86 P.2d 12, 107 Mont. 394.

Pa—Cella v Pennsylvania R. Co., 70 A.2d 638, 364 Pa 82—Wink v Western Maryland Ry. Co., 176 A 760, 116 Pa Super. 374—Hale v Pennsylvania R Co., Com Pl., 53 York Leg.Rec 45

S D—Backer v Chicago & N. W Ry Co., 4 N W 2d 853, 68 S D. 531

Tex—Wichita Valley Ry Co. v Fite Civ App., 78 S.W.2d 714

38. Ill—Langston v. Chicago & N W. Ry Co., 70 N.E 2d 852, 330 Ill App 260, affirmed 75 N E 2d 363, 398 Ill. 248

39. Ill—Langston v. Chicago & N. W. Ry. Co., supra

40. Ill.—Cash v. New York Cent. R. Co., 13 N E 2d 1012, 294 Ill App 389

Iowa—Dilliner v Joyce, 6 N W 2d 275, 233 Iowa 279

La—Aaron v. Martin, App., 172 So. 840, affirmed 177 So. 242, 188 La 371

Minn—Krause v Chicago, St P, M & O Ry. Co., 290 N.W. 294, 207 Minn. 175.

Mo—Rowe v. Henwood, App., 207 S W 2d 829

Mont.—Inkret v. Chicago, M., St P & P R Co., 86 P.2d 12, 107 Mont 394

Okl.—Raley v. Thompson, 225 P 2d 171

Tex—Kypfer v Texas & P. Ry. Co., Civ App., 88 S W.2d 528, error dismissed.

Vt—Yardley v Rutland R. Co., 153 A 195, 103 Vt 182

Where railroad crossed highway at almost a right angle and highway approach was straight for at least a hundred yards, ordinary prudence did not require that railroad place signals observable by users of highway, notwithstanding alleged frequency of accidents at such crossing—Fleming v. Missouri & A Ry. Co., 128 S W 2d 986, 198 Ark. 290.

41. D C.—Sisson v. Southern Ry. Co., 68 F.2d 403, 62 App.D.C. 356.

of such obstruction is not necessarily an act of negligence,[42] in the absence of special circumstances which make the crossing peculiarly hazardous,[43] notwithstanding, according to some cases, the obstruction is unreasonably prolonged;[44] and the railroad company is not chargeable with negligence for failure to give a warning where conditions are not such that the employees in charge of the train, in the exercise of reasonable care, should anticipate that because of the darkness persons traveling along the highway in vehicles properly equipped with lights and operated with due care would be likely to come into collision with the obstruction.[45] There is no duty on the part of the railroad company to anticipate that one using the highway will not see the train and be apprised of its presence as fully as he would be if other signs or warnings were used.[46]

On the other hand, the train itself is not always an effective and adequate warning of the obstruction of the crossing, and hence the duty of the railroad company is not necessarily discharged under all circumstances if it fails to give additional warning in some form.[47] A peculiar or unusual hazard, condition, or practice may impose a duty on the railroad to give some special warning of the presence of a train on the crossing,[48] particularly where a car obstructs the crossing in the darkness,[49] but the railroad must have, or be charged with, notice of the factors which make necessary the additional warning of the presence of cars upon the

42. U.S.—Chicago, M., St P. & P. R. Co. v. Slowik, C.A.Minn., 184 F.2d 920—**Corpus Juris quoted in** Mabray v. Union Pac. R. Co., D.C. Colo., 5 F.Supp. 397, 400
La.—Dobrowolski v. Holloway Gravel Co., App., 173 So. 474.
Minn.—Ausen v. Minneapolis, St P. & S. S. M. Ry. Co., 258 N.W. 511, 193 Minn. 316
Miss.—Mississippi Export R. Co. v. Summers, 11 So.2d 429, 194 Miss. 179, suggestion of error overruled 11 So.2d 905, 194 Miss. 179
Neb.—Sailors v. Lowden, 299 N.W. 510, 140 Neb. 206
52 C.J. p. 191 note 1.

Day or night

In absence of statute or special conditions of hazard to motorists, railroad has no duty to provide special warning or safeguards to motorists, either in day or nighttime, to prevent collisions with cars standing on crossing.—Southern Ry. Co. v. Lambert, 160 So. 262, 230 Ala. 162.

43. Mo.—Hicks v. Chicago, M., St P. & P. R. Co., App., 233 S.W.2d 787

Open doors of boxcars

Where boxcar obstructed crossing at night with highway which ran without change of elevation a straight two miles before crossing railroad at right angles and then continued straight for some six blocks, even though doors of boxcars were open and permitted unobstructed vision through openings, crossing was not extraordinarily hazardous so as to require railroad to give special warnings.—Lloyd v. St. Louis Southwestern Ry. Co., 179 S.W.2d 651, 207 Ark. 154

44. U.S.—**Corpus Juris quoted in** Mabray v. Union Pac. R. Co., D.C. Colo., 5 F.Supp. 397, 400.
Ala.—St. Louis-San Francisco R. Co. v. Guthrie, 114 So. 215, 216 Ala. 513, 56 A.L.R. 1110.

45. U.S.—Holt v. Thompson, C.C.A. Okl., 115 F.2d 1013—**Corpus Juris quoted in** Mabray v. Union Pac. R. Co., D.C. Colo., 5 F.Supp. 397, 400
Ala.—Callaway v. Adams, 40 So.2d 73, 252 Ala. 136
Me.—Richard v. Maine Cent. R. Co., 168 A. 811, 132 Me. 197.
Miss.—Illinois Cent. R. Co. v. McNeil, 39 So.2d 490, 205 Miss. 807—Gulf, M. & N. R. Co. v. Addkison, 194 So. 593, 189 Miss. 301
Okl.—Lowden v. Bowles, 105 P.2d 1061, 188 Okl. 35—Kurn v. Jones, 101 P.2d 242, 187 Okl. 94.
52 C.J. p. 191 note 3.

46. Iowa.—Dilliner v. Joyce, 6 N.W.2d 275, 233 Iowa 279—Dolan v. Bremner, 263 N.W. 798, 220 Iowa 1143

47. La.—Domite v. Thompson, App., 9 So.2d 55.
Me.—Plante v. Canadian Nat. Rys., 23 A.2d 814, 138 Me. 215
Minn.—Munkel v. Chicago, M., St P. & P. R. Co., 278 N.W. 41, 202 Minn. 264.

48. Ala.—Callaway v. Adams, 40 So.2d 73, 252 Ala. 136.
Ark.—Lloyd v. St. Louis Southwestern Ry. Co., 179 S.W.2d 651, 207 Ark. 154—Fleming v. Missouri & A. Ry. Co., 128 S.W.2d 986, 198 Ark. 290
Cal.—Peri v. Los Angeles Junction Ry., 137 P.2d 441, 22 Cal.2d 111—Mallett v. Southern Pac. Co., 68 P.2d 281, 20 Cal.App.2d 500
Ga.—Shelley v. Pollard, 189 S.E. 570, 55 Ga.App. 88—Central of Georgia Ry. Co. v. Mann, 173 S.E. 180, 48 Ga.App. 668.
Ky.—Louisville & N. R. Co. v. Reynolds, 202 S.W.2d 997, 305 Ky. 54—Illinois Central R. Co. v. Maxwell, 167 S.W.2d 841, 292 Ky. 660.
La.—Domite v. Thompson, App., 9 So.2d 55—Squyres v. Baldwin, App., 181 So. 584, affirmed 185 So. 14, 191 La. 249—Aaron v. Martin, App., 172 So. 849, affirmed 177 So. 242, 188 La. 371.
Minn.—Munkel v. Chicago, M., St P. & P. R. Co., 278 N.W. 41, 202 Minn. 264.
Mo.—Carson v. Baldwin, 144 S.W.2d 134, 346 Mo. 984—Dimond v. Terminal R. Ass'n of St. Louis, 141 S.W.2d 789, 346 Mo. 333, applying Illinois law—Hicks v. Chicago, M., St. P. & P. R. Co., App., 233 S.W.2d 787—Rowe v. Henwood, App., 207 S.W.2d 829—Jones (Cooper) v. Thompson, App., 207 S.W.2d 517, reversed on other grounds State ex rel. Thompson v. Cave, 215 S.W.2d 435, 358 Mo. 414
Mont.—Broberg v. Northern Pac. Ry. Co., 182 P.2d 851, 120 Mont. 280
Or.—Finn v. Spokane, P. & S. Ry. Co., 214 P.2d 354, opinion adhered to 218 P.2d 720.
Tex.—Texas & N.O.R. Co. v. Davis, Civ.App., 210 S.W.2d 195, refused no reversible error.
Wash.—Cox v. Polson Logging Co., 138 P.2d 169, 18 Wash.2d 49—Schofield v. Northern Pac. Ry. Co., 104 P.2d 324, 4 Wash.2d 512.

Infrequent use of crossing

Fact that railroad uses crossing only infrequently may impose on it special duty to prevent collision by automobile traveling on highway with standing train at crossing since persons familiar with fact may be lulled into false sense of security.—Broberg v. Northern Pac. Ry. Co., 182 P.2d 851, 120 Mont. 280.

49. U.S.—**Corpus Juris quoted in** Mabray v. Union Pac. R. Co., D.C. Colo., 5 F.Supp. 397, 400
La.—**Corpus Juris quoted in** Squyres v. Baldwin, 185 So. 14, 17, 191 La. 249—Domite v. Thompson, App., 9 So.2d 55.
Minn.—Munkel v. Chicago, M., St P. & P. R. Co., 278 N.W. 41, 202 Minn. 264.
S.C.—Miller v. Atlantic Coast Line R. Co., 138 S.E. 675, 140 S.C. 123, certiorari denied 48 S.Ct. 117, 275 U.S. 556, 72 L.Ed. 424.

crossing [50] Whether or not a warning is required in any given case depends on the particular surrounding circumstances.[51] The test is applied whether an ordinarily prudent person would have deemed it necessary to maintain additional warning devices to prevent users of the highway from running into the train on the crossing,[52] and the railroad company is guilty of negligence where it fails to give such notice of the presence of the train as a reasonably prudent man would be expected to give under the circumstances [53]

In general, a crossing is extrahazardous or dangerous so as to require a warning or notice of the obstruction if the railroad company through its operative employees can, under the existing conditions, reasonably anticipate that a person traveling on the highway in a vehicle having standard lights and exercising due care would nevertheless be likely to be injured by reason of the train blocking the highway.[54] The train is not itself a sufficient warning where the combination of circumstances presents a situation in the nature of a trap or one which would naturally deceive a traveler on the highway [55] So a railroad may be required to provide watchmen, gongs, lights, or similar warning devices where a crossing is more than ordinarily dangerous because of obstructions interfering with visibility.[56] According to some decisions, a railroad crossing, not in itself inherently dangerous, may become so by virtue of unusual atmospheric conditions, such as heavy snow or fog, in which case it is the duty of the railroad to anticipate the

50. Tex.—Texas & N. O R. Co v Davis, Civ App, 210 S W 2d 195, refused no reversible error.

51. Mo—Hicks v Chicago, M, St P. & P R Co., App., 233 S W 2d 787.
Utah—Olson v Denver & R G. W R. Co, 98 P 2d 944, 98 Utah 208.

Factors to be considered

(1) In stopping a train on a highway crossing, railroad must take into consideration atmospheric conditions, nature and extent of darkness, ability and likelihood of travelers to become aware of the obstruction, nature and extent of use of highway by the public, length of time highway is to be obstructed, infrequency of passage of trains over highway, necessity for the stopping, and other factors according to the existing situation.—Hendrickson v. Union Pac R Co, 136 P.2d 438, 17 Wash.2d 548, 161 A L R 96.

(2) Whether warning is required depends on circumstances, such as atmospheric conditions, obscurity and darkness of crossing, length of time crossing is obstructed, and topography of land including highway and crossing.—Hicks v. Chicago, M., St P & P R. Co., Mo.App., 233 S W 2d 787

(3) Court may consider that a dark railroad car will absorb a considerable proportion of light rays which strike it and that a large proportion of rays which are actually reflected will travel in various directions so that only a relatively small proportion of rays will register on eyes of motorist—Broberg v Northern Pac Ry Co., 182 P.2d 851, 120 Mont. 280.

(4) Court may consider that physical construction of crossing was such that lights of an approaching automobile would shine under, instead of upon, side of car obstructing the crossing.—Broberg v. Northern Pac Ry. Co., supra.

Street light

The presence of a municipally maintained street light approximately one hundred feet from intersection between highway and railroad tracks did not, by reason of effect of street light on vision of an approaching motorist, create such an unusual, peculiar and deceptive condition as to impose on railroad or its employees a duty to warn one driving an automobile, at a reasonable rate of speed in compliance with law, of presence of railroad cars across intersection—Holt v. Thompson, C C A Okl, 115 F 2d 1013.

52. Me—Plante v Canadian Nat Rys., 23 A.2d 814, 138 Me. 215
Mich—McParlan v. Grand Trunk Western R. Co., 263 N W 734, 273 Mich 527
Mo—Dimond v. Terminal R. Ass'n of St Louis, 141 S W.2d 789, 346 Mo 333, applying Illinois law.

Reasonable assumption

Duty of furnishing additional signals, gates or warnings of the presence of trains across highways arises only when the operatives of the train could reasonably have assumed that, due to peculiar conditions, the lawful presence of the trains across highways was not sufficient to warn travelers approaching the crossing in a careful manner.—Texas & N. O. R Co v. Davis, Tex.Civ.App, 210 S W 2d 195, refused no reversible error.

53. Ariz—Malin v. Southern Pac. Co, 154 P.2d 790, 62 Ariz. 126—Doty v. Southern Pac. Co, 129 P. 2d 991, 59 Ariz 449
54. Or—Finn v Spokane, P. & S. Ry. Co, 214 P 2d 354, opinion adhered to 218 P 2d 720.
Wash.—Hendrickson v Union Pac R. Co, 136 P.2d 438, 17 Wash.2d 548, 161 A L R. 96

Incline coupled with other circumstances

(1) Where, because of downgrade of highway leading toward crossing, lights on motor vehicles were focused only on roadway until in immediate vicinity of crossing, and where, because of overhanging tree limbs, signal light was obstructed from view, railroad was under duty to provide special warnings or safeguards—Callaway v. Adams, 40 So. 2d 73, 252 Ala 136

(2) Where much traveled street inclined down as it approached crossing so that beam of automobile's headlights tilted so as not to strike flat car across street, and fog impaired visibility, an unusual hazard existed, imposing duty on railroad, in exercise of ordinary care, to provide warning to travelers approaching crossing—Carson v. Thompson, Mo App, 161 S W 2d 995.

(3) Where highway approached railroad crossing on a curve, and dipped, railroad was bound to have knowledge of existence of curve and dip in highway and that automobile lights would be deflected either sideways or up and down so that highway and tracks were not plainly visible at all times to motorists and was required to take reasonable precautions accordingly—Doty v Southern Pac Co, 129 P 2d 991, 59 Ariz 449.

Prior railroad crossing collisions on dark rainy nights when crossing was blocked by cars required that railroad make some effort to determine cause of such collisions.—Texas & N. O. R Co. v Davis, Tex.Civ. App, 210 S W.2d 195, refused no reversible error.

55. Wash—Cox v Polson Logging Co, 138 P 2d 169, 18 Wash.2d 49

56. Ark—Hawkins v. Missouri Pac R Co, 228 S W.2d 642—Fleming v. Missouri & A. Ry. Co, 128 S W.2d 986, 198 Ark. 290
Mont—Broberg v Northern Pac Ry. Co., 182 P 2d 851, 120 Mont. 280

added peril to travelers and give affirmative warning of the presence of its trains upon the crossing,[57] but according to other decisions additional warnings are not required merely because of the existence of unusual atmospheric conditions, such as fog or snow.[58]

Where it has been customary to give reasonable and timely warning that a train is standing on, or running over, a crossing, and a traveler upon the road relies on receiving such warning, the failure to give the warning is negligence.[59] If the railroad has in effect given notice to the public that the railroad will warn them of trains at a crossing, it is bound to assume that every member of the public will receive and rely on such notice,[60] and knowledge or lack of knowledge of plaintiff unknown to the railroad concerning such custom of giving warning or of the discontinuance of such warning cannot affect the nature or extent of the duty owed to plaintiff by the railroad or the performance of such duty.[61]

§ 726. —— Signboards

A railroad company may be required to maintain signboards or warning posts at its crossings over highways to warn travelers of the existence of the railway, and the violation of a statute imposing such a requirement, while not creating an absolute liability on the part of the railroad company, may, under the circumstances, constitute such negligence as to make it liable for a resulting injury.

Under the provisions of some statutes, it is required that a railroad company maintain signboards or warning posts at its crossings over highways to warn travelers of the existence of the railway.[62] Such a statute, in accordance with its terms, may[63] or may not[64] be applicable within the limits of a municipality, and, while it may be construed to extend to a crossing of only part of the width of a street,[65] its application may be restricted to crossings of a "public highway" and not extend to the crossing of a road which is entirely within the lines of the railroad's right of way.[66] Where the state road department has placed its own warning signs at a crossing, the railroad company has been held not to be required by the statute to place additional signs at such crossing.[67]

The violation of such a statute, while not creating an absolute liability on the part of the railroad company, may, under the circumstances, constitute such negligence as to make the railroad company liable for a resulting injury.[68] On the other hand, compliance with such a statute does not necessarily negative any negligence on the part of the railroad with respect to safeguards at crossings.[69] Even

57. Wash.—Hendrickson v. Pacific R. Co., 136 P.2d 438, 17 Wash.2d 548, 161 A.L.R. 96.

On a dark, rainy night cars alone do not give adequate warning of their presence across highway and, if railroad knew or in the exercise of due care should have known of such fact when motorist approached crossing, railroad owed motorist duty of giving additional warning that cars were blocking highway.—Texas & N. O. R. Co. v. Davis, Tex. Civ. App., 210 S.W.2d 195, refused no reversible error.

Fog

Negligence of trainmen stopping freight train on highway crossing for fifteen minutes on foggy night without any signal lights, resulting in motorist's collision with box car, held for jury.—Richard v. Maine Cent. R. Co., 168 A. 811, 132 Me. 197.

58. U.S.—Thomson v. Stevens, C.C.A. 8, 106 F.2d 739.
Del.—Jones v. Pennsylvania R. Co., 61 A.2d 691, 5 Terry 486.
Mo.—Hicks v. Chicago, M., St. P. & P. R. Co., App., 233 S.W.2d 787.
N.D.—Bowers v. Great Northern R. Co., 259 N.W. 99, 65 N.D. 384, 99 A.L.R. 1443.

59. Ky.—Illinois Central R. Co. v. Maxwell, 167 S.W.2d 841, 292 Ky. 660.
Minn.—Munkel v. Chicago, M., St. P. & P. R. Co., 278 N.W. 41, 202 Minn. 264.

60. Md.—Pennsylvania R. Co. v. State, 53 A.2d 562, 188 Md. 646.

61. Md.—Pennsylvania R. Co. v. State, supra.

62. Fla.—Loftin v. McGregor, 14 So.2d 574, 152 Fla. 813.
52 C.J. p. 201 note 44.

Construction

Statute requiring railroad to erect crossing signboard was intended to provide a further safeguard to public against hazard created by crossing, and its scope is to be determined, not so much by a strict literal interpretation of the word "crossing," as by object it was primarily designed to serve.—Murphy v. Palmer, 54 A.2d 427, 73 R.I. 182.

Notice

Statutory warning signs along highway indicating approach to railroad crossing served notice on motorist that he was about to cross tracks and that he must exercise ordinary care for own safety.—Probert v. Chicago, I. & L. Ry. Co., C.C.A. Ill., 93 F.2d 259.

Compliance with statute held shown

Mass.—Peterson v. Boston & M. R. R., 36 N.E.2d 701, 310 Mass. 45.

Noncompliance not excused

Statute requiring railroad to erect and place railroad crossing signboard under direction and with consent of division of public utilities does not authorize the division to excuse railroad from compliance with statute, and automobile passenger suing for injuries sustained in crossing collision was not required to show that the division had expressly directed erection of signboard.—Murphy v. Palmer, 54 A.2d 427, 73 R.I. 182.

63. U.S.—Atlantic Coast Line R. Co. v. Hadlock, C.A. Fla., 180 F.2d 105.

64. Ala.—Sloss-Sheffield Steel & Iron Co. v. Willingham, 199 So. 28, 240 Ala. 294.
52 C.J. p. 201 note 44 [c].

65. R.I.—Murphy v. Palmer, 54 A.2d 427, 73 R.I. 182.

66. Wis.—Langer v. Chicago, M., St. P. & P. Ry. Co., 265 N.W. 851, 220 Wis. 571.

67. U.S.—Ouzts v. Powell, C.C.A. Fla., 125 F.2d 768.

68. N.J.—**Corpus Juris cited in** Lyman v. Pennsylvania R. Co., 162 A. 547, 748, 109 N.J.Law 400.
Ohio.—Cobb v. Bushey, 89 N.E.2d 466, 152 Ohio St. 336.
52 C.J. p. 201 note 45.

69. Okl.—Kurn v. Campbell, 112 P.2d 386, 188 Okl. 636.

Minimum care

Statute requiring railroad to erect suitable crossing signs prescribes

in the absence of statutory requirement, it may be negligence not to provide such a signboard if the crossing is of an unusually dangerous character,[70] but it has also been held that the common law does not require a railroad to maintain such warning devices as signboards at highway crossings in the country[71] and that a railroad has no duty to place on the highway adjacent to or near the crossing any warning sign of a metal substance which will reflect the lights of an approaching automobile and warn the motorist of the crossing[72]

Where the character of the sign is prescribed by statute, compliance must be had therewith[73] Where the form of sign is not prescribed, however, no particular character of sign is necessary, but the sign need be only such as will give reasonable notice to persons approaching the crossing[74] The use of letters smaller than required by statute may constitute negligence,[75] although it has been held, under a statute requiring the highway authorities to put up signboards at crossings and requiring the railroad company to give signals at all crossings so designated, that a signboard is sufficient if it is in plain view of passing trains, although there is no lettering on the side toward the railroad,[76] and some of the letters are obliterated,[77] and the signboard does not extend wholly across the highway[78] An inconsiderable mistake in the distance the sign is placed from the track is of no consequence.[79]

Ordinarily crossing signs should be located at points at which they are most easily visible[80] At some crossings such signs have been held an adequate safeguard if placed on either side of the highway or railroad crossing.[81] However, it may be required under the statute that signs be provided on both sides of the track,[82] and it has been held that a railroad maintaining only a single warning sign on one side of the highway or crossing failed to comply with the statute requiring warning signs at crossings.[83] It has also been held that even where the statute requires only that "a sign" be placed at the crossing, the placing of a single sign visible from only one approach to the crossing may constitute negligence since the statute must be deemed a minimum requirement with respect to number of signs, and be deemed to require that signs be placed where they can be easily seen by travelers[84]

Since the object of such a signboard is to warn travelers of the existence of the railroad crossing, and of the approach of trains,[85] the absence thereof does not make the company liable to a person

minimum care, and not standard determining every case—Kurn v Campbell, supra—St Louis-San Francisco Ry. Co v Prince, 291 P 973, 145 Okl 194, 71 A.L.R 357.

70. Ill—Wagner v Toledo, P & W R R, 185 N.E. 236, 352 Ill 85
La.—Grappe v Texas & P Ry. Co, 133 So 802, 16 La App. 244.
52 C.J p 201 note 53.

71. Ind.—Morley v Cleveland, C, C & St. L. R. Co., 194 N E 806, 100 Ind.App 515

72. Ga—Southern Ry. Co. v. Riley, 194 S.E 422, 57 Ga App 26.

73. Va—John F Ivory Storage Co v Atlantic Coast Line R Co, 48 S E 2d 242, 187 Va 857

Rectangular railroad crossing sign supported on post on which was written vertically words "railroad crossing," and further containing words, "Slow down—five miles—Virginia law," and below it, words "Atlantic Coast Line," was not a compliance with the statute requiring erection of "railroad crossing boards" in the form of an X or cross containing, in capital letters, the inscription railroad crossing—John F Ivory Storage Co v. Atlantic Coast Line R Co., supra

74. Ark—Hovley v. St Louis-San Francisco Ry Co., 102 S W 2d 845, 193 Ark. 580.

Sign held sufficient

The fact that one board of a railroad crossing sign was split and part of the word "railroad" covered up did not prevent it from serving as a warning to driver approaching crossing—Borrson v. Missouri-Kansas-Texas R Co., 172 S W 2d 835, 351 Mo 229

75. N Y—Lewis v. Long Island R Co, 56 N E 548, 162 N Y 52

76. U S—Western & A R Co v Roberson, Tenn, 61 F. 592, 9 C C A 646

77. U.S—Western & A. R. Co v Roberson, supra

78. Kan—Heinen v. Atchison, etc, R Co, 266 P. 35, 125 Kan. 612.
52 C J p 201 note 49.

79. N H—Osgood v Boston, etc, R Co, 141 A 132, 83 N H 262

80. Ark—St Louis-San Francisco Ry. Co v Fowler, 111 S.W.2d 546, 195 Ark 122—Missouri Pac R Co v. Price, 33 S.W 2d 366, 182 Ark 801.

81. Ark—Missouri Pac. R. Co. v. Price, supra
N H—Collette v. Boston, etc, R Co, 140 A 176, 83 N H 210
Tex.—Wichita Valley Ry Co. v. Fite, Civ App, 78 S W 2d 714

Where warning sign accomplished its purpose by putting plaintiff on alert for approaching train as automobile in which plaintiff was riding approached railroad crossing, railroad was not negligent because crossing sign was on left side of highway—Willy v. Atchison, T & S F Ry. Co, 172 P 2d 958, 115 Colo 306

82. Minn—Wessman v Scandrett, 14 N W 2d 445, 217 Minn. 312

83. Ohio—Baltimore & O. R. Co v Roudebush, 172 N.E 559, 35 Ohio App. 471.

84. Ark—St. Louis-San Francisco Ry Co. v. Fowler, 111 S W.2d 546, 195 Ark 122.

85. Kan—Shepard v Thompson, 109 P 2d 126, 153 Kan 68—Bledsoe v Missouri, K & T. R Co, 90 P 2d 9, 149 Kan 741
Tex—McMahan v. Texas & N O. R Co, 161 S.W 2d 70, 138 Tex. 626

Train occupying crossing

(1) The purpose of crossing signs near railroad crossings is to warn of approaching trains and not of trains already occupying the crossing
Kan—Corkill v. Thompson, 217 P.2d 273, 169 Kan 38—Shepard v. Thompson, 109 P 2d 126, 153 Kan. 68
Pa—Cella v. Pennsylvania R. Co., 70 A 2d 638, 364 Pa 82.

(2) The purpose of warning signs at railroad crossings is to warn persons using highways of danger of approaching trains, not to prevent

familiar with the crossing and knowing of the existence of the railroad at the time of the accident[86] or to one who struck the train because of inattention.[87] Thus the fact that a train stopped on the crossing hid the warning sign from an automobilist's view has been held immaterial in an action for a crossing collision, since the train itself was notice of its presence.[88] Where, in the absence of other negligence, a railroad lacked knowledge of the fact that a sign erected by it had been knocked down a short time before the accident complained of, it may not be held liable for failure to reerect and have the sign in place at the time of the accident.[89]

Closing of old highway. A railroad is not liable for failure to erect warning signs advising travelers of the closing of an old highway and the diversion of traffic to a new one where the railroad had no right, and was under no duty, to erect such signs[90]

§ 727. —— Automatic Signals

a. In general
b. Maintenance and operation

a. In General

The maintenance by railroad companies of automatic signals at crossings may be required under the terms of some statutes, but a railroad company ordinarily is not negligent in failing to maintain an automatic alarm, in the absence of statutory requirement, unless the crossing is more than ordinarily hazardous

Under the terms of some statutes or governmental regulations, railroad companies are obliged to maintain automatic signals at crossings,[91] and the violation of such statutes my constitute negligence per se, as discussed infra § 730 However, a railroad company ordinarily is not negligent in failing to maintain an automatic alarm, in the absence of statutory requirement,[92] when the crossing is not more than ordinarily hazardous,[93] as where the view at the crossing is unobstructed[94] In other words, mechanical warnings ordinarily are required only at crossings so dangerous that prudent

them from running into trains on crossings.
Iowa—Hitchcock v. Iowa Southern Utilities Co of Delaware, 6 N W 2d 29, 233 Iowa 301—Dolan v Bremner, 263 N.W. 798, 220 Iowa 1143
Pa—Hale v. Pennsylvania R. Co., Com Pl., 53 York Leg.Rec. 45.
(3) Duty of railroad where trains or cars occupy crossing generally see supra § 725 b.

86. Ohio.—New York, C & St L. R Co v. Bowles, 171 N E. 844, 35 Ohio App 145
52 C.J. p 201 note 54.

87. Ark—Missouri Pac R Co v Price, 33 S W 2d 366, 182 Ark 801
Ohio.—Cobb v. Bushey, 89 N E 2d 466, 152 Ohio St 336—Reed v Erie R. Co, 15 N E.2d 637, 134 Ohio St. 31—Kramers v. Chesapeake & O Ry Co., 22 N.E 2d 227, 60 Ohio App. 556.
Vt.—Gallagher v. Montpelier, etc., R. Co, 137 A. 207, 100 Vt. 299, 52 A. L R. 744

88. Okl—Fleming v. Loch, 195 P.2d 942, 200 Okl. 448.
Vt.—Yardley v. Rutland R. Co, 153 A. 195, 103 Vt. 182.

89. Ga—Southern Ry. Co. v. Riley, 4 S.E 2d 54, 60 Ga App. 475

90. N Y—Isaac v. Town of Queensbury, 278 N Y S 496, 244 App Div 14

91. N.C—Blum v. Southern R Co, 122 S E. 562, 187 N.C 640.

Effect of ordinance

Where city ordinance requiring installation of railroad crossing signals was enacted under authorization of statute, question as to effect of ordinance involved construction o statute as well as ordinance—Mc Caffrey v Minneapolis, St P & S S M Ry. Co, 267 N W 326, 222 Wis 311, modified on other grounds 268 N.W. 872, 222 Wis 311

92. Ariz—Canion v Southern Pac Co., 80 P.2d 397, 52 Ariz 245.
Ind—Pennsylvania R. Co v Rizzo, 86 N E 2d 91, 119 Ind App 505, rehearing denied 87 N E 2d 885, 119 Ind App 505
La—Natal v Louisiana & A. Ry Co, 137 So 600, 18 La App 50.
Tex—Corpus Juris quoted in Texas & N O. R Co v Beard, Civ App, 91 S W 2d 1080, 1082, error refused
52 C J p 201 note 60.

Electric signal

At common law, there was no general duty on railroad to maintain at crossing an electric wigwag, flash signal—Interstate Motor Lines v Great Western Ry. Co, C C A.Colo, 161 F.2d 968.

93. La—Natal v Louisiana & A Ry Co, 137 So 600, 18 La App. 50.
Neb.—Sailors v Lowden, 299 N W 510, 140 Neb 206.
N H.—Gillingham v. Boston & M R R, 21 A 2d 174, 91 N H. 433—Despres v Boston & M. R. R, 181 A 420, 87 N H. 427
N C—Chinnis v. Atlantic Coast Line R Co, 14 S E.2d 500, 219 N C. 528—Eller v. North Carolina R. Co, 157 S E. 800, 200 N C. 527—Batchelor v. Atlantic Coast Line R. Co, 144 S E 542, 196 N C. 84, 60 A.L.R 1091.
Tex—Texas & N O. R Co v Compton, 136 S W 2d 1113, 135 Tex 7—Corpus Juris quoted in Texas & N O R Co v Beard, Civ App, 91 S W 2d 1080, 1082, error refused—Thompson v St Louis Southwestern Ry Co of Texas, Civ.App, 55 S W 2d 1084
Va—Atlantic Coast Line R Co v. Clements, 36 S E 2d 553, 184 Va. 656.

Obstruction of view

Fact that approaching motorist's view in direction from which train was approaching grade crossing was solidly obstructed did not of itself make the crossing an unusual hazard so as to require railroad to maintain a mechanical signal or warning device at the crossing—Fish v. Southern Pac Co, 143 P 2d 917, 173 Or 294, rehearing denied 145 P 2d 991, 173 Or. 294

Signals or flashers

The law does not require railroad companies to place signals or flashers at highway crossing unless ordered by the public utility commission, or unless such crossings are especially dangerous or there exists special circumstances which render such precautions necessary for the public safety.—Icsman v New York Cent. R Co, 87 N E 2d 829, 85 Ohio App 47.

Country crossing

U.S—Constantine v Pennsylvania R Co, C C A Ind, 114 F 2d 271
Ind—Morley v Cleveland, C, C & St. L. R Co., 194 N E 806, 100 Ind App 515
La.—Alanza v Texas & P Ry Co, App, 32 So 2d 341.

94. Wash.—Hopp v Northern Pac. Ry. Co, 147 P 2d 950, 20 Wash 2d 439
52 C J. p 201 note 62.

persons cannot use them with safety unless extraordinary protective means are used.[95] Since the purpose of a signaling device is to warn of approaching trains rather than the presence of a train on the crossing, a railroad ordinarily is not negligent in failing to have a crossing properly equipped with a mechanical signal where an automobile is driven into a train already occupying the crossing.[96]

On the other hand, the absence of a statute or order of a commission requiring automatic signals does not relieve the company altogether from negligence in failure to maintain such safeguards,[97] even, under some circumstances, where the train is occupying the crossing at the time of the accident,[98] and the fact that a railroad crossing is frequently used by travelers is not an indispensable factor to a determination that the crossing is particularly dangerous so as to require the maintenance of an automatic signaling device, since the hazardous nature of the crossing may depend on the physical nature of the crossing.[99] Accordingly, if a railroad crossing in the country is peculiarly dangerous to travelers because of its location, or its mode of construction, or because the track is curved or the view is obstructed, the railroad must exercise ordinary care to meet the peril with a special warning signal.[1] The purpose of an automatic warning signal is to warn persons on or approaching the crossing of a coming train and it does not notify the operator of such a train of the presence of a person or vehicle on the crossing and is not designed for that purpose.[2]

b. Maintenance and Operation

If signals are provided, the public has the right to rely thereon, and the railroad company must use reasonable care to keep them in good condition and in working order or to give notice that they are not in good working order. The failure of automatic signals to operate at the time of the accident ordinarily is evidence of negligence, but under certain circumstances the railroad company may not be liable in the event of failure of the signal to function.

If signals are provided, although not required by statute, the public has the right to rely thereon,[3] and the company must use reasonable care to keep them in good condition and in working order,[4] or to give notice that they are not operating,[5] since if

95. Tex.—Southwest Stone Co. v. Symons, Civ.App., 237 S.W.2d 380, error refused no reversible error—Attebery v. Henwood, Civ.App., 177 S.W.2d 95, error refused

Special dangers

Duty of railroad to provide special protection at crossings, such as automatic lights, depends on special dangers inherent in the situation and on the volume of traffic on highway and railroad.—Dahar v. Boston & M. R. R., 66 A.2d 707, 95 N.H. 464

96. Ind.—Morley v. Cleveland, C., C. & St. L. R. Co., 194 N.E. 806, 100 Ind.App. 515.

Kan.—Shepard v. Thompson, 109 P.2d 126, 153 Kan. 68.

Duty where trains or cars occupy crossing generally see supra § 725 b.

Device obscured by cars blocking crossing

Mich.—Esterline v. Kennicott, 268 N.W. 835, 277 Mich. 130.

97. Ill.—Willett v. Baltimore & O. S. W. R. Co., 1 N.E.2d 748, 284 Ill.App. 307.

Ind.—**Corpus Juris cited in** Watson v. Brady, 185 N.E. 516, 519, 205 Ind. 1

La.—Robertson v. Missouri Pac. R. Co., App., 165 So. 527, rehearing denied 167 So. 165.

52 C.J. p. 201 note 63.

Speed of trains

Fact that passenger trains ran at speeds in excess of fifty miles an hour across important state highway in vicinity of large city was sufficient to justify a jury's finding that crossing was a dangerous crossing.—John F. Ivory Storage Co. v. Atlantic Coast Line R. Co., 48 S.E.2d 242, 187 Va. 857

98. Ark.—Hawkins v. Missouri Pac. R. Co., 228 S.W.2d 642

99. Cal.—Hinkle v. Southern Pac. Co., 87 P.2d 349, 12 Cal.2d 691

1. U.S.—Interstate Motor Lines v. Great Western Ry. Co., C.C.A.Colo., 161 F.2d 968

2. Va.—Seaboard Air Line R. Co. v. Crowder, 62 S.E.2d 227, 191 Va. 635.

3. Cal.—**Corpus Juris quoted in** Mallett v. Southern Pac. Co., 68 P.2d 281, 286, 20 Cal.App.2d 500

Ill.—Langston v. Chicago & N. W. Ry. Co., 75 N.E.2d 363, 398 Ill. 248

Wash.—**Corpus Juris quoted in** Cox v. Polson Lumber Co., 138 P.2d 169, 175, 18 Wash.2d 49.

52 C.J. p. 201 note 64.

4. Cal.—Startup v. Pacific Elec. Ry. Co., 180 P.2d 896, 29 Cal.2d 866—Will v. Southern Pac. Co., 116 P.2d 44, 18 Cal.2d 468.—**Corpus Juris quoted in** Mallett v. Southern Pac. Co., 68 P.2d 281, 286, 20 Cal.App.2d 500

Ill.—Langston v. Chicago & N. W. Ry. Co., 75 N.E.2d 363, 398 Ill. 248

Ky.—Whitney v. Louisville & N. R. Co., 138 S.W.2d 503, 282 Ky. 392.

N.J.—Stewart v. Norton, 75 A.2d 900, 9 N.J.Super. 222, affirmed 80 A.2d 111, 6 N.J. 591

Wash.—**Corpus Juris quoted in** Cox v. Polson Lumber Co., 138 P.2d 169, 175, 18 Wash.2d 49.

Wis.—McCaffrey v. Minneapolis, St. P. & S. S. M. Ry. Co., 267 N.W. 326, 222 Wis. 311, modified on other grounds 268 N.W. 872, 222 Wis. 311

52 C.J. p. 201 note 65

Collision with stationary cars

Railroad which maintains automatic wigwag signal system at crossing will be held liable for injuries motorist sustains in collision with stationary cars as result of defect in system, regardless of whether system was designed to warn travelers of approach of trains rather than of danger from stationary cars.—Mallett v. Southern Pac. Co., 68 P.2d 281, 20 Cal.App.2d 500.

5. Ala.—Washington v. Birmingham Southern R. Co., 82 So. 545, 203 Ala. 295

Cal.—**Corpus Juris quoted in** Mallett v. Southern Pac. Co., 68 P.2d 281, 286, 20 Cal.App.2d 500

Wash.—**Corpus Juris quoted in** Cox v. Polson Logging Co., 138 P.2d 169, 175, 18 Wash.2d 49.

Other warning

In action for injuries to passengers in automobile colliding with defendant's train on railroad crossing, whether wigwag signal at crossing was defective or defendant was negligent in maintenance thereof was immaterial, in view of evidence of defendant's negligence in failing to give any warning of presence of train on crossing, as by sounding locomotive whistle or bell, after discovering that wigwag was not operating.—Peri v. Los Angeles Junction Ry., 137 P.2d 441, 22 Cal.2d 111.

such a signal is misunderstood it is a menace [6] The failure to repair a gong has been held to be only a circumstance showing negligence and is not negligence per se.[7] Although a bell cannot be classed with a gate or flagman,[8] a statute requiring an efficient electric bell requires an automatic one and does not comprehend one operated by the hand of a trainman.[9]

The failure of automatic bells or warning lights, placed at a railroad crossing to signal approaching trains, to ring or flash at the time of the accident is evidence of negligence,[10] unless the person injured knew that such a signal was no longer used,[11] or that it was defective,[12] although in the determination of the negligence of the company it is immaterial whether the injured person knew of the existence of the signal.[13] The company has been held negligent in operating a fast train over a crossing where an automatic bell is not functioning.[14] Where a bell is provided for each of two tracks which cross, the failure of one to ring, although the other rings, is negligence, where such fact is known to the company [15] An automatic signal may be sufficient notwithstanding it is operated only by a train upon the main track,[16] but not where the signal functions erratically,[17] as where it operates from causes other than an approaching train[18] and rings most of the time [19]

Under certain circumstances the railroad company may not be liable in the event of failure of the signal to function,[20] as, for example, where the bell failed to ring momentarily[21] or where the flashlight signals temporarily failed to function.[22] It has been held that, in order to charge a railroad company with negligence in this matter, it must be shown that the railroad company had knowledge of the defective signal,[23] or constructive notice thereof,[24] as where the defective condition existed for such length of time that the company in the exercise of due care should have discovered it.[25] The failure of such a signal to function is not negligence where the injury is the result of a cause against

6. Cal.—**Corpus Juris quoted in** Mallett v Southern Pac Co, 68 P 2d 281, 286, 20 Cal App 2d 500—Baldwin v Pacific Electric R Co, App, 273 P. 155, reheard 274 P 72
Wash.—**Corpus Juris quoted in** Cox v. Polson Logging Co., 138 P 2d 169, 175, 18 Wash.2d 49

Invitation

Failure of railroad's wigwag signal to operate was invitation to motorist to proceed across track on highway—Silvey v Lehigh & N E. R Co, C C A N Y, 62 F 2d 71.

Location of signal

Where a motorist was approaching a railroad grade crossing during a snowstorm, while driving in a southerly direction, and the flasher light was located on the northerly side of the track, it could be found that the flasher light located on the northerly side of the track was located in such a position as to mislead the motorist with respect to the location of the track under the conditions existing on the day of the accident—Copithorn v. Boston & M R R, 17 N E 2d 713, 301 Mass. 510

7. Ohio—Cleveland, etc., R Co. v Sivey, 27 Ohio Cir Ct. 248.

8. Kan—Jacobs v Atchison, etc, R Co, 154 P 1023, 97 Kan 247, L R A 1916D 783, Ann Cas 1918D 473

9. Wis.—Jorgenson v. Chicago, etc., R Co, 140 N W 1088, 153 Wis 108.

10. U S—Pennsylvania R Co. v Ackerson, C.A Mich, 183 F 2d 662
Ill.—Langston v. Chicago & N W Ry. Co., 70 N.E.2d 852, 330 Ill App 260, affirmed 75 N.E.2d 363, 398 Ill 248.
Mich—Jones v Grand Trunk Western R. Co, 5 N W 2d 676, 303 Mich 114
N J—Piper v Erie R. Co, 152 A 643, 9 N J Misc 40
52 C.J p 202 note 71.

11. N Y—Wellenhoffer v New York, etc, R Co, 21 N Y S. 866.

12. Ind.—Lake Erie, etc, R Co v Howarth, 124 N E. 687, 127 N E 804, 73 Ind App 454.

13. D C.—Conger v Baltimore, etc, R. Co, 31 App D C. 139

14. Colo—Headley v Denver, etc, R Co, 154 P 731, 60 Colo 500
N Y—Hamilton v. Erie R. Co, 114 N E 399, 219 N Y 343, Ann Cas 1918A 928

15. U S—Detroit United R Co v Weintrobe, Mich, 259 F 64, 170 C.C A 132

16. Pa—Miller v Pennsylvania R Co., 149 A 85, 299 Pa 63

17. Ind—Lake Erie, etc, R Co v. Howart, 124 N E 687, 127 N E. 804, 73 Ind App 454.
Pa—Frank v Reading Co, 146 A 598, 297 Pa. 233

18. Pa—Frank v Reading Co, supra.

19. Ky—Cincinnati, etc, R Co. v Champ, 104 S W. 988, 31 Ky L 1054.

20. Del.—MacRobert v. Baltimore, etc, R. Co, 138 A 904, 33 Del 447.
Va—Davis v. McCall, 113 S.E. 835, 133 Va. 487

21. Cal.—Vaca v. Southern Pac. R. Co, 267 P. 346, 91 Cal App. 470

22. Mo—Rinderknecht v Thompson, 220 S W 2d 69, 359 Mo 21.
Pa—Miller v. Pennsylvania R. Co, 149 A. 85, 299 Pa 63.

Failure of wigwag signal to operate automatically when accident occurred does not alone show negligence—Southern Pac Co v. Kauffman, C C A Cal, 50 F 2d 159.

23. Ill—Applegate v. Chicago & N W Ry Co, 78 N E 2d 793, 334 Ill App 141.
Ind—Lake Erie, etc, R Co v Howart, 124 N E 687, 127 N E 804, 73 Ind App 454.
Mo—Rinderknecht v Thompson, 220 S W 2d 69, 359 Mo 21.
Pa—Miller v Pennsylvania R Co, 149 A 85, 299 Pa 63—Goldscheiter v Baltimore & O R Co., 33 A 2d 477, 153 Pa Super. 141.
Tenn—Louisville & N R. Co. v Frakes, 11 Tenn App 593.

No duty to give warning

In absence of knowledge on part of railroad that automatic signals at crossing were out of order, railroad was not under duty to place servant or light or other signal at or near crossing to warn or notify travelers of dangerous condition caused by presence of train on crossing.—Northern Pac Ry Co. v Bacon, C.C A Mont, 91 F.2d 173, certiorari denied Bacon v Northern Pac R Co, 58 S Ct 55, 302 U S. 730, 82 L.Ed. 564.

24. Ill—Applegate v. Chicago & N W Ry. Co, 78 N E 2d 793, 334 Ill App 141.
Pa—Miller v Pennsylvania R Co, 149 A 85, 299 Pa. 63—Goldscheiter v. Baltimore & O R. Co, 33 A 2d 477, 153 Pa Super. 141

25. Mo—Rinderknecht v. Thompson, 220 S W 2d 69, 359 Mo. 21.
52 C J p 202 note 85.

which such signal was not a safeguard,[26] as where an automobile was driven into a standing train,[27] but it has also been held that, where a train standing or moving across the highway was not observed by a traveler through no fault of his own and the traveler was injured by relying on, and reasonably acting in compliance with, signals known by the railroad to be defective, the railroad is liable to the traveler.[28] The failure, through the railroad's negligence, of a warning signal at a crossing to operate does not constitute a breach of duty to a person attempting to cross the track on a street some distance from the signal.[29] It has been held that the installation of an automatic signal is a recognition of the dangerous character of the crossing,[30] but a contrary view has also been taken.[31]

§ 728. —— Gates and Flagmen

a. In general

b. Maintenance and operation

a. In General

A railroad company ordinarily is under no duty to maintain a flagman or gate at a crossing, and negligence cannot be predicated on a mere failure to do so except where the maintenance of such safeguards is required by statute, ordinance, order of a public service commission, or other proper authority, or where the crossing is so extraordinarily hazardous that ordinary care or reasonable prudence requires that a flagman or gates should be maintained.

Under some statutes or governmental regulations, a railroad company is required to provide flagmen or gates at certain crossings,[32] and failure to comply with such statutes is negligence per se, as discussed infra § 730. Where not so required by statute, ordinance, order of a public service commission, or other proper authority, a railroad company ordinarily is under no duty to maintain a flagman or gate at a crossing, and negligence cannot be predicated on a mere failure to do so,[33] although such failure may, together with other circumstanc-

26. Mass.—McGlauflin v. Boston, etc., R. Co., 119 N.E. 955, 230 Mass. 431, L.R.A. 1918E 790
52 C.J. p. 202 note 86

27. Mass.—McGlauflin v. Boston, etc., R. Co., supra

28. Cal.—Mallett v. Southern Pac. Co., 68 P.2d 281, 20 Cal.App.2d 500.

Installation

In action by motorist who drove into north-bound gondola car, standing on unlighted town crossing at night, in reliance on belief that wigwag signal system, which had ceased operating, operated until trains had cleared crossing while in fact system operated for south-bound train until crossing was cleared, but ceased to operate for north-bound train when last car passed point thirty-one feet south of crossing, evidence held not to show that wigwag signal system was installed at crossing in accordance with approved rules of railroad commission so as to exempt railroad from negligence because of any defect in the system which might exist —Mallett v. Southern Pac. Co., supra

Synchronized signals

Railroad could not escape liability for death of driver of automobile and injuries sustained by occupants when automobile ran into side of moving freight train at night while crossing signals with swinging red lights and bells were not operating because storage batteries had been permitted to run down, because of the fact that stop and go signal, which showed green at intersection a short distance from crossing at time of accident, was maintained by state, where signal was synchronized with railroad crossing signals—Langston v. Chicago & N. W. Ry. Co., 70 N.E.2d 852, 330 Ill.App. 260, affirmed 75 N.E.2d 363, 398 Ill. 248

29. Okl.—Kansas, O. & G. Ry. Co. v. Jones, 17 P.2d 959, 161 Okl. 206

30. Mo.—Bachman v. Quincy, etc., R. Co., 274 S.W. 764, 310 Mo. 48

Four-lane highway

Railroad, which had recognized need of warning light at crossing with four-lane highway and had maintained one for a number of years, could not deny duty to maintain light—Dehn v. Thompson, Mo.App., 181 S.W.2d 171.

31. Ky.—Payne v. Barnette, 244 S.W. 896, 196 Ky. 489.
52 C.J. p. 202 note 89.

32. Ky.—Louisville, etc., R. Co. v. Louisville Provision Co., 279 S.W. 1100, 212 Ky. 709

Order of commission

The maintenance of gates may be required by order of a commission. —Norfolk & W. Ry. Co. v. Wellon's Adm'r, 154 S.E. 575, 155 Va. 218.

Companies to which applicable

Ordinance requiring flagman at crossing was construed as applicable to any railroad company operating line therein described—Illinois Cent. R. Co. v. McGuire's Adm'r, 38 S.W.2d 913, 239 Ky. 1.

Crossings to which applicable

Motorbus substituted for rail streetcar in urban transportation could not be considered a "streetcar" within city ordinance requiring railroad to have a flagman stationed at least two minutes before arrival of train at each crossing in city at which railroad crosses streets on which streetcars are running—Levy v. New Orleans & N. E. R. Co., La.App., 20 So.2d 559, rehearing denied 21 So.2d 155

Propelling power of cars

Ordinance requiring watchman at railroad crossing when street is being crossed by railway cars "propelled in whole or in part by steam" was not applicable to cars propelled on track by gasoline or electricity, precluding recovery in action arising out of collision at crossing with railroad car propelled by gasoline, where sole negligence of railroad was the alleged violation of the ordinance—Abernathy v. Kurn, Mo.App., 92 S.W.2d 936

33. U.S.—**Corpus Juris cited in** Lewis v. Thompson, D.C.La., 47 F.Supp. 435, 439

Ariz.—Canion v. Southern Pac. Co., 80 P.2d 397, 52 Ariz. 245.

Ill.—Hyland v. Chicago & N. W. R. Co., 262 Ill.App. 427

Ind.—Pennsylvania R. Co. v. Rizzo, 86 N.E.2d 91, 119 Ind.App. 505, rehearing denied 87 N.E.2d 885, 119 Ind.App. 505—Cleveland, C., C. & St. L. Ry. Co. v. Gillespie, 173 N.E. 708, 96 Ind.App. 535

La.—Eggleston v. Louisiana & A. Ry. Co., App., 192 So. 774—Cuccia v. Gulf, M. & N. R. Co., App., 180 So. 513—Plummer v. Gulf, M. & N. R. Co., App., 153 So. 322.

Miss.—**Corpus Juris cited in** Bon Homie & H. S. R. Co. v. Ferguson, 134 So. 146, 147, 160 Miss. 433.

Mo.—Hein v. Terminal R. R. Ass'n of St. Louis, 224 S.W.2d 963, 359 Mo. 946—Homan v. Missouri Pac. R. Co., 64 S.W.2d 617, 334 Mo. 61, certiorari denied Missouri Pac. R. Co. v. Homan, 54 S.Ct. 561, 291 U.S. 683, 78 L.Ed. 1070—Hein v. Chicago & E. I. R. Co., App., 209 S.W.2d 578.

Neb.—**Corpus Juris cited in** McQuin v. Missouri Pac. R. Corporation, 240 N.W. 515, 521, 122 Neb. 423.

es, be considered as evidence of negligence in operating the road.[34] So it has been stated that whether a railroad is negligent in failing to maintain gates or a flagman at a crossing depends on the facts and circumstances of the particular case.[35] Failure to provide such safeguards may constitute negligence where, and only where, the conditions at the crossing are such that ordinary care or reasonable prudence requires that a flagman or gates should be maintained;[36] and this duty may exist independently of a statute regulating the signs and signals at crossings if the situation of the crossing reasonably requires it.[37]

Before a jury will be warranted in saying, in the absence of any statutory direction to that effect, that a railroad company should keep a flagman or gates at a crossing, it must be first shown that such crossing is more than ordinarily hazardous,[38] as,

N C.—Eller v. North Carolina R Co., 157 S E. 800, 200 N C. 527
Ohio.—Icsman v. New York Cent R Co., 87 N E 2d 829, 85 Ohio App 47
Pa.—Cummings v. Pennsylvania R Co., 151 A. 590, 301 Pa 39, 71 A L R. 1156
Tex.—Texas & N. O. Ry Co v Adams, Civ.App., 27 S W 2d 331, error dismissed.
52 C J. p 202 note 93.

Arterial highway

A railroad is not obliged under the law to maintain flagmen or watchmen, or install signal devices under all conditions, at ordinary highway crossings, even though such highway is an arterial one.—Sailors v Lowden, 299 N W. 510, 140 Neb. 206

Local agent

Where there were no special hazards at crossing at which motorist was killed, and railroad provided adequate signals from train and devices at crossing, railroad was not liable for such death on ground of local agent's failure to stop motorist, notwithstanding testimony that agent sometimes stopped children and automobiles at crossing, especially in absence of evidence of reliance on such custom by deceased.—Nice v. Illinois Cent R Co., 25 N.E 2d 104, 303 Ill App 292

34. Kan.—Johnson v. Union Pac R Co., 143 P.2d 630, 157 Kan. 633
Pa.—Cummings v Pennsylvania R Co., 151 A. 590, 301 Pa. 39, 71 A L.R. 1156.
Tenn.—Tennessee Cent. Ry Co. v Hayes, 9 Tenn.App. 116.
52 C.J. p 203 note 94.

Railroad rule

In action for death when truck in which decedent was riding was struck by defendant's work train at grade crossing which had been obstructed by freight train engaged in switching operations, a railroad rule requiring stationing of a flagman when freight trains or engines are standing was not inadmissible on ground that rule did not apply because in railroad parlance a "standing" train is one completely coupled, where rule was broad enough to include a separation of train into sections.—Pennsylvania R Co v. State 53 A 2d 562, 188 Md 646.

35. Tex.—Missouri, K. & T. R. Co of Texas v Young, Civ.App., 127 S W 2d 489, error dismissed, judgment correct.

Question of fact

Whether failure of railroad company to station a flagman at a crossing constitutes omission of such care as ordinarily prudent person would use under same or similar circumstances is a question of fact, where there are obstructions which materially hinder view of approaching trains, provided crossing is used frequently by the public and numerous trains are run thereon.—Hawkins v Missouri Pac. R Co., Ark., 228 S W. 2d 642.

36. U S.—Ranstrom v. Oregon Short Line R. Co., D C Idaho, 18 F Supp 256.
Ariz.—Canion v. Southern Pac Co., 80 P 2d 397, 52 Ariz 245.
Ill.—Wagner v Toledo, P. & W R R., 185 N E 236, 352 Ill 85.—Willett v. Baltimore & O S W R Co., 1 N E 2d 748, 284 Ill App 307
La.—Eggleston v Louisiana & A Ry Co., App., 192 So 774.—Grappe v Texas & P Ry Co., 133 So 802, 16 La App. 244.
Mo.—**Corpus Juris cited in** Homan v Missouri Pac R Co., 64 S W 2d 617, 622, 334 Mo 61, certiorari denied 54 S Ct 561, 291 U S 683, 78 L Ed 1070.—Holman v. Terminal R Ass'n of St. Louis, App., 125 S W 2d 527.
N C.—Caldwell v. Southern Ry. Co., 10 S.E 2d 680, 218 N C 63.
Ohio.—Thomas v. Pennsylvania R Co., 45 N.E 2d 776, 70 Ohio App. 191.
Or.—Case v. Northern Pac. Terminal Co., 160 P 2d 313, 176 Or. 643.
Tex.—Southwest Stone Co v. Symons, Civ App., 237 S.W 2d 380, error refused no reversible error.—Texas & N O R. Co v. Dickson, Civ App., 72 S W.2d 384, error dismissed
52 C J. p 203 note 95

Reasonable necessity

A railroad company is not required to have gate or flagman, or brakeman at every highway crossing, but only where reasonably necessary for protection of travelers, depending on amount of travel on highway, frequency of trains, view of trains approaching or moving over crossing, and other conditions.—Dimond v. Terminal R. Ass'n of St Louis, 141 S W 2d 789, 346 Mo 333

Special dangers

(1) Duty to provide special protection at crossings, such as crossing-tenders and gates, depends on special dangers inherent in situation and on volume of traffic on highway and railroad.—Dahar v Boston & M R R., 66 A 2d 707, 95 N H. 464.—Gillingham v Boston & M. R. R., 21 A 2d 174, 91 N.H. 433.

(2) Duty to have gates or watchman at crossing arises only where situation or surroundings of crossing render it peculiarly or more than ordinarily dangerous, or where particular place is so peculiarly dangerous that prudent persons cannot use public road in safety unless company employs flagman.—Walker v Texas & N O R. Co., Tex Civ App., 150 S W 2d 853, error dismissed, judgment correct.

37. Ind.—**Corpus Juris cited in** Watson v. Brady, 185 N E 516, 519, 205 Ind 1.
Mo.—Hein v Chicago & E I. R Co., App., 209 S W 2d 578
Tex.—Galveston, H & S A Ry Co v Wells, 50 S W 2d 247, 121 Tex 310
52 C.J. p 203 note 96.

38. U S.—Walton v Oregon Short Line R. Co., C C.A.Idaho, 50 F 2d 352.—**Corpus Juris cited in** Williams v Thompson, D C La., 48 F Supp. 760, 764.—**Corpus Juris cited in** Lewis v. Thompson, D C La., 47 F Supp 435, 439
Kan.—Johnson v. Union Pac. R Co., 143 P.2d 630, 157 Kan 633
Miss.—**Corpus Juris cited in** Bon Homie & H S R Co v Ferguson, 134 So 146, 147, 160 Miss 433
Or.—Case v Northern Pac Terminal Co., 160 P 2d 313, 176 Or. 643
Pa.—Haller v Pennsylvania R Co., 159 A 10, 306 Pa. 98
Tex.—Texas & N. O R Co v Compton, 136 S W 2d 1113, 135 Tex 7.—Attebery v. Henwood, Civ.App., 177 S W 2d 95, error refused.—**Corpus Juris quoted in** Texas & N O R Co v. Beard, Civ App., 91 S W 2d 1080, 1082, error refused.
52 C.J p 204 note 97.

A railroad crossing is more than ordinarily dangerous if it is so peculiarly dangerous that prudent per-

for instance, that it is in a thickly populated town or city,[39] that the view of the track is obstructed either by the company itself,[40] or by other objects proper in themselves,[41] or by the configuration of the land,[42] or that the crossing is one which, for any reason, a reasonably prudent person in the exercise of ordinary care could not use with safety,[43] or that the crossing is a much traveled one,[44] and the noise of approaching trains is rendered indistinct and the ordinary signals difficult to be heard by reason of bustle and confusion incident to railroad or other business,[45] or by reason of some other such cause.[46]

In determining whether a railroad crossing is extrahazardous within this rule, each case must be viewed in the light of its own facts.[47] It has been held that, unless the railroad company knew, or in the exercise of ordinary care should have known, of the hazardous condition of the crossing, it is not negligent,[48] but it is held to have recognized the dangerous character of the crossing where it has maintained a flagman there[49] or erected gates,[50] or where a statement was made to a public officer that plans for maintaining certain safeguards were under consideration.[51]

Unless required by statute, a railroad company ordinarily is under no obligation to keep a flagman at the crossings of public country roads[52] or private roads,[53] or at a crossing which is in a sparsely settled locality,[54] as in a residence district,[55] or at a branch line street crossing,[56] or at a flag station,[57] or at a crossing in a small town

sons cannot use it with safety unless extraordinary means are used to approach such place—Hopp v Northern Pac Ry. Co., 147 P 2d 950, 20 Wash 2d 439.

Crossing held not extraordinarily hazardous

(1) In general

La—Natal v. Louisiana & A Ry. Co., 137 So. 600, 18 La App 50

Tex—Thompson v St. Louis Southwestern Ry. Co of Texas, Civ App., 55 S W.2d 1084

Wash.—Hopp v Northern Pac. Ry Co., 147 P 2d 950, 20 Wash 2d 439

(2) Fact that approaching motorist's view in direction from which train was approaching grade crossing was solidly obstructed did not of itself make the crossing an unusual hazard so as to require railroad to maintain a mechanical signal, warning device, or watchman at the crossing.—Fish v Southern Pac Co, 143 P.2d 917, 173 Or 294, rehearing denied 145 P 2d 991, 173 Or 294.

At night

Flagman held unnecessary at night at city crossing little used by traffic, except during daytime—Moschetto v. Illinois Cent. R Co, 131 So 500, 15 La App 505

39. U S.—Ranstrom v. Oregon Short Line R Co, D C.Idaho, 18 F Supp 256.

Kan—Johnson v. Union Pac R Co, 143 P 2d 630, 157 Kan 633

La—Robertson v. Missouri Pac R Co, App, 165 So. 527, rehearing denied 167 So 165.

Or.—Case v. Northern Pac Terminal Co, 160 P.2d 313, 176 Or 643

Tex.—**Corpus Juris quoted in** Texas & N O R Co. v Beard, Civ App, 91 S.W.2d 1080, 1082, error refused.

52 C.J p 204 note 98.

40. Kan—Johnson v. Union Pac R Co., 143 P.2d 630, 157 Kan 633.

Tex.—**Corpus Juris quoted in** Texas & N. O R. Co v. Beard, Civ App, 91 S W 2d 1080, 1082, error refused

52 C.J p 204 note 99.

Box cars

Or—Fish v. Southern Pac. Co, 143 P 2d 917, 173 Or 294, rehearing denied 145 P 2d 991, 173 Or 294

41. Kan—Johnson v. Union Pac R Co, 143 P 2d 630, 157 Kan. 633

Tex—**Corpus Juris quoted in** Texas & N O R Co v. Beard, Civ App, 91 S.W 2d 1080, 1082, error refused

52 C J. p 204 note 1

42. Mass—Hubbard v Boston, etc, R. Co, 38 N.E. 366, 162 Mass 132

Tex.—**Corpus Juris quoted in** Texas & N O. R Co. v. Beard, Civ.App, 91 S.W 2d 1080, 1082, error refused

Surrounding physical conditions

A railroad was required to maintain flagmen to warn the public of the approach of trains at crossing which was extraordinarily hazardous because of surrounding physical conditions obstructing the views of those using the crossing.—Martin v. Yazoo & M R Co, La App., 181 So. 571.

43. Tex—**Corpus Juris quoted in** Texas & N O. R Co v Beard, Civ App, 91 S W.2d 1080, 1082, error refused

52 C J. p 204 note 3.

44. U S—Ranstrom v Oregon Short Line R Co., D C.Idaho, 18 F Supp 256

Insufficient basis

It has been held, however, that the circumstance, without more, that a crossing is greatly frequented by travelers is insufficient as a basis on which to predicate negligence of railroad from failure to maintain watchman there—Eggleston v Louisiana & A. Ry Co, La.App., 192 So 774.

45. Kan—Johnson v Union Pac R Co, 143 P.2d 630, 157 Kan 633

Tex—**Corpus Juris quoted in** Texas & N O R Co v Beard, Civ App, 91 S W 2d 1080, 1082, error refused

52 C J p 204 note 4

46. Tex—**Corpus Juris quoted in** Texas & N O R Co v Beard, Civ App, 91 S.W 2d 1080, 1082, error refused

52 C J p 204 note 5

47. Or—Case v Northern Pac Terminal Co., 160 P 2d 313, 176 Or 643

48. Tex.—Galveston, etc, R Co v Burr, Civ App, 291 S.W. 299

52 C J p 204 note 6

49. La—Martin v. Yazoo & M R Co, App, 181 So 571

52 C J p 204 note 7

50. N J—Record v Pennsylvania R Co, 72 A. 62, 76 N.J Law 800

51. N J—State v. New York, S & W R Co., 139 A 883, 104 N J Law 226, affirmed 142 A 918, 105 N J. Law 253

52. La—Alanza v Texas & P Ry Co, App, 32 So 2d 341.

52 C J p 204 note 10.

53. Iowa—Graves v. Chicago, etc, R Co, 222 N W. 344, 207 Iowa 30

Delegated duty

Rule that maintenance of gates at a crossing is a nondelegable duty of railroad is inapplicable to case of private crossing, where company contracted with railroad to maintain and operate crossing gates at private crossing, railroad was entitled to assume, in absence of notice to contrary, that company would perform its undertaking.—Peppin v Boston & M. R R., 169 A. 877, 86 N. H 395

54. N J—Telfer v. Northern R. Co, 30 N J Law 188.

55. Ill—Opp v Pryor, 128 N E 580, 294 Ill 538.

56. Me—Dyer v. Maine Cent. R. Co, 113 A 26, 120 Me. 154

57. La—Savage v Tremont Lumber Co, 3 La App. 704.

or village,[58] or where, although the view is obstructed, the train could have been seen by the person injured before he reached the track, and the ordinary signals were adequate to apprise him of the danger.[59] The duty of a railroad company to provide a flagman at a crossing cannot be inferred alone from the fact that trains are operated over the crossing at high speed.[60] Where a company obeys an order of a public service commission and provides certain safeguards, it is not negligent in failing to maintain gates or a flagman.[61]

Crossing obstructed by train or cars. Ordinarily railroads are under no duty to station an employee at a crossing to warn travelers that the crossing is obstructed by a train, or part thereof,[62] or to maintain a gate under such circumstances,[63] where conditions at the crossing are not of such an unusual and dangerous nature as to make it necessary to take such precautions,[64] since the primary purpose of gates and watchmen at crossings is to warn travelers of approaching trains, not of standing ones.[65] Accordingly, negligence on the part of the railroad company is not established by the fact that an automobile collides with a train standing on a crossing unprotected by a gate, flag, or light,[66] or where signal flags are absent, where such flags are for the guidance of employees and not travelers upon the highway.[67] However, a railroad company may be required to provide a watchman at an abnormally dangerous crossing where circumstances make his use reasonably necessary to give warning of cars already on a crossing, whether standing or passing, as where a crossing is more than ordinarily dangerous because of obstructions interfering with visibility[68] or because of weather conditions, such as fog, rendering visibility poor.[69] So where a railroad company permits a box car to remain across a walk used by pedestrians, without posting a flagman in a proper position to warn of the approaching trains, the company has been held negligent.[70]

b. Maintenance and Operation

(1) In general
(2) Duties of flagmen or gatemen
(3) Construction and sufficiency of gates
(4) Operation and attendance of gates

(1) In General

If a railroad company assumes the duty to maintain

58. Va.—Atlantic Coast Line R. Co. v. Clements, 36 S.E.2d 553, 184 Va. 656.
52 C.J. p. 204 note 16.

59. Ky.—Louisville, etc., R. Co. v. Cummins, 63 S.W. 594, 111 Ky. 333, 23 Ky. L. 681.

60. U.S.—Latham v. Staten Island R. Co., C.C.N.J., 150 F. 235.

61. Me.—Labbe v. Maine Cent. R. Co., 120 A. 425, 122 Me. 403.

62. U.S.—Good v. Atlantic Coast Line R. Co., C.C.A.Fla., 142 F.2d 46.
Cal.—Mallett v. Southern Pac. Co., 68 P.2d 281, 20 Cal.App.2d 500—Dunlap v. Pacific Electric Ry. Co., 55 P.2d 894, 12 Cal.App.2d 473.
Ind.—Pennsylvania R. Co. v. Huss, 180 N.E. 919, 96 Ind.App. 71.
Ky.—Scarbrough v. Louisville & N. R. Co., 124 S.W.2d 88, 276 Ky. 292—Louisville & N. R. Co. v. Mischel's Adm'x, 114 S.W.2d 115, 272 Ky. 295.
La.—Arnold v. Illinois Cent. R. Co., App., 32 So.2d 76, rehearing denied 33 So.2d 98—Cuccia v. Gulf, M. & N. R. Co., App., 180 So. 513.
Mont.—Broberg v. Northern Pac. Ry. Co., 182 P.2d 851, 120 Mont. 280.
Or.—Rogers v. Southern Pac. Co., 227 P.2d 979—Finn v. Spokane, P. & S. Ry. Co., 214 P.2d 354, opinion adhered to 218 P.2d 720.
Pa.—Cella v. Pennsylvania R. Co., 70 A.2d 638, 364 Pa. 82.
Tenn.—Tennessee Cent. Ry. Co. v. Schutt, 2 Tenn.App. 514.
Wash.—Webb v. Oregon, Washington R. & Nav. Co., 80 P.2d 409, 195 Wash. 155.
Duty to warn of obstructions see supra § 725 b.

Existing fact
Railroad company is not under duty to station employee at highway crossing to warn travelers on highway or to maintain signal gates or other devices when train or any part thereof is occupying crossing, since law does not require that information be given of existing fact that ordinary observation will disclose.—New York Cent. R. Co. v. Casey, 14 N.E.2d 714, 214 Ind. 464, followed in Dyer v. New York Cent. R. Co., 14 N.E.2d 719, 214 Ind. 695, rehearing denied 17 N.E.2d 839, 214 Ind. 695.

63. U.S.—Good v. Atlantic Coast Line R. Co., C.C.A.Fla., 142 F.2d 46.

64. La.—Aaron v. Martin, App., 172 So. 840, affirmed 177 So. 242, 188 La. 371—Aaron v. Martin, App., 167 So. 106—Plummer v. Gulf, M. & N. R. Co., App., 153 So. 322.
Miss.—Illinois Cent. R. Co. v. McNeil, 39 So.2d 490, 205 Miss. 807.
N.C.—Chinnis v. Atlantic Coast Line R. Co., 14 S.E.2d 500, 219 N.C. 528.
Tex.—Texas & N. O. R. Co. v. Davis, Civ.App., 210 S.W.2d 195, refused no reversible error.

65. Ind.—Morley v. Cleveland, C., C. & St. L. R. Co., 194 N.E. 806, 100 Ind.App. 515—Pennsylvania R. Co. v. Huss, 180 N.E. 919, 96 Ind.App. 71.

66. U.S.—**Corpus Juris quoted in** Mabray v. Union Pac. R. Co., D.C.Colo., 5 F.Supp. 397, 400.
Mont.—Jarvella v. Northern Pac. Ry. Co., 53 P.2d 446, 101 Mont. 102.
Tex.—Texas & N. O. Ry. Co. v. Adams, Civ.App., 27 S.W.2d 331, error dismissed.
52 C.J. p. 205 note 20.

Standing freight car
The company was not held liable for failing to post a person with a lantern at a crossing to warn motorists of a standing freight car.—Scott v. Delaware, etc., R. Co., 226 N.Y.S. 287, 222 App.Div. 409.

67. U.S.—**Corpus Juris quoted in** Mabray v. Union Pac. R. Co., D.C.Colo., 5 F.Supp. 397, 400.
N.Y.—Schwartz v. Hudson River R. Co., 27 N.Y.Super. 347.

68. Ark.—Hawkins v. Missouri Pac. R. Co., 228 S.W.2d 642—Fleming v. Missouri & A. Ry. Co., 128 S.W. 2d 986, 198 Ark. 290.
La.—Aaron v. Martin, App., 172 So. 840, affirmed 177 So. 242, 188 La. 371.
Mont.—Broberg v. Northern Pac. Ry. Co., 182 P.2d 851, 120 Mont. 280.

69. La.—Arnold v. Illinois Cent. R. Co., App., 32 So.2d 76, rehearing denied 33 So.2d 98.

70. La.—Gragnon v. New Orleans, App., 118 So. 791.

a flagman or gate, it is bound to perform the duty with due care and employ fit and competent persons; and, where a flagman has constantly been maintained at a crossing, unless reasonable notice be given the traveling public a withdrawal of such service may constitute negligence.

If a railroad company assumes the duty to maintain a flagman or gate, it is bound to perform the duty with due care,[71] and whether or not the duty has been imposed by law is immaterial.[72] It has been held, however, that the failure of the company to operate gates, where there is no statutory requirement therefor, is not negligence where the exercise of due care did not require the maintenance of the gate under the circumstances prevailing at the time of the accident.[73] The fact that maintaining watchmen on both sides of the train at a crossing might have averted a collision does not show that a railroad guarding only one side was negligent.[74] An order by a town council requiring a flagman at a certain crossing, without specifying the time for so doing, requires a flagman both by night and by day.[75]

A railroad which selected a watchman to control a private crossing constructed for use by a contractor has been held responsible to persons entitled to use the crossing for the watchman's negligence.[76] A brakeman engaged in switching cars who was not a regular flagman for a crossing, but who acted in that capacity by giving a signal to a motorist that the crossing was clear, and the brakeman's employer, were bound by the brakeman's conduct to be measured by the general rules applying to flagmen, in determining the liability of the railroad for injuries to a motorist struck by a train at the crossing.[77]

Fitness or competency of flagmen or watchmen. Where a flagman or watchman is employed at a public highway crossing, until the public has become accustomed to regard his presence or absence as one of the evidences of the approach of trains, or otherwise, it is part of the company's duty to keep a fit person there whose conduct will not be liable to mislead and deceive the traveling public,[78] thus it is negligence to provide a watchman who is incapable of reasonably discharging his duties because of any physical disability,[79] such as age[80] or epilepsy.[81] It has been held, however, that the railroad company is not liable for negligence in employing and retaining an incompetent flagman,[82] but is liable only for his negligence which was the proximate cause of an injury.[83]

Withdrawal of flagman. Where a flagman has constantly been maintained at a crossing, unless reasonable notice be given the traveling public a withdrawal of such service may constitute negligence,[84] but where a company voluntarily installed an automatic signal at a crossing to lessen the hours a watchman is maintained there such partial withdrawal is not negligence,[85] although travelers are not given notice of such shortening of a watchman's hours on duty.[86] The company may, however, abandon the keeping of a flagman at any time without being negligent where his purpose is only to prevent collision between the cars of two different railroads.[87] Where there was no custom of a railroad to flag a crossing for the train involved in the accident but only to flag through trains, and the railroad posted no notice specifying that the crossing would be flagged for the train involved in the accident, the railroad has been held under no duty to protect the crossing for the train involved.[88]

71. Ill.—**Corpus Juris cited in** Greenfield v. Terminal R. Ass'n of St. Louis, 6 N.E.2d 888, 890, 289 Ill.App. 147,
Mo.—**Corpus Juris cited in** Holman v. Terminal R. Ass'n of St. Louis, App., 125 S.W.2d 527, 530.
N.J.—Girardin v. New York & Long Branch R. Co., 76 A.2d 31, 9 N.J. Super. 275.
52 C.J. p. 205 note 24.

72. Ill.—**Corpus Juris cited in** Greenfield v. Terminal R. Ass'n of St. Louis, 6 N.E.2d 888, 890, 289 Ill.App. 147
52 C.J. p. 205 note 25.
Custom
In action for collision between truck and train, where plaintiff showed custom to keep flagman on crossing, proof that employees of railroad knew that persons using crossing were aware of, and relied on, observance of, custom, was not essential.—Scott v. Missouri Pac. R. Co., 62 S.W.2d 834, 333 Mo. 374.

73. Ark.—Missouri Pac. R. Co. v. Hood, 135 S.W.2d 329, 199 Ark. 520.

74. Ark.—Missouri Pac. R. Co. v. Price, 33 S.W.2d 366, 182 Ark. 801.

75. R.I.—Wilson v. New York, etc., R. Co., 29 A. 300, 18 R.I. 598.

76. U.S.—Erie R. Co. v. Firth, C.C.A.N.J., 42 F.2d 35, certiorari denied 51 S.Ct. 78, 282 U.S. 872, 75 L.Ed. 771.

77. Ariz.—Atchison, T. & S. F. R. Co. v. Hicks, 165 P.2d 167, 64 Ariz. 15.

78. N.Y.—Warner v. New York Cent. R. Co., 45 Barb. 299, reversed on other grounds 44 N.Y. 465.
Wash.—Ray v. Hines, 203 P. 929, 118 Wash. 530.

79. Mo.—McNamara v. Chicago, etc., R. Co., 103 S.W. 1093, 126 Mo. App. 152.

80. Mo.—McNamara v. Chicago, etc., R. Co., supra.

81. La.—Ryan v. Louisiana R., etc., Co., 83 So. 371, 146 La. 40.

82. Ind.—Lake Erie, etc., R. Co. v. Griswold, 125 N.E. 783, 72 Ind. App. 265.

83. Ind.—Lake Erie, etc., R. Co. v. Griswold, supra.

84. Wis.—Bluhm v. Byram, 214 N.W. 364, 193 Wis. 346.
52 C.J. p. 207 note 95.

85. Md.—Pennsylvania R. Co. v. Yingling, 129 A. 36, 148 Md. 169, 41 A.L.R. 398.

86. Md.—Pennsylvania R. Co. v. Yingling, supra.

87. N.Y.—O'Reilly v. Brooklyn Heights R. Co., 81 N.Y.S. 572, 82 App. Div. 492.

88. N.J.—Mente Bros. v. Pitney, 46 A.2d 809, 134 N.J.Law 211.

(2) Duties of Flagmen or Gatemen
(a) In general
(b) Warnings or signals of approach of trains

(a) In General

Where a flagman is employed or a gate established, the person in charge is bound to perform his duties with reasonable care and prudence, and a failure to do so is negligence for which the railroad company is liable. It is negligence for a gatekeeper or flagman to leave his post, knowing that an engine is approaching, without giving some signal of danger, but after a train has reached the crossing the duty of the gatekeeper or flagman ends as to that train and he may then leave his post of duty.

Where a flagman is employed or a gate established, the person in charge is bound to perform his duties with reasonable care and prudence, and a failure to do so is negligence for which the railroad company is liable.[89] On the other hand, a flagman or watchman is not negligent if he acts with due care under the circumstances,[90] and it has further been held that an act done by a crossing watchman on a sudden emergency when life is apparently in peril, although it is not the wisest action he could have taken, does not constitute negligence.[91]

The public has a right, when the gates are open, or the flagman not in his accustomed place of duty, to presume, in the absence of knowledge to the contrary, that the gateman or flagman is properly discharging his duties, and it is negligence for a gatekeeper or flagman to leave his post, knowing that an engine is approaching, without giving some signal of danger.[92] After the train has reached the crossing, however, the duty of the gatekeeper or flagman ends as to that train,[93] and such person is not negligent in then leaving his post of duty,[94] since the train itself is then a sufficient warning.[95]

The flagman must station himself in such a position as to give adequate warning to those about to cross.[96] A flagman is not standing at the crossing when he is at one end or at the side of a crossing over a large number of tracks,[97] but he is not expected to look both ways in the street at once or to stand on both sides of the crossing.[98]

89. Ill—Nice v Illinois Cent R Co, 25 N E 2d 104, 303 Ill App 292
Mass—Quinby v. Boston & M. R R., 61 N E 2d 853, 318 Mass 438, 160 A L.R. 724.
Mo—Holman v Terminal R Ass'n of St. Louis, App., 125 S.W 2d 527
N J—Fine & Jackson Trucking Corporation v. Lehigh Valley R Co., 166 A. 184, 110 N J.Law 385
Okl—Kurn v. Youngblood, 142 P 2d 983, 193 Okl 299
52 C J. p 205 note 32.

Employee of contractor

Where contractor repairing road stationed crossing tender at railroad crossing to warn travelers, if railroad relied wholly on crossing tender to give necessary warning, railroad adopted him as its agent to perform that duty and would be answerable for his negligence, and railroad could not escape liability for collision resulting because of crossing tender's negligence on ground that as to railroad crossing tender was a mere volunteer—Lemieux v. Leonard Const. Co, 56 A 2d 189, 73 R I. 338, reargument denied 58 A.2d 625, 73 R I 338

90. Pa—Mayer v Pennsylvania R R, 33 A.2d 474, 153 Pa.Super 186

Time to cross in safety

(1) Fact that crossing watchman waved stop signal and commanded motorist to turn back did not authorize recovery against railroad for motorist's death, resulting when motorist, turning automobile around, became confused and backed car into train, notwithstanding watchman knew motorist had time to cross tracks safely.—Chumley v Louisville & N R Co, 165 S E 917, 45 Ga App 732.

(2) Where driver of automobile approaching four-track grade crossing failed to stop, look, and listen, and did not heed watchman's warning until automobile had started across first track, and because of his inexpertness as a driver stalled on second track on which passenger train was approaching, mere fact that if watchman had said nothing automobile probably would have cleared approaching train by a few seconds did not establish negligence on part of watchman which would authorize a recovery by guest in automobile against railroad—Mayer v. Pennsylvania R. R, 33 A 2d 474, 153 Pa Super. 186.

91. Ky—Louisville & N. R. Co v. Henry's Adm'r, 66 S W 2d 818, 252 Ky 278.
Pa.—Floyd v Philadelphia & Reading R, 29 A 396, 162 Pa 29—Mayer v. Pennsylvania R R., 33 A 2d 474, 153 Pa Super 186

92. Mo—Holman v Terminal R Ass'n of St Louis, App, 125 S W. 2d 527
N Y—Dombroski v New York Cent R. Co, 8 N Y S 2d 619, affirmed 12 N Y S 2d 243, 257 App Div 916, reargument denied 14 N.Y S.2d 495, 257 App Div 1044.
52 C J p 205 note 33

93. U S.—**Corpus Juris quoted in** Pollard v Davis, C C A.Ala, 93 F 2d 193, 195—**Corpus Juris quoted in** Mabray v Union Pac R Co, D C Colo, 5 F Supp 397, 400
Ala—Pollard v. Rogers, 173 So 881, 234 Ala 92—**Corpus Juris quoted in** Southern Ry Co v Lambert, 160 So. 262, 264, 230 Ala. 162
52 C J. p 205 note 34.

94. U S—**Corpus Juris quoted in** Pollard v. Davis, C C A Ala, 93 F. 2d 193, 195—**Corpus Juris quoted in** Mabray v Union Pac. R. Co, D C.Colo, 5 F Supp 397, 400
Ala.—Pollard v Rogers, 173 So 881, 234 Ala 92—**Corpus Juris quoted in** Southern Ry Co v Lambert, 160 So. 262, 264, 230 Ala 162
Me—Huntington v Bangor, etc, R Co, 74 A 802, 105 Me. 363.

95. U.S—**Corpus Juris quoted in** Pollard v Davis, C C A.Ala, 93 F 2d 193, 195—**Corpus Juris quoted in** Mabray v. Union Pac R Co, D C Colo, 5 F Supp 397, 400
Ala—Pollard v Rogers, 173 So 881, 234 Ala 92—**Corpus Juris quoted in** Southern Ry Co v Lambert, 160 So 262, 264, 230 Ala 162
Me—Huntington v Bangor, etc, R Co, 74 A 802, 105 Me. 363.

96. La—Polizzi v Louisiana Ry & Nav Co, 131 So 611, 14 La App. 442

97. U S—**Corpus Juris quoted in** Mabray v Union Pac. R Co, D C Colo, 5 F Supp 397, 400
La—Roby v Kansas City Southern R Co, 58 So 696, 130 La 880, 41 L R.A.,N S, 355.

98. U.S—Baltimore & O R Co v. Shaw, C.C A Del., 35 F.2d 410—**Cor-**

Duty to stop approaching trains Where a flagman discovers that his warning is undiscovered or unheeded, it has been held his duty to flag the approaching train when this can be done before the danger is imminent,[99] since the train and travelers both have the right to use the crossing;[1] but a flagman is not generally required to stop a train to allow travelers to cross,[2] and where a flagman fails to stop trains which might strike an automobile which has stalled upon the tracks there is no negligence.[3]

Duty to assist in controlling horses. It has been held not the duty of a flagman to hold the heads of horses while a train is passing.[4]

(b) Warnings or Signals of Approach of Trains

It is the duty of a flagman or watchman to use reasonable care to know and give timely warning of the near approach of trains so as to avoid a collision, and the railroad company is liable if the flagman or watchman fails to give any warning, as by failing to raise a flag or stop sign, or if he erroneously signals a person to cross as the train is approaching.

It is the duty of a flagman or watchman to use reasonable care to know and give timely warning of the near approach of trains so as to avoid a collision,[5] and also to enable a traveler approaching a crossing, in the exercise of reasonable care, to protect himself against other accidents,[6] as from the acts of frightened animals.[7] The public has a right to rely on a reasonable performance of that duty.[8] Since the mere presence of a watchman is insufficient to constitute a warning,[9] the company is liable if the flagman or watchman neglects to give any warning,[10] as by failing to raise a flag[11] or stop sign.[12] A watchman should warn of the approach of a hand car as well as of trains,[13] although the statute requires a warning only for trains.[14]

Sufficiency. A railroad sufficiently complies with the order of a public utility commission to maintain a flagman at a crossing by providing a man whose duty it is to warn the public by waving a flag,[15] and if he so warns the public it is sufficient,[16] and it is not important that he does not stand in the exact middle of the highway[17] or that he waves a white flag[18] or a white lantern.[19] Warning should be given in such a manner that it will be understood by the ordinary person under such cir-

pus Juris quoted in Mabray v. Union Pac R. Co, D.C.Colo., 5 F. Supp. 397, 400.

99. Ala.—Alabama Great Southern R Co. v. Anderson, 19 So 516, 109 Ala 299.
Puerto Rico.—Dominguez v. Porto Rico R, etc, Co, 19 Puerto Rico 1034

1. Puerto Rico—Dominguez v Porto Rico R, etc, Co, supra.

2. Utah—Graham v. Ogden Union R, etc, Co., 266 P. 504, 71 Utah 365

Crossing tender need not leave post at crossing to save automobile without passengers which is stalled upon tracks—S. E Rand Transp Co v Boston & M. R R., 173 N.E. 547, 273 Mass 327.

3. Mass.—S. E Rand Transp Co v. Boston & M. R R, supra
N Y.—Carnochan v Erie R Co., 144 N Y.S. 1108, 159 App Div. 406

4. Ill—Fuller v Peoria, etc., R. Co, 164 Ill App 385.

5. Ariz.—Atchison, T & S F. R Co. v. Hicks, 165 P 2d 167, 64 Ariz 15
52 C J p 205 note 39.

When to cross or not to cross
Railroad watchman has duty to either warn people when not to cross tracks or to signal them to cross—Mayer v. Pennsylvania R R, 33 A 2d 474, 153 Pa Super 186

Notice held sufficient
(1) If flagman stood at railroad crossing holding a stop sign in plain sight of occupants of motor vehicle as they approached crossing, adequate notice of approach of train was given, precluding recovery for deaths of occupants in crossing accident—McKelvey v Delaware, L & W R Co, 300 N.Y S. 1263, 253 App Div 109

(2) Where railroad crossing watchman by whistling, shouting, and gesticulating did all in his power to prevent approach of automobile bearing plaintiff into a position of danger, plaintiff could not rely for a recovery against railroad on any deceptive assurance of safety—Mayer v Pennsylvania R. R, 33 A 2d 474, 153 Pa Super 186.

6. Tex—Bell v Texas, etc, R. Co, Civ App, 70 S W 573.
52 C J p 206 note 40

7. Ind—Pennsylvania Co. v. Fertig, 70 N.E 834, 34 Ind.App 459
Iowa—Hart v Chicago, etc, R Co, 7 N W 9, 9 N W. 116, 56 Iowa 166, 41 Am R 93.

8. Tenn—Pollard v. Beene, 95 S.W 2d 942, 20 Tenn App. 83.
52 C.J. p 206 note 42.

9. Mo.—Montgomery v Missouri Pac. R. Co, 79 S W. 930, 181 Mo. 477.

10. Mo—Ellington v Chicago, R I & P. Ry. Co., App., 45 S.W.2d 105
52 C.J. p 206 note 44.

11. N.Y—McGovern v. New York Cent, etc., R Co, 67 N.Y 423.

S C—Butler v. Southern R Co Carolina Div, 73 S E 185, 90 S C 272.

12. Ark—Missouri Pac R Co v Elvins, 4 S W 2d 528, 176 Ark 737

13. Tenn—Tennessee Cent R Co v Gilbert, 174 S W. 812, 131 Tenn 201

14. Tenn—Tennessee, etc, R. Co v. Gilbert, supra.

15. Conn—Borglum v New York, etc, R. Co, 96 A. 174, 90 Conn 52.

16. Conn—Borglum v. New York, etc, R Co, supra.

17. Conn—Borglum v New York, etc, R. Co., supra

18. Conn—Borglum v. New York, etc, R Co, supra.

19. Wash—Tonning v Northern Pac Ry Co, 39 P 2d 1002, 180 Wash 374

No invitation to cross
Fact that gateman at railroad crossing waved white and not red lantern did not constitute invitation to truck driver to cross tracks in front of approaching train so as to render railroad liable for death of truck driver where automatic red lights were properly working and there was no evidence that truck driver had any reason to believe white lantern was an invitation to cross tracks—Rohthstein v Boston & Maine R. R., 2 N.E 2d 205, 294 Mass 423.

cumstances to be a warning of danger.[20] Where the gates at a crossing are lowered, a further warning need not be given, since such gates are in themselves a sufficient warning.[21]

Time. The railroad company is responsible where the flagman does not give a warning until the traveler is in great danger,[22] especially where the view of the approaching train is obstructed[23] and no signals are given by it.[24] It has been held that a flagman should allow travelers time to cross at ordinary speed with a fair margin of safety,[25] but where it is apparent that the traveler can cross in safety, the train being sufficiently far away, the failure to give warning is not necessarily negligence.[26] Thus a flagman is not bound to allow a margin of safety for a stalling automobile, where such stalling upon the tracks would not be anticipated by a prudent person.[27] It has been held that the signal should be given to the driver of a team at such time as would enable the driver to stop without his horses being dangerously frightened, if they are ordinarily well broken and gentle,[28] or, if they are not, to turn around and drive to a point of safety.[29]

Effect. Where a watchman or flagman erroneously signals a person to cross who is then struck by a train, the company is liable.[30] Where crossing gates were not lowered, the mere fact that the flagman attempted to signal the person injured not to cross does not free the railroad company from negligence unless such signal was given in time for such person, by the exercise of reasonable care, to avoid the injury.[31]

(3) Construction and Sufficiency of Gates

Gates should be constructed so that they may be seen, and it may be negligence not to place lights on the arms of gates.

Gates should be constructed so that they can be seen.[32] They need not be strong enough to withstand the shock of a runaway team colliding therewith.[33] It is proper to have gates on two different crossings operated by one gatekeeper in a tower.[34] A railroad is under no duty to a pedestrian to maintain gates extending over the sidewalk as well as the street, since gates are not intended to make it impossible to go upon the tracks but only to give warning that a train is approaching.[35]

Lights. It may be negligence not to place lights on the arms of gates,[36] but it is not necessary to have a light on the arm of the gate if other lighting enables a person to see the arm of the gate.[37]

(4) Operation and Attendance of Gates

Where gates are established, it is negligence if they are not constructed, attended, and maintained with ordinary care and prudence so as to give the proper warning of an approaching train; and nonuse of the accustomed gates at a crossing when trains are passing may in itself amount to negligence, or at least a circumstance from which negligence may be found.

20. Ill.—Deheave v. Hines, 217 Ill App. 427.

21. Ill.—Chicago, etc., R. Co. v. Wise, 69 N.E. 500, 206 Ill. 453.
Md.—State v. Philadelphia, etc., R. Co., 78 A. 730, 114 Md. 1.

22. La.—Roby v. Kansas City Southern R. Co., 58 So. 696, 130 La. 880, 41 L.R.A.,N.S., 355.
52 C. J. p. 206 note 55.

23. Ill.—Chicago, etc., R. Co. v. Clough, 25 N.E. 664, 29 N.E. 184, 134 Ill. 586.

24. Ill.—Chicago, etc., R. Co. v. Clough, supra.

25. U. S.—Philadelphia, B. & W. R. Co. v. State of Maryland, 259 F. 163, 170 C.C.A. 231.

When margin of safety insufficient.
Under watchman's duty to observe movement of trains and warn persons about to cross tracks of danger, those who seek to cross are to be given a reasonable opportunity to get over safely with a safe margin added in view of chance that something might occur to retard or entirely stop their progress, hence margin of safety which permits but a bare crossing with but a few seconds to spare if nothing happened is insufficient.—Mayer v. Pennsylvania R. R., 33 A.2d 474, 153 Pa. Super. 186.

26. Tex.—Bell v. Texas, etc., R. Co., Civ. App., 70 S.W. 573.

27. N.H.—Osgood v. Boston, etc., R. Co., 141 A. 132, 83 N.H. 262.

28. Me.—Huntington v. Bangor, etc., R. Co., 74 A. 802, 105 Me. 363.
52 C. J. p. 206 note 61.

29. Ky.—Louisville, etc., R. Co. v. Sights, 89 S.W. 132, 121 Ky. 203, 28 Ky. L. 186.

30. Ariz.—Atchison, T. & S. F. R. Co. v. Hicks, 165 P.2d 167, 64 Ariz. 15.
Mass.—Jones v. New York, N. H. & H. R. Co., 175 N.E. 487, 275 Mass. 139.
52 C. J. p. 206 note 63.

Duty to observe signal.
Railroad company whose trainman, acting as watchman, signaled traffic to cross crossing, had duty of observing such signal, with respect to company's liability for injuries received by plaintiffs who were riding in automobile which collided with train after receiving such signal.—Pollard v. Beene, 95 S.W.2d 942, 20 Tenn. App. 83.

31. Ill.—Chicago, etc., R. Co. v. Clough, 25 N.E. 664, 29 N.E. 184, 134 Ill. 586.
N.Y.—Fitzgerald v. Long Island R. Co., 3 N.Y.S. 230, affirmed 22 N.E. 1133, 117 N.Y. 653.

32. Cal.—Baldwin v. Pacific Electric R. Co., App., 273 P. 155, reheard 274 P. 72.
52 C. J. p. 206 note 71.

33. Mass.—Brooks v. Boston, etc., R. Co., 74 N.E. 670, 188 Mass. 416.

Barrier.
Gates at railroad crossings are not supposed to act as a barrier to runaway teams.—Huntington v. Bangor, etc., R. Co., 74 A. 802, 105 Me. 363.

34. Mass.—Brooks v. Boston, etc., R. Co., 74 N.E. 670, 188 Mass. 416.

35. U. S.—Witiak v. Delaware & H. R. Corp., D.C.Pa., 59 F.Supp. 1009, affirmed, C.C.A., 153 F.2d 379.
N.J.—Girardin v. New York & Long Branch R. Co., 76 A.2d 31, 9 N.J. Super. 275.

36. N.J.—Record v. Pennsylvania R. Co., 72 A. 62, 76 N.J. Law 800.
52 C. J. p. 207 note 74.

37. Ky.—McDonald v. Covington, etc., El. R. Transfer, etc., Co., 107 S.W. 726, 32 Ky. L. 992.

Where gates are established, it is negligence if they are not constructed, attended, and maintained, with ordinary care and prudence, so as to give the proper warning of an approaching train,[38] and also to prevent collisions between travelers,[39] but the existence of safety gates at a crossing does not make the railroad an insurer of a pedestrian's safety in crossing the tracks.[40] The gates should be operated so as not to injure a passer-by by the manner in which they are maintained or closed.[41] Where one side of the gates failed to operate, the condition has been held to be a trap.[42] Where crossing gates at a private crossing are out of repair but a few hours, the fact that trains passed the crossing frequently does not charge the railroad with notice of condition of the crossing gates.[43] It has been held that a railroad's failure to repair and operate gates at a crossing at which it is not required to maintain gates is not in and of itself actionable negligence.[44]

Injuries occasioned by descending gates Open gates at a crossing have been held to be affirmative assurance to a traveler that he will not be imperiled in crossing by the descent of a gate arm.[45] Ordinary care requires a gatekeeper to keep the gates under control at all times,[46] and to keep his eyes constantly on the street while lowering them.[47] The gatekeeper cannot presume that a pedestrian will not walk under a gate while it is being lowered.[48] The railroad company is not liable where a stranger, without authority from the gatekeeper and while his back is turned, lowers the gates and injures a person crossing the tracks.[49]

Allowing gates to remain open. Nonuse of the accustomed gates at a street crossing when trains are passing may in itself amount to negligence,[50] or at least a circumstance from which negligence may be found,[51] except as to one who sees the train going in front of him.[52] So where a train is allowed to approach too near to the crossing before the gates are lowered, the company may be held liable for the resulting injury.[53] It is negligence not to lower the gates as required, although no person is seen approaching the tracks.[54]

If the gates are required to be operated but part of the day, a failure to operate them more than that is not negligence since travelers are presumed to know the law;[55] but, where the company voluntarily operates such gates, if it operates them only part of the day reasonable notice should be given of such hours.[56] A railroad may not be deemed negligent for complying with an order of the commission requiring it to maintain at a crossing gates for use at certain times only as well as automatic signals, although the fact that the gates were open at other times might be misleading.[57] Where the mechanism of such gates is out of repair, preventing operation of them, a reasonable alternative should be adopted to warn travelers.[58]

§ 729. —— Persons Entitled to Protection

The protection of the rule requiring a flagman or gates at a crossing extends only to persons crossing the railroad tracks at such crossing by way of the highway, or to persons lawfully on the right of way and approaching the crossing.

38. U S.—Surdyk v Indiana Harbor Belt R. Co, C.C.A Ill, 148 F 2d 795
Ill —Humbert v Lowden, 47 N E 2d 137, 317 Ill.App 538, reversed on other grounds 53 N E 2d 418, 385 Ill. 437, conformed to 56 N E 2d 323, 323 Ill App. 557—Nice v Illinois Cent. R Co., 25 N E 2d 104, 303 Ill.App 292
See Carlin v Michigan Cent. R Co, 189 Ill App 23.
Ky.—Louisville & N. R Co v Bell, 125 S W 2d 239, 276 Ky 778
Mo.—Homan v Terminal R Ass'n of St Louis, App., 125 S W 2d 527
N.J —Girardin v New York & Long Branch R Co., 76 A 2d 31, 9 N J. Super 275
Wash.—Aores v. Great Northern Ry. Co., 6 P.2d 398, 166 Wash. 17.
52 C J. p 207 note 76.

39. Ky.—Illinois Cent. R. Co v Ruoff, 133 S W. 553, 141 Ky. 623

40. Wash.—Aores v. Great Northern Ry. Co, 6 P.2d 398, 166 Wash. 17

41. Pa.—Sgier v Philadelphia, etc, R Co, 103 A 730, 260 Pa 343.
52 C J. p 207 note 78.

42. Wis —Jorgenson v Chicago, etc, R. Co, 140 N W. 1088, 153 Wis 108.

43. N H —Peppin v Boston & M R R., 169 A. 877, 86 N H 395

44. N Y —McKelvey v Delaware, L & W. R Co., 300 N Y S 1263, 253 App.Div 109.

45. Ala —Atlantic Coast Line R Co v. Ballard, 80 So 436, 202 Ala 354.
Kan —Sager v Atchison, etc, R. Co., 79 P 132, 70 Kan 504.

46. Mo —O'Keefe v St Louis, etc, R Co, 83 S.W 308, 108 Mo App 177.
52 C J p 207 note 81.

47. Mo.—O'Keefe v. St Louis, etc, R Co, supra.

48. Mo —O'Keefe v. St Louis, etc, R Co, supra

49. N.J —Haines v. Atlantic City R Co, 46 A 595, 65 N J Law 27, 50 L.R A 862

N Y —Tuohy v Long Island R. Co, 85 N Y.S. 824, 89 App.Div 198

50. Va —Norfolk & W Ry Co. v Wellons' Adm'r, 154 S.E 575, 155 Va 218
52 C J p 207 note 86

51. Kan —Chicago, etc, R Co v Durand, 69 P 356, 65 Kan 380

52. Ill —Theobald v. Chicago, etc, R Co., 75 Ill App 208

53. Wash —Aores v. Great Northern Ry Co, 6 P 2d 398, 166 Wash 17.

54. Ill —Chicago, etc, R. Co v. Wise, 69 N E. 500, 206 Ill 453.

55. Cal —Wyseur v Davis, 209 P. 213, 58 Cal App 598

56. Cal —Wyseur v. Davis, supra.

57. Me.—Johnson v. Maine Cent. R Co., 38 A.2d 884, 141 Me. 38

58. Puerto Rico —Morales v Vannina, 32 Puerto Rico 188.
Wis —Jorgenson v Chicago, etc, R Co, 140 N W 1088, 153 Wis 108.

The protection of the rule requiring a flagman or gates at a crossing extends only to persons crossing the railroad tracks at such crossing by way of the highway,[59] or to persons lawfully on the right of way and approaching the crossing,[60] and not to persons approaching the crossing by wrongfully walking along the railroad track before turning onto the highway,[61] or to persons crossing outside the limits of the highway,[62] or to other trespassers.[63]

It may not be negligence on the part of the railroad company not to provide gates or a watchman at a crossing where the person using such crossing is familiar with it,[64] or is not paying attention and the train is in clearer view than a flagman would have been,[65] since a railroad company is not required to keep a flagman to warn reckless travelers.[66] It has also been held, however, that the railroad company is not relieved from its duty to provide a flagman, if required to do so, by the fact that a person approaching the crossing is familiar therewith,[67] or by the fact that the injured person drove on the crossing believing the train which caused the injury to be standing still,[68] and that the failure of the railroad company to provide a flagman is no less negligence because the person using the crossing knew of such failure.[69] Where the injured person knew one track was in use at the time and did not rely on the gates but on his own senses while crossing the track, it is immaterial whether he was within the class for whose benefit such gates should be maintained.[70]

§ 730. —— Effect of Statutes or Ordinances

Where safeguards at public crossings are prescribed by statute, ordinance, or order of a commission, it is negligence per se not to use such precautions, and such negligence is not excused by the taking of precautions other than the prescribed ones. The reasonable need for crossing protection in addition to the warnings required by statute is to be determined by the special and unusual dangers of the particular crossing.

Where safeguards at public crossings are prescribed by statute, ordinance,[71] or order of a commission,[72] it is negligence per se not to use such precautions, as where the railroad company fails to comply with a statute, ordinance, or other governmental regulation with respect to having a flagman,[73] or gates,[74] or automatic signals,[75] or lights,[76] or signboards.[77] So where, in violation of a municipal ordinance, the railroad company fails to place a light on a temporary obstruction in the street, the company may be liable for an injury resulting from such failure.[78] It has been held, however, that failure to comply with a statutory requirement does not automatically place responsibility for a crossing accident on the railroad.[79] It has been held that failure to provide the safeguards prescribed by statute is evidence of negligence, although the person injured might have seen the train had he been looking.[80]

59. Mo.—Hein v. Chicago & E. I. R Co, App., 209 S.W.2d 578.
52 C.J. p 208 note 99.

60. Ill.—Chicago, etc, R. Co v Wise, 69 N.E. 500, 206 Ill 453.

61. U.S.—Delaware, L. & W. R Co v. James, N.J., 241 F. 344, 154 C.C.A 224, certiorari denied 37 S.Ct. 742, 244 U.S 656, 61 L.Ed. 1374.
52 C.J. p 208 note 2.

62. Mo.—Hein v Chicago & E. I. R. Co, App, 209 S.W.2d 578
52 C.J. p 208 note 3.

63. Ill.—Chicago, etc., R. Co v. Roath, 35 Ill App 349.

64. U.S.—Chicago, M. & St. P. R. Co. v. Clarkson, Iowa, 147 F. 397, 77 C.C.A 575.

65. Iowa.—Lenning v. Des Moines, etc, R. Co., 227 N.W. 828.

66. Tex.—Louisiana R, etc, Co v. Loudermilk, Civ.App., 295 S.W 193

67. Tex.—Missouri, etc, R. Co. v. Magee, Civ.App, 49 S.W 156, affirmed 50 S.W. 1013, 92 Tex. 616.

68. Tex.—Missouri, etc, R. Co v. Magee, supra.

69. Iowa.—Annaker v Chicago, etc., R Co, 47 N.W 68, 81 Iowa 267.
Tex.—Galveston, etc, R. Co v. Linney, Civ.App., 163 S.W 1035.

70. Ohio.—Yeazel v. Louisville, etc., R. Co., 32 Ohio C.A 492.

71. U.S.—Baltimore & O R Co v. Felgenhauer, C.C.A.Mo, 168 F.2d 12
Ohio.—Cobb v. Bushey, 89 N.E.2d 466, 152 Ohio St. 336.
52 C.J. p 208 note 13.

Inference of negligence
Where a railroad company blocks a much-traveled crossing with its cars at night for a considerable period of time in violation of an ordinance prohibiting trains from blocking a crossing for longer than a specified time, and no warning of the presence of the cars is given, an inference that the railroad company was negligent is authorized.—Shelley v Pollard, 189 S.E. 570, 55 Ga.App 88

72. U.S.—Baltimore & O R Co. v. Felgenhauer, C.C.A.Mo, 168 F.2d 12

73. U.S.—Erie R. Co. v. Stewart, C.C.A Ohio, 40 F.2d 855, certiorari denied 51 S.Ct 34, 282 U.S. 843, 75 L.Ed 748
Ky.—Illinois Cent. R Co v. McGuire's Adm'r, 38 S.W.2d 913, 239 Ky. 1.
52 C.J. p 208 note 14.

74. Cal.—Fresno Tract. Co. v Atchison, etc, R. Co, 165 P. 1013, 175 Cal 358
52 C.J. p 208 note 15.

75. Ky.—Louisville, etc, R Co v. Louisville Provision Co, 279 S.W. 1100, 212 Ky 709
N.C.—Blum v. Southern R Co, 122 S.E 562, 187 N.C 640

76. Tex.—Texas & N O R Co v. Skeen, Civ.App, 149 S.W.2d 1060, error dismissed, judgment correct

77. Ind.—Morley v Cleveland, C, C. & St. L R Co, 194 N.E. 806, 100 Ind.App. 515.
Minn.—Wessman v Scandrett, 14 N.W 2d 445, 217 Minn 312
Ohio.—Cobb v. Bushey, 89 N.E.2d 466, 152 Ohio St. 336
52 C.J. p 209 note 16.

78. U.S.—**Corpus Juris quoted in** Mabray v. Union Pac R Co, D.C. Colo, 5 F.Supp 397, 400
52 C.J. p 191 note 5.

79. D.C.—Ferranti v. Capital Transit Co., Mun.App, 38 A.2d 116, applying Maryland law
Md.—Glick v Cumberland & W Electric Ry. Co, 92 A 778, 124 Md 308.

80. Puerto Rico.—Dominguez v Porto Rico R., etc., Co., 19 Puerto Rico 1034.

The failure of a railroad to take the precautions required by statute has been held to constitute negligence not excused by the taking of any other precautions.[81] So, a substitution of a flagman for gates required by a statute is negligence per se,[82] and the failure of a railroad company to provide a flagman required by statute is negligence per se, although automatic signals are provided.[83] A traveler over a railroad crossing may rely on the performance by the company of its duty under a statute or ordinance to provide safeguards, as discussed infra § 792; but, even if a traveler over the crossing is ignorant of such a statute or ordinance, the negligence of the company in not providing a watchman is not affected.[84] A railroad may be liable for the consequences of its negligence in failing to operate gates as required by ordinance, although the person injured has knowledge that the ordinance is not being complied with[85]

At an ordinary crossing and in the absence of any unusual circumstances the erection of a sign or signaling device as required by statute or ordinance is a sufficient performance of the railroad's duty and it may not be considered to be negligent for failure to furnish a warning of the presence of a crossing and of the approach of trains in addition to the signs or signals required by the statute, ordinance,[86] or order of the commission[87] However, a statute or commission order requiring a railroad to erect suitable warning devices prescribes the minimum of care which must be observed, and does not furnish a standard by which to determine in every case whether or not the railroad has failed to discharge its duty with respect to giving sufficient warning of the presence of the crossing and of the approach of trains.[88] In other words, the reasonable need for crossing protection in addition to the warnings required by statute is to be determined by the special and unusual dangers of the particular crossing[89] Under the doctrine of the existence of exceptional conditions at a crossing calling for precautions on the part of

81. Ky.—Illinois Cent R Co v McGuire's Adm'r, 38 S W 2d 913, 231 Ky. 1.

82. Puerto Rico—Dominguez v. Porto Rico R, etc, Co., 19 Puerto Rico 1034

83. Tenn—Nashville, etc, R Co v White, 15 S W.2d 1, 158 Tenn 407

84. Mo—Henderson v St Louis, etc, R. Co, App, 248 S.W 987, affirmed 284 S W. 788, 314 Mo 414

85. Ill.—Rosenthal v Chicago, etc, R. Co, 99 N E. 672, 255 Ill. 552

86. U S—Cmuk v Lehigh Valley R. Co., C.C.A N.Y, 116 F 2d 569
Ind.—New York Cent. Ry. Co v Powell, 47 N E 2d 615, 221 Ind 321.
Iowa—Dillmer v. Joyce, 6 N W 2d 275, 233 Iowa 279
Mass—Peterson v Boston & M R. R., 36 N E 2d 701, 310 Mass. 45.
Minn—Jorgenson v. Minneapolis, St. P. & S S Marie Ry Co, 42 N. W 2d 540, 231 Minn. 121—Olson v. Chicago, Great Western Ry Co, 259 N.W. 70, 193 Minn 533
Ohio—Shaffer v. New York Cent R. Co, 34 N E.2d 792, 66 Ohio App 417.

87. Minn—Sullivan v Boone, 286 N W. 350, 205 Minn. 437

Fog warnings

Where crossing on highway was in open country on almost level ground and fog conditions were not of such character that ordinary care required the installation of fog warnings, railroad was not required to furnish warnings other than those prescribed by the railroad and warehouse commission.—Rhine v. Duluth, M & I. R Ry. Co, 297 N W 852, 210 Minn 281

88. U S—Duluth, W. & P. Ry Co v Zuck, C C A.Minn, 119 F 2d 74
Ill—Karlock v. New York Cent R Co, 78 N.E 2d 122, 333 Ill App 655
Iowa—Lindquist v. Des Moines Union Ry Co, 30 N W.2d 120, 239 Iowa 356
Ohio—Icsman v New York Cent R Co, 87 N E 2d 829, 85 Ohio App. 47—Loos v. Wheeling & L. E. Ry. Co, 22 N E 2d 217, 60 Ohio App. 527.
Okl—Kurn v. Campbell, 112 P.2d 386, 188 Okl 636—St. Louis-San Francisco Ry. Co. v. Prince, 291 P. 973, 145 Okl 194, 71 A L R. 357.

Common-law requirement

(1) Mere fact that railroad had fully complied with requirements of commission on subject of warning devices at railroad crossing at which collision occurred did not necessarily satisfy common-law requirement of due care and therefore absolve railroad from negligence.—Northern Pac. Ry. Co. v. Haugan, C.A.Minn, 184 F 2d 472.

(2) Installation of an electric warning signal at a railroad grade crossing in compliance with statutory duty is alone not conclusive proof that the railroad's common-law duty to provide adequate warning has been complied with, since the common-law duty exists in all cases where circumstances render statutory warning inadequate in fact, the statutory requirement being merely the minimum precaution—John F Ivory Storage Co. v Atlantic Coast Line R Co, 48 S E 2d 242, 187 Va 857

General duty not abolished

Statute authorizing commission to require certain warnings at railroad crossings, not being a code of regulations for running of railroad trains and not being authority for commission to make such code, does not abolish general duty of railroads to exercise care in addition to that required by statute or order of commission, where prudent management and operation of railroad require precautions for public safety.—Licha v Northern Pac Ry. Co., 276 N W. 813, 201 Minn. 427.

Special circumstances

(1) Where special circumstances in existence at time of accident involving train and automobile on railroad crossing may establish that extra hazards are present at railroad crossing, burden may fall on railroad to provide signals or protection therefor beyond statutory requirements or commission's regulations.—Blaske v. Northern Pac. Ry Co, 37 N.W 2d 758, 228 Minn. 444

(2) Where snowstorms were not unusual in winter months in locality where railroad crossing was located, an unlighted wooden cross-arm sign on left-hand side of highway at crossing would not be a sufficient warning to highway users of presence of crossing unless it would be visible in snowstorms not unusual to the vicinity—Southern Pac Co. v Haight, C C A Cal., 126 F 2d 900, certiorari denied 63 S Ct. 154, 317 U S 676, 87 L Ed 542

89. N.H—Chevalier v. Boston & M. R R, 199 A 571, 89 N H 367

the railroad company in addition to the statutory signals, the exceptional condition must be one known to the railroad or one which has existed for such a length of time that the railroad, in the exercise of ordinary care, should have known that the crossing was unusually dangerous,[90] and the mere fact that smoke from a locomotive mingled with the darkness of night and an incline in the highway leading to the crossing operated to obscure a motorist's view of a train moving on the crossing has been held not to create an exceptional condition within the rule.[91]

§ 731. Mode of Running or Operating at Crossings

The rules of law as to the mode of running or operating cars or trains at crossings ordinarily apply alike to the operators of a railroad and those permissively using its facilities.

The rules of law as to the mode of running or operating cars or trains at crossings ordinarily apply alike to the operators of a railroad and those permissively using its facilities,[92] but statutes applicable to railroad companies only have no application to other companies operating cars or trains at a crossing.[93] Statutes requiring certain precautions of a railroad have been held applicable to private, as well as to public, railroads.[94]

§ 732. —— Care Required in General

In operating trains at a crossing, a railroad company must exercise the degree of care imposed in a given case by statute or arising under the common law, and ordinarily the company must, through its engineers, firemen, and other employees, use such reasonable care and precaution to avoid injuring a person at the crossing, as the circumstances reasonably require; but the railroad is not an insurer of the safety of travelers using the crossing.

As a general rule, with respect to the care required to be exercised in operating cars or trains at crossings, the operators of a railroad or those permissively using its facilities must exercise the degree of care imposed in a given case by statute or arising under the common law.[95] While a railroad company has the right as against one approaching a crossing to operate its engines and cars in the usual and ordinary way and to make such noises or movements as are usually and necessarily made by trains in motion under similar circumstances,[96] the company must, through its engineers, firemen, and other employees, use such reasonable care and precaution in operating its trains and cars at crossings, to avoid injuring a person thereat, as the circumstances reasonably require,[97] or else, under the circumstances of the

90. U S—Flagg v. Chicago Great Western Ry. Co., C.C.A.Minn., 143 F.2d 90.
Mo.—Hicks v. Chicago, M., St P. & P. R. Co., App., 233 S.W.2d 787

91. U.S—Flagg v. Chicago Great Western Ry Co., C.C.A.Minn., 143 F.2d 90

92. Ark.—Crossett Lumber Co. v. Cater, 144 S.W.2d 1074, 201 Ark. 432.

93. Ark—Crossett Lumber Co. v. Cater, supra.

94. Tenn—Toomey v. Goad, 12 Tenn.App. 80.

95. Ark.—Crossett Lumber Co v. Cater, 144 S.W.2d 1074, 201 Ark. 432.

96. Tex—Texas-Mexican R. Co. v. Baldez, Civ.App., 43 S.W. 564.
52 C.J. p 209 note 26.

97. U S—Smith v. Southern Pac Co., C.A.Or., 187 F.2d 397—Cmuk v. Lehigh Valley R Co., C.C.A.N.Y., 116 F.2d 569—Chicago Great Western Ry Co. v. Beecher, C.C.A. Minn., 150 F.2d 394, certiorari denied 66 S.Ct 339, 326 U.S. 781, 90 L.Ed 473—Duluth, W. & P Ry. Co. v. Zuck, C.C.A.Minn., 119 F.2d 74—Deneen v Baltimore & O. R Co., D.C.W.Va., 68 F.Supp 148, reversed on other grounds, C.C.A., 161 F.2d 674—Poe v Chesapeake & O. Ry. Co., D.C.Ky., 64 F.Supp. 358—Pennsylvania R Co. v. Miller, N.J., 99 F. 529, 39 C.C.A. 642.
Ariz.—Humphrey v. Atchison, T. & S. F. Ry. Co., 70 P.2d 319, 50 Ariz 167.
Cal.—Peri v. Los Angeles Junction Ry., 137 P.2d 441, 22 Cal.2d 111—Connors v. Southern Pac Co., 206 P.2d 31, 91 Cal.App.2d 872
Fla.—Atlantic Coast Line R Co. v Timmons, 36 So.2d 430, 160 Fla. 754
Ga.—Luke v. Powell, 12 S.E.2d 196, 63 Ga.App. 795—**Corpus Juris cited in** Seaboard Air Line Ry Co v. Benton, 159 S.E. 717, 719, 43 Ga.App. 495, reversed on other grounds 165 S.E. 593, 175 Ga. 491, conformed to 166 S.E. 219, 45 Ga.App. 832
Idaho—Whiffin v Union Pac R Co., 89 P.2d 540, 60 Idaho 141.
Ill.—Wagner v. Toledo, P. & W R. R., 185 N.E. 236, 352 Ill. 85—Randolph v. New York Cent R. Co., 79 N.E.2d 301, 334 Ill.App. 268—Taylor v Alton & E. R Co., 258 Ill.App. 293.
Ind.—Cleveland, C., C & St. L Ry Co. v. Gillespie, 173 N.E. 708, 96 Ind.App 535
Md.—Baltimore Transit Co v. Bramble, 2 A.2d 416, 175 Md 334
Mass.—Mercantante v. Boston & M R R. Co., 197 N.E. 46, 291 Mass 261.
Miss.—H Weston Lumber Co. v. Hibbens, 182 So. 115, 182 Miss. 669—Hancock v Illinois Cent R Co., 131 So. 83, 158 Miss. 668.
Mont.—Inkret v. Chicago, M., St P & P R. Co., 86 P.2d 12, 107 Mont 394.
Nev.—Los Angeles & S L R. Co. v. Umbaugh, 123 P.2d 224, 61 Nev. 214
N.D.—Bowers v. Great Northern Ry Co., 259 N.W. 99, 65 N.D. 384, 99 A.L.R 1443
Pa.—Lewis v New York Cent. R Co., Com.Pl., 21 Erie Co 24.
S.C.—Bogan v. Southern Ry. Co., 184 S.E 143, 179 S.C 394.
Va.—Godwin v Camp Mfg. Co., 32 S.E.2d 674, 183 Va. 528
52 C.J. p 209 note 27, p 210 note 29

Duty not excused

The duty of a traveler on a highway to look and listen before going on a railroad track does not excuse the operators of the train from also exercising due care.—Canion v Southern Pac Co., 80 P.2d 397, 52 Ariz 245

Safe crossing

Railroad must so regulate its trains as to enable driver to cross tracks safely if he has properly stopped, looked, and listened.—Haller v Pennsylvania R. Co., 159 A. 10, 306 Pa. 98.

Nighttime

(1) Railroad has common-law duty to exercise care enabling traveler on highway reasonably to ascertain

particular case, be considered to be negligent[98] If it fails to exercise the requisite care by reason whereof a person approaching or using the crossing with reasonable care is injured, it is liable therefor,[99] even though the injury did not result from the train striking the vehicle[1] Such care is required while passing over a crossing as well as in approaching the crossing,[2] and is required not only as to persons who may be on the track, but also as to persons in close proximity thereto who may be about to cross,[3] and the duty is not affected by the fact that the person crossing had just previously been a trespasser on the company's platform.[4]

The duty of a railroad company to exercise due care in operating its cars or trains at a crossing exists independently of, and in addition to, statutes or ordinances requiring a railroad company to perform certain precautionary acts in approaching a crossing[5] In other words, the requirements of such regulations do not constitute the maximum measure of care demanded of a railroad,[6] and a railroad company will not be held free from negligence merely because it has complied literally with various safety statutes,[7] since neither the legislature nor the railroad commission can foresee in advance what would, under all circumstances, constitute ordinary care.[8]

The degree of care required in operating cars or trains at a crossing is only what under the circumstances of the particular case is ordinary care,[9] or in other words, such care as an ordinarily pru-

in nighttime approach of train—Wagner v. Toledo, P. & W. R R, 185 N.E. 236, 352 Ill 85—Trumbo v Chicago, B. & Q. R Co, 54 N E 2d 258, 322 Ill App. 277, reversed on other grounds 59 N E 2d 92, 389 Ill 213.

(2) Fact that a person with knowledge that he was approaching a railroad crossing might, by exercise of reasonable care, discover approach of train in daytime would have no bearing on duty of railroad toward strangers to locality who approached crossing at night—Whipple v Boston & Maine R R, 7 A.2d 239, 90 N.H. 261.

Private passageway

Employees in charge of train must anticipate that persons will be on track at given place and must use ordinary care to prevent injury to such persons, where employees are aware that number of persons, with knowledge of and without disapproval of railway, habitually used private passageway to cross tracks at such place—Southern Ry. Co. v Waldrup, 45 S E 2d 775, 76 Ga App 356.

98. U S.—Lowry v. Seaboard Air-line R. Co., C A.Fla, 171 F 2d 625
Ind.—Cleveland, C. C. & St L. Ry Co v. Gillespie, 173 N E. 708, 96 Ind App. 535
Pa—Rice v. Pittsburgh, C & Y. R Co, Com Pl, 97 Pittsb.Leg J 105.

Negligence held not shown

Wis—Hynek v. Kewaunee, G. B & W. Ry Co, 29 N.W.2d 45, 251 Wis. 319.

99. Fla.—Kenan v. Black, 7 So 2d 462, 150 Fla. 208.
Ill—Randolph v New York Cent R Co, 79 N E 2d 301, 334 Ill App 268
Ky.—Fryrear v. Kentucky & Indiana Terminal R Co, 220 S W 2d 546, 310 Ky. 250, followed in 220 S.W 2d 551, 552, 310 Ky 258, 359 and Musick's Adm'r v. Kentucky & Indiana Terminal R Co, 220 S. W 2d 551, 310 Ky 259
52 C J p 209 note 27.

1. Ark—Missouri Pac R Co v. Watt, 52 S.W 2d 634, 186 Ark. 86

2. Cal.—Peri v Los Angeles Junction Ry, 137 P 2d 441, 22 Cal 2d 111.

3. Utah—Gesas v. Oregon Short Line R Co, 93 P 274, 33 Utah 156, 13 L R A,N S, 1074
52 C.J p 212 note 37.

Anticipation

Where collision between train and automobile occurred at public crossing, railroad was under duty to anticipate presence of persons on street—Central of Georgia Ry Co. v. Johnston, 165 S E 916, 45 Ga App 773

Persons not known to be in danger

General duty exists to use due care for protection of persons who may or may not be in danger at crossings but are not known to be in danger.—Snyder v. New York Cent. R Co, 194 N E 796, 101 Ind App 258

4. Pa—Daubert v Delaware, etc, R. Co., 49 A. 72, 199 Pa 345.

5. Ga—Southern Ry. Co v Waldrup, 45 S.E.2d 775, 76 Ga.App. 356—Pollard v Savage, 190 S E 423, 55 Ga App. 470—Seaboard Air Line Ry Co v Benton, 159 S E. 717, 43 Ga App 495, reversed on other grounds 165 S E 593, 175 Ga 491, conformed to 166 S E 219, 45 Ga App 832
Ill—Wagner v Toledo, P. & W. R R, 185 N E 236, 352 Ill. 85—Taylor v. Alton & E R Co., 258 Ill. App. 293.
Minn—Crosby v Great Northern Ry. Co, 245 N W. 31, 187 Minn. 263—Munkel v Chicago, M., St P. & P R. Co., 278 N W 41, 202 Minn 264—Lucha v Northern Pac Ry Co., 276 N.W. 813, 201 Minn. 427.
Mo.—Elliott v. Missouri Pac R. Co, 52 S.W 2d 448, 227 Mo App 225
Nev—**Corpus Juris cited in** Los Angeles & S L R Co. v Umbaugh, 123 P.2d 224, 232, 61 Nev. 214
Tenn—Southern Ry Co v. Defoe, 6 Tenn App 503
Va—Franklin & P Ry. Co v. Shoemaker's Committee, 159 S.E 100, 156 Va. 619.
52 C J. p 210 note 30.

Statute providing for giving of crossing signals by approaching train did not repeal common-law rule with respect to the care required, but was merely cumulative of common-law duty to exercise ordinary care to prevent injury to persons or property on, or dangerously near, such crossing—Hoelzel v Chicago, R I & P Ry Co., 85 S W 2d 126, 337 Mo 61.

6. U S—Markar v New York, N. H & H. R. Co, C C A Conn, 77 F 2d 282.

7. Cal—Harper v. Northwestern Pac. R Co., 93 P.2d 821, 34 Cal App 2d 451—Bush v. Southern Pac Co., 289 P. 190, 106 Cal App. 101.

8. Cal—Harper v Northwestern Pac R. Co., 93 P 2d 821, 34 Cal App.2d 451.

9. U S—Duluth, W & P. Ry. Co v Zuck, C C A.Minn, 119 F 2d 74—Pokora v. Wabash Ry Co, C C A Ill, 66 F 2d 166, reversed on other grounds 54 S Ct 580, 292 U S. 98, 78 L Ed 1149, 91 A L.R. 1049—**Corpus Juris cited in** Lewis v. Thompson, D C La, 47 F Supp 435, 439.
Cal.—Peri v. Los Angeles Junction Ry, 137 P 2d 441, 22 Cal.2d 111—Hopkins v Pacific Electric Ry Co, App, 118 P 2d 872—Lucchese v San Francisco-Sacramento R Co, 289 P. 188, 106 Cal.App. 242.
Ga—Atlanta & West Point R Co. v Hemmings, 19 S E 2d 787, 66 Ga App. 881—Atlantic Coast Line R Co v Heath, 196 S.E 125, 57 Ga App. 763.

dent person would exercise under like circumstances[10] It varies as peculiar and unusual conditions are presented[11] Where the crossing is especially dangerous, it is incumbent on the company to use increased care commensurate with the danger,[12] even though the crossing is not a much traveled and used one[13] and the traveler on it knows of its extrahazardous condition[14] A railroad company, however, is not an insurer of the safety of travelers using a crossing,[15] although

Ill.—Randolph v New York Cent. R Co, 79 N E 2d 301, 334 Ill App 268—Shaw v Chicago & E I R Co., 75 N E.2d 51, 332 Ill App 285
Ky.—Collins' Adm'r v. Chesapeake & O Ry. Co, 124 S.W 2d 1039, 276 Ky 659
La.—Eleazar v. Illinois Cent R Co., App., 24 So 2d 387
Mo—Hoelzel v. Chicago, R I & P Ry. Co, 85 S.W 2d 126, 337 Mo. 61
Nev—**Corpus Juris quoted in** Los Angeles & S L R Co. v Lytle, 47 P.2d 934, 938, 56 Nev 192, rehearing denied 52 P 2d 464, 56 Nev 192.
Okl.—St. Louis-San Francisco Ry Co. v Prince, 291 P 973, 145 Okl 194, 71 A L R 357
Tex—Rio Grande, E P & S F. R Co. v. Dupree, Com App. 55 S W 2d 522—St Louis Southwestern Ry Co of Texas v Larkin, Civ App., 34 S W 2d 693, error dismissed.
52 C J p 210 note 31

Circumstances which may tend to increase the hazards and make a grade crossing more dangerous do not require railroad to do more than exercise ordinary care commensurate with the circumstances.—State ex rel Kurn v Hughes, 153 S W 2d 46, 348 Mo. 177.

Imminent peril

Only ordinary care is required of a railroad unless the situation is one of imminent peril—Southern Ry Co v Berry, 1 S.E 2d 261, 172 Va. 266

10. U S—Pokora v Wabash Ry. Co, C C A.Ill, 66 F.2d 166, reversed on other grounds 54 S Ct. 580, 292 U S. 98, 78 L Ed 1149, 91 A L R. 1049.
Cal.—Peri v. Los Angeles Junction Ry, 137 P 2d 441, 22 Cal 2d 111
Ill.—Randolph v. New York Cent. R Co., 79 N.E.2d 301, 334 Ill.App 268
Nev—**Corpus Juris quoted in** Los Angeles & S. L. R Co v Lytle, 47 P 2d 934, 938, 56 Nev 192, rehearing denied 52 P 2d 464, 56 Nev. 192
Or—Case v. Northern Pac Terminal Co, 160 P 2d 313, 176 Or 643.
Tex—Texas & N O R Co v. Blake, Civ App, 175 S.W 2d 683, error refused
52 C J p 211 note 32.

11. U.S—Lowry v. Seaboard Airline R Co, C A Fla, 171 F 2d 625—Pokora v Wabash Ry Co, C.C.A. Ill, 66 F 2d 166, reversed on other grounds 54 S Ct 580, 292 U S. 98, 78 L.Ed 1149, 91 A L R. 1049
Nev—**Corpus Juris quoted in** Los Angeles & S L R Co. v. Lytle, 47 P 2d 934, 938, 56 Nev 192, rehearing denied 52 P 2d 464, 56 Nev 192
Tenn—Tennessee Cent Ry Co v Hayes, 9 Tenn App 116.
52 C J. p 211 note 33

Particular factors

(1) The degree of care varies with the character of the crossing, with the use made of the highway by the traveling public, and with the speed and frequency of passing trains
U S—Pennsylvania R Co v Miller, N J, 99 F. 529, 39 C.C.A. 642.
Nev—Los Angeles & S L R Co v Umbaugh, 123 P.2d 224, 61 Nev 214.

(2) A railroad operating its trains on thoroughfare of a city must use greater care than in less frequented localities—Lowry v. Seaboard Airline R Co., C A Fla, 171 F 2d 625

The extent of travel on a highway over a railroad crossing is an element to be considered in determining whether adequate precautions have been taken by railroad or its employees for the protection of travelers—Mannino v. Boston & M R R, 14 N E 2d 122, 300 Mass. 71.

Conditions at time of accident

Duties of train operatives at railroad crossing are measured by conditions thereat at time of traveler's attempt to cross tracks—Anderson v Crawford, 149 So 656, 111 Fla. 381

12. Cal—Peri v Los Angeles Junction Ry., 137 P.2d 441, 22 Cal 2d 111
Ky—Cox's Adm'r v. Cincinnati, N. O. & T. P Ry Co., 37 S.W 2d 859, 238 Ky. 312
Mo—Elliott v Missouri Pac. R Co, 52 S W 2d 448, 227 Mo App 225
Mont—**Corpus Juris quoted in** Broberg v. Northern Pac. Ry. Co, 182 P 2d 851, 859, 120 Mont. 280.
Nev.—**Corpus Juris cited in** Los Angeles & S L R Co, v. Umbaugh, 123 P 2d 224, 232, 61 Nev. 214—**Corpus Juris quoted in** Los Angeles & S. L. R Co. v. Lytle, 47 P.2d 934, 938, 56 Nev. 192, rehearing denied 52 P.2d 464, 56 Nev 192
N J.—Di Giendemonica v. Pennsylvania-Reading Seashore Lines, 8 A.2d 342, 123 N J.Law 296.
Or—Case v. Northern Pac. Terminal Co., 160 P.2d 313, 176 Or. 643.
52 C.J. p 211 note 34

Additional precautions

(1) If a crossing is a much traveled thoroughfare and, because of its location, unusually dangerous, sound of train whistle or ringing of bell is not sufficient, but it is further duty of railroad to use such other means to prevent injury as ordinarily prudent person would use—Franklin v Louisville & N R Co, 102 S W 2d 1010, 267 Ky 577

(2) If railroad crossing, because of obstructing trees and undergrowth, was hazardous and much used by public to knowledge of train crew for reasonable time prior to accident, crew had duty, in addition to ringing bell or sounding whistle and maintaining lookout, to use such other means at their command to avoid injuring those using crossing, including victim of accident, as, in exercise of reasonable judgment, an ordinarily prudent person would have used.—Hopper v. Barren Fork Coal Co, 92 S W 2d 776, 263 Ky 446

Knowledge of danger

Where crossing at which accident occurred and its physical aspects were known to railroad, if crossing was dangerous, the railroad was charged with that knowledge—Poe v Chesapeake & O Ry. Co., D C Ky, 64 F Supp 358

City or country crossing

A railroad is required to exercise greater care at highway crossing in city than in the country where there is less chance of accident
U S—Baltimore & O R Co. v Green, C C A W.Va, 136 F 2d 88.
Minn—Bryant v Northern Pac Ry Co, 23 N W.2d 174, 221 Minn 577
52 C J p 211 note 34 [f] (2).

Crossing held not extrahazardous one requiring more than ordinary care—Texas & N O R Co v Stratton, Tex Civ.App, 74 S W 2d 741, error refused, followed in Texas & N O R Co v Berry, 74 S W 2d 750, error refused.

13. Ky—Louisville, etc., R Co v Howser, 257 S W. 1010, 201 Ky 548, 36 A L R 327
Mont—**Corpus Juris quoted in** Broberg v. Northern Pac Ry. Co, 182 P 2d 851, 859, 120 Mont 280
Nev—**Corpus Juris quoted in** Los Angeles & S L R Co v Lytle, 47 P.2d 934, 938, 56 Nev 192, rehearing denied 52 P.2d 464, 56 Nev 192

14. Ky.—Louisville, etc, R Co. v Howser, 257 S W 1010, 201 Ky 548, 36 A L.R. 327.
Nev.—**Corpus Juris quoted in** Los Angeles & S L. R Co v. Lytle, 47 P.2d 934, 938, 56 Nev. 192, rehearing denied 52 P 2d 464, 56 Nev 192

15. U S—Duluth, W & P Ry Co v Zuck, C.C A.Minn., 119 F.2d 74.

in so doing they exercise ordinary care,[16] and it is not required to exercise great care and prudence,[17] or the highest possible care,[18] or care which shall necessarily and in all cases be sufficient, efficient, and effective,[19] or such care and skill as the most prudent are accustomed to exercise,[20] or such care as an ordinarily prudent person "could" have used.[21]

The rule requiring the exercise of ordinary care in operating cars or trains at crossings does not call for the performance of any act outside of, or disconnected with, the actual operation of the railroad.[22] Also, the company owes no duty forcibly to prevent a person from coming in contact with its moving train at a crossing[23] Although a vehicle approaching the crossing should stop until the train has passed, as discussed infra § 774, the train should not, by stopping at the crossing or moving backward and forward, subject the vehicle to unreasonable delay.[24] Ordinary care on the part of a train engineer on approaching a public crossing requires vigilance to guard against a dangerous situation reasonably to be apprehended as well as one actually imminent[25]

Negligent acts. A railroad company is not liable for accidents at crossings unless its employees were negligent.[26] The negligence causing the injury need not relate particularly to the person injured, but it is sufficient to render the railroad company liable if it is a failure to perform an obligation owing to the public generally;[27] nor can the question whether certain acts constitute negligence depend on whether other railroad companies forbid or permit them[28] In determining whether there was negligence in the operation of a train at a crossing, the condition of the machinery and track with relation to the speed, the environment, the speed in relation to the environment, and the signals given must be considered.[29] Accordingly, it has been held negligent to run trains in such a manner as to make statutory signals unavailing,[30] to run a hand car in front of a freight train,[31] or to open a train at a public crossing where travelers are waiting to cross the track and then close it without giving them time to cross,[32] whether or not signals are given,[33] and the moving of

Cal.—Hopkins v. Pacific Electric Ry Co., App., 118 P. 2d 872

Ga.—Atlanta & West Point R. Co. v. Hemmings, 19 S.E.2d 787, 66 Ga. App. 881

Mo.—Hutchison v. Thompson, App., 167 S.W.2d 96, transferred, see. Sup., 175 S.W.2d 903.

52 C.J. p. 212 note 39.

16. Ohio—Weaver v. Columbia, etc., R. Co., 81 N.E. 180, 76 Ohio St. 164.

Tenn.—Chesapeake, etc., R. Co. v. Crews, 99 S.W. 368, 118 Tenn. 52.

17. Tex.—Missouri, etc., R. Co. v. Luten, Com.App., 228 S.W. 159.

52 C.J. p. 212 note 41.

18. U.S.—American R. Co. v. Lopez, C.C.A. Puerto Rico, 3 F.2d 876, certiorari denied 45 S.Ct. 463, 267 U.S. 603, 69 L.Ed. 809.

52 C.J. p. 212 note 42.

19. Kan.—Chicago, etc., R. Co. v. Fisher, 30 P. 462, 49 Kan. 460.

20. Tex.—Houston, etc., R. Co. v. Brin, 13 S.W. 886, 77 Tex. 174

21. Tex.—Chicago, etc., R. Co. v. James, Civ.App., 75 S.W. 930.

22. N.Y.—Bleyle v. New York Cent., etc., R. Co., 11 N.Y.St. 585, affirmed 20 N.E. 877, 113 N.Y. 626

23. Tex.—Harris v. Texas, etc., R. Co., Civ.App., 28 S.W.2d 1093, error refused.

24. Utah—Wilson v. Southern Pac. Co., 44 P. 1040, 13 Utah 352, 57 Am.S.R. 766.

Under ordinance requiring train which has passed over crossing to let traffic across before passing over crossing a second time, train foreman who was directing movements of train over crossing had duty to ascertain if there was traffic on street and to permit it to cross before directing train over crossing a second time—Pollard v. Beene, 95 S.W.2d 942, 20 Tenn.App. 83

25. U.S.—Gaede v. Union Pac. R. Co., D.C.Colo., 28 F.Supp. 396, reversed on other grounds, C.C.A., Union Pac. R. Co. v. Gaede, 110 F.2d 931

Colo.—Nichols v. Chicago, B. & Q. R. Co., 98 P. 808, 44 Colo. 501

26. La.—Eleazar v. Illinois Cent. R. Co., App., 24 So.2d 387—Ellington Sugars, Inc. v. Texas, etc., R. Co., 8 La.App. 271.

Mich.—Momany v. Pere Marquette Ry. Co., 275 N.W. 807, 282 Mich. 168.

Reasonable care and diligence

Under statute making railroad liable for damage done to persons or property by running of its locomotives, cars, or other machinery unless company makes it appear that their agents have exercised all ordinary and reasonable care and diligence, proof by company that its agents did exercise such care absolves it of liability.—Lowry v. Seaboard Airline R. Co., C.A.Fla., 171 F.2d 625.

Direction of movement

Where switch track could be entered at either end, direction in which cars were moved at night over crossing was immaterial, particularly where movement in different direction would have been impracticable and would not have lessened danger to motorist struck on crossing—Ross v. Missouri Pac. R. Co., La.App., 153 So. 570

Engineer held qualified by experience

La.—Matthews v. New Orleans Terminal Co., App., 45 So.2d 547.

Stalled automobile

Call to train dispatcher, warning him of automobile stalled on track at crossing, furnished no basis for imposing liability on railroad company for damage to automobile in absence of showing as to when call was made with respect to time of collision or that it was made in time for dispatcher to stop train—Guyler v. Lehigh Valley R. Co., 67 A.2d 575, 165 Pa.Super. 196.

27. Ohio—Pennsylvania Co. v. Langendorf, 28 N.E. 172, 48 Ohio St. 316, 29 Am.S.R. 553, 13 L.R.A. 190

28. Tex.—Gulf, etc., R. Co. v. Smith, 28 S.W. 520, 87 Tex. 348.

29. Fla.—Seaboard Air Line Ry. Co. v. Watson, 137 So. 719, 103 Fla. 477, appeal dismissed 53 S.Ct. 32, 287 U.S. 86, 77 L.Ed. 180, 86 A.L.R. 174—Atlantic Coast Line R. Co. v. Watkins, 121 So. 95, 97 Fla. 350.

30. Ind.—Chicago, etc., R. Co. v. Boggs, 101 Ind. 522, 51 Am.R. 761.

31. Ill.—Lake Erie, etc., R. Co. v. Wills, 39 Ill.App. 649, affirmed 31 N.E. 122, 140 Ill. 614.

32. Tex.—Ft. Worth, etc., R. Co. v. Dennis, Civ.App., 33 S.W. 884.

52 C.J. p. 212 note 57.

33. Tex.—Ft. Worth, etc., R. Co. v. Dennis, supra.

cars near a street crossing, although done in the usual manner, may constitute negligence as to persons using the track[34] It may also constitute negligence to violate duties imposed by statute or ordinance.[35]

The fact that a railroad train is behind time does not show negligence on the part of the company in approaching a crossing,[36] nor is a higher degree of care required in such cases.[37] The act of a railroad in permitting its train to leave a town ahead of schedule, even if negligence, is in no sense a breach of any duty owed to a motorist on the theory that, if the train had left on scheduled time, it would not have reached the crossing until after the automobile had passed in safety[38] Likewise, there is no negligence in failing to sidetrack a train in accordance with a previous custom known to the traveler at a crossing,[39] or in properly operating a train over a guarded crossing.[40] Emission of a cinder the size of a pinhead from an engine is not negligence per se,[41] nor is attaching a stake to an engine or tender on one track and extending it diagonally across to a car on another track for the purpose of shoving the car along by the engine.[42]

Duty to stop. The company owes no duty to stop its trains at a crossing[43] or a switch or transfer track[44] except to avoid a known or probable accident,[45] and there is no duty to stop at all stations on the road, even though an injury at a crossing near a station might thereby be avoided[46] Likewise, a train approaching a crossing need not be so operated that it can be brought instantly to a stop at the crossing at any time, no matter how short the notice or how sudden the emergency.[47] However, a person injured at a street crossing, where street railroad tracks also crossed, may avail himself of a statute requiring trains to come to a full stop before a railroad crossing,[48] or of an ordinance requiring trains to come to a stop at street railroad crossings[49]

Rules of company. It has been held that the violation of the rules of a railroad company by its employees constitutes negligence for which the railroad is liable when such rules have been adopted in the interest of safety.[50] A rule of the company with respect to the conduct of its employees concerning "railroad crossings at grade" does not apply where a railroad crosses a highway at grade,[51] but means a crossing of two lines of railroad at grade.[52]

§ 733. —— Backing or Running Unattended or Unattached Cars over Crossings

a. In general
b. "Kicking cars" or making "flying switches"

a. In General

As a general rule, backing engines or trains or running unattended cars over a crossing is not negligence if

34. Tex.—San Antonio, etc., R. Co. v. Peterson, 49 S.W. 924, 20 Tex. Civ.App 495

35. Ala.—Weatherly v Nashville, etc., R. Co, 51 So 959, 166 Ala. 575
Idaho—Whiffin v Union Pac. R. Co, 89 P.2d 540, 60 Idaho 141
S.C.—Lawrence v. Southern Ry—, Carolina Division, 167 S.E. 839, 169 S.C. 1.

Statute held inapplicable
A train colliding with automobile at crossing was not a "vehicle" within statute defining duties of driver of "vehicle" about to enter or cross public highway from alley or private road or driveway, in view of statute defining vehicle as not including device used exclusively on stationary rails or tracks—Grover v Sharp & Fellows Contracting Co, 186 P.2d 682, 82 Cal.App.2d 515

36. Pa.—Keiser v. Lehigh Valley R Co, 61 A. 903, 212 Pa. 409, 108 Am.St.R. 872
52 C.J. p 212 note 60.

37. Ill.—Toledo, etc, R. Co v Jones, 76 Ill. 311.

38. N.C.—Truelove v. Durham & S. Ry. Co, 24 S.E.2d 537, 222 N.C. 704.

39. Ind.—Rich v. Evansville etc, R Co, 66 N.E. 1028, 31 Ind.App. 10.

40. La.—Guillot v. Louisiana R, etc. Co, 3 La.App. 541.
52 C.J. p 213 note 63.

41. Miss.—Louisville, etc, R. Co. v Jones, 98 So. 230, 134 Miss. 53

42. Mich.—Kelly v Michigan Cent R. Co, 31 N.W. 904, 65 Mich. 186, 8 Am.S.R. 876.

43. Va.—Norfolk & W. Ry. Co. v Benton, 169 S.E. 560, 160 Va. 633.
52 C.J. p 213 note 67
As to persons seen at or near crossing see infra § 751.

44. Ark.—Gregory v Missouri Pac R. Co, 270 S.W. 621, 168 Ark. 469.

45. Ill.—Grinestaff v. New York Cent. R. Co, 253 Ill.App. 589.

46. La.—Davis v. Alexandria, etc., R. Co, 94 So. 436, 152 La. 898.
52 C.J. p 213 note 70.

47. Ill.—Willett v Baltimore & O. S.W. R. Co., 1 N.E.2d 748, 284 Ill. App. 307.
La.—Bordenave v. Texas & N. O. R. Co., App, 46 S.W.2d 525

Timetable requirement
The intent of city timetable requirement that all trains, yard cuts, or engines must approach a highway or street crossing at grade with caution, prepared to stop, crossing whistle sounded, and bell ringing until engine passes over crossing, is merely that trains and engines anticipate necessity of stopping for a blocked crossing, in contradistinction to trains and engines which operate on main lines, and which may and must operate in expectation that crossings will be open, and such rule does not require trains and engines to be so operated that they can be brought instantly to a stop at a crossing—Bordenave v. Texas & N. O. R. Co, supra.

48. Ala.—Illinois Cent R. Co. v. Camp, 75 So. 290, 201 Ala. 4.
52 C.J. p 213 note 71.

49. Ala.—Illinois Cent R. Co. v Camp, supra.

50. La.—Levy v. New Orleans & N.E. R. Co, App, 20 So.2d 559, rehearing denied 21 So.2d 155.

51. Mass.—Poole v Boston, etc, R Co., 102 N.E. 918, 216 Mass. 12

52. Mass.—Poole v. Boston, etc., R Co, supra.

performed with proper precautions; but, since the operation of cars or trains in such a manner is especially dangerous, the railroad company is bound to exercise special precautions to avoid injuries to persons lawfully on or approaching the track.

As a general rule, backing engines or trains or running unattended cars over a crossing is not negligence if performed with proper precautions [53] The fact, however, that the company is engaged in switching does not relieve it from exercising care in crossing a public street [54] Since the operation of cars or trains in such a manner is especially dangerous, the railroad company is bound to exercise special precautions to avoid injuries to persons lawfully on or approaching the track,[55] particularly where the crossing is infrequently used for switching purposes,[56] or where the train movement occurs at night [57] Accordingly, the railroad may be negligent if it backs its engines or trains or runs unattended cars without proper lookouts,[58] or without proper lights,[59] or other signals or warnings,[60] and without taking such other precautions for the safety of travelers as the circumstances reasonably require.[61] Merely ringing the engine bell[62] or blowing the whistle[63] does not necessari-

53. Ga—Atlanta, B & C R Co v Davis, 187 S E 148, 53 Ga App 814
La—Dalferes v Illinois Cent R Co, App, 185 So 49.
Mich—Mallory v Pitcairn, 11 N W 2d 318, 307 Mich 40.
Wash—Watson v Northern Pac. R. Co, 223 P.2d 1057.
52 C J p 213 note 75

Tender in front

(1) Operating locomotive over crossing at night with tender in front was held not negligence—Moschetto v Illinois Cent R. Co., 131 So 500, 15 La App 505.

(2) Where makeup of train involved in crossing collision with automobile consisted of a water car first, and next a locomotive which was proceeding on regular run in reverse gear, and next the box cars and coach, the train was not a "backing train" within rule as to precautions required.—Stelly v Texas & N. O R Co, La App, 49 So.2d 640.

Precautions held sufficient

Having brakemen with lanterns on lead car of moving freight train, and on one side when backing up and blocking crossing, was sufficient, with respect to automobile approaching from other side of track—Missouri Pac R Co v Price, 33 S W 2d 366, 182 Ark 801.

54. Ind—New York, etc, R Co v Shields, 112 N.E. 762, 185 Ind 704

55. Ark—Missouri Pac R Co v Dotson, 111 S.W 2d 566, 195 Ark 286.
Or—**Corpus Juris cited in** Case v Northern Pac Terminal Co., 160 P.2d 313, 316, 176 Or 643
S.C.—Bishop v. Atlantic Coast Line R. Co, 48 S E 2d 620, 213 S C. 125.
52 C.J. p 213 note 77.

Dangerous instrumentality

A backing train is more dangerous instrumentality than a train proceeding in a forward manner—Stelly v. Texas & N. O. R. Co., La App., 49 So.2d 640.

56. Minn.—Klotz v. Winona, etc., R. Co., 71 N W. 257, 68 Minn. 341

57. S.C.—Smith v Southern Ry. Co, Carolina Div, 35 S E 2d 225, 207 S C 179

58. Ala—Birmingham Belt R. Co v Watkins, 146 So 279, 226 Ala 197
Ga—**Corpus Juris cited in** Central of Georgia Ry. Co v Johnston, 165 S E 916, 45 Ga App. 773
Mo—Anderson v St Louis-San Francisco Ry. Co, App., 63 S W 2d 182.
Tenn—Tennessee Cent Ry. Co. v Hayes, 9 Tenn App 116.
52 C J p 213 note 79

Company rule held inapplicable

(1) Railroad company rule forbidding pushing or backing cars without flagman did not apply where automobile collided with locomotive and tender being backed over crossing—McGinnis v Shaw, 167 S E 533, 46 Ga App. 248—Central of Georgia Ry. Co v Cooper, 165 S E 858, 45 Ga App 806

(2) Rule of railroad that, where cars are pushed by engine, a member of crew must take a conspicuous position in front of leading car was not applicable where engine was pushing only the water car and other remaining cars were being pulled by the engine.—Stelly v. Texas & N. O R Co, La App, 49 So.2d 640.

59. Kan—Moses v Missouri Pac. R. Co, 26 P 2d 259, 138 Kan 347.
La—Dobrowolski v. Holloway Gravel Co, App, 173 So. 474—Robertson v Missouri Pac R Co., App, 165 So 527, rehearing denied 167 So 165
N C.—Pridgen v Atlantic Coast Line R Co, 164 S E 325, 203 N C. 62.
52 C J. p 214 note 80

Company rule held inapplicable

Rule of railroad that night signals must be used in addition to day signals when day signals cannot be plainly seen was not applicable in determining railroad's liability where a light burning in daytime when collision occurred would not have drawn attention of decedent if decedent was otherwise unable to see train in time to avoid collision.—Stelly v Texas & N. O. R Co, La.App, 49 So 2d 640

60. Kan—Moses v Missouri Pac R Co., 26 P.2d 259, 138 Kan. 347.
La—Robertson v Missouri Pac R Co, App, 165 So 527, rehearing denied 167 So 165
Mo—Feltz v. Terminal Railroad Ass'n of St Louis, 81 S W 2d 616, 336 Mo 790
N C—Pridgen v Atlantic Coast Line R. Co, 164 S E 325, 203 N.C 62.
Tenn—Tennessee Cent Ry Co. v Hayes, 9 Tenn App 116
Va—Chesapeake & O. Ry Co v Folkes, 18 S E 2d 309, 179 Va. 60—Southern R Co v. Campbell, 1 S E 2d 255, 172 Va. 311.
52 C J p 214 note 81.

61. La—Robertson v. Missouri Pac R Co., App, 165 So 527, rehearing denied 167 So. 165
Or—Case v. Northern Pac Terminal Co., 160 P.2d 313, 176 Or 643
Tenn—Tennessee Cent. Ry. Co. v Hayes, 9 Tenn App. 116.
52 C J. p 214 note 82

Use of facilities at hand

Brakeman on tender of locomotive backing across crossing, if he discovers automobile approaching, and can reasonably infer that driver will likely undertake to cross, must use facilities at hand to prevent collision; brakeman has no right to wait until absolutely certain that traveler is going into place of danger before taking steps to avoid injuring him—Smith v El Paso & N E R. Co., Tex Civ App, 67 S.W.2d 362, error dismissed.

62. La—Dobrowolski v. Holloway Gravel Co, App, 173 So. 474.
52 C J p 215 note 83

Distance of locomotive from lead car

In suit by motorist for damage to automobile when struck at crossing by train which was being backed over switch track at night, facts that whistle of locomotive was blown and bell was rung did not relieve defendant of negligence for failing to have light on lead car as it backed over crossing, where locomotive was over six hundred feet back of lead car.—Dobrowolski v Holloway Gravel Co., supra.

63. La—Stelly v. Texas & N. O. R. Cp, App., 49 So.2d 640.

ly absolve the company from the duty of taking other precautions, the means of warning should be as effective on a backing train as on an advancing unreversed train.[64]

Statutory provisions In some jurisdictions the duty of observing particular precautions is required by statute, and the company is liable for injuries resulting from failure to comply therewith,[65] and such failure is negligence per se[66] Under the terms of such statutes, an ordinary lantern in the hand of a brakeman on the top of a car is not a "conspicuous light."[67] An ordinance requiring a company running a locomotive, car, or train backward to provide a watchman at the rear end thereof requires, when backing an engine with a tender, a watchman on the rear of the tender,[68] and a watchman on the rear of the locomotive in such case is insufficient.[69] Under a statute requiring a railroad to keep a "lookout ahead" on a locomotive, it has been held that there is absolute liability on a railroad for injuries inflicted when its train is moving backward, or by means of an engine placed elsewhere than in front, since the statute is complied with only when a train is moving forward by means of an engine at its front;[70] but there is no absolute liability under the statute where an accident occurs while an engine is operated backward with the tender in front, and the engineer is actually on the lookout ahead of his engine[71]

b. "Kicking Cars" or Making "Flying Switches"

As a general rule, it is not negligence per se on the part of a railroad company to "kick" cars or to make "running" or "flying switches" over a highway crossing not in a populous town or city, or when proper precautions are taken for the safety of travelers using the crossing, but, since such a practice is peculiarly dangerous, it creates a duty of unusual care on the part of the company

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64. W.Va.—Morris v. Baltimore, etc., R. Co., 147 S.E. 547, 107 W.Va 97 —Bowles v. Chesapeake, etc., R Co., 57 S.E. 131, 61 W.Va. 272.

65. Ga.—Central of Georgia Ry. Co v. Dumas, 160 S.E. 814, 44 Ga App 152
52 C.J. p 215 notes 85, 86.

Direction of lookout

Under statute requiring railroad engineer to look "ahead," engineer had duty to look in direction in which he was moving train, whether forward or backward, the word "ahead" relating to direction in which train is moving rather than to direction in which pilot on engine is pointing.—Atlanta, B. & C. Co v. Davis, 187 S.E. 148, 53 Ga.App. 814.

Ordinances held inapplicable

(1) In suit by owner of automobile against railroad to recover for damages to automobile which collided with tender of backing engine at night, city ordinance, obvious purpose of which was to have a lookout on the approaching rear of a train being operated under conditions where the enginemen would not, in the backing movement, be in position to give an alarm or signal the approach of such backing movement, was inapplicable.—Southern Ry. Co v. Maddox, 11 S.E.2d 501, 63 Ga.App 508.

(2) Ordinance requiring guards on rear platform of trains moved backward over street crossing was applicable to train containing no rear platform —Central of Georgia Ry Co v. Dumas, 160 S.E 814, 44 Ga App 152

66. Ala.—Birmingham Belt R Co. v. Watkins, 146 So 279, 226 Ala 197
52 C.J p 215 note 87

67. Ill.—Chicago, etc, R Co v Walsh, 41 N.E 900, 157 Ill 672

68. Ind.—Harmon v Foran, 94 N.E 1050, 95 N.E. 597, 48 Ind App. 262

69. Ind.—Harmon v. Foran, supra.

70. U.S.—Alabama Great Southern R. Co v. Brookshire, C.C.A Tenn., 166 F.2d 278, 1 A.L.R.2d 612.
Tenn.—Little Rock & M. R. Co v Wilson, 16 S.W. 613, 90 Tenn. 271, 25 Am.S.R. 693, 13 L.R.A. 364.
Inapplicability of statute to trains engaged in switching operations see infra § 740.

71. U.S.—Southern R. Co v Simpson, Tenn., 131 F. 705, 65 C.C.A. 563.
52 C.J p 215 note 85 [a] (2).

72. N.Y.—Bowen v New York Cent., etc., R Co, 35 N.Y.S 540, 89 Hun 594
"Kicking" cars and "flying switches" defined see supra § 1 n.

73. Cal.—Sheets v Southern Pac. Co, 299 P 71, 212 Cal 509.
Mo.—Haton v Illinois Cent. R Co, 76 S.W.2d 127, 335 Mo 1186
52 C.J p 215 note 96.

74. Mo.—Haton v. Illinois Cent. R Co, supra
52 C.J p 215 note 97

75. Wis.—Ward v Chicago, etc, R. Co, 55 N.W. 771, 85 Wis. 601
52 C.J. p 215 note 98

76. La.—Mitchell v. Illinois Cent. R Co, 34 So 714, 110 La 630, 98 Am.S.R. 472.

77. Cal.—Sheets v. Southern Pac Co, 35 P.2d 121, 1 Cal 2d 408.
52 C.J. p 216 note 1.

Act of brakeman

Railroad brakeman, stopping traffic at crossing while flying switch was being made, participated in such operation, so as to entitle truck driver, suing for injuries in collision between truck and shunted freight car, to prove brakeman's act in leaving crossing before car reached it as negligence, under complaint alleging negligent operation of car.—Sheets v. Southern Pac. Co, supra.

tion of a statute or ordinance.[78] Where such acts are performed at a crossing in a populous town or city along which people are constantly accustomed to travel, they have been held to be negligence per se,[79] although signals of alarm are given from the engine employed in the switching[80]

§ 734. Lights, Signals, and Lookouts on Trains and Cars

A railroad company has the burden to exercise care to safeguard users of a highway against injury by making provision for adequate warning by lights or signals on its cars or trains which approach or cross a grade crossing

As a general rule, a railroad has the burden to exercise care to safeguard users of a highway against injury by making provision for adequate warning of danger by lights or signals on its cars or trains which approach or cross a grade crossing[81] The omission or nonoperation of signals and other warnings required or customarily given to indicate the approach of a train to a crossing is equivalent to an assurance by the railroad that no train is in fact approaching, and constitutes an invitation by the railroad to travelers on the highway to proceed toward and over the crossing.[82] Whether a railroad was negligent with respect to performance of its statutory duty to give warning of the approach of trains to a crossing must be determined by the circumstances of the particular case.[83]

Trains or cars occupying crossing. Generally, since actual occupancy by a train of a crossing constitutes notice and warning of its presence, the railroad company need not give other warning to a traveler on the highway by lights or signals on the train,[84] in the absence of unusual conditions creating an extraordinary hazard,[85] but this rule of law may be inapplicable where the train came onto the crossing when the car was within less than stopping distance.[86] So it is generally held, although there is some authority to the contrary,[87] that the failure of a railroad to give the signal or warning required by statute in approaching a crossing is immaterial once the train has occupied the crossing and the traveler then collides therewith,[88] since the object of statutes imposing re-

78. Ala.—Alabama Great Southern R. Co. v Anderson, 19 So 516, 109 Ala 299.
52 C.J. p 216 note 2.

79. Ill.—Illinois Cent R. Co. v Baches, 55 Ill. 379.
52 C.J. p 216 note 3

80. Ill.—Illinois Cent. R. Co. v. Baches, supra

81. Ga.—Gay v. Sylvania Cent R Co., 53 S E 2d 713, 79 Ga App. 362.
Wash.—Watson v. Northern Pac Co, 223 P 2d 1057

Duties as to warnings held complied with
Ill.—Robins v Pitcairn, C C A Ill., 124 F.2d 734

82. Ill.—Chapman v Baltimore & O. R Co, 92 N.E.2d 466, 340 Ill App 475

83. S C.—Carter v. Atlantic Coast Line R. Co, 7 S.E.2d 163, 192 S. C. 441

84. U S.—Flagg v. Chicago Great Western Ry. Co, C C A Minn, 143 F.2d 90
Del.—Jones v Pennsylvania R. Co, 61 A 2d 691, 5 Terry 486.
D C.—Sisson v. Southern Ry. Co, 68 F.2d 403, 62 App.D.C 356.
Ill.—Coleman v. Chicago, B. & Q R. Co., 5 N.E 2d 103, 287 Ill App. 483.
Mont.—Jarvella v. Northern Pac Ry. Co, 53 P.2d 446, 101 Mont. 102.
Ohio.—Kramers v Chesapeake & O Ry Co, 22 N.E 2d 227, 60 Ohio App 556
Or.—Rogers v. Southern Pac. Co., 227 P.2d 979.
Pa.—Wink v. Western Maryland Ry Co, 176 A. 760, 116 Pa Super 374.
Wash.—Schofield v Northern Pac Ry Co, 104 P 2d 324, 4 Wash.2d 512
52 C.J. p 236 note 49 [b].

85. Mont.—Broberg v Northern Pac Ry Co, 182 P 2d 851, 120 Mont. 280
Wash.—Schofield v Northern Pac Ry. Co, 104 P 2d 324, 4 Wash 2d 512

86. Utah.—Earle v. Salt Lake & Utah R Corp, 165 P.2d 877, 109 Utah 111.

Presence at crossing at same time
Where railroad motor car, which had been standing a short distance from crossing, obscured from view of motorist by shrubbery, gave no warning that it was about to start, and motor car and automobile arrived at crossing at nearly the same time, presence of motor car on crossing was not sufficient warning to motorist that crossing was occupied.—Smith v Chicago, B & Q R Co., 291 N W 417, 227 Iowa 1404, followed in 291 N W. 422, 227 Iowa 1404

87. Wash.—Schofield v. Northern Pac Ry. Co., 104 P.2d 324, 4 Wash 2d 512.

Negligence per se
The failure to ring bell or sound whistle of locomotive, pulling a train a car of which was struck by a truck in which deceased was riding, would be "negligence per se" within the statute requiring the giving of signals a certain distance from road crossing, irrespective of the fact that the locomotive had already passed over crossing when car was struck.—Schofield v Northern Pac Ry Co, supra

88. U S.—Flagg v. Chicago Great Western Ry Co, C C A Minn, 143 F 2d 90
Ga.—Pollard v Clifton, 9 S E 2d 782, 62 Ga App 573
Ill.—Miles v American Steel Foundries, 23 N.E 2d 754, 302 Ill App 262
Mass.—Bell Cab Co. v New York, N H & H R Co, 199 N E. 727, 293 Mass 334
Mich.—McParlan v Grand Trunk Western R Co, 263 N W 734, 273 Mich 527.
Minn.—Olson v. Chicago, Great Western Ry. Co, 259 N W 70, 193 Minn 533.—Crosby v. Great Northern Ry Co, 245 N W. 31, 187 Minn 263
Miss.—Spilman v Gulf & S I R Co, 163 So. 445, 173 Miss. 725
Ohio.—Kramers v Chesapeake & O Ry Co, 22 N E 2d 227, 60 Ohio App. 556.
Tex.—Texas & N O R. Co v. Stratton, Civ.App, 74 S W 2d 741, error refused, followed in Texas & N. O R Co. v. Berry, 74 S.W.2d 750, error refused.

Intent of signals
Statutory signals required to be given by trains approaching highway crossing are not intended to prevent automobile drivers from running into side of train occupying crossing.—Crosby v Great Northern Ry. Co., 245 N W 31, 187 Minn 263

quirements as to signals is to warn of the approach of trains, and not to give warning of the presence of a train on the crossing, or to prevent a traveler from running into a train so situated, as discussed infra § 736 b (1), and the requirement that warning devices be operated until the crossing is "passed" does not necessitate the continuance of signals once the engine has passed and the crossing is entirely occupied by the train or car, as discussed infra § 736 b (2). On the other hand, the failure to operate warning signals and devices may constitute negligence where the crossing is extrahazardous by reason of peculiar circumstances or conditions,[89] and the situation constitutes a trap.[90] The duty of a railroad as to obstructions at crossings generally is considered supra § 720, and the duty to provide safeguards at the crossing for cars blocking the crossing is considered generally supra § 725.

§ 735. —— Lights

In the night or when it is dark, the common-law duty of reasonable care may require that a railroad company give some signal by light so that persons at a crossing may see an approaching train, and ordinarily the absence of warning lights constitutes evidence of negligence to be considered in connection with other circumstances.

In the night[91] or when it is dark[92] or dusk dark,[93] the common-law duty of reasonable care may require that a railroad company give some signal by light so that persons at a crossing may see an approaching train.[94] Such light should be of a kind calculated to attract the attention of travelers at or near the crossing,[95] indicating to them the approach of the train toward the crossing,[96] such as a headlight,[97] or, if the train is backing toward the crossing, an appropriate bright light on the rear of the train to show that fact,[98] and, although there is a light on the forward end of a backing train, if it is of such a character as not to suggest the approach of such train to the crossing to a reasonably cautious man, it does not suffice.[99] Likewise, the presence of a headlight will not fulfill the company's duty if the headlight is clouded and obscured[1] or if it is turned down so low as to be ineffective.[2]

Ordinarily the absence of warning lights constitutes evidence of negligence to be considered in connection with other circumstances,[3] such as the amount of light.[4] When coupled with the failure to give proper signals of approach, the absence of proper lights from moving cars or trains approaching a crossing in a city or where per-

89. Mont—Broberg v. Northern Pac. Ry. Co., 182 P.2d 851, 120 Mont. 280.

Curve in highway

Where motorist approaching railroad crossing in country at night could not see the crossing or train thereon until after turning curve in highway near the crossing, failure of railroad to blow whistle on approaching the crossing was negligence, as against contention that the fact that the train was already on the crossing and a number of its cars had already passed when the automobile rounded the curve and struck the train was sufficient notice of the presence of the train—Southern Ry Co. v. Riley, 4 S E 2d 54, 60 Ga App. 475.

90. Wash—Schofield v. Northern Pac Ry Co, 104 P.2d 324, 4 Wash 2d 512

91. Cal—Cooper v. Southern Pac. Co, 111 P.2d 689, 43 Cal.App 2d 693

Kan.—Moses v. Missouri Pac R. Co., 26 P 2d 259, 138 Kan. 347

La—Robertson v Missouri Pac. R. Co, App, 165 So 527, rehearing denied 167 So. 165.

Mich—Richman v Detroit, G. H & M Ry. Co, 236 N.W. 878, 254 Mich. 607.

N C—Pridgen v. Atlantic Coast Line R. Co., 164 S E 325, 203 N C. 62.

52 C.J. p 216 note 6.

Lights held sufficient

Md—State, for Use of Emerson, v Poe, 190 A 231, 171 Md 584

92. N C—Parker v. Seaboard Air Line R. Co, 106 S E 755, 181 N C 95

52 C.J. p 216 note 7.

93. Ark—Ft Smith, etc, R Co v Messek, 131 S W. 686, 966, 96 Ark 243

Tex—Ft Worth, etc, R Co v. Houston, Civ App, 185 S W. 919.

94. Mo—Becke v Missouri Pac R Co, 13 S W 1053, 102 Mo 544, 9 L R A 157.

N C—Hill v. Atlantic Coast Line R Co., 82 S.E 864, 166 N C 592.

95. Mich—Gorton v Harmon, 116 N W. 443, 152 Mich. 473, 15 Ann Cas. 461.

52 C J. p 216 note 10.

96. Mich.—Gorton v. Harmon, 116 N W 443, 152 Mich. 473, 15 Ann Cas 461.

52 C J. p 216 note 11.

97. Ohio—Continental Baking Co. v. Pennsylvania R. Co, 96 N E 2d 258, 87 Ohio App 505

52 C J p 216 note 12.

98. Kan.—Moses v. Missouri Pac. R Co, 26 P.2d 259, 138 Kan 347.

La—Dobrowolski v. Holloway Gravel Co, App, 173 So. 474—Robertson v. Missouri Pac R Co, App., 165 So. 527, rehearing denied 167 So. 165.

N C—Pridgen v. Atlantic Coast Line R Co, 164 S E 325, 203 N C. 62.

52 C J. p 217 note 13

99. Wash—Hines v. Chicago, etc, R Co, 177 P 795, 105 Wash 178.

52 C J p 217 note 14

1. Ind—Chicago, etc, R Co v Coon, 93 N E 561, 95 N.E 596, 48 Ind App. 675.

2. N Y—Daniels v. Staten Island Rapid Transit Co, 26 N E 466, 125 N.Y. 407.

3. Ohio—Continental Baking Co. v Pennsylvania R Co., 96 N E 2d 258, 87 Ohio App. 505

52 C J p 217 note 19.

Negligence per se

(1) In absence of statutory requirement, running of train across highway at night without lights to disclose its presence is not negligence per se—Morley v Cleveland, C., C & St. L R Co, 194 N E 806, 100 Ind App 515.

(2) Although the mere absence of lights or mere irregular order of cars is not of itself negligent, where the two concur, and further, the cars are run at irregular intervals, a case of negligence is made out as a matter of law—Principe v. American R Co., 22 Puerto Rico 282

4. N.C.—Parker v Seaboard Air Line R. Co., 106 S E 755, 181 N.C. 95

52 C.J. p 217 note 20.

sons may reasonably be expected is negligence as a matter of law,[5] and especially when such train is running at a rapid speed[6] or is backing toward the crossing.[7] On the other hand, merely having a sufficient light displayed on trains or cars does not show that the railroad has performed its full duty of due care to travelers.[8]

Statutes requiring engines to be furnished with headlights which shall be kept burning are designed to secure the protection that a useful headlight affords,[9] and not to compel such headlight to be carried where it would serve no useful purpose,[10] so that engines preceded by, and coupled to, snow plows need not have headlights.[11]

Ordinarily a railroad is under no duty to provide lights in or on cars obstructing a crossing while standing still or passing over the crossing, and its failure in this respect does not constitute negligence.[12] In order to charge a railroad with negligence in moving a train at night across a highway without lights to disclose its presence, an injured motorist must show that trainmen exercising reasonable care should know that because of darkness cars are such an obstruction that people traveling in automobiles properly equipped with lights and carefully operated at a reasonable rate of speed would be likely to come into collision with them.[13] So, where a railroad crossing is extrahazardous by reason of peculiar circumstances, the failure of the railroad to take precautionary measures such as the placing of warning lights along the train where it has stopped on the crossing or is slowly moving thereover may render the railroad liable for negligence.[14]

§ 736. —— Signals

a. In general
b. Provisions of statutes or ordinances

a. In General

A railroad company generally has the duty, apart from any imposed by statute or ordinance, to give signals of the approach of its trains or cars to crossings, and the failure to give a proper signal or warning may constitute negligence or evidence of negligence. Ordinarily, no particular or specific kind of signals or warning is necessary but it is only required that a suitable means of giving warning adapted to the circumstances be adopted and applied.

Under some decisions a specific common-law duty to give warning or notice of the approach of trains or cars to a crossing has been recognized,[15] and the failure to give a proper signal or

5. Mich.—Richman v Detroit, G. H & M Ry. Co., 236 N.W 878, 254 Mich. 607.
52 C.J p 217 note 22

6. Okl.—Midland Valley R. Co. v. Lawhorn, 198 P. 586, 81 Okl 288
52 C.J p 217 note 23.

7. La.—Robertson v Missouri Pac R. Co., App., 165 So 527, rehearing denied 167 So 165.
52 C.J. p 217 note 24.

8. N Y.—Henavie v New York Cent R. Co, 59 N E. 901, 166 N Y. 280.
52 C.J p 217 note 25.

9. Mo.—McNeil v. Missouri Pac R Co., App., 182 S.W. 762

10. Mo.—McNeil v. Missouri Pac. R Co, supra.

11. Mo.—McNeil v. Missouri Pac. R Co, supra.

12. U.S.—Probert v. Chicago, I & L. Ry. Co., C.C.A.Ill., 93 F 2d 259.
Del.—Jones v. Pennsylvania R. Co., 61 A.2d 601, 5 Terry 486.
Ga.—Southern Ry. Co. v. Riley, 194 S.E. 422, 57 Ga App. 26.
Ky.—Scarbrough v. Louisville & N. R Co., 124 S.W 2d 88, 276 Ky 292
La.—Gates v. Arkansas & L. M Ry. Co., App., 180 So 835
Mont.—Broberg v. Northern Pac Ry. Co., 182 P.2d 851, 120 Mont 280.
Pa.—Cella v. Pennsylvania R. Co., 70 A 2d 638, 364 Pa. 82.
Tex.—Texas & N. O R. Co v. Compton, 136 S.W 2d 1113, 135 Tex 7.

Presence of cars on crossing as affecting duty of railroad with respect to·
Safeguards at crossings generally see supra § 725.
Lights, signals, and lookouts on trains and cars generally see supra § 734

Color of cars

The fact that railroad passenger cars were black and had no lights inside them did not constitute negligence toward motorist who struck cars at railroad crossing.—Northern Pac Ry Co v Bacon, C C A Mont., 91 F 2d 173, certiorari denied Bacon v Northern Pac R Co, 58 S Ct. 55, 302 U.S 730, 82 L Ed 564

Precautionary measures held sufficient

(1) Street light of railroad illuminating crossing, and headlight of engine and lights on front and rear coach, were held sufficient precautionary measures to protect truck driver approaching switch track crossing obstructed by unlighted coach.—Plummer v Gulf, M & N R Co, La App, 153 So 322.

(2) Where trainmen gave ample warning with lanterns of a railroad car partially obstructing a grade crossing, the failure to put lights on the car was not negligence authorizing recovery for death of a motorist who struck the car.—Gates v. Arkansas & L M Ry. Co, La App., 180 So. 835.

13. Okl.—Fleming v. Loch, 195 P.2d 942, 200 Okl. 448

14. Mont.—Broberg v. Northern Pac Ry Co, 182 P.2d 851, 120 Mont 280.

15. Del.—Leedom v Pennsylvania R Co, 29 A 2d 171, 3 Terry 186
Ga.—Gay v Sylvania Cent R Co, 53 S E 2d 713, 79 Ga App 362.
Ky.—Deitz' Adm'x v. Cincinnati, N. O & T P Ry. Co, 176 S W.2d 699, 296 Ky. 279
N C.—Henderson v Powell, 19 S E 2d 876, 221 N C 239.—Johnson v Atlantic Coast Line R Co, 170 S.E 120, 205 N C 127.—Collett v. Southern Ry Co., 153 S E 405, 198 N C. 760
S C.—Smith v Southern Ry. Co, Carolina Div, 35 S.E 2d 225, 207 S C 179
Tex.—Burlington-Rock Island R Co v Ellison, Civ App., 159 S W 2d 569, affirmed 167 S.W 2d 723, 140 Tex 353
Va.—Atlantic Coast Line R. Co v. Clements, 36 S E 2d 553, 184 Va. 656.—Chesapeake & O Ry Co v. Folkes, 18 S E 2d 309, 179 Va 60.—Southern R. Co v Campbell, 1 S. E 2d 255, 172 Va 311.
Wis.—Webster v. Roth, 18 N.W 2d 1, 246 Wis 535
52 C J p 218 note 32.

In Tennessee

(1) It has been held that it is generally the duty of a railroad company to give warning of approach of

warning held to constitute negligence;[16] and in other jurisdictions, while no such specific duty exists,[17] the omission of warnings of approach is to be considered in connection with the duty of the railroad to operate its trains with due care and caution so as to avoid injuries to others.[18] A railroad company is not relieved from the obligation of giving signals of the approach of its trains or cars to crossings by the fact that no statute or ordinance has been adopted or is applicable to the situation and circumstances in question.[19]

Where the duty to give warning arises, the courts, in defining the character of the requisite warning, have employed varying expressions, as for example, that it should be reasonable,[20] timely,[21] adequate,[22] and in other cases that the warn

its trains to crossings of its tracks with a street or highway—**Corpus Juris cited in** Southern Ry. Co v Penley, 134 S W 2d 177, 179, 175 Tenn 380—Louisville & N R. Co v Ross, 2 Tenn.App. 384.

(2) Where there is no statute governing the matter, the common-law liability of a railroad for negligence at highway crossings prevails, and it must give proper warning of the approach of trains—Hurt v. Yazoo, etc., R Co., 205 S W. 437, 140 Tenn 623—52 C J p 241 note 2 [c] (4)

(3) On the other hand, where statutes relating to blowing whistles or ringing bells at grade crossings conflict with the common law and undertake to define the entire duty of railroads as to warnings at every grade crossing, no common-law duty remains on railroad as to giving warning at such crossings.—Southern Ry Co v Noah, 176 S.W 2d 826, 180 Tenn 532—52 C.J. p 241 note 2 [c] (3).

16. U.S.—Plough v. Baltimore & O R. Co, C.A.N.Y., 172 F 2d 396, certiorari denied 69 S Ct 1518, 337 U S. 940, 93 L Ed 1745, Hanson v Baltimore & O R Co, 69 S Ct 1518, 337 U.S 940, 93 L Ed 1745, Van Slyke v Baltimore & O R Co., 69 S.Ct. 1518, 337 U S. 941, 93 L Ed. 1745, and Lynch v Baltimore & O. R. Co, 69 S Ct. 1518, 337 U S. 941, 93 L Ed 1745.
La—Grappe v Texas & P. Ry. Co., 133 So 802, 16 La.App 244.
Mich.—Richman v. Detroit, G. H & M. Ry Co, 236 N W. 878, 254 Mich 607
N C—Coltrain v. Atlantic Coast Line R Co, 4 S E 2d 853, 216 N C 263—Kuykendall v Southern Ry. Co, 181 S E. 625, 208 N C 840—Johnson v Atlantic Coast Line R. Co, 170 S E 120, 205 N C 127—Rives v Atlantic Coast Line R. Co, 165 S E 709, 203 N C 227—Collett v Southern Ry. Co, 153 S E. 405, 198 N.C. 760.
Va—Southern R Co v. Campbell, 1 S E 2d 255, 172 Va. 311.
52 C J. p 218 note 33.

Negligence per se

(1) A failure to give crossing signals constitutes "negligence per se"—Moore v Atlantic Coast Line R Co., 7 S E.2d 4, 192 S.C. 406—Mishoe v. Atlantic Coast Line R Co, 197 S E. 97, 186 S C. 402.

(2) It has also been held, however, that in the absence of statutory requirement, running of train across highway at night without signals to disclose its presence is not negligence per se—Morley v Cleveland, C., C & St L. R Co, 194 N E 806, 100 Ind App 515

17. Miss—Illinois Cent R Co. v Mann, 106 So 7, 141 Miss 778
52 C J p 218 note 34.

Within municipality

Railroad is under no common-law duty to sound a whistle when approaching a grade crossing within municipality—Keegan v Chicago, M, St P. & P Ry. Co, 27 N.W 2d 739, 251 Wis 7.

18. Ga—Seaboard Air Line Ry Co v Benton, 159 S E. 717, 43 Ga App 495, reversed on other grounds 165 S E. 593, 175 Ga 491, conformed to 166 S E 219, 45 Ga App 832
Iowa—Coonley v. Lowden, 12 N.W.2d 870, 234 Iowa 731
52 C J p 219 note 35.

19. U S—Southern Pac Co v Haight, C.C.A.Cal, 126 F 2d 900, certiorari denied 63 S Ct 154, 317 U.S. 676, 87 L Ed 542.
Iowa—Coonley v. Lowden, 12 N W 2d 870, 234 Iowa 731.
Ky—Deitz' Adm'x v Cincinnati, N O. & T. P Ry Co, 176 S W 2d 699, 296 Ky. 279
S C—Smith v Southern Ry Co, Carolina Div, 35 S E 2d 225, 207 S C. 179
Va.—Chesapeake & O Ry Co v Folkes, 18 S E 2d 309, 179 Va 60—Southern R Co v. Campbell, 1 S E 2d 255, 172 Va 311—Franklin & P. Ry Co. v. Shoemaker's Committee, 159 S E. 100, 156 Va. 619
52 C J p 217 note 31.

Crossing in town or municipality

(1) A railroad company sued for death of passenger in automobile colliding with train at crossing in town was not relieved from its common-law duty to give adequate crossing warning by the fact that railroad was not required to give statutory crossing warning at a crossing in a town, and that town had not enacted ordinance requiring gate or flagman at crossing—Atlantic Coast Line R. Co v. Clements, 36 S E 2d 553, 184 Va 656

(2) Although statute does not require engineer to blow whistle at a grade crossing within a municipality if he sees motorist approaching crossing and about to go on track and believes that he is unaware of train's approach, it would be engineer's duty to sound whistle as well as to take every other reasonable precaution to prevent the collision—Webster v. Roth, 18 N W 2d 1, 246 Wis 535

20. Ky—Deitz' Adm'x v Cincinnati N O & T P Ry. Co, 176 S W 2d 699, 296 Ky 279
Mo—Scott v Missouri Pac R Co 62 S W 2d 834, 333 Mo 374
N H—Rancourt v Boston & M R R 30 A 2d 453, 192 N H 284
Va—Atlantic Coast Line R Co v Clements, 36 S E 2d 553, 184 Va 656
52 C J. p 219 note 36.

Ordinary prudence

Duty of railroad in warning of approach of trains at crossing is to provide such means and take such steps as ordinarily prudent man would in the same or similar circumstances, since there is never a guarantee of the prevention of injurious results—Louisville & N R Co. v Marshall's Adm'x, 158 S W 2d 137, 289 Ky 129

21. U S—Plough v Baltimore & O R Co, C A N.Y, 172 F.2d 396, certiorari denied 69 S Ct. 1518, 337 U S 940, 93 L Ed 1745, Hanson v Baltimore & O. R Co, 69 S Ct 1518, 337 U S 940, 93 L Ed. 1745, Van Slyke v. Baltimore & O R Co, 69 S Ct 1518, 337 U S. 941, 93 L Ed. 1745, and Lynch v Baltimore & O. R. Co, 69 S Ct. 1518, 337 U. S 941, 93 L Ed 1745
N.C—Johnson v Atlantic Coast Line R Co, 170 S E. 120, 205 N C 127
Va—Atlantic Coast Line R Co v Clements, 36 S E 2d 553, 184 Va. 656—Franklin & P Ry Co v Shoemaker's Committee, 159 S E 100, 156 Va. 619.
52 C J. p 219 note 37

22. U S—Plough v. Baltimore & O R Co, C.A N Y., 172 F 2d 396, certiorari denied 69 S Ct 1518, 337 U. S 940, 93 L Ed 1745, Hanson v Baltimore & O R. Co, 69 S Ct. 1518, 337 U S 940, 93 L Ed 1745, Van Slyke v. Baltimore & O R. Co., 69 S.Ct. 1518, 337 U.S. 941, 93 L Ed 1745, and Lynch v Baltimore & O. R. Co, 69 S Ct 1518, 337 U.S 941, 93 L Ed 1745.

ing should be proper,[23] sufficient,[24] suitable,[25] or appropriate.[26] It has also been held that the requisite warning should be due warning,[27] reasonably sufficient,[28] reasonably adequate,[29] adequate to apprise travelers,[30] reasonably calculated to arrest a traveler's attention to the danger,[31] such as may reasonably be demanded by all the surrounding conditions,[32] or reasonably necessary.[33] Other decisions have characterized the warning required as due and timely,[34] due and proper,[35] due and adequate,[36] ample and timely,[37] sufficient and timely,[38] proper and sufficient,[39] timely and effective,[40] reasonable and proper,[41] reasonable and timely,[42] or timely and proper.[43]

As a general rule, a suitable means of giving warning adapted to the circumstances must be adopted and applied.[44] Ordinarily the ringing of a bell or the blowing of a whistle constitutes sufficient warning,[45] but the law does not require any particular or specific kind of signals or warning where no specific requirement is imposed by statute or ordinance,[46] and it is not always essential that warning be given by whistle and bell[47] or either of these.[48] On the other hand, the law will

Pa.—Haller v. Pennsylvania R. Co., 159 A. 10, 306 Pa. 98.
Va.—Atlantic Coast Line R. Co. v. Clements, 36 S.E.2d 553, 184 Va. 656—Franklin & P. Ry. Co. v. Shoemaker's Committee, 159 S.E. 100, 156 Va. 619
Wis.—Langer v. Chicago, M. St. P. & P. Ry. Co., 265 N.W. 851, 220 Wis. 571
52 C.J. p. 219 note 38

23. Pa.—Ealy v. New York Cent. R. Co., 5 A.2d 110, 333 Pa. 471
52 C.J. p. 219 note 39

24. Del.—Short v. Philadelphia, etc., R. Co., 76 A. 363, 23 Del. 108
52 C.J. p. 219 note 40

25. Mo.—Kerr v. Bush, App., 215 S.W. 393
Neb.—Missouri Pac. R. Co. v. Geist, 68 N.W. 640, 49 Neb. 489

26. Cal.—Cooper v. Southern Pac. Co., 111 P.2d 689, 43 Cal.App.2d 693.
Fla.—Atlantic Coast Line R. Co. v. Watkins, 121 So. 95, 97 Fla. 350
Idaho.—Whiffin v. Union Pac. R. Co., 89 P.2d 540, 60 Idaho 141

27. U.S.—Chesapeake, etc., R. Co. v. Steele, Ky., 84 F.2d 93, 29 C.C.A. 81.
52 C.J. p. 219 note 44

28. N.C.—Edwards v. Atlantic Coast Line R. Co., 43 S.E. 585, 132 N.C. 99.
52 C.J. p. 219 note 45.

29. Hawaii.—Andrade v. Oahu R., etc., Co., 27 Hawaii 381
Or.—**Corpus Juris cited in** Fish v. Southern Pac. Co., 143 P.2d 917, 921, 173 Or. 294, rehearing denied 145 P.2d 991, 173 Or. 294.

30. W.Va.—Niland v. Monongahela West Penn Public Serv. Co., 147 S.E. 478, 106 W.Va. 528.

31. N.Y.—Raymer v. Rutland R. Co., 198 N.Y.S. 261, 204 App.Div. 135

32. Ala.—Birmingham, etc., R. Co. v. Osburn, 56 So. 599, 4 Ala.App. 399

33. Ind.—Pittsburgh, etc., R. Co. v. Tatman, 122 N.E. 357, 72 Ind.App. 519.

34. Hawaii.—Andrade v. Oahu, etc., R. Co., 27 Hawaii 381.
52 C.J. p. 219 note 51.

35. Ky.—Louisville, etc., R. Co. v. Goetz, 79 Ky. 442, 42 Am.R. 227.

36. N.Y.—Petrie v. New York Cent., etc., R. Co., 71 N.Y.S. 866, 63 App.Div. 473, affirmed 63 N.E. 1121, 171 N.Y. 638

37. N.Y.—Turnier v. New York Cent. R. Co., 207 N.Y.S. 316, 124 Misc. 269.

38. Pa.—Anstine v. Pennsylvania R. Co., 20 A.2d 774, 342 Pa. 423.
52 C.J. p. 219 note 55

39. Md.—Baltimore Transit Co. v. Bramble, 2 A.2d 416, 175 Md. 334—Steil Brewing Co. v. Washington, etc., Electric Co., 87 A. 838, 120 Md. 419

40. Mo.—Hudson v. Southwest Missouri R. Co., 159 S.W. 9, 173 Mo.App. 611—Jackson v. Southwest Missouri R. Co., 156 S.W. 1005, 171 Mo.App. 430, affirmed, Sup., 189 S.W. 381

41. U.S.—Whelan v. New York, etc., R. Co., C.C.Ohio, 38 F. 15
N.Y.—Foley v. New York Cent., etc., R. Co., 117 N.Y.S. 956, 132 App.Div. 506, reversed on other grounds 90 N.E. 1116, 197 N.Y. 430, 18 Ann.Cas. 631

42. Ga.—Atlantic Coast Line R. Co. v. Dickson, 28 S.E.2d 879, 70 Ga.App. 590, followed in 28 S.E.2d 883, 70 Ga.App. 596
N.C.—Caldwell v. Southern Ry. Co., 10 S.E.2d 680, 218 N.C. 63
52 C.J. p. 219 note 59.

43. Pa.—Pennsylvania R. Co. v. Goodman, 62 Pa. 329

44. Ky.—Deitz' Adm'x v. Cincinnati, N. O. & T. P. Ry. Co., 176 S.W.2d 699, 296 Ky. 279.
Pa.—Anstine v. Pennsylvania R. Co., 20 A.2d 774, 342 Pa. 423.

45. Ky.—Deitz' Adm'x v. Cincinnati, N. O. & T. P. Ry. Co., 176 S.W.2d 699, 296 Ky. 279

46. U.S.—Plough v. Baltimore & O. R. Co., C.A.N.Y., 172 F.2d 396, certiorari denied 69 S.Ct. 1518, 337 U.S. 940, 93 L.Ed. 1745, Hanson v. Baltimore & O. R. Co., 69 S.Ct. 1518, 337 U.S. 940, 93 L.Ed. 1745, Van Slyke v. Baltimore & O. R. Co., 69 S.Ct. 1518, 337 U.S. 941, 93 L.Ed. 1745, and Lynch v. Baltimore & O. R. Co., 69 S.Ct. 1518, 337 U.S. 941, 93 L.Ed. 1745
Ky.—Illinois Central R. Co. v. Maxwell, 167 S.W.2d 841, 292 Ky. 660
Or.—**Corpus Juris cited in** Fish v. Southern Pac. Co., 143 P.2d 917, 920, 173 Or. 294, rehearing denied 145 P.2d 991, 173 Or. 294
Pa.—Anstine v. Pennsylvania R. Co., 20 A.2d 774, 342 Pa. 423.
52 C.J. p. 220 note 61.

Adequate warning given

(1) Failure of railroad to warn of approach of train to crossing by particular method would not be negligence, if adequate warning were given by some other method.—Blackwell v. Union Pac. R. Co., 52 S.W.2d 814, 331 Mo. 34.

(2) If headlight of train or noise of its approach gives adequate warning to those using private crossing, or if open and unobstructed character of crossing is such as to give adequate opportunity to see and hear the train, negligence of railroad cannot be predicated on failure to give particular kind of warning.—Langer v. Chicago, M., St. P. & P. Ry. Co., 265 N.W. 851, 220 Wis. 571

47. Ky.—Deitz' Adm'x v. Cincinnati, N. O. & T. P. Ry. Co., 176 S.W.2d 699, 296 Ky. 279.
52 C.J. p. 220 note 62.

Either whistle or bell may constitute sufficient warning.—Deitz' Adm'x v. Cincinnati, N. O. & T. P. Ry. Co., supra.

48. Minn.—Larson v. Lowden, 282 N.W. 669, 204 Minn. 80
52 C.J. p. 220 note 63.

Locomotive not equipped with whistle

Where crossing collision occurred in incorporated city so that statutory requirement that train whistle be blown was inapplicable, failure of railroad to have locomotive engine equipped with a whistle as required by statute was not actionable negli-

not undertake to say that the giving of any certain signal or warning is sufficient[49] or that the omission of a particular kind of signal is not negligence.[50]

There is no obligation at common law to give continuous signals of approach to a crossing[51] or where the signaling statute does not expressly require that measure of care.[52] The rumble of a moving train is a warning to travelers,[53] but it is not under ordinary circumstances a sufficient warning to discharge the company's duty in this particular.[54] What constitutes a sufficient signal to fulfill the company's common-law obligation depends at all times on the circumstances,[55] and the precautions necessary to be exercised are commensurate with the danger,[56] but a railroad company cannot be required, other than where a statute so provides, to give any signals or warnings not connected with the operation of its trains or cars.[57]

A proper signal of an approach of a train constitutes notice to the public that the railroad is about to use a grade crossing and take advantage of its superior right to do so,[58] and, if the accustomed warning was given by the train crew on approaching a crossing, and the warning was adequate, the fact that it was not noticed by the persons injured does not show that the train crew was negligent.[59] It has been held, however, that the railroad company is obliged to anticipate that the traveler will fail to hear or disregard the signal when given, and to keep reasonable watch for such instances, and be prepared to protect those guilty of such carelessness;[60] and this duty is reciprocal with the duty of the traveler to anticipate that the railroad may fail to give the required signals and to act accordingly.[61] It has been held that the maintenance of an automatic crossing signal at a crossing sufficiently discharges the common-law duty of the railroad to warn of approaching trains regardless of whether the whistle and bell on the locomotive are sounded,[62] but it has also been held that the failure to give crossing signals is actionable, however adequate the warning signs at the crossing.[63] The presence of the train or car at the crossing may constitute sufficient warning to absolve the railroad company of liability without other signal by it, as discussed supra § 734.

gence—Luke v. Powell, 12 S.E.2d 196, 63 Ga.App. 795.

49. Mo.—Williams v. Thompson, App., 166 S.W.2d 785.
52 C.J. p. 220 note 64.

50. U.S.—Thomas v. Delaware, etc., R. Co., C.C.N.Y., 8 F. 729, 18 Blatchf. 533.
52 C.J. p. 220 note 65.

51. Pa.—Keller v. Philadelphia, etc., R. Co., 63 A. 413, 214 Pa. 82.

52. Wash.—Hopp v. Northern Pac. Ry. Co., 147 P.2d 950, 20 Wash.2d 439.
52 C.J. p. 220 note 67.

53. Ind.—Cincinnati, etc., R. Co. v. Grames, 34 N.E. 613, 37 N.E. 421, 8 Ind.App. 112.
Me.—Dyer v. Maine Cent. R. Co., 113 A. 26, 120 Me. 154.

54. N.C.—Perry v. Norfolk Southern R. Co., 104 S.E. 673, 180 N.C. 290.
52 C.J. p. 221 note 69.

55. Del.—Leedom v. Pennsylvania R. Co., 29 A.2d 171, 3 Terry 186.
Pa.—Anstine v. Pennsylvania R. Co., 20 A.2d 774, 342 Pa. 423.
52 C.J. p. 221 note 70.

Additional warning.

(1) When delay by an additional whistle might have averted accident, it is duty of trainmen to use such means.—Meyette v. Canadian Pac. Ry. Co., 6 A.2d 33, 110 Vt. 345.

(2) However, the failure of motorman on gasoline motor car to give further warning after driver on wagon apparently saw car approaching and attempted to hurry over tracks, and instead applying brakes, would not constitute negligence.—Franklin & P. Ry. Co. v. Shoemaker's Committee, 159 S.E. 100, 156 Va. 619.

Signal held sufficient.

Ill.—Zuidema v. Chicago & Northwestern Ry. Co., 15 N.E.2d 4, 295 Ill.App. 286.

Md.—State, for Use of Emerson, v. Poe, 190 A. 231, 171 Md. 584.

Mich.—Perch v. New York Cent. R. Co., 293 N.W. 778, 294 Mich. 227, followed in Balicki v. New York Cent. R. Co., 293 N.W. 892, 294 Mich. 639.

Va.—Chesapeake & O. R. Co. v. Jacobs, 183 S.E. 221, 166 Va. 11.

Wis.—Langer v. Chicago, M., St. P. & P. Ry. Co., 265 N.W. 851, 220 Wis. 571.

Signal held insufficient.

(1) Railroad could not avail itself of fact that fireman shouted warning, as defense to action against it for injuries to driver and damage to truck in railroad collision, where it was not attempted to be shown that driver heard fireman.—Hopper v. Barren Fork Coal Co., 92 S.W.2d 776, 263 Ky. 446.

(2) Where approaching train blew whistle approximately a mile from grade crossing over city street and track was visible for approximately eight hundred feet from crossing, which was within a switching yard and about half a block from a railroad station, blowing of whistle was not an adequate warning of approach of train.—Fish v. Southern Pac. Co., 143 P.2d 917, 173 Or. 294, rehearing denied 145 P.2d 991, 173 Or. 294.

56. N.C.—Johnson v. Atlantic Coast Line R. Co., 170 S.E. 120, 205 N.C. 127.
Pa.—Tomlinson v. Northwestern Electric Service Co. of Pennsylvania, 151 A. 680, 301 Pa. 72.
52 C.J. p. 221 note 71.

57. N.Y.—Weber v. New York Cent., etc., R. Co., 58 N.Y. 451.
52 C.J. p. 221 note 72.

58. N.Y.—Lee v. Pennsylvania R. Co., 280 N.Y.S. 285, 244 App.Div. 558, reversed on other grounds 198 N.E. 629, 269 N.Y. 53, reargument denied 200 N.E. 52, 269 N.Y. 674, amendment of remittitur denied 1 N.E.2d 364, 270 N.Y. 629.

59. Md.—Gosnell v. Baltimore & O. R. Co., 57 A.2d 322, 189 Md. 677.

60. Mo.—State ex rel. Kurn v. Hughes, 153 S.W.2d 46, 348 Mo. 177.—Gorman v. Franklin, 117 S.W.2d 289.—Jackson v. Southwest Missouri R. Co., 189 S.W. 381.

61. Mo.—State ex rel. Kurn v. Hughes, 153 S.W.2d 46, 348 Mo. 177.—Gorman v. Franklin, 117 S.W.2d 289.—Jackson v. Southwest Missouri R. Co., 189 S.W. 381.
Duty of traveler to anticipate failure to give signals see infra § 792.

62. Ky.—Louisville & N. R. Co. v. Craig, 219 S.W.2d 954, 310 Ky. 43.

63. U.S.—Cmuk v. Lehigh Valley R. Co., C.C.A.N.Y., 116 F.2d 569.

Factors determining adequacy. Besides obstructions to view and hearing, considered infra § 741, factors taken into consideration in determining whether adequate signals of approach have been given include the character of the crossing,[64] as for example, whether it is in a town or other place where the presence of people may be expected, discussed infra § 738, the condition of the crossing,[65] the rate of speed,[66] the presence of signs or precautions at the crossing,[67] whether the train is a regularly scheduled or an extra train,[68] and other considerations relevant to the manner of running the train,[69] changes in methods of transportation along the highways,[70] and the presence or proximity of other trains or cars.[71] Multiplication of tracks passing over a highway at a particular point may be considered in determining whether such a place is more than usually hazardous,[72] although there is also authority to the contrary.[73]

Useless signals. It does not relieve the railroad of liability to signal its approach to a crossing if it does so too late for the warning to be of any value in avoiding injury,[74] or if by its own conduct it renders such signals, although properly given, unavailing.[75] The signal must be given in such manner and at such time as to be a warning to travelers at the crossing.[76]

Effect of railroad rules and regulations. Violation of regulations of the railroad requiring signals and warnings of approach at particular crossings is evidence of negligence,[77] as is disregard by its servants of whistling posts erected by it.[78]

b. Provisions of Statutes or Ordinances

(1) In general
(2) Manner of signaling or giving warning

(1) In General

Statutory provisions or ordinances requiring railroad companies to give signals of the approach of their trains to crossings and prescribing the conditions for giving them and their character are mandatory and must be observed.

Statutory provisions requiring railroad companies to give signals of the approach of their trains to crossings and prescribing the conditions for giving them and their character are mandatory, and must be observed,[79] and compliance must likewise be had

64. Okl.—Kurn v. Youngblood, 142 P 2d 983, 193 Okl. 299
Pa.—Anstine v. Pennsylvania R. Co., 20 A.2d 774, 342 Pa. 423—Tomlinson v. Northwestern Electric Service Co of Pennsylvania, 151 A. 680, 301 Pa. 72
Tenn.—Yazoo & M. V R. Co v. Williams, 185 S.W 2d 527, 182 Tenn 241—**Corpus Juris cited in** Southern Ry Co v. Penley, 134 S.W 2d 177, 179, 175 Tenn 380.
52 C.J. p 222 note 74.

65. Tenn.—**Corpus Juris cited in** Southern Ry Co v. Penley, 134 S.W 2d 177, 179, 175 Tenn. 380.
52 C.J. p 222 note 76.

66. Pa.—Anstine v. Pennsylvania R. Co., 20 A.2d 774, 342 Pa. 423—Witkoski v. Lehigh Valley R. Co., Com. Pl., 34 Luz. Leg. Reg. 153, reversed on other grounds Witkowski v. Lehigh Valley R. Co., 12 A.2d 908, 338 Pa. 510
52 C.J. p 222 note 77

Warning of minimum value

Mere perfunctory blowing of whistle and ringing of bell at or near crossing to give warning of approaching train, being driven under such circumstances and at such speed as to reduce such warning to its minimum value for prevention of injury to highway traveler, may not be sufficient to discharge railroad company's obligation.—Roberts v. Powell, 187 So. 766, 137 Fla. 159—Atlantic Coast Line R. Co. v. Watkins, 121 So. 95, 97 Fla. 350.

67. Ky.—Louisville & N. R. Co. v. Craig, 219 S.W 2d 954, 310 Ky. 43
52 C.J. p 222 note 78.

68. Va.—Roberts v. Alexandria, etc., R. Co., 2 S.E. 518, 83 Va. 312.
52 C.J. p 222 note 79

69. Mich.—Guggenheim v. Lake Shore, etc., R. Co., 33 N.W 161, 66 Mich. 150
52 C.J. p 222 note 80

70. Ind.—Pittsburgh, etc., R. Co. v. Bunting, 149 N.E. 916, 917, 84 Ind. App. 45.
52 C.J. p 222 note 81.

71. Ky.—Louisville, etc., R. Co. v. Thompson, 288 S.W. 761, 217 Ky. 21
52 C.J. p 222 note 82.

72. S.D.—Merrill v. Minneapolis, etc., R. Co. 129 N.W 468, 27 S.D. 1
Utah.—English v. Southern Pac. R. Co., 45 P. 47, 13 Utah 407, 57 Am. St. R. 772, 35 L.R.A. 155

73. N.J.—Dando v. Director Gen. of Railroads, 110 A. 700, 94 N.J.Law 285

74. Pa.—Anstine v. Pennsylvania R. Co., 20 A.2d 774, 342 Pa. 423—Cummings v. Pennsylvania R. Co., 155 A. 436, 304 Pa. 219—Childs v. Pennsylvania R. Co., 24 A. 341, 150 Pa. 73.
52 C.J. p 223 note 85.

75. U.S.—Rothe v. Pennsylvania Co., Ohio, 195 F. 21. 114 C.C.A. 627
Ind.—Chicago, etc., R. Co. v. Boggs, 101 Ind. 522, 51 Am.R. 761.

76. Pa.—Anstine v. Pennsylvania R. Co., 20 A.2d 774, 342 Pa. 423.
52 C.J. p 223 note 87

Signal given too soon

Generally, the adequacy of a signal given by a train when approaching a crossing depends on whether warning was given soon enough in view of rapid movement of train, but adequacy of signal may depend on whether signal was given too soon, in view of retarded rate of speed of train, and in either event the question is whether warning was timely, in view of all circumstances.—Anstine v. Pennsylvania R. Co., supra

77. Pa.—Bickel v. Pennsylvania R. Co., 66 A. 756, 217 Pa. 456, 118 Am.S.R. 926
52 C.J. p 223 note 88.

78. N.C.—Hinkle v. Richmond, etc., R. Co., 13 S.E. 884, 109 N.C. 472, 26 Am.S.R. 581
52 C.J. p 223 note 89.

79. U.S.—Majestic v. Louisville & N. R. Co., C.C.A.Tenn., 147 F.2d 621
Idaho.—Allan v. Oregon Short Line R. Co., 90 P.2d 707, 60 Idaho 267.
Ill.—Randolph v. New York Cent. R. Co., 79 N.E.2d 301, 334 Ill.App. 268.—Shaw v. Chicago & E. I. R. Co., 75 N.E.2d 51, 332 Ill.App. 285.
Ky.—Franklin v. Louisville & N. R. Co., 102 S.W.2d 1010, 267 Ky. 577.
Mo.—Williams v. Thompson, App., 166 S.W 2d 785
S.C.—Limehouse v. Southern Ry. Co., 58 S.E.2d 685, 216 S.C. 424.

with ordinances regulating such matters.[80] Such laws are safety measures designed for the protection of people using public thoroughfares and to afford them such warning as to insure safe passage over crossings.[81] Their object has been said to be to warn persons of danger at a railroad crossing,[82] that is, to protect persons who might come within the realm of danger of a train at the crossing,[83] but it has more restrictively been stated that the object of such statutes is to warn persons of the approach of trains to a crossing,[84] and not to warn travelers of the presence of a track,[85] or of the presence of a train on the crossing, or to prevent them from running into a train or cars occupying the crossing.[86] Such statutes, being penal in nature, are subject to the rule of strict construction,[87] but they should not be so strictly construed as to restrict to their manifest purpose of protecting travelers.[88] The repeal of a statute with respect to signals of approach results in the restoration of the common-law rule of conduct,[89] but a partial repeal restores it only to the extent to which the statutory provisions have been repealed.[90]

Statutes requiring certain signals or warnings of approach to be given at rural country crossings do not constitute a standard to be observed at street or highway crossings in towns and cities,[91] and, conversely, signals prescribed by statute for crossings in towns or cities are not the measure of a railroad's duty on approaching rural crossings.[92] A statute requiring certain signals of approach sub-

Va.—Southern Ry Co v. Berry, 1 S E 2d 261, 172 Va. 266
52 C J. p 238 note 70

Train is not lawfully on crossing as against traveler without having first given statutory signals—New York Cent R. Co v De Leury, 192 N E 125, 100 Ind App 140

Approaching or leaving city or town

(1) Statute requiring that bell or whistle on a train be sounded when train is approaching or leaving a city or town is applicable to incorporated towns.—Illinois Cent R Co v. Sigler, C C.A.Tenn, 122 F 2d 279

(2) The fact that plaintiff attempted to stop his car to avoid being hit by a train, and in doing so turned to the left and hit the engine about the cab, was held not to prevent the application of the above statute—Southern Ry. Co. v. Buskill, 10 Tenn App 1

Statute held applicable to trustee operating railroad

Ark—Missouri Pac. R. Co. v Yelldell, 133 S W 2d 642, 199 Ark. 343

Application to United States

The United States operating a railroad in a state between military base and junction with privately owned railroad was required to comply with crossing signal statutes of the state, and failure to do so rendered the United States liable under Federal Tort Claims Act for damage to automobile in collision with diesel-electric locomotive at public highway crossing unless owner was guilty of gross contributory negligence.—Carroll v. U. S, D C S C, 87 F Supp. 721.

Compliance held shown

Mo—Knorp v Thompson, 212 S.W 2d 584, 35 Mo. 1062, 5 A.L R.2d 103

Statute held inapplicable

Where highway crossed railroad on straight track two hundred and seventy-six feet from curve, statutory provisions pertaining to signals of trains approaching a highway crossing on a curve could not be invoked to show negligence of railroad in a crossing accident—Louisville & N. R. Co v. Bailey, 16 So 2d 167, 245 Ala. 178.

80. Va.—Norfolk & W. Ry. Co. v. White, 163 S E 530, 158 Va 243

"Signals required by law"

Ordinance regulating railroad signals pursuant to statutory authority was "law," within statute penalizing railroad's failure to give "signals required by law."—Norfolk & W Ry Co v. White, supra

81. Tex—Missouri, K & T. R Co of Texas v Young, Civ App, 127 S W 2d 489, error dismissed, judgment correct.
Utah—Earle v. Salt Lake & Utah R. Corp, 165 P 2d 877, 109 Utah 111

Other statement of purpose

The purpose of the statute requiring the operators of a train to give signals when approaching a crossing is to give warning to persons on the crossing or those who may be approaching the crossing or to those whose animals may be scared by the sudden and unwarned approach of the train—Pollard v. Clifton, 9 S E 2d 782, 62 Ga.App. 573

82. Ga.—Southern Ry Co. v Riley, 4 S E 2d 54, 60 Ga App 475.

83. Ga—Southern Ry Co v. Riley, supra.

84. Ark—Missouri Pac R Co. v. Moore, 138 S W 2d 384, 199 Ark. 1035, certiorari denied Moore v Missouri Pac R Co., 61 S Ct. 19, 311 U S 646, 85 L Ed 412.
Idaho—Allan v. Oregon Short Line R Co, 90 P 2d 707, 60 Idaho 267.
Ind—Chicago, etc, R Co v Boggs, 101 Ind. 522, 51 Am R 761—New York Cent. R. Co. v. Gardner, 24 N E.2d 811, 107 Ind.App. 366
Iowa.—Hitchcock v. Iowa Southern Utilities Co of Delaware, 6 N.W 2d 29, 233 Iowa 301
Kan—Bledsoe v Missouri, K & T R Co, 90 P 2d 9, 149 Kan 741
Minn—Rhine v Duluth, M. & I R Ry Co, 297 N W 852, 210 Minn 281.

85. Ind—Chicago, etc, R. Co v Boggs, 101 Ind 522, 51 Am R 761.

86. U S—Flagg v. Chicago Great Western Ry. Co, C C A Minn, 143 F 2d 90
Ind—New York Cent R Co. v Gardner, 24 N E 2d 811, 107 Ind App 366
Iowa—Hitchcock v Iowa Southern Utilities Co. of Delaware, 6 N W 2d 29, 233 Iowa 301
Kan—Bledsoe v Missouri, K. & T R Co, 90 P 2d 9, 149 Kan 741
Minn—Rhine v Duluth, M & I R. Ry Co., 297 N.W 852, 210 Minn 281.

Duties of railroad with respect to cars occupying crossing

As to safeguards at crossing generally see supra § 725

As to lights, signals, and lookouts on trains and cars generally see supra § 734.

87. Ga.—Gainesville Midland R. Co. v. Allen, 35 S E 2d 12, 72 Ga App 736.

88. Wash.—Sanderson v Hartford Eastern Ry. Co, 294 P. 241, 153 Wash 472

89. U S—Illinois Cent R. Co v Davis, C C A.Tenn, 32 F 2d 232
52 C J p 224 note 5

90. U S.—Illinois Cent. R Co v. Davis, supra

91. Wis—Keegan v Chicago, M, St P & P Ry. Co, 27 N W.2d 739, 251 Wis 7
52 C J. p 223 note 92.

92. Ga—East Tennessee, etc, R Co. v Markens, 13 S E. 855, 88 Ga. 60, 14 L R A. 281
52 C J p 223 note 93

ject to the power of towns or cities to change the requirements by ordinance applies in such places in the absence of ordinance providing other regulations,[93] as well as if an ordinance exists permitting such signals to be given in case necessity for the safety of persons at crossings requires it.[94]

On the other hand, if a statute provides that certain of the signals provided for highway crossings may be omitted at street crossings in towns and cities, unless required by ordinance, any signal so treated is not required as a matter of law in the absence of an ordinance,[95] but such a statute does not prohibit the sounding of a whistle in a city and does not excuse the railroad from sounding the whistle if it should have been sounded in the exercise of due care.[96] It is an excuse for a failure to give a particular sort of signal that the use of such signal is forbidden by ordinance,[97] but not where it is essential to the safety of persons at dangerous crossings that the forbidden signal be given.[98]

(2) Manner of Signaling or Giving Warning

Signals or warnings must be given in the manner prescribed by the statute or ordinance, and the substitution or other signals or warnings of approach for those required by the law, or the giving of the prescribed signals at times and for distances different from those demanded, does not comply with the law, and does not avoid the effect of the omission of the regulation signals; but there is no requirement that the signal be effective.

As a general rule, signals or warnings must be given in the manner prescribed by the statute or ordinance,[99] and the substitution of other signals or warnings of approach for those required by the law,[1] or the giving of the prescribed signals at times and for distances different from those demanded,[2] does not comply with the law, and does not avoid the effect of the omission of the regulation signals.[3] There is, however, no requirement that such signal shall be heard,[4] or that it be effective,[5] or that it shall be done in a manner calculated to warn of the approach of a train,[6] or that it amount to reasonable notice,[7] since a railroad is not required to give such signals as shall absolutely guarantee the safety of persons at crossings.[8] So, also, under a statute requiring the sounding of a signal at a certain distance from the crossing, no duty is imposed to give a signal warning so that it may be heard for a greater distance than that specified.[9]

93. Ind.—Lake Shore, etc., R. Co. v. Myers, 98 N.E. 654, 100 N.E. 813, 52 Ind.App. 59.
52 C.J. p. 223 note 94

94. Ind.—Chicago, etc., R. Co. v. Ackman, 133 N.E. 164, 80 Ind.App. 169
52 C.J. p. 223 note 95.

95. Iowa.—Pratt v. Chicago, etc., R. Co., 77 N.W. 1064, 107 Iowa 287.
52 C.J. p. 223 note 96.

96. U.S.—Southern Pac. Co. v. Haight, C.C.A.Cal., 126 F.2d 900, certiorari denied 63 S.Ct. 154, 317 U.S. 676, 87 L.Ed. 542.
Iowa.—Coonley v. Lowden, 12 N.W.2d 870, 234 Iowa 731.

97. Ky.—Chesapeake & O. Ry. Co. v. Harrell's Adm'r, 81 S.W.2d 10, 258 Ky. 650.
Mich.—June v. Grand Trunk Western R. Co., 205 N.W. 181, 232 Mich. 449.

98. Iowa.—Langham v. Chicago, etc., R. Co., 198 N.W. 525, 197 Iowa 1118.
Pa.—Bracken v. Pennsylvania R. Co., 82 Pa.Super. 22.

99. Ga.—Chandler v. Pollard, 12 S.E.2d 190, 64 Ga.App. 122
La.—Smith v. Texas & Pac. Ry. Co., App., 189 So. 316—Winfiele v. Texas & P. Ry. Co., App., 150 So. 43.

Number

Three statutory blasts of train approaching highway crossing are required so that if traveler fails to hear first or second he may hear third blast.—New York Cent. R. Co. v. De Leury, 192 N.E. 125, 100 Ind.App. 140.

1. Cal.—Johnson v. Southern Pac. Co., 288 P. 81, 105 Cal.App. 340
Va.—Southern Ry. Co. v. Berry, 1 S.E.2d 261, 172 Va. 266.
52 C.J. p. 238 note 71.

Bell

Under statute, an engineer approaching crossing within corporate limits of city, town, or village is required constantly to toll bell of locomotive, and is not relieved from such duty by blowing whistle of engine.—Chandler v. Pollard, 12 S.E.2d 190, 64 Ga.App. 122

Horn

Fact that remodeled automobile, operated over railway, sounded horn in time to enable automobile on highway to stop, did not preclude guest's recovery against railway, statute contemplating bell or whistle.—Sanderson v. Hartford Eastern Ry. Co., 294 P. 241, 159 Wash. 472.

Waving of lantern

Where, under statute, a railroad was bound to cause whistle or bell on locomotive to be kept ringing or whistling from a designated distance from where railroad intersected highway until highway was reached, the waving of a red lantern by watchman at crossing was not a lawful substitute for ringing of bell or sounding of whistle and did not relieve defendant from performance of statutory duty.—Amos v. Terminal R. Ass'n of St. Louis, Mo.App., 142 S.W.2d 787, applying Illinois law.

2. La.—Smith v. Texas & Pac. Ry. Co., App., 189 So. 316—Winfiele v. Texas & P. Ry. Co., App., 150 So. 43
52 C.J. p. 238 note 72.

3. Ky.—Chesapeake, etc., R. Co. v. Stone, 255 S.W. 134, 200 Ky. 502.
52 C.J. p. 238 note 73.

4. Okl.—Missouri, etc., R. Co. v. Stanton, 189 P. 753, 78 Okl. 167
52 C.J. p. 238 note 74.

5. Ga.—Elberton, etc., R. Co. v. Thornton, 122 S.E. 795, 32 Ga.App. 259
Ky.—Louisville, etc., R. Co. v. Jameson, 283 S.W. 1026, 214 Ky. 552

6. Ill.—Peoria, etc., R. Co. v. Siltman, 67 Ill. 72
52 C.J. p. 238 note 76.

7. Ill.—Toledo, etc., R. Co. v. Cline, 25 N.E. 846, 135 Ill. 41.

8. Okl.—Missouri, etc., R. Co. v. Stanton, 189 P. 753, 78 Okl. 167
52 C.J. p. 238 note 78

9. Miss.—Spilman v. Gulf & S. I. R. Co., 163 So. 445, 173 Miss. 725

Statutes permitting the alternative of ringing the bell or sounding the whistle on an engine after it reaches a specified distance until it passes the crossing, or requiring the sounding of a whistle at a specified distance from the crossing and allowing the use of bell or whistle thereafter until the crossing is passed, are fully satisfied by either alternative,[10] and do not require that both methods of warning shall be employed;[11] but one or the other of the required warnings must continue without cessation until the crossing has been passed.[12] A provision that within the required distance either ringing of the bell or blowing of the whistle shall be done continuously or alternately with the other permits the doing of either for any part or the whole of the prescribed distance and of the other for the remaining part thereof,[13] and does not require that the one or the other shall be done for the whole of the distance,[14] while those statutes requiring the sounding of a whistle or the ringing of a bell at a specified distance from a crossing and the continuous ringing of the bell thereafter until the crossing is passed demand only that the one or the other be done at the distance named and be followed by the ringing of the bell as provided for.[15] Where the statute requires only that the whistle be sounded at the initial point and the bell rung thereafter, the whistle need not be blown continuously from the whistling post until the crossing.[16]

A statutory provision requiring a certain signal to be given when a train or car is at least a certain distance from a crossing requires it to be given not nearer than such distance and within such distance as to serve as a reasonable warning of approach;[17] and it is not necessary that the signal in question be given precisely at the distance mentioned from the crossing.[18] Under a statute requiring the whistle to be sounded a prescribed distance from the crossing, trains starting at a shorter distance need not literally comply with the requirement as to signaling from the greater distance,[19] but, if the continuous ringing of a bell or blowing of a whistle at intervals from a prescribed distance until the crossing is demanded, such trains must give a signal of this kind from the time of starting,[20] and such conduct is a sufficient compliance with the statute.[21] Moreover, where the expressed purpose of the statute is that signals should be given for a time sufficient to give due notice of the approach of the train before the crossing is reached, it is not absolutely essential that the signals be commenced at the time the train starts to move, and it is sufficient if the signal is given in such time as to constitute adequate warning under the circumstances.[22] Statutes requiring the bell to be rung or the whistle sounded at intervals indicate that this shall be done at relatively short intervals and not at widely separated periods.[23]

Where the engine has approached the crossing with its bell ringing and has entirely passed over the crossing, the requirement of a statute that the engine bell should ring continuously until the engine has fully passed the highway crossing is satisfied,[24] and it is not required that the bell continue to be rung until the entire train has crossed the highway.[25] Likewise, under a statutory re-

10. Ill.—Applegate v Chicago & N W. Ry. Co, 78 N E 2d 793, 334 Ill App 141—Nardoni v Chicago & E I. Ry Co., 261 Ill App 339.
La.—Wright v. Texas & N O R Co, App, 19 So 2d 894, rehearing denied 20 So 2d 558—Henderson v Missouri Pac R Co, 131 So. 586, 15 La App. 196
Mo—Hoelzel v Chicago, R I. & P Ry Co, 85 S W 2d 126, 337 Mo 61
52 C.J. p 223 note 99.

11. La—Wright v. Texas & N O R Co, App, 19 So 2d 894, rehearing denied 20 So.2d 558
Mo—Foster v. Kurn, 163 S.W.2d 133, 236 Mo App 1149.
S C—McAbee v Southern Ry. Co, 164 S E 444, 166 S C 166.
52 C.J. p 224 note 1.

12. La.—Browne v. Texas & P. R. Co, App., 193 So 511.
The sounding of one or two blasts of a locomotive whistle for a crossing does not meet statutory requirement of a continuous signal, but a continuous series of blasts for more than required distance is sufficient —Wright v. Texas & N. O. R Co, La.App, 19 So.2d 894, rehearing denied 20 So 2d 558—Smith v Texas & Pac. Ry Co., La App, 189 So 316

13. Ky—Chesapeake, etc, R Co v Stone, 255 S.W 134, 200 Ky. 502
52 C.J. p 224 note 2.

14. Va—Norfolk, etc., R Co v Simmons, 103 S.E. 609, 127 Va 419
52 C.J. p 224 note 3.

15. Tex—Missouri, etc, R. Co v. Kirschoffer, Civ App, 24 S W 577.

16. Tex—Texas & P. Ry. Co. v. Brown, 181 S.W 2d 68, 142 Tex 385 —Houston & T C R Co v. O'Neal, 47 S W. 95, 91 Tex. 671.

17. La—Smith v Texas & Pac Ry. Co, App, 189 So. 316.
Mo—Sing v. St. Louis-San Francisco Ry. Co., 30 S W 2d 37.
52 C J p 224 note 7.

18. U S—Texas, etc, R Co. v Bryant, Tex, 56 F. 799, 6 C C A. 138

19. Ky—Norfolk & W Ry. Co v Barney, 90 S W 2d 14, 262 Ky. 228
52 C J. p 223 note 99.

20. Ark—Missouri Pac R. Co v. Riley, 128 S W 2d 1005, 198 Ark 372
Mass.—Rivet v Boston & M R R, 67 N E 2d 751, 320 Mass 41.
52 C J p 224 note 10.

21. Tex—Houston, etc, R. Co. v Rogers, 39 S.W 1112, 15 Tex.Civ App 680.

22. Ky—Norfolk & W. Ry. Co. v Barney, 90 S W.2d 14, 262 Ky. 228

23. Mo—Hiatt v. St Louis-San Francisco R Co., 271 S W 806, 308 Mo. 77.
52 C.J p 224 note 12.

24. U S—Probert v. Chicago, I. & L Ry. Co., C C A Ill, 93 F 2d 259
Duty of railroad as to lights and signals generally where train or car occupies crossing see supra § 734

25. Tex.—Texas & N. O R. Co. v

quirement that the bell be rung continuously until the "crossing is passed," it has been held that ringing of the bell is required only while the engine is passing the crossing,[26] and that the crossing is "passed" when it has become entirely occupied by the train, whereupon the obligation to continue signals no longer exists.[27] So, also, where, at the time of stopping of a train, the engine has passed over the crossing, with the coaches occupying the crossing, the engineer is not required to sound the whistle or ring the bell when the train begins to move.[28]

§ 737. —— Lookouts

A railroad company under a duty of keeping a lookout must exercise reasonable and ordinary care in this regard, and the failure of those in charge of a train to keep a lookout of the kind and at the times required by law is negligence, rendering the company liable for those injured by reason of such negligence

A railroad company may be under a duty of keeping a lookout at certain crossings, as discussed infra § 738, and its duty in this regard is the exercise of reasonable and ordinary care.[29] The character of the lookout required has been variously characterized by such terms as "vigilant,"[30] "careful,"[31] "reasonable,"[32] "proper,"[33] "continuous,"[34] "constant,"[35] "diligent,"[36] "sharp,"[37] "efficient,"[38] or "effective."[39] When a duty to keep a lookout exists, the servants of the company charged with that duty must be stationed in a position from which it is possible to see the danger,[40] but if, owing to conditions surrounding a crossing, it would not be possible to maintain a sufficient

Stratton, Civ App, 74 S.W.2d 741, error refused, followed in Texas & N O R Co. v Berry, 74 S W 2d 750, error refused

26. Iowa—Butters v Chicago, M, St P. & P R Co, 243 N.W. 597, 214 Iowa 700
Mo—Bell v. Hannibal, etc, R Co, 72 Mo 50

27. Miss—Spilman v. Gulf & S I. R. Co, 163 So 445, 173 Miss 725

28. Iowa—Butters v. Chicago, M, St P. & P R Co, 243 N.W. 597, 214 Iowa 700

29. Ga.—Luke v Powell, 12 S E 2d 196, 63 Ga App 795.
Ill—Shaw v Chicago & E I R. Co, 75 N.E.2d 51, 332 Ill App 285
Ky—Cox's Adm'r v. Cincinnati, N. O & T. P Ry. Co, 37 S.W 2d 859, 238 Ky. 312.
Minn.—Bryant v. Northern Pac. Ry Co., 23 N.W 2d 174, 221 Minn 577
Mo—Krause v. Pitcairn, 167 S.W 2d 74, 350 Mo. 339.
Mont—Pollard v. Oregon Short Line R. Co, 11 P.2d 271, 92 Mont 119
N C—Henderson v Powell, 19 S.E 2d 876, 221 N.C. 239—Johnson v Atlantic Coast Line R Co., 170 S.E 120, 205 N.C. 127
Tenn—Tennessee Cent. Ry. Co v Hayes, 9 Tenn App 116—Louisville & N. R. Co. v. Ross, 2 Tenn App 384.
52 C.J. p 224 note 14.

Constructive knowledge

Trustees of a railroad company are charged with knowledge of such conditions as operators of train, striking pedestrian crossing track, should have observed in exercise of reasonable care—Mocarski v. Palmer, 44 A 2d 64, 132 Conn 349—Cote v Palmer, 16 A.2d 595, 127 Conn 321

Consideration of existing conditions

In order to determine whether operators of railroad train were negligent in failing to see what they should have seen, the conditions existing at the time which would have made it possible for the trainmen to see an object on the track in time to prevent striking it must be taken into consideration—Bahry v Illinois Cent. Ry Co, La App, 13 So. 2d 78

Negligence held not shown

(1) In general.

U S—Kilmer v Norfolk & W. Ry Co, C C A W Va, 45 F 2d 532, certiorari denied 51 S Ct 347, 283 U S 824, 75 L Ed 1438.
Ark—Missouri Pac. R Co v Doyle, 160 S W 2d 856, 203 Ark. 1111
Ohio—Pennsylvania R Co v Millerson, 2 N E 2d 17, 51 Ohio App 528

(2) A railway company, keeping on its locomotive a lookout capable of seeing obstruction on track ahead, but unable to do so because of fog, discharged its full duty under statute requiring every such company to keep some person always on lookout ahead on locomotive and to sound whistle, apply brakes, and employ every possible means to stop train when any person or other obstruction appears on track—Nashville, C & St L Ry v. Smith, Tenn. App, 228 S.W 2d 495

30. Ga—Powell v. Jarrell, 16 S E 2d 198, 65 Ga App 453—Luke v Powell, 12 S E 2d 196, 63 Ga App 795
Mo—March v. Pitcairn, App, 125 S W 2d 972—Hinds v. Chicago, B & Q R Co, App, 85 S W 2d 165
Mont—Pollard v Oregon Short Line R Co, 11 P 2d 271, 92 Mont 119
Nev—Cox v. Los Angeles & S L R Co, 56 P 2d 149, 56 Nev 472, rehearing denied 58 P 2d 373, 56 Nev 510—Deiss v Southern Pac Co, 47 P 2d 928, 56 Nev 151, rehearing denied 53 P 2d 332, 56 Nev 151
52 C J p 225 note 15

31. U S—Continental Impr. Co. v Stead, Ind., 95 U.S 161, 24 L Ed 403
Hawaii—Andrade v Oahu R, etc, Co, 27 Hawaii 381

32. N Y—Lee v Pennsylvania R Co, 280 N Y S 285, 244 App Div 558, reversed on other grounds 198 N.E 629, 269 N Y 53, reargument denied 200 N E 52, 269 N Y 674, amendment of remittitur denied 1 N E 2d 364, 270 N Y 629
Vt—Meyette v Canadian Pac. Ry Co, 6 A 2d 33, 110 Vt 345.
52 C J. p 225 note 17.

33. Ga—Gay v Sylvania Cent R Co, 53 S E 2d 713, 79 Ga App. 362.
Iowa—Simmons v Chicago, R. I. & P Ry Co, 252 N W. 516, 217 Iowa 1277
Tex.—Burlington-Rock Island R Co v Ellison, Civ App, 159 S.W 2d 569, affirmed 167 S W.2d 723, 140 Tex 353
52 C J. p 225 note 18.

34. Iowa.—Ressler v Wabash R Co., 132 N W 827, 152 Iowa 449.

35. Ark—Missouri Pac R Co v Mitchell, 122 S W 2d 544, 197 Ark 400
Ga—Powell v Jarrell, 16 S E 2d 198, 65 Ga App 453
52 C.J p 225 note 20.

36. Ala—Atlantic Coast Line R Co. v Jones, 78 So 645, 16 Ala App 447.

37. Mo—Anderson v St. Louis-San Francisco Ry Co, Mo App, 63 S W 2d 182
52 C.J p 225 note 22

38. U S—Harrod v Missouri Pac. R. Co, D.C Ark, 26 F Supp. 619

39. U S—Poe v Chesapeake & O Ry. Co, D C Ky, 64 F Supp. 358
52 C J. p 225 note 23

40. U S—Harrod v Missouri Pac R. Co, D.C Ark, 26 F Supp 619.
Ark—Kelly v DeQueen & Eastern Railroad Co, 298 S.W. 347, 174 Ark. 1000.
52 C J p 225 note 24.

lookout on an approaching train, the failure to have a lookout will not render a railroad company liable.[41]

The duty to keep a lookout devolves on those servants of a railroad in charge of its trains, more specifically, the engineer[42] or the engineer and fireman jointly,[43] in order that the railroad may perform its duty, in certain circumstances, of looking out on both sides of the engine;[44] but it has also been held that the engineer and fireman need not both be on constant watch for travelers at a crossing.[45] The fireman must keep a lookout at any time when the engineer is so occupied or situated as to be unable to do so.[46] The railroad ordinarily need not station extra men in the engine for the purpose of keeping a lookout,[47] nor does this obligation rest on the agents or servants of a company other than those in charge of a train, in its usual and ordinary operation.[48] The trainman keeping a lookout need not keep his eyes constantly on the road,[49] and, if the safety of the passengers and the proper operation of the train make it necessary that he perform other duties which prevent his keeping a lookout, his failure to maintain a lookout cannot be regarded as negligent.[50] The mere fact that the engineer in charge of a train did not see a vehicle approaching on a highway at a crossing is not sufficient to support an inference of negligence.[51]

In order to maintain a proper lookout, the persons charged with such duty must look ahead along the track,[52] and watch out for travelers who have reached the railroad's right of way,[53] but it has been held that no duty exists to observe persons beyond the right of way,[54] such as persons near and alongside the crossing,[55] although some decisions impose the duty of lookout over a wider area.[56] The chief purpose of the lookout duty is to pro-

41. Tex.—Andrews v. Mynier, Civ App., 190 S.W. 1164.
Va.—U. S. Spruce Lumber Co. v. Shumate, 87 S.E. 723, 118 Va. 471
52 C.J. p. 225 note 25

42. Ga.—Powell v. Jarrell, 16 S.E. 2d 198, 65 Ga. App. 453.
Ky.—Kentucky & Indiana Terminal R. Co. v. Cantrell, 184 S.W.2d 111, 298 Ky. 743
Miss.—Alabama Great Southern R. Co. v. Martin, 39 So.2d 501, 205 Miss. 851
Mo.—Womack v. Missouri Pac. R. Co., 88 S.W.2d 368, 337 Mo. 1160.—Grotjan v. Thompson, App., 140 S.W.2d 706.
52 C.J. p. 225 note 27.

43. Nev.—Deiss v. Southern Pac. Co., 47 P.2d 928, 56 Nev. 151, rehearing denied 53 P.2d 332, 56 Nev. 151.
W.Va.—Tawney v. Kirkhart, 44 S.E. 2d 634, 130 W.Va. 550
52 C.J. p. 225 note 28

When not busy

The duty of keeping a lookout is as much on the fireman when he is not busy with his fires as on the engineer.—Yazoo & M.V.R. Co. v. Lum, 2 So.2d 561, 191 Miss. 170.

44. Utah.—Malizia v. Oregon Short Line R. Co., 178 P. 756, 53 Utah 122
52 C.J. p. 225 note 29.

45. La.—Winfiele v. Texas & P. Ry. Co., App., 150 So. 43.

Attending other duties

Where engineer was keeping proper lookout and saw automobile approaching crossing until his vision was obstructed by engine while fireman was attending to other duties, railroad was not negligent because fireman was not keeping lookout on his side from which automobile approached.—Winfiele v. Texas & P. Ry. Co., supra

46. U.S.—Callaway v. Christison, C.C.A. Tenn., 148 F.2d 303.
Mo.—Thrower v. Henwood, 173 S.W. 2d 861, 351 Mo. 663.—March v. Pitcairn, App., 125 S.W.2d 972
52 C.J. p. 225 note 30

Ordinary care

Railroad fireman was bound to have seen truck approaching railroad crossing if by exercise of ordinary care he could have seen it.—Hoelzel v. Chicago, R.I. & P. Ry. Co., 85 S.W.2d 126, 337 Mo. 61.

47. Mo.—Kirkdoffer v. St. Louis-San Francisco Ry. Co., 37 S.W.2d 569, 327 Mo. 166
52 C.J. p. 226 note 31.

48. Mo.—Thrower v. Henwood, 173 S.W.2d 861, 351 Mo. 663.
52 C.J. p. 226 note 32

49. N.Y.—Lee v. Pennsylvania R. Co., 280 N.Y.S. 285, 244 App. Div. 558, reversed on other grounds 198 N.E. 629, 269 N.Y. 53, reargument denied 200 N.E. 52, 269 N.Y. 674, amendment of remittitur denied 1 N.E.2d 364, 270 N.Y. 629.

50. La.—**Corpus Juris quoted in** Winfiele v. Texas & P. Ry. Co., App., 150 So. 43, 47
52 C.J. p. 226 note 33.

51. Cal.—Gundry v. Atchison, T. & S.F. Ry. Co., 286 P. 718, 104 Cal. App. 753.
Mich.—Perch v. New York Cent. R. Co., 293 N.W. 778, 294 Mich. 227, followed in Balicki v. New York Cent. R. Co., 293 N.W. 892, 294 Mich. 639
52 C.J. p. 226 note 35.

Blinding lights

Where proof showed that engineer was blinded by lights of approaching automobile and was thereby prevented from seeing stalled automobile near private country crossing in time to avoid collision, although everything possible consistent with safety of passengers was done after stalled automobile was discovered, the railroad was not liable for destruction of the automobile.—Alabama Great Southern R. Co. v. Martin, 39 So.2d 501, 205 Miss. 851

52. Ark.—Missouri Pac. R. Co. v. Eubanks, 139 S.W.2d 413, 200 Ark. 483
52 C.J. p. 226 note 36.

53. Mo.—Rice v. St. Louis-San Francisco Ry. Co., App., 52 S.W.2d 746.

54. Miss.—Mobile & O. R. Co. v. Johnson, 141 So. 581, 165 Miss. 397

55. Ky.—Louisville, etc., R. Co. v. Engleman, 122 S.W. 833, 135 Ky. 515, 21 Ann. Cas. 565.
52 C.J. p. 226 note 37.

56. Ark.—Missouri Pac. R. Co. v. Eubanks, 139 S.W.2d 413, 200 Ark. 483.—Missouri Pac. R. Co. v. Greene, 6 S.W.2d 26, 177 Ark. 217
Mo.—Thrower v. Henwood, 173 S.W. 2d 861, 351 Mo. 663.
52 C.J. p. 226 note 38.

Adjacent highways

The duty of railroad engine crew to maintain a lookout is limited to the track and streets and highways adjacent to the track.—Hynek v. Kewaunee, G. B. & W. Ry. Co., 29 N.W. 2d 45, 251 Wis. 319.

Points within perspective

Engineer's duty on approaching crossing and station is to watch all points within perspective, including station platform and signals from agent.—Morris v. Boston & M.R.R., 160 A. 52, 85 N.H. 265.

tect the traveling public from the consequences of its own negligence,[57] and so the fact that proper signals have been given and other precautions taken to apprise travelers at a crossing of the approach of a train will not relieve it of the duty to keep a lookout.[58] The fact that a train is approaching a crossing off the scheduled time imposes a duty of extra watchfulness on those in charge of it,[59] and, similarly, the failure to keep a lookout is to be considered in connection with the speed at which the train is running,[60] the amount and kind of travel over the crossing reasonably to be expected,[61] and the presence or absence of safeguards.[62]

The failure of those in charge of a train to keep a lookout of the kind and at the times required by law is negligence,[63] rendering a railroad liable for those injured by reason of such negligence,[64] if the breach of duty is the proximate cause of their injuries.[65]

§ 738. —— At What Crossings Required

a. In general
b. Private crossings
c. Crossings by custom
d. Crossings by invitation or license

a. In General

The liability of a railroad company to an individual with respect to its duty as to lights, signals, and lookouts at crossings is determined by the law applicable to the crossing at which he is injured, and where breach of a statutory duty is relied on, it must be shown that the crossing at which the injury occurred was one within the scope of the statute. The duty to give proper signals and warnings of approach, and to keep a proper lookout, usually exists in the case of an approach to a public crossing.

The liability of a railroad company to an individual with respect to its duty as to lights, signals, and lookouts at crossings is determined by the law applicable to the crossing at which he is injured,[66] and a failure to give the signals required for another crossing is ordinarily no breach of duty to one who is at a crossing for which no signals are required.[67] Where breach of a statutory duty is relied on, it must be shown that the crossing at which the injury occurred was one within the scope of the statute.[68]

At public crossings,[69] and especially street cross-

57. Ky.—Chesapeake, etc., R. Co. v. Banks, 137 S.W. 1066, 144 Ky. 137, affirmed 34 S.Ct. 278, 232 U.S. 146, 58 L.Ed. 544.

Intent of statute

The statute making railroads liable for failure to keep constant lookout for persons and property on the tracks manifests intent to protect persons who unwittingly, although carelessly or negligently, or as trespassers, enter danger zones near tracks and particularly intersections or grade crossings.—Missouri Pac. R. Co. v. Nelson, 115 S.W.2d 872, 195 Ark. 883.

58. Ky.—Kentucky & Indiana Terminal R. Co. v. Cantrell, 184 S.W.2d 111, 298 Ky. 743.
52 C.J. p. 226 note 40.

Gates or lights

The erection and maintenance of gates or lights do not relieve the engineer of duty to keep a lookout ahead.—Kentucky & Indiana Terminal R. Co. v. Cantrell, 184 S.W.2d 111, 298 Ky. 743.

59. Mich.—Guggenheim v. Lake Shore, etc., R. Co., 33 N.W. 161, 66 Mich. 150.

60. Ky.—Chesapeake, etc., R. Co. v. Boren, 259 S.W. 711, 202 Ky. 348.
52 C.J. p. 226 note 42.

61. Vt.—Johnson v. Rutland R. Co., 106 A. 682, 93 Vt. 132.
52 C.J. p. 226 note 43.

62. Vt.—Johnson v. Rutland R. Co., supra.
52 C.J. p. 226 note 44.

63. N.C.—Johnson v. Atlantic Coast Line R. Co., 170 S.E. 120, 205 N.C. 127.
52 C.J. p. 226 note 45.

64. Mont.—Pollard v. Oregon Short Line R. Co., 11 P.2d 271, 92 Mont. 119.
N.C.—Johnson v. Atlantic Coast Line R. Co., 170 S.E. 120, 205 N.C. 127.
52 C.J. p. 227 note 46.

65. U.S.—Markar v. New York, N.H. & H.R. Co., C.C.A.Conn., 77 F.2d 282.
N.C.—Johnson v. Atlantic Coast Line R. Co., 170 S.E. 120, 205 N.C. 127.
52 C.J. p. 227 note 47.

66. U.S.—Illinois Cent. R. Co. v. Davis, C.C.A.Tenn., 32 F.2d 232.
Or.—**Corpus Juris quoted in** Case v. Northern Pac. Terminal Co., 160 P.2d 313, 317, 176 Or. 643.

67. Or.—**Corpus Juris quoted in** Case v. Northern Pac. Terminal Co., 160 P.2d 313, 317, 176 Or. 643.
52 C.J. p. 227 note 49.

68. Ky.—Deitz' Adm'x v. Cincinnati, N.O. & T.P. Ry. Co., 176 S.W.2d 699, 296 Ky. 279.—Collins' Adm'r v. Chesapeake & O. Ry. Co., 124 S.W.2d 1039, 276 Ky. 659.

69. Mo.—Womack v. Missouri Pac. R. Co., 88 S.W.2d 368, 337 Mo. 1160.
N.C.—Caudle v. Seaboard Air Line Ry. Co., 163 S.E. 122, 202 N.C. 404.
52 C.J. p. 227 note 50.

In Tennessee

(1) Where a statute requires a signal by the engine driver only for crossings designated and marked by signs, and such statute undertakes to define the entire duty of railroads as to warnings at every grade crossing, the railroad has no common-law duty to give effective warning on approaching a crossing which is not properly designated and marked by signs.—Southern Ry. Co. v. Noah, 176 S.W.2d 826, 180 Tenn. 532.—52 C.J. p. 241 note 2 [c] (1).

(2) Nevertheless the common-law duty with respect to lookouts prevails at all crossings.—Whittaker v. Louisville, etc., R. Co., 179 S.W. 140, 132 Tenn. 576.

(3) Although under statute failure to give warning of train's approach to unmarked public grade crossing is not in itself negligence, if railway company commits other acts of common-law negligence, it may be under duty to give warning of approach to such unmarked crossing, since statute is not a license to railway company to commit other acts of common-law negligence.—Cincinnati, N.O. & T.P. Ry. Co. v. Garrett, 154 S.W.2d 435, 25 Tenn.App. 173.

(4) A warning must be given of the approach of a train to a public grade crossing, whether marked or unmarked, where such crossing is rendered extrahazardous by common-law acts of negligence on the part of a railway company other than failure to give warning by whistle and bell, notwithstanding the statute.—Cincinnati, N.O. & T.P. Ry. Co. v. Garrett, supra.

ings in cities or towns,[70] proper signals and warnings of approach must be given[71] and a proper lookout kept;[72] and a failure in this respect is negligence.[73] Some statutory provisions requiring certain precautions in the operation of trains and cars impose a duty on the railroad company only with respect to trains and cars moving toward public highway crossings of the kind designated.[74] Such provisions are generally held to apply not only to crossings of formally established public highways,[75] but also to all crossings which are public in fact,[76] as through dedication[77] or

70. Nev—Cox v. Los Angeles & S. L R Co., 56 P 2d 149, 56 Nev 472, rehearing denied 58 P 2d 373, 56 Nev 510
N C—Johnson v. Atlantic Coast Line R. Co, 170 S E 120, 205 N C 127.
Va—Southern R Co v Campbell, 1 S E 2d 255, 172 Va. 311.
52 C J. p 227 note 51.

71. N C—Johnson v Atlantic Coast Line R. Co, 170 S E. 120, 205 N C 127—Caudle v Seaboard Air Line Ry Co, 163 S E 122, 202 N C 404.
52 C.J. p 227 note 52.

72. Ky—Louisville & N. R Co v Elzey, 194 S W 2d 962, 302 Ky. 407—Kentucky & Indiana Terminal R. Co v Cantrell, 184 S W 2d 111, 298 Ky. 743—Franklin v Louisville & N. R Co., 102 S W 2d 1010, 267 Ky. 577—Louisville & N R Co v. Treanor's Adm'r, 200 S W. 634, 179 Ky 337.
Mo—Womack v. Missouri Pac. R Co, 88 S W 2d 368, 337 Mo 1160—Bray v. St Louis-San Francisco Ry Co, App, 236 S W 2d 758—Hutchison v Thompson, App, 167 S W.2d 96, transferred, see, Sup, 175 S.W 2d 903—Hinds v Chicago, B. & Q R. Co, App, 85 S W 2d 165
Nev—Cox v Los Angeles & S L R. Co, 56 P 2d 149, 56 Nev 472, rehearing denied 58 P 2d 373, 56 Nev. 510
N C—Johnson v. Atlantic Coast Line R Co, 170 S E 120, 205 N C 127
Pa—Doran v Pittsburgh Rys. Co, 22 A 2d 826, 343 Pa 204
52 C.J p 227 note 53.

73. N C—Johnson v Atlantic Coast Line R Co, 170 S E 120, 205 N C 127—Caudle v. Seaboard Air Line Ry Co, 163 S E 122, 202 N C. 404
Va.—Southern R Co v. Campbell, 1 S E 2d 255, 172 Va. 311.
52 C J. p 227 note 54.

74. Idaho—Judd v. Oregon Short Line R. Co, 44 P.2d 291, 55 Idaho 461
Ky—Deitz' Adm'x v. Cincinnati, N. O. & T. P. Ry. Co., 176 S.W.2d 699, 296 Ky 279
52 C.J p 227 note 55.

Highway crossing

(1) A railroad crossing at point where a private dirt road formed extension of paved highway, the dirt road having been used by property owners and by the public generally for many years and railroad having constructed warning sign at crossing, was a "highway crossing" within meaning of statute requiring sounding of whistle and ringing of bell by locomotives at highway crossings.—Chesapeake & O Ry Co v. Pulliam, 41 S E 2d 54, 185 Va 908

(2) City street held "highway" within statutes requiring, and penalizing railroad's failure to give, signals at "highway" crossings, where city had ordinance enacted pursuant to statutory authority requiring signals—Norfolk & W Ry. Co v. White, 163 S E 530, 158 Va 243

Public highway

(1) Under the statute requiring sounding of bell or whistle when railroad engine is approaching any "highway" at grade, quoted word is used in the usual sense of a public way and does not include a private way—Stavola v. Palmer, 73 A 2d 331, 136 Conn. 670.

(2) Road which was entirely within railroad's right of way lines and which was used by farmers with permission of railroad in connection with depot was not "public highway" so as to render railroad company, whose train struck automobile at road crossing, negligent for failure to sound whistle—Langer v Chicago, M, St P & P. Ry Co, 265 N W 851, 220 Wis 571

Public way

If the public has right to use a way and exercises that right, even though it is neither dedicated as a highway nor maintained as such at public expense, it may be properly deemed a "public way" within statute requiring certain warning to be given at least a designated distance from place where railroad crosses public way.—Lemieux v Leonard Const. Co, 56 A 2d 189, 73 R I 338, reargument denied 58 A 2d 625, 73 R I. 338.

Held not a "public crossing"

Crossing leading to opening of private driveway located midway of block, there being no similar opening on opposite side of street, was not "public crossing" over railroad tracks in street within purview of statute requiring signals to be given by locomotives—Knight v Wabash Ry Co, Mo, 85 S W 2d 392

In Tennessee

(1) The statutes relating to railroads' duty to warn at grade crossings apply to every crossing whether such crossing be considered dangerous or otherwise—Southern Ry Co v. Noah, 176 S.W 2d 826, 180 Tenn 532

(2) Under such statutes, the duty exists to give a warning signal only when approaching a highway crossing which has properly been designated and marked by signs
U S—Southern R Co v Elder, C C A 6, 81 F 791
Tenn—Southern Ry Co v Noah, 176 S W 2d 826, 180 Tenn 532—Graves v. Illinois Cent R Co, 148 S W 239, 126 Tenn 148—Cincinnati, N O & T P. Ry Co v Garrett, 154 S W 2d 435, 25 Tenn App 173—Tennessee Cent Ry Co v. Zearing, 2 Tenn App 451

(3) Where the crossing has not been designated by the required statutory signals as provided, no liability can be predicated on the failure of the defendant company to comply with the additional requirements of the statute as to precautions to be taken, and the burden of proof is on plaintiff to show that the crossing has been thus designated—Louisville & N R Co v Ross, 2 Tenn App 384

75. Ky—Deitz' Adm'x v Cincinnati, N O & T P Ry Co, 176 S W 2d 699, 296 Ky 279
52 C J p 228 note 56

76. Neb—McQuin v Missouri Pac R. Corporation, 240 N W 515, 122 Neb 423—Chicago, B & Q R Co v Metcalf, 63 N W. 51, 44 Neb 848, 28 L R A 824
R I—Lemieux v Leonard Const Co, 56 A 2d 189, 73 R I 338, reargument denied 58 A 2d 625, 73 R I 338
52 C J p 228 note 57.

77. Ky—Deitz' Adm'x v. Cincinnati, N O & T P Ry Co, 176 S W.2d 699, 296 Ky. 279
52 C J p 228 note 58.

Acceptance

In order that a crossing may be a "public crossing" so as to require statutory warning signals by railroad, the road on which it is situated must be a public road established either in manner prescribed by statute or by dedication and if in the latter manner, there must be an acceptance.—Deitz' Adm'x v. Cincinnati, N. O & T. P. Ry. Co, supra.

No express dedication by the railroad is required if, by its conduct, it manifests a willingness to regard a crossing over its track as public
Cal—Gregoriev v Northwestern Pac. R Co, 273 P 84, 95 Cal App 428
R I—Lemieux v Leonard Const. Co, 56 A 2d 189, 73 R I 338, reargument denied 58 A 2d 625, 73 R I 338.

prescription[78] Some provisions are broad enough to cover and include in their protection street crossings in incorporated towns and cities,[79] but other statutes have been held inapplicable to crossings within a municipality[80] or to crossings within an incorporated town or city[81] When a highway has been discontinued[82] and never reestablished,[83] there is no longer any duty to give statutory signals for a place where it crosses over a railroad track,[84] unless the discontinuance has been conditional and the condition is not yet complied with.[85]

At crossings over the tracks of a railroad company in its yards on its private premises there is no obligation to give the signals required at crossings generally,[86] even though such roads are constructed by the company and designed for ingress to, and egress from, its depot and premises,[87] but it must observe due care under the circumstances,[88] and a lookout statute requiring a constant lookout for persons on the track has been held to impose such a duty even as to trains being operated in the yards of the railroad company.[89] In approaching crossings just outside switch yards as a train departs therefrom, the statutory signals must be given[90] The statutory signals must be given, although the track on which a train is approaching a crossing is a side track.[91] The fact that gates or other local precautions to warn travelers have been installed at a crossing does not make it any less incumbent on a railroad to give the appropriate signals of approach and keep the proper lookout,[92] nor does the fact that another train is standing or running over a crossing on which there are two or more tracks.[93] The place where a railroad track runs at right angles across an alley which is not traveled or capable of being traveled except at one end, which travel does not cross the railroad, is not such a crossing as to require the giving of the signals required by statute.[94]

b. Private Crossings

Ordinarily no duty exists to give statutory signals at private crossings unless the statute expressly extends the duty to such crossings. Apart from statute, whether a duty exists to give signals at these crossings depends on the circumstances existing at the particular time, and the exercise of due care, under the existing surroundings and circumstances, may make necessary the giving of signals at such places

Ordinarily no duty exists to give statutory signals at private crossings,[95] but if the statute expressly extends the duty to all crossings, the rule

78. Ga.—Southern R. Co. v. Combs, 53 S.E. 508, 124 Ga. 1004.
52 C.J. p 228 note 59.

79. Ga.—Luke v. Powell, 12 S.E.2d 196, 63 Ga.App. 795
52 C.J. p 228 note 60

Provisions as to lookout
Ga.—Luke v. Powell, 12 S.E.2d 196, 63 Ga.App. 795.

Towns which enact ordinances
Statutes requiring, and penalizing railroad's failure to give, signals at public highway crossings were intended to apply to crossings within incorporated towns which enact ordinances, pursuant to statute, requiring signals.—Norfolk & W. Ry. Co. v. White, 163 S.E. 530, 158 Va. 243.

80. Wis.—Keegan v. Chicago, M., St. P. & P. Ry. Co., 27 N.W.2d 739, 251 Wis. 7

Part inside and part outside
The statute requiring train approaching crossing outside municipality to blow whistle is inapplicable where crossing is partly inside and partly outside municipality.—Riley v. Chicago & N. W. Ry. Co., 38 N.W.2d 522, 255 Wis. 172.

81. Ga.—Luke v. Powell, 12 S.E.2d 196, 63 Ga.App. 795
Ky.—Deitz' Adm'x v. Cincinnati, N. O. & T. P. Ry. Co., 176 S.W.2d 699, 296 Ky. 279—Collins' Adm'r v. Chesapeake & O. Ry. Co., 124 S.W.2d 1039, 276 Ky. 659.
Va.—Atlantic Coast Line R. Co. v. Clements, 36 S.E.2d 553, 184 Va. 656

Local regulation
Statute imposing on railroads duty of signaling of approaching trains to public crossing has no application to crossings in cities, where local government regulates the giving of signals.—Deitz' Adm'x v. Cincinnati, N. O. & T. P. Ry. Co., 176 S.W.2d 699, 296 Ky. 279

82. Ky.—Louisville, etc., R. Co. v. Whittle, 287 S.W. 894, 216 Ky. 314.
Mass.—Coakley v. Boston, etc., R. Co., 33 N.E. 930, 159 Mass. 32.

Abandoned segment
Where an abandoned segment of a county road which paralleled railroad right of way on south side was connected to highway to the north of right of way by a road and crossing which were constructed by railroad in order to give farmers access to highway from their lands, the abandoned segment, connecting "road," and "crossing" were not "public" with respect to railroad's duty to sound warning when trains approached the crossing.—Virginian Ry. Co. v. Rodgers, 197 S.E. 476, 170 Va. 581.

83. Ky.—Louisville, etc., R. Co. v. Whittle, 287 S.W. 894, 216 Ky. 314

84. Ky.—Louisville, etc., R. Co. v. Whittle, supra
Mass.—Coakley v. Boston, etc., R. Co., 33 N.E. 930, 159 Mass. 32.

85. N.Y.—Rodrian v. New York, etc., R. Co., 7 N.Y.S. 811, 55 Hun 606, reversed on other grounds 26 N.E. 741, 125 N.Y. 526

86. Mo.—Gurley v. Missouri Pac. R. Co., 16 S.W. 11, 104 Mo. 211
52 C.J. p 228 note 65

87. Mo.—Hodges v. St. Louis, etc., R. Co., 71 Mo. 50—Bauer v. Kansas Pac. R. Co., 69 Mo. 219

88. Mo.—Hodges v. St. Louis, etc., R. Co., 71 Mo. 50.

89. Ark.—Ft. Smith, etc., R. Co. v. Missek, 131 S.W. 686, 966, 96 Ark. 243.

90. N.Y.—Casey v. New York Cent., etc., R. Co., 78 N.Y. 518

91. Ga.—Bryson v. Southern R. Co., 59 S.E. 1124, 3 Ga.App. 407

92. Ind.—Lake Shore, etc., R. Co. v. Myers, 98 N.E. 654, 100 N.E. 313, 52 Ind.App. 59
52 C.J. p 228 note 70.

93. Tex.—Brown v. Griffin, 9 S.W. 546, 71 Tex. 654.
52 C.J. p 229 note 71.

94. N.Y.—Byrne v. New York, etc., R. Co., 94 N.Y. 12.

95. Conn.—Code v. Palmer, 16 A.2d 595, 127 Conn. 321.
Ill.—Emge v. Illinois Cent. R. Co., 17 N.E.2d 612, 297 Ill.App. 344
Iowa.—Nichols v. Chicago, etc., R. Co., 100 N.W. 1115, 125 Iowa 236
Ky.—Chesapeake & O. Ry. Co. v.

is otherwise.[96] Apart from statute, whether a duty exists to give signals at private crossings depends on the circumstances existing at the particular time.[97] Ordinarily, at common law, no duty exists to give warning of the approach of trains to private crossings,[98] unless some unusual condition makes such action proper and necessary.[99] On the other hand, the exercise of due care, under the existing surroundings and circumstances, may make necessary the giving of some signals at such crossings,[1] and, if so, a failure to give warning of approach is negligence.[2] If at a private crossing people pass in such numbers that their presence should be anticipated[3] or the company is aware of such frequent user,[4] the company may have a duty to give warning of the approach of its trains or cars to crossings thus used, and if it has been customary for it to signal its approach to a crossing of this character[5] and the public relies on this being done,[6] reasonable[7] and customary[8] signals must be given.

Where a private crossing is so close to a public crossing that travelers on the former are accustomed to rely on the statutory warning being given for the latter, a failure to give the signals prescribed by statute for the public crossing is a breach of duty toward those on the private crossing.[9] On the other hand, a whistle given for a

Burke's Adm'x, 187 S.W.2d 295, 299 Ky. 851

Mass.—Guertin v. Trustees of New York, N. H. & H. R. Co., 76 N.E.2d 24, 322 Mass. 91.

Mo.—Fowler v. Missouri, K. & T. R. Co., 84 S.W.2d 194, 229 Mo.App. 561.

N.H.—Wentworth v. Boston & M. R. R., 166 A. 265, 86 N.H. 251.

52 C.J. p. 229 note 73

96. Cal.—Emmolo v. Southern Pac. Co., 204 P.2d 427, 91 Cal.App.2d 87

52 C.J. p. 229 note 74.

97. Miss.—New Orleans & N. E. R. Co. v. Keller, 138 So. 358, 162 Miss. 392—Y. & M. V. R. R. Co. v. Lucken, 102 So. 393, 137 Miss. 572

Mo.—Fowler v. Missouri, K. & T. R. Co., 84 S.W.2d 194, 229 Mo.App. 561

98. Ky.—Illinois Central R. Co. v. Maxwell, 167 S.W.2d 841, 292 Ky. 660

La.—Guidry v. Texas & N. O. R. Co., App., 20 So.2d 637—Lockhart v. Missouri Pac. R. Co., App., 153 So. 577

52 C.J. p. 229 note 75.

Duty not assumed

Railroad company assumed no new duty as to signaling when it granted permission to use private farm crossing on condition that flagman be stationed there by contracting company which took such license subject to use of road in manner in which it was used when license was granted—Wentworth v. Boston & M. R. R., 166 A. 265, 86 N.H. 251.

Railroad rule

An engine was not "approaching and passing a public crossing" within a railroad's rule requiring that bell be rung while "approaching and passing public crossings" where accident occurred at a private farm crossing—Follett v. Boston & M. R. R., 33 N.E.2d 269, 308 Mass. 553

99. La.—Guidry v. Texas & N. O. R. Co., App., 20 So.2d 637—Lockhart v. Missouri Pac. R. Co., App., 153 So. 577.

Disregard of safety

Warning to person at private crossing is not necessary until it becomes evident that he will ignore and disregard entirely his own safety—New Orleans & N. E. R. Co. v. Keller, 138 So. 358, 162 Miss. 392

1. Idaho.—Judd v. Oregon Short Line R. Co., 44 P.2d 291, 55 Idaho 461

Ill.—Emge v. Illinois Cent. R. Co., 17 N.E.2d 612, 297 Ill.App. 344

Mo.—Fowler v. Missouri, K. & T. R. Co., 84 S.W.2d 194, 229 Mo.App. 561

52 C.J. p. 229 note 76.

Lesser measure of precaution need be taken at a private farm crossing than at a public crossing where the danger is greater—Tomlinson v. Northwestern Electric Service Co. of Pennsylvania, 151 A. 680, 301 Pa. 72—52 C.J. p. 229 note 76 [d]

2. Ill.—Emge v. Illinois Cent. R. Co., 17 N.E.2d 612, 297 Ill.App. 344

52 C.J. p. 230 note 77.

3. U.S.—Thomas v. Southern Ry. Co., C.C.A.Ga., 92 F.2d 445.

N.Y.—Fischer v. New York Cent. R. Co., 66 N.Y.S.2d 557, 188 Misc. 72, affirmed 77 N.Y.S.2d 196, 273 App.Div. 135, reargument and appeal denied 78 N.Y.S.2d 556, 273 App.Div. 929, appeal dismissed, In re Hoppe's Estate, 80 N.E.2d 351, 297 N.Y. 956

52 C.J. p. 230 note 78.

Habitual use not shown

Where railroad crossing was a private one and evidence showed that crossing was used only by about seventy-five persons daily, this was not such habitual use as to impose on the railroad statutory duty of lookout and warning as to persons passing the crossing—Deitz' Adm'x v. Cincinnati, N. O. & T. P. Ry. Co., 176 S.W.2d 699, 296 Ky. 279

Farm crossing

(1) Ordinary farm crossing or private crossing in the country, which is normally used only by the proprietor and his family, is not such a place that the company is required to anticipate the presence of persons—Louisville, etc., R. Co. v. Kirk, 194 S.W. 925, 175 Ky. 588

(2) Under statute providing for necessary farm crossings for use of proprietors or owners of land adjoining railroads, a railroad company would have no duty to keep lookout for general public at private farm crossing in absence of known frequent public use—English v. Wabash Ry. Co., 108 S.W.2d 51, 341 Mo. 550.

4. U.S.—Thomas v. Southern Ry. Co., C.C.A.Ga., 92 F.2d 445

52 C.J. p. 230 note 79

5. Ky.—Illinois Central R. Co. v. Maxwell, 167 S.W.2d 841, 292 Ky. 660

Mo.—Fowler v. Missouri, K. & T. R. Co., 84 S.W.2d 194, 229 Mo.App. 561

52 C.J. p. 230 note 81

6. Ky.—Illinois Central R. Co. v. Maxwell, 167 S.W.2d 841, 292 Ky. 660

52 C.J. p. 230 note 82.

7. Ky.—Illinois Central R. Co. v. Maxwell, supra.

52 C.J. p. 230 note 83

8. Mo.—Fowler v. Missouri, K. & T. R. Co., 84 S.W.2d 194, 229 Mo.App. 561

52 C.J. p. 230 note 84

9. Okl.—**Corpus Juris quoted in** Atchison, T. & S. F. Ry. Co. v. Hunter, 49 P.2d 86, 93, 173 Okl. 415.

52 C.J. p. 231 note 85

Station whistle

(1) It has been held that station whistle which the railroad is accustomed to blow imposes on it no obligation to those using a nearby private crossing and no liability for omission of such signal—Annapolis, etc., R. Co. v. State, 65 A. 434, 104 Md. 659.

(2) It has also been held, however, that maintenance by railroad of post as a place for a station whistle cast on railroad duty of observing due care to sound whistle at such point,

public crossing adjacent to a private crossing may suffice for the latter.[10] If such circumstances exist as to make a private crossing unusually hazardous, that may result in a duty to warn[11]

According to some decisions, a railroad company is required to maintain a lookout at private crossings,[12] but there is also authority to the contrary.[13]

c. Crossings by Custom

Ordinarily, the signals required by statute for public crossings need not be given at a crossing which is not public in fact, notwithstanding such crossing has been used by the public for a considerable time constantly and in large numbers, so that the presence of members of the public is to be anticipated at such place; but it is the duty of the railroad company at such places to give such signals of approach and keep such lookout as are necessary at common law.

Ordinarily, the signals required by statute for public crossings need not be given at a crossing which is not public in fact notwithstanding such crossing has been used by the public for a considerable time constantly in large numbers so that the presence of members of the public is to be anticipated at such place[14] Apart from statute, however, the railroad company may be required to take precautions to protect travelers at such crossings, particularly in cities and towns,[15] although its duty is not limited to crossings in cities and villages[16] Accordingly it is the duty of the railroad company at such places to give such signals of approach[17] and keep such lookout[18] as are necessary at common law, and a failure in one or the other of these duties is negligence.

d. Crossings by Invitation or License

At places where a railroad company has extended to the public an invitation to pass over its tracks, or where, by acquiescing in such a course of conduct, it has licensed its so doing, the company must give such warnings and signals of approach and keep such lookout as are requisite in the exercise of due care, although it need not observe at such places the requirements provided by statute for public crossings.

At places where a railroad company has extended to the public an invitation to pass over its tracks,[19] or where, by acquiescing in such a course of conduct, it has licensed its so doing,[20] precau-

with respect to injury incurred at nearby private crossing—Fowler v Missouri, K. & T R Co., 84 S W 2d 194, 229 Mo App 561.

10. Ohio—Pennsylvania R Co v. Milleson, 2 N.E 2d 17, 51 Ohio App 528

11. Mo—Fowler v Missouri, K & T R Co., 84 S W 2d 194, 229 Mo App 561.
52 C J. p 231 note 86

Obstructions to view

Under evidence that a private roadway took a sharp turn just before crossing the railroad track and in view of obstructions to view, duty of care by railroad at such a crossing with respect to giving signals of approach of train might be found to be the same as at a public highway crossing, which duty would require the railroad to give reasonable notice and warning of the approach of trains—Fischer v. New York Cent R. Co., 77 N.Y.S 2d 196, 273 App Div 135, reargument and appeal denied 78 N.Y.S 2d 556, 273 App Div 929, appeal dismissed, In re Hoppe's Estate, 80 N E 2d 351, 297 N Y 956.

12. Miss—Alabama Great Southern R. Co v. Martin, 39 So 2d 501, 205 Miss. 851
52 C.J p 231 note 87.

Trespasser

A railroad company was liable for damage to automobile which stalled on private railway crossing and was run into by train, notwithstanding motorist may have been a trespasser and railroad company was not bound to anticipate presence of trespassers on tracks, where company's servants were guilty of a reckless or intentional disregard of presence of automobile on the tracks due to failure to pay any attention to signals given in an attempt to stop train—Naugle v. Reading Co, 21 A 2d 109, 145 Pa Super 341

13. Ala—Model City Lumber Co v Southern Ry. Co, 34 So.2d 862, 33 Ala App 425, certiorari denied 34 So 2d 865, 250 Ala 444.
52 C J. p 231 note 88.

"Especial lookout"

Evidence established that crossing at which truck stalled on tracks was struck by train was a private crossing so that truck driver was a mere licensee and railroad was not required to keep an "especial lookout" for truck—Model City Lumber Co. v Southern Ry Co, supra

14. Mich—Burt v. Detroit, G H & M Ry Co, 247 N W. 157, 262 Mich 204
52 C.J p 231 note 89.

15. U S.—Thomas v. Southern Ry Co, C C A Ga, 92 F 2d 445.
52 C J p 231 note 90.

16. Ky—Corder v. Cincinnati, etc, R Co, 159 S W 1144, 155 Ky. 536
52 C.J p 231 note 91.

17. U S—Thomas v Southern Ry Co, C.C A Ga, 92 F 2d 445
N.C—Caudle v. Seaboard Air Line Ry Co, 163 S E 122, 202 N C. 404
52 C.J. p 231 note 92

18. Mo—Hilton v. Terminal R Ass'n of St Louis, 137 S W 2d 520, 345 Mo 987
52 C J. p 231 note 93.

19. Ala—**Corpus Juris cited in** Woodward Iron Co. v. Goolsby, 6 So 2d 11, 14, 242 Ala. 329—**Corpus Juris cited in** Southern Ry Co v. Holder, 161 So. 513, 514, 230 Ala. 500
52 C J. p 232 note 95

Workmen

Inducement and invitation extended by railroad, in setting up whistling posts and slow signs for guidance of its employees at point where new highway was being constructed across track, to workmen to cross track at such point carried with it correlative duty of railroad to give signals signs called for, and failure to do so constituted actionable negligence with respect to truck driver injured in crossing collision—Curtiss v. New York Cent R Co, C C.A N Y, 79 F 2d 91.

20. U S—Thomas v. Southern Ry. Co, C C A.Ga, 92 F 2d 445
Mo—Mayfield v Kansas City Southern Ry. Co., 85 S W 2d 116, 337 Mo. 79.
52 C.J p 232 note 96.

"Licensee by implied invitation"

Where child under three years of age was struck by train while on path in city which was used constantly by both children and adults in crossing tracks, child was a "licensee by implied invitation," and employees of railroad were bound to expect his presence, to keep a lookout for him and to exercise reasonable and ordinary care in operation of train to protect him from injury—Chicago Great Western Ry. Co. v Beecher, C C A Minn, 150 F 2d 394, applying Iowa law, certiorari denied 66 S Ct. 339, 326 U.S. 781, 90 L.Ed. 473.

tions for the protection of travelers must be taken, and the company is not entitled to anticipate a clear track.[21] Accordingly, the railroad must give such warnings and signals of approach[22] and keep such lookout[23] as are requisite in the exercise of due care,[24] although it need not observe at such places the requirements provided by statute for public crossings.[25]

§ 739. —— Persons Entitled to Benefit of Signals and Lookouts

Statutes requiring a railroad company to give signals or other warnings when approaching crossings are for the protection of persons and property on, or passing over, crossings in order to afford notice of peril, and the failure to give warning or to keep a lookout for travelers affords no cause of action to those who are already aware of the presence and movement of the train.

Statutes requiring railroads to give signals or other warnings when approaching crossings are for the protection of persons and property on or passing over crossings,[26] and the object of requiring a railroad to give notice by signals or lights of the approach of its trains or cars to crossings is that those who are on or approaching such places may avoid peril by leaving them,[27] or by refraining from going on them.[28] So the failure to give warning affords no cause of action to those who are already aware of the presence and movement of the train,[29] and have all the warning which would be afforded by resort to such means,[30] as where the train obstructs the crossing at the time of the accident, as discussed supra § 734. In order, however, to absolve the railroad from negligence in failing to give signals on the ground that the injured person was aware of the approach of the train or should have known of the approach thereof by due care, it must appear that the injured person had actual or constructive notice in time to avoid injury.[31]

The required warning of approach of trains to crossings is due to those rightfully using or about to use such crossings as travelers[32] and not to others present there, as discussed infra § 910, but it is immaterial to those thus occupied that the crossing has been reached by walking along the track,[33] or that only a partial crossing is contemplated,[34] or that those in charge of the train

Extent of use

Evidence that fifty to one hundred persons daily used path on which pedestrian was struck by train and other paths nearby was insufficient to cast on railroad duty of maintaining a lookout or signaling the approach of trains—Louisville & N R Co. v Jackson, 151 S W 2d 386, 286 Ky 595.

21. U S—Thomas v Southern Ry. Co, C C A Ga., 92 F 2d 445
Mo—Mayfield v. Kansas City Southern Ry Co, 85 S W 2d 116, 337 Mo. 79
52 C J. p 232 note 97.

22. Ala.—Louisville & Nashville R Co. v Sullivan, 13 So.2d 877, 244 Ala. 485.
52 C.J. p 232 note 98.

23. U S—Chicago Great Western Ry. Co v. Beecher, C C A Minn, 150 F 2d 394, certiorari denied 66 S Ct. 339, 326 U S 781, 90 L Ed 473.
Ala.—Louisville & Nashville R. Co. v Sullivan, 13 So 2d 877, 244 Ala. 485
Mo—Mayfield v Kansas City Southern Ry Co, 85 S.W 2d 116, 337 Mo. 79.
Pa—Figard v. Pennsylvania R Co, 65 A 2d 411, 361 Pa 380
52 C J p 232 note 99.

24. U S—Thomas v. Southern Ry Co, C.C A Ga, 92 F.2d 445
Ala—**Corpus Juris cited in** Woodward Iron Co. v. Goolsby, 6 So.2d 11, 14, 242 Ala. 329—**Corpus Juris cited in** Southern Ry. Co. v. Holder, 161 So. 513, 514, 230 Ala 500.
Pa—Figard v Pennsylvania R Co, 65 A 2d 411, 361 Pa 380
52 C J. p 232 note 1.

25. Ala—**Corpus Juris cited in** Woodward Iron Co v Goolsby, 6 So 2d 11, 14, 242 Ala 329—**Corpus Juris cited in** Southern Ry Co v Holder, 161 So. 513, 514, 230 Ala 500
52 C J p 232 note 2.

26. Kan—Davis v. Atchison, T & S. F. Ry Co, 9 P 2d 990, 135 Kan 96

27. Miss—Gulf, etc, R Co v Simmons, 121 So 144, 153 Miss 327
52 C J p 233 note 4.

28. Mass—Rivet v Boston & M R R, 67 N E 2d 751, 320 Mass. 41.
52 C J p 233 note 5

29. Ark—Missouri Pac. R Co. v. Moore, 138 S W 2d 384, 199 Ark. 1035, certiorari denied Moore v. Missouri Pac R Co, 61 S Ct 19, 311 U S 646, 85 L Ed 412
Ky—Chesapeake & Ohio R Co. v Boyd's Adm'r, 160 S W 2d 342, 290 Ky. 9—Louisville & N R Co v Mitchell's Adm'x, 124 S W 2d 1025, 276 Ky 671—Cincinnati, N O & T P. Ry. Co v Wallace's Adm'r, 103 S W.2d 91, 267 Ky 661—Louisville & N R Co. v Shaw's Adm'x, 94 S W.2d 642, 264 Ky. 321.
S D—Backer v Chicago & N. W. Ry. Co, 4 N W.2d 853, 68 S D 531.
52 C J p 233 note 6.

30. N.Y.—Canning v. Buffalo, etc, R Co, 61 N E 901, 168 N.Y. 555.
52 C.J p 233 note 7.

31. Ga.—Atlanta & W. P. R Co. v. McCord, 189 S E 403, 54 Ga App. 811

32. U S—Flagg v. Chicago Great Western Ry Co, C C A Minn, 143 F 2d 90—Alabama Great Southern R Co. v Johnson, C C A Miss, 140 F 2d 968
Kan—Davis v. Atchison, T & S F Ry. Co, 9 P 2d 990, 135 Kan 96
Minn—Crosby v Great Northern Ry. Co, 245 N W. 31, 187 Minn. 263.
52 C J p 233 note 8.

Licensees

The statute with respect to locomotive engineer's duty to ring bell and blow whistle is a public safety regulation enacted by legislature in exercise of police power and applicable to all persons within its scope, including licensees—Sharpe v Western Ry of Alabama, 175 So. 542, 234 Ala 507

Outside limits of crossing

In actions against railroad for injuries sustained by pedestrians who were struck by locomotive at street crossing, which actions were based on common-law negligence and failure to give statutory signals, if pedestrians crossed track at place outside limits of crossing, there could be no recovery under statutory counts.—Sylvia v. New York, N. H. & H R. Co., 6 N.E 2d 359, 296 Mass. 157.

33. Va—Shiveley v. Norfolk, etc, R Co, 99 S E 650, 125 Va. 384.
52 C.J. p 234 note 10.

34. S C—Hutto v. South Bound R. Co, 39 S E 710, 61 S C 495

are not aware of their intention to cross[35] It is not necessary that persons thus engaged have sufficient intelligence to understand the meaning and purpose of such signals[36] A breach of the duties owed by a railroad company to those possessed of a right to use a private crossing, discussed supra § 738 b, is not a violation of duty as to one using such a crossing without right[37]

The duty of keeping a lookout at crossings is an obligation due to travelers along the road using the crossing, who are on the track[38] or approaching it,[39] and to the property rightfully there belonging to such persons.[40] Damages cannot be recovered from a railroad because of its negligent failure to maintain a lookout, where the injured person knew or was bound to have known of the approach of the train causing the injury.[41]

Where a railroad blocks up a public crossing with its trains or cars, the travelers on the highway may continue their journey by going around in front of or behind the train,[42] and those traveling around by such extended crossing[43] or employing a nearby private crossing under such circumstances[44] are entitled to reasonable warning of the movements of trains and to have a reasonable lookout exercised for their safety[45]

§ 740. —— To What Trains or Cars Applicable

The application of statutes prescribing signals and warnings of approach and lookout duties has been held not to be determined solely by reference to motive power, but to be considered in connection with the substantive purpose and manner of operation of the road, and to extend to, and include, single cars operating under their own power

The application of statutes prescribing signals and warnings of approach and lookout duties has been held not to be determined solely by reference to motive power,[46] but to be considered in connection with the substantive purpose and manner of operation of the road,[47] and to extend to, and include, single cars operating under their own power.[48] On the other hand, some statutes requiring crossing signals and referring to "locomotive engines" and "steam whistles" have been held to refer only to motor engines generating and driver by steam power,[49] and, hence, inapplicable to electric railways[50] It has also been held that the statutes with respect to signals, lookouts, and other precautions do not apply to the operation of hand cars,[51] gasoline hand cars,[52] autospeeders,[53] or motorcars[54] approaching crossings along a railroad track, although there is also authority to

35. Ind.—Pittsburgh, etc., R. Co v Lambert, 137 N.E 560, 79 Ind App 133

36. Neb.—Palmer v. Missouri Pac R Co, 74 N W. 66, 53 Neb 611.
52 C J p 234 note 13

37. Ky.—Louisville, etc, R Co v Horton, 219 S W. 1084, 187 Ky 617
N Y.—Clarke v New York Cent, etc, R. Co., 93 N Y S. 525, 104 App Div 167

38. Mo.—Thrower v. Henwood, 173 S W.2d 861, 351 Mo. 663.
52 C.J. p 234 note 16

Walking, standing, or lying down
Ordinary care required locomotive engineer and fireman to keep lookout for persons on track at point where pathway crossed it, whether they were walking, standing, or lying down.—Chicago G. W. R Co v. Robinson, C C.A.Neb, 101 F 2d 994, certiorari denied 59 S.Ct. 1038, 307 U S. 640, 83 L.Ed 1520.

Persons on train
The lookout statute applicable to persons "upon the track" does not cover persons "on the train"—Thrower v. Henwood, 173 S W 2d 861, 351 Mo. 663.

39. Mo.—Thrower v Henwood, supra.
52 C.J. p 234 note 17

40. N D.—Bishop v. Chicago, etc., R Co., 62 N W 605, 4 N D 536.
52 C J p 235 note 18.

41. Ky.—Chesapeake & Ohio R Co v Boyd's Adm'r, 160 S W 2d 342, 290 Ky 9

42. Ind.—Chicago, etc, R Co v Hunter, 113 N E 772, 65 Ind App 158
Mo.—Waite v Chicago, etc, R Co, 153 S W 66, 168 Mo App 160

43. Ind.—Chicago, etc, R Co v Hunter, 113 N E. 772, 65 Ind App 158
52 C J p 235 note 20.

44. Iowa.—Hartman v. Chicago Great Western R. Co, 110 N.W 10, 132 Iowa 582.

45. Okl.—St Louis-San Francisco R Co v Jones, 190 P 385, 78 Okl 204, 16 A L R 1048.
52 C J p 235 note 23

46. Tenn.—Stem v Nashville Interurban R Co, 221 S.W. 192, 142 Tenn. 494

47. Tenn.—Stem v. Nashville Interurban R Co, supra
52 C.J. p 235 note 25.

48. Mo.—Mudd v. Missouri, etc, R. Co, 124 S W 59, 146 Mo App 388

A single inspection car propelled by steam, designed to carry passengers and equipped with whistle and bell, must observe the regulations imposed by statute and ordinance on locomotives approaching a crossing—Mudd v. Missouri, etc, R. Co, supra

49. Mass.—Libby v. New York, N. H. & H R Co, 174 N E. 171, 273 Mass 522, 73 A L R 101.

Other signaling device
Statute providing that steam whistle shall be attached to each "locomotive engine" did not require equipment of railroad train propelled by electric motors or internal combustion engines, or combination thereof with steam whistle as distinguished from electrically operated signal or an air horn.—Smith v Atchison, T & S F Ry. Co, 66 P 2d 562, 145 Kan 615

50. Cal.—Davis v. Lane, 75 P 2d 565, 24 Cal.App 2d 400—Linninger v San Francisco, V & Napa Valley R Co., 123 P. 235, 18 Cal App 411.

51. Ark.—St Louis Southwestern R Co. v Mitchell, 171 S W 895, 115 Ark 339, Ann Cas 1916E 317.
Tenn.—**Corpus Juris quoted in** Gordon v Tennessee Cent. Ry. Co, 69 S W.2d 611, 612, 167 Tenn 302

52. Tenn.—**Corpus Juris quoted in** Gordon v Tennessee Cent Ry Co, 69 S W 2d 611, 612, 167 Tenn 302.
52 C J. p 235 note 31.

53. Ill.—Coyne v Cleveland, etc., R Co, 208 Ill App 425
Tenn.—**Corpus Juris quoted in** Gordon v. Tennessee Cent. Ry. Co, 69 S.W 2d 611, 612, 167 Tenn. 302

54. Mass.—Libby v. New York, N H. & H R Co., 174 N E 171, 273 Mass. 522, 73 A L R 101
Tenn.—**Corpus Juris quoted in** Gor-

the contrary as to the application of such statutes to motorcars.[55] In any event, the common-law obligations with respect to these matters do control the operation even of such cars[56] The law imposes no greater degree of care on operators of diesel engines than is required of operators of steam locomotives because of the difference in the amount of noise made by the whistle or horn[57]

A train of cars without an engine is not of such character as to be required to give the statutory signals by bell or whistle,[58] but a car or cars running thus must give reasonable warning of approach to a crossing.[59] Some statutory regulations with respect to maintaining a lookout ahead[60] and with respect to the giving of signals[61] have been held not to apply to trains or engines engaged in switching operations, but the operators of trains or engines so engaged may have the duty, apart from statute, to give reasonable warning of their approach to crossings,[62] and to keep a proper lookout and display proper lights.[63] Other statutes relating to signals have been held to apply to switching movements and not only to trains as made up as they pass from station to station[64]

Statutes requiring the locomotive to give certain signals of approach at a specified distance from a crossing apply only to trains running with the locomotive in front,[65] and others must signal when the nearest part of the train reaches the prescribed distance[66] A statute requiring a railroad to keep a "lookout ahead" on a locomotive is complied with only when a train is moving forward by means of an engine at its front.[67] An engine backing toward a string of cars left standing across a crossing with the purpose of coupling to them and with no purpose of crossing need not give the signals prescribed by statute of engines approaching crossings.[68] Through trains as well as local trains must observe the requirements of statutes providing that on approaching and leaving cities or towns signals shall be given within a certain distance of city limits[69]

An engine with its tender is a train within the meaning of statutes requiring signals and lookouts from trains,[70] and a tender is part of the engine under statutes requiring lookouts to be placed at the rear of backing engines[71] A train standing close to, or on, a crossing, when it starts up to move across should give proper signals[72] and a proper lookout should be maintained[73] A statute

don v Tennessee Cent Ry Co, 69 S W 2d 611, 612, 167 Tenn 302
Va—Franklin & P Ry. Co. v Shoemaker's Committee, 159 S E 100, 156 Va 619
52 C J p 235 note 33.

Bell

The statutory requirement that locomotive engineer signal approach of train to street crossing in city limits by constantly tolling locomotive bell does not require that gasoline motor bus, operated on railway tracks, be equipped with bell, but applies to steam locomotives only.—Gainesville Midland R Co. v Allen, 35 S E 2d 12, 72 Ga App. 786.

55. Puerto Rico—Marrero v. American R Co, 33 Puerto Rico 201
Wash—Haaga v. Saginaw Logging Co, 5 P 2d 505, 165 Wash 367, affirmed 14 P.2d 55, 169 Wash 547, and petition granted 15 P.2d 655, 170 Wash 93—Sanderson v. Hartford Eastern Ry. Co., 294 P 241, 159 Wash 472

56. Va—Franklin & P. Ry Co v. Shoemaker's Committee, 159 S E 100, 156 Va 619.
52 C J p 235 note 34.

57. Minn—Jorgenson v. Minneapolis, St P & S S Marie Ry Co, 42 N.W.2d 540, 231 Minn 121

58. Ind—Ohio, etc, R Co v. McDaneld, 31 N.E. 836, 5 Ind App 108
52 C.J p 235 note 35.

59. Tex—Lancaster v. Carlock, Civ App, 267 S W 1028
52 C J p 236 note 37.

60. U S—Alabama Great Southern R Co. v Brookshire, C.C A Tenn, 166 F 2d 278, 1 A L R 2d 612.
Tenn—Morgan v Tennessee Cent Ry Co, 216 S W 2d 32, 31 Tenn App 409

Engine held not engaged in "switching operation"

(1) Engine, which had gone into industrial section of city on tracks of another railroad to pick up cars two miles away from railroad's nearest switchyard, was not engaged in a "switching operation," and railroad was therefore liable, under statute requiring a railroad to keep a lookout ahead of locomotive, for injuries sustained by truck driver when truck was struck at crossing by cars being pushed by locomotive, even though railroad was not negligent—Alabama Great Southern R Co v Brookshire, C C A Tenn, 166 F 2d 278, 1 A L R 2d 612

(2) A wrecking train moving to a wreck was not engaged, "in a switching operation" so as to relieve defendant of compliance with statutory precautions—Tennessee Cent Ry. Co. v. Zearing, 2 Tenn App. 451

61. Tenn—Morgan v Tennessee Cent Ry Co, 216 S.W 2d 32, 31 Tenn App 409—Southern R. Co v Simpson, 261 S W 677, 149 Tenn 458.

62. Mo—Hudson v Southwest Missouri R Co, 159 S W 9, 173 Mo App 611
52 C J p 236 note 39

63. La—Maher v Louisiana R., etc, Co, 82 So 872, 145 La 733
52 C J p 236 note 39 [b]

64. Ark—Missouri Pac R Co v Powell, 120 S W 2d 349, 196 Ark 834

65. W Va—Bowles v. Chesapeake, etc, R Co, 57 S E 131, 61 W Va. 272
52 C J p 236 note 41.

66. Ill—Elgin, etc, R Co v Lawlor, 132 Ill App 280, affirmed 82 N. E 407, 229 Ill 621

67. U.S—Alabama Great Southern R Co. v Brookshire, C.C A.Tenn, 166 F 2d 278, 1 A L R 2d 612

68. Mass—White v New York, etc., R. Co, 86 N E 923, 200 Mass 441.
52 C J p 236 note 43

69. U S—Illinois Cent R Co v Sigler, C C A Tenn, 122 F 2d 279
Tenn—Southern R Co v Griffin, 167 S W 688, 129 Tenn. 558

70. Ark—Ft Smith, etc, R Co v Messek, 131 S W 686, 966, 96 Ark 243

71. Ind—Harmon v. Foran, 94 N.E. 1050, 95 N E 597, 48 Ind.App. 262

72. N D—Severtson v. Northern Pac R. Co, 155 N W 11, 32 N D 200
52 C J p 236, note 49.

73. Ky—Chesapeake, etc, R. Co. v.

requiring a lookout has been held to extend to trains which are not in motion such as cars being loaded or unloaded on a sidetrack.[74]

§ 741. —— Obstructions of View and Hearing

a. In general
b. Atmospheric conditions

a. In General

The existence of obstructions to view or hearing is a circumstance bearing on the question whether a railroad company has performed its full duty as to lights and warnings and signals of approach, and as to keeping a lookout.

As a general rule the existence of obstructions to view or hearing is a circumstance bearing on the question whether a railroad company has performed its full duty as to lights and warnings and signals of approach,[75] and as to keeping a lookout,[76] particularly where the railroad company has itself caused or permitted the obstructions,[77] and this is true, although their construction may have been lawful and authorized[78] and although there may be no negligence in the fact of permitting them.[79] There is, however, authority to the effect that only where such obstructions have been caused or continued by a railroad company is it proper to consider them with respect to the precautions necessary to be exercised by the company,[80] but generally no such limitation is made.[81]

In accordance with the foregoing rule, in determining what precautions may be required of a railroad, regard is had to vegetation and other obstructions near the right of way at the crossing,[82] as well as to curves,[83] cuts,[84] embankments,[85] and buildings[86] of the railroad company on its right of way. Although there is authority holding that the mere temporary presence of a train or cars near a crossing is not such a circumstance as to impose any extra diligence with respect to warnings or signals of approach, on a railroad,[87] there are many decisions to the contrary,[88] and the presence of a car obstructing the view of the crossing may also affect the adequacy of the lookout maintained by the operators of the train causing the injury.[89] It has been held that in determining the adequacy of signals as a warning, obstructions to hearing only can be considered.[90]

b. Atmospheric Conditions

Atmospheric conditions prevailing at the time and place of the accident are treated by some decisions, although not by others, as proper for consideration in determining what constitutes reasonable warning of approach.

There is authority to the effect that in determining what constitutes reasonable warning of approach, atmospheric conditions prevailing at the time and place of the accident,[91] as for example,

Banks, 137 S W 1066, 144 Ky 137, affirmed 34 S Ct 278, 232 U S 146, 58 L Ed. 544
52 C J. p 236 note 50.

74. Mo.—Thrower v Henwood, 173 S W 2d 861, 351 Mo 663.

75. U S —Pokora v Wabash Ry Co, Ill, 54 S Ct. 580, 292 U S. 98, 78 L.Ed 1149, 91 A L R. 1049
Cal.—Peri v Los Angeles Junction Ry., 137 P.2d 441, 22 Cal 2d 111
Ga.—Southern Ry Co v. Riley, 4 S E.2d 54, 60 Ga.App. 475
Mo —Fowler v Missouri, K & T R Co, 84 S W 2d 194, 229 Mo App 561.
Tenn —**Corpus Juris cited in** Southern Ry. Co v Penley, 134 S W 2d 177, 179, 175 Tenn 380.
52 C.J. p 236 note 51.

76. Ill.—Goodrich v. Sprague, 26 N E 2d 884, 304 Ill.App 556, reversed on other grounds Sprague v Goodrich, 32 N.E 2d 897, 376 Ill 80

77. U.S.—Pennsylvania R. Co v Moffitt, C C A Ill., 1 F 2d 276.
52 C J. p 237 note 52.

78. Ky.—Louisville, etc, R Co. v Locker, 206 S W. 780, 182 Ky. 578
Tex.—International, etc, R Co v Knight, Civ App., 45 S.W. 167, reversed on other grounds 45 S W 556, 91 Tex 660

79. U S —Pennsylvania R Co v Moffitt, C C A Ill, 1 F.2d 276.

80. N J —Swenson v. Delaware, etc, R Co, 123 A 709, 99 N J Law 403
52 C J p 237 note 55

81. N.Y —Grippen v New York Cent R Co, 40 N Y 34, 45
52 C J p 236 note 51, p 237 notes 56, 57.

82. Fla —Florida East Coast Ry Co v Townsend, 140 So 196, 104 Fla. 362, followed in Florida East Coast Ry Co. v. Guilford, 140 So 199, 104 Fla 370, modified on other grounds 143 So 446, 104 Fla 370, modified on other grounds Florida East Coast Ry. Co v Townsend, 143 So 445, 104 Fla 362
52 C J. p 237 note 57.

83. Ga —Southern Ry Co v Riley, 4 S E 2d 54, 60 Ga App. 475
52 C J p 237 note 58.
Statutory signals held sufficient
Miss —Illinois Cent. R Co v. Roberson, 191 So 494, 186 Miss 507

84. U S.—Northern Pac. R Co v Spike, Minn, 121 F. 44, 57 C.C A 384
52 C J p 237 note 59.

85. Fla —Atlantic Coast Line R Co v. Watkins, 121 So 95, 97 Fla 350
52 C J p 237 note 60

86. Fla —Atlantic Coast Line R Co v Watkins, supra
52 C J p 237 note 61.

87. N J —Swenson v Delaware, etc, R Co, 123 A 709, 99 N J Law 403
52 C J p 237 note 62.

88. N C —Blum v Southern R. Co., 122 S E 562, 187 N C. 640
52 C.J p 237 note 63

89. La —Bloxom v Texas & P Ry. Co, 131 So. 520, 15 La App 467.

90. U S —Pennsylvania R. Co v Stegaman, 22 F.2d 69
Cal —Hoffman v. Southern Pac R Co, 281 P. 681, 101 Cal App. 218.

91. Del.—Jones v Pennsylvania R. Co, 61 A 2d 691, 5 Terry 486.
52 C J. p 237 note 65
Snowstorm
Railroad was not negligent in failing to display warning lights on freight train being operated over crossing, and was not liable for injuries sustained by motorist who collided with the train, even though collision occurred at night during a heavy snowstorm —Jones v. Pennsylvania R Co., supra.

wind[92] and fog[93] shall not be considered, but these matters are treated in other decisions as proper for consideration[94] as is darkness.[95] It has been held that the fact that it is snowing and visibility is poor puts no more burden on the engine crew to maintain a lookout for a motorist approaching the crossing than it does on the occupants of the automobile.[96] The fact that a hard, blowing rain was falling and the alleged fact that, under the conditions of weather, the occupants of the vehicle colliding with the train could not have heard the train whistle or bell have been held to constitute no excuse for the failure of the operators of the train to perform the duty of giving a signal.[97]

§ 742. —— Effect of Compliance with Statutes or Ordinances

Statutes requiring lights or signals from trains or cars as a warning of their approach to a crossing express only the minimum of the duty of the railroad company, and there may be a duty under the circumstances to take other precautions than are required by the statute; but at an ordinary crossing and in the absence of any unusual circumstances, the doing of the acts prescribed by statute is sufficient.

Statutes requiring lights or signals from trains or cars as a warning of their approach to a crossing express only the minimum of the duty of a railroad company,[98] and a literal compliance therewith is not necessarily sufficient to show that the company has performed its full duty with respect to such precautions,[99] at least where there is nothing in the statute expressly providing that compliance therewith shall be sufficient to relieve the company from responsibility,[1] although there is some authority holding that compliance with the statute is all that is required except in certain unusual circumstances.[2] According to the generally prevailing rule, there may be a duty under the circumstances to give other and further notice than is required by the statute and to use other means to prevent accidents,[3] since the railroad is held to the exercise of due care to avoid injury to travelers;[4] and if such a duty is found to exist its breach is negligence.[5] At an ordinary crossing and in the absence of any unusual circumstances, however, the doing of the acts prescribed by statute is sufficient,[6] and, in any case, such conduct will re-

92. U.S.—Pennsylvania R. Co. v. Stegaman, C.C.A. Ohio, 22 F.2d 69
Conn.—Tessmer v. New York, etc., R. Co., 44 A. 38, 72 Conn. 208.

93. U.S.—Pennsylvania R. Co. v. Stegaman, C.C.A. Ohio, 22 F.2d 69
Cal.—Hoffman v. Southern Pac. Co., 281 P. 681, 101 Cal.App. 218

94. N.C.—Meacham v. Southern Ry. Co., 197 S.E. 189, 213 N.C. 609.
52 C.J. p. 237 note 68.

Fog
N.C.—Meacham v. Southern Ry. Co., supra.

95. Tex.—Ft. Worth, etc., R. Co. v. Houston, Civ.App., 185 S.W. 919.
52 C.J. p. 237 note 69

In order to charge a railroad with negligence in moving a train slowly at night across a highway without signals to disclose its presence, injured motorist must show that trainmen exercising reasonable care should know that, because of darkness, cars are such an obstruction that people traveling in automobiles properly equipped with lights and carefully operated at a reasonable rate of speed would be likely to come into collision with them.—Fleming v. Loch, 195 P.2d 942, 200 Okl. 448

96. Wis.—Hynek v. Kewaunee, G. B. & W. Ry. Co., 29 N.W.2d 45, 251 Wis. 319

97. Tex.—Texas & N. O. R. Co. v. Brook, Civ.App., 127 S.W.2d 599, error dismissed, judgment correct

98. U.S.—Jarrett v. Wabash Ry. Co., C.C.A.N.Y., 57 F.2d 669, applying Canadian law, certiorari denied Wabash Ry. Co. v. Jarrett, 53 S. Ct. 80, 287 U.S. 627, 77 L.Ed. 544.
—Mast v. Illinois Cent. R. Co., D.C.Iowa, 79 F.Supp. 149, affirmed, C.A., 176 F.2d 157
Cal.—Peri v. Los Angeles Junction Ry., 137 P.2d 441, 22 Cal.2d 111
Mo.—Sisk v. Chicago, B. & Q. R. Co., App., 67 S.W.2d 830
Okl.—St. Louis-San Francisco Ry. Co. v. Pufahl, 45 P.2d 729, 172 Okl. 449.—St. Louis-San Francisco Ry. Co. v. Prince, 291 P. 973, 145 Okl. 194, 71 A.L.R. 357
52 C.J. p. 241 note 99.

99. U.S.—Pokora v. Wabash Ry. Co., Ill., 54 S.Ct. 580, 292 U.S. 98, 78 L.Ed. 1149, 91 A.L.R. 1049.—Deneen v. Baltimore & O. R. Co., D.C.W.Va., 68 F.Supp. 148, reversed on other grounds, C.C.A., 161 F.2d 674
Cal.—Peri v. Los Angeles Junction Ry., 137 P.2d 441, 22 Cal.2d 111
Kan.—Smith v. Atchison, T. & S. F. Ry. Co., 66 P.2d 562, 145 Kan. 615
Mass.—Mannino v. Boston & M. R. R., 14 N.E.2d 122, 300 Mass. 71
52 C.J. p. 241 note 1.

1. Mass.—Bradley v. Boston, etc., R. Co., 2 Cush. 539.
52 C.J. p. 239 note 81.

2. N.J.—Swenson v. Delaware, etc., R. Co., 123 A. 709, 99 N.J.Law 403
52 C.J. p. 241 note 2

3. U.S.—Mast v. Illinois Cent. R. Co., D.C.Iowa, 79 F.Supp. 149, affirmed, C.A., 176 F.2d 157
Cal.—Peri v. Los Angeles Junction Ry., 137 P.2d 441, 22 Cal.2d 111
Conn.—Kinderavich v. Palmer, 15 A.2d 83, 127 Conn. 85
Ill.—Wagner v. Toledo, P. & W. R. R., 185 N.E. 236, 352 Ill. 85.
Iowa.—Butters v. Chicago, M., St. P. & P. R. Co., 243 N.W. 597, 214 Iowa 700
Mo.—Williams v. Thompson, App., 166 S.W.2d 785.—Fowler v. Missouri, K. & T. R. Co., 84 S.W.2d 194, 229 Mo.App. 561
Okl.—St. Louis-San Francisco Ry. Co. v. Prince, 291 P. 973, 145 Okl. 194, 71 A.L.R. 357.
52 C.J. p. 242 note 3.

Knowledge of company or employees
Whether precautions other than giving of signals required by statute should be taken by a railroad or its employees for protection of travelers at a particular highway crossing at a particular time depends on the circumstances existing which were known or reasonably should have been anticipated by the company or by its employees.—Mannino v. Boston & M. R. R., 14 N.E.2d 122, 300 Mass. 71.

4. Ohio.—Franklin v. Nowak, 4 N.E.2d 232, 53 Ohio App. 44.
52 C.J. p. 242 note 4.

5. Cal.—Peri v. Los Angeles Junction Ry., 137 P.2d 441, 22 Cal.2d 111
52 C.J. p. 242 note 5.

6. Conn.—Kinderavich v. Palmer, 15 A.2d 83, 127 Conn. 85
Ill.—Shaw v. Chicago & E. I. R. Co., 75 N.E.2d 51, 332 Ill.App. 285.
Ind.—Dyer v. New York Cent. R. Co., 17 N.E.2d 839, 214 Ind. 695.
Iowa.—Butters v. Chicago, M., St. P. & P. R. Co., 243 N.W. 597, 214 Iowa 700.
La.—Wyatt v. Yazoo & M. V. R. Co., 127 So. 479, 13 La.App. 632.

lieve the company from liability in any cause of action based on the statute.[7]

§ 743. —— Effect of Violations of Statutes or Ordinances

Generally, a failure to observe the requirements of statutes or ordinances concerning signals, warnings, and lookouts is negligence as a matter of law as to all those designed to be protected by such statute, and renders the railroad company liable for damages caused by such failure where the injured person is not guilty of contributory negligence.

As a general rule, a failure to observe the requirements of statutes[8] or ordinances[9] concerning signals and warnings is negligence as a matter of law as to all those designed to be protected by such statute,[10] and renders the railroad company liable for damages caused by such failure where the injured person is not guilty of contributory negligence.[11] Similarly, it is negligence per se to violate statutes or ordinances with respect to lookouts.[12] There is, however, authority to the effect that violation only constitutes evidence of negligence,[13] and likewise that it is prima facie evidence

Mass —Mannino v. Boston & M. R R, 14 N E 2d 122, 300 Mass 71
N J —Mente Bros v. Pitney, 46 A 2d 809, 134 N J Law 211.
Ohio —Shaffer v New York Cent R Co, 34 N E 2d 792, 66 Ohio App 417
52 C J p 242 note 6.

In absence of "peculiar environment," railroad had no duty to give warning on or at crossing over which flat cars were passing in addition to signals required by statute —Spilman v Gulf & S I R. Co., 163 So 445, 173 Miss 725

7. Mo —Rollison v Wabash R. Co, 160 S W 994, 252 Mo. 525.
52 C J p 242 note 7.

8. U S —Northern Pac. Ry. Co v Haugan, C A Minn, 184 F 2d 472—Roth v Swanson, C C A Minn, 145 F 2d 262—Northern Pac Ry Co v Robison, C C A Wash, 143 F 2d 352, certiorari denied 65 S Ct 310, 323 U.S 738, 89 L Ed 629—Baltimore & O R Co v. Joseph, C.C A Ohio, 112 F 2d 518, certiorari denied 61 S Ct 551, 312 U S 682, 85 L Ed 1121, rehearing denied 61 S Ct 710, 312 U S 714, 85 L Ed. 1144—Judd v Oregon Short Line R. Co, D C Idaho, 4 F Supp 657
Ala —Pollard v Stewart, 168 So 205, 232 Ala 453—Central of Georgia Ry Co v. Pope, 127 So. 835, 221 Ala. 145.
Ariz —Canion v. Southern Pac. Co, 80 P 2d 397, 52 Ariz. 245
Ga —Thompson v Powell, 5 S E 2d 260, 60 Ga App 796—Southern Ry Co v Riley, 4 S E 2d 54, 60 Ga App 475—Seaboard Air Line Ry Co v Benton, 159 S.E 717, 43 Ga App 495, reversed on other grounds 165 S.E 593, 175 Ga 491, conformed to 166 S E 219, 45 Ga. App 832.
Idaho.—Hobbs v. Union Pac. R. Co, 108 P.2d 841, 62 Idaho 58—Allan v Oregon Short Line R Co, 90 P 2d 707, 60 Idaho 267.
Ind.—New York Cent. Ry. Co v Powell, 47 N E 2d 615, 221 Ind 321—Bartley v Chicago & E I Ry Co, 24 N E 2d 405, 216 Ind 512—Pennsylvania R Co v Rizzo, 86 N E 2d 91, 119 Ind App. 505, rehearing denied 87 N E 2d 885, 119 Ind App 505—Chicago & E I Ry Co v Hix, 173 N E 602, 91 Ind App 698
La —Henderson v Missouri Pac R Co, 131 So 586, 15 La App. 196
Miss —Mississippi Cent R Co v Smith, 154 So 533, 173 Miss 507, modified on other grounds 159 So 562, 173 Miss 507, and appeal dismissed 55 S Ct 330, 295 U.S 718, 79 L Ed 1673
Mo —Busker v. New York Cent R Co, App, 149 S W.2d 449, applying Illinois law—Taylor v. Alton R Co, App, 148 S W 2d 806.
S C —Limehouse v Southern Ry Co., 58 S E 2d 685, 216 S C 424—Truett v. Atlantic Coast Line R Co, 33 S E 2d 396, 206 S C. 144—Harrison v. Atlantic Coast Line R Co, 13 S.E 2d 137, 196 S C. 259—Ford v. Atlantic Coast Line R Co, 168 S E. 143, 169 S C. 41, affirmed Atlantic Coast Line R. Co. v. Ford, 53 S Ct. 249, 287 U S. 502, 77 L Ed. 457
Tex —Rio Grande, E. P. & S F. R Co v Dupree, Com App, 55 S W. 2d 522
Va —Leath v. Richmond, F. & P R Co, 174 S E. 678, 162 Va 705—Southern Ry Co v Whetzel, 167 S E 427, 159 Va 796—Virginian Ry. Co v Haley, 157 S E 776, 156 Va 350
Wash —Cox v. Polson Logging Co., 138 P 2d 169, 18 Wash 2d 49—Hendrickson v Union Pac R Co, 136 P.2d 438, 17 Wash 2d 548, 161 A L R 96—Schofield v Northern Pac Ry. Co, 104 P 2d 324, 4 Wash. 2d 512.
45 C J. p 722 note 87—52 C.J p 238 note 79.

Only defenses open to a company when a failure to comply with the requirements of the statute is shown are the consent of the person injured or that by the use of ordinary care he could have avoided the injury, or, in mitigation of damages, his contributory negligence — Alabama Great Southern R Co v. Gross, 7 S E 2d 38, 61 Ga App. 609—Clements v Central of Georgia Ry. Co, 152 S.E 849, 41 Ga App. 310—Reed v. Southern R Co, 140 S.E 921, 37 Ga App 550

9. S C —Dyson v Southern R. Co, 65 S E 344, 83 S C. 354.
52 C J p 239 note 82

Headlights on locomotives
Mo —Karle v Kansas City, etc., R Co, 55 Mo 476

Ringing of bells on moving locomotives
Mo —Karle v. Kansas City, etc., R Co, supra

10. S C —Bowen v. Southern R Co, 36 S E 590, 58 S C 222.

11. U S —Majestic v Louisville & N R Co, C C A Tenn, 147 F 2d 621.
Ill.—Shaw v. Chicago & E. I R Co, 75 N E 2d 51, 332 Ill App 285.
Ind —New York Cent. R Co. v. De Leury, 192 N.E. 125, 100 Ind App 140.
N Y —Kavanagh v. New York Cent R. Co, 187 N.Y S 859, 196 App Div 884, affirmed 135 N E. 933, 233 N Y 597
Tenn —Southern Ry. Co. v Buskill, 10 Tenn App. 1—Louisville & N. R Co. v. Ross, 2 Tenn App 384

Actionable
Negligence in failure to observe statutory duties to ring bell and blow whistle at street crossing must be actionable in order to render railroad liable for such injury.—Louisville & N. R Co. v. Davis, 181 So 695, 236 Ala. 191.

Liability irrespective of negligence
Under a statute imposing liability on railroads for failure to give certain signals at crossings, the failure to give such signal creates a liability against the railroad irrespective of negligence if the special defenses set out in the statute are not established —Mannino v. Boston & M. R R, 14 N.E 2d 122, 300 Mass. 71—Commonwealth v. Boston, etc, R Co, 133 Mass 383

12. Ga —Powell v Jarrell, 16 S E. 2d 198, 65 Ga App 453.
52 C J. p 240 note 83.

13. Mass —Mannino v. Boston & M. R. R, 14 N E 2d 122, 300 Mass. 71
Neb —Eggeling v. Chicago, R I. & P. Ry. Co, 228 N.W. 361, 119 Neb.

of negligence[14]

Violation of a crossing signal statute may be sufficient to warrant an inference of recklessness, willfulness, or wantonness[15] when taken in connection with other circumstances existing at the time of the injury,[16] as when the omission is willful[17] or is at any extraordinarily hazardous crossing,[18] although it cannot be so regarded when the omission is purely inadvertent[19] and the mere failure to give the statutory signals is not of itself recklessness or wantonness[20]

A statute which makes it a misdemeanor on the part of an engineer to fail to give certain prescribed signals imposes a duty on the company to give the warnings therein specified,[21] and its failure in this respect is negligence,[22] although there is other authority to the effect that such a statute imposes no duty on the railroad[23] even though omission of the signals therein prescribed may be evidence of a breach of the company's common-law obligation to give reasonable warnings of its approach to a crossing[24] A statute, imposing a fine on the railroad for failure to give certain required signals but a fine of such character that it is obviously inadequate to compel performance, is not a mere police regulation the penalty of which is exclusive, but it imposes a duty on the railroad to give such specified signals,[25] a breach of which is negligence per se,[26] and this is true especially when it is expressly provided that nothing in the statute shall take away any remedy from a person injured thereby[27]

§ 744. Rate of Speed

Under the common law no rate of speed consistent with safety of passengers and freight is negligence per se, but it is the duty of the railroad and its employees to run its trains with due regard to persons exercising ordinary care in traveling on the highway across its tracks, and what is a reasonable speed depends on the nature of the crossing and other circumstances of the case.

In the absence of statutory or municipal regulations a railroad company has the right to use its discretion in establishing the speed of its trains;[28] but the mere fact that there is no statutory limitation on the speed of trains through cities does not permit a negligent, excessive rate.[29] Generally no rate of speed consistent with the safety of passengers and freight is negligence per se.[30] However, under

229, modified on other grounds 231 N.W. 152, 119 Neb 229
R.I.—Kennedy v. New York, N. H. & H. R. Co, 112 A. 429, 43 R.I. 358
45 C.J. p 718 note 41—52 C.J. p 240 note 84.

14. Vt.—LeFebvre v. Vermont Cent. R. Co, 123 A. 211, 97 Vt. 342
52 C.J. p 240 note 85.

15. S.C.—Miller v. Atlantic Coast Line R. Co., 138 S.E. 675, 140 S.C. 123, certiorari denied Camp Mfg. Co. v. Miller, 48 S.Ct. 117, 275 U.S. 556, 72 L.Ed. 424
52 C.J. p 240 note 86.

Gross negligence
A violation of statute with respect to signaling by the railroad company as to a person crossing the track on a public road has been held to be negligence of the grossest character
Ga.—Davis v. Whitcomb, 118 S.E. 488, 30 Ga.App. 497, 499
La.—Smith v. Texas & Pac. Ry. Co., App., 189 So. 316.

16. Ala.—Louisville, etc., R. Co. v. Loyd, 65 So. 153, 186 Ala. 119.
52 C.J. p 240 note 87.

17. Ill.—Ohio, etc., R. Co. v. Eaves, 42 Ill. 288

18. Ill.—Indianapolis, etc., R. Co. v. Stables, 62 Ill. 313

19. S.C.—Miller v. Atlantic Coast Line R. Co., 138 S.E. 675, 140 S.C. 123, certiorari denied Camp Mfg. Co. v. Miller, 48 S.Ct. 117, 275 U.S. 556, 72 L.Ed. 424—Callison v. Charleston, etc., R. Co., 90 S.E. 260, 106 S.C. 123.

20. S.C.—Ford v. Atlantic Coast Line R. Co., 168 S.E. 143, 169 S.C. 41, affirmed Atlantic Coast Line R. Co. v. Ford, 53 S.Ct. 249, 287 U.S. 502, 77 L.Ed. 457
52 C.J. p 240 note 91

21. Ariz.—Davis v. Boggs, 199 P. 116, 22 Ariz. 497
52 C.J. p 240 note 92

22. Wash.—Schofield v. Northern Pac. Ry. Co., 104 P.2d 324, 4 Wash. 2d 512.
52 C.J. p 240 note 93

23. U.S.—Delaware, etc., Co. v. Nahas, C.C.A.Pa., 14 F.2d 56.
52 C.J. p 240 note 94.

24. U.S.—Delaware, etc., Co. v. Nahas, supra
N.Y.—Vandewater v. New York, etc., R. Co., 32 N.E. 636, 135 N.Y. 583

25. N.Y.—Kavanagh v. New York, etc., R. Co., 187 N.Y.S. 859, 196 App. Div. 384, affirmed 135 N.E. 933, 233 N.Y. 597
52 C.J. p 240 note 96.

26. N.Y.—Kavanagh v. New York, etc., R. Co., supra.

27. Ky.—Louisville, etc., R. Co. v. Sanders, 92 S.W. 937, 29 Ky.L. 212
N.Y.—Kavanagh v. New York, etc., R. Co., 187 N.Y.S. 859, 196 App. Div. 384, affirmed 135 N.E. 933, 233 N.Y. 597

28. Conn.—Freedman v. New York, etc., R. Co., 71 A. 901, 81 Conn. 601, 15 Ann.Cas. 464
52 C.J. p 242 note 9

29. Cal.—Johnson v. Southern Pac. Co., 288 P. 81, 105 Cal.App. 340
Rate of speed through cities generally see infra § 745

30. U.S.—**Corpus Juris cited in** Williams v. Thompson, D.C.La., 48 F.Supp. 760, 763—**Corpus Juris cited in** Lewis v. Thompson, D.C.La., 47 F.Supp. 435, 439
Ariz.—Atchison, T. & S.F. R. Co. v. Hicks, 165 P.2d 167, 64 Ariz. 15
Ark.—Missouri Pac. R. Co. v. Nelson, 115 S.W.2d 872, 195 Ark. 883.
Cal.—Peri v. Los Angeles Junction Ry., 187 P.2d 441, 22 Cal.2d 111—Friddle v. Southern Pac. Co., 14 P.2d 568, 126 Cal.App. 388.
Colo.—Union Pac. R. Co. v. Siemann, 145 P.2d 986, 112 Colo. 70.
Ill.—Provenzano v. Illinois Cent. R. Co., 191 N.E. 287, 357 Ill. 192—Applegate v. Chicago & N.W. Ry. Co., 78 N.E.2d 793, 334 Ill.App. 141—Purdy v. Sprague, 2 N.E.2d 743, 286 Ill.App. 17—Willett v. Baltimore & O.S.W.R. Co., 1 N.E.2d 748, 284 Ill.App. 307
Ind.—New York Cent. Ry. Co. v. Powell, 47 N.E.2d 615, 221 Ind. 321—Pennsylvania R. Co. v. Rizzo, 86 N.E.2d 91, 119 Ind.App. 505, rehearing denied 87 N.E.2d 885, 119 Ind.App. 505
Iowa.—Jensvold v. Chicago Great Western R. Co., 12 N.W.2d 293, 234 Iowa 627—Finley v. Lowden, 277 N.W. 487, 224 Iowa 999.

the rule of the common law requiring a company to exercise its franchise with due regard to the safety of its passengers and such persons as may travel on a highway crossing its tracks, it is the duty of the company, in establishing the rate of speed at which its trains may be run, and of the trainmen in operating the train, to exercise due regard not only to the safety of passengers, but also to that of all persons in the exercise of ordinary care traveling on the highway across its tracks;[31] and whether the rate of speed in any particular case is reasonable or negligent depends on the nature of the crossing and other circumstances of the case.[32] Thus it has been held negligence to run over a crossing at a high

Md—Pennsylvania R Co v State, 53 A 2d 562, 188 Md 646
Miss—Hancock v Illinois Cent R Co, 131 So 83, 158 Miss 668
N J—Di Giendemonica v Pennsylvania-Reading Seashore Lines, 8 A 2d 342, 123 N J Law 296
Ohio—Woodworth v New York Cent R Co, 80 N E 2d 142, 149 Ohio St 543
Pa—Scholl v Philadelphia Suburban Transp Co, 51 A 2d 732, 356 Pa 217—Solomon v. Lehigh Val R Co, 41 A 2d 664, 351 Pa 302—Anstine v Pennsylvania R Co, 20 A. 2d 774, 342 Pa 423—Ealy v New York Cent. R Co, 5 A 2d 110, 333 Pa 471
Tenn—Louisville & N R Co v. Frakes, 11 Tenn App 593—Louisville & N R. R Co v Ross, 2 Tenn App 384
52 C J p 243 note 11

Speed reasonably necessary to purposes of rapid transportation, and to make connections, does not constitute negligence per se
Ala—Atlantic Coast Line R Co v. Jackson, 130 So 388, 221 Ala 646
Md—State, for Use of Emerson, v. Poe, 190 A 231, 171 Md. 584

Activities of busses and trucks
Fact that passengers and freight are being carried by busses and trucks probably as extensively as by railroads does not require change in rule that no rate of speed of railroad train at crossing is negligence per se, in absence of statute or municipal ordinance restricting rate of speed thereof, since maintenance of such rule will not tend to impede movement of busses and trucks materially—Duncan v. Chicago, B. & Q R Co, Mo.App, 149 S.W.2d 920.

Ability to stop within visible distance held not required
Ala.—Atlantic Coast Line R. Co v. Jackson, 130 So. 388, 221 Ala. 646
La.—Homeland Ins Co v Thompson, App, 12 So 2d 62
Ohio—Shaifer v. New York Cent R. Co, 34 N E.2d 792, 66 Ohio App. 417

Failure of engineer to slow down his train and to have it under control at a public crossing does not constitute negligence per se, where statute does not especially require engineer as a matter of law to slow down train on approaching public crossing—Georgia Northern Ry Co. v. Rollins, 8 S E 2d 114, 62 Ga App 138.

Rates of speed held not negligent per se
(1) Twenty-five to thirty miles an hour—Veres v Pennsylvania R Co., 54 A 2d 77, 161 Pa Super 177

(2) Forty to forty-five miles an hour
U S—Williams v Thompson, D C La, 48 F Supp 760
S C—Melton v Atlantic Coast Line R Co, 27 S E 2d 490, 206 S C. 251

(3) Sixty-five miles an hour—Chicago, R I & P R Co v Consumers Co-op Ass'n, C.A Kan, 180 F 2d 900, certiorari denied 71 S Ct. 42, 340 U S 813, 95 L Ed. ——

(4) Sixty-five to eighty miles an hour—Consumers Lumber & Veneer Co v. Atlantic Coast Line R Co., C C A Fla, 117 F 2d 329

(5) Other rates of speed held not negligent per se see 52 C J. p 243 note 11 [e].

31. U S—Poe v Chesapeake & O Ry Co, D C Ky, 64 F Supp 358
Cal—Peri v Los Angeles Junction Ry., 137 P 2d 441, 22 Cal 2d 111—Lahey v Southern Pac Co, 61 P 2d 461, 16 Cal App 2d 652, certiorari denied Southern Pacific Co. v Lahey, 57 S Ct 508, 300 U S. 665, 81 L Ed. 873
Ga—Gay v Sylvania Cent R. Co, 53 S E 2d 713, 79 Ga App. 362
Ill—Randolph v New York Cent R Co, 79 N E 2d 301, 334 Ill.App 268—Applegate v. Chicago & N W. Ry Co, 78 N.E 2d 793, 334 Ill App. 141—Shaw v. Chicago & E I. R. Co, 75 N E.2d 51, 332 Ill.App 285—Humbert v Lowden, 47 N E 2d 137, 317 Ill.App 538, reversed on other grounds 53 N E.2d 418, 385 Ill 437, conformed to 56 N E.2d 323, 323 Ill App 557
Ky—Louisville & N R. Co v. Bordoffsky's Adm'r, 236 S W 2d 950.
La—Martin v. Yazoo & M R. Co, App., 181 So. 571.
Nev—Los Angeles & S L R Co v Umbaugh, 123 P 2d 224, 61 Nev. 214
N C—Henderson v. Powell, 19 S E 2d 876, 221 N C 239
Tex—Baylor University v Bradshaw, Civ App, 52 S.W 2d 1094, affirmed Bradshaw v Baylor University, 84 S W 2d 703, 126 Tex. 99
52 C.J p 243 note 12.

No special duty as to control
If train was running at reasonable speed, locomotive engineer had no duty to keep train under any better control than any other train running at the same speed—Canion v Southern Pac. Co, 80 P 2d 397, 52 Ariz 245

32. U S—Poe v. Chesapeake & O Ry Co, D C.Ky, 64 F.Supp 358
Ariz—Atchison, T. & S F R. Co v Hicks, 165 P 2d 167, 64 Ariz 15
Cal.—Peri v Los Angeles Junction Ry, 137 P 2d 441, 22 Cal.2d 111
Ga—Powell v Crowell, 11 S E 2d 918, 63 Ga App 890—Georgia Northern Ry. Co. v Rollins, 8 S E 2d 114, 62 Ga App 138—Southern Ry Co v Alexander, 2 S E 2d 219, 59 Ga App 852—Seaboard Air Line Ry Co v Benton, 159 S E 717, 43 Ga.App 495, reversed on other grounds 165 S E 593, 175 Ga 491, conformed to 166 S E 219, 45 Ga App. 832
Ill—Applegate v. Chicago & N. W Ry Co, 78 N E 2d 793, 334 Ill App 141
Ky—Louisville & N R Co. v. Bordoffsky's Adm'r, 236 S W 2d 950—Chesapeake & O. Ry. Co. v. Coates, 113 S W 2d 28, 271 Ky. 736
Minn—Ohrmann v Chicago & N. W Ry Co, 27 N W 2d 806, 223 Minn 580—Engberg v Great Northern Ry Co, 290 N W 579, 207 Minn 194, 154 A L R. 206
Mo.—Pentecost v. St. Louis Merchants' Bridge Terminal R Co, 66 S W 2d 533, 334 Mo 572—Benton v. Thompson, 156 S W.2d 739, 236 Mo App. 1000, certiorari quashed State ex rel. Thompson v Shain, 163 S.W.2d 967, 349 Mo 1075—Duncan v. Chicago, B & Q R Co, App, 149 S.W.2d 920
Nev.—Los Angeles & S L R Co v Umbaugh, 123 P 2d 224, 61 Nev. 214
S.C.—**Corpus Juris cited in** Melton v Atlantic Coast Line R Co, 27 S. E 2d 490, 492, 206 S C. 251
Tenn—Louisville & N. R Co v. Frakes, 11 Tenn App. 593—Louisville & N. R R. Co. v. Ross, 2 Tenn App. 384
Tex—Texas & N O R Co v Haney, Civ App, 144 S W 2d 677, error dismissed, judgment correct—Rio Grande, E P. & S. F. R Co v. Lucero, Civ.App., 54 S W.2d 877, error dismissed
52 C.J p 244 note 13
Negligence in rate of speed as question for jury see infra § 870.

rate of speed without giving proper signals[33] or at a rate which renders the signals unavailing,[34] and the giving of signals does not justify an unreasonable rate of speed at a crossing.[35] Moreover, it has been held to be negligence for a train to approach a crossing at a rate of speed which the engineer knew would render it impossible to comply with statutory requirements.[36] Where the train was actually stopped before it reached the crossing, and a collision was avoided, it cannot be said that the train was operating at a negligent speed.[37]

Schedule; variance from usual speed or schedule. The fact that the train was being operated on its customary schedule does not alter its duty to pass a crossing at a reasonable rate of speed,[38] but the fact that a train was running later than schedule time does not require a reduction of speed.[39] Moreover, a railroad is not chargeable with negligence merely because it is operating a train faster than the usual or customary speed.[40]

Company rules and regulations. A railroad company rule as to the speed of certain trains, which does not relate merely to crossings, and which was not established for the purpose of protecting persons at crossings, does not render a speed in excess thereof negligence as to persons at a crossing.[41] Certainly, a speed of less than that permitted by company rules does not constitute evidence of defendant's negligence.[42] A railroad company regulation which requires a restricted speed within the limits of the railroad yard, but which fixes no maximum speed, does not establish that any particular speed is ex-

Particular circumstances to be considered
Nature and locality of crossing see infra § 745
Obstruction of view or hearing see infra § 746

Any speed may constitute negligence if, under the circumstances, reasonable prudence calls for a lesser speed.—Jensvold v. Chicago Great Western R Co, 12 N.W.2d 293, 234 Iowa 627—Finley v Lowden, 277 N.W. 487, 224 Iowa 999.

Extrahazardous crossing

(1) In action against railroad for death of occupant of truck which was struck at extraordinarily hazardous crossing, what was excessive speed for trains was required to be determined by consideration of hazardous conditions existing at crossing.—Martin v. Yazoo & M. R. Co, La App, 181 So. 571.

(2) Where conditions surrounding and in proximity to a railroad crossing make it more hazardous than an ordinary crossing, it may be negligence for a train to travel over the crossing at its usual rate of speed.—Blaske v Northern Pac Ry. Co, 37 N.W.2d 758, 228 Minn. 444.

Failure to observe custom

Negligence may be predicated on failure to observe custom to slow down trains at particular crossing, but such claim of fault is presumably only one based on peculiar circumstances concerning a railroad crossing.—Markar v. New York, N H & H. R Co., C.C.A.Conn., 77 F. 2d 282.

Rate of speed held not negligent under circumstances

(1) In general

Pa.—Adams v Maryland & P. R Co, Com.Pl., 52 York Leg.Rec 196

Wis.—Hynek v. Kewaunee, G B & W. Ry. Co., 29 N.W.2d 45, 251 Wis 319.

52 C.J. p 244 note 13 [b].

(2) Fifteen miles per hour for freight train of thirteen cars at night in city approaching open crossing.—Matthews v New Orleans Terminal Co, La App, 45 So 2d 547.

(3) Twenty-nine miles per hour, where crossing was adequately marked and automobile driver could have seen an approaching train as far back as it could possibly have been when he started to cross track.—Jorgenson v Minneapolis, St. P & S. S. Marie Ry Co, 42 N.W.2d 540, 231 Minn. 121

(4) Thirty to forty miles per hour, where view was unobstructed, the day was fair, and warning of approach of train was being given by whistle and bell.—Peterson v Boston & M R R, 36 N.E.2d 701, 310 Mass 45

(5) In excess of fifty miles per hour, where train sounded all necessary alarms, and motorist had unobstructed view of track for one thousand eight hundred feet from stop sign.—Hancock v Illinois Cent R Co, 131 So. 83, 158 Miss 668

Reduction in speed held required

(1) Special conditions, such as much-frequented crossing, may raise common-law duty on part of railroad engineer to reduce speed on coming in sight of crossing.—Atlantic Coast Line R Co. v. Jackson, 130 So. 388, 221 Ala. 646.

(2) Operators of train approaching heavily traveled crossing were required to reduce speed to comport with safety of travelers on highway.—Baylor University v Bradshaw, Civ.App, 52 S.W.2d 1094, affirmed Bradshaw v. Baylor University, 84 S.W.2d 703, 126 Tex 99.

Reduction in speed held not required

Evidence that fifty to one hundred persons daily used path on which pedestrian was struck by train and other paths nearby was insufficient to cast on railroad duty of slackening speed of train.—Louisville & N R. Co. v Jackson, 151 S.W.2d 386, 286 Ky 595.

33. Ark.—Missouri Pac R Co v Rogers, 43 S.W.2d 757, 184 Ark 725.
52 C.J. p 244 note 14

34. U.S.—Continental Impr Co. v. Stead, Ind., 95 U.S. 161, 24 L.Ed 403.
52 C.J. p 244 note 15.

35. Nev.—Los Angeles & S L R Co v Umbaugh, 123 P.2d 224, 61 Nev 214.

36. Tenn.—Louisville & N. R. Co v Frakes, 11 Tenn.App 593.

37. Tenn.—Nashville, C & St L. Ry v Perry, 13 Tenn.App 268

38. Tex.—Rio Grande, E P. & S F R Co v Lucero, Civ.App, 54 S.W.2d 877, error dismissed

39. Mich.—Tucker v Chicago & G T Ry. Co, 80 N.W. 984, 122 Mich 149.

Motorist's belief that train had passed could not be known to those operating the train.—Despres v Boston & M R R, 181 A. 420, 87 N.H 427.

40. N.J.—Di Giendemonica v. Pennsylvania-Reading Seashore Lines, 8 A.2d 342, 123 N.J.Law 296

Notice of change not required

Railroad company, not voluntarily assuming to protect grade crossing over which it customarily operated locomotives and trains at speed not exceeding five miles per hour, was not bound to continue, or give adequate notice to traveling public of its decision to terminate, such practice.—Di Giendemonica v. Pennsylvania-Reading Seashore Lines, supra

41. Mass.—Peterson v. Boston & M R R, 36 N.E.2d 701, 310 Mass 45
Regulation of speeds by statute or ordinance see infra §§ 747–749

42. U.S.—Baltimore & O R Co v Deneen, C.C.A.W.Va., 161 F.2d 674.

cessive,[43] nor ordinarily does it establish that any particular crossing is dangerous, where no particular crossing influenced the adoption of the regulation.[44]

Alleged negligence in reducing and then increasing speed is immaterial in an action for damages for injuries sustained in a crossing accident where no one was misled thereby.[45]

§ 745. —— Nature and Locality of Crossings

Whether a railroad crossing is in a rural or an urban area is a circumstance to be considered with respect to reasonableness of speed; and, while apart from statute or ordinance no speed is negligence per se either in city or country, greater care is required at greatly traveled crossings in cities than at unfrequented ones in the country.

In determining whether the speed of a train is negligence, whether the crossing is within a city or town rather than rural area is a circumstance to be considered.[46] In the absence of statute, and under ordinary circumstances, a railroad company is not guilty of negligence per se in running a train at a high rate of speed at crossings in the country outside cities and villages,[47] or, although within the corporate limits, outside the settled portion of the town,[48] especially where the proper signals have been given,[49] or where the view is unobstructed,[50] or where both the proper signals for such crossings have been given and the view is unobstructed.[51] However, whether a particular speed at a particular country crossing is excessive depends on the surrounding circumstances,[52] and, when considered together with other circumstances existing at the time, it may be negligent for the company to run a train at a high rate of speed even at such a crossing.[53]

43. La.—Eggleston v Louisiana & A. Ry Co, App, 192 So. 774.

44. La.—Eggleston v. Louisiana & A Ry Co, supra

45. Md.—Klein v United R, etc, Co, 137 A 306, 152 Md 492

46. Ill.—Applegate v Chicago & N W Ry Co., 78 N E 2d 793, 334 Ill App. 141
Ky.—Louisville & N R Co v Bordoffsky's Adm'r, 236 S W 2d 950
Mo.—Duncan v Chicago, B & Q R Co, App, 149 S W 2d 920.

47. U S.—Kilmer v Norfolk & W Ry. Co, C C A W Va, 45 F 2d 532, certiorari denied 51 S Ct. 347, 283 U S. 824, 75 L Ed 1438—Mast v Illinois Cent R Co, D C Iowa, 79 F.Supp. 149, affirmed, C C A, 176 F 2d 157—Lewis v Thompson, D C.La, 47 F Supp 435.
Colo.—Colorado & S Ry Co. v. Barth, 183 P 2d 549, 117 Colo. 17—Union Pac R. Co v Siemann, 145 P.2d 986, 112 Colo 70
Ky.—Louisville & N R Co v Elzey, 194 S W 2d 962, 302 Ky. 407—Illinois Cent R Co v. Applegate's Adm'x, 105 S W.2d 153, 268 Ky. 458.
La.—Guidry v. Texas & N O. R Co., App., 20 So 2d 637—Bahry v Illinois Cent Ry. Co, App, 13 So 2d 78—Sullivan v Yazoo & M V Ry. Co., App., 8 So 2d 109—Winfiele v. Texas & P. Ry. Co., App, 150 So. 43
Md.—Baltimore Transit Co. v. Bramble, 2 A 2d 416 175 Md 334.
Miss.—New Orleans & N E R Co v. Wheat, 160 So 607, 172 Miss 524—New Orleans & N. E R. Co v. Holsomback, 151 So 720, 168 Miss 493.
Pa.—Ealy v New York Cent. R. Co., 5 A 2d 110, 333 Pa 471.
52 C J. p 244 note 17.

The requirements of modern transportation make it necessary that passenger trains be operated at high speed and not slowed down ordinarily outside the limits of municipalities.—Illinois Cent R Co v Roberson, 191 So 494, 186 Miss 507

Crossings within rule

(1) Crossing outside unincorporated village of four houses with no railroad depot was in the "open country" within rule that speed of train traveling in open country is not limited in absence of statute.—Carter v Pennsylvania R. Co., C A. Ohio, 172 F 2d 521.

(2) Private crossings in the country are within the rule of the text.—Louisville, etc., R. Co v. Cantrell, 194 S W. 353, 175 Ky. 440—52 C.J p 244 note 17 [b].

Particular speeds held not negligent

(1) Twenty to thirty miles per hour.—Pennsylvania R. Co. v. Millesson, 2 N E 2d 17, 51 Ohio App. 528.

(2) Fifty miles per hour.—Guyler v. Lehigh Valley R. Co., 67 A 2d 575, 165 Pa Super 196

(3) Fifty miles an hour or even more.—Watson v. Vanosdal, 19 N.E 2d 269, 215 Ind 149.

(4) Fifty-seven miles per hour.—Winfiele v. Texas & P. Ry Co, La App, 150 So 43

(5) Sixty miles an hour.—Alabama Great Southern R Co. v. Martin, 39 So 2d 501, 205 Miss. 851

(6) Sixty-five miles per hour.—Missouri Pac R. Co. v. Dennis, 166 S.W 2d 886, 205 Ark. 28.

(7) Other speeds held not negligent see 52 C J. p 244 note 17 [c].

48. Tex.—Lancaster v. Green, Civ. App, 245 S W 1040.
52 C J. p 245 note 18.

49. U S.—Carter v Pennsylvania R. Co, C A Ohio, 172 F 2d 521—Plough v Baltimore & O R Co, C A N Y, 172 F 2d 396, certiorari denied 69 S.Ct 1518, 337 U S 940, 93 L Ed 1745, Hanson v Baltimore & O R. Co, 69 S.Ct 1518, 337 U S 940, 93 L Ed 1745, Van Slyke v Baltimore & O R Co, 69 S Ct 1518, 337 U S. 941, 93 L.Ed 1745, and Lynch v. Baltimore & O R Co, 69 S Ct 1518, 337 U.S 941, 93 L Ed 1745

Speed of about sixty miles per hour held not negligent
Md.—State, for Use of Emerson, v. Poe, 190 A 231, 171 Md 584
N Y.—Lee v. Pennsylvania R Co, 280 N.Y S 285, 244 App Div. 558, reversed on other grounds 198 N E 629, 269 N Y 53, reargument denied 200 N.E 52, 269 N.Y 674, amendment of remittitur denied 1 N E 2d 364, 270 N Y. 629.

50. U S.—Constantine v. Pennsylvania R. Co, C C A Ind, 114 F 2d 271—Bassett v. Delaware & H. Co, C C.A.Vt., 62 F.2d 74

51. Kan.—Atchison, etc, R. Co. v Judah, 70 P. 346, 65 Kan. 474
Pa.—Newhard v. Pennsylvania R Co, 26 A. 105, 153 Pa 417, 19 L R.A. 563.

Particular speeds held not negligent

(1) Forty miles an hour.—Hoyum v. Duluth, W. & P. Ry Co, 279 N W 729, 203 Minn 35.

(2) Fifty miles per hour.—Engberg v Great Northern Ry Co, 290 N W. 579, 207 Minn. 194, 154 A L R 206.

(3) Seventy-five miles per hour.—Robins v. Pitcairn, C C A.Ill, 124 F 2d 734.

52. Mo.—Duncan v Chicago, B & Q R. Co, App., 149 S W 2d 920

53. Mo.—Duncan v. Chicago, B & Q R Co., supra.

Likewise, in the absence of statute or ordinance, it is not negligence per se to run at a high rate of speed over crossings in a city or village,[54] at least if due and timely warning was given of the approach of the train.[55] However, a railroad must exercise greater care in the matter of speed at greatly traveled crossings in cities than at unfrequented crossings in the country;[56] and a rate of speed which would not be negligence at a crossing in the country may constitute negligence under the conditions existing at a crossing in a populous town or city,[57] and the question whether or not it is negligence depends on the circumstances at the particular time and crossing.[58]

It has been held that, in running through cities and towns, the speed of the train should be moderated to a reasonable degree, so as to have it under reasonable control,[59] and the same rule has been applied to a frequently used crossing outside the city limits.[60] This does not require, however, that the speed should be such as to enable those in charge of the train to stop it instantly,[61] but it is sufficient if the speed could be slackened in time to afford a traveler upon the highway an opportunity to make an effort to avoid a collision.[62]

Excessive speed held not excused The fact that a train was moving at its usual[63] or scheduled[64] rate of speed, or that a high rate would render it easier to ascend a grade just beyond,[65] does not excuse an excessive speed over crossings in a town or city.

Where gates have been erected and a flagman stationed at a crossing, the railroad company has the right to operate its trains over the crossing at any rate of speed, provided it uses due care in operating the appliances intended to shut off the public,[66] but where the watchman is off duty and the gates are open it is the duty of its employees to slacken speed.[67]

§ 746. —— Obstruction of View or Hearing

The fact that an obstruction or atmospheric conditions interfere with the ability to see or hear the highway or the train is a circumstance to be considered in determining whether the speed of the approaching train is negligent.

The fact that a crossing is or is not obstructed so as to interfere with the view of the highway or with the ability of travelers on the highway to see or hear the train approaching the crossing is a circumstance to be considered in determining whether the speed of the approaching train is negligent.[68]

Tenn.—Louisville & N. R. Co. v. Frakes, 11 Tenn App 593
52 C.J. p 245 note 20.

Circumstances held not to render speed negligent
Fact that highway intersected railroad at acute angle did not alter rule permitting operation of trains at high speed over country crossings; and roughness of highway at country crossing did not impose duty on railroad to slow down train or render its speed negligent.—Bassett v Delaware & H. Co, C.C.A.Vt., 62 F.2d 74.

54. U.S.—Williams v. Thompson, D. C.La., 48 F.Supp 760
52 C.J. p 246 note 21.

Ability to stop within visible distance held not required
La.—Cruse v. Thompson, App., 36 So. 2d 735

Particular speed held not negligent
(1) In excess of thirty-two miles an hour.—Hopp v. Northern Pac Ry Co., 147 P.2d 950, 20 Wash.2d 439

(2) Forty miles an hour.—Haller v Pennsylvania R. Co., 159 A. 10, 306 Pa. 98.

(3) Forty to forty-five miles per hour.—Lewis v. Thompson, D.C.La., 47 F.Supp. 435

(4) Other speeds held not negligent see 52 C.J. p. 246 note 21 [a].

55. N.Y.—McKelvey v. Delaware, L. & W. R. Co., 300 N.Y.S. 1263, 253 App.Div. 109.

56. Nev.—Los Angeles & S. L. R. Co. v. Umbaugh, 123 P.2d 224, 61 Nev. 214.

57. Cal.—Dow v. Southern Pac. Co., 288 P. 89, 105 Cal.App. 378.
52 C.J. p. 246 note 22

58. Cal.—Dow v. Southern Pac. Co., supra
52 C.J. p. 246 note 23

Speeds held not negligent under circumstances
(1) Operation of passenger train running on fixed schedule at speed of sixty-five to seventy miles per hour, at point where depot for town and grade crossing were located, was held not negligent, where such speed was not unusual for trains of that character.—Missouri Pac. R. Co. v. Sanders, 106 S.W.2d 182, 193 Ark. 1099

(2) A railroad was not negligent in operating train at ninety miles per hour over crossing in small village, where there were no special hazards at crossing and adequate signals were given from train and from devices at crossing.—Nice v. Illinois Cent. R. Co., 25 N.E.2d 104, 303 Ill.App. 292

59. Ohio.—New York, C. & St. L. R. Co. v. Van Dorp, 173 N.E. 445, 36 Ohio App. 530.
52 C.J. p. 246 note 24

60. Miss.—New Orleans & N. E. R. Co. v. Wheat, 160 So. 607, 172 Miss. 524.—Hines v. Moore, 87 So. 1, 124 Miss. 500

Proportional diminution of speed
Where a railroad passes through a locality in the country where it is known that persons habitually use a private way maintained by the company in crossing its tracks and that persons are likely to be near such track, the speed of the train should be diminished in proportion to the probability of meeting persons on the tracks.—Wilson v. Pollard, 10 S.E.2d 407, 62 Ga.App. 781

61. Ky.—Louisville, etc., R. Co. v. Staebler, 212 S.W. 919, 184 Ky. 730.—Louisville, etc., R. Co. v. Scott, 211 S.W. 747, 184 Ky. 319.

62. Ky.—Louisville, etc., R. Co. v. Staebler, 212 S.W. 919, 184 Ky. 730.—Louisville, etc., R. Co. v. Scott, 211 S.W. 747, 184 Ky. 319.

63. Ohio.—Davis v. Breckler, 17 Ohio App. 19

64. Tex.—Galveston, etc., R. Co. v. Leifeste, Civ.App., 8 S.W.2d 764, affirmed, Com.App., 22 S.W.2d 1061.

65. Ky.—Louisville, etc., R. Co. v. Taylor, 104 S.W. 776, 31 Ky.L. 1142.

66. U.S.—Central R. Co. v. Hudson, Pa., 209 F. 176, 126 C.C.A. 124.
52 C.J. p. 247 note 31.

67. U.S.—Canadian Pac. R. Co. v. Slayton, C.C.A.Vt., 29 F.2d 687.
52 C.J. p. 247 note 32

68. U.S.—Mast v. Illinois Cent. R. Co., D.C.Iowa, 79 F.Supp. 149, affirmed, C.C.A., 176 F.2d 157.

Thus, while the fact that the view of the highway or of the train at a crossing is obstructed by intervening objects ordinarily does not make it negligence not to slacken speed at such crossing, where the required danger signals have been given,[69] running over it at a high rate of speed without giving sufficient warning signals is negligence.[70] Moreover, where the conditions at the time and crossing are otherwise such as, in the exercise of ordinary care, to require the railroad to slacken speed,[71] as where the crossing so obstructed is a much-used one,[72] the duty devolves on the company to run its trains over the crossing at a reasonable rate. In regulating the speed of its trains a company is not, however, bound to take into consideration objects not on its right of way or its own lands, even though they obstruct the view of its lines.[73] Whether the rate of speed at an obstructed crossing is negligent depends on all the circumstances;[74] and whether the company should slacken speed at a particular obstructed crossing depends on the circumstances.[75] It has been held that the railroad's negligence in operating a train at maximum speed at an obstructed crossing should be determined regardless of the average rate of speed on such run or the rate of speed at the place of collision.[76]

Atmospheric conditions. Whether a rate of speed during fog or rain is negligence depends on all the circumstances,[77] including the density of the population at the crossing.[78] Although there is some authority to the contrary,[79] where proper signals are given failure to check the speed of a train at a crossing because of fog[80] or rain[81] affecting visibility is not negligence, but where the direction of the wind makes it difficult for a traveler upon the highway to hear the noise of the train and its signals, and dust in the air tends to obscure his vision, it is the duty of the engineer to control the speed of the train accordingly.[82]

§ 747. —— Under Statutes or Ordinances in General

a. In general
b. Construction

a. In General

Where the rate of speed of trains at public crossings is regulated by statute or ordinance it is the duty of the railroad company to comply therewith.

Where the rate of speed of trains at public crossings is regulated by statute or ordinance, fixing the maximum rate within specified limits, or providing that the engineer on reaching a whistle post shall give the required signals and check the train so that he may be able to stop at the crossing, or that the train shall not go faster than a specified rate until the crossing or street is passed, or that the railroad company shall be liable for damages sustained while running at a greater rate than the one specified, it is the duty of the railroad company to comply therewith.[83] The purpose of such provisions

Ill.—Applegate v. Chicago & N. W. Ry. Co., 78 N.E.2d 793, 334 Ill.App. 141.

Ky.—Louisville & N. R. Co. v. Bordoffsky's Adm'r, 236 S.W.2d 950.

Minn.—Engberg v. Great Northern Ry. Co., 290 N.W. 579, 207 Minn. 194, 154 A.L.R. 206.

Mo.—Duncan v. Chicago, B. & Q. R. Co., App., 149 S.W.2d 920.

Mere curve in railroad track, obstructing train operators' view of crossing, so that train cannot be stopped after rounding curve in time to avoid collision with truck at crossing because of rate of speed of train, does not render crossing extraordinarily dangerous or hazardous, even though collision happens in nighttime.—Duncan v. Chicago, B. & Q. R. Co., supra.

69. Miss.—Illinois Cent. R. Co. v. Roberson, 191 So. 494, 186 Miss. 507.
52 C.J. p. 247 note 33.

70. Pa.—Kelly v. Director Gen. of Railroads, 118 A. 436, 274 Pa. 470.
52 C.J. p. 247 note 34.
Requirement of signals at crossings with obstructed view generally see supra § 741.

71. U.S.—Canadian Pac. R. Co. v. Slayton, C.C.A.Vt., 29 F.2d 687.
52 C.J. p. 247 note 35.

72. Wash.—Hubenthal v. Spokane, etc., R. Co., 166 P. 797, 97 Wash. 581.
52 C.J. p. 247 note 36.

73. Ohio.—New York, etc., R. Co. v. Kistler, 64 N.E. 130, 66 Ohio St. 326.
52 C.J. p. 247 note 37.

74. Ill.—Shaw v. Chicago & E. I. R. Co., 75 N.E.2d 51, 332 Ill.App. 285.

Railroad held not negligent
Ill.—Shaw v. Chicago & E. I. R. Co., supra.

75. Me.—Ham v. Maine Cent. R. Co., 116 A. 261, 121 Me. 171.
Ohio.—Lake Shore, etc., R. Co. v. Schade, 15 Ohio Cir. Ct. 424, 8 Ohio Cir. Dec. 316.

76. Mo.—Duncan v. Chicago, B. & Q. R. Co., App., 149 S.W.2d 920.

77. La.—Homeland Ins. Co. v. Thompson, App., 12 So.2d 62.

Evidence of negligence
Although speed at which train is moving may not in itself be evidence of negligence, a high rate of speed in fog over main traveled highway may be.—Atlantic Coast Line R. Co. v. McKinley, C.C.A.Fla., 84 F.2d 33.

78. La.—Homeland Ins. Co. v. Thompson, App., 12 So.2d 62.

Sparsely settled community
A railroad company is not required to slow its trains during rainy or foggy weather when traveling through a sparsely settled community.—Homeland Ins. Co. v. Thompson, supra.

79. Ala.—Hines v. Beasley, 88 So. 31, 17 Ala.App. 636.
52 C.J. p. 247 note 39.

80. La.—Homeland Ins. Co. v. Thompson, App., 12 So.2d 62.
52 C.J. p. 247 note 40.

81. La.—De Buono v. Illinois Cent. R. Co., 124 So. 694, 12 La.App. 35.
52 C.J. p. 247 note 41.

82. Ariz.—Davis v. Boggs, 199 P. 116, 22 Ariz. 497.

83. Mo.—Mullis v. Thompson, 213 S.W.2d 941, 358 Mo. 230.
52 C.J. p. 248 note 44.
Statutory, municipal, or official regulation of rate of speed generally see supra § 431.

is to govern the railroads in their conduct toward persons crossing the tracks[84] and to safeguard against injuries to persons and property.[85] Liability under such statutes has been said to depend on the lawfulness of the speed when the danger is, or should have been, discovered.[86]

The regulation of speed by company rules and regulations is discussed supra § 744.

b. Construction

(1) In general
(2) As to particular crossings
(3) As to particular engines and cars
(4) Persons and property protected

(1) In General

General rules apply in construing statutes or ordinances regulating the speed of engines or cars over crossings.

General rules as to the construction of statutes or municipal ordinances are applicable in construing statutes or ordinances regulating the speed of engines or cars over crossings,[87] and such enactments are to be interpreted in the light of other provisions on the same subject.[88] Where the statute requires speed to be checked on reaching a certain point, it is not necessary to begin checking the speed before reaching that point;[89] but under an ordinance limiting the speed on certain tracks to a specified rate a train must be brought within the limit by the time it reaches such track.[90]

(2) As to Particular Crossings

Statutes or ordinances prescribing the speed of trains at certain crossings or types of crossings or crossings in certain areas should be construed so as to give effect to the limiting provisions.

Statutes or ordinances prescribing the speed of trains at certain crossings or certain types of crossings or crossings in certain areas are to be construed so as to give effect to the limitations contained in the provisions.[91] Thus, where a statute or ordinance prescribes a speed limit in a certain area, it has no application to persons or property situated outside such area,[92] even though the train itself is partly within such area.[93] A statute or ordinance prescribing the speed of trains through[94] or in[95] streets applies only to streets upon and through which the track is located, and not to a simple street crossing.[96] Where the speed is limited until gates and signal bells are erected and put into operation, the limit ceases to be in force when such appliances are put into use,[97] and it is not revived by subsequent failure to operate them.[98] Although there is some authority to the contrary,[99] where an ordinance designates certain streets as boundaries of the area in which speed is to be limited, crossings at the designated streets are construed to be within the area;[1] and, where a municipal ordinance limits speed over any public place or at any place between certain streets, the limit applies to a public crossing in the city although it is not within the designated area.[2] Requirements as to speed at crossings apply only to grade crossings,[3] particularly where they expressly so state;[4] and a law requiring the checking of trains at road crossings applies as well to crossings of streets in cities.[5] A statute making a railroad company liable for injuries caused by a rate of speed exceeding a designated rate within a municipality does not apply to injuries inflicted outside the municipal limits[6] even though the speed could not be reduced to such rate before reaching

84. Ala.—Miles v. Hines, 87 So. 837, 205 Ala. 83.
Kan.—Long v. Missouri Pac. R. Co., 216 P. 1079, 114 Kan. 40.

85. Mich.—Fairchild v. Detroit, G. H. & M. Ry. Co., 230 N.W. 167, 250 Mich. 252.
Tex.—Missouri, K. & T. R. Co. of Texas v. Young, Civ. App., 127 S.W.2d 489, error dismissed, judgment correct.
52 C.J. p. 248 note 47.

86. Miss.—Louisville, etc., R. Co. v. Dick, 48 So. 401, 95 Miss. 111.
52 C.J. p. 248 note 48.

87. Wis.—O'Brien v. Wisconsin Cent. R. Co., 96 N.W. 424, 119 Wis. 7.

88. Wis.—O'Brien v. Wisconsin Cent. R. Co., supra.
52 C.J. p. 248 note 52.

89. Ga.—Crawley v. Georgia R., etc., Co., 8 S.E. 417, 82 Ga. 190.
52 C.J. p. 248 note 53.

90. Mo.—Johnson v. Wabash R. Co., 168 S.W. 713, 259 Mo. 534.
52 C.J. p. 248 note 54.

91. Va.—Washington-Virginia R. Co. v. Struder, 111 S.E. 239, 132 Va. 368.

92. Miss.—Hancock v. Illinois Cent. R. Co., 131 So. 83, 158 Miss. 668.

93. Miss.—Hancock v. Illinois Cent. R. Co., supra.

94. Fla.—Seaboard Air Line R. Co. v. Tomberlin, 70 So. 437, 70 Fla. 435—Seaboard Air Line R. Co. v. Smith, 43 So. 235, 53 Fla. 375.

95. Va.—Chesapeake, etc., R. Co. v. Hewin, 148 S.E. 794, 152 Va. 649.
52 C.J. p. 248 note 56.

96. Va.—Chesapeake, etc., R. Co. v. Hewin, supra.
52 C.J. p. 248 note 57.

97. Ill.—Hecker v. Illinois Cent. R. Co., 83 N.E. 456, 231 Ill. 574.

98. Ill.—Hecker v. Illinois Cent. R. Co., supra.

99. Ala.—Louisville, etc., R. Co. v. Loyd, 65 So. 153, 186 Ala. 119.
52 C.J. p. 248 note 60.

1. Mich.—Fairchild v. Detroit, etc., R. Co., 230 N.W. 167, 250 Mich. 252.
52 C.J. p. 248 note 61.

2. Wash.—Gillum v. Pacific Coast R. Co., 279 P. 114, 152 Wash. 657.

3. Wis.—Barron v. Chicago, etc., R. Co., 61 N.W. 303, 89 Wis. 79—Jenson v. Chicago, etc., R. Co., 57 N.W. 359, 86 Wis. 589, 22 L.R.A. 680.

4. Va.—Washington-Virginia R. Co. v. Struder, 111 S.E. 239, 132 Va. 368.
52 C.J. p. 249 note 64.

5. Ga.—Central R. Co. v. Russell, 75 Ga. 810.

6. Miss.—Hines v. Moore, 87 So. 1, 124 Miss. 500.

such limits[7] A statute limiting speed over crossings "near the compact part of a town" applies to any compact portion, and not necessarily the largest or principal compact part of a town[8]

Curves. Under a statute so providing, the requirement to slow down applies only to crossings on curves of certain specifications[9]

Origin of crossing on highway Persons crossing the track at a public road crossing are entitled to the protection of statutes regulating the approach of locomotives and cars to the crossing, no matter how the road or crossing came into existence[10] Thus, a requirement that trains shall not exceed a certain speed until "they have passed all traveled streets of a city" applies to all actually traveled streets within the city limits, although such only by user;[11] and a "highway," within the meaning of such regulatory statutes, is not limited to ways established by county commissioners or municipal authorities,[12] the term being used in its more generic and popular legal sense.[13]

(3) As to Particular Engines and Cars

Effect should be given statutes or ordinances prescribing the speed of certain trains or trains under certain conditions.

Effect should be given to statutes or ordinances prescribing the speed of certain trains or trains under certain conditions or circumstances[14] Thus, a statute prescribing speed limits for trains running "into or through" a station does not apply to a train running past the station without going into or through it.[15] While an engine and tender are not within the meaning of a law or ordinance limiting the speed of "passenger trains,"[16] where an ordinance by its terms applies to "any through or local freight train or passenger train," an engine and tender of a freight train proceeding to reconnect with the train after switching some cars is within its provisions.[17] Where an ordinance limits the speed of cars operated over street railway tracks, it does not apply to cars when operated over railroad tracks upon a private right of way,[18] even though they are local cars operated only within the city limits and running for the greater part of their course over city streets.[19]

Train started at crossing. A statute requiring the checking of speed of trains at public crossings does not apply to a train started at or upon a crossing.[20]

(4) Persons and Property Protected

Every person who would be benefited by compliance by the railroad company with a valid statute or ordinance is entitled to the protection which obedience thereto would furnish.

Every person who would be benefited by a compliance by the railroad company with a valid statute or ordinance is entitled to the protection which obedience to such ordinance would furnish,[21] whether or not he is an inhabitant of the city,[22] whether or not he knew or relied on such regulation,[23] and even though the ordinance is a franchise ordinance.[24] So a statute relating to the speed of engines and cars in depots and providing for recovery of full damages by one injured as a result of violations thereof is not confined to passengers and those intending to take passage,[25] and it covers injuries to property as well as to the person[26] A statute requiring trains at railroad crossings to come to a full stop and move forward slowly, however, imposes no duty on the company as to a person at a highway crossing near a railroad crossing.[27]

7. Miss.—Hines v Moore, supra

8. Me—Moore v Maine Cent R Co, 76 A 871, 106 Me 297.
52 C J. p 249 note 70

9. Ala—Atlantic Coast Line R. Co v Jackson, 130 So 388, 221 Ala 646
Statute held inapplicable
Ala—Louisville & N R Co v. Bailey, 16 So 2d 167, 245 Ala 178—Southern Ry Co. v. Hale, 133 So. 8, 222 Ala 489.

10. Ga—Atkinson v Fountain, 73 S E 534, 10 Ga App 307

11. Wis—Ewen v. Chicago, etc., R Co, 38 Wis 613

12. Me—Moore v Maine Cent. R. Co., 76 A 871, 106 Me 297.
52 C J. p 249 note 73

13. Me.—Moore v Maine Cent R. Co, supra.

14. Ill—Lake Shore, etc, R. Co. v. Probeck, 33 Ill App 145

15. Vt—Flint v. Central Vermont R Co., 73 A. 590, 82 Vt 269

16. Ill—Lake Shore, etc, R. Co. v. Probeck, 33 Ill App. 145
52 C J. p 249 note 76

17. N C—Dorsett v Atlantic Coast Line R Co, 87 S E 961, 171 N.C. 109

18. Cal.—Simoneau v. Pacific Electric R Co, 115 P. 320, 159 Cal 494
52 C J p 249 note 78.

19. Cal—Simoneau v. Pacific Electric R. Co, supra.
52 C J p 249 note 79.

20. Ga—Harris v. Central R. Co., 3 S E 355, 78 Ga 525.
52 C J p 249 note 80

21. Ill—Pridmore v. Chicago, etc, R Co, 114 N E 176, 275 Ill. 386
52 C J p 249 note 81.

22. Kan—Long v Missouri Pac. R Co., 216 P 1079, 114 Kan 40

23. Mo—Todd v St. Louis-San Francisco Ry. Co, App, 37 S W 2d 557.

24. Utah—Shortino v. Salt Lake, etc, R Co., 174 P 860, 52 Utah 476.
52 C J p 249 note 83

25. Miss—Davis v. Thomas, 89 So 907, 127 Miss. 174.

26. Miss—Davis v. Thomas, supra

27. Ga.—Central of Georgia R. Co. v Griffin, 132 S E 255, 35 Ga.App 161.
52 C J. p 250 note 86.

§ 748. —— Effect of Statutes or Ordinances

Statutes or ordinances regulating the speed of trains do not change the general law as to speed; and, while compliance with regulations ordinarily will negative negligence, a rate of speed may under some circumstances be negligent at common law even though within the regulations.

Statutes or ordinances regulating the speed of trains do not change the general law on the subject,[28] or the rights and duties of the parties growing out of obedience or disobedience to such a statute or ordinance;[29] and employees operating trains must use ordinary care and conform their rate of speed to the safety of the public, according to the circumstances of each case, and irrespective of statute or ordinance.[30] Accordingly, while compliance with the requirements of a statute or ordinance as to speed ordinarily will be sufficient to negative negligence,[31] it is also true that, since a rate of speed may be negligent at common law while within the statutory speed limit,[32] where the circumstances at a particular time and crossing are such that ordinary care and prudence require trains to be run at a less rate of speed than that limited by the statute or ordinance, the railroad company is bound to exercise such care and prudence,[33] it being a question of fact to be determined by the circumstances whether the speed fixed by such statute or ordinance is consistent with due caution.[34]

§ 749. —— Violation of Statutes or Ordinances

The running of a train at a crossing at a speed in excess of that limited by statute or ordinance is usually negligence per se.

Where a train is run at a crossing at a rate of speed in excess of that limited by statute or ordinance, it is in most jurisdictions negligence per se,[35] for which the railroad company is liable if such speed is the proximate cause of the injury, as discussed infra § 761, and there is no contributory negligence on the part of the person injured.[36] Moreover, this liability exists even though there was no actual collision,[37] and notwithstanding such statute or ordinance has never been enforced,[38] and was customarily violated,[39] or the engineer or other person in charge of the train did all in his power to stop the train after discovering the danger of the person injured.[40] In some jurisdictions, however, an unlawful rate of speed at a crossing is held to be merely evidence of negligence to be considered by the jury together with other circumstances on the question of negligence,[41] although under some circumstances it may become negligence per se.[42]

Duty must be owing to injured person. The general rule that in order that the violation of a statute or ordinance may constitute negligence it is necessary that the duty created thereby should have been for the benefit of, or should have been owed to, the person claiming to have been injured through its violation, discussed in Negligence § 19 e (4) (a), has been applied to statutes or ordinances regulating the speed of trains.[43]

28. U S—Whelan v New York, etc, R. Co., C C Ohio, 38 F. 15

29. U S—Whelan v. New York, etc, R. Co. supra

30. Ill.—Humbert v. Lowden, 53 N E 2d 418, 385 Ill. 437, conformed to 56 N E 2d 323, 323 Ill App 557.
Nev—Los Angeles & S L. R. Co v. Umbaugh, 123 P.2d 224, 61 Nev 214.
52 C J p 250 note 89.

31. Conn—Kinderavich v. Palmer, 15 A 2d 83, 127 Conn. 85

32. Mo—Duncan v Chicago, B. & Q R Co., App, 149 S.W 2d 920
52 C J p 250 note 90

33. Conn—Kinderavich v. Palmer, 15 A 2d 83, 127 Conn. 85.
52 C J. p 250 note 91

34. Miss—Alabama, etc, R. Co v. Phillips, 11 So. 602, 70 Miss. 14.
52 C J p 250 note 92.

35. U.S—Moss v. Pennsylvania R Co, C C A Ind, 146 F.2d 673, certiorari denied 65 S Ct 1200, 325 U S 861, 89 L Ed 1982
Ala—Roberts v Louisville & N. R Co, 186 So 457, 237 Ala 267
Colo—Colorado & S Ry Co v. Honaker, 19 P.2d 759, 92 Colo. 239.
Ga.—Central of Georgia Ry Co. v Barnes, 167 S E 217, 46 Ga App 158.
Ind—Baltimore & O R Co v Reyher, 24 N.E 2d 284, 216 Ind 545—New York Cent R Co v Pinnell, 40 N E 2d 988, 112 Ind App. 116.
Iowa—Jensvold v Chicago G W R Co., 18 N W 2d 616, 236 Iowa 708
Mo.—Stegner v. Missouri-Kansas-Texas R Co, 64 S W 2d 691, 333 Mo. 1182—Todd v. St. Louis-San Francisco Ry. Co, 37 S.W.2d 557—Dove v. Atchison, T. & S F. Ry Co, App, 140 S W.2d 715
N C—Johnson v Atlantic Coast Line R Co., 170 S E 120, 205 N C 127—Rives v. Atlantic Coast Line R Co., 165 S.E. 709, 203 N C 227.
Ohio—Patton v Pennsylvania R Co, 24 N E 2d 597, 136 Ohio St 159.
Okl.—Kurn v. Adair, 178 P.2d 104, 198 Okl. 340.
S C—Harrison v. Atlantic Coast Line R. Co, 13 S.E.2d 137, 196 S C 259.
Wis—Umlauft v Chicago, M, St. P. & P Ry. Co, 289 N W 623, 233 Wis 391.
52 C J p 250 note 93—45 C J. p 723 note 25.

36. Ga—Central of Georgia R. Co. v. Tribble, 38 S.E. 356, 112 Ga 863
52 C J. p 251 note 95

37. Ill—Illinois Cent. R Co. v Crawford, 48 N E 679, 169 Ill 554

38. Ind—Cleveland, etc, R. Co v. Harrington, 30 N E 37, 131 Ind 426
52 C J p 251 note 97.

39. Tex.—Garber v St Louis Southwestern R. Co, Civ App., 118 S W. 857

40. Ill.—Chicago, etc, R. Co. v. Smith, 77 Ill App 492.
Mo.—Chappell v United R. Co, 156 S.W. 819, 174 Mo App 126.

41. Ark—Missouri Pac. R. Co. v. Dalby, 132 S W 2d 646, 199 Ark 49.
W Va.—Jones v Virginian Ry Co, 177 S.E. 621, 115 W Va 665
52 C.J. p 251 note 1—45 C J. p 718 note 35.

42. N.C.—Norton v. North Carolina R. Co, 29 S E 886, 122 N.C. 910.
52 C J. p 251 note 2

43. Iowa.—Girl v. U. S. Railroad

Injury by suction. Where a person is injured by being sucked under a train by the current of air put in motion by a train while running at a rate of speed prohibited by ordinance, the company cannot be held liable unless it is shown that it knew that such excessive speed would produce such a result or that a reasonably prudent man would have apprehended it.[44]

§ 750. Means of Controlling Trains

It is generally the duty of a railroad company to adopt well tested brakes or other appliances for the control of its trains.

It is the duty of a railroad company to adopt well tested brakes or other appliances for the control of its trains,[45] and it is liable for injuries caused, without any fault on the part of the person injured, by reason of its failure to supply or keep in repair such brakes or appliances,[46] and to have an employee on hand to apply them[47] at the proper time.[48]

Under the Federal Safety Appliance Act, the duty of an interstate railroad with respect to power control brakes applies to travelers at highway crossings,[49] and is not limited to travelers on the railroad and railroad employees,[50] whose protection was the primary purpose of the act;[51] and the statute converts the railroad's common-law duty to maintain adequate brakes from a qualified duty into an absolute one,[52] from the violation of which there arises a liability for an injury resulting therefrom to any person falling within the terms and intent of the act.[53] However, the statute, and the rules of interstate commerce commission pursuant thereto, have been held not to apply to ordinary switching operations in railroad yards.[54] Moreover, statutory provisions which are held to have no application to the safety of the general public are not controlling in actions for injuries at crossings resulting from failure to maintain required safety appliances.[55]

§ 751. Precautions as to Persons or Objects Seen at or near Crossings

a. In general
b. Duty to stop or reduce speed

a. In General

Train operatives are under no duty to take action for the safety of a person at or near a crossing except where such person is in imminent peril, which is or should have been appreciated by them, in which case they must use all reasonable precautions and efforts to avert an accident.

The requirement of care on the part of a railroad company as to crossings is to be determined by considering what the engineer would be justified in counting on from travelers on the highway approaching a crossing.[56] Thus, other than the general duty to operate trains with ordinary care when approaching a crossing, discussed supra § 732, railroad employees not reasonably anticipating that a person will come upon a crossing owe no particular duty of care to him;[57] and there is no duty to take action for the safety of a person at or near a cross-

Administration, 189 N.W. 834, 194 Iowa 1382
45 C.J. p. 728 note 89.

44. Mo.—Graney v. St. Louis, etc., R. Co., 57 S.W. 276, 157 Mo. 666, 50 A.L.R. 153

45. Va.—Seaboard Air Line R. Co. v. Abernathy, 92 S.E. 913, 121 Va. 173.
52 C.J. p. 251 note 4.

It is the common-law duty of the railroad company to use ordinary care to provide and keep in reasonably safe condition adequate brakes for the control of its trains.—Fairport, P. & E. R. Co. v. Meredith, Ohio, 54 S.Ct. 826, 292 U.S. 589, 78 L.Ed. 1446.

46. N.C.—Bradley v. Ohio River, etc., R. Co., 36 S.E. 181, 126 N.C. 735.
52 C.J. p. 251 note 5.

47. Ill.—Illinois Cent. R. Co. v. Baches, 55 Ill. 379.
52 C.J. p. 251 note 6.

48. Ill.—Illinois Cent. R. Co. v. Baches, supra
52 C.J. p. 251 note 7.

49. U.S.—Fairport, P. & E. R. Co. v. Meredith, Ohio, 54 S.Ct. 826, 292 U.S. 589, 78 L.Ed. 1446—Andersen v. Bingham & G. Ry. Co., C.A. Utah, 169 F.2d 328

50. U.S.—Fairport, P. & E. R. Co. v. Meredith, Ohio, 54 S.Ct. 826, 292 U.S. 589, 78 L.Ed. 1446—Andersen v. Bingham & G. Ry. Co., C.A. Utah, 169 F.2d 328

51. U.S.—Fairport, P. & E. R. Co. v. Meredith, Ohio, 54 S.Ct. 826, 292 U.S. 589, 78 L.Ed. 1446—Andersen v. Bingham & G. Ry. Co., C.A. Utah, 169 F.2d 328

52. U.S.—Fairport, P. & E. R. Co. v. Meredith, Ohio, 54 S.Ct. 826, 292 U.S. 589, 78 L.Ed. 1446.

53. U.S.—Fairport, P. & E. R. Co. v. Meredith, supra

54. Fla.—Sea Board Air Line R. Co. v. Watson, 113 So. 716, 94 Fla. 571
52 C.J. p. 252 note 9

55. Ind.—Indianapolis, etc., Tract. Co. v. Rogers, 134 N.E. 669, 79 Ind. App. 173
52 C.J. p. 251 note 8.

56. Md.—Western Maryland Ry. Co. v. Myers, 163 A. 700, 163 Md. 534

57. Ga.—Georgia, etc., R. Co. v. Lasseter, 147 S.E. 166, 39 Ga. App. 393
Mo.—Janssens v. Thompson, Mo., 228 S.W.2d 743, 360 Mo. 351—**Corpus Juris cited in** Weishaar v. Kansas City Public Service Co., App., 128 S.W.2d 332, 340
Contributory negligence in crossing near approaching train see infra § 799

Duty to blow horn or whistle
(1) Mere fact that automobile is approaching city railroad grade crossing does not of itself require engineer on train approaching crossing to blow its whistle.—Keegan v. Chicago, M., St. P. & P. Ry. Co., 27 N.W.2d 739, 251 Wis. 7.

(2) Engineer of gas-electric train seeing men on truck crossing private grade crossing waving as though to attract somebody's attention and having a view of roadway for nearly one hundred feet owed no duty of care to motorist some distance behind truck beyond blowing horn to give notice of approach of train.—Rideout v. Boston & M. R. R., 30 A.2d 488, 92 N.H. 340.

ing until the peril is appreciated or is so obvious that it would be assumed to have been appreciated [58] However, where an engineer or other employee in charge of a train sees a person in a position of imminent peril upon or near a crossing, it is his duty, although such person is not actually upon the track,[59] to use all reasonable precautions and efforts to prevent a collision or otherwise to avert an accident;[60] and if he fails to do so the railroad company is liable for the resulting injuries.[61]

The company is not guilty of negligence, however, because such employee fails to exercise the best judgment possible when confronted with a sudden contingency,[62] or fails to provide against unusual or unexpected contingencies,[63] or does not at all hazards use all the means at his command to prevent a collision;[64] and if on discovering a person in peril at a crossing the engineer or other employee uses all reasonable precautions and efforts to avert an accident, such as by giving the alarm and applying the brakes, he performs his whole duty, and although such efforts are unavailing there is no liability on the part of the railroad company [65]

b. Duty to Stop or Reduce Speed

A train operative may presume that a person on or approaching a crossing is in possession of his natural faculties, aware of the situation, will exercise care for his own safety, and will remove to or remain in a place of safety; and he need not stop or check the train until he knows or should know that the person apparently will not get or stay out of danger.

Except in so far as the rule may be affected by statutory provisions,[66] and unless and until the con-

Circumstance not reasonably to be anticipated

Trainmen were not bound to anticipate stalling of automobile on crossing—Southern Ry. Co v Hale, 133 So. 8, 222 Ala. 489—Atlantic Coast Line R Co v. Jackson, 130 So 388, 221 Ala 646

58. Ala—Southern Ry Co v. Hale, 133 So 8, 222 Ala 489
Ark—Missouri Pac R. Co v. Doyle, 160 S W 2d 856, 203 Ark 1111—Missouri Pac R. Co. v. Ward, 115 S W 2d 835, 195 Ark. 966
Ky—Louisville & N R. Co v Elzey, 194 S W.2d 962, 302 Ky. 407.
Mo—Thrower v Henwood, 173 S W. 2d 861, 351 Mo 663, applying Arkansas statute—Thomasson v. Henwood, 146 S.W 2d 88, 235 Mo. App 1211—Camp v Kurn, 142 S W. 2d 772, 235 Mo.App. 109—Lakin v. Chicago, R I. & P Ry. Co, 95 S.W. 2d 1245, 229 Mo App 461
N H—Bixby v Boston & M R R, 47 A 2d 575, 94 N.H. 107, 165 A L R 590.
N Y.—Lee v Pennsylvania R. Co, 280 N Y.S. 285, 244 App Div. 558, reversed on other grounds 198 N.E 629, 269 N.Y. 53, reargument denied 200 N.E. 52, 269 N Y. 674, amendment of remittitur denied 1 N E 2d 374, 270 N Y 629.
Vt.—Durkee v. Delaware & H R. Co., 174 A 921, 106 Vt. 488.

Automobile apparently stopping

Where trainmen, if they had been looking, would have seen automobile in which plaintiff was riding approaching a crossing at such speed as to indicate driver's intention to stop and knowing that from a certain distance from crossing the driver had an unobstructed view of track and that at such time train was in plain sight, for a time after trainmen should have seen automobile they would have had the right to assume that driver would stop or drive off the road and not get upon crossing—Meyette v Canadian Pac Ry Co, 6 A 2d 33, 110 Vt 345.

59. Vt—Meyette v. Canadian Pac Ry Co, supra
52 C J p 252 note 13.

60. Ark.—Missouri Pac. R. Co v. Mitchell, 122 S W.2d 544, 197 Ark 400.
Ga—Gay v. Sylvania Cent R Co, 53 S E 2d 713, 79 Ga App 362.
Ky.—Louisville & N. R Co. v. Elzey, 194 S W 2d 962, 302 Ky. 407—Louisville & N. R Co. v. Reynolds' Adm'r, 42 S W.2d 911, 240 Ky 662.
Mo—Fair v. Thompson, 212 S W.2d 923, 240 Mo App 664.
S C.—Key v. Carolina & N. W Ry. Co, 162 S E. 582, 165 S C. 43, appeal dismissed Carolina & N. W. Ry Co. v. Key, 52 S Ct 139, 284 U. S 691, 76 L Ed. 583
Vt.—**Corpus Juris cited in** Meyette v. Canadian Pac Ry. Co, 6 A 2d 33, 39, 110 Vt 345
Wis—Reinke v. Chicago, M, St. P. & P. R. Co., 30 N.W 2d 201, 252 Wis. 1.
52 C J p 252 note 14.
Injury avoidable notwithstanding contributory negligence see infra § 814.

In absence of statutory requirement that engineer, after discovering motorist's peril, must use all means at his command, consistent with safety of himself and train, to avert injury, whether engineer owed such duty is determinable by common law of negligence—Daugherty v. Chicago, R. I. & G Ry. Co, Tex.Civ App, 94 S W 2d 587, error dismissed.

Duty to signal

A railroad engineer or fireman may be negligent for failing to sound or to call for a warning whistle after discovering a traveler in a dangerous situation on a grade crossing.—Craig v. Boston & Maine R. R, 32 A.2d 316, 92 N.H. 408—52 C.J. p 252 note 14 [a].

Fireman's shout to stop held sufficient

Where fireman discovered that automobile approaching crossing was not going to stop and shouted to engineer to stop, railroad was held not negligent so as to be liable for death of automobile occupants because fireman did not shout to engineer to sound whistle—Chesapeake & O Ry Co v Harrell's Adm'r, 81 S W 2d 10, 258 Ky 650

61. N H—Peppin v Boston & M. R. R, 169 A. 877, 86 N H. 395.

Avoidable accident

In action for injuries by pedestrian injured by train at private crossing, evidence that enginemen could not see plaintiff until train was one hundred and twenty feet from crossing, because of fog, did not bar plaintiff from recovery, where accident could have been avoided by reasonable care of engineer after being aware of plaintiff's danger—Peppin v. Boston & M R R, supra

62. U S—Peterson v. Baltimore & O R Co, D C.Pa, 73 F Supp 597
N Y.—Lee v Pennsylvania R Co, 280 N.Y S 285, 244 App Div. 558, reversed on other grounds 198 N E 629, 269 N Y 53, reargument denied 200 N E 52, 269 N Y 674, amendment of remittitur denied 1 N E 2d 364, 270 N Y 629
52 C J p 252 note 16.

63. Ind—Louisville, etc, R Co v Schmidt, 33 N E 774, 134 Ind 16
52 C.J p 253 note 17.

64. Tex—Chicago, etc., R Co. v. Shockley, Civ.App, 214 S.W. 716

65. Ky—**Corpus Juris cited in** Chesapeake & O Ry Co. v. Harrell's Adm'r, 81 S.W.2d 10, 13, 258 Ky. 650
52 C.J. p 253 note 19

66. Ga—Central of Georgia R. Co. v. Motz, 61 S E. 1, 130 Ga. 414.
52 C.J. p 253 note 21.

trary becomes evident,[67] an engineer or other employee in charge of a train ordinarily has the right to presume that a person on or approaching a crossing is in possession of his natural facilities,[68] that he is aware of the situation,[69] that he will exercise ordinary care and take the precautions which the law requires him to take to insure his own safety,[70] that the vehicle he is riding in is under control and in good repair,[71] and that he will remove to, or remain in, a place of safety.[72] Accordingly, the

67. La.—Bordenave v. Texas & N. O. R. Co., App., 46 So. 2d 525—Cruse v. Thompson, App., 36 So. 2d 735
Va.—Chesapeake & O. R. Co. v. Jacobs, 183 S.E. 221, 166 Va. 11
Wis.—Hynek v. Kewaunee, G. B. & W. Ry. Co., 29 N.W.2d 45, 251 Wis. 319—Bellrichard v. Chicago & N. W. Ry. Co., 20 N.W.2d 710, 247 Wis. 569—De Wildt v. Thomson, 6 N.W.2d 173, 241 Wis. 352

Motorist obviously unaware of train

(1) If passengers in truck did not know that train was approaching, and enginemen had good cause to realize such fact, fireman had no right to assume that truck would wait for train to pass at crossing.—Smith v. Thompson, 142 S.W.2d 70, 346 Mo. 502

(2) When there is something about motorist's actions, conduct, or movement of his vehicle which is indicative of fact that he is oblivious to his peril or for any reason cannot or will not stop before coming upon track, engineer of train does not have right to assume that motorist will act for his own protection.—Neill v. Alton R. Co., Mo.App., 113 S.W.2d 1073.

View of moving car obscured

Engineer could not indulge assumption that motorist saw and heard approaching train and would stop before reaching track after locomotive entirely obscured engineer's view of automobile which was still moving forward toward crossing when engineer last saw it.—Alabama Great Southern R. Co. v. Bolton, 7 So. 2d 296, 242 Ala. 562.

Automobile partly in ditch

Where one of the front wheels of an automobile was in a ditch, and the back end of the automobile was over a rail, and automobile looked as if it would turn over, engineer of locomotive, approaching automobile, had no right to assume that it would move either out of danger, or backward into danger.—Grotjan v. Thompson, Mo.App., 140 S.W.2d 706.

68. U.S.—Foster v. St. Louis-San Francisco Ry. Co., D.C.Fla., 75 F. Supp. 809
Ala.—Southern Ry. Co. v. Melton, 198 So. 588, 240 Ala. 244
Kan.—**Corpus Juris cited in** Klose v. Missouri Pac. R. Co., 27 P.2d 207, 208, 138 Kan. 495
La.—Cruse v. Thompson, App., 36 So. 2d 735—Browne v. Texas & P. R. Co., App., 193 So. 511—Smith v. Texas & Pac. Ry. Co., App., 189 So. 316.
S.C.—Melton v. Atlantic Coast Line R. Co., 27 S.E.2d 490, 206 S.C. 251
Tex.—Panhandle & S. F. Ry. Co. v. Napier, 143 S.W.2d 754, 135 Tex. 314
52 C.J. p. 253 note 22

Deafness or lameness unknown to trainmen

Railroad engineer and fireman, having no knowledge of deafness or lameness, if any, of pedestrian approaching railroad track, could not be required to exercise special care because of such infirmities.—Perry v. Louisiana & A. Ry. Co., La.App., 142 So. 736, reheard 144 So. 202

69. Ala.—Atlantic Coast Line R. Co. v. Jackson, 130 So. 388, 221 Ala. 646.
Ind.—Morley v. Cleveland, C., C. & St. L. R. Co., 194 N.E. 806, 100 Ind. App. 515.
Ky.—Louisville & N. R. Co. v. Craig, 219 S.W.2d 954, 310 Ky. 43—Louisville & N. R. Co. v. Shaw's Adm'x, 94 S.W.2d 642, 264 Ky. 321.
La.—Cruse v. Thompson, App., 36 So. 2d 735
Mo.—Dody v. Lonsdale, App., 158 S.W.2d 203
Tenn.—Nashville, C. & St. L. Ry. v. Perry, 13 Tenn. App. 268.
52 C.J. p. 253 note 24

70. U.S.—Kansas City Southern Ry. Co. v. Ray, C.C.A.Ark., 109 F.2d 708—Miller v. Union Pac. R. Co., C.C.A.Mo., 63 F.2d 574, reversed on other grounds 54 S.Ct. 172, 290 U.S. 227, 78 L.Ed. 285.
Ark.—Missouri Pac. R. Co. v. Lemons, 127 S.W.2d 120, 198 Ark. 1—Missouri Pac. R. Co. v. Brewer, 102 S.W.2d 538, 193 Ark. 754
Cal.—Docherty v. Key System, 184 P.2d 33, 80 Cal.App.2d 888
Iowa.—Hitchcock v. Iowa Southern Utilities Co. of Delaware, 6 N.W.2d 29, 233 Iowa 301
La.—Smith v. Texas & Pac. Ry. Co., App., 189 So. 316
Md.—Baltimore & O. R. Co. v. Leasure, 69 A.2d 248
Mo.—Tepel v. Thompson, 220 S.W.2d 23, 359 Mo. 1—Thrower v. Henwood, 173 S.W.2d 861, 351 Mo. 663—Dody v. Lonsdale, App., 158 S.W.2d 203
N.H.—Gates v. Boston & Maine R. R., 37 A.2d 474, 93 N.H. 179.
Tenn.—West v. Southern Ry. Co., 100 S.W.2d 1004, 20 Tenn.App. 491.
Tex.—Panhandle & S. F. Ry. Co. v. Napier, 143 S.W.2d 754, 135 Tex. 314
Utah.—Pippy v. Oregon Short Line R. Co., 11 P.2d 305, 79 Utah 439.
Va.—Chesapeake & O. R. Co. v. Jacobs, 183 S.E. 221, 166 Va. 11.
Wash.—Hopp v. Northern Pac. R. Co., 147 P.2d 950, 20 Wash.2d 439
52 C.J. p. 253 note 23
Duties of person crossing near approaching trains or cars see infra § 799

Presumption is especially strong where a vehicle has come to a stop near the track.—Ross v. Fleming, 194 P.2d 491, 165 Kan. 279.

Duty to yield right of way

Ky.—Louisville & N. R. Co. v. Shaw's Adm'x, 94 S.W.2d 642, 264 Ky. 321
N.H.—Bixby v. Boston & M. R. R., 47 A.2d 575, 94 N.H. 107, 165 A.L.R. 590—Rideout v. Boston & M. R. R., 30 A.2d 488, 92 N.H. 340
Utah.—Pippy v. Oregon Short Line R. Co., 11 P.2d 305, 79 Utah 439
Wash.—Hopp v. Northern Pac. R. Co., 147 P.2d 950, 20 Wash.2d 439
52 C.J. p. 253 note 23 [a].

Stop, look, and listen before crossing

(1) Engineer can assume that person approaching crossing will stop, look, and listen
Ala.—Alabama Great Southern R. Co. v. Moundville Motor Co., 4 So. 2d 305, 241 Ala. 633—DeBardeleben v. Western Ry. of Alabama, 151 So. 56, 227 Ala. 553.
Cal.—Rasmussen v. Fresno Traction Co., 32 P.2d 1091, 138 Cal.App. 540
La.—Browne v. Texas & P. R. Co., App., 193 So. 511.
Wis.—Reinke v. Chicago, M., St. P. & P. R. Co., 30 N.W.2d 201, 252 Wis. 1—Keegan v. Chicago, M., St. P. & P. Ry. Co., 27 N.W.2d 739, 251 Wis. 7—Bellrichard v. Chicago & N. W. Ry. Co., 20 N.W.2d 710, 247 Wis. 569—De Wildt v. Thomson, 6 N.W.2d 173, 241 Wis. 352

(2) Duty of person approaching or going on crossing to stop, look, and listen see infra §§ 772–790

71. Tex.—Panhandle & S. F. Ry. Co. v. Napier, 143 S.W.2d 754, 135 Tex. 314

Brake failure

Cal.—Powell v. Pacific Elec. Ry. Co., 216 P.2d 448, 35 Cal.2d 40

72. U.S.—Union Pac. R. Co. v. Gaede, C.C.A.Colo., 110 F.2d 931—Markar v. New York, N. H. & H. R. Co., C.C.A.Conn., 77 F.2d 282—Mast v. Illinois Cent. R. Co., D.C.Iowa, 79 F.Supp. 149, affirmed, C.A., 176 F.2d 157—Haase v. Chicago, M., St. P. & P. R. Co., D.C.Minn., 76 F. Supp. 393—Foster v. St. Louis-San Francisco Ry. Co., D.C.Fla., 75 F. Supp. 809.

mere fact that a person is seen on or approaching a crossing does not, in the absence of other circumstances, impose an obligation on the engineer or other trainmen to stop or check the speed of the

Ala.—Alabama Great Southern R Co v Bolton, 7 So 2d 296, 242 Ala 562—Alabama Great Southern R. Co v Moundville Motor Co, 4 So 2d 305, 241 Ala 633.

Cal.—Powell v. Pacific Elec Ry. Co, 216 P 2d 448, 35 Cal 2d 40—Rasmussen v Fresno Traction Co, 59 P 2d 617, 15 Cal App 2d 356—Korchak v Pacific Electric Ry Co, 48 P 2d 752, 9 Cal App 2d 89

Ga.—Southern Ry. Co. v Waldrup, 45 S E 2d 775, 76 Ga App 356

Ill.—Robertson v New York Cent R Co, 58 N E 2d 527, 388 Ill 580—Greenfield v Terminal R Ass'n of St Louis, 6 N E 2d 888, 289 Ill. App 147

Kan.—**Corpus Juris cited in** Ross v Fleming, 194 P.2d 491, 497, 165 Kan 279

La.—Bordenave v. Texas & N O R Co, App, 46 So 2d 525—Cruse v Thompson, App, 36 So 2d 735—Wright v Texas & N O R Co, App, 19 So 2d 894—Perry v Louisiana & A. Ry Co, 142 So 736, reheard 144 So 202

Md.—Pennsylvania R Co. v State, 53 A 2d 562, 188 Md 646

Mass.—McNally v Trustees of New York, N. H & Hartford R Co, 90 N E 2d 318, 325 Mass. 367—Peterson v Boston & M. R R, 36 N E 2d 701, 310 Mass 45—Kenney v Boston & M R R, 17 N.E 2d 103, 301 Mass 271

Minn.—Ohrmann v. Chicago & N. W. Ry Co, 27 N.W 2d 806, 223 Minn 580.

Miss.—Mobile & O. R Co. v. Bryant, 132 So 539, 159 Miss. 528.

Mo.—Janssens v Thompson, 228 S. W.2d 743, 360 Mo. 351—Worth v. St Louis-San Francisco Ry. Co, 69 S W.2d 672, 334 Mo. 1025—Kirkdoffer v. St. Louis-San Francisco Ry. Co, 37 S W 2d 569, 327 Mo 166—Thomasson v. Henwood, 146 S W.2d 88, 235 Mo App 1211—Camp v. Kurn, 142 S W.2d 772, 235 Mo. App 109—Smith v. Chicago, R. I & P Ry Co, App, 104 S.W 2d 1050—Hinds v Chicago, B & Q. R. Co, App, 85 S W 2d 165.

N.H.—Rowe v Boston & M. R. R, 64 A 2d 6, 95 N.H 371—Gates v. Boston & Maine R R, 37 A 2d 474, 93 N.H 179—Rideout v Boston & M. R R, 30 A 2d 488, 92 N H. 340

N Y.—Wright v New York Central R Co., 16 N Y S 2d 600, 258 App Div. 935—Lee v. Pennsylvania R Co, 280 N.Y S 285, 244 App Div 558, reversed on other grounds 198 N E. 629, 269 N Y. 53, reargument denied 200 N E 52, 269 N Y 674, amendment of remittitur denied 1 N E 2d 374, 270 N Y. 629

N C.—Hinnant v Atlantic Coast Line R. Co, 163 S E 555, 202 N C. 489

Pa.—Haller v Pennsylvania R. Co, 159 A 10, 306 Pa 98

S C.—Melton v Atlantic Coast Line R Co, 27 S E 2d 490, 206 S C 251

Tenn.—Nashville, C & St. L Ry v Perry, 13 Tenn App. 268

Tex.—Texas & N O R Co v Brannen, 166 S W 2d 112, 140 Tex 52—Blasdell v Port Terminal R Ass'n, Civ App, 227 S W 2d 248, error refused

Vt.—Bates v Rutland R Co, 165 A 923, 105 Vt 394

Va.—Nichols v Southern Ry Co, 45 S E 2d 913, 187 Va 89—Southern Ry Co v Berry, 1 S E 2d 261, 172 Va. 266—Chesapeake & O. R Co v. Jacobs, 183 S E 221, 166 Va 11.

W Va.—Parsons v New York Cent. R Co, 34 S E 2d 334, 127 W Va. 619

Wis.—Hynek v Kewaunee, G B & W Ry Co, 29 N W 2d 45, 251 Wis 319—Keegan v. Chicago, M, St P & P. Ry Co, 27 N W 2d 739, 251 Wis 7—Bellrichard v Chicago & N.W. Ry. Co, 20 N W.2d 710, 247 Wis 569—De Wildt v Thomson, 5 N W 2d 173, 241 Wis 352—Umlauft v Chicago, M, St. P & P Ry Co, 289 N W 623, 233 Wis 391.

52 C.J p 254 note 25.

Contrary assumption

Train crew not required to assume that person will fail to remove to, or fail to remain in, place of safety

Minn.—Engberg v Great Northern Ry Co, 290 N.W 579, 207 Minn 194, 154 A L R. 206

Tex.—Aranda v Texas & N O R Co, Civ App, 140 S W 2d 236, error dismissed, judgment correct

A fireman is under no duty to notify engineer of the approach of slowly moving automobile until such time as it becomes apparent that the motorist is not going to stop and that a collision is imminent.

U S.—Roth v. Swanson, C C.A Minn, 145 F.2d 262.

Minn.—Ohrmann v Chicago & N W Ry Co., 27 N W 2d 806, 223 Minn 580.

Stalled car

(1) Railroad engineer had right to assume up to very moment of collision that driver of truck stalled upon crossing could and would extricate himself from danger.

N C.—Temple v Hawkins, 16 S.E 2d 400, 220 N.C 26

Tex.—Beatty v. Thompson, Civ App, 176 S W 2d 795, error refused.

(2) Railroad engineer could presume that automobile crossing track quarter of a mile ahead would clear track before train reached crossing, and was not required to presume that automobile would stall, that driver would remain in automobile after it stalled, or that doors were in such condition that driver could not readily get out.—Truett v Atlantic Coast Line R Co, 33 S E 2d 396, 206 S C. 144

Assumptions with respect to children

(1) The rule stated in the text has been applied even to infants.—Ingle v Clinchfield R Co, 192 S E 782, 169 Va 131

(2) But it has also been held that operators of train were not entitled to assume that child would stop before reaching danger zone to same extent that they could properly do in case of adult, for lack of judgment natural to so young a child must be considered.—Cote v. Palmer, 16 A 2d 595, 127 Conn 321.

(3) Likewise, engineer has no right, at least in absence of warning signal of approaching train to assume that child of tender years, even though he has seen train, will act with discretion of adult in remaining in place of safety unless it is apparently of sufficient age and intelligence to understand danger of its position.—West v Southern Ry Co, 100 S W.2d 1004, 20 Tenn App 491

In Arkansas

(1) It is generally held that the trainmen may assume that a car or person approaching the track will stop before reaching a position of danger.—Kansas City Southern Ry Co v. Mickel, 183 S W 2d 45, 207 Ark 872—Missouri Pac R Co. v Doyle, 160 S W 2d 856, 203 Ark 1111—Crossett Lumber Co v. Cater, 141 S W.2d 1074, 201 Ark 432—Missouri Pac R Co v Davis, 125 S W.2d 785, 197 Ark 830.

(2) Where those in control of slow-moving locomotive see an automobile or other vehicle approaching a crossing and manner of approach in respect of speed and control is such that in view of attending physical conditions a normal person could and a reasonably prudent person would see the train and stop, responsibility for accident will not be shifted to railroad.—Crossett Lumber Co v Cater, supra

(3) However, it has also been held that, if railroad engineer saw motorist slowly approaching railroad crossing in city in time to avoid injury, engineer was required to stop train or reduce its speed without regard to the lookout statute, unless there was something to indicate that the motorist intended to stop.—Missouri Pac. R Co v Huffman, 108 S. W.2d 479, 194 Ark. 456.

train[73] unless the conduct of those in charge thereof induces one approaching the crossing to believe that the train will not proceed to the crossing or that those in charge will yield the right of way[74] or unless they have failed to give proper crossing signals.[75]

Where the engineer or other employee knows or has reason to apprehend that a person on or approaching a crossing apparently will not get or stay out of danger, it is his duty to use all reasonable efforts, consistent with the safety of the train and the persons thereon,[76] to slacken its speed, and, if possible, to stop it in time, in order to avert an accident,[77] particularly where he knows or has reason to apprehend that the person on or approaching the crossing is not in possession of ordinary ability to care for himself,[78] as that he is infirm or helpless[79]

73. U S —Mast v. Illinois Cent R Co, D C Iowa, 79 F Supp 149, affirmed C.A., 176 F 2d 157—Foster v St Louis-San Francisco Ry. Co, D C Fla, 75 F Supp 809.
Cal —Rasmussen v. Fresno Traction Co, 59 P 2d 617, 15 Cal App 2d 356 —Korchak v. Pacific Electric Ry Co, 48 P 2d 752, 9 Cal App 2d 89— Choquette v Key System Transit Co, 5 P 2d 921, 118 Cal App 643
Colo —Union Pac R Co. v Siemann, 145 P 2d 986, 112 Colo 70
Idaho —McIntire v Oregon Short Line R Co., 55 P 2d 148, 56 Idaho 392
Ill —Robertson v. New York Cent R Co, 58 N E 2d 527, 388 Ill 580
Iowa.—Rosenberg v Des Moines Ry Co, 238 N W 703, 213 Iowa 152
Ky —Louisville & N R. Co v Shaw's Adm'x, 94 S W 2d 642, 264 Ky 321
La —Cruse v. Thompson, App., 36 So 2d 735—Matthews v New Orleans Terminal Co, App, 45 So 2d 547
Md.—Pennsylvania R Co v State, 53 A.2d 562, 188 Md 646
Mass —Peterson v Boston & M R R, 36 N E 2d 701, 310 Mass 45
Minn —Ohrmann v Chicago & N W Ry. Co., 27 N W 2d 806, 223 Minn 580
Mo —Janssens v Thompson, 228 S W 2d 743, 360 Mo 351—Tepel v Thompson, 220 S W 2d 23, 359 Mo. 1—Gorman v Franklin, 117 S W 2d 289—Worth v. St Louis-San Francisco Ry. Co., 69 S W 2d 672, 334 Mo. 1025—Jackson v. Southwest Mo. R. Co, 189 S W. 381—Thomasson v. Henwood, 146 S W 2d 88, 235 Mo.App 1211—Camp v. Kurn, 142 S W 2d 772, 235 Mo App. 109
N H.—Lavalle v. Boston & Maine R R, 197 A 816, 89 N H 323—Bixby v Boston & M R R., 47 A 2d 575, 94 N H 107, 165 A.L R 590—Gates v. Boston & Maine R. R, 37 A 2d 474, 93 N.H 179—Craig v Boston & Maine R R, 32 A 2d 316, 92 N H. 408—Despres v. Boston & M R. R, 181 A. 420, 87 N.H 427
N.Y —Rutkowski v Lehigh Valley R Co, 288 N Y S 194, 247 App Div. 575—Lee v. Pennsylvania R. Co, 280 N Y S. 285, 244 App Div 558, reversed on other grounds 198 N E 629, 269 N Y 53, reargument denied 200 N.E. 52, 269 N Y. 674, amendment of remittitur denied 1 N.E 2d 374, 270 N.Y. 629.
Tenn —Louisville & N. R. Co. v. Ross, 2 Tenn App 384.
Va —Chesapeake & O R. Co v. Jacobs, 183 S E 221, 166 Va 11
Wash —Hopp v Northern Pac Ry Co, 147 P 2d 950, 20 Wash 2d 439
Wis —Riley v Chicago & N. W Ry Co, 38 N W 2d 522, 255 Wis. 172
52 C J p 254 note 26
Duty to stop at crossing generally see supra § 732.

74. Tex —Horton v. Houston, etc, R Co, 103 S W 467, 46 Tex Civ App 639

75. Ky —Big Sandy, etc, R Co v Keaton, 266 S W 1056, 206 Ky. 156
52 C J p 255 note 28

76. Cal —Lucchese v. San Francisco-Sacramento R Co, 289 P. 188, 106 Cal App 242
52 C J p 255 note 29

77. U S —Mast v Illinois Cent R Co, D C Iowa, 79 F Supp 149, affirmed, C A., 176 F 2d 157—Foster v. St Louis-San Francisco Ry Co, D.C Fla, 75 F Supp 809
Ala —Alabama Great Southern R Co v Moundville Motor Co., 4 So.2d 305, 241 Ala 633
Cal —Rasmussen v Fresno Traction Co, 59 P 2d 617, 15 Cal.App 2d 356
Ga —Gay v Sylvania Cent R Co, 53 S E 2d 713, 79 Ga App 362
Ill —Robertson v New York Cent R Co, 58 N E 2d 527, 388 Ill 580
La —Cruse v Thompson, App, 36 So 2d 735
Mass —McNally v Trustees of New York, N H & Hartford R Co, 90 N E 2d 318, 325 Mass. 367
Minn —Ohrmann v Chicago & N. W Ry Co, 27 N W 2d 806, 223 Minn. 580
Miss —Mississippi Cent R. Co. v Aultman, 160 So 737, 173 Miss 622, appeal dismissed 56 S Ct. 108, 296 U.S 537, 80 L Ed 382
Mo —Green v Terminal R Ass'n of St Louis, App, 135 S W 2d 652, applying Illinois law—Scott v. Terminal Railroad Ass'n of St. Louis, App, 86 S.W 2d 116
N H —Bixby v. Boston & M R R, 47 A.2d 575, 94 N.H 107, 165 A L R. 590—Gates v Boston & Maine R R., 37 A.2d 474, 93 N H 179—Lavalle v. Boston & Maine R. R, 197 A 816, 89 N H 323.
N Y.—Lee v Pennsylvania R. Co., 280 N Y.S 285, 244 App Div. 558, reversed on other grounds 198 N. E 629, 269 N Y. 53, reargument denied 200 N E 52, 269 N Y. 674, amendment of remittitur denied 1 N E 2d 364, 270 N Y 629.
Pa —Haller v Pennsylvania R Co, 159 A 10, 306 Pa 98
S C —**Corpus Juris cited in** Melton v Atlantic Coast Line R Co, 27 S E 2d 490, 493, 206 S C 251.
Tenn —Louisville & N. R. Co. v Ross, 2 Tenn App 384.
Vt —Meyette v Canadian Pac Ry Co, 6 A.2d 33, 110 Vt 345
Va —Ingle v. Clinchfield R. Co, 192 S E 782, 169 Va 131.
52 C J. p 255 note 33.

Fact that speed was not in itself negligent, did not necessarily free operators of train from duty to reduce speed, so as to avoid accident, under exceptional circumstances arising from danger or injury, of which they knew or should have known —Cote v Palmer, 16 A 2d 595, 127 Conn 321

78. N H —Waldron v Boston, etc, R Co, 52 A 443, 71 N H 362.
Va —Director Gen of Railroads v Blue, 109 S E 482, 114 S E 557, 134 Va 366

Inability to stop car

Where operators of train knew that they could stop train in a short distance and that it would take some distance for truck driver to stop his truck because of wet pavement, if train operators did not act under circumstances as an ordinarily prudent person would have done, they were guilty of negligence —Missouri-Kansas-Texas R. Co. of Texas v McKinney, Civ App, 126 S.W 2d 789, affirmed Missouri, K. & T. R Co. of Texas v McKinney, 145 S W.2d 1081, 136 Tex 75.

Stalled car

Mo —Niedner v Wabash R. Co., App, 219 S W 2d 886.

Complete assurance on part of engineer that pedestrian on track was incapable of saving himself from being struck by approaching train was held unnecessary to impose on engineer duty of taking protective action —Peppin v. Boston & M R. R, 185 A 153, 88 N.H. 145.

79. N C —Daily v Richmond, etc, R Co, 11 S E. 320, 106 N C. 301
Tex —Yoakum v Mettasch, Civ.App, 26 S W 129.

or is a child of tender years;[80] and if he fails to do so the company is liable for the resulting damages.[81] He is not, however, required to stop the train in the shortest time possible after discovery of the peril;[82] and, where it is impossible to do so, failure to stop before striking a traveler upon the highway is not negligence.[83]

Objects seen on or near track. It has been held that an engineer is not required, every time he sees an object on or near the track, to stop for fear that it may be a person;[84] but if by the exercise of reasonable care he could have discovered such to be the fact in time to have stopped the train failure to do so is negligence for which the company is liable;[85] and where the engineer sees an automobile standing on the tracks he cannot proceed as though the way were clear until he is able to ascertain whether or not there is a human being in the automobile.[86] Moreover, it has been held to be the common-law duty of railroad trainmen, on the appearance of an obstruction on the track, to use their utmost endeavors to prevent a collision.[87] Under or without reference to a statute so providing, it is the duty of an engineer on perceiving any obstruction on the track to use all the means within his power known to skillful engineers to bring the train to a stop.[88]

80. Pa.—Figard v Pennsylvania R Co, 65 A.2d 411, 361 Pa. 380
52 C J. p 255 note 32.

81. Miss.—Mississippi Cent R Co v. Aultman, 160 So 737, 173 Miss 622, appeal dismissed 56 S Ct 108, 296 U S 537, 80 L Ed 382

82. Tex.—St Louis Southwestern R Co. v. Tarver, Civ App, 150 S.W 958

83. Miss.—Illinois Cent. R. Co v Roberson, 191 So 494, 186 Miss. 507
Pa.—Guyler v. Lehigh Valley R Co., 67 A 2d 575, 165 Pa Super 196.
Va.—Chesapeake & O R Co v. Jacobs, 183 S E 221, 166 Va 11.
52 C J p 256 note 36.

84. Mo.—Owen v. Delano, App, 194 S W. 756.

85. Cal.—Meeks v Southern Pac. R. Co, 56 Cal 513, 38 Am R 67
Mo.—Owen v. Delano, App, 194 S W 756

86. Mo.—Grotjan v Thompson, App., 140 S.W 2d 706.

87. Tenn.—Louisville & N. R Co v Ross, 2 Tenn App 384

88. Ala.—Alabama Great Southern R. Co v. Bolton, 7 So 2d 296, 242 Ala 562—Louisville & N. R. Co v. Griffin, 198 So 345, 240 Ala. 213.

Under Tennessee statute

(1) Under Tennessee statute to that effect, when any obstruction appears on the road, that is, in front of the train or so near thereto that it will be struck by the train, the alarm whistle must be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident, and the failure to observe such precautions results in absolute liability on the part of the railroad
U.S.—Callaway v Christison, C.C.A. Tenn, 148 F 2d 303
Tenn.—Gaines v Tennessee Cent. Ry. Co, 135 S W 2d 441, 175 Tenn. 389—Tennessee Cent. Ry. Co. v. Zearing, 2 Tenn App. 451.

(2) Such provisions are mandatory and require absolute obedience, regardless of whether compliance appears to be either necessary or effective to prevent an accident.
U S.—Callaway v Christison, supra.
Tenn.—Southern Ry Co. v. Harris, 9 Tenn App 589—Southern Ry Co. v Brubeck, 6 Tenn App. 493.

(3) The statute is merely declaratory of the common law with the exception that contributory negligence of the injured party, where the statute is violated, does not bar a recovery and the burden of proof is on the railroad company to show that it has complied with the statutory precautions.—Louisville & N R. Co v. Tracey, 12 Tenn App 167.

(4) A railroad is not required to observe the precautions in the order named in the statute, but must use the most effective.—Louisville & N R Co v. Ross, 2 Tenn.App 384

(5) Where there is insufficient time to do everything required by the statute, locomotive engineer must first do things best calculated to prevent accident
U S.—Cincinnati, N O. & T. P Ry Co v. Galloway, C C.A Tenn, 59 F.2d 664
Tenn.—Louisville & N. R Co v. Frakes, 11 Tenn App 593.

(6) The word "obstruction" means that which may obstruct or hinder the free and safe passage of the train or that which may receive an injury or damage if run over by the train.—Majestic v. Louisville & N R. Co, C C.A.Tenn, 147 F 2d 621.

(7) The duty to observe the requirements of the statute is not confined to the very time the accident occurs but commences when the obstruction appears upon the "road," which is not strictly the roadbed or track but also includes the public approaches thereto.—Majestic v Louisville & N. R Co., supra.

(8) However, the statutory duties do not arise until the obstruction, such as an automobile, appears on the road, either in front of or within striking distance of the train, and until then the duty of the trainmen is determined by the common law
U S.—Alabama Great Southern R Co v Brookshire, C C A Tenn, 166 F 2d 278, 1 A L R 2d 612—Cincinnati, N O & T. P. Ry. Co v. Galloway, supra
Ky.—Cincinnati, N O & T P Ry Co v. Wilson's Adm'r, 172 S W.2d 585, 294 Ky 698, applying Tennessee law.
Tenn.—Louisville & N R Co v Tracey, 12 Tenn App 167—Southern Ry Co v Harris, 9 Tenn App 589—Louisville & N. R. Co v Ross, 2 Tenn App. 384

(9) Where a person or an automobile or other object appears as an obstruction on the road too late to afford the trainmen an opportunity to observe the statutory precautions, the absolute liability of the statute does not apply.
U S.—Alabama Great Southern R Co v Brookshire, C C A Tenn, 166 F 2d 278, 1 A L R 2d 612
Ky.—Cincinnati, N O & T. P Ry Co v Wilson's Adm'r, 172 S W 2d 585, 294 Ky. 698, applying Tennessee law.
Tenn.—Gaines v. Tennessee Cent Ry Co, 135 S W 2d 441, 175 Tenn 389—Louisville & N R Co. v Tracey, supra—Louisville & N R. Co. v Frakes, 11 Tenn.App 593—Louisville & N. R Co. v Ross, supra

(10) One does not pass beyond striking distance of a train, so as to absolve railroad from complying with statute, as long as he is sufficiently close to the road that, having due regard for the instinct of self-preservation and the involuntary movements of the body, there is still a reasonable probability that he might fall or be thrown against the side or in front of the engine or train as it passes him, or be struck if traveling in a vehicle.—Majestic v. Louisville & N. R. Co., C C.A Tenn, 147 F.2d 621.

(11) Where the railroad observes the statutory precautions there is no liability under the statute.—Strick-

§ 752. Frightening Animals

Generally, where the failure to give the usual or statutory signals results in a horse or horses becoming frightened at the approaching or passing train, and causing injury, the railroad company is guilty of negligence and is liable for such injury.

It is generally held that where a railroad company employee fails to give the usual or statutory signals as a train approaches a crossing, and as a result thereof a horse or horses are frightened by the approaching or passing train and cause injury without any fault on the part of the person injured, the company is guilty of negligence and is liable for such injury,[89] but there is also authority to the contrary.[90] The majority rule is based on recognition of a duty imposed by such statutes to protect those near such crossings from fright as well as those on them from collision,[91] and those who are not within the protection of this duty, for example, persons at private crossings,[92] and persons who have crossed over the railroad and gone some distance beyond at the time when the train arrives at the crossing,[93] cannot recover for injuries from animals frightened as a result of the omission of the required signals. A statute making the railroad liable for damages from collision at a crossing if the required signals are not given restricts the duty of protection by such signals and the right of recovery for their omission to those whose damages spring from collision,[94] and does not include those whose injuries are the result of the fright of passing teams,[95] nor is the railroad liable, even though it omitted to give the proper signals, where the driver saw the train and was aware of its approach as soon as he would have been had the proper signals been given.[96]

A railroad company is liable for injury arising from the fright of horses or other animals at crossings occasioned by negligence in giving signals or permitting steam to escape, as discussed infra § 754, or its negligence in obstructing the highway and permitting cars or objects emitting offensive odors to remain near a highway crossing, infra § 755, or its negligence in the operation of trains, generally, infra § 753. The liability of a railroad for injuries occasioned by frightening animals near the tracks in general is discussed infra § 989; and the liability of a railroad for injuries to animals supra §§ 547–689

§ 753. —— Liability in General

A railroad company is not liable for injuries occasioned by animals taking fright at the ordinary movements, noise, or appearance of trains or cars, or other noises incident to the operation of the railroad, and this is usually likewise true at intersections of highways and railroads other than grade crossings.

The authority of a railroad company to operate a railroad includes the right to make any noise necessarily incident to the operation of its road and the movement and working of its engines;[97] and it is therefore not liable for injuries occasioned at crossings by horses taking fright at the ordinary movements, noise, or appearance of trains or cars,[98] or at other noises incident to the operation of its road.[99] However, except where the person injured

lin v Louisville & N R Co, 2 Tenn App 141

(12) Under the statute, railroad fireman observing plaintiff's automobile when within striking distance of train had duty then to warn the engineer and not wait until the automobile came upon the tracks —Callaway v Christison, C.C A Tenn, 148 F 2d 303.

(13) Under the statute a truck does not become an "obstruction" within the statute until the engineer sees that the driver is not going to stop —Cincinnati, N O & T P Ry Co. v Galloway, C C.A Tenn., 59 F. 2d 664

(14) Where a wrecking train was moving to a wreck, it was not engaged, "in a switching operation" so as to relieve defendant of compliance with statutory precautions, and the mere fact that a train was operating "within the switching district" was not sufficient therefor.— Tennessee Cent Ry. Co. v. Zearing, 2 Tenn App 451

(15) Other decisions under the Tennessee statute see 52 C J. p 253 note 21 [b]

89. Iowa —Warn v Chicago Great Western R Co, 126 N W 1104, 149 Iowa 450, 31 L R A,N.S, 667. 52 C J p 263 note 94.

90. Neb —Clinebell v Chicago, etc, R Co, 110 N W. 347, 77 Neb 538 52 C J p 263 note 95.

91. Ind —Cleveland, etc, R. Co v. Carey, 71 N E. 244, 33 Ind.App. 275. 52 C J p 263 note 96.

Farmer plowing field

The negligent omission to whistle or ring a bell when approaching a crossing as required by statute did not render the company liable to a farmer who was plowing his field near the crossing and who was injured because his horses were frightened by the train, since the statutory requirement was intended only for the benefit of travelers on the highway.—Williams v Chicago, etc, R Co, 26 N E. 661, 135 Ill 491, 25 Am S.R. 397, 11 L R A. 352.

92. Ga —McCoy v Central of Georgia R Co, 62 S.E 297, 131 Ga 378. 52 C J. p 263 note 97

93. Ga —Southern R Co v. Pugh, 84 S.E 968, 143 Ga 294
Tex —Hargis v St Louis, etc, R Co, 13 S W 953, 75 Tex 19

94. U S —Whilton v Richmond, etc, R. Co, C C S.C, 57 F 551
S C —Kinard v. Columbia, etc, R Co, 18 S E 119, 39 S C 514

95. U S —Whilton v. Richmond, etc, R Co, C C S.C, 57 F 551
S C —Kinard v. Columbia, etc, R Co, 18 S.E 119, 39 S C 514.

96. Ky —Louisville, etc, R Co v Lewis, 279 S W. 657, 212 Ky. 460
Mich —Kosenicki v Pere Marquette R. Co., 171 N W. 354, 205 Mich 387.

97. Ind —Louisville, etc., R Co v Schmidt, 33 N E. 774, 134 Ind 16 52 C.J. p 256 note 40.

98. Tenn —Louisville & N R Co. v Chambers, 8 Tenn App. 226 52 C J p 257 note 41.

99. Tenn.—Louisville & N. R Co v. Chambers, supra 52 C.J. p 257 note 42.

is by his own fault prevented from recovering,[1] if, in operating a train or conducting the business of a railroad its employees act improperly without regard for the rights of others, the railroad is liable for injuries occasioned by frightened horses,[2] either by the creation of unnecessary and unusual or extraordinary noises or conditions not reasonably and usually connected with the operation of railroads,[3] or by conducting such business in a manner ordinarily usual and proper but under circumstances such that the railroad employees have reason to apprehend injury therefrom and fail to use due care to prevent it[4] or such that they are otherwise negligent in the operation of the road.[5] No recovery can be had for mere fright of animals or their drivers unaccompanied by physical injury.[6]

Handcars. The above rules are applicable to the operation of handcars by employees of a railroad.[7] Thus the railroad ordinarily is not liable for fright occasioned by the mere appearance of handcars or ordinary sounds arising from their use,[8] and in the absence of statute no rate of speed is per se negligent,[9] nor is a failure to give signals of their approach,[10] so that a railroad will not be liable for fright and injury caused thereby.[11] However, negligent operation of a handcar, such as starting it near or moving it toward one who has entered on a crossing when the handcar is standing still and the operators are aware of the fact,[12] or continuing to run a handcar toward a crossing by an operator after he is aware that a team at that point is becoming frightened,[13] or failing to signal or to slacken speed where the company maintains an obstruction near the crossing in a manner which conceals the ordinary approach of such a vehicle[14] may render the railroad liable for injuries occasioned by animals frightened at the handcar.

Intersections of highway and railway other than grade crossings The ordinary sounds and noises of moving trains or the ordinary escape of smoke, produced in the operation of railroads, which frighten horses passing along the highway at or near a point where a railroad crosses over a highway on a bridge or trestle or passes under a highway bridge, do not of themselves constitute actionable negligence making the railroad liable for injuries occasioned by such fright,[15] but if, on all the facts, the company has failed to use due care toward those passing over or under its tracks with horses, it is liable for injuries occasioned by their fright[16] It is not sufficient proof of negligence to show that noises or smoke were unnecessary,[17] or that the employees of the railroad could have seen the approaching horses in time to have discontinued the noises,[18] although it has also been held that the fact of their presence in the vicinity of the crossing need not be known to the employees in order to charge the company with liability.[19]

Blowing a whistle at or near a place where a railroad crosses a highway upon or under a bridge is not of itself negligence,[20] even though blown at a place of extraordinary danger,[21] and if the blowing of a whistle at a bridge over or under a road is necessary, the railroad is not liable for having thus acted.[22] The unnecessary blowing of a whistle under a bridge constitutes negligence,[23] but if at the time and under the circumstances it appears necessary to the engineer to blow the whistle it is not

1. Tex.—Gulf, etc., R Co v. Younger, Civ App, 40 S W. 423
52 C J p 259 note 47.

2. Kan.—Atchison, etc., R Co. v. Wilkie, 90 P 775, 77 Kan. 791, 127 Am S.R 464, 11 L R A,N S, 963, 15 Ann.Cas. 731.
52 C.J p 257 note 43

3. Miss.—McCerrin v Alabama, etc, R Co, 18 So. 420, 72 Miss 1013.
52 C J p 258 note 44.

4. Neb.—Williams v Chicago, etc, R. Co., 111 N W. 596, 113 N W. 791, 78 Neb. 695, 701, 14 L.R.A.,N S., 1224
52 C J. p 258 note 45.

5. Ky.—Louisville, etc., R Co v Comley, 191 S W. 96, 173 Ky. 469, L R A 1917C 978.
52 C J p 258 note 46.

6. Tex.—Fort Worth, etc, R Co. v. Burton, Civ App, 15 S W. 197

7. Ky.—Louisville, etc., R Co v. Hulette, 188 S W 653, 171 Ky. 500

8. Ind.—Lake Erie, etc., R Co. v. Juday, 49 N E 843, 19 Ind App. 436
52 C J. p 259 note 51

9. Miss.—McCerrin v Alabama, etc, R Co, 18 So. 420, 72 Miss 1013

10. Miss.—Yazoo, etc, R Co v. Day, 82 So 148, 120 Miss 296
52 C J p 259 note 53.

11. Miss.—McCerrin v Alabama, etc, R. Co., 18 So 420, 72 Miss. 1013.

12. Ky.—Cincinnati, etc, R. Co v. Bell, 271 S.W 689, 690, 208 Ky. 597, 600.
52 C J p 259 note 54.

13. Kan.—Baker v Missouri, etc, R Co., 136 P. 220, 90 Kan. 681.

14. Mo.—Culbertson v St. Louis, etc, R. Co, App., 178 S W. 269

15. Mich.—Dotson v Michigan Cent R Co, 153 N W 1065, 187 Mich 650
52 C J. p 259 note 57.

16. Ala.—Louisville, etc, R. Co v. Kelly, 73 So 953, 198 Ala 648.

17. Ala.—Louisville, etc., R Co v Kelly, supra.

18. Ala.—Louisville, etc., R Co v Kelly, supra

19. Ind.—Rodgers v. Baltimore, etc., R. Co, 49 N E 543, 150 Ind. 397.

20. Ind.—Cincinnati, etc, R Co v Gaines, 4 N E 34, 5 N E. 746, 104 Ind. 526, 54 Am.R. 334.
52 C J. p 259 note 63

21. Ind.—Rodgers v Baltimore, etc, R Co, 49 N E 453, 150 Ind 397—Cincinnati, etc., R Co v Gaines, 4 N.E 34, 5 N E 746, 104 Ind. 526, 54 Am R. 334

22. Mo.—Pontius v Chicago, etc., R Co, 161 S.W. 292, 174 Mo App. 576
52 C J. p 259 note 65.

23. Ky.—Louisville, etc., R. Co. v. Shearer, 59 S W. 330, 22 Ky.L. 929.
Tenn.—Mitchell v Nashville, etc, R Co, 45 S W 337, 100 Tenn. 329, 40 L R A 426.

negligence to do so,[24] and whether or not it is negligence depends on all the facts and circumstances existing at the time of the act and relating to it.[25] The burden is on the person injured to show that the blowing of the whistle at such a place and at the time it was blown was unnecessary,[26] but there is also authority to the contrary, at least as to whistling done underneath a highway crossing, holding that the mere act of blowing in such a place justifies an inference of negligence.[27] The act of blowing a whistle under a bridge in a manner calculated to frighten horses when a horse is known to be traveling overhead renders the railroad liable for injuries occasioned by the fright of the horse at the whistle.[28]

Failure to give a signal or warning on approaching the bridge and at that distance from it at which statutes require that a signal shall be given on approaching highway crossings does not render the railroad liable for fright of horses and resulting injury caused by a failure to do so,[29] since the duty of the railroad company in this respect is analogous to that toward those traveling on parallel highways rather than toward those at grade crossings;[30] but in at least one jurisdiction the jury may find negligence from a failure to signal.[31]

§ 754. —— By Signals and Escape of Steam

In general, a railroad company is not responsible for injuries occasioned by horses becoming frightened by the sounding of whistles or other signals, or the escape of steam from its engines, unless it is done wrongfully and improperly.

The usual and proper sounding of whistles or other signals[32] or the proper escape of steam from its engines[33] is not negligence and does not make the railroad company responsible for injuries occasioned by horses becoming frightened thereat. However, where the employees wrongfully and improperly blow the whistle,[34] or cause or allow steam to escape,[35] thereby causing horses to become frightened, the railroad company is responsible for the resulting injury; and this is especially true where the acts are done in violation of statute[36] or ordinance.[37] The act in letting off steam or blowing a whistle or giving other signals is improper if it is unnecessary[38] and is done without regard to the safety of those passing to or over its crossings after its servants are aware of their proximity and the fright of their animals,[39] or after they should, in the exercise of due care, be aware of such facts.[40]

Automatic discharge of steam. The discharge of steam from the automatic steam valve of an engine standing in a lawful and proper place, over which steam valve the railroad employees in charge of the train have no control, cannot be treated as improper or negligent;[41] but if they can control and regulate its operation the railroad is liable for harm occasioned by their negligent omission to do so,[42] although if to regulate it would seriously hamper and impair the operation of the railroad failure to do so is not negligence.[43]

Signals required by statute. As a general rule the blowing of whistles and giving of other signals required by statute whereby horses are frightened and injury is caused is not negligence for which the railroad company is responsible[44] unless they are given negligently or wantonly.[45] However, even the giving of the statutory signals may constitute negligence if the railroad employees see that ani-

24. Ind.—Rodgers v. Baltimore, etc., R. Co., 49 N.E. 453, 150 Ind. 397.
25. Ind.—Rodgers v. Baltimore, etc., R. Co., supra.
26. Mass.—Kelsey v. New York, etc., R. Co., 63 N.E. 8, 181 Mass. 64.
52 C.J. p. 260 note 69.
27. Tenn.—Mitchell v. Nashville, etc., R. Co., 45 S.W. 337, 100 Tenn. 329, 40 L.R.A. 426.
52 C.J. p. 260 note 70.
28. Ill.—Cleveland, etc., R. Co. v. David, 105 Ill.App. 69.
29. Ga.—Barton v. Southern R. Co., 64 S.E. 1079, 132 Ga. 841, 22 L.R.A.,N.S., 915, 16 Ann.Cas. 1232.
52 C.J. p. 260 note 72.
30. Ind.—Cincinnati, etc., R. Co. v. Gaines, 4 N.E. 24, 5 N.E. 746, 104 Ind. 526, 54 Am.R. 334.
52 C.J. p. 260 note 73.
31. Ky.—Chesapeake, etc., R. Co. v. Ogles, 73 S.W. 751, 24 Ky.L. 2160.
52 C.J. p. 260 note 74.
32. Cal.—Pepper v. Southern Pac. R. Co., 38 P. 974, 105 Cal. 389.
52 C.J. p. 260 note 75.
33. Neb.—Omaha, etc., R. Co. v. Brady, 57 N.W. 767, 39 Neb. 27.
52 C.J. p. 260 note 76.
34. Tenn.—Beopple v. Illinois Cent. R. Co., 58 S.W. 231, 104 Tenn. 420.
52 C.J. p. 261 note 78.
35. Okl.—Talliaferro v. Atchison, etc., R. Co., 160 P. 69, 61 Okl. 27.
52 C.J. p. 261 note 79.
36. Ga.—Georgia R. Co. v. Carr, 73 Ga. 557.
52 C.J. p. 261 note 81.
37. S.C.—Lindler v. Southern R. Co., 66 S.E. 995, 84 S.C. 536.
52 C.J. p. 261 note 82.
38. Wis.—Kalbus v. Abbott, 46 N.W. 810, 77 Wis. 621.
52 C.J. p. 262 note 86.
39. Ill.—Wabash, etc., R. Co. v. Speer, 40 N.E. 835, 156 Ill. 244.
52 C.J. p. 262 note 87.
40. Tex.—Houston, etc., R. Co. v. Abrahams, Civ.App., 40 S.W. 1034.
52 C.J. p. 262 note 88.
41. Md.—Duvall v. Baltimore, etc., R. Co., 21 A. 496, 73 Md. 516.
52 C.J. p. 262 note 83.
42. Mich.—Hinchman v. Pere Marquette R. Co., 99 N.W. 277, 136 Mich. 341, 65 L.R.A. 553.
52 C.J. p. 262 note 84.
43. Ind.—Louisville, etc., R. Co. v. Schmidt, 33 N.E. 774, 134 Ind. 16.
N.Y.—Wilson v. New York Cent., etc., R. Co., 58 N.Y.S. 617, 41 App.Div. 36.
44. N.D.—Salewski v. Minneapolis, etc., R. Co., 181 N.W. 72, 47 N.D. 64.
52 C.J. p. 262 note 89.
45. N.D.—Salewski v. Minneapolis, etc., R. Co., supra.
52 C.J. p. 262 note 90.

mals will be frightened and can desist from giving them consistently with their duty,[46] but only in the absence of facts tending to show that injury to others at the crossing might result.[47] Whenever the train has reached a point where the law requires signals to be given and it is uncertain whether the train can be stopped before reaching the crossing, the signals must be given in spite of the known presence of animals.[48]

§ 755. —— By Obstructions or Odors on or near Tracks

A railroad company is liable for injuries arising from the fright of horses or other animals occasioned by its negligence in placing or leaving cars, trains, or other objects at a crossing, including cars or objects emitting noxious odors.

The rule that one who negligently or without right places an object naturally calculated to frighten horses of ordinary gentleness within the limits of a public highway may become liable for injuries arising from the fright of horses occasioned by his act in so placing them, discussed in Highways § 259, applies to railroad companies,[49] and the negligent placing or leaving of cars, trains, or other objects at the crossing of a railway track and a public highway so as to extend upon, and occupy part of, the latter and affect horses, renders the company answerable for resultant damage.[50] As to what is negligence on the part of the company there is authority to the effect that the mere position of the cars at such a point is sufficient,[51] and likewise to the effect that such conduct in itself is evidence of negligence,[52] and the mere occupancy of a crossing by cars or engines of a railroad is prima facie unlawful and must be explained by the company.[53] However, it is usually material evidence in establishing the existence of negligence that the objects complained of were placed at the crossing unnecessarily,[54] and were of a character and in a position reasonably calculated to frighten ordinarily gentle animals,[55] and were left on the highway at the crossing for an unreasonable length of time,[56] and whether a sufficient showing has been made to demonstrate that these conditions existed is a question of fact to be considered with all the surrounding circumstances.[57]

The courts have quite generally refused to hold as a matter of law that the ordinary trains and equipment of a railroad company are nuisances calculated to frighten ordinarily gentle horses,[58] although it has been so held under some circumstances.[59] It has been held that an allegation must be made that the character and location of the objects were reasonably calculated to frighten an ordinarily gentle horse in order to make out a cause of action,[60] but there is also authority to the contrary.[61] If the obstruction under all the circumstances was calculated to frighten a reasonably gentle horse, the fact that the horse which was frightened thereby was not of that kind but was a spirited animal will not relieve the railroad of liability,[62] but the driver, if not himself negligent, can still recover.[63]

Reasonable duration. In determining whether the object has been allowed to stand on the crossing for more than a reasonable time, limitations in statutes and ordinances of the length of time that trains may remain on crossings have been resorted to, any further period being held to be unreasonable[64] and any shorter period reasona-

46. Ind.—Nichols v. Baltimore, etc., R. Co., 70 N.E. 183, 71 N.E. 170, 33 Ind.App. 229
52 C.J. p. 262 note 91.

47. Tex.—Gulf, etc., R. Co. v. Milner, 66 S.W. 574, 28 Tex.Civ.App. 86.

48. Ind.—Nichols v. Baltimore, etc., R. Co., 70 N.E. 183, 71 N.E. 170, 33 Ind.App. 229—Louisville, etc., R. Co. v. Stanger, 32 N.E. 209, 34 N.E. 688, 7 Ind.App. 179.

49. Tex.—Texas, etc., R. Co. v. McManus, 38 S.W. 241, 15 Tex.Civ.App. 122
52 C.J. p. 264 note 5.

50. Ky.—Louisville, etc., R. Co. v. Blackaby, 111 S.W. 317, 33 Ky.L. 885.
52 C.J. p. 264 note 6.

51. N.Y.—Borst v. Lake Shore, etc., R. Co., 4 Hun 346, affirmed 66 N.Y. 639
52 C.J. p. 264 note 7.

52. Tex.—Texas Cent. R. Co. v. Randall, 113 S.W. 180, 51 Tex.Civ.App. 249—Ft. Worth, etc., R. Co. v. Morris, 101 S.W. 1038, 45 Tex.Civ.App. 596.

53. Ind.—Ohio, etc., R. Co. v. Trowbridge, 26 N.E. 64, 126 Ind. 391

54. U.S.—Webster v. Chicago, B. & Q. R. Co., Mo., 158 F. 769, 86 C.C.A. 125, 42 L.R.A.,N.S., 568.
52 C.J. p. 264 note 9.

55. Iowa.—Hanson v. Chicago, etc., R. Co., 62 N.W. 788, 94 Iowa 409.
52 C.J. p. 264 note 10

56. Pa.—Pittsburgh Southern R. Co. v. Taylor, 140 Pa. 306, 49 Am.R. 580
52 C.J. p. 264 note 11.

57. N.C.—Myers v. Richmond, etc., R. Co., 87 N.C. 345.
52 C.J. p. 264 note 12.

58. Kan.—Atchison, etc., R. Co. v. Morris, 67 P. 837, 64 Kan. 411.
52 C.J. p. 264 note 14.

59. Ky.—Harvey v. Illinois Cent. R. Co., 167 S.W. 875, 159 Ky. 492
52 C.J. p. 264 note 15.

60. Ga.—Louisville, etc., R. Co. v. Barnwell, 63 S.E. 501, 131 Ga. 791
52 C.J. p. 265 note 16

61. Ind.—Baltimore, etc., R. Co. v. Slaughter, 79 N.E. 186, 167 Ind. 330, 119 Am.S.R. 503, 7 L.R.A.,N.S., 597—Cleveland, etc., R. Co. v. Wynant, 17 N.E. 118, 114 Ind. 525, 5 Am.S.R. 644

62. Ind.—Baltimore, etc., R. Co. v. Slaughter, 79 N.E. 186, 167 Ind. 330, 119 Am.S.R. 503, 7 L.R.A.,N.S., 597
Kan.—Missouri Pac. R. Co. v. Clark, App., 49 P. 799.

63. Ind.—Baltimore, etc., R. Co. v. Slaughter, 79 N.E. 186, 167 Ind. 330, 119 Am.S.R. 503, 7 L.R.A.,N.S., 597

64. Ga.—Central R. Co. v. Curtis, 13 S.E. 757, 87 Ga. 416.
52 C.J. p. 265 note 20.

ble,[65] and there is authority that the mere fact of remaining thus in excess of such designated period is sufficient to show negligence.[66] On the other hand, violation of such a statute has been said to be evidence of negligence only.[67]

Necessity. In determining whether the obstruction was necessary, it is no defense to the railroad company to show that it had no other grounds or switch tracks available on which to place the cars which caused the fright,[68] and, conversely, a showing that there were at the time other premises available is not conclusive that there was no necessity for the placing of the cars or equipment on the crossing.[69]

Place of location. The public right is not limited to the traveled part of the highway at the crossing,[70] and an object placed by a railroad company at any point whatsoever within the limits of the highway may be an obstruction for which it is liable.[71] A distinction is recognized between the liability of a railroad for fright occasioned by objects on the highway and that occasioned by those near but not on it,[72] since the company has a right to place and leave its cars on tracks or private grounds for any length of time[73] and is liable only for negligence in doing so.[74]

Private crossings. The responsibility of a railroad is not any different for leaving objects calculated to frighten horses on or near private crossings than with respect to public crossings,[75] except that, where the railroad maintains the crossing and permits the public to use it, the company is free from liability for obstruction at any portions of it other than the traveled part.[76]

Bridge crossing. A railroad is liable for injuries from fright occasioned by obstructions on a highway bridge crossing its track under circumstances such as would impose liability if a grade crossing were involved.[77]

Act of third person. The liability of a railroad for injuries from animals taking fright at objects on or near the highway does not extend to situations where the object is thus placed by third persons not under its control or direction[78] unless they did so at the suggestion and with the knowledge of its employees,[79] nor does such liability extend to other situations where the object is placed there without fault on the part of the railroad company.[80] However, the railroad company is liable when, in either of the above situations, it has allowed the terrifying object to remain for an unreasonable length of time[81] after it knows or should, in discharging its duties, know of its presence on or near the tracks.[82]

Offensive odors. Independently of statute, a railroad is liable for leaving its cars so near a crossing as to frighten passing animals by noxious odors if such conduct is negligent,[83] or for permitting a carcass to remain upon its right of way and emit offensive odors near a highway when such odors cause fright and injury.[84]

§ 756. Willful, Wanton, and Unauthorized Acts

a. Willful or wanton acts
b. Unauthorized acts

a. Willful or Wanton Acts

Where the servants or employees of a railroad company are guilty of wantonness or willfulness in inflicting an injury at a railroad crossing, the railroad is liable therefor notwithstanding contributory negligence on the part of the person injured.

Where the servants or employees of a railroad

65. Ill.—Chicago Great Western R Co v. Kenyon, 70 Ill App. 567.
Mich.—Young v. Detroit, etc, R Co, 23 N W 67, 56 Mich. 430.

66. Ga.—Central R Co v Curtis, 13 S E 757, 87 Ga 416.
Mich.—Young v Detroit, etc, R Co, 23 N W 67, 56 Mich 430

67. N Y.—Burns v. Delaware, etc, R. Co, 96 N.Y S. 509, 110 App Div 592.

68. N C—Harrell v Albemarle, etc, R. Co., 14 S E. 687, 110 N C 215

69. Ill.—Chicago Great Western R Co. v. Kenyon, 70 Ill.App. 567

70. Ky.—Harvey v Illinois Cent. R Co, 167 S W. 875, 159 Ky 492.

71. Ga.—Central R Co. v. Curtis, 13 S E 757, 87 Ga 416.
52 C J. p 265 note 27.

72. Miss.—Vicksburg, etc, R. Co. v Alexander, 62 Miss 496
52 C J p 265 note 28

73. Del.—Kyne v Wilmington, etc., R Co, 14 A 922, 13 Del 185

74. N D.—Rozell v Northern Pac. R Co, 167 N.W 489, 39 N D. 475.
52 C J p 265 note 30.

75. Tex.—Texas, etc, R. Co. v. McManus, 38 S.W. 241, 15 Tex Civ App 122
52 C.J p 265 note 31

76. Iowa.—O'Donnell v Chicago, etc, R Co, 28 N W 464, 69 Iowa 102.

77. Mo.—Golden v Chicago, etc, R Co, 84 Mo App. 59
52 C J. p 265 note 33.

78. N Y.—Burns v Delaware, etc, R Co, 101 N Y S. 225, 116 App Div 111.
52 C J p 266 note 34

79. Iowa.—Baxter v. Chicago, etc, R. Co, 54 N W. 350, 87 Iowa 488.

80. Ky.—Louisville, etc., R Co v. Armstrong, 105 S W. 473, 127 Ky. 367, 32 Ky.L 252
52 C J p 266 note 36.

81. Ky.—Louisville, etc, R Co v. Armstrong, supra
52 C J. p 266 note 37

82. Ill.—Chicago, etc, R. Co. v. Scranton, 78 Ill App 230
Ky.—Louisville, etc, R. Co v. Armstrong, 105 S.W. 473, 127 Ky. 367, 32 Ky.L 252.

83. S C.—Settlemeyer v. Southern R. Co, Carolina Div., 81 S.E. 465, 97 S C 85.

84. U S.—Great Northern R. Co v Ennis, Mont., 236 F. 17, 149 C C A 227.

company are guilty of wantonness or willfulness in inflicting an injury at a railroad crossing,[85] or, in some instances, "gross negligence,"[86] the railroad company is liable therefor, notwithstanding contributory negligence on the part of the person injured.[87] In order to constitute willfulness or wantonness the railroad employees must have done the negligent acts with the knowledge and consciousness that injury would probably result;[88] and a formed intent to injure or kill is not essential.[89]

Whether or not the conduct of a company's servants in a particular case amounts to willfulness or wantonness[90] or "gross negligence"[91] depends on the circumstances of the case. Thus the injury may be wantonly or willfully inflicted by running a train at a high or unlawful rate of speed and without giving the proper signals, when approaching a crossing over a much traveled street or highway, and where the view is obstructed[92] and the engineer saw or might have seen the person injured, and prevented the injury,[93] or by sending cars across a public crossing, under no control, and without precautions or warnings,[94] or by unnecessarily blowing the whistle, when it is apparent to those in charge of the engine that horses at the crossing will become frightened thereat.[95] However, mere knowledge of the proximity of a team is not conclusive evidence of willfulness in blowing the whistle, notwithstanding the whistling is needless.[96]

An injury is not deemed wantonly or willfully inflicted by the mere fact that the company's servants did not exercise such care as very prudent men take of their own concerns,[97] or that the railroad was violating a statute or ordinance,[98] or that the train which inflicted the injury was being run in violation of a statute or ordinance,[99] as at an

85. Ala.—Birmingham, etc., R. Co v. Gerganous, 37 So. 929, 142 Ala 238.
Tex.—Texas, etc, R. Co. v. Hill, 9 S W 351, 71 Tex. 451.
Liability of master for willful or malicious acts of servant generally see Master and Servant § 572

86. Mich.—Goldman v. Grand Trunk Western Ry. Co, 283 N.W 583, 287 Mich 289—Adams v. Grand Trunk Western R. Co., 233 N.W. 331, 252 Mich 326

87. U S.—Witiak v. Delaware & H. R. R Corp, C C A Pa., 153 F.2d 379
Ala.—Highland Ave, etc., R. Co. v. Maddox, 13 So 615, 100 Ala 618.
Mich.—Goldman v. Grand Trunk Western Ry. Co, 283 N.W 583, 287 Mich. 289—Adams v. Grand Trunk Western R. Co., 233 N W. 331, 252 Mich. 326.
Nev.—Cox v. Los Angeles & S L. R. Co., 56 P 2d 149, 56 Nev. 472, rehearing denied 58 P.2d 373, 56 Nev. 510.
52 C J. p 266 note 43.

Simple negligence of injured person
Where guest in automobile which was ditched to avoid collision with a standing train which was blocking the crossing at night, was guilty of no more than simple negligence in failing to observe the crossing or to pay attention to the operation of the automobile, such negligence would not bar a recovery against the railroad if it was guilty of wilfulness and wantonness in blocking the crossing.—Crapse v. Southern Ry Co, 21 S E 2d 737, 201 S.C. 176.

88. Ala.—Rothrock v Alabama Great Southern R. Co, 78 So. 84, 201 Ala. 308
52 C.J. p 267 note 44.

"Subsequent negligence" distinguished
(1) Where engineer has actual notice of peril, "subsequent negligence" consists of inadvertent failure properly to use all available means known to skillful engineers to avoid accident, while "wantonness" involves knowledge of consequences, and reckless disregard thereof, accompanying failure properly to use such means.—Southern Ry Co. v Diffley, 153 So. 746, 228 Ala. 490.
(2) "Subsequent negligence" generally see infra § 814.

89. Ind.—Cleveland, etc, R. Co v Starks, App, 89 N E. 602, rehearing denied 91 N E. 565.
52 C.J. p 267 note 45

90. Mass.—Washburn v. Union Freight R. Co, 142 N.E 79, 247 Mass 414.
52 C.J. p 267 note 46.
Willful, wanton, or gross negligence as question for jury see infra § 884.

Conduct held not willful or wanton
(1) Allowing freight cars to remain on highway crossing.—Cox v Los Angeles & S L R Co., 56 P.2d 149, 56 Nev 472, rehearing denied 58 P 2d 373, 56 Nev. 510.
(2) Other facts held not to constitute willfulness or wantonness see 52 C J. p 267 note 46 [b].

Violation of ordinance forbidding backing of train across street without lookout on rear was a circumstance for consideration of jury.—Birmingham Belt R. Co v. Watkins, 146 So 279, 226 Ala. 197.

Wantonness is not precluded by the fact that signals were given where engineer of train approaching crossing had actual notice of decedent's peril.—Southern Ry Co v Diffley, 153 So 746, 228 Ala 490.

91. Mich.—Adams v. Grand Trunk Western R Co, 233 N.W. 331, 252 Mich. 326.

Conduct held not "gross negligence"
Failure to keep watchman at crossing was not gross negligence with respect to injury to boy attempting to cross between cars.—Adams v Grand Trunk Western R Co, supra

92. Ill.—Elgin, etc, R Co v. Duffy, 61 N E 432, 191 Ill. 489.
52 C J. p 268 note 47

Reasonable anticipation of presence of persons
Where the trainmen have reason to believe there are persons in exposed positions on the track, a reckless indifference will be imputed to the trainmen where they run the train at a high rate of speed and without signals of approach.—Southern Ry. Co. v Diffley, 153 So. 746, 228 Ala 490—Central of Georgia Ry. Co v. Pope, 127 So. 835, 221 Ala 145.

93. Ala.—Georgia Cent R. Co v. Partridge, 34 So. 927, 136 Ala. 587.

94. Mich.—Schindler v Milwaukee, etc., R. Co., 49 N W. 670, 87 Mich. 400.
52 C.J. p 268 note 49.

95. Tex.—Gulf, etc, R. Co. v. Box, 17 S W 375, 81 Tex 670

96. Ill.—Wabash R Co v. Speer, 40 N E. 835, 156 Ill 244.

97. Ind.—Evansville, etc, R. Co. v Lowdermilk, 15 Ind 120.

98. U S.—Gulf, M. & O R Co. v Freund, C A Mo., 183 F 2d 1005, certiorari denied Freund v. Gulf, M & O. R Co, 71 S Ct 280, 340 U. S. 904, 95 L.Ed ——.

99. Ala.—Southern R. Co v. Shelton, 34 So 194, 136 Ala 191.
52 C.J. p 268 note 53.

unlawful rate of speed[1] or without giving the proper signals,[2] or that the train approached and passed a public crossing at a high[3] or excessive[4] rate of speed, without ringing the bell or sounding the whistle.[5] Moreover, the starting of a standing train while a person is attempting to climb between the cars is not itself wantonness or willfulness[6] unless the employees of the railroad company have notice at the time that he is in a position where such movement of the cars will be very dangerous[7]

b. Unauthorized Acts

A railroad company is liable for injury resulting from the act or omission of an employee, even though such act or omission is unauthorized, provided it is is within the general scope of his employment; and under certain conditions it may even be liable for the negligence of one not its employee.

Where an act or omission of a railroad employee which causes an injury at a crossing is within the general scope of his employment, the company is responsible therefor notwithstanding the particular act or omission is unauthorized[8] and notwithstanding it is done wantonly or maliciously[9] However, unless the company expressly or impliedly assents thereto,[10] it is not responsible for unauthorized acts or omissions not within the general scope of a servant's employment;[11] and the mere fact that such servant was retained in its employment after the accident does not constitute a ratification of his act[12]

Negligence of one not its employee. A railroad company may be liable for damages resulting from the negligence of one not its employee where it has, without objection and with notice, actual or constructive, permitted such person to engage in practices dangerous to those in proximity to its track and to whom the railroad owes the duty to protect from injury,[13] without taking precautions against injury resulting from such acts.[14]

§ 757. Proximate Cause of Injury

a. In general
b. Concurrent and intervening causes

a. In General

A railroad company will not be responsible for an injury at a railroad crossing unless it is guilty of a wrongful act or omission which is the proximate cause of the injury.

In accordance with general rules as to proximate cause, and their qualifications and limitations, as

1. Mo—Schmidt v Missouri Pac. R Co., 90 S W 136, 191 Mo. 215, 3 L R A,N S, 196
52 C J. p 268 note 54.

2. U S—Gulf, M. & O. R. Co v Freund, C.A Mo., 183 F.2d 1005, certiorari denied Freund v Gulf, M. & O R Co, 71 S Ct 280, 340 U S. 904, 95 L Ed —.
Ala—Highland Ave, etc, R Co. v. Maddox, 13 So. 615, 100 Ala 618.
Conn.—Piscitello v. New York, N H. & H. R. Co, 166 A 61, 116 Conn. 638
Ill—Miles v. American Steel Foundries, 23 N E 2d 754, 302 Ill App 262
Mass—Kenney v. Boston & M R R., 17 N E 2d 103, 301 Mass. 271.
52 C J p 268 note 55.

3. Ala—Southern Ry Co v Diffley, 153 So 746, 228 Ala 490
Ill—Provenzano v. Illinois Cent. R Co., 191 N E 287, 357 Ill 192.

Particular speed held not wanton conduct

Twenty-five to forty-five miles per hour over grade crossing within city limits—Kitchell v Chicago & I. M. Ry. Co., 2 N.E 2d 164, 285 Ill App. 368.

Particular speed held not "gross negligence"

Forty to fifty miles per hour in approaching crossing, in conjunction with failure to give proper crossing signals,—Goldman v. Grand Trunk Western Ry. Co, 283 N.W. 583, 287 Mich. 289.

4. Ill—Trumbo v Chicago, B. & Q. R Co., 59 N.E 2d 92, 389 Ill. 213.

5. Ill—Provenzano v Illinois Cent. R Co, 191 N E. 287, 357 Ill 192.

6. Ill—Chicago, etc, R. Co. v Surowieski, 67 Ill App 682
Kan—Missouri Pac. R. Co. v. Cooper, 45 P 587, 57 Kan. 185.

7. Ill.—Chicago, etc, R. Co. v. Surowieski, 67 Ill App 682
Kan—Missouri Pac. R. Co. v. Cooper, 45 P. 587, 57 Kan 185.

8. La—Black v. Rock Island, etc, R Co, 51 So. 82, 125 La. 101, 26 L R A,N S, 166.
52 C J p 268 note 59
Liability of master under doctrine of respondeat superior for acts of servant generally see Master and Servant § 570

Signaling motorist to cross; collision with truck

Railroad was liable for trainman's negligence in signaling motorist to proceed across street crossing, resulting in collision of motorist with truck, if committed in prosecution of trainman's business with railroad, although railroad had limited trainman's duty to attending to train and to seeing that train did not injure any one at crossing—Louisville & N. R Co v Ellis, 189 S E. 559, 54 Ga. App. 783.

9. Tenn—Nashville, etc., R Co. v Starnes, 9 Heisk. 2, 24 Am.R. 296
52 C J. p 269 note 60.

10. Mich—Peck v. Michigan Cent R Co, 23 N.W 466, 57 Mich. 3.

11. Cal.—Reger v Southern Pac Co, 210 P 971, 59 Cal.App 313
52 C.J. p 269 note 62.

12. Cal.—Reger v. Southern Pac. Co, 210 P. 971, 59 Cal App 313.

13. Ark—Missouri Pac. R. Co. v. Newton, 168 S W 2d 812, 205 Ark 353.

Postal clerk

Ark—Missouri Pac. R. Co. v. Newton, supra

14. Pa.—Cusatis v. Lehigh Valley R Co, 31 A 2d 572, 152 Pa.Super. 193.

Unset derailing device

Where railroad conductor, after placing coalcar on downgrade siding for brewery, left unlocked a set derailing device maintained on siding although he knew that car would be moved by brewery workmen, and car after passing through unset derailing device collided with plaintiff's truck at a private crossing after brewery workmen lost control of car in moving it to complete unloading, railroad was under duty to have the device in operation, and was chargeable with knowledge that car would be moved by others than its own employees.—Cusatis v. Lehigh Valley R. Co., supra.

discussed in Negligence §§ 103–115, even though a railroad company is guilty of a wrongful act or omission, in order to hold it responsible for an injury sustained at a railroad crossing on that ground it must appear that such act or omission is the proximate cause of the injury,[15] but where the negligence of the railroad or its operatives is the proximate cause of the damage the railroad is liable therefor.[16] Whether or not the negligence of the railroad company is to be deemed the proximate cause of the injury is to be determined from a consideration of all the facts and circumstances[17] Certainly, in the absence of any wrongful act or omission on the part of a railroad company or its servants, such company is not responsible for an injury which is the result of accident alone,[18] of the act or omission of a third person,[19] or of any other cause for which it is not responsible.[20]

Anticipated, natural, and probable consequences. In accordance with general rules and subject to applicable qualifications and limitations, discussed in Negligence §§ 108, 109, in general the railroad company may not be charged with liability where the injury was not a natural and probable consequence of the act or omission complained of[21] and one which men of ordinary prudence ought reasonably to anticipate might probably occur as a result of the alleged wrong.[22] In order to charge the railroad company, however, it is sufficient, provided all other elements of liability are present, if the injury is the natural and probable consequence of the wrongful act or omission;[23] and it is not necessary that all details leading up to the injury,[24] or the particular injury,[25] should be foreseen.

Negligence per se; violation of statute or ordinance. Even though the act or omission of the railroad is negligence per se,[26] as where a statute or ordinance has been violated,[27] civil liability generally cannot be predicated thereon unless such breach is the proximate cause of the injury and damage or substantially contributes thereto However, it has also been held that defendant's failure to observe statutory precautions renders it liable even though such failure was not the proximate cause of the injury and even though the negligence of plaintiff was the direct and proximate cause.[28]

15. U S —Hart v. Wabash R Co, C A Ind, 177 F.2d 492—Constantine v Pennsylvania R Co, C C A Ind, 114 F 2d 271—Lewis v Thompson, D C La, 47 F Supp. 435
Ga —Southern Ry Co v Alexander, 2 S E 2d 219, 59 Ga App 852—Crawford v. Western & A R. R, 179 S E. 852, 51 Ga App 150
Idaho —Whiffin v Union Pac R Co, 89 P 2d 540, 60 Idaho 141
Ky.—Louisville & N R Co v Jackson, 151 S W 2d 386, 286 Ky 595.
La —Eleazar v Illinois Cent R Co, App, 24 So 2d 387—Murray v Yazoo & M V R Co, App, 183 So 543, rehearing denied 184 So 413—Cuccia v Gulf, M. & N R Co, App, 180 So. 513.
Mass —Copithorn v. Boston & M R R, 17 N E 2d 713, 301 Mass 510
Mo —Thrower v. Henwood, 173 S. W.2d 861, 351 Mo 663.
Ohio —Cobb v. Bushey, 89 N E 2d 466, 152 Ohio St. 336.
Wis —Umlauft v. Chicago, M, St. P. & P. Ry. Co, 289 N W. 623, 233 Wis 391.
52 C J p 269 note 69.

Wrongful act or omission must be substantial factor in producing the injury —New Orleans & N E R Co v. Burge, 2 So.2d 825, 191 Mass 303

Accident subsequent to collision

Where motorist drove away apparently unhurt after crossing collision but later experienced headache which was allayed by sedatives and subsequently while driving another automobile lost consciousness and collided with telephone post, but there was no proof of cause of unconsciousness, no causal connection existed between crossing collision and collision with telephone post so as to impose any liability on railroad company for second collision even if first collision was caused by railroad's negligence —St Louis Southwestern Ry Co of Texas v Barr Tex Civ App, 148 S W.2d 924, error dismissed, judgment correct.

16. Ala —Alabama Great Southern R Co v Moundville Motor Co, 1 So 2d 305, 241 Ala 633
Tenn —Southern Ry. Co. v. Buskill, 10 Tenn App 1

17. Va —Atlantic Coast Line R Co v. Church, 92 S E 905, 120 Va 725
Proximate cause as question of law or fact see infra § 885

18. Ill —Shaw v Chicago & E I R Co, 75 N E 2d 51, 332 Ill App 285
52 C J p 269 note 65
Contributory negligence as proximate cause of injury see infra § 809
Injury preventable notwithstanding negligence of person injured see infra § 814

19. Miss —Illinois Cent R. Co v Bloodworth, 145 So 333, 166 Miss. 602.
Tenn —Nashville, C. & St L Ry v. Perry, 13 Tenn App 268
52 C J p 269 note 66

20. Fla —Bagdad Land, etc, Co v Moneyway, 86 So 687, 80 Fla. 784
52 C.J. p 269 note 67.

21. Ark —Missouri Pac R Co. v Richardson, 47 S W 2d 794, 185 Ark 472.
La —Bordenave v. Texas & N O. R Co, App, 46 So 2d 525
Vt —Meyette v Canadian Pac Ry. Co, 6 A 2d 33, 110 Vt. 345.
52 C J p 270 note 72.

22. La —Bordenave v. Texas & N. O R Co, App, 46 So 2d 525.
52 C J. p 270 note 73.

23. Mo —Fowler v. Missouri, K & T. R Co, 84 S W 2d 194, 229 Mo App 561
Tex —Missouri-Kansas-Texas R Co. of Texas v McLain, 126 S W 2d 474, 133 Tex 484
52 C J p 270 note 74.

24. Ind —Cleveland, etc, R. Co v. Clark, 97 N E 822, 51 Ind App. 392
Tex —Missouri-Kansas-Texas R Co. of Texas v McLain, 126 S W 2d 474, 133 Tex 484.

25. Mo.—Fowler v Missouri, K & T R Co, 84 S W 2d 194, 229 Mo App. 561.
Tex —Missouri-Kansas-Texas R Co. v. McLain, 126 S W 2d 474, 133 Tex. 484
52 C J p 270 note 76.

26. Kan —Richards v Chicago, R I & P Ry. Co, 139 P.2d 427, 157 Kan 378—Griffith v Atchison, T & S. F Ry Co, 295 P. 687, 132 Kan 282

27. Kan —Richards v Chicago, R. I & P. Ry Co, 139 P 2d 427, 157 Kan 378—Griffith v Atchison, T & S. F. Ry Co., 295 P. 687, 132 Kan 282.

28. Tenn —Louisville & N R. Co. v. Ross, 2 Tenn.App. 384.

Improper operation in general. While the railroad company is liable where the improper operation of a train by its trainmen is the proximate cause of the injury and the other elements of liability are present,[29] the rule is otherwise where the negligent operation is not the proximate cause.[30] Thus, even if the length of the train was so great as to constitute an extraordinary hazard or negligence it is immaterial if there was no causal connection between it and plaintiff's injuries when the vehicle he was riding in was struck by the train at a crossing.[31]

Unlawful laying of tracks The mere fact that the railroad company failed to obtain a franchise or the consent of certain public officers to lay its tracks across a public highway may not be regarded as the proximate cause of a collision at a crossing.[32]

b. Concurrent and Intervening Causes

Where contributory negligence is not involved, a railroad company may be liable where its wrongful act or omission concurs with another cause to constitute the proximate cause of the injury; but the company is not liable where there is an intervening efficient cause for which it is not responsible and which it could not reasonably anticipate.

In accordance with general rules and subject to applicable qualifications and limitations, discussed in Negligence § 110, where contributory negligence is not involved, the wrongful act or omission of the railroad company need not, in order to render it liable, be the sole cause of the injury.[33] Thus the company may be liable where such act or omission concurs with another cause or other causes than a fault chargeable to the person sustaining the injury to constitute the proximate cause of the injury,[34] as, for example, where its wrong concurs with a lawful act on its part,[35] or with an event or condition over which the railroad company has no control,[36] such as the act or omission of a third person,[37] and this is so where the concurring negligence is that of the driver of the vehicle which was damaged[38] or in which the injured person was riding.[39] In such case both

29. Miss.—Davis v. Thomas, 89 So. 907, 127 Miss. 174.
52 C.J. p. 270 note 77.

Engineer's negligence after discovery of peril

Mont.—Pollard v. Oregon Short Line R. Co., 11 P.2d 271, 92 Mont. 119.

30. Conn.—Elliott v. New York, etc., R. Co., 80 A. 283, 84 Conn. 444.
52 C.J. p. 270 note 79.

Failure to give warning before starting train

In action for injuries sustained in attempt to cross through a train which has blocked public crossing for longer than statutory period of five minutes, inquiry must be directed to whether failure to perform duty of giving required warning before starting train was proximate cause of injury.—Illinois Cent. R. Co. v. Thomason, 156 S.W.2d 192, 288 Ky. 386.

Acts or omissions held not proximate cause

(1) Failure of locomotive engineer to observe automobile approaching private crossing on dirt road.—Lockhart v. Missouri Pac. R. Co., La.App., 153 So. 577.

(2) Failure to give notice that train was blocking crossing.—Coleman v. Chicago, B. & Q. R. Co., 5 N.E.2d 103, 287 Ill.App. 483.

(3) Permitting train to leave ahead of schedule.—Truelove v. Durham & S. Ry. Co., 24 S.E.2d 537, 222 N.C. 704.

(4) Other acts or omissions see 52 C.J. p. 270 note 79 [a].

31. U.S.—Lewis v. Thompson, D.C. La., 47 F.Supp. 435.

32. Or.—**Corpus Juris cited in** Burroughs v. Southern Pac. Co., 56 P.2d 1145, 1148, 153 Or. 431.

Tex.—Smith v. Galveston-Houston Electric R. Co., Civ.App., 265 S.W. 267, reversed on other grounds, Com.App., 277 S.W. 103.

33. U.S.—Miller v. Union Pac. R. Co., Mo., 54 S.Ct. 172, 290 U.S. 227, 78 L.Ed. 285.

Mo.—McFetridge v. Kurn, App., 125 S.W.2d 912.
52 C.J. p. 270 note 83.

Contributory negligence as concurrent cause see supra § 810.

34. U.S.—Miller v. Union Pac. R. Co., Mo., 54 S.Ct. 172, 290 U.S. 227, 78 L.Ed. 285.

Ala.—Alabama Great Southern R. Co. v. Moundville Motor Co., 4 So.2d 305, 241 Ala. 633.—Roberts v. Louisville & N. R. Co., 186 So. 457, 237 Ala. 267.

Mo.—**Corpus Juris cited in** Whitaker v. Pitcairn, 174 S.W.2d 163, 168.—McFetridge v. Kurn, App., 125 S.W.2d 912.
52 C.J. p. 270 note 84.

35. S.C.—Thompson v. Seaboard Air Line R. Co., 62 S.E. 396, 81 S.C. 333, 20 L.R.A.,N.S., 426.
52 C.J. p. 270 note 85.

36. Miss.—Columbus, etc., R. Co. v. Lee, 115 So. 782, 149 Miss. 543.
52 C.J. p. 270 note 86.

Fright or unmanageableness of animal see infra § 762.

Icy streets

U.S.—Pennsylvania R. Co. v. Ackerson, C.A.Mich., 183 F.2d 662.

37. N.J.—Brower v. New York Cent., etc., R. Co., 103 A. 166, 91 N.J.Law 109, 1 A.L.R. 734.
52 C.J. p. 270 note 87.

Degree of negligence not to be measured

The degree of contributing negligence of the two wrongdoers is not to be measured or apportioned, the only question being whether the negligence of the railroad directly caused or contributed in any manner to the collision or to the injuries inflicted.—Dixon v. Wabash R. Co., Mo.App., 198 S.W.2d 395.

Loose gravel under railroad bridge

Fact that railroad had not placed loose gravel on highway in underpass would not relieve railroad of liability for maintenance of bridge and underpass in unsafe condition.—McFetridge v. Kurn, Mo.App., 125 S.W.2d 912.

38. Ala.—Alabama Great Southern R. Co. v. Moundville Motor Co., 4 So.2d 305, 241 Ala. 633.

39. U.S.—Miller v. Union Pac. R. Co., Mo., 54 S.Ct. 172, 290 U.S. 227, 78 L.Ed. 285.—Baltimore & O. R. Co. v. Saunders, C.C.A.W.Va., 158 F.2d 481.—Southern Pac. Co. v. Kauffman, C.C.A.Cal., 50 F.2d 159.

Ala.—Alabama Power Co. v. McGehee, 154 So. 105, 228 Ala. 505.

Ark.—Missouri Pac. R. Co. v. Frye, 214 S.W.2d 495, 214 Ark. 92.—Missouri Pac. R. Co. v. Hare, 108 S.W.2d 577, 194 Ark. 441.

Cal.—Peri v. Los Angeles Junction Ry., 137 P.2d 441, 22 Cal.2d 111.

Ga.—Atlanta, B. & C. Ry. Co. v. Loftin, 21 S.E.2d 290, 67 Ga.App. 2d 601.—Pollard v. Roberson, 6 S.E.2d 207, 61 Ga.App. 472.—Pollard

tort-feasors will be jointly and severally liable.[40] So also several wrongful acts or omissions of the railroad company may concur to constitute the proximate cause.[41]

Intervening cause. In accordance with general rules and subject to applicable qualifications and limitations, discussed in Negligence § 111, where there is an intervening efficient cause for which the railroad company is not responsible, and the occurrence of which could not reasonably be anticipated, the company may not be held liable on the theory that its wrongful act or omission was the proximate cause.[42] Thus the railroad is not liable where the sole proximate cause of the injury is the act or omission of a third person,[43] as where it is the negligence of the driver of the motor vehicle in which the injured person was riding[44] However, the act or omission of the railroad company need not be the immediate cause of the injury, or the nearest in point of time or sequence of events,[45] and, if such act or omission is the last event contributing to the injury without which the injury would not have occurred, such act or omission is the proximate cause of the injury,[46] even though some other incidental cause ensues, without contributory negligence on the part of the person sustaining the injury, which may in some degree aid in inflicting the injury.[47] So, where an intervening cause is not such as breaks the sequence or chain of events following the railroad company's wrong,[48] as, for example, where the occurrence of the intervening cause might reasonably be anticipated,[49] or is set in motion by the

v. Gorman, 182 S.E 678, 52 Ga.App 127.
Iowa—Reysack v. Joyce, 3 N W 2d 535, 232 Iowa 415—Wright v Chicago, R I. & P. R Co, 268 N W 915, 222 Iowa 583.
Mich—Wiles v New York Cent R Co., 19 N W.2d 90, 311 Mich 540
Minn—Munkel v. Chicago, M, St P & P R. Co, 278 N W. 41, 202 Minn 264.
Miss—Mississippi Cent R Co. v Alexander, 152 So 653, 169 Miss. 620
N H.—Whipple v. Boston & Maine R R, 7 A.2d 239, 90 N.H 261.
N C—Henderson v. Powell, 19 S E 2d 876, 221 N C. 239—Smith v Atlantic & Y. Ry. Co, 156 S.E. 508, 200 N.C. 177.
52 C J p 270 note 87 [a].

40. U.S.—Baltimore & O. R. Co. v Saunders, C C.A.W.Va., 159 F 2d 481.

41. Ky.—Chesapeake, etc., R. Co v Boren, 259 S W. 711, 202 Ky. 348
52 C.J. p 271 note 88

42. Ill.—Shaw v. Chicago & E. I. R. Co., 75 N.E 2d 51, 332 Ill.App. 285.
Mo—Williams v. Thompson, App, 166 S W.2d 785.
Vt—Meyette v. Canadian Pac. Ry Co., 6 A.2d 33, 110 Vt. 345.
Wis—Patterson v. Chicago, St. P., M & O. Ry. Co., 294 N.W 68, 236 Wis 205.
52 C J p 271 note 90.

43. Ill—Shaw v Chicago & E I R Co, 75 N E 2d 51, 332 Ill App. 285.
52 C J p 271 note 91.

44. U S—Carter v. Pennsylvania R Co, C A Ohio, 172 F 2d 521—Van Allen v. Atlantic Coast Line R Co., C C A Fla, 109 F 2d 780—Probert v Chicago, I & L Ry Co, C.C A Ill., 93 F.2d 259—Walton v. Oregon Short Line R. Co, C C A Idaho, 50 F.2d 352—Lewis v Thompson, D C.La., 47 F Supp 435.
Ala—Roberts v. Louisville & N R Co, 186 So. 457, 237 Ala 267
Conn—**Corpus Juris cited in** Ferino v Palmer, 52 A 2d 433, 435, 133 Conn. 463.
Ga—Evans v. Georgia Northern R Co, 52 S E 2d 28, 78 Ga App 709—Atlanta, B. & C Ry. Co v. Loftin, 21 S E 2d 290, 67 Ga App 601—Hallman v. Powell, 4 S E.2d 104, 60 Ga.App. 339, followed in Harbuck v Powell, 4 S E 2d 107, 60 Ga App 344—Pollard v Gorman, 182 S E 678, 52 Ga App 127.
Ill—Elliott v Elgin, J. & E Ry Co, 59 N E 2d 486, 325 Ill App 161
Kan—Christie v Atchison, T & S F Ry. Co., 121 P 2d 208, 154 Kan 713—Bledsoe v Missouri, K & T R. Co, 90 P.2d 9, 149 Kan 741.
Ky—Cox's Adm'r v. Cincinnati, N O & T. P Ry. Co., 37 S W 2d 859, 238 Ky. 312
Md—State, for Use of Emerson v. Poe, 190 A. 231, 171 Md. 584.
Mich.—Perch v New York Cent. R Co, 293 N.W. 778, 294 Mich. 227, followed in Balicki v. New York Cent. R Co., 293 N.W. 892, 294 Mich. 639—Momany v. Pere Marquette Ry. Co., 275 N.W. 807, 282 Mich 168.
N C.—Harper v. Seaboard Air Line Ry. Co, 190 S E. 750, 211 N C. 398—Hinnant v. Atlantic Coast Line R Co, 163 S E. 555, 202 N C. 489—Sanders v. Atlantic Coast Line R. Co., 161 S E. 320, 201 N C 672—Campbell v High Point, T. & D R. Co, 159 S E. 327, 201 N C 102.
Ohio—Cobb v. Bushey, 89 N.E 2d 466, 152 Ohio St. 336.
Or—Andersen v. Southern Pac. Co, 106 P 2d 1048, 165 Or. 368.
Tenn.—Thompson v Hawes, 162 S W. 2d 71, 25 Tenn App. 581.
Tex—Reedy v Missouri, K & T Ry Co, Civ App, 203 S W 2d 347—Wichita Falls & Southern R. Co v. Anderson, Civ App, 144 S W 2d 441, error dismissed, judgment correct
Vt—Meyette v Canadian Pac Ry Co, 6 A 2d 33, 110 Vt 345.
Va—Seaboard Air Line R. Co. v. Crowder, 62 S E 2d 227, 191 Va 635
Wis—Wilmet v Chicago & N W Ry Co, 289 N W 815, 233 Wis. 335.
52 C J. p 269 note 66 [a], p 271 note 91 [a] (1).

Driver's negligence must be palpable and gross in order to constitute it the sole proximate cause of guest's injuries—Hinnant v. Atlantic Coast Line R. Co., 163 S E 555, 202 N C 489.

Vehicle having defective brakes
Ark—Missouri Pac R Co v Moore, 138 S W 2d 384, 199 Ark 1035, certiorari denied Moore v Missouri Pac R Co, 61 S Ct. 19, 311 U S. 646, 85 L.Ed. 412.

Motorist's negligence held not intervening cause
Iowa.—Wright v. Chicago, R. I & P R. Co., 268 N.W. 915, 222 Iowa 583.

45. Ill.—Wabash R. Co. v. Billings, 72 N E 2, 212 Ill. 37.
52 C.J. p 271 note 92.

46. Ark—Davis v. Hareford, 245 S W. 833, 156 Ark. 67.
Conn—Elliott v New York, etc., R. Co., 80 A 283, 84 Conn 444

47. Ky.—Louisville, etc, R Co v. Eckman, 125 S W 729, 137 Ky. 331
52 C J p 271 note 94.

48. Ky.—Louisville, etc., R. Co. v. Eckman, supra.
52 C J. p 271 note 95

49. N.C.—Henderson v. Powell, 19 S E.2d 876, 221 N.C 239.
Pa.—Cusatis v. Lehigh Valley R Co, 31 A.2d 572, 152 Pa Super. 193
52 C J. p 271 note 96.

Failure to give signal; icy surface
Where railroad failed to give statutory signals but motorist would have been able to stop and avoid collision but for snow and ice, the

railroad company's wrongful act or omission,[50] in general liability may not be avoided on the theory that the negligence was not the proximate cause.

§ 758. —— Defects or Obstructions at Crossings

A railroad company wrongfully causing or permitting a defect or obstruction at a crossing, such as an obstruction by trains or cars, is not liable for injury unless such defect or obstruction is the proximate cause of the injury.

A railroad company is not liable for an injury, because of its wrongfully causing or permitting a defect or an obstruction at a crossing, where such defect or obstruction is not the proximate cause of the injury;[51] and whether a defect or obstruction at a crossing is the proximate cause of the injury depends on the circumstances.[52] In this connection and under the circumstances of the particular case it has been held or recognized that certain defects due to a failure properly to construct or to maintain crossings or the approaches thereto,[53] including bridges over tracks or highways or the approaches thereto,[54] were not the proximate causes of the injuries complained of; and this has also been held true of certain obstructions,[55] including obstructions by trains or cars.[56]

The railroad company is liable, however, where

snow and ice did not constitute a new intervening efficient proximate cause completely exculpating the railroad's negligence—Jackson v St Louis-San Francisco Ry. Co, 211 S. W.2d 931, 357 Mo 998

50. Tex—Stegall v. Missouri-Kansas-Texas R Co., Com App., 25 S W 2d 327.
52 C J p 272 note 97

51. Kan.—Pagan v. Lowden, 66 P. 2d 567, 145 Kan 513.
Ky.—Mazyck v Pennsylvania R R, 172 S W 2d 614, 295 Ky 1
La.—Cuccia v Gulf, M & N. R Co., App, 180 So. 513.
Mo—Hicks v Chicago, M, St P & P R Co, App, 233 S W 2d 787
N.C.—Stewart v. Atlantic Coast Line R Co, 162 S E. 547, 202 N C 288.
52 C.J. p 272 note 1
Liability of railroad company in respect of defects and obstructions at crossings in general see supra §§ 718–724.

52. Cal—Hofstadt v Southern Pac Co., App, 1 P.2d 470.

53. Iowa—Gable v Kriege, 267 N. W. 86, 221 Iowa 852, 105 A L R 539
Ky—Warren v. Louisville & N R. Co., 180 S.W.2d 97, 297 Ky. 253
Va—Chesapeake & O. Ry. Co v. Farson, 52 S E.2d 865, 189 Va. 341.
52 C.J. p 272 note 2.

Failure to erect barrier or guard
Ga.—Wright v Southern Ry Co, 7 S E.2d 793, 62 Ga App 316

Roughness of surface at crossing
Mich.—Mallory v. Pitcairn, 11 N.W 2d 318, 307 Mich 40
Mo.—Bollinger v. St. Louis-San Francisco Ry. Co., 67 S.W 2d 985, 334 Mo. 720.

Mudhole
Neb.—Loudy v. Union Pac. R. Co., 21 N.W.2d 431, 146 Neb 676.

54. N C—Smith v. Sink, 192 S E 108, 211 N.C. 725.
52 C.J. p 272 note 3.

Abutment wall of overpass
N.H.—Shea v. Boston & M. R. R, 191 A. 650, 88 N.H 462.

Pillar in center of street
N C—Montgomery v Blades, 23 S E 844, 222 N C 463, petition denied 26 S E 2d 567, 223 N C. 331.

55. U S—Davis v. Schroeder, C C A Mo., 291 F. 47.
Pa—Simmons v. Pennsylvania R Co, 48 A 1070, 199 Pa 232.

Motor vehicle driven into:
(1) Embankment—Pedigo v. City of Chattanooga, 64 S W 2d 207, 16 Tenn App 264

(2) Piling placed on highway, when gear slipped, leaving driver without brake—Atlanta, B & C R Co v Mullis, 159 S E 893, 43 Ga App 692

(3) Trestle pier.
La—Abadie, for Use of Abadie, v. Texas & N O R Co, App, 147 So. 384
N C—Baker v Atlantic Coast Line R Co, 171 S E 342, 205 N C. 329.

Obstruction of view
Wis—Wilmet v Chicago & N. W. Ry Co, 289 N W. 815, 233 Wis. 335

Injury while disengaging sagging wire from vehicle
Railroad's negligence in permitting sagging of private telephone wire along track was held not proximate cause of injuries to one who broke wire while attempting to disengage it from truck stalled on track—Cochran v. Wadley Southern Ry. Co, 160 S E 706, 44 Ga App. 208.

56. Vt—Gilman v. Central Vermont R Co, 107 A. 122, 93 Vt 340, 16 A L R 1102
52 C J p 272 note 5.

Automobile driven into cars or train
(1) In general.
U S—Good v. Atlantic Coast Line R Co, C C A. Fla, 142 F 2d 46—Megan v. Stevens, C C.A Iowa, 91 F 2d 419, 113 A.L.R. 992, certiorari denied Stevens v. Megan, 58 S Ct 267, 302 U.S. 746, 82 L Ed 576.
Ind—Killion v. Chicago, M., St P & P. R Co., 25 N.E 2d 647, 107 Ind App. 527, followed in Lucas v Chicago, M, St P & P. R Co., 25 N. E.2d 652, two cases, 107 Ind App. 705 and Killion v Chicago, M., St P & P R. Co, 25 N E 2d 652, 107 Ind App 706—Morley v Cleveland, C, C & St. L R Co, 194 N E. 806, 100 Ind App. 515—Pennsylvania R. Co v Huss, 180 N.E 919, 96 Ind. App 71.
Kan—Shepard v Thompson, 109 P. 2d 126, 153 Kan. 68.
Ky—Louisville & N. R Co. v. Reynolds, 202 S W 2d 997, 305 Ky. 54.
La—Cuccia v. Gulf, M & N R. Co, App, 180 So 513
Mich—Simpson v. Pere Marquette Ry Co, 268 N W. 769, 276 Mich 653
N C—Chinnis v Atlantic Coast Line R Co, 14 S E 2d 500, 219 N C 528
N D—Bowers v Great Northern Ry Co, 259 N W 99, 65 N D 384, 99 A L R. 1443.
52 C J. p 272 note 5 [a].

(2) When automobile driver could not stop after lights made train visible, blocking of crossing was not proximate cause of injuries—Cleveland, C, C & St L. Ry. Co v Gillespie, 173 N E 708, 96 Ind App 535.

(3) In the absence of statutory requirement, the mere leaving of a train across a highway at night without lights or other signals to disclose its presence is not negligence per se, and cannot be considered as the effective cause, but merely as the condition, of injuries resulting from a traveler upon highway running against the train.
Neb—Sailors v. Lowden, 299 N W. 510, 140 Neb. 206
Ohio—Capelle v. Baltimore & O. R. Co, 24 N E 2d 822, 136 Ohio St. 203
Wash.—Webb v Oregon, Washington R & Nav. Co, 80 P.2d 409, 195 Wash 155

Person crossing over, under, between, or around train
U S—Key v Southern Ry. Co., C C A. Ala., 46 F 2d 993
Wash—Smith v Great Northern Ry. Co., 127 P 2d 712, 14 Wash.2d 245.
52 C J p 272 note 5 [b].

the defect or obstruction is the proximate cause of the injury complained of and all other elements of liability are present.[57] In this connection and under the facts of the particular case, it has been held or recognized that certain defects due to a failure properly to construct or to maintain crossings or the approaches thereto,[58] including highway bridges over tracks[59] and streets under tracks,[60] were the proximate causes of the injuries complained of; and this has also been held true of certain obstructions,[61] including wrongful obstructions by trains, cars, or locomotives.[62]

§ 759. —— Gates, Signals, or Flagmen at Crossings

A railroad company is not liable because of its act or omission in respect of gates, a flagman or watchman, or other signs, signals, or warnings, unless such act or omission is the proximate cause of the injury complained of.

A railroad company is not liable where its act or omission in respect of gates,[63] a flagman or watchman,[64] or other signs, signals, or warnings[65] at a crossing is not the proximate cause of the injury complained of, as, for example, where the act or omission in respect of such protective agencies does not contribute to the injury.[66] So, in

57. Ga.—Louisville & N. R. Co. v. Ellis, 189 S.E. 559, 54 Ga.App. 783
N.C.—Campbell v. High Point, T. & D. R. Co., 159 S.E. 327, 201 N.C. 102.
52 C.J. p. 273 note 6

58. Miss.—Mississippi Cent. R. Co. v. Alexander, 152 So. 653, 169 Miss. 620
52 C.J. p. 273 note 7

Pedestrian's foot caught in hole
Ky.—Chesapeake & O. Ry. Co. v. Pope, 176 S.W.2d 876, 296 Ky. 254

59. U.S.—Hamilton v. Southern Ry. Co., C.C.A.Va., 162 F.2d 884.
52 C.J. p. 273 note 8.

60. Tex.—Hines v. Morrow, Civ. App., 236 S.W. 183

61. N.Y.—Hoffman v. New York Cent., etc., R. Co., 75 N.Y. 605
52 C.J. p. 273 note 10

Obstruction as substantial factor in collision
Where automobile collides with obstruction on highway because atmospheric or other conditions interfere with driver's ability to see obstruction in time to avoid collision, presence of obstruction is a substantial factor in happening of resulting collision, and consequently a proximate cause of resulting injury.—Flaherty v. Great Northern Ry. Co., 16 N.W.2d 553, 218 Minn. 488

62. Ark.—St. Louis, etc., R. Co. v. Wells, 143 S.W. 1069, 102 Ark. 257.
52 C.J. p. 273 note 11.

Motor vehicle driven into cars
(1) In general
La.—Squyres v. Baldwin, App., 185 So. 14
Minn.—Flaherty v. Great Northern Ry. Co., 16 N.W.2d 553, 218 Minn. 488

(2) Where railroad permitted freight train to block highway which was wet and slippery and provided nothing, although it was dark and foggy, to warn public of train, it was not necessary, in order to impose liability on railroad, that the train crew foresee that skidding automobile would injure pedestrian, it being only necessary that injury was of such general character as might reasonably have been anticipated.—Missouri-Kansas-Texas R. Co. of Texas v. McLain, 126 S.W.2d 474, 133 Tex. 484

63. Minn.—Mehalek v. Minneapolis, etc., R. Co., 117 N.W. 250, 105 Minn. 128
52 C.J. p. 273 note 14.
Liability of railroad company in respect of gates, signals, and flagmen at crossings in general see supra §§ 725-730

Failure to maintain gates
Md.—Buczkowski v. Canton R. Co., 30 A.2d 257, 181 Md. 377.
Mass.—Copithorn v. Boston & M. R. R., 17 N.E.2d 713, 301 Mass. 510

Gates open
Wash.—Smith v. Great Northern Ry. Co., 127 P.2d 712, 14 Wash.2d 245

64. U.S.—Hart v. Wabash R. Co., C.A.Ind., 177 F.2d 492
Ill.—Nice v. Illinois Cent. R. Co., 25 N.E.2d 104, 303 Ill.App. 292.
Mass.—Copithorn v. Boston & M. R. R., 17 N.E.2d 713, 301 Mass. 510
Tex.—McMahan v. Texas & N.O.R. Co., 161 S.W.2d 70, 138 Tex. 626—Texas & N.O.R. Co. v. Stratton, Civ.App., 74 S.W.2d 746, error refused, followed in Texas & N.O.R. Co. v. Berry, 74 S.W.2d 750, error refused—McMahan v. Texas & N.O.R. Co., 161 S.W.2d 70, 138 Tex. 626—Texas & N.O.R. Co. v. Stratton, Civ.App., 74 S.W.2d 746, error refused, followed in Texas & N.O.R. Co. v. Berry, 74 S.W.2d 750, error refused—Harris v. Texas & P. Ry. Co., Civ.App., 28 S.W.2d 1093, error refused
Wash.—Smith v. Great Northern Ry. Co., 127 P.2d 712, 14 Wash.2d 245.
52 C.J. p. 273 note 15.

65. U.S.—Hart v. Wabash R. Co., C.A.Ind., 177 F.2d 492—Robins v. Pitcairn, C.C.A.Ill., 124 F.2d 734—Haase v. Chicago, M., St. P. & P. R. Co., D.C.Minn., 76 F.Supp. 393.
Ark.—Missouri Pac. R. Co. v. Price, 33 S.W.2d 366, 182 Ark. 801
Ga.—Evans v. Georgia Northern R. Co., 52 S.E.2d 28, 78 Ga.App. 709.
Ind.—Killion v. Chicago, M., St. P. & P. R. Co., 25 N.E.2d 647, 107 Ind.App. 527, followed in Lucas v. Chicago, M., St. P. & P. R. Co., 25 N.E.2d 652, two cases, 107 Ind.App. 705, and Killion v. Chicago, M., St. P. & P. R. Co., 25 N.E.2d 652, 107 Ind.App. 706
Md.—Krause v. Baltimore & O. R. Co., 39 A.2d 795, 183 Md. 664
Ohio.—Cobb v. Bushey, 89 N.E.2d 466, 152 Ohio St. 336
Tex.—McMahan v. Texas & N.O.R. Co., 161 S.W.2d 70, 138 Tex. 626—Texas & N.O.R. Co. v. Compton, 136 S.W.2d 1113, 135 Tex. 7—Texas & N.O.R. Co. v. Stratton, Civ.App., 74 S.W.2d 746, error refused, followed in Texas & N.O.R. Co. v. Berry, 74 S.W.2d 750, error refused—Texas & N.O.R. Co. v. Stratton, Civ.App., 74 S.W.2d 741, error refused, followed in Texas & N.O.R. Co. v. Berry, 74 S.W.2d 750, error refused
52 C.J. p. 273 note 16.

If motorist sees train in time to stop, negligent failure to give notice of approach of train ceases to be operating cause of accident
U.S.—Southern Pac. Co. v. Kauffman, C.C.A.Cal., 50 F.2d 159
Va.—Seaboard Air Line R. Co. v. Crowder, 62 S.E.2d 227, 191 Va. 635.

66. N.Y.—Carnochan v. Erie R. Co., 130 N.Y.S. 514, 73 Misc. 131, affirmed 144 N.Y.S. 1108, 159 App. Div. 406.
52 C.J. p. 273 note 17

Absence or improper management of gates
Md.—Krause v. Baltimore & O. R. Co., 39 A.2d 795, 183 Md. 664
Va.—Norfolk & W. Ry. Co. v. Wellons' Adm'r, 154 S.E. 575, 155 Va. 218.

Absence of flagman or watchman
Ky.—Louisville & N. R. Co. v. Henry's Adm'r, 66 S.W.2d 818, 252 Ky. 278
La.—Levy v. New Orleans & N.E. R. Co., App., 20 So.2d 559, rehearing denied 21 So.2d 155

Failure to maintain signs or signals
Ind.—Morley v. Cleveland, C., C. & St. L. R. Co., 194 N.E. 806, 100 Ind.App. 515.
Iowa.—Dillner v. Joyce, 6 N.W.2d

order to charge the railroad company with liability for failure of a signal at a crossing to operate, the injury must have resulted from the particular danger for protection against which the signal was designed.[67]

On the other hand, a railroad company is liable where its wrongful act or omission in respect of gates,[68] a flagman or watchman,[69] or other signals or warnings[70] at a crossing is the proximate cause of the injury complained of and the other elements of liability are present Where a driver of a motor vehicle on approaching a crossing at which the company is required to keep a flagman sees no flagman and no flag in front of the first track on the crossing where he has a right to expect to see him in case a train is approaching, and sees no train, he is not guilty of negligence in proceeding, as discussed infra § 792, and where the flagman then appears and gives warning, but only in time to enable the chauffeur to stop on the first track where he is almost immediately struck by a train, the accident will be attributed to the negligence of the flagman.[71]

§ 760. —— Signals, Lights, or Lookouts on Trains or Cars

A railroad company is not liable because of its failure to keep a lookout, or to give the customary or statutory signals, or to maintain proper lights, unless such failure is the proximate cause of the injury complained of.

A railroad company is not liable if there is no legal causal connection between the failure to keep a lookout,[72] or to give the customary or statutory signals,[73] or to maintain proper limits,[74] on approaching a crossing, and the injury complained of, as, for example, where giving the signals would not have prevented the injury,[75] or where the trav-

275, 233 Iowa 279—Wright v Chicago, R I & P. R Co, 268 N W 915, 222 Iowa 583—Dolan v Bremner, 263 N W 798, 220 Iowa 1143

Defective signals

N J —Stewart v Norton, 75 A 2d 900, 9 N.J Super 222, affirmed 80 A.2d 111, 6 N J 591

67. Wis.—Schmidt v. Chicago, etc., R. Co, 210 N W 370, 191 Wis 184.
52 C J p 274 note 18

68. U S.—Surdyk v. Indiana Harbor Belt R. Co, C C A Ill, 148 F 2d 795.
Ill.—Greenfield v. Terminal R Ass'n of St. Louis, 6 N.E 2d 888, 289 Ill App 147.
52 C J. p 274 note 19

69. Ill —Greenfield v Terminal R Ass'n of St Louis, supra.
52 C J. p 274 note 20.

70. Ind —Wabash R Co v McNown, 99 N E 126, 100 N E 383, 53 Ind App 116.

If motorist does not see train, although he might do so by looking, failure to give warning of approach of train, contributing to motorist's ignorance and therefore to collision, is proximate cause —Southern Pac Co v. Kauffman, C C A.Cal, 50 F 2d 159.

71. La —Robey v. Kansas City Southern R. Co., 58 So 696, 130 La 880, 41 L.R A ,N.S, 355.

72. Ind —Hart v Wabash R. Co., C A Ind., 177 F 2d 492
Ga —Western & A R. R v Leslie, 173 S E. 170, 48 Ga App 714
Ky.—Moore v. Illinois Cent R Co., 183 S.W 2d 29, 298 Ky. 433—Louisville & N R Co v. Jackson, 151 S.W 2d 386, 286 Ky 595.
Mich.—Perch v New York Cent R Co, 293 N.W 778, 294 Mich 227, followed in Balicki v New York Cent. R Co., 293 N W. 892, 294 Mich. 639.
Vt —Meyette v Canadian Pac Ry. Co, 6 A 2d 33, 110 Vt 345.
52 C J p 274 note 26
Liability of railroad company in respect of signals, lights, or lookouts on trains or cars in general see supra §§ 734-743

73. U S —Hart v Wabash R. Co, C A Ind, 177 F 2d 492—Northern Pac Ry Co v Bacon, C C A Mont, 91 F 2d 173, certiorari denied Bacon v Northern Pac R Co, 58 S Ct 55, 302 U S 730, 82 L Ed 564—American R Co of Porto Rico v Mattei, C C A Puerto Rico, 45 F 2d 307
Ala —Louisville & N R Co. v Davis, 181 So 695, 236 Ala 191
Ark —Missouri Pac R Co v. Dennis, 166 S W 2d 886, 205 Ark 28—Missouri Pac R Co v Hood, 135 S W 2d 329, 199 Ark 520
D C —Small v. Pennsylvania R Co, 80 F 2d 704, 65 App.D C 112, certiorari denied 56 S Ct 669, 297 U S. 724, 80 L Ed 1008
Ga —Evans v Georgia Northern R. Co, 52 S E 2d 28, 78 Ga App 709—Chumley v. Louisville & N. R. Co, 165 S E 917, 45 Ga.App 732
Idaho —Allan v. Oregon Short Line R Co, 90 P 2d 707, 60 Idaho 267.
Ky —Louisville & N R Co. v Jackson, 151 S W 2d 386, 286 Ky 595
Miss —New Orleans & N. E R Co v Burge, 2 So 2d 825, 191 Miss 303
Mo —Amos v. Terminal R. Ass'n of St. Louis, App, 142 S W.2d 787
Ohio —Croke v Chesapeake & O Ry Co, 93 N E.2d 311, 86 Ohio App 483
Tenn —Southern Ry. Co. v Noah, 176 S.W 2d 826, 180 Tenn 532
Tex —Texas & N. O. R. Co v Stratton, Civ App, 74 S W 2d 746, error refused, followed in Texas & N. O. R Co v. Berry, 74 S W 2d 750, error refused—Texas & N. O R Co v. Stratton, Civ App, 74 S W 2d 741, error refused, followed in Texas & N O R. Co v. Berry, 74 S W. 2d 750, error refused.
Va —Southern Ry Co v Giles, 192 S E 772, 169 Va. 218—Southern Ry. Co v. Whetzel, 167 S E. 427, 159 Va 796—Virginian Ry. Co v. Haley, 157 S E 776, 156 Va 350—Chesapeake & O Ry Co v Barlow, 156 S E 397, 155 Va 863.
Wis —Keegan v. Chicago, M, St P & P Ry. Co, 27 N W 2d 739, 251 Wis. 7
52 C J. p 274 note 27, p 645 note 28 [f].

74. Ga —Evans v Georgia Northern R. Co., 52 S E 2d 28, 78 Ga App 709

75. Ind —New York Cent R Co v Gardner, 24 N E 2d 811, 107 Ind App 366
La —Lockhart v Missouri Pac R Co, App, 153 So 577
Minn —Sullivan v Boone, 286 N W 350, 205 Minn. 437
Miss —New Orleans & N E R. Co v. Burge, 2 So 2d 825, 191 Miss. 303
N C —Chinnis v Atlantic Coast Line R Co, 14 S E 2d 500, 219 N C 528
Ohio —Icsman v New York Cent. R Co, 87 N E 2d 829, 85 Ohio App. 47 —Kramers v Chesapeake & O Ry Co, 22 N.E 2d 227, 60 Ohio App. 556
Okl.—Fleming v Loch, 195 P.2d 942, 200 Okl 448.
Va.—Franklin & P. Ry Co v. Shoemaker's Committee, 159 S E 100, 156 Va. 619
52 C J p 275 note 28.

Where, but for stalling of motor, motorist could have safely negotiated crossing no recovery could be rested on theory of railroad's negligence in failing to sound warning — Southern Ry Co. v. Hale, 133 So. 8, 222 Ala. 489.

eler,[76] including a person traveling in a vehicle,[77] has complete knowledge in respect of the approach of the train. While there is authority for the view that, if the driver of the vehicle has notice of the approach of the train, the failure of the railroad company to give signals would not be the cause of an injury to one riding with such driver,[78] some courts refuse to extend the rule that the failure to give signals is not the proximate cause of an injury where the traveler has knowledge of the approach of the train to the case of an injury sustained by a person who had no knowledge of such approach, although the driver of the vehicle in which the injured person was driving had such knowledge.[79] Accordingly, such rule does not apply where the traveler, although he knows of the approach of the train, is deceived by a defective headlight on the locomotive as to the distance of such train from the crossing.[80]

In any event, a failure to give the customary or statutory signals,[81] or failure to maintain a proper lookout[82] or the required lights,[83] will make the railroad company liable for an injury sustained by an accident at the crossing, where it is shown that such failure is the proximate or contributing cause of the injury, and the other elements of liability are present.

§ 761. —— Rate of Speed and Control of Train

A railroad company is not liable because its train was operated at an unlawful or excessive speed, or because the train was not equipped with proper appliances for stopping or checking speed, unless such speed or lack of control was the proximate cause of the injury complained of.

A railroad company is not liable on the ground that the train was operated at an unlawful, or otherwise excessive, speed where such operation was not the proximate cause of the injury for which recovery is sought,[84] as, for example, where the injury was not the natural and probable result of the excessive speed,[85] or where the exces-

76. Ark.—Missouri Pac. R. Co. v. Moore, 138 S.W.2d 384, 199 Ark. 1035, certiorari denied Moore v. Missouri Pac. R. Co., 61 S.Ct. 19, 311 U.S. 646, 85 L.Ed. 412—Chicago, R. I. & P. Ry. Co. v. Sullivan, 101 S.W.2d 175, 193 Ark. 491.
Ky.—Louisville & N. R. Co. v. Brock's Adm'r, 135 S.W.2d 898, 281 Ky. 240—Louisville & N. R. Co. v. Mitchell's Adm'x, 124 S.W.2d 1025, 276 Ky. 671.
Va.—Southern Ry. Co. v. Berry, 1 S.E.2d 261, 172 Va. 266.
52 C.J. p. 275 note 29.

Failure to erect blowpost, as required by statute, was not proximate cause of death of pedestrian struck by train, where undisputed evidence showed that pedestrian saw train while he was walking on track ahead of it, and not while using crossing. —Southern Ry. Co. v. Nix, 8 S.E.2d 409, 62 Ga.App. 119.

77. Ark.—Missouri Pac. R. Co. v. Dennis, 166 S.W.2d 886, 205 Ark. 28—Missouri Pac. R. Co. v. Doyle, 160 S.W.2d 856, 203 Ark. 1111.
Iowa.—Wright v. Chicago, R. I. & P. R. Co., 268 N.W. 915, 222 Iowa 583.
Miss.—Gulf, M. & O. R. Co. v. Baggett, 8 So.2d 246, 193 Miss. 356.
Tex.—Reedy v. Missouri, K. & T. Ry. Co., Civ.App., 203 S.W.2d 347.
Vt.—Meyette v. Canadian Pac. Ry. Co., 6 A.2d 33, 110 Vt. 345.
52 C.J. p. 275 note 30.

78. N.H.—Morier v. Hines, 122 A. 330, 81 N.H. 48.

79. Ohio.—Pennsylvania R. Co. v. Lindahl, 146 N.E. 71, 111 Ohio St. 502.

80. Miss.—Alabama, etc., R. Co. v. McGee, 78 So. 296, 117 Miss. 370.

81. Cal.—Lahey v. Southern Pac. Co., 61 P.2d 461, 16 Cal.App.2d 652, certiorari denied Southern Pacific Co. v. Lahey, 57 S.Ct. 508, 300 U.S. 665, 81 L.Ed. 873.
Ga.—Luke v. Powell, 12 S.E.2d 196, 63 Ga.App. 795—Chandler v. Pollard, 12 S.E.2d 190, 64 Ga.App. 122.
Ill.—Chapman v. Baltimore & O. R. Co., 92 N.E.2d 466, 340 Ill.App. 475—Randolph v. New York Cent. R. Co., 79 N.E.2d 301, 334 Ill.App. 268.
Ind.—New York Cent. R. Co. v. De Leury, 192 N.E. 125, 100 Ind.App. 140.
N.C.—Kuykendall v. Southern Ry. Co., 181 S.E. 625, 208 N.C. 340.
52 C.J. p. 275 note 34.

Opportunity to alight from stalled car

Fact that automobile was already stalled on grade crossing did not render failure to give proper warning immaterial, since, although absence of warning did not result in automobile being driven upon the tracks, a warning at the statutory distance would have afforded driver and occupant of automobile an opportunity to alight therefrom and escape injury.—Canadian Pac. Ry. Co. v. Sullivan, C.C.A.Mass., 126 F.2d 433, certiorari denied 62 S.Ct. 1291, 316 U.S. 696, 86 L.Ed. 1766.

82. Ark.—Missouri Pac. R. Co. v. Helmert, 121 S.W.2d 103, 196 Ark. 1073.
52 C.J. p. 276 note 35.

83. Ill.—Chapman v. Baltimore & O. R. Co., 92 N.E.2d 466, 340 Ill.App. 475.

84. U.S.—Hart v. Wabash R. Co., C.A.Ind., 177 F.2d 492—Chicago & N. W. Ry. Co. v. Golay, C.C.A.Wyo., 155 F.2d 842—Lewis v. Thompson, D.C.La., 47 F.Supp. 435.
Ala.—Roberts v. Louisville & N. R. Co., 186 So. 457, 237 Ala. 267.
Fla.—Powell v. Gary, 200 So. 854, 146 Fla. 334.
Kan.—**Corpus Juris cited in** Johnson v. Union Pac. R. Co., 143 P.2d 630, 633, 157 Kan. 633—**Corpus Juris quoted in** Richards v. Chicago, R. I. & P. Ry. Co., 139 P.2d 427, 430, 157 Kan. 378—Vance v. Union Pac. R. Co., 298 P. 764, 133 Kan. 11.
Ky.—Louisville & N. R. Co. v. Jackson, 151 S.W.2d 386, 286 Ky. 595.
La.—Homeland Ins. Co. v. Thompson, App., 12 So.2d 62.
Miss.—Yazoo & Mississippi Valley R. Co. v. Aultman, 173 So. 280, 179 Miss. 109.
N.C.—Johnson v. Atlantic Coast Line R. Co., 170 S.E. 120, 205 N.C. 127.
Vt.—Meyette v. Canadian Pac. Ry. Co., 6 A.2d 33, 110 Vt. 345.
Va.—Seaboard Air Line R. Co. v. Crowder, 62 S.E.2d 227, 191 Va. 635.
Wis.—Garlock v. Chicago, M., St. P. & P. R. Co., 31 N.W.2d 582, 252 Wis. 269—De Wildt v. Thomson, 6 N.W.2d 173, 241 Wis. 352—Umlauft v. Chicago, M., St. P. & P. Ry. Co., 289 N.W. 623, 233 Wis. 391.
52 C.J. p. 276 note 39.
Liability of railroad company in respect of rate of speed and control of trains at crossings in general see supra §§ 744–749.

85. U.S.—Williams v. Thompson, D.C.La., 48 F.Supp. 760—Lewis v. Thompson, D.C.La., 47 F.Supp. 435.
Ala.—Roberts v. Louisville & N. R. Co., 186 So. 457, 237 Ala. 267.

sive speed did not contribute to the injury,[86] and this is also true of the failure to apply brakes immediately on discovering the danger.[87] Likewise, where a failure to equip a train with proper appliances for stopping or checking speed is not the proximate cause of the injury, liability of the railroad company cannot be based on its failure so to equip.[88] On the other hand, wrongfully running a train at a rate of speed in violation of a statute or ordinance, or at a rate otherwise excessive, imposes liability on the railroad company for resultant injuries where such speed is the proximate cause of the injury and the other elements of liability are present.[89]

§ 762. —— Fright or Unmanageableness of Animal

A railroad company ordinarily is not liable for injuries resulting from the fright or unmanageableness of an animal unless some wrongful act or omission on the part of the company is regarded as the proximate or concurring cause of such fright or unmanageableness.

A railroad company is not liable for injuries resulting from the fright or unmanageableness of an animal where such fright or unmanageableness is not the proximate result of any wrongful act or omission on its part and the company is not otherwise chargeable with any wrongful act or omission,[90] as, for example, where its negligence is only the remote cause of the fright or unmanageableness,[91] or where there is no causal connection between the negligence for which a recovery is sought and such fright or unmanageableness.[92]

Where the fright is caused by an operation or condition in respect of which the company is not guilty of any breach of duty, the fright is generally regarded as the proximate cause of the resultant injury,[93] and not such operation or condition.[94] Where, however, such fright or unmanageableness is the proximate result of a wrongful act or omission of the railroad company and the other elements of liability are present, the company is liable for injuries resulting from such fright or unmanageableness;[95] and such wrongful act or omission,[96] and not the fright or unmanageableness of the animal,[97] is in a legal sense the proximate cause of the injury.

Concurrent and independent causes. The railroad company may be liable where its wrongful act or omission causes the fright or unmanageableness of the animal and this concurs with a cause other than the negligence of the person sustaining the injury to produce the injury complained of,[98] as, for example, where such concurring cause is one over which the railroad company has no con-

Mich.—Perch v. New York Cent. R. Co., 293 N.W. 778, 294 Mich. 227, followed in Balicki v. New York Cent. R. Co., 293 N.W. 892, 294 Mich. 639.
Ohio.—Lynch v. Pennsylvania R. Co., 194 N.E. 31, 48 Ohio App. 295.
Wis.—Garlock v. Chicago, M., St. P. & P. R. Co., 31 N.W.2d 582, 252 Wis. 269—Bellrichard v. Chicago & N. W. Ry. Co., 20 N.W.2d 710, 247 Wis. 569—Roswell v. Chicago, M., St. P. & P. Ry. Co., 2 N.W.2d 215, 240 Wis. 507—Umlauft v. Chicago, M., St. P. & P. Ry. Co., 289 N.W. 623, 233 Wis. 391.
52 C.J. p. 276 note 40.

Car backed into train

Where motorist, turning away from railroad crossing, in confusion backed car into train, excessive speed of train was not proximate cause of motorist's injury.—Chumley v. Louisville & N. R. Co., 165 S.E. 917, 45 Ga. App. 732.

86. Mich.—Perch v. New York Cent. R. Co., 293 N.W. 778, 294 Mich. 227, followed in Balicki v. New York Cent. R. Co., 293 N.W. 892, 294 Mich. 639.
52 C.J. p. 276 note 41.

87. U.S.—Union Pac. R. Co. v. Gaede, C.C.A.Colo., 110 F.2d 931.

88. Ala.—Nashville, etc., R. Co. v. Myrick, 77 So. 458, 16 Ala. App. 308.
52 C.J. p. 276 note 42.

89. Ill.—Randolph v. New York Cent. R. Co., 79 N.E.2d 301, 334 Ill. App. 268.
52 C.J. p. 276 note 43.

Speed in combination with other circumstances

Although speed, by itself, cannot be the cause of an accident, the speed of a train in combination with other circumstances may be such cause.—Carr v. Chicago & N. W. R. Co., 43 N.W.2d 461, 257 Wis. 315—De Rousseau v. Chicago, St. P., M. & O. Ry. Co., 39 N.W.2d 764, 256 Wis. 19—Bellrichard v. Chicago & N. W. R. Co., 20 N.W.2d 710, 247 Wis. 569—Umlauft v. Chicago, M., St. P. & P. Ry. Co., 289 N.W. 623, 233 Wis. 391.

90. Ky.—Louisville, etc., R. Co. v. Onan, 110 S.W. 380, 33 Ky.L. 462.
52 C.J. p. 277 note 46.
Liability of railroad company for injuries at crossings resulting from fright or unmanageableness of animal in general see supra §§ 547–689, 752–755.

91. Pa.—Simmons v. Pennsylvania R. Co., 48 A. 1070, 199 Pa. 232.
52 C.J. p. 277 note 47.

92. Iowa.—McFarland v. Illinois Cent. R. Co., 187 N.W. 947, 193 Iowa 776.
52 C.J. p. 277 note 48.

93. U.S.—Hunt v. Southern R. Co., D.C.S.C., 236 F. 157.

94. Ill.—Chicago, etc., R. Co. v. Scranton, 95 Ill. App. 619.
52 C.J. p. 277 note 50.

95. N.Y.—Laible v. New York Cent., etc., R. Co., 43 N.Y.S. 1003, 13 App. Div. 574, affirmed 57 N.E. 1114, 162 N.Y. 621.
52 C.J. p. 278 note 51.

96. Ark.—Louisiana, etc., R. Co. v. Nix, 126 S.W. 1076, 94 Ark. 270.
52 C.J. p. 278 note 52.

Animals frightened by negligent sounding of whistle

Mo.—Fowler v. Missouri, K. & T. R. Co., 84 S.W.2d 194, 229 Mo. App. 561.

Horse's foot caught in defective crossing

U.S.—Chicago Great Western R. Co. v. Mackie, C.C.A. Iowa, 60 F.2d 384.

97. Wis.—Michaels v. Chicago, etc., R. Co., 131 N.W. 892, 146 Wis. 466.
52 C.J. p. 278 note 53.

98. N.C.—Paul v. Atlantic Coast Line R. Co., 87 S.E. 66, 170 N.C. 230, L.R.A.1916B 1079.
52 C.J. p. 278 note 55.

trol.[99] So also, the liability of the railroad company may, according to some cases, be based on its wrongful act or omission which concurs with the fright or unmanageableness of the horse to produce the injury complained of, although no wrongful act or omission on its part caused such fright or unmanageableness[1] In some cases, however, the fright or unmanageableness of the animal, which was not caused by any act or omission of the railroad company, has been regarded as the proximate cause of the injury[2] or as an independent intervening agency,[3] and the railroad company is not liable notwithstanding its wrongful act or omission to some extent contributed to, or was involved in, the accident. In any event, if the railroad company is not chargeable with a breach of duty in respect of a condition at the crossing which to some extent contributes to the injury, such condition may not be regarded as the proximate cause[4]

99. Ark.—Louisiana, etc, R Co v. Nix, 126 S W. 1076, 94 Ark 270
52 C J p 278 note 56

1. Okl —Chicago, etc., R Co v. Taylor, 192 P. 349, 79 Okl 142
52 C.J. p 278 note 57.

2. Mich —Lambeck v Grand Rapids, etc, R. Co, 64 N W. 479, 106 Mich. 512
52 C J. p 278 note 58.

3. U S —Hunt v. Southern R. Co, D C S C, 236 F 157
52 C J p 279 note 59.

4. U S —Myers v Chicago, M & St P R Co, C C Iowa, 101 F. 915.
52 C J. p 279 note 60.

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CORPUS JURIS SECUNDUM

1986
Cumulative
Annual Pocket Part

Volume 74

Insert this Pocket Part in back of volume
It replaces prior pocket part

NOTICE

Consult General Index pocket parts for references to new matter.

CITE BY TITLE AND SECTION

Thus

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Lawyers' Edition, Second Series	88 L.Ed.2d (part)
Federal Reporter, Second Series	771 F.2d 1503
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American Law Reports, Fourth Series	43 A.L.R 4th

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QUARTERLY.

Similarly defined

(1) C.J.S. cited in the wood "quarterly" means a three-months period Civic Plaza Nat Bank v First Nat. Bank in Dallas, C A Mo., 401 F 2d 193, 199

(2) Computed for or payable at three-month intervals, recurring, issued or spaced at three-month intervals Civic Plaza Nat Bank v First Nat Bank in Dallas, C A Mo, 401 F 2d 193, 199

Similarly expressed

(1) "Quasi" (Lat as if, almost) is a term used to mark a resemblance, and supposes a difference between two objects It is exclusively a term of classification It implies that conception to which it serves as index is connected with conception with which comparison is instituted by strong superficial analogy or resemblance Moreover it negatives idea of identity, but points out that the conceptions are sufficiently similar for one to be classed as the equal of the other South Discount Foods, Inc v. Retail Clerks Union Local 1552, Com Pl, 235 N E 2d 143, 147, 14 Ohio Misc 188

QUASH.

page 1

To "quash" means to abate, annul, overthrow, or make void; a motion to quash lies only for defect apparent on face of proceedings, it is not favored, and court will exercise its power to quash with great caution and only in very clear cases —State v Almori, 222 A 2d 820, 822, 3 Conn.Cir 641.

QUASI.

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47. Ohio—State ex rel Gill v. Volz, 100 N E 2d 203, 207, 156 Ohio St. 60.

48. Ohio—State ex rel. Gill v Volz, supra, n. 47

51. Ohio—State ex rel. Gill v. Volz, supra, n 47

53. Ohio—State ex rel. Gill v. Volz, supra, n 47

54. Ohio—State ex rel. Gill v Volz, supra, n 47

56. Ohio—State ex rel. Gill v Volz, supra, n. 47.

W.Va.—U.S. Steel Corp. v. Stokes, 76 S E.2d 474, 477, 138 W.Va. 506.

57. Ohio—State ex rel. Gill v. Volz, supra, n. 47

58. W.Va.—U.S. Steel Corp. v. Stokes, supra, n 56

59. Iowa—Wapello County v. Ward, 136 N.W.2d 249, 251, 257 Iowa 1231.

60. Cal.—Hubbs v. California Dept of Public Works, 112 Cal.Rptr. 172, 174, 36 C.A.3d 1005

Iowa—Wapello County v. Ward, Iowa, 136 N.W 2d 249, 251, 257 Iowa 1231.

Having some resemblance to

W.Va.—U S. Steel Corp v Stokes, supra, n. 56.

Similarly defined

(1) "Quasi" means superficially resembling but intrinsically different.—Galloway v. Truesdell, 422 P.2d 237, 243, 83 Nev. 13.

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QUEEN. A wife of a king.[63.50]

63.50. Webster New Int.D.

The term is also used to denote the female partner in a male homosexual relationship.[63.51]

63.51. Cal.—People v. Polk, 37 Cal.Rptr. 753, 755, 390 P.2d 641, 61 C.2d 217.

QUEERS. A term employed to designate homosexuals.[65.50]

65.50. N.Y.—People v. Westfall, 174 N.Y.S 2d 339, 340, 6 A.D.2d 732.

QUESTION.

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73. N Y—C.J S cited in Botens v Board of Education, Etc, 204 N Y S 2d 266, 269, 26 Misc 2d 158

QUI.

80 Qui tam

(2) "Qui tam" is abbreviation of Latin phrase qui tam pro domino rege quam pro si ipso in hac parte sequitur, meaning "Who sues on behalf of the King as well as for himself" and is an action brought by an informer on behalf of the government to seek civil penalties for violation of a statute—U S v Florida-Vanderbilt Development Corp, D C Fla, 326 F Supp 289, 290

(3) Phrase used to describe informer's action brought by one who sues for state or United States as well as for himself—U S ex rel Vance v Westinghouse Elec Corp, D C Pa, 363 F Supp 1038, 1040

(4) "Qui tam action" is one brought by an informer or volunteer for violation of a particular civil or criminal statute which generally provides that the informer, if successful, may recover his costs and attorney fees, as well as a share of the penalty, it is called a "qui tam action" since plaintiff states that he sues for the state as well as himself—Fritz v Gorton, Wash, 517 P 2d 911, 933, 83 Wash 2d 275, app. dism, 94 S Ct 2596, two cases, 417 U S 902, 41 L Ed 2d 208

Maxims

Qui facit per alium, facit per se.

81. Ark—Arkansas State Bd of Architects v Bank Bldg & Equipment Corp of America, 286 S W 2d 323, 327, 225 Ark 889, 56 A.L R 2d 720

Fla—Georgia S. & F. Ry Co v Shiver, App, 172 So 2d 639, 642

Discussion of maxim

(3) Or—Knapp v. Standard Oil Co of California, 68 P 2d 1052, 1055, 156 Or 564

QUIA.

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89. Quia timet

Tenn—Patterson v T J Moss Tie Co., 330 S.W 2d 344, 349, 46 Tenn.App 405

QUICK.

91. Applied to unborn child

The word "quick" means that the child is so far developed as to move or stir in the mother's womb

Ga.—Porter v Lassiter, 87 S E 2d 100, 102, 91 Ga App 712

QUICKENING.

92. Similarly defined

(1) Quickening is that point when fetus indicates signs of life by way of fetal movements which can be felt by mother—People v Nixon, 201 N W 2d 635, 638, 42 Mich App 332

QUIETING TITLE

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1 C J p 1046 note 75

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10 U S—C J S cited in 1st Nat Credit Corp v Von Hake, D C Utah, 511 F Supp 634, 641

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N Y—Culk v Feldmeier, 146 N Y S 2d 821, 2 Misc 2d 1029—Reiter v Landon Homes, Inc, 287 N Y S 2d 724, 56 Misc 2d 168, affd 295 N Y S 2d 103, 31 A D 2d 538—Town of Smithtown v Brooklyn Gun Club, 296 N Y S 2d 633, 58 Misc 2d 708

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Or—Jones v Jackson, 246 P 2d 546, 195 Or. 643—Freytag v. Vitas, 326 P 2d 110, 213 Or 462—Rohner v. Neville, 365 P.2d 614, 230 Or 31, reh den 368 P 2d 391, 230 Or 31

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title held inapplicable

Ind.—Elliott v. Elliott, 288 P.2d 532, 136 C.A 2d 337

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59. Colo—School Dist No Six in Weld County v Russell, 396 P 2d 929, 156 Colo 75

N D—State v Rosenquist, supra, n 58

Okl—Choate v Muskogee Elec Traction Co, 295 P 2d 781

Or—Rohner v Neville, 365 P 2d 614, 230 Or 31, reh den 368 P 2d 391, 230 Or 31

60. It is enough, etc.

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61. U S—Bonner v Smith, D C Okl, 114 F Supp 895

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N C—Etheridge v Wescott, 94 S E 2d 846, 244 N C 637

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Or—Rohner v Neville, 365 P 2d 614, 230 Or 31, reh den 368 P 2d 391, 230 Or 31

66. Miss—Hemphill v Mississippi State Highway Commission, 145 So 2d 455, 245 Miss 33

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67. Fla—Gibson v Wright, App, 179 So 2d 245

68. Ill—Pickens v Adams, 131 N E 2d 38, 7 Ill 2d 283, 56 A L R 2d 605

Title or interest held sufficient

(5) Other titles or interests

U S—Federal Home Loan Bank of San Francisco v Long Beach Federal Sav. & Loan Ass'n, 122 F Supp 401—O'Boyle v Bevil, C A Tex, 259 F 2d 506, cert den 79 S Ct 590, 359 U S 913, 3 L Ed 2d 576

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70. Cal—Santoro v Carbone, 99 Cal Rptr 488, 22 C.A 3d 721

71. Ill—Reynolds v Burns, 170 N E 2d 122, 20 Ill 2d 179

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Title or interest held insufficient

(4) Other title or interest

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(2) Other instances.

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76. Cal—Lake Merced Golf and Country Club v Ocean Shore R. Co, 23 Cal Rptr 881; 206 C.A.2d 421

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77. U.S.—Hilliard v Saul, C.A Idaho, 192 F.2d 800

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Okl—Jeffers v Edge, 295 P 2d 787

Utah—Pleasant Grove City v Crease, 266 P 2d 1019, 1 Utah 2d 352

79. Ark—Bailey v Martin, 237 S W 2d 16, 218 Ark 513—Coslin v Crossett Co., 342 S W 2d 303, 233 Ark 13—Jones v Brooks, 343 S W 2d 99, 233 Ark 148—Pollins v Pettus, 458 S W 2d 724, 249 Ark. 67—McKim v McLiney, 465 S.W 2d 911, 250 Ark 423

Idaho—Mulder v Stands, 225 P 2d 463, 71 Idaho 22—White v Boydstun, 428 P 2d 747, 91 Idaho 615

Ill—Yeates v Daily, 150 N E 2d 159, 13 Ill 2d 510

Ky—Mullins v Hargis, 242 S.W 2d 611—Noland v Wise, 259 S W 2d 46

Me—Chickering v Yates, 420 A.2d 1219

Mich—Walker v Bowen, 52 N W.2d 574, 333 Mich 13

Miss—Cochran v. Cochran, 74 So 2d 841, 221 Miss 780

Neb—Eurich v Ostwald, 46 N.W 2d 686, 154 Neb 8, reh den 47 N W 2d 574, 154 Neb 277

N D—Tavis v Higgins, 157 N.W.2d 718.

Or—Rohner v Neville, 365 P 2d 614, 230 Or. 31, reh den 368 P 2d 391, 230 Or. 31.

§ 19. —— Title Derived from Common Source

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83. Ark—Booth v Peoples Loan & Inv Co., 455 S W 2d 868, 248 Ark 1213

Cal—Taylor v Coachella Val County Water Dist, 239 P 2d 454, 108 C A 2d 743—Hohn v Riverside County Flood Control and Water Conservation Dist, 39 Cal Rptr. 647, 228 C A 2d 605

Ky—Noland v Wise, supra, n 79

Wyo—Dame v. Mileski, 340 P 2d 205, 80 Wyo 156

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85. Fla—Nissim Hadjes, Inc. v Di Costanzo, App, 197 So 2d 602

87. U S—Fetzer v Bodcaw Co, C.A Ark, 601 F 2d 356

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Elder title prevails

S D—Senechal v. Senechal, 112 N W.2d 618, 79 S D. 416.

Chain of title through deed of trust prevails over subsequent series of mesne conveyances.

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§ 20. —— Record or Paper Title

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97. Cal—Helvey v Sax, supra, n. 96—Taylor v. Coachella Val. County Water Dist, supra, n 58—Erme v Trinity Lutheran Church, 336 P 2d 525, 51 C.2d 702—Hayes v Mitchell, 7 Cal Rptr. 364, 184 C A 2d 301—Hohn v. Riverside County Flood Control and Water Conservation Dist, 39 Cal Rptr 647, 228 C A 2d 605

N.M—Caranta v Pioneer Home Improvements, Inc, 467 P.2d 719, 81 N M 393

Title need not be founded on instrument of record

U.S.—Federal Home Loan Bank of San Francisco v Long Beach Federal Sav & Loan Ass'n, supra, n 71

98. N H.—Flewelling v. Roby, 82 A 2d 83, 97 N.H 97

Or.—Rohner v. Neville, 365 P 2d 614, 230 Or 31, reh den 368 P.2d 391, 230 Or. 31.

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4. Ark.—Bailey v Martin, 237 S W 2d 16, 218 Ark. 513—Browning v. Hicks, 420 S.W.2d 545, 243 Ark 394

6. Ala.—McArthur v. Terrell, 163 So.2d 600, 276 Ala 440.

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12. Mich.—Porter v. Landis, 44 N W 2d 877, 329 Mich. 76

15. Ind.—Wischmeyer v. Little, 169 N.E.2d 207, 131 Ind App. 485.

§ 21. —— Vendors and Purchasers

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(2) Fla.—Stoneman v. Peninsula Land Co., App, 124 So.2d 760.

Action against vendee constitutes strict foreclosure

Cal.—Scarbery v. Bill Patch Land & Water Co., 7 Cal.Rptr. 408, 184 C A.2d 87—Kay v. Kay, 10 Cal.Rptr 196, 188 C.A.2d 214

23. N.H—Paquin v. Cote, 269 A 2d 863, 110 N.H 404

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37. Ark.—Driver v. Driver, 263 S.W.2d 914, 223 Ark. 15.

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39. Cal—Pettis v General Tel Co of Cal, 58 Cal Rptr 316, 426 P 2d 884, 66 C 2d 503

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49. Cal—Horn v Govan, 341 P 2d 784, 172 C A 2d 77

56. Okl—Sautbine v Keller, 423 P 2d 447

§ 22. —— Creditors

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64. Action against one in possession may not be brought by mere lienholder—Elbert, Limited v. McKenna, 254 P.2d 107, 116 C A 2d 480

§ 23. —— Homestead, Dower, or Leasehold Interests

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70. **Interest held expired**

N J—Bridgewater Leasing Corp v Wollman, 226 A 2d 735, 94 N J Super 28

71. **Community property**

Cal—Wolfson v Beatty, 257 P 2d 1017, 118 C A.2d 392.

73. Neb—C.J.S. cited in Peterson v Vak, 70 N W 2d 436, 438, 160 Neb 450, 51 A L R 2d 1221, am 71 N.W 2d 186, 160 Neb 708, 51 A.L R 2d 1221—Peterson v Vak, 100 N W.2d 44, 169 Neb 441

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74. Neb—Mass v Platte Val Public Power and Irr Dist, 91 N.W.2d 409, 167 Neb. 124

§ 24. —— Interest as Mortgagor or Mortgagee

77. U S—Federal Home Loan Bank of San Francisco v Long Beach Federal Sav & Loan Ass'n, supra, n 30

80. Ala.—Hart v Allgood, 72 So 2d 91, 260 Ala. 560

82. **Grantees from grantees of deed absolute in form**

Ark—Gamble v. Johnson, 256 S.W 2d 46, 221 Ark. 800.

84. S.D—Fuller v Muddaugh, 77 N W 2d 841, 76 S.D 288.

85. U S.—Herter v Helmsley-Spear, Inc, D.C N Y., 149 F.Supp. 713

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88. N Y—Chesne v Kozmaki, 112 N.Y.S 2d 829.

§ 27. —— When Title or Interest Legal

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99. U S.—C.J.S. cited in Kasdon v. G. W. Zierden Landscaping, Inc., D.C Md., 541 F.Supp. 991, 994, affd., C.A., 707 F.2d 820.

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U S—Zumamon v Brown, C A Ark, 418 F.2d 883.

2. U S—Humble Oil & Refining Co v Sun Oil Co, C.A Tex, 191 F 2d 705

Neb—Peterson v Vak, 70 N W 2d 436, 160 Neb 450, 51 A L R 2d 1221, am 71 N W 2d 186, 160 Neb 708, 51 A L R.2d 1221

N.M.—Currier v Gonzales, 434 P 2d 66, 78 N.M 541—Caranta v Pioneer Home Improvements, Inc, 467 P 2d 719, 81 N.M 393—Pacheco v Martinez, App., 636 P 2d 308, 97 N.M 37

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3. Ala.—Moorer v Bethlehem Baptist Church, 130 So.2d 367, 272 Ala 259—Patronas v. West Dauphin Corp., 194 So 2d 845, 280 Ala. 442

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5. Ark.—Green v Garrett, 280 S W 2d 905, 225 Ark. 311

7. La—Gudry v Town of St Martinville, 98 So 2d 192, 233 La 794

Miss.—Moore v Kuljis, 207 So.2d 604.

8. U.S.—Moore Oil, Inc, v. Snakard, D C Okl., 150 F.Supp 250, remd., C A, 249 F 2d 318

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11. Ark.—McKim v McLiney, 465 S W 2d 911, 250 Ark 423

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12. Okl—Chapman v. Tiger, 356 P.2d 571

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13. Me—Lewien v Cohen, 432 A 2d 800

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16. Ala—Wilder v Scott, 89 So 2d 682, 265 Ala 106—Taylor v Gray, 90 So 2d 778, 265 Ala 279—Anniton v Robinson, 134 So 2d 764, 273 Ala 76

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§ 28. When Title or Interest Equitable

19. Ark—McKim v McLiney, 465 S W 2d 911, 250 Ark 423

Iowa—Moser v Thorp Sales Corp, 256 N W 2d 900, app after remand 312 N W 2d 881 and 334 N W 2d 715

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§ 29. —— Statutes Dispensing with Possession in General

22. Fla—Ford v Turner, App, 142 So 2d 335

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25. N C—Vandiford v Vandiford, 84 S E 2d 278, 241 N C 42.

28. Joinder of actions necessary

Okl—Murray v Lmk Oil Co, 353 P 2d 1111—Hale v Hall, 383 P 2d 653

§ 30. —— Vacant or Unoccupied Lands, or Lands Not in Actual Possession of Defendant

30. Ala.—Fitts v. Alexander, 170 So.2d 808, 277 Ala 372.

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31. La.—Henry v Radcliah, App, 86 So 2d 635

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§ 31. —— Waiver of Objection

37. Kan—Mid American Oil Co v Windus, 290 P 2d 102, 178 Kan. 499

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S C—C J S cited in Kunkle v South Carolina Elec & Gas Co, 161 S E 2d 163, 167, 251 S C 138

38. Ky—Haws v Short, 304 S W 2d 924

§ 32. Sufficiency

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39. U S—C J S. cited in Miners Sav Bank of Pittston, Pa v United States, D C Pa, 110 F Supp 563, 572

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40. Ala—Chestang v Tensaw Land & Timber Co, 134 So 2d 159, 273 Ala 8—Barry v Thomas, 142 So 2d 918, 273 Ala 527—Patronas v West Dauphin Corp, 194 So 2d 845, 280 Ala 442

Mont—Stephens v Hurly, 563 P 2d 546, 172 Mont 269

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41. Ala—Dennison v Claiborne, 265 So 2d 853, 289 Ala 69

42. Mont—Stephens v Hurly, 563 P 2d 546, 172 Mont 269

44. Ala—Family Land & Inv Co v Williams, 138 So 2d 696, 273 Ala 273

45. Ala—Dennison v Claiborne, 265 So 2d 853, 289 Ala 69

Mich—Golaher v Hunting, 104 N W 2d 765, 361 Mich 78

49. Ala—Ford v Washington, 259 So 2d 226, 288 Ala 194

Constructive possession held shown

(1) Miss—Covington v Butler, 242 So 2d 444

50. Ala—Denson v Gibson, 392 So 2d 523

Ky—Noland v Wise, 259 S.W 2d 46

53. Defendant in possession of part

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65. S C—C.J.S. cited in Kunkle v South Carolina Elec & Gas Co, 161 S E 2d 163, 167, 251 S C 138

67. Wyo—C.J.S. cited in Amuck v Elwood, 314 P 2d 944, 947, 77 Wyo 269

§ 33. —— Vacant and Unoccupied Lands

70. Ala—Moorer v. Bethlehem Baptist Church, 130 So 2d 367, 272 Ala 259

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Colo—O'Reilly v Balkwill, 297 P 2d 263, 133 Colo 474.

§ 35. —— Peaceable Possession

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80. Colo—Levy v Welsh, 612 P 2d 1135, 44 Colo App 360, affd, 612 P 2d 80, 200 Colo 36

84. Ala—Sanford v Alabama Power Co, 54 So 2d 562, 256 Ala. 280—Hart v Allgood, 72 So 2d 91, 260 Ala 560—McGowin v Felts, 83 So 2d 228, 263 Ala 504—Motley v Crumpton, 93 So 2d 413, 265 Ala 565—Wilson v Dorman, 123 So 2d 112, 271 Ala 280—Chestang v Tensaw Land & Timber Co, 134 So 2d 159, 273 Ala 8—Merchants Nat Bank of Mobile v Hall, 178 So.2d 146, 278 Ala. 319—Bukacek v. Fall City Farms, Inc., 237 So 2d 851, 286 Ala 141, cert den 91 S.Ct. 872, 401 U.S. 910, 27 L.Ed.2d 809—Ford v Washington, 259 So 2d 226, 288 Ala. 194—M. C. Dixon Lumber Co, Inc. v. Mathison, 266 So.2d 841, 289 Ala 229—Almon v Champion Intern. Corp., 310 So.2d 207, 293 Ala. 727

Ga—Poss v Guy, 93 S E 2d 565, 212 Ga 393

N J—Robinson-Shore Development Co v Gallagh 125 A 2d 1, 41 N J Super 324, op supp 128 A 884, 43 N J Super 430, affd 133 A 2d 353, N J Super 507, revd on oth grds 138 A 2d 7, 26 N J 59—Persons v Bergmann, 442 A 2d 64 182 N J Super 476, 33 A L R 4th 1201

86. Ala—Low v Low, 52 So 2d 218, 255 Ala 53

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88. N J—Robinson-Shore Development Co v Gallagher, 125 A 2d 1, 41 N J Super 324, op supp 128 A 2d 884, 43 N J Super 430, affd. 133 A 2d 353, 45 N J Super 507, revd. on oth. grds 13 A 2d 726, 26 N J 59

89. Ala—Hart v Allgood, supra, n 84

91. Ala—M C Dixon Lumber Co, Inc v Mathison 266 So 2d 841, 289 Ala. 229

92. Ala—Ford v. Washington, 259 So 2d 226, 28 Ala 194

93. Ala—Family Land & Inv Co v Williams, 13 So 2d 696, 273 Ala 273—Patronas v. West Dauphin Corp, 194 So 2d 845, 280 Ala. 442—Ford v Washington, 259 So 2d 226, 288 Ala 194

95. Ala—McGowin v. Felts, 83 So 2d 228, 263 Ala 504—Patronas v West Dauphin Corp., 194 So 2d 845, 280 Ala 442—Ford v Washington, 259 So 2d 226, 288 Ala 194

98. Ala—McGowin v Felts, 83 So 2d 228, 263 Ala 504—Orso v Cater, 133 So 2d 864, 272 Ala 657—Lott v Keith, 241 So 2d 104, 286 Ala 431—Ford v Washington, 259 So 2d 226, 288 Ala 194

Possession held peaceable

Ala—M C Dixon Lumber Co, Inc v Mathison, 266 So 2d 841, 289 Ala 229

Not "peaceful possession"

Ala—Hinds v. Slack, 299 So 2d 717, 293 Ala 25

3. Ala—Hinds v Slack, 299 So 2d 717, 293 Ala 25.

§ 36. —— Possession of Part of Tract

5. Ala—Pierce v Lee Bros Foundry Co., 51 So 2d 677, 255 Ala 410

§ 37. Necessity

Library References

Quieting Title ⇐6, 17, 21.

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10. U S—C J S cited in Stephenson v Stephenson, C A Wis., 249 F 2d 203, 205, 207

Ariz—Kennedy v. Morrow, 268 P 2d 326, 77 Ariz 152.

Conn—Lake Garda Imp Ass'n v Battistoni, 231 A.2d 276, 155 Conn. 287 App. after remand 280 A.2d 877, 160 Conn 503

N.Y—Hbisous Harbor, Inc. v, Ebersold, 280 N Y.S.2d 44, 53 Misc 2d 868

N C—Wells v Clayton, 72 S.E.2d 16, 236 N C. 102—Vandiford v Vandiford, 84 S E 2d 278, 241 N C 42

Pa—Nenstiel v. Smith, 33 North. 366.

Tex—Frost v. Molina, Civ.App, 595 S W.2d 184, err dism

§ 38. What Constitutes

Library References

Quieting Title ⇐6, 17, 21.

11. U.S.—Humble Oil & Refining Co. v. Sun Oil Co, C.A Tex, 191 F.2d 705.

Pa—Bruker v Burgess and Town Council of Borough of Carlisle, 4 Cumb 44, affd. 102 A 2d 418, 376 Pa. 330

Particular matters or claims held not adverse

(1) U.S.—Federal Home Loan Bank of San Francisco v. Long Beach Federal Sav. & Loan Ass'n, D.C Cal., 122 F Supp. 401

N Y —Highway Displays, Inc v People, 241 N Y S 2d 887, 39 Misc 2d 703

N D —Minneapolis, St P & S S M R Co v Duvall, 67 N W 2d 593

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13. Wash —Symington v Hudson, 243 P 2d 484, 40 Wash 2d 331

§ 39. —— Present or Future Interest

19. Present claim

Conn —Lake Garda Imp Ass'n v. Battistoni, 231 A 2d 276, 155 Conn 287 App after remand 280 A 2d 877, 160 Conn 503

20. Ind —C.J.S. cited in Lantz v Pence, 142 N E 2d 456, 465, 127 Ind App 620

§ 40. —— Lien Claims

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27. Ohio—Gustafson v Buckley, 121 N E 2d 280, 96 Ohio App 115, affd 118 N E.2d 403, 161 Ohio St 160, app dism 115 N E 2d 5, 160 Ohio St 174

28. N.D —Mueller v. Mercer County, 60 N W 2d 678

§ 41. General Statement

29. Conn.—Simonelli v Fitzgerald, 238 A.2d 418, 156 Conn 49

N C —Barbee v Edwards, 77 S E 2d 646, 238 N C 215

Mistake in description

Ga —Gauker v Eubanks, 199 S E.2d 771, 230 Ga 893

30. Ala.—Ex parte Arrington, 66 So 2d 96, 259 Ala. 243.

33. Ala —Thompson v. Page, 49 So 2d 910, 255 Ala 29

Iowa—Moser v Thorp Sales Corp., 312 N.W 2d 881, app. after remand 334 N.W.2d 715

N.D.—C.J.S. cited in Neset v. Rudman, 74 N.W 2d 826, 831

S.C —Epps v Freeman, 200 S E 2d 235, 261 S.C 375

§ 42. Particular Defenses

Library References

Quieting Title ⇐18, 15, 17, 25.

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44. Ala.—Gibson v Elba Exchange Bank, 88 So.2d 163, 264 Ala. 502.

Mo —Rubbelke v Aebli, 340 S.W.2d 747.

45. Cal —Rahlves & Rahlves, Inc v Ambort, 258 P.2d 18, 118 C.A.2d 465—Lake Merced Golf and Country Club v Ocean Shore R Co, 23 Cal Rptr 881, 206 C.A.2d 421

Iowa—Atkin v Westfall, 69 N.W.2d 523, 246 Iowa 822

Kan —Common School Dist No. 45 v Burr, 278 P.2d 596, 177 Kan 261.

Okl —Hobart v. Patrick, 257 P 2d 825, 208 Okl 560.

Particular matters

(7) Other matters

Cal —Petersen v Ridenour, 287 P.2d 848, 135 C.A.2d 720

N.C.—Tripp v. North Carolina Phosphate Corp., 174 S.E.2d 693, 8 N.C.App. 548.

N.D.—Gajewski v. Bratcher, 224 N.W.2d 614, 81 A.L R.3d 211, app after remand 240 N.W 2d 871, and 307 N.W.2d 826.

Pa.—Makelonis v. Nothoff, 50 Luz.L Reg. 280.

47. Colo.—C.J.S. quoted at length in Pastenau v Engel, 270 P.2d 1019, 1021, 129 Colo. 440—C.J.S. quoted at length in Nelson v. Van Cleve, 352 P.2d 269, 271, 143 Colo. 117.

48. Cal.—Hohn v Riverside County Flood Control and Water Conservation Dist, 39 Cal.Rptr 647, 228 C.A.2d 605.

N.C.—Williams v. North Carolina State Bd. of Ed., 147 S E.2d 381, 266 N.C. 761.

Pa.—Williams v. Lukas, 103 A.2d 675, 376 Pa. 413

51. Paramount title must be shown

Kan —Common School Dist No 45 v Burr, supra, n 45

52. Ark —Coulter v Anthony, 308 S W 2d 445, 228 Ark 192, app dism and cert den 79 S Ct 153, 358 U S 73, 3 L Ed 2d 118

Mont —Diamond Inv Co v Geagan, 460 P 2d 760, 154 Mont 122

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53. Cal —Lake Merced Golf and Country Club v Ocean Shore R Co, 23 Cal Rptr 881, 206 C A 2d 421

61. Cal —Hunt v Plavsa, 229 P 2d 482, 103 Cal App 2d 222

Hawaii—Hana Ranch, Inc v Kanakaole, 623 P 2d 885, 1 Haw App 573, app after remand, Sup, 672 P 2d 550

Mo —Hall v Hudgins, 277 S W 2d 637

§ 43. —— Title or Interest of Defendant

Library References

Quieting Title ⇐15, 17, 25.

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74. Colo —Harrison v Everett, 308 P 2d 216, 135 Colo 55.

Fla —Stewart v Gadarian, App, 141 So 2d 289

Mo —Rubbelke v Aebli, 340 S W 2d 747

Okl —Smith v. Fox, 289 P 2d 126

Limitation of defendants' claim where plaintiff's title paramount

Ky —Goodwin v McNeill, 236 S W 2d 708, 314 Ky 605

77. Conn —Arrigoni v Consolini, 307 A 2d 183, 30 Conn Sup 179

Cotenancy

Ala —Ex parte Arrington, 66 So 2d 96, 259 Ala 243

78. N.M.—Yarborough v. Harkey, 354 P.2d 137, 67 N M 204

80. Kan —Unruh v. Whorton, 397 P 2d 84, 194 Kan 32

Mont —C.J.S. cited in Flathead Lumber Corp v Everett, 263 P 2d 376, 377, 127 Mont 291

Adverse possession not shown

Hawaii—Yin v Midkiff, 481 P 2d 109, 52 Haw 537

However, under statute failure to pay taxes may operate as a bar to a suit to quiet title.[82.1]

82.1. Tenn —Lee v Harrison, 270 S W.2d 173, 196 Tenn. 603

§ 44. —— Defendant in Possession

83. Ark —Ralston v Powers, 598 S W 2d 410, 269 Ark 63

Or —Hall v Smith, 523 P.2d 1254, 269 Or 215

Pa.—Goodbread v Pintye, 40 West. 59

Under statute

La.—Daigle v. Pan Am Production Co., 108 So 2d 516, 236 La 578.

Relegation to ejectment where right to jury trial invoked

U S —Payne Land & Livestock Co v Archuleta, D.C N.M., 180 F Supp. 651

Limitation of rule

Fla.—Ford v Turner, App., 142 So.2d 335

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89. Mining and surface rights

Or —Yaquina Bay Timber & Logging Co v Shiny Rock Mining Corp, 556 P 2d 672, 276 Or. 779

§ 45. Waiver and Bar of Defenses

Library References

Quieting Title ⇐15, 25.

93. Colo —Cuddy v. Whatley, 404 P 2d 533, 157 Colo 562

98. Cross action for specific performance of easement is not barred, since limitations to enforce or protect easements do not run until breach or objection —Fry v Harkey, Tex Civ App, 141 S W 2d 662, err dism, judg correct

§ 46. In General

Library References

99. La —Harris v Smith, App, 121 So 2d 747

Okl —Murray v Link Oil Co, 353 P 2d 1111—King v Oakley, 434 P 2d 868

Pa —Behan v Lane, 40 Erie 199—Kehley v Deatrick Hunting Club, Inc, 60 Lack Jur. 105—Worthington v Gelvin, 1 Adams L J 174

§ 47. Jurisdiction and Venue

Library References

Quieting Title ⇐28.

3. U S —Durfee v Duke, Mo, 84 S Ct 242, 375 U S 106, 11 L Ed 2d 186

Ala —Ford v Washington, 259 So 2d 226, 288 Ala 194—Palmer v. Rucker, 268 So 2d 773, 289 Ala 496

Cal —River Farms, Inc v Superior Court of San Bernardino County, 60 Cal Rptr 665, 252 C A 2d 604.

Miss —Key v. Wise, 341 So 2d 1326

Mo —Gorman v State Highway Commission, App, 552 S.W 2d 335

N H —Worcester North Sav Institution v Somerville Mill Co, 141 A 2d 885, 101 N H. 307, app dism and cert den 79 S Ct 313, 358 U S 278, 3 L Ed 2d 298

Pa —Bell v Bolla, 74 Dauph 290

Derailgnment of title not jurisdictional

Ark —Booth v Peoples Loan & Inv Co, 455 S W 2d 868, 248 Ark 1213

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6. Colo —Zavislak v Shipman, 362 P.2d 1053, 147 Colo 184

Conn.—Prout v Monroe, Cir A D, 224 A 2d 566, 4 Conn Cir 15

Md —Wathen v. Brown, 429 A.2d 292, 48 Md App 655

Mich —Weber v Fitzpatrick, 76 N W.2d 68, 345 Mich 313.

N Y —City of Mount Vernon v East Hudson Parkway Authority, 259 N.Y.S 2d 167, 23 A D 2d 849

N.D.—Woodland v Woodland, 147 N W 2d 590

Pa.—Rule v Rule, 10 D & C 2d 294, 46 Luz.L Reg 94—In re Henderson's Estate, 14 D & C 2d 638, 8 Fiduciary 409, affd 149 A.2d 892, 395 Pa. 215—In re O'Brien's Trust, 9 Chest. 178.

Utah—Holland v. Wilson, 327 P 2d 250, 8 Utah 2d 11

District Court

Neb.—Page v. Buchfinck, 242 N W.2d 610, 196 Neb 135

Corporate stock. State court has jurisdiction to determine rights with respect to stock of state corporation.[6.1]

6.1. Rights under Uniform Stock Transfer Act recognized

Del —Haas v Haas, 119 A 2d 358, 35 Del.Ch. 392

7. U S.—Pan Am Petroleum Corp v Candelaria, C A N M, 403 F 2d 351

Cal.—Carlton v Superior Court for Butte County, App., 49 Cal Rptr. 759, 240 C A 2d 586

Fla —Hendry Corp v State Bd of Trustees of Internal Improvement Trust Fund, App, 313 So 2d 453

9. Cal—Carlton v Superior Court for Butte County, App, 49 Cal Rptr 759, 240 C A 2d 586
Fla—George v Gustinger, App, 350 So 2d 574
Miss—Knighten v Castle, 247 So 2d 421
Tex—Best Inv Co v Parkhill, Civ App, 429 S W 2d 531—Farmin Bank v Johnson, Civ App, 432 S W 2d 138, err dism

10. Where tract of land lies partly in one county and partly in another

(2) Pa—Appalachian Trail Ranch, Inc v Bell, 8 Cumb 72

11. Pa—Rosenwald v Rosenwald, 4 D & C 2d 163, 42 Del Co 284

§ 48. Time to Sue and Limitations

Library References

Quieting Title ⇐29.

18. Miss—Hollingsworth v Central Oil Co, 112 So 2d 518, 236 Miss 779
Wyo.—C.J.S. quoted in Body v McDonald, 334 P 2d 513, 518, 79 Wyo 371

Action held not barred

Cal—Beyl v Robinson, 4 Cal Rptr 18, 179 C A 2d 444—Schoenfeld v Pritzker, 64 Cal Rptr 592, 257 C A 2d 117

Statute does not bar action

Wyo—Sanders v. Lidle, 674 P 2d 1291

19. Cal—C.J.S. cited in Cole v. Ames, 317 P 2d 662, 664, 155 C.A 2d 8
Okl—Alfrey v Richardson, 231 P 2d 363, 204 Okl 473—Viersen v Boettcher, 387 P 2d 133
Wyo.—C.J.S. quoted in Body v McDonald, 334 P 2d 513, 518, 79 Wyo 371

Possession sufficient

Colo—Brian v Valley View Cattle Ranch, Inc., 535 P.2d 237, 35 Colo.App 428

§ 49. Laches

Library References

Quieting Title ⇐29.

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20. Cal—Oates v Nelson, 74 Cal Rptr 475, 269 C A 2d 18
Ind—C.J.S. cited in Hutter v. Weiss, 177 N E 2d 339, 346, 132 Ind.App 244.
Iowa—Chadek v Alberhasky, 111 N W 2d 297, 253 Iowa 32

Laches not available

Colo—Jacobs v Perry, 313 P 2d 1008, 135 Colo 550

22. Ark.—Matlock v McCracken, 479 S W 2d 508, 251 Ark. 972.
Cal—Lake Merced Golf and Country Club v Ocean Shore R. Co., 23 Cal Rptr 881, 206 C A 2d 421
Ga.—Shirley v. Shirley, 72 S.E 2d 719, 209 Ga 366
Iowa—C.J.S. cited in Atkin v Westfall, 69 N W 2d 523, 527, 246 Iowa 822
Kan—Becker v Rolle, 508 P 2d 509, 211 Kan 769

24. Cal.—Gerhard v Stephens, 69 Cal.Rptr 612, 442 P.2d 692, 68 C.2d 864.

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N.Y.—Hibiscus Harbor, Inc. v. Ebersold, 280 N.Y.S.2d 44, 53 Misc.2d 868

34. Facts held to show laches

Ala.—Marks v. Marks, 49 So 2d 166, 254 Ala. 612, foll. 49 So 2d 170, two cases, 254 Ala. 672.
Ark—Gamble v. Johnson, 256 S.W 2d 46, 221 Ark 800.
Cal.—Lundgren v Lundgren, 54 Cal Rptr 30, 245 C A.2d 582.
Conn.—Robinson v. Myers, 244 A.2d 385, 156 Conn 510.
Idaho—Quinlan v Pearson, 225 P.2d 455, 71 Idaho 26
Ill.—Hartaman v. Abboreno, 165 N.E.2d 338, 18 Ill 2d 467.
Ky.—Burchett v. James, 246 S.W.2d 461.
Mass—Randon v Edstrom, 307 N E 2d 347, 1 Mass App 796
Mont—Lowrance v Gunderson, 487 P 2d 511, 157 Mont 532

Facts held not to show laches

(1) U S—Pacific Royalty Co v Williams, C A N M, 227 F 2d 49, cert den 76 S Ct 847, 351 U S 951, 100 L Ed 1474
Ala—Woods v Allison Lumber Co, 62 So 2d 229, 258 Ala 282
Ark—Eades v Joslin, 244 S W 2d 623, 219 Ark 688—Chambers v Chambers, 246 S W 2d 124, 220 Ark 51—Charles v Pierce, 378 S W 2d 213, 238 Ark 22
Cal—Turner v Milstein, 230 P 2d 25, 103 Cal App 2d 651—Dinkins v Lamb, 238 P 2d 630, 108 C A 2d 175—Stewart v Indian Creek Lumber Co, 13 Cal Rptr 397, 192 C A 2d 93—DaSilva v Reeves, 30 Cal Rptr 81, 215 C A 2d 172—Schoenfeld v Pritzker, 64 Cal Rptr 592, 257 C A 2d 117—Hill v Younkin, 79 Cal Rptr 509, 274 C A 2d 880
Fla—Van Meter v Kelsey, 91 So 2d 327—Brown v Semple, App, 204 So 2d 229—Wilson v Kelley, App, 226 So 2d 123
Ga—Myers v Grant, 95 S E 2d 9, 212 Ga 677
Ill—Holland v Richards, 123 N E 2d 731, 4 Ill 2d 570—Holland v Richards, 142 N E 2d 44, 142 N E 2d 687, 11 Ill 2d 268—Holland v Richards, 142 N E 2d 687, 11 Ill 2d 268
Ind—Hegarty v. Curtis, 95 N E 2d 706, 121 Ind App 74—Merryman v Price, App, 259 N E 2d 883, cert den 92 S Ct 89, 404 U S 852, 30 L Ed 2d 92
Mich—Golaher v Hunting, 104 N W 2d 765, 361 Mich 78
Miss—Enochs v Mississippi Tower Bldg, 50 So 2d 551, 210 Miss 676—Dampier v Polk, 58 So 2d 44, 214 Miss 695—Cassidy v Central Lumber Co, 68 So 2d 286, 219 Miss 96
Mo—Kansas City Power & Light Co v Kansas City, 448 S W 2d 612
N.H—Ross v Brown, 260 A 2d 102, 110 N H 56
N M—Hobson v Miller, 326 P 2d 1095, 64 N M 215—Thomas v Pigman, 424 P 2d 799, 77 N M 521
N D—Park Dist of City of Bismarck v Bertsch, 152 N W 2d 401, cert den 88 S Ct 818, 390 U S 904, 19 L Ed 2d 870.
Or—Willis v Stager, 481 P 2d 78, 257 Or. 608
Utah—Meagher v Uintah Gas Co., 255 P 2d 989, 123 Utah 123
Wash—Nethery v Olson, 247 P.2d 1011, 41 Wash 2d 173
Wyo—Torgeson v Connelly, 348 P 2d 63

35. Cal—Carlson v Lindauer, 259 P 2d 925, 119 C A 2d 292—Cole v Ames, 317 P 2d 662, 155 C.A 2d 8—Lake Merced Golf and Country Club v Ocean Shore R Co, 23 Cal Rptr. 881, 206 C A 2d 421
Iowa—Atkin v Westfall, 69 N W 2d 523, 246 Iowa 822
Wash—Sallee v. Bugge Canning Co, 232 P 2d 81, 38 Wash.2d 737

Mere delay, not exceeding time limited by statute, etc.

Nev.—Lanigir v Arden, 409 P 2d 891, 82 Nev 28

36. U.S—Amerada Petroleum Corp. v Rio Oil Co, D C Wyo., 225 F.Supp. 907.
Cal—Cole v Ames, 317 P 2d 662, 155 C A 2d 8.
Ill—Slatin's Properties, Inc. v Hassler, 271 N E.2d 665, 132 Ill App 2d 882, revd. on oth grds. 291 N.E.2d 641, 35 Ill 2d 325

Delay held unreasonable

(1) Cal—Philp v Hobart, 229 P 2d 783, 103 Cal. App 2d 446
Okl—Richards v Freeman, 247 P.2d 731, 207 Okl. 100
Tex—Wilson v. Meredith, Clegg & Hunt, Civ.App, 268 S.W.2d 511, err. ref. no rev err.

Delay held not unreasonable

Okl—Hopper v Rowntree, 275 P.2d 285

37. Iowa—Atkin v. Westfall, supra, n 35.
N.D.—Wittrock v. Wenz, 73 N.W.2d 355
Pa—Zimnisky v Zimnisky, 231 A 2d 904, 210 Pa Super 266

Defendant held prejudiced

Cal—Stafford v Ballinger, 18 Cal Rptr 568, 199 C A 2d 289

Defendant held not misled or prejudiced

Cal—Hohn v Riverside County Flood Control and Water Conservation Dist, 39 Cal Rptr 647, 228 C A 2d 605
Mich—Rose v Fuller, 175 N W 2d 344, 21 Mich App 172

38. Iowa—Atkin v Westfall, supra, n 35

40. Iowa—C.J S cited in Atkin v Westfall, 69 N W 2d 523, 527, 246 Iowa 822

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42. Ark—O'Halloran v Dawson, 479 S W 2d 532, 252 Ark 415

43. Okl—Richards v Freeman, supra, n 36

§ 50. Process

Library References

Quieting Title ⇐31.
West's Federal Forms § 1362.

47. Cal—Batchelor v Finn, 341 P.2d 803, 169 C A 2d 410—City of Stockton v Stockton Plaza Corp, 68 Cal Rptr 266, 261 C.A 2d 639
Pa—City of Harrisburg v Central Trust Capital Bank, 77 Dauph 21

Knowledge of pendency of the action cannot be substituted for service of process.[47.5]

47.5. Colo—Weber v Williams, 324 P 2d 365, 137 Colo 269

49. Cal—Muller v Muller, 297 P 2d 789, 141 C A 2d 722

Service by publication not necessary

Ala—McSwain v Wallace, 312 So 2d 23, 294 Ala 72

50. S D—Gruwell v. Hinds, 130 N.W 2d 92, 81 S D 6

51. Ark—Ingram v. Luther, 424 S W 2d 546, 244 Ark 260
N D—Woodland v Woodland, 147 N W.2d 590

Service by registered mail

Ariz—Walter v Northern Arizona Title Co, 433 P 2d 998, 6 Ariz App 506.
Hawaii—Enos v Berger, 373 P 2d 710, 46 Haw 1

53. Ala—McSwain v Wallace, 312 So 2d 23, 294 Ala 72

56. Fla—Sheffield v Carter, App., 141 So 2d 780. Due diligence depends on circumstances
N M—Kaye v Cooper Grocery Co., 312 P 2d 798, 63 N M 36

57. Fla—Gmaz v. King, App, 238 So.2d 511.
N D—Smith v. Mountrail County, 70 N.W 2d 518

58. Utah—Bowen v Olson, 246 P 2d 602, 122 Utah 66

Affidavit held sufficient

N.D—Bartell v Morken, 65 N.W.2d 270, 46 A.L.R.2d 1353—Turnquist v Kjelbak, 77 N W.2d 854.

Complaint held insufficient

N Y—Newpar Estates, Inc. v. Barilla, 164 N.Y.S.2d 132, 4 A.D.2d 186, app. gr 166 N.Y S.2d 304, 4 A.D.2d 830

Complaint held sufficient

Fla.—Sheffield v. Carter, App., 141 So.2d 780.

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61. Hawaii—In re Vockrodt, 436 P.2d 752, 50 Haw. 201, 222
Mont.—Clinton v. Miller, 226 P 2d 487, 124 Mont. 463.
N.D.—Smith v. Mountrail County, supra, n. 57.

Service of process held valid

N.D.—Jensen v. Schwartz, 90 N.W 2d 716.

Pa —Poljowski v Sprock, 40 West 177

65. Affidavit held sufficient

N D —Jensen v Schwartz, 90 N W 2d 716

Service held insufficient

N J —Bridgewater Leasing Corp v Wollman, 226 A 2d 735, 94 N J Super 28

N D —Woodland v Woodland, 147 N W 2d 590

66. Hawaii—In re Vockrodt, 436 P 2d 752, 50 Haw 201, 222

Minn —C J S cited in Jeurissen v Harbeck, 127 N W 2d 437, 438, 267 Minn 559

N D —Northern Pac Ry Co v Advance Realty Co, 78 N W 2d 705

Okl —Murphy v Walkup, 258 P 2d 922

Diligence need not be shown in affidavit

N D —Jensen v Schwartz, 90 N W 2d 716

Reasonable diligence

Cal —Gerhard v Stephens, 69 Cal Rptr 612, 442 P 2d 692, 68 C 2d 864

§ 51. Injunction, Receiver, and Use or Disposition of Property Pending Proceedings

Library References

Quieting Title ⇐32.

The return need not state that a diligent search has been made for persons unknown and whose interests are unknown.[67.1]

67.1. N D —Bartell v Morken, supra, n 58

Such statement in the return does not render the return defective —Stewart v Berg, 65 N W 2d 621

68. Wyo —Olson v Leith, 257 P 2d 342, 71 Wyo 316

Refusal to dissolve held proper

Fla.—Gill v Rhomberg, 11 So 2d 795, 152 Fla 262

70. Discretion not abused

Ala.—Almon v Champion Intern Corp, 310 So 2d 207, 293 Ala 727

Fla —Bell v All Persons Claiming Any Estate, Right, Title, or Interest in, or Lien Upon, Real Property, App, 198 So 2d 35.

72. Posting bond required

N Y —Park Swift Parking Co. v Panfil Parking Corp, 393 N Y.S.2d 11, 56 A D 2d 807.

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76. Persons entitled to have receiver appointed

Ind.—Stanley v Gieseking; 105 N E.2d 171, 230 Ind. 690.

§ 52. General Rules

Library References

Barron and Holtzoff, Federal Practice and Procedure § 518.

§ 53. —— Necessary Parties

Library References

Quieting Title ⇐30(3).

82. U.S.—McShan v Sherrill, C A Ariz., 283 F 2d 462—U.S. v. Wood, C.A.Or., 466 F.2d 1385

Ala.—Mid-State Homes, Inc v. Jones, 126 So 2d 213, 271 Ala 574

Cal.—Lake Merced Golf and Country Club v Ocean Shore R. Co., 23 Cal.Rptr 881, 206 C.A.2d 421—Taylor v. Western States Land & Mortgage Co., 147 P.2d 36, 63 Cal.App.2d 401.

Conn.—Lake Garda Imp. Ass'n v Battistoni, 231 A.2d 276, 155 Conn. 287. App. after remand 280 A.2d 877, 160 A.2d 503—Graham v Zimmerman, 435 A.2d 996, 181 Conn. 367.

Ga.—Linder v Ponder, 75 S E.2d 814, 209 Ga. 746

La —Bolden v. Brazile, App., 172 So.2d 304.

Mo.—Buford v. Lucy, 328 S.W.2d 14

Mont —Purcell v Gibbs, 326 P 2d 679, 133 Mont 481

N Y —Queens Realty, Inc v Engelhardt, 223 N Y S 2d 636—Burke v Suburban Mortg Corp, 252 N Y S 2d 911, 43 Misc 2d 1077—Dowdell v Brown, 281 N Y S 2d 390, 54 Misc 2d 44

N C —Howard v Boyce, 146 S E 2d 828, 266 N C 572

N D —Northern Pac Ry Co v Advance Realty Co, 78 N W 2d 705—Woodland v Woodland, 147 N W 2d 590

Ohio—Scott v Wilson, App, 136 N E 2d 282

Okl —Ellis v Union Oil Co of California, 630 P 2d 306

Or —Calderwood v Young, 315 P 2d 561, 212 Or 197, reh den 319 P 2d 184, 212 Or 197

Pa —DiCola v Murr, 53 Lanc L Rev 211—Gentile v Badner, 13 Chest 432

Tex —Texan Development Co v Hodges, Civ App, 237 S W 2d 436—Pickett v Roberts, Civ App, 467 S W 2d 244, err ref no rev err

Remaindermen

Conn —Dennen v Searle, 176 A 2d 561, 149 Conn 126

Indispensable party

Nev —Schwob v Hemsath, 646 P 2d 1212, 98 Nev 293

Legal title holder not joined

Or —Egaas v Columbia County, 673 P 2d 1372, 66 Or App 196, review den 678 P 2d 738, 296 Or 536

83. Pa —Farmers' Northern Market v Fulton Nat Bank of Lancaster, 55 Lanc Rev 81

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84. U S —Spring v Ohio Oil Co, C C A Tex, 108 F 2d 560—Bekins v Bekins Van & Storage Co, C A Tex, 210 F 2d 338, cert den 74 S Ct 870, 347 U S 1015, 98 L Ed 1137—Amerada Petroleum Corp v Rio Oil Co, D C Wyo, 225 F Supp 907

Ark —Wood v McCoy, 311 S W 2d 755

Conn —Dennen v Searle, 176 A 2d 561, 149 Conn 126

Iowa—C J S cited in Noel v. Uthe, 184 N W 2d 686, 689

Kan.—Kalivoda v Pugh, 226 P 2d 857, 170 Kan 505

Ky —Phillips v Reed, 258 S W 2d 503

Miss —Texas Gulf Producing Co v Griffith, 65 So 2d 447, sug over 65 So 2d 834

Mont —Williams v Widows and Orphans Home, Veterans of Foreign Wars, of Eaton Rapids, Mich, 373 P 2d 948

N C —Etheridge v Wescott, 94 S.E 2d 846, 244 N C 637

Tenn —Brewer v Lawson, App, 569 S W 2d 856.

Tex —Outlaw v Bowen, Civ App, 285 S W 2d 280, err ref no rev err

Not indispensable parties

Ariz —Babo v Bookbinder Financial Corp, 551 P.2d 63, 27 Ariz App 73

Ill.—Klingel v. Kehrer, App, 401 N E 2d 560, 36 Ill Dec 719, 81 Ill App 3d 431

Tenn.—Gilley v Jernigan, App, 597 S W 2d 313

Tex —Henry v Mr M Convenience Stores, Inc, Civ App., 543 S W 2d 393, err ref no rev err

Trespasser

Ariz.—Babo v Bookbinder Financial Corp, 551 P.2d 63, 27 Ariz App. 73

85. Cal.—Arthur v. Davis, 178 Cal.Rptr 920, 126 C.A.3d 684

Conn —Swenson v. Dittner, 439 A.2d 334

N M.—Alston v Clinton, 388 P.2d 64, 73 N.M. 341.

88. N.M.—Matter of Baca's Estate, 621 P.2d 511, 95 N.M. 294

94. Ill.—Hobbs v. Pinnell, 162 N.E.2d 361, 17 Ill 2d 535

A requirement of a rule of practice that the complaint indicate whether it is brought under statute or on general power of the court must be complied with.[95.5]

95.5. Complaint held insufficient

Pa —Cantwell v Henzler, 9 D & C 2d 21, 6 Bucks 273, 19 Monroe L R 78

96. Ala —West v Green, 226 So 2d 302, 284 Ala 517

Idaho—Soden v Carr, 426 P 2d 213, 91 Idaho 492

Miss —Jones v New Orleans & Northeastern R Co, 59 So 2d 541, 214 Miss 804

Mo —Baxter v Vasquez, App, 501 S W 2d 201

Mont —Yost Farm Co v Cremer, 447 P 2d 688, 152 Mont 200

N Y —Croft v Richards, 123 N Y S 2d 792—Brothers v Wall, 447 N Y S 2d 64, 84 A D 2d 923

N D —Wilson v Polsfut, 49 N W 2d 102, 78 N D 204

Tenn —Chance v Geldreich, 337 S W 2d 770, 47 Tenn App 263

Tex —Outlaw v Bowen, Civ App, 285 S W 2d 280, err ref no rev err

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98. Ga —North Am Acceptance Corp v Ramey, 123 S E 2d 253, 217 Ga. 476

2. Ind —Hollars v Stephenson, 99 N E 2d 258, 121 Ind App 410

§ 54. —— Proper Parties

Library References

Quieting Title ⇐30(2).

5. U S —Bonner v Smith, D C Okl, 114 F Supp 895 —Federal Home Loan Bank of San Francisco v Long Beach Federal Sav & Loan Ass'n, D.C Cal, 122 F Supp 401—Herter v. Helmsley-Spear, Inc, D C N Y, 149 F Supp 713.

Neb —Maas v Platte Val Public Power and Irr Dist., 91 N W 2d 409, 167 Neb 124

N M —Alston v Clinton, 388 P 2d 64, 73 N M 341

N Y —Hibiscus Harbor, Inc v Ebersold, 280 N Y S 2d 44, 53 Misc 2d 868

N D —Northern Pac Ry Co v Advance Realty Co, 78 N W 2d 705

Ohio—Board of Ed, City of Wapakoneta v. Unknown Heirs of Aughmbaugh, 134 N E.2d 872, 99 Ohio App 463

Okl —Choate v Muskogee Elec Traction Co, 295 P.2d 781

Pa —Borough of West Fairview v. Myers, 13 Cumb 73.

Tex —Fine v. Scott, Civ App, 592 S W 2d 56

Wash.—Symington v Hudson, 243 P 2d 484, 40 Wash 2d 331

Stockholders and creditors of defunct corporation

Colo —Whatley v. Wood, 404 P.2d 537, 157 Colo. 552.

Statute construed

N Y —Dowdell v Brown, 281 N Y S 2d 390, 54 Misc 2d 44

6. Cal —Lake Merced Golf and Country Club v. Ocean Shore R. Co, 23 Cal.Rptr 881, 206 C.A 2d 421

7. U S.—Bonner v Smith, supra, n 5.

8. Ill.—Mills v. Ehler, 95 N E.2d 848, 407 Ill 602.

N C —Etheridge v. Wescott, 94 S.E 2d 846, 244 N C 637.

Utah—Eddington v Clegg, 639 P.2d 143

12. Ga.—Shirley v Shirley, 72 S.E 2d 719, 209 Ga. 366

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20. Miss —Jones v. New Orleans & Northeastern R. Co, 59 So 2d 541, 214 Miss 804.

Tenn —A. L. Kornman Co. v Metropolitan Government of Nashville and Davidson County, 391 S W 2d 633, 216 Tenn. 205, on remand, 417 S.W.2d 793, 57 Tenn App 230.

§ 55. Plaintiffs

22. U S —C.J.S. cited in Ronsick v Pharris, C.A Kan, 286 F.2d 316, 318

Colo—Gore Trading Co v Alice, 529 P 2d 324, 35 Colo App 97

N M—Campbell v Kerr, 618 P 2d 1237, 95 N M 73

Substitution of heir as party plaintiff

La—Plaisance v Blanchard, 83 So 2d 648, 228 La 618

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34. Ohio—Board of Ed, City of Wapakoneta v Unknown Heirs of Aughinbaugh, Com Pl, 128 N E 2d 534

37. Mich—Hamilton v City of Charlevoix, 198 N W 2d 898, 40 Mich App 442

Pa.—Stefanik v Matkowski, 446 A 2d 655, 300 Pa Super 359

§ 56. Defendants

Library References

Quieting Title ⇐30(1).

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50. La—Keel v Rodessa Oil & Land Co, 180 So 502, 189 La 732—Blanchard v Martel, App, 146 So 480—Williams v Williams, App 56 So.2d 216

N M—Houchen v. Hubbell, 461 P 2d 413, 80 N M 764

R I—Gammons v Caswell, 447 A 2d 361

Purchaser held proper party

Ohio—Board of Ed, City of Wapakoneta v Unknown Heirs of Aughinbaugh, Com Pl, 128 N E 2d 534

52. Or—Pallies v Durand, 519 P 2d 374, 268 Or 187

55. N Y—S H Kress & Co v Fine, 202 N Y S 2d 368, 25 Misc 2d 500.

Pa—Westinghouse Elec Corp v Clark, 34 West Co 91—Cowles v Lagana, 23 Beaver 200

The right to maintain an action against a county to quiet title has been denied.[57.5]

57.5. Or—Kern County Land Co v Lake County, 375 P 2d 817, 232 Or 405

§ 57. Intervention

61. Ga.—Heath v. Stinson, 233 S E 2d 178, 238 Ga 364

Pa.—Stroud v Harper, 66 Montg 313—City of Harrisburg v Central Trust Capital Bank, 77 Dauph 21—Tallarico v. Bellotti, 200 A 2d 763, 414 Pa 535

Statutory requirements held not complied with

Ill.—Feiertag v Reichmann, 157 N E 2d 818, 21 Ill App.2d 215.

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62. Ohio—Dexter v. Taylor, 95 N E.2d 790, app. dism. 101 N E.2d 502, 156 Ohio St. 182, affd, App, 107 N E.2d 402

Change of interest after commencement of cause

Ill—Feiertag v. Reichmann, 157 N E 2d 818, 21 Ill App 2d 215

63. Cal.—Faus v. Pacific Elec Ry Co, 285 P 2d 1017, 134 C A.2d 352—Muller v Robinson, 345 P 2d 25, 174 C A 2d 511—People By and Through State Lands Commission v City of Long Beach, 6 Cal.Rptr 658, 183 C A 2d 271

Ill.—Getty v Union Bank of Chicago, 205 N.E 2d 809, 56 Ill.App 2d 287

Ky.—Vogler v. Salem Primitive Baptist Church, 415 S.W.2d 72.

Okl—Noyes v. McDonnell, 398 P.2d 838

64. Cal.—Faus v Pacific Elec. Ry, Co, 285 P.2d 1017, 134 C A.2d 352.

Intervention not permitted

Cal—Continental Vinyl Products Corp v. Mead Corp., 103 Cal.Rptr. 806, 27 C.A.3d 543.

N.C—Ellis v Ellis, 247 S.E.2d 274, 38 N C.App 81

82. Summary dismissal erroneous

Pa—First Pennsylvania Bank v Bonaventure, 390 A 2d 1365, 257 Pa Super 533

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87. Ark—Wilson v Harris, 302 S W 2d 86, 227 Ark 808

§ 58. Bill, Complaint, or Petition

Library References

Barron and Holtzoff, Federal Practice and Procedure §§ 271, 396.

96. Ala—City of Montgomery v Brown, 228 So 2d 820, 285 Ala 64

Cal—Thornton v Stevenson, 8 Cal Rptr 603, 185 C A 2d 708

Fla—Stark v Frayer, 67 So 2d 237

Mo—C.J.S cited in Morgan v Morgan, 555 S W 2d 378, 380

Pa—Hennmg v Nowicki, 18 D & C 2d 47

Pleadings held sufficient

(1) Ala—Fitts v Alexander, 170 So 2d 808, 277 Ala 372

Alaska—Davis v Tant, 361 P 2d 763

Ark—Skelton v Ferguson, 262 S W 2d 913, 222 Ark 847

Cal—Turner v Milstein, 230 P 2d 25, 103 Cal App 2d 651—Kerr v Construction Engineers, Inc, 245 P 2d 21, 111 C A 2d 817—Lucas v Sweet, 300 P 2d 828, 47 C 2d 20—Smith v Williams, 12 Cal Rptr 665, 361 P 2d 241, 55 C 2d 617

Fla—Doyle v Tutan, App, 110 So 2d 42—Woodruff v Taylor, App, 118 So 2d 822

Ga—Hill v Lang, 86 S E 2d 498, 211 Ga 484—Stephens v Carter, 110 S E 2d 762, 215 Ga 355

Ill—C.J.S. cited in Yeates v Daily, 150 N E 2d 159, 161, 13 Ill 2d 510

Kan—Ables v City of Topeka, 303 P.2d 177, 180 Kan 204

Md—Cherry v Siegert, 136 A 2d 754, 215 Md 81

Miss—Hatcher v Alexander, 260 So 2d 424

Mo—Bailey v. Williams, 326 S.W 2d 115—Randall v St Albans Farms, Inc, 345 S.W 2d 220

Mont—Warren v Warren, 261 P 2d 364, 127 Mont 259.

N C—Elliott v Goss, 119 S E 2d 192, 254 N C 508

Okl—Crain v Farmers United Co-op Pool, 472 P 2d 882

Pa—Farmers' Northern Market Co v Fulton Nat Bank of Lancaster, 55 Lanc Rev 31, 18 Monroe L R 26

Tenn—Montgomery v Tapp, 321 S W.2d 565, 204 Tenn 372

Pleadings held insufficient

Cal—Beck v Reinholtz, 292 P 2d 906, 138 C A 2d 719—South v Wishard, 303 P 2d 805, 146 C A 2d 276

Ill.—Rabus v Calcari, 156 N E.2d 567, 16 Ill 2d 99

Mass—MacNeil Bros. Co v State Realty Co of Boston, 131 N E 2d 178, 333 Mass 770

Miss—Osborne v Vince, 129 So 2d 345, 240 Miss 807

N Y—Simmons v Kelly, 195 N Y.S 2d 425—Lake Minnewaska Mountain Houses, Inc. v Smiley, 297 N Y S.2d 243, 58 Misc 2d 1001

N C—Scott Poultry Co v Bryan Oil Co, 157 S E.2d 693, 272 N C. 16

Pa—Bruker v Burgess and Town Council of Borough of Carlisle, 4 Cumb 44, affd. 102 A 2d 418, 376 Pa 330—Hanson v Berenfield, 24 D. & C 2d 361

A cause of action to quiet title may be pleaded in general terms.[96.5]

96.5. Cal—Lucas v Sweet, 300 P 2d 828, 47 C 2d 20

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97. Ala.—Lyle v. All States Life Ins Co., 82 So.2d 255, 263 Ala. 283

N D—State v Amerada Petroleum Corp, 71 N W 2d 675

82. Kan—Cessna v Carroll, 290 P 2d 803, 178 Kan 650, 58 A L R 2d 291

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A complaint not under statute must indicate that defendant is not in possession.[14.5]

14.5. Pa—Cantwell v Henzler, 9 D & C 2d 21, 6 Bucks 273, 19 Monroe L R 78

16. N Y—Noto v Headley, 240 N Y S 2d 267, 39 Misc 2d 233

In determining the sufficiency of the complaint, declaration, or petition in stating a cause of action, it is to be liberally construed.[20.5]

20.5. Cal—Lucas v Sweet, 300 P 2d 828, 47 C 2d 20

23. Ala—Petcher v Rounsaville, 101 So.2d 324, 267 Ala. 237

However, in a bill to remove a cloud it has been held that there is no need to allege that there is no pending suit to test the title.[23.1]

23.1. Ala—Casey v Krump, 82 So 2d 424, 263 Ala 346

§ 59. —— Allegations as to Title or Interest of Plaintiff

Library References

Quieting Title ⇐35(1, 2).

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39. Ga—Myers v Grant, 95 S E.2d 9, 212 Ga. 677.

41. Ala—Wilder v Scott, 89 So 2d 682, 265 Ala 106.

Alaska—Davis v Tant, 361 P 2d 763

Cal—Carlson v Lindauer, 259 P 2d 925, 119 C.A 2d 292—Stafford v Ballinger, 18 Cal Rptr. 568, 199 C A 2d 289

Conn—Gager v Carlson, 150 A 2d 302, 146 Conn 288—Loewenberg v Wallace, 166 A.2d 150, 147 Conn 689—Lake Garda Imp Ass'n v Battistoni, 231 A 2d 276, 155 Conn 287, app after remand 280 A 2d 877, 160 Conn 503

Fla—Stark v Frayer, 67 So.2d 237—Woodruff v Taylor, App, 118 So 2d 822—Sheffield v Carter, App, 141 So.2d 780

Ga—Thomas v Stedham, 68 S E 2d 560, 208 Ga. 603.

Ky—Noland v Wise, 259 S W 2d 46—Aluminum Co of America v Frazer, 328 S W 2d 142

La—Boagni's Heirs v Thornton, App., 132 So 2d 494.

Mo—Kundert v Powell, 376 S.W.2d 237—C.J.S. cited in Morgan v Morgan, 555 S W.2d 378, 380.

N Y—Croft v Richards, 123 N Y S 2d 792.

N.C—Resort Development Co. v. Phillips, 178 S E 2d 813, 278 N C 69

Pa—Goodhart v Goodhart, 6 Cumb. 123

42. Ohio—Board of Ed., City of Wapakoneta v. Unknown Heirs of Aughinbaugh, Com.Pl., 128 N E 2d 534

Okl.—Ballinger v. Sarkeys, 360 P.2d 515

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43. Fla.—Sheffield v Carter, App, 141 So 2d 780.

Pa.—Goodhart v Goodhart, 6 Cumb. 123.

46. Pa.—Morton v. Cameron, 3 Bucks 107

Tex.—Ellison v Butler, Civ.App., 443 S.W.2d 886.

47. Allegations held sufficient

Fla—Lopez v Smith, App, 109 So.2d 176.

Ga—Stephens v Carter, 110 S.E.2d 762, 215 Ga. 355.

Mo.—Klorner v. Nunn, 318 S.W.2d 241—Stottle v. Brittan, 459 S W 2d 310.

N D.—Dixon v Kaufman, 58 N.W.2d 797, 79 N D. 633.

Okl—Sooner Pipe & Iron Co v Bartholomew, 248 P 2d 225, 207 Okl 191

Allegations held insufficient

Cal—Stafford v Ballinger, 18 Cal Rptr 568, 199 C A 2d 289

Fla—Reinhard v Bliss, 85 So 2d 131

Md—Carey v Adams, 95 A 2d 874, 202 Md 158

Okl—Yeldell v Moore, 275 P 2d 281—Carter v Foote, 361 P 2d 215

49. Ala—Wylie v Lewis, 83 So 2d 346, 263 Ala 522—Brownell v Lewis, 84 So 2d 489, 264 Ala 79—Busby v Pierson, 128 So 2d 516, 272 Ala 59

Ark—Skelton v Ferguson, 262 S W 2d 913, 222 Ark 847

Pa—Prusan v McGuire, 82 Pa Dist & Co 374

50. Mo—Kundert v Powell, 376 S W 2d 237

51. Or—City of North Bend v Coos County, 485 P 2d 1226

53. Mo—Bailey v Williams, 326 S.W 2d 115

56. Or—Pallies v Durand, 519 P 2d 374, 268 Or 187

57. Okl—Murray v Link Oil Co, 353 P 2d 1111—Hale v Hall, 383 P.2d 653

Requisites and sufficiency of deraignment

(5) Other statements

Miss—Kuhn v Gabriel Cemetery Ass'n, 202 So 2d 634

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67. Cal—Stafford v Ballinger, 18 Cal Rptr 568, 199 C A 2d 289

Ind—Denham v Degymas, 147 N E 2d 214, 237 Ind 666

73. Ind—Triplett v. Triplett, 193 N E 2d 662, 135 Ind.App 302

74. Cal—Stafford v Ballinger, 18 Cal Rptr 568, 199 C.A 2d 289

Mo—C.J.S. cited in Morgan v Morgan, 555 S W 2d 378, 380

§ 60. —— Allegations as to Possession of Plaintiff

Library References

Quieting Title ⇐35(8).

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78. Ala—Barton v State, 66 So 2d 452, 259 Ala 285

N M—Archuleta v. Landers, 356 P 2d 443, 67 N.M 422

N C—Williams v. North Carolina State Bd of Ed., 147 S.E.2d 381, 266 N C 761.

79. Ala—Moorer v Bethlehem Baptist Church, 130 So 2d 367, 272 Ala 259

Alaska—Davis v Tant, 361 P 2d 763

Cal—South Shore Land Co v Petersen, 38 Cal.Rptr 392, 226 C.A 2d 725

Ill.—Barger v Slayden, 103 N.E.2d 645, 411 Ill 237—Hunsley v. Valter, 147 N E.2d 356, 12 Ill 2d 608—Rabus v Calcari, 156 N E 2d 567, 16 Ill.2d 99

Ky.—Noland v. Wise, 259 S W 2d 46—Haws v Short, 304 S.W.2d 924.

Md—Glorius v. Watkins, 102 A.2d 274, 203 Md. 546—Barnes v. Webster, 154 A 2d 918, 220 Md. 473

Miss.—Allen v. Thomas, 215 So 2d 882.

Pa.—Rule v. Rule, 10 D & C.2d 294, 46 Luz L Reg 94—McNeal v Fahy, 23 Monroe L J 46.

Complaint or petition showing defendants in possession, etc.

Ala.—Taylor v. Gray, 90 So 2d 778, 265 Ala 279

Ill—Barger v. Slayden, supra

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80. Ill—Barger v. Slayden, supra, n. 79—Rabus v Calcari, 156 N.E.2d 567, 16 Ill.2d 99

Miss.—Allen v. Thomas, 215 So.2d 882.

84. Ala.—Yeargin v. Donnelly, 296 So.2d 144, 292 Ala. 430

La—Walmsley v Pan Am Petroleum Corp, 153 So 2d 375

Fraudulent effort to appropriate title

Ky—Brennenstuhl v Scharfenberger, 259 S W 2d 41

85. Ga—Carter v Bush, 116 S E 2d 568, 216 Ga 429

89. Pa—Kershner v Burtman, 15 Cumb 18

Allegations held sufficient

Pa—McNeal v Fahy, 23 Monroe L J 46

91. Miss—Bickham v Bates, 150 So 2d 138, 246 Miss 171

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1. Ala—Barry v Thomas, 142 So 2d 918, 273 Ala 527—Patronas v West Dauphin Corp, 194 So 2d 845, 280 Ala 442

5. Ala—Wilson v Dorman, 123 So 2d 112, 271 Ala 280—Bonner v Johnson, 159 So 2d 840, 276 Ala 137

Allegations held insufficient

Ala—City of Montgomery v Brown, 228 So 2d 820, 285 Ala 64

7. Ala—Casey v Krump, 82 So 2d 424, 263 Ala 346

§ 61. —— Allegations as to Inadequacy of Remedy at Law

9. Mo—Collins v Shive, 261 S W.2d 58

N Y—Noto v Headley, 240 N Y S 2d 267, 39 Misc 2d 233

11. Pa—Hickey v Crossan, 14 Chest 288

§ 62. —— Allegations as to Cloud or Adverse Claim

Library References

Quieting Title ⇐34(5).

14. Cal—Arechuga v Housing Authority of City of Los Angeles, 7 Cal Rptr 338, 183 C A 2d 835

Fla—Woodruff v Taylor, App, 118 So 2d 822—Sheffield v Carter, App, 141 So 2d 780

Allegations held sufficient

U S—U S v Perry, C A Ala, 473 F 2d 643

Ala—Yeargin v Donnelly, 296 So 2d 144, 292 Ala 430

Ill—Krile v Swiney, 109 N E 2d 189, 413 Ill 350

Tex—McCurdy v Morgan, Civ App, 252 S W 2d 264

Allegations held insufficient

Fla—Stark v Frayer, 67 So 2d 237

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15. Fla—Woodruff v Taylor, App, 118 So 2d 822.

Effect of failure to allege

Fla.—Sheffield v Carter, App., 141 So 2d 780

17. Fla.—Stark v Frayer, supra, n 14—Woodruff v Taylor, App, 118 So 2d 822

18. Ala—Low v Low, 52 So 2d 218, 255 Ala. 536

Fla—Woodruff v Taylor, App, 118 So 2d 822

Ga—Shirley v Shirley, 72 S.E 2d 719, 209 Ga. 366

Allegations held sufficient

Ark.—Eakin v Cities Service Oil Co, 311 S W 2d 530, 228 Ark. 979

Cal—Vaughan v Roberts, 113 P 2d 884, 45 Cal.App 2d 246

Ga—Harp v Bacon, 150 S.E 2d 655, 222 Ga. 478

Va—Day v Vaughn & Usilton, 67 S E 2d 898, 193 Va 168.

Allegations held insufficient

N C.—East Carolina Lumber Co. v Pamlico County, 110 S E 2d 278, 250 N.C. 681, foll 110 S.E 2d 281, 250 N.C. 686, 110 S.E.2d 282, 250 N.C 686, 110 S E 2d 282, 250 N C 687

26. U S.—Huckins v. Duval County, Fla., C.A.Fla., 286 F 2d 46, cert den 81 S Ct. 1673, 366 U.S 945, 6 L Ed 2d 856

Ala.—Wilder v. Scott, 89 So.2d 682, 265 Ala. 106

Alaska—Davis v Tant, 361 P 2d 763

Idaho—Lisher v Krasselt, 492 P 2d 52, 94 Idaho 513, app after remand 538 P 2d 783, 96 Idaho 854

Pa—Goodhart v Goodhart, 6 Cumb 123

27. Cal—South Shore Land Co v Petersen, 38 Cal Rptr 392, 226 C A 2d 725

Conn—Gager v Carlson, 150 A 2d 302, 146 Conn 288

Ky—Louisville & N R Co v Smith, 251 S W 2d 855

Pa—Hickey v Crossan, 14 Chest 288

Allegations held sufficient

Ind—Lantz v Pence, 142 N E 2d 456, 127 Ind App 620

N D—Damel v Hamilton, 61 N W 2d 281

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28. Kan—Mid American Oil Co v Windus, 290 P 2d 102, 178 Kan 499

Pa—Goodhart v Goodhart, 6 Cumb 123

29 Cal—Stearns Ranchos Co v Atchison, T & S F Ry Co, 96 Cal Rptr 317, 19 C A 3d 24

30. N J—City of Paterson v Schneider, 107 A 2d 553, 31 N J Super 598

N Y—Cameron Estates, Inc v Deering, 115 N Y S 2d 687, mod on oth grds 121 N Y S 2d 66, 281 App Div 985, rearg den 122 N.Y S 2d 630, 282 App Div 696, rearg den 122 N Y S 2d 914, 282 App Div 713, app den 124 N Y S 2d 348, 282 App Div 839 Motion den 116 N E 2d 244, 306 N Y 635, affd 123 N E 2d 621, 308 N Y 24

N D—Dixon v Kaufman, 58 N W 2d 797, 79 N D 633

32. N J—City of Paterson v Schneider, supra, n 30.

N Y—Romano v Long, 116 N Y S 2d 226

N C—Vandiford v Vandiford, 84 S E 2d 278, 241 N C 42

Allegations held sufficient

Idaho—Edgeller v Johnston, 262 P 2d 1006, 74 Idaho 359

Ill—Yeates v Daily, 150 N E 2d 159, 13 Ill 2d 510

Minn—Smola v. City of West St. Paul, 47 N.W.2d 789, 234 Minn 157

N C—Cannon v City of Wilmington, 89 S.E 2d 595, 242 N C 711, cert den 77 S Ct 66, 352 U.S. 342, 1 L Ed 2d 58—York v Newman, 163 S E 2d 282, 2 N C App 484

Tex—Texan Development Co v Hodges Civ.App, 237 S W 2d 436

34. Ala—Petcher v Rounsville, 101 So 2d 324, 267 Ala 237

40. Alaska—Davis v Tant, 361 P 2d 763

§ 63. —— Allegations as to Parties

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48. Class action

Fla—Hendler v Rogers House Condominium, Inc, App, 234 So 2d 128

49. "Not in possession" need not be added to designation—Stewart v Berg, N.D, 65 N W 2d 621

§ 64. —— Location and Description of Land

56. N Y—Croft v Richards, 123 N Y S 2d 792

57. Under statute requiring bill to describe land with certainty

(1) Ala—Orso v Cater, 105 So 2d 108, 268 Ala. 130.

59. N M.—Archuleta v Landers, 356 P.2d 443, 67 N M 422.

Descriptions held insufficient

N.C—Boone v Pritchett, 130 S E 2d 288, 259 N.C 226.

Pa—MacKubbin v Rosedale Memorial Park, Inc., 198 A 2d 856, 413 Pa. 637.

61. Ill—Yeates v Daily, 150 N E.2d 159, 13 Ill.2d 510

Description held sufficient

Ala.—State v Allen, 150 So 2d 714, 274 Ala. 600.

Cal—Stearns Ranchos Co. v. Atchison, T & S.F. Ry. Co, 96 Cal Rptr 317, 19 C A 3d 24.

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Ky—Mullins v Hargis, 242 S W 2d 611
Mo—Hatch v Rhyne, 253 S W 2d 170
Tex—Sanchez v. Carey, Civ App, 409 S W 2d 458

Description held insufficient

Fla—Brown v Sohn, App, 276 So 2d 501
N C—Deans v Deans, 84 S E 2d 321, 241 N C 1

62. Consideration of all pleadings

Tex—Sanchez v Carey, Civ App, S W 2d 458

§ 65. —— Offering to do Equity

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65. Ala—Woods v Allison Lumber Co, 62 So 2d 229, 258 Ala 282

§ 66. —— Prayer for Relief

Library References

Quieting Title ⇐34(1)

68. Okl—Allied Paint Mfg Co v Banes, 253 P 2d 826, 208 Okl. 119—Yeldell v Moore, 275 P 2d 281

69. Ky—Thompson v Gonterman, 285 S.W 2d 157
N D—United Accounts, Inc v Larson, 121 N W 2d 628

72. Ala.—Woods v Allison Lumber Co, supra, n 65

75. Wyo.—Town of Glenrock v Chicago & N W Ry. Co, 281 P 2d 455, 73 Wyo 385

§ 67. Plea or Answer in General

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83. Ala.—Barry v Thomas, 142 So 2d 918, 273 Ala 527.

85. Cal—South Shore Land Co v Petersen, 38 Cal Rptr 392, 226 C A.2d 725

Answers held sufficient

Ala.—Jim Walter Corp v Green, 192 So 2d 724, 280 Ala. 272, app after remand 230 So 2d 234, 285 Ala. 176
Cal—Hagen v Silva, 293 P 2d 143, 139 C A 2d 199
Mo—Burns v Uebel, 318 S.W 2d 324.
N.C—Buzzell v Buzzell, 75 S E 2d 536, 237 N C 535
Pa.—Maplewood Memorial Post #696 v Platt, 43 Del Co 146
Utah—Young v Texas Co, 331 P 2d 1099, 8 Utah 2d 206

Answers held insufficient

(1) Ind—Guthrie v Blakely, 130 N E 2d 62, 127 Ind App. 119, transf 125 N E.2d 437, 234 Ind 167, reh den 131 N.E.2d 357, 127 Ind App 119, foll 131 N E.2d 362, 126 Ind.App 294.
Kan—McGill v Kuhn, 348 P 811, 186 Kan. 99

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91. N.C.—Buzzell v Buzzell, supra, n 85

8. Cal—Furnival v Groves, 317 P.2d 117, 154 C.A 2d 846
N M—Archuleta v Landers, 356 P 2d 443, 67 N M 422
N C—Buzzell v. Buzzell, 75 S E.2d 536, 237 N C. 535

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20. Cal.—Hendershott v. Shipman, 231 P 2d 481, 37 C.2d 190

21. Cal.—Carlson v. Lindaner, 259 P.2d 925, 119 C.A 2d 292

Conn—Loewenberg v. Wallace, 166 A 2d 150, 147 Conn 689

27. Cal.—South Shore Land Co v. Petersen, 38 Cal Rptr 392, 226 C.A.2d 725

33. Answer admitting allegations of no force and effect

Ohio—Board of Ed., City of Wapakoneta v. Unknown Heirs of Aughinbaugh, Com Pl., 128 N.E.2d 534

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43. Conn—Loewenberg v Wallace, 166 A 2d 150, 147 Conn 689
Or—Fehl v Horst, 474 P 2d 525, 256 Or 518
Pa—Shea v Cummings, 81 Pa Dist & Co 556, 53 Lack Jur 15

46. Cal—Winberry v Lopez, 3 Cal Rptr 245, 178 C A 2d 672

48. Failure to plead precludes raising such defense

Wash—Hallgren Co, Inc v Correl, Inc, 534 P.2d 591, 13 Wash App 263

49. Ala—Yeargin v Donnelly, 296 So 2d 144, 292 Ala 430
Miss—Tillman v Richton Tie & Timber Co, 80 So 2d 745, 224 Miss 789
N C—Mayberry v Campbell, 192 S E 2d 27, 16 N C App 375, cert den 192 S.E 2d 840, 282 N C 427

53. Conn—Loewenberg v Wallace, 166 A 2d 150, 147 Conn 689

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66. Allegations held insufficient

Mont—Flathead Lumber Corp v Everett, 263 P 2d 376, 127 Mont 291

§ 68. Disclaimer

Library References

Quieting Title ⇐38

73. Tex—Daugherty v Garrett, Civ App, 336 S.W 2d 642, err dism

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81. Cal—Muller v Muller, 26 Cal Rptr 337, 209 C A 2d 704

85. U.S.—Federal Home Loan Bank of San Francisco v Long Beach Federal Sav & Loan Ass'n, D C Cal, 122 F Supp 401
Ariz—Knight v DeMarcus, 425 P 2d 837, 102 Ariz 105, cert gr 88 S Ct 288, 389 U S 926, 19 L Ed 2d 277, cert dism 88 S Ct 1437, 390 U S 736, 20 L Ed 2d 270, reh den 88 S.Ct 2051, 392 U.S 917, 20 L Ed 2d 1379
Cal—Tesseyman v Jovick, 278 P 2d 921, 130 C A 2d 384

§ 70. —— Cross Bill or Cross Complaint and Answer Thereto

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96. Ala.—Ex parte Arrington, 66 So 2d 96, 259 Ala 243—Barry v Thomas, 142 So 2d 918, 273 Ala 527
Cal—Thornton v Stevenson, 8 Cal Rptr 603, 185 C A 2d 708

99. U S—Warren v. Lawler, C A Cal, 343 F 2d 351
Ala—Dean v. Griffith, 57 So.2d 545, 257 Ala 67

3. Affirmative relief sought

(2) Other matters
Ala—Ex parte Arrington, 66 So 2d 96, 259 Ala 243

7. N D—Dixon v. Kaufman, 58 N W.2d 797, 79 N.D 633

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14. Counterclaim held not sufficient to confer jurisdiction

Ill—Barger v Slayden, 103 N.E.2d 645, 411 Ill. 237

15. Ala.—C.J.S. quoted in Ex parte Arrington, 66 So 2d 96, 102, 259 Ala. 243

16. Ala—C.J.S. quoted in Ex parte Arrington, supra, n. 15.

18. Cross complaint held proper

(1) Other instances
Cal.—Dunlop v Hersum Lumber Co,, 273 P 2d 22, 126 C A.2d 815

19. Cal—Duttweiler v Washburn, 66 P 2d 219, 19 Cal App 2d 701—Luther v Foster, 310 P 2d 655, 150 C A 2d 725

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26. Va—Monk v Walters, 78 S E 2d 202, 195 Va 246

31. Mo—Baxter v Vasquez, App, 501 S W 2d 201.

33. Cross pleading held sufficient

Mo—Ridenour v Duncan, 246 S W 2d 765
Okl—Allison v Caruthers, 239 P 2d 759, 205 Okl 582

34. Ind—Hughes v Cook, 130 N E 2d 330, 126 Ind App 103

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64. Cal—Thornton v Stevenson, 8 Cal Rptr 603, 185 C A 2d 708

68. Kan—Thom v Thom, 237 P 2d 250, 171 Kan 651

§ 71. —— Counterclaim

70. Nev—MacDonald v. Krause, 362 P 2d 724, 77 Nev 312

Right to counterclaim for anything contractual in nature

Pa—Coukart v Totten, 21 D & C 2d 29, 107 P L J 469

71. Ala—Young v Blonk, 74 So 2d 910, 261 Ala 542
N M—Heron v Conder, 423 P 2d 985, 77 N M 462
Pa—Myczka v Myczka, 102 Pittsb Leg J 145

Counterclaims held proper

(1) Fla—Crane v Stulz, App, 136 So 2d 238
Mo—Seiser v Maggard, 457 S W 2d 678
N C—Etheridge v Wescott, 94 S E 2d 846, 244 N C 637.
Pa—Coukart v Totten, 21 D & C 2d 29, 107 P L J 469

Counterclaims held not proper

(2) Cal—Zamudio v Meizel, 259 P 2d 460, 119 C A 2d 265
N M—Clark v Primus, 308 P 2d 584, 62 N M 259

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72. Defense held not a counterclaim

N C—Mayberry v Campbell, 192 S E 2d 27, 16 N C. App 375, cert den 192 S E 2d 840, 282 N C. 727

73. Pa—Thomas v Venneri, 17 D & C.2d 379, 107 P L J 24

§ 72. Replication or Reply and Subsequent Pleadings

Library References

Quieting Title ⇐40.

76. Mo.—White v. Wilks, 357 S W.2d 908.

78. Mont—Flathead Lumber Corp v Everett, 263 P.2d 376, 127 Mont 291

79. Cal.—Furnival v. Groves, 317 P.2d 117, 154 C A 2d 846
N.M—C.J.S. cited in Edmonds v Gomez, 320 P.2d 735, 736, 63 N.M 378

80. Mo—Pitts v Pitts, 388 S W.2d 337

82. Cal—Furnival v. Groves, 317 P 2d 117, 154 C A 2d 846

86. Pleading held insufficient

Colo—Lamberson v Thomas, 362 P 2d 180, 146 Colo. 539.

§ 73. Demurrer or Exception

Library References

Quieting Title ⇐41.

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92. Ala—Wylie v Lewis, 83 So 2d 346, 263 Ala 522—Brownell v Lewis, 84 So 2d 489, 264 Ala 79

Cal—South Shore Land Co v Petersen, 38 Cal Rptr 392, 226 C A 2d 725

Conn—Brill v Ulrey, 269 A 2d 262, 159 Conn 371

Mass—MacNeil Bros Co v State Realty Co of Boston, 131 N E.2d 178, 333 Mass 770

Okl—Singler-Fleschaker Royalty Co v Whisenhunt, 402 P 2d 886

Pa—Myers v Heirs and Devisees of Walter, 41 West 175

98. Cal—Carlson v Lundauer, 259 P 2d 925, 119 C A.2d 292—South Shore Land Co v Petersen, 38 Cal Rptr 392, 226 C A 2d 725—Taliaferro v Taliaferro, 31 Cal Rptr 690, 217 C A 2d 211

99. Wis—Bratt v Peterson, 143 N W 2d 538, 31 Wis 2d 447

3. Ala—Kendall v Cornellison, 84 So.2d 494, 264 Ala 16

Cal—Carlson v Lundauer, 259 P 2d 925, 119 C A 2d 292

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5. Mo—C.J.S. cited in Morgan v Morgan, 555 S W 2d 378, 380

Pleading held demurrable

Ala—Galin v Bieker, 70 So 2d 254, 260 Ala 265—City of Montgomery v Brown, 228 So 2d 820, 285 Ala 64

Ga—Myers v. Grant, 95 S E 2d 9, 212 Ga 677

La—Wells v. Joseph, App., 95 So 2d 843, affd 101 So 2d 667, 234 La 780

Pleadings held to state cause of action

Kan—Board of Ed of City of Hermgton v Thompson, 347 P 2d 369, 185 Kan 620.

N C—East Carolina Lumber Co v Pamlico County, 89 S.E.2d 381, 242 N C 728, foll 89 S E.2d 382, 242 N.C. 730—Cannon v. City of Wilmington, 89 S E 2d 595, 242 N C 711, cert den 77 S Ct 66, 352 U S. 842, 1 L.Ed 58

Pa—Nenstiel v Smith, 33 North. 366

6. Mont—Williams v. Widows and Orphans Home, Veterans of Foreign Wars, of Eaton Rapids, Mich, 373 P 2d 948.

7. Ala.—Gibson v Elba Exchange Bank, 88 So 2d 163, 264 Ala. 502

9. Ala—Stoudenmire v Mims, 98 So 2d 42, 266 Ala 562.

N.C.—Pressly v. Walker, 78 S E 2d 920, 238 N C 732

10. Ga.—Carter v. Bush, 116 S E.2d 568, 216 Ga 429

Kan.—Board of Ed. of City of Hermgton v Thompson, 347 P.2d 369, 185 Kan 620.

Laches

(1) Demurrer not sustained

Cal.—Stearns Ranchos Co v Atchison, T. & S.F Ry Co., 96 Cal.Rptr 317, 19 C A 3d 24

11. Okl—Rush v. Champlin Refining Co, 321 P 2d 697.

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22. Conn.—Loewenberg v Wallace, 166 A 2d 150, 147 Conn. 689.

Okl.—State ex rel. Com'rs of Land Office of State v Bingaman, 299 P.2d 168—Rush v Champlin Refining Co., 321 P.2d 697.

27. Bill not subject to preliminary objection

Pa.—Trubiani v Pennsylvania R. Co., 55 Lanc.Rev. 299.

Where the suit is to remove a cloud from title under equity power of the court, absence of an averment that complainant was in peaceable possession is not ground for demurrer.[31.1]

31.1. Ala.—Low v. Low, 52 So 2d 218.

32. Pa—Lerch v Lerch, 24 Northumb Leg J 26

35. Conn—Fanfesti v Englehardt, 238 A 2d 429, 27 Conn Sup 349.

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44. Ala—Orso v Cater, 105 So 2d 108, 268 Ala 130

45. Okl—Priddy v Massey, 256 P 2d 425

§ 74. Amended or Supplemental Pleadings

Library References

Quieting Title ⇐42.

52. Ala—West v Green, 226 So 2d 302, 284 Ala 517

Mo—Harris v Consolidated School Dist No 8 C, Dunklin County, 328 S W 2d 646

Pleadings held amendable

(3) Other pleadings

N Y—Maliades v Maliades, 233 N Y S 2d 695, 37 Misc 2d 125, app den 234 N Y S 2d 274, 17 A D 2d 994, affd 239 N Y S 2d 653, 18 A D 2d 1138

Wis—Beranek v Gohr, 50 N W 2d 459, 260 Wis 282

53. Cal—Rogers v Courtney, 294 P 2d 755, 139 C A 2d 884—Marshall v Marshall, 295 P 2d 131, 140 C A 2d 475—Golden v Penland, 300 P 2d 279, 143 C A 2d 583, cert den 77 S Ct 556, 352 U S 1000, 1 L Ed 2d 545—Newport v City of Los Angeles, 7 Cal Rptr 497, 184 C A 2d 229

N H—Fagan v Grady, 131 A 2d 441, 101 N.H 18

Refusal to allow amendment not error

Or—Leach v West, 504 P 2d 1233

55. Miss—Downes v Crosby Chemicals, Inc, 234 So 2d 916

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68. Iowa—Dvorak v Dvorak, 60 N W 2d 88, 244 Iowa 1113.

72. Okl—Sooner Pipe & Iron Co v Bartholomew, 248 P.2d 225, 207 Okl 191

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90. Mont—Warren v Warren, 261 P 2d 364, 127 Mont 259

§ 75. Issues, Proof, and Variance

Library References

Quieting Title ⇐43.

94. Ala.—Wiggins v Stapleton Baptist Church, 210 So.2d 814, 282 Ala. 255—Watson v. Taylor, 304 So 2d 181, 293 Ala. 386.

Cal—Thornton v Stevenson, 8 Cal.Rptr 603, 185 C.A 2d 708.

Pa.—Lepore v Italian Victory B & L. Ass'n, 90 A 2d 327, 171 Pa Super. 35

If the bill and answer conform to the statute, etc.

Ala—Stewart v Childress, 111 So.2d 8, 269 Ala 87

Matters held in issue

Cal—Dreher v Rohrmoser, 285 P 2d 285, 134 C A.2d 196—Beck v. Combs, 337 P 2d 505, 169 C A 2d 583.

Kan—Dennis v. Smith, 352 P 2d 405, 186 Kan. 539

Matters held not in issue

Ark.—Bailey v Martin, 237 S.W 2d 16, 218 Ark. 513.

Kan—Dennis v Smith, 352 P 2d 405, 186 Kan. 539

Mont.—Pattyn v. Revere, 327 P 2d 818, 133 Mont. 360.

Okl.—Colonial Royalties Co. v Sitler, 298 P.2d 1060.

Plaintiff does not necessarily put his title in issue

N.C.—Resort Development Co v Phillips, 178 S E.2d 813, 278 N C. 69

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98. La—Mestayer v Cities Service Development Co., App, 136 So 2d 513

Wyo—York v James, 148 P 2d 596, 60 Wyo 222

Primary issue

Ala—Watson v Taylor, 304 So 2d 181, 393 Ala 386

99. Cal—Harmon Enterprises, Inc v Vroman, 334 P 2d 628, 167 C A 2d 517

Ky—Chandler v Sullivan, 265 S W 2d 78

Mo—Pitts v Pitts, 388 S W 2d 337

Plaintiff's co-ownership not in issue

N C—Resort Development Co v Phillips, 178 S E 2d 813, 278 N C 69

1. S D—Nelson v Stadel, 62 N W 2d 766, 75 S D 218

2. Statutory complaint may be sufficient to require determination of claims set up though no pleading assails their validity

N D—State v Amerada Petroleum Corp, 71 N W 2d 675

7. Issue held properly raised

Cal—Gillette v Nicolls, 262 P 2d 856, 121 C A 2d 185.

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10. Ala—Chestang v Tensaw Land & Timber Co, 134 So 2d 159, 273 Ala 8

Conn—Lake Garda Imp Ass'n v Battistoni, 231 A 2d 276, 155 Conn 287 App after remand 280 A 2d 877, 160 Conn 503

Fla—Booth v Board of Public Instruction of Dade County, 67 So 2d 690

Or—Rohner v Neville, 365 P 2d 614, 230 Or 31, reh den 368 P 2d 391, 230 Or 31

Effect of failure to prove

N Y—Schenectady Chemicals, Inc v. DeLuke Sand & Gravel Co, 278 N Y.S 2d 953, 53 Misc 2d 383, affd 286 N Y.S.2d 902, 29 A D 2d 800

11. Cal—Santoro v Carbone, 99 Cal Rptr 488, 22 C A.3d 721

Okl—Melton v Goodman, 317 P 2d 244

17. Conn—Loewenberg v Wallace, 166 A 2d 150, 147 Conn 689

Mo—Kundert v Powell, 376 S W 2d 237

18. Cal—Fleishman v Blechman, 306 P 2d 548, 148 C A 2d 88

Conn—Loewenberg v. Wallace, 166 A.2d 150, 147 Conn 689

Ky—Kentucky River Coal Corp v Bayless, 318 S W 2d 554—Letcher County Coal & Imp Co v Marlowe, 398 S W 2d 870

Okl—Choate v Muskogee Elec Traction Co, 295 P 2d 781—Dwelle v Greenshields, 305 P 2d 1038—Ballinger v Sarkeys, 360 P 2d 515

20. Miss—Coaker v Churchwell, 90 So 2d 849, 229 Miss 369

22. Cal—Roberts v. Lebram, 248 P 2d 810, 113 C.A 2d 712.

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23. Cal—Taliaferro v. Croia, 313 P 2d 136, 152 C.A 2d 448.

30. Title designed from common grantor

Tex—Rains v Thorton, Civ App., 286 S W 2d 174, revd. on oth grds., 299 S.W 2d 287, 157 Tex. 65

34. Ky—Letcher County Coal & Imp Co v Marlowe, 398 S.W.2d 870

Peaceable possession

Ala.—Pierce v Lee Bros Foundry Co., 51 So 2d 677, 255 Ala. 410

35. N J—Robinson-Shore Development Co v. Gallagher, 125 A.2d 1, 41 N.J Super. 324, op. supp. 128 A.2d 884, 43 N J Super. 430, affd. 133 A 2d 353, 45 N.J Super. 507, revd. on oth. grds 138 A.2d 726, 26 N J 59

36. Or.—Brooke v Amuchastegui, 360 P 2d 275, 226 Or. 335

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40. Colo—Siler v Investment Securities Co, 244 P 2d 877, 125 Colo 438

46. Cal—Cralle v City of Eureka, 289 P 2d 509, 136 C A 2d 808

Mo—Obermeyer v Hentschel, 389 S W 2d 203

Mont—Flathead Lumber Corp v Everett, 263 P 2d 376, 127 Mont 291

Evidence held admissible

Ala—Yeargin v Donnelly, 296 So 2d 144, 292 Ala 430

Cal—Baucum v Le Baron, 289 P 2d 266, 136 C A 2d 593—Roman v Ries, 66 Cal Rptr 120, 259 C A 2d 65

Pa—Nenstiel v Smith, 33 North 366

47. Cal—Selby v Battley, 309 P 2d 120, 149 C A 2d 659

Ind—L & G Realty & Const Co v City of Indianapolis, 139 N E 2d 580, 127 Ind App 315

48. N M—Shipley v Ballew, 252 P 2d 514, 57 N M 11

Wash—Fowles v Sweeney, 248 P 2d 400, 41 Wash 2d 182

49. Mo—White v Wilks, 357 S W 2d 908

Or—Jones v Jackson, 246 P 2d 546, 195 Or 643

50. Kan.—Cessna v Carroll, 290 P 2d 803, 178 Kan 650, 58 A L R 2d 291

N.C—Wachovia Bank & Trust Co v Miller, 89 S E 2d 765, 243 N C 1

Or—Jones v Jackson, supra, n 49

51. Utah—C.J.S cited in Meagher v Uintah Gas Co, 255 P 2d 989, 992, 123 Utah 123

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Under an answer denying plaintiff's title defendant may show title in himself.[59 5]

59.5. Burns v Kennedy, 41 P 458, 108 Cal 331—Talaferro v Crola, 313 P 2d 136, 152 C A 2d 448

75. Fraud not pleaded in reply

N D—Dixon v Kaufman, 58 N W 2d 797, 79 N D 633

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82. Variance held not fatal

(3) Other statements.

Ark—Epperson v. Singleton, 449 S W 2d 203, 247 Ark 1006

Ga.—Barnes v. Barnes, 160 S E.2d 391, 224 Ga 92

83. Or—C.J.S. cited in Brooke v Amschastegui, 360 P.2d 275, 226 Or 335.

84. Ind—Hughes v. Cook, 130 N.E.2d 330, 126 Ind App 103—Denham v Degymas, 147 N E.2d 214, 237 Ind. 666.

85. Ind—Hare v Chisman, 101 N E 2d 268, 230 Ind 333—Hughes v Cook, 130 N E.2d 330, 126 Ind App 103

88. Cal—Moss Estate Co v Adler, 261 P 2d 732, 41 C 2d 581

§ 76. Presumptions and Burden of Proof

Library References

Quieting Title ⇐44(1).

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92. Cal—Sheeter v Lifur, 249 P 2d 336, 113 C A 2d 729

Pa.—In re Hunlock Tp School Dist Sale, 48 Luz L Reg 7.

Peaceable possession

N.J—Perlstein v. Pearce, 96 A.2d 392, 12 N.J 198

Ohio—Broadswood v Kauer, 120 N E.2d 111, 161 Ohio St. 524, 46 A.L R.2d 1309

Presumption of assignment of dower in particular tract not established by widowhood

Ark—Robinson v Gulley, 255 S W 2d 438, 221 Ark 695

94. Cal—Sheeter v Lifur, supra, n 92

Idaho—Beneficial Life Ins Co v Wakamatsu, 270 P 2d 830, 75 Idaho 232

N C—Williams v North Carolina State Bd of Ed, 147 S E 2d 381, 266 N C 761

1. Ala—Webb v King, 105 So 2d 653, 268 Ala 282—Chestang v Tensaw Land & Timber Co, 134 So 2d 159, 273 Ala 8

Ark—Myers v Snider, 294 S W 2d 495, 226 Ark 849

Cal—Chaffee v Sorensen, 236 P 2d 851, 107 C A 2d 284—Ernie v Trinity Lutheran Church, 336 P 2d 525, 51 C 2d 702

Ga—Duffee v Jones, 68 S E 2d 699, 208 Ga 639—Arrington v Thompson, 88 S E 2d 402, 211 Ga 734

Idaho—Howard v Bar Bell Land & Cattle Co, 340 P 2d 103, 81 Idaho 189

Ind—Kruzick v Kruzick, 118 N E 2d 376, 124 Ind App 365

Iowa—In re Sterling's Estate, 92 N W 2d 138, 249 Iowa 1260

Ky—Ellis v Chestnut, 289 S W 2d 740

La—Stockstill v Choctaw Towing Corp, 70 So 2d 93, 224 La 473

Mo—Curtis v Curtis, 427 S W 2d 410

Neb—Stratbucker v Junge, 46 N W 2d 486, 153 Neb 885—Heun v W T Rawleigh Co, 92 N.W.2d 185, 167 Neb 176—Jones v Schmidt, 102 N W 2d 640, 170 Neb 351

Okl—Ballinger v Sarkeys, 360 P 2d 515—Pettit v Vogt, 495 P 2d 395

Pa—Cox's Inc v Snodgrass, 92 A 2d 540, 372 Pa 148

Failure of proof requires reversal

Cal—Zachery v McWilliams, 104 Cal Rptr 293, 28 C A 3d 57

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3. U S.—Ussery v Anderson-Tully Co, D C Ark., 122 F Supp 115—Perpetual Royalty Corp v Kipfer, D C Kan, 253 F Supp 571, affd., C A, 361 F 2d 317, cert den 87 S Ct 743, 385 U S 1025, 17 L Ed 2d 673—C.J S cited in Washington Medical Center, Inc v U S, 545 F 2d 116, 127, 211 Ct Cl. 145, cert den 98 S Ct 296, 434 U S 902, 54 L Ed 2d 188, reh den 98 S Ct 1891, 435 U S 1018, 56 L Ed 2d 398

Ala—Wylie v Lewis, 83 So 2d 346, 263 Ala 522—Motley v Crumpton, 93 So 2d 413, 265 Ala 565—Busby v Pierson, 128 So 2d 516, 272 Ala 59

Ariz—Allison v State, 420 P 2d 289, 101 Ariz 418—State v Crawford, 475 P 2d 515, 13 Ariz App 225

Ark—Coulter v O'Kelly, 295 S W 2d 753, 226 Ark 836—Arkansas & O Ry Corp v West, 353 S W 2d 337, 234 Ark 590—Vick v Berg, 473 S W 2d 858, 251 Ark 573

Cal—Winchell v Lambert, 304 P 2d 149, 146 C A 2d 575—Hayes v Mitchell, 7 Cal Rptr 364, 184 C A 2d 301

Conn—Loewenberg v Wallace, 166 A 2d 150, 147 Conn 689

Idaho—Campbell v Weisbrod, 245 P 2d 1052, 73 Idaho 82

Ill—Hadie v Erlandson, 190 N E 2d 848, 41 Ill App 2d 328

Ind.—Hughes v Cook, 130 N E.2d 330, 126 Ind App 103

Ky—Noland v Wise, 259 S W 2d 46—Aluminum Co of America v Frazer, 328 S.W.2d 142—Vogler v. Salem Primitive Baptist Church, 415 S W 2d 72—Knott Coal Corp v Kelly, 417 S W 2d 253.

La.—Albritton v Childers, 74 So 2d 156, 225 La. 900—Boagni's Heirs v Thornton, App, 132 So.2d 494.

Mich—Calhoun v Calhoun, 106 N W.2d 158, 361 Mich 698.

Miss.—De Lee v Anderson, 63 So.2d 393, 216 Miss. 888

Mont.—Helland v Custer County, 256 P 2d 1085, 127 Mont. 23

Neb—Durfee v. Keiffer, 95 N.W 2d 618, 168 Neb 272

N M—Caranta v Pioneer Home Improvements, Inc, 467 P 2d 719, 81 N M 393

N C—Walker v Story, 116 S E 2d 147, 253 N C 59—Chisholm v Hall, 121 S E 2d 726, 255 N C 374—Denson v Davis, 124 S E 2d 827, 256 N C 658—International Paper Co v Jacobs, 128 S E 2d 818, 258 N C 439—State v Johnson, 179 S E 2d 371, 278 N C 126—Lane v Faust, 176 S E 2d 381, 9 N C App 427—Campbell v Mayberry, 183 S E 2d 867, 12 N C App 469, cert den 184 S E 2d 883, 279 N C 726

Okl—Dwelle v Greenshields, 305 P 2d 1038

Tex—Rains v Thornton, Civ App, 286 S W 2d 174, revd on oth grds, 299 S W 2d 287, 157 Tex 65—Ellison v Butler, Civ App, 443 S W 2d 886—Nabours v Whiteley, Civ App, 466 S W 2d 62, err ref no rev err

Utah—Olsen v Park Daughters Inv Co, 511 P 2d 145, 29 Utah 2d 421

Wyo—Kirby Royalties, Inc v Texaco, Inc, 458 P 2d 101, reh den 461 P.2d 282—Kirby Royalties, Inc v Texaco, Inc, 461 P 2d 282

Title deducible from commonwealth, common source, or adverse possession

(4) Other matters

R I.—Plante v. Conklin Limestone Co, 151 A 2d 116, 89 R I 64

Payment of value for deed

Cal—Sieger v. Standard Oil Co, 318 P 2d 479, 155 C A 2d 649.

4. Or—Freytag v Vitas, 326 P 2d 110, 213 Or. 462

5. Ark—Corn v Arkansas Warehouse Corp, 419 S W 2d 316, 243 Ark 130

Cal—Potter v Los Angeles County, 59 Cal.Rptr 335, 251 C A.2d 280

Mo—Gaskill v Cook, 315 S W.2d 747

Neb—Weesner v Weesner, 95 N W 2d 682, 168 Neb 346

N H—Judge v. Field, 295 A 2d 459, 112 N H. 337

N C—Waters v Pittman, 118 S E 2d 395, 254 N C. 191

Or—Freytag v Vitas, 326 P.2d 110, 213 Or 462—Rohner v Neville, 365 P 2d 614, 230 Or. 31, reh den 368 P 2d 391, 230 Or 31

Tex—Ellison v Butler, Civ App, 443 S W 2d 886

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10. Cal—Walley v P M C Inv Co, 68 Cal Rptr. 711, 262 C A 2d 218.

11. N C—Allen v Conservative Hunting Club, 189 S E 2d 532, 14 N C App 697

16. Ala—Motley v Crumpton, 93 So 2d 413, 265 Ala. 565

Kan—Mid American Oil Co v. Windus, 290 P 2d 102, 178 Kan 499

Ky—Noland v Wise, 259 S W 2d 46

Proof of possession held not required under statute

Ala—Barry v Thomas, 142 So.2d 918, 273 Ala. 527

Colo—Board of County Com'rs of Pitkin County v. Blanning, 479 P 2d 404, 29 Colo.App 61.

N C.—Barbee v. Edwards, 77 S E 2d 646, 238 N C 215

Peaceable possession

Ala—Hamner v Carroll's Creek Baptist Church, 51 So 2d 164, 255 Ala 277—Busby v Pierson, 128 So 2d 516, 272 Ala. 59—Bonner v. Johnson, 159 So 2d 840, 276 Ala. 137.

19. Ky.—Noland v. Wise, 259 S.W.2d 46—Kephart v Rucker, 379 S W 2d 244—Vogler v Salem Primitive Baptist Church, 415 S W.2d 72

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22. Conn.—Gager v. Carlson, 150 A.2d 302, 146 Conn 288.

Okl.—C.J.S. black letter summary quoted in Collins v. Smith, 372 P.2d 878, 881.

23. U.S.—Mays v Kirk, C A.Fla., 414 F 2d 131

N.D—Mueller v Mercer County, 60 N W 2d 678.

Proof of invalidity as independent proposition not required

N C—Wells v Clayton, 72 S E 2d 16, 236 N C 102

25. U S—Ussery v Anderson-Tully Co, D C Ark, 122 F Supp 115—U S v Buras, C A La, 458 F 2d 346, reh den 475 F 2d 1370, cert den 94 S Ct 129, 414 U S 865, 38 L Ed 2d 117

Cal—Petersen v Ridenour, 287 P 2d 848, 135 C A 2d 720—Perry v State, 293 P 2d 480, 139 C A 2d 379

Colo—Wall v Magnes, 30 P 56, 17 Colo 476—Wannamaker v Pendleton, 121 P 108, 21 Colo App 174

Ga—Grand Lodge of Ga, Independent Order of Odd Fellows v City of Thomasville, 172 S E 2d 612, 226 Ga 4

Ill—Israel v Hart, 124 N E 2d 657, 5 Ill App 2d 233

Ind—Novak v Novak, 133 N E 2d 578, 126 Ind App 428—Dowell v Jolly, App, 159 N E 2d 590, 130 Ind App 280—Otterman v Hollingsworth, 214 N E 2d 189, 140 Ind App. 281

Ky—Aluminum Co of America v Frazer, 328 S W 2d 142

Mo—Gaskill v Cook, 315 S W 2d 747

N J—Harvey v Orland Properties, Inc., 261 A 2d 708, 108 N J Super 493, affd 286 A 2d 711, 118 N J Super 104

N.C—C.J.S. black letter summary quoted in Resort Development Co v Phillips, 178 S E 2d 813, 819, 278 N C 69—Campbell v Mayberry, 183 S E 2d 867, 12 N C App. 469, cert den 184 S E 2d 883, 279 N C 726

N D—Woodland v Woodland, 147 N W 2d 590—Tavis v Higgins, 157 N W 2d 718

Identity of grantor's dower

Ark.—Robinson v Gulley, 255 S W 2d 438, 221 Ark 695

26. Or.—Freytag v Vitas, 326 P 2d 110, 213 Or 462

27. N J—Robinson-Shore Development Co v Gallagher, 125 A 2d 1, 41 N.J.Super. 324, op supp 128 A.2d 884, 43 N J Super 430, affd 133 A 2d 353, 45 N.J.Super 507, revd. on oth. grds 138 A 2d 726, 26 N J. 59

28. Del—Suplee v Eckert, 152 A 2d 289, 38 Del Ch. 359.

29. Ala.—Stewart v Childress, 111 So 2d 8, 269 Ala 87—Machen v Wilder, 215 So 2d 282, 283 Ala 205.

La—Rouyer v. Harrison, App., 58 So 2d 753

30. Ala—Wiggins v Stapleton Baptist Church, 210 So.2d 814, 282 Ala. 255.

Ky—Creech v Minard, 408 S W 2d 432

N.J.—Robinson-Shore Development Co v Gallagher, 125 A.2d 1, 41 N.J Super. 324, op supp 128 A 2d 884, 43 N.J Super 430, affd 133 A 2d 353, 45 N.J Super. 507, revd on oth grds. 138 A.2d 726, 26 N J. 59.

Tex.—Rains v. Thornton, Civ.App., 286 S W.2d 174, revd., 299 S W 2d 287, 157 Tex 65.

Burden on each party claiming title from different sources

Colo.—Gilpin Inv Co v Pengo Mines Co, 421 P.2d 477, 161 Colo. 252

Utah—Music Service Corp. v Walton, 432 P.2d 334, 20 Utah 2d 16.

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31. Cal.—Miller v Boswell, 328 P.2d 517, 162 C.A.2d 508.

32. Ariz.—Allison v. State, 420 P 2d 289, 101 Ariz. 418

Tex.—Ellison v. Butler, Civ App., 443 S.W.2d 886

33. Ala.—Stewart v. Childress, 111 So.2d 8, 269 Ala 87—Wiggins v. Stapleton Baptist Church, 210 So.2d 814, 282 Ala. 255

§ 77. Admissibility

Library References

Quieting Title ⇐44(2).

36. N C—McCormick v Smith, 98 S E 2d 448, 246 N C 425

Evidence held admissible

(5) Other evidence

Cal—Horn v Govan, 341 P 2d 784, 172 C A 2d 77

Idaho—Smith v Smith, 511 P 2d 294, 95 Idaho 477

Ky—Stivers v Samuels, 415 S W 2d 366

Mo—Evans v Brussel, 330 S W 2d 788, cert den 80 S Ct 673, 362 U S 919, 4 L Ed 2d 740

N C—Pendergrass v Massengill, 152 S E 2d 657, 269 N C 364.

S C—Southern Ry-Carolina Division v Horne Inv Co, 105 S E 2d 527, 233 S C 440

Evidence held inadmissible

(4) Other evidence

U S—Neagle v Johnson, D C Mo, 261 F Supp 634, affd, C A, 381 F 2d 9

Ga—Stephens v Carter, 110 S E 2d 762, 215 Ga 355—Webb v McDaniel, 127 S.E 2d 900, 218 Ga 366

Okl—Cox v Sarkeys, 304 P 2d 979—Marcum v Zaring, 406 P 2d 970

Utah—Alleman v Miner, 353 P 2d 463, 10 Utah 2d 356

§ 78. —— As to Title and Adverse Claim

Library References

Quieting Title ⇐44(2)

37. Cal—McGlasson v Blythe, 299 P 2d 325, 143 C A 2d 152

Mo—Dudeck v Ellis, 399 S W 2d 80

Tex—Eason v David, Civ.App, 232 S W 2d 427, err ref no rev err

Lost instruments

Okl—Farr v Spurck, 248 P 2d 245, 207 Okl 136

Illegitimacy

N C—Robinson v Sampson, 104 S.E 2d 882, 248 N C 746

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38. Cal.—Schulman v Shores, 238 P.2d 664, 108 C A.2d 156

Mo—Dudeck v Ellis, 399 S.W.2d 80

Okl—Cox v. Sarkeys, 304 P.2d 979

43. Ind—Starr v Oswalt, 97 N E 2d 375, 121 Ind. App 382

N Y—Hughes v. Curran, 175 N Y S 2d 351, 6 A D.2d 71, rearg den 176 N Y S 2d 957, 6 A D 2d 995

Evidence held inadmissible

N C.—Barringer v Weathington, 182 S E 2d 239, 11 N C App 618

48. Cal.—McDonald v Jones, 277 P 2d 477, 129 C A 2d 519

Kan—Common School Dist. No 45 v Burr, 278 P 2d 596, 177 Kan. 261

§ 79. —— As To Possession

51. Evidence held admissible

Ala—Miller v Hewell, 123 So.2d 126, 271 Ala. 286—Williams v Romano, 266 So.2d 750, 289 Ala. 190.

Evidence held inadmissible

Okl—Cox v. Sarkeys, 304 P.2d 979

§ 80. Weight and Sufficiency

Library References

Quieting Title ⇐44(3–5).

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57. Cal.—Chaffee v. Sorensen, supra, n. 1

Conn—Simonelli v Fitzgerald, 238 A 2d 418, 156 Conn 49.

Ohio—C.J.S. quoted in Selman v Schaaf, 269 N E.2d 60, 68, 26 Ohio App.2d 35

Okl—Gawf v. Gawf, 240 P 2d 1095, 206 Okl. 73.

Evidence held sufficient

(1) Ala—Williams v Romano, 266 So 2d 750, 289 Ala 190

Ariz—Rogers v House, 435 P 2d 492, 6 Ariz App 582

Cal—Brewer v King, 293 P 2d 126, 139 C A 2d 33—Jaffa v Guttman, 346 P 2d 876, 175 C A 2d 790—Maloney v White, 6 Cal Rptr 540, 182 C A 2d 787—Edelstein v Pon, 7 Cal Rptr 65, 183 C A 2d 795

Fla—Clayton v Clayton, App, 275 So 2d 588

Ill—Hadie v Erlandson, 190 N E 2d 848, 41 Ill App 2d 328

Iowa—Cheney v Womans Baptist Foreign Missionary Soc of West, 50 N W 2d 651, 243 Iowa 134

Ky—Justice v Kentland Coal & Coke Co, 327 S W 2d 740

Neb—Soflo v Glassmann, 57 N W 2d 176, 156 Neb 610

Okl—Kansas, O & G Ry Co v Doneghy, 249 P 2d 719, 207 Okl 346

(2) Cal—Brown v Busch, 313 P 2d 19, 152 C A 2d 200

(4) Miss—Donohoe v Aultman, 127 So 2d 395, 240 Miss. 304

N.M—Sanchez v Garcia, 384 P 2d 681, 72 N M 406.

(5) Cal—Rast v Fischer, 236 P 2d 393, 107 C A 2d 129—Schulman v Shores, supra, n 38

La—Benedict v Lynch, App, 81 So 2d 91

N M—Martinez v Trujillo, 467 P 2d 398, 81 N M 382—Rael v Cisneros, 487 P 2d 133, 82 N M 705

S C—Johnson v Roland, 187 S E 2d 244, 258 S C 61

(6) Cal—Rinehart v First Cupertino Co, 317 P 2d 30, 154 C A 2d 842—Ramirez v Mookini, 24 Cal Rptr 354, 207 C A 2d 42

Idaho—Salvis v Lawyer, 253 P 2d 589, 73 Idaho 469

(8) Mo—Erickson v Greub, 287 S W 2d 873

N M—Giovannini v Turnetta, 414 P 2d 855, 76 N M. 344

(9) U S—Moore Oil, Inc v Snakard, D C Okl, 150 F Supp 250, remd, C A, 249 F 2d 318—Northern Pac Ry Co v U S., C A Wyo, 277 F 2d 615

Ala.—Miller v Hewell, 123 So.2d 126, 271 Ala. 286—Tanner v. Case, 173 So 2d 803, 277 Ala. 641

Ark—Phillips v Tramble, 273 S W 2d 400, 224 Ark 359

Cal.—Dunlap v Bellah, 7 Cal Rptr. 766, 184 C A 2d 579

Fla—Schulz v City of Dania, App, 156 So 2d 520

Ky—Creech v. Jackson, 375 S.W 2d 679

Mass—Otis Power Co v Wohn, 164 N E.2d 306, 340 Mass. 391

Mich—Walker v Bowen, 52 N W 2d 574, 333 Mich 13

Mo—Adams v. Richardson, 337 S W.2d 911.

N M—Werner v City of Albuquerque, 229 P.2d 688, 55 N M 189—Gish v Hart, 411 P.2d 349, 75 N.M 765—Houchen v. Hubbell, 461 P 2d 413, 80 N.M. 764

N D—Smith v Mountrail County, 70 N.W.2d 518

Okl—Blagg v Rutledge, 251 P 2d 196, 207 Okl. 559

Or.—Cutting v. Witcher, 356 P 2d 1053, 225 Or 234

Tex—Barr v Wall, Civ App, 265 S.W 2d 208, err ref no rev err—Carter v. Barclay, Civ.App., 476 S W.2d 909

Utah—Allcrean v. Miner, 353 P 2d 463, 10 Utah 2d 356

Wash—Birkeland v. Corbett, 320 P 2d 635, 51 Wash.2d 554

Evidence held insufficient

(1) Ala—Bienville Mortg. Corp v Mayo, 245 So.2d 819, 286 Ala. 675

Ark.—Corn v Arkansas Warehouse Corp, 419 S W.2d 316, 243 Ark 130.

Idaho—Peterson v Neal, 498 P 2d 1289, 94 Idaho 816

Ind.—Wischmeyer v Little, 169 N.E.2d 207, 131 Ind. App 485

Mo—Wilson v Lambeth, 266 S W 2d 602

(2) Cal.—Le Fevre v Borwick, 254 P.2d 626, 116 C.A.2d 786.

Okl.—Clements v. Mee, 254 P.2d 354, 208 Okl. 201.

(3) Ark—Coulter v O'Kelly, 295 S W 2d 753, 226 Ark 836

R I—Smith v Coutu, 107 A 2d 282, 82 R I 280

(4) Cal—Goldman v Goldman, 253 P 2d 474, 116 C A 2d 227, foll 253 P 2d 483, 116 C A 2d 911

Kan—Alcorn v. State Highway Commission, 375 P 2d 614, 190 Kan 370

Okl—Chapman v Calhoun, 226 P 2d 974, 204 Okl 63

(5) Ky—Havens v Clem, 275 S W 2d 70

Mont—Davis v Steingruber, 311 P 2d 784, 131 Mont 468

(6) Cal—Arnold v Hadgis, 226 P 2d 641, 102 Cal App 2d 88—Goldman v Goldman, supra—Fabares v Benjamin, 4 Cal Rptr 359, 180 C A 2d 264—Kay v Kay, 10 Cal Rptr 196, 188 C A 2d 214

Mass—Pica Realty Co v Papuzynski, 172 N E 2d 841, 342 Mass 240

Mont—Pattyn v Favers, 327 P 2d 818, 133 Mont 560

N C—Seawell v Boone's Mill Fishing Club, Inc, 106 S E 2d 486, 249 N C 402—Bolton v Harrison, 108 S E 2d 666, 250 N C 290

Okl—Kelley v Wentz' Estate, 319 P 2d 1014

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58. Ark—Hunter v Dixon, 410 S W 2d 389, 241 Ark 725

Neb—Fitch v Slama, 128 N W 2d 377, 177 Neb 96

Ohio—Kohler v Ichler, 186 N E 2d 202, 116 Ohio App 16—C.J.S. quoted in Sellman v Schaaf, 269 N E 2d 60, 68, 26 Ohio App 2d 35

59. Evidence held insufficient

Colo—Swallow v Calcum Co, 348 P 2d 715, 141 Colo 399

63. Proof must be:

(2) Iowa—Mack v. Lange, 119 N W 2d 897, 254 Iowa 963

64. Necessary elements of prima facie case

Neb—Blohme v Blohme, 89 N W 2d 127, 166 Neb 369, reh. den. 91 N W.2d 30, 167 Neb 1

Test of prima facie case

Ala.—Machen v Wilder, 215 So.2d 282, 283 Ala 205

Neb—Blohme v Blohme, 89 N W 2d 127, 166 Neb 369, reh den 91 N W 2d 30, 167 Neb. 1

§ 81. —— As to Title and Adverse Claim

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65. Conn—Loewenberg v Wallace, 166 A 2d 150, 147 Conn 689.

Evidence held sufficient

(1) Ark—Mabry v. Covington, 337 S W 2d 643, 232 Ark 308

Cal—Roberts v Lebrun, 248 P 2d 810, 113 C A 2d 712—Marker v Wendelken, 288 P 2d 981, 136 C A 2d 276.

Conn—Bridgeport Hydraulic Co. v Sciortino, 88 A 2d 378, 138 Conn. 690

Fla.—Mogee v Haller, App, 222 So.2d 468

Ky—Rose v Griffith, 337 S W 2d 15

Mich—Arndt v Ball, 70 N.W 2d 746, 342 Mich 649

N.M—Currier v Gonzales, 434 P 2d 66, 78 N M 541

N C—Campbell v Mayberry, 183 S.E 2d 867, 12 N C App. 469, cert den 184 S E.2d 883, 279 N C 726

(2) U.S—Gulf Refining Co. v. Price, C.A La., 232 F.2d 25, cert den 77 S.Ct. 380, 352 U S. 981, 1 L.Ed 2d 365—Zunamon v Brown, D C Ark, 287 F Supp. 426, affd., C A., 418 F 2d 883

Ala.—McKenzie v Protestant Episcopal Church in Diocese of Ala., 50 So.2d 725, 255 Ala. 176—Ford v. Washington, 259 So.2d 226, 288 Ala 194

Ark—Rinke v Shackleford, 455 S W 2d 83.

Cal.—Rozelle v. Gunn, 286 P.2d 543, 134 C A.2d 589—Winchell v. Lambert, 304 P 2d 149, 146 C.A.2d 575—Kneale v. Rhoads, 13 Cal Rptr 918, 192 C.A.2d 764—Behrendt v Abraham, 49 Cal Rptr 292, 410 P 2d 828, 64 C 2d 182

Ind—Terrey v Brinckman, 194 N E 2d 760, 135 Ind App 479

Ky—Hall v Gayheart, 235 S W 2d 1020, 314 Ky 432—Havens v Clem, 275 S W 2d 70

La—Rouyer v Harrison, 58 So 2d 753—Allen v Butler, App, 60 So 2d 314

Miss—Hartness v Nix, 67 So 2d 718, 218 Miss 750

Mo—Ritter v Pattonville Consol School Dist R-3, 318 S W 2d 304

N H—Fagan v Grady, 131 A 2d 441, 101 N H 18—Russell v Emerson, 240 A 2d 52, 108 N H 518

N M—Reneham v Lobato, 237 P 2d 100, 55 N M 532—Edmonds v Gomez, 320 P 2d 735, 63 N M 378—Cubero Land Grant v DeSoto, 416 P 2d 155, 76 N M 490—Gilmer v Gilmer, 419 P 2d 976, 77 N M 137

N Y—Lipton v Bruce, 154 N Y S 2d 951, 1 N Y 2d 631, 136 N E 2d 900

Okl—Alfrey v Richardson, 231 P 2d 363, 204 Okl 473—Ewing v Trawick, 256 P 2d 182, 208 Okl 311

Va.—Kiser v Clinchfield Coal Corp, 106 S E 2d 601, 200 Va 517, app dism 80 S Ct 57, 361 U S. 8, 4 L Ed 2d 49

(3) Conn—Ball v Town of Branford, 110 A 2d 459, 142 Conn 13

Ky—Chandler v Sullivan, 265 S W 2d 78

Mont—Peery v Higgins, 447 P 2d 481, 152 Mont 140

(4) Ark—Hill v Barnard, 224 S W 2d 31, 216 Ark 29

Cal—Daluiso v Boone, 75 Cal Rptr 287, 269 C A 2d 253

Colo—Kirkman v Faulkner, 524 P 2d 648

Fla—Thomas v Whitaker, App, 145 So 2d 522

N M.—Gallegos v War, 438 P 2d 636, 78 N M 796

Wash—Lewis and Clark Playground Ass'n v City of Spokane, 248 P 2d 407, 41 Wash 2d 944.

Evidence held insufficient

(1) U S—Gulf Refining Co v Price, C A La, 232 F 2d 25, cert den 77 S Ct 380, 352 U S 981, 1 L Ed 2d 365

Ark—Griffin v Isgrig, 302 S W 2d 777, 227 Ark 931

Cal—Hoeller v Lloyd, 343 P 2d 929, 173 C A 2d 777

Fla—Culbertson v Montanbault, App., 133 So 2d 772

Ga—Woodard v Bowen, 97 S E 2d 573, 213 Ga 185

Ind—Milhon v Brown, 143 N E 2d 573, 127 Ind App 694, reh den 145 N E 2d 307, 127 Ind App 694

Ky—Kephart v Rucker, 379 S W 2d 244—Stewart Lumber Co v Fields, 445 S W 2d 140

La—Stockstill v Choctaw Towing Corp, 70 So 2d 93, 224 La 473

Mich—Calhoun v Calhoun, 106 N W 2d 158, 361 Mich 698.

Mo—Baugh v Grigsby, 286 S W 2d 798, 58 A L R 2d 607—Lock v Bennartz, 470 S W 2d 801

N H—Sheris v Morton, 276 A 2d 813, 111 N H 66

N M—Walter v Richardson, 306 P.2d 643, 62 N M 152

N.C.—Resort Development Co v Phillips, 178 S E 2d 813, 278 N C 69

(2) Cal—Elbert, Limited v McKenna, 254 P 2d 107, 116 C A 2d 480

Ky—Mullins v Hargis, 242 S.W 2d 611

N M—Heron v. Conder, 423 P 2d 985, 77 N M 462

(3) Kan—Beams v Werth, 438 P.2d 957, 200 Kan 532

Mo—Mueller v Larson, 355 S W 2d 5

N M—Chavez v Chavez, 378 P 2d 603, 71 N M. 362

Utah—Music Service Corp v Walton, 432 P 2d 334, 20 Utah 2d 16

(4) Other statements

Mont.—Roe v Newman, 509 P 2d 844, 162 Mont. 135

Tex—Elkson v Butler, Civ App, 443 S W 2d 886

66. Ark—Vick v. Berg, 473 S.W.2d 858, 251 Ark. 573.

Evidence held sufficient

(1) Ala.—Woolf v Oswell, 235 So 2d 794, 285 Ala 648—Mid-State Homes, Inc v King, 249 So 2d 836, 287 Ala. 180.

Ark—Bengel v City of Cotton Plant, 243 S W 2d 370, 219 Ark 510—Chambers v Chambers, 246 S W 2d 124, 220 Ark 51

Cal—Caballero v Balamotus, 300 P 2d 363, 144 C A 2d 58

Idaho—Holland v Beames, 231 P 2d 741, 71 Idaho 343

Ind—Fleetwood v Denny, 251 N E 2d 454, 145 Ind App 404, reh den 255 N E 2d 121, 145 Ind App 404

Miss—Laub v Reason, 64 So 2d 637, 217 Miss 475

Mo—Ford v Spiller, 241 S W 2d 1.

N M—Gish v Hart, 411 P 2d 349, 75 N M 765

N C—Resort Development Co v Phillips, 178 S E 2d 813, 278 N.C 69

N D—Woodland v Woodland, 147 N W 2d 590

Okl—Choate v Muskogee Elec. Traction Co, 295 P 2d 781

(2) Mo—Schell v City of Jefferson, 235 S W 2d 351, 361 Mo 495—Harrington v Muzzy, 258 S W 2d 637

Mont—Gray v Corcoran, 269 P 2d 1091, 127 Mont. 572

Evidence held insufficient

U S—Miners Sav Bank of Pittston, Pa v. U S, D C Pa, 110 F Supp. 563.

Ark—Griffin v Isgrig, 302 S W 2d 777, 227 Ark 931

Ind—Bahar v Tadros, 112 N E.2d 754, 123 Ind App 570

Iowa—Currie v Currie, 90 N W 2d 13

N C—State v Brooks, 181 S.E 2d 553, 279 N C 45

Mere paper chain of title, etc.

Conn—Loewenberg v Wallace, 166 A.2d 150, 147 Conn. 689

Attachment of dower not established

Ark—Robinson v Gulley, 255 S W 2d 438, 221 Ark 695

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72. Fla—Huckins v. Duval County, App, 147 So 2d 551

N C—Allen v Conservative Hunting Club, 189 S E.2d 532, 14 N C App 697

74. S D—Lenker v Musilek, 59 N W.2d 417, 75 S.D. 60

75. Evidence held insufficient

Fla—Van Meter v Kelvey, 91 So 2d 327.

Neb—Krumwiede v Rose, 129 N W 2d 491, 177 Neb 570

Evidence held sufficient

Ky—Com, Dept of Military Affairs v. Kinder, 379 S W 2d 732

77. Mo—C.J.S. cited in State ex rel Dryden v Thym, App, 282 S.W 2d 178, 187

80. Fla.—Huckins v Duval County, App., 147 So.2d 551

Evidence held insufficient

Ohio—Hull v Hull, App, 115 N E 2d 465

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82. Cal—Miller v Boswell, 328 P 2d 517, 162 C.A.2d 508

Fla.—Ford v. Turner, 142 So.2d 335.

Or.—Rohner v Neville, 365 P 2d 614, 230 Or, 31, reh den. 368 P 2d 391, 230 Or. 31

Evidence held to establish prima facie case of ownership

Colo.—Lamberson v. Thomas, 362 P.2d 180, 146 Colo. 539.

Ind.—Otterman v. Hollingsworth, 214 N.E.2d 189, 140 Ind.App 281

Evidence held insufficient

Cal—Ernie v Trinity Lutheran Church, 356 P 2d 525, 51 C.2d 702—Hayes v. Mitchell, 7 Cal.Rptr. 364, 184 C.A 2d 301

Colo.—Boek v, Board of County Com'rs of El Paso County, 520 P.2d 149.

N.C—Allen v Conservative Hunting Club, 189 S.E 2d 532, 14 N.C App. 697.

Utah—Music Service Corp v Walton, 432 P 2d 334, 20 Utah 2d 16

Title from common source

(2) Other cases

Tex—Rains v Thornton, Civ App, 286 S W 2d 174, revd on oth grds, 299 S W 2d 287, 157 Tex 65

83. Cal—Hohn v Riverside County, Flood Control and Water Conservation Dist, 39 Cal Rptr 647, 228 C A 2d 605

Fla—Davis v Wigfall, 70 So 2d 908

N C—Wells v Clayton, 72 S E 2d 16, 236 N C 102

Evidence held sufficient

Ill—Israel v Hart, 124 N E 2d 657, 5 Ill App 2d 233

84. Mo—Dudeck v Ellis, 399 S W 2d 80

§ 82. —— As to Possession

91. Ala—Wiggins v Stapleton Baptist Church, 210 So.2d 814, 282 Ala 255

Evidence held sufficient

(1) Ala—Moorer v Macon, 134 So 2d 181, 273 Ala 66

Fla—Macrellis v George, App, 202 So 2d 107

Mass—Cowden v Cutting, 158 N E 2d 324, 339 Mass 164

N C—Barbee v Edwards, 77 S E 2d 646, 238 N C 215

Okl—Cox v Kelley, 295 P 2d 1061

S C—Kunkle v South Carolina Elec & Gas Co, 161 S E 2d 163, 251 S C 138

(2) Ala—McKenzie v Protestant Episcopal Church in the Diocese of Ala, 50 So 2d 725, 255 Ala 176—Pierce v Lee Bros Foundry Co, 51 So 2d 677, 255 Ala 410—Duke v Harden, 66 So 2d 899, 259 Ala 398—Patrons v. West Dauphin Corp, 194 So.2d 845, 280 Ala 442

(3) Okl.—Woodrow v Ewing, 263 P 2d 167

(5) Ala—McGowin v Felts, 83 So 2d 228, 263 Ala 504.

(8) To show other matters

Ala.—Fudge v. County Bd of Ed of Wilcox County, 133 So 2d 38, 272 Ala. 521

Ark—Calvert v Haley, 238 S W 2d 664, 218 Ark 75

Utah—Layton v Holt, 449 P 2d 986, 22 Utah 2d 138.

Evidence held insufficient

(1) Ala—Woolf v Oswell, 235 So.2d 794, 285 Ala 648

(3) Other matters.

Miss—Boling v. Aaron, 100 So 2d 581, 232 Miss 749

Utah—Music Service Corp. v Walton, 432 P 2d 334, 20 Utah 2d 16—Smith v. DeNiro, 486 P 2d 1036, 26 Utah 2d 153, app after remand 501 P.2d 265, 28 Utah 2d 259

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93. Ala—Williams v Romano, 266 So 2d 750, 289 Ala. 190

94. Ark—Coulter v. O'Kelly, 295 S W 2d 753, 226 Ark. 836.

95. Ind—C.J.S. cited in State ex rel. Cunningham v Circuit Court of Hancock County, 180 N E 2d 527, 529, 242 Ind. 571

Dismissal by less than all plaintiffs

Nev—Langir v. Arden, 409 P.2d 891, 82 Nev 28.

§ 84. Involuntary

4. U.S.—Dudley v. Meyers, C.A.Virgin Islands, 422 F.2d 1389.

Ala.—Hart v Allgood, 72 So.2d 91, 260 Ala. 560—Watson v. Mills, 153 So.2d 612, 275 Ala 176.

Cal.—Pease v City of San Diego, 209 P 2d 843, 93 Cal.App.2d 706.

Me.—Mahaney v. Groves, 117 A.2d 64, 151 Me 200

Neb.—Pressey v State, 114 N.W.2d 518, 173 Neb. 652.

N.Y.—Queens Realty Inc. v. Engelhardt, 223 N.Y.S.2d 636.

N.D—Dixon v. Kaufman, 58 N.W.2d 797, 79 N D 633.

Pa—Rice v Rice, 41 Pa.D. 169

Utah—Meagher v Uintah Gas Co, 255 P 2d 989, 123 Utah 123

Order altering dismissal order held void

Nev—Dredge Corp v Peccole, 505 P 2d 290, 89 Nev 26

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5. Ala—Hart v Allgood, supra, n 4

Ill—Barger v Slayden, 103 N E 2d 645, 411 Ill 237

12. Mo—Stottle v Brittian, 459 S W 2d 310

Okl—Welch v Ayres, 121 P 2d 576, 190 Okl 97

Granting motion to dismiss held error

(1) Other instances

La—Cattle Farms, Inc v Succession of Pautsch, 81 So 2d 424, 228 La 1

Ky—York v Perkins, 269 S W 2d 242

14. Dismissal held proper

N C—Pendergrass v Massengill, 152 S E 2d 657, 269 N C 364

§ 86. In General

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Quieting Title ⇐47(1).

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39. Okl—Craig v Craig's Unknown Heirs, Executors, Administrators, Devisees, Trustees and Assigns, Immediate and Remote, 358 P 2d 835

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45. Wash.—Rainier Ave. Corp v City of Seattle, 459 P 2d 40, 76 Wash 2d 800, app after remand 494 P 2d 996, 80 Wash 2d 362, cert den 93 S Ct 321, 409 U S 983, 34 L Ed 2d 247

Motion for jury trial held properly denied

N H—Town of Hampton v Palmer, 106 A 2d 397, 99 N H 143

§ 87. Scope of Inquiry and Power of Court in General

Library References

Quieting Title ⇐46.

48. Cal—Petersen v Ridenour, 287 P 2d 848, 135 C A 2d 720

Okl—Frensley v White, 254 P 2d 982, 208 Okl 209

Neb—Pierce v Fontenelle, 55 N.W 2d 658, 156 Neb 235

N D—Wilson v Polsfut, 49 N W.2d 102, 78 N.D 204

Okl—Schultz v Evans, 228 P.2d 626, 204 Okl 209—Roberson for Use and Benefit of Miles v Brown, 241 P 2d 181, 205 Okl 680

Pa—Baker v Chunchick, 14 Beaver Co Leg J 195.

Tex—Commercial Securities Co v Thompson, Civ App, 239 S.W 2d 911

Issue of possession

Cal—Hatch v Bank of America N T & S.A., 5 Cal Rptr 875, 182 C A.2d 206

49. U.S—Cherokee Nation v State of Okl, C.A Okl., 461 F 2d 674, cert den, 93 S Ct 521, 409 U S 1039, 34 L Ed 2d 489, app after remand, 490 F.2d 521, cert den. 94 S.Ct 3070, 417 U S 946, 41 L.Ed.2d 666.

Ala.—Stewart v. Childress, 111 So 2d 8, 269 Ala. 87—Almon v Champion Intern Corp., 310 So.2d 207, 293 Ala 727.

Cal—Barcoun v. Le Baron, 289 P 2d 266, 136 C A.2d 593—Devereaux v Frazer Mountain Park & Fisheries Co., 56 Cal.Rptr 345, 248 C A 2d 323.

Conn.—Lake Garda Imp. Ass'n v Battistoni, 231 A.2d 276, 155 Conn. 287, app after remand 280 A 2d 877, 160 Conn. 503—Marquis v Drost, 231 A.2d 527, 155 Conn 327

Del—Suplee v. Eckert, 152 A 2d 289, 38 Del.Ch 359

Ky—Letcher County Coal & Imp Co. v Marlowe, 398 S.W.2d 870.

Mont—Schumacher v. Cole, 309 P.2d 311, 131 Mont 166

Okl—King v Oakley, 434 P 2d 868—Crain v Farmers United Co-op Pool, 472 P 2d 882

Pa—Worthington v Gelvin, 1 Adams L J 174—Gentile v Badner, 13 Chest 432

Determination of boundaries

N M—Alston v Clinton, 388 P 2d 64, 73 N M 341

Peaceable possession

Ala—Patronas v West Dauphin Corp, 194 So 2d 845, 280 Ala 442

All matters available for presentation even if not presented

U S—U S v Perry, C A Ala, 473 F 2d 643

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52. Ala—Ford v Washington, 259 So 2d 226, 288 Ala 194

53. Neb—Pierce v Fontenelle, supra, n 49

55. Wash—O'Brien v Schultz, 278 P 2d 322, 45 Wash 2d 769

59. Wyo—Town of Glenrock v Chicago & N W Ry Co, 279 P 2d 894, 73 Wyo 385, reh den. 281 P 2d 455, 73 Wyo 385

66 N J—Gaub v Nassau Homes, Inc, 147 A 2d 73, 53 N J Super 209

68 Utah—Peterson v Holloway, 334 P 2d 559, 8 Utah 2d 328

Contract for sale of property subject to construction and determination of terms by court under pleadings

Cal.—Petersen v Ridenour, Cal App, 287 P 2d 848, 135 C A 2d 720

Action held for construction of probate decree rather than will

U S—Goodwin v Thomas, C.A Okl, 346 F 2d 40

§ 88. Direction and Framing of Issues

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82. N J—Robinson-Shore Development Co v Gallagher, 125 A 2d 1, 41 N.J Super. 324, op supp. 128 A 2d 884, 43 N J Super 430, affd 133 A 2d 353, 45 N J Super 507, revd on oth grds 138 A 2d 726, 26 N J 59

Pa—Luckey v Leaming, 76 Montg. 529.

84. On preliminary hearing on question of chancery's jurisdiction

(3) Other cases

N.J—Robinson-Shore Development Co v Gallagher, 125 A 2d 1, 41 N J Super 324, op supp 128 A 2d 884, 43 N J Super 430, affd 133 A 2d 353, 45 N J Super 507, revd on oth. grds 138 A 2d 726, 26 N J. 59

§ 89. Questions of Law and Fact

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87. Minn.—Ginsberg v Williams, 135 N.W 2d 213, 270 Minn. 474

94. Cal—Pierce v Freitas, 280 P.2d 67, 131 C.A 2d 65

95. Pa—Taylor v Gross, 42 West 231, revd. on oth grds 171 A 2d 613, 195 Pa Super 225.

97. Cal—Rast v Fischer, 236 P 2d 393, 107 C.A.2d 129—Gerhard v Stephens, 69 Cal.Rptr. 612, 442 P 2d 692, 68 C.2d 864.

N.C—Williams v. Robertson, 70 S E.2d 692, 235 N.C. 478

Utah—Music Service Corp. v. Walton, 432 P.2d 334, 20 Utah 2d 16

Cross action by architect to recover fees

Tex.—Mabry v Priester, 338 S W.2d 704, 161 Tex. 173

98. Ala.—Ford v Washington, 259 So.2d 226, 288 Ala 194

Cal—Maloney v White, 6 Cal Rptr 540, 182 C A 2d 787—Stearns Ranchos Co v Atchison, T & S F Ry Co, 96 Cal Rptr 317, 19 C A 3d 24

Neb—Enrich v Ostwald, 46 N W 2d 686, 154 Neb 8, reh den 47 N W 2d 574, 154 Neb 277

N C—Etheridge v Wescott, 94 S E 2d 846, 244 N C 637

1. Cal—Blackburn v Drake, 27 Cal Rptr 651, 211 C A 2d 806

3. Ala—O'Donnell v First Nat Bank of Ariz, 378 P 2d 244, 93 Ariz 17

Kan.—Mid American Oil Co v Windus, 290 P 2d 102, 178 Kan 499

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11. N C.—Dulin v Fares, 145 S E 2d 873, 266 N C 257

12. Mo—Wilcox v Coons, 241 S W 2d 907, 362 Mo 381

§ 90. —— Dismissal and Nonsuit

14. N Y—Bernat v Echo Soc of Niagara Falls, N Y, Inc, 185 N Y S 2d 847, 8 A D.2d 760, revd on oth grds 197 N Y S 2d 480, 7 N Y 2d 914, 165 N.E 2d 428

Wis.—Saletri v. Clark, 108 N W 2d 548, 13 Wis 2d 325

Wyo—French v Poulos, 440 P 2d 520

15. Ala.—Wilson v. Dorman, 123 So 2d 112, 271 Ala 280

Peaceable possession

Ala—McGowin v. Felts, 83 So 2d 228, 263 Ala. 504

17. Idaho—Roddy v State, 139 P 2d 1005, 65 Idaho 137.

Under particular circumstances suit is not subject to dismissal.[20 1]

20.1. Hawaii—Makuakane v Tanigawa, 443 P 2d 153, 50 Haw 493.

Statutory suit where neither party in actual possession

La.—Texas Delta Land Co. v Whatley, App, 171 So 127

22. Ky—Peabody Coal Co v. Rutter, 283 S W 2d 842

Ky—Ellis v Chestnut, 289 S W 2d 740

§ 91. Instructions

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25. Mo.—Wilcox v. Coons, supra, n 12

N C—Robinson v Sampson, 104 S E.2d 882, 248 N C 746—Barnes v. House, 117 S E 2d 265, 253 N C 444

Utah—Stratford v Wood, 358 P.2d 80, 11 Utah 2d 251

31. Ind—Norman v Norman, 169 N E.2d 414, 131 Ind App 67.

34. N C—Etheridge v. Wescott, 94 S E 2d 846, 244 N.C 637

§ 92. Verdict and Findings

Library References
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37. Mich.—Rose v. Fuller, 175 N.W 2d 344, 21 Mich App. 172

Particular findings held essential to recovery

Ind.—Wyatt v Wyatt, 165 N E 2d 768, 131 Ind.App 1

38. Cal.—Stinson v. Blodget, 266 P.2d 947, 123 C.A 2d 390—O'Keefe v Aptos Land & Water Co, 286 P.2d 417, 134 C A.2d 772, 54 A.L.R.2d 462

N.C.—Etheridge v. Wescott, 94 S E.2d 846, 244 N C 637.

Utah—Provonsha v. Pitman, 305 P 2d 486, 6 Utah 2d 26.

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46. Mo—Farrow v Trickey, 374 S W 2d 49

50. Ariz—MacEwen v Peterson, 427 P 2d 527, 102 Ariz 209

51. **Findings held sufficient**

(1) Cal—Oakes v Fernandez, 238 P 2d 641, 108 C A 2d 168

Neb—Creason v Wells, 62 N W 2d 327, 158 Neb 78

Wash—Hallgren Co, Inc v Correl, Inc, 534 P 2d 591, 13 Wash App 263

(3) N M—Duran v Montoya, 242 P 2d 492, 56 N M 198

(4) Cal—Gerbracht v Obersmith, 277 P 2d 841, 129 C A 2d 793—Danenberg v O'Connor, 15 Cal Rptr 667, 195 C A 2d 194—French v Brinkman, 35 Cal Rptr. 289, 387 P 2d 1, 60 C 2d 547

Nev—Allen v Webb, 485 P 2d 677, 87 Nev 261

Findings held insufficient

N.M—Watson Land Co v Lucero, 517 P 2d 1302, 85 N M 776

52. Ind—Denham v Degymas, App, 138 N E 2d 9

N D—MacMaster v Onstad, 86 N W 2d 36

Findings held insufficient

Cal.—Beck v Combs, 337 P 2d 505, 169 C A 2d 583

Conn—Loewenberg v Wallace, 166 A 2d 150, 147 Conn 689

Findings held supported by evidence

Cal—Black v Arnold Best Co, 268 P 2d 513, 124 C A 2d 378.

Kan—Lanning v Goldsberry, 280 P 2d 954, 177 Kan 419.

Ky—Roberts v Owens, 378 S W 2d 224

Verdict held sufficient

Ky—Havens v Clem, 275 S W 2d 70

53. Okl—Loflin v Capps, 327 P 2d 443

Findings held to raise inference adverse to defendant

Cal—Dunkins v Lamb, 238 P 2d 630, 108 C A 2d 175

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59. Ky—Wood v Davis, 242 S W 2d 612

62. **Conclusion of law held supported by findings of fact**

Kan.—Dennis v Smith, 352 P 2d 405, 186 Kan 539

64. Cal—Rahlves v Rahlves, Inc v Ambort, 258 P 2d 18, 118 C A 2d 465—Erne v. Trinity Lutheran Church, 336 P 2d 525, 51 C 2d 702—French v Brinkman, 35 Cal Rptr 289, 387 P 2d 1, 60 C 2d 547

68. Cal—Wagner v Trout, 268 P 2d 537, 124 C A 2d 248

Ind—Denham v Degymas, App, 138 N E 2d 9—Otterman v Hollingsworth, 214 N E 2d 189, 140 Ind App 281

Findings held not inconsistent

Cal—Gregoire v Redwood City Elementary School Dist., 345 P 2d 99, 174 C.A.2d 667

Findings held not irreconcilable

Cal—Solomon v Walton, 241 P 2d 49, 109 C A 2d 381—Priest v Bell, 267 P.2d 49, 123 C.A 2d 528.

Findings held inconsistent

Conn—Buckley v. Webb, 122 A 2d 220, 143 Conn 309.

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74. N.D.—Bolyea v First Presbyterian Church of Wilton, 196 N.W.2d 149, 55 A L R 3d 1304.

Utah—Stevens v Memmott, 337 P 2d 418, 9 Utah 2d 37

77. Cal.—Gregoire v. Redwood City Elementary School Dist., 345 P.2d 99, 174 C.A.2d 667.

Ill—Chirikos v Akathiotis, 292 N.E.2d 120, 9 Ill App 3d 191

Conclusion held to imply finding of intent to dedicate

Nev—Charleston Plaza, Inc v Board of Ed, La Vegas Union School Dist, 387 P 2d 99, 79 Nev 476

Verdict held finding on issue

Ky—Phillips v Reed, 258 S W 2d 503

N C—Bradham v Robinson, 73 S E 2d 555, 236 N C 589

79. N.D—Bolyea v First Presbyterian Church of Wilton, 196 N W 2d 149, 55 A L R 3d 1304

§ 93. Conditions Precedent

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91. **Clear intent**

Minn—Neill v Hake, 93 N W 2d 821, 254 Minn 110

§ 94. —— Necessity of Doing Equity

94. U S—U S v Fallbrook Public Utility Dist., D C. Cal, 193 F Supp 342, affd in part and revd in part on oth grds, C A., 347 F 2d 48—McAndrews v Belknap C C.A Ky, 141 F 2d 111, cert den 65 S Ct 53, 323 U S. 721, 89 L.Ed 580.

Ariz—Belfer v Lewis, 281 P 2d 794, 79 Ariz. 13—Mason v Ellison, 160 P 2d 326, 63 Ariz. 196.

Idaho—Qunlan v. Pearson, 225 P.2d 455, 71 Idaho 26.

Iowa—Equitable Life Ins. Co. of Iowa v. Condon, 10 N W.2d 78, 233 Iowa 567

N C—Pendergrass v Massengill, 152 S.E 2d 657, 269 N C 364

Tenn.—Chance v Geldreich, 337 S W.2d 770, 47 Tenn App 263

Failure to tender payment

(2) Other statements

Ga—Waldrop v Bettis, 169 S E 2d 777, 225 Ga 491

Text rule inapplicable under particular circumstances

Cal—Stein v Simpson, 230 P 2d 816, 37 C 2d 79

95. Cal—Behrendt v Abraham, 49 Cal Rptr 292, 410 P 2d 828, 64 C 2d 182

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1. N J—Hollings v Hollings, 78 A.2d 919, 12 N J.Super 57

2. Mont.—Montana Valley Land Co. v Bestul, 253 P 2d 325, 126 Mont 426

3. Iowa—Atkin v Westfall, 69 N W.2d 523, 246 Iowa 822

12. Cal—Beck v. Combs, 337 P 2d 505, 169 C.A 2d 583

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17. Tenn—Lowe v. Wright, 292 S W.2d 413, 40 Tenn App 525

20. Okl—King v Oakley, 434 P.2d 868.

Wyo—Lawrence v Demos, 244 P.2d 793, 70 Wyo. 56

21. U S—Bensinger v. Davidson, D.C Cal, 147 F Supp 240.

Cal—Austen v. Underwood, 7 Cal.Rptr 84, 183 C A.2d 304

§ 95. Nature and Extent in General

Library References
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25. Ala.—Sims v City of Birmingham, 49 So.2d 302, 254 Ala. 598—Chestang v Tensaw Land & Timber Co., 134 So 2d 159, 273 Ala. 8

Cal.—Hendershott v Shipman, 231 P.2d 481, 37 C.2d 190—Dunlop v Hersum Lumber Co, 273 P 2d 22, 126 C.A.2d 815—Beucum v. Le Baron, 289 P 2d 266, 136 C.A.2d 593.

Fla—Estey v Vizor, App. 113 So 2d 576

La—Daigle v Pan Am Production Co, 108 So 2d 516, 236 La 578
N M—Kaye v Cooper Grocery Co, 312 P 2d 798, 63 N M 36
N D—State v Rosenquist, 51 N W 2d 767, 78 N D 671—Knauss v Miles Homes, Inc, 173 N W 2d 896
Okl—Woodrow v Ewing, 263 P 2d 167

Discretion not abused

Utah—Helman v Paterson, 241 P 2d 910, 121 Utah 332

No attempt to reform deed

Ala—Reynolds v Burkhalter, 268 So 2d 802, 289 Ala 528

26. Mo—Pitts v Pitts, 388 N W 2d 337—Stottle v Brittian, 459 S W 2d 310

27. Cal—Kudokas v Balkus, 103 Cal Rptr 318, 26 C A 3d 744
Kan—Bennett v LaDoux, 398 P 2d 590, 194 Kan 216
N D—Knauss v Miles Homes, Inc, 173 N W 2d 896
Utah—Johnson v National Public Service Ins Co, 536 P 2d 138

Interest not usually recoverable

Mo—Land Clearance for Redevelopment Authority of City of St Louis v Zitko, 386 S W 2d 69

Relief limited by scope of pleadings

Mo—Lucas v Smith, 383 S W 2d 513

In an action to quiet title the court is required to adjudicate the respective interests of the parties even though plaintiffs fail to establish their claim of title and even if defendants do not request an adjudication of title.[27.5]

27.5. Mo—Baldwin v Black, 618 S W 2d 730—Calvert v Latimer, App., 670 S W 2d 588

28. Ark—Cooper v Cooper, 476 S W 2d 223, 251 Ark 1007
Cal—Stearns Ranchos Co v Atchison, T & S F Ry Co, 96 Cal.Rptr 317, 19 C A 3d 24.
Fla—Cavalier v Ignas, App, 275 So 2d 293, op quashed, Sup., 290 So 2d 20, mand conf to, 294 So.2d 720
Ill—Churikos v Akathiotis, 292 N E 2d 120, 9 Ill. App.3d 191
Mo.—Pitts v Pitts, 388 S.W 2d 337—Jones v Garden Park Homes Corp, 393 S W 2d 501—Seiser v Maggard, 457 S.W 2d 678.

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30. Colo—Shamrock Land & Cattle Co v Hagen, 489 P 2d 607, 30 Colo App. 127
Mo.—Harris v. Consolidated School Dist No. 8, C, Dunklin County, 328 S W 2d 646.
N.Y—Noto v. Headley, 240 N.Y.S 2d 267, 39 Misc 2d 233.

31. Okl—Noyes v McDonnell, 398 P 2d 838.
Or.—Protrka v. Palmer, 423 P 2d 514, 246 Or 467

32. Pa—City of Pittsburgh v. Brown, 105 P L J 459

33. U S.—Moore Oil, Inc. v Snakard, D.C Okl, 150 F Supp 250, remd., C.A., 249 F.2d 318.
Cal—Lake Merced Golf and Country Club v Ocean Shore R Co., 23 Cal Rptr 881, 206 C.A 2d 421
Ky.—Peabody Coal Co v. Rutter, 283 S W.2d 842
Wash.—Harkins v. Del Pozzi, 310 P 2d 532, 50 Wash.2d 237

36. Claim against decedent's estate not condition precedent to cross-bill

Wash.—Parchen v Rowley, 82 P.2d 857, 196 Wash. 340.

37. Cal.—Santoro v Carbone, 99 Cal Rptr 488, 22 C.A 3d 721.
Mo.—Burns v. Ozark Beagle Club, 459 S W 2d 324
Wyo.—Olson v. Leith, 257 P 2d 342, 71 Wyo 316

Disclaimer

(2) Other statements.

Nev.—Tolbos v. Pescole, 335 P.2d 77, 75 Nev 86

38. U S—U S v Fallbrook Public Utility Dist, D C Cal, 193 F Supp 342, affd in part and revd in part on oth grds, C A, 347 F 2d 48
Cal—Petersen v Ridenour, 287 P 2d 848, 135 C A 2d 720—Santoro v Carbone, 99 Cal Rptr 488, 22 C A 3d 721
Ill—Churikos v Akathiotis, 292 N E 2d 120, 9 Ill App 3d 191

Relief held improper

Wash—Lalley v Lalley, 260 P 2d 905, 43 Wash 2d 192

39. Cal—Petersen v Ridenour, 287 P 2d 848, 135 C A 2d 720—Jones v Sacramento Sav & Loan Ass'n, 56 Cal Rptr 741, 248 C A 2d 522

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40. Ala—Motley v Crumpton, 93 So 2d 413, 265 Ala 565
Kan—Crawford v Walrath, 247 P 2d 457, 173 Kan 409

42. N H—Frew v Dasch, 339 A 2d 18, 115 N H 274

Party in possession under claim of ownership, etc.

Mo—Shaw v Armstrong, 235 S W.2d 851, 361 Mo 648

44. Fla—Nelson v Sullivan, 40 So 2d 114

No constructive trusts

N M—Laura v Christian, 537 P 2d 1389, 88 N M 127

§ 96. Relief to Plaintiff

Library References

Quieting Title ⇐49, 50.

46. Ala—Bienville Mortg Corp v Mayo, 245 So 2d 819, 286 Ala 675
Cal—Harless v Johnson, 254 P 2d 122, 116 C A 2d 649—Burch v. Hiberna Bank, 304 P 2d 212, 146 C A 2d 422, cert den, 77 S Ct 1050, 353 U S 968, 1 L Ed 2d 914
Fla—Brown v Semple, App, 204 So 2d 229.
Ky—Aluminum Co of America v Frazer, 328 S W 2d 142
Mont—Johnstone v Sanborn, 358 P 2d 399, 138 Mont 467
Neb—C J.S. quoted at length in Pierce v Fontenelle, 55 N W 2d 658, 664, 156 Neb 235
N C—Collins v R L Coleman & Co, 137 S E 2d 803, 262 N.C 478
Okl—Pettit v Vogt, 495 P 2d 395

Defendants disclaimer of interest

(1) Other matters.

Miss—Edwards v Peresich, 74 So 2d 844, 221 Miss 788

Particular parties and classes thereof held entitled to judgment quieting title in notes and deeds of trusts—Federal Home Loan Bank of San Francisco v Long Beach Federal Sav. & Loan Ass'n, D C Cal, 122 F Supp 401

47. La—Harris v Smith, App, 121 So 2d 747
Miss.—Allen v Thomas, 215 So 2d 882
Neb.—Hein v W. T Rawleigh Co, 92 N W 2d 185, 167 Neb. 176

48. Cal—Stearns Ranchos Co. v. Atchison, T & S.F Ry Co, 96 Cal Rptr. 317, 19 C A 3d 24
Mont.—Te Selle v Storey, 319 P 2d 218, 133 Mont 1.
Or—Muzzy v. Wilson, 487 P 2d 875, 259 Or 512

49. Cal—Kaiser v Mansfield, 325 P 2d 865, 160 C A 2d 620—Mountain Brow Lodge No. 82, Independent Order of Odd Fellows v Toscano, 64 Cal.Rptr 816, 257 C A 2d 22.
Conn—Loewenberg v Wallace, 166 A 2d 150, 147 Conn. 689
Iowa—Bjornstad v Fish, 87 N W 2d 1, 249 Iowa 269
Ky—Thompson v. Gonterman, 285 S W 2d 157.

51. Ark.—Mabry v Covington, 337 S W 2d 643, 232 Ark 308.
Mo.—Roberts v. Quesenberry, 242 S.W 2d 26, 362 Mo 404—Possien v Higgins, 421 S.W 2d 327.

Credit for expenditures

(1) Payments on mortgage except additional interest on delinquent payments

Or—Scott v Nygaard, 405 P 2d 850, 241 Or 347

(2) Not allowed for cleaning premises

Or—Scott v Nygaard, 405 P 2d 850, 241 Or 347

(3) Offset against credits for rental value of property use of which plaintiff has had

Or—Scott v Nygaard, 405 P 2d 850, 241 Or 347

(4) Net credit should be lien on property

Or—Scott v Nygaard, 405 P 2d 850, 241 Or 347

53. Ark—Hunter v Dixon, 410 S W 2d 389, 241 Ark 725
Mass—Wilcox v Sarris, 122 N E 2d 362, 331 Mass 701
N J—Bridgewater Leasing Corp v Wollman, 226 A 2d 735, 94 N J Super 28
Utah—Blanchard v Smith, 255 P 2d 729, 123 Utah 119

54. U S—Dudley v Meyers, C A Virgin Islands, 422 F 2d 1389
Cal—Eddleman v Deavel, 237 P 2d 38, 107 C A 2d 351
Colo—Lamberson v Thomas, 362 P 2d 180, 146 Colo 539
Iowa—Klosterboer v Engelkes, 125 N W 2d 115, 255 Iowa 1076
Mo—Obermeyer v Hentschel, 389 S W 2d 203—Possien v Higgins, 421 S W 2d 327

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Cal—Tesseyman v Jovick, 278 P 2d 921, 130 C A 2d 384

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59. Pa—Haberlein v Limbacher, 16 Cambria 205

67. Ind—Denham v Degymas, 147 N E 2d 214, 237 Ind 666

68. N Y—Noto v Headley, 240 N Y S 2d 267, 39 Misc 2d 233

70. Me—Strater v Strater, 83 A.2d 130, 147 Me. 33.

71. Ind—Kielczewski v Rochwalik, App, 131 N E 2d 469, 126 Ind.App 206

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79. Ariz—McNeil v Attaway, 348 P 2d 301, 87 Ariz. 103
Cal—Luz v Lopes, 10 Cal Rptr 161, 358 P 2d 289, 55 C 2d 54
N C—Watson v Carr, 175 S E 2d 733, 9 N C App 217.

86. Fla—Nissim Hadjes, Inc v Di Costanzo, App, 197 So 2d 602
Or—Scott v Nygaard, 405 P 2d 850, 241 Or. 347

92. Ala—Sims v City of Birmingham, supra, n 25

Limited to improvements made before plaintiff learned there was a possible defect of title

Or—Scott v Nygaard, 405 P 2d 850, 241 Or 347

§ 97. —— Cancellation and Reformation

Library References

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96. Cal.—Hernandez v Hernandez, 242 P.2d 59, 109 C A 2d 903
Fla—Daytona Development Corp. v Bergquist, App., 308 So.2d 548.
La—Daigle v Pan Am Production Co., 108 So 2d 516, 236 La. 578—Shell v. Greer, App, 171 So 2d 672
Mont.—Schumacher v Cole, 309 P 2d 311, 131 Mont 166
N J.—East Newark Realty Corp v Dolan, 83 A.2d 346, 15 N J Super 288

97. Cal.—West v U L C Corp, 42 Cal Rptr 603, 232 C A 2d 85

Plaintiff not entitled to reformation

U S—Evangelical Lutheran Church v Standard Oil & Gas Co., C.A N D, 251 F.2d 412

Relief denied in certain circumstances

N D—MacMaster v Onstad, 86 N W 2d 36

Although not demanded in pleadings

Idaho—Collins v Parkinson, 527 P 2d 1252, 96 Idaho 294

98. R I—Hill v Ogrodnik, 113 A 2d 734, 83 R I 138, rearg den 114 A 2d 398, 83 R I 138

§ 98. —— Injunction

6. Cal—Mansfield v Kaiser, 1 Cal Rptr 555, 176 C A 2d 632—Little v Schwartz, 6 Cal Rptr 40, 182 C A 2d 594—West v U L C Corp, 42 Cal Rptr 603, 232 C A 2d 85—Santoro v Carbone, 99 Cal Rptr 488, 22 C A 3d 721

Conn—Lake Garda Imp Ass'n v Battistoni, 280 A 2d 877, 160 Conn 503

Ill—Allensworth v First Galesburg Nat Bank & Trust Co, 128 N E 2d 600, 7 Ill App 2d 1

Wyo—Olson v. Leith, 257 P 2d 342, 71 Wyo 316

Injunctive relief not proper

Pa.—Farmers' Northern Market Co v Fulton Nat Bank of Lancaster, 55 Lanc Rev 31, 18 Monroe L.R 26

Injunctive relief not proper

Wash.—Strom v Sheldon, 527 P 2d 1382, 12 Wash App. 66

§ 99. —— Recovery of Damages

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10. N M—Chavez v Gomez, 423 P 2d 31, 77 N M 341.

Pa.—Dippy v Berks Title Ins Co., 9 Chest 396

12. Cal—Kay v. Kay, 10 Cal Rptr 196, 188 C A 2d 214.

Conn.—Loewenberg v Wallace, 166 A 2d 150, 147 Conn 689

Fla.—McGriff v. McGill, 62 So 2d 28

Ind.—Monawa Tribe No 352 I O R M of St Paul, Ind v. Wiley, 142 N E.2d 488, 127 Ind App. 660

N.Y.—Burke v. Suburban Mortg. Corp, 252 N Y S 2d 911, 43 Misc.2d 1077

Tenn—Montgomery v Tapp, 321 S W 2d 565, 204 Tenn 372

Punitive damages

Fla.—Glassman v Lieberman, App, 285 So 2d 29

Idaho—Lewiston Pistol Club, Inc v Imthurn, 486 P 2d 275, 94 Idaho 264

15. Wis.—C.J.S. cited in Schlytter v Lesperance, 215 N.W 2d 552, 555, 62 Wis 2d 661

16. Okl.—Sooner Pipe & Iron Co v Bartholomew, 248 P 2d 225, 207 Okl. 191.

Discretionary power to award attorney's fees

Ariz.—McNeil v Attaway, 348 P.2d 301, 87 Ariz 103

18. Cal—Vaughan v Roberts, 113 P.2d 884, 45 Cal App.2d 246.

Idaho—C.J.S. quoted in Beal v Mars Larsen Ranch Corp., Inc., 586 P.2d 1378, 1383, 99 Idaho 662

Rental value

Iowa—Simpson v. Bostwick, 80 N W 2d 339, 248 Iowa 238.

Okl.—Pettit v Vogt, 495 P 2d 395.

§ 100. Relief to Defendant

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24. Cal.—Harless v Johnson, 254 P 2d 122, 116 C A 2d 649—Tenneyman v. Jovick, 278 P 2d 921, 130 C.A.2d 384.

Idaho—Lasher v. Krasselt, 492 P.2d 52, 94 Idaho 513, app. after remand 538 P 2d 783, 96 Idaho 854

Mo.—Seiser v Maggard, 457 S W.2d 678—Parham v. Chandler, 470 S W 2d 477

N.D—Rennick v. Rennick, 80 N.W.2d 300

Va.—Sanford v Sims, 66 S E 2d 495, 192 Va 644.

Necessity of doing equity

U S—U S v Fallbrook Public Utility Dist, D C Cal, 193 F Supp 342, affd in part and revd in part on oth grds, C A, 347 F 2d 48

26. Ala—Chestang v Tensaw Land & Timber Co, 134 So 2d 159, 273 Ala 8—Hinds v Slack, 299 So 2d 717, 293 Ala 25

Cal—Mooney v Shields, App, 16 Cal Rptr 449, 196 C A 2d 165—Kish v Bay Counties Title Guaranty Co, 62 Cal Rptr 494, 254 C.A 2d 725—Jay v Dollarhide, 84 Cal Rptr 538, 3 C A 3d 1001

Mo—Pettus v City of St Louis, 242 S W 2d 723, 362 Mo 603—Baugh v Grigsby, 286 S W 2d 798, 58 A L R 2d 607—Hunter v Hunter, 320 S W 2d 529, 69 A L R 2d 1048—Jones v. Garden Park Homes Corp, 393 S W 2d 501—Baxter v. Vasquez, App, 501 S W 2d 201

Ohio—Shewell v Board of Ed of Goshen Union Local School Dist, 96 N E 2d 323, 88 Ohio App 1

Tex—Messer v Johnson, 422 S W 2d 908

Utah—Pender v Bird, 224 P 2d 1057, 119 Utah 91

Wash.—Harkins v Del Pozzi, 310 P 2d 532, 50 Wash 2d 237—Anderson v Blossom, 387 P 2d 507, 63 Wash 2d 330

Cross bill not necessary

Ala—Myers v Moorer, 134 So 2d 168, 273 Ala 18

Denial of interest by defendant

N D—Smith v Anderson, 144 N W 2d 530

27. Ark—Lusby v Herndon, 361 S W 2d 21, 235 Ark 509

Colo—Zavislak v Shipman, 362 P 2d 1053, 147 Colo 184

Conn—Loewenberg v Wallace, 166 A 2d 150, 147 Conn 689.

Ind—Dowell v Jolly, App, 159 N E 2d 590, 130 Ind App 280

Ky.—Aluminum Co of America v Frazer, 328 S W.2d 142—Vogler v Salem Primitive Baptist Church, 415 S W 2d 72

La—Allen v Butler, App, 51 So 2d 162

Mo—Pitts v. Pitts, 388 S W 2d 337.

Tex.—Eubank v Twin Mountain Oil Corp., Civ App, 406 S W 2d 789, err ref no rev err

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28. N C—Garris v Butler, 189 S E 2d 809, 15 N C App 268

§ 101. —— Incidental, Additional, or Alternative Relief in General

Library References

Quieting Title ⇐51.

36. U.S—U.S. v. Fallbrook Public Utility Dist, D.C. Cal., 193 F Supp 342. Affd in part and revd in part on oth grds, C A, 347 F 2d 48.

R I—Hill v Ogrodnik, 113 A 2d 734, 83 R I, 138, rearg den. 114 A 2d 398, 83 R I 138

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Where defendant has not sought reformation it has been held that the court cannot decree reformation of a deed.[43.1]

43.1. Mo—Walters v. Tucker, 281 S W 2d 843.

48. U.S—Capital Investors Co v. Devers, C A Va., 360 F 2d 462, cert den. 87 S Ct 294, 385 U S 934, 17 L Ed.2d 214, reh. den. 87 S Ct 702, 385 U.S 1021, 17 L Ed.2d 560, app. after remand 387 F 2d 591

50. Taxes

Okl—Parks v Hughes, 312 P.2d 435.

Where statute authorizing suit by defendant for damages for breach of warranty requires that a separate action be brought damages cannot be recovered in the quiet title action.[53.1]

53.1. Okl—Cutright v Richey, 285 P 2d 864

§ 102. —— Reimbursement for Moneys Expended

54. U S—Delta Drilling Co. v Arnett, C A Ky, 186 F 2d 481, cert den 71 S Ct 574, 340 U S 954, 95 L Ed 688, reh den 71 S.Ct. 735, 341 U S 917, 95 L Ed 1352

Ala—M C Dixon Lumber Co, Inc v Mathison, 266 So 2d 841, 289 Ala 229.

Ark—Upshaw v Wilson, 257 S W 2d 279, 222 Ark. 78.

Cal.—Kaiser v Mansfield, 297 P 2d 98, 141 C A 2d 428—Behrendt v Abraham, 49 Cal Rptr 292, 410 P 2d 828, 64 C 2d 182

N D—United Accounts, Inc v Larson, 121 N W 2d 628

After entry of adverse judgment

Okl—Gibbons v Foster, 296 P 2d 133

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62. Utah—C J.S. cited in Jolley v. Corry, 671 P 2d 139, 142

64. Cal—City of Vernon v. Southern Cal. Edison Co, 12 Cal Rptr 701, 191 C A.2d 378

Conn—Robinson v Myers, 244 A 2d 385, 156 Conn 510

Iowa—Simpson v. Bostwick, 80 N.W 2d 339, 248 Iowa 238

Ky—Roberts v Owens, 378 S W 2d 224

Tex—Gause v Gause, Civ App, 430 S W 2d 409

67. Miss—Hays v Cole, 73 So 2d 258, 221 Miss. 459

68. Possession without color of title

N D—Greeman v. Smith, 138 N W.2d 433

69. Ala.—Davis v Bell, 306 So 2d 263, 293 Ala. 513

74. Offset to damages

Cal—Taliaferro v Colasso, 294 P 2d 774, 139 C.A.2d 903

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80. Iowa—C.J.S. quoted in Moser v Thorp Sales Corp, 312 N W 2d 881, 902, app after remand 334 N W 2d 715

Kan—Kalivoda v. Pugh, 226 P.2d 857, 170 Kan. 505.

Mich—Bonninghausen v Hansen, 9 N.W 2d 856, 305 Mich 595.

N D—United Accounts, Inc v Larson, 121 N.W.2d 628

Effect of recorded deed

Cal—Dinkins v Lamb, 238 P 2d 630, 108 C A.2d 175

Reimbursement by defendant

Fla—Spohrer v Elliott, App., 284 So.2d 420

90. Evidence authorizing finding improvement lien was on property not described in complaint

Ala—Case v. Ward, 160 So.2d 859, 276 Ala. 242

91. Credit for proceeds of insurance not allowed

Pa—Farmers Production Credit Ass'n v Rauch, 32 D & C 2d 477, 30 Leh.L.J. 345.

§ 103. Nature, Form, and Requisites

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16. Mo.—City of Kirkwood v. Young, 252 S W.2d 286.

17. Cal.—McGlasson v Blythe, 299 P.2d 325, 143 C A 2d 152.

Conn.—Lake Garda Imp. Ass'n v. Battistoni, 231 A.2d 276, 155 Conn 287 App after remand 280 A 2d 877, 160 Conn. 503

Mo—Lazare v. Hoffman, 444 S W 2d 446.

N J—Garden of Memories, Inc v Forest Lawn Memorial Park Ass'n, 264 A 2d 82, 109 N J Super 523.

Ohio—Board of Ed., City of Wapakoneta v Unknown Heirs of Aughinbaugh, Com Pl, 128 N.E.2d 534

Wash—Hallgren Co, Inc v Correl, Inc, 534 P 2d 591, 13 Wash App 263

Judgments or decrees held sufficient

Ala—Ford v Washington, 259 So 2d 226, 288 Ala 194

Ariz—Hamilton v McDaniel, 227 P 2d 755, 71 Ariz 371

Cal—Stein v Simpson, 230 P 2d 816, 37 C 2d 79—Butler v Butler, 10 Cal Rptr 382, 188 C A 2d 228—Newhouse v Upchurch, 99 Cal Rptr 436, 22 C A 3d 204

Mo—Harrington v Muzzy, 258 S W 2d 637

Judgment should reflect interest as owner

La—Yerger v Lopez, App, 160 So 2d 773, writ ref 162 So 2d 576, 245 La 1087

Joint or several judgments

Cal—Thorson v Western Development Corp, 59 Cal Rptr 299, 251 C A 2d 206

18. Utah—Alleman v Miner, 353 P 2d 463, 10 Utah 2d 356

19. Conn—Marquis v Drost, 231 A 2d 527, 155 Conn 327.

Wash—Symington v. Hudson, 243 P 2d 484, 40 Wash 2d 331

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25. Cal—Stein v Simpson, 253 P 2d 1026, 116 C A.2d 559

26. Cal—Uren v Troup, 242 P 2d 895, 110 C A 2d 419

Inclusion in the judgment of the name of a person not a party is without effect.[28.5]

28.5. Cal—Hurt v Jones, 304 P 2d 786, 147 C A 2d 164

32. N.J—Wilomay Holding Co v. Peninsula Land Co, 116 A 2d 484, 36 N J Super 440

33. Idaho—Lisher v Krasselt, 492 P.2d 52, 94 Idaho 513, app after remand 538 P 2d 783, 96 Idaho 854

Judgments held sufficiently certain

Cal—Daluso v Boone, 75 Cal.Rptr. 287, 269 C A 2d 253

35. U S—Elk Horn Coal Corp. v. Anderson Coal Co, D C.Ky, 223 F Supp. 746.

36. Descriptions held proper or sufficient

Ala.—Oreo v Cater, 133 So 2d 864, 272 Ala. 657

Cal—Hay v Allen, 247 P 2d 94, 112 C A.2d 676

Mo.—Hatch v Rhyne, 253 S.W.2d 170

Neb.—Converse v. Kenyon, 132 N.W 2d 334, 178 Neb 151.

N.M.—Alston v. Clinton, 388 P 2d 64, 73 N.M 341—Marrujo v. Chavez, 426 P 2d 199, 77 N M 595

Description held insufficient

Cal.—City of Redlands v Nickerson, 10 Cal Rptr. 431, 188 C.A.2d 118.

Colo.—Thomson v Clarks Inc, 427 P 2d 314, 162 Colo 506

Idaho—Lisher v Krasselt, 492 P 2d 52, 94 Idaho 53, app. after remand 538 P.2d 783, 96 Idaho 854

Miss.—Berry v Houston, 195 So.2d 515

§ 104. Judgment or Decree by Default or Pro Confesso

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40. N.D.—State v. Rosenquist, 51 N.W.2d 767, 78 N.D. 671

45. Mont.—Diamond Inv. Co. v Geagan, 460 P 2d 760, 154 Mont. 122.

§ 105. Construction, Operation, and Effect

Library References
Quieting Title ⇐52.

53. U S—Panton v Lee, C A Okl, 261 F 2d 183—Superior Oil Co v Vanderhoof, D C Mont, 307 F Supp 84

Ark—Massee v Schiller, 420 S W 2d 839, 243 Ark 572

Cal—Newman v Cornelius, App, 83 Cal Rptr 435, 3 C A 3d 279

Conn—Marquis v Drost, 231 A 2d 527, 155 Conn 327

Fla—Sheffield v Carter, App, 141 So 2d 780

Idaho—Howard v Bar Bell Land & Cattle Co, 340 P 2d 103, 81 Idaho 189

Mont—Smith v Musselshell County, 472 P 2d 878, 155 Mont 376

N D—Woodland v Woodland, 147 N W 2d 590

Pa—Kehley v Dettrick Hunting Club, Inc, 60 Lack Jur 105

Tex—Outlaw v Bowen, Civ App, 285 S W 2d 280, err ref no rev err—Eubank v. Twin Mountain Oil Corp, Civ App, 406 S W 2d 789, err ref no rev err

Iowa—Dvorak v Dvorak, 60 N W 2d 88, 244 Iowa 1113

Okl—Bartlett v Lashley, 229 P 2d 185, 204 Okl 299—Younge v Knappenberger, 240 P 2d 1114, 206 Okl 48—Murphy v Walkup, 258 P 2d 922

Wash—Hallgren Co, Inc v Correl, Inc, 534 P 2d 591, 13 Wash App 263

W Va—Brewster v Hines, 185 S E 2d 513, 155 W Va 302

Later transfer by prevailing party not prohibited

Okl—Colby v Stevenson, 265 P 2d 477

Unknown persons parties

Colo—Bowen v. Turgoose, 314 P 2d 694, 136 Colo 137.

Judgment is self-operating

N M—Kaye v Cooper Grocery Co, 312 P 2d 798, 63 N M 36

Interest of nonparty not affected by decree

N M—State v Brown, 383 P 2d 243, 72 N M 274

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59. "Owner in fee" construed to mean merely owner of estate of inheritance—Ocean Shore R Co v Doelger, 274 P 2d 23, 127 C A 2d 922

66. Cal—Little v. Schwartz, 6 Cal Rptr 40, 182 C.A 2d 594

§ 106. Opening, Vacating, or Setting Aside

Library References
Quieting Title ⇐52

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77. U.S—Buckhannan v. Nash, D C.Ark., 216 F Supp 843

Pa—Freeman v Lloyd, 15 Beaver Co Leg J 100

Invalid service

Okl.—Murphy v. Walkup, supra, n. 53

Pleadings held insufficient

N M—Archuleta v Landers, 356 P 2d 443, 67 N M 422

Decree not void in absence of bad faith

Mo.—Nowlin v. Columbia School Dist., 401 S W.2d 394.

78. Denial held proper

Wyo—Globe Min. Co. v Anderson, 318 P 2d 373, 78 Wyo. 17

79. Mont.—Clinton v Miller, 226 P 2d 487, 124 Mont 463—Hinton v. Staunton, 228 P 2d 461, 124 Mont. 534

80. Mo.—Nowlin v. Columbia School Dist, 401 S W.2d 394.

§ 107. Amendment and Modification

81. Amendment outside terms of original decree improper

Colo—McMullin v City and County of Denver, 294 P 2d 918, 133 Colo 297

La—Watt v Stann, App, 195 So 2d 343

82. Okl—Treece v Treece, 366 P 2d 625

Decree void in absence of notice

Miss—Campbell v Campbell, 97 So 2d 527, 231 Miss 658

Procedure

Mich—Bender v Zoba, 136 N W 2d 19, 376 Mich. 237

§ 108. Enforcement

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85. Ariz—Wineglass Ranches, Inc. v Campbell, 473 P 2d 496, 12 Ariz App 571

§ 110. Costs

89. U S—Hamilton v Nakai, C A.Ariz, 453 F.2d 152, cert den 92 S Ct 2044, 406 U S 945, 32 L Ed 2d 332

§ 111. —— Right

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97. Lien for improvements for defendant

Miss—Magee v Holmes, 70 So.2d 60, 220 Miss 49

Prevailing party entitled to costs

Mo—Land Clearance for Redevelopment Authority of City of St Louis v Zitko, 386 S W 2d 69.

Defendant held not entitled to attorney's fees and expenses

Utah—Lyman Grazing Ass'n, v Smith, 473 P 2d 905, 24 Utah 2d 443

Costs awarded against plaintiff who prevailed in part

Miss—Fant v Standard Oil Co., 247 So 2d 132

98. Cal—Thorson v Western Development Corp., 59 Cal Rptr 299, 251 C A 2d 206

Mont—Godfrey v. Pilon, 529 P.2d 1372, 165 Mont. 439

3. Ariz—Hamilton v McDaniel, 227 P 2d 755, 71 Ariz 371.

11. U S—Federal Home Loan Bank of San Francisco v Long Beach Federal Sav. & Loan Ass'n, D C. Cal, 122 F.Supp 401

N.M—Hughes v West, 430 P 2d 778, 78 N M 281

Costs properly taxed only against answering defendants

N D—Silbernagel v Silbernagel, 55 N W 2d 713, 79 N D 275

Liability for attorney's fees by contract

Cal—Tibbets v Robb, 322 P 2d 585, 158 C A 2d 330.

13. Costs required under lease

Cal.—Stubblefield v. Fickle, 266 P 2d 808, 123 C.A.2d 325

§ 112. —— Amount and Items Allowable

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23. Or—Stoll v Curl, 551 P 2d 1058, 275 Or 487.

24. N.Y—Great River Realty Corp. v. Davis, 167 N.Y.S 2d 850, 4 A.D.2d 949, rearg. and app. den. 169 N Y.S 2d 431, 5 A D.2d 679, motion withdrawn 172 N.Y S 2d 813, 4 N Y.2d 761, 149 N E.2d 332, affd. 177 N Y S.2d 520, 4 N.Y.2d 1008, 152 N.E.2d 539

Tex.—Bush v Bush, Civ App, 265 S W 2d 676, err dism

Burden of proving necessity for incurring expense

Cal —Fabares v Benjamin, 4 Cal Rptr 359, 180 C A 2d 264

In rem jurisdiction

Ariz —Walter v Northern Arizona Title Co, 433 P 2d 998, 6 Ariz App 506

Various other matters, relating to the amount and items of costs allowable, have been adjudicated.[24 1]

24.1. Ariz —Chantler v Wood, 430 P 2d 713, 6 Ariz App 134, op supp 432 P 2d 469, 6 Ariz App 325—Chantler v Wood, 432 P 2d 469, 6 Ariz App 325

Ark —Griffin v Isgrig, 302 S W 2d 777, 227 Ark 931

La —Benedict v. Lynch, App, 81 So 2d 91

Okl —Cutright v Richey, 285 P 2d 864

Expenses not contemplated by contract in event of breach

Cal —Fabares v Benjamin, 4 Cal Rptr 359, 180 C A 2d 264

Use of expert testimony to determine attorney fees

Cal —Fabares v Benjamin, 4 Cal Rptr 359, 180 C A 2d 264

Attorney's fees not recoverable

Miss —Equity Services Co v Hamilton, 257 So 2d 201

Costs for services at plaintiff's request not allowed

Or —Stoll v Curl, 551 P 2d 1058, 275 Or 487

Witness fee reduced

Or —Stoll v Curl, 551 P 2d 1058, 275 Or 487

§ 113. Right of Action and Defenses

25. Pa —Best v Kennelty, 78 Pa Dist & Co 424, 33 West Co 239

§ 114. Proceedings and Relief

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86. Pa —Thomas v Venneri, 17 D & C 2d 379, 107 P L J 24—Hoffman v Bozitsko, 182 A 2d 113, 198 Pa Super 553

90. Pa —Hoffman v. Bozitsko, 182 A 2d 113, 198 Pa.Super 553

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24. Pa.—Kline v Patynski, 36 Northumb.L J 206

26. Pa.—Paulsen v Snyder, 6 Chest Co. 154

QUIT.

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9. Other phrases

(1) "Quit work" generally means a complete severance of the employer-employee relationship —Neff v Board of Review, Bureau of Unemployment Compensation, Ohio Com.Pl, 117 N E.2d 533, 537

QUOD.

Maxims

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Quod per me non possum, nec per alium. A maxim meaning "What I cannot do myself, I cannot do through another." [24 1]

24.1. Ark.—Muncrief v Hall, 262 S W.2d 92, 95, 222 Ark 570

51 C J p 303 note 38

Quorum.

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32. La —C.J.S quoted in Alonzo v Louisiana Dept of Highways, App, 268 So 2d 52, 54

33. La —C.J.S quoted in Alonzo v Louisiana Dept of Highways, App, 268 So 2d 52, 54

34. La —C J.S quoted in Alonzo v Louisiana Dept of Highways, App, 268 So 2d 52, 54

35. Ind —Davidson v State, Ind, 221 N E 2d 814, 248 Ind 26

La —C J S quoted in Alonzo v Louisiana Dept of Highways, App, 268 So 2d 52, 54

36. La —C J S. quoted in Alonzo v Louisiana Dept of Highways, App 268 So 2d 52, 54

Tenn —C.J.S cited in Polk County v State Board of Equalization, 484 S W 2d 49, 56

37. La —C.J S. quoted in Alonzo v Louisiana Dept of Highways, App 268 So 2d 52, 54

Majority normally a quorum

Ind —Davidson v State, 221 N E 2d 814, 248 Ind 26

38. La —C.J S quoted in Alonzo v Louisiana Dept of Highways, App, 268 So 2d 52, 54

Similarly expressed

(1) Ordinarily a "quorum" means a majority of all entitled to vote —Bedford County Hospital v Bedford County, Tenn App, 304 S W 2d 697, 704, 42 Tenn App 569, citing C.J.S.

39. La —C J S. quoted in Alonzo v Louisiana Dept of Highways, App, 268 So 2d 52, 54

Tenn —C J.S quoted in Polk County v State Board of Equalization, 484 S W 2d 49, 56

40. La —C.J S. quoted in Alonzo v Louisiana Dept of Highways, App, 268 So 2d 52, 54

Tenn —C J.S quoted in Polk County v State Board of Equalization, 484 S W 2d 49, 56

QUOTA.

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42. "Fraction" synonymous see 37 C J S p 138 note 77

"Proportion" synonymous see 70 C J S p 449 note 64 1

Similarly defined

(1) A proportional part or share —Oliphint v Oliphint, 54 So 2d 18, 23, 219 La 781

QUOTATION.

47. In commercial usage

Naming or publishing of current price of stocks, bonds, or any commodity and also the price named — Tomlinson v Wander Seed & Blub Co, 2 Cal Rptr 310, 314, 315, 177 C A 2d 462

QUO WARRANTO

§ 1. Definitions, Origin, and Development of Remedy

Library References

Quo Warranto ⇐1, 2.

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1. U S —C.J.S. cited in U S v. Nussbaum, D.C.Cal, 306 F Supp 66, 68—C.J.S. cited in Barany v Butler, C A.Ind., 670 F 2d 726, 735

Ill —People ex rel. Freeport Fire Protection Dist, Stephenson County v City of Freeport, 412 N.E 2d 718, 45 Ill Dec 367, 90 Ill.App.3d 112

Kan —Brinson v School Dist. No 431, 576 P 2d 602, 223 Kan 465.

Ky.—Arnett v De Weese, 304 S W 2d 784

La —Hebert v. Stansbury, App., 351 So.2d 253, writ den. Sup., 353 So 2d 1335.

Mo —C.J.S. cited in State ex rel. Schneider's Credit Jewelers v Brackman, 272 S W 2d 289, 292, app. transf, App., 260 S W 2d 800

Ohio—State ex rel Brown v Regional Public Safety Service Corp, 353 N E 2d 851, 47 Ohio App 2d 300, 1 O O 3d 360

Okl —Gardner v Scott, 237 P 2d 863, 205 Okl 333

R I —Fargnoli v Cianci, 397 A 2d 68, 121 R I 153

Tex —Hawkins v State, Cr App, 628 S W 2d 71

Other definitions

(3) Ill.—People ex rel Chillicothe Tp v Board of Review of Peoria County, 167 N E 2d 553, 19 Ill 2d 424

Miss —State ex rel Patterson v Land, 95 So 2d 764, 231 Miss 529, sug err over, 96 So 2d 828, 231 Miss 529

Ohio—State ex rel St Sava Serbian Orthodox Church of Cleveland v Riley, 305 N E 2d 808, 36 Ohio St 2d 171

Wyo —Board of Trustees of School Dist No 3 in Natrona County v District Boundary Bd of Natrona County, 489 P 2d 1393

2. Other definitions

Tenn —State ex rel Abernathy v Anthony, 335 S W.2d 832, 206 Tenn 597

Tex —State ex rel Bennett v Clarendon Independent School Dist, Civ App, 287 S W 2d 279, revd on oth grds 298 S W 2d 111, 156 Tex 542—Fuller Springs v State ex rel City of Lufkin, 513 S W 2d 17

Wash —Green Mountain School Dist No. 103 v Durkee, 351 P 2d 525, 56 Wash 2d 154

3. Removal suit

Tex —Lamb v State ex rel Johnson, 267 S W 2d 285

Distinction between quo warranto and scire facias no longer important

Wis —State ex rel City Bank & Trust Co. v Marshall & Ilsley Bank, 90 N W 2d 556, 4 Wis 2d 315

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4. Me —C.J S. quoted at length in State by Information of Hancock ex rel Banks v Elwell, 163 A 2d 342, 344, 156 Me 193

Tex —State ex rel City of Colleyville v City of Hurst, Civ App, 519 S W 2d 698, err ref no rev err

5. Tenn —State ex rel. Wallen v Miller, 304 S W.2d 654, 202 Tenn 498

6. Colo —People ex rel Wilson v Blake, 260 P 2d 592, 128 Colo 111

Ill —People ex rel Adamowski v Wilson, 170 N.E 2d 605, 20 Ill 2d 568—People ex rel. Knaus v. Village of Hinsdale, 250 N E.2d 309, 111 Ill App.2d 368.

Mo —State ex inf. Dalton v. Mosley, 286 S W 2d 721, 365 Mo 711

9. Ohio—State ex rel City of Cincinnati v. Butler Water Conservancy Dist, 214 N.E.2d 86, 5 Ohio St 2d 80—State ex rel Cain v Kay, 309 N E 2d 860, 38 Ohio St 2d 15

Okl —C.J.S. quoted in Wagoner County Election Bd v Plunkett, 305 P 2d 525, 529.

Pa.—Stalgitis v Sauers, 53 Sch L R. 120

14. Ill —People ex rel Carey v Lincoln Towing Service, Inc., 369 N.E 2d 94, 11 Ill Dec 640, 54 Ill.App 3d 61

Me —Black letter summary quoted in State by Information of Hancock ex rel. Banks v. Elwell, 163 A.2d 342, 344, 156 Me. 193.

Defined

Minn —State ex rel. Danielson v. Village of Mound, 48 N W 2d 855, 234 Minn. 531.

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17. Minn.—State ex rel Danielson v. Village of Mound, supra, n 14.

Purpose of statute

Mo —State ex inf. Graham v Hurley, 540 S W 2d 20.

W Va.—State ex rel Morrison v. Freeland, 81 S E 2d 685, 139 W.Va. 327.

18. Prior to Statute of Anne

Del.—Cleaver v Roberts, 203 A.2d 63, 7 Storey 538

20. U.S.—U S v. Nussbaum, D.C.Cal., 306 F Supp 66

Colo—People ex rel Mijares v Kruss, 357 P 2d 352, 144 Colo 551, 82 A L R 2d 1163

Ga—Camp v Trapp, 71 S E 2d 534, 209 Ga 298

Ill—C.J.S. cited in People ex rel Carey v Lincoln Tow Serv Inc, 369 N E 2d 94, 97, 11 Ill Dec 640, 54 Ill App 3d 61

Iowa—State ex rel Robbins v Shellsburg Grain & Lumber Co, 53 N W 2d 143, 243 Iowa 734

N Y—Valentin v Simon, 413 N Y S 2d 266, 98 Misc 2d 5

21. Ill—People ex rel McCarthy v Firek, 125 N E 2d 637, 5 Ill 2d 317

Statutory provisions must be followed

Ala—State ex rel Norrell v Key, 165 So 2d 76, 276 Ala. 524

Ind—State ex rel Kiser v Millspaugh, 175 N E 2d 13, 241 Ind 656

Ohio—State ex rel Kearns v Ohio-Midland Light & Power Co, App, 140 N E 2d 430

Tenn—State ex rel. Southerland v Town of Greeneville, 297 S W 2d 68, 201 Tenn 133

22. Distinction between quo warranto and statutory proceeding in nature of quo warranto

R I—Andrews v Stiles, 209 A 2d 210, 99 R I 546

23. N J—Keyport Sewerage Authority v Granata, 144 A 2d 811, 52 N J Super 76

24. Colo—People ex rel Mijares v Kruss, 357 P 2d 352, 144 Colo 551, 82 A L R 2d 1163

D C—Slim Olson, Inc v National Enforcement Commission, D C, 118 F Supp 861, revd on oth grds, C A, 221 F.2d 92.

La—Leleng v Sutherland, App, 134 So 2d 627

Minn—Town of Burnsville v City of Bloomington, 117 N W 2d 746, 264 Minn. 133

Liberal construction

Ariz—City of Scottsdale v McDowell Mountain Irr and Drainage Dist, 483 P 2d 532, 107 Ariz 117

Wash.—State ex rel. Evans v Brotherhood of Friends, 247 P.2d 787, 41 Wash 2d 133

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27. Kan—Babcock v Kansas City, 419 P 2d 882, 197 Kan. 610

§ 2. Form and Nature

Library References

Quo Warranto ⇐1, 5, 26.

Barron and Holtzoff, Federal Practice and Procedure §§ 131, 1691.

38. Colo.—People ex rel. Wilson v Blake, 260 P.2d 592, 128 Colo. 111

Ga.—Thibadeau v. Henley, 213 S.E.2d 657, 233 Ga 884.

Ill—People ex rel Carey v Lincoln Towing Service, Inc., 369 N.E.2d 94, 11 Ill.Dec 640, 54 Ill App.3d 61.

Kan.—State ex rel. Ferguson v United Royalty Co., 363 P.2d 397, 188 Kan. 443

Mich.—Sobocinski v Quinn, 47 N W 2d 655, 330 Mich 386, 26 A.L.R.2d 824—Shoemaker v City of Southgate, 180 N.W.2d 815, 24 Mich.App 676

Ohio—State ex rel. Cain v. Kay, 309 N.E.2d 860, 38 Ohio St.2d 15.

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40. Ark.—McKenzie v. Burns, 500 S.W.2d 357, 255 Ark. 330, 61 A.L.R.3d 250.

Mo—State ex inf Peach v. Goins, 575 S.W.2d 175

Originally used to correct public wrong

Ill.—People ex rel. Brooks for and on Behalf of City of Wheaton v. Village of Lisle, 321 N.E.2d 65, 24 Ill.App.3d 432.

42. Cal.—Board of Sup'rs of Nevada County v. Superior Court, Nevada County, 310 P.2d 37, 150 C.A.2d 618.

Ill—People ex rel Phelps v Kerstein, 108 N E 2d 915, 413 Ill 333

Kan—State ex rel Miller v Richardson, 623 P 2d 1317, 229 Kan 234

43. Conn—State ex rel Repay v Fodeman, 300 A 2d 729, 30 Conn Sup 82

Tenn—C.J S quoted at length in State v Stine, 292 S W 2d 771, 773, 200 Tenn 561

47. Iowa—State ex rel Cox v Consolidated Independent School Dist of Readlyn, 68 N W 2d 305, 246 Iowa 566

48. Mo—Pollard v Swenson, App, 411 S W 2d 837

Ohio—State ex rel Steyer v Szabo, 186 N E 2d 839, 174 Ohio St 109

49. Ohio—State ex rel Cullitan v Stookey, 113 N E 2d 254, 95 Ohio App 97

52. Mich—Olsen v National Memorial Gardens, Inc, 115 N.W 2d 312, 366 Mich 492

Neb—State v Jones, 275 N W 2d 851, 202 Neb 488

Tenn—State By and Through Canale ex rel Hall v Minimum Salary Dept of African Methodist Episcopal Church, Inc, 477 S W 2d 11

53. Ohio—State ex rel Kearns v Ohio-Midland Light & Power Co, App, 140 N E 2d 430

§ 3. —— Civil or Criminal

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59. U S—Wilder v Brace, D C Me, 218 F Supp 860

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58. Minn—State ex rel La Jesse v Meisinger, 103 N W 2d 864, 258 Minn 297

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68. Ohio—Hickman v City of Portsmouth, 187 N E 2d 653

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Under some statutes or rules of procedure quo warranto is not an authorized remedy to try title to office in an unincorporated association.[71.5]

71.5. U S.—Wirtz v. District Council No. 21, Broth. of Painters, Decorators, and Paperhangers of America (BPDP), D.C.Pa., 211 F.Supp. 253—Wirtz v National Maritime Union of America, D C N.Y., 272 F.Supp. 68, affd., C.A., 399 F 2d 544

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93. Ill—Department of Disabled Am. Veterans v. Bialczak, 349 N E.2d 897, 38 Ill.App.3d 848.

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51. Tex—Bledsoe v Beard, Civ App, 516 S W 2d 207, err. ref no rev err

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52. Ill—People ex rel Knaus v Village of Hinsdale, 250 N E 2d 309, 111 Ill App 2d 368

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65. U S—In re Distillers Factors Corp, supra, n 60

66. Ohio—State ex rel Brown v Regional Public Safety Service Corp, 353 N E 2d 851, 47 Ohio App 2d 300, 1 O O 3d 360

67. Wash—State ex rel Evans v Brotherhood of Friends, 247 P 2d 787, 41 Wash 2d 133

69. Iowa—State ex rel Robbins v Shellsburg Grain & Lumber Co, 53 N W 2d 143, 243 Iowa 734

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Mo—State at Information of Dalton ex rel Holekamp v. Holekamp Lumber Co, App, 331 S W 2d 171, transf to, Sup, 340 S W 2d 678, app dism 81 S Ct 1660, 366 U S 715, 6 L Ed 2d 846, reh den 82 S Ct 26, 368 U S 870, 7 L Ed.2d 71

72. **To compel compliance with charter**

Mich—Lakehead Pipe Line Co v Dehn, 64 N W 2d 903, 340 Mich 25

A writ of quo warranto is appropriate to test a private foreign corporation's exercise of its corporate franchise when the jurisdiction of incorporation has restricted that authority.[73.5]

73.5. Fla—Belle Island Inv Co., Ltd v. Feingold, App. 3 Dist, 453 So.2d 1143, dismissed 459 So.2d 1039

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87. U S—Lapides v Doner, D C Mich., 248 F Supp. 883

Ala—State ex rel Fuller v Hargrove, 174 So.2d 328, 277 Ala 688

Ill.—People ex rel. Curtin v Hetzer, 223 N.E.2d 128, 36 Ill.2d 438—People ex rel. Town of Richwoods v City of Peoria, 225 N E 2d 48, 80 Ill.App 2d 359

Kan.—State ex rel Ferguson v. United Royalty Co, 363 P.2d 397, 188 Kan. 443

Minn—State ex rel. Danielson v. Village of Mound, supra, n. 44

N C—State ex rel Payne v. Ramsey, 138 S.E.2d 405, 262 N.C 757.

Ohio—State ex rel Day v Superior Sav. & Loan Ass'n, 266 N.E.2d 842, 25 Ohio St.2d 79.

Tenn.—State v. Simpson, 281 S.W.2d 679, 198 Tenn 695

Tex.—Town of Sunnyvale v. Dallas County Bd. of School Trustees, Civ.App., 283 S.W.2d 296.

Wash.—State ex rel Johnson v Lally, 370 P 2d 971, 59 Wash 2d 849.

88. Tex—State ex rel Bennett v Clarendon Independent School Dist, Civ App, 287 S W 2d 279, revd on oth grds, 298 S W 2d 111, 156 Tex. 542.

89. Cal—Hills For Everyone v Local Agency Formation Commission of Orange County, App, 164 Cal Rptr 420, 105 C A 3d 461

N Y—Stella v O'Rourke, 298 N Y S 2d 132, 58 Misc 2d 1041, affd 299 N Y S 2d 779, 31 A D 2d 798

Ohio—State ex rel De Mart v Gresko, 170 N E 2d 920, 171 Ohio St 345

Tex—McFarlin v. State ex rel Barnard, Civ App, 272 S W 2d 630, err ref no rev err

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95. Cal—Brown v Memorial Nat Home Foundation, 329 P 2d 118, 162 C A 2d 513, 75 A L R 2d 427, cert den 79 S Ct 353, 358 U S 943, 3 L Ed 2d 352

Ill—People ex rel Town of Richwoods v City of Peoria, 225 N E 2d 48, 80 Ill.App 2d 359

Miss—State ex rel Livingston v Bounds, supra, n 25

Ohio—State ex rel Steyer v Szabo, 186 N E 2d 839, 174 Ohio St 109

96. N M—State on Complaint of Vigil v Rodriguez, 332 P 2d 1005, 65 N M 80

97. Mo—State ex inf. Saunders v Burgess, 264 S W 2d 339, 364 Mo 548—State ex inf. Dalton v Mosley, 286 S W 2d 721, 365 Mo 711—State upon Information of Dalton ex rel Waters v Harris, 363 S W 2d 580.

98. N M—State on Complaint of Vigil v Rodriguez, 332 P 2d 1005, 65 N M. 80

1. Neb—State ex rel. Larson v Morrison, 51 N.W.2d 626, 155 Neb 309.

§ 16. Practice and Procedure Generally

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5. Me.—State by Information of Hancock ex rel Banks v. Elwell, 163 A.2d 342.

6. Ala.—State ex rel. Norrell v. Key, 165 So.2d 76, 276 Ala 524.

La.—Lelong v. Sutherland, App., 134 So.2d 627.

Neb—Stasch v Weber, 199 N W 2d 391, 188 Neb 710

N J.—New Jersey State Lodge-Fraternal Order of Police v Aaron, 121 A.2d 402, 39 N J.Super 423

R I—Fargnoli v Cianci, 397 A.2d 68, 121 R.I 153

Action held not capable of being transformed into action of quo warranto

Cal—City of Coronado v San Diego Unified Port Dist., 38 Cal Rptr. 834, 227 C A 2d 455, app. dism 85 S Ct 806, 380 U.S 125, 13 L Ed 2d 792

9. **Rules inapplicable**

Pa—Com ex rel. Storb v Ressler, 13 D. & C.2d 175, 55 Lanc Rev 231

§ 17. Conditions Precedent in General

Library References

Quo Warranto ⇐26.

10. Mo—State ex inf Saunders v. Burgess, 264 S.W 2d 339, 364 Mo. 548.

12. Ariz.—State ex rel. Smith v. Bohannan, 421 P.2d 877, 101 Ariz. 520, app dism. 88 S.Ct. 55, 389 U S. 1, 19 L.Ed.2d 1.

Okl.—State ex rel Blankenship v. Freeman, 440 P 2d 744—Rogers v. State Election Bd. of Oklahoma, 533 P.2d 621.

Other particular matters have been held to constitute conditions precedent to quo warranto proceedings.[13.1]

13.1. Existence of corporation

Iowa—Anderson v Hadley, 63 N W 2d 234, 245 Iowa 550

Authority to terminate services

Ohio—State ex rel Klapp v Dayton Power & Light Co, 225 N E 2d 230, 10 Ohio St 2d 14

14. Nev—State ex rel Bible v Malone, 231 P 2d 599, 68 Nev 32

Other particular matters have been held not to constitute conditions precedent to quo warranto proceedings.[21 1]

21.1. Ohio—State ex rel Highland Heights v Kee, 327 N E 2d 770, 42 Ohio St 2d 234

Tex—John L Hammond Life Ins Co v State, Civ App, 299 S.W 2d 163, err ref no rev err

Investigation by state bar association and recommendation to attorney general are not conditions precedent to quo warranto proceedings for unauthorized practice of law—State ex rel Fatzer v Schmitt, 258 P 2d 228, 174 Kan 581

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22. Ala—State ex rel Fuller v Hargrove, 174 So 2d 328, 277 Ala 688

Insufficient amount

(3) Amounts held insufficient

Ala—State ex rel Radcliff v Lauten, 56 So 2d 106, 256 Ala 559

§ 18. Consent of Attorney General or Prosecuting Attorney

24. U.S—International Harvester Co. v Kansas City, C.A.Kan., 308 F.2d 35, cert den 83 S.Ct 503, 371 U.S 948, 9 L.Ed.2d 498—Application of James, D C N Y, 241 F.Supp 858

Cal—People upon Inquiry of Conway v San Quentin Prison Officials, 31 Cal Rptr 649, 217 C A 2d 182

Ill—People v City of Chicago, 108 N.E.2d 16, 413 Ill 83

Me—C.J.S. quoted at length in State by Information of Hancock ex rel Banks v Elwell, 163 A.2d 342, 346

N H—C.J.S. cited in Attorney General ex rel Chamberlin v Nadeau, 266 A.2d 118, 120, 110 N H. 264

Pa—Com. v. Peoples, 30 Del.Co. 80.

Tex—Marshall v City of Lubbock, Civ App., 520 S W.2d 553

Consent not effectual

Colo—Enos v District Court of First Judicial Dist in and for Arapahoe County, 238 P 2d 861, 124 Colo 335

Discretion held not abused

Cal—City of Campbell v Mosk, App, 17 Cal Rptr 584, 197 C.A.2d 640.

26. N.C—State ex rel Freeman v Ponder, 67 S E 2d 292, 234 N C. 294

27. Del.—C.J.S. cited in Cleaver v Roberts, 203 A 2d 63, 67, 7 Storey 538

Ill—People ex rel Brooks for and on Behalf of City of Wheaton v. Village of Lisle, 321 N.E.2d 65, 24 Ill.App 3d 432.

Pa—Com ex rel. McCabe v Fahringer, 9 Chest 301.

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28. Del—C.J.S. cited in Cleaver v. Roberts, 203 A.2d 63, 67, 7 Storey 538.

Ill.—People v Wood, 104 N.E.2d 800, 411 Ill. 514

31. N.D.—State ex rel Lyons v Guy, 107 N W 2d 211.

33. Order to show cause

Wash.—Green Mountain School Dist No. 103 v Durkee, 351 P.2d 525, 56 Wash 2d 154

34. Wis.—State ex rel. City Bank & Trust Co. v Marshall & Ilsley Bank, 90 N W.2d 556, 4 Wis 2d 315.

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43. Neb—State ex rel Brogan v Boehner, 119 N W 2d 147, 174 Neb 689

§ 19. Leave of Court

45. S C—Gold v South Carolina Bd of Chiropractic Examiners, 245 S E 2d 117, 271 S C 74

§ 20. —— Necessity

Library References

Quo Warranto ⇐42.

50. Ill—People v Wood, 104 N E 2d 800, 411 Ill 514—People ex rel Hettleman v Board of County Com'rs of Cook County, 243 N E 2d 531, 102 Ill App 2d 310

Mich—Penn School Dist No 7 v Board of Ed of Lewis-Cass Intermediate School Dist of Cass County, 165 N W 2d 464, 14 Mich App 109

Minn—State ex rel Danielson v Village of Mound, 48 N W 2d 855, 234 Minn 531

Tex—Bute v League City, Civ App, 390 S W 2d 811

In New Jersey

(2) Other cases

N J—Goff v Hunt, 80 A 2d 104, 6 N J 600

Purpose of statute requiring leave of court

Ga—Walker v Hamilton, 76 S E 2d 12, 209 Ga 735

51. Ill—People v Wood, supra, n 28

Me—State by Information of Hancock ex rel Banks v Elwell, 163 A 2d 342

Minn—State ex rel Danielson v Village of Mound, supra, n 50.

Mo—State ex inf Graham v Hurley, 540 S W 2d 20

§ 21. —— Application for Leave and Proceedings Thereon

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Quo Warranto ⇐6, 43.

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55. Me—State by Information of Hancock ex rel Banks v Elwell, 163 A 2d 342

Mich—Penn School Dist No 7 v Board of Ed of Lewis-Cass Intermediate School Dist of Cass County, 165 N W 2d 464, 14 Mich App 109

60. Verification may be made by amendment if necessary

Ga—Camp v Trapp, 71 S E 2d 534, 209 Ga. 298

62. Ill.—People ex rel Hannawell v Dimmick, 181 N E 2d 825, 35 Ill App 2d 10

63. Ill—People ex rel. Hettleman v Board of County Com'rs of Cook County, 243 N.E.2d 531, 102 Ill.App.2d 310

64. Application or petition held insufficient

Mass—Lord v Maryland Cas Co, 202 N E.2d 239, 348 Mass 768

Petition must be full positive and convincing

Ill—People ex rel Koplin v. Village of Hinsdale, 348 N.E.2d 483, 38 Ill App 3d 714

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70. Ga—C.J.S. quoted at length in Hartley v. Caldwell, 155 S E 2d 389, 390, 223 Ga. 333

Second hearing not required

Ill.—People ex rel. Koplin v. Village of Hinsdale, 348 N E.2d 483, 38 Ill.App.3d 714

Hearing allowed

Ill—People ex rel Koplin v Village of Hinsdale, 348 N.E.2d 483, 38 Ill.App 3d 714.

74. When request to Attorney General refused

Ill—People ex rel. Brooks for and on Behalf of City of Wheaton v Village of Lisle, 321 N E.2d 65, 24 Ill App 3d 432

75. Mich.—Penn School Dist. No. 7 v Board of Ed of Lewis-Cass Intermediate School Dist of Cass County, 165 N W.2d 464, 14 Mich App 109

W Va—State ex rel Morrison v Freeland, 81 S E 2d 685, 139 W Va 327

76. Ga—Kidd v Nelson, 99 S E 2d 123, 213 Ga. 417

Mo—State ex inf Wallach ex rel Missouri Optometric Ass'n v Schneider's Credit Jewelers, App, 243 S W 2d 125

Ohio—State ex rel Halak v Cebula, 363 N E 2d 744, 50 Ohio App 2d 334, 4 O O 3d 352

City councilmen

W Va—State ex rel Morrison v Freeland, supra, n 75

77. Colo—Enos v District Court of First Judicial Dist in and for Arapahoe County, supra, n 24

Ill—People v Wood, supra, n 28

Mo—State ex inf Wallach ex rel Missouri Optometric Ass'n v Schneider's Credit Jewelers, supra, n 76

Ohio—State ex rel Halak v Cebula, 363 N E 2d 744, 50 Ohio App 2d 334, 4 O O 3d 352

Pa—Dorris v Lloyd, 100 A 2d 599, 375 Pa 481, 51 A L R 2d 1303

W Va—State ex rel Morrison v Freeland, supra, n 75

Interest held sufficiently shown

Ga—Walker v Hamilton, supra, n 50

Interest held not sufficiently shown

Ill—People ex rel Vanderhyden v Village of Elwood, 284 N E 2d 668, 5 Ill App 3d 590

La—Small v Levy, App, 355 So 2d 643, cert den Sup, 361 So 2d 450

78. Ga—Walker v Hamilton, supra, n 77

Ill—People ex rel Freeport Fire Protection Dist, Stephenson County v City of Freeport, 412 N E 2d 718, 45 Ill Dec 367, 90 Ill App 3d 112.

Pa—Dorris v Lloyd, supra, n 77

80. Ga—Walker v Hamilton, supra, n 50

Ill—People ex rel Smith v Wisch, 104 N E.2d 353, 345 Ill App 609.

82. Rights under former practice preserved

Del—Cleaver v Roberts, 203 A.2d 63, 7 Storey 538.

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98. Colo—People ex rel Dunbar v Lakehurst Metropolitan Dist, 373 P 2d 946, 150 Colo 297

Ill—People ex rel Saam v. Village of Green Oaks, 204 N E.2d 149, 55 Ill App 2d 51

5. Ill—Palmatier v Tighe, 135 N E.2d 811, 11 Ill App.2d 1.

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12. Incidental benefit to petitioner

Ala—State ex rel. Fuller v. Hargrove, 174 So.2d 328, 277 Ala. 688

14. Ga.—Walker v Hamilton, 76 S.E 2d 12, 209 Ga 735

Ill—People ex rel Smith v Wisch, 104 N.E.2d 353, 345 Ill App 609—Palmatier v Tighe, 135 N E.2d 811, 11 Ill App 2d 1—People ex rel. Hettleman v. Board of County Com'rs of Cook County, 243 N E 2d 531, 102 Ill.App.2d 310—People ex rel. Vanderhyden v Village of Elwood, 284 N E 2d 668, 5 Ill App 3d 590

Kan—State ex rel. Fatzer v Martin, 289 P 2d 745, 178 Kan 476

Minn—State ex rel Danielson v Village of Mound, 48 N.W 2d 855, 234 Minn 531

Mo.—State ex inf. Graham v Hurley, 540 S W 2d 20

Tex—State ex rel Manchac v City of Orange, Civ App, 274 S W 2d 886

Wash.—State ex rel Evans v. Brotherhood of Friends, 247 P 2d 787, 41 Wash 2d 133—State ex rel Johnson v Lally, 370 P 2d 971, 59 Wash 2d 849

17. Ill—Graves Motor Co v Commissioners of Green River Special Drainage Dist, 129 N E 2d 6, 6 Ill.2d 445—People ex rel Knaus v Village of Hinsdale, 250 N E.2d 309, 111 Ill App 2d 368

Discretion held not abused

Ill.—People ex rel Smith v. Wisch, supra, n. 14

Discretion held abused

Ill—People ex rel Marre v Countryside Sanitary Dist, 284 N E 2d 308, 5 Ill App 3d 747

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18. Ill—Palmatier v Tighe, 135 N E 2d 811, 11 Ill App 2d 1

Facts for consideration

Ill—People ex rel Koplin v Village of Hinsdale, 348 N E 2d 483, 38 Ill App 3d 714

19. Ill—Palmatier v Tighe, 135 N E 2d 811, 11 Ill App 2d 1

21. Ill—Palmatier v Tighe, 135 N E 2d 811, 11 Ill App 2d 1

31. Ill—Mank v Board of Fire and Police Com'rs, Granite City, 288 N E 2d 49, 7 Ill App 3d 478

§ 22. Time to Sue, Limitations, Laches, and Estoppel

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39. Ala—State ex rel White v Town of Addison, 77 So 2d 663, 262 Ala 139

Tenn—State ex rel Bastnagel v City of Memphis, 457 S W.2d 532, 224 Tenn. 514

40. Tex—City of Monahans v State ex rel Cook, Civ App, 348 S W 2d 176, err ref no rev err

Action deemed not premature

Wis.—State ex rel City Bank & Trust Co v Marshall & Ilsley Bank, 90 N W 2d 556, 4 Wis.2d 315

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53. Colo—Burns v District Court of Eighteenth Judicial Dist In and For Arapahoe County, 356 P 2d 245, 144 Colo 259

Iowa—Swan Lake Consol School Dist v Consolidated School Dist of Dolliver, 58 N W 2d 349, 244 Iowa 1269

Mich.—Millard ex rel Reuter v City of Bay City, 54 N W 2d 635, 334 Mich 514

N C—State ex rel Long v Smitherman, 111 S E 2d 834, 251 N C 682

Ohio—State ex rel McElroy v Trumbull Sav & Loan Co, 197 N E 2d 797, 176 Ohio St 85

Demurrer

Ohio—State ex rel Kearns v Ohio-Midland Light & Power Co, App, 140 N E 2d 430

54. Mich—Boshka v Board of Ed of Ottawa Area Intermediate School Dist, 168 N W 2d 906, 16 Mich App 706—Dartland ex rel. De Motts v Public Schools, City of Hancock, 181 N W 2d 41, 25 Mich App 14

55. Ill—People ex rel Coojar Realty Corp v. Village of Burr Ridge, 225 N E 2d 39, 81 Ill App 2d 203—People v. Junior College Dist No. 526, 246 N.E.2d 292, 42 Ill 2d 136

56. Mich—Atty-Gen v Marr, 21 NW 883, 55 Mich. 445

Miss—State ex rel Patterson v Land, 95 So 2d 764, 231 Miss 529, sug err. over., 96 So 2d 828, 231 Miss. 529.

Wash—State ex rel Carroll v. Bastian, 403 P 2d 896, 66 Wash.2d 546

Ousting official for neglect or misconduct

Mo.—State ex inf. Danforth v. Orton, 465 S W 2d 618, cert. den. 92 S Ct 90, 404 U S 852, 30 L Ed 2d 92.

57. Ill.—People ex rel. Phelps v. Kerstein, 108 N E.2d 915, 413 Ill 333

Mich—Millard ex rel. Reuter v City of Bay City, supra, n. 53

60. Ill.—People ex rel. Cherry Valley Fire Protection Dist. v City of Rockford, 258 N.E 2d 577, 122 Ill.App.2d 272—People ex rel. Cherry Valley Fire Protection Dist v. City of Rockford, 277 N E 2d 736, 2 Ill.App.3d 731.

Iowa—State ex rel Freese v Mid-Prairie Reorganized Community School Dist. of Washington County, 93 N.W.2d 109, 250 Iowa 176

Mich.—Layle v. Schnipke, 186 N W.2d 559, 384 Mich. 638.

Mo—State ex Inf Voigts ex rel Mayor, Council and Citizens of Liberty v City of Pleasant Valley, App, 453 S W 2d 700

Laches held shown

(1) Ill—People ex rel. Lindsey v Board of Ed of Community Unit School Dist No 4 of Edgar County, 120 N E 2d 887, 3 Ill 2d 159

Mich—Sobocinski v Quinn, 47 N W 2d 655, 330 Mich 386, 26 A L R 2d 824

Mo—State on Information of Eagleton v Champ, 393 S W 2d 516

Pa—Com ex rel Storb v Schroll, 18 D & C 2d 547, 56 Lanc Rev 417, revd 157 A 2d 179, 398 Pa 354

Laches held not shown

Mich—Penn School Dist No 7 v Board of Ed of Lewis-Cass Intermediate School Dist of Cass County, 165 N W 2d 464, 14 Mich App 109—Stokes v Clerk of Bd of Canvassers of Monroe County, 184 N W 2d 746, 29 Mich App 80

Ohio—State ex rel Kearns v Ohio Power Co, 127 N E.2d 394, 163 Ohio St 451

62. Mo—State on Information of Eagleton v Champ, 393 S W 2d 516

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66. Mich—Brown v State, Dept of Military Affairs, 191 N W 2d 347, 386 Mich 194, cert den 92 S Ct 1256, 405 U S 990, 31 L Ed 2d 457

67. Ala—State ex rel Norrell v Key, 165 So 2d 76, 276 Ala 524

Ill—People ex rel Goldberg v Delaney, 236 N E 2d 689, 39 Ill 2d 474

Neb—State ex rel Genz v Thomas, 177 N W 2d 607, 185 Neb 637

Laches not shown

S D—Burke v Schmidt, 191 N W 2d 281, 86 S D 71

68. Kan—State ex rel Fatzer v Board of County Com'rs of Lyon County, 250 P 2d 556, 173 Kan 544

69. Ill—People v Junior College Dist No 526, 246 N E 2d 292, 42 Ill 2d 136

Delay held to constitute laches

(1) Pa—Com ex rel Truscott v DiLauro, 69 Dauph 69, affd. 128 A 2d 348, 387 Pa 506

70. Fla—State ex rel. Tropical Audubon Soc, Inc v City of Islandia, App, 224 So 2d 427

Ga—Huff v Anderson, 90 S.E 2d 329, 212 Ga. 32, 52 A L R 2d 1310

Ill—People ex rel Chas G Blake Co v Oak Woods Cemetery Ass'n, 160 N E 2d 759, 17 Ill 2d 64

Iowa—State ex rel Fenton v. Downing, 155 N W 2d 517, 261 Iowa 965

§ 23. Defenses to, and Abatement or Dismissal of Proceeding

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Quo Warranto ⇐2, 22–24, 56.

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71. Cal—City of Campbell v Mosk, 17 Cal Rptr 584, 197 C A 2d 640

Conn—State ex rel. Santaniello v O'Connor, 300 A 2d 485, 30 Conn Sup 74

Ill—People ex rel Carey v Lincoln Towing Service, Inc., 369 N.E.2d 94, 11 Ill.Dec 640, 54 Ill.App.3d 61.

Okl—Callender v. District Court for Twentieth Judicial Dist, Ardmore, Carter County, 625 P.2d 627.

Unclean hands

Tex—Hand v State ex rel Yelkin, 335 S.W 2d 410, err. ref no rev. err., 337 S.W.2d 798, 160 Tex. 416

Violation of statute

Ind—State ex rel. Uebelhor v. Armstrong, 248 N E 2d 32, 252 Ind 351

Statute held inapplicable

Neb—Stasch v. Weber 199 N.W 2d 391, 188 Neb. 710

72. Colo—Enos v District Court of First Judicial Dist in and for Arapahoe County, 238 P 2d 861 124 Colo 335

Miss—State ex rel Powe v Pittman, 179 So 2d 563 253 Miss 844

73 Ala—State ex rel Fuller v Hargrove, 174 So 2d 328, 277 Ala 688

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89. Ala—State ex rel Fuller v Hargrove, 174 So 2d 328, 277 Ala 688.

Pa—Com ex rel Crabbs v Boyle, 73 York 65

Va—Dotson v Com, 66 S E 2d 490, 192 Va 565

Held not grounds for dismissal

N D—State ex rel Lyons v Guy, 107 N W 2d 211

Tex—State ex rel Bennett v Clarendon Independent School Dist, 298 S.W 2d 111, 156 Tex. 542

90. Mo—State ex inf. Wallach ex rel Missouri Optometric Ass'n v Schneider's Credit Jewelers, App, 243 S W 2d 125

Ohio—State ex rel City of Cincinnati v Butler Water Conservancy Dist, 214 N E 2d 86, 5 Ohio St 2d 80

Tex—State ex rel Bennett v Clarendon Independent School Dist, Civ App, 287 S W 2d 279, revd on oth grds, 298 S W 2d 111, 156 Tex 542

91 Pa—Com ex rel Schwartz v Kopack, 81 Pa. Dist & Co, 555, 42 Luz.Leg.Reg 117

92. Minn—State ex rel. Associated Master Barbers & Beauticians of Minn v Eschen, 76 N W 2d 385, 246 Minn 559.

Nev—State ex rel Holland v City of Reno, 262 P 2d 953, 70 Nev 167

96. D C—U S ex rel Chase v Burton, C A, 293 F 8d 156, 110 U S App D C 317

Ga.—Summerour v Cartrett, 136 S E.2d 724, 220 Ga 31

Mo—State ex inf Dalton ex rel Hough v. Eckley, 347 S W 2d 704.

Ohio—Board of Health of St Bernard v City of St. Bernard, 249 N E.2d 888, 19 Ohio St.2d 49.

Pa—City of Philadelphia v Sacks, 210 A 2d 279, 418 Pa 193

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1. U S.—Equal Employment Opportunity Commission v. Sears, Roebuck & Co., 504 F.Supp. 241

Kan—State ex rel Stephan v. Carlin, 630 P 2d 709, 229 Kan 665

Mich—Layle v Schnipke, 186 N.W.2d 559, 384 Mich. 638—Attorney General ex rel Barr v. Kent County Clerk, 206 N.W.2d 475, 45 Mich.App. 406.

Ohio—State ex rel Mikus v. Chapla, 205 N E.2d 663, 1 Ohio St 2d 174.

Tenn—State ex rel West v. Kivett, 308 S.W.2d 833, 203 Tenn 49

Proceedings held not to be moot

(2) Other instances

Mich—Wayne County Republican Committee v. Wayne County Bd. of Com'rs, 247 N.W.2d 571, 70 Mich.App 620.

Tex—State ex rel Manchac v. City of Orange, Civ. App., 274 S.W.2d 886—Hand v. State ex rel. Yelkin, Civ.App., 335 S.W.2d 410, err. ref. no rev. err 337 S.W.2d 798, 160 Tex 416.

3. La—Hardy v. Albert, App., 225 So 2d 127.

6. Fla.—State ex rel. Tropical Audubon Soc., Inc. v City of Islandia, App., 224 So 2d 427.

8. Ohio—Board of Health of St. Bernard v. City of St Bernard, 249 N.E.2d 888, 19 Ohio St 2d 49.

Various actions by the parties have been held to constitute a voluntary dismissal.[9.5]

9.5. Ky.—Choate v. Com. ex rel. Ferguson, 347

10. Absolute right to dismiss action brought by county attorney

Kan—State ex rel Foster v City of Kansas City, 350 P.2d 37, 186 Kan 190, cert den 8 S Ct 1598, 363 U S 831, 4 L Ed 2d 1525

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13. Me—State by Information of Hancock ex rel Banks v Elwell, 163 A 2d 342

15. Tenn—State v Stine, 292 S W 2d 771, 200 Tenn 561

17. Tenn—State ex rel Wallen v Miller, 304 S W 2d 654, 202 Tenn 498

20. Ill—People ex rel McCarthy v Firek, 125 N E 2d 637, 5 Ill 2d 317

21. N C—C.J.S. cited in In re Peoples, 250 S E 2d 890, 913, 296 N C 109

§ 24. Jurisdiction and Venue

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Quo Warranto ⇐27, 28 Barron and Holtzoff, Federal Practice and Procedure § 23

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26. Mich—Williams v Lansing Bd of Ed, 245 N W 2d 365, 69 Mich App 654

Mo—State ex rel Schneider's Credit Jewelers, Inc v Brackman, App, 260 S W 2d 800, transf, Sup, 272 S W 2d 289

Tenn—State ex rel Inman v. Brock, 622 S W 2d 36, cert den 102 S Ct. 477, 454 U S 941, 70 L Ed 2d 249—State by Lockert v Knott, 631 S W 2d 124

Wis—Henning v Village of Waterford, 253 N W 2d 893, 78 Wis 2d 181

36. Fla—State ex rel. Vance v Wellman, App, 222 So 2d 449.

Iowa—State ex rel. Cary v. Iowa Co-op, Ass'n, 79 N W 2d 775, 248 Iowa 167.

Mich—City of Grand Rapids v. Harper, 188 N W 2d 668, 32 Mich App 324

Ohio—Veterans of World War I v Levy App, 118 N.E 2d 670

Pa—Com ex rel Alessandroni v Sacks, 39 D & C 2d 295, 84 Dauph, 238—Com. ex rel. Alessandroni v Sacks, 39 D & C.2d 295, 84 Dauph. 238.

Tenn—Algee v State ex rel Makin, 290 S W 2d 869, 200 Tenn 127

W.Va—State ex rel Morrison v. Freeland, 81 S.E.2d 685, 139 W Va. 327.

Wis—State ex rel. State Bar of Wis v Keller, 114 N W 2d 796, 16 Wis.2d 377, reh den 116 N W 2d 141, 16 Wis 2d 377, vac. 83 S Ct. 1686, 374 U S 102, 10 L.Ed 2d 1026, on remand 123 N W 2d 905, 21 Wis.2d 100, cert den 84 S Ct 1643, 377 U S 964, 12 L Ed 2d 734

Jurisdiction lacking

Ohio—Hendershot v Conner, 357 N E 2d 386, 48 Ohio App 2d 335, 2 O O.3d 314

R I—Fargnoli v Cianci, 397 A 2d 68, 121 R I. 153

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47. Mo—Parker v Sherman, 456 S W.2d 577.

Ohio—Veterans of World War I v. Levy, supra, n 36

Pa.—Com. ex rel. Alessandroni v Sacks, 39 D & C 2d 295, 84 Dauph. 238.

Supreme Court

Okl—State ex rel Stuart v Rapp, 632 P 2d 388.

Or.—State ex rel. Boe v Straub, 578 P.2d 1247, 282 Or. 387.

While it has been held that although there may occasionally appear to be a need to file an original petition in the supreme court of a state to issue quo warranto when an intermediate appellate court judge is named as respondent, such petition should be filed in the appropriate intermediate appellate court, and the final decision appealed to the state supreme court [47.5]

47.5. Ga—Brown v Johnson, 306 S E 2d 655, 251 Ga 436, overruling Shreve v Pendleton, 58 S E 880, 129 Ga 374

52. Pa—Helsel v Rodgers, 269 A 2d 917, 440 Pa 516

54. Ga—Smith v Upshaw, 124 S E 2d 751, 217 Ga 703

55. Mich—Bowman v Intermediate School Dist of Wexford and Missaukee Counties, 167 N W 2d 867, 16 Mich App 340

Tex—Wortham Independent School Dist v State ex rel Fairfield Consol Independent School Dist, Civ App, 244 S W 2d 838, err ref no rev err

57. Mo—State ex rel Schneider's Credit Jewelers v Brackman, supra, n 26

§ 25. Plaintiffs, Petitioners, and Relators

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62. State senators have standing to bring action

Pa—Stroup v Kapleau, 313 A 2d 237, 455 Pa 171

Nominal parties

Tex—State ex rel Kimmons v City of Azle, Civ App, 588 S W 2d 666

§ 26. —— Government or People

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Quo Warranto ⇐32.

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65. U S—U S v Machado, D C Cal, 306 F Supp. 995

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Public interest

(2) Other cases

Kan—State ex rel Moses v Board of County Com'rs of Marshall County, 242 P.2d 527, 172 Kan 601

Discretion as to filing information

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Matter of public importance

Ill—People ex rel Brooks for and on Behalf of City of Wheaton v Village of Lisle, 321 N E 2d 65, 24 Ill App 3d 432

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69. Cal—People ex rel. Southwest Exploration Co v City of Huntington Beach, 275 P 2d 601, 128 C A 2d 452

Mich—Millard ex rel Reuter v City of Bay City, 54 N W 2d 635, 334 Mich 514

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Prosecuting attorney held not real party in interest

Mo—State ex inf Wallach ex rel Missouri Optometric Ass'n v Schneider's Credit Jewelers, App, 243 S.W 2d 125

Attorney general not party

Mo—State at Inf of Dalton ex rel Tucker v Mattingly, 268 S W 2d 868 app transf, App, 275 S W 2d 34.

70. Ohio—State ex rel Halak v Cebula, 361 N E 2d 244, 49 Ohio St 2d 291, 3 O O 3d 439, affd 363 N E.2d 744, 50 Ohio App 2d 334, 4 O O 3d 285

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77. Tex—State ex rel Engle v City of San Antonio, Civ App, 474 S W 2d 28, err ref no rev err—State ex rel City of Colleyville v City of Hurst, Civ App, 519 S W 2d 698, err. ref no rev err

Proceeding held initiated by attorney general

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78. Ill—People v Wood, 104 N E 2d 800, 411 Ill 514—People ex rel Brooks for and on Behalf of City of Wheaton v Village of Lisle, 321 N E 2d 65, 24 Ill App.3d 432

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Statute held not invalid

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Kan —Fransham v McDowell, 451 P 2d 131, 202 Kan 604

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95. Kan —Fransham v McDowell, 451 P 2d 131, 202 Kan 604

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97. Fla —Austin v State ex rel Christian, 310 So 2d 289

Ill —People ex rel Koch v Wilson, 104 N E 2d 559, 346 Ill App 175—People ex rel Hettleman v Board of County Com'rs of Cook County, 243 N E 2d 531, 102 Ill App 2d 310

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Mich —City of Grand Rapids v Harper, 188 N W.2d 668, 32 Mich App 324

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19. Fla —McGhee v City of Frostproof, App., 289 So 2d 751

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22. Ill.—People ex rel. J. H Anderson Monument Co. v. Rosehill Cemetery Co., 122 N E 2d 283, 3 Ill.2d 592—Palmather v. Tighe, 135 N E 2d 811, 11 Ill App 2d 1—People ex rel Hannawell v Dimmick, 181 N W 2d 825, 35 Ill App 2d 10

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Pa —Com ex rel Cliver v Freed, 83 Montg 173—Com ex rel Duggan v Williams, 113 P L J 151

Effect of judgment of ouster as test of interest

Pa —Stalgitis v Sauers, 53 Sch L R 120—Mayer v Hemphill, 190 A 2d 444, 411 Pa 1

Requisite interest held lacking

(1) U S —Application of James, D C N Y, 241 F Supp 858

Fla —Tobler v Beckett, App, 297 So 2d 59

Ill —People ex rel Turner v Lewis, 432 N E 2d 665, 59 Ill Dec 879, 104 Ill App 3d 75

Miss —State ex rel Powe v Pittman, 179 So 2d 563, 253 Miss 844

Requisite interest held present

(3) Rival claimant has standing to file complaint in quo warranto on his own relation challenging appointed State's attorney's title to his office

Ill —People ex rel Turner v Lewis, 432 N E 2d 665, 59 Ill Dec 879, 104 Ill App 3d 75

(4) Any member of board of supervisors who object to appointment of State's attorney has standing to file complaint in quo warranto on his own relation challenging appointed State's attorney's title to his office

Ill —People ex rel Turner v Lewis, 432 N E 2d 665, 59 Ill Dec 879, 104 Ill App 3d 75

23. Ohio—Maranze v Montgomery County Bd of Elections, 148 N E 2d 229, 167 Ohio St 323, app dism and cert. den 79 S Ct 84, 358 U S 47, 3 L Ed 2d 45—State ex rel Macdonald v Shawnee Country Club, 207 N.E.2d 658, 2 Ohio St 2d 176

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26. Neb —State ex rel Brogan v. Boehner, 119 N W 2d 147, 174 Neb 689

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41. Del —Cleaver v Roberts, 203 A 2d 63, 7 Storey 538

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45. Pa —Com ex rel Markovitz v Trans-United Industries, Inc, 23 D & C 2d 571

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54. State held proper party to maintain action

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55. Ill —People ex rel Henderson v City of Bloomington, 186 N E 2d 159, 38 Ill.App.2d 9

Wash.—State ex rel. Thigpen v. City of Kent, 394 P.2d 686, 64 Wash.2d 823

57. U S —International Harvester Co. v Kansas City, C A.Kan., 308 F 2d 35, cert den 83 S Ct. 503, 371 U.S 948, 9 L Ed 2d 498

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Tex —State ex rel Kimmons v City of Azle, Civ.App, 588 S W 2d 666.

Annexation of Land by city

(2) Effect of suit by part of landowners.—State ex rel. Watson v City of Hallandale, Fla, 52 So.2d 797

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The cases of Rowan v City of Shawneetown, 38 N.E 2d 2, 378 Ill. 289, and Adair v Williams, 95 N.E.2d 345, 407 Ill. 309, have been expressly overruled, the court holding that a sufficient interest exists.

Ill—People ex rel McCarthy v Firek, 125 N E 2d 637, 5 Ill 2d 317

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64. Tex—Lumbermen's Ins Corp v State, Civ App, 364 S.W 2d 429, err ref no rev err—John L Hammond Life Ins Co v State, Civ App, 299 S W 2d 163, err ref no rev err

66. Mo—State at Information of Dalton ex rel Tucker v Mattingly, supra, n 7

Ohio—State ex rel Macdonald v Shawnee Country Club, 207 N E 2d 658, 2 Ohio St 2d 176

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69. State board as relator

Mo—State ex rel Schneider's Credit Jewelers v Brackman, App, 260 S W 2d 800, transf, Sup, 272 S W 2d 289.

§ 31. —— Joinder

81. Ill.—Lackey v Pulaski Drainage Dist, 122 N E 2d 257, 4 Ill 2d 72

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86. Tenn—State, by Lockert v Knott, 631 S W 2d 124

Tex—City of Duncanville v City of Woodland Hills, Civ App, 484 S W 2d 111, err ref no rev err

87. Ala—Young v State ex rel Russell, 53 So 2d 350, 256 Ala 84.

Involuntary joinder held improper

Tex—State ex rel Engle v City of San Antonio, Civ App, 474 S W 2d 28, err ref no rev err

Indispensable party

N M—State ex rel Huning v Los Chavez Zoning Commission, 604 P 2d 121, 93 N M 655, app after remand 641 P 2d 503, 97 N M 472

§ 32. Defendants or Respondents

Library References

Quo Warranto ⇐25, 38, 39

89. Tex—McFarlin v State ex rel Barnard, Civ App, 272 S W 2d 630, err ref no rev err.

92. N C—State ex rel Freeman v Ponder, 67 S E 2d 292, 234 N C 294

Corporation held not indispensable party

Tenn—State By and Through Canale ex rel Hall v Minimum Salary Dept of African Methodist Episcopal Church, Inc, 477 S W 2d 11

Held not necessary party

Mo—State ex inf Danforth v Dale Curteman, Inc, 480 S W 2d 848

Tex.—Bradbury v State ex rel Clutter, Civ App, 503 S.W 2d 619

Not indispensable parties

Ala.—City of Homewood v State ex rel City of Birmingham, 358 So.2d 424

94. U S.—Consolidated Elec Cooperative v Panhandle Eastern Pipeline Co, C A Mo, 189 F 2d 777

95. Iowa—C.J.S. cited in Anderson v. Hadley, 63 N W 2d 234, 240, 245 Iowa 550

Neb—State ex rel Larson v Morrison, 51 N W.2d 626, 155 Neb 309.

Pa—Curwood v Curwood, 38 D & C 2d 571

Tex.—Mallow v State ex rel City of Denton, Civ.App, 374 S W 2d 732, err. ref no rev err

Consolidation of school districts

(1) Other matters.

Iowa—State ex rel. Cox v Consolidated Independent School Dist of Readlyn, 68 N W 2d 305, 246 Iowa 566

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1. Annexation of territory

(2) By municipality

Minn.—State ex rel. Danielson v Village of Mound, 48 N W 2d 855, 234 Minn. 531.

Mo—State on Information of Eagleton v Champ, 393 S W 2d 516

2 Addition of municipality where both existence and exercise of power to annex challenged held not admission of lawful existence

Mo—State on Information of Eagleton v Champ, 393 S W 2d 516, overr State ex rel Crow v Flemming, 59 S W 118, 158 Mo 558

In a quo warranto action by Minority shareholders to contest the validity of action of majority shareholders, it is proper to make the majority shareholders parties respondent.[25]

2.5. Amendment of articles to extend corporate existence

Mo—State at Information of Dalton ex rel Holekamp v Holekamp Lumber Co, 331 S W 2d 171, transf to, Sup., 340 S W 2d 678, app dism 81 S Ct 1660, 366 U S 715, 6 L Ed 2d 846, reh den 82 S Ct 26, 368 U S 870, 7 L Ed 2d 71

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14. N Y—Brescia v Mugridge, 276 N Y S 2d 947, 52 Misc 2d 859, affd 285 N Y S 2d 569, 29 A D 2d 632

15. U S—Blackburn v O'Brien, D C Va, 289 F Supp 289

Pa—Com ex rel Hovis v Zeigler, 29 D & C 2d 562

Corporation held not necessary party

Tex—Hand v State ex rel Yelkin, Civ App, 335 S W 2d 410, err ref no rev err 337 S W 2d 798, 160 Tex 416

Corporation held not indispensable party

Tex—State ex rel Yelkin v Hand, Civ App, 331 S W 2d 789, err ref no rev err 333 S W 2d 109, 160 Tex 415—Hand v State ex rel Yelkin, Civ App., 335 S W 2d 410, err ref no rev err 337 S W 2d 798, 160 Tex 416

Non-resident stockholders held not indispensable parties

Colo—State ex rel Gentles v Barnholt, 358 P 2d 466, 145 Colo 259

Ministerial officer not a proper party defendant

Mich—Stokes v Clerk of Bd of Canvassers of Monroe County, 184 N W 2d 746, 29 Mich App 80

18. Corporation held not necessary party

Tex—State ex rel Yelkin v Hand, Civ App, 331 S W 2d 789, err ref no rev err 333 S.W 2d 109, 160 Tex 415

Corporation held indispensable party

Colo—State ex rel Gentles v Barnholt, 358 P 2d 466, 146 Colo 259

§ 33. Intervention and Substitution of Parties

Library References

Quo Warranto ⇐40.

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25. Inclusion of property within city limits

(3) Intervention of attorney general proper

Kan.—State ex rel Foster v City of Kansas City, 350 P 2d 37, 186 Kan. 190, cert den. 8 S Ct 1598, 363 U S 831, 4 L.Ed.2d 1525.

(4) Persons not allowed to intervene

Kan—State ex rel Foster v City of Kansas City, 350 P 2d 37, 186 Kan 190, cert den 80 S.Ct 1598, 363 U S 831, 4 L Ed.2d 1525

Control of litigation

Ill—People v Thompson, 242 N.E 2d 49, 101 Ill App 2d 104

Intervention denied

Ill.—People ex rel Thomas v Village of Sleepy Hollow, 418 N.E.2d 466, 49 Ill Dec. 612, 94 Ill.App.3d 492

28. Ill—People ex rel Hanrahan v Village of Wheeling, 356 N E 2d 806, 1 Ill Dec 524, 42 Ill App 3d 825

Pa—Sherman v Yiddisher Kultur Farband, 99 A 2d 868, 375 Pa. 108

Tex—Mulcahy v Houston Steel Drum Co, Civ App, 402 S W 2d 817

29. Pa—Dahl v Wooster, 11 D & C 2d 677, 16 Law L J 60

30. Ill—People v Thompson, 242 N E.2d 49, 101 Ill App 2d 104

§ 34. Process

Library References

Quo Warranto ⇐45

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37. Va—Dotson v Com., 66 S E 2d 490, 192 Va 565.

Service held sufficient

Pa—Com. ex rel Truscott v Yiddisher Kultur Farband, 106 A 2d 426, 378 Pa 383

42. Personal service

Ga—Gary v Ogletree, 136 S E 2d 373, 219 Ga 791

Statute held not to apply retroactively

Ga—Gary v Ogletree, 136 S E 2d 373, 219 Ga 791

§ 36. —— Mode and Form in General

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65. Minn—State ex rel Danielson v Village of Mound, supra, n 1.

In some jurisdictions, statutes provide that the only authorized pleadings are a petition and answer.[68.5]

68.5. Purpose

Kan—State ex rel Ralston v Showalter, 370 P 2d 408, 189 Kan 562

§ 37. —— Information, Petition, or Complaint

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69. Me—Lund ex rel Wilbur v Pratt, 308 A 2d 554

77. Ohio—State ex rel Kearns v Ohio-Midland Light & Power Co, App., 140 N.E.2d 430

78. Ill—People ex rel Henderson v Redfern, 197 N.E 2d 841, 48 Ill App 2d 100.

80. Pa—Com ex rel Fox v Chace, 48 Del.Co. 237, revd on oth. grds 168 A.2d 569, 403 Pa. 117.

Complaint held sufficient

Tenn—State By and Through Canale ex rel Hall v. Minimum Salary Dept of African Methodist Episcopal Church, Inc, 477 S W 2d 11

81. Ill—People ex rel City of Burbank v City of Chicago, 305 N E.2d 656, 16 Ill App 3d 184

While the quo warranto statute does not require that an information or petition be verified, it should be sworn to[85.5]

85.5. Tex.—Hunnicut v. State ex rel. Witt, 12 S W 106, 75 Tex. 233—State ex rel. Yelkin v Hand, Civ.App, 331 S.W.2d 789, err. ref no rev err 333 S.W.2d 109, 160 Tex. 415

Jurisdiction not lacking because petition not sworn to

Tex.—Gifford v State ex rel Lilly, Civ App., 525 S.W.2d 250.

87. Colo.—People ex rel Wilson v Blake, 260 P.2d 592, 128 Colo. 111.

Ill.—Edgewood Park No. 2 Homeowners Ass'n v. Countryside Sanitary Dist, 246 N E.2d 294, 42 Ill.2d 241.

88. Ill—People ex rel Brooks for and on Behalf of City of Wheaton v Village of Lisle, 321 N E 2d 65, 24 Ill App 3d 432

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90. Matters occurring after filing petition cannot be pleaded

Ill—People ex rel Smith v Wisch, 104 N E 2d 353, 345 Ill App 609

8. Ill—People ex rel Henderson v Redfern, 220 N E 2d 323, 75 Ill App 2d 196

11. Ill—People ex rel Henderson v Redfern, 220 N E 2d 323, 75 Ill App 2d 196

12. Ill—People ex rel Henderson v Redfern, 197 N E 2d 841, 48 Ill App 2d 100

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21. Kan—State ex rel Ross v Board of Ed of City of Beloit, 280 P.2d 929, 177 Kan 540

22. Ill—People ex rel Buffalo Utility Co v Village of Buffalo Grove, 229 N E 2d 401, 85 Ill App 2d 382

25. Complaints, petitions, and informations held sufficient

Fla—State ex rel Tropical Audubon Soc, Inc. v City of Islandia, App, 224 So 2d 427

Petition held insufficient

Ohio—State ex rel Klapp v Dayton Power & Light Co, 178 N E 2d 838, 113 Ohio App 433

Attack on incorporation and later annexation in separate counts held proper

Mo—State on Information of Eagleton v Champ, 393 S W 2d 516

28. Fla.—Watson v City of Hallandale, App., 193 So.2d 195

Petition held sufficient

Fla.—State ex rel Tropical Audubon Soc, Inc v City of Islandia, App, 224 So 2d 427

Kan—State ex rel Foster v Kansas City, 371 P.2d 161, 189 Kan 728

Information or petition held insufficient

(7) To state cause of action generally

Colo—City of Pueblo v People ex rel. Flanders, 268 P 2d 702, 129 Colo 246

(8) Other matters

Ala—State ex rel White v Town of Addison, 77 So 2d 663, 262 Ala 139

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30. Allegations held insufficient

(1) Other matters

Cal—People ex rel Averna v City of Palm Springs, 331 P 2d 4, 51 C.2d 38.

Ill—People ex rel. City of Burbank v City of Chicago, 305 N.E.2d 656, 16 Ill.App 3d 184.

Tex.—State ex rel Manchac v City of Orange, Civ App, 274 S W 2d 886

Cause of action stated

Ill.—People ex rel City of Des Plaines v Village of Mount Prospect, 331 N E 2d 373, 29 Ill App 3d 807.

33. Ill.—People ex rel J H Anderson v Rosehill Cemetery Co., 122 N E 2d 283, 3 Ill 2d 592

Ohio—State ex rel Kearns v. Ohio-Midland Light & Power Co., App, 140 N E 2d 430

36. Election of statutory remedy

Ala.—State ex rel. Fuller v Hargrove, 174 So.2d 328, 277 Ala 688.

38. Allegations held sufficient

(1) Wis.—State ex rel. City Bank & Trust Co v Marshall & Ilsley Bank, 90 N.W.2d 556, 4 Wis 2d 315.

(3) Other matters.

Ohio—State ex rel. Kearns v Ohio-Midland Light & Power Co., App, 140 N E 2d 430.

Allegations held insufficient

(5) Other matters.

Ala.—State ex rel. Fuller v. Hargrove, 174 So 2d 328, 277 Ala. 688.

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41. Tex—State v First Divine Ass'n in America, Civ App, 248 S W 2d 291, err ref no rev err

50. Fla—State ex rel Pettigrew v Kirk, 243 So 2d 147

Ind—C.J S cited in State ex rel Kiser v Millspaugh, 175 N E 2d 13, 241 Ind 656

Petition or information held sufficient

(1) U S—Lawson v California Adult Authority Agents, C A Cal, 392 F 2d 576

Ga—Summerour v Cartrett, 136 S E 2d 724, 220 Ga 31

N J—New Jersey State Lodge-Fraternal Order of Police v Aaron, 121 A 2d 402, 39 N J Super 423

Pa—Com ex rel Alessandrom v Sacks, 39 D & C 2d 295, 84 Dauph 238

(3) Pa—Com ex rel Boyle v Jakomas, 13 D & C 2d 739, 48 Mun 176, 104 P L J 424

Petition or information held insufficient

(1) Ala—State ex rel Van Antwerp v Hogan, 218 So 2d 258, 283 Ala 445

Fla—State ex rel Ayres v Gray, 69 So 2d 187

Ga—Styles v Jones, 121 S E 2d 627, 217 Ga 228

Tenn—State ex rel Chitwood v Murley, 308 S W 2d 405, 202 Tenn 637

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51 Petition considered notwithstanding improper designation

R I—Andrews v Stiles, 209 A 2d 210, 99 R I 546

60. Pa—Com ex rel Alessandrom v Sacks, 39 D & C 2d 295, 84 Dauph 238

Allegations held sufficient

Miss—State ex rel Funches v Keys, 61 So 2d 339, 215 Miss 562

61. Held mere conclusion

(2) Other allegations

N C—State ex rel Wilson v Pearson, 89 S E 2d 150, 242 N C 601

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71. W Va—State ex rel Morrison v Freeland, 81 S E 2d 685, 139 W Va 327

73. U S—Blackburn v. O'Brien D C Va, 289 F Supp 289

Ind—State ex rel Kiser v Millspaugh, 175 N E 2d 13, 241 Ind 656

74. Allegations held insufficient

Tenn—State ex rel. Chitwood v Murley, 308 S W 2d 405, 202 Tenn 637

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82. Pa—Curwood v Curwood, 38 D & C 2d 571

§ 38. —— Plea or Answer

Library References

Quo Warranto ⇐50(1, 2).

91. Relief by cross action not permitted

Tex—Fuller Springs v State ex rel City of Lufkin, 513 S W 2d 17.

94. Time for filing

Kan.—State ex rel. Ralston v Blam, 370 P 2d 415, 189 Kan 575, 92 A.L R 2d 1115.

Wash—State ex rel Zempel v. Twitchell, 367 P.2d 985, 59 Wash.2d 419

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4. General denial sufficient

Tex—Fuller Springs v. State ex rel. City of Lufkin, 513 S.W.2d 17.

6. Ill.—People ex rel Phelps v Kerstein, 108 N.E 2d 915, 413 Ill 333

Specific complaint does not require a justification by defendant

Ill.—People ex rel. Koch v Wilson, 104 N E.2d 559, 346 Ill App 175

9. Answer held sufficient

Ill—People ex rel Koch v Wilson, supra, n 6

14. Kan—C.J.S cited in State ex rel Ralston v Showalter, 370 P 2d 408, 414, 189 Kan 562

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22. Pleas and answers held insufficient

Ill—People ex rel DuPage County v Lowe, 214 N E 2d 593, 67 Ill App 2d 369

23. Ill—People ex rel Knaus v Village of Hinsdale, 250 N E 2d 309, 111 Ill App 2d 368

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35. Ill—People ex rel Phelps v Kerstein, 108 N E 2d 915, 413 Ill 333—People ex rel DuPage County v Lowe, 214 N E 2d 593, 67 Ill App.2d 369—People ex rel Henderson v Redfern, 220 N E 2d 323, 75 Ill App 2d 196

39. Ill—People ex rel Moran v Teolis, 169 N E 2d 232, 20 Ill 2d 95—People ex rel DuPage County v Lowe, 214 N E 2d 593, 67 Ill App 2d 369

41. Ill—People ex rel Skonberg v. Paxton, 211 N E 2d 591, 64 Ill App 2d 294

42. Ill—People ex rel Henderson v Redfern, 220 N E 2d 323, 75 Ill App 2d 196

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53. Authority must be stated

La—Foreman v Hines, App, 314 So 2d 460

§ 40. —— Motion or Demurrer

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84. Motions held improper

Nev—State ex rel Mathews v Murray, 258 P 2d 982, 70 Nev 116

Motions held improper

Mo—State at Information of Dalton ex rel Tucker v Mattingly, App, 275 S W.2d 34, app transf, Sup, 268 S W 2d 868

86. Fla—State ex rel Tropical Audubon Soc, Inc v City of Islandia, App, 224 So 2d 427

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In some jurisdictions, under statutes providing that a petition and answer shall constitute the only pleadings, a motion attacking a petition is a nullity[95.5]

95.5. Kan—State ex rel. Ralston v Showalter, 370 P 2d 408, 189 Kan 562

97. Ga.—Summerour v Cartrett, 136 S E 2d 724, 220 Ga 31

9. Kan—High v Jones, 265 P.2d 857, 175 Kan. 668.

Under statutes providing that the only authorized pleadings are a petition and answer, a demurrer is an inappropriate pleading.[11.5]

11.5. Kan.—State ex rel Ralston v Blam, 370 P.2d 415, 189 Kan. 575, 92 A.L R.2d 1115.

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19. W.Va.—State ex rel. Morrison v. Freeland, 81 S E.2d 685, 139 W.Va 327

24. Me.—State v. Marcotte, 89 A 2d 308, 148 Me 45

28. Mo—State at Information of Dalton ex rel. Tucker v Mattingly, App, 275 S W 2d 34, app transf, Sup, 268 S W.2d 868

Ohio—State ex rel Saxbe v. Alexander, App., 160 N E.2d 369, revd on oth grds 155 N.E.2d 678, 168 Ohio St 404

29. Tex—State v First Divine Ass'n in America, Civ.App, 248 S.W.2d 291, err ref no rev err

30. Ala—State ex rel Van Antwerp v Hogan, 218 So 2d 258, 283 Ala 445

Pa —Com ex rel McCabe v Fahringer, 9 Chest 301

31. Ala —Young v State ex rel Russell, 53 So 2d 350, 256 Ala 84

Tenn —City of Knoxville v State ex rel Graves, 341 S W 2d 718, 207 Tenn 558

§ 41. —— Amended and Supplemental Pleadings

Library References

Quo Warranto ⇐53

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65. Fla —Town of Coreytown v State ex rel Ervin, 60 So 2d 482

N C —State ex rel Wilson v Pearson, 89 S E 2d 150, 242 N C 601

Pa —Curwood v Curwood, 38 D & C 2d 571

Effect of amendment

Ill —People ex rel Skonberg v Paxton, 211 N E 2d 591, 64 Ill App 2d 294

66. Fla —Town of Coreytown v State ex rel Ervin, supra, n 65

67. Mich —Rosenbrock v School Dist No 3, Fractional Tps of Williams and Monitor, 74 N W 2d 32, 344 Mich 335

70. Ill —People ex rel Moran v Teolis, 169 N E 2d 232, 20 Ill 2d 95

Amendment properly denied under circumstances

Tenn —State v Simpson, 281 S W 2d 679, 198 Tenn 695

§ 42. —— Issues, Proof, and Variance

Library References

Quo Warranto ⇐54.

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83. Cal —People ex rel Pennington v City of Richmond, 296 P 2d 351, 141 C A 2d 107

Colo —People ex rel Wilson v Blake, 260 P 2d 592, 128 Colo 111

Kan —State ex rel Ralston v Showalter, 370 P 2d 408, 189 Kan 562

Created by answer and not complaint

Ill —People ex rel Henderson v Redfern, 220 N E 2d 323, 75 Ill App.2d 196

86. Neb —Stasch v. Weber, 199 N W 2d 391, 188 Neb 710

87. Only defendant's rights considered

Ill.—People ex rel. City of Des Plaines v Village of Mount Prospect, 331 N E 2d 373, 29 Ill App 3d 807

88. Ill —People ex rel Town of Richwoods v City of Peoria, 225 N E 2d 48, 80 Ill.App 2d 359

Miss —Livingston v Bounds, 52 So 2d 660, 212 Miss 184, sug err over 54 So 2d 576, 212 Miss 184

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90. Ill —People ex rel Karns v. Village of Caseyville, 241 N.E.2d 23, 99 Ill App.2d 60

92. Ala —State ex rel Smith v. Deason, 88 So.2d 674, 264 Ala 596

93. Ill —People ex rel. Karns v Village of Caseyville, 241 N.E 2d 23, 99 Ill.App 2d 60.

4. Ohio—State ex rel Kearns v. Ohio-Midland Light & Power Co, App, 140 N.E 2d 430

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10. Tex.—State ex rel. Warbritton v School Bd of City of Marshall, Civ App., 337 S W 2d 731, revd. on oth. grds 343 S W.2d 247, 162 Tex 9

§ 43. Evidence

Library References

Quo Warranto ⇐55

16. Same proof as under older forms of procedure

Colo —People ex rel Mijares v Kniss, 357 P 2d 352, 144 Colo 551, 82 A L R 2d 1163

17. Ariz —State ex rel Pickrell v Downey, 430 P 2d 122, 102 Ariz 360

Evidence held inadmissible

(8) Ky —Com ex rel Buckman v Preece, 257 S W 2d 51

Mo —State at Information of Dalton v Taylor, App, 293 S W 2d 12

18. Mo —State ex rel Boyer v Whittle, 401 S W 2d 401

Disclosure of secret vote

(3) Other cases

Tex —State ex rel Lukovich v Johnston, 238 S W 2d 957, 150 Tex 174

Evidence held admissible

(5) Fla —State ex rel Watson v City of Hallandale, 52 So 2d 797

Idaho—Tiegs v Patterson, 336 P 2d 687, 81 Idaho 46, 71 A L R 2d 348

Pa —Com ex rel Dowling v Novinger, 68 Dauph 316

Tenn.—State ex rel Senff v City of Columbia, 343 S W 2d 888, 208 Tenn 59

Evidence held inadmissible

(8) Ga —Huff v Anderson, 90 S E 2d 329, 212 Ga 32, 52 A L R 2d 1310

Minn —State ex rel School Dist No 56 Traverse County v Schmiesing, 66 N W 2d 20, 243 Minn 11

Nev —State ex rel Bible v Malone, 231 P 2d 599, 68 Nev 32

N C —State ex rel Freeman v Ponder, 67 S E 2d 292, 234 N.C 294

Pa —Com ex rel Dowling v Novinger, 68 Dauph 316

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19. Evidence held inadmissible

Minn —State ex rel Harrier v Village of Spring Lake Park, 71 N W 2d 812, 245 Minn 302

Mich.—Rosenbrock v School Dist No 3, Fractional Tps of Williams and Monitor, 74 N W 2d 32, 344 Mich 335

Tex —Walker-Texas Inv Corp v State, Civ App, 323 S W 2d 603

Evidence held insufficient

(1) Ky —Com ex rel Buckman v Preece, supra, n 17

23. Kan —State ex rel Ralston v Showalter, 370 P 2d 408, 189 Kan. 562—State ex rel. Ralston v Blain, 370 P 2d 415, 189 Kan 575, 92 A L R.2d 1115

Mo —C.J.S. quoted in State on Information of Connett v Madget, 297 S W 2d 416, 428

Evidence held sufficient

(1) Ga —Clark v Hammock, 184 S.E.2d 581, 228 Ga 157

Iowa—State ex rel Warrington v. Community School Dist of St Ansgar, 78 N.W.2d 86, 247 Iowa 1167

Kan.—State ex rel Londerholm v Schroeder, 430 P 2d 304, 199 Kan. 403

Ky —Brooks v Com ex rel Buckman, 286 S W 2d 913.

Mo.—State ex inf Dalton v Moody, 325 S W 2d 21—State ex inf Stephens v Fletchall, 412 S.W.2d 423

(5) N M.—State ex rel. Magee v. Williams, 261 P 2d 131, 57 N.M. 588.

Evidence held insufficient

(1) Iowa—State ex rel Warrington v Community School Dist of St. Ansgar, 78 N W.2d 86, 247 Iowa 1167

Minn.—State ex rel School Dist. No 56 Traverse County v Schmiesing, supra, n 18

Mo —State ex inf Taylor v Campton, 240 S.W 2d 877, 362 Mo 199—State on Information of Connett v. Madget, 297 S.W 2d 416

Ohio—State ex rel Burns v Ross, 152 N E.2d 332, 105 Ohio App 307

(2) Ala.—State ex rel. Smith v. Deason, 88 So.2d 674

Conn —State ex rel Moran v Washburn, 112 A 2d 897, 19 Conn Sup 316

Neb —Stasch v Weber, 199 N W 2d 391, 188 Neb 710

Tenn —State ex rel Dobbins v Larry, 332 S W 2d 669, 206 Tenn 261

Tex —State ex rel Lukovich v Johnston, 238 S W 2d 957, 150 Tex 174

Admissions against interest

Mo —State ex inf Taylor v Campton, supra

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24. Evidence held sufficient

(1) Cal —People ex rel Patterson v City of Carlsbad, 274 P 2d 740, 128 C A 2d 77

Fla —State ex rel Watson v City of Hallandale, 52 So 2d 797—City of Miami Beach v State ex rel Wood, 56 So 2d 520

Ill —People ex rel White v. Underwood, 116 N E 2d 354, 1 Ill 2d 620

Iowa—State ex rel Howson v Consolidated School Dist of Elvira, Clinton County, 65 N W 2d 168, 245 Iowa 1244

Kan —State ex rel. Fatzer v Zale Jewelry Co. of Wichita, 298 P 2d 283, 179 Kan 628

Minn —State ex rel Copley Tp v Village of Webb, 83 N W 2d 788, 250 Minn. 22

Mo —State ex rel Dalton ex rel Stonum v. Reorganized Dist No 11, Clinton County, 307 S W 2d 501

Tenn —Highlander Folk School v. State ex rel Sloan, 345 S W.2d 667, 208 Tenn 234, cert. den 82 S.Ct. 62, 368 U S 840, 7 L Ed 2d 39

Tex —Walker-Texas Inv. Corp v State, Civ App, 323 S W 2d 603—State ex rel Townsend v City of Mission, Civ App., 329 S W 2d 98, err ref. no rev. err

(8) Ill.—People ex rel. Warren v Drummet, 114 N E 2d 364, 415 Ill 411

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25. Evidence held sufficient

Kan —State ex rel Fatzer v Schmitt, 258 P.2d 228, 174 Kan 581

27. Fla —State ex rel Watson v. City of Hallandale, supra, n 24

Ill —People ex rel Phelps v. Kerstein, 108 N E.2d 915, 413 Ill. 333—People ex rel. Knaus v. Village of Hinsdale, 250 N.E 2d 309, 111 Ill App 2d 368.

Or —State ex rel Brewster v. Ostrander, 318 P 2d 284, 212 Or 177.

Proof of delay justifying application of doctrine of laches

Pa —Com ex rel Storb v Schroll, 157 A.2d 179, 398 Pa. 354.

28. N M —State ex rel Garcia v Martinez, 459 P.2d 458, 80 N.M. 659.

34. Ky —Brooks v. Com ex rel. Buckman, 286 S W.2d 913

Minn.—State ex rel. Grozbach v Common School Dist No. 65, 54 N.W 2d 130, 237 Minn. 150—State ex rel Associated Master Barbers & Beauticians v Eischen, 86 N.W.2d 652, 251 Minn. 36.

Presumption not applicable

Conn.—Town of Cheshire v. McKenney, 438 A.2d 86, 182 Conn. 253.

36. Ala —Young v. State ex rel. Russell, 53 So 2d 350, 256 Ala 84—State ex rel. Smith v Deason, 88 So 2d 674, 264 Ala. 596.

Conn —State ex rel. Moran v. Washburn, Super., 112 A.2d 897, 19 Conn.Sup. 316—State ex rel Barlow v. Kaminsky, 136 A.2d 792, 144 Conn 612—State ex rel. Kenney v. Ranalow, 154 A 2d 526, 21 Conn.Sup, 294—State ex rel Doherty v. Finnegan, 206 A.2d 477, 25 Conn.Sup. 390

Ill —People ex rel. Henderson v Redfern, 220 N E.2d 323, 75 Ill.App.2d 196.

Minn —State ex rel Associated Master Barbers & Beauticians v Eischen, 86 N.W 2d 652, 251 Minn. 36.

Miss —State ex rel. Patterson v Land, 95 So.2d 764,

Neb—C.J.S. cited in Stasch v Weber, 199 N W 2d 391, 393, 188 Neb 710

N J—Berne v Gangemi, 174 A 2d 100, 69 N J Super 220, affd 181 A 2d 800, 74 N J Super 557

Tenn—C.J.S. cited in State ex rel Dobbins v Larry, 332 S W 2d 669, 671, 206 Tenn 261

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37. Neb—Stasch v Weber, 199 N W 2d 391, 188 Neb 710

39. Miss—State ex rel Patterson v Land, 95 So 2d 764, 231 Miss 529, sug err. over, 96 So 2d 828, 231 Miss 529

N.J—Monte v Milat, 85 A 2d 822, 17 N J Super 260

Tex—State ex rel Lukovich v Johnston, 238 S.W 2d 957, 150 Tex. 174

41. Miss.—State ex rel. Patterson v Land, 95 So 2d 764, 231 Miss 529, sug err over, 96 So 2d 828, 231 Miss 529

Mo—State ex rel McNutt v Northup, 367 S W 2d 512

N J—Haack v Ramen, 200 A 2d 522, 83 N J Super 526.

Ohio—State ex rel Burns v Ross, 152 N E 2d 332, 105 Ohio App 307

42. Mo—State ex inf Stephens v. Fletchall, 412 S W.2d 423

45. Kan—State ex rel Fatzer v. Minneola Hospital Dist, 277 P.2d 607, 177 Kan 238

Mo.—State ex inf Taylor v Cumpton, supra, n 23

R I—Auge v Anderson, 309 A 2d 17, 112 R I 296

Tex—State ex rel Lukovich v Johnston, supra, n 41

Particular matters within rule

(4) Other matters

Mo—State on Information of Connett v Madget, 297 S W 2d 416—State ex inf Eagleton v Elliott, 380 S W 2d 929

N J—Haack v Ramen, 200 A 2d 522, 83 N J Super 526

Tenn—State ex rel Senff v City of Columbia, 343 S W.2d 888, 208 Tenn 59

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52. Neb—Stasch v. Weber, 199 N W 2d 391, 188 Neb 710

59. Ill—People ex rel. White v Underwood, 116 N E 2d 354, 1 Ill 2d 620

60. Unconstitutionality of violated statutes

Mo.—State ex inf. Dalton v Riss & Co, 335 S W 2d 118, app dism. 81 S Ct 124, 364 U.S 338, 5 L Ed.2d 99

63. Minn—State ex rel Copley Tp v Village of Webb, 83 N W 2d 788, 250 Minn 22

§ 44. Trial

Library References

Quo Warranto ⇐57, 58.

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73. La.—Foreman v Hines, App., 314 So 2d 460

74. Kan—State ex rel Anderson v Engler, 317 P 2d 432, 181 Kan. 1040

§ 45. —— Scope of Inquiry and Powers of Court

77. Colo—People ex rel Dunbar v South Platte Water Conservancy Dist., 343 P.2d 812, 139 Colo. 503.

Ill.—People ex rel Adamowski v. Metropolitan Sanitary Dist. of Greater Chicago, 143 N.E.2d 550, 11 Ill.2d 476—People ex rel. City of Des Plaines v. Village of Mount Prospect, 331 N.E 2d 373, 29 Ill.App.3d 807.

N.M.—State ex rel. Garcia v. Martinez, 459 P 2d 458, 80 N M. 659

Tex.—State ex rel. Pan Am. Production Co. v. Texas City, Civ App., 295 S W.2d 697, affd., 303 S W.2d 780, 157 Tex 450, app dism. 78 S Ct. 533, 355 U S. 603, 2 L Ed.2d 523

Proper notice of hearing

Mo—State ex rel O'Brien v Petry, App, 397 S W 2d 1

78. Minn—State ex rel Grozbach v Common School Dist No 65, supra, n 34

79. Ill—People ex rel Smith v Wisch, 108 N E 2d 353, 345 Ill App 609—People ex rel City of Des Plaines v Village of Mount Prospect, 331 N E 2d 373, 29 Ill App 3d 807

La—Foreman v Hines, App, 314 So 2d 460

Tex—State ex rel Winn v City of San Antonio, Civ App, 259 S W 2d 248, err ref no rev err

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83. Ariz—State ex rel Pickrell v Downey, 430 P 2d 122, 102 Ariz 360

Colo—People ex rel Dunbar v South Platte Water Conservancy Dist, 343 P 2d 812, 139 Colo 503

Ill—People ex rel White v Underwood, supra, n 59—People ex rel Moran v Teolis, 169 N E 2d 232, 20 Ill 2d 95

Election may be looked to

Tex—Nueces County Water Control and Imp Dist No. 4 v State ex rel Wilson, Civ App, 270 S W 2d 672, err ref no rev err

84. Mo—State ex rel Schneider's Credit Jewelers v Brackman, 272 S W 2d 289, app transf, App, 260 S W 2d 800

Particular matters held beyond scope of inquiry

(2) Other matters

Pa—Com ex rel Truscott v Yiddisher Kultur Farband, 116 A 2d 555, 382 Pa 553

85. Ill.—People ex rel Moran v Teolis, 169 N E 2d 232, 20 Ill 2d 95

98. Ill—People ex rel Town of Richwoods v City of Leoria, 225 N E 2d 48, 80 Ill App 2d 359—People ex rel Cherry Valley Fire Protection Dist v. City of Rockford, 256 N E 2d 653, 120 Ill App.2d 275, app. after remand 277 N E.2d 736, 2 Ill App 2d 731

Nev—State ex rel Quimby v City of Reno, 310 P 2d 850, 73 Nev 136

Tex—State ex rel Manchac v City of Orange, Civ App, 274 S W 2d 886—Fuller Springs v State ex rel City of Lufkin, 513 S W 2d 17

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10. Del—State ex rel Craven v Schorr, 131 A 2d 158, 11 Terry 365

Ill.—People ex rel Lindsey v Board of Ed of Community Unit School Dist No 4 of Edgar County, 120 N E 2d 887, 3 Ill 2d 159

Neb—State ex rel Tomek v Colfax County Reorganization Committee, 209 N W 2d 188, 190 Neb 447

Ohio—State ex rel Saxbe v Alexander, App., 160 N E 2d 369, revd on oth grds. 155 N E.2d 678, 168 Ohio St 404

Pa—Com ex rel DiFrancesco v Strippy, 17 Cambria 89

W Va.—Layne v Hayes, 90 S E.2d 270, 141 W Va. 289

11. Conn.—State ex rel Barlow v Kamunsky, 136 A.2d 792, 144 Conn 612

12. Conn—State ex rel Repay v Fodeman, 300 A.2d 729, 30 Conn Sup 82

13. Idaho—C.J.S. quoted at length in Tiegs v Patterson, 336 P.2d 687, 689, 81 Idaho 46, 71 A.L.R.2d 348

15. Pa.—Com. ex rel Schwartz v Kopack, 81 Pa. Dist & Co 535, 42 Lux Leg.Reg. 117

21. Application of constitutional provisions not determinable

(2) Other matters

Del.—State ex rel. Craven v. Shaw, 126 A.2d 542, 11 Terry 193, affd., 131 A.2d 158, 11 Terry 365.

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22. Pa—Meyer v Strouse, 221 A.2d 191, 422 Pa 136

26. Neb—Stasch v Weber, 199 N.W 2d 391, 188 Neb 710

30. Motives of removing officer or his bias and prejudice not considered

Neb—State ex rel Churchill v Hay, 63 N W 821, 45 Neb 321—State ex rel Meyer v Sorrell, 117 N W 2d 872, 174 Neb 340

31. Del—State ex rel Craven v Schorr 131 A 2d 158, 11 Terry 365

Kan—State ex rel Fatzer v Board of County Com'rs of Lyon County, 250 P 2d 556, 173 Kan 544

Mo—State ex inf Taylor v Cumpton, 240 S W 2d 877, 362 Mo 199

34. Minn—State ex rel Associated Master Barbers & Beauticians v Eschen, 86 N W 2d 652, 251 Minn 36

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51. Ohio—State ex rel Burns v Ross, 152 N E 2d 332, 105 Ohio App. 307

52. Minn—State ex rel Grozbach v Common School Dist No 65, 54 N W 2d 130, 237 Minn 150

§ 46. —— Mode and Conduct of Trial

Library References

Quo Warranto ⇐58.

54. Fla—State ex rel Watson v City of Hallandale, supra, n 24

N C—State ex rel Freeman v Ponder, 67 S E 2d 292, 234 N C 294

Pa—Com ex rel Boyle v Jakomas, 13 D & C 2d 739, 48 Mun 176, 104 P L J 424

Questions held for jury

(4) Other questions

Ill—People ex rel Mullin v Williams, 141 N E 2d 645, 13 Ill App 2d 164

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57. Okl—State ex rel. Rice v Dunning, 322 P 2d 1067

58. Ala—White v State ex rel Fowler, 81 So.2d 267, 262 Ala 694.

59. Ala—Griffith v State ex rel Scholl, 225 So 2d 872, 284 Ala. 469

61. Grant of voluntary non-suit held improper

Nev—State ex rel Quimby v City of Reno, 310 P.2d 850

63. Ala.—Young v State ex rel. Russell, 53 So 2d 350, 256 Ala 84

69. Mo—State ex inf Taylor v Cumpton, supra, n 31

71. Minn—State ex rel Copley Tp. v. Village of Webb, 83 N W 2d 788, 250 Minn. 22.

Mo.—State ex inf Eagleton v Elliott, 380 S W.2d 929.

§ 47. New Trial or Rehearing

Library References

Quo Warranto ⇐56.

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80. Ala.—White v State ex rel. Hardegree, 53 So.2d 599, 256 Ala. 18.

Ariz—State ex rel Nelson v Jordan, 450 P.2d 383, 104 Ariz. 193, app dism 90 S Ct 24, 396 U.S 5, 24 L Ed 2d 4

Mo—C.J.S. quoted in State ex rel. McNutt v. Northup, 367 S.W.2d 512, 514

Matters not put in issue in the original proceedings cannot be considered on a motion for a rehearing.[83.1]

83.1. Tex—Nueces County Water Control and Imp Dist No 4 v State ex rel Wilson, Civ App, 270 S W 2d 672, err ref no rev err

§ 48. Judgment and Enforcement Thereof

Library References

Quo Warranto ⇐60, 61, 64

86. Kan—State ex rel Ralston v Blaun, 370 P 2d 415, 189 Kan 575, 92 A L R 2d 1115

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88. Ga—Huff v Anderson, 90 S E 2d 329, 212 Ga 32, 52 A L R 2d 1310

Mo—State ex inf Taylor v Cumpton, supra, n 31

Ouster from office

Mich—Wayne County Republican Committee v Wayne County Bd of Com'rs, 247 N W 2d 571, 70 Mich App 620

89. Ill—People v Zahn, 161 N E 2d 265, 17 Ill 2d 271—People ex rel Henderson v Redfern, 220 N E 2d 323, 75 Ill App 2d 196

91. Fla—City of Tarpon Springs v State ex rel Tarpon Springs Coca-Cola Bottling Co, 89 So 2d 606

96. La—State ex rel. Mount Herman Baptist Church of Baton Rouge, Inc v Robertson, App, 106 So 2d 756

§ 49. —— Scope and Extent of Relief

Library References

Quo Warranto ⇐60

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2. Ala.—White v State ex rel Fowler, 81 So 2d 267, 262 Ala 694

Limited by statute

Pa—Meyer v Strouse, 221 A 2d 191, 422 Pa 136

5. Relief limited to affect only parties to action

Colo—People ex rel Cory v Colorado High School Activities Ass'n, 349 P 2d 381, 141 Colo 382

8. Granting of complete relief

Mich—Peoples Sav Bank v Stoddard, 102 N W 2d 777, 359 Mich 297, 83 A.L R 2d 344

Validity of reorganized school district

Iowa—Rollins v Halverson, 132 N W 2d 465, 257 Iowa 399

Injunction. Where the injunctive features of a quo warranto suit are merely ancillary, the strict rules applicable to injunction suits are not controlling.[12 5]

12.5. Tex—Wortham Independent School Dist v State ex rel Fairfield Consol Independent School Dist., Civ App., 244 S W 2d 838, err ref. no rev err—Hand v State, ex rel. Yelkin, Civ App., 335 S W 2d 410, err ref no rev err 337 S W 2d 798, 160 Tex 416

13. Mo—State ex inf Taylor v Cumpton, 240 S W 2d 877, 362 Mo. 199—State ex rel. Schneider's Credit Jewelers v Brackman, 272 S W 2d 289, app transf, Mo App, 260 S W 2d 800

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15. Minn—State ex rel Danielson v. Village of Mound, 48 N.W 2d 855, 234 Minn 531

18. Ill.—People ex rel McGrady v Carmody, 243 N E.2d 19, 104 Ill App 2d 137

25. Kan—State ex rel Fatzer v Board of Com'rs of Lyon County, 250 P 2d 556, 173 Kan 544

Minn.—State ex rel Danielson v. Village of Mound, supra, n 15.

Conditions necessary for ouster

N.Y.—People v Abbott Maintenance Corp., 200 N.Y. S.2d 210, 22 Misc.2d 1019, mod. on oth. grds. 201 N.Y.S.2d 895, 11 A.D.2d 136, app. den. 206 N Y S.2d 934, 11 A.D.2d 928, rearg. and app den. 206 N Y S 2d 535, 11 A D 2d 928, motion den 209 N Y S 2d 800, 8 N Y 2d 1120, 171 N E 2d 883, motion gr 212 N Y S 2d 422, 9 N Y 2d 687, 173 N E 2d 241, affd 215 N Y S 2d 761, 9 N Y 2d 810, 175 N E 2d 341

27. Rules applicable to injunction suits not controlling

Tex—Wortham Independent School Dist v State ex rel Fairfield Consol Independent School Dist, Civ App, 244 S W 2d 838, err ref no rev err

The court may grant a temporary mandatory injunction while completing its investigation of a corporation during a quo warranto proceeding.[27 5]

27.5. Tex—Day v State, Civ App, 489 S W 2d 368, err ref no rev err

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28. Ind—State ex rel Doll v Fulton Circuit Court, 169 N E 2d 604, 241 Ind 171

31. Computation of fine where stay of ouster decreed

Mo—State ex inf Dalton v Riss & Co, 335 S W 2d 118, app dism 81 S Ct 124, 364 U S 338, 5 L Ed.2d 99

32. Kan—State ex rel Ferguson v United Royalty Co, 363 P 2d 397, 188 Kan 443

33. Mich—Olsen v National Memorial Gardens, Inc, 115 N W 2d 312, 366 Mich 492

However, it has been held that in the absence of a request by a party in interest the court cannot appoint a trustee or receiver[36 1]

36.1. Appointment in absence of request held abuse of discretion

Pa—Com ex rel Truscott v. Yiddisher Kultur Farband, 116 A 2d 555, 382 Pa 553

37. Ala—State ex rel Smith v Deason, 88 So 2d 674, 264 Ala. 596

Del—Cleaver v Roberts, 203 A 2d 63, 7 Storey 538

Ohio—State ex rel Ethell v. Hendricks, 135 N E 2d 362, 165 Ohio St 217

Okl—State ex rel Blankenship v Freeman, 440 P 2d 744

Specific directions as to compliance proper

Tex—State ex rel Burnet County v Burnet County Hospital Authority, Civ.App, 495 S W 2d 300, err ref no rev err

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43. Tenn—State v. Thompson, 246 S W.2d 59, 193 Tenn 395

51. N.Y—Ohrbach v Kirkeby, 161 N Y 2d 371, 3 A D 2d 269.

The court may grant a temporary injunction restraining the holding of an election pending the outcome of a quo warranto proceeding.[51 5]

51.5. Temporary injunction held not improper

Tex—Hand v. State ex rel Yelkin, Civ App, 335 S W 2d 410, err ref. no rev err, 337 S W.2d 798, 160 Tex. 416

53. Notwithstanding disclaimer

Tex.—Mallow v. State ex rel. City of Denton, Civ App., 374 S W 2d 732, err ref. no rev err

However it has been held that the judgment may dissolve the purported municipality.[54 5]

54.5. Authority unaffected by officers' disclaimer

Tex.—Mallow v State ex rel. City of Denton, Civ App., 374 S W 2d 732, err. ref. no rev. err.

§ 50. —— Effect and Enforcement

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70. Cal—People ex rel City of Downey v Downey County Water Dist, 21 Cal Rptr 370, 202 C A 2d 786

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90. Ill—People ex rel Phelps v Kerstein, 108 N E 2d 915, 413 Ill 333

91. Judgment entered

Pa—Com ex rel DiFrancesco v Strippy, 17 Cambria 89

96. Mo—State ex rel Danforth v Alford, 467 S W 2d 55

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3. Del—Hampson v State ex rel Buckson, 233 A.2d 155

10. N D—Haaland v Verendrye Elec Co-op, 66 N W 2d 902

§ 51. Appeal and Error

Library References

Quo Warranto ⇐62.

18. Motion to strike assignment of errors

Ga—Britton v Bowden, 5 S.E 2d 47, 188 Ga 806

Stay of judgment

Ill—People ex rel Taborski v Illinois Appellate Court, First Dist, 278 N E 2d 796, 50 Ill 2d 336

19. 51 C J p 363 note 49[a]

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23. Pa—Meyer v Strouse, 221 A 2d 191, 422 Pa. 136

Motion for directed verdict deemed motion to dismiss

Kan—State ex rel. Elting v Doerschlag, 416 P.2d 257, 197 Kan 302

26. Tex.—Wortham Independent School Dist v. State ex rel Fairfield Consol Independent School Dist., Civ App, 253 S W.2d 495

Rule held jurisdictional and mandatory

Tex—State ex rel Rowe v City of Ingleside, Civ.App., 348 S W.2d 278—State ex rel. Burnet County v. Burnet County Hospital Authority, Civ.App, 495 S W.2d 300, err. ref no rev err.

Appeal dismissed

Tex—State ex rel. Burnet County v. Burnet County Hospital Authority, Civ.App., 495 S W.2d 300, err ref. no rev. err

30. Private interest essential

Ill—People v Wood, 104 N E 2d 800, 411 Ill 514

31. Appeal held not by state

Del—Cleaver v Roberts, 203 A 2d 63, 7 Storey 538.

32. Mich.—People ex rel. O'Brien v. Society of Good Neighbors, 42 N W 2d 761, 327 Mich 620.

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36. Cal.—People ex rel. Paganini v. Town of Corte Madera, 218 P.2d 810, 97 C.A.2d 726—People ex rel. Smith v City of San Jose, 222 P 2d 947, 100 C.A 2d 57.

Wash—State ex rel. Davis v. Dailey, 158 P.2d 330, 23 Wash 2d 25.

Harmless error

Ga.—Cloud v. Maxey, 23 S.E 2d 668, 195 Ga. 90

Va.—Dotson v. Com, 66 S.E 2d 490, 192 Va 565

Findings of referee

Minn.—State ex rel. Northern Pump Co v. So-Called Village of Fridley, 47 N W 2d 204, 233 Minn. 442.

Credibility of witnesses may be reviewed

Ala.—White v. State ex rel. Hardegree, 53 So.2d 599, 256 Ala. 18.

Issue of stating cause of action not raised by either party

Ill —People ex rel City of Burbank v City of Chicago, 305 N E 2d 656, 16 Ill App 3d 184

49. Ohio—State ex rel Mikus v Hirbe, 218 N E 2d 438, 7 Ohio St 2d 104.

51. Reversal as to one or more coparties

Ill —People ex rel Barrett v Gentile Co-op Ass'n, 64 N E 2d 907, 392 Ill 393

§ 52. Costs

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57. Kan —State ex rel Hawks v. City of Topeka, 270 P 2d 270, 176 Kan 240

Mo —State ex inf Dalton v Mosley, 286 S W 2d 721, 365 Mo. 711

Tenn —State ex rel Wallen v Miller, 304 S W 2d 654, 202 Tenn 498

Defendants taxed with costs

(2) Minn —State ex rel Village of Minnetonka v City of St Louis Park, 81 N W 2d 94, 248 Minn 581

Mo —State on Information of Connett v Madget, 297 S.W 2d 416

Attorney fees not included

Ala —Hogan v State ex rel Van Antwerp, Civ, 240 So 2d 227, 46 Ala App 240, cert den 240 So 2d 230, 286 Ala 735

Ill —People ex rel Henderson v Redfern, 243 N E 2d 252, 104 Ill App 2d 132

59. Iowa—State ex rel Cox v Consolidated Independent School Dist of Readlyn, 68 N W 2d 305, 246 Iowa 566

61. Mich —Boshka v. Board of Ed of Ottawa Area Intermediate School Dist, 168 N W 2d 906, 16 Mich App 706

63. Costs allowed where successful defendant submits a sum sufficient to cover costs and expenses prior to commencement of the action —Miami Retreat Foundation v Ervin, Fla., 66 So 2d 667

65. Bond for costs not required by statute

Neb —State ex rel Brogan v. Boehner, 119 N W 2d 147, 174 Neb. 689

66. Ala —State ex rel Radcliff v Lauten, 56 So 2d 106, 256 Ala 559

67. Fla.—Miami Retreat Foundation v Ervin, supra, n 63.

N M —C.J.S. cited in White v. Clevenger, 376 P 2d 31, 34, 71 N M 80

73. Tex.—C.J.S. cited in Mallow v. State ex rel City of Denton, Civ.App., 374 S W.2d 732, 734, err ref. no rev. err

74. Tex —C.J.S. cited in Mallow v State ex rel City of Denton, Civ.App, 374 S W 2d 732, 734, err ref no rev err.

RACE.

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16. Similarly defined

A "race" is a contest of speed or a competitive trial of speed, or a competition of speed such as in running, skating, riding, etc.—State v. Dionne, Cir A.D, 186 A.2d 561, 564, 24 Conn Sup 59, 1 Conn.Cir 395

(2) A "race" is a contest of speed, a competitive trial of speed, involving the idea of competitive locomotion, and competition is an essential element.—State v. Hart, 193 A.2d 903, 904, 2 Conn.Cir 27

Dominant characteristic of race is the awareness or intent of competition in respect to speed and distance to prove superiority in performance in some respect, and normally there must be an acceptance or competitive response to awareness of the challenge, such response may be the result of prearrangement or it may come into existence on spur of the moment —City of Madison v Geier, 135 N W 2d 761, 764, 27 Wis 2d 687

17. Speed competition

N J —State v O'Connor, 184 A 2d 83, 84, 76 N J Super 246

Phrases:

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20. Phrases

(7) "Claiming-race" is one in which every horse is entered at a price and may be claimed for its entered price by any registered owner in good faith for racing at that meet —Jacobs v Joseph, 126 N Y S 2d 274, 275, 282 App Div 622

RACEMATE.

A name coined by Pasteur for a compound consisting of equal parts of a dextro and a levo isomer, also referred to as a racemic mixture.[20 50]

20.50. U S —Eli Lilly & Co, Inc v Generix Drugs Sales, Inc, C A Fla, 460 F 2d 1096, 1100

RACK.

Phrases

(1) "Rack-jobber" is a sub-distributor who purchases phonograph records from distributors and places them in self-service racks in supermarkets, drugstores, and similar retail outlets in which sale of records is only an incidental item —Harris v Capital Records Distributing Corp, 50 Cal Rptr 539, 541, 413 P 2d 139, 64 C 2d 454

RACKET.

As a slang expression:

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33. Similarly expressed

(1) "Racket" does not necessarily connote a fraudulent or illegitimate enterprise, it may simply mean an easy or lucrative means of livelihood or even one's occupation or business —Hensley v Life Magazine, Time, Inc., D.C Ga., 336 F Supp 50, 51.

39. Or —Marr v Putnam, 246 P 2d 509, 521, 196 Or 1

RACKETEER.

46. Similarly defined

(1) A person who obtains money illegally, as by bootlegging, fraud, or especially, threats of violence — State v Garrison, 154 So 2d 400, 417, 244 La 787

Racketeer influences when applied to anyone, suggests and imputes that he has been influenced to practice fraud, deceit, trickery, cheating, and dishonesty — State v Garrison, 154 So.2d 400, 417, 244 La. 787

Racketeering.

48. Similarly defined

(1) To obtain money illegally, as by bootlegging, fraud, or by threats of violence.—State v. Garrison, 154 So 400, 417, 244 La 787

RADAR.

An electronic method of detecting objects and ascertaining their range and bearing[49 50]

49.50. U S —Afran Transport Co v The Bergechief, C A N Y, 274 F 2d 469, 473, 474

See Collision §§ 11(2), 113(2)

Acronym

The term "radar" is an acronym of the phrase "RAdio Detection And Ranging" and is correctly applied only to a device such as that in general use by the armed forces for determining the range, direction and speed of a target object, this true "radar" device, commonly known as the pulse type, emits at regular intervals a pulse or beam of short electro-magnetic waves which are reflected from the target object —State v Tomanelli, 216 A 2d 625, 629, 153 Conn 365

Difference between true radar and police radar

The significant distinction between true "radar" and the so-called "police radar" is that the former operates on a pulse principle while the latter operates on a continuance-wave principle —State v Tomanelli, 216 A.2d 625, 629, 153 Conn 365

RADIATION.

52. "Radiation zone" is area where control measures allow dose rates above that which would produce the maximum permissible exposure of individual inhabiting area for full eight-hour shift —Mahoney v U S, D C Tenn, 220 F Supp 823, 829

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RADICULITIS.

Inflammation of nerve root.[56 30]

56.30. N H.—Taylor v Metropolitan Life Ins Co, 214 A 2d 109, 112, 106 N H 455

RADIOSONDE.

A radio transmitter used for transmitting coded signals as to pressure, temperature, and humidity of the atmosphere through which the instrument descends by parachute when dropped from an airplane.[56 50]

56.50. U S —Garod Radio Corp v U S, 307 F 2d 945, 158 Ct Cl 596

RADOME.

A plastic cover for outdoor radar equipment.[69 50]

69.50. U S —Shiro v Drew, D C.Me, 174 F Supp 495, 496—United Corp v Beatty Safway Scaffold Co of Or, C A Or, 358 F 2d 470, 473

RAG.

73. N.Y —People on Complaint of Meltzer v Sobel, 104 N Y S 2d 162, 165, 198 Misc. 891.

Rag top van is covered with canvas top rather than being permanently enclosed —Federated Dept Stores, Inc v Brinke, C A Fla., 450 F 2d 1223, 1225

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74. N Y.—People on Complaint of Meltzer v Sobel, supra, n 73

78. N.Y —People on Complaint of Meltzer v. Sobel, supra, n 73

RAIL.

As a verb, to revile or scold in harsh, insolent, or vituperative language.[85 1]

85.1. U S —Lazarus v Faircloth, D C Fla., 301 F Supp. 266, 272

RAILROADS

For developments concerning the National Railroad Passenger Corporation (Amtrak) see Railroads § 31.1.

For developments concerning the reorganization of railroads under federal reorganization statute see Railroads § 342.1.

§ 1. Definitions and Distinctions

Library References

Railroads ⇐2, 3, 18.

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1 Ga—C.J.S. quoted in Westinghouse Elec Corp v Williams, 325 S E 2d 460, 463, 173 Ga App 118

W.Va—C.J.S. cited in State Road Commission v Penndel Co., 129 S E.2d 133, 136, 147 W Va 505

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6. Distinction discussed

Wis—Wisconsin Employment Relations Bd v Amalgamated Ass'n of St, Elec Ry & Motor Coach Emp of America, Division 998, 42 N W 2d 471, 475, 257 Wis. 43, revd on oth grds 71 S Ct 359, 340 U S 383, 95 L Ed. 364, 22 A L R 2d 874

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36. Held not a railroad

W.Va.—State Road Commission v Penndel Co., 129 S E.2d 133, 147 W Va 505

44. Public belt

U S—City of New Orleans v Texas and Pac Ry Co., C A.La., 195 F 2d 887

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55. Or—Oregon, C & E Railway Co v Blackmer, 59 P 2d 694, 696, 154 Or 388—Union Pac R Co v Anderson, 120 P 2d 578, 588, 167 Or 687

"Main line" defined

Or.—Union Pac. R Co v Anderson, 120 P 2d 578, 588, 167 Or. 687

57. Interchangeable terms

Or—Union Pac R Co v. Anderson, supra, n. 55

58. "Main line" compared with "branch line"

Or.—Union Pac R. Co v. Anderson, supra, n. 55

61. Or—Union Pac R Co v Anderson, supra, n 55

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7. Mo.—Beck v Thompson, App., 245 S W.2d 174

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42. Fla.—C.J.S. quoted in Central Mutual Insurance Co v Elliott, App., 347 So.2d 812, 813.

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63. Fla.—C.J.S. quoted in Central Mutual Insurance Co. v. Elliott, App., 347 So.2d 812, 813

"Hot car" defined

Ill.—Bonnier v Chicago, B & Q R. Co., 113 N.E.2d 615, 616, 351 Ill App 34, revd. on oth grds 119 N.E.2d 254, 2 Ill 2d 606, cert. den 75 S Ct 53, 348 U.S. 830, 99 L.Ed 655.

Budd car defined

Minn.—Hanson v. Duluth M & I.R. Ry. Co., 124 N W.2d 486, 267 Minn. 24

Tex—Railroad Commission of Tex v Chicago, R I & P R Co, Civ App, 291 S W 2d 796, 797, err ref

"Articulated car" defined

U S—U S v Southern Ry Co, C A N C, 341 F 2d 669

Buddliner

U S—Boston and M R R v Talbert, C A N H, 360 F 2d 286

66. Ill—Williams v New York Cent R Co, 81 N E 2d 15, 18, 335 Ill App 159, revd on oth grds 84 N E 2d 399, 402 Ill 494

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20. Miss—Town of Sumner v Illinois Cent R Co, 111 So 2d 230, 236 Miss 342

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45. Tex.—C.J.S. cited in Cray v State, Cr, 490 S W 2d 838

46. Tex—C.J.S. cited in Cray v State, Cr, 490 S W 2d 838

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60. "Hostler's helper" defined

Mo—Smith v Thompson, App, 258 S W 2d 278, 279

62. Mo—Smith v Thompson, supra, n 60

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78. Switch yard

Ga—Pollard v. Holland, 13 S E 2d 682, 683, 64 Ga. App 487.

60 C J p 1201 notes 59, 60.

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6. Tex—Texas Elec, Ry Co. v. Neale, 252 S W 2d 451, 151 Tex. 526.

Other definition

Md—Maryland & P R Co v. Mercantile-Safe Deposit & Trust Co., 166 A.2d 247, 224 Md 34, 95 A.L R.2d 463

Miss—Texas Co v Newton Naval Stores Co, 78 So.2d 751, 223 Miss 468, 49 A.L.R 2d 1182.

(2) Additional definitions.

N.C.—McCotter v. Barnes, 101 S.E.2d 330, 247 N.C. 480

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Washout signal. An emergency signal meaning to stop immediately.[63.1]

63.1. U S—Stinson v Aluminum Co. of America, C.C.A Tenn, 141 F 2d 682, 684.

Or—Rogers v Southern Pac. Co., 227 P.2d 979, 985, 190 Or 643

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75. "Nonagency station" defined

Or.—Timber Structures, Inc. v Southern Pac Co., 390 P 2d 343, 237 Or 42, 16 A L.R.3d 1102.

81. Rigid switch

Cal—Spencer v Atchison, T & S F Ry Co, 207 P 2d 126, 127, 92 Cal App 2d 490

Spring switch

Cal—Spencer v Atchison, T & S F Ry Co, 207 P.2d 126, 127, 92 Cal App 2d 490

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6. Defined

U S—Sinkler v Missouri Pac R Co, U S Tex, 78 S Ct 758, 356 U S. 326, 2 L Ed 2d 799, reh den 78 S Ct 1133, 356 U S 978, 2 L.Ed 2d 1152.

Ill—Ernhart v Elgin, J & E Ry. Co, 84 N.E.2d 868, 872, 337 Ill.App 56, transf 78 N.E 2d 257, 399 Ill 512, affd 92 N E 2d 96, 405 Ill 577

"Station switching"

(1) Defined—Union Pac R Co v Anderson, 120 P 2d 578, 585, 167 Or 687.

(2) "Switching incident to the movement of the train handled" distinguished—Union Pac R Co. v. Anderson, supra

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47. Held not a "repair track"

U S.—U S. v. Chicago, B. & Q.R. Co, D.C Colo., 273 F.Supp 246

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62. Cal—C.J.S. cited in Atchison, T. & S F. Ry Co. v. Abar, 79 Cal.Rptr. 807, 814, 275 C A.2d 456

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94. Local freight train

(1) Or.—Oregon, C. & E Railway Co. v. Blackmer, 59 P.2d 694, 695, 154 Or. 388—Union Pac R. Co v. Anderson, supra, n. 6.

Assigned local freight train

Or—Union Pac R. Co. v Anderson, supra, n 6

97. Neb—State ex rel. Spillman v Chicago, St. P, M. & O Ry Co., 212 N.W. 535, 536, 115 Neb. 306.

99. Other definitions

Mich—Chesapeake & O. Ry. Co. v. Public Service Commission, 147 N.W.2d 469, 5 Mich.App. 492, affd 167 N.W.2d 438, 382 Mich 8.

1. Okl.—St. Louis-San Francisco Ry. Co. v State, 262 P.2d 168, 172.

6. Mich.—Chesapeake & O. Ry. Co. v Public Service Commission, 147 N.W.2d 469, 5 Mich App. 492, affd 167 N.W.2d 438, 382 Mich 8

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10. Draft gear

U.S.—Southern Pac. Co. v. State of Ariz. ex rel Sullivan, Ariz., 65 S.Ct 1515, 1523, 325 U.S. 761, 89 L.Ed. 1915.

Dock

U.S.—Republic of Indonesia v. J. R. Simplot Co., C.A. Idaho, 220 F 2d 321, 322

Line-haul

Utah—Denver & R G W R Co v Public Service Commission, 259 P 2d 873, 123 Utah 362

Route

Ky—Regenhardt Const Co v Southern Ry in Kentucky, 181 S W 2d 441, 444, 297 Ky 840

"Sander"

U S—Urie v Thompson, Mo, 69 S Ct 1018, 1023, 337 U S 163, 93 L Ed 1282

"Setout"

Or—Union Pac R Co v Anderson, 120 P 2d 578, 585, 167 Or 687

"Shim"

U S—St Louis, I M & S R Co v Taylor, Ark, 28 S Ct 616, 210 U S 281, 294, 52 L Ed 1061

Idaho—Lescinski v Potlatch Forests, 170 P 2d 605, 67 Idaho 98

57 C J p 1145 note 79

Slack action

U.S—Southern Pac. Co. v State of Ariz ex rel Sullivan, supra—U S v Atchison, T & S F Ry Co, D C Cal 205 F Supp 589

Substitute service

N Y—Bush Terminal Buildings Co v Bush Terminal R Co, 63 N.Y.S 2d 744, 753, affd 66 N Y S 2d 644, 271 App Div 835, app den 67 N Y S 2d 486, 271 App Div 883, cert den. 67 S Ct 1533, 331 U.S 843, 91 L Ed 1864

Telltale

Ala—Southern Ry Co v Crawley, 155 So 568, 569, 229 Ala 162

62 C.J p 305 note 44, p 306 note 58

Ties

Me—Dead River Co v Assessors of Houlton, 103 A 2d 123, 149 Me 349

Turntable

Iowa—Edgington v. Burlington, C R & N.R Co, 90 N W. 95, 116 Iowa 410, 411, 57 L R A 561

"Big-holed"

Or—Rogers v Southern Pac Co, 227 P 2d 979, 985, 190 Or 643

"Wagon"

Ky—Harco Corp v Martin, 112 S W 2d 693, 697, 271 Ky. 572

"Watchman" as device

Ga—Southern Ry Co v Lunsford, Ga, 56 S Ct 504, 505, 297 U S 398, 80 L Ed 740, reh. den 56 S Ct 667, 297 U S 729, 80 L Ed 1011

"Angle-cocking"

U S—Johnson v Baltimore & O R. Co, C A Pa, 208 F 2d 633, 634

65 C.J. p 1182 note 2

"Railroad crossing" defined

Mich—Board of County Road Com'rs of Washtenaw County v Michigan Public Service Commission, 85 N.W 2d 134, 349 Mich. 663

Piggyback service

U S—Atchison, T & S.F Ry. Co v U S, D C Ill., 244 F.Supp 955, revd on oth grds 87 S Ct 1608, 387 U.S 397, 18 L.Ed 2d 847, affd 87 S.Ct 2094, 388 U S 445, 18 L Ed.2d 1307, reh. den 88 S Ct 11, 12, two cases, 389 U.S. 889, 19 L.Ed 2d 197

"Piggyback terminal facilities"

U.S.—Matter of Erie Lackawanna Ry Co., C.A.Ohio, 643 F.2d 1227

19. Other definitions

Wis.—Weiss v. Chicago, N.S. & M.R.R., 101 N W 2d 688, 9 Wis.2d 581.

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41. Tenn.—Illinois Cent. R. Co. v. Hudson, 188 S.W 589, 136 Tenn. 1, 2 A.L.R. 147.

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The term is also used as meaning a triangular metal plate connecting several trolley wires of an electric railroad.[47.1]

47.1. U S—Lloy v Pacific Elec Ry Co, C A Cal, 207 F 2d 662, 663

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86 C J.S. cited in

Tex—U S Coffee & Tea Co v Texas & Pac Ry Co, Civ App, 280 S W 2d 290, 294, err ref no rev err

Shifting. In railroad parlance, the cutting out and putting in cars in the making up of a train before it is dispatched on its journey, but not the transfer of a train of cars already made up and to be delivered to another railroad company to be transported.[96.1]

96.1. N C—Atlantic Coast Line R Co v Goldsboro, 71 S E 514, 516, 517, 155 N C 356, affd 34 S Ct 364, 232 U S 548, 58 L Ed 721

Sign.

In connection with a railroad crossing the word "sign" is commonly understood as meaning an inanimate, inactive object, such as a board upon which words of warning are printed.[2.1]

2.1. Kan—Coleman v St Louis-San Francisco R Co, 286 P 254, 257, 130 Kan 325

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9. Tex—Fort Worth & D C Ry Co v Mills, Civ App., 140 S W 2d 513, 515, err dism, judgm correct

10. "Spotted"

Ark—Missouri Pacific R Co v. Skipper, 298 S W 849, 854, 174 Ark 1083, cert den 48 S Ct 322, 276 U S 629, 72 L Ed 470.

Pa—Davenport v Pennsylvania R Co, 72 A 2d 59, 364 Pa 202

"To spot a car"

Or—Haynes v Douglas Fir Exploitation & Export Co, 90 P 2d 761, 762, 161 Or 538—Union Pac R Co v Anderson, 120 P 2d 578, 585, 167 Or 687

§ 2. Nature and Status of Railroad

17. Constitutional designation as "highway" to protect rights of public

Tex—Lo-Vaca Gathering Co v Missouri-Kansas-Texas R Co, Civ App, 476 S W 2d 732, err ref no rev err

18. Tex—Lo-Vaca Gathering Co v Missouri-Kansas-Texas R. Co., Civ.App, 476 S.W 2d 732, err ref no rev err

§ 3. Nature and Status of Railroad Company

Library References

Railroads ⇐4, 13.

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22. N Y.—Reese v. Long Island R.R., 259 N.Y.S.2d 231, 46 Misc.2d 5, revd. on oth grds. 262 N Y S.2d 194, 24 A.D 2d 581

R I—Kennelly v. Kent County Water Authority, 89 A 2d 188, 79 R.I. 376.

23. Entitled to privileges as common carrier

U.S—Central R. Co of N.J v. U.S., 113 F Supp 457, 125 Ct Cl. 562

28. R.I—Kennelly v Kent County Water Authority, supra, n. 22.

30. Minn.—Chicago, M., St. P. & P.R. Co. v Chicago Great Western Ry Co., 130 N.W.2d 56, 268 Minn. 500.

N.C—Seaboard Air Line R Co. v Atlantic Coast Line R. Co., 82 S E 2d 771, 240 N C. 495

W Va—Marthens v B & O R Co, 289 S E 2d 706

§ 4. Right to Engage in Railroad Business

Library References

Railroads ⇐1, 1½, 6, 7, 18.

32. N Y—Metropolitan Transp Authority v. City of New York, 257 N E 2d 898, 26 N Y 2d 817, 309 N Y S 2d 352

36. N J—Application of Pennsylvania & N R Co, 155 A 2d 761, 31 N J 146

§ 6. —— Determination of Convenience and Necessity

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66. Purpose

(2) U S—Chicago, R I. & P R Co v Thompson, D C Ark, 135 F Supp 43

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76. U S—Tampa Phosphate R. Co v Seaboard Coast Line R Co, C A Fla, 418 F 2d 387, cert den 90 S Ct 907, 397 U S 910, 25 L Ed 2d 90, reh den 90 S Ct 1256, 397 U S 1030, 25 L Ed 2d 543.

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88. Ill—Chicago, R.I & P R Co v Illinois Commerce Commission ex rel Illinois Cent R Co, 111 N E 2d 136, 414 Ill 134

2. Preliminary injunction

U S—Georgia S & F Ry Co v Atlantic Coast Line R. Co, D C Fla, 250 F Supp 260, revd on oth grds, C A, 373 F 2d 493, cert den 88 S Ct. 69, 389 U S. 851, 19 L.Ed 2d 120.

Lack of jurisdiction to determine present or future public convenience or necessity

U S—Georgia S & F Ry Co v Atlantic Coast Line R. Co, D C Fla, 250 F Supp 260, revd on oth. grds., C A, 373 F 2d 493, cert. den 88 S Ct 69, 389 U S. 851, 19 L.Ed 2d 120.

4. Evidence held properly excluded

U S—Union Pac R Co v Denver & R G W R. Co, C A Utah, 198 F 2d 854

Evidence held sufficient

U S—Union Pac R. Co v Denver & R.G W R Co, supra

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13. U S—Chicago & E.I.R Co v Illinois Cent. R. Co., D C Ill., 261 F.Supp 289—Tampa Phosphate R Co. v Seaboard Coast Line R. Co., C.A.Fla., 418 F 2d 387, cert. den. 90 S Ct. 907, 397 U.S. 910, 25 L Ed.2d 90, reh. den. 90 S Ct. 1256, 397 U.S 1030, 25 L.Ed 2d 543

§ 7. In General

Library References

Railroads ⇐13.

18. U S.—Overstreet v Southern Ry Co, C.A.Miss, 371 F 2d 411, cert den. 87 S Ct. 1700, 387 U.S. 912, 18 L Ed.2d 634

Mich—Chesapeake & O Ry Co. v Herzberg, 166 N.W.2d 652, 15 Mich.App. 271

N.Y—Pennsylvania R. Co. v. State, 192 N.Y.S.2d 298, 17 Misc 2d 1074, app. dism. 217 N.Y.S.2d 84, 9 N.Y 2d 909, 176 N E 2d 95, affd 223 N Y S 2d 541, 15 A.D.2d 269, affd 230 N.Y.S.2d 1004, 11 N.Y.2d 504, 184 N E.2d 588.

Wis.—Northern Pac Ry Co v. Wise, 82 N.W.2d 352, 275 Wis. 479.

19. Wis.—Northern Pac Ry. Co v. Wise, 82 N.W 2d 352, 275 Wis. 479

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35. Ky—Louisville & N R. Co v. Sutton, 436 S W 2d 487

§ 8. Incorporation and Existence

Library References

Railroads ⇐8, 14.

44. Corporate existence shown

Ill—People v Meeks, 375 N E 2d 1001, 16 Ill Dec 894, 59 Ill App 3d 521

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47. Tex—Thompson v Sinkler, Civ App, 295 S W 2d 508, err ref no rev err Revd on oth grds 78 S Ct 758, 356 U S 326, 2 L Ed 2d 799, reh den 78 S Ct 1133, 356 U S. 978, 2 L Ed 2d 1152

§ 11. —— Acceptance of Charter

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24. Construction of charter provisions

Ky—Louisville & N R Co v Sutton, 436 S W 2d 487

§ 12. —— Organization Fee or Tax

25. Contractual in nature

Ill—Snow v Dixon, 362 N E 2d 1052, 6 Ill Dec 230, 66 Ill 2d 443, cert den 98 S Ct 429, 434 U S 939, 54 L Ed 2d 298

§ 13. Capital and Stock

Library References

Railroads ⇐15

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36. Records as to ownership; inspection

U S—Gaudiosi v Franklin, D C Pa, 166 F Supp 353, affd. and app dism. in part, C A, 269 F 2d 873, cert. den 80 S Ct 211, 361 U S 902, 4 L Ed 2d 157

37. U S—Guttmann v Illinois Cent R Co, D C N Y, 91 F Supp 285, affd, C A, 189 F 2d 927, 27 A L R 2d 1066, cert den 72 S Ct 107, 342 U S. 867, 96 L Ed 652

Discretion of directors to withhold

U S—Guttmann v Illinois Cent. R Co, D C N Y., 91 F Supp. 285, applying Illinois law Affd, C A, 189 F 2d 927, 27 A L.R 2d 1066, cert den 72 S Ct 107, 342 U S 867, 96 L Ed 652

Preferred stock; surplus earnings

(1) At common law

Mo—St. Louis Southwestern Ry Co v Loeb, 318 S W.2d 246

(2) Under statutes

Mo—St. Louis Southwestern Ry Co v. Loeb, 318 S.W 2d 246

(3) Determination of right to participate

Mo—St Louis Southwestern Ry Co v Loeb, 318 S W 2d 246

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7. Wis—Northern Pac Ry Co v Wise, 82 N.W 2d 352, 275 Wis 479

Extent of stock issuance under fee paid

I—New York, C. & St L R. Co v. Hoffman, 150 N E.2d 618, 13 Ill 2d 580.

Computation and measure of fees

I.—New York, C & St. L.R. Co v Hoffman, 150 N.E.2d 618, 13 Ill 2d 580

Stock change without capitalization change

—New York, C. & St. L R. Co v Hoffman, 150 N.E.2d 618, 13 Ill 2d 580

Statute held an enabling act

s—St. Louis Southwestern Ry Co. v. Loeb, 318 S W 2d 246

§ 14. Subscriptions to Stock; Rights and Liabilities of Stockholders

Library References

Railroads ⇐16

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72. Ky—Kentucky Coal, & Iron Mfg Co v' Lexington, & Big Sandy R Co, 7 Ky Opin 131

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94. U S—Western Pac R R Corp v Western Pac R Co, C A Cal, 197 F 2d 994, vac on oth grds 73 S Ct 656, 345 U S 247, 97 L Ed 986, reh den, C A, 206 F 2d 495, cert den 74 S Ct 241, 346 U S 910, 98 L Ed 407, and 74 S Ct 242, 346 U S 910, 98 L Ed 407, reh den 74 S Ct 376, 346 U S 940, 98 L Ed 428

N J—In re Paterson & Hudson River R Co, 94 A 2d 657, 11 N J 403

97. Attorney's fees

U S—Harris v Chicago Great Western Ry Co, C A Ill, 197 F 2d 829

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9. Proxies

U S—Weeks v Alpert, D C Mass., 131 F Supp 608—Brown v Chicago, R I & P R Co, C A Ill, 328 F 2d 122—Union Pac R Co v Chicago & N W Ry Co, D C Ill, 226 F Supp 400

Ratification of long-term rates

N Y—Ripley v International Rys of Central America, 209 N Y S 2d 289, 8 N Y 2d 430, 171 N E 2d 443

Application of Securities Exchange Act

U S—Union Pac R. Co v Chicago & N W Ry Co, D C Ill., 226 F Supp 400

10. Theory of action

U S—Industrial Waxes, Inc v International Rys of Central America, D C N Y, 193 F Supp 783

General rules of procedure govern in actions by stockholders to enforce their stock rights [11.1]

11.1. U S—Levin v Mississippi River Corp, D C N Y, 289 F Supp 353

Pa—Weston v Reading Co, 41 D & C 2d 231

Weight and sufficiency of evidence

U S—Guttmann v Illinois Cent R Co, C A., 189 F 2d 927, 27 A L.R 2d 1066, cert den. 72 S Ct 107, 342 U S 867, 96 L Ed 652

Injunction to prevent proxy voting denied

U S—Weeks v. Alpert, D C.Mass, 131 F Supp. 608

Sufficiency of pleadings

N.Y—Case v New York Cent. R. Co., 184 N Y S 2d 295, 16 Misc 2d 568

General rules of procedure govern in actions under the railroad stock appraisal statute.[11.2]

11.2. Parties

U S—Lesch v Chicago & E I R. Co, C A Ind, 226 F 2d 687

General rules of procedure govern in other actions by stockholders seeking relief against acts of the railroad.[11.3]

11.3. N Y—Ripley v. International Railways of Central America, 227 N Y S.2d 64, 16 A D.2d 260, motion den. 184 N E 2d 321, 11 N.Y 2d 1111, 230 N Y.S 2d 734, affd 187 N E 2d 131, 12 N Y 2d 814, 236 N Y S 2d 64

Complaint held sufficient

U.S.—U.S v. New York, N H. & H.R Co, C.A N.Y., 276 F.2d 525, cert den. 80 S.Ct 877, 362 U.S. 961, 1 L Ed 2d 876, and 80 S Ct 877, 362 U S 964, 4 L Ed 2d 878

Rule requiring plaintiffs to be stockholders at time of transaction

Pa—Weston v Reading Co, 282 A 2d 714, 445 Pa 182

Necessary allegations

Pa—Weston v Reading Co, 282 A 2d 714, 445 Pa. 182

§ 15. Officers and Agents

Library References

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12. U S—Geib v. Alan Wood Steel Co, D C Pa, 419 F Supp 1205

Tex—H Rouw Co v Thompson, Civ App, 297 S W 2d 241

18. Proxy

U S—Gaudiosi v Franklin, D C Pa, 166 F Supp 353, affd and app dism in part, C A, 269 F 2d 873, cert den 80 S Ct 211, 361 U S 902, 4 L Ed 2d 157

Staggered election of directors

Ill—Kern v. Chicago & E I R Co, 195 N E 2d 197, 44 Ill App 2d 468, construing Indiana law, cert den 85 S Ct 51, 379 U S 825, 13 L Ed 2d 35.

General counsel

U S—Jacksonville Terminal Co v Florida East Coast Ry Co, C A Fla, 363 F 2d 216, cert den 87 S Ct 321, 385 U.S 950, 17 L Ed 2d 227.

19. Legal title sufficient

Tex—Colorado River Western Ry v Texas & N O R Co, Civ App., 283 S W 2d 768, err. ref no rev. err

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26. Meetings

La—Bolding v Eason Oil Co, App, 170 So 2d 883, affd, 178 So 2d 246, 248 La. 269

28. Discretion of board

U S—Burke v Gulf, M & O R Co, D C Ala., 324 F Supp 1125, affd C A, 465 F.2d 1206

29. U S—Chicago Great Western Ry Co v. Robinson, C A Mo., 243 F.2d 389

31. U S—Chicago Great Western Ry. Co v. Robinson, C A Mo, 243 F 2d 389—Zukoski v. Baltimore & O.R Co, C A Pa., 315 F.2d 622, cert. den 84 S.Ct 118, 375 U.S 856, 11 L Ed.2d 83.

33. Or—Holt v City of Salem, 234 P 2d 564, 192 Or 200

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45. N J—City of Bayonne v Palmer, 217 A 2d 141, 90 N J.Super. 245, affd 221 A.2d 741, 47 N J 520.

48. Regional sales manager

U.S—Boston & M.R R. v. Aetna Cas. & Sur. Co, D C Mass, 222 F Supp. 458, affd., C.A., 329 F.2d 602

Secretary

La.—Bolding v. Eason Oil Co., App., 170 So.2d 883, affd. 178 So 2d 246, 248 La. 269

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49. Discretion not abused

U.S.—Guttmann v. Illinois Cent R. Co., supra, n. 11 1

55. Not chargeable personally with all details of operation

Tex—Deramus v. Thornton, 333 S W 2d 824, 160 Tex. 494

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94. U.S.—Golick v New York Cent. R Co, D.C. Mich., 138 F Supp. 384.

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24. Ariz.—Southern Pac. Co. v. Barnes, 415 P.2d 579, 3 Ariz.App 483

25. Pa—Fuller v Pennsylvania R Co, 83 A 2d 405, 169 Pa Super 523, revd on oth grds 89 A 2d 795, 371 Pa 330, 34 A L R 2d 820

In the absence of breach of trust, directors may repurchase stock issued under a stock incentive plan.[33.5]

33.5. Fraud or breach of trust not shown

U S—Gruber v Chesapeake & O Ry Co, D C Ohio, 158 F Supp 593

§ 16. Powers

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52. Constructing lines across country

U S—Central R Co of N J v U S, 113 F Supp 457, 125 Ct Cl 562

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64. Contract with union

U S—Halpern v Pennsylvania R Co, D C N Y, 189 F Supp 494

65. Ky—Yellow Cab Co of Ashland v Murphy, 243 S W 2d 42

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75. Remote expenditures improper

U S—U S v Boston & M R R, D C Mass, 157 F Supp 218

Charitable contributions

Utah—Union Pac. R Co v Trustees, Inc, 329 P 2d 398, 8 Utah 2d 101

Noninterference by commission

La—Southern Pac Co v Louisiana Public Service Commission, 222 So 2d 499, 254 La. 23

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5. Miss.—West Bros, Inc v Illinois Cent R Co, 75 So.2d 723, 222 Miss 335.

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§ 17. Duration and Termination of Corporate Existence

The continuous corporate existence of a railroad is not affected by an election to relinquish its original charter and file a certificate of incorporation under a new statute.[16.5]

16.5. U.S.—In re Penn Cent. Securities Litigation, D.C.Pa., 335 F Supp 1026.

17. U.S.—Durham v. Southern Ry Co, D.C Va, 256 F.Supp. 879

Del.—Wolfensohn v Madison Fund, Inc, 253 A.2d 72

Interlocking directorate insufficient to warrant disregard of corporate entity

U.S.—In re Penn Cent Securities Litigation, D.C Pa., 335 F.Supp. 1026.

§ 18. Amendment, Revocation, or Forfeiture of Charter or Franchise, and Dissolution

Library References

Railroads ⇐9, 32.

21. N.Y.—Pennsylvania R. Co. v. State, 192 N.Y.S 2d 298, 17 Misc.2d 1074, app. dism. 217 N Y.S.2d 84, 9 N.Y.2d 909, 176 N E.2d 95, affd. 223 N Y S 2d 541, 15 A.D.2d 269, affd. 230 N.Y.S.2d 1004, 11 N.Y.2d 504, 189 N.E.2d 588.

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82. N.J—Application of Pennsylvania & N.R. Co, 155 A.2d 761, 31 N.J. 146.

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13. N J—C J.S cited in Application of Pennsylvania & N R Co, 155 A 2d 761, 765, 31 N J 146

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37. Mo—Hennick v Kansas City Southern Ry Co, 269 S W 2d 646, 364 Mo 883

§ 21. State Regulation

Library References

Railroads ⇐33(1).

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66 Miss—West Bros, Inc v Illinois Cent R Co, 75 So 2d 723, 222 Miss 335

§ 22. —— What Constitutes "Doing Business"

Library References

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71. U S—Dodd v Rahway Valley Co, D C N J, 150 F Supp 599

Ga—Kirkland v Atchison, T & S F Ry Co, 121 S E 2d 411, 104 Ga App 200

N Y—Rondinelli v Chicago, R I & P R Co, 170 N Y S.2d 947, 5 A D 2d 842, app gr 175 N Y S 2d 578, 6 A D 2d 813

Wis—Huck v Chicago, St. P, M & O Ry Co, 90 N W 2d 154, 4 Wis 2d 132

Solicitation of business

Pa—Ramey v Donora Southern R Co, 13 D & C 2d 732, 37 Wash 70

Wis.—Lau v Chicago & N W Ry Co, 111 N W 2d 158, 14 Wis 2d 329

§ 23. In General

Library References

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73. Evidence

U S—Western Pac R R Corp v Western Pac R Co, C A Cal, 197 F.2d 994, vac on oth grds 73 S Ct 656, 345 U S 247, 97 L.Ed 986, reh den, C A, 206 F 2d 495, cert den 74 S Ct 241, 346 U.S 910, 98 L Ed 407, and 74 S Ct 242, 346 U S 910, 98 L.Ed 407, reh den 74 S Ct. 376, 346 U S 940, 98 L Ed 428.

N Y—Foster v Erie R Co, 156 N Y.S 2d 705, 2 A D 2d 868

N C—Israel v. Baltimore & A R Co, 136 S E 2d 248, 262 N C 83

S C—Central of Georgia Ry v Walker Truck Contractors, 243 S E 2d 923, 270 S.C 533

Trial

Iowa—Des Moines & C I Ry. Co. v. Iowa State Tax Commission, 115 N.W 2d 178, 253 Iowa 994.

Actions by private persons suffering special damage

N Y—Brunschwig v Long Island R. Co, 244 N.Y S.2d 708, 41 Misc 2d 24

Notice of claim

N Y—Sudakin v. Long Island R. Co., 300 N.Y.S.2d 371, 32 A.D 2d 560

No right of recovery against vendor for prior corporate mismanagement

U S—Bangor Punta Operations, Inc v. Bangor & A.R. Co, Me., 94 S Ct. 2578, 417 U.S 703, 41 L.Ed 2d 418

Right of railroad to maintain action

U S.—Bangor & Aroostook R. Co. v Bangor Punta Operations, Inc., C.A.Me., 482 F 2d 865, revd. on oth. grds 94 S Ct. 2578, 417 U S. 703, 41 L.Ed 2d 418

§ 25. Jurisdiction and Venue

Library References

Railroads ⇐22(1), 33(2).

Barron and Holtzoff, Federal Practice and Procedure §§ 21, 23, 54.

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79. U S—Chicago R I & P R Co v Chicago, B & Q R Co, D C Ill, 301 F Supp 72, affd, C A, 437 F 2d 6, cert den 91 S Ct 2173, 402 U S 996, 29 L Ed 2d 161

80. Tex—Union Terminal Co v McDonald, Civ App, 324 S W 2d 561

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Under some statutes suits against railroad companies may be brought in any county through or into which the railroad rails and roadbeds of the railroad extend or are operated.[55]

5.5. Ark—Willis Shaw Frozen Exp v Digby, 538 S W 2d 706, 260 Ark 284

Tex—Houston Contracting Co v Texas & P Ry Co, Civ App, 361 S W 2d 251.

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7. Tenn—Skaggs v Tennessee Cent Ry Co, 246 S W 2d 55, 193 Tenn 384

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23. Ga—Georgia, A S & C Ry Co v Atlantic Coast Line R Co, 76 S.E 2d 724, 88 Ga.App 426

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44. Miss—Alabama, T & N R. Co v Howell, 141 So 2d 242, 244 Miss 157

45. U S Lindley v St Louis-San Francisco Ry Co, C A Ill, 407 F 2d 639

Fla—Glisson v Central of Georgia Ry Co, App, 147 So 2d 5

La—Universal Carloading & Distributing Co v Sara Motor Freight Line, Inc, App, 156 So 2d 608

Mo—Hayman v Southern Pac Co, 278 S W 2d 749

46. U S—Waller v New York, N.H & H R Co., D C N Y, 127 F Supp 863

Ga.—Kirkland v Atchison, T & S F Ry Co, 121 S E 2d 411, 104 Ga App 200

La—Shaw v. Texas & Pac Ry Co., App, 170 So.2d 874, application den 172 So 2d 703, 247 La 621

Mo—Hayman v Southern Pac Co, supra, n. 45.

N Y—Cincis v. Seaboard Air Line Ry, 113 N Y.S.2d 29, 201 Misc. 887

47.5. Fla.—Sumari v Illinois Cent R Co, App., 179 So 2d 220, decision quashed, Sup, 191 So 2d 427.

Service by registered mail

N J—Berry v Pennsylvania R. Co., 193 A 2d 569, 80 N J Super 321

Jurisdiction not assumed under particular facts

D.C—Byrd v Norfolk & W Ry. Co, App, 194 A.2d 651.

50. Miss.—Illinois Cent R. Co. v. McDaniel, 151 So.2d 805, 246 Miss 600

Under a state long arm statute a foreign rail carrier can be subject to jurisdiction for actions arising out of the supply of services to a person within that state, regardless of whether it is present under the doing business test.[50.5]

50.5. Effect of Carmack Amendment

U S.—Sarno v Florida East Coast Ry. Co, D C Mass, 327 F Supp. 506

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60. Pa—Pezzulo v Delaware & Hudson R Corp, 113 P L J 163

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63. Ill—Baltimore & O R Co v Mosele, 368 N E 2d 88, 10 Ill Dec 602, 67 Ill 2d 321

68. U S—Burnett v New York Cent R Co, Ohio, 85 S Ct 1050, 380 U S 424, 13 L Ed 2d 941

71. Venue not proper

Ga—Central of Georgia R Co v Georgia Kraft Co, 230 S E 2d 74, 140 Ga App 8

72. U S—Burnett v New York Cent R Co, Ohio, 85 S Ct 1050, 380 U S 424, 13 L Ed 2d 941

77. Waiver of venue

U S—Burnett v New York Cent R Co, Ohio, 85 S Ct 1050, 380 U S 424, 13 L Ed 2d 941

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88. Miss—Alabama, T & N R Co v Howell, 141 So.2d 242, 244 Miss 157

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95. N Y—Elish v St Louis Southwestern ern Ry Co, 112 N E 2d 842, 305 N Y 267

96. Mo—Hayman v Southern Pac Co, supra, n 45

98. U S—Truck Transport Co v Canadian Nat Rys, D C Mich, 168 F Supp 619

1. N C—Dumas v Chesapeake & O Ry Co, 117 S E 2d 426, 253 N C 501

4. U S—Hornstein v Atchison, T & S F R R, D C Wis, 229 F Supp 1009

Pa—Ramey v Donora Southern R Co, 13 D & C 2d 732, 37 Wash 70

Tenn—Atchison, T & S F Ry Co v Ortiz, 361 S.W.2d 113, 50 Tenn App. 317

5. U S—Fannin v Chesapeake & O Ry Co, D C Pa, 204 F Supp 154—Vereen v Chicago, M, St P. & P R Co, D C Pa, 209 F Supp 919—Greenawalt v Reading Co, D.C.Pa, 209 F Supp. 954

Mich—Hershel Radio Co v Pennsylvania R Co, 54 N W 2d 286, 334 Mich 148

N Y—Hardaway v Illinois Cent. R Co, 170 N Y S 2d 584, 9 Misc 2d 705

N.C—Lambert v Schell, 69 S E 2d 11, 235 N C 21

Doing business not shown

(3) Other matters

N.Y.—Badger v Lehigh Valley R Co, 360 N Y S 2d 523, 45 A D.2d 601

Jurisdiction assumed under particular facts

U S—Guillot v Southern Pac. Co., D.C La., 287 F Supp 65

6. Pa—Pezzulo v Delaware & Hudson R Corp, 113 P L.J. 163

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16. Particular activities

(4) Other activities.

Tex—Forcum-Dean Co v Missouri Pac R Co, Civ App, 341 S W 2d 464, err dism.

§ 26. Process

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28. Ga—Georgia, A.S & C Ry Co v Atlantic Coast Line R Co., 76 S E 2d 724, 88 Ga App 426.

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56. N.Y—Taylor v Long Island R.R, 181 N Y S 2d 69, 17 Misc 2d 44.

58. N.Y.—Isaf v. Pennsylvania R Co, 299 N.Y.S 2d 231, 32 A D 2d 578

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71. Kan—C.J.S cited in Kinsch v Missouri-Kansas-Texas R Co, 310 P 2d 903, 906, 181 Kan 354

Miss—Alabama, T & N R Co v Howell, 141 So 2d 242, 244 Miss 157

74. Kan—Kinsch v Missouri-Kansas-Texas R Co, 310 P 2d 903, 181 Kan 354

76. U S—Truck Transport Co v Canadian Nat Rys, D C Mich, 168 F Supp 619

83. N Y—Ruth v Rock Island R Co, 157 N Y S 2d 141, revd on oth grds 171 N Y S 2d 406, 5 A D 2d 215, app gr 175 N Y S 2d 1021, 6 A D 2d 866

84. U S—Hornstein v Atchison, T & S F R R, D C Wis, 229 F Supp 1009

Pa—Ramey v Donora Southern R Co, 13 D & C 2d 732, 37 Wash 70

Cause of action arising out of state

(2) Other matters

Fla—Illinois Cent R Co v Simari, 191 So 2d 427

Service held valid

Fla—Simari v Illinois Cent R Co, App, 179 So 2d 220, decision quashed, Sup, 191 So 2d 427

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90. U S—Insurance Co of North America v Lone Star Package Car Co, D C.Tex, 107 F Supp 645

91. U S—Insurance Co of North America v Lone Star Package Car Co, supra, n 90

Publication unnecessary

Miss—Illinois Cent R Co v McDaniel, 151 So 2d 805, 246 Miss 600

93. U S—Marsh v Tillie Lewis Foods, Inc, D.C S D, 254 F Supp 490

2. Service upheld

U S—White v Seaboard Coast Line R Co, D C Pa, 48 F R D 454

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57. Held discriminatory

U S—Alabama Great Southern R Co v Eagerton, D C Ala, 541 F Supp 1084

58. Effect of acting in different capacity

Cal—Union Pac R Co v City of Long Beach, 101 Cal Rptr 112, 24 C A 3d 594

§ 28. —— Power to Regulate

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67. Kan—Missouri Pac R. R. v Board of County Com'rs of Greeley County, 643 P 2d 188, 231 Kan 225

69. Ariz—Pima County v Southern Pac Co, 386 P 2d 400, 95 Ariz 41.

N Y—Pennsylvania R. Co v State, 192 N.Y.S.2d 298, 17 Misc.2d 1074, app. dism 217 N.Y.S.2d 84, 9 N Y.2d 909, 176 N E.2d 95, affd. 223 N.Y.S 2d 541, 15 A D.2d 269, affd. 230 N Y.S 2d 1004, 11 N.Y 2d 504, 184 N.E.2d 588.

S C.—Atlantic Coast Line R Co. v. Public Service Commission, 84 S.E.2d 132, 226 S C 136.

Attorney general

N.Y—Brunschwig v Long Island R Co, 244 N Y.S.2d 708, 41 Misc 2d 24

Subject to legislative control

D C—Brotherhood of Locomotive Firemen and Enginemen v. Chicago, B. & Q R Co, D.C, 225 F Supp 11, affd, C A, 331 F 2d 1020, cert. den. 84 S.Ct 1181, 1182, 377 U S 918, 12 L.Ed.2d 187

71. N Y.—Brunschwig v Long Island R. Co, 244 N Y S.2d 708, 41 Misc 2d 24.

Jurisdiction over highway-rail crossing proceedings

Pa—Com Dept of Transp v Pennsylvania Public Utility Commission, 346 A 2d 371, 21 Pa Cmwlt 407

77. N Y—Brunschwig v Long Island R Co, 2 N Y S 2d 708, 41 Misc 2d 24

§ 29. —— Regulation by Commission

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84. N J—Pennsylvania R Co v Department of Public Utilities, Bd of Public Utility Com'rs, 102 A 2 618, 14 N.J 411

S C—State ex rel Public Service Commission v. Atlantic Coast Line R Co, 72 S E 2d 438, 222 S C 26 cert den. 73 S Ct 727, 345 U S 916, 97 L E 1350

Purpose of control

Neb—Application of Chicago, R I & P.R Co, 10 N W.2d 448, 169 Neb 867

85. N H—Opinion of the Justices, 81 A 2d 306, 9 N H 541

86. U S—Silke v Penn Central Transp Co, D C Ohio, 352 F Supp 983

Ill—City of Wheaton v Chicago, A & E Ry Co., 12 N.E 2d 370, 3 Ill App 2d 29.

Ind—New York Cent R Co v. Public Service Commission, 183 N E 2d 609, 133 Ind App 680

La—Texas & N O R. Co v Louisiana Public Service Commission, 135 So 2d 268, 242 La 191—Texas & N O R. Co v. Louisiana Public Service Commission, 161 So 2d 67, 245 La 748

N J—City of Bayonne v. Board of Public Utility Com'rs, Dept of Public Utilities, 105 A 2d 417, 3 N J Super 520—New York, S & W.R. Co v Board of Public Utility Com'rs, 150 A 2d 656, 2 N J. 513—Sprissler v Pennsylvania-Reading Seashore Lines, 211 A 2d 783, 45 N J 127

N.Y—Brunschwig v Long Island R. Co., 244 N Y.S 2d 708, 41 Misc.2d 24—Long Island R. Co. v Public Service Commission, 292 N Y.S.2d 167, 30 A D 2d 409, affd. 245 N E.2d 799, 23 N Y 2d 852, 297 N Y.S 2d 65

S C—State ex rel Public Service Commission v Atlantic Coast Line R Co, supra, n. 84

Tex—Railroad Commission of Tex v Jackson, Civ App, 315 S W.2d 193, err. ref. no rev err.

All matters

Tex.—Colorado River Western Ry. v. Texas & N.O R Co, Civ.App, 283 S.W.2d 768, err ref no rev err

87. Ohio—Baltimore & O.R Co. v Public Utilities Commission of Ohio, 102 N.E.2d 246, 156 Ohio St. 282.

§ 30. —— Enforcement of Duties

96. Neb—Chicago, B. & Q.R. Co v. Keifer, 6 N.W 2d 541, 160 Neb. 168.

§ 31. Federal Wartime Control

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52. U S—U S v. Panhandle & Santa Fe Ry. Co. D.C.Tex., 104 F.Supp. 758.

58. Tenn.—Melton v American Flour & Grain Co., 5 Tenn.App. 383.

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2. Execution authorized by departmental order

U.S.—U.S. v. Panhandle & Santa Fe Ry. Co., D.C.Tex 104 F Supp 758

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20. Government held not liable in damages for trespass

US—Clark v US, D C Or, 109 F Supp 213, affd, C A, 218 F 2d 446

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29. US—National R R Passenger Corp v Harris, C A Okl, 490 F 2d 572

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§ 31.1. National Railroad Passenger Corporation

Under the Rail Passenger Service Act of 1970, a basic system of intercity rail passenger service for the whole country is operated by a National Railroad Passenger Corporation (Amtrak), and railroads contracting with the corporation for its assumption of passenger service are relieved of responsibility for providing this service.

Library References

Railroads ⇐5.51.

The Rail Passenger Service Act of 1970 [35.1] is a national attempt to preserve and revitalize intercity railway passenger service,[36.1] and it was enacted by Congress because of the worsening rail passenger crisis [37.1] Its validity has been upheld against various objections,[38.1] including objections that it violated the due process [39.1] and equal protection [40.1] clauses of the Constitution.

35.1. 45 U S C A § 501 et seq

Purpose of Act

US—In re Penn Cent Transp Co, D C Pa, 329 F.Supp 572—City of Philadelphia v Baker, C A Pa., 508 F 2d 279, cert. den 95 S.Ct. 2657, 422 U.S. 1042, 45 L Ed 2d 694

D C.—Potomac Passengers Ass'n v Chesapeake & O Ry Co, C A, 475 F.2d 325, 154 U.S App D C 214, on remand, D C., 363 F Supp 39, revd on oth grds., 94 S Ct. 690, 414 U S 453, 38 L.Ed 2d 646, reh. den. 94 S Ct. 1478, 415 U.S 952, 39 L.Ed 2d 568, vac 494 F 2d 1156, 161 U S.App D C. 237, revd on oth. grds 520 F 2d 91, 171 U.S.App D C. 359.

Not a government agency

US—National R.R. Passenger Corp v. Miller, D C Kan., 358 F.Supp 1321, affd. 94 S.Ct 285, 414 U.S. 948, 38 L Ed 2d 205—Sentner v Amtrak, D.C.N.J., 540 F.Supp 557

Construed

U S.—Seaboard Coast Line R. Co v. National R R. Passenger Corp, C.A.Fla., 645 F 2d 513

36.1. U.S.—Quincy College & Seminary Corp v Burlington Northern, Inc, D.C.Ill., 328 F Supp. 808, affd. 92 S Ct, 939, 405 U S. 906, 30 L Ed 2d 777

D C—Potomac Passengers Ass'n v Chesapeake & O.R. Co, D.C, 363 F Supp. 39, revd. on oth grds, C.A., 520 F 2d 91, 171 U.S.App.D C 359

Not violative of Twentieth Amendment

U S.—National R.R Passenger Corp. v. Miller, D C Kan., 358 F.Supp 1321, affd. 94 S.Ct. 285, 414 U.S. 948, 38 L.Ed.2d 205.

37.1. D.C.—Congress of Railway Unions v Hodgson, D.C., 326 F.Supp. 68.

Passengers intended beneficiaries

D C—Potomac Passengers Ass'n v Chesapeake & O Ry Co, C A, 475 F 2d 325, 154 U S App D C 214, on remand, D C, 363 F Supp 39, revd on oth grds, 94 S Ct 690, 414 U S 453, 38 L Ed 2d 646, reh den 94 S Ct 1478, 415 U S 952, 39 L Ed 2d 568, vac 494 F 2d 1156, 161 U S App D C 237, revd on oth grds 520 F 2d 91, 171 U S App D C 359

38.1. Delegation of legislative power

U S—Quincy College & Seminary Corp v Burlington Northern, Inc, 328 F Supp 808, affd 92 S Ct 939, 405 U S 906, 30 L Ed 2d 777

Regulation of intrastate commerce

U S—Quincy College & Seminary Corp v Burlington Northern, Inc, D C Ill, 328 F Supp 808, affd 92 S Ct 939, 405 U S 906, 30 L Ed 2d 777

39.1. U S—Quincy College & Seminary Corp v Burlington Northern, Inc, D C Ill, 328 F Supp 808, affd 92 S Ct 939, 405 U S 906, 30 L Ed 2d 777

Providing reimbursement for employee travel privileges

U S—National R R Passenger Corp v Atchison Topeka and Santa Fe Ry Co, Ill, 105 S Ct 1441, 84 L Ed 2d 432

40.1. U S—Quincy College & Seminary Corp v Burlington Northern, Inc, 328 F Supp 808, affd 92 S Ct 939, 405 U S 906, 30 L Ed 2d 777

This legislation authorized the formation of a National Railroad Passenger Corporation, which has been called "Amtrak," [41.1] and it directed the Secretary of Transportation to designate a "basic system" of intercity rail passenger service for the whole country.[42.1] Except to the limited extent that it permits rail service beyond the basic system,[43.1] it envisages that passenger service over any lines not included in the basic system will be discontinued.[44.1] As to lines included within the system it permits any railroad to enter into a contract with Amtrak under which Amtrak will assume the burden of operating the service, thereby relieving the railroad of its entire responsibility for providing intercity passenger service.[45.1] The procedure for discontinuance of passenger trains or services is provided for by the Act.[46.1]

41.1. D.C—Congress of Railway Unions v Hodgson, D C, 326 F.Supp 68

42.1. D C—Congress of Railway Unions v. Hodgson, D.C, 326 F Supp 68

Judicial review

(1) Explicit words of Rail Passenger Service Act that basic system "shall not be reviewable in any court" are sufficient to indicate that Congress intended no judicial review

US—Quincy College & Seminary Corp v. Burlington Northern, Inc, 328 F.Supp 808, affd. 92 S Ct. 939, 405 U S 906, 30 L.Ed.2d 777.

(2) Neither the courts nor the I.C.C. may review basic system of intercity rail passenger service operated by Amtrak, including designation of specific trains

US.—In re Penn Cent. Transp. Co., D C Pa., 329 F Supp 572—In re Penn Cent. Transp. Co, D C Pa, 370 F.Supp. 22, affd, C A., 508 F.2d 279, affd 510 F.2d 970, two cases, cert. den 95 S Ct. 2657, 422 U.S. 1042, 45 L.Ed.2d 694—City of Philadelphia v, Baker, C A.Pa., 508 F.2d 279, cert den. 95 S.Ct. 2657, 422 U.S 1042, 45 L.Ed.2d 694

(3) Strong presumption in favor thereof

D.C.—Potomac Passengers Ass'n v. Chesapeake & O Ry. Co., C A., 475 F.2d 325, 154 U S.App.D C 214, on remand, D.C., 363 F.Supp 39, revd. on oth grds, 94 S Ct 690, 414 U S 453, 38 L Ed 2d 646, reh den 94 S Ct 1478, 415 U S 952, 39 L Ed 2d 568, vac 494 F 2d 1156, 161 U S App D C 237, revd on oth grds 520 F 2d 91, 171 U S App D C 359

(4) Other matters

D C—National R R Passenger Corp v I C C, C A, 610 F 2d 865, 197 U S App D C 346

43.1. See 45 U S C A § 563

44.1. U S—Wood v National R R Passenger Corp, D C Conn, 341 F Supp 908

D C—Congress of Railway Unions v Hodgson, D C, 326 F Supp 68

45.1. U S—National R R Passenger Corp v. Chesapeake & O Ry Co, C A Ind, 551 F 2d 136

D C—Congress of Railway Unions v Hodgson, D C, 326 F Supp 68

Contract construed

U S—Wood v National R R Passenger Corp, D C Conn, 341 F Supp 908—In re Penn Cent Transp Co, D C Pa, 370 F Supp 22, affd, C A, 508 F.2d 279, affd 510 F 2d 970, two cases, cert den 95 S Ct 2657, 422 U S 1042, 45 L Ed 2d 694.

Reference to ICC for study and determination

U S—In re Penn Cent Transp Co., D.C Pa., 329 F Supp. 572

Complete substitute for service provided by carriers contracting with Amtrak

U S—In re Penn Cent Transp Co, D C Pa, 329 F Supp 572

Res Judicata

U S—In re Penn Cent Transp Co, D.C Pa, 370 F Supp 22, affd. C A, 508 F 2d 279, affd 510 F 2d 970, two cases, cert den 95 S Ct 2657, 422 U S 1042, 45 L Ed 2d 694

Just and reasonable compensation

U S—Matter of Penn Cent. Transp Co., D C Pa., 440 F Supp 1069

D C—National R.R. Passenger Corp v I.C.C, C.A., 610 F.2d 865, 197 U S App D.C 346

Lease not discharged by frustration of purpose

Wis—Chicago, M., St P & P R Co v Chicago & N W Transp Co, 263 N W 2d 189, 82 Wis.2d 514

46.1. 45 U S C A § 564

Notice

(1) The 30-day notice of proposed discontinuance of intercity rail passenger service is not related to date that railroad contracts with National Railroad Passenger Corporation (Amtrak)

D C—Congress of Railway Unions v. Hodgson, D.C., 326 F Supp 68

(2) The National Railroad Passenger Service Act precludes judicial enforcement, except upon petition of Attorney General in case not involving labor agreement, of the requirement that railroads signing contracts with National Railroad Passenger Corporation (Amtrak) give 30-day notice of proposed discontinuance of intercity rail passenger service.

D.C—Congress of Railway Unions v Hodgson, D C, 326 F Supp 68.

(3) Held sufficient

U S—In re Penn Cent Transp Co, D C Pa., 329 F.Supp 572

Standing to seek injunctive relief

(1) Under Rail Passenger Service Act, railway labor unions and railroad passengers association and two state agencies did not have standing to seek injunctive relief against discontinuance of certain intercity passenger trains that were not included within basic system of intercity rail passenger service designated by Secretary of Transportation.

D C.—Congress of Railway Unions v Hodgson, D C, 326 F.Supp. 68.

(2) State Commissioner of Transportation had standing to bring action for an injunction restraining National Railway Passenger Corporation from discontinuing certain passenger service between two cities

U S.—Wood v. National R R. Passenger Corp, D C Conn, 341 F.Supp 908

(3) By Attorney General

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U S—In re Penn Cent Transp Co, D C Pa, 370 F Supp 22, affd, C A, 508 F 2d 279, affd 510 F 2d 970, two cases, cert den 95 S Ct 2657, 422 U S 1042, 45 L Ed 2d 694

D C—Potomac Passengers Ass'n v Chesapeake & O Ry Co, C.A, 475 F 2d 325, 154 U S App D C 214, on remand, D C, 363 F Supp 39, revd on oth grds, 94 S Ct 690, 414 U S 453, 38 L Ed 2d 646, reh den 94 S Ct 1478, 415 U S 952, 39 L Ed.2d 568, vac 494 F 2d 1156, 161 U S App D C 237, revd 520 F 2d 91, 171 U S App D C 359

District Court without jurisdiction to enjoin discontinuance

D.C—Potomac Passengers Ass'n v Chesapeake & O Ry Co, C A, 475 F 2d 325, 154 U S App D C 214, on remand, D C, 363 F.Supp 39, revd on oth grds, 94 S Ct 690, 414 U S 453, 38 L Ed.2d 646, reh den. 94 S Ct 1478, 415 U S 952, 39 L Ed 2d 568, vac 494 F 2d 1156, 161 U S App D.C 237, revd on oth grds 520 F.2d 91, 171 U.S App.D C 359

Approval of Commission before discontinuing bus service

U.S.—In re Penn Cent Transp Co, D.C Pa, 370 F.Supp 22, affd, C A, 508 F 2d 279, affd 510 F.2d 970, two cases, cert den 95 S Ct 2657, 422 U.S 1042, 45 L Ed 2d 694

Under express provisions of the Rail Passenger Service Act, fair and equitable arrangements must be made by railroads signing contracts with the National Railroad Passenger Corporation (Amtrak) to protect the interests of employees affected by discontinuances of intercity rail passenger service.[47.1] The determination whether the labor protective provisions of the contract afford the affected employees fair and equitable protection is committed to the discretion of the Secretary of Labor, and is not subject to judicial review either under the Rail Passenger Service Act[48.1] or the Administrative Procedure Act.[49.1] Even assuming that the court has jurisdiction to review the determination of the Secretary, that review must be narrowly and carefully limited,[50.1] and concerns only the question whether the Secretary abused his discretion in certifying the protective arrangements as fair and equitable.[51.1]

47.1. 45 U.S C A. § 565

U S.—International Broth of Teamsters, Local 732, IBT v. Southeastern Pennsylvania Transp. Authority, Sp Ct.R R.R A, 539 F Supp 1222

Statute held inapplicable to employee passes

U S.—Baker v System Federation No. 1, D C Pa, 331 F.Supp. 1363

Burden on railroad

U S.—Baker v. System Federation No 1, D C.Pa, 331 F.Supp. 1363

Duty of Amtrak defined

U.S —Baker v System Federation No. 1, D C.Pa., 331 F.Supp. 1363

48.1. D C.—Congress of Railway Unions v Hodgson, D C., 326 F.Supp 68.

49.1. D C —Congress of Railway Unions v Hodgson, D.C., 326 F.Supp. 68

50.1. D.C.—Congress of Railway Unions v. Hodgson, D.C, 326 F.Supp 68.

51.1. D C.—Congress of Railway Unions v Hodgson, D C., 326 F Supp 68.

§ 40. —— Acceptance and Performance of Conditions

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56. Tenn —Red River Furnace Co v Tennessee Cent R Co, 87 S W 1016, 113 Tenn 697

§ 53. —— Extensions

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17. Powers of state boards or commissions

N J —New York, S & W R Co v Board of Public Utility Com'rs, 150 A 2d 656, 29 N J 513

25. Construction held not "branch" or "extension"

Minn —Chicago Great Western Ry Co v Jesse, 82 N W 2d 227, 249 Minn 324

§ 54. —— Federal Control

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30. U S—Union Pac R Co v Denver & R G.W R Co, C A Utah, 198 F 2d 354—Chicago, R I & P R Co v Thompson, D.C Ark, 135 F Supp 43—Gilmore v Sandersville R Co, D C.Ga, 149 F Supp. 725—Denver & R G W R, Co. v U S, D C Colo, 312 F Supp 329, affd 91 S Ct 188, 400 U S 921, 27 L Ed.2d 182

49 U S C.A § 1(18) is now 49 U S C A § 10901

Evidence

(2) U S.—Florida East Coast Ry Co v. U S, D C Fla, 242 F.Supp 490, affd 86 S Ct. 316, 382 U S 161, 15 L.Ed 2d 228

(4) U S —Pennsylvania R. Co v Reading Co, D C Pa, 132 F Supp 616, affd, C A, 226 F 2d 958—Chicago, M, St P & P R Co v U S, D C Wis, 242 F Supp 698—Chicago Great Western Ry. Co. v Illinois Cent R Co, D C Iowa, 275 F Supp 909.

Review

U S —Florida East Coast Ry Co. v U S, D.C Fla., 242 F Supp 490, affd 86 S Ct. 316, 382 U.S. 161, 15 L Ed 2d 228

31. U S —Chicago, M., St P. & P R Co v Chicago & E I.R Co., C A Ind., 198 F.2d 8—Pennsylvania R. Co v Reading Co, D.C Pa., 132 F Supp. 616, affd, C A., 226 F 2d 958—New York Cent R Co v Southern Ry Co, D.C Ill, 226 F Supp 463, affd, C.A, 338 F 2d 667; cert den. 85 S Ct 1088, 380 U S 954, 13 L.Ed.2d 971, reh. den. 85 S Ct 1445, 381 U S. 907, 14 L Ed.2d 289—Chicago Great Western Ry. Co v. Illinois Cent R Co., D C Iowa, 275 F.Supp 909

33. U S —Detroit & T S L R. Co v New York Cent. R Co, C A Mich., 233 F 2d 168—Chicago, R I & P R Co v Thompson, D.C Ark, 135 F Supp 43

49 U S.C A § 1(22) is now § 10907

34. U.S —Gilmore v. Sandersville R Co., D.C Ga., 149 F.Supp 725.

Evidence sufficient to show spur

U S.—Pennsylvania R Co v Reading Co, C A Pa, 226 F.2d 958—Chicago, R I. & P R. Co. v Thompson, D C.Ark, 135 F Supp. 43

Evidence sufficient to show extension

U.S.—Chicago, R I. & P.R. Co v. Thompson, D C. Ark., 135 F.Supp. 43

Liberal construction of statutory terms

U S —Chicago, M, St. P. & P.R. Co. v. Northern Pac R Co, D.C Wash, 120 F.Supp. 710, affd, C.A., 225 F.2d 840

Particular construction held within exception

Minn —Chicago Great Western Ry. Co v Jesse, 82 N.W.2d 227, 249 Minn. 324.

Test

U S —Chicago Great Western Ry Co v Illinois Cent. R Co, D C Iowa, 275 F Supp 909

35. D C —City of Pittsburgh v Federal Power Commission, C A, 237 F 2d 741, 99 U S App D C 113

Ky —Jefferson County v. Louisville & N R Co., 245 S W 2d 611

49 U S C A § 1(20) is now § 11505

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37. Injunction granted

U S —Chicago, M, St P & P R. Co v Northern Pac. R Co, supra, n 34—New York Cent R Co v Norfolk & W Ry Co, D C W Va, 214 F Supp 549

§ 56. Connections

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63. N J.—New York, S. & W R Co. v Board of Public Utility Com'rs, 150 A 2d 656, 29 N J 513.

72. N J —New York, S & W R Co v. Board of Public Utility Com'rs, 150 A 2d 656, 29 N J. 513.

73. Order held not invalid

N J —New York, S & W.R Co v Board of Public Utility Com'rs, 150 A 2d 656, 29 N J. 513

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12. N J —New York, S & W.R Co v. Board of Public Utility Com'rs, 150 A 2d 656, 29 N.J 513.

15. Evidence held sufficient to sustain board's findings.

N J.—New York, S. & W.R. Co v. Board of Public Utility Com'rs, 150 A.2d 656, 29 N.J 513.

§ 57. Stations

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73. S C —State ex rel Public Service Commission v. Atlantic Coast Line R. Co, 72 S E.2d 438, 222 S C 266, cert den. 73 S.Ct 727, 345 U S. 916, 97 L Ed 1350

§ 58. In General

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§ 59. Extensions and Branch or Spur Lines

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§ 60. Terminal Buildings, Division Terminal, Offices, Shops, Etc.

Library References

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§ 61. Stations

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99. Ill.—Illinois Cent R Co. v Michigan Cent R Co., 152 N.E 2d 627, 18 Ill.App 2d 462.

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16. Passenger terminal

US—Illinois Cent R Co v Gulf, M & O R Co, D C La, 191 F Supp 275 Affd, C A, 308 F 2d 374

§ 65. Change of Location

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Purpose of statute

N J—City of Bayonne v Palmer, 217 A 2d 141, 90 N J Super 245, affd 221 A 2d 741, 47 N J 520

Statute not affecting contracts under rerouting program

N J—City of Bayonne v Palmer, 217 A 2d 141, 90 N J Super 245, affd 221 A 2d 741, 47 N J 520

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6. 49 U S C A § 1(18) is now 49 U S C A §§ 10901, 10903

§ 66. —— Stations

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43. La—Denegre v Louisiana Public Service Commission, 242 So 2d 832, 257 La 503

§ 67. Abandonment of Location

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52. U S—I C C v Baltimore & Annapolis R Co, D C Md, 64 F R D 337

Abandonment not shown

Ind.—Simkin v New York Cent R Co, 214 N E 2d 661, 138 Ind App 668.

Abandonment occurs on failure to perform essential maintenance

U S—I C C v Chicago, Rock Island, & Pac R Co, C A Neb, 501 F.2d 908, cert den 95 S Ct 1393, 420 U S 972, 43 L Ed 2d 652

Intention to cease permanently or indefinitely

U.S—I C C v Chicago & N W Transp Co, C A Iowa, 533 F 2d 1025

Finding of abandonment not precluded

U.S.—I.C C v Chicago & N W. Transp Co, C A Iowa, 533 F.2d 1025.

62. U.S—Zirn v Hanover Bank, C A N Y., 215 F 2d 63—Manufacturers Hanover Trust Co v U S, D.C N.Y., 300 F.Supp. 185, affd 90 S Ct 758, 396 U S 555, 24 L Ed.2d 748

Relocation

U S.—City of Des Momes, Iowa v. Chicago & N W Ry Co, C A Iowa, 264 F 2d 454

63. Public convenience and necessity

La.—Denegre v. Louisiana Public Service Commission, 242 So 2d 832, 257 La 503

64. Providing service at hopeless loss

U S—In re Penn Central Transp Co, D C Pa., 372 F.Supp 1123.

§ 68. —— Stations

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73. Constitutional provision construed not to forbid discontinuance of depot

Tex.—Railroad Commission v. St. Louis Southwestern Ry. Co, Civ.App, 443 S W 2d 71, err ref. no rev err

77. La.—C.J.S. cited in Texas & N O.R. Co. v Louisiana Public Service Commission, 141 So.2d 366, 368, 242 La. 1063—Denegre v. Louisiana Public Service Commission, 242 So.2d 832, 257 La 503.

Operation at loss factor only

La.—Louisiana & A. Ry. Co. v. Louisiana Public Service Commission, 134 So 2d 551, 242 La. 67.

§ 69. Liability of Railroad Company

81. Tex—City of Fort Worth v Southwest Magazine, Civ App, 358 S W 2d 139, err ref no rev err Cert den 83 S Ct 730, 372 U S 914, 9 L Ed 2d 722

§ 70. Remedies and Proceedings

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88. U S—Tennessee Public Service Commission v U S, D C Tenn, 275 F Supp 87

Questions of law and fact

Wash—Ocean Spray Cranberries, Inc v Doyle, 500 P 2d 79, 81 Wash 2d 146

The admissibility of evidence has been adjudicated in proceedings to review orders of a commission with respect to a change or abandonment of location.[98 5]

98.5. Evidence held admissible

Tex—Railroad Commission v St Louis Southwestern Ry Co, Civ App, 443 S W 2d 71, err ref no rev err

The decisions of various commissions denying an application to relocate or abandon tracks or stations have been sustained on appeal.[98 10]

98.10. La—Denegre v Louisiana Public Service Commission, 242 So 2d 832, 257 La 503

§ 73. Capacity to Acquire and Hold Land

Library References

Railroads ⇐61, 62.

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34. Miss—Mississippi Cent R Co v Ratcliff, 59 So 2d 311, 214 Miss 674

35. N Y—Corning v Lehigh Val R Co., 217 N Y S.2d 874, 14 A D 2d 156

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47. N Y—C.J.S. cited in Corning v Lehigh Val R. Co, 217 N Y S 2d 874, 879, 14 A D 2d 156

§ 74. —— Purposes for Which Land May Be Acquired

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56. Statute construed

Cal—People By and Through Dept. of Transp v Southern Pac. Transp. Co., 148 Cal Rptr 535, 84 C A.3d 315

57. U S.—Bailey v Banister, C.A Okl, 200 F 2d 683

Minn—Bolin Lumber Co. v. Chicago & N W. Ry Co, 134 N W.2d 312, 270 Minn. 516.

§ 75. Modes of Acquiring Land or Rights Therein

Library References

Railroads ⇐63.

Modern Legal Forms Ch. 26, Deeds; Ch. 28, Easements and Licenses.

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84. Kan—Harvest Queen Mill & Elevator Co v Sanders, 370 P 2d 419, 189 Kan 536, 6 A.L.R.3d 962

Mich—Detroit Edison Co v City of Detroit, 51 N W.2d 245, 332 Mich 348.

Voluntary grants

(1) Mo—Clay v Missouri State Highway Commission, 239 S W 2d 505, 362 Mo 60

87. Mich—Detroit Edison Co v City of Detroit, supra, n 84

Limitation on power

S D—Nystrom v State, 104 N W 2d 711, 78 S D 498

General statute as to corporations applicable

Mo—Coates & Hopkins Realty Co v Kansas City L Ry Co, 43 S W 2d 817, 328 Mo 1118—Clay v Missouri State Highway Commission, supra, n 84

88. Okl—Midland Val R Co v Arrow Indus Mfg Co, 297 P 2d 410

Presumptive evidence of agreement

Utah—Oregon Short Line R. Co v Murray City, 277 P 2d 798, 2 Utah 2d 427

Title may also be acquired as abutting owner by reversion following abandonment by a street railroad company.[89 1]

89.1. Mo—Clay v Missouri State Highway Commission, supra, n 34

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95. Ark—Arkansas & O Ry Corp v West, 353 S W 2d 337, 234 Ark 590

Ohio—Norfolk & Western Ry Co v Bremco Mills, Inc, 288 N.E 2d 868

Evidence held insufficient

U S—St Louis-San Francisco Ry Co v. Walter, C A Okl, 305 F 2d 90

Evidence insufficient to rebut presumption of grant

Pa—Coxe v Lehigh Val R Co, 158 A 2d 782, 398 Pa. 424

96. Ill—Smith v Mervis, 348 N.E.2d 463, 38 Ill. App 3d 731

Md—East Washington Ry Co v Brooke, 223 A.2d 599, 244 Md 287

Mich—Detroit Edison Co v City of Detroit, supra, n 87

N C—Kezuah v Seaboard Air Line R Co, 158 S E 2d 539, 272 N C 299

Not dependent on any specific period

(2) Other statements

La—Perret v Louisiana Southern Ry Co, App, 118 So 2d 510

Claim of right of way

(2) Other statements

U S—St Louis-San Francisco Ry Co v Walter, C A. Okl, 305 F.2d 90

Doctrine of acquiescence and estoppel

La—Perret v Louisiana Southern Ry Co., App, 118 So 2d 510

Prior possession

Ky—Chesapeake & O. Ry Co v Hall, 347 S.W 2d 82

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The use of property in conformity with the grant of a right of way does not constitute adverse possession.[1 5]

1.5. Tex—Rio Bravo Oil Co v Hunt Petroleum Corp., Civ.App, 439 S.W 2d 853, revd on oth. grds, Sup, 455 S W 2d 722.

3. No title by adverse possession where entry is under agreement

Cal.—Johnson v Ocean Shore R. Co., 94 Cal.Rptr 68, 16 C A.3d 429

§ 78. —— License or Consent

Library References

Railroads ⇐65.

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41. Right to remove gravel constituted a "profit a prendre"

Vt—Theberge v Canadian Pac R Co, 122 A 2d 848, 119 Vt 193

§ 79. Implied Grants

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80. Cal—Atchison, T & S F Ry Co v Abar, 79 Cal Rptr 807, 275 C A 2d 456

82. Utah—Oregon Short Line R. Co v Murray City, 277 P 2d 798, 2 Utah 2d 427

§ 80. —— Remedies of Parties

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91. Specific performance

Wash—Carr v Burlington Northern, Inc, 597 P 2d 409, 23 Wash App 386

§ 81. Conveyances To or for Railroad Company

Library References

Railroads ⇐67(1, 2)

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41. Ill.—Schnabel v. DuPage County, 428 N E 2d 671, 57 Ill Dec 121, 101 Ill App 3d 553

N D.—State v Rosenquist, 51 N W 2d 767, 78 N D 671.

Pa—Fleck v Universal-Cyclops Steel Corp, 107 P L J 82, affd 156 A.2d 832, 397 Pa 648

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47. Description held sufficient

N.D—State v Rosenquist, supra, n 41

Description not determination of question

Tenn—Smoky Mountain R Co v Paine Oil Co, App, 496 S W 2d 904.

65. Cal—Ocean Shore R Co v Doelger, 274 P 2d 23, 127 C A 2d 392—Faus v City of Los Angeles, 15 Cal.Rptr 783, 195 C.A 2d 134

N C—McCotter v. Barnes, 101 S E 2d 330, 247 N C 480

Construction against grantor and assigns

Ky.—Cincinnati, N O & T P Ry Co v Barker, 247 S.W.2d 943

66. Mo—C.J.S. cited in Missouri-Kansas-Texas R Co. v. Freer, App., 321 S.W.2d 731, 739.

N Y—Nichols v Hachn, 187 N.Y.S.2d 773, 8 A.D 2d 405.

Tenn.—Smoky Mountain R. Co v Paine Oil Co., App., 496 S.W.2d 904

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89. Miss—C.J.S. quoted at length in Alabama & V Ry. Co v Mashburn, 109 So 2d 533, 537, 235 Miss 346

§ 82. Extent of Way or Land Acquired

Library References

Railroads ⇐68.

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18. Ill—McVey v Unknown Shareholders of Inland Coal and Washing Co., 427 N.E.2d 215, 56 Ill. Dec. 135, 100 Ill App 3d 584.

Mo—C.J.S. cited in Missouri-Kansas-Texas R. Co v. Freer, App, 321 S W 2d 731, 738

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34. Pa.—Lacy v. Montgomery, 124 A 2d 492, 181 Pa Super. 640

11. Ga.—West Lumber Co v. Georgia Air Line R R., 90 S.E 2d 7, 212 Ga 29

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50. Cal—Cash v Southern Pac R Co, 177 Cal Rptr 474, 123 C A 3d 974

53. Ga—West Lumber Co v Georgia Air Line R R, 90 S E 2d 7, 212 Ga 29

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63. Pa—Palmer v Philadelphia Suburban Transp Co, 98 A 2d 245, 174 Pa Super 1

§ 83. Title, Estate, or Interest Acquired

Library References

Railroads ⇐69, 70.

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16. La—Board of Com'rs of Port of New Orleans v Illinois Cent Gulf R Co, App, 379 So 2d 838, writ den, Sup, 380 So 2d 1210

N Y—C.J.S cited in Corning v Lehigh Val R Co, 217 N Y S 2d 874, 882, 14 A D 2d 156

Easement or fee-simple title

U S—U S v 1 44 Acres of Land, More or Less, in Montgomery County, Md, D C Md, 304 F Supp 1063

Ohio—Norfolk & Western Ry Co v Bremco Mills, Inc, 288 N E 2d 868

Tex—City of Houston v Fort Worth & Denver Ry Co, Civ App, 561 S W 2d 22, err. ref. no rev err

Wash—Veach v Culp, 599 P 2d 526, 92 Wash 2d 570.

More than easement never presumed

Nev—City Motel, Inc v. State ex rel State Dept of Highways, 336 P 2d 375, 75 Nev 137, am den, reh stricken 337 P 2d 273, 75 Nev. 137

17. Del.—State ex rel Department of Transp v Penn Central Corp., Super, 445 A 2d 939

18. La—Farrell v Hodges Stock Yards, Inc, App, 333 So 2d 745 Revd on oth grds. 343 So 2d 1364

N M—Timberlake v Southern Pac Co., 461 P 2d 903, 80 N M 770

In some jurisdictions, public policy does not favor the conveyance of strips of land by simple titles to railroad companies for right of way purposes.[20.5]

20.5. Ind—Ross, Inc v. Legler, 199 N E 2d 346, 245 Ind 655

21. Mo—Clay v Missouri State Highway Commission, 239 S W.2d 505, 362 Mo 60.

22. Statute construed

Ind—Ross, Inc v. Legler, 199 N E 2d 346, 245 Ind 655

N Y—O & W Lines, Inc v. St John, 228 N E.2d 370, 20 N.Y 2d 17, 281 N.Y S 2d 302.

General rules of procedure govern in actions brought in ejectment.[22.1]

22.1. Instructions held erroneous

Ga—West Lumber Co. v Georgia Air Line R R., 90 S.E 2d 7, 212 Ga. 29

Natural easements can exist to the detriment of railroads.[22.5]

22.5. Colo.—Howard v Cactus Hill Ranch Co, App, 529 P 2d 660

§ 84. —— Under Grant or Conveyance from Owner

Library References

Railroads ⇐69.

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25. Cal.—Faus v. Pacific Elec Ry. Co., 9 Cal.Rptr. 697, 187 C.A.2d 563—Atchison, T. & S.F. Ry. Co. v Abar, 79 Cal.Rptr. 807, 275 C.A.2d 456

Del—State ex rel Department of Transp v Per Central Corp, Super, 445 A 2d 939

Ind—Ross, Inc v Legler, 199 N E 2d 346, 245 Ind 655

Nev—C J S cited in City Motel, Inc v State ex re State Dept of Highways, 336 P 2d 375, 75 Nev 137, am den, reh stricken 337 P 2d 273, 75 Nev 137

N Y—Corning v Lehigh Val R Co, 217 N Y S 2d 874, 14 A D 2d 156—O & W Lines, Inc v St John, 271 N Y S 2d 770, 26 A D 2d 145, affd 22 N E 2d 370, 20 N Y 2d 17, 281 N Y S 2d 302

Pa—Mount Carmel R. Co and Reading Co v M A Hanna Co, 24 Northumb Leg J 50, affd 89 A 2d 508, 371 Pa 232 Brookbank v Benedum-Trees Oil Co, 131 A 2d 103, 389 Pa 151—O'Loughlin v Pennsylvania R Co, 8 Chest 241

Wash—Zobrist v Culp, 627 P 2d 1308, 95 Wash 2d 556

Right of entry

U S—New Haven Inclusion Cases, Conn, 90 S Ct 2054, 399 U S 392, 26 L Ed 2d 691

26. Ill—People ex rel Adamowski v Chicago R R Terminal Authority, 151 N E 2d 311, 14 Ill 2d 230

N Y—O & W Lines, Inc v St John, 271 N Y S 2d 770, 26 A.D 2d 145, affd 228 N E 2d 370, 20 N Y 2d 17, 281 N Y S 2d 302

Okl—St Louis-San Francisco Ry Co v Humphrey, 446 P 2d 271

Ambiguity construed in favor of grantors

Ind—Ross, Inc v Legler, 199 N E 2d 346, 245 Ind 655.

La—Farrell v Hodges Stock Yards, Inc, 343 So 2d 1364

27. U.S.—U S v 1.44 Acres of Land, More or Less, in Montgomery County, Md, D.C Md, 304, F Supp 1063.

Oral declarations

Cal.—Wagner v Chambers, 42 Cal.Rptr. 334, 232 C A 2d 14

Purpose of acquisition

N Y—O & W Lines, Inc. v St John, 228 N E.2d 370, 20 N Y 2d 17, 281 N Y.S 2d 302.

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35. U S—Afflick v Pekin Wood Products Co, D C. Ark., 131 F Supp 910, affd, C A, 228 F 2d 816—U S v 1 44 Acres of Land, More or Less, in Montgomery County, Md, D C.Md., 304 F Supp 1063.

Hawaii—Midkiff v. Castle & Cooke, Inc, 368 P 2d 887, 45 Haw. 409.

Ind.—L & G Realty & Const. Co v. City of Indianapolis, 139 N.E 2d 580, 127 Ind App. 315.

Iowa—Turner v Unknown Claimants of Land in Section 4, 87 North Tp., Range 32 West of 5th Principal Meridian, 207 N W 2d 544

Miss—Mississippi Cent R Co v. Ratcliff, 99 So.2d 311, 214 Miss. 674—Alabama & V. Ry. Co. v Mashburn, 109 So.2d 533, 235 Miss. 346.

Mo—State ex rel. State Highway Commission v. Chicago B & Q R Co., App., 539 S W.2d 760.

N.Y.—O & W Lines, Inc. v. St. John, 228 N.E 2d 370, 20 N.Y.2d 17, 281 N.Y.S.2d 302.

N.C—Craig v. Southern Ry. Co, 138 S E 2d 35, 262 N C 538.

Ohio—Norfolk & Western Ry. Co v Bremco Mills, Inc, 288 N.E 2d 868.

Wash—Veach v. Culp, 585 P 2d 818, 21 Wash App. 454, revd 599 P.2d 526, 92 Wash 2d 570

Equitable fee under agreement to convey

N.Y—Corning v. Lehigh Val. R Co., 217 N Y S 2d 874, 14 A.D.2d 156.

N.C.—McCotter v. Barnes, 101 S.E 2d 330, 247 N C. 480.

Okl.—Midland Val R Co. v Arrow Indus. Mfg Co., 297 P.2d 410—Cruzan v. Missouri-Kansas-Texas R. Co., 303 P.2d 313.

Or.—Bouche v. Wagner, 293 P.2d 203, 206 Or 621.

Pa—City of Pittsburgh v Pennsylvania R R, 145 A 2d 700, 394 Pa 58

S D—Nystrom v State, 104 N W 2d 711, 78 S D 498

Deed held not to convey fee simple absolute

S C—Southern Ry Co v Smoak, 133 S E 2d 806, 243 S C 331

Reversion clause

Minn—Matter of Trust Known as Great Northern Iron Ore Properties, 263 N W 2d 610, cert den 99 S Ct 116, 439 U S 835, 58 L Ed 2d 130

Miss—Hathorn v Illinois Cent Gulf R Co, 374 So 2d 813

36. Ky—Gabbard v Short, 351 S W 2d 510

Miss—C.J.S. quoted in Mississippi Cent R Co v Ratcliff, 59 So 2d 311, 314, 214 Miss 674

Mo—Clay v Missouri State Highway Commission, 239 S W 2d 505, 362 Mo 60—Schuermann Enterprises, Inc v St Louis County, 436 S W.2d 666

38. N Y—Corning v Lehigh Val R Co, 217 N Y S 2d 874, 14 A D 2d 156

Okl—Aubert v St Louis-San Francisco Ry Co, 251 P 2d 190, 207 Okl. 537

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39. Okl—St Louis-San Francisco Ry Co v Humphrey, 446 P 2d 271

Or—Bouche v Wagner, 293 P 2d 203, 206 Or 621

42. Miss—C.J.S quoted in Mississippi Cent R Co v Ratcliff, 59 So 2d 311, 315, 214 Miss 674

43. N Y—C.J.S. cited in Corning v Lehigh Val R Co, 217 N Y.S 2d 874, 882, 14 A D 2d 156

Tex—Texas Elec Ry Co v Neale, 252 S W 2d 451, 151 Tex. 526—Millmen Union, Local 324, AFL v Missouri-Kansas-Texas R Co of Tex, Civ App, 253 S W 2d 450, err ref no rev err

44. Ark—Lynch v Cypert, 302 S W 2d 284, 227 Ark 907—Rostell v Arkansas & Ozarks Ry Corp, 323 S W 2d 539, 230 Ark 515

Hawaii—Midkiff v Castle & Cooke, Inc, 368 P 2d 887, 45 Haw 409

Miss.—Jones v New Orleans & Northeastern R Co., 59 So.2d 541, 214 Miss. 804

45. Cal—Goodman v. Southern Pac. Co, 299 P 2d 321, 143 C A 2d 424—Faus v. Pacific Elec Ry. Co, 303 P.2d 814, 146 C.A 2d 370—Faus v City of Los Angeles, 15 Cal Rptr 783, 195 C A.2d 134

Hawaii—Midkiff v Castle & Cooke, Inc, 368 P 2d 887, 45 Haw 409

Iowa—Turner v. Unknown Claimants of Land in Section 4, 87 North Tp, Range 32 West of 5th Principal Meridian, 207 N W.2d 544

Agreement to convey

N Y—Corning v Lehigh Val R Co, 217 N Y S 2d 874, 14 A D 2d 156.

46. Cal—Goodman v Southern Pac Co., 299 P 2d 321, 143 C A 2d 424.

49. Mo.—Clay v. Missouri State Highway Commission, supra, n 21

50. Nev—Peterson v. City of Reno, 436 P 2d 417, 84 Nev. 60.

N.Y.—Lipetz v Papsah, 124 N.Y.S.2d 393, revd. on oth. grds 131 N.Y.S.2d 104, 283 App Div. 1065, affd. 125 N.E.2d 432, 308 N Y. 787—Nichols v. Haehn, 187 N.Y S 2d 773, 8 A.D.2d 405.

Pa.—Brookbank v. Benedum-Trees Oil Co., 151 A 2d 103, 389 Pa. 151.

52. U.S.—Falls City v Missouri Pac R. Co., C.A. Neb, 453 F.2d 771.

Ill.—City of Urbana v Solo Cup Co, 383 N E.2d 262, 22 Ill.Dec 786, 66 Ill.App.3d 45

Or.—State By and Through Dept. of Transp, Highway Division v Tolke, 586 P 2d 791, 36 Or App. 751

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53. Conveyance held not base fee

Pa.—Fleck v Universal-Cyclops Steel Corp., 156 A 2d 832, 397 Pa. 648.

54. U.S.—U.S. v. 1.44 Acres of Land, More or Less, in Montgomery County, Md., D.C.Md., 304 F.Supp 1063.

Ark—Daugherty v Helena & Northwestern Ry, 252 S W 2d 546, 221 Ark 101

Ill—People ex rel Carson v Mateyka, 373 N E 2d 471, 15 Ill Dec 125, 57 Ill App 3d 991

Ind—L & G Realty & Const Co v City of Indianapolis, 139 N E 2d 580, 127 Ind App 315

Md—Maryland & P R Co v Mercantile-Safe Deposit & Trust Co, 166 A 2d 247, 224 Md 34, 95 A L R 2d 463

Mo—Quinn v St Louis-San Francisco Ry Co, 439 S W 2d 533

Okl—Cruzan v Missouri-Kansas-Texas R Co, 303 P 2d 313

Pa—Palmer v Philadelphia Suburban Transp Co, 39 Del Co Leg J 266, affd, 98 A 2d 245, 174 Pa Super 1

Tex—Rio Bravo Oil Co v Hunt Petroleum Corp, Civ App, 439 S W 2d 853, revd on oth grds, Sup, 455 S W 2d 722

Servitude of passage

U S—Louisiana Land & Exploration Co v Parish of Jefferson, La, D C La, 59 F Supp 260, 268

La—Knox v Louisiana R, etc, Co, 102 So 685, 157 La 602, 607—Esso Standard Oil Co v Texas & N O R Co, App, 127 So 2d 551

Tex—Brightwell v International-Great Northern R Co, Civ App, 41 S W 2d 319, 322, affd 49 S W 2d 437, 121 Tex 338, 84 A L R 265

55. U S—Kingwood Oil Co v Bell, D C Ill, 136 F.Supp 229, affd, C A, 244 F 2d 115—U S v 1 44 Acres of Land, More or Less, in Montgomery County, Md, D C Md, 304 F Supp 1063

Ala—C J S cited in Standard Oil Co v Milner, 152 So 2d 431, 434, 275 Ala 104

Ark—C.J.S. quoted in Chicago, R I & P R Co v Olson, 262 S W 2d 882, 884, 222 Ark 828—El Dorado & Wesson Ry Co v Smith, 344 S W 2d 343, 233 Ark 298

Cal—Ocean Shore R Co v Doelger, 274 P 2d 23, 127 C A 2d 392—Highland Realty Co. v City of San Rafael, 298 P 2d 15, 46 C 2d 669—City of Glendora v Faus, 307 P 2d 976, 148 C A 2d 920—Faus v City of Los Angeles, 15 Cal Rptr 783, 195 C A 2d 134—Johnson v Ocean Shore R Co, 94 Cal Rptr 68, 16 C A.3d 429

Del—State ex rel Department of Transp v Penn Central Corp, Super, 445 A 2d 939

Ga—Askew v Spence, 79 S E 2d 531, 210 Ga 279

Ill—Standard Steel & Wire Corp v A Finkl & Sons, Co, 287 N E 2d 55, 7 Ill App 3d 32—Schnabel v DuPage County, 428 N E.2d 671, 57 Ill Dec. 121, 101 Ill App 3d 553.

Ind—Ross, Inc v Legler, 199 N E 2d 346, 245 Ind. 655

Iowa—Atkin v. Westfall, 69 N W 2d 523, 246 Iowa 822

Kan.—Harvest Queen Mill & Elevator Co v. Sanders, 370 P 2d 419, 189 Kan. 536, 6 A L R 3d 962

Ky.—Hollins v. White, 287 S W.2d 431

La—Chasson v Duplechain, App., 56 So.2d 615—Kansas City Southern Ry Co. v. Louisiana Public Service Commission, 223 So 2d 132, 254 La. 160

Md—East Washington Ry Co v Brooke, 223 A 2d 599, 244 Md 287—D.C Transit Systems, Inc v State Roads Commission, 270 A 2d 793, 259 Md. 675, app after remand 290 A.2d 807, 265 Md 622.

Miss—Texas Co. v Newton Naval Stores Co., 78 So.2d 751, 223 Miss 468, 49 A.L.R 2d 1182

Mo.—C.J.S. cited in Missouri-Kansas-Texas R Co v Beese, App., 321 S.W.2d 731, 736—Schuermann Enterprises, Inc v. St. Louis County, 436 S W 2d 666—G. M. Morris Boat Co., Inc v. Bishop, App, 631 S.W.2d 84

Neb.—Bode v. Flobert Industries, Inc, 249 N.W.2d 750, 197 Neb. 488.

Nev.—City Motel, Inc v State ex rel. State Dept. of Highways, 336 P 2d 375, 75 Nev. 137, sup. den., reh. stricken 337 P.2d 273, 75 Nev. 137

N.Y.—O & W Lines, Inc. v. St. John, 228 N.E.2d 370, 20 N Y.2d 17, 281 N Y.S.2d 302.

N.C—Bivins v Southern Ry. Co, 102 S.E.2d 128, 247 N.C 711

Okl—C.J.S. quoted in Aubert v. St. Louis-San Francisco Ry Co, 251 P.2d 190, 193, 207 Okl. 537.

Or—Powers v Coos Bay Lumber Co, 263 P 2d 913, 200 Or 329—Georgia-Pacific Corp v Miller, 304 P 2d 428, 208 Or 684

Pa—Fleck v Universal-Cyclops Steel Corp, 156 A 2d 832, 397 Pa 648

Tenn—Southern Ry Co v Griffitts 304 S W 2d 508, 42 Tenn App 494—Lillard v Southern Ry Co, 330 S W 2d 335, 206 Tenn 1

Tex—City of Dallas v Leake, Civ App 300 S W 2d 135, err ref no rev err—Rio Bravo Oil Co v Hunt Petroleum Corp, 455 S W 2d 722

Grantor not having title to property

La—Bray v Boyd, App, 286 So 2d 508, writ den, Sup, 287 So 2d 189

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56. Cal—Johnson v Ocean Shore R Co 94 Cal Rptr 68, 16 C A 3d 429

Mo—Hennick v Kansas City Southern Ry Co, 269 S W 2d 646, 364 Mo 883—Quinn v St Louis-San Francisco Ry Co, 439 S W 2d 533

N C—Sparrow v Dixie Leaf Tobacco Co, 61 S E 2d 700, 232 N C 589

57. Ill—Department of Public Works and Bldgs for and in Behalf of People v Schmauss, 285 N E 2d 628, 6 Ill App 3d 470

Mo—State ex rel State Highway Commission v Jacob, 260 S W 2d 22—Weeks v Missouri Pac R Co, 505 S W 2d 33

58. Cal—Stearns Ranchos Co v Atchison, T & S F Ry Co, 96 Cal Rptr 317, 19 C A 3d 24.

Ga—Askew v Spence, 79 S E 2d 531, 210 Ga 279—Tompkins v Atlantic Coast Line R Co, 79 S E 2d 41, 89 Ga App 171, transf 76 S E 2d 482, 209 Ga 794—Jackson v. Sorrells, 92 S E 2d 513, 212 Ga 333

N H—State v Ladd, 268 A 2d 894

Mo—State ex rel State Highway Commission v Southern Development Co, 509 S W 2d 18

Okl—Aubert v St Louis-San Francisco Ry Co, supra, n 38

60. U S—Chicago, R I & P R Co v Blackmon, C A Okl, 229 F 2d 803

Cal—Highland Realty Co v. City of San Rafael, 298 P 2d 15, 46 C 2d 669—City of Glendora v Faus, 307 P.2d 976, 148 C A 2d 920

Mo—Seventy-Ninth Street Imp Corp v Ashley, 509 S W 2d 121

Tenn—Smoky Mountain R Co v Pame Oil Co, App, 496 S W 2d 904

61. Iowa—Johnson v Burlington Northern, Inc, App, 294 N W 2d 63

64. Deed considered to convey fee simple

Miss—Dessett v New Orleans Great Northern R Co, 295 So 2d 771

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68. Pa.—Girard Bank v John T. Dyer Quarry Co, 49 Berks 127.

70. Held nonexclusive easement

U S—Bain v New York Cent. R R., C.A.N.Y, 342 F 2d 801

75. Idaho—Oregon Short Line R. Co v City of Mountain Home, 465 P.2d 105, 93 Idaho 494.

76. U S.—Barnard v. Wabash R. Co, C.A.Mo., 208 F.2d 489—Midwestern Developments, Inc. v City of Tulsa, Okl, D C Okl., 259 F Supp 554, affd, C A, 374 F 2d 683

Idaho—Oregon Short Line R Co v City of Mountain Home, 465 P.2d 105, 93 Idaho 494.

Okl.—Energy Transp. Systems, Inc v Kansas City Southern Ry. Co, 638 P 2d 459.

W.Va.—Marthens v B & O R. Co, 289 S.E.2d 706

77. W Va.—Marthens v. B & O R Co., 289 S.E 2d 706

§ 85. —— By Mere Use or Adverse Possession

82. Md—C.J.S. cited in Maryland & P R Co v Mercantile-Safe Deposit & Trust Co, 166 A 2d 247, 249, 224 Md 34, 95 A L R 2d 463

N.C—Keziah v Seaboard Air Line R. Co, 158 S E 2d 539, 272 N C 299

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83. N Y—Corning v Lehigh Val R Co, 217 N Y S.2d 874, 14 A D 2d 156

Ohio—Norfolk & Western Ry. Co v Bremco Mills, Inc, 288 N.E 2d 868.

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84. Mo—Springs v. Cantrell, App, 539 S W 2d 318

§ 86. —— Rights in Adjoining Lands

85. Idaho—State ex rel Evans v Spokane Intern R Co, 579 P 2d 694, 99 Idaho 197

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Cal—Ocean Shore R Co v. Doelger, supra, n 55

87. N.C—Keziah v. Seaboard Air Line R Co, 158 S E 2d 539, 272 N C 299.

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Cal—Stearns Ranchos Co v Atchison, T & S F Ry Co, 96 Cal Rptr 317, 19 C A 3d 24

§ 88. Exceptions and Reservations

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15. Kan—Harvest Queen Mill & Elevator Co v Sanders, 370 P.2d 419, 189 Kan 536, 6 A L R 3d 962

20. Ky.—Louisville & N R Co v Quillen, 242 S.W.2d 95

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21. Colo—Board of County Com'rs of Weld County v Anderson, 525 P.2d 478, 34 Colo App 37, affd, 534 P 2d 1201, 188 Colo 337

36. Ga.—Atlantic Coast Line R Co v. Ashburn, S & C Ry. Co., 87 S E 2d 92, 91 Ga App 698, cert den 76 S Ct 142, 350 U.S. 887, 100 L Ed. 782

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48. Or.—Powers v. Coos Bay Lumber Co, 263 P.2d 913, 200 Or 329.

50. Title to land not reserved

La.—Welsh Southern Oil Co v Scurlock Oil Co, App, 201 So 2d 376

52. N Y.—C.J.S. cited in Corning v Lehigh Val R Co, 217 N Y S 2d 874, 881, 14 A D 2d 156

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54. N.Y.—Lipetz v Papish, 131 N Y S 2d 104, 283 App Div. 1065, affd 125 N E 2d 432, 308 N Y. 787.

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55. N Y.—Corning v Lehigh Val R Co, 217 N Y. S.2d 874, 14 A.D 2d 156.

§ 89. Covenants and Conditions

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64. Stipulation deemed covenant

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65. N Y—Nichols v Haehn, 171 N Y.S 2d 734, 8 Misc 2d 780, revd on oth grds 187 N Y S 2d 773, 8 A D.2d 405

S D—Lien v Northwestern Engineering Co, 54 N W.2d 472, 74 S.D 476

§ 90. —— Particular Covenants and Conditions in General

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92. Iowa—Jacobs v Miller, 111 N W 2d 673, 253 Iowa 213

93. U S—Chicago, R I & P R Co v. Spool Stockyards Co, D C Tex, 220 F Supp 433, affd, C.A, 353 F 2d 263.

Cal—Faus v City of Los Angeles, 62 Cal.Rptr 193, 431 P.2d 849, 67 C 2d 350

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Va—Sanford v Sims, 66 S E.2d 495, 192 Va 644

94. Too indefinite

Ga—Atlantic Coast Line R Co v Ashburn, S & C Ry Co, supra, n 36

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Cal—Faus v Pacific Elec Ry Co., 9 Cal.Rptr 697, 187 C.A 2d 563

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Iowa—McSweyn v Inter-Urban Ry Co, 130 N.W 2d 445, 256 Iowa 1140

2. Ga—Atlantic Coast Line R. Co v Ashburn, S & C Ry. Co, 87 S E 2d 92, 91 Ga App 698, cert den 76 S Ct 142, 350 U S. 887, 100 L Ed. 782

3. Lease of portion of land

U S—Bornholdt v Southern Pac Co., C A Cal, 327 F 2d 18

7 U S.—Spool Stockyards Co v Chicago, R.I & P R Co., C A Tex, 353 F 2d 263

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15. Provision held not vague or indefinite

Tex.—Missouri-Kansas-Texas R. Co of Tex. v Taub, Civ App, 345 S W 2d 442

§ 92. —— Location and Operation of Road

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46. Tex—Missouri-Kansas-Texas R. Co. of Tex v Taub, Civ App, 345 S.W 2d 442

§ 93. —— Location and Maintenance of Station or Termini

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59. Cal.—City of Santa Monica v Jones, 232 P 2d 55, 104 Cal.App 2d 463

71. Use of slag improper

Miss.—White v. Mississippi Power & Light Co, 196 So.2d 343, 30 A.L.R.3d 754.

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79. Fla.—Robb v. Atlantic Coast Line R. Co, App, 154 So.2d 871, 7 A L R 3d 644

§ 94. —— Private Crossings, Fences, and Cattle Guards

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92. Ky—Louisville & N R Co v Pierce, 254 S W 2d 943

93. By statute

Va—Chesapeake & O Ry Co v Willis, 105 S.E 2d 833, 200 Va 299

95. Hawaii—Midkiff v Castle & Cooke, Inc, 368 P 2d 887, 45 Haw 409

Ind—Chicago, I & L Ry Co v Beisel, 106 N E 2d 117, 122 Ind App 448

N Y.—Neuhaus v Long Island R Co, 292 N Y S 2d 930, 30 A D 2d 825, affd 246 N E 2d 756, 23 N Y 2d 987, 298 N Y.S 2d 997

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Cal—Ocean Shore R Co v. Doelger, 3 Cal Rptr 706, 179 C A 2d 222

7. Reasonable time

Va—Chesapeake & O Ry Co v Willis, 105 S E.2d 833, 200 Va 299

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14. N Y—Neuhaus v Long Island R Co., 292 N Y S 2d 930, 30 A.D 2d 825, affd. 246 N E 2d 756, 23 N.Y 2d 987, 298 N Y S 2d 997

20. Ky—Louisville & N R Co v Pierce, 254 S.W 2d 943

§ 95. —— Effect of Succession to, or Transfer of, Property

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33. U.S—Spool Stockyards Co v Chicago, R I & P R Co, C A Tex, 353 F 2d 263.

34. Ga—Atlantic Coast Line R Co v Ashburn, S & C Ry. Co., 87 S.E 2d 92, 91 Ga App 698, cert den 76 S Ct. 142, 350 U.S 887, 100 L Ed 782

Constructive notice

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36. U S—Miller v Atchison, T & S F Ry Co, D C Mo, 325 F Supp. 604

41. Tex.—Ingram Freezers v Atchison, T & S F. Ry Co., Civ App., 464 S W 2d 915, err ref. no rev err

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54. Iowa—McSweyn v Inter-Urban Ry Co, 130 N.W 2d 445, 256 Iowa 1140

N Y—Beach Land Amusement Co v. Staten Island Rapid Transit Ry Co, 153 N Y.S.2d 692, 3 Misc.2d 734—Nichols v. Haehn, 187 N Y.S.2d 773, 8 A.D 2d 405—O & W Lines, Inc v. St. John, 231 N Y.S.2d 72, 53 Misc 2d 792

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U.S—Bornholdt v. Southern Pac Co D C Cal, 209 F.Supp. 310, affd., C.A. 327 F 2d 18

57. Easement held extinguished

Ind—Chicago, I. & L Ry. Co v Beisel, 106 N.E 2d 117, 122 Ind App. 448

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§ 96. —— Excuses for Nonperformance and Waiver of Performance

66. Tex—Missouri-Kansas-Texas R Co of Tex v. Taub, Civ App, 345 S W 2d 442

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Cal—Ocean Shore R Co v. Doelger, 3 Cal.Rptr. 706, 179 C A 2d 222

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§ 97. —— Rights and Remedies of Parties

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85. Evidence held insufficient

N Y—Roberts v Lehigh Val R Co, 255 N Y S 2d 191, 23 A D 2d 507

§ 99. —— Incidental Uses

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62. U S—Royal Elkhorn Coal Co v Chesapeake & O Ry Co, D C Ky, 114 F Supp 341

Ga—C J S cited in Tompkins v Atlantic Coast Line R Co, 96 S E 2d 603, 605, 213 Ga 48

63. Ga—C.J.S cited in Tompkins v Atlantic Coast Line R Co, 96 S E 2d 603, 605, 213 Ga 48

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64. U S—Kansas City Southern Ry Co v Arkansas Louisiana Gas Co, C A Okl, 476 F.2d 829

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70. Erection for general public or private shippers

N M—Garry v Atchison, T & S.F Ry Co, 378 P 2d 609, 71 N.M 370

72. Ga—Tompkins v. Atlantic Coast Line R Co, 96 S.E.2d 603, 213 Ga 48

74. Iowa—C.J.S. cited in McSweyn v Inter-Urban Ry Co, 130 N.W 2d 445, 449, 256 Iowa 1140

N.C.—Bane v Norfolk-Southern R Co, 130 N W 2d 445, 256 Iowa 1140

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75. Iowa—McSweyn v Inter-Urban Ry Co, 130 N W.2d 445, 256 Iowa 1140

78. N C—Bane v. Norfolk-Southern R Co., 130 S E 2d 406, 259 N C. 285

88. Mo.—Missouri-Kansas-Texas R Co v Freer, App, 321 S W 2d 731.

94. Heavier loads and equipment

Ky.—Cincinnati, N O & T.P. Ry. Co. v. Barker, 247 S.W.2d 943

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98. Cal—Southern Pac. Co. v. City and County of San Francisco, 41 Cal.Rptr 79, 396 P 2d 383, 62 C.2d 50.

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19. U.S—Kansas City Southern Ry. Co. v. Arkansas Louisiana Gas Co, C A.Okl., 476 F.2d 829

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20. Ga.—Tompkins v Atlantic Coast Line R. Co, 79 S E.2d 41, 89 Ga.App 171, transf. 76 S.E.2d 482, 209 Ga. 794

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29. Kan.—Harvest Queen Mill & Elevator Co. v Sanders, 370 P.2d 419, 189 Kan. 596, 6 A.L.R.3d 692.

33. U.S.—St. Louis-San Francisco Ry. Co. v. Wade, C.A.Ala., 307 F.2d 126.

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Installation of pipeline

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38. Mo—C J S cited in Missouri-Kansas-Texas R Co v Freer, App, 321 S W 2d 731, 740

§ 100. —— Exclusiveness of Possession and Use

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54. Ky—Cincinnati, N O & T P Ry Co v Barker, 247 S W 2d 943—Anderson v Norfolk & W Ry Co, 324 S W 2d 413

55. Pa—Mount Carmel R Co and Reading Co v M A Hanna Co, 24 Northumb.Leg J 50, affd 89 A.2d 508, 371 Pa 232

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60. N C—Bivins v Southern Ry Co, 102 S E 2d 128, 247 N C. 711

68. Instructions

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§ 101. —— Permitting Use by Third Person

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77. U S.—Mississippi Investments v New Orleans & N E R. Co., C A Miss, 188 F.2d 245

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Lease construed

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81. Md—D C Transit Systems, Inc v State Roads Commission, 270 A 2d 793, 259 Md 675, app after remand 290 A 2d 807, 265 Md 622

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(3) Other uses

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83 Mo—C.J S. cited in Missouri-Kansas-Texas R Co v Freer, App, 321 S W 2d 731, 737

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13. U S—Republic Carloading & Distributing Co v Missouri Pac R Co, C A Mo, 302 F 2d 381

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19. Removal of property on termination of lease

(4) Other matters

Tex—Panhandle & S F Ry Co v Hogan, Civ App, 388 S W 2d 320, err ref no rev err

24. Minn—Bohn Lumber Co v Chicago & N W Ry Co, 134 N W 2d 312, 270 Minn 516

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34. Iowa—Seymour v Chicago & N M Ry Co, 124 N W 2d 157, 255 Iowa 780

35. Iowa—Seymour v Chicago & N W Ry Co, 124 N W 2d 157, 255 Iowa 780

36. U S—Gottschalk v Consolidated R R Corp, D C N Y, 469 F Supp 254

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Particular damage held within provision

U S—Firemen's Ins Co of Newark, N J v Chicago, St P, M & O Ry Co, D C.Neb, 116 F Supp 289, app dism, C.A, 211 F 2d 581

Mo—Tri-State Gas Co v Kansas City Southern Ry Co, 484 S W.2d 252.

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Railroad held liable notwithstanding exculpatory provision

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37. Kan—Riddle Quarries v Thompson, supra, n. 36

Agreement held not contrary to public policy

Fla—Russell v Martin, 88 So 2d 315

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Fla.—Russell v Martin, 88 So.2d 315

38. U S—Republic Carloading & Distributing Co v Missouri Pac R. Co, C.A.Mo., 302 F 2d 381

Ill—Sweney Gasoline & Oil Co. v Toledo, P & W R. Co., 247 N.E 2d 603, 42 Ill 2d 265

§ 103. —— Legislative Grant or Authority

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§ 104. —— Grant or Consent by Municipal or other Local Authorities

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60. N.C—C.J.S. cited in Thompson v Seaboard Air Line R Co, 104 S E 2d 181, 186, 248 N C 577

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72. Utah—Union Pac R Co v Public Service Commission, 134 P.2d 469, 103 Utah 186—Provo City v Department of Business Regulation, 218 P 2d 675, 118 Utah 1

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83. Cal—Mann v City of Bakersfield, 13 Cal Rptr 211, 192 C A 2d 424

§ 109. —— Covenants and Conditions in Grants

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97. N.Y.—Nicholas Di Menna & Sons v City of New York, 114 N Y.S 2d 347

§ 111. —— Duration of Right

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39. Cal—Mann v City of Bakersfield, 13 Cal Rptr 211, 192 C A 2d 424

42. Limitation in city charter

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54. Cal.—Mann v City of Bakersfield, 13 Cal Rptr 211, 192 C.A 2d 424

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8. Interest of public is paramount

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17. Pa—Borough of Dunbar v Coraretti, 22 Fay L J 1

18. N C—Thompson v Seaboard Air Line R Co, 104 S E 2d 181, 248 N.C. 577.

§ 113. —— Remedies by or against Railroad Company

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79. Cal—Mann v City of Bakersfield, 13 Cal Rptr 211, 192 C A 2d 424

80. Cal—Mann v. City of Bakersfield, 13 Cal Rptr 211, 192 C A.2d 424

§ 114. Right to Use Tracks, Right of Way, or Other Property of Another Road

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84. Ga.—Atlantic Coast Line R Co v Southern Ry. Co, 104 S.E.2d 77, 214 Ga 178.

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'5. Consent required

ia.—Atlantic Coast Line R. Co v Southern Ry Co, 104 S.E.2d 77, 214 Ga 178

§ 115. Conveyance or Release of Right of Way or Land by Railroad

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13. Mo—Hennick v. Kansas City Southern Ry Co., 269 S.W 2d 646, 364 Mo 883.

15. U.S—Belusko v Phillips Petroleum Co, D.C Ill, 198 F Supp 140, affd, C A., 308 F 2d 832, cert den. 83 S Ct 874, 372 U S 930, 9 L.Ed 2d 733

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N Y—Brunschwig v Long Island R. Co., 244 N Y S 2d 708, 41 Misc 2d 24.

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45. N Y—Holmes v State, 111 N Y.S.2d 627, 201 Misc 640, revd on oth. grds 111 N.Y S 2d 634, 279 App Div 489, 958

Deed held not to convey right of way

La—Collins v Sun Oil Co, 68 So.2d 184, 223 La 1094

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U S—Northern Pac Ry Co. v U S., C A Wyo, 277 F.2d 615

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49. Wash—Scott v Wallitner, 299 P 2d 204, 49 Wash 2d 161

53. Tex—S H Oil & Royalty Co. v. Texas & N O R. Co, Civ App., 295 S W 2d 227, err ref no rev err

55. Reservation of right to use equipment

Mass—Weiner v Boston & Maine Corp, 280 N.E 2d 668, 361 Mass. 427

§ 117. —— Nonuser or Abandonment

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63. U.S—U.S. v. 1 44 Acres of Land, More or Less, in Montgomery County, Md., D.C Md., 304 F.Supp 1063.

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N C.—McCotter v Barnes, 101 S E 2d 330, 247 N C 480.

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64. Ark.—Miller v. Empire Rice Mills, Inc, 312 S.W 2d 925, 228 Ark. 1161.

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Or—Georgia-Pacific Corp v Miller, 304 P 2d 428, 208 Or 684

Perpetuity does not affect question of abandonment

Cal—Ocean Shore R Co. v Doelger, supra

Termination of easement

Cal—Ocean Shore R Co v Doelger, 3 Cal.Rptr 706, 179 C A 2d 222

65. Colo—Allard Cattle Co v Colorado & S Ry Co, 530 P 2d 503, 187 Colo 1

67. U S—Midwestern Developments, Inc v City of Tulsa, Okl, D C Okl, 259 F Supp 554, affd, C A, 374 F 2d 683

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W Va—Marthens v B & O R. Co, 289 S E 2d 706

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68. Cal—Ocean Shore R. Co v Doelger, 3 Cal Rptr 706, 179 C A.2d 222

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69. Pa—Chew v. Com, 47 Del Co 195, revd. 161 A 2d 621, 400 Pa 307, 81 A.L.R 2d 562

No requirement that servient owner rely to his detriment

Cal—Ocean Shore R. Co v. Doelger, 3 Cal Rptr 706, 179 C A 2d 222

70. Evidence held insufficient to show abandonment

U S—Royal Elkhorn Coal Co v Chesapeake & Ohio Ry Co, D.C.Ky, 114 F.Supp 341

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71. Ill—Schnabel v. DuPage County, 428 N E 2d 671, 57 Ill.Dec 121, 101 Ill.App.3d 553

73. W Va.—Marthens v. B & O R Co, 289 S E 2d 706

75. Cal—Ocean Shore R. Co. v Doelger, 3 Cal Rptr 706, 179 C A.2d 222

Mo—Hennick v Kansas City Southern Ry Co, supra, n. 70

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78. Cal—Ocean Shore R. Co v. Doelger, 3 Cal.Rptr 706, 179 C A 2d 222

79. Evidence held sufficient to show abandonment

U S—Penn Central Transp Co v Lake Placid Branch Track, D C.Pa, 366 F Supp. 62

Cal.—Ocean Shore R Co v Doelger, 3 Cal Rptr 706, 179 C A.2d 222—Lake Merced Golf and Country Club v Ocean Shore R Co, 23 Cal.Rptr. 881, 206 C.A 2d 421

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N M.—Timberlake v. Southern Pac. Co., 461 P.2d 903, 80 N.M. 770.

Tenn.—Smoky Mountain R. Co. v. Paine Oil Co, App, 496 S W.2d 904.

Evidence held sufficient to show no abandonment

Cal.—Goodman v Southern Pac Co, 299 P 2d 321, 143 C A.2d 424.

Evidence held insufficient to show no abandonment

Cal—Ocean Shore R. Co v Doelger, 3 Cal.Rptr 706, 179 C.A.2d 222.

Evidence held insufficient to show abandonment

Md.—D.C. Transit Systems, Inc. v State Roads Commission, 270 A.2d 793, 259 Md 675, app. after remand 290 A 2d 807, 265 Md. 622

82. Particular acts held not to show abandonment

(1) U S—Mississippi Investments v New Orleans & N E R Co, C A Miss, 188 F 2d 245—Midwestern Developments, Inc v City of Tulsa, Okl, C A Okl, 374 F 2d 683

Cal—Ocean Shore R Co v Doelger, 3 Cal Rptr 706, 179 C A 2d 222

Ill—Department of Public Works and Bldgs for and in Behalf of People v Schmauss, 285 N E 2d 628, 6 Ill App 3d 740

Mo—Hennick v Kansas City Southern Ry Co, supra, n 70

Pa.—O'Loughlin v Pennsylvania R Co, 8 Chest 241—Chew v Com, 47 Del Co 195, revd on oth grds 161 A 2d 621, 400 Pa 307, 81 A L R 2d 562

83. Particular matters embraced in proof of abandonment

Cal—Ocean Shore R Co v Doelger, 3 Cal Rptr 706, 179 C A 2d 222

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85. Md—East Washington Ry Co v Brooke, 223 A 2d 599, 244 Md 287

W Va—State Road Commission v Penndel Co, 129 S E 2d 133, 147 W Va 505

Particular acts held to evidence abandonment

(1) U S—U S v. 1 44 Acres of Land, More or Less, in Montgomery County, Md, D C.Md, 304 F Supp 1063

Ill—People ex rel Carson v Mateyka, 373 N E 2d 471, 15 Ill Dec 125, 57 Ill App 3d 991.

Kan—Pratt v. Griese, 409 P 2d 777, 196 Kan 182

Mass—R E Cunniff, Inc v. Community Service Stations, Inc., 185 N E 2d 745, 345 Mass 79

Mo.—Seventy-Ninth Street Imp. Corp v Ashley, 509 S.W 2d 121.

Nev—City Motel, Inc v State ex rel State Dept. of Highways, 336 P.2d 375, 75 Nev 137, am den, reh stricken 337 P 2d 273, 75 Nev 137

Or—Powers v Coos Bay Lumber Co, 263 P 2d 913, 200 Or 329

Desire to use right of way for other purposes

Cal—Ocean Shore R Co v Doelger, 3 Cal Rptr 706, 179 C A 2d 222.

89. Building of road rather than rails warranted by lease

Or.—Powers v. Coos Bay Lumber Co, supra, n 85

Motor bus service

Cal—Faus v. City of Los Angeles, 62 Cal Rptr 193, 431 P.2d 849, 67 C 2d 350

92. Iowa—Atkin v Westfall, 69 N W 2d 523, 246 Iowa 822.

93. Iowa—Atkin v. Westfall, supra, n 92

Disposition of abandoned rail property

U.S.—Penn Central Transp Co v Lake Placid Branch Track, D C.Pa, 366 F Supp 62

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3. Cal—Faus v. Pacific Elec. Ry Co., 303 P.2d 814, 146 C.A 2d 370

Kan—Martell v Stewart, 628 P.2d 1069, 6 Kan.App 2d 387

Pa.—Chew v. Com., 47 Del Co. 195, revd on oth grds. 161 A.2d 621, 400 Pa. 307, 81 A L.R 2d 562

4. Cal—Faus v. Pacific Elec. Ry. Co, 303 P 2d 814, 146 C.A.2d 370

5. Cal—Faus v City of Los Angeles, 62 Cal Rptr. 193, 431 P.2d 849, 67 C 2d 350.

8. U.S—U S. v 1.44 Acres of Land, More or Less, in Montgomery County, Md., D C.Md, 304 F.Supp 1063

Ark—El Dorado & Wesson Ry. Co v Smith, 344 S.W 2d 343, 233 Ark. 298

Ind.—L. & G Realty & Const. Co. v City of Indianapolis, 139 N.E.2d 580, 127 Ind.App. 315.

Md.—East Washington Ry Co. v. Brooke, 223 A 2d 599, 244 Md. 287.

Pa—Brookbank v Benedum-Trees Oil Co, 131 A 2d 103, 389 Pa 151

Wis—Pollnow v State Dept of Natural Resources, 276 N W 2d 738, 88 Wis 2d 350

11. Mo—Hennick v Kansas City Southern Ry Co, 269 S W 2d 646, 364 Mo 883

12. S C—Charleston & W C Ry Co v Joyce, 99 S E 2d 187, 231 S C 493

14. Pa—Girard Bank v John T Dyer Quarry Co, 49 Berks 127

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19. Ark—Daugherty v Helena & Northwestern Ry, 252 S W 2d 546, 221 Ark 101

Cal—Highland Realty Co v City of San Rafael, 298 P 2d 15, 46 C 2d 669

Ill—Schnabel v DuPage County, 428 N E 2d 671, 57 Ill Dec 121, 101 Ill App 3d 553

Iowa—Atkin v Westfall, 69 N W 2d 523, 246 Iowa 822

Kan—Taylor Inv Co v Kansas City Power & Light Co, 322 P 2d 817, 182 Kan 511

La—Hanks v Stutes, App, 85 So 2d 362

Md—East Washington Ry Co v Brooke, 223 A 2d 599, 244 Md 287

Mo—State ex rel State Highway Commission v. Jacob, 244 S W 2d 7, 362 Mo 781

Nev—City Motel, Inc v State ex rel State Dept of Highways, 336 P 2d 375, 75 Nev 137, am den, reh stricken 337 P 2d 273, 75 Nev 137

N Y—Nichols v Haehn, 171 N Y S 2d 734, 8 Misc 2d 780, revd on oth grds 187 N Y S 2d 773, 8 A D 2d 405

Okl—City of Ardmore v Knight, 270 P 2d 325

Pa—Chew v. Com, 47 Del Co 195, revd on oth grds 161 A 2d 621, 400 Pa 307, 81 A L R 2d 562

Tenn—Smoky Mountain R Co v Pame Oil Co, App, 496 S W 2d 904

Wash—Scott v Wallitner, 299 P 2d 204, 49 Wash 2d 161

No reversion of fee

Mo—State ex rel. State Highway Commission v Jacob, 260 S W 2d 22

Pa—Fleck v Universal-Cyclops Steel Corp, 156 A 2d 832, 397 Pa. 648.

Compliance with Marketable Title Act required

Iowa—Chicago & N W Ry Co. v. City of Osage, 176 N W 2d 788

20. U S—Affick v Pekin Wood Products Co, D C. Ark, 131 F Supp 910, affd, C A, 228 F 2d 816—Fitzgerald v City of Ardmore, Okl, C A.Okl, 281 F 2d 717—St Louis-San Francisco Ry Co. v Walter, C A Okl, 305 F 2d 90

Ga—Georgia, Ashburn, Sylvester & Camilla Ry Co. v Johnson, 174 S.E 2d 895, 226 Ga. 358

Iowa—Jacobs v Miller, 111 N W 2d 673, 253 Iowa 213

La—Chiasson v Duplechain, App, 56 So 2d 615

Md—East Washington Ry Co v Brooke, 223 A 2d 599, 244 Md 287

Mo.—Bray v St Louis-San Francisco Ry Co, 310 S W.2d 822—Kovsak v Union Elec Co., 442 S W 2d 934—St Louis County v St. Appaloosa Corp., 471 S W 2d 238.

N M—Timberlake v. Southern Pac Co., 461 P.2d 903, 80 N M 770

Pa—O'Loughlin v. Pennsylvania R Co, 8 Chest. 241

Tex—City of Dallas v. Leake, Civ.App., 300 S W 2d 135, err ref. no rev. err.—Fuller v. State, Civ App., 394 S.W.2d 203, mod on oth. grds., Sup, 407 S.W.2d 215—State v. Fuller, 407 S.W.2d 215

Wash—Scott v. Wallitner, 299 P.2d 204, 49 Wash.2d 161

Wis.—Pollnow v State Dept of Natural Resources, 276 N.W 2d 738, 88 Wis 2d 350

21. U.S.—Chickasha Cotton Oil Co. v Town of Maysville, Okl., C.A.Okl., 289 F.2d 542—Wallace v. Swafford, C.A.Okl., 273 F.2d 602.

Kan.—Pratt v. Griese, 409 P.2d 777, 196 Kan. 182

Miss.—Texas Co v. Newton Naval Stores Co., 78 So 2d 751, 223 Miss. 468, 49 A.L R 2d 1182

Mo—Weeks v Missouri Pac R. Co, 505 S W 2d 33—G M Morris Boat Co, Inc v Bishop, App, 631 S W 2d 84

Ohio—In re Wyatt's Claim, App, 141 N E 2d 308

Title

Iowa—Chadek v Alberhasky, 111 N W 2d 297, 253 Iowa 32

Presumption in favor of both abutting owners

Mo—St Louis County v Delbet Inv Co, App, 469 S W 2d 951

23. Nev—City Motel, Inc v State ex rel State Dept of Highways, 336 P 2d 375, 75 Nev 137, am den, reh stricken 337 P 2d 273, 75 Nev 137.

Or—Georgia-Pacific Corp v Miller, 304 P 2d 428, 208 Or 684

Easement extinguished

Pa—Fleck v Universal-Cyclops Steel Corp, 156 A 2d 832, 397 Pa 648

24. Cal—Highland Realty Co v City of San Rafael, 298 P 2d 15, 46 C 2d 669

Hawaii—Midkiff v Castle & Cooke, Inc, 368 P 2d 887, 45 Haw 409

Neb—Bode v Flobert Industries, Inc, 249 N.W 2d 750, 197 Neb 488

Tex—State v Fuller, 407 S W 2d 215

Mere contiguity no basis for right

La—Lawton v Anthony, App, 92 So 2d 747.

Right of adjoining owner

Ark—Lynch v Cypert, 302 S W 2d 284, 227 Ark 907

26. Cal—Highland Realty Co v City of San Rafael, 298 P 2d 15, 46 C 2d 669

30. Nev—City Motel, Inc v State ex rel State Dept. of Highways, 336 P 2d 375, 75 Nev 137, am den., reh stricken 337 P 2d 273, 75 Nev 137

Counterclaim

Iowa—Chadek v Alberhasky, 111 N W 2d 297, 253 Iowa 32

Laches

Cal—Faus v City of Los Angeles, 62 Cal.Rptr 193, 431 P 2d 849, 67 C 2d 350

Iowa—Chadek v Alberhasky, 111 N.W 2d 297, 253 Iowa 32

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31. Or—Georgia-Pacific Corp. v Miller, 304 P 2d 428, 208 Or 684

Ejectment not proper

Kan—Taylor Inv Co v Kansas City Power & Light Co, 322 P 2d 817, 182 Kan 511.

§ 118. —— Failure to Complete or Construct Road

Rights to a proposed road will continue only as long as the locating company manifests good faith by diligent prosecution of railroad construction work contemplated by its organization.[40.5]

40.5. W Va.—State Road Commission v Penndel Co, 129 S E.2d 133, 147 W Va. 505

§ 119. —— Revocation, or Forfeiture, or Loss by Estoppel, of Franchise to Use Streets or Public Place

Library References

Railroads ⇐82(4).

41. Ga—Atlantic Coast Line R. Co. v Southern Ry Co., 104 S E 2d 77, 214 Ga 178.

Right of adjoining owner

Ark.—Arkansas & O Ry Corp v West, 353 S W 2d 337, 234 Ark 590

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47. Ga—Atlantic Coast Line R Co v Southern Ry Co, 104 S E 2d 77, 214 Ga 178

Self-operating forfeiture provision

U S—City of Des Moines, Iowa v Chicago & N W Ry Co, C A Iowa, 264 F 2d 454

§ 120. —— Breach of Condition in Private Grant

Library References

Railroads ⇐82(3)

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61. Cal—Faus v Pacific Elec Ry Co, 303 P 2d 814, 146 C A 2d 370

Iowa—Connolly v Des Moines & Cent, Iowa Ry Co, 68 N W 2d 320, 246 Iowa 874

63. N Y—Beach Land Amusement Co v Staten Island Rapid Transit Ry Co, 153 N.Y.S 2d 692, 3 Misc.2d 734

Request to discontinue passenger travel

Cal—City of Santa Monica v Jones, 232 P 2d 55, 104 Cal App 2d 463

66. Ky—Hollins v White, 287 S W 2d 431

69. N Y—Bayles v Long Island R Co, 210 N Y S 2d 258, 26 Misc 2d 15

70. Fla—Robb v Atlantic Coast Line R Co, App, 154 So 2d 871, 7 A L R 3d 644

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76. Cal—City of Santa Monica v Jones, supra, n 63

Motor bus service

Cal—Faus v City of Los Angeles, 62 Cal.Rptr 193, 431 P 2d 849, 67 C 2d 350

82. 49 U S C A § 1(7) is now 49 U S C A § 10721

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12. Plea held insufficient

Ala—Louisville & N R Co v State, 159 So 2d 458, 276 Ala 99

15. Iowa—Connolly v Des Moines & Cent Iowa Ry Co, 68 N W 2d 320, 246 Iowa 874

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25. Cal—Goodman v Southern Pac Co., 299 P 2d 321, 143 C A 2d 424

§ 121. Duty to Construct

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64. U S—New York Cent R. Co v Southern Ry Co., D C Ill, 226 F Supp 463, affd, C.A, 338 F 2d 667. Cert den 85 S Ct 1088, 380 U S 954, 13 L.Ed 2d 971, reh den 85 S Ct 1445, 381 U S 907, 14 L.Ed 2d 289.

§ 122. Authority to Construct

Library References

Railroads ⇐6, 83, 84.

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95. U S—Spool Stockyards Co. v Chicago, R I & P.R. Co, C A Tex., 353 F 2d 263.

N C—Seaboard Air Line R. Co. v. Atlantic Coast Line R Co, 82 S E 2d 771, 240 N.C. 495

§ 124. Maintenance and Repair

Library References

Railroads ⇐109.

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15. U S.—Turner v Southern Ry Co., D.C.Ga, 46 F R.D. 71

Neb.—C.J.S. cited in Humphrey Feed & Grain v Union Pack R Co., 257 N W.2d 391, 402, 199 Neb. 189.

N Y—Bruno v City of Middletown, 417 N Y S 2d 187, 99 Misc 2d 742, mod on oth grds 421 N Y S 2d 926, 72 A D 2d 803

N C—Bivins v Southern Ry Co, 102 S E 2d 128, 247 N C 711

W Va—C.J.S cited in Sommerville v Pennsylvania R Co, 155 S E 2d 865, 869, 151 W Va 709

Liability for cost

Wis—Chicago & N W Ry Co v Public Service Commission, 79 N W 2d 110, 273 Wis 654

Obligation directly on railroad

N Y—Bruno v City of Middletown, 421 N Y S 2d 926, 72 A D 2d 803

Ohio—Penn Central Transp Co v Public Utilities Commission, 298 N E 2d 587, 35 Ohio St 2d 97

16. U S—Rucker v Wabash R Co, C A Ill, 418 F 2d 146

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23. Neb—C J S cited in Humphrey Feed & Grain v Union Pac R Co, 257 N W 2d 391, 402, 199 Neb 189

Requirement of inspection

W Va—Sommerville v Pennsylvania R Co, 155 S E 2d 865, 151 W Va 709

"Trackage"

Tex—Gulledge v Grief Bros Corp, Civ App, 499 S W 2d 745

§ 126. Interference with Construction

Library References

Railroads ⇐114(5)

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43. Evidence

(1) Burden of proof

U S—New York Cent R. Co v Chicago & E I R Co., C A Ind, 222 F 2d 828

(2) Weight and sufficiency

U S—New York Cent R Co v. Chicago & E I R Co, C A Ind, 222 F 2d 828.

§ 131. Roadbed and Tracks

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13. "Trackage"

Tex—Gulledge v Grief Bros, Corp, Civ App, 499 S W 2d 745

16. N.C—Austin v Shaw, 71 S E 2d 25, 235 N C 722

§ 132. Remedies

Library References

Railroads ⇐86.

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50. Sufficiency of evidence

(2) Other evidence

Wis.—Laur v Chicago & N.W. Ry. Co, 85 N.W 2d 353, 1 Wis.2d 567.

§ 133. Right to Cross

Library References

Railroads ⇐89.

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54. S D—Great Northern Ry. Co. v. Chicago, St P., M & O Ry Co., 99 N.W.2d 439, 78 S.D 168

71. S D.—Great Northern Ry. Co. v Chicago, St. P, M & O Ry Co., 99 N.W 2d 439, 78 S.D. 168.

72. S D.—Great Northern Ry. Co v Chicago, St. P., M & O. Ry. Co., 99 N W.2d 439, 78 S.D 168

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78. Right of street railroad to remove railroad crossing

N Y—Kingston v Colonial City Traction Co, 45 N Y S 762, 17 App Div 274

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84. Agreement with municipality

La—Harbison v City of New Orleans, App., 171 So 2d 687

§ 135. Determination as to Necessity, Place, Mode, and Expense of Crossing

Library References

Railroads ⇐91

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29. S C—Atlanta & C A L Ry Co v Spartanburg Terminal Co, 117 S E 2d 574, 237 S C 404

32. S D—Great Northern Ry Co v Chicago, St P., M & O Ry Co, 99 N W 2d 439, 78 S D 168

33. Statute held inapplicable

S D—Great Northern Ry Co v Chicago, St P, M & O Ry Co, 99 N W 2d 439, 78 S D 168

§ 136. —— Powers and Proceedings of Commissioners

35 S C—Atlanta & C A L Ry Co v Spartanburg Terminal Co, 117 S E 2d 574, 237 S C 404

S D—Great Northern Ry Co v Chicago, St P, M & O Ry Co., 99 N.W.2d 439, 78 S.D 168

Metropolitan Transportation Authority exempt

N Y—Long Island R Co v Public Service Commission, 292 N Y S 2d 167, 30 A D 2d 409, affd 245 N E 2d 799, 23 N Y.2d 852, 298 N Y S 2d 65

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51. Jurisdiction of board of public works

Ind—Indianapolis Rys v City of Indianapolis, 98 N.E.2d 505, 229 Ind 487

§ 140. What Constitutes a Crossing

Library References

Railroads ⇐94(1).

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16. U S—Illinois Cent. R. Co. v Farris, C A Miss, 259 F 2d 445, 67 A.L.R.2d 1358

19. U S.—Illinois Cent R. Co v Farris, C.A.Miss, 259 F 2d 445, 67 A L R 2d 1358

21. U S—Atlantic Coastline R. Co. v Smith, C.A. Tenn., 264 F 2d 428

§ 141. Right to Cross

24. Kan.—Harmon v Atchison, T & S F Ry Co., 233 P.2d 489, 171 Kan 403.

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41. Protective devices

Tenn.—Southern Ry Co v City of Knoxville, 442 S.W 2d 619, 223 Tenn. 90, cert den 90 S Ct. 551, 396 U.S 1002, 24 L.Ed.2d 494

§ 142. Place, Mode, and Expense of Crossing

Library References

Railroads ⇐11, 94.

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61. La.—Kansas City Southern Ry. Co. v Louisiana Public Service Commission, 223 So 2d 132, 254 La. 160.

62. Fla.—Trabulsy v. Lofton, 76 So.2d 143.

Ill—DiOrio v City of Chicago, 425 N E 2d 1223, 55 Ill Dec 50, 99 Ill App 3d 1047

Mo—State ex rel State Highway Commission of Mo v Conrad, 310 S W 2d 871

Jurisdiction or power of commission

(5) Other cases

Cal—Union City v Southern Pac Co, 67 Cal Rptr 816, 261 C A 2d 277

La—New Orleans & N E R Co v Louisiana Public Service Commission, 164 So 2d 300, 246 La 207

Mo—State ex rel Chicago, R I & P R Co v Public Service Commission, App, 441 S W 2d 742

Pa—Borough of Tarentum v Pennsylvania Public Utility Commission, 90 A 2d 853, 171 Pa Super 156

S D—Northwestern Bell Tel Co v Chicago & North Western Transp Co, 245 N W 2d 639

63. N C—Southern Ry Co v City of Winston-Salem, 165 S E 2d 751, 4 N C App 11, affd 168 S E 2d 396, 275 N C 465

City charter construed

Tenn—Southern Ry Co v City of Knoxville, 442 S W 2d 619, 223 Tenn 90, cert den 90 S Ct 551, 396 U S 1002, 24 L Ed 2d 494

Statute providing for allocation of costs held inapplicable

N C—Southern Ry Co v City of Winston-Salem, 168 S E 2d 396, 275 N C. 465

64. N C—Southern Ry Co v City of Winston-Salem, 165 S E 2d 751, 4 N C App 11, affd 168 S E 2d 396, 275 N C 465

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66. Ga—Atlantic Coast Line R Co v Hansford, 69 S E 2d 681, 85 Ga App 507

69. La—Illinois Cent R Co v Louisiana Public Service Commission, 69 So 2d 43, 224 La 279

70. N C—City of Winston-Salem v Southern Ry. Co, 105 S E 2d 37, 248 N C 637

72. Del—Mayor and Council of Laurel v Delaware R Co, 154 A 2d 762, 38 Del Ch 496

Pa—Borough of Tarentum v. Pennsylvania Public Utility Commission, supra, n 62

Apportionment of cost

Mo.—State ex rel Wabash R Co v Public Service Commission, 273 S W 2d 334

Benefit to users

U.S.—City of St Paul v Chicago & N.W Transp Co, D.C Minn, 436 F Supp 628

73. Del—Mayor and Council of Laurel v. Delaware R Co., 154 A 2d 762, 38 Del.Ch 496

74. Pa—Borough of Bridgewater v Pennsylvania Public Utility Commission, 124 A 2d 165, 181 Pa Super 84

77. Mo—C.J.S. cited in Hickey v Kansas City Southern Ry Co., 290 S W.2d 58, 61, citing Arkansas law

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83. Del—Mayor and Council of Laurel v Delaware R. Co, 154 A 2d 762, 38 Del Ch 496

§ 143. —— Crossing at, Above, or Below Grade

Library References

Railroads ⇐94(4).

88. Ky.—Jefferson County v. Louisville & N.R. Co., 245 S.W.2d 611.—City of Harrodsburg v. Southern Ry Co, 313 S W.2d 864.

93. Proceedings of commission

Ill.—Village of Bensenville v. Illinois Commerce Commission, 195 N.E.2d 169, 29 Ill.2d 601.

Requiring construction of bridge

N C—City of Raleigh v. Norfolk Southern Ry. Co., 165 S E.2d 745, 4 N.C.App. 1, remd. 168 S.E.2d 389.

§ 144. —— Character of Highway

Library References

Railroads ⇐94(3).

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9. Cal—Southern Pac Transp Co v Public Utilities Commission, 134 Cal Rptr 189, 556 P 2d 289, 18 C 3d 308

Pa—Delaware, L & W R Co v Shuman, 115 A 2d 161, 382 Pa 452

10. Ky—Illinois Cent R Co v Hopkins County, 369 S W 2d 116

N C—Southern Ry Co v City of Winston-Salem, 165 S E 2d 751, 4 N C App 11, affd 168 S E 2d 396, 275 N C 465

Statute applied to public roads to be constructed

La—Illinois Cent R Co v Louisiana Public Service Commission, 69 So 2d 43, 224 La 279

§ 145. —— Changing Location or Grade of Highway

Library References

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18. Duty of public utility commission

Pa—Borough of Tarentum v Pennsylvania Public Utility Commission, 90 A 2d 853, 171 Pa Super 156

29. N C—City of Winston-Salem v Southern Ry Co, 105 S E 2d 37, 248 N C 637

§ 146. —— Remedies in General

Library References

Railroads ⇐94(6).

33. Del—Mayor and Council of Laurel v Delaware R Co, 154 A 2d 762, 38 Del Ch 496

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Other matters relating to remedies of railroads with respect to railroad crossings have been adjudicated.[64.1]

64.1. Injunction against use of crossing

Pa—Delaware, L & W R. Co v Shuman, 115 A 2d 161, 382 Pa 452

Abolition of subway crossing

Pa—Reading Co v Pennsylvania Public Utility Commission, 195 A 2d 190, 202 Pa.Super 50

§ 147. —— Penalty for Failure to Construct Crossing

65. "Fine" construed as "penalty"

S C—South Carolina State Highway Dept. v Southern Ry Co, 122 S E 2d 422, 239 S C 227

"Conviction" construed

S C—South Carolina State Highway Dept v. Southern Ry Co, 122 S E 2d 422, 239 S C 227

§ 148. Restoring and Maintaining Highway

Library References

Railroads ⇐95.

70. U.S.—Jamce v. Texas & P Ry. Co, C.A La., 395 F.2d 759.

Ga.—Atlantic Coast Line R Co v Layne, 77 S E.2d 565, 88 Ga.App. 674

72. Cal—Alameda County v Southern Pac. Co., 11 Cal Rptr. 751, 360 P.2d 327, 55 C 2d 479

Tenn—Southern Ry Co v Maples, 296 S.W.2d 870, 201 Tenn. 85—Ferrill v. Southern Ry. Co., App, 493 S W 2d 90

73. Ill.—McElligott v Illinois Cent R. Co, 227

Implied repeal

(3) Other matters

Ill—McElligott v Illinois Central R Co, 219 N E 2d 785, 74 Ill App 2d 121, app after remand, 227 N E 2d 764, 37 Ill 2d 459

Scope of duties imposed

Minn—Cameron v Northern Pac Ry Co, 48 N W 2d 540, 234 Minn 355

Purpose of statute

U S—Atlantic Coastline R Co v Smith, C A Tenn, 264 F 2d 428

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77. Duty restricted to cross ties

Ark—Untiedt v St Louis Southwestern Ry Co, 440 S W 2d 251, 246 Ark 941

§ 149. —— Duty to Restore Highway

Library References

Railroads ⇐95(1, 2).

87. Cal—Alameda County v Southern Pac Co, 11 Cal Rptr 751, 360 P 2d 327, 55 C 2d 479

Ga—Southern Ry Co v Dunn, 75 S E 2d 31, 87 Ga App 737

Tex—Railroad Commission of Texas v Atchison, T & S F Ry Co, Civ App, 609 S W 2d 641, err ref no rev err

Wis—Metropolitan Sewerage Dist of Milwaukee County v Chicago, M, St P & P R Co, 230 N W 2d 651, 69 Wis 2d 387

89. Ky—Jefferson County v Louisville & N R. Co, 245 S.W 2d 611

92. N C—Thompson v Seaboard Air Line R Co, 104 S.E 2d 181, 248 N C 577

§ 150. —— Mode and Sufficiency of Restoration

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14. Ill—Henegar v Illinois Cent R Co, 174 N E 2d 887, 30 Ill App 2d 418

§ 151. —— Bridges and Approaches Thereto

Library References

Railroads ⇐95(6).

29. N.C—City of Winston-Salem v Southern Ry. Co, 105 S E 2d 37, 248 N.C 637

Matters not excusing duty

N J—Petition of Bergen County, 156 A.2d 694, 31 N.J. 254

Financial difficulty no defense

N J—Petition of Bergen County, 156 A.2d 694, 31 N J. 254

No duty to maintain bridge able to bear statutory maximum load

N J—Petition of Bergen County, 156 A 2d 694, 31 N J 254.

31. N J—Petition of Bergen County, 156 A 2d 694, 31 N J 254

33. Subsequent statutes

(2) Other cases.

N.Y—City of Mount Vernon v Feinberg, 113 N.Y S 2d 534, 280 App Div. 848, app den 115 N.Y S 2d 311, 280 App Div. 902

Construction of statutes

N J—Petition of Bergen County, 156 A 2d 694, 31 N J 254

Reasonable need for application essential

N J—Petition of Bergen County, 156 A 2d 694, 31 N J 254

Nature of bridge required

N J—Petition of Bergen County, 156 A 2d 694, 31 N J

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35. Iowa—Board of Sup'rs, Carroll County v Chicago & North Western Transp Co, 260 N W 2d 813

N Y—City of Mount Vernon v Feinberg, 106 N Y S 2d 532, 200 Misc 720

N C—City of Raleigh v Norfolk S Ry Co, 168 S E 2d 389, 275 N C 454

Pa—New York Cent R Co v Pennsylvania Public Utility Commission, 205 A 2d 883, 204 Pa Super 753

Duty to replace bridge

(2) Other matters

N J—Petition of Bergen County, 156 A 2d 694, 31 N J 254

Duty enforceable by commission

Pa.—Scott Tp v Pennsylvania Public Utility Commission, 146 A 2d 617, 188 Pa Super 174

Commissioner's discretion in dealing with maintenance problems

N J—Petition of Bergen County, 156 A 2d 694, 31 N J 254

No duty to repair

N J—Borough of Roselle v Lehigh Valley R Corp, 368 A 2d 359, 145 N J Super 427

41. Statute construed

N Y—City of Mount Vernon v Femberg, supra, n 33

43. Tenn—Louisville & N R Co v Head, 332 S W 2d 682, 46 Tenn App 612

44. Ill—McElligott v Illinois Cent R Co., 227 N E 2d 764, 37 Ill 2d 459

N Y—Petition of City of Lackawanna, 355 N Y S 2d 846, 45 A D 2d 1

Ohio—State v Baltimore & O R Co, 119 N E 2d 866

45. U S—City of St. Paul v Chicago & N W Transp Co., D C Minn, 436 F.Supp 628

§ 152. —— Agreements for Restoration and Maintenance

Library References

Railroads ⇐95(7).

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68. Pa—Lehigh Valley R Co. v Lehigh County, 2 D & C 2d 514, 26 Leh L J. 190, 68 York 197

75. Pa—Borough of Tarentum v Pennsylvania Public Utility Commission, 90 A 2d 853, 171 Pa Super 156

86. Construction and validity of contract

Ky—Louisville Transit Co v Louisville & N R Co, 253 S W 2d 240

Agreement of street railway to maintain crossing

U S—Erie R. Co v. Ohio Public Service Co, C C A Ohio, 62 F.2d 83.

§ 153. —— Character of Highway

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87. N J—Hillside Tp, Union County v Lehigh Valley R Co., 232 A 2d 683, 96 N.J.Super 167

92. Ga.—Georgia S & F Ry Co, v. Blanchard, 173 S E.2d 103, 121 Ga App. 82

Ky.—Lousville & N R Co v City of Owensboro, 238 S.W 2d 148.

§ 154. —— Companies and Persons Liable

96. Cal—Alameda County v Southern Pac Co, 11 Cal Rptr 751, 360 P 2d 327, 55 C.2d 479

Wis.—Wells v. Chicago and North Western Transp. Co, App., 283 N.W 2d 471, 91 Wis 2d 565, affd. 296 N W 2d 559, 98 Wis.2d 328

§ 155. —— Rights and Remedies of Public

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9. Not eminent domain proceeding

Ky—Louisville v N R Co v City of Owensboro, 238 S W 2d 148

20. Ky—Louisville & N R Co v City of Owensboro, supra, n 9

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30. Action by public authorities

(2) Other matters

Vt—State Highway Bd v Hazen, 221 A 2d 579, 126 Vt 46

§ 156. Opening or Extension of Public Ways across Existing Railroad

Library References

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57. Ariz—Pima County v Southern Pac Co, 386 P 2d 400, 95 Ariz 41

N C—Southern Ry Co. v City of Greensboro, 101 S E 2d 347, 247 N C 321

"New road" defined

N Y—Delaware L & W R Co. v Board of Sup'rs of Broome County, 149 N Y S 2d 201, 1 A D.2d 867, rearg and app den 152 N.Y S 2d 426, 2 A D 2d 612

Easement held subject to right of way

Tex—Harris County v Southern Pac Transp Co, Civ App, 457 S W 2d 336

Effect of contract

Fla—City of North Miami v Florida East Coast Ry Co, App, 277 So 2d 62

59. Preliminary local proceedings

N Y—Delaware L & W R Co v Board of Sup'rs of Broome County, 149 N Y S 2d 201, 1 A.D 2d 867, rearg and app. den 152 N.Y.S 2d 426, 2 A D 2d 612

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61. La—C.J.S. cited in Southern Pac Transp Co v Louisiana Public Service Commission, 263 So 2d 333, 336, 262 La. 391

68. Findings prima facie proper

Va.—City of Bristol v Virginia & S W. Ry Co, 107 S E.2d 473, 200 Va 617.

69. Findings held supported by evidence

Va—City of Bristol v Virginia & S.W Ry. Co, 107 S.E.2d 473, 200 Va 617.

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17. Conn—Peterson v. City of Norwalk, 190 A.2d 33, 150 Conn. 366.

Del—Mayor and Council of Laurel v Delaware R Co, 154 A 2d 762, 38 Del Ch. 496.

Construction of statutory language

N J.—New Jersey Highway Authority v. Central R. Co of N J., 121 A 2d 388, 21 N.J 157

18. Conn.—Peterson v City of Norwalk, 190 A.2d 33, 150 Conn. 366.

19. N J—New Jersey Highway Authority v. Central R Co. of N.J, 121 A.2d 388, 21 N J. 157.

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20. Conn.—Peterson v City of Norwalk, 190 A 2d 33, 150 Conn. 366.

28. Relocation of communication signals and electric lines

Conn.—Peterson v. City of Norwalk, 190 A.2d 33, 150 Conn. 366

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38. Del—Mayor and Council of Laurel v Delaware R Co, 154 A 2d 762, 38 Del Ch 496

§ 157. Change after Construction

Library References

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43. N H—C J S cited in Boston & Maine Corp v State, 261 A 2d 267, 269, 109 N H 547

N J—Borough of Sayreville v Pennsylvania R Co, 129 A 2d 895, 44 N J Super 172, affd 139 A 2d 97, 26 N J 197, app dism 79 S Ct 43, 358 U S 44, 3 L Ed 2d 45

44. Ill—Chicago, B & Q R Co v Illinois Commerce Commission, 101 N E 2d 92, 410 Ill 60—Chicago Junction Ry Co v Illinois Commerce Commission, 107 N E 2d 758, 412 Ill 579

Neb—Village of Louisville v Chicago B & Q R Co, 129 N W 2d 454, 177 Neb 491

Statute prohibiting change without order construed

Pa—Delaware, L & W R Co v Shuman, 115 A 2d 161, 382 Pa 452

Agency discretion in particular matters

N J—Petition of Bergen County, 156 A 2d 694, 31 N J 254

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47. Matters considered in determining duty

N J.—Petition of Bergen County, 156 A 2d 694, 31 N J 254

48. N J—Petition of Bergen County, 156 A 2d 694, 31 NJ 254

52. Wis—Chicago & N.W Ry Co v. Public Service Commission, 166 N W 2d 143, 274 Wis 2d 274.

53. N Y—City of Mount Vernon v Feinberg, 106 N.Y S 2d 532, 200 Misc 720.

54. Doubtful validity

Del—Smith v Baltimore & O R Co, Super, 85 A 2d 73, 7 Terry 441

Duty to strengthen not absolute

N J.—Petition of Bergen County, 156 A.2d 694, 31 N J 254

It has been held that a railroad does not have the right to widen a roadway established by the highway authorities.[64.5]

64.5. Cal—Greenesch v. Southern Pac. Co., 11 Cal Rptr. 235, 189 C A.2d 100.

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70. U S—Atchison, T & S F Ry Co. v Public Utilities Commission of Cal, 74 S.Ct 92, 346 U S 346, 98 L Ed 51

71. U S.—Atchison, T & S F Ry. Co. v. Public Utilities Commission of Cal, supra, n 70.

N J—Borough of Sayreville v Pennsylvania R. Co., 139 A 2d 97, 26 N.J. 197, app. dism. 79 S.Ct. 43, 358 U S. 44, 3 L.Ed 2d 45.

N.Y.—New York Cent. R Co v. State, 129 N.Y S 2d 121, 283 App Div. 613

72. Ill—City of Chicago v. Chicago & N.W. Ry Co, 122 N.E.2d 553, 4 Ill.2d 307.

N J—Borough of Sayreville v Pennsylvania R Co, 139 A.2d 97, 26 N.J 197, app dism 79 S Ct 43, 358 U.S 44, 3 L Ed 2d 45

Exercise of police power

Ill.—Chicago, B. & Q R Co v Illinois Commerce Commission, supra, n. 44—Chicago Junction Ry Co. v. Illinois Commerce Commission, supra, n. 44.

Public Utilities Act

Ill.—Chicago Junction Ry Co v. Illinois Commerce Commission, supra, n. 44.

80. Pleadings held insufficient

Ill—Chicago Junction Ry Co v Illinois Commerce Commission, 107 N E 2d 758, 412 Ill 579

Evidence held sufficient

Ill—Chicago Junction Ry Co v Illinois Commerce Commission, supra

Legislative function for purpose of jurisdiction

U S—Atchison, T & S F Ry Co v Public Utilities Commission of Cal, supra, n 70

81. U S—Atchison, T & S F Ry Co v Public Utilities Commission of Cal, supra, n 70

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In a proper case the reviewing court may remand the matter to the commission for proper determination.[82.5]

82.5. Submission of further evidence

N J—Petition of Bergen County, 156 A 2d 694, 31 N J 254

§ 159. Determination as to Necessity, Place, Mode, and Expense of Crossings

Library References

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21. Cal—Breidert v Southern Pac Co, App, 77 Cal Rptr 262, 272 C A 2d 398

Colo—Atchison, T & S F Ry Co v Public Utilities Commission, 572 P 2d 138, 194 Colo 263

Iowa—Chicago, R I. & P R Co v Iowa State Highway Commission, 182 N W 2d 160

Mass—New York Cent R. Co v Department of Public Works, 237 N E 2d 283, 354 Mass 332

Mo—State ex rel Wabash R Co v Public Service Commission, 273 S W 2d 334—State ex rel State Highway Commission of Mo v Conrad, 310 S W 2d 871—State ex rel. Chicago, R I & P R Co v Public Service Commission, App., 441 S.W 2d 742

N J—Borough of Sayreville v Pennsylvania R. Co., 129 A.2d 895, 44 N.J Super 172, affd 139 A 2d 97, 26 N.J. 197, app. dism. 79 S Ct 43, 358 U S 44, 3 L Ed.2d 45

Okl—Board of County Com'rs of Cleveland County v City of Norman, 472 P 2d 910

Pa.—In re Road in North Whitehall and South Whitehall Tps., 76 Pa Dist & Co 436—Borough of Bridgewater v. Pennsylvania Public Utility Commission, 124 A 2d 165, 181 Pa Super 84—Moulton v Philadelphia Suburban Transp Co, 44 Del 119, 48 Mun. 303—Department of Highways v. Pennsylvania Public Utility Commission, 182 A.2d 267, 198 Pa.Super 87—Department of Highways v Pennsylvania Public Utility Commission, 182 A.2d 273, 198 Pa.Super 102.

Wis—Verrette v Chicago & N W. Ry. Co., 161 N.W.2d 264, 40 Wis 2d 20

Private convenience

(2) Other statements.

Ill—Forest Preserve Dist of Du Page County v. Illinois Commerce Commission, 146 N.E.2d 27, 12 Ill 2d 319.

Findings

(3) Other findings

Ill.—Forest Preserve Dist. of Du Page County v. Illinois Commerce Commission, 146 N.E.2d 27, 12 Ill 2d 319

Ind.—Public Service Commission v. Fort Wayne Union Ry Co., 111 N.E.2d 719, 232 Ind. 82.

Pa.—Faxon Co v Pennsylvania Public Utility Commission, 419 A.2d 818, 54 Pa.Cmwlth 36

Wis.—Green Bay & W.R. Co. v. Public Service Commission, 68 N.W.2d 828, 269 Wis 178—Chicago & N.W. Ry. Co. v. Public Service Commission, 169 N.W.2d 65, 43 Wis.2d 570.

Effect of private agreement on powers of commission or board

Utah—Denver & R G W R Co v Public Service Commission, 377 P 2d 493, 14 Utah 2d 68

Persons entitled to have questions determined

Neb—Village of Louisville v Chicago, B & Q R Co, 129 N W 2d 454, 177 Neb 491

Traffic congestion as element for consideration

Pa—Pennsylvania Public Utility Commission v Borough of Souderton, 231 A 2d 875, 210 Pa Super 22

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22. N J—Latzoni v City of Garfield, 123 A 2d 531, 22 N J 84

Pa—Pennsylvania R Co v Pennsylvania Public Utility Commission, 195 A 2d 162, 202 Pa Super 114

Exclusive power as to grade crossings

Wis—Verrette v Chicago & N W Ry Co, 161 N W 2d 264, 40 Wis 2d 20

23. Mo—State ex rel State Highway Commission v Public Service Commission, 471 S W 2d 249.

Pa—Pennsylvania Public Utility Commission v Borough of Souderton, 231 A 2d 875, 210 Pa Super 22

Judicial questions

Minn—Northern Pac Ry Co v City of Duluth, 67 N W 2d 635, 243 Minn 84

May order construction

Okl—Atchison, Topeka and Santa Fe Ry Co v State, 683 P 2d 974

24. Pa—Pennsylvania Public Utility Commission v Borough of Souderton, 231 A 2d 875, 210 Pa Super 22—Pennsylvania Dept. of Transp v Pennsylvania Public Utility Commission, 284 A 2d 155, 3 Pa Cmwlth 473

Discretion held not abused

La—Southern Pac. Transp Co v Louisiana Public Service Commission, 263 So.2d 333, 262 La 391

25. Colo—Atchison, T & S.F Ry Co v Public Utilities Commission, 572 P 2d 138, 194 Colo 263

Ind—Indianapolis Rys v City of Indianapolis, 98 N E 2d 505, 229 Ind 487

Minn—Northern Pac Ry. Co v City of Duluth, supra, n. 23

Mo—State ex rel Wabash R Co v Public Service Commission, supra, n 21—State ex rel State Highway Commission of Mo v. Conrad, 310 S W 2d 871—State ex rel City of Neosho v Public Service Commission, 367 S W 2d 589—State ex rel State Highway Commission v Public Service Commission, App, 459 S W 2d 736

N H—Boston & Maine Corp v State, 261 A 2d 267, 109 N H 547.

Okl—Board of County Com'rs of Cleveland County v City of Norman, 472 P 2d 910

Pa—Department of Highways v Pennsylvania Public Utility Commission, 138 A.2d 143, 185 Pa Super 418—Scott Tp v Pennsylvania Public Utility Commission, 146 A.2d 617, 188 Pa Super. 174—Department of Highways v. Pennsylvania Public Utility Commission, 178 A 2d 820, 197 Pa.Super 350—Department of Highways v. Pennsylvania Public Utility Commission, 182 A.2d 267, 198 Pa.Super 87—Port Authority of Allegheny County v Pennsylvania Public Utility Commission, 217 A 2d 810, 207 Pa.Super 299

Utah—Denver & R.G.W.R. Co. v. Public Service Commission, 377 P.2d 493, 14 Utah 2d 68.

Va.—Southern Ry. Co. v. Com. ex rel. Fugate, 147 S.E.2d 72, 206 Va. 831.

Wis.—Chicago & N.W Ry. Co v. Public Service Commission, 169 N.W 2d 65, 43 Wis.2d 570

Obligation to pay held not contractual

Mo—Wabash R. Co. v. City of Wellston, 276 S.W 2d 208.

Reimbursement by county unauthorized

Ariz.—Pima County v. Southern Pac. Co., 386 P 2d 400, 95 Ariz. 41

Discretion held not abused

Pa—Pennsylvania R Co v Pennsylvania Public Utility Commission, Super, 195 A 2d 162, 202 Pa Super 114

Recovery of expense

N C—Atlantic Coast Line R Co v State Highway Commission, 150 S E 2d 70, 268 N C 92

26. Ky—Ward v Louisville & N R Co, 402 S W 2d 98

Mo—State ex rel Wabash R Co v Public Service Commission, supra, n 21

27. Pa—Lehigh Valley R Co v Lehigh County, 2 Pa Dist & Co 2d 514, 26 Lehigh Co L J 190, 68 York Leg Rec 197—Scott Tp v Pennsylvania Public Utility Commission, 146 A 2d 617, 188 Pa Super 174

28. Colo—Union Pac R Co v Public Utilities Commission, 463 P 2d 294, 170 Colo 514

Ind—Public Service Commission v Fort Wayne Union Ry Co, supra, n 21

La—Kansas City Southern Ry Co v Louisiana Public Service Commission, 223 So 2d 132, 254 La 160

N C—State Highway Commission v Cinchfield R Co, 132 S E 2d 595, 260 N C 274

Pa—Pittsburgh Rys Co v Pennsylvania Public Utility Commission, 119 A 2d 804, 180 Pa Super 201

In Connecticut

(1) Public utilities

Conn—Coppola v New York, N H & H R Co, 119 A 2d 730, 143 Conn 109

(2) Former law see 51 C J p 677 note 83[a]

Reasonable construction

Wis—Green Bay & W R. Co v Public Service Commission, 68 N W 2d 828, 269 Wis. 178—Verrette v Chicago & N W. Ry. Co, 161 N W 2d 264, 40 Wis 2d 20—Chicago & N W Ry Co v Public Service Commission, 169 N W.2d 65, 43 Wis 2d 570

Purpose of statute

Neb—Village of Louisville v Chicago, B. & Q R. Co., 129 N W 2d 454, 177 Neb 491

Jurisdiction held lacking

Neb—Village of Louisville v Chicago, B. & Q R. Co, 129 N W 2d 454, 177 Neb. 491

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34. Pa—Lehigh Valley R Co v Lehigh County, supra, n 27—Delaware, L & W R Co v Shuman, 115 A 2d 161, 382 Pa 452—Pennsylvania Dept of Transp v Pennsylvania Public Utility Commission, 284 A.2d 155, 3 Pa.Cmwlth 473.

37. Del—Mayor and Council of Laurel v Delaware R Co, 154 A 2d 762, 38 Del.Ch. 496

N J—Latzoni v City of Garfield, 123 A.2d 531, 22 N.J. 84.

§ 160. —— Appeal from Orders of Commission

Library References

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42. Va—Seaboard Air Line R Co v Board of Sup'rs of Chesterfield County, 87 S.E.2d 799, 197 Va. 130

Rehearing properly denied

Pa.—Scott Tp. v. Pennsylvania Public Utility Commission, 146 A 2d 617, 188 Pa Super 174

Dismissal of appeal made dependent on stipulation of parties

Conn—Peterson v. City of Norwalk, 190 A.2d 41, 150 Conn 383.

Remand

Mo—State ex rel Chicago, R.I. & P R. Co v Public Service Commission, App, 441 S W.2d 742

Questions properly raised

Mo.—State ex rel. Chicago, R.I. & P R. Co. v. Public Service Commission, App, 441 S W.2d 742

43. U.S —Chicago & N.W Ry Co v City of Rochester, D C.Minn , 331 F Supp. 47

Ind —Public Service Commission v Fort Wayne Union Ry. Co , 111 N E 2d 719, 232 Ind 82

Pa —Scott Tp v Pennsylvania Public Utility Commission, 146 A.2d 617, 188 Pa Super 174

45. Pa —Port Authority of Allegheny County v Pennsylvania Public Utility Commission, 217 A 2d 810, 207 Pa Super 299

46. Ga —State Highway Dept of Ga v Reed, 84 S E 2d 561, 211 Ga 197

Ind —Public Service Commission v Fort Wayne Union Ry Co , supra, n 43

Mass —New York Cent R Co v. Department of Public Works, 237 N E 2d 283, 354 Mass 332

Pa —Port Authority of Allegheny County v Pennsylvania Public Utility Commission, 217 A 2d 810, 207 Pa Super 299—Department of Transp v Pennsylvania Public Utility Commission, Cmwlth , 284 A 2d 330

Evidence held sufficient, etc.

Ill —Chicago, B & Q R Co v Illinois Commerce Commission, 211 N E 2d 279, 33 Ill 2d 274, cert den 86 S.Ct 890, 383 U S 912, 15 L Ed 2d 667

La.—Illinois Cent R Co v Louisiana Public Service Commission, 69 So 2d 43, 224 La 279

Minn —Northern Pac Ry Co v City of Duluth, 67 N W 2d 635, 243 Minn 84

Mo —State ex rel Chicago, R I & P R Co v Public Service Commission, App , 441 S W 2d 742

N.H —Boston & Maine Corp v. State, 261 A 2d 267, 109 N H 547

Okl —Chicago, R I & P R Co v State, 281 P 2d 172

Pa —Borough of Atglen v Pennsylvania Public Utility Commission, 100 A 2d 138, 174 Pa Super 149—Scott Tp. v Pennsylvania Public Utility Commission, 146 A 2d 617, 188 Pa Super 174

Va.—Seaboard Air Line R Co v Board of Sup'rs of Chesterfield County, 87 S E 2d 799, 197 Va 130—Southern Ry Co v Com ex rel Fugate, 147 S E.2d 72, 206 Va. 831

Wis.—Green Bay & W.R. Co v Public Service Commission, 68 N W 2d 828, 269 Wis 178

Failure to appeal from commission order waives review of merits

U S.—Chicago & N W Ry Co v City of Rochester, D C Minn , 331 F Supp 47

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47. La.—Kansas City Southern Ry. Co. v Louisiana Public Service Commission, 223 So 2d 132, 254 La 160.

Pa.—Pennsylvania R. Co v Pennsylvania Public Utility Commission, 195 A 2d 162, 202 Pa.Super. 114

Discretion held not abused

Pa —Pennsylvania Dept of Transp v. Pennsylvania Public Utility Commission, 284 A 2d 155, 3 Pa. Cmwlth 473.

§ 161. Abolition and Removal of Grade Crossings

Library References

Railroads ⇐99.

49. La.—Southern Pac Transp. Co v Louisiana Public Service Commission, 290 So.2d 816, app dism 95 S Ct. 23, 419 U S 810, 42 L Ed.2d 37

50. Ky —Jefferson County v Louisville & N R. Co , 245 S W.2d 611.

Statute inapplicable under circumstances

U S.—U S. v Certain Parcels of Land in Williams County, N D , D C N D , 178 F Supp. 313

Unsafe crossing

Pa.—Marinelli v Montour R. Co , 420 A 2d 603, 278 Pa.Super. 403.

51. N.C.—Town of Wilhamston v Atlantic Coast Line R Co , 72 S E 2d 609, 236 N C 271.

53. Cal —Southern Pac Transp Co v Public Utilities Commission, 134 Cal Rptr 189, 556 P 2d 289, 18 C 3d 308.

Crossing at grade not against public policy

Conn —Coppola v New York, N H & H R Co , 119 A 2d 730, 143 Conn 109

Reversion of jurisdiction to local authority

Tenn —Wilkey v. Cincinnati, N O & T P Ry Co , 340 S W 2d 256, 47 Tenn App 556

In the absence of imminent danger or a contractual duty, a bankrupt railroad which has ceased operations has no legal obligation to remove its highway crossings [54.5]

54.5 U S —Matter of Chicago, Rock Island and Pacific R Co , C A 7 (Ill), 756 F 2d 517

55. N Y —New York Cent R Co v State, 129 N Y S 2d 121, 283 App Div 613, affd 127 N E 2d 866, 308 N Y 1029

Pa —Pittsburgh Railways Co v Pennsylvania Public Utility Commission, 182 A 2d 80, 198 Pa Super 415

58. N M —Matter of Closing of State St R R Grade Crossing, Elida, 640 P.2d 924, 97 N.M 424

59. **Railroad liable for improper removal**

Tenn —Stokely v Southern Ry. Co , 418 S W 2d 255, 57 Tenn App 271

60. N Y —New York Cent R Co v State, 109 N Y S 2d 121, 200 Misc 1052, revd. on oth grds 129 N Y S 2d 121, 283 App Div 613, affd 127 N E 2d 866, 308 N Y 1029

§ 162. —— Contracts and Agreements for Abolition or Removal

Library References

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61. Tex —Barrington v Cokinos, Civ.App , 339 S.W.2d 330, cert ques ans 338 S W.2d 133, 161 Tex 136.

Va.—Wiley N. Jackson Co v. City of Norfolk, 87 S E 2d 781, 197 Va 62.

State Highway Commissioner

Mich.—Grand Trunk Western R Co v Michigan Public Service Commission, 93 N W.2d 919, 354 Mich 673

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74. Mich —Grand Trunk Western R Co v Michigan Public Service Commission, 93 N.W 2d 919, 354 Mich 673

N C —Austin v. Shaw, 71 S E 2d 25, 235 N.C. 722.

Tex —Barrington v Cokinos, Civ.App., 339 S.W 2d 330, cert ques. ans 338 S W.2d 133, 161 Tex. 136

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76. Tex —Barrington v. Cokinos, Civ App , 339 S.W 2d 330, cert. ques ans 338 S.W 2d 133, 161 Tex. 136

83. N Y.—People v. Palmer, 108 N.Y S 2d 548, 279 App Div 60, rearg. and app. den 109 N.Y.S 2d 622, 279 App.Div. 835

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99. **Residents on street losing access rights by relocation held entitled to injunction**

Tenn.—Wilkey v. Cincinnati, N.O. & T.P Ry. Co , 340 S W 2d 256, 47 Tenn.App 556.

§ 163. —— Power to Require Abolition or Removal

Library References

Railroads ⇐99(4–8).

5. Ill.—People v Illinois State Toll Highway Commission, 120 N E 2d 35, 3 Ill 2d 218.

State legislation abrogates common law rights of cities

Ky —City of Harrodsburg v Southern Ry Co , 313 S W 2d 864

8. N Y —New York Cent R Co v Town of Cheektowaga, 106 N Y S 2d 78, 278 App.Div 521, affd 107 N E 2d 70, 304 N Y 565

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12. La.—Southern Pac Transp Co v Louisiana Public Service Commission, 290 So 2d 816, app dism 95 S Ct 23, 419 U S 810, 42 L Ed 2d 37

Pa —Pittsburgh Railways Co v Pennsylvania Utility Commission, 182 A 2d 80, 198 Pa Super 415

13. **Held reasonably exercised**

N J.—City of Bayonne v Board of Public Utility Com'rs, Dept of Public Utilities, 105 A 2d 417, 30 N J Super 520

Impairment of contract obligations

Mo —State ex rel Chicago, B & Q R Co v Public Service Commission, 334 S W 2d 54

18. Fla —City of Plant City v Department of Transp , App , 399 So 2d 1075

Iowa—Chicago, R I & P.R Co v Iowa State Commerce Commission, 80 N W 2d 351, 248 Iowa 207

N Y —New York Cent R Co. v. State, 129 N Y S 2d 121, 283 App Div 613, affd 127 N E 2d 866, 308 N Y 1029

Pa —Pittsburgh Railways Co v Pennsylvania Public Utility Commission, 182 A 2d 80, 198 Pa Super 415—Department of Highways v Pennsylvania Public Utility Commission, 182 A 2d 267, 198 Pa Super 87—Springettsbury Tp v Pennsylvania Public Utility Commission, 289 A 2d 762, 5 Pa Cmwlth. 102—Com., Dept of Transp. v Pennsylvania Public Utility Commission, 440 A 2d 657, 64 Pa.Cmwlth 299.

R I —East Greenwich Fire Dist. v Penn Central Co , 302 A.2d 304, 111 R.I 303

Vt —Town of Sheldon v. Central Vermont Ry. , 449 A 2d 976, 141 Vt. 477

Plenary and exclusive jurisdiction

(3) Other matters

N Y —Onondaga County v White, 321 N.Y S 2d 305, 36 A.D 2d 449.

Pa —Borough of Bridgewater v Pennsylvania Public Utility Commission, 124 A 2d 165, 181 Pa Super 84

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19. Ind —Southern Ry Co. v Board of Com'rs of Vanderburgh County, App , 426 N.E.2d 445

Pa.—Pittsburgh Rys. Co v. Pennsylvania Public Utility Commission, 119 A 2d 804, 180 Pa Super 201—Pittsburgh Railways Co v Pennsylvania Public Utility Commission, 182 A 2d 80, 198 Pa.Super 415—Com., Dept. of Transp v. Pennsylvania Public Utility Commission, 440 A.2d 657, 64 Pa Cmwlth. 299.

Tenn —Wilkey v. Cincinnati, N O. & T P Ry Co , 340 S.W.2d 256, 47 Tenn App 556

Public utility facilities

Pa.—Department of Highways v. Pennsylvania Public Utility Commission, 182 A 2d 267, 198 Pa.Super. 87

Questions held not cognizable by board

Iowa—Chicago, R I. & P R Co. v. Iowa State Commerce Commission, 80 N W 2d 351, 248 Iowa 207.

Statutes not operating prospectively only

R.I.—East Greenwich Fire Dist. v. Penn Central Co., 302 A.2d 304, 111 R I 303.

20. Pa —Pittsburgh Railways Co. v. Pennsylvania Utility Commission, 182 A.2d 80, 198 Pa.Super 415

Contract with railroad

(2) Other statements.

La.—New Orleans & N.E R. Co. v. Louisiana Public Service Commission, 164 So.2d 300, 246 La 207

24. Necessity for four-lane viaduct

La—Southern Pac Transp Co v Louisiana Public Service Commission, 290 So 2d 816, app dism 95 S Ct 23, 419 U S 810, 42 L Ed 2d 37

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44. Reduction in number of crossings

(2) Other instances

Pa—Pennsylvania Public Utility Commission v Borough of Souderton, 231 A 2d 875, 210 Pa Super 22

56. Pa—Delaware, L & W R Co v Shuman, 115 A 2d 161, 382 Pa 452

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62. Tenn—Wilkey v Cincinnati, N O & T P Ry Co, 340 S W 2d 256, 47 Tenn App 556

Tex—City of Waco v Archenhold Auto Supply Co, Civ App, 386 S W 2d 174, affd, Sup, 396 S W 2d 111

66. Power to order elimination not conferred

Ky—City of Harrodsburg v Southern Ry Co, 313 S W 2d 864

Cities held authorized

Ky—City of Harrodsburg v Southern Ry Co, 313 S W 2d 864

La—Southern Pac Transp Co v Louisiana Public Service Commission, 290 So 2d 816, app dism 95 S Ct 23, 419 U S 810, 42 L Ed 2d 37

Fourth class city held not to have statutory authority

Ky—City of Harrodsburg v Southern Ry Co, 313 S W 2d 864

75. Tex—Barrington v Colmos, 338 S W 2d 133, 161 Tex 136

§ 164. —— Proceedings to Abolish or Remove

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91. Location of overpass

La.—Southern Pac Transp Co. v. Louisiana Public Service Commission, 290 So 2d 816, app dism 95 S Ct 23, 419 U S 810, 42 L.Ed 2d 37.

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13. N Y—Onondaga County v. White, 321 N Y S 2d 305, 36 A D 2d 449.

Evidence

Pa.—Faxon Co v Pennsylvania Public Utility Commission, 419 A 2d 818, 54 Pa Cmwlth 36

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18. Pa—Borough of Bridgewater v Pennsylvania Public Utility Commission, 124 A 2d 165, 181 Pa Super 84

19. Pa—City of Arnold v Pennsylvania Public Utilty Commission, 162 A.2d 77, 192 Pa.Super. 476.

20. Matters not necessary to be proved

Ohio—Erie-Lackawanna Rd. Co v. Public Utilities Commission, 247 N.E 2d 736, 18 Ohio St.2d 112

22. Minn.—Village of Norwood v. Chicago & N.W Railway Co., 178 N.W.2d 704, 287 Minn. 407.

Ohio—Erie-Lackawanna Rd Co. v. Public Utilities Commission, 247 N.E.2d 736, 18 Ohio St 2d 112.

Question of fact

Ill.—Galt v Illinois Commerce Commission, 192 N.E.2d 906, 28 Ill.2d 501

Fact that no accident had ever happened, etc.

Ill—Galt v Illinois Commerce Commission, 192 N E 2d 906, 28 Ill.2d 501.

23. Pa.—Borough of Bridgewater v. Pennsylvania Public Utility Commission, 124 A.2d 165, 181 Pa.Super. 84.

28. Minn.—Village of Norwood v Chicago & N.W. Railway Co., 178 N.W 2d 704, 287 Minn. 407.

Findings held sufficient

Pa—Pennsylvania Public Utility Commission v Borough of Souderton, 231 A 2d 875, 210 Pa Super 22

R I—East Greenwich Fire Dist v Penn Central Co, 302 A 2d 304, 111 R I 303

Findings held insufficient

Ohio—Erie-Lackawanna Rd Co v Public Utilities Commission, 247 N E 2d 736, 18 Ohio St 2d 112

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31. Pa—Beaver County v Com, Public Utility Commission, 369 A 2d 509, 28 Pa Cmwlth 511

34. N Y—New York Cent R Co v Town of Cheektowaga, 106 N Y S 2d 78, 278 App Div 521, affd 107 N E 2d 70, 304 N Y 565

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45 New matters

(2) Other instances

Pa—City of Arnold v Pennsylvania Public Utility Commission, Super, 162 A 2d 77, 192 Pa Super 476

Formal order denying petition for rehearing not required

Pa—Department of Highways of Com of Pa v Pennsylvania Public Utility Commission, 149 A 2d 552, 189 Pa Super 111

48. Refusal justified

Pa—Bueg v Pennsylvania Public Utility Commission, 144 A 2d 511, 187 Pa Super 378

49. N H—Petition of Boston & Maine Corp, 251 A 2d 332, 109 N H 324.

54. Notice of appeal

Pa—Department of Highways of Com of Pa. v Pennsylvania Public Utility Commission, 149 A 2d 552, 189 Pa Super 111

Dismissal not required

Mo—State ex rel City of Neosho v Public Service Commission, 367 S W 2d 589

55 Order held final

Wis—Town of Caledonia v Public Service Commission of Wisconsin, 202 N W 2d 912, 56 Wis 2d 720

57. Wis—Town of Caledonia v Public Service Commission of Wisconsin, 202 N W 2d 912, 56 Wis 2d 720

Appeal nunc pro tunc held not justified

Pa.—Department of Highways of Com of Pa. v Pennsylvania Public Utility Commission, 149 A.2d 552, 189 Pa Super 111

Extension of statutory time for appeal not permitted

Pa—Department of Highways of Com of Pa. v Pennsylvania Public Utility Commission, 149 A 2d 552, 189 Pa.Super 111

Extension of statutory time for appeal permitted

Pa—Pennsylvania Public Utility Commission v Borough of Souderton, 231 A.2d 875, 210 Pa Super 22.

58. N.Y—Long Island R Co. v. State, 148 N Y.S 2d 711, 1 Misc.2d 781

Notice of decision

Wash—Gau v Washington Utilities and Transp Commission, 534 P 2d 156, 13 Wash App. 219

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68. Pa.—Pennsylvania Public Utility Commission v. Department of Transp, 276 A.2d 573, 2 Pa. Cmwlth. 144—Erie Lackawanna Ry Co. v. Pennsylvania Public Utility Commission, 278 A.2d 188, 2 Pa.Cmwlth. 396.

71. Power held not exceeded

Pa.—Pennsylvania Public Utility Commission v. Borough of Souderton, 231 A.2d 875, 210 Pa.Super 22.

Order held reasonable or not unreasonable

Pa.—Borough of Bridgewater v Pennsylvania Public Utility Commission, 124 A.2d 165, 181 Pa.Super. 84.

72. Minn—Village of Norwood v Chicago & N W Railway Co, 178 N W 2d 704, 287 Minn 407

Pa—Erie Lackawanna Ry Co v Pennsylvania Public Utility Commission, 278 A 2d 188, 2 Pa Cmwlth 396

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75. Pa—Bueg v Pennsylvania Public Utility Commission, 144 A 2d 511, 187 Pa Super 378

Orders supported by substantial evidence

Mo—State ex rel Chicago, B & O R Co v Public Service Commission, 334 S W 2d 54

78 Discretion

(2) Other statements

Pa—Bueg v. Pennsylvania Public Utility Commission, 144 A 2d 511, 187 Pa Super 378

79. Engineering questions, etc.

(2) Other matters

Pa—Pennsylvania Public Utility Commission v Borough of Souderton, 231 A 2d 875, 210 Pa Super 22

80. Ill—Galt v Illinois Commerce Commission, 192 N E 2d 906, 28 Ill 2d 501

Pa—Borough of Bridgewater v Pennsylvania Public Utility Commission, 124 A 2d 165, 181 Pa Super 84

81. Pa—Borough of Bridgewater v Pennsylvania Public Utility Commission, 124 A 2d 165, 181 Pa Super 84

82. Colo—Hassler & Bates Co v. Public Utilities Commission, 451 P 2d 280, 168 Colo 183

Mo—State ex rel City of Neosho v Public Service Commission, 367 S W 2d 589

Pa—Pittsburgh Railways Co v Pennsylvania Public Utility Commission, 182 A 2d 80, 198 Pa Super 415—Department of Highways v Pennsylvania Public Utility Commission, 220 A 2d 380, 208 Pa Super 168

Vt—In re Central Vermont Ry, Inc, 433 A 2d 303, 140 Vt 10

Evidence held sufficient to support order

Ill—Galt v Illinois Commerce Commission, 192 N E 2d 906, 28 Ill 2d 501

Pa—Borough of Bridgewater v Pennsylvania Public Utility Commission, 124 A 2d 165, 181 Pa Super 84—Bueg v Pennsylvania Public Utility Commission, 144 A 2d 511, 187 Pa Super 378

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83. Pa—Department of Highways v Pennsylvania Public Utility Commission, 220 A 2d 380, 208 Pa.Super 168

86. R I—East Greenwich Fire Dist v Penn Central Co, 302 A.2d 304, 111 R I 303.

87. Pa—Borough of Bridgewater v Pennsylvania Public Utility Commission, 124 A.2d 165, 181 Pa.Super 84

89. Discretion held not abused

Pa—Pennsylvania Public Utility Commission v Borough of Souderton, 231 A 2d 875, 210 Pa Super 22—Borough of Platea v Com, Public Utility Commission, 322 A 2d 780, 14 Pa Cmwlth 478

94. N Y—Public Service Commission v New York Cent R. Co., 285 N Y.S.2d 112, 28 A.D.2d 1080

The court may, in its discretion, remand the cause for further hearings.[94.5]

94.5. Refusal held not abuse of discretion

Mo—State ex rel Chicago, B. & Q R Co v. Public Service Commission, 334 S W 2d 54

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8. Tex.—Barrington v. Colmos, 338 S.W.2d 133, 161 Tex. 136.

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31. Things railroad may be compelled to do

Mo.—State ex rel. Chicago, B. & Q R. Co. v Public Service Commission, 334 S.W.2d 54.

§ 165. —— Expenses and Apportionment

Library References

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46. Conn—Peterson v City of Norwalk, 190 A 2d 33, 150 Conn 366

NJ—Borough of Sayreville v Pennsylvania R Co, 129 A 2d 895, 44 NJ Super 172, affd 139 A 2d 97, 26 NJ. 197, app dism 79 S Ct 43, 358 U S 44, 3 L Ed 2d 45

NY—New York Cent. R Co v State, 129 N Y S 2d 121, 283 App Div. 613, affd 127 N E 2d 866, 308 N Y 1029

Cost of condemnation not relevant

Pa—Faxon Co v Pennsylvania Public Utility Commission, 419 A 2d 818, 54 Pa Cmwlth 36

48. N.C—City of Winston-Salem v Southern Ry Co, 105 S.E 2d 37, 248 N C 637

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51. Va—C.J.S. cited in Southern Ry Co v Com ex rel Fugate, 147 S E 2d 72, 76, 206 Va 831

52. N C—City of Winston-Salem v Southern Ry Co., 105 S E 2d 37, 248 N C 637—City of Raleigh v Norfolk Southern Ry Co, 165 S E 2d 745, 4 N C.App 1, remd 168 S E 2d 389, 275 N C 454.

56. Tex—Barrington v Cokinos, 338 S W 2d 133, 161 Tex 136

58. Va.—Southern Ry Co v Com ex rel Fugate, 147 S E 2d 72, 206 Va 831

60. N.J.—Borough of Sayreville v Pennsylvania R Co, 129 A.2d 895, 44 N.J Super. 172, affd 139 A 2d 97, 26 N J 197, app dism 79 S Ct 43, 358 U.S 44, 3 L Ed.2d 45

N Y.—In re Elimination of Existing Highway-Railroad Crossings Operated by New York Cent R. Co in City of Dunkirk, 122 N Y.S 2d 636, 282 App Div 823, rearg den and app gr 125 N Y S 2d 294, 282 App Div 853, affd. 126 N E 2d 567, 308 N.Y 895

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Under some statutes the railroad's share of the apportioned expense becomes a paramount lien on its real property,[63.5] and such debt becomes accelerated on dissolution of the company.[63.10]

63.5. U S.—State of N.Y v. Kilsheimer, C A N Y, 251 F.2d 175

63.10. "Dissolution" construed

U S.—State of N Y v Kilsheimer, C.A N Y, 251 F.2d 175.

Acceleration mandatory

U S.—State of N Y v. Kilsheimer, C A N Y., 251 F 2d 175.

64. Entire expense apportioned

N.J—Public Service Coordinated Transport v Board of Public Utilty Com'rs, 33 A 2d 579, 130 N.J.L 409, affd 35 A.2d 895, 131 N J L. 226

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80. Pa—Pittsburgh Railways Co v. Pennsylvania Public Utility Commission, 237 A 2d 602, 427 Pa 562

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91. S.C.—Southern Ry Co v South Carolina State Highway Dept., 115 S E 2d 685, 237 S.C 75

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96. Minn.—Soo Line R. Co. v Minnesota Dept of Transp., 304 N W 2d 301

Pa.—Department of Highways of Com v Pennsylvania Public Utility Commission, 116 A 2d 855, 179 Pa Super 376—Department of Highways v Pennsylvania Public Utility Commission, 136 A 2d 473, 185 Pa Super 1, revd on oth grds 145 A 2d 538, 394 Pa 31—Department of Highways v Pennsylvania Public Utility Commission, 178 A 2d 820, 197 Pa Super 350—Port Authority of Allegheny County v Pennsylvania Public Utility Commission, 217 A 2d 810, 207 Pa Super 299

Hearing held not required

Minn—Minneapolis Eastern Ry Co v City of Minneapolis, 77 N W 2d 425, 247 Minn 413

99. N Y—New York Cent R. Co v Town of Cheektowaga, 106 N Y S 2d 78, 278 App Div 521, affd 107 N E 2d 70, 304 N Y 565

1. Minn—Soo Line R Co v Minnesota Dept of Transp, 304 N W 2d 301

Pa—Department of Highways v Pennsylvania Public Utility Commission, 136 A 2d 473, 185 Pa Super 1, revd on oth grds 145 A 2d 538, 394 Pa 31

Statutory formula

Ind—Indianapolis Rys v City of Indianapolis, 98 N E 2d 505, 229 Ind 487

3. Factors to be considered

(2) Other factors

Pa—Department of Highways of Com v Pennsylvania Public Utility Commission, 116 A 2d 855, 179 Pa Super 376—Department of Highways v Pennsylvania Public Utility Commission, 136 A.2d 473, 185 Pa Super 1, revd 145 A 2d 538, 394 Pa 31

Proper factors considered

La—Southern Pac Transp Co. v. Louisiana Public Service Commission, 290 So 2d 816, app dism 95 S Ct 23, 419 U S 810, 42 L Ed 2d 37

Pa—Department of Highways of Com v Pennsylvania Public Utility Commission, 116 A 2d 855, 179 Pa Super. 376

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10. Minn—Soo Line R Co. v Minnesota Dept. of Transp., 304 N W.2d 301

Order reversed

Pa—Port Authority of Allegheny County v. Pennsylvania Public Utility Commission, 217 A.2d 810, 207 Pa Super 299

13. Pa—Department of Highways v. Pennsylvania Public Utility Commission, 136 A 2d 473, 185 Pa Super 1, revd on oth grds., 145 A.2d 538, 394 Pa. 31

In the absence of abuse of discretion, discretionary orders will not be reversed.[13.1]

13.1. Pa—Department of Highways of Com. v Pennsylvania Public Utility Commission, 116 A.2d 855, 179 Pa.Super 376

19. Tex—Barrington v. Cokinos, Civ App., 339 S W.2d 330, cert. ques. ans 338 S W 2d 133, 161 Tex. 136

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24. N D—C.J.S. cited in Northwestern Bell Telephone Company v Wentz, 103 N W.2d 245, 257.

§ 166. —— Damages Because of Abolition

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38. Damages ascertained and determined by commission

Pa.—Borough of Platea v. Com, Public Utility Commission, 322 A 2d 780, 14 Pa.Cmwlth. 478.

41. N Y—Cook v. State, 46 N.Y S 2d 15, 267 App Div. 847.

42. N Y—Lawrence Const Corp. v. State, 59 N.E.2d 630, 293 N.Y. 634.

Vt—Menut & Parks Co v. Cray, 39 A.2d 342, 114 Vt. 41, 156 A.L.R. 404

46. Pa—Borough of Platea v. Com., Public Utility Commission, 322 A.2d 780, 14 Pa.Cmwlth. 478

48. N Y—East River Sav Bank v. State, 43 N Y S 2d 703, 266 App Div 494

Town not liable

N Y—Katonah Lumber, Coal & Feed Co v State, 86 N Y S 2d 696, 194 Misc 311

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50. N Y—Mistretta v State, 110 N Y S 2d 527, 201 Misc 946, affd 117 N.Y S.2d 666, 280 App Div 960

Construction of viaduct as "change of grade"

Vt—Menut & Parks Co v Cray, 39 A 2d 342, 114 Vt 41, 156 A L R 404.

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88. Pa—Pittsburgh Railways Co v Pennsylvania Public Utility Commission, 237 A 2d 602, 427 Pa 562

§ 167. —— Maintenance and Repair

Library References

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9. Bridges and approaches

(4) Other cases

N Y—New York Cent R Co v. Town of Cheektowaga, 106 N Y S 2d 78, 278 App.Div 521, affd 107 N E 2d 70, 304 N Y. 565

10. Order held valid

Mo—State ex rel Chicago, B & Q R Co v. Public Service Commission, 334 S W 2d 54

§ 168. In General

Library References

Railroads ⇐101.

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A railroad company may construct its lines across private property.

U.S—Central R. Co. of N.J v U.S, 113 F Supp 457, 125 Ct Cl 562

§ 170. —— Right and Duty to Cross or Construct Crossings

Library References

Railroads ⇐102(1, 2).

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26. N.Y—Pro-Fac Co-op., Inc v. Baltimore & O R. Co, 321 N Y S 2d 208, 36 A D.2d 441.

Not absolute right

Ill—Hagemann v. Chicago G.W Ry. Co., 119 N E.2d 523, 2 Ill App 2d 401

28. Ark—St Louis Southwestern Ry Co. v. Wallace, 229 S W 2d 659, 217 Ark. 278.

N.Y.—Jenkins v New York Cent. R. Co., 147 N.Y.S.2d 68, 1 A D 2d 57—Erie R Co. v. Kaplowitz, 137 N.Y S.2d 261, 23 Misc.2d 807—Zogby v State, 279 N.Y.S.2d 665, 53 Misc.2d 740

29. U.S—Himonas v Denver & R.G.W R. Co, C.A. Utah, 179 F.2d 171

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49. U S.—Central R Co. of N J. v. U.S., 113 F.Supp 457, 125 Ct.Cl 562

50. Conn.—Wamphassuc Point Property Owners Ass'n v. Public Utilities Commission, 228 A.2d 513, 154 Conn 674.

52. Kan—Wilson v St Louis-San Francisco Ry Co, 292 P 2d 725, 179 Kan 112

53. May not delegate to contractor

Ky.—Collins v. Liquid Transporters, 262 S.W.2d 382.

56. Construction and application of statutes
(3) Kan—Strauss v Thompson, 259 P 2d 145, 175 Kan 98
N H—Patterson v Boston & M R R, 157 A 2d 653, 102 N H 387

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71. Ill—Forest Preserve Dist of Du Page County v Illinois Commerce Commission, 146 N E 2d 27, 12 Ill 2d 319

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80. N J—City of Bayonne v Board of Public Utility Com'rs, Dept of Public Utilities, 105 A 2d 417, 30 N J Super 520

§ 171. —— Character of Lands and Persons Entitled to Crossings

87. Va—C.J.S. cited in Southern Ry Co v Anderson, 128 S E 2d 429, 433, 203 Va 991

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2. Farm property sold for industrial uses
N Y—Pro-Fac Co-op, Inc. v Baltimore & O R Co, 321 N Y S 2d 208, 36 A D 2d 441

Crossings suitable for industrial access
N Y—Walker v State, 337 N Y S 2d 431, 40 A D.2d 63, affd 310 N E 2d 304, 33 N Y 2d 450, 354 N Y S.2d 626

3. Construed
N Y—Syracuse Ready-Mix Concrete Co, Inc v State, 350 N Y S 2d 474, 43 A.D 2d 800, motion den 316 N E 2d 341, 34 N Y 2d 832, 359 N Y S 2d 58

§ 172. —— Location, Number, and Purpose of Crossings

Library References
Railroads ⇐102(5).

9. Ill—Hagemann v Chicago G W Ry Co, 119 N.E 2d 523, 2 Ill App 2d 401
N H—Patterson v Boston & M R R., 157 A 2d 653, 102 N H 387

10. Ill—Hagemann v Chicago G W Ry. Co, supra, n. 9.
N H—Patterson v Boston & M R.R, 157 A 2d 653, 102 N H 387

14. Impossibility of suitable crossing as requested
N H.—Patterson v Boston & M R.R, 157 A 2d 653, 102 N H 387

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27. N.J—Adams v. Cale, 137 A.2d 92, 48 N.J Super 119.

29. Pa—Delaware, L & W Ry v Shuman, 9 D & C 2d 303, revd on oth grds 115 A 2d 161, 382 Pa. 452.

31. Va—Hurt v Southern Ry. Co, 147 S E 2d 777, 207 Va 60

A court of equity has jurisdiction to determine whether a particular use of a crossing is in the interest of public safety[31.5] and may prohibit that use if it decides it is not.[31.10]

31.5. Commission's lack of jurisdiction of crossings
Wis.—Weiss v Chicago, N S & M R.R., 101 N W.2d 688, 9 Wis.2d 581.

Limitations on rights of commercial use
Wis.—Weiss v Chicago, N.S & M R.R., 101 N W 2d 688, 9 Wis.2d 581

31.10. Wis.—Weiss v. Chicago, N S. & M R.R., 101 N.W.2d 688, 9 Wis.2d 581.

§ 173. —— Character and Sufficiency of Crossings

Library References
Railroads ⇐102(6).

32. Va—Hurt v Southern Ry Co, 147 S E 2d 777, 207 Va 60

Statute construed
Wis—Weiss v Chicago, N S & M R R, 101 N W 2d 688, 9 Wis 2d 581

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39. "Suitable crossing" construed
N H—Patterson v Boston & M R R, 157 A 2d 653, 102 N H 387

46. N Y—Neuhaus v Long Island R Co, 292 N.Y S 2d 930, 30 A D 2d 825, affd 246 N E 2d 756, 23 N Y 2d 987, 298 N Y S 2d 997

§ 174. —— Removal Change, or Obstruction of Crossing

Library References
Railroads ⇐102(7, 8).

56. N J—City of Bayonne v Board of Public Utility Com'rs, Dept of Public Utilities, 105 A 2d 417, 30 N J Super 520

Statutory power
N J—City of Bayonne v Board of Public Utility Com'rs, Dept of Public Utilities, supra

§ 175. —— Agreement with, or Waiver by, Landowner

Library References
Modern Legal Forms Ch. 28. Easements and Licenses

§ 177. —— Duty to Construct

Library References
Railroads ⇐103(1, 2), 411(1).
Modern Legal Forms Ch. 48, Notices; Ch. 55, Public Utilities.

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84. Ill—American Nat Bank & Trust Co v Pennsylvania R Co, 219 N.E.2d 529, 35 Ill 2d 145, cert den 87 S Ct 777, 385 U S 1035, 17 L Ed 2d 683
Okl.—Kansas, O & G. Ry. Co. v Kersey, 266 P 2d 617—Kansas City Southern Ry Co v Gardner, 421 P 2d 250

Ordinance
U S—Reilly v Chicago & N.W Ry Co, C A Ill, 201 F 2d 473, cert den 73 S Ct 1140, 345 U S 997, 97 L Ed 1404
Ill—American Nat Bank & Trust Co. v Pennsylvania R Co., 202 N E 2d 79, 52 Ill App 2d 406, revd on oth grds. 219 N.E.2d 529, 35 Ill.2d 145, cert. den 87 S Ct. 777, 385 U S 1035, 17 L.Ed.2d 683

85. Okl—Kansas, O & G. Ry Co v. Kersey, supra, n 84

92. Ohio—Counts v Chesapeake & O R Co, 107 N E 2d 896, 91 Ohio App. 130
W Va—Taylor v Baltimore & O R. Co., 75 S E 2d 858, 136 W Va 313

May not delegate duty to contractor
Ky—Collins v. Liquid Transporters, 262 S W 2d 382

93. S.D—Berens v Chicago, M., St P & P R. Co, 120 N.W 2d 565, 80 S.D. 168.

94. S.D.—Berens v. Chicago, M., St. P & P.R. Co., 120 N W.2d 565, 80 S D 168.

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96. Neb.—Lineabrink v. Chicago & N.W Ry Co, 131 N W.2d 417, 177 Neb 838

5. N Y—Gonsenhauser v New York Cent R Co., 188 N Y S 2d 901, 8 A D 2d 483

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§ 179. —— At What Places Required

43. Duty to fence only right of way
Vt—Brown v Central Vermont Ry, Inc, 157 A 2d 219, 121 Vt 340

Within limits of right of way
Vt—Town of Fairlee v Boston & Maine Corp, 244 A 2d 53, 127 Vt 215

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57. U S—Cygan v Chesapeake & O Ry Co, C A Mich, 291 F 2d 782

§ 181. —— Waiver or Agreement of Adjoining Landowner

Library References
Railroads ⇐103(1).
Modern Legal Forms Ch 48, Notices; Ch. 55, Public Utilities.

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1. Kan—C J S. cited in Atkinson v Thompson, 320 P 2d 850, 855, 182 Kan 389

§ 182. Actions and Proceedings to Enforce Rights

14. Va—Southern Ry Co v Darnell, 277 S E 2d 175, 221 Va 1026

Exceptions to report of board of commissioners
Va—Southern Ry Co v Anderson, 128 S E 2d 429, 203 Va 991

21. Injunction denied
Ky—Louisville & N R Co v Sergent, 242 S W 2d 97

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32. Judgment restraining use for improper purposes
Wis—Weiss v Chicago, N S & M R R, 101 N W 2d 688, 9 Wis 2d 581

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56. Petition held sufficient
Va—Southern Ry Co v Anderson, 128 S E 2d 429, 203 Va. 991

Petition to restrain closing of bridge
Ga.—Sams v Seaboard Air Line R. Co., 129 S E 2d 859, 218 Ga 569

63. Pa—Swatara Tp. v Com., Pennsylvania Public Utility Commission, 312 A 2d 809, 11 Pa Cmwlth 196

Evidence held sufficient
Va—Hurt v Southern Ry Co, 147 S.E.2d 777, 207 Va 60.

Evidence held insufficient
Va—Hurt v Southern Ry Co., 147 S E 2d 777, 207 Va. 60

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Costs. That railroad company, under no legal obligation to do so, agreed to construct a private crossing over the railroad right of way, shortly after a petition was filed in a suit to establish a crossing and recover damages, affords no basis for imposing costs on the railroad.[71.5]

71.5. Ky.—Anderson v. Norfolk & W. Ry Co., 324 S.W 2d 413.

72. Limitation of decree held too narrow
Va—Hurt v Southern Ry Co, 147 S E 2d 777, 207 Va 60

§ 185. Right and Duty to Construct Railroad over or near Waters and Watercourses

Library References
Railroads ⇐107, 108

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77. U S—Atchison, T & S F Ry Co v Hamilton Bros, C A Mo, 192 F 2d 817

78. U S—Farmers Drainage Dist v Chicago, M, St P & P R Co, D C Iowa, 223 F Supp 208

79. Wis—Metropolitan Sewerage Dist of Milwaukee County v Chicago, M, St P & P R Co, 230 N W 2d 651, 69 Wis 2d 387

Diversion of watercourse by another
Wis—Metropolitan Sewerage Dist of Milwaukee County v Chicago & N W Ry Co, 254 N W 2d 190, 78 Wis 2d 119

§ 186. Construction

80. Burden of pleading and proving bridge a nuisance
U S—Farmers Drainage Dist v Chicago, M, St P & P R Co, D C Iowa, 223 F Supp 208

84. Ga—Western & Atlantic R R v Hassler, 88 S E 2d 559, 92 Ga App 278

Purpose of right of way
Mo—Buschelberg v Chicago B & Q R Co., App, 289 S W 2d 447

87. Railroad not an insurer
Ga.—Western & Atlantic R.R v Hassler, 88 S E 2d 559, 92 Ga.App 278

Duty not to impede reasonable flow into ditch
U.S—Farmers Drainage Dist v Chicago, M, St P & P R Co, D C Iowa, 223 F Supp 208

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6. Pa.—Walker v New York C & St L R R Co, 45 Erie 110

7. Wis—Metropolitan Sewerage Dist of Milwaukee County v Chicago, M, St P. & P R Co, 230 N W 2d 651, 69 Wis.2d 387

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8. U S—Bauman v Choctaw-Chickasaw Nations, C A.Okl., 333 F.2d 785, cert. den 85 S.Ct 658, 379 U S. 965, 13 L Ed.2d 559

17. Statute construed
Mo.—Temple v Atchison, T. & S.F. Ry Co., 417 S W.2d 97.

19. Word "sewer", etc.
Mo—Chicago, B. & Q.R Co v North Kansas City, 367 S W.2d 561

§ 187. Maintenance, Alterations, and Repairs

Library References
Railroads ⇐107, 108.

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29. U.S—Farmers Drainage Dist v Chicago, M., St P. & P R. Co., D.C Iowa, 223 F Supp. 208

Stream above bridge
U S.—Atchison, T & S.F Ry Co v Hamilton Bros, C A.Mo, 192 F.2d 817

Continuance of duty after abandonment of right-of-way
Mont.—Harrer v Northern Pac. Ry Co., 410 P.2d 713, 147 Mont. 130

No obligation where no construction by railroad
Okl—St Louis-San Francisco Ry Co v Chandler, 422 P 2d 845

33. Pa—Pittsburgh & Lake Erie R Co v Pennsylvania Public Utility Commission, 445 A 2d 851, 66 Pa Cmwlth 609

35. U S—Chicago, R I & P R Co v Goodson, Trinity Universal Ins Co, Intervener, C A Tex, 242 F 2d 203

Ohio—City of Xenia v Baltimore & O R Co, 115 N E 2d 89

Tex—Meier v Thompson, Civ App, 248 S W 2d 493, err ref no rev err

36. Tex—Meier v Thompson, supra, n 35

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38. Wis—Laur v Chicago & N W Ry Co, 85 N W 2d 353, 1 Wis 2d 567

§ 188. In General

Library References
Railroads ⇐111.

47. N Y—Nicholas Di Menna & Sons v City of New York, 114 N Y.S 2d 347.

Utah—Ewell & Son, Inc v Salt Lake City Corp, 493 P 2d 1283, 27 Utah 2d 188

§ 190. In General

Library References
Railroads ⇐113(12).

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75. Ky—Jefferson County v Louisville & N R Co, 245 S W 2d 611

§ 191. Remedies

page 683

92. Not entitled to injunctive relief
U S.—Hardy Salt Co v Southern Pac Transp Co, C A Utah, 501 F 2d 1156

§ 193. Rolling Stock

page 684

12. U S—Millers Mut. Ins Assn of Ill. v. Southern Ry Corp., C.A N.C., 483 F 2d 1044.

§ 194. Criminal Responsibility in General

Library References
Railroads ⇐12.

22. Ky.—Chesapeake & O. Ry. Co. v. Com., 268 S.W 2d 956

§ 195. Defenses

page 685

45. New interpretation limited to prospective operations
U.S.—Seaboard Coast Line R. Co. v Long Island R Co, D C.N Y, 447 F Supp 108, affd, C A., 595 F 2d 96

§ 196. Prosecution and Punishment

page 686

65. Evidence held insufficient
Ky.—Chesapeake & O Ry. Co. v. Com., supra, n. 22

§ 197. Right to Alienate or Transfer Franchises or Property Generally

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74. Ill—Snow v Dixon, 362 N E 2d 1052, 6 Ill Dec. 230, 66 Ill 2d 443, cert den 98 S Ct 429, 434 U S 939, 54 L Ed 2d 298

76. Ill—Snow v Dixon, 362 N E 2d 1052, 6 Ill Dec 230, 66 Ill 2d 443, cert den 98 S Ct 429, 434 U S 939, 54 L Ed 2d 298

§ 199. Right to Sell or Purchase

Library References
Railroads ⇐6, 119–124, 126.

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84. Ill—Klopf v Illinois Commerce Commission, 369 N E 2d 906, 12 Ill.Dec 199, 54 Ill App 3d 491

Approval by commission not required
N Y—Vernon Park Realty, Inc v City of Mount Vernon, 125 N.Y S 2d 112, 282 App Div 890, app den 126 N Y S.2d 200, 282 App Div 958, app den. 117 N E 2d 919, 306 N Y 746, affd 121 N E 2d 517, 307 N Y 493

Wash—Ocean Spray Cranberries, Inc v Doyle, 500 P 2d 79, 81 Wash 2d 146

Evidence sustains refusal of Commission to approve sale
N.J—Application of West Jersey & S S R Co, 135 A 2d 35, 46 N J Super 543.

Proceedings for approval by commission
Mass—Attorney General v Department of Public Utilities, 175 N E 2d 255, 342 Mass 662

Sale held not void as against public policy
Wash.—Ocean Spray Cranberries, Inc v Doyle, 500 P 2d 79, 81 Wash 2d 146

1 Ill.—Mound City Warehouse Co v. Illinois Cent R Co, 200 N.E 2d 919, 51 Ill App 2d 103

Personal property
Okl—Irwin v Smith, App., 536 P 2d 415

§ 204. Requisites and Validity of Conveyance or Contract to Convey

Library References
Railroads ⇐127, 128.

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66. Contract not void for uncertainty
Mass.—Nassif v Boston & Me. R.R, 165 N E 2d 397, 340 Mass. 557

§ 205. Construction and Operation

74. Md.—Chertkof v. Philadelphia, B. & W R Co., 255 A 2d 14, 254 Md. 557.

§ 206. Rights and Liabilities of Purchasers

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83. Ky.—Louisville & N.R. Co v. Sutton, 436 S W.2d 487.

§ 208. Right to Make or Take Lease

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Library References
Summers, The Law of Oil and Gas § 229.

§ 214. Requisites and Validity

Library References

Modern Legal Forms Ch 42, Leases

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27. Leases held not invalid

US—In re Penn Central Transp Co, D C Pa, 354 F Supp 759

45. Ill—City of Chicago v Pennsylvania R Co, 242 N E 2d 152, 41 Ill 2d 245

§ 215. Construction

Library References

Railroads ⇐133(1, 2)

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59. Okl—Kansas, O & G Ry Co v Grand Lake Grain Co, 434 P 2d 153

Expenses, repairs, and improvements

US—Chicago & W I R Co v Atchison, T & S F Ry Co, C A Ill, 419 F 2d 936

Other contracts construed

US—Law v Reading Co, C A Pa, 312 F 2d 841

Held assignment

US—Thomas v U S, 505 F 2d 1282, 205 Ct Cl 623

Inventory

US—R-T Leasing Corp v Ethyl Corp, D C N Y, 494 F Supp 1128

62. Ill—Illinois Cent. R Co v Michigan Cent R Co, 152 N E 2d 627, 18 Ill App 2d 462

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72. Ill.—Illinois Cent R. Co v Michigan Cent R Co, 152 N E 2d 627, 18 Ill App 2d 462

73. Ill—Illinois Cent R Co v Michigan Cent R Co., 152 N.E 2d 627, 18 Ill App 2d 462.

§ 216. Operation and Effect in General

Library References

Railroads ⇐133(1), 134(7).

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A noncarrier, by merely leasing its property to a carrier, does not become a carrier by railroad [87.5]

87.5. No duty to continue service after lessee ceases

US—Meyers v Famous Realty, Inc, C A N Y., 271 F 2d 811, cert den 80 S Ct 681, 362 U S 910, 4 L Ed 2d 619

§ 217. Property, Rights, and Franchises Included

8. U.S—R-T Leasing Corp. v Ethyl Corp., D C N Y, 494 F Supp 1128

Mass.—Fall River Line Pier, Inc v New York, N H & H R Co., 181 N E.2d 552, 344 Mass 179

9. N.Y—New York Cent R. Co. v New York, N H. & H R. Co, 208 N.Y.S.2d 605, 24 Misc 2d 414, mod on oth. grds 216 N Y S 2d 928, 13 A.D 2d 309, affd. 184 N E 2d 194, 11 N.Y 2d 1077, 230 N.Y S 2d 226.

§ 218. General Rights and Liabilities of Lessor and Lessee

Library References

Railroads ⇐134(1, 2, 5, 8).

6. U S—Wiggins v City of Philadelphia, C A Pa., 331 F 2d 521

Mass—Fall River Line Pier, Inc v New York, N H & H R Co, 181 N E 2d 552, 344 Mass 179

Mo—Cooperative Ass'n No 37 v St Louis-San Francisco Ry Co, App, 591 S W 2d 404

Maintenance and repair of tracks

U S—Conley v Denver & R G W R Co, D C Colo, 226 F Supp 661, affd, C A, 328 F 2d 569

Sublease

La—Trinity Carton Co v Falstaff Brewing Corp, App, 261 So 2d 269, writ den 263 So 2d 723, 262 La 457

Agreement terminable at will

Ky—Miller v Com, Dept of Highways, 487 S W 2d 931

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2. U S—In re Penn Central Transp Co, D C Pa, 354 F Supp 759

4. Failure to record lease has effect of making lessor liable for acts of lessee—Atlantic Coast Line R Co v Newsome, 83 S E 2d 333, 90 Ga App 509

Actions. Various matters have been adjudicated in actions against the lessor [7.5]

7.5. Demurrer

Pa—Delaware, L & W R Co v Pringle Coal Co, 48 Luz L Reg 53

Right of action denied

Wash—Ocean Spray Cranberries, Inc v Doyle, 500 P 2d 79, 81 Wash 2d 146

Notice

U S—R-T Leasing Corp v Ethyl Corp, D C N Y, 494 F Supp 1128

Where property devoted to railroad purposes is abandoned by the lessee, the lessor is under no duty to operate the railroad,[7.10] or to lease to a purchaser of the railroad's property upon reasonable terms.[7.15]

7.10. U S.—Meyers v Famous Realty, Inc, D C N Y, 178 F Supp 472, affd 271 F 2d 811, cert den 90 S Ct 681, 362 U S 910, 4 L Ed 2d 619

7.15. Acts held not unlawful

U S—Meyers v Famous Realty, Inc, D C N Y, 178 F Supp 472, affd, C A, 271 F 2d 811, cert den. 80 S Ct 681, 362 U S 910, 4 L Ed 2d 619

11. Ky—Louisville & N R Co v Sutton, 436 S W 2d 487

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17. Del—Mayor and Council of Laurel v. Delaware R Co, 154 A.2d 762, 38 Del Ch 496

N C—Hough-Wylie Co v Lucas, 72 S E 2d 11, 236 N C 90

29. N C.—Hough-Wylie Co v Lucas, supra, n 17

§ 219. Rents and Advances

Library References

Railroads ⇐131, 133(4), 134(1).

34. U S—Gulf, M & O.R Co v. Illinois Cent R Co, C A.Ala, 225 F 2d 816, cert den 76 S Ct 303, 350 U S. 932, 100 L Ed. 815, reh den. 76 S Ct 430, 350 U S 977, 100 L Ed 847.

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41. U.S—Gulf, M. & O.R Co. v. Illinois Cent R Co., C A.Ala., 225 F 2d 816, cert den 76 S Ct 303, 350 U.S 932, 100 L.Ed 815, reh. den 76 S.Ct 430, 350 U.S. 977, 100 L.Ed. 847

Miss.—Fall River Line Pier, Inc. v New York, N.H & H.R. Co., 181 N.E 2d 552, 344 Mass 179

Lawful abandonment of operations

U S.—Gulf, M & O R Co v Illinois Cent R Co, D.C Ala., 128 F Supp 311, affd, C A., 225 F 2d 816 cert den. 76 S Ct 303 350 U S 932, 100 L Ed 815, reh den 76 S Ct 430, 350 U S 977, 100 L Ed 847

§ 220. Taxes and Assessments

Library References

Railroads ⇐134(4).

50. U S—Gulf, M & O R Co v Illinois Cent R Co, supra, n 41—Gulf, M. & O R Co v Illinois Cent R Co, C A Ala, 225 F 2d 816, cert den 76 S Ct 303, 350 U S 932, 100 L Ed 815, reh den 76 S Ct 430, 350 U S 977, 100 L Ed 847

51. Railroad not exempt

La—New Orleans Great Northern Ry Co, Inc v City of New Orleans, App, 299 So 2d 426

§ 222 Rights and Remedies of Stockholders, Creditors, and Bondholders

page 709

14. Laches

U S—In re Penn Central Transp Co, D C Pa, 354 F Supp 759

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27. U S—In re Penn Central Transp Co, D C Pa, 354 F Supp 759

§ 223. Continuance and Termination

page 711

51. Lease allowing oil company to maintain pipeline along bridge

U S—Richfield Oil Corp v U S., 178 F.Supp 799, 147 Ct Cl 593

§ 224. Modification

page 712

74. Ratification of original lease

Ga—Stone Mountain Scenic R R, Inc v Stone Mountain Memorial Ass'n, 199 S E 2d 216, 230 Ga 800, app after remand 205 S E 2d 293, 232 Ga 92

§ 225. Right to Make Contracts

Library References

Railroads ⇐119–124, 136.

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79. U S—Clinchfield R Co v Boston & Marine Corp, D C N Y, 258 F Supp 467

N J—New York, S & W.R. Co v Board of Public Utility Com'rs, 150 A 2d 656, 29 N.J 513

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97. U.S—Southern Ry Co v Louisville & N R Co, D.C.Ky, 185 F Supp 645, affd., C.A., 289 F.2d 934.

§ 227. —— Parallel or Competing Lines

page 715

An order of the public service commission that railroads, which had an agreement that both should serve a shipper over the first railroad's tracks, must continue this service or, in the alternative, remove discrimination against the shipper by adjusting switching rates, does not violate a commission rule that the use of property of one railroad company by another should not be required without the consent of the owner.[345]

34.5. Ga—Southern Ry Co v Georgia Public Service Commission, 127 S E 2d 12, 218 Ga 157

§ 228. Requisites and Validity

Library References

Railroads ⇐137.

Modern Legal Forms Ch. 20, Chattel Mortgages and Conditional Sales (Secured Transactions under the Uniform Commercial Code); Ch. 29, Equipment Agreements; Ch 42, Leases; Ch. 45, Mortgages (Real Estate).

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35. U S—Railway Labor Executives' Ass'n v Southeastern Pennsylvania Transp Authority, Sp Ct R R R A., 534 F Supp 852

Ill.—Regional Transp Authority v Burlington Northern Inc, 426 N E 2d 1143, 55 Ill Dec 818, 100 Ill.App 3d 779

Contracts held valid

U.S.—City of New Orleans v Texas & N O R Co, C A La., 195 F 2d 882—City of New Orleans v Texas & Pac Ry Co, C A La., 195 F 2d 887

36. U S—City of New Orleans v Texas & N O R Co, supra, n 35

50. U S—In re Missouri Pac R Co, D C Mo, 93 F Supp 832, affd, C A., 191 F 2d 265, cert den 72 S Ct 293, 342 U.S 904, 96 L.Ed 676, 72 S Ct 364, 342 U S 918, 96 L Ed 686, 72 S Ct 757, three cases, 758, two cases, 343 U S 929, 96 L Ed 1339, and 72 S Ct 1018, 343 U S 982, 96 L Ed 1372

Fiduciary relationship

U S—In re Missouri Pac R Co, supra

Interest rates on indebtedness

U.S—In re Missouri Pac R Co, supra

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51. U S.—In re Missouri Pac R Co, supra, n 50

§ 229. Construction

Library References

Railroads ⇐138.

52. Ill—Pennsylvania R Co v Chicago, R I & P R Co., 147 N E.2d 363, 12 Ill.2d 374.

Particular contracts construed

U.S.—New York, S & W R. Co v. Reading Co, C A.Pa., 268 F 2d 348—Texas & N O R Co v City of New Orleans By and Through Public Belt R.R. Commission for City of New Orleans, C A La., 292 F.2d 607—Baltimore & O R Co v New York, N.H. & H.R Co., D C N Y., 196 F Supp 724—Illinois Cent. R. Co. v Gulf, M. & O R Co., C.A.La., 308 F.2d 374—Illinois Cent. R Co v Standard Oil Co, D C Miss., 292 F Supp 337, affd., C A., 403 F 2d 1022 Supp. 337, affd, C.A., 403 F.2d 1022.

N Y.—New York Cent R. Co v New York, N H & H.R. Co., 208 N.Y S.2d 605, 24 Misc.2d 414, mod. 216 N Y.S.2d 928, 13 A.D 2d 309, affd. 184 N E.2d 194, 11 N.Y.2d 77, 230 N.Y S.2d 226—Levine v New York Cent R. Co., 296 N Y S.2d 911, 58 Misc.2d 1086

W.Va—Sommerville v. Pennsylvania R Co., 155 S.E 2d 865, 151 W.Va. 709.

U S.—Texas & N.O R. Co. v. City of New Orleans By and Through Public Belt R.R. Commission for City of New Orleans, C.A.La., 292 F.2d 607.

ex.—Texas & N O R Co v. Houston Belt & Terminal Ry. Co., Civ App., 308 S.W 2d 917

4. N.Y—Levine v New York Cent R Co, 296 N Y.S 2d 911, 58 Misc 2d 1086

Tex—Ingram Freezers v Atchison, T & S F Ry Co, Civ App, 464 S W 2d 915, err ref no rev err

56 Ill—Illinois Cent R Co v Michigan Cent R Co, 152 N E 2d 627, 18 Ill App 2d 462

58. Ill—Chicago & N W Ry Co v Toledo, P & W R Co, 236 N E 2d 773, 94 Ill App 2d 297

64. Ill—Illinois Cent R Co v Michigan Cent R Co, 152 N E 2d 627, 18 Ill App 2d 462

65. Ky—Central Transfer Ry & Storage Co v Louisville & N R Co, 239 S W 2d 50

N Y—New York Cent R Co v Erie R Co, 213 N Y S 2d 15, 30 Misc 2d 362

§ 231. Termination or Modification

Library References

Railroads ⇐138

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73. Contract between city and railroad

U S—City of New Orleans v Texas & N O R Co, supra, n 35

75. Cal—Mann v City of Bakersfield, 13 Cal Rptr 211, 192 C A 2d 424

77. Cancellation without authority of commission held invalid

S C—State ex rel Public Service Commission v Atlantic Coast Line R Co, 72 S E 2d 438, 222 S C 266, cert den 73 S Ct 727, 345 U S 916, 97 L Ed 1350

78. Ind—Monon R R v New York Cent R Co, 227 N E.2d 450, 141 Ind App 277

§ 232. Operation and Effect in General

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89. Obligation to reimburse for cars switched in error

U S—Cincinnati, N O & T.P Ry Co v Chesapeake & O Ry Co, C A Va., 441 F 2d 483

§ 233. Rights, Liabilities, and Remedies

Library References

Railroads ⇐139.

Modern Legal Forms Ch. 39, Indemnities

92. U S—City of New Orleans v. Texas & N O R Co, supra, n 35—Pennsylvania R. Co. v Indiana Harbor Belt R Co, C A.Ill, 261 F 2d 939—New York, S & W R Co v Reading Co., D.C Pa., 166 F Supp 646, affd, C.A., 268 F 2d 348—Southern Ry Co. v. Louisville & N R Co, D.C.Ky, 185 F Supp. 645, affd, C A., 289 F 2d 934—Baltimore & O.R. Co, v New York, N.H & H.R Co., D C N Y., 196 F.Supp 724—Jacksonville Terminal Co v. Florida East Coast Ry. Co., C.A Fla, 363 F 2d 216, cert den. 87 S Ct 321, 385 U.S. 950, 17 L Ed.2d 227—U.S. v. Toledo, P. & W R Co., D C.Ind., 280 F Supp. 243—Chicago, R I. & P.R Co v Chicago, B. & Q R Co., D C Ill, 301 F Supp. 72, affd, C A., 437 F.2d 6, cert den. 91 S Ct 2173, 402 U.S 996, 29 L Ed.2d 161—International Railways of Central America v United Brands Co., D.C.N.Y, 358 F.Supp. 1363.

Fla.—Florida East Coast Ry Co v Atlantic Coast Line R. Co., App., 193 So.2d 666.

Ga.—Louisville & N.R. Co. v. Central of Georgia Ry. Co., 149 S.E.2d 730, 113 Ga.App. 808.

Ill.—Chicago Great Western Ry. Co. v. Chicago, A & E. Ry. Co., 124 N.E 2d 611, 5 Ill.App 2d 231—Chicago & N.W. Ry. Co. v Toledo, P. & W.R. Co, 236 N.E.2d 773, 94 Ill App.2d 297.

Compensation for freight car hire

U.S.—Boston & M.R.R. v. U.S., D.C.Mass., 162 F.Supp. 289, app. dism. 79 S.Ct. 307, 358 U.S. 68, 3 L.Ed.2d 34.

96. U S—Southern Ry Co v Louisville & N R. Co D C Ky, 185 F Supp 645, affd, C A, 289 F 2d 934

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13. Evidence

U S—Southern Ry Co v Louisville & N R Co, D C Ky, 185 F Supp 645, affd, C A, 289 F 2d 934

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24. Effect of laches

Ky—Central Transfer Ry & Storage Co v Louisville & N R Co, 239 S W 2d 50

§ 235. Right to Consolidate

Library References

Railroads ⇐141

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46. Lease held not a bar

U S—Friedman v U S, D C N Y, 168 F Supp 815, affd 79 S Ct 738, 359 U S. 205, 3 L Ed 2d 759, reh den 79 S Ct 940, 359 U S 985, 3 L Ed 2d 934

47. National transportation policy

U S—Missouri Pac R Co v U S, D C Mo, 346 F Supp 1193, affd 93 S Ct 902, 409 U S 1094, 34 L Ed 2d 679

D C—U S v U S, D C, 296 F Supp 853, affd 90 S Ct 708, 396 U S 491, 24 L Ed 2d 700

Object of statute

U S—U S v I C C, Dist Col, 90 S Ct 708, 396 U S 491, 24 L Ed 2d 700

50. U S—U S v I C C, Dist.Col, 90 S Ct. 708, 396 U S 491, 24 L Ed 2d 700

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§ 236. Assent of Stockholders and Bondholders

43. U S—Levin v. Mississippi River Fuel Corp, Mo, 87 S Ct 927, 386 U.S 162, 17 L.Ed 2d 834

§ 237. Remedies of Dissenting Stockholders

46. Intervention in proceedings before Interstate Commerce Commission

U S—Fned v U S, D.C N Y., 212 F Supp 886

§ 238. Agreements and Procedure for Consolidation

Library References

Modern Legal Forms Ch. 25, Corporations.

49. Applicability of statute

U S.—Mississippi River Fuel Corp v Slayton, C A Mo, 359 F 2d 106, revd. on oth grds. 87 S.Ct 927, 386 U S 162, 17 L Ed.2d 834

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64. Stock exchange ratio held reasonable

D.C—U.S. v. U.S., D C., 296 F.Supp. 853, affd. 90 S.Ct 708, 396 U.S. 491, 24 L Ed 2d 700.

§ 239. Operation and Effect of Consolidation

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9. Protection of employees

U.S.—Brotherhood of Maintenance of Way Emp v. U S, D C.Mich., 189 F.Supp 942, affd. 81 S.Ct. 913, 366 U.S. 169, 6 L.Ed 2d 206

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21. Del.—Wolfensohn v. Madison Fund, Inc', 253 A 2d 72

29. Ohio—Nationwide Ins Co v New York, C & St LR Co, 211 N E 2d 872, 4 Ohio App 2d 167

§ 241. —— Rights and Liabilities of Stockholders and Subscribers to Stock

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57. US—Stott v US, D C N Y, 166 F Supp 851

§ 242. Actions Brought after Consolidation

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70. US—In re Penn Cent Securities Litigation, D C Pa, 335 F Supp 1026

§ 243. In General

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88. No legal obligation created by gratuitous payments

US—Allenton Volunteer Fire Dept v Soo Line R Co, D.C Wis, 372 F Supp 422

§ 251. —— Form, Requisites, and Validity

page 739

61. US—Southern Capital Corp v Southern Pac Co, C.A Ark, 568 F 2d 590, cert den 98 S Ct 2821, 436 U S 927, 56 L.Ed 2d 770.

§ 253. —— Rights of Bondholders Generally

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9. US—Mayer v. Chase Nat Bank of City of New York, D C N Y, 165 F Supp 287

Iowa—Southern New York Ry., Inc. v Ft Dodge, Des Moines & Southern Ry Co, 316 N.W 2d 840

Rights against parent company

(2) Other matters

Del—Wolfensohn v Madison Fund, Inc, 253 A 2d 72

10. US.—Friedman v Chesapeake & O. Ry. Co, D C N Y., 261 F.Supp. 728 Affd., C A, 395 F 2d 663, cert den. 89 S Ct 619, 393 U S 1016, 21 L.Ed 2d 561

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16. US—Mayer v. Chase Nat. Bank of City of New York, C A N Y, 233 F 2d 468, cert. den. 77 S.Ct 64, 352 U S 841, 1 L.Ed.2d 58—R. M Smythe & Co v Chase Nat. Bank of City of New York, C A N.Y., 291 F 2d 721

17. US.—Friedman v Chesapeake & O. Ry Co, C.A N Y, 395 F 2d 663, cert. den. 89 S Ct 619, 393 U S. 1016, 21 L Ed 2d 561

§ 254. Indemnity, Guaranty, and Suretyship

Library References

Railroads ⇐154.

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78. N.Y—Slater v. Gulf, M. & O.R Co, 108 N Y. S.2d 145, 279 App.Div. 166, 655, applying Illinois rule. App. den. 110 N.Y.S 2d 279, 279 App.Div. 790, affd. 107 N.E.2d 163, 304 N.Y 636

§ 258. —— Applicability of General Rules as to Construction and Operation

Library References

Railroads ⇐155.

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19 Lien on stock

Mass—Delaware & Hudson Co v Boston R R Holding Co 102 N E 2d 67, 328 Mass 63, cert den 72 S Ct 676, 677, 343 U S 920, 96 L Ed 1334

§ 271. —— Contract with, or Consent of, Railroad

page 755

17. Lien not matured within agreement

N Y—Metropolitan Transp Authority v Nassau County, 315 N Y S 2d 1002, 35 A D 2d 739, affd 271 N E 2d 213, 28 N Y 2d 385, 322 N Y S 2d 228

§ 272. —— Nature and Purpose of Labor, Material, or Expenditure

Library References

Railroads ⇐159(4).

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40. Tenn—R L Harris, Inc v Cincinnati, N O & T P Ry Co, 280 S W 2d 800, 198 Tenn 339.

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It has been held that cost of repairs to tools, carts and machinery of contractor used on the improved property is not "labor" within the meaning of a statute authorizing a lien [65.1]

65.1. Tenn—S B Luttrell & Co v Knoxville, L. & J R Co., 105 S W 565, 119 Tenn 492, 123 Am St Rep 737—R L. Harris, Inc v Cincinnati, N O & T C Ry Co, 280 S W 2d 800, 198 Tenn 339

§ 280. —— Proceedings to Perfect Lien

page 762

50. Minn.—Armco Steel Corp, Metal Products Division v Chicago & N W Ry Co, 149 N W 2d 23, 276 Minn. 133

§ 287. —— Construction and Operation in General

Library References

Railroads ⇐166.

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86. "Fixed charges" construed

Iowa—Iowa-Des Moines Nat. Bank v Fort Dodge, D M & S Ry Co, 89 N W 2d 360, 249 Iowa 810

Applying net income to cash working capital

Iowa—Iowa-Des Moines Nat Bank v. Fort Dodge D M & S. Ry. Co, 89 N.W.2d 360, 249 Iowa 810

Deductions from net income for insurance reserve purposes

Iowa—Iowa-Des Moines Nat. Bank v. Fort Dodge, D M & S Ry Co., 89 N.W.2d 360, 249 Iowa 810

§ 290. —— Debts and Obligations Secured

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45. Mass—New York Cent R Co v New England Merchants Nat. Bank of Boston, 183 N E.2d 852, 344 Mass. 709.

§ 293. —— Rights, Duties, and Liabilities of Mortgagees and Trustees

Library References

Railroads ⇐169.

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99. N Y—In re Harlem River Drive, City of New York, 121 N E 2d 414, 307 N Y 447

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82. Iowa—Southern New York Ry, Inc v Ft Dodge, Des Moines & Southern Ry Co, 316 N W 2d 840

§ 295. Priorities of Liens, Mortgages, and other Claims

Library References

Railroads ⇐171

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41. Acceleration

US—State of N Y v Kilsheimer, C A N Y, 251 F 2d 175

§ 308. Interest and Interest Coupons

Library References

Railroads ⇐172

page 816

37. Iowa—Iowa-Des Moines Nat Bank v Fort Dodge, D M & S Ry Co, 89 N W 2d 360, 249 Iowa 810

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72. US—In re Wisconsin Cent Ry Co., D C Minn, 93 F Supp 579, applying New York law Affd, C A., 191 F 2d 822, cert den 72 S Ct 558, 342 US 944, 96 L.Ed. 702

§ 310. Application of Earnings and Income; Sinking Fund and Deposits

page 820

87. "Interline accounts"

US—Matter of Chicago, R.I & P.R Co, C A Ill, 537 F 2d 906, cert den 97 S Ct 1102, 429 U S 1092, 51 L Ed 2d 537

§ 311. Maturity, Payment, Satisfaction, Release, or Discharge

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A statute which requires that any mortgage executed by a railroad company shall secure, on equal terms with any other indebtedness secured by such mortgage, all outstanding unsecured obligations does not permit the discharge of the mortgage when the bonds issued thereunder are paid in full where pre-existing obligations are still outstanding.[67.5]

67.5. Mass—New York Cent R Co. v. New England Merchants Nat Bank of Boston, 183 N E 2d 852, 344 Mass. 709.

§ 312. Actions on Bonds and Coupons

68. U.S.—In re New York, N H. & H R Co, C A Conn., 298 F 2d 761—Watts v Missouri-Kansas-Texas R Co, C.A Tex., 383 F 2d 571

80. N.Y—Campbell v. Hudson & M R. Co, 102 N Y S 2d 878, 277 App.Div 731, affd 100 N.E.2d 183, 302 N Y 902

81. N Y—Campbell v. Hudson & M R. Co, supra, n 80

82. N Y.—Campbell v Hudson & M.R Co., supra, n 80.

83. N Y—Campbell v Hudson & M R Co, supra, n 80

Trustee urged granting of relief

N Y—Campbell v Hudson & M R Co, supra, n 80

Bondholders cannot maintain action in nature of creditor's suit against owner of voting stock of railroad until they have the equivalent of a judgment against the railroad and an unsatisfied judgment.[83.1]

83.1. Bondholders stand in shoes of railroad

U S—Rieser v Baltimore & O R Co, C A N Y, 228 F 2d 563, cert den 76 S Ct 651, 350 U S 1006, 100 L Ed 868

page 826

94. Pleadings as a whole, etc.

N Y—Campbell v Hudson & M R Co, supra, n 80

§ 329. —— Corporate Capacity, Franchises, and Powers of Original Company

page 853

78. Cal—Mushroom Tunnel Farms, Inc v Friedeberg, App, 48 Cal Rptr 317, 238 C.A 2d 727

§ 331. —— Construction, Maintenance, and Operation

83. Ky—C.J.S. cited in Louisville & N R Co v Sutton, 436 S W 2d 487, 491

§ 332. —— Contracts in General

page 854

97. U.S.—Seaboard Air Line R Co v Savannah Union Station Co, C A Ga, 196 F 2d 431

§ 338. —— Actions or Proceedings by or Against Purchasers

page 858

Evidence held sufficient

Cal.—Mushroom Tunnel Farms, Inc. v. Friedeberg, App, 48 Cal Rptr 317, 238 C.A 2d 727.

§ 339. Purchase and Reorganization

Library References

Railroads ⇐80, 195, 196.
Modern Legal Forms Ch. 25, Corporations

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68. Reorganization of railroad federal reorganization act see infra § 342 1.

Reorganization defined

Va—Indemnity Ins Co of North America v Rutherford Freight Lines, 64 S E 2d 668, 192 Va 257

Railroad Revitalization Act

Okl—Application of State ex rel Dept of Transp, 646 P 2d 605.

Milwaukee Railroad Restructuring Act

J.S—Matter of Chicago, M, St. P and P R Co, C.A Ill, 673 F 2d 169

Rail Passenger Service Act of 1970

J S—Railway Labor Executives' Ass'n v. Southeastern Pennsylvania Transp. Authority, Sp Ct R R R.A, 534 F Supp 832, cert den 102 S Ct 2271, 456 U S. 990, 73 L Ed.2d 1285

9. Milwaukee Railroad Restructuring Act

.S—Matter of New York, S & W R, Co, 504 F Supp, 851

3. Word "assent" construed

S—Wood v U.S., D C N Y, 132 F Supp 586

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80. 49 U S C A § 20b is now 49 U S C A § 11361

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81. Regional Rail Reorganization Act construed

U S—In re Lehigh & H R Ry Co, D C N Y, 377 F Supp 475

91. Matters considered

(1) Public interest

U S—Wood v U S, D C N Y, 132 F Supp 586

(2) Other matters

U S—Wood v U S, D C N Y, 132 F Supp 586

"Continuing accumulation" construed

U S—Wood v U S, D.C N Y, 132 F Supp 586

Modification not justified

U S—Wood v U S, D C N Y, 132 F Supp 586

Review by court

U S—Wood v U S, D C N Y, 132 F Supp 586

95. U S—Bondholders, Inc, v Powell, C A Va, 190 F 2d 74, cert den 72 S Ct 319, 342 U S 921, 96 L Ed 688, reh den 72 S Ct 550, 342 U.S 950, 96 L Ed 706

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8. Particular allowances

N Y—Wehle v Shanks, 35 N Y S 2d 801

Order fixing attorney's fee as not subject to collateral attack

N Y—Wehle v Shanks, 35 N Y S 2d 801

Order fixing attorney's fee as res judicata

N Y—Wehle v Shanks, 35 N Y S 2d 801

9. Ill—Snow v Dixon, 362 N.E 2d 1052, 6 Ill Dec 230, 66 Ill 2d 443, cert den 98 S Ct 429, 434 U S 939, 54 L Ed.2d 298

13. Del—Wolfensohn v Madison Fund, Inc., 253 A 2d 72

18. U S—Bondholders, Inc, v Powell, C A Va., 190 F 2d 74, cert den 72 S Ct 319, 342 U S 921, 96 L Ed 688, reh den. 72 S Ct 550, 342 U S 950, 96 L Ed 706

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41. U S—Matter of Erie Lackawanna Ry Co, C.A Ohio, 548 F 2d 621

55. Public hearing not required under statute

N Y—City of New York v Feinberg, 142 N.Y S 2d 467, 207 Misc 649.

Purpose of redevelopment statute

N Y—City of New York v Feinberg, 142 N Y.S 2d 467, 207 Misc. 649

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70. Statute held not unconstitutional

N.Y—Klein v Long Island R Co., 170 N.Y.S 2d 67, 9 Misc 2d 486

§ 341. —— Rights of Stockholders

Library References

Railroads ⇐195(3).

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11. Action barred by laches

D.C—Landell v Northern Pac. Ry. Co., C.A, 223 F 2d 316, 96 U S App D.C 24, cert. den. 76 S Ct 85, 350 U S. 844, 100 L.Ed. 752, reh. den 76 S Ct 178, 350 U.S 905, 100 L Ed. 795

§ 342.1. Reorganization under Federal Reorganization Statute

Under the regional Rail Reorganization Act of 1973, where a railroad cannot be reorganized on an income basis within a reasonable time under the Bankruptcy Act, it must be reorganized under the Regional Rail Reorganization Act.

Library References

Railroads ⇐5 52, 30.

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Congress has enacted the Regional Rail Reorganization Act of 1973,[39.25] commonly called the Rail Act.[39.26] The Act has been held valid as against objections to its constitutionality on various grounds [39.27]

39.25. 45 U S C A § 701 et seq

Reorganization under Bankruptcy laws see C J S Bankruptcy § 1017 et seq

Reorganization of railroad through medium of equity receivership see infra § 339 et seq

Effective date of Act

In re Litigation Under Regional Rail Reorganization Act of 1973, Jud Pan Mult Lit 373 F Supp 1401

Amendment

U S—People of State of Ill v Consolidated Rail Corp, C A Ill, 589 F 2d 1327, cert den 99 S Ct 2884, 442 U S 942, 61 L Ed 2d 312—Consolidated Rail Corp v Providence & Worcester Co, D C Del, 540 F Supp 1210

Arbitration of employees protection scheme

U S—Wenzer v Consolidated Rail Corp, D C Pa, 464 F Supp 643, affd, C A, 612 F 2d 576

Successorship doctrine

U S—Howard v Penn Cent Transp Co, D C Ohio, 87 F R D 342.

39.26. U S—Blanchette v Connecticut General Ins Corporations, Pa, 95 S Ct 335, 419 U S 102, 42 L Ed 2d 320

Meaning of "operation" under Act

U.S—Matter of Penn Central Transp Co, D.C.Pa., 411 F Supp 1079

Construction of Act

U.S—Matter of Penn Central Transp. Co., D.C.Pa, 411 F Supp 1079—Matter of Reading Co, D C Pa, 2 B R 724

39.27. U S—Blanchette v Connecticut General Ins. Corporations, Pa, 95 S.Ct 335, 419 U S 102, 42 L Ed.2d 320—In re Penn Central Transp Co, Sp Ct R R R A, 384 F Supp. 895—In re Reading Co, D.C Pa., 378 F.Supp 474—In re Penn Central Transp Co, D.C.Pa., 395 F Supp 567

D C—Com of Pa v I C.C, C.A., 535 F 2d 91, 175 U S.App D C. 263, cert den. 97 S Ct. 99, 429 U S 834, 50 L Ed 2d 99.

In general terms, the purpose of the Rail Act is to provide a rail service system in the Midwest and Northeast regions of the United States which is adequate to meet the needs and service requirements of those regions and of the national rail transportation system,[39.28] and it is not intended to absolve trustees of a railroad in reorganization from financial responsibility.[39.29] The Interstate Commerce Act and the Bankruptcy Act provision relating to railroads undergoing reorganization may properly be resorted to to ascertain Congressional intent in using the term public interest in the Rail Act.[39.30]

39.28. U.S—In re Litigation Under Regional Rail Reorganization Act of 1973, Jud Pan Mult.Lit. 373 F.Supp. 1401—Matter of Lehigh Valley R Co.

CA Pa, 558 F2d 137, on remand DC, 440 F Supp 602

Choices between subsidized operations and abandonments of rail lines should be made in context with Rail Act

US—In re Lehigh Valley R Co, DCNY, 384 F Supp 58

Collection of required information for judgment as to future subsidies

DC—Com of Pa v ICC, CA, 535 F2d 91, 175 US App DC 263, cert den 97 S Ct 99, 429 US 834, 50 L Ed 2d 99

Promote competition

US—Green Bay & W R Co v US, CA, 644 F2d 1217

39.29. US—In re Penn Central Transp Co, DC Pa, 395 F Supp 567

39.30. US—In re Penn Central Transp Co, DC Pa, 382 F Supp 821, affd, CA, 510 F2d 969, 970, three cases—Matter of Erie Lackawanna Ry Co, CA Ohio, 558 F2d 339—New England Southern R Co, Inc v U S Dept of Transp, Sp Ct R R R A., 544 F Supp 917

ConRail not obligated to fulfil insolvent railroad's obligations

US—Stratford Land & Imp. Co, Inc v Blanchette, Sp Ct R R.R A, 448 F Supp 279

Rail Service Planning Office

US—Southeastern Pennsylvania Transp Authority v I.C C, C.A, 644 F2d 253.

In enacting the Rail Act, Congress expressed a preference for proceeding under such Act rather than a continuation of reorganization of railroads pursuant to the Bankruptcy Act,[39 31] and a court would be justified in precluding resort to procedures of the Rail Act only for the most compelling reasons.[39 32] Thus, if a court finds that the public interest would be equally well-served by a railroad undergoing reorganization pursuant to the Bankruptcy Act provisions or pursuant to the provisions of the Rail Act, the procedures of the latter Act must be chosen.[39 33] The Rail Act creates a presumption in favor of a reorganization thereunder, but such presumption is not conclusive.[39 34]

39.31. U.S—In re Penn Central Transp. Co, D C Pa., 382 F.Supp 821, affd. C.A, 510 F2d 969, 970, three cases

Reorganization of railroad under Bankruptcy Act see Bankruptcy & 1017 et seq

Congressional intent

Congress intended that the Rail Act apply only to railroads that were in proceedings for reorganization under Bankruptcy Act on date of its enactment.

U.S—In re Penn Central Transp Co. Sp.Ct.R.R R.A., 384 F.Supp. 895

(2) Other statements

U.S.—National R.R. Passenger Corp. v. Blanchette, C.A Ind., 551 F.2d 127, cert. den. 98 S Ct. 176, 434 U.S. 856, 54 L Ed.2d 128.

Inconsistent requirements of Bankruptcy Act disregarded

Whenever a transaction under the Rail Act is necessary to formulate and implement the final system plan, any inconsistent requirements of the Bankruptcy Act are to be disregarded.

U.S.—In re Penn Central Transp. Co., D.C.Pa., 395 F Supp 567.

39.32. U.S.—In re Penn Central Transp. Co., D C. Pa., 382 F.Supp 856.

DC—Com of Pa v ICC, CA, 535 F2d 91, 175 US App DC 263, cert den 97 S Ct 99, 429 US 834, 50 L Ed 2d 99

Pension benefit plan not disqualified from transfer

US—Matter of Regional Rail Reorganization Proceedings, Sp Ct R R R A, 421 F Supp 1061

39.33. US—In re Penn Central Transp Co, DC Pa, 382 F Supp 821, affd, CA, 510 F2d 969, 970, three cases

39.34. US—In re Penn Central Transp Co, Sp Ct R R R A, 384 F Supp 895

The first step in the scheme of the Rail Act is the so-called 120-day decision of whether a railroad is reorganizable on an income basis within a reasonable time under the Bankruptcy Act and that the public interest would be better served by such reorganization than by a reorganization under the Rail Act,[39 35] and a railroad that cannot be reorganized on an income basis within a reasonable time under the Bankruptcy Act is eligible for reorganization under the Rail Act.[39 36] If the court concludes that the railroad cannot be reorganized on an income basis within a reasonable time under the Bankruptcy Act, the next step is the 180-day decision under the Rail Act which requires that reorganization proceed pursuant to the Rail Act, unless the court finds that the Rail Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization.[39 37] In other words where a court concludes that a railroad in reorganization no longer has the ability to reorganize on an income basis pursuant to the Bankruptcy Act, it is required to order that reorganization proceed pursuant to the Rail Act, since such latter Act provides a process which is fair and equitable to the debtor's estate.[39 38] The Rail Act also makes provision with respect to a final system plan.[39 39]

39.35. US—In re Penn Central Transp Co, C A. Pa, 508 F 2d 270

What is meant by "on an income basis"

US—In re Reading Co, D C Pa., 378 F Supp. 474

39.36. U.S.—In re Reading Co, D C.Pa., 378 F Supp 481.

39.37. US—In re Penn Central Transp. Co., C A Pa, 508 F 2d 270.

"Process"

U.S.—In re Reading Co., D C Pa., 378 F Supp. 481

39.38. US.—In re Penn Central Transp. Co., Sp.Ct. R.R R.A., 384 F.Supp. 895—In re Reading Co., D.C.Pa., 378 F.Supp 474—In re Reading Co, D.C.Pa., 378 F.Supp. 481—In re Erie Lackawanna Railway Co., D.C.Ohio, 393 F.Supp 352—Matter of Penn Cent. Transp Co., D.C Pa, 430 F.Supp. 467.

Installment payments pursuant to approved settlement agreement continued

U.S.—Matter of Penn Central Transp Co, D C Pa., 408 F.Supp. 919.

39.39. 45 U.S.C.A. § 717.

Agreement not inconsistent with final system plan

US—Stratford Land & Imp Co, Inc v Blanchette, Sp Ct R R R A, 448 F Supp 279

Under the Rail Act, both the representative of the government interests and the trustees of a railroad in reorganization must act within their respective sphere of control with due regard for the limitations and requirements of the bankruptcy statute relating to reorganization of railroads as supplemented by the Rail Act.[39 40]

39.40. US—In re Penn Central Transp Co, D C Pa, 395 F Supp 567—Matter of Penn Cent Transp Co, D C Pa, 430 F Supp 467

Interim financing

US—Matter of Penn Central Transp Co, D C Pa, 400 F Supp 920

Terminating transferable pension benefit plan

US—Matter of Regional Rail Reorganization Proceedings, Sp Ct R R R A, 421 F Supp 1061

Nature of accounts

US—Matter of Penn Cent Transp Co, C C Pa, 570 F 2d 1189

The Rail Act precludes a court from attempting to terminate a reorganization proceedings on the ground that a "reasonable time" for reorganization has been exceeded, and also requires the court to assume that a reorganization which is completed in accordance with, and in the time span contemplated by, the Act will be "successful."[39 41] The court is also under an obligation not to permit the implementation of the Rail Act according to its terms to be frustrated.[39 42] However, within the preceding limitations, it is the continuing obligation of the court to attempt to insure that the best interests of the estate and the parties to the reorganization are not unnecessarily jeopardized, and to avoid intentional enlargement of eventual Tucker Act claims.[39 43]

39.41. U.S.—In re Penn Central Transp. Co, D.C Pa, 395 F Supp 567

39.42. U.S—In re Penn Central Transp Co, D.C Pa, 395 F Supp. 567.

39.43. U.S—In re Penn Central Transp. Co, D.C Pa., 395 F Supp. 567.

Remedies of creditors

U.S—Matter of Ann Arbor R. Co., D C Mich, 414 F Supp 812

The Rail Act supplements the procedures of the Bankruptcy Act by providing for the creation of a new operating company, called Conrail, which is to take over ownership and operation of those portions of the rail properties to be designated by the United States Railway Association (USRA), the planning agency created by the Rail Act.[39 44] The Rail Act[39 45] provides for financing during the period from the enactment of the Act to the conveyance to Conrail; in essence, it provides for grants to bankrupt railroads to m-

sure that such carriers are not forced to terminate rail operations for lack of cash.[39 46] Also, the Rail Act[39 47] provides funds to upgrade the rail properties which are to be conveyed to Conrail.[39 48]

39.44. U S—In re Penn Central Transportation Company, D C Pa, 395 F Supp 567, 569

Invasion of lien escrow funds

U S—Matter of Ann Arbor R Co, D C Mich, 414 F Supp 812

"Incentive prices"

U S—New York Dock Ry v Consolidated Rail Corp, Sp Ct R R R A, 434 F Supp 1245

Liabilities

U S—Matter of Erie Lackawanna Ry Co, 643 F 2d 1227

39.45. 45 U S C A § 723

39.46. U S—In re Penn Central Transp Co, D C Pa, 395 F Supp 567—In re Central R Co of New Jersey, C A N J, 521 F 2d 635—Matter of Penn Central Transp Co, D C Pa, 402 F Supp 127

Regulations as to subsidies not facially invalid

U S—Com of Pa v I C C, C A, 535 F 2d 91, 175 U S App D C 263, cert den 97 S Ct 99, 429 U S 834, 50 L Ed 2d 99

Accumulations not justified

U S—Matter of Penn Cent Transp Co, D C Pa, 419 F Supp 1373

Loan agreements with ConRail

U S—Matter of Central R Co of N J, D C N J, 425 F Supp. 1055

"Cash and other current assets"

U S—Matter of Erie Lackawanna Ry Co, C A Ohio, 563 F 2d 784

39.47. 45 U S C A § 725

39.48. U S—In re Penn Central Transp Co, D C Pa, 395 F Supp 567

The Rail Act provides for the establishment of a special court, with specified functions and powers.[39 49] While, the Rail Act gives to such special court all of the powers of a reorganization court, the special court's jurisdiction is limited to all judicial proceedings with respect to the final system plan.[39 50] In any event, the powers of a reorganization court may not be exercised without regard to the Rail Act.[39 51] The right of appeal depends on the provisions of the Rail Act,[39.52] and the appellate authority of the special court is limited to review of the orders entered with respect to the final system plan.[39.53]

39.49. U S.—In re Litigation Under Regional Rail Reorganization Act of 1973, Jud.Pan Mult Lit. 373 F Supp. 1401—Consolidated Rail Corp v Hinds, Sp Ct R R R A, 512 F Supp 1331—Consolidated Rail Corp v Delaware and Hudson Ry. Co., Sp Ct R R R.A., 543 F Supp 1079.

Special Court not deprived of jurisdiction

U.S—In re Penn Central Transp Co, Sp Ct R.R.R A, 384 F Supp 895

Power to issue injunctions

U.S—Consolidated Rail Corp v State of Ill, Sp Ct R R R.A, 423 F Supp 941, cert den. 97 S Ct 1111, 429 U.S 1095, 51 L Ed.2d 542

Intervention in valuation proceedings

U S—Matter of Valuation Proceedings Under §§ 303(c) and 306 of Regional Rail Reorganization Act, Sp Ct R R R A, 425 F Supp 266

Jurisdiction lacking

U S—Stratford Land & Imp Co, Inc v Blanchette, Sp Ct R R R A, 448 F Supp 279—International Broth of Teamsters, Local 732, IBT v Southeastern Pennsylvania Transp Authority, Sp Ct R R R A, 539 F Supp 1222

Exclusive jurisdiction

U S—Leibitzke v Consolidated Rail Corp, D C Ohio, 532 F Supp 831—Consolidated Rail Corp v Penn Central Corp, Sp Ct R R R A, 533 F Supp 1351

39.50. U S—In re Penn Central Transp Co, D C Pa, 395 F Supp 567—Matter of Reading Co, D C Pa, 413 F Supp. 54

Burden of proof

U S—Matter of Regional Rail Reorganization Proceedings, Sp Ct R R R A, 421 F Supp 1061

Standing to challenge shown

U S—Brown v Consolidated Rail Corp, D C Ohio, 422 F Supp 1251

Evidence

U S—Coleman v Consolidated Rail Corp, D C Ohio, 449 F Supp 621

39.51. U S—In re Penn Central Transp Co, D.C Pa, 395 F Supp 567

Enjoining proceedings in another court

U S—In re Penn Central Transp Co, C A Pa, 520 F 2d 1388

Usual standards of reorganization court not eliminated by Rail Act

U S—Matter of Penn Central Transp Co, D C Pa., 400 F Supp 920

Court should consider general concern of Congress

U S—Matter of Penn Central Transp Co, C A.Pa, 533 F.2d 1347

Matters considered in valuation proceedings

U S—Matter of Valuation Proceedings Under §§ 303(c) and 306 of Regional Rail Reorganization Act, Sp Ct R R R A, 425 F Supp 266—Matter of Valuation Proceedings Under Sections 303(c) and 306 of Regional Rail Reorganization Act of 1973, Sp Ct R R R A, 531 F Supp 1191.

39.52. U S—In re Penn Central Transp Co, Sp Ct R R R A, 382 F Supp 453

No standing to appeal

U S—In re Penn Central Transp Co., C A Pa, 508 F 2d 270

Orders appealable

U S—Matter of Penn Cent Transp Co., C A.Pa, 570 F.2d 1189

39.53. U S.—In re Penn Central Transp. Co, D C Pa, 395 F Supp 567

Order vacated

U S.—Matter of Penn Central Transp Co., C A Pa, 533 F.2d 1347.

Order affirmed

U.S—Matter of Penn Central Transp. Co, C A.Pa, 533 F 2d 1347

Appeal moot

U.S.—Matter of Penn Central Transp. Co, C A Pa., 533 F 2d 1347

Court of Appeals had jurisdiction

D C.—Com. of Pa. v I.C.C., C.A., 535 F.2d 91, 175 U.S.App.D C 263, cert den 97 S.Ct 99, 429 U.S 834, 50 L.Ed.2d 99

Effect on Tucker Act. The legislative history of the Rail Act does not support the argument that the Act should be construed to withdraw the Tucker Act remedy of interest-holders in railroads subject to reorganization under the Rail Act,[39.54] and, in fact, the Tucker Act is available as a protection to railroads in reorganization coming under the Rail Act as a remedy to insure payment of a "fair and equitable consideration" for any "conveyance taking" or "erosion taking" thereunder.[39 55] Under a 1975 amendment to the Rail Act,[39 56] the fact that the trustees of a railroad in reorganization are given discretion to initiate proceedings to afford the court an opportunity to evaluate the ability of the railroad to continue its efforts to reorganize on an income basis does not render the Tucker Act remedy inapplicable.[39 57]

39.54. U S—T O F C, Inc v U S, 683 F 2d 389, 231 Ct Cl 182

"Erosion taking" of property

U S—Blanchette v Connecticut General Ins Corporations, Pa, 95 S Ct 335, 419 U S 102, 42 L Ed 2d 320—In re Penn Central Transp Co, C A Pa, 520 F 2d 1388

39.55. U S—In re Erie Lackawanna Railway Co, D C Ohio, 393 F Supp 352—T O F C, Inc v U S, 683 F 2d 389, 231 Ct Cl 182

39.56. 45 U S C A § 717(b)

Continuation of pension benefit plans

U S—Matter of Regional Rail Reorganization Proceedings, Sp Ct R R R A, 421 F Supp 1061

39.57. U S—In re Erie Lackawanna Railway Co, D C Ohio, 393 F Supp 352

Other matters with respect to the Rail Act have been adjudicated by the courts[39 58]

39.58. Obligations prior to conveyance to Conrail have priority over taxes

U S—Matter of Reading Co., D C Pa, 2 B R 724

Salary claims of employees

U S—Matter of Penn Cent Transp Co, C A Pa, 625 F 2d 1112.

Successorship doctrine with regard to nonmonetary relief not precluded

U S.—Howard v. Penn Cent Transp Co, D C Ohio, 87 F R.D. 342.

Assignment of rolling stock and equipment

U.S—Consolidated Rail Corp v. Penn Central Corp, Sp Ct R.R R A, 543 F Supp 457.

Termination or severance of employees

U S—United Transp Union v. Consolidated Rail Corp, Sp Ct.R.R.R.A, 535 F.Supp. 697, cert. den. 102 S Ct 2960, two cases, 457 U S 1133, 73 L Ed 2d 1350

Arbitration

U S—Local 194 C & T, United Transp Union v Consolidated Rail Corp, C A.Ind., 672 F 2d 621.

Wage structure

U S—Hinds v. Consolidated Rail Corp, Sp Ct R.R R A, 518 F.Supp. 1350, cert. den 102 S.Ct 1007, 454 U S 1145, 71 L Ed.2d 298

Disability allowances for classes of employees

U S.—Hinds v. Consolidated Rail Corp., Sp Ct R.R R A., 518 F Supp. 1350, cert den 102 S Ct. 1007, 454 U.S. 1145, 71 L Ed.2d 298.

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16. U S.—C.I.S. quoted in Missouri Pac. R. Co v. Star City Gravel Co., D.C.Ark., 452 F.Supp 480, 485, affd., C.A., 592 F.2d 455.

Idaho—Russell v. City of Idaho Falls, 305 P 2d 740, 78 Idaho 466

S C.—Alexander v. Seaboard Air Line R. Co., 71 S E.2d 299, 221 S C. 477

17. Miss.—Illinois Cent R Co v. Pigott, 181 So 2d 144, 254 Miss 429

19. U S—Fort Dodge, D M & S Ry Co v Chicago Great Western Ry. Co, C A Iowa, 197 F 2d 886

§ 349. Railroad Holding Stock or Bonds of Another Railroad; Control

Library References

Railroads ⇐256.

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41. U S—Atlantic Coast Line R Co v Shields, C A Ala, 220 F 2d 242, revd on oth grds 76 S Ct 386, 350 U S 318, 100 L Ed 364

43. U S—Southern Ry Co v Crosby, C A S C, 201 F 2d 878, 36 A L R 2d 1186—Conry v Baltimore & O R Co, D C Pa, 112 F Supp 252, affd, C A, 209 F 2d 422

§ 350. Mortgagees and Trustees in Possession

Library References

Railroads ⇐264.

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54. U S—Wagner v New York, O & W Ry, D C Pa, 146 F Supp 926

55. Mo—Beck v Thompson, App, 245 S W 2d 174

§ 352. —— Liability of Lessor in General

60. Ariz—Southern Pac Co. v Bolen, 264 P 2d 401, 76 Ariz 317.

Ga—Griggs v Louisville & N.R Co, App, 185 S E 2d 546, 124 Ga.App. 629

Ill.—American Nat Bank & Trust Co v Pennsylvania R Co, 202 N E 2d 79, 52 Ill App 2d 406, revd on oth grds 219 N E 2d 529, 35 Ill 2d 145, cert. den 87 S Ct 777, 385 U S. 1035, 17 L Ed 2d 683—Dickeson v. Baltimore & O C T R Co, 245 N E 2d 762, 42 Ill 2d 103, 35 A L R 3d 1.

Ind—Penn Cent Co v. Youngstown Sheet & Tube Co, 253 N E.2d 704, 146 Ind.App 216

N C—Hough-Wylie Co v Lucas, 72 S E 2d 11, 236 N C 90

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65. Ky.—Southern Ry Co. v Kelly Const Co, 406 S W.2d 305

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82. Mass—Cronin v. Universal Carloading & Distributing Co, 204 N E 2d 917, 348 Mass 645

§ 353. —— Liability of Lessee in General

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90. U S—Illinois Cent R Co v Standard Oil Co., D C Miss., 292 F.Supp 337, affd, C A., 403 F.2d 1022.

§ 354. —— Injuries Due to Defective Roadbeds, Tracks, Etc.

3. U.S—Law v Reading Co, C.A.Pa., 312 F.2d 841.

Failure to maintain tracks in proper condition

U.S.—Conley v. Denver & R.G.W.R. Co., D.C.Colo., 226 F.Supp. 661, affd., C.A., 328 F.2d 569.

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15. U.S.—Wiggins v. City of Philadelphia, C.A.Pa., 331 F.2d 521.

Ga.—Savannah & A. Ry Co. v. Newsome, 83 S.E.2d 80, 90 Ga.App. 390.

§ 356. —— Injuries to Employees

29. Ga—Georgia R & Banking Co v Fulmer, 65 S E 2d 636, 84 Ga App 101

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33. U S—Durham v Southern Ry Co, D.C Va, 256 F Supp 879

34. Tex—Atchison, T & S F Ry Co v Smith, Civ App, 563 S W 2d 660, err ref no rev err

§ 364. Railroad Allowing Use of Road by Another

Library References

Railroads ⇐129, 260.

Modern Legal Forms Ch. 39, Indemnities.

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41. Ill—American Nat Bank & Trust Co v Pennsylvania R Co, 219 N E 2d 529, 35 Ill 2d 145, cert den 87 S Ct 777, 385 U.S 1035, 17 L Ed 2d 683

N C—C.J.S. quoted at length in Johnson v Southern Railroad Co, 121 S E 2d 580, 581, 255 N C 386, 90 A L R 2d 344

42. Construction of contract

U S—Pennsylvania R Co v Chesapeake & O R Co, C A Ky, 229 F 2d 721

49. U S—St Johnsbury & Lamoille County R R v Canadian Pac Ry Co, D C Vt, 341 F Supp 1368, affd, C A, 469 F 2d 1395

50. Ky—Johnson v Louisville & N R Co, 394 S W 2d 110, cert den 86 S Ct 1372, 384 U S 921, 16 L Ed 2d 441

§ 365. Railroad Using Road of Another

Library References

Railroads ⇐139, 261

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70. W Va—Sommerville v Pennsylvania R Co, 155 S E.2d 865, 151 W Va 709

71. Ill—American Nat. Bank & Trust Co. v. Pennsylvania R. Co, 219 N E.2d 529, 35 Ill 2d 145, cert den 87 S Ct 777, 385 U S 1035, 17 L Ed 2d 683

Effect of failure to record lease

Ga.—Atlantic Coast Line R. Co v Newsome, 83 S E.2d 333, 90 Ga App 509

72. U S—Eddings v Collins Pine Co., D C Cal, 140 F Supp. 622.

74. W.Va.—Sommerville v Pennsylvania R Co, 155 S.E 2d 865, 151 W Va 709

75. Colo—Colorado & S Ry Co v. Duffy Storage & Moving Co, 361 P 2d 144, 145 Colo 344.

§ 366. Connecting Roads

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8. U S.—Hunter v Missouri-Kansas-Texas R. Co, D C.Okl, 276 F Supp. 936, affd., C A., 433 F 2d 352

§ 368. Companies Owning or Using Cars

Library References

Railroads ⇐256, 262, 266.

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20. Fla.—Atlantic Coast Line R. Co. v Gary, 57 So.2d 10

Wis—Huck v Chicago, St. P, M & O Ry. Co, 114 N.W 2d 811, 16 Wis.2d 466.

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23. Tex—Missouri Pac R Co v Southern Pac Co, Civ App, 430 S W 2d 900, err ref no rev err cert den 89 S Ct 1630, 394 U S 1013, 23 L Ed 2d 39

Wis—C J.S. cited in Huck v Chicago, St P, M & O Ry Co, 114 N W 2d 811, 813, 16 Wis 2d 466

24. U S—C.J.S cited in Chicago, R I & P R Co v Chicago & N W Ry Co, C A Iowa, 280 F 2d 110, 117, cert den 81 S Ct 378, 364 U S 931, 5 L Ed 2d 364

26. Wis—Huck v Chicago, St P, M & O Ry Co, 92 N W 2d 352, 5 Wis 2d 130

§ 370. Agents or Employees of Railroad

Library References

Railroads ⇐267.

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35. U S—Killebrew v Atchison, T & S F Ry Co, D C Okl, 233 F Supp 250

Mo—C.J.S cited in Albertson v Wabash R Co, 253 S W 2d 184, 191, 363 Mo 696

Failing to reduce speed

(2) Other cases

U S—Scott v Huffman, C A Okl, 237 F.2d 396

38. Acts within scope of authority

U S—Missouri Pac R Co v Star City Gravel Co, Inc, D C Ark, 452 F Supp 480, affd, C.A, 592 F 2d 455

§ 371. Private Individuals

Library References

Railroads ⇐256.

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52. Ariz—Southern Pac Co v Bolen, 264 P 2d 401, 76 Ariz 317

55. N C—C.J.S. cited in Yandell v National Fireproofing Corp, 79 S E.2d 223, 227, 239 N C 1.

Standard of care

U.S—Watkins v Continental Can Co, D.C N C., 225 F Supp 449, remd, C A, 332 F 2d 423

Contributory negligence

U S—Watkins v Continental Can Co, D C N C, 225 F Supp 449, remd, C.A, 332 F 2d 423.

Questions of law and fact

U S—Watkins v Continental Can Co, D C.N C, 225 F.Supp 449, remd, C.A., 332 F.2d 423.

Generally, the intentional blocking of a main line of a railroad is negligence.[61.5]

61.5. Blocking held not negligence under circumstances

La.—Spiers v Consolidated Companies, 132 So 2d 879, 241 La. 1012, cert den 82 S Ct 602, 368 U S 986, 7 L Ed 2d 524

62. Iowa—Chicago & N.W Ry. Co v. Kramme, 59 N W 2d 204, 244 Iowa 944

Duty of care incurred in improving crossing

Pa.—Wilbert v Pittsburgh Consolidation Coal Co, 122 A.2d 406, 385 Pa. 149

§ 372. Joint Liability

Library References

Railroads ⇐113(6), 266.

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74. U S.—Brogdon v. Southern Ry Co, D C Tenn, 253 F Supp 676, affd, C A, 384 F 2d 220

Cal—Jensen v Southern Pac Co, 276 P.2d 703, 125 C.A.2d 67

La.—Reeves v. Louisiana & A. Ry. Co, 282 So 2d 503 on remand, App, 304 So 2d 370

Va—Atlantic Coast Line R Co v Withers, 65 S E 2d 654, 192 Va 493

Joint and several

U S—Butler v Norfolk Southern Ry Co, D C N C, 140 F Supp 601, stating Georgia law

Concurrent negligence may be proved

Kan—Watts v St Louis-San Francisco Ry Co, 531 P 2d 22, 216 Kan 160

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92. Miss—Harrison v Illinois Cent R Co, 69 So 2d 218, 219 Miss 401

94. Ga—Seaboard Coast Line R Co v Harris, 182 S E 2d 915, 124 Ga App 126

§ 373. Pleading Ownership and Operation

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10. La—Richard v Kansas City So Ry Co, App, 55 So 2d 12

§ 374. Evidence as to Ownership and Operation

Library References

Railroads ⇐270–272.

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34. Ill—New York, C & St L R Co v Erie R Co, 105 N E 2d 518, 346 Ill App 356

35. Me—C.J.S. cited in Flood v Belfast and Moosehead Lake Railroad Co, 171 A 2d 433, 434, 157 Me 317

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40. Ill—Sutherland v Guccione, 131 N E 2d 130, 8 Ill.App 2d 201

47. U S—Conry v Baltimore & O R Co, D C Pa, 112 F.Supp. 252, affd, C.A., 209 F 2d 422

48. Evidence held sufficient

U S—Brogdon v Southern Ry Co, D C Tenn, 253 F.Supp 676, affd, C A, 384 F 2d 220

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53. Ill—New York, C & St L R Co v Erie R Co, supra, n 34.

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68. Rule otherwise in action against lessor and lessee railroad companies

Ill.—American Nat Bank & Trust Co v Pennsylvania R. Co., 202 N.E.2d 79, 52 Ill App 2d 406, revd. on oth. grds. 219 N.E.2d 529, 35 Ill 2d 145, cert. den 87 S Ct. 777, 385 U S. 1035, 17 L Ed.2d 683

§ 375. Trial

Library References

Railroads ⇐273.

55. Ark—Missouri Pac R. Co. v Lester, 242 S.W.2d 714, 219 Ark. 413, 27 A.L.R 2d 1182.

N Y—Baynes v New York, N H. & H.R Co, 107 N.Y S.2d 472, 279 App Div. 598

57. Ariz—Southern Pac. Co. v Bolen, 264 P.2d 401, 76 Ariz 317

58. Ill—Gibson v Nenne, 118 N.E.2d 788, 2 Ill. App 2d 158.

60. W.Va—Darling v. Baltimore & O.R. Co, 69 S.E 2d 139, 136 W Va 303.

63. Ark.—Missouri Pac R. Co v Lester, supra, n. 55.

Instructions held erroneous or properly refused

N.Y—Baynes v. New York, N.H & H R. Co, supra, n. 55.

§ 379. Effect of Appointment

Library References

Railroads ⇐207–209, 211

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33. U S—Matter of Lehigh and N E Ry Co, C A N J, 657 F 2d 570

Mass—Boston Penny Sav Bank v Boston & M R R, 138 N E 907, 244 Mass 488

§ 381. Operation of Road under Receivership

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36. Rights of mortgage holders

U S—Chase Nat Bank of City of New York v Mobile & O R Co, D C Ala, 39 F Supp 874

§ 382. —— Powers and Duties of Receiver

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54. U S—Wagner v New York, O & W Ry, D C Pa, 146 F Supp 926

Ga—Pidcock v Stripling, 19 S E 2d 178, 68 Ga App 692

Va—Richmond, F & P R Co v Virginia Cent Ry Co, 279 S E 2d 146, 222 Va 167

§ 383. —— Liability of Receiver in General

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16. Permission held shown

U S—Lovett v Calloway, D C Ga, 69 F Supp 532

§ 388. —— Liability of Company

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95. Mo—C.J S cited in Wilson v St Louis-San Francisco Ry Co, 247 S W 2d 644, 646, 362 Mo 1168

Okl—St Louis-San Francisco Ry Co v Childers, 301 P 2d 368

§ 390. In General

Library References

Railroads ⇐214, 215

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68. Operation of trains on property of others

W Va.—Sommerville v Pennsylvania R Co., 155 S E.2d 865, 151 W Va. 709

69. Ill—Fink v Baker, 361 N E 2d 702, 5 Ill Dec 379, 46 Ill App 3d 1061.

Minn—Chicago, M, St P & P R Co v Chicago Great Western Ry Co, 130 N W 2d 56, 268 Minn 500

N Y—People v Long Island R.R., 397 N Y S 2d 846, 90 Misc.2d 269

71. Neb—C.J.S cited in Humphrey Feed & Grain v Union Pac R Co, 257 N W 2d 391, 402, 199 Neb. 189

72. U S—Ethan Allen, Inc v. Maine Cent. R Co, D C.Vt, 431 F.Supp 740

74. Ariz.—Southern Pac. Co. v Arizona Corp. Commission, 404 P.2d 692, 98 Ariz. 339.

Operation of private track for individuals not within public duty

Mass.—New York, N.H. & H.R. Co. v. Walworth Co., 162 N E.2d 789, 340 Mass. 1.

75. Mont—Chicago, M., St., P & P.R. Co. v Board of R.R. Com'rs, 255 P.2d 346, 126 Mont. 568, cert. den 74 S.Ct. 40, 346 U S. 823, 98 L.Ed. 349

N J.—Pennsylvania R. Co. v. Board of Public Utility Com'rs, 93 A.2d 339, 11 N.J. 43.

77. Duty to reduce expenses

(2) Other statements

Neb—Application of Chicago, B & Q R Co, 138 N W 2d 711, 179 Neb 489

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80. Minn—Chicago, M, St P & P R Co v Chicago Great Western Ry Co, 130 N W 2d 56, 268 Minn 500

Va—Southern Ry Co v Com, 68 S E 2d 552, 193 Va 291

86. Ariz—Arizona Corp Commission v Southern Pac Co, 350 P 2d 765, 87 Ariz 310

Idaho—Application of Union Pac R Co, 340 P 2d 1103, 81 Idaho 300

Neb—Application of Chicago, B & Q R Co, 138 N W 2d 711, 179 Neb 489

N J—Application of Central R Co of N J, 127 A 2d 436, 43 N J Super 13

Okl—St Louis-San Francisco Ry Co v State, 486 P 2d 734

§ 391. Relief from Performance of Duty

Library References

Railroads ⇐214, 215.

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89. U S—Ethan Allen, Inc v Maine Cent R Co, D C Vt, 431 F.Supp 740

N J—Application of Central R Co of N J, 127 A 2d 436, 43 N J Super 13

Conditions held insufficient to justify abandonment

Ariz—Arizona Corp Commission v Southern Pac Co., 350 P 2d 765, 87 Ariz 310

90. Failure to earn fair return on rest of system no excuse

Ariz—Arizona Corp Commission v. Southern Pac Co, 350 P 2d 765, 87 Ariz 310

91. Neb—Application of Missouri Pac R Co., 126 N W 2d 679, 176 Neb 501—Application of Chicago, B & Q R Co, 138 N W 2d 711, 179 Neb 489—Application of Chicago, B & Q R Co, 138 N W.2d 816, 179 Neb 470.

Pa—Reading Co v. Pennsylvania Public Utility Commission, 159 A.2d 61, 191 Pa Super 635—Erie Lackawanna R Co v Pennsylvania Public Utility Commission, 214 A 2d 268, 206 Pa Super 523

A railroad may be excused from the performance of its duty to provide transportation in certain emergency situations where it cannot reasonably meet the demands made upon it.[93.5]

93.5. U S.—Ethan Allen, Inc. v Maine Cent. R. Co, D C Vt, 431 F Supp 740.

§ 392. Abandonment or Discontinuance

Library References

Railroads ⇐214, 215.

96. U.S.—In re Auto-Train Corp, Bkrtcy.D C., 11 B R. 418.

Or.—C.J.S. cited in Morgan v Portland Traction Co, 331 P 2d 344, 354, 222 Or 614

Removal test

Ark—Arkansas Commerce Commission v Arkansas & O. Ry. Co., 357 S W.2d 295, 235 Ark 89

97. U.S—New York, N H. & H.R. Co, First Mortgage 4% Bondholders' Committee v U S., D C N Y., 289 F.Supp. 418, app. after remand 305 F Supp. 1049, vac. 90 S Ct 2054, 399 U S. 392, 26 L.Ed.2d 691—In re Penn Central Transp. Co., D.C.Pa., 382 F.Supp. 836.

98. Abandonment and embargo distinguished

US—Interstate Commerce Commission v Baltimore & Annapolis R Co, D C Md, 398 F Supp 454, affd 537 F 2d 77, cert den 97 S Ct 159, two cases, 429 U S 859, 50 L Ed 2d 136

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7. US—State of Neb ex rel Nebraska State Ry Commission v U S, D C Neb, 255 F Supp 718

Wis—City of Princeton v Public Service Commission, 68 N W 2d 420, 268 Wis 542

9. There is no absolute or positive duty

Wis—City of Princeton v Public Service Commission, supra, n 7

Maintenance for one's own use not permitted

US—Com of Pa. v U S, D C Pa, 360 F Supp 658

16. US—General Foods Corp v. Baker, D C Md., 451 F Supp 873

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21. Effect of certificate

(1) Other matters

US—Gulf, M & O R Co v Illinois Cent R Co, D C Ala, 128 F Supp 311, affd, C A, 225 F 2d 816, cert den 76 S.Ct 303, 350 U S 932, 100 L Ed 815, reh den 76 S Ct 430, 350 U S 977, 100 L Ed 847

Interstate Commerce Commission

La—Gulf, M & O.R Co v Louisiana Public Service Commission, 77 So 2d 548, 226 La 952

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30. Evidence held sufficient

US—State of Neb. ex rel Nebraska State Ry Commission v U S, D C Neb, 255 F Supp 718.

La—Louisiana & A. Ry. Co v Louisiana Public Service Commission, 134 So.2d 551, 242 La 67.

Va—Washington and Old Dominion Users Ass'n v Washington and Old Dominion R R, 155 S E 2d 322, 208 Va. 1

Evidence insufficient

US—Com of Pa v U S, D C Pa., 360 F Supp. 658

32. La—Louisiana & A. Ry Co v. Louisiana Public Service Commission, 134 So 2d 551, 242 La 67

§ 393. By Railroad Company

Library References

Railroads ⇐5, 214, 223.

35. Tex—Missouri-Kansas-Texas R Co of Tex v Fowler, Civ.App., 290 S.W 2d 922, err. ref. no rev err.

No duty to supervise car loading by consignors

U.S.—Casella v Norfolk & W. Ry. Co, C A Va., 381 F.2d 473, 29 A L R 3d 1029

39. Md—Brotherhood of R R. Trainmen v Baltimore & O.R Co, 238 A.2d 516, 248 Md 580

Okl—St. Louis-San Francisco R. Co v State, 515 P 2d 233

40. Assessing additional charges on empty repair movements

U S.—Indiana Harbor Belt R. Co v General American Transp Corp., C.A., 377 F 2d 394.

§ 394. Public Regulation

Library References

Railroads ⇐6, 9(2), 214, 218, 222, 224.

42. Or.—Carlson v Southern Pac. Co., 346 P.2d 381, 219 Or. 77.

Interstate Commerce Act

U.S.—Casella v Norfolk & W Ry. Co, C A Va., 381 F.2d 473

42. Idaho—Burlington Out Now v. Burlington Northern, Inc., 532 P.2d 936, 96 Idaho 594

Investigation

US—U S v Massachusetts Bay Transp Authority, D C Mass, 360 F Supp 698

National Transportation Safety Board

US—U S v Massachusetts Bay Transp Authority, D C Mass, 360 F Supp 698

Within jurisdiction of Federal Railroad Administration

US—U S v Massachusetts Bay Transp Authority, D C Mass, 360 F Supp 698

Maintain and repair lines and provide service

US—Interstate Commerce Commission v Maine Cent R Co, C A Vt, 505 F 2d 590

§ 395. —— By State or Municipality

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44. Miss—White v Mississippi Power & Light Co, 196 So 2d 343, 30 A L R 3d 754

48. N J—Pennsylvania R Co v Department of Public Utilities, Bd of Public Utility Com'rs, 102 A 2d 618, 14 N J 411

52. Va.—Norfolk & W Ry Co v Com, 207 S E 2d 883, 215 Va 214

54. N Y—New York Cent R Co v Lefkowitz, 259 N Y S 2d 76, 46 Misc 2d 68, mod on oth. grds 282 N Y S 2d 68, 28 A D 2d 735, motion den 233 N E 2d 721, 20 N Y 2d 954, 286 N Y S 2d 679, affd 241 N E 2d 730, 23 N Y 2d 1, 294 N Y S 2d 519, app dism 89 S Ct 876, 393 U S 536, 21 L Ed 2d 755

Or—Carlson v Southern Pac Co, 346 P 2d 381, 219 Or 77

Va—Norfolk & W Ry Co v Com, 207 S E 2d 883, 215 Va 214

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61. La.—Sambola v Public Belt R R Commission of City of New Orleans, App, 56 So 2d 267

Construction of ordinance

US—Owens v Chicago, R I & P.R. Co, C A Kan, 292 F 2d 696

63. Ohio—City of Ashtabula v Kovacs, 222 N E 2d 440, 8 Ohio App 2d 320

65. Tex—Barrington v Cokinos, Civ App, 339 S.W 2d 330, cert ques ans 338 S W 2d 133, 161 Tex 136

§ 396. —— By Board or Commission

Library References

Railroads ⇐223.

77. Ill—Illinois Cent R Co v Illinois Commerce Commission, 101 N E 2d 588, 410 Ill 77

La—Denegre v Louisiana Public Service Commission, 242 So 2d 832, 257 La 503

Me—Maine Cent R. Co. v Public Utilities Commission, 163 A 2d 633, 156 Me 284

Mass—Penn Cent Co v Department of Public Utilities, 253 N E 2d 339, 356 Mass. 478

Neb—Application of United Mineral Products Co, 131 N W 2d 604, 177 Neb 898.

N J—Lehigh & H R.R. Co v. Department of Public Utilities, Bd. of Public Utility Com'rs, 102 A 2d 633, 14 N.J. 440—State v. New York Cent R. Co, 145 A.2d 54, 52 N.J.Super. 206

N Y—People v Penn Cent. Co., 304 N Y.S.2d 149, 60 Misc 2d 919, affd. 311 N.Y S.2d 150, 34 A D 2d 278.

Pa—Pennsylvania Public Utility Commission v Borough of Souderton, 231 A.2d 875, 210 Pa.Super 22

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81. Idaho—Burlington Out Now v Burlington Northern, Inc., 532 P 2d 936, 96 Idaho 594.

Mass—City of Newton v Department of Public Utilities, 160 N E 2d 108, 339 Mass 535—Attorney General v Department of Public Utilities, 17 N E 2d 255, 242 Mass 662

Neb—Application of Christensen, 64 N W 2d 99, 15 Neb 601

N J—In re Brotherhood of R R Trainmen, 229 A 2d 505, 49 N J 174

Ohio—Southern Ry System v Public Utilities Commission, 141 N E 2d 149, 166 Ohio St 240

Tex—Colorado River Western Ry v Texas & N O R Co, Civ App, 283 S W 2d 768, err ref no rev err

Burden of proof

(2) Other matters

La—Southern Pac Co v Louisiana Public Service Commission, 222 So 2d 499, 254 La 23

Statute held inapplicable

S C—City of Columbia v South Carolina Public Service Commission, 131 S E 2d 705, 242 S C 528

82. Order held not final

(2) Other orders

Fla—Atlantic Coast Line R Co v Carter, 66 So 2d 480

Ohio—Application for New Union Depot, Columbus 115 N E 2d 4, 160 Ohio St 173

83. Ariz—Southern Pac Co v Arizona Corp Commission, 404 P 2d 692, 98 Ariz 339

Mass—Penn Cent Co v Department of Public Utilities, 253 N E 2d 339, 356 Mass 478

Mich—Board of County Road Com'rs of Washtenaw County v Michigan Public Service Commission, 85 N W 2d 134, 349 Mich 663

Under the Railroad Terminal Authority Act

Ill—People ex rel Adamowski v Chicago R R Terminal Authority, 151 N E 2d 311, 14 Ill 2d 230

Investigation as to public interest not required

Idaho—Burlington Out Now v Burlington Northern, Inc, 532 P 2d 936, 96 Idaho 594

84. Tex—Missouri-Kansas-Texas R Co of Tex v Fowler, Civ App, 290 S W 2d 922, err ref no rev err

86 Mo—State ex rel Wabash R Co v Public Service Commission, App, 379 S W 2d 206

88. Mass—Penn Cent Co. v Department of Public Utilities, 253 N.E 2d 339, 356 Mass 478

Va—Norfolk & W Ry Co v Com., 201 S E.2d 883, 215 Va 214

89. Order held not unreasonable

(2) Other cases.

N Y—People v Penn Cent. Co, 311 N Y S.2d 150, 34 A D 2d 278

Ohio—Southern Ry. System v Public Utilities Commission, 141 N E 2d 149, 166 Ohio St 240

Tenn—Louisville & N R Co. v Tennessee Public Service Commission, 542 S W 2d 813

Order held unreasonable

Ohio—Cincinnati, N O & T.P Ry Co. v Public Utilities Commission, 285 N E.2d 371, 31 Ohio St 2d 81

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90. Neb—Application of Chicago, B. & Q R. Co, 109 N W 2d 369, 172 Neb 321.

91. N J.—In re New Jersey & N Y R Co, 92 A.2d 515, 23 N.J Super 1, affd 96 A 2d 526, 12 N J 281, app dism. 74 S.Ct 123, 346 U S 868, 98 L Ed 2d 378

Va.—Norfolk & W Ry. Co. v Com, 207 S E 2d 883 215 Va 214

92. Pa—Monongahela Connecting R Co v Pennsylvania Public Utility Commission, Super, 211 A.2d 113, 206 Pa.Super. 17

§ 397. —— By Courts

Library References

Railroads ⇐9(2), 214, 218.

Modern Legal Forms Ch. 55 Public Utilities.

8. N H—Opinion of the Justices, 81 A 2d 306, 97 N H 541

N Y—New York Cent R Co v Lefkowitz, 259 N Y S 2d 76, 46 Misc 2d 68 Mod on oth grds 282 N Y S 2d 68, 28 A D 2d 735, motion den 233 N E 2d 721, 20 N Y 2d 954, 286 N Y S 2d 679, affd 241 N E 2d 730, 23 N Y 2d 1, 294 N Y S 2d 519, app dism 89 S Ct 876, 393 U S 536, 21 L Ed.2d 755

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11. Cal—Jensen v Southern Pac Co, 276 P 2d 703, 129 C A 2d 67

Mont—State ex rel Board of R R Com'rs v District Court of First Judicial Dist In and For Lewis and Clark County, 483 P 2d 912, 157 Mont 163

§ 399. —— Construction of Statutes

Library References

Railroads ⇐223.

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43. Terms construed

Wis—City of Princeton v Public Service Commission, 68 N W 2d 420, 268 Wis 542

Purpose of Railroad Safety Act

U S—Iowa City-Montezuma R R Shippers Ass'n v U S, D C Iowa, 338 F Supp 1383

Iowa—Union Pac R R v Johnson, 264 N W 2d 796

44. Ind—Indiana Harbor Belt R Co v Public Service Commission, 263 N E 2d 292, 147 Ind App 652, cert den 92 S Ct 961, 405 U S 923, 30 L.Ed.2d 794

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47. W Va—Chesapeake v O R Co v Public Service Commission, 81 S E 2d 700, 139 W Va 161

§ 400. Railroad Employees

Library References

Railroads ⇐60, 225, 226, 230, 231.

57. Ala.—Hill v State, 339 So 2d 601, cert den Pitchford v State, Cr, 339 So 2d 610, cert den 97 S Ct. 1590, 430 U.S 950, 51 L Ed 2d 799

58. Ohio—Baltimore & O R Co v Public Utilities Commission of Ohio, 102 N E 2d 246, 156 Ohio St 282—Southern Ry. System v Public Utilities Commission, 141 N E.2d 149, 166 Ohio St. 240—Cincinnati, N.O. & T P Ry. Co. v Public Utilities Commission, 192 N E.2d 53, 175 Ohio St 130—Co-operative Legislative Committee of Transp Brotherhoods and Broth. of Maintenance of Way Emp. v Public Utilities Commission, 202 N.E.2d 699, 177 Ohio St 101.

Pa.—Erie-Lackawanna R. Co v Pennsylvania Public Utility Commission, 208 A 2d 908, 205 Pa.Super 291—Monongahela Connecting R Co v Pennsylvania Public Utility Commission, 211 A.2d 113, 206 Pa.Super 17

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68. Ill—Illinois Central R. Co v. Illinois Commerce Commission, 104 N E.2d 796, 411 Ill 526.

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Under similar statutes various other terms have been construed.[76.1]

76.1. "Roundhouse, shop or shed"

Or—Southern Pac Co v Brown, 295 P.2d 861, 207 Or. 222

"Usually made"

Or.—Southern Pac Co. v Brown, 295 P.2d 861, 207 Or. 222

"Light repairs"

Or.—Southern Pac. Co. v. Brown, 295 P.2d 861, 207 Or. 222.

77. D C—Bangor & A R Co v Brotherhood of Locomotive Firemen and Enginemen, D C, 314 F Supp 352, affd in part, revd in part on oth grds 442 F 2d 812, 143 U S App D C 90

§ 401. —— Full-Crew Regulations

Library References

Railroads ⇐230

Wis—Chicago & N W Ry Co v La Follette, 169 N W 2d 441, 43 Wis 2d 631

Congressional power to regulate

U S—Brotherhood of Locomotive Firemen and Enginemen v. Chicago, R I & P R Co, Ark, 89 S Ct 323, 393 U S 129, 21 L Ed 2d 289, reh den 89 S Ct 610, 393 U S 1045, 21 L Ed 2d 598, and 89 S Ct 610, 393 U S 1045, 21 L Ed 2d 599

78. Ind—Indiana Harbor Belt R Co v Public Service Commission, 263 N E 2d 292, 147 Ind App 652, cert den 92 S Ct 961, 405 U S 923, 30 L Ed 2d 794

N Y—New York Cent R Co v Lefkowitz, 259 N Y S 2d 76, 46 Misc 2d 68, mod on oth grds 282 N Y S 2d 68, 28 A D 2d 735, motion den 233 N E 2d 721, 20 N Y 2d 954, 286 N Y S 2d 679, affd 241 N E 2d 730, 23 N Y 2d 1, 294 N Y S 2d 519, app dism 89 S Ct 876, 393 U S 536, 21 L Ed 2d 755—New York Cent R Co v Lefkowitz, 241 N E 2d 730, 23 N Y 2d 1, 294 N Y S 2d 519, app dism 89 S Ct 876, 393 U S 536, 21 L Ed 2d 755

Wis—Chicago & N W Ry Co v. La Follette, 135 N W 2d 269, 27 Wis.2d 505—Chicago & N W Ry Co v La Follette, 169 N W 2d 441, 43 Wis 2d 631.

Particular employee or class

Vt—Petition of Weyerhaeuser Co, 315 A 2d 446, 132 Vt 121

79. U S—Brotherhood of Locomotive Engineers v Chicago, R I & P R Co, Ark, 86 S Ct 594, 382 U S 423, 15 L Ed.2d 501—Brotherhood of Locomotive Firemen and Enginemen v. Chicago, R I & P R Co, Ark, 89 S.Ct. 323, 393 U S 129, 21 L Ed 2d 289, reh den 89 S Ct 610, 393 U S. 1045, 21 L Ed 2d 598, and 89 S Ct 610, 393 U S 1045, 21 L Ed.2d 599—Bangor & A R Co. v Brotherhood of Locomotive Firemen and Enginemen, D C, 314 F Supp 352, affd in part, revd in part on oth grds 442 F 2d 812, 143 U S App D C 90

Ind—Public Service Commission v New York Cent R Co., 216 N E 2d 716, 247 Ind. 411, cert den 87 S.Ct 90, 385 U S. 843, 17 L Ed 2d 76

Miss—Brotherhood of R R Trainmen v. Illinois Cent R Co, 138 So 2d 908, 243 Miss 851

N.Y—New York Cent R. Co v Lefkowitz, 241 N E.2d 730, 23 N Y.2d 1, 294 N.Y.S.2d 519, app dism. 89 S.Ct. 876, 393 U S 536, 21 L Ed 2d 755

Ohio—Akron, Canton & Youngstown R Co v. Public Utilities Commission, 224 N E 2d 169, 9 Ohio Misc. 183.

Pa.—Pennsylvania R. Co v Pennsylvania Public Utility Commission, 70 Dauph. 247

Wis—Chicago & N.W. Ry Co. v La Follette, 169 N W.2d 441, 43 Wis.2d 631

Bill of review to modify prior decree

Pa.—Pennsylvania R. Co. v Schwartz, 119 A.2d 314, 383 Pa. 575

Burden of proof in action to declare statute unconstitutional.

Wis.—Chicago & N W Ry Co. v. La Follette, 135 N.W.2d 269, 27 Wis.2d 505.

80. N Y.—New York Cent. R. Co. v. Lefkowitz, 259 N Y.S.2d 76, 46 Misc 2d 68, mod on oth. grds 282 N.Y.S.2d 68, 28 A.D.2d 735, motion den. 233 N.E.2d 721, 20 N.Y.2d 954, 286 N.Y.S 2d 679, affd 241 N.E 2d 730, 23 N.Y.2d 1, 294 N.Y.S 2d 519, app. dism. 89 S Ct. 876, 393 U.S. 536, 21 L Ed.2d 755—New York Cent. R. Co. v. Lefkowitz, 241 N.E.2d 730, 23 N Y.2d 1, 294 N.Y.S 2d 519, app. dism. 99 S Ct. 876, 393 U.S. 536, 21 L.Ed.2d 755.

Ohio—Akron, Canton & Youngstown R Co v Public Utilities Commission, 224 N E 2d 169, 9 Ohio Misc 183

82. Order held unreasonable

(3) Other orders

Ohio—New York Cent R Co v Public Utilities Commission, 115 N E 2d 842, 160 Ohio St 236

Statutory provision held not invalid as limiting power of commission

Ariz—Iman v Bolin, 404 P 2d 705, 98 Ariz 358

83. N J—Pennsylvania R Co v Department of Public Utilities, Bd of Public Utilities Com'rs, 102 A 2d 618, 14 N J 411

Wis—Chicago & N W Ry Co v La Follette, 169 N W 2d 441, 43 Wis 2d 631

Power to determine if violations exist

Miss—Brotherhood of R R Trainmen v Illinois Cent R Co, 138 So 2d 908, 243 Miss 851

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88. Ohio—Co-operative Legislative Committee of Transp Brotherhoods and Broth. of Maintenance of Way Emp v Public Utilities Commission, 202 N E 2d 699, 177 Ohio St 101—Co-operative Legislative Committee of Transp Brotherhoods and Broth of Maintenance of Way Emp v. Public Utilities Commission, 205 N E 2d 919, 1 Ohio St 2d 187

Wis—Chicago & N W. Ry Co v La Follette, 135 N W 2d 269, 27 Wis 2d 505

89. Nev—Western Pac R Co v State, 241 P 2d 846, 69 Nev 66, 45 A L.R.2d 429

96. Leased tracks

(2) Other matters

Ind—Indiana Harbor Belt R Co v Public Service Commission, 263 N E 2d 292, 147 Ind App 652, cert den 92 S Ct 961, 405 U.S 923, 30 L Ed 2d 794

"Mainline tracks"

Ind—Indiana Harbor Belt R. Co v Public Service Commission, 263 N E.2d 292, 147 Ind App. 652, cert den 92 S Ct 961, 405 U S 923, 30 L Ed 2d 794

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2. Nev—Western Pac R Co v State, 241 P.2d 846, 69 Nev 66, 45 A L.R.2d 429.

N Y.—New York Cent R Co v Lefkowitz, 241 N E.2d 730, 23 N Y 2d 1, 294 N Y.S.2d 519, app. dism. 89 S Ct 876, 393 U S 536, 21 L.Ed 2d 755

Ohio—Co-operative Legislative Committee of Transp. Brotherhoods and Broth of Maintenance of Way Emp. v. Public Utilities Commission, 205 N.E.2d 919, 1 Ohio St.2d 187.

"Returning" construed in relation to helper locomotives

Ariz—State v Atchison, T. & S.F. Ry. Co., 307 P.2d 908, 82 Ariz 12

Provision held inapplicable to diesel locomotive

Nev—Southern Pac Co v Dickerson, 397 P 2d 187, 80 Nev. 572.

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16. Tex—Railroad Commission of Tex. v Chicago, R.I. & P.R. Co., Civ.App., 291 S.W.2d 796, err. ref.

18. Fireman on diesel locomotive

Ohio—Akron, Canton & Youngstown R. Co v Public Utilities Commission, 224 N.E 2d 169, 9 Ohio Misc. 183

20. Ind.—Indiana Harbor Belt R. Co. v. Public Service Commission, 263 N.E.2d 292, 147 Ind.App. 652, cert. den 92 S.Ct 961, 405 U.S. 923, 30 L Ed.2d 794.

Operations held not to constitute "switching"

Wis.—State v. Minneapolis, St. P. & S.S M.R. Co., 106 N W.2d 320, 12 Wis.2d 21.

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30. Statute held inapplicable to tractor-like vehicle

Ohio—Co-operative Legislative Committee of Transp Brotherhoods and Broth of Maintenance of Way Emp v Public Utilities Commission, 202 N E 2d 699, 177 Ohio St 101

34. Wis—State v Minneapolis, St P & S S M R Co, 106 N W 2d 320, 12 Wis 2d 21

35. Miss—Brotherhood of R R Trainmen v Illinois Cent R Co, 138 So 2d 908, 243 Miss 851

Nev—Western Pac R Co v State, supra, n. 2

§ 402. —— Station Agents

Library References

Railroads ⇐60, 225, 226, 230.

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41. Miss—Mississippi Public Service Commission v Illinois Cent R Co, 236 So 2d 425

Substitution of mobile agency service

Va—Chesapeake & O Ry Co. v State Corp Commission, 252 S.E 2d 304, 219 Va 819.

47. Necessity of proof

Okl.—St Louis-San Francisco Ry v State, 271 P 2d 338.

49. Va—Norfolk & W Ry. Co v Com, 207 S E 2d 883, 215 Va 214

50. Mont—C.J.S. quoted at length in Citizens of Stringer v Gulf, M & O.R. Co, 90 So 2d 25, 30, 229 Miss. 1

52. Miss—Mississippi Public Service Commission v. Illinois Cent. R Co, 108 So.2d 573, 235 Miss 46—Illinois Cent. R.R v Town of Goodman, 173 So.2d 116, 252 Miss 297.

53. Ariz—Arizona Corp Commission v. Southern Pac. Co, 350 P 2d 765, 87 Ariz 310.

Ky.—Com ex rel. Ky R Commission v. Illinois Cent. R Co., 358 S W 2d 533.

54. Miss—Illinois Cent. R.R. v. Town of Goodman, 173 So 2d 116, 252 Miss. 297.

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56. Neb.—Chicago, B & Q R. Co. v. Keifer, 69 N.W 2d 541, 160 Neb 168

58. Tex.—Missouri-Kansas-Texas R. Co. of Tex. v. Fowler, Civ.App., 290 S.W 2d 922, err ref, no rev err.

63. Ohio—New York Cent. R Co. v Public Utilities Commission, 171 N E.2d 503, 171 Ohio St. 365

64. Pa—Pennsylvania R. Co v. Pennsylvania Public Utility Commission, 178 A.2d 856, 197 Pa.Super 382.

Tex.—Missouri-Kansas-Texas R. Co. of Tex. v. Fowler, Civ App., 290 S.W.2d 922, err. ref. no rev err—City of Jefferson v. Railroad Commission, Civ App., 453 S.W.2d 906, err. ref. no rev. err—Railroad Commission of Tex. v. Southern Pac. Co, Civ.App., 454 S.W.2d 853

Commission has jurisdiction, etc.

(2) Other matters.

Miss—Village of Myrtle, Union County v St. Louis-San Francisco Ry. Co., 121 So.2d 717, 239 Miss 110.

Application to discontinue not one for relief from absolute duty

Ariz.—Arizona Corp. Commission v. Southern Pac. Co., 350 P.2d 765, 87 Ariz. 310.

Hearing not required

Kan.—Community of Woodston v. State Corp. Commission, 353 P.2d 206, 186 Kan. 747.

Hearings in communities affected

Kan.—Missouri Pac. R. Co. v State Corp Commission, 470 P 2d 767, 205 Kan. 610.

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67. Miss—Village of Myrtle, Union County v St Louis-San Francisco Ry Co, 121 So 2d 717, 239 Miss 110

Denial of application for discontinuance held unreasonable

La—Texas & N O R Co v Louisiana Public Service Commission, 106 So 2d 438, 235 La 973—Kansas City S Ry Co v Louisiana Public Service Commission, 161 So 2d 75, 245 La 769

N H—Boston v M R R v State, 148 A 2d 652, 102 N H 9

Tex—Railroad Commission of Tex v Southern Pac Co, Civ App, 454 S W 2d 853

Findings held reasonable

Kan—Missouri-Kansas-Texas R Co v City of Savonburg, 348 P 2d 1015, 186 Kan 120

Granting discontinuance held reasonable

Kan—Missouri-Kansas-Texas R Co v City of Savonburg, 348 P 2d 1015, 186 Kan 120

Neb—Application of Chicago, R I & P R Co, 101 N W 2d 448, 169 Neb 867

Tex—City of Jefferson v Railroad Commission, Civ App, 453 S W 2d 906, err ref no rev. err

Duty to view entire picture with long range consideration

La—Illinois Cent R Co v Louisiana Public Service Commission, 125 So 2d 159, 240 La 769

68. Ark—St Louis Southwestern Ry Co v Arkansas Commerce Commission, 449 S W 2d 198, 247 Ark 1044

Evidence held sufficient

(1) Ala—Alabama Public Service Commission v Western Ry of Ala, 89 So 2d 64, 264 Ala 619

La—Texas & N O.R Co v Louisiana Public Service Commission, 141 So 2d 366, 242 La 1063

Tex—Railroad Commission of Tex v St Louis Southwestern Ry. Co, Civ App, 474 S.W.2d 19

Utah—Los Angeles & S L R Co v Public Service Commission, 240 P.2d 493, 121 Utah 209, mod on oth. grds and reh den. 253 P 2d 355, 121 Utah 217.

Va—Pennsylvania R Co v Com ex rel State Corp Commission, 79 S E 2d 607, 195 Va 538.

(2) N.C—State ex rel Utilities Commission v Atlantic Coast Line R Co, 69 S.E 2d 502, 235 N C 273

(3) As to other matters.

Ariz—Arizona Corp Commission v Southern Pac Co., 350 P 2d 765, 87 Ariz 310

Ark—City of Caraway v. Arkansas Commerce Commission, 453 S W 2d 722, 248 Ark 765

Kan.—Missouri-Kansas-Texas R. Co v City of Savonburg, 348 P 2d 1015, 186 Kan 120—Community of Woodston v. State Corp. Commission, 353 P 2d 206, 186 Kan 747—Missouri Pac R Co v State Corp Commission, 470 P.2d 767, 205 Kan 610

Ky—Com ex rel Ky. R Commission v Illinois Cent R. Co., 358 S W.2d 533

La.—Texas & N.O.R. Co v Louisiana Public Service Commission, 130 So 2d 398, 241 La 635—Texas & Pac Ry Co v. Louisiana Public Service Commission, So.2d 315. Pac Transp Co v Louisiana Public Service Commission, 309 so 2d 315

Miss.—Village of Myrtle, Union County v St. Louis-San Francisco Ry Co., 121 So.2d 717, 239 Miss. 110.

Neb.—Application of Chicago, R.I. & P R. Co., 101 N.W.2d 448, 169 Neb 867

Ohio—New York Cent. R. Co. v. Public Utilities Commission, 171 N.E.2d 503, 171 Ohio St. 365

Pa.—Rydal-Meadowbrook Civic Ass'n v Pennsylvania Public Utility Commission, 98 A.2d 481, 173 Pa. Super. 380

Tex.—Missouri-Kansas-Texas R Co of Tex. v Fowler, Civ.App., 290 S.W.2d 922, err. ref no rev. err.

Evidence held insufficient

(1) Miss.—Citizens of Stringer v. Gulf, M. & O.R Co., 90 So.2d 25, 229 Miss. 1—Mississippi Public Service Commission v Southern Ry Co., 138 So 2d 277, 243 Miss 197—Illinois Cent R R v Town of Goodman, 173 So 2d 116, 252 Miss 297

Mo—State ex rel Wabash R Co v Public Service Commission, App, 379 S W 2d 206

N C—State ex rel Utilities Commission v Atlantic Coast Line R Co, 150 S E 2d 386, 268 N C 242

Pa—Reading Co v Pennsylvania Public Utility Commission, 132 A 2d 701, 184 Pa Super 232

Error to deny application where change justified

Pa—Reading Co v Pennsylvania Public Utility Commission, 159 A 2d 61, 191 Pa Super 635

Burden of proof

Kan—Community of Woodston v State Corp Commission, 353 P 2d 206, 186 Kan 747

Miss—Illinois Cent R R v Town of Goodman, 173 So 2d 116, 252 Miss 297

The courts have passed upon the propriety of considering particular evidence.[68.5]

68.5. Evidence held properly considered

Kan—Missouri-Kansas-Texas R Co v City of Savonburg, 348 P 2d 1015, 186 Kan 120

Ky—Com ex rel. Ky. R Commission v Illinois Cent R Co, 358 S W 2d 533

Evidence held immaterial

Kan—Missouri-Kansas-Texas R Co v City of Savonburg, 348 P 2d 1015, 186 Kan 120

Pa—Erie Lackawanna R Co v Pennsylvania Public Utility Commission, 214 A 2d 268, 206 Pa Super 523

69. Miss—Citizens of Stringer v Gulf, M & O R. Co, 90 So 2d 25, 229 Miss 1

Neb.—Application of Chicago, B & Q R Co., 138 N W 2d 816, 179 Neb. 470.

Pa—Erie Lackawanna R Co. v Pennsylvania Public Utility Commission, 214 A.2d 268, 206 Pa Super 523

Order held not void for indefiniteness and discrimination

Tex—Missouri-Kansas-Texas R Co of Tex v Fowler, Civ App., 290 S.W 2d 922, err ref no rev. err

Order held proper

Kan—Community of Woodston v State Corp Commission, 353 P 2d 206, 186 Kan. 747

70. Pa—New York Cent R Co v. Pennsylvania Public Utility Commission, 166 A 2d 55, 193 Pa. Super 636

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71. Kan—Missouri Pac R Co v. State Corp Commission, 470 P 2d 767, 205 Kan. 610

Ky—Com ex rel Kentucky R. Commission v. Illinois Cent R. Co, 358 S W 2d 533.

La—Illinois Cent R Co. v. Louisiana Public Service Commission, 125 So 2d 159, 240 La 769.

Miss—Mississippi Public Service Commission v Illinois Cent. R Co, 236 So.2d 425.

Mo—State ex rel Wabash R Co v Public Service Commission, App, 379 S W.2d 206

Findings held definite

Pa.—Rydal-Meadowbrook Civic Ass'n v. Pennsylvania Public Utility Commission, supra, n. 68

Trial de novo

Ariz.—Arizona Corp. Commission v Southern Pac Co., 350 P.2d 765, 87 Ariz. 310

Adoption of railroad's accounting formula

La—Texas & N O R. Co v Louisiana Public Service Commission, 130 So.2d 398, 241 La 635.

Scope of review

Ohio—New York Cent. R. Co v Public Utilities Commission, 171 N.E.2d 503, 171 Ohio St. 365

72. Miss.—Mississippi Public Service Commission v. Illinois Cent R. Co, 108 So 2d 573, 235 Miss 46

N C.—State ex rel. Utilities Commission v. Atlantic Coast Line R. Co, supra, n. 68.

73. N.C.—State ex rel. Utilities Commission v Atlantic Coast Line R Co., supra, n. 68

74. Fla—Butler v Carter, 123 So 2d 313
La—Texas & Pac Ry Co v Louisiana Public Service Commission, 143 So 2d 86, 243 La 322
Mich—Chicago, M, St P & P R Co v Michigan Public Service Commission, 254 N W 2d 39, 74 Mich App 678
Miss—Mississippi Public Service Commission v Illinois Cent R Co, 108 So 2d 573, 235 Miss 46—Illinois Cent R R v Town of Goodman, 173 So 2d 116

75. Ind—Public Service Commission v Chicago, I & L Ry Co, 132 N E 2d 698, 235 Ind 394, reh den 134 N E 2d 53, 235 Ind 394
Kan—Missouri Pac R Co v State Corp Commission, 470 P 2d 767, 205 Kan 610
La—Texas & N O R Co v Louisiana Public Service Commission, 130 So 2d 398, 241 La 635
Mich—Chicago, M, St P & P R Co v Michigan Public Service Commission, 254 N W 2d 39, 74 Mich App 678
Minn—State v Chicago & N W Ry Co, 75 N W 2d 411, 246 Minn 403
Miss—Mississippi Public Service Commission v Illinois Cent R Co, 108 So 2d 573, 235 Miss 46
Pa—Erie-Lackawanna R Co v Pennsylvania Public Utility Commission, 198 A 2d 383, 202 Pa Super 511

Evidence held sufficient

La—Louisiana & A Ry Co v Louisiana Public Service Commission, 124 So 2d 899, 240 La 658

79. Neb—Chicago, B & Q R Co v Keifer, 69 N W 2d 541, 160 Neb 168—Application of Missouri Pac R Co, 126 N W 2d 679, 176 Neb 501
Okl—Missouri Pac R Co v State, 563 P 2d 1179.
Pa—Reading Co v Pennsylvania Public Utility Commission, 169 A 2d 587, 194 Pa Super 636—Reading Co. v Pennsylvania Public Utility Commission, 169 A 2d 590, 194 Pa Super 577—New York Cent R. Co. v Pennsylvania Public Utility Commission 182 A 2d 251, 198 Pa Super 458—Erie-Lackawanna R Co v Pennsylvania Public Utility Commission 198 A 2d 383, 202 Pa Super 511

Orders held inconsistent with findings

Pa—Reading Co v Pennsylvania Public Utility Commission, 159 A 2d 61, 191 Pa Super 635

Surplusage

Ind—Public Service Commission v Chicago, I & L Ry. Co, 132 N E 2d 698, 235 Ind 394, reh den 134 N.E 2d 53, 235 Ind 394

In such case, it has been held, the judgment of the court should contain an order remanding the case to the commission for further proceedings, since only the commission has authority to grant the relief requested by the railroad.[80]

80. Ark—Arkansas Commerce Commission v St Louis Southwestern Ry. Co., 448 S W 2d 950, 247 Ark 1032.
Ill—Illinois Cent R Co v Illinois Commerce Commission, 32 N E 2d 146, 375 Ill 585.
Ind—Public Service Commission v. Chicago, I. & L. Ry Co, 134 N.E.2d 53
La—Missouri Pac R Co. v Louisiana Public Service Commission, 128 So.2d 644, 241 La. 242
N C—State ex rel Utilities Commission v Atlantic Coast Line R. Co, 72 S.E.2d 739, 236 N C. 337

hange in conditions

a—Gulf, C & S F Ry Co. v. Louisiana Public Service Commission, 143 So 2d 75, 243 La 290.
L. Tex—Railroad Commission of Tex. v St. Louis Southwestern Ry. Co., Civ.App, 474 S.W.2d 19

nclusiveness of findings

(3) Other cases

—Louisiana & A Ry Co v Louisiana Public Service Commission, 124 So.2d 899, 240 La 658—Illinois Cent R. Co v Louisiana Public Service Commission, 125 So 2d 159, 240 La. 769

Tex—Missouri-Kansas-Texas R Co of Tex v Fowler, Civ App, 290 S W 2d 922, err ref no rev err

Necessity of record

Ind—Public Service Commission v Chicago, I & L Ry Co, 132 N E 2d 698, 235 Ind 394, reh den 134 N E 2d 53, 235 Ind 394

Function of court

Ky—Railroad Commission v Chesapeake & O Ry Co, 490 S W 2d 763
Minn—State v Chicago & N W Ry Co, 75 N W 2d 411, 246 Minn 403

Evidence held sufficient

La—Texas & Pac Ry Co v Louisiana Public Service Commission, 124 So 2d 902, 240 La 669
Minn—State v Chicago & N W Ry Co, 75 N W 2d 411, 246 Minn 403

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82 Ariz—Arizona Corp Commission v Southern Pac Co, 350 P 2d 765, 87 Ariz 310
Neb—Chicago, B & Q R Co v Keifer, supra, n 56—Application of Chicago, R I & P R Co, 101 N W 2d 448, 169 Neb 867—Application of Missouri Pac R Co, 126 N W 2d 679, 176 Neb 501—Application of Chicago, B & Q R Co, 138 N W 2d 816, 179 Neb 470

83. Ariz—Arizona Corp Commission v Southern Pac Co, 350 P 2d 765, 87 Ariz. 310
Neb—Application of Chicago, R I & P R Co, 101 N W 2d 448, 169 Neb 867—Application of Missouri Pac R Co, 126 N W 2d 679, 176 Neb 501

84. Tex—Missouri-Kansas-Texas R Co of Tex v Fowler, Civ App, 290 S W 2d 922, err ref no rev err

87. Fla—C.J.S. quoted at length in Butler v Carter, 123 So 2d 313, 315, 316
Kan—Missouri-Kansas-Texas R. Co v City of Savonburg, 348 P 2d 1015, 186 Kan 120
La.—C J S quoted at length in Texas & N O R Co v Louisiana Public Service Commission, 106 So 2d 438, 441, 235 La 973—C.J.S. cited in Railway Exp Agency, Inc v Louisiana Public Service Commission, 145 So 2d 18, 30, 243 La 518
Miss—Mississippi Public Service Commission v Illinois Cent R Co, 236 So 2d 425
Neb—Application of Missouri Pac R Co, 126 N W 2d 679, 176 Neb 501
Pa—Rydal-Meadowbrook Civil Ass'n v Pennsylvania Public Utility Commission, 98 A 2d 481, 173 Pa Super 380

Right to discontinue agency held shown

La—Illinois Cent R Co v Louisiana Public Service Commission, 125 So 2d 159, 240 La 769—Illinois Cent R Co v Louisiana Public Service Commission, 127 So 2d 178, 241 La 1—Texas & N O R Co. v Louisiana Public Service Commission, 130 So.2d 398, 241 La 635.
Pa—Pennsylvania R. Co v Pennsylvania Public Utility Commission, 132 A 2d 887, 184 Pa Super 228

88. Ariz—Arizona Corp Commission v. Southern Pac Co., 350 P.2d 765, 87 Ariz. 310
Kan—Missouri-Kansas-Texas R Co v City of Savonburg, 348 P 2d 1015, 186 Kan. 120—Missouri Pac R. Co v State Corp Commission, 470 P 2d 767, 205 Kan 610
La.—Illinois Cent R Co. v Louisiana Public Service Commission, 127 So 2d 178, 241 La 1—Texas & N O R Co v Louisiana Public Service Commission, 130 So 2d 398, 241 La. 635—Texas & N O R. Co v Louisiana Public Service Commission, 136 So 2d 382, 242 La 349—Texas & P. Ry Co v. Louisiana Public Service Commission, 136 So 2d 385, 242 La. 357—C.J.S. cited in Texas & N O.R. Co. v Louisiana Public Service Commission, 135 So.2d 268, 270, 242 La 191—Texas & Pac Ry Co. v Louisiana Public Service Commission, 143 So 2d 86, 243 La. 322
N M—Matter of Missouri Pac R. Co., 605 P.2d 1152, 93 N M 753
Pa.—New York Cent. R. Co. v. Pennsylvania Public Utility Commission, 166 A.2d 55, 193 Pa.Super. 636—Erie-Lackawanna R. Co v. Pennsylvania Public Utility Commission, 198 A 2d 383, 202 Pa Super 511
Wyo—C J.S cited in Union Pac R Co v Public Service Commission of Wyoming, 518 P 2d 23, 25

Discontinuance held improper

Ark—Louisiana & A Ry Co v Arkansas Commerce Commission, 360 S W 2d 763, 235 Ark 506

Primarily question of business policy

Kan—Missouri Pac R Co v State Corp Commission, 389 P 2d 813, 192 Kan 575

89. Ark—Louisiana & A Ry Co v Arkansas Commerce Commission, 360 S W 2d 763, 235 Ark 506
La—Southern Pac Transp Co v Louisiana Public Service Commission, 309 So 2d 315
Pa—Erie-Lackawanna R Co v Pennsylvania Public Utility Commission, 198 A 2d 383, 202 Pa Super 511

Financial condition

Pa—Rydal-Meadowbrook Civic Ass'n v Pennsylvania Public Utility Commission, supra, n 87

90. Ala—Alabama Public Service Commission v Western Ry of Ala., 89 So 2d 64, 264 Ala 619
Kan—Missouri Pac R Co v State Corp Commission, 389 P 2d 813, 192 Kan 575
Pa—Rydal-Meadowbrook Civic Ass'n v Pennsylvania Public Utility Commission, supra, n 87
Va—Pennsylvania R Co v Com. ex rel State Corp Commission, 79 S.E 2d 607, 195 Va 538

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91. Fla—Atlantic Coast Line R Co v King, 51 So 2d 723
Kan—C J.S quoted at length in Missouri-Kansas-Texas R Co v City of Savonburg, 348 P 2d 1015, 1021, 186 Kan 120
La—Louisiana & A Ry. Co v Louisiana Public Service Commission, 124 So 2d 899, 240 La 658—C.J.S cited in Texas & Pac Ry Co v Louisiana Public Service Commission, 124 So.2d 902, 904, 240 La 669—Illinois Cent R. Co. v Louisiana Public Service Commission, 125 So.2d 159, 240 La 769—Texas & N O R Co v. Louisiana Public Service Commission, 130 So.2d 398, 241 La 635—Texas & P Ry Co v Louisiana Public Service Commission, 136 So 2d 385, 242 La. 357—C.J.S. cited in Railway Exp Agency, Inc v Louisiana Public Service Commission, 145 So 2d 18, 32, 243 La 518—Southern Pac Transp Co v Louisiana Public Service Commission, 309 So 2d 315
Miss.—Illinois Cent R.R v Town of Goodman, 173 So.2d 116, 252 Miss 297
Pa—Rydal-Meadowbrook Civic Ass'n v Pennsylvania Public Utility Commission, supra, n 87—Pennsylvania R Co v Pennsylvania Public Utility Commission, 132 A 2d 887, 184 Pa.Super. 228—New York Cent R Co. v. Pennsylvania Public Utility Commission, 166 A 2d 55, 193 Pa Super. 636—Pennsylvania R Co v Pennsylvania Public Utility Commission, 178 A 2d 856, 197 Pa Super 382—Pennsylvania R Co v Pennsylvania Public Utility Commission, 195 A.2d 830, 202 Pa.Super. 402—Erie-Lackawanna R Co v Pennsylvania Public Utility Commission, 198 A 2d 383, 202 Pa.Super 511—Erie Lackawanna R. Co v Pennsylvania Public Utility Commission, 214 A 2d 268, 206 Pa Super 523

Financial condition not only factor

(2) Additional factors enumerated.

Ariz.—Arizona Corp. Commission v Southern Pac Co., 350 P.2d 765, 87 Ariz 310
Ky—Com ex rel. Ky R Commission v Illinois Cent R Co., 358 S.W.2d 533

Time necessary for performance of duties, etc.

Neb—Application of Chicago, R I & P.R. Co., 101 N.W 2d 448, 169 Neb 867—Application of Missouri Pac R Co, 126 N W 2d 679, 176 Neb 501—Application of Chicago, B. & Q R Co, 138 N W 2d 711, 179 Neb. 489—Application of Chicago, B. & Q.R Co, 138 N W 2d 816, 179 Neb. 470

Probability of future increase in business

La.—Texas & Pac Ry Co. v Louisiana Public Service Commission, 124 So.2d 902, 240 La. 669—Texas &

P Ry Co v Louisiana Public Service Commission, 136 So 2d 385, 242 La 357—Texas & Pac Ry Co v Louisiana Public Service Commission, 143 So 2d 86, 243 La 322

92. Neb—Application of Chicago, B & Q R Co, 52 N W 2d 238, 155 Neb 387—Application of Chicago, B & Q R Co, 52 N W 2d 241, 155 Neb 392

Pa—Pennsylvania R Co v Pennsylvania Public Utility Commission, 195 A 2d 830, 202 Pa Super 402

94. Ariz—Arizona Corp Commission v Southern Pac Co, 350 P 2d 765, 87 Ariz 310

Neb—Chicago, B & Q R Co v Keifer, 69 N W 2d 541, 160 Neb 168—Application of Chicago, B & Q R Co, 138 N W 2d 816, 179 Neb 470

N C—State ex rel Utilities Commission v Atlantic Coast Line R Co, 64 S E 2d 272, 233 N C 365

Pa—Pennsylvania R Co v Pennsylvania Public Utility Commission, 178 A 2d 856, 197 Pa Super 382—Pennsylvania R Co. v Pennsylvania Public Utility Commission, Super, 195 A 2d 830, 202 Pa Super 402

Considerations in determining if station operated at profit

Kan—Missouri-Kansas-Texas R. Co v City of Savonburg, 348 P 2d 1015, 186 Kan 120

Ky—Com. ex rel Ky R Commission v Illinois Cent R. Co., 358 S W 2d 533

95. Neb—Application of Chicago, B & Q.R Co, supra, n. 92—Application of Chicago, B & Q.R Co, supra, n 92—Application of Missouri Pac R Co, 126 N W 2d 679, 176 Neb 501—Application of Chicago, B & Q R Co, 138 N.W 2d 711, 179 Neb. 489

Pa.—Erie Lackawanna R Co. v Pennsylvania Public Utility Commission, 214 A.2d 268, 206 Pa Super 523.

96. Neb—Application of Chicago, B. & Q R. Co, 52 S W.2d 238, 155 Neb 387—Application of Chicago B. & Q R Co., 52 N W 2d 241, 155 Neb. 392.

97. La.—Texas & N O.R Co v Louisiana Public Service Commission, 161 So 2d 67, 245 La 748

98. Income not major consideration

(2) Neb—Application of Chicago, B & Q R. Co., 138 N.W 2d 816, 179 Neb 470

1. N C—State ex rel Utilities Commission v. Atlantic Coast Line R Co, 69 S E 2d 502, 235 N C. 273—State ex rel. Utilities Commission v. Atlantic Coast Line R. Co., 72 S E.2d 739, 236 N C. 337.

Va.—Pennsylvania R Co v. Com ex rel. State Corp Commission, 79 S E.2d 607, 195 Va 538

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2. La.—Missouri Pac R. Co v Louisiana Public Service Commission, 128 So 2d 644, 241 La 242—Texas & N O.R. Co. v. Louisiana Public Service Commission, 161 So 2d 67, 245 La. 748.

Neb.—Application of Chicago, B. & Q R Co., 52 N W 2d 241, 155 Neb 387—Application of Chicago, B & Q R. Co., 52 N.W.2d 241, 155 Neb 392—Application of Chicago, B. & Q.R. Co., 138 N W.2d 816, 179 Neb. 470

Tex.—C.J.S. cited in Railroad Commission of Tex v. St. Louis Southwestern Ry. Co., Civ App, 474 S.W.2d 19, 21

3. Distance without station immaterial

La.—Kansas City S. Ry. Co v. Louisiana Public Service Commission, 161 So.2d 75, 245 La. 769.

4. Neb—Application of Chicago, R.I & P.R. Co., 101 N W.2d 448, 169 Neb. 867—Application of Chicago, B. & Q.R. Co., 138 N W.2d 816, 179 Neb. 470.

N.M.—Matter of Missouri Pac. R. Co., 605 P.2d 1152, 93 N.M. 759.

Utah—Los Angeles & S.L.R. Co. v Public Service Commission, 240 P.2d 493, 121 Utah 209, mod on oth. grds. and reh. den. 253 P.2d 355, 121 Utah 217.

§ 404. —— Regulation by State or by Board or Commission in General

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18. Statute superseded by later act

Kan—Missouri Pac R Co v State Corp Commission, 389 P 2d 813, 192 Kan 575

23. Miss—New Orleans & N E R Co v Town of Heidelberg, 194 So 2d 866

24. Power not conditioned on objection or lack of objection

Va—Norfolk & W Ry Co v Com, 207 S E 2d 883, 215 Va 214

25. Reinstatement of services

Kan—Missouri Pac R Co v State Corp Commission, 389 P 2d 813, 192 Kan 575

26. Neb—Application of Chicago, B & Q R Co, 52 N W 2d 238, 155 Neb 387—Application of Chicago, B & Q R Co, 52 N W 2d 238, 155 Neb 392—Application of Chicago, R I & P R Co, 101 N W 2d 448, 169 Neb 867

27. Mich—Chesapeake & O Ry Co v Michigan Public Service Commission, 228 N W 2d 843, 59 Mich App. 88

28. Wyo—Union Pac R Co v Public Service Commission of Wyoming, 518 P 2d 20

29. N M—Southern Pac Co v State Corp v Commission, 414 P.2d 489, 76 N.M 257

Evidence sustained findings, etc.

(2) Other findings

S.C.—Atlantic Coast Line R Co. v Public Service Commission, 84 S E 2d 132, 226 S C 136.

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32. S C—State ex rel. Public Service Commission v Atlantic Coast Line R. Co, 72 S E 2d 438, 222 S.C 266, cert den 73 S.Ct. 727, 345 U S 916, 97 L Ed 1350

35. Evidence sustained finding

La—Chicago, R I & P R Co. v Louisiana Public Service Commission, 146 So 2d 161, 243 La. 680.

§ 405. —— Depots and Waiting Rooms

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37. Miss.—Mississippi Public Service Commission v Illinois Cent R Co, 236 So 2d 425.

N J—In re Penn Cent. Passenger Station at Newark, 273 A 2d 42, 57 N J 400.

38. S C—Atlantic Coast Line R Co. v Public Service Commission, supra, n. 29

42. N Y—Smith v Lundy, 301 N Y S 2d 858, 32 A D 2d 991

A statute making the cost to a metropolitan transportation authority of operation of railroad stations within the city chargeable to the city has been construed and applied.[45.5]

45.5. N.Y.—Metropolitan Transp. Authority v City of New York, 301 N.Y.S.2d 245, 32 A.D.2d 197, mod. on oth. grds. 257 N.E.2d 898, 26 N.Y.2d 817, 309 N.Y.S.2d 352.

Statute held retroactive

N Y.—Metropolitan Transp. Authority v City of New York, 301 N.Y.S.2d 245, 32 A.D.2d 197, mod. on oth. grds. 257 N.E.2d 898, 26 N.Y.2d 817, 309 N.Y.S.2d 352.

Cost of liability insurance

N Y—Metropolitan Transp Authority v Nassau County, 315 N Y S 2d 1002, 35 A D 2d 739, affd 271 N E 2d 213, 28 N Y 2d 385, 322 N Y S 2d 228

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73. Requirement held not complied with

Miss—Town v Sumner v Illinois Cent R Co, 111 So 2d 230, 236 Miss 342

Prospective operation

Miss—Mississippi Public Service Commission v Illinois Cent R Co, 236 So 2d 425

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82. S C—Atlantic Coast Line R Co v Public Service Commission, supra, n 29

84. N C—State ex rel Utilities Commission v Atlantic Coast Line R Co., 150 S E 2d 386, 268 N C 242

98. N C—State ex rel Utilities Commission v Atlantic Coast Line R Co 150 S E 2d 386, 268 N C 242

3. Ind—Draper v Evansville, etc, R Co, 74 N E. 889, 165 Ind 117, 119, 6 Ann Cas 569

§ 406. —— Station Accommodations and Facilities in General

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15. U S.—U S v Pennsylvania R Co D.C.Pa, 105 F Supp 615

Okl—St. Louis-San Francisco R Co v State, 515 P 2d 233

17. Okl—St Louis-San Francisco R Co v State, 515 P 2d 233

Consolidating two stations

Fla.—Atlantic Coast Line R. Co v King, 135 So.2d 201

18. Neb.—Chicago, B & Q R. Co. v. Keifer, 69 N W 2d 541, 160 Neb 168—Application of Chicago, R I & P R Co, 101 N W 2d 448, 169 Neb 867—Application of Missouri Pac R Co, 126 N W 2d 679, 176 Neb. 501—Application of Chicago, B & Q R Co, 138 N W 2d 711, 179 Neb 489—Application of Chicago, B & Q R. Co, 138 N W 2d 816, 179 Neb 470

Okl—St Louis-San Francisco R Co v State, 515 P.2d 233

§ 408. —— Other Facilities

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Railroads ⇐217, 225, 226.

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30. S C—Atlantic Coast Line R. Co v. Public Service Commission, 84 S.E.2d 132, 226 S.C 136

31. U.S—William N. Fenstem & Co. v U S, D C N.Y, 209 F Supp 613, affd, C A, 317 F 2d 509.

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56. U.S—U S. v Pennsylvania R Co, supra, n 15

§ 409. —— Abandonment or Discontinuance of Station

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Railroads ⇐225, 226.

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77. La—Missouri Pac R Co v. Louisiana Public Service Commission, 115 So.2d 337, 238 La. 243

Miss.—Village of Myrtle, Union County v St. Louis-San Francisco Ry Co, 121 So.2d 717, 239 Miss. 110

Burden of proof

U S —State of Me Dept of Transp v I C C, C A, 587 F 2d 541

Ark —Chicago, R I & P R Co v Arkansas Commerce Commission, 420 S W 2d 917, 243 Ark 661

S C —State ex rel Public Service Commission v Atlantic Coast Line R Co, 72 S E 2d 438, 222 S C 266, cert den 73 S Ct 727, 345 U S 916, 97 L Ed 1350

Wyo —Union Pac R Co v Public Service Commission of Wyoming, 518 P 2d 17

Order held unreasonable

N H —Boston v M R R. v State, 148 A 2d 652, 102 N H 9

Order held reasonable

U.S —Brown v Consolidated Rail Corp, D C Ohio, 422 F Supp 1251

Neb —Application of Chicago, R I & P R Co, 101 N W 2d 448, 169 Neb 867

Evidence held to justify closing of station

U S —People of State of Ill v I C C, C A, 615 F 2d 743

La —Missouri Pac R Co v Louisiana Public Service Commission, 151 So 2d 362, 244 La 175—Southern Pac Co v Louisiana Public Service Commission, 222 So 2d 499, 254 La 23

Okl —St Louis-San Francisco Ry Co v State, 486 P 2d 734

Evidence held to justify continuance of station

Ga.—Lousville & N R Co v Georgia Public Service Commission, 149 S E 2d 681, 222 Ga 332

Mo —State ex rel St Louis Southwestern Ry Co v Public Service Commission, App, 452 S W 2d 589

Tex —Railroad Commission v Southern Pac Co, Civ App, 468 S W 2d 125, err ref. no rev err

Wyo —Union Pac R Co. v Public Service Commission of Wyoming, 518 P 2d 23

Order held arbitrary and capricious

Miss.—New Orleans & N E R. Co. v Town of Heidelberg, 194 So 2d 866

Findings held not clearly against preponderance of evidence

Ark —Chicago, R I & P R Co v Arkansas Commerce Commission, 420 S W 2d 917, 243 Ark 661

Scope of review

Mo —State ex rel St Louis Southwestern Ry. Co v Public Service Commission, App, 452 S W 2d 589

Wyo —Union Pac R Co v Public Service Commission of Wyoming, 518 P 2d 20

By statute, the commission may allow persons to intervene as a party in proceedings on a railroad's application for discontinuance of stations [78.5]

78.5. Intervention by town properly allowed

Mass —Town of Wilmington v Department of Public Utilities, 165 N.E.2d 99, 340 Mass. 432

Standing to bring action shown

U S —Brown v. Consolidated Rail Corp, D C.Ohio, 422 F Supp. 1251

§ 410. Switches, Spurs, and Sidings

79. Pa.—Rogoff v Buncher Co, 107 P L J 65, revd on oth. grds 151 A 2d 83, 395 Pa 477,

W.Va.—C.J.S. quoted in Sommerville v Pennsylvania R. Co, 155 S E.2d 865, 869, 151 W Va 709

80. U S —I C C. v Memphis Union Station Co, C A Tenn, 360 F 2d 44, cert. den 87 S.Ct 66, 385 U S 830, 17 L.Ed.2d 66

83. Tex.—Southern Pac Transp. Co v. Railroad Commission of Texas, Civ App., 592 S.W.2d 74, err ref. no rev err

§ 411. —— Regulation by State or Municipality

84. U S —New Orleans Terminal Co v Spencer, C A La, 366 F 2d 160, cert den 87 S Ct 974, 386 U S 942, 17 L Ed 2d 873

§ 412. —— Regulation by Board or Commission

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91 Ohio—Baltimore & Ohio R Co v Public Utilities Commission of Ohio, 102 N E 2d 246, 156 Ohio St 282—Akron & B B R Co v Public Utilities Commission, 135 N E 2d 400, 165 Ohio St 316

Pa —Rogoff v Buncher Co, 151 A 2d 83, 395 Pa 477

93. Minn —Chicago, M, St P & P R Co v Chicago Great Western Ry Co, 130 N W 2d 56, 268 Minn 500

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4. Minn —Chicago, M, St P. & P R Co v Chicago Great Western Ry Co, 130 N W 2d 56, 268 Minn, 500

11. Must be supported by hearing and evidence

Ohio—Akron & B B R Co v Public Utilities Commission, 136 N E 2d 400, 165 Ohio St 316

12. Utah—Denver & R G W R Co v Public Service Commission, 230 P 2d 557, 119 Utah 573

14. Ga —Southern Ry Co v Georgia Public Service Commission, 127 S E 2d 12, 218 Ga 157

15. Minn —Chicago, M, St P & P R Co v Chicago Great Western Ry Co, 130 N W 2d 56, 268 Minn 500

§ 413. —— Duty of Railroad

Library References

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23. Railroad not required to provide spur track

U S —Miller & Co of Burmingham v. Lousville & N R Co, C A Ala, 328 F 2d 73, cert den 84 S Ct 1648, 377 U S 966, 12 L Ed 2d 737

Duty of reasonable care

La —Dixie Mach Welding & Metal Works, Inc. v Illinois Cent R Co., App, 285 So 2d 808, writ den., Sup., 288 So 2d 644.

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36. Tex.—Houston Belt & Terminal Ry Co v J Weingarten, Inc, Civ App., 421 S W 2d 431, err ref no rev err

37. Ky —B Perini & Sons v. Southern Ry. Co., 239 S.W 2d 964

Tex —Houston Belt & Terminal Ry Co, v J. Weingarten, Inc, Civ App, 421 S W 2d 431, err ref no rev err

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51. U.S —Missouri Pac. R. Co. v. U.S., C.A., 625 F.2d 178, reh. den 625 F 2d 184

55. Abandonment mandated by statute

U S —New Orleans Terminal Co v Spencer, C.A.La., 366 F 2d 160, cert den. 87 S.Ct 974, 386 U.S. 942, 17 L.Ed 2d 873

56. Evidence

U.S —I C.C v. Memphis Union Station Co, C.A.Tenn, 360 F.2d 44, cert den 87 S.Ct 66, 385 U.S. 830, 17 L Ed 2d 66.

Parties

U S —I C C v Memphis Union Station Co, C A Tenn, 360 F 2d 44, cert den 87 S Ct 66, 385 U S 830, 17 L Ed 2d 66

57. U S —I C C v Memphis Union Station Co, C A Tenn, 360 F 2d 44, cert den 87 S Ct 66, 385 U S 830, 17 L Ed 2d 66

Burden of proof

Ill —I Erlichman Co, Inc v Illinois Commerce Commission, 416 N E 2d 721, 48 Ill Dec 448, 92 Ill App 3d 1091

§ 414. —— Cost of Furnishing and Charge for Use

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§ 416. Train Service and Accommodations

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88. In determining whether patronage justifies expense, etc.

(2) Other matters

Ohio—Detroit, T & I R Co v Public Utilities Commission, 119 N E 2d 73, 161 Ohio St 317

82. Okl —St Louis-San Francisco Ry Co v State, 283 P 2d 519

90. Statute inapplicable to branch lines

N D —Northern Pac Ry Co v Anderson, 95 N W 2d 582—Brotherhood of Locomotive Engineers v Minneapolis, St P & S S M.R Co., 92 N W 2d 650.

Purpose of statute

N J —City of Bayonne v Palmer, 217 A 2d 141, 90 N J Super 245, affd 221 A 2d 741, 47 N.J 520

§ 417. —— Regulation by State or Municipality

92. N J —City of Bayonne v Palmer, 221 A.2d 741, 47 N J 520

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Other statutes pertaining to control of train service by municipalities have been considered.[99.5]

99.5. Mass —Town of Wilmington v Department of Public Utilities, 171 N E 2d 466, 341 Mass 599

1. N.D —C.J.S quoted at length in Chicago, M, St P. & P R. Co v Public Service Commission, 98 N.W 2d 101, 108

3. N D.—Chicago, M, St P & P R Co. v. Public Service Commission, 98 N.W.2d 101.

§ 418. —— Regulation by Board or Commission

Library References

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18. Neb —Application of Chicago, B & Q.R. Co., 87 N.W 2d 630, 166 Neb 29

Jurisdiction

N J —Pennsylvania R. Co. v. Board of Public Utility Com'rs, 93 A 2d 339, 11 N J 43.

Ohio—City of Columbus v. New York Cent R. Co., 172 N.E 2d 138, 112 Ohio App. 314.

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20. Restoring operation of trains

(2) Other cases

Ark.—Chamber of Commerce of City of Hot Springs v. Chicago, R.I. & P.R. Co, 249 S.W 2d 8, 220 Ark. 631

Pa—New York Cent R Co v Pennsylvania Public Utility Commission, 149 A 2d 562, 188 Pa Super 647

Tex—Railroad Commission of Tex v Texas & N R Co, Civ App, 266 S W 2d 954, err ref no rev err

21. Mass—Town of Wilmington v Department of Public Utilities, 171 N E 2d 466, 341 Mass 599

Minn—State v Duluth, M & I R Ry Co, 75 N W 2d 398, 246 Minn 383, app dism 77 S Ct 46, 352 U S. 804, 1 L Ed 2d 38

Public necessity

N J—Pennsylvania R Co v Board of Public Utility Com'rs, supra, n 18

24. Ind—New York Cent R Co v Public Service Commission, 183 N E 2d 609, 133 Ind App 680

Minn—State v Duluth, M & I R Ry Co, 75 N W 2d 398, 246 Minn 383, app dism 77 S Ct 46, 352 U S. 804, 1 L Ed 2d 38

26. N D.—C.J S. quoted in Chicago, M, St P & P R Co v Public Service Commission, 98 N W 2d 101, 108

29. Miss—C.J.S cited in Mississippi Public Service Com'rs v Illinois Cent. R Co, 67 So 2d 472, 477, 218 Miss 531

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34. U S—City of New York v U S, D C N Y., 337 F Supp 150, op supp 344 F Supp 929.

La—Gulf, M & O R. Co v Louisiana Public Service Commission, 77 So 2d 548, 226 La 952

Me—Maine Cent R Co v Public Utilities Commission, 163 A 2d 633, 156 Me 284.

Mass—Town of Wilmington v Department of Public Utilities, 171 N E 2d 466, 341 Mass 599

Mich—Chesapeake & O Ry Co v Public Service Commission, 147 N W 2d 469, 5 Mich App. 492, affd. 167 N W.2d 438, 382 Mich 8

Neb.—Application of Chicago, B & Q R Co., 47 N W 2d 577, 154 Neb. 281—Application of Chicago & N W Ry Co., 60 N.W.2d 662, 157 Neb. 594—Application of Chicago, R I & P R Co, 87 N W 2d 616, 166 Neb. 32—Application of Chicago & N W Ry Co, 91 N W 2d 312, 167 Neb 61

Ohio—City of Columbus v Public Utilities Commission, 197 N.E 2d 340, 176 Ohio St 42

Okl—St Louis-San Francisco Ry Co v State, 486 P.2d 734

Tenn.—Louisville & N R Co v Fowler, 271 S.W 2d 188, 197 Tenn 266

Where the public does not use the facilities, etc—Detroit, T. & I.R. Co. v. Public Utilities Commission, 119 N.E 2d 73, 161 Ohio St 317.

Condition

Wis.—City of Princeton v Public Service Commission, 68 N.W 2d 420, 268 Wis. 542.

In New Jersey

(3) Other cases.

N.J—Application of Central R. Co. of N J, 127 A.2d 436, 43 N J Super 13—Application of New York, S. & W.R. Co., 136 A.2d 408, 25 N.J 343—Application of Delaware, L & W R R., 136 A 2d 413, 25 N.J. 353—Pennsylvania R. Co. v. Board of Public Utility Com'rs, 137 A 2d 76, 48 N.J.Super 216—Sprissler v Pennsylvania-Reading Seashore Lines, 211 A 2d 783, 45 N.J 127—Brotherhood of R R Trainmen v. Central R. Co. of N J., 221 A.2d 735, 47 N.J. 508—City of Bayonne v. Palmer, 221 A 2d 741, 47 N.J 520—Brotherhood of R.R Trainmen v. Central R. Co. of N.J, 224 A.2d 28, 92 N.J Super. 466—United Transp Union v. State, 271 A.2d 9, 112 N.J.Super. 290.

Statutory exemption

Mich.—Chesapeake & O. Ry Co. v. Michigan Public Service Commission, 167 N W.2d 438, 382 Mich 8.

35. U S.—Gulf, M & O.R. Co. v Louisiana Public Service Commission, D.C.La., 120 F.Supp. 250.

Mich.—Chesapeake & O. Ry. Co. v. Michigan Public Service Commission, 167 N.W.2d 438, 382 Mich. 8.

Neb.—Application of Chicago & N.W. Ry. Co., supra, n 34.

Pa—New York Cent R Co v Pennsylvania Public Utility Commission, 149 A 2d 562, 188 Pa Super 647

Order requiring service proper

Mont—Great Northern Ry Co v Board of R R Com'rs, 298 P 2d 1093, 130 Mont 250, app dism 77 S Ct 146, 352 U S 904, 1 L Ed 2d 114

Under statutory contract with state

N J—City of Bayonne v Palmer, 221 A 2d 741, 47 N J 520

38. Ind—New York Cent R Co v Public Service Commission, 183 N E 2d 609, 133 Ind App 680

40. Fla—Florida East Coast Ry Co v Mason, 177 So 2d 217

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41. Pa—Commuters' Committee v Pennsylvania Public Utility Commission, 88 A 2d 420, 170 Pa Super 596

43. Mich—Chesapeake & O Ry Co v Public Service Commission, 147 N W 2d 469, 5 Mich App 492, affd 167 N W 2d 438, 382 Mich 8

Minn—Great Northern Ry Co v Public Service Commission of Minn, 169 N W 2d 732, 284 Minn 217

46 Ill—Egan v. Chicago, A & E Ry Co, 153 N E 2d 286, 19 Ill App 2d 130

Or—Morgan v Portland Traction Co, 331 P 2d 344, 222 Or 614

47. Discontinuance of service not involving abandonment

Ohio—Baltimore & O Rd. Co v Public Utilities Commission, 242 N.E.2d 577, 16 Ohio St 2d 60

49. No contest of order's validity

Or.—Morgan v Portland Traction Co, 331 P 2d 344, 222 Or 614

50. N D—Chicago, M, St P & P R Co. v Public Service Commission, 98 N W 2d 101

Tenn—Louisville & N R. Co v Fowler, supra, n. 34

Order to restore service not authorized by general power to make reasonable regulations and orders

Ariz.—Southern Pac Co v Arizona Corp Commission, 404 P.2d 692, 98 Ariz 339.

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52. Ill.—Schussler v Illinois Commerce Commission, 102 N E 2d 101, 410 Ill 289.

Mich.—Chicago, M., St. P & P R Co v Michigan Public Service Commission, 50 N W 2d 884, 332 Mich. 291

56. Minn.—State v Duluth, M & I R Ry. Co, 75 N.W 2d 398, 246 Minn 383, app dism 77 S Ct 46, 352 U.S. 804, 1 L.Ed.2d 38

N.Y—Delaware & H R. Corp v. Public Service commission, 136 N Y S.2d 510, 285 App.Div 326

Evidence held sufficient

N.J—Pennsylvania R Co. v Board of Public Utility Com'rs, supra, n 18.

Okl.—Chicago, R.I. & P R Co v State, 284 P.2d 172

Tenn.—Louisville & N.R. Co v. Fowler, 271 S.W 2d 188, 197 Tenn 266.

Wis.—Chicago, M, St P. & P Ry. Co v. Public Service Commission, 66 N.W.2d 351, 267 Wis. 402.

Evidence held insufficient

Mich—New York Cent. R. Co v Michigan Public Service Commission, 167 N W.2d 364, 15 Mich App. 699.

67. Kan.—St. Louis-San Francisco Ry Co. v. City of Fall River, 353 P.2d 505, 187 Kan. 23.

Neb.—Application of Chicago, R.I. & P.R. Co., 87 N.W 2d 616, 166 Neb. 32.

Va.—Southern Ry. Co. v. Com., 86 S.E.2d 839, 196 Va. 1066

69. Okl.—Missouri-K.-T. R. Co. v. State, 230 P.2d 727, 204 Okl. 446

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74. Other orders held not unreasonable

Neb—Application of Chicago, B & Q R Co, 89 N W 2d 837, 166 Neb 567

76. Ariz—Safford Chamber of Commerce v Corporation Commission, 303 P 2d 713, 81 Ariz 226

Ark—Missouri Pac R Co v Richie Grocer Co, 625 S W 2d 531, 274 Ark 437

Mass—City of Newton v Department of Public Utilities, 160 N E 2d 108, 339 Mass 535

Pa—Commuters' Committee v Pennsylvania Public Utility Commission, supra, n 41

Particular rule held waived

Neb—Application of Chicago & N W Ry Co, 60 N W 2d 662, 157 Neb 594—Application of Chicago, B & Q R Co, 89 N W 2d 837, 166 Neb 567

Necessity for application

Tex—Railroad Commission of Tex v Texas & N O R Co, Civ App, 266 S W 2d 954, err ref no rev err

77. Ark—Missouri Pac R Co v Richie Grocer Co, 625 S W 2d 531, 274 Ark 437

Standing to protest discontinuance of service acquired after abandonment of service held sufficient

Pa—New York Cent R Co v Pennsylvania Public Utility Commission, 149 A 2d 562, 188 Pa Super 647

By statute, the commission may allow any person to intervene as a party in proceedings to discontinue service [77.5]

77.5. Town properly allowed to intervene

Mass—Town of Wilmington v Department of Public Utilities, 165 N E 2d 99, 340 Mass 432.

78. U S—Meyers v Jay St Connecting R R, C.A. N Y., 262 F 2d 676

Idaho—Application of Union Pac R. Co, 340 P 2d 1103, 81 Idaho 300

Petition and proof held not insufficient

Ala.—Alabama Public Service Commission v Southern Ry Co, 111 So.2d 214, 269 Ala. 63

79. Ky—Com ex rel Kentucky R R Commission v Illinois Cent R. Co, 299 S W 2d 803

Or—Portland Traction Co v Hill, 372 P 2d 501, 231 Or 354

Wyo—Application of Chicago & N W Ry Co, 334 P.2d 519, 79 Wyo 343

Burden may not be shifted

Mont—Great Northern Ry Co v Board of R.R. Com'rs, 298 P.2d 1093, 130 Mont. 250, app dism 77 S Ct 146, 352 U S 904, 1 L Ed 2d 114

80. Okl—St Louis-San Francisco Ry v State, 271 P 2d 338

Pa—Commuters' Committee v Pennsylvania Public Utility Commission, supra, n 41

Burden of proof held met

Or—Portland Traction Co v Hill 372 P 2d 501, 231 Or. 354

Tex.—Railroad Commission of Tex. v Texas & N O R. Co, supra, n, 76

Accounting not necessary

Tex—Railroad Commission of Tex v. Texas & N O.R. Co., supra, n 76

81. Ala—Alabama Public Service Commission v Southern Ry. Co, 111 So 2d 214, 269 Ala. 63.

82. Ariz.—Southern Pac. Co v Arizona Corp. Commission, 404 P 2d 692, 98 Ariz. 339

Neb—Application of Chicago & N.W. Ry. Co., 91 N W 2d 312, 167 Neb 61.

N D.—State ex rel. Public Service Commission v. Northern Pac Ry Co., 75 N.W 2d 129

Notice

Wis.—Village of Cobb v Public Service Commission, 107 N W 2d 595, 12 Wis 2d 441

83. N J—Brotherhood of R.R. Trainmen v Palmer, 221 A.2d 721, 47 N J 482

Pa—Sherwood v Pennsylvania Public Utility Commission, 109 A 2d 220, 177 Pa Super 6

Statute held complied with

Okl—Chicago, R I & P R Co v State, 281 P 2d 172

84. Ariz—Southern Pac Co v Arizona Corp Commission, 404 P 2d 692, 98 Ariz 339

Ky—City of Middlesboro v Louisville & N R Co, 252 S W.2d 680

Mass—City of Newton v Department of Public Utilities, 160 N.E 2d 108, 339 Mass 535

N.J—Susquehanna Transit Commuters Ass'n v Board of Public Utility Com'rs, 151 A 2d 9, 55 N J Super 377

88. Ind—Petition of Chicago, M, St P & P R Co, 159 N.E 2d 288, 129 Ind App 626

Kan—Atchison, T & S F Ry Co v State Corp Commission, 322 P 2d 715, 182 Kan 603

Minn—State v Duluth, M & I R Ry Co, 75 N W 2d 398, 246 Minn 383, app dism 77 S Ct 46, 352 U S 804, 1 L Ed 2d 38

Mont.—Chicago, M, St P & P R Co. v Board of R.R. Com'rs, 255 P 2d 346, 126 Mont 568, cert den 74 S Ct 40, 346 U S 823, 98 L Ed 349

Neb—Application of Chicago & N W Ry Co, 91 N W 2d 312, 167 Neb 61

Jurisdiction of regulatory body

(2) Other statements

N D.—Brotherhood of Locomotive Engineers v Minneapolis, St P. & S S M R Co, 92 N W 2d 650

Judicial issues

U S.—Illinois Cent. R Co v Mississippi Public Service Commission, D C Miss, 135 F Supp 304.

Review held not to lie

Ky—City of Middlesboro v. Louisville & N R Co, supra, n 84.

Pa.—Pennsylvania R Co v. Pennsylvania Public Utility Commission, 152 A 2d 422, 396 Pa 34

Motion for dismissal of appeal

Wis—City of Princeton v Public Service Commission, 68 N W.2d 420, 268 Wis 542.

Extent of review

N J—Application of Delaware, L & W R R, 136 A 2d 413.

N D—Northern Pac Ry Co v Anderson, 95 N W 2d 582

Wis—Village of Cobb v. Public Service Commission, 107 N W 2d 595, 12 Wis.2d 441

Effect of stay order

Ala.—Ex parte Alabama Public Service Commission, 106 So 2d 158, 268 Ala 322

Or—Morgan v Portland Traction Co, 331 P.2d 344, 222 Or. 614

Request properly refused

Mass.—Town of Wilmington v Department of Public Utilities, 171 N.E 2d 466, 341 Mass 599

Review limited to courts of competent jurisdiction

S C—City of Columbia v South Carolina Public Service Commission, 131 S E.2d 705, 242 S C 528

Certiorari appropriate where appeal inadequate

Ariz—Southern Pac Co v. Arizona Corp. Commission, 404 P 2d 692, 98 Ariz. 339

89. Mass—City of Newton v. Department of Public Utilities, 160 N E.2d 108, 339 Mass 535

Pa—Commuters' Committee v Pennsylvania Public Utility Commission, supra, n. 41—Pennsylvania R. Co. v. Pennsylvania Public Utility Commission, 152 A 2d 422, 396 Pa. 34.

Record

(2) Other cases

N.J—Susquehanna Transit Commuters Ass'n v. Board of Public Utility Com'rs, 151 A.2d 9, 55 N J Super. 377,

Pa.—City of New Castle v. Pennsylvania Public Utility Commission, 94 A.2d 57, 172 Pa.Super. 569

Refusal of jurisdiction

Mont—Great Northern Ry Co v Board of R R Com'rs, 298 P 2d 1093, 130 Mont 250, app dism 77 S Ct 146, 352 U S 904, 1 L Ed 2d 114

Appeal held moot

Pa—Pennsylvania R Co v Pennsylvania Public Utility Commission, 146 A 2d 360, 187 Pa Super 587

90. Ala—Alabama Public Service Commission v Southern Ry Co, 111 So 2d 214, 269 Ala 63

Idaho—Application of Union Pac R Co, 340 P 2d 1103, 81 Idaho 300

Kan—Chicago, R I & P R Co v State Corp Commission, 282 P 2d 405, 177 Kan 697

Ky—Railroad Commission of Ky v Illinois Cent R Co, 265 S W 2d 797

Mass—City of Newton v Department of Public Utilities, 160 N E 2d 108, 339 Mass 535

Neb—Application of Chicago, B & Q R Co, 87 N W 2d 630, 166 Neb 29

N J—Application of New York, S & W R Co, 136 A 2d 408, 25 N J 343—Pennsylvania R Co v Board of Public Utility Com'rs, 137 A 2d 76, 48 N J Super 216—Petition of Erie-Lackawanna R Co, 227 A 2d 129, 48 N J 567

N Y—Public Service Commission v Norton, 109 N E 2d 705, 304 N Y 522

N C—State ex rel Utilities Commission v Carolina Coach Co, 118 S E 2d 762, 254 N C 319

Pa—Commuters' Committee v Pennsylvania Public Utility Commission, supra, n 41—Sherwood v Pennsylvania Public Utility, Commission, 109 A 2d 220, 177 Pa Super 6

Utah—Los Angeles & S L R Co v. Public Service Commission, 240 P 2d 493, 121 Utah 209, mod on oth grds and reh den 253 P 2d 355, 121 Utah 217

Sufficiency of evidence

(2) Other cases

U S—City of New York v U S, D C N Y., 337 F.Supp. 150, op supp 344 F Supp. 929.

Ark—Arkansas Commerce Commission v Kansas City Southern Ry Co, 428 S W 2d 83, 244 Ark 912

Mo—State ex rel Chicago, R.I & P R Co. v Public Service Commission, 312 S.W 2d 791

N J—In re New Jersey & New York R. Co, 96 A 2d 526, 12 N J 281, app. dism 74 S Ct 123, 346 U S 868, 98 L Ed 378—Application of Central R Co. of N J, 102 A 2d 80, 29 N J Super 32

N C—State ex rel. Utilities Commission v Atlantic Coast Line R Co, 78 S.E.2d 780, 238 N C 701

N D—Chicago, M, St P & P R. Co v Public Service Commission, 98 N W 2d 101

Okl—Missouri-Kansas-Texas R Co v State, 266 P 2d 642

Particular matters considered

(4) Other matters

Miss—Mississippi Public Service Commission v Illinois Cent R. Co, 67 So 2d 472, 218 Miss 531

N J.—Susquehanna Transit Commuters Ass'n v Board of Public Utility Com'rs, 151 A 2d 9, 55 N J Super 377

N.D—State ex rel Northern Pac Transport Co v Public Service Commission, 82 N.W.2d 597.

Considered separately

Minn.—State v Duluth, M. & I R Ry. Co., 75 N W 2d 398, 246 Minn. 383, app dism. 77 S.Ct. 46, 352 U.S. 804, 1 L.Ed.2d 38

Considered together

N D—Northern Pac. Ry. Co. v. Anderson, 95 N.W.2d 582

91. N.J.—Application of Central R. Co., of N.J., 102 A.2d 80, 29 N J Super. 32—Brotherhood of R R. Trainmen v. Central R. Co of N.J., 221 A 2d 735, 47 N.J. 508—Petition of Erie-Lackawanna R Co., 227 A 2d 129, 48 N.J 567.

N C—State ex rel. Utilities Commission v. Atlantic Coast Line R. Co, supra, n. 90

Va.—Southern Ry. Co. v. Com., 68 S.E.2d 552, 193 Va. 291

92. Ariz.—Safford Chamber of Commerce v. Corporation Commission, 303 P 2d 713, 81 Ariz. 226

Mass—Town of Wilmington v Department of Public Utilities, 171 N E 2d 466, 341 Mass 599

Minn—State v Duluth, M & I R Ry Co, 75 N W 2d 398, 246 Minn 383, app dism 77 S Ct 46, 352 U S 804, 1 L Ed 2d 38

N J—Petition of Erie—Lackawanna R Co, 227 A 2d 129, 48 N J 567

Or—Morgan v Portland Traction Co, 331 P 2d 344, 222 Or 614

93. Minn—State v Duluth, M & I R Ry Co, 75 N W 2d 398, 246 Minn 383, app dism 77 S Ct 46, 352 U S 804, 1 L Ed 2d 38

N J—Brotherhood of R R Trainmen v Central R Co of N J, 221 A 2d 735, 47 N J 508

94. Ariz—Safford Chamber of Commerce v Corporation Commission, 303 P 2d 713, 81 Ariz 226

Minn—State v Duluth, M & I R Ry. Co, 75 N W 2d 398, 246 Minn 383, app dism 77 S Ct 46, 352 U S 804, 1 L Ed 2d 38

N.J—Pennsylvania R Co v Board of Public Utility Com'rs, 137 A 2d 76, 48 N J Super 216—Susquehanna Transit Commuters Ass'n v Board of Public Utility Com'rs, 151 A 2d 9, 55 N J Super 377—Petition of Erie-Lackawanna R Co, 227 A 2d 129, 48 N J 567

N C—State ex rel Utilities Commission v Southern Ry Co, 118 S W 2d 21, 254 N C 73

Ohio—City of Columbus v. Public Utilities Commission, 197 N.E 2d 340, 176 Ohio St 42

Okl—Missouri-Kansas-Texas R. Co v State, 319 P 2d 590—St Louis-San Francisco Ry Co. v State, 319 P 2d 592

Tenn—Louisville & N R Co v Fowler, 271 S W 2d 188, 197 Tenn 266

Va—Southern Ry Co. v Com, 86 S E 2d 839, 196 Va 1086

Wis—Village of Cobb v Public Service Commission, 107 N W 2d 595, 12 Wis 2d 441

Wyo—Application of Chicago & N W. Ry Co., 334 P.2d 519, 79 Wyo 343

Evidence held insufficient

Okl.—St. Louis-San Francisco Ry Co. v State, 301 P 2d 228

Pa—Sherwood v. Pennsylvania Public Utility Commission, 109 A 2d 220, 177 Pa Super 6

Findings supported by evidence

U S—Interstate Commerce Commission v Maine Cent. R Co, C A Vt, 505 F 2d 590

Idaho—Application of Union Pac R Co, 340 P 2d 1103, 81 Idaho 300

Mass.—City of Newton v Department of Public Utilities, 160 N E.2d 108, 339 Mass 535—Town of Wilmington v. Department of Public Utilities, 171 N E 2d 466, 341 Mass 599

Pa—Norfolk & W Ry Co v Pennsylvania Public Utility Commission, 413 A 2d 1037, 489 Pa 109

Wis—City of Princeton v Public Service Commission, 68 N.W 2d 420, 268 Wis. 542.

Refusal to grant held erroneous

La—Chicago, R.I & P R Co v Louisiana Public Service Commission, 100 So.2d 471, 234 La 462

95. Ill.—Thompson v. Illinois Commerce Commission, 115 N.E.2d 622, 1 Ill 2d 350

Kan.—Chicago, R.I. & P.R. Co v State Corp. Commission, 282 P.2d 405, 177, Kan. 697—Atchison, T & S.F Ry Co. v. State Corp Commission, 322 P 2d 715, 182 Kan. 603

97. Ark—Chamber of Commerce of City of Hot Springs v. Chicago, R I & P R. Co, 249 S W.2d 8, 220 Ark 631.

N.D.—Brotherhood of Locomotive Engineers v. Minneapolis, St. P. & S.S.M.R. Co., 92 N W.2d 650

98. Fla.—Florida East Coast Ry Co. v. Mason, 177 So.2d 217.

Ill.—Thompson v Illinois Commerce Commission, supra, n. 95.

Ind.—Petition of Chicago, M., St. P. & P.R. Co, 159 N E.2d 288, 129 Ind.App. 626

Kan—Atchison, T & S F Ry Co v State Corp Commission, 322 P 2d 715, 182 Kan 603

La—Texas & N O R Co v Louisiana Public Service Commission, 106 So 2d 438, 235 La 973

Mich—Chicago, M, St P & P R Co v Michigan Public Service Commission, 61 N W 2d 24, 338 Mich 9

Neb—Application of Chicago, B & Q R Co, 87 N W 2d 630, 166 Neb 29

N H—Boston & M R v State, 89 A 2d 764, 97 N H 380

Finding unsupported by evidence

(2) Other findings

Ky—Railroad Commission of Ky v Illinois Cent R Co, 265 S W 2d 797

N D—Northern Pac Ry Co v Anderson, 95 N W 2d 582

Ohio—Baltimore & O R Co v Public Utilities Commission, 113 N.E 2d 249, 160 Ohio St 67.

Effect of judgment

Neb—Save the Trains Ass'n v Chicago & N W Ry Co, 95 N.W 2d 334, 168 Neb. 180

99. U S—Atlantic Coast Line R Co v. Alabama Public Service Commission, D C Ala, 92 F Supp 579, revd without discussion 71 S Ct 1012, 340 U.S 943, 95 L Ed 1369—Penn Cent Co v Public Utilities Commission of State of Conn., D C Conn, 296 F Supp 893

Sufficiency of evidence

(3) Other cases

Ky—City of Middlesboro v. Louisville & N R Co, 252 S.W 2d 680

La.—Texas & N O R Co v Louisiana Public Service Commission, 98 So.2d 189, 233 La 787.

Necessity for exhaustion of administrative remedies

Ohio—City of Columbus v New York Cent R Co, 172 N E 2d 138, 112 Ohio App 314

1. Ark—Chamber of Commerce of City of Hot Springs v. Chicago, R I & P R Co, 249 S W.2d 8, 220 Ark 631

Minn.—State v. Duluth, M & I R Ry Co, 75 N W.2d 398, 246 Minn. 383, app dism. 77 S.Ct 46, 352 U S. 804, 1 L.Ed.2d 38

N H.—Tilton v Boston & Me. R R., 113 A 2d 543, 99 N.H 503

N J.—United Transp Union v. State, 271 A 2d 9, 112 N.J.Super 290.

N.Y.—New York Cent. R. Co. v Public Service Commission, 103 N Y S 2d 217, 278 App.Div. 725, rearg and app. den 105 N Y.S 2d 383, 278 App Div 865.

Remand

N.J.—Application of New York, S. & W.R Co, 136 A 2d 408, 25 N J. 343.

N D—Northern Pac Ry. Co. v Anderson, 95 N W.2d 582

2. Idaho—Application of Union Pac R Co, 340 P.2d 1103, 81 Idaho 300.

Kan—Chicago, R.I & P.R. Co. v. State Corp Commission, 282 P.2d 405, 177 Kan. 697.

Mich.—Chesapeake & O. Ry. Co. v. Michigan Public Service Commission, 167 N.W.2d 438, 382 Mich 8.

N.J.—Brotherhood of R.R. Trainmen v. Central R. Co. of N.J., 221 A.2d 735, 47 N.J 508.

Public necessity and convenience

Cal—Southern Pac Co v Public Utilities Commission, 269 P.2d 70, 41 C.2d 354, app dism. 74 S Ct. 313, 346 U.S. 919, 98 L Ed. 414.

N.Y—New York Cent. R. Co. v. Public Service Commission, supra, n. 1.

The court may remand the case to the commission to make such orders as may be proper in light of subsequent development.[3.5]

3.5. Court unable to determine dissatisfactions arising from change of service

Mo—State ex rel Chicago R I & P R Co v Public Service Commission, 335 S W 2d 182

Proceedings on remand

Mo—State ex rel Chicago, R I & P R Co v Public Service Commission, 355 S W 2d 45

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4. Ill—Illinois Cent R Co v Illinois Commerce Commission, 101 N E 2d 588, 410 Ill 77—Schussler v Illinois Commerce Commission, 102 N E 2d 101, 410 Ill 289

Kan—St Louis-San Francisco Ry Co v City of Fall River, 353 P 2d 505, 187 Kan 23

La—C.J.S. black letter summary quoted in Texas & N O R Co v Louisiana Public Service Commission, 98 So 2d 189, 190, 233 La 787—C.J.S black letter summary quoted in Chicago, R I & P R Co v Louisiana Public Service Commission, 100 So 2d 471, 473, 234 La 462—Missouri Pac R Co v Louisiana Public Service Commission, 115 So 2d 337, 238 La. 243—C J.S. cited in Railway Exp Agency, Inc v Louisiana Public Service Commission, 145 So 2d 18, 31, 243 La. 518.

Me—Maine Cent R Co v Public Utilities Commission, 163 A 2d 633, 156 Me 284

Mass—City of Newton v Department of Public Utilities, 160 N E 2d 108, 339 Mass 535

Mo—State ex rel Chicago, R I & P R Co v Public Service Commission, 312 S W 2d 791

Neb.—Application of Chicago & N W Ry Co, 60 N W 2d 662, 157 Neb 594—Application of Chicago, R I & P.R Co, 101 N W 2d 448, 169 Neb 867—Application of Chicago, B. & Q R Co, 109 N.W 2d 369, 172 Neb 321—Application of Chicago, B. & Q R Co., 138 N W.2d 711, 179 Neb 489

N H—Boston & M R v State, 89 A 2d 764, 97 N H 380.

N J—In re New Jersey & New York R Co, 96 A 2d 526, 12 N.J 281, app dism 74 S Ct 123, 346 U S 868, 98 L Ed 378—Application of Central R Co of N J, 102 A 2d 80, 29 N J Super. 32—Application of New York, S & W R Co, 136 A 2d 408, 25 N J 343—Susquehanna Transit Commuters Ass'n v. Board of Public Utility Com'rs, 151 A 2d 9, 55 N.J.Super. 377

N.D.—Chicago, M, St P. & P R. Co v Public Service Commission, 98 N W.2d 101

W.Va.—Western Maryland Ry Co v Public Service Commission, 106 S.E.2d 923, 144 W Va 110

5. Kan—Chicago, R.I. & P.R Co v State Corp Commission, 282 P 2d 405, 177 Kan 697

Mont—Chicago, M, St. P & P R. Co. v. Board of R.R Com'rs, 255 P.2d 346, 126 Mont 568, cert den. 74 S.Ct. 40, 346 U S 823, 98 L Ed 349

Neb—Application of Chicago, B & Q.R. Co, 87 N.W 2d 630, 166 Neb. 29

N.C.—State ex rel. Utilities Commission v Atlantic Coast Line R Co, 78 S E.2d 780, 238 N C. 701

Pa.—Commuters' Committee v Pennsylvania Public Utility Commission, 88 A 2d 420, 170 Pa Super 596.

Inconvenience to few person and businesses

(2) Other cases

Ill—Illinois Cent. R Co v Illinois Commerce Commission, supra, n 4.

Mich.—Chicago, M., St. P. & P R. Co. v Michigan Public Service Commission, 61 N.W 2d 24, 338 Mich. 9.

Neb.—Application of Chicago & N W Ry Co, supra, n. 4.

N J.—Susquehanna Transit Commuters Ass'n v. Board of Public Utility Com'rs, 151 A.2d 9, 55 N J Super 377.

W.Va.—Western Maryland Ry Co v. Public Service Commission, 106 S E.2d 923, 144 W.Va. 110

6. Ill.—Illinois Cent. R. Co. v. Illinois Commerce Commission, supra, n. 4.

La.—Texas & N.O.R. Co. v. Louisiana Public Service Commission, 106 So.2d 438, 235 La 973—Missouri Pac R Co v Louisiana Public Service Commission, 128 So 2d 644, 241 La 242

Mo—State ex rel Chicago, R I & P R Co v Public Service Commission, 312 S W 2d 791

N H—Boston & M R v State, supra, n 4

N J—Susquehanna Transit Commuters Ass'n v Board of Public Utility Com'rs, 151 A 2d 9, 55 N J Super 377

N C—State ex rel Utilities Commission v Southern Ry Co, 118 S E 2d 21, 254 N C 73

Ohio—Detroit, T & I R Co v Public Utilities Commission, 119 N E 2d 73, 161 Ohio St 317

Va—Southern Ry Co v Com, 86 S E 2d 839, 196 Va 1086

Particular matters to be considered

(4) Other matters

Ala—Alabama Public Service Commission v Southern Ry Co, 111 So 2d 214, 269 Ala 63

Ariz—Safford Chamber of Commerce v Corporation Commission, 303 P 2d 713, 81 Ariz 226

Cal.—Southern Pac Co v Public Utilities Commission, 260 P 2d 70, 41 C 2d 354, app dism 74 S Ct 313, 346 U S 919, 98 L Ed 414

Ill—Thompson v Illinois Commerce Commission, 115 N E 2d 622, 1 Ill 2d 350

Ky—Com ex rel Kentucky R R. Commission v Illinois Cent R Co, 299 S W 2d 803

Miss—Mississippi Public Service Commission v Illinois Cent R Co, 67 So 2d 472, 218 Miss 531.

Mont—Chicago, M, St P & P R. Co v Board of R R Com'rs, supra, n 5

Neb—Application of Chicago, R I & P R. Co., 101 N W 2d 448, 169 Neb 867—Application of Chicago, B & Q R Co, 109 N W 2d 369, 172 Neb 321

N J—Pennsylvania R Co v Board of Public Utility Com'rs, 93 A 2d 339, 11 N.J 43—Application of Central R Co of N J, supra, n. 4—Pennsylvania R Co v Board of Public Utility Com'rs, 137 A 2d 76, 48 N J Super. 216—Brotherhood of R.R Trainmen v Central R Co of N J, 224 A 2d 28, 92 N J Super 466

Pa—Commuters' Committee v Pennsylvania Public Utility Commission, supra, n 5

W Va—Western Maryland Ry Co v Public Service Commission, 106 S E 2d 923, 144 W Va. 110

Wis—Chicago, M, St P & P Ry Co v Public Service Commission, 66 N W 2d 351, 267 Wis 402—City of Princeton v Public Service Commission, 68 N W 2d 420, 268 Wis 542

Evidence

N J—In re New Jersey & New York R Co, 96 A 2d 526, 12 N J 281, app dism 74 S.Ct 123, 346 U S 868, 98 L Ed 378

Income tax not considered in out-of-pocket losses

Mo—State ex rel. Chicago, R.I. & P R. Co v Public Service Commission, 335 S W 2d 182.

7. U S—Hunter v Missouri-Kansas-Texas R Co, D C.Okl, 276 F Supp 936—U S. v Toledo, P & W R Co, D C Ind, 280 F Supp 243

Neb—Application of Chicago, R.I & P R. Co, 87 N W 2d 616, 166 Neb 32—Application of Chicago & N W Ry Co, 91 N W 2d 312, 167 Neb 61

Elements of cause of action

Ill.—Boyer v. Atchison, T. & S.F Ry Co, 230 N E 2d 173, 38 Ill 2d 31, cert. den. 88 S.Ct 1038, 390 U.S. 949, 19 L Ed 2d 1140.

8. Ariz.—Safford Chamber of Commerce v Corporation Commission, 303 P.2d 713, 81 Ariz 226

Ark.—Chamber of Commerce of City of Hot Springs v Chicago, R.I. & P.R. Co., supra, n 1

Ill.—Schussler v. Illinois Commerce Commission, supra, n. 4.

Ky—Com. ex. rel. Kentucky R.R. Commission v. Illinois Cent R. Co, 299 S.W.2d 803.

Mass.—Town of Wilmington v. Department of Public Utilities, 171 N.E 2d 466, 341 Mass. 599.

Neb.—Application of Chicago, R.I & P R Co., 101 N W.2d 448, 169 Neb. 867—Application of Chicago, B. & Q R Co, 109 N.W.2d 369, 172 Neb

321—Application of Chicago, B & Q R Co, 133 N W 2d 711, 179 Neb 489

N J —In re New Jersey & New York R Co, supra, n 6

Okl —St Louis-San Francisco Ry Co v State, 262 P 2d 168

Tenn —Louisville & N R Co v Fowler, 271 S W 2d 188, 197 Tenn 266

Wis —City of Princeton v Public Service Commission, 68 N W 2d 420, 268 Wis 542

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9. U S —Atlantic Coast Line R Co v Florida R R & Public Utilities Commission, D C Fla, 96 F Supp 583—Louisville & N R Co v Alabama Public Service Commission, D C Ala, 94 F Supp 892, revd 72 S.Ct 34, first case, 342 U S 802, 96 L Ed 608—Louisville & N R Co v Alabama Public Service Commission, D C Ala, 94 F Supp 893, revd without discussion 72 S Ct 34, second case, 342 U S 802, 96 L Ed 608

Ill.—Illinois Cent R Co v Illinois Commerce Commission, supra, n 4—Schussler v Illinois Commerce Commission, supra, n 4

Mich —Chicago, M, St P. & P.R Co v Michigan Public Service Commission, 61 N W 2d 24, 338 Mich 9

Neb —Application of Chicago, B & Q R Co, 87 N W 2d 630, 166 Neb 29—Application of Chicago & N.W Ry Co., 91 N W 2d 312, 167 Neb 61—Application of Chicago, R I & P R Co, 101 N.W 2d 448, 169 Neb 867—Application of Chicago, B & Q R Co, 109 N W 2d 369, 172 Neb 321—Application of Chicago, B & Q R Co, 138 N.W.2d 711, 179 Neb 489

N H.—Boston & M R v State, 89 A 2d 764, 97 N H 380

Okl —St Louis-San Francisco Ry Co v. State, 262 P 2d 168

Evidence

(4) Other evidence

Ala —Alabama Public Service Commission v Southern Ry. Co., 111 So 2d 214, 269 Ala 63,

Ark.—Chamber of Commerce of City of Hot Springs v Chicago, R I & P R Co, supra, n 1

Me —Maine Cent R Co v Public Utilities Commission, 163 A 2d 633, 156 Me 284.

Mo —State ex rel Chicago R I & P R Co v Public Service Commission, 335 S.W.2d 182

Mont —Chicago, M, St P & P R Co v Board of R.R. Com'rs, 255 P.2d 346, 126 Mont 568, cert den 74 S Ct. 40, 346 U S 823, 98 L Ed 349

Okl.—Kansas, O. & G Ry Co. v. State, 275 P 2d 274—St Louis-San Francisco Ry Co. v State, 283 P.2d 519

Wis —City of Princeton v Public Service Commission, 68 N W 2d 420, 268 Wis. 542

10. Mich.—Chicago, M, St P. & P R Co v Michigan Public Service Commission, 50 N.W 2d 884, 332 Mich. 291—Chicago, M., St P & P R. Co v Michigan Public Service Commission, 61 N.W 2d 24, 338 Mich. 9.

N.J.—Susquehanna Transit Commuters Ass'n v. Board of Public Utility Com'rs, 151 A.2d 9, 55 N.J Super 377.

Wis —City of Princeton v Public Service Commission, supra, n 9

11. U S —Anderson v. U.S., D C Minn., 309 F Supp 494

Ill —Thompson v. Illinois Commerce Commission, supra, n 6.

Neb —Application of Chicago, B & Q.R. Co, 89 N W 2d 837, 166 Neb. 567—Application of Chicago & N W Ry. Co, 91 N W 2d 312, 167 Neb 61

N J —Application of Central R Co of N J, 102 A 2d 80, 29 N J.Super. 32—Brotherhood of R.R Trainmen v Central R Co of N J, 221 A 2d 735, 47 N.J 508—Brotherhood of R R Trainmen v Central R. Co. of N J, 224 A.2d 28, 92 N.J Super. 466—United Transp. Union v State, 271 A 2d 9, 112 N.J.Super 290

Pa.—Commuters' Committee v Pennsylvania Public Utility Commission, supra, n. 5—Sherwood v. Pennsylvania Public Utility Commission, 109 A 2d 220, 177 Pa Super 6

Finding sustained by evidence

(3) Other findings

Ariz —Safford Chamber of Commerce v Corporation Commission, 303 P 2d 713, 81 Ariz 226

Ark —Chamber of Commerce of City of Hot Springs v Chicago, R I & P R Co, 249 S W 2d 8, 220 Ark 631

Okl —St Louis-San Francisco Ry Co v State, 262 P 2d 168

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14. N J —Pennsylvania R Co v Board of Public Utility Com'rs, 137 A 2d 76, 48 N J Super 216

No mathematical precision

Neb —Application of Chicago & N W Ry Co, 91 N W 2d 312, 167 Neb 61

15. Minn —State v Duluth, M & I R Ry Co, 75 N W 2d 398, 246 Minn 383, app dism 77 S Ct 46, 352 U S 804, 1 L Ed 2d 38

Mont —Chicago, M, St P & P R Co v Board of R R Com'rs, supra, n 9

Neb —Application of Chicago, R I & P R Co, 87 N W 2d 616, 166 Neb 32

N J —In re New Jersey & New York R Co, 96 A 2d 526, 12 N J 281, app dism 74 S Ct 123, 346 U S 868, 98 L Ed 378—Pennsylvania R Co v Board of Public Utility Com'rs, 137 A.2d 76, 48 N J Super 216—Susquehanna Transit Commuters Ass'n v Board of Public Utility Com'rs, 151 A 2d 9, 55 N J Super 377

N Y.—New York Cent R Co v Public Service Commission, 103 N Y S 2d 217, 278 App.Div 725, rearg and app den. 105 N Y S 2d 383, 278 App. Div. 865.

Va —Southern Ry Co v Com, 86 S E 2d 839, 196 Va 1086

Wis —Chicago, M, St P. & P Ry Co v Public Service Commission, 50 N.W 2d 416, 260 Wis. 212—Chicago, M, St P & P Ry Co v. Public Service Commission, 66 N W 2d 351, 267 Wis. 402

Question of expense of small importance

Ariz —Arizona Corp Commission v Southern Pac. Co, 350 P 2d 765, 87 Ariz 310

16. U.S —Alabama Public Service Commission v Southern Ry Co., Ala, 71 S.Ct. 762, 341 U.S 341, 95 L Ed 1002

Ark —Chamber of Commerce of City of Hot Springs v. Chicago, R I & P R Co, supra, n 11

Neb —Application of Chicago, B. & Q R. Co, 138 N W 2d 816, 179 Neb 470

N.J —Pennsylvania R Co v Board of Public Utility Com'rs, 137 A 2d 76, 48 N J Super 216

N Y.—C.J.S. cited in Delaware & H R. Corp. v Public Service Commission, 136 N Y S 2d 510, 513, 285 App Div 326

Pa —Commuters' Committee v Pennsylvania Public Utility Commission, 88 A 2d 420, 170 Pa Super 596

17. Ariz —Safford Chamber of Commerce v Corporation Commission, 303 P 2d 713, 81 Ariz 226

Fla —Florida East Coast Ry. Co. v Mason, 177 So 2d 217

N H —Boston & M R v State, 89 A 2d 764, 97 N.H. 380

N J —In re New Jersey & N.Y.R. Co., supra, n. 16—C.J.S. cited in Pennsylvania R. Co. v, Board of Public Utility Com'rs, 137 A.2d 76, 81, 48 N J Super 216.

N.Y.—Delaware & H R. Corp. v. Public Service Commission, 136 N Y.S 2d 510, 285 App.Div 326

Ohio—Detroit, T. & I R. Co, v Public Utilities Commission, 119 N E.2d 73, 161 Ohio St. 317.

Evidence

(3) Other cases.

Ky —Com. ex rel Kentucky R.R. Commission v. Illinois Cent. R. Co., 299 S.W.2d 803.

Mont —Chicago, M., St. P & P.R. Co. v. Board of R.R. Com'rs, 255 P 2d 346, 126 Mont. 568, cert. den. 74 S Ct 40, 346 U.S. 823, 98 L.Ed. 349

N J —In re New Jersey & New York R Co, supra, n 15

Wis —Chicago M, St P & P Ry Co v Public Service Commission, 66 N W 2d 351, 267 Wis 402

(4) N J —Pennsylvania R Co v Board of Public Utility Com'rs, 137 A 2d 76, 48 N J Super 216

Public safety

Pa —Monongahela Connecting R Co v Pennsylvania Public Utility Commission, 211 A 2d 113, 206 Pa Super 17

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19. Ala —Alabama Public Service Commission v Southern Ry Co, 111 So.2d 214, 269 Ala 63

Cal —Southern Pac Co v Public Utilities Commission, 260 P 2d 70, 41 C 2d 354, app dism 74 S Ct 313, 346 U S 919, 98 L Ed 414

Idaho—Application of Union Pac R Co, 340 P 2d 1103, 81 Idaho 300

Minn —State v Duluth, M. & I R Ry Co, 75 N W 2d 398, 246 Minn 383, app dism 77 S Ct 46, 352 U S 804, 1 L Ed 2d 38

Neb —Application of Chicago & N W. Ry Co, 60 N W 2d 662, 157 Neb 594

Va —Southern Ry Co v Com, 86 S E 2d 839, 196 Va 1086

Wis —Chicago, M, St. P & P Ry Co v Public Service Commission, supra, n 17

20. Ala —Alabama Public Service Commission v Southern Ry Co, 111 So 2d 214, 269 Ala 63

Mont.—Chicago, M, St P & P R Co v Board of R R Com'rs, supra, n 17

N H —Boston & M R v State, 89 A 2d 764, 97 N.H 380

23. U S —City of New York v. U S, D C N Y, 337 F.Supp. 150, op supp 344 F.Supp 929

Neb.—Application of Chicago & N.W. Ry. Co, 91 N W 2d 312, 167 Neb. 61

Okl —St Louis-San Francisco R Co. v. State, 230 P.2d 709, 204 Okl 432

25. Ill —Illinois Cent R Co. v. Illinois Commerce Commission, 101 N E.2d 588, 410 Ill 77.

26. N.H.—Boston & M R v. State, supra, n 20

§ 419. —— Duty of Railroad in General

Library References

Railroads ⇐218, 226, 227.

28. Neb —Application of Chicago & N.W. Ry Co, 91 N W 2d 312, 167 Neb. 61—Application of Chicago, R.I. & P R Co., 101 N.W 2d 448, 169 Neb 867—Application of Chicago, B. & Q.R. Co, 138 N W 2d 711, 179 Neb. 489.

Okl —St. Louis—San Francisco R Co v State, supra, n. 23

Pa —Easttown Tp v Auto Parks, Inc, 12 D & C 2d 33, 8 Chest. 140.

Existence of duty in absence of statute

Ariz —Southern Pac Co v Arizona Corp. Commission, 404 P 2d 692, 98 Ariz 339.

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29. Ky —City of Middlesboro v. Louisville & N.R. Co., 252 S.W 2d 680

32. D.C.—Potomac Elec Power Co v U S, C.A., 584 F 2d 1058, 190 U.S.App.D C 77

34. Kan.—Atchison, T. & S.F. Ry. Co. v. State Corp. Commission, 322 P.2d 715, 182 Kan. 603.

Okl.—St Louis-San Francisco Ry Co. v. State, 283 P.2d 519

35. Neb —Application of Chicago, B, & Q.R. Co., 109 N.W 2d 369, 172 Neb 321.

37. N.Y.—Delaware & H.R. Corp. v. Public Service Commission, 136 N.Y S.2d 510, 285 App.Div. 326.

40. Consideration of public

Neb.—Application of Chicago, R.I. & P.R. Co., 87 N W.2d 616, 166 Neb 32.

43. Kan—Atchison T & S F Ry Co v State Corp Commission, 322 P 2d 715, 182 Kan 603—St Louis-San Francisco Ry Co v City of Fall River, 353 P 2d 505, 187 Kan 23

Me—Maine Cent R Co v Public Utilities Commission, 163 A 2d 633, 156 Me 284

Neb—Application of Chicago & N W Ry Co, 91 N W 2d 312, 167 Neb 61

N J—Brotherhood of R R Trainmen v Central R Co of N J, 224 A 2d 28, 92 N J Super 466

Okl—St Louis-San Francisco R Co v State, supra, n 23—St Louis-San Francisco Ry Co v State, 262 P 2d 168—St Louis-San Francisco Ry Co v State, supra, n 34

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44. Kan—Atchison, T & S F Ry Co v State Corp Commission, 322 P 2d 715, 182 Kan 603

Mo—State ex rel Chicago, R I & P R Co v Public Service Commission, 312 S W 2d 791

45. Kan—Atchison, T & S F Ry Co v State Corp Commission, 322 P 2d 715, 182 Kan 603

46. Mo—State ex rel Chicago, R I & P R Co v Public Service Commission, 335 S W 2d 182

47. Kan—Atchison, T & S F Ry Co v State Corp Commission, 322 P 2d 715, 182 Kan 603

Okl—Missouri-K-T R Co v State, 230 P 2d 727, 204 Okl 446

§ 420. —— Number of Trains, Cars, and Engines

Library References

Railroads ⇐218, 227

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51. U S—Chicago & N.W Ry Co v Minnesota Transfer Ry. Co, C A Minn, 371 F 2d 129

54. Ill—Illinois Cent R Co. v Illinois Commerce Commission, supra, n 25

§ 421. —— Stopping at Stations or Other Places

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66. Abandonment statute not applicable

Ohio—In re New York Cent Train No. 421, 119 N.E.2d 77, 161 Ohio St 332—Baltimore & O. Rd Co. v Public Utilities Commission, 242 N E 2d 577, 16 Ohio St 2d 60

§ 423. —— Separate Accommodations for Races

85. Commission's orders invalid

U S.—Baldwin v. Morgan, C A.Ala., 287 F.2d 750

§ 424. Operating Equipment

Library References

Railroads ⇐229.

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1. Cal—Southern Pac. Co. v. Public Utilities Commission, 260 P.2d 70, 41 C.2d 354, app dism 74 S Ct 313, 346 U.S. 919, 98 L.Ed 414

Evidence held sufficient to support order

Pa.—Monongahela Connecting R. Co. v. Pennsylvania Public Utility Commission, 211 A 2d 113, 206 Pa. Super. 17.

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Federal railroad Safety Act of 1970. Congressional concern over the rapid increase in railroad accidents and the damage threatened by the release of explosive or volatile substances during such incidents has lead to the enactment of the Federal Railroad Safety Act of 1970.[6.5] The goals of the Act are remedial in nature and the courts must construe the statute liberally.[6 10]

6.5. Pa—Norfolk and W Ry Co v Pennsylvania Public Utility Commission, 399 A 2d 1184, 41 Pa Cmwlth 634, revd on oth grds 413 A 2d 1037, 489 Pa 109

45 U S C A 421 et seq

Urban mass transit system not subject to Act

U S—Chicago Transit Authority, v Flohr, C A Ill, 570 F 2d 1305

6.10. U S—U S v Missouri Pac. R Co, C.A Mo, 553 F 2d 1156

Other purposes

U S—Chicago Transit Authority v Flohr, C A Ill, 570 F 2d 1305

Iowa—Union Pac R R v Johnson, 264 N W 2d 796

The Act authorizes the Secretary of Transportation or his agents to enter upon, inspect and examine rail facilities, equipment, rolling stock, operations and pertinent records at a reasonable time and in a reasonable manner.[6 15] The Act countenances reasonable cooperation by the railroads to be inspected.[6 20] The railroad is required to bear responsibility for accidents arising from the negligence of railroad crew members in the course of an inspection authorized under the act.[6 25]

6.15. U S—U S v Missouri Pac. R Co, C A.Mo, 553 F 2d 1156

6.20. U S—U S v Missouri Pac R. Co, C A Mo, 553 F.2d 1156

6.25. U S—U S v Missouri Pac R Co, C A Mo, 553 F 2d 1156

§ 425. —— Federal Safety Appliance Act

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Railroads ⇐229(1–8).

7. U.S.—Jacobson v New York, N H & H.R Co, C.A Mass., 206 F.2d 153, affd 74 S Ct 474, 347 U S 909, 98 L Ed 1067—U S v. Seaboard Air Line R Co, Va, 80 S Ct 12, 361 U.S. 78, 4 L.Ed.2d 25—U S. v Alton & Southern R R., D C Ill, 190 F.Supp 166—Barney v Staten Island Rapid Transit Ry. Co, C.A N.J., 316 F.2d 38, cert den 84 S.Ct. 67, 375 U.S 826, 11 L Ed 2d 58.

Ark—Missouri Pac R Co v. Nichols, 328 S W.2d 856, 231 Ark 178

Fla—Jacksonville Terminal Co. v McCullough, 179 So.2d 850

Ohio—King v. New York, C & St L R Co, 216 N.E 2d 900, 6 Ohio App.2d 123

8. U.S.—U S. v Baltimore & O.R Co, D.C.Pa., 97 F.Supp 921—U.S. v Southern Ry. Co, C A N.C., 341 F.2d 669

Mont—Reynolds v Burlington Northern, Inc, 621 P.2d 1028.

Proving inefficiency of safety appliances

U.S.—Chicago & N.W Ry. Co. v Chicago, R.I & P R Co., D C.Iowa, 179 F.Supp 33, affd., C.A., 280 F.2d 110, cert. den. 81 S.Ct. 378, 364 U S 931, 5 L.Ed 2d 364.

Right of action not conferred by statute

U.S.—Jacobson v. New York, N.H. & H.R. Co., C A Mass., 206 F.2d 153, affd. 74 S.Ct. 474, 347 U.S. 909, 98 L.Ed. 1067—Barney v. Staten Island Rapid Transit Ry. Co., C.A.N.J., 316 F.2d 38, cert den 84 S.Ct. 67, 375 U.S. 826, 11 L.Ed.2d 58—King v Chicago, R.I & P.R. Co., D.C Ark., 313 F Supp 786.

Ga—Radford v. Seaboard Coast Line R. Co., 178 S E.2d 774, 122 Ga.App. 763.

Ohio—King v New York, C & St L R Co, 216 N E 2d 900, 6 Ohio App 2d 123

"Safety appliances" within act

Tex—Hercules, Inc v Eilers, Civ App, 458 S W 2d 221, err ref no rev err, cert den 91 S Ct 2251, 403 U S 937, 29 L Ed 2d 717

Purpose of statute

Ill—Jenkins v Chicago & E I R R, 284 N E 2d 392, 5 Ill App 3d 954

10. U S—U S v Missouri-Kansas-Texas R Co, C A Kan, 273 F 2d 474

11. Ohio—King v New York, C & St L R Co, 216 N E 2d 900, 6 Ohio App 2d 123

Provision of statute construed

U S—U S v Missouri-Kansas-Texas R Co, C A Kan, 273 F 2d 474

Commission's powers under act

U S—U S v Missouri-Kansas-Texas R Co, C A Kan, 273 F 2d 474

13. U S—U S v Seaboard Air Line R Co, Va, 80 S Ct 12, 361 U S 78, 4 L Ed 2d 25—Carbon County Ry Co v U S, C A Utah, 309 F 2d 938—U S v Southern Ry Co, D C N C, 226 F Supp 745, revd on oth grds, C A, 341 F 2d 669—U S v St Louis-San Francisco Ry Co, D C Mo, 271 F Supp 212—U.S v Akron, C & Y R Co, C A Ohio, 397 F 2d 139—U S v Seaboard Coast Line R Co, D C Fla, 368 F Supp 1079

Ohio—King v New York, C & St L R Co, 216 N E 2d 900, 6 Ohio App 2d 123

14. U S—U S v Houston Belt & Terminal Ry Co, C A Tex., 210 F 2d 421—U S v Southern Ry Co, C A N C, 341 F 2d 669—Hunter v Missouri-Kansas-Texas R Co, D C Okl, 276 F Supp 936, affd, C A, 433 F 2d 352

Ill—Chicago, B & Q R Co v Illinois Commerce Commission, 116 N E 2d 392, 1 Ill 2d 614

15. U S—U S v Seaboard Coast Line R Co, D C Fla, 368 F Supp 1079.

Ill—Patton v T O F C, Inc, 398 N E 2d 313, 34 Ill Dec 638, 79 Ill App 3d 94

Mo—Craig v Jo B Gardner, Inc., 586 S W 2d 316

Mont—Reynolds v Burlington Northern, Inc, 621 P.2d 1028

16. U S—Shields v Atlantic Coast Line R Co, Ala, 76 S Ct 386, 350 U S 318, 100 L.Ed. 364.

21. U S—U S v Denver & R G W R Co, D C Utah, 175 F Supp 662, app dism, C A., 274 F 2d 828—Sheehy v. Southern Pac. Transp Co, C A Cal., 631 F 2d 649

Tank car dome step boards held within scope of act

U S—Shields v Atlantic Coast Line R Co, Ala, 76 S Ct. 386, 350 U.S 318, 100 L Ed. 364.

Question of law

Tex—Hercules, Inc. v Eilers, Civ App, 458 S W.2d 221, err. ref no rev err, cert den. 91 S.Ct. 2251, 403 U.S 937, 29 L.Ed 2d 717

23. U.S.—U.S v. Southern Ry. Co., D.C.N C, 226 F.Supp 745, revd on oth. grds., C.A, 341 F 2d 669—U.S v Toledo, P & W R Co., D.C Ind., 280 F Supp 243

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25. U.S.—U S v. Northern Pac. Ry. Co., D C Minn, 121 F Supp 397—Colorado Mill & Elevator Co v. Terminal R.R. Ass'n of St Louis, C A Mo, 350 F.2d 273, cert den 86 S Ct 563, 382 U.S 989, 15 L Ed 2d 476

26. U.S.—C.J.S. cited in Chicago & N W. Ry. Co v Davenport, C A.Tex., 205 F.2d 589, 593, cert. den 74 S Ct. 320, 346 U S. 930, 98 L Ed 422—U S v Denver & R.G W.R. Co., D C Utah, 175 F.Supp. 662, app dism., C.A., 274 F 2d 828.

Ill.—Jenkins v. Chicago & R.I.R.R., 284 N.E 2d 392, 5 Ill.App.3d 954

29. Mere nonenforcement by agents not acquiescence

U.S.—U.S. v. Northern Pac Ry. Co., D.C Minn, 121 F.Supp. 397

35. US—US v Northern Pac Ry Co, supra, n 29

40. Duty to refuse defective car

US—Chicago & N W Ry Co v Chicago, R I & P R Co, D C Iowa, 179 F.Supp 33, affd, C A, 280 F 2d 110 Cert den. 81 S Ct 378, 364 U S 931, 5 L Ed 2d 364

Duty to inspect

U.S—Chicago & N W Ry Co v. Chicago, R I & P R Co, D.C Iowa, 179 F Supp 33, affd, C A, 280 F 2d 110 Cert den 81 S Ct 378, 364 U S 931, 5 L Ed 2d 364—U S v Toledo, P & W R Co, D C Ind, 280 F Supp 243

41. US—Rodgers v Conemaugh & Black Lick R. Co, D C Pa., 137 F Supp 467—Chicago & N W Ry Co v Chicago, R I & P R Co, D C Iowa, 179 F Supp 33, affd, C A, 280 F 2d 110, cert den 81 S Ct 378, 364 U S 931, 5 L Ed 2d 364

42. US—Chicago & N W Ry Co v Chicago, R I & P R Co, D.C Iowa, 179 F Supp 33, affd, C A, 280 F 2d 110, cert den 81 S Ct 378, 364 U S 931, 5 L Ed 2d 364

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45. US—Chicago & N W Ry Co v Chicago, R I & P R Co, D C Iowa, 179 F Supp 33, affd, C A, 280 F 2d 110, cert den 81 S Ct 378, 364 U S 931, 5 L Ed 2d 364

56. US—US v Southern Ry Co, C A N C, 341 F 2d 669

Ill—Buskirk v Burlington Northern, Inc, 431 N E 2d 410, 59 Ill Dec 125, 103 Ill App 3d 414, cert den 103 S Ct 217, 459 U S 910, 74 L Ed 2d 173

58. US—US v Southern Ry Co, C A N C, 341 F 2d 669

59. Ill—Buskirk v Burlington Northern, Inc, 431 N E 2d 410, 59 Ill Dec 125, 103 Ill App 3d 414, cert den 103 S Ct. 217, 459 U S 910, 74 L Ed 2d 173

62. U.S—Alabama Great Southern R Co v U S, C.A Ala., 233 F 2d 520

66. Curved track

Ga.—Atlantic Coast Line R. Co v Brown, 92 S.E 2d 874, 93 Ga App 805

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68. U.S—US v Southern Ry. Co, D C N.C, 226 F.Supp 745, revd on oth. grds, C A, 341 F.2d 669

75. Two hopper cars combined by permanent welded coupling held one car

US.—US v Southern Ry Co, D C N C, 226 F Supp 745, revd on oth grds, C A, 341 F 2d 669

78. US—Chicago & N.W Ry. Co v Chicago, R I & P R. Co., D C Iowa, 179 F Supp 33, affd, C A, 280 F 2d 110, cert. den 81 S Ct. 378, 364 U S 931, 5 L Ed 2d 364

Visual inspection

US—U.S v Alton & Southern R R., D C Ill, 190 F.Supp 166—U.S. v Carbon County Ry Co, D C Utah, 199 F.Supp 726, affd., C A., 309 F.2d 938—Carbon County Ry Co v U S, C A Utah, 309 F 2d 938

Inspection and testing

D C—United Transp Union v U.S, D.C, 337 F Supp 410, affd 92 S Ct 2410, 406 U S 964, 32 L.Ed 2d 663.

79. US—U.S. v. Baltimore & O R Co, supra, n 8—Patton v Baltimore & O R Co, supra, n 15—U S v Seaboard Air Line R Co, C A Va, 258 F 2d 262, revd. on oth grds. 80 S.Ct 12, 361 U S 78, 4 L Ed 2d 25—Chicago, R I. & P R Co v. Chicago & N.W Ry Co, C.A.Iowa, 280 F 2d 110, cert den 81 S Ct. 378, 364 U S. 931, 5 L Ed 2d 364—U S. v Carbon County Ry Co., D C Utah, 199 F Supp 726, affd, C A, 309 F 2d 938—U S v. Manufacturers Ry Co, D.C Mo, 199 F.Supp 866—U.S. v St Louis-San Francisco Ry Co, D C Mo, 271 F.Supp 212

Tex.—Missouri-Kansas-Texas R Co v. Evans, 250 S.W.2d 385, 151 Tex 340

Regulation held valid

US—Carbon County Ry Co v U S, C A Utah, 309 F 2d 938—U S v Toledo, P & W R Co, D C Ind, 280 F Supp 243—U S v Terminal R R Ass'n of St Louis, C A Ill, 397 F 2d 467, cert den 89 S Ct 447, 393 U S 979, 21 L Ed 2d 440

Compliance with inspection provision insufficient

U S—U S v Atchison, T & S F Ry Co, D C Cal, 205 F Supp 589

Meaning of words

US—US v Ogden Union Ry & Depot Co, C A Utah, 370 F 2d 540

81. US—US v Baltimore & O R Co, supra, n 8

84 Ohio—King v New York, C & St L R Co, 216 N E 2d 900, 6 Ohio App 2d 123

85. US—US v Baltimore & O R Co, supra, n 8—U S v Atchison, T & S F Ry Co, D C Cal, 205 F Supp 589

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95. Tex.—Missouri-Kansas-Texas R Co v Evans, supra, n 79

4. US—US v Terminal R R Ass'n of St Louis, C A Ill, 260 F 2d 884, revd on oth grds 80 S Ct 204, 361 U S 116, 4 L Ed 2d 154

6. Regulation reasonable

US—U S v Seaboard Coast Line R Co, D C Fla, 368 F Supp 1079

7. Violation of statute

US—U S v Seaboard Coast Line R. Co, D C Fla, 368 F Supp 1079

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8. US—US v Seaboard Air Line R Co, Va, 80 S Ct. 12, 361 U S 78, 4 L Ed 2d 25—Monongahela Connecting R Co v Pennsylvania Public Utility Commission, D C Pa, 253 F Supp 50, revd on oth grds, C A, 373 F 2d 142, 17 A L.R.3d 271

9. US—US v. Ogden Union Ry. & Depot Co, C A Utah, 370 F 2d 540

12. US.—Atchison, T & S F Ry Co v U S, C A. Okl, 403 F 2d 211.

Held train movements

(1) US—US v Baltimore & O.R Co, D C Pa, 97 F Supp 921—U S v. Panhandle & Santa Fe Ry Co., D.C Tex, 104 F Supp 758—U S v Panhandle & Santa Fe Ry Co, C A Tex, 203 F 2d 241—U S v. Thompson, C.A Ark, 252 F.2d 6—U.S v Seaboard Air Line R Co, Va, 80 S Ct 12, 361 U S 78, 4 L Ed 2d 25—U.S. v Carbon County Ry Co, D C Utah, 199 F Supp 726, affd, C A, 309 F.2d 938—DiFrischia v. New York Cent R Co, C A Pa., 307 F.2d 473—Carbon County Ry Co v U.S, C A Utah, 309 F 2d 938—Monongahela Connecting R Co. v Pennsylvania Public Utility Commission, C.A.Pa, 373 F.2d 142, 17 A L. R 3d 271—U.S. v Terminal R R Ass'n of St. Louis, C A Ill, 397 F 2d 467, cert den 89 S Ct 447, 393 U S 979, 21 L.Ed.2d 440.

Held switching operations

(1) U S.—U S v Great Northern Ry. Co, supra, n 9—U.S v. Chicago, B & Q.R. Co, C A Ill., 199 F 2d 223, cert den 73 S.Ct 648, 345 U S 908, 97 L Ed 1343—U.S v. St. Louis-San Francisco Ry. Co., D.C Okl, 112 F Supp 646—U S v Northern Pac. Ry. Co., D C.Minn, 121 F Supp 397—U S v. Staten Island Rapid Transit Ry Co, D C.N.Y., 151 F.Supp. 911—U S. v. Union R Co, D.C Pa, 159 F.Supp. 930—U S v Chesapeake & O Ry Co, D C W Va, 238 F Supp. 160.

13. US—U.S. v. Baltimore & O.R Co, supra, n 12—U S v Union R. Co, 159 F.Supp 930—Carbon County Ry. Co v U S., C A.Utah, 309 F.2d 938—U.S. v. Terminal R R Ass'n of St. Louis, C A.Ill, 397 F.2d 467, cert. den. 89 S.Ct. 447, 393 U.S. 979, 21 L Ed 2d 440

Only movement in question considered

U S—U.S. v. Northern Pac Ry Co., supra, n. 12

15. U.S—U.S v Panhandle & Santa Fe Ry Co., supra n 12

17. Held controlling

U S—U S v Terminal R R Ass'n of St Louis, C Ill, 397 F 2d 467, cert den 89 S Ct 447, 393 U 979, 21 L Ed 2d 440

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The fact that switching operatio precede or follow the movements irrelevant to the statutory test.[21 5]

21.5. U S—U S v Seaboard Air Line R Co, Va, S Ct 12, 361 U S 78, 4 L Ed 2d 25—DiFrischia New York Cent R Co, C A Pa, 307 F 2d 47

25. US—US v Baltimore & O R Co, supra, n 1

27. US—US v Houston Belt & Terminal Ry Co C A Tex, 210 F 2d 421

Agreements for repair

US—US v Toledo, P & W R Co, D C.Ind, 28 F Supp 243

29. US—Texas & P Ry Co v U S, C A Ark, 18 F 2d 749—U S v Kansas City Terminal Ry Co D C.Mo, 105 F Supp 514—U S v Denver & R G W R Co, D.C Utah, 175 F Supp. 662, app dism, C A, 274 F 2d 828—Chicago & N W Ry Co v Chicago, R I & P R Co, D.C Iowa, 17 F Supp 33, affd, C A, 280 F 2d 110, cert den 8 S Ct 378, 364 U S 931, 5 L Ed 2d 364

33. US—U S v Houston Belt & Terminal Ry Co supra, n 27

35. US—US v Atchison, T & S F Ry Co, D C Cal, 205 F Supp 589—U.S v Akron, C & Y R Co, C A Ohio, 397 F.2d 139

37. US—U.S v Boston & M Corp., D C.Mass., 294 F Supp 356

Tex.—Missouri-Kansas-Texas R Co v Evans, 250 S W 2d 385, 151 Tex 340

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39. US—U.S v Toledo, P & W R Co., D C Ind, 280 F Supp 243

41. U S.—Chicago & N W Ry Co v Chicago, R I & P R. Co, D C Iowa, 179 F Supp 33, affd, C A, 280 F 2d 110, cert. den 81 S Ct 378, 364 U S 931, 5 L Ed 2d 364—U S v Denver & R.G W R. Co, D.C Utah, 175 F Supp 662, app. dism., C A., 274 F 2d 828

43. Risk to safety of employees

US—U S. v. Boston & M. Corp., D C.Mass., 294 F Supp 356.

§ 426. —— State Safety Appliance Acts

57. Ohio—Erie Lackawanna Ry Co v Public Utilities Commissn, 271 N E 2d 806, 27 Ohio St 2d 227

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64. Travelers on highway and passengers under protection of statute

Ill.—Boyer v. Atchison, T & S F Ry. Co, 181 N E 2d 372, 34 Ill.App 2d 330, 96 A L.R.2d 400

§ 427. —— Miscellaneous Regulations as to Equipment

77. Not mandatory

Or—Morris v Oregon State Transp. Commission, 590 P 2d 260, 38 Or.App. 331

80. Order held not supported

N J.—In re Brotherhood of R.R. Trainmen, 229 A.2d 505, 49 N.J. 174

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87. D C—Association of Am Railroads v Adams, 485 F Supp 1077

92. Ohio—Erie Lackawanna Ry. Co. v Public Utilities Commission, 271 N.E.2d 806, 27 Ohio St.2d

Pa—Erie-Lackawanna R Co v Pennsylvania Public Utility Commission, 208 A 2d 908, 205 Pa Super 291

§ 428. Signals

Library References

Railroads ⇐233, 244.

98. Maintenance of devices

Me—Gould v Bangor & A R Co, 292 A 2d 837

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99. U S—Southern Ry Co v Shealey, C A Ga, 382 F 2d 752

Evidence insufficient to sustain order

N J—Pennsylvania R Co v Department of Public Utilities, Bd of Public Utility Com'rs, 102 A 2d 618, 14 N J 411

3. Statute held valid

U S—Southern Ry Co v. Shealey, C.A Ga., 382 F 2d 752

18. Ill—Bryant v New York Cent R Co, 148 N E 2d 331, 16 Ill App 2d 469

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34. Regulations applicable

Va—Selfe v. Hale, 69 S E 2d 434, 193 Va. 543

35. Other cars within requirements

Va—Norfolk Southern Ry Co v Lassiter, 68 S E 2d 641, 193 Va 360—Virginian Ry Co v Craighead, 68 S E 2d 647, 193 Va 300

37. Regulation held unreasonable

Ga—Cruse v City of Rome, 94 S E 2d 617, 94 Ga App 373

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49. Ala—Lousville & N R Co v. Moseley, 81 So 2d 321, 263 Ala 103.

50. Ky—Hunt's Adm'r v Chesapeake & O Ry Co, 254 S W 2d 705.

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Other particular statutes have been construed and applied.[71.5]

71.5. Statute requiring signal when approaching town held not to apply outside corporate limits of town

Tenn.—Belcher v Tennessee Cent Ry Co, 377 S.W 2d 928, 214 Tenn 74

§ 431. Speed

Library References

Railroads ⇐225, 236, 245.

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6. Ohio—Trushel v New York Cent R. Co, 164 N.E 2d 780, 109 Ohio App. 197

7. U.S.—Louisville & N.R Co v. Sullivan, D C, 471 F.Supp. 469.

Or.—Southern Pac Co v Consolidated Freightways, 281 P.2d 693, 203 Or 657

Wis.—Dombeck v. Chicago, M., St. P, & P.R. Co, 129 N W.2d 185, 24 Wis.2d 420.

Limited power of commission

Ohio—New York Cent R. Co v Public Utilities Commission, 105 N.E.2d 37, 157 Ohio St. 254—New York Cent R. Co v Public Utilities Commission of Ohio, 105 N.E 2d 410, 157 Ohio St 257.

10. Regulations held reasonable

Ala.—Southern Ry Co v. Edmunds, 192 So.2d 451, 280 Ala. 247.

N.J.—Pennsylvania R. Co. v. Department of Public Utilities, Bd. of Public Utility Com'rs, 102 A.2d 618, 14 N.J. 411

12. U.S.—Britt v. Seaboard Coast Line R. Co., D.C. S.C., 281 F.Supp. 481.

Ala—Dixie Highway Exp Inc v Southern Ry Co, 244 So 2d 591, 286 Ala 646

Fla—Atlantic Coast Line R Co v Walker, App, 113 So 2d 420

13 Wis—Kurz v Chicago, M, St P & P R Co, 192 N W 2d 97, 53 Wis 2d 12

15. Penal provision not changed

U S—McNaughton v New York Cent R Co, C A Ind, 220 F 2d 835

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33 Ala—Louisville & N R Co v Moseley, 81 So 2d 321, 263 Ala 103

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48. Violation negligence per se

U S—McNaughton v New York Cent R Co, supra, n 15—Louisville & N R Co v Byrd, C A Ala, 298 F 2d 586

Violation not negligence per se

Neb—Carter v Chicago, B & Q R R Co, 103 N W 2d 152, 170 Neb 438

49. Minn—Forde v Northern Pac Ry Co, 63 N W 2d 11, 241 Minn 246

Ohio—Trushel v New York Cent R Co, 164 N E 2d 780, 109 Ohio App 197

52. Wash—Hoops v Burlington Northern, Inc, 518 P 2d 707, 83 Wash 2d 396

53. Ga—Atlantic Coast Line R Co v Hodges, 71 S E 2d 524, 86 Ga App 334

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62. Minn—Forde v Northern Pac Ry Co, 63 N W 2d 11, 241 Minn 246

Ohio—Bender v New York Cent R Co, 209 N E 2d 589, 3 Ohio App.2d 150

64. Ohio—Trushel v. New York Cent R Co, 161 N E 2d 780, 109 Ohio App 197

Clear and convincing evidence required

Ohio—Bender v New York Cent R Co., 209 N E 2d 589, 3 Ohio App 2d 150

66. Fla—Loftin v. City of Miami, 53 So 2d 654

70. Fla.—Loftin v. City of Miami, supra, n 66

Ohio—Bender v New York Cent R Co, 209 N E 2d 589, 3 Ohio App 2d 150

Judged with reference to modern conditions

Minn.—Forde v Northern Pac Ry Co., supra, n 62

Held unreasonable

Minn—Forde v Northern Pac Ry Co, supra, n 62

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74. Ohio—Trushel v New York Cent. R. Co, 164 N E 2d 780, 109 Ohio App 197—Bender v New York Cent R Co, 209 N E 2d 589, 3 Ohio App.2d 150.

§ 432. Precautions on Crossing Other Railroads

76. "Street-railway" exception

Ga—Southern Ry Co v Martin, 188 S.E 2d 819, 125 Ga.App 653

§ 433. Safety Devices and Flagman at Highway and Private Crossings

Library References

Railroads ⇐242, 243, 247.

84. Ind.—New York Cent. R. Co. v Sarch, 180 N.E.2d 368, 133 Ind.App. 516

N.J.—Pennsylvania-Reading Seashore Lines v. Board of Public Utility Com'rs, 83 A.2d 774, 8 N.J 85

Or.—Brown v. Spokane, P. & S Ry Co., 431 P 2d 817, 248 Or. 110.

85. S.C.—C.J.S. cited in Atlantic Coast Line R. Co v. Public Service Commission, 81 S.E.2d 357, 358, 225 S.C. 196.

87. U S—Wallace v Louisville & N R Co, C A Tenn, 332 F 2d 97

Purpose of statute, etc.

(2) Other statements

Me—Runnells v Maine Central R R, 190 A 2d 739, 159 Me 200

Necessity of signs on both sides

U S—Dean v Southern Ry Co, C A Tenn, 327 F 2d 757, stating Virginia law

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88 Ga—Underwood v Atlanta & W P R Co, App, 124 S E 2d 758, 105 Ga App 340, affd in part, revd in part on oth grds 126 S E 2d 785, 218 Ga. 193, on remand 127 S E 2d 318, 106 Ga App 467

92. Reflectorizing

U S—Tuck v Chesapeake & O Ry Co, C A W Va., 251 F.2d 180

5. Ga—C J.S. quoted in Underwood v Atlanta & West Point Railroad Co., 124 S E 2d 758, 765, 105 Ga App 340, affd in part, revd in part on oth grds 126 S E 2d 785, 218 Ga 193, on remand 127 S E 2d 318, 106 Ga App 467

6. Statute inapplicable to new crossings

Mich—Chesapeake & O Ry Co v Michigan Public Service Commission, 79 N W 2d 586, 347 Mich 234

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12. Ariz—Southern Pac Co v Corporation Commission, 321 P 2d 224, 83 Ariz 333

Colo—Atchison, T & S F Ry Co v Public Utilities Commission, 547 P 2d 234, 190 Colo 378

Ky—City of Shively v Illinois Cent R. Co, 349 S W 2d 682, app dism 82 S Ct 653, 369 U S 120, 7 L Ed 2d 611

Md.—Tyler v Baltimore County, 247 A 2d 704, 251 Md 420

N H—Meserve v State, 440 A 2d 34, 119 N.H. 149

Ohio—Erie-Lackawanna R Co v Public Utilities Commission, 190 N E 2d 689, 174 Ohio St. 548

Tex.—City of Houston v Fort Worth & D Ry Co, Civ App, 619 S W.2d 234, err ref no rev err, app after remand, App 14 Dist, 672 S W 2d 299, err ref no rev err

"Peabody-Dimmick formula" allocating federal funds

La.—Senegal v Thompson, App., 91 So 2d 865, foll 91 So 2d 897, two cases

16. Conn—Graham v Smith, 197 A.2d 652, 25 Conn Sup 123

Fla.—City of Belle Glade v Florida East Coast Ry Co, App, 344 So 2d 873

Grant of right of way does not deprive municipality of power to regulate

Ky—City of Shively v Illinois Cent R. Co, 349 S W 2d 682, app dism 82 S Ct 653, 369 U S 120, 7 L Ed 2d 611

Agreement between railroad and county

Wash.—Kittitas County v Chicago, M., St P & P R. Co, 483 P 2d 1279, 4 Wash App 768

Effect of court proceedings challenging ordinance

Fla.—Seaboard Air Line R Co v. Hawes, App, 269 So.2d 392.

18. U S—City of Gainesville v. Southern Ry Co, C A Ga., 423 F 2d 588, app. after remand 447 F.2d 502—Southern Ry. Co v City of Morristown, .D.C Tenn., 332 F Supp. 482, affirmed 448 F.2d 288, cert den 92 S.Ct. 958, 405 U.S. 922, 30 L.Ed.2d 792.

Ga.—Underwood v. Atlanta & W.P.R Co, 124 S.E.2d 758, 105 Ga.App. 340, affd in part, revd. in part on oth. grds 126 S E 2d 785, 218 Ga 193, on remand 127 S E 2d 318, 106 Ga App. 467

Wis.—City of Madison v Chicago, M., St. P. & P Ry Co., 67 N.W.2d 251, 2 Wis 2d 467

23. Md.—Dietrich v. Canton R. Co., 151 A 2d 163, 220 Md. 127.

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28. Ga.—Hancock v. City of Dalton, 205 S.E.2d 470, 131 Ga.App. 178

32. Concurrent jurisdiction

Ind.—New York Cent. R. Co. v. Public Service Commission of Ind., 147 N.E.2d 547, 237 Ind. 544

38. U.S.—City of Gainesville v. Southern Ry. Co., C.A.Ga., 423 F.2d 588, app. after remand, 447 F.2d 502

Fla.—Weeks v. Welch, 92 So.2d 645

Regulations held reasonable

U.S.—Seaboard Air Line Co. v. City of West Palm Beach, Fla., C.A.Fla., 373 F.2d 328—Southern Ry. Co. v. City of Morristown, C.A.Tenn., 448 F.2d 288, cert. den. 92 S.Ct. 958, 405 U.S. 922, 30 L.Ed.2d 792

Fla.—Weeks v. Welch, 92 So.2d 645

Regulations held unreasonable

Fla.—Loftin v. City of Miami, 53 So.2d 654

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41. Grade crossing

U.S.—Alabama Great Southern R. Co. v. City of Laurel, Miss., D.C.Miss., 334 F.Supp. 285

48. Ky.—City of Shively v. Illinois Cent. R. Co., 349 S.W.2d 682, app. dism. 82 S.Ct. 653, 369 U.S. 120, 7 L.Ed.2d 611

49. Ariz.—Pima County v. Southern Pac. Co., 386 P.2d 400, 95 Ariz. 41

Cal.—Jensen v. Southern Pac. Co., 276 P.2d 703, 129 C.A.2d 67—Wilcox v. Southern Pac. Co., 12 Cal.Rptr. 207, 190 C.A.2d 548

Iowa—Chicago, R.I. & Pac. R. Co. v. Long, 51 N.W.2d 135, 243 Iowa 514

N.H.—City of Manchester v. Boston & M.R.R., 94 A.2d 552, 98 N.H. 52

N.J.—Pennsylvania-Reading Seashore Lines v. Board of Public Utility Com'rs, Dept. of Public Utilities, 81 A.2d 28, 13 N.J.Super. 540, affd. 83 A.2d 774, 8 N.J. 85

Or.—Southern Pac. Transp. Co. v. Sabin, 513 P.2d 500, 14 Or.App. 504.

Tenn.—Tennessee Public Service Commission v. Southern Ry. Co., 554 S.W.2d 612

Utah—Velasquez v. Union Pac. R. Co., 469 P.2d 5, 24 Utah 2d 217.

Continuing jurisdiction to review conditions

Miss.—Mississippi Public Service Commission v. Alabama Great Southern R. Co. (Southern Ry. System), 255 So.2d 665

50. Municipal authority not exclusive

Ohio—New York Cent. R. Co. v. Public Utilities Commission, 130 N.E.2d 365, 164 Ohio St. 289

51. Pa.—New York Cent. R. Co. v. Pennsylvania Public Utility Commission, 171 A.2d 635, 195 Pa.Super. 297.

N.H.—Boston & Maine Corp. v. City of Manchester, 257 A.2d 14, 109 N.H. 521

N.J.—Pennsylvania-Reading Seashore Lines v. Board of Public Utility Com'rs, supra, n. 49—Erie R. Co. v. Board of Public Utility Com'rs, 166 A.2d 597, 64 N.J.Super. 479

Ohio—New York Cent. R. Co. v. Public Utilities Commission, 126 N.E.2d 320, 163 Ohio St. 250—Pennsylvania R. Co. v. Public Utilities Commission, 171 N.E.2d 515, 171 Ohio St. 413.

Wis.—Town of Caledonia v. Public Service Commission of Wisconsin, 202 N.W.2d 912, 56 Wis.2d 720.

Adoption of examiner's findings held sufficient

Ohio—New York Cent. R. Co. v. Public Utilities, Commission, 130 N.E.2d 365, 164 Ohio St. 289

Order enjoined only after proper hearing

Ind.—State ex rel. Public Service Commission v. Warrick Circuit Court, 118 N.E.2d 493, 233 Ind. 241

Order held not unlawful, arbitrary, or abuse of discretion

Ohio—New York Cent. R. Co. v. Public Utilities Commission, 130 N.E.2d 365, 164 Ohio St. 289—Toledo Terminal R. Co. v. Public Utilities Commission, 181 N.E.2d 271, 173 Ohio St. 251—Pennsylvania R. Co. v. Public Utilities Commission, 189 N.E.2d 874, 174 Ohio St. 420

Perfecting appeal

Ill.—City of Edwardsville v. Illinois Commerce Commission, 104 N.E.2d 283, 412 Ill. 34

Ind.—Monon R. Co. v. Citizens of Sherwood Forest Addition, Marion County, 257 N.E.2d 846, 146 Ind.App. 620

Evidence held sufficient to sustain findings

Mich.—Board of County Road Com'rs of Washtenaw County v. Michigan Public Service Commission, 85 N.W.2d 134, 349 Mich. 663

Miss.—Mississippi Public Service Commission v. Alabama Great Southern R. Co., 294 So.2d 173

Pa.—New York Cent. R. Co. v. Pennsylvania Public Utility Commission, Super., 171 A.2d 635, 195 Pa.Super. 297—Delaware & H.R. Corp. v. Pennsylvania Public Utility Commission, 182 A.2d 254, 198 Pa.Super. 464

Necessity for specific findings

Ind.—Monon R.R. v. Public Service Commission, 170 N.E.2d 441, 241 Ind. 142—Baltimore & O.R. Co. v. Bremen Grange No. 2160, 196 N.E.2d 420, 135 Ind.App. 621—Pennsylvania R. Co. v. Town Bd. of Trustees of Town of Edinburg, 218 N.E.2d 171, 139 Ind.App. 216

Procedural requirements

Ind.—Monon R.R. v. Public Service Commission, 170 N.E.2d 441, 241 Ind. 142

Remand on appeal

Ind.—New York Cent. R. Co. v. Holland, 180 N.E.2d 770, 133 Ind.App. 194—Baltimore & O.R. Co. v. Bremen Grange No. 2160, 196 N.E.2d 420, 135 Ind.App. 621

Evidence held insufficient to sustain findings

Ind.—Pennsylvania R. Co. v. Town Bd. of Trustees of Town of Edinburg, 218 N.E.2d 171, 139 Ind.App. 216

Findings held insufficient to support order

Ind.—Pennsylvania R. Co. v. Town Bd. of Trustees of Town of Edinburg, 218 N.E.2d 171, 139 Ind.App. 216

52. Kan.—Waits v. St. Louis-San Francisco Ry. Co., 531 P.2d 22, 216 Kan. 160

Review

Iowa—Chicago and Northwestern Transp. Co. v. Iowa Transp. Regulation Bd., 322 N.W.2d 273

Ohio—Greer v. Public Utilities Commission, 176 N.E.2d 416, 172 Ohio St. 361

55. Cal.—Jensen v. Southern Pac. Co., supra, n. 49

Ohio—New York Cent. R. Co. v. Public Utilities Commission, 112 N.E.2d 667, 159 Ohio St. 524.

Statute construed

Mich.—Board of County Road Com'rs of Washtenaw County v. Michigan Public Service Commission, 85 N.W.2d 134, 349 Mich. 663

Statute sufficiently complied with

U.S.—Silke v. Penn Central Transp. Co., D.C.Ohio, 352 F.Supp. 983

56. Ariz.—Southern Pac. Co. v. Corporation Commission, 321 P.2d 224, 83 Ariz. 333.

Iowa—Chicago, R.I. & Pac. R. Co. v. Long, 51 N.W.2d 135, 243 Iowa 514.

N.J.—Erie R. Co. v. Board of Public Utility Com'rs, 166 A.2d 597, 64 N.J.Super. 479

63. Rule applicable to other statutes

Mich.—Board of County Road Com'rs of Washtenaw County v. Michigan Public Service Commission, 85 N.W.2d 134, 349 Mich. 663.

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64. N.J.—Pennsylvania-Reading Seashore Lines v. Board of Public Utility Com'rs Dept. of Public Utilities, supra, n. 49.

Ohio—New York Cent. R. Co. v. Public Utilities Commission, 127 N.E.2d 208, 163 Ohio St. 482.

Pa.—New York Cent. R. Co. v. Pennsylvania Public Utility Commission, 171 A.2d 635, 195 Pa.Super. 297

65. Cal.—Southern Pac. Co. v. Public Utilities Commission, 65 Cal.Rptr. 737, 436 P.2d 889, 68 C.2d 243

Ill.—Chicago, B. & Q.R. Co. v. Illinois Commerce Commission, 101 N.E.2d 92, 410 Ill. 60

S.C.—Atlantic Coast Line Co. v. Public Service Commission, 81 S.E.2d 357, 225 S.C. 196

N.J.—Pennsylvania-Reading Seashore Lines v. Board of Public Utility Com'rs, 81 A.2d 28, 13 N.J.Super. 540, affd. 83 A.2d 774, 8 N.J. 85

Order sustained

Ariz.—Southern Pac. Co. v. Corporation Commission, 329 P.2d 883, 84 Ariz. 365, app. dism. 79 S.Ct. 1136, 359 U.S. 532, 3 L.Ed.2d 1028

Ill.—Centerville Tp. v. Illinois Commerce Commission, 124 N.E.2d 882, 5 Ill.2d 72

Ohio—New York Cent. R. Co. v. Public Utilities Commission, 139 N.E.2d 623, 166 Ohio St. 113.

Pa.—New York Cent. R. Co. v. Pennsylvania Public Utility Commission, 135 A.2d 786, 184 Pa.Super. 610

Burden of proof

Ariz.—Southern Pac. Co. v. Corporation Commission, 321 P.2d 224, 83 Ariz. 333—Southern Pac. Co. v. Corporation Commission, 329 P.2d 883, 84 Ariz. 365, app. dism. 79 S.Ct. 1136, 359 U.S. 532, 3 L.Ed.2d 1028

Pa.—New York Cent. R. Co. v. Pennsylvania Public Utility Commission, 171 A.2d 635, 195 Pa.Super. 297—Delaware & H.R. Corp. v. Pennsylvania Public Utility Commission, 182 A.2d 254, 198 Pa.Super. 464

Automatic signals

(1) Evidentiary value of public opinion

Pa.—Delaware & H.R. Corp. v. Pennsylvania Public Utility Commission, 182 A.2d 254, 198 Pa.Super. 464

(2) Economic plight of railroad company

Pa.—Delaware & H.R. Corp. v. Pennsylvania Public Utility Commission, 182 A.2d 254, 198 Pa.Super. 464

66. Wis.—Kurz v. Chicago, M., St. P. & P.R. Co., 192 N.W.2d 97, 53 Wis.2d 12.

68. Ill.—Chicago, B. & Q.R. Co. v. Illinois Commerce Commission, supra, n. 65.

Mich.—Board of County Road Com'rs of Washtenaw County v. Michigan Public Service Commission, 85 N.W.2d 134, 349 Mich. 663.

N.H.—Boston & Maine Corp. v. City of Manchester, 257 A.2d 14, 109 N.H. 521

N.J.—Pennsylvania-Reading Seashore Lines v. Board of Public Utility Com'rs, Dept. of Public Utilities, supra, n. 66.

Authority of commission to apportion cost

Ariz.—Maricopa County v. Corporation Commission of Ariz., 289 P.2d 183, 79 Ariz. 307.

Authority of court on review

Ariz.—Maricopa County v. Corporation Commission of Ariz., 289 P.2d 183, 79 Ariz. 307

Authority of board to bind state

Mich.—Chesapeake & O. Ry. Co. v. Michigan Public Service Commission, 79 N.W.2d 586, 347 Mich. 234.

Moot question

Ariz.—Southern Pac. Co. v. Corporation Commission, 321 P.2d 224, 83 Ariz. 333.

Statute held constitutional

Miss.—Mississippi Public Service Commission v. Alabama Great Southern R. Co., 294 So.2d 173.

Or.—Union Pac. R. Co. v. Hill, 349 P.2d 1090, 220 Or. 591.

Petitioners not to pay part of costs

Or.—Union Pac. R. Co. v. Hill, 349 P.2d 1090, 220 Or. 591

No judicial authority to compel public to pay
Or—Union Pac R Co v Hill, 349 P 2d 1090, 220 Or 591

Order allocating costs remanded where commission made no findings as to factors considered
Ohio—New York, C & St L R Co v Public Utilities Commission, 197 N E 2d 546, 176 Ohio St 81

Voluntary reimbursement by county improper
Ariz—Pima County v Southern Pac Co, 386 P 2d 400, 95 Ariz 41

Allocation of full cost to railroad
US—Alabama Great Southern R Co v City of Laurel, Miss, D C Miss, 334 F Supp 285

§ 434. Obstruction by Trains

Library References

Railroads ⇐246.

69. Ill—People v Indiana Harbor Belt R Co, 430 N E 2d 104, 58 Ill Dec 162, 102 Ill App 3d 811
Pa—Kozlowski v Pennsylvania R Co, 39 Erie 70

Obstruction for less than specified time
(2) Other matters
Pa—Whitehall Tp v Stem, 20 D & C 2d 225

Statute applicable to switching operations
Tex—Missouri-Kansas-Texas R Co v Neuhoff Bros, Civ App, 297 S W 2d 316, err ref no rev err

Statute inapplicable
Pa—Gay v Pennsylvania R Co, 35 West Co 259

Obstruction statute applicable to moving and stationary trains
Mass.—Com v New York Cent R Co, 216 N E 2d 870, 350 Mass 724

71. Tex—Missouri-Kansas-Texas R Co v Neuhoff Bros, Civ App, 297 S.W 2d 316, err ref no rev err

Temporary obstruction implicitly authorized by statute
Ky—City of Harrodsburg v. Southern Ry Co., 313 S W 2d 864.

Townboards do not have jurisdiction to exclusion of Commission
Ind—New York Cent R. Co v Public Service Commission of Ind., 147 N.E 2d 547, 237 Ind. 544

Ordinance held not arbitrary or unreasonable
Fla.—Burnsed v. Seaboard Coastline R Co, 290 So.2d 13
Ky.—Lousville & N R. Co. v Com. for Use and Benefit of City of Covington, 488 S.W 2d 329.

72. La—City of Lake Charles v. Southern Pac Transp Co., App., 310 So 2d 116, application den., Sup., 313 So 2d 600.
Mo—Dodwell v. Missouri Pac R. Co., 384 S.W 2d 643, 11 A.L R.3d 1156

Held not applicable to moving trains
Va.—Ocean View Imp. Corp. v. Norfolk & W Ry. Co, 140 S.E.2d 700, 205 Va. 949.

Notice
Iowa—Chicago and Northwestern Transp. Co v. Iowa Transp. Regulation Bd., 322 N.W 2d 273.

73. Ill—People v. Indiana Harbor Belt R. Co, 430 N E.2d 104, 58 Ill.Dec. 162, 102 Ill.App.3d 811.

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80. Other periods of time
Ohio—City of Ashtabula v Kovacs, 222 N.E 2d 440, 8 Ohio App.2d 320

Blockage beyond railroad's control
La.—City of Lake Charles v Southern Pac. Transp. Co, App., 310 So.2d 116, application den., Sup., 313 So.2d 600.

81. Ohio—City of Ashtabula v. Kovacs, 222 N.E.2d 440, 8 Ohio App 2d 320.

Statute construed
Fla—Burnsed v Seaboard Coastline R Co, App, 336 So 2d 711
Ohio—City of Struthers v Penn Cent Co, 260 N E 2d 836, 23 Ohio St 2d 1

Improper operation held not shown
Ohio—City of Struthers v Penn Cent Co, 260 N E 2d 836, 23 Ohio St 2d 1

85. Question of fact
Fla—Burnsed v Seaboard Coastline R Co, 290 So 2d 13

93. US—Louisville & N R Co v Tucker, C A Tenn, 211 F 2d 325, reh den 215 F 2d 227

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95 Determination by commission
Ind—New York Cent R Co v Public Service Commission of Ind, 147 N E 2d 547, 237 Ind 544

98. Obstructed and non-obstructed crossings in different category
Ind—New York Cent R Co v Public Service Commission of Ind, 147 N E 2d 547, 237 Ind 544

§ 436. Miscellaneous

6. Statute concerning locomotive inspections construed and applied
US—US v Quincy R Co, C A Cal, 338 F 2d 430

The practice of "humping" may be forbidden.[7.1]

7.1. Evidence held to sustain order
Ohio—New York Cent R Co v Public Utilities Commission, 115 N E 2d 163, 160 Ohio St 220

A state commission may investigate the safety of bridges and determine the allocation of costs involved in providing for safety of such bridges for public use.[10.5]

10.5. Pa.—Pennsylvania Dept of Transp. v Pennsylvania Public Utility Commission, 283 A 2d 313, 3 Pa Cmwlth 405.

Order construed as not constituting denial of petition for amendment
Pa—Com, Dept of Transp v Com, Public Utility Commission, 320 A 2d 403, 13 Pa Cmwlth 550

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33. Ordinance held invalid
Ohio—City of Niles v. Drummond, 232 N E 2d 830, 12 Ohio App.2d 209.

Public service commission proceeding held exclusive remedy
Fla.—State ex rel Jackson v Seaboard Coast Line R Co, App, 257 So 2d 88.

35. Question of law for court
US—US v Thompson, C.A.Ark., 252 F 2d 6

36. U.S—Rucker v Wabash R Co, C A Ill, 418 F 2d 146

38. Statute not repealed by implication
Ind—New York Cent. R. Co. v Public Service Commission of Ind, 147 N.E.2d 547, 237 Ind. 544.

§ 437. Power to Impose

39. N.Y.—People v. Penn Cent. Co., 311 N.Y.S 2d 150, 34 A.D.2d 278—People v. Penn Cent. Co., 304 N Y.S.2d 149, 60 Misc.2d 919, affd, 311 N Y. S.2d 150, 34 A.D.2d 278.

42. U.S.—U.S. v. Denver & R.G.W R. Co., D C.Utah, 175 F.Supp 662, app. dism., C.A., 274 F.2d 828

§ 439. Defenses

Library References

Railroads ⇐254(2, 6)

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51. Or—State v Portland Traction Co, 386 P 2d 435, 236 Or 38

57. US—US v Denver & R G W R Co, D C Utah, 175 F Supp 662, app dism, C A, 274 F 2d 828—Chicago & N W Ry Co v Chicago, R I. & P R Co, D C Iowa, 179 F Supp 33, affd., C A., 280 F 2d 110, cert den 81 S Ct 378, 364 US 931, 5 L Ed 2d 364

Use held permissible
US—Texas & P Ry Co v US, C A Ark, 189 F 2d 749

59. US—Alabama Great Southern R Co v U.S, C A Ala, 233 F 2d 520

Agency no defense
US—US v Houston Belt & Terminal Ry Co, C A Tex, 210 F 2d 421—US v Indiana Harbor Belt R Co, D C Ind, 224 F Supp 219—US v Pacific Elec Ry Co, D C Cal, 224 F Supp 948

63. US—Chicago & N W Ry Co v Chicago, R I & P R Co, D C Iowa, 179 F Supp 33, affd., C A, 280 F 2d 110, cert den 81 S Ct 378, 364 US 931, 5 L Ed 2d 364—US v Southern Ry. Co, D C Ga, 206 F Supp 562

65. US—US v St Louis-San Francisco Ry Co, D C Okl, 112 F Supp 646

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The fact that the Interstate Commerce Commission approved a deviation from a regulation in favor of another railroad company is no defense to an action for violation of the regulation [69.5]

69.5. Regulation governing track relays
US—US v Southern Ry Co, D C Ga., 206 F Supp 562

§ 440. Persons Entitled to Sue

76. Ill—People for Use of Horwarth v. Gulf, M. & O.R Co, 261 N E.2d 221, 125 Ill App 2d 473.

§ 441. Persons Liable

Library References

Railroads ⇐254(2, 5).

82. US—US v Southern Pac Co, D C Ariz, 293 F.Supp 572
D.C—U.S. v Northern Pac Ry Co, D C., 213 F Supp 1

Principal and agent liable
U.S—U.S v Houston Belt & Terminal Ry. Co., supra, n 59

§ 443. Actions

Library References

Railroads ⇐254(2, 4, 6)

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91. U.S.—U.S v Southern Ry Co., D C Ga., 206 F.Supp 562
Pa.—Com. v. Pennsylvania R. Co, 10 D & C.2d 103, 21 Cambria 225

Exhaustion of administrative remedy
U.S.—U.S. v Southern Ry. Co., C.A Ga., 364 F 2d 86, cert den 87 S Ct 1479, 386 U.S 1031, 18 L Ed.2d 592

Federal Safety Appliance Act
US—US v Indiana Harbor Belt R. Co., D C Ind, 314 F Supp 691

General rules as to parties apply.[96.1]

96.1. Held not necessary party
U.S—U S v Panhandle & Santa Fe Ry Co, D C Tex, 104 F Supp 758

An order by the commission that prior orders notifying the railroad that action would be taken against it to collect penalties "are rescinded effective this date" is prospective in operation[96.2] and order is kept intact as to everything that had transpired.[96.3]

96.2. Or—Portland Traction Co v Hill, 352 P 2d 552, 222 Or 636, reh den 353 P.2d 838, 222 Or 636

96.3. Order not rescinded for purposes of dismissing action to set it aside

Or—Portland Traction Co v. Hill, 352 P 2d 552, 222 Or 636, reh den 353 P 2d 838, 222 Or 636

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4. Allegations held sufficient

(1) N Y—People v Penn Cent Co, 305 N Y S 2d 898, 33 A D 2d 860

22. Proof of matter not pleaded allowed where defendant not mislead

U S.—U S v Missouri-Kansas-Texas R Co, C A Kan, 273 F 2d 474

Failure to plead regulation not fatal

U S—U S v Missouri-Kansas-Texas R Co, C A Kan, 273 F 2d 474

23. U S—Alabama Great Southern R Co v U S, C A Ala, 233 F 2d 520

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27. U S.—U S v Houston Belt & Terminal Ry Co, C A Tex, 210 F 2d 421—Alabama Great Southern R. Co. v. U S, C.A Ala, 233 F 2d 520

34. Evidence held sufficient

U S—Alabama Great Southern R. Co v U S, C A Ala, 233 F 2d 520—U S v Alton & Southern R R, D C Ill, 190 F Supp 166

35. Necessity for findings

U S—U S v Southern Pac Co, C A Cal, 285 F 2d 931

§ 444. Amount and Extent of Penalty

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48. N Y.—People v Penn Cent Co, 304 N.Y S 2d 149, 60 Misc 2d 919, affd 311 N Y S 2d 150, 34 A D 2d 278

52. U.S—U S v Southern Pac Co, C A Cal, 289 F 2d 481

§ 447. In General

Library References

Railroads ⇐253.

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66. U S.—Shields v Atlantic Coast Line R Co., Ala, 76 S Ct 386, 350 U.S. 318, 100 L Ed. 364

Tex.—Hercules, Inc v Eilers, Civ App, 458 S W.2d 221, err ref. no rev err., cert den 91 S.Ct 2251, 403 U.S. 937, 29 L Ed.2d 717

Proximate cause

Ill.—Jenkins v Chicago & E.I.R.R., 284 N E 2d 392, 5 Ill App 3d 954.

In some cases, statutory damages have been refused.[68.5]

68.5. U S.—S.H & W Lumber Co v California & Oregon Coast R Co., D.C Or., 154 F.Supp 152

§ 449. In General

Library References

Railroads ⇐219, 220.

Modern Legal Forms Ch. 55, Public Utilities.

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86. U S—I C C v Memphis Union Station Co, D C Tenn, 230 F Supp 456 Affd, C A, 360 F 2d 44, cert den 87 S Ct 66, 385 U S 830, 17 L Ed 2d 66

92. U S—Meyers v Jay St Connecting R R, C A N Y, 288 F 2d 356—Interstate Commerce Commission v Maine Cent R Co, C A Vt, 505 F 2d 590

D C—Asbury v Chesapeake & O Ry Co, D C, 314 F Supp 310

Right to appeal held adequate and complete remedy

Miss—Illinois Cent R Co v Mississippi Public Service Commission, 71 So 2d 176, 220 Miss 439

Failure to obtain certificate

U S—Meyers v Jay St Connecting R R, C A N Y., 259 F 2d 532

Injunction held proper

U S—Com of Pa v Penn Cent Transp Co, D C Pa, 348 F Supp 28, affd, C A, 475 F 2d 1394

Temporary restoration of service not required

U S—Com of Pa v Penn Cent Transp Co, D C Pa, 348 F Supp 28, affd, C A, 475 F 2d 1394

Only question to be determined

U S—I C C v Chicago, Rock Island, & Pac R. Co, C A Neb, 501 F 2d 908, cert gr 95 S Ct. 1393, 420 U S 972, 43 L Ed 2d 652

Discretion to deny injunction

U S—I C C v Chicago & N W. Transp Co, C A Iowa, 533 F 2d 1025

Relief discretionary with court

U S—Brown v Consolidated Rail Corp, D C Ohio, 422 F Supp 1251.

98. U S—I C C v Memphis Union Station Co, D C Tenn., 230 F Supp 456, affd, C A, 360 F 2d 44, cert den 87 S Ct. 66, 385 U.S. 830, 17 L Ed.2d 66

Determination of illegal abandonment without prior resort to commission

U S—I C C v Chicago & N.W. Transp Co, C.A Iowa, 533 F 2d 1025

99. "Abandonment" construed

U S—Brown v. Consolidated Rail Corp, D C Ohio, 422 F Supp 1251.

"Abandonment" distinguished from "embargo"

U S.—General Foods Corp v Baker, D.C.Md, 451 F Supp 873

34. U S—U S v. Panhandle & Santa Fe Ry Co, C A.Tex., 203 F 2d 241

§ 450. Proceedings Instituted in Court

Library References

Railroads ⇐219, 220.

Modern Legal Forms Ch. 55, Public Utilities.

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1. U S—Meyers v. Jay St Connecting R.R., C A N.Y, 259 F.2d 532.

"Party in interest"

U S—Com of Pa. v. Penn Cent. Transp. Co., D.C Pa, 348 F.Supp. 28, affd., C.A., 475 F.2d 1394.

4. U.S—I.C C. v. Chicago & N.W Transp. Co, C.A. Iowa, 533 F 2d 1025.

§ 451. Proceedings before Board or Commission

Library References

Railroads ⇐9(1, 2).

Modern Legal Forms Ch. 55, Public Utilities.

7. Cal—Southern Pac Co v Public Utilities Commission, 260 P 2d 70, 41 C 2d 354, app dism 74 S Ct 313, 346 U S 919, 98 L Ed 414

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17. Application for rehearing

Ohio—Pennsylvania R Co v Public Utilities Commission, 174 N E 2d 102, 172 Ohio St 154

26. Cal—Southern Pac Co v Public Utilities Commission, supra, n 7

29. Ind—Public Service Commission v Fort Wayne Union Ry Co, 111 N E 2d 719, 232 Ind 82

Necessity for timely notice of appeal

Ohio—Pennsylvania R Co v Public Utilities Commission, 174 N E 2d 102, 172 Ohio St 154

Effect of appeal on jurisdiction of commission

Neb—Application of United Mineral Products Co, 131 N W 2d 604, 177 Neb 898

30. Failure to serve commission with notice not fatal under circumstances

Kan—Missouri-Kansas-Texas R Co v City of Savonburg, 348 P 2d 1015, 186 Kan 120

31. Iowa—Chicago, R I. & Pac. R Co v Long, 51 N W 2d 135, 243 Iowa 514

32. Vt—Petition of Residents of Shaftsbury, 95 A 2d 41, 117 Vt 502

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35. Neb—Application of United Mineral Products Co, 131 N W 2d 604, 177 Neb 898

Pa—Monongahela Connecting R Co. v Pennsylvania Public Utility Commission, 211 A 2d 113, 206 Pa Super 17

Determination held law of case on second appeal

Mo—State ex rel Chicago, R I & P R Co. v Public Service Commission, 335 S W 2d 182

40. Md—Brotherhood of R R. Trainmen v. Baltimore & O R Co, 238 A 2d 516, 248 Md 580

Ohio—Erie Lackawanna Ry. Co v. Public Utilities Commission, 265 N E 2d 266, 24 Ohio St.2d 159.

44. U.S—Silke v Penn Central Transp Co, D C Ohio, 352 F Supp 983

Ill—Schussler v Illinois Commerce Commission, 102 N E.2d 101, 410 Ill 289

Ohio—Baltimore & O R Co v Public Utilities Commission of Ohio, 102 N E 2d 246, 156 Ohio St. 282.

Pa—Erie-Lackawanna R Co v Pennsylvania Public Utility Commission, 208 A.2d 908, 205 Pa Super 291—Monongahela Connecting R Co v Pennsylvania Public Utility Commission, 211 A 2d 113, 206 Pa Super 17

S C.—Atlantic Coast Line R. Co v South Carolina Public Service Commission, 144 S.E 2d 212, 246 S C 447.

45. N J—Pennsylvania-Reading Seashore Lines v Board of Public Utility Com'rs, Dept of Public Utilities, 81 A.2d 28, 13 N.J.Super. 540, affd. 83 A 2d 774, 8 N J 85.

47. Ohio—Chesapeake & O. Ry. Co. v Public Utilities Commission, 126 N.E.2d 314, 163 Ohio St. 252

§ 452. Evidence

Library References

Railroads ⇐9(1, 2), 219, 220.

Modern Legal Forms Ch. 55, Public Utilities.

49. Ill—City of Wheaton v. Chicago, A. & E. Ry. Co., 120 N E 2d 370, 3 Ill.App 2d 29

N C.—State ex rel Utilities Commission v. Atlantic Coast Line R. Co, 64 S E.2d 272, 235 N C 365.

S.C.—State ex rel. Public Service Commission v Atlantic Coast Line R. Co, 72 S.E 2d 438, 222 S.C. 266, cert. den. 73 S.Ct. 727, 345 U.S. 916, 97 L.Ed. 1350—Atlantic Coast Line R Co. v South Carolina Public Service Commission, 144 S.E.2d 212, 246 S C 447

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51. La—Louisiana & A Ry Co v Louisiana Public Service Commission, 124 So 2d 899, 240 La 658

54. Pa—Pennsylvania R Co v Pennsylvania Public Utility Commission, 70 Dauph 247

55. N Y—Bastek v Lehigh & N E R Co, 192 N Y S 2d 134, 9 A D 2d 692

Evidence held admissible

U S—I C C v Memphis Union Station Co, D C Tenn, 230 F Supp 456, affd, C A, 360 F 2d 44, cert den 87 S Ct 66, 385 U S 830, 17 L Ed 2d 66

57. **Evidence held sufficient**

(1) U S—I C C v Memphis Union Station Co, D C Tenn, 230 F Supp 456, affd, C A, 360 F 2d 44, cert den 87 S Ct 66, 385 U S 830, 17 L Ed 2d 66

Ill—Schussler v Illinois Commerce Commission, supra, n 44—Centerville Tp v Illinois Commerce Commission, 124 N E 2d 882, 5 Ill 2d 72

N.H—City of Manchester v Boston & M R R, 94 A 2d 552, 98 N H 52

N.J.—Pennsylvania-Reading Seashore Lines v Board of Public Utility Com'rs, Dept of Public Utilities, supra, n 45

Ohio—Baltimore & O R Co v Public Utilities Commission of Ohio, supra, n 44

Pa—Erie-Lackawanna R Co v Pennsylvania Public Utility Commission, 208 A 2d 908, 205 Pa Super 291

Utah—Denver & R G W R Co v Public Service Commission, 230 P 2d 557, 119 Utah 573.

Vt—Petition of Residents of Shaftsbury, 95 A 2d 41, 117 Vt 502

Va—Southern Ry Co. v Com, 68 S E 2d 552, 193 Va 291

Wis—Chicago, M, St P & P Ry Co v Public Service Commission, 50 N W 2d 416, 260 Wis. 212

Evidence held insufficient

(3) Ill—Illinois Cent R Co v Illinois Commerce Commission, 101 N E 2d 588, 410 Ill. 77.

Vt—Petition of Residents of Shaftsbury, supra

§ 453. Right of Action and Conditions Precedent

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66. D C.—Asbury v Chesapeake & O Ry Co., D.C, 314 F Supp. 310

67. U S—Ethan Allen, Inc v Maine Cent. R Co, D C Vt, 431 F.Supp 740.

§ 456. In General

Library References

Railroads ⇐255(1, 3).

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87. Ind—New York Cent. R Co v. Sarich, 180 N.E.2d 388, 133 Ind App 516

Statute prohibiting railroad from erecting traffic sign

Mich—People v Grand Trunk Western R Co, 142 N W 2d 54, 3 Mich App 242

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98. **"Willful" defined**

N Y.—People v. Cummings, 216 N.Y.S.2d 207, 29 Misc 2d 545

1. **Inapplicability of statute or regulation**

U.S.—U S. v Illinois Cent. R. Co, D.C.Tenn., 269 F.Supp 236.

2. Ark.—Chicago, R.I. & P.R. Co v State, 275 S.W.2d 646, 224 Ark. 622.

§ 457. Obstructing Public Highways

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32. Mich—People v. Norfolk and Western Ry. Co., 305 N W.2d 290, 104 Mich.App. 677.

Absolute liability

Ind—Norfolk & W Ry Co v State, 387 N E 2d 1343, 180 Ind App 185

§ 459. Persons Liable

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50. Tex—Gray v State, Cr, 490 S W 2d 838

§ 463. —— Evidence, Trial, and Review

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85. Tex—Kennedy v State, 344 S W 2d 885, 171 Tex Cr R 94

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92 **Evidence held insufficient**

U S—U S v Seaboard Air Line R Co, D C.N C, 225 F Supp 38

Ark—Chicago, R I & P R Co v State, supra, n 2

Ga—Britt v City of Gainesville, 162 S E 2d 740, 118 Ga App 40

Ohio—City of Hamilton v Hausenbein, 139 N E 2d 459, 102 Ohio App 556

Tex—Kennedy v State, 344 S W 2d 885, 171 Tex Cr R 94

98. Ga—Britt v City of Gainesville, 162 S E 2d 740, 118 Ga App 40

Wis—City of Madison v Chicago, M, St P & P Ry Co, 87 N W.2d 251, 2 Wis 2d 467

§ 465. Existence and Extent of Liability in General

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6. Iowa—Wittrup v Chicago & Northwestern Ry Co, 226 N W 2d 822

§ 467. —— Release, Waiver, or Estoppel

21. U S—Kesslering v Chesapeake & O Ry. Co, D C.Mich, 437 F Supp 267

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24. Mo—Struckhoff v Thompson, App, 241 S.W 2d 39

25. Tenn—Williams v Southern Ry Co, 417 S W 2d 573, 57 Tenn App 215

28. Mo—Struckhoff v Thompson, supra, n 24

§ 470. —— Failure to Construct Fences and Cattle Guards

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54. Nev.—Union Pac R. Co. v. Adams, 362 P 2d 450, 77 Nev 282

56. **C.J.S. cited in**

Tex—Texas & N O R. Co v Ivey, Civ App, 283 S W 2d 78, 81

§ 471. —— Obstruction, Diversion, or Interference with Waters and Watercourses

Library References

Railroads ⇐113(5).

65. **It is no defense, etc.**

(4) Other cases

Mo.—Buschelberg v. Chicago, B. & Q R. Co, App, 289 S.W.2d 447.

66. **Degree of care**

Ohio—Lytle v Pennsylvania R. Co., 108 N E.2d 72, 91 Ohio App. 232

68. Ohio—Lytle v Pennsylvania R. Co, supra, n 66.

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69. Mo—Struckhoff v Thompson, supra, n 24—Buschelberg v Chicago, B & Q R Co, App, 289 S W 2d 447

Notice to railroad of inadequate drainage system

Ohio—City of Xenia v Baltimore & O R Co, 115 N E 2d 89

Statute construed

Mo—Temple v Atchison, T & S F Ry Co, 417 S W 2d 97

70. Mo—Struckhoff v Thompson, supra, n 24

72. Mo—Hawkins v Burlington Northern, Inc, 514 S W 2d 593

73. U S—Dobbs v Missouri Pac R Co, D C Okl, 416 F Supp 5

Tex—Meier v Thompson, Civ App, 248 S W 2d 493, err ref no rev err

Absolute duty

Tex—Atchison, T & S F Ry Co v Mahon, Civ App, 473 S W 2d 598, err ref no rev err

Alterations by others of natural flow held no defense

Tex—Atchison, T & S F Ry Co v Mahon, Civ App, 473 S W 2d 598, err ref no rev. err.

75. Pa—Walker v New York, C & St L R R Co, 45 Erie 110

77. U S—Atchison, T. & S F Ry Co v Hamilton Bros, C A Mo, 192 F 2d 817

Absence of evidence

Iowa—Meeker v City of Clinton, 259 N W 2d 822

78. **No liability for dilution of salt content of diverted water**

Utah—Morton Intern, Inc v Southern Pac Transp Co, 495 P 2d 31, 27 Utah 2d 256, cert. den 93 S Ct 238, 409 U S 934, 34 L.Ed 2d 189

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A railroad cannot escape liability for damages inflicted in the course of restoring a stream to usefulness on the theory that it had simply exercised its right to restore natural drainage.[82.1]

82.1. La—Brantley v Tremont & Gulf Ry Co., 75 So 2d 236, 226 La 176

85 Since the publication of the bound volume the case of Le Munyon v Gallatin Valley R Co, 199 P 915, 60 Mont 517, has been overruled, the court held that such a statute does indeed impose duty on railroad not to obstruct surface waters

Mont—Formicove, Inc. v Burlington Northern, Inc, 673 P 2d 469

§ 472. —— Miscellaneous Injuries

Library References

Railroads ⇐113(2).

87. Iowa—Wittrup v Chicago & Northwestern Ry Co., 226 N W 2d 822

Mo—Moore v St Louis Southwestern Ry. Co, App, 301 S.W 2d 395

S C—Alexander v Seaboard Air Line R Co, 71 S E 2d 299, 221 S C 477.

Tex—Lewis Montgomery Trucking Co. v. Southern Pac Co, Civ.App, 439 S W 2d 691, err. ref no rev err.

91. N C—Thompson v. Seaboard Air Line R. Co, 104 S E.2d 181, 248 N C. 577.

§ 473. Proximate Cause

Library References

Railroads ⇐113(10).

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16. Va—Carolina, C & O R Co v Mullins, 148 S E 2d 752, 207 Va 207

Held not proximate cause

Mo—Duke v Missouri Pac R Co, 303 S W 2d 613

18. Ohio—Lytle v Pennsylvania R Co, 108 N E 2d 72, 91 Ohio App 232

20. Tex—Gulf, C & S F R Co v Seydler, Civ App, 132 S W 2d 453

23. Mo—Buschelberg v Chicago, B & Q R Co, App, 289 S W 2d 447

§ 474. Contributory Negligence

Library References

Railroads ⇐113(11)

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27. Pa—Walker v New York, c & St L R R Co, 45 Erie 110

28. La—Burger v T Smith & Son, Inc, App, 93 So 2d 34

§ 475. Persons Entitled to Sue

34. U S—Hardy Salt Co v Southern Pac Transp Co., C A Utah, 501 F 2d 1156

Surface owners

Utah—Morton Intern, Inc v Southern Pac Transp Co., 495 P 2d 31, 27 Utah 2d 256, cert den 93 S Ct. 238 409 U S 934, 34 L Ed 2d 189

38. Right to sue denied

Ky—Cincinnati, N O & T P Ry Co v Barker, 247 S W.2d 943

§ 476. Actions

Library References

Railroads ⇐114(¼–5).

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49. Not exclusive remedy

Mo—Hawkins v Burlington Northern, Inc, 514 S W 2d 593

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65. Cal—Passarino v City of Merced, 314 P 2d 128, 153 C A 2d 887

67. Mo—Buschelberg v Chicago, B & Q R Co, App, 289 S W 2d 447

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80. Petition or complaint held insufficient

Mo.—Berwert v. Atchison, T. & S F. Ry. Co., 289 S W.2d 112, citing Kansas law.

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5. U.S—Chicago, R I & P.R Co v Goodson, Trinity Universal Ins Co., Intervener, C A Tex., 242 F 2d 203

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12. Res ipsa loquitur

N Y—Scimeca v New York City Transit Authority, 332 N Y S 2d 11, 39 A D.2d 596, app after remand 346 N Y.S.2d 308, 42 A.D.2d 745, revd 311 N.E.2d 500, 34 N Y 2d 613, 355 N Y.S.2d 363.

15. N C.—Bivins v Southern Ry Co, 102 S.E 2d 128, 247 N C. 711.

Pa.—Shepp v. Reading Co., 4 Lebanon 312, exceptions dism 4 Lebanon 380.

Va.—Carolina, C & O R. Co. v Mullins, 148 S E.2d 752, 207 Va 207

17. Tex.—Burlington–Rock Island R Co. v Newsom, Civ.App, 239 S W 2d 734.

Va.—Carolina, C & O R Co v Mullins, 148 S.E.2d 752, 207 Va 207

18. N C—Bivins v Southern Ry Co, 102 S E.2d 128, 247 N.C. 711.

Tenn—Williams v Southern Ry Co, 417 S W 2d 573, 57 Tenn App 215

21. Evidence held competent

S C—Alexander v Seaboard Air Line R Co, 71 S E 2d 299, 221 S C 477

23. Evidence held admissible

S C—Alexander v Seaboard Air Line R Co, supra, n 21

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34. Mo—Moore v St Louis Southwestern Ry Co, App, 301 S W 2d 395

Prima facie case

N Y—Scimeca v New York City Transit Authority, 332 N Y S 2d 11, 39 A D 2d 596, app after remand 346 N Y S 2d 308, 42 A D 2d 745, revd 311 N E 2d 500, 34 N Y 2d 613, 355 N Y S 2d 363

36. U S—Baker v City of Ann Arbor, D C Mich, 381 F Supp 547

Tenn—Williams v Southern Ry Co, 396 S W 2d 98, 55 Tenn App 81, app after remand 417 S W 2d 573, 57 Tenn App 215

Tex—Burlington–Rock Island R Co v Newsom, supra, n 17

Va—Carolina, C & O R Co v Mullins, 148 S E 2d 752, 207 Va 207

37. Mo—Moore v St Louis Southwestern Ry Co, App, 301 S W 2d 395

Findings held authorized

(1) Cal—Gonella v City of Merced, 314 P 2d 124, 153 C A 2d 44

Iowa—Wittrup v Chicago, & Northwestern Ry Co, 226 N W.2d 822

Ky—Cincinnati, N O & T P Ry Co v Barker, 247 S W 2d 943

Tenn—Williams v Southern Ry Co, 417 S W 2d 573, 57 Tenn App 215.

Tex—Atchison, T & S F Ry Co v Mahon, Civ App, 473 S W 2d 598, err. ref no rev err

38. N C—Bivins v Southern Ry Co, 102 S E 2d 128, 247 N C 711

Tenn—Williams v Southern Ry Co, App, 396 S W 2d 98, 55 Tenn App 81, app after remand 417 S W 2d 573, 57 Tenn App 215

Questions held for jury

(10) Cal—Passarino v City of Merced, 314 P 2d 128, 153 C A 2d 887

Ohio—Lytle v Pennsylvania R Co, 108 N E 2d 72, 91 Ohio App 232

Okl—Wood v Thompson, 248 P.2d 606, 207 Okl 153—Midland Valley R Co v Lowery, 248 P 2d 1042, 207 Okl 227.

S C—Alexander v Seaboard Air Line R Co, supra, n 21

Evidence held insufficient to submit to jury

U S—Atchison, T. & S F Ry Co v Hamilton Bros, C A Mo, 192 F 2d 817

42. Iowa—Wittrup v Chicago & Northwestern Ry Co, 226 N W 2d 822

Mo—Hawkins v Burlington Northern, Inc, 514 S W 2d 593

43. Questions held for jury

(10) U S—St. Louis–San Francisco Ry Co. v Wade, C A Ala, 607 F 2d 126.

Evidence held insufficient to submit to jury

Tex.—Speck v Atchison, T. & S F Ry. Co., Civ.App, 446 S W.2d 715.

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46. Mo—Hawkins v. Burlington Northern, Inc., 514 S W 2d 593

Instructions held proper or not erroneous

N C—Bivins v Southern Ry Co., 102 S.E.2d 128, 247 N.C 711

Ohio—Lytle v Pennsylvania R Co., supra, n. 43.

Okl—Wood v Thompson, supra, n. 43.

Pa.—Walker v. New York, C. & St. L.R.R Co., 45 Erie 110.

Instructions held erroneous or properly refused

Ohio—Lytle v Pennsylvania R Co, supra, n 43

48. Tex—Burlington–Rock Island R Co v Newsom, supra, n 17

50. Tex—Meier v Thompson, Civ App, 248 S W 2d 493, err ref no rev err

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55. Apportionment held not required

Tex—Achison, T & S F Ry Co v Mahon, Civ App, 473 S W 2d 598, err ref no rev err

56. Amount of damages held not abuse of discretion

La—Brantley v Tremont & Gulf Ry Co, 75 So 2d 236, 226 La 176

57. Tex—Burlington–Rock Island R Co v Newsom, supra, n 17

59 Tenn—Williams v Southern Ry Co, 396 S W 2d 98, 55 Tenn App 81, app after remand 417 S W 2d 573, 57 Tenn App 215

62. Tenn—Williams v Southern Ry Co, 396 S W 2d 98, 55 Tenn App 81, app after remand 417 S W 2d 573, 57 Tenn App 215

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81. Right to punitive damages

U S—Stafos v Missouri Pac R Co, C.A Kan, 367 F 2d 314

83. Evidence held sufficient to support award

Mo—Buschelberg v Chicago, B & Q R Co, App, 289 S W.2d 447

88. Pa—Walker v New York, C & St L R R Co, 45 Erie 110

§ 477. Existence and Extent of Liability

Library References

Railroads ⇐222(1–4).

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8. La—Dixie Mach Welding & Metal Works, Inc v Illinois Cent R Co., App., 285 So 2d 808, writ den, Sup, 288 So 2d 644

Pa—Silvestri v Pennsylvania R.R, 100 Pittsb Leg J. 479

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10. U S.—Alabama Great Southern R. Co. v Allied Chemical Corp, C.A Miss, 501 F 2d 94, reh 509 F 2d 539

11. Liability not shown

U.S—General Foods Corp v U.S., D C Md, 448 F Supp. 111.

12. Tex.—Missouri Pac R. Co. v American Statesman, 552 S W.2d 99.

Va.—Baltimore & O.R. Co. v Patterson, 129 S E 2d 1, 204 Va 81

Improper parking of vehicle on tracks

La—Centanni v New Orleans Public Belt R.R, App, 261 So.2d 729

14. Ga—Southern Ry. Co. v. Wooten, 137 S.E.2d 696, 110 Ga App. 6—Seaboard Coast Line R. Co. v. Zeigler, 170 S.E 2d 60, 120 Ga App 276.

Tex—Missouri Pac. R. Co. v. American Statesman, 552 S.W 2d 99.

16. Ga—Southern Ry. Co. v. Wooten, 137 S.E 2d 696, 110 Ga App 6—Seaboard Coast Line R. Co v Zeigler, 170 S E.2d 60, 120 Ga.App. 276

17. Ind.—Penn Central Transp. Co v. Wilson, 292 N.E 2d 827, 155 Ind.App. 328

19. Ga.—Southern Ry. Co. v. Wooten, 137 S.E.2d 696, 110 Ga.App 6.

Contributing negligence of another immaterial

Ill.—Illinois Terminal R. Co. v Gulf, M. & O.R. Co., 171 N E.2d 669, 28 Ill.App.2d 425.

20. Consent by acquiescence to parking on or near tracks during hours of nonuse

La—Centanni v New Orleans Public Belt R R, App, 261 So 2d 729

§ 478. —— Occupation or Obstruction of Streets or Highways

Library References

Railroads ⇐222(3)

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32. U S—Kahn v Southern Ry. Co, C A N.C, 202 F 2d 875

39. Pa—Sunbury Milk Products Co v. Reading Co, 34 Northumb L J 170

40. Pa—Sunbury Milk Products Co v Reading Co, 34 Northumb L.J 170

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41. U S—Kahn v Southern Ry Co., supra, n 32

Mo—C.J.S. cited in Jennings v. Southwestern Bell Telephone Company, 307 S W 2d 464, 467

46. Pa—Sunbury Milk Products Co. v Reading Co, 34 Northumb L J 170.

48. U S—Kahn v Southern Ry. Co, supra, n 32

50. Ordinance held not violated

Va—Ocean View Imp. Corp v Norfolk & W Ry Co, 140 S E 2d 700, 205 Va 949

54. U.S—Kahn v Southern Ry Co, supra, n 48

Pa—Sunbury Milk Products Co v Reading Co, 34 Northumb L.J 170

§ 480. —— Derailment or Loss of Control of Cars

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68. Not proximate cause

Ill—Publication Corp. v. Chicago River & Indiana R Co, 364 N E.2d 523, 7 Ill Dec. 362, 49 Ill App.3d 508

72. Ga—Hawes v. Central of Georgia R Co, 162 S E 2d 14, 117 Ga.App 771, app after remand 169 S E 2d 356, 120 Ga App 4.

Evacuation of surrounding area. Where a tank car accident forces the evacuation of the surrounding area, an evacuated business may recover economic losses from the railroad, even though it suffers no physical damages, where such economic losses are a foreseeable result of just such an accident, and where the railroad has actual or constructive knowledge of the dangers of the transported material.[74.5]

74.5 N.J.—People Exp. Airlines, Inc. v. Consolidated Rail Corp., 495 A.2d 107, 100 N.J. 246.

§ 481. —— Release from Liability

page 1071

78. U.S.—Graham v. Chicago R I & P Ry. Co., D C.Okl, 431 F.Supp. 444.

§ 482. Actions

Library References

Railroads ⇐222(5).

81. Pleading held sufficient

D.C.—Molitch v. Baltimore & O.R. Co., Mun.App., 176 A.2d 360.

85. Mo.—Empiregas, Inc of Noel v Hoover Ball & Bearing Co., 507 S.W 2d 637.

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90. Va—Norfolk & W Ry Co v Anderson, 151 S E 2d 628, 207 Va 567

91. Pa—Mack v Reading Co, 98 A 2d 399, 173 Pa Super 296, affd 103 A 2d 749, 377 Pa 135, 41 A L R 2d 927

Rule held inapplicable

Va—Norfolk & W Ry Co v Anderson, 151 S E 2d 628, 207 Va 567

94. U S.—Alabama Great Southern R Co v Allied Chemical Corp, C A Miss, 501 F 2d 94, reh 509 F 2d 539

Ark—Missouri Pac R Co v Boley, 477 S W 2d 468, 251 Ark 964

95. Ala—Louisville & N R. Co v Self, Civ, 233 So 2d 90, 45 Ala App 530

96 U.S—Alabama Great Southern R Co v Allied Chemical Corp, C A Miss, 501 F 2d 94, reh 509 F 2d 539

97. Pa—Sunbury Milk Products Co v Reading Co, 34 Northumb.L J 170

2. Interstate commerce commission reports not admissible

U S—Yanick v Pennsylvania R Co, D C N Y, 192 F Supp 373

7. La—Bituminous Cas. Corp v Avondale Marine Ways, Inc, App, 148 So 2d 768, writ den 150 So 2d 767, 244 La 144

Evidence held sufficient

Ill—Illinois Terminal R Co v Gulf, M & O R Co, 171 N E 2d 669, 28 Ill App.2d 425

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8. Evidence held sufficient

(1) La—Flanders v. Arkansas & La Mo Ry Co, 56 So.2d 151, 220 La 193

11. La—Ganaloser v. Kansas City Southern Ry Co, App, 339 So 2d 498, writ den, Sup, 342 So 2d 219

14. Evidence held sufficient to show freight yard a nuisance

Ind—Penn Central Transp Co v Wilson, 292 N E 2d 827, 155 Ind.App 328.

17. Ga—Southern Ry. Co v Turner, 81 S E 2d 291, 89 Ga.App 785

Idaho—Whitt v. Jarnagin, 418 P 2d 278, 91 Idaho 181

Va—Norfolk & W Ry Co v Anderson, 151 S.E 2d 628, 207 Va. 567.

Questions held for jury

(4) Other questions

N.C—Safie Bros Co. v Seaboard Air Line R Co, 128 S E.2d 754, 258 N.C 471

18. Questions held for jury

(2) Pa—Sunbury Milk Products Co v Reading Co., 34 Northumb L J. 170

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23. Instructions held improper or properly refused

Pa—Mack v Reading Co., 103 A.2d 749, 377 Pa. 135, 41 A.L.R.2d 927.

Va—Norfolk & W. Ry. Co v. Anderson, 151 S.E.2d 628, 207 Va 567

24. Ga.—Seaboard Coast Line R. Co. v. Zeigler, 170 S.E.2d 60, 120 Ga.App. 276.

§ 483. —— Damages

Library References

Railroads ⇐222(5).

26. Ind.—Penn Central Transp Co. v. Wilson, 292 N.E.2d 827, 155 Ind.App. 328.

N C.—Bivins v. Southern Ry. Co., 102 S.E.2d 128, 247 N.C. 711

§ 484. In Absence of Statute

Library References

Railroads ⇐453.

32. Mo—Anderson v St Louis-San Francisco Ry Co, App, 367 S W 2d 657

N H—C.J S cited in Hurd v Boston & Maine R R, 129 A 2d 196, 199, 100 N H 404

33. N C—Fleming v Atlantic Coast Line R Co, 73 S E 2d 544, 236 N C 568

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34. Ga—Atlantic Coast Line R Co v Olivent, 79 S E 2d 435, 89 Ga App 403

42. Mo—Stevens v Missouri Pac R Co, 355 S W 2d 122

45. Dry season and high wind

Tenn—Illinois Cent R R v Exum, 296 S W 2d 372, 41 Tenn App 450

§ 485. Under Statutes

Library References

Railroads ⇐453, 467, 468.

53. Va—Peck Iron & Metal Co v Seaboard Air Line R Co, 107 S E 2d 421, 200 Va 698

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54. Liability held not shown

La—Terre Haute Plantation, Inc v Louisiana & A Ry Co, App, 210 So 2d 566, writ ref 214 So.2d 164, 252 La 845

§ 486. —— Validity of Statutes

60. U S—Daily v Missouri Pac R Co, D C Kan, 298 F Supp 911

N H—State v Boston & M R R, 105 A 2d 751, 99 N H 66.

§ 487. —— Nature, Construction, and Operation of Statutes in General

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72. N.H.—Beard v Boston & M R R, 115 A 2d 314, 99 N H 469

76. N H—State v Boston & M R R., supra, n. 60—Hurd v Boston & Maine R.R, 129 A 2d 196, 100 N H 404

78. N H—Beard v. Boston & M.R.R, 115 A 2d 314, 99 N H. 469—Hurd v. Boston & Maine R R, 129 A 2d 196, 100 N H. 404

§ 488. —— To What Property Applicable

page 1078

95. N.H—Hurd v Boston & Maine R.R., 129 A.2d 196, 100 N H 404.

1. N H—State v Boston & M.R.R, 105 A 2d 751, 99 N H 66

§ 490. Construction and Equipment of Locomotives

Library References

Railroads ⇐454(1–8).

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Under statute, however, the failure to use proper spark-arresting appliances has no bearing on the company's liability for fire damage caused by sparks emitted from engines.[155]

155. Va.—Peck Iron & Metal Co. v. Seaboard Air Line R Co., 107 S.E.2d 421, 200 Va. 698

21. Ga—Southern Ry Co v Scott, 113 S E 2d 459, 215 Ga 739

§ 491. Keeping Locomotives in Proper State of Repair

Library References

Railroads ⇐458, 455

page 1081

49. Ga—Atlantic Coast Line R Co v Olivent, 79 S E 2d 435, 89 Ga App 403

§ 493. Management and Operation of Locomotives and Trains

Library References

Railroads ⇐455.

57. Va—Chesapeake & O Ry Co v Seay, 79 S E 2d 631, 195 Va 566

§ 494. Combustibles on Track, Right of Way, or other Property

page 1083

2. Ga.—Georgia R R & Banking Co v Flynt, 92 S E.2d 330, 93 Ga App 514

3. Purpose of statute

Va—Southern Ry Co v Com, 135 S E 2d 160, 205 Va 114

Construction of statute

Va.—Southern Ry Co v Com, 135 S E.2d 160, 205 Va 114

Amount of right of way to be cleared

Va—Southern Ry Co v Com., 135 S E 2d 160, 205 Va 114

Time to act

Va.—Southern Ry Co v Com, 135 S E 2d 160, 205 Va. 114

Criminal offense

Va.—Southern Ry Co v Com, 135 S E 2d 160, 205 Va 114

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4. Ga—Atlantic Coast Line R Co v Olivent, 79 S E 2d 435, 89 Ga App 403

N C—Gainey v Rockingham R Co, 68 S E 2d 780, 235 N C 114

5. Ga—Southern Ry Co v Scott, 113 S E 2d 459, 215 Ga. 739—Georgia A S & C Ry. Co v Collins, 160 S E 2d 441, 117 Ga App 254

11. Railroad held not negligent

Ga.—Southern Ry Co v Scott, 113 S E 2d 459, 215 Ga. 739

12. Ky—Louisville & N R Co v Turner, 379 S W 2d 749

17. Va—Peck Iron & Metal Co v. Seaboard Air Line R Co, 107 S E 2d 421, 200 Va 698.

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22. Va—Peck Iron & Metal Co v Seaboard Air Line R Co, 107 S E 2d 421, 200 Va 698

§ 495. Preventing Spread and Extinguishment of Fires

29. Ky—Louisville & N R Co v Howe, 243 S W.2d 905

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48. Tex—Huffington v. Texas & N.O.R Co., Civ. App., 376 S W 2d 388, err ref no rev. err.

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60. U S—Arnhold v. U S., C A.Wash, 284 F 2d 326, reh den 289 F 2d 924, cert den 82 S Ct 122, 368 U S 876, 7 L.Ed 2d 76

Ark—Chicago, R I & P R Co v. Harris, 276 S W 2d 686, 224 Ark 848

§ 496. Proximate Cause of Injury

Library References

Railroads ⇐464, 465

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63. U S—Daily v Missouri Pac R Co, D C Kan, 298 F Supp 911

Ga—Southern Ry Co v Scott, 113 S E 2d 459, 215 Ga 739

Ky—Louisville & N R Co v Turner, 379 S W 2d 749

N H—Beard v Boston & M R R, 115 A 2d 314, 99 N H 469—Hurd v Boston & Maine R R, 129 A 2d 196, 100 N H 404

65. N H—Beard v Boston & M R R, 115 A 2d 314, 99 N H 469

66. Ill—Young v Toledo, P & W R Co, 360 N E 2d 978, 4 Ill Dec 715, 46 Ill App 3d 167

68. N H—State v Boston & M R R, 105 A 2d 751, 99 N H 66

71. N H—Beard v Boston & M R R, 115 A 2d 314, 99 N H 469

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84. N C—Gainey v Rockingham R Co, supra, n 4

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95 N H—State v Boston & M R R, supra, n 68

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14. N H—Hurd v Boston & Maine R R, 129 A 2d 196, 100 N H 404

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16. Okl—St Louis-San Francisco R Co v. Ginn, 264 P 2d 351, 42 A L R.2d 488

19. U S—Chicago, R I & P Ry Co. v. Howell, C A Okl, 401 F.2d 752.

22. U S—Daily v Missouri Pac R Co., D C Kan., 298 F Supp. 911

31. Va—C.J.S cited in Chesapeake & O Ry Co v Crouch, 159 S E.2d 650, 653, 208 Va 602, cert den 89 S Ct 128, 393 U S 840, 21 L Ed 2d 115

Person held not fireman

U.S—Daily v Missouri Pac R Co., D C Kan, 298 F Supp 911

§ 497. Contributory Negligence and Assumption of Risk

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36. U S—Daily v Missouri Pac R Co, D C Kan, 298 F Supp 911

§ 498. —— What Constitutes Contributory Negligence in General

page 1094

50. Tex—Huffington v Texas & N O R Co, Civ. App, 376 S W 2d 388, err ref no rev err.

§ 500. —— Care of Buildings on Owner's Property near Track

Library References

Railroads ⇐459(1).

64. Tex—C.J.S quoted in Brownsville Nav Dist v Valley Ice & Fuel Co, Civ.App, 313 S.W 2d 104, 107.

65. Tex.—C.J.S. quoted in Brownsville Nav. Dist. v. Valley Ice & Fuel Co., Civ.App., 313 S.W.2d 104, 107

§ 508. —— Contributory Negligence as Proximate Cause of Injury

Library References

Railroads ⇐459(1)

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44. N H—State v Boston & M R R, 105 A 2d 751, 99 N H 66

§ 510. Contracts for Exemption from Liability

Library References

Railroads ⇐469

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49. Minn—Speltz Grain & Coal Co v Rush, 51 N W 2d 641, 236 Minn 1

50. Or—Southern Pac Co v Morrison-Knudsen Co, 338 P 2d 665, 216 Or 398

51. Minn—Speltz Grain & Coal Co v Rush, supra, n 49

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64. Minn—Speltz Grain & Coal Co v. Rush, supra, n. 49

73. U S—Thomas v Atlantic Coast Line R Co, C A Fla, 201 F 2d 167

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78. U S—Thomas v Atlantic Coast Line R Co, supra, n 73

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6. Ga.—Bohannon v Southern Ry Co, 104 S.E 2d 603, 97 Ga.App 849.

§ 511. Persons Entitled to Damages

14. U S.—Daily v Missouri Pac R Co., D C Kan, 298 F Supp 911.

15. However, it has been held that a railroad may be liable even though plaintiff was licensee or trespasser.

Mo.—Stevens v Missouri Pac R. Co, 355 S W 2d 122.

§ 512. In General

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54. Okl—Missouri-Kansas-Texas Ry. Co v Smithart, 475 P.2d 823.

§ 513. Declaration, Petition, or Complaint

Library References

Railroads ⇐478(1–6).

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96. U.S—Thomas v Atlantic Coast Line R. Co, C.A Fla., 201 F 2d 167

97. Ark—Kansas City Southern Ry. Co v Story, 390 S W 2d 124, 239 Ark 458.

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16. Ga—Georgia R & Banking Co v Flynt, 79 S E 2d 377, 89 Ga.App 315

§ 515. Issues, Proof, and Variance

page 1112

57. Ark.—Kansas City Southern Ry Co., v. Story, 390 S.W 2d 124, 239 Ark. 458.

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64. Ga.—Atlantic Coast Line R. Co v Sellars, 79 S E 2d 35, 89 Ga App. 293.

§ 516. Presumptions and Burden of Proof

Library References
Railroads ⇐480

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77. N H —State v Boston & M R R , 165 A 2d 751, 99 N H 66

78. Ark —Kansas City Southern Ry Co v Beaty, 388 S W 2d 79, 239 Ark 187

Ga.—Georgia, A , S & C Ry Co v Collins, 160 S E 2d 441, 117 Ga App 254.

N C—Westmoreland v Southern Ry Co , 116 S E 2d 350, 253 N C 197

80. Ark —Kansas City Southern Ry Co v Beaty, 388 S W 2d 79, 239 Ark 187

86. La.—Terre Haute Plantation, Inc v Louisiana & A Ry Co , App , 210 So 2d 566, writ ref 214 So 2d 164, 252 La 845

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97. Ky —Louisville & N R Co v Turner, 379 S W 2d 749

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18. N C —McDowell v Norfolk Southern R Co , 120 S E 205, 186 N C 571, 42 A L R 857—Fleming v Atlantic Coast Line R Co , 73 S E 2d 544, 236 N C 568

25. Miss —Serio v Illinois Cent R Co., 54 So 2d 481

§ 518. —— Origin of Fire or Cause of Injury

Library References
Railroads ⇐480(2–4).

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37. La —Pearson v. Louisiana & A Ry Co., 77 So.2d 411, 226 La 834.

38. Ga.—Georgia R R & Banking Co v Knox, 71 S E 2d 250, 86 Ga.App. 255

Miss —Serio v Illinois Cent. R Co , supra, n. 25

Ohio—State v Pennsylvania R Co , 136 N.E.2d 738, 101 Ohio App. 521.

Tex —Quanah, A & P Ry. Co v. Hand, Civ App , 484 S W 2d 390, err ref. no rev. err

Va —Chesapeake & O Ry. Co v. Seay, 79 S E 2d 631, 195 Va 566—Peck Iron & Metal Co v. Seaboard Air Line R Co., 107 S.E.2d 421, 200 Va. 698.

Locomotive as cause

(2) Other statements.

Mo —Anderson v. St Louis-San Francisco Ry. Co , App., 367 S.W 2d 657.

39. Ga.—Atlantic Coast Line R Co. v Olivent, 79 S E.2d 435, 89 Ga.App. 403

§ 519. —— Breach of Duty

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71. N H.—Hurd v. Boston & Maine R.R., 129 A 2d 196, 100 N.H. 404

§ 521. Admissibility of Evidence

Library References
Railroads ⇐481.

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11. Miss —Serio v. Illinois Cent. R. Co., supra, n. 25

§ 522. —— Construction, Equipment, and Management of Locomotives in General

page 1125

18. Ga.—Atlantic Coast Line R Co. v. Sellars, 79 S.E.2d 35, 89 Ga.App. 293.

§ 523. —— Setting Out Other Fires or Emission of Sparks or Coals on Other Occasions

page 1127

70. Tenn —Illinois Cent R R v Exum, 296 S W 2d 372, 41 Tenn App 450

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14 Ky —Louisville & N R Co v Howe, 243 S W 2d 905

§ 525. —— Subsequent Repairs or Precautions

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36. Ga —Atlantic Coast Line R Co v Sellars, 79 S E 2d 35, 89 Ga App 293

§ 527. Weight and Sufficiency of Evidence

Library References
Railroads ⇐482(1–5)

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43. Va —Chesapeake & O Ry Co v Crouch, 159 S E 2d 650, 208 Va 602 Cert den 89 S Ct 128, 393 U S 840, 21 L Ed 2d 115

Evidence held sufficient

(1) U S —Chicago, R I & P Ry Co v Howell, C A Okl , 401 F 2d 752

Ark —Kansas City Southern Ry Co v Whisnant, 391 S W 2d 17, 239 Ark 640

Ga —Georgia R R & Banking Co v Flynt, 92 S E 2d 330, 93 Ga App 514

Tenn.—Illinois Cent R R v Exum, 296 S W 2d 372, 41 Tenn App 450

Evidence held insufficient

Miss.—Maness v. Illinois Cent R. Co , 271 So 2d 418, 61 A L R 3d 1

Va —Chesapeake & O Ry Co v Seay, 79 S E 2d 631, 195 Va 566

48. Evidence held sufficient to show

(1) Tex —Missouri-Kansas-Texas R Co of Tex v Crouch, Civ App., 273 S W 2d 466

(2) Ga —Georgia R R. & Banking Co v Knox, 71 S.E 2d 250, 86 Ga.App. 255

(4) U S —Chicago, R.I & P Ry Co v Howell, C A Okl , 401 F 2d 752

Mo.—Anderson v St. Louis-San Francisco Ry Co , App , 367 S W 2d 657

Va.—Peck Iron & Metal Co v Seaboard Air Line R Co , 107 S E.2d 421, 200 Va 698

Evidence held insufficient to show

(1) Ohio—State v. Pennsylvania R Co , 136 N E 2d 738, 101 Ohio App 521

(2) La.—Pearson v. Louisiana & A Ry Co., 77 So.2d 411, 226 La 834.

Miss.—Serio v Illinois Cent R Co., 54 So.2d 481

(4) Fire caused by operation of train.

Ga.—Southern Ry. Co. v. Scott, 113 S.E 2d 459, 215 Ga 739.

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49. Ga.—Atlantic Coast Line R Co v. Olivent, 79 S.E.2d 435, 89 Ga App. 403

Kan.—Thomas v Kansas City Southern Ry. Co., 421 P.2d 51, 197 Kan. 747.

Tex —Louisiana & A Ry. Co. v. Littlefield, Civ App., 407 S.W.2d 16—Louisiana & A Ry. Co. v. Carpenter, Civ App., 407 S.W.2d 357—Quanah, A. & P Ry. Co v. Hand, Civ App., 484 S.W.2d 390, err ref. no rev. err.

Va.—Chesapeake & O. Ry Co v. Seay, supra, n 43—Peck Iron & Metal Co. v. Seaboard Air Line R. Co., 107 S.E.2d 421, 200 Va 698

Eyewitness

Mo —Anderson v St Louis-San Francisco Ry Co , App , 367 S W 2d 657

50. La —Pearson v Louisiana & A Ry Co , supra n 48

51. Tex —Louisiana & A Ry Co v Littlefield, Civ App , 407 S W 2d 16

52. Ga —Georgia R R & Banking Co v Knox, supra, n 48

53. La —Pearson v Louisiana & A Ry Co , supra, n 48

54. Kan —Thomas v Kansas City Southern Ry Co , 421 P 2d 51, 197 Kan 747

55. N H —State v Boston & M R R , 105 A 2d 751, 99 N H 66

60. Ga —Southern Ry Co v Scott, 113 S E 2d 459, 215 Ga 739

61. Ga —Georgia R R & Banking Co v Knox, 71 S E 2d 250, 86 Ga App 255—Georgia, A , S & C Ry Co v Collins, 160 S E 2d 441, 117 Ga App 254

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63. Ark —Chicago, R I & P R Co v Harris, 276 S W 2d 686, 224 Ark 848

N C —Fleming v Atlantic Coast Line R Co , 73 S E 2d 544, 236 N C 568

64. Tex —Quanah, A & P Ry Co v Hand, Civ App , 484 S W 2d 390, err ref no rev err

67. Ga —Southern Ry Co v Scott, 113 S E 2d 459, 215 Ga 739

N C —Grannan v Southern Ry Co , 78 S E 2d 165, 238 N C 432

Va —Chesapeake & O Ry Co v Seay, 79 S E 2d 631, 195 Va 566—Peck Iron & Metal Co v Seaboard Air Line R Co , 107 S E 2d 421, 200 Va 698

72. Tex —Missouri-Kansas-Texas R Co of Tex v Crouch, Civ App., 273 S W 2d 466

74. N C —Fleming v Atlantic Coast Line R. Co , supra, n 63

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78. Ky —Louisville & N R Co v Turner, 379 S W 2d 749

81. N H —State v Boston & M R R., supra, n 55

To show negligence

Ark —Kansas City Southern Ry Co v Story, 390 S W 2d 124, 239 Ark 458

To show that negligence was proximate cause of injury

Ala —Central of Ga Ry Co v Griffin, 55 So 2d 218, 36 Ala App 292

Ga —Atlantic Coast Line R Co v Olivent, 79 S E 2d 435, 89 Ga App 403

La.—Graham v Kansas City Southern R. Co , App , 54 So 2d 822

To make out prima facie case

Ark —Kansas City Southern Ry Co v Beaty, 388 S W 2d 79, 239 Ark 187

N C —Fleming v Atlantic Coast Line R Co , 73 S E 2d 544, 236 N C. 568

82. La.—Terre Haute Plantation, Inc. v Louisiana & A. Ry Co., App , 210 So 2d 566, writ ref 214 So 2d 164, 252 La. 845

Minn —Speltz Grain & Coal Co v Rush, 51 N W 2d 641, 236 Minn. 1.

To show negligence

Ark.—Chicago, R.I & P R. Co. v Harris, supra, n. 63

To make out prima facie case

D.C.—Oliphant v. Atlantic Coast Line R Co., C A., 209 F.2d 793, 93 U.S.App D C 341.

83. Prima facie case

N C.—Fleming v Atlantic Coast Line R Co , supra, n 81

84. Ky.—Louisville & N.R Co v Turner, 379 S W 2d 749

90. Ark —Kansas City Southern Ry. Co. v. Whisnant, 391 S W.2d 17, 239 Ark 640

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2. Evidence held sufficient

(5) Other cases

Ga.—Georgia R R & Banking Co v Flynt, 92 S E 2d 330, 93 Ga App 514

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12. Ala.—Central of Ga. Ry Co v Griffin, 55 So 2d 218, 36 Ala App 292

17. Ark.—Chicago, R I & P R Co v Harris, 276 S W 2d 686, 224 Ark 848

19. Tex.—Howell v Texas & Pac Ry Co, Civ App, 243 S W 2d 186

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25. Ark.—Kansas City Southern Ry Co v Beaty, 388 S W 2d 79, 239 Ark 187

§ 529. —— Origin of Fire

Library References

Railroads ⇐484(3).

33. Particular questions held for jury

(1) Ky.—Louisville & N R Co v Howe, 243 S W 2d 905

Evidence held sufficient to go to jury

Fla.—Atlantic Coast Line R Co v Burquest, App, 101 So 2d 828

Mass.—Sheldon Forwarding Co v Boston & M R R, 162 N E.2d 288, 339 Mass 679

Pa.—Connelly Containers, Inc v Pennsylvania R R, 292 A 2d 528, 222 Pa Super 7

Evidence held insufficient to go to jury

Ga.—Georgia, A, S & C Ry Co v Collins, 160 S E.2d 441, 17 Ga App 254

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38. N C.—Gainey v Rockingham R. Co, 68 S E 2d 780, 235 N C 114

47. Mo.—Anderson v St Louis-San Francisco Ry Co, App, 367 S W 2d 657

48. Ga.—Georgia, A, S & C Ry. Co v Collins, 160 S E.2d 441, 117 Ga App 254

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57. Miss.—Serio v Illinois Cent R. Co., 54 So 2d 481

§ 530. —— Negligence in General

Library References

Railroads ⇐484(1, 2).

66. Ill.—Chambers v Penn Cent Transp Co, 289 N E 2d 51, 8 Ill App 3d 69.

Particular questions held for jury

(5) U.S.—Thomas v Atlantic Coast Line R. Co., C.A.Fla., 223 F 2d 1

N H.—Hurd v Boston & Maine R.R, 129 A 2d 196, 100 N H 404

Evidence held insufficient to go to jury

U S.—Thomas v Atlantic Coast Line R. Co., C A.Fla, 223 F 2d 1

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68. Motion for directed verdict properly denied

Ga.—Southern Ry Co. v Scott, 113 S E 2d 459, 215 Ga 739

§ 531. —— Construction, Equipment, and Management of Locomotive

Library References

Railroads ⇐484(4).

74. Mo.—Stevens v Missouri Pac R. Co, 355 S W.2d 122.

77. Evidence held insufficient to go to jury

Ky.—Louisville & N R Co v Turner, 379 S W 2d 749

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80. N C.—Fleming v Atlantic Coast Line R Co, 73 S E 2d 544, 236 N C 568

§ 532. —— Combustibles on Railroad Property

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2. N C.—Gainey v Rockingham R Co, 68 S E 2d 780, 235 N C 114

§ 534. —— Proximate Cause of Injury

Library References

Railroads ⇐484(1).

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12. Evidence held sufficient to go to jury

N H.—Hurd v Boston & Maine R R, 129 A 2d 196, 100 N H 404

Evidence held insufficient to go to jury

N C.—Grinnan v Southern Ry Co, 78 S E 2d 165, 238 N C 432

§ 535. Instructions

Library References

Railroads ⇐485.

13. Instruction held proper

Ark.—Kansas City Southern Ry Co v Beaty, 388 S W 2d 79, 239 Ark. 187

Mo.—Stevens v Missouri Pac R Co, 355 S W 2d 122

N C.—Fleming v Atlantic Coast Line R Co, 73 S.E 2d 544, 236 N C 568

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28. Ga.—Georgia R R & Banking Co. v Flynt, 92 S E 2d 330, 93 Ga App 514.

32. N.C.—Fleming v Atlantic Coast Line R Co, supra n 13.

42. Ga.—Georgia R R & Banking Co v Flynt, 92 S E 2d 330, 93 Ga App 514

§ 536. —— Applicability to Pleadings and Evidence

Library References

Railroads ⇐485(2).

41. Ky.—Louisville & N.R Co v Howe, 243 S W.2d 905

Instructions held not supported by evidence

Ga.—Georgia R. & Banking Co v Flynt, 79 S.E.2d 377, 89 Ga App 315

§ 540. —— Combustibles on Right of Way

Library References

Railroads ⇐485(7).

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81. Ark.—Kansas City Southern Ry. Co v Beaty, 388 S W.2d 79, 239 Ark. 187.

Ky.—Louisville & N R Co. v. Howe, supra, n 41.

§ 542. —— Proximate Cause of Injury

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98. Instructions held sufficient

Ga.—Georgia R.R. & Banking Co. v. Flynt, 92 S.E 2d 330, 93 Ga.App 514

§ 544. Judgment

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9. Judgment held supported by evidence

Ga.—Georgia R R & Banking Co v Flynt, 92 S E 2d 330, 93 Ga App 514

§ 546. Damages

Library References

Railroads ⇐483.

10. Certainty of proof standard held met

Tex.—Missouri-Kansas-Texas R Co v Whitaker, Civ App, 489 S W 2d 348

11. Use of permanent injury measure not improper

Ark.—St Louis S F Ry Co v Friddle, 375 S W 2d 373, 237 Ark 695

17. Ga.—Georgia R R & Banking Co. v Flynt, 92 S E 2d 330, 93 Ga App 514

§ 547. Care Required and Liability in General

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35. Ark.—Missouri Pac R Co. v Neissl, 483 S W 2d 188, 252 Ark 1090

44. Miss.—Gulf, M & O.R Co v Chisolm, 183 So 2d 823

49. N C.—Aycock v Norfolk-Southern Ry Co, 124 S E 2d 566, 256 N.C. 604

§ 548. Statutes Imposing Liability

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65. Rationale of statutes

La.—Cushman v Louisiana & A Ry Co, App., 184 So 2d 741

§ 550. —— Trespassing Animals

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78. Ga.—Louisville & N.R Co v. Moreland, 178 S E.2d 904, 122 Ga App 850

79. Ga.—Tennessee, A & G. Ry Co v Andrews, 159 S E 2d 460, 117 Ga App 164

84. Poisoned grass

(3) Other matters

N C.—Aycock v. Norfolk-Southern Ry Co., 124 S E 2d 566, 256 N C 604

85. Attractive nuisance Doctrine inapplicable

(3) Other matters

N C.—Aycock v Norfolk-Southern Ry. Co, 124 S.E 2d 566, 256 N.C 604

§ 552. —— Effect of Stock Laws

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91. Ga.—Atlantic Coast Line R Co v Scott, 97 S E 2d 325, 95 Ga App. 70

2. Ala.—Armstrong v Louisville & N.R Co, 90 So 2d 103, 265 Ala. 113

§ 555. —— Accidents at Public Crossings

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44. Tex.—Gulf, C. & S.F.R Co. v. Matlock, Civ. App, 244 S.W.2d 706.

§ 559. —— At Common Law

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73. La.—Cox v. Texas & Pac. Ry. Co., App, 56 So.2d 202—Cushman v. Louisiana & A. Ry. Co., App, 184 So.2d 741.—Bush v. Texas & P.R Co, App., 191 So.2d 508.

Vt.—Gloss v Delaware & Hudson R. Co, 378 A.2d 507, 135 Vt. 419

75. La—Cushman v Louisiana & A Ry Co, App, 184 So 2d 741

§ 560. —— When Required by Statute

78. Statutory duty cast on railroad
Vt—Brown v Central Vermont Ry, Inc, 157 A 2d 219, 121 Vt 340

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84. Idaho—Darrar v. Chicago, M, St P & P R Co, 497 P 2d 1399, 94 Idaho 772
Mo—Beck v Thompson, App, 245 S W 2d 174

85. Nev—Union Pac R Co v Adams, 362 P 2d 450, 77 Nev 282

Validity of statute
(2) Other statements
Ala—Louisville & N R Co v Stuart, 117 So.2d 399, 270 Ala 285
Neb—Linenbrink v Chicago & N.W Ry Co, 131 N W 2d 417, 177 Neb 838

Construction of statute
(2) Other statements
Ark—Missouri Pac R Co. v Stroupe, 373 S W 2d 709, 237 Ark. 464.

92. La—Bush v Texas & P R Co, App, 191 So.2d 508

93. S D—Berens v Chicago, M, St P & P R Co, 120 N W 2d 565, 80 S.D 168

Railroad not liable irrespective of conditions and circumstances
Kan—Atkinson v Thompson, 320 P 2d 850, 182 Kan. 389.

§ 561. —— Effect of Agreement or Waiver

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11. Owner may not maintain action for not fencing where there was agreement to maintain open private crossing
Kan.—Atkinson v Thompson, 320 P 2d 850, 182 Kan. 389

13. Kan—C.J.S. cited in Atkinson v. Thompson, 320 P 2d 850, 855, 182 Kan 389

§ 565. —— Species of Animal Injured

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52. Okl—Kansas City Southern Ry Co v English, 417 P.2d 309

§ 566. —— Trespassing Animals and Effect of Stock Laws

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62. Va.—Chesapeake & O. Ry. Co. v. Willis, 105 S.E.2d 833, 200 Va. 299.

69. Iowa—C.J.S. cited in Burchette v. Chicago, R I. & P.R Co, 234 N W.2d 149, 150.

§ 567. —— Place of Entry of Animal upon Track

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72. Tex.—C.J.S. cited in Texas & N.O R. Co. v. Ivey, Civ App., 283 S.W.2d 78, 81

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93. Animals held not trespassers
Vt—Brown v. Central Vermont Ry., Inc., 157 A.2d 219, 121 Vt. 340.

§ 568. —— Place, Nature, and Cause of Injury

98. La—Cushman v Louisiana & A Ry Co, App, 184 So 2d 741

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21. Okl—Kansas, O & G Ry Co v Kersey, 266 P 2d 617

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32. Newly cut grass
Okl—Kansas, O & G Ry Co v Kersey, supra, n 21

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§ 569. Particular Places Where Fence or Cattle Guard Required or Not Required

69. Okl—Kansas City Southern Ry Co v English, 417 P 2d 309

§ 571. —— Stations, Switchyards, and Depot Grounds

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31. Tex—Trevino v Missouri Pac R Co, Civ App, 318 S W 2d 460

§ 572. —— Improved, Inclosed, Unimproved, and Uninclosed Lands

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65. Statute imposes no duty as to public crossing or road
Ark.—Missouri Pac R Co v. Stroupe, 373 S W 2d 709, 237 Ark 464

§ 573. —— Highways

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9. Vt—Abell v. Central Vt Ry., Inc., 102 A 2d 847, 118 Vt 189.

§ 574. —— Other Places

15. Vt—Abell v. Central Vt Ry., Inc., supra, n 9

§ 576. —— Sufficiency

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46. Statute construed
Ohio—Counts v Chesapeake & O.R Co, 107 N.E.2d 896, 91 Ohio App. 130

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66. Ala.—Lousville & N R. Co. v. Sadler, 223 So 2d 294, 45 Ala.App 54.

§ 577. —— Defects and Repairs in General

Library References
Railroads ⇐412(1).

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89. Ohio—Counts v. Chesapeake & O R. Co, supra, n 46.

90. N.Y—Gonsenhauser v. New York Cent R. Co, 188 N.Y.S.2d 901, 8 A.D.2d 483

92. N.Y.—Gonsenhauser v New York Cent. R Co, 188 N.Y.S.2d 901, 8 A.D.2d 483.

Statutes held valid
Wyo.—Chicago & N.W. Ry Co. v. Bishop, 390 P 2d 731.

95. Okl.—Kansas City Southern Ry. Co v Gardner, 421 P 2d 250

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13. S D—Berens v Chicago, M, St P & P R Co, 120 N W 2d 565, 80 S D 168

17. N Y—Gonsenhauser v New York Cent R Co, 188 N Y S 2d 901, 8 A D 2d 483

§ 581. Persons Entitled to Benefits of Statute

Library References
Railroads ⇐411(10).

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56. Vt—Brown v Central Vermont Ry, Inc, 157 A 2d 219, 121 Vt 340

Waiver
Okl—Kansas City Southern Ry Co v English, 417 P 2d 309

57. Vt—Abell v Central Vt Ry, Inc, 102 A 2d 847, 118 Vt 189

§ 592. To Whom Liable, and Estoppel

86. Tex—Swim v Quanah, A & P Ry Co, Civ App, 441 S W 2d 307

§ 595. Signals

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8. Statute held inapplicable
Ala—Atlantic Coast Line R Co v Vise, 78 So 2d 656, 38 Ala App 7, affd 78 So 2d 661, 262 Ala 329

§ 596. Lookout

Library References
Railroads ⇐415(1, 3–5).

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26. Ala—Lousville & N R. Co. v Harper, 120 So 2d 574, 40 Ala App 635

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38. Ala—Lousville & N R Co v Harper, 120 So 2d, 574, 40 Ala App 635

Duty of engineer and fireman
Ala—Lousville & N R Co. v Moseley, 81 So 2d 318, 38 Ala App 19, affd 81 So 2d 321, 263 Ala 103—Lousville & N R Co v Yates, 81 So 2d 620, 38 Ala App 183, cert den 81 So.2d 623, 263 Ala. 129

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56. Ala.—Lousville & N R. Co v Moseley, 81 So 2d 318, 38 Ala App. 19, affd 81 So 2d 321, 263 Ala 103—Lousville & N R. Co v Yates, 81 So 2d 620, 38 Ala App 183, cert. den 81 So 2d 623, 263 Ala. 129.

§ 601. Speed

Library References
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90. La—Bush v Texas & P R. Co., App., 191 So 2d 508

92. La.—Sylvester v. Texas & P Ry Co, App, 183 So 2d 81—Bush v Texas & P.R Co, App, 191 So.2d 508

94. Ga—Atlantic Coast Line R Co. v Walker, 80 S E 2d 508, 89 Ga.App. 605.

96. Ga—Atlantic Coast Line R. Co v Powers, 80 S E.2d 510, 89 Ga.App 630

1. Ala.—Lousville & N.R Co v King, 67 So 2d 49, cert. den 67 So 2d 51, 259 Ala. 358—Lousville & N R. Co. v Moseley, 81 So.2d 318, 38 Ala App. 19, affd. 81 So 2d 321, 263 Ala. 103—Lousville & N.R. Co v Yates, 81 So 2d 623, 263 Ala 129

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18. Ala—Louisville & N R Co v Moseley, 81 So 2d 321, 263 Ala 103

Ga—Atlantic Coast Line R Co v Hodges, 71 S E 2d 524, 86 Ga App 334

27. Ala—Atlantic Coast Line R Co v Vise, 78 So 2d 656, 38 Ala App 7, affd 78 So 2d 661, 262 Ala 329

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28. Tex—Gulf, C & S F Ry Co v Clark, Civ App, 337 S W 2d 706

33. Ga—Atlantic Coast Line R Co v Hodges, supra, n 18

§ 603. Precautions as to Animals Seen On or Near Tracks

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47. Ala—Louisville & N R Co v Lowrey, 64 So 2d 139, 37 Ala App 112—Atlantic Coast Line R Co v Adams, 74 So 2d 524, 37 Ala App 538, cert den 74 So 2d 527, 261 Ala 696

49. Miss—Gulf, M & O R Co v Chisolm, 183 So 2d 823

§ 607. —— Duty to Stop or Slacken Speed in General

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85. La—Jordan v Kansas City Southern Ry Co, App, 260 So 2d 115

92. Ga.—C.J.S. cited in Louisville & N R Co v Moreland, 178 S E.2d 904, 907, 122 Ga App 850

93. Ala—Louisville & N R Co v Lowrey supra, n 47.

Ga—C.J.S. cited in Louisville & N R Co v Moreland, 178 S E 2d 904, 907, 122 Ga App 850

94. Ga.—C.J.S. quoted in Louisville & N R Co v Moreland, 178 S E 2d 904, 907, 122 Ga App 850

95. Ga—C.J.S. quoted in Louisville & N R Co v Moreland, 178 S E 2d 904, 907, 122 Ga App 850

§ 608. —— Animals near or Approaching Track

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4. Ga.—Atlantic Coast Line R Co v Clemmons, 73 S E.2d 210, 87 Ga.App 177

11. Miss.—Gulf, M. & O.R Co. v. Chisolm, 183 So.2d 823

§ 611. In General

Library References

Railroads ⇐425.

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34. Okl—Kansas, O & G Ry Co. v Searcey, 240 P 2d 440, 206 Okl 1

§ 615. Rate of Speed and Means of Control

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Railroads ⇐425.

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8. Ala.—Louisville & N R. Co v King, App, 67 So.2d 49, cert. den 67 So.2d 51, 259 Ala 358

ex.—Gulf, C & S F. Ry. Co v Clark, Civ App, 337 S.W.2d 706.

§ 618. —— Injury Avoidable Notwithstanding Contributory Negligence

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71. La—Harrison v Missouri Pac R Co, App, 344 So 2d 1145

§ 624. Conduct with Respect to Fences, Gates, and Bars

Library References

Railroads ⇐422

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28. Ohio—Counts v Chesapeake & O R Co, 107 N E 2d 896, 91 Ohio App 130

§ 625. Allowing Animals to Go at Large

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Railroads ⇐424

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68. Ala—Louisville & N R Co v Harper, 120 So 2d 574, 40 Ala App 635

§ 626. Escape of Animals from Inclosure or Control

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15. Failure to inspect fence where animals pastured on another's lands

Vt—Brown v Central Vermont Ry, Inc., 157 A 2d 219, 121 Vt 340

§ 627. Notice of Claim or Demand for Payment

Library References

Modern Legal Forms Ch. 48, Notices

27. Time liability attaches

Ark—Lovegrove v Missouri Pac R Co, 436 S W 2d 798, 245 Ark 1021

§ 635. Declaration, Complaint, or Petition

Library References

Railroads ⇐439(1, 7–9).

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55. Pleading held not demurrable

Ala—Atlantic Coast Line R Co. v. Vise, 78 So 2d 656, 38 Ala.App. 7, affd 78 So.2d 661, 262 Ala 329

Petition held sufficient

Ga—Atlantic Coast Line R. Co. v Willett, 80 S E.2d 849, 89 Ga App 712—Louisville & N R Co. v Lowe, 96 S E 2d 643, 95 Ga.App 8

Where the statute makes proof of the injury prima facie evidence of negligence and places the burden of proof on defendant, in some,[65] but not other,[65.1] jurisdictions plaintiff must still allege negligence in his complaint.

65. Ala.—Mobile & O R Co v. Williams, 53 Ala 595

Colo—Burlington & M.R.R. in Nebraska v Campbell, 59 P. 424, 14 Colo.App. 141.

65.1. La—Jackson v Missouri Pac R. Co., App., 141 So 770—James v. Missouri Pac. R Co., App., 113 So.2d 41

52 C J. p 94 note 44.

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70 Miss—Illinois Cent R Co v Gibbson, 70 So 2d 52, 219 Miss 815

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88 Petition held insufficient

Ga—Tennessee, A & G Ry Co v Andrews, 159 S E 2d 460, 117 Ga App 164

96. Ala—Atlantic Coast Line R Co v Vise, 78 So 2d 656, 38 Ala App 7, affd 78 So 2d 661, 262 Ala 329—Louisville & N R Co v Self, Civ, 233 So 2d 90, 45 Ala App 530

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6. Ala—Atlantic Coast Line R Co v Horn, 66 So 2d 202, 37 Ala App 220

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43. Kan—Atkinson v. Thompson, 320 P 2d 850, 182 Kan 389

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Okl—Kansas City Southern Ry Co v Girdner, 421 P 2d 250

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75. Iowa—State Farm Mut Auto Ins Co v Nelson, 166 N W 2d 803

§ 636. Plea or Answer

Library References

Railroads ⇐439(8).

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34. La—James v Missouri Pac R Co, App, 113 So 2d 41

§ 638. Issues, Proof, and Variance

Library References

Railroads ⇐440.

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74. La—Cushman v Louisiana & A Ry Co, App, 184 So 2d 741

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7. Ga.—Atlantic Coast Line R Co v Royal, 65 S.E 2d 827, 84 Ga App. 247.

§ 640. —— Liability Generally

Library References

Railroads ⇐251, 441(1).

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73. La—Lafleur v Texas & P Ry Co, App, 116 So 2d 844

76. La—Lafleur v. Texas & P. Ry Co, App, 116 So 2d 844

§ 641. —— Fact of Killing or Injury

Library References

Railroads ⇐251, 441(2–5).

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89. La.—Francis v. Thompson, App, 59 So.2d 381, 382—Bush v Texas & P R. Co, App, 191 So 2d 508—Jordan v. Kansas City Southern Ry Co., App., 260 So 2d 115.

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98. Ala.—Louisville & N.R. Co. v. Self, Civ., 233 So.2d 90, 45 Ala.App. 530.

Ark—Chicago, R I. & P.R. Co. v Williams, 253 S.W 2d 349, 221 Ark. 404—Missouri Pac R. Co. v Nessl, 483 S W.2d 188, 252 Ark. 1090.

La.—Richard v. Kansas City So. Ry. Co, App., 55 So 2d 12—Cox v. Texas & Pac. Ry. Co, App., 56

So 2d 202—James v Missouri Pac R Co, App, 113 So 2d 41—Lafleur v Texas & P Ry Co, App, 116 So 2d 844

1. Ala—Atlantic Coast Line R Co v Vise, 78 So 2d 656, 38 Ala App 7, affd 78 So 2d 661, 262 Ala 329

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12. Ala—Atlantic Coast Line R Co v Smith, 78 So 2d 663, 38 Ala App 120, cert den 78 So 2d 664, 262 Ala 345

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26. La—Cox v Texas & Pac Ry Co, App, 56 So 2d 202

27. Ala—Louisville & N R Co v Morris, 205 So 2d 910, 44 Ala App 216, cert den 205 So 2d 915, 281 Ala 722—Louisville & N R Co v Nettles, 222 So 2d 727, 45 Ala App 46

La—Richard v Kansas City So Ry Co, App, 55 So 2d 12

28. Ala—Louisville & N R Co v Lewis, 208 So 2d 911, 44 Ala App 360, cert. den 208 So 2d 913, 282 Ala 727

32. Evidence held sufficient to rebut statutory presumption

(1) Miss.—Illinois Cent r. Co v Shivers, 67 So 2d 372, 218 Miss. 332

Evidence held insufficient to rebut statutory presumption

Ala—Louisville & N R Co v Self, Civ., 233 So 2d 90, 45 Ala.App 530

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37. Ga—Louisville & N R. Co v Bennett, 80 S E 2d 195, 89 Ga App. 534—Atlantic Coast Line R. Co v. Hodges, 84 S E.2d 711, 90 Ga.App 870

Miss—Illinois Cent R Co. v Gibson, 70 So 2d 52, 219 Miss 815

49. Ga—Atlantic Coast Line R. Co v. Clemmons, 73 S E 2d 210, 87 Ga.App 177

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51. Ga.—Atlantic Coast Line R. Co v Rowe, 64 S E 2d 689, 83 Ga App. 733

Miss.—New Orleans & N E R. Co v. Lee, 205 So.2d 923

53. Railroad held not insurer of safety of animals

La.—Cushman v. Louisiana & A. Ry Co., App, 184 So.2d 741

56. Ala—Armstrong v. Louisville & N R. Co, 90 So.2d 103, 265 Ala 113

§ 642. —— Fences and Cattle Guards

Library References

Railroads ⇐441(6).

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64. Statute held inapplicable

(2) Other statements

Tex.—Trevino v Missouri Pac R Co., Civ App, 318 S W.2d 460.

65. Tex—Texas & N.O.R. Co. v Allen, Civ.App., 251 S.W.2d 790

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4. La.—Lafluer v. Texas & P. Ry. Co, App, 116 So 2d 844.

§ 647. Admissibility of Evidence

Library References

Railroads ⇐442.

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49. Ala—Louisville & N R Co v Powers, 192 So 2d 476, 43 Ala App 470

Tex—Trevino v Missouri Pac R Co, Civ App, 318 S W 2d 460

§ 650. —— Fences and Cattle Guards

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90. Idaho—Zener v Spokane Intern R Co, 300 P 2d 494, 78 Idaho 196

§ 653. —— Violation of Statutes and Ordinances

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56. Ga—Atlantic Coast Line R Co v Hodges, 71 S E 2d 524, 86 Ga App 334

§ 655. Weight and Sufficiency of Evidence

Library References

Railroads ⇐443

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69. Ala.—Louisville & N R Co v Cox, Civ, 237 So 2d 112, 46 Ala App 1

Evidence held sufficient, etc.

La—Lafleur v Texas & P Ry Co, App, 116 So 2d 844

70. Evidence held sufficient

Idaho—Darrar v Chicago, M, St P & P R Co, 497 P 2d 1399, 94 Idaho 772

71. Ala—Louisville & N R Co v Cox, Civ, 237 So 2d 112, 46 Ala App 1

74. Ga—Wright v. Central of Ga Ry Co, 69 S E 2d 902, 85 Ga App 654—Atlantic Coast Line R Co v Scott, 97 S E 2d 325, 95 Ga App 70.

Evidence held sufficient

Ala—Louisville & N.R. Co v Lowrey, 64 So 2d 139, 37 Ala App 112—Louisville & N R Co v Moseley, 81 So 2d 318, 38 Ala App 19, affd 81 So 2d 321, 263 Ala 103—Louisville & N R Co v Yates, 81 So 2d 620, 38 Ala.App. 183, cert den. 81 So.2d 623, 263 Ala 129.

Pa.—Hay v Baltimore & O.R Co, 202 A.2d 824, 415 Pa 190

Evidence held insufficient

Ala.—Atlantic Coast Line R Co v Adams, 74 So 2d 524, 37 Ala App 538, cert den 74 So 2d 527, 261 Ala 696.

La.—Sylvester v Texas & P Ry Co, App, 183 So 2d 81—Bush v Texas & P R Co, App, 191 So 2d 508

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77. Evidence held to establish prima facie case

Ala—Louisville & N R Co v Harper, 120 So 2d 574, 40 Ala App 635

78. La—James v. Missouri Pac. R. Co., App, 113 So.2d 41

§ 656. —— Where Statutory Presumption of Negligence Rebutted

Library References

Railroads ⇐443(1).

80. Ga.—Atlantic Coast Line R. Co v Rowe, 64 S.E 2d 689, 83 Ga.App. 733—Atlantic Coast Line R. Co. v. Clemmons, 73 S E 2d 210, 87 Ga.App. 177.

83. Evidence held sufficient to rebut presumption

Ark—Kansas City Southern Ry. Co. v. Smith, 283 S.W 2d 860, 225 Ark. 587.

Evidence held insufficient to rebut presumption

Ark—Kansas City Southern Ry Co v Smith, 283 S W 2d 860, 225 Ark 587

§ 657. —— Direct and Circumstantial Evidence

85. Ala—Louisville & N R Co v King, 67 So 2d 49, cert den 67 So 2d 51, 259 Ala 358

§ 658. —— Cause of Injury

Library References

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98. Evidence held sufficient

(1) Ala—Louisville & N R Co v Spitzer, 63 So 2d 295, 36 Ala App 705

(2) Ark—Kansas City Southern Ry Co v Smith, 283 S W 2d 860, 225 Ark 587

99. Evidence held sufficient

Pa—Hay v Baltimore & O R Co, 202 A 2d 824, 415 Pa 190

2. Ga—Atlantic Coast Line R Co v Hodges, 84 S E 2d 711, 90 Ga App 870

3. Evidence held sufficient

La—Cox v Texas & Pac Ry Co, App, 56 So 2d 202—Francis v Thompson, App, 59 So 2d 381—Francis v Thompson, App, 59 So 2d 382.

§ 661. —— Fences and Cattle Guards

Library References

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34. Evidence held sufficient

(4) Other evidence.

Idaho—Darrar v Chicago, M, St P & P R Co, 497 P 2d 1399, 94 Idaho 772

N Y—Gonsenhauser v New York Cent R Co, 188 N Y S 2d 901, 8 A D 2d 483

35. Evidence held sufficient

Okl—Kansas City Southern Ry Co v English, 417 P.2d 309—Kansas City Southern Ry Co v Gardner, 421 P 2d 250

36. Idaho—Zener v Spokane Intern. R. Co, 300 P 2d 494, 78 Idaho 196

37. Evidence held insufficient

Tex.—Texas & N O R Co v Allen, Civ App, 251 S W 2d 790

38. Idaho—Zener v Spokane Intern. R Co., 300 P 2d 494, 78 Idaho 196

43. Ala—Louisville & N R. Co. v Martin, Civ, 255 So.2d 42, 47 Ala.App 371

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44. Evidence held sufficient

Idaho—Darrar v Chicago, M, St P & P R Co, 497 P 2d 1399, 94 Idaho 772

Ohio—Counts v Chesapeake & O R Co, 107 N E 2d 896, 91 Ohio App 130

45. Okl—Kansas, O & G Ry Co v. Searcy, 240 P 2d 440, 206 Okl 1.

47. Mo—Kidd v Thompson, App, 242 S W 2d 585

49. Kan—Atkinson v Thompson, 320 P 2d 850, 182 Kan 389

Evidence held sufficient

(3) Other evidence

N.Y.—Gonsenhauser v New York Cent. R Co, 188 N.Y.S.2d 901, 8 A D 2d 483

Okl.—Kansas City Southern Ry Co. v Gardner, 421 P 2d 250

Evidence held insufficient

La—Bush v Texas & P R. Co., App, 191 So 2d 508.

Tex—Texas & N O R Co v Ivey, Civ App, 283 S W 2d 78

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60. Ark—Missouri Pac R Co v Stroupe, 373 S W 2d 709, 237 Ark 464

§ 662. —— Crossings, Gates, and Bars

75. Mo—Beck v Thompson, App, 245 S W 2d 174

§ 663. —— Rate of Speed

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88. Ga—Atlantic Coast Line R Co v Walker, 80 S E 2d 508, 89 Ga App 605

86. Tex—Gulf, C & S F Ry Co v Clark, Civ App, 337 S.W 2d 706

§ 664. —— Precautions; Signals and Lookouts

91. Evidence held sufficient

Ala—Louisville & N R. Co v Morris, 205 So 2d 910, 44 Ala App 216, cert den 205 So 2d 915, 281 Ala 722

Ga—Seaboard Air Line R Co v Williams, 72 S E 2d 733, 86 Ga App 870—Western & A R R v Treadaway, 119 S.E 2d 716, 103 Ga App 511

95. La—Francis v Thompson, supra, n 3

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2. La—Sylvester v Texas & P Ry. Co, App, 183 So 2d 81

5. Ark—Missouri Pac R Co v Boley, 477 S W 2d 468, 251 Ark 964

La—Colonial Dairy Farms, Inc v Texas & P. Ry Co, App, 138 So 2d 216.

§ 665. —— Contributory Negligence

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18. Negligence of plaintiff remote and not proximate cause of accident

La.—Colonial Dairy Farms, Inc v Texas & P Ry Co, App, 138 So 2d 216

Evidence held sufficient to show freedom from contributory negligence

Ga.—Louisville & N R Co v Moreland, 178 S E 2d 904, 122 Ga.App. 850.

19. La.—Sylvester v. Texas & P Ry Co, App, 183 So.2d 81

§ 668. Questions of Law and Fact

Library References
Railroads ⇐446.

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35. Ga.—Louisville & N.R. Co v Moreland, 178 S E.2d 904, 122 Ga.App 850

36. Ala.—Atlantic Coast Line R Co. v Vise, 78 So 2d 656, 38 Ala.App. 7, affd 78 So.2d 661, 262 Ala. 329

37. Ala—Louisville & N R Co v. Morris, 205 So.2d 910, 44 Ala.App. 216, cert. den. 205 So.2d 915, 281 Ala 722

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42. Miss—Gulf, M & O R Co. v Chisolm, 183 So.2d 823.

§ 669. —— Fact of Killing or Injury by Train

Library References
Railroads ⇐446(8).

52. Evidence held for jury

Ark—Chicago, R I & P R Co v Williams, 253 S W 2d 349, 221 Ark 404

§ 670. —— Character and Condition of Public Crossing

53. Evidence held sufficient to submit to jury

Tex—Texas & N O R Co v Allen, Civ App, 251 S W 2d 790

§ 671. —— Operation of Train

Library References
Railroads ⇐446(1).

56. Ala—Louisville & N R Co v Yates, 81 So 2d 620, 38 Ala App 183, cert den 81 So 2d 623, 263 Ala 129—Armstrong v Louisville & N R Co, 90 So 2d 103, 265 Ala 113

Ga—Atlantic Coast Line R Co v Scott, 97 S E 2d 325, 95 Ga App 70

57. Ala—Louisville & N R Co v Moseley, 81 So 2d 321, 263 Ala 103

Ga—Buchanan v Heath, 80 S E 2d 393, 210 Ga 410

Evidence held sufficient for jury

Ala—Carr v Alabama Great Southern R Co, App, 179 So 2d 328, certiorari denied 179 So 2d 330, 278 Ala 707

Ga—Atlantic Coast Line R Co v Willett, 80 S E 2d 849, 89 Ga App 712

58. Miss—Illinois Cent R Co v. Gibson, 70 So 2d 52, 219 Miss 815.

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60. Ark—Kansas City Southern Ry Co v Smith, 283 S W 2d 860, 225 Ark 587

63. Evidence held insufficient for jury

Ga—Atlantic Coast Line R Co v Powers, 80 S.E 2d 510, 89 Ga App 630

§ 672. —— Rebuttal of Statutory Presumption of Negligence

67. Ark—Missouri Pac. R Co v Boley, 477 S W 2d 468, 251 Ark 964

68. Ala.—Louisville & N.R Co v Lowrey, 64 So 2d 139, 37 Ala App 112

70. Miss—Illinois Cent. R Co v Shivers, 67 So 2d 372, 218 Miss. 332

76. Ala—Carr v Alabama Great Southern R Co, App, 179 So 2d 328, certiorari denied 179 So.2d 330, 278 Ala. 707.

§ 673. —— Fences and Cattle Guards

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87. Idaho—Zenier v. Spokane Intern R. Co, 300 P.2d 494, 78 Idaho 196.

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1. Tex.—Trevino v Missouri Pac R. Co., Civ App, 318 S W 2d 460

10. Tex.—Texas & N.O.R. Co. v. Allen, Civ.App, 251 S W.2d 790.

14. Ala.—Louisville & N R. Co v. Sadler, 223 So 2d 294, 45 Ala.App. 54

Idaho—Zenier v. Spokane Intern. R Co, 300 P 2d 494, 78 Idaho 196

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29. Mo—Kidd v. Thompson, App., 242 S.W 2d 585

§ 675. —— Signals, Lookouts, and Precautions

Library References
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42. Ala—Louisville & N R Co. v Lewis, App, 208 So 2d 911, 44 Ala App 360, cert den 208 So 2d 913, 282 Ala 727

Ark—Lovegrove v Missouri Pac R Co, 436 S W 2d 798, 245 Ark 1021

Ill—Bauer v Elgin, J & E Ry Co, 107 N E 2d 53, 347 Ill App 542

43. Ala—Louisville & N R Co v King, App, 67 So 2d 49, cert den 67 So 2d 51, 259 Ala 358

Ga—Atlantic Coast Line R Co v Hodges, 84 S E 2d 711, 90 Ga App 870

44. Ala—Louisville & N R Co v Harper, 120 So 574, 40 Ala App 635

46. Ark—Lovegrove v Missouri Pac R Co, 436 S W 2d 798, 245 Ark 1021

48. Ala—Louisville & N R Co v. Nettles, 222 So 2d 727, 45 Ala App 46

Ark—Chicago, R I & P R Co. v Williams, 253 S W 2d 349, 221 Ark 404

52. Ala—Atlantic Coast Line R Co v Norred, App, 82 So 2d 309, 38 Ala App 291

55. Ala—Atlantic Coast Line R Co v Norred, App, 82 So 2d 309, 38 Ala App 291

Ark—Chicago R I & P R Co v Williams, supra, n 48

§ 676. —— Rate of Speed

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63. Ala—Louisville & N R Co v Martin, Civ, 255 So 2d 42, 47 Ala App 371

Ark—Kansas City Southern Ry Co v Smith, 283 S.W 2d 860, 225 Ark 587.

Ill—Bauer v Elgin, J & E Ry Co., 107 N E 2d 53, 347 Ill App 542

Kan—Home Ins Co v Atchison, T & S F. Ry Co, 369 P 2d 338, 189 Kan 316.

§ 677. —— Contributory Negligence of Owner

69. Kan—Home Ins Co v. Atchison, T & S F Ry Co, 369 P 2d 338, 189 Kan 316

§ 679. Instructions

Library References
Railroads ⇐447.

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4. Ala.—Louisville & N.R Co v. Self, Civ., 233 So 2d 90, 45 Ala.App. 530—Louisville & N.R. Co. v. Cox, Civ, 237 So.2d 112, 46 Ala App. 1.

8. Ark—Lovegrove v Missouri Pac R Co, 436 S.W 2d 798, 245 Ark 1021

9. Speed of train

(2) Other cases.

Ala.—Louisville & N R Co v Moseley, 81 So.2d 318, 38 Ala App 19, affd. 81 So 2d 321, 263 Ala. 103

Ga—Atlantic Coast Line R Co. v. Hodges, 71 S.E.2d 524, 86 Ga.App. 334

18. Instructions held proper

Ga—Western & A R R. v Dalton, 114 S E 2d 293, 101 Ga.App 506.

24. Requested instruction in language of reported case need not be given

Ala—Louisville & N R. Co v Yates, 81 So 2d 620, 38 Ala.App 183, cert den 81 So 2d 623, 263 Ala. 129.

§ 680. —— Conformity to Issues and Evidence

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38. Miss.—Illinois Cent. R Co. v Gibson, 70 So.2d 52, 219 Miss. 815.

§ 681. —— Presumptions and Burden of Proof

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58. Ala—Louisville & N R Co v McRae, Civ, 253 So 2d 788, 47 Ala App 331

60. Ga—Louisville & N R Co v Bennett, 80 S E 2d 195, 89 Ga App 534

§ 682. —— Fences and Cattle Guards

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91. Mo—Kidd v Thompson, App, 242 S W 2d 585

§ 684. —— Signals, Lookouts, and Precautions

8. Ala—Atlantic Coast Line R Co v Adams, 74 So.2d 524, 37 Ala.App 538, cert den 74 So 2d 527, 261 Ala 696

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16. Ala.—Atlantic Coast Line R Co v Horn, 66 So 2d 202, 37 Ala App 220.

27 Ala.—Atlantic Coast Line R Co v Adams, supra, n. 8

§ 686. Verdict, Findings, and Judgment

Library References
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62. Tex—Texas & N.O.R. Co v Allen, Civ.App, 251 S W.2d 790

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§ 688. Costs

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2. Idaho—Darrar v Chicago, M, St P & P.R. Co, 497 P.2d 1399, 94 Idaho 772.

§ 689. Damages

26. Idaho—Darrar v. Chicago, M, St P & P R Co., 497 P.2d 1399, 94 Idaho 772.

33. N Y—Gonsenhauser v. New York Cent. R. Co, 188 N Y.S 2d 901, 8 A.D.2d 483.

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64. Failure to keep record book

Idaho—Darrar v Chicago, M., St P & P.R. Co., 497 P.2d 1399, 94 Idaho 772.

65. Ga.—Buchanan v Heath, 80 S.E.2d 393, 210 Ga. 410

§ 691. Rate of Speed

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15. La.—Louisiana & A Ry Co v Chicago, R I & P R. Co., App., 345 So.2d 163

§ 692. Collision on Same Track

Library References
Railroads ⇐287.

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22. Contract exemption

D C—Pruemont Const. Corp. v. Baltimore & O R. Co., Mun.App., 131 A.2d 877.

§ 695. Obstructions on Tracks

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44. La.—Louisiana & A. Ry. Co. v. Chicago, R.I. & P R. Co., App., 345 So.2d 163.

§ 700. Contributory Negligence

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74. La—Louisiana & A Ry Co v Chicago, R I & P R Co, App, 345 So 2d 163

§ 703. —— Pleading

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14. La—Louisiana & A Ry Co v Chicago, R I & P R Co, App, 345 So 2d 163.

§ 704. —— Evidence

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39. U S—Fort Dodge, D M & S Ry Co v Chicago Great Western Ry Co, C A Iowa, 197 F 2d 886

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53. Train derailed by scrap cargo from earlier train

Ill—Grand Trunk Western R Co v M S Kaplan Co, 193 N E 2d 456, 43 Ill App 2d 230, 7 A L R 3d 1289

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95. La—Louisiana & A Ry Co v Chicago, R I & P R Co., App, 345 So.2d 163

96. U S—Wiggins v. City of Philadelphia, C A Pa, 331 F 2d 521—Alabama Great Southern R. Co v Allied Chemical Corp, 501 F 2d 94, reh 509 F 2d 539

Evidence held sufficient

(1) U S.—Anderson v U S, D C Ky., 118 F Supp. 498.

§ 705. —— Questions of Law and Fact

6. U.S—Alabama Great Southern R. Co v Allied Chemical Corp, 501 F 2d 94, reh. 509 F 2d 539

Ill—Grand Trunk Western R. Co. v M S Kaplan Co., 193 N E 2d 456, 43 Ill.App 2d 230, 7 A L R 3d 1289.

Miss—Illinois Cent R Co v. Aldy, 185 So 2d 680

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11. Ill.—Grand Trunk Western R. Co v M. S Kaplan Co, 193 N.E 2d 456, 43 Ill.App.2d 230, 7 A.L.R 3d 1289

Contributory negligence held for jury

(4) U S.—Fort Dodge, D M & S. Ry Co v Chicago Great Western Ry Co, C.A.Iowa, 197 F.2d 886—Ballinger v. J V Sutphin Co., Atlanta, Inc, C.A.Tenn, 332 F 2d 436

§ 706. —— Instructions

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26. Miss—Illinois Cent, R Co v Aldy, 185 So 2d 680

§ 707. —— Verdict and Findings

36. Tex.—Goolsbee v Texas & N O.R. Co., 243 S W 2d 386, 150 Tex. 528

§ 710. Rights and Duties at Crossings Generally

Library References
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44. Kan.—C.J.S. cited in Grisamore v Atchison, T. & S.F. Ry. Co, 405 P.2d 93, 100, 195 Kan. 16

45. Colo.—Union Pac. R. Co. v. Cogburn, 315 P 2d 209, 136 Colo. 184.

Wash.—Hewitt v. Spokane, P. & S Ry. Co, 402 F 2d 334, 66 Wash.2d 285.

46. U S—Patterson v Pennsylvania R Co, 402 P 2d 334, 66 Wash 2d 285

Ill—Baker v Norfolk & W Ry Co, 256 N E 2d 887, 120 Ill App 2d 296

N C—Faircloth v Atlantic Coast Line R Co, 100 S E 2d 328, 247 N C 190

48. Ga—Atlantic Coast Line R Co v Coxwell, 91 S E 2d 135, 93 Ga App 159

Mich—Alexander v Grand Trunk W R Co, 65 N W 2d 696, 340 Mich 207

50. La—Maryland Cas Co v Gulf, M & O R Co, App, 157 So 2d 302

§ 711. —— Care Required of Railroad in General

53. U S—Palsa v Louisville & N R Co, D C Miss, 226 F Supp 651, affd, C A, 342 F 2d 799, cert den 86 S Ct 80, 382 U S 834, 15 L Ed 2d 78—Adamson v Midland Val R. Co, C A Kan, 384 F 2d 341.

Kan—Grisamore v Atchison, T & S F Ry Co, 403 P 2d 93, 195 Kan. 16

Ky—Ward v Louisville & N R Co, 439 S W 2d 315

La—Hymel v Texas & N O R. Co, App, 145 So 2d 138

Mont—Sztaba v. Great Northern Ry Co, 411 P 2d 379, 147 Mont 185

54. U S—U S A C Transport, Inc v Baltimore & O R Co, D C Md, 209 F Supp 815—Adamson v Midland Val R Co, C A Kan, 384 F 2d 341

Fla—Florida East Coast Ry Co v Soper, App, 146 So 2d 605

Ind—Pennsylvania R Co v Mink, 212 N E.2d 784, 138 Ind App 311

Ky—Louisville & N R Co. v Howard's Adm'r, 305 S W 2d 305

Me.—Runnells v Maine Central R R, 190 A 2d 739, 159 Me 200

Mont—Sztaba v Great Northern Ry Co, 411 P 2d 379, 147 Mont 185

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55. Ill—Reiser v Illinois Cent R Co, 270 N.E 2d 856, 132 Ill.App.2d 941

59. U S.—Adamson v Midland Val R. Co, C.A Kan., 384 F 2d 341.

Fla—Florida East Coast Ry Co. v. Soper, App, 146 So 2d 605—Florida East Coast Ry Co. v. Schwerda, App., 151 So.2d 665

Ky.—Ward v Louisville & N R. Co, 439 S.W 2d 315

La—McFarland v. Illinois Cent. R Co., App, 122 So 2d 845, am on oth grds 127 So.2d 183, 241 La 15, 87 A L R 2d 246

Miss—C.J S. cited in New Orleans & N E.R Co. v Burney, 159 So 2d 85, 96, 248 Miss 290

N J—Di Domenico v Pennsylvania–Reading Seashore Lines, 178 A 2d 10, 36 N.J 455

N Y—McDermott v New York Cent R Co., 218 N.Y.S 2d 266, 14 A.D.2d 642

N C—Leggett v Seaboard Air Line R Co, 179 S E 2d 811, 10 N.C.App. 681, cert. den. 180 S E 2d 864, 278 N C. 521.

Unusual and extraordinary precautions

La.—Kleck v Illinois Cent R.R., App, 144 So 2d 693

Crossing not extra-hazardous as matter of law

Tex—Jinks v. Chicago, R.I & P R Co, Civ App, 369 S W.2d 784.

"Extrahazardous railroad crossing"

Or—Brown v. Spokane, P & S Ry Co, 431 P 2d 817, 248 Or. 110.

60. Ky—Louisville & N.R Co v. Troutman, 351 S W 2d 518

Md—Cunningham v. Baltimore & O R. Co, 334 A 2d 120, 25 Md App 253

Crossing held dangerous trap

La.—McFarland v Illinois Cent R. Co, App., 122 So.2d 845, am. on oth. grds. 127 So 2d 183, 241 La 15, 87 A L R.2d 246—Kleck v Illinois Cent. R.R., App, 144 So.2d 693.

Crossing held not dangerous trap

La—Glisson v Missouri Pac R Co, App, 158 So 2d 875, affd 165 So 2d 289, 246 La 470—Bertrand v Missouri Pac R Co, App, 160 So.2d 19, writ ref 162 So 2d 571, 245 La 1075—Breaux v Texas & P Ry Co, App, 176 So 2d 640, writ ref 178 So 2d 660, 248 La 375, motion over 182 So 2d 551

"Extrahazardous" defined

Minn—Young v Wlazik, 262 N W 2d 300

Or—Raymond v Southern Pac Co, 488 P 2d 460, 259 Or 629

62. Mont—Sztaba v Great Northern Ry Co, 411 P.2d 379, 147 Mont 185

Tex—Southern Pac Co v Castro, Civ App, 473 S W 2d 577, revd on oth grds, Sup, 493 S W 2d 491

63. Md—Cunningham v Baltimore & O R Co, 334 A 2d 120, 25 Md App 253

Miss—C.J.S quoted in Illinois Cent R Co v McDaniel, 151 So 2d 805, 811, 246 Miss 600—C J.S. cited in New Orleans & N E R Co v Phillips, 172 So 2d 414, 419, 252 Miss 438

Crossing held not extrahazardous

Tex—Missouri-Kansas-Texas R Co v Bernhardt, Civ App, 418 S W 2d 368, err ref no rev err

Weather conditions

Or—Brown v Spokane, P & S Ry Co, 431 P 2d 817, 248 Or 110

65. U S—Gagnier v Bendixen, C A Minn., 439 F 2d 57

Kan—Watts v. St Louis-San Francisco Ry Co, 531 P 2d 22, 216 Kan 160

Mich.—Alexander v Grand Trunk W R Co, supra, n. 48

Reasonableness of regulations

Ohio—Hood v New York, C & St L R Co, 144 N.E 2d 104, 166 Ohio St 529

Jurisdiction to promulgate

Ill—Merchants Nat Bank of Aurora v Elgin, J & E Ry Co, 273 N E 2d 809, 49 Ill 2d 118

67. U S.—Gagnier v Bendixen, C A Minn, 439 F.2d 57

Mich—Emery v. Chesapeake & O Ry Co, 127 N W 2d 826, 372 Mich 663—Baldinger's Estate v Ann Arbor R Co., 127 N W 2d 837, 372 Mich 685—Bauman v Grand Trunk Western R R, 138 N W 2d 285, 376 Mich 675.

When railroad crossing unusually hazardous

U S.—DiFrischia v New York Cent R Co, C A Pa, 307 F 2d 473, stating Ohio law

Ohio—Hood v New York, Chicago & St Louis R Co, 144 N E 2d 104, 166 Ohio St 529

70. U S—Gagnier v Bendixen, C A.Minn, 439 F 2d 57.

71. Ark.—St. Louis Southwestern Ry. Co v Farrell, 416 S W 2d 334, 242 Ark. 757

Ga.—Central of Ga. Ry Co v Tyson, 70 S.E.2d 914, 86 Ga.App. 122, foll. 70 S E 2d 916, 86 Ga App 125.

§ 712. —— Care Required at Public Crossings

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74. U S—Arrasmith v. Pennsylvania R. Co., C.A. Ohio, 410 F 2d 1311

Kan.—Grisamore v Atchison, T & S.F. Ry Co., 403 P.2d 93, 195 Kan 16.

La—Bardfield v New Orleans Public Belt R.R., 371 So 2d 783, on remand App., 375 So 2d 716

Pa—Henry v Pennsylvania R Co, 84 A.2d 675, 368 Pa 596

75. Ariz—Southern Pac R Co v Mitchell, 292 P 2d 827, 80 Ariz 50

Colo.—Union Pac. R. Co v Cogburn, 315 P 2d 209, 136 Colo 184

76. U S—New York Cent R Co v Monroe, D C N Y, 188 F Supp 826

Cal—Pitcher v Atchison, T & S F Ry Co, 34 Cal Rptr 614, 221 C A 2d 712

Ind—New York Cent R Co v Sholl, 146 N E 2d 565, 128 Ind App 134

Kan—Grisamore v Atchison, T & S F Ry Co, 403 P 2d 93, 195 Kan 16

77. Sufficient opportunity to observe train

(2) Other matters

Tenn—Prater v Louisville & N R Co, App, 438 S W 2d 68, 59 Tenn App 82, app after remand 462 S W 2d 514, 62 Tenn App 318

80. Statutory definition

U S—Outlaw v Louisville & N R Co, C A Tenn, 448 F 2d 1284

However, there is contrary authority.[82 5]

82.5. Va—Chesapeake & O Ry Co v Faison, 52 S E 2d 865, 189 Va 341—Norfolk & V Ry Co v Fletcher, 94 S E 2d 251, 198 Va 397

83. Mo—Hackett v Wabash R Co, 271 S W 2d 573

84. Ill—Murray v Pennsylvania R Co, 106 N E 2d 819, 347 Ill App 218

§ 713. —— Care Required at Private Crossings

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87. Premises guest statute

Del—Malin v Consolidated Rail Corp, 438 A 2d 1221

89. Conn—Ives v New York, N H & H R Co, 85 A 2d 902, 138 Conn. 471

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Purpose

U S—Kloewer v Burlington Northern, Inc, C A Neb, 512 F 2d 300

90. U S—Britt v Seaboard Coast Line R Co, D C S C, 281 F Supp 481

Colo—Colorado-Wyoming Ry Co v Wheelock Bros Inc, 395 P 2d 1, 155 Colo 406

92. U S—Central R. Co of N J v. U.S, 113 F Supp. 457, 125 Ct.Cl 562

93. Ill—Pearce v Illinois Cent Gulf R Co, 411 N E 2d 102, 44 Ill Dec. 196, 89 Ill.App.3d 22.

Mass—Pooles v. Boston & Maine R R, 102 N E.2d 433, 328 Mass 165

94. W Va—Daugherty v Baltimore & O R. Co., 64 S E 2d 231, 135 W.Va 688.

A landowner for whose benefit a private crossing is maintained is not required to guarantee safe passage over the tracks to those who desire to visit his property.[99 5]

99.5. N Y—Stone v New York Cent R.R. System, 209 N Y S.2d 840, 12 A.D.2d 854, app den 214 N Y S 2d 667, 2 cases, 13 A D 2d 610.

§ 714. —— Care Required at Crossings by Recognition or Invitation

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8. U.S.—McGunegill v. Chesapeake & O. Ry. Co., C.A.Ind., 199 F.2d 302

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S C—Bailes v Southern Ry Co, 99 S E 2d 195, 231 S C 474

W Va—Belcher v Norfolk & W Ry Co, 87 S E 2d 616, 140 W Va 848

9. Pa—Henry v Pennsylvania R Co, 84 A 2d 675, 368 Pa 596—Shaw v Pennsylvania R Co, 96 A 2d 923, 374 Pa 8

W Va—Belcher v Norfolk & W Ry Co, supra, n 8

10 Ga—Georgia Southern & F Ry Co v Wilson, 91 S E 2d 71, 93 Ga App 94

Knowledge of use by train operators essential

U S.—Atlantic Coast Line R Co v Futch, C A Ga, 263 F 2d 701, cert den 79 S Ct 1456, 360 U S 935, 3 L Ed 2d 1547

Knowledge of use essential

U S—Clark v Atlantic Coast Line R Co, C A Ga, 288 F 2d 255

11. N Y—Waters v Long Island R Co, 276 N Y S 2d 262, 52 Misc 2d 515

12. U S—Atlantic Coast Line R Co v Futch, C A Ga, 263 F 2d 701, cert den 79 S Ct 1456, 360 U S 935, 3 L Ed 2d 1547

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13. Ind—New York Cent R. Co v Wyatt, 184 N.E 2d 657, 135 Ind.App 205, transfer den 193 N.E 2d 63, 244 Ind 373

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(1) Mass.—Nickerson v Boston & M R.R, 173 N E 2d 248, 342 Mass 306

N J—Acken v. Campbell, 342 A 2d 209, 134 N J Super 481, affd 342 A 2d 172, 67 N.J 585

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14. La—Motors Ins Corp. v Thompson, App, 55 So 2d 697

Mass—Pooles v Boston & Maine R.R., 102 N.E 2d 433, 328 Mass 165—Sawler v. Boston & A R Co., 157 N E.2d 516, 339 Mass. 34.

R I.—Zoubra v New York, N.H & H R Co, 150 A 2d 643, 89 R.I 41

15. Pa.—Shaw v Pennsylvania R Co., supra, n 9.

16. N Y—Waters v Long Island R Co, 276 N Y S.2d 262, 52 Misc 2d 515.

21. Pa—Shaw v Pennsylvania R. Co, supra, n 9

§ 715. —— Status and Rights of Persons Using Crossings

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23. U S—Kloewer v. Burlington Northern, Inc., C A Neb, 512 F.2d 300

24. U.S.—Transport, Inc. v Baltimore & O R Co, D C Md., 209 F.Supp. 815.

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27. Ga.—Bridges v Southern Ry Co., 100 S E.2d 619, 96 Ga App. 497

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30. N.Y—Waters v Long Island R. Co., 276 N.Y. S 2d 262, 52 Misc.2d 515.

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46. Ga—Bridges v Southern Ry Co, 100 S E 2d 619, 96 Ga App 497

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50. U S—Hooks v New York Cent. R Co, C.A N Y, 327 F 2d 259

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54. Utah—Toomer's Estate v. Union Pac. R Co, 239 P.2d 163, 121 Utah 37.

55. Ga—Atlantic Coast Line R. Co. v Hansford, 69 S.E 2d 681, 85 Ga App. 507

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56. Colo.—Balloga v. Wyman, 431 P.2d 866, 163 Colo. 558.

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57. U.S—Flinchum v Clinchfield R. Co., C A.Tenn., 460 F 2d 252, cert. den 93 S.Ct 541, 409 U.S 1044, 34 L.Ed.2d 494.

58. U.S—Overstreet v Missouri Pac R Co., D.C Ark, 195 F Supp 542.

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59. La.—Odom v Hooper, 273 So.2d 510

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60. Okl.—St. Louis-San Francisco Ry. Co v. Green, 287 P.2d 700.

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63. U.S.—Missouri-Kansas-Texas R. Co. v. Wardlow, C.A.Okl., 262 F.2d 681—Graham v. Seaboard Air Line R. Co., D.C.S.C., 250 F.Supp. 566.

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64. N J—Douglas v. Central R. Co. of N.J., 97 A.2d 484, 26 N J Super. 208

65. U S—Union Pac R Co v Hormaechea, C A Idaho, 418 F 2d 990

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Only superior right

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69. Unusual conditions

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71. U S—Union Pac R. Co v Snyder, C A Colo, 220 F 2d 388

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72. U S—Eastern Brick & Tile Co v U S, D C S C, 281 F Supp 216

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82. Mo—Honeycutt v Missouri Pac R Co, 440 S W 2d 481

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88. Mass—Badoloto v New York, N H & H R. Co, 155 N E.2d 770, 338 Mass 421

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92. U.S.—Serratoni v Chesapeake & O. Ry Co, C A.Mich., 333 F 2d 621, cert den 85 S Ct 648, 379 U S. 960, 13 L.Ed.2d 555, app after remand, C A., 359 F 2d 857, cert den 86 S Ct 1203, 383 U S. 946, 16 L.Ed.2d 208

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93. Particular matters of procedure

(4) Other matters.

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§ 718. Defects in, and Obstructions at, Crossings

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94. Ala—Gulf, M & O R Co v Sims, 69 So 2d 449, 260 Ala 258

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As regards persons engaging in frolic

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Statute not creating new cause of action

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Statutory obligation cannot be absolved by contract

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95. U S—Hall v. Atchison, T & S F. Ry Co, C A Tex., 504 F 2d 380

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96. Pa.—Robertson v. Pennsylvania R Co, 36 West.Co. 231

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15. U S—Howard v Illinois Central R Co, D C La, 349 F Supp 141

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Limited to railroad's right-of-way

La—Kinchen v Traders & General Ins Co, App, 198 So 2d 114

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16. Ala—Louisville & N R Co v Outlaw, 60 So 2d 367, 36 Ala App 278, cert den 60 So 2d 377, 257 Ala 585

20. Ala—Alabama Great Southern R Co v Bishop, 68 So 2d 530, 259 Ala 629

24. Iowa—C J.S. quoted in Jasper v Chicago Great Western Ry Co, 84 N W.2d 21, 26, 248 Iowa 1286

25. Ky—Cincinnati, N O & T P Ry Co v Wright, 549 S W 2d 499

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33. Cal—Pitcher v Atchison, T & S F Ry Co, 34 Cal Rptr 614, 221 C A 2d 712

35. Mo—Hickey v Kansas City Southern Ry Co, 290 S W 2d 58, citing Arkansas law

38. Cal—Pitcher v Atchison, T. & S.F Ry Co, 34 Cal Rptr 614, 221 C A.2d 712

Ill—Merchants Nat Bank of Aurora v Elgin, J & E Ry Co, 257 N E 2d 216, 121 Ill App 2d 445, affd 273 N E 2d 809, 49 Ill 2d 118

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41. U S—Miller v. Pennsylvania R. Co., C A., 251 F 2d 376, 102 U S.App.D.C 135.

43. U S—Shofner v Illinois Cent R Co, D.C Miss, 188 F Supp. 422, affd., C.A., 300 F 2d 188, reh den 302 F 2d 266

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Existing conditions at place of accident

Ark—Missouri Pac R. Co v Purdy, 567 S W 2d 92, 263 Ark 654

Nev—Southern Pac Co v Harris, 395 P.2d 767, 80 Nev 426.

Conditions at other crossings may not be employed to require higher duty

Nev.—Southern Pac Co v Harris, 395 P 2d 767, 80 Nev 426

Common law statutory duty similar

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47. Ga.—Atlantic Coast Line R Co v Marshall, 91 S E 2d 96, 93 Ga.App. 134

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49. Kan.—Waits v St Louis-San Francisco Ry. Co, 531 P 2d 22, 216 Kan 160

50. Ky—Louisville & N.R Co v Taylor, 290 S W 2d 608

§ 719. —— Nature and Location of Defect

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64. Ill—McElligott v Illinois Cent R Co, 227 N.E 2d 764, 37 Ill 2d 459

Railroad liable where ruts made by train caused accident

N Y.—Montfort v. New York Cent. R. Co, 197 N Y S.2d 738, 7 N Y.2d 936, 165 N.E 2d 580

71. Ky—Cincinnati, N O & T.P Ry Co v Wright, 549 S W.2d 499

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(3) Other defects

Ky—Louisville & N R Co. v. Taylor, 290 S W.2d 608.

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72. U S—Foster v. New York Cent. System, C A Ind, 402 F.2d 312

Ky—Cincinnati, N O. & T P Ry. Co v Wright, 549 S W.2d 499.

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77. W Va—Haynes v. City of Nitro, 240 S E 2d 544, 161 W.Va 230

An "approach", etc.

Mo.—Throckmorton v Wabash R.R. Co, App., 409 S.W 2d 260

80. Mo.—Throckmorton v Wabash R R. Co., App., 409 S.W 2d 260

§ 720. —— Obstruction of Passage

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93. U.S—Arrasmith v. Pennsylvania R. Co., C.A. Ohio, 410 F 2d 1311.

Moving locomotive or train may properly block a crossing while in course of passage.—Coleman v Dahl, 92 A.2d 678, 371 Pa 639.

Right to complete crossing

Ind—Budkiewicz v. Elgin, J & E Ry. Co, 150 N E 2d 897, 238 Ind 535

Common-law negligence pertaining to motorists not applicable

Ind—Tyler v Chicago & E.I Ry., 173 N E.2d 314, 241 Ind. 463

94. Colo.—Union Pac. R Co. v Cogburn, 315 P.2d 209, 136 Colo. 184

Tex.—St. Louis, Southwestern Ry. Co. of Tex. v. Duffy, Civ App, 308 S W 2d 202, err. ref. no rev. err

Wis.—McLaughlin v Chicago, M., St. P. & P. Ry Co, 143 N W 2d 32, 31 Wis 2d 378

Reliance on another railroad to move car held no excuse

U S—Chesapeake & O. Ry. Co v. Schlink, C A.Mich, 276 F.2d 114.

1. Proper precautions required

Fla.—Atlantic Coast Line R. Co. v. Johnston, 74 So 2d 689.

Ga.—Savannah & A. Ry. Co. v. Newsome, 83 S.E.2d 80, 90 Ga.App. 390.

Additional warning necessary

Kan—Watts v St Louis-San Francisco Ry Co, 531 P 2d 22, 216 Kan 160

3. Ark—Chicago, R I & P R Co v Davis, 397 S W 2d 360, 239 Ark 1059

Ga—Atlantic Coast Line R Co v Marshall, 81 S E 2d 228, 89 Ga App. 740

La—Simon v Texas & N O R Co, App, 124 So 2d 646

Factors to be considered

U S—Stacey v. Illinois Cent R R, C A La, 491 F 2d 542, reh den 493 F 2d 664

Warning

U S—Newman v Missouri Pac R Co, C A Miss, 545 F 2d 439, reh den 551 F 2d 863

4. Ga.—Gazaway v Seaboard Coast Line R Co, 206 S.E.2d 596, 131 Ga.App 588

Ky—Cincinnati, N O & T P Ry Co v Wright, 549 S.W 2d 499

Tex.—Texas City Terminal Ry Co v Blaha, Civ App, 502 S W 2d 204

5. Mo.—Albertson v Wabash R. Co, 253 S W 2d 184, 363 Mo 696—Reames v St Louis-San Francisco Ry Co, App, 359 S W 2d 230

S.C.—Poole v. Southern Ry Co, 157 S E 2d 175, 250 S C. 213—Still v Hampton and Branchville R R, 189 S E 2d 15, 258 S.C 416

Tex.—Greeson v Texas & Pac Ry Co, Civ App, 310 S W 2d 615, err. ref. no rev err.

At night

Tex—Missouri-Kansas-Texas R Co v Bernhardt, Civ App, 418 S W.2d 368, err ref no rev err

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6. U S—Wood v Atlantic Coast Line R Co, D C Ga, 192 F Supp 351, affd, C.A, 290 F 2d 220.

Ga—Padgett v Central of Georgia Ry Co, 96 S E 2d 658, 95 Ga.App 96.

Kan—Sexsmith v. Union Pac. R. Co, 495 P 2d 930, 209 Kan 99.

Mo—Reames v St. Louis-San Francisco Ry Co, App., 359 S W 2d 230.

N C.—Morris v Winston-Salem Southbound Ry Co, 144 S E 2d 598, 265 N C 537.

Or—Murphy v Southern Pac Co, 355 P.2d 236, 223 Or. 522

Failure to warn

Mont.—Frank v. Burlington Northern, Inc, 538 P.2d 333, 167 Mont 293.

S C.—Still v Hampton and Branchville R.R, 189 S.E.2d 15, 258 S C 416

7. Or—Murphy v. Southern Pac. Co, 355 P.2d 236, 223 Or. 522.

8. Ariz—Golfinos v. Southern Pac Co., 345 P 2d 780, 86 Ariz. 315.

Or—Carlson v. Southern Pac. Co, 346 P.2d 381, 219 Or 77

9. Colo—Union Pac. R Co v. Cogburn, 315 P.2d 209, 136 Colo 184.

Kan.—Watts v St Louis-San Francisco Ry. Co, 531 P 2d 22, 216 Kan. 160.

10. U S.—Yazvac v Baltimore & O.R. Co., D.C Pa., 342 F Supp. 161

Kan.—Harmon v Atchison, T & S F. Ry. Co., 233 P.2d 489, 171 Kan. 403

Okl.—Atchison, T. & S.F Ry. Co v Templar, 230 P.2d 907, 204 Okl. 460—Cain v St Louis-San Francisco R. Co., 293 P.2d 355.

Tex.—May v. Missouri-Kansas-Texas R Co., Civ App., 583 S.W.2d 694, err. ref no rev. err, writ ref., Supp., 600 S.W.2d 755.

11. U.S.—Yazvac v. Baltimore & O.R. Co, D.C.Pa, 342 F.Supp. 161.

Minn.—Seekins v. Duluth, M. & I.R Ry Co, 103 N.W.2d 239, 258 Minn. 180

Or.—Spencer v Southern Pac. Co, 260 P.2d 956, 199 Or 246—Carlson v. Southern Pac Co., 346 P 2d 381, 219 Or. 77

Rule not applicable where crossing extrahazardous

Or—Brown v Spokane, P & S Ry Co, 431 P 2d 817, 248 Or 110

Train must be visible

Kan—Watts v. St Louis-San Francisco Ry Co, 531 P 2d 22, 216 Kan 160

12. Minn—Seekins v Duluth, M & I R Ry Co, 103 N W 2d 239, 258 Minn 180

Fog or mist

(2) Other matters

La.—Serpas v. New Orleans Public Belt R R, App., 356 So 2d 107

Tex—Missouri-Kansas-Texas R Co v Bernhardt, Civ App, 418 S W 2d 368, err ref no rev err

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14. Ind—Budkiewicz v Elgin, J & E Ry Co, 150 N E 2d 897, 238 Ind 535.

15. Ohio—Canterbury v Pennsylvania R Co., 107 N E 2d 115, 158 Ohio St 68

21. U S—Louisiana & A Ry Co v Hughes, C A Tex, 374 F 2d 106

23. Ind—Budkiewicz v Elgin, J & E Ry Co, 150 N E 2d 897, 238 Ind 535

Case overruled

The case of Budkiewicz v Elgin, J & E Ry Co, 150 N.E 2d 897, 238 Ind 535 has been expressly overruled

Ind—Tyler v Chicago & E I Ry, 173 N.E 2d 314, 241 Ind 463

29. U S—Louisiana & A Ry Co v Hughes, C A Tex, 374 F 2d 106

D C—Pugh v Baltimore & O.R Co, C A., 204 F 2d 391, 92 U S App D C 198

31. Ind—Tyler v Chicago & E I Ry, 173 N E.2d 314, 241 Ind 463

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36. U S—Stratton v Southern Ry Co, C A N C, 190 F 2d 917, 27 A L.R 2d 363

§ 721. —— Bridges or Tunnels

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47. Ga—Gordon County v Cochran, 119 S E 2d 368, 103 Ga App 412.

Ohio—Kay v Pennsylvania R Co, App, 102 N E.2d 855

Okl.—Texas, O. & E R. Co v Campbell, App, 477 P 2d 705

48. Ill—Kutsenkow v Chicago & N W Ry. Co, 240 N E 2d 805, 99 Ill App 2d 265

49. S D—Homan v Chicago and Northwestern Transp Co, 314 N W 2d 861

56. Ill—Kutsenkow v Chicago & N W Ry Co, 240 N E.2d 805, 99 Ill App.2d 265

Not insurer

Pa.—Ault v, Pennsylvania R. Co., 113 A 2d 150, 381 Pa. 496.

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66. Auto carelessly driven

Pa.—Ault v Pennsylvania R. Co, supra, n 56.

68. Ga.—Southern Ry Co v Lomax, 136 S.E 2d 485, 109 Ga.App 484

71. U.S—Norfolk Southern Ry Co v Davis Frozen Foods, C A N C, 195 F 2d 662—Illinois Cent R Co v Farris, C A Miss, 259 F.2d 445, 67 A L R 2d 1358

Pa—Marinelli v Montour R. Co, 420 A.2d 603, 278 Pa.Super 403

Shoulder of road included

U.S.—Southern Pac Co. v Rash, C A Or, 205 F 2d 389.

74. Ohio—Brelo v New York Cent. R Co, 168 N.E 2d 609, 112 Ohio App 145

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76. Ill—Kutsenkow v Chicago & N W Ry Co, 240 N E 2d 805, 99 Ill App 2d 265

Other matters pertaining to clearance signs have been adjudicated [79.5]

79.5. Constant patrol to determine accuracy not required

U S—Ryan v St Johnsbury & Lamoille County R R, C A Vt, 290 F 2d 350

Liability of railroad notwithstanding duty of maintenance of signs on highway board

U S—Ryan v St Johnsbury & Lamoille County R R, C A Vt, 290 F 2d 350

80. U S—Illinois Cent R Co v Farris, C A Miss, 259 F 2d 445, 67 A L R 2d 1358

Pa—Robertson v Pennsylvania R Co, 36 West Co 231

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98. Painting of posts with black and white stripes

Ind—New York Cent R Co v Wagner, 185 N E 2d 537, 134 Ind App 514

§ 722. —— Obstruction of View or Hearing

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2. Ala.—Lousville & N R Co v Outlaw, 60 So 2d 367, 36 Ala App 278, cert den 60 So 2d 377, 257 Ala. 585

Miss—Gulf, M. & O R. Co v Scott, 62 So 2d 878, 216 Miss. 532

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N Y—LaRocco v Penn Cent Transp Co, 317 N Y S 2d 431, 36 A D 2d 557, revd on oth grds 272 N.E.2d 573, 29 N.Y 2d 528, 324 N Y S 2d 82, rearg den 274 N E 2d 446, 29 N Y 2d 666, 324 N Y S 2d 956, on remand 327 N Y S 2d 525, 68 Misc.2d 689, motion den 278 N E 2d 914, 29 N.Y 2d 892, 328 N Y S 2d 681

N C—C.J.S. cited in May v Southern Ry Co, 129 S E 2d 624, 628, 259 N C 43

3. Ill—Bottorff v Spence, 183 N.E 2d 1, 36 Ill App 2d 128

Effect of administrative order

U S—Lippincott v Wabash R Co., C A Ill., 295 F.2d 577

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4. Ill.—Bottorff v Spence, 183 N E 2d 1, 36 Ill App 2d 128

7. U.S.—Miller v. Pennsylvania R Co., C A.Ind, 233 F.2d 535.

Ariz.—Southern Pac R. Co v. Mitchell, 292 P.2d 827, 80 Ariz. 50

Ark—Chicago, R.I. & P.R. Co v. Davis, 397 S W 2d 360, 239 Ark. 1059

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La.—Jenkins v. St Paul Fire & Marine Ins. Co., 393 So.2d 851, affd. 422 So 2d 1109.

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Spotting cars on spur track

La—Oliver v Illinois Cent R Co., App, 135 So 2d 521

8. Ark—St Louis Southwestern Ry Co v. Pennington, 553 S W 2d 436, 261 Ark 650

Ga—Atlantic Coast Line R. Co v Grover, 164 S E 2d 356, 118 Ga App. 547

La.-Rachal v. Texas & P Ry Co., App, 61 So 2d 525—Hanks v. Arkansas & Louisiana Missouri Ry Co., App, 62 So.2d 139—Gray v. Illinois Cent. R. Co., App., 132 So.2d 61—Addison v. Kansas City Southern Ry Co, App, 170 So 2d 142—Freeman v Vines, App, 262 So 2d 93

Miss—New Orleans & Northeastern R Co v Lewis, 58 So 2d 486, 214 Miss 163

N J—Pangborn v Central R Co of N J, 112 A 2d 705, 18 N J 84

Ohio—Gibbons v Baltimore & O R Co, 109 N E 2d 511, 92 Ohio App 87

Pa—Fallon v Penn Cent Transp Co, 279 A 2d 164, 444 Pa 148

Dangerous trap doctrine

U S—Green v Kansas City Southern Ry Co, D C La, 399 F Supp 1180, affd 538 F 2d 897

La—Glisson v Missouri Pac R Co, 165 So 2d 289, 246 La 470—Bertrand v Missouri Pac R Co, App, 160 So 2d 19, writ ref 162 So 2d 571, 245 La 1075—Mediamolle v Texas & N O R Co, App, 169 So 2d 235, application not considered 170 So 2d 510, 247 La 253—Theriot v Texas & N O R Co, App, 220 So 2d 563, writ ref 220 So 2d 886, 254 La 142

10. U S—Badger v Louisville & N R Co, C A Miss, 414 F 2d 880

Ark—Chicago, R I & P R Co v Davis, 397 S W 2d 360, 239 Ark 1059

Ga—Seaboard Coast Line R Co v Sheffield, 194 S E 2d 484, 127 Ga App 580

Ind—Chicago, I and L R Co v Carter, 274 N E 2d 537, 149 Ind App 649

Kan—Waits v St Louis-San Francisco Ry Co, 531 P 2d 22, 216 Kan 160

La—Gray v Illinois Cent R Co, App, 132 So 2d 61

Mont—Sztaba v Great Northern Ry Co, 411 P 2d 379, 147 Mont 185

W Va—Daugherty v. Baltimore & O R Co, 64 S E.2d 231, 135 W Va 688

13. U S—Rucker v Wabash R Co, C A Ill, 418 F 2d 146

Ga—Western & A R. Co. v Davis, 159 S E 2d 134, 116 Ga App 831.

La—C J S. quoted at length in McFarland v. Illinois Cent R. Co, App, 122 So 2d 845, 854, am on oth grds. 127 So 2d 183, 241 La 15, 87 A L.R 2d 246

Mo—Black v. Kansas City Southern Ry Co, 436 S W 2d 19, stating Kansas law

14. Mo—Black v. Kansas City Southern Ry Co, 436 S W 2d 19

15. Ala—Alabama Great Southern R Co v Johnston, 199 So 2d 840, 281 Ala 140

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Tex—Atchison, T & S F Ry Co v Rubrecht, Civ App, 445 S W.2d 784, err. ref no rev err

Wis—Wells v Chicago and North Western Transp Co., 296 N W 2d 559, 98 Wis 2d 328.

18. Va—Bangley v. Virginian Ry Co, 78 S E.2d 696, 195 Va 340

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19. Ala—Lousville & N R Co v. Garrett, 378 So 2d 668.

Minn—Hondl v Chicago Great Western Ry. Co, 82 N W.2d 245, 249 Minn. 306.

25. Position of sun

Idaho—Ineas v Union Pac. R. Co, 241 P 2d 1178, 72 Idaho 390

26. N.C.—May v. Southern Ry. Co, 129 S E.2d 624, 259 N.C. 43.

29. Mo—Honeycutt v. Missouri Pac R. Co., 440 S.W.2d 481.

32. Mo—Honeycutt v Missouri Pac. R. Co, 440 S.W.2d 481

§ 723. —— Knowledge of, or Notice to, Railroad Company

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38. Cal—Jackson v Atchison, T & S F Ry Co, 342 P 2d 337, 172 C A 2d 184

Iowa—Jasper v Chicago Great Western Ry Co, 84 N W 2d 21, 248 Iowa 1286

La—Bangs v City of New Orleans, Through Dept of Streets, Division of Traffic Engineering, App, 196 So 2d 324

Minn—Young v Wlazik, 262 N W 2d 300

Tex—St Louis, Southwestern Ry Co of Tex v Duffy, Civ App, 308 S W 2d 202, err ref no rev err—St Louis Southwestern Ry Co v Lyons, Civ App, 486 S W 2d 890, err ref no rev err

Attempt to repair imposing knowledge of condition

Mo—Hartmann v St Louis-San Francisco Ry Co, App, 280 S W 2d 442

Occurrence of prior collisions at a crossing may not indicate presence of obvious hazard—Rachal v Texas & P Ry Co, supra, n 8

Knowledge held not chargeable

Cal—Jensen v Southern Pac Co, 276 P 2d 703, 129 C A 2d 67

Prior accident not notice

Mo—Hess v Chicago, R I. & P R Co, 479 S W 2d 425

Notice to city

Alaska—Johnson v State, 636 P 2d 47

39. U S—Menke v Southern Ry Co, C A Ind, 603 F 2d 1281—Gardner v. Southern Ry Systems, C A Ind, 675 F 2d 949

N H—Burgess v Boston & M R R, 101 A 2d 781, 98 N H 372

Okl.—Atchison, T & S F. Ry Co v Coulson, 371 P 2d 914

Tex—Atchison, T & S F Ry Co v. Acosta, Civ App, 435 S W 2d 539, err ref no rev err

Burden at occupied crossing

S C—Still v Hampton and Branchville R R, 189 S E 2d 15, 258 S C 416

40. U S—Wallace v Lousville & N R. Co, C A Tenn, 332 F 2d 97

Tex—Karr v Panhandle & Santa Fe Ry Co, 262 S W 2d 925, 153 Tex 25

41. Mo.—Patterson v Thompson, App, 277 S W 2d 314

42. Ill—Maltby v Chicago Great Western Ry Co, 106 N E 2d 879, 347 Ill App. 441

43. Cal.—Pitcher v Atchison, T. & S F Ry Co, 34 Cal.Rptr 614, 221 C A.2d 712

Fla.—Christmas v. Seaboard Coastline R. Co, App., 294 So.2d 384

§ 724. —— Status of, and Care Required as to, Persons Passing Around, over, between, or under Trains or Cars

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72. U S—Stratton v. Southern Ry. Co., C.A.N C., 190 F 2d 917, 27 A.L R.2d 363.

Mo—C.J.S. cited in Dodwell v Missouri Pac. R Co, 384 S W 2d 643, 647, 11 A L R 3d 1156.

73. U.S—Stratton v. Southern Ry. Co., supra, n. 72.

Mo.—C.J.S. cited in Dodwell v Missouri Pac. R Co., 384 S.W 2d 643, 647, 11 A L R.3d 1156

§ 725. Safeguards at Crossings

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87. Mont.—Sztaba v. Great Northern Ry. Co, 411 P.2d 379, 147 Mont. 185.

88. U.S.—Evans v. Pennsylvania R. Co., C.A.Del., 255 F.2d 208, 70 A.L.R.2d 158—Evans v Pennsylvania R. Co., D.C.Del., 154 F.Supp. 14, remd.,

C A, 255 F.2d 205, 70 A L R.2d 158—Adamson v Midland Val R Co, C A Kan, 384 F.2d 341

Ariz—Atchison, T. & S F. Ry Co. v Renfroe, 266 P 2d 745, 77 Ariz 28

Ga—Western & A R. Co v Davis, 159 S.E.2d 134, 116 Ga App 831

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Iowa—Russell v Chicago, R I & P R. Co, 86 N W 2d 843, 249 Iowa 664 C.J.S. quoted in Maier v Illinois Cent R. Co, 234 N W 2d 388, 392

La—Hanks v Arkansas & Louisiana Missouri Ry Co, App., 62 So 2d 139

Mo—Hackett v Wabash R. Co, 271 S W 2d 573.

N.J.—Mellon v Pennsylvania-Reading Seashore Lines, 81 A 2d 747, 7 N J 415—Di Domenico v. Pennsylvania-Reading Seashore Lines, 178 A 2d 10, 36 N J 455—Shutka v Pennsylvania R. Co, 181 A.2d 400, 74 N.J Super. 381

N C—Southern Ry Co v Hutton & Bourbonnais Co, 177 S E 2d 901, 10 N.C App 1.

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Tex—Muniz v. Panhandle & Santa Fe Ry Co., Civ App, 285 S.W 2d 809, err. ref. no rev err.

Wis.—Murawski v Brown, 187 N W 2d 194, 51 Wis 2d 306.

Traveler exercising due care

(2) Other statements.

U.S—Dean v. Southern Ry. Co., C A.Tenn., 327 F 2d 757, stating Virginia law.

Va.—Norfolk & W. Ry. Co v. Sykes, 106 S.E 2d 734, 200 Va 541.

Warning held adequate

U S—Louisville & N.R Co. v Byrd, C.A.Ala, 298 F 2d 586

La—Menard v. Southern Pac. Co., App., 192 So.2d 658

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Duty not dependent on cause of dangerous conditions

Okl.—Missouri-Kansas-Texas R. Co. v. Hayes, 445 P 2d 249

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89. U.S.—Hartzler v Chesapeake & O. Ry. Co, C.A. Ind, 433 F 2d 104

90. Kan.—Sexsmith v. Union Pac. R. Co., 495 P 2d 930, 209 Kan. 99

Miss.—New Orleans & Northeastern R. Co v Lewis, supra, n 8.

Tex.—Texas & N O Ry Co. v. Hart, 356 S W.2d 901, 163 Tex 450, on remand, Civ.App, 361 S.W.2d 237, err ref. no rev. err.

A railroad crossing is more than ordinarily dangerous, etc.—Bradshaw v. City of Seattle, 264 P.2d 265, 43 Wash 2d 766, 42 A L.R.2d 800—Wilson v. Northern Pac. Ry. Co., 265 P.2d 815.

(2) Other statements.

Tex—Muniz v Panhandle & Santa Fe Ry. Co., Civ. App., 285 S.W.2d 809, err ref no rev. err.

91. Tex.—Karr v. Panhandle & Santa Fe Ry Co., 262 S.W 2d 925, 153 Tex. 25.

92. U S.—Graham v. Seaboard Air Line R. Co., D C S.C., 250 F.Supp. 566.

Ill.—Devore v Toledo, P & W R.R., 194 N.E.2d 683, 30 Ill.App.2d 409.

Mich.—People v Grand Trunk Western R. Co, 142 N.W.2d 54, 3 Mich.App. 242—Masters v. Grand Trunk Western R R Co, 163 N W 2d 661, 13 Mich App 80

N C.—Kinlaw v. Norfolk Southern Ry Co., 152 S E 2d 329, 269 N C 110.

S C—Doremus v Atlantic Coast Line R Co, 130 S E 2d 370, 242 S C 123

Wis—Schulz v Chicago, M., St P & P. Ry Co, supra, n 88

93. N C.—Cox v Gallamore, 148 S E 2d 616, 267 N.C. 537

Tex—Panhandle & Santa Fe Ry Co v Karr, Civ App, 257 S W 2d 486, affd, 262 S W 2d 925, 153 Tex 25.

94. U.S.—Louisville & N R Co v Byrd, C A Ala, 298 F.2d 586

Ariz—Atchison, T. & S F Ry Co v Renfroe, 266 P 2d 745, 77 Ariz. 28

La.—Gray v. Illinois Cent R Co, App., 132 So 2d 61

N.J.—Di Domenico v Pennsylvania-Reading Seashore Lines, 178 A.2d 10, 36 N J. 455

95. U.S—Lopez v. Denver & R G W R Co, C A Utah, 277 F.2d 830—Louisville & N.R. Co. v Byrd, C A Ala, 298 F 2d 586

Ariz—Southern Pac Co v Cavallo, 323 P.2d 1, 84 Ariz 24.

Tex.—Texas & P. Ry. Co. v Salazar, Civ App, 458 S W 2d 116, err. ref no rev err

Circumstances held not to create extrahazardous crossing

U.S.—Orsbon v. Baltimore & O.R. Co, D.C Ohio, 206 F.Supp 356

Tex.—Karr v Panhandle & Santa Fe Ry Co, supra, n 91.

96. Ill—Merchants Nat Bank of Aurora v. Elgin, J & E Ry. Co., 257 N E.2d 216, 121 Ill App.2d 445, affd 273 N E 2d 809, 49 Ill 2d 118

Iowa—Wickman v. Illinois Cent R Co., 114 N W 2d 627, 253 Iowa 912.

Mo.—Baldwin v Atchison, T. & S.F. Ry. Co., 425 S.W 2d 905

Tex.—Fort Worth & D Ry Co v Williams, 375 S W.2d 279.

97. U S—Helgeson v Chicago, R I & P.R Co., D C Minn, 123 F.Supp 175

N.H—Di Prizio v. Boston & Maine R R, 120 A 2d 331, 100 N.H 65

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98. La.—Hanks v. Arkansas & Louisiana Missouri Ry Co, supra, n. 88

11. Ind—Pennsylvania R. Co v Sherron, 105 N E 2d 334, 230 Ind 610

N.Y—Bastek v Lehigh & N.E.R. Co., 192 N.Y.S.2d 134, 9 A D 2d 692

N C—Price v. Seaboard Air Line R Co., 161 S E.2d 590, 274 N C 32.

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12. Ala.—Watson v Birmingham Southern R. Co, 66 So.2d 903, 259 Ala 364.

Mo.—Chaney v Wabash R Co., 422 S W.2d 349

Tex.—Missouri-Kansas-Texas R Co of Tex v Beasley, Civ.App., 321 S W.2d 938, err. ref. no rev. err

14. U S.—Evans v. Pennsylvania R. Co., D.C.Del, 154 F.Supp. 14, remd., C.A., 255 F.2d 205, 70 A.L R.2d 158—Louisville & N.R Co. v Byrd, C A Ala, 298 F.2d 586.

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N.J.—Di Domenico v. Pennsylvania-Reading Seashore Lines, 178 A.2d 10, 36 N.J. 455—Shutka v. Pennsylvania R. Co, 181 A.2d 400, 74 N.J Super. 381

Ohio—Hood v New York, C St L.R. Co, 144 N E 2d 104, 166 Ohio St 529

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15. N J—Di Domenico v Pennsylvania-Reading Seashore Lines, 178 A 2d 10, 36 N J 455

16. Minn—Haukom v Chicago Great Western Ry Co, 132 N W 2d 271, 269 Minn 542.

Common-law duty

Mich—People v Grand Trunk Western R. Co, 142 N W 2d 54, 3 Mich App 242

17. N.J—Di Domenico v Pennsylvania-Reading Seashore Lines, 178 A 2d 10, 36 N J 455

Factors not to be considered

Tex—Missouri-Kansas-Texas R Co of Tex v Beasley, Civ App, 321 S W 2d 938, err ref no rev err

18. U S—Orsbon v Baltimore & O R Co, D C Ohio, 206 F Supp 356

Or—Carlson v Southern Pac Co, 346 P 2d 381, 219 Or 77

Tex.—Panhandle & Santa Fe Ry Co v Karr, Civ App, 257 S W 2d 486, affd 262 S W 2d 925, 153 Tex 25—Panhandle & S F Ry Co v Liscomb, Civ App, 365 S W.2d 190, err ref no rev. err

A railroad crossing is extrahazardous, etc.

(2) Similar statement

Mont.—Sztaba v Great Northern Ry. Co, 411 P 2d 379, 147 Mont 185

Extra safeguards held unnecessary

N H.—Burgess v Boston & M R.R, 101 A 2d 781, 98 N H 372

Factors held not to create extrahazardous crossing

Mont—Hernandez v Chicago, B & Q R Co, 398 P 2d 953, 144 Mont 585

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31. **Statute held inapplicable**

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Extra-hazardous condition held not to exist

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Time of hazard

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51. U S—Adamson v Midland Val R Co., C A Kan, 384 F 2d 341—Gross v. Southern Ry Co, C A.Ga, 414 F 2d 292, app. after remand 446 F 2d 1057

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(4) Other instances.

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55 Kan—Grisamore v Atchison, T & S F Ry Co, 403 P 2d 93, 195 Kan 16

Unusual and extraordinary precautions

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Crossing held dangerous trap

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56. Character of means of warning depends on particular conditions and circumstances

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57. La—Senegal v Thompson, App, 91 So 2d 865, foll, 91 So 2d 897, two cases

59. Absence of reliance

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61. Mont—Hernandez v Chicago, B & Q R Co, 398 P 2d 953, 144 Mont 585

§ 726. —— Signboards

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67. La.—Zeringue v Texas & P Ry Co, App, 196 So 2d 809, writ ref. 199 So.2d 183, 250 La 749, cert den. 88 S Ct 770, 389 U.S 1047, 19 L Ed.2d 841

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71. Colo—Romero v. Denver & R G.W Ry Co, App, 497 P 2d 704, 30 Colo App., 516, revd. on oth grds., Sup, 514 P 2d 626, 183 Colo. 32

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§ 727. —— Automatic Signals

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92. U.S.—Union Pac R. Co v. Snyder, C A Colo, 220 F 2d 388—Nice v Pennsylvania R Co., D C Ohio, 168 F.Supp 641

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Wis—Kurz v Chicago, M, St P & P R Co, 192 N.W 2d 97, 53 Wis 2d 12

96 Kan—Harmon v Atchison, T & S F Ry Co, supra, n 85

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97. U S—Dimenco v Pennsylvania R Co, D C Del, 126 F Supp 417—McGlinchey v Baker, D C Pa, 356 F Supp 1134.

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2. Pa—Yolton v Pennsylvania R. Co, 84 A 2d 501, 368 Pa 429

Erection of barricade or warning sign on road being constructed is not a violation of statute forbidding such sings on public highway.[3,5]

3.5. Iowa—Jasper v. Chicago Great Western Ry. Co., 84 N.W.2d 21, 248 Iowa 1286

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21. Okl—C.J S. cited in Atchison, T & S F Ry Co. v Messmore, 339 P.2d 779, 782

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§ 728. —— Gates and Flagmen

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Function of crossing gate

N J—Pangborn v Central R Co of N J, 112 A 2d 705, 18 N J 84

33. U S—Bailey v Baltimore & O.R Co, C A.N Y, 227 F 2d 344—Kansas City Southern Ry Co v. Wiggins, C A.La, 234 F 2d 128—Nice v Pennsylvania R Co, D C Ohio, 168 F Supp 641—Overstreet v Missouri Pac R Co, D.C Ark., 195 F Supp 542

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34. Pa.—Laughman v. Reading Co, 14 Cumb. 77.

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(2) U.S.—Kansas City Southern Ry Co. v. Wiggins, C.A La., 234 F.2d 128.

37. Ariz—Alires v Southern Pac Co, 378 P 2d 913, 93 Ariz 97

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38. Or—Finn v Spokane, P & S Ry Co, 241 P 2d 876, 194 Or 288—Sargent v Southern Pac Transp Co, 504 P 2d 729, 264 Or 435

Pa—Wilson v Pennsylvania R Co, 219 A 2d 666, 421 Pa 419

Tex—C.J.S. quoted at length in St Louis, Southwestern Railway Co of Tex v Duffy, 308 S W 2d 202, 210, err ref no rev err—Western Transport Co v Gulf, C & S F Ry Co, Civ App, 414 S W 2d 218

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—Wilson v Northern Pac Ry Co, 265 P 2d 815, 44 Wash 2d 122

Crossing held not extraordinarily hazardous

(1) Iowa—Berk v Arendts, 117 N W 2d 905, 254 Iowa 363

Tex—Gulf, C & S F R Co v Pratt, Civ App, 262 S W 2d 775, err ref no rev err

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47. Tex—Fort Worth & D Ry Co v Williams, Civ App, 367 S W 2d 925, err gr

Doctrine not applicable unless there is a real and substantial obstruction to sight or hearing

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52. Ill—White v Illinois Cent R Co, 144 N E 2d 175, 14 Ill App 2d 216

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54. La—Rogers v Williams, App, 172 So 2d 149, writ ref 175 So 2d 108, 247 La 870

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62. Pa—Yolton v Pennsylvania R Co, supra, n. 2

64. Ind.—Gilkes v New York Cent R Co, 116 N E 2d 555, 124 Ind App 382.

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65. Ind—Gilkes v New York Cent R Co, supra, n 64

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71. Ill—Pritchett v. Indiana Harbor Belt R Co, 155 N E 2d 667, 20 Ill App.2d 190

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89. La.—Wiggins v Kansas City Southern Ry Co, App., 240 So 2d 744

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90. U S—Gibbs v. Norfolk Southern Ry Co, D C N C, 358 F.Supp 239, affd, C.A., 474 F 2d 1341.

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hio—Tanzi v New York Cent R Co., 98 N E.2d 39, 155 Ohio St 149, 24 A L R 2d 1151

Sounding of whistle by operator of train does not change rule

Mo—Landon v New York Cent R Co, App, 289 S W 2d 478

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§ 729. —— Persons Entitled to Protection

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73. La.—Smith v Illinois Cent. R Co, App, 191 So 2d 193, application not considered 192 So.2d 372, 249 La 1025

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86. U S—Graham v Seaboard Air Line R Co, D C S C, 250 F Supp. 566.

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(3) Other circumstances

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89. Ariz—C J S cited in Southern Pac R Co v Mitchell, 292 P 2d 827, 834, 80 Ariz 50

Duty exists though railroad did not create hazard

N J—Duffy v Bill, 160 A 2d 822, 32 N J 278

Railroad held not negligent

N J—Duffy v Bill, 160 A 2d 822, 32 N J 278

§ 732. —— Care Required in General

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98. **Precedents of little value**

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3. N J.—Jelinek v. Sotak, 86 A 2d 684, 9 N J. 19

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(2) Other matters.

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5. U S—Atlantic Coast Line R. Co v Key, C.A.Ga, 196 F.2d 64—Helgeson v Chicago, R.I & P.R Co., D.C Minn., 123 F Supp. 175—Gibbs v Norfolk Southern Ry Co, D C.N.C., 358 F.Supp. 239, affd, C.A., 474 F 2d 1341.

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6. U S—Dimenco v Pennsylvania R. Co., D C Del, 126 F Supp 417—Miller v Pennsylvania R Co., C A Ind., 233 F 2d 535

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11. U S.—Miller v. Pennsylvania R. Co, C A Ind, 233 F 2d 535

N J.—Pangborn v Central R Co of N J, 112 A.2d 705, 18 N J 84

Particular factors

(3) Nature of crossing and probability of danger

U S.—Bailey v Pennington, C.A Neb., 274 F 2d 328

(4) Other matters.

Mont—Hernandez v. Chicago, B. & Q.R. Co., 398 P.2d 953, 144 Mont. 585

Conditions at time of accident

(2) Other statements

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12. U S—Wrzesinski v. Chicago, M., St. P. & P.R. Co., D C Mont., 207 F.Supp 460, affd., C.A., 318 F.2d 323

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Additional precautions

(3) Darkness alone insufficient to impose liability.

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Minn—Sullivan v Boone, 286 N.W.2d 350, 205 Minn 437—Seekings v. Duluth, M. & I.R. Ry. Co., 103 N.W.2d 239, 258 Minn. 180.

Crossing held not extrahazardous one, etc.

(2) Other matters.

Mont—Hernandez v. Chicago, B. & Q.R. Co., 398 P.2d 953, 144 Mont. 585

15. Mo.—Hickey v. Kansas City Southern Ry. Co., 290 S.W 2d 58, citing Arkansas law.

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26. U.S.—New York Cent. R. Co. v. Monroe, D.C. N Y, 188 F Supp. 826.

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36. La—Guidry v. Texas & N.O.R. Co., App., 56 So.2d 611.

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50. La.—Perkins v. Texas & N.O.R. Co., 147 So.2d 446, 243 La. 829.

Some evidence of negligence

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Violation by itself does not establish liability

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§ 733. —— Backing or Running Unattended or Unattached Cars over Crossings

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59. La.—Manuel v Missouri Pac R Co, App, 264 So.2d 376, application not considered 266 So 2d 431, 262 La 1123, writ ref. 266 So 2d 432, 262 La 1125.

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81. U S—Louisville & N R Co v Rochelle, C A Tenn, 252 F 2d 730.

Cal—Downey v. Santa Fe Transp Co, 286 P.2d 40, 134 C A.2d 720

Ky.—Louisville & N.R Co. v. Howard's Adm'r, 305 S.W.2d 305

N C—Irby v Southern Ry, Co, 98 S.E.2d 349, 246 N.C. 384, 70 A.L.R.2d 1—Johnson v Southern Ry Co., 121 S.E 2d 580, 255 N.C. 386, 90 A L R 2d 344.

Duties as to warnings held complied with

Mich—Masters v. Grand Trunk Western R R. Co., 163 N.W.2d 661, 13 Mich App. 80

Negligence of railroad held not imputable to engineer

Iowa—Hoyt v Chicago, R I & P.R Co, 206 N W 2d 115.

No duty to equip with warning mechanisms

U.S.—Beenken v. Chicago & N.W R. Co, D C.Iowa, 367 F.Supp 1337.

83. N.C.—Young v. Baltimore & O R Co, 146 S E.2d 441, 266 N.C 458

84. Ill—Petricek v Elgin, J & E Ry Co, 157 N.E.2d 421, 21 Ill.App.2d 60.

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89. Ill.—Petricek v. Elgin, J. & E. Ry. Co., 157 N.E.2d 421, 21 Ill.App.2d 60.

§ 735. —— Lights

91. **Lights held sufficient**

La.—Seeps v. New Orleans Public Belt R.R., App., 356 So.2d 109.

92. Okl—Chicago, R I & P R Co v McDougal, 262 P 2d 884

97 Tex—Missouri Pac R Co v. Shaw, Civ App, 620 S W 2d 161, err ref no rev err

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5. Ga—Cosper v Atlantic Coast Line R Co, 69 S E 2d 886, 85 Ga App 683

9. Ga—Cosper v Atlantic Coast Line R Co, supra, n 5

10. **Held inapplicable to engines used exclusively in daylight**

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No common-law duty to equip sides of freight cars with lights

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§ 736. —— Signals

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Negligence per se

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(2) US—Atlantic Coast Line R Co v Key, CA Ga, 196 F 2d 64

Plaintiffs' knowledge of dangerous crossing held no excuse

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17. Wis—Devine v McGowan, 113 N W 2d 162, 15 Wis 2d 534

18. US—Atlantic Coast Line R Co v Key, supra, n 16

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19. Mo—Hackett v Wabash R Co, 271 S W 2d 573

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20. Mont—Sztaba v Great Northern Ry Co, 411 P 2d 379, 147 Mont 185

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22. Ky—Illinois Cent R R v Vincent, 412 S W 2d 874

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32. Iowa—Wickman v Illinois Cent R Co, 114 N W 2d 627, 253 Iowa 912

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45. Ga—Atlantic Coast Line R Co v Marshall, 81 S E 2d 228, 89 Ga.App 740.

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46. Adequate warning given

(3) Other instances

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55. Wash—Porter v Chicago, M, St. P & P.R Co., 252 P.2d 306, 41 Wash 2d 836

Signal held sufficient

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Signal held insufficient

(3) Other instances

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56. Fla—Atlantic Coast Line R. Co v Smith, 53 So 2d 301

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66. Iowa—Daly v Illinois Cent. R Co., 93 N.W 2d 68, 250 Iowa 110.

67. La.—Mehlsen v Louisiana Southern Ry. Co., App., 148 So.2d 473.

79. US—Southern Lumber Co v Thompson, D C Ark., 133 F.Supp 92—Louisville & N.R Co v Rochelle, C A Tenn, 252 F 2d 730—Markham v Holt, C A Fla, 369 F.2d 940, app after remand 409 F.2d 542—Baxter v. Missouri-Kansas-Texas Ry Co, C A Mo, 454 F.2d 25—Gibbs v Norfolk Southern Ry Co, D C N C, 358 F Supp 239, affd, C A, 474 F 2d 1341

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Approaching or leaving city or town

(3) Other cases

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Compliance held shown

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Statute held inapplicable

(2) Other statements

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81. Mass—Weir v New York, N H & H.R Co., 162 N E.2d 793, 340 Mass 66

Other statement of purpose

(2) Kan—Kendrick v Atchison, T & S F.R. Co., 320 P 2d 1061, 182 Kan 249.

85. Duty to warn in appropriate situations

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91. Va—Norfolk & W Ry Co v Hagy, 110 S E.2d 177, 201 Va 183, cert den 80 S.Ct 595, 361 U.S 966, 4 L Ed 2d 546

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97. Minn—Muggenburg v Leighton, 63 N W.2d 533, 241 Minn. 498.

98. Ind—New York, C. & St. L R. Co v. Henderson, 146 N.E 2d 531, 237 Ind 456, reh den. 147 N.E 2d 237, 237 Ind 456

99. Ga—Western & A R R v. Mansfield, 105 S E 2d 804, 98 Ga.App 421

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10. Ill—Bales v. Pennsylvania R. Co., 107 N.E 2d 179, 347 Ill.App. 466.

11. Ky—Louisville & N R Co. v. Frye, 246 S.W.2d 458

16. Me—Gould v Bangor & A.R. Co., 292 A.2d 837

17. La.—Bertrand v Missouri Pac. R. Co., App., 160 So.2d 19, writ ref. 162 So 2d 571, 245 La. 1075

20. US—Southern Lumber Co v Thompson, D C Ark, 133 F Supp 92

25. Tex—Woods v Panhandle & Santa Fe Ry Co, Civ App, 315 S W 2d 953, err ref no rev err

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Negligence held not shown

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Statute mandatory

U.S—Louisville & N R. Co. v. Tucker, C A Tenn., 211 F 2d 325, reh den 215 F 2d 227

Statute inapplicable

U S—Louisville & N R. Co. v Tucker, supra.

30. N C—Brown v Atlantic Coast Line R Co, 172 S E 2d 502, 276 N C 398

33. Md—Campbell v Patton, 175 A.2d 761, 227 Md 125

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42. Ga—Atlantic Coast Line R Co. v Strickland, 74 S E 2d 897, 87 Ga App 596

45. Duty may be discharged by single member of train

Ark—Missouri Pac R. Co v Harelson, 382 S W 2d 900, 238 Ark 452.

46. U S.—Southern Lumber Co v Thompson, D.C Ark, 133 F.Supp 92—Louisville & N R. Co v Byrd, C A Ala, 298 F 2d 586.

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49. Mo—Reames v. St. Louis-San Francisco Ry Co, App., 359 S.W.2d 230

52. Ky—Illinois Cent. R. Co. v Arms, 361 S.W.2d 506

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58. Cal.—Herrera v Southern Pac. Co., 318 P.2d 784, 155 C.A.2d 781

63. U.S—Brown v. Louisville & N R. Co., D.C.La., 135 F.Supp. 28, affd, C.A., 234 F.2d 304.

§ 738. —— At What Crossings Required

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67. U S—Stapleton v Louisville & N R Co, C A Miss, 265 F 2d 738

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70. U S—Foreman v Texas & N O R Co, D C La, 97 F Supp 378

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Va—Chesapeake & O Ry Co v Kinzer, 142 S E 2d 514, 206 Va. 175

71. Ill—Higgins v Baltimore & O R Co, 147 N E 714, 16 Ill App 2d 227

Mo—Cunningham v Thompson, 277 S W 2d 602.

72. Cal.—C.J.S. cited in Herrera v Southern Pac Co, 318 P 2d 784, 787, 155 C.A 2d 781

Mo—Kilroy v Gulf, M & O.R Co, 247 S.W.2d 660—Bray v St Louis-San Francisco Ry Co., supra, n. 69—Cunningham v Thompson, 277 S W 2d 602—Baldwin v. Atchison, T & S F Ry Co., 425 S W.2d 905.

73. Ga.—Georgia R R. & Banking Co v. Cook, 95 S E 2d 703, 94 Ga App. 650

Public highway

(3) Title of "street" does not of itself make way a "public highway" within meaning of statute.

Ill.—Daniel v. Elgin, J. & E. Ry Co., 208 N.E.2d 311, 58 Ill App 2d 414

76. Miss.—Illinois Cent. R. Co. v. McDaniel, 151 So 2d 805, 246 Miss 600

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80. U S.—Atlantic Coast Line R. Co. v. Key, C.A. Ga., 196 F.2d 64.

81. Ga.—Georgia R R. & Banking Co. v. Cook, 95 S E 2d 703, 94 Ga.App. 650.

86. Va—Norfolk & W Ry. Co v Wright, 229 S.E.2d 890, 217 Va 515.

95. U S.—Falkerson v. New York, N.H. & H.R. Co., C.A.N.Y., 188 F.2d 892, applying Connecticut law—Texas & P. Ry. Co. v. Laborde, C.A.La., 257 F.2d 587, cert. den 79 S Ct. 314, 358 U.S. 928, 3 L.Ed.2d 302.

Iowa—Paulsen v. Des Moines Union Ry Co., 262 N.W.2d 592.

Ky—Louisville & N.R. Co. v Wallace, 302 S.W.2d 561

La—Guidry v Texas & N O.R. Co, App, 56 So.2d 611.

Mass.—Badoloto v. New York, N.H. & H.R. Co., 155 N.E.2d 770, 338 Mass. 421.

N J.—Acken v. Campbell, 342 A 2d 209, 134 N J Super. 481 affd., 342 A.2d 172, 67 N.J 585.

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97. **Extent of duty**

Ky—Maggard v. Louisville & N R. Co., App., 568 S W.2d 508

1. Ind.—New York Cent R. Co v. Wyatt, 184 N E.2d 657, 135 Ind.App. 205, transfer den. 193 N.E.2d 63, 244 Ind. 373.

Ky.—Louisville & N.R. Co. v. Wallace, 302 S W.2d 561.—Louisville & N.R. Co. v. Quisenberry, 336 S.W.2d 409

Va.—Norfolk & W. Ry. Co. v. Fletcher, 94 S.E.2d 251, 198 Va. 397.

3. Ky.—Hunt's Adm'r v Chesapeake & O Ry Co, 254 S W 2d 705—Louisville & N R Co v Wallace, 302 S W 2d 561

4. Ky—Louisville & N R Co v Wallace, 302 S W 2d 561

Mo—Dickerson v Terminal R Ass'n of St Louis, 284 S W 2d 568

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12. N H—Lamontagne v Canadian Nat Ry Co, 79 A 2d 835, 97 N H 6

14. Kan—C.J.S cited in Creten v Chicago, R I & P R Co, 337 P 2d 1003, 1012, 184 Kan 387

18. U S—Gulf, M & O R Co v Thornton, C A Mo, 294 F.2d 104.

19. U S—C.J.S. cited in Illinois Cent R Co v Lee, C.A Miss, 212 F 2d 496, 498

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22. Ill.—Higgins v Baltimore & O R Co, 147 N E 2d 714, 16 Ill App.2d 227

Miss—Illinois Cent R Co v McDaniel, 151 So 2d 805, 246 Miss 600

24. Iowa—C J.S cited in Jasper v Chicago Great Western Ry Co, 84 N W 2d 21, 28, 248 Iowa 1286

Kan—C J S. cited in Creten v Chicago, R I & P R Co, 337 P 2d 1003, 1012, 184 Kan 387

§ 739. —— Persons Entitled to Benefit of Signals and Lookouts

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26. Iowa—C J.S cited in Jasper v Chicago Great Western Ry Co, 84 N W 2d 21, 28, 248 Iowa 1286.

27. U S—Southern Ry Co. v Clevenger, C.A Tenn, 243 F.2d 764

29. Ark—Koch v. Missouri Pac R Co, 455 S.W.2d 858, 248 Ark 1251.

32. U S.—Helgeson v Chicago, R I & P R Co, D C Minn, 123 F.Supp 175

§ 740. —— To what Trains or Cars Applicable

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47. Ky—Wright v Illinois Cent. Gulf R. Co, 550 S W.2d 489

49. U.S—Palus v. Louisville & N.R Co, D.C Miss., 226 F.Supp 651, affd., C.A., 342 F.2d 799, cert den 86 S Ct. 80, 382 U S 834, 15 L.Ed 2d 78.

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64. U S—Louisville & N.R. Co v. Tucker, C A. Tenn, 211 F 2d 325, reh den 215 F 2d 227.

68. **Headlights not required on caboose**

U S.—Dengler v Chicago & N W Ry. System, C A. Ill, 274 F.2d 638.

§ 741. —— Obstructions of View and Hearing

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75. U.S.—Southern Lumber Co v. Thompson, D C Ark., 133 F.Supp. 92.

Cal.—Downey v. Santa Fe Transp. Co., 286 P 2d 40, 134 C.A.2d 720

La.—Perkins v. Texas & N.R. Co., App, 137 So.2d 673, revd. on oth grds. 147 So.2d 646, 243 La. 829

Mo.—C.J.S. quoted in Black v. Kansas City Southern Ry. Co., 436 S W 2d 19, 26.

82. U S—Evans v Pennsylvania R Co, D C Del, 154 F Supp 14, remd, C A, 255 F 2d 205, 70 A L R 2d 158

85. N C—Kinlaw v Norfolk Southern Ry Co, 152 S E 2d 329, 269 N C 110

86. La—Perkins v Texas & N O R Co, App, 137 So 2d 673, revd on oth grds 147 So 2d 646, 243 La 829

N C—Cox v Gallamore, 148 S E 2d 616, 267 N C 537

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94. Iowa—Roberts v Chicago & N W Ry Co, 113 N W 2d 269, 253 Iowa 646

95. Ky—Illinois Cent R Co v Arms, 361 S W 2d 506

§ 742. —— Effect of Compliance with Statutes or Ordinances

98. Ariz—Southern Pac R Co v Mitchell, 292 P 2d 827, 80 Ariz 50

N J—Pangborn v Central R Co of N J, 112 A 2d 705, 18 N J 84

99. Ariz—Southern Pac R Co v Mitchell, 292 P 2d 827, 80 Ariz 50

2. Ala—Westbrook v Gibbs, 231 So 2d 97, 285 Ala. 223

§ 743. —— Effect of Violations of Statutes or Ordinances

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8. Ariz—Southern Pac R Co v Mitchell, 292 P.2d 827, 80 Ariz 50—Konow v Southern Pac Co, 465 P 2d 366, 105 Ariz 386

Ga.—Savannah & A Ry Co v Ward, 139 S E.2d 154, 110 Ga.App 529.

Idaho—Yearout v Chicago, M, St P & P R. Co, 354 P.2d 759, 82 Idaho 466.

La.—Bertrand v Missouri Pac R. Co, App, 160 So 2d 19, writ ref 162 So 2d 571, 245 La 1075

Tenn—Little v Nashville, C & St. L. Ry Co., App., 281 S W 2d 284, 39 Tenn.App 130.

Only defenses, etc.

Ga.—McPhail v Atlantic Coast Line R. Co., 92 S.E.2d 558, 93 Ga.App 599, foll 92 S E.2d 561, 93 Ga. App. 603

10. U.S.—Pearson v Baltimore & O R. Co., C A.Ind., 200 F 2d 569

13. Neb.—Kennedy v. Chicago, R.I. & P R. Co, 56 N W 2d 446, 156 Neb 345

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14. Ala—Southern Ry Co v Carter, 160 So 2d 628, 276 Ala 218

Cal.—Merhno v Southern Pac Co., 281 P.2d 583, 132 C.A.2d 58

Ill—Hatcher v New York Cent R. Co, 156 N.E.2d 617, 20 Ill App 2d 481, revd on oth grds 162 N E.2d 362, 17 Ill 2d 587, on remd. 166 N E 2d 110, 25 Ill App.2d 193

Where, however, compliance with the statutory requirement is impossible under the circumstances, the violation thereof does not constitute negligence.[14.5]

14.5. Ohio—Gigliotti v New York, C & St. L.R Co., 157 N.E.2d 447, 107 Ohio App 174.

15. U.S.—Curry v. U S, D C.S.C., 129 F Supp 38

23. U S—Bailey v. Baltimore & O R. Co., C A.N.Y., 227 F.2d 344

§ 744. Rate of Speed

28. U S—Bailey v Baltimore & O R Co, C A N Y, 227 F 2d 344—C J S. quoted at length in Ludwig v Chesapeake & O Ry Co, D C Mich, 229 F Supp 61, 63, affd in part and vac on oth grds, C A, 333 F 2d 621, cert den 85 S Ct 648, 379 U S 960, 13 L Ed 2d 555, app after remand, C A, 359 F 2d 857, cert den 86 S Ct 1203, 383 U S 946, 16 L Ed 2d 208

Ind—New York Cent R Co v Wyatt, 184 N E 2d 657, 135 Ind App 205, transfer den 193 N E 2d 63, 244 Ind 373

29. Ariz—Alires v Southern Pac Co, 378 P 2d 913, 93 Ariz 97

30. U S—Kansas City Southern Ry Co v Wiggins, C A La, 234 F 2d 128—Bailey v Erie R Co, D C Ohio, 143 F Supp 351—New York Cent R Co v Monroe, D C N Y, 188 F Supp 826—McVicker v Chesapeake & O Ry Co, C A Mich, 307 F 2d 501 stating Indiana law

Colo—Overfield v Great Western Ry Co, App, 499 P 2d 625

Fla.—McAllister v Tucker, 88 So 2d 526, revd on oth grds 93 So 2d 83

Ill—Merchants Nat Bank of Aurora v Elgin, J & E Ry Co., 257 N E 2d 216, 121 Ill App 2d 445, affd 273 N.E 2d 809, 49 Ill 2d 118

La—Guidry v Texas & N.O R Co, App, 56 So 2d 611—Gibson v Kansas City Southern R Co, App, 233 So 2d 26, writ ref 236 So 2d 31, 256 La 254.

Pa—Davies v Delaware, L & W R Co, 87 A 2d 183, 370 Pa. 180, 31 A L R2d 781—Drabish v Baltimore & Ohio R Co, 17 Som Leg J 81

Wis—Kurz v Chicago, M, St P & P R Co, 192 N.W.2d 97, 53 Wis 2d 12

Ability to stop within visible distance held not required

U S.—Conner v Pennsylvania R Co, D C Pa, 163 F Supp 718, affd, C A, 263 F 2d 944—Owens v Chicago, R.I. & P.R Co, C A Kan., 292 F 2d 696—McGlinchey v Baker, D C Pa, 356 F Supp 1134.

Cal—Marquis v. St Louis-San Francisco Ry Co, 44 Cal.Rptr 367, 234 C.A.2d 335

Kan.—Johnson v Kilhon, 297 P 2d 177, 179 Kan 571

Held not wanton conduct

Kan—Horn v Chicago, R I & P R Co, 357 P 2d 815, 187 Kan 423

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31. U.S—Atlantic Coast Line R Co v Pidd, C A. Fla., 197 F 2d 153, cert. den 73 S.Ct 166, 344 U S 874, 97 L.Ed 677

Ga.—Seaboard Coast Line R Co v Wallace, 181 S.E.2d 542, 123 Ga.App 490

Ill.—Bales v Pennsylvania R. Co, 107 N E 2d 179, 347 Ill.App 466.

Ky.—Louisville & N R. Co v Howard's Adm'r, 305 S.W 2d 305

Mo—Finley v Illinois Cent. R. Co, App, 251 S W 2d 713, stating Illinois rule

Wis.—Kurz v Chicago, M., St P & P.R Co, 192 N W.2d 97, 53 Wis 2d 12

Excessive speed to be determined by rules of the common law

Or.—Southern Pac. Co. v. Consolidated Freightways, 281 P 2d 693, 203 Or 657.

Duty to stop or slow train governed by ordinary care duty of common law

U S.—Scott v. Southern Ry Co., C A, Tenn., 472 F.2d 1163

32. U S—Atlantic Coast Line R. Co. v Freeman, C A.Ala., 193 F.2d 217, cert den. 72 S.Ct. 771, 343 U.S. 935, 96 L Ed. 1343—Atlantic Coast Line R. Co. v. Pidd, C.A.Fla, 197 F.2d 153, cert den. 73 S Ct 166, 344 U S 874, 97 L.Ed 677—Vera Cruz v. Chesapeake & O.R R., C A Ind, 312 F 2d 330, cert den 84 S Ct 44, 375 U S 813, 11 L Ed 2d 49—Chicago, B & Q R Co v King, C A Iowa, 337 F 2d 510

Cal—Deshotel v Atchison, T & S F Ry Co, 272 P 2d 71, 126 C A 2d 303—Stout v Southern Pac R Co, 274 P 2d 194, 127 C A 2d 491

Ill—Farr v Chicago & E I R Co, 121 N E 2d 5, 3 Ill App 2d 209—Cellini v Elgin, J & E Ry Co, 125 N E 2d 315, 5 Ill App 2d 238

Ind—New York Cent R Co v Wyatt, 184 N E 2d 657, 135 Ind App 205, transfer den 193 N E 2d 63, 244 Ind 373

Iowa-C J S. cited in Jasper v Chicago Great Western Ry Co, 84 N W 2d 21, 28, 248 Iowa 1286

Kan—Sexsmith v Union Pac R Co, 495 P 2d 930, 209 Kan 99

Ky—Illinois Cent R Co v Arms, 361 S W 2d 506—Illinois Cent R R v Vincent, 412 S W 2d 874

La—Addison v Kansas City Southern Ry Co, App, 170 So 2d 142

Mo—Finley v Illinois Cent R Co, supra, n 31

Ohio—Strahm v B & O R R Co, 291 N E 2d 783, 32 Ohio App 2d 333

Wis—Dombeck v Chicago, M, St P & P R Co, 129 N W 2d 185, 24 Wis 2d 420

Any speed may constitute negligence, etc.

(2) Other statements

Iowa—Daly v Illinois Cent R Co, 93 N W 2d 68, 250 Iowa 110

Rate of speed held not negligent under circumstances

(1) Iowa—Hammarmeister v Illinois Cent R Co, 117 N W 2d 463, 254 Iowa 253

La—Guidry v Texas & N O R Co, supra, n 30

Ohio—Baker v Norfolk & W Ry Co, 100 N E 2d 649, 88 Ohio App 537

Reduction in speed held not required

(2) Other statements

U S.—Eastern Brick & Tile Co. v. U.S, D.C S C, 281 F Supp 216

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36. U S.—Louisville & N.R. Co v Tucker, C A Tenn, 211 F 2d 325, reh den 215 F.2d 227

40. U S—Wallace v Louisville & N R Co, C A Tenn, 332 F 2d 97

§ 745. —— Nature and Locality of Crossings

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Ill—Bryant v. New York Cent R Co, 148 N.E.2d 331, 16 Ill App 2d 469.

Miss—New Orleans & N E R Co v. Phillips, 172 So 2d 414, 252 Miss. 438.

47. U.S—Chicago, R.I. & P.R Co v. Hugh Breeding, Inc, C A Okl, 232 F.2d 584, citing Kansas law—Kansas City Southern Ry. Co. v Wiggins, C A.La., 234 F 2d 128—Chicago, R.I. & P R. Co v. Hugh Breeding, Inc., C A Okl, 247 F.2d 217, stating Kansas law, cert dism 78 S Ct 138, 355 U S 880, 2 L Ed.2d 107—Texas & P Ry. Co v Laborde, C A La., 257 F.2d 587, cert. den. 79 S.Ct, 314, 358 U.S 928, 3 L.Ed 2d 302—Ludwig v Chesapeake & O. Ry Co, D.C.Mich., 229 F Supp. 61, affd. in part and vac. on oth. grds., C.A., 333 F.2d 621, cert. den. 85 S.Ct, 648, 379 U.S 960, 13 L.Ed 2d 555, app. after remand, C A., 359 F.2d 857; cert den 86 S.Ct. 1203, 383 U.S. 946, 16 L.Ed.2d 208

Ill.—Higgins v. Baltimore & O.R. Co., 147 N.E.2d 714, 16 Ill App.2d 227.

Kan—Modlin v Consumers Co-op Ass'n, 241 P 2d 692, 172 Kan 428

Ky—Wadkins' Adm'x v Chesapeake & O Ry Co, 298 S W 2d 7

La—Ledet v Texas & N O R Co, App, 79 So 2d 604—Smith v New Orleans & N E R Co, App, 153 So 2d 533, writ gr and application den 156 So 2d 225, 244 La 1018, affd 163 So 2d 65, 245 La 1099—Theriot v Texas & N O R Co, App, 220 So 2d 563, writ ref 222 So 2d 886, 254 La 142—Jenkins v Harper, App, 221 So 2d 279

Miss—New Orleans & N E R Co v Phillips, 172 So 2d 414, 252 Miss 438—Illinois Cent R Co v Aldy, 185 So 2d 680

Mo—Branson v Atchison, T & S F Ry Co, App, 239 S W 2d 1003

Neb—Kennedy v Chicago, R I & P R Co, 56 N W 2d 446, 156 Neb 345—Ecker v Union Pac R Co, 83 N W 2d 551, 164 Neb 744

Ohio—Diebley v New York, C & St L R Co, 162 N E 2d 142, 108 Ohio App 381

Pa—Miller v Pennsylvania R Co, 84 A 2d 200, 368 Pa 507—Killen v Pennsylvania R Co, 102 A 2d 140, 376 Pa 320

W Va—Holman v Baltimore & O R Co, 74 S E 2d 767, 137 W Va 874

Crossings within rule

(2) La—Guidry v. Texas & N O R Co, supra, n 30

(3) Other instances

Fla.—Adams v Florida East Coast Ry Co, App, 179 So 2d 374

Ind.—Baker v. Fisher, 288 N.E.2d 263, 153 Ind App. 581, transfer den 296 N.E.2d 882, 260 Ind. 513

Particular speeds held not negligent

(1) Ill—White v Illinois Cent R Co, 144 N E 2d 175, 14 Ill App 2d 216

(2) N J—Bowman v Central R Co of N.J, 99 A 2d 423, 27 N J.Super 370.

(7) La—Gibson v Kansas City Southern R Co, App, 233 So 2d 26, writ ref 236 So 2d 31, 256 La 254

Mich—Buchthal v New York Cent R. Co., 55 N.W.2d 92, 334 Mich. 556.

Tex.—Gulf, C & S F.R Co v Pratt, Civ App, 262 S W 2d 775, err ref no rev err

51. Ohio—Hicks v Baltimore & O R Co, 116 N E 2d 307, 160 Ohio St 307

Particular speeds held not negligent

(1) U S—Britt v Seaboard Coast Line R Co, D C S C, 281 F Supp 481

52. U S.—Box v South Georgia Ry Co, C A.Fla, 433 F 2d 89

Cal—Rice v Southern Pac. Co, 55 Cal Rptr 840, 247 C A 2d 701

Iowa—C.J.S. cited in Jasper v Chicago Great Western Ry Co, 84 N.W.2d 21, 28, 248 Iowa 1286

La—Zeringue v Texas & P Ry Co, App, 196 So 2d 809, writ ref 199 So 2d 183, 250 La 749, 88 S.Ct 770, 389 U.S. 1047, 19 L Ed 2d 841

Mich—Buchthal v New York Cent. R Co, supra, n. 47.

Mo—Branson v Atchison T & S F Ry Co, supra, n 47.

Pa—Killen v Pennsylvania R Co., supra, n 47

53. U.S—Chicago, R.I. & P.R Co. v Hugh Breeding, Inc., C.A Okl, 232 F 2d 584, citing Kansas law—Chicago, R I. & P R. Co v Hugh Breeding, Inc, C A Okl, 247 F 2d 217, stating Kansas law, cert dism 78 S.Ct 138, 355 U.S. 880, 2 L.Ed 2d 107

Fla—Atlantic Coast Line R. Co. v. Ward, 81 So.2d 476.

Miss.—Donald v Gulf M & O R Co, 71 So.2d 776, 220 Miss 714—New Orleans & N.E R. Co v. Phillips, 172 So 2d 414, 252 Miss. 438.

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55. La.—New Orleans & N.E R. Co. v. Scoggins, App., 148 So.2d 909

56. U.S.—Foreman v. Texas & N.O R. Co., D.C.La., 97 F.Supp. 378.

Ohio—Gibbons v Baltimore & O R Co, 109 N E 2d 511, 92 Ohio App 87

57. Fla—Atlantic Coast Line R Co v Ward, 81 So 2d 476

58. Railroad safety rule on maximum speed applicable

Ohio—Strahm v B & O R R Co, 291 N.E 2d 783, 32 Ohio App 2d 333

60. Ohio—Ratliff v Baltimore & O R Co, 164 N E 2d 438, 109 Ohio App 177

62 Ky—Louisville & N R Co v Galloway's Adm'x, 267 S W 2d 90

Where the crossing is dangerous the railroad has the duty to adjust the speed of the train.[62.5]

62.5. U S—New Orleans & N.E R. Co. v Anderson, C A Miss, 293 F 2d 97

§ 746. —— Obstruction of View or Hearing

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68. U S—Atlantic Coast Line R Co v Freeman, supra, n 32

Cal.—Stout v. Southern Pac R Co, 274 P 2d 194, 127 C A 2d 491

Ohio—Diebley v New York, C & St L R Co, 162 N E 2d 142, 108 Ohio App 381

Utah—Toomer's Estate v Union Pac R. Co, 239 P 2d 163, 121 Utah 37.

Mere curve, etc.

71. Miss—New Orleans & Northeastern R. Co v Lewis, 58 So.2d 486, 214 Miss 163

Miss.—New Orleans & N E R. Co v Phillips, 172 So 2d 414, 252 Miss 438

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69. U S—Bailey v Baltimore & O R Co, C.A N.Y, 227 F 2d 344

72. Ga—Atlantic Coast Line R. Co. v Parker, 82 S E 2d 706, 90 Ga.App. 251.

74. Cal—Stout v. Southern Pac R Co., supra, n 68

Railroad held negligent

La—Perkins v. Texas & N O.R. Co, App, 137 So 2d 673, revd on oth grds 147 So 2d 646, 243 La. 829

75. Tex.—Southern Pac. Co. v. Stanley, Civ.App., 459 S W 2d 232, revd. on oth. grds., sup., 466 S W.2d 548, on remand 473 S W.2d 52, err ref no rev. err

77. Held not negligent

U S.—Chicago, R.I. & P.R Co v Hugh Breeding, Inc, C A.Okl., 247 F 2d 217, stating Kansas law, cert dism 78 S Ct 138, 355 U S 880, 2 L.Ed 2d 107.

78. La.—Guidry v Texas & N.O.R Co., App, 56 So 2d 611

80. La.—Guidry v. Texas & N O R Co., supra, n. 78.

81. La.—American Emp. Ins. Co v. Missouri Pac. R Co., App., 111 So.2d 380

82. U S—Texas & Pac. Ry. Co v Watkins, C A.La., 243 F.2d 171, cert. den. 78 S.Ct 117, 355 U.S. 868, 2 L.Ed.2d 74.

§ 747. —— Under Statutes or Ordinances in General

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83. Fla.—Apalachicola Northern R Co v. Tyus, App., 114 So.2d 33, op. quashed, Sup, 130 So.2d 580

Ga.—Ellis v. Southern Ry. Co., 101 S.E.2d 230, 96 Ga App 687.

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86. Tex—Ware v Texas & P Ry Co, Civ App, 302 S W 2d 702, err ref no rev err

87. U S—Atlantic Coast Line R Co v Swafford, C A Fla., 220 F 2d 901, revd 76 S.Ct 80, 350 U S 807, 100 L Ed 725, reh den 76 S Ct 150, 350 U S 898, 100 L Ed 789—Southern Ry Co v Neely, C A Ga, 284 F 2d 633

Ga—Georgia R R & Banking Co v Cook, 95 S E 2d 703, 94 Ga App 650

94. Fla—Jones v Atlantic Coast Line R Co, App, 117 So 2d 234

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14. U S—Stapleton v Louisville & N R Co, C A Miss, 265 F 2d 738—Palusi v Louisville & N R Co, D C Miss, 226 F Supp 651, affd, C A, 342 F 2d 799, cert den 86 S Ct 80, 382 U S 834, 15 L Ed 2d 78

Miss—New Orleans & N E R. Co v Burney, 159 So 2d 85, 248 Miss. 290

§ 748. —— Effect of Statutes or Ordinances

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30. Mo—Grace v Smith, App, 270 S W 2d 79, affd, Sup, 277 S W 2d 503, 365 Mo 147

33. Fla.—Adams v Florida East Coast Ry Co, App, 179 So 2d 374.

34. Fla—Florida East Coast Ry Co v Soper, App, 146 So 2d 605

Tex—C J S. cited in Ware v Texas & P Ry. Co, Civ App., 302 S.W 2d 702, 705, err ref no rev err

§ 749. —— Violation of Statutes or Ordinances

35. U S—Southern Ry Co v Campbell, C A Ga, 309 F.2d 569—Graham v Seaboard Air Line R Co, D C S C, 250 F Supp 566

Ariz—Southern Pac Co v Baca, 268 P 2d 968, 77 Ariz. 173

Cal—Whinery v. Southern Pac. Co, 85 Cal.Rptr. 649, 6 C A 3d 126

Ga—Seaboard Coast Line R. Co v. Wallace, 181 S E 2d 542, 123 Ga App 490

Mo.—Grace v Smith, 277 S W.2d 503, 365 Mo 147

Okl—Missouri, K & T R Co. v Dodson, 356 P 2d 1079

41. Neb.—Carter v Chicago, B & Q R Co, 121 N.W 2d 44, 175 Neb. 188

38. No liability arising from violation of outdated statute

La.—McCray v Illinois Cent. Ry Co, App, 244 So.2d 877.

§ 750. Means of Controlling Trains

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55. U.S.—Levendosky v Chicago, M, St. P. & P Ry Co, C A.Iowa, 223 F 2d 395

§ 751. Precautions as to Persons or Objects Seen at or near Crossings

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56. U S.—Brunner v. Minneapolis, St P & S.S.M.R Co., C.A.Wis., 240 F.2d 608.

Cal—Chambers v Southern Pac Co, 307 P.2d 662, 148 C.A.2d 673

Fla.—Loftin v Wilson, 67 So.2d 185.

Minn.—Baldwin v. Chicago & N.W. Ry. Co., 171 N.W 2d 89, 285 Minn 15

N.J.—Bowman v. Central R. Co of N.J., 99 A.2d 423, 27 N.J.Super. 370

57. U.S.—Allen v. Texas & Pac Ry. Co, C.A La., 195 F 2d 545

Cal—Essick v Union Pac R Co, 6 Cal Rptr 208, 182 C A 2d 456

Fla—Martin v Rivers, 72 So 2d 789

Mont—Sztaba v Great Northern Ry Co, 411 P 2d 379, 147 Mont 185

Tex—Texas & Pac Ry Co v Meeks, Civ App, 338 S W 2d 169, err ref no rev err.

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58. Ill—Farr v Chicago & E I R Co, 121 N E 2d 5, 3 Ill App 2d 209

Mass—Canty v New York, N H & H R Co, 147 N E 2d 801, 337 Mass 38

Mo—Bray v St Louis-San Francisco Ry Co, App, 259 S W 2d 132

59. N J—Jelinek v Sotak, 86 A 2d 684, 9 N J 19

60. Ky—Hunt's Adm'r v Chesapeake & O Ry Co, 254 S W 2d 705

Tenn—Baggett v Louisville & N R Co, 365 S W 2d 902, 51 Tenn App 175

61. U S—Brown v Louisville & N R Co., D C La, 135 F Supp. 28, affd, C A, 234 F 2d 204

Failure to determine adequacy of clearance

La—Patenotte v New Orleans Public Belt R R Commission, App, 118 So 2d 270

62. La—Williamson v Texas & P Ry Co, App, 66 So 2d 621

65. U S—Brown v Louisville & N R Co, C A La, 234 F 2d 204—Howard v Illinois Cent R Co, D C La, 349 F Supp 141

Ga—Seaboard Air Line R Co v Hollomon, 102 S E 2d 185, 97 Ga App 16

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67. La—Wheat v. New Orleans & N.E R Co, 163 So 2d 65, 245 La 1099

Motorist obviously unaware of train

(3) Other cases

Ala.—Southern Ry Co v Hughes, 103 So 2d 324, 267 Ala 418

68. Cal—Nemer v Atchison, T & S F Ry. Co, 319 P 2d 770, 156 C A 2d 445—Akers v City of Palo Alto, 14 Cal Rptr 767, 194 C A 2d 109

Fla.—Lindsey v Seaboard Coastline R Co, App, 248 So 2d 518

Or—Marks v Southern Pac Co, 316 P 2d 523, 211 Or 539

Utah—C.J.S. cited in Lawrence v Bamberger R. Co, 282 P 2d 335, 338, 3 Utah 2d 247

70. U.S.—Kansas City Southern Ry Co v Wiggins, C A La., 234 F.2d 128—Brown v Louisville & N.R Co, C A La, 234 F 2d 204—Texas & P Ry Co v Laborde, C.A.La., 257 F 2d 587, cert. den. 79 S.Ct. 314, 358 U.S. 928, 3 L.Ed 2d 302—Guilford Nat Bank of Greensboro, v. Southern Ry. Co., D C N.C, 211 F.Supp. 1, revd on oth. grds, C A., 319 F.2d 825, cert. den. 84 S.Ct. 518, 375 U.S 985, 11 L.Ed.2d 473—Kennison v. Missouri Pac. R. Co, D.C.La., 241 F.Supp. 545—Gagnier v Benduxen, C.A.Minn., 439 F.2d 57

Ark—Sherman v. Missouri Pac. R Co, 383 S W 2d 881, 238 Ark 554

Fla.—Apalachicola Northern R Co v Tyus, App, 114 So.2d 33, op quashed, Sup, 130 So 2d 580—Atlantic Coast Line R. Co v Walker, App, 113 So 2d 420

Ill.—Rakers v. Southern Ry Co, 290 N.E 2d 421, 8 Ill.App 3d 877

La.—Calvert Fire Ins Co v Texas & P. Ry. Co., App., 55 So 2d 693—C.J.S. cited in Fradella v Texas & N.O.R. Co, App, 86 So.2d 414, 417.

Or.—Marks v Southern Pac Co, 316 P 2d 523, 211 Or 539

Tex—Missouri-Kansas-Texas R. Co of Tex v Beasley, Civ App., 321 S W.2d 938, err ref no rev. err

Duty to yield right of way

U.S.—Northern Pac Ry Co. v. Zontelli Bros., Inc., D C.Minn., 161 F Supp. 769, mod on oth grds, C A, 263 F 2d 194.

Or—Brown v Spokane, P & S. Ry Co., 431 P.2d 817, 248 Or. 110

Stop, look and listen before crossing

(1) Ala—Southern Ry Co v McCamy, 120 So 2d 695, 270 Ala 510

La—Theriot v Texas & N O R Co, App, 220 So 2d 563, writ ref 222 So 2d 886, 254 La 142

72. U S—Allen v Texas & P Ry Co, D C La, 96 F Supp 520, affd, C A, 195 F 2d 545—Allen v Texas & Pac Ry Co, supra, n 57—Brunner v Minneapolis, St P & S S M R Co, D C Wis, 139 F Supp 424, affd, C A, 240 F 2d 608 Citing Wisconsin law

Ark—Missouri Pac R Co v Yarbrough, 315 S W 2d 897, 229 Ark 308

La—Hymel v Texas & N O R Co, App, 145 So 2d 138—Wheat v New Orleans & N E R Co, 163 So 2d 65, 245 La 1099—Breaux v Texas & P Ry Co, App, 176 So.2d 640, writ ref 178 So 2d 660, 248 La 375, motion to remand over, 182 So 2d 551

Md—Sears v Baltimore & O R Co, 148 A 2d 366, 219 Md 118

Mass—Pooles v Boston & Maine R R, 102 N E 2d 433, 328 Mass 165

Minn.—Schroht v Voll, 71 N W 2d 843, 245 Minn 114

Miss.—Gulf, M & O R Co v Grubbs, 260 So 2d 837

Mo—Hillhouse v Thompson, 240 S W 2d 224, 241 Mo App 859, revd on oth grds. 243 S W 2d 531, 362 Mo 700—Reedy v Missouri-Kansas-Texas R Co., 347 S W.2d 111—Bunch v Missouri Pac R Co, 386 S W 2d 40

N Y.—Vadell v Long Island R Co., 171 N Y S 2d 306, 6 A.D.2d 88.

S.C—Rock v Atlantic Coast Line R Co, 72 S E 2d 900, 222 S C. 362—Bramlett v Southern Ry Co, 108 S E 2d 91, 234 S C 283

A fireman is under no duty, etc.

U.S—Missouri-Kansas-Texas R Co of Tex v Lane, C A Tex, 213 F 2d 851

Stalled car

(1) Or—Marks v Southern Pac. Co., 316 P.2d 523, 211 Or. 539

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73. U S—Levendosky v Chicago, M., St P & P Ry Co, C.A Iowa, 223 F 2d 395—Gagnier v Bendixen, C A Minn, 439 F 2d 57

Ala—Southern Ry Co v McCamy, 120 So 2d 695, 270 Ala 510

Fla—Loftin v. Nolin, 86 So 2d 161, 59 A L R 2d 1257

Ga.—Georgia Southern & F R Co v Haygood, 119 S.E 2d 277, 103 Ga App 381—Northern Freight Lines, Inc v. Southern Ry Co, 132 S E 2d 541, 108 Ga.App 189

Ind.—Central Indiana Ry. Co v. Anderson Banking Co., 240 N E 2d 840, 143 Ind.App. 396

La.—Hymel v. Texas & N O R Co, App, 145 So 2d 138—Breaux v Texas & P Ry Co, App, 176 So 2d 640, writ ref 178 So.2d 660, 248 La 375, motion over, 182 So.2d 551

Mich—Buchthal v New York Cent R Co, 55 N W 2d 92, 334 Mich. 556

Mo—See v. Wabash R Co, 259 S.W 2d 828.

Mont—Sztaba v. Great Northern Ry. Co., 411 P 2d 379, 147 Mont 185

Or.—Marks v Southern Pac. Co, 316 P 2d 523, 211 Or 539

74. Idaho—Ineas v Union Pac. R. Co., 241 P 2d 1178, 72 Idaho 390

Minn—Forde v Northern Pac. Ry. Co., 63 N W 2d 11, 241 Minn. 246

76. Or.—Marks v Southern Pac. Co., 316 P 2d 523, 211 Or. 539

77. U.S.—Brinks v. Chesapeake & O Ry Co., C A Mich, 398 F.2d 889

Ill.—Higgins v Baltimore & O.R Co, 147 N E.2d 714, 16 Ill App.2d 227

Iowa—C.J.S. cited in Jasper v. Chicago Great Western Ry. Co., 84 N W 2d 21, 28, 248 Iowa 1286.

Mo.—Hillhouse v. Thompson, supra, n. 72

N.H—Di Prizio v. Boston & Maine R.R, 120 A.2d 331, 100 N.H. 65.

N J—Duffy v Bill, 160 A 2d 822, 32 N J 278

Or—Brown v Spokane, P & S Ry Co, 431 P 2d 817, 248 Or 110

S C—Rock v Atlantic Coast Line R Co, 72 S E 2d 900, 222 S C 362

Tex—C J S cited in Ware v Texas & P Ry Co, Civ App, 302 S W 2d 702, 705, err ref no rev err

Utah—Lawrence v Bamberger R Co, 282 P 2d 335, 3 Utah 2d 247

White object seen at crossing precludes assumption that object is not a human being

U S—Conry v Baltimore & O R Co, D C Pa, 112 F Supp 252, affd, C A, 209 F 2d 422

78. Tenn—Prater v Louisville & N R Co, 438 S W 2d 68, 59 Tenn App 82, app after remand 462 S W 2d 514, 62 Tenn App 318

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83. U S—Kansas City Southern Ry Co v Wiggins, C A La, 234 F 2d 128

La—Hartford Fire Ins Co v Texas & N O R Co, App, 70 So 2d 767

84. Mich—Aetna Ins Co v Detroit & T S R Co, 93 N W 2d 272, 354 Mich 580

87. Pa—Marino v Pennsylvania R Co, 119 A 2d 836, 180 Pa Super 179

88. Under Tennessee statute

(8) U S—Louisville & N R. Co v Farmer, C A Tenn, 220 F 2d 90, reh den 224 F 2d 599

(9) Tenn—Jones v Louisville & Nashville R R, 241 S W 2d 572, 192 Tenn 570—Ori v St Louis-San Francisco Ry Co, 348 S W 2d 809, 48 Tenn App 448

(15) Tenn—Ori v St Louis-San Francisco Ry Co, 348 S W 2d 809, 48 Tenn App 448—Baggett v Louisville & N.R. Co, 365 S W.2d 902, 51 Tenn App. 175—Union Ry Co v Junks, 402 S W 2d 495, 55 Tenn App 491

§ 756. Willful, Wanton, and Unauthorized Acts

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85. Mo—Carrow v Terminal R Ass'n of St. Louis, App., 267 S W 2d 373.

87. Pa—Geelen v Pennsylvania R Co, 161 A 2d 595, 400 Pa 240

W Va—Chesapeake & O Ry Co v Hartwell, 95 S E 2d 462, 142 W Va. 318

88. Other statements

Cal.—Givens v Southern Pac. Co., 14 Cal Rptr 736, 194 C A 2d 39

Pa—Geelen v. Pennsylvania R. Co, 161 A 2d 595, 400 Pa. 240

90. U S.—Turner v Atlantic Coast Line R Co, C A Ala, 222 F.2d 337.

Conduct held not willful or wanton

(2) U S—Goss v Baltimore & O R Co., C A Pa, 355 F 2d 649—Sturdevant v. Erie Lackawanna R. Co., D C Pa., 319 F Supp. 732, affd, C A, 458 F 2d 1214

Ala—Terminal Transport Co v. Central of Georgia Ry., 133 So 2d 29, 272 Ala. 495.

Ill—Herglund v. New York, C. & St. L.R. Co., App, 274 N E 2d 671, 1 Ill App.3d 968

Mich—LaCroix v. Grand Trunk Western R Co., 152 N.W.2d 656, 379 Mich. 417.

Minn.—Perkins v. National R.R. Passenger Corp., 289 N.W 2d 462

Ohio—Matkovich v. Penn Cent Transp. Co., 431 N.E 2d 652, 69 Ohio St 2d 210, 23 O.O.3d 224.

91. Pa.—Emrich v. Pennsylvania R. Co., 67 York Leg.Rec. 49

92. Ariz—Bryan v. Southern Pac. Co., 286 F.2d 761, 79 Ariz 253, 50 A L R.2d 1

98. U.S.—Saaybe v. Penn Cent. Transp. Co., D.C Pa., 438 F.Supp. 65.

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However, the negligence of one not employed by a railroad company is not, ordinarily, to be imputed to it.[14.5]

14.5. Guard employed by construction contractor

La—Oliver v Illinois Cent R Co, App, 135 So 2d 521

One employing a railroad as an independent contractor may be vicariously liable to a third party due to the railroad's negligence[14.10]

14.10. U S—Morris v Baltimore & O R Co, D C W Va, 349 F Supp 649

§ 757. Proximate Cause of Injury

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15. U S—Whitlock v U S, D C Va, 304 F Supp 1020

Ark—Chicago, R I & P R Co v Gray, 453 S W 2d 54, 248 Ark 640

Cal—Greenetch v Southern Pac Co, 11 Cal Rptr 235, 189 C A 2d 100

Ga—Hathcock v Georgia Northern Ry Co, 83 S E 2d 329, 90 Ga App 533—Central of Georgia Ry Co v Brower, 128 S E 2d 926, 218 Ga 525, conf to 129 S.E 2d 401, 107 Ga App 216

Ill—Stefan v Elgin, J & E R Co, 120 N E.2d 52, 2 Ill App 2d 300

Ind—Carmichael v Baltimore & O R Co., 98 N E 2d 698, 121 Ind App 463

Ky.—Hunt's Adm'r v. Chesapeake & O. Ry Co, 254 S W.2d 705—Layman v Chesapeake & O Ry Co., 266 S W 2d 111—Tillery v Louisville & N.R Co, 433 S.W 2d 623

Tex—Missouri-Kansas-Texas R. Co v Wagner, Civ App, 400 S W 2d 357, err. ref no rev err

Sudden emergency

Tex.—Kansas City Southern Ry Co v Flowers, Civ App, 336 S W 2d 235, err ref no rev err

16. U S—Union Pac R. Co. v Jarrett, C A Idaho, 381 F 2d 597.

19. U S—Chicago, B & Q.R Co. v Benninger, C A Neb, 373 F 2d 854

Ky—Illinois Cent, R R. v. Vincent, 412 S W 2d 874

21. U S—Bolam v Louisville & N R. Co., C.A Ohio, 295 F 2d 809

23. Tex—Pate v. Southern Pac. Transp Co, Civ. App, 567 S.W.2d 805, err ref no rev err

27. U S—Gross v. Southern Ry Co, C.A Ga, 446 F.2d 1057.

Statute or ordinance not violated

Ala—Coe v Louisville & N.R Co, 130 So 2d 32, 272 Ala. 115.

28. U S—Southern Ry Co v Miller, C A Tenn, 285 F 2d 202, 85 A L.R.2d 842

Tenn.—Little v. Nashville, C & St L Ry Co, App, 281 S.W 2d 284, 39 Tenn.App. 130.

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29. Cal—Deshotel v. Atchison, T. & S.F Ry. Co., 272 P.2d 71, 126 C.A.2d 303.

30. U S.—Ludwig v Chesapeake & O. Ry. Co., D.C Mich, 229 F Supp. 61, affd. in part and vac. on oth grds., C.A., 353 F 2d 621, cert. den 85 S.Ct. 648, 379 U.S. 960, 13 L.Ed.2d 555, app. after remand, C.A., 369 F 2d 857, cert. den. 86 S.Ct. 1203, 383 U.S. 946, 16 L.Ed.2d 208

Acts or omissions held not proximate cause

(2) Ind.—Carmichael v. Baltimore & O.R Co, supra, n 15.

(4) Fla.—Lindsey v. Seaboard Coastline R. Co, App., 248 So 2d 518

Ga.—Joyce v. Georgia, S. & F. Ry. Co., 178 S.E.2d 575, 122 Ga.App. 712.

La—McCray v Illinois Cent Ry Co, App, 244 So 2d 877

Ohio—Gigliotti v New York, C & St L R Co, 157 N E 2d 447, 107 Ohio App 174

Wis—Dombeck v Chicago, M, St P & P R Co, 129 N W 2d 185, 24 Wis 2d 420

34. Mo—Black v Kansas City Southern Ry Co, 436 S W 2d 19, stating Kansas law

36. Icy streets

Wash—Wright v City of Kennewick, 381 P 2d 620, 62 Wash 2d 163

37. Ga—Hathcock v Georgia Northern Ry Co, supra, n 15

NJ—Pangborn v Central R Co of N J, 108 A 2d 276, 32 N J Super 289, affd in part and revd in part on oth grds 112 A 2d 705, 18 N J 84

38. U S—Atlantic Coast Line R Co v Freeman, C A Ala, 193 F 2d 217, cert den 72 S Ct 771, 343 U S 935, 96 L Ed 1343

Kan—Kendrick v Atchison, T & S F R Co, 320 P 2d 1061, 182 Kan 249

Or—Koch v Southern Pac. Co., 513 P 2d 770, 266 Or 335, app after remand 547 P 2d 589, 274 Or 499

39. U S—Emery v Northern Pac R Co, C A N D, 407 F 2d 109

Ga—Terry v Central of Georgia Ry Co, 132 S E 2d 573, 108 Ga App 204

Va—Atlantic Coast Line R. Co. v Withers, 65 S E 2d 654, 192 Va 493, applying North Carolina rule

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40. Cal—Deshotel v Atchison, T & S.F Ry. Co, supra, n 29—Jensen v. Southern Pac Co, 276 P 2d 703, 129 C A 2d 67

42. Ind—Holtz v. Elgin, J. & E. Ry. Co., 98 N E 2d 245, 121 Ind App 175, stating Illinois law

43. Kan.—Garrison v St Louis & S F Ry Co., 271 P 2d 307, 176 Kan. 548

44. N C—Jones v. Atlantic Coast Line R Co, 70 S E 2d 669, 235 N C 640

48. Ga—Southern Ry. Co v Elliott, 91 S E 2d 775, 93 Ga App. 370

49. Pa—Boyle v Pennsylvania R Co, 170 A 2d 865, 403 Pa 614

§ 758. —— Defects or Obstructions at Crossings

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51. U.S—Lippincott v Wabash R Co., C.A.Ill., 295 F 2d 577—Brown v. Seaboard Coastline R.R., C.A Ga, 405 F 2d 601

Ind—New York Cent. R. Co, v Sholl, 146 N E.2d 565, 128 Ind App 134

Kan—Harmon v Atchison, T. & S.F. Ry. Co, 233 P.2d 489, 171 Kan 403

N C—Price v Seaboard Air Line R Co., 161 S E 2d 590, 274 N C 32

Okl.—Wilson v Chicago, R I. & P R Co., 429 P 2d 763

52. Ala.—Alabama Great Southern R. Co. v Bishop, 89 So 2d 738, 265 Ala 118, 64 A L R.2d 1190.

53. Ala.—Alabama Great Southern R. Co. v. Bishop, 68 So 2d 530, 259 Ala. 629.

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Minn—Nelson v Minneapolis, St P & S S M R Co, 108 N W 2d 720, 260 Minn 61

N Y—Brookins v Pennsylvania R Co, 110 N Y S 2d 541, 202 Misc. 467, affd 117 N Y S 2d 676, 280 App Div 1037

56. Ohio—Canterbury v Pennsylvania R Co, 107 N E 2d 115, 158 Ohio St 68

Automobile Driven into cars or train

(1) U S—Shofner v Illinois Cent R Co, D C Miss, 188 F Supp 422, affd, C A, 300 F 2d 188, reh den 302 F 2d 266

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62. Motor vehicle driven into cars

(1) Fla—Goff v Atlantic Coast Line R Co, 53 So 2d 777

§ 759. —— Gates, Signals, or Flagmen at Crossings

65. U S—Illinois Cent R Co v Kean, C A Iowa, 365 F.2d 785

Ill—Kutsenkow v Chicago & N W Ry Co, 240 N E 2d 805, 99 Ill.App 2d 265

Or—Murphy v Southern Pac Co, 355 P 2d 236, 223 Or 522

Tex—Hasting, Central Sur Ins Co, Intervenors v Texas & P Ry. Co., Civ.App, 313 S W 2d 344

66. N J—Duffy v Bill, 160 A 2d 822, 32 N J 278

Defective Signals

N J—Stewart v Norton, 80 A 2d 111, 6 N J 591

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69. Tex—Texas & P Ry. Co v Salazar, Civ App, 458 S W.2d 116, err ref no rev err.

70. U.S—Pearson v Baltimore & O R Co, C A Ind, 200 F 2d 569

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§ 760. —— Signals, Lights, or Lookouts on Trains or Cars

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73. U S—Helgeson v Chicago, R I. & P R Co, D C. Minn., 123 F.Supp 175—Isgett v Atlantic Coast Line R Co, C.A S C, 328 F 2d 364

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76. U.S.—Cincinnati, N.O & T P. Ry. Co v Eller, C A Ky., 197 F 2d 652, cert den 73 S Ct 105, 344 U S. 864, 97 L.Ed 670—Iler v Seaboard Air Line R. Co, C.A.Ga., 214 F.2d 385.

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77. Ky—Louisville & N R Co v Branson, 267 S W 2d 945—Cincinnati, N O & T P R Co v Zeder, 328 S W 2d 525

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81. U S—Pearson v Baltimore & O R Co, C A Ind, 200 F 2d 569—Gross v Southern Ry Co, C A Ga, 414 F 2d 292, app after remand 446 F 2d 1057

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Va—Danville & W Ry Co v Chattin, 64 S E 2d 748, 192 Va 216

§ 761. —— Rate of Speed and Control of Train

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84. U S—Conrad v Baltimore & O R Co, D C Pa, 146 F Supp 151, affd, C A, 238 F 2d 624

Ark—Harper v Missouri Pac R Co, 314 S W 2d 696, 229 Ark 348—Missouri Pac R Co v Ligon Specialized Haulers, Inc, 455 S W 2d 663, 248 Ark 1233

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86. Wis—Dombeck v Chicago, M, St P & P R Co, 129 N W 2d 185, 24 Wis.2d 420

89. U S—Pearson v Baltimore & O R Co, 56 N W 2d 446, 156 Neb 345—Guilford Nat Bank of Greensboro v Southern Ry Co, C A N C, 319 F 2d 825, cert den 84 S Ct 518, 375 U S. 985, 11 L Ed 2d 473

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La.—Perkins v Texas & N O R. Co, App, 137 So 2d 673, revd. on oth grds 147 So 2d 646, 243 La 829

Tex.—Texas & Pac. Ry Co v Hasting, Civ App, 282 S.W 2d 758, err ref no rev err